

The *Crawford* Outline

Cases interpreting *Crawford v. Washington*

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Crawford News:

On June 18, 2015, the Supreme Court decided ***Ohio v. Clark*, 576 U.S. ___, 135 S.Ct. 2173 (2015)**, holding that a small child's statements to his Head Start teachers were not testimonial. Most important holding: **"Statements by very young children will rarely, if ever, implicate the Confrontation Clause."**

For the first time, the Court applied the "primary purpose" test to conversations between private parties. But it also redefined the test, separating it from the emergency doctrine announced in *Davis*. Now, the question is whether "the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'"

The Court also held that "the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause."

Another formulation: the conversation between preschooler and teacher is not "a law enforcement mission aimed primarily at gathering evidence for a prosecution." That implies that a testimonial statement is one spoken in the course of such a mission.

The Court declined to hold that conversations between people unaffiliated with law enforcement were *per se* non-testimonial, but said they "are significantly less likely to be testimonial than statements given to law enforcement officers."

The preceding two paragraphs, read together, support an argument that a conversation between private persons can produce testimonial hearsay only when one of the persons is acting as an agent for law enforcement.

The Court referred to actual trial court transcripts when considering what the Founders would have considered normal and acceptable practice at the time of the Founding. *Crawford*, by contrast, considered only appellate opinions and secondary sources, disregarding the evidence most relevant to its sweeping historical conclusions.

Crawford Outline News:

Crawford was decided in March, 2004. Allie Phillips originated this Outline shortly afterward. Joel Jacobsen began updating of the Outline in 2007. Starting with the next update, the task of updating the Outline will be taken over by New Mexico Assistant Attorney General Ken Stalter.

Organizing Principles

The purpose of the Outline is to assist prosecutors and judges conducting their own research. **New cases and categories are highlighted in red.**

Not all post-*Crawford* cases are listed in this outline. Prior to July, 2009, the attempt was made to include all cases, published or unpublished, that provided major, interesting or potentially

useful interpretations. That became overwhelming. Beginning in July 2009, unpublished decisions are included only when unusually significant.

Cases decided solely on the basis of harmless error, lack of preservation or non-retroactivity are not included in the Outline.

When a new category is added to the Outline, time constraints generally preclude any effort to re-categorize older cases. Usually, only cases appearing from that date forward are included in the new category.

When an entry could fit within multiple categories, it is generally included in only one, to avoid repetition. The preference is for the most specific category. But researchers should keep in mind that there is considerable overlap between categories. Moreover, the opinions themselves sometimes misclassify the issue.

When a case included in earlier editions of the Outline is overruled or otherwise superseded on the *Crawford* issue, the summary of that case is deleted but its updated citation remains. If the case is overruled for a non-*Crawford*-related reason, the summary remains and the citation is updated.

Whenever practicable, cases are quoted rather than paraphrased to avoid intruding between the author and reader.

Citations and quotations are not checked. Citations within quotations are sometimes omitted without signal. Researchers should absolutely perform their own cite-checking.

Only English-language cases are included, which excludes some from Puerto Rico.

Note about the Authors

Allie Phillips originated this outline. Allie is now director of the National Center for Prosecution of Animal Abuse at the National District Attorneys Association.

Joel Jacobsen, New Mexico Assistant Attorney General, updates the outline. Many thanks to New Mexico Attorney General Hector H. Balderas and to Anne Kelly, director of the NMAGO's Criminal Appeals Division, for lending Joel to the project.

PART 1: *Crawford, Davis & Hammon, Bockting, Danforth, Giles, Melendez-Diaz Bryant, Bullcoming and Williams*

Crawford v. Washington

***Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)**

- U.S. Supreme Court decision on March 8, 2004
- 7-2 decision, majority opinion authored by Justice Scalia
- Appeals to the Washington Court of Appeals and Washington Supreme Court addressed the reliability and trustworthiness of admitting Mrs. Crawford's taped statements to police (pursuant to Evidence rule 804(b)(3))
- U.S. Supreme Court only addressed Confrontation Clause issue rather than reliability issues
- Crawford supplanted without explicitly overruling Ohio v Roberts, 448 U.S. 56 (1980) – as to testimonial statements; and undermined Idaho v Wright, 497 U.S. 805 (1990), and Illinois v White, 502 U.S. 346 (1992)
- The *Crawford* Rule: "Testimonial" statements no longer admissible unless witness takes the stand and is subject to cross-examination, with some exceptions
 - Testimonial not defined
- Retroactive for pending cases on direct appeal

Two Ways to Analyze Crawford

Is the statement testimonial?	Does my witness appear for cross-examination?
If no, then no <i>Crawford</i> analysis is conducted	If yes, then no <i>Crawford</i> analysis is conducted
If yes, then these must occur:	If no, then is the statement testimonial?
Declarant must testify (then all admissible hearsay from the declarant may be introduced), <i>or</i>	If not testimonial, then no <i>Crawford</i> analysis is conducted (Rules of Evidence applied as usual; in some jurisdiction, <i>Ohio v. Roberts</i> reliability test still used, too)
Declarant be unavailable <u>AND</u> have been subject to cross-examination at a prior time	If testimonial, then these must be shown:
... UNLESS defendant forfeited or waived right of confrontation, opens the door, etc.	Witness is legally unavailable (NOT the 804(a) standard) <u>AND</u> was subject to cross-examination previously
Note: Reliability or trustworthiness of the prior statement is not an issue under <i>Crawford</i>	... UNLESS defendant forfeited or waived right of confrontation, opens the door, etc.

Note: Reliability or trustworthiness of the prior statement is not an issue under <i>Crawford</i>

Davis v. Washington / Hammon v. Indiana

***Davis v. Washington and Hammon v. Indiana*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (June 19, 2006)**

- [NOTE: The meaning of Davis / Hammon is arguably altered by *Giles v. California*. See below.]
- 8-1 decision, Justice Scalia again writing the majority opinion (Thomas dissenting in part)
- Issues on appeal addressed excited utterances and 911 calls from victims of domestic disturbances
- In *Davis*, the victim was speaking about events *as they were actually happening*, rather than "describing past events. She was alone and not protected by police."
 - Note that the Court didn't say "crimes as they were actually being committed." "Events" is a broader term than "crimes," and (as you'd expect) the victim in *Davis* called 911 only after her abuser left. [This detail isn't made clear in the Supreme Court opinion, but it is clearly stated in the Washington Supreme Court opinion, 111 P.3d 844, ¶ 3.]
 - The statements were non-testimonial. The Court ruled: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."
 - Statements requesting help, where the emergency still exists, where the declarant is excited/frantic and/or still in danger will be non-testimonial under the Davis rule.
- In *Hammon*, there was no emergency in progress. The sole purpose of the "interrogation" by law enforcement was to investigate a past crime. The victim was separated from defendant and protected by police.
 - *Hammon* did not involve a 911 call but on-the-scene questioning after the victim said things were "fine", plus her handwritten affidavit.
 - The statements by the victim in *Hammon* were testimonial and the Court ruled = "They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."
 - Statements made, even at the crime scene, where the emergency has stopped and that describe a past crime, and that involve interrogation by the police resulting in accusatory statements made by a calm declarant (or declarant not reaching the standard of an excited utterance) will be testimonial under *Hammon*.
- The Court did not provide a comprehensive definition of "testimonial statements" for all prosecution cases and limited the rulings in these combined cases to situations involving interrogations by law enforcement (see footnote 2 in the opinion)
 - The rule in *Davis* and *Hammon* should only be applied to law enforcement interrogation cases as directed by the court (footnote 2) and should only be applied to cases similar to *Davis/Hammon* (footnote 5).

- Other cases that are not similar to the facts in *Hammon* or *Davis* should go back to the rule announced in *Crawford*.
- Do not fall into the trap of conducting a "primary purpose" analysis of a conversation between private parties!
- *Davis* said: "We overruled *Roberts* in *Crawford*" (footnote 4), although it had not done so explicitly in *Crawford* itself.
- One way to look at *Davis* is that it recognized an emergency exception to *Crawford*.
 - *Crawford* had said that "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." 541 U.S. at 52. And: "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Id.* at 53.
 - *Davis* backed off from those categorical statements, holding that *some* interrogations by law enforcement officers aren't testimonial, after all.

Crawford / Davis / Hammon Factors

The basic *Davis / Hammon* analysis should follow this sequence, although the decisions are still all over the place.

FIRST FACTOR:

1. Was a government agent (or a person working as an agent of the government) involved in creating the testimony or taking a formalized statement?
 - A. If no, analysis is completed and the statement *should* be non-testimonial.
 - i. The only exception is when the declarant asks or expects the hearer to forward the information to authorities.
 - B. If yes, then go to the second factor.

SECOND FACTOR:

2. In looking objectively at the circumstances of when the statement was made:
 - A. Was there an interrogation of the witness by law enforcement?
 1. If no, go to B.
 2. If yes, what was the primary purpose of the interrogation by law enforcement?
 - a. If done to resolve an ongoing emergency, the statements are non-testimonial and the analysis is complete.
 - b. If done to obtain facts of a past **crime**, then go to B.
 - B. Perform ordinary *Crawford* analysis.

➤ Sub-Category: Cases Misstating the Facts of Davis (category added June, 2008)

With surprising frequency, lower court opinions misstate the facts of *Davis*. As noted above, the Washington opinion was clear that the entire 911 call occurred after the abuser had left the

premises, which (if one thinks about it) is obvious: batterers don't let their victims call 911 in the middle of the beating, and few people getting beaten up would care to provide a blow-by-blow account, anyway. Yet some judges apparently don't think about it, or can't be bothered to spend the 30 seconds it takes to access the Washington opinion on Westlaw or LEXIS. (Of course, the source of the problem is the sloppy draftsmanship of *Davis* itself.)

Commonwealth v. Williams, 2014 PA Super 249, 103 A.3d 354 (2014) – "We are cognizant that in *Davis*, the victim called while the assault was ongoing." – not true

State v. Clue, 139 Conn. App. 189, 55 A.3d 311 (Conn. App. Ct. 2012), appeal denied (2013) – "*Davis* involved a domestic disturbance during which the victim called police while a known assailant beat her with his fists and then fled the scene." – not true, he fled before she called

People v. Bryant, __ N.W.2d __, 2009 WL 1677569 (Mich. Jun 10, 2009) – "the Court [in *Davis*] said that once the criminal event was over, *i.e.*, the defendant had stopped assaulting the victim and left the premises, the 'ongoing emergency' was over at least for purposes of evaluating an alleged *Crawford* violation." – no, it held that the emergency was ongoing *after* the defendant left the premises

People v. Sutton, __ N.E.2d __, 2009 WL 1012020 (Ill. Apr 16, 2009) – "In *Davis*, the victim of a domestic assault made a 911 call while in the midst of a domestic disturbance with her former boyfriend, describing the attack while it was occurring and answering other questions." – ludicrous

Clark v. State, 199 P.3d 1203 (Alaska App. Jan 16, 2009) – "One could argue that Clark's case is different from the facts of *Davis*, in that the assault committed on Amouak was concluded by the time she came to the emergency room, while the victim in *Davis* was reporting ongoing criminal activity." – nuh-uh

Thomas v. State, 284 Ga. 540, 668 S.E.2d 711 (Ga. Oct 27, 2008) – "The facts in *Davis* are closely analogous to the case now before this Court. There, the victim of domestic violence reported to a 911 operator that her former boyfriend was at her home and was beating her." - nope

State v. Graves, 224 Or.App. 157, 197 P.3d 74 (Or. App. Nov 26, 2008) (Edmonds, P.J., concurring) – "the appropriate focus under *Davis* is on whether [Officer] Debler's testimony about D's statements related to events as they actually were occurring in D's presence, or whether D was describing to Debler what had occurred in the past."

State v. Shea, 965 A.2d 504, 2008 VT 114 (Vt. Aug 14, 2008) – "Courts have pointed to two independent ways in which an emergency may be ongoing. The first, present in *Davis*, arises when a crime is still in progress." – it may be true that courts have pointed to that, but it's not true that those were the facts of *Davis*

State ex rel. J.A., 195 N.J. 324, 949 A.2d 790 (N.J. Jun 23, 2008) – "Indeed, in *Davis*, after the abusive husband fled his home, ending the immediate emergency, the Court declared that '[i]t could readily be maintained' that the wife's continuing remarks to the 911 operator were

testimonial statements." – not true – *all* of her remarks to the operator were made after the husband fled *her* home

State v. Buda, 195 N.J. 278, 949 A.2d 761 (N.J. Jun 23, 2008) (dissent) – in a 4-3 opinion, the dissent (by Justice Albin, author of *J.A.*, above) says that the victim's statements to the 911 operator in *Davis* "were nontestimonial because her husband was in the process of beating her" – not true

Sanon v. State, 978 So.2d 275 (Fla. App. 4 Dist. Apr 16, 2008) – "here there was no ongoing emergency, as in *Davis*, where the victim was speaking to a 911 operator while she was being attacked." – not true

Whorton v. Bockting

Whorton v. Bockting, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007)

- U.S. Supreme Court decision on February 28, 2007
- Unanimous decision authored by Justice Alito, reversing a Ninth Circuit decision.
- The specific holding is set forth in its first two sentences: "This case presents the question whether, under the rules set out in *Teague v. Lane*, 489 U.S. 288 (1989), our decision in *Crawford v. Washington*, 541 U.S. 36 (2004), is retroactive to cases already final on direct review. We hold that it is not."
- In addition to its retroactivity holding, *Bockting* makes several interesting points.
 - o "[T]his Court overruled *Roberts* in *Crawford*". *Id.* at 1175. This was not actually stated in *Crawford*. Some lower courts still don't believe it.
 - o The *Crawford* rule was a "new rule," meaning it was not dictated by governing precedent. *Id.* at 1181.
 - o "[I]t is clear and undisputed that the [*Crawford*] rule is procedural and not substantive[.]" *Id.* at 1181.
 - o "[T]he overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess. [¶] With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. ... But whatever improvement in reliability *Crawford* produced in this respect must be considered together with *Crawford's* elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, **the Confrontation Clause has no application to such statements** and therefore permits their admission even if they lack indicia of reliability. [¶] It is thus unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials." *Id.* at 1183.
 - o The emphasized words, if they mean what they say, mean that *Bruton* has no application to non-testimonial statements.

- o "The *Crawford* rule also did not 'alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.'" *Id.* at 1183 (italics in original; citation omitted)

Danforth v. Minnesota

***Danforth v. Minnesota*, 128 S.Ct. 1029, 76 USLW 4069 (Feb. 20, 2008) -**

- 7-2 decision authored by Justice Stevens.
- "Our recent decision in *Whorton v. Bockting* ... makes clear that the Minnesota court correctly concluded that federal law does not require state courts to apply the holding in *Crawford* to cases that were final when that case was decided. Nevertheless, we granted certiorari, ... to consider whether *Teague* or any other federal rule of law *prohibits* them from doing so."
- The answer is "no."
- Of course, if it wanted to reach that result, the Minnesota Supreme Court could have reached it under its state constitution. It didn't need permission from SCOTUS.
- *Danforth* is really a retroactivity case, not a *Crawford* case.
- Nonetheless Justices Stevens' opinion makes a couple points of some significance to *Crawford*. First, he points out that the 6th amendment is applicable to the states only through the 14th amendment, which in turn suggests that the Framers whose original intent needs to be examined were the Radical Republicans of 1868 and not the knee-britches-wearing men in powdered wigs.
- Second: "Finally, the dissent contends that the 'end result [of this opinion] is startling' because 'two criminal defendants, each of whom committed the same crime, at the same time, whose convictions became final on the same day, and each of whom raised an identical claim at the same time under the Federal Constitution' could obtain different results. ... [S]uch nonuniformity is a necessary consequence of a federalist system of government."
 - o This last raises the somewhat disquieting possibility that a majority of the Court views the wild inconsistency of *Crawford* precedent as a product of federalism, even though *Crawford* supersedes state law, which would seem to make it the exact opposite of federalism.

Giles v. California

***Giles v. California*, 554 U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (June 25, 2008)**

- A 5-opinion decision. Basic rule seems to be: A defendant who kills or intimidates a witness does not forfeit his right to confront that witness unless he killed or intimidated the witness with the intent or purpose to prevent the witness from testifying.
 - o But, as shown below, there is no clear statement of the holding.
 - o The intent does not appear to be ordinary specific intent. As shown below, it can be shown inferentially by a pattern of behavior over the entire course of a relationship.
 - o Thus in domestic abuse cases, at least, it is unnecessary for the prosecution to prove the victimizer specifically thought about preventing the testimony.

- Also as shown below, there are arguably two different majority opinions, each backed by a different majority of the justices (shades of *Booker*!).
- Justice Scalia wrote the opinion for the Court, most of which was joined by five other justices (Roberts, Souter, Thomas, Ginsburg, Alito). Justices Souter and Ginsburg part ways with respect to one passage, part II-D-2, demoting that part of Justice Scalia's opinion to a plurality.
- Justice Breyer wrote a dissent joined by Justices Stevens and Kennedy.
- Justice Souter wrote an opinion concurring in part, joined by Justice Ginsburg. Justice Breyer (writing for himself and Justices Stevens and Kennedy) says of the Souter concurrence: "I agree with this formulation" – which means five justices agree.
 - **Thus it is at least arguable that Justice Souter's opinion is the majority opinion with respect to the precise topic under discussion, namely the application of the forfeiture doctrine in domestic violence / murder cases.**
 - (This point is elaborated below.)
- Giles beat and threatened to kill his ex-girlfriend, Brenda Avie. She reported the beating and threat to police in the immediate aftermath of the attack. Three weeks later, he carried through on his threat. The question was whether the jury should have been permitted to hear what she told police.
- The California Supreme Court held that Giles forfeited his right to confront Ms. Avie by killing her, regardless of his reason for killing her.
- Justice Scalia's majority opinion reverses. But while Justice Scalia's opinion is very long, it contains no clear statement of the rule being adopted. For example, it does not contain any statement prefaced with "We hold."
- As with *Crawford*, the opinion contains various highly-suggestive and yet indefinite statements, such as the following:
 - "A second common-law doctrine, which we will refer to as forfeiture by wrongdoing, permitted the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."
 - The terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying. The rule required the witness to have been 'kept back' or 'detained' by 'means or procurement' of the defendant." (Italics in original.)
 - "Cases and treatises of the time indicate that a purpose-based definition of these terms governed."
 - "The manner in which the rule was applied makes plain that unconfrosted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying." (Italics in original.)
 - "In 1997, this Court approved a Federal Rule of Evidence, entitled 'Forfeiture by wrongdoing,' which applies only when the defendant 'engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.' Fed. Rule of Evid. 804(b)(6). We have described this as a rule 'which codifies the forfeiture doctrine.' *Davis* ... Every commentator we are aware of has concluded the requirement of intent 'means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.'"
 - "In sum, our interpretation of the common-law forfeiture rule is supported by (1) the most natural reading of the language used at common law; (2) the absence of common-law cases *admitting* prior statements on a forfeiture theory when the

defendant had not engaged in conduct designed to prevent a witness from testifying; (3) the common law's uniform exclusion of uncontroverted inculpatory testimony by murder victims (except testimony given with awareness of impending death) in the innumerable cases in which the defendant was on trial for killing the victim, but was not shown to have done so for the purpose of preventing testimony; (4) a subsequent history in which the dissent's broad forfeiture theory has not been applied. The first two and the last are highly persuasive; the third is in our view conclusive." (Italics in original.)

- Justice Breyer's dissent points out that Justice Scalia's majority/plurality opinion fails to define the precise intent required.
 - Justice Scalia does not clarify the point of uncertainty identified by Justice Breyer, other than with the conclusory: "This is not, as the dissent charges, post, at 25, nothing more than 'knowledge-based intent.'"
 - Justice Scalia's opinion uses the phrase "specific intent" only once, in rebuttal to the dissent: "If the forfeiture doctrine did not admit uncontroverted prior testimony at common law, the conclusion must be, not that the forfeiture doctrine requires no specific intent in order to render uncontroverted testimony available, but that uncontroverted testimony is subject to no forfeiture doctrine at all."
- In his separate opinion, Justices Thomas would hold that the statements at issue were not testimonial to begin with, adhering to his bright-line rule from *Davis*. Justice Alito strongly suggests the statements at issue were not testimonial under the *Davis* rule. But because California did not seek certiorari review of the state courts' determination that the statements were testimonial, these two justices go along with the majority.
- Justice Scalia's opinion says in its closing section that a history of domestic abuse "would be highly relevant" to the inquiry into the defendant's purpose in making the victim-witness unavailable.
- Justice Souter, joined by Justice Ginsburg, goes further, saying: "[The requisite] element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger. The Court's conclusion in Part II-E thus fits the rationale that equity requires and the historical record supports." [NOTE: The precise alteration at the beginning of this quotation is taken from Justice Breyer's dissent, which quotes this passage.]
 - Justice Breyer writes of this passage: "This seems to say that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim. Doing so when, in fact, the abuser may have had other matters in mind apart from preventing the witness from testifying, is in effect not to insist upon a showing of 'purpose.' Consequently, I agree with this formulation, though I would apply a simple intent requirement across the board."
 - This seems to mean that five justices vote for the proposition "that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim."
- Professor Richard Friedman, whose work was both cited and paraphrased without attribution in *Crawford*, predicted in a 1997 law review article that importing an intent

requirement into the forfeiture principle will result in courts narrowing the definition of "testimonial" in order to avoid unjust results. Richard D. Friedman, "Confrontation and the Definition of Chutzpa," 31 Isr. L. R. 506 (1997). The separate opinions of Souter and Alito, in particular, suggest that the predicted dynamic has already started.

The Historical Approach

- The *Giles* majority opinion reconfirms that a majority of the Court is wedded to the historical approach of *Crawford*.
- Justice Breyer's dissent in *Giles* also embraces historicity as the proper mode of confrontation clause analysis.
- In *Giles*, Justices Souter and Ginsburg more or less explicitly reject the historical approach, relying instead on policy considerations.
- But the majority's approach in *Crawford* and *Giles* is, upon examination, only *pseudo*-historical. It is ahistorical in (among others) the following particulars:
 - It fakes evidence, for example by attributing a preoccupation with Sir Walter Raleigh to the Framers.
 - Raleigh was an Elizabethan courtier who lived into the reign of James I. The accession of a new royal house is always uncomfortable for those who rely on royal favor. Making it worse, Raleigh unintentionally offended the new king at their first meeting. The problem with his trial wasn't that he was denied the right to cross-examine his accusers, but that it was a political show trial.
 - *Giles* reaches conclusions based on the absence of evidence, a classic historians' fallacy.
 - The pseudo-historical approach anachronistically projects the modern lawyers' concept of hearsay backwards onto the drafters of the sixth amendment, even though most trials of the period proceeded without lawyers at all, and most "lawyers" of the era received a legal education only slightly more formal than that of today's jailhouse lawyers.
 - It considers only an extraordinarily narrow range of sources, namely appellate opinions and treatises, representing (respectively) a tiny fraction of actual trials and the personal opinions of a few self-publishing egotists.
 - Trial transcripts and accounts of trials are not consulted, even though the trial court is obviously where these issues would have been addressed most frequently, and in the federal system exclusively (because there was no federal right of appeal in criminal cases before the Gilded Age). Such transcripts and accounts are readily available.
 - It never defines who the "Framers" were (a critical point returned to below), although it imputes very specific legal doctrines to them.
 - It assume that the Framers thought alike, as if they were an alien combine reminiscent of *Star Trek's* Borg.
 - It ignores the obvious point, mentioned by Justice Souter, that domestic abuse was only rarely prosecuted at common law. The absence of reported cases finding forfeiture on facts analogous to *Giles* therefore doesn't reflect the Framers' attitude toward forfeiture so much as their attitude toward prosecuting domestic abuse.

- In addition, the pseudo-historical approach is inconsistent with the political, as opposed to strictly legal, vision of the Framers, as Justice Scalia himself recognizes when writing about different topics.
 - In *Danforth*, he joined Justice Stevens' opinion, which observed: "The ratification of the Fourteenth Amendment radically changed the federal courts' relationship with state courts. That Amendment, one of the post-Civil War Reconstruction Amendments ratified in 1868, is the source of this Court's power to decide whether a defendant in a state proceeding received a fair trial—*i.e.*, whether his deprivation of liberty was 'without due process of law.'"
 - This means that, in any inquiry into original intent concerning the application of the Bill of Rights to the states, the Framers whose intent counts are the Radical Republicans of 1868. But *Giles* refers repeatedly to the time of the founding. This is *highly* anachronistic. The one thing that is absolutely clear from the debates over the ratification of the Bill of Rights was that it was viewed strictly as a limitation on federal power. That was, in fact, the whole point.
 - In *Boumediene v. Bush*, 128 S.Ct. 2229 (June 12, 2008), Justice Scalia wrote in his dissenting opinion: "The proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people. *See, e.g., Crawford v. Washington*, 541 U. S. 36, 54 (2004)." While the use of the passive voice allows the justice to avoid identifying whose understanding counts, his reference to "the people" hints strongly at a democratic theory of original intent, one based on the idea that governments "derive[e] their just powers from the consent of the governed" and that political power originates in the people's will – which, of course, is the political theory behind ratification in the first place, as *Marbury v. Madison* and Hamilton's Federalist 78 (on which *Marbury* was based) both emphasize. Under the theory of democratic constitutionalism, the "Framers" were the people themselves, or at least those among them with the right to vote. But in both *Crawford* and *Giles*, Justice Scalia refers only to elite opinion, and then only to the views of the lawyers among the elite.
 - The *Giles* opinion makes no attempt to reconcile Justice Scalia's various inconsistent historical pronouncements from the first half of 2008 alone.

Melendez-Diaz

***Melendez-Diaz v. Massachusetts*, 557 U.S. __, __ S.Ct. __, __ L.Ed.2d __ (June 25, 2009)**

- 5-4 decision. Justice Scalia wrote the majority opinion, with Justice Thomas concurring fully, but on narrow grounds. Justice Kennedy wrote the sole dissent.
 - In 2004, Justices Kennedy and Breyer joined *Crawford*, but they dissented from *Melendez-Diaz*. Chief Justice Roberts and Justice Alito joined the dissent, just as their specific predecessors, Chief Justice Rehnquist and Justice O'Connor, had disagreed with *Crawford* itself.
 - Now that Justice Souter has retired, the lineup of remaining justices is 4-4.
- *Melendez-Diaz* states that the defendant's ability to subpoena the analyst is no substitute for the prosecution calling him or her in its case in chief: "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." (Note the departure from the purported textual

analysis of *Crawford* and *Davis*. The written confrontation clause says nothing about burdens.)

- Although that dicta from *Melendez-Diaz* addresses the precise issue, on June 29, the Court granted certiorari in *Briscoe v. Virginia*, raising the question whether a defendant's ability to subpoena the analyst prevents any confrontation clause violation.
- The oddity of the Court granting certiorari to hear an issue specifically addressed (albeit in dicta) in an opinion they issued just four days earlier suggests the possibility that the four justices in the minority might be seeking to revisit the issue in the fall, when the Court is back to full strength. (Four votes are necessary to grant certiorari.)
- If so, the continued viability of *Melendez-Diaz* might depend wholly on a single person: Justice Sotomayor (or whoever is confirmed to replace Justice Souter).
- In *Melendez-Diaz*, the Massachusetts courts permitted the prosecution to prove the chemical identity of cocaine through a certificate prepared by a non-testifying laboratory analyst.
 - Massachusetts's Supreme Judicial Court reached that conclusion based on a *Crawford*-style analysis from 1923 that included a thorough examination of precedents from the founding era. *Commonwealth v. Slavski*, 245 Mass. 405, 140 N.E. 465 (1923). When the Supreme Judicial Court revisited the issue in the wake of *Crawford*, it concluded that its 1923 proto-*Crawford* analysis was exactly what *Crawford* demanded. *Commonwealth v. Verde*, 444 Mass. 279, 827 N.E.2d 701 (Mass. 2005).
 - Scalia's opinion acknowledges the Supreme Judicial Court's 1923 analysis only in passing, observing that some other state courts reached different conclusions.
 - The pseudo-historical approach, apparently, is not something that lower courts can engage in on their own.
 - The basic holding of *Melendez-Diaz* is that the certificates are affidavits, and as *Crawford* said, affidavits are testimonial. Justice Scalia's opinion, which contains only a few paragraphs of analysis, doesn't go further into the issue than that.
 - The rest of Scalia's opinion is devoted to responding to the dissent, and these defensive passages contain sweeping dicta that will likely prove troublesome for prosecutors in cases far afield from drug prosecutions. Some of the areas of likely trouble are described below.
- Justice Thomas concurred (in full) based on his position, stated in his *Davis* partial dissent, that *only* affidavits, transcripts and similarly formal types of testimony are testimonial.
 - Because Justice Thomas's concurrence was necessary to form the majority, prosecutors should argue that it would be wrong to extend the holding beyond his narrow position. *Marks v. United States*, 430 U.S. 188, 193 (1977), is arguably not directly applicable (because Thomas concurred in full, and not merely in the judgment) it is closely analogous. There were five votes for Justice Thomas's formalistic-but-workable position, and only four votes for anything beyond that.

Positive Dicta in *Melendez-Diaz*:

- Scalia's sweeping dicta include the following that will likely prove useful to the prosecution:
 - "we do not hold, at it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." Rather, "[i]t is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live." (fn 1)
 - What does this mean in concrete terms?
 - "Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." (fn 1)
- Notice and demand statutes are A-OK: "The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections." (pdf slip op at 21)

Negative Dicta in *Melendez-Diaz*:

- Scalia's sweeping dicta also include the following that will likely prove troubling to the prosecution:
 - "The text of the Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. ... [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." (pdf slip op at 7-8)
 - The justice makes no attempt to prove the underlying (absurd) assumption that the amendment was intended to provide a comprehensive classification of witnesses.
 - This dicta calls into question cases, collected in part 2 of this Outline, holding that only "witnesses against" the accused, and only inculpatory statements, are subject to the confrontation clause.
 - *Gray v. Maryland* "did indeed distinguish between evidence that is 'incriminating on its face' and evidence that 'bec[omes] incriminating ... only when linked with evidence introduced later at trial'" – but that does not mean the latter is exempt from the confrontation clause, but only that it is exempted when a limiting instruction is given. (fn 3)
 - So if a limiting instruction is given, doesn't that create a third category of witnesses, those that are neither called by the defense nor subject to cross-examination?
 - Scalia's opinion gives no hint of recognizing the self-contradiction.
 - Similarly, the opinion later states that the hearsay evidence in *Dowdell v. U.S.* was non-testimonial because the declarants "were not witnesses for purposes of the Confrontation Clause because their statements concerned only the conduct of defendant's prior trial, not any facts regarding defendants' guilt or innocence." (fn 8)
 - Again, "a third category of witnesses", or rather fourth – and again Scalia doesn't seem to recognize his self-contradiction.
 - Scalia's opinion states: "Respondents and the dissent may be right that there are other ways—and in some cases better ways [than cross-examination]—to

challenge or verify the results of a forensic test. [fn 5] Though surely not always. Some forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated, and the specimens used for other analyses have often been lost or degraded."

- This would seem to imply, vaguely, that cross-examination is particularly necessary in cases involving autopsies and breathalyzer tests.
- The dissent believes the holding applies to autopsy reports, and Scalia doesn't deny it.
- In part III(C), Scalia first accuses the dissent of wanting to return to *Ohio v. Roberts*, and then launches on a lengthy discussion of the unreliability of forensic testing – the *Ohio v. Roberts* concern.
 - So is reliability back? At the end of a lengthy discussion, Scalia drops a footnote (fn 6) that says it isn't, which, if true, makes the whole discussion spectacularly pointless.
 - Scalia says: "Confrontation is one means of assuring accurate forensic analysis. ... Confrontation is designed [!] to weed out not only the fraudulent analyst, but the incompetent one as well." (pdf slip op. at 13) But he does not provide any example of faked or incompetent analysis being exposed by cross-examination.
 - Bad science is exposed by quality control, review, laboratory audit, or confessions, not by humanities majors asking questions in routine drug cases.
- Scalia says the laboratory reports do not qualify as business records because they are made for courtroom use and not for the business, comparing them to a railroad's accident investigation. (pdf slip op. at 15-16)
 - "The analysts' certificates—like police reports generated by law enforcement officials—do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as 'excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel')." (pdf slip op. at 16)
 - So is the 803(8) (public records) exclusion now imported into 803(6) (business records)?
 - And are lab workers "law enforcement personnel"?
 - Both conclusions seem implied, although neither is stated, perhaps because neither is, upon honest examination, defensible.
 - The opinion says: "Business and public records are generally admissible absent confrontation ... because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial."
 - The opinion thus establishes a dichotomy, which like other dichotomies established recently by Justice Scalia (*e.g.*, responding to an emergency vs. gathering evidence), involves categories that are not mutually exclusive.
 - Laboratory reports, obviously, are necessary for quality assurance, that is, the administration of the lab's affairs. But they are also, *Melendez-Diaz* holds, created for the purpose of establishing or proving some fact at trial.

- The same is equally true of many, many business and public records. Just think, for instance, of the "paper trail" in an employee's personnel file.
 - Yet the dichotomy established by *Melendez-Diaz* says that's not possible.
- Scalia purports to discern the framers' intent through the absence of evidence, specifically the absence of evidence regarding the admission of documents analogous to reports of forensic analyses of controlled substances. (pdf slip op. at 16)
 - To his previous sins against historiography (see preceding section) must be added yet another anachronism.
 - The obvious conclusion, that the framers hadn't formed any views about the admissibility of chemical tests of controlled substances, and the American people who ratified the sixth amendment weren't even thinking about it, is apparently not permissible.
 - That should be contrasted to Scalia's dissent this term in *Capterton v. A.T. Massey Coal Co.*, where he wrote: "Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed..."
 - By contrast to the due process clause, the sixth amendment *does* contain the answer to all earthly questions, at least those having to do with the admission of the particular type of evidence that 20th century lawyers took to denominating "hearsay."
- Scalia refers to common law cases "in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it." (pdf slip op. at 17) That, he says, was testimonial evidence.
 - Accordingly, this dicta seems to say that certificates of non-existence of a record are inadmissible without live testimony, contrary to the unanimous authority collected in part 5 of this Outline.
- The opinion says that the confrontation clause problem is not resolved by the defendant's power to subpoena the analyst, if the defendant sincerely wanted to cross-examine him or her. (pdf slip op. at 18-19) That is precisely the issue raised by *Briscoe v. Virginia*, in which the Court granted certiorari four days after *Melendez-Diaz* was issued.
- The opinion says the Court has no authority to alter the requirements of the Constitution, even though it did so just five years ago in *Crawford*. (pdf slip op at 19-21)
 - Or, if it is assumed *Crawford* was correct and the previous history of the sixth amendment nothing but a prolonged mistake, then the Court altered the requirements of the Constitution for the 213 years previous to 2004.
- Finally, in a passage that is already notorious, Scalia states: "Defense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic evidence. Nor will defense attorneys

want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion. [fn 13] ... We simply do not expect defense attorneys to believe that their clients' interests (or their own) are furthered by objections to analysts' reports whose conclusions counsel have no intention of challenging."

- Beyond the "what planet does he live on?" naivete of the passage—a reminder that none of the 8 current justices other than Justice Alito has criminal law experience, and that Justice Scalia hasn't practiced law since the 1960s—an argument could be made that any defense attorney who *doesn't* insist on the analyst's appearance is failing to do his or her job.
 - After all, why *not* make the demand? It could win the case. If the analyst shows up on the morning of trial, you can always offer to stipulate then, or negotiate a plea.
 - Which means prosecutors should perhaps be wary about accepting a stipulation without an on-record explanation of defense counsel's thought processes sufficient to create a tactics-and-strategy defense to a claim of ineffective assistance.
- Scalia seems unaware that his opinion will change the incentives for entering into stipulations—that he is introducing a new force into a dynamic, not moving one block in an otherwise-unchanging Lego structure.

Post-Melendez-Diaz Cert Decisions

As noted in the "*Crawford* News" section at the beginning of this Outline, four days after Melendez-Diaz was issued, the Court GVRed (granted certiorari, summary vacated, and remanded for reconsideration) five cases, but denied cert in twice that number. This is the list of cases in which cert was **denied**, along with a brief summary of the holding in each. It is difficult even to guess what distinctions the Court drew among the 15 cases.

U.S. v. De La Cruz, 514 F.3d 121, n. 5 (1st Cir. Feb 01, 2008), cert. denied, No. 07-1602 (June 29, 2009) – an autopsy report is a business record and therefore non-testimonial; and a testifying physician can rely on reports prepared by other, non-testifying physicians

State v. O'Maley, 932 A.2d 1 (N.H. 2007), cert. denied, No. 07-7577 (June 29, 2009), overruled in part by State v. Dilboy, 999 A.2d 1092, 160 N.H. 135, 139-142 (N.H. 2010) – in DUI prosecution, blood sample report is non-testimonial

People v. Geier, 41 Cal.4th 555, 161 P.3d 104, 61 Cal.Rptr.3d 580 (Cal. 2007), cert. denied, No. 07-7770 (June 29, 2009) – autopsy report is a business record and therefore non-testimonial; DNA report is non-testimonial

U.S. v. Washington, 498 F.3d 225 (4th Cir. 2007), cert. denied, No. 07-8291 (June 29, 2009) – DUI case – blood sample results are not testimonial hearsay

Hinojos-Mendoza v. People, 169 P.3d 662 (Colo. Sep 10, 2007), cert. denied, No. 07-9369 (June 29, 2009) – a case cited with approval by Scalia in his majority opinion (pdf slip op. at 21) – in cocaine case, lab report was testimonial but defendant waived his *Crawford* right to cross-examine the chemist by failing to comply with a demand statute

People v. Meekins, 2006 NY Slip Op 9018 (N.Y. App. Div. 2d Dept. 2006), aff'd sub nom. People v. Rawlins, 10 N.Y.3d 136, 884 N.E.2d 1019, 855 N.Y.S.2d 20, 2008 WL 423397, 2008 N.Y. Slip Op. 01420 (N.Y. Feb 19, 2008), cert. denied, sub nom. Meekins v. New York, No. 07-10845 (May 09, 2008) – DNA report is non-testimonial, but fingerprint comparison is testimonial

State v. Cosme, 2007 WL 926357, 2007-Ohio-1454 (Ohio App. 8 Dist. March 29, 2007), aff'd 117 Ohio St.3d 74, 881 N.E.2d 864, 2008-Ohio-500 (Feb. 13, 2008), cert. denied, No. 07-10908 (June 29, 2009) – "[¶ 1] The judgment of the court of appeals is affirmed on the authority of *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840, 879 N.E.2d 745." - [NOTE: That's the Ohio Supreme Court's opinion in its entirety. On June 29, 2009, the Supreme Court granted certiorari in *Crager*, summarily vacated it, and remanded for further consideration in light of *Melendez-Diaz*. But the Court denied certiorari in *Cosme*. Go figure.]

State v. Raines, 362 N.C. 1, 653 S.E.2d 126 (N.C. Dec 07, 2007), cert. denied, No. 07-11127 (June 29, 2009) – detention center incident reports are non-testimonial business records

State v. Sweet, 195 N.J. 357, 949 A.2d 809 (N.J. Jun 23, 2008), cert. denied, No. 08-381 (June 29, 2009) – DUI case – "neither the ampoule testing certificates nor the breath testing instrument inspection certificates at issue are testimonial"

Blaylock v. State, 259 S.W.3d 202 (Tex. App.-Texarkana May 14, 2008), pet. ref'd (Oct 15, 2008), cert. denied, No. 08-8259 (June 29, 2009) – drug case – testimony by supervisor who reached independent conclusions from results obtained by non-testifying chemist satisfied confrontation clause

Justice Thomas's Fifth Votes in *Melendez-Diaz* and *Williams*

see Marks v United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'")

People v. Barba, 215 Cal. App. 4th 712, 155 Cal. Rptr. 3d 707 (Cal. App. 2d Dist. 2013), cert. denied (Nov. 12, 2013) – "Under the interpretive rule announced in *Dungo*, we may affirm if we can find that there was no Confrontation Clause violation under the rationales employed by both the plurality and Justice Thomas's concurring opinion in *Williams*."

People v. Davis, 199 Cal. App. 4th 1254, 1256-1273 (Cal. App. 3d Dist. 2011) (as modified), review granted, depublished (Jan. 11, 2012), review dismissed (May 22, 2013) – "Because Justice Thomas concurred on grounds narrower than those set forth in the plurality opinion, we must treat as controlling only the position shared between Justice Thomas and the plurality. ... fn.6 We recognize that Justice Thomas, one of five votes in *Melendez-Diaz*, did in fact join the

opinion that we refer to as the 'plurality' opinion. While on its face the opinion could be dubbed a 'majority' opinion, we refer to it as a plurality opinion because the language of Justice Thomas's concurrence makes clear that his assent to the opinion was not a blanket endorsement of its entire rationale. ... To construe Justice Thomas's act of joining the court's opinion as creating a majority opinion in all respects would render Justice Thomas's separate concurrence a dead letter, something we are not prepared to do. [cites] We give effect to Justice Thomas's act of joining the opinion and the language of his separate concurrence by treating the analytical consistency between the opinion and Justice Thomas's separate concurrence as the controlling precedent. Moreover, the analytical consistency between the two was all that was necessary to reach the result, further justifying allegiance to the common ground."

Nardi v. Pepe, 662 F.3d 107 (1st Cir. Mass. 2011) (habeas) – describing *Melendez-Diaz* – "a necessary fifth vote for the majority limited his support to 'formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'"

People v Hall, 2011 NY Slip Op 3193, 84 A.D.3d 79, 923 N.Y.S.2d 428 (N.Y. App. Div. 1st Dep't 2011) – "any holding in *Melendez-Diaz*, at least insofar as scientific forensic reports are concerned, is arguably limited to the 'formalized testimonial materials' to which Justice Thomas referred"

Ware v. State, __ So.3d __, 2011 Ala. Crim. App. LEXIS 19 (Ala. Crim. App. Mar. 25, 2011) – "Justice Thomas, the majority's fifth vote, made it clear in his concurring opinion that he could concur in *Melendez-Diaz* because the certificate of analysis at issue was an affidavit and thus was testimonial. However, he stated that he "adhered to [his] position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" ... we agree with the State's argument that the *Melendez-Diaz* definition of testimonial was limited to formalized testimonial materials, i.e., affidavits. [citing Thomas concurrence]"

State v. Mitchell, 2010 ME 73, 4 A.3d 478 (Me. 2010) – "It is unclear whether the Court's holding in *Melendez-Diaz* should be applied so as to permit the State to offer an expert witness's testimony based on an autopsy report that the expert witness did not author. Justice Thomas stated in his concurring opinion that he "continue[s] to adhere to [his] position that the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." See *id.* at __, 174 L. Ed. 2d at 333 (Thomas, J., concurring) (quotation marks omitted). The opinion suggests that the rationale of *Melendez-Diaz* should be limited to trial-oriented documents and should not extend to documents, such as autopsy reports, that are produced during the investigation."

People v. Miller, 187 Cal. App. 4th 902, 904-915, 114 Cal. Rptr. 3d 629 (Cal. App. 4th Dist. 2010), republished on grant of review (2010), review dismissed (May 22, 2013) – "the fifth justice in the *Melendez-Diaz* majority [i.e., Thomas] did not endorse the comments made by the author that contradict the holding in *Geier*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds' [cites] By supplying the fifth vote on grounds narrower than those

seemingly adopted by the majority, Justice Thomas's position takes on a heightened significance in interpreting *Melendez-Diaz*."

State v. Dilboy, 999 A.2d 1092, 160 N.H. 135, 139-142 (N.H. 2010), cert. granted, summarily vacated and remanded, Dilboy v. New Hampshire, 131 S. Ct. 3089, 180 L. Ed. 2d 911 (U.S. 2011) (June 28, 2011) – "*Melendez-Diaz* simply did not determine whether the technician or analyst who performed the scientific tests at issue must testify at trial. ... [*151] Justice Thomas' concurring opinion, in which he reaffirmed his belief that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' underscores the limited reach of *Melendez-Diaz*."

People v. John David Hull, 2010 Cal. App. Unpub. LEXIS 6536 (Cal. App. 3d Dist. Aug. 17, 2010) – "whatever broader ideas about what constitutes a 'testimonial' statement might be drawn from Justice Scalia's opinion in *Melendez-Diaz*, under *Marks* the holding of the court in *Melendez-Diaz* can be found in Justice Thomas's conclusion that "'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'""

State v. Argon, 2010-NMSC-008, 225 P.3d 1280, 1284-85 (N.M. 2010) – "The State relies on Justice Thomas's narrow concurring opinion and argues that his concurring opinion severely limits the *Melendez-Diaz* holding to only 'formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' 557 U.S. at ___, 129 S.Ct. at 2543 (Thomas, J., concurring) (internal quotation marks and citation omitted). We disagree..." – on the ground that "we believe that in *Davis* a clear majority of the United States Supreme Court rejected Justice Thomas's limitation..."

People v. Colon, 2010 Cal. App. Unpub. LEXIS 1280 (Cal. App. 5th Dist. 2010) – "While the opinion in *Melendez-Diaz* may not be 'fragmented,' Justice Thomas supplied the 'decisive' fifth vote and he concurred on grounds narrower than those put forth by the plurality. (See, e.g., *United States v. Brown* (5th Cir. 2008) 553 F.3d 768, 783.) As a result, his position takes on heightened significance in interpreting *Melendez-Diaz* and may be considered controlling."

Larkin v. Yates, 2009 WL 2049991 (C.D. Cal. Jul 09, 2009) (unpub) (habeas) – "the fact that Justice Thomas in his concurrence limited Confrontation Clause protections to only extrajudicial statements contained in formalized testimonial material highlights the lack of clarity on this issue. Importantly, Justice Thomas was the fifth vote in the five-to-four decision, meaning that there would be no clear majority if, as in petitioner's case, the offending testimony did not consist of formalized testimonial material. See *Marks v. United States*, 430 U.S. 188, 193 (1976) ('When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.')."

Michigan v. Bryant

Michigan v. Bryant, 562 U.S. ___, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (Feb. 28, 2011)

- A 5-1-2 decision, majority opinion by Justice Sotomayor. Justice Thomas concurred in the judgment, while Justices Scalia and Ginsburg dissented.
- Rick Bryant shot Anthony Covington in 2001. Covington was able to get into his car and drive to a gas station, where police found him. He talked to police for 5-10 minutes before EMTs arrived, and died a short time later. Were his statements at the scene testimonial?
 - The Michigan courts concluded that the prosecution had abandoned the theory that the statements were dying declarations, so that issue was off the table. 131 S.Ct. at 1151 n.1.
 - The Michigan Court of Appeals concluded the statements were non-testimonial, because the police were responding to an emergency, but the Michigan Supreme Court reversed, concluding on a 4-3 vote that the emergency was over, since violent death isn't an emergency (hey, we're talking Detroit here).
- The U.S. Supreme Court reaffirmed that "the basic objective of the Confrontation Clause... is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." 131 S.Ct. at 1155. With that basic purpose in mind, it follows that when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause." *Id.*
- The Court "face[d] a new context: a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim." *Id.* at 1156.
- The Court explained that "[t]he existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecution.'" *Id.* at 1157 (quoting *Davis*).
- "Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." *Id.*
- "This logic is not unlike that justifying the excited utterance exception in hearsay law." *Id.* In other words, "[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.* at 1155.
 - As a practical matter, this is the most important part of the opinion: excited utterances are highly likely to be non-testimonial.
 - The Court didn't say that excited utterances are *presumed* non-testimonial, but it got pretty close to it.
 - Shades of "firmly-rooted hearsay exceptions" – which is almost certainly the reason for Justice Scalia's operative dissent.
- The Court identified five errors by the Michigan Supreme Court majority. First, that court wrongly believed *Davis* had defined the meaning of "ongoing emergency," when in fact it "did not even define the extent of the emergency in that case." *Id.* at 1158.
- Second, the lower court "failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry." *Id.* It includes not only a potential threat to the victims, but consideration of the entire "zone of potential victims" including "the police and public." *Id.*

- Third, "[t]he Michigan Supreme Court also did not appreciate that the duration and scope of an emergency may depend in part on the type of weapon employed." *Id.* A suspect armed with a gun obviously poses a much different threat of more serious injury inflicted from a greater distance than a suspect armed only with his fists, such as the attackers in the *Davis* pair of cases. *Id.* at 1158-59.
- Fourth, the lower court incorrectly concluded "that the medical condition of a declarant is irrelevant." *Id.* at 1159. On the contrary, "The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public." *Id.* at 1159.
- Finally, the lower court failed to appreciate that "the existence *vel non* of an ongoing emergency" is not "dispositive of the testimonial inquiry." *Id.* at 1160. Other factors to consider are the formality or informality of the statements. In *Bryant*, "the questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion. All of those facts make this case distinguishable from the formal station-house interrogation in *Crawford*." *Id.*
- The Supreme Court emphasized the potential danger posed to officers, EMTs, the general public and the still-surviving victim by a suspect armed with a weapon who has already demonstrated his readiness to shoot human beings. *Id.* at 1163-64. The Court pointed out the different kind of threat presented by an attacker armed with a gun than an attacker who used only his fists. *Id.* at 1158-59.
 - In other words, *Bryant* formalized the stricter standard of admissibility in domestic violence crimes.
- The Court stated: "In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." *Id.* at 1160.
 - In other words, the Court stuck with the inherently ambiguous, if not nonsensical, *Davis* standard of determining the "purpose of the interrogation," despite the obvious fact that interrogations, being abstractions, are incapable of having a purpose.
 - However, "[i]f the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause."
- The Court also recognized that "[a] severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive. The victim's injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution. Taking into account a victim's injuries does not transform this objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim – circumstances that prominently include the victim's physical state." *Id.* at 1161-1162.

- We're supposed to think what a reasonable victim would think if placed in the position of a person too debilitated to think??
- Justice Thomas concluded that the statement was non-testimonial because it was so informal, which was just one of the multiple factors considered by the five-justice majority.
- Justice Scalia's dissent is exceptionally emotional and vituperative even by his standards.
 - *Bryant* didn't ditch the nonsense perpetrated by Scalia's opinion in *Davis*: the absurd inquiry into the "purpose of an interrogation" as opposed to the purpose of the people engaged in the exchange; and the false dichotomy between an officer responding to an emergency and an officer investigating a crime.
 - And yet Scalia now concludes that remaining true to *Davis* reduces "our Confrontation Clause jurisprudence" to "a shambles."
 - A shambles is a slaughterhouse – an interesting choice of metaphor in a case involving violent death.
- Almost certainly, the source of Scalia's ire is the majority's use of that word "reliable." He sees a return of the *Ohio v. Roberts* regime.
- Scalia claims: "I continue to adhere to the Confrontation Clause that the People adopted, as described in *Crawford*..."
 - But *Crawford* considered only elite opinion from judges and commentators. Neither it nor *Giles* contained any discussion of the people's understanding of the confrontation clause and due process clause before their respective ratifications. Is Scalia now saying that "the People" ratified the 6th and 14th amendments because they shared his concern for the fate of Sir Walter Raleigh, who's mentioned no fewer than 20 times in *Crawford*?
- Scalia now claims that "[t]he declarant's intent is what counts." (Justice Ginsburg agrees with this, but none of the other justices do.)
 - Note the assumption that any conversation has an "intent" – a word otherwise used in criminal and tort law to describe an actor's state of mind while doing a wrongful act.
- From the point of view of a dying man, dying a painful death is obviously not an emergency. QED.
 - Scalia carefully avoided taking a position on this very point in *Davis*.
- Scalia's dissent is perhaps the clearest indication yet that he had no clear idea of where he was going when he wrote *Crawford*. He doesn't seem to realize that he's effectively arguing against his own opinion in *Davis*.

Bullcoming v. New Mexico

Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (June 23, 2011)

- A 5-1-4 opinion, which adds up to too many justices, but Justice Sotomayor joined the majority opinion and then wrote a separate partial concurrence. *See State v. Benefield, 2012 Conn. Super. LEXIS 238, 1-30 (Conn. Super. Ct. Jan. 10, 2012)* (unpub) ("Although Justice Sotomayor joined the Court's judgment in *Bullcoming*, her concurring opinion opens" with a definition of testimonial statement narrower than that in fn.6 of the main opinion. "It would appear, therefore, that it is this more restrictive definition, and

not the broader footnote 6 definition, that has garnered the support of a majority of the Supreme Court.").

- A drunk driving case. The defendant's level of intoxication was determined by blood test. The technician who ran the sample through the gas chromatograph, Caylor, did not testify because he had been placed on administrative leave, but a different scientist, Razatos, did.
- Majority opinion by Justice Ginsburg determined the introduction of Caylor's report as a business record violated the Sixth Amendment.
- Only Justice Scalia joined Ginsburg's opinion in full. (The same tandem dissented in *Bryant*.) Justices Sotomayor, Kagan and Thomas joined in all but part IV of the majority opinion, and Justice Thomas further withheld his support from footnote 6.
 - Part IV confirms the unworldliness of the justices: it relies on the statistic that most cases don't proceed to trial, seemingly without awareness that its decision will affect that percentage.
 - Ginsburg writes: "The dissent is silent... on the number of instances in which subpoenaed analysts in fact testify, *i.e.*, the figure that would reveal the actual burden of courtroom testimony." *Id.* at 2719 n. 9. Driving four hours and staying overnight in a motel, only to learn next morning that the case settled as soon as the defense attorney saw the analyst actually enter the courtroom, and then driving four hours back to the lab, isn't an "actual burden" to the analyst? It must be nice up there in la-la land.
 - Footnote 6 (on page 2714) quotes language from *Davis* and *Melendez-Diaz*. Thomas doesn't explain his objection to the footnote, but a good guess is that the quoted language is broader than his oft-stated view that only formal documents prepared for courtroom use are testimonial.
- The New Mexico Supreme Court held that the nontestifying technician was a "mere scrivener" who merely jotted down the results from the gas chromatograph. But the majority opinion finds that factually inaccurate: the report also included the technician's affirmation that he complied with proper procedures. *Id.* at 2714.
 - Justice Sotomayor points out that a different result might be obtained if the machine readout itself had been introduced, without any certification regarding proper procedures.
 - In other words, the problem came from the assurance of reliability.
- "Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'" *Id.* at 2715.
 - The Court doesn't explain what it means to "write" a report. What happens if, as in a case contained in this outline, no fewer than 15 analysts contribute to a report? Are they all "writers" of the report, or only the person who signs it?
 - Obviously the writer isn't the person who actually writes the words on the page: Caylor's "report" was a standard form with check boxes.
- The Court makes much of the fact that the technician didn't testify because he was put on unpaid leave. *Id.* at 2715. The updater of this outline, who has some inside knowledge, can confirm that the reason he was put on leave was well-known to defense counsel, which (of course) is *why* the record doesn't contain that information – it had nothing to do with his technical competence or any issue in the case.

- That point is, when you stop to think about it, perfectly obvious: if the defense could plausibly have claimed dishonesty or incompetence, don't you think it would have, if not at trial then in a motion for new trial? Ginsburg's point makes sense only if you first assume defense counsel was epically incompetent.
 - The justices' distressing lack of criminal law experience keeps showing through the fine verbal fabric of their opinions.
- The Court concludes that the expert who testified didn't satisfy the confrontation clause because he "could not convey what Caylor knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." *Id.* at 2715 (footnotes omitted).
 - The Court admits in footnote 7 that doubtless Caylor himself couldn't have supplied that testimony either, given the sheer volume of similar tests an analyst runs. But that doesn't matter, because defense counsel could have questioned him about *other* things pertinent to his general practice.
 - Which, of course, is equally true of the testifying expert.
 - Then again, the analyst himself couldn't provide any information concerning the design and manufacture of the machine, or the ultimate validity of the scientific information that informed the original design. And so on.
- "Nor did the State assert that [the testifying expert] had any 'independent opinion' concerning Bullcoming's BAC." *Id.* at 27156.
- Bottom line: "In all material respects, the laboratory report in this case resembles those in *Melendez-Diaz*." *Id.* at 2717.
- Sotomayor writes separately to say: "Although this case is materially indistinguishable from the facts we considered in *Melendez-Diaz*, I highlight some of the factual circumstances that this case does *not* present." *Id.* at 2721-22 (*italics in original*). *Viz.*:
 - The state did not contend there was a medical purpose for the blood test.
 - The testifying expert was not a supervisor or peer reviewer.
 - The testifying expert was not asked for his or her independent opinion.
 - The state did not introduce the machine-printed results themselves.
 - Hint, hint.
- Justice Kennedy's opinion, joined by Justices Breyer, Roberts and Alito, concludes: "Seven years after its initiation, it bears remembering that the Crawford approach was not preordained. This Court's missteps have produced an interpretation of the word 'witness' at odds with its meaning elsewhere in the Constitution, including elsewhere in the Sixth Amendment, and at odds with the sound administration of justice." *Id.* at 2728 (citation omitted).
 - Of course, if *Crawford* actually reflected the Constitution's meaning, it was indeed "preordained." Kennedy means it doesn't reflect it.
 - The Court's "missteps" are the subject of this outline.

Justice Sotomayor's Fifth Vote in *Bullcoming*

(category added Dec. 2011)

People v. Davis, 199 Cal. App. 4th 1254, 1256-1273 (Cal. App. 3d Dist. 2011) (as modified), review granted, depublished (Jan. 11, 2012), review dismissed (May 22, 2013) – "As to the

second issue, a majority of the court (the plurality plus Justice Sotomayor) agreed that the analyst's signed certificate was testimonial. Justice Sotomayor wrote separately, however, to explain her reasoning. Because Justice Sotomayor's analysis is different from the plurality's, we search once again for common ground to extract the controlling precedent." – [NOTE: "Once again" because the court had previously described the common ground between the plurality opinion and Justice Thomas's concurrence in *Melendez-Diaz*.]

Nardi v. Pepe, 662 F.3d 107 (1st Cir. Mass. 2011) (habeas) – "This time, Justice Sotomayor provided the needed fifth vote, stressing that the certificate's primary purpose was as trial evidence, and adding: 'this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence.'"

Williams v. Illinois

Williams v. Illinois, 567 U.S. ___, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (June 18, 2012)

- A 4-1-4 decision, with no majority rationale. Despairing commentary from lower courts has come quickly: "it may not be possible to definitively state the Court's prevailing view on this issue" *Leger v. State*, 732 S.E.2d 53, 60 (Ga. 2012). The Louisiana Supreme Court concluded the decision announced no rule at all: "We therefore read *Williams* no more broadly than the particular circumstances that led to the convergence of the votes of five Justices to uphold the judgment of the Illinois appellate courts affirming the defendant's conviction..." *State v. Bolden*, __ So.3d __, 2012 La. LEXIS 2894 (La. Oct. 26, 2012). Justice Liu of the California Supreme Court agreed: "The United States Supreme Court's most recent decision in this area produced no authoritative guidance beyond the result reached on the particular facts of that case." *People v. Lopez*, 55 Cal.4th 569, 590, 286 P.3d 469, 483 (Cal. Oct. 15, 2012) (Liu, J., dissenting).
- Defendant raped the victim in February, 2000. In August of the same year he was arrested for an unrelated offense and required to give a DNA sample. In March 2001, a database hit was returned. At the subsequent bench trial, the prosecution introduced DNA evidence. The extraction was performed by Illinois State Police crime lab technicians but the testing – the derivation of a genetic profile – was done by Cellmark. The Cellmark report was not introduced into evidence. However, it formed the basis for the opinion given by the testifying witness, Sandra Lambatos, a forensic biologist with the ISP crime lab.
 - These facts are taken from *People v. Williams*, 895 N.E.2d 961, 963 (Ill. App. 1st Dist. 2008), and *People v. Williams*, 939 N.E.2d 268 (Ill. 2010). It's sadly true that statements of fact in the Supreme Court's *Crawford* line of cases have not always been completely reliable.
- Justice Alito wrote the opinion for the Court, joined by Roberts, Kennedy and Breyer. The four justices concluded that the confrontation clause was not violated by Lambatos's testimony for each of two independent reasons:
 - Plurality Rationale 1: "When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that

opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." In other words, Fed. R. Evid. 703 and its state analogues control.

- Plurality Rationale 2: Even if the Cellmark report had been introduced into evidence, it would not be testimonial, because it is so unlike the statements identified as such in *Crawford*, etc. "The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. The use of DNA evidence to exonerate persons who have been wrongfully accused or convicted is well known." And if the prosecution was required to call every single technician who worked on the sample into court, prosecutions would be given a powerful economic incentive to forego reliable DNA evidence in favor of less reliable forms of evidence.
- Justice Thomas reiterated his view that only "formal" documents can be testimonial, which he has consistently held through the years, and that the Cellmark report was not sufficiently formal to count.
- But he then set out his disagreement with both of the rationales offered by the plurality.
 - Thomas's purpose in spelling out his disagreement may have been tactical. By preventing any other view from obtaining a majority, he may have been angling to make his fifth vote decisive under the rule of *Marks v. United States*, 430 U.S. 188 (1977) (in the absence of majority, narrowest concurring opinion controls).
- Four justices of the California Supreme Court have suggested that a scientific report should be regarded as non-testimonial if it satisfies either one of the plurality's independent tests *and also* Justice Thomas's "formality" requirement. A report that passes muster under *both* the plurality *and* Justice Thomas's concurrence is copasetic. *People v. Duno*, 286 P.3d 442, 455-58 (Oct. 15, 2012) (Chin, J., concurring).
- Justice Kagan, joined by Scalia (of course), Ginsburg (of course) and Sotomayor dissented. Kagan's opinion is unusual. It begins with an anecdote about a case from San Diego, but tells it in an apparently misleading way, according to Justice Breyer in his separate concurrence.
 - Regardless of the accuracy of her telling of the anecdote, Justice Kagan is arguing that Williams' case should have been decided on the basis of the record of a *different* case, one entirely unrelated to him.
- Kagan refers to the plurality's first rationale as a "prosecutorial dodge."
 - But the "dodge" of Rule 703 was drafted by the Supreme Court and enacted by Congress. It wasn't invented by prosecutors.
 - And what are prosecutors attempting to dodge? – apparently, Justice Kagan's minority opinion, which isn't law and therefore doesn't require dodging.
 - Her remark makes no sense at all.
- The tone of Kagan's dissent is self-righteous and abusive.
 - The intemperance of Justice Kagan's dissent is, like the lineup of votes itself, a measure of the incoherence of the Supreme Court's jurisprudence, because if their precedents actually led to any predictable result, no one would have to get all heated up about it.

- Bottom line: The various opinions in *Williams* show that the Supreme Court has taken on a task – prescribing a comprehensive hearsay rule for the entire nation – that its members are incapable of performing.

Whether *Williams* Establishes Any Rule at All
(category added Dec. 2012)

State v. Sauerbry, 447 S.W.3d 780, 781-89 (Mo. Ct. App. 2014) – "Given the fractured Court, *Williams* offers little guidance for future Confrontation Clause cases."

State v. Dotson, 450 S.W.3d 1, 11-18 (Tenn. 2014) cert. denied, 135 S.Ct. 1535 (U.S. Mar. 9, 2015) – "The Supreme Court's fractured decision in *Williams* provides little guidance and is of uncertain precedential value..."

People v. Merritt, 2014 COA 124, ¶¶ 1-61, __ P.3d __ (Colo. App. 2014) – "¶ 39 Given the absence of majority support for any of the reasoning behind the outcome of *Williams*, it provides no clear guidance as to the current state of the law regarding the testimony of experts whose opinions are based on forensic reports which they themselves did not prepare."

Anderson v. State, 317 P.3d 1108 (Wyo. 2014) – "[¶ 37] ... as the Arizona Supreme Court recently explained, '[n]either the plurality's 'primary purpose' test nor Justice Thomas's solemnity standard can be deemed a subset of the other; therefore, there is no binding rule for determining when reports are testimonial.' [cite] We agree, and apply *Williams* accordingly."

Commonwealth v. Yohe, 79 A.3d 520, 523-43 (Pa. 2013) – "The narrowest grounds for the Court's affirmance of the lower court in *Williams*, a disposition on which the lead opinion and Justice Thomas were in agreement, is their conclusion that the Cellmark report was not testimonial. It is irrelevant for our purposes to determine the narrowest commonality of their respective legal rationales for reaching this conclusion..."

Jenkins v. U.S., 75 A.3d 174, 176-210 (D.C. App. 2013) – "We are presented here with the question of how to treat a fractured Supreme Court opinion when *Marks* does not apply. ... We therefore conclude that *Williams* produces no new rule of law that we can apply in this case."

State v. Medina, 306 P.3d 48, 62-64 (Ariz. 2013) – "¶ 60 Neither the plurality's 'primary purpose' test nor Justice Thomas's solemnity standard can be deemed a subset of the other; therefore, there is no binding rule for determining when reports are testimonial."

State v. Deadwiller, 834 N.W.2d 362, 364-84 (Wis. 2013) (Abrahamson, J., concurring) – "¶ 50 First, I conclude that this court is not obligated to follow the United States Supreme Court's decision in *Williams v. Illinois* in reaching its result. The decision is not binding upon this court because there is no single or narrowest rationale upon which the majority of the United States Supreme Court relied in reaching its conclusion. ... ¶ 65 Because there is no single or narrowest rationale upon which the majority in the United States Supreme Court relied on reaching its conclusion in *Williams*, I conclude that there is no standard in *Williams* for this court to follow."

Young v. United States, 63 A.3d 1033, 1035-1049 (D.C. 2013) – "The fractured decision in *Williams* may be a harbinger of changes to come in the Supreme Court's Confrontation Clause

jurisprudence, but for now its force as precedent is uncertain because no rationale for the decision—not one of the three proffered tests for determining whether an extrajudicial statement is testimonial—attracted the support of a majority of the Justices."

United States v. Mallay, 712 F.3d 79, 95 (2d Cir. N.Y. 2013) – "*Williams* does not, as far as we can determine, using the *Marks* analytic approach, yield a single, useful holding relevant to the case before us. It is therefore for our purposes confined to the particular set of facts presented in that case."

Commonwealth v. Tassone, 83 Mass. App. Ct. 197, 982 N.E.2d 534 (Mass. App. Ct. 2013), reversed by Commonwealth v. Tassone, 468 Mass. 391, 11 N.E.3d 67 (Mass. 2014) – "the divided opinions in *Williams* create a vote-cycling problem, a problem in which the outcome depends upon the order in which multiple questions are asked."

State v. Kennedy, 735 S.E.2d 905, 908-927 (W. Va. 2012) – "we view *Williams* with caution. ... [W]e believe *Williams* cannot be fairly read to supplant the 'primary purpose' test previously endorsed by the Court and as established in *Melendez-Diaz* and *Bullcoming*. However, for purposes of this particular case, we need not determine what the 'narrowest grounds' obtaining concurrence in *Williams* are, or whether there are any such grounds, for that matter. ... Again, however, we construe *Williams* with extreme caution and admonish lower courts to do likewise. ...[W]e find *Williams* a tenuous and highly distinguishable opinion..."

Ohio v. Clark

Ohio v. Clark, 576 U.S. __, 135 S.Ct. 2173, __ L.Ed.2d __ (2015) – decided June 18, 2015

- All nine justices agreed with the result, but they produced a 6-2-1 decision. Justice Alito wrote the opinion for the Court. Justice Scalia wrote an opinion concurring in the judgment that was joined by Justice Ginsburg. Justice Thomas also wrote a separate opinion concurring in the judgment.
- Three-year-old L.P. appeared at his Head Start preschool at lunchtime. One of his teachers noticed marks on his face in the lunchroom and asked him about them, but didn't understand L.P.'s reply. The teacher asked again in the classroom, where she could more clearly see whip marks. L.P. replied "Dee did it." The teacher did not know who Dee was; he or she could have been an older student at the school. The teacher and L.P. went to the supervisor's office, where they discovered more unmistakable marks of abuse on the little boy's body. "Dee" was the defendant, Darius Clark.
- The Ohio appellate courts held that the three-year-old's statements to his teachers were testimonial, among other reasons because Ohio's mandatory reporting laws supposedly rendered all teachers agents of the police.
- None of the justices agreed with the Ohio courts' analysis.
- Reviewing *Davis* and *Bryant*, the Court confirmed the various factors that, ironically enough, inform the multi-factor test. Recall that *Crawford* denigrated multi-factor tests and claimed to be doing away with them. 135 S.Ct. at 2180.

- "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Id.* at 2180.
- However, "the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." *Id.* at 2180-81.
- The Court declined to hold that conversations between private person are per se non-testimonial. "Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers." *Id.* at 2181.
- "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id.* at 2182.
- The Court significantly expanded the definition of "emergency" beyond an immediate threat to life or safety, holding that events in the Head Start center "occurred in the context of an ongoing emergency involving suspected child abuse." *Id.* at 2181.
- "[T]he conversation between L.P. and his teachers was informal and spontaneous." *Id.* at 2181. Note the phrasing: the question is **not** whether L.P.'s answers to his teachers' questions were spontaneous, in the sense of volunteered.
- "Statements by very young children will rarely, if ever, implicated the Confrontation Clause." *Id.* at 2182.
- "[M]andatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution." *Id.* at 2183.
- Justice Thomas, writing separately, began by stating: "I agree with the Court that Ohio mandatory reporters are not agents of law enforcement, that statements made to private persons or by very young children will rarely implicate the Confrontation Clause, and that the admission of the statements at issue here did not implicate that constitutional provision." *Id.* at 2185 (Thomas, J., concurring in the judgment).
- He would hold that "L.P.'s statements do not bear sufficient indicia of solemnity to qualify as testimonial."
- Justice Scalia, joined by Justice Ginsburg, wrote a very peculiar opinion concurring in the judgment. He wrote: "*Crawford* remains the law. But when else has the categorical overruling, the thorough repudiation, of an earlier line of cases been described as nothing more than 'adopt[ing] a different approach[?]'?" *Id.* at 2184. However, *Crawford* was not a "categorical overruling" of *Ohio v. Roberts*. *Crawford*'s failure explicitly to overrule *Roberts* was the source of great confusion for many years, as documented in this Outline under the heading "Survival of *Ohio v. Roberts*."
- Justices Scalia and Ginsburg also assert that the Court "refus[ed] to decide" "what effect Ohio's mandatory-reporting law has in transforming a private party into a state actor for Confrontation Clause purposes." *Id.* at 2183. But the majority did indeed decide that very point, quite explicitly, as Justice Thomas observes.
- Justices Scalia and Ginsburg nonetheless conclude: "L.P.'s purpose here was certainly not to invoke the coercive machinery of the State against Clark. His age refutes the notion that he is capable of forming such a purpose." *Id.* at 2184.
- Justices Scalia and Ginsburg refer to one portion of the majority opinion as "absolutely false" – highly emotional words, not backed up by legal analysis. *Id.* at 2184-85.

- Justices Scalia and Ginsburg worry that the majority opinion is "the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause." *Id.* at 2185. But those exceptions never left. Nearly all hearsay that fits within a longstanding hearsay exception remains as freely admissible under *Crawford* as it ever was under *Roberts*, as documented in part 5 of this Outline. The required analysis is much longer and far more convoluted, but the results are the same. It's a little mind-boggling that two justices of the Supreme Court refuse to recognize something so obvious.

Retroactivity

(See also pt. 17, Reverse Retroactivity – *Crawford* may be used to deny claims of a habeas petitioner whose conviction became final prior to 2004, even if the claims would be valid under *Ohio v. Roberts*, since any retrial would be under the new rule)

Howell v. Trammell, 728 F.3d 1202, 1216 (10th Cir. 2013) – "FN 6: We cannot grant Howell relief based on the Supreme Court's subsequent decision in *Crawford* ... because Howell's trial and direct appeals concluded before the Supreme Court decided *Crawford*."

Dennis v. State, __ So.3d __, 2012 Fla. LEXIS 2594 (Fla. Dec. 20, 2012) – "*Crawford* does not apply retroactively, and by extension neither does its progeny"

Commonwealth v. Brandon, 2012 PA Super 164, 51 A.3d 231 (Pa. Super. Ct. 2012) – "Moreover, *Melendez-Diaz* has not been held by the Supreme Court to apply retroactively on collateral appeal and 'the [Court] has expressly provided that its decision in *Crawford*, upon which *Melendez-Diaz* relies, does not apply retroactively to cases already final on direct review.'"

Commonwealth v. Velez, 82 Mass. App. Ct. 12, 16-17, 969 N.E.2d 1142 (Mass. App. Ct. 2012) – "*Melendez-Diaz II* prohibits the defendant's second motion for a new trial as a retroactive, collateral attack upon a final conviction."

Swan v. State, 28 A.3d 362, 384-385 (Del. 2011) – "Because *Crawford* does not retroactively apply to Swan's case,ⁿ⁵⁶ reconsideration of Swan's claim under that rule is not warranted in the interest of justice."

Commonwealth v. Melendez-Diaz, 460 Mass. 238, 950 N.E.2d 867 (Mass. 2011) – "after *Crawford* was decided, most courts continued to conclude that drug certificates (or their equivalent) remained outside the scope of that decision and, either as business records or as official records, were admissible as prima facie evidence without the testimony of the analyst. ... In sum, to the extent *Melendez-Diaz* classified this limited category of evidence as triggering the protections of the confrontation clause, it broke new ground and announced a new rule."

Commonwealth v. Boria, 460 Mass. 249, 251, 951 N.E.2d 10 (Mass. 2011) – "We today concluded that the rule announced by the United States Supreme Court in *Melendez-Diaz I* was a new rule not applicable to convictions, such as the defendant's, that had become final prior to its issuance. See *Commonwealth v. Melendez-Diaz, ante*, 460 Mass. 238, 950 N.E.2d 867 (2011)

(*Melendez-Diaz II*). Consequently, there was no error in the admission of the drug certificate at the defendant's trial based on the law in effect at the time."

Commonwealth v. Leggett, 2011 PA Super 40, 16 A.3d 1144 (Pa. Super. Ct. 2011) – "Moreover, assuming arguendo that Appellant had timely filed his petition, he has not established that the *Melendez-Diaz* decision applies retroactively to cases on collateral review."

Commonwealth v. Arnaut, 78 Mass. App. Ct. 906, 906-907, 940 N.E.2d 1232 (Mass. App. Ct. 2011) – "*Whorton v. Bockting*, [cite] held 'that *Crawford* [cite] announced a 'new rule' of criminal procedure and that this rule does not fall within the *Teague* exception for watershed rules.' We assume thus that *Melendez-Diaz*, which is based upon *Crawford*, is subject to the same interpretation."

Danforth v. Crist, 624 F.3d 915 (8th Cir. Minn. 2010) (habeas) – *Crawford* does not apply retroactively

Geralds v. State, __ So.3d __, 2010 Fla. LEXIS 1540, 35 Fla. L. Weekly S 503 (Fla. Sept. 16, 2010) – "*Crawford* does not apply to *Geralds* because his case became final almost eight years before *Crawford* was decided."

Whorton v. Bockting, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) – *Crawford* is not retroactively applicable to cases that were final before March 8, 2004, overturning contrary Ninth Circuit decision

Juarez v. Ryan, 2009 WL 514076 (C.D. Cal. Feb 28, 2009) (unpub) (habeas) – "The California courts did state that *Crawford* was inapplicable [to case that was final before March 8, 2004] ... but both sides agree, in this Court, that the state courts erred in this respect and that *Crawford* is applicable." – apparently the parties briefed the case before *Whorton v. Bockting* was decided, at a time when the Ninth Circuit decision was the controlling authority

Shaw v. Harry, 2008 WL 4534156 (W.D. Mich. Sep 29, 2008) (unpub) (habeas) – in September, 2008, noting majority of circuits hold *Crawford* is not retroactive "*but see Bockting v. Bayer*, 399 F.3d 1010 (9th Cir.2005)." [NOTE: Somebody should tell the judge's clerks about *Shepards* and *InstaCite!*]

Peed v. Hill, 210 Or.App. 704, 153 P.3d 125 (Or. App. 2007) – pre-*Bockting* case from within 9th Circuit – not ineffective assistance of counsel to have failed to anticipate *Crawford*

People v. Watson, 827 N.Y.S.2d 822, 834-837 (N.Y. Sup. 2007) - anticipating *Bockting*, encouraging New York appellate courts to find *Crawford* retroactive as a matter of state law

Rubio v. State, 241 S.W.3d 1 (Tex. Crim. App. Sep 12, 2007) – "[T]he State does concede the Supreme Court's holding that new rules of criminal procedure are to be 'applied retroactively to all cases, state or federal, pending on direct review or not yet final,' [FN10] and that *Crawford* came into effect while the appellant's case was pending on direct appeal. [¶] Accordingly, we hold that the trial court erred in admitting *Camacho's* statements."

Post-Danforth state retroactivity cases

State v. Kennedy, 735 S.E.2d 905, 908-927 (W. Va. 2012) – "As such, *Blake* requires that *Crawford/Mechling* be given prospective application only inasmuch as it is a new principle of law, retroactive application of which would retard its operation and produce inequitable results, as illustrated above. ... In light of the foregoing, we hold that *State v. Mechling*... stated a new rule of criminal procedure that is non-retroactive and is to be given prospective application only."

In re Pers. Restraint of Hacheney, 169 Wn. App. 1, 288 P.3d 619 (Wash. Ct. App. 2012) (substituted opinion) – "Although reexamination of the merits of Hacheney's claim in light of the rapidly-evolving area of confrontation clause jurisprudence in a direct appeal may well reach a different conclusion,⁸ and that emerging law may change the outcome,⁹ we hold that Washington law precludes retroactive application of *Bullcoming* and *Melendez-Diaz* with regard to the admission of Weiss's toxicology report and the expert testimony relying on it in this PRP collateral attack on Hacheney's conviction."

Grandison v. State, 425 Md. 34, 64-65, 38 A.3d 352 (Md. 2012) – "Before and after *Crawford*, this court has ruled that Article 21 and the Sixth Amendment to the U.S. Constitution are to be read in pari materia. We see no reason to modify these precedents or depart from the Supreme Court's ruling in *Whorton* that [*65] *Crawford* is procedural and need not be applied retroactively."

Danforth v. State, __ N.W.2d __, 2009 WL 465766 (Minn. Feb. 26, 2009) – the original on remand – adopting *Teague v. Lane* as state law

Newsome v. Commissioner of Correction, __ A.2d __, 2008 WL 2697239, *3+ (Conn.App. Jul 15, 2008) – following *Whorton v. Bockting* without independent analysis

Ex Parte Lave, __ S.W.3d __, 2008 WL 2512820 (Tex. Crim. App. Jun 25, 2008) – on remand from SCOTUS for reconsideration in light of *Danforth* – "Although not required by the United States Supreme Court to do so, we adhere to our retroactivity analysis in *Keith* and its holding that *Crawford* does not apply retroactively to cases on collateral review in Texas state courts."

Delgadillo v. Woodford, __ F.3d __, 2008 WL 2246473 (9th Cir. Jun 03, 2008) (habeas) – "Although the state habeas court applied *Crawford* to his claims, Delgadillo contends that we should apply *Ohio v. Roberts* ..., which was the applicable Supreme Court precedent at the time Delgadillo's conviction became final. ... Delgadillo's appeal requires us to consider first whether the state habeas court's application of *Crawford* to Delgadillo's Confrontation Clause claims is contrary to or an unreasonable application of Supreme Court precedent. ... In light of *Danforth's* holding ... that a state habeas court may apply *Crawford* retroactively on collateral review, the state habeas court here did not err in applying *Crawford* to Danforth's habeas petition."

Bennett v. State, 2008 WL 2039303 (Iowa App. May 14, 2008) (unpub) – declining to apply *Crawford* retroactively as a matter of state law

Commonwealth v. Carter, 932 A.2d 1261 (Pa. 2007) – Post Conviction Relief Act (*i.e.*, state habeas) proceeding – "[T]his Court has held *Crawford* does not apply to collateral review, *see Commonwealth v. Collins*, 888 A.2d 564, 576 n. 15 (Pa.2005), and the United States Supreme Court recently held *Crawford* does not apply retroactively. *See Whorton v. Bockting*, 127 S.Ct. 1173 (2007). Thus, *Crawford* is inapplicable to this case, and *Roberts* governs our Confrontation Clause analysis." – holding lab report is business record

Preservation of Confrontation Issues
(see also True Waiver as Distinguished from Forfeiture)

NOTE: Every other category in this Outline aspires to be comprehensive, but this category includes only cases that say something noteworthy, which compose only a tiny fraction of the cases addressing the general issue. New opinions declining to address the *Crawford* issue are otherwise omitted from the Outline.

Several courts hold, either directly or in effect, that *Crawford* issues need not be preserved in the trial court.

State court decisions (arranged alphabetically by state)

Helms v. State, 2005 Ark. App. LEXIS 604 (Ark. Ct. App. 2005)

People v. Chavez, 2007 WL 4201292 (Cal. App. 2 Dist. Nov 29, 2007) (unpub) – hearsay objection sufficient to preserve confrontation clause claim where "there appears no tactical reason for counsel having failed to make them, if valid"

People v. Castillo, 2007 WL 3151689 (Cal. App. 4 Dist. Oct 30, 2007) (unpub) – "A hearsay objection is insufficient to preserve a confrontation clause claim."

People v. Magdaleno, 2007 WL 1429498 (Cal. App. 2 Dist. May 16, 2007) (unpub)

Williams v. State, 967 So.2d 735, n.11 (Fla. Jun 21, 2007) (hearsay objection insufficient to preserve *Crawford* issue)

Mencos v. State, 909 So. 2d 349 (Fla. Dist. Ct. App. 4th Dist. 2005)

Estes v. State, 2006 Ga. App. LEXIS 582 (Ga. Ct. App. 2006)

Patterson v. State, 280 Ga. 132, 625 S.E.2d 395 (Ga. 2006)

Roberson v. State, 277 Ga. App. 557, 627 S.E.2d 161 (Ga. Ct. App. 2006)

State v. Dukes, 174 P.3d 914 (Kan. App. Jan 18, 2008) – "Because the defendant's objection implicates his fundamental right to confront the witnesses against him, we will address it even though it was not raised at trial." – [NOTE: This seems to mean the issue is automatically reviewable, with no contemporaneous objection requirement.]

State v. Laturner, 38 Kan.App.2d 193, 163 P.3d 367 (Kan. App. Jul 27, 2007), review granted (Dec. 18, 2007) – "Laturner objected to the lab report's admission without the testimony of the forensic scientist who wrote it because the report was not clear as to which baggies tested positive for methamphetamine. He also objected because the certificate of analysis did not explain what test equipment was used." – Held: These objections were sufficient to preserve *Crawford* issue.

State v. McKinley, 2008 WL 2065940, 2007-1933 (La.App. 1 Cir. 5/2/08) (unpub) – "we find defendant's general hearsay objection sufficient to preserve this [*Crawford*] issue for appellate review."

Collins v. State, 164 Md. App. 582, 884 A.2d 181 (Md. Ct. Spec. App. 2005)

People v. Ciavone, 2007 WL 4322168 (Mich. App. Dec 11, 2007) (unpub) – "objection on hearsay grounds does not preserve a Confrontation Clause challenge for appeal."

State v. Masso, 2008 WL 2245730 (Minn. App. Jun 03, 2008) (unpub) – applying plain error standard when "[t]he ground on which Masso objected is categorically distinct from the [*Crawford*] error he now raised on appeal." – but not reversing based on facts

State v. Willis, 2008 WL 2065863 (Minn. App. May 13, 2008) (unpub) – reversing on basis of unobjected-to admission of lab report, applying plain error standard

State v. Gonzalez Mejia, 2008 WL 2065886 (Minn. App. May 13, 2008) (unpub) – "Although the analysts came to trial, because their reports were admitted without their testimony and without objection by appellant, the prosecutor told them that their presence was no longer required." – under plain error analysis, admission of reports erroneous but non-prejudicial

State v. Paoni, 2006 MT 26 (2006)

People v. Cato, 22 A.D.3d 863, 802 N.Y.S.2d 753 (N.Y. App. Div. 2d Dept 2005)

In re L.E.J., 2006 N.C. App. LEXIS 1763 (N.C. Ct. App. 2006)

State v. George, 2005 N.C. App. LEXIS 1175 (N.C. Ct. App. 2005)

State v. Robertson, 2008 WL 2220395, 2008-Ohio-2562 (Ohio App. 1 Dist. May 30, 2008) (unpub)

State v. Alne, __ P.3d __, 219 Or.App. 583, 2008 WL 1959496 (Or. App. May 07, 2008) – "We need not decide whether defendant preserved his claim of error because, even if he did not, we would exercise our discretion to address it as plain error."

State v. Stalder, 205 Ore. App. 126, 133 P.3d 920 (Ore. Ct. App. 2006)

Commonwealth v. Hood, 2005 PA Super 93 (2005)

Santacruz v. State, 237 S.W.3d 822 (Tex. App.-Hous. Sep 27, 2007)

Bradley v. State, 2007 WL 1424658 (Tex. App.-Texarkana May 16, 2007) (unpub)

Couog v. State, 2007 WL 1153062 (Tex. App.-Hous. 2007) (unpub) (pretrial motion to compel child to testify insufficient to preserve *Crawford* issue if not renewed at trial)

Delacueva v. State, 2006 Tex. App. LEXIS 10563, 2006 WL 3589482 (Tex. App.-Hous. 2006) (unpub)

Randall v. State, 2006 Tex. App. LEXIS 7918 (Tex. App. 2006)

Lasher v. State, 202 S.W.3d 292 (Tex. App.-Waco 2006)

Degnan v. State, 2006 Tex. App. LEXIS 3054, 2006 WL 952386 (Tex. App.-Austin 2006)

Taylor v. State, 2006 Tex. App. LEXIS 327, 2006 WL 66515 (Tex. App.-Texarkana 2006)

Johnson v. State, 2005 Tex. App. LEXIS 4286, 2005 WL 1308887 (Tex. App.-Houston 2005)

McCleod v. State, 2005 Tex. App. LEXIS 10319, 2005 WL 3369150 (Tex.App.-Dallas 2005)

Dixon v. State, 2005 Tex. App. LEXIS 7041, 2005 WL 2060628 (Tex.App.-Corpus Christi 2005)

Courson v. State, 160 S.W.3d 125 (Tex. App.-Fort Worth 2005)

Ramirez v. State, 2004 Tex. App. LEXIS 11600, 2004 WL 2997747 (Tex.App.-San Antonio 2004)

Muhammad v. Commonwealth, 269 Va. 451, 611 S.E.2d 537 (Va. 2005)

State v. Earl, 2008 WL 383337 (Wash. App. Div. 2 Feb 12, 2008) (unpub) – dispensing with preservation requirement for *Crawford* claims – "Although Earl raises the Confrontation Clause issue for the first time on appeal, we consider his assignment of error because he has identified an alleged constitutional error that, assuming he is correct, may have 'actually affected' his rights at trial."

Federal Cases (arranged numerically by circuit)

McGonagle v. United States, 137 Fed. Appx. 373 (1st Cir. N.H. 2005)

United States v. Bowes, 115 Fed. Appx. 503 (2nd Cir NY 2004)

United States v. Briscoe-Bey, 126 Fed. Appx. 551 (3rd Cir Del 2005)

Primary Purpose Test (*Davis / Hammon Rule*)
(see also part 9, When Does Emergency End?)

Cox v. State, 421 Md. 630, 635-651, 28 A.3d 687 (Md. 2011) – "if the primary purpose of a statement is not to create a substitute for trial testimony, then 'the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.'"

Langham v. State, 305 S.W.3d 568, 575-582 (Tex. Crim. App. 2010) – "by 'primary' purpose, the Supreme Court in *Davis* meant the 'first in importance' among multiple, potentially competing purposes." – court then goes on to apply "primary purpose" test to non-emergency situation

Lollis v. State, 232 S.W.3d 803 (Tex. App.-Texarkana 2007) – "In the course of essentially weekly counseling sessions occurring over a period of approximately three and one-half months during the middle of 2006, three-year-old A.T. told licensed professional counselor Reba Clark that Nathaniel D. Lollis "hurt her," "touched her in the private parts of her body," "broke her arm," and "mushed her like a nake [*sic*]" (the last act apparently accomplished with his foot). During those sessions, A.T.'s two older brothers, C.T. and J.J.T., also made comments to Clark that they, too, had received abuse from Lollis. ... The evidence suggests that Clark's regular counseling sessions with these three children were intended primarily as therapy to assist the children in recovering from abusive experiences. The alternative reading--that the sessions

constituted a long and single-minded effort by the State to obtain hearsay testimony--seems strained and is contrary to the evidence. We conclude, as apparently did the trial court, that, from the standpoint of either Clark or the State, this relationship was primarily one of counseling rather than one of trial preparation. Also, there is no evidence that, from the perspective of the children, the ongoing relationship with Clark was anything but counseling. And that is the proper perspective from which we view the context of the statements. ... The children's statements to Clark were nontestimonial and, thus, did not violate Lollis' right of confrontation."

State v. Krasky, 736 N.W.2d 636 (Minn. Aug 09, 2007) – "Appellant State of Minnesota appealed from a pretrial order barring admission of statements made to a nurse by a [6-year-old] child victim, T.K., who was incompetent to testify at trial by reason of her young age." – 18 months had passed since defendant's last contact with child – "We conclude that the primary purpose of T.K.'s statements to [Nurse] Carney was to assess and protect T.K.'s health and welfare. Carney conducted a physical examination of T.K., questioned the foster mother about T.K.'s medical history, tested T.K. for sexually transmitted diseases, recommended that T.K. receive psychotherapy, and repeatedly told T.K. that an examination was necessary in order to ensure that T.K. was healthy. That Krasky had been incarcerated and no longer possessed parental rights at the time of Carney's assessment does not mean that T.K.'s future health and welfare were not in question. The harms of child abuse are not limited to the abused child's physical well-being. Although future acts of abuse were unlikely given that Krasky's parental rights had been terminated and he was incarcerated at the time T.K. reported the abuse, Carney's recommendation that T.K. receive psychotherapy indicates that her mental health was still at risk. Further, unlike in *Bobadilla* and *Scacchetti*, there is no indication in the record that T.K. was examined after she first reported the abuse and before meeting with Carney. Therefore, it could be said that T.K.'s current physical health remained in doubt. In addition, seeking an assessment from Carney was a natural response to T.K.'s inappropriate [*i.e.*, sexual] behavior towards other children and, following the assessment, T.K. was eventually removed from foster care and the company of the other children living there. Consequently, we conclude that T.K.'s statements to Carney were nontestimonial and that admission of those statements will not violate Krasky's rights under the Confrontation Clause."

State v. Warsame, 735 N.W.2d 684 (Minn. 2007) – "In the normal course of operation, law enforcement officials must make inferences from witness and victim interrogations to determine whether there are other exigencies that must be addressed. Courts cannot determine whether the primary purpose of an interrogation was to address an ongoing emergency unless the court similarly infers, based on objectively reasonable circumstances in the record, whether the police had an emergency to address."

U.S. v. Foerster, 65 M.J. 120 (U.S. Armed Forces Jun 20, 2007) – [victim of forgery signed document prepared by bank entitled "affidavit of unauthorized signature (forgery affidavit)"] – "Looking to the context in which the document was drafted, FSNB's [*i.e.*, bank's] primary purpose in eliciting the affidavit was, as the military judge found and the record supports, to ensure that it would not be defrauded by an account holder. The record also demonstrates that Sgt Porter's primary purpose in filling out the affidavit was to be reimbursed for the missing funds. [¶] The affidavit did contain language allowing the document to be turned over to law enforcement. But that does not change the primary purposes for either eliciting or making the statement. Nor is there authority to suggest that that fact, without more, transforms a nontestimonial business record into a testimonial statement."

People v. Wilson, 2007 WL 1941443 (Cal. App. 3 Dist. Jul 05, 2007) (unpub) – "When Brandy arrived at the Bessers' house, she was barefoot and not wearing a jacket. She had significant injuries to her face and nose. By all accounts, she was very upset--crying and, at times, yelling and screaming--and although she exhibited signs of drinking, she had no problem standing or walking. When the 911 dispatcher asked Brandy if her assailant was still there, Brandy told her '[h]e just left.' [¶] We conclude that these facts, viewed objectively, show that the primary purpose of Brandy's call was to enable the 911 operator to assist in an ongoing emergency."

People v. Brenn, 152 Cal.App.4th 166, 60 Cal.Rptr.3d 830 (Cal. App. 4 Dist. June 18, 2007), Review Denied Oct. 10, 2007 – "At one point during the call, [stabbing victim] Zupsic did say he wanted to 'press charges.' But it does not appear that his primary purpose during the call was to establish past facts for use in a criminal trial, nor that the 911 operator was concerned about that issue. ... Much of the information Zupsic provided to the 911 dispatcher pertained to who and where he was, what he was calling about, where the suspect was located, what the suspect looked like, and what he might be expected to do. Background information of this sort would be expected of anyone calling the police during an emergency situation. It is not typically grist for a prosecutor's closing argument."

Wolfe v. Grams, 2007 WL 1655457 (E.D. Wis. Jun 07, 2007) (unpub) (habeas) – homicide victim wrote letter to state judge, seeking to have his ex-lover's parole revoked – not testimonial: "[A]lthough the letter might be construed to include some remarks concerning 'potentially criminal past events,' the obvious overriding purpose of the letter was to convey to the three judges Carter's state of mind, to wit, his genuine fear of Wolfe and his consequent desire to have Wolfe's bond revoked."

State v. Williams, 150 P.3d 111, 120 (Wash. App. Div. 1, 2007) – "The circumstances under which the 911 call at issue in this case was made indicate that the primary purpose of the call was to secure police assistance to meet an ongoing emergency. The call was made very shortly after the incident took place. Moreover, many of Otis' statements during the call clearly demonstrated that her over-riding purpose for calling 911 was to secure police assistance to ensure her safety and the safety of her children. *** During the call, Otis did provide information of past facts in response to questions by the 911 operator and state that she wanted the men involved arrested. As a whole, however, the 911 call was made under circumstances objectively indicating that the primary purpose of the questions asked by the 911 operator and the statements made by Otis were to enable police assistance to meet an ongoing emergency, rather than to establish or prove past events potentially relevant to later criminal proceedings. Accordingly, the 911 call was not testimonial."

People v. Hrubecky, 236 N.Y.L.J. 116 (2006) - On appeal, the court applied the Davis/Hammon primary purpose test to whether evidence of test ampules, certified copies of simulator solution certification, and calibration/maintenance records of a breath test instrument were testimonial. The court found the evidence to be non-testimonial as it did not offer testimony against the defendant, but instead certified the equipment.

State v. Buda, 389 N.J. Super. 241, 912 A.2d 735 (N.J. Super. A.D. 2006), overruled by State v. Buda, 195 N.J. 278, 949 A.2d 761 (N.J. Jun 23, 2008) –

State v. Ayer, 154 N.H. 500, 917 A.2d 214 (N.H. 2006) - “When an officer arrived at the scene a few minutes after the shooting, he noticed defendant's wife crying hysterically. The wife said that defendant had said that morning that he was going to shoot the caseworker and that he had been sitting in his truck waiting for him. The court held that the trial court did not violate the Confrontation Clause or N.H. Const. pt. I, art. 15 in introducing the statements of the wife, who did not testify at trial. At the time the statements were made, the primary purpose of the officer's interrogation was to enable police to meet an ongoing emergency; therefore, the wife's initial statements were not testimonial.”

State v. Washington, 725 N.W.2d 125 (Minn. Ct. App. 2006) – “The 911 conversation was made under circumstances objectively indicating that the primary purpose of the interrogation was to enable police to meet an ongoing emergency. Further, the 911 recording was made shortly after the first assault, and the tape apparently recorded a second assault in progress. The recording was therefore highly probative of whether the victim was actually assaulted.”

Commonwealth v. Galicia, 447 Mass. 737, 857 N.E.2d 463 (Mass. 2006) - “The supreme judicial court concluded that the 911 recording was admissible as it concerned an assault that was actually happening and that any reasonable listener would have concluded constituted an ongoing emergency. The statements bore no witness to any event but identified an exigent circumstance and provided law enforcement with information necessary to assess the current level of dangerousness of the situation. The statements to the officers should not have been admitted because by the time they were made, the emergent nature of the situation was over.”

Head v. State, 171 Md.App. 642, 912 A.2d 1 (Md. Ct. Spec. App. 2006), cert. denied, 398 Md. 315, 920 A.2d 1059 (Md. Apr 13, 2007) - “Defendant argued that trial court erred in allowing an officer to testify that the decedent told the officer that he had been shot by “Bobby,” because it denied defendant the ability to confront the witnesses against him in contravention of rights afforded by the Sixth Amendment. The appellate court held that the statement made by the decedent was nontestimonial and thus, defendant's right to confront witnesses was not violated. The appellate court concluded that any reasonable observer would have understood that the decedent was facing an ongoing emergency and that the purpose of the officer's questions to the decedent was to enable police assistance to meet that emergency. Three main facts supported that conclusion; the situation was chaotic, the scent of gunpowder in the air would have meant to an objective observer that the crime was recent and the situation was dangerous, and immediately before identifying his attacker, the decedent was crying for help. Finally, because the excited utterance and dying declaration exceptions to the hearsay rule were “firmly rooted” exceptions, no reliability inquiry was necessary.”

Raile v. People, 148 P.3d 126 (Colo. 2006) – “The inmate was convicted for entering his ex-wife's trailer without permission and in violation of a restraining order. On appeal, the court held that the trial court erred by admitting a witness's statements to a police officer concerning the events that took place inside the trailer after the inmate entered it because the statements were testimonial and therefore their admission violated defendant's Confrontation Clause rights, as the witness did not testify at trial. The statements were testimonial because at the time they were made, the witness was not asking for help, she was not in danger, the situation was under the officers' control, and the inmate was under control. The primary purpose of the officer's

interrogation was to elicit statements that established and were relevant to a later criminal prosecution. However, the error was harmless ...”

United States v. Billingslea, 204 Fed.Appx. 856, 2006 U.S. App. LEXIS 27538 (11th Cir. 2006) – “Defendant correctly argued that the admission of a deceased witness' photo identification of him was plain error because the witness was not available to testify at trial and because there was insufficient indicia of reliability to support admission of the testimony. The circumstances objectively indicated that the witness' photo identification of defendant was testimonial. The detective's interrogation of the witness, including the display of the photographs to try to identify defendant, was part of an official police investigation into past criminal conduct. There was no ongoing emergency, but instead the detective prepared the photo spread to try to identify defendant as one of the robbers fleeing the scene of the crime. Indeed, the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution. The Confrontation Clause barred admission of the testimonial identification of defendant because, even though the witness was unavailable to testify at trial, defendant had not had a prior opportunity to cross-examine the witness.”

State v. Parks, 142 P.3d 720 (Ariz. Ct. App. 2006) – Statements made to police by the defendant's son, who witnessed the shooting, were testimonial because the primary purpose of the interrogation was to establish past facts for later prosecution.

State v. Kirby, 280 Conn. 361, 908 A.2d 506 (2006) – “Defendant's convictions arose from the alleged assault of the complainant, who asserted that defendant, a friend of her husband, was the assailant. The complainant died a few days after the assault from an unrelated incident. The primary issue in defendant's appeal was whether the trial court properly admitted into evidence the complainant's statements to the police dispatcher who received the 911 telephone call, the police officer who initially responded to the call and interviewed the complainant, and the emergency medical technician who treated and transported her.” **911 Call:** “Applying the Davis test to the facts of the present case, we first conclude that the complainant's statements by telephone to Gomes were testimonial and, therefore, inadmissible under Crawford. A review of Gomes' conversation with the complainant makes clear that the “primary purpose” of the call was to investigate and apprehend a suspect from a prior crime, rather than to solve an ongoing emergency or crime in progress *at the time of the call*. The defendant properly points out that the call at issue was made after the emergency had been averted and the complainant no longer was under any threat from the defendant because she already had escaped and had left him stranded on the side of the road. Thus, although the complainant might have needed emergency medical assistance at the time she made the call, the bulk of her conversation with Gomes nevertheless consisted of her account of a crime that had happened to her in the recent past, rather than one that was happening to her at the time of the call.” **Officer questioning:** “In the present case, Thornton's presence and the fact that the defendant, the alleged perpetrator, was located some distance away, rendered the primary purpose of Thornton's interaction with the complainant investigatory, and her answers to his questions testimonial statements. Accordingly, the trial court improperly permitted Thornton to testify about the complainant's statements to him.”

State v. McKenzie, 2006-Ohio-5725, 2006 WL 3095671 (Ohio App. 8 Dist. 2006) (unpub) – “The officer testified that he had been responding to a very early morning call (apparently unrelated to this incident) and observed McKenzie walking down the street. The officer then saw the victim run out of an apartment door, waving her arms and yelling, “that's him, that's him.

He's the one that just hit me." The officer exited his vehicle and approached McKenzie. McKenzie said, "all we was doing is arguing." The officer put McKenzie in the police car and "drove across the street to conduct a further interview with [the victim]." The officer noted the victim had a two-inch "swollen knot right in the middle of her forehead." The victim told the officer that she and McKenzie had an argument and that he grabbed her, threw her on the bed and began to choke her. He struck her several times with a closed fist and took his thumb and dug it into her eye socket, as though trying to pop the eyeball out. The officer testified that in addition to the knot on her head, the victim's eye had nearly swollen shut. *** The victim's statement, taken in context, was made in the midst of an ongoing emergency and not for testimonial purposes. *** We agree with the court that any statements the victim made after McKenzie had been secured in the police car were testimonial in nature."

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668 (Ariz. Ct. App. 2006) – "Assuming the deputy's brief questioning of the victim during his one-minute encounter with him constituted "interrogation," nothing in the record suggested the victim would have reasonably expected his statement to be used prosecutorially. The record did not reflect that the semi-conscious victim was even aware that the person to whom he spoke was a law enforcement officer. Further, the victim did not identify any of the persons who "jumped" him and took his vehicle, provided no details, and never mentioned defendant. Nor did the deputy ask for any such information. The primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency when the victim was found staggering in a roadway, bleeding profusely from his head, and slipping in and out of consciousness: injuries that resulted in his death within 48 hours."

Matter of German F., 13 Misc.3d 642, 821 N.Y.S.2d 410 (N.Y. Fam. Ct. 2006) – In this juvenile delinquency proceeding, a responding officer testified to statements made by the victim after being stabbed and still lying prone on the ground. On appeal, the court found that the statements of the victim were non-testimonial. "[I]t is clear that the victim's statement was made to Police Officer Gschlecht in response to the officer's questions. However, Gschlecht's questions to the victim occurred on the street where the victim was lying prone on the sidewalk moments after the officer had observed the victim essentially surrounded by the respondents and two others and there was also a larger 'hostile' crowd encircling the victim and the three apparent perpetrators. Additionally, once Gschlecht observed blood on the victim's pants and socks as well as a large cut on the victim's lower leg, the officer's questions were clearly intended to deal with an ongoing emergency in a volatile atmosphere. Therefore, the victim's statements made in response to the police officer's questions are 'non-testimonial' under both *Crawford* and *Davis* because the purpose of the officer's interrogation was to enable him to assist the victim in an emergency situation rather than to 'establish or prove past events potentially relevant to later criminal prosecution.'"

Kimbrell v. State, 280 Ga.App. 867, 635 S.E.2d 237 (Ga. Ct. App. 2006) – "911 calls, however, are not testimonial since, rather than being made for the purpose of proving a past event, they are not premeditated and are made to prevent or stop an ongoing crime."

United States v. Clemmons, 461 F.3d 1057 (8th Cir. 2006) – "On August 30, 2002, Jamil Williams reported a burglary of his apartment to the Independence, Missouri, police department ... Williams told the police that he believed that Clemmons had burglarized his apartment ... On October 20, 2002, Officers Steven Lester and Lawrence Cory ... found Williams lying on the

ground with a pool of blood gathering on his right leg. Officer Lester testified that Williams was talking *1059 on his cell phone in a calm voice. ... Lester asked Williams who had shot him. Williams answered that Antonio Clemmons had shot him and had stolen his Mac-11 pistol. ... On December 5, 2003, Williams was murdered. Clemmons, who was incarcerated in the Jackson County jail at the time, was released because the only witness to the assault and robbery, Williams, had died. ... Viewing the facts in the light of the Supreme Court's decision in *Davis*, we conclude that Williams's statements to Officer Lester were nontestimonial. The circumstances, viewed objectively, indicate that the primary purpose of Lester's questions was to enable him to assess the situation and to meet the needs of the victim. ... Accordingly, because Williams's statements were nontestimonial, they do not implicate Clemmons's right to confrontation." – despite victim's calm voice, statements to officer were admissible as excited utterances: "Williams had suffered five gunshot wounds and lay bleeding on the ground. As the district court stated, '[i]t would be unreasonable to conclude that someone recently suffering multiple gun-shot wounds and awaiting the arrival of paramedics is so nonchalant ab[ou]t his condition that he is likely to calculate who he might unfairly blame for his injuries.'"

Commonwealth v. Tang, 66 Mass. App. Ct. 53, 845 N.E.2d 407 (Mass. App. Ct. 2006) - A young child witnessed a shooting and was still under the excitement of the moment when police officers arrived to secure the scene. The defendant was convicted and on appeal, the court held that the child's statements were non-testimonial. "Emergency questioning designed to secure a volatile scene or provide medical care, however, is not related to the investigation of a crime and does not constitute interrogation. "Such questioning is considered part of the government's peacekeeping or community care function," *ibid.*, and "cannot be said to be interrogation. Because the questioning is not interrogation, any out-of-court statements it elicits are not testimonial per se and must be evaluated on a case-by-case basis to determine whether they are testimonial in fact." *Id.* at 10. Whether the questioning at issue had its genesis in the community caretaking function or the need to secure a volatile scene, on the one hand, rather than in the investigative function, on the other, "does not depend . . . on answers to police questions, but on the existence of objective circumstances." *Ibid.* Whether incriminating out-of-court statements that are determined not to be testimonial per se are nonetheless testimonial in fact depends upon "whether a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting a crime." *Id.* at 12-13. *** We see nothing in the record to suggest that the questions put to Michael were in aid of the investigation or prosecution of a crime. Unlike *Commonwealth v. Rodriguez*, 445 Mass. 1003, 1004, 833 N.E.2d 134 (2005), the statements were not made in the context of a "secure scene," nor were they "made in response to investigatory interrogation." See *Commonwealth v. Williams*, 65 Mass. App. Ct. 9, 12-13, 836 N.E.2d 335 (2005). The statements that Michael made were not even directly responsive to the questions asked him, and the questions that had been put to him were posed in the context of an emergency for the purpose of securing a volatile scene. The statements are not testimonial per se."

Davis v. Washington, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) = The victim who had filed the no-contact order against defendant called 911 but hung up. The 911 operator called her back, at which time the woman stated that defendant was "jumpin' on" her. She told the operator that defendant had used his fists to beat her. On appeal, the court was asked to determine whether the admission of the 911 call violated defendant's Sixth Amendment right to confrontation. The Court held the statements to be non-testimonial "when made in the course of police interrogation

under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency.”

Hammon v. State, 126 S. Ct. 2266; 165 L. Ed. 2d 224 (2006) – “The victim, defendant's wife, did not testify at trial, but had described defendant's violent conduct to arriving police officers. She memorialized the same account by affidavit. The trial court admitted her statements as excited utterances. The statements were held to be testimonial. “They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”

Whose Perspective?

(This category was previously called "*Whose* Primary Purpose?")

Both *Crawford* and *Davis* are ambiguous – apparently, studiedly so – about whether the testimonial nature of a statement should be measured from the declarant's perspective or that of the listener. *Bryant* says both perspectives should be considered, at least in emergency situations. Most lower courts adopt one or the other point of view without explaining why, and some switch between them in the course of a decision. This section gathers cases that either address the ambiguity forthrightly or explicitly take up sides.

As a very rough rule of thumb, courts *often* disregard the declarant's point of view if the declarant is a child, and *sometimes* disregard it if the declarant is a battered woman. With regard to all other declarants, courts *tend* to view matters from the declarant's perspective. Prosecutors should not hesitate to call attention to the double (or triple) standard, which has no justification in constitutional theory.

McCarley v. Kelly, 759 F.3d 535 (6th Cir. 2014) (habeas) – small child witnessed his mother's murder – police officer suggested putting child in therapy to obtain information from him – child went into therapy, therapist reported to officer what child had said – oddly, at trial the therapist was asked to read from reports to officer, rather than simply testifying – held: neither the child's nor therapist's perspective counted, the primary purpose of the therapy session was determined strictly from the point of view of the officer who suggested it, but who wasn't even present when statements were made - the opinion is lengthy but diffuse, relying on an obviously-inadequate analogy to *Davis* (necessary to evade the limitations imposed by 28 U.S.C. § 2254(d)(1)) – the underlying point seems to be that *the therapist's* statements to the officer were testimonial, which is true but irrelevant, since the therapist testified

U.S. v. Liera-Morales, 759 F.3d 1105 (9th Cir. 2014) – mother of kidnap victim, in presence of federal agent, phoned kidnappers to arrange ransom payment – "The record confirms that Agent Goyco's principal motive in recording the telephone call was to ensure Aguilar's safety and assist his fellow agents in executing a rescue mission. That Agent Goyco may have also recorded the call in part to build a criminal case does not alter our conclusion that the *primary* purpose of the call was to diffuse the emergency hostage situation. Consequently, the challenged statements from the telephone call were nontestimonial, and their introduction at trial did not violate Liera-Morales's Confrontation Clause rights." – [NOTE: But Agent Goyco was neither the declarant nor the interrogator. Why does his motive matter at all? The opinion doesn't explain.]

U.S. v. Dargan, 738 F.3d 643, 645-47 (4th Cir. 2013) – "The primary determinant of a statement's testimonial quality is 'whether a reasonable person in the declarant's position would have expected his statements to be used at trial—that is, whether the declarant would have expected or intended to 'bear witness' against another in a later proceeding.'"

People v. Cleary, 2013 IL App (3d) 110610, 377 Ill.Dec. 273, 1 N.E.3d 1160, appeal pending (Mar. 2014) – " Specifically, in *Bryant*, the Supreme Court established that the primary purpose of the out-of-court statement is determined by analyzing the objective circumstances surrounding the statement based on the actions of both the declarant and the person receiving the statement. [cite] *Stechly* 's shifting-intent inquiry—where the focus of primary purpose of the statement is on the questioner's intent if the statement is given to law enforcement, but on the declarant's intent if given to nongovernment personnel—may thus be inconsistent with *Bryant*'s direction that both parties to the conversation be considered." – but applying *Stechly*

State v. Gurule, 2013-NMSC-025, 303 P.3d 838 (N.M. 2013) – "Post-*Crawford* cases addressing the issue regarding what constitutes a testimonial statement have focused on the declarant's primary purpose in making the statement."

Best v. United States, 66 A.3d 1013 (D.C. 2013) – "Depending on the attendant circumstances, the primary purpose of the declarant or the primary purpose of responding officers may take greater prominence, though both are relevant to the inquiry. Where a statement is made 'in response to questioning . . . , a principal factor to be considered is the primary purpose of the interrogation.'" [NOTE: Of course, the primary purpose of the interrogation, being an entirely fictional construct, need not coincide with the purpose of either participant.]

United States v. Jones, 716 F.3d 851, 852-856 (4th Cir. Va. 2013) – "statements are testimonial when 'a reasonable person in the declarant's position would have expected his statements to be used at trial—that is, whether the declarant would have expected or intended to 'bear witness' against another in a later proceeding.'"

State v. Jones, 984 N.E.2d 948, 2012 Ohio 5677 (Ohio Dec. 6, 2012) – "[¶ 161] In *Stahl*, we adopted the 'objective witness test' for out-of-court statements made to a person who is not law enforcement. We explained that such a statement is testimonial for Confrontation Clause purposes if the witness would have reasonably believed that her statement would be available for use at a later trial. *Id.* The focus is on 'the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations.'" [NOTE: This seems to assume that the "objective witness" is a reasonable person in the declarant's position, which is only one of at least three possible interpretations of *Crawford*'s ambiguous formulation. It could also refer to an imaginary witness observing the conversation from outside, or to the witness on the stand.]

Paul v. State, __ S.W.3d __, 2012 Tex. App. LEXIS 6308, 1-3 (Tex. App. Tyler July 31, 2012), pet. dismissed w/o prejudice (Dec. 12, 2012) – pretext phone call – "The State argues that because an objective person in Walker's and Johnson's positions would not reasonably believe that these statements would later be used at trial, the statements are not testimonial. We stress that the primary focus in determining whether a hearsay statement is 'testimonial' is upon the objective purpose of the interview or interrogation, not upon the declarant's expectations." – [NOTE: In holding that the declarants' statements to their own turncoat confederate were

testimonial, the court views the evidence from the subjective perspective of the confederate and officers, which it then arbitrarily declares "objective." In fairness, though, when the purposes of two people differ so widely, the Supreme Court's command to consider both is just nonsensical – it has to be one or the other.]

Petit v. State, 92 So. 3d 906, 915-16 (Fla. Dist. Ct. App. 4th Dist. 2012) – "we now address whether the four 911 calls introduced in the instant case were testimonial or nontestimonial. This determination hinges on whether the questions from the 911 operator occurred during the context of an ongoing emergency and were designed 'to enable police assistance to meet [the] ongoing emergency.' *Bryant*,..." – [NOTE: But *Bryant* specifically says *both* perspectives should be considered, not just the questioner's!]

State v. Beadle, 173 Wn.2d 97, 265 P.3d 863 (Wash. 2011) – "¶24 Following *Crawford*, in *Shafer*, this court announced a declarant-centric standard for determining whether an out-of-court statement made to a nongovernmental witness is testimonial. ... ¶29 Based on the evolution of the law since *Shafer*, we conclude that the *Shafer* standard does not apply to statements made to law enforcement."

Commonwealth v. Smith, 460 Mass. 385, 951 N.E.2d 674 (Mass. 2011) – "The parties' subjective motives or intentions are largely irrelevant. The question is not whether Penn actually intended her statements to serve a prosecutorial purpose, but whether reasonable participants in the parties' shoes would have believed an emergency was occurring." – [NOTE: Really? Isn't "largely irrelevant" a bit of an exaggeration?]

United States v. Chaco, 801 F. Supp. 2d 1200, 1200-1217 (D.N.M. 2011) – "The Tenth Circuit has stated that a critical element in determining whether a statement is testimonial or non-testimonial 'centers on the reasonable expectations of the declarant.'"

Sanders v. Commonwealth, 282 Va. 154, 711 S.E.2d 213 (Va. 2011) – lab test showed that child abuse victim had STD – "Unlike *Melendez-Diaz*, where the forensic analysts understood that their reports would be used prosecutorially, there is no evidence [*167] here that the laboratory technicians that tested CL's samples understood that the report would be used to prosecute Sanders for a crime. ... Furthermore, unlike a crime laboratory testing for narcotics or DNA, there are any number of typically non-prosecutorial reasons to test urine and vaginal discharge, such as for infections arising from both consensual sexual and nonsexual exposure to pathogens. Thus, under these circumstances, a laboratory technician would not have reason to believe or suspect that the results of his or her testing would be used in a later trial." – accordingly lab report is non-testimonial

State v. Moreno-Garcia, 243 Ore. App. 571, 260 P.3d 522 (Or. Ct. App. 2011) – "We noted that, in general, relevant factors in determining whether a statement is testimonial include the declarant's purpose in making the statement, the questioner's purpose in talking to the declarant, and the amount of police involvement in the questioning, and that, in the context of a child abuse investigation, the victim's purpose in making a statement is less important than the other factors." [NOTE: A rare explicit acknowledgment that *Crawford* can operate as a device for preventing equal protection of the laws. Cf. *People v. Garcia-Cordova*, 963 N.E.2d 355, ¶ 66 (Ill. App. 2011): "The issue presented by the admission of hearsay is constitutionally identical in a child

sex abuse case and a murder case, and the response of the sixth amendment is identical in both types of cases."]

People v. Dendel, 289 Mich. App. 445, 797 N.W.2d 645 (Mich. Ct. App. Aug. 24, 2010), leave to appeal denied (Sept. 21, 2011) – "The medical examiner ... sought from the lab specific information to investigate the possibility of criminal activity. Under these circumstances, any statements made [i.e., lab results obtained] in relation to this investigation took on a testimonial character." – medical examiner's perspective controls, not that of the declarant[s]

State v. Franklin, 308 S.W.3d 799, 802-827 (Tenn. 2010) – "In the context of statements obtained through questions and answers, courts have grappled with the issue of whether the declarant's or the questioner's intent is the proper focus in determining the primary purpose. ... different passages in *Davis* can be read to consider either the declarant's or the questioner's intent ... We believe that considering the intent both of a reasonable person in the declarant's position and of a reasonable person in the questioner's position is the approach most faithful to the Supreme Court's decisions in *Crawford* and *Davis* and most consistent with our previous applications of [*818] those precedents." [NOTE: So who's purpose is "primary," if they don't agree?]

Coronado v. State, 310 S.W.3d 156 (Tex. App. Amarillo 2010), rev'd, Coronado v. State, 351 S.W.3d 315, 315-343 (Tex. Crim. App. 2011)

United States v. Burden, 600 F.3d 204, 223-225 (2d Cir. Conn. 2010) – "In *United States v. Sagnet*, 377 F.3d 223, 228 (2d Cir. 2004), we wrote that '*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial.' However, we later made clear that this broadly worded test in *Sagnet* was dictum. See *United States v. Feliz*, 467 F.3d 227, 235 (2d Cir. 2006)('We do not believe, however, that this statement in *Sagnet* should be read to have adopted such an expansive definition of testimonial.'). In *Feliz*, we held that autopsy reports were not testimonial, and in the course of doing so we stated: Certainly, practical norms may lead a medical examiner reasonably to expect autopsy reports may be available for use at trial, but this practical expectation alone cannot be dispositive on the issue of whether those reports are testimonial. . ."

United States v. Caraballo, 595 F.3d 1214 (11th Cir. Fla. 2010) – I-213 form, entitled Record of Deportable/Inadmissible Alien – "The Supreme Court has instructed us to look only at the primary purpose of the law enforcement officer's questioning in determining whether the information elicited is testimonial. See *Davis*, 547 U.S. at 828, 830 (focusing on the primary purpose of the 911 operator's interrogation in determining whether the answers elicited were testimonial)."

U.S. v. Johnson, 581 F.3d 320 (6th Cir. (Mich.) Sep 18, 2009), cert. denied, 2010 U.S. LEXIS 4874 (June 14, 2010) – "In determining whether statements are testimonial, we ask whether the declarant 'intend[ed] to bear testimony against the accused.' *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir.2004). This, in turn, depends on 'whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.' *Id.* Because O'Reilly did not know that his statements were being recorded and because it is clear that he did not anticipate them being used in a criminal

proceeding against Johnson, they are not testimonial, and the Confrontation Clause does not apply. ... Johnson argues that our inquiry into whether the state-ments are testimonial should focus on Nix-Bey and the FBI's encouragement of his questioning, but our precedent makes clear that the intent of O'Reilly, the declarant, determines whether the statements on the tape-recording are testimonial."

Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. (Minn.) Aug 06, 2009), cert. denied, 130 S. Ct. 1081; 175 L. Ed. 2d 928 (2010) – The Eighth Circuit rules that in child abuse cases, the declarant's perspective is immaterial – only the interviewer's motive counts

In re K.S., 229 Or.App. 50, 209 P.3d 845(Or. App. Jun 10, 2009) – "In addressing that same issue, we have concluded that a victim's hearsay statements were testimonial under the Sixth Amendment after considering the victim's purpose in making the statement, the ques-tioner's purpose in talking to the victim, and the amount of police involvement in or direction of the questioning. [cite] We noted that, in the context of a child abuse investigation, the victim's purpose in making a statement is less important than the questioner's purpose and the level of police involvement in the questioning." – [NOTE: An admirably frank confession of a double standard. It's rare nowadays to have a court publicly acknowledge disparate treatment based on demographics.]

People v. Sutton, __ N.E.2d __, 2009 WL 1012020 (Ill. Apr 16, 2009) – "when the statement under consideration is the product of questioning, either by the police or someone acting on the behalf of law enforcement, the objective intent of the questioner is determinative. [cite] However, if the statements are not the product of law en-forcement interrogation, the proper focus is on the intent of the declarant and the inquiry should be whether the objective circumstances would lead a reasonable person to conclude that his statements could be used against the defendant."

State v. Peeples, 2009 WL 737922, 2009-Ohio-1198 (Ohio App. 7 Dist. Mar 11, 2009) (unpub) – "{¶ 25} Thus, the "primary purpose of the interrogation" test applies to evaluate statements made to law enforcement officers and their agents (such as 911 operators). *Siler*, 116 Ohio St.3d 39 at ¶ 28. But, in order to determine whether a statement to a non-law enforcement person is testimonial, the "objective witness" test of Crawford applies. *Siler*, 116 Ohio St.3d 39 at ¶ 26-27; *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, ¶ 25, 36."

State v. Swanigan, 2009 WL 580732, 2009-Ohio-978 (Ohio App. 5 Dist. Mar 04, 2009) (unpub) – "{¶ 20} We find the statements made by the child victims to the SANE nurses in the case sub judice were not testimonial in nature. Again, under *Crawford*, in deciding whether the testimony is admissible, the trial court must look to the expectation of the de-clarant, not the questioner, in making the statement."

Clark v. State, 199 P.3d 1203 (Alaska App. Jan 16, 2009) – "the Supreme Court's decision in *Davis* indi-cates that the decision as to whether hearsay is 'testimonial' is not controlled by the subjective motives of the parties to the conversation. Davis implicitly (if not directly) holds that the issue of 'primary purpose' is determined objectively, taking into consideration all of the circumstances that might reasonably bear on the intent of the participants to the conversation."

State v. Brown, 961 A.2d 481 (Conn. App. Jan 13, 2009) – "In the present case, the stated purpose for [Officer] Turecheck's presence in the ambulance with the [shooting] victim was so that he could obtain a dying declaration. This is precisely a situation that *Crawford's* protections intend to remedy. Specifically, in telling Turecheck that his brother had shot him, the victim should have been under the reasonable expectation that this statement would later be used for his brother's prosecution. The victim was under no present threat of the defendant, as the victim had fled the scene of the shooting and was undergoing treatment for his injuries. He was in the presence of emergency medical staff and a police officer when he made this statement. Further, Turecheck's additional questioning that sought a motive for the crime indicates that his intent was to seek information for a future prosecution." [NOTE: So whose perspective counts? And is "should have been" the standard, like a tort case? Would a person who by all appearances was in a condition to give a dying declaration really be thinking about his brother's prosecution?]

U.S. v. Graham, 2008 WL 5424142 (D. S.D. Dec 27, 2008) (unpub) (pretrial order) – describing cases from Third and Fourth Circuit holding that "whether the statement is 'testimonial' is to be judged from the standpoint of the declarant--here, the defendant--not from the standpoint of the informant. ... For the statement to be 'testimonial,' the declarant himself must expect that the statement will be used as evidence in a later formal proceeding."

U.S. v. Romero, 2008 WL 5262311 (2nd Cir. Dec 18, 2008) (unpub) – "Furthermore, none of the victim's challenged out-of-court statements were testimonial, *see Crawford* ...; *United States v. Saget*, 377 F.3d 223, 228 (2d Cir.2004) (observing that *Crawford* suggests the determinative factor in deciding whether a declarant's statement is testimonial is the 'declarant's awareness or expectation that his or her statements may later be used at trial')"

In re Rolandis G., 902 N.E.2d 600, 327 Ill.Dec. 479, 232 Ill.2d 13 (Ill. Nov 20, 2008), rehearing denied (Jan 26, 2009) – "After reviewing *Crawford* and *Davis*, the *Stechly* plurality concluded that, when the statement under consideration is the product of questioning, either by the police or someone acting on the behalf of law enforcement, it is the objective intent of the questioner that is determinative. [cite] However, where statements are not the product of law enforcement interrogation, the proper focus is on the intent of the declarant..."

James v. Marshall, 2008 WL 4601238 (C.D. Cal. Aug 13, 2008) (unpub) (habeas) – DV case – woman shot in the face, would die four days later – questioned by EMT in ambulance – "Nothing in the record shows the victim believed that she or anyone else was still in danger of injury or further injury. There was no ongoing emergency in the sense of a perpetrator being unknown or still at large. ... FN5. The victim's injury may have presented an ongoing medical emergency, but the interrogation was irrelevant to addressing that emergency. Any medical emergency of the victim remained the same regardless of the identity of the shooter." – [NOTE: So a medical emergency doesn't count as an emergency. Obviously the declarant's point of view is disregarded, but the opinion doesn't explain why. This is a very lengthy opinion but never explains, much less examines, the assumptions on which it rests.]

Amos v. State, 896 N.E.2d 1163 (Ind. App. Nov 25, 2008), transfer denied (Jan 21, 2009) – "'A testimonial statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings.' *Frye v. State*, 850 N.E.2d 951, 955 (Ind.Ct.App.2006), trans. denied. In determining whether a statement is for purposes of future legal utility, 'the motive of the questioner, more than that of the declarant, is determinative,' but if either is

primarily motivated by a desire to preserve the statement, this is sufficient to render the statement testimonial. *Id.*"

State v. Barnes, 149 Ohio Misc.2d 1, 896 N.E.2d 1033, 2008-Ohio-5609 (Ohio Com. Pl. Jun 27, 2008) (pretrial) – "¶ 54} ... 'In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of the questioner is relevant only if it could affect a reasonable declarant's expectations.'" (quoting *Stahl*)

Bobadilla v. Carlson, 570 F.Supp.2d 1098 (D. Minn. Jul 16, 2008) (habeas), appeal pending – perspective of declarant ignored when declarant is a very young child

U.S. v. Honken, 541 F.3d 1146 (8th Cir. Sep 12, 2008) – jailhouse informant tricked incarcerated co-defendant into drawing maps to where the bodies were buried, in order to facilitate a false confession by a third prisoner – "we conclude Johnson's maps are non-testimonial. ... [W]e conclude the proper focus is on Johnson's expectations as the declarant, not on McNeese's expectations as the recipient of the information. Johnson did not draw the maps with the expectation they would be used against Honken at trial, nor did she draw the maps 'for the purpose of establishing or proving some fact' against Honken. Johnson drew the maps for the express purpose of recruiting another inmate to confess to the murders so she and Honken could go free. ... We simply cannot conclude Johnson made a 'testimonial' statement against Honken without the faintest notion she was doing so."

People v. Nugent, 2008 WL 4062073 (Cal. App. 4 Dist. Sep 03, 2008) (unpub) – "From the totality of the circumstances, it is clear that the impetus in setting up, conducting, recording, and playing the forensic interview between the social worker and Jane [who was 6 or 7] to the jury was to use Jane's interview to prove defendant molested Jane. We find statements made by Jane during the RCAT [Riverside Child Assessment Team] interview were testimonial in nature and subject to *Crawford's* confrontation clause strictures." – [NOTE: Child's perspective ignored.]

State v. Shea, 965 A.2d 504, 506+, 2008 VT 114 (Vt. Aug 14, 2008) – " we recognize several elements to be crucial in the *Davis* analysis. The first element requires that the emergency involved be ongoing. ... ¶ 15. The second factor involves the officer's purpose in prompting the hearsay statement... [¶ 17] We conclude that the complainant's mental state is relevant only to the extent it is related to the other two *Davis* factors."

People v. Suniga, 2008 WL 3090622 (Cal. App. 5 Dist. Jul 03, 2008) (unpub) – statements made to officer at scene by victim of spousal abuse – with respect to one statement, court examines only "the primary purpose for which [Officer] Meek took Cindy's statement", while with regard to another statement it examines both "the primary purpose for which at least Cindy's initial statements were given and taken" – discrepancy not explained – in footnote 17, the opinion states: "As *Cage* teaches, however, we must consider not only the purpose for which the statements were given, but also the purpose for which they were taken." – which, of course, doesn't explain what to do if speaker and listener have different purposes

Bobadilla v. Carlson, 2008 WL 2788011 (D. Minn. Mar 25, 2008) (unpub) (habeas) magistrate's recommendation rejected and writ of habeas corpus granted, **Bobadilla v. Carlson, 570 F.Supp.2d 1098 (D. Minn. Jul 16, 2008)** (habeas), appeal pending –

State v. Dorsey, 2008 WL 2571851, 2008-Ohio-2515 (Ohio App. 5 Dist. May 23, 2008) (unpub) – {¶ 74} "In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations.' *Stahl*..."

U.S. v. Taylor, 2008 WL 2122591 (11th Cir. May 21, 2008) (unpub) – quoting the 3 formulations of "testimonial" from *Crawford* – "The common factor in these examples is that all involve statements made under circumstances which would lead the declarant to believe that the statement would be available for use at a later trial."

State v. Shelton, 218 Or.App. 652, 180 P.3d 155 (Or. App. Mar 19, 2008) – "We have recently examined the question of when hearsay statements by the victim of child abuse are 'testimonial' for purposes of the Sixth Amendment. ... The major considerations include the primary purpose of the questioner who elicited the statement, the primary purpose of the declarant, and the 'nature and extent of police or prosecutorial involvement.'"

State ex rel. Juvenile Dept. of Multnomah County v. S.P., 218 Or.App. 131, 178 P.3d 318 (Or. App. Feb 20, 2008) – child abuse case – "The totality of the Court's discussion in *Davis/Hammon* thus indicates that while (1) the purpose of the questioner in eliciting statements is a key focus of the inquiry, particularly in cases involving police interrogations, (2) in some circumstances, the declarant's reasons for making a statement may also be relevant to determining whether a statement should be treated as testimonial for purposes of Sixth Amendment analysis." – but eventually adopting a third point of view in preference to that of the declarant or listener, concluding that the "institutional" perspective (apparently, that of the criminal justice system, as imputed by the appellate judges themselves) is controlling: "It may be that individual interviewers/evaluators subjectively elevate the diagnostic purpose but, institutionally, the evaluation process ... is designed to advance both ends [*i.e.*, diagnostic and evidence-gathering] concurrently ... Thus, as in *Pitt*, a 'primary purpose' of the interview process was to 'establish or prove past events potentially relevant to later criminal prosecution.'"

People v. Monroe, 2008 WL 544221 (Cal. App. 4 Dist. Feb 29, 2008) (unpub) – analyzing 911 call from viewpoint of *both* caller *and* operator (and, conveniently, finding them congruent)

People v. Rawlins, 10 N.Y.3d 136, 884 N.E.2d 1019, 855 N.Y.S.2d 20, 2008 N.Y. Slip Op. 01420 (N.Y. Feb 19, 2008), cert. denied sub nom. Meekins v. New York, No. 07-10845 (May 09, 2008) – fingerprint reports are testimonial [NOTE: Curiously, the same opinion holds that DNA reports are not testimonial, although as the concurring judge notes, "the distinctions advanced by the majority do not explain why the fingerprint comparison ... was testimonial, but the DNA profile... was not."]

– "*Davis* reminds us that the inquiry is an objective one under the circumstances, an approach that necessarily must account for various indicia of testimoniality beyond the declarant's reasonable expectations. ... The question of testimoniality requires consideration of multiple factors, not all of equal import in every case." [NOTE: Necessarily??? And how different are "indicia of testimoniality" from "indicia of reliability"? Cf. *Crawford* at 67-68: "By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."] [Everything old is new again.]

U.S. v. Udeozor, 515 F.3d 260 (4th Cir. Feb 01, 2008) – "[I]n *Crawford*, the Court set forth three formulations of the 'core class of 'testimonial' statements" ... All three of these formulations indicate, twice explicitly, that the "common nucleus" of the "core class" of testimonial statements is whether a reasonable person in the declarant's position would have expected his statements to be used at trial--that is, whether the declarant would have expected or intended to "bear witness" against another in a later proceeding. ... *Davis*' application of *Crawford* is entirely consistent with the notion that the "common nucleus" of testimonial statements is the declarant's expectations. ... The distinction between the two sets of statements in *Davis* is consistent with the principle that, for a statement to be testimonial, the declarant must have had a reasonable expectation that his statements would be used prosecutorially: "No 'witness' goes into court to proclaim an emergency and seek help." ... Because Mr. Udeozor plainly did not think he was giving any sort of testimony when making his statements to the victim during the recorded telephone calls, the admission of these two taped conversations into evidence did not violate Dr. Udeozor's rights under the Confrontation Clause. Under no plain meaning of the term may the declarant's statements in this case be called those of a "witness," much less a witness bearing testimony. Any other ruling would disregard substantial circuit law and the teachings of the Supreme Court itself."

State v. Slater, 285 Conn. 162, 939 A.2d 1105 (Conn. Jan 22, 2008) – "Although we recognize that there is no comprehensive definition of 'testimonial,' it is clear that much of the Supreme Court's and our own jurisprudence applying *Crawford* largely has focused on the reasonable expectation of the declarant that, under the circumstances, his or her words later could be used for prosecutorial purposes. [FN8] [n.8] We view the 'primary purpose' gloss articulated in *Davis* as entirely consistent with *Crawford*'s focus on the reasonable expectation of the declarant."

State v. Brown, 173 P.3d 612 (Kan. Dec 07, 2007) – "The *Davis* decision creates an ambiguity about the role (and perhaps the continued viability) of another factor, the declarant's objective intent. While the declarant's intent is frequently referenced in *Crawford*, the *Davis* Court vacillated on this point. At some points in the discussion, the *Davis* Court indicated it is the purpose of the declarant that counts: '[E]ven when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.' 165 L.Ed.2d at 237 n. 1. Yet, in other passages there are indications that the interrogator's intent is determinative. For example, the Court stated: 'A 911 call ... at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e] some past fact, but to describe current circumstances requiring police assistance.' 165 L.Ed.2d at 240."

State v. Ortega, 2008-NMCA-001, 143 N.M. 261, 175 P.3d 929 (N.M.App. Sept. 19, 2007), cert. denied, 2007-NMCERT-12, 175 P.3d 307 (N.M. Dec 10, 2007), overruled in part by State v. Mendez, 2010-NMSC-044, 148 N.M. 761, 242 P.3d 328 – looking not to the primary purpose of declarant or listener, both of which were medical, but rather to the "law enforcement purpose behind the exam" – by which the court apparently means the primary purpose of the officer involved in arranging for the SANE exam, or possibly that of the prosecutor who offers the nurse's report into evidence

U.S. v. Jordan, 509 F.3d 191 (4th Cir. Dec 04, 2007) – "Even assuming that statements to friends or associates may be considered testimonial in the rare case, the district court correctly

concluded that '[t]he critical *Crawford* issue here is whether Ms. Brown, at the time she made her statements to Mr. Adams, reasonably believed these statements would be later used at trial.' *Jordan II*, 399 F.Supp.2d at 708. As the district court found, 'there was no indication Ms. Brown was aware that she would be called upon to testify until she was interviewed' by the Richmond City Police Department. *Id.* at 710. Brown's statements, made to a friend rather than to law enforcement personnel, 'appear[ed] to flow more from atonement and contrition' than from an attempt to record past events or shift blame to others with the knowledge that the statements would later be used in court. *Id.* at 710. There is simply no evidence--only Jordan's conjecture--to suggest that Brown knew that her statements to her friend Adams would later be used at trial. We therefore conclude that the statements were non-testimonial and thus do not need to resort to *Crawford* and its Sixth Amendment principles.

Long v. U.S., 940 A.2d 87 (D.C. Nov 15, 2007) – "[T]he circumstances here lie closer to those in *Davis* than those in *Hammon*, and, when viewed objectively, they demonstrate to us that the primary purpose of Officer James' questions was to enable the police to respond to an ongoing emergency and not 'to establish or prove past events potentially relevant to later criminal prosecution.'"

State v. D.H., 2007 WL 3293361, 2007-Ohio-5970 (Ohio App. 10 Dist. Nov 08, 2007) (unpub) – "¶ 51} 'In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations.' *Stahl*, paragraph two of the syllabus."

Rankins v. Commonwealth, 237 S.W.3d 128 (Ky. 2007) – "Under an objective standard [for determining "the primary purpose of the interrogation"], the thoughts and motivations of the declarant, or the person taking the statements, are irrelevant." [NOTE: This means that the purpose of an interrogation exists separately from the purpose of the interrogator. *Compare Lollis*, below.]

State v. Ohlson, 162 Wash.2d 1, 168 P.3d 1273 (Wash. 2007) – defendant, while yelling racial slurs, repeatedly attempted to run over "two minors, L.F. and D.L." – first officer on scene spoke to D.L., who was "pretty upset" and "pretty shaken up" – "[W]e conclude that the primary purpose of Officer Gray's interrogation of D.L. was to enable police assistance to meet an ongoing emergency. As such, D.L.'s statements to Officer Gray were nontestimonial. [FN4] Therefore, the trial court's admission of D.L.'s out-of-court statements did not violate Ohlson's Sixth Amendment right to confrontation." [NOTE: While the opinion does not directly address the point, it is clearly examining the officer's primary purpose, not the child-declarant's.]

Lollis v. State, 232 S.W.3d 803 (Tex. App.-Texarkana 2007) – "While we recognize that the United States Supreme Court has not yet set out a comprehensive test for whether a statement is testimonial, the test applied by *Davis*--i.e., the principal purpose of the interrogation--appears to be both limited to an actual interrogation and subject to inherent ambiguity in analysis. *See Davis*, 126 S.Ct. at 2280 (Thomas, J., concurring in part and dissenting in part) (pointing out ambiguity in standard). An interrogation does not have a purpose except for the purposes assigned to it by the participants. Each participant may have a different purpose or even multiple purposes, and it may prove very difficult to deduce the primary purpose of the interrogation. While a court should be able to determine a primary purpose for any particular participant,

deducing the overall primary purpose of the interrogation is fraught with challenges. Regardless, the phrase was repeatedly used in *Davis*. See *id.* at 2273-74. Fortunately, the case before us does not require us to resolve that standard. In this opinion, we intentionally use the phrase 'the primary purpose of the statement' to maintain that ambiguity created by the United States Supreme Court, while hoping to further the dialogue."

Anderson v. State, 163 P.3d 1000 (Alaska App. Aug 03, 2007) – "We acknowledge that, even though most of the Supreme Court's discussion in *Davis* focuses on the primary purpose of the police interrogation, the Supreme Court also stated that 'in the final analysis' it is 'the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.' [fn] And, as we explained above, when the Supreme Court analyzed the facts of *Davis* and *Hammon*, the Court focused to some degree on factors that would affect the declarant's state of mind: (1) whether the declarant was speaking about events that were currently happening or circumstances that could currently be responded to, as opposed to events that were clearly in the past and could only be investigated and litigated; (2) whether the declarant was facing an ongoing emergency (i.e., describing or seeking help for a current physical danger); and (3) whether the setting of the declarant's statement was a perilous crime scene or a safe location." – going on to consider both points of view, which lead to same result

People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333, 312 Ill.Dec. 268 (Ill. 2007) – "It is clear, therefore, that when the statements under consideration are the product of questioning by the police (or those whose 'acts [are] acts of the police' (*Davis*, 547 U.S. at ---- n. 2, 126 S.Ct. at 2274 n. 2, 165 L.Ed.2d at 238 n. 2)), we must focus on the intent of the questioner in eliciting the statement. Moreover, our evaluation of that intent must rely on objective circumstances, not testimony from the officer as to his actual subjective intent. *Davis*, 547 U.S. at ----, 126 S.Ct. at 2273-74, 165 L.Ed.2d at 237. ... We agree with Professor Friedman and the *Cromer* court that outside of the context of statements produced in response to government interrogation, it is the declarant's perspective which is paramount in a testimonial analysis." – called into question by **People v. Cleary, 2013 IL App (3d) 110610, 377 Ill.Dec. 273, 1 N.E.3d 1160, appeal pending (Mar. 2014)** ("*Stechly's* shifting-intent inquiry.... may thus be inconsistent with *Bryant's* direction that both parties to the conversation be considered.")

State v. Alvarez, 213 Ariz. 467, 471-472, 143 P.3d 668, 672-673 (Ariz. Ct. App. 2006) – "¶ 15 Although not entirely clear, the Court in *Davis* apparently shifted the focus from the motivations or reasonable expectations of the declarant to the primary purpose of the interrogation. See --- U.S. at ----, ----, 126 S.Ct. at 2273-74, 2274 n. 1 (Court's holding in *Davis* emphasized 'the primary purpose of the interrogation' as the lynchpin differentiating testimonial from nontestimonial statements, but Court also stated, 'even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate'); see also *State v. Hooper*, No. 31025, 2006 WL 2328233, at *5, --- Idaho ----, ----, --- P.3d ----, ---- (Idaho Ct.App.2006) (*Davis* 'focuses not at all on the expectations of the declarant but on the content of the statement, the circumstances under which it was made, and the interrogator's purpose in asking questions. '); Ariana J. Torchin, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington*, 94 Geo. L.J. 581, 589 (2006) ('[I]t is clear [*sic*; ha!] that testimonial hearsay embraces both the perspective of the declarant and the government.'). But, under either construct, the statement at issue here is nontestimonial."

U.S. v. Summers, 414 F.3d 1287, 1302 (10th Cir. 2005) – "We conclude that the 'common nucleus' present in the formulations which the Court considered centers on the reasonable expectation of the declarant. ... [W]e believe an objective test focusing on the reasonable expectations of the declarant under the circumstances of the case more adequately safeguards the accused's confrontation right and more closely reflects the concerns underpinning the Sixth Amendment."

Survival of *Ohio v. Roberts*

Crawford did not say that it overruled *Ohio v. Roberts*, 448 U.S. 56 (1980). However, both *Davis*, 547 U.S. at 825 n.4 ("We overruled *Roberts* in *Crawford*"), and *Bockting*, 127 S.Ct. at 1179 ("While this appeal was pending, we issued our opinion in *Crawford*, in which we overruled *Roberts*"), do say it. Nonetheless, some courts continue to apply the *Ohio v. Roberts* firmly-rooted exception / indicia of reliability test to nontestimonial hearsay, sometimes as a matter of state law.

People v. Brown, 2014 COA 155M, __ P.3d __ (Colo. App. 2014), as modified on denial of reh'g (Dec. 31, 2014), as modified (Jan. 29, 2015) – indicia of reliability required under Colorado Constitution

U.S. v. Taylor, 17 F.Supp.3d 162 (E.D. N.Y. 2014) – (Dora L. Irizarry, District Judge) – "Where the statements are non-testimonial, on the other hand, their admission does not violate the Confrontation Clause as long as the statements 'fall within a firmly rooted hearsay exception or demonstrate particularized guarantees of trustworthiness.'"

State v. Kaufman, 711 S.E.2d 607, 610-626 (W. Va. 2011) – under West Virginia rules of evidence, "a trial court must determine if the offered declaration or remark made by the unavailable declarant is hearsay and, if it is, whether it falls within a firmly rooted hearsay exception or has a particularized guarantee of trustworthiness."

State v. Garlington, 122 Conn. App. 345, 359-368, 998 A.2d 1197 (Conn. App. Ct. 2010) – applying *Ohio v. Roberts* to non-testimonial hearsay

United States v. Smalls, 605 F.3d 765, 767-789 (10th Cir. N.M. 2010) – "Regrettably, we have been slow to come into compliance with the Court's controlling precedent. In *United States v. Ramirez*, 479 F.3d 1229 (10th Cir. 2007), a decision subsequent to both *Crawford* and *Davis*, we erroneously concluded, with nary a cite to the latter case, that district [*775] courts still should analyze the admissibility of nontestimonial hearsay statements under the pre-*Crawford* rubric of *Roberts*."

Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, 2010 Fulton County D. Rep. 551 (Ga. 2010) – applying *Ohio v. Roberts* test while acknowledging in footnote 2 that the constitutional foundations "have recently been undermined"

U.S. v. Johnson, 581 F.3d 320 (6th Cir. (Mich.) Sep 18, 2009), cert. denied, 2010 U.S. LEXIS 4874 (June 14, 2010) – "the Confrontation Clause has no bearing on non-testimonial out-of-court statements. Thus, *Roberts* no longer applies to statements such as O'Reilly's..."

U.S. v. Rodriguez-Berrios, 573 F.3d 55 (1st Cir. (Puerto Rico) Jul 23, 2009) – "Appellant concedes that the hearsay statements admitted through the testimony of Ramos and Acosta were not 'testimonial' ... Nonetheless, he argues that we should apply the older rule of *Ohio v. Roberts*, ... However, post-*Crawford*, the Supreme Court held in *Davis v. Washington*, 547 U.S. 813, 823-24 (2004), "that the Confrontation Clause applies only to testimonial hearsay." *United States v. Earle*, 488 F.3d 537, 542 (1st Cir.2007). We therefore reject appellant's argument that the non-testimonial hearsay admitted through Acosta and Ramos violated his rights under the Confrontation Clause."

French v. Lafler, 2009 WL 799217 (E.D. Mich. Mar 24, 2009) (unpub) (habeas) – "The Sixth Circuit continues to look to *Ohio v. Roberts*... and its progeny for guidance when nontestimonial hearsay is at issue."

Riva v. Kirkland, 2009 WL 528672 (9th Cir. Mar 03, 2009) (unpub) (habeas) – "Because the statement was nontestimonial, the *Roberts* test determines its admissibility."

Quintero-Calle v. U.S., 2009 WL 498068 (S.D. Fla. Feb 26, 2009) (unpub) (§ 2255) – "Admission of non-testimonial hearsay against criminal defendants is not governed by *Crawford*, but still violates the Confrontation Clause unless the statement falls within a firmly rooted hearsay exception, or otherwise carries a particularized guarantee of trustworthiness. *Ohio v. Roberts*..."

People v. Taylor, 482 Mich. 368, 759 N.W.2d 361 (Mich. Dec 19, 2008) – "The United States Supreme Court subsequently decided *Crawford* and *Davis*, which in combination overruled *Roberts* in its entirety."

State v. Rolon, 201 P.3d 657 (Idaho App. Oct 23, 2008), rehearing denied (Dec 02, 2008) – "The Supreme Court has made it abundantly clear that the Confrontation Clause has no application to nontestimonial hearsay statements."

Garrison v. Ortiz, 296 Fed.Appx. 724 (10th Cir. Oct 21, 2008) (habeas) – "it is clear that the trustworthiness test established in *Roberts* has been overruled."

State v. Legere, 958 A.2d 969 (N.H. Oct 15, 2008) – applying *Roberts* under state Constitution

Coker v. Harry, 2008 WL 4377655 (W.D. Mich. Sep 23, 2008) (unpub) (habeas) – "After *Crawford*, the Sixth Circuit has consistently held that the *Roberts* standard continued to apply to non-testimonial hearsay. See *United States v. Arnold*, 486 F.3d 177, 192 (6th Cir.2007)" – [NOTE: *Arnold* actually says the opposite at 192-193.]

State v. Fischer, 199 P.3d 663 (Ariz. App. Div. 1 Aug 05, 2008), Review Denied (Dec. 4, 2008) – "Non-testimonial statements are not subject to a confrontation challenge."

State v. Lee, 2008 WL 2745277 (Wis. App. II Dist. July 16, 2008) (unpub) – "Nontestimonial hearsay is governed by *Ohio v. Roberts*"

U.S. v. Russell, 66 M.J. 597 (Army Ct. Crim. App. Apr 29, 2008) – *Ohio v. Roberts* standard survives both as component of military rules of evidence and as component of harmless error analysis

Boyer v. Sheets, 2008 WL 2329272 (S.D. Ohio Jun 04, 2008) (unpub) (habeas) – "[U]nless a particular hearsay statement qualifies as 'testimonial,' *Crawford* is inapplicable and *Roberts* still controls." (quoting *Coy v. Renico*, 414 F.Supp.2d 744, 773 (E.D. Michigan 2006)) – compare *Arnold*, the Sixth Circuit's en banc decision to the contrary

Jackson v. McKee, 525 F.3d 430 (6th Cir. May 12, 2008) (habeas) – "what happens under AEDPA-constrained habeas review when a state court decision on direct review may amount to an unreasonable application of Supreme Court precedent [*i.e.*, *Ohio v. Roberts*] but that precedent is overruled before a federal court entertains the habeas petition?" – but not deciding issue because petitioner "loses either way."

State v. Munoz, 157 N.H. 143, 949 A.2d 155 (N.H. Apr 18, 2008) – *Ohio v. Roberts* survives as a matter of state law

State v. Smith, 2008 WL 220749 (Wis. App. Jan. 29, 2008) (unpub) – "*Ohio v. Roberts*, 448 U.S. 56 (1980), was abrogated as applicable to testimonial, not nontestimonial hearsay by *Crawford* ..."

Cannon v. U.S., 2007 WL 4616281 (S.D. Fla. Oct 16, 2007) (unpub) (§ 2255) – "Admission of non-testimonial hearsay against criminal defendants is not governed by *Crawford*, but still violates the Confrontation Clause unless the statement falls within a firmly rooted hearsay exception, or otherwise carries a particularized guarantee of trustworthiness. *Ohio v. Roberts*..."

People v. Ciavone, 2007 WL 4322168 (Mich. App. Dec 11, 2007) (unpub) – "*Crawford* left *Roberts* intact"

State v. Beaner, 974 So.2d 667 (La. App. 2 Cir. Dec 05, 2007) – "Although *Crawford* left open the question of whether the admissibility of nontestimonial statements were still to be evaluated under the pre-*Crawford* analysis, the Supreme Court has since made clear that the right to confrontation has no application to nontestimonial statements. *Davis*..."

People v. Harrison, 2007 WL 4100080 (Cal. App. 2 Dist. Nov 19, 2007) (unpub) – "Since *Crawford* is not applicable, the appropriate analysis is under *Ohio v. Roberts* ..."

U.S. v. Barry-Scott, 2007 WL 3129723 (6th Cir. Oct 25, 2007) (unpub) – "where statements at issue are nontestimonial hearsay, the decision of *Ohio v. Roberts*, 448 U.S. 56 (1980), is still controlling." [NOTE: *Cf. Arnold*, the Sixth Circuit's own en banc decision of a few months earlier, summarized below!!]

State v. Fields, 115 Hawai'i 503, 168 P.3d 955 (Hawai'i Aug 30, 2007; amended Oct. 10, 2007) – *Ohio v. Roberts* test survives under state constitution

State v. Silva, 2007-NMCA-117, 142 N.M. 686, 168 P.3d 1110 (N.M. App. Jun 26, 2007), rev'd in part on non-Crawford issue, 144 N.M. 815, 192 P.3d 1192, 2008-NMSC-051 (N.M. Aug 20, 2008) – "In the absence of a testimonial statement, which we hold that this statement was not, we return to the 'traditional' analysis of whether an absent co-defendant's inculpatory statement violates Defendant's Sixth Amendment rights under *Ohio v. Roberts* ..."

Howard v. Kernan, 2007 WL 2900164 (E.D. Cal. Sep 28, 2007) (unpub) – "This creates some confusion. As we have seen applying *Crawford* Forstein's statements to Howard were not testimonial and hence not affected by the confrontation clause. But as Justice Alito observes in *Whorton*, statements that pass muster under *Crawford* because they are not testimonial might run a foul of *Roberts* because they were hearsay which did not satisfy a well rooted exception to the hearsay rule and were not otherwise trustworthy. ... Common sense suggests that before returning to an evaluation of whether admission of hearsay violates *Roberts* the court must at the threshold determine whether it is testimonial because unless it is it can't violate the confrontation clause under current law and current law would be applied at any retrial. See *Miller v. Fleming*, 225 Fed.Appx. 606 (9th Cir.2007) (unpublished, reserving judgment on this argument)."
[NOTE: Compare *Legion v. McKee*, below.]

U.S. v. Larson, 495 F.3d 1094 (9th Cir. 2007) (en banc) – "Because we agree with the three-judge panel's disposition of the remaining issues that Defendants raise on appeal, we adopt those portions of the panel opinion with the exception of the final three paragraphs. These final paragraphs addressed an issue that was unresolved at the time: whether the test articulated in *Ohio v. Roberts*, 448 U.S. 56 (1980), to determine the admissibility of out-of-court nontestimonial statements survived *Crawford*. .. The Supreme Court has since clarified, however, that *Crawford* 'eliminat[es] Confrontation clause protection against the admission of unreliable out-of-court non-testimonial statements' and that 'the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.' *Whorton v. Bockting*, 127 S.Ct. 1173, 1183 (2007)." (citations omitted)

People v. Saracoglu, 152 Cal.App.4th 1584, 62 Cal.Rptr.3d 418 (Cal. App. 2 Dist. Jul 09, 2007) – "[T]here is no basis for an inference that, even if a hearsay statement is nontestimonial, it must nonetheless undergo a *Roberts* analysis before it may be admitted under the Constitution.' (*People v. Cage* (2007) 40 Cal.4th 965, 981-982, fn. 10.)" [but see case immediately below]

People v. Sweat, 2007 WL 2052131 (Cal. App. 6 Dist. July 17, 2007) (unpub) – "After *Crawford*, a 'nontestimonial' hearsay statement continues to be governed by the *Roberts* standard" [but see case immediately above]

Freeburg v. Carter, 2007 WL 2220199 (W.D. Wash. Jul 30, 2007) (habeas) (unpub) – "the *Roberts* reliability test which remains applicable to non-testimonial statements" [but see *Larson*, above]

State v. Petitto, 2007 WL 2200478, 2007-Ohio-3901 (Ohio App. 8 Dist. Aug 02, 2007) (unpub) – "[T]he [U.S. Supreme] Court held that with nontestimonial hearsay, the *Roberts*, *supra*, reliability test still applies."

Paredes v. Quarterman, 2007 WL 760230 (W.D. Tex. March 8, 2007) (unpub) – "The applicable federal constitutional standard for evaluating Confrontation Clause claims concerning non-testimonial hearsay declarations remains the test set forth in *Ohio v. Roberts*"

Legion v. McKee, 2007 WL 2004918 (E.D. Mich. Jul 10, 2007) (unpub) (habeas) – "the *Roberts*'s [*sic*] reliability analysis continues to apply to the admission of non-testimonial hearsay." [*but see Gendron v. Lafler*, immediately below, and compare the courts and the dates] – on denial of motion for rehearing, **Legion v. McKee, 2007 WL 2852224 (E.D. Mich. Sep 28, 2007)** – in stridently defensive opinion on rehearing, holding that an intermediate version of the confrontation clause existed during the interval between *Crawford* and *Davis*, during which *Ohio v. Roberts* remained "clearly established law" for nontestimonial hearsay – so that habeas is granted unless the state retries the defendant *with exactly the same evidence, admission of which was constitutional error*, since the retrial will be governed by the post-*Davis* standard!! [NOTE: Compare *Howard v. Kernan*, above.]

Gendron v. Lafler, 2007 WL 2005057 (E.D. Mich. Jul 10, 2007) (unpub) (habeas) – "Furthermore, the Supreme Court has made clear that the Confrontation Clause is not implicated, and need not be considered, when non-testimonial hearsay is at issue." [*but see case immediately above, and note the dates*]

U.S. v. Arnold, 486 F.3d 177 (6th Cir. 2007) (en banc) – "The Confrontation Clause, *Davis* explains, is 'solely concerned with testimonial hearsay,' 126 S.Ct. at 2274 (internal quotation marks omitted), meaning that the only admissibility question in this setting is whether the statement satisfies the Federal (or State) Rules of Evidence. *See id.* (noting that the Confrontation Clause's "focus on testimonial hearsay" "must fairly be said to mark out not merely its 'core,' but its perimeter") (internal quotation marks and brackets omitted); *see also Whorton v. Bockting*, 127 S.Ct. 1173, 1183 (2007) ('[T]he Confrontation Clause has no application' to 'out-of-court nontestimonial statement[s]')."

People v. Bell, 2007 WL 1653102, *23+ (Cal.App. 4 Dist. Jun 08, 2007) (unpub) – "The admission of a 'nontestimonial' hearsay statement, on the other hand, can never violate the confrontation clause."

Desai v. Booker, 2007 WL 1343718 (E.D. Mich. May 8, 2007), overruled, --- F.3d ----, 2008 WL 3540083 (6th Cir. Aug. 15, 2008)

U.S. v. York, 2007 WL 1343801 (E.D. Mich. May 07, 2007) (unpub) – "Despite the Court's abrogation of *Roberts* in *Crawford*, *Roberts* continues to govern the Confrontation Clause analysis of non-testimonial statements." [*but see Arnold*, above]

U.S. v. Myton, 2007 WL 1492470 (2nd Cir. May 22, 2007) (unpub) – "We evaluate the admissibility of non-testimonial, out-of-court statements under the two-part test elaborated by the Supreme Court in *Ohio v. Roberts*".

Buenos Ruiz v. Fischer, 2007 WL 1395462 (E.D. N.Y. May 10, 2007) (unpub) – "Based on the decision in *Davis*, the Second Circuit has made clear that the 'reliability analysis' required in *Ohio v. Roberts*--that is, determining whether statements are 'firmly rooted hearsay exception' or

contain 'particularized guarantees of trustworthiness'--no longer governs." [but see *Myton*, above]

Commonwealth v. Allshouse, 924 A.2d 1215, 2007 PA Super 109 (Pa. Super. 2007) **aff'd**, 985 A.2d 847, 849-871 (Pa. 2009), summarily vacated and remanded for reconsideration, **Allshouse v. Pennsylvania**, 131 S. Ct. 1597, 179 L. Ed. 2d 495 (March 7, 2011), **reaffirmed Commonwealth v. Allshouse**, 36 A.3d 163, 165-190 (Pa. 2012) – "FN24. The Federal Circuit Courts of Appeals that have considered the question of whether the *Ohio v. Roberts*, 448 U.S. 56 (1980), analysis governs the admission of non-testimonial hearsay evidence have unanimously held or assumed it does and this consensus includes the Third Circuit. *See e.g.*, *United States v. Feliz, et al.*, 467 F.3d 227, 71 Fed.R.Evid. Serv. (Callaghan) 734, ---- (2d Cir.2006); *Summers v. Dretke*, 431 F.3d 861, 877 (5th Cir.2005); *United States v. Hinton*, 423 F.3d 355, 358 n. 1 (3d Cir.2005) ("Furthermore, the admission of non-testimonial evidence is still governed by *Roberts*." (citations omitted); *United States v. Brun*, 416 F.3d 703, 707 (8th Cir.2005); *United States v. Franklin*, 415 F.3d 537, 546 (6th Cir.2005) (citations omitted); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir.2004)."

U.S. v. Thomas, 453 F.3d 838, 844 n. 2 (7th Cir. 2006) – "We recognize that *Crawford v. Washington*, 541 U.S. at 60, 124 S.Ct. 1354, overruled, in part, *Ohio v. Roberts*, and that *Davis v. Washington* reaffirmed this fact. *Davis*, *10, n. 4, *19. While at first glance, *Davis* appears to speak of *Roberts* being overruled in general, a closer reading reveals that the discussion of *Roberts* occurs strictly within the context of statements implicating the Confrontation Clause. *Id.* Where the Court addresses nontestimonial statements such language is conspicuously absent."

Crawford Does Not Affect the Defendant's Right to Introduce Evidence

State v. Smith-Parker, 340 P.3d 485, 505 (Kan. 2014) – "The district judge's Confrontation Clause ruling was based on a faulty premise—that the State has a right of confrontation equal to that of a defendant. This is not the case."

Shorter v. State, 98 So. 3d 685 (Fla. Dist. Ct. App. 4th Dist. 2012) – "when the defense seeks to admit a forensic case report, the Confrontation Clause does not apply."

Smith v. United States, 26 A.3d 248, 252-260 (D.C. 2011) – "Even assuming that Gant's statement to Detective McCloud was testimonial, *Crawford* would not apply because Smith was the party seeking to introduce the statement."

People v. Jackson, 2008 WL 3319838 (Cal.App. 5 Dist. Aug 12, 2008) (unpub) – *Crawford* does not limit defendant's right to present evidence

People v. Gay, 2008 WL 699068 (Cal. App. 3 Dist. Mar 17, 2008) (unpub) – "*Crawford* holds that testimonial statements are not admissible against a defendant unless the defendant is provided an opportunity to cross-examine the declarant. ... *Crawford* does not hold the converse, that nontestimonial statements must be admitted irrespective of whether they fall within a hearsay exception."

Crawford Does Not Require Prosecution to Call Witnesses

United States v. Beale, 620 F.3d 856 (8th Cir. Minn. Sept. 2, 2010), cert. denied 131 S. Ct. 1023, 178 L. Ed. 2d 847 (2011) – "The Sixth Amendment's right to confront witness does not include a mandate requiring the government to call particular witnesses."

Prosecution's Burden of Proof (category added June, 2008)

In the space of three weeks, both the Minnesota Supreme Court and the Texas Court of Criminal Appeals found *Crawford* error while expressly declining to find error under *Crawford*. They reached this seemingly-absurd result by holding that the prosecution had failed to carry its burden to prove the statements were non-testimonial, thus obviating any need for the court to determine whether they were testimonial. In practical terms, both courts concluded that, in certain circumstances, the trial court's non-erroneous admission of non-testimonial statements can constitute reversible error under *Crawford*.

This amounts to a presumption that certain statements are testimonial and therefore inadmissible until proven otherwise. Or, to put it another way, it re-conceptualizes *Crawford* as a rule of evidence, governing the mechanics of admitting evidence, rather than as a constitutional prohibition.

Commonwealth v. Abrue, 2010 PA Super 196, 11 A.3d 484 (Pa. Super. Ct. 2010), appeal denied (May 11, 2011) – defense surprise caught prosecution without rebuttal witness, so it relied on hearsay – "the lack of evidence to demonstrate the primary purpose of Officer Maroney's statements inures to the detriment of the Commonwealth." – that is, an absence of evidence means a statement made by one police officer (victim of inmate attack) to a fellow officer is testimonial by default

State v. Alvarez-Abrego, 154 Wn. App. 351, 225 P.3d 396 (Wash. Ct. App. 2010), review denied, 2010 Wash. LEXIS 454 (Wash., June 2, 2010) – hearsay statement from 4 year old to mother presumed to be testimonial – burden on state to prove otherwise

State v. Her, 750 N.W.2d 258 (Minn. May 29, 2008) – "For all of these reasons, we conclude that the State did not meet its burden to prove that Vang's statement to police was nontestimonial. We do not hold, as the concurrence states, that Vang's statements to [Officer] Baumhofer 'are inadmissible under *Crawford* * * * and its progeny' because the statements are testimonial. We, in fact, do not make a determination as to the testimonial or nontestimonial nature of the statements. We hold only that the State failed to meet its burden to show that the primary purpose of the interrogation in this case was to address an ongoing emergency."

De La Paz v. State, 273 S.W.3d 671 (Tex. Crim.App. Jun 18, 2008), reh'g denied (Sept. 10, 2008) – child victim, recovering from very serious vaginal tear that required surgery, made statements to hospital personnel which were recorded in nurses' notes in the hospital's medical chart – "Once appellant objected to the admission of the notes under *Crawford*, the burden shifted to the State, as the proponent of that evidence, to establish that it was admissible under *Crawford*. [cite] In other words, once appellant objected, the State was obligated to establish

either (1) that the notes did not contain testimonial hearsay statements or (2) that the notes did contain testimonial hearsay statements but that such statements were nevertheless admissible under *Crawford*. ... After reviewing the record, we conclude that the State failed to carry its burden. ... FN9. We hasten to add that we are not holding that the notes in question contained testimonial hearsay statements. Rather, we are holding only that the State failed to establish that the notes were admissible under *Crawford*."

Applicability of Harmless Error Analysis in Indiana
(category added Dec. 2010)

(
Koenig v. State, 933 N.E.2d 1271 (Ind. Sept. 21, 2010) – "Koenig contends a violation of the Sixth Amendment right to confrontation can never be harmless. (Pet. to Transfer at 4.) He directs us to a footnote in a Court of Appeals opinion that states a harmless error analysis, after *Crawford v. Washington*, is not applicable to the Sixth Amendment. *Jackson v. State*, 891 N.E.2d 657, 662 n.5 (Ind. Ct. App. 2008). We conclude otherwise."



PART 2: WHAT ARE TESTIMONIAL STATEMENTS?

- Testimony is a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Not casual remarks.
- The *Crawford* test:
 - (1) Government agent (was the government involved in creating the testimony or taking a formalized statement from the declarant?)
 - Statements to police officers or government agents
 - Custodial examinations
 - Interrogations (did not define)
 - Affidavits or depositions
 - In court testimony
 - At preliminary hearing
 - At trial
 - Testimony before grand jury
 - Plea allocutions, confessions and pretext calls of Co-Defendants
 - Statements of Confidential Informants
 - (2) Would an objective person in the declarant’s position reasonably expect the statement to later be used in court?
 - Although *Davis* adds a “primary purpose” test based on the circumstances surrounding taking the declarant’s statement, the ruling was specifically limited to situations involving interrogations by law enforcement -- a limitation some lower courts ignore.

Formulations of Test for Determining What Is "Testimonial"

"We have never suggested, however, that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case. Instead, we ask whether a statement was given with the 'primary purpose of creating an out-of-court substitute for trial testimony.'" *Ohio v. Clark*, 135 S. Ct. 2173, 2183 (2015).

Lower courts have formulated a wide variety of tests for determining whether a statement is "testimonial." The tests are almost comically inconsistent with one another.

Crawford itself said: "Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. *See, e.g., People v. Farrell*, 34 P. 3d 401, 406-407 (Colo. 2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts." So what did *Crawford* replace those multi-factor tests with? A vastly greater variety of multi-factor tests!

***People v. Garcia*, 25 N.Y.3d 77, 7 N.Y.S.3d 246, 30 N.E.3d 137 (N.Y. 2015)** – "Our precedent teaches that 'two factors ... are 'especially important' in resolving whether to designate a statement as testimonial—'first, whether the statement was prepared in a manner resembling ex parte examination and second, whether the statement accuses defendant of criminal wrongdoing' [cite]."

***Duhs v. Capra*, __ F.Supp.3d __, 2015 WL 428321, at *16-30 (E.D.N.Y. Feb. 3, 2015), appealing pending** (habeas) – in a pre-*Ohio v. Clark* opinion unlikely to survive appellate review, Judge Weinstein decrees a three-step analysis: "The inquiry begins with an objective analysis of the declarant's purpose in speaking. ... Next considered is the perspective of the interrogator. ... Considered is the formality of the situation, including the location of the questioning and who was present. Evaluated is whether an emergency is in progress or has passed so that only a declaration about historical facts is being elicited." – [NOTE: This incorporates the emergency exception into the general rule, and assumes without analysis that it applies even to statements made to medical professionals.]

***U.S. v. Norwood*, 50 F.Supp.3d 810 (E.D. Mich. 2014)** – "The Sixth Circuit has held that the proper inquiry is 'whether the declarant intends to bear testimony against the accused.' [cite] Whether a statement reflects an intent to bear testimony is determined by asking 'whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.' [cite]" – [NOTE: One's intent is a function of one's speculation about the future actions of unspecified other people??]

***People v. Chism*, 58 Cal.4th 1266, 171 Cal.Rptr.3d 347 (Cal. 2014)** – "Based on the reasoning in *Bryant*, in *Blacksher* we identified six factors to consider in determining whether statements made in the course of police questioning were for the "'primary purpose of creating an out-of-court substitute for trial testimony' that implicates the confrontation clause." [cite] These are (1) an objective evaluation of the circumstances of the encounter and the statements and actions of the individuals involved in the encounter; (2) whether the statements were made during an ongoing emergency or under circumstances that ***370 reasonably appeared to present an

emergency, or were obtained for purposes other than for use by the prosecution at trial; (3) whether any actual or perceived emergency presented an ongoing threat to first responders or the public; (4) the declarant's medical condition; (5) whether the focus of the interrogation had shifted from addressing an ongoing emergency to obtaining evidence for trial; and (6) the informality of the statement and the circumstances under which it was obtained."

State v. Lui, 179 Wash.2d 457, 315 P.3d 493 (Wash. 2014), cert. denied, 2014 WL 1354998 (June 23, 2014) – "[¶ 2] an expert comes within the scope of the confrontation clause if two conditions are satisfied: first, the person must be a 'witness' by virtue of making a statement of fact to the tribunal and, second, the person must be a witness 'against' the defendant by making a statement that tends to inculcate the accused. ... [¶ 25] a person is a 'witness' for confrontation clause purposes only if he or she makes some statement of fact to the court (as opposed to merely processing a piece of evidence) and that statement of fact bears some inculpatory character (meaning that the evidence, without the need for *471 expert interpretation, bears on some factual issue in the case). ... [¶ 51] If the declarant makes a factual statement to the tribunal, then he or she is a witness. If the witness's statements help to identify or inculcate the defendant, then the witness is a 'witness against' the defendant."

State v. Foster, 286 Neb. 826, 839 N.W.2d 783, 803-06 (Neb. 2013) – "A statement that is not intended for use in the prosecution of a crime and that law enforcement had no role in obtaining is not testimonial."

People v. Valadez, 220 Cal.App.4th 16, 162 Cal. Rptr. 3d 722, 730-38 (Cal. App. 2d Dist. 2013), review denied (Jan. 15, 2014) – "our Supreme Court in *Dungo* **737 and *Lopez* formulated a two-part test to determine whether an out-of-court statement is testimonial: 'First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution.'"

United States v. Rojas-Pedroza, 716 F.3d 1253 (9th Cir. Cal. 2013) – immigration case – "the 'mere possibility' that a record 'could be used in a later criminal prosecution' does not render it testimonial. [cite] Rather, there must be some additional showing that the primary purpose of the document is for use in litigation."

United States v. Jones, 716 F.3d 851, 852-856 (4th Cir. Va. 2013) – "statements are testimonial when 'a reasonable person in the declarant's position would have expected his statements to be used at trial—that is, whether the declarant would have expected or intended to 'bear witness' against another in a later proceeding.'"

State v. Navarette, 2013-NMSC-003, 294 P.3d 435 (N.M. 2013), cert. denied – "Our examination of *Crawford* and its progeny reveals that at least five justices of the United States Supreme Court have agreed upon the following principles that we conclude are essential to a Sixth Amendment Confrontation Clause analysis." – listing seven such principles, a vaguer cousin of a multi-factor test – **declined to follow by State v. Sauerbry, 447 S.W.3d 780 n. 1 (Mo. Ct. App. 2014)**

People v. Arauz, 210 Cal. App. 4th 1394 (Cal. App. 2d Dist. 2012) – "Pursuant to *Crawford*, out-of-court statements can be divided into police interrogations ('testimonial' hearsay) and statements in which no interrogation takes place ('non-testimonial' hearsay)."

United States v. Pablo, 696 F.3d 1280 (10th Cir. 2012) – "A testimonial statement is a statement that a reasonable person in the position of the declarant would objectively foresee might be used in the investigation or prosecution of a crime." – [NOTE: This formulation is incorrect, at least in the circumstances involved in *Bryant*, which requires both parties' perspectives to be considered.]

Amador v. State, 376 S.W.3d 339, 339-345 (Tex. App. Houston 14th Dist. 2012) – "We have also previously identified the following principles as useful in determining whether particular statements are testimonial: (1) testimonial statements are official and formal in nature, (2) interaction with the police initiated by a witness or the victim is less likely to result in testimonial statements than if initiated by the police, (3) spontaneous statements to the police are not testimonial, and (4) responses to preliminary questions by police at the scene of the crime while police are assessing and securing the scene are not testimonial."

State v. Lopez, 55 Cal. 4th 569, 286 P.3d 469, 147 Cal. Rptr. 3d 559 (Oct. 15, 2012) – "Although the high court has not agreed on a definition of 'testimonial,' a review of the just-mentioned four decisions [*Crawford*, *Melendez-Diaz*, *Bullcoming*, *Williams*] indicates that a statement is testimonial when two critical components are present. [¶] First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity. ... The degree of formality required, however, remains a subject of dispute in the United States Supreme Court. ... Second, all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be." – [got that?]

State v. Benefield, 2012 Conn. Super. LEXIS 238, 1-30 (Conn. Super. Ct. Jan. 10, 2012) (unpub) – "it is useful to analyze the Justices' efforts in *Bullcoming* to reach a consensus as to the definition of a testimonial statement. In footnote 6, the Court stated that 'to rank as 'testimonial,' a statement must have a primary purpose of establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.' Although Justice Sotomayor joined the Court's judgment in *Bullcoming*, her concurring opinion opens by defining a testimonial statement as one which has 'a primary purpose of creating an out-of-court substitute for trial testimony.' This definition, which seems to be a more narrow one than the footnote 6 definition, is taken from Justice Sotomayor's majority opinion in [*Bryant*], a decision in which she was joined by the four Justices who dissented in *Bullcoming*. It would appear, therefore, that it is this more restrictive definition, and not the broader footnote 6 definition, that has garnered the support of a majority of the Supreme Court." [citations and internal quotation marks omitted]

People v. Davis, 199 Cal. App. 4th 1254, 1256-1273 (Cal. App. 3d Dist. 2011) (as modified), review granted, depublished (Jan. 11, 2012), review dismissed (May 22, 2013) – "The fatal defect in defendant's argument is that his underlying premise is false: *Melendez-Diaz* did not establish that the test for determining what statements are "testimonial" is whether they 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."" [cites] This part of the plurality opinion did not gain Justice Thomas's support and thus did not establish precedent. Moreover,

neither *Crawford* nor *Davis*, nor Justice Thomas in his partial concurrence and partial dissent in *Davis*, adopted this language as the test for “testimonial” statements.”

Cox v. State, 421 Md. 630, 635-651, 28 A.3d 687 (Md. 2011) – “We hold that when the State seeks to introduce an out-of-court statement against a criminal defendant, the proper inquiry under *Crawford* and *Bryant* is to determine whether a reasonable person in the declarant's situation would have made the statement 'with a primary purpose of creating an out-of-court substitute for trial testimony.' [cite] Thus, if the primary purpose of the statement is 'made under circumstances that would [not] lead an objective declarant reasonably to believe that the statement would be available for use at a later trial,' [cite], [**699] then it is not testimonial and the Confrontation Clause does not bar its admission.” – [NOTE: Court seems unaware that it has stated two different tests capable of producing opposite results.]

People v Hall, 2011 NY Slip Op 3193, 84 A.D.3d 79, 923 N.Y.S.2d 428 (N.Y. App. Div. 1st Dep't 2011) – “In rejecting the defendant's argument, the Court of Appeals in *Freycinet* focused on 'various indicia of testimoniality' that it had previously identified in *People v Rawlins* [cite] These indicia include: 'the extent to which the entity conducting the procedure is an arm of law enforcement; whether the contents of the report are a contemporaneous record of objective facts, or reflect the exercise of fallible human judgment; . . . whether a pro-law-enforcement bias is likely to influence the contents of the report; and whether the report's contents are directly accusatory in the sense that they explicitly link the defendant to the crime' [cite].”

United States v. Smalls, 605 F.3d 765, 767-789 (10th Cir. N.M. 2010) – “Synthesizing *Crawford* and *Davis*, we might today formulate a definition of a testimonial statement which reads: a formal declaration made by the declarant that, when objectively considered, indicates the primary purpose for which the declaration was made was that of establishing or proving some fact potentially relevant to a criminal prosecution. Or, to better conform to the current state of Tenth Circuit precedent, we might say: A formal statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that the primary purpose of the statement was for use in the investigation or prosecution of a crime.” – but not, in the end, definitively adopting either formula

State v. Franklin, 308 S.W.3d 799, 802-827 (Tenn. 2010) – “We believe the multi-factor test that we first articulated in *Maclin* and repeated in *Lewis* remains relevant in determining whether the statement is 'testimonial.' Such factors as the identity of the declarant, the formality of the surrounding circumstances, the structure and extent of the questioning, et al. may very well bear on the ultimate, decisive inquiry: an objective determination of the primary purpose of the statement. We emphasize that the factors are 'non-exhaustive,' [cite] and allow for consideration of additional factual details specific to a particular case. Lower courts ought not apply the factors mechanically.”

Commonwealth v. Simon, 456 Mass. 280, 923 N.E.2d 58 (Mass. 2010) – “Although much of the 911 call was not testimonial per se, five statements contained therein were testimonial per se because, viewed objectively, they would not have helped resolve the ongoing emergency or secure the crime scene.”

Washington v. State, 191 Md. App. 48, 94-95, 990 A.2d 549 (Md. Ct. Spec. App. 2010) – “While there are multiple standards to determine what is 'testimonial hearsay,' 'the uniting theme

underlying the *Crawford* holding is that when a statement is made in the course of a criminal investigation initiated by the government, the Confrontation Clause forbids its introduction unless the defendant has had the opportunity to cross-examine the declarant."

United States v. Chun Ya Cheung, 350 Fed. Appx. 19, 20-24 (6th Cir. Ky. 2009) – " In debating whether a statement is testimonial, lawyers for the government and the defense have made a habit over the last few years of citing *Cromer* for this proposition: [*23] 'The proper inquiry . . . is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.' 389 F.3d at 675. That may be the appropriate way to define 'testimonial' in non-interrogation settings, [cites], but it is not the way the Court defined "testimonial" hearsay in *Davis* ... The statements at issue in *Cromer* did not arise from a governmental interrogation but from a confidential informant. [cite]. The *Cromer* articulation of 'testimonial' hearsay is perfectly reasonable in that setting and is consistent with *Crawford*, but it does not seem to match *Davis*'s later definition of the term in the context of a governmental investigation or interrogation, as occurred here. Now that we have this additional guidance from the Supreme Court in the context of law enforcement questioning, litigants may wish to invoke *Davis* or at least explain why it does not apply." [NOTE: This seems to be a wordy way of saying that *Crawford* and *Davis* are contradictory. Note, also, the distinction drawn between law enforcement receiving information from a CI and receiving information from a witness.]

People v. Padilla, 2009 WL 808496 (Cal. App. 4 Dist. Mar 30, 2009) (unpub) – "In *People v. Taulton* ... [w]e determined 'Crawford supports a conclusion that the test for determining whether a statement is 'testimonial' is not whether its use in a potential trial is foreseeable, but whether it was obtained for the purpose of potentially using it in a criminal trial or determining if a criminal charge should issue.'"

State v. Lucas, 965 A.2d 75, 407 Md. 307 (Md. Feb 19, 2009) – "'the uniting theme underlying the *Crawford* holding is that when a statement is made in the course of a criminal investigation initiated by the government, the Confrontation Clause forbids its introduction unless the defendant has had an opportunity to cross-examine the declarant.' ... The *Davis* Court considered a number of factors in analyzing the primary purpose of the interrogations at issue, including (1) the timing of the statements, i.e. whether the declarant was speaking about actually happening or past events; (2) whether the "reasonable listener would recognize that [the declarant] ... was facing an ongoing emergency"; (3) the nature of what was asked and answered, i.e. whether the statements were necessary to resolve the present emergency or simply to learn what had happened in the past; and (4) the interview's level of formality. ... In assessing formality, relevant measures included the interview's location; whether the declarant was actively separated from the defendant; whether "the officer receiv[ed] [the declarant's] replies for use in his 'investigat[ion]' "; and whether the statements "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed.'" (brackets in original)

People v. Posey, 2009 WL 151335 (Cal. App. 1 Dist. Jan 22, 2009) (unpub) – "*Crawford* only limits out-of-court testimonial statements that are analogous to testimony given by witnesses at trial, such as prior testimony at a preliminary hearing, before a grand jury or at a former trial, and responses to police interrogations. ... [Future murder victim] Liz was not acting as a witness

and providing testimonial statements when she confided her fears to her mother, friend, and divorce lawyer."

Pritchard v. State, 2009 WL 112717 (Tex. App.-Fort Worth Jan 15, 2009) (unpub) – "in determining whether Mr. Marten's statements to Officer King were testimonial, the issue is whether circumstances were present that would indicate the existence of an ongoing emergency at the time he made the statements. *See Vinson*, 252 S.W.3d at 339. We look to the nonexclusive factors of (1) whether the situation was still in progress; (2) whether the questions sought to determine what is presently happening as opposed to what has happened in the past; (3) whether the primary purpose of the interrogation was to render aid rather than to memorialize a possible crime; (4) whether the questioning was conducted in a separate room, away from the alleged attacker; and (5) whether the events were deliberately recounted in a step-by-step fashion. *See id.* (citing *Davis* ...)"

State v. Barnes, 149 Ohio Misc.2d 1, 896 N.E.2d 1033, 2008-Ohio-5609 (Ohio Com. Pl. Jun 27, 2008) (pretrial) – "¶ 58} The following factors are important in determining the purpose of the child's statements: (1) whether the questioning was leading or suggestive, (2) whether there was motive to fabricate, such as an underlying legal battle, and (3) whether the child understood the need to tell the truth. *Muttart*, 2007- Ohio-5267, at ¶ 49, 116 Ohio St.3d 5, 875 N.E.2d 944. Additionally, the court may be guided by the child's age, which could suggest the absence or presence of an ability to fabricate. *Id.* Further, the court may consider the consistency of the declarations. *Id.* Finally, the court should be aware of the manner in which the interviewer elicited or pursued a disclosure, as compared to evidence of the proper protocol for interviewing children who allege sexual abuse. *Id.*"

State v. Shea, 965 A.2d 504, 2008 VT 114 (Vt. Aug 14, 2008) – DV case – "¶ 16. Thus, the main factors for our analysis are: (1) whether the emergency was ongoing because the crime was being committed at the time of the hearsay statement or because the complainant or officer was in imminent physical danger; and (2) whether the officer's primary purpose was to resolve an emergency or to investigate a possible criminal act."

State v. Her, 750 N.W.2d 258 (Minn. May 29, 2008) – "We analyzed four objective factors in *Wright* and *Warsame* to determine whether the victim's statements to law enforcement related to an ongoing emergency: (1) was the victim describing events as they were actually happening, rather than describing past events; (2) would a reasonable listener recognize that the victim was facing an ongoing emergency and seeking aid rather than just telling a story; (3) were the questions and answers designed to resolve a present emergency rather than learn about past events; and (4) how formal was the interview as evaluated by the victim's demeanor and the environment in which she found herself."

People v. Dominguez, 382 Ill.App.3d 757, 888 N.E.2d 1205, 321 Ill.Dec. 272 (Ill. App. 2 Dist. May 14, 2008) – "The Illinois Supreme Court fashioned the United States Supreme Court's analysis of testimonial evidence into a two-component test ... [T]he two components are that statements (1) must be made in a solemn fashion and (2) must be intended to establish a particular fact. *Stechly*, 225 Ill.2d at 281-82."

State v. Chun, 194 N.J. 54, 943 A.2d 114 (N.J. Mar 17, 2008) – "the essential elements of testimonial evidence are a report of a past event, given in response to police interrogation, with the purpose of establishing evidence that a defendant committed an offense."

U.S. v. Mendez, 514 F.3d 1035 (10th Cir. Jan 24, 2008) – "That a piece of evidence may become 'relevant to later criminal prosecution' does not automatically place it within the ambit of 'testimonial.' At no point did the author keep the drug ledger for the primary purpose of aiding police in a criminal investigation, the focus of the *Davis* inquiry. Under Mendez's reading of *Crawford* and *Davis* any piece of evidence which aids the prosecution would be testimonial and subject to Confrontation Clause scrutiny. Such an interpretation is antithetical to the logic of the Confrontation Clause, the Supreme Court's precedent, and this circuit's case law. It therefore must fail."

State v. Sanchez, 341 Mont. 240, 177 P.3d 444, 2008 MT 27 (Mont. Jan 31, 2008) – "Thus, to determine whether a witness bears testimony, the Court finds significant the statement's purpose, the statement's context, and the audience the statement is intended to reach."

State v. Brown, 173 P.3d 612 (Kan. Dec 07, 2007) –

"(1) Would an objective witness reasonably believe such a statement would later be available for use in the prosecution of a crime?

(2) Was the statement made to a law enforcement officer or to another government official?

(3) Was proof of facts potentially relevant to a later prosecution of a crime the primary purpose of the interview when viewed from an objective totality of the circumstances, including circumstances of whether

(a) the declarant was speaking about events as they were actually happening, instead of describing past events;

(b) the statement was made while the declarant was in immediate danger, i.e., during an ongoing emergency;

(c) the statement was made in order to resolve an emergency or simply to learn what had happened in the past; and

(d) the interview was part of a governmental investigation; and

(4) Was the level of formality of the statement sufficient to make it inherently testimonial; e.g., was the statement made in response to questions, was the statement recorded, was the declarant removed from third parties, or was the interview conducted in a formal setting such as in a governmental building?"

Dixon v. State, 244 S.W.3d 472 (Tex. App.-Hous. Nov 29, 2007) – "We have identified the following principles as guidance in determining whether statements are testimonial in nature: (1) testimonial statements are official and formal in nature, (2) interaction with the police initiated by a witness or the victim is less likely to result in testimonial statements than if initiated by the police, (3) spontaneous statements to the police are not testimonial, and (4) responses to preliminary questions by police at the scene of the crime while police are assessing and securing the scene are not testimonial."

Collins v. State, 873 N.E.2d 149 (Ind. App. 2007) – "In concluding that the statements at issue in *Davis* were not testimonial, the Court considered several factors: (1) whether the declarant was describing past events or current events, (2) whether the declarant was facing an ongoing emergency, (3) whether the questions asked by law enforcement were such that they elicited

responses necessary to resolve the present emergency rather than learn about past events, and (4) the level of formality of the interrogation. [FN2] FN2: We do not mean to suggest that the four factors relied upon by the *Davis* court represent an exhaustive list, that all four will be relevant in all cases, or that they represent 'elements' that must all be satisfied before testimony can be determined to be nontestimonial.

In re T.T., __ N.E.2d __, 2007 WL 2579869 (Ill. App. 1 Dist. Sep 07, 2007), opinion withdrawn, (Jan 22, 2008)–

State v. O'Maley, 932 A.2d 1 (N.H. 2007), cert. denied, No. 07-7577 (June 29, 2009), cert. denied, No. 07-7577 (June 29, 2009), overruled in part by State v. Dilboy, 999 A.2d 1092, 160 N.H. 135, 139-142 (N.H. 2010) – "Like other courts which have considered the issue of what makes a statement testimonial, we believe it would be fruitless to attempt to provide an exhaustive list of factors which may potentially enter into the 'testimonial' calculus and the weight to be accorded them." *Stechly*, 870 N.E.2d at 363. "Each case must be resolved on its own merits, and a pertinent factor in one case may not carry much weight in another." *Id.* [¶] However, we agree with the court in *Geier* that the circumstances under which an out-of-court statement is generated is the "critical inquiry." *Geier*, 161 P.3d at ----. We also agree that a crucial factor in determining whether a statement is testimonial or not is whether it represents "the documentation of past events" or "the contemporaneous recordation of observable events." *Id.* at ----; *see Davis*, 126 S.Ct. at 2278. [¶] We believe that two other factors are also important; the first is whether the statement was prepared in a manner resembling ex parte examination. *See Michels v. Com.*, 624 S.E.2d 675, 680 (Va.Ct.App.2006). [¶] The second factor we believe is important is whether the statement is an accusation."

People v. Thomas, 2007 WL 2430009 (Cal. App. 2 Dist. Aug 29, 2007) (unpub) – "A statement is testimonial only if it is (1) made to a law enforcement officer, or by or to a law enforcement agent; (2) describes a past fact related to criminal activity; and (3) is for possible use at a later trial. (*People v. Geier, supra*, 41 Cal.4th at p. 605.)"

Lollis v. State, 232 S.W.3d 803 (Tex.App.-Texarkana 2007) – "Various factors have been used in determining whether the primary purpose of a statement was to get or give testimony or to accomplish some other purpose. The following factors are illustrative of the inquiry, but not exhaustive: (A) whether the statement was made in a formal and structured setting; (B) the purpose of the interrogator; (C) whether the statement was spontaneous (e.g., "plea for assistance") or elicited by others; (D) whether the police or the declarant initiated the conversation; (E) the sophistication and maturity of the declarant; (F) whether the declarant was a victim or an observer; (G) whether the statement was made to a uniformed police officer, a governmental agent, or a friend or acquaintance; (H) the degree to which law enforcement was involved in obtaining the statement; (I) whether the statement involved more than a routine and objective cataloging of unambiguous factual matters; and (J) where the statements were made (i.e., the declarant's house, a squad car, or the police station)." (citations omitted)

State v. Krasky, 736 N.W.2d 636 (Minn. 2007) – quoting earlier cases which provided " a list of eight nonexclusive factors that are relevant to our review: '(1) whether the declarant was a victim or an observer; (2) the declarant's purpose in speaking with the officer (e.g., to obtain assistance); (3) whether it was the police or the declarant who initiated the conversation; (4) the location where the statements were made (e.g., the declarant's home, a squad car, or the police

station); (5) the declarant's emotional state when the statements were made; (6) the level of formality and structure of the conversation between the officer and declarant; (7) the officers' purpose in speaking with the declarant (e.g., to secure the scene, determine what happened, or collect evidence); and (8) if and how the statements were recorded."

Martinez v. State, 236 S.W.3d 361 (Tex. App.-Fort Worth July 19, 2007) – "[In *Davis*,] [t]he Court stated that the declarant's statements were not testimonial because (1) she was describing events as they were actually happening rather than past events, (2) any reasonable listener would recognize that the declarant was facing an ongoing emergency, (3) the nature of what was asked and answered, when viewed objectively, was such that elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn what had happened in the past, and (4) the declarant was frantically answering the 911 emergency operator's questions over the phone, in an environment that was not tranquil. ... So, from *Davis*, we learn that there are at least four factors we may consider when determining whether a statement is testimonial or not, and the timing, purpose, and setting of the statement can be relevant considerations. ... Consistent with this holding, in determining whether statements are testimonial, Texas courts generally have looked to the degree of formality of a declarant's interaction with police, the purpose and structure of police questioning, and the likelihood that the declarant expects that the statements could be used in a criminal prosecution."

People v. Geier, 41 Cal.4th 555, 161 P.3d 104, 61 Cal.Rptr.3d 580 (Cal. 2007), cert. denied, No. 07-7770 (June 29, 2009) – "An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*."

– "There is no question that the DNA report was requested by a police agency. Even if the employees of Cellmark are not themselves members of law enforcement, they were paid to do work as part of a government investigation; furthermore, it could reasonably have been anticipated that the report might be used at a later criminal trial. [Biologist] Yates's observations, however, constitute a contemporaneous recordation of observable events rather than the documentation of past events. That is, she recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks. "Therefore, when [she] made these observations, [she]--like the declarant reporting an emergency in *Davis*--[was] 'not acting as [a] witness []; and [was] 'not testifying.' " (*United States v. Ellis, supra*, 460 F.3d at pp. 926-927.)"

– "While we have found no single analysis of the applicability of *Crawford* and *Davis* to the kind of scientific evidence at issue in this case to be entirely persuasive, we are nonetheless more persuaded by those cases concluding that such evidence is not testimonial, based on our own interpretation of *Crawford* and *Davis*. For our purposes in this case, involving the admission of a DNA report, what we extract from those decisions is that a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial. ... As we read *Davis*, the crucial point is whether the statement represents the contemporaneous recordation of observable events."

U.S. v. Foerster, 65 M.J. 120 (U.S. Armed Forces Jun 20, 2007) – "After *Davis*' addition of the contextual 'primary purpose' analysis to the testimonial/nontestimonial inquiry, this Court decided *Rankin*. In *Rankin*, we identified several factors 'relevant in distinguishing between testimonial and nontestimonial hearsay made under circumstances that would cause an objective witness to reasonably believe that the statement would be available for use at a later trial.' 64 M.J. at 352. Those factors include: (1) whether the statement was elicited by or made in response to law enforcement or prosecutorial inquiry; (2) whether the statement involved more than a routine and objective cataloging of unambiguous factual matters; and, (3) whether the primary purpose for making, or eliciting, the statements was the production of evidence with an eye toward trial. *Id.*"

Zapata v. State, 232 S.W.3d 254 (Tex. App.-Hous. 2007) – superseding withdrawn prior opinion issued May 17, 2007) – "Guided by the principles set forth in *Davis* and *Crawford*, this Court has noted that, 'in determining whether statements are testimonial, Texas courts generally have looked to the degree of formality of a declarant's interaction with police, the purpose and structure of police questioning, and the likelihood that the declarant expects that the statements could be used in a criminal prosecution.' *Cook*, 199 S.W.3d at 497-98."

U.S. v. Gardinier, 65 M.J. 60, 2007 WL 1650053, *2+ (U.S. Armed Forces Jun 06, 2007) – " In *Rankin*, we identified several factors that could be considered when distinguishing between testimonial and nontestimonial hearsay under these circumstances. 64 M.J. at 352. Those factors include: (1) was the statement elicited by or made in response to law enforcement or prosecutorial inquiry?; (2) did the statement involve more than a routine and objective cataloging of unambiguous factual matters?; and (3) was the primary purpose for making, or eliciting, the statement the production of evidence with an eye toward trial? *Id.* (C.A.A.F. 2007) (citation and quotation omitted). In undertaking this factors approach, our goal is an objective look at the totality of the circumstances surrounding the statement to determine if the statement was made or elicited to preserve past facts for a criminal trial."

People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333, 312 Ill.Dec. 268 (Ill. 2007) – "[T]here would appear to be two components to a 'testimonial' statement. First, it must be made in solemn fashion. ... The second requirement is that the statement must be intended to establish a particular fact."

People v. Cage, 40 Cal.4th 965, 155 P.3d 205, 56 Cal.Rptr.3d 789 (Cal. 2007) – "We derive several basic principles from *Davis*. First, as noted above, the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. [p. 803] Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony--to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency,

rather than to produce evidence about past events for possible use at a criminal trial." (footnotes omitted)

State v. Mechling, 633 S.E.2d 311, 321-322 (W. Va. 2006) – "We believe that the Court's holdings in *Crawford* and in *Davis* regarding the meaning of 'testimonial statements' may therefore be distilled down into the following three points. First, a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Second, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency. And third, a court assessing whether a witness's out-of-court statement is 'testimonial' should focus more upon the witness's [322] statement, and less upon any interrogator's questions."

Judicial Expressions of Despair

(category added Dec. 2011)

Crawford prompts remarkably frank complaints from judges.

State v. Dotson, 450 S.W.3d 1 (Tenn. 2014) cert. denied, 135 S.Ct. 1535 (Mar. 9, 2015) – "Given the uncertainty that has existed in Confrontation Clause jurisprudence since *Crawford*, and in particular the lack of clarity regarding expert reports and testimony, which was actually exacerbated by the splintered decision in *Williams*, we conclude that the defendant has failed to establish that a clear and unequivocal rule of law was breached."

People v. Richter, 977 N.E.2d 1257, 2012 IL App (4th) 101025, 365 Ill. Dec. 158 (Ill. App. Ct. 4th Dist. 2012), cert. denied, 81 U.S.L.W. 3512 (2013) – "[¶ 137] Since the Supreme Court first explained the concept of testimonial hearsay eight years ago, courts nationwide have struggled to understand *Crawford* and its progeny and to properly apply them. ... [¶ 140] ... we cannot hold the rules of evidence in abeyance until such time—if ever—the United States Supreme Court chooses to again address this issue to provide clarification."

People v. Barba, 215 Cal.App.4th 712, 155 Cal. Rptr. 3d 707, 728 (Cal. App. 2d Dist. 2013) cert. denied, 134 S. Ct. 628 (U.S. 2013) – "Making sense out of the case law in this area is to some extent an exercise in tasseomancy." – that is, reading tea leaves

United States v. Pablo, 696 F.3d 1280 (10th Cir. 2012) – "we need not decide the precise mandates and limits of *Williams*, to the extent they exist."

State v. O'Cain, 169 Wn. App. 228, 279 P.3d 926 (Wash. Ct. App. 2012) – "[¶11 If it is possible for jurisprudence to be in an uproar, the case law development of the Sixth Amendment confrontation clause [*235] has been in the juristic version of such a state for the past eight years."

In re Pers. Restraint of Hacheney, 169 Wn. App. 1, __ P.3d __ (Wash. Ct. App. 2012) (substituted opinion) – "¶33 We write further to address the general lack of clarity in current confrontation clause jurisprudence were we to consider Hacheney's claim for relief under the confrontation clause in light of the emerging law on the issue. ... ¶38 Under *Crawford*'s analysis, our legal inquiry begins to resemble the old-fashioned game of 'telephone,' as we must attempt to reconstruct the investigation, chain of custody, and sequence of testing from beginning to end, asking who knew what and when."

Commonwealth v. Allshouse, 36 A.3d 163, 165-190 (Pa. 2012) (Saylor, J., concurring) – "I join the majority opinion, as I did the prior one in this case, while again crediting the majority author for doing the best job possible in light of the 'many open questions in the wake of the immense shift in Confrontation Clause jurisprudence heralded by *Crawford*[,] leav[ing] lower-tier federal courts and state courts in a difficult position in terms of predicting the appropriate limits of this critical Sixth Amendment provision, as newly construed."

State v. Benefield, 2012 Conn. Super. LEXIS 238, 1-30 (Conn. Super. Ct. Jan. 10, 2012) (unpub) – "In light of this somewhat confusing Supreme Court precedent and this court's duty now to apply it, it is perhaps an understatement to say that the law in this area is evolving; and, as the dissenting Justices in *Melendez-Diaz* predicted and in *Bullcoming* reiterated, trial judges must, to an extent, 'guess what future rules th[e] Court will distill from the sparse constitutional text . . . [and] struggle to apply an amorphous, if not entirely subjective, highly context-dependent inquiry involving open-ended balancing."

Nardi v. Pepe, 662 F.3d 107 (1st Cir. Mass. 2011) (habeas) – "Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez-Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. ... no one can be certain just what the Supreme Court would say about that issue today."

People v. Fackelman, 489 Mich. 515, 802 N.W.2d 552 (Mich. 2011), cert. denied, 181 L. Ed. 2d 483 (Nov. 28, 2011) – "While the dissent's test, in our judgment, constitutes a not-unreasonable attempt to synthesize several very-difficult-to-synthesize Confrontation Clause decisions of the Supreme Court, the test must be recognized for what it is— an attempt to accord meaning to some very tortuous jurisprudence. ... We are not unsympathetic to the dissent's inability to fashion a single all-purpose Confrontation Clause test from recent Supreme Court decisions. These decisions seem not entirely consistent, they employ varying constitutional tests and formulations for discerning Confrontation Clause violations, they are lengthy and susceptible to having their language taken out of context, and the justices are sharply divided in these decisions, making it sometimes difficult to know which propositions of constitutional law have garnered the support of a majority of the Court."

Sandefur v. State, 945 N.E.2d 785, 789 n.1 (Ind. Ct. App. 2011) – "We acknowledge that the testimonial-nontestimonial dichotomy created by the U.S. Supreme Court has done little to provide guidance to practitioners or trial courts, but it is the structural construct within which issues such as this must be decided for Sixth Amendment purposes."

State v. Duncan, 2011 ND 85, ¶¶ 14-15, 796 N.W.2d 672 (N.D. 2011) – "[I]nterpretation of the confrontation clause has been anything but consistent since the 2004 *Crawford* decision. [cites] *Crawford* itself has been cited in more than 27,000 cases, periodicals and briefs. ... *Davis* has

been cited more than 5,200 times. ... This large and highly uncertain body of confrontation clause law makes resolution of the underlying issue difficult."

Classic Testimonial Statements

(category added March 2009)

(This category is for cases that do no more than declare obviously testimonial statements testimonial.)

State v. Gentry, 439 N.J. Super. 57, 106 A.3d 552 (App. Div. 2015) – "absent exceptions not present here, a witness's statement resulting from a police interrogation constitutes testimonial hearsay."

People v. Beato, 124 A.D.3d 516, 3 N.Y.S.3d 6 (N.Y. App. Div. 2015) – "an officer testified that two of the persons who made apparent drug purchases from defendant and his alleged accomplices told the officer that they had, in fact, purchased drugs but had swallowed and thereby disposed of them. These claimed purchasers were never identified by name." – testimonial [though dissent would have permitted it as background]

State v. Jackson, 410 S.C. 584, 765 S.E.2d 841 (S.C. App. 2014), reh'g denied (Dec. 17, 2014) – "Canty agrees to speak with the officers, and between January 13 and 25, he gave six statements." – insufficient redaction, *Bruton* violation

United States v. Brooks, 772 F.3d 1161 (9th Cir. 2014) – "Inspector Agster testified regarding his communication with the post office supervisor" about an ongoing investigation – "we conclude that the prosecution introduced statements by the *1171 postal supervisor that were testimonial and offered for their truth."

People v. Lucas, 60 Cal.4th 153, 177 Cal.Rptr.3d 378, 333 P.3d 587 (Cal. 2014), cert. pet. filed – "After her husband's arrest, Shannon made her statement to a law enforcement officer while being questioned at a police station. ... It seems apparent that Shannon's statement was testimonial for confrontation purposes."

U.S. v. Shaw, 758 F.3d 1187 (10th Cir. 2014) – "Statements made during police interrogation, such as the one made by Beadles, are testimonial."

State v. Berniard, 327 P.3d 1290, 1292-94 (Wash. App. Div. 2 2014) – statements made by co-perpetrators during formal interviews: "¶ 42 As the State properly concedes, the statements at issue here qualify as testimonial..."

People v. Henry, __ N.W.2d __, 305 Mich. App. 127 (Mich. App. 2014) – "A statement by a confidential informant to the authorities generally constitutes a testimonial statement."

Staples v. Commonwealth, __ S.W.3d __, 2014 WL 1511385 (Ky. 2014) – "Staples also objected to the introduction during the lead detective's testimony of portions of an audio recording the detective made during his interview of Garcia. ... The Commonwealth concedes that the introduction of [co-perpetrator] Garcia's clearly testimonial hearsay statements regarding

Staples violated Staples's Sixth Amendment right to confront and to cross-examine the witnesses against him."

Johnson v. State, ___ So.3d ___, 2014 WL 971542 (Miss. 2014) – "¶ 2. The search warrants and accompanying documents [*i.e.*, affidavits] were introduced by the State and admitted as substantive evidence at trial. ... ¶ 12. ... We therefore find that admission of such statements at trial offends the Confrontation Clauses of our federal and state constitutions."

State v. Augustine, 133 So. 3d 148, 150 (La. App. 4th Cir. 2014) – statements taken by detectives investigating a shooting are testimonial

U.S. v. Duron-Caldera, 737 F.3d 988 (5th Cir. 2013) – "The government has not met its burden in this case to prove that the Serrato Affidavit is nontestimonial. In describing the 'core class of testimonial statements,' the Court in *Crawford* mentions affidavits twice."

Lane v. State, 997 N.E.2d 83, 85-87 (Ind. App. 2013) transfer denied, 2014 WL 292068 (Ind. 2014) – "police had learned during an interview with Obie Davis (Lane's cousin) that the 678 number was affiliated with Lane ... The record indicates that Lane was the primary suspect within an hour or two of the shooting and well before Detective Melton interviewed Davis. The purpose of the interview was to gather evidence and to locate Lane. Further, there was no ongoing emergency when Davis was formally questioned several days after the shooting. The statement was clearly testimonial."

People v. Andujar, 105 A.D.3d 756, 963 N.Y.S.2d 667 (N.Y. App. Div. 2d Dep't 2013) – "the trial court allowed the prosecutor to elicit, from a detective, the statement of a nontestifying codefendant that the defendant was in the codefendant's vehicle on the night of the incident. As the People correctly concede, this violated the defendant's right of confrontation..."

Burdette v. State, 110 So. 3d 296, 297-306 (Miss. 2013) – "[¶ 11] [Detective] Williford testified to efforts made to verify that the nine-millimeter Sig Sauer handgun, which undisputedly was the weapon used in the homicide, was able to fire .380 casings. Williford stated that 'we contacted the company that manufactured it and they definitely agreed with that and were in the process of sending us a letter and we never received the letter stating that it does shoot both bullets.' ... [¶ 23] The purported statements of unidentified persons at the company constituted hearsay, and — since it is unclear who contacted the company — perhaps double hearsay and its admission resulted in a violation of the Confrontation Clause."

State v. Larsen, 2013 ME 38, 65 A.3d 1203 (Me. Mar. 28, 2013) – "statements such as those made by Larsen's son during police interrogation well after the events that led to the burglary and theft charges are testimonial statements for purposes of the Confrontation Clause..."

Colton v. State, 292 Ga. 509, 739 S.E.2d 380 (Ga. 2013) – "Thus, in light of the United States Supreme Court's decision in *Crawford*, because the co-defendant's initial statement to police here was testimonial in nature, the statement was inadmissible in light of Colton having had no opportunity to cross-examine the co-defendant. The fact that the co-defendant's initial statement was non-custodial is irrelevant..."

People v Andujar, 101 A.D.3d 1039, 956 N.Y.S.2d 161 (N.Y. App. Div. 2d Dep't 2012) – "over the defendant's objection, the trial court allowed the prosecutor to elicit, from a detective, the statement of a nontestifying codefendant that the defendant was in the codefendant's vehicle on the night of the incident. As the People correctly concede, this violated the defendant's right of confrontation..."

People v Class, 101 A.D.3d 1041, 956 N.Y.S.2d 159 (N.Y. App. Div. 2d Dep't 2012) – "As the People correctly concede, a nontestifying codefendant's statement to the police that the defendant was in the codefendant's vehicle shortly before the subject incident occurred constituted testimonial hearsay..."

C.L.H. v. State, __ So.3d __, 2012 Ala. Crim. App. LEXIS 115, 1-11 (Ala. Crim. App. Dec. 14, 2012) – "The State also offered an out-of-court statement given by A.R. to police. ... [A.R.] did not testify... A.R.'s statement established that H.S.'s girlfriend was present when the burglary was planned and that H.S.'s girlfriend participated in the burglary by driving the men to the apartment in her Honda. The State offered evidence establishing that C.L.H. is H.S.'s girlfriend and that she drives a Honda." – ergo, violation

United States v. Shores, 700 F.3d 366 (8th Cir. Mo. 2012) – "Shores next argues the Government violated his Sixth Amendment Confrontation Clause rights because he did not have an opportunity to cross-examine the CI whom Detective Boettigheimer identified as the source of the initial tip that Shores was involved "with drugs and guns. ... The CI's statement clearly falls within the type of out-of-court statement categorized as 'testimonial'."

McNaughton v. State, 290 Ga. 894, 894-895, 725 S.E.2d 590 (Ga. 2012) – "The State correctly concedes that Frazier's statement to police during the investigation of Tucker's murder is testimonial in nature and that it was improperly admitted because Jackson could not confront Frazier, who died before the trial commenced."

People v. Livingston, 274 P.3d 1132, 140 Cal. Rptr. 3d 139, 53 Cal. 4th 1145, 1149-1164 (Cal. 2012) – "the prosecution sought to present a videotape of a police interview with Markius Walker, who had died by the time of trial. n6 Defendant objected. After a hearing, the court overruled the objection and admitted the tape, which was later played to the jury. ... Defendant contends admitting the tape violated his right to confront witnesses under the Sixth Amendment to the United States Constitution. He is correct, as United States Supreme Court decisions postdating the trial have made clear."

Miller v. State, 289 Ga. 854, 717 S.E.2d 179, 2011 Fulton County D. Rep. 3176 (Ga. 2011) – "Both appellants assert that their Sixth Amendment rights to confront the witnesses against them were violated when the trial court allowed Raul Palomino, a Florida Circuit Court judge, to testify to the contents of three petitions for temporary protective injunctions that were filed in the Florida court in which he presided. ... At trial, the State provided Judge Palomino with copies of Miranda's two petitions, and he was asked to read the allegations into evidence. ... the sworn statements were testimonial in nature."

State v. Parker, 350 S.W.3d 883, 887-903 (Tenn. 2011) – "Ms. Lackey's statements to Deputy Benton were testimonial, and the State concedes this point in its brief to this Court. By the time Ms. Lackey was speaking with Deputy Benton, there was no longer an ongoing emergency. Ms.

Lackey was describing past events to a law enforcement officer and she was answering questions designed to help apprehend her attacker."

Corbin v. State, 74 So. 3d 333, 335-339 (Miss. 2011) – "Approximately one month after the wreck, [Investigator] Castleberry received a phone call and learned that Henry, the driver of the green Expedition, was no longer on life support, and that he was able to speak about the wreck. ... Henry died from the injuries he had sustained in the wreck approximately six months after the recorded interview. At trial, and over a hearsay objection by defense counsel, the tape was played for the jury and admitted into evidence. ... Henry's statement to Castleberry implicating Corbin as the driver who hit the Expedition and the person responsible for the wreck certainly qualifies as testimonial under the core class of statements enumerated in *Crawford*."

State v. Lahai, 128 Conn. App. 448, 449-477, 18 A.3d 630 (Conn. App. Ct. 2011) – "A police report is a quintessential example of an extrajudicial statement contained in a formalized testimonial material. It is signed by the attesting officer under penalty of law. It is prepared 'with an eye toward prosecution'; [cites]; and it is inherently accusatory." [NOTE: Do police officers ever handle calls that don't result in prosecutions or even accusations? What the author means is: "police reports that contain accusations are inherently accusatory," which I think we can all agree with.]

State v. Payne, 2011 MT 35, 359 Mont. 270, 248 P.3d 842 (Mont. 2011) – prosecution for failure to register as sex offender after moving to Montana from Connecticut – "The testimony delivered by Merifield at trial was obtained when she called the Connecticut authorities during her investigation of Payne. The "declarant" in this case is the Connecticut official with whom Merifield spoke. Presumably, upon reaching "the declarant," Merifield identified herself as a Missoula Police Department detective conducting an investigation and asked about the status of Payne's Connecticut registration. She was told that Payne was a former registrant but that his Connecticut registration was not current. She testified to the same at trial. While Merifield did not repeat the declarant's words verbatim on the witness stand, the fact remains that the statement of the Connecticut official during the inquiry—that Payne was not in compliance with Connecticut registration requirements—was made knowingly to a government official for the purpose of creating evidence, and then presented at trial for the truth of the matter asserted. As such, it falls squarely within the analysis of Mizenko. Under these circumstances, Merifield's statements pertaining to Payne's Connecticut registration were testimonial hearsay."

Morris v. State, 418 Md. 194, 13 A.3d 1206 (Md. 2011) – procedurally bizarre case (plus an opinion with an epigraph from Don Henley) but the statements at issue were made by a suspect to a detective in a stationhouse interview

People v Nesbitt, 2010 NY Slip Op 7568, 77 A.D.3d 854, 910 N.Y.S.2d 471 (N.Y. App. Div. 2d Dep't 2010) – "a detective's testimony as to conversations between the police and an alleged accomplice" was improperly admitted "as it directly implied that the alleged accomplice, who did not testify at trial, identified the defendant as the perpetrator"

State v. Hull, 788 N.W.2d 91, 100-101 (Minn. 2010) – "[Theft victim] Wilczek's naming of suspects to the police officer investigating the theft was a testimonial statement under *Crawford*."

Stovall v. State, 287 Ga. 415, 696 S.E.2d 633, 2010 Fulton County D. Rep. 2082 (Ga. June 28, 2010) – "As part of its case in chief and over the objection of appellant, the State played for the jury a redacted version of a videotaped interview police conducted with a woman who was present with the co-indictee in the apartment visited by appellant and his brother. The woman did not testify at appellant's trial.... Although appellant's trial took place prior to the date *Crawford* was decided, the *Crawford* decision is applicable to all cases pending on direct review or not yet final. [cite] It was error to admit the woman's statement to police."

City of Garfield Heights v. Winbush, 187 Ohio App. 3d 302, 2010 Ohio 1658, 931 N.E.2d 1148 (Ohio Ct. App., Cuyahoga County Apr. 15, 2010) – speeding & eluding case – "Officer Marks was able to locate and visit the home of the vehicle's registered owner, Charletta Peterson. Peterson indicated that she had loaned her car to someone name Fred, whom she had met two months earlier. Peterson visited the police station later that day and indicated that Fred had called her and apologized for the chase and told her where she could find her car. ... Peterson's statements to Officers Marks and Baon, as well as her subsequent written statement, which was admitted into evidence were clearly testimonial."

People v. Hagos, 2009 Colo. App. LEXIS 1868, 10-65 (Colo. Ct. App. Oct. 29, 2009), cert. denied 2010 Colo. LEXIS 679 (Sept 13, 2010) (unpub) – "Prim did not testify for the prosecution at defendant's trial because he exercised his Fifth Amendment rights. However, the trial court allowed the police officer who took Prim's confession to summarize what Prim admitted, including the fact that he killed the victim. [¶] The People concede this evidence of Prim's confession was testimonial hearsay because it was made during a police interrogation for the purpose of gathering information for a criminal prosecution."

State v. Cibelli, __ A.2d __, 2009 WL 1635250 (N.J. Super. A.D. Jun 12, 2009) – "When asked what he found out at the YMCA, [Detective] Bataille stated that it "was not the case" that defendant and Tania had met there. He began to describe the information a secretary obtained from computer records when defense counsel objected on hearsay grounds." – court overruled, and even asked its own question to clarify the hearsay

State v. Haggblom, __ P.3d __, 2009 WL 1458461 (Or.App. May 27, 2009) – police interviewed victim 6 hours after assault

Stanley v. Commonwealth, __ S.W.3d __, 2009 WL 1348157 (Ky. App. May 15, 2009) – "By the detective testifying to the statements of the victim that he was robbed, that the robbery occurred at Stanley's apartment and that based on what the victim told the detective the day after the robbery, ... the jury was given the statements of the victim as to "what happened" with the primary purpose to establish criminal liability without Stanley having the opportunity to cross-examine the witness accusing her." – [NOTE: Although this is a published opinion, the offending statements are not set out.]

State v. Busch, 2009 WL 981677 (Kan. App. Apr 10, 2009) (unpub) – witness reported that DUI defendant offered him \$100 to say he was driving – "We find it hard to imagine that a reasonable person would approach a law enforcement officer and report an attempt to suborn perjury in the very case the officer had investigated and not expect that statement to wind up in court."

U.S. v. Clayton, ___ M.J. ___, 2009 WL 805087 (U.S. Armed Forces Mar 26, 2009) – German police report

Daly v. Burt, ___ F.Supp.2d ___, 2009 WL 804926 (E.D. Mich. Mar 25, 2009) (habeas) – co-defendant's statement to police, admitted in pre-*Crawford* trial as statement against interest

State v. Madigosky, 291 Conn. 28, 966 A.2d 730 (Conn. Mar 31, 2009) – "In the present case, the state concedes that introduction of the [witness's] statement violated the defendant's confrontation rights because it was testimonial, as a consequence of police interrogation, and the defendant had not had an opportunity to cross-examine the declarant."

Seaton v. State, 272 S.W.3d 854, 101 Ark.App. 201 (Ark.App. Jan 30, 2008) – "There can be no dispute that Pope's statement was testimonial in that it was given at the behest of law enforcement officers in their attempt to solve a murder case, and it caused Pope to bear witness against her brother."

In re A.J.W., 2008 WL 4471658 (N.C.App. Oct 07, 2008) (unpub) – "The statements by Seeds and Nackley unquestionably constituted "testimonial statements" since they were in response to interrogation by law enforcement officers in the course of their investigation of the breaking and entering and larceny at the convenience store."

Is Official Involvement Required?

(see also next category and part 12, Status of Forensic Interviewer)

State v. Wade, 346 P.3d 838, 848-49 (Wash. Ct. App. 2015) – this case finds that a conversation between two bank employees was testimonial, but the court doesn't even recognize the private nature of the conversation as an issue

U.S. v. Parnell, 32 F.Supp.3d 1300 (M.D. Ga. 2014) (pretrial) – prosecution for sale of salmonella-contaminated peanuts – "the Court concludes that both categories of microbiological testing records are nontestimonial. Documents in the first category of microbiological testing results were produced at the request of PCA or its customers. Thus, unlike every post-*Crawford* Supreme Court case finding a Confrontation Clause violation, the records were produced at the request of private entities, not law enforcement."

State v. Rollins, 760 S.E.2d 529, 549-50 (W. Va. 2014) – "Despite Mr. Rollins's position to the contrary, the statements in question are not testimonial. ... The statements in this case were made to Mr. Thompson, a non-official and non-investigatorial witness, and the statements were not made in conjunction with a governmental investigation."

People v. Hajek, 58 Cal.4th 1144, 171 Cal.Rptr.3d 234, 324 P.3d 88, 142 (Cal. 2014) – "Hajek's conversation with Moriarty cannot be deemed testimonial within the meaning of *Crawford* because it was not a conversation involving an agent of the police."

State v. Vasquez, 311 P.3d 1115, 1117-22 (Ariz. App. 2d Div. 2013), review denied (May 28, 2014) – brothers named Orel and Christian were tried together for murder – after the killing, they were fugitives, eventually turned themselves in, and Orel gave a TV interview that was played at

the joint trial – held: "that video is also 'testimonial' within the meaning of *Crawford*, and therefore subject to the Confrontation Clause, because it is a 'solemn declaration ... made for the purpose of establishing or proving some fact.' [cite] In the video, Orel states his intention in granting the interview is to 'clear everything out.' His words thus acknowledge a testimonial intent ... And, although no detective was present, Orel made his statements while in custody, pending prosecution for the events that he addressed, and did so in the presence of a video camera that he knew would memorialize anything he said. ... By any measure, the video was testimonial evidence." – [NOTE: Solemn? Testimonial intent? This opinion shows how easy it is to slap labels on evidence and then analyze the labels rather than the evidence.]

United States v. Cameron, 699 F.3d 621 (1st Cir. Me. 2012) (corrected December 21, 2012) – "Yahoo! had an established process for dealing with reports of child pornography. ... If the Legal Department agreed that any images were child pornography, it then sent an electronic report [called a CP Report] to NCMEC [National Center for Missing and Exploited Children, a non-governmental agency] via the CyberTipline. ... there is strong evidence that the CP Reports were prepared with the 'primary purpose of establishing or proving past events potentially relevant to a later criminal prosecution.' ... Thus, although the CP Reports may have been created in the ordinary course of Yahoo!'s business, they were also testimonial... Although NCMEC is not officially a government entity, it receives a grant from the government, and one of the uses to which NCMEC puts this grant money is to operate the CyberTipline and forward reports of child pornography to law enforcement." [NOTE: So a report to non-law enforcement is the same as a report to law enforcement??]

People v. Richter, 977 N.E.2d 1257, 2012 IL App (4th) 101025, 365 Ill. Dec. 158 (Ill. App. Ct. 4th Dist. 2012), cert. denied, 81 U.S.L.W. 3512 (2013) – "defendant contends that (1) the court erred by admitting numerous hearsay statements the victim made to friends, family members, and coworkers ... [***P123] The primary problem with defendant's argument is that it overlooks the fact that none of Dawn's statements were made to government officials. Thus, as legal scholars have explained, those statements do not constitute testimonial hearsay." – not followed by **People v. Cleary, 2013 IL App (3d) 110610, 377 Ill. Dec. 273, 1 N.E.3d 1160, appeal pending (Mar. 2014)**

Perry v. State, 956 N.E.2d 41, 44-57 (Ind. Ct. App. 2011) – "Neither Davis nor Bryant resolved to what extent their holdings extended beyond the context of police interrogation, [cites] but lower courts have found Davis's "primary purpose" framework applicable outside the realm of explicit police questioning—and more specifically, courts have employed the primary purpose inquiry when evaluating statements by alleged victims to medical personnel, [cites]."

State v. Gurule, 2011 NMCA 63, __ N.M. __, 256 P.3d 992 (N.M. Ct. App. 2011), cert. granted (June 8, 2011) – statement by mother to son deemed testimonial – issue identified by the heading to this category not addressed

Commonwealth v. Figueroa, 79 Mass. App. Ct. 389, 946 N.E.2d 142 (Mass. App. Ct. 2011) – "Here in the Commonwealth, 'both steps of the test set forth in *Commonwealth v. Gonsalves*, [cite], continue to apply to statements made to people other than law enforcement officers."

People v. Nelson, 190 Cal. App. 4th 1453, 1456-1468 (Cal. App. 4th Dist. 2010) – "Although firefighter [and EMT] Witt was not a police officer, we agree with defendant that he could be an agent of the police for purposes of securing a testimonial statement."

State v. Larson, 788 N.W.2d 25, 37 (Minn. 2010) – "We have explained that 'statements made to non-government questioners who are not acting in concert with or as agents of the government are considered nontestimonial.'"

State v. Ahmed, 782 N.W.2d 253, 258-259 (Minn. Ct. App. 2010) – "Statements made to nongovernment questioners, who are 'not acting in concert with or as an agent of the government' are considered nontestimonial."

State v. Franklin, 308 S.W.3d 799, 802-827 (Tenn. 2010) – robbery victim asked unidentified passerby to write down license plate of fleeing robber's car, and passerby did so, which led police to robber – "we do not hold that statements between private parties unconnected to law enforcement, such as the exchange between the victim and the contractor in this case, are per se nontestimonial and thus exempt from Confrontation Clause scrutiny."

Moreno v. Yates, 2009 WL 1364096 (N.D. Cal. May 14, 2009) (unpub) (habeas) – "the statements to Frances and Valerie, who are not government officers, were not testimonial, and thus not subject to Confrontation Clause challenge at all."

People v. Ball, 2009 WL 755626 (Cal. App. 5 Dist. Mar 24, 2009) (unpub) – prison phone call – "While the participants on the telephone call heard a warning that the call was subject to monitoring and recording, a Sixth Amendment violation could be established only where " 'the police ... took some action, beyond merely listening, that was de-signed deliberately to elicit incriminating remarks.'"

State v. Gilfillan, 2009 WL 638264, 2009-Ohio-1104 (Ohio App. 10 Dist. Mar 12, 2009) (unpub) – {¶ 82} Here, we acknowledge Horner's testimony that the police and prosecution have representatives at the Advocacy Center. ... [P]olice and prosecution representation at the Advocacy Center does not make the center's employees the agents of the police when providing services to sex abuse victims. ... Therefore, we conclude that J.C.'s February 2006 interview was a non-police interrogation and that the 'objective witness' test applies."

Hartsfield v. Com., 277 S.W.3d 239 (Ky. Feb 19, 2009) "We believe their function of evidence gathering, combined with their close relationships with law enforcement, renders SANE nurses' interviews the functional equivalent of police questioning." – especially the gynecological exam, presumably – declined to follow by **State v. Hill, 236 Ariz. 162, 336 P.3d 1283, ¶ 19 (Ariz. Ct. App. 2014)**

Harris v. Com., 2009 WL 350615 (Ky. App. Feb 13, 2009) (unpub) – estranged husband "took the children to the office of Patricia Reynolds ("Reynolds"), a social worker who had been previously involved with the family in Owsley County. At that meeting, Reynolds noticed three small lesions on [5-year-old] A.H.'s arm. When asked, A.H. told Reynolds and Charles that Bridget had burned her with a cigarette." – in dicta stating: "A.H.'s statements to Reynolds were made in furtherance of the investigation of the alleged abuse and, therefore, would qualify as 'testimonial' under *Crawford*" – no police involvement at all until after the disclosure

State v. Franklin, 2009 WL 29893 (Tenn. Crim. App. Jan 05, 2009) (unpub), rev'd 308 S.W.3d 799, 802-827 (Tenn. 2010) –

State v. Jones, 197 P.3d 815 (Kan. Dec 12, 2008) – "Granted, the paramedics testified that the questioning of a patient fulfills a medical purpose by assuring the paramedic that the patient's airway remains open and by assisting in maintaining the patient's consciousness. However, that purpose does not explain the content of the questions which were asked. The fire department paramedic acknowledged that the information obtained through their questioning often helps the police where the patient has been transported from the scene quickly, before any police investigation could occur. Here, the specific questions asked were obviously designed to obtain such helpful information for law enforcement. In that light, the interview formed a part of a governmental investigation into past events." [NOTE absence of "primary purpose" analysis.]

State v. Maxwell, 2008 WL 4613878 (Tenn. Crim. App. Oct 15, 2008) (unpub) – following bar fight, future murder victim spoke to the bar's head of security, Mr. Livingston – "Because Mr. Livingston was not a law enforcement officer, the statement was not elicited for the purposes of prosecution, and because the statement was elicited in order to address an ongoing emergency situation, it was not testimonial."

James v. Marshall, 2008 WL 4601238 (C.D. Cal. Aug 13, 2008) (unpub) (habeas) – DV case – dying woman's answer to EMT's question testimonial because EMT said he was trying to help deputy, who didn't request his help and wasn't even present

People v. Ibarra, 2008 WL 4329899 (Cal. App. 6 Dist. Sep 23, 2008) (unpub) – recorded calls from prison – "*Crawford* speaks in terms of an examination by law enforcement leading to a statement. The telephone conversation here was not in any way an examination by law enforcement. No questions were asked by law enforcement. Furthermore, Ramos's statements to appellant were neither formal nor made to a governmental officer or agent. The *Davis* court held that with respect to a police interrogation conducted for the purpose of investigating a crime, the requirement of formality is met because a false statement to a police officer in the course of an investigation may result in criminal prosecution. [cite] Ramos did not risk prosecution if he lied to appellant. Nor could either appellant or Ramos be considered to have been acting as agent of the police or the prosecution." – not testimonial

Gilliam v. Com., 2008 WL 4291544 (Ky. Sep 18, 2008) (unpub) – analyzing words spoken by a seriously-injured victim of elder abuse to her daughter, and a separate statement to an EMT, as testimonial statements, without explaining what made them testimonial

Young v. State, 987 So.2d 1074 (Miss. App. Jul 29, 2008) – woman was applying for order of protection when ex-boyfriend came into police station and said he wanted to talk to her – clerk overheard the conversation – moments later ex-boyfriend killed woman – "We conclude that the statements made by Neal to Young are not testimonial under the definition established by the Mississippi Supreme Court. Even though the purported conversation took place in the lobby of the sheriff's department, we find that the statements made by Neal to Young were not given to law enforcement for purposes of prosecuting Young. In fact, the statements were overheard by law enforcement and not directed toward or given directly to law enforcement. Therefore, under

the limited definition of what constitutes a testimonial statement given to us by the United States Supreme Court and our supreme court, we must find that there is no violation of *Crawford*."

State v. Arnold, 2008 WL 2698885, 2008-Ohio-3471 (Ohio App. 10 Dist. Jul 10, 2008) (unpub) – "{ ¶ 18} ... the Supreme Court of Ohio applies different tests to determine whether or not statements are testimonial based on the identity of the questioner and the purpose of the questioning. [cite] If the questioner is a law enforcement officer or an agent thereof, the court applies the primary purpose test to determine whether the statements are testimonial. *Siler*. If the questioner is not a law enforcement officer or agent thereof, the court applies the objective witness test. *Stahl*."

De La Paz v. State, 273 S.W.3d 671 (Tex. Crim.App. Jun 18, 2008), reh'g denied (Sept. 10, 2008) – child's statements to hospital workers, no government involvement – "Whether a statement may be testimonial if made, as in this case, to a non-government employee has not yet been resolved by the Supreme Court." – but not squarely deciding issue, holding instead only that the state had failed to carry its burden of proving the statements were *non*-testimonial – in other words, non-erroneous admission of non-testimonial statements *may* be reversible error under *Crawford*, depending not on the statements themselves but on the evidence presented or proffered by the prosecution regarding their proper classification – even after prosecution prevailed in the trial court, it should have insisted on continuing to litigate the issue

Miles v. State, 259 S.W.3d 240 (Tex. App.-Texarkana Jun 03, 2008) – "The original out-of-court statement, whether made by James Epps or Miles, was not testimonial. ... The statement was not made to a police officer, but to an acquaintance. An objective witness standing in the declarant's shoes would not reasonably believe that the statement would be used at a later trial."

State v. Her, 750 N.W.2d 258 (Minn. May 29, 2008) – "But statements made to non-government questioners who are not acting in concert with or as agents of the government are considered nontestimonial."

People v. Wilburn, 2008 WL 352469 (Cal. App. 5 Dist. Feb 11, 2008) (unpub) – convenience store clerk called store owner after midnight to report robbery – "[I]f [clerk] Singh called [boss] Sandhu and calmly reported the events of that evening, in a manner similar to filling out an incident report, such a situation might have resulted in testimonial statements made with some formality for the purpose of establishing the facts of the crime." [NOTE: This dictum seems plainly wrong. No matter how calm the clerk, it still wouldn't be a statement to authorities.]

State v. Sanchez, 341 Mont. 240, 177 P.3d 444, 2008 MT 27, 27+ (Mont. Jan 31, 2008) – "In general, a declarant's statements are presumed testimonial if they are knowingly made to a police officer or government agent."

Benson v. State, 5 So.3d 653 (Ala. Crim. App. Feb 01, 2008) (Welch, J., concurring in result reached in unpublished decision) – "Whether a defendant's statement to someone who is not a law-enforcement official is testimonial hinges upon whether the individual to whom the defendant spoke is acting as an agent of law enforcement."

State v. Slater, 285 Conn. 162, 939 A.2d 1105 (Conn. Jan 22, 2008) – "[T]he mere fact that the victim's statements were not made to a police officer does not dictate whether such statements

are testimonial, [FN10] [n.10] ... [W]e decline to hold that under no circumstances can statements to individuals with no law enforcement affiliation constitute testimonial statements.

People v. Levine, 2007 WL 4248775, *15+ (Cal.App. 4 Dist. Dec 05, 2007) (unpub) – "We also reject Levine's assertion that Deborah's profession as an attorney working as a prosecutor in another state rendered Jerome's statement testimonial. There is nothing to suggest that Deborah was speaking with her father in any manner other than as a concerned daughter."

State v. Brown, 173 P.3d 612 (Kan. Dec 07, 2007) – "Is the involvement of police or other government officials a critical factor? In other words, do the holdings in *Crawford* and *Davis* require an "official inducement" for a statement to be testimonial? ... Hence, while it is clear that the Court left open the question of whether statements made to government officials other than law enforcement are testimonial, it is not clear that the Court intended to leave open the question of whether statements made to nonofficials can be testimonial. Rather, there are indications that the Court intended to exclude private or casual conversations from the definition of testimonial statements. ... At a minimum, these passages indicate that there remains an open question as to whether the United States Supreme Court categorically excludes from the definition of testimonial any statement made to someone who is not a government official. ... In light of the ambiguities and uncertainties of the *Crawford* and *Davis* decisions, the unsettled nature of the case law, and the continuing debate between members of the United States Supreme Court and among legal scholars as to the efficacy of the testimonial standard and as to what test formulation best determines when that standard has been met, we will continue to approach the issue broadly under the possibility that the Supreme Court may intend for conversations between a declarant and a nonofficial to be testimonial if other aspects of the test stated in the decisions are met."

Gifford v. State, 287 Ga.App. 725, 652 S.E.2d 610, 07 FCDR 3128 (Ga. App. Oct 02, 2007) – "On December 16, 2001, Officer Christopher Hasty responded to an armed robbery call at a Valdosta gas station. The store clerk, Prahladbhai Patel," described the robbery. "Patel died of natural causes before the trial, and the trial court permitted Hasty to testify regarding Patel's statements to police following the robbery. ... [B]ecause he had no opportunity to cross-examine Patel, who was unavailable for trial, Gifford's right to confrontation was violated by the admission of Patel's statements to the officer."

Lindsey v. State, 282 Ga. 447, 651 S.E.2d 66, 07 FCDR 2953 (Ga. Sep 24, 2007) – "The evidence established that Lindsey previously had been prosecuted for the murder of 83-year-old Rosa Barnes in a drive-by shooting. Taylor testified against Lindsey in that case, which resulted in Lindsey's conviction. Lindsey's conviction was reversed on appeal to this Court, *Lindsey v. State*, 271 Ga. 657 (522 S.E.2d 459) (1999), and on retrial, he was acquitted of the shooting. Nonetheless, while Lindsey was incarcerated pending the outcome of the Barnes prosecution, he plotted with co-defendants Lawton and Charles Hankerson to kill Taylor." – Defendant and two others were convicted of subsequently killing Taylor. The ADA who prosecuted the Barnes case was permitted to testify that Taylor had told him "that by coming to testify, we were saving him [Taylor] three bullets." – "A statement is testimonial if it is made with '[t]he involvement of government officers in production of testimonial evidence.' *Crawford, supra* at 53(III)(A). Testimonial statements under *Crawford* include statements made by witnesses to government officers investigating a crime. ... Thus, Taylor's statement to the ADA, an officer of the State, was testimonial in nature; and since Taylor was unavailable, admission of the hearsay statement

violated *Crawford*." [NOTE: The opinion contains no discussion of forfeiture. It also seems unlikely that Taylor's statement was admitted for the truth, *i.e.*, that the State was saving him three bullets, but that issue isn't discussed either.]

State v. Todd, 2007 WL 2042477 (Tenn. Crim. App. July 13, 2007) (unpub) – "Richard Stern testified that he was employed by First Tennessee Bank as Vice President of Asset Recovery. ... During Stern's testimony, he said that he had taken a statement from Carmen Coats, one of the defendants. He identified a copy of the statement and, without objection, was asked to read it aloud to the jury, which he did. Stern then was asked a number of questions about the contents of the statement..." – despite the absence of government involvement, the trial court concluded the statements were testimonial – the appellate court held only: "While there may well have been a confrontation problem, it was waived."

State v. Webb, 2007-Ohio-2222, 2007 WL 1365968, *1 (Ohio App. 8 Dist. 2007) (unpub) – in dicta, stating that statements to a security guard concerning car theft were testimonial (§ 14)

State v. Jensen, 727 N.W.2d 518, ¶¶ 24, 27 (Wis. 2007) - Wife gave letter to neighbor with instructions that if anything happened to her, the neighbor should give letter to the police - the letter said: "if anything happens to me, he [her husband] would be my first suspect" – held: testimonial - "[W]e believe a broad definition of testimonial is required to guarantee that the right to confrontation is preserved. That is, we do not agree with the State's position that the government needs to be involved in the creation of the statement. We believe such a narrow definition of testimonial could create situations where a declarant could nefariously incriminate a defendant." (footnote omitted) "In light of the standard set out above, we conclude that under the circumstances, a reasonable person in Julie's position would anticipate a letter addressed to the police and accusing another of murder would be available for use at a later trial."

Grant v. State, 218 S.W.3d 225 (Tex. App.-Hous. 2007) – admissibility of school disciplinary reports – "[W]e apply the same *Crawford* analysis to descriptions of violations of disciplinary rules that we apply to descriptions of crimes. We therefore review the records at issue to determine whether the narrative descriptions of disciplinary offenses were made by witnesses against appellant for the purpose of establishing that the identified infractions of school rules actually occurred. ... After careful review, we hold that many of the entries in the records contain testimonial statements. Specifically, the descriptions of appellant's behavior and quotations of language he used are not intended merely to establish that appellant committed a disciplinary infraction, but to establish that he violated school rules by engaging in the specific behavior described."

Harris v. Quarterman, 2007 WL 470647 (S.D.Tex.,2007) (unpub) - wife killed by estranged husband – "during an interview for a protective order against Harris, Wenona told Ella Anderson, an assistant criminal district attorney from Galveston County, about prior occasions when Harris had assaulted her in the couple's household." – held: not testimonial

People v. Goldstein, 6 N.Y.3d 119, 843 N.E.2d 727, 810 N.Y.S.2d 100, 2005 N.Y. Slip Op. 09654 (N.Y. 2005) – because forensic psychiatrist had been hired by the prosecution, therefore any statements made to her by third parties, even non-accusatory statements, were automatically testimonial

People v. Brown, 363 Ill.App.3d 838, 842 N.E.2d 1141, 299 Ill.Dec.789 (Ill. App. Ct. 1st Dist. 2005) – The defendant’s confrontation rights were violated when custodial statements and prior testimony of two non-testifying co-defendants were admitted at trial. The defendant never had an opportunity to cross-examine any statements.

Mason v. State, 173 S.W.3d 105 (Tex. App. 2005) - “The appellate court found that the complainant's out-of-court oral statements [to a police officer responding to a 911 call] resulted from an "interrogation" within the meaning of the Sixth Amendment. Thus, the statements were testimonial. Moreover, even if the complainant's out-of-court oral statements were not in response to "interrogation," they were testimonial because they were 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.”

People v. King, 121 P.3d 234 (Colo. 2005) - “where, as here, a victim makes an excited utterance to a police officer, in a noncustodial setting and without indicia of formality, the statement is nontestimonial interrogation under *Crawford*.”

People v. Lee, 124 Cal. App. 4th 483 (Cal App 2d Dist 2004) – Tape recorded statements were taken of two eyewitnesses to the crime by police officers. Both witnesses were available for trial but did not appear or testify. Admitting the statements at trial violated *Crawford* because the officers were governmental agents.

Richardson v. Newland, 342 F. Supp. 2d 900 (ED Cal 2004) - Statements given to police officers by individuals who do not appear at trial are testimonial statements and require the witness to appear at trial and be subject to confrontation in order to admit the statement.

United States v. Manfre, 368 F.3d 832 (8th Cir Ark 2004) – "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."

Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177 (2004) – involving a "stop-and-identify" statute - **according to Justice Stevens' dissent**, “police questioning during a *Terry* stop qualifies as an interrogation, and it follows that responses to such questions are testimonial in nature.” [note: no other justice joins Stevens, and the other two opinions do not discuss *Crawford*]

State v. Barnes, 2005 ME 105, 854 A.2d 208 (2004) – “Defendant argued that the admission of his mother's statements to a police officer following an earlier alleged assault constituted a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. Specifically, the issue was whether the statements were "testimonial" in nature. The state supreme court concluded that the admission of the statements did not violate the Confrontation Clause for several reasons. First, the police did not seek the mother out. She went to the police station on her own. Second, her statements were made when she was still under the stress of the alleged assault. Third, she was not responding to tactically structured police questioning, but was instead seeking safety and aid. The police were not questioning her regarding known criminal activity. Thus, the interaction between defendant's mother and the officer was not structured police interrogation triggering the cross-examination requirement of the Confrontation Clause. Nor did the victim's words in any other way constitute a "testimonial" statement. Therefore, it was not obvious error for the trial court to admit the officer's testimony.”

United States v. Saner, 313 F. Supp. 2d 896, 2004-1 Trade Cas. (CCH) P74362 (S.D. Ind. 2004) - "In response to the prosecutor's questioning, Vogel [who was not in custody] made *ex parte* statements incriminating himself and Saner, which a paralegal transcribed. The prosecution now seeks to use the statements at trial against both Defendants. In other words, Vogel will "bear testimony" against Saner at his criminal trial, and Saner did not have the prior opportunity to confront him. Vogel's responses to the prosecutor's questions were testimonial statements, and admission of the statements against Saner would violate his Confrontation Clause rights under the Sixth Amendment."

United States v. Mikos, 2004 U.S. Dist. LEXIS 13650, 2004 WL 1631675, *6 (N.D. Ill. 2004) – "HHS Agents interviewed Brannon as part of a formal healthcare fraud investigation. Their purpose was to gather information for potential use against Mikos at trial, thus, the Court finds that Brannon's statements to the HHS Agents fall within the realm of testimonial statements. *See United States v. Saner*, 313 F.Supp.2d 896, 902 (N.D.Ill.2004) (holding statements made in response to questioning by Department of Justice prosecutor were testimonial)."

State v. Lewis, 360 N.C. 1, 619 S.E.2d 830 (2005), vacated and remanded, 126 S.Ct. 2983, 165 L.Ed.2d 985 (2006), on remand, 361 N.C. 541, 648 S.E.2d 824 (N.C. Aug. 24, 2007)

People v. Bryant, 2004 Mich. App. LEXIS 2244, 2004 WL 1882661 (Mich. App. 2004) (unpub), on remand, 2007 WL 67541 (Mich. App. Mar. 6, 2007), **rev'd, __ N.W.2d __, 2009 WL 1677569 (Mich. Jun 10, 2009)** –

Is Interrogation Necessary?

State v. Hurtado, 173 Wn. App. 592, 294 P.3d 838 (Wash. Ct. App. 2013) – "While the record does not show that the officer asked J.V. questions at the hospital [¶ 29] ... J.V. made her statements to the nurse while the officer was present and gathering evidence. Thus, under the test enunciated by Washington courts, J.V.'s statements were testimonial."

People v. Arauz, 210 Cal. App. 4th 1394 (Cal. App. 2d Dist. 2012) – "Pursuant to *Crawford*, out-of-court statements can be divided into police interrogations ('testimonial' hearsay) and statements in which no interrogation takes place ('non-testimonial' hearsay)."

People v Green, 92 A.D.3d 953, 939 N.Y.S.2d 520, 2012 NY Slip Op 1616(N.Y. App. Div. 2d Dep't 2012) – "even if some of the declarations retrieved from the wiretapped conversations and repeated to the jury by the law enforcement witnesses meet the definition of common-law hearsay, those declarations do not constitute testimonial hearsay, since the declarants were not subject to formal or quasi-formal questioning when they made those declarations..."

State v. Telles, 2011-NMCA-083, 150 N.M. 465, 261 P.3d 1097 (N.M. Ct. App. 2011) – secretly-recorded stationhouse conversation between co-perpetrators – "[W]e conclude that no interrogation of either Defendant or R.O. occurred where the detectives coordinated the placement of Defendant and R.O. in a room with a hidden camera, but did not question them. Because Defendant and R.O. talked freely with one another without police questioning, no police

interrogation will be recognized for Confrontation Clause purposes." – following *United States v. Smalls*, 605 F.3d 765, 767-789 (10th Cir. N.M. 2010)

Riva v. Kirkland, 2009 WL 528672 (9th Cir. Mar 03, 2009) (unpub) (habeas) – "Riva also objected at trial to the admission of the statement by the driver of the SUV: 'He was trying to shoot us, but we ducked.' ... The statement does not fit with any of the examples listed in *Crawford* or with the purpose behind them. ... The driver of the SUV was not being interrogated or making a statement that anyone was intending to preserve for trial."

State v. Williams, 2009 WL 504686 (Wash. App. Div. 1 Mar 02, 2009) (unpub) – "While police were investigating Racheal Williams' possible participation in passing a counterfeit \$20 bill, ... a man walked up [to a detective] and whispered over his shoulder, 'you might want to check the trash can.' The man gestured toward Williams and indicated 'that girl' had dropped something in the nearby trash can. The man, who was holding a Dick's food bag, walked away and remained unidentified." – held: testimonial – "the absence of formal police interrogation does not preclude the existence of a testimonial statement." [NOTE: The only authority cited is *Crawford*'s comment about the colloquial meaning of "interrogation," which the court misunderstands. See the following sub-category.]

State v. Belvin, 986 So.2d 516 (Fla. May 01, 2008) – drunk driving case involving breath test affidavit – "A statement does not have to be the product of interrogation in order for it to be testimonial." – [NOTE: No authority given for this statement.]

State v. Freeman, 2008 WL 833936 (Tenn. Crim. App. Mar 28, 2008) (unpub) – "Freeman was conveying a present sense observation. Additionally, Freeman's statement was not a response to a question, much less formal questioning by the police... Thus, we conclude that the statement was "nontestimonial;" and the rule of *Crawford v. Washington* was not offended."

People v. Sandusky, 2008 WL 723924 (Mich. App. Mar 18, 2008) (unpub) – "While we agree that [co-defendant] Allen's statement to Detective Delgreco was not made in response to interrogation, that alone does not establish that the statement was not testimonial. The statement related to a past criminal event and was made to a police officer after Allen was arrested. In this circumstance, a declarant should reasonably expect that the statement would be available for use at a later trial. Accordingly, we conclude that Allen's statement to Detective Delgreco was testimonial..."

State v. Camarena, 344 Or. 28, 36-37, 176 P.3d 380 (Ore. Jan. 25, 2008) – "As the Supreme Court made plain in *Davis* and we now reiterate, 'it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.' [cite] As we read *Davis*, that statement was intended to emphasize that statements made in situations not amounting to 'interrogation' may, depending on the circumstances, nevertheless qualify as testimonial, so that their admission would violate the Sixth Amendment if the declarant were not available to testify."

People v. Moon, 2007 WL 490949, *1 (Mich. App. 2007) (unpub) - "In this case, defendant's mother told a police officer that the southeast bedroom belonged to defendant without ever being questioned by the police. The statements were made at the scene of a police raid. While the police did not interrogate her, defendant's mother implicated her son in a crime and she could

reasonably expect that her statements would be used in a prosecutorial manner. Under these circumstances, an objective witness would reasonably believe that the statement would be available for use at a later trial."

U.S. v. Ayala, 469 F.Supp.2d 357 (W.D. Va. 2007) – "Although Pope's statements that 'his guy' would be supplying the drugs were elicited by questions posed by Agent Snedeker, a government agent, these statements were not the result of an interrogation and therefore are not testimonial."

➤ Sub-Category: The "Colloquial" Meaning of "Interrogation"

Crawford's footnote 4 reads: "We use the term 'interrogation' in its colloquial, rather than any technical legal, sense. *Cf. Rhode Island v. Innis*, 446 U. S. 291, 300-301 (1980)." This has confused a lot of judges. In most contexts, the colloquial definition of a word is broader than its technical legal meaning, and many judges assume the colloquial meaning of "interrogation" is broad, too. For instance, in *Clarke v. U.S.*, 943 A.2d 555 (D.C. Feb. 28, 2008), the court wrote: "This case, however, involves no statement made to police officers, nor one made in response to 'interrogation,' no matter how 'colloquial[ly]' defined."

But the dictionary definition of "interrogate" is actually much *narrower* than the legal definition. The online version of the *American Heritage* dictionary contains only two definitions. One is computer jargon. The other is: "To examine by questioning formally or officially. See synonyms at ask." The *Miriam-Webster New Collegiate Dictionary* (1977) has: "to question formally and systematically".

The legal definition found on the cited pages of *Innis*, by contrast, is not limited to formal questioning: "We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Crawford's footnote 4 was almost certainly intended to convey the meaning that "interrogation" under *Crawford* includes express questioning but not its "functional equivalent" – more or less the opposite of the interpretation given it by most lower court judges.

State v. Koslowski, __ P.3d __, 2009 WL 1709639 (Wash. Jun 18, 2009) – "'Interrogation' is not meant in a formal sense, but rather in a colloquial manner." – that's not what *Crawford* says

Statements that Predate the Crime (category added July 2009)

People v. Cleary, 2013 IL App (3d) 110610, 377 Ill.Dec. 273, 1 N.E.3d 1160, appeal pending (Mar. 2014) – "the victim told her friends and family that defendant had stated he would kill her if she tried to end their marriage and that she wanted to leave defendant but was afraid to do so" – he killed her – "MeLisa's statements about Cleary's threats to kill her often occurred in

conversations where she was discussing her relationship and why she was afraid to leave it; her statements could have been explanations for why she stayed in the relationship, expressions of her feelings of helplessness, or cries for help. It is not axiomatic that a reasonable person would make these statements with the intent that they be transmitted to law enforcement in the event of a subsequent crime occurring, and Cleary has cited no other evidence demonstrating such an intent."

State v. Bowling, 232 W.Va. 529, 753 S.E.2d 27 (W. Va. 2013) cert. denied, 134 S. Ct. 1772 (U.S. 2014) – like most of these cases, a woman who voiced justified fear that her ex would kill her – this case finds a whole slew of statements predating the crime, sometimes by years, to be testimonial, based on the unexamined stacked assumptions that a reasonable person would (1) know a crime would not only be committed but also (2) be prosecuted and that statements from the past would be (3) recollected, (4) repeated to authorities, and then (5) used as evidence – since only on all five assumptions can the private conversations be considered even remotely analogous to testimony – the key factor for the court seems to have been the future victim's particular choice of words, since she didn't just say she was scared of being shot in her sleep but phrased it more dramatically, asking a friend to make sure the police knew it wasn't an accident

State v. Jensen, 2011 WI App 3, 331 Wis. 2d 440 (Wis. Ct. App. 2010) – "[¶ 5] Wojt testified that just prior to Julie's death, she gave him an envelope and told him that if anything happened to her, Wojt should give the envelope to the police. ... [¶ 7] [Detective] Ratzburg testified that on the day after Julie's death, he received a sealed envelope from Wojt. [cite] The envelope contained a handwritten letter, n2 addressed to 'Pleasant Prairie Police Department, Ron Kosman or Detective Ratzburg' and bearing Julie's signature that read as follows: ... if anything happens to me, he [defendant, her husband] would be my first suspect. ... I pray I'm wrong [and] nothing happens ... but I am suspicious of Mark's suspicious behaviors [and] fear for my early demise. ... [¶ 27] After explaining that a statement is 'testimonial' if a reasonable person in the position of the declarant would objectively foresee that his or her statement might be used in the investigation or prosecution of a crime, the supreme court determined that the statements Julie made to Kosman, including the letter addressed to the police, are 'testimonial,' while the statements Julie made to her neighbor, Wojt, and her son's teacher, DeFazio, are 'nontestimonial.' Jensen, 299 Wis. 2d 267, ¶¶2, 25." – [NOTE: If a statement describing events "as they were actually happening" is nontestimonial, what should we conclude about a statement predicting future events? Shades of *Minority Report*.]

Washington v. State, 191 Md. App. 48, 94-95, 990 A.2d 549 (Md. Ct. Spec. App. 2010) – "Clark's statement to a fellow employee before either had the slightest intimation that anything was seriously amiss was obviously not testimonial."

Walker v. United States, 982 A.2d 723, 735-738 (D.C. 2009) – "'[T]he Confrontation Clause has no application' to out-of-court non-testimonial statements. Whorton v. Bockting, 549 U.S. 406, 420, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007). Testimonial statements describe past events. Davis ... Utterances that are not statements of fact, but instead are directives or 'proposal[s] of a future course of action' are non-testimonial and do not implicate the Confrontation Clause. United States v. Spotted Elk, 548 F.3d 641, 662 (8th Cir. 2008);.."

French v. Lafler, 2009 WL 799217 (E.D. Mich. Mar 24, 2009) (unpub) (habeas) – "the declarant, Ms. Thomas, could not have anticipated that her statement would be used against

Petitioner in investigating and prosecuting the crime, because the statement was made before the shooting. Ms. Thomas's statement was nontestimonial; therefore, *Crawford* does not apply."

Implied / Inadequately Redacted Statements
(see also Background Statements)

Wheeler v. State, 36 A.3d 310, 311-321 (Del. 2012) – "In each instance, the chief investigating officer, Detective Ryde, was asked by the prosecutor if after speaking with a particular named witness, he had any reason to believe that any suspect other than Wheeler was involved in the 2009 shooting of Davis. ... Detective Ryde's testimony is also a classic example of indirect hearsay. In Wheeler's case, as in Meises and Mitchell, the jury could only draw one reasonable inference from Detective Ryde's testimony: that each witness identified Wheeler as the perpetrator. Detective Ryde, in effect, repeated the substance of the three unavailable witnesses' statements to him. That indirect hearsay testimony was offered by the State to prove the truth of the matter asserted. Accordingly, we hold that the hearsay rule was violated. ... Several federal circuit courts have held that in-court testimony which communicates the substance of unavailable witnesses' statements can violate the Confrontation Clause, even when there is no verbatim account of the out-of-court statement. ... Although the jury in Wheeler's case was not told what the three unavailable witnesses said verbatim, Detective Ryde's testimony conveyed the substance. The clear inference that the State sought to elicit from Detective Ryde was that each witness identified Wheeler as the person who shot Davis. That point was emphasized in the State's opening and closing arguments to the jury. Accordingly, we hold the State violated Wheeler's Sixth Amendment right to confrontation when it introduced into evidence the substance of inadmissible hearsay statements to an investigating police detective."

Ocampo v. Vail, 649 F.3d 1098, 1099-1118 (9th Cir. Wash. 2011) – "The state appellate court implied that Vasquez's statements were not admitted against Ocampo at trial. Specifically, the state court stated that Detective Webb 'did not testify to the substance of any statements Vasquez made,' and that 'Detective Ringer's testimony only implied the outlines of Vasquez's statement.' We conclude that Ringer's testimony indisputably conveyed some of the critical substance of Vasquez's statements to the jury, in violation of the Confrontation Clause, even though his testimony was not detailed."

United States v. Meises, 645 F.3d 5, 7-12 (1st Cir. P.R. 2011) – a very long, borderline-incoherent opinion – when an agent describes talking to a person, and then describes changing the course of the investigation, an out-of-court testimonial statement has been implied, and hence the confrontation clause has been violated – stating flatly, without authority or analysis, "It makes no difference that the government took care not to introduce Rubis's 'actual statements.'" [NOTE: If the First Circuit means what it says, it is a confrontation clause violation for an officer or agent to describe the course of an investigation unless every person who contributed information appears in court. Presumably this is one of those opinions that will be discreetly ignored in the future.]

State v. Swaney, 787 N.W.2d 541, 553-554 (Minn. 2010) – jury heard investigator's questions, not the non-testifying [spousal privilege] witness's answers – "The district court recognized that the jury could imply Dawn Swaney's statements from Russell's testimony. But the [*554] court essentially concluded that because Russell only testified as to his own words from the interview,

his questions were admissible unless his questions happened to repeat Dawn Swaney's statements during the interview. We disagree. Trial testimony regarding statements or questions that inescapably imply another person's testimonial hearsay statements are not very different substantively from trial testimony that expressly states another person's testimonial hearsay statement. Therefore, we conclude that a district court violates the Confrontation Clause when it admits testimony that inescapably implies a nontestifying witness's testimonial hearsay statement." [NOTE: If, as *Crawford* says, confrontation is "a procedural rather than a substantive guarantee", the supposed lack of substantive difference doesn't seem germane.]

People v Fairweather, 2010 NY Slip Op 534, 69 A.D.3d 876, 894 N.Y.S.2d 81 (N.Y. App. Div. 2d Dep't 2010) – "The defendant also contends that he was denied his constitutional right to confront the witnesses against him because a detective testified that he determined the defendant was a suspect after he interviewed the injured complainant, who did not testify at trial... The challenged testimony was improper, since it directly implied that the complainant [*2] identified the defendant as the perpetrator..."

State v. Lavadores, 230 Ore. App. 163; 214 P.3d 86 (Or. App. Aug 05, 2009) – "In this case, codefendant's statements were redacted in a way that referred to defendant's existence and described his criminal conduct in detail... Moreover, like the ineffective redaction in *Johnson*, every individual in codefendant's statements--with the exception of defendant--was named." – [NOTE: Though a *Bruton* case, really, the court explicitly relies on *Crawford*, too.]

State v. Harris, 2009 WL 735757 (N.J. Super. A.D. Mar 23, 2009) (unpub) – "Defendant argues that '[t]he logical reasoning is: If Santos and Tair were seated in the same patrol car, and taken to the same place, for the same purpose, then they must have made the same identification.' Consequently, the repeated references to Santos at the show-up 'impliedly corroborated' Tair's positive identification of defendant." – even though no statement by Santos was quoted – "We reject this as pure conjecture."

People v. Wright, 54 A.D.3d 695, 863 N.Y.S.2d 253, 2008 N.Y. Slip Op. 06731 (N.Y.A.D. 2 Dept. Sep 02, 2008) – "The defendant's contention that his constitutional right to confront witnesses was violated when the trial court allowed the People to elicit testimony from police witnesses implying that other nontestifying individuals had identified him as the perpetrator of the crime is without merit. The testimony was admitted not for the truth of the matter asserted, but to demonstrate how the police investigation evolved and to explain the sequence of events leading to the defendant's apprehension (*see Crawford*...)"

Summerville v. Conway, 2008 WL 3165850 (E.D. N.Y. Aug 06, 2008) (unpub) (habeas) – "In *Ryan v. Miller*, 303 F.3d 231 (2d Cir.2002), the Second Circuit recognized that the admission of an implied out of court statement may constitute an unreasonable application of *Bruton* ... No doubt, such a statement, if testimonial, could also fall within the prohibition of *Crawford*... Here, ... there is nothing implicit in the Detective's statement about the specifics of what was said to him, except that cumulatively, it led the Detective to conclude that petitioner was a suspect"

Robinson v. Mississippi, 2008 WL 2954946 (N.D. Miss. Jul 29, 2008) (unpub) (habeas) – "On direct examination, [Detective] Starks testified that he had interviewed both the victim and Peppie Deon Wright in his investigation of that case and that their statements were "essentially the same." Then, in closing argument, the state reiterated that these two statements were

'essentially the same' and, as such, the jury had been presented with evidence of two witnesses to the aggravated assault. ... The statement of the murder victim Hampton was not offered or entered into evidence; nor was the statement of Wright. For that reason alone, the statement does not qualify as hearsay. In addition, as the contents of both statements were not presented to the jury, they could hardly be offered to 'prove the truth of the matter asserted' under the rules governing hearsay. Thus, neither of the statements even qualifies as hearsay. In addition, as neither statement was offered into evidence, neither statement was testimonial in nature. As such, *Crawford* does not apply."

People v. Berry, 49 A.D.3d 888, 854 N.Y.S.2d 507, 2008 N.Y. Slip Op. 02854 (N.Y. A.D. 2 Dept. Mar 25, 2008) – "During the trial, the prosecutor elicited testimony from an investigating detective that a personal telephone/address book was recovered from Kirven during the interview at the police station. The detective related that he photocopied one particular page from this book, sought subscriber information for one specific entry on that page, and then put out a "wanted card" for the defendant. ... The plain implication of the detective's testimony was that Kirven, who was not called as a witness at trial, accused the defendant of committing the instant offense ... Moreover, the prejudicial impact of this testimony was exacerbated by the prosecutor's assertion, during her opening statement, that Kirven 'knew ... the person who did the shooting' and 'identified the Defendant to the police.' ... Because the implicit accusation made by Kirven during an interrogation at the police station was testimonial hearsay, its admission violated the defendant's right to confrontation" [NOTE: Was the key factor the prosecutor's argument, rather than the evidence itself?]

State v. Moss, 215 Ariz. 385, 160 P.3d 1143, (Ariz. App. Div. 1 May 29, 2007) – driver seriously injured other motorists – blood sample tested by private laboratory came back positive for methamphetamine and amphetamine, but laboratory closed down and criminalist who performed test could not be located – "The testimony by Dr. Kelly reporting the results would be, in essence, an accusation by the absent criminalists that Moss had ingested methamphetamine before the accident. Therefore, Dr. Kelly's proposed evidence is testimonial under *Crawford*, triggering the protections of the Confrontation Clause." [NOTE: According to a Westlaw search, the case represents the first-ever use of the phrase "functional equivalent of hearsay."]

Affidavits

(see also part 6, Foundation / Preliminary Questions of Fact)

June, 08 Update: Cases addressing affidavits laying the foundation for self-authenticating documents have been moved to the category "Foundation / Preliminary Questions of Fact" in part 6. It might be wise to call such foundational documents something other than "affidavit." However, as the *Pacer* case shows, it is not always easy to distinguish foundational from substantive affidavits.

Crawford included affidavits in its list of *per se* testimonial documents, and *Hammon v. Indiana* found a D.V. victim's handwritten affidavit, prepared at the scene at the investigating officer's request, to be testimonial. But it would make no sense for a court to accept unquestioningly a business's decision to place that word at the top of an everyday form, as in *Foerster*, described below.

United States v. Bustamante, 687 F.3d 1190, 1191-1194 (9th Cir. Cal. 2012) – "These convictions rested on the government's allegation that Bustamante is not a United States citizen. To prove that allegation, the government introduced a document appearing to be a transcription of Bustamante's birth certificate from the Philippines. ... Exhibit 1 is not a copy or duplicate of a birth certificate. ... Exhibit 1 is 'quite plainly' an affidavit. [cite] It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante." – testimonial

Delhall v. State, 95 So. 3d 134, 141-160 (Fla. 2012) – "Delhall also contends that the trial court erred in allowing into evidence the affidavit that [retaliatory homicide victim] Hubert McCrae made in the Bennett murder case. [He was killed for making it.] ... The affidavit in this case was without doubt testimonial." – [NOTE: The opinion also holds that the affidavit was admitted for a non-hearsay purpose, *i.e.*, to prove motive, so this unnecessary holding effectively recognizes a category of testimonial non-hearsay.]

Crawford v. Commonwealth, 55 Va. App. 457, 686 S.E.2d 557 (Va. Ct. App. 2009), aff'd Crawford v. Commonwealth, 281 Va. 84, 704 S.E.2d 107 (Va. 2011) – "The statements at issue in this appeal are contained within an "Affidavit for Preliminary Protective Order." Although the Supreme Court of the United States recently stated that HN8affidavits "fall within the 'core class of testimonial statements'" subject to the Confrontation Clause, we find it significant that the Court did not go as far as to hold that all affidavits are per se testimonial. Melendez-Diaz ... In fact, neither Melendez-Diaz, nor any [*479] other case from the Supreme Court for that matter, has overruled or limited the applicability of the primary purpose test set forth in Davis. Lacking any further guidance on the matter from the Supreme Court, it becomes our task to attempt to reconcile the language in Davis with that in Melendez-Diaz and to determine whether the primary purpose test set forth in Davis is [**568] applicable to an affidavit unrelated to a criminal prosecution or whether conversely, any and all affidavits are ipso facto testimonial, irrespective of the primary purpose for their existence. ... After carefully reviewing the holdings of Crawford, Davis, and Melendez-Diaz, we see no principled reason to conclude that a hearsay statement obtained for a purpose other than criminal prosecution should be treated differently with respect to the Confrontation Clause solely because it takes the form of an affidavit."

U.S. v. Foerster, 65 M.J. 120, (U.S. Armed Forces 2007) – victim of forgery signed document prepared by bank entitled "affidavit of unauthorized signature (forgery affidavit)" – "We recognize that the Supreme Court refers, at different times, to "affidavits" as among those categories of out-of-court statements that could be considered within the "core class of 'testimonial statements.'" *Crawford*, 541 U.S. at 51-52. But we do not believe that the Court intended that every document labeled "affidavit" is, for that reason alone, a testimonial statement. Rather, given the Court's focus on the abuses at which the Confrontation Clause was aimed, we believe that its references to affidavits that would be presumptively testimonial refer to *ex parte* affidavits developed: (1) by law enforcement or government officials and (2) by private individuals acting in concert with or at the behest of law enforcement or government officials. Other affidavits remain subject to a contextual analysis to determine whether they are, or are not, testimonial. ... Under a contextual analysis, given the facts of this case, the forgery

affidavit was not testimonial, and the Confrontation Clause is not implicated by its admission in Appellant's trial."

People v. Pacer, 6 N.Y.3d 504, 847 N.E.2d 1149, 814 N.Y.S.2d 575, 2006 N.Y. Slip Op. 02291 (2006) – trial for unlicensed driving – "Here, defendant testified he never learned that his New York State driving privileges had been revoked. ... As their sole proof that defendant knew or had reason to know his privileges were revoked, the People introduced an August 13, 2003 document titled 'Affidavit of Regularity/Proof of Mailing' from a Department of Motor Vehicles official, purporting to explain the Department's ordinary mailing procedures for revocation notices. The affidavit contained a statement, on the official's 'information and belief,' that the ordinary procedures described in the affidavit had been followed in defendant's case. ... Although *Crawford* repeatedly describes affidavits as typically being testimonial, not all affidavits are inadmissible. ... [T]he challenged affidavit does not merely assert that the Department had a certificate showing that defendant's license had been revoked. It goes well beyond that, and alleges that the agency took a specific action against defendant based on that revocation—namely, mailing the notice." – the affidavit was the prosecution's only evidence to establish the defendant's *mens rea* of knowingly driving when his New York driving privileges had been revoked (he apparently had a valid Georgia license) – thus it was testimonial

Civil Complaints

U.S. v. Bartek, 2008 WL 2949437 (N.D. Fla. Jul 29, 2008) (unpub) (pretrial motion) – fraudulent telemarketing trial – "The Complaint, as a pleading filed in a legal matter, contains pretrial statements of unavailable declarants who are adverse to Defendant. Those declarants would have reasonably expected their statements to be used prosecutorially. Therefore, the statements in the Complaint are testimonial in nature."

In-Court Testimony

People v. Williams, 2007 WL 2153577, *2+ (Cal.App. 6 Dist. Jul 27, 2007) (unpub) – "Defendant argues it was error to use the preliminary hearing transcript and the probation report in the 1995 case to prove, at the 2006 court trial on the prior conviction allegations, that he personally inflicted injury in the 1995 case. We agree, and reverse. ... [I]t was error for the trial court to admit the preliminary hearing transcript in the 1995 case to prove that defendant personally inflicted the requisite injury. Proposition 115 'does not create a general exception to the prohibition against the use of hearsay in other proceedings,' and no other hearsay exception exists."

Hillard v. State, 950 So.2d 224 (Miss. App. 2007) – "¶ 24. We now address whether Quawrells's prior testimony was 'testimonial' evidence. Applying *Crawford* we find that it is most assuredly 'testimonial.' *Crawford* specifically lists prior testimony at a former trial as one of the examples of 'testimonial' evidence that must be subjected to cross-examination. There is no doubt that Hillard did not get an opportunity to cross-examine Quawrells at Quawrells's trial, nor did Hillard get to cross-examine Quawrells at his own trial."

People v. Whitley, 11 Misc. 3d 1084A, 2006 NY Slip Op 50701U (N.Y. County Ct. 2006) – Introducing the prior trial testimony of two unavailable witnesses at this trial will not violate *Crawford* since the defendant had a previous opportunity to cross-examine.

Schneider v. Commonwealth, 47 Va. App. 609, 625 S.E.2d 688 (Va. Ct. App. 2006) – Preliminary hearing testimony may later be admitted at trial so long as the witness is unavailable and there was an opportunity to cross examine at the hearing.

State v. Skakel, 276 Conn. 633, 888 A.2d 985 (Conn. 2006) – “The testimony at issue in the present case, namely, Coleman's prior probable cause hearing testimony, falls squarely within *Crawford's* core class of testimonial evidence. Accordingly, the confrontation clause bars the state's use of that testimony unless Coleman was unavailable to testify at trial and the defendant had a full and fair opportunity to cross-examine Coleman at the probable cause hearing. Coleman's unavailability, due to his death, is undisputed. With respect to the defendant's prior opportunity to cross-examine Coleman, our review of the record of Coleman's probable cause hearing testimony indicates that the defendant's trial counsel questioned Coleman extensively...” The prior testimony was properly admitted and did not violate *Crawford*.

Farmer v. State, 2005 WY 162, 124 P.3d 699 (Wy. 2005) – A key witness testified at defendant’s first trial, but was not able to be located for the second trial. Admission of the transcript from the first trial did not violate defendant’s confrontation rights. Defendant claimed that the cross-examination at the first trial was insufficient. The court denied this claim and held that under federal rules, a defendant need only be given the “opportunity” to cross-examine, not a cross-examination that is effective.

State v. Newell, 2005 Ohio 2848 (Ohio Ct. App. 2005) - “The appellate court held that admission of the victim's preliminary hearing testimony did not violate defendant's right to confrontation because he did cross-examine the victim at the preliminary hearing.”

State v. Hale, 2005 WI 7, 277 Wis.2d 593, 691 N.W.2d 637 (Wis. 2005) – “Defendant asserted that he was entitled to a new trial because the trial court improperly allowed into evidence the former testimony of an unavailable witness who had testified at the separate trial of defendant's codefendant. The court agreed with defendant that the testimony in question should not have been admitted into evidence. The evidence, which was testimonial in nature and was given by a witness who was not available to testify at defendant's trial, violated defendant's right to confrontation under U.S. Const. amend. VI and Wis. Const. art. I, § 7 because defendant did not have a prior opportunity to cross-examine the witness.”

People v. Stewart, 2004 Mich. App. LEXIS 2110, 2004 WL 1778525 (Mich. App. 2004) (unpub) - Testimony at preliminary hearing is admissible at trial if the witness is declared unavailable. No *Crawford* violation in admitting prior testimony.

People v. Ochoa, 121 Cal. App. 4th 1551; 18 Cal. Rptr. 3d 365 (Cal App 4th Dist 2004) - The victim of a rape testified at preliminary hearing and was subject to cross-examination. The victim was unavailable for trial and the prosecutor admitted statements that the victim to police officers investigating the case. The defendant objected because not all the statements made to police were cross-examined during the preliminary hearing. The court ruled that defense

counsel's failure to cross-examine the victim regarding all statements did not bar the police officers from providing that testimony at trial. No *Crawford* violation.

Primeaux v. State, 88 P.2d 893 (Okla. Crim. App. 2004) - "when a defendant is provided an opportunity to cross examine the witness and avails himself of that opportunity at a prior hearing, the confrontation clause is satisfied and a transcript of the prior hearing is admissible."

People v. Rossbach, 2004 Mich. App. LEXIS 1350, 2004 WL 1178424 (2004) (unpub) - "Prior testimonial evidence is admissible if the witness is unavailable and the defendant had an opportunity to cross-examine the witness. Our review of the record indicates that Rossbach had a full opportunity to cross-examine the witness at the preliminary hearing regarding his interactions with Rossbach. Accordingly, the trial court did not violate Rossbach's Sixth Amendment right to confront the witness by admitting the testimony."

Testimony Elicited by Counsel for Co-Defendant
(category added July 2009)

Ardis v. State, 290 Ga. 58, 63, 718 S.E.2d 526, 2011 Fulton County D. Rep. 3431 (Ga. 2011) – "During cross-examination of the lead detective, [co-defendant] West's counsel introduced into evidence a statement given by aggravated assault victim Langston to the police on the day of the shooting. Langston died of unrelated causes prior to Ardis' trial. Ardis' counsel specifically stated that he had no objection to the admissibility of Langston's statement. ... Since Langston was interviewed by the police for the purpose of investigating and prosecuting the crimes that took place in the parking lot, his statement was clearly testimonial in nature. And because Langston was an unavailable witness and Ardis presumably had no prior opportunity to cross-examine him, admission of his statement into evidence violated the rule in *Crawford*."

U.S. v. Nguyen, 565 F.3d 668 (9th Cir. (Wash.) May 15, 2009) – "Our Confrontation Clause analysis does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. ... The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers." – [NOTE: By "co-counsel" the court apparently means counsel for co-defendant, not the defendant's own counsel.]

Grand Jury Testimony

U.S. v. Jefferson, ___ F.Supp.2d ___, 2009 WL 187803 (E.D. Va. Jan 23, 2009) – "a defendant's Confrontation Clause rights preclude the government from offering an unavailable declarant's grand jury testimony"

Tyer v. United States, 912 A.2d 1150, 1161 (D.C.,2006) – "Under § 14-102(b)(1), because the witness's grand jury testimony was given under oath, and because he was subject to cross-examination about what he said before the grand jury, the evidence was admissible both for impeachment purposes and as substantive evidence." No *Crawford* violation.

United States v. Lore, 430 F.3d 190 (3rd Cir. N.J. 2005) - Grand jury testimony (not subject to cross-examination) of two witnesses who did not testify at trial was found to be testimonial.

However, since the testimony was admitted not for the truth, but to introduce self-exculpatory statements denying wrongdoing to show those statements were false, this did not violate the defendant's confrontation rights.

United States v. Thompson, 2005 U.S. Dist. LEXIS 27763, 2005 WL 3050634, *5 (E.D. Mo. 2005) (unpub) - Grand jury testimony, not subject to cross examination, of a deceased witness may be admitted at a subsequent suppression hearing because hearsay is admissible at suppression hearings.

People v. Howell, 358 Ill. App. 3d 512, 831 N.E.2d 681 (Ill. Ct. App. 2005) - It violates *Crawford* to admit grand jury testimony at trial of non-testifying witnesses due to lack of confrontation during the grand jury testimony.

People v. Patterson, 808 N.E.2d 1159(2004) - If witness testifies at grand jury and is not subject to cross examination, the grand jury testimony cannot be admitted at trial unless the witness testifies at trial and is subject to cross examination regarding testimony given before the grand jury.

Plea Allocutions / Co-Defendant Confessions

(see also following section and pt. 6, Statements to Informants and Undercover Agents)

Plea allocutions and confessions to police of non-testifying co-defendants are testimonial and may not be admitted at trial unless the co-defendant testifies. However, confessions made unknowingly to an undercover agent, or to a friend or cellmate, etc., are *not* testimonial. See various categories in part 6.

State cases (arranged alphabetically by state)

People v. Hill, 191 Cal. App. 4th 1104, 1136-1137, 120 Cal. Rptr. 3d 251 (Cal. App. 1st Dist. 2011)

Hagans v. U.S., 96 A.3d 1 (D.C. App. 2014)

People v. Duff, 374 Ill.App.3d 599, 872 N.E.2d 46, 313 Ill.Dec. 286 (Ill. App. 1 Dist. Jun 26, 2007) – holding the *fact* of a co-defendant's guilty plea to be testimonial hearsay, on the theory that "a guilty plea is tantamount to a confession" –

People v. Brown, 363 Ill.App.3d 838, 842 N.E.2d 1141, 299 Ill.Dec.789 (Ill. App. Ct. 1st Dist. 2005)

People v. Pipes, 715 N.W.2d 290 (Mich. 2006)

People v. Bell, 264 Mich. App 58; 689 NW2d 732 (2004)

State v. Walters, 2006-NMCA-071, 139 N.M. 705, 137 P.3d 645, rev'd in part on harmless error grounds, State v. Walters, 2007-NMSC-__, State v. Lopez, 2007-NMSC-__, and State v. Lopez, 2007-NMSC-037 (June 21, 2007)

People v. Lee, 120 A.D.3d 1137, 992 N.Y.S.2d 429 (N.Y. Sup. Ct. 2014)

People v. Woods, 779 N.Y.S.2d 494 (2004)

State v. Pullen, 594 S.E.2d 248 (N.C. Ct. App. 2004)

State v. Cutlip, 2004 Ohio 2120 (2004)

State v. Sine, 214 Or. App. 656, 167 P.3d 485 (Or. App. 2007) –

Commonwealth v. Brown, 853 A.2d 1029; 2004 PA Super 213 (PA. Super. Ct. 2004) –
Conviction vacated because redacted confession of co-Defendant that labeled this Defendant “the other guy” was properly admitted, but in closing argument the prosecutor directly named the Defendant in a manner that related to the information contained in the Co-Defendant statement and, therefore, identified “the other guy” to the jury.

State v. Alston, 900 A.2d 1212 (R.I. 2006)

State v. Sanlin, 2005 Tenn. Crim. App. LEXIS 451 (Tenn Crim App 2005)

Brooks v. State, 132 S.W.3d 702 (Tex. App. 2004)

State v. Vincent, 120 P.3d 120 (Wash. Ct. App. 2005)

Federal cases (arranged numerically by circuit)

United States v. Molina, 407 F.3d 511 (1st Cir. PR 2005)

Roy v Coplan, 2004 DNH 56, 2004 WL 603412 (D. N.H. 2004) –

U.S. v. Sutherland, 2009 WL 76514 (2nd Cir. Jan 13, 2009) (unpub)

U.S. v. Riggi, 541 F.3d 94 (2nd Cir. Sep 04, 2008)

U.S. v. Rittweger, 2008 WL 1813231 (2nd Cir. Apr 23, 2008) (unpub)

U.S. v. Hardwick, 523 F.3d 94 (2nd Cir. Apr 11, 2008) –

U.S. v. Becker, 502 F.3d 122 (2nd Cir. Sep 13, 2007) –

U.S. v. Lombardozzi, 491 F.3d 61 (2nd Cir. 2007)

U.S. v. Samet, 200 Fed.Appx. 15, 2006 U.S. App. LEXIS 23402 (2nd Cir. 2006)

U.S. v. Steele, 2007 U.S. Dist. LEXIS 7637, 2007 WL 419628 (D. Conn. 2007)

U.S. v. Becker, 2006 U.S. Dist. LEXIS 2076, 2006 WL 156677 (S.D.N.Y. 2006)

U.S. v. Alfonso, 158 Fed. Appx. 356 (2nd Cir. 2005)

United States v. Bermudez, 138 Fed. Appx. 339 (2nd Cir NY 2005)

United States v. Foster, 127 Fed. Appx. 537 (2nd Cir NY 2005)

United States v. Massino, 319 F.Supp 2d 295 (EDNY 2004)

United States v. Rozenfeld, 131 Fed. Appx. 759 (2nd Cir NY 2005)

US v Sherry, 107 Fed. Appx. 253 (2d Cir NY 2004)

US v. Tusaneza, 116 Fed. Appx. 305 (2d Cir NY 2004)

United States v. De La Cruz, 114 Fed. Appx 293 (2d Cir NY 2004)

United States v. Hundley, 2004 U.S. Dist. LEXIS 21574 (SDNY 2004)

United States v. Rivera, 363 F.Supp. 2d 814 (E.D. Va. 2005) – “redacted post-arrest statements made by two of the co-defendants would not violate the other co-defendants' right to confrontation during the trial because the redacted statements did not directly implicate the co-defendants since the universe of gang members and possible participants in the murder of the witness was quite broad.” No Crawford violation.

U.S. v. Vieyra-Vazquez, 205 Fed.Appx. 688, 2006 U.S. App. LEXIS 28220, 2006 WL 3262408 (10th Cir. 2006)

Pretext Phone Calls

(category added June, 2008)

(see also pt. 4, Context Statements, Statements Made by Defendant)

Paul v. State, __ S.W.3d __, 2012 Tex. App. LEXIS 6308, 1-3 (Tex. App. Tyler July 31, 2012), pet. dismissed w/o prejudice (Dec. 12, 2012) – “Here, the record reflects that Adedeji confessed to police that he was one of the perpetrators of the Dollar General store robbery and, further, informed police that Walker, Johnson, and Appellant were the other participants. Tyler Police Officer Greg Roberts testified that he arranged for a phone call to be placed by Adedeji from the police station and that the phone call was recorded. Roberts further testified that the phone call was made by Adedeji under the supervision of Tyler police officers and that Walker and Johnson spoke to Adedeji apparently unaware of the circumstances under which the call was placed. Roberts stated that Adedeji was not told what to say. Rather, according to Roberts, Adedeji was told to 'call him and talk.' [¶] Viewing the circumstances under which Walker's and Johnson's declarations were made, we conclude that an objective witness would reasonably believe that these statements would be available for use at a later trial. We further conclude that these circumstances objectively indicate that the primary purpose of the recorded phone call was to establish or prove the past events relating to the Dollar General store robbery that would be potentially relevant to later criminal prosecution. Accordingly, we hold that Walker's and Johnson's statements were 'testimonial' under the Confrontation Clause...” – [NOTE: In other words, the "objective witness" views the situation from the officers' perspective, because obviously the declarants themselves didn't share that mythical creature's POV. This holding would seem to apply to all statements made to undercover officers, informants, etc.]

People v. Knanishu, 2008 WL 5169835 (Cal. App. 3 Dist. Dec 10, 2008) (unpub) – “At the behest of Georgia law enforcement, [defendant's pedophile buddy] Kelly made a pretext call to defendant. The call was played over defendant's objection. In the call, defendant admitted sending the CDs to Kelly. ... It is clear that Kelly's statements in the pretext call do not implicate defendant's right to confrontation. ... Kelly's statements were used at trial to give context to incriminating admissions made by defendant during the pretext call. Defendant's admissions did not violate his right to confrontation, as he was available at trial to "defend or explain" his statements.”

State v. Scott, 2008 WL 4662487 (Ariz. App. Div. 1 Oct 16, 2008) (unpub) – “The victim's statements on the confrontation call were appropriately admitted, not to prove the matter asserted, but simply to supply context for the defendant's statements, and to show that defendant adopted them as his own admissions, both non-hearsay uses.”

State v. Doliboa, 2008 WL 4541998, 2008-Ohio-5297 (Ohio App. 12 Dist. Oct 13, 2008) (unpub) – "Doliboa's recorded statements qualify as admissions of a party-opponent under Evid.R. 801(D)(2), and therefore, are not hearsay. Id. {¶ 25} The CI's recorded statements are also not hearsay because they were not offered to prove the truth of the matter asserted, but instead, were admitted to give meaning and provide context to Doliboa's admissible statements and responses."

U.S. v. Watson, 525 F.3d 583 (7th Cir. May 13, 2008) – bank robbery – inside job – co-conspirator teller made pretext call recorded by FBI – but most significant statements were made in follow-up meeting – court's opinion finds statements non-testimonial without specifically distinguishing between those made during call and those made in person – "Anthony's private statement [concerning defendant] to a confederate [*i.e.*, the teller], which was secretly recorded, does not fit into any of *Crawford's* broad categories of testimonial evidence. It certainly was not made to the police in an interrogation, which is the classic type of testimonial evidence the Sixth Amendment seeks to limit."

People v. Prasad, 2008 WL 1992032 (Cal. App. 1 Dist. May 09, 2008) (unpub) – DV victim made pretext call from police station – non-testimonial – "The pretext call contained statements of defendant and numerous accusatory statements made to defendant. Defendant's own statements were admissible against him as an admission by a party ... Moreover, Doe's accusatory statements were separately admissible against defendant as adoptive admissions. ... Finally, the introduction of an adoptive admission does not violate *Crawford*, as an adoptive admission is not offered for the truth of the matter asserted. [cite] Rather, it is admitted to supply meaning to the defendant's conduct or silence in the face of the declarant's accusatory statements."

People v. Wahlert, 31 Cal.Rptr.3d 603, 31 Cal.Rptr.3d 603 (Cal. App. 4th Dist. 2005), modified (July 19, 2005), review granted and opinion superseded, 120 P.3d 1050, 34 Cal.Rptr.3d 657 (Cal. Sep 28, 2005), review dismissed, cause remanded, 169 P.3d 884, 67 Cal.Rptr.3d 463 (Cal. Oct 10, 2007) – The Oct. 10, 2007 order states: "The People's request for depublication of the Court of Appeal opinion is denied as moot." – for non-California practitioners, it's unclear what that means – at any rate, the Court of Appeal held that when police have a co-defendant in custody call another defendant to get the defendant to confess or admit to the crime, playing the tape of the pretext phone call at trial implicates *Crawford* –

Meaning of "Witness Against" and "Bear Testimony"
(see also the following categories)

Warning: *Melendez-Diaz* says contradictory things about witnesses who provide non-inculpatory evidence. Compare 129 S. Ct. at 2533-2534, 174 L.Ed.2d at 323, with *id.* at 2532 n.1, 174 L.Ed.2d at 322 n.1. The text says there are only two types of witnesses but the footnote recognizes other types. The tentative consensus among lower court judges seems to be that the footnote controls over the text.

State v. Lui, 179 Wash.2d 457, 315 P.3d 493 (Wash. 2014), cert. denied, 2014 WL 1354998 (June 23, 2014) – "[¶ 25] ... a person is a 'witness' for confrontation clause purposes only if he or she makes some statement of fact to the court (as opposed to merely processing a piece of

evidence) and that statement of fact bears some inculpatory character (meaning that the evidence, without the need for *471 expert interpretation, bears on some factual issue in the case). ... [¶ 50] Not everyone who makes some affirmation of fact to the tribunal will fall under the confrontation clause. The word 'against' implies some adversarial elements—some capacity to inculcate the defendant."

People v. Fackelman, 489 Mich. 515, 802 N.W.2d 552 (Mich. 2011), cert. denied, 181 L. Ed. 2d 483 (Nov. 28, 2011) – a painfully long 5-2 opinion – the primary issue was defendant's sanity, and the dueling experts were each questioned in some detail about the conclusion of a third, non-testifying expert, Dr. Shahid – "Moreover, our review of the record leads inescapably to the conclusion that Dr. Shahid was a true 'witness against' defendant. The ultimate issue at trial was not whether defendant had actually engaged in the conduct that led to the criminal charges; instead, it was whether he was legally insane at the time. ... In this context, the prosecutor's improper introduction and repeated use of Dr. Shahid's diagnosis that defendant was not, in fact, experiencing psychosis fully rendered the doctor a witness against defendant." – [NOTE: In this analysis, "introduction" of evidence doesn't require formally introducing it.]

United States v. Olguin, 643 F.3d 384, 392 (5th Cir. Tex. 2011) – "Here, the evidence to which Macias objects is the admission of recorded conversations between Losoya and other unidentified persons, purportedly in furtherance of the conspiracy. ... First, the calls do not implicate Macias, instead they implicate Losoya. In fact, Macias does not even contend that the calls implicate him. The Sixth Amendment guarantees the right to confrontation against a party testifying against him, not against others. Put differently, the violation (if any) offends Losoya's rights, and it was Losoya's duty to bring the action to remedy the violation of his rights. Thus, Macias does not have any basis to allege a violation."

Aguilar v. Commonwealth, 699 S.E.2d 215 (Va. 2010), cert. denied, 131 S. Ct. 3089 (June 28, 2011) – "the issue we address is whether, in view of the decision in *Melendez-Diaz*, the Commonwealth's failure to call as witnesses two forensic scientists who played preliminary roles in the DNA analysis at issue but did not author certificates of analysis admitted into evidence violated Aguilar's rights under the Confrontation Clause. We conclude that it did not because neither scientist bore testimony against Aguilar." – one scientist's work was not incorporated into the eventual analysis, the other merely prepared samples for analysis by another

Grey v. State, 299 S.W.3d 902, 903-911 (Tex. App. Austin 2009) – "Under *Melendez-Diaz*, a statement made for prosecutorial use is testimonial even if the statement does not directly accuse the defendant or wrongdoing, does not describe the crime or any human action related to it, or describes the results of neutral scientific testing."

People v. Thompson, 59 A.D.3d 1115, 873 N.Y.S.2d 834, 2009 N.Y. Slip Op. 01023 (N.Y.A.D. 4 Dept. Feb 11, 2009) – "Contrary to the further contention of defendant, there was no violation of his rights under *Bruton* ... or *Crawford* ... Nothing in the trial testimony established that the codefendant made any statements or took any action that implicated defendant..."

U.S. v. Jackson, 2008 WL 5378015 (6th Cir. Dec 23, 2008) (unpub) – "It is clear that introduction of the cellular telephone records cannot constitute a *Crawford* violation, because

they are not "testimonial" and, most importantly, did not implicate the defendant in the offenses for which he was convicted."

State v. Graves, 224 Or.App. 157, 197 P.3d 74 (Or. App. Nov 26, 2008) – D.V. victim said: "No, I ain't trying to get anyone put in jail. This ain't nothing." – refused to say anything incriminating about defendant – nonetheless, statement was found testimonial, without discussion of the topic of this category

U.S. v. Taylor, 2008 WL 4186934 (E.D. Tenn. Sep 05, 2008) (unpub) (mid-trial order) – "Defendant is accused of carjacking, kidnapping, and murdering Guy Luck. [subsequently convicted] ... Clouden was a detective for the Dekalb County Police Department near Atlanta. She was investigating Defendant's use of stolen credit cards to purchase expensive electronics. Checks belonging to a restaurant owned by Luck were found in Defendant's possession. Outside the presence of the jury, Clouden testified she called Luck and identified herself as a Dekalb police detective. She told Luck she had the checks. Luck told her that his home had been burglarized and his checks had been stolen and counterfeited. ... Luck's statement is testimonial because he was providing evidence to convict the perpetrator by identifying past facts, specifically that checks found in Defendant's apartment had been stolen or counterfeited. The evidence links Defendant to a crime. [cite] Given that the victim was being interviewed by a police officer, he surely understood the facts he provided would be used to prosecute the culprit. ... That Luck did not know the specific identity of the person he was linking to a crime is not pertinent. He was linking a person to a crime." – under prosecution theory, the defendant's discovery that Luck knew about the earlier burglary was the motive for the murder

Simpkins v. People of New York State, 2008 WL 2986473 (E.D. N.Y. Jul 31, 2008) (unpub) (habeas) – "No out-of-court statements by Shah were introduced as evidence against Simpkins, and so Shah was not a 'witness[] against' Simpkins within the meaning of the Confrontation Clause."

People v. Freycinet, __ N.E.2d __, 2008 WL 2519867, 2008 N.Y. Slip Op. 05776 (N.Y. Jun 26, 2008) – absent forensic pathologist's report non-testimonial – "Dr. Lacy's report did not directly link defendant to the crime. The report is concerned only with what happened to the victim, not with who killed her. As *Crawford* explains, the Confrontation Clause derives from the strongly held idea of our country's founders, derived from English common law, that a person accused should have the right to face his or her 'accuser.' ... Dr. Lacy was not defendant's 'accuser' in any but the most attenuated sense."

U.S. v. Harper, 514 F.3d 456 (5th Cir. 2008), withdrawn and replaced with new opinion on rehearing, 2008 WL 1984267 (5th Cir. May 08, 2008) (unpub) –
– original opinion rejected the prosecution's argument that non-inculpatory statements by nontestifying co-defendant were non-testimonial, but then held their admission was harmless because they didn't pertain to the defendant – which seemed like a more-complicated way of getting to the same place – opinion on rehearing eliminates that passage and replaces it with this: "Collins's statements did not directly or obviously implicate Harper until other evidence, such as the fact that Harper lived in the same house as Collins, was introduced. Collins's admission that he sold crack cocaine in quantities known as 50's does not facially incriminate Harper nor does it refer to the existence of Harper or anyone else. This statement is well within the category of statements identified in *Richardson* that do not violate the Sixth Amendment."

People v. Torres, 2008 WL 256752 (Cal. App. 5 Dist. Jan. 31, 2008) (unpub) – "[I]f a confession is testimonial within the meaning of *Crawford*, it may be admitted at a joint trial without violating *Aranda-Bruton* or *Crawford* if the confession makes no reference to the nondeclarant defendant's existence, and the jury is given a limiting instruction not to consider the evidence when determining the nondeclarant defendant's guilt or innocent. [cites] In such a situation, the admission of the statement does not violate the defendant's confrontation rights because the jury is instructed to consider a witness's testimony against only one of the defendants, such that the witness is ordinarily not considered to be a witness against the defendant within the meaning of the confrontation clause."

People v. Torres, 47 A.D.3d 851, 850 N.Y.S.2d 529, 2008 N.Y. Slip Op. 00551 (N.Y.A.D. 2 Dept. Jan 22, 2008) – "The trial court did not violate the defendant's right of confrontation (*see Crawford* ...) in admitting at a joint trial the prior statement of a nontestifying codefendant against that codefendant only [cite]. Moreover, the defendant's confrontation rights were properly safeguarded by the measures taken by the court in admitting the statement" – measures not otherwise described

U.S. v. Vasilakos, 508 F.3d 401 (6th Cir. Nov 21, 2007) – "Ordinarily when, at a joint trial, a codefendant's prior statement, testimonial or otherwise, is introduced only against the declarant-codefendant, and not against the complaining codefendant, the latter has suffered no violation of his Sixth Amendment Confrontation Clause rights. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987). However, the Supreme Court has recognized an exception to this general rule for a codefendant's statement that facially incriminates the defendant. *Bruton v. United States*, 391 U.S. 123, 135-36 (1968)."

In re Bonds, 2007 WL 3378567 (Wash. App. Div. 2 Nov 14, 2007) (unpub) – "Under *Bruton* and its progeny, if a statement is properly redacted and the jury is instructed not to use it against the defendant, the declarant is not a 'witness against' the defendant. [cite] If a codefendant is not a 'witness against' the defendant, admitting the codefendant's statement does not implicate the confrontation clause. [cite]" – cites are to *Hegney*, below

State v. Araujo, 285 Kan. 214, 169 P.3d 1123 (Kan. Nov 02, 2007) – "[T]he rationale of the conclusion that the Confrontation Clause is not implicated when evidence is not offered for the truth of the matter asserted is that the declarant is not a 'witness' against the accused."

Szymanski v. State, 166 P.3d 879, 2007 WY 139 (Wyo. Aug 29, 2007), cert. denied, 2008 WL 114221, 76 USLW 3373 (Jan 14, 2008) – arson investigator was properly permitted to repeat hearsay statement of unavailable witness in whose apartment the fire began, to the effect that her floor had not been cluttered with flammable materials when she left that morning – "The statements did not identify or even implicate Mr. Szymanski as the arsonist. ... [I]t is central to our holding in this case that the out-of-court statement did not incriminate Mr. Szymanski."

Martinez v. State, 2007 WL 2790174 (Tex. App.-Hous. Sep 27, 2007) (unpub) – "The *Crawford* court describes the category of witnesses to which this rule applies in various, apparently synonymous, ways as (1) witnesses who do not "appear at trial," [FN2] (2) "absent" witnesses, [FN3] (3) witnesses "absent from trial," [FN4] (4) witnesses who do not "appear []

for cross-examination at trial," [FN5] and (5) witnesses who are not "present at trial to defend [their statements] or explain [them]." [FN6] What witnesses fall within this category?

- Only those witnesses who are not physically present in the courtroom or in a nearby holding cell during trial? [FN7]
- Only those witnesses who do not take the witness stand at trial?
- Only those witnesses (a) who do not take the witness stand at trial or (b) who take the witness stand at trial but assert a valid privilege that permits them not to testify?
- Only those witnesses (a) who do not take the witness stand at trial or (b) who take the witness stand at trial but refuse to testify, whether or not they have a valid legal basis for their refusal?
- Only those witnesses (a) who do not take the witness stand at trial or (b) who take the witness stand at trial but refuse to testify after being ordered to do so by the trial court, whether or not they have a valid legal basis for their refusal? [FN8]
- Only those witnesses (a) who do not take the witness stand at trial, (b) who take the witness stand at trial but refuse to testify after being ordered to do so by the trial court, or (c) who take the witness stand at trial but refuse to testify based on a valid legal privilege from testifying, without being ordered to testify by the trial court?

These are compelling and interesting issues but ones this court need not decide to resolve this case." (concurring opinion of Frost, J.)

People v. Scott, 2007 WL 2459116 (Cal. App. 1 Dist. Aug 30, 2007) (unpub) – challenge to police dispatcher's classification of call as a "415-C" and "261" (rape) – "The police dispatcher was not a witness against them. Witnesses are those who 'bear testimony.' ... A 911 dispatcher's purpose is 'to enable police assistance to meet an ongoing emergency.' (*Davis, supra*, at p. 2277.) The dispatcher's classification of a request for police assistance informs the responding officers of the nature of the call and the situation they may encounter. The classification is not testimonial."

U.S. v. Johnson, 495 F.3d 951 (8th Cir. Jul 30, 2007) – "[T]he district court allowed Steven Vest, who had been incarcerated with Honken, to testify to statements that Honken had made to Vest about the murders. ... Honken was not making 'formal statement[s].' Nor were his statements elicited in response to government interrogation whose primary purpose was to establish facts potentially relevant to a criminal prosecution. In other words, when Honken spoke with Vest he did not 'bear testimony,' in any relevant sense of the term, and the admission of his statements, through Vest's testimony, did not violate Johnson's confrontation rights." (citations omitted)

People v. Geier, 41 Cal.4th 555, 161 P.3d 104, 61 Cal.Rptr.3d 580 (Cal. 2007), cert. denied, No. 07-7770 (June 29, 2009) – "In simply following Cellmark's protocol of noting carefully each step of the DNA analysis, recording what she did with each sample received, [biologist] Yates did not 'bear witness' against defendant. (*State v. Forte, supra*, 629 S.E.2d at p. 143.) Records of laboratory protocols followed and the resulting raw data acquired are not accusatory. 'Instead, they are neutral, having the power to exonerate as well as convict.' (*Ibid.*)"

In re Personal Restraint of Hegney, 158 P.3d 1193 (Wash. App. Div. 2 2007) – "'[A]s a threshold matter, there must be a 'witness [] against' the accused for the Confrontation Clause to be invoked properly.' ... Although *Crawford* heightened the standard under which a witness's statements can be admitted, it did not overrule *Bruton*, *Richardson*, and *Gray*. See *Crawford*, 541

U.S. at 57-58. Reading these cases together, *Bruton*, *Richardson*, and *Gray* all answer the threshold question posed in *Crawford* of when an admission by one defendant can be considered a 'witness [] against' another defendant in a joint trial. *Mason*, 447 F.3d at 699 (Wallace, J., concurring). [¶] Here, Hill's admission cannot be considered a 'witness[] against' Hegney. *Mason*, 447 F.3d at 699 (Wallace, J., concurring). After all, in Hegney's direct appeal, we found that Hill's statements: (1) did not refer to Hegney by name or otherwise; (2) did not contain any blanks or obvious deletions; and (3) were accompanied by a limiting instruction. [FN15] In other words, these redactions and limiting instructions effectively prevented Hill from being a 'witness[] against' Hegney, and the protections of the confrontation clause were not at issue. *Mason*, 447 F.3d at 699 (Wallace, J., concurring). Therefore, Hegney's confrontation clause rights were not violated. [FN15.] Hill's admissions in this case may have become incriminating when linked with other evidence introduced at trial. That the jury could make such an inference does not mean, however, that the admissions were otherwise inadmissible. *Richardson*, 481 U.S. at 208-09; *State v. Larry*, 108 Wn.App. 894, 905-07, 34 P.3d 241 (2001), *review denied*, 146 Wn.2d 1022 (2002)."

Hegney v. Vail, 2008 WL 4766816 (W.D. Wash. Oct 27, 2008) (unpub) (habeas) – "The Washington State Court of Appeals dissertation on the current state of the law in this area is accurate and correct."

Scott v. State, 165 S.W.3d 27, 45-51 (Tex. App.-Austin 2005), *rev'd on other grounds*, 227 S.W.3d 670 (Tex. Crim. App. 2007) – Austin's yogurt-shop murders – "[T]he State argues that Springsteen's statement was not testimonial under *Crawford* because it was not 'accusatory.' Noting that the word 'accuse' or some variation of it appears over twenty times in *Crawford*, the State urges that a declarant must have a motive to accuse and must actually accuse the defendant of a criminal act for the declarant's statement to be considered testimonial. The State claims to find support for this position in the text of the Sixth Amendment, arguing that the Confrontation Clause does not attach unless the declarant's statement is used 'against' the accused, which the State equates to an accusation of criminal conduct. Because Springsteen's statement to the police had been redacted to omit any reference to Scott, the State concludes that it was not accusatory and that its introduction in evidence did not make Springsteen a witness against Scott within the meaning of the Sixth Amendment. ... Although Springsteen's statement had been redacted to remove any reference to Scott, the State used the statement against Scott just as surely as the prosecutors used *Crawford*'s wife's statement against *Crawford*. ... Springsteen's statement to the police was no less testimonial because it had been redacted to remove all references to Scott." [NOTE: The intermediate court found the supposed error harmless, but the Court of Criminal Appeals, on a 5-4 vote, disagreed.]

State v. Athan, 158 P.3d 27 (Wash. 2007) – "However, at most, the effect of the [hearsay] statement is to place Athan in the area where the body was found, with a cart and a box, something Athan admitted to. Athan's initial statements to the police in 1982 are entirely consistent with this testimony. The testimony, in context, does not go to prove any material fact in dispute. Under these circumstances, *Crawford* is not implicated." – [NOTE: The technical legal basis of this holding is not entirely clear. The court may have meant that the hearsay declarant was not a "witness against" the defendant, or perhaps merely that the admission of the hearsay was harmless.]

U.S. v. Gould, 2007 WL 1302593 (D. N.M. March 23, 2007) (unpub) – "If a limiting instruction is given to the jury, a properly redacted statement of a co-defendant, one that satisfies

Bruton v. United States, does not raise a Confrontation Clause issue pursuant to *Crawford v. Washington*, because such a statement is not offered against the defendant."

State v. White, 920 A.2d 1216 (N.H. 2007) – bizarre and convoluted case – defendant was convicted of molesting two girls, but First Circuit granted writ of habeas corpus because he had been prevented from cross-examining the girls about other, supposedly false accusations they had made against another man – on retrial, defendant cross-examined the girls about the prior accusations, and the state introduced the confession of the other man, in order to prove that the prior accusations were not false – held: the other man's confession, which did not refer to defendant, was testimonial hearsay as to him – [Note: This seems obviously wrong. A person confessing to his own crimes without mentioning another person is not a witness against the other person.]

State v. Ennis, 212 Or. App. 240, 158 P.3d 510 (Or. App. 2007) – non-testifying co-defendant's inadequately-redacted statement was introduced into evidence – "[B]oth the existence and the identity of the other participants in the crime were readily inferable from the redacted statement itself. [¶] Hudson's redacted statement to [Detective] Stoelk therefore was admitted against defendant for purposes of the Confrontation Clause. Because Hudson was not available for cross-examination, admission of the statement violated defendant's Confrontation Clause rights as explicated in *Crawford*. [¶] We reach a similar conclusion with regard to the redacted versions of statements Hudson made to Detectives Quakenbush and Rawlins. Each of those statements, on its face, allowed the jury to infer the existence and presence of persons other than Hudson--the unavailable declarant--at the scene of Murphy's murder. We also conclude that, when linked with other evidence in the case, each of those statements allowed the jury to infer that one of those persons was defendant. Accordingly, where Hudson was unavailable for cross-examination, each of those statements was admitted against defendant in violation of his Confrontation Clause rights." [NOTE: The latter holding, drawing inferences to find a sixth amendment violation, seems to use *Crawford* to expand the *Bruton* rule, although there is no indication the court consciously intended to do so. See *Gray v. Maryland*, 523 U.S. 185, 196 (1998); *Richardson v. Marsh*, 481 U.S. 200, 208 (1987).]

Riley v. U.S., 923 A.2d 868 (D.C. 2007) – three gang members shot and killed two innocent kids, thinking they were members of rival gang – all three confessed – tried jointly, with redacted confessions – "*Crawford*, therefore, is not pertinent to Riley's appeal, because Marks' and Muhammad's confessions were properly redacted in accordance with *Bruton*, *Richardson*, *Gray*, and *Plater*. In addition, the court gave a proper limiting instruction to resolve any questions that the jurors might have had about how the statements could be used. See *Richardson*, 481 U.S. at 211. Thus Riley had no right based on the *Bruton* line of cases, or on *Crawford*, to confront his co-defendants through cross-examination because their statements did not implicate Riley's Confrontation Clause rights."

Sallee v. Commonwealth, 2007 WL 1192088, *4 (Ky. App. 2007) (unpub) – " Waddell claims that, during the execution of the search warrant, Sallee admitted to Detective Savage that he had drugs in his bedroom. Waddell insists that the trial court, by consolidating the defendants' cases, prejudiced her since Sallee's admission, which was introduced at trial, weakened her defense. Citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed. 2D 177 (2004), Waddell argues that Sallee's admission to Detective Savage was testimonial in nature and was inadmissible against her since she had no opportunity to cross-examine Sallee since he failed

to testify at trial. ... As the Commonwealth pointed out in its brief, Sallee's admission did not implicate Waddell. In fact, Sallee's admission to Detective Savage did not mention Waddell at all; therefore, the holding in *Crawford v. Washington, supra* simply does not apply to this case."

State v. Graton, 2007 WL 1322234, *4 (Minn. App. 2007) (unpub) – assuming that nontestifying witness's statements that he was a friend and "fishing buddy" of defendant were testimonial, but finding their admission harmless – but: "We reject Graton's suggestion that Nelson's [nontestifying witness's] opinion of Graton's wife bears on Graton's guilt or affected his trial theme that his wife and Nelson were the only conspirators."

People v. Rhodes, 2007 WL 1135663, *3-4 (Mich. App. 2007) (unpub) – "The trial court specifically instructed the jury that defendant Lott's statements could only be considered against him, and not against the other defendants. 'It is well established that jurors are presumed to follow their instructions.' *People v. Graves*, 458 Mich. 476, 486; 581 NW2d 229 (1998), citing *People v. Hana* 447 Mich. 325, 351; 524 NW2d 682 (1994). Further, there was no possibility of undue prejudice to defendant Rhodes arising from the admission of defendant Lott's statement. The statement that was admitted against defendant Rhodes was that defendant Lott told an officer that he was with 'some other person' on the day of the arrests."

U.S. v. Nettles, 476 F.3d 508 (7th Cir. 2007) – Would-be terrorist conspired with "Ali", undercover agent pretending to be al-Qaeda member – tape-recorded conversations between Ali and defendant introduced, but Ali not called as witness – "Ali presented himself as an individual who had trouble speaking and understanding English, and often asked Nettles to repeat what he said or better explain himself. In many of their discussions, Nettles would do most of the talking while Ali said nothing but 'okay' in response. Sometimes, Ali asked questions (presumably in order to elicit more incriminating information from Nettles), such as Nettles's target, or how to make a bomb. However, Ali does not appear to say anything of substance. He does not put words into Nettles's mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit. In other words, Ali did not actually 'testify against' Nettles. ... Ali was not a 'witness' for Sixth Amendment purposes."

McCoy v. United States, 890 A.2d 204 (D.C. 2006) – "The facts here do not trigger a *Crawford* issue, because Woodard's statement was offered only against Woodard, and not against McCoy, as the court's instructions to the jury made clear. Where references to one defendant in a co-defendant's statement are removed or replaced, admission of the redacted statement will not violate the Confrontation Clause if, 'when viewed together with other evidence, the statement does not create an inevitable association with the defendant, and a proper limiting instruction is given.' *United States v. Washington*, 293 U.S. App. D.C. 208, 212-13, 952 F.2d 1402, 1406-07 (1991), *distinguishing Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). 'Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant.'""

Commonwealth v. Whitaker, 2005 PA Super 241 (Pa. Super. Ct. 2005) - "Defendant was tried with a co-defendant. The co-defendant's confession was admitted in evidence against the co-defendant only, and it had been redacted to change references to defendant to references to the 'other guy.' The court held that the term used did not unduly suggest that defendant was the person referred to and that the jury had been cautioned not to use it for any purpose except to

determine the co-defendant's innocence or guilt. The decision in *Crawford v. Washington* did not make use of the redacted confession any less permissible because *Crawford* was directed to the introduction of another's statements against a defendant, not their introduction against someone else."

Burchfield v. State, 892 So.2d 191 (Miss. 2004) – "¶ 43. It seems clear to us that the author of the label on the non-prescription, over-the-counter medication at issue here, was not a 'witness against the accused.' Thus, the statements on the labels, though hearsay, would nevertheless fall within *Crawford's* discussion of non-testimonial hearsay."

Non-Inculpatory Hearsay Statements

(see also Meaning of "Witness Against"; Relationship of *Crawford* and *Bruton*)

Warning: *Melendez-Diaz* says contradictory things about witnesses who provide non-inculpatory evidence. Compare 129 S. Ct. at 2533-2534, 174 L.Ed.2d at 323, with *id.* at 2532 n.1, 174 L.Ed.2d at 322 n.1. The tentative consensus among lower court judges seems to be that while the text says there are only two types of witnesses, the footnote recognizes other types, and the footnote controls over the text.

People v. Richberg, 123 A.D.3d 946, 998 N.Y.S.2d 454 (2014) – "Sergeant Tribble's testimony and the subsequent testimony relating to the discovery of the weapon did not violate the Confrontation Clause, since there was no direct implication that the nontestifying witness told the police that the defendant possessed the knife, disposed of it, or tried to conceal it [cites]."

U.S. v. Curbelo, 726 F.3d 1260, 1264-65 (11th Cir. 2013) – holding that a translator's implicit statement that transcript was accurate is a testimonial statement, although it did not reflect on defendant's guilt

State v. Blevins, 744 S.E.2d 245, 268 n.20 (W. Va. 2013) – "A discussion regarding the accusatory nature of the autopsy report testimony informs only our analysis of the harmless nature of the Confrontation Clause error. This discussion in no way bears upon the issue of whether or not the autopsy report is testimonial for purposes of analyzing the Confrontation Clause error." – [NOTE: So much for the actual text of the clause....]

United States v. Lindsey, 702 F.3d 1092, 1094-1096 (8th Cir. Minn. 2013) – "Because the officer learned Hill's cell phone number while questioning him about the murders, the statement was testimonial."

People v. Beliard, 101 A.D.3d 1236, 956 N.Y.S.2d 234 (N.Y. App. Div. 3d Dep't 2012) – "Defendant further claims that the consolidation violated his right to confront witnesses as enunciated in *Crawford* [cite] and *Bruton* [cite] in that a redacted statement made by Joseph to police was admitted at the joint trial, where Joseph did not testify. ... there was no *Crawford* or *Bruton* violation; Joseph's statement named Val as the second man involved in the crimes, did not mention defendant [*1238] and implicated him only when linked with other evidence at trial [cites]."

People v Alnutt, 101 A.D.3d 1461, 957 N.Y.S.2d 412 (N.Y. App. Div. 3d Dep't 2012) – "Defendant's constitutional right to confront witnesses [cites] was not violated by the use at trial of a statement in which the son-in-law told police that he [*i.e.*, the son-in-law] 'had knowledge' of and 'was involved in' the fire. The statement was admitted solely as evidence against the son-in-law, the jury was repeatedly given instructions to that effect and the statement neither mentioned defendant nor implicated him in any wrongdoing [cites]."

People v Dennis, 91 A.D.3d 1277, 937 N.Y.S.2d 496, 2012 NY Slip Op 548 (N.Y. App. Div. 4th Dep't 2012) – "The codefendant's statement did not implicate defendant in any wrongdoing and thus did not deprive defendant of his US Constitution Sixth Amendment right to confront witnesses against him [cites]."

Commonwealth v. Bizanowicz, 459 Mass. 400, 945 N.E.2d 356 (Mass. 2011) – "Moreover, the erroneously admitted testimony (no semen present on the sofa, the comforter, and the pillows) was not incriminating because it, by itself, did not tie the defendant to the crime." [NOTE: This is part of the court's harmless error analysis but also implies the out-of-court declarant wasn't a witness against the defendant.]

United States v. Clarke, 767 F. Supp. 2d 12, 18-37 (D. D.C. 2011) – post-conviction motions – "Where the out-of-court statements are redacted as required by *Bruton*, *Richardson*, and *Gray*, no *Crawford* problem arises because the statements do not constitute 'testimonial' statements against the non-declarant defendants."

Cantu v. State, 339 S.W.3d 688, 689-691 (Tex. App. Fort Worth 2011) – "The evidence that Garza was listed in a gang unit report as having self-identified as a gang member is not testimonial as to Appellant because it does not accuse Appellant of anything."

Matthews v. United States, 13 A.3d 1181 (D.C. 2011) – "In this case, however, we need not determine whether Dubose's statement was [*1187] testimonial, or whether his statement satisfied the hearsay exception for statements against penal interest because we find that Dubose's statement did not implicate Matthews." – [NOTE: Is this a harmless error holding, or a holding that the sixth amendment doesn't apply?]

People v. Dendel, 289 Mich. App. 445, 797 N.W.2d 645 (Mich. Ct. App. Aug. 24, 2010), leave to appeal denied (Sept. 21, 2011) – "Here, the toxicologist's finding that Burley's glucose level was zero at the time of death was the fact on which Dr. Evans based his opinion that an insulin injection was a possible cause of his death. Although the statement concerning a glucose level of zero has no independently incriminating effect, it is nonetheless an accusatory statement under *Melendez-Diaz* because it supported the prosecution theory that defendant killed Burley by injecting him with insulin." [NOTE: Compare *Bruton* standard that asks whether statement is *facially* incriminating. *Richardson v. Marsh*, 481 U.S. 200, 208 (1987).]

Martinez v. State, 311 S.W.3d 104 (Tex. App. Amarillo 2010) – "The only testimonial hearsay evidence that was admitted that was not cumulative or irrelevant actually favored appellant." – [Note: Part of harmless error analysis.]

Commonwealth v. Sylvia, 456 Mass. 182, 921 N.E.2d 968 (Mass. 2010) – "Because the Commonwealth is not required to prove motive, whether the substance found on the victim was,

in fact, crack cocaine was not a matter that played a role in the Commonwealth's case and does not implicate the principles set forth in *Melendez-Diaz*..."

United States v. Burden, 600 F.3d 204, 223-225 (2d Cir. Conn. 2010) – CI's statements (and whistle) on surreptitious recording of drug deal – "Saunders [CI] was not phoning in an ongoing emergency, but he also was not testifying, either; he was attempting to elicit statements from others, and anything he said was meant not as an accusation in its own right but as bait. Saunders is thus similar to the declarant in the lead case in *Davis*, because his purpose was non-accusatory."

Camacho v. State, 2008 WL 6099077 (Nev. Jul 14, 2008) (unpub) – "The statements attributed to Marquez and Snapp did not mention Camacho by name, make any reference to his existence, or otherwise implicate him as a participant in the alleged crimes. Under these circumstances, we conclude that admission of Marquez's and Snapp's extrajudicial confessions did not violate Camacho's Sixth Amendment confrontation rights."

U.S. v. Nguyen, 565 F.3d 668 (9th Cir. (Wash.) May 15, 2009) – "The government argues that Merke's statement was not inculpatory. But this is not controlling on the existence of error. *Crawford* does not require that a statement inculcate a defendant to trigger error under the Confrontation Clause. Simply, Confrontation Clause error occurs at admission of a testimonial statement without an opportunity to cross-examine. *Crawford*, 541 U.S. at 68- 69. If the statement is not inculpatory, that might be probative of the harmlessness of an error, but not of the existence of a Confrontation Clause error." – [NOTE: The error was found not harmless, which would seem to imply that it was, in fact, inculpatory.]

Lopez v. Hedgpeth, 2009 WL 1220286 (E.D. Cal. May 05, 2009) (unpub) – "In short, the codefendants' statements did not implicate petitioner; the codefendants therefore were not rendered witnesses against petitioner. Accordingly, the admission of the statements did not violate petitioner's right "to be confronted with the witnesses against him," U.S. Const amend VI."

People v. DiGiacomo, 2009 WL 891826 (Cal. App. 6 Dist. Apr 03, 2009) (unpub) – "although other evidence pointed to defendant as a coparticipant with White in the robbery involving the laptop, White's exculpatory statement was properly admitted at the joint trial with limiting instructions and the admission of the statement did not violate defendant's rights under the confrontation clause"

People v. Padilla, 2009 WL 808496 (Cal. App. 4 Dist. Mar 30, 2009) (unpub) – "The statements in Prince's guilty plea were also not testimonial because they did not incriminate defendant. Prince's plea inculpated only himself and made no mention of defendant or an accomplice."

People v. Gomez-Perez, 2009 WL 795289 (Cal. App. 3 Dist. Mar 27, 2009) (unpub) – assuming admission of co-perpetrator's guilty plea was error but finding it harmless because "Nothing in Villeda's guilty plea pointed the finger of guilt at either codefendant." – [NOTE: This seems just a roundabout way of getting to the same place reached by saying that a non-inculpatory hearsay statement isn't testimonial.]

Perez v. U.S., ___ A.2d ___, 2009 WL 774847 (D.C. Mar 26, 2009) – "Bonilla's statements to the police are clearly testimonial. [cite] The Sixth Amendment, however, does not bar the admission of the redacted tape introduced during the government's case-in-chief because, as all parties agreed at the time, those statements did not implicate Robles-Benevides in the crime."

Dalton v. Commonwealth, 2009 WL 735882 (Ky. Mar 19, 2009) (unpub) – "*Crawford* and *Bruton* are not applicable to the statements testified to here because the statements do not inculcate Dalton."

People v. Donnon, 2009 WL 498937 (Cal. App. 4 Dist. Feb 27, 2009) (unpub) – "a criminal defendant's constitutional right to confront prosecution witnesses requires the exclusion of a codefendant's statement unless it does not incriminate the defendant. ... Augustus's statement to Officer O'Boyle did not constitute direct evidence of defendant's substantive guilt. Furthermore, the evidence did not incriminate defendant." – no sixth amendment violation

U.S. v. Diamond, 65 M.J. 876 (Army Ct. Crim. App. Dec 21, 2007) – "We also disagree with the government's assertion that because Dr. Theer's testimony was primarily exculpatory the Sixth Amendment Confrontation Clause is inapplicable. We find no support for this proposition. In any event, as the government offered these statements ostensibly to prove a conspiracy existed or some other fact relevant to the government's case, they seem inherently inculpatory." – [NOTE: This seems to collapse any distinction, familiar from *Bruton* context, between statements that are inculpatory on their face and those that become inculpatory only when combined with other information.]

Bowe v. State, 288 Ga.App. 376, 654 S.E.2d 196, 7 FCDR 3563 (Ga. App. 2007) – [consolidated appeals from defendants, Bowe and Baker, who were tried together for a series of carjackings] – "The out-of-court statement at issue here, that Baker called and said that his vehicle had been used in an armed robbery, does not implicate Bowe. The State offered this evidence to show that Baker was involved, but this statement does not show Bowe's guilt. Thus, because 'admission of evidence in violation of *Crawford* will be deemed harmless if there is no reasonable possibility that it contributed to a guilty verdict,' *Richard v. State*, [FN6] we discern no reversible error with respect to this statement." [NOTE: It is at best questionable whether the declarant can be classified as a "witness against" the defendant.]

U.S. v. Espinoza-Torres, 2007 WL 2746658 (D. Ariz. Sep 18, 2007) (unpub) (§ 2255) – "The United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), cited by Movant in his Reply, does not support his ineffective assistance of counsel claim. Unlike the hearsay statements in *Crawford*, the statements here were not introduced as evidence against Movant but were redacted to be admissible only against Garcia-Mesa."

People v. Geier, 41 Cal.4th 555, 161 P.3d 104, 61 Cal.Rptr.3d 580 (Cal. 2007), cert. denied, No. 07-7770 (June 29, 2009) – "While the prosecutor undoubtedly hired Cellmark in the hope of obtaining evidence against defendant, [biologist] Yates conducted her analysis, and made her notes and report, as part of her job, not in order to incriminate defendant. Moreover, to the extent Yates's notes, forms and report merely recount the procedures she used to analyze the DNA samples, they are not themselves accusatory, as DNA analysis can lead to either incriminatory or exculpatory results. Finally, the accusatory opinions in this case--that defendant's DNA matched that taken from the victim's vagina and that such a result was very unlikely unless defendant was

the donor--were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, Dr. Cotton."

Maxwell v. U.S., 2007 WL 1847182, *3 (E.D. Mo. Jun 25, 2007) (unpub) – (§ 2255 case) "Movant's argument that Mr. Cohen failed to object, on the basis of hearsay, to the statements by the two female witnesses, testified to by Detective Gary Pride, is without merit. Detective Pride testified that the two female witnesses denied ownership of the firearm, and denied firing the firearm. The trial transcript shows that Mr. Cohen did object on the grounds of hearsay to the statements made by the two female witnesses. The statements of the two female witnesses were not testimonial. *See Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("The Confrontation Clause ... applies to witnesses against the accused--in other words those who bear testimony." (internal citation omitted)). The two unidentified women were not accusers of movant."

People v. Stevens, 59 Cal.Rptr.3d 196, 158 P.3d 763 (Cal. 2007) – "*Crawford* addressed the introduction of testimonial hearsay statements against a defendant. Clark's redacted statement contained no evidence against defendant. (*Crawford*, *supra*, 541 U.S. at pp. 39-40, 68.) Thus, it cannot implicate the confrontation clause. (*Richardson v. Marsh* (1987) 481 U.S. 200, 211; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1046-1047.) The same redaction that 'prevents Bruton error also serves to prevent Crawford error.' (*United States v. Chen* (2d Cir.2004) 393 F.3d 139, 150.)"

Sallee v. Commonwealth, 2007 WL 1192088 (Ky. App. April 6, 2007) (unpub) – "As the Commonwealth pointed out in its brief, Sallee's admission did not implicate Waddell. In fact, Sallee's admission to Detective Savage did not mention Waddell at all; therefore, the holding in *Crawford v. Washington*, *supra* simply does not apply to this case."

State v. White, 920 A.2d 1216 (N.H. 2007) – bizarre and convoluted case – with minimal discussion, holding that another man's confession to an unrelated crime was "testimonial" as to defendant who was not mentioned in the confession – [NOTE: This seems obviously wrong.]

State v. Nia, 2007 WL 853332, *5 -6 (Ohio App. 8 Dist. 2007) (unpub) – "the statements of an absent co-defendant may be admitted without violation of *Crawford* if the statements do not incriminate the defendant. In this case, the statements made by Walker exculpated, rather than incriminated, appellant."

State v. Otero 2007 WL 364740, *9 (Wash.App. Div. 2 2007) (unpub) – "the confrontation clause does not operate here because Simon's testimony did not implicate Barasa".

Bynum v. State, 929 So.2d 312 (Miss. May 18, 2006), cert. denied, 549 U.S. 962 (2006) – "¶ 6. ... [B]ecause Bynum lacked the opportunity to cross-examine his co-defendant, we find the trial court erred in allowing the police officer to testify concerning the co-defendant's statement." – from Court of Appeals opinion: "¶ 21. The full text of the statement clearly reflects that no specific individual was facially implicated by the co-defendant's statement to the police. The co-defendant's only reference to another person is to an unnamed 'white male.'" [NOTE: The court found no *Bruton* violation because the statement was non-inculpatory, and found the *Crawford* "error" harmless for the same reason.]

United States v. Harris, 167 Fed. Appx. 856 (2nd Cir. N.Y. 2006) - Introduction of a co-defendant's redacted post-arrest statement did not violate Defendant's right to confront in violation of Crawford because the statement was not admitted against the defendant but against the co-defendant. Defendant's confrontation or Crawford rights were not violated.

People v. Goldstein, 6 N.Y.3d 119, 843 N.E.2d 727, 810 N.Y.S.2d 100, 2005 N.Y. Slip Op. 09654 (N.Y. 2005) – non-accusatory statements made by third parties to forensic psychiatrist were testimonial, because they were used by the psychiatrist to form her diagnosis, which in turn was relied upon by the prosecution to prove defendant was sane when he pushed woman in front of subway train

State v. Pierre, 277 Conn. 42, 890 A.2d 474 (Conn. 2006), cert. denied, 126 S.Ct. 2873, 165 L.Ed.2d 904 (2006) – At trial, a friend of the defendant testified and was impeached with a prior inconsistent written statement. A lengthy letter written by this witness was introduced at trial that incriminated another individual (consistent with statements given by the defendant to police that two other individual committed the murder), but also incriminated the defendant. This witness testified inconsistent with his written statement, acknowledged the written statement, including his signature on each page, yet denied writing the statement and saying that the police pieced the statement together from numerous other documents. The witness claimed no memory of the incriminating statements made by the other individual or the defendant. On appeal defendant objected to the inconsistent statement being admitted at trial and complained of his inability to conduct a full cross-examination due to the “memory loss” as well as being unable to cross examine the other subject. The court found that the inculpatory statement said to the witness from the other suspect was properly admitted as a statement against penal interest against that subject, and adoptive admission against the current defendant, as well as an inconsistent statement against the testifying witness. There was no *Crawford* violation since the witness testified and was cross-examined, in spite of claimed memory loss, the defense was given a chance for an effective cross examination. Moreover, the other subject who inculpated himself to the witness was not testimony “against” this defendant to invoke Sixth Amendment protections.

Smith v. Sirmons, 2005 U.S. Dist. LEXIS 40043 (W.D. Okla. 2005) - *Crawford* only applies to statements against a defendant. If non-incriminating/non-inculpatory statements are admitted from a non-testifying witness, this does not implicate *Crawford*.

United States v. Simpson, 116 Fed. Appx. 736 (6th Cir. Tenn 2004) - *Crawford* and the Confrontation Clause only apply to statements offered *against* the Defendant. Exculpatory statements for the Defendant do not invoke *Crawford*

Declarant Expressly Doesn't Want to Provide Evidence
(category added July 2009)

It might seem intuitively obvious that a person who tells police she or he doesn't want to provide evidence is "not acting as a *witness*; she [is] not *testifying*." *Davis*, 547 U.S. at 828. But apparently it isn't obvious.

State v. Bowling, 232 W.Va. 529, 753 S.E.2d 27 (W. Va. 2013) cert. denied, 134 S. Ct. 1772 (U.S. 2014) – in private conversation with friend, an off-duty police officer, future victim

"request[ed] that he not reveal to anyone the events she described for him. ... An objective witness would reasonably believe that the statement would be available for use at a later trial, and therefore it is testimonial."

State v. Basil, 202 N.J. 570, 998 A.2d 472 (N.J. 2010) – "Officer Anthony Ruocco of the Jersey City Police Department testified that on February 12, 2005, at approximately 1:00 a.m., he and Officer William Sullivan, as well as other police units, responded to a report of a man with a shotgun at 199 Bidwell Avenue. Upon arrival at the scene, Officer Ruocco observed several black males, including defendant, in the area of 199 Bidwell Avenue. He was approached by a young black woman who looked to be eighteen- or nineteen-years old and "came from around the corner." The woman told Officer Ruocco that defendant had pointed a shotgun in her direction and had uttered words to the effect of, "Get off the corner." The woman also stated that she saw defendant throw the shotgun underneath a black Cadillac. Officer Ruocco testified that as she spoke to him, the woman was shaking a bit and her voice was elevated. ... The young woman told Officer Ruocco that she lived in the area but nothing else about herself. She said that she did not want to become involved in the case "because she was scared for her safety." ... According to Officer Sullivan, the woman stated that she did not want to be a witness..." – justices split 3-3 as to whether the woman was testifying when she said she wouldn't testify, affirming the intermediate court's decision that this was a testimonial statement

State v. Basil, 2009 WL 1174777, 2009 N.J. Super. Unpub. LEXIS 1038 (N.J. Super. A.D. May 04, 2009) (unpub), **result left undisturbed in an incredibly fractured decision, State v. Basil, 202 N.J. 570, 998 A.2d 472 (N.J. 2010)** – officer "was approached by a black female of approximately eighteen or nineteen years of age, who pointed to defendant and stated, in essence, 'that that guy pointed a shotgun at me and told us to get off the corner.' The female stated additionally that defendant had thrown the gun underneath a black Cadillac, where it was later recovered by another police officer. The female refused to give her name or a statement, claiming that she lived in the area and 'didn't want no further police action.'" – held: testimonial – "Those statements, made after any danger had passed, since the perpetrator no longer possessed the weapon that was previously brandished, and uttered for the purpose of identifying defendant to the police so that he could be subject to criminal prosecution, were clearly testimonial in nature." – [NOTE: Even though the tipster said her purpose *wasn't* to subject him to criminal prosecution!]

People v. Hudnall-Johnson, 2009 WL 499151 (Cal.App. 1 Dist. Feb 27, 2009) (unpub) – wife killed husband, jury heard evidence of prior acts of abuse – after one such prior incident husband told officer "did not want to pursue the case and wanted appellant released from jail" – with regard to a different incident, he told the officer "he believed she was not trying to hurt him. He did not want to pursue the case" – nonetheless, his statements to the officers were testimonial

State v. Graves, 212 Or.App. 196, 157 P.3d 295 (Or. App. 2007), adhered to on remand, State v. Graves, 224 Or.App. 157, 197 P.3d 74 (Or. App. Nov 26, 2008) – Victim "was very uncooperative" with responding officers but eventually explained that defendant had "kicked her in the face while she was sleeping" – held: testimonial – even though she specifically stated that "I ain't trying to get anyone put in jail. This ain't nothing."

Meaning of "Statement"

(category added Oct. 2008)

(see also part 15, Can a Machine Be a Hearsay Declarant?)

United States v. Gaytan, 649 F.3d 573, 573-577 (7th Cir. Ill. 2011) – recording of drug transaction captured CI telling dealer: "My brother just came with some dude who's tr-, trying to get two ounces of rock." and "I'm trying to get, f—ing um, a couple O's of rock, man." – The Seventh Circuit concludes: "There's no doubt that these statements were testimonial; Worthen made them with the knowledge that FBI agents were recording the conversation 'in anticipation of or with an eye toward a criminal prosecution' of Gaytan." – [NOTE: Implicitly, the opinion equates "statement" with "utterance."]

United States v. Cameron, 762 F. Supp. 2d 152, 159-160 (D. Me. 2011) – child pornography case in which defendant claims right to confront Yahoo employees – "images are not hearsay... The rule against the admission of hearsay applies only to statements offered to prove the truth of the matter asserted. ... Whatever else might be said about the images of child pornography in this case, it is beyond argument that they were not created for trial purposes and thus they do not fall within the ambit of the Confrontation Clause."

Dell v. Ercole, 2009 WL 605188 (E.D. N.Y. Mar 06, 2009) (unpub) (habeas) – "There is no obvious Bruton or Crawford issue because Officer Mattei was not asked to disclose what Warburton or Warburton's mother told him ... [and] it cannot be said here that 'the clear implication' of the police testimony was that the defendant was implicated by a co-defendant."

State v. Wilson, 2009 WL 48141 (Hawai'i App. Jan. 07, 2009) (unpub) – "In our view, an x-ray photograph of internal bodily injuries is not an assertion by a person that expresses a fact or opinion and thus, does not constitute hearsay unless the x-ray photograph was generated for the purpose of asserting a 'statement' and was offered to prove the truth of that 'statement.' Therefore, the circuit court did not err in allowing the Japanese x-rays to be admitted into evidence."

U.S. v. Honken, 541 F.3d 1146 (8th Cir. Sep 12, 2008) – jailhouse informant tricked incarcerated co-defendant into drawing maps to where the bodies were buried, in order to facilitate a false confession by a third prisoner – "we conclude Johnson's maps are non-testimonial. ... [Among other reasons,] the maps obviously were not a 'solemn declaration' or a 'formal statement.'"

State v. Lee, 2008 WL 2745277 (Wis. App. II Dist. July 16, 2008) (unpub) – witness overheard nontestifying third party (Thomas) asking defendant to confirm what had happened – "Indeed, what Thomas purportedly said is not really even a statement."

U.S. v. Lamons, 532 F.3d 1251 (11th Cir. Jul 03, 2008) – flight attendant, terrified to fly in days immediately after 9/11 attacks, made phony bomb threat to prevent plane from taking off – defendant "contends that the introduction of Exhibit 2, a compact disc of data collected from telephone calls made to AirTran in September 2001, and Exhibit 3, a call report created from the compact disc, amounted to testimonial hearsay not properly admissible under *Crawford* ... we conclude that both pieces of evidence in question are not 'statements' within the meaning of the Confrontation Clause ... [W]e are persuaded that the witnesses with whom the Confrontation Clause is concerned are human witnesses, and that the evidence challenged in this appeal does

not contain the statements of human witnesses. ... Lamons makes much of the fact that it was Agent Lazarus who requested the production of the evidence; but the relevant point is that no human intervened at the time the raw billing data was "stated" by the machine--that is, recorded onto Sprint's data reels. [FN24] The process by which the data was extracted from the reels and placed onto compact CDs such as Exhibit 2 was similarly fully automated. ... The exemption of machine-generated statements from the purview of the Confrontation Clause also makes sense in light of the purposes of confrontation."

Indicia of Formality

(category added March 2013)

(Justice Thomas's fifth vote in *Williams* makes his concept of "formality" an important consideration. The concept is discussed in many post-*Williams* cases collected in part 15.)

People v. Banks, 59 Cal.4th 1113, 176 Cal.Rptr.3d 185, 331 P.3d 1206 (Cal. 2014) – "a lab technician's act of initialing a report describing actions he or she has taken with respect to a particular lab test is insufficient to convert that report into a testimonial statement because initialing lacks the requisite formality, absent (at the least) a signature, certification, or other form of swearing to the truth."

U.S. v. Liera-Morales, 759 F.3d 1105 (9th Cir. 2014) – mother of kidnap victim, in presence of federal agent, phoned kidnappers to arrange ransom payment – "the statements of Avila and the captor during the telephone call lacked any indicia of formality: they occurred in an informal high-stress 'environment that was not tranquil, or even ... safe' in light of Aguilar's captivity."

People v. Crawford, 377 Ill.Dec. 862, 2 N.E.3d 1143 (Ill. App., 1st Div., 2013) – "Unlike the forensic report in *Melendez-Diaz* but similar to the autopsy report in *Leach*, the autopsy report in this case was not certified or sworn.¹² [cite] Thus, the autopsy report here lacks the "formality and solemnity of an affidavit, deposition, or prior sworn testimony" and does not trigger *Crawford*."

People v. Valadez, 220 Cal.App.4th 16, 162 Cal. Rptr. 3d 722, 730-38 (Cal. App. 2d Dist. 2013), review denied (Jan. 15, 2014) – gang expert's background knowledge of specific gangs – "There is no evidence to suggest any of this information bore any degree of solemnity or *36 formality as required by Justice Thomas in *Williams* or by the court in *Dungo* and *Lopez*, or resembled in any way formal dialogue or interrogation as discussed in *Davis* and other cases."

Derr v. State, 73 A.3d 254, 258-73 (Md. 2013), cert. pet. filed (Nov. 20, 2013) – "The [*Williams*] plurality did not clarify how to determine if a statement is sufficiently formalized to be testimonial. Both the plurality opinion and Justice Thomas's concurring opinion, however, use nearly the same examples of what constitutes sufficiently formalized statements, namely affidavits, depositions, prior testimony, or statements made in formalized dialogue or a confession. [cite] We, thus, conclude that courts should rely on Justice Thomas's concurrence to determine whether a statement is formalized."

U.S. v. Porter, 72 M.J. 335 (App. Armed Forces 2013) – "While the two pages do not exhibit 'indicia of formality or solemnity that ... would suggest an evidentiary purpose,' that is merely one factor relevant to whether statements are testimonial." (ellipsis in original)

State v. Anwar S., 141 Conn. App. 355, 61 A.3d 1129 (Conn. App. Ct. 2013) – child abuse victim tested positive for STD in Connecticut, with confirmatory test performed in California – "Although the state concedes that the California reports serve a dual medical-prosecutorial purpose, the defendant has not pointed us to any evidence in the record that the laboratory analysts understood the request as such. ... Moreover, although this test served a dual purpose of confirming the Yale clinic results and providing medical treatment to T, [nurse practitioner] Murphy's testimony is devoid of any evidence that the California laboratory results bore the indicia of formality sufficient to render the results a solemn declaration and, consequently, testimonial."

Relationship of Crawford and Bruton
(see also Meaning of "Witness Against")

Bruton v. United States, 391 U.S. 123 (1968), holds that in certain circumstances defined by emotive adjectives ("devastating" and the like), jurors are incapable of following the trial judge's instruction to consider a non-testifying co-defendant's confession only against the confessor. Because, *ex hypothesi*, the jury will consider such a "devastating" confession against the non-confessing defendant despite the judge's instructions, its admission is a deprivation of the sixth amendment right of confrontation. If you scratch the surface of *Bruton*, its half-disguised underlying idea is that juries are overly-likely to find the co-defendant's confession credible, so judges have to step in to prevent them from making that erroneous credibility determination. As such, the *Bruton* doctrine bears a certain resemblance to the *Ohio v. Roberts* test, which also depended on a half-disguised credibility determination by the judge, albeit under the different rubric of "reliability." *Bruton*, in short, depends on exactly the sort of "amorphous" standards and trial court credibility determinations that *Crawford* denigrated so colorfully and purported to abolish.

Whorton v. Bockting states categorically that "the Confrontation Clause has no application to [non-testimonial] statements". 127 S.Ct. at 1183. So if a statement is non-testimonial, can it produce *Bruton* error? The emerging consensus is that it cannot – that *Bruton* and *Crawford* dovetail, so a statement properly admitted under one is also properly admitted under the other. But some courts disagree, at least in dicta.

Favors v. State, 296 Ga. 842, 770 S.E.2d 855 (Ga. 2015) – "*Bruton* thus applies only to out-of-court statements by non-testifying co-defendants that are 'testimonial' in nature."

State v. Wilcoxon, 185 Wash. App. 534, 341 P.3d 1019 (Wash. App. 2015), review granted, (Wash. June 3, 2015) – because statements of co-defendant were non-testimonial, "[Defendant]'s claim that the trial court needed to sever the cases to satisfy *Bruton* and its progeny fails."

United States v. Rodriguez, 591 F. App'x 897, 900-02 (11th Cir. 2015), cert. pet. filed – "we conclude that, as *Bruton* was premised on the Confrontation Clause, its protections only apply to testimonial statements. Every other Circuit to have considered the issues has concluded the same. [listing cases]"

State v. DeLeon, 341 P.3d 315, 333-36 (Wash. Ct. App. 2014) – "*Bruton* 's restriction on the admission of the inculpatory statements by a jointly tried codefendant is limited to testimonial hearsay."

State v. Payne, 440 Md. 680, 714-18, 104 A.3d 142, 162-64 (2014) – "Because *Crawford* is not implicated by the six recordings, Payne's *Bruton* rights are not triggered."

United States v. Vasquez, 766 F.3d 373, 378-79 (5th Cir. 2014) cert. denied, No. 14-7843, 2015 WL 732194 (U.S. Feb. 23, 2015) – "Vasquez has never disputed the government's characterization of Echeverria's jailhouse confession as non-testimonial. Accordingly, the district court's decision to admit Sanchez–Alvarez's testimony regarding Echeverria's non-testimonial confession was entirely in accordance with most of the circuit authorities interpreting the relationship between *Bruton* and *Crawford*." – but noting in footnote 16 that: "The Seventh Circuit has arguably applied *Bruton* to non-testimonial statements, although without explicitly acknowledging the resulting split of authority. See *Jones v. Basinger*, 635 F.3d 1030, 1037, 1050–52 (7th Cir.2011)..."

U.S. v. Morgan, 748 F.3d 1024 (10th Cir. 2014) – "The Defendants' claim fails because *Bruton* applies only to testimonial statements."

U.S. v. Dargan, 738 F.3d 643, 645-47 (4th Cir. 2013) – "*Bruton* is simply irrelevant in the context of nontestimonial statements."

State v. Norah, 131 So. 3d 172, 179 (La. App. 4th Cir. 2013) – " We find that [co-defendant] Mr. Watts' statements were 'non-testimonial' in nature, and, thus, the procedural protections set forth in *Bruton* do not apply."

Lane v. State, 750 S.E.2d 381, 390-91 (Ga. App. 2013) – " At the outset, we note that *Crawford* and *Bruton* expound related but distinct doctrines. ... Although Dominique preserved his objection under *Bruton*, he waived any objection under *Crawford* by failing to object on this ground at trial."

U.S. v. Figueroa, 729 F.3d 267, 276 n.14 (3d Cir. 2013), cert. denied, 134 S.Ct. 1037 (2014) – "The protections of the Confrontation Clause and *Bruton* apply only to testimonial statements."

U.S. v. Walters, __ F.Supp.2d __, 2013 WL 4535904 (E.D. N.Y. 2013) – "In light of the significant redactions accepted with respect to the rest of Dunn's post-arrest statement, however, there is little danger of a jury not following an appropriate limiting instruction, and this sentence need not be redacted. See *Richardson*, 481 U.S. at 211, 107 S.Ct. 1702; cf. *Lung Fong Chen*, 393 F.3d at 150 (where the statements of the non-testifying defendant Tu would inculcate co-defendants Chen and Liu 'only in the context of the substantial evidence used to link them to Tu's statements[, t]he same attenuation of Tu's statements from Chen and Liu's guilt that prevents *Bruton* error also serves to prevent *Crawford* error.')

State v. Gurule, 2013-NMSC-025, 303 P.3d 838 (N.M. 2013) – "The central question is whether *Bruton* survives as a stand-alone objection under the Confrontation Clause for co-conspirators, independent of *Crawford* analysis, or whether *Crawford* now modifies *Bruton* to the extent of applying only to testimonial statements by a co-conspirator implicating another co-

conspirator. If the latter, then *Bruton* would not apply to this non-testimonial statement for the very reason that *Crawford* does not apply. Recent federal cases addressing this question would appear to lend support to the latter view that *Bruton* must now be seen in light of *Crawford*. [cites] For that reason, we conclude that *Bruton* is no help to Defendant in the context of this case."

Billings v. State, 293 Ga. 99, 745 S.E.2d 583 (Ga. 2013) – "the rule set forth in *Bruton*, which bars the admission at a joint trial of a co-defendant's confession to police that implicates the [*104] defendant if the co-defendant does not testify and face cross-examination, [**589] does not apply to non-testimonial out-of-court statements..."

United States v. Clark, 717 F.3d 790, 795-798 (10th Cir. Okla. 2013) – "Like our sister circuits, we have recognized the need to interpret *Bruton* 'consistent[ly] with the present state of Sixth Amendment law.' ... the Confrontation Clause's scope generally extends no further than testimonial hearsay... Thus, we are obliged to 'view *Bruton* through the lens of *Crawford*' and, in doing so, we consider 'whether the challenged statement is testimonial.'"

Peacher v. Commonwealth, 391 S.W.3d 821, 828-836 (Ky. 2013) – considering "'the possibility of *Crawford* error despite *Bruton* compliance'" but finding none, although it seems like a straightforward *Bruton* analysis

State v. Beckwith, 2012 Ohio 3076, 973 N.E.2d 849 (Ohio Ct. App., Cuyahoga County 2012) – finding that admission of a non-testimonial statement was *Bruton* error – not analyzing whether *Bruton* even applies to non-testimonial statements but simply assuming it does

State v. Alston, 47 A.3d 234 (R.I. 2012) – "The defendant, in his brief, concedes that the statements, which on appeal he argues violated his right to confrontation, were not testimonial. However, at trial, defendant argued that Harrell's testimony about Coleman's statements created 'a *Bruton* problem' ... Because Coleman's statements to Harrell were not testimonial in nature, defendant's constitutional right to confrontation was never triggered."

United States v. Berrios, 676 F.3d 118, 122-129 (3d Cir. V.I. 2012) – "However, because *Bruton* is no more than a by-product of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements."

People v Pagan, 87 A.D.3d 1181, 929 N.Y.S.2d 332 (N.Y. App. Div. 3d Dep't 2011) – "There is no question that Pagan's out-of-court statements, made to an investigator, were testimonial in nature [cites]. *Crawford* accordingly prohibits the use of Pagan's statements 'against the other defendants in' this joint trial [cites]. A codefendant, however, is generally not 'considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against [the] codefendant,' and nothing in *Crawford* alters this long-established principle [cites]. Thus, the Confrontation Clause is generally not implicated when a codefendant's statement is admitted 'against' him or her alone." – the only exception is the circumstance defined by *Bruton* – "if the statement does not directly inculcate the accused, it cannot be deemed to have been admitted against him or her and '[t]he same attenuation . . . that prevents *Bruton* error also serves to prevent *Crawford* error'"

State v. Usee, 800 N.W.2d 192, 195-198 (Minn. Ct. App. 2011) – "Because *Bruton* and its progeny are based on the protections afforded by the Confrontation Clause, after *Crawford*, *Bruton's* restriction on the admission of inculpatory statements by a jointly tried codefendant is limited to testimonial hearsay."

People v. Ardoin, 196 Cal. App. 4th 102, 134-139, 130 Cal. Rptr. 3d 1 (Cal. App. 1st Dist. 2011) – "Several factors strike us as limiting both the incriminating nature of the statement and the risk that a jury could not follow the trial court's instruction to disregard the evidence. First, the extrajudicial statement by Jaquez [to his wife] is neither testimonial in nature under *Crawford* [cite], n14 nor a powerfully incriminating confession."

People v. Arceo, 195 Cal. App. 4th 556, 559-580 (Cal. App. 2d Dist. 2011) – " First, the confrontation clause has no application to out-of-court nontestimonial statements [cites], including statements by codefendants. ... In sum, from this body of law we can draw only one conclusion. *Crawford*, *Davis*, and *Whorton* mean what they say—the confrontation clause applies only to testimonial statements—and nothing in the cases applying that principle to extrajudicial statements by nontestifying codefendants is inconsistent with or purports 'to overrule *Bruton*,' which itself did not address 'any recognized exception to the hearsay rule.'"

United States v. Clarke, 767 F. Supp. 2d 12, 18-37 (D. D.C. 2011) – post-conviction motions – "Although *Crawford* was clear that "testimonial" statements include those given during police interrogations (541 U.S. at 68), which are precisely the types of statements at issue here, no *Crawford* problem was presented because the testimonial statements would not be offered against co-defendants — they were offered solely against the declarants themselves. Indeed, the very purpose of the extensive redactions ordered by the Court was to ensure that the out-of-court statements would be offered in evidence solely against the individuals who made them. Where the out-of-court statements are redacted as required by *Bruton*, *Richardson*, and *Gray*, no *Crawford* problem arises because the statements do not constitute 'testimonial' statements against the non-declarant defendants."

Matthews v. United States, 13 A.3d 1181 (D.C. 2011) – "If, however, the defendant's statement 'is not testimonial, *Bruton* does not apply"

United States v. Figueroa-Cartagena, 612 F.3d 69, 84-85 (1st Cir. P.R. 2010) – "The Bruton/Richardson framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place. If none of the co-defendants has a constitutional right to confront the declarant, none can complain that his right has been denied. It is thus necessary to view Bruton through the lens of Crawford and Davis. The threshold question in every case is whether the challenged statement is testimonial. If it is not, the Confrontation Clause 'has no application.'"

United States v. Castro-Davis, 612 F.3d 53, 65-66 (1st Cir. P.R. 2010) – "the Bruton rule does not apply to non-testimonial hearsay statements."

United States v. Dale, 614 F.3d 942, 954-956 (8th Cir. Mo. 2010), cert. denied (2011) – admission made to wired cellmate – "Thus, the critical distinction between Bruton and this case is the circumstances under which the out-of-court statement was made. Whereas in Bruton the incriminating statement was the product of a formal interrogation and therefore testimonial, the

incriminating statements made by Dale here were made unwittingly, and not in anticipation by Dale of future use of the statements at trial. Under our present understanding of the confrontation right, governed by *Crawford*, the introduction of Dale's out of court statements did not violate Johnson's confrontation right."

U.S. v. Johnson, 581 F.3d 320 (6th Cir. (Mich.) Sep 18, 2009), cert. denied, 2010 U.S. LEXIS 4874 (June 14, 2010) – "Because it is premised on the Con-frontation Clause, the Bruton rule, like the Confrontation Clause itself, does not apply to nontestimonial statements."

Rodgers v. Commonwealth, __ S.W.3d __, 2009 WL 1819474 (Ky. Jun 25, 2009) – "*Crawford* did not implicitly overrule *Richardson* and *Gray*. ... '[t]he same redaction that 'prevents *Bruton* error also serves to prevent *Crawford* error.'""

People v. Gomez-Perez, 2009 WL 795289 (Cal. App. 3 Dist. Mar 27, 2009) (unpub) – "nothing in *Crawford* suggests a retraction of *Richardson*."

People v. Reyes, 2009 WL 755404 (Cal. App. 2 Dist. Mar 24, 2009) (unpub) – "the comprehensive redaction of the wiretap evidence eliminated any risk of a confrontation clause violation" under both *Bruton* and *Crawford*

People v. Daniels, 2009 WL 568918, *15+ (Cal.App. 1 Dist. Mar 06, 2009) (unpub) – "Citing *Crawford* ... the Attorney General argues that there was no confrontation problem because Daniels's statements were not testimonial. Our Supreme Court appears to have rejected this argument:" – [NOTE: But the quotation that follows, from *People v. Stevens* (2007) 41 Cal.4th 182, 198-199, doesn't actually seem to address the argument.]

State v. Perry, 2009 WL 139536 (Iowa App. Jan 22, 2009) (unpub) – "a non-testifying defendant is only a "witness" within the meaning of the Confrontation Clause when the admitted statements are testimonial in nature. *Davis* ... Watson's statements on the videotape are not testimonial. Accordingly, Perry's Sixth Amendment rights and Bruton are not at issue."

U.S. v. Graham, 2008 WL 5424142 (D. S.D. Dec 27, 2008) (unpub) (pretrial order) – "Taken together, all of the above case law should be interpreted to mean that *Bruton* applies only when the out-of-court statement sought to be admitted is 'testimonial' and the declarant will not be testifying."

U.S. v. Spotted Elk, 548 F.3d 641 (8th Cir. Nov 26, 2008) – "In the years since *Bruton*, the Supreme Court has clarified the scope of the Confrontation Clause in *Crawford* ... *Davis* ... and *Giles* ... It is now clear that the Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant. *Davis*, 547 U.S. at 823-26; *Whorton v. Bockting*, 127 S.Ct. 1173, 1183 (2007) ("[T]he Confrontation Clause has no application to [non-testimonial out-of-court statements]"). Blue Bird's reported utterance was not a statement of fact, but a proposal of a future course of action (*i.e.*, what to say in the future), uttered not to any official, but to a co-defendant. See *Davis*, 547 U.S. at 822 (testimonial statements describe past events); *United States v. Singh*, 494 F.3d 653, 658-59 (8th Cir.) (co-conspirators' statements in furtherance of the conspiracy were not testimonial under *Crawford*), *cert. denied*, 128 S.Ct. 528 (2007). Blue Bird's reported words were not testimonial, and therefore Frogg's account of them could not violate Spotted Elk's Sixth Amendment rights."

People v. Garcia, 168 Cal.App.4th 261, 85 Cal.Rptr.3d 393 (Cal. App. 4 Dist. Nov 14, 2008) – "FN12. The People suggest there was no *Aranda/Bruton* error because none of Garcia's out-of-court statements in question were testimonial-- i.e., none were made under circumstances that would lead an objective witness to believe they would be available for use at a later trial. The People rely on *Crawford* ...Whether the *Aranda/Bruton* rule applies only to extrajudicial testimonial statements appears to be an unsettled question, and one that we need not address in this case. We note, without citation or reliance, that there is inconsistency in unpublished California appellate court opinions on the issue. We also note the federal Third Circuit Court of Appeals has "interpreted *Bruton* expansively, holding that it applies not only to custodial confessions, but also when the statements of the non-testifying co-defendant were made to family or friends, and are otherwise inadmissible hearsay." (*U.S. v. Mussare* (3rd Cir.2005) 405 F.3d 161, 168.)"

U.S. v. Hatfield, 2008 WL 4516320 (S.D. Ill. Oct 03, 2008) (unpub) (pretrial order) – "The law is clear under *Bruton* or *Crawford* that defendant has to be 'expressly implicated as a participant in the crime' in the statements for there to be a violation of confrontation rights."

U.S. v. Newell, 2008 WL 4402177 (D. Me. Sep 29, 2008) (unpub) (pretrial order) – "The Court believes this redaction [in accordance with *Bruton*] also resolves any *Crawford* issue with respect to Defendant Parisi."

U.S. v. Scott, 2008 WL 4344530 (S.D. N.Y. Sep 16, 2008) (unpub) (pretrial ruling) – "Defendants argue that *Crawford* limited the holdings of *Richardson*, *Gray* and their progeny and so a codefendant's statement that incriminates the other codefendant is no longer permitted even if redacted. The Court in *Crawford*, however, did no such thing and called this issue an 'entirely different question .'"

U.S. v. Pike, 2008 WL 4163242 (2nd Cir. Sep 05, 2008) (unpub) – "because the statement was not testimonial, its admission does not violate either *Crawford* [cite] or *Bruton*..."

U.S. v. Hernandez-Orellana, 539 F.3d 994 (9th Cir. Aug 20, 2008) – appellant argued that *Crawford* was violated, but actual holding refers only to *Bruton*: "Nothing in the record can be read as implicating Drewry, let alone in the manner of a *Bruton* violation. Thus, Drewry's contention that her specific right to confront the witnesses against her was abridged is unavailing." – by implication, *Bruton*-compliant statement raises no *Crawford* issue

U.S. v. Rakow, 286 Fed.Appx. 452 (9th Cir. Jul 28, 2008) – "Finally, Rakow argues that his right of confrontation was violated when evidence of prior testimony by his codefendant, Denise Del Bianco, was admitted against her. [cite] However, the statements admitted against her did not actually incriminate him ... absent *Bruton* error, *Crawford* has no work to do in this context."

People v. Abraham, 2008 WL 2877818 (Cal. App. 2 Dist. Jul 28, 2008) (unpub) – "Compliance with this [*Bruton*] rule is sufficient to prevent error under *Crawford*"

U.S. v. Berrios, 2008 WL 2704884 (D. V.I. Jul 08, 2008) (unpub) – "*Bruton* applies not only to testimonial statements, but also to nontestimonial statements such as statements of the non-

testifying co-defendant to family or friends." – but then holding that *Bruton* incorporates *Ohio v. Roberts* test

People v. Larabee, 2008 WL 2697550 (Mich. App. Jul 10, 2008) (unpub) – in dicta, stating: "We note that *Bruton* provides a brightline rule regarding the introduction of a nontestifying codefendant's statements implicating a defendant at a joint trial irrespective of *Crawford's* testimonial statement analysis."

State v. Latre, 2008 WL 2426826 (Cal.App. 5 Dist. June 17, 2008) (unpub) – "[discussing *Bruton* claim] In the form in which they were admitted, however, Felix's statements did not state or imply that those unnamed companions were coperpetrators. In fact, ... this statement was never introduced, not even with Latre's name omitted. As presented to the jury, Felix's statements showed only that she was in the company of other people when she came to the casino to pass counterfeit money. ... [discussing *Crawford* claim] There was no confrontation clause violation for the reasons we have already stated: The statements did not incriminate Latre, and the jury instructions adequately directed the jurors not to use them against him."

People v. Villa, 2008 WL 2266398 (Cal. App. 2 Dist. Jun 04, 2008) (unpub) – "Padilla's statement about a jale was offered for the truth of the matter asserted, that is, to show that he planned to commit a jale. Since Villa was present when the statement was made, the statement could show that Villa knew what Padilla was planning when he drove to the liquor store and intended to participate. The statement thus inferentially incriminates Villa. We see no application of *Bruton* to this case, however. ... Padilla's statement to Gutierrez was not testimonial. The Confrontation Clause has no application to his statement."

People v. Lewis, 43 Cal.4th 415, 181 P.3d 947, 75 Cal.Rptr.3d 588 (Cal. Apr 28, 2008) – "Here, codefendant Huber's statements were no doubt testimonial because they were taken during police interrogations. Nonetheless, their admission at the joint trial violated defendant's confrontation rights only to the extent they were admitted 'against' defendant. (*See Crawford* ...) As the high court has explained, "[o]rdinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." (*Richardson*...) The only exception to this rule is the narrow class of statements falling within the holdings of *Bruton* and *Gray*—that is, statements that powerfully incriminate the defendant on their face because they directly implicate the defendant by name or do so in a manner the jury could not reasonably be expected to ignore. [cites] Accordingly, redacted codefendant statements that satisfy *Bruton's* requirements are not admitted 'against' the defendant for *Crawford* purposes."

U.S. v. Harper, 2008 WL 1984267 (5th Cir. May 08, 2008) (on rehearing) (unpub) – "Because the Supreme Court has thus far taken a "pragmatic" approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, [FN56] we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton*, *Cruz*, and *Gray*." – no violation when jury was instructed to disregard a remark that only inferentially (if that) implicated defendant

U.S. v. Pugh, 2008 WL 961564 (6th Cir. Apr 09, 2008), cert. denied (June 16, 2008) (unpub) – "Because the statement at issue is not testimonial in nature, the Confrontation Clause is not implicated, and an analysis under *Bruton* is unnecessary."

U.S. v. Walden, 2004 WL 5564187 (S.D. Fla. Apr 29, 2004) (unpub) (post-trial motion) – "First and foremost, Godinez' statement was admissible solely against Defendant Godinez. It was redacted to remove any direct reference to co-Defendant Geer in accordance with *Bruton*... Therefore, no testimonial statements by Godinez was admitted as evidence against Defendant Geer"

U.S. v. Ramos-Cardenas, 524 F.3d 600 (5th Cir. Apr 09, 2008) – "[W]hile *Crawford* certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by *Bruton*, *Richardson*, and *Gray*."

Perkins v. Warren, 2008 WL 440991, *5 (E.D. Mich. Feb 14, 2008) (unpub) (habeas) – "*Crawford* neither overruled *Richardson* nor expanded the holding of *Bruton*. *United States v. Lung Fong Chen*, 393 F.3d 139, 150 (2d Cir.2004), *cert. denied*, 546 U.S. 870, 126 S.Ct. 372 (2005)."

McCulloch v. Horel, 2008 WL 755919 (C.D.Cal. Jan 31, 2008) (unpub) (habeas) – the warden "argues that under *Crawford*, nontestimonial out of court statements may be admissible even if they lack indicia of reliability. *See Whorton*, 127 S.Ct. at 1183. Thus, one may suppose that *Bruton* no longer constitutes an independent federal constitutional limit on the admission of nontestimonial statements." – but not deciding the issue

People v. Espinoza, 2008 WL 315785 (Cal.App. 2 Dist. Feb 06, 2008) (unpub) – "*Crawford* does not overrule, limit or even address the rule of *Bruton* and its progeny. That Hernandez's statement was 'testimonial' under *Crawford* does not help Espinoza because it did not incriminate him, and was limited both in its applicability to him and its use as to Hernandez as well. When a statement is properly redacted and the jury is instructed not to use it against the defendant, the codefendant is not a 'witness against' the defendant, and the statement does not implicate the confrontation clause."

People v. Torres, 2008 WL 256752 (Cal. App. 5 Dist. Jan. 31, 2008) (unpub) – "'*Crawford* did not overrule *Bruton* and in fact cited *Bruton* as an example of a case which was consistent with the original understanding of the Confrontation Clause, [citation], as opposed to the now-discredited balancing test....' [cite] Thus, if a confession is testimonial within the meaning of *Crawford*, it may be admitted at a joint trial without violating *Aranda-Bruton* or *Crawford* if the confession makes no reference to the nondeclarant defendant's existence, and the jury is given a limiting instruction not to consider the evidence when determining the nondeclarant defendant's guilt or innocent."

U.S. v. Stone, 2007 WL 4560599 (E.D. N.Y. Dec 18, 2007) (unpub) (pretrial) – "The question this motion presents is whether statements which pass muster pursuant to *Bruton* must also pass muster pursuant to *Crawford*? ... The question posed at the outset of this opinion, namely, whether a statement that passes muster pursuant to *Bruton* and *Richardson* must also pass muster pursuant to *Crawford* was precisely answered in *United States v. Lung Fong Chen*, 393 F.3d 139, 150 (2d Cir.2004), where the court held that a co-defendant's statement that encountered no *Bruton* error also encountered no *Crawford* error stating 'we see no indication that *Crawford*

overrules *Richardson* or expands the holding of *Bruton*. We therefore do not find that the admission of any of Tu's statements violated the Confrontation Clause."

U.S. v. Lujan, 529 F.Supp.2d 1315 (D. N.M. Dec 13, 2007) – mainly a *Bruton* case, but adding: "Moreover, a properly redacted confession of a non-testifying co-defendant does not raise a *Crawford* problem because the co-defendant's statement was not offered against the defendant, but only against the co-defendant."

U.S. v. Rodriguez-Duran, 507 F.3d 749 (1st Cir. Nov 21, 2007) – "[O]ur conclusion that *Bruton* is inapt [because statement was not inculpatory on its face] does not necessarily mean that there was no Sixth Amendment violation as recognized by *Crawford*."

In re Bonds, 2007 WL 3378567 (Wash. App. Div. 2 Nov 14, 2007) (unpub) – "But Bonds asserts that *Crawford* changed the *Bruton* analysis. He reasons that *Bruton*'s notion that the confrontation clause is not violated where the trial is otherwise fair is inconsistent with *Crawford*. ... We have recently held, however, that although *Crawford* heightened the standard under which a trial court can admit hearsay statements, it did not overrule *Bruton* and its progeny. [cite] We recognized that a *Bruton* redaction answers 'the threshold question posed in *Crawford* of when an admission by one defendant can be considered a 'witness[] against' another defendant in a joint trial." [cite] Under *Bruton* and its progeny, if a statement is properly redacted and the jury is instructed not to use it against the defendant, the declarant is not a "witness against" the defendant. [cite] If a codefendant is not a "witness against" the defendant, admitting the codefendant's statement does not implicate the confrontation clause. [cite]" – all deleted cites are to *In re Pers. Restraint of Hegney*, 138 Wn.App. 511, 546, 158 P.3d 1193 (2007).

People v. Harrison, 2007 WL 4100080 (Cal. App. 2 Dist. Nov 19, 2007) (unpub) – "The [*Aranda/Bruton*] rule thus presumes the statement is an admissible admission by the declarant and inadmissible hearsay against the codefendant."

People v. Leonel, 2007 WL 3077273 (Cal. App. 6 Dist. Oct 23, 2007) (unpub) – "As *Bruton*, *supra*, 391 U.S. 123, like *Crawford*, is based solely on the Confrontation Clause, *Bruton*, like *Crawford*, is inapplicable where the statements at issue are nontestimonial."

People v. Mendoza, 2007 WL 3051719 (Cal. App. 5 Dist. Oct 19, 2007) (unpub) – "The *Aranda/Bruton* rule applies here only if the statements of Garcia and Mendoza were inadmissible against Santana. ... '[I]f the statement is admissible against the codefendant under a hearsay exception, and its admission otherwise survives confrontation analysis, then the jury may consider it against the codefendant; no reason exists for severance or redaction.'" (quoting *People v. Smith* (2005) 135 Cal.App.4th 914, 921-922.) – co-defendants' non-testimonial statements against interest raise no *Bruton* issue

Bolus v. Portuondo, 2007 WL 2846912 (N.D. N.Y. Sep 26, 2007) (unpub) (habeas) – "Even if it [*i.e.*, *Crawford*] were [retroactively] applicable this Court's conclusion would be the same, since the Second Circuit 'see[s] no indication that *Crawford* overrules *Richardson* or expands the holding of *Bruton*.' *United States v. Chen*, 393 F.3d 139, 150 (2d Cir.2004). ... Since this Court finds no *Bruton* error, there would be no *Crawford* error, even if *Crawford* were applicable."

U.S. v. Parra, 2007 WL 2886725 (2nd Cir. Sep 28, 2007) (unpub) – "The Government, in its brief, conceded that admission of Parra's statement amounted to a *Bruton* violation. At argument, however, the Government informed us that it was now of the view that Parra's statement constituted a non-testimonial statement under *Crawford v. Washington*, 541 U.S. 36 (2004). For the record, we note our agreement with this observation." [NOTE: So if the non-testifying co-defendant's statement isn't testimonial hearsay, its admission doesn't violate *Bruton*?]

U.S. v. Smith, 2007 WL 2902893 (N.D. Ohio Aug 08, 2007) (unpub) – case involving defendants named Zgoznik, Zrino Jukic and Smith, in which one defendant opposed severance motion by another – "The fact that the statements at issue—whether they are contained in the recording and transcript or the live oral testimony of Jukic—are not governed by the Confrontation Clause does not prevent the court from severing the defendants due to the prejudice to Smith that would be caused if those statements were introduced. While *Bruton* is a Confrontation Clause case, it is also a case that delineates a specific context where redaction and limiting instruction are insufficient to cure the admission of hearsay otherwise inadmissible against Smith. *Bruton* rests not only on analysis of the inability of Bruton to confront or cross-examine Evans, but also on the prejudice triggered by the introduction of Evans's statements in the first place." [NOTE: So when non-testifying co-defendant's statement isn't testimonial, *Bruton* mandates a non-constitutionally-required Rule 403-type analysis?]

United States v. Cuong Gia Le, 316 F. Supp. 2d 330 (E.D. Va. 2004) – "At the hearing in this matter, counsel for Loc Tien Nguyen argued that, under *Crawford*, anytime the government introduces a non-testifying defendant's statement that establishes any aspect of the case related to a redacted co-defendant, that co-defendant, under the Sixth Amendment, must have the opportunity to cross-examine the non-testifying defendant. As a result, he argues that such statements must be excluded in their entirety or severance granted. The essence of this argument is that *Crawford* overruled *Bruton* and its progeny. As such, it is unpersuasive; *Crawford* may not be read to mandate such a dramatic result. Indeed, the logic of Loc Tien Nguyen's argument would mean that even in cases like *Richardson*, where the very existence of a co-defendant is redacted entirely, the Sixth Amendment would still be violated if the statement helps establish any other ancillary fact of potential relevance to the government's case against a co-defendant. Such a revolutionary change in criminal procedure jurisprudence was not announced in *Crawford* and it cannot be assumed that the Justices intended to overrule *Richardson sub silencio*. Once the statements at issue here are properly redacted, they are facially neutral."

Informants' Statements to Police (admitted for the truth)
(see also pt. 4, Background / Context Statements)

Mack v. State, 23 N.E.3d 742 (Ind. Ct. App. Dec. 18, 2014) – "[C.I.] Stewart's statements to Officer Simpson were testimonial. His statements were made to a police officer in the course of an official investigation in which Stewart was a participant. An objective witness would reasonably have believed that the purpose of the statements was to gather evidence of past events potentially relevant to a later criminal prosecution of Mack. As such, the statements were testimonial..."

Freeman v. State, 329 Ga. App. 429, 429-31, 765 S.E.2d 631, 633-34 (2014) – "Quite simply, a confidential informant's 'statements to a law enforcement officer are clearly testimonial'..."

Hereford v. State, 444 S.W.3d 346, 348-53 (Tex. App. 2014) – unnamed person called 911 to give detailed information about drug dealing from a particular hotel room – not to report an emergency – testimonial

State v. Hudlow, 331 P.3d 90 (Wash. App. Div. 3 2014) – "¶ 35 ... the out of court statement to Detective Todd Carlson was from a confidential informant who knew he was participating in a criminal investigation. An informant knows or should know that anything he or she says can and will be used against the target of the controlled buy." – testimonial

Walker v. State, 406 S.W.3d 590 (Tex. App. Eastland Mar. 21, 2013) – "Officer Luckie testified that he received information from a confidential informant, Martinez, that a large amount of methamphetamine remained undiscovered in the impounded vehicle. ... we conclude that her statements to Officers Luckie and Miller were testimonial."

State v. Johnson, 771 N.W.2d 360, 2009 SD 67 (S.D. Jul 29, 2009) – "[¶ 23.] Under the teachings of *Crawford*, an objective witness acting as a government informant would believe his statement to law enforcement, regarding the ability to purchase drugs from a certain person, would be available for use at a later trial. [cite] Accordingly, Lewis's statement was testimonial."

State v. Tscheu, 758 N.W.2d 849 (Minn. Dec 31, 2008) – "[Agent] Jaeche testified that he asked the driver to go by [murder victim] Thoms's residence, familiarize himself, and try to recall any suspicious activity or vehicles in the area on the date of her death." – snowplow driver did and gave statement - testimonial

U.S. v. McGee, 529 F.3d 691 (6th Cir. Jun 24, 2008) – after defense suggested CI had been talking to a third person rather than defendant, detective testified on redirect that he asked the CI who he was talking to and CI said defendant – held: testimonial

U.S. v. Powers, 500 F.3d 500 (6th Cir. Sep 12, 2007) – "[T]he admission of the SOI's [source of information, or CI] out-of-court statements violated the Defendant's Confrontation Clause rights. ... 'Tips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial. The very fact that the informant is confidential—i.e., that not even his identity is disclosed to the defendant—heightens the dangers involved in allowing a declarant to bear testimony without confrontation. The allowance of anonymous accusations of crime without any opportunity for cross-examination would make a mockery of the Confrontation Clause.' *Cromer*, 389 F.3d at 675. [¶] This is not to say that every CI's statement offered through a police officer at trial amounts to a Confrontation Clause violation."

U.S. v. Hearn, 500 F.3d 479 (6th Cir. Sep 11, 2007) – "Can the government, for the purpose of establishing the heart of the government's case, repeatedly solicit testimony regarding confidential informants' statements to the effect that a defendant had the intent to distribute illegal drugs, when the defendant does not have an opportunity to cross-examine the informants and when the government is on notice of a potential Sixth Amendment problem?" – no surprise, use of CI's statements to prove the elements was not OK

People v. Demann, 2007 WL 2404534 (Mich. App. August 23, 2007) (unpub) – "The challenged statement about the substance of the anonymous tip was an out-of-court statement by an unnamed informant, who did not testify at trial. Clearly, the police officer responded to this tip by going to the barn to look for evidence of methamphetamine production. Under the circumstances, where the statement was made directly to law enforcement, accused defendant of a crime, and appears to have been admitted to show that defendant committed the crime, we find the challenged statement to be testimonial hearsay. ... We therefore conclude that the challenged statement was inadmissible to prove the truth of the matter asserted."

People v. Thompson, 2007 WL 2051977 (Mich. App. 2007) (unpub) – "The informant's tip or statement to police would be testimonial in nature."

People v. McEaddy, 41 A.D.3d 877, 838 N.Y.S.2d 218, 2007 N.Y. Slip Op. 04726 (N.Y. A.D. 3 Dept. 2007) – "Two detectives testified that after the video aired on television, several people called in tips that defendant was the man in the video. The detectives further stated that after taking another call identifying defendant from the video, they talked with Kevin Woodall, obtained two sworn statements from him, then arrested defendant for the September 2002 robbery. One detective referred to Woodall as a witness to the incident. Woodall never testified. [¶] Clearly, a statement solicited by a police agency for investigative and evidentiary purposes to advance a potential prosecution is testimonial under the *Crawford* criteria ..."

U.S. v. Rodriguez-Martinez, 480 F.3d 303 (5th Cir. 2007) – "At trial, Officer Cedillo testified that the confidential informant identified Rodriguez-Martinez as his drug source. Rodriguez-Martinez objected, arguing that the informant's out-of-court identification was testimonial hearsay inadmissible under *Crawford*. The district court overruled the objection on the basis that the statement is not hearsay because it was a statement against interest. The Government concedes that the admission of the informant's out-of-court identification through Officer Cedillo's testimony violated the Confrontation Clause under *Crawford*." (fn omitted)

State v. Rodriguez, 2006 Minn. App. Unpub. LEXIS 1131 (Minn. Ct. App. 2006) – "The CI failed to appear at trial in response to a subpoena. Despite the CI's absence and defendant's inability to cross-examine the CI, the investigating officer testified at length about statements made by the CI. All of the CI's statements were offered for the truth of the matter asserted: that defendant was the person who participated in a controlled substance transaction. Thus, all of these statements fit within the definition of hearsay, Minn. R. Evid. 801(c), were made by an unavailable declarant who had not previously been cross-examined, and admission of the evidence violated the protections extended to defendant under the Confrontation Clause."

United States v. Maher, 454 F.3d 13 (1st Cir. 2006), cert. denied, 127 S.Ct. 568, 166 L.Ed.2d 420 (2006) – "The statement at issue here was made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of the drugs. Johnson's statement is also testimonial under *Crawford*'s third example of the "core class" of testimonial statements. The cooperation agreement, indeed, made it more likely the statement would be used prosecutorially. In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial. This is sufficient to render the statement testimonial under the test in *Crawford* and our test in *Brito*." In relation to the prosecution's argument that the statements of the informant were admitted for reasons other than the truth of the matter, the court held, "The

government's articulated justification – that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statement and thus not within Crawford – is impossibly overbroad. It is overbroad even in classic hearsay terms, as stated in the McCormick treatise.”

State v. Adams, 131 P.3d 556 (Kan. Ct. App. 2006) – “Godfrey [police officer] was permitted to recount absent-witness Green's [confidential informant] statements in his telephone calls to Adams [defendant]. Green has never been available for cross-examination. Further, there was evidence of bad blood between Green and Adams. Green was specifically retained by the police because of his knowledge of drug deals and drug dealers. The whole point of Green's telephone call to Adams, which he knew the police were listening to, was to establish evidence with which to prosecute Adams. Green had every reason to believe that his statements made to Adams during the telephone conversations would be used against Adams at trial. Green's statements in his telephone conversations with Adams were testimonial in nature. They were offered for the truth of the matter asserted, *i.e.*, that Green offered to buy cocaine from Adams.”

State v. Davis, 2005 Ohio 5544 (Ohio Ct. App. 2005) – “Based on information received from a confidential informant (CI), police detectives set up a controlled purchase of crack cocaine. When the CI and the undercover detective arrived at the specified address, defendant approached the vehicle and engaged in drug sale activity. After several other controlled buys of heroin, a search warrant for the address was obtained. Three individuals, including defendant, were arrested. Upon execution of the search warrant, a police officer saw defendant run upstairs, and upon being searched, defendant had a large amount of cash and a bag of crack cocaine in his pants pocket. Defendant was indicted and he was convicted of multiple offenses after a jury trial. *** While defendant's confrontation rights were violated by testimony from police officers as to the CI's statements, which was testimonial, such was harmless error.”

United States v. Savoires, 430 F.3d 376, 2005 Fed.App. 0458P (6th Cir. 2005) – A police officer may testify regarding an informant's statement if offered solely as background for why a search warrant was obtained, and not as substantive proof that drugs were sold at the house. This does not implicate the Confrontation Clause. However, when the prosecutor took this testimony and argued it as substantive evidence, this violated the defendant's right to confrontation.

United States v. Cromer, 389 F.3d 662 (6th Cir. Mich. 2004) - “statements of a confidential informant are testimonial in nature and therefore may not be offered by the government to establish the guilt of an accused absent an opportunity for the accused to cross-examine the informant.”

Objective reasonable person standard (too many cases to list those merely reciting the standard)

U.S. v. Udeozor, 515 F.3d 260 (4th Cir. Feb 01, 2008) – “The intent of the police officers or investigators is relevant to the determination of whether a statement is “testimonial” only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially.”

People v. Trevizo, 181 P.3d 375 (Colo. App. Dec 13, 2007) – "An 'objective witness' has been interpreted by the Colorado Supreme Court to mean 'an objective reasonable person in the declarant's position.'"

State v. Bailey 2007 WL 1226949 (Ohio App. 1 Dist. 2007) (unpub) – "{¶ 45} In distinguishing between testimonial and nontestimonial statements, the Ohio Supreme Court has held that 'courts should focus on the expectation of the declarant at the time of making the statement.' Thus, the court has adopted an 'objective witness' test. The intent of the questioner is 'is relevant only if it could affect a reasonable declarant's expectations.'" (quoting *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, at ¶ 36.)

State v. James, 158 P.3d 102 (Wash. App. Div. 3 2007) – "Officer Curtis, was informed by an unnamed witness that a black male was seen talking on a cell phone when a handgun fell out of his pants in front of an apartment complex at 2712 East South Riverton just before the shooting. ... Given that the investigation was crime related, the reporting person would reasonably believe the statement would be available for use at a later trial. Thus, the statement is testimonial." [NOTE: The state argued that the evidence was admitted for the non-hearsay purpose of showing how investigation proceeded, but court didn't really address the argument, ¶¶ 29-31, possibly because it found any error to be harmless.]

People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333, 312 Ill.Dec. 268 (Ill. 2007) – "[I]n our view, the proper question is not whether the declarant actually did intend or foresee that his statement would be used in prosecution. Rather, the question is whether the objective circumstances indicate that a reasonable person in the declarant's position would have anticipated that his statement likely would be used in prosecution." (This is a plurality opinion, but the justice who concurs in the result states that he would adopt an identical formulation.)

State v. Jensen, 727 N.W.2d 518 (Wis. 2007) - "In light of the standard set out above, we conclude that under the circumstances, a reasonable person in [murder victim]'s position would anticipate a letter addressed to the police and accusing another of [her own future] murder would be available for use at a later trial." - "[I]t does not matter if a crime has already been committed or not. The focus of the inquiry is whether a 'reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime.'" - also, voice mails to police officer are testimonial

U.S. v. Torres-Villalobos, 487 F.3d 607 (8th Cir. 2007) (superseding prior opinion) – "Warrants of deportation are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions. They are properly characterized as non-testimonial official records that were prepared independent of this litigation. We therefore agree with our sister circuits that the warrants of deportation are not 'testimonial' evidence that implicate the Confrontation Clause of the Sixth Amendment." (Citations omitted.)

U.S. v. Mooneyham, 473 F.3d 280, 286-287 (6th Cir. 2007) – conspirator made statements to undercover agent – "The threshold question, then, is whether McMahan's statement was 'testimonial.' In this regard, the proper inquiry is 'whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and

prosecuting the crime." *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir.2004). McMahan's statements were admitted into evidence under the theory that they were statements made by a co-conspirator in furtherance of the conspiracy. By definition, such statements are not by their nature testimonial; the one making them has no "awareness or expectation that his or her statements may later be used at a trial." *Id.* at 674 (internal quotation omitted). ... Because McMahan was not aware that Williams was a police officer, his remarks were not the product of interrogation and were not testimonial in nature. Hence, there was no *Crawford* error in the introduction of those remarks."

People v. Quintana, 2007 WL 404075, **9-12 (Cal.App. 2 Dist.,2007) (unpub) – "the People introduced the statements at issue as part of the evidence that Fernando threatened Soqui in an attempt to suppress evidence ... If Fernando, by his statements, was suborning perjury, he did not want *his* statements disclosed; he wanted only for Soqui to perjure himself. Fernando's statements were not 'testimonial'"

State v. Sudduth 149 P.3d 547 (table), 2007 WL 92638, **5 (Kan. App. 2007) (unpub) – evidence of prior robbery admitted to show M.O., but witnesses to prior robbery not called – "The question is whether, after a conviction on the charges for which the statements were made, the evidence continues to be testimonial in nature. ... The statements were testimonial only to the extent that the declarants would naturally intend their statements to be used to convict Sudduth for that crime. The declarants had no intention of accusing Sudduth of subsequent robberies. Therefore, with respect to the current robberies, the statements were not testimonial evidence."

Pope v. White, 184 Fed.Appx. 606 (9th Cir. Cal. 2006) – State of mind hearsay statements are non-testimonial because an objective witness would not reasonably believe that a casual remark to an acquaintance would be later used in court.

U.S. v. Pugh, 405 F.3d 390 (6th Cir. 2005), appeal after remand, 273 Fed.Appx. 449 (6th Cir. Apr 09, 2008), cert. denied, 128 S.Ct. 2945 (U.S. Jun 16, 2008) – "the 'Court emphasized that, '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.'" *Cromer*, 389 F.3d at 672. Thus, we determined that the proper inquiry in deciding whether a statement is testimonial for evidentiary purposes is "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime."

Non-Verbal Statements

State v. Sexton, 368 S.W.3d 371, 383-409 (Tenn. 2012) – "Nonverbal conduct, therefore, qualifies as a 'statement' only if the conduct is 'intended by the person as an assertion.' ... s applied to these circumstances, it is not apparent that Ms. Sexton intended to declare the guilt of the Defendant by arranging an interview with the officers. ... In our view, because Ms. Sexton's conduct did not qualify as hearsay, the testimony of Detective Alvarez and Agent Brakebill relating to her conduct did not violate the Defendant's right of confrontation."

People v Porco, 2010 NY Slip Op 1989, 71 A.D.3d 791, 896 N.Y.S.2d 161 (N.Y. App. Div. 2d Dep't 2010) – " The defendant was convicted of murdering his father and attempting [**792] to murder his mother with an axe while the victims were at home asleep in their bed. [¶] The

defendant contends on appeal that the trial court erred in permitting a detective to testify that the defendant's mother, while being treated by paramedics at her home after the attack, nodded affirmatively in response to the detective's question as to whether the defendant attacked her. ... Here, the affirmative nod was not made spontaneously, but in response to probing, direct questions by the detective and, as such, constituted testimonial hearsay subject to exclusion from evidence in accordance with *Crawford*..." [dicta, since mother testified]

People v. Garrett, 2008 WL 4639566 (Cal. App. 4 Dist. Oct 21, 2008) (unpub) – tape of crime scene includes brief appearances of homeowner, who makes gestures – "The tape does not constitute anything of evidentiary value with regard to the homeowner. The portion of it in which he appears conveys no meaning whatsoever, therefore, it does not constitute testimony."

State v. Monroe, 2008 WL 4838649 (Del. Super. Oct 31, 2008) (unpub) (pretrial order) – "Ferrell's nonverbal identification of Defendant from a photo lineup is inadmissible. A nonverbal act is considered a statement for hearsay purposes under D.R.E. 801(a)(2) [FN13] and it is barred by *Crawford* because it is testimonial."

State v. Brooks, 2008 WL 4383962 (Wash. App. Div. 1 Sep 29, 2008) (unpub) – "Brooks contends that he was denied his constitutional right to confrontation when Officer Lundin testified about the telephone calls that Quinones made as part of the 'order-up/take-down' operation. ... Lundin's testimony did not describe any assertions or conduct intended to be an assertion and therefore did not constitute a statement for purposes of hearsay." – no *Crawford* problem

U.S. v. Flores, 286 Fed.Appx. 206 (5th Cir. Aug 07, 2008) – "Flores first contends that evidence that Mata made a phone call to Flores and then directed officers to the dumpster containing the firearm was nonverbal assertive conduct. ... Mata's actions--making a phone call to Flores and going with police to retrieve the missing firearm--are not testimonial statements prohibited by the Confrontation Clause. ... Mata's actions were neither a declaration nor an affirmation and do not resemble a witness bearing testimony."

People v. Bird, 2007 WL 2377343 (Mich. App. Aug. 21, 2007) (unpub) – "Melissa Friar and her eight-year-old daughter Alana were found dead in their home. Melissa's four-year-old son Jonathan was found several miles away, on the back porch of a vacant home, the same morning. ... Defendant also argues on appeal that his counsel was ineffective for failing to object to the admission of testimony regarding defendant's nephew's behavior at the preliminary hearing. Eric Friar, Melissa's brother, testified that when defendant entered the courtroom at the preliminary hearing, Jonathan became very frightened. Jonathan had been sitting on Eric's lap, and when he saw defendant, he slid off and tried to hide under the witness table. He crawled to a door and attempted to leave the courtroom. When that door would not open, he crawled back behind the judge and attempted to leave by another doorway. ... Nonverbal actions and conduct may be hearsay if the conduct is intended to be an assertion. The first step to determine whether conduct is hearsay to determine whether an assertion is actually intended by the conduct. ... We likewise conclude in this case that Jonathan did not intend an assertion by his spontaneous attempt to escape the courtroom. Four-year-old Jonathan was afraid, but defendant has not provided any evidence that Jonathan intended an assertion by his conduct. The evidence was not a 'statement' and thus, was not inadmissible hearsay. ... Jonathan did not intend his conduct to be an assertion. Defendant's confrontation clause argument is without merit."

Veltre v. State, 957 So.2d 47 (Fla. App. 4 Dist. 2007) – "The neighbor was pointing in the direction of where a man had gone either while she was perceiving him, or immediately thereafter; consequently, there was no chance for reflection. Further, the trial court found that the neighbor pointed as a result of witnessing a startling event." [NOTE: This passage immediately follows a footnote citation to *Crawford*, but in context it reads more like a ruling on the state law of evidence.]

State v. Heller, 2007 WL 380907, *2 (Wash.App. Div. 3, 2007) (unpub) – based on hearsay definition, "testimony that the women pointed the finger at one another was a statement that they accused one another of the ownership of the purse and therefore the drugs. And it was for the basis of reporting who possessed the illegal substance for the purpose of reporting a crime. *Powers*, 124 Wn.App. at 99. The statement was then testimonial and barred by the Sixth Amendment."

Recordings of Police Radio Traffic, Aerial Surveillance Videos, Etc.

Taylor v. Connelly, __ F.Supp.2d __, 2014 WL 1814153 (E.D. N.Y. 2014) (habeas) – calls for assistance non-testimonial excited utterances

United States v. Solorio, 669 F.3d 943, 944-949 (9th Cir. Cal. 2012) – "About eight to ten of the agents conducted surveillance of the meeting. At least two of those agents broadcast their observations over a radio, one from a van "parked on a street overlooking the parking lot area," and one from an airplane overhead. ... By reporting their contemporaneous observations over the radio, the nontestifying agents enabled the testifying agents to monitor the operation, to stay ready to protect Portillo-Rodriguez and the on-the-scene agents should it prove necessary, and to be promptly alerted when it was time for them to play their assigned roles once the arrest was triggered... Accordingly, objectively assessed, the 'primary purpose' of the agents' statements was assuring that the arrest effort both succeeded and did not escalate into a dangerous situation, not 'to create a record for trial.'"

People v. Frailley, 2007 WL 4209031 (Mich. App. Nov 29, 2007) (unpub) – "Detective Henry Herpel testified that he knew the police were conducting ground and aerial surveillance of defendant on the day of the crime. Detective Herpel participated in the ground surveillance and he remained in radio contact with the aerial surveillance team and he was aware that the aerial activities were videotaped. ... Defendant fails to explain how the videotape constitutes a 'statement' or how it is 'testimonial.' However, were there a statement on the videotape to which defendant objects, the very nature of the covert surveillance recording suggests that it did not contain knowing responses to questioning in an investigative setting or under other formal circumstances that would lead someone to believe the statements would be used in future criminal proceedings. *Id.* Accordingly, defendant has failed to establish that the videotape constitutes a testimonial statement and his claim of error is without merit."

Williams v. State, 947 So.2d 694 (Fla. App. 4 Dist. 2007) – during surveillance and subsequent car chase, officer's communications over radio are testimonial, reasoning that officer "was aware that he was in the midst of a surveillance investigation. He knew that his recorded observations would have their place in a criminal prosecution as a contemporaneous record of the criminal

conduct of the occupants of the Taurus. Objectively, there was a reasonable expectation that the taped statements would later be used in the prosecution of a crime." - quoting and following another case involving same incident, *Shennett v. State*, 937 So.2d 287, 290 (Fla. 4th DCA 2006)

United States v. Ramirez, 2005 Fed. App. 0388N, 133 Fed.Appx. 196 (6th Cir. 2005) – One surveillance agent may not testify at trial to what another surveillance agent saw that goes to the fact of whether the defendant was present at a drug house. *Crawford* and the 6th Amendment require that the observing agent testify to what was seen in order to prove that fact.

Surreptitious Recordings / Prison Phones

(category added June, 2008)

(see also statements to co-conspirator statements, context statements, admissions of party opponent, adoptive admissions, casual remarks, non-hearsay)

Surreptitious recordings can be analyzed in a variety of ways, so the cases are scattered throughout the Outline. This category is offered as a type of finding aid. Only very short descriptions are provided here. Fuller summaries can be found by searching for the case name with the Adobe Reader "find" function.

State v. Payne, 440 Md. 680, 714-18, 104 A.3d 142, 162-64 (2014) – wiretaps

State v. Owens, 151 So. 3d 86, 87-89 (La. Ct. App. 2014) – prison phones

Ayers v. State, 97 A.3d 1037 (Del. 2014) – wiretaps

People v. Wood, 985 N.Y.S.2d 724, 985 N.Y.S.2d 724 (N.Y. App. Div. 2d Dept. 2014) – "The Supreme Court properly admitted into evidence certain recorded telephone conversations in which the defendant tried to dissuade a witness from testifying at his trial, as that evidence constituted consciousness of guilt [cites]. The defendant's contention that the admission of this evidence violated his right of confrontation is without merit [cites]."

U.S. v. Miller, 738 F.3d 361, 378-80 (D.C. Cir. 2013) – phone wiretaps – "None of the ... phone calls ... was consensually recorded, and therefore cannot be deemed 'testimonial' as the speakers certainly did not make the statements thinking that they 'would be available for use at a later trial.'" (some of a bewildering nest of internal quotation marks omitted)

Watson v. State, 421 S.W.3d 186, 195-98 (Tex. App.--San Antonio 2013), petition for discretionary review refused (May 14, 2014) – video of drug deal

State v. Johnson, 128 So. 3d 237 (Fla. 4th Dist. App. 2013) – video of drug deal

State v. Norah, 131 So. 3d 172, 179 (La. App. 4th Cir. 2013) – prison phone

U.S. v. Curbelo, 726 F.3d 1260, 1264-65 (11th Cir. 2013) – telephone wiretaps

U.S. v. Wright, 722 F.3d 1064, 1065-68 (7th Cir. 2013) – conversation between defendant and wired CI

United States v. Jones, 716 F.3d 851, 852-856 (4th Cir. Va. 2013) – "Even if Otis and Austin were aware that the prison was recording their conversation, a declarant's understanding that a statement could potentially serve as criminal evidence does not necessarily denote 'testimonial' intent. ... Put another way, just because recorded statements are used at trial does not mean they were 'created for trial.'"

People v. Arauz, 210 Cal. App. 4th 1394 (Cal. App. 2d Dist. 2012) – fellow inmate was paid informant

United States v. Ciresi, 697 F.3d 19, 22-32 (1st Cir. R.I. 2012) – municipal corruption, wire-wearing co-conspirator

Brown v. Epps, 686 F.3d 281, 282-289 (5th Cir. Miss. 2012) (habeas) – recording of drug deal

United States v. Berrios, 676 F.3d 118, 122-129 (3d Cir. V.I. 2012) – recording of conversations in a prison recreational yard

State v. Massey, __ So.3d __, 2012 La. App. LEXIS 412, 1-16 (La.App. 5 Cir. Mar. 27, 2012) – jail phone

People v Heard, 92 A.D.3d 1142, 938 N.Y.S.2d 672, 2012 NY Slip Op 1385 (N.Y. App. Div. 3d Dep't 2012) – wiretaps

People v Green, 92 A.D.3d 953, 939 N.Y.S.2d 520, 2012 NY Slip Op 1616(N.Y. App. Div. 2d Dep't 2012) – wiretaps

Bowens v. State, 80 So. 3d 1056, 1056-1058 (Fla. Dist. Ct. App. 4th Dist. 2012) – tape-recorded conversation between co-perpetrators in back of patrol car

State v. Waldron, 723 S.E.2d 402, 403-408 (W. Va. 2012) – recorded drug transaction

State v. Telles, 2011-NMCA-083, __ N.M. __, 261 P.3d 1097 (N.M. Ct. App. 2011) – secretly-recorded stationhouse conversation between co-perpetrators –

Estes v. State, 249 P.3d 313 (Alaska Ct. App. 2011) – monitored phone conversation

United States v. Stevens, 778 F. Supp. 2d 683, 687-692 (W.D. La. 2011) – corruption investigation, recordings made by cooperating witness

United States v. Farhane, 634 F.3d 127 (2d Cir. N.Y. 2011) – prosecution of al-Qaeda doctor – "tape recorded conversations between co-defendant Shah and confidential informant Saeed or undercover Agent Soufan"

Helms v. State, 38 So. 3d 182 (Fla. Dist. Ct. App. 1st Dist. 2010) – pimping prosecution, recording of meeting between officer and escort

Wilson v. United States, 995 A.2d 174 (D.C. 2010) – friends, one of whom is cooperating with authorities, talking in car

Lehman v. State, 926 N.E.2d 35, 36-42 (Ind. Ct. App. 2010) – drug deal

United States v. Spencer, 592 F.3d 866, 878-879 (8th Cir. Minn. 2010) – drug deal

U.S. v. Johnson, 581 F.3d 320 (6th Cir. (Mich.) Sep 18, 2009), cert. denied, 2010 U.S. LEXIS 4874 (June 14, 2010) – cooperating prisoner "using a recording device disguised as a radio... recorded a conversation with O'Reilly in the yard of the Macomb prison in which he asked O'Reilly for details about the DFCU robbery. O'Reilly provided extensive information, including the full names of the other participants in the crime."

United States v. Detelich, 351 Fed. Appx. 616, 622-623 (3d Cir. Pa. 2009) – crooked chiropractor's recorded conversations with cooperating witnesses

People v. Marshall, 65 A.D.3d 710, 2009 WL 2391862, 2009 N.Y. Slip Op. 06083 (N.Y. A.D. 3 Dept. Aug 06, 2009) – drug case, CI calls go-between

U.S. v. Santiago, __ F.3d __, 2009 WL 1424609 (1st Cir.(Mass.) May 22, 2009) – drug case, cooperating witness calls dealer

People v. Willis, 2009 WL 1464367 (Cal. App. 2 Dist. May 27, 2009) (unpub) – prisoners in wired cell

U.S. v. Bermea-Boone, __ F.3d __, 2009 WL 1078656 (7th Cir. Apr 23, 2009) – recordings of conversations between defendant and CW

State v. Sorrell, 2009 WL 1025873 (Tenn. Crim. App. Apr 08, 2009) (unpub) – a cell phone with an open line broadcast killers searching their victim's car, and their conversation was recorded on the victim's girlfriend's voice mail

U.S. v. Hamilton, 597 F.Supp.2d 407, 411 (S.D. N.Y. Feb 11, 2009) (pretrial ruling) – recorded phone calls with CI and investigator

U.S. v. Jones, 2009 WL 706454 (7th Cir. Mar 19, 2009) (unpub) – wired cooperating witness

People v. Washington, 2009 WL 714512 (Cal. App. 1 Dist. Mar 19, 2009) (unpub) – prison phone

People v. Ball, 2009 WL 755626 (Cal. App. 5 Dist. Mar 24, 2009) (unpub) – prison phone conversation

State v. Graves, 2009 WL 653091, 2009-Ohio-1133 (Ohio App. 9 Dist. Mar 16, 2009) (unpub) – suspects in patrol car

U.S. v. Nighbert, 2009 WL 393773 (E.D. Ky. Feb 13, 2009) (unpub) (pretrial) – "turned" conspirator recorded phone conversation with unsuspecting co-conspirators

Stauffer v. Vasquez, 2009 WL 385446 (C.D. Cal. Feb 12, 2009) (unpub) (habeas) – wife secretly tape-recorded husband

Ferrer v. State, 2 So.3d 1111 (Fla. App. 4 Dist. Feb 18, 2009) (post-conviction) – "appellant's recorded conversation at the police station with his codefendant"

State v. Perry, 2009 WL 139536 (Iowa App. Jan 22, 2009) (unpub) – co-defendants in back of patrol car

State v. Kelley, 179 Ohio App.3d 666, 903 N.E.2d 365, 2008-Ohio-6598 (Ohio App. 7 Dist. Dec 10, 2008) – recorded drug buy

U.S. v. Lewis, 2008 WL 5083131 (N.D. Ill. Nov 25, 2008) (unpub) (pretrial order) – recorded conversations between CI and drug defendants

State v. Smith, 289 Conn. 598, 960 A.2d 993 (Conn. Nov 25, 2008) – "a recorded conversation between a coconspirator and a jailhouse informant that implicated the defendant" in murder

U.S. v. Rios, 298 Fed.Appx. 312 (5th Cir. Oct 27, 2008) – recording of meth sale by defendant to CI

Khan v. Fischer, 583 F.Supp.2d 390 (E.D. N.Y. Oct 24, 2008) (habeas) – taped conversation between petitioner and CI discussing drug deals

State v. Doliboa, 2008 WL 4541998, 2008-Ohio-5297 (Ohio App. 12 Dist. Oct 13, 2008) (unpub) – recorded pretext phone call to drug dealer from supplier

State v. Tsolainos, 997 So.2d 46,, 2007-2443 (La. App. 1 Cir. Oct 10, 2008) – supposed hit man met with defendant, who wanted his wife killed

U.S. v. Newell, 2008 WL 4402177 (D. Me. Sep 29, 2008) (unpub) (pretrial order) – tribal police chief wore wire to meeting with governor

People v. Ibarra, 2008 WL 4329899 (Cal. App. 6 Dist. Sep 23, 2008) (unpub) – recorded calls from prison

U.S. v. Spencer, 2008 WL 4104693 (D. Minn. Aug 29, 2008) (unpub) (new trial motion) – "tape-recorded conversations between [absent CI] Gentle and Spencer" during drug deals non-testimonial

U.S. v. Fleming, __ Fed. Appx. __, 2008 WL 3824752 (3rd Cir. Aug 15, 2008) (unpub) – "The visual aspect of the video is not testimonial as there is no 'statement' that could be construed to be testimonial." – audio portion is casual remarks / context statements / admissions of party opponent

U.S. v. Berrios, 2008 WL 2704884 (D. V.I. Jul 08, 2008) (unpub) – conversation of two prisoners in prison yard – non-testimonial

U.S. v. Toepfer, 2008 WL 2673878 (11th Cir. Jul 09, 2008) (unpub) – recordings of conversation with C.I. non-testimonial

People v. Adames, 53 A.D.3d 503, 862 N.Y.S.2d 80, 2008 N.Y. Slip Op. 06162 (N.Y. A.D. 2 Dept. Jul 01, 2008) – "[T]he recorded telephone conversations between the codefendant and an undercover police officer, in which the logistics for the subject criminal drug transaction were arranged" were non-testimonial

U.S. v. Dominguez, 2008 WL 2235371 (2nd Cir. Jun 02, 2008) (unpub) – non-testifying CI's statements on tape were non-testimonial

State v. Jose DeJesus, 947 A.2d 873 (R.I. May 29, 2008) – while defendant was in jail on an unrelated DV charge, his cellmate wore a wire and questioned him about the robbery/murder at issue in this appeal – the cellmate died before trial – held: cellmate's questions were not testimonial

Pestano v. State, 980 So.2d 1200 (Fla. App. 3 Dist. Apr 30, 2008) – two murder suspects "were placed in a room together; their conversation was video and audio taped." – non-testimonial

U.S. v. Watson, 525 F.3d 583 (7th Cir. May 13, 2008) – bank robbery – inside job – co-conspirator teller made pretext call to confederate (not defendant), then met with him – both the call and meeting were recorded by FBI – held: non-testimonial

Brown v. State, 2008 WL 2152557 (Ind. App. May 23, 2008) (unpub) – audio/video device (called "the Hawk") worn by CI during drug deal – defendant's statements were party admissions, C.I.'s statements provided context

U.S. v. Claville, 2008 WL 914490 (W.D.La. Apr 01, 2008) (unpub) (pretrial order) – "Title III and other surreptitious recordings are not testimonial. *See U.S. v. Hendricks*, 395 F.3d 173, 181 (3rd Cir.2005)"

Physical Evidence (category added June 2013)

State v. Hawkinson, 829 N.W.2d 367 (Minn. 2013) – DWI case in which drawn blood was destroyed after testing – "Hawkinson cites *Crawford* ... and *Bullcoming* ... to assert that his constitutional right to confront witnesses via cross-examination extends to physical evidence and that the destruction of evidence can constitute a violation of a defendant's Confrontation Clause rights. ... the issue before us is whether a defendant like Hawkinson must be afforded the opportunity to cross-examine a piece of physical evidence—specifically a blood sample. We conclude that the historic notion of cross-examination does not encompass such an examination, nor has such a right been recognized by the Supreme Court or our court. More specifically, the rights that the Confrontation Clause confer relate to the examination of witnesses—in this case the forensic analyst who was involved in the testing of the sample—not the examination of

physical evidence. Therefore, we hold that the district court erred by ruling that Hawkinson had a Confrontation Clause right to conduct forensic testing on his blood sample."

Translators and Translations
(Category added September 2013)
(see also part 4, Language Conduit Theory)

U.S. v. Curbelo, 726 F.3d 1260, 1264-65 (11th Cir. 2013) – "So the translator's implicit representation that the transcripts were correct qualifies as a hearsay statement for purposes of the Confrontation Clause. [¶] Next, of course, we must ask if this statement is testimonial. We do not know when or why the translator prepared the transcripts, but we would assume he or she did so with an eye toward *1274 trial." [NOTE: The opinion goes on to hold, rather mysteriously, that because a witness explicitly testified the transcripts were accurate, therefore the translator's supposed implicit statement "did not violate the Confrontation Clause." Possibly the court meant that the explicit statement made the implicit one harmless, but that's not what the opinion says.]

United States v. Charles, 722 F.3d 1319, 1320-22 (11th Cir. 2013) – "The CBP [Customs and Border Patrol] officer only heard Charles speak in Creole and never heard any statements from Charles in English. Thus, during the trial when the CBP officer testified as though the statements were made by Charles in English, he was actually testifying to the out-of-court statements of the *interpreter*. In other words, the interpreter made the testimonial statements to the CBP officer, and, accordingly, is the declarant of the English-language statements that the CBP officer heard and testified to at trial. ... [B]ecause Charles has the right, under the Confrontation Clause, to confront the 'declarant,' that is the person who made the out-of-court statement, she has the right to confront the Creole language interpreter about the statements to which the CBP officer testified to in court. ... [I]t was a violation of Charles's Sixth *1331 Amendment right to confrontation to admit the CBP officer's testimony of the interpreter's statements of what Charles said where Charles had no opportunity to cross-examine the interpreter..." [NOTE: The actual holding of the case is that, because the law was not previously established, the error was not plain.]



Part 3: *Crawford* is Generally Not Applicable in These Situations

- Does not impact cases where witness testifies – this is a near-absolute rule
- Does not impact proceedings where the 6th Amendment does not apply
- Does not impact civil proceedings (including civil child neglect and commitments)
- Does not impact probation revocation proceedings or parole revocation hearings
- Does not impact sentencing hearings, with exceptions
 - Juvenile disposition hearings
- Does not impact pre-trial suppression hearings (except in Waco, Texas – see below)

- **Some in-camera hearings implicate *Crawford***
- **Does not impact non-hearsay statements**
- **Does not impact hearsay statements that are non-testimonial**
 - **This involves many traditional hearsay exceptions (see part 4)**
- **Does not impact statements made by the Defendant (no right to cross examine self)**
- **Does not impact hearsay statements offered by the Defendant (waives 6th Amendment)**
- **Not applicable to exculpatory hearsay statements (see part 2)**
- **Does not impact closed-circuit TV testimony in compliance with *Maryland v Craig***
- **Does not impact expert witness opinions (except in the Arizona Court of Appeals – see below)**

Declarant Testifies (list)

When a witness appears, testifies and is willing to answer questions on cross-examination, the Constitution places no restraint on the admission of the witness's prior out-of-court statements. This is a **near-absolute** rule from *Crawford*. As described below, Mississippi has recently evolved a sequencing rule, under which it is error to introduce the out-of-court statements through another witness before the declarant takes the stand, but that the declarant's subsequent testimony renders the error harmless. It is difficult to see the point of that rule from either a practical or theoretical standpoint. One of the Washington Courts of Appeals has also recognized a theoretical exception to the rule, described below.

Maryland adopted a version of the sequencing rule as a matter of state evidentiary law in *Myer v. State*, 403 Md. 463, 943 A.2d 615 (Md. Mar 10, 2008), also described below.

Note: If the witness takes the stand but refuses to answer questions, or "forgets," or is too young and/or traumatized to testify, etc., the analysis becomes more complicated. See under part 7 of this Outline.

State cases (arranged alphabetically by state)

King v. State, 929 So.2d 1032 (Ala. Crim. App. 2005)

State v. Joe, 234 Ariz. 26, 316 P.3d 615, 616-17 (Ariz. App. 1st Div. 2014), review denied (May 28, 2014)

State v. Dahnad, 2009 WL 325445 (Ariz. App. Div. 1 Feb 10, 2009) (unpub)

State v. Weeks, 2009 WL 189169 (Ariz. App. Div. 2 Jan 27, 2009) (unpub)

Turnbough v. State, __ S.W.3d __, 2013 Ark. App. 235, 7 (Ark. Ct. App. 2013)

Dirickson v. State, __ S.W.3d __, 2009 WL 195744 (Ark. App. Jan 28, 2009)

Fisher v. State, 2007 WL 1347655, *4 (Ark. App. 2007) (unpub)

People v. Rodriguez, 58 Cal.4th 587, 168 Cal.Rptr.3d 380, 319 P.3d 151, 186-87 (Cal. 2014)

People v. Williams, 56 Cal. 4th 630, 299 P.3d 1185, 156 Cal. Rptr. 3d 214 (Cal. 2013)

People v. Riccardi, 54 Cal. 4th 758, 801-802, 281 P.3d 1, 144 Cal. Rptr.3d 84 (Cal. 2012)

People v. Livingston, 274 P.3d 1132, 140 Cal. Rptr. 3d 139, 53 Cal. 4th 1145, 1161 (Cal. 2012)

People v. Dement, 53 Cal. 4th 1, 21-24, 264 P.3d 292, 133 Cal. Rptr. 3d 496 (Cal. 2011)
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People v. Redd, 48 Cal. 4th 691, 730-731, 229 P.3d 101, 108 Cal. Rptr. 3d 192, 234-35 (Cal. 2010)

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People v. Elias, 2009 WL 1111093 (Cal. App. 2 Dist. Apr 27, 2009) (unpub)
People v. Rodriguez, 2009 WL 840028 (Cal. App. 2 Dist. Apr 01, 2009) (unpub)
People v. Graham, 2009 WL 223702 (Cal. App. 4 Dist. Jan 30, 2009) (unpub)
People v. Young, 2009 WL 58868 (Cal. App. 5 Dist. Jan 12, 2009) (unpub)
People v. Zapata, 2009 WL 52167 (Cal. App. 6 Dist. Jan 09, 2009) (unpub)
People v. Fowler, 2008 WL 2917093 (Cal. App. 1 Dist. Jul 30, 2008) (unpub)
Medina v. State, 2008 WL 2247061 (Ind. App. Jun 03, 2008) (unpub)
People v. Richardson, 43 Cal.4th 959, 183 P.3d 1146, 77 Cal.Rptr.3d 163 (Cal. May 22, 2008)
People v. Turner, 2008 WL 2271433 (Cal. App. 4 Dist. Jun 04, 2008) (unpub)
People v. Steele, 2008 WL 963863 (Cal. App. 3 Dist. Apr 10, 2008) (unpub)
People v. Ushikoshi, 2008 WL 62601 (Cal. App. 6 Dist. Jan 07, 2008) (unpub)
People v. Dominguez, 2007 WL 2819772 (Cal.App. 1 Dist. Sep 28, 2007) (unpub)
People v. McRoberts, 2007 WL 2456094 (Cal.App. 3 Dist. Aug 30, 2007) (unpub)
People v. Brooks, 2007 WL 2045617 (Cal.App. 1 Dist. Jul 18, 2007), as modified on denial of rehearing (Aug. 16, 2007) (unpub)
People v. Seastrunk, 2007 WL 2045581 (Cal.App. 1 Dist. Jul 18, 2007) (unpub)
People v. Whicker, 2007 WL 1822435 n. 12 (Cal. App. 6 Dist. Jun 26, 2007) (unpub)
People v. Tafolla, 2007 WL 1794426 (Cal. App. 4 Dist. Jun 22, 2007) (unpub)
People v. Bell, 2007 WL 1653102, *23+ (Cal. App. 4 Dist. Jun 08, 2007) (unpub)
People v. Stevens, 59 Cal.Rptr.3d 196, 158 P.3d 763 (Cal. 2007)
People v. Mendez, 2007 WL 1576433, *1 (Cal.App. 4 Dist.,2007) (unpub)

People v. Stackhouse, 2012 COA 202, __ P.3D __, 2012 Colo. App. LEXIS 1912 (Colo. Ct. App. 2012)

People v. Phillips, __ P.3d __, 2012 COA 176, ¶ 143 (Colo. Ct. App. 2012)

People v. Whitman, 205 P.3d 371 (Colo. App. Nov 29, 2007)

People v. Rojas, 181 P.3d 1216 (Colo. App. Mar 06, 2008) ("Contrary to defendant's argument, where the child testifies at trial, *Crawford* ... does not modify the analysis set forth above or warrant treating the issue as one implicating the defendant's confrontation rights.")

People v. Argomaniz-Ramirez, 102 P.3d 1015 (Colo. 2004)

State v. Paredes, 139 Conn. App. 135, 54 A.3d 1073 (Conn. App. Ct. 2012) –

State v. Nelson, 105 Conn.App. 393, 937 A.2d 1249 (Conn. App. Jan 22, 2008) –

Poteet v. State, 5 A.3d 631 (Del. Sept. 24, 2010) –

Nieves v. State, 998 A.2d 851 (Del. June 24, 2010)

Flonnory v. State, 893 A.2d 507 (Del. 2006)

Goodwine v. United States, 990 A.2d 965, 967 (D.C. 2010)

Serrano v. State, 64 So. 3d 93, 112-113 (Fla. 2011) (bloodstain pattern expert testified based on tape measurements taken by another officer – no problem when other officer testified)

DeVaughn v. State, 296 Ga. 475, 769 S.E.2d 70 (2015), cert. pet. filed
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Overton v. State, __ S.E.2d __, 2008 WL 5050079 (Ga. App. Nov 26, 2008) –
McKnight v. State, 656 S.E.2d 830, 8 FCDR 222 (Ga. Jan 28, 2008) –
Campbell v. State, 282 Ga.App. 854, 640 S.E.2d 358, 06 FCDR 3925 (Ga. Ct. App. 2006)

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State v. Fields, 115 Hawai'i 503, 168 P.3d 955 (Hawai'i Aug 30, 2007; as amended, Oct. 10, 2007)
State v. Wrightsman, 2005 Haw. App. LEXIS 268, 2005 WL 1528515 (Haw. Ct. App. 2005) (unpub)

People v. Garcia-Cordova, 963 N.E.2d 355 (Ill. App. Ct. 2d Dist. 2011) ("The issue presented by the admission of hearsay is constitutionally identical in a child sex abuse case and a murder case, and the response of the sixth amendment is identical in both types of cases. ... Where the declarant appears for cross-examination, even where the declarant does not testify to the substance of his hearsay statement, its admission is a nonevent under the confrontation clause.")
People v. Sutton, 233 Ill. 2d 89, 107, 908 N.E.2d 50, 62, 330 Ill. Dec. 198 (Ill. Apr 16, 2009)
People v. Alsup, 373 Ill.App.3d 745, 869 N.E.2d 157, 311 Ill.Dec. 483, n. 2 (Ill. App. 5 Dist. 2007)
People v. Monroe, 366 Ill.App.3d 1080, 852 N.E.2d 888, 304 Ill.Dec. 432 (Ill. App. Ct. 2nd Dist. 2006)
People v. Miller, 363 Ill.App.3d 67, 842 N.E.2d 290, 299 Ill.Dec. 551 (Ill. App. Ct. 1st Dist. 2005)

Surber v. State, 884 N.E.2d 856 (Ind. App. Apr 10, 2008), transfer denied (May 29, 2008)
Mathis v. State 859 N.E.2d 1275, 1279 n.3 (Ind. App. 2007)
Taylor v. State, 841 N.E.2d 631 (Ind. App. 2006)
Hooker v. State, 2007 WL 3244055 (Ind. App. Nov 05, 2007) (unpub)

State v. Tompkins, 859 N.W.2d 631 (Iowa 2015) – "We agree with Tompkins that the State's decision not to question A.H. about the statements she made to Officer Jurgensen, or the events surrounding the night in question, placed Tompkins in the unenviable position to weigh the advantages and disadvantages of cross-examining A.H. during her initial testimony or calling her as a witness for the defense. However, Tompkins's Confrontation Clause rights were not violated based on this choice."

State v. McMullen, 221 P.3d 92, 97 (Kan. 2009)
State v. Corbett, 281 Kan. 294, 130 P.3d 1179 (Kan. 2006)

James v. Commonwealth, 360 S.W.3d 189, 203 (Ky. 2012)
Brown v. Commonwealth, 313 S.W.3d 577 (Ky. 2010)
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Epperson v. Commonwealth, 197 S.W.3d 46 (Ky. 2006)

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Davis v. State, __ So.3d __, 2013 WL 4055166 (Miss. App. 2013), reh'g denied (Nov. 19, 2013) –

Bridgeman v. State, 58 So.3d 1208 (Miss. Ct. App. Nov. 2, 2010)

Anderson v. State, 1 So.3d 905 (Miss. App. Sep 09, 2008) –

Smith v. State, 984 So.2d 295 (Miss. App. Sep 25, 2007) (summarized below)

Williams v. State, 970 So.2d 727 (Miss. App. Sept. 04, 2007) (summarized below)

Higdon v. State 938 So.2d 340, 343 (Miss. App. 2006)

Penny v. State, 960 So.2d 533 (Miss. App. Dec 12, 2006)

Elkins v. State, 918 So.2d 828 (Miss. Ct. App. 2005)

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State v. Lucio, 247 S.W.3d 131 (Mo. App. S.D. Mar 11, 2008)

State v. Pound, 326 P.3d 422 (Mont. 2014)

State v. Lotter, 2013 MT 336, 372 Mont. 445, 313 P.3d 148 (Mont. 2013)

State v. Baker, 2013 MT 113, ¶ 20, 370 Mont. 43, 300 P.3d 696 (Mont. 2013)

State v. Howard, 2011 MT 246, ¶ 33, 362 Mont. 196, 265 P.3d 606 (Mont. 2011)

State v. Smith, 286 Neb. 856, 839 N.W.2d 333, 359 (Neb. 2013)

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State v. Lang, 129 Ohio St. 3d 512, 529, 954 N.E.2d 596 (Ohio 2011)

State v. Perez, 124 Ohio St. 3d 122, 920 N.E.2d 104 (Ohio 2009)

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Alvarez v. Quarterman, 2007 WL 548761 (N.D. Tex. 2007) (unpub) –

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Duanyai v. Friel, 2009 WL 473365 (D. Utah Feb 23, 2009) (unpub) (habeas)
Varela v. Moya, 2008 WL 4068436 (10th Cir. Sep 03, 2008) (unpub) (habeas)
Corbett v. Kansas, 272 Fed.Appx. 680 (10th Cir. Apr 03, 2008) (unpub) (habeas)
United States v. Murphy, 2006 U.S. Dist. LEXIS 62842, 2006 WL 2536458 (D. Kan. 2006) (unpub) (pretrial ruling)

Davis v. McNeil, 2009 WL 860628 (M.D. Fla. Mar 30, 2009) (unpub) (habeas)
Quintero-Calle v. U.S., 2009 WL 498068 (S.D. Fla. Feb 26, 2009) (unpub) (§ 2255)
Campbell v. Herdon, 2008 WL 5147947 (11th Cir. Dec 09, 2008) (unpub) –

Military cases

U.S. v. Cucuzzella, 66 M.J. 57 (U.S. Armed Forces Feb 25, 2008)
United States v. Olafson, 2006 CCA LEXIS 138, 2006 WL 1663011 (Navy-Marine Corps Ct. Crim. App. 2006) (unpub)

➤ Sub-Category: Does the Confrontation Clause Impose a Sequencing Rule?

Cases adopting a sequencing rule:

People v. Johnson, 2009 WL 1263994 (Cal. App. 3 Dist. May 08, 2009) (unpub) – "The MDIC interview, which was conducted by a police officer and took place after defendant became a suspect, was testimonial. ... Although Jane testified at trial, she was dismissed when the MDIC interview was admitted and there-fore not available to defend or deny the statements. When she testified, the interview was not yet admitted, and she was only cursorily questioned about it by the People. The then unresolved question of the interview's admissibility also influenced defendant's strategy, as counsel chose not to cross-examine Jane regarding the interview to limit the possibility of it being admitted later. ... Defendant had the opportunity and motive to raise the MDIC interview only on cross-examination after the court admitted the interview. When the court refused to recall Jane, it denied defendant's opportunity for meaningful cross-examination, a violation of his right to confrontation."

Myer v. State, 403 Md. 463, 943 A.2d 615 (Md. Mar 10, 2008) – decided on state law grounds – sexual abuse of a minor case – "We hold that the trial court's denial of Myer's request to recall the witness after the tape was admitted to be a violation of Maryland evidence law separate and apart from any rights Myer may have under the Sixth Amendment to the United States Constitution. [cite] Because we find that the Circuit Court abused its discretion in restricting petitioner's right of cross-examination, and the error was not harmless, we do not consider petitioner's constitutional argument as to the admissibility of the tape." [NOTE: Two concurring justices would have limited the second round of cross-examination to specific inconsistencies between the child's direct testimony and the tape, but the majority rejects that on the painfully ironic ground that it would be "hurtful to the child-witness."]

State v. Williams, 137 Wash.App. 736, 154 P.3d 322 (Wash. App. Div. 2 2007) – stating in dicta that it is not enough that out-of-court declarant is put on the stand to testify – in addition, the confrontation clause "requires the State to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses" (quoting *State v. Rohrich*, 132 Wash.2d 472, 478, 939 P.2d 697 (1997)) – but in the particular case, "the State did not avoid asking JAD about the alleged acts, nor did it prevent Williams from a full cross-examination of her."

Williams v. State, 970 So.2d 727 (Miss. App. 2007) – "Testimonial hearsay must be subjected to cross-examination before it may be admissible. Williams did not get to cross-examine Jane prior to the admission of the videotaped forensic interview. However, we cannot find that Williams was unduly prejudiced because Williams cross-examined Jane later during the trial and even called Jane during his case-in-chief. Williams had the opportunity to question Jane about her statements on the videotape and in general. Accordingly, though we find error, we find it harmless beyond a reasonable doubt." – [NOTE: The constitutional problem, apparently, was strictly a matter of timing.]

Smith v. State, 984 So.2d 295 (Miss. App. Sep 25, 2007) – "¶ 25. Over the objection of Smith, the trial judge allowed this testimony as within the scope of Detective McDonald's investigation. However, even after that instruction, Detective McDonald continued to state the content of Kevin Wakefield's statements. Under *Crawford*, this would be considered testimonial and, therefore, inadmissible. *Id.* The trial judge, therefore, erred. However, we find the error to be harmless as Wakefield later testified on the stand and Smith had the opportunity to cross-examine him." [NOTE: Again, the constitutional problem is apparently a matter of timing: the declarant should take the stand before the hearsay is admitted. The opinion finds a second example of harmless error elsewhere in the opinion, too.]

Hemming and hawing about sequencing rule:

Hernandez v. Schuetzle, 2009 WL 395781 (D. N.D. Feb 17, 2009) (unpub) (habeas) – victim of child sexual abuse testified, then a doctor – during cross-examination of doctor defense counsel opened the door to doctor's testimony of prior statement by victim – among other things the state court noted that defendant could have recalled the victim if the original cross was deemed insufficient – a simple case made into a very long, deeply-confused opinion that asks: "Whether the burden of exercising Sixth Amendment rights can be shifted to the defendant to call the declarant." The question obviously assumes the answer, but it's the wrong question – there's no burden on anybody – the question is simply whether defendant has an opportunity to

cross-examine, which he indisputably did – and then secondarily if the sixth amendment imposes a sequencing rule – opinion concludes that it remains "an open issue"

Rejecting a sequencing rule:

People v. Miranda, 2014 COA 102, __ P.3d __ (Colo. App. 2014) – "we further conclude that the Confrontation Clause permits admission of testimonial hearsay after the declarant has testified and been released, provided that the declarant testified concerning matters addressed in the declaration, the declarant was subject to cross-examination, and the defendant did not ask that the prosecution be required to recall the declarant for further cross-examination after the hearsay had been introduced."

State v. Maguire, 310 Conn. 535, 78 A.3d 828, n.15 (Conn. 2013) – subject to abuse of discretion review

State v. Henderson, __ So.3d __, 2013 WL 5019652 (La. App. 1 Cir. 9/13/13) – "Defendant argues that Nelton was not actually subject to full cross-examination on her second statement because she was not questioned about it when she was called as a witness. However, as the trial judge pointed out during arguments concerning the admission of this statement, defense counsel had every opportunity to cross-examine Nelton regarding the second statement, but apparently elected not to do so because it was not helpful to defendant's case."

State v. Baker, 2013 MT 113, 370 Mont. 43, 300 P.3d 696 (Mont. 2013) – "Baker cannot contend that his confrontation rights were violated because the Spencer statement was introduced after H.B. testified, *Howard*, ¶ 34."

State v. Pollock, 251 Ore. App. 755, 284 P.3d 1222 (Or. Ct. App. 2012) – state put 5-year-old victim on stand but did not ask her about facts in detail, then introduced a DVD of her forensic interview – "the victim's adoption on direct examination of the statements in the DVD provided defendant with an adequate opportunity to cross-examine her as to the content of those statements. Defendant in fact cross-examined the victim, but did not ask questions about the statements that she had adopted. Defendant also chose not to recall the victim for cross-examination although he could have after the prosecutor played the DVD. [cite] n4 Those decisions were defendant's choice but did not impair his right to confront a witness against him."

State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (S.C. Ct. App. 2011) – "Hill does not argue he was prohibited by any rule of law from examining Victim about the elements of the offense or the making of the out-of-court statement during his cross-examination of Victim. He simply maintains that his cross-examination of Victim was not effective because the State failed to first place the DVD [of forensic interview] into evidence. However, as noted, the Confrontation Clause guarantees only the opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish. In addition, we note Hill does not assert he was in any way prohibited from recalling Victim to the stand to examine the child after introduction of the DVD through the forensic investigator."

State v. Hoch, 2011 VT 4, 18 A.3d 562 (Vt. 2011) – "Defendant also claims that admission of the videotape violated his Sixth Amendment right under the Federal Constitution to confront

adverse witnesses because the videotape was admitted after M.C. testified and thus M.C. was not cross-examined on the testimonial statements made in the videotaped interview. ... M.C. testified prior to the admission of the videotape, but defendant was entirely free to recall her to the stand for cross-examination. He did not, and therefore he cannot show that his right to confront adverse witnesses was violated."

State v. Claudio C., 125 Conn. App. 588, 11 A.3d 1086 (Conn. App. Ct. 2010), appeal denied (2011) – "there is no indication that the defendant sought to conduct further cross-examination of the victim after [Detective] Reyes testified or that the court, in any relevant way, interfered with his right to cross-examine the victim. [cite] Consequently, the defendant's position, which is that he was deprived of his right to cross-examine the victim fully and effectively because Reyes testified after the victim, is untenable."

State v. Richards, 47 So. 3d 598, 10-11 (La.App. 4 Cir. Aug. 18, 2010) – ID via photo array – "K.P. did not testify regarding her previous identification of the defendant. n4 Although K.P. had already testified when Officer Riles testified regarding the identification, she was nevertheless still under subpoena and available to testify if defendant had exercised his right to examine her about the identification. Because K.P. was present at the trial, Mr. Richards cannot claim that his Sixth Amendment right to confront K.P. was violated."

People v. Cowan, 50 Cal. 4th 401, 415-427, 236 P.3d 1074; 113 Cal. Rptr. 3d 850 (Cal. 2010) – "Here, although Foreman testified before Porter did and was not asked about her statements to him, she was released subject to recall. Accordingly, defendant was free to recall and cross-examine her about the discrepancy between her trial testimony and her statements to Porter. No Sixth Amendment violation occurred."

State v. Gaines, 316 S.W.3d 440 (Mo. Ct. App. May 4, 2010) – "There are no temporal restraints on the declarant's appearance at trial to satisfy the Confrontation Clause as long as the declarant appears and is available for cross-examination at any point during the trial."

State v. Perez, 124 Ohio St. 3d 122, 920 N.E.2d 104 (Ohio 2009) – "Perez now contends that by letting the tapes be played during DeWine's testimony and not requiring that they be played during Debra's testimony, the trial court somehow deprived him of the right to cross-examine Debra with respect to statements made by her during the taped conversations. [¶127] Perez's confrontation claim lacks merit. ... Perez cites no authority for his contention that the Confrontation Clause requires such a statement to be introduced during the testimony of the declarant. [¶128] Moreover, nothing would have prevented Perez from cross-examining Debra about her statements on the tapes had he chosen to do so. HN20Under Evid.R. 611(B), cross-examination is not limited to the scope of direct examination, but may cover "all relevant matters." Thus, Perez could have asked Debra about the taped conversations on cross-examination, notwithstanding that they were not introduced during her direct examination. Perez's fifth proposition of law is overruled."

State v. Davis, 109 Conn.App. 187, 951 A.2d 31 (Conn. App. Jul 22, 2008) – "Although the victim was called to testify before the state introduced his challenged testimonial statements during its later direct examination of Miller, the defendant could have attempted to recall the victim as a witness." – because he didn't do so, no sixth amendment issue

Ross v. State, __ So.2d __, 2008 WL 183701 (Fla. App. 2 Dist. Jan 23, 2008) – rule regarding prior consistent statements does not require " that the defense must have had the opportunity to cross-examine [the witnesses] after the State introduced their taped statements."

McKnight v. State, 656 S.E.2d 830, 8 FCDR 222 (Ga. Jan 28, 2008) – "Here, Williams was not unavailable. To the contrary, she had already testified at trial and remained subject to recall. Therefore, contrary to McKnight's contentions, *Crawford* is not applicable to this case."

U.S. v. Butterworth, 511 F.3d 71 (1st Cir. Dec 20, 2007) – "Some of the grand jury testimony was heard when the government sought to refresh Alexander's memory on cross-examination, but the grand jury transcript itself was formally read into the record on government motion after she had stepped down. Butterworth says that she was therefore not 'subject to cross-examination concerning the statement[s]' (as required by the evidence rule) because they were not admitted until after she left the stand. ... Here, Alexander was present at trial and was available for cross-examination for the defense. The subject matter of the grand jury testimony was the focus of the government's direct examination, and the defense was free to cover the same subject matter on cross-examination (and did so). This is not a case where the defense has a legitimate claim of surprise. [cite] Nor did the defense ask that Alexander be recalled when the grand jury testimony itself was offered."

People v. Swain, 2007 WL 3277038 (Cal. App. 2 Dist. Nov 07, 2007), review denied (Jan 23, 2008) (unpub) – "Appellants argue that because Lucas was no longer testifying at trial, the admission of her out-of-court statement violates the Confrontation Clause because she was not subject to immediate cross-examination. We disagree. First, we find nothing in the language of either *Crawford*, *Green* or *Cannady* that requires the out-of-court statement to be followed immediately by cross-examination without any delay. Second, as we have seen, Lucas was available to be recalled for additional cross-examination after the jury saw the videotape of her May 2001 statement. We find no violation of the right to confrontation."

People v. Dominguez, 2007 WL 2819772 (Cal. App. 1 Dist. Sep 28, 2007) (unpub) – "Although Jane Doe's videotaped statement may be testimonial, defendant's claim fails because Jane Doe did testify at trial and was subjected to cross-examination by defendant. ... Defendant contends that he did not have a meaningful opportunity to cross-examine Doe because she testified before the videotape was shown to the jury. Defendant presents no authority for his argument that the timing of the video viewing denied him the opportunity to cross-examine Doe regarding the statement. Defendant knew that the prosecution intended to admit the videotaped statement from the in limine motions, but he did not request permission to question Doe about it during his cross-examination. Nor did the defendant request that the victim be recalled after admission of the statement for further cross-examination. Defendant's Confrontation Clause claim is without merit."

State v. Higgins, 2007 WL 2792938 (Tenn. Crim. App. Sept. 27, 2007) (unpub) – "Here, although the three witnesses testified after the victim, the defendant could have recalled the victim, but decided against it. Therefore, the defendant's claim that the three witnesses' testimony violated the Confrontation Clause is without merit."

Preliminary Hearings

State v. O'Brien, 354 Wis.2d 753, 850 N.W.2d 8 (Wis. 2014) – "¶ 30 ... Our caselaw establishes that the Confrontation Clause does not apply to preliminary examinations."

State v. Lopez, 2013-NMSC-047, 314 P.3d 236 (N.M. 2013) – " the only issue presented to the Court [is] whether the constitutional right of confrontation applies at a preliminary examination ... {9} The United States Supreme Court consistently has interpreted confrontation as a right that attaches at the criminal trial, and not before. ... {11} Applying federal law, we therefore must reject Defendant's reliance on the Confrontation Clause of the United States Constitution."

United States v. Colasuonno, 697 F.3d 164, 177 (2d Cir. N.Y. 2012) – "For example, the full protections of the Confrontation Clause do not apply to preliminary hearings..."

Peterson v. California, 604 F.3d 1166, 1170 (9th Cir. Cal. 2010) – challenge to Prop. 115 – "we conclude that the admission of hearsay statements at a preliminary hearing does not violate the Confrontation Clause. n3 Accordingly, we hold that Prop. 115 does not violate the Sixth Amendment."

Randolph v. State, 2010 OK CR 2, 231 P.3d 672 (Okla. Crim. App. 2010) – "The scope of the right to confrontation of accusers at preliminary examination, like the scope of a preliminary examination itself, is subject to reasonable legislation."

State v. Timmerman, 2009 UT 58, 218 P.3d 590 (Utah Sep 04, 2009) – "¶ 13 Accordingly, we hold that the federal Confrontation Clause does not apply to preliminary hear-ings. In so doing, we note that a substantial number of jurisdictions have reached the same conclusion."

Tolliver v. McGrath, 2008 WL 4682023 (C.D. Cal. Oct 17, 2008) (unpub) (habeas) – "the constitutional protections of the Confrontation Clause do not apply to preliminary hearings."

State v. Robinson, 2008 WL 2467110 (Wis. App. II Dist. Jun 18, 2008) (unpub) – "[¶ 19] ... There is no constitutional or statutory right to confront witnesses at a preliminary hearing. [cite] The *Crawford* rule does not apply to a preliminary hearing in Wisconsin."

Mendoza v. Solis, 2008 WL 1925012 (E.D. Cal. Apr 29, 2008) (unpub) (habeas) – "The *Crawford* decision, which overruled prior Supreme Court case governing admission of hearsay statements in criminal trials over Confrontation Clause objection, does not effect the admissibility of evidence at a preliminary hearing."

Reyes v. Dexter, 2008 WL 594686 (C.D. Cal. Feb 28, 2008) (unpub) (habeas) – *Crawford* doesn't apply to preliminary hearing

State v. Rhinehart, 153 P.3d 830, 834-835, 2006 UT App 517 (Utah App. 2006) – "The Confrontation Clause pertains to a criminal defendant's right to confront and cross-examine the witnesses against the defendant at trial; it does not afford the right to confront and cross-examine witnesses at a preliminary hearing, and *Crawford* does not alter the Court's previous holdings with respect to this matter."

Gresham v. Edwards, 281 Ga. 881, 644 S.E.2d 122, 7 FCDR 1375 (Ga. 2007) – "There being no indication in *Crawford* of a change from the Court's previous statements that the right of confrontation is a trial right, we join the several States which have addressed this issue in their conclusion that the holding in *Crawford* is not applicable to preliminary hearings."

State v. Besic 2007 WL 479054 (Utah App.,2007) (unpub) – "the right to confrontation does not apply to preliminary hearings" (citing *State v. Reinhart*, 2006 UT App 517)

Sheriff v. Witzenburg, 145 P.3d 1002 (Nev. 2006) – "At issue on appeal was whether the Confrontation Clause and jurisprudence from the United States Supreme Court applied at a preliminary examination. The supreme court concluded that the Sixth Amendment Confrontation Clause and *Crawford* decision did not apply to a preliminary examination because the confrontation right was historically described as a trial right. The supreme court further concluded that the statutory right to cross-examination, under Nev. Rev. Stat. § 171.196(5), was a qualified right, subject to the exception under Nev. Rev. Stat. § 171.197, which allowed the State to use an affidavit when a witness either resided outside of Nevada or more than 100 miles from the preliminary examination's location."

State v. Mackin, 695 NW2d 904; 2005 WI App 88 (2005) – "Three years after the burglary, in a telephone conversation with a police detective, an accomplice implicated himself and defendants in the crime. At the preliminary examination, the State called the accomplice as a witness, but he exercised his Fifth Amendment right and refused to testify. The trial court found that the accomplice was unavailable and allowed the detective to testify to the accomplice's statements implicating all three defendants and bound the matter over for trial. A new trial judge reversed, holding that the accomplice's statement was self-serving as he sought to mitigate the impact of his crime by implicating others and that the statement lacked particular guarantees of trustworthiness. The appellate court held that the confrontation clause did not apply to preliminary examinations, and that the only right to confront witnesses at a preliminary examination was the statutory right to question witnesses who actually testified. The appellate court further held that the trial court should have considered each part of the accomplice's statement to determine whether a reasonable person in his position would have made the statement unless he believed it to be true."

Grand Jury

People v. Haran, 22 Misc.3d 283, 865 N.Y.S.2d 877, 2008 N.Y. Slip Op. 28420 (N.Y. Co. Ct. Oct 20, 2008) – "The indictment must be dismissed because the submission and reading into evidence of the certified transcripts of the plea and sentencing proceedings violated the defendant's constitutional right to confrontation ... and therefore were inadmissible in evidence to establish the elements of the charged crime." [NOTE: This seems to be saying the target had a right to cross-examine grand jury witnesses.]

People v. Hoffer, 53 A.D.3d 116, 860 N.Y.S.2d 266, 2008 N.Y. Slip Op. 05406 (N.Y.A.D. 3 Dept. Jun 12, 2008) – "as defendant had no right of cross-examination, he was not deprived of any right by the grand jury's consideration of the [testimonial] statements"

Pretrial Release Hearings / Challenges to Conditions of Confinement

United States v. Hernandez, 778 F. Supp. 2d 1211, 1219-1220 (D. N.M. 2011) – " Before *Crawford v. Washington*, courts held that the Confrontation Clause did not attach to detention hearings. Nothing in the Supreme Court's opinion in *Crawford v. Washington* undermines those holdings. Moreover, what authority exists after *Crawford v. Washington* rejects the proposition that *Crawford v. Washington* applies outside of trial. The Court, therefore, rejects T. Hernandez' contention that the Confrontation Clause applies to detention hearings."

Basciano v. Lindsay, 2008 WL 141860 (E.D. N.Y. Jan 14, 2008) (unpub) (pretrial habeas) – mob prisoner seeking "order lifting the Special Administrative Measures ('SAMs') currently governing his confinement ... Basciano's argument that the in camera proffer to Judge Levy violated his confrontation rights under *Crawford* ... is unavailing. The holding in *Crawford* was explicitly limited to the right of confrontation as it applies to the use of testimonial statements of witnesses absent from trial. [cite] The defense cites no authority other than *Crawford* for its contention that the in camera, ex parte proffer violated Basciano's due process rights as a general matter, and this court has found none. Accordingly, this court declines to extend *Crawford* to the current circumstances of this petition."

U.S. v. Bibbs, 488 F.Supp.2d 925 (N.D. Cal. Jun 08, 2007) – "Prior to *Crawford*, the Ninth Circuit and every other circuit of which I am aware, had ruled that 'the government may proceed in a detention hearing by proffer or hearsay.' ... Nothing in *Crawford* requires or even suggests that it be applied to a detention hearing under the Bail Reform Act, which has never been considered to be part of the trial."

Godwin v. Johnson, 957 So.2d 39 (Fla. App. 1 Dist. 2007) – "*Crawford* did not change the types of proceedings where the confrontation clause does or does not apply. Instead, it provides guidance on how the clause is to be implemented when it is applicable. The court in *Arthur* found that the state could present its case in a pretrial detention proceeding 'in the form of transcripts or affidavits.' 390 So.2d at 720. Thus, an unstated, but necessary premise of the *Arthur* decision is that the confrontation clause does not apply in this type of proceeding and we conclude that principle continues to be the law in Florida after *Crawford*. The confrontation clause of the Sixth Amendment expressly applies in 'criminal prosecutions.' We agree with the reasoning and conclusion of *State v. Engel*, 493 A.2d 1217 (N.J.1985) that this does not include proceedings on the issue of pretrial release."

Pretrial Suppression Hearings

People v. Mitchell, 124 A.D.3d 912, 2 N.Y.S.3d 207 (N.Y. App. Div. 2015) – "'hearsay evidence is admissible to establish any material fact' at a pretrial suppression hearing... Contrary to the Supreme Court's conclusion, the decision of the United States Supreme Court in *Crawford* ... does not require a different result."

United States v. Loera, ___ F.Supp.3d ___, 2014 WL 5859072 (D.N.M. Oct. 20, 2014) – in dicta: "The Court notes, however, that the courts that have decided whether the Confrontation Clause applies to suppression hearings have found that *Crawford v. Washington* does not apply to suppression hearings."

State v. Johnson, 2014 ME 83, 95 A.3d 621 (Me. 2014) – "[¶ 9] We have not previously determined whether the Confrontation Clause applies to statements made at pretrial hearings such as suppression hearings. We need not decide the issue here, however..."

U.S. v. Lyons, 740 F.3d 702, 722 (1st Cir. 2014) cert. denied, 13-10108, 2014 WL 1922008 (U.S. 2014) – "Because the district court was uncertain whether Massachusetts law required re-designation and personal review *722 by the district attorney when new numbers were added to an existing wiretap, it ordered District Attorney Blodgett to file 'an affidavit regarding his authorization of the particular amendments at issue....' District Attorney Blodgett filed such an affidavit... The district court therefore denied the suppression motion as to the remaining wiretaps. [fn 6] Lyons also suggests that he had a right to confront District Attorney Blodgett. Again, he misunderstands the Confrontation Clause."

State v. Lee, 83 So. 3d 1191 (La.App. 4 Cir. 2012) – "we emphasize that the evidentiary rulings were made during or in connection with a pretrial hearing. Generally, an accused's Sixth Amendment rights respecting confrontation, cross-examination, compulsion of attendance of witnesses, and presentation of a defense are only implicated in the context of a trial."

State v. Price, 66 So. 3d 495, 500-501 (La.App. 5 Cir. 2011) – "the Confrontation Clause is not implicated at a motion hearing"

Porter v. United States, 7 A.3d 1021, 1026-1027 (D.C. 2010) – "a defendant's Sixth Amendment right to confrontation is not implicated by an officer's testimony at a probable cause hearing about what an informant told him."

State v. Fortun-Cebada, 158 Wn. App. 158, 172-173, 241 P.3d 800 (Wash. Ct. App. 2010) – "[¶41 But nothing in Crawford suggests that the Supreme Court intended to change its prior decisions allowing the admission of hearsay at pretrial proceedings, such as a suppression hearing.... ¶42 The overwhelming majority of state courts that have addressed the question of whether Crawford applies to a preliminary hearing such as a motion to suppress have also held that the right of confrontation is not implicated. [collecting cases] ¶43 We hold HN14there is no right to confrontation at a pretrial CrR 3.6 evidentiary hearing on a motion to suppress under the Sixth Amendment and Crawford."

Graves v. State, 307 S.W.3d 483 (Tex. App. Texarkana 2010) – confrontation clause does not apply at pretrial suppression hearing

Commonwealth v. Atkinson, 2009 PA Super 239, 987 A.2d 743 (Pa. Super. Ct. 2009) – "The right to confrontation applies at a suppression hearing, as in the instant matter. In Commonwealth ex. rel. Buchanan v. Verbonitz, 525 Pa. 413, 581 A.2d 172 (Pa. 1990) (plurality opinion), cert. denied, 499 U.S. 907, 111 S. Ct. 1108, 113 L. Ed. 2d 217 (1991), it was stated that 'the Pennsylvania Constitution mandates a criminal defendant's right to confrontation and cross-examination at the preliminary hearing.'" [NOTE: Does Crawford apply under the state constitution?]

State v. Turner, 2009 WL 1324212, 08-1188 (La.App. 5 Cir. May 12, 2009) (unpub) – assuming without discussion that *Crawford* applies to suppression hearing

U.S. v. Garcia, 2009 WL 868019 (10th Cir. (N.M.) Apr 02, 2009) (unpub) – "We need not resolve whether *Crawford*'s protection of an accused's Sixth Amendment confrontation right applies to suppression hearings, because even if we were to assume this protection does apply, we would conclude that the district court's error cannot be adjudged 'plain.'"

Lewis v. State, 904 N.E.2d 290 (Ind. App. Apr 09, 2009) – suppression motion during bench trial – "Lewis advances no reason why *Crawford* would apply when the admissibility of evidence is being ruled on during a bench trial rather than at a separate pre-trial hearing."

U.S. v. Garcia, 2009 WL 868019 (10th Cir. Apr 02, 2009) (unpub) – "We need not resolve whether *Crawford*'s protection of an accused's Sixth Amendment confrontation right applies to suppression hearings, because even if we were to assume this protection does apply, we would conclude that the district court's error cannot be adjudged 'plain.'"

U.S. v. Wellman, 2009 WL 37184 (S.D. W.Va. Jan 07, 2009) (unpub) (pretrial order) – "*Crawford* applies only to trials and not to suppression hearings."

State v. Amilcar, 2008 WL 5423263, 2008-Ohio-6918 (Ohio App. 10 Dist. Dec 30, 2008) (unpub) – "we decline to extend *Crawford* to pre-trial suppression hearings under the circumstances of this case."

State v. Williams, 960 A.2d 805 (N.J. Super. A.D. Dec 18, 2008) – "*Crawford* is inapplicable to the instant case since Randolph's statement was not used at the trial but during a suppression hearing."

Ford v. State, 268 S.W.3d 620 (Tex. App.-Texarkana Oct 01, 2008), petition for discretionary review granted (Feb 11, 2009) – "Determining the suppression motion based on affidavits does not violate *Crawford*"

State v. Rivera, 2008-NMSC-056, 144 N.M. 836, 192 P.3d 1213 (N.M. Sept. 9, 2008), overruling 2007-NMCA-104, 142 N.M. 427, 166 P.3d 488 – "{23} This Court was called upon to review the narrow question of whether the protections of the Confrontation Clause extend to a suppression hearing. As discussed above, we conclude that they do not..."

U.S. v. Spellissy, 2008 WL 4083031 (M.D. Fla. Sep 03, 2008) (unpub) (§ 2255) – *Crawford* does not apply at a pretrial *Franks* hearing

Shedden v. State, __ S.W.3d __, 2008 WL 3984146 (Tex. App.-Corpus Christi Aug 29, 2008) – *Crawford* does not apply at a pretrial *Franks* hearing

Fair v. State, 284 Ga. 165, 664 S.E.2d 227, 08 FCDR 2391 (Ga. Jul 14, 2008) – "guilt or innocence is not at issue on a motion to suppress and does not involve the issue of right of confrontation."

Kirtland Hills v. Hall, 2008 WL 2635477, 2008-Ohio-3391 (Ohio App. 11 Dist. Jul 03, 2008) (unpub) – "{19} 'As a general principle, a court may consider hearsay testimony at a suppression hearing. ... *Crawford* does not affect the foregoing established rule."

Bell v. State, 291 Ga.App. 437, 662 S.E.2d 248, 08 FCDR 1666 (Ga.App. May 07, 2008) – "Corporal Mitchell, who conducted the traffic stop, did not testify at the suppression hearing. The trial court allowed Officer Dykes to testify—over Bell's objection—at to what Mitchell told him about his reasons for stopping Bell." – not a problem because "'hearsay is admissible in determining the existence of probable cause.'"

State v. Miller, 2008 WL 116201, 2008-Ohio-100 (Ohio App. 5 Dist. Jan 11, 2008) (unpub) – "Upon our review of *Crawford* and its progeny, we decline to extend the rule to pretrial suppression hearings under the circumstances of the case *sub judice*."

State v. Watkins, 190 P.3d 266 (Kan. App. Oct 05, 2007) – "In a pre-*Crawford* case, the Kansas Supreme Court held that the confrontation right is a trial right that does not apply at a preliminary hearing. *State v. Sherry*, 233 Kan. 920, 929, 667 P. 2d 367 (1983). ... Further, the majority of courts addressing this issue following *Crawford* have concluded that the confrontation rights are not implicated at pretrial evidentiary hearings. [collecting cases] ... We conclude that *Sherry* remains good law in Kansas: the Confrontation Clause rights discussed in the *Crawford* case do not apply at pretrial hearings."

Jefferson v. U.S., 2007 WL 2461973 (M.D. Ala. Aug 27, 2007) (unpub) (§ 2255) – guilty plea following denial of suppression motion – "Hawk's alleged statement, as relayed in the deputy sheriff's testimony, was not admitted to prove the truth of any assertion, *i.e.*, whether suppression was warranted, and thus there was no Sixth Amendment violation in this case. On the contrary, the court cited Hawk's own rights under the Fifth and Sixth Amendments, because she was without counsel for any potential federal proceedings, and her testimony would have related to events for which she could later be indicted."

U.S. v. Waldron, 2007 WL 2080520 (D. S.D. Jul 17, 2007) (unpub) – permitting testimony from prior state court suppression hearing to be used in deciding a federal court suppression motion – "Several courts have specifically held that the confrontation right emanating from the Sixth Amendment described in *Crawford* applies only to trial and not to a pretrial suppression hearing."

State v. Rivera, 2007-NMCA-104, 142 N.M. 427, 166 P.3d 488, rev'd, 2008-NMSC-056, 144 N.M. 836, 192 P.3d 1213

Curry v. State, 228 S.W.3d 292 (Tex. App.-Waco 2007), petition for discretionary review filed (Sep 05, 2007) – "[We] hold that the protections of the Confrontation Clause extend to a pretrial suppression hearing." – a 2-1 decision based on policy rationales derided by the concurring judge as "Enron Economics" ("By this I mean it is based on nothing more than what the majority wants it to be and is not based upon the reality or a study of any kind.")

Washburn v. United States, 72 Fed. R. Evid. Serv. 6, 2006 U.S. Dist. LEXIS 90481, 2006 WL 3715393 (N.D. Ind. 2006) – *Crawford* does not apply to pre-trial suppression hearings and hearsay is admissible without confrontation.

State v. Woinarowicz, 2006 ND 179 (N.D. 2006) – The Sixth Amendment right to confront does not apply to suppression hearings and, therefore, neither does *Crawford*.

State v. Cleveland, 2006 Del. Super. LEXIS 339 (Del. Super. Ct. 2006) – *Crawford* does not apply to a pre-trial suppression hearing (i.e., drugs).

People v. Brink, 2006 NY Slip Op 5428 (N.Y. App. Div. 4th Dept. 2006) – *Crawford* does not apply to pre-trial suppression hearings since the same trial rights are not afforded at these hearings.

State v. Rentoul, 2006 Del. C.P. LEXIS 16 (2006) – The right to confront does not extend to pre-trial suppression hearings.

People v. Felder, 129 P.3d 1072 (Colo. Ct. App. 2005) – The right to confrontation is a trial right that does not apply at pre-trial suppression hearings. Therefore, *Crawford* is not applicable.

United States v. Thompson, 2005 U.S. Dist. LEXIS 27763 (E.D. Mo. 2005) – Grand jury testimony, not subject to cross examination, of a deceased witness may be admitted at a subsequent suppression hearing because hearsay is admissible at suppression hearings.

People v. Martinez, 132 Cal. App. 4th 233, 33 Cal. Rptr. 3d 328, 2005 D.A.R. 10591 (Cal. App. 4th Dist. 2005) – Defendant objected to an in camera hearing by the Judge concerning whether the reveal the identity of a confidential informant listed in a search warrant for controlled substances. The Judge denied the defendant's request and allowed the search warrant to remain sealed. On appeal, the court found no Sixth Amendment or *Crawford* violation since those protections did not attach to a suppression hearing.

LaPointe v. State, 166 S.W.3d 287 (Tex. 2005) – An in-camera hearing to determine whether to admit the sexual history of the victim in this sexual assault trial implicates the Sixth Amendment and requires the presence of the defendant and permits cross-examination.

State v. Massie, 2005 Ohio 1678 (Ohio Ct App 2005) – Hearsay is allowed in pre-trial suppression hearings; therefore, *Crawford* does not bar the admission of even testimonial hearsay at this proceeding.

Vanmeter v. State, 165 SW3d 68 (2005) – The Confrontation Clause does not apply to pre-trial suppression hearings.

Other Pretrial Hearings

U.S. v. Persaud, 605 Fed.Appx. 791 (11th Cir. 2015), cert. pet. filed – jurisdiction under Maritime Drug Law Enforcement Act – "[t]he Confrontation Clause does not bar the admission of hearsay to make a pretrial determination of jurisdiction when that hearsay does not pertain to an element of the offense." [cite] Thus, a State Department's certification under the MDLEA, admitted to establish subject-matter jurisdiction during a pretrial hearing, does not violate the Confrontation Clause."

People v. Williams, 125 A.D.3d 697, 2 N.Y.S.3d 612 (N.Y. App. Div. 2015) – defendant has right to confront witness at a pretrial *Sirois* (i.e., forfeiture by wrongdoing) hearing – no word on whether a person can forfeit their right to confront witness at a *Sirois* hearing, but presumably

a finding of forfeiture would require a pre-*Sirois* hearing, at which defendant would have right to confront the witness, and so on into infinity

U.S. v. Campbell, 743 F.3d 802, 803-09 (11th Cir. 2014) – "Two changes in law—a statutory change and a decisional change—require us to reconsider whether the admission of a certification of the Secretary of State to establish extraterritorial jurisdiction for a prosecution of drug trafficking on the high seas violates a defendant's right to confront the witnesses against him at trial. ... The Confrontation Clause does not bar the admission of hearsay to make a pretrial determination of jurisdiction when that hearsay does not pertain to an element of the offense." – [NOTE: So the confrontation clause applies at pretrial hearings if the hearsay pertains to an element of the offense? It seems unlikely that the court actually meant that.]

People of the State of New York ex rel. Spencer Todd George v. Howard, 970 N.Y.S.2d 662 (N.Y. County Ct. 2013) – extradition proceedings – "This Court finds the Crawford issue irrelevant at this stage of the proceedings as the matter before the Court is not a trial."

United States v. Nueci-Peña, 711 F.3d 191, 198-199 (1st Cir. P.R. 2013) – hearing to determine jurisdiction regarding seizure on high seas – "the two cases upon which Nueci relies here, have not extended the reach of the Confrontation Clause beyond the context of trial. *See Mitchell-Hunter* [next case down]. We concluded, as we do here, that '[i]n this non-trial context, where evidence does not go to guilt or innocence,' the Confrontation Clause does not apply."

United States v. Mitchell-Hunter, 663 F.3d 45, 50-51 (1st Cir. P.R. 2011) – the Maritime Drug Law Enforcement Act (MDLEA) gives federal courts jurisdiction over "vessels without nationality" – "Mitchell's primary argument on appeal is that it was a violation of his Sixth Amendment right to confrontation for the district court to use the Welzant Certifications as evidence in the determination of jurisdiction under the MDLEA. Because [*51] the MDLEA's jurisdiction determination is relegated by statute to a pretrial conclusion of law by the judge, and because the confrontation right has never been extended beyond the context of a trial, this argument is without merit."

People v Afrika, 79 A.D.3d 1678, 914 N.Y.S.2d 542, 2010 NY Slip Op 9681 (N.Y. App. Div. 4th Dep't 2010) – "The People's application for a buccal swab was supported by probable cause [cite] and, contrary to defendant's contention, that application did not rely on previously suppressed evidence. Contrary to defendant's further contention, there was no Crawford violation because Crawford applies only to testimonial evidence that is presented at trial [cites]."

U.S. ex rel. Thomas v. Gaetz, 633 F. Supp. 2d 645 (N.D. Ill. Jul 16, 2009) (habeas) – "Petitioner's motion to quash his arrest and suppress identification evidence... Because the Supreme Court has not held that *Crawford* applies to pre-trial hearings, it cannot be said that the appellate court's decision was contrary to, or an unreasonable application of clearly established federal law."

U.S. v. Cole, 2007 WL 2461776 (3rd Cir. Aug 31, 2007) (unpub) – motion to impanel anonymous jury – " Cole contends the government's motion for impaneling an anonymous jury included hearsay statements that Cole did not have an opportunity to cross-examine. The government's motion included allegations by jurors in Cole's first trial that suggested jury

tampering. ... These allegations were offered in support of this particular motion only and not as evidence against Cole at trial. There was no violation of the Confrontation Clause."

Contempt Proceedings

Gilman v. Com., 275 Va. 222, 657 S.E.2d 474 (Va. Feb 29, 2008) – "The Supreme Court has emphasized that Sixth Amendment rights do not apply to adjudications for contempt, including those of petty, direct contempt. ... Because criminal contempt proceedings are not 'criminal prosecutions,' the protections of the Sixth Amendment do not apply to such proceedings. ... we hold that Gilman did not have a Sixth Amendment right of confrontation that could be asserted in her contempt adjudication in the Henry County circuit court."

Hearing to Determine Competency to Stand Trial

State v. Lieser, 2009 WL 1483149, 2009-Ohio-2502 (Ohio App. 5 Dist. May 26, 2009) (unpub) – *Crawford* does not apply

People v. Perry, 2008 WL 698924 (Cal.App. 5 Dist. Mar 17, 2008) (unpub) – "a defendant has no confrontation clause rights in a proceeding to determine his competency to stand trial"

Sexually Violent Predator and Similar Proceedings

People v. Pichcuskie, 974 N.Y.S.2d 728, 729 (N.Y. App. Div. 4th Dept. 2013) leave to appeal denied, 982 N.Y.S.2d 443 (N.Y. 2014) – "*Crawford* ... does not apply in SORA hearings..."

U.S. v. Pardee, 531 Fed. Appx. 383, 387 (4th Cir. 2013) – "*Crawford*, on which he relies, applies only to criminal cases, not to civil proceedings such as this."

People v. Hunter (In re Detention of Hunter), 982 N.E.2d 953 (Ill. App. Ct. 4th Dist. 2013) – "we are not faced with a criminal prosecution in this case. It is understood that proceedings conducted under the Act are civil in nature. ... Our supreme court has noted that in proceedings under the Act, even though they are considered civil in nature, the right to due process applies and 'entitles the defendant to the right to confront and cross-examine witnesses testifying against him.' [cite] '[O]ur legislature intended rigid adherence to rules of evidence and that every necessary element of the State's petition be proved by competent evidence.' [cite] Thus, *Crawford* applies to proceedings under the Act." – [NOTE: This seems to be saying that the due process standard is identical to the direct application of the confrontation clause, although it's not clear from the opinion that the judges meant to say that, or even understood that most other judges perceive a distinction.]

In re Detention of Coe, 175 Wn.2d 482, 509-512, 286 P.3d 29 (Wash. 2012) – "¶ 64 We have previously held that a defendant in an SVP proceeding has no right to confront witnesses, either in trial or in deposition." – adhering to that holding

People v. Nelson, 209 Cal. App. 4th 698, 147 Cal. Rptr. 3d 183 (Cal. App. 4th Dist. 2012) – "An MDO [mentally disordered offender] proceeding, however, is a civil proceeding. 'There is no right to confrontation under the state and federal confrontation clause in civil proceedings, but such a right does exist under the due process clause.' [cite] The Sixth Amendment and due process confrontation rights are not [**195] coextensive."

People v. Tiemann (In re Tiemann), __ N.W.2d __, 2012 Mich. App. LEXIS 1316, 24-25 (Mich. Ct. App. May 8, 2012) – "because SORA is a regulatory statute n42 and not a criminal statute, a 'criminal prosecution' is not at issue and neither confrontation clause applies."

Matter of State of New York v Wilkes, 2010 NY Slip Op 7006, 77 A.D.3d 1451, 908 N.Y.S.2d 495 (N.Y. App. Div. 4th Dep't 2010) – "This appeal arises from a proceeding pursuant to article 10 of the Mental Hygiene Law, in which petitioner sought the civil confinement of respondent after his criminal sentence expired. He appeals from an order committing him to a secure treatment facility, following a jury verdict determining that he suffers from a mental abnormality that predisposes him to commit sex offenses and makes it unlikely that he will be able to control his behavior.... *Crawford* ... does not apply to respondent in this civil proceeding [cites]."

In re Thomas R., 233 P.3d 1158 (Ariz. Ct. App. 2010) – SVP proceeding – "We assume for these purposes that the Confrontation Clause analysis under *Crawford* ... is similar to the right to confrontation under procedural due process in civil proceedings."

People v. Hardin, 2009 WL 1228320 (Cal. App. 1 Dist. May 06, 2009) (unpub) – "Proceedings to commit an individual as an SVP in order to protect the public are civil in nature. [cite] Accordingly, the Sixth Amendment right of confrontation--the subject of the *Crawford* opinion--does not apply in such proceedings."

In re Civil Commitment of T.R.K., 2006 WL 287851 (N.J. Super. A.D. Jan. 20, 2009) (unpub) – *Crawford* doesn't apply in SVPA proceedings

People v. Carroll, 2008 WL 2358670 (Cal. App. 4 Dist. Jun 11, 2008) (unpub) – *Crawford* doesn't apply in SVP proceedings

People v. Bolton, 50 A.D.3d 990, 857 N.Y.S.2d 190, 2008 N.Y. Slip Op. 03614 (N.Y. A.D. 2 Dept. Apr 22, 2008) – "Contrary to the defendant's contention, reliable hearsay evidence is admissible to support a sex offender adjudication [cite]. This includes out-of-court statements by the victim [cite]. The decision of the Supreme Court of the United States in *Crawford v. Washington* (541 U.S. 36) does not apply in a civil matter such as this [cite]."

People v. DeBerry, 2008 WL 37027 (Cal. App. 4 Dist. Jan 02, 2008) (unpub) – "DeBerry has no state or federal right to confrontation in an SVP proceeding because of its civil nature."

People v. Hicks, 2008 WL 116407 (Cal. App. 2 Dist. Jan 14, 2008) (unpub) – "*Crawford* does not extend 'the Sixth Amendment right of confrontation to civil proceedings[,] such as the SVPA."

People v. Robledo, 2007 WL 3360165 (Cal.App. 6 Dist. Nov 14, 2007) (unpub) – "*Crawford* does not apply to SVP [sexually violent predator] trials"

People v. Snow, 2007 WL 3208742 (Cal. App. 1 Dist. Nov 01, 2007) (unpub) – "As appellant acknowledges, under existing California law he has no Sixth Amendment right to confrontation in an SVP proceeding because of its civil nature." – and *Crawford* didn't change that

People v. Hobbs, 2007 WL 3194554 (Cal. App. 4 Dist. Oct 31, 2007) (unpub) – "each jury determined that defendant was a mentally disordered sex offender (MDSO) who remained a substantial danger to the community ... *Crawford* neither expressly nor impliedly extended the Sixth Amendment right of confrontation to civil proceedings."

In re Allen, 2007 WL 2757158 (Wash. App. Div. 1 Sep 24, 2007) (unpub) – right to confront witnesses "is available only to criminal defendants, not to individuals challenging a SVP [sexually violent predator] civil commitment."

State v. Marshall, 2006 Wash. App. LEXIS 1147 (Wash. Ct. App. 2006) – *Crawford* and the 6th Amendment are not applicable to Special Sex Offender Sentencing Alternative Proceedings.

People v. Reynolds, 2006 Daily Journal DAR 5433 (Cal. App. 4th Dist. 2006) – *Crawford* and the 6th Amendment do not apply to civil proceedings, such as hearings under the Sexually Violent Predator Act.

In re Polk, 187 S.W.3d 550 (Tex. App. 2006) – Sexually violent predator hearings are civil in nature and *Crawford* does not apply to civil hearings.

In re Commitment of Frankovitch, 121 P.3d 1240, 461 Ariz. Adv. Rep. 13 (Ariz. Ct. App. 2005) – The Sixth Amendment and *Crawford* do not apply to sexually violent person hearings.

People v. Angulo, 129 Cal App 4th 1349; 30 Cal Rptr 3d 483 (Cal App 4th Dist 2005) – Defendant was petitioned as a sexually violent predator and in a civil hearing was committed. Defendant claimed that an expert witnesses' reliance on police reports (and admission of the police reports) violated *Crawford*. The court found that *Crawford* was a criminal case based on the 6th Amendment and did not apply in this civil hearing.

People v. Dort, 18 AD 3d 23; 792 NYS2d 112 (NY App Div 3d Dept 2005) – Sex Offender Risk Assessment Hearings are not criminal in nature and therefore the protections of the Sixth Amendment right to confront witnesses are not applicable as announced in *Crawford*.

Alesi v. Sex Offender Registry Bd., 18 Mass. L. Rep. 500 (Mass Super Ct 2004) – The right to confront witnesses does not apply in civil sex offender proceedings.

In re Civil Commitment of G.G.N., 372 NJ Super 562; 854 A2d 936 (NJ Super Ct App Div 2004) – Civil commitment proceedings under the Sexually Violent Predators Act does not invoke the 6th Amendment and, therefore, *Crawford* does not apply.

Commitments, Child Dependency Proceedings, and Civil Cases Generally

Demski v. Petlick, __ N.W.2d __, 2015 WL 966024 (Mich. Ct. App. Mar. 5, 2015) – "The Confrontation Clause does not apply to civil proceedings."

In re E.A., 2015 ME 37, 114 A.3d 207 (Me. 2015) – "[¶14] The Confrontation Clause therefore does not apply in child protection proceedings."

Muratore v. State ex rel. Dept. of Pub. Safety, 320 P.3d 1024, 1031-32 (Okla. 2014) – "¶ 15 *The Confrontation Clause only applies in criminal cases.* The case before us is an administrative appeal of a revocation of a driver's license..."

State v. Floyd Y., 22 N.Y.3d 95, 979 N.Y.S.2d 2402, 979 N.Y.S.2d 240, 245 (N.Y. 2013) – "Floyd Y.'s arguments in support of a right to confrontation in article 10 proceedings are compelling but nonetheless unsupportable under the United States Supreme Court's and this Court's respective jurisprudence on civil confinement proceedings."

Dept. of Human Services v. J.G., 258 Or.App. 118, 308 P.3d 296, 302 (Or. App. 2013) – "juvenile dependency case" – "here, no right to confrontation exists"

In re S.A.G., 403 S.W.3d 907 (Tex. App. Texarkana 2013) – conservatorship – "*Crawford* is a criminal case which does not apply to this civil proceeding"

Twenty Thousand Eight Hundred Dollars \$20,800.00 in U.S. Currency v. State ex rel. Miss. Bureau of Narcotics, 115 So. 3d 137, 141 (Miss. Ct. App. 2013) – "the Confrontation Clause has no application to civil forfeiture cases."

In re M.F., 55 A.3d 373 (D.C. Sept. 27, 2012) – "the Sixth Amendment's Confrontation Clause does not apply in civil neglect proceedings."

In re Amey, 40 A.3d 902, 904-917 (D.C. 2012) – "we hold that the Confrontation Clause of the Sixth Amendment is inapplicable in involuntary civil commitment proceedings in the District of Columbia."

Golden Living Ctr. v. Sec'y of HHS, 656 F.3d 421, 426 (6th Cir. 2011) – "Golden contends that issues raised at oral argument before the Supreme Court, in a case in which the Court issued no written decision, expands Confrontation Clause rights to the civil context. See *Briscoe v. Virginia*... We do not find this argument persuasive."

Johnson v. Clements, 344 S.W.3d 253, 259-260 (Mo. Ct. App. 2011) – without discussion, applying *Crawford*, apparently as a matter of due process, in employment case

Devon S. v. Aundrea B.-S., 2011 NY Slip Op 21163, 32 Misc. 3d 341, 924 N.Y.S.2d 233 (N.Y. Fam. Ct. 2011) – "While the holding of *Crawford* is not directly applicable to this proceeding, 'the principles articulated therein caution against an expansive interpretation of traditional hearsay exceptions to curtail a litigant's right to confront witnesses in civil proceedings involving important interests, such as the right to continued custody of one's children' [cite]. [¶] N.S.'s report cards and the teacher's comments that accompany those cards are

clearly testimonial in nature and should not be admitted under the business-record exception to the hearsay rule." [NOTE: In other words, *Crawford*, while not applicable, applies.]

Adoption of Olivette, 79 Mass. App. Ct. 141, 944 N.E.2d 1068 (Mass. App. Ct. 2011) – "n6 In the present case, the constitutional right at issue is the due process right of parents to rebut evidence in cases seeking termination of their parental rights. [cite] The present case does not require us to consider the effect of *Crawford*..."

In re A.B., 999 A.2d 36, 43 (D.C. 2010) – "Appellant N.B. asks us to reverse the adjudication of her three young daughters as neglected children... In criminal cases, the Confrontation Clause of the Sixth Amendment may limit a prosecution expert's reliance at trial on testimonial hearsay, including the out-of-court opinion of a non-testifying expert. [cite] This is not a criminal case, however, and no comparable limitation applies here."

Neal v. Augusta-Richmond County Pers. Bd., 695 S.E.2d 318, 2010 Fulton County D. Rep. 1548 (Ga. Ct. App. 2010) – "Edward Neal, a firefighter of 25 years with the City of Augusta, filed this discretionary appeal from the trial court's decision upholding his termination by the Augusta-Richmond County Personnel Board ["Augusta-Richmond County"]. In his appeal, Neal challenges the admission of drug test results in the administrative proceeding where no one with knowledge of the lab test or testing procedures used in his case testified at the hearing... We find that Neal's property interest in his employment with the County is such that due process requires he be afforded the right to confront witnesses." – citing *Melendez-Diaz*

People v. Sweeney, __ Cal.Rptr.3d __, 2009 WL 1783637 (Cal. App. 4 Dist. Jun 24, 2009) – does not apply to civil commitment proceedings (in this case, including finding that respondent was dangerous)

Ten Broeck Dupont, Inc. v. Brooks, __ S.W.3d __, 2009 WL 1439178 (Ky. May 21, 2009) – "'the Sixth Amendment does not apply to civil cases.'"

Melkonians v. Los Angeles County Civil Service Com'n, 2009 WL 1314724 (Cal. App. 2 Dist. May 13, 2009) (unpub) – *Crawford* doesn't apply to civil service administrative proceedings

Orozco v. Kramer, 2009 WL 1033610 (C.D. Cal. April 14, 2009) (unpub) – "*Crawford* is inapplicable here because *Crawford* involved a criminal prosecution, not a civil commitment proceeding."

Benjamin v. BWIA Airlines, 2009 WL 783353 (S.D. Fla. Mar 24, 2009) (unpub) – "the Confrontation Clause does not protect litigants in civil proceedings"

U.S. v. \$40,955.00 in U.S. Currency, 554 F.3d 752 (9th Cir. Jan 27, 2009) – confrontation clause does not apply to civil forfeiture proceedings

New Jersey Div. of Youth and Family Services v. S.O., 2009 WL 187684 (N.J. Super. A.D. Jan 28, 2009) (unpub) – "The constitutional right of confrontation does not apply to civil proceedings under the Sixth Amendment to the United States Constitution or article I, paragraph 10, of the New Jersey Constitution."

Division of Youth and Family Services v. M.C. III, 405 N.J.Super. 24, 963 A.2d 348 (N.J. Super. A.D. Dec 31, 2008) – "we need not reach the issue of whether *Crawford v. Washington*, *supra*, applies in DYFS [Division of Youth and Family Services] abuse and neglect proceedings." – [NOTE: Implying issue remains open.]

In re Tayler F., 111 Conn.App. 28, 958 A.2d 170 (Conn. App. Oct 28, 2008), certification granted (on hearsay, not c.c., issue), 290 Conn. 901, 962 A.2d 128 (Conn. Dec 16, 2008) – "the right to confrontation as set forth in *Crawford*, which applies to the sixth amendment rights of an accused, does not extend to a parent in a neglect hearing."

In re J.B., 755 N.W.2d 496, 500, 2008 SD 80 (S.D. Aug 06, 2008) – "'the *Crawford* [cite] analysis involving the Sixth Amendment right of confrontation in criminal cases is not applicable in this civil abuse and neglect proceeding.'"

Carr v. City of Los Angeles, 2008 WL 625176, (Cal. App. 2 Dist. Mar 10, 2008) (unpub) – *Crawford* inapplicable to LAPD internal Board of Rights (disciplinary) proceeding – "Carr's support for his constitutional argument is thin to the point of heroic."

In re Marriage of Liggins and Payne, 2008 WL 615880 (Cal. App. 2 Dist. Mar 07, 2008) (unpub) – *Crawford* inapplicable to marital dissolution proceeding

In re Suspension or Revocation of License of Joachim, 2007 WL 4472123 (N.J.Super.A.D. Dec 24, 2007) (unpub) – *Crawford* inapplicable to license-revocation proceeding

In re G.D.H., 2007 WL 2833286, *1+ (N.C.App. Oct 02, 2007) (unpub) – termination of parental rights – "*Crawford* does not apply to Chapter 7B proceedings involving parental rights, because such proceedings are civil, rather than criminal, in nature."

Commonwealth v. Pultz, 69 Mass. App. Ct. 1117, 2007 WL 2404414 (Mass. App. Ct. Aug. 23, 2007) (unpub) – "The confrontation clause does not bar the use of out-of-court statements in civil commitment proceedings."

Hall v. University of Maryland Medical System Corp., 398 Md. 67, 919 A.2d 1177, n. 11 (Md. 2007) – "In a *civil case*, such as the present one, we are generally free to rely on our civil *and* criminal cases addressing the application of the business records exception because the protections provided to a criminal defendant are greater than those provided to a civil defendant. We express no opinion on the construction of *Crawford* in relation to Rule 5-803(b)(6) and § 10-101." (Italics in original)

State v. Warren, 100 Conn.App. 407, 919 A.2d 465 (Conn. App. 2007) – defendant was found not guilty by reason of insanity years ago and committed – "'continued commitment proceedings are not criminal prosecutions and, therefore, the confrontation clause of the sixth amendment does not apply and did not preclude the report's admission....'" (citation omitted)

Kucera v. Terrell, 2006 U.S. App. LEXIS 31054, 2006 WL 3692457 (10th Cir. Kan. 2006) (unpub) – "The Sixth Amendment right to confront one's accusers is available only in criminal

trials. 'Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.'"

State v. Dickinson, 2006 Conn. Super. LEXIS 2046 (Conn. Super. Ct. 2006) – A hearing for continued commitment before the Psychiatric Security Review Board is a civil hearing not subject to *Crawford*.

Cabinet for Health and Family Servs. V. A.G.G., 190 S.W.3d 338 (Ky. 2006) – *Crawford* is based on the 6th Amendment right to confrontation and is not application to civil child protection proceedings.

In re J.D.C., 2006 Kan. App. LEXIS 562 (Kan. Ct. App. 2006) – “The fourteen-year-old victim reported to her school counselor that she had been sexually assaulted by her stepfather. The counselor reported the incident to Kansas Social and Rehabilitation Services (SRS). The SRS subsequently removed the victim from the home. At the close of the State's CINC case, the mother moved to strike all the testimony, arguing it was hearsay since the State did not call the victim to testify. The State argued the evidence was admissible under Kan. Stat. Ann. § 60-460(a). The trial court denied the motion, ruling that the victim was available to testify under § 60-460(a) and that the mother could have called her and cross-examined her as to anything the victim had said on a videotaped statement that was played to the trial court. However, the mother did not call the victim. Because a CINC case was a civil proceeding, under Kan. Stat. Ann. § 38-1554, the evidentiary safeguards guaranteed in a criminal case did not apply. Therefore, there was no violation of the mother's right of confrontation under the Sixth Amendment when the trial court admitted hearsay statements of a counselor, an investigator, a detective, and a taped interview of the victim.”

People v. Waid, 2006 Ill. LEXIS 1080 (Ill. 2006) – A discharge hearing, after a defendant has been found mentally unfit to stand trial, is a civil proceeding not entitled to the confrontation right protections of *Crawford*.

State ex rel. Children, Youth and Families Dep't v. Pamela R.D.G., 2006 NMSC 19 (N.M. 2006) – *Crawford* does not apply to civil child protection proceedings.

In re S.L.G., 2006 N.C. App. LEXIS 492 (N.C. Ct. App. 2006) – *Crawford* does not apply to proceedings to terminate parental rights because those hearings are civil and not criminal.

State v. Harris, 277 Conn. 378 (2006) – *Crawford* does not apply to recommitment hearings because they are not criminal proceedings.

In re S.C., 2006 Cal. App. LEXIS 482 (Cal. App. 3rd Dist. 2006) – “*Crawford* has no application here because the Sixth Amendment right of a criminal defendant to confrontation under the United States Constitution does not extend to parents in state [juvenile] dependency proceedings.”

Jennings v. N.Y. City Council, 2006 NY Slip Op 50052U (N.Y. Sup. Ct. 2006) – *Crawford* does not apply to civil proceedings.

Fessler v. Ollie (in Re Fessler), 2005 Mich. App. LEXIS 1418 (unpub. 2005) – Child protective proceedings are not criminal and, therefore, *Crawford* does not apply.

State v. Frazier (In re P.F.), 2005 OK CIV APP 50 (Ok. Ct. App. 2005) – Mother and father were accused of abuse/failure to protect of their child in a deprivation of child action. A forensic interview was conducted of the child. The child did not testify at trial, but the interviewer testified and the videotaped interview was played. The court found that the forensic interview was testimonial, but did not assess whether the child reasonably expected that the statement would later be used in court. The court also did not address the applicability of the 6th Amendment to this proceeding but made a brief reference to it being a quasi-criminal proceeding.

In re D.R., 616 S.E.2d 300 (NC Ct. App. 2005) – “The parents argued that the trial court erred by admitting statements made by the child through the testimony of social workers, a foster parent, and psychologists. The appellate court held that the Sixth Amendment was not applicable to this matter as it was a civil action.” No *Crawford* violation.

In re April C., 131 Cal. App. 4th 599; 31 Cal. Rptr. 3d 804 (Cal. App. 2nd Dist. 2005) – “The dependency petition alleged that the boyfriend sexually abused one of the children. The juvenile court received reports containing the child's statements of abuse, and the parties stipulated that the child was not competent to testify. The juvenile court denied a motion to strike the child's hearsay statements. The court, in affirming, held that evidence admitted pursuant to Cal. Welf. & Inst. Code § 355, subjected to the judicial test of reliability, protected the due process rights of a parent accused of sexual abuse in a dependency proceeding. Thus, the requirement of fundamental fairness in the Due Process Clause of the Fourteenth Amendment did not compel the striking of the child's statements from the reports. The child's statements, together with the corroborating evidence of sexual abuse, constituted substantial evidence in support of the jurisdictional findings and disposition order. The court stated that the distinction between testimonial and nontestimonial hearsay was not applicable because the Sixth Amendment right to confrontation did not apply to parties in civil proceedings, including dependency proceedings.”

Erickson v. Dep't of Labor & Indus., 2005 Wash. App. LEXIS 1206 (Wash Ct App 2005) – *Crawford* is not applicable in civil cases.

In re Children of L.D., 2005 Minn. App. LEXIS 222 (2005) – Civil child abuse/neglect termination proceedings are civil in nature, and not quasi-criminal, thus not affording the Sixth Amendment protections as outlined in *Crawford*.

People v. Maxwell (In re C.M.), 815 N.E. 2d 49 (Ill App Ct 2004) – *Crawford* or right to confrontation do not apply in civil proceedings under the Juvenile Act.

➤ Sub-Category: Attorney Discipline Hearings

In re Disciplinary Proceeding Against Sanai, 177 Wn.2d 743, 302 P.3d 864 (Wash. 2013) – “But this is a bar disciplinary [*763] proceeding, not a criminal trial. ... Thus, the denial of Sixth Amendment confrontation clause rights at a discipline proceeding does not constitute

manifest constitutional error." – [NOTE: The opinion goes on to analyze the issue under the sixth amendment anyway.]

Statewide Grievance Committee v. Johnson, 108 Conn.App. 74, 946 A.2d 1256 (Conn. App. May 27, 2008), certification denied, 288 Conn. 915, 954 A.2d 187 (Conn. Jul 17, 2008) – "Because a grievance hearing is quasi-criminal in nature, we look to criminal law to resolve the defendant's claim." – and so *Crawford* applies [NOTE: My, aren't we special!]

➤ Sub-Category: Prison Disciplinary Proceedings

Lepley v. Warden, Nevada State Prison, 2008 WL 6058235 (Nev. Sep 05, 2008) (unpub) – *Crawford* does not apply in prison disciplinary proceedings

Juvenile Delinquency Proceedings

State v. Trevor M., 2015-NMCA-009, 341 P.3d 25 (N.M. App. 2014) – "Unlike adult probation revocations, which are decidedly different from trials, '[a]n allegation of a juvenile probation violation is treated as if it were a charge brought in a delinquency proceeding.' ... The effect of this [statutory] language is plain: since juveniles have the right to confront witnesses during delinquency proceedings, they must be accorded that right in probation revocation hearings." – therefore, the incoherent discussion seems to conclude, the statute creates a constitutional right to confront witnesses in juvenile probation revocation hearings

In re M.H.V.-P., 341 S.W.3d 553, 553-557 (Tex. App. El Paso 2011) – "Initially, we address the State's argument that *Crawford* does not apply in a juvenile adjudication hearing. ... we conclude that *M.P.* is inapposite and hold that *Crawford* applies at the adjudication hearing."

In re K.S., __ P.3d __, 2009 WL 1674927 (Or. App. Jun 10, 2009) – assuming without discussion that *Crawford* applies to transfer hearing combined with probation revocation hearing

In re T.F., 671 S.E.2d 887, 9 FCDR 137 (Ga. App. Dec 31, 2008) – "Given that the right of confrontation is a trial right that does not apply to preliminary hearings or suppression hearings, we see no reason to apply that right to the transfer hearing at issue here."

In re A.B., 2008 WL 4966903 (Cal. App. 2 Dist. Nov 20, 2008) (unpub) – "the court in the present case could admit reliable hearsay to the same extent evidence would have been admissible in an adult probation revocation hearing. *Crawford* does not apply to adult probation revocation proceedings."

In re J.D.D., 2008 WL 4916326 (Tex. App.-Dallas Nov 18, 2008) (unpub) – "Regardless, this Court has previously concluded an appellant has no right to confrontation at a transfer hearing because it is dispositional rather than adjudicative in nature."

State v. Mays, 2008 WL 484337 (Wash. App. Div. 1 February 25, 2008) (unpub) – "Because Mays' juvenile court decline hearing neither determined guilt nor imposed punishment, the trial

rights to confrontation of adverse witnesses and a jury determination of the facts did not apply at the hearing."

In re Personal Restraint of Hegney, 158 P.3d 1193 (Wash. App. Div. 2 2007) – "At the time of his offense [*i.e.*, first degree felony murder], Hegney was 15 years old. After arresting him, the State asked the juvenile court to decline jurisdiction over Hegney, even though he was not yet 18 years old. The juvenile court so ordered. ... The Sixth Amendment right to confrontation specifically applies to criminal prosecutions. Because the guilt or innocence of a juvenile is not at issue in a decline hearing, the Sixth Amendment is inapplicable here. Moreover, fundamental fairness at a juvenile proceeding does not require the exclusion of hearsay evidence. Thus, under RCW 13.40.110, and the decline hearings thereunder, the technical rules for the exclusion of evidence do not apply and hearsay is generally admissible." (citations omitted)

Hegney v. Vail, 2008 WL 4766816 (W.D. Wash. Oct 27, 2008) (unpub) (habeas) – "The Washington State Court of Appeals dissertation on the current state of the law in this area is accurate and correct."

In re M.P., 220 S.W.3d 99 (Tex. App.-Waco 2007) – "the Supreme Court's jurisprudence regarding the Sixth Amendment right of confrontation, and particularly *Crawford*, has no application to the disposition phase of a juvenile delinquency proceeding." – although it does apply in part to punishment phase of adult criminal trials

In re S.M., 207 S.W.3d 421 (Tex. App.-Ft. Worth 2006) – "A juvenile challenging TYC records at transfer hearing had no right of confrontation."

Matter of German F., 13 Misc.3d 642, 821 N.Y.S.2d 410, 2006 N.Y. Slip Op. 26341 (N.Y. Fam. Ct. 2006) – In this juvenile delinquency proceeding, a responding officer testified to statements made by the victim after being stabbed and still lying prone on the ground. On appeal, the court found that the statements of the victim were non-testimonial. "[I]t is clear that the victim's statement was made to Police Officer Gschlecht in response to the officer's questions. However, Gschlecht's questions to the victim occurred on the street where the victim was lying prone on the sidewalk moments after the officer had observed the victim essentially surrounded by the respondents and two others and there was also a larger 'hostile' crowd encircling the victim and the three apparent perpetrators. Additionally, once Gschlecht observed blood on the victim's pants and socks as well as a large cut on the victim's lower leg, the officer's questions were clearly intended to deal with an ongoing emergency in a volatile atmosphere. Therefore, the victim's statements made in response to the police officer's questions are 'non-testimonial' under both *Crawford* and *Davis* because the purpose of the officer's interrogation was to enable him to assist the victim in an emergency situation rather than to 'establish or prove past events potentially relevant to later criminal prosecution.'"

Milligan v. State, 2006 Tex. App. LEXIS 1356 (Tex. App. 2006) – "It has been held that neither the Sixth Amendment nor the hearsay rule applies to a juvenile certification hearing. *In re S.J.M.*, 922 S.W.2d 241, 242 (Tex. App.-Houston [14th Dist.] 1996, no writ); *Alford v. State*, 806 S.W.2d 581, 582 (Tex. App.-Dallas 1991), *aff'd*, 866 S.W.2d 619, 625 (Tex. Crim. App. 1993)."

In re D.L., 198 S.W.3d 228 (Tex. App.-San Antonio 2006) – "a transfer hearing under section 54.11 of the Family Code is not a stage of a criminal prosecution for purposes of the Sixth Amendment. Under Texas law, a transfer hearing is not a trial; a juvenile is neither being

adjudicated nor sentenced. *In re J.M.O.*, 980 S.W.2d at 813; *In re D.S.*, 921 S.W.2d 383, 387 (Tex. App.–Corpus Christi 1996, writ dismissed w.o.j.). Rather, the transfer hearing is a "second chance hearing" after the juvenile has already been sentenced to a determinate number of years. *In re D.S.*, 921 S.W.2d at 387. Because the juvenile is already being punished for his original conduct in which he was adjudged delinquent, in making this "second chance" determination, the trial court should be able to consider the juvenile's behavior since commitment. *Id.* As such, the hearing does not need to meet the same stringent due process requirements as a trial in which a person's guilt is decided. *In re J.M.O.*, 980 S.W.2d at 813; *In re D.S.*, 921 S.W.2d at 387. Because a transfer hearing is not a stage of a criminal prosecution, we hold that *Crawford* does not apply.”

In re A.L., 2006 N.C. App. LEXIS 22, 2006 WL 9511 (N.C. Ct. App. 2006) (unpub) – “In a juvenile adjudicatory hearing, the respondent is entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults.” Thus, *Crawford* applies in these proceedings.

State v. Tai N., 127 Wash. App. 733, 113 P.3d 19 (Wash. Ct. App. 2005) – rejecting argument that the 6th Amendment right to trial by jury applies to juvenile proceedings – the argument was that *Crawford*, in conjunction with *Apprendi* and *Blakely*, altered the traditional understanding of the sixth amendment sufficiently that the old precedent had lost force – the court disagreed, stating: "Juvenile adjudicatory proceedings have never been equated with a 'criminal prosecution' for purposes of the Sixth Amendment."

State v. D.R., 128 Wash.App. 1058, 2005 Wash. App. LEXIS 1911, 2005 WL 1825301 (Wash. Ct. App. 2005) (unpub); **State v. A.N.**, 128 Wash.App. 1058, 2005 Wash. App. LEXIS 1903, 2005 WL 1825504 (Wash. Ct. App. 2005) (unpub); **State v. J.L.**, 128 Wash.App. 1058, 2005 Wash. App. LEXIS 1898, 2005 WL 1825414 (Wash. Ct. App. 2005) (unpub); **State v. M.K.**, 128 Wash.App. 1038, 2005 Wash. App. LEXIS 1695, 2005 WL 1705753 (Wash. Ct. App. 2005) (unpub) – these unpublished opinions all followed *Tai N.*, described above

In re D.G.G., 2005 Tex. App. LEXIS 6200 (Texas App. 2005) – Although the court did not provide an analysis of the applicability of the 6th Amendment to delinquency proceedings, the court conducted a *Crawford* analysis and held: “The juvenile argued that the court erred in admitting hearsay identification testimony in violation of his Sixth Amendment right to confrontation by admitting hearsay statements by the officer that his neighbor identified the juvenile as being in the trunk of the officer's car. The appellate court held that the neighbor's statement did not fall in the "testimonial" category and was exempt from Confrontation Clause scrutiny. The fact that the officer was a police officer did not, without more, make the conversation between him and his neighbor akin to a police interrogation. Nothing indicated who initiated the conversations, the circumstances surrounding them, or any other information showing that the neighbor's statement was made in response to question from an officer acting under color of police authority. Finally, the statement was not made in a formalized setting analogous to any of the situations described in *Crawford* as producing testimonial statements.”

C.C. v. State, 826 NE2d 106 (Ind. Ct App 2005) – Sixth Amendment rights, as outlined in *Crawford*, were not violated by the introduction of hearsay at the disposition hearing because the rule against hearsay does not apply in juvenile disposition hearings.

Probation Revocation / Supervised Release Hearings

There is no 6th Amendment right to confront in probation revocation proceedings or supervised release revocation proceedings. Therefore, *Crawford* does not apply in these hearings.

State Cases (arranged alphabetically by state)

State v. Schofield, 2007 WL 5248830 (Ariz. App. Div. 1 Dec 20, 2007) (unpub)

State v. Carr, 216 Ariz. 444, 167 P.3d 131 (Ariz. App. Div. 2 2007)

James v. State, 2012 Ark. App. 429, 2-4, __ S.W.3d __ (Ark. Ct. App. 2012)

Sims-Navarre v. State, 2010 Ark. App. 770, __ S.W.3d __ (Ark. Ct. App. 2010)

People v. Hudson, 2009 WL 151253, *1+ (Cal. App. 4 Dist. Jan 22, 2009) (unpub)

People v. Stanphill, 87 Cal.Rptr.3d 643, 170 Cal.App.4th 61 (Cal. App. 3 Dist. Jan 14, 2009)

People v. Roden-Delgado, 2008 WL 4951055 (Cal. App. 4 Dist. Nov 20, 2008) (unpub) –

People v. Vital, 2008 WL 2133124 (Cal. App. 3 Dist. May 22, 2008) (unpub)

People v. Davenport, 2008 WL 616286 (Cal. App. 1 Dist. Mar 07, 2008) (unpub)

People v. Barry, 2007 WL 4510362 (Cal. App. 1 Dist. Dec 26, 2007) (unpub)

People v. Abrams, 158 Cal.App.4th 396, 69 Cal.Rptr.3d 742 (Cal. App. 2 Dist. Dec 21, 2007)

People v. Tii, 2007 WL 4446943 (Cal. App. 1 Dist. Dec 20, 2007) (unpub)

People v. Clemons, 2007 WL 4305951 (Cal.App. 6 Dist. Dec 11, 2007) (unpub)

People v. Senegal, 2007 WL 1874426 (Cal. App. 1 Dist. June 29, 2007) (unpub)

People v. Shepherd, 151 Cal.App.4th 1193, 60 Cal.Rptr.3d 616 (Cal. App. 1 Dist. June 8, 2007) (as modified June 26, 2007)

People v. Lopez 2007 WL 586630, n.1 (Cal.App. 2 Dist. 2007) (unpub)

People v. Johnson, 121 Cal. App. 4th 1409; 18 Cal. Rptr. 3d 230 (Cal App 1st Dist 2004)

People v. Turley, 109 P.3d 1025 (Colo Ct App 2004)

Jenkins v. State, 2004 Del. LEXIS 549, 2004 WL 2743556 (Del. 2004)

Young v. United States, 863 A.2d 804 (D.C. 2004)

Thompson v. State, __ So.2d __, 2008 WL 4791009 (Fla. App. 3 Dist. Nov 05, 2008) –

Russell v. State, 982 So.2d 642 (Fla. May 01, 2008) – "We hold that the decision in *Crawford* ... is not applicable to probation revocation proceedings"

Peters v. State, 984 So.2d 1227 (Fla. May 01, 2008) – community control – "Because *Crawford* addresses the use of testimonial hearsay only in the context of criminal prosecutions, the decision does not apply to Florida revocation proceedings."

Stephens v. State, 979 So.2d 1160 (Fla. App. 1 Dist. Apr 21, 2008) (community control)

Pride v. State, 952 So.2d 617 (Fla. App. 1 Dist. 2007) (community control revocation)

Massery v. State, 953 So.2d 568 (Fla. App. 1 Dist. 2007) – holding *Crawford* does not apply to probation revocation proceeding where defendant "received a true split sentence", but

simultaneously certifying question to state Supreme Court – several other Court of Appeals cases raising similar issues have also been certified

Wilcher v. State, 946 So.2d 114, 115 (Fla. App. 5 Dist. 2007) – *Crawford* does not apply to community control revocation proceeding but certifying question to state Supreme Court

Richardson v. State, 955 So.2d 666 (Fla. App. 1 Dist. 2007) – certifying issue as above

Jackson v. State, 953 So.2d 7801 (Fla. App. 4 Dist. 2007) – certifying issue

Hawthorne v. State, 953 So.2d 751 (Fla. App. 2 Dist. 2007) – certifying issue

Ware v. State, 658 S.E.2d 441, 08 FCDR 714 (Ga. App. Feb 29, 2008) –

State v. Rose, 144 Idaho 762, 171 P.3d 253 (Idaho Oct 19, 2007) (very thorough discussion)

Wann v. State, 997 N.E.2d 1103, 1105 (Ind. App. 2013), reh'g denied (Feb. 7, 2014)

Bass v. State, 974 N.E.2d 482, 486 (Ind. Ct. App. 2012)

Smith v. State, 971 N.E.2d 86, 89 (Ind. 2012)

Robinson v. State, 955 N.E.2d 228, 232 (Ind. Ct. App. 2011)

Holmes v. State, 923 N.E.2d 479 (Ind. Ct. App. 2010)

Monroe v. State, 899 N.E.2d 688 (Ind. App. Jan 12, 2009) ("*Crawford* does not apply to probation revocation hearings because they are not criminal trials.")

Larry v. State, 2008 WL 4353788, *2+ (Ind.App. Sep 25, 2008) (unpub)

Wright v. State, 2007 WL 3409335 (Ind. App. Nov 16, 2007) (unpub)

Reyes v. State, 868 N.E.2d 438, n.1 (Ind. 2007)

Reyes v. State, 853 N.E.2d 1278 (Ind. Ct. App. 2006), aff'd as modified, 868 N.E.2d 438 (Ind. 2007)

State v. Marquis, 292 Kan. 925, 257 P.3d 775 (Kan. 2011)

State v. Hill, 2009 WL 1212685 (Kan. App. May 01, 2009) (unpub) –

State v. Palmer, 158 P.3d 363 (Kan. App. 2007) – (collecting cases)

Commonwealth v. Thissell, 457 Mass. 191, 199, 928 N.E.2d 932 (Mass. 2010)

Commonwealth v. Terrio, 2009 WL 613774 (Mass. App. Ct. Mar 12, 2009) (unpub)

Commonwealth v. Allison, 2008 WL 2219824 (Mass. App. Ct. May 30, 2008) (unpub)

Commonwealth v. Wilcox, 446 Mass. 61, 841 N.E.2d 1240 (Mass. 2006)

Commonwealth v. Nunez, 446 Mass. 54, 841 N.E.2d 1250 (Mass. 2006)

Commonwealth v. Kendrick, 446 Mass. 72, 841 N.E.2d 1235 (Mass. 2006)

People v. Breeding, ___ N.W.2d ___, 2009 WL 1687950 (Mich. App. Jun 16, 2009)

State v. Johnson, 287 Neb. 190, 842 N.W.2d 63, 72-73 (Neb. 2014)

State v. Trevor M., 2015-NMCA-009, 341 P.3d 25 (N.M. App. 2014) – confrontation clause does apply in juvenile probation revocation hearings – a statute expands the constitutional right (or something like that – the opinion is incoherent)

People v. Maldonado, 44 A.D.3d 793, 843 N.Y.S.2d 415, 2007 N.Y. Slip Op. 07722 (N.Y. A.D. 2 Dept. Oct 09, 2007)

People v. Brown, 2006 NY Slip Op 6706 (N.Y. App. Div. 4th Dept. 2006)

State v. Pauling, 371 S.C. 435, 639 S.E.2d 680 (N.C. Ct. App. 2006)

State v. Crace, 2006 Ohio 3027 (Ohio Ct. App. 2006) (community control revocation)

Wortham v. State, 188 P.3d 201, 2008 OK CR 18 (Okla. Crim. App. Jun 19, 2008) –

State v. Johnson, 221 Or.App. 394, 190 P.3d 455 (Or. App. Jul 30, 2008) –

State v. Gonzalez, 212 Or.App. 1, 157 P.3d 266 (Or. App. 2007)

Commonwealth v. Colon, 2014 PA Super 242, 102 A.3d 1033, 1039-40 (2014), appeal denied, (Pa. Feb. 11, 2015)

State v. Pompey, 934 A.2d 210 (R.I. 2007)

State v. Wisser, __ S.W.3d __, 2011 Tex. App. LEXIS 3334 (Tex. App. 4th District San Antonio 2011) –

Nickerson v. State, 2008 WL 2286179 (Tex. App.-Eastland Jun 05, 2008) (unpub) (deferred adjudication of guilt)

Mauro v. State, 235 S.W.3d 374 (Tex. App.-Eastland 2007), pet. refused (Jan. 16, 2008) (community supervision revocation) –

Galindo v. State, 2007 WL 1470217 (Tex. App.-Hous. May 22, 2007) (unpub)

Trevino v. State, 218 S.W.3d 234 (Tex.App.-Hous. 2007)

Henderson v. Commonwealth, 59 Va. App. 641, 722 S.E.2d 275 (Va. Ct. App. 2012) (on rehearing)

Dickens v. Commonwealth, 52 Va.App. 412, 663 S.E.2d 548 (Va. App. Jul 29, 2008)

Commonwealth v. Dickens, 2007 WL 2187606 (Va. Cir. Ct. Jul 18, 2007) (unpub) (trial court ruling), *aff'd*, 52 Va.App. 412, 663 S.E.2d 548 (Va. App. Jul 29, 2008)

State v. Lewis, 2006 Wash. App. LEXIS 113 (Wash. Ct. App. 2006)

Federal Cases (arranged numerically by circuit)

United States v. Rondeau, 430 F.3d 44 (1st Cir. Mass. 2005)

United States v. Carthen, 681 F.3d 94, 99-100 (2d Cir. N.Y. 2012)

United States v. Aspinall, 389 F.3d 332 (2d Cir. N.Y. 2004)

United States v. Ward, 770 F.3d 1090, 1097-98 (4th Cir. 2014)

U.S. v. Vance, 2008 WL 4280085 (4th Cir. Sep 18, 2008) (unpub)

U.S. v. Crawford, 288 Fed.Appx. 903 (4th Cir. Aug 18, 2008)

U.S. v. Walker, 2008 WL 228151 (4th Cir. Jan 29, 2008) (unpub)

United States v. Palmer, 2006 U.S. Dist. LEXIS 86016 (E.D. Va. 2006)

United States v. Minnitt, 617 F.3d 327, 334 (5th Cir. Tex. 2010)

U.S. v. Denson, 2007 WL 1112658 (5th Cir. Apr 12, 2007) (unpub) – (collecting federal cases)

U.S. v. Thompson, 2009 WL 1211289 (E.D. Mich. Apr 20, 2009) (unpub) (habeas)
(magistrate's recommendation)

United States v. Kirby, 418 F.3d 621 (6th Cir. Tenn. 2005)

U.S. v. Mosley, 759 F.3d 664 (7th Cir. 2014)

United States v. Kelley, 446 F.3d 688 (7th Cir. Ind. 2006)

U.S. v. Farmer, __ F.3d __, 2009 WL 1544398 (8th Cir.(Mo.) Jun 04, 2009)

U.S. v. Turrentine, 2009 WL 322494 (E.D. Mo. Feb 09, 2009) (unpub)

Gonzales v. Bartos, 2009 WL 825812 (D. Ariz. Mar 30, 2009) (unpub) (habeas)

United States v. Hall, 419 F.3d 980 (9th Cir. Cal. 2005)

United States v. Barazza, 318 F. Supp. 2d 1031(SD Cal 2004)

United States v. Reese, 775 F.3d 1327, 1328-29 (11th Cir. 2015)

United States v. Johnson, 349 Fed. Appx. 387, 388-389 (11th Cir. Fla. 2009)

U.S. v. Dorsey, 2009 WL 348358, *1+ (S.D.Fla. Feb 04, 2009) (unpub)

United States v. Wooden, 2006 U.S. App. LEXIS 11068 (11th Cir. Fla. 2006)

United States v. Morris, 140 Fed. Appx. 138 (11th Cir. Fla. 2005)

United States v. Zayas, 146 Fed. Appx. 346 (11th Cir. Fla. 2005) – at supervised release revocation hearing, defendant entitled to some due process and Sixth Amendment protections, specifically the right to confront the police officer who issued a report regarding a new crime.

Parole Revocation Hearings

Curtis v. Chester, 626 F.3d 540, 544 (10th Cir. Kan. 2010) – "Sixth Amendment rights are not applicable in parole revocation hearings because those hearings are not 'criminal prosecutions.'"

Valdivia v. Schwarzenegger, 599 F.3d 984, 986-998 (9th Cir. Cal. 2010), reh'g en banc denied with multiple opinions, 623 F.3d 849 (9th Cir. 2010) – "parolees are due certain 'minimum requirements of due process,' including the right to confront witnesses. [cite] These rights, however, are based in the Due Process Clause of the Fourteenth and Fifth Amendments and not in the Confrontation Clause of the Sixth Amendment and its articulation in the *Crawford* line of cases." – criticized by *Curtis v. Chester*, 626 F.3d 540, 546 n.3 (10th Cir. Kan. 2010)

Martin v. S.D. Bd. of Pardons & Paroles, 2009 SD 103, 776 N.W.2d 93 (S.D. 2009) – "*Crawford* applies to criminal proceedings, not civil parole revocation proceedings."

Walker v. Tilton, 2009 WL 1155663 (E.D. Cal. Apr 29, 2009) (unpub) (habeas) – "The Sixth Amendment's Confrontation Clause applies only to criminal prosecutions, and does not extend to parole revocation proceedings."

U.S. v. Geathers, 2008 WL 4682618 (11th Cir. Oct 24, 2008) (unpub) – "No authority extends the Sixth Amendment right to confront adverse witnesses to supervised release revocation proceedings..."

Ray, 530 F.3d 666 (8th Cir. Jul 08, 2008) – "*Crawford* is not implicated in a supervised release revocation hearing."

McCallum v. Reilley, 2007 WL 2455662 (N.D. W.Va. Aug 24, 2007) (unpub) (§ 2241 proceeding, federal prisoner) – *Crawford* does not apply to parole revocation hearings

Schmanke v. Irvins, 2006 U.S. App. LEXIS 27485, 2006 WL 3168015 (7th Cir. 2006) (unpub) – *Crawford* and the Sixth Amendment do not apply to a parole revocation hearing.

Ash v. Reilly, 431 F.3d 826, 829-30 (D.C. Cir. 2005) – the D.C. Circuit opinion is not entirely clear, but it has been cited for the proposition that *Crawford* does not apply in parole revocation hearings – see, e.g., *U.S. v. Denson*, 224 Fed.Appx. 417 (5th Cir. 2007); *State v. Rose*, 144 Idaho 762, 171 P.3d 253 (Idaho App. 2006)

U.S. v. Hall, 419 F.3d 980, 985 (9th Cir. 2005) – "We reject Hall's assertion that *Crawford* extends the Sixth Amendment right to confrontation to revocation of supervised release proceedings. ... Because '[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions' the full protection provided to criminal defendants, including the Sixth Amendment right to confrontation, does not apply to them. *Morrissey*, 408 U.S. at 480, 92 S.Ct. 2593. Rather, a due process standard is used to determine whether hearsay evidence admitted during revocation proceedings violates a defendant's rights. *Id.* at 482, 92 S.Ct. 2593. ... [FN4.] Parole, probation, and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner."

U.S. v. Littlejohn, 444 F.3d 1196, *1200 (9th Cir. 2006) – "We rejected an attempt to graft *Crawford's* Sixth Amendment rule onto *Morrissey's* Due Process requirement at revocation proceedings in our recent decision in *United States v. Hall*[419 F.3d at 985]."

United States v. Jarvis, 94 Fed. Appx. 501 (9th Cir. 2004) – seeming to imply that *Crawford* applies to parole revocation hearings – but see *U.S. v. Hall*, 419 F.3d 980 (9th Cir. 2005), described above

United States v. Martin, 382 F.3d 840 (8th Cir. 2004) – Sixth Amendment right to confrontation did not exist in parole revocation hearings.

United States v. Aspinall, 389 F.3d 332 (2nd Cir. 2004) – *Crawford v. Washington* does not apply to parole revocation hearings because by its text, the Sixth Amendment is limited to "criminal prosecutions." That Court also cited to *Morrissey* for the proposition that "'revocation of parole is not part of a criminal prosecution.'"

Sentencing Hearings

With *two major exceptions*, the Sixth Amendment does not apply to sentencing hearings, including restitution hearings. *One exception* is for sentencing hearings held before juries in non-capital cases in Texas, Missouri and Minnesota. It is unclear (at least to someone not familiar with the practice in those states) whether the same exception would apply if the

defendant waives the right to a jury determination. *The other exception* is for capital sentencing hearings in some, but not all, jurisdictions.

Harper v. Commonwealth, 675 S.E.2d 841, 54 Va.App. 21 (Va. App. Apr 28, 2009) contains a very long and detailed discussion.

State Cases (arranged alphabetically by state)

Petric v. State, __ So.3d __, 2013 WL 598118, 2013 Ala. Crim. App. LEXIS 12 (Ala. Crim. App. Feb. 15, 2013) (in dicta)

State v. Martinez, 282 P.3d 409, 419-420 (Ariz. 2012), cert. denied (Dec. 3, 2012)

State v. McGill, 2006 Ariz. LEXIS 103 (Ariz. 2006)

People v. Vensor, 116 P.3d 1240 (Colo Ct of Ap 2005)

Franco v. State, 918 A.2d 1158, 1161 (Del. 2007) ("the Sixth Amendment right of confrontation does not apply in restitution hearings")

Box v. State, 993 So.2d 135 (Fla. App. 5 Dist. Oct 24, 2008) – ("we conclude that the Sixth Amendment right of confrontation does not apply to restitution hearings.")

Cameron v. State, 31 Fla. L. Weekly D 3066 (Fla. Dist. Ct. App. 4th Dist. 2006) (habitual offender sentencing)

State v. Shackelford, 314 P.3d 136, 138 (Idaho 2013), reh'g denied (Oct. 31, 2013)

State v. Martinez, 303 P.3d 627, 303 P.3d 627 (Idaho Ct. App. 2013)

Davis v. State, 892 N.E.2d 156 (Ind. App. Aug 11, 2008)

Steward v. Commonwealth, __ S.W.3d __, 2012 Ky. LEXIS 202, 9-13 (Ky. Dec. 20, 2012)

State v. Rodriguez, 738 N.W.2d 422 (Minn. App. 2007), aff'd, 754 N.W.2d 672 (Minn. 2008) (containing lengthy discussion)

Conner v. State, 138 So. 3d 143 (Miss. 2014)

Frazier v. State 907 So.2d 985, 997-998 (Miss. App. 2005) – (decided on basis that pen packs are not testimonial)

Martin v. State, 291 S.W.3d 846 (Mo. App. W.D. Aug 04, 2009) –

People v Johnson, 94 A.D.3d 1408, 942 N.Y.S.2d 302 (N.Y. App. Div. 4th Dep't 2012)

People v. Anderson, 2010 NY Slip Op 20158, 28 Misc. 3d 289; 900 N.Y.S.2d 829 (N.Y. Sup. Ct. 2010)

People v. Leon, 10 N.Y.3d 122, 884 N.E.2d 1037, 855 N.Y.S.2d 38, 2008 N.Y. Slip Op. 01421 (N.Y. Feb 19, 2008)

State v. McPhail, 2007 WL 1892851 (N.C. App. Jul 03, 2007) (unpub) –

State v. Sings, 641 S.E.2d 370 (N.C. App. 2007) – (but *Crawford* does apply to capital sentencing hearings)

State v. Williams, 2008 WL 1932134, 2008-Ohio-2122 (Ohio App. 11 Dist. May 02, 2008)
(unpub) –

State v. Randlett, 2007-Ohio-3546, 2007 WL 2009535 (Ohio App. 10 Dist. Jul 12, 2007)
(unpub) –

McDonald v. Belleque, 2006 Ore. App. LEXIS 933 (Ore. Ct. App. 2006)

State v. Stephenson, 2006 Tenn. LEXIS 454 (2006)

State v. Stephenson, 2005 Tenn. Crim. App. LEXIS 208 (2005)

Blunt v. Commonwealth, 62 Va. App. 1, 741 S.E.2d 56 (Va. Ct. App. 2013)

Harper v. Commonwealth, 675 S.E.2d 841, 54 Va.App. 21 (Va. App. Apr 28, 2009) –

State v. Abd-Rahmaan, 154 Wash. 2d 280, 111 P3d 1157 (Wash. 2005)

State v. Webster, 2005 Wash. App. LEXIS 1316 (Wash. Ct. App. 2005) (restitution hearing)

Federal Cases (arranged by circuit)

United States v. Díaz-Arias, 717 F.3d 1 (1st Cir. Mass. 2013)

Santiago-Camacho v. U.S., 2007 WL 789066 (D. Puerto Rico 2007) (unpub)

United States v. Grant, 2006 U.S. Dist. LEXIS 61151 (D. Me. 2006)

United States v. Monteiro, 417 F.3d 218 (1st Cir. Mass. 2005)

United States v. Luciano, 414 F.3d 174, 67 Fed. R. Evid. Serv. (1st Cir RI 2005)

United States v. Lizardo, 445 F.3d 73 (1st Cir. Mass. 2006)

United States v. Martinez, 413 F.3d 239 (2nd Cir NY 2005)

Thielemann v. U.S., __ F.Supp.2d __, 2013 WL 6506168 (D. Del. 2013)

U.S. v. White, 2008 WL 4191736, *2 (E.D.Pa. Sep 08, 2008) (unpub) –

U.S. v. Esquivel-Corona, 2008 WL 118463 (3rd Cir. Jan 14, 2008) (unpub)

United States v. Robinson, 482 F.3d 244 (3d Cir. 2007) –

U.S. v. Wynn, 2007 WL 186530, *1-2 (3d Cir. 2007) (unpub)

United States v. Wynn, 2007 U.S. App. LEXIS 1786 (3rd Cir. N.J. 2007)

United States v. Cabbagestalk, 2006 U.S. App. LEXIS 14311 (3rd Cir. Pa. 2006)

U.S. v. Crawford, 734 F.3d 339, 344 (4th Cir. 2013) cert. denied, 134 S. Ct. 1528 (U.S. 2014)

United States v. Powell, 650 F.3d 388, 392-93 (4th Cir. Va. 2011), cert. denied (Oct. 3, 2011)

U.S. v. Arias, 2009 WL 808464 (4th Cir. Mar 30, 2009) (unpub)

U.S. v. Martinez, 274 Fed.Appx. 291 (4th Cir. Apr 18, 2008) (unpub)

Wallace v. U.S., 2008 WL 583369 (S.D. W.Va. Feb 29, 2008) (unpub) (§ 2255) –

U.S. v. Debreus, 2007 WL 4180633 (4th Cir. Nov 27, 2007) (unpub) –

U.S. v. Sullivan, 2007 WL 2436041 (4th Cir. Aug 22, 2007) (unpub) –

Strickland v. Lee, 2007 U.S. Dist. LEXIS 6743 (4th Cir. W.D.N.C 2007)

U.S. v. LaChance, 2007 WL 1051432 (4th Cir. 2007) (unpub)

U.S. v. Levesque, 2007 WL 2022043 (4th Cir. Jul 12, 2007) (unpub) –
United States v. Gray, 362 F.Supp 2d 714 (S.D. W.Va. 2005)
United States v. Aguilar, 2006 U.S. App. LEXIS 2264 (4th Cir. N.C. 2006)
United States v. Sanders, 2006 U.S. App. LEXIS 11403 (4th Cir. W.Va. 2006)
United States v. Cole, 2006 U.S. App. LEXIS 12013 (4th Cir. W.Va. 2006)

United States v. Ellis, 2013 U.S. App. LEXIS 13815 (5th Cir. Tex. May 20, 2013)
U.S. v. Walton, 2009 WL 695445 (5th Cir. Mar 18, 2009) (unpub) –
U.S. v. Broadus, 2007 WL 4245307 (5th Cir Dec 04, 2007) (unpub) –
U.S. v. Sardin, 2007 WL 2891036 (5th Cir. Oct 03, 2007) (unpub)
U.S. v. Soto, 2007 WL 2778234 (5th Cir. Sep 24, 2007) (unpub)
U.S. v. Olaya, 2007 WL 2376620 (5th Cir. Aug 21, 2007) (unpub) –
U.S. v. Aguilar, 2007 WL 2110761 (5th Cir. Jul 20, 2007) (unpub) –
U.S. v. Vittek, 2007 WL 1454500 (5th Cir. May 16, 2007) (unpub) –
U.S. v. Lyerla, 2007 WL 1108420 (5th Cir. Apr 09, 2007) (unpub) –
United States v. Underwood, 2006 U.S. App. LEXIS 21111 (5th Cir. La. 2006)
United States v. Orisakwe, 2006 U.S. App. LEXIS 11634 (5th Cir. Tex. 2006)
United States v. Beydoun, 2006 U.S. App. LEXIS 26434 (5th Cir. La. 2006)
United States v. Munoz, 2006 U.S. Dist. LEXIS 15241 (S.D. Tex. 2006)
United States v. Rigdon, 138 Fed. Appx. 703 (5th Cir. Tex. 2005)
United States v. Wilson, 127 Fed. Appx. 740 (5th Cir LA 2005)
United States v. Edwards, 133 Fed. Appx. 960 (5th Cir. Tex. 2005)
United States v. Rivera-Benito, 136 Fed. Appx. 690 (5th Cir. Tex. 2005)
United States v. Leatch, 111 Fed. Appx. 770 (5th Cir TX 2004)

United States v. Graham-Wright, 715 F.3d 598 (6th Cir. Mich. 2013)
United States v. Poulsen, 655 F.3d 492, 512 (6th Cir. Ohio 2011)
U.S. v. Paull, 551 F.3d 516 (6th Cir. Jan 09, 2009)
U.S. v. Horton, 2008 WL 630003 (6th Cir. Mar 06, 2008) (unpub)
U.S. v. Chisom, 2007 WL 2860896 (6th Cir. Oct 01, 2007) (unpub)
U.S. v. Moncivais, 492 F.3d 652 (6th Cir. 2007), cert. denied, 128 S.Ct. 633, 169 L.Ed.2d 409 (2007)
United States v. Wisdom, 2006 U.S. App. LEXIS 9911 (6th Cir. Ky. 2006)
United States v. Perkins, 2006 U.S. App. LEXIS 29421 (6th Cir. Tenn. 2006)
United States v. McCaskill, 2006 U.S. App. LEXIS 26639 (6th Cir. Mich. 2006)

U.S. v. Santiago, 495 F.3d 820 (7th Cir. 2007) –
United States v. Miller, 450 F.3d 270 (7th Cir. Ind. 2006)
United States v. Torres, 2006 U.S. Dist. LEXIS 29409 (S.D. Ill. 2006)
Herrmann v. United States, 2006 U.S. Dist. LEXIS 91361 (C.D. Ill. 2006)

U.S. v. Pepper, 747 F.3d 520, 525 (8th Cir. 2014)
United States v. Godat, 688 F.3d 399, 401 (8th Cir. Mo. 2012)
U.S. v. Bentley, 492 F.Supp.2d 1050 (N.D. Iowa 2007) –
United States v. Postel, 2006 U.S. Dist. LEXIS 61675 (N.D. Iowa 2006)
United States v. Brown, 430 F.3d 942 (8th Cir. Mo. 2005)

Garren v. Kramer, 2008 WL 2704342 (C.D. Cal. Jul 10, 2008) (unpub) (habeas)

Torres v. U.S., 2008 WL 2225745 (E.D. Cal. May 28, 2008) (§ 2255)
U.S. v. Ingham, 486 F.3d 1068, 1076 (9th Cir. 2007) ("the law on hearsay at sentencing is still what it was before *Crawford*")
United States v. Littlesun, 444 F.3d 1196 (9th Cir. Mont. 2006), cert. denied, 127 S.Ct. 248, 166 L.Ed.2d 149 (2006)
Moore v. United States, 2006 U.S. Dist. LEXIS 8691 (W.D. Wash. 2006)

U.S. v. Davis, 213 Fed.Appx. 725 (10th Cir. 2007)
United States v. Henderson, 2006 U.S. Dist. LEXIS 55497 (10th Cir. Kan. 2006)
United States v. Bustamante, 454 F.3d 1200 (10th Cir. Wyo. 2006)
United States v. Phillips, 2006 U.S. App. LEXIS 3156 (10th Cir. Okla. 2006) – not applicable at noncapital sentencing hearings
United States v. Lake, 2006 U.S. App. LEXIS 25632 (10th Cir. Wyo. 2006)
United States v. Mata, 145 Fed. Appx. 276 (10th Cir. Wyo. 2005)
United States v. McGuffin, 2005 U.S. App. LEXIS 13081 (10th Cir. Wyo. 2005)

U.S. v. Silva, 566 Fed.Appx. 804 (11th Cir. 2014)
U.S. v. Jones, 2009 WL 323087 (11th Cir. Feb 10, 2009) (unpub)
U.S. v. Morton, 2008 WL 5077733, 102 A.F.T.R.2d 2008-7193 (11th Cir. Dec 03, 2008) (unpub)
U.S. v. Broxton, 2008 WL 4435943 (11th Cir. Oct 02, 2008) (unpub)
U.S. v. Sanchez, 278 Fed.Appx. 927 (11th Cir. May 20, 2008) –
U.S. v. Smith, 2007 WL 3244187 (11th Cir. Nov 05, 2007) (unpub) –
U.S. v. Melvin, 2007 WL 2325388 (11th Cir. Aug 15, 2007) (unpub) –
United States v. Sanchez, 2006 U.S. App. LEXIS 18864 (11th Cir. Fla. 2006)
United States v. Taylor, 2006 U.S. App. LEXIS 14874 (11th Cir. Fla. 2006)
United States v. Stewart, 185 Fed.Appx. 803, 2006 U.S. App. LEXIS 14925 (11th Cir. 2006)
United States v. Chau, 426 F.3d 1318 (11th Cir. Ala. 2005)
United States v. Mandhai, 140 Fed. Appx. 54 (11th Cir. Fla. 2005)
United States v. Tien Quyet Luong, 2006 U.S. App. LEXIS 7469 (11th Cir. Fla. 2006)

U.S. v. Edwards, __ F.Supp.2d __, 2014 WL 775195 (D.D.C. 2014)
U.S. v. Bras, 483 F.3d 103 (D.C. Cir. 2007)

➤ Sub-Category: Courts Holding Confrontation Clause Applies at Sentencing
(category added Sept. 2012)

Vanwey v. State, __ So.3d __, 2014 WL 2058102 (Miss. App. 2014) – "We have held that self-authenticating records of a defendant's prior convictions are not testimonial evidence, and do not trigger a defendant's constitutional right to confront witnesses. ... The certified documents used to prove Vanwey's prior convictions are not testimonial, and the holding in *Bullcoming* does not change that." – necessarily implying, but without analysis or even identification of the issue, that the confrontation clause applied

United States v. Godat, 688 F.3d 399, 401 (8th Cir. Mo. 2012) – "The Confrontation Clause of the Sixth Amendment is implicated when consideration by the sentencing court of evidence that the defendant was not given an opportunity to rebut results in a defendant being 'sentenced on

the basis of 'misinformation of constitutional magnitude.'" – [NOTE: Isn't this a matter of due process, not a confrontation clause issue?]

➤ Sub-Category: Non-Capital Jury Sentencing Hearings

Smith v. State, 420 S.W.3d 207, 222-26 (Tex. App.--Hous. [1st Dist.] 2013), petition for discretionary review refused (Apr. 16, 2014) – "In his sixth issue, appellant argues that the trial court, during the punishment phase of trial, erred in admitting into evidence disciplinary records from the Harris County Jail, the Harris County Probation Department, and the Texas Youth Commission because the offense reports constituted hearsay ... we hold that the trial court abused its discretion in admitting the reports into evidence over appellant's hearsay and Confrontation Clause objections."

Vankirk v. State, 2011 Ark. 428, 385 S.W.3d 144 (Ark. 2011) – "The issue presented to this court is one of first impression: whether the constitutional right of confrontation applies where a defendant pleads guilty but chooses to be sentenced by a jury in a bifurcated proceeding. ... we are convinced that the right of confrontation, guaranteed by both the Sixth Amendment and article 2, section 10, extends to Appellant's sentencing proceeding before a jury."

State v. Lahai, 128 Conn. App. 448, 449-477, 18 A.3d 630 (Conn. App. Ct. 2011) – without analysis applying *Crawford* to part of persistent offender ("part B") proceeding in trifurcated trial

State v. Hurt, 702 S.E.2d 82, 100 (N.C. Ct. App. 2010), stay granted (N.C. Nov. 30, 2010) – "Whether a defendant has a right to confront witnesses against him at sentencing trials conducted pursuant to Blakely is an issue of first impression in our courts. ... we agree that the Confrontation Clause of the Sixth Amendment applies to all sentencing proceedings where a jury makes the determination of a fact or facts that, if found, increase the defendant's sentence beyond the statutory maximum."

Wallace v. State, 2010 Ark. App. 706, __ S.W.3d __ (Ark. Ct. App. 2010) – pen pack introduced at habitual offender proceeding – "The United States Supreme Court has never applied the Confrontation Clause to sentencing, and the *Melendez-Diaz* decision does not extend that application."

State v. McClenton, 781 N.W.2d 181, 186 (Minn. Ct. App. 2010) – simply assuming *Crawford* applies to "*Blakely* trial"

State v. Rodriguez, 754 N.W.2d 672 (Minn. Aug 21, 2008) – "Syllabus by the Court [¶] 1. The right of confrontation guaranteed by the Sixth Amendment applies in jury sentencing trials."

Sanchez v. Dexter, 2008 WL 1766729 (C.D. Cal. Apr 14, 2008) (unpub) (habeas) – "In bifurcated proceedings, the jury found that petitioner had sustained three prior 'strike' convictions in New Mexico" – applying *Crawford* without discussing its applicability

State v. Berry, 168 S.W.3d 527 (Mo Ct App 2005) – Non-capital case – When a sentencing phase is held before a jury, the traditional rules of hearsay apply and, therefore, the Sixth

Amendment applies at this proceeding. Thus, only non-testimonial hearsay may be admitted without the witness testifying.

McNac v. State, 215 S.W.3d 420 (Tex. Ct. Crim.App. 2007) – *Crawford* applies to punishment phase in non-capital case – whether *Crawford* error is harmless depends on whether the wrongfully-admitted evidence contributed to the sentence assessed, not the finding of guilt

Grant v. State, 218 S.W.3d 225 (Tex. App.-Hous. 2007) – *Crawford* applies to punishment phase in non-capital case

In re M.P., 220 S.W.3d 99 (Tex.App.-Waco 2007) – "we conclude that the Sixth Amendment right of confrontation applies in some, but not all, respects to the punishment phase of an adult criminal trial." – but not "to the disposition phase of a juvenile delinquency proceeding."

➤ Sub-Category: Presentence Reports

(category added March 2009)

(In states which recognize a right of confrontation in sentencing hearings, the presentence report raises a *Crawford* issue.)

People v. Stacchini, 969 N.Y.S.2d 218, 220 (N.Y. App. Div. 3d Dept. 2013) – "we reject defendant's claim that the inclusion of a police officer's statements in the PSI violated his 6th Amendment right of confrontation as set forth in *Crawford* ... This protection pertains to the admissibility of testimonial statements at trial and does not extend to sentencing (cite)."

Stringer v. State, 309 S.W.3d 42, 48 (Tex. Crim. App. 2010) – "We hold that when a PSI is used in a non-capital case in which the defendant has elected to have the judge determine sentencing, *Crawford* does not apply. For us to conclude in Appellant's favor would require a trial judge to hold a mini-trial for sentencing and would thwart the purpose of the PSI as a tool for the court to use in determining punishment. This holding is limited to a sentencing hearing in which the judge assesses punishment. We need not address here whether *Crawford* applies when a jury determines the sentence in a non-capital case."

➤ Sub-Category: Death Penalty Cases

(see also part 17, Clearly Established Federal Law)

State v. Carr, 331 P.3d 544 (Kan. 2014) – "Thus the first question before us is whether *Crawford's* interpretation and application of the Confrontation Clause reaches the penalty phase of a capital proceeding. The United States Supreme Court has not yet answered this question. [cite] Until we have a definitive answer from that Court, we recognize that other jurisdictions are split and we accept convincing arguments that confrontation law is applicable to a capital penalty phase trial."

State v. Neyland, 2014-Ohio-1914, 139 Ohio St. 3d 353, 12 N.E.3d 1112 (Ohio 2014) – "{¶ 166} Dr. Delaney Smith, a psychiatrist, was also a rebuttal witness, although she was not present for the hearing. The prosecutor sought to introduce Dr. Smith's former testimony at the

competency hearing in lieu of calling her as a witness in the penalty phase, because she was on maternity leave." – court simply assumes, without analysis, that the confrontation clause applies

Muhammad v. Sec., Florida Dept. of Corrections, 733 F.3d 1065, 1073-77 (11th Cir. 2013) (habeas) – "Muhammad's rights under the Confrontation Clause were not violated because Muhammad had an opportunity to rebut the hearsay information. The hearsay was admissible at Muhammad's capital sentencing hearings."

State v. Dunlap, 313 P.3d 1, 34 (Idaho 2013) – "In our view, the most persuasive analysis of the applicability of the Confrontation Clause in capital sentencing proceedings is to be found in *United States v. Fields*, 483 F.3d 313 (5th Cir.2007). After a lengthy and scholarly consideration of precedent from the U.S. Supreme Court, *see id.* at 324–337, that court concluded that 'the Confrontation Clause is inapplicable to the presentation of testimony relevant only to the sentencing authority's selection decision.' *Id.* at 337. We agree and hold that the admission of the reports did not violate Dunlap's Sixth Amendment rights."

Boyle v. State, __ So.3d __, 2013 Ala. Crim. App. LEXIS 24, 131-133, 2013 WL 1284362 (Ala. Crim. App. Mar. 29, 2013) – "Here, the information contained on the contact sheets was relevant to rebut Osborne's testimony of Boyle's good character. Boyle had an opportunity to rebut the testimony. For the reasons stated in *Gavin*, we hold that the circuit court committed no error in allowing the hearsay testimony to be admitted during the [capital] penalty phase of Boyle's trial."

Petric v. State, __ So.3d __, 2013 Ala. Crim. App. LEXIS 12, 2013 WL 598118 (Ala. Crim. App. Feb. 15, 2013) – "Furthermore, contrary to Petric's allegation, it is far from obvious that *Crawford* and *Melendez-Diaz* applied to his sentencing. All the post-*Crawford* decisions of the Courts of Appeals that have decided this issue have stated that *Crawford* does not apply to capital sentencing. ... Therefore, for the foregoing reasons, considering that Petric did not object to the consideration of the presentence report on the ground that the consideration of the report violated *Crawford*, the trial court did not commit an obvious error by not sua sponte disregarding the statutorily required report based on *Crawford*."

State v. Berget, 2013 SD 1, 826 N.W.2d 1 (S.D. 2013) – "Liberal admission of evidence at the capital punishment selection stage, unimpeded by the requirement of confrontation, provides the sentencer with a complete picture of the character of the individual defendant. ... From our review of the applicable authority, we conclude that the right of confrontation does not operate to bar the admission of evidence relevant only to a capital sentencing authority's selection decision. [fn 11] This should not be read to address the applicability of the right of confrontation during presentation of evidence relevant to the death eligibility determination, *i.e.*, evidence relevant to one of the statutorily enumerated aggravated circumstances "

Braddy v. State, 111 So. 3d 810 (Fla. Nov. 15, 2012) – "it is true that Braddy's 'Sixth Amendment right of confrontation applie[d] to all three phases of [his] capital trial'..."

United States v. Ebron, 683 F.3d 105, 155 (5th Cir. Tex. 2012) – "Ebron contends that hearsay statements offered against him during the selection phase violated the Confrontation Clause. In making this contention, Ebron recognizes that this argument is foreclosed by circuit precedent. *See Fields*..."

State v. Prince, 226 Ariz. 516, 530, 250 P.3d 1145 (Ariz. 2011) – without discussion, applying *Crawford* to penalty phase

People v. Thomas, 51 Cal. 4th 449, 247 P.3d 886, 121 Cal. Rptr. 3d 521 (Cal. 2011) – without discussion, applying *Crawford* to penalty phase

People v. Adkins, 239 Ill. 2d 1, 940 N.E.2d 11, 346 Ill. Dec. 11, 65-71 (Ill. Oct. 21, 2010), cert. denied, 131 S. Ct. 2115; 179 L. Ed. 2d 909 (April 18, 2011) – "Crawford did not consider whether the confrontation clause of the sixth amendment is applicable at the aggravation/mitigation phase of a capital sentencing hearing. [¶] We answered this question in *People v. Banks*, 237 Ill. 2d 154, 203 (2010), holding that the confrontation clause does not apply at the second phase of a capital sentencing hearing and reaffirming the standard of relevance and reliability."

State v. Chappell, 236 P.3d 1176, 1187 (Ariz. 2010) – "We have distinguished hearsay used to establish aggravating factors from hearsay used as rebuttal evidence in the penalty phase, concluding that the former was entitled to Confrontation Clause protections and the latter was not."

Pitchford v. State, 45 So. 3d 216 (Miss. June 24, 2010), cert. denied, 131 S. Ct. 2098, 179 L. Ed. 2d 897 (April 18, 2011) – "While we are aware of federal authority that the Sixth Amendment does not apply at sentencing proceedings, n99 this Court's precedent holds otherwise. n100"

State v. Vela, 279 Neb. 94, 777 N.W.2d 266 (Neb. 2010) – capital sentencing hearing before three-judge panel – "*Crawford v. Washington* n155 did not change the established principle that Sixth Amendment rights are inapplicable to a sentencing proceeding."

People v. Banks, 237 Ill. 2d 154, __ N.E.2d __, 2010 Ill. LEXIS 272, 1-33 (Ill. Feb. 19, 2010) (as corrected and modified) – "There is nothing in *Crawford* to indicate that the confrontation clause does or does not apply to the aggravation/mitigation phase of a capital sentencing hearing. There is a split of authority on the issue by the courts that have considered the issue.... we hold that the confrontation clause does not apply to the aggravation/mitigation phase of a capital sentencing hearing."

Barnes v. State, 29 So. 3d 1010, 1027-1028 (Fla. 2010) – "Because we conclude that the claim is procedurally barred and even if not barred, that any error is harmless beyond a reasonable doubt, we do not reach the State's request that we recede from the holding in *Rodgers v. State*, 948 So. 2d 655 (Fla. 2006), that *Crawford* and the Confrontation Clause apply in capital penalty phase and sentencing proceedings."

Worthington v. Roper, 2009 WL 878704 (E.D. Mo. Mar 27, 2009) (unpub) (habeas) – "FN16. At the time of the sentencing proceedings, the United States Supreme Court and the Eighth Circuit were clear that the Confrontation Clause does not apply to pen-alty phase hearings, even in capital cases. [cites] The Eighth Circuit declined to revisit this is-sue after the decision in *Crawford*..."

Muehleman v. State, 3 So. 3d 1149 (Fla. Feb 19, 2009) – second sentencing hearing for 1983 murder – "The prior testimony was taken in Muehleman's first penalty phase, in a judicial proceeding, on the same issues, subject to cross-examination, and the unavailability of the witnesses was established." – no *Crawford* violation

U.S. v. Williams, 2008 WL 4644830 (C.D. Cal. Oct 15, 2008) (unpub) (pretrial order; federal death penalty case) – "Courts since *Crawford* have held that the evidentiary standard in the FDPA does not violate a defendant's constitutional rights."

U.S. v. Smith, 2008 WL 3285911 (E.D. Va. Aug 08, 2008) (unpub) (pretrial; federal death penalty) – "out of an abundance of caution, ... the Court will enforce *Crawford* during the final sentencing stage."

Wilson v. Sirmons, 536 F.3d 1064 (10th Cir. Aug 08, 2008) (habeas) – "we have recently stated that it is 'far from clear' whether the Confrontation Clause even applies at capital sentencing proceedings."

Strong v. State, __ S.W.3d __, 2008 WL 2929675 (Mo. Jul 31, 2008) – assuming without discussion that *Crawford* applies to sentencing phase in death penalty case

Browning v. State, __ P.3d __, 2008 WL 2852401 (Nev. Jul 24, 2008) – "Browning acknowledges this court's opinions in *Thomas v. State*, [FN57] *Summers v. State*, [FN58] and *Johnson v. State*, [FN59] in which this court concluded that *Crawford* does not apply to capital penalty hearings. We decline Browning's invitation to revisit our holdings in those cases."

U.S. v. Concepcion Sablan, 555 F.Supp.2d 1205 (D. Colo. Feb 26, 2007) (pretrial order) – "under *Crawford*, the Confrontation Clause is applicable at both the eligibility phase and at least a portion of the selection phase. Specifically, I agree with *Mills* that the existence of all the aggravating factors are constitutionally significant facts that should be found by the jury." – referring to *U.S. v. Mills*, 446 F.Supp.2d 1115 (C.D. Cal. 2006)

U.S. v. Sablan, 2008 WL 700172 (D. Colo. Mar 13, 2008) (unpub) (pretrial order) – "I find that the dissenting opinion in *Fields* [*U.S. v. Fields*, 483 F.3d 313 (5th Cir.2007), *cert. denied*, 128 S.Ct. 1065 (2008)] is much more persuasive than the majority opinion, and adopt its rationale that the Confrontation Clause should be applicable at both stages of the penalty phase.

Davis v. Polk, 2007 WL 2898711 (W.D. N.C. Sep 28, 2007) (unpub) (habeas) – "there is no clearly established federal law that the Confrontation Clause applies in a capital sentencing proceeding."

State v. Smith, 215 Ariz. 221, 159 P.3d 531 (Ariz. 2007), cert. denied, 2007 WL 2982759, 76 USLW 3197 (Oct 15, 2007) – third death penalty proceedings for 1976 murders – "The State correctly concedes that the Confrontation Clause applies when the evidence presented is used to prove an aggravator."

U.S. v. Fields, 483 F.3d 313 (5th Cir. 2007) – federal death penalty case – "[W]e conclude that the Confrontation Clause does not operate to bar the admission of testimony relevant only to a capital sentencing authority's selection decision." (Judge Benavides dissented from this holding)

Summers v. State, 148 P.3d 778 (Nev. 2006) – "neither the Confrontation Clause nor *Crawford* apply to evidence admitted at a capital penalty hearing and the decision in *Crawford* does not alter Nevada's death penalty jurisprudence."

Taylor v. State, 156 P.3d 739, 2007 UT 12 (Utah 2007) – stating *Crawford* "has triggered some debate as to whether confrontation rights apply to sentencing" but apparently referring only to capital sentencing

Rodgers v. State, 948 So.2d 655 (Fla. 2006) – *Crawford* applies at the penalty phase of capital sentencing.

United States v. Barry Byron Mills, 2006 U.S. Dist. LEXIS 62066 (C.D. Cal. 2006) – *Crawford* applies to both eligibility and selection phases of capital sentencing.

United States v. Cheever, 423 F. Supp. 2d 1181 (D. Kan. 2006) – The relaxed evidentiary standards at the sentencing phase under the Federal Death Penalty Act (18 USC 3593c) do not violate the constitution or *Crawford*.

Russeau v. State, 171 S.W.3d 871 (Tex. Crim. App. 2005) – applying *Crawford* to reverse death penalty

United States v. Bodkins, 2005 U.S. Dist. LEXIS 8747 (WD VA 2005) – "if the defendants are convicted of one or more death eligible offenses, the subsequent sentencing proceeding will be bifurcated into an eligibility phase followed by a selection phase. Thus, as the *Jordan* court noted, any testimonial hearsay evidence offered during the eligibility phase would have to meet the requirements of *Crawford* before it could be presented to the jury. Those same requirements would not apply to hearsay evidence, testimonial or non-testimonial, offered during the selection phase."

➤ **Sub-Category: Relationship of *Crawford* to *Apprendi* / *Blakely* / *Booker* / *Cunningham***

State v. Horn, 40 Kan.App.2d 687, 196 P.3d 379 (Kan. App. Nov 07, 2008) – "This is the appeal of Jerry Allen Horn from the upward departure sentence entered after he pled guilty to seven sex crimes with a 10-year-old boy. [¶] Horn's arguments revolve around the procedure involved in impaneling a jury to consider whether a fiduciary relationship existed between Horn and the victim as an aggravating factor to justify an upward durational departure sentence. ... The State makes two convincing arguments why there is no Confrontation Clause violation here. First, there is case law that the *Crawford* ... confrontation requirements are not applicable to postconviction proceedings. [¶] Even more important is the fact that C.T.P. testified at the departure hearing." [NOTE: Why is that more important, if *Crawford* doesn't apply?]

State v. Rodriguez, 754 N.W.2d 672 (Minn. Aug 21, 2008) – because *Apprendi* / *Blakely* / *Booker* / *Cunningham* held that the jury rather than the judge must find aggravating factors in state court (though not in federal court), and "[b]ecause cross-examination is a core component of a defendant's right to a jury trial, we hold that the right of confrontation guaranteed by the Sixth Amendment applies in jury sentencing trials."

U.S. v. Williams, 2008 WL 2091152 (D. Md. May 16, 2008) (unpub) (sentencing memorandum) – "The Sixth Amendment permits a sentencing judge to consider facts not found by a jury, and that judge may rely on those facts to increase a convicted defendant's sentence. *Rita v. United States*, 127 S.Ct. 2456, 2465-66 (2007). Sentencing judges may find facts by a preponderance of the evidence so long as the fact-finding does not result in a sentence beyond the maximum term of imprisonment specified in the relevant statute. ... As Welshons's unavailability for cross-examination was procured by Williams, the consideration of her statements to TFO Deveau does not offend the Sixth Amendment. *See Crawford*..." - [NOTE: Applicability to *Crawford* to sentencing not otherwise specifically addressed.]

U.S. v. Newbold, 2007 WL 301145, *8 (4th Cir. 2007) (unpub) – "Dissenting in *Blakely*, Justice Breyer suggested that under the *Blakely* majority's interpretation of the Sixth Amendment, district courts' use of PSRs containing testimonial hearsay might violate the Confrontation Clause under *Crawford*. *Blakely*, 542 U.S. at 346 (Breyer, J., dissenting). ... We likewise find nothing in *Blakely* or *Booker* that 'necessitates a change in the majority view that there is no Sixth Amendment right to confront witnesses during the sentencing phase.' *Luciano*, 414 F.3d at 179."

United States v. Katzopoulos, 437 F.3d 569, 576 (6th Cir. 2006) – rejecting claim that *Crawford* combines with *Booker* to change prior law: "Following the path that all other Circuits which have considered this issue have followed, without a clear directive from the Supreme Court, this Court will continue to observe its precedent that testimonial hearsay does not affect a defendant's right to confrontation at sentencing."

Restitution Proceedings

(Category added September 2013)

U.S. v. Loreng, 956 F.Supp.2d 213 (D. D.C. 2013) – "the Confrontation Clause's protections do not extend to restitution proceedings."

Post-Conviction DNA Hearing

State v. Denney, 283 Kan. 781, 156 P.3d 1275 (Kan. 2007) – "[I]s the postconviction forensic DNA testing process created by K.S.A.2006 Supp. 21-2512 equivalent to a 'prosecution?' We answer no." – and so sixth amendment does not apply

Habeas / § 2255 / Other Postconviction Proceedings

(category added July 2009)

Commonwealth v. Wantz, 2014 PA Super 6, 84 A.3d 324, 337 (Pa. Super. 2014) – "The focus of claims of violation of this constitutional right is on the fairness and reliability of the criminal defendant's *trial*. Wantz has cited to no authority holding that a Confrontation Clause challenge may be asserted in non-trial proceedings, including during PCRA [Post-Conviction Relief Act]

evidentiary hearings. [cite] To the contrary, on at least two occasions our Supreme Court has held that Confrontation Clause issues may not be asserted in collateral proceedings."

West v. U.S., 2009 WL 1043962 (M.D. Fla. Apr 16, 2009) (unpub) (§ 2255) – magistrate's recommendation: "Although this is not a criminal trial, it does involve a cherished constitutional right--the right to effective assistance of counsel. Thus, the Court recommends that since Atty. Johnston was not available for cross examination, the Petitioner's § 2255 Motion should be granted ..." – district court adopted recommendation "to [an] extent," but was ambiguous about whether it was adopting this reasoning



Part 4: Varieties of Non-Hearsay

Non-Hearsay Statements / Statements Not for the Truth of Matter Asserted (see also following specific sub-categories and other categories in this part)

Vaughn v. State, 13 N.E.3d 873 (Ind. App. 2014) – "if a statement is either nontestimonial or nonhearsay, its admissibility is not barred by the Confrontation Clause. [cite] Because, here, we have determined that none of the evidence objected to by Vaughn was hearsay, the admission of such evidence was not barred by the Confrontation Clause."

Commonwealth v. Keo, 467 Mass. 25, 3 N.E.3d 55 (Mass. 2014) – " In his motion for a new trial and on appeal, the defendant argues error in the admission of Lieutenant Vail's testimony that certain numbers on Sok's bedroom wall stood for the words 'crip killer.' ... [fn 16] Because the statements were not admitted for their truth, there is no merit to the defendant's claim that admission of the 'crip killer' reference violated his confrontation rights."

State v. Forde, 233 Ariz. 543, 315 P.3d 1200 (Ariz. 2014) – "¶ 73 Forde argues that the trial court erred by admitting into evidence a text message, sent less than one hour after the murders from Gaxiola's phone to Forde's phone, which stated: 'cops on scene, lay low.' ... ¶ 78 The text message was not hearsay because the State did not introduce it to prove the truth of the matter asserted—that the cops were on the scene. ... [¶ 79] The court did not violate Forde's Confrontation Clause rights by admitting the text message."

U.S. v. Wright, 739 F.3d 1160, 1164-66 (8th Cir. 2014) – " *Crawford* made clear that the Confrontation Clause applies only to testimonial hearsay statements. [cite] Thus, in order to fall within the purview of the Confrontation Clause, the evidence not only must be testimonial but also must be offered for the truth of the matter asserted. [cite] If the underlying statement is testimonial but not hearsay, it can be admitted without violating the defendant's Sixth Amendment rights."

Arena v. Kaplan, 952 F.Supp.2d 468 (E.D. N.Y. 2013) (habeas) – "the Court rejects the Petitioner's confrontation clause claim because no hearsay testimony was elicited..."

U.S. v. Adams, 722 F.3d 788, 829-30 (6th Cir. 2013) – "The Confrontation Clause does not, however, bar the admission of testimonial statements that are offered for non-hearsay purposes (i.e., not for the truth of the matter asserted)."

State v. Ortiz-Zape, 743 S.E.2d 156, 156-173 (N.C. 2013) – "If the challenged testimony is not hearsay—in [*18] other words, if the witness does not repeat out-of-court statements—then it is not necessary to determine whether a lab report is testimonial."

Delhall v. State, 95 So. 3d 134, 141-160 (Fla. 2012) – witness to prior murder was shot and killed in retaliation for cooperating with police – "it can be seen that McCrae's affidavit was not inadmissible hearsay and thus is not barred by the Confrontation Clause. The McCrae affidavit was offered in Wadada's trial not to prove that McCrae actually did see Negus Delhall kill Bennett or that McCrae actually picked a photograph of Bennett's killer out of a photo array, as the affidavit indicates. The affidavit was not offered to prove the truth of the allegations against Negus but to prove that Delhall had a reason to believe McCrae would be a witness against Negus, regardless of the veracity of the allegations in the affidavit. This provided evidence of Delhall's motive for murdering McCrae."

State v. Placide, __ So.3d __, 2012 La. App. LEXIS 930, 1-17 (La.App. 5 Cir. June 28, 2012) – "Here, Placide's name was found on pieces of mail inside his residence. Providing his name and contact information to Sprint and his employer were likely not made under 'circumstances that would lead an objective witness to reasonably believe the statements would be available for use at a later trial.'"

People v. McKinnon, 52 Cal. 4th 610, 656, 259 P.3d 1186, 130 Cal. Rptr. 3d 590 (Cal. 2011) – "Given our conclusion that the gang testimony of Scott and Black was properly admitted for a nonhearsay purpose, defendant's claim that his constitutional right to confrontation was violated also fails."

Coble v. State, 330 S.W.3d 253 (Tex. Crim. App. Oct. 13, 2010) – "If the testimony did not involve hearsay, it ineluctably follows that it did not involve 'testimonial hearsay.'"

United States v. Mays, 350 Fed. Appx. 396, 399 (11th Cir. Fla. 2009) – "Mays's rights, pursuant to the Confrontation Clause, were not violated when [Officer] Oliphant mentioned in his testimony that he had heard [via a confidential informant] that Mays was carrying a firearm. Oliphant's statement does not constitute hearsay because it was not offered for the truth of the matter asserted. See Fed. R. Evid. 801(c). Moreover, the government [*399] did not need to use this statement for the truth of the matter asserted because Mays readily admitted that he possessed a firearm. Thus, the Confrontation Clause did not bar the admission of this statement."

State v. Holland, 2009 WL 454494 (N.J. Super. A.D. Feb 25, 2009) (unpub) – "When a statement is not hearsay, the Confrontation Clause does not bar its admission. *Crawford* ... Only if the statement is hearsay, and only if it meets an exception making it admissible, does it become necessary to decide whether the statement is "testimonial" and thereby implicates the confrontation clause."

State v. Stiles, 2009 WL 57062, 2009-Ohio-89 (Ohio App. 3 Dist. Jan 12, 2009) (unpub) – "We reject Stiles' pro-posed 'functional equivalent' hearsay test; whether a statement is hearsay is determined by Evid.R. 801(C). We also reject Stiles' argument that 'functionally equivalent' hearsay violates the Confronta-tion Clause; to the contrary, if the statement is not hearsay, then its admission does not violate the Confrontation Clause or *Crawford*."

Proffit v. State, 191 P.3d 974, 2008 WY 103 (Wyo. Sep 03, 2008) – "'The fact that Hicks' statements were not offered to prove the truth of the matter asserted also defeats [Proffit's] contention that admission of the statements violated his constitutional confrontation rights.'" (brackets in original)

People v. Reyes, 159 Cal.App.4th 214, 70 Cal.Rptr.3d 903 (Cal. App. 2 Dist. Jan 23, 2008) – "The prosecution may well have offered this statement for its truth. It depends on what the true meaning is. We must interpret Reyes's words to determine their meaning. Only then can one tell if the prosecution offered these words for the truth of this meaning." [NOTE: How can the prosecutor's purpose for offering the evidence be retroactively affected by an appellate judge's after-the-fact interpretation of a third party's statement? This ruling is nonsensical.]

State v. Araujo, 285 Kan. 214, 169 P.3d 1123 (Kan. 2007) – "This statement rebuts an analysis, suggested in the parties' arguments, that determination of whether the statements are offered for the truth of the matter asserted is an aspect of determining whether the statements are testimonial. The Crawford Court referenced "testimonial statements" and stated those statements could be introduced if they were not offered for the truth of the matter asserted. In other words, Crawford does not bar testimonial out-of-court statements, it bars testimonial hearsay unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant." [NOTE: This appears to be a perfect example of a distinction without a difference.]

State v. Mason, 160 Wash.2d 910, 162 P.3d 396 (Wash. 2007), overruled in part by Giles v. California as recognized in State v. Fallentine, 2009 WL 151643 (Wash. App. Div. 1 Jan 20, 2009) (unpub) – in dicta stating: "However, we are not convinced a trial court's ruling that a statement is offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis. To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge. ... Our decision that a hearsay ruling was reasonable does not preclude deciding the statement was intended to establish a fact and that it was reasonable to expect it would be used in a prosecution or investigation; in other words that it was testimonial." [NOTE: In the next sentence, the court adds: "we find it unnecessary to decide whether the statements ... were testimonial", rendering the whole discussion dicta. While the court's precise meaning is obscure, it seems to contradict *Crawford*'s footnote 9: "The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."]

In re J.H., 928 A.2d 643 (D.C. 2007) – "Because we do not disturb the trial court's decision not to admit the statements for the truth of the matter asserted, we need not reach appellant's argument that doing so would violate appellant's rights under the confrontation clause of the U.S. Constitution pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004)".

U.S. v. Malpica-Garcia, 489 F.3d 393 (1st Cir. 2007) – "To come within the parameters of the Confrontation Clause, the testimony first must be hearsay. ... Díaz-Pastrana's testimony did not expressly include an out-of-court statement made by another declarant. If, as defense counsel asserted, her challenged testimony were based on an out-of-court statement by either Carlitos Way or his wife, rather than on Díaz-Pastrana's personal knowledge, the out-of-court statement must also be testimonial to render it inadmissible under *Crawford*."

Commonwealth v. Castillo, 68 Mass. App. Ct. 1112, 862 N.E.2d 470 (table), 2007 WL 755074 (Mass. App. Ct., 2007) (unpub) – "In searching an apartment linked to the defendant, the police found, among other things, a bag of cocaine in the bathroom vanity and a pen pager on the defendant's person. Shortly thereafter, a number of calls were made to the pager and one of the male police officers returned two of them. The first caller identified herself as Maria and told him that she was unable to make it to the 'meet' place but that she wanted to come by the house for an 'eight.' The second caller, who identified himself as Dave, said that he wanted to meet at the Store 24 to get 'four pieces for \$80.' [¶] The defendant contends that, because he did not have the opportunity to cross-examine Maria and Dave, the admission of these out-of-court statements violated *Crawford v. Washington*, 541 U.S. 36 (2004), and the confrontation clause of the Sixth Amendment of the United States Constitution. Because the evidence was admissible for a nonhearsay purpose, i.e., to prove that the pager was an instrumentality of the drug business, this contention is without merit." [NOTE: It's a good bet the callers didn't intend to provide a substitute for testimony. See sub-category: Statements Unknowingly Made to Officer]

U.S. v. Townley, 472 F.3d 1267, 1274 -1275 (10th Cir. 2007) – "We have held that '[o]ne thing that is clear from *Crawford* is that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement.' *United States v. Faulkner*, 439 F.3d 1221, 1226 (10th Cir.2006) (providing detailed analysis and collecting cases). Appellant has not identified any of the statements as having been offered for their truth. For all these reasons, Appellant's Confrontation Clause challenge fails."

Com. v. Thomas, 448 Mass. 180, 188, 859 N.E.2d 813, 819-820 (Mass. 2007) – DV murder case – "Testimony by a police officer, who investigated a prior incident of abuse of the victim by the defendant, about the victim's statements, did not violate the principles of *Crawford* ... [T]he testimony was properly admitted for a nonhearsay purpose that was carefully defined by the judge in a limiting instruction." [NOTE: No detail given.]

United States v. Sorich, 2006 U.S. Dist. LEXIS 84226 (N.D. Ill. 2006) – Hearsay admitted not for the truth is non-testimonial under *Crawford*.

United States v. Bobb, 2006 U.S. App. LEXIS 32023 (3rd Cir. Pa. 2006) – "the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'"

State v. Araujo, 36 Kan.App.2d 747, 144 P.3d 66 (Kan. Ct. App. 2006), aff'd, 285 Kan. 214, 169 P.3d 1123 (Kan. Nov 02, 2007) – the Kansas Supreme Court wrote: "that portion of the Court of Appeals' decision concluding the statements were not hearsay is affirmed. From that point, the Court of Appeals' analysis of whether the statements were testimonial is dicta. Because the Confrontation Clause does not apply to nonhearsay statements, it does not matter whether the statements were testimonial, and we refrain from discussing this issue."

United States v. Faulkner, 439 F.3d 1221, 69 Fed. R. Evid. Serv. 679 (10th Cir. 2006) – "One thing that is clear from *Crawford* is that the Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement. ... In other words, the Clause restricts only statements meeting the traditional definition of hearsay."

People v. Ledesma, 39 Cal. 4th 641 (Cal. 2006) – Statements not offered for the truth are non-testimonial.

United States v. Guishard, 163 Fed. Appx. 114 (3rd Cir. V.I. 2006) – Statements of non-testifying witnesses that are offered not for the truth are not a violation of the Sixth Amendment.

People v. Isom, 2005 Colo. App. LEXIS 1955 (Colo. Ct. App. 2005) – "There is no right of confrontation or hearsay preclusion when statements are offered, not for their truth, but to provide context for the declarant's statements."

Hilburn v. State, 2005 Ark. App. LEXIS 164, 2005 WL 419499 (Ark. App. 2005) – statements offered not for the truth of matter asserted are not testimonial and do not violate *Crawford*.

Tao Li v. Phillips, 358 F. Supp. 2d 135 (E.D. N.Y. 2005) – statements offered not for the truth of matter asserted are not testimonial and do not violate *Crawford*.

People v. Davis, 2005 Cal. LEXIS 7963 (2005) – Hearsay statements offered not for the truth of the matter asserted do not violate *Crawford*.

United States v. Trala, 386 F.3d 536 (3rd Cir DE 2004) – Hearsay statements, not offered for the truth of matter asserted, do not violate *Crawford*.

➤ Sub-Category: Offered to Show Effect on Hearer

(cases involving statements offered to show effect on police investigation are collected in the category "Background Statements"; *see also* "Commands and Directives")

State v. Hayes, 768 S.E.2d 636, 640-41 (N.C. Ct. App. 2015) – defendant murdered the mother of his children – "As part of their temporary arrangement, the parties agreed to a psychological evaluation by Dr. Ginger Calloway, a forensic psychologist. After evaluating the parties over a period of time, Dr. Calloway issued a report recommending that defendant and the victim share legal and physical custody of the children. Over defendant's objection, Dr. Calloway testified about the contents of her report at trial. ... it is clear that the trial court admitted Dr. Calloway's report and testimony to the extent that it was relevant upon the issue of defendant's state of mind, not for the truth of the matter asserted (see the trial court's limiting instruction below). Accordingly, the third party statements found in Dr. Calloway's report and testimony were not inadmissible on Confrontation Clause grounds."

U.S. v. Wright, 739 F.3d 1160, 1164-66 (8th Cir. 2014) – "Brooks conducted the search of the northwest bedroom, and Investigator Mike Sexson conducted the search of the southeast bedroom. ... Because it is determinative, we turn first to the question of whether Brook's

testimony that Sexson said 'something along those lines [of] 'Come here. We've got something' ' constitutes hearsay—more specifically, whether it was offered for the truth of the matter asserted. [cite] We conclude it was not, and therefore, the admission of Sexson's statement did not violate Wright's Sixth Amendment right to confront witnesses against him. '[A] statement offered to show its effect on the listener is not hearsay.'"

People v. Livingston, 274 P.3d 1132, 140 Cal. Rptr. 3d 139, 53 Cal. 4th 1145, 1149-1164 (Cal. 2012) – "Defendant contends the court erred in permitting Perry to testify that someone had said it was Goldie. As the court explained to the jury, it admitted the statement for the nonhearsay purpose of explaining conduct which, in this context, could only have been meant to explain why Perry and the others ran across the street. This is an example of 'one important category of nonhearsay evidence—evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.'" (some internal quotation marks omitted)

State v. Shackelford, 247 P.3d 582 (Idaho June 1, 2010) (substituted opinion) – "Looking at the totality of the circumstances here, it is apparent that the statements were non-testimonial in nature. ... Mary then called Shackelford, and he put her on speaker phone in the room he was sitting in with Sergeant Aston. Mary's statements themselves were not offered for the purpose of establishing or proving some fact. Nor was the primary purpose of the questioning to establish or prove past events. Instead, Sergeant Aston's testimony focused on Shackelford's demeanor during the conversation. Therefore, we find that the district court did not err in admitting the out-of-court statements of Mary Abitz." [Note: The court seems to be using "non-testimonial" as a synonym for "non-hearsay."]

Jackson v. State, 25 So. 3d 518 (Fla. Sep 24, 2009), cert. denied, 130 S. Ct. 1144, 175 L. Ed. 2d 979 (2010) – "After his arrest in South Carolina, JSO detectives questioned Jackson with regard to the disappearance of the Sumners. During this recorded interview, officers probed Jackson for his response to statements allegedly made by Tiffany Cole that revealed details of the criminal acts. ... However, there is no record evidence that Cole was interrogated by the JSO or any indication that Cole actually made the contested statements to law enforcement as an affirmation for the purpose of establishing some fact. The statements were not admitted to prove the truth of the matter asserted (i.e., that Cole drove Jackson to the Sumner residence and that Jackson called the JSO under the pretense of being James Sumner). Rather, the statements were used purely as provocation to observe Jackson's reactions. Police misrepresentations as to statements made by others may be used to provoke a confession as long as the deception does not render a confession involuntary."

People v. Posey, 2009 WL 151335 (Cal. App. 1 Dist. Jan 22, 2009) (unpub) – " Defendant's threats to kill Liz were admitted as circumstantial evidence of Liz's fearful state of mind, not to prove that defendant made the threats. ... [Murder victim] Liz's statements that defendant threatened to kill her were not testimonial, and thus were outside the reach of the confrontation clause."

People v. White, 2008 WL 508064 (Mich. App. Feb 26, 2008) (unpub) –stalking case – "Defendant's assertion that the contents of a note he wrote to one complainant constituted

inadmissible testimonial hearsay under *Crawford* ... is without merit. The contents of the note were not offered for the truth of the matter asserted therein, i.e., that defendant found the complainant attractive and needed the complainant's assistance with a 'problem,' but rather were offered to illustrate the type of note the complainant received, and why he reacted the way he did after receiving the note. The contents of the note were not hearsay." [NOTE: Also defendant's own words.]

Ramkhalawan v. State, 972 So.2d 301 (Fla.App. 4 Dist. Jan 23, 2008) – "The victim in this case testified that her recantation before trial was as a result of being pressured to recant by her father and other members of her family. This was confirmed by a letter her father had written her, which was in evidence. The essence of the letter was that, if the victim did not recant, he was going to kill himself. Appellant argues that this letter was inadmissible because it was hearsay. The letter, however, was not being admitted to demonstrate that what was said in the letter was true, but only to show the effect the letter had on the recipient."

State v. Williams, 2007 WL 4139295 (N.J. Super. A.D. Nov 23, 2007) (unpub) – defendant, nicknamed "Face," shot his victim 7 or 8 times at close range – victim lived – "We are similarly unpersuaded by defendant's second point on appeal, contending that the judge erred in admitting Holman's out-of-court exclamation, 'Face, come on. It's the police coming.' Defendant specifically argues that Holman's utterance, which was overheard by [victim] Geddes, is inadmissible hearsay, and that he was unconstitutionally deprived of the opportunity to cross-examine Holman, who did not testify at trial. [¶] Defendant's claims of error are easily rejected because Holman's utterance was not offered for its truth. ... [T]he prosecutor offered it for the limited purpose of showing the manner in which Holman addressed the shooter, calling him 'Face.' The term was a salutation, not an assertion. Having thus obtained the attention of the shooter, Holman's exclamation caused 'the listener [to take] certain action as a result thereof,' i.e., ceasing fire and running away." – [NOTE: This holding is based on state evidentiary law, but in the next paragraph the court concludes there was no *Crawford* violation because the statement was non-testimonial, as well. Either ground supports the constitutional ruling.]

People v. Smith, 2007 WL 3407779 (Mich. App. Nov 15, 2007) (unpub) – "During cross-examination, Beverly Hargrove testified that she heard from a friend of her son that defendant followed young girls around at work. She further testified that one of these young girls told her that she was uneasy about defendant following her around. When read in context, it is clear that Hargrove's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. MRE 801(c). It was not offered to prove that defendant followed young girls around at work. Rather, Hargrove's testimony was offered to establish why, in part, her gut gave her an uneasy feeling toward defendant. It was given directly in response to defense counsel's question as to why she had an uneasy feeling toward defendant. Because the out-of-court statements were used to show their effect on Hargrove, the trial court did not err in admitting Hargrove's testimony." – therefore no a *Crawford* issue, either

People v. Rodriguez, 2007 WL 2660233, 2007 Cal. App. Unpub. LEXIS 7383 (Cal. App. 2 Dist. Sep 12, 2007) (unpub) – "While in Coronel's kitchen, appellant's brother [Juan] told Coronel that for the safety of Coronel and his family, he should not say anything to the police about Spanky killing the truck driver. While making that statement, appellant's brother had his hand in the middle of his back at the belt area, causing Coronel to suspect he had a weapon.

Coronel was afraid and thought appellant's brother was going to shoot him. ... Juan's threats were not admitted for the truth of the matter stated." – no constitutional deprivation

U.S. v. Matera, 489 F.3d 115, 73 Fed. R. Evid. Serv. 722 (2nd Cir. May 30, 2007) – "We need not address whether John[Gotti]'s statements in the Marion recordings were 'testimonial,' within the meaning of *Crawford*, because there is no Confrontation Clause violation for statements admitted 'for purposes other than establishing the truth of the matter asserted.' ... The district court instructed the jury that the statements made by John Gotti in the Marion recordings were not admitted for the truth of the matters asserted but rather to show the effect of John's statements on Peter. We find no error."

People v. Lewis, 11 A.D.3d 954, 782 N.Y.S.2d 321 (N.Y. App. Div. 4th Dept. 2004) – "Contrary to defendant's contention in appeal No. 2, County Court properly allowed two officers to testify that they had informed defendant during interrogation that his codefendant had implicated him in the crimes and that there were witnesses who had identified him at the crime scene. Although the codefendant's statement to the officers was testimonial [cites], it was not offered for the truth of the facts asserted therein, but was instead offered to set forth the circumstances in which defendant admitted his culpability after initially denying all involvement in the crimes [cites]. Thus, the use of the statement did not violate the Confrontation Clause [cites]."

➤ Sub-Category: Offered to Show Notice to Defendant

U.S. v. Matthies, 2009 WL 631353 (9th Cir. Mar 12, 2009) (unpub) – "The Matthies next challenge the admission of a transcript from Mr. Matthies' previous trial for failure to pay taxes. Because the transcript was offered to show that the Matthies were on notice of their duty to pay income taxes and to impeach Mr. Matthies, rather than for the truth of the substance of the tax laws, the evidence was not hearsay."

➤ Sub-Category: Offered to Show Declarant's or Hearer's Knowledge

Graham v. State, 331 Ga. App. 36, 769 S.E.2d 753 (2015), cert. denied (June 1, 2015) – "Here, the testimony concerning the out-of-court statement was not offered to prove that Graham had given the falsified document to the hospital. Rather, it was offered to explain how Graham's siblings learned of the document and their sister's purported guardianship, and to explain their investigation into the authenticity of the document. Accordingly, the testimony did not constitute hearsay... And contrary to Graham's confrontation clause argument, since the testimony was not hearsay, it did not violate her constitutional right to confront witnesses." – [NOTE: The statement was also non-testimonial for being made in a private conversation.]

State v. Frasquillo, 161 Wn. App. 907, 255 P.3d 813 (Wash. Ct. App. 2011) – "David asserts that Joseph's statement [to police] that the shotgun in the trunk of his car belonged to David was testimonial and, because Joseph was a codefendant and did not testify, this statement was inadmissible under the confrontation clause of the Sixth Amendment. ... *Crawford* does not exclude testimonial statements offered for purposes other than for the truth of the matter asserted. [cite] Here, the statement was admitted to show that Joseph knew that the shotgun was

in the trunk, not to show that the shotgun actually belonged to David. The prosecutor's closing argument and the trial court's instructions support this assertion. During closing argument and on rebuttal, the State pointed to Joseph's statement as evidence that Joseph knew the shotgun was in the trunk, arguing that he therefore had constructive possession of it. The State never argued that Joseph's statement proved any facts against David.... *Crawford* therefore does not apply and David's argument on this point fails."

People v. Frandsen, 2007 WL 2600819 (Cal. App. 2 Dist. Sep 11, 2007) (unpub) – "[Co-perpetrator] Huang's statements about killing one or both of the victims were relevant to establish his malice, premeditation and deliberation, which were relevant to establish appellant's liability for murder as an aider and abettor. ... None of Huang's statements were testimonial in nature. They therefore fell outside the scope of the Confrontation Clause. ... To the extent appellant heard Huang's statements, they were admissible to establish appellant's knowledge, rather than the truth of the matter stated. They were therefore not hearsay."

➤ **Sub-Category: Offered to Show Motive, State of Mind or Purpose**

People v. Merriman, 60 Cal.4th 1, 177 Cal.Rptr.3d 1, 332 P.3d 1187 (Cal. 2014) – "In accordance with the court's ruling, the prosecutor asked Jensen whether [murder victim] Katrina had disclosed to her that 'something had happened' at defendant's house in the summer of 1992. Jensen replied, 'Yes.' The court interrupted the prosecutor's continued questioning to give a limiting instruction, informing the jurors that the witness's reference to an incident at defendant's house was being admitted, not for its truth, but to illustrate Katrina's state of mind toward defendant. ... Defendant's argument that the admission of Katrina's statement to Jensen deprived him of his federal constitutional rights likewise fails. An out-of-court statement properly admitted for a limited nonhearsay purpose does not render a trial fundamentally unfair... Nor does it deprive a defendant of the Sixth Amendment right to confront the witnesses against him..."

State v. Osie, 2014-Ohio-2966, __ N.E.3d __ (Ohio 2014) – "{¶ 118} ... In this case, the state did not use Williams's statement to establish the truth of the matter asserted, but for the nonhearsay purpose of establishing Osie's motive in killing Williams. ... {¶ 121} ... The fact that Williams told Osie that he intended to go to the police to file charges was relevant to prove Osie's purpose in killing Williams... {¶ 126} For the same reason, the statement's admission did not violate the Confrontation Clause. 'The Clause * * * does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'"

Jean-Philippe v. State, 123 So.3d 1071 (Fla. June 13, 2013), reh'g denied (Oct. 3, 2013) – "most of the text messages from appellant's phone were not hearsay because they were not offered to prove the truth of the matter asserted therein. [cite] They were admitted to show the course of appellant's conduct and were relevant to appellant's motive for killing his wife. ... We have already concluded that the text messages in this case did not constitute hearsay or were admissions; accordingly, there is no *Crawford* violation."

Batiste v. State, 121 So. 3d 808 (Miss. May 16, 2013) – victim of theft subsequently killed by thief – "[¶ 98] Over Batiste's Confrontation Clause objection, the trial court permitted Deputy Woodruff to testify that, at about 5:00 p.m. on March 6, 2008, Galanis had made a complaint that

money was missing from his account. ... the statement was not admitted to establish the truth of the matter asserted. Galanis's statement was not admitted to prove as truth that money was missing from Galanis's account, but only to show that Galanis had reported the theft to the authorities. This tended to show that Batiste had felt threatened, and that he had a motive for the crime."

People v. Munoz, 2009 WL 1483122 (Cal. App. 4 Dist. May 28, 2009) (unpub) – "Campos's testimony was offered for the nonhearsay purpose of explaining why his testimony differed from what he told the investigator. The testimony was to show his state of mind, which rendered it not hearsay."

People v. Washington, 2009 WL 714512 (Cal. App. 1 Dist. Mar 19, 2009) (unpub) – prison phone call – "The statement by Harris to which defendant refers, like others made during the course of the recorded telephone conversations, was admissible to prove defendant's attempts to manufacture an alibi, if not for the truth of the implicit assertion that defendant shot Damon. In addition, Harris's statement arguably was admissible under the adoptive admission exception to the hearsay rule."

People v. Marquez, 2008 WL 5076458 (Cal. App. 2 Dist. Dec 02, 2008) (unpub) – "Appellant contends the trial court committed reversible error by allowing evidence of Morales' statement to police that appellant said he shot five Highland Park gang members and Morales heard appellant killed the Sanchez brothers. He argues such statement violated *Crawford* ... the statement was offered to show Morales' murder was motivated by appellant's desire to silence Morales before he could testify at appellant's trial for killing the Sanchez brothers and for the additional reason that, as a 'rat,' Morales was marked for death by appellant's gang."

Dednam v. Norris, 2008 WL 4006997 (E.D. Ark. Aug 25, 2008) (unpub) (habeas) – "While there is no question that the out-of-court statements made by Otis to Detective Keel were testimonial, it is equally clear that the statements were not hearsay. Detective Keel's testimony about Otis's out-of-court statements were not offered to prove the truth of what Otis said. That is, they were not offered to prove that Baker actually committed an armed robbery against Otis, but rather to demonstrate that Petitioner, who is Baker's cousin, had a motive to kill Otis. Thus, Keel's testimony as to Otis's statements were not presented to prove the truth of the matter asserted, but rather were offered to prove that the statements were made by Otis, whether true or not."

Renteria v. Subia, 2008 WL 2413998 (C.D. Cal. Jun 13, 2008) (unpub) (habeas) – "During the trial, Tony Marin, Diane's boyfriend, testified that Diane had told him Petitioner stated he 'would hurt her really bad' if he found she was dating someone." – he killed her – "Marin's testimony was admitted for reasons other than the truth of the matters therein, specifically, it was relevant to Petitioner's motive and credibility, and it corroborated the statements made by [witnesses] Ruvera and Kaylee. The trial court also gave limiting instructions regarding the use of evidence and motive." – [NOTE: Statement wasn't testimonial anyway, being a private conversation between lovers.]

U.S. v. Estrada, 2008 WL 63883 (11th Cir. Jan 07, 2008) (unpub) – "Estrada argues that the district court violated his Sixth Amendment rights as set forth in *Crawford* ... by admitting the TECS records and NCIC screen images into evidence. ... The fact that the entries existed was

introduced to establish Estrada's motive for the bribery. The district court explained this to the jury and specifically instructed them that they could not consider the TECS entries for their truth, but solely for their existence. Consequently, Estrada suffered no Sixth Amendment Confrontation Clause violation and his *Crawford* claim fails."

U.S. v. Salum, 2007 WL 4233170 (11th Cir. Dec 04, 2007) (unpub) – "The prosecutor asked White, 'What did Mr. Carmichael tell you he wanted to do to Raymond DeJohn?' White responded that Carmichael wanted to obtain information to discredit DeJohn. Defense counsel objected on hearsay grounds and because Carmichael could not be cross-examined, but the court overruled the objection and permitted the testimony to show motive and intent. ... The court did not err by allowing White to testify. First, the statement was not offered for the truth of the matter asserted. The judge admitted the statement only for the purpose of showing White's motive or intent. It does not matter whether Carmichael really did want to discredit DeJohn. What matters is what Carmichael told White. Therefore, the district court did not err by admitting the statement. ... Second, in order to violate the Confrontation Clause, a statement must be testimonial and must be offered for the truth of the matter asserted. [cite] Because White's statement was neither, there is no Confrontation Clause issue here."

McDowell v. State, 984 So.2d 1003 (Miss. App. Oct 02, 2007) – "Under Mississippi Rule of Evidence 801(c), the testimony would not be considered hearsay. It is apparent that the statements made by Davis were not offered to prove the truth of the matter asserted, but were offered to prove that Davis was in fear and felt that he needed to protect himself. Under *Crawford*, Davis' statement was not testimonial and subject to the Sixth Amendment right to confrontation. Therefore, under the Rule and *Crawford*, Davis' underlying statement would not be considered hearsay and subject to a *Crawford* analysis."

State v. Stein, 140 Wash.App. 43, 165 P.3d 16 (Wash.App. Div. 2 2007) (as amended Aug. 21, 2007) – "Even if the recording included testimonial statements, [FN29] it showed Stein's state of mind and how he dealt with those he believed were frustrating his ability to control Nicholas's assets. It was not offered to prove the truth of any of the recorded statements."

Andrew v. State, 2007 OK CR 23, 164 P.3d 176 (Okla. Crim. App. 2007), opinion corrected on denial of rehearing, 2007 OK CR 36, 168 P.3d 1150 (2007) – "¶ 30 Appellant next claims that hearsay evidence concerning Rob Andrew's belief that Appellant and James Pavatt tried to kill him by cutting the brake lines to his car, were inadmissible. These taped statements were introduced through Prudential employees. Again this evidence was introduced to show Rob Andrew's state-of-mind. His fear of Appellant and Pavatt, and the motive for this killing: the insurance money. The conversations Rob had with the insurance company were introduced to show why Appellant had a motive to kill Rob. ... [¶ 31] The inclusion of this evidence also showed the inadequacy of the police in their ability to stop Appellant and Pavatt before they actually carried out their plan to kill Rob Andrew. *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (also a finding of harmless error)

People v. Osborg, 2007 WL 708792 (Cal. App. 3 Dist. 2007) (unpub) – Victim's statements regarding defendant "are not hearsay because they are not offered for the truth of the matter asserted (i.e., that there were altercations or that defendant made threats to Phillips [victim]), but as circumstantial evidence that Phillips was afraid of defendant, thus would not have invited

defendant into his home. [*Crawford*] held that the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' Therefore, we need not consider whether these statements violated defendant's confrontation rights." (citation omitted)

People v. Church, 2007 WL 765746, *6 (Cal. App. 1 Dist. 2007) (unpub) – "Zachary's [murder victim's] statement to his wife Bria was not testimonial in nature. Even if it were, Zachary's statement was admitted solely for a nonhearsay purpose: evidence of his intent to meet with Church at Doyle's cabin that evening, and the jury was so instructed at the time of his wife's testimony. Zachary's comment was made under circumstances in which Zachary had no motive to lie."

➤ **Sub-Category: Questions, Commands, Directives**

Ruhl v. Hardy, 743 F.3d 1083, 1098-99 (7th Cir. 2014), reh'g denied (Apr. 3, 2014) (habeas) – "Serio's direct order that Ruhl knock on the car window and shoot Neubauer was not even hearsay. It was a direct command, not a statement offered to prove the truth of the matter asserted. ... because neither type of statement was testimonial, Ruhl's confrontation rights under the Sixth Amendment were not implicated."

State v. Heath, 21 Neb.App. 141, 838 N.W.2d 4, 9-11 (Neb. App. 2013), review denied (Sept. 11, 2013) – "Heath asserts that the district court erred in allowing testimony that his mother asked the officer whether the officer was alone... the utterance at issue in this case was not hearsay and was not a declaration or affirmation of any fact—it was an inquiry, seeking information.... Heath's mother's inquiry of whether Officer Grell was alone was not the functional equivalent of testimonial hearsay."

People v. Bennett, 290 Mich.App. 465, 802 N.W.2d 627 (Mich. Ct. App. Nov. 2, 2010), leave to appeal denied (April 25, 2011) – consolidated appeals of Bennett and Benson – "Benson next argues that Larvaidean's testimony about a conversation he had with his father about whether to talk to the police violates his right of confrontation. Larvaidean's father told Larvaidean to 'tell the truth.' This statement is not hearsay because it does not contain an assertion; it is a command. [cites] Moreover, the statement was nontestimonial because it had nothing to do with Benson or his alleged conduct and it was not made for testimonial purposes."

People v. Barco, 2007 WL 1765424 (Cal. App. 2 Dist. Jun 20, 2007) (unpub) – "[Gang member] Johnny's statement, 'Let's go get retaliation,' encouraging retaliation was introduced on the question of whether he had the specific intent to agree to commit an offense. It was not a direct statement of his mental state, and, as such, was not offered for the truth of the matter asserted and is therefore not hearsay. The right to confrontation is not implicated by nonhearsay."

➤ **Sub-Category: Offered to Show Relationship**

Commonwealth v. Beneche, 458 Mass. 61, 80-82, 933 N.E.2d 951 (Mass. 2010) – "Evidence of the prior bad acts in this case was not admitted for its truth, but to show the hostile

relationship between Ravenell and Beneche that contributed to his motive for the murders. ... Because Ravenell's testimony that Beneche struck her was not admitted for the truth, but for other relevant nonhearsay purposes, there was no confrontation clause violation."

People v. Seriales, 2007 WL 3208541 (Cal.App. 5 Dist. Nov 01, 2007) (unpub) – "Respondent notes that the trial court also admitted Vidal's statement for the nonhearsay purpose of showing his relationship with appellant. We agree that, in light of appellant's attempt, in his statement to Skiles, to minimize his relationship with Vidal and the prosecutor's use of aiding and abetting and conspiracy theories of liability, this was a relevant purpose."

State v. McKinney, 2007 WL 2297111 (Wash. App. Div. 1 Aug 13, 2007) (unpub) – (1) "Donovan's out-of-court statements to Officer Marrs were offered to show that Donovan knew McKinney and that McKinney was nearby at the Sunrise Motel. Because Donovan's statements were not offered for the truth of the matter asserted, they were not hearsay and do not implicate McKinney's right to confrontation." (2) "neither Officer Rabelos nor Officer French repeated any out-of-court statements of others. Because Officer Rabelos's and Officer French's testimony was based on personal knowledge of Durant's and Turcott's criminal history, the testimony was not hearsay and did not violate McKinney's right to confrontation"

U.S. v. Becerra, 209 Fed.Appx. 802, 806-807 (10th Cir. 2006) – "The confrontation clause did not prohibit the admission of the phone calls between Angie Becerra and Lopez because those calls were not testimonial hearsay. They were not offered to prove the truth of the matters asserted in the calls, nor were they testimonial in nature under *Davis* or *Crawford*. They were purely private informal conversations between two individuals, and they were introduced at Becerra's trial simply to demonstrate a connection between Lopez and the Becerra family."

➤ Sub-Category: Insults and Denunciations

Thomas v. Commonwealth, 279 Va. 131, 688 S.E.2d 220 (Va. 2010) – "Major Roberts testified that Thomas stated to him that she 'asked [Avent] if he had anything to do with [her father's death]. And [Avent] said that [the victim], being her father, was a piece of shit, that he took care of it, but he never said, yes he did it.' ... The recitation of Avent's opinion that Thomas' father [the murder victim] was 'a piece of shit' most assuredly was not offered for the truth of the matter stated." [Note: Major Roberts' source wasn't Avent but Thomas, the defendant. Is it still double hearsay when the second declarant is the defendant herself?]

People v. Garza, 2008 WL 187982 (Cal. App. 4 Dist. Jan 23, 2008) (unpub) – middle school teacher had long affair with victim, beginning when she was 13 – victim testified about incident in which teacher's wife came to school and made a scene – victim repeated what non-testifying wife had said – "The testimony challenged on appeal is as follows: 'She kept telling him what a pervert he was. And how he could have done that to herself and his daughter. And she kept telling me the same things. What I had done to their family and how I had broken up a marriage. And how I could have ever done that to their daughter.' We conclude that the challenged testimony was not hearsay because it was not offered to prove the truth of the matter asserted—obviously, it was not offered to prove that defendant was a pervert or that he and M. had broken up the marriage." [NOTE: While a *Crawford* objection was made and *Crawford* is cited in the opinion, no explicit *Crawford* ruling is made.]

➤ **Sub-Category: Offered to Show Defendant's Connection to a Place or Car**

State v. Sorrell, 2009 WL 1025873 (Tenn. Crim. App. Apr 08, 2009) (unpub) – a cell phone with an open line broadcast killers searching their victim's car, and their conversation was recorded on the victim's girlfriend's voice mail, without killers' knowledge – "the conversation on the tape was the defendant and another person discussing looking underneath the dead victim and in the victim's car after the killing. Because the statements were offered to establish context and the defendant's presence at the crime scene, the Confrontation Clause does not bar admission of the statements." – [NOTE: Also casual remark, co-conspirator statement and defendant's own statements.]

Weems v. State, 295 Ga.App. 680, 673 S.E.2d 50, 9 FCDR 404 (Ga. App. Jan 26, 2009) – "Here, the receipt was not offered as proof of what was asserted therein--that Weems had a key made for a vehicle--but as evidence that a piece of paper with Weems name on it was found in the same residence where the cocaine and firearms were located ... While Weems also contends that the admission of the receipt violated his Confrontation Clause rights under *Crawford* ..., the Clause does not bar the admission of statements for purposes other than establishing the truth of the matter asserted."

State v. Palmer, 2008 WL 2424455, 2008-Ohio-2937 (Ohio App. 8 Dist. Jun 16, 2008) (unpub) – eyewitness observed burglars escaping in a Grand Prix – "A cell phone was also recovered from the Grand Prix. The caller identification revealed that a 'Cat' had attempted to call the telephone. Later, at the police station, a Catherine Fleegle called. She informed Detective Beigacki that she had attempted to call Palmer because he had her car. The officer asked her if her name appeared as 'Cat' on Palmer's cell phone, to which she responded, 'yes.' ... {¶ 26} The detective's statements did not constitute hearsay. The statements were not admitted to prove the truth of the matter asserted, but to prove Palmer's link to the get-away car." – [NOTE: Also not "witness against."

➤ **Sub-Category: Offered to Show Discrepancy**

U.S. v. Jimenez, 513 F.3d 62 (3rd Cir. Jan 14, 2008) – "Nonhearsay use of evidence as a means of demonstrating a discrepancy does not implicate the Confrontation Clause. ... [T]he actual truthfulness of what the tax returns as filed and the abstracts said was irrelevant to the jury's determination of whether the Appellants made false representations to the lenders by providing them with fabricated tax returns; the relevant point was that the copies of the tax returns used to support the loan applications were fabricated."

➤ **Sub-Category: Courts Prepared to Say Non-Hearsay May Be Testimonial**
(category added Dec. 2011)

State v. Dash, 163 Wn. App. 63, 72-74, 259 P.3d 319 (Wash. Ct. App. 2011) – in dicta, added "to assist the trial court" on remand – "In *Crawford*, the Court broadly stated that the confrontation clause 'does not bar the use of testimonial statements for purposes other than

establishing the truth of the matter asserted.' [cite] However, the Court has more recently suggested that the proper focus is not on whether the statement is hearsay but, rather, whether the statement is offered 'against' the defendant to establish or prove a past event relevant to the criminal prosecution. ... This is a fast-evolving area of the law. Whether *Bullcoming*, *Bryant*, and *Melendez-Diaz* signal a departure from the blanket assertion in *Crawford's* note 9 (that if a statement is not offered to prove the truth of the matter asserted, it is not hearsay and, thus, is not subject to confrontation) is not yet clear." – [NOTE: Gee, thanks for the assistance!]

➤ **Sub-Category: Verbal Acts / Offered to Prove It Was Said**
(sub-category added Dec. 2010)

State v. Holland, 76 So. 3d 1032, 1033-1035 (Fla. Dist. Ct. App. 4th Dist. 2011) – "Deputy Grady was called to the scene to perform field sobriety exercises on Holland. He requested Holland undergo a breath test. The interaction between Grady and Holland was recorded by video camera. ... We hold that Grady's statements on the videotape were non-hearsay verbal acts. A verbal act is defined as 'an utterance of an operative fact that gives rise to legal consequences.' [cite] Verbal acts are not hearsay because they are admitted to show they were actually made and not to prove the truth of what was asserted therein. ... Having concluded that the statements on the videotape are not hearsay, the constitutional concerns raised in *Crawford* regarding testimonial statements are not implicated."

United States v. Henderson, 626 F.3d 326, 331-335 (6th Cir. Ohio 2010) – "Bass's offer to provide information to the [*334] FBI was introduced not to show that he provided truthful information regarding the location of the weapon and vehicle used in the bank robbery, but to show that he made the offer to assist authorities. Whether or not Bass actually possessed and provided the information he claimed to have was irrelevant to the inquiry whether Henderson retaliated against Bass for giving information to the authorities. However, the fact that Bass made such an offer to the FBI tends to show that Bass cooperated with the government in the bank robbery prosecution, thus bringing his murder within the purview of retaliation under 18 U.S.C. § 1513(a)(1)(B). Consequently, Bass's offer to provide information to the FBI was admissible over Henderson's Confrontation Clause objection because it was not testimonial hearsay offered to establish the truth of the matter asserted, but was introduced only to establish the verbal act."

People v. Bogan, 152 Cal.App.4th 1070, 62 Cal.Rptr.3d 34 (Cal.App. 3 Dist. 2007) – (unpublished portion of opinion) "Defendant contends the testimony of SPD Detective Lockwood and Phoenix Detective Murry, recounting their respective conversations with suspected prostitutes Woods and Peters (aka Jenkins), was inadmissible hearsay and violated his confrontation rights. We disagree because the prostitutes' statements are verbal acts or operative facts, which are not hearsay, and the statements did not implicate defendant's confrontation rights. ... The statements made by the prostitutes here relating to an exchange of money for sex were not offered for the truth of the matter asserted. ... Whether or not the prostitutes would actually have performed the specified acts for the agreed-upon price is of no consequence." [NOTE: Although this holding would also resolve the *Crawford* issue, it pertains only to the evidentiary issue. The court went on to decide the *Crawford* issue on the different ground that the statements were not testimonial.]

People v. Fullbright, 2007 WL 2405802 (Cal.App. 4 Dist. Aug 24, 2007) (unpub) (on rehearing regarding sentencing issue – earlier opinion dated June 28, 2007 superseded) – "The People cite no authority for the proposition that the admission of an affidavit providing a detailed account of a previous incident of domestic violence can be admitted for the nonhearsay purpose of showing simply that the report was made. It appears that the People are relying on the 'fresh complaint' hearsay exception... In this case the court did not simply admit into evidence that fact Pradd had reported a domestic abuse assault, but admitted a detailed statement describing the actions of Fullbright."

State v. Ramirez, 101 Conn. App. 283, 921 A.2d 702 (Conn. App. 2007) – "The defendant's first claim is that the court improperly admitted hearsay evidence consisting of a statement made by his girlfriend, Waye, which he claims was harmful error. ... The state argued that it was not hearsay because the statement was not being offered for its truth; rather, it was being offered for the fact that it was said and was relevant evidence concerning the defendant's 'consciousness of guilt' ... [T]he state did not present any evidence to connect the defendant to Waye's statement, and, therefore, the court's admission of Waye's statement was improper." [NOTE: Apparently decided under state hearsay rule, though *Crawford* is also discussed.]

U.S. v. Kenney, 2007 WL 579539, *4 (6th Cir. 2007) (unpub) – "[T]he out-of-court statement by Wright was not hearsay under Federal Rule of Evidence 801(c), because it was not offered to prove that the declarant did not go bowling on November 6, but only that he said as much. Moreover, as non-hearsay the testimony does not implicate any Sixth Amendment concerns such as those raised in *Crawford v. Washington*, 541 U.S. 36 (2004)."

People v. Quintana 2007 WL 404075, **9-12 (Cal.App. 2 Dist., 2007) (unpub) – "the statements were relevant, not to prove Soqui would be stabbed, but as circumstantial nonhearsay evidence of the threat. The *Crawford* rule does not apply to nonhearsay. (*People v. Ledesma* (2006) 39 Cal.4th 641, 707, fn. 18.)"

➤ Sub-Category: Statements Offered for their Falsity
(category added March 2009)

U.S. v. Young, 753 F.3d 757 (8th Cir. 2014) – "Deputy Salsberry interviewed Mock after Deputy Salsberry knew that a homicide occurred. Thus, he elicited testimonial statements from Mock during this interview. However, the government did not introduce these statements to prove the truth of the matter asserted; rather, the government introduced these statements to show that Young and Mock had a common alibi, scheme, or conspiracy. In fact, Mock's statements to Deputy Salsberry are valuable to the government because they are false. Therefore, the Confrontation Clause does not bar Deputy Salsberry's testimony."

Ward v. United States, 55 A.3d 840, 842-844 (D.C. 2012) – "Although Thompson may be correct that the government used Hansen's statements to Detective Jefferson 'to establish that she lied to the police, which was probative of the fact that Mr. Thompson had warned her not to snitch,' that does not amount to using Hansen's statements to prove the truth of the matter asserted (i.e., a use that would render Detective Jefferson's testimony relaying the statements 'hearsay')."

People v. Phillips, 315 P.3d 136, 2012 COA 176 (Colo. Ct. App. 2012) – "[¶ 121] We conclude that C.G.'s statement, 'I fell in the bathroom because it was slippery,' to the police officer during the welfare check was admissible for the relevant, nonhearsay purpose of showing that C.G. had been coached to change his account. ... [¶ 128] C.G.'s multiple statements to the caseworker that he had slipped and fallen in the shower were admissible for the nonhearsay purpose of showing that C.G. had been coached to change his account."

United States v. Yielding, 657 F.3d 688, 698-700 (8th Cir. Ark. 2011) – "the government introduced the evidence about Kelley Yielding's characterization of the payments to Wall to demonstrate that she used a false 'cover story' about a 'loan,' not to prove the truth of her assertion to the FBI. Statements are not hearsay when 'the point of the prosecutor's introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false.'"

People v. Gann, 193 Cal. App. 4th 994, 123 Cal. Rptr. 3d 208 (Cal. App. 4th Dist. 2011) – "n10 With respect to any false statements that Hansen made to Detective Rivera, such statements clearly were not offered for their truth, and are thus not 'testimonial.' Indeed, during Gann's first trial, the prosecutor responded to a hearsay objection to Hansen's prearrest statements by arguing that he was not offering Hansen's statements 'for the truth of the matter asserted. In fact, I am going to argue that she's lying through the teeth the whole time.'"

Commonwealth v. Pytou Heang, 458 Mass. 827, 853-855, 942 N.E.2d 927 (Mass. 2011) – "The Commonwealth did not offer this testimony for the truth of the matter asserted. Rather, the testimony was offered for both its falsity and for its similarity to the defendant's statement ... which the prosecution also argued was false. Consequently, the admission of But's statements to police was not error."

U.S. v. Thompson, et al., 2009 WL 331478, 2009 WL 331482, 2009 WL 331490, 2009 WL 331472 (E.D. Ky. Feb 09, 2009) (unpub) (post-trial motion) (four nearly-identical decisions in multi-defendant corruption case) – "In fact, the point of the government's offering Ms. Brewer's and Mr. Dobson's statements [*i.e.*, grand jury testimony] was simply to prove that those statements were made so as to establish a foundation for later showing, through other admissible evidence and testimony, that they were false. ... when an out-of-court statement is not offered to prove the truth of the matter asserted, as with Brewer's and Dobson's statements, the Confrontation Clause is not implicated."

Commonwealth v. Pelletier, 71 Mass.App.Ct. 67, 879 N.E.2d 125 (Mass. App. Ct. Jan 15, 2008) – severely battered wife told officer she had fallen down the stairs – "In sum, we consider the Crawford footnote [n.9] applicable and conclude that the confrontation clause does not bar the wife's statement, which was introduced 'for purposes other than establishing the truth of the matter asserted.'" – extremely long string-cite of supporting cases in note 5 [NOTE: It also seems plain she was not a "witness against" her batterer, but that point is not addressed.]

U.S. v. Adefehinti, 510 F.3d 319 (D.C. Cir. Dec 18, 2007) – rejecting defense counsel's "creative but perplexing formulation, ... that 'the alleged false statements contained in the 500 exhibits were most definitely offered for the truth—the 'truth' of their falsity.'"

Commonwealth v. Duff, 2007 WL 4355272 (Mass. App. Ct. Dec 13, 2007) (unpub) – larceny by false pretenses cases – "The testimony was not admitted to prove the truth of Cruz's statement, *i.e.*, that the grants were approved, but rather for the nonhearsay purpose of showing how the defendant perpetuated the scheme when some of the victims had become skeptical. In fact, the evidence was admitted to show that Cruz's statements were false. Because the testimony was properly admitted for a nonhearsay purpose, it fails to serve as a violation of the confrontation clause. *See Crawford*..."

United States v. Petraia Maritime, Ltd., 489 F.Supp.2d 90, 2007 A.M.C. 1294 (D. Me. 2007) – "The Government responds, with respect to the first category of statements—made by the two Petraia Maritime engineering officers and two crewmen to the Coast Guard during the onboard inspection of the vessel shortly after arrival in Portland on August 14, 2004—that they form the basis of the obstruction of justice charge (Count II) and will not be offered for the truth of the matter asserted. It is clear from *Crawford* that the Confrontation Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement. ... Therefore, the admission of statements made by Arcolas, Lozado, Buendichio and Celda during the Coast Guard's initial inspection, if not offered for the truth of the matter at trial, will not violate the Confrontation Clause."

U.S. v. Rodriguez-Martinez, 480 F.3d 303 (5th Cir. 2007) – "At trial, Officer Cedillo testified that Mireya Mendoza gave inconsistent statements when he questioned her about why she was in Fort Worth. Rodriguez-Martinez objected, arguing that Mireya Mendoza's out-of-court statements were testimonial hearsay inadmissible under *Crawford*. The district court properly overruled this objection because Mireya Mendoza's inconsistent statements were not admitted for the truth of the matter asserted. There was no Confrontation Clause violation in admitting these statements." (footnotes omitted)

U.S. v. Bland, 2007 WL 1814174 (9th Cir. Jun 21, 2007) (unpub) – "The district court erred by admitting Smith's statements to Agent Joseph Rogers that entries in her At-A-Glance book represented grocery money she had given Bland as non-hearsay. In each of the 'false exculpatory statement' cases cited by the government, the prosecution presented additional evidence to show that the purported exculpatory statements were, in fact, false. [citations omitted] Here, Agent Rogers' speculative testimony as to what he believed the notations referred to falls well short of demonstrating that Smith's statements were false. In the absence of evidence contradicting Smith's explanation of the notations, Smith's statements to Agent Rogers should not have been admitted as non-hearsay false exculpatory statements. [FN 1] Admitting Smith's statements to Agent Rogers also violated the Confrontation Clause. Smith's responses to Agent Rogers' questions following Bland's arrest were testimonial statements."

United States v. Paulino, 445 F.3d 211 (2nd Cir. N.Y. 2006) – "Defendant's challenged conviction was based on a seizure of cocaine from his bedroom closet while law enforcement officers were executing an arrest warrant for his father. On appeal, the court held that defendant's Sixth Amendment right to confrontation was not violated by the admission into evidence of statements his father made because the statements, indicating that he was taking full responsibility for drugs found in the hall closet of the family's home but denying knowing of any other cocaine in the residence, were not offered for their truth, but rather to allow the jury to understand the course of events that unfolded."

United States v. Lore, 430 F.3d 190 (3rd Cir. N.J. 2005) – Grand jury testimony (not subject to cross-examination) of two witnesses who did not testify at trial was found to be testimonial. However, since the testimony was admitted not for the truth, but to introduce self-exculpatory statements denying wrongdoing to show those statements were false, this did not violate the defendant's confrontation rights.

United States v. Holmes, 406 F.3d 337, 66 Fed. R. Evid. Serv. 1139 (5th Cir. 2005), cert. denied, 126 S.Ct. 375, 163 L.Ed.2d 163 (2005) – fraud case: "Far from offering this testimony to prove its *truthfulness*, the government sought to establish its *falsity* through independent evidence. Indeed, the entire thrust of the government's case was that the back-dating was not the result of a clerical error, but instead was the objective of an illicit conspiracy between Holmes and Pauline Gonzalez. Gonzalez's testimony was thus offered both to show the existence of a scheme and to prove one of the overt acts charged in the indictment. Even assuming that her civil deposition testimony is testimonial within the meaning of Crawford, then, this nonhearsay use of her testimony poses no Confrontation Clause concerns." (footnote omitted)

Statements or Questions Offered to Show Consciousness of Guilt / Participation in Conspiracy

People v. Willis, 2009 WL 1464367 (Cal. App. 2 Dist. May 27, 2009) (unpub) – "Statements admitted to show a defendant's consciousness of guilt are admitted for a nonhearsay purpose. ... the Confrontation Clause does not restrict the introduction of out-of-court statements for nonhearsay purposes. (*Crawford* ..."

U.S. v. Jean-Jacques, 274 Fed.Appx. 752 (11th Cir. Apr 16, 2008) (unpub) – "he statements of the co-conspirator to the agent [FN1] were not offered for their truth but rather to show that she was part of the conspiracy and attempting to conceal this fact. As the agent's testimony was not hearsay, it does not implicate Frank and Seraphin's rights under the Confrontation Clause."

People v. Reyes, 159 Cal.App.4th 214, 70 Cal.Rptr.3d 903 (Cal. App. 2 Dist. Jan 23, 2008) – suspect in drive-by shooting spontaneously asked officer, "Well, if you don't find the gun, then you are going to let us go, right?" – lengthy, confused discussion about whether this should be considered a facially-inculpatory statement raising a *Bruton* problem, or alternatively a statement offered for the truth of what it didn't say, raising a *Crawford* problem, and eventually concluding any error was harmless – the source of the confusion seems to be the judge's failure to distinguish between the implication of a remark and the inference that can be drawn from it

Background Statements

(see also the surrounding categories; and part 2, Implied Statements and Statements of Informants to Police (admitted for the truth); part 4, Statements Quoted by Detective or Prosecutor; part 6, Citizen Assisting Officer.)

People v. McGhee, 125 A.D.3d 537, 4 N.Y.S.3d 186 (N.Y. App. Div. 2015) – "Since this evidence was not offered for its truth, but as evidence of the detective's state of mind, defendant's hearsay and Confrontation Clause arguments are unavailing."

People v. Putman, __ N.W.2d __, 2015 WL 710974 (Mich. Ct. App. Feb. 19, 2015) – "it is clear that the tipster's statement was not elicited from Officer Ford to prove the truth of the tipster's statement, i.e., that 'Mike' committed the murder; rather, it was used to explain why Officer Ford put a photograph of defendant in the photographic array. Because the Confrontation Clause does not prevent the use of out of court testimonial statements to show why a police officer acted as he did, the admission of this testimony did not violate defendant's right of confrontation..."

People v. Speaks, 124 A.D.3d 689, 1 N.Y.S.3d 257 (N.Y. App. Div.) leave to appeal granted, 24 N.Y.3d 1222, 28 N.E.3d 46 (2015) – detective "recount[ed] a description of the perpetrator given by a nontestifying witness... The jury was specifically instructed not to consider this description for its truth, and the description was properly admitted for the relevant, nonhearsay purpose of 'establishing the reasons behind the detective's actions, and to complete the narrative of events leading to the defendant's arrest'"

People v. Whitfield, 2014 IL App (1st) 123135, 387 Ill.Dec. 868, 23 N.E.3d 560, appeal pending (Mar Term 2015) – patrolling officers heard gunshots and went to investigate – people on porch pointed to defendant – "¶ 28 Moreover, the record shows that this evidence was introduced for the sole purpose of showing the conduct of police and the steps in their investigation, which falls outside the category of hearsay." – and therefore "does not implicate the confrontation clause"

Wimbley v. State, __ So.3d __, 2014 WL 7236984 (Ala. Crim. App. Dec. 19, 2014) – "The record demonstrates that none of the statements relayed by Roberts and Barnes was offered to prove the truth of the matter asserted. Rather, they were offered to explain the subsequent conduct of the hearer of the statement, i.e., they were offered to explain why Roberts called Barnes and why Barnes dropped off Crayton and Wimbley and went to the police." – no confrontation clause issue

United States v. Brinson, 772 F.3d 1314, 1316-18 (10th Cir. 2014) – officer responding to online escort ad spoke to female about arrangements – "The resulting issue is whether the female on the telephone would reasonably have foreseen use of her statements in an investigation or prosecution. The district court properly concluded that this use would not have been foreseen." – non-testimonial (also non-hearsay, as the court previously held under the Fed.R.Evid.)

People v. Quantano, 120 A.D.3d 1116, 992 N.Y.S.2d 409, (Mem)-410 leave to appeal denied, 24 N.Y.3d 1087 (2014) – "The nontestifying grandmother's statements to the police were properly admitted, not for their truth, but for the legitimate nonhearsay purpose of explaining police actions that would otherwise have made little sense to the jury [cites]."

People v. Peyton, 229 Cal. App. 4th 1063, 1075-77, 177 Cal. Rptr. 3d 823, 833-34 (2014), review denied (Nov. 25, 2014) – no sixth amendment problem where "Gutierrez's statement about recent auto theft was not admitted to prove the truth of the matter asserted but to explain why Detective Medina asked Gutierrez to wear a 'wire' and record a conversation with appellant."

People v. Rahman, 989 N.Y.S.2d 306, 989 N.Y.S.2d 306 (N.Y. App. Div. 2d Dept. 2014) – "The defendant contends that the Supreme Court erred in admitting into evidence the testimony of an undercover officer that he was told by an individual who was not called as a witness that he could buy drugs from the defendant, and that the individual also told him to give her money so she could buy drugs from the defendant. However, the contention is without merit since, as the court instructed the jury, the testimony was not offered for its truth, but rather, to explain the undercover officer's conduct leading to the defendant's arrest [cite]."

State v. Johnson, 2014 ME 83, 95 A.3d 621 (Me. 2014) – "[Officer] Lever's statements via radio to [Officers] Aucoin and Olson—that two black men had possibly been involved in an altercation and that he had seen two black men waiting outside the entrance to the bar—were not hearsay because they were not offered to establish that Lever had actually seen the men, but to demonstrate that the officers had articulable suspicion for stopping and ultimately searching Johnson."

People v. Henry, __ N.W.2d __, 305 Mich. App. 127 (Mich. App. 2014) – "a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause. Specifically, a statement offered to show why police officers acted as they did is not hearsay."

U.S. v. Ransfer, 749 F.3d 914, 927 (11th Cir. 2014) – "Sergeant Villaverde's statements were not admitted for the truth of the assertion, but to explain the next steps taken in the course of the investigation. Accordingly, we do not find plain error in their admission."

People v. Garcia, 113 A.D.3d 553, 980 N.Y.S.2d 11, 13 (N.Y. App. Div. 1st Dept. 2014) leave to appeal granted, 22 N.Y.3d 1198 (2014) – "This testimony was presented not for the truth of the matter asserted, but to explain why the police focused on defendant and spent years attempting to locate him [cites]."

People v. Santana, 113 A.D.3d 504, 978 N.Y.S.2d 225, 226 (N.Y. App. Div. 1st Dept. 2014) – "The detective's testimony was admissible for the legitimate nonhearsay purposes of explaining the police investigation in the context of issues raised at trial [cites]."

Green v. State, 2013 Ark. 497, __ S.W.3d __ (Ark. 2013) – "Here, the testimony was not admitted for its truth but was admitted to explain a series of police actions in the police investigation. Further, the jury was instructed to consider the statements only for that purpose."

People v. Irvin, 111 A.D.3d 1294, 974 N.Y.S.2d 214, 215 (N.Y. App. Div. 4th Dept. 2013) – "Here, the testimony was properly admitted in evidence for the purpose of explaining the police witness's actions and the sequence of events leading to defendant's arrest [cite]."

State v. Ricks, 2013-Ohio-3712, 136 Ohio St.3d 356, 995 N.E.2d 1181, 1189 (Ohio 2013) – "{¶ 27} In sum, in order for testimony offered to explain police conduct to be admissible as nonhearsay, the conduct to be explained should be relevant, equivocal, and contemporaneous with the statements; the probative value of statements must not be substantially outweighed by the danger of unfair prejudice; and the statements cannot connect the accused with the crime charged."

State v. Nelson, 144 Conn.App. 678, 73 A.3d 811, 817-18 (Conn. App. 2013) – "[Security guard] Hinton's statements to [officer] Dogali on the night of the incident were admitted not for their truth, but solely for their effect on Dogali. As the court instructed the jury, 'Mr. Hinton is not here to testify. Any evidence that I allow Officer Dogali to testify to, is not to be used to prove that what Mr. Hinton said happened actually happened.... You may, however, consider evidence ... about what Mr. Hinton told [Officer] Dogali as evidence as to what Officer Dogali was thinking at the *691 time that these events occurred.' Because Dogali's testimony concerning Hinton's statements was not admitted to prove the truth of the matter asserted, they are not hearsay statements, and, therefore, the testimony raised no legitimate confrontation clause issue."

Arena v. Kaplan, 952 F.Supp.2d 468 (E.D. N.Y. 2013) (habeas) – "any 'references to the out-of-court statements did not violate the Confrontation Clause because the references were used to explain the background of petitioner's confession and to rebut the defense argument that the detectives coerced the confession.'" (citation omitted)

West v. State, 406 S.W.3d 748, 764-65 (Tex. App.--Hous. [14th Dist.] 2013), petition for discretionary review refused (Dec. 18, 2013) – "Because the 9–1–1 call was properly offered and admitted, not to prove the truth of the matter—that appellant committed aggravated kidnapping—but rather for the non-hearsay purpose of explaining how and why police responded to the Stewart Beach area, the statement was not hearsay, did not implicate appellant's confrontation clause rights, and was admissible under *Crawford*."

State v. Bruffey, 745 S.E.2d 540, 544-546 (W. Va. 2013) – "A review of the record reveals that the statements from the non-trial witness were not introduced to inculcate Mr. Bruffey. Rather, they were introduced to explain how the Sergeant came to identify Mr. Bruffey as a potential suspect and how the Sergeant located Mr. Bruffey. Second, Mr. Bruffey never denied owning the purple car. Third, there was no *Crawford* or *Mechling* violation because the non-trial statements were not testimonial statements directed at establishing the facts of a past crime, but simply part of the *res gestae* of the Sergeant's investigation."

People v DeJesus, 105 A.D.3d 476, 963 N.Y.S.2d 91 (N.Y. App. Div. 1st Dep't 2013) – "A detective's brief, limited testimony that defendant was already a suspect at the time the People's main witness was interviewed did not violate the Confrontation Clause. This evidence was not offered for its truth (*see Tennessee v Street*, ...), but for the legitimate nonhearsay purposes of completing the narrative, explaining police actions, providing the context of the interview, correcting a misimpression created by defendant on cross-examination and preventing jury speculation..."

State v. Rollins, 738 S.E.2d 440, 441-449 (N.C. Ct. App. 2013) – "In the instant case, Agent Brown's testimony regarding the information he learned from Ford was used to explain to the jury the reason Agent Brown took the subsequent action of searching a particular field near Andrews Terrace almost four years after Highsmith's murder. While it is true, as defendant suggests, that Agent Brown's testimony creates a strong inference that Ford learned the location of the knife from defendant, that inference would only be problematic if Ford's indirect statement had been admitted for its truth. Statements by non-testifying witnesses which may implicate the defendant in a crime are permissible when they are only used to explain the subsequent actions of the testifying witness. ... Since Agent Brown's testimony regarding his conversations with

Ford was admitted for the proper purpose of explaining his decision to conduct a search near Andrews Terrace, the testimony was not hearsay." – [NOTE: The informant's actual words were not relayed to the jury.]

United States v. Wahchumwah, 710 F.3d 862 (9th Cir. Wash. 2013) – "The anonymous complaints were not offered to prove that Wahchumwah was selling eagle parts, but merely to explain why the federal agents began investigating him."

United States v. Macias-Farias, 706 F.3d 775, 779-781 (6th Cir. Ky. 2013) – "Agent Moore testified only that he had obtained information from Amber Babor. He did not repeat the information itself, which might well have amounted to hearsay testimony if it had been offered to establish the truth of the statement by the declarant, Babor. ... As we have noted, '[t]he hearsay rule does not apply to statements offered merely to show that they were made or had some effect on the hearer.'" – [NOTE: The offending statement was elicited by the defense on cross-examination, a point the opinion does not address.]

Braddy v. State, 111 So. 3d 810 (Fla. Nov. 15, 2012) – "The search warrant and affidavit were not introduced for the purpose of establishing the truth of the facts contained therein. Instead, the documents were presented to establish a foundation for later evidence.... Because neither of the documents constituted hearsay evidence, neither crossed the threshold triggering Confrontation Clause analysis."

State v. Skipper, 101 So. 3d 537, 541-544 (La.App. 4 Cir. 2012) – "On direct examination, Detective Baldwin testified that after taking the victim's statement, he asked her to check her phone records for any activity. When the victim noticed that phone calls were made after the robbery, she gave Detective Baldwin the information. After receiving the number that was dialed, he called it and spoke to the owner, from whom he learned that defendant had called the number from the victim's phone. Detective Baldwin then proceeded to compile a six-person photo lineup, which included the defendant. The victim positively identified the defendant from that lineup. ... Thus the out-of-court statement was offered to show how the defendant was developed as a suspect in the purse snatching and why he was included in the photo-lineup. Accordingly, the testimony was not hearsay" and hence not testimonial hearsay

State v. Mason, 730 S.E.2d 795, 797-798 (N.C. Ct. App. 2012) – "Where the police officer testified as to the victim's statements at the scene of the robbery obtained through a telephonic translation service, and the testimony was received only for corroboration purposes, it did not violate defendant's constitutional right of confrontation. ... At trial, Officer McQueen testified as to Lin's statements made at the scene of the robbery through 'Language Line,' telephone translation service. Officer McQueen used this service because Lin did not speak English, and McQueen did not speak Mandarin Chinese. Defendant objected to Officer McQueen's testimony on the grounds that it violated his constitutional right of confrontation and that it constituted double hearsay. The trial court instructed the jury that this evidence 'is not being admitted into evidence for substantive purposes. It is not being admitted into evidence to prove the truth of any matter asserted. But it is being admitted into evidence for the limited purpose of corroboration[.]' ... [T]he testimony of Officer McQueen was not admitted for the purpose of establishing the truth of the matter asserted, but rather was admitted solely for the [*801] purpose of corroboration. The Sixth Amendment's Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" – [NOTE: Isn't

offering as statement for corroboration the same as offering it for the truth? A better analysis would have been: Lin testified, and the telephone translation service was a language conduit.]

State v. Taylor, 373 S.W.3d 513, 520-521 (Mo. Ct. App. 2012) – "Defendant contends that the trial court erred by permitting Detective Rudolph to testify that he received information from a confidential informant about narcotic sales and 'weapons possession' at 5029 Aubert Avenue and that the confidential informant told him that Defendant 'was one of the people selling drugs.' ... Detective Rudolph's testimony explained to the jury why the police focused their investigation on a particular address and particular suspects. Out-of-court statements offered to explain subsequent police conduct and provide relevant background are admissible." – [NOTE: The defendant's argument was phrased in terms of the confrontation clause, while the court's opinion talks about hearsay, the implication being that non-hearsay does not violate the CC.]

State v. Cyrus, 97 So. 3d 554, 556-558 (La.App. 4 Cir. 2012) – "The State's elicitation from Det. Keating that an unnamed witness identified defendant as the individual seen exiting Dr. Hogan's Jaguar with a gun in his hand was not offered for the truth of the matter asserted, but to explain the course of Det. Keating's investigation. The truth of the out-of-court statement/assertion—the identification of Defendant Cyrus as the person seen exiting the Jaguar—was irrelevant. The relevancy of the statement was the impact of the identification on the course of Det. Keating's investigation, regardless of the accuracy of the matter asserted—the fact of the identification. Part of Det. Keating's investigation was his decision not to have the sweatshirt tested for hairs, DNA, etc. One reason for that decision made in the course of his investigation was that the unnamed witness had identified Defendant Cyrus as the person seen exiting Dr. Hogan's car." – [NOTE: The defense opened the door to this line of questioning, although that wasn't the basis of the court's decision.]

United States v. Woods, 684 F.3d 1045, 1049 (11th Cir. Ga. 2012) – child porn case – "Agent Eversman and Morris testified that images found on Woods's computers matched images in the NCMEC database. Assuming without deciding that these matches were out-of-court 'statements' ... this testimony was not introduced to prove the truth of the matter asserted, *i.e.*, that the images found on Woods's computer matched images of known child pornography. [cite] Rather, the testimony explained how the government selected which images recovered from Woods's computers to subject to in-depth analysis. ... Because the admitted testimony was not hearsay, Woods's Confrontation Clause challenge also fails."

Alvarez v. State, 312 Ga. App. 552, 718 S.E.2d 884, 2011 Fulton County D. Rep. 3797 (Ga. Ct. App. 2011) – "Here, the testimony at issue was offered not to prove that Sosa had been beaten up by a man who indicated that he had a weapon, but instead to establish a basis for the officers' actions. 'In establishing that [Alvarez] obstructed the officers, the State was required to prove that they were acting in the lawful discharge of their official duties at the time of the obstruction.'⁹ Thus, the State needed the officers to testify about their encounter with Sosa and their belief that a person at his residence was armed with a gun. 'Accordingly, the testimony was admissible as original evidence to explain that the officers were lawfully discharging their official duties.' ... 'Because the statements were not offered to establish the truth of the matter asserted, the Confrontation Clause does not apply.'"

United States v. Brooks, 645 F.3d 971, 976-977 (8th Cir. Mo. 2011) – "In this case, the statement at issue was not offered to prove the truth of the matter asserted—that is, that Brooks

was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes*. In *Holmes*, it was undisputed that officers had a valid warrant. Accordingly, less explanation was necessary. Here, the CI's information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here." – [NOTE: Is "less explanation when a warrant is involved" a constitutional standard??]

United States v. Meises, 645 F.3d 5, 7-12 (1st Cir. P.R. 2011) – a very long, borderline-incoherent opinion – when an agent describes talking to a person, and then describes subsequently altering the focus of the investigation, an out-of-court testimonial statement has been implied, and hence the confrontation clause has been violated – "[n.25] This risk of violation of the hearsay rule or the Confrontation Clause reinforces the importance of prosecutors understanding the limitations on so-called background or context evidence." – apparently, in the First Circuit, at least when Judge Lipez is writing the opinion, background information can include only first-hand observations by the testifying officer – or, in other words, the category of "testimonial hearsay" is broader than the category of "hearsay" such that statements not offered for their truth are nonetheless prohibited, notwithstanding *Crawford's* note 9 which says exactly the opposite – an example of just how tangled up a judge, or his clerk, can get in *Crawford's* undergrowth

Johnson v. State, 289 Ga. 22, 709 S.E.2d 217, 2011 Fulton County D. Rep. 777 (Ga. 2011) – "In his final enumeration, appellant asserts error, on both Confrontation Clause and hearsay grounds, with respect to several references in testimony by the lead investigator in the case, Brett Zimbrick, to a tip he had received from an unnamed source implicating appellant in the shooting. ... The record reflects that most of the instances in which Zimbrick made mention of the tip did not involve recitation of any 'statement' made by the tipster but rather merely referred to unspecified 'information' that Zimbrick had come to possess with regard to the case or simply acknowledged that an unnamed source existed.ⁿ³ In these instances, Zimbrick was not testifying as to any 'statements' made by the tipster, and thus such testimony violated neither the hearsay rule nor the Confrontation Clause."

Carter v. State, 289 Ga. 51, 709 S.E.2d 223, 2011 Fulton County D. Rep. 774 (Ga. 2011) – "Carter claims that, because Haynes did not testify, the officer's testimony about obtaining a warrant after speaking with Haynes deprived Carter of his opportunity to cross-examine Haynes about the nature of any statements that he may have made to the detective. *See Crawford* ... As an initial matter, a review of the transcript reveals that the officer did not testify regarding any actual statements made by Haynes."

State v. Morris, 711 S.E.2d 607 (W. Va. Nov. 19, 2010) – reckless driving – officer repeated nurse's statement that defendant's injuries indicated he had been the driver – "the circuit court permitted Officer Tiong to present this testimony not for the truth of the matter asserted, but to show why he charged Mr. Morris. ... because Officer Tiong's testimony regarding Nurse Engle's statements was properly admitted for purposes other than establishing the truth of the matter asserted, the Confrontation Clause does not bar the use of these statements." [NOTE: This case

has a weird, megalomaniac dissent, in which Judge Ketchum chastises prosecutors for presenting admissible hearsay.]

State v. Allison, 326 S.W.3d 81, 12-16 (Mo. Ct. App. Sept. 14, 2010), transfer denied (2010)

– "Detective Ford's testimony about the conversation with the CI was not offered to prove the truth of the matter asserted--that Allison contacted the CI and offered to sell him 'medicine.' Rather, it is evident from the questions asked that the testimony was elicited to explain Detective Ford's subsequent conduct. ... Detective Ford's testimony relating to Allison's offer to sell the CI "medicine" did not go beyond what was reasonably necessary. The testimony provided the jury with an explanation for Detective Ford's direction to the CI to arrange a meeting with Allison at Allison's garage."

State v. Hull, 788 N.W.2d 91, 100-101 (Minn. 2010) – "The statement was not admitted to show that something was in fact wrong when Wilczek did not call J.B. that evening, but rather, for the purpose of explaining [private citizen] J.B.'s efforts to locate Wilczek the following day."

State v. Womble, 235 P.3d 244, 249-250 (Ariz. 2010) – "The detective here testified only that the informant told him of Womble's existence, which resulted in the detective seeking a court order to review the jail tapes. The testimony was not offered to prove that Womble was involved in the murder, but rather only to explain why the detective obtained the order to listen to Speer's calls to Womble. The testimony thus did not violate the Confrontation Clause."

People v Fairweather, 2010 NY Slip Op 534, 69 A.D.3d 876, 894 N.Y.S.2d 81 (N.Y. App. Div. 2d Dep't 2010) – "The defendant also contends that he was denied his constitutional right to confront the witnesses against him because a detective testified that he determined the defendant was a suspect after he interviewed the injured complainant, who did not testify at trial... The challenged testimony was improper, since it directly implied that the complainant identified the defendant as the perpetrator..." [Note: No analysis of background theory.]

People v. Banks, 237 Ill. 2d 154, __ N.E.2d __, 2010 Ill. LEXIS 272, 1-33 (Ill. Feb. 19, 2010) (as corrected and modified) – "Detective Cardo testified that he was on his way to a burglary when there was a series of flash messages sent over the radio. When a crime happens and someone flees the scene, a responding officer will give out a flash of either a person fleeing the scene or a vehicle fleeing the scene so that other units in the area can look for this person or vehicle. ... The admission of an out-of-court statement that is not offered to prove the truth of the matter asserted but rather to explain the investigatory procedure followed in a case is proper [cite] and to show that the police officers had probable cause to arrest on the basis of the communication" – no confrontation issue

United States v. McCallum, 348 Fed. Appx. 693, 695-696 (2d Cir. N.Y. 2009) – "The evidence was not admitted for the truth of any implicit statement by DeFreese, but was offered to 'clarify [the] noncontroversial matter[]' of how the officers had come to focus their investigation on McCallum and Wright, [cite] in order to dispel any suggestion that they had done so arbitrarily."

United States v. Presley, 349 Fed. Appx. 22 (6th Cir. Mich. 2009) – "Contrary to defendant's assertions, the information Agent Tenprano received from the Missouri authorities does not constitute inadmissible hearsay. The statements were not offered to prove their truth--that is, that

Eason and Jackson were in fact stopped by Missouri police, or that Jackson said the marijuana was intended for defendant. These facts were confirmed independently through the testimony of both Eason and Jackson. Instead, as the government points out, Agent Tenprano used the statements of the Missouri authorities to provide background evidence for his description of the enforcement actions taken by the DEA with respect to defendant."

United States v. Sanchez, 586 F.3d 918, 927 (11th Cir. Fla. 2009) – "The officer's statement was not admitted for the truth of the dispatcher's statement--that shots had been fired--and therefore did not constitute testimonial hearsay. Rather, the statement was admitted solely for the purpose of explaining why the officer was sent to the scene and the danger the officer thought she might face on arrival."

People v Ragsdale, 2009 NY Slip Op 9256, 68 A.D.3d 897; 889 N.Y.S.2d 681 (N.Y. App. Div. 2d Dep't 2009) – "where, as here, 'the evidence was admitted not for the truth of the statement, but to show the detectives' state of mind and to demonstrate how the police investigation evolved' [cite] there is no violation of the defendant's right of confrontation"

U.S. v. Dodds, __ F.3d __, 2009 WL 1766775 (7th Cir.(Wis.) Jun 24, 2009) – "an unidentified person driving a red Dodge pulled alongside of [Officer] Koesterling's vehicle and told him that he had seen an African American male, wearing a black jacket and a black knit cap, pointing a gun at people two blocks away at the corner of 35th and Galena. ... The witness's statement to Koesterling was not admitted for its truth--that the witness saw the man he described pointing a gun at people--but rather to explain why the police proceeded to the intersection of 35th and Galena and focused their attention on Dodds, who matched the description they had been given. This was a permissible, non-hearsay purpose."

Neal v. State, __ So.3d __, 2009 WL 1546621 (Miss. Jun 04, 2009) – "¶ 31... Detective Hodges testified that he believed the eight-month-old had been in his crib since around three o'clock p.m. because C.D. had been to the home, had heard the baby crying, and had returned to Loerker's home. ... [¶ 36] Hodges's testimony was not elicited to prove that the baby in fact had been crying that afternoon, but only to explain Investigator Hodges's decision to proceed as he did regarding the children."

People v. Robinson, __ P.3d __, 2009 WL 1331093 (Colo. App. May 14, 2009) – "Here, we agree with the trial court that the informant's statements-- referencing the drug transaction arrangements, purportedly describing the two suppliers and giving their street names, and identifying them upon arriving at the scene--were all introduced for the nonhearsay purpose of showing their effect on the listening officers, that is, to show why they chose to go to that particular location and stop, arrest, and search defendant and the car in which he was traveling. ... We recognize the danger that a jury might well misuse evidence offered to explain the background for an investigation or police actions, particularly when the substance of the statements goes precisely to the issue that the government is required to prove. In our view, however, this risk presents an issue not of hearsay, but of "legal" relevance under CRE 403, that is, whether the evidence, though relevant, would engender confusion and undue prejudice..."

State v. Turner, 2009 WL 1324212, 08-1188 (La.App. 5 Cir. May 12, 2009) (unpub) – "the statement was not offered for the truth of the matter asserted, but merely to explain the officer's actions in patrolling the area."

State v. Dietrich, 204 P.3d 748, 2009-NMCA-031 (N.M.App. Jan 08, 2009), cert. denied, 2009-NMCERT-02 (Feb. 17, 2009) – "{53} The admission of Detective Harris's statement regarding J.O. does not violate *Crawford*. In order for a statement to be testimonial under *Crawford*, it must be offered for the truth of the matter asserted--or in other words, it must be hearsay. ... {54} ... The statements of J.O. were not offered to prove that he was the victim of an attempted rape or that Defendant photographed him. Instead, they were offered to demonstrate how the investigation proceeded from one of burglary to one of sexual misconduct."

Salcedo v. Ollison, 2009 WL 1041527 (C.D. Cal. Apr 17, 2009) (unpub) (habeas) – state court concluded that "admission did not violate *Crawford* because the call was admitted only to show the reasonableness of what the police did, not for the truth of the matter." – not unreasonable application of *Crawford*

State v. Thompson, 2009 WL 1034519 (Tenn. Crim. App. Apr 17, 2009) (unpub) – "the faxed phone record arguably was not admitted to prove the truth of the matter asserted, that the calls were made, but instead to show how Sergeant Hopkins came to develop the defendant as a suspect. As such, the defendant's rights under the confrontation clause are also not implicated as it pri-marily concerns only testimonial hearsay, *see Crawford* ... and the phone record is non-testimonial, non-hearsay." – and so its admission was not plain error

State v. Busch, 2009 WL 981677 (Kan. App. Apr 10, 2009) (unpub) – dispatcher's statement to officer – "The State does not claim that any hearsay ex-ception applies. Rather, it claims this testimony was not hearsay since it was not offered to establish the truth of the matter asserted but, rather, simply to explain the officer's usual procedure in commencing a roadside investigation. In essence, the State seems to argue that this step in the investigation was part of the *res gestae*. *Res gestae* is no longer a valid independent basis for the admission of evidence." – [NOTE: One for the not-clear-on-the-concept file.]

Lewis v. State, 904 N.E.2d 290 (Ind. App. Apr 09, 2009) – "To the extent Officer Eldridge's testi-mony was admitted to explain her course of action, it was not hearsay, and therefore does not implicate *Crawford*."

State v. Dietrich, 2009-NMCA-031, __ N.M. __, __ P.3d __, 2009 WL 838127 (N.M. App. Jan 08, 2009), cert. denied, (Feb. 17, 2009) – defendant initially accused juveniles of burglary, juvenile then told investigating officer that defendant tried to rape him – juvenile refused to testify and his initial statement was introduced through officer – "The statements of J.O. were not offered to prove that he was the victim of an attempted rape or that Defendant photographed him. Instead, they were offered to demonstrate how the investigation proceeded from one of burglary to one of sexual misconduct."

U.S. v. Brown, __ F.3d __, 2009 WL 723266 (8th Cir. Mar 20, 2009) – a case involving a lawyer named Crawford and a defendant named Giles – "An out of court statement is not hearsay when offered to explain why an officer conducted an investigation in a certain way."

People v. Washington, 2009 WL 714512 (Cal. App. 1 Dist. Mar 19, 2009) (unpub) – "Although [Officer] Cruz testified that the information he obtained from Peters eventually led to defendant's arrest, that fact is not testimonial and did not disclose the content of Peters'

statements. Cruz's testimony that Peters gave the officers information did not convey a testimonial statement for purposes of the Sixth Amendment."

State v. McGee, ___ S.W.3d ___, 2009 WL 755361 (Mo. App. E.D. Mar 24, 2009) – "the use of an unavailable witness's testimonial statements for non-hearsay purposes, such as explaining a police officer's subsequent conduct, is not precluded by the Confrontation Clause."

Swinson v. Dwyer, 2009 WL 537071 (E.D. Mo. Mar 03, 2009) (unpub) (habeas) – "the state appellate court reasoned that the challenged testimony by Detective Rask was not hearsay because it was not introduced to prove the truth of the matter asserted therein, but was rather introduced to offer an explanation of why Detective Rask subsequently took Petitioner to the police station and read him his rights." – not objectively unreasonable

State v. Holland, 2009 WL 454494 (N.J. Super. A.D. Feb 25, 2009) (unpub) – "[Trooper] Burns testified merely that [witness] Bodo described the vehicle, as a result of which he put out a second BOLO. He did not recount any of the details that were conveyed to him, such as the vehicle's color. The State offered the testimony only to show that Bodo's statements were made, and that the listener, Burns, took certain action as a result."

State v. Hodges, 672 S.E.2d 724 (N.C. App. Feb 17, 2009) – "defendant argues that the evidence of Muir's consent to search the vehicle should have been suppressed because it constitutes inadmissible hearsay testimony in violation of *Crawford*... This argument is without merit. ... this evidence was used to explain why Officer Prescott believed he could conduct the search of the vehicle and proceeded to search the vehicle."

U.S. v. Holmes, 2009 WL 323246 (10th Cir. Feb 11, 2009) (unpub) – "statements that are not offered to prove the truth of the matter asserted may not be excluded under *Crawford*. ... the informant's tip was made for the limited purpose of explaining why a government agent had reason for the stop, search and seizure of Mr. Holmes, not for the purpose of establishing a fact."

People v. Chandler, ___ N.Y.S.2d ___, 2009 WL 323627 (N.Y. A.D. 2 Dept. Feb 10, 2009) – "The defendant contends that the Supreme Court erred in admitting into evidence the testimony of a police detective that the detective identified him as a suspect after engaging in a conversation with two individuals who were not called as witnesses, and undertaking further detective work. However, the contention is without merit since the testimony was not offered for its truth, but rather to explain police actions and the sequence of events leading to the defendant's arrest..."

State v. Annis, ___ P.3d ___, 2009 WL 198265 (Wash. App. Div. 3 Jan 29, 2009) – hotel maid reported to manager that she had seen meth lab in room – manager called police – "The maid's statement was not offered to prove the truth of the matter asserted. Her statement was not used to prove Mr. Annis was manufacturing methamphetamine. Her statement was used only to show the chain of events leading from her discovery to Mr. Hale's inspection to police involvement." – because it wasn't hearsay, not testimonial hearsay

People v. Martinez, 224 P.3d 1026 (Colo. App. Sep 03, 2009), cert. granted on unrelated issue 2010 Colo. LEXIS 70 (2010) – "The prosecutor said she did not intend to ask the detective what Fernandez had said, but whether the detective had received information from Fernandez that led to the inclusion of defendant in a photo lineup. ... Because the detective's limited

testimony regarding statements made by Fernandez did not include hearsay, they did not implicate defendant's right of confrontation, and we conclude the trial court did not abuse its discretion in admitting such testimony."

People v. Ervine, 47 Cal. 4th 745, 752-763, 102 Cal. Rptr. 3d 786, 220 P.3d 820 (Cal. 2009) - "Defendant's statutory and constitutional arguments presuppose that the out-of-court statements introduced through the peace officers' testimony were inadmissible hearsay, but (as demonstrated above) the jury was instructed at length that these statements were not offered for their truth. Indeed, the jury was cautioned that defendant's wife and the dispatcher were not subject to cross-examination, that "we don't know whether [what they said was] true," that their statements were "not being offered to prove that those things are true," and that their statements instead were being admitted only "to explain what the officer may have done in response to this information" ... Out-of-court statements that are not offered for their truth are not hearsay under California law ([cites]), nor do they run afoul of the confrontation clause."

Decay v. State, 289 S.W.3d 96, 2009 Ark. 566 (Ark. 2009) – "Detective Paul Shepard testified at trial that 'the investigation had led us to an individual that told us that Mr. Decay told him that he committed the murders.' Although Decay made a hearsay objection, the State argued that the information was not being used to try to prove that Decay committed the murders, but why the investigation turned to Decay. ... The circuit court correctly held that Shepard's testimony was not hearsay, as it was not offered to prove the truth of the matter asserted. Therefore, Decay's argument under the Confrontation Clause is misplaced, as the admission of testimony that is not hearsay raises no Confrontation Clause concerns."

Santiago v. McEachern, __ F.Supp.2d __, 2009 WL 1563505 (D. Mass. Jun 01, 2009) – officer testified "We had received several complaints for individuals selling narcotics..." – "It is manifest that the complaints received by the police department which Officer Barkyoub noted do not fall within this category [of testimonial statements]."

People v. Anderson, 2009 WL 1204499 (Mich. App. Apr 30, 2009) (unpub) – "A review of the challenged testimony reveals that a police officer testified regarding the role of confidential informants and search warrants in a police investigation, but the officer did not refer to any out-of-court statements. Similarly, the officer did not disclose any out-of-court statements during cross-examination by defense counsel, or when discussing the credibility of confidential informants. Thus, defendant's right of confrontation was not implicated by the challenged testimony."

U.S. v. Jiminez, 64 F.3d 1280 (11th Cir. Apr 07, 2009) – "The cross-examination was designed to impeach [Detective] Wharton's credibility and suggest that Wharton was lying about the circumstances surrounding the interviews and about Jiminez's confession. In order to rehabilitate the credibility of Detective Wharton, the prosecution sought to explain to the jury why Wharton would have been motivated to re-interview Jiminez and why Jiminez would tell Wharton on a successive occasion that he had participated in the marijuana grow operation. The prosecutor did just that; on redirect examination, he asked Wharton about his interview with Jisklif for the purpose of explaining why Wharton, after speaking with the defendant's brother, interviewed the defendant once again. Wharton testified that he had spoken to Jisklif and that Jisklif had told him that Jisklif's "brother, Jesus, was living with him and that he was helping him with the marijuana plants." Finally, the detective said "[t]hat's why we went back and interviewed [the defendant] a

second time, because, after the first time, we took him at his word, until his brother indicated otherwise, and then we went back and asked him again." Detective Wharton's statement was admitted only to show what was said, not that it was true. ... The truth of the statement is irrelevant. It is the existence of the statement, not its veracity, that provides the explanation, and thus there is no reason to think about its admissibility in Confrontation Clause terms." – not hearsay and hence not testimonial hearsay

U.S. v. Cruz-Diaz, 550 F.3d 169 (1st Cir. Dec 18, 2008) – *Crawford* not violated by admission of co-defendant's on-the-scene statement "'the money is over there in a black bag, we already threw away the weapons,' and something to the effect of, 'we're screwed, less than five minutes and they caught us.'" – "Here, the government introduced Cruz's confession to explain why the authorities cut short their investigation into the robbery, specifically, why they did not take fingerprints or DNA evidence from the red Mazda." – defense counsel opened that door

U.S. v. Barriera-Vera, 2008 WL 5216017 (11th Cir. Dec 15, 2008) (unpub) – "[Detective] Kercher testified only that he received information and instructions from his supervisor to go to Harden Boulevard. Kercher merely explained at trial why he took the actions he did and did not testify as to what information was relayed to him from the anonymous phone call." – no *Crawford* violation

Ahmed v. Wolfenbarger, 2008 WL 5188268 (E.D. Mich. Dec 09, 2008) (unpub) (habeas) – "testimony by a police officer that he learned 'something' from an informant and then acted on it does not place out-of court statements before the jury. ... Sergeant Wilson's testimony regarding the confidential informant provided only general background information and an explanation as to why the investigation proceeded as it did." – no *Crawford* violation

State v. Nabors, 267 S.W.3d 789 (Mo. App. E.D. Oct 21, 2008) – "Detective Blaskiewicz did not testify that the informants specifically identified Defendant as committing the criminal activities with which Defendant later was charged. Additionally, prior to Detective Blaskiewicz's testimony, the trial court was quick to instruct the jury that his answer to the question should be heeded as an explanation as to why the officer acted as he did, and not to establish the truth of the information that he received." – no *Crawford* violation

Damron v. Haines, 672 S.E.2d 271 (W.Va. Nov 26, 2008) – "the record indicates that this evidence was presented at trial only to show why Officer Compton believed he had probable cause to arrest the appellant. The jury was specifically instructed by the trial judge when this evidence was admitted that it could not be considered as a true identification of the appellant at the scene of the fire because Mr. Smith was not available to testify."

State v. Robertson, __ So.2d __, 2008 WL 4737181, 08-297 (La.App. 5 Cir. Oct 28, 2008) – "In the present case, there was no error in the admission of Detective Cunningham's testimony. Allen Narcisse was only mentioned at trial to show during the course of the investigation how defendant came to be a suspect and was eventually arrested for the victim's murder. The testimony was not that Allen Narcisse told Detective Cunningham that defendant committed the homicide. The testimony was simply that the detective's investigation resumed after he received a lead from Allen Narcisse."

Moses v. Payne, 543 F.3d 1090, 08 Cal. Daily Op. Serv. 12,122 (9th Cir. Sep 15, 2008), __ F.3d __, 2009 WL 213070 (9th Cir. Jan. 30, 2009) (amended) (habeas) – "[Victim] Jennifer Moses's son's out-of-court statements to Muller...were introduced at trial when the prosecutor asked Muller why she had contacted CPS. Muller explained that because Jennifer Moses's son had told her that his father had kicked his mother, Muller had a mandatory duty under state law to notify CPS. The state appellate court concluded that the government did not introduce this testimony to prove the truth of the matter asserted (whether Moses kicked Jennifer Moses), but rather to explain a separate relevant issue: why Muller contacted the CPS." – no c.c. violation

Langham v. State, __ S.W.3d __, 2008 WL 4108443 (Tex. App.-Eastland Sep 04, 2008), overruled by Langham v. State, 305 S.W.3d 568, 575-582 (Tex. Crim. App. 2010)

U.S. v. Vasquez-Torres, 289 Fed.Appx. 222 (9th Cir. Aug 15, 2008) – "It is not a violation of the Confrontation Clause for an officer to testify that he spoke to an informant where the statements of the informant are not presented to the jury to prove the truth of the matter asserted. ... The neighborhood complaints were admitted to show why the surveillance had been instituted and to rebut the defense charge that the officers were involved in a conspiracy to frame Vasquez-Torres."

Lesley v. Trombley, 2008 WL 3318734 (E.D. Mich. Aug 08, 2008) (unpub) (habeas) – "Officer Pelfrey's testimony regarding the confidential informant provided only general background information and an explanation as to why the investigation proceeded as it did. Therefore, Officer Pelfrey's testimony did not violate the Confrontation Clause..."

State v. Adams, 2008 WL 3273567 (Wash. App. Div. 1 Aug 11, 2008) (unpub) – "Adams claims he is entitled to a new trial because the trial court violated his confrontation rights by admitting, over objection, a statement Victoria Johnson made to Officer Landis explaining the presence of the luggage in Adams' car. Officer Landis said, 'She told me that she was going to move in with Richard; that was her luggage.' [that was untrue] ... Johnson's statement, although arguably testimonial because it was made to a police officer during interrogation, was not admitted to establish the truth of the matter asserted. It did not matter whether Johnson was actually moving in with Adams. Her living arrangements had no bearing or relevance to the crimes." – [NOTE: Johnson was also not a "witness against" Adams. On the contrary, she seems to have been trying to cover for him.]

Wilson v. Sirmons, 536 F.3d 1064 (10th Cir. Aug 08, 2008) (habeas) – "Detective Gary Meek informed [Sergeant Mike] Huff that Wilson was 'driving a vehicle which matched the description of the vehicle used in that homicide the previous night.' [cite] As a result, Huff stopped Wilson when he spotted him driving. Mr. Wilson claims that Huff's repetition of what Meek told him was testimonial hearsay which violated his confrontation rights. ... Huff's statement was not offered to prove the truth of the matter asserted, but instead, was offered to show Huff's motivation for stopping Mr. Wilson. Accordingly, there is no Confrontation Clause problem."

Taylor v. Renico, 2008 WL 2745129 (E.D. Mich. Jul 14, 2008) (unpub) (habeas) – "The state court of appeals concluded that Williams's testimony relaying the incident described by Griggs was not offered for a hearsay purpose[but to provide background for course of officer's investigation], and this Court has no reason to second guess that conclusion. The petitioner has not established a violation of his rights under the Confrontation Clause."

Moore v. State, 1 So.3d 871 (Miss. App. Jun 24, 2008) – "¶ 17. Moore also argues that the trial court violated his constitutional right to confront a witness against him by allowing Detective Hayman to testify that an unidentified person told him that Rudy shot Heard. Detective Hayman testified that he did not know the source's name and that the person chose to remain anonymous because he was afraid of Moore. The trial court allowed this testimony for the limited purpose of showing why the police included Ronald Moore in a photo lineup. The trial court also instructed the jury that this statement was not to be used to prove the truth of the matter asserted—that Moore shot Heard. ... the trial judge found that the unidentified declarant's statement could come in with a limiting instruction because it was not being used to prove that Moore shot Heard. ¶ 21. We agree with the trial court's holding on this issue.'

Newland v. Lape, 2008 WL 2485404 (S.D. N.Y. Jun 19, 2008) (unpub) (habeas) – "statements admitted merely to complete a narrative or explain the actions of a police officer are admissible" under confrontation clause

West v. Jones, 2008 WL 1902063, *9 (E.D.Mich. Apr 29, 2008) (unpub) (habeas) – "Although Lieutenant Morell indicated that he took Petitioner into custody based upon information from Lorenzo Green, Morell did not discuss the specific content of Green's statement and Green's statement was not actually admitted into evidence. [cite]. Furthermore, Lieutenant Morell's reference to Green's statement was not offered for the truth of the matter asserted, rather it was made to explain why Petitioner was taken into custody. ... Given such circumstances, Petitioner has not established a violation of his confrontation rights."

Chestnut v. Com., 250 S.W.3d 288 (Ky. Apr 24, 2008) – "During trial Appellant objected to the introduction of certain testimony by Officer Ebersol indicating that after the stop of Appellant in the Mt. Rainier Dr. area, a "show-up" identification was held. Additionally, Appellant objected to testimony by Detective Mellon that he took Ms. Boldrick to the scene of the stop to conduct the "show-up" identification, and that the purpose of a "show-up" is to see if a witness can identify a suspect. The officers also testified that Appellant was arrested following the "show-up." The trial judge sustained Appellant's objections to the extent that no hearsay statements of Ms. Boldrick regarding identification would be admissible. Thus, no identification testimony was presented regarding what Ms. Boldrick said about Appellant. ... The testimony was not offered to prove the truth of what Boldrick told the officers. Rather, it was offered to prove the officers' motive for arresting Appellant. In the present instance, what was not said concerning the "show-up" identification is as important as what was said. There was no hearsay testimony presented purporting to show that what Boldrick told the officers was true or untrue. The officers' testimony concerned only what they did on the night in question, not that Boldrick identified the Appellant." – [NOTE: This is a confused opinion, holding that the testimony was properly admissible as "investigative hearsay" even while acknowledging it wasn't hearsay, and then rendering entire discussion dicta by reversing on unrelated grounds.]

U.S. v. Hunt, 278 Fed.Appx. 491 (6th Cir. May 16, 2008) – "the court directed the Assistant U.S. Attorney to instruct his witness, Jennifer Clemans, to mention only that a parole officer had received a tip and that in response to that tip, officers went to defendant's house. ... Clemans testified precisely as directed." – non-testimonial (and "Defendant's argument is feckless.")

State v. Delaney, 2008 WL 1776549, 2008-Ohio-1879 (Ohio App. 9 Dist. Apr 21, 2008) (unpub) – "it is clear that Detective Barbee's statement that Delaney's name came up during the investigation was not offered for the truth of the matter asserted—that Delaney shot Vickers. Instead, Detective Barbee's statement was introduced to explain how the investigation was conducted and how the decision was made to issue a warrant for Delaney. This type of testimony is permissible under *Crawford*." – [NOTE: No analysis as to whether statement was hearsay to begin with.]

U.S. v. Goosby, 523 F.3d 632 (6th Cir. Apr 24, 2008) – "Investigative Analyst [for the IRS] Carl Gibeault explained that he received a list of tax return preparers for the region that included Goosby's business. Gibeault used a computer program that allows him to review all the returns by a given tax preparer and rank the returns by amount of refund. He then compared the ratio of adjusted gross income to the amount of deductions; a high ratio is an indicator of potential fraud. Gibeault found a high ratio for returns prepared by Goosby's business and referred the case for further investigation. ... the purpose of Gibeault's testimony was to provide background information about the investigation.... There is also no Confrontation Clause violation because Gibeault did not make statements that would be characterized as testimonial hearsay. *See Davis...*"

Wisdom v. Graham, 2008 WL 1924930, *1+ (N.D. N.Y. Apr 29, 2008) (unpub) (habeas) – "Shepard's statement was not offered for the truth of the matter (i.e. to prove that Petitioner fired shots at Shepard and her brother), but rather to explain why the police established a perimeter around the 55 Ten Broeck Street residence. In other words, the statements were not offered to prove the alleged shooting, but to explain the course of conduct by the police and provide a context for the subsequent events. [FN8] This context was relevant and necessary to explain the confrontation between the police and Petitioner, which ensued after the police established the perimeter in response to Shepard's information and which formed the basis for the weapons and reckless endangerment charges that Petitioner was ultimately convicted on."

U.S. v. Adeniyi, 2008 WL 1984256 (2nd Cir. May 06, 2008) (unpub) – "Adeniyi argues that his Sixth Amendment right to confront the witnesses against him was violated when the district court allowed an agent to testify regarding the information he received from two victims that led him to investigate Adeniyi. ... The agent's testimony about the victims' statements was properly admitted because it was not offered for the purpose of establishing the truth of the matters asserted."

State v. Munoz, 157 N.H. 143, 949 A.2d 155 (N.H. Apr 18, 2008) – "The trial court, however, ruled that this information was permissible to show why the police contacted INS, as opposed to continuing their investigation in some other way. ... Accordingly, because the information conveyed to the jury served to demonstrate the reasonableness of the police action in contacting INS, we conclude that the trial court's decision to permit the evidence on that ground was not error."

People v. Reyes, 49 A.D.3d 565, 855 N.Y.S.2d 160, 2008 N.Y. Slip Op. 01978 (N.Y. A.D. 2 Dept. Mar 04, 2008) – "the defendant's right to confront witnesses against him was not violated since the challenged statements were not admitted for their truth but to show the police detectives' state of mind and to demonstrate how the police investigation evolved"

State v. Simpson, 2008 WL 2277123 (N.J. Super. A.D. Jun 05, 2008) (unpub) – "Evidence of the existence of search warrants does not constitute testimonial hearsay which triggers Confrontation Clause scrutiny. ... the mention of a search warrant for the limited purpose of explaining forced entry into an apartment is not hearsay."

State v. Garner, 2008 WL 600247, 2008-Ohio-944 (Ohio App. 10 Dist. Mar 06, 2008) – "{¶ 23} In his second assignment of error, appellant argues that his constitutional right to confront the witnesses against him was violated when Detective Dorn testified that appellant and Emory came to be suspects based on information received from patrol officers working in the area of the shootings. ... {¶ 25} In this case, the Crawford analysis is not implicated because Detective Dorn's testimony did not include any hearsay statements." – also background statement

People v. Weary, 2008 WL 542677 (Cal. App. 3 Dist. Feb 29, 2008) (unpub) –pimping case, statements by non-testifying prostitute to undercover cop – "'The statements were not offered to prove the escorts would actually perform these specific sex acts and at the quoted price.'" [NOTE: This specifically addresses hearsay objection; the *Crawford* issue is dealt with conclusorily in the following paragraph.]

People v. Cruz, 2008 WL 467098 (Cal. App. 2 Dist. Feb 22, 2008) (unpub) – "Appellant contends that the trial court erred in admitting an out-of-court statement by a non-testifying witness that the shooter drove away from the crime scene in a red Thunderbird. ... Here, the out-of-court statement was admitted for a non-hearsay purpose, to explain the detective's decision to select appellant as a suspect." – no confrontation clause violation

People v. Hernandez-Perez, 2008 WL 161108 (Mich. App. Jan 17, 2008) (unpub) – "The challenged testimony did not violate defendant's constitutional right of confrontation. First and foremost, Rodriguez's statement to police was never admitted into evidence and the challenged testimony did not disclose the contents of that statement. Instead, the challenged testimony, which revealed that Rodriguez provided information prompting the police to apprehend defendant, was offered to explain why the police pursued defendant as a suspect. Viewing the challenged testimony in context, it is apparent that it was not introduced as substantive evidence that defendant committed the crime or to prove the truth of Rodriguez's statement, but was offered to show why the police acted as they did."

State v. Loughhead, 726 N.W.2d 859, 863-864 (N.D. 2007) – The RAP [report all poaching] tipster did not 'testify' against Loughhead for Sixth Amendment purposes. A person does not have the constitutional right to confront a mere informer who does not testify against him.

U.S. v. Howard, 2007 WL 177890, *7 (6th Cir. 2007) (unpub) – "*Crawford*, however, does not apply here. No statements made by the CI were before the jury. In other words, neither Agent Brock nor any other law enforcement personnel testified as to any testimonial statement by the CI. Rather, the testimony was simply that the officers had been given information about defendant's residence from a CI. Moreover, the testimony was merely background. Under these circumstances, defendant's confrontation right was not violated. *See Cromer*, 389 F.3d at 676."

People v. McCluskey, 2007 WL 4355430 (Mich. App. Dec 13, 2007) (unpub) – "We find that the confrontation clause is not implicated by the testimony quoted above. The quoted testimony merely asked the officer whether he received an informant's tip, what he did in response to the

tip (arrest defendant), and how he knew where to find defendant. The alleged hearsay testimony was not presented for the truth of the matter asserted (where, in fact, defendant was to be found), but for its effect on the officer (how it led him to be able to find and arrest defendant)."

U.S. v. Armstrong, 2007 WL 4386489 (4th Cir. Dec 13, 2007) (unpub) – "Armstrong challenges the testimony of an investigating officer as to what prompted the investigation of Armstrong's drug offenses. We find the testimony concerning the informant was introduced for the limited purpose of explaining the course of the police investigation and thus was not a testimonial hearsay statement to which *Crawford* applies."

State v. Tate, 653 S.E.2d 892 (N.C. App. Dec 18, 2007) – "the testimony in the instant case—i.e., the testimony concerning Corporal Pearsall's identification of 'Fats' as defendant—was not offered for the truth of the matter asserted but rather to explain subsequent actions undertaken by police officers during the course of the investigation."

State v. Toussaint, 974 So.2d 698 (La. App. 5 Cir. Dec. 11, 2007) – "Beverly's statement was not admitted into evidence, quoted in part or referred to in any way. Although the Defendant argues that, effectively, the jury did know that the identification of the Defendant as a suspect came from Beverly because there was no other way the police could have discovered it, we disagree with this argument. There are many ways the police 'develop' information, from fingerprints to community assistance. The officer's testimony that the Defendant was 'developed' as a suspect can not be logically or realistically construed to be the same as testimony that Beverly told the officer the Defendant was his accomplice. Therefore, we find, since no part of Beverly's statement was admitted into evidence, there is no confrontation violation and no error in the trial court ruling allowing the officer to testify that the Defendant was 'developed' as a suspect."

State v. O'Hara, 174 P.3d 114 (Wash. App. Div. 3 Nov 29, 2007) – "¶ 19 A police officer's testimony concerning his investigation does not necessarily introduce hearsay simply because the officer testifies he spoke with witnesses. [cite] An officer may appropriately describe the context and background of a criminal investigation, so long as the testimony does not incorporate out-of-court statements."

People v. Peoples, 377 Ill.App.3d 978, 880 N.E.2d 598, 316 Ill.Dec. 862 (Ill. App. 1 Dist. Nov 30, 2007) – "Detective Halloran testified that he spoke with White after White's arrest. Detective Halloran testified that he then searched a police computer database for a person named Chris who had lived or had been arrested in the area of the Campbell shooting. The detective then testified that his computer search revealed a 'Christopher Peoples who lived at 5026 South Union, which is only a few blocks from the incident.' Detective Halloran testified that he placed a photo of defendant in a photo array that was shown to Powers and that she identified defendant as the person who shot Campbell. ... Detective Halloran's testimony did not indicate that White had identified defendant in the shooting; rather, it established that White implicated someone who fit specific criteria that likewise applied to defendant and that from those criteria, police narrowed their investigation and eventually focused on defendant. ... Because Detective Halloran's testimony was not offered for its truth, but rather to show the course of the police investigation that led to defendant's arrest, the evidence in question was not hearsay and did not violate *Crawford*."

State v. Araujo, 285 Kan. 214, 169 P.3d 1123 (Kan. Nov 02, 2007) – "We do not reach the issue of whether statements made to officers receiving and responding to a 911 call are testimonial however, because, in this case, the trial court admitted the statements for the limited nonhearsay purpose of explaining the officers' actions of approaching the defendant, who was believed to be the suspect in the assault reported by the 911 caller. This interaction led to the discovery of drugs and to Araujo's arrest and conviction on drug charges. Because the out-of-court statements of the 911 caller were not admitted for the truth of the matter asserted and were not hearsay, Araujo's right of confrontation is not implicated. ... As this analysis indicates, the rationale of the conclusion that the Confrontation Clause is not implicated when evidence is not offered for the truth of the matter asserted is that the declarant is not a 'witness' against the accused."

U.S. v. Gibbs, 506 F.3d 479 (6th Cir. Oct 29, 2007) – "Gibbs also claims that the district court erred in admitting an out-of-court statement by Frank Kuzyk, a fellow parolee, through the testimony of Agent Cole. Cole testified that Kuzyk told him that Gibbs had some long guns hidden in his basement bedroom. This statement, Gibbs contends, was improperly admitted hearsay in violation of the Confrontation Clause of the Sixth Amendment. ... The government does not contest the fact that Kuzyk's statement, made to his parole agent, was testimonial in nature. ... The government contends, and we agree, that Kuzyk's statement was not hearsay, but instead testimony offered simply as background evidence. ... Cole offered this testimony solely as background evidence to show why Gibbs's bedroom was searched. Whether Gibbs had long guns, shotguns, or rifles in his bedroom was not offered for its truth, because the testimony did not bear on Gibbs's alleged possession of the .380 Llama pistol with which he was charged." [NOTE: Would it have been different if the fellow parolee's information was more accurate?]

Schultz v. State, 169 P.3d 81, 2007 WY 162 (Wyo. Oct 17, 2007) – road rage shooting – "Ms. Peterson's [victim] testimony [describing instructions received from 911 operator] was not offered to prove the truth of the matter asserted. It was offered to explain the Petersons' subsequent conduct in stopping to meet with the police. It was not hearsay, and the trial court had a legitimate basis for ruling it admissible. ... Even a cursory reading of *Crawford* reveals that it does not apply to testimony offered 'for purposes other than establishing the truth of the matter asserted.' 541 U.S. at 59 n. 9".

People v. Chambers, 277 Mich.App. 1, 742 N.W.2d 610 (Mich. App. Oct 09, 2007) – particularly brutal ATM robbery – "Police were able to obtain three still photographs from the video surveillance tape, and they were aired on local television stations. An FBI agent later contacted the detective working the case and told him that one of the agent's informants recognized and identified defendant from the photographs. On the basis of that information, a police surveillance team monitored defendant's home, and he was arrested after driving up to the house. ... [A] statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause. ... Specifically, a statement offered to show why police officers acted as they did is not hearsay. ... The testimony was not offered to establish the truth of the informant's tip. Rather, it was offered to establish and explain why the detective organized a surveillance of defendant's home and how defendant came to be arrested. Because the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted, the testimony did not violate defendant's right of confrontation."

U.S. v. Sales, 2007 WL 2618365 (6th Cir. Sep 06, 2007) (unpub) – no *Crawford* problem when CI's statements were not put before the jury – to extent the officer's testimony allowed the jury to infer what CI had said, that information was provided by way of background and not for the truth

U.S. v. Mitchell, 502 F.3d 931 (9th Cir. 2007) – "Testimony by a patrol officer about information an eyewitnesses gave her about the car parked at the Trading Post was offered as a basis for action, not for its truth."

State v. Wiggins, 648 S.E.2d 865 (N.C. App. 2007) – "[W]e find no error in the admission of Deputy Duprey's testimony referencing the statements of the informant. The State specifically noted that the statements were not offered for their truth. Rather, the statements were offered to explain how the investigation of Defendants unfolded, why Defendants were under surveillance at the Quality Inn, and why Deputy Duprey followed the vehicle to the Quality Inn. We further note that, as requested by *Cartwright*, the trial court gave the jury a limiting instruction pertaining to confidential informants."

People v. Varnado, 2007 WL 3025083 (Cal. App. 2 Dist. Oct 17, 2007) (unpub) – "But even if the interviewees had provided inculpatory eyewitness identifications, [Detective] Cochran's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. Rather, it was offered for the non-hearsay purpose of explaining why Cochran included defendants' photographs in the lineups he showed Blackwell. Immediately prior to the portion of Cochran's direct examination cited by Bryan, the prosecutor had asked, "As part of your investigation, did you put a picture [of each defendant] in a six-pack?" It was after Cochran answered yes that the prosecutor asked him to explain how photo arrays were assembled. Cochran's subsequent testimony on redirect examination was not offered to prove that whatever information the interviewees had given him was true; it was offered to explain why he decided to include the defendants pictures. Hence, the defense objection was properly denied. [FN3]" – footnote 3 holds that, therefore, the confrontation clause was not violated

State v. Johnson, 2007 WL 2990297 (N.C. App. Oct 16, 2007) (unpub) – "In his next assignment of error, defendant argues that the statements from a confidential informant included in Detective Driggers's testimony ... were testimonial and their admission violated his right to confront the witnesses against him. ... [I]f this Court determines that the testimony was used to explain the officer's conduct, then any hearsay would not be in violation of the Confrontation Clause. ... The issue before this Court is whether this exchange went beyond describing the investigation. As to where the officer was looking for defendant, those statements were admissible, not for the truth of the matter asserted, but for purposes of explaining why Detective Driggers observed the area at 1015 or 1017 Franklin Street. ... Moreover, Detective Driggers did not relate any statement made by the informant in terms of where defendant could be found; rather, he merely testified about what he did next. We thus find no error, much less plain error, in the admission of the testimony relating to defendant's whereabouts." – however, testimony that defendant's nickname was "Smoke" may have crossed the line, but was harmless

State v. Miller, 2007 WL 2990531 (N.C. App. Oct 16, 2007) (unpub) – "Contrary to defendant's contention, however, none of these statements constitute hearsay, a threshold condition for a *Crawford* and Confrontation Clause analysis. ... One example of admissible nonhearsay is '[a] statement which explains a person's subsequent conduct,'" and statements by CI to narcotics officer fit that bill.

State v. Barney, 185 P.3d 277 (Kan. App. Oct 05, 2007)– "Barney also asserts [Officer] Trimble's testimony regarding the police dispatch statement violated his rights under the Confrontation Clause ... Trimble's testimony regarding the police dispatch statement was not offered to prove the truth of the matter asserted, and therefore did not violate Barney's rights under the Confrontation Clause." [NOTE: This opinion was initially unpublished.]

People v. Williams, 2007 WL 2819528 (Cal. App. 1 Dist. Sep 28, 2007) (unpub) – "After Officer Brackett first testified on direct regarding the text message he had received on his pager, the trial court told the jury that the evidence was only offered for a limited purpose: 'In this case— it will be true a couple of times in this case that evidence is going to be offered for a limited purpose. The evidence of why the officers were dispatched to [the location] is offered only to explain their actions and as it relates to the lawfulness of any detention. It is not offered for the truth of the matter asserted.' ... Because the challenged testimony was admitted for nonhearsay purposes, we do not address appellant's *Crawford* arguments."

State v. Matthews, 2007 WL 2745211, 2007-Ohio-4881 (Ohio App. 1 Dist. Sep 21, 2007) (unpub) – "{¶ 11} In this case, the hearsay statements were not admitted for their truth, but to show why the police officers had obtained and executed a search warrant for that particular address. ... {¶ 12} Here, whether informants had told the police that Matthews and Hart were involved in prior drug activity at the apartment did not go to the heart of the state's case. No matter what the informants had said, the basis of Matthews's convictions was that police officers had caught him with a baggie of crack cocaine during the execution of a valid search warrant. Consequently, the introduction of the hearsay statements into evidence did not violate the Confrontation Clause." – [NOTE: This analysis seems to merge the non-hearsay and harmless error questions. See the different conclusion reached in case of co-defendant, *State v. Hart*, below.]

In re Alex R., 2007 WL 2505745 (Cal. App. 5 Dist. Sep 06, 2007) (unpub) – "In eliciting the statements at issue the prosecutor did not introduce them for their truth. Instead the prosecutor offered them only to explain the conduct of Deputy Mallet and Captain Grizzard. Absent evidence to the contrary we presume that that is all the court considered them for."

State v. Craft, 2007 WL 2296456, *6+, 2007-Ohio-4116, 4116+ (Ohio App. 12 Dist. Aug 13, 2007) (unpub) – cold-case squad conviction for 1974 murder – bench trial – "The state questioned Detective Smith regarding the memorandum, at which point appellant's trial counsel objected to the admission of the document on the basis of hearsay. The state, however, advised that the document was not being offered for the truth of its contents, but rather, to demonstrate the investigative activities undertaken by Detective Smith after reading the document. ... Although the trial court did not state a rationale for overruling appellant's objection at the close of the state's case-in-chief, our review of the record indicates the trial court admitted the document for the purpose of explaining Detective Smith's investigative activities. ... As stated, a statement offered for the purpose of explaining an officer's subsequent investigative activities does not constitute hearsay, and is properly admissible." [NOTE: *Crawford* is cited but not separately analyzed.]

State v. McKinney, 2007 WL 2297111 (Wash. App. Div. 1 Aug 13, 2007) (unpub) – "McKinney argues her right to confrontation was violated when the court admitted Officer

Williams's testimony that the Welcome Motor Inn manager asked him to investigate McKinney's 'suspicious activity.' We disagree. A statement 'offered to show why an officer conducted an investigation is not hearsay' and does not violate the right to confrontation. *State v. Iverson*, 126 Wn.App. 329, 337, 108 P.3d 799 (2005)."

U.S. v. Moore, 2007 WL 1991060 (6th Cir. Jul 05, 2007) (unpub) – "Ocegueda argues that one officer's testimony about actions he took in response to the tip of a confidential informant was inadmissible and violated his Confrontation Clause rights. Not true. The statements of the confidential informant were never admitted into evidence. And even if the jury could infer what the confidential informant said from the officer's actions, the inferred statement was not admitted for the truth of the matter asserted but for showing the officer's actions in response to the tip."

U.S. v. Loving, 2007 WL 1977747 (4th Cir. Jul 05, 2007) (unpub) – "We find that the testimony concerning the confidential informant was introduced for the limited purpose of explaining the course of the investigation and thus was not a testimonial hearsay statement to which Crawford applies."

Maxwell v. U.S., 2007 WL 1847182, *3 (E.D. Mo. Jun 25, 2007) (unpub) – (§ 2255 case) "[T]heir statements were not hearsay. They were offered to show what the officers did in their investigation, not for the truth of the matter asserted."

Jennings v. State, 285 Ga.App. 774, 648 S.E.2d 105, 07 FCDR 1929 (Ga. App. 2007), cert. denied (Sept. 10, 2007) – "Here, neither witness actually repeated any alleged hearsay regarding Jennings as the perpetrator. Instead, Jones and the detective simply testified that Jones provided Jennings's name to the authorities. Thus, the evidence 'did not create a credibility problem that could only be cured by cross-examination of the [witness].' As the trial court explained in its ruling, the State did not offer the evidence to establish the truth of the matter; rather, it was offered for the limited purpose of explaining why the police included Jennings's photograph in the line-up. The Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' Under these circumstances, the trial court did not violate Jennings's right to confront and cross-examine a witness by admitting the testimony of Jones and the detective." (footnotes omitted)

People v. Dean, 41 A.D.3d 495, 837 N.Y.S.2d 714, 2007 N.Y. Slip Op. 04845 (N.Y.A.D. 2 Dept. 2007) – "The defendant's Sixth Amendment right to confront witnesses against him was not violated, since the challenged statements were not admitted for their truth, but to demonstrate how the police investigation evolved, in other words, why the undercover detective focused on the defendant and initiated contact with him." (citations omitted)

People v. Suastegui, 374 Ill.App.3d 635, 871 N.E.2d 145, 312 Ill.Dec. 745 (Ill. App. 1 Dist. 2007) – "[T]he statement that Montanez corroborated Salgado's testimony was not testimonial; rather, it showed the course of conduct that officers took to investigate the shooting. The statement was not offered to prove any issue, but was responsive to defendant's questions about how the police investigation proceeded. We disagree with defendant's contention that the statement violated his sixth amendment rights to be confronted by the witnesses against him."

Smith v. Commonwealth, 2007 WL 1536860 (Ky. May 24, 2007) (unpub) – "Attorney Marcia Smith represented Rigglesman in his divorce and custody actions. Because the Commonwealth

argued that Appellant killed Riggleman as a result of the contentious divorce, Smith was called to testify regarding those proceedings and to establish that Appellant and Denise Smith had access to Riggleman's work schedule. ... [I]t is very clear that the essence of the ruling was that Smith's testimony was not, in fact, hearsay because the statements were not offered for their truth. Rather, any statements by Riggleman were provided simply to explain why Smith took certain action in the case."

State v. Irizzary, 2007 WL 1574308 (N.J. Super. A.D. Jun 01, 2007) (per curiam) (unpub) –

"Next, we turn to defendant's argument that the court erred by permitting Detective Avila to twice testify concerning 'information received.' ... First, in response to a question from the prosecutor, Avila, the State's only witness, testified that 'based on information received ... [he] respond[ed] to a certain location in Paterson.' Second, when asked why he suspected that an object discarded by defendant was a controlled dangerous substance, he replied that he based his opinion 'first of all, [on] the information [he had] received.' ... Both the Confrontation Clause and the hearsay rules are violated where, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant incriminating the defendant. *Id.* at 350, 351, 353. The phrase 'based on information received' may be used by police officers to explain their actions, but only if necessary to rebut a suggestion that they acted arbitrarily and only if use of the phrase does not create an inference that the defendant has been implicated in a crime by some unknown person. ... It is permissible, however, for a police officer to state that he went to a location based on information received. ... Here, the first statement challenged, which pertained to the reasons the officers went to the particular location where they observed defendant, falls within this category, and consequently, does not offend the Confrontation Clause." – but second statement had too much detail

Buenos Ruiz v. Fischer, 2007 WL 1395462, *3+ (E.D. N.Y. May 10, 2007) (unpub) – habeas –

"At trial, over objection, Detective Marcos Martinez ('Detective Martinez') testified that he recovered the blue Jeep, ran a license plate check on the vehicle, and learned that it was registered in Newark, New Jersey. (*Id.* at 282-83.) He went to the address, had a conversation with Eric Balenzuela ('Balenzuela'), and obtained a photograph of Petitioner from him. (*Id.*) ... Here, the evidence was admitted to explain how the investigation of the Petitioner progressed and to explain the lapse of time between the commission of the crime and the apprehension of Petitioner. Any prejudice resulting from an implication that Balenzuela had inculcated Petitioner by giving Detective Martinez a photograph of Petitioner was minimal, if at all. The Appellate Division properly found, therefore, that Detective Martinez's testimony did not violate the Confrontation Clause." (transcript citations omitted) [NOTE: It is also difficult to see how Balenzuela could be considered a "witness against" the defendant, and not clear whether any actual hearsay was admitted.]

People v. Bundrage, 2007 WL 1203547, *3 (Mich. App. April 24, 2007) (unpub) – "In this case, portions of Greenhill's recorded statements were admitted even though Greenhill had given them in response to structured police questioning after he was in custody and had received *Miranda* warnings, and although Bundrage never had an opportunity to cross-examine Greenhill on those statements. Nonetheless, except for an identification of Bundrage, nothing from Greenhill's statements was discussed, and it is clear that testimony that Bundrage was discussed in Greenhill's first statement and identified in Greenhill's second statement was offered only for the purpose of showing why the police interviewed Bundrage. Because the statements were not offered for the truth of the matter asserted, it was not plain error to admit them."

People v. Deese, 2007 WL 927926, *7-8 (Cal. App. 1 Dist. 2007) (unpub) – "In-house conversations among police officers regarding the state of their information about a person who might be dealing drugs but as to whom there was no known completed drug transaction are not testimonial statements. They are not the kinds of statements that would reasonably be expected to be available for later use at trial. As the trial court explained to the jury, these statements were not given for their truth but as background related to police investigation procedures. Furthermore, these officers were witnesses and subject to cross-examination."

State v. Leyva, 640 S.E.2d 394 (N.C. App. 2007) – "However, defendant incorrectly categorizes the evidence as testimonial. Here, the evidence was introduced to explain the officers' presence at Salsa's Restaurant that night, not for the truth of the matter asserted." – other evidence offered to rebut claim of entrapment "was introduced to explain Detective Briggs' presence outside of defendant's apartment rather than the truth of the matter asserted"

U.S. v. Kone, 2007 U.S. App. LEXIS 2530, 2007 WL 419281, *1 (2d Cir. 2007) (unpub) – "Any out-of-court statements made by the CI and admitted at trial through the case agent's testimony were not offered for the truth of the matter asserted, but rather as background evidence. 'Background evidence may be admitted to ... furnish an explanation of the understanding or intent with which certain acts were performed,' and here it was admitted to explain how the investigation of the three defendants began. *United States v. Reifler*, 446 F.3d 65, 92 (2d Cir.2006) (internal quotation marks omitted) (omission in original)."

U.S. v. Valdes-Fiallo, 213 Fed.Appx. 957, 2007 WL 106791, *3 (11th Cir. 2007) – non-witness's side of recorded conversation with co-defendant – "Here, Brito's statements are not hearsay because they were not used to prove the truth of the matter asserted, but rather, merely to provide context, and thus, do not run afoul of the Confrontation Clause."

U.S. v. Kone, 2007 U.S. App. LEXIS 2530, 2007 WL 419281, *1 (2d Cir. 2007) (unpub) – "Defendant raised two challenges to evidentiary rulings of the district court: statements allegedly made by a confidential informant (CI) and admitted into evidence through the testimony of a case agent violated defendant's rights under the Confrontation Clause; and the admission of defendant's own statements made after his arrest to his two co-defendants. Any out-of-court statements made by the CI and admitted at trial through the case agent's testimony were not offered for the truth of the matter asserted, but rather as background evidence. Further, most of the testimony of which defendant complained either did not include an out-of-court statement made by the CI to the case agent or never actually occurred. The post-arrest statements, when offered against defendant, were not within the definition of hearsay, and contrary to defendant's argument were not excludable as hearsay. Defendant did not allege that he ever made a request to the district court that two witnesses be sequestered, nor did he show that the district court issued such an order of its own accord. As a result, there was no error under Fed. R. Evid. 615. The government consented to a remand for resentencing."

U.S. v. Tseng, 2007 WL 3237520, *4 (S.D. Cal. Oct 30, 2007) (unpub) – fake kidnapping scheme – "The Court allowed this testimony solely for the non-hearsay purpose of providing the jury with the context of the Venezuelan agents' decision to alter their kidnapping investigation of the Defendant from one of victim to one of possible perpetrator. ... The Sixth Amendment does

not bar out-of-court statements when the statement is not offered to prove the truth of the matter asserted; thus, the Sixth Amendment poses no bar to the admission of non-hearsay statements."

State v. Keith, 2007-Ohio-4632, 2007 WL 2579619, (Ohio App. 3 Dist. Sep 10, 2007) (unpub) – "[¶ 58] Upon our review of the record, we find that the trial court did not abuse its discretion in allowing Detective Marik's testimony that he received information from Keith's mother and sister identifying Keith in the videotape. First, the trial court limited Detective Marik's testimony to not include what Keith's mother and sister actually said. Second, Detective Marik's testimony was used to explain his course of action in the investigation after being questioned about it during cross-examination." [NOTE: While the holding is phrased in state-law evidentiary terms, the defendant argued *Crawford*.]

People v. Salido, 2007 WL 2325810 (Cal. App. 2 Dist. Aug 16, 2007) (unpub) – "Leaving the scene of the final robbery, Salido and Jimenez crashed and abandoned Jimenez' car. [¶] After the robberies, Salido and Jimenez met and agreed on an alibi. They would tell detectives that Jimenez' car had been stolen while they were together. [Jimenez did so.] ... Jimenez' statement was offered only to explain why officers contacted Salido on January 5, as a witness to a reported theft. It was not offered to prove the truth of the matter asserted, that Jimenez' car was actually stolen while he was with Salido. The court gave a limiting instruction." – no confrontation clause violation

Akrawi v. Booker, 2007 WL 1975044 (E.D. Mich. Jun 30, 2007) (unpub) – (habeas) "Here, all that was said was that Petitioner and other people were known to federal officials through informants. The informants' actual comments about Petitioner were not repeated, nor offered for the truth of the matter. The agent's comment was mere background information about the investigation. Thus, the remark was not hearsay and did not violate Petitioner's rights under the Confrontation Clause."

People v. Sapp, 2007 WL 1822420, *11 (Cal. App. 4 Dist. Jun 26, 2007) (unpub) – "The record shows that Detective Shumway did not testify to how Lopez described his attackers. Instead, Detective Shumway was only asked whether Lopez was able to describe to police his attackers' heights, builds, ages, ethnicities, clothing, and facial hair. Detective Shumway answered 'yes' to these questions, without revealing Lopez's out-of-court statements describing his attackers. ... Detective Shumway's testimony was not hearsay and did not otherwise violate defendant's right to confrontation."

State v. Athan, 158 P.3d 27 (Wash. 2007) – officer testified that as a result of information received from non-testifying witness, he asked defendant certain questions – "We find no violation of Athan's Sixth Amendment rights during this exchange. The content of James' statement was not revealed to the jury during this exchange so arguably, the testimony does not even qualify as hearsay. The reference to James' statement was made in passing as an explanation of why Detective Wollack was questioning Athan. *See Cromer*, 389 F.3d at 675-76. We agree with the *Cromer* court's holding that testimony which does not disclose the content of hearsay and is referenced only to provide context or background to the testimony is not a *Crawford* violation."

City of Shoreline v. Stover, 2007 WL 1666748 (Wash. App. Div. 1 Jun 11, 2007) (unpub) – "A person McRae [hit-and-run accident victim] could identify only as a man from Alaska gave

her the SUV's description and license number. ... We next turn to Stover's claim that the trial court violated his right of confrontation by admitting testimonial hearsay from the "man from Alaska" and the police dispatcher about the SUV and its license plate information. ... [C]ontrary to Stover's argument, the trial court did not admit the challenged statements for the truth of the matter asserted. ... [T]he trial court clearly did not rely on those statements in reaching its substantive determination of guilt. Because the statements were not considered for the truth of their assertions, *Crawford* was not implicated."

State v. Greene, 2007 WL 1223906 (N.J. Super. A.D. 2007) (unpub) – "When defendant objected to Officer Roseman's hearsay testimony, the trial judge held that the declarant's statement was being offered as evidence of 'information received' by the officer and not for the truth of its content. The judge thus determined that the testimony did not meet the definition of hearsay. Although it may be true that this limitation on the evidence was what the prosecutor originally intended when eliciting the testimony in question, the prosecutor's summation expanded its use. [¶] The summation included an argument that there was a consistency between Heiman's testimony as to what he told the 9-1-1 operator about the robber's description and Officer Roseman's testimony as to what he was told by the police dispatcher about the appearance of the robber. Clearly, then, the State ultimately utilized Officer Roseman's testimony about what he was told by the dispatcher to prove the truth of what Heiman told the 9-1-1 operator. And so, even if it is assumed that the judge was correct in limiting the use of Officer Roseman's testimony in a way that rendered it admissible, the prosecution mistakenly expanded that license by urging the jury to rely upon the substance of the dispatcher's statement to prove the truth and accuracy of the description of the robber given by Heiman at trial." [Note: This seems confused. It was hearsay-within-hearsay, but only the original declarant's (Heiman's) words were offered for the truth, and he testified.]

State v. Lewis, 2007 WL 936571, *7 (Ohio App. 1 Dist. 2007) (unpub) – "Ohio and federal courts have permitted the introduction of testimonial statements not subjected to prior confrontation where the testimony merely provided background information or a context for the investigation,^{FN42} explained a detective's conduct while investigating a crime,^{FN43} gave meaning to the otherwise admissible responses of the defendants,^{FN44} or served solely to impeach a witness.^{FN45} In many of these instances, in ruling on a contemporaneous objection to the admission of the out-of-court statements, the trial court informed the jury that the statements were not being offered for the truth of the matter asserted and instructed the jury on the constitutionally permissible use of the statements." - [the footnotes include citations to other cases – in this particular case, the evidence was offered for truth but its admission was not plain error]

State v. Carpenter, 2006 Ohio 4296 (Ohio Ct. App. 2006) – An anonymous tip regarding a drug transaction was a non-testimonial statement when testified to by a police officer to show what action he took.

Edwards v. State, 2006 Mo. LEXIS 111 (Mo. 2006) – Statements that are admitted at trial not for the truth, but to show what action the police took, are not hearsay and do not implicate *Crawford*. Here, a statement from an unavailable witness, who informed the police where the murder weapon was, was not testimonial.

Merrell v. Workman, 2006 U.S. Dist. LEXIS 14404 (W.D. Okla. 2006) – “the officer's testimony concerning the dispatch he overheard relating the caller's statements does not implicate the "specific type of out-of-court statement" targeted by the Confrontation Clause.”

Ford v. State, 2005 Tex. App. LEXIS 8848 (Tex. App. Houston 14th Dist. 2005) – “An undercover narcotics officer arranged a controlled buy of narcotics by a confidential informant. The officer and the informant went to an apartment complex where the informant purchased a cigarette dipped in phencyclidine. While the informant was in the apartment, the officer watched from the parking lot. Based on the controlled buy, the officer later obtained a search warrant for the apartment. Officers found defendant and another individual in the apartment, as well as a bottle of PCP and a handgun. The court held that, while defendant was denied the opportunity to cross-examine the confidential informant, no testimonial statements provided by the confidential informant were ever introduced into evidence.”

Commonwealth v. Dargon, 2006 PA Super 74, 2006 Pa. Super. LEXIS 301 (Pa. Super. Ct. 2006) – “A detective testified about statements that a non-testifying CI made about the inmate's appearance, residence, and vehicle, and the CI's ability to buy narcotics from him. Based on this information, the CI then made a controlled buy of heroin, which led to the inmate's arrest. The trial court admitted this testimony and instructed the jury not to consider the truthfulness of the CI's statements, since they were offered solely to show the detectives' course of conduct. The court held that the inmate was not entitled to a new trial under Crawford because the detective was subject to extensive cross-examination regarding the CI and his purported statements, which were admitted into evidence for a limited purpose. Moreover, any alleged error was harmless due to other, untainted evidence that established the inmate's guilt beyond a reasonable doubt.” This was upheld on appeal to the Pennsylvania Superior Court.

United States v. Jimenez, 419 F.3d 34, 44 (1st Cir. Mass. 2005) – “The challenged statements were properly admissible, not for their truth, but to provide context to ... (2) the investigatory steps pursued by Burns and Ortiz.”

Vallien v. State, 2005 Ark. App. LEXIS 768 (Ark. Ct. App. 2005) – An officer can testify, utilizing hearsay statements, to show why he did something and this does not violate the confrontation clause.

State v. Rogers, 2005 Ohio 4958 (Ohio Ct. App. 2005) – An officer can testify to information told him by a witness at the crime scene regarding the whereabouts of a weapon because this shows what action the officer took and is not for the truth.

State v. McClanahan, 2005 Ohio 2975 (Ohio Ct. App. 2005) – “Further, the trial court did not violate defendant's constitutional right to confront witnesses against him. The unidentified declarant's statement at the scene of the shooting was not "testimonial" as it was not introduced to prove that defendant had repeatedly fired guns in his backyard. The evidence was offered to explain why the police officers directed their investigation toward defendant's residence.”

Dednam v. State, 360 Ark. 240, 200 S.W.3d 875 (2005) – “The State argued that defendant's motive for killing the victim was to silence him for the benefit of defendant's cousin, who had allegedly robbed the victim some months earlier. Defendant claimed that the admission of a detective's testimony about statements made by the victim implicating defendant's cousin in the

robbery violated defendant's Sixth Amendment right to confront and cross-examine a witness against him as well as his due process rights under the United States and Arkansas Constitutions. However, the Sixth Amendment demanded unavailability and a prior opportunity for cross-examination where testimonial evidence was at issue, and where a statement was admitted for a legitimate, non-hearsay purposes, the non-hearsay aspect raised no confrontation-clause concerns. Because the victim's statements to the detective were presented to establish the basis for the detective's actions in obtaining an arrest warrant for defendant's cousin rather than the truth of the victim's statements, they did not constitute hearsay under Ark. R. Evid. 801(c) (2004), cross-examination was not required to test their veracity, and they were not barred by the Confrontation Clause."

People v. Ruis, 11 AD 3d 212; 782 NYS 2d 257 (NY App Div 2d Dept 2004) – "Here, the investigating officer was permitted to testify that after speaking with an eyewitness who did not testify at trial and obtaining from the eyewitness a photograph of the defendant, the officer investigated further and the defendant subsequently was apprehended in Costa Rica. This testimony was properly admitted for the purpose of explaining the sequence of events leading to the defendant's apprehension" No *Crawford* violation.

United States v. Eberhart, 388 F.3d 1043 (7th Cir Ill 2004) – Hearsay statements, not offered for the truth of matter asserted, but rather to prove why an investigation occurred, does not violate *Crawford*.

State v. McCall, 2008 WL 5331730 (N.J. Super. A.D. Dec 23, 2008) (unpub) – "The detective did not testify that Luma implicated defendant in the mini-mart robbery. His testimony did not reveal the substantive content of Luma's statement; nor did the State's line of questioning attempt to elicit such content. Rather, the detective merely testified that he took a statement from Luma, and then afterward, he spoke to defendant." – impliedly, no *Crawford* violation

Context Statements

(see also the preceding and following categories; and pt. 2, Pretext Phone Calls, Surreptitious Recordings; and pt. 4, Statements Quoted by Detective or Prosecutor)

Mack v. State, 23 N.E.3d 742 (Ind. Ct. App. Dec. 18, 2014) – C.I.'s side of recorded conversation non-hearsay, because not offered for the truth – "As such, Mack's Sixth Amendment right to confront Stewart was not implicated by these statements."

United States v. Sitzmann, __ F.Supp.3d __, 2014 WL 6461834 (D. D.C. Nov. 18, 2014) – "Terrence Colligan was a government informant at the time of the recordings, as the jury was made well aware—he was the one who recorded the conversations at the behest of federal agents. His words obviously had to be played for the jury in order for co-conspirator George Jones' responses to make any sense. ... Colligan's statements were not relied upon by the government for the truth of the matters asserted therein; the calls were admitted for what Mr. Jones had to say, not for what Mr. Colligan had to say."

State v. Owens, 151 So. 3d 86, 87-89 (La. Ct. App. 2014) – prison phone calls – "in addition to being non-testimonial, the recorded telephone conversations do not constitute hearsay as they

were not offered to prove the truth of the matter asserted. La.C.Cr.P. art. 801(C). Rather, the statements of the persons other than defendant were offered to provide a context for defendant's portion of the conversation."

U.S. v. Liriano, 761 F.3d 131 (1st Cir. 2014) – "Liriano argues that two statements introduced to the jury violated his Confrontation Clause rights. The jury heard an audio recording of Agent Charles instructing Robert to use the word "candy" during his second call to Liriano, and of Robert subsequently using the term when speaking to Liriano." – neither testified – "Here, the question posed by Robert to Liriano—'Are you supposed to see a guy today? To get some candy?'—... provided context for Liriano's response. ... Accordingly, there was no error in admitting this statement."

U.S. v. Mouallem, 566 Fed.Appx. 82 (2d Cir. 2014) – "Mouallem next argues that Exhibit 56—a recording of a meeting that Mouallem had with cooperating witnesses—was admitted without sufficient foundation and in violation of his Sixth Amendment right to confront witnesses testifying against him. We disagree. ... Mouallem has failed to identify any recorded statements of the cooperating witnesses in Exhibit 56 that were offered for the truth of the matter asserted, rather than as context for his own recorded statements."

State v. Lambert, 232 W.Va. 104, 750 S.E.2d 657, 660-62 (W. Va. 2013) – "we hold that where the out-of-court statements of a non-testifying individual are introduced into evidence solely to provide foundation or context for understanding a defendant's responses to those statements, the statements are offered for a non-hearsay purpose and the introduction of the evidence does not violate the defendant's rights under *Crawford*..."

People v. Maciel, 57 Cal.4th 482, 160 Cal.Rptr.3d 305, 304 P.3d 983, 1016-18 (Cal. 2013) – "Moreover, contrary to defendant's assertion, the officers' statements that defendant had 'set ... up' the murders in this case were not "inadmissible hearsay." Rather, they served the nonhearsay purpose of giving context to defendant's responses. ... The statements were not hearsay and therefore not testimonial."

U.S. v. Wright, 722 F.3d 1064, 1065-68 (7th Cir. 2013) – conversation between defendant and wired CI – "the [CI's] statements—which were mostly confirmatory inquiries—were simply used to provide necessary context for Wright's own admissions, and using such statements to provide context in this way does not violate the Confrontation Clause."

United States v. Foster, 701 F.3d 1142 (7th Cir. Ill. 2012) – "The admission of recorded conversations between informants and defendants is permissible where an informant's statements provide context for the defendant's own admissions. '[S]tatements providing context for other admissible statements are not hearsay because they are not offered for their truth.' ... Because the statements were admitted only to provide context, *Crawford* does not require confrontation."

United States v. Vallone, 698 F.3d 416 (7th Cir. Ill. 2012) – "The letter from Ring to Sodaro was among the documents recovered from Cover's office. Pogue's testimony about what the letter said was not offered for its truth but rather to establish context for later testimony concerning backdated trust documents that Aegis personnel prepared for Ring." – no *Crawford* problem – [NOTE: The letter was between private parties and non-testimonial anyway.]

People v. Riccardi, 54 Cal. 4th 758, 801-802, 281 P.3d 1, 144 Cal. Rptr.3d 84 (Cal. 2012) – "As to Detective Purcell's statements, although he did not appear as a witness at trial and was not subject to defense cross-examination, the trial court clearly instructed the jury not to consider his statements, but instead to consider only those of Young. ... Here, Detective Purcell's statements were admitted for the nonhearsay purpose of giving context to Young's answers. Defendant's confrontation and due process claims, therefore, fail on the merits."

Christian v. State, 276 P.3d 479, 480-484 (Alaska Ct. App. 2012) – "On appeal, Christian argues that his right of confrontation was violated when the State introduced the content of Christian's telephone calls to Greenlee from jail. Christian points out that Greenlee did not testify at trial, and thus Christian never had an opportunity to confront Greenlee about the statements he made during these conversations. ... Greenlee's side of those conversations was offered for the non-hearsay purpose of providing the context for understanding Christian's statements during those conversations. ... Because the evidence of Greenlee's out-of-court statements was offered for a non-hearsay purpose, the introduction of that evidence did not implicate Christian's right of confrontation under the Sixth Amendment."

United States v. Díaz, 670 F.3d 332, 346 (1st Cir. P.R. 2012) – "The government offered Pérez's out-of-court statement to explain why Veguilla had arrested Rodríguez-Romero, not as proof of the drug sale that Pérez allegedly witnessed. Out-of-court statements providing directions from one individual to another do not constitute hearsay."

People v. Theis, 963 N.E.2d 378 (Ill. App. Ct. 2d Dist. 2011) – "an out-of-court statement that is necessary to show its effect on the listener's mind or explain the listener's subsequent actions is not hearsay. [cite] In this case, absent Detective Nachman's statements, defendant's answers would have been nonsensical. ... admissible evidence that is not hearsay does not implicate the right of confrontation under either the United States or the Illinois Constitution."

United States v. Augustin, 661 F.3d 1105, 1128-1129 (11th Cir. Fla. 2011) – "the Confrontation Clause is not violated by a non-testifying informant's recorded statements when offered only to place the defendant's statements in context. [cite] Because Master Athea's statements were offered only for context, [*1129] and not for the truth of the matters asserted, their admission did not violate the Confrontation Clause."

United States v. Gaytan, 649 F.3d 573, 573-577 (7th Cir. Ill. 2011) – "Here, the government offered the challenged statements not for their truth but to put Gaytan's own words in context and to help the jury make sense out of his reaction to what Worthen said and did. Gaytan's responses '[w]hat you need?' and '[w]here the loot at?' would have been unintelligible without the context provided by Worthen's statements about his or his brother's interest in 'rock' or 'a couple O's of rock.'"

Estes v. State, 249 P.3d 313 (Alaska Ct. App. 2011) – "Estes's responses to the questions posed by Chew and by the trooper investigators would have made little sense unless the jurors were apprised of the content of those questions — in particular, the way in which Chew and the investigators referred to, and characterized, Deremer's purported out-of-court statements. Many of Estes's responses were either brief statements of agreement or brief denials. These responses would be unintelligible unless one knew the content of the questions that prompted these responses. [¶] In short, to the extent that Chew's questions to Estes and the troopers' questions to

Estes contained references to Deremer's purported out-of-court statements, those references were offered for a non-hearsay purpose. [¶] And because the evidence of Deremer's purported out-of-court statements was offered for a non-hearsay purpose, the introduction of that evidence did not implicate Estes's Sixth Amendment right of confrontation."

Commonwealth v. Pytou Heang, 458 Mass. 827, 853-855, 942 N.E.2d 927 (Mass. 2011) – "Buth's question was not offered for the truth of the matter asserted. Rather, it was offered to provide context for the defendant's subsequent request to Eang Logn to contact a drug dealer, which suggested that the defendant was looking to obtain drugs through a robbery because the defendant at the time had neither money to purchase nor marijuana to trade for the drugs."

State v. Swaney, 787 N.W.2d 541, 552-553 (Minn. 2010) – "We agree with the State that Russell's testimony about showing a photograph of the watch found at the scene to Dawn Swaney, asking Dawn Swaney "if she was familiar with the watch and if she recognized the watch," and telling her that her DNA and Swaney's DNA were found on the watch was relevant for a non-truth [*553] purpose. More specifically, this testimony explains why Dawn Swaney confronted Swaney during their telephone conversation about his use of a watch and was therefore relevant to provide context for the telephone conversation. In addition, Russell's testimony that he showed Dawn Swaney a photograph of the cigarettes found near Nelson's body was properly admitted for a non-truth purpose--to explain why Dawn Swaney knew and told Swaney that the police had found a pack of cigarettes at the crime scene."

State v. Martin, 235 P.3d 1045, 1047 (Ariz. Ct. App. 2010) – "For Confrontation Clause purposes, Defendant's focus on [interviewer] C.L.'s statements is misplaced. C.L.'s statements were not offered as evidence; rather, the jury heard those statements as an integrated part of the entire videotaped interview. After viewing [*1050] the videotape, we conclude C.L.'s statements during the interview of [5-year-old] C.Y. were not testimonial hearsay. C.L. asked questions of C.Y. and at times requested clarification; C.L. did not repeat statements made by others nor did she recount any other information that may implicate Defendant. [cites] The only purpose of playing C.L.'s questions for the jury was to provide a context for C.Y.'s statements. [cites] Accordingly, C.Y.'s statements in the videotape did not implicate Defendant's right to confront witnesses against him."

United States v. Tenerelli, 614 F.3d 764, 773 (8th Cir. Minn. 2010) – "The only possible testimonial statement at issue is the [C.I.'s] act of ordering methamphetamine on the phone, which was introduced to explain why the officers were later present to observe what occurred at the home improvement store. This court has noted that regardless of whether an out of court statement is testimonial, a right to confrontation is not implicated if the testimony is not offered or admitted to prove the truth of the matter asserted.... The CRI's statement was only offered to explain subsequent actions of the officers..." – no violation

Williams v. State, 930 N.E.2d 602, 605-610 (Ind. Ct. App. 2010) – " the C.I.'s recorded statements during the controlled drug buys were nonhearsay because those statements merely provided context for Williams's own recorded statements as well as the lengthy periods of silence that occurred during the transaction." – thus non-testimonial

Wilson v. United States, 995 A.2d 174 (D.C. 2010) – recorded conversation between friends, one of whom was cooperating with police – "We think it would have been apparent to the jury

that Thompson's statements about appellant committing the murder were made to elicit a confession or other incriminating information from appellant, and that Thompson's statements were not themselves evidence that appellant committed the murder."

State v. Shackelford, __ P.3d __, 2010 Ida. LEXIS 101 (Idaho June 1, 2010) (substituted opinion) – "The district court also overruled defense counsel's objection to the introduction of Robin Eckmann's out-of-court statements during Sergeant Aston's testimony regarding the conversation with Mary about the tape. We agree with the State that the statements were offered merely to provide context to Mary's answer."

United States v. Spencer, 592 F.3d 866, 878-879 (8th Cir. Minn. 2010) – "[CI]'s statements on the tape are admissible because they are nontestimonial. They put [defendant] Derrick's statements 'into context, making the admissions intelligible for the jury.' [cite] 'Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused.' Id."

United States v. Detelich, 351 Fed. Appx. 616, 622-623 (3d Cir. Pa. 2009) – crooked chiropractor's recorded conversations with cooperating witnesses – "Detelich's statements, unquestionably admissible as party admissions, were responses to a conversation and are therefore meaningless without the context of [deceased witness] Mrs. Proper's statements."

State v. Bell, __ S.W.3d __, 2009 Tenn. Crim. App. LEXIS 949 (Tenn. Crim. App. Nov. 19, 2009), appeal denied, 2010 Tenn. LEXIS 366 (Tenn., Apr. 15, 2010) – "Investigator Hardin's testimony and the audio recording contained several statements by the Defendant. For example, Investigator Hardin testified that the Defendant told the informant he was afraid Officer Carpenter was an undercover officer. The Defendant's statements constitute admissions by a party-opponent and, as such, are by definition not hearsay under Rule 801(c) and, thus, do not offend Crawford. Admission of the informant's statements provided context for the Defendant's admissible statements, illuminating their meaning to the jury. [cites] As such, because they were not offered for their truth, they were not hearsay, and their admission did not offend Crawford."

U.S. v. Santiago, __ F.3d __, 2009 WL 1424609 (1st Cir.(Mass.) May 22, 2009) – "the statements of the informants were not offered for their truth but as exchanges with Santiago essential to understand the context of Santiago's own recorded statements arranging to "cook" and supply the crack."

U.S. v. Bermea-Boone, __ F.3d __, 2009 WL 1078656 (7th Cir. Apr 23, 2009) – recordings of conversations between defendant and CW – "Here, [CW] Garcia's statements were not offered for their truth, but to provide context for Bermea-Boone's admissions concerning the drug conspiracy and to make those admissions intelligible for the jury. ... Where there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused and the admission of his statements did not offend the Confrontation Clause."

People v. Theus, 2009 WL 1039832 (Cal. App. 2 Dist. Apr 20, 2009) (unpub) – "Whitman's statement that the items belonged to Henderson was admissible not for the truth, but as indicative

of her connection to Henderson, and to explain Detective Hanson's seizure of the items. The trial court did not err in allowing this statement for a nonhearsay purpose."

U.S. v. Jones, 2009 WL 706454 (7th Cir. Mar 19, 2009) (unpub) – "By the time Millet participated in recorded conversations with Jones, he no longer was a coconspirator because he was a government informant. [cite] But Jones's own statements were admissible as party admissions. [cite] And Millet's statements then were admissible to provide context for Jones's statements."

U.S. v. Lewis, 2008 WL 5083131 (N.D. Ill. Nov 25, 2008) (unpub) (pretrial order) – "the Government has represented that it only intends to introduce the tape-recorded statements of the CI to provide context to Lewis and Williams' statements, and not for their truth. The Government has also represented that it will request and submit a jury instruction to this effect. Therefore, the admission of the tape recordings at trial, in the absence of the CI's testimony, does not violate Lewis and Williams' Sixth Amendment right to confrontation."

State v. Smith, 289 Conn. 598, 960 A.2d 993 (Conn. Nov 25, 2008) – recorded conversation between co-defendant (Estrella) and CI (Williams) in cell, introduced against defendant – "we view Williams' recorded statements as falling into three separate categories: (1) nonassertive vocalizations, e.g., "mm-hmm" or "yeah"; (2) questions Williams directly posed to Estrella about the crime; [FN23] and (3) statements Williams made that directly implicated Estrella or the defendant in the commission of the crime." – first two categories non-testimonial, but the state conceded that some statements in the last category were offered for the truth, and Williams obviously knew they were for use at trial – hence, testimonial

U.S. v. Rios, 2008 WL 4699498 (5th Cir. Oct 27, 2008) (unpub) – "The statements of the confidential informant on the recording were part of an integrated and reciprocal conversation with Rios. ... the statements of the confidential informant on the recording and transcript were admitted to provide context to Rios's statements, were not admitted to prove the truth of the matters asserted therein, and did not violate the Confrontation Clause..."

U.S. v. Spencer, 2008 WL 4104693 (D. Minn. Aug 29, 2008) (unpub) (new trial motion) – recording of drug deals between absent CI and defendant – "The Court notes that many of Gentle's statements served to put Derrick Spencer's admissions on the tape recording into context for the jury. Under those circumstances, Gentle's statements would not be offered for the truth of the matter asserted, and thus would be non-hearsay statements. ... Such statements are not subject to exclusion under the Confrontation Clause."

State v. Lee, 2008 WL 2745277 (Wis. App. II Dist. July 16, 2008) (unpub) – witness repeated conversation he overheard between third party (Thomas) and defendant – "Johnson's testimony that Thomas 'asked [Lee] to confirm' what happened is not hearsay because it was not offered to prove the truth of the matter asserted. [cite] Johnson simply overheard a comment tantamount to Thomas asking, 'What happened?'--a question with no independent substantive value apart from Lee's response. Thomas' query asking Lee 'to confirm it' simply set the context for the jury to understand how Lee's statement that he 'pop[ped] the guy' came about." – also casual remark

U.S. v. Toepfer, 2008 WL 2673878 (11th Cir. Jul 09, 2008) (unpub) – CI's statements on recordings "were offered merely to provide context to [defendant]'s admissions about his activities, knowledge, and intent, and thus did not run afoul of the Confrontation Clause."

People v. Villa, 2008 WL 2266398 (Cal. App. 2 Dist. Jun 04, 2008) (unpub) – "Padilla's offer to sell the gun was not offered for the truth of the matter asserted, that is that Padilla was actually trying to sell the gun. It was offered to give context to the display of the gun. ... Since the statement was not offered for the truth of the matter asserted, the Confrontation Clause did not bar its use. (*Crawford*..."

U.S. v. Dominguez, 2008 WL 2235371 (2nd Cir. Jun 02, 2008) (unpub) – non-testifying CI's statements to defendant, captured on tape, were admitted to provide context to defendant's statements and were therefore non-testimonial

State v. Jose DeJesus, 947 A.2d 873 (R.I. May 29, 2008) – while defendant was in jail on an unrelated DV charge, his cellmate wore a wire and questioned him about the robbery/murder at issue in this appeal – the cellmate died before trial – "After our review of the record, it could not be clearer to us that Viera's statements, recorded primarily in the form of questions posed to defendant, were not offered at trial for their truth, and that the veracity of anything Viera said was completely irrelevant. What was important on the recording were defendant's responses. [FN15] We agree with the trial justice that Viera's statements merely provided the framework or context within which defendant's statements could be understood. ... excising Viera's questions would have rendered the recording incomprehensible and created unnecessary confusion for the jurors."

Brown v. State, 2008 WL 2152557 (Ind. App. May 23, 2008) (unpub) – audio/video device (called "the Hawk") worn by CI during drug deal – "The statements made by the C.I. on the tape also do not violate the Confrontation Clause. First, the statements made by the C.I. on the video were not introduced for the truth of the matter asserted, but instead merely provide context for Brown's statements and actions."

U.S. v. Davis, 278 Fed.Appx. 263 (4th Cir. Mar 17, 2008) – "[T]he district court carefully circumscribed the jury's consideration of those statements of Corey Williams captured, with his consent, via wire. ... Corey Williams's half of the conversation was admitted to provide context for the captured statements made by others. ... Because Corey Williams's statements were not admitted for their truth, they were not testimonial. The cooperating Corey Williams was not, then, a "witness [] against [Appellants]," U.S. Const. amend. VI, and the admission of his statements therefore poses no Confrontation Clause problem."

State v. Simuel, 2008 WL 597592, 2008-Ohio-913 (Ohio App. 8 Dist. Mar 06, 2008) (unpub) – "{¶ 40} We determine that Detective Evans' testimony about the CI giving him a predetermined signal that a buy was made was not offered to prove the truth of the matter asserted. Rather, his testimony provided context to explain his response to receiving the signal, *i.e.*, calling the takedown unit, and the events leading up to Simuel's arrest." – also, somewhat dubiously, holding the signal wasn't hearsay

Jones v. Adams, 2008 WL 413742 (N.D. Cal. Feb 13, 2008) (unpub) (habeas) – suspects placed squad car with tape recorder running – "Smith's recorded statements were not testimony;

they merely provided context for petitioner's responses; these responses were admitted into evidence as an adoptive admission of petitioner's guilt."

People v. Barba, 2007 WL 4125230 (Cal. App. 2 Dist. Nov 21, 2007) (unpub), cert. granted, summarily vacated and remanded, 557 U.S. 930 (June 29, 2009), 2010 Cal. LEXIS 4428 (Cal., May 12, 2010) (denying petition without prejudice), cert. granted, summarily vacated and remanded (again!), 131 S. Ct. 3088, 180 L. Ed. 2d 911 (June 28, 2011), 2012 Cal. LEXIS 3385 (Cal., Apr. 11, 2012) (denying petition without prejudice), cert. granted, summarily vacated and remanded (third time!), 133 S. Ct. 609, 184 L. Ed. 2d 390 (Nov. 13, 2012) –

U.S. v. Wilson, 2007 WL 2174571 (11th Cir. Jul 30, 2007) (unpub) – "A confidential informant's statement made during a taped conversation with the defendant can be admitted to provide context, so long as the informant's statements are not admitted for the truth asserted. ... The admission of the recordings was proper because the confidential informant's statements were not admitted for the truth of what he said, but rather for context. The court instructed the jury not to credit the confidential informant's statements as truth, because they were only being provided as context for Dawkins's statements. Accordingly, the recording was not hearsay, nor did it violate Wilson's constitutional right to confrontation ..."

U.S. v. Louis, 2007 WL 1494030 (11th Cir. May 23, 2007) (unpub) – "[T]he informant's statements on this topic were offered merely to give context to Louis' own statements during the conversation (the admission of which is not contested here) and not for their truth. Accordingly, the informant's statements do not fall within the ambit of the Confrontation Clause."

U.S. v. Hidalgo, 2007 WL 1108395, *7+ (5th Cir. Apr 10, 2007) (unpub) – "The voices of Hidalgo, Crain, and Savoy can all be heard on the recording. Of those three individuals, only Savoy did not testify at trial and therefore was unavailable for cross-examination. Even if Savoy's statements are testimonial, they are not barred by the Confrontation Clause because they were offered not for truth, but instead for context and evidence of knowledge. The Confrontation Clause does not bar testimonial statements when they are offered for some purpose other than the truth of the matter asserted. ... In *Cheramie*, this court held that an unavailable witness's recorded statements did not violate the Confrontation Clause because the statements were part of a reciprocal and integrated conversation between the informant and the defendant and necessary to provide a context for the defendant's statements. 51 F.3d at 541. Here, the jury needed to hear Savoy's statements to understand the meaning of Hidalgo's responses."

U.S. v. Nguyen, 2007 WL 1202896, *2+ (9th Cir. Apr 24, 2007) (unpub) – "[T]he district court did not err in admitting out-of-court statements of the informant, which were translated and transcribed for the jury. The statements were properly admitted for the non-hearsay purpose of providing context for Nguyen's recorded statements, and not for truth. Therefore, even assuming that they were testimonial, their admission does not violate *Crawford* ..."

U.S. v. Rodriguez, 484 F.3d 1006 (8th Cir. 2007) – "Rodriguez argues his Sixth Amendment right to confront witnesses against him was violated by the admission of testimony from Officer Chris Claramunt (Officer Claramunt), a narcotics detective ... While cooperating with law enforcement, Witt [a drug courier] placed a recorded telephone call to Rodriguez in the presence of Officer Claramunt ... At trial, Officer Claramunt summarized Witt's statements to Rodriguez

... Regardless whether Witt's statements to Officer Claramunt were 'testimonial,' they do not implicate Rodriguez's right to confrontation. Officer Claramunt's testimony recounting Witt's telephonic statements was admitted to show Rodriguez's state of mind and to place Rodriguez's statement into context, that is, what caused Rodriguez to arrive at the airport, and the testimony was *not* offered or admitted to prove the truth of the matter asserted. The testimony did not violate Rodriguez's rights under the Confrontation Clause". [Note: Also, Witt testified at trial.]

U.S. v. Yurisich, 2007 WL 1098214 (E.D. Wash. 2007) (unpub) – perjury case – questions of lawyer who deposed defendants, but who did not testify at trial, were offered "in order to establish the context in which the Yurisiches gave their deposition answers. A statement offered to show context generally is not hearsay."

U.S. v. Nettles, 476 F.3d 508, 72 Fed. R. Evid. Serv. 496 (7th Cir. 2007) – "when statements are merely offered to show context, they are not being offered for the truth of the matter asserted, and therefore, Crawford does not require confrontation. *United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir.2006)."

U.S. v. Valdes, 2007 WL 152529 (11th Cir. 2007) (unpub) – "As an evidentiary matter, the district court did not err in admitting the informant's recorded statements because they were not hearsay. ... Statements made by the informant were not hearsay because they were admitted not to prove the truth of the informant's statements but to provide context for Valdes's half of the telephone conversations. ... Because the informant's statements were not hearsay, and because the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted,' *Crawford*, 541 U.S. at 59 n. 9, Valdes's Sixth Amendment challenge to his conviction is without merit."

U.S. v. Leong, 2007 WL 33500, *1 (9th Cir. 2007) – Defendant "argues the district court erred when it admitted audio-taped conversations between Leong and a cooperating witness, Michael Alvarez, in violation of Leong's Sixth Amendment right to confront adverse witnesses, because the prosecution did not call Alvarez as a witness and make him available for cross-examination. ... Leong's first argument fails because Alvarez's recorded statements are not hearsay. In *Crawford v. Washington*, the Supreme Court emphasized that the Confrontation Clause applies only to testimonial hearsay, and not to non-hearsay evidence. 541 U.S. 36, 59 n. 9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Alvarez's recorded statements were offered for the sole purpose of facilitating the jury's understanding of comments Leong made during his conversation with Alvarez. This is a permissible non-hearsay use of Alvarez's recorded statements."

United States v. Tolliver, 454 F.3d 660 (7th Cir. Ill. 2006) – The non-testifying informant's statements were not hearsay and were admitted to provide context and not for the truth. The statements were non-testimonial.

United States v. Van Sach, 458 F.3d 694, 71 Fed. R. Evid. Serv. 1 (7th Cir. Ill. 2006) – Defendant appealed on the grounds that he was not permitted to cross examine a confidential informant. The informant's information was presented through the detective's testimony. The testimony was not for the truth, but was presented to give context to the situation. The testimony was non-testimonial.

Little v. State, 2006 Ga. App. LEXIS 749 (Ga. Ct. App. 2006) – “A confidential informant (CI) arranged for a controlled drug buy. Both defendant and her car matched the CI's descriptions. An officer approached defendant's car, and received defendant's consent to search her car. Drugs and other evidence were found in the car. Defendant argued that the trial court erred in denying her motion to reveal the identity of the CI because the witness was necessary to show she did not consent to the search of her car. The appellate court disagreed. The CI did not participate in the transaction in the parking lot. Further, she was not the only person present who could have testified about what occurred. Whether defendant consented to the search was immaterial because the officer was authorized to arrest defendant for possession of drugs he saw in plain view, and based on that arrest, he had the authority to search the car. Whether defendant and her car matched the CI's descriptions was not being offered to establish the truth of those matters; rather, it was offered to explain to provide context explaining his presence in the parking lot and his conduct in approaching defendant's car, so there was no Confrontation Clause violation.”

United States v. Jimenez, 419 F.3d 34, 44 (1st Cir. Mass. 2005) – “The [Confrontation] Clause [] does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Id.* at 59 n.9. The challenged statements were properly admissible, not for their truth, but to provide context to (1) Jimenez's admissions in his written confession, and (2) the investigatory steps pursued by Burns and Ortiz. *United States v. McDowell*, 918 F.2d 1004, 1007 (1st Cir. 1990) (“[A] defendant, having made admissions, [cannot] keep from the jury other segments of the discussion reasonably required to place those admissions into context.”).

➤ Sub-Category: Too Much Detail to Qualify as Background / Context Statements
(see also preceding two categories)

People v. Garcia, 25 N.Y.3d 77, 7 N.Y.S.3d 246, 30 N.E.3d 137 (N.Y. 2015) – “The *87 testimony as to that friction, which arguably gave a motive for the shooting, exceeded that which was necessary to explain the police pursuit of defendant.”

Hereford v. State, 444 S.W.3d 346, 348-53 (Tex. App. 2014) – “the reiteration by the two police officers of the tipster's alleged statement ... 'provided far greater detail than was reasonably necessary to explain why the police decided to investigate....'”

State v. Berniard, 327 P.3d 1290, 1292-94 (Wash. App. Div. 2 2014) – “¶ 43 The trial court admitted the testimony, however, on the ground that the statements were not offered for 'the truth of the matter asserted, but rather to explain why the police were pursuing the identity of [defendant]' ... The court required the State to limit introduction of the codefendants' statements to matters relating to their own participation in the crimes,⁶ and instructed the jury to consider the statements 'only for the purpose of determining [their] involvement in the charged crime.' [cite] These limitations comply with the rules for admission of inculpatory statements made by codefendants in joint trials...” - but this was not a joint trial

People v. Henry, __ N.W.2d __, 305 Mich. App. 127 (Mich. App. 2014) – “This testimony was not limited to show why [Detective] McClean proceeded in a certain direction with his investigation. *Id.* Instead, the testimony necessarily implied that the informant accused defendant of the first two robberies and that McClean considered the informant credible. ... Had McClean

limited his testimony to an explanation that, on the basis of the information he received from the informant he proceeded in a certain direction with his investigation, it may have been admissible."

State v. Ricks, 2013-Ohio-3712, 136 Ohio St.3d 356, 995 N.E.2d 1181, 1189 (Ohio 2013) – "{¶ 29} But key parts of Steckel's testimony were not limited to explaining what had led him to obtain a picture of Ricks. Some of his testimony had nothing to do with police conduct..."

State v. Dehart, 430 N.J. Super. 108, 62 A.3d 327 (App. Div. 2013) – convenience store robbery – "In this appeal, we address the issue of whether it was plain error for a police officer to provide hearsay testimony explaining why he included defendant's photograph [**329] in a photo array and for the prosecutor to highlight that testimony in summation. ... The detective testified Mr. Boutros [*i.e.*, store's co-owner] told him 'a customer of his had either called or come in - - I'm not exactly sure what he said - - but provided the name of [defendant] as the person who' was involved in the incident. ... [T]here was nothing linking defendant to the crime until an anonymous source told Mr. Boutros, who then told Detective Sergeant Stettner, that defendant was the culprit. Permitting this double hearsay into evidence deprived defendant of his right to confrontation."

United States v. Walker, 673 F.3d 649 (7th Cir. Ill. 2012) – "The government repeatedly hides behind its asserted needs to provide 'context' and relate the 'course of investigation.' These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. The government was free to elicit through Agent Inlow that Ringswald had given him the Smith & Wesson. The government also was free to elicit through Agent Bayless that the informant had given him the Sturm Ruger. But if other admissible evidence could not satisfactorily link these guns back to the defendants, prosecutors were not free to ignore the rules of evidence in the interest of disassociating themselves from their informant." – [NOTE: The weirdly personal tone suggests a history between the authoring judge and prosecutor.]

Commonwealth v. Arias, 81 Mass. App. Ct. 342, 351-352, 963 N.E.2d 100 (Mass. App. Ct. 2012) – "Sergeant Detective Mahoney and Officer Lewis should not have been permitted to testify, over objection, that the defendant was known to carry a firearm and that he would be driving a blue and silver BMW from Downtown Crossing to North Station.n14 The testimony was hearsay, perhaps totem pole hearsay, as the officers received all of that information from Hart and Halloran, who did not testify and who received at least some of it from unnamed others. The Commonwealth agrees that 'the admitted statements went beyond what was necessary to show the state of police knowledge.' [cite] Under those circumstances, admission of the testimony violated the defendant's right to confrontation..."

Jones v. Basinger, 635 F.3d 1030 (7th Cir. Ind. 2011) (habeas) – "At his trial, two police detectives testified in detail about an informant's double-hearsay statement accusing Jones as the leader of the robbery and murders. That testimony was allowed on the theory that it was offered not to show the truth of the informant's statement but for the purpose of showing the course of the police investigation that led to Jones' arrest." – finding unreasonable application of *Crawford*

United States v. Adams, 628 F.3d 407, 417-418 (7th Cir. Ill. 2010) – " Our cases recognize there is a particular potential for abuse when police officers testify to out-of-court statements by

confidential informants. ... The CI's statements directly inculcate Adams on the charge of possessing crack with the intent to distribute it, and were not necessary to provide any foundation for the officer's subsequent actions. The brevity of an inadmissible statement may show its harmlessness, but it cannot make an inadmissible statement admissible. The CI's statements here are different from statements we have found admissible that gave context to an other-wise meaningless conversation or investigation."

United States v. Holmes, 620 F.3d 836 (8th Cir. Mo. Sept. 2, 2010) – "But here the detailed statements read into the record from the search warrant affidavit went well beyond establishing the propriety of the investigation, and they were certainly offered to establish their truth--to show that Holmes sold drugs from the Anderson Avenue residence and that he possessed guns while he was at the residence where the guns were found."

State v. Swaney, 787 N.W.2d 541, 552-553 (Minn. 2010) – "Other parts of Russell's testimony, however, were irrelevant to provide context for the telephone call. For example, interview questions about ownership of the watch, her use of the watch, and the purchase of the watch were unnecessary to provide context for the telephone conversation because she did not mention these questions to Swaney during their conversation." – etc. – very detailed examination

Langham v. State, 305 S.W.3d 568, 575-582 (Tex. Crim. App. 2010) – "it is not necessary to go into elaborate detail in setting the evidentiary scene, and there is a danger inherent in doing so."

State v. Henry, 27 So. 3d 935, 944-945 (La.App. 5 Cir. 2009) – "In the context of the instant trial, this testimony was used to show not only why the officers acted as they did, but also to bolster the State's case, since this information was not needed to explain the course of the investigation."

Sanabria v. State, __ A.2d __, 2009 WL 1362278 (Del. May 15, 2009) – "The State's interest in providing the jury with a background context for the officer's actions could have been accomplished by referring to 'information received.' The unfair prejudice to Sanabria from having the jury hear the officer repeat the content of the dispatcher's statements outweighed the probative value to the State's case as background information. [FN1] Alternatively, we hold that because there was no limiting instruction that the dispatcher's comments were not being admitted for the truth of their content, the Superior Court violated Sanabria's Sixth Amendment rights under the Confrontation Clause by permitting the police officer to testify about the dispatcher's statements." – [NOTE: Dispatcher's statement was only evidence on an element of offense.]

U.S. v. Buffington, 2009 WL 367582 (6th Cir. Feb 09, 2009) (unpub) – guns found wrapped in blankets and sleeping bags – defendant's wife told officer the blankets and sleeping bags belonged to defendant – "Thus, while Officer Nanney's statements connecting Buffington to the blankets and sleeping bags provide some background as to the reason the officers chose not to test those items for trace evidence, they also establish the truth of the matter asserted: that Buffington possessed the weapons at issue."

U.S. v. Travis, 2009 WL 331379 (11th Cir. Feb 12, 2009) (unpub) – "The government argues that Whiteman's recitation of the Complex 21 employees' statements 'was offered to show the investigative steps that the FBI took to identify and locate the persons who committed the armed

robbery of Wachovia Bank.' However, the government's interpretation, if adopted, would eviscerate *Crawford*. Indeed, it is difficult to conceive of a circumstance where a testimonial statement could not be recast as merely showing the steps the police took during their investigations. We therefore reject the government's argument and hold that the district court erred..."

State v. Smith, 289 Conn. 598, 960 A.2d 993 (Conn. Nov 25, 2008) – surreptitious recording of CI and co-defendant – state conceded some of CI's statements were offered for the truth – "For example, Williams [the CI], referring to the defendant by name, stated at one point '[Larry] always be lying' and 'Larry is the one who hide the body.' We agree that this category of Williams' statements were hearsay."

State v. Maltepes, 2008 WL 3878510 (Ariz. App. Div. 1 Aug 19, 2008) (unpub) – "The State does not explain why a recitation of the complete investigation, including all the out-of-court statements made to Detective Valadez by others, leading up to the surveillance of the McDowell warehouse was necessary 'background information.' Any question about the reason for police activity at that location could be readily explained with the simple statement that it was based 'upon information received,' or similar words to that effect." – [NOTE: The second sentence illustrates the risk of judicial overreaction when prosecutors push the envelope.]

McFarland v. Deppisch, 2008 WL 2405035 (E.D. Wis. Jun 10, 2008) (unpub) (habeas) – federal judge inexplicably classifies conversation between neighbors as testimonial – "The state courts concluded that the statements were not hearsay and no violation of McFarland's confrontation rights occurred because the statements were not offered to prove the truth of the matter asserted, but rather to 'establish how the investigation proceeded.' [cite] But Ray's statements had nothing to do with how the investigation proceeded. The lead detective in the case testified that it was the victim's recollection of where J. Money's sister lived that led to the identification of McFarland as a suspect." [NOTE: This seems to be saying that only the *first* lead qualifies as a background statement, without quite explaining why cumulative testimony on the same point is a federal constitutional issue.]

Lee v. State, __ S.W.3d __, 102 Ark.App. 23 (Ark. App. March 12, 2008) – fraudulent use of credit card case – statements to police by since-deceased victim were testimonial and improperly admitted – "the key is the purpose for which the State offers the out-of-court statement. [cite] ... According to the State, the 'officer's testimony about Jordan's statements was to explain why he took the step of arresting [Lee], and was not presented for the truth of what Jordan had told either the officer or [Lee].' [cite] [¶] We disagree. The record shows no such limited intention or effort by the State at trial."

People v. Feazell, 898 N.E.2d 1077, 325 Ill.Dec. 798 (as modified on denial of motion for rehearing, Oct. 31, 2007), appeal denied, 226 Ill.2d 621, 882 N.E.2d 80, 317 Ill.Dec. 506 (Ill. Jan 30, 2008) – [this case holds that *Crawford* prohibited a detective from recounting his interrogation of the defendant, when as part of that interrogation he told her things her codefendant had said during his separate interrogation] – "Had Winstead merely stated that he confronted Feazell with Banks' statement, then he would have been within the boundaries of the exception. However, he went much further. He, in effect, placed Banks' version of the events and Feazell's alleged knowledge of those events squarely before the jury. ... We also reject the State's contention that Bank's statements were used to prove the effect of the statements on

Feazell's mind or offered to show why Feazell subsequently acted as she did. The State has failed to establish how Feazell's behavior, actions or cooperation changed after hearing Banks' statements." [NOTE: This last seems to imply that the testimonial character of the evidence can change based on the suspect's response to it.]

U.S. v. Powers, 500 F.3d 500 (6th Cir. 2007) – "Whether ... the background information regarding Defendant's previous illegal activities provided by the SOI [source of information, or CI], violates the Confrontation Clause is a closer question. ... [D]etails about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation in which the SOI was to purchase narcotics from Defendant."

U.S. v. Hearn, 500 F.3d 479 (6th Cir. Sep 11, 2007) – "The government repeatedly assured the district court that it did not intend to offer any part of the informants' statements to prove the elements of the crimes. ... The government's conduct at trial, however, belied the stated reason given by the prosecution for offering the evidence, namely to explain why the government commenced the investigation. Specifically, instead of providing a limited explanation for why the officers stopped Hearn, two witnesses provided more expansive explanations, which implicated Hearn in a manner unlike that of any other evidence. ... The government's conduct in this case makes clear that it introduced the confidential informants' statements, at least in part, to establish possession with intent to distribute and firearms-possession in furtherance of drug trafficking. ... [T]his is not a case where prosecutors, hoping to limit jury concerns about the reasons for police actions, took reasonable, or even minimal, steps to limit testimony about how officers stopped a suspect in response to statements from confidential informants. Nor is this a case where witnesses blurted out more testimony than prosecutors expected. The excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments. ... Moreover, this is not a case in which prosecutors admitted confidential informants' statements only to provide general background."

U.S. v. Barry-Scott, 2007 WL 3129723 (6th Cir. Oct 25, 2007) (unpub) – "Barry-Scott argues that her Confrontation Clause rights were violated when the confidential informant, Westin, was not produced for cross-examination and Officer Solic was permitted to testify as to what he heard Westin say to Barry-Scott during the investigation. ... The Government responds that the Confrontation Clause was not violated because the testimony was not hearsay as it was not offered for the truth of the matter asserted but instead was offered only to prove the procedures of the investigation. ... It appears, however, that some of the statements were testimonial in that they were given to police as part of interrogation or questioning of Westin following the buy transactions. *Crawford* clearly holds that statements resulting from police questioning are testimonial. ... Even more troubling, the Government made several references in its closing argument to statements purportedly made by Westin. ... These statements attributed to Westin do appear to have been proffered to prove the truth of the matter asserted, rather than simply as background."

State v. Hart, 2007 WL 3119720, 2007-Ohio-5740 (Ohio App. 1 Dist. Oct 26, 2007) (unpub) – "Officers Mark Bemmes and Hall testified only that they had received complaints about drug sales at 658 Hawthorne. Officer Bode testified that he had received information about drug sales taking place at 658 Hawthorne, and that Hart's and her codefendant's names were associated with that address." – "The state argues that any testimony given by police about complaints of drug

sales was background information not intended to prove that Hart was trafficking in crack cocaine, and thus not hearsay—the old 'background' ruse." – "The statements in this case were testimonial evidence. The confidential informant would have known that statements made to police about Hart selling drugs would be used to prosecute Hart. Statements made to the police describing illegal activities are usually testimonial. ... {¶ 31} We recently decided Hart's co-defendant's appeal, *State v. Matthews*. [FN28] We ruled that the testimony of the police officers about information provided by a confidential informant was background information and did not violate the Confrontation Clause. But Hart's case is distinguishable from *Matthews*. There, the evidence against the defendant was not circumstantial. As the court noted, the police officers caught him holding a baggie of crack cocaine. On the other hand, the evidence against Hart was purely circumstantial." [NOTE: It is not explained why the classification of the evidence as testimonial depends on the quantity of direct evidence adduced. The court seems to have merged the testimonial and harmless error analyses.]

People v. Montgomery, 2007 WL 3085513 (Mich. App. Oct 23, 2007) (unpub) – officer testified: "I was given the information that [defendant] was in Gun River East Trailer Park and in possession of a large amount of pseudoephedrine tablets which he was going to make meth with ... the information further described that he was going to be in a black Firebird or Trans Am at that—in this trailer park" – Held: "It can be reasonably inferred that this was an out-of-court statement by an unnamed declarant, who did not testify at trial. Clearly, the undercover police officer responded to this tip by going to the trailer park, looking for defendant. However, the undercover police officer was also provided with defendant's name, a description of defendant's vehicle, information that defendant possessed a quantity of methamphetamine precursor, and information that defendant planned on manufacturing methamphetamine." – However, plain error did not effect defendant's rights when, among other things, "defense counsel used the alleged informant's tip to demonstrate bias by the police against defendant."

People v. Thompson, 2007 WL 2051977 (Mich. App. 2007) (unpub) – "The substance of a confidential informant's tip is generally inadmissible as hearsay. [cite] Any testimony in regard to a confidential informant's tip should, at a minimum, be limited to a general, nonspecific statement that the officers were responding to a tip. [cite] This would provide the jury with an explanation of the police conduct. ... Here, the officers' testimony regarding the substance of the confidential informant's tip went beyond the non-hearsay purpose of explaining the police conduct, and the jury was presented with a statement from the informant which indicated that defendant would be delivering drugs in the restaurant parking lot. The admission of this evidence offended the rules of evidence as well as the Confrontation Clause."

People v. McEaddy, 41 A.D.3d 877, 838 N.Y.S.2d 218, 2007 N.Y. Slip Op. 04726 (N.Y. A.D. 3 Dept. Jun 07, 2007) – "While police officers may be permitted to testify to statements obtained in the course of an investigation for purposes other than to establish their truth—such as to show the officer's state of mind and actions in response to the defense's attack on the investigation—here the statements regarding the course of the investigation were relevant only to prove the truth of their contents, since no relevant nonhearsay purpose was demonstrated." (citations omitted)

State v. Johnson, 2007 WL 1417312, *2+ (Wash. App. Div. 2 May 15, 2007) (unpub) – "The testimonial statements at issue here are the statements the prostitute made to Cassio while she was under arrest. The substance of those statements was that she had a pimp, a 25- to 30-year-old

black man named Wayne who drove a red car with a black hood. Johnson claims that the deputies' testimony improperly communicated to the jury that the prostitute had described her pimp and the car he was driving. The State counters that the descriptions were admissible to show how the deputies conducted their investigation and were not offered for their truth. ... [T]he State's contention that the description was offered merely 'to show why the officers felt they had probable cause to pull over the car that picked up [the prostitute]' is belied by the prosecutor's use of the descriptions in opening statement and closing argument to show Johnson's guilt. ... Additionally, the evidence was far more detailed than what would be required to explain why the deputies arrested Johnson. It might have been sufficient to elicit that the deputies acted on a tip, or that they received information consistent with Johnson, without setting forth the details that Cassio spoke with a prostitute and received a description of a pimp matching Johnson."

State v. Robinson, 2007 WL 1452590, *2+, 2007-Ohio-2388, 2388+ (Ohio App. 1 Dist. May 18, 2007) (unpub) – baby killed by negligence while defendant was babysitting; defendant refused to take baby to hospital because of an outstanding warrant for her arrest – "In this case, Officer Salvatore Tufano testified at length about statements [4-year-old] Egypt had made to him during questioning. He stated that she had told him that she had put her sister on the banister and that the baby had fallen and hit the back of her head. The state contends that these statements were not testimonial because they were not admitted for their truth but to explain the officer's actions during the investigation. We disagree. The officer testified in detail about what Egypt had told him. The record shows that Egypt's hearsay statements were offered for their truth and went to the heart of the state's case. [¶] Further, the primary purpose of Tufano's interrogation of Egypt was to 'establish or prove past events potentially relevant to later prosecution.' Thus, Egypt's statements were testimonial. They were part of an ex parte examination used as evidence against Robinson. Because Robinson had no opportunity to cross-examine Egypt, the admission of her hearsay statements into evidence violated Robinson's right to confront the witnesses against her." [footnotes omitted]

State v. Hoover, 220 S.W.3d 395 (Mo. App. 2007) – in case involving family conspiracy to murder an abusive in-law – "The State's position appears to depend analytically on those cases which permit a police officer to testify to a declarant's out of court statements offered to explain the testifying officer's subsequent conduct. *See, e.g., State v. Brooks supra*. However, the obvious problem with such a theory of admissibility here is that the State did not use Robert Hoover's statements to police to explain the police officers' subsequent conduct but rather Defendant's subsequent conduct. The *Brooks* line of cases only permits a testifying police officer to discuss the impact of the declarant's statements on the testifying police officer. More importantly, even where police officers are permitted to testify to background and context, courts do not permit the prosecutor to elicit details directly connecting the defendant to the crime."

State v. Mason, 2007 WL 1174898 (Tenn. Crim. App. 2007) (unpub) – "[A] caller informed the 9-1-1 center that 'Alonzo Mason [is] shooting guns at 701 Deery Street; come pick his ass up before somebody kill [sic] him.' The caller stated that the defendant was '[d]riving a white [Chevrolet] Lumina; him and a girl named Teka.' The caller added, '[w]e ducked when they shot ... [m]y granny sitting [sic] right here in this chair. Lock his ass up before somebody kill [sic] him.'" (brackets in original) [Note: Granny wasn't hit.] – "The State argues the caller's statements are not hearsay because they were not offered to prove the truth of the matters asserted but rather to explain the officers' actions in looking for and detaining the defendant. ...

We are unpersuaded." – but the only information in the tape not already established by the officer's testimony (Granny's peril, for instance) was superfluous to the officer's purpose – [Note: *Crawford* discussed only as alternative holding.]

State v. Irizzary, 2007 WL 1574308 (N.J. Super. A.D. Jun 01, 2007) (per curiam) (unpub) – "Next, we turn to defendant's argument that the court erred by permitting Detective Avila to twice testify concerning 'information received.' ... Second, when asked why he suspected that an object discarded by defendant was a controlled dangerous substance, he replied that he based his opinion 'first of all, [on] the information [he had] received.' ... It is permissible, however, for a police officer to state that he went to a location based on information received. ... The detective's second reference to 'information received,' however, was directed to the reason he suspected that defendant had discarded illegal drugs. ... [T]he detective's testimony implied that he was privy to outside-the-record knowledge that defendant was holding drugs, which caused him to view a potentially innocuous movement as an indication of criminal activity. Thus, defendant's right to confront his accusers was violated by the second challenged portion of testimony."

Statements Made by Defendant / Adoptive Admissions / Statement by Agent
(see also Statements of a Party-Opponent)

United States v. Brinson, 772 F.3d 1314, 1316-18 (10th Cir. 2014) – "[T]he district court could reasonably find by a preponderance of the evidence that Mr. Brinson had authored the [Facebook] messages... Because the messages did not constitute 'hearsay,' their introduction did not violate the Confrontation Clause of the Sixth Amendment."

Corrothers v. State, __ So.3d __, 2014 WL 2894310 (Miss. 2014) – "¶ 91. Under Mississippi Rule of Evidence 801(d)(2), an admission by a party-opponent is not hearsay. Therefore, the trial court properly allowed Hutchins's testimony as to what Corrothers communicated. Because the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted,' no Confrontation–Clause violation arose from that testimony." – [NOTE: While the statement wasn't hearsay, it was certainly offered for the truth – the court reached the right result but its rationale is a close miss.]

Braddy v. State, 111 So.3d 810 (Fla. Nov. 15, 2012) – "we have 'previously recognized that admissions by acquiescence or silence do not implicate the Confrontation Clause.'"

People v. Donegan, 974 N.E.2d 352, 371-373 (Ill. App. Ct. 1st Dist. 2012) – "it is clear that Pikes' statement to Coleman describing defendant's role in the shooting satisfies the requirements of the tacit admission rule: (1) defendant was present during the conversation, (2) the accusation, that defendant shot at a crowd, was such that the natural reaction of an innocent person would be to deny, and (3) defendant not only remained silent but confirmed Pikes' description of the shooting. Therefore, the trial court did not err in admitting Pikes' statement to Coleman into evidence."

United States v. Cervantes, 646 F.3d 1054, 1056-1058 (8th Cir. Ark. 2011) – "At the plea hearing, Rincon acknowledged the accuracy of the government's factual recitation under oath. ... The district court allowed the jury to consider statements Luis Rincon adopted as his own at his

plea hearing [*i.e.*, the prosecutor's factual recitation] because they were made under oath and inconsistent with his trial testimony."

State v. Telles, 2011-NMCA-083, 150 N.M. 465, 261 P.3d 1097 (N.M. Ct. App. 2011) – secretly-recorded stationhouse conversation between co-perpetrators – "We agree with the State that Defendant's own statements during the conversation with R.O. were non-testimonial and do not violate the Confrontation Clause."

Cantu v. State, 339 S.W.3d 688, 689-691 (Tex. App. Fort Worth 2011) – "the evidence that Appellant was likewise listed as having self-identified as a gang member in a similar report is not testimonial hearsay. ... At the first level, it is an admission because Appellant is the declarant, therefore, by definition, it is non-hearsay. Tex. R. Evid. 801(e)(2)(A). And at the next level, Appellant's admission that he was a gang member is non-hearsay because it was not offered for the truth of the matter asserted—that Appellant was a gang member—but rather for the fact that he is listed in a report as having claimed gang membership."

Gusmao v. State, 48 So. 3d 93 (Fla. Dist. Ct. App. 5th Dist. 2010) – "On appeal, Gusmao also cites Crawford ... as did his trial counsel below, as a basis for prohibiting testimony as to his own out-of-court admissions during trial. Since there is apparently at least one attorney who views this as a valid argument, we note that the Sixth Amendment's Confrontation Clause is in no way implicated when the state offers a defendant's own out-of-court statements as evidence at trial." [NOTE: Ouch! But there are apparently at least three judges who can't add 1 + 1.]

Cox v. State, 194 Md. App. 629, 5 A.3d 730 (Md. Ct. Spec. App. Sept. 17, 2010), aff'd 421 Md. 630, 28 A.3d 687 (Md. 2011) – "A statement admitted as a tacit admission is a statement that the defendant has adopted as his or her own. When such a statement is admitted into evidence, the "witness" against the defendant, therefore, is the defendant. Thus, there is no violation of the right to confront "the witnesses against him." U.S. CONST. amend. VI. As the Court of Appeals has noted, a party "cannot be prejudiced by an inability to cross-examine him or herself." [cite] Accordingly, admission of the statements made by Mr. Johnson, which were admitted as tacit admissions by appellant, did not violate appellant's right to confrontation."

People v. Jennings, 50 Cal. 4th 616, 627-638, 237 P.3d 474; 114 Cal. Rptr. 3d 133 (Cal. 2010) – "when a defendant has adopted a statement as his own, the defendant himself is, in effect, the declarant. The 'witness' against the defendant is the defendant himself, not the actual declarant; there is no violation of the defendant's right to confront the declarant because the defendant only has the right to confront 'the witnesses against him.' ... we conclude statements made by Michelle [in a joint police interview] that were met by defendant's silence, or by equivocal or evasive responses on his part, properly are viewed as adoptive admissions, and therefore were admissible in evidence."

Wilson v. United States, 995 A.2d 174 (D.C. 2010) – recorded conversation between friends, one of whom was cooperating with police – "we are satisfied that there was sufficient evidence to support admissibility of the Thompson/appellant exchanges on the videotape for further consideration by the jury as adoptive admissions by appellant, and that the admission of the challenged portion of the exchanges for this purpose did not violate appellant's rights under the Confrontation Clause."

State v. Far West Water & Sewer Inc., 228 P.3d 909, 931 (Ariz. Ct. App. 2010) – "Far West Water & Sewer, Inc. ("Far West") appeals its convictions and sentences for negligent homicide, aggravated assault, two counts of endangerment and violating a safety standard or regulation which caused the death of an employee.... [¶ 77] Here, Weidman made statements to an investigator in his representative capacity as president of Far West and within the scope of his authority. Weidman's statements were the statements of Far West. ... Although the Confrontation Clause applies to statements made by a witness against a defendant, a defendant does not have the right to confront his own statements."

People v Valdes, 2009 NY Slip Op 7664, 66 A.D.3d 925; 886 N.Y.S.2d 623 (N.Y. App. Div. 2d Dep't 2009) – "the statement made by the defendant was not testimonial in nature"

People v. O'Non, 483 Mich. 943, 763 N.W.2d 286 (Mich. Apr 08, 2009) – "in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for con-sideration, as on leave granted, of the issues: (1) whether the redacted transcript of the prior testimony of Matthew O'Non at his own trial, which was admit-ted in this case, was "testimonial" under *Crawford v. Washington*, 541 U.S. 36; 124 S Ct 1354; 158 L.Ed.2d 177 (2004)" – [NOTE: No further information given, and not explanation as to why the question would be dispositive.]

Plantillas v. Cate, 2009 WL 890656 (C.D. Cal. Mar 31, 2009) (unpub) (habeas) – "the Confrontation Clause is not implicated because the statements at issue were petitioner's own admissions"

People v. Ball, 2009 WL 755626 (Cal. App. 5 Dist. Mar 24, 2009) (unpub) – "The entire context of the telephone call established the foundation for the authorized admission exception. Avila told appellant's mother that he was calling for "your boy," who wanted her to call Vickie, and then informed Vickie that same person wanted her to fabricate evidence that she was at the mall and saw the victim reach for his waist. Avila's declaration that he was calling for "your boy" was insufficient to establish the agency by itself, but there was much more to this telephone call than one inmate simply passing along a message for another. Instead, there were nu-merous instances when Avila paused and shouted "Vickie's" responses to someone at the jail, and the third party then shouted additional instructions and details on how Vickie should fabricate her testimony."

State v. Richardson, 2009 WL 678466 (N.C. App. Mar 17, 2009) (unpub) – "Officer Wood's testimony indicates that defendant "smiled and snickered" when her boyfriend made both of the statements at issue. While another trial court might have come to a different decision as to whether such actions constituted an adoptive admission, reading them as such under the circumstances does not constitute plain error."

Porter v. Yates, 2009 WL 412127 (C.D. Cal. Feb 13, 2009) (unpub) (habeas) – officer played tape of co-defendant's confession – defendant didn't deny statements incriminating him – "adoptive admissions do not implicate the Confrontation Clause ... By 'adopting' [Detective] Carver's and [co-d] Hambly's statements, petitioner is, in effect, the declarant. Thus, the Confrontation Clause does not apply because petitioner has the right to confront only "the witnesses against him[.]"

Stauffer v. Vasquez, 2009 WL 385446 (C.D. Cal. Feb 12, 2009) (unpub) (habeas) – wife secretly tape-recorded husband – "Here, the statements at issue were made by Petitioner himself, not his wife, and although he was speaking to his wife in the recorded statement, the transcript does not reflect that she said anything."

People v. Casbar, 2009 WL 131693 (Mich. App. Jan 20, 2009) (unpub) – "The Confrontation Clause argument lacks merit because testimonial statements by the previous victims were not used; rather, it was defendant's own statements to police that were admitted into evidence."

People v. Zavala, 168 Cal.App.4th 772, 85 Cal.Rptr.3d 734 (Cal. App. 5 Dist. Nov 24, 2008), review denied (Feb 25, 2009) – "since adoptive admissions are in effect the defendant's own admissions, no concerns arise about the credibility or veracity of the original declarant, so no violation of the confrontation clause arises from the admission into evidence of the statements at issue."

State v. Scott, 2008 WL 4662487 (Ariz. App. Div. 1 Oct 16, 2008) (unpub) – pretext phone call – "In this case, by failing to deny the victim's allegations but instead apologizing for what he had done and attempting to explain why he had engaged in the sexual misconduct, defendant 'manifested an adoption or belief in truth' of the victim's statements. [cite] The victim's statements thus were not hearsay because they were not admitted for the purpose of proving the truth of the matter asserted but instead were admitted as defendant's adoptive admissions."

Barocio v. Horel, 2008 WL 4661448 (E.D. Cal. Oct 16, 2008) (unpub) (habeas) – "The Sixth Amendment does not provide that an accused has the right to confront and cross-examine himself."

Williams v. Wong, 2008 WL 4191632 (C.D. Cal. Sep 11, 2008) (unpub) (habeas) – magistrate report – "Contrary to Petitioner's claims, the admission of his [own] out of court statements do not implicate the Confrontation Clause because they were not used to establish the truth of the matters asserted." – [NOTE: And because they're non-hearsay, being his own statements.]

People v. Ojito, 2008 WL 3824295 (Cal. App. 4 Dist. Aug 18, 2008) (unpub) – "Because any level of cooperation can earn the appellation of rat, regardless of the specific content of the information provided, the fact Ojito referred to Lucero as a rat has no probative value on his acquiescence to her specific statements about the crime." – that is, calling subsequently-murdered cooperating witness a rat wasn't the same as adopting her statements to authorities as the truth

U.S. v. Fleming, 287 Fed.Appx. 150 (3rd Cir. Aug 15, 2008) (unpub) – surreptitious recording of drug deal – "the audio, to the extent it was audible, was admissible, as to comments by Hendricks or Fleming, as statements of a party opponent ..., and, as to comments by [C.I.] Rivera, in order to place Hendricks's and Fleming's statements in context."

State v. Self, 2008 WL 2954597 (Ariz. App. Div. 1 Jul 29, 2008) (unpub) – detective repeated what co-suspect had said and asked if it was true – defendant said "Yeah" – adoptive admission, no *Crawford* violation – [NOTE: But the officer's statement wasn't hearsay anyway, being offered to show its effect on the defendant and put his answer in context.]

Smith v. State, 986 So.2d 290 (Miss. Jun 26, 2008) – "[W]hile Crawford certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself"

Pestano v. State, 980 So.2d 1200 (Fla. App. 3 Dist. Apr 30, 2008) – two suspects picked up in 8-year-old unsolved murder – "The police permitted the men to speak to each other. They were placed in a room together; their conversation was video and audio taped. The men agreed to a version of the story that placed the blame on a third person, who was deceased. They agreed to say that they left the victim alone with the third person." ... The record demonstrates that Pestano adopted the co-defendant's statements as his own. *Globe v. State*... Hence there was no error in admitting the conversation into evidence." – [NOTE: Opinion doesn't specify its holding is based on 6th amendment, but *Globe* is a *Crawford* case.]

Sanchez v. Dexter, 2008 WL 1766729 (C.D. Cal. Apr 14, 2008) (unpub) (habeas) – "In bifurcated proceedings, the jury found that petitioner had sustained three prior 'strike' convictions in New Mexico" – petitioner entered *Alford* plea and did not contest N.M. prosecutor's statement of the factual foundation for the plea, but on the contrary said how sorry he was, thus adopting prosecutor's statements as his own – "Here, because petitioner 'adopted' the New Mexico prosecutor's statements, petitioner is, in effect, the declarant. Thus, cross-examination is unnecessary because petitioner has the right to confront only 'the witnesses against him[.]'"

Coleman v. State, 2008 WL 1032753 (Ind. App. Apr 11, 2008) (unpub) – "Russell's testimony that E 'said that Aljonon wanted me to lie for him' is hearsay" but made by authorized agent – "Short of a written agreement, we are hard pressed to think of stronger evidence of an agency relationship than a recording of a conversation where a person instructs another to do the person's bidding. Accordingly, we conclude Rule 801(d)(2)(D) renders Russell's testimony and the Recording nonhearsay ... For purposes of determining a Confrontation Clause violation, we are not convinced that a statement admitted pursuant to Rule 801(d)(2)(D) should yield a different result than one admitted pursuant to the co-conspirator exception... [W]e conclude the trial court did not violate Coleman's Sixth Amendment right to confront witnesses against him when it admitted Russell's testimony and the Recording."

U.S. v. Esposito, 2008 WL 680968 (Naval-Marine Corps Ct. Crim. App. Mar 11, 2008) (unpub) – "*Crawford* concerns a criminal defendant's right to confront the witnesses against her. It has no bearing on the admissibility of the accused's *own* statement."

Hernandez v. State, 979 So.2d 1013 (Fla. App. 3 Dist. Mar 05, 2008) – "The issue before us is whether the trial court properly admitted Hernandez's statements from the redacted tape-recorded conversation between himself and codefendant Cuesta. We conclude that the trial court correctly admitted into evidence Hernandez's own statements." – adding, contrary to earlier opinion in case, that "it is now clear that it would have been permissible for the trial court to admit into evidence any statements by codefendant Cuesta that qualified as adoptive admissions by Hernandez"

Jones v. Adams, 2008 WL 413742 (N.D. Cal. Feb 13, 2008) (unpub) (habeas) – suspects placed squad car with tape recorder running – "Smith's recorded statements were not testimony;

they merely provided context for petitioner's responses; these responses were admitted into evidence as an adoptive admission of petitioner's guilt."

State v. Bell, 2008 WL 397620 (Ohio Com. Pl. Jan 29, 2008) (unpub) (trial court order) – "{¶ 16} Defendant essentially argues that he is the witness who made inadmissible testimonial statements in the case at bar. ... {¶ 17} However, when the alleged 'witness' is the accused himself, 'the Confrontation Clause is simply inapplicable.'"

State v. Davis, 116 Ohio St.3d 404, 880 N.E.2d 31, 2008-Ohio-2 (Ohio Jan. 3, 2008) – "{¶ 127} Fourth, Davis argues that [Detective] Vanoy's ongoing commentary and interpretation of Davis's reactions during the interview denied him the right to confrontation in violation of *Crawford* ... *Crawford* does not apply to Vanoy's testimony about Davis's statements because Davis is the accused." [NOTE: Also not hearsay but first-hand observations.]

People v. Seriales, 2007 WL 3208541 (Cal.App. 5 Dist. Nov 01, 2007) (unpub) – "[N]o confrontation right is impinged when those statements are admitted as adoptive admissions without providing for cross-examination of the declarant." [citation omitted] This is so even in light of *Crawford*."

Rankin v. State, 963 So.2d 1255 (Miss. App. 2007) – defendant wrote letters from jail to his former girlfriend, his victim's mother – "Further, there can be no violation of the Confrontation Clause when the defendant is the person making the incriminating statement, as the defendant cannot cross-examine himself."

Loredo v. State, 2007 WL 2380346 (Tex. App.-Tyler Aug 22, 2007) (unpub) – "No confrontation issues or hearsay issues are raised by the expert relying on Appellant's own words."

People v. Barrientes, 2007 WL 1753569 (Mich. App. Jun 19, 2007) (unpub) – "Defendant characterized the recordings as a number of telephone calls he made to the victim with the last call being made approximately one week before the trial. Primarily, the recordings consisted of defendant's questioning their relationship. But a couple of times in the conversation, defendant indicated that he would plead guilty. Also, defendant stated that it did not take long for him to become intoxicated. ... Defendant has misapplied *Crawford* because the recordings did not constitute testimonial hearsay. Defendant himself made the recordings and such admissions are excluded from the rule against hearsay." (footnote omitted)

State v. Ortiz, 101 Conn. App. 411, 922 A.2d 244 (Conn. App. 2007) – "On the basis of evidence gathered from both [elderly murder victim] Arnini's home and the area where the truck was located, the police were able to link Kimberly Lebel to the crime scene. During the investigation, the police also arrested a witness, Jorge Santos, who implicated the defendant and Lebel. At trial, Santos testified that on the night of February 4, 2003, the defendant and Lebel were with Santos at an apartment, and they discussed the crime. According to Santos, Lebel stated that she and the defendant had robbed an 'old man' in West Hartford and had stabbed him and that he had died. ... [Santos] testified specifically that the defendant was present during a conversation in an apartment when Lebel, in the presence of others, including the defendant, made statements that directly incriminated the defendant as being involved in the murder of Arnini. According to Santos, the defendant made no effort to correct Lebel, did not deny that the

crime had occurred and said nothing in response. Thus, the record amply supports that a highly inculpatory statement was made within the defendant's hearing, that he understood and comprehended the statement, that he had the opportunity to speak and that the circumstances naturally called for a reply from him, yet he made no response. Under these circumstances, we conclude that the defendant's silence may be construed properly as an admission of guilt. ... A nontestimonial statement admitted properly as an adoptive admission does not raise confrontation issues. Here, the defendant adopted Lebel's statement as his own; thus, the lack of opportunity to cross-examine Lebel does not violate the confrontation clause."

United States v. Petraia Maritime, Ltd., 489 F.Supp.2d 90, 2007 A.M.C. 1294 (D. Me. 2007) – statement by party's agent or servant – "Although it does not appear that the issue of the admissibility of a corporate defendant's vicarious admissions has been decided by any court post-*Crawford*, courts which have addressed the admissibility of other categories of 801(d)(2) statements have found their admissibility to present no Confrontation Clause problems. ... Because these statements are 801(d)(2)(D) admissions of Defendant and, as such, are defined as 'not hearsay,' the Court finds that their admission, even for the truth, does not violate the Confrontation Clause." – However, "once the crew members entered into cooperation agreements with the Government, the interests of the individual declarants diverged significantly from that of their employer and their interests, in fact, became adverse. ... Once their interests deviated, the statements can no longer be found to be made during the course of the agency relationship. ... [T]he statements made by the engineers and crewmembers after entering into the various agreements with the Government were clearly testimonial."

Torres v. Roberts, 2007 WL 1662645 (D. Kan. Jun 05, 2007) (unpub) (habeas) – "After *Crawford*, most courts addressing this issue have found that a party's own admission offered against him can be admitted without the right to cross-examination. ... Where the 'witness' against defendant is the defendant himself, there is no violation of defendant's Sixth Amendment right to confront because the defendant only has the right to confront the witnesses against him."

People v. Andrade, 2007 WL 1041656 (Cal. App. 4 Dist. 2007) (unpub) – "Andrade and Rizo argue that their right to confront and cross-examine adverse witnesses was violated by the admission of Rivera's statements regarding the conversations he overheard in Mendez's garage after the shooting. (*Cf. Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.) In that testimony, Rivera used the generalized pronoun, 'they,' in reference to those who were discussing the gun and that it belonged to the gang, had jammed and had been returned to Flores by Andrade. He could not identify the specific source of most of the statements because he was on his cellular phone to his girlfriend while the other people were talking. ... Rivera was present with all the SSRs[members of Southside Raza, a gang]—including the unconscious Cesar—as they talked about the gun brought by Flores, who passed it among the SSRs and who received it back from Andrade after the evening's events. Flores handed it to another SSR, and it eventually reached Andrade via Cesar along with the admonition that it had failed to fire. In such circumstances, no Fifth or Sixth Amendment concerns were implicated because the accusation of criminal conduct was not posed by any state agent but by a *private person* (see *People v. Roldan* (2005) 35 Cal.4th 646, 710-711 & 711, fn. 25; see generally 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 141, pp. 852-853) and, once adopted, the statements *became* those of the party against whom they were admitted. (*Roldan, supra*, 35 Cal.4th at p. 711, fn. 25.) Therefore, such statements were not *testimonial* in nature, and their admission did not violate the Confrontation

Clause. (*Ibid.*)"

State v. Snow, 2006 Kan. LEXIS 657 (2006) – A defendant does not have a 6th Amendment right to confront his own statements.

State v. Stevens, 138 P.3d 1262 (Kan. Ct. App. 2006) – Defendant's voluntary statements to police can be admitted in court without violating *Crawford* since a defendant does not have a right to confront his own statement.

U.S. v. Tolliver, 454 F.3d 660, 665 (7th Cir. Ill. 2006) – Defendant's statements made to a confidential informant during a drug transaction were non-testimonial for two reasons. First, defendants' statements are not hearsay and therefore do not implicate *Crawford*. Second, "Dunklin—the target of this sting operation who engaged in informal conversations with a customer, not known to him to be an informant—did not make his statements here with any expectation that they would be used against him in a criminal trial. If anything, as a purveyor of an illegal substance, Dunklin made these statements believing the exact opposite. Moreover, unlike a witness giving testimony, Dunklin was not recounting past events on these tapes but was rather making candid, real-time comments about drug transactions in progress. Therefore, besides not being hearsay, Dunklin's statements on the tapes are also not testimonial and thus fall outside of the *Crawford* rule against testimonial hearsay. *See Davis*, 126 S. Ct. at 2275 (statements made "unwittingly" to a government informant are "clearly nontestimonial")."

Derring v. McKee, 2006 U.S. Dist. LEXIS 8681 (W.D. Mich. 2006) – "An adoptive admission avoids the Confrontation Clause problem because the words of the hearsay declarant become the words of the defendant." Admitting statements made by deceased victim to friends and family, in the presence of the defendant, did not violate *Crawford*.

State v. Torres, 121 P.3d 429 (Kan. 2005) – A defendant has no Sixth Amendment right to confront his own statements to law enforcement. There is no conflict between a defendant's Fifth Amendment right to remain silent and the Sixth Amendment right to confront.

Benjamin v. State, 940 So.2d 371 (Ala. Crim. App. 2005) – Defendant robbed and murdered the victim and then admitted the crimes to a friend. The district attorney had the friend wear a wire and go back to the defendant who again confessed. The friend did not testify at trial, but the officer in charge of the wire authenticated the tape recording. The court held this was non-testimonial because the friend was not an adverse witness implicating the defendant and the defendant had no idea the statements would be used against him in court.

People v. Thoma, 128 Cal. App 4th 676; 27 Cal. Rptr 3d 309 (Cal App 2nd Dist 2005) – Defendant was convicted of drunk driving. When defendant did not dispute the sentencing court's description of the victim's injuries, this became a tacit admission and therefore an adoptive admission of the defendant. As such, the admission was non-testimonial.

People v. Roldan, 35 Cal. 4th 646; 27 Cal. Rptr. 3d 360; 110 P3d 289 (2005) – When a defendant adopts another person's statement as his own, this adoptive admission becomes the defendant's own statements and are non-testimonial.

State v. Robinson, 33 Kan. App. 2d 773; 109 P. 3d 185 (Kan Ct App 2005) – The Confrontation Clause does not apply when addressing admitting a defendant's confession at trial. A Defendant does not have a constitutional right to confront himself.

➤ Sub-Category: Language Conduit Theory

(for cases rejecting the language conduit theory, *see* part 2, Translators and Translations)

U.S. v. Shibin, 722 F.3d 233, 235-37 (4th Cir. 2013) – "the absence in court of the interpreter did not render the statements inadmissible as hearsay because the interpreter was not the declarant, but only a 'language conduit.'" – as for confrontation clause challenge, "Here, the statements were introduced as prior inconsistent statements. The interpreter was nothing more than a language conduit."

United States v. Orm Hieng, 679 F.3d 1131, 1136-1141 (9th Cir. Cal. 2012) – "A defendant and an interpreter are treated as identical for testimonial purposes if the interpreter acted as a 'mere language conduit' or agent of the defendant. ... "

United States v. Romo-Chavez, 681 F.3d 955 (9th Cir. Ariz. 2012) – border patrol officer served as interpreter – "Whether statements made through an interpreter should be considered statements of the original declarant 'require[s] an analysis of the facts on a case-by-case basis.' ... We do not presume, as Romo-Chavez would have us do, that a public servant is inherently biased. ... the district court did not err in concluding that Officer Hernandez served merely as a language conduit for Romo-Chavez."

Driver v. State, 2009 WL 276539 (Tex. App.-Hous. Feb 05, 2009) (unpub) – "mere language conduit" not hearsay declarant – [NOTE: While sixth amendment issue was raised, opinion expressly discusses only hearsay.]

Hernandez v. State, 291 Ga.App. 562, 662 S.E.2d 325, 08 FCDR 1809 (Ga. App. May 19, 2008) – " Under the language conduit rule, however, the statements of the translator are considered to be the statements of the declarant, [FN14] and Hernandez would not have the right to, in essence, confront himself. [FN15] Hernandez had a right to inquire into [translator] Loredó's honesty and competency in rendering the translation, but he shows no authority for the proposition that the Sixth Amendment requires that these issues may only be tested through cross-examination of the translator."

People v. Lopez, 2007 WL 3044331 (Cal. App. 6 Dist. Oct 19, 2007) (unpub) – "Defendant also contended that the court erred in admitting a statement he made to police in connection with a prior, unrelated burglary investigation. The statement was obtained through a police interpreter, but his partner, the officer who interrogated defendant in English, was the witness who testified at trial to the substance of defendant's prior statement." – held: statement was defendant's own under "language conduit" theory, thus raising no *Crawford* issue

People v. Maldonado, 44 A.D.3d 793, 843 N.Y.S.2d 415, 2007 N.Y. Slip Op. 07722 (N.Y. A.D. 2 Dept. 2007) – "language conduit" theory – when an English-speaking officer asked questions, a bilingual officer translated, and the defendant answered in Spanish, the

confrontation clause does not require that the translator testify absent reason to seriously doubt the accuracy of the translation – the translated words are the defendant's own

Stipulations
(category added Jan. 2011)

United States v. Williams, 632 F.3d 129, 130-133 (4th Cir. S.C. 2011) – "we find that the district court erred when it accepted the stipulation over Williams' objection and violated his Sixth Amendment right."

United States v. Smith, 632 F.3d 1043, 1047 (8th Cir. Iowa 2011), cert. denied (Oct. 3, 2011) – "Smith argues that the district court's admission of a forensic chemist's testimonial lab report that the five rocks purchased by Pickett contained three grams of crack violated Smith's Sixth Amendment right to confront adverse witnesses as construed in *Melendez-Diaz* ... However, at trial, Smith stipulated to the admission of the report. A stipulation 'is evidence introduced by both of the parties,' so neither may 'complain on appeal that the evidence was erroneously admitted.'"

Testimonial Statements Offered by Defendant / Opening the Door / Rule of Completeness / Invited Error

Sheffield v. United States, 111 A.3d 611, 623 (D.C. 2015) – "Butler cannot contest Dr. Pierre-Louis's expert testimony, when he failed to object, further developed it on cross-examination, and relied on it during closing arguments."

Freeman v. State, 329 Ga. App. 429, 429-31, 765 S.E.2d 631, 633-34 (2014) – "Furthermore, we disagree with the trial court's assertion that Freeman opened the door to the admission of this evidence during his aggressive cross-examination of the lead officer as to why Freeman was targeted... Defense counsel's decision to waive a defendant's confrontation rights must be *437 done 'intentionally'... But here, there was no such waiver. In fact, the record shows that Freeman's counsel explicitly objected to the admission of the CI's statements, as well as the trial court's ruling that he opened the door to such statements." – in other words, counsel can close the door after opening it

People v. Lee, 120 A.D.3d 1137, 992 N.Y.S.2d 429 (N.Y. Sup. Ct. 2014) – "The People's argument that the Confrontation Clause was inapplicable because defendant himself introduced the evidence is unavailing. Although defendant personally requested the introduction of the evidence, he was not appearing pro se. Defendant was represented by counsel throughout the case, and there was no form of hybrid representation. The decision to introduce evidence was not a fundamental decision reserved to defendant, but a strategic or tactical decision for his attorney [cites]. Thus, defendant was deprived of his right to counsel when the court admitted the evidence solely based on his own request, over his attorney's vigorous and consistent opposition [cites]."

People v. Merritt, 2014 COA 124, ¶¶ 1-61, __ P.3d __ (Colo. App. 2014) – after holding (on case-by-case analysis) that autopsy report was testimonial: "The decision to introduce testimonial

statements about the alcohol was thus an intentional trial tactic by defense counsel. By opening the door to a line of questioning about alternative causes of death which relied upon facts contained in the autopsy report, defendant's confrontation rights were effectively waived."

Corrothers v. State, __ So.3d __, 2014 WL 2894310 (Miss. 2014) – "¶ 91.... Hutchins did relay another statement by Holmes, but she gave that statement in response to cross-examination elicited by the defense, and Corrothers did not object on hearsay or Confrontation–Clause grounds or request that the jury be instructed to disregard her testimony."

People v. Santana, 113 A.D.3d 504, 978 N.Y.S.2d 225, 226 (N.Y. App. Div. 1st Dept. 2014) – "The detective's testimony was admissible ... for the related reason that the codefendant unequivocally opened the door to such testimony [cites]."

Lane v. State, 997 N.E.2d 83, 85-87 (Ind. App. 2013) transfer denied, 2014 WL 292068 (Ind. 2014) – "We agree with the majority of jurisdictions that have found that a defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause. ... We hold that for a waiver of the fundamental constitutional right of confrontation to be effective, such waiver must be 'clear and intentional.'" (citation omitted) – [NOTE: But, of course, if the waiver is intentional, it's not a matter of opening the door. The court seems unaware that it's contradicting itself.]

U.S. v. Monserrate-Valentin, 729 F.3d 31, 55-56 (1st Cir. 2013) – "the district judge warned Monserrate's counsel that her question was going to elicit hearsay from Agent Torres and gave her an opportunity to withdraw it. She chose not to. As such, we conclude that any objection as to the admission of this testimony is waived."

State v. McLeod, 66 A.3d 1221 (N.H. 2013) – "Even if introduction of [deceased witness] Walker's testimonial statements on cross-examination [of fire expert] is 'forced' upon the defendant, we do not conclude that the defendant's rights are thereby violated. ... The purpose behind the Confrontation Clause is to 'secure for the opponent the opportunity of cross-examination.' ... This purpose is not compromised by the defendant's choice, 'forced' or otherwise, to elicit underlying testimonial statements through an expert witness who is not acting as a mere transmitter of testimonial hearsay."

People v. Dean, 101 A.D.3d 1781, 958 N.Y.S.2d 247 (N.Y. App. Div. 4th Dep't 2012) – "Defendant further contends that County Court violated the Confrontation Clause by ruling that defense counsel opened the door to a hearsay statement. We reject that contention. In *People v Reid* [cite], the Court of Appeals concluded that the door could be opened to evidence that was otherwise inadmissible under the Confrontation Clause. We further conclude that the rule enunciated in *Reid* should be applied retroactively [cite]."

People v. Rogers, 2012 COA 192, __ P.3d __, 2012 Colo. App. LEXIS 1834 (Colo. Ct. App. 2012) – "[¶ 22] We conclude that in this case defense counsel intentionally opened the door to the Confrontation Clause violation by her strategic trial decision to introduce the non-testifying driver's hearsay statement. Accordingly, defendant has waived the right to challenge the admission as error."

United States v. Shores, 700 F.3d 366 (8th Cir. Mo. 2012) – "such [testimonial] statements will only be considered context for the investigation—and thus outside the realm of hearsay—if 'the propriety of the investigation is at issue in the trial.' ... From the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting. ... The challenged statement was offered 'only to show why the officers conducted their investigation in the way they did,' namely by focusing their attention on Shores. [cite] Therefore, the district court did not abuse its discretion in admitting this evidence."

People v Reid, 19 N.Y.3d 382, 383-389, 971 N.E.2d 353, 948 N.Y.S.2d 223 (N.Y. 2012) – "This appeal raises the question whether a defendant can open the door to the admission of testimony that would otherwise be [*385] inadmissible under the Confrontation Clause of the United States Constitution. We hold that he can, and, in this case, he did. ... Here, by eliciting from witnesses that the police had information that McFarland was involved in the shooting, by suggesting that more than one source indicated that McFarland was at the [*389] scene, and by persistently presenting the argument that the police investigation was incompetent, defendant opened the door to the admission of the testimonial evidence, from his nontestifying codefendant, that the police had information that McFarland was not at the shooting."

State v. Brooks, 125 Haw. 462, 264 P.3d 40 (Haw. Ct. App. 2011) – "We agree with the Circuit Court's analysis and with the decisions from other jurisdictions the Circuit Court cited which have held that *Crawford* does not bar the admission of evidence pursuant to the rule of completeness. We conclude that the Circuit Court properly ruled that Brooks was not entitled to introduce selected portions of Rangamar's statement that were favorable to his defense and, at the same time, use *Crawford* to preclude the State from introducing other portions of Rangamar's statement that were necessary to prevent the jury from being misled."

Turner v. State, 953 N.E.2d 1039 (Ind. 2011) – addressing hearsay issue, court finds: "Turner injected into the trial the issue of whether there was a disagreement between Putzek and Brundage on the question of an identification match between the live round and the discharged shell casings. Left unchallenged, the evidence Turner introduced suggested the two examiners reached different conclusions. Having thus opened the door during cross-examination of a supposed disagreement, Turner is in no position to complain of contrary evidence elicited by the State on redirect examination. We find no error on this issue." – also no confrontation clause violation, because the same reason indicates that the statement was not created to be an out of court substitute for testimony

People v. Andrade, 87 A.D.3d 160, 162-165, 927 N.Y.S.2d 648 (N.Y. App. Div. 1st Dep't 2011) – "By raising a challenge at trial to the voluntariness of his inculpatory statements, defendant opened the door to the introduction of the evidence the police had placed before him to elicit those statements. The admission of this evidence — a videotape of the interview of a nontestifying witness and a photo array from which that witness had identified defendant — did not violate the hearsay rule or defendant's right of confrontation, because the evidence was admitted, not as proof of the matters asserted therein, but to rebut defendant's claim that his statements to the police were involuntary, a claim the People were required to disprove beyond a reasonable doubt [cites]."

People v. Kitano, 2011 Guam 11 (Guam Sup. Ct. 2011) – "the issue is whether the trial court's decision that all of Officer Tainatongo's evidence would be admissible [under rule of

completeness] should Kitano elicit testimony from Officer Tainatongo prevented Kitano from fully confronting C.L., Officer Tydingco, and Officer Tainatongo. ... If Kitano's right to effective cross-examination was in any way hampered, it was through no fault of the trial court, but rather was a result of defense counsel's tactical decision to forego examining Officer Tainatongo for fear that other parts of his report might be admitted."

People v. Vines, 51 Cal. 4th 830, 858-864, 251 P.3d 943,124 Cal. Rptr. 3d 830 (Cal. 2011) – "Nor, as defendant argues, would the confrontation clause of the Sixth Amendment to the United States Constitution have precluded the admission, under the hearsay exception embodied in Evidence Code section 356, of the portion of Proby's statement that implicated defendant. In interpreting the requirements of the confrontation clause, the United States Supreme Court in Crawford recognized the continuing validity of exceptions, like the rule of forfeiture by wrongdoing, that derive from equitable considerations rather than an improper judicial determination of reliability. ... We conclude the rule of completeness also falls within this category. ... We find unavailing defendant's efforts to analogize this case to the *Bruton-Richardson-Gray* line of cases. n14 Here, unlike in those cases, the prosecution did not initially seek to introduce the portion of the statement implicating defendant, but only sought to use it to correct what would have been an inevitably misleading implication..."

Tunstull v. Commonwealth, 337 S.W.3d 576, 588-589 (Ky. 2011) – "We agree with Appellant that Detective Mann's testimony clearly implied that the women identified him as the person in the bank surveillance photo. Had the Commonwealth attempted to introduce this identification in its case-in-chief, it would have been inadmissible as a violation of the Confrontation Clause, as neither woman testified at trial. [cites] However, in this case, the evidence was brought up in rebuttal to the defense's initial use of the existence of, and hearsay statements of, these two women to suggest that Demond Tunstull was the person who committed the robberies, and that the police inexplicably went after the wrong man - Appellant. Accordingly, we cannot say the trial court erred in ruling that the defense opened the door with regard to this witness as to why the police pursued Appellant, rather than Demond."

Woodall v. State, 336 S.W.3d 634, 635-647 (Tex. Crim. App. 2011) – "Appellant declined the court's invitation to bring Pinedo into court. Thus, Appellant induced the alleged error of which she now complains, and she may not argue on appeal that her confrontation rights were violated when Pinedo's grand jury testimony was read into evidence."

Johnson v. State, 289 Ga. 22, 709 S.E.2d 217, 2011 Fulton County D. Rep. 777 (Ga. 2011) – " n3 Specifically, the testimony at issue consists of statements by [Detective] Zimbrick to the effect ... (2) that he had shown a photographic lineup to 'the source of the information of [appellant's] name.' The latter category of these references, in addition to not relating an actual statement, was in fact elicited by appellant's counsel's own cross-examination of Zimbrick and thus may not be asserted as error by appellant."

State v. Hull, 788 N.W.2d 91 (Minn. 2010) – seemingly holding that defense counsel did not open the door because he or she was just responding to the prosecution's introduction of irrelevant evidence – "The State cannot raise this inference and now complain about Hull's appropriate response..." [NOTE: It wasn't complaining, judge.] - in other words, the state opened the door to the defense, and therefore the defense didn't open the door to the state – apparently that makes sense – anyway, "Even if Hull could be said to have 'opened the door' to

the officer's statement, our analysis under Crawford would not end at that point. We have not decided whether a defendant's 'opening the door' to a constitutionally inadmissible statement can essentially operate as a waiver of the Confrontation Clause right. Cases from other jurisdictions have gone [*102] both ways on this question." – Chief Justice Gildea and Justice Dietzen file separate opinion concluding defense opened the door

United States v. Holmes, 620 F.3d 836 (8th Cir. Mo. Sept. 2, 2010) – "To the extent he [i.e., defense counsel] opened the door by asking questions of Officer Singh on cross-examination in an attempt to give the jury the impression that Officer Singh had no information tying Holmes to the Anderson Avenue residence, he did not open the door so wide as to allow Officer Singh to recite the full extent of the statements from the CI implicating Holmes in selling drugs and possessing firearms."

Wells v. State, 319 S.W.3d 82 (Tex. App. San Antonio Apr. 14, 2010), pet. ref'd (Oct. 13, 2010) – "Because appellant opened the door to Detective Moffitt's testimony regarding Toledo's statements, its admission did not violate appellant's right of confrontation."

Moses v. State, 30 So. 3d 391, 397 (Miss. Ct. App. 2010) – "During the cross-examination, counsel for Moses repeatedly questioned Investigator Gibson as to whether he had any direct evidence of Moses's involvement in the carjacking. The court then ruled that counsel for Moses had opened the door, and the court then allowed Investigator Gibson to state that Kennedy informed him that Moses had been with him in the parking lot of the casino 'on the morning of the incident.' This issue lacks merit."

United States v. Lopez-Medina, 596 F.3d 716, 731-733 (10th Cir. Utah 2010) – "We agree with the government that Lopez-Medina opened the door to further questioning of Officer Johnson regarding the information he received from [*731] the confidential informant. Where, as here, defense counsel purposefully and explicitly opens the door on a particular (and otherwise inadmissible) line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic. ... Similar to waiver by stipulating to the admission of evidence, counsel in a criminal case may waive a client's Sixth Amendment right of confrontation by opening the door, 'so long as the defendant does not dissent from his attorney's decision and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy.'"

Commonwealth v. Santos, 454 Mass. 770; 912 N.E.2d 985 (Mass. Sep 15, 2009) – autopsy report – "Despite the fact that a Crawford issue, if any, had not been removed, defense counsel indicated his consent with this limitation, and agreed that Dr. Evans could testify in place of Dr. Chirkov. Given the defendant's agreement, there was no error in admitting the testimony." – and not ineffective, because the report supported the defense theory

Vanpelt v. State, __ So.2d __, 2009 Ala. Crim. App. LEXIS 166, 2-7 (Ala. Crim. App. Dec. 18, 2009) – "Vanpelt next argues that the circuit court erred in allowing the State to present hearsay evidence. Specifically, he argues that the State's medical examiner, Dr. Emily Ward, should not have been allowed to testify to the results of a toxicological report she had not prepared. ... Assuming, without deciding, that the toxicology results were hearsay and their admission violated Vanpelt's right to confront, [FN 10] any error that might have occurred did not rise to the level of plain error. Here, defense counsel made the first reference to the victim's

blood-alcohol level, and counsel did not object when Dr. Ward testified to the toxicology results. Clearly, defense counsel viewed the results of the toxicology report as favorable and relevant to Vanpelt's defense."

U.S. v. Miller, 319 Fed.Appx. 351 (6th Cir. (Mich.) Mar 26, 2009) – "In light of the fact that it was defense counsel who, on cross-examination, first asked Tutt about the out-of-court statements contained in the analysis, Miller's claim that he was denied his right of confrontation fails."

Lobato v. State, 2009 WL 1491517 (Nev. Feb 05, 2009) (unpub) – "Finally, Lobato contends that because she was not able to confront and cross-examine the urologists and medical providers Detective Thowsen spoke to, her confrontation rights under *Crawford v. Washington* were violated. ... This testimony was occasioned by defense counsel's questioning during cross-examination and thus was invited error."

State v. Busch, 2009 WL 981677 (Kan. App. Apr 10, 2009) (unpub) – "Busch opened the door by asking Hamner on cross-examination whether he had asked any of the four men if they had been driving that night. The State followed up by asking what Baker and Parmenter said in reply. Thus, because originally Busch broached the subject, he opened the door to inquiring about Baker and Parmenter's responses."

State v. Sorto, 2009 WL 877669 (Wash. App. Div. 1 Mar 30, 2009) (unpub) – "because Sorto elicited or invited admission of these [testimonial] statements, he cannot now claim it as error"

State v. Moorer, 2009 WL 818945, 2009-Ohio-1494 (Ohio App. 9 Dist. Mar 31, 2009) (unpub) – "Mr. Moorer specifically asked Officer French what he had written in his report regarding what Ms. Washington told him. Officer French replied that Ms. Washington had said she 'was choked, pushed down, and was hit in the face.' Mr. Moorer, therefore, has not only forfeited any error regarding Officer French's testimony, he invited that error."

U.S. v. Miller, 2009 WL 792842 (6th Cir. Mar 26, 2009) (unpub) – "In light of the fact that it was defense counsel who, on cross-examination, first asked Tutt about the out-of-court statements contained in the analysis, Miller's claim that he was denied his right of confrontation fails."

State v. Samuel, 2009 WL 170772 (Minn. App. Jan 27, 2009) (unpub) – "It was within the district court's discretion to admit the reference to Haile's denials because Samuel had himself sought in an impermissible way to influence jurors' impression of BD's credibility. The Confrontation Clause violation is, thus, justified as a permissible rebuttal under the curative admissibility doctrine."

U.S. v. Cruz-Diaz, 550 F.3d 169 (1st Cir. Dec 18, 2008) – "Ayala's counsel opened the door to the FBI agent's testimony, pointedly cross-examining a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. ... Faced with this line of questioning, the government sought to introduce the FBI agent's testimony to explain why the FBI and police did not lift forensic evidence from the car." – namely, Ayala's co-defendant confessed – admission of confession not *Crawford* error

State v. Shearod, 992 So.2d 900 (Fla. App. 2 Dist. Oct 24, 2008) – after ordering retrial for non-*Crawford* reasons, appending extended dicta on *Crawford* – "FN2. After the detective testified to what Mr. Joyner had told him, the State moved to play the audio tape of the interviews to the jury, at which time defense counsel, who knew that Mr. Joyner would not be testifying, finally objected on the basis of *Crawford*. The trial court overruled that objection, finding that the door had already been opened." – purpose of dicta, apparently, is to make sure defense counsel does make same mistake on retrial

Stringer v. State, __ S.W.3d __, 2008 WL 4661830 (Tex. App.-Fort Worth Oct 23, 2008) – "A defendant may not use portions of a witness's testimony as a sword--here the supervision officer's presentence report--but then use a constitutional right as a shield to eliminate portions of the same witness's testimony that are unfavorable to the defendant. For these reasons, by filing an application for probation swearing that he had never been convicted of a felony and by urging the trial court to grant probation based on the positive portions of the PSI, Stringer waived, or is estopped from asserting, a Confrontation Clause objection to the Adult Criminal History portion of his PSI."

State v. Nelson, __ P.3d __, 2008 WL 5072289 (Or. App. Dec 03, 2008) – "Defendant admitted at trial that he had obtained and cashed the unemployment checks and, thus, was guilty of theft; however, defendant asserted that Derrick had given him permission to receive and cash the checks and, therefore, he was not guilty of identity theft and forgery. Derrick refused to testify at defendant's trial. In support of his theory, defendant offered into evidence an unsigned letter, purportedly written by Derrick, that, defendant argued, showed that Derrick had given him permission to receive and cash the checks. ... After defendant had testified to the contents of the letter, the state called [Officer] Kelley as a rebuttal witness to recount Derrick's statement that he had not given anyone permission to use his unemployment account. Admission of that statement was proper under OEC 806 as impeachment of a hearsay declarant and, because the statement was not offered for its truth, defendant's Sixth Amendment right to confrontation was not violated."

Hernandez v. State, 273 S.W.3d 685 (Tex. Crim. App. Oct 15, 2008), rehearing denied (Dec 17, 2008) – "Leffew's statement to [Deputy] Damiani was used in rebuttal for the nonhearsay purpose of impeaching her credibility. When the appellant called the declarant, Leffew, to testify through the inmate witnesses, she placed the declarant's credibility in issue. Under Rule 806, [FN20] in conjunction with Texas Rule of Evidence 613(a), [FN21] the State was then permitted to impeach her credibility by introducing her prior inconsistent statement." – no *Crawford* violation, although statement indisputably testimonial

U.S. v. Mejia, 545 F.3d 179 (2nd Cir. Oct 06, 2008) – either court finds information brought out by defense counsel to be *Crawford* violation, or else it relies on that information to find the direct testimony a violation – although opinion is very long, its precise holding is unclear

U.S. v. Rubi-Gonzalez, 2009 WL 464208 (2nd Cir. Feb 25, 2009) (unpub) – a short, unpublished decision that explains *Mejia*'s holding better than *Mejia* does – including "some of [gang expert] Alicea's testimony **may** also have violated *Crawford* by communicating 'out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion.'" – boldface added

State v. Robinson, 2008 WL 2700002, 2008-Ohio-3498 (Ohio App. 6 Dist. Jul 11, 2008) (unpub) – "FN 1. Early in the trial proceedings, defense counsel--over vigorous objection by the state--persuaded the trial court to admit into evidence as 'ancient documents' police reports from 1980 that contained statements from third-party interviewees. Although appellant now claims that the admission of such evidence was in violation of appellant's confrontation rights under *Crawford* ... we find that any such rights were knowingly, intelligently, and voluntarily waived by appellant at trial."

State v. Gray, 2008 WL 2635493, 2008-Ohio-3394 (Ohio App. 11 Dist. Jul 03, 2008) (unpub) – "{¶ 96} Thus, the statements were introduced during the cross-examination of Officer Bilicic by defense counsel. They were not introduced by the state." – invited error

People v. Knox, 2008 WL 2440657 (Cal. App. 4 Dist. Jun 18, 2008) (unpub) – "At the preliminary hearing, Miles was called to testify by defendant." – and was impeached by her prior inconsistent statement to detective – "defendant himself put Miles on the stand; thus, Miles was not a prosecution witness. Hence, defendant's right to confront the witnesses against him was preserved."

State v. Palmer, 2008 WL 2424455, 2008-Ohio-2937 (Ohio App. 8 Dist. Jun 16, 2008) (unpub) – "defense counsel opened the door to this line of questioning when on cross-examination he accused the detective of assuming the cell phone found in the car was Palmer's. On redirect, the state asked Palmer to explain how he knew the cell phone was Palmer's and the detective responded by detailing his conversation with Ms. Fleegle. Therefore, the hearsay was not used to prove the truth of the matter... Instead, it was used to prove that the phone was Palmer's. Because the statements were not hearsay, Palmer's right to confrontation was not implicated"

Pugh v. Wynder, 2008 WL 2412978 (E.D.Pa. Jun 10, 2008) (unpub) (habeas) – defense counsel called officer to stand and asked him about statement made by robbery victim at station, after robber had been arrested – "On cross-examination, the prosecutor further questioned Detective Grace, bringing out further hearsay, but at this point, the door had been opened on direct and Petitioner's counsel did not object to any of Detective Grace's testimony. Clearly, then, any further objection was waived."

U.S. v. Whittington, 2008 WL 659150 (5th Cir. Mar 10, 2008) (unpub) – "Detective Hughs's testimony was not admitted by the government on direct or redirect, but rather on cross-examination. Cardona's own counsel repeatedly asked questions implying that the detective had no knowledge of Cardona's interest in the marijuana. When accusing the detective of having no information of Cardona's connection to the marijuana, Cardona invited the witness to provide testimony regarding the informant's tip. Because Cardona invited the error, he cannot complain of its admission on appeal."

Ko v. Burge, 2008 WL 552629 (S.D. N.Y. Feb 26, 2008) (unpub) (habeas) – upholding *People v. Ko*, 789 N.Y.S.2d 43 (App. Div. 2005) – rejecting Sixth Circuit *Cromer* opinion holding it is no longer possible to open the door – "The *Cromer* decision cited no authority for the proposition that a defendant cannot open the door to the admission of evidence otherwise barred by the Confrontation Clause. The decision has not been followed by any other Court of Appeals. It is inconsistent with other cases in which the Supreme Court has held that a defendant's

statement, otherwise inadmissible under other constitutional provisions, can be introduced at trial to impeach a defendant's conflicting trial testimony." – here, defense counsel opened door with his opening statement

State v. Selalla, 2008 WL 58968 (S.D. Jan. 2, 2008) – "[T]he absent Vallejo's statement, made to Duprey during the course of his interrogation, was clearly testimonial as defined by Crawford. Selalla sought to elicit the exculpatory parts through Duprey's testimony. The trial court agreed to allow this line of questioning under our Rule 804(b)(3). However, consistent with our Rule 106, it determined that it would also allow the State to 'complete the picture' by eliciting testimony from Duprey about Vallejo's statements inculcating Selalla in the Sioux Falls drug trade." – rejecting defendant's attempt at "using the Confrontation Clause as a sword ... If this Court were to reverse Selalla's conviction on these grounds, we would eviscerate the 'rule of completeness.' The result would be to set up unfair outcomes arising out of not-so-hypothetical scenarios such as that of the declarant who confesses to the police that he murdered two people, but then subsequently, during the same interview, says that the defendant forced him to do it. Applying Rule 804(b)(3), the defendant could introduce the first portion of the declarant's statement to the police because it was a statement against interest; then trumping the State's right to introduce the second statement under Rule 106 by invoking the Confrontation Clause under the banner of *Crawford*. See *id.* We refuse to establish that unfair precedent."

U.S. v. Halter, 2008 WL 77790 (6th Cir. Jan 07, 2008) (unpub) – "Halter's counsel elicited most of the alleged *Crawford*-violating statements about which he now complains when conducting cross-examination of government witnesses. Halter cannot complain that *Crawford* bars statements that his own counsel elicited."

People v. Hernandez-Perez, 2008 WL 161108 (Mich. App. Jan 17, 2008) (unpub) – "defense counsel elicited the testimony during his line of questioning concerning why defendant was not arrested until four to five days after the crime occurred. As such, defendant cannot now claim error."

U.S. v. Robinson, 272 Fed.Appx. 421 (6th Cir. Nov 19, 2007) (unpub) – "The record indicates that Officer Eastman's testimony concerning the information the police had received about a possible shooter was offered not for the truth of the matter asserted, but rather to explain, in response to the defense inquiries, why the police did not wait longer after announcing their presence before breaking down the door. ... The trial court gave a cautionary instruction ... Since the statement was not offered for the truth of the matter asserted, Officer Eastman's testimony did not violate the Confrontation Clause, and the trial court did not err in allowing this testimony."

People v. Aghchay, 2007 WL 3408375 (Cal. App. 2 Dist. Nov 16, 2007) (unpub) – "Because we find that he did 'open the door' to their admission, we hold that the court did not err in admitting them, and that we therefore need not address Aghchay's remaining arguments concerning hearsay, *Crawford*, and Evidence Code section 352. ... The phrase 'opening the door' has been used to refer to two different theories for the admission of evidence: specific contradiction and curative admissibility. ... Although it is unclear which theory of admissibility the trial court here relied on in admitting the exhibits, admission of the documents was admissible [*sic*] under both theories."

Bowe v. State, 288 Ga.App. 376, 654 S.E.2d 196, 7 FCDR 3563 (Ga. App. 2007) – "We note that, on cross examination, Bowe's attorney asked the officer if that phone call directed police to the motel room where Bowe was found and arrested, which the officer answered in the affirmative. However, Bowe cannot now complain of testimony he himself elicited."

U.S. v. Rommy, 506 F.3d 108 (2nd Cir. 2007) – "In Rommy's case, the prosecution never attempted to use Leichel's colleague as an absent 'witness' against Rommy. Rather, the existence of this colleague was elicited on cross-examination by the defense."

Lewis v. U.S., 930 A.2d 1003 (D.C. 2007) – "Appellant contends that the rule against hearsay was violated, and that he was denied his Sixth Amendment right of confrontation, when the trial court failed to take corrective action sua sponte after Ms. Miller testified that a hotel valet named Mario told the police, with regard to the identity of her assailant, that 'It's Roscoe.' ... [T]he testimony about the valet's statement was elicited and developed by defense counsel during his cross-examination of Ms. Miller, and was mentioned only by defense counsel during closing argument. ... Even if we were to assume that the statement was testimonial, it was relied upon by the defense solely to prove its effect on those who heard it, and the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' *Crawford v. Washington*, 541 U.S. 36, 59 n. 9 (2004)."

State v. Patterson, 2007 WL 3169092 (N.J. Super. A.D. Oct 31, 2007) (unpub) – "Here, we take defense counsel's failure to object to mean that she did not consider the hearsay testimony to be adverse to her client. Notably, not only did defense counsel not object when the State elicited hearsay testimony, it was defense counsel who elicited the bulk of the hearsay responses. When the assistant prosecutor elicited hearsay testimony, it was primarily related to the same subject matter as the hearsay testimony that had been elicited by defense counsel. ... *see also State v. Robinson*, 146 S.W.3d 469, 492-93 (Tenn.2004) (hearsay testimony elicited by defendant does not violate defendant's constitutional right to confrontation as discussed in *Crawford* ...)"

U.S. v. Erwin, 2007 WL 2933157 (D. Neb. Oct 05, 2007) (unpub) (§ 2255) – "Erwin argues that a statement made by Officer Hinchey that Cathy Nelson told him the gun found under her couch belonged to Erwin (Tr. 206:6-9) violated his rights under the Confrontation Clause because Ms. Nelson was not called as a witness. However, it was Erwin's counsel who elicited this testimony on cross examination, not the government. This is not the type of concern the Confrontation Clause addresses and therefore the Court finds that [appellate] counsel was not ineffective when he chose not to raise this issue in his brief."

State v. Watkins, 190 P.3d 266 (Kan. App. Oct 05, 2007) – "She contends that key evidence regarding the February 2004 traffic stop in Wichita was hearsay and that its admission violated her right to confront the witnesses against her, citing *Crawford* ... Moreover, it was Watkins' own attorney who began the inquiry about that stop to an officer who was not present for it. ... And while constitutional grounds for reversal will sometimes be heard when they involve only a question of law arising on admitted facts or when necessary to prevent denial of fundamental rights, ... such claims are not heard when the testimony complained of was brought forward by the defendant's attorney."

Guilbeau v. Cain, 2007 WL 2478888 (W.D.La. Jul 31, 2007) (unpub) (habeas) – "Chautin's statements were not presented during the State's case in chief. Rather, Garcia was called only as a

rebuttal witness. During direct examination of Guilbeau, Guilbeau's counsel elicited testimony that Guilbeau and Chautin were in a harmonious and loving relationship with plans to resume their joint living arrangements. Moreover, defense counsel specifically elicited testimony regarding Guilbeau's visit to Chautin's place of employment, while bearing flowers for her, on Valentine's Day, shortly before the murder. This testimony opened the door for admission of the statements, via the testimony of [the victim's employer] Garcia, to rebut Guilbeau's claims. Guilbeau therefore cannot now object to any alleged error which he clearly invited."

People v. Scott, 2007 WL 2459116 (Cal. App. 1 Dist. Aug 30, 2007) (unpub) – "Officer Tisdale testified that the victim's husband asked the officer 'Why aren't you going to get this person?' ... The testimony was offered to demonstrate that the victim's husband was '[v]ery angry and upset' and 'ready to get into a physical confrontation' with the police, which explained why the police left the scene for a few minutes before continuing to investigate the reported crime. Such an explanation was necessary given the opening statement of defendant Scott's attorney, which questioned why the police left the scene if a crime had occurred."

Brown v. State, __ So.2d __, 2007 WL 1865383 (Ala. Crim. App. Jun 29, 2007) – "The record shows that during direct examination Det. Hagler testified that Brown told him that he and three other individuals were involved in the robbery but that Smith committed the murder. No mention was made of any statements that Smith had made to police or the fact that Smith had even been questioned by police. [¶] On cross-examination, the defense elicited testimony that Smith had been questioned by police [including many details, and on redirect the prosecution introduced the part where Smith fingered Brown] ... A defendant is not permitted to present evidence to the jury on a specific issue and object when the state attempts to introduce evidence on the same point. ... In *Walker v. State*, 631 So.2d 294 (Ala.Crim.App.1993), we noted how wide the door is opened when a matter is first brought out during cross-examination. ... The Alabama Supreme Court in *Ex parte D.L.H.*, 806 So.2d 1190 (Ala.2001), referred to this rule of evidence as the doctrine of curative admissibility. ... See *Tinker v. State*, 932 So.2d 168 (Ala.Crim.App.2005) (this court noted that we did not have to reach the issue of alleged *Crawford v. Washington*, 541 U.S. 36 (2004), violation because evidence was admissible under the doctrine of curative admissibility.) ... Here, the defense counsel implied on cross-examination that Det. Hagler acted irresponsibly in not investigating Robert Smith. To rebut the matters that were presented on cross-examination the State had a right to question Det. Hagler so that Det. Hagler could explain his actions during the course of the investigation. Under the caselaw cited above, we hold that there was no error, much less plain error."

Benjamin v. Cunningham, 2007 WL 2127212 (E.D. N.Y. Jul 25, 2007) (unpub) – "Wilson [the victim] claims that in the months after Petitioner's arrest, several threats and bribe attempts were directed at Wilson and his family in an attempt to force Wilson to drop the charges. On March 20, 2002, Wilson signed a sworn statement at Petitioner's trial counsel's office requesting that the state drop the charges against Petitioner because Wilson had been mistaken in regards to Petitioner's involvement in the assault and robbery. ... The trial judge ruled that because defense counsel elicited testimony with regard to this signed statement during cross-examination, on redirect the prosecutor was permitted to establish Wilson's state of mind at the time he signed the statement through testimony of the threats he had received, even though it was double, triple and quadruple hearsay. ... [T]he testimony was permitted at trial for the exclusive purpose of explaining Wilson's state of mind at the time he made the initial recantation in defense counsel's office. ... Therefore, the testimony given by Wilson in regards to threats he alleged was the

impetus to signing the recantation is not testimonial hearsay under *Crawford* and does not violate the Confrontation Clause."

People v. Parrish, 152 Cal.App.4th 263, 60 Cal.Rptr.3d 868 (Cal. App. 2 Dist. 2007) –

Necessary background: California's "Section 356 is sometimes referred to as the statutory version of the common-law rule of completeness." – "At a hearing pursuant to Evidence Code section 402, defendant argued that Childs's out-of-court statements to Detective Abdul were admissible, not for the truth of the matter asserted ... but for the non-hearsay purpose of corroborating defendant's testimony. Defendant countered that, if defendant introduced this evidence, the prosecution should be allowed to rebut the inference of duress by introducing into evidence other statements made by Childs during the same interview with Detective Abdul. Defense counsel disagreed, arguing that, whereas Childs's statements proffered by defendant were admissible for a non-hearsay purpose, those proffered by the prosecution were inadmissible under *Crawford*.... *Crawford* did not renounce all exceptions to the Confrontation Clause, only those that replace the constitutionally prescribed method of assessing reliability – cross-examination – with a judicial determination of reliability ... We conclude, by analogy to the rule of forfeiture by wrongdoing, that statements otherwise admissible under section 356 are generally not made inadmissible by *Crawford*. This is because, like forfeiture by wrongdoing, section 356 is not an exception to the hearsay rule that purports to assess the reliability of testimony. The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on Confrontation Clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood. Section 356 is founded not on reliability but on fairness so that one party may not use 'selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.' (*People v. Arias* (1996) 13 Cal.4th 92, 156; *People v. Samuels*, *supra*, 36 Cal.4th at p. 130 [same].) As *Crawford* forbids only the admissibility of evidence under statutes purporting to substitute another method for confrontation clause test of reliability, evidence admissible under section 356 does not offend *Crawford*."

State v. Birth, 158 P.3d 345 (Kan. App. 2007) – "As discussed above, the trial court admitted the hearsay statements because Birth had 'opened the door' to such testimony. [¶] Arguing that the trial court erroneously admitted Rayford's hearsay statements, Birth cites *United States v. Cromer*, 389 F.3d 662 (6th Cir.2004). In *Cromer*, the Sixth Circuit Court of Appeals held that the admission of testimonial hearsay evidence during the State's redirect examination violated the defendant's right to confrontation even though the defendant opened the door to such evidence during cross-examination. ... The major premise that underlies *Cromer* is as follows: [¶] No defendant may forfeit his or her right of confrontation unless the defendant kills, intimidates, or procures the absence of the witness. [¶] This major premise, however, conflicts with the 'open the door' rule applied in this jurisdiction. ... Other jurisdictions that have decided cases after *Crawford* have applied a similar 'open the door' rule in holding that there is no Confrontation Clause violation when the defendant has opened the door to the admission of the hearsay testimony. ... Birth opened the door to the hearsay evidence. Birth elicited testimony concerning Rayford's statements during cross-examination of Alexander but then objected when the State announced its intention to question Alexander about those hearsay statements. Under *Fisher*, Birth waived his right to confrontation under the Sixth Amendment Confrontation Clause when he opened the door to the hearsay testimony."

State v. Veal, 2007 WL 1748102, *4+ (Wash. App. Div. 2 Jun 19, 2007) (unpub) – defendant who seeks to introduce out-of-court statements of absent witness for non-hearsay purpose of demonstrating his state of mind does not thereby open the door to the prosecution's rebuttal use of further hearsay statements from the same absent witness – [NOTE: The opinion is opaque, but it seems to be saying that the hearsay offered by the defense was non-hearsay because it fit into a hearsay exception, and therefore Washington's Rule 806 does not apply. But that seems obviously wrong; hearsay exceptions, by definition, apply only to hearsay.]

U.S. v. Jarvis, 2007 WL 1704949, *2+ (2nd Cir. Jun 12, 2007) (unpub) – "Agent Lewer's testimony about what the informants involvement—what they had done, not what they specifically said—was elicited during cross-examination by Jarvis's counsel, not the government, and was not presented for the truth of the matter asserted (*i.e.*, the presence of drugs and firearms) at trial. Rather, Agent Lewer was responding to defense counsel's questions about whether the information obtained from the informants was used as the basis for the search warrant application. Accordingly, we conclude that no violation of the Confrontation Clause occurred."

State v. Hall, 2007 WL 1582667, *10+ (Tenn. Crim. App. Jun 01, 2007) (unpub) – "In our opinion, the defendant opened the door to the type of testimony that he now argues is objectionable. When that occurs, the party opening the door will not be heard to later complain. ... '[N]either *Crawford* nor Rule 803(1.1) is dispositive in this case because the defendant himself both elicited and opened the door to the testimony he now assigns as error. Under these circumstances, the defendant is not entitled to relief.'" (quoting *State v. Robinson*, 146 S.W.3d 469, 493 (Tenn.2004))

State v. Fisher, 154 P.3d 455 (Kan. 2007) – "At trial, a discussion of Holden was first initiated by defense counsel on cross-examination of Detective Jager During the State's later direct examination of Agent Smith, the prosecutor questioned him regarding Holden's statements. Over defense counsel's objection, Holden's written out-of-court statement was admitted in its entirety. [¶] This record reveals that Fisher did indeed open the door to the evidence about Holden's information." – *Crawford* did not alter prior law that "[b]y opening the door to otherwise inadmissible hearsay, a defendant waives the Sixth Amendment right to confrontation."

State v. Barden, 2007 WL 715686, *3 (N.J. Super. A.D., 2007) (unpub) – "Defendant's argument that the trial court violated his right of confrontation, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 2142, 90 L. Ed.2d 177 (2004), by allowing defendant to introduce Sliwinski's statement given to the police in lieu of live testimony, is rejected. The statement was offered by defense counsel as substantive evidence to bolster defendant's testimony; it was not evidence used against defendant ..."

State v. Heller, 2007 WL 380907, *2 (Wash.App. Div. 3, 2007) (unpub) – "Defense counsel elicited the statement challenged here on appeal. And he did not object or ask for a curative instruction at trial. A party cannot set up error at trial and then assign error to it on appeal."

Dubberly v. McDonough, 2007 WL 628115, *38 (USDC N.D. Fla. 2007) (unpub) – "In the instant case, Ms. Ranier was Petitioner's own witness (*see* Doc. 14, Ex. B, Vol. III at 75). Therefore, Petitioner cannot state a claim of a Confrontation Clause violation."

United States v. Valadez, 186 Fed.Appx. 508 (5th Cir. Tex. 2006) – A defendant has no right to complain of a confrontation violation from testimony he elicited on cross-examination.

Le v. State, 913 So.2d 913 (Miss. 2005) – "¶ 96. After Le offered into evidence alleged statements of [deceased co-defendant] Than to other inmates, the State moved to introduce, in rebuttal, a tape recording and transcript of Than's statement to law enforcement." – no *Crawford* violation

Tinker v. State, 932 So.2d 168 (Ala. Crim. App. 2005) – When defendant cross examined a police investigator regarding statements made by a co-conspirator who testified and invoked the Fifth Amendment, he cannot then later complain that the State's rebuttal introduction of the co-conspirators entire statement to the investigator violates the Sixth Amendment and *Crawford*.

State v. Smith, 2005 Wisc. App. LEXIS 516 (Wisc. Ct. App. 2005) – "At trial, the defense sought to introduce testimony from a co-actor, who stated that when he was in jail, an accomplice told him that he had shot one of the victims. The prosecutor unsuccessfully opposed the admission of the testimony, but later introduced evidence on rebuttal that the co-actor had made prior inconsistent statements to police denying that he was the shooter. On appeal, defendant argued that the trial court erred by permitting the State to introduce out-of-court statements of a co-actor for the purpose of rebutting out-of-court statements introduced by the defense. The appellate court held that a defendant who introduced testimony from an unavailable declarant could not later claim that he was harmed by his inability to cross-examine that declarant when prior inconsistent statements were introduced to impeach an out-of-court statement introduced by the defendant."

State v. Prasertphong, 114 P.3d 828 (Ariz. 2005) – When a Defendant offers in to evidence portions of a non-testifying co-defendant's statement to police that exculpates the Defendant, then the Defendant forfeits the right to complain about admission of the entire statement and the right to confront that statement.

State v. Harris, 871 A.2d 341 (RI 2005) – "Defendant argued that the admission of a witness's oral statement to police violated the Confrontation Clause. The supreme court concluded that defendant waived any right he had with respect to the statement because, although he initially objected to use of the statement, he later failed to object to the hearsay statement at issue and actually introduced the statement himself on more than one occasion for impeachment purposes." No *Crawford* violation.

State v. Dunivant, 2005 Ohio 1497 (2005) – When Defendant calls a witness to the stand and produces hearsay testimony from that witness, the prosecutor is permitted to cross examine on that hearsay evidence without the need to call the declarant to the stand. This does not violate *Crawford* because the Defendant created the issue.

Commonwealth v. Gonzalez, 443 Mass. 799; 824 NE2d 843 (2005) – Defendant called his girlfriend to the witness stand and she contradicted much of her prior grand jury testimony (which was not subject to cross examination). Because the Defendant offered this testimony, he cannot allege a *Crawford* violation.

United States v. Hite, 364 F.3d 874 (7th Cir. 2004) – Defendant offered unreliable hearsay at trial which does not implicate *Crawford* because defendant proffered the testimony and waived confrontation of the declarant.

People v. McMillian, 2004 Mich. App. LEXIS 1156 (2004 unpub dec) - “defendant argues that his right to confront witnesses was violated when Officer Barbre testified that defendant's friend, Hasan Warlick, stated that the gun belonged to defendant. However, it was defense counsel's questioning of Officer Barbre that led to the complained of testimony. A party waives review of the admission of evidence that he introduced, or that was made relevant by his own placement of a matter in issue.”

➤ Sub-Category: Too Much Detail for Opening the Door
(category added June 2011)

State v. Sharpless, 725 S.E.2d 894, 896-898 (N.C. Ct. App. 2012), review denied, 731 S.E.2d 159 – “While defendant may have opened the door to the admission of further evidence regarding his potential involvement in the robbery, we do not believe defendant opened the door to the admission of the substance of improper hearsay statements. ... The State could have certainly elicited at trial that there was an anonymous call that rebutted the initial BOLO, but we believe it was prejudicial for the State to elicit the substance of the call...”

People v Reid, 2011 NY Slip Op 2488, 82 A.D.3d 1495, 919 N.Y.S.2d 560 (N.Y. App. Div. 3d Dep't 2011), rev'd, People v Reid, 19 N.Y.3d 382, 383-389, 971 N.E.2d 353, 948 N.Y.S.2d 223 (N.Y. 2012) –

Non-Evidence / Non-Admitted Evidence / Read-Back of Testimony / Inference Drawn from Observed Facts / Refreshed Recollection

(see also Statements Quoted or Alluded to by Detective or Prosecutor)

This category ought to be superfluous, but these cases keep popping up (and in *Fackelman*, the Michigan Supreme Court ruled that non-evidence is sometimes evidence).

United States v. Sitzmann, __ F.Supp.3d __, 2014 WL 6461834 (D. D.C. Nov. 18, 2014) – “Because Garrett did not testify and none of his out-of-court statements were used at trial, Defendant's constitutional right to confront the witnesses against him was neither implicated nor violated.”

Lobo-Lopez v. United States, __ F.Supp.3d __, 2014 WL 5430626, at *7 (E.D. Va. Oct. 23, 2014) – “Petitioner further contends as ground (5) for his motion that his counsel were ineffective for failing to object to the government's use of hearsay testimony in violation of *Crawford*... petitioner mistakenly labels the prosecutor's statements at a bench conference hearsay. This claim clearly fails...”

U.S. v. Moreland, __ Fed. Appx. __, 2014 WL 3537950 (3d Cir. 2014) – “Because Trooper Kirby referred only to physical evidence turned over by Ms. Ogden, and not to any statements

made by her, no part of the disputed exchange implicated Moreland's rights under the Confrontation Clause."

People v. Lloyd, 987 N.Y.S.2d 672, 987 N.Y.S.2d 672 (N.Y. App. Div. 3d Dept. 2014) – "Defendant failed to preserve his claim that he was denied the right to confront witnesses—namely, the owners of each of the credit/bank cards, driver's licenses and nondriver identification cards that were in defendant's possession [cites]. In any event, the Confrontation Clause was not implicated, as the People did not elicit the testimonial statements of any witness who did not appear at trial [cites]."

James v. Martin, 567 Fed.Appx. 594 (10th Cir. 2014) (habeas) – "The prosecutor asked about what an absent declarant may have said, and the witness denied even having the conversation. There was no statement admitted from a missing witness, no prosecutorial misconduct, and nothing for appellate counsel to appeal." – therefore no viable IAC claim to piggyback on *Crawford*

Flowers v. State, __ So.3d __, 2014 WL 114654 (Miss. App. 2014) – "We find nothing in the record to show that the FBI task force agents who prepared the photo lineup raised any accusatory statements used against Flowers in his trial, nor were the agents witnesses at his trial. The record reveals that Flowers fully cross-examined all of the State's witnesses who testified against him. Therefore, Flowers suffered no denial of his Sixth and Fourteenth Amendment rights to confront his accuser."

State v. Keys, 125 So. 3d 19, 29-30 (La. App. 4th Cir. 2013) – controlled buy – "The record demonstrates that Detective Burke only testified as to his own observations during his participation in the controlled purchase. He did not testify regarding any statements made by the informant regarding what happened inside of the trailer."

Hammond v. U.S., 77 A.3d 964, 970-71 (D.C. App. 2013) – "Officer Little testified that he personally saw the ammunition being recovered from the scene, watched it being placed in an evidence bag, and witnessed the officer mark *971 the bag into which the ammunition was placed. Because the officer was testifying about his personal observations, appellant was not prejudiced in his ability to cross examine the witness."

Keithley v. State, 111 So. 3d 1202, 1203-1205 (Miss. 2013) – "Officer Rodgers attempted to gather information from several people at the scene; but, according to her, most of them were afraid to get involved. However, she did find two people who were willing to talk with her on condition of anonymity. Rodgers gave no testimony about what these two people had told her." – the fact that the officer also testified that she developed defendant as a suspect during her investigation did not amount to admitting hearsay statements from the two anonymous witnesses

Brown v. State, 61 A.3d 617 (Del. 2013) – "The record in this case reflects that the women who engaged in the drug transaction with Brown were never detained or questioned by police, nor were they presented as witnesses against Brown at trial.⁵ Because the women did not appear at trial as witnesses against Brown, there was no violation of Brown's Sixth Amendment right of confrontation."

State v. Payne, 108 So. 3d 174 (La.App. 2 Cir. Dec. 12, 2012) – "the police detective who investigated Greer's shooting mentioned Newton's statement at trial only to indicate how defendant was apprehended during the investigation. Thus, unlike the situation in *Crawford*, Newton's recorded statement was not admitted into evidence against the defendant at trial and so did not involve his right to confront witnesses."

State v. Tucker, 290 P.3d 1248, 1266-1267 (Ariz. Ct. App. 2012) – joint trial – "Armstrong cites no authority to support his contention that evidence of Tucker and Cuttler's activities before his involvement on March 15 was inadmissible against him under the Sixth Amendment's Confrontation Clause, and we are aware of none."

State v. Cagno, 211 N.J. 488, 49 A.3d 388 (N.J. 2012), cert. denied (2013) – mob little-RICO trial, witness twice refused to testify then, smiled and winked at defendant, gave him a thumbs-up and told him "keep your head up" – "The testimony of Kodak and Rivera-Estrada indicating that Lombardino did not answer questions at the first proceeding is not 'testimonial' for purposes of the Sixth Amendment for it did not relate an out-of-court statement by a declarant who was not available for cross-examination. The witnesses recounted to the jury their observations of Lombardino's conduct and gestures and were closely cross-examined as to their ability to make those observations. To the extent that such conduct and gestures were testimonial, statements of a co-conspirator in furtherance of the conspiracy are an exception to hearsay, and their admission does not violate the Confrontation Clause." – [NOTE: Also "casual remark."]

Hutcherson v. State, 966 N.E.2d 766, 767-773 (Ind. Ct. App. 2012) – "This case addresses the unusual circumstance where, in a criminal trial, the State attempts to use a witness's prior statement to refresh his recollection, but the witness cannot read. ... Because Lee is illiterate, the trial court ultimately allowed the prosecutor to read the statement out loud to Lee in front of the jury. Afterward, Lee stated that he remembered 'half of it but not all[.]' ... Although Lee could not initially recall any specifics concerning the night of the incident, he eventually testified that he could remember about half of the information contained in his prior statement. To the extent that his testimony remained less than unequivocal, such vacillation goes to the weight and not the admissibility of the evidence, a matter that is properly left for the trier of fact."

Evans v. State, 82 So.3d 766 (Ala. Crim. App. Sept. 30, 2011) – "The affidavits signed by Brown and Bowden in support of an arrest warrant were not presented to the jury at trial. ... While the Confrontation Clause applies to in-court testimony and some out-of-court statements introduced at trial, *Crawford*..., it does not apply to out-of-court statements that are not introduced at trial."

United States v. Lopez, 649 F.3d 1222, 1237-1238 (11th Cir. Fla. 2011) – "Varela argues that he was seriously prejudiced by being tried jointly with Sanchez and Troya because of statements Sanchez's attorney made in his closing arguments. The attorney told the jury that Sanchez was on the Florida Turnpike the night the Escobedos were murdered but argued that he was not there to commit murder but instead to provide counter-surveillance for drug deliveries by 'the Varela group.' Varela argues that statement constitutes an admission by Sanchez through counsel, and that admission violates the Sixth Amendment's Confrontation Clause because Varela could not cross-examine Sanchez about it since he exercised his right not to testify. That argument sounds like a good one, but it is not.... Sanchez's attorney was not a witness, and the statements he made in his closing arguments were neither testimony nor any other kind of evidence."

People v. Fackelman, 489 Mich. 515, 802 N.W.2d 552 (Mich. 2011), cert. denied, 181 L. Ed. 2d 483 (Nov. 28, 2011) – a painfully long 5-2 opinion that concludes that a non-testifying doctor's diagnosis was "introduced" and that its "admission in evidence" was error, when it was only referred to during cross-examination of live witnesses

State v. Elkins, 44 Kan. App. 2d 974, 242 P.3d 1223 (Kan. Ct. App. 2010) – argument that mention of CODIS database implies the testimonial statements of the California authorities who entered defendant's DNA in the database – "who is the declarant Elkins had no opportunity to confront? There was no testimony at trial about any statement or declaration by any California official. In fact, there was no trial testimony whatsoever about how Elkins' DNA got into the CODIS database. Further, if the act of Elkins allowing a DNA swab to be taken from him is not testimonial, the act of entering Elkins' DNA information into the database is likewise nontestimonial."

Bunch v. State, 937 N.E.2d 839, 849-850 (Ind. Ct. App. 2010) – "The confrontation clause does not apply to the children who did not testify."

United States v. Tenerelli, 614 F.3d 764, 773 (8th Cir. Minn. 2010) – "We agree with the district court that Deputy Wood's statements regarding what he observed during the controlled buy are not hearsay; no statements of the CRI were offered for the underlying truth. Instead, Deputy Wood testified about the fact that the order [for methamphetamine] occurred, a verbal act of which Deputy Wood had personal knowledge."

United States v. Charboneau, 613 F.3d 860, 860-861 (8th Cir. N.D. 2010) – "even if medical reports could be testimonial under *Melendez-Diaz*, an issue we need not consider, neither the medical report nor any out-of-court statement by the examining physician was admitted into evidence. Thus, there was no Confrontation Clause error."

Boggs v. State, 304 Ga. App. 698, 697 S.E.2d 843, 2010 Fulton County D. Rep. 2264 (Ga. Ct. App. June 30, 2010) – "in the present case, the jury never heard any out-of-court statements of the victim, and so Boggs's enumeration of error is without merit."

United States v. Wilson, 605 F.3d 985, 1017 (D.C. Cir. 2010) – "The appellants have no *Bruton* claim, however, because Franklin's concessions through counsel do not implicate the Confrontation Clause. The Confrontation Clause prohibits '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.' *Davis* ... The opening statement and closing argument made by Franklin's counsel, however, neither were admitted into evidence nor were they testimony."

Moses v. State, 30 So. 3d 391, 397 (Miss. Ct. App. 2010) – "Since the statement was not admitted into evidence, *Crawford* is not implicated."

Thomas v. Commonwealth, 279 Va. 131, 688 S.E.2d 220 (Va. 2010) – rejecting *Crawford* challenge on the ground that "there is no statement made by Avent that was introduced on this subject."

United States v. Nieves, 354 Fed. Appx. 547, 550-551 (2d Cir. N.Y. 2009) – "Agent Salter testified that he told McTier that 'Juma Cain had confessed twice to the murder of Tabitha Buckman.' There was, however, no Confrontation Clause violation, as Agent Salter's statement about Cain's confessions was not, in fact, admitted into evidence. Counsel for McTier objected to the statement, and the District Court sustained the objection."

Commonwealth v. Brown, 987 A.2d 699, 709-710 (Pa. 2009) – "t no time was the affidavit's language read aloud to the jury, nor were any witness statements discussed, other than to say the document contained specific witness statements. As no statements, incriminating or otherwise, were actually provided to the jury, neither the Confrontation Clause nor the hearsay rule was violated. The questions were not improper, and any inferences derived therefrom were a matter for the jury going to the weight of the evidence. Accordingly, we reject appellant's Crawford and hearsay arguments."

People v. Sisneros, __ P.3d __, 2009 WL 1414876 (Cal. App. 2 Dist. May 21, 2009) – witness who had already pled guilty refused to testify – "Defendant's attempt to frame the issue in terms of a violation of defendant's right to confront adverse witnesses under the Sixth Amendment fares no better. ... Here, of course, Luna never testified as a witness and never offered any statement, much less a testimonial statement."

State v. Laberth, 2009 WL 1373364 (N.J. Super. A.D. May 19, 2009) (unpub) – "The State presented the testimony of Detective Patela who had made his own independent comparison of defendant's fingerprints against those found in the truck and determined that they matched. Thus, the State did not rely on the State Police experts, but rather relied solely on the competency and credibility of Detective Patela when proving the fingerprint match. Defendant had an opportunity to fully cross-examine Detective Patela. We do not see that defendant's right to cross-examination was violated by this testimony."

U.S. v. Gaines, 2009 WL 1457713 (N.D. Okla. May 22, 2009) (unpub) (§ 2255) – "the officers in this case used the name provided by the confidential informant solely to obtain further information about the defendant, including a known photograph of the defendant. Thereafter, the agents were able to identify the defendant based upon their personal observations of the defendant during the drug transaction. ... the information provided by the confidential informant was not a 'testi-monial statement'..."

Thrasher v. McNeil, 2009 WL 1058737 (N.D. Fla. Apr 20, 2009) (unpub) (habeas) – "The witnesses here testified only to what they observed. Defense counsel cross-examined the witnesses who testified and had ample opportunity to test the foundation of their respective observations. There was no denial of the right of confrontation."

Troutman v. State, __ S.E.2d __, 2009 WL 806758 (Ga. App. Mar 30, 2009) – "At trial, one of the investigating officers testified that after confiscating Aikens' cell phone, he used the "recently called" function and discovered that the phone had been used to call Decatur's Best Taxi Ser-vice at 8:34 p.m. on the night of the robbery. ... the officer's statement that the phone number was for the taxi service is not hearsay, but is a statement of undisputed fact." – and therefore not *Crawford* violation

People v. Hill, __ N.W.2d __, 2009 WL 536838 (Mich. App. Mar 03, 2009) – "The medical report was only used to refresh the victim's recollection... the report was not admitted into evidence and was not used for its truth. Therefore, there was no violation of defendant's right of confrontation."

People v. Ajaelo, 2009 WL 449643 (Cal. App. 1 Dist. Feb 24, 2009) (unpub) – "co-defendant Williams's use of co-defendant Wise's statements to refresh the recollection of Gomer on cross-examination raises no Confrontation Clause concerns with respect to defendant"

Singleton v. State, 1 So.3d 930 (Miss. App. Oct 21, 2008), rehearing denied (Feb 10, 2009) – co-defendant Vann, who died before trial, took police on "treasure hunt" to various sites related to murder – "we find no violation of *Crawford* in the comparisons of Vann's road trip with law enforcement authorities with Singleton's statement."

People v. Rodriguez, 2008 WL 4606568 (Cal. App. 4 Dist. Oct 17, 2008) (unpub) – "Here, the prosecutor did not seek to elicit the testimony of the female who made the anonymous phone call to police. At no time was there mention of a call made to police or statements made outside of court. The prosecutor's questions went to what Maciel observed that evening. Clearly, the prosecutor could ask Maciel what he saw before and after he and defendant were stopped."

Williams v. Wong, 2008 WL 4191632 (C.D. Cal. Sep 11, 2008) (unpub) (habeas) – magistrate report – "Contrary to Petitioner's claims, Detective Swanson's and Detective Harvill's use of the police report to refresh their recollection does not constitute hearsay, testimonial or otherwise."

State v. Green, 2008 WL 3067920 (N.J. Super. A.D. Aug 07, 2008) (unpub) – although ballistics expert used exemplars from third party, he "did not testify as to the opinions and conclusions of others; he testified only as to the conclusions and opinions he himself reached after performing his own examination and analysis." – no *Crawford* issue

People v. Jones, 2008 WL 2744285, *3 (Mich.App. Jul 15, 2008) (unpub) – "Contrary to what defendant argues, his right of confrontation was not infringed by the prosecutor's failure to disclose the witness contact information."

Finley v. Trombley, 2008 WL 2637421 (E.D. Mich. Jun 30, 2008) (unpub) (habeas) – "the police officers described the confidential informant's actions during the controlled drug buy and recounted their own observations of the events. The officers did not reveal specific statements made by the confidential informant." – no confrontation clause violation

State v. Gray, 2008 WL 2635493, 2008-Ohio-3394 (Ohio App. 11 Dist. Jul 03, 2008) (unpub) – "the fact that Bovitt's name appeared on certain exhibits does not make those exhibits 'testimonial' in regard to the inclusion of Bovitt's name. The assistant prosecutor explained that Bovitt's name was only included on these exhibits for identification purposes. Bovitt was in Gray's vehicle at the time the cocaine was found and was initially considered a co-suspect. The inclusion of Bovitt's name is not a testimonial statement.."

Newland v. Lape, 2008 WL 2485404 (S.D. N.Y. Jun 19, 2008) (unpub) (habeas) – officer received tip from witness on street, which led to discovery of defendant's identification documents at the burglary scene – tipster didn't testify – "The Appellate Division reasonably

concluded that, because [Officer] Crescitelli did not testify about any testimonial statements made by absent witnesses, there was no *Crawford* violation at Newland's trial. After the judge sustained a defense objection, Crescitelli described how he acted after speaking with an unidentified person at the scene of the crime. There was no description of or quotation from the conversation between Crescitelli and the newsstand employee, and no mention of any conversation between the newsstand employee and the second employee. Crescitelli simply testified about his own conduct and first-hand observations that occurred subsequent to his encounter with the unidentified bystander."

U.S. ex rel. Klimawicze v. Sigler, 559 F.Supp.2d 906 (N.D. Ill. Apr 15, 2008) (habeas) – investigators told defendant that co-perpetrator "had told the police 'the true story'" but "the contents of the non-testifying co-defendant's statement were not introduced" – "The appellate court did not make a *Crawford* analysis, presumably because it found that the references to Mercado's statement did not amount to hearsay. That was fully consistent with *Crawford*..."

U.S. v. Ruiz-Rojo, 2008 WL 1868005 (9th Cir. Apr 28, 2008) (unpub) – "Ruiz-Rojo next contends that the district court violated his rights under the Confrontation Clause of the Sixth Amendment by admitting into evidence a border patrol agent's testimony that individuals encountered at Ruiz-Rojo's residence were later processed for return to their country of origin. We find this contention without merit. The witness's testimony about his personal observations does not establish a Confrontation Clause violation. *Crawford*..."

People v. Allen, 2008 WL 2132363 (Cal. App. 2 Dist. May 22, 2008) (unpub) – "Allen claims these references to 'Drew' were tantamount to evidence of an identification of Allen as a perpetrator by a nontestifying witness because the jury necessarily would have made that assumption. We disagree. ... Neither the confrontation clause nor the hearsay rule were implicated because there were no testimonial statements by absent witnesses offered for the truth of the matter asserted. (See *Crawford*..."

U.S. v. Brooks, 2008 WL 2332375 (S.D. N.Y. Jun 03, 2008) (unpub) (order on motion for directed verdict) – "Defendant asks the Court to impute to the Sixth Amendment a requirement that the Government call to the stand every witness that led it to obtain an indictment against defendant. Such a requirement does not exist. Moreover, only if the Government attempted to introduce testimony of one of these absent guards would Sixth Amendment considerations be raised. In the Government's case-in-chief, it did not attempt to introduce any absent guards' statements..."

Fontenot v. Quarterman, 2008 WL 905154 (S.D. Tex. Apr 02, 2008) (unpub) (habeas) – "Ramirez testified about Neri's emotional state during the robbery, but she did not testify about any out-of-court statements by Neri. [cite] Because Ramirez was present at the robbery and witnessed the events first hand, her observation about Neri's reaction constitutes a present sense impression that fits within an exception to the prohibition against hearsay. [cite; fn] Likewise, her observation was also relevant to Neri's state of mind. [cite] Because the testimony given by Ramirez about Neri's demeanor during the robbery fits within a recognized exception to the rule against hearsay, Fontenot's counsel was not deficient for failing to object to this testimony." – [NOTE: How was the testimony hearsay at all?]

People v. Yanez, 2008 WL 651223 (Cal.App. 2 Dist. Mar 12, 2008) (unpub) – "Here, however, there were no hearsay statements of a witness that the prosecution sought to introduce; all that was presented was Officer Ververa's first-hand account of his observation that Davalos' key chain was found in Yanez's possession."

People v. Williams, 2008 WL 239648 (Mich. App. Jan 29, 2008) (unpub) – "Williams asserts that the admission of testimony that the police sought his arrest after speaking to [his co-perpetrator] Coleman violated the Confrontation Clause. ... [T]he police officer testified that they sought Williams's arrest after the officer had talked with Coleman. Because the prosecutor never presented a statement from Coleman's interrogation to the jury, the Confrontation Clause is not implicated here."

U.S. v. Perez-Lopez, 2008 WL 185507 (11th Cir. Jan 23, 2008) (unpub) – "The district court did not violate Perez-Lopez's Confrontation Clause rights by admitting Agent Murphy's testimony that Burro, an unindicted co-conspirator, was under investigation because the testimony was based on her personal knowledge and was not hearsay."

People v. Martinez, 2008 WL 62528 (Cal. App. 2 Dist. Jan 07, 2008) (unpub) – "Here, once the witnesses were granted immunity, they no longer had a privilege not to testify, and the trial court did not err in permitting them to take the stand. The jury was entitled to hear their refusal to testify and draw inferences from this conduct. ... Here, however, there were no hearsay statements of these witnesses which the prosecution sought to introduce; all that was presented was their refusal to respond to questioning." – no sixth amendment issue

U.S. v. Marshall, 2008 WL 55989 (7th Cir Jan 04, 2008) (unpub) – "Mallindine merely recounted what he did in preparing the informant for the meeting with Marshall, what he observed the informant and Marshall do during their meeting, and what he received from the informant following the meeting. This testimony is not hearsay because it only describes nonassertive conduct. Putting it another way, this is straight-forward eyewitness testimony. As the government concedes, Mallindine's testimony clearly supplied an inference that Marshall provided the informant with drugs during their meeting. But an inference drawn from observable facts is not the same as an out-of-court statement made by a nontestifying witness. Mallindine had first-hand knowledge about the facts to which he testified. Marshall's ability to cross-examine Mallindine provided the necessary opportunity for confrontation."

Mendoza v. State, 2007 WL 4547551 (Tex. App.-San Antonio Dec 28, 2007) (unpub) – "Mendoza argues that the lack of an audio recording of his statement impaired his ability to cross-examine witnesses about unrecorded gestures made by Mendoza in violation of the Confrontation Clause. ... Here, however, Texas Ranger Rey Ramon and Captain Enrique Saenz – the officers who took Mendoza's statement – testified at trial, and Mendoza had the opportunity to confront them at that time. Because both witnesses testified at trial, no Confrontation Clause violation is implicated."

State v. Tapplar, 2007 WL 4463991, 2007-Ohio-6868 (Ohio App. 1 Dist. Dec 21, 2007) (unpub) – "{¶ 11} ... Since nothing said by the informant was admitted into evidence, any failure of the state to produce the informant at trial did not implicate Tapplar's right to confrontation."

U.S. v. Taylor, 509 F.3d 839 (7th Cir. Dec 07, 2007) – "[W]e turn now to defendant Taylor's somewhat cursory argument that his rights under the Confrontation Clause were violated when Thomas's counsel, during closing argument, used Taylor's name when referencing a written statement from which the judge had ordered it redacted. ... But during closing argument, Thomas's attorney mentioned Taylor, apparently accidentally. ... Taylor's argument fails because the attorney's remark he challenges is not 'testimonial evidence' covered by the Confrontation Clause. *See Crawford* ... As every jury is instructed, lawyers' statements are not evidence. To the extent that Taylor has a valid complaint, it has to do with an improper remark or characterization of the evidence by Thomas's counsel that implicates the fairness of the joint trial. [cites] Taylor, however, raises no such argument. We certainly do not endorse what happened here, but it does not implicate the Confrontation Clause."

Harris v. Ricci, 2007 WL 4207828 (D. N.J. Nov 26, 2007) (unpub) (habeas) – "*Crawford* is not applicable here. The testimonial evidence at issue, McDowell's testimony, occurred at trial and was subject to vigorous cross-examination. The testimony was simply read back to the same jury, in whole, including both direct and cross-examinations, at their request during deliberations."

Proof of Value: Receipts, Blue Book, Etc.
(category added Jan. 2011)

Robertson v. Commonwealth, 61 Va. App. 554, 738 S.E.2d 531 (Va. Ct. App. 2013) – shoplifter caught leaving store with a plastic bin full of goods she hadn't paid for – "[store manager] Holcomb took the merchandise out of the bin and put it in the buggy and pushed the buggy over to a cash register. Cindy Dishman ('Dishman'), an employee, was standing at the register and Holcomb was standing on the outside of the register, pulling items from the buggy and placing them on the counter. Holcomb directed Dishman to scan each item into the register to determine the price and to write down each item with the price on a sheet of paper." – which was admitted into evidence as an exhibit; Holcomb testified but Dishman did not – "In essence, the issue before us is essentially whether or not the Confrontation Clause of the Sixth Amendment requires the Commonwealth to tender for cross-examination every single person involved in the joint preparation of an exhibit. ... There is no Sixth Amendment Confrontation Clause violation where, as here, an exhibit is jointly prepared, and at least one of the proponents intimately involved in the preparation of the exhibit is subject to cross-examination. To conclude to the contrary would blur the distinction between the weight a [*566] factfinder may choose to give to the evidence and the constitutional issues presented in a Confrontation Clause analysis."

Robertson v. Commonwealth, 60 Va. App. 688, 732 S.E.2d 30 (Va. Ct. App. 2012), rehearing en banc and stay granted, 733 S.E.2d 155, 2012 Va. App. LEXIS 341 (Va. Ct. App. 2012), new opinion reaching opposite result, 61 Va. App. 554, 738 S.E.2d 531 (Va. Ct. App. 2013)

Walker v. Commonwealth, 281 Va. 227, 704 S.E.2d 124 (Va. 2011) – "In this appeal from a conviction of grand larceny of an automobile under Code § 18.2-95, the Commonwealth relied on the "blue book" published by the National Automobile Dealer's Association (NADA) to prove that the value of the stolen property exceeded \$200. The dispositive question is whether proof by

that method, although expressly authorized by statute, violated the defendant's Sixth Amendment right of confrontation as elucidated in *Crawford*..." – "It is most improbable that the compilers of the "blue book" ever heard of Walker or the charges against him and they certainly did not prepare the book for the purpose of assisting the Commonwealth in securing his conviction. We agree with the conclusion reached by the Court of Appeals that the book was not testimonial in character."

State v. Jennings, 125 Conn. App. 801, 9 A.3d 446 (Conn. App. Ct. 2011) – "A store receipt is not the statement of an individual; the receipt, unlike an individual, cannot be cross-examined. It makes no difference whatsoever whether the receipt was prepared in anticipation of trial or for some other purpose. The total amount reflected on the store receipt is a mathematical sum. The principal purpose of cross-examination, which is to test the credibility of a witness and hence the truth of his or her testimony; [cite] has no applicability under these circumstances.}

Expert Witness Opinions Generally

(see also following category, dealing specifically with gang/mob experts; and especially see various categories in part 15, dealing with scientific evidence)

United States v. Gonzalez-Robles, 603 Fed.Appx. 558 (9th Cir. Mar. 16, 2015), cert. pet. filed – "'An expert witness's reliance on evidence that *Crawford* would bar ... only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay.' [cite] Agent LeVan did not refer to any specific statements, arguments, or information from sources, but made only general assertions about panga boat smuggling." – no violation

U.S. v. Kantengwa, 781 F.3d 545 (1st Cir. 2015) – perjury prosecution arising out of asylum application, with roots in Rwandan genocide – historian's testimony about recent historical events did not violate confrontation clause – "Dr. Longman did not merely act as a 'conduit' for the testimony of a select few individuals, but gave testimony that could explain the consistency of accounts as to this historical fact..." – [NOTE: Court simply assumes, without examination, that statements between private parties could be testimonial, equating the historian with a police officer. Also, the analysis wanders between confrontation clause and hearsay rule.]

People v. Tademy, 2015 IL App (3d) 120741, 30 N.E.3d 1134 (Ill. App. 2015) – insanity defense – "the State argues that the jail psychiatrist's diagnosis was not offered for the truth of the matter asserted, but offered to show the facts and conclusions underlying the experts' opinions. We agree. However, the State referred to the jail psychiatrist in its closing, saying that the defendant was evaluated and never diagnosed with anything. Thus, it appears that even if the testimony was initially not offered as substantive evidence, it was argued as such by the State, which would be reversible error if the evidence is closely balanced."

U.S. v. Garcia, 752 F.3d 382, 393-95 (4th Cir. 2014) – officer translated coded messages, using information she had learned from co-conspirators – held: her de-coding relied on testimonial statements, which was impermissible – "In *Johnson*, we expressed wariness over this exact problem, and cautioned against '[a]llowing a witness simply to parrot out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion' as it 'would provide an end run around *Crawford*.'" – [NOTE: This rather

impressionistic opinion is short on legal analysis, but it seems to hold that it is impermissible to de-code conspirators' messages unless one of the conspirators testifies.]

Commonwealth v. Sepheus, 468 Mass. 160, 9 N.E.3d 800 (2014) – "Detective Wadlegger testified that a basis for his opinion was the information provided by a 'reliable informant.' Wadlegger specified earlier that the informant told police that the defendant was in the neighborhood selling drugs. It is well settled that the disclosure by an expert of a hearsay basis for his opinion, properly limited by the judge, does not serve as an admission of the hearsay for the truth of the matter, but solely as a basis for his opinion. ... Because the evidence was not admitted for the truth of the matter, the Sixth Amendment was not *171 implicated."

U.S. v. Akins, 746 F.3d 590 (5th Cir. 2014) – "Hundreds of recordings of wiretapped phone calls between the co-conspirators were introduced at trial to support the testimony of Bellamy, Holt, and others. Although in English, the calls made heavy use of code words and vernacular and were often difficult to parse. ... The Government also called a DEA Group Supervisor, Mark Styron, as an expert witness at trial. ... Styron explained his understanding of the meanings of various code words that he claimed were commonly used in the drug distribution business. ... Styron's testimony suggests only that he based his opinion on the types of information that an agent with extensive experience investigating drug conspiracies reasonably would rely, and we hold that no Confrontation Clause violation occurred here."

Carrington v. D.C., 77 A.3d 999, 1001-07 (D.C. App. 2013), cert. denied, 134 S. Ct. 1353 (U.S. 2014) – "at least five Justices would find that admitting testimonial hearsay for the limited, non-hearsay purpose of evaluating the basis of the expert's opinion does not cure the Confrontation Clause violation."

U.S. v. Gomez, 725 F.3d 1121, 1128-31 (9th Cir. 2013) – "'An expert witness's reliance on evidence that *Crawford* would bar if offered directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation. ... The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem. The expert's opinion will be an original product that can be tested through cross-examination.'" (citation omitted)

People v Rogers, 103 A.D.3d 1150, 1154, 958 N.Y.S.2d 835 (N.Y. App. Div. 4th Dep't 2013) – "Those experts relied on an autopsy report and DNA paternity report, respectively, but the actual reports were not admitted in evidence. 'Out-of-court statements that are related by [an] expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause' (*Williams* ...)."

United States v. Huether, 673 F.3d 789 (8th Cir. N.D. 2012) – "Huether contends the district court erred in admitting testimony from Agent Erickson, which repeated the conclusions of a report prepared by those at NCMEC [National Center for Missing and Exploited Children], and testimony from Agent Helderop concerning the hard drives' and compact discs' origin. ... [*Bullcoming*] did not address expert testimony based on independent knowledge of the evidence, as is the case here. Evidence of the images' origin came from Agent Erickson's testimony based

on his training, ten years of experience, and use of NDBCI's file server to identify the images." – no error

United States v. Thornton, 642 F.3d 599, 605-607 (7th Cir. Wis. 2011) – "[W]hen an expert testifies, 'the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted' if those facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. [cite] Manufacturers' materials which identify the place that a product was manufactured fall within this category of facts or data."

United States v. Pablo, 625 F.3d 1285, 1288-1295 (10th Cir. N.M. 2010) – "A prime example of where testimonial hearsay may be admitted for a purpose other than to establish the substantive truth of the hearsay, and one pertinent to this case, is when an expert witness testifies regarding the out-of-court development of facts or data on which she based her expert opinion."

United States v. Johnson, 587 F.3d 625, 633-636 (4th Cir. Md. 2009) – officers interpreting intercepted coded messages between drug traffickers – "An expert witness's reliance on evidence that Crawford would bar if offered directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation. Allowing a witness simply to parrot "out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion" would provide an end run around Crawford. ... The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no Crawford problem. The expert's opinion will be an original product that can be tested through cross-examination."

People v. Raby, 2009 WL 839109 (Mich. App. Mar 31, 2009), application for leave to appeal granted and remanded, 485 Mich. 994, 775 N.W.2d 144 (Mich. 2009) (unpub) – "it was not error for the trial court to allow Dr. Schmidt to testify to his own conclusions as to the cause of Kyra Kind's and Raven Raby's deaths" based on autopsy report prepared by another pathologist – remanded for reconsideration in light of M-D

U.S. v. Scott, 2009 WL 36548 (S.D. N.Y. Jan 07, 2009) (unpub) (post-trial order) – "The Circuit in *Mejia* held that 'an officer expert's testimony violates *Crawford* if [the expert] communicated out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion.' 545 F.3d at 198 (internal quotations and citation omitted). Here, Agent Phildius did no such thing, as his opinion was based on his analysis of his investigations, and he refrained from communicating any testimonial statements to the jury."

People v. Johnson, 2009 WL 27427 (Cal. App. 4 Dist. Jan 06, 2009) (unpub) – "a holding that testimonial hearsay, although not admitted, could not be used as a basis for an expert opinion, would significantly change existing law. If the *Geier* court had made such a determination it would be spelled out and not left to speculation."

State v. Swope, 762 N.W.2d 725, 2008 WI App 175 (Wis. App. Nov 19, 2008), petition for review filed – FBI agent Mark Safarik was brought in "to conduct a 'death scene' analysis in an attempt to determine the cause of death." – his reliance on information from other sources, including colleagues as well as statistics, did not violate *Crawford* – "'A defendant's confrontation right is satisfied if a qualified expert testifies as to his or her independent opinion, even if the opinion is based in part on the work of another.'" [NOTE: Also not statements against the defendant.]

U.S. v. Steed, 548 F.3d 961 (11th Cir. Nov 10, 2008) – "Osgood argues that [Officer] Gonzalez's expert testimony [FN11] violated Fed.R.Evid. 703 because it acted as a conduit for inadmissible hearsay. ... Osgood could not show that any [unpreserved] error was 'plain' under *Crawford* because there is no binding precedent from the Supreme Court or this Court regarding what otherwise inadmissible sources an expert may rely upon when forming an opinion..."

State v. Johnson, 756 N.W.2d 883 (Minn. App. Oct 14, 2008) – after holding that autopsy report is testimonial, dropping footnote 1: "The autopsy report introduced as an exhibit did not include the usual conclusions as to the cause and manner of death. Dr. Baker, however, testified that Hollie's death was caused by a gunshot wound, and that the manner of her death was homicide. Although Dr. Baker was subject to cross-examination regarding these conclusions, because the conclusions had no basis other than the autopsy report, we will assume that they implicate Johnson's right of confrontation." – this dictum seems to be saying that an expert may not base opinion on testimonial hearsay, or in other words that Rule 702 was overruled in part by *Crawford*

People v. Dendel, 2008 WL 4180292 (Mich. App. Sep 11, 2008), application for leave to appeal granted and remanded 485 Mich. 903, 773 N.W.2d 16 (Mich. 2009) (unpub) – forensic pathologist testifying based on post-mortem toxicology results - remanded for reconsideration in light of M-D

State v. Boretsky, 2008 WL 4057972 (N.J. Super.A.D. Aug 28, 2008) (unpub) – "the State was entitled to use [testimonial] hearsay statements relied upon by the [defense] expert to expose, as fully as possible, the bases for his opinion"

State v. Reetz, 2008 WL 680226 (Iowa App. Mar 14, 2008) (unpub) – "In the past, courts determined an expert's reliance on information provided by others did not violate the Confrontation Clause as long as the expert was available for cross-examination and the defendant had access to the information relied upon by the expert. ... This reasoning may still be applicable in light of *Crawford*. [cites] [¶] On the other hand, some courts have cautioned that the testifying expert should not repeat the opinion of the absent expert to the jury." – not resolving question, because any error was harmless, although (curiously enough) the concluding paragraph says "the district court properly overruled Reetz's objections"

U.S. v. Moon, 512 F.3d 359 (7th Cir. Jan 03, 2008), cert. denied, (Oct. 6, 2008) – opinion by Judge Easterbrook – DEA chemist DeFrancesco "testified as an expert, not as a fact witness. When an expert testifies, 'the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.' Fed.R.Evid. 703. So if the Confrontation Clause precludes admitting Olson's report, this does not spoil DeFrancesco's testimony."

Szymanski v. State, 166 P.3d 879, 2007 WY 139 (Wyo. 2007), cert. denied, 2008 WL 114221, 76 USLW 3373 (Jan 14, 2008) – arson investigator was properly permitted to repeat hearsay from person in whose apartment the fire was started, even though the person died from unrelated causes before being cross-examined – trial court gave limiting instruction "that the testimony was not being allowed for the truth of the matter asserted but only to show what the inspector did and what information he relied upon in forming the opinion that the fire was intentionally set by human hand." – also, apparently, admissible for the non-hearsay purpose of "describing his investigation"

State v. Pettis, 2007 WL 2701358 (N.C. App. Sep 18, 2007) (unpub) – "At trial, SBI Agent David Freeman testified about a DNA analysis that was performed by Agent Jenny Elwell on a cutting taken from the gray pants recovered from Ms. Gladden's house. Agent Elwell did not testify at trial because she was in Seattle, Washington, attending a conference. Agent Freeman's opinion was based on Agent Elwell's report and notes. ... We determine defendant's Confrontation Clause rights were not violated. '[I]t is well established [that there is no violation of a defendant's right of confrontation under the rationale of Crawford when] an expert ... base[s] an opinion on tests performed by others in the field and [d]efendant was given an opportunity to cross-examine [the testifying expert] on the basis of his opinion[.]' *State v. Delaney*, 171 N.C.App. 141, 144, 613 S.E.2d 699, 701 (2005)." (brackets in original)

Veney v. U.S., 929 A.2d 448 (D.C. Aug 02, 2007), merits discussion deleted on motion for rehearing, which resolved issue on grounds of harmless error instead, 936 A.2d 809 (D.C. Nov 16, 2007)

People v. Jones, 374 Ill.App.3d 566, 871 N.E.2d 823, 313 Ill.Dec. 96 (Ill. App. 1 Dist. Jun 25, 2007) – "It is well established that an expert may testify about the findings and conclusions of a nontestifying expert that he used in forming his opinions. [citation omitted] Here, Rochowicz, a qualified expert, testified that he had reviewed the results of the gunshot residue test conducted by Wong. He described the procedures Wong used and stated that in his opinion defendant either had discharged a firearm, handled something contaminated with residue or been in close proximity to a firearm when it was discharged. Rochowicz was subject to cross-examination. The trial court did not violate Crawford in allowing Rochowicz's testimony."

Bodenburg v. Conway, 2007 WL 2295812 (E.D. N.Y. Aug 04, 2007) (unpub) (habeas) – "Dr. Dawson did not relay hearsay, but rather, merely explained what factors he used to reach his conclusions. In addition, although Dr. Wetlie also explained the factors that medical examiners rely upon to reach conclusions, he did not testify as to what he was told by detectives and other non-testifying witnesses. [¶] Further, the Petitioner's trial counsel cross-examined Dr. Dawson and Dr. Wetlie and was able to question them about their conclusions, methodology and the bases for their conclusions. ... Accordingly, the Petitioner's confrontation clause claim is without merit." – citing *Howard v. Walker*, 406 F.3d 114, 127 (2d Cir.2005), which contains a thorough discussion of rationale for this rule

U.S. v. Holy Land Foundation For Relief and Development, 2007 WL 2059722, *5+ (N.D.Tex. Jul 16, 2007) (unpub) – pretrial ruling – "To the extent that [terrorism expert] Fighel's opinion may be a mere recitation of testimonial hearsay statements, allowing such testimony would constitute a violation of the Confrontation Clause. That is, to allow Fighel to transmit to the jury otherwise inadmissible testimonial hearsay under the guise of expert testimony would

deprive the defendants of their right to confront and cross-examine the out-of-court speakers. However, the court disagrees with the defendants to the extent that they argue Fighel's entire testimony must be excluded. ... If after such examination the court is satisfied that Fighel's testimony is sufficiently supported by facts and data upon which an expert in his field would reasonably rely and that the facts and data include more than testimonial hearsay, then the court will permit his testimony to be introduced to the jury."

People v. Flournoy, 2007 WL 1830806 (Cal. App. 4 Dist. Jun 27, 2007) (unpub) – "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions.' (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) This is so for two reasons. First, the materials upon which the expert relies are not elicited for their truth but, rather, are examined to assess the weight of the expert's opinion. (*Ibid.*; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 56-57; see also *Delaware v. Fensterer* (1985) 474 U.S. 15, 19; *People v. Coleman* (1985) 38 Cal.3d 69, 90, 92-93.) Secondly, an expert is subject to cross-examination about his or her opinions. (*Thomas, supra*, 130 Cal.App.4th at p. 1210.) Thus, even assuming that the population frequency figures contained in the lab report were 'testimonial,' its admission as a basis for the expert opinion rendered did not violate Flournoy's confrontation rights under *Crawford*."

State v. Tucker, 215 Ariz. 298, 160 P.3d 177 (Ariz. 2007) – duct tape expert – "Because the facts underlying an expert's opinion are admissible only to show the basis of that opinion and not to prove their truth, an expert does not admit hearsay or violate the Confrontation Clause by revealing the substance of a non-testifying expert's opinion. ... Thus, Tucker had a right to confront Knell, the testifying expert, but he did not have a right to confront McFarland, the non-testifying expert, because Knell's statements about his conversation with McFarland were admissible only to show the basis of Knell's opinion."

State v. Smith, 215 Ariz. 221, 159 P.3d 531 (Ariz. 2007) – medical examiner – "Expert testimony that discusses reports and opinions of another is admissible under this rule if the expert reasonably relied on these matters in reaching his own conclusion. ... Such testimony is not hearsay because it is offered not to prove the truth of the prior reports or opinions, but rather is offered only to show the basis of the testifying expert's opinion."

State v. Moss, 215 Ariz. 385, 160 P.3d 1143 (Ariz. App. Div. 1 May 29, 2007), review denied and ordered republished, 217 Ariz. 320, 173 P.3d 1021 (Ariz. Nov 29, 2007) – toxicologist – "The protection of the Confrontation Clause may, as here, predominate over Rule 703 admissibility of facts or data relied on by an expert. The admissibility of such facts or data has historically been based on a judicial determination that the evidence is 'of a type reasonably relied upon by experts in the particular field' and therefore reliable. See Ariz. R. Evid. 703. Because the Supreme Court in *Crawford* rejected judicially-determined reliability in favor of actual confrontation, see *supra* ¶ 10, facts and data relied upon by experts may be subject to challenge, on a case-by-case basis, under the Confrontation Clause." [NOTE: Isn't that last sentence a bit self-contradictory?]

U.S. v. Henry, 472 F.3d 910, 914 (D.C. Cir. 2007) – detective testified about drug dealers' code words – "*Crawford*, however, did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703."

People v. Cooper, 2007 WL 475789, *1, *7-10 (Cal. App. 2 Dist. 2007) (unpub) – “*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions.’ (*People v. Thomas, supra*, 130 Cal.App. 4th at p. 1210.) The reason is clear; if hearsay is admitted for a nonhearsay purpose, it does not turn upon the credibility of the hearsay declarant, making cross-examination of that person less important. The hearsay relied upon by an expert in forming his or her opinion is ‘examined to assess the weight of the expert’s opinion,’ not the validity of their contents. (*Ibid.*)”

Daotien v. Siskiyou County Prob., 2006 U.S. Dist. LEXIS 64016 (E.D. Cal. 2006) – An expert witness may testify to hearsay as the basis of their opinion and this does not violate *Crawford*.

United States v. Diaz, 2006 U.S. Dist. LEXIS 71123 (N.D. Cal. 2006) – An expert witness may testify to hearsay as the basis of their opinion and this does not violate *Crawford*.

United States v. Allen, 2006 U.S. App. LEXIS 18214 (11th Cir. Ga. 2006) – “Agent Torp testified as an expert witness, basing his opinion on his education, training, knowledge, and personal experience. Appellant objected on hearsay and *Crawford* grounds to Torp’s opinion as to where the pistol was manufactured because the opinion was based in part on the statement of another ATF special agent – who had consulted the records the manufacturer of the pistol had placed on file with the ATF. The court overruled appellant’s objection. We find no error. Experts may rely on hearsay if it is of the type of evidence reasonably relied on by experts in the particular field. In this instance, it was reasonable for Torp to rely on what the other agent told him. But that is not all that Torp relied on to say that the pistol had traveled in interstate commerce. He based his opinion as well on the markings on the gun, his personal knowledge concerning the manufacture and distribution of guns, and his review of industry-wide publications, including *The Blue Book of Gun Values*.”

State v. Scott, 2006 N.C. App. LEXIS 1471 (N.C. Ct. App. 2006) – An expert witness may base his opinions on others in the field even if it includes hearsay testimony. This does not violate *Crawford*.

State v. Taylor, 2006 N.C. App. LEXIS 954 (N.C. Ct. App. 2006) – “The Court held that it was “clear that Special Agent Evans’s testimony was expert testimony as to the nature of the seized substance as cocaine” and that “the lab analysis was not tendered to prove the truth of the matter asserted therein, but to demonstrate the basis of Agent Evans’s opinion.” *Id.* The Court noted that “it is well established that an expert may base an opinion on tests performed by others in the field and defendant was given an opportunity to cross-examine Special Agent Evans on the basis of his opinion[.]” *Id.* at , 619 S.E.2d at 920-21. Thus, the Court concluded that *Crawford* did not apply and there was no violation of the defendant’s right of confrontation.”

Schoenwetter v. State, 2006 Fla. LEXIS 668 (Fla. 2006) – The medical examiner who performed the autopsy was unavailable for trial, but a colleague testified after reviewing all the records. There was no *Crawford* violation for admitting the records or allowing the expert to render an opinion based on reviewing the records.

United States v. Garcia, 447 F.3d 1327 (11th Cir. Ga. 2006) – An expert witness may testify to out-of-court statements of non-testifying witnesses as part of an expert opinion.

State v. Durham, 625 S.E.2d 831 (N.C. Ct. App. 2006) – “The admission of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment right of confrontation where the expert is available for cross-examination.”

United States v. Springer, 165 Fed. Appx. 709 (11th Cir. Fla. 2006) – “On appeal, defendant argued that: (1) the district court violated his Sixth Amendment Confrontation Clause rights in light of Crawford, by allowing an expert opinion based, in part, on hearsay (specifically, the testimonial evidence of a company historian), or, in the alternative, violated the pre-Crawford Fed. R. Evid. 703; and (2) abused its discretion by denying his motions for a mistrial. The constitutional/evidentiary challenge did not stand up under plain error review. Even excluding the company historian's evidence, the expert's opinion was based on books, CDs, and personal knowledge that did not appear to be testimonial evidence subject to the Crawford rule. Moreover, neither the U.S. Supreme Court nor any circuit court had issued a published opinion regarding what otherwise inadmissible sources, testimonial or non-testimonial, an expert could rely upon when forming an opinion in light of Crawford. Thus, any error the district court may have committed by permitting the expert testimony was not plain.”

State v. Barton, 2005 Wisc. App. LEXIS 1152 (Wisc. Ct. App. 2005) – “Defendant was charged with arson. At trial, a unit leader at a crime lab testified about the tests that a laboratory analyst had performed. The laboratory analyst was unavailable to testify. The unit leader had performed a peer review of the analyst's tests, and he presented his own conclusions regarding the tests to the jury. Defendant was convicted. He filed a motion for postconviction relief, arguing that the trial court erred by permitting the unit leader to testify about tests performed by the analyst. The trial court denied the motion. On appeal, the court found that the unit leader's testimony was properly admitted because he was a highly qualified expert presenting his independent opinion. He was the technical unit leader in the trace evidence unit in the crime lab. He had been examining items for the presence of ignitable liquids for many years. He not only examined the results of the analyst's tests, but also performed a peer review of the tests. He formed his opinion based on his own expertise and his own analysis of the scientific testing. He was available to defendant for cross-examination. Thus, his testimony satisfied defendant's confrontation right.”

People v. Goldstein, 6 N.Y.3d 119; 843 N.E.2d 727; 810 N.Y.S.2d 100; 2005 N.Y. LEXIS 3389 (2006) – “Defendant killed the victim by throwing her into the path of an approaching subway train. At the second trial, the People presented a forensic psychiatrist who testified that defendant suffered from only a mild mental disorder. The trial court allowed the psychiatrist to testify as to information she had obtained in interviews of third parties. The statements in the interviews supported the argument that defendant was not insane at the time of the crime. The reviewing court found that the admission of those statements constituted a violation of defendant's right to confrontation under U.S. Const. amend. VI and N.Y. Const. art. I, § 6. The Confrontation Clause generally prohibited the use of “testimonial” hearsay against a defendant unless the defendant had a chance to cross-examine the declarant. The reviewing court held that the statements were hearsay, as they were offered to prove the truth of the matter asserted, that defendant was not insane. The statements were testimonial, as the statements should reasonably

have been expected to be used prosecutorially or to be available for use at a later trial. Thus, the conviction had to be reversed and a new trial held.”

State v. Bethea, 617 S.E.2d 687 (N.C. Ct. App. 2005) – An expert witness may rely on the findings of another expert in rendering an opinion at trial.

State v. Jacobs, 2005 N.C. App. LEXIS 1856 (NC Ct. App. 2005) – An expert witness may rely on other out-of-court information, including information from another expert, when testifying in court. This does not violate *Crawford*.

People v. Thomas, 130 Cal.App.4th 1202, 1210, 130 Cal. App. 4th 709 (Cal. App. 4th Dist. 2005) – “there was no Sixth Amendment violation based on the gang expert's reliance on hearsay matters, as the conversations with other gang members were mentioned only as a basis for the gang expert's opinion that defendant was a gang member.”

United States v. Stone, 222 F.R.D. 334 (ED Tenn 2004) – An expert witness may rely on statements from non-testifying witnesses in testifying to an opinion in court and this does not violate *Crawford*. **NOTE: See United States v. Buonsignore, 2005 U.S. App. LEXIS 8898 (11th Cir GA 2005) at the end of this outline for a contradictory result.**

State v. Bethea, 617 S.E.2d 687 (NC Ct. App. 2005) – An expert witness may rely on other out-of-court information, including information from another expert, when testifying in court. This does not violate *Crawford*.

State v. Rogers, 615 S.E.2d 435 (NC Ct. App. 2005) – “Expert witnesses are generally allowed to rely on otherwise inadmissible evidence to formulate their opinions without running afoul of the Confrontation Clause. *** The testimony concerning Special Agent Earle's involvement simply explained to the jury how the CODIS data came to the attention of Special Agent Budzynski. It was not offered to establish the CODIS match. Special Agent Budzynski testified that he conducted his own independent analysis of the data, concluded that the two DNA profiles matched, and presented the results of his analysis to the jury.”

State v. Watts, 616 S.E.2d 290 (NC Ct. App. 2005) – “Defendant argued that a witness tendered as an expert in forensic DNA analysis was not qualified to testify on population statistics. The appellate court disagreed, noting that a population-statistical analysis is part of DNA analysis, and that North Carolina case law supported the admission of such testimony by forensic DNA analysis experts. The fact that the expert relied on the results of an analysis conducted by an absent colleague did not violate defendant's Sixth Amendment right to confrontation.”

People v. Brown, 2005 NY Slip Op 25303 (NY Sup. Ct. 2005) – “The charges against defendant arose out of an incident in 1993 and were based on DNA evidence that was developed in 2002 and 2004. The prosecution's expert had reviewed the records technicians prepared regarding both the 2002 testing of a swab that had been taken from the victim and held since 1993 and the 2004 swab taken from defendant at some later date. The expert did not perform the actual DNA testing herself. Defendant argued that the testing constituted "testimonial" evidence and that under *Crawford*, his Sixth Amendment rights were violated because he was not given the opportunity to confront the technicians who performed the actual testing. The court

disagreed. The notes and records prepared by the technicians were not made for investigative or prosecutorial purposes but, rather, were made for the routine purpose of ensuring the accuracy of the testing done in the laboratory and as a foundation for formulating a DNA profile. As such, they were not "testimonial" in nature, and there was no Sixth Amendment right of confrontation as to the technicians. There were no constitutional grounds for reversal of the judgment."

Ellis v. Phillips, 2005 U.S. Dist. LEXIS 13910 (SDNY 2005) – "The Confrontation Clause was not violated by allowing one expert to testify as to DNA test results when the expert who conducted the tests was unavailable due to cancer under the business record exception to the hearsay rule."

➤ Sub-Category: Gang / Mob Expert Testimony
(see also preceding section, dealing with experts generally, and under part 15)

Conceptually this category isn't any different from the prior category, but there are a ton of these cases, many from California. It may be useful to remind judges that all expert testimony based on anything but the evidence of one's own senses is ultimately based on hearsay, because that's the nature of knowledge. The DNA analyst, no less than the gang expert, is basing conclusions on what he or she has heard from others such as, for example, textbook writers.

People v. Sanchez, 232 Cal. App. 4th 197, 181 Cal. Rptr. 3d 360, 373-74 (2014), reh'g denied (Dec. 24, 2014), reh'g denied (Jan. 5, 2015), review granted and opinion superseded, No. S223722, 2015 WL 1063950 (Cal. Mar. 11, 2015) – "Because Detective Kilmer did not relate statements by out-of-court declarants *382 to the jury, the admission of his testimony did not violate defendants' confrontation rights."

United States v. Vera, 770 F.3d 1232 (9th Cir. 2014) – holding: "the key *1238 question for determining whether an expert has complied with *Crawford* is the same as for evaluating expert opinion generally: whether the expert has developed his opinion by 'applying his extensive experience and a reliable methodology.'" – [NOTE: This is somehow required by the confrontation clause!] – so long as gang expert "'appl[ied] his training and experience *1240 to the sources before him and reach[ed] an independent judgment,' his testimony complied with *Crawford* and the Confrontation Clause" – but finding "reason to suspect" some testimony "rested on testimonial hearsay, violating the defendants' Confrontation Clause rights under *Crawford*, although the record does not allow a conclusive determination" - [NOTE: The opinion uses confrontation clause terms when it really seems to be talking about ordinary evidentiary objections such as lack of foundation and speculation.]

U.S. v. Kamahele, 748 F.3d 984 (10th Cir. 2014) – expert testimony regarding structure and history of Tongan gang in Salt Lake City – "Introduction of expert testimony violates the Confrontation Clause only when the expert is simply parroting a testimonial fact. ... Introduction of opinion testimony does not violate the Confrontation Clause when the experts rely on their independent judgment—even when this independent judgment is based on inadmissible evidence."

People v. Archuleta, 225 Cal.App.4th 527, 170 Cal. Rptr. 3d 361, 361-94 (Cal. App. 4th Dist. 2014), Review Granted and Opinion Superseded, 326 P.3d 253 (Cal., June 11, 2014)

("Further action in this matter is deferred pending consideration and disposition of a related issue in *People v. Sanchez*, S216681") – a very lengthy opinion addressing the situation in which a gang expert bases an opinion, in part, on statements made by gang members to detectives in formal interviews – "When, on direct examination, an expert witness against a criminally accused 'treats as factual' the contents of an out-of-court testimonial statement and 'relates as true' its contents to the trier of fact [cite], the declarant is unavailable to testify, and the defendant had no prior opportunity for cross-examination, the admission of the testimonial statement as expert opinion basis evidence will violate the defendant's Sixth Amendment right to confront and cross-examine the declarant." – at the same time, however, "[e]xperts may rely on testimonial hearsay in formulating their opinions..." [NOTE: An opinion concurring in the judgment points out that the majority opinion is effectively dicta.]

People v. Sanchez, 167 Cal. Rptr. 3d 9, 21-24, 223 Cal.App.4th 1 (Cal. App. 4th Dist. 2014), **Review Granted and Opinion Superseded**, 324 P.3d 273 (Cal., May 14, 2014) – "Because the complained of evidence was admitted as a basis for the gang expert's opinion and not for the truth of the statements, the trial court did not err in admitting the evidence over defendant's Sixth Amendment objection. ... We recognize defendant claims he was denied the right to confront police officers who wrote down the statements of himself and others, not that he was denied the right to confront those who made the statements. However, if the statements themselves are not shown to be testimonial, we fail to see how *recording* of such statements is testimonial."

People v. Valadez, 220 Cal.App.4th 16, 162 Cal. Rptr. 3d 722, 730-38 (Cal. App. 2d Dist. 2013), **review denied (Jan. 15, 2014)** – "under any definition of 'testimonial' the general background information he obtained from gang members, other officers, and written materials on the history of the El Sereno and Lowell Street gangs plainly does not qualify."

United States v. Palacios, 677 F.3d 234, 237-244 (4th Cir. Md. 2012) – "Sergeant Norris testified both as an expert witness and a fact witness. Based on his training and experience investigating MS-13 as part of the Prince George's County Police Department Gang Unit, Norris provided expert testimony on the gang's development, organization, policies, practices, and symbols. ... Assuming at least some of the interviews Norris conducted produced testimonial hearsay, however, Norris did not specifically reference any of these interviews during his expert testimony, nor did he make any mention of Palacios in particular. Rather, he used these interviews, along with the other sources of his extensive [*244] knowledge about MS-13, to form an independent opinion about the gang's history, operation, structure, practices, and symbols. Norris was available for cross-examination regarding this opinion. As such, we reiterate our position in *Alaya* that the admission of Norris's testimony was not a Crawford violation, even if his expert opinion was based, in part, on testimonial hearsay."

People v. Green, 92 A.D.3d 953, 939 N.Y.S.2d 520, 2012 NY Slip Op 1616 (N.Y. App. Div. 2d Dep't 2012) – "The defendant argues that the admission into evidence of the testimony of an FBI special agent and a former New York State Police investigator (hereinafter together the law enforcement witnesses) concerning their understanding of other written rap lyrics, which were found in the defendant's bedroom, as well as the structure of the gang to which the defendant belonged, and the defendant's place in that hierarchy, violated his right to confront witnesses against him since it constituted testimonial hearsay.... To the extent that the law enforcement witnesses testified as to any declarations made to them in the course of their questioning of gang members other than the defendant, the defendant correctly argues that this testimony was

testimonial hearsay, and that its admission into evidence violated his Sixth Amendment right to confront witnesses against him..." [NOTE: The opinion draws no distinction between investigatory interrogations and other conversations, treating all cop-gangbanger exchanges the same, without explaining why it does so.]

People v. Hill, 191 Cal. App. 4th 1104, 1127-1137, 120 Cal. Rptr. 3d 251 (Cal. App. 1st Dist. 2011) – this case criticizes *Thomas* at length on the theory that disclosing the hearsay basis of the expert's opinion requires the jury to determine the truth of the underlying hearsay, an argument that presupposes the jury's inquiry is limited to whether the hearsay is (a) true or (b) untrue – when the actual scope of the jury's consideration is (duh!) whether the expert is (a) relying on actual data, or (b) just making it up, repeating Internet rumors, etc. – but the opinion nonetheless concludes that the information gathered by the gang expert was mostly nontestimonial

California Cases: Gang Expert's Reliance on Hearsay Did Not Violate *Crawford*

People v. Cabrera, 191 Cal. App. 4th 276, 121 Cal. Rptr. 3d 320 (Cal. App. 4th Dist. 2010), review pending, 122 Cal.Rptr.3d 639, 249 P.3d 262 (Cal., Mar. 23, 2011) –

People v. Sisneros, __ P.3d __, 2009 WL 1414876 (Cal. App. 2 Dist. May 21, 2009)

Jerro v. Scribner, 2009 WL 1217536 (C.D. Cal. Apr 30, 2009) (unpub) (habeas)

Cason v. Hedgpeth, 2009 WL 1096209 (C.D. Cal. Apr 22, 2009) (unpub) (habeas)

People v. Gutierrez, 2009 WL 931701 (Cal. App. 2 Dist. Apr 08, 2009) (unpub)

People v. Olague, 2009 WL 924503 (Cal. App. 3 Dist. Apr 07, 2009) (unpub)

Mendoza v. Attorney General of State of Cal., 2009 WL 926814 (E.D. Cal. Apr 03, 2009) (unpub) (habeas)

People v. Gutierrez, 2009 WL 931701 (Cal. App. 2 Dist. Apr 08, 2009) (unpub)

People v. Perez, 2009 WL 465168 (Cal. App. 6 Dist. Feb 25, 2009) (unpub)

People v. Yann, 2009 WL 402084 (Cal. App. 5 Dist. Feb 19, 2009) (unpub), modified on denial of rehearing, 2009 WL 597238 (Cal. App. 5 Dist. Mar 09, 2009) (unpub)

People v. Chea, 2009 WL 402080 (Cal. App. 5 Dist. Feb 19, 2009), modified on denial of rehearing, 2009 WL 597239 (March 9, 2009) (unpub) –

People v. Serna, 2009 WL 428582 (Cal. App. 2 Dist. Feb 23, 2009) (unpub) –

Holden v. Hernandez, 2009 WL 235632 (C.D. Cal. Jan 27, 2009) (unpub) (habeas)

People v. Torres, 2009 WL 202467 (Cal. App. 2 Dist. Jan 29, 2009) (unpub)

People v. Taylor, 2008 WL 5339924 (Cal. App. 5 Dist. Dec 23, 2008) (unpub)

People v. Gutierrez, 2008 WL 5342190 (Cal. App. 2 Dist. Dec 23, 2008) (unpub)

People v. Ortiz, 2008 WL 5274633 (Cal. App. 2 Dist. Dec 22, 2008) (unpub)

People v. Gonzalez, 2008 WL 5077702 (Cal. App. 4 Dist. Dec 03, 2008) (unpub)

People v. Castaneda, 2008 WL 4717186 (Cal. App. 5 Dist. Oct 28, 2008) (unpub)

People v. Garrett, 2008 WL 5050448 (Cal. App. 2 Dist. Dec 01, 2008) (unpub) – "Gang experts may reasonably rely on conversations with gang members, personal investigations of crimes committed by gang members and information from colleagues and various law enforcement agencies."

People v. Lopez, 2008 WL 4717986 (Cal. App. 2 Dist. Oct 28, 2008) (unpub)

Thomas v. Chromes, 2008 WL 4597214 (C.D. Cal. Oct 10, 2008) (unpub) (habeas) – "courts in the wake of *Crawford* and *Davis* have held that the introduction of otherwise inadmissible evidence offered in support of a gang expert witness's testimony does not violate the Confrontation Clause."

People v. Khensokvann, 2008 WL 3415461 (Cal.App. 6 Dist. Aug 13, 2008) (unpub)

People v. Cordova, 2008 WL 2895958 (Cal. App. 2 Dist. Jul 29, 2008) (unpub) – "Further, even if the admissions as to gang membership... were testimonial, it does not follow that introducing them into evidence violated appellant's right to confrontation. 'The rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay.'"

People v. Perez, 2008 WL 2791667 (Cal. App. 2 Dist. Jul 21, 2008) (unpub)
Ortiz v. Tilton, 2008 WL 2543440 (S.D. Cal. May 05, 2008) (unpub) (habeas)
People v. Villegas, 2008 WL 2210567 (Cal. App. 4 Dist. May 29, 2008) (unpub)
People v. Lopez, 2008 WL 1919798 (Cal. App. 5 Dist. May 02, 2008) (unpub)
Tran v. Felker, 2008 WL 1805820 (E.D. Cal. Apr 22, 2008) (unpub) (habeas)
People v. McGuire, 2008 WL 2108096 (Cal. App. 5 Dist. May 20, 2008) (unpub)
Nguyen v. Evans, 2008 WL 1994902 (N.D. Cal. May 5, 2008) (unpub) (habeas)
People v. Cruz, 2008 WL 2132579 (Cal. App. 2 Dist. May 22, 2008) (unpub)
Nguyen v. Evans, 2008 WL 1994902 (N.D. Cal. May 05, 2008) (unpub) (habeas)
Eddington v. Adams, 2008 WL 397290 (E.D. Cal. Feb 08, 2008) (unpub) (habeas)
People v. Lamson Trong Pham, 2008 WL 176473 (Cal. App. 3 Dist. Jan 22, 2008) (unpub)
People v. Hunt, 2008 WL 62534 (Cal. App. 2 Dist. Jan 07, 2008) (unpub)
People v. Valladares, 2007 WL 3257364 (Cal. App. 5 Dist. Nov 06, 2007)
People v. Garcia, 2007 WL 2729466 (Cal.App. 2 Dist. Sep 20, 2007) (unpub)
People v. Ware, 2007 WL 2460426 (Cal. App. 2 Dist. Aug 31, 2007) (unpub)
People v. Abanico, 2007 WL 1956909, *12+ (Cal.App. 6 Dist. Jul 06, 2007) (unpub)
In re Genaro G., 2007 WL 1851122, *3+ (Cal. App. 4 Dist. Jun 28, 2007) (unpub)
People v. Thong, 2007 WL 1453964 (Cal. App. 5 Dist. May 18, 2007) (unpub)
People v. Cason, 2007 WL 891292, *5-6 (Cal. App. 2 Dist. 2007) (unpub)
People v. Flores, 2007 WL 404913, *2, *12-14 (Cal.App. 1 Dist., 2007) (unpub)
People v. Thomas, 130 Cal.App.4th 1202, 1210 (2005)

California Cases: Gang Expert's Reliance on Hearsay DOES Violate *Crawford*

People v. Monsivais, 2007 WL 2391007 (Cal. App. 6 Dist. Aug 23, 2007) (unpub) – "Next, Amparo contends the court erred in allowing gang expert Officer Royce Heath's statement, that Amparo's brother told him Amparo was a gang member, to be used as part of the basis for Heath's expert opinion that Amparo was, in fact, a gang member. ... As regards X's statement, it was offered to prove the truth of what he stated, namely, that Amparo was a gang member. As the New York high court has said, 'We do not see how the jury could use the statements of the interviewees to evaluate [the expert's] opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress [the expert's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true.... The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context.' [quoting *People v. Goldstein* (2005) 6 N.Y.3d 119, 127-128] ... In this case, X's statement was inadmissible because it was admitted for the truth of the matter asserted, that Amparo was a gang member, and X was not available for cross-examination." [NOTE: The reasoning seems to be that because the jury is too dumb to grasp the distinction between information provided to explain the basis of an expert's opinion and evidence offered for the truth of the matter asserted, therefore information conveyed for the first purpose is "really" introduced for the second purpose. As for "how the

jury could use the statements" properly, well, it could determine whether the statement was made and, if so, evaluate whether the expert reasonably took it into consideration. It's really not difficult.]

Cases from Jurisdictions Other than California

People v Colletti, 2010 NY Slip Op 4610, 73 A.D.3d 1203, 901 N.Y.S.2d 684 (N.Y. App. Div. 2d Dep't 2010) – "we take this opportunity to note that, upon retrial, any expert testimony regarding the commission of specific crimes or the defendant's involvement in organized crime must comport with the principles set forth in *Crawford*... Moreover, to the extent that our decision in *People v Barone* ... may be interpreted as being inconsistent with *Crawford* ... it should no longer be followed." [NOTE: Could an appellate court's "guidance" be less helpful?]

State v. McDaniel, 155 Wn. App. 829, 835-851, 230 P.3d 245 (Wash. Ct. App. 2010) – detectives learned that individuals identified by gang monikers were bragging about shooting – they then found out who those people were – "The parties did not provide, and we could not find, any authority clarifying (1) whether a declarant's out-of-court statement that someone goes by a particular name or nickname constitutes testimonial hearsay or (2) the point during a police investigation at which law enforcement has personal knowledge of a fact instead of hearsay statements." – concluding that gang expert's knowledge of one gangster's moniker was first-hand knowledge while the other was testimonial hearsay

United States v. Ayala, 601 F.3d 256, 271-272 (4th Cir. Md. 2010) – "[T]he defendants contend that the district court admitted the testimony of three expert witnesses in violation of the Confrontation Clause as interpreted by *Crawford* ... because the experts relied in part on interviews with unnamed declarants.... the question when applying *Crawford* to expert testimony is 'whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.'"

U.S. v. Mejia, 545 F.3d 179 (2nd Cir. Oct 06, 2008) – "When faced with the intersection of the *Crawford* rule and officer experts, [FN4] we have determined that an officer expert's testimony violates *Crawford* 'if [the expert] communicated out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion.'" – [NOTE: A bit circular, no?] – very long and unclear opinion expressing author's distaste for "these 'officer experts'" and holding that because one part of the expert's testimony, brought out by defense counsel, may have violated *Crawford*, therefore it all did, requiring reversal – or something like that – alternatively, this case may be trying to say that an expert may not rely on testimonial hearsay, or in other words that *Crawford* overrules Rule 702 in part – or possibly only that the testimony at issue wasn't really "expert"

U.S. v. Law, 528 F.3d 888 (D.C. Cir. Jun 13, 2008) – "All three defendants contest the admission of Detective Tyrone Thomas's expert testimony about the typical operations of narcotics dealers, arguing that it was testimonial hearsay admitted in violation of the Sixth Amendment as interpreted in *Crawford*... The three defendants argue that Detective Thomas formed his opinion about the typical operations of narcotics dealers over the course of thousands of interviews, and that his testimony is in reality the testimony of thousands of out-of-court 'witnesses' who were not subject to cross-examination. But as this court has previously explained (in a case involving this same expert), *Crawford* 'did not involve expert witness testimony and

thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703.' *United States v. Henry*, 472 F.3d 910, 914 (D.C.Cir.2007). "

Loredo v. State, 2007 WL 2380346 (Tex. App.-Tyler Aug 22, 2007) (unpub) – gang testimony – "In the appropriate circumstances, an expert may rely upon hearsay in formulating an opinion. Tex.R. Evid. 703."

U.S. v. Lombardozzi, 491 F.3d 61 (2nd Cir. Jul 11, 2007) – "The government called Kenneth McCabe, a criminal investigator for the United States Attorney's office for the Southern District of New York, as an expert who testified as to, inter alia, the general structure of La Cosa Nostra in New York and Lombardozzi's affiliation with organized crime. ... [T]he admission of McCabe's testimony was error only if he communicated out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion. While the record indicates that may have been the case, and admission of McCabe's testimony, therefore, may have constituted error, we hold it did not rise to the level of reversible plain error because it did not affect Lombardozzi's substantial rights."

Statements Quoted or Alluded To by Detective or Prosecutor
(see also Background Statements, Context Statements & Too Much Detail)

Allen v. State, 296 Ga. 785, 770 S.E.2d 824 (2015) – video of interrogation played for jury – "Allen objected to a detective's comment to Allen that 'you don't know who I've talked to ... you don't know what those people told me,' as well as the remark of a second detective that 'somebody gave up your name,' and the admonition that Allen should reveal his fellow actors as 'your buddies have already dropped the name on you.' ... [T]he detectives' statements were clearly not meant to establish as true that others had implicated Allen, but were simply a part of an interrogation technique. ... The detectives did not identify the 'buddies' mentioned, and no substance of any supposed statements was placed before the jury by the detectives' reference."

Thornton v. State, 25 N.E.3d 800, 802-06 (Ind. Ct. App. 2015) – finding the following to be testimonial hearsay: "State: Okay. Without getting into what Mr. Dillar said, because of hearsay rules, did Thornton's version of Thornton's actions match that of Mr. Dillard's version? Matonovich: No." – the court's logic is that because the exchange invited the jury to speculate about what Dillar said, it was "worse than" actually repeating what he said – that is, complying with the hearsay rule is worse than violating it, constitutionally-speaking

State v. Gentry, 439 N.J. Super. 57, 106 A.3d 552 (App. Div. 2015) – "During the subsequent cross-examination of defendant, one of the prosecutors asked defendant another series of questions about whether his brother [named Jerrod] participated in the fight with Haulmark, allegedly by elbowing, hitting, and kicking him. Defendant denied it. She then asked, 'isn't it true that Jarrod said that he did?' Defense counsel objected and, at sidebar, the judge asked the prosecutor to withdraw the question. She agreed, but clearly, the information was presented to the jury through her questions, and no curative instruction was given." – prosecutor repeatedly referred to Jerrod's statement in closing – "We conclude that the prosecutor's questions and summation comments, and the trial court's ruling permitting the comments, were clearly improper, violated bedrock constitutional principles, and constituted prejudicial error."

People v. Murillo, 231 Cal. App. 4th 448, 179 Cal. Rptr. 3d 891 (Cal. App. 2014), as modified (Dec. 9, 2014) – "A prosecution witness takes the witness stand but refuses to answer any questions. The trial court allows the prosecutor to ask the *450 witness more than 100 leading questions concerning the witness's out-of-court statements to prove defendant guilty of several criminal offenses. The questions create the illusion of testimony. This deprived the defendant of a fair trial because he could not exercise his constitutional right of cross-examination. ... A prosecutor 'may not, under the guise of cross-examination, get before the jury what is tantamount to devastating direct testimony.'"

State v. Jim, 2014-NMCA-089, 332 P.3d 870 (N.M. App. 2014), cert. denied, 328 P.3d 1188 (N.M. 2014) – " When one police detective described to Defendant the sequence of events as reported to them by witnesses to the assaults that led to Victim's death, Defendant stated, 'I'm guessing that's what happened and I'm pretty sure that is how it went down.... I believe her. She was sober. She saw everything.' ... {18} The parties do not dispute that references to witnesses' statements contained within the transcript of Defendant's interview with police are testimonial in nature." - [NOTE: The statements in question would seem to be non-testimonial either as context statements or adoptive admissions.]

People v. Lloyd, 115 A.D.3d 766, 981 N.Y.S.2d 792 (N.Y. App. Div. 2d Dept. 2014) – "As the defendant correctly contends, during the cross-examination of Lloyd, the prosecutor improperly gave the impression that Drake, who did not testify, implicated the defendant while the police questioned her [cites]. ... The defendant's constitutional right to be confronted with the witnesses against him prohibits the 'admission of testimonial statements of a witness who did not appear at trial unless he [or she] was unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination' [cites]. Here, the defendant's constitutional right to be confronted with the witnesses against him was violated."

State v. Jackson, 115 So. 3d 1155, 1156-1159 (La.App. 4 Cir. 2013) – "The defendant also asserts that his constitutional rights were violated when the trial court allowed "indirect" hearsay testimony of Bradley, Nelson, and Calloway to be admitted into evidence. He claims that this evidence was introduced "indirectly" because the court allowed Detective Burns to testify regarding photographic lineups that were shown to each of these witnesses. ... This Court has previously explained that '[t]he fact that the jury could infer that someone may have made a statement implicating the appellant does not automatically make [*1165] the statement hearsay.' ... Because Detective Burns' testimony did not amount to inadmissible hearsay, the defendant's Sixth Amendment right to confrontation was not violated."

Turner v. State, 115 So. 3d 939 (Ala. Crim. App. Dec. 14, 2012) – "The State also admitted into evidence the recording of Turner's interrogation in which the officers stated that Turner's accomplices had told them that Turner intended to shoot Shah. The recording also contained a police officer's statement that the accomplices had informed the officers that when Shah 'grabbed the phone[,] [Turner] said f*** this and [he] shot.' ... The confessions of Turner's accomplices to police officers were, without a doubt, testimonial. ... Accordingly, the introduction of statements by Turner's nontestifying accomplices to police officers during their interrogations violated Turner's right to confront the witnesses against him..." [NOTE: Does it matter whether the detectives' representation of the accomplices' confessions was accurate? What if it was just a

ruse? This case effectively recognizes a constitutional right to suppress one's reaction to unwelcome news / ruse.]

People v. Gholam, 99 A.D.3d 441, 951 N.Y.S.2d 526 (N.Y. App. Div. 1st Dep't 2012) – "We find no merit in defendant's claim that he was deprived of his Sixth Amendment right to confrontation under *Crawford* ... on the basis of his being questioned about the thought processes of one of his accomplices. [*443] Questions themselves are not hearsay because they are not offered for their truth [cite]."

People v Davis, 87 A.D.3d 1332, 929 N.Y.S.2d 819 (N.Y. App. Div. 4th Dep't 2011) – "We reject the contention of defendant that the court erred in allowing police witnesses to testify that he changed his statement concerning the incident after being confronted with information allegedly provided by his wife. ... the testimony was properly admitted in evidence to explain why defendant made certain admissions to the police after first professing his ignorance of the incident and then denying his presence at the crime [**823] scene..."

Gilbert v. State, 954 N.E.2d 515, 516-519 (Ind. Ct. App. 2011) – "Officer Decker's testimony regarding Detective Wilkerson's statements was not hearsay, inasmuch as it was not offered for its substantive truth. More particularly, Officer Decker's testimony [*519] that Detective Wilkerson stated to Gilbert that "he wanted some h**d" was not offered to prove that Detective Wilkerson, in fact, wanted to receive oral sex. Rather, the statement was introduced to show that it was made, and, more importantly, provided context for Gilbert's response, which was to ask how much money they had. [¶] In short, Detective Wilkerson's statements are not hearsay... 'the Confrontation Clause does not apply to nonhearsay statements, even if those statements are testimonial.'"

State v. Castaneda, 715 S.E.2d 290, 292-294 (N.C. Ct. App. 2011) – "During the interview, Detective Brandon told defendant that he did not believe defendant's story that Aguilar attacked him, saying that 'people said that . . . you picked the knife up and you stabbed [Aguilar].' Later, Detective Santiago told defendant that some parts of his story were 'not true' as they did not 'match' the evidence from the scene. ... As the detectives' statements were not offered to prove the truth of the matter asserted, they did not constitute hearsay, and the trial court properly admitted the evidence. ... It is well recognized, however, that '[t]he Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'"

People v. Fackelman, 802 N.W.2d 552 (Mich. 2011), cert. denied, 181 L. Ed. 2d 483 (Nov. 28, 2011) – When prosecutor's questioning of two testifying experts conveyed the substance of a third, non-testifying expert's report, confrontation clause was violated, even though non-testifying expert's report was never actually admitted into evidence

Estes v. State, 249 P.3d 313 (Alaska Ct. App. 2011) – "In Estes's case, the State wished to introduce two recorded interviews with Estes — the surreptitiously recorded conversation with Chew, and the openly recorded interview with the state troopers. Both of these interviews contained references to out-of-court statements purportedly made by Estes's husband, Deremer — statements implicating Estes in the planning and commission of the murder. [¶] But this evidence was not hearsay, because the State did not offer this evidence as proof of the matters asserted in the statements attributed to Deremer. Rather, Chew's assertions about what Deremer

said, and the troopers' assertions about what Deremer said, were offered to provide the foundation or context for understanding the statements that Estes made when she responded to these assertions about what Deremer purportedly said.... to the extent that Chew's questions to Estes and the troopers' questions to Estes contained references to Deremer's purported out-of-court statements, those references were offered for a non-hearsay purpose. [¶] And because the evidence of Deremer's purported out-of-court statements was offered for a non-hearsay purpose, the introduction of that evidence did not implicate Estes's Sixth Amendment right of confrontation."

In re T.J.B., 2010 MT 116, 356 Mont. 342, 233 P.3d 341 (Mont. 2010) – analyzing statements made by detective during custodial interview under hearsay rule and confrontation clause, without addressing threshold question whether that is appropriate

McWatters v. State, 36 So. 3d 613 (Fla. Mar. 18, 2010), re'g denied (June 2, 2010) –

"Second, McWatters argues that his right to confront his accusers was violated when the trial court erroneously permitted the State to play portions of McWatters' June 23, 2004, taped interview. The portions at issue contained statements made by police investigators that Austin Cottle, Sr., Austin Cottle, Jr., and a man named Hilton "Shep" Shepard said that they saw McWatters leave with Jackie Bradley and that they thought he killed her. n5 McWatters argues that since these statements were testimonial and these witnesses did not testify at trial, his right to confront these witnesses as set out in *Crawford*... A review of the June 23, 2004, interview reveals that Sergeant Silvas's statements were not offered for the truth of the matter asserted. ... it appears that Sergeant Silvas's statements were admitted solely to give context to McWatters' responses ..."

Jackson v. State, 25 So. 3d 518 (Fla. Sep 24, 2009), cert. denied, 130 S. Ct. 1144, 175 L. Ed. 2d 979 (2010) – "After his arrest in South Carolina, JSO detectives questioned Jackson with regard to the disappearance of the Sumners. During this recorded interview, officers probed Jackson for his response to statements allegedly made by Tiffany Cole that revealed details of the criminal acts. ... However, there is no record evidence that Cole was interrogated by the JSO or any indication that Cole actually made the contested statements to law enforcement as an affirmation for the purpose of establishing some fact. The statements were not admitted to prove the truth of the matter asserted (i.e., that Cole drove Jackson to the Sumner residence and that Jackson called the JSO under the pretense of being James Sumner). Rather, the statements were used purely as provocation to observe Jackson's reactions. Police misrepresentations as to statements made by others may be used to provoke a confession as long as the deception does not render a confession involuntary."

State v. Miller, __ S.E.2d __, 2009 WL 1373146 (N.C. App. May 19, 2009) – "Some of the detectives' questions contained statements incriminating defendant that were allegedly made by others, includ-ing Grady, Graham, Bowser, and defendant's sisters. [FN3] With the exception of Bowser, none of the individuals to whom the statements were attributed testified at trial. ... Because defendant changed his story as a result of these out-of-court statements, it can be properly said that these questions were admitted to show their effect on defendant, not to prove the truth of the matter asserted."

Rhodes v. Ercole, 2009 WL 1346395 (E.D. N.Y. May 13, 2009) (unpub) (habeas) – Detective Lockwood "testified that he 'had informed Mr. Rhodes that there was a witness to this shooting, and the witness tells me that she was with him when he shot and killed this livery cab driver.'...

this testimony did not violate the petitioner's rights under the Confrontation Clause, [cites] because there is no indication that the non-testifying witness's statements were testimonial, and because Detective Lockwood only testified that he told that the petitioner that a witness had implicated him rather than relaying the actual state-ments of the nontestifying witness."

York v. State, __ S.W.3d __, 2009 WL 1493255 (Tex. App.-Hous. May 28, 2009) – assuming without deciding that detective's repetition of statements made by third party were testimonial

Hernandez v. State, __ S.W.3d __, 2009 WL 1331649 (Tex. App.-Hous. May 14, 2009) – "appellant contends that the trial court erred by overruling his objections to various statements made by [Officers] Flores and Peters on the interrogation videotape challenging appellant's version of events by citing the accounts of unnamed witnesses. ... Statements offered only to show their effect on the listener are not hearsay. [cites] Further, statements made by police officers during an interview are not hearsay if they are offered only to give context to the interviewee's replies, even if the officers accuse the interviewee of lying and refer to the statements of unnamed witnesses. ... Having held reasonable the trial court's conclusion that the officers' statements were not offered to prove the truth of the matters asserted, we also hold that the Sixth Amendment's Confrontation Clause did not bar those statements."

Klimawicze v. Trancoso, 2009 WL 667228 (7th Cir. Mar 13, 2009) (unpub) – Klimawicze argued that her confession was false--that it was ob-tained only after hours of harsh interrogation tactics, isolation, and intimidation. The state countered with another explanation--that Klimawicze confessed in response to learning from Mercado that he had di-vulged the 'true' story. But Mercado was not an available witness for Fifth Amendment reasons, so the prosecution introduced his statement through two others." – held: not offered for truth of the matter – "A testimonial statement does not alone amount to a Sixth Amendment violation: *Crawford* requires testimonial hearsay. ... [T]estimonial statements offered for a non-hearsay purpose do not violate the Confrontation Clause--even if they tend to cast doubt on a defendant's innocence."

People v. Maldonado, 2009 WL 580744 (Cal. App. 4 Dist. Mar 06, 2009) (unpub) – "Maldonado contends the trial court erroneously allowed the prosecutor to cross-examine Costanzo [a defense psychologist] using a hypothetical question because the hypothetical question violated his confrontation rights ... Here, Maldonado's father's statement was not admitted for the truth of the matter asserted. The trial court allowed the prosecutor to cross-examine Costanzo with the hypothetical question to explore the basis of his opinion." – [NOTE: How was the statement "admitted" at all?]

Robinson v. State, __ So.2d __, 2009 WL 529258 (Fla. App. 3 Dist. Mar 04, 2009) – " In this case the officers asked interrogation questions. The defendant has not offered any authority for the proposition that a police officer's questions amount to testimonial statements for purposes of *Crawford*. We therefore reject the *Crawford* argument."

Porter v. Yates, 2009 WL 412127 (C.D. Cal. Feb 13, 2009) (unpub) (habeas) – officer played co-defendant's confession to observe defendant's reaction – "the Confrontation Clause is not implicated by nontestimonial statements. [Detective] Carver's and [co-d] Hambly's statements were not testimonial, as they simply pro-vided context for petitioner's conduct and responses after hearing them."

People v. Cox, 2009 WL 378821 (Cal. App. 4 Dist. Feb 17, 2009) (unpub) – "Defendant claims that Detective Pluimer's testimony that involved questions posed to defendant by Detective Masson, who did not testify at trial, violated his federal constitutional rights of cross-examination under *Crawford*... The questions posed by Detective Masson were not admitted for their truth. Rather, they were admitted to give meaning to the responses by defendant. ... The prosecution never argued that Detective Masson's statements were true or showed defendant's guilt. Detective Masson's questions were admissible for the nonhearsay purpose of placing defendant's statements into context."

U.S. v. Barriera-Vera, 2008 WL 5216017 (11th Cir. Dec 15, 2008) (unpub) – "[Detective] Kercher's refer-ences to the anonymous phone call in Barriera-Vera's interview were admitted to provide context and explain Barriera-Vera's responses, not to prove the truth of the matter asserted."

Singleton v. State, 1 So.3d 930 (Miss. App. Oct 21, 2008), rehearing denied (Feb 10, 2009) – sheriff testified that statements of defendant and deceased co-defendant were "consistent" and "corroborated" each other, without quoting from co-defendant's statement – "¶ 17. The State makes no attempt to argue that this situation was not a violation of Singleton's constitutional right to confront the witness, but argues it was harmless error. Under the facts and circumstances of this case, we agree."

State v. Holness, 289 Conn. 535, 958 A.2d 754 (Conn. Nov 18, 2008) – prosecutor questioned defendant about inculpatory statements made by another – the statement itself was not admitted – defense counsel asked for instruction that statement was not introduced for substantive purpose – prosecutor agreed – "The defendant cannot prevail on his unpreserved constitutional claim because it falls squarely within the waiver doctrine ... To reach a contrary conclusion would result in an ambush of the trial court by permitting the defendant to raise a claim on appeal that his or her counsel expressly had abandoned in the trial court."

Barlow v. Scribner, 2008 WL 4500030 (C.D. Cal. Oct 05, 2008) (unpub) (habeas) – "Devore's statements were not introduced for their truth, but rather to show Petitioner's reaction in his interview with police to Devore's accusation that Petitioner admitted he killed the victim."

State v. Self, 2008 WL 2954597 (Ariz. App. Div. 1 Jul 29, 2008) (unpub) – "¶ 6 Detective B.V. first interviewed D.H. and then interviewed Self. Detective B.V. tape-recorded the interview with Self. After reading Self his *Miranda* rights, Detective B.V. said to Self, 'He [referring to D.H.] said you picked him up tonight and then ... I guess he was walking and needed a ride or something like that and you guys stopped over at [the house].' After a considerable pause, Self reluctantly responded, 'Yeah.' ... ¶ 17] [O]nce Self adopted the statement made by D.H. it was no longer hearsay. Thus, under *Crawford*, there was no Confrontation Clause violation."

Thompson v. State, 2008 WL 2841675 (Tex. App.-Hous. Jul 24, 2008) (unpub) – "Appellant specifically complains about hearsay statements in the videotaped interview, made by the police officer interviewing appellant, that Dre and House had implicated appellant as having participated in the entire crime. Appellant claims that because Dre and House did not testify at trial, he was unable to confront the witnesses against him, and thus the trial court should have

excluded the portion of the video containing these statements." – not resolved – decided on harmless error grounds

U.S. v. Tucker, 533 F.3d 711 (8th Cir. Jul 17, 2008) – "Tucker cites no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross examination of the defendant at trial implicates the Confrontation Clause. And direct authority to the contrary is found in our decision in *United States v. Miller*, 974 F.2d 953, 960 (8th Cir.1992)" – [NOTE: In this case the statement wasn't even quoted.]

U.S. ex rel. Klimawicze v. Sigler, 559 F.Supp.2d 906 (N.D. Ill. Apr 15, 2008) (habeas) – investigators told defendant that co-perpetrator "had told the police 'the true story'" but "the contents of the non-testifying co-defendant's statement were not introduced" – held: not hearsay, and therefore not *Crawford* issue

Woods v. Wolfe, 2008 WL 2371401 (S.D. Ohio Jun 10, 2008) (unpub) (habeas) – detective testified, "I told Mr. Woods that I checked his alibi and that it did not check out." – whereupon defendant changed his story – he did not, in fact, rely on an alibi defense at trial – "Assuming Dickson's statement to police [shooting down defendant's alibi] was testimonial within the meaning of *Crawford*, ... admission of the testimony complained of nonetheless was not constitutionally prohibited since the statement(s) were not offered for their truth, but to show why petitioner changed his story to police." [NOTE: If it wasn't offered the truth, it wasn't hearsay, and therefore it wasn't testimonial hearsay. But even if the road followed was unnecessary long, the magistrate arrived at the correct destination.]

Reyes v. Dexter, 2008 WL 594686 (C.D. Cal. Feb 28, 2008) (unpub) (habeas) – "To the extent that petitioner is challenging the admission of [co-d] Bauders's 'back-door' incrimination of him through the transcript of petitioner's own interview at trial, petitioner's Confrontation Clause claim still fails. First, because of the ambiguities in the transcript, it is not entirely clear that [Detective] Lujan even was referencing statements made specifically by Bauders when he said to petitioner that "people" had told him that petitioner had been involved in the fight and had hit a guy in the head; the jury would have to have inferred that Lujan was referencing the non-testifying co-defendant. Second, there was no evidence before the jury that Bauders actually even made the statements to Lujan that Lujan inferentially attributed to him. In other words, for all the jury knew, Lujan could well have made up the fact that Bauders had made 'inculcating' statements against petitioner for the purpose of getting petitioner to incriminate himself. Further, the recorded statement that Bauders had made to Detective Lujan was not itself ever admitted into evidence at petitioner's trial. The Court therefore questions whether the Confrontation Clause even applies to the admission of Lujan's reference to Bauders's out-of-court statements."

People v. Wise, 2007 WL 4479063 (Cal. App. 1 Dist. Dec 21, 2007) (unpub) – defendant claims his counsel's failure to object to embedded statement constituted ineffective assistance of counsel – held: no, because counsel had a tactical reason not to object – court does not address whether such an objection would have been meritorious in the first place

People v. Hills, 2007 WL 4355435 (Mich. App. Dec 13, 2007) (unpub) – "Here, during their interrogation, the police presented defendant with statements allegedly made by other witnesses or suspects whom the police had allegedly interviewed. These statements were not offered for

their truth, but only for observing defendant's reaction, and to place his answers in context. Considered in this context, there was no plain violation of defendant's right of confrontation."

Hennes v. Bagley, 2007 WL 3284930 (S.D. Ohio Oct 31, 2007) (unpub) (habeas) – "This Court agrees with the state court's finding that the interrogating officer's questions are not hearsay evidence, as Hennes contends. ... As explained by the Ohio Supreme Court in another case, 'because a true question or inquiry is by its nature incapable of being proved either true or false and cannot be offered 'to prove the truth of the matter asserted,' it does not constitute hearsay as defined by Evid.R. 801.' [citation omitted] The Sixth Circuit Court of Appeals has also observed that questions do not themselves assert the truth or falsity of a fact, and therefore fall outside the definition of hearsay evidence." [NOTE: Decided under pre-*Crawford* law.]

Lidiano v. State, 967 So.2d 972 (Fla. App. 3 Dist. 2007) (on rehearing) – "The detective told the jury that the defendant denied being at the restaurant, even when the detective told him that there were witnesses who had seen him there. Detective Elosegui stated, "I asked Mr. Lidiano about the allegation, I told him about the allegations against him, that there were witnesses against him." The defense immediately objected, the trial court sustained the objection, and the defense moved for a mistrial, which was denied by the trial court. No curative instruction was requested or given. When asked what statements the defendant made during the interview, the detective responded, "I then told him that witnesses had seen him at the location and he again told me that it was impossible because he had never been at the restaurant." The defense objected and again moved for mistrial, which the trial court also denied." – the 2-1 majority affirmed the conviction on state-law grounds, but the dissent would have reversed on the basis of *Crawford*

People v. Feazell, --- N.E.2d ---, 2007 WL 3226960 (as modified on denial of motion for rehearing, Oct. 31, 2007), 226 Ill.2d 621, 882 N.E.2d 80, 317 Ill.Dec. 506 (Ill. Jan 30, 2008) – [This decision holds that *Crawford* was violated when the detective was permitted to describe his interrogation of the defendant, because in the course of that interrogation the detective relayed what her codefendant had said, or what for tactical reasons the detective wanted her to believe her codefendant had said, and then took note of her response and nonverbal reactions. In essence, the case holds that *Crawford* prohibits the jury from hearing a complete and accurate rendition of the defendant's own interrogation. The decision seems plainly wrong, as the detective obviously wasn't vouching for the codefendant's credibility – that is, the statements weren't offered for the truth of the matters asserted.]

Savage v. Commonwealth, 2007 WL 2812581 (Ky.App. Sep 28, 2007) (unpub) – "Finally, Savage argues that the Commonwealth violated the Confrontation Clause during the cross-examination of Rachel Kyc when it brought in a statement by a non-testifying witness (Jeff Sasser) inculcating Savage in the burglary. ... The question at issue is: 'Ma'am, in fact, you were told by Officer Phelps during this conversation that Mr. Sasser had implicated Mr. Savage in this burglary, did he not?' We agree with the Commonwealth that this question by the Commonwealth did not result in a violation of the Confrontation Clause, nor did the question constitute inadmissible hearsay."

State v. Frazier, 2007 WL 2769589 (Minn. App. Sep 25, 2007) (unpub) – following arrest for driving a stolen car – "Appellant argues his tape-recorded interview with the trooper, ruled admissible by the district court, alluded to statements made by appellant's companions, which were hearsay statements admitted in violation of the Sixth Amendment's Confrontation Clause.

In taking the statement, the trooper told appellant that his companions had said that it was appellant's girlfriend's car; the trooper also told appellant that there were some inconsistencies between appellant's story and those of his companions. The trooper elicited responses to these comments. ... Here, the trooper's statements were not offered to prove the truth of the matter asserted, namely, that appellant stole the car. Rather, they demonstrate the many inconsistencies between appellant's own statements, as well as the statements of his companions, and impeach his credibility. In particular, because some of the passenger statements claim that appellant's girlfriend owned the car, and the others address who actually drove the car, they do not directly prove that appellant stole the car himself. Because they are not hearsay statements, their admission did not violate the Confrontation Clause of the Sixth Amendment."

People v. Stokes, 2007 WL 2609483 (Mich. App. Sept. 11, 2007) (unpub) – "[D]efendant summoned two women to a house in Detroit, to accuse them of involvement in, and to extract information about, an earlier robbery of a separate drug house he maintained. Defendant threatened the women with a gun. He placed his gun in one victim's mouth and genital area and then doused both women with gasoline and set them on fire. ... [D]efendant also complains that the prosecutor cross-examined defendant with some of the witness's testimony from the preliminary examination, and elicited from defendant that the witness had identified defendant as her assailant. ... [D]efendant has not demonstrated that the trial court erred when it admitted the preliminary examination testimony and no Confrontation Clause violation occurred." [NOTE: Despite the court's use of the word "admitted", it appears that the preliminary hearing testimony was used on cross-examination and not admitted as an exhibit or read to the jury.]

People v. Diaz, 2007 WL 1847412 (Cal. App. 2 Dist. June 28, 2007) (unpub) – "On March 26, 2003, Los Angeles County Sheriff's Department Sergeant Richard Garcia and Los Angeles County Sheriff's Detective Richard Ramirez interviewed appellant at the sheriff's station after he waived his *Miranda* [footnote citation] rights. Appellant denied involvement in the shooting of Reygadas and appellant presented an alibi. ... During the interview, [Detective] Ramirez made five statements about which appellant complains ... Evidence of Ramirez's statements was admissible, not for their truth, but as evidence of statements designed to elicit responses from appellant concerning his involvement in the killing of Reygadas. Ramirez's statements were to be considered in connection with those responses, including any admissions by appellant of what Ramirez stated. Ramirez's statements were thus admissible as nonhearsay. The admission in evidence of nonhearsay does not violate *Crawford*."

State v. Athan, 158 P.3d 27 (Wash. 2007) – "The State contends Detective Mixsell's testimony also did not violate the Sixth Amendment because, although he disclosed the contents of [non-testifying witness] James' statement, he did so to provide context to [defendant] Athan's answer to the question. Athan's answer would be admissible under ER 801(d)(2) and without the context of James' statements, Athan's response would not make sense. Statements not used to prove the truth of the matter asserted, but instead used to provide context to a defendant's otherwise admissible statement do not violate the Sixth Amendment."

U.S. v. Andrews, 2007 WL 1749221 (N.D. Ind. Jun 15, 2007) (unpub) – (habeas) "The Defendant argues that the confrontation clause of the Sixth Amendment barred the government from playing the video recording of his interview with police officers because some of the interviewing officers, whose statements are heard on the tape, never testified at trial. ... *Crawford* is not applicable to the videotape of the Defendant's police interview because neither

the Defendant's own statement nor the statements of the interviewing officers are hearsay. ... The officer's statements are not hearsay because they were not offered for their truth, but only to provide context for the Defendant's admissible statements."

People v. Lewis, 11 A.D.3d 954, 782 N.Y.S.2d 321 (N.Y. App. Div. 4th Dept. 2004) – "Contrary to defendant's contention in appeal No. 2, County Court properly allowed two officers to testify that they had informed defendant during interrogation that his codefendant had implicated him in the crimes and that there were witnesses who had identified him at the crime scene. Although the codefendant's statement to the officers was testimonial [cites], it was not offered for the truth of the facts asserted therein, but was instead offered to set forth the circumstances in which defendant admitted his culpability after initially denying all involvement in the crimes [cites]. Thus, the use of the statement did not violate the Confrontation Clause [cites]."

Photographs and Video (category added December 2011)

Wise v. State, 26 N.E.3d 137 (Ind. Ct. App. 2015) transfer denied, (Ind. May 28, 2015) – "silent witness" theory is constitutional – "Here, the State produced M.B. to testify concerning the circumstances under which she obtained the video recordings. ... We ... find no confrontation violation associated with admission of the video recording into evidence."

People v. Rekte, 232 Cal. App. 4th 1237, 181 Cal. Rptr. 3d 912 (2015) – ATEs or red-light camera case – in a footnote of dicta, stating: "fn. 4: The trial court did not expressly rule on the admissibility of, or rely on the declaration of the Redflex technician that accompanied the photographs, in ruling on their admissibility. It is unclear whether or to what extent the court relied on the declaration, and the parties have not briefed this particular issue. If the court did rely on the declaration, such reliance would have violated the defendant's constitutional right to confrontation because the technician did not testify and declarations, like affidavits, constitute testimonial hearsay." – [NOTE: The opinion does such a poor job describing the evidence that it's unclear whether the affidavit in question is merely foundational, or whether it might be analogous to a breath analysis instrument certification report, or whether it actually constituted substantive evidence.]

Sheckles v. State, 24 N.E.3d 978 (Ind. Ct. App.) transfer denied, 26 N.E.3d 981 (Ind. 2015) – "Sheckles further contends that the trial court abused its discretion when it admitted into evidence the video recording of the controlled buy, because admission into evidence of that recording violates his rights under the Confrontation Clause." – rejecting claim under Indiana "silent witness" cases, which predate but survive *Crawford*

Commonwealth v. Newkirk, __ S.W.3d __, 2014 WL 6612430 (Ky. Ct. App. Nov. 21, 2014) – witnesses testified to contents of since-destroyed surveillance video – "Obviously, the videotape itself is not a human being capable of confrontation. More to the point, the videotape did not memorialize the testimonial statement of a human being; rather, it recorded the crime itself." – non-testimonial – [NOTE: also non-hearsay]

United States v. Brooks, 772 F.3d 1161 (9th Cir. 2014) – "The photographs of the seized parcel were not 'witnesses' against Brooks. They did not 'bear testimony' by declaring or affirming anything with a 'purpose.' Therefore, their admission did not violate the Confrontation Clause."

People v. Peyton, 229 Cal. App. 4th 1063, 1075-77, 177 Cal. Rptr. 3d 823, 833-34 (2014), review denied (Nov. 25, 2014) – "None of the ATM photos were testimonial statements. This is so because the computer controlling the ATM camera 'automatically generates and imprints data information on the photographic image, [and] there is ... no statement being made by a person regarding the data information so recorded.'" (brackets and ellipsis in original)

Vaughn v. State, 13 N.E.3d 873 (Ind. App. 2014) – "if a statement is either nontestimonial or nonhearsay, the federal Confrontation Clause will not bar its admissibility at trial.... the videos and the still photographs showing the controlled drug buy between the CI and Vaughn were not meant to be an assertion. They merely showed the conduct of the CI and Vaughn." – not hearsay, therefore not a confrontation clause issue

People v. Goldsmith, 59 Cal.4th 258, 172 Cal.Rptr.3d 637, 326 P.3d 239 (Cal. 2014) – challenge to red-light cameras, or Automated Traffic Enforcement System (ATES) – "The ATES-generated photographs and video introduced here as substantive evidence of defendant's infraction are not statements of a person ... Therefore, they do not constitute hearsay ... Because the computer controlling the ATES digital camera automatically generates and imprints data information on the photographic image, there is similarly no statement being made by a person regarding the data information so recorded. ... our determination that the ATES evidence is not hearsay necessarily requires the rejection of defendant's confrontation claims."

People v. Johnson, 118 A.D.3d 1502, 988 N.Y.S.2d 385, 387 (N.Y. App. Div. 4th Dept. 2014) – "We reject defendant's contention that his Confrontation Clause rights were violated by an officer's testimony regarding the photographs contained in the cell phone, inasmuch as those photographs were not "'procured with a primary purpose of creating an out-of-court substitute for trial testimony [cite].'"

Watson v. State, 421 S.W.3d 186, 195-98 (Tex. App.--San Antonio 2013), petition for discretionary review refused (May 14, 2014) – video of drug deal played for the jury without sound – "We conclude the silent videotaped recording in question was neither testimonial nor a statement and, therefore, did not invoke the Sixth Amendment or violate Watson's rights under the Confrontation Clause."

State v. Johnson, 128 So. 3d 237 (Fla. 4th Dist. App. 2013) – "The video does not involve a statement made after the crime to prove a past event. Rather, the video depicts the criminal act itself. Thus, it is not testimonial, and *Crawford* is not implicated."

Bunch v. State, 123 So. 3d 484, 494-95 (Miss. App. 2013) – "¶ 27. Bunch argues that the surveillance videos constituted inadmissible hearsay evidence and violated his Sixth Amendment right to confrontation. We disagree." – [NOTE: The court held the videos were business records instead of recognizing them non-hearsay.]

People v. Ellis, 213 Cal. App. 4th 1551, 1553-1570 (Cal. App. 1st Dist. 2013) – defendant "argues that photographs taken during the victim's sexual assault examination were admitted in evidence in violation of his Sixth Amendment confrontation clause rights... The consistent principle that is articulated in both the federal and state high court cases is that the confrontation clause is not implicated unless there is evidence presented of a hearsay statement, *i.e.*, a statement from a 'witness[] absent from trial,' which is 'testimonial.' n6 [cites] The photographs at issue here fail to meet the threshold hearsay requirement. ... The SART digital photographs are not 'verbal expressions,' nor are they made by a 'person.' n7 'Only people can generate hearsay. Machines, animals, chemical reactions cannot.' [cites]"

People v. Huynh, 212 Cal. App. 4th 285, 315-321, 151 Cal. Rptr. 3d 170 (Cal. App. 4th Dist. 2012) – "At issue here are the two photographs that [sexual assault nurse examiner] Kawachi took during her SART examination of Jeremiah that were used by [supervisory nurse] Nelli to state her independent opinion, and whether Huynh's Sixth Amendment right was violated because he was not able to confront and cross-examine Kawachi. [¶] These photographs, like the autopsy report and accompanying photographs in *Dungo* (see fn. 21, ante), depicted objective facts about the condition of Jeremiah's body. The photographs by themselves did not set forth Kawachi's conclusions or opinions about the results of the SART examination. ... The two SART examination photographs lacked the formality and solemnity that are a requirement of being testimonial. ... When Jeremiah's SART examination took place in June 2009, there was no criminal investigation of Huynh; Huynh did not become a suspect until September. The photographs of the anus and rectum depicted the condition of these areas and were taken to document whether Jeremiah was sodomized. The primary purpose of the photographs that Nelli relied on was to show the condition of the body. In taking the photographs, there was no likelihood of falsification and no motivation to produce anything other than a reliable depiction of Jeremiah's injuries, if any. The photographs were not taken for the primary purpose of accusing a targeted individual. Therefore, Nelli's use of the photographs was not testimonial and did not violate Huynh's right to confront and cross-examine the photographer (Kawachi)."

State v. Schmidt, 2012 ND 120, 817 N.W.2d 332 (N.D. 2012) – "At trial, [store owner] Mees testified about the still photo taken from the video recording. Schmidt argues Mees's testimony about the video was inadmissible hearsay because the video was testimonial in nature. ... Schmidt was not deprived of his right to confront Mees because Mees testified at trial about what he viewed on the video, and Schmidt had the opportunity to confront and cross-examine him."

Smoot v. State, 316 Ga. App. 102, 729 S.E.2d 416, 2012 Fulton County D. Rep. 1836 (Ga. Ct. App. 2012) – "Testimony regarding the content of photographs does not 'ask the jury to assume the truth of out-of-court statements made by others, and instead the value of the testimony rest[s] on the [testifying witness's] own veracity and competence.' [cite] Thus, the testimony of the investigating officers and lieutenant describing the content of the photographs on the web pages was not hearsay." – and therefore not sixth amendment issue

People v. Winters, 208 Cal. App. 4th Supp. 8, 10-16 (Cal. Super. Ct. 2012) – red light camera case – "Here, no employees of Redflex testified at trial. Instead, the prosecution relied exclusively on the testimony of Ms. Hill to lay the foundation for the photographs and videotape. ... In short, Ms. Hill failed to provide any of the evidence necessary to lay a foundation for the admission of the statement, the photographs or the videotape into evidence. ... The trial court erred by ruling that it was appellant's obligation to subpoena Redflex employees to appear at trial

if he wished to confront them and cross-examine them regarding the photographic evidence. That burden was the prosecution's alone, and could not be shifted to appellant." – [NOTE: The opinion doesn't examine its assumption that the sixth amendment grants a right to cross-examine foundation witnesses. Indeed, it doesn't appear aware that it is making that assumption. The constitutional ruling is not only wrong, but dicta.]

People v. Myers, 87 A.D.3d 826, 928 N.Y.S.2d 407 (N.Y. App. Div. 4th Dep't 2011) – "the photographs depicting the victim's injuries are demonstrative rather than testimonial evidence"

State v. Graves, 2009 WL 653091, 2009-Ohio-1133 (Ohio App. 9 Dist. Mar 16, 2009) (unpub) – "Defendant's second assignment of error is that the trial court erred in admitting a videotape of Defendant and two co-defendants, Moriba Ramsey and James Williams, recorded while all three men were in the back seat of State Highway Patrol Officer Mark Neff's patrol car. ... The recorded conversation at issue in this case contains the contemporaneous reactions of the speakers to events as they unfolded. They were not made in response to questions from law enforcement officers and, from the content of the statements, it can be inferred that the speakers were not mindful of the recording equipment mounted directly in front of them."

People v. Mendoza, 2008 WL 444396 (Cal. App. 5 Dist. Feb 20, 2008) (unpub) – "The surveillance videotapes of the robberies, including the erased tape from Cigarettes 4 Less, do not consist of hearsay statements, and thus do not trigger *Crawford's* analysis of testimonial hearsay. There was no evidence the videotapes had soundtracks with audio statements, or that the suspects displayed nonverbal assertive conduct intended as statements. Instead, the tapes constituted demonstrative evidence"

People v. Cooper, 148 Cal. App. 4th 731, 746, 56 Cal. Rptr. 3d 6, 26 (Cal.App. 2 Dist., 2007) – "Photographs and videotapes are demonstrative evidence, depicting what the camera sees. ... They are not testimonial and they are not hearsay"

People v. Diaz, 150 Cal.App.4th 254, 58 Cal.Rptr.3d 287 (Cal. App. 2 Dist. 2007) (unpublished in part), vacated and remanded, 165 P.3d 461, 64 Cal.Rptr.3d 660 (Cal. Sep 12, 2007), on rehearing, 2007 WL 3015448 (Cal. App. 2 Dist. Oct 17, 2007) (unpub) – the remand was with regard to sentencing issue – "Mark Diaz was convicted of sexual penetration of a victim who was unable to resist due to intoxication, anesthesia, or controlled substance ... Diaz argues that the videotape of his sexual conduct with Jane Doe should not have been admitted because it violates his Sixth Amendment rights (*Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177) and because it is hearsay that is not admissible under any exception to the hearsay rule. Both of Diaz's arguments are premised on the view that the evidentiary value of the videotape was to show consent or lack thereof. ... The problem with Diaz's argument is its starting point. The evidentiary value of the videotape was not to demonstrate that Jane Doe gave or did not give consent to the sexual acts Diaz engaged in. In fact, whether she consented is entirely irrelevant to the charges against Diaz. ... The value of the videotape for purposes of the charges against Diaz relating to Jane Doe was that the videotape permitted the jury to evaluate Jane Doe's *condition* while Diaz was performing sexual acts upon her: her mostly motionless body, her grogginess and lack of alertness, her slurred speech and frequent incoherence, her failure to rouse unless slapped (and sometimes even when slapped), and other indicia of her level of impairment. While Jane Doe did speak on the tape, her statements were not offered for the truth of the matter asserted with respect to any of the charges

on appeal. The videotape therefore was not hearsay in this context ..., nor was it a testimonial statement offered for the truth of the matters asserted." [NOTE: The quoted portion of the opinion was unpublished on the first go-around, and remains unpublished on rehearing.]

United States v. Beach, 2006 U.S. App. LEXIS 22286 (4th Cir. N.C. 2006) – Photographs of seized evidence are not testimonial.

Marketing Materials
(category added March 2013)

Andersen v. State, 830 N.W.2d 1, 9 (Minn. 2013) – "Pearlson testified that the bullets recovered from the victim were 'characteristic of some of the bullets that Winchester uses,' and identified an exhibit displaying several types of Winchester bullets to help explain the differences between the bullets. The witness explained that the exhibit was not prepared for litigation; instead it was marketing material he received as part of an email from a representative of Winchester Owen Corporation. ... We conclude that the exhibit was not testimonial under *Crawford*."

Questions by Judge
(category added June 2011)

People v. Spector, 194 Cal. App. 4th 1335, 1342-1371, 128 Cal. Rptr. 3d 31; 127 Cal. Rptr. 3d 31 (Cal. App. 2d Dist. 2011) – Spector as in wall of sound – testimony from first trial admitted at retrial – "All of Spector's claims fail, most fundamentally because they are predicated on his mistaken assertion the trial court's statements and actions on the videotape were admitted into evidence to establish the truth of a material fact. ... We agree with the Attorney General that 'the trial court's questions, clarifications, and gestures on the videotape ... were admissible for the non-hearsay purpose of giving context and meaning to Lintemoot's responses.' ... Because the trial court's words and actions on the videotape were not admitted for their truth, they did not constitute hearsay, they were not 'testimonial,' and they did not violate *Crawford*."

Results of Web Searches
(category added March 2012)

People v. Hard, 2014 COA 132, 342 P.3d 572 (Colo. App. 2014), reh'g denied (Nov. 26, 2014) – traffic stop, trooper discovered pills in defendant's possession – "¶ 8 Before taking defendant to the police station, Trooper Hancey accessed the website Drugs.com to identify the pills. ... He did not subsequently submit the pills for any confirmatory chemical testing." – court finds hearsay error but drops footnote 3: "We disagree with defendant, however, that her confrontation rights were implicated in this case. The information on Drugs.com is not testimonial for purposes of the Sixth Amendment's Confrontation Clause, as it was not created primarily for the purpose of establishing facts relevant to later criminal prosecution."

Smoot v. State, 316 Ga. App. 102, 729 S.E.2d 416, 2012 Fulton County D. Rep. 1836 (Ga. Ct. App. 2012) – keeping a place of prostitution case – "Smoot further argues that the trial court

erred in allowing the State to elicit testimony from the investigating officers and the police lieutenant describing the photographs and advertisements contained in the web pages that they reviewed as part of their investigation." – web advertisements are photographs and verbal acts, neither of which is hearsay, and therefore "testimony regarding the photographs and the advertising content on the web pages was not barred by the Sixth Amendment"

State v. Hummel, 165 Wn. App. 749, 774-777, 266 P.3d 269 (Wash. Ct. App. 2012) – children of long-missing mother, whose body was never recovered, testified about their attempts to locate her – "There were no certificates, affidavits, declarations, or other such testimony from third parties that did not participate in Hummel's trial and were not subject to cross-examination. Indeed, all of the evidence about which Hummel complains came from live testimony at trial that was [*777] subject to cross-examination by Hummel. To the extent Hummel takes issue with the reliability of the computer searches to which several witnesses testified, that subject was fully available for Hummel to explore on cross-examination, or perhaps move in-limine to exclude as not scientifically valid. It is not, however, a confrontation issue..."

Technician Who Assists in Preparing an Exhibit
(category added August 2014)

U.S. v. Vitrano, 747 F.3d 922, 923-25 (7th Cir. 2014) – " The government also played two phone calls Vitrano made to Valona from prison. *924 Vitrano objected to the phone calls on Confrontation Clause grounds... Vitrano asserts that the district court violated his rights under the Confrontation Clause by admitting his phone calls to Valona without subjecting the technician who pulled the phone calls to cross-examination. ... Preparing an exhibit for trial is not in itself testimonial; ... There was thus no need for the government to call the technician who prepared Exhibit 9 as a witness, and no violation of Vitrano's Sixth Amendment rights."



Part 5: Traditional Hearsay Exceptions (mostly not impacted by *Crawford*)

Crawford said: "Most of the [traditional, common-law] hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." 541 U.S. at 55. Statements falling within those exceptions aren't barred by the confrontation clause – not because the exceptions are firmly-rooted, but because the statements are non-testimonial.

Prior Consistent or Inconsistent Statement of Testifying Witness

State v. McComas, 345 P.3d 36, 40-41 (Wash. Ct. App. 2015) – "*Crawford* has no bearing on the admissibility of prior inconsistent statements..."

State v. Pound, 326 P.3d 422 (Mont. 2014) – "¶ 39 It is also clear that admission of a prior statement that is inconsistent with a witness's trial testimony, [cites], is not a violation of an accused's constitutional right of confrontation. It is established that when a witness is available for cross-examination at trial, the confrontation clause does not prohibit admission of extrinsic evidence of prior inconsistent statements."

People v. Rodriguez, 58 Cal.4th 587, 168 Cal.Rptr.3d 380, 319 P.3d 151, 186-87 (Cal. 2014) – "In support of her argument, defendant cites a series of high court decisions beginning with *Crawford*... But those cases made no change regarding use of prior statements of a witness who actually testifies. ... As a practical matter, [witness] Hall's claim of total lack of recall limited defendant's ability to cross-examine her about her prior statements. But this circumstance does not implicate the confrontation clause."

State v. Joe, 234 Ariz. 26, 316 P.3d 615, 616-17 (Ariz. App. 1st Div. 2014), review denied (May 28, 2014) – "[fn 3] On appeal, Joe correctly has not pressed the Confrontation Clause issue raised with the superior court."

McAtee v. Commonwealth, 413 S.W.3d 608, 614-15 (Ky. 2013) – "Appellant contends that this rule violates the Confrontation Clause when the witness whose prior inconsistent statements are introduced testifies at trial that he or she does not remember making them. We disagree."

People v. Dement, 53 Cal. 4th 1, 21-24, 264 P.3d 292, 133 Cal. Rptr. 3d 496 (Cal. 2011) – "Nothing in *Crawford* casts doubt on earlier cases holding that the confrontation clause is not violated by the introduction of out-of-court statements a witness denies or does not recall making."

People v. Blacksher, 52 Cal. 4th 769, 259 P.3d 370, 130 Cal. Rptr. 3d 191 (Cal. 2011) – "the confrontation clause does not prohibit the prosecution from impeaching the former testimony of its own unavailable witnesses with their inconsistent statements, provided those statements are admitted only for impeachment purposes.... It is sufficient to observe that because the statements were not offered for their truth they do not implicate the confrontation clause under the *Crawford* rule."

People v. Cowan, 50 Cal. 4th 401, 415-427, 236 P.3d 1074; 113 Cal. Rptr. 3d 850 (Cal. 2010) – "Defendant argues Foreman's response at trial was not inconsistent, but rather was merely nonresponsive. However, a witness's deliberate evasion of questioning can constitute an implied denial that amounts to inconsistency, rendering a prior statement admissible under Evidence Code section 1235. [cite] ... Answering questions in a deliberately nonresponsive manner, however, also can rise to the level of evasion. Here, the trial court reasonably could have concluded that Foreman was being deliberately evasive when she twice answered questions about what defendant had purportedly said about "murdering anybody" or harming an elderly couple in a nonresponsive manner. Under the circumstances, her nonresponsive answers could be deemed an implied denial that defendant had admitted killing an elderly couple." – no violation

Kennedy v. Warren, 2009 WL 1313327 (E.D. Mich. May 11, 2009) (unpub) (habeas) – use of witnesses' prior statements to police for purposes of impeachment "did not violate the Confrontation Clause because the police statements were admitted for impeachment purposes and not to prove the truth of the matters asserted."

People v. Leonard, 391 Ill. App. 3d 926, 911 N.E.2d 403, 331 Ill. Dec. 582 (Ill. App. 3 Dist. May 26, 2009) – "The trial court did not abuse its discretion when it declared Jackson a hostile witness and allowed the State to impeach him with evidence of his prior inconsistent statement to the police. ... [B]ecause Jackson was available for cross-examination, the confrontation clause was not implicated."

Soto v. State, __ S.E.2d __, 2009 WL 1174458 (Ga. May 04, 2009) – "Wiedeman entered a guilty plea and the State called him as a witness. He testified that Soto walked with him to the victim's neighborhood, but waited at a supermarket while he alone killed the victim by hitting her with a barbell and stabbing her with a knife. Suddenly, in the midst of further questioning by the State, Wiedeman announced that he would not answer any questions. He also refused to answer questions posed by the defense. He continued to refuse to answer questions even after the trial court ordered him to do so and threatened to hold him in contempt. Later, the State was allowed to impeach Wiedeman through the testimony of a police officer and a fellow prisoner by introducing hearsay state-ments Wiedeman gave to those individuals. ... However, the mere fact that Wiedeman's trial testimony was inconsistent with his prior statements does not mean that his prior statements were admissible at trial. That is because prior inconsistent statements remain inadmissible in the absence of "an opportunity for effective cross-examination." " [cites] Here, defendant was given no opportunity whatsoever to cross-examine Wiedeman because Wiedeman "shut down" in the midst of direct-examination and refused to answer further questions posed by either the prosecution or the defense. We must conclude, therefore, that the admission of Wiedeman's prior statements violated defendant's right of confrontation." – [NOTE: This seems plainly wrong. Most obviously, the statement to the fellow prisoner was not testimonial.]

Perez v. U.S., __ A.2d __, 2009 WL 774847 (D.C. Mar 26, 2009) – "The Sixth Amendment did not bar the government's use of the unredacted transcript of the tape [of a testimonial statement] to cross-examine Bonilla, because the government used it only after Bonilla had taken the stand and he was available for cross-examination by the defendants."

U.S. v. Matthies, 2009 WL 631353 (9th Cir. Mar 12, 2009) (unpub) – "The Matthies next challenge the admission of a transcript from Mr. Matthies' previous trial for failure to pay taxes. Because the transcript was offered to show that the Matthies were on notice of their duty to pay income taxes and to impeach Mr. Matthies, rather than for the truth of the substance of the tax laws, the evidence was not hearsay."

Jordan v. Warden, Lebanon Correctional Inst., 2008 WL 5688394 (S.D. Ohio Sep 29, 2008) (unpub) (habeas) – "Where a prior statement is admitted solely for the non-hearsay purpose of impeachment, it raised no Confrontation Clause problem. *Crawford*..."

People v. Pettiford, 2009 WL 529211 (Mich. App. Mar 03, 2009) (unpub) – "the Confrontation Clause does not apply here because the trial court permitted the prosecutor to inquire about Green's letter solely for the purpose of impeaching Crenshaw's alibi testimony, not for the truth of any matters contained in Green's letter."

State v. Stokes, 673 S.E.2d 434 (S.C. Feb 17, 2009) – "Appellant argues his right to confrontation was violated when the trial court admitted Brown's written statement pursuant to Rule 613, SCRE. We disagree. ... Because Brown denied the written statement while on the stand, appellant maintains he was denied effective cross-examination of Brown, and therefore, the admission of the written statement violated his right to confrontation. ... In our opinion, *Crawford* clearly establishes there is no Confrontation Clause violation in the instant case because Brown was available at trial and subject to cross-examination. The trial court even offered to allow Brown to be recalled to the stand in light of its decision to admit the statement under Rule 613(b), SCRE. ... It is undisputed Brown appeared at trial, was available for cross-examination, and could have been recalled after the statement was admitted. [FN12] [¶] Instead, appellant's trial counsel chose not to cross-examine on this subject. Although trial counsel apparently decided that such cross-examination would be to appellant's detriment, this does not amount to a violation of appellant's right to confrontation."

Ross v. State, 993 So.2d 1026 (Fla. App. 2 Dist. Jan 23, 2008) – "The trial court properly ruled that the taped statements were prior consistent statements offered to rebut the defense's implication, in cross-examining Lakeisha and Corbie Jones, that they were motivated by plea bargains to fabricate their trial testimony. Thus the statements were not hearsay, and the confrontation clause did not bar their admission at trial."

Del Carmen Hernandez v. State, 273 S.W.3d 685 (Tex. Crim. App. Oct 15, 2008), rehearing denied (Dec 17, 2008) – testimonial statement may be used to impeach as a prior inconsistent statement – "'The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements.'" [FN22] – [NOTE: Westlaw gives this case name both as "Del Carmen Hernandez" and "Hernandez."]

U.S. v. Mayberry, 540 F.3d 506 (6th Cir. Aug 21, 2008) – "It is well established that a witness' 'limited and vague recall of events, equivocation, and claims of memory loss' can constitute prior inconsistent statements under Fed.R.Evid. 801(d)(1), and thus such statements allow the witness' prior inconsistent grand jury testimony to be admitted as substantive evidence." – because witness testified, defendant's "claim that the Confrontation Clause prevents admission of Bowman's prior statements is without merit."

People v. Brownell, 2008 WL 2514186 (Mich. App. Jun 24, 2008) (unpub) – "we find no merit to defendant's argument that admission of the prior [inconsistent] statements violated his constitutional right of Confrontation under the Sixth Amendment and *Crawford*... the declarants, defendant's stepsister and stepmother, were available for cross-examination. Therefore, defendant was not denied his right of confrontation."

Commonwealth v. Figueroa, 451 Mass. 566, 887 N.E.2d 1040 (Mass. Jun 05, 2008) – "The judge found, inter alia, that Laboy's lack of memory was a recent fabrication. When Laboy testified at trial and claimed a lack of memory about the defendant's statements the evening of the murder, the pages of Laboy's grand jury testimony concerning the defendant's statements that he shot someone and wanted Laboy to take him out of town were read to the jury as a prior

inconsistent statement." – not a *Crawford* problem because the witness was available for cross-examination

Vaughn v. Runnels, 2008 WL 1734741 (N.D. Cal. Apr 11, 2008) (unpub) (habeas) – no sixth amendment problem because "forgetful" witnesses were on the stand

Ross v. State, __ So.2d __, 2008 WL 183701 (Fla. App. 2 Dist. Jan 23, 2008) – "The trial court properly ruled that the taped statements were prior consistent statements offered to rebut the defense's implication, in cross-examining Lakeisha and Corbie Jones, that they were motivated by plea bargains to fabricate their trial testimony. Thus the statements were not hearsay, and the confrontation clause did not bar their admission at trial."

State v. Kraus, 2007 WL 3348426, 2007-Ohio-6027 (Ohio App. 12 Dist. Nov 13, 2007) (unpub) – [DV case; victim testified that she had threatened the defendant with a knife. She was impeached by her grand jury testimony, which didn't mention a knife.] "¶ 27} In this case, K.F. was the 'declarant' who gave the grand jury testimony that appellee used to impeach K.F. at trial. Because K.F. appeared for cross-examination at trial, the Confrontation Clause placed no constraint at all on the use of K.F.'s prior testimonial statements, i.e., her grand jury testimony."

Boyt v. State, 286 Ga.App. 460, 649 S.E.2d 589, 7 FCDR 2424 (Ga. App. 2007) – seeming to hold that use of witness's prior statement raises no confrontation clause concern because the witness is available for cross-examination – but a bit vague

United States v. Beatty, 189 Fed.Appx. 531, 2006 U.S. App. LEXIS 18093 (7th Cir. 2006) – Impeaching a testifying witness with their prior grand jury testimony does not violate *Crawford*.

Del Carmen Hernandez v. State, 219 S.W.3d 6 (Tex.App.-San Antonio Nov 01, 2006), aff'd, 273 S.W.3d 685 (Tex. Crim. App. Oct 15, 2008), rehearing denied (Dec 17, 2008)

State v. Wilder, 2006 Iowa App. LEXIS 715 (Iowa Ct. App. 2006) – A robbery victim identified his assailants through a 911 call (immediately following the robbery), as well as statements made at the scene and later at the police station. At trial, the victim recanted his identification, but his prior statements were admitted. This did not violate *Crawford* since the testimonial statements to the police officer were subject to cross-examination when the victim testified at trial.

U.S. v. Melendez, 2006 U.S. Dist. LEXIS 30670 (S.D. N.Y. 2006) – A witness was properly impeached with her prior grand jury testimony and this did not violate *Crawford*.

Terrell v. Walsh, 2005 U.S. Dist. LEXIS 33538 (S.D.N.Y. 2005) – Introduction of a witness's prior consistent statement did not violate *Crawford* since the witness was present for cross-examination.

Yancy v. State, 2005 Ark. App. LEXIS 421 (Ark. Ct. App. 2005) – The victim testified at trial, recanted her statement to police which was given under oath, and was impeached with the prior statement given. This did not violate *Crawford* because the victim was present and subject to cross examination at trial. *Crawford* does not apply to prior statements so long as the witness testifies and is subject to cross examination.

Use of Testimonial Statements in Rebuttal

(category added July 2009)

State v. Martinez, 2009 WL 817088 (Minn. App. Mar 31, 2009) (unpub) – "As Martinez acknowledges, prosecutors may introduce non-testifying codefendants' statements for rebuttal purposes. *Tennessee v. Street*, 471 U.S. 409, 417, 105 S.Ct. 2078, 2083 (1985). ... Testimonial statements of unavailable witnesses as to whom there has been no opportunity of cross-examination do not violate *Crawford* if they are used only for impeachment."

Statement / Admission by Party Opponent

United States v. Johnson, 2006 U.S. App. LEXIS 20766 (11th Cir. Fla. 2006) – Jailhouse confessions of a defendant to another inmate are non-testimonial.

United States v. Tolliver, 454 F.3d 660 (7th Cir. Ill. 2006) – Audio tapes that recorded the defendant's sale of cocaine to an informant were non-testimonial party-opponent admissions.

United States v. Pike, 2006 U.S. Dist. LEXIS 12830 (W.D.N.Y. 2006) – In a trial of co-defendants, one defendant's admission of guilt in the murder made to another co-defendant while in jail was held to be non-testimonial because "The confession at issue in this case was not made to law enforcement authorities or to an informant acting under instructions from the government. Because the confession to Darling was not testimonial in nature, it falls outside the scope of *Crawford* and *Bruton*."

United States v. Moffie, 2005 U.S. Dist. LEXIS 9462 (ND Ohio 2005) – Defendants were indicted for bank fraud in 2004; however, in a prior recovery asset civil suit, one defendant testified at a deposition in 1999 concerning facts that are relevant to the indictment and was represented by counsel at that deposition. The prosecutor wanted to admit the civil suit deposition during the criminal trial, pursuant to 801(d)(2)(A), admission by a party-opponent. The court found significant precedent throughout the Circuits that prior civil deposition testimony is admissible as a party-admission in a subsequent criminal case. Thus, no *Crawford* issue to admit the deposition against that defendant; however, redactions would have to be made as to other defendants referenced in the deposition because that would violate *Crawford* and *Bruton* unless the defendant took the witness stand.

United States v. Gibson, 2005 FED App. 0230P (6th Cir. KY 2005) – Admissions by party opponents are non-testimonial and do not implicate *Crawford*.

State v. Robinson, 33 Kan. App. 2d 773; 109 P.3d 185 (Kan Ct App 2005) – The Confrontation Clause does not apply when addressing admitting a defendant's confession at trial. A Defendant does not have a constitutional right to confront himself.

People v. Thoma, 125 Cal. App. 4th 1471 (Cal Ap 2d 2005) – "The admission of appellant's adoptive admission did not violate his confrontation rights under *Crawford*. "[B]y reason of the adoptive admissions rule, once the defendant has expressly or impliedly adopted the statements

of another, the statements become *his own admissions*, and are admissible on that basis as a well-recognized exception to the hearsay rule. Being deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant. Accordingly, no confrontation right is impinged when those statements are admitted as adoptive admissions without providing for cross-examination of the declarant."''

State v. Rivera, 268 Conn. 351, 844 A.2d 191 (2004) – Defendant confessing a murder to a family member prior to arrest is non-testimonial and *Crawford* analysis does not apply. Reliability test from *Ohio v Roberts* applies in this situation.

United States v. Morgan, 385 F.3d 196 (2d Cir NY 2004) – Handwritten letter by a defendant to her boyfriend was not testimonial as she likely did not expect it to be found by the police or used against her at trial. The letter was not testimonial.

People v. Cervantes, 118 Cal. App. 4th 162; 12 Ca. Prtr. 3d 774 (Cal. App. 2d Dist. 2004) – The Defendant's confession was made to a witness to explain injuries he received during the murder and to receive medical help, and with reasonable expectation it would not be repeated due to the fact that witness was afraid of Defendant and his gang. This statement was non-testimonial and no *Crawford* analysis was required.

Globe v. State, 29 Fla. L. Weekly S 119, 29 Fla. L. Weekly S 345 (2004)– Co-defendant admissions by acquiescence or silence do not implicate the Confrontation Clause or *Crawford*.

In re J. K.W., 2004 Minn. App. LEXIS 783 (Minn. Ct. of Ap. 2004) – Police asked a co-defendant to call the defendant and see if defendant would admit to being involved in phoning in a bomb threat. The Court of Appeals ruled that since co-defendant didn't testify, the transcript of the phone call could not come in to evidence since the Co-defendant was not subject to cross examination. {NOTE: This Court did not state how the initial transcript was permitted into court, but it appears that this is a statement by party opponent hearsay exception.}

People v. Hayes, 2004 Mich. App. LEXIS 2500 (Mich Ct App 2004) – Statements made by a defendant in jail to another inmate are not testimonial so long as the inmate is not acting as a governmental agent.

People v. Cervantes, 118 Cal. App. 4th 162, 12 Cal. Rptr. 3d 774 (Cal. App. 2d Dist. 2004) – Three Defendants killed one victim and paralyzed another victim. One Defendant confessed the crime to a witness from whom he sought medical aid from for injuries he suffered during the murder. The witness went to police. The 3 Defendants were in a gang and the witness afraid to testify regarding the statement. The witness did testify regarding the one Defendant's confession in a trial involving the other two Defendants. The Court held that the witness could testify to the statement because the state of the confessing Defendant was a statement against penal interest (FRE 801(d)(2)(a)) and there was no Confrontation clause violation against the two non-confessing Defendants because the statement to the witness was not testimonial. The confession was made to the witness to explain his injuries and to receive medical help, and with reasonable expectation it would not be repeated due to the fact that witness was afraid of Defendant and his gang. Therefore, no *Crawford* analysis was required.

Co-Conspirator Statements In Furtherance of Conspiracy (list)
(see following sub-category)
(see also pt. 2, Statements that Predate the Crime)

Admitting statements and tape recordings of co-conspirators made in the furtherance of the conspiracy is not hearsay and does not violate *Crawford*. *Crawford* itself says such statements are non-testimonial "by their nature." 541 U.S. at 56. Obviously the conspirators did not intend their statements to be used prosecutorially, and except when a CI or undercover agent is involved, the statements could not have been made in response to official questioning.

A few courts aren't so sure. Their decisions are collected in the following sub-category.

In May, 2009, Georgia became the first state to say that co-conspirator statements are inadmissible absent an opportunity to cross-examine. **Soto v. State, 285 Ga. 367, 677 S.E.2d 95 (Ga. 2009)**

State Cases (arranged alphabetically by state)

State v. Tucker, 290 P.3d 1248, 1267 (Ariz. Ct. App. 2012)

State v. Windhorst, 2008 WL 2941388 (Ariz. App. Div. 2 Jul 31, 2008) (unpub) – drug ledger

People v. Marquez, 2008 WL 5076458 (Cal. App. 2 Dist. Dec 02, 2008) (unpub) –

People v. King, 2008 WL 2109231 (Cal. App. 1 Dist. May 20, 2008) (unpub)

People v. Villano, 181 P.3d 1225 (Colo. App. Mar 06, 2008)

State v. Garlington, 122 Conn. App. 345, 359-368, 998 A.2d 1197 (Conn. App. Ct. 2010)

State v. Camacho, 282 Conn. 328, 924 A.2d 99 (Conn. 2007)

Favors v. State, 296 Ga. 842, 770 S.E.2d 855 (Ga. 2015)

Rainey v. State, 319 Ga. App. 858, 864, 738 S.E.2d 685 (Ga. Ct. App. 2013)

Brinson v. State, 288 Ga. 435, 704 S.E.2d 756, 2011 Fulton County D. Rep. 60 (Ga. 2011)

Allen v. State, 288 Ga. 263, 702 S.E.2d 869, 2010 Fulton County D. Rep. 3824 (Ga. 2010)

Toney v. State, 695 S.E.2d 355, 2010 Fulton County D. Rep. 1685 (Ga. Ct. App. 2010)

Soto v. State, 285 Ga. 367, 677 S.E.2d 95, 2009 FCDR 1580 (Ga. 2009) – "the statement was inadmissible as the statement of a co-conspirator because, even if it can be said that the conspiracy was ongoing when the statement was made, defendant did not have an opportunity to cross-examine the declarant." – [NOTE: Wrong.]

Brooks v. State, 2006 Fulton County D. Rep. 3026 (Ga. 2006)

Bowden v. State, 279 Ga. App. 173 (Ga. Ct. App. 2006)

Hightower v. State, 866 N.E.2d 356 (Ind. App. 2007)

Jones v. State, 834 N.E.2d 167 (Ind. Ct. App. 2005)

State v. Betancourt, 301 Kan. 282, 342 P.3d 916, 929 (2015)

State v. Sharp, 289 Kan. 72, 210 P.3d 590 (Kan. Jun 19, 2009)

State v. Lang, 128 So. 3d 330 (La. App. 5th Cir. 2013), writ denied, 2013-2614 La. 5/2/14
State v. Tsolainos, 997 So.2d 46,, 2007-2443 (La. App. 1 Cir. Oct 10, 2008)
State v. Freeman, 2008 WL 2068072, 2007-0363 (La.App. 1 Cir. 5/2/08) (unpub)

Commonwealth v. Carriere, 470 Mass. 1, 18 N.E.3d 326 (Mass. 2014)

People v. Bell, 2008 WL 4604071 (Mich. App. Oct 16, 2008) (unpub) –
People v. Watson, 2008 WL 2436313 (Mich. App. Jun 17, 2008) (unpub) –

State v. Brist, 812 N.W.2d 51 (Minn. 2012) ("*Bourjaily* is on point and remains good law")
State v. Brist, 799 N.W.2d 238, 239-242 (Minn. Ct. App. 2011), *aff'd*, 812 N.W.2d 51 (Minn. 2012)
State v. Larson, 788 N.W.2d 25, 37 (Minn. 2010)

Bush v. State, 895 So.2d 836 (Miss. 2005)

State v. Hoover, 220 S.W.3d 395 (Mo. App. 2007) – but does not include statements made when co-conspirator is cooperating with police

Holmes v. State, 306 P.3d 415, 422 (Nev. 2013)

N.J. – see following sub-category

N.M. – see following sub-category

People v Robles, 72 A.D.3d 1520, 899 N.Y.S.2d 780, 2010 NY Slip Op 3553 (N.Y. App. Div. 4th Dep't 2010)
People v. Basagoitia, 865 N.Y.S.2d 313, 315, 2008 N.Y. Slip Op. 07674 (N.Y. A.D. 2 Dept. Oct 07, 2008)

State v. Ha, 2009 WL 649818, 2009-Ohio-1134 (Ohio App. 9 Dist. Mar 16, 2009) (unpub)
State v. Hand, 107 Ohio St. 3d 378 (2006)

State v. Saechao, 195 Ore. App. 581, 98 P.3d 1144 (Or Ct App 2004)

Commonwealth v. Holton, 2006 PA Super 234 (Pa. Super. Ct. 2006)

State v. Tiegen, 744 N.W.2d 578, 2008 SD 6 (S.D. Jan 16, 2008)

State v. Breeden, 2005 Tenn. Crim. App. LEXIS 1257 (Tenn. Crim. App. 2005)

Fuelberg v. State, __ S.W.3d __, 2014 WL 3558761 (Tex. App.--Austin 2014)
Miles v. State, 259 S.W.3d 240 (Tex. App.-Texarkana Jun 03, 2008) –
Fritz v. State, 2008 WL 2229533 (Tex. App.-Amarillo May 30, 2008) (unpub)
Arroyo v. State, 239 S.W.3d 282 (Tex. App.-Tyler Jun 29, 2007)
Wiggins v. State, 152 S.W.3d 656 (Tex. App.-Texarkana 2004)

Ensley v. Commonwealth, 2008 WL 926138 (Va. App. Apr 08, 2008) (unpub)

**State v. Flores, 164 Wash.2d 1, 186 P.3d 1038 (Wash. Jun 26, 2008) –
State v. Whitaker, 133 Wash. App. 199, 135 P.3d 923 (Wash. Ct. App. 2006)**

Federal Cases (arranged by circuit)

**United States v. Appolon, 715 F.3d 362, 375 (1st Cir. Mass. 2013)
United States v. Ciresi, 697 F.3d 19, 22-32 (1st Cir. R.I. 2012)
United States v. Rivera-Donate, 682 F.3d 120, 132 (1st Cir. P.R. 2012)
United States v. De La Paz-Rentas, 613 F.3d 18, 28 (1st Cir. P.R. 2010)
Estevez v. U.S., 2009 WL 514227 (D. Mass. Feb 26, 2009) (unpub) (§ 2255)
U.S. v. Newell, 2008 WL 4402177 (D. Me. Sep 29, 2008) (unpub) (pretrial order)
United States v. Hansen, 434 F.3d 92 (1st Cir. Mass. 2006)
United States v. Brooks, 173 Fed. Appx. 848 (1st Cir. Me. 2006)
United States v. Sanchez-Berrios, 424 F.3d 65 (1st Cir. P.R. 2005)**

**U.S. v. Hamilton, 597 F.Supp.2d 407, 411 (S.D. N.Y. Feb 11, 2009) (pretrial ruling)
McBean v. Warden, 2008 WL 5169549 (N.D. N.Y. Dec 09, 2008) (unpub) (habeas)
Khan v. Fischer, 583 F.Supp.2d 390 (E.D. N.Y. Oct 24, 2008) (habeas)
U.S. v. Wexler, 522 F.3d 194 (2nd Cir. Apr 03, 2008)
U.S. v. Myton, 2007 WL 1492470 (2nd Cir. May 22, 2007) (unpub) –
United States v. Steele, 2007 U.S. Dist. LEXIS 7637 (S.D. N.Y. 2007)
United States v. Thomas, 2006 U.S. Dist. LEXIS 76389 (N.D. N.Y. 2006)
United States v. Columbo, 2006 U.S. Dist. LEXIS 49255 (S.D. N.Y. 2006) (wiretap)
United States v. Amato, 2006 U.S. Dist. LEXIS 38176 (E.D. N.Y. 2006)
Llaca v Duncan, 2004 U.S. Dist. LEXIS 7916 (S.D. N.Y. 2004)**

**United States v. Reynolds, 171 Fed. Appx. 961 (3rd Cir. Pa. 2006)
United States v. Peak, 2006 U.S. Dist. LEXIS 21379 (E.D. Pa. 2006)
Harris v. Moore, 2005 U.S. Dist. LEXIS 29265 (D. N.J. 2005) (tape recorded phone conversation)
United States v. Hoffman, 2005 U.S. Dist. LEXIS 5572 (ED Pa 2005)
United States v. Hendricks, 395 F.3d 173 (3rd Cir. VI 2005)**

U.S. v. Davis, 278 Fed.Appx. 263 (4th Cir. Mar 17, 2008) ("Prior to his cooperation with authorities, Corey Williams was a coconspirator to Appellants. Any statements captured by the wiretap, therefore, are non-testimonial and their admission does not violate the Confrontation Clause.")

**U.S. v. Newbold, 2007 WL 301145, *8 (4th Cir. 2007) (unpub)
United States v. Ayala, 469 F.Supp.2d 357, 72 Fed. R. Evid. Serv. 173 (W.D. Va. 2007)
United States v. Sullivan, 2006 U.S. App. LEXIS 17303 (4th Cir. S.C. 2006)**

**U.S. v. Alaniz, 726 F.3d 586 (5th Cir. 2013)
United States v. Olguin, 643 F.3d 384, 392 (5th Cir. Tex. 2011)
U.S. v. King, 541 F.3d 1143 (5th Cir. Aug 26, 2008) – " FN3. We decline King's invitation to hold that these statements are testimonial because they were 'presented by the government for**

their testimonial value.' *Crawford's* emphasis clearly is on whether the statement was 'testimonial' at the time it was made."

U.S. v. Galindo, 2007 WL 4015308 (5th Cir. Nov 16, 2007) (unpub)

United States v. Crespo-Hernandez, 2006 U.S. App. LEXIS 11576 (5th Cir. Tex. 2006)

United States v. Delgado, 401 F.3d 290 (5th Cir TX 2005)

United States v. Holmes, 406 F.3d 337, 347-349 and n.11, 66 Fed. R. Evid. Serv. 1139 (5th Cir. 2005) – raising but not resolving question whether civil deposition testimony given *in furtherance of* a fraud conspiracy is testimonial

United States v. Robinson, 367 F.3d 278 (5th Cir Tex. 2004)

U.S. v. Tragas, 727 F.3d 610, 615 (6th Cir. 2013)

United States v. Damra, 621 F.3d 474 (6th Cir. Ohio 2010), cert. denied 131 S. Ct. 2930, 180 L. Ed. 2d 224 (2011)

U.S. v. Culberson, 2009 WL 776106 (6th Cir. Mar 24, 2009) (unpub)

U.S. v. Shrout, 298 Fed.Appx. 479, 77 Fed. R. Evid. Serv. 1282 (6th Cir. Oct 22, 2008)

U.S. v. Cornell, 2008 WL 2944938 (N.D. Ohio Jul 25, 2008) (unpub) (post-trial motion)

Graves v. Romanowski, 2008 WL 362990, *5+ (E.D.Mich. Feb 11, 2008) (unpub) (habeas)

U.S. v. Mooneyham, 473 F.3d 280, 285-287 (6th Cir. 2007) – statements by co-conspirator made to undercover agent are non-testimonial

United States v. Lopez-Medina, 2006 FED App. 0321P (6th Cir. Tenn. 2006))

U.S. v. Jones, 2009 WL 706454 (7th Cir. Mar 19, 2009) (unpub) –

U.S. v. Jackson, 540 F.3d 578 (7th Cir. Aug 29, 2008)

U.S. v. Hargrove, 508 F.3d 445 (7th Cir. Nov 27, 2007) –

U.S. v. Xiong, 2007 WL 2703859 (E.D. Wis. Sep 14, 2007) (unpub)

U.S. v. Jones, 2007 WL 1046515, *2 (7th Cir. 2007) (unpub)

United States v. Jenkins, 2005 U.S. App. LEXIS 17226 (7th Cir. Ill. 2005)

United States v. Cozzo, 2004 U.S. Dist. LEXIS 7391 (N.D. Ill 2004)

United States v. Dinwiddie, 618 F.3d 821 (8th Cir. Mo. 2010)

U.S. v. Yielding, 2009 WL 1110817 (E.D. Ark. Apr 24, 2009) (unpub) (pretrial order)

U.S. v. Siepker, 2008 WL 5273088 (N.D. Iowa Dec 18, 2008) (unpub) (§ 2255)

U.S. v. Sturdivant, 513 F.3d 795 (8th Cir. Jan. 17, 2008) –

U.S. v. Singh, 494 F.3d 653, 73 Fed. R. Evid. Serv. 1203 (8th Cir. Jul 13, 2007)

United States v. Reyes, 362 F.3d 536 (8th Cir 2004)

United States v. Fries, 781 F.3d 1137 (9th Cir. 2015)

U.S. v. Grasso, 724 F.3d 1077, 1085 n.9 (9th Cir. 2013), cert. denied, 134 S.Ct. 484 (2013)

Kim v. Hense, 2009 WL 1346155 (C.D. Cal. May 12, 2009) (unpub) (habeas)

U.S. v. Nicholas, 2008 WL 5546721 (C.D. Cal. Dec 29, 2008) (unpub) (pretrial order)

U.S. v. Milburn, 2008 WL 2557973 (N.D. Cal. Jun 24, 2008) (unpub) (pretrial ruling)

U.S. v. Crozier, 2008 WL 565368 (9th Cir. March 3, 2008)

U.S. v. Hunter, 2008 WL 399150 (9th Cir. Feb 12, 2008) (unpub) – text messages

McCulloch v. Horel, 2008 WL 755919 (C.D.Cal. Jan 31, 2008) (unpub) (habeas)

U.S. v. Nguyen, 2008 WL 467804 (9th Cir. February 22, 2008) (unpub)

U.S. v. Stalcup, 2007 WL 4224237 (9th Cir. Nov 30, 2007) (unpub)

Howard v. Kernan, 2007 WL 779759, *4 (E.D. Cal. 2007) (unpub)

United States v. Larson, 2006 U.S. App. LEXIS 21936 (9th Cir. Mont. 2006)

United States v. Bridgeforth, 441 F.3d 864 (9th Cir. Cal. 2006)
United States v. Allen, 425 F.3d 1231 (9th Cir. Cal. 2005)
United States v. Wilson, 2005 U.S. App. LEXIS 18941 (9th Cir. Mont. 2005)
People v. Wahlert, 2005 Cal. App. LEXIS 1108 (Cal. App. 4th Dist. 2005)

U.S. v. Garcia-Escalera, __ F.Supp.2d __, 2014 WL 470763 (N.D. Okla. 2014)
United States v. Clark, 717 F.3d 790, 795-798 (10th Cir. Okla. 2013) –
United States v. Patterson, 713 F.3d 1237, 1246-1247 (10th Cir. Kan. 2013)
U.S. v. Mitchell, 2008 WL 2048386 (D. Utah May 12, 2008) (pretrial order) – rejecting argument that foreseeable use of statement in future prosecution renders it testimonial – "That a piece of evidence may become 'relevant to later criminal prosecution' does not automatically place it within the ambit of 'testimonial.'" (quoting *U.S. v. Mendez*, 514 F.3d 1035, 1046 (10th Cir.2008))
U.S. v. Ramirez, 479 F.3d 1229 (10th Cir. 2007) – "Because *Crawford* did not overturn *Bourjaily*, the latter continues to control our application of the Confrontation Clause to Rule 801 co-conspirator statements."
U.S. v. Townley, 472 F.3d 1267, 1274 -1275 (10th Cir. 2007)
U.S. v. Cortez, 2007 WL 3225373 (10th Cir. Oct 26, 2007) (unpub) – even though person to whom statement was made was cooperating with authorities

U.S. v. Puckett, 2008 WL 2277532 (N.D. Fla. May 30, 2008) (unpub) (§ 2255)
United States v. Abram, 171 Fed. Appx. 304 (11th Cir. Fla. 2006)
United States v. Underwood, 446 F.3d 1340 (11th Cir. Fla. 2006)

United States v. Sitzmann, __ F.Supp.3d __, 2014 WL 6461834 (D. D.C. Nov. 18, 2014)
U.S. v. Miller, 738 F.3d 361, 379 (D.C. Cir. 2013)

Military Cases

U.S. v. Diamond, 65 M.J. 876 (Army Ct. Crim. App. Dec 21, 2007)

➤ Sub-category: Courts Prepared to Say a Co-Conspirator Statement May Be Testimonial (category added Oct. 2008)

NOTE: If statements were genuinely made in course of and in furtherance of a conspiracy, then *obviously* they weren't made to supply proof in a subsequent prosecution, and *obviously* the declarant wasn't doing "precisely *what a witness does* on direct examination," unless perhaps there was a separate conspiracy to get convicted. That's why *Crawford* said such statements were, "by their nature," non-testimonial. The obviousness of the point doesn't guarantee that judges will perceive it, however.

Giles's footnote 6 says:

Bourjaily v. United States, 483 U.S. 171 (1987), held that admission of the evidence did not violate the Confrontation Clause because it 'falls within a firmly rooted hearsay exception'—the test under *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), the case that *Crawford* overruled. In fact it did not violate the Confrontation Clause for the quite different reason that it was not (as an incriminating statement in furtherance of the

conspiracy *would probably never be*) testimonial. The co-conspirator hearsay rule does not pertain to a constitutional right and is in fact quite unusual."

(Emphasis added) "Probably never be" is pretty strong stuff, coming from the Supreme Court, but some judges are reluctant to take the Court at its word.

Soto v. State, 285 Ga. 367, 677 S.E.2d 95, 2009 FCDR 1580 (Ga. May 04, 2009) – "the statement was inadmissible as the statement of a co-conspirator because, even if it can be said that the conspiracy was ongoing when the statement was made, defendant did not have an opportunity to cross-examine the declarant."

U.S. v. Sutherland, 2008 WL 4858322 (D. S.D. Nov 10, 2008) (pretrial order) – after finding statements to officers not made in furtherance of conspiracy, adding dicta – "Even if this Court were to find that Henley's statements made to law enforcement fall within the limits of Rule 801(d)(2)(E), the Court still would find them to be inadmissible under *Crawford v. Washington*, since such statements are testimonial..."

U.S. v. Miller, 250 F.R.D. 588, 76 Fed. R. Evid. Serv. 1176 (D. Kan. Jul 03, 2008) (pretrial order) – in dicta, stating: "Where, however, the statements qualify as both non-hearsay under Rule 801(d)(2)(E) and are testimonial, an analysis under *Crawford* and its progeny is required. Defendant Earnshaw does not point the Court to any statements fitting this bill and accordingly, his motion is denied."

State v. Gonzales, 2008 WL 680750 (Iowa App. Mar 14, 2008) – "Therefore, even if some of J.M.'s statements were properly admitted as coconspirator statements, these statements might nonetheless be excluded from evidence to protect the defendant's constitutional right to confront and cross-examine witnesses against her. The Confrontation Clause analysis focuses on whether the statements are testimonial or nontestimonial in nature."

State v. Hill, 2008 WL 656678 (N.J. Super. A.D. March 13, 2008) (unpub) – statements at issue weren't co-conspirator statements, but in long dictum the court adds: "While the Court's dicta may apply to typical co-conspirator statements as being nontestimonial in nature, we do not read the language as establishing a per se exception for all co-conspirator statements. Each such statement must be evaluated on its particular facts." [NOTE: *cf. U.S. v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007): "we are 'bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements.'"]

U.S. v. Stein, 2007 WL 3009650 (S.D. N.Y. Oct. 15, 2007) (pretrial ruling) – stating in dicta: "A testimonial statement made in furtherance of a conspiracy triggers the Sixth Amendment right of confrontation, but may be admissible over Confrontation Clause objection, depending upon the objects of the conspiracy."

U.S. v. Baines 486 F.Supp.2d 1288, 1300 (D. N.M. 2007) (pretrial ruling) – statement in furtherance of conspiracy made to border patrol agent – "[W]hile the majority of co-conspirator statements are not testimonial in nature, when such a statement is testimonial it is subject to the requirements of the Confrontation Clause. ... To the extent that the *Crawford* decision may conflict with *Bourjaily*, this court is obligated to follow the Supreme Court's more recent decision in *Crawford*." – [NOTE: *Crawford* specifically cites *Bourjaily* as a correct statement of

the law. *Baines* appears to be the only case reaching this conclusion in non-dicta, with the exception of the overruled decision in *Walters*, below, curiously enough also from New Mexico.]

State v. Walters, 2006-NMCA-071, ¶ 31, 139 N.M. 705, 137 P.3d 645, rev'd on harmless error grounds, State v. Lopez, 142 N.M. 138, 164 P.3d 19, 2007-NMSC-037(June 21, 2007), State v. Lopez, 142 N.M. 613, 168 P.3d 743, 2007-NMCA-049 (Aug. 29, 2007), State v. Walters, 142 N.M. 644, 168 P.3d 1068, 2007-NMSC-050 (Aug. 28, 2007) – "the admission of statements made by a co-conspirator during the course and in furtherance of a conspiracy are governed by Rule 11-801(D)(2)(e) NMRA *unless* the statements are 'testimonial.'" (italics in original) – no authority cited for this proposition, which seems plainly wrong and has not been accepted as authority by any subsequent case

U.S. v. Logan, 419 F.3d 172, 178 (2nd Cir. 2005) – in weird self-contradiction, this case first holds that non-hearsay statements (false alibi statements offered for their falsity) do not implicate the confrontation clause, then goes on to add in dicta that the non-hearsay is nonetheless testimonial hearsay

Co-Conspirator Statements In Furtherance of Cover-Up

Grimes v. State, 296 Ga. 337, 766 S.E.2d 72, 75-76 (2014) – Slaton was first of conspirators to be arrested – "Reed contends that Slaton's statements [to cellmate] were not made during the concealment phase of the conspiracy. This argument is without merit. The concealment phase was ongoing because the statements in question were not made to police, the investigation was ongoing, and the other conspirators, including Grimes who was not mentioned to police by Johnson, were still at-large."

Hassel v. State, 294 Ga. 834, 755 S.E.2d 134 (Ga. 2014) – "The statements of Shepard, a co-conspirator, were made to Hankton after the shooting and while the identity of those complicit therein were still being concealed. ... Shepard's statements to his friend Hankton were not testimonial in nature so as to implicate Hassel's *840 right of confrontation under *Crawford*..."

Young v. State, 291 Ga. 627, 732 S.E.2d 269, 2012 Fulton County D. Rep. 2916 (Ga. 2012) – "A neighbor of the victim testified that Satterfield told him the day after [*629] the shooting that appellant had shot the victim after Satterfield and appellant had entered the victim's home through a window. ... Co-defendant Satterfield did not testify at his and appellant's joint trial. ... The co-defendant's statement to the victim's neighbor was made during the concealment phase of the conspiracy and was admissible against appellant under the co-conspirator exception to the hearsay rule. [cite] The admission of the co-defendant's statement to the neighbor did not violate the Confrontation Clause..." [NOTE: It seems a wee bit of a stretch to say a statement identifying the shooter was an act of concealment.]

People v. Donegan, 974 N.E.2d 352, 371-373 (Ill. App. Ct. 1st Dist. 2012) – "Statements that are made after the crime, in an effort to conceal the conspiracy may also fall under the exception. [¶ 67] In this case, the statements Pike made to Coleman after the Moseley murder should not have been admitted under the coconspirator's exception to the hearsay rule because they were made after the crime occurred and therefore were not in furtherance of a conspiracy and were not made in an effort to conceal the crime since they were, in fact, a recitation of the crime."

State v. Williams, 2012 ME 63, 52 A.3d 911 (Me. 2012) – "[¶ 32] The trial court's determination, by a preponderance of the evidence, that George's statements to the officers hours after the murder were made during the course and in furtherance of the conspiracy is supported by the record. The evidence indicates that George called 911, as planned, on the morning of June 20, 2008, alerting law enforcement that there had been a robbery. As would be anticipated, George was later interviewed by the officers and related the details of the home invasion, including misleading descriptions [**17] of the assailants. George's affirmative act of concealing the identities of the assailants from the officers, a few hours after the target objective was complete, was executed in furtherance of the conspiracy."

People v. Gann, 193 Cal. App. 4th 994, 123 Cal. Rptr. 3d 208 (Cal. App. 4th Dist. 2011) – "Gann and Hansen's plan to make it appear that MacNeil was murdered by a masked intruder during a home invasion robbery was, in essence, a plan to obstruct justice, and all of Hansen's prearrest statements to Detective Rivera—both truthful and untruthful—were made in furtherance of the conspiracy."

Orona v. State, 341 S.W.3d 452, 463-464 (Tex. App. Fort Worth 2011) – "In this case, all of the complained-of testimony was nontestimonial in nature. Munn was a co-conspirator, and the statements he made to Johns after the murder—about talking to the police and knowing where to find Johns—were made in furtherance of the conspiracy in order to conceal Sartain's murder."

Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, 2010 Fulton County D. Rep. 551 (Ga. 2010) – "38. Stinski argues that the trial court erred by denying his motion to exclude [*868] testimony recounting the out-of-court statements of his co-defendant, O'Kelley. O'Kelley's statements were made to friends during the concealment phase of the conspiracy between O'Kelley and Stinski. ... The statements were not testimonial in nature; therefore, they were not inadmissible simply because they were not subjected to cross-examination."

State v. Sharp, 289 Kan. 72; 210 P.3d 590, 611 (Kan. Jun 19, 2009) – "'a conspiracy is not terminated when an attempt to conceal the offense is made'"

U.S. v. Brown, 560 F.3d 754 (8th Cir. Mar 20, 2009), cert. denied, 130 S. Ct. 1135, 175 L. Ed. 2d 976 (2010) – "One of these statements was a remark made by Giles after Richard McGinnis asked him on the phone whether he had anything to do with the May 3 murders. McGinnis heard Giles ask someone at his end: "Do you believe what this man's asking me?" Brown argues that Giles's remark was not admissible under the coconspirator exception because it was a question rather than an affirmative statement and was not made in furtherance of the conspiracy. If Giles's remark was intended to conceal their involvement with the murders related to their marijuana trafficking activities, however, it was in furtherance of the conspiracy."

Guevara v. State, 297 S.W.3d 350, 363-64 (Tex. App.-San Antonio Jan 28, 2009), pet. ref'd (2009) – "Here, based on the evidence, the trial court could have reasonably concluded that Salinas perpetrated a falsehood by encouraging Timmerman to provide false information for the purpose of aiding Guevara to evade arrest or prosecution. ... Here, we must decide whether Salinas's out-of-court statements to Timmerman advanced the objective of the conspiracy to hinder Guevara's apprehension. We conclude that they did." – [NOTE: This is a Rule 801 ruling.

The *Crawford* issue was decided on the basis of "casual remarks" but it could as easily have been decided as a co-conspirator statement.]

State v. Hill, 2008 WL 656678 (N.J. Super. A.D. March 13, 2008) (unpub) – co-defendant's sworn plea allocution absolved defendant, his cousin, of complicity in planning of robbery – court found it was not made in furtherance of conspiracy, but in a weird and very lengthy dictum went on to consider how it would have ruled on the *Crawford* issue, if the plea allocution had been otherwise admissible – "when an out-of-court declarant makes statements 'in furtherance of a conspiracy to a government official, the statements will almost always be made unknowingly to a government informant.'" – the court refused to accept the Supreme Court's assertion that statements in furtherance of a conspiracy are "by their nature" non-testimonial – "While the Court's dicta may apply to typical co-conspirator statements as being nontestimonial in nature, we do not read the language as establishing a per se exception for all co-conspirator statements. Each such statement must be evaluated on its particular facts." – and rejecting holding of *Stewart* to assert that "even if a conspiracy were established, the plea allocution would be inadmissible because it would deprive defendant of his rights under the Confrontation Clause" [NOTE: This whole dictum is based on the theory that co-conspirator statements are admissible because of their reliability, which of course is exactly the rationale rejected by *Crawford*. See the Westlaw slip op. at *12. So in essence the New Jersey Court of Appeals is saying that *Ohio v. Roberts* still lives with regard to co-conspirator statements, and the *Crawford* statement to the contrary is not controlling.]

Commonwealth v. Burton, 450 Mass. 55, 876 N.E.2d 411 (Mass. 2007) – "The venture was continuing at the time of the conversation. The three men had fled to the apartment directly from the murder scene. In fact, the defendant gave the driver directions for getting there. After the conversation, Taylor hid the murder weapon. Thus, the conversation took place immediately after the murder when three of the joint venturers were still together, discussing what had happened, and when the murder weapon was hidden in an effort to evade detection. ... Many other jurisdictions have reached a similar conclusion, holding in general that statements of joint venturers (or coperpetrators or coconspirators) are the type of remarks that the *Crawford* Court deemed nontestimonial."

People v. Nguyen, 2007 WL 2456077 (Cal. App. 4 Dist. Aug 30, 2007) (unpub) – "The prosecution did not offer Huy Le's statements for their truth, but to show a conspiracy to prevent the police from learning that the group drove to the Phuc Loc Restaurant to attack AG members and that Si Do had left the car with the nine-millimeter firearm used in the attack. Offered for this limited purpose, the statements did not constitute hearsay. Nonhearsay statements, even if considered testimonial, do not implicate the Confrontation Clause."

State v. Mitchell, 2007 WL 2081469 (N.J. Super. A.D. July 23, 2007) (unpub) – "[A] statement regarding past events can still be 'in furtherance of a conspiracy if it serves 'a current purpose such as to promote cohesiveness' ' or prompts a stranger to the conspiracy to act in ways that further the conspiracy. [cites] The mere completion of a criminal act does not necessarily end the conspiracy for purposes of this exception to the hearsay rule. ... Bullock's statements prompted a stranger to the conspiracy, Lowe, to act in ways that furthered the conspiracy by hindering the police investigation and concealing evidence. [cite] Indeed, our Supreme Court has recognized that statements that included a request for help in avoiding apprehension are admissible under R. 803(b)(5). ... [T]he admission of the redacted tape recording of the

conversation between Bullock and Lowe did not deprive defendant of his constitutional right to confront the witnesses against him."

Arroyo v. State, 239 S.W.3d 282 (Tex. App.-Tyler Jun 29, 2007), pet. ref. (Nov. 14, 2007) – "But there can be a conspiracy to hinder apprehension. [citation omitted]. The statements here came fairly closely on the heels of the actual murder and were related to the initial flight from the locale of the crime. Furthermore, the construct that a coconspirator's statement is adopted by the defendant/conspirator [FN8] is not strained in this case because Appellant was present when the statements were made and made similar statements herself. Finally, there is little question that Appellant and Hersain were working together to avoid being apprehended and that Hersain's statement was made to help them escape the jurisdiction."

U.S. v. Stewart, 433 F.3d 273, 293 (2d Cir. 2006) – (Martha Stewart case) – statements made to police in furtherance of conspiracy to cover up crime are nontestimonial

U.S. v. Logan, 419 F.3d 172, 178 (2nd Cir. 2005) – this case states that non-hearsay statements – false alibi statements offered for their falsity – can nonetheless be testimonial hearsay, which is directly contrary to *Crawford's* footnote 9

➤ Sub-Category: Relationship of Co-Conspirator Statements to Casual Remarks

Conversations between co-conspirators that are not strictly "in furtherance of" the conspiracy would seem to qualify, more or less automatically, as non-testimonial casual remarks.

State v. Larson, 788 N.W.2d 25, 37 (Minn. 2010) – "The co-conspirator statements introduced at Larson's trial arose in discussions amongst friends and acquaintances, not during police interrogations, and were not made for the purpose of establishing facts potentially relevant for a future criminal prosecution. These statements therefore are not testimonial..."

U.S. v. Hyles, 521 F.3d 946 (8th Cir. Apr 08, 2008) – holding that statements are admissible under hearsay rules as co-conspirator statements, under the confrontation clause as non-testimonial casual remarks

U.S. v. Hatfield, 2008 WL 151352 (S.D. Ill. Jan. 15, 2008) (unpub) (ruling on motion for new trial) – finding statement admissible under confrontation clause as casual remark, and under the hearsay rules as co-conspirator statement

U.S. v. Hatfield, 2008 WL 151352 (S.D. Ill. Jan. 15, 2008) (unpub) (motion for new trial) – "Here, Everly Hatfield's out-of-court statement does not clearly fall within the coverage of *Crawford's* holding, because it bears the mark of a non-testimonial statement—the 'casual remark to an acquaintance'—rather than a testimonial statement. As such, *Crawford* is inapplicable and the only issue here is whether the statements were made in furtherance of the conspiracy as required by Rule 801(d)(2)(E)."

U.S. v. Nguyen, 2008 WL 467804 (9th Cir. Feb. 22, 2008) (unpub) – "Many of the challenged statements were statements in furtherance of a conspiracy, which are 'by their nature ... not testimonial.' [cites] [¶] The rest of the challenged statements may not have been made in

furtherance of any conspiracy, but they were made between co-conspirators in casual conversation."

Present Sense Impressions

United States v. Solorio, 669 F.3d 943, 944-949 (9th Cir. Cal. 2012) – contemporaneous observations of surveilling officers, conceded by defendant to have been present sense impressions, were non-testimonial

M.J. v. State, 994 So.2d 485 (Fla. App. 3 Dist. Nov 12, 2008) – "Officer Milian testified that she was working off-duty providing security at a mall, ... carrying a mall walkie-talkie that was connected to store clerks and mall security. ... Officer Milian testified that she received a radio dispatch from a Loss Prevention security officer over the mall walkie-talkie advising her that M.J. and another individual were seen on a security camera leaving a store without paying for merchandise. ... The non-testifying security officer's statements were properly admitted pursuant to the spontaneous statement exception to the hearsay rule, as the security officer was 'describing or explaining an event or condition while [he] was perceiving the event or condition, or immediately thereafter.' ... The security officer's statements to Officer Milian are similar to statements made by a 911 caller to a 911 operator--the declarant in each scenario is describing events he is perceiving or immediately after he perceived them in an effort to obtain assistance."

State v. Freeman, 2008 WL 833936 (Tenn. Crim. App. Mar 28, 2008) (unpub) – "Freeman was conveying a present sense observation. Additionally, Freeman's statement was not a response to a question, much less formal questioning by the police... Thus, we conclude that the statement was 'nontestimonial;' and the rule of *Crawford v. Washington* was not offended."

Ko v. Burge, 2008 WL 552629 (S.D. N.Y. Feb 26, 2008) (unpub) (habeas) – upholding *People v. Ko*, 789 N.Y.S.2d 43 (App. Div. 2005) – Columbia law student, on phone with friend, said, "It's Ed, I've got to go" immediately before being murdered by Ed, the defendant – "Hong's statement is plainly nontestimonial. It was made to a friend over the phone with no intervention of any government authorities. It was neither solicited by any law enforcement officers nor made in the context of any government investigation."

Fischer v. State, 252 S.W.3d 375 (Tex. Crim. App. Jan 16, 2008) – state trooper contemporaneously recorded his observations on videotape as he conducted traffic stop – "Trooper Martinez ... calmly walked back and forth from his patrol car to the suspect, and he carefully and deliberately narrated the results of his DWI field tests and investigation. Trooper Martinez's recorded statements are 'testimonial' and reflective in nature; they are the type of statements that are made for evidentiary use in a future criminal proceeding. ... We therefore agree with the court of appeals which had held that Trooper Martinez's recorded investigation narrative did not qualify for admission as a present sense impression under Rule 803(1)." – 5-4 decision [NOTE: Unclear whether decision is based on state law or the federal Constitution.]

People v. Basurto, 2007 WL 3173412 (Cal.App. 5 Dist. Oct. 31, 2007) (unpub) – "[Victims] Valencia, the Espinozas, and Figueroa were led to Figueroa's Jeep. [Defendant] Basurto drove the Jeep; the other two men followed in Teran's pickup. At one point Basurto began driving very slowly. Figueroa commented, 'you've got a gun there.' Valencia looked over at Basurto and

saw that Basurto's hand was covering a gun." – moments later, Basurto shot and killed the Espinozas and Figueroa, but Valencia escaped – at trial, Valencia was permitted to describe the conversation between Figueroa and the defendant – the statement about the gun was admissible under Evidence Code section 1240 – "admission of the statement did not violate Basurto's Sixth Amendment rights because the statement was not testimonial under *Crawford* ... Figueroa's statement clearly was not made under circumstances imparting the 'formality and solemnity characteristic of testimony' and was not made for the purpose of preserving the comment for use at trial. Figueroa's comment was not a testimonial statement." (citations omitted)

United States v. Bifulco, 2007 WL 1288214 (W.D. N.Y. May 1, 2007) (unpub) (§ 2255 action) – "*Crawford* prohibits only testimonial hearsay, not all hearsay. Statements offered under the excited utterance or present sense impression exceptions to the hearsay rule, Fed.R.Evid. 803(1)-(2), which was the case here, are not considered testimonial."

State v. Smith, 215 Ariz. 221, 159 P.3d 531 (Ariz. May 31, 2007) – "The medical examiner's statements are present sense impressions because they describe the condition of the body, were made by the person perceiving the information, and were made as he perceived the conditions. Accordingly, Detective Dominguez's testimony was not inadmissible hearsay." [Footnote omitted] [NOTE: The rule was based on state evidentiary law; *Crawford* issue not reached because error, if any, was harmless.]

In the Interest of J.A., 385 N.J. Super. 544 (N.J. App. Div. 2006), overruled by State ex rel. J.A., 195 N.J. 324, 949 A.2d 790 (N.J. Jun 23, 2008) –

United States v. Thomas, 453 F.3d 838 (7th Cir. Wis. 2006) – "Defendant was involved in a shooting that involved several other people. The court found that an emergency call made during the shootout was nontestimonial because it was made in the course of an ongoing emergency. Because the tape-recording of the call was nontestimonial, it did not implicate defendant's right to confrontation under U.S. Const. amend. VI and was admissible under Fed. R. Evid. 803(1) as a present sense impression and R. 803(2) as an excited utterance." The court relied on the new rulings of *Davis* and *Hammon* regarding the emergency situation.

Gardner v. United States, 898 A.2d 367 (D.C. 2006) – A present sense impression (which is spontaneous and contemporaneous) is non-testimonial.

Wooten v. Cluff, 2006 U.S. Dist. LEXIS 12390 (D. Ariz. 2006) – "The challenged testimony in this case involved a statement made by the murder victim to a friend, over the phone, placing Petitioner at the scene of the crime. Whatever the scope of "testimonial" statements might be, the Court concludes that the victim's statement in this case does not fall within it. Statements made by phone to a friend simply cannot be equated with testimonial statements made in judicial proceedings or police interrogations."

State v. Naugler, 2005 Ohio 6274 (Ohio Ct. App. 2005) – "Defendant was reportedly waving his finger or a gun at passing drivers, so, due to this and a traffic violation, an officer stopped his car. The appellate court held admitting 9-1-1 calls from unavailable motorists did not violate defendant's right of confrontation as they were not clearly testimonial. The calls were admissible under Ohio R. Evid. 803(1) as present sense impressions accurately describing defendant's car and license number within one digit."

Bray v. Commonwealth, 177 S.W.3d 741 (2005) – The victim, who was subsequently murdered, called her sister and said she was scared because the defendant was down the street sitting in his car. The victim was describing the situation as it was occurring and how she feared for her life. The sister was permitted to testify to these statements as present sense impressions and they were deemed non-testimonial.

State v. Heggart, 908 So. 2d 1245 (La. App. 2 Cir. 2005) – At trial, the prosecution presented testimony of defendant's former girlfriend regarding the content of her conversations with the victim (her new boyfriend) immediately prior to his murder. On appeal, the court found that admitting the present sense impressions were non-testimonial and did not violate *Crawford*. “The victim's statement to the girlfriend described the arrival of defendant as it happened; likewise, the victim's later statement to the girlfriend immediately prior to the shooting that he and defendant were talking was a description of the event as it happened and also qualified under the present sense exception to the hearsay rule.”

Crawford v. State, 2005 Tex. App. LEXIS 4789, 2005 WL 1474041 (Tex. App. 2005) (unpub), upheld on habeas, 2009 WL 579501 (S.D. Tex. Mar 03, 2009) – The victim of a fatal shooting was a drug dealer who was doing business with the defendant. Before leaving to meet with the defendant, the victim told his girlfriend that “I'm fixing to go meet Sterling”; (2) “If I don't call you back in thirty minutes, call me”; and (3) “I am where I told you I was goin' to be.” The first and second statements were non-testimonial as state of mind statements and properly admitted. The last statement was non-testimonial as a present sense impression and properly admitted. No *Crawford* violations.

People v. Dobbin, 2004 NY Slip Op 24534 (NY Sup Ct 2004) – A witness to a robbery called 911 to report the crime and gave his last name. The court found the call to be testimonial thus requiring the caller to testify at trial. The court found that the caller was making an official report of a crime to a governmental agency; that a reasonable person would expect that the call to the 911 police operator would be later used in a trial; that the mere act of reporting a crime would lead a reasonable person to understand he has become involved in a police investigation and that the statement could be used in prosecution; and last, although the statements by the caller were present sense impressions, the statements were accusatory in nature and therefore testimonial.

United States v. Griggs, 65 Fed. R. Evid. Serv. (CBC) 1109; 2004 U.S. Dist. LEXIS 23695 (SDNY 2004) – “The government seeks to introduce testimony by a police officer, summoned to the scene from the police precinct across the street, who heard the statement “Gun! Gun! He's got a gun!” and observed the declarant gesture at the defendant to identify the person to whom his statement had referred. The government has indicated that this witness has not been found by government investigators. The government seeks to introduce this testimony pursuant to the hearsay exceptions for either excited utterances or present sense impressions. Although the *Crawford* court did not provide a definition for what constitutes a “testimonial” statement, the Second Circuit has subsequently stated that a declarant's statements are testimonial if they are “knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings.” Therefore, these statements fall within both hearsay exceptions and are not testimonial.

State v. Meeks, 88 P.3d 789 (Kan. 2004) - Statement by shooting victim to police officer "Meeks shot me" and prosecutor admitted statement of now dead victim under present sense impression hearsay exception. "In the instant case, Officer Hall was arguably conducting an interrogation when he asked Green if he knew who shot him, thus making the response testimonial. Moreover, Meeks was not given the opportunity to confront Green through cross-examination because Green died before testifying at trial. We need not determine whether the response was testimonial or not, however, because we hold that Meeks forfeited his right to confrontation by killing the witness, Green." Therefore, this was admissible hearsay as a present sense impression.

State of Mind

State v. Reynolds, 152 Conn. App. 318, __ A.3d __ (Conn. App. 2014) – "the introduction of nonhearsay statements does not trigger the protections of the confrontation clause... In this case, the court admitted the application for a restraining order as circumstantial evidence of Brown's subjective state of mind. The application was redacted heavily and did not contain an affidavit explaining the reasons Brown was seeking protection from the defendant. [cite] In addition, the court instructed the jury on the limited purpose of the evidence. For these reasons, we agree with the court that the application for a restraining order was not hearsay, and, therefore, its admissibility was properly determined by the court."

Ruhl v. Hardy, 743 F.3d 1083, 1098-99 (7th Cir. 2014), reh'g denied (Apr. 3, 2014) (habeas) – "Serio's statements about his intent to kill Neubauer were admissible as non-testimonial statements of his then existing state of mind. Under the state-of-mind exception, a hearsay statement may be admissible if it '[expresses] the declarant's state of mind at the time of the utterance,' i.e., his intentions, plans or motivations. ... because neither type of statement was testimonial, Ruhl's confrontation rights under the Sixth Amendment were not implicated."

State v. Fraser, 170 Wn. App. 13, 282 P.3d 152 (Wash. Ct. App. 2012) – "¶19 By arguing that compliance with *Parr* satisfies the confrontation clause, the State is confusing two lines of authority. *Parr* sets forth a rule of evidence now embodied in ER 803(a)(3). *Parr* holds that hearsay—an out of court statement offered to prove the truth of the matter asserted—may be admitted in some circumstances to prove the declarant's state of mind. [¶20] To survive a hearsay challenge 'is not, per se, to survive a confrontation clause challenge.' ... Because the statement was offered for its truth, the court erred by admitting it."

Machicote v. Ercole, 2008 WL 169348 (S.D. N.Y. Jan 18, 2008) (unpub) (habeas) – "Mr. Machicote contends that the trial court wrongfully admitted Ms. Arthur's testimony, which he claims included hearsay. Specifically, he complains that Ms. Arthur was permitted to testify that she had heard from others that the man who shot Mr. George was 'the guy Shawn in the rap video.' ... Since, as discussed above, Ms. Arthur's statements were admitted only to show her state of mind and to establish a context for her identification of the petitioner, there was no violation of the petitioner's Sixth Amendment rights."

People v. Osborg, 2007 WL 708792, *4-6 (Cal. App. 3 Dist. 2007) (unpub) – "Phillips's [victim's] hearsay statement that he 'was afraid' of defendant was admissible hearsay because it was introduced for the purpose of showing Phillips's state of mind. (Evid.Code, § 1250.)

Phillips's fear of defendant was important because it indicated defendant would not have been invited into Phillips's home, negating any inference that defendant may have left his fingerprints in Phillips's home on a prior, consensual visit. ... Whichever test for determining whether a statement is 'testimonial' is used, we conclude the statement here was not testimonial. Phillips does not appear to have foreseen that his statement would be used in a later trial. He was complaining to a friend and city council member who he thought might be able to help him with his problem neighbor. However, there is no indication Phillips contemplated any legal action against defendant, and he certainly did not contemplate his own murder trial. Since the statement was not testimonial, there was no Sixth Amendment violation."

Ashford v. State 2007 WL 431865, *2 -3 (Tex. App.-Eastland, 2007) (unpub) – absent witness's statement that she was scared to testify admissible under state of mind exception and non-testimonial

People v. Gash, 165 P.3d 779 (Colo. Ct. App. 2006) – “During trial, the People offered into evidence, for purposes of refuting defendant's contention that the victim committed suicide, statements made by the victim to her nephew at a family gathering shortly before her death. Defendant contended the trial court erred in denying his postconviction motion because his confrontation rights were violated when the nephew was allowed to testify to hearsay statements made by the victim. The court disagreed. The statements were not testimonial, as no objective witness in the victim's position would have believed that her statements would be used at a trial.”

Welch v. Sirmons, 451 F.3d 675 (10th Cir. Okla. 2006) – Statements made by the murder victim to her friend that the defendant “gave her the creeps” was properly admitted as a state of mind exception as was non-testimonial.

Pope v. White, 184 Fed. Appx. 606 (9th Cir. Cal. 2006) – State of mind hearsay statements are non-testimonial because an objective witness would not reasonably believe that a casual remark to an acquaintance would be later used in court.

State v. Carlson, 2006 Wash. App. LEXIS 929 (Wash. Ct. Ap. 2006) – The deceased victims’s estranged husband and his mother were convicted in her murder. Prior to her murder, the victim informed family and friends that she was planning to divorce her husband and take the kids to move out of state. The court found that these state of mind statements were casual remarks not deemed testimonial and were non-testimonial. The court, however, found that these statements were not relevant and improperly admitted, thus the convictions were overturned.

State v. D'Antonio, 2005 Tenn. Crim. App. LEXIS 1152 (2005) – The victim, who was killed by the defendant, expressed fear and other feelings that were relevant and were non-testimonial.

State v. Smith, 275 Conn. 205 (2005) – Admitting statements by the deceased victim that she feared the defendant were properly admitted as state of mind hearsay statements and did not violate *Crawford*.

State v. Johnson, 2005 Del. Super. LEXIS 253 (Del. Super. Ct. 2005) – “The elderly victim had expressed fear of defendant, her former handyman, after an earlier burglary, and she did not want to discuss the alleged later rape with police at all. She did make many statements to medical professionals, immediately after the incident and after her return to her winter home, and to her

children. Except for a few statements to a nurse who had a role in gathering forensic evidence, the court held that most of the statements were nontestimonial in nature under a Sixth Amendment analysis, so that they would be admissible if they fell within a deeply rooted hearsay exception under Del. R. Evid. 803 and bore indicia of reliability. Many of the statements were clearly admissible as made for purposes of obtaining medical treatment, and others were excited utterances. Statements of the victim's then-existing state of mind with regard to fears of returning to the house were admissible, but other statements that would have related to the history of the victim's fears of defendant were not. Finally, since there was plenty of other evidence as to the victim's medical condition, the court declined to admit her medical treatment records as business records.”

Hodges v. Commonwealth, 613 S.E.2d 834 (Va. Ct. App. 2005) – Statements made by the deceased victim regarding meeting with the defendant prior to being killed were non-testimonial state of mind statements and properly admitted at trial.

Crawford v. State, 2005 Tex. App. LEXIS 4789, 2005 WL 1474041 (Tex. App. 2005), upheld on habeas, 2009 WL 579501 (S.D. Tex. Mar 03, 2009) – The victim of a fatal shooting was a drug dealer who was doing business with the defendant. Before leaving to meet with the defendant, the victim told his girlfriend that “I'm fixing to go meet Sterling”; (2) “If I don't call you back in thirty minutes, call me”; and (3) “I am where I told you I was goin' to be.” The first and second statements were non-testimonial as state of mind statements and properly admitted. The last statement was non-testimonial as a present sense impression and properly admitted. No *Crawford* violations.

McKinney v. Bruce, 125 Fed. Appx. 983 (10th Cir Kan 2005) – A victim’s statements made to his uncle about who he was leaving to go see and immediately prior to his murder were admitted as state of mind statements and were held to be non-testimonial under *Crawford*.

State v. Jones, 2004 Del. Super. LEXIS 407 (2004) – The defendant’s girlfriend, who did was unavailable to testify at trial, informed police that a co-conspirator to the murder, who worked as a drug dealer for one of the victims, planned to rob the victim because the victim would not pay the co-conspirator. The girlfriend said that the co-conspirator intended to shoot the victim so that the victim could not identify the robbers. The court admitted the statements of the co-conspirator's intent to commit murder as the co-conspirator's existing state of mind. The court held these statements were non-testimonial because they were made to an acquaintance and not to an arm of the government.

United States v. Dorman, 108 Fed. Appx. 228 (6th Cir. Ky 2004) – A witness testified as to a 803(3) hearsay statement regarding state of mind and future intent. The court held this was non-testimonial and no *Crawford* analysis was needed under the rules of evidence.

People v. Becerra, 2004 Cal. App. Unpub. LEXIS 2692 and 3702 (2004) – When child stated to her mom “my head hurts” and child dies as a result of injuries, that statement is non-testimonial state of mind hearsay exception and can be admitted at trial without *Crawford* analysis.

People v. Williams, 2004 Mich. App. LEXIS 1217 (2004 unpub dec) – deceased victim's statements of fear for her life from Defendant to her mom and brother were admissible as state of mind exceptions and non-testimonial and not subject to *Crawford* analysis.

Horton v. Allen, 370 F.3d 75 (1st Cir. Mass 2004) – State of mind statements made by co-conspirator to a witness are not testimonial and not subject to *Crawford* analysis since the statement was made without the expectation of being used at trial.

Stoddard v. State, 157 Md. App. 247, 850 A.2d 406 (Md. Ct. Spec. App 2004), rev'd, 389 Md. 681, 887 A.2d 564 (Md. Dec 08, 2005)

Evans v. Luebbers, 371 F.3d 438 (8th Cir. MO 2004) - Defendant was convicted of murdering his wife. Statements made by the deceased victim to others were admitted into evidence under the state of mind hearsay exception. "The trial court admitted statements suggesting that Sheilah Evans was scared of the petitioner (e.g., "I'll be like another Nicole Simpson." Trial Tr. At 486; "This might be another O.J. Simpson case." Trial Tr. At 341), that Sheilah Evans was verbally and physically abused by the petitioner, that Sheilah Evans intended to divorce the petitioner, and that Sheilah Evans obtained a protective order against the petitioner." The Court found that *Crawford* did not apply in this case because the deceased victim's statements were non-testimonial and fell within the hearsay exception for state of mind.

Medical Diagnosis / Treatment

(When the declarant is a child, the cases go in part 12. When the declarant is a victim of elder abuse, the cases go in part 14. Medical records cases go in part 15.)

State v. Koederitz, 2014-1526 (La. 3/17/15), __ So.3d __ (La. 2015) – "the statements made in the present case by the victim to her treating physicians identifying the person who struck her repeatedly in the face and broke her nose, as recorded in the certified records from Ochsner Hospital, are admissible under the hearsay exception in La. C.E. art. 803(4), and as a matter of the Confrontation Clause, because they were made for the non-testimonial purposes of, and were reasonably pertinent to, medical treatment, and diagnosis in connection with medical treatment, in a case that appeared to be one of domestic violence and that involved not only treatment of the victim's physical injuries but also psychiatric counseling."

State v. Belone, 51 Kan. App. 2d 179, 343 P.3d 128 (2015) – "we find Begay's statements to [her primary nurse] Feltman were not testimonial in nature. Although Begay did tell Feltman when she arrived at the hospital that her boyfriend had beaten her, she did so in the context of describing the nature of her injuries. Begay's statements were not made to law enforcement or any other government official in any type of formal interview. Instead, Begay's statements served as an explanation of her physical condition when she arrived at the emergency room. ... [W]e find Begay's statements to [attending nurse] Bond were not testimonial in nature. ... an objective witness would likely believe that Begay's statements existed only to explain her injuries to her nurse."

Kirksey v. State, __ So.3d __, 2014 WL 7236987 (Ala. Crim. App. Dec. 19, 2014) – in child abuse resulting in death case, a comprehensively inadequate opinion – after concluding, without analysis and apparently without evidence (because it's plain error review), that certain notes by

social worker and doctor contained in hospital records were not "pathologically germane" to medical treatment, holding that therefore they were not "business records of the Children's Hospital. The nature of the information contained in the documents was testimonial in nature, and their admission violated the Confrontation Clause." – but opinion does not discuss whether the information was hearsay, and if so from whom, and for what purpose it was spoken – in short, it does not contain any relevant legal analysis at all

State v. Hill, 236 Ariz. 162, 336 P.3d 1283, 1284-90 (Ariz. Ct. App. 2014) – "¶ 19 Because forensic medical examinations often have two purposes—to gather evidence for a criminal investigation and to provide medical care to the victim—whether a victim's statement in response to a question by the examiner is testimonial for purposes of the Confrontation Clause turns on whether the surrounding circumstances, objectively viewed, show that the primary purpose of the exchange at issue was to provide medical care or to gather evidence. ... ¶ 22 We cannot say, however, that a statement made in response to a question by a medical provider in connection with non-emergent medical care necessarily is testimonial simply because the victim does not require *urgent* medical attention. [cite] If the primary purpose of the encounter is the provision and receipt of medical care, the statement is non-testimonial, regardless of whether the care *1289 sought is for an emergent condition. ... ¶ 24 Guided by these authorities, we conclude the [SANE] nurse's recounting of the victim's statement did not violate Hill's rights under the Confrontation Clause."

Ward v. State, 15 N.E.3d 114 (Ind. App. 2014) – "In the course of receiving treatment, J.M. indicated to the treating paramedic and emergency room forensic nurse that her injuries were caused by Ward. ... According to paramedic Hodge-McKinney, it is important for a paramedic who treats a victim who has suffered physical injury to identify the cause of the injuries, including the attacker, because the paramedic needs to establish that the victim is safe. ... The identity of the attacker can also reasonably be considered to be important to forensic nurse Morrison's treatment of J.M. ... In light of the above-stated facts, we conclude that, as in *Perry*,² the totality of the circumstances, viewed objectively, indicate that the primary purposes of the examinations of J.M. by paramedic Hodge-McKinney and forensic nurse Morrison, during which J.M. made the challenged statements regarding the identity of her attacker, were to furnish emergency medical care to J.M. As such, J.M.'s statements were not testimonial."

Freeman v. State, 760 S.E.2d 708, 711-13 (Ga. App. 2014), reconsideration denied (July 31, 2014) – "Freeman next argues that the trial court erred by admitting hearsay testimony from the EMS worker who treated Nelson at the scene and told the jury what she said about the attack. ... Freeman objected to the testimony on the grounds that it was hearsay and a violation of his constitutional right to confrontation under *Crawford v. Washington*.⁹ But the EMS worker was responsible for emergency medical diagnosis and treatment, to which the cause of the injury was relevant. Statements made for purposes of medical diagnosis or treatment and describing the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment have long been admissible under [statutory hearsay exceptions] and continue to be admissible even after *Crawford*"

People v. Pham, 987 N.Y.S.2d 687, 987 N.Y.S.2d 687 (N.Y. App. Div. 3d Dept. 2014) – "Details of the abuse, even *691 including the perpetrator's identity, may be relevant to diagnosis and treatment when the assault occurs within a domestic violence relationship because the medical provider must consider the victim's safety when creating a discharge plan and gauging

the patient's psychological needs [cite]. The physician who examined the victim testified that all of the information in the medical records was relevant to and gathered for purposes of diagnosis or treatment, and the primary purpose of the examination was to care for the patient's health and safety, although a secondary purpose of the forensic examination was to gather evidence that could be used in the future for purposes of prosecution. Considering this information, although the victim was unavailable to testify because she died before trial (from causes unrelated to defendant's crimes), defendant's Confrontation Clause rights were not violated because the statements were not testimonial [cite]."

Little v. Commonwealth, 422 S.W.3d 238, 240-41 (Ky. 2013), reh'g denied (Mar. 20, 2014) – drunk driving crash in which perpetrator was also injured – "Little challenges the admission of an earlier laboratory report based on blood drawn when he arrived at the hospital for treatment. This four-page report, created by the University of Louisville Hospital, is a comprehensive blood analysis report that contains, among other things, information regarding Little's blood alcohol level shortly after his hospital admission. ... [W]e conclude that the admission of the hospital laboratory report does not implicate the Confrontation Clause. ... The record establishes that Little was treated at University Hospital for injuries he received in the collision, including emergency surgery for a fractured femur. This comprehensive blood analysis report was clearly intended for the primary purpose of providing that medical treatment to Little, and was not intended to establish or prove a fact or serve as a 'substitute for trial testimony.'"

State v. Ruff, 996 N.E.2d 513, 515-19 (Ohio App. 1st Dist. 2013) – "Mr. Ruff argues that it was improper to allow Delores Holtmann, a Sexual Abuse Nurse Examiner ("SANE") who examined P.F. after the rape, to read a statement that P.F. had made to her at the hospital. P.F. had died prior to trial and was thus unavailable to testify. ... {¶ 20} In this case, the vast majority of P.F.'s statements dealt with the abuse Mr. Ruff inflicted upon her. Such statements were made for the purpose of medical diagnosis and treatment and would have been understood to be so by an objective observer. Under either the 'objective observer' or 'primary purpose' test such statements were nontestimonial and properly admitted into evidence."

State v. Moten, 64 A.3d 1232, 1232-1248 (R.I. 2013) – ER doctor brought in ophthalmologist for consult in shaken baby case – the majority finds confrontation clause issue waived but concurring opinion would find: "the primary purpose of the ophthalmologist's report was to resolve an ongoing medical emergency—to wit, damage to the baby's eye sight and the potential threat of blindness. Because the primary purpose of the ophthalmologist's statements was to resolve that emergency with proper medical treatment, thereby rendering the statements nontestimonial..."

State v. Paredes, 139 Conn. App. 135, 54 A.3d 1073 (Conn. App. Ct. 2012) – "when the primary purpose of the statements is to receive a medical diagnosis or treatment, not future criminal prosecution, the confrontation clause is not implicated."

State v. Doerflinger, 170 Wn. App. 650, 285 P.3d 217 (Wash. Ct. App. 2012), reconsideration denied November 9, 2012 – "When the primary purpose of a radiologist's finding of a nasal fracture was to inform [**219] the treating physician of the nature of a patient's injuries in order to determine appropriate treatment, the radiologist's finding is not testimonial and the limitations of the confrontation clause do not apply to its admissibility. ... Objectively viewed, the primary purpose of the radiologist's statement that Palmer had a nasal fracture was to inform the treating

physician of the nature of Palmer's injuries so they could be treated appropriately, not to prepare facts for litigation. ... Nor were the radiologist's findings sworn or certified extrajudicial statements that the confrontation clause was designed to reach [*659] as they were not prepared to serve as a substitute for in-court testimony."

State v. O'Cain, 169 Wn. App. 228, 231-262, 279 P.3d 926 (Wash. Ct. App. 2012) – "Robinson's statements were made for the purpose of obtaining medical treatment. Therefore, the statements are both nontestimonial and inherently reliable, thus implicating neither the federal constitution's Sixth Amendment nor article I, section 22 of our state constitution."

Commonwealth v. Irene, 462 Mass. 600, 616-618, 970 N.E.2d 291 (Mass. 2012) – "Although directed to different concerns, the class of medical records that do not constitute testimonial statements, as articulated by the Court in *Melendez-Diaz*, is substantially similar to the type of hospital records admissible [*618] under § 79. ... [W]here statements contained in hospital medical records demonstrate, on their face, that they were included for the purpose of medical treatment, that evident purpose renders the statements both nontestimonial as to the author of the record, and as falling within the scope of § 79."

Palilonis v. State, 970 N.E.2d 713, 718-729 (Ind. Ct. App. 2012) – "The primary purpose of the examination was to furnish and receive emergency medical and psychological care; B.S. had just been raped and was sent to the hospital for an evaluation. Therefore, despite the fact that the evidence was later used at trial, B.S.'s statements to Freeman were nontestimonial..."

People v Blackman, 90 A.D.3d 1304, 935 N.Y.S.2d 181, 2011 NY Slip Op 9210 (N.Y. App. Div. 3d Dep't 2011) – "The physician testified that the victim's responses were relevant for forensic purposes, and the information was also pertinent to her medical care and treatment. As the questions had the dual purpose of assisting in the investigation of the crime and the care and treatment of the victim's injuries, the victim's responses were properly admitted..."

State v. Bennington, 293 Kan. 503, 264 P.3d 440 (Kan. 2011) – "The discussions in *Giles*, *Melendez-Diaz*, and *Bullcoming* suggest a general rule that statements made to health care professionals during the course of treatment and recorded in medical records [*511] and statements in other business records would generally not [**448] be testimonial because the purpose of such statements is not to produce evidence for use at trial. ... In testimony that sets this case apart from a situation where statements are made solely to a health care professional, the SANE explained a law enforcement officer was present during V.B.'s 'history.' While the SANE asked for a narrative statement, asking V.B. to explain what had happened, the officer also asked V.B. a few specific questions. The SANE wrote down V.B.'s statements, which incorporated her responses to all questions. The SANE's notes were recorded in the medical chart; in those notes, one cannot make a distinction between the statements to the SANE and the statements to the officer. ... we hold the admission of the SANE's testimony about the statements made in the presence of a law enforcement officer violated Bennington's confrontation rights."

State v. Parker, 350 S.W.3d 883, 887-903 (Tenn. 2011) – "Ms. Cogdill was the registered nurse who attended to Ms. Lackey at the emergency room. She testified that the victim told her that an assailant had tried to rape her with his hand, had choked her, and had 'put her to the ground and then bent her legs up over her head.' The victim also reported a headache to Ms.

Cogdill. We agree with the Court of Criminal Appeals that these statements were made for the purpose of obtaining medical treatment and were nontestimonial."

Perry v. State, 956 N.E.2d 41, 44-57 (Ind. Ct. App. 2011) – "Perry was accused of assaulting his ex-girlfriend, N.D. After the alleged assault, N.D. sought assistance from police and was brought to the hospital for examination. She told her examining nurse that she had been sexually assaulted and strangled. She further identified Perry as the assailant. N.D.'s statements were admitted at trial via a medical record prepared by the examining nurse. N.D. did not testify. ... We conclude that N.D.'s material statements—those detailing her physical attack and identifying her attacker—were admissible pursuant to the medical diagnosis exception to the hearsay rule. We further conclude that N.D.'s statements were nontestimonial under *Crawford*..."

People v. Jones, __ P.3d __, 2011 Colo. App. LEXIS 1402, 1-3 (Colo. Ct. App. Aug. 18, 2011) – "When she arrived at the hospital, she had to tell the triage nurse why she was there. [She'd been raped] Thus, an objectively reasonable person in J.R.'s position would not believe that a statement simply identifying the reason for her hospital visit, without any identifying information about her assailant or details of the assault, would be available for use at a later trial. ... Similarly, the emergency room doctor did not examine J.R. for the purpose of gathering evidence about the assault (which was the SANE nurse's task), but rather to diagnose and treat her pain. Thus, we view her statement that her assailant had caused her neck and jaw pain by holding her mouth closed as one made for the purposes of medical diagnosis and treatment, and, as such, one that an objectively reasonable person would not reasonably believe would be available for use at a later trial."

Commonwealth v. McLaughlin, 79 Mass. App. Ct. 670, 948 N.E.2d 1258 (Mass. App. Ct. 2011) – "It is settled that the Sixth Amendment right to confrontation articulated in *Crawford* [cite] and *Melendez-Diaz* [cite] does not include an entitlement to cross-examine the authors of routine medical records because 'medical reports created for treatment purposes . . . [*677] would not be testimonial.' *Melendez-Diaz* ... at 2533 n.2."

Green v. State, 199 Md. App. 386, 22 A.3d 941 (Md. Ct. Spec. App. 2011) – "We hold that the SAFE nurse who wrote the report at issue, did so under circumstances that would lead an objective witness to believe that the statement in the report would be available for use at trial. Accordingly, the nurse's statement fell within the 'core class' of extra-judicial statements against which the confrontation clause protects. Thus all statements in the report, whether 'factual' or otherwise were testimonial, and were inadmissible because appellant never had an opportunity to cross-examine the person who prepared the report." [NOTE: An exception to the medical records exception, limited to cases of rape.]

City of Columbus v. Nearhood, 193 Ohio App. 3d 178, 951 N.E.2d 452 (Ohio Ct. App., Franklin County 2011) – "[P10] Statements made by K.L. to police and the paramedic indicated that Nearhood punched her in the face repeatedly. Her visible injuries were consistent with her story. ... [P15] Use of a medical history under such circumstances is not a violation of the constitutional right of confrontation."

People v Shaw, 2011 NY Slip Op 99, 80 A.D.3d 465, 914 N.Y.S.2d 155 (N.Y. App. Div. 1st Dep't 2011) – " The second declaration at issue was made to a gynecologist who examined the victim at a hospital. This was not testimonial, because the doctor acted primarily as a treating

physician [cite] and her role in gathering evidence for the police by way of a rape kit was secondary."

People v. McNeal, 405 Ill. App. 3d 647 (Ill. App. Ct. 1st Dist. Nov. 24, 2010), appeal denied, (Jan. 26, 2011), cert. denied (Oct. 3 2011) – "The statutory exception does not require the testifying medical personnel to have been the individual who heard the victim's statement firsthand." – hearing it from another medical professional is good enough

State v. Parker, 2010 Tenn. Crim. App. LEXIS 795, 10-29 (Tenn. Crim. App. Sept. 22, 2010), aff'd on confrontation clause issue, reversed on other issue, 350 S.W.3d 883 (2011) – "The Defendant also challenges [triage nurse] Ms. Cogdill's testimony that the victim stated while she was being treated at the emergency room that her son's friend attacked her. The record reflects that the victim made these statements outside of the presence of law enforcement personnel and that these statements were made in furtherance of her medical treatment. We hold that these statements were nontestimonial."

State v. Serrano, 123 Conn. App. 530, 532-541, 1 A.3d 1277 (Conn. App. Ct. 2010) – "The victim did not testify at trial. Waitze testified that he treated the victim approximately two days after the victim was admitted to the hospital. Furthermore, Waitze testified [*539] that, as a surgeon, it was important for him to understand what caused the victim's injuries in order to provide the victim with effective medical treatment. The victim told Waitze that he had been beaten with a blunt object, although he was not sure of the exact nature of the object. ... The circumstances of this case, viewed objectively, would not have led the victim reasonably to believe that his statement to his treating physician would be used later for prosecutorial purposes. Rather, the nature of the victim's statement, and the context in which it was elicited, make it clear that the victim reasonably expected that he was providing Waitze with information that would enable Waitze to provide the victim with proper medical treatment. [cite] The victim's statement to Waitze did not identify the assailant or reveal any detail of the crime unrelated to medical treatment. Accordingly, we conclude that the victim's statement to Waitze was nontestimonial in nature."

State v. Asbury, 2010 Tenn. Crim. App. LEXIS 354 (Tenn. Crim. App. Apr. 30, 2010) – "The medical records at issue in this case are nontestimonial under the primary purpose analysis. ... Indeed, the United States Supreme Court has specifically stated that HN10medical records created for treatment purposes are nontestimonial. *Melendez-Diaz*, 129 S. Ct. at 2533 n.2."

State v. Morgan, 34 So. 3d 1127, 1130-1134 (La.App. 2 Cir. 2010) – "Under the *Crawford* analysis, the statements made by the victims which were admitted at trial did not constitute 'testimony.' ... the statements made by R.H. and A.A. to medical personnel were for medical treatment and not made with the belief that they would later be used at a trial. These vulnerable, elderly women were seeking immediate aid following a violent sexual attack. Their statements seeking said help were not made with any intent to be used in any future, possible trial."

State v. Fry, 125 Ohio St. 3d 163; 2010 Ohio 1017; 926 N.E.2d 1239; (Ohio 2010) – "On July 18, Hardison went to Akron City Hospital for medical treatment following her assault. Amy Veney, a nurse examiner with Developing Options for Violent Emergencies ("DOVE"), treated Hardison. During the course of her treatment, Veney asked Hardison a series of questions about what happened. ... Hardison talked to [Officer] Hackathorn and identified Fry as her assailant

before Veney interviewed her at the hospital. Hardison could reasonably assume that repeating the same information to Veney was for a separate and distinct medical purpose. Applying the objective-witness test, we conclude that Hardison's statements to Veney were nontestimonial statements whose admission did not violate the Confrontation Clause."

United States v. Santos, 589 F.3d 759, 761-763 (5th Cir. La. 2009) – "We do not doubt that some statements made to a prison nurse would be testimonial due to the nurse's dual role in providing treatment and gathering information regarding the incident, but we believe that district courts are equipped to distinguish the point after which "statements in response to questions become testimonial." *Id.* [¶] Cazeau made the statement that his pain was a nine out of ten for medical treatment to "meet an ongoing emergency." See *id.* [Nurse] Dallas was not interrogating Cazeau to gather evidence for trial or prison disciplinary proceedings. Dallas asked Cazeau the question to determine whether he needed pain medication. This interpretation is bolstered by the fact that Dallas, after administering the medication, again asked Cazeau about his level of pain. Even if Cazeau lied about his level of pain to receive medication, this does not render his statements testimonial. Any witness would have concluded that Cazeau was in pain and wanted pain medication, but would not have anticipated that Cazeau's statements regarding his level of pain would be used against Appellant at a later trial. We therefore hold that statements made for the purposes of obtaining medical treatment during an ongoing emergency are not testimonial under Crawford."

State v. Bella, 231 Ore. App. 420, 220 P.3d 128 (Or. Ct. App. 2009) – "Late one night, defendant and the victim, his long-time girlfriend, had an argument. In the ensuing struggle, defendant stabbed the victim in the arm with a pocketknife and injured her in the leg. She went to the emergency room at the Kaiser Permanente medical center in Clackamas, where she was treated by Dr. Stephan M. Snyder. There is no evidence that any police officers were present during Snyder's interaction with the victim. Likewise, there is no evidence that police officers witnessed or in any other way participated, directly or indirectly, in the interaction.... It is true that Snyder listed "domestic violence" as one of his diagnoses of the victim [**132] and noted the fact that police had been called to interview the patient. But defendant does not explain--and we do not understand--why merely identifying a possible cause of the victim's injuries and noting that police had been summoned transforms a physician into, in effect, a "proxy" of law enforcement authorities during his examination of the victim. ... Rather, throughout his interaction with the victim, Snyder acted in his capacity as a medical professional and for the purpose of medical diagnosis and treatment of the victim's injuries, and her statements to him were for the purposes of facilitating that diagnosis and treatment."

People v Shaw, 2009 NY Slip Op 9157, 68 A.D.3d 507; 890 N.Y.S.2d 524 (N.Y. App. Div. 1st Dep't 2009) – "The second declaration at issue was made [by since-deceased rape victim] to a gynecologist who examined the victim at a hospital. This was not testimonial, because the doctor acted primarily as a treating physician (see *People v Duhs*, 65 AD3d 699 [2009]), and her role in gathering evidence for the police by way of a rape kit was secondary. Although the gynecologist prepared a sexual assault form and questionnaire as part of the rape kit, that was not received in evidence."

People v. Vargas, 178 Cal. App. 4th 647, 650-664 (Cal. App. 2d Dist. 2009), review denied (2010) – 14- to 17-year-old rape victim's statements to sexual assault nurse examiner were testimonial, but error harmless – SANE-type exam

State v. Garcia, 115 Conn.App. 766, 973 A.2d 1278 (Conn. App. Jul 21, 2009) – "At trial, [orthopedic surgeon]Walker, who treated Bruno, testified that when he treats a patient, he typically asks the patient what caused the injury. He asked Bruno what caused his injury and did so because 'the mechanism of in-jury is very important to what the injuries could be,' and it is very helpful in the treatment of his patients. Walker also testified that he does not ask questions to gain information for law enforcement or for testimony in court. He further testified that his handwritten report stated that 'patient heard gunshot, felt injury in the back.'" – non-testimonial

In the Matter of K.S., 229 Ore. App. 50, 209 P.3d 845 (Or. App. Jun 10, 2009) – "J went to the Emanuel emergency room because she was pregnant and had been experiencing "worsening" abdominal cramps. She made the out-of-court statements found in the ER record for the purpose of obtaining medical treatment. Bridges, a nurse, questioned J in her capacity as a medical professional and for the purpose of medical diagnosis and treatment; moreover, there was no police or state involvement in the questioning at that time. We conclude that J's statements contained in the ER record were not testimonial..."

Russell v. State, 290 SW 3d 387 (Tex.App.-Beaumont 2009) – DUI prosecution in which defendant claimed he was hypoglycemic, not drunk – "Russell complains about the trial court's admission, over his objection, of portions of a videotape in which an unidentified emergency medical technician, called to the scene by the arresting officer, asked Russell for permission to check his blood sugar. In response, Russell replied: 'No, I'm okay.'" – not testimonial

State v. Bennington, 2009 WL 981683 (Kan. App. Apr 10, 2009) (unpub) – 77-year-old rape victim provided history to SANE nurse – applying four-factor test established by Kansas Supreme Court – " Accordingly, we have concluded that two of the four inquiries would lead us to the conclusion that the statements were testimonial, but the other two inquiries would lead us to the opposite conclusion. As has been noted by our Supreme Court, the ambiguities and uncertainties of *Crawford* and its progeny make synthesis of these factors difficult. Here, our panel is unable to unanimously conclude that the victim's statements to nurse Harrell were testimonial."

Hartsfield v. Com., 277 S.W.3d 239 (Ky. Feb 19, 2009) – "the interview of M.B. by the SANE nurse bears more similarity to a police interview, as in *Crawford* and *Hammon*, than to the questioning conducted in the 911 call in *Davis*. *Davis* advises that persons who are not police officers, but who may be regarded as agents of law enforcement (such as the 911 operator), can conduct interrogations which would likewise be considered testimonial. ... The SANE nurse was acting in cooperation with or for the police. The protocol of SANE nurses requires them to act upon request of a peace officer or prosecuting attorney. [FN24] A SANE nurse serves two roles: providing medical treatment and gathering evidence. [FN25] SANE nurses act to supplement law enforcement by eliciting evidence of past offenses with an eye toward future criminal prosecution. The SANE nurse under KRS 314.011(14) is made available to "victims of sexual offenses," which makes the SANE nurse an active participant in the formal criminal investigation. We believe their function of evidence gathering, combined with their close relationships with law enforcement, renders SANE nurses' interviews the functional equivalent of police questioning." [NOTE absence of "primary purpose" analysis or discussion of purpose of giving medical history.] – **declined to follow by State v. Hill, 236 Ariz. 162, 336 P.3d 1283, ¶ 19 (Ariz. Ct. App. 2014)**

Hernandez v. Schuetzle, 2009 WL 395781 (D. N.D. Feb 17, 2009) (unpub) (habeas) – long, inconclusive discussion of whether child's statements to SANE nurse are testimonial – stating in passing that among the arguments for finding the girl's medical history testimonial was "The fact that the primary purpose for the mother taking L.H. to the emergency room was to determine whether she had been raped and not for other medical treatment." – unexamined assumption that "rape" is a legal category with no medical significance – and ignoring fact that 12-year-old was diagnosed with gonorrhea – which some might consider a matter for medical treatment – and had pelvic bruising

State v. Harper, 770 N.W.2d 316 (Iowa Feb 06, 2009) – "A badly-burned woman was brought to the emergency room. When the attending doctor asked what had happened, she responded, 'Sessions Harper raped me, tied me, and set my house on fire.' Holly Michael died eighteen days later from the burns." – not testimonial, distinguishing *Bentley*

Clark v. State, 199 P.3d 1203 (Alaska App. Jan 16, 2009) – DV case – "the district court concluded (based on the testimony presented at the evidentiary hearing) that when Amouak was interviewed by the nurse and the doctor at the hospital emergency room, the primary purpose of the interview was to secure proper medical diagnosis and treatment of Amouak's injuries. The district court's conclusion is supported by the record." – adopting analysis in *People v. Cage*

U.S. v. Romero, 2008 WL 5262311 (2nd Cir. Dec 18, 2008) (unpub) – with minimal discussion stating that statements made for medical diagnosis or treatment are non-testimonial

State v. Schaer, 757 N.W.2d 630 (Iowa Nov 21, 2008) – badly-injured DV victim's statements to hospital workers non-testimonial – "The present case lacks the indicia of formality that characterized the interview in *Bentley*. Although hospital personnel informed the police of Bergan's assault, there is no indication in the record of any relationship between the emergency room personnel and law enforcement authorities that would support a finding the medical providers' questioning of Bergan as to the cause of her injuries was 'a substitute for police interrogation at the station house.'"

Doan v. Carter, 548 F.3d 449, 2008 WL 4999070 (6th Cir.(Ohio) Nov 26, 2008), rehearing and rehearing en banc denied (Feb 19, 2009) – "Moreover, in *Giles*, albeit in dicta, the Supreme Court specifically provided that '[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules,' because they are not testimonial within the meaning of the Confrontation Clause. 128 S.Ct. at 2693-94..."

State v. Monroe, 2008 WL 4838649 (Del. Super. Oct 31, 2008) (unpub) (pretrial order) – "Ferrell's statement to a hospital nurse upon intake that 'they shot me in my back' is admissible. The statement is not testimonial because it was not made to a government agent (although it was overheard by a police officer). Rather, the statement was made to medical personnel and identified the cause and location of Ferrell's injury." .. Ferrell's statements made to police officers first at Wilmington Hospital and later at Christiana Hospital are inadmissible. ... Ferrell's statements to the police were made well after the shooting and there was no 'ongoing emergency.'"

Moses v. Payne, 555 F.3d 742 (9th Cir. Jan. 30, 2009) (amended) (habeas) – husband murdered wife, state introduced evidence of prior abuse – "The state appellate court analyzed Moses's Confrontation Clause claim under the *Crawford* framework. In considering Dr. Appleton's testimony regarding Jennifer Moses's out-of-court statements, the state appellate court correctly noted that *Crawford* did not articulate a comprehensive definition of testimonial statements and thus did not address the question whether statements made to doctors and social workers for purposes of medical diagnosis and treatment are testimonial under the Confrontation Clause. Applying state-law precedents interpreting *Crawford*, the state appellate court concluded that Jennifer Moses's statements to Dr. Appleton were non-testimonial because they were made for purposes of diagnosis and treatment, rather than to inculcate Moses." – not contrary to or unreasonable application of clearly-established federal law

State v. Garnica, 2008 WL 2582492 (Wash. App. Div. 1 Jun 30, 2008) (unpub) – "[W]hether [rape victim] M.A.'s statements to medical personnel are testimonial does not turn on whether the medical personnel may have had previous experience dealing with police and prosecutors. The question is whether M.A. made statements for the purpose of receiving a medical diagnosis or treatment. [¶] Fouts, the emergency room social worker, testified that her "major purpose is to make sure that [sexual assault victims] get medical care." Fouts gathered information about what happened to M.A. and provided it to other medical personnel who then examined M.A. Nothing in the record suggests that Fouts interviewed M.A. for the purpose of aiding the prosecution. M.A. also made statements to Dr. Hodde and nurse examiner Dippery while they were attempting to provide a medical diagnosis and treatment. Nothing in the record suggests otherwise." – non-testimonial

State v. Avington, 2007 WL 5248859 (Ariz. App. Div. 1 Dec 20, 2007) (unpub) – D.V. case – "¶ 8 A physician's assistant at the hospital emergency room treated L.C. In the presence of the detective who drove L.C. to the hospital, he asked L.C. what happened. She responded that 'she was punched and kicked in the face, chest and head.' ... Avington admits the statement would otherwise be admissible as an exception to the hearsay rule under Rule 803(4). He claims, however, that because the statement was made in the presence of the detective who transported L.C. to the hospital, the trial court violated Avington's confrontation clause rights under *Crawford* by admitting the statement. ... ¶ 20 Here, although the detective transported the victim to the hospital at her request and was present during the examination, the victim's statement was made to a medical professional, not to the detective. ... Although the detective was present, she did not ask the victim questions or otherwise participate in the conversation." – held: non-testimonial

Krizman v. Horel, 2008 WL 2367297 (C.D. Cal. Jun 10, 2008) (unpub) (habeas) – "Petitioner contends that the admission of hearsay statements made by [D.V. and eventual murder victim] Mrs. Krizman to medical providers violated the Confrontation Clause under *Crawford*... the state court's determination that Mrs. Krizman's statements were not 'testimonial' for purposes of the Confrontation Clause was not contrary to, or an unreasonable application of, *Crawford*."

State v. Cannon, 254 S.W.3d 287 (Tenn. Apr 29, 2008) – "We conclude therefore that [82-year-old] M.N.'s medical records containing her out-of-court statements to emergency room medical personnel that she had been raped were nontestimonial..." – but "M.N.'s statements to [SANE practitioner] Nurse Redolfo were not 'reasonably pertinent to diagnosis and treatment.'"

Id. Emergency room medical personnel had examined and stabilized M.N. before she spoke with Nurse Redolfo." – even though the SANE nurse performed a physical examination

Hester v. State, 283 Ga. 367, 659 S.E.2d 600, 08 FCDR 1099 (Ga. Mar 31, 2008) – woman bleeding profusely, soon to die from blood loss, told paramedic what happened to her – "As for the paramedic, we conclude that his interrogation of Ms. Parris did not produce testimony even if he acted as an agent of law enforcement. [cite] Although the paramedic was not responsible for securing the area, he was responsible for emergency medical diagnosis and treatment, to which the cause of the injury was relevant."

Brown v. Com., 2008 WL 630829 (Va. App. Mar 11, 2008) (unpub) – in prior unpublished opinion on interlocutory appeal (2006 WL 1068989, 2006 Va.App. LEXIS 152 (Va.App. Apr 20, 2006)), court held SANE nurse's report was non-testimonial – but nurse died in car crash before trial – assuming without finding error in admission of her report, finding it harmless, among other reasons because "the point of the SANE report was not to prove that Brown was the rapist but that the victim was raped – a fact wholly uncontested by Brown at trial. Brown's only defense was that he was not the perpetrator."

U.S. v. Cucuzzella, 66 M.J. 57 (U.S. Armed Forces Feb 25, 2008) – "Appellant and his wife, RC, attended a Newborn-New Parent Support Program in September 2003. The program was run by Ms. Linda Moultrie, a registered nurse and the Family Advocacy Nurse at the Charleston Air Force Base Family Advocacy Office." – RC's responses to the paperwork raised red flags – a pediatrician referred them to Nurse Moultrie again, concerned that they were not paying attention to their newborn – appellant then contacted Nurse Moultrie for marriage counseling – RC came in to talk with her and, without prompting, spoke for four straight hours about the abuse she was suffering – majority held statements were for medical diagnosis or treatment, and did not reach *Crawford* issue because RC testified – one concurrence would have held that the four-hour monologue was testimonial

People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675, 318 Ill.Dec. 707 (Ill. App. 1 Dist. Feb 25, 2008) (opinion modified on denial of motion for rehearing) – defendant robbed and raped an elderly woman, who was suffering from dementia and the effects of a stroke by trial – her statements to emergency room doctor qualified under state evidentiary rules as statements for medical diagnosis and treatment, yet were testimonial – because "she was not speaking about events as they were actually happening" – "Thus, in the instant case, if the victim had made her statement about past events to a police officer, it would have qualified as testimonial pursuant to *Davis*. ... The question then is whether our holding should be different because the police officer transported her to a doctor, so that the doctor took the statement instead of the officer who was waiting in the hospital. ... [T]his court finds that the protections of the confrontation clause cannot be evaded by having the note-taking policeman simply bring the victim to a note-taking doctor." [NOTE: The key to this case, which is not even acknowledged in a very lengthy opinion, is that the court considers only the doctor's perspective, not the declarant's, when discussing the confrontation clause. When discussing the medical diagnosis exception, it adopts the declarant's perspective.]

Johnson v. Artus, 2008 WL 612619 (S.D. N.Y. Feb 29, 2008) (unpub) (habeas), the continuation of *People v. Johnson*, 6 A.D.3d 216, 217, 775 N.Y.S.2d 21, 22 (A.D. 1st Dep't 2004) – magistrate judge "correctly determined that 'it cannot be said that [the complainant's]

statement to the emergency room doctor [who was trying to determine what happened to the complainant/patient] was testimonial in nature' and thus the Confrontation Clause "poses no bar to the admission of the statement into evidence." (bracketed phrases in original)

Benson v. State 5 So.3d 653 (Ala. Crim. App. Feb 01, 2008) (Welch, J., concurring in result reached in unpublished decision) – "A number of jurisdictions that have considered the issue have determined that statements made during such a medical interview are nontestimonial in nature because the primary purpose of the interview is for the care and treatment of the victim. [cites]. [¶] In applying the above-cited authorities, I would find that an objective person in S.S.'s position would understand that [triage nurse] Manfrey's interview was conducted primarily for the purpose of providing a medical diagnosis and appropriate treatment and not for the purpose of gathering evidence for trial. Therefore, I would hold that S.S.'s statements to Manfrey were nontestimonial and that, therefore, the statements were properly admitted into evidence."

Sullivan v. State, 248 S.W.3d 746 (Tex. App.-Hous. Jan 31, 2008) – drunk driver killed two people – "After appellant was taken to a local hospital, medical personnel drew a blood sample and estimated appellant's blood alcohol level to have been between 0.18 and 0.20 at the time of the collision—more than twice the legal limit. ... State's Exhibit 54A is a copy of one page of medical records, entitled "Substance Abuse Consult." The consult was taken in July 2005, before appellant underwent surgery at Ben Taub General Hospital. The document contains the notes of Kim Jackson, a substance abuse counselor, regarding appellant's history of drinking. Specifically, the notes indicate that appellant had a 40-year history of drinking six to eight beers a day and that appellant was counseled on the dynamics of addiction. At trial, appellant confirmed the notes were in his medical records, but stated that his daily beer consumption was two to three beers a day and that he did not recall answering Jackson's questions. Appellant objected that the notes were hearsay and that their admission into evidence violated the Confrontation Clause. ... Numerous Texas courts have held that reports and business records are indeed non-testimonial in nature. [¶] Accordingly, we hold that Jackson's notes are not testimonial and that their admission into evidence did not violate the Confrontation Clause." [NOTE: Also defendant's own statements.]

State v. Slater, 285 Conn. 162, 939 A.2d 1105 (Conn. Jan 22, 2008) – "The defendant next contends that the victim's statements to [Nurse] Judd and [Dr.] Wise were testimonial because they were made in conjunction with the administration of a rape kit and therefore were made in contemplation of a criminal prosecution. The defendant relies, in particular, on the statute governing the collection of evidence in a rape case, General Statutes § 19a-112a, as establishing such intent. [FN13] We reject this contention. ... the nature of the victim's statements and the context in which they were elicited make it clear that she reasonably expected that she was speaking primarily to provide Wise and Judd with information that would enable them to treat her. Every statement that Wise recorded related to the treatment of a potential injury. For instance, the victim described all exchanges of bodily fluid, i.e., through oral and vaginal intercourse, and that the defendant had ejaculated in her vagina. All of these details would be relevant to assessing the patient for possible pregnancy and sexually transmitted diseases. Indeed, Judd testified that she had administered a blood test for venereal disease before the victim left the hospital. The statement regarding the puncture wound on her hand undoubtedly relates to medical treatment as well. None of the victim's statements related to the identity of her assailant nor to other details of the crime unrelated to medical treatment, such as, for example,

the make and model of the van, the type of knife, or the location of the assault. ... A rape victim is necessarily in need of medical attention."

Thomas v. State, 288 Ga.App. 602, 654 S.E.2d 682, 07 FCDR 3763 (Ga. App. Nov 28, 2007) – prison rape case – "the statements in this case that were admitted under the medical diagnosis or treatment exception do not fall within any of the described classes of testimonial statements. In particular, no objective witness would reasonably conclude that these statements were made under such circumstances that the statement would be available for use at a later trial."

People v. Perkins, 2007 WL 2781034 (Mich. App. Sep 25, 2007) (unpub) – "The declarant told the security police officer at the hospital that she and the victim had gone over to defendant's house "to confront him about taking some 'E' pills," defendant and the victim got into an argument on the front porch, and defendant shot the victim. This information went beyond that necessary to obtain medical treatment for the victim, and, because the declarant was making the statements to a police officer, she may well have been making them for the purpose of establishing past facts possibly relevant to future criminal proceedings." – but harmless

State v. Heddrick, 2007 WL 2411354 (Wash. App. Div. 1 Aug 27, 2007) (unpub) – prisoner attacked guards – "Officer Braden stated that after the nurse examined Heddrick for two or three minutes, Heddrick 'was cleared to go back [to his cell].' ... Heddrick appears to argue that the nurse's statement that he was cleared to return to his cell is testimonial hearsay, excludable as a violation of the Confrontation Clause. [¶] Assuming, without deciding, that the nurse's statement was hearsay, it was not testimonial and therefore does not implicate the Confrontation Clause. Her purpose in making the statements was to provide medical attention and treatment, not to make a formal statement or further a prosecution."

State v. Hardy, 2007 WL 766128, 2007-Ohio-1159 (Ohio App. 8 Dist. Mar 15, 2007) (unpub) – DV case – "[¶ 78] Statements made to a medical professional for purposes of receiving medical treatment or diagnosis do not constitute testimonial statements. *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834."

State v. Mancini, 2007 WL 2363719 (Minn. App. Aug 21, 2007) (unpub) – DV case – "The record reflects that Dr. Towey testified that for purposes of medical diagnosis or treatment, he asked D.M. what caused her injuries. According to Dr. Towey, D.M. stated that her injuries were caused when appellant punched and kicked her in the face. Dr. Towey is not a government agent nor was he acting in concert with a government agent. Moreover, Dr. Towey asked the questions in order to assess D.M.'s medical condition. Accordingly, D.M.'s statements to Dr. Towey were not testimonial ..."

State v. Benton, 2007 WL 2217057, 2007-Ohio-3945 (Ohio App. 6 Dist. Aug 03, 2007) (unpub) – rape case – "[¶ 52] It is of interest for the purposes of the present matter that in *Stahl* the statements at issue were those of a rape victim to a sexual abuse nurse examiner at a unit much like the one here. The *Stahl* court found that such a unit's primary mission was the care of its patient. Thus, statements made in the course of that care could not objectively be believed to be for trial and were, consequently, not testimonial. *Stahl* at 196-197, 2006-Ohio-5482, ¶ 39-40."

State v. Warlick, 2007 WL 1439648, *1+ (Tenn. Crim. App. May 17, 2007) (unpub) – "The ambulance attendant was dispatched to the scene of a motor vehicle accident and found the Appellant's fourteen-year-old son sitting in the roadway. He had sustained an injury to his shoulder, he complained of pain, his heart rate was up, and he appeared anxious. The attendant asked him questions in order to provide medical treatment. Clearly, the attendant was at the scene to offer medical assistance, not to gather information to be used in a later prosecution of the boy's mother. We conclude from the totality of the circumstances that an objective witness in the son's position would not have considered the possibility that his statement might later be used to prosecute his mother for a criminal offense. Thus, the minor son was not acting as a 'witness' giving 'testimony.'"

State v. Sandoval, 154 P.3d 271 (Wash. App. Div. 3, 2007) – ¶ 8 Witness statements to a medical doctor are not testimonial (1) where they are made for diagnosis and treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working with the State. *State v. Moses*, 129 Wash.App. 718, 729-30, 119 P.3d 906, *review denied*, 157 Wash.2d 1006, 136 P.3d 759 (2006). This includes statements of fault in domestic violence cases since the identity of an abuser may affect the witness's treatment. *Id.* at 729, 119 P.3d 906. ¶ 9 Here, Ms. Thacker told Dr. Jenkins that Mr. Sandoval kicked her, hit her with his fists, and hit her several times with a belt. Ms. Thacker explained where she felt pain. Dr. Jenkins used this information to conduct an examination of Ms. Thacker's injuries. The police were not present during Dr. Jenkins discussions with Ms. Thacker and Dr. Jenkins did not discuss whether the report would be used in a criminal investigation. According to Dr. Jenkins, the manner in which an injury occurs, including whether it was inflicted by a stranger or by a family member, impacts diagnosis and treatment. Dr. Jenkins testified that asking for names in domestic violence cases helps her to "better communicate with the patient." RP (Dec. 8, 2004) at 111. ¶ 10 In sum, Ms. Thacker's statements were made for diagnosis and treatment purposes and were not testimonial, or primarily given for criminal prosecution purposes. *Moses*, 129 Wash.App. at 729-30, 119 P.3d 906. Mr. Sandoval's confrontation rights were not violated."

Moses v. Payne, 2007 WL 1101494, *1 (W.D. Wash. April 10, 2007) (unpub), aff'd, 543 F.3d 1090, 08 Cal. Daily Op. Serv. 12,122 (9th Cir. Sep 15, 2008), __ F.3d __, 2009 WL 213070 (9th Cir. Jan. 30, 2009) (amended) (habeas) – habeas – "Evidence of a previous domestic violence incident was admitted at trial. An emergency room doctor and social worker who saw the deceased at the hospital in November 2001 testified that Jennifer Moses stated that Petitioner hit and/or kicked her in the face. ... Federal courts have recognized that "*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial." *United States v. Saget*, 377 F.3d 223, 228 (2d Cir.2004). ... As the Washington Court of Appeals noted, courts addressing *Crawford's* impact on statements admitted under the medical diagnosis and treatment exception focus on the *purpose* of the declarant's encounter with the health care provider. (See Dkt. No. 10, Ex. 3 at 10). Dr. Appleton was not involved in the investigation of the assault and was not working in conjunction with police or governmental officials to develop testimony. Petitioner does not point to anything in the record indicating the deceased had any reason to believe her statements to Dr. Appleton would be used at a trial. Dr. Appleton's testimony is admissible under *Crawford*." – statements to social worker might be

testimonial, but admission was harmless

Commonwealth v. Hartsfield, 2007 WL 29385, *1 -3 (Ky. App. 2007), reversed by Hartsfield v. Com., ___ S.W.3d ___, 2009 WL 425008 (Ky. Feb 19, 2009) – intermediate court found rape victim's consultation with SANE practitioner was for medical diagnosis or treatment and not testimonial – state supreme court reversed, though without discussing medical diagnosis or treatment exception

People v. Mileski, 2007 WL 28288 (Mich. App. 2007) (unpub) – "However, the remarks the complainant made to the police officer, and to the investigating nurse, had less to do with quelling an emergency than with building a case against defendant. *Davis, supra*, 126 S Ct 2273-2274. Accordingly, even if those remarks qualified as excited utterances or some other form of excepted hearsay, they were nonetheless testimonial in nature and thus barred. *Id.*" – [NOTE: This implies a false either/or choice between building a case or quelling an emergency, as if there are no other possibilities.]

State v. Stahl, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834 (Ohio 2006) – “After the victim's alleged rape, police took her to a hospital unit specializing in examining rape victims. The State sought to introduce her statements to the nurse practitioner who examined her. The supreme court adopted the "objective witness" test of the testimonial nature of such statements, holding a testimonial statement included one made under circumstances leading an objective witness reasonably to believe the statement would be available for use at a later trial, and the relevant inquiry was the victim's expectation when making the statement. The questioner's intent was only relevant if it could affect a reasonable declarant's expectations. As the victim had already identified defendant to the police, her later statements in a medical examination, repeating that identification, were not made under circumstances leading an objective witness reasonably to believe they would be available for use at a later trial. The statements were made to a medical professional at a medical facility primarily to receive proper medical treatment and not to investigate past events related to criminal prosecution, so they were not testimonial, under the Sixth Amendment.”

Medina v. State, 122 Nev. 346, 143 P.3d 471 (2006) – “Defendant was convicted of five counts of sexual assault of a victim 65 years or older, one count of battery with intent to commit a crime, victim 65 years or older, and one count of first-degree kidnapping of a victim 65 years or older. The victim died before defendant's trial began. On appeal, the court found that ... the testimony of a forensics nurse about what the victim told her during the sexual assault examination did violate the Confrontation Clause because the nurse was a police operative. ... She testified that she is a "forensics nurse" and that she gathers evidence for the prosecution for possible use in later prosecutions. As such, the circumstances under which Ryer made the statements to Adams would lead an objective witness to reasonably believe that the statements would be available for use at a later trial.” – **refused by followed by State v. Hill, 236 Ariz. 162, 336 P.3d 1283, ¶ 19 (Ariz. Ct. App. 2014)** –

State v. Slater, 2006 Conn. App. LEXIS 460 (Conn. Ct. App. 2006), aff'd, State v. Slater, 285 Conn. 162, 939 A.2d 1105 (Conn. Jan 22, 2008) –

State v. Kirby, 2006 Conn. LEXIS 386 (2006) – “We conclude that the complainant's statements to Knapp were not testimonial under Crawford, and, therefore, properly were

admitted under the "firmly rooted" medical treatment hearsay exception, which satisfied the applicable rule of *Ohio v. Roberts*, supra, 448 U.S. 66. The statements did not identify the defendant as the assailant, and the complainant's statements about her kidnapping and assaults were relevant to Knapp's determination of the origin of her injuries. They were, therefore, germane to describing the complainant's need for "medical treatment," and were not "testimonial." Moreover, Knapp's questioning of the complainant was secondary to the more detailed interview and statements taken by Thornton at the scene, which we have concluded were testimonial under *Crawford*. See part I B 2 of this opinion. Accordingly, the trial court properly admitted into evidence Knapp's testimony about the complainant's statements to him."

State v. Grimes, 2006 Ohio 4262 (Ohio Ct. App. 2006) – Defendant appealed that the unredacted medical records of the victim were testimonial records. The court disagreed and held that although the victim did not testify, the medical professionals who wrote the notes testified. The records were non-testimonial business records.

Commonwealth v. Brown, 2006 Va. App. LEXIS 152 (Va. Ct. App. 2006) – "Defendant was indicted for rape, object sexual penetration, two counts of forcible sodomy, and burglary. A Sexual Assault Nurse Examiner (SANE) examined the victim and prepared a SANE report. The nurse died prior to trial and, thus, the Commonwealth sought to introduce the report itself, with the nurse's opinion and the victim's statements to the nurse during the course of the examination redacted. Defendant moved to suppress the SANE report as redacted on the ground that it violated his Sixth Amendment right to confront witnesses. The trial court granted defendant's motion. The Commonwealth appealed. The appellate court reversed. The appellate court found that none of the *Crawford* Sixth Amendment Confrontation Clause factors that would compel suppression of the evidence were present. Specifically, it found that the SANE report as redacted contained no accusations whatsoever, that the report was the result of a physical examination of the victim, and that the report was not derived from information gathered in an adversarial setting."

State v. Romero, 2006 NMCA 45 (N.M. Ct. App. 2006) – Defendant was convicted of several domestic violence and rape charges against his wife. Before trial, the defendant killed his wife and was subsequently convicted of her murder (but the conviction was reversed). In the domestic assault trial, the prosecutor admitted several statements of the victim, one being to a SANE examiner. On appeal, the court found that the statements to the SANE were testimonial. The court reasoned that since the victim had not been medically examined until she reported the incident to the police and they made an appointment with the SANE for her. The court solely relied on the "reasonable expectation" prong in *Crawford* and found that a reasonable person in the victim's position would have understood that her statements to the SANE might later be used in court due to the SANE's training and expertise in evidence collection.

State v. Saunders, 132 Wn. App. 592; 132 P.3d 743 (2006) – Defendant was convicted of domestic assault. The victim did not testify. The court upheld the admission of statements made by the victim to paramedics: "Typically, the purpose of giving a statement to a provider of medical diagnosis or treatment is to obtain appropriate care. Here, there is no reason to believe that a reasonable person in Hieronymus' position would think she was making a record of evidence for a future prosecution when she told paramedic Keyes and Dr. Andrews that her injuries occurred as a result of her boyfriend choking her and throwing her against the wall. The responsibilities of these two medical professionals bear no similarity to those of the government

officials, historic and contemporary, whose activities are at the core of *Crawford's* holding. Saunders' Sixth Amendment right was not violated by the admission of their testimony.” The identity of her assailant was allowed in to evidence through the testimony of the paramedics since it related to the paramedic’s diagnosis and treatment of the victim.

People v. Purcell, 364 Ill. App. 3d 283; 846 N.E.2d 203 (2006) – Defendant attacked his wife with a stun gun 6 days prior to her murder. Defendant was convicted of her murder. Statements of the deceased victim to a police officer and physician were admitted at trial in relation to the stun-gun attack. Because the statements to the police officer were made approximately 6 hours after the attack, they were improper excited utterances and testimonial. In relation to statements made to the physician, the court held: “In this case, Dr. Petty treated Barbara for the injuries she sustained earlier that day on May 31, 2001. At the time of the hospital visit, Dr. Petty's role was medical rather than investigatory. Barbara's statements describing her injuries were nontestimonial because they "were not accusatory against [defendant] at the time made and, thus, do not trigger enhanced protection under the confrontation clause." In re T.T., 351 Ill. App. 3d at 993. However, Barbara's remaining statements to Dr. Petty were testimonial because they described the physical confrontation and identified defendant as the attacker. Thus, we conclude that *Crawford* gave defendant the right to bar Dr. Petty from testifying to the portion of Barbara's statements in which she described defendant's attack with the stun gun.”

Commonwealth v. Lampron, 2005 Mass. App. LEXIS 1248 (2005) – In this drunk driving case, “the statements in the hospital records were not testimonial in fact and did not violate the Confrontation Clause because the challenged notations appear to have been made within hours or a day after his admission and were related to evaluating his condition at the time of his admission in order to determine appropriate treatment. The notations were not made in anticipation of their use in the investigation and prosecution of a crime.

State v. Sheppard, 2005 Ohio 6065 (Ohio Ct. App. 2005) – “Defendant argued that his rights to confrontation and due process were violated by the testimony of a psychologist. The appellate court held that the psychologist's testimony was non-testimonial and fell within Ohio R. Evid. 803(4). While there was no evidence that the victim realized the statements she made to the psychologist would be used in a criminal trial, the testimony was properly admitted as the victim appeared for cross-examination. The admission of the hearsay testimony of the psychologist was proper as the failure to conduct a voir dire of the victim was not fatal as the psychologist and the victim were cross-examined.”

State v. Davis, 2005 Ohio 6224 (Ohio Ct. App. 2005) – “On appeal, the court found that admission of the victim's statements to medical personnel and testimony regarding the dispatch did not violate defendant's confrontation right under U.S. Const. amend. VI. The description of the assault to medical personnel was for the purpose of medical diagnosis and treatment, was nontestimonial, and was admissible under Ohio R. Evid. 803(4).”

State v. Molina, 2005 Wash. App. LEXIS 2058 (Wash. Ct. App. 2005) – “Defendant argued that testimony admitted at trial regarding out of court statements and a question by the victim were inadmissible hearsay that also violated his Sixth Amendment right to confrontation. The appellate court found that the doctor asked how the victim got the wound. She responded that her ex-boyfriend stabbed her. The victim's response was necessary to ascertain the nature of the wound inflicted and to provide her with appropriate medical treatment. The statement was

reasonably pertinent to diagnosis and treatment of her injuries. Her statements were admissible under the statement for medical treatment exception of Wash. R. Evid. 803(a)(4) because a doctor or social worker may recommend counseling or escape from the dangerous domestic environment as part of a treatment plan.”

State v. Johnson, 2005 Del. Super. LEXIS 253 (Del. Super. Ct. 2005) – “The elderly victim had expressed fear of defendant, her former handyman, after an earlier burglary, and she did not want to discuss the alleged later rape with police at all. She did make many statements to medical professionals, immediately after the incident and after her return to her winter home, and to her children. Except for a few statements to a nurse who had a role in gathering forensic evidence, the court held that most of the statements were nontestimonial in nature under a Sixth Amendment analysis, so that they would be admissible if they fell within a deeply rooted hearsay exception under Del. R. Evid. 803 and bore indicia of reliability. Many of the statements were clearly admissible as made for purposes of obtaining medical treatment, and others were excited utterances. Statements of the victim's then-existing state of mind with regard to fears of returning to the house were admissible, but other statements that would have related to the history of the victim's fears of defendant were not. Finally, since there was plenty of other evidence as to the victim's medical condition, the court declined to admit her medical treatment records as business records.”

State v. Bartholomew, 2005 Wash. App. LEXIS 832 (Wash Ct App 2005) – “The victim did not testify at defendant's trial for kidnapping and attempted murder. The superior court admitted the victim's hearsay statements through two witnesses who found her on the side of the road. The victim told them that defendant had beaten her up. Her statements were admissible as excited utterances under Wash. R. Evid. 803(a)(2). Her hearsay statements to medical personnel two days after the offense, in which she identified defendant as the assailant, were testimonial in nature. *** [The victim] should have reasonably known that her statements would lead to the identity and prosecution of her assailants. She spoke with Lindall and Dr. Slack two days after the offense, when the initial shock would have faded. Police officers were present when Lindall treated [the victim] in the hotel room. Additionally, [the victim] filled out a police report and spoke with a police officer while in the hospital. Although there are some circumstances in which statements made to medical personnel are not testimonial, this is not such a case.”

State v. Lee, 2005 Ohio 996 (2005) – “While being examined by the sexual assault nurse, the wife detailed that her husband had strangled her and beaten her with a belt, and then retrieved a knife from the kitchen and demanded that she have sex with him. The appellate court held that because the wife's statements to the sexual assault nurse were non-testimonial, the trial court erred in excluding them. A reasonable person under the circumstances would have had no reason to believe that her statements made to the examining nurse would later be used at trial. The nurse indicated that a detailed description of the events was crucial to a successful examination, giving her the knowledge necessary to conduct a thorough examination. She then testified as to the specifics of the victim's case. The record indicated that the victim first went to the police and was then sent for treatment. However, no officers accompanied her, nor were any officers present during her examination. Further, despite defendant's repeated assertions that the medical consent form included statements made by the victim, the plain language of the consent form referenced categories of physical evidence.”

People v. West, 355 Ill.App.3d 28 (Ill App Ct 2004), not followed by People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675, 318 Ill.Dec. 707 (Ill. App. 1 Dist. Feb 25, 2008) – Statements made by a victim to an ER nurse and doctor of the cause of her symptoms and pain were held to be non-testimonial and properly admitted; but statements concerning identity of the assailants were deemed testimonial.

State v. Vaught, 268 Neb. 316 (Neb. Sup. Ct. 2004) - This case involved a 4-yr old victim of sexual abuse who informed a physician during a medical examine about the identity of the defendant. “We believe on the facts of this case that the victim's statement to the doctor was not a "testimonial" statement under *Crawford*. As discussed above, the victim's identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment. In the present case, 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. {NOTE: It does not appear that the victim testified at any hearing in this case.}

People v. Cage, 120 Cal. App. 4th 770, 15 Cal.Rptr.3d 846 (2004), aff'd, 40 Cal.4th 965, 155 P.3d 205, 56 Cal.Rptr.3d 789 (Cal. 2007) – “During a fight between defendant and her 15-year-old son John F., John sustained a long and nasty cut down his neck. John made three successive hearsay statements—to a police officer at the hospital, to a doctor at the hospital, and to the same police officer at the police station—each to the effect that defendant had picked up a piece of glass and deliberately slashed him with it.” The court held “The statement to the police officer at the police station was clearly testimonial. The statement to the doctor at the hospital was just as clearly nontestimonial. We will hold that the statement to the police officer at the hospital was not testimonial because the interview was not sufficiently analogous to a pretrial examination by a justice of the peace; among other things, the police had not yet focused on a crime or a suspect, there was no structured questioning, and the interview was informal and unrecorded.

People v. Cervantes, 118 Cal. App. 4th 162, 12 Cal. Rptr. 3d 774 (Cal. App. 2d Dist. 2004) – Three Defendants killed one victim and paralyzed another victim. One Defendant confessed the crime to a witness from whom he sought medical aid from for injuries he suffered during the murder. The witness went to police. The 3 Defendants were in a gang and the witness afraid to testify regarding the statement. The witness did testify regarding the one Defendant's confession in a trial involving the other two Defendants. The Court held that the witness could testify to the statement because the state of the confessing Defendant was a statement against penal interest (FRE 801(d)(2)(a)) and there was no Confrontation clause violation against the two non-confessing Defendants because the statement to the witness was not testimonial. The confession was made to the witness to explain his injuries and to receive medical help, and with reasonable expectation it would not be repeated due to the fact that witness was afraid of Defendant and his gang. Therefore, no *Crawford* analysis was required.

➤ Sub-Category: Witness's Statements During Ongoing Therapy
(category added October, 2008)

(This category includes only cases in which a witness, rather than a victim, makes incriminating statements during therapy. See part 12, Sub-Category: Statements Made During Ongoing Therapy, for cases in which the patient is the victim.)

McCarley v. Kelly, 759 F.3d 535 (6th Cir. 2014) (habeas) – small child witnessed his mother's murder – police officer suggested putting child in therapy to obtain information from him – child went into therapy, therapist reported to officer what child had said – oddly, at trial the therapist was asked to read from reports to officer, rather than simply testifying – held: it didn't matter what either the child or the therapist thought they were doing, this was police interrogation - the opinion is lengthy but diffuse, never actually grappling with the issues it raises, relying instead on an obviously-inadquate analogy to *Davis* (necessary to evade the limitations imposed by 28 U.S.C. § 2254(d)(1)) - the underlying point seems to be that *the therapist's* statements to the officer were testimonial, which is true but irrelevant, since the therapist testified

State v. Patel, 2008 WL 4233769, *9+, 2008-Ohio-4692, 4692+ (Ohio App. 9 Dist. Sep 17, 2008) (unpub) – bizarre family murder – "The record reflects that Dr. Kucyk testified as to her counseling sessions with R.P., [victim] Sejal's oldest son, who was seven years old at the time. With regard to Minaxi, Dr. Kucyk testified that R.P. indicated to her that Minaxi was at home along with at least eight other family members when Sejal was killed. ... Minaxi makes no attempt to explain why she believes that the statements R.P. made to his therapist were testimonial rather than non-testimonial; a prerequisite to any determination that a Confrontation Clause issue exists. See *Crawford*..."

Bush v. State, 193 P.3d 203, 2008 WY 108 (Wyo. Sep 17, 2008), cert. pet. filed (Dec. 16, 2008) – defendant was charged with wife's murder 15+ years after committing it – "After Mrs. Bush disappeared, her daughter was removed from Mr. Bush's custody and placed in the legal custody of the Wyoming Department of Family Services (DFS) and the physical custody of her maternal grandparents. [FN2] The grandparents observed some unusual behaviors by the child and sought treatment for her at Northwestern Mental Health Society in Sheridan. Initially, Bruce Andrews cared for the child. In April of 1991, when the child was almost three years old, Ms. Gordon took over her care. Ms. Gordon treated the child for over two years, typically seeing her once per week. Over the course of the treatment, the child made statements to Ms. Gordon implicating Mr. Bush in her mother's disappearance." – as adult, daughter had no memory of events occurring before she was 3 – "Because the statements were made for purposes of medical diagnosis and treatment, they also were not testimonial and their admission would not have violated the confrontation clause even if the declarant had not appeared at trial, testified and been subject to cross-examination."

➤ Sub-Category: Mandated Rape Kit

State v. Miller, 293 Kan. 535, 264 P.3d 461 (Kan. 2011) – SANE exam of child – "We conclude the SANE was acting as an agent of law enforcement when performing the role of collecting evidence and completing the KBI evidence kit. Any inquiries made solely for the purpose of recording answers on a KBI form would produce testimonial statements in most circumstances."

State v. Bennington, 293 Kan. 503, 264 P.3d 440 (Kan. 2011) – elderly victim – "because the SANE was complying with the protocol established pursuant to K.S.A. 2010 Supp. 65-448 and

was seeking information in addition to the history that she said she used for diagnostic purposes, her actions reflect that the primary purpose of posing the questions was to gather information for prosecution. ... Moreover, when a SANE—even one who is a non-State actor—follows the procedures for gathering evidence pursuant to K.S.A. 2010 Supp. 65-448 and asks questions prepared by the KBI, the SANE acts as an agent of law enforcement."

State v. Slater, 285 Conn. 162, 939 A.2d 1105 (Conn. Jan 22, 2008) – "The defendant contends that the administration of a rape kit for the collection of evidence necessarily would have made it apparent to the victim that her statements could be used later at trial. Under the facts of this case, we cannot agree. Section 19a-112a does require that medical personnel administer a rape kit to collect and preserve physical evidence related to the assault. That fact, however, does not eviscerate the medical treatment purpose of the exam for the victim."

➤ Sub-Category: Competence / Sanity Evaluations
(category added Dec. 2011)

People v. Fackelman, 489 Mich. 515, 802 N.W.2d 552 (Mich. 2011), cert. denied, 181 L. Ed. 2d 483 (Nov. 28, 2011) – a painfully long 5-2 opinion – "Dr. Shahid's report was 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]' ... Specifically, the following indications, taken together, are highly probative in this respect: (1) defendant's admittance to the hospital was arranged by lawyers, (2) defendant was arrested en route to the hospital, (3) the [*533] report noted that the Monroe County Sheriff requested notification before defendant's discharge, (4) defendant referred to a trial and to a gun in his responses related in the report, and, perhaps most significantly, (5) at its very beginning and ending, in which its overall context is most clearly identified, the report expressly focused on defendant's alleged crime and the charges pending against him."

Recorded Recollection

U.S. v. Garcia, 282 Fed.Appx. 14 (2nd Cir. May 29, 2008) (unpub) – "two police officers [were allowed] to read from arrest reports and booking sheets under the recorded recollection exception ... because both police officers were witnesses subject to cross-examination by the defendants testifying about their own prior recollection of events, we find no violation of Silva's Confrontation Clause rights."

Abney v. Com., 51 Va.App. 337, 657 S.E.2d 796 (Va. App. Mar 04, 2008) – cold-case 978 murder – "[C]ourts in a number of other jurisdictions, both before and after Crawford, have held that the past recollection recorded hearsay exception does not violate the Confrontation Clause where the declarant, despite his or her memory loss, was subject to cross-examination as a witness at trial." – agreeing with them

U.S. v. Cuesta, 2007 WL 2729853 (E.D. Cal. Sep 19, 2007) (unpub) – "testimony admissible as a recorded recollection does not violate the confrontation clause."

Gov't of the V.I. v. George, 2004 V.I. LEXIS 25 (V.I. Terr. Ct. 2005) – Recorded recollection documents are non-testimonial and since the witnesses testified at trial and there was the opportunity to cross-examine, there was no confrontation violation.

City of Kirkland v. Nakandakari-Arana, 2005 Wash. App. LEXIS 1587 (Wash. Ct. App. 2005) – When the witness testifies and is impeached or has memory refreshed with a prior recorded statement, this does not violate *Crawford* because the witness is available for cross-examination. “The victim alleged that defendant had assaulted her. A police officer interviewed her and wrote up a narrative statement on her behalf, in which she identified defendant as her assailant and gave a detailed account of the assault. When the victim could not identify defendant at trial, the prosecutor offered defendant's written statement into evidence. The trial court found that the victim's written statement to police violated defendant's right to confront witnesses and the City appealed. The appellate court noted that when a declarant appeared for cross-examination at trial, the Confrontation Clause placed no constraints at all on the use of her prior testimonial statements. The appellate court held that because the victim testified and was cross-examined, there was no confrontation clause violation.”

Business Records

(see also following sub-categories; and pt. 3, Foundation, for Rule 903(11) certifications; part 5, Public Records; and specific categories in part 15, Scientific Evidence)

State v. Abdi, 2015 ME 23, ¶¶ 1-15, 112 A.3d 360 (Me. 2015) – HUD form 50059, certifying compliance with section 8 eligibility procedures – “[¶ 25] Evidence created for an independent business purpose, even if it later becomes relevant at a trial, is distinct from testimonial evidence. ... [¶ 26] The 50059 forms are not testimonial because they were created to determine Abdi and Ahmed's eligibility for federal housing assistance, rather than for use at trial.”

United States v. Ekiyor, __ F.Supp.3d __, 2015 WL 1084525 (E.D. Mich. Mar. 12, 2015) – record of movements of baggage transported by airlines – “In light of the Court's conclusion above that the baggage log in proposed Exhibit 26 does not qualify as a business record, in part because it was prepared specifically for use in Defendant's trial, the Government faces an uphill battle in demonstrating that the baggage log is not testimonial in nature. ... evidence becomes testimonial in nature when it goes beyond a mere restatement of 'raw, machine-produced data' and includes 'representations not revealed in the raw data.'”

Carr v. State, 156 So. 3d 1052, 1063 (Fla. 2015), cert. pet. filed – “We find no error, let alone fundamental error, in the trial court's admission of the school record under the business record exception to the hearsay rule. [cite] This record, kept in the ordinary course of the school's business, is not testimonial and therefore does not implicate *Crawford*.”

United States v. Banks, __ F.Supp.3d __, 2015 WL 751953 (D. Kan. Feb. 23, 2015) – “Cellular service providers collect cell-site data during the course of their normal business operations. ... Here, the Court follows the overwhelming weight of precedent and concludes that the cell-site data offered by the government are not testimonial evidence, and hence, not subject to the Confrontation Clause.”

Anaman v. Commonwealth, 64 Va. App. 379, 768 S.E.2d 700 (Va. App. 2015) – “Appellant argues that the trial court erred when it *383 allowed into evidence a “Declaration of Unauthorized Use” form (Exhibit 5F) that one of the victims had completed after Citibank notified her that unauthorized charges had appeared on her credit card. ... the Commonwealth

introduced Exhibit 5F, the Unauthorized Declaration of Use form, through Steven Bishop, a fraud investigator for Citibank. Bishop testified that Exhibit 5F was a record that was made and kept in the ordinary course of business... Both the testimony of Steve Bishop and the content of Exhibit 5F make clear that the primary purpose of Exhibit 5F was not 'to establish or prove past events potentially relevant to later criminal prosecution.' *Davis*,... – not testimonial

State v. Gardner, 769 S.E.2d 196 (N.C. Ct. App. Dec. 2, 2014) – failure to register as sex offender – " Defendant first argues the admission of the GPS tracking reports violated his rights under the Sixth Amendment's Confrontation Clause in light of *Crawford*.... We disagree and hold that the GPS tracking evidence was properly admitted as a business record.... the GPS evidence admitted in this case was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant's compliance with his post-release supervision conditions."

People v. Coleman, 2014 IL App (5th) 110274, ¶¶ 149-153, 388 Ill.Dec. 465, 24 N.E.3d 373 (Ill. App. 2014) – "¶ 149 The fifth issue is whether the trial court erred in admitting the testimony of Marcus Rogers and Kenneth Wojtowicz, who testified about IP addresses. Defendant contends the trial court erred in admitting their testimony because it violated his right to confrontation, included inadmissible hearsay, and lacked a sufficient **500 *408 foundation. The State responds that assignment of computer IP addresses does not implicate the confrontation clause and there was sufficient foundation for the testimony regarding assignment of an IP address to defendant's computer. We agree with the State. ... [¶ 152] Google's records were not testimonial in nature. ... Google provided the IP addresses that sent the email threats."

Kirksey v. State, __ So.3d __, 2014 WL 7236987 (Ala. Crim. App. Dec. 19, 2014) – in child abuse resulting in death case, a comprehensively inadequate opinion – after concluding, without analysis and apparently without evidence (because it's plain error review), that certain notes by social worker and doctor contained in hospital records were not "pathologically germane" to medical treatment, holding that therefore they were not "business records of the Children's Hospital. The nature of the information contained in the documents was testimonial in nature, and their admission violated the Confrontation Clause." – but opinion does not discuss whether the information was hearsay, and if so from whom, and for what purpose it was spoken – in short, it does not contain any relevant legal analysis at all

People v. Marciano, __ P.3d __, 2014 COA 92 (Colo. App. 2014) – "¶ 41 Defendant's personal bank account statements from Netbank were not created for testimonial purposes. While duplicates of the statements may have been obtained in the course of investigating this case, the original statements were produced to facilitate the administration of the defendant's bank account. [cite] Because the Netbank statements are nontestimonial, the federal Confrontation Clause is not implicated..."

U.S. v. Tischler, 572 Fed.Appx. 63 (2d Cir. 2014) – immigration fraud – "Defendant Schwartz contends that the admission of certain DOL [Department of Labor] 'case notes' with notations that the case was associated with the Earl David investigation violated his right to confrontation under the Sixth Amendment. ... After review, we conclude that the primary purpose of the DOL records, which all parties agree were business records under Fed.R.Evid. 803(6), was not for later use at trial. These records were created solely as part of the administrative task of processing applications to ensure that only valid ones were approved. The references to the Earl

David investigation do not persuade us otherwise. The circumstances under which these case notes were prepared, viewed objectively, do not establish that the *primary* purpose of a reasonable department employee in the declarant's position would have been to create a record for use at a later trial." – not testimonial

U.S. v. Keita, 742 F.3d 184 (4th Cir. 2014) – "In sum, American Express created the reports at issue for the administration of its regularly-conducted business rather than 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]' [cite] The business records Defendant challenges are therefore not testimonial..."

Bunch v. State, 123 So. 3d 484, 494-95 (Miss. App. 2013) – "¶ 27. Bunch argues that the surveillance videos constituted inadmissible hearsay evidence and violated his Sixth Amendment right to confrontation. We disagree." – finding the videos to be business records

U.S. v. Williams, 720 F.3d 674, 697-99 (8th Cir. 2013) – "We conclude that the fingerprint cards are business records admissible pursuant to Federal Rule of Evidence 803(6) because they were created "in the regular course of business," [cite], and not "solely for an 'evidentiary purpose,'" [cite]."

People v. Fucito, 969 N.Y.S.2d 563, 564, 108 A.D.3d 777 (N.Y. App. Div. 2d Dept. 2013) – referring to "reports generated by the Office of the Chief Medical Examiner of the City of New York. Each of these reports consisted of a DNA profile developed from samples extracted from items found at the crime scene" – "a foundation for the admission of these reports as business records was established through the testimony of an *778 assistant director employed by the Office of the Chief Medical Examiner of the City of New York..."

State v. McNeil, 2013 UT App 134, ¶ 38 n.6, 302 P.3d 844 (Utah Ct. App. 2013) – "We note that phone records are frequently held to be non-testimonial."

United States v. Brooks, 715 F.3d 1069, 1072-1080 (8th Cir. Iowa 2013) – bank robber objected to records of the GPS device included with the cash – "In this case, the GPS tracking reports similarly were used to track Brooks in an ongoing pursuit. Although the reports ultimately were used to link him to the bank robbery, they were not created for this purpose as Brooks contends. In other words, unlike the chemical analysis report in *Melendez-Diaz* or the blood alcohol report in *Bullcoming*, the GPS reports were not created to establish some fact at trial. Instead, the GPS evidence was generated by the credit union's security company for the purpose of locating a robber and recovering stolen money. Therefore, the GPS reports were non-testimonial..."

United States v. Patterson, 713 F.3d 1237, 1246-1247 (10th Cir. Kan. 2013) – "We have previously held that admitting cell phone records of the type at issue here does not raise a Sixth Amendment problem."

Terry v. State, 397 S.W.3d 823 (Tex. App. Houston 14th Dist. 2013) – food stamp fraud – "In her second issue, appellant claims the trial court erred in admitting three of the generic worksheets used to calculate benefits that were compiled by state employees who interviewed appellant. According to appellant, her Sixth Amendment right to confrontation was violated by

the admission of these documents because the interviewers who prepared the reports did not testify. ... The parties have not cited and research has not revealed any precedent addressing whether documents generated during interviews of a party seeking government benefits contain testimonial statements. ... As reflected in the record, the objective purpose of the caseworker's interviews and generating the generic worksheets is to gather and record information about an applicant's current income and household size, among other things, to determine future benefit amounts. ... Though the application contains a warning pertaining to the applicant's duty to tell the truth, the worksheets were created for the purpose of administering SNAP, a 'food-stamp' program associated with the Texas Health and Human Services Commission. ... the primary purpose of the interrogation during these interviews is not to establish or prove past events potentially relevant to later criminal prosecution. [cite] Therefore, the statements contained in the generic worksheets are not testimonial..."

State v. Parker, 296 P.3d 54, 60-61 (Ariz. 2013) – "¶ 40 Parker argues that admission of the credit card transaction information violated the Confrontation Clause because Ward's report, having been created at the request of police, was testimonial, and he did not have the opportunity to cross-examine the sources who transmitted the transaction information to Capital One's database. Although Ward created the report at the request of the police, the transaction information in the report is not testimonial. The credit card records in Capital One's database are maintained to facilitate its business, not to aid police. The third parties who transmit transaction information to Capitol One similarly do so to facilitate their own businesses, not to aid police investigations. Parker's Confrontation Clause rights with respect to Ward were not violated because Ward was subject to cross-examination by Parker about the preparation of the report. ... ¶ 42 Parker also contends that admitting Wayne's timesheets violated the Confrontation Clause because Wayne was not available as a witness and had not previously been cross-examined. Wayne prepared his timesheets as part of a routine business practice, not to aid a police investigation. This type of record is nontestimonial..."

Infante v. State, ___ S.W.3d ___, 2012 Tex. App. LEXIS 10800 (Tex. App. Houston 1st Dist. Dec. 28, 2012) – "Typically, documents filed in compliance with the public-records or business-records exceptions to the hearsay rule are non-testimonial. ... But business or public records may be testimonial; for example, business records are testimonial if they contain a 'factual description of specific observations or events that is akin to testimony,' [cite] or if the business entity's 'regularly conducted business activity is the production of evidence for use at trial' ... we conclude that LeJeune's testimony regarding the results he found in his personal research based on the serial number acquired by a technician did not violate Infante's Sixth Amendment right of confrontation for three reasons. First, the serial number is exactly the kind of 'raw, machine-produced data' that the Supreme Court said was not at issue in *Bullcoming* ... The technician's out-of-court statement is only the recording of the serial number produced by the radio—he performed no analysis, made no representations as to his own personal observations or opinion, and did not attest to the accuracy of the number produced by the radio or the means by which it was obtained. [¶] Second, the record does not establish that the serial number was obtained for the primary purpose of generating evidence to use against Infante. ... Finally, the lab technician's identification of the radio's serial number is similar to the chain-of-custody link discussed in *Melendez-Diaz*..."

State v. Hood, ___ N.E.2d ___, 2012 Ohio 6208 (Ohio Dec. 31, 2012) – "[¶ 36] ... The fact that records are used in a trial does not mean that the information contained in them was produced for

that purpose. Even when cell-phone companies, in response to a subpoena, prepare types of records that are not normally prepared for their customers, those records still contain information cell-phone companies keep in the ordinary course of their business. ... [¶ 39] Because cell-phone records are generally business records that are not prepared for litigation and are thus not testimonial, the Confrontation Clause does not affect their admissibility. But in this case, there is no assurance that the records at issue are business records. ... [¶ 42] Thus, the cell-phone records in this case were not authenticated as business records, and that fact affects their status in regard to the Confrontation Clause. If the records had been authenticated, we could be sure that they were not testimonial, that is, that they were not prepared for use at trial. Without knowing that they were prepared in the ordinary course of a business, among the other requirements of Evid.R. 803(6), we cannot determine that they are nontestimonial. We thus find that the admission of the records in this case was constitutional error."

United States v. Cameron, 699 F.3d 621 (1st Cir. Me. 2012) (corrected December 21, 2012) – Yahoo records in child pornography case – "although the Supreme Court seemed to indicate in *Crawford* that business records are not testimonial 'by their nature,' 541 U.S. at 56, the Court later indicated that this is not necessarily the case for all business records. In *Meléndez-Díaz* ...[a]lthough the majority found that the certificates '[did] not qualify as business records,' they held that even if the certificates were business records, 'their authors would be subject to confrontation nonetheless.' ...

State v. Brooks, 56 A.3d 1245 (N.H. 2012) – "[Defendant] conceded at oral argument that nearly all of the records admitted in the case were not testimonial. He contends, however, that some of the telephone records 'were not records ... that were maintained in the ordinary course of business by the phone company.' We disagree. The defendant's argument relies upon the testimony of a witness who explained that the telephone records that were not billing records were nonetheless part of the telephone company's record system. ... Because all of the telephone records, including the records that would not normally be provided to a subscriber, were 'created for the administration of [the] entity's affairs and not for the purpose of establishing or proving some fact at trial,' [cite] they are not testimonial." [First ellipsis in original.]

United States v. Thompson, 686 F.3d 575 (8th Cir. Iowa 2012) – "The Government also introduced a record from the Iowa Workforce Development Agency ("IWDA")² showing no reported wages for Thompson's social security number during 2009 and 2010. ... the Mardesen Affidavit does not indicate that the IWDA record was prepared for the purposes of litigation, but it merely indicates that Mardesen prepared a copy of some of the existing IWDA employment records so that this copy could be introduced at trial. ... Because the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights."

United States v. Berry, 683 F.3d 1015, 1022-1023 (9th Cir. Cal. 2012) – Social Security fraud – "the documents admitted at Berry's trial were routine, administrative documents prepared by the SSA for each and every request for benefits. No affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Indeed, every expectation was that Berry would use the funds for their intended purpose. ... No reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Indeed, no police investigation even existed when the documents were created. Simply stated,

the holdings in *Melendez-Diaz* and *Bullcoming* do not support the dissenting argument. Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed. R. Evid. 803(8), and no constitutional violation occurred."

Commonwealth v. Albino, 81 Mass. App. Ct. 736, 967 N.E.2d 645 (Mass. App. Ct. 2012) – "The principal issue is whether the trial judge properly admitted in evidence notification letters from the Sex Offender Registry Board (SORB) to the defendant and the Gardner police department as business records ... The SORB notification letters at issue here were not testimonial but were instead maintained for administrative purposes. [cite] Thus, the introduction of these letters without the testimony of a SORB witness did not violate the defendant's [**648] Sixth Amendment confrontation rights."

Commonwealth v. Charles, 81 Mass. App. Ct. 901, 959 N.E.2d 994 (Mass. App. Ct. 2012), review granted (March 5, 2012) – "Unlike admission of the certificates of ballistics analysis, the certified records from the house of correction and the District Court clerk's office were properly admitted to establish a violation of G. L. c. 269, § 10G(a). Those records are business records because they were "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial," and as such, they are not testimonial."

Woodward v. State, __ So.3d __, 2011 Ala. Crim. App. LEXIS 124 (Ala. Crim. App. Dec. 16, 2011) – "Jennifer Scheid, a custodian of records for Sprint Nextel, testified about call records, including cell-tower information ... as to Scheid's testimony about the Sprint Nextel records and maps, the only relevant testimony in the record about the creation of the maps is that the records from which they were generated were kept in the ordinary course of business and that they accurately reflected the locations of all Sprint Nextel cell towers throughout the United States. ... there was no violation of Woodward's Sixth Amendment right of confrontation"

United States v. Bansal, 663 F.3d 634, 666-67 (3d Cir. Pa. 2011) – "His primary contention is that the records contain testimonial statements, so he had a right to confront the documents' authors and custodians. We disagree, first, because the Supreme Court has indicated that HN48business records are almost never 'testimonial' for Confrontation Clauses purposes, [cite], and because the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury."

State v. Bennington, 293 Kan. 503, 264 P.3d 440 (Kan. 2011) – "V.B. had a stroke and died before Bennington's jury trial, but she had related the events of the incident ... on a claim form submitted to her bank in reporting the unauthorized use of her financial card. ... V.B. made the statement in order to document with her bank that her financial card had been stolen and to seek credit of amounts withdrawn through unauthorized usage. In turn, the bank needed the document for its internal processing. Other significant circumstances are that the statement was made on a bank form, was given to a non-State actor, and was a part of the records created in the usual course of the bank's business. As such, the statement was of the type referred to in *Bryant* as one which by its nature was 'made for a purpose other than use in a prosecution.'" – non-testimonial

Commonwealth v. Siny Van Tran, 460 Mass. 535, 551-552, 953 N.E.2d 139 (Mass. 2011) – "At issue here are two business records. ... Contarino testified that the passenger manifest is created, as a matter of course, for the pilot and flight crew on every United Airlines flight, while the information produced on the ticket inquiries is stored in a company database to facilitate billing, and to comply with Federal Aviation Administration regulations. Clearly, the two records are created 'for the administration of an entity's affairs,' and were not created in anticipation of use at trial."

United States v. Langford, 647 F.3d 1309, 1327 (11th Cir. Ala. 2011) – "business records are not considered testimonial -a necessary element of a Confrontation Clause violation."

United States v. Keck, 643 F.3d 789, 795-797 (10th Cir. Wyo. 2011) – "the records of wire-transfer transactions involving Keck were created for the administration of MoneyGram's affairs and not the purpose of establishing or proving some fact at trial. [cite] And since the underlying wire-transfer data are not testimonial, the records custodian's actions in preparing the exhibits do not constitute a Confrontation Clause violation. ... In the context of electronically-stored data, the business record is the datum itself, not the format in which it is printed out for trial or other purposes."

United States v. Thornton, 642 F.3d 599, 605-607 (7th Cir. Wis. 2011) – "We turn finally to Thornton's claim that Agent Baudhuin's testimony violated the Confrontation Clause because he was allowed to testify that the ammunition was manufactured outside of Wisconsin based on materials kept by the ATF for the purposes of prosecution. ... Agent Baudhuin's reliance in part on written materials provided by ammunition manufacturers and kept by the ATF for the purposes of prosecution in no way violates Thornton's Confrontation Clause rights. Although the ATF kept the manufacturers' written materials for the purposes of aiding prosecutions, there was no indication that the manufacturers created this documentation of their products for that same purpose."

People v Kurth, 2011 NY Slip Op 1862, 82 A.D.3d 905, 918 N.Y.S.2d 536 (N.Y. App. Div. 2d Dep't 2011) – challenge to "certain records of the Orange County Sheriff's Department involving a firearm receipt and evidence logbook " – not testimonial

United States v. Naranjo, 634 F.3d 1198, 1213-1214 (11th Cir. Fla. 2011) – Ponzi scheme – "Naranjo also argues that the introduction of summary evidence deprived him of his Sixth Amendment right to challenge the accuracy of this evidence through cross-examination, as articulated in *Davis*... and *Crawford* ... because the summary evidence concerned investments made by investors who did not testify. ... The district court admitted into evidence the bank records and checks that provided the basis for the summary charts without any objection from Naranjo. These bank records and checks were admissible under the business records exception to the hearsay rule [cite]. Business records are not testimonial. [cites] Summary evidence also is not testimonial if the evidence underlying the summary is not testimonial. [cite] Because the Confrontation Clause only provides a right to cross-examination of testimonial statements, the district court did not plainly err by admitting summary evidence based on bank records and checks."

United States v. Yeley-Davis, 632 F.3d 673, 676-681 (10th Cir. Wyo. 2011), cert. denied (Apr. 25, 2011) – cell phone records – "Because the phone records here were 'created for the

administration of [Verizon's] affairs and not for the purpose of establishing or proving some fact at trial' we conclude that they were not testimonial and thus, not subject to confrontation."

State v. Ducasse, 2010 ME 117, 8 A.3d 1252 (Me. 2010) – "Ducasse contends that the court violated her Sixth Amendment right to confront witnesses by admitting in evidence a certificate of compliance from the manufacturer of the blood collection tubes in the blood-alcohol kit used to collect Ducasse's blood sample. ... Unlike the certificates in *Melendez-Diaz*, the certificate of compliance is a business record; it was 'created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.' For these reasons, we conclude that the statements in the certificate are not testimonial..."

United States v. Ali, 616 F.3d 745, 751-752 (8th Cir. Neb. 2010) – prosecution's ex. 95 "included the HSBC records for each taxpayer's 2002 refund anticipation check and copies of the cashier's checks issued to the taxpayers. The documents and letter were accompanied by a certification from Brian Wilson, custodian of records for HSBC, that they were made in the regular course of business. ... *Melendez Diaz*, however, does not apply to the HSBC business records that were kept in the ordinary course of business. These documents were nontestimonial and thus do not implicate the Confrontation Clause. [cite] Accordingly, the district court did not err in admitting the bank records that had been certified by HSBC's custodian of records." – cover letter, however, was "arguably equivalent to live, in-court testimony and thus not admissible as a business record" but its admission did not amount to plain error

State v. Al-Yasiri, 786 N.W.2d 520 (Iowa Ct. App. May 26, 2010) – ID theft case – confrontation clause challenge to "(1) credit application for the vehicle; (2) motor vehicle purchase agreement; (3) member application for a credit union savings account; (4) member application for a credit union checking account; (5) Visa credit card application; (6) report showing cash withdrawals; (7) currency transaction report; (8) Visa debit card, credit union membership card, and Iowa driver's license; (9) bill for post office box; (10) Hassan's driver's license photograph; (11) Al-Yasiri's driver's license photograph; and (12) Visa billing statement. ... The documents presented by the State in this case were not created for the purposes of trial. They were created as business records during the regular course of business. We conclude the documents were not testimonial..."

State v. Fleming, 155 Wn. App. 489, 228 P.3d 804 (Wash. Ct. App. 2010) – theft (or embezzlement) from rental store by failure to make payments – "Fleming asserts that the admission of a quote sheet, which indicated the replacement value of the rented property, violated his Sixth Amendment confrontation right. ... Hale did not [*503] compile the quote sheet at the behest of law enforcement officials. Instead, Hale completed the quote sheet in the normal course of her duties as a Quality Rentals employee. The fact that Quality Rentals began generating quote sheets at the request of the prosecutor's office does not render them testimonial in nature."

Grey v. State, 299 S.W.3d 902 (Tex. App. Austin 2009) – introduction of pen pack at punishment stage in non-capital trial – "the summary of appellant's criminal history at issue here is part of a social and criminal history prepared in 1990 upon appellant's arrival at the department of corrections following his 1989 retaliation conviction. The document is stamped 'restricted and confidential.' The objective circumstances indicate that the document was not prepared for prosecutorial use; appellant had already been convicted, and he was beginning a forty-five-year

prison sentence. Instead, the social and criminal history appears on its face to have been prepared for the internal use of the department in determining appellant's proper classification and assignment. We conclude that the challenged criminal history summary, not having been made in anticipation of prosecutorial use, was not testimonial, and the admission of the summary in evidence did not violate appellant's constitutional confrontation right."

U.S. v. Miller, 319 Fed.Appx. 351 (6th Cir. (Mich.) Mar 26, 2009) – " Business records are considered non-testimonial for purposes of the Confrontation Clause."

People v. Bradley, 2009 WL 1533154 (Cal. App. 2 Dist. Jun 03, 2009) (unpub) – "[Coroner's criminalist] Mahaney evaluated the victim's body at the scene and collected evidence from the body both at the scene and at the coroner's Forensic Science Center. Mahaney's form 81, the sexual assault evidence data sheet, is prepared in the regular course of business at the coroner's office. It documented the swabs taken from various areas of the body and other physical evidence. ... Mahaney's reports were neutral rather than accusatory, and they were not rendered testimonial simply by the fact of their use by Anderson in a trial some 15 years later."

State v. Jackson, __ N.W.2d __, 2009 WL 1118847 (Minn. App. Apr 28, 2009) – "Here, the firearm-trace report was not created for litigation purposes but instead is a record that is maintained in the normal course of business at the Bureau of Alcohol, Tobacco, and Firearms (ATF)." – not testimonial, but not because it's a business record: "we recently rejected an analysis that the protection under the Confrontation Clause turns solely on the nature or scope of a particular hearsay exception." – Rather, it's non-testimonial because "The firearm-trace report existed to track the gun's ownership and possession. The declarant did not expect that the firearm-trace report would be used prosecutorially. In addition to the fact that the firearm-trace report was not created for purposes of litigation, we also note that the firearm-trace report was not used to prove that appellant was armed with a shotgun during the robbery attempt. Instead, the state only offered it on redirect to rebut the defense's assertion that appellant was not the gun's owner. ... The firearm-trace report in this case is distinguishable from the BCA lab report in *Caulfield* because the trace report was not created to aid the state in the prosecution of appellant. ... because the information existed notwithstanding the police officer's request for a printed report, the officer's request did not amount to a request to create a report to serve as evidence in a criminal case, unlike the laboratory analysis in *Caulfield*. ... the mere fact that a record may be introduced in a criminal prosecution to prove an element of the crime does not mean the record was created for that purpose or that it is testimonial." - [NOTE: This seems like a very long and roundabout way of getting to the same point that would be reached by saying that genuine business records aren't testimonial.]

State v. Bennington, 2009 WL 981683 (Kan. App. Apr 10, 2009) (unpub) – rape and robbery victim prepared a statement " to document the loss of the victim's financial card and to seek credit of amounts withdrawn through unauthorized usage. The statement was made on a standard form issued by the bank and was maintained in the ordinary course of the bank's business to document the complaint and request for credit." – not testimonial

People v. Sterhan, 2009 WL 638205 (Mich. App. Mar 12, 2009) (unpub) – "Business records admissible under MRE 803(6) necessarily are not prepared in anticipation of litigation against a defendant and, therefore, do not qualify as testimonial. [cites] The Muskegon County Mental Health records comprising exhibit 17 were prepared for the purpose of treating defendant.

Because the records had no connection to any litigation against defendant and defendant does not dispute that it qualifies for admission under MRE 803(6), the prosecutor's use of the records did not violate the Confrontation Clause."

State v. Nash, 2009 WL 235622 (Wash.App. Div. 1 Feb 02, 2009) (unpub) – "reprint buy slips generated by the store's computer database system" not testimonial

U.S. v. Jackson, 2008 WL 5378015 (6th Cir. Dec 23, 2008) (unpub) – "It is clear that introduction of the cellular telephone records cannot constitute a *Crawford* violation, because they are not 'testimonial'"

People v. Roden-Delgado, 2008 WL 4951055 (Cal. App. 4 Dist. Nov 20, 2008) (unpub) – "testimonial evidence is limited to statements that, among other things, 'describe[] a past fact related to criminal activity....' [cite] Lab reports typically do not meet this requirement because they 'involve the contemporaneous recordation of observable events.'"

U.S. v. Lezcano, 296 Fed.Appx. 800 (11th Cir. Oct 17, 2008) – "Finally, Delgado asserts the admission of the business records without an accompanying records custodian testifying violated *Crawford*. This argument is meritless. *Crawford* applies only to testimonial statements, and in giving examples of "statements that by their nature were not testimonial[.]" and, thus, not subject to Confrontation Clause scrutiny, the *Crawford* Court identified business records."

State v. Johnson, 756 N.W.2d 883 (Minn. App. Oct 14, 2008), review denied (Dec 23, 2008) – autopsy report is testimonial – "We cannot conclude that the Supreme Court would view all statements currently allowed into evidence under the business-records exception as being non-testimonial."

State v. Hinchman, 666 S.E.2d 199 (N.C. App. Sep 16, 2008) – "'The distinction between business records and testimonial evidence is readily seen. Among other attributes, business records are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse.' ... [A] permit to perform chemical analyses of blood issued by the DHHS was neutral evidence and was created to serve a number of purposes other than to be used as evidence at trial, and it is not the type of testimonial evidence described in *Crawford*."

U.S. v. Burgos, 539 F.3d 641 (7th Cir. Aug 22, 2008) – this appeal "presents the question, under the Sixth Amendment's Confrontation Clause, whether the government may use at trial the contents of the defendant's alien-registration file (his "A-file")--specifically, a warrant of deportation and a "certificate of nonexistence of record"--to prove its case. We conclude that these A-file records are nontestimonial business records not subject to the requirements of the Confrontation Clause under *Crawford*..."

Dickey v. State, 2008 WL 3843531 (Tex. App.-Eastland Aug 14, 2008) (unpub) – "The exhibit is a computer-generated printout from the Correctional Care System of the Texas Youth Commission (TYC) where appellant had been committed for over two years. The printout contains an incident summary indicating generally that there were 150 incidents involving appellant. ... [Witness] indicated that such records were kept during the regular course of the business activities at TYC and that entries are made at or near the time of the events by someone

with knowledge of the events. ... The sterile printout, merely listing TYC incidents for which appellant was cited, does not contain any statements that are testimonial in nature."

State v. Sizemore, 2008 WL 2968921 (N.C. App. Aug 05, 2008), remanded for reconsideration in light of M-D by 363 N.C. 578, 684 S.E.2d 37 (N.C. Aug. 27, 2009) – (unpub) – arson – State Bureau of Investigation report created by agent "as part of his regular duties with the agency and in the ordinary course of agency business." – not testimonial

State v. Sanders, 2007 WL 5290431 (Ariz. App. Div. 1 Dec 24, 2007) (unpub) – forgery case – "check-cashing business's 'customer information report' on defendant ... included defendant's personal information, including references and a photo, as well as the dates, amounts, and issuing party of the checks he had cashed at the business" – "The evidence showed only that the check-cashing business prepared the record to facilitate 'recourse,' *i.e.*, to recover any potential losses from its customer. No evidence supports defendant's suggestion that this 'customer information report' was developed for use against defendant at a criminal trial. This 'customer information report' is not the type of 'testimonial' hearsay statement implicated by the Confrontation Clause."

State v. Sweet, 195 N.J. 357, 949 A.2d 809 (N.J. Jun 23, 2008), cert. denied, No. 08-381 (June 29, 2009) – "the distinction we earlier drew in *State v. Simbara* [175 N.J. at 49] between those business records that directly address the crux of a criminal prosecution and those on its periphery is controlling" – strongly implying the former are testimonial while the latter are not

People v. Brown, 50 A.D.3d 1154, 856 N.Y.S.2d 672,, 2008 N.Y. Slip Op. 04102 (N.Y. A.D. 2 Dept. Apr 29, 2008) – "Contrary to the defendant's contention, the DNA evidence was properly admitted under the business record exception to the hearsay rule [cites] and did not violate his Sixth Amendment right to confront his accusers (*see Crawford* ..."

State v. Johnson, 982 So.2d 672 (Fla. May 01, 2008) – Florida Dept. of Law Enforcement lab test is business record, but not nonetheless testimonial – "we find a distinction between records that are prepared as a routine part of a business's operation and records that are prepared and kept at the request of law enforcement agencies and for the purpose of criminal prosecution. An FDLE lab report is prepared pursuant to police investigation and is introduced by the prosecution to establish an element of a charged crime. In the instant drug possession case, the FDLE lab report was used by the State to prove that the seized substances were illegal drugs. The only purpose for the FDLE lab report was in anticipation of prosecution of the defendant on these drug-related offenses. We agree with Johnson that the FDLE lab report in this case is the functional equivalent of an affidavit [FN4] submitted instead of testimony from a live witness. It was prepared for litigation and written to prove critical elements of the prosecution's case." – [NOTE: Why does it change the character of evidence that it was "introduced by the prosecution to establish an element of a charged crime"? If it wasn't admitted for that reason, it would be objectionable as irrelevant.]

U.S. v. Qualls, 553 F.Supp.2d 241 (E.D. N.Y. May 19, 2008) (pretrial order) – "A business record is, by its very nature, 'fundamentally inconsistent with what the Supreme Court has suggested comprise the defining characteristics of testimonial evidence.'"

U.S. v. Taylor, 2008 WL 2122591 (11th Cir. May 21, 2008) (unpub) – "Here, the phone records were not prepared in anticipation of litigation and, as business records, they are non-testimonial and not subject to the Confrontation Clause."

Williams v. Schriro, 2008 WL 2328351 (D. Ariz. Jun 04, 2008) (unpub) (habeas) – "In his first ground, Williams argues, as he did on direct review, that the trial court erred when it admitted charts summarizing 1,600 telephone calls between certain telephone and pager numbers made during a three-month period." – concluding these were non-testimonial business records was "not contrary to or an unreasonable application of *Crawford*."

People v. Rawlins, 10 N.Y.3d 136, 884 N.E.2d 1019, 855 N.Y.S.2d 20, 2008 N.Y. Slip Op. 01420 (N.Y. Feb 19, 2008), cert. denied sub nom. Meekins v. New York, No. 07-10845 (May 09, 2008) – DNA report is non-testimonial– "The People in both appeals before us ask us to adopt an absolute rule, discussed in *Crawford*, that all business records 'by their nature [are] not testimonial' (*Crawford*, 541 U.S. at 56). [FN8] [fn] Some courts have reached that conclusion. [citing many cases]" – but declining to do so because the New York rules, unlike the federal rules, include police reports as business records – and adding: " However, we hasten to warn against the convenient danger of relying on a hearsay exception—particularly business records, and the breadth of that exception in New York—as a proxy for the statement's reliability when the real inquiry concerns whether a statement is "testimonial" as that term is now understood after *Crawford* and *Davis*. ... Thus, in each case, we must view the statement through a multi-faceted prism that properly reflects the 'core' evil the Confrontation Clause was designed to prevent: 'the civil-law mode of criminal procedure' and its insidious 'use of ex parte examinations as evidence against the accused [cite] In short, our task in each case must be to evaluate whether a statement is properly viewed as a surrogate for accusatory in-court testimony." [NOTE: What's the difference between a "multi-faceted prism" and the multi-factor test decried in *Crawford* at 63 and 67-68?]

State v. Earl, 2008 WL 383337 (Wash. App. Div. 2 Feb 12, 2008) (unpub) – incest case, paternity test – "We hold that Exhibit 2A, the blood draw form, is a nontestimonial business record

U.S. v. Hemphill, 514 F.3d 1350 (D.C. Cir. Feb 08, 2008) – "Needless to say, bank records and credit card statements are not testimonial evidence, and that is what the Confrontation Clause regulates. *Crawford* ..."

Reyes v. State, 2008 WL 138077, n.1 (Tex. App.-San Antonio Jan 16, 2008) (unpub) – "With regard to the admissibility of the DNA analysis, we briefly note that medical records, including DNA evidence, are admissible under the business records exception to the hearsay rule, and medical records may be properly introduced by a custodian of records. [cite] Furthermore, the introduction of medical records as a hearsay exception does not violate a defendant's confrontation rights."

U.S. v. Myles, 2008 WL 54878 (11th Cir Jan 04, 2008) (unpub) – "George Myles, Jr. appeals his convictions and aggregate sentence of 78 months' imprisonment for making fraudulent representations concerning aircraft parts to the Department of Defense and others ... Myles first asserts the district court violated the Confrontation Clause of the Sixth Amendment by admitting

seized business records from his company, Miles Aviation, and by admitting Agent Timothy Arnold's testimony regarding the contents of the records." – no plain error

Hungerford v. State, 972 So.2d 303 (Fla. App. 4 Dist. Jan 23, 2008) – "Appellant, a department store employee, was convicted of grand theft. She argues that a log prepared daily by the store manager for the cash registers was not admissible in evidence as a business record under *Crawford* ... Appellant recognizes that *Crawford*, in which the Court held inadmissible 'testimonial' out-of-court statements, such as a statement given to an officer investigating the crime, does not preclude business records from being admitted in evidence. ... In this case, the testimony demonstrated that the log was prepared on a daily basis for each register based on internal operating procedures of the company, in order to show an objective fact, a discrepancy. We accordingly agree with the state that the log was properly admitted as a business record and affirm."

State v. Sims, 2007 WL 4442684, 2007-Ohio-6821 (Ohio App. 8 Dist. Dec 20, 2007) (unpub) – "{¶ 4} Sims' first assignment of error complains that the court denied him his right to cross-examine witnesses by allowing a detective to identify and testify to the contents of a police laboratory report which verified the operability of the firearm. ... {¶ 8} ... The detective testified that reports generated from the test-firing of ballistic weapons were kept in the regular course of business by the Cleveland Police Department. This testimony established that the ballistic report prepared by the laboratory fell within the Evid.R. 803(6) business records exception to the hearsay rule. Like the autopsy report referenced in *Craig*, the ballistic test was nontestimonial because the conclusions stated in the report were fact, not opinion. Sims' constitutional right to confront witnesses was not violated."

People v. Jackson, 2007 WL 4283089 (Cal. App. 2 Dist. Dec 07, 2007) (unpub) – "By its own terms, *Crawford* does not apply to non-testimonial hearsay such as business records ..."
[NOTE: This is probation revocation case but opinion does not discuss whether *Crawford* applies at all.]

State v. Raines, 362 N.C. 1, 653 S.E.2d 126 (N.C. Dec 07, 2007), cert. denied, No. 07-11127 (June 29, 2009) – " Defendant contends that when McDonald read from various detention center incident reports, he interjected 'testimonial' statements which should have been excluded under *Crawford* ... [T]hese reports are more like business records, which 'by their nature [are] not testimonial.' ... McDonald testified that he was in charge of the facilities at the detention center, that he was familiar with the record keeping policies, that he frequently viewed incident reports, that it was policy for an incident report to be prepared after each incident, and that disciplinary action is to be documented when it occurs. There is no indication in the record that the reports were prepared for use in later legal proceedings. Instead, the record indicates that these reports were created as internal documents concerning administration of the detention center. The statements contained in the report from detention officers and other inmates were not taken in such a manner as to be testimonial or to be used during later criminal proceedings. The detention center incident reports are not testimonial in nature, nor are the statements contained therein testimonial. As a result, their admission did not violate defendant's Confrontation Clause rights or the analogous rights under the North Carolina Constitution."

U.S. v. Burton, 249 Fed.Appx. 882, 2007 WL 2914373 (2nd Cir. Oct. 05, 2007) (unpub) – "Bureau of Alcohol, Tobacco, Firearms and Explosives Form 4473 ... is a classic business record."

Wells v. State, 241 S.W.3d 172 (Tex. App.-Eastland Oct 25, 2007) – "Wells argues that the trial court erred by admitting CPS records containing statements from a witness that he was not given the opportunity to cross-examine. The State offered records from the 1992 CPS investigation under the business records exception to the hearsay rule. These records included an intake form that indicated that an unnamed 'collateral' person, who had lived with Wells the last few months, reported that Wells [stepfather] had watched the victim [stepdaughter] shower and dress, had inappropriately touched the victim, and had made inappropriate comments." – without further discussing business records exception, finding the intake form testimonial – see below under "Tips to Child Protective Services by Non-Mandated Reporters"

U.S. v. Morgan, 505 F.3d 332 (5th Cir. Oct 17, 2007) – "[W]e hold that, after *Crawford*, business records are not testimonial in nature and their admission at trial is not a violation of the Confrontation Clause."

Tavares v. O'Brien, 2007 WL 2908828 (D. Mass. September 27, 2007) (unpub) (habeas) – "Hospital records such as those introduced at Petitioner's trial are nontestimonial" [NOTE: This case was final before *Crawford* was decided, and should have been decided on retroactivity.]

Gonzalez v. State, 965 So.2d 273 (Fla. App. 5 Dist. Sept. 14, 2007) – "The pawn shop transaction form used in evidence at Mr. Gonzalez's trial was not prepared or obtained in a manner remotely resembling an ex parte examination. We believe that most true business records will not be 'testimonial' because they do not contain accusations of criminal activity and were not prepared for use in prosecuting criminal matters. That was certainly the case here. Accordingly, we conclude that the pawn shop transaction record was not testimonial hearsay prohibited by *Crawford*."

U.S. v. Cuesta, 2007 WL 2729853 (E.D. Cal. Sep 19, 2007) (unpub) – minor in possession of alcohol in National Park – "Cuesta argues that admission of the license violates the confrontation clause under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) because he was not afforded an opportunity to cross-examine anyone from the DMV regarding its purported testimonial assertions. This argument is without merit. '[P]ublic records ... are not themselves testimonial in nature and ... these records do not fall within the prohibition established by the Supreme Court in *Crawford*.' *U.S. v. Weiland*, 420 F.3d 1062, 1077 (9th Cir.2005)..."

State v. Monico, 2007 WL 2476583 (Hawai'i App. Aug 31, 2007) (unpub) – summary disposition order with minimal discussion – "employment documents" (not otherwise described) are not testimonial

People v. Thomas, 2007 WL 2430009 (Cal. App. 2 Dist. Aug 29, 2007) (unpub) – "standard sexual assault form documenting the examination conducted by" a sexual assault nurse was admissible as a business record, and did not implicate *Crawford*, after the patient's statements to the nurse had been redacted

Costley v. State, 175 Md.App. 90, 926 A.2d 769 (Md. Ct. Spec. App. 2007) – "Although an autopsy report may be classified as both a business and a public record, it is the contents of the autopsy report that must be scrutinized in order to determine the propriety of its admission into evidence without the testimony of its preparer. If the autopsy report contains only findings about the physical condition of the decedent that may be fairly characterized as routine, descriptive and not analytical, and those findings are generally reliable and are afforded an indicum of reliability, the report may be admitted into evidence without the testimony of its preparer, and without violating the Confrontation Clause. If the autopsy report contains statements which can be categorized as contested opinions or conclusions, or are central to the determination of the defendant's guilt, they are testimonial and trigger the protections of the Confrontation Clause, requiring both the unavailability of the witness and prior opportunity for cross-examination." (quoting *Rollins v. State*, 392 Md. 455, 497, 897 A.2d 821 (Md. 2006))

U.S. v. Beets, 2007 WL 2164263 (5th Cir. Jul 27, 2007) (unpub) – [post-Katrina fraud prosecution] "Beets also alleges that the government's failure to have an ARC [*i.e.*, American Red Cross] employee testify about the ARC application violated *Crawford* ... [T]he admission of Beets's ARC application was permissible, because it was a non-testimonial document admitted under the business records exception to the hearsay rule."

U.S. v. Moore, 2007 WL 1991060 (6th Cir. Jul 05, 2007) (unpub) – "To the extent Guizar, Herod and Ocegueda challenge the admission of the telephone records as hearsay, they disregard the fact that business records, including computer data compilations that are not printed out until trial, are an exception to the hearsay rule in federal court, Fed.R.Evid. 803(6); *United States v. Salgado*, 250 F.3d 438, 452 (6th Cir.2001), and that business records are considered non-testimonial for purposes of the Confrontation Clause, *see Crawford v. Washington*, 541 U.S. 36, 56 (2004)."

People v. Freycinet, 41 A.D.3d 731, 839 N.Y.S.2d 770, 2007 N.Y. Slip Op. 05522 (N.Y. A.D. 2 Dept. 2007), aff'd, 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450, 2008 N.Y. Slip Op. 05776 (N.Y. Jun 26, 2008)

State v. Heinricy, 645 S.E.2d 147 (N.C. App. 2007) – homicide by vehicle case – "Defendant argues that the trial court committed reversible error in admitting the affidavit of a chemist, Brad Johnson, containing defendant's blood alcohol level stemming from his 2001 DWI conviction in South Dakota. ... We hold that the affidavit is nontestimonial in nature and does not violate defendant's rights to confrontation. ... Brad Johnson determined defendant's blood alcohol content using the gas chromatograph head space method. ... Johnson's affidavit was limited to his objective analysis of the evidence and routine chain of custody information. Although the affidavit was prepared with the understanding that its use in court was probable, Johnson had no interest in the outcome of the trial. The affidavit was nontestimonial and properly admitted."

State v. Moss, 215 Ariz. 385, 160 P.3d 1143 (Ariz. App. Div. 1 2007) – "Nor are we persuaded that Dr. Kelly's testimony regarding the results of blood tests performed by non-testifying criminalists would fall within any exception to the requirements of the Confrontation Clause simply because the written report might qualify as a business record. The Supreme Court suggested in dicta in *Crawford* that business records are non-testimonial. *See* 541 U.S. at 56. ... As *Crawford* emphasized, however, the application of the Confrontation Clause is not controlled by state evidence law. 541 U.S. at 50-51. Here, the key question is whether the proffered

testimony of Dr. Kelly regarding the test results would be testimonial under *Crawford*. We agree with the trial court: the answer is yes."

U.S. v. Muñoz-Franco, 487 F.3d 25, 73 Fed. R. Evid. Serv. 611 (1st Cir. 2007) – bank fraud case – "Although the Court has yet to articulate a precise definition of 'testimonial,' it is beyond debate that the Board minutes are nontestimonial in character and, consequently, outside the class of statements prohibited by the Confrontation Clause. ... If business records are nontestimonial, it follows that the absence of information from those records also must be nontestimonial. Thus, the Confrontation Clause presents no bar to reliance on the absence of certain information from the Board meeting minutes to prove that the Board was not given that information."

Seigfried v. Greer, 2007 WL 1395469, *16+ (S.D.Miss. May 09, 2007) (unpub) – (habeas) "In Ground Five, Seigfried argues that the trial court erred in admitting into evidence the receipt from the video store (State's Exhibit # 1) indicating that petitioner had rented three movies, two of which were identified on the receipt as 'adult' movies. ... [B]ecause the receipt would qualify as business record, the Confrontation Clause is not implicated in the instant case."

State v. Howard, 2007 WL 1574413 (N.J. Super. A.D. Jun 01, 2007) (unpub) – drunk driving case – *Crawford* challenge to "the Guth Laboratories Certificate of Analysis and the Simulator Solution Certificate" – "Although the specific document that we held was non-testimonial in *Dorman* differs from the two certificates at issue here, all three share the common element of not being created with any specific defendant in mind. For the same reasons that we concluded in *Dorman* that the certificates of operability prepared before and after the machine was used to test the defendant were not testimonial in nature, we reach the identical conclusion here concerning the simulator solution certificate and the Guth Laboratories Certificate of Analysis. ... Although it is true that a breathalyzer machine is only used in connection with a DWI prosecution, we disagree that such intended law enforcement use should necessarily cause us to characterize these routine inspection documents as testimonial. The certificates at issue here were prepared in the ordinary course of business, at or about the time that the testing in question was completed, and accordingly, they qualify as business records under *N.J.R.E.* 803(c)(6). As we determined in *Dorman, supra*, slip op. at 7-8, these documents were not created with any particular prosecution in mind, and accordingly can properly be admitted without affording a defendant the right of confrontation."

U.S. v. Kilbride, 2007 WL 1589561 (D. Ariz. Jun 01, 2007) (unpub) – "The Government seeks to admit approximately 660,000 complaints received by America On-Line ("AOL"). The complaints allegedly were received from AOL customers who received spam email from Defendants and their co-conspirators. The Government also seeks to admit approximately 8,000 complaints received by the Federal Trade Commission ("FTC") regarding spam email sent by Defendants and their co-conspirators. ... The complaints are not testimonial. They are not in-court testimony or its functional equivalent, such as affidavits, depositions, prior testimony, or confessions. *Id.* [*Crawford*] at 52-53. Business records are not testimonial."

State v. Sherman, 2007 WL 1417411, *3+ (Wash. App. Div. 2 May 15, 2007) (unpub) – in shoplifting case, incident report prepared by Sears loss prevention employee not testimonial – "Bartosh completed the incident report in the normal course of his duties as a loss prevention employee at Sears, not at the behest of law enforcement officials, as was the case in *Hopkins*."

Bartosh included information (i.e., the date of the incident, the drill's identification number, the store's identification number, and the drill's retail value) that was relevant to Sears' business, independent of any relevance that same information might have in a criminal proceeding. By noting those pieces of information, Bartosh was not making a 'solemn declaration' for prosecutorial testimonial purposes, excludable under *Crawford*. [¶] Furthermore, Bartosh did not know Sherman, identify him, or in any way tie him to the shoplifting incident noted in the report."

State v. Warlick, 2007 WL 1439648, *1+ (Tenn. Crim. App. May 17, 2007) (unpub) – "the Medical Records Act, when read in conjunction with the Hospital Records as Evidence Act, is the functional equivalent of the business records exception to the hearsay rule. ... business records are nontestimonial evidence within the scope of a Confrontation Clause challenge."

People v. Barno, 2007 WL 1448732, *13+ (Cal. App. 4 Dist. May 17, 2007) (unpub) – in car vandalism case, repair bill admitted under "corroborative evidence exception to the hearsay rule. ... [T]he repair bill was a business record and therefore not considered testimonial under *Crawford*."

People v. Thong, 2007 WL 1453964 (Cal. App. 5 Dist. May 18, 2007) (unpub) – "Thong argues that the admission of hearsay in court records and FI [field identification] cards to which the gang expert testified violated his right to confrontation. ... case law is settled that FI cards are police reports on which a gang expert can rely to form his or her opinion and which are admissible under the public records exception to the hearsay rule."

U.S. v. Reeder, 2007 WL 1454965, *1 (9th Cir. May 17, 2007) (unpub) – "Reeder asserts that the district court plainly erred when it allowed appraisals obtained by the defrauded banks to be admitted in evidence. We disagree. Reeder waived his business record foundation claims when he expressly and voluntarily stipulated to the records' foundation. ... Moreover, Reeder's rights under the Confrontation Clause of the Sixth Amendment were not violated."

State v. Hewson, 642 S.E.2d 459 (N.C. App. 2007) – 911 event report properly admitted as business record, and is not testimonial

State v. Renshaw, 390 N.J.Super. 456, 915 A.2d 1081 (N.J. Super. A.D. 2007) – drunken driving, blood draw – "In the instant case, the preparation of the Uniform Certification for Bodily Specimens Taken in a Medically Acceptable Manner could not qualify for admission under the business record exception to the hearsay rule, *N.J.R.E.* 803(c)(6), because it was not prepared in the ordinary course of business. Instead, the certification was prepared solely to be used "in any proceeding as evidence of the statements contained" within such record. *N.J.S.A.* 2A:62A-11. As we observed in *Berezansky, supra*, the business records exception will not apply if the document was prepared specifically for the purposes of litigation. 386 *N.J.Super.* at 94, 899 *A.2d* 306." [note: law enforcement exception to business records exception??]

State v. Reynolds 2007 WL 601185, *4 (Iowa App.,2007) (unpub) – theft, forgery prosecution – Federal Reserve report non-testimonial

State v. Cook, 2007 WL 475444, 2007-Ohio-625 (Ohio App. 8 Dist.,2007) (unpub) – medical records containing statements of non-testifying witnesses admissible as business records

People v. Saucedo, 2007 WL 404878, *3 -4 (Cal.App. 6 Dist.,2007) (unpub) – "the admission of prison records under a recognized hearsay exception does not implicate the right to confrontation."

United States v. Ebersole, 2007 U.S. Dist. LEXIS 5870 (E.D. VA 2007) – fraud, false claims – Federal Government (State Department) document non-testimonial.

United States v. DiPace, 203 Fed.Appx. 368, 2006 U.S. App. LEXIS 27354, 2006 WL 3147474 (2nd Cir. 2006) – “*Crawford* explicitly preserved the business records exception, which encompasses documents such as the minutes of the trustees' meetings”

Anderson v. Commonwealth, 48 Va. App. 704, 634 S.E.2d 372 (Va. Ct. App. 2006) – A certificate of analysis regarding chain of custody of a lab sample is non-testimonial.

State v. Craig, 2006-Ohio-4571, 110 Ohio St.3d 306, 853 N.E.2d 621 (Ohio 2006) – “A non-examining coroner could testify based on an autopsy report admitted into evidence. Defendant's right to confrontation was not denied, as the report was a non-testimonial, business and public record.”

State v. Anderson, 2006 La. App. LEXIS 2316 (La. App. 2 Cir. 2006) – “The autopsy report describes the location of the wounds, the injuries inflicted by each wound, the path of the bullet, and whether a projectile was recovered. The information in the autopsy report was routine, descriptive, and nonanalytical; i.e., it was nontestimonial in nature and thus did not trigger the *Crawford* mandate for cross-examination pursuant to the Confrontation Clause.”

United States v. Spain, 2006 CCA LEXIS 245 (A.F.C.C.A. 2006) and United States v. Stafford, 2006 CCA LEXIS 212 (A.F.C.C.A. 2006) – A laboratory report from the Air Force Institute for Operational Health that indicated the appellant's urine had tested positive for a metabolite of marijuana was a non-testimonial business record.

United States v. Macias-Llamas, 202 Fed.Appx. 959, 2006 U.S. App. LEXIS 26456, 2006 WL 2990121 (9th Cir. Cal. 2006) – A Certificate of Non-Existence of Records and a Departure Verification are non-testimonial.

United States v. Feliz, 467 F.3d 227, 71 Fed. R. Evid. Serv. 734 (2nd Cir. N.Y. 2006) – "Although [defendant] does not challenge the District Court's determination that the autopsy reports were business records, he maintains that their admission violated his Sixth Amendment rights because he had no opportunity to cross-examine the medical examiners who prepared them. ... [Holding] that testimonial statements within the meaning of *Crawford* and *Davis* would not qualify as business records under Fed. R. Evid. 803(6). Stated differently, we hold that a statement properly admitted under Fed. R. Evid. 803(6) cannot be testimonial because a business record is fundamentally inconsistent with what the Supreme Court has suggested comprise the defining characteristics of testimonial evidence. ... In sum, therefore, we hold that where a statement is properly determined to be a business record as defined by Fed. R. Evid. 803(6), it is not testimonial within the meaning of *Crawford*, even where the declarant is aware that it may be available for later use at trial. ... Because the autopsy reports are business records as defined in Fed. R. Evid. 803(6), they are nontestimonial. ... We hold that the autopsy reports are equally

admissible as public records. For reasons substantially analogous to those outlined above, we find that public records are, indeed, nontestimonial under *Crawford*, 541 U.S. at 36, 124 S.Ct. 1354."

Dotie v. State, 2006 Tex. App. LEXIS 7200 (Tex. App. 2006) – “Defendant argued, inter alia, that the trial court erred in overruling his objection to the admission of records from a hospital because the author of the records was not available for cross-examination, and they contained hearsay information. The court of appeals disagreed. A witness testified that she was the legal custodian of the business records in question, that the records were kept in the regular course of business, and that an employee of the hospital recorded the information contained in the records at or near the time of the sexual abuse exam.”

State v. Musser, 2006 Iowa Sup. LEXIS 99 (Iowa 2006) – Medical/HIV lab reports are non-testimonial business records.

Acuna v. Commonwealth, 2006 Va. App. LEXIS 306 (Va. Ct. App. 2006) – A record from Department of Motor Vehicles is non-testimonial.

Johnson v. State, 2006 Tex. App. LEXIS 5460 (Tex. Crim. App. 2006) – The admission of a sexual exam report and DNA report were non-testimonial. “The reports at issue in this case do not fall within the *Crawford* testimonial categories. Instead, these documents contain reports of physical evidence collected during the investigation of a crime. They set forth matters observed pursuant to a duty imposed by law. *** The reports do not accuse Johnson of wrongdoing. They merely provide factual evidence that may support his conviction, in the same manner all evidence discovered or developed in an investigation has the potential to do.”

Fencher v. State, 31 Fla. L. Weekly D 1592 (Fla. Dist. Ct. App. 5th Dist. 2006) – “On appeal defendant contended that the trial court erred when it allowed the admission of a rape kit into evidence without the testimony of the nurse who collected the samples and when it limited defense counsel's closing argument. The court found that the evidence from the rape kit was admissible under the business record exception to the hearsay rule.” The rape kit records were non-testimonial business records.

Rollins v. State, 392 Md. 455, 897 A.2d 821 (Md. 2006) – “The autopsy report admitted at petitioner's trial was prepared by the former assistant medical examiner, who was no longer working for the county. Petitioner asserted that because the opinion testimony of the deputy medical examiner, who did testify at the trial, was based on hearsay statements contained in the autopsy, his right to confrontation under U.S. Const. amend. VI. And Md. Const. Decl. Rights art. 21 was violated by such testimony. Petitioner also alleged error with regard to the admission of the deputy medical examiner's expert testimony relating to the time and manner of the victim's death. The court noted that the portions of the autopsy report that contained the preparer's opinion as to the cause of the victim's death were redacted as testimonial. As a result, the autopsy report, as redacted, contained non-testimonial hearsay statements that were admissible under either the business or public records exception to the hearsay rule. As a result, petitioner's right to confrontation was not violated.”

United States v. Evans, 178 Fed.Appx. 747, 2006 U.S. App. LEXIS 12271, 2006 WL 1217901 (9th Cir. Cal. 2006) – Business records are non-testimonial

United States v. McIntosh, 2006 U.S. App. LEXIS 11057, 2006 WL 1158897 (7th Cir. Ill. 2006) – Business records are non-testimonial.

United States v. Page, 169 Fed. Appx. 782 (4th Cir. W.Va. 2006) – A certified penitentiary packet is a non-testimonial business record.

Michels v. Commonwealth, 47 Va. App. 461, 624 S.E.2d 675 (Va. Ct. App. 2006) – Documents from the Delaware Secretary of State, which certified that two entities were not corporations licensed in Delaware, were non-testimonial and properly admitted at trial.

Smith v. State, 2005 Ind. App. LEXIS 2442 (Ind. Ct. App. 2005) – Cell phone records are business records and, therefore, non-testimonial.

United States v. King, 2006 U.S. App. LEXIS 468 (4th Cir. N.C. 2006) – Business records are non-testimonial.

People v. Romano, 2005 NY Slip Op 51820U (N.Y. Sup. Ct. 2005) – “The computerized record of the Department of Finance, Parking Violations Bureau, listing the effective date and the expiration date of the license plate of [a car] is a routine a business record, not made for the purpose of litigation, and not in violation of Crawford.”

United States v. Rankin, 2005 CCA LEXIS 354 (N-M.C.C.A. 2005) –Service record entries for a period of unauthorized absence are not testimonial statements for purposes of the Sixth Amendment. They are business records and public records.

State v. Bellerouche, 2005 Wash. App. LEXIS 2648 (Wash. Ct. App. 2005) – A Trespass Notice is a business record and non-testimonial under *Crawford*.

Peterson v. State, 30 Fla. L. Weekly D 2154 (Fla. Dist. Ct. App. 1st Dist. 2005) – Department of Corrections records are business records and non-testimonial.

Desue v. State, 30 Fla. L. Weekly D 1775 (Fla. Dist. Ct. App. 1st Dist. 2005) – Department of Corrections release records of the defendant were non-testimonial business records.

Ellis v. Phillips, 2005 U.S. Dist. LEXIS 13910 (SDNY 2005) – “The Confrontation Clause was not violated by allowing one expert to testify as to DNA test results when the expert who conducted the tests was unavailable due to cancer under the business record exception to the hearsay rule.”

State v. Leonard, 2005 La. App. LEXIS 1106 (La App 1 Cir 2005) – A coroner’s report is non-testimonial under *Crawford*.

State v. Vaster, 2005 Wash. App. LEXIS 465 (2005) – A Judgment of Conviction and Sentence is non-testimonial.

Eslora v. State, 2005 Tex. App. LEXIS 2564 (2005) – Medical records are business records and are non-testimonial and do not require testimony from the preparing witness.

Rollins v. State, 161 Md. App. 34, 866 A.2d 926 (Md Ct Spec App 2005) – “Defendant argued the trial court erred in overruling his objection to the autopsy report prepared by one doctor and testified to by the medical examiner, because the document was hearsay, and its introduction violated his rights to confrontation. The opinions/conclusions in the autopsy report fell within the business records exception of the hearsay rule and was non-testimonial hearsay.”

State v. McKinney, 2004 Ohio 5518 (2004) – The business record exception does not fall under *Crawford*.

Smith v. State, 898 So. 2d 907 (Ala Crim App 2004) – Although the court held that this autopsy report from a non-testifying medical examiner violated the defendant’s Sixth Amendment rights (harmless error), the court nonetheless held, “*Crawford v. Washington*, 158 L. Ed. 2d 177, ___ U.S. ___, 124 S. Ct. 1354 (2004), does not appear to be implicated here because the evidence at issue is not testimonial. The admissibility of the autopsy report and materials associated with it is governed by hearsay law. This Court has held that an autopsy report is admissible as a business-records exception to the hearsay rule.”

United States v. Gutierrez-Gonzales, 111 Fed. Appx. 732 (5th Cir TX 2004) – Because the items in Gonzales' immigration file are nontestimonial, the Confrontation Clause does not bar their admission. Moreover, the Supreme Court noted that business records are "statements that by their nature are not testimonial" and therefore do not run afoul of *Crawford*.

People v. Shreck, 107 P.3d 1048 (Colo Ct App 2004) – Court records showing a defendant’s prior criminal convictions are business records and not subject to *Crawford*.

➤ Sub-Category: Drug Ledgers
(category added Dec. 2010)

United States v. Jackson, 636 F.3d 687 (5th Cir. Tex. 2011) (on rehearing) – still a long and not very clear opinion – idea seems to be that documents provided by nontestifying cooperating witness at proffer session are testimonial, just like words spoken at that session, unless a foundation is independently laid that the documents are what the CW said they were, in this case drug ledgers

United States v. Jackson, 625 F.3d 875, 878-885 (5th Cir. Tex. 2010) – withdrawn

➤ Sub-Category: Pseudoephedrine Purchase Logs
(category added August 2014)

State v. Guinn, 453 S.W.3d 846 (Mo. Ct. App. Dec. 4, 2014), reh'g and/or transfer denied (Dec. 22, 2014), transfer denied (Feb. 24, 2015) – "The records of Defendant's pseudoephedrine purchases did not violate Defendant's right of confrontation because those records were not testimonial in nature."

Montgomery v. State, 22 N.E.3d 768 (Ind. Ct. App. Dec. 11, 2014) – "the main purpose of the NPLEx [National Precursor Log Exchange] records is to enable the NADDI to track and regulate the sale of non-prescription ephedrine and pseudoephedrine. Accordingly, the main purpose of the NPLEx records is not to establish or prove some fact at trial. As such, in light of the United States Supreme Court's holding in *Melendez-Diaz*, we conclude that the records are not testimonial..."

State v. Cady, 425 S.W.3d 234, 239-40 (Mo. App. S. Dist. 2014), reh'g and/or transfer denied (Apr. 23, 2014), transfer denied (May 27, 2104) – " Shortly thereafter, Trooper Rutledge continued his investigation by accessing records of Defendant's purchases of pseudoephedrine using records from the National Precursor Log Exchange ("NPLEx"). ... it is clear that the NPLEx records at issue in this case are not 'testimonial' for purposes of the Confrontation Clause."

United States v. Wells, 706 F.3d 908, 913 (8th Cir. Mo. 2013) – "Wells argues that the admission of the pseudoephedrine logs violates the Confrontation Clause of the Sixth Amendment In *United States v. Mashek*, 606 F.3d 922 (8th Cir. 2010), we rejected the same argument made here. We held that *Melendez Diaz* did not preclude the admission of pseudoephedrine logs because they constituted non-testimonial business records under Federal Rule of Evidence 803(6). *Mashek*, 606 F.3d at 930. The same analysis applies here, and the district court thus properly admitted the logs."

United States v. Towns, 718 F.3d 404 (5th Cir. Tex. 2013) – "Towns next argues that admission of the pseudoephedrine purchase logs violated his Sixth Amendment rights under the Confrontation Clause. ... The pharmacies created these purchase logs ex ante to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver's license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. Because the purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause."

State v. Esteve, 92 So. 3d 1058, 1059-1064 (La.App. 1 Cir. 2012) – "defendant argues that the trial court erred in allowing the state to admit into evidence pharmacy logs detailing defendant's purchases of pseudoephedrine without requiring the state to show that the persons who created the documents were unable to testify. ... [W]e find that although these records might prove useful in a prosecution related to charges similar to those in this case, they were not created for the primary purpose of proving or establishing some fact at trial. Thus, we cannot say that the regularly conducted business activity in this case is the production of evidence for use at trial. Accordingly, these pharmacy records are non-testimonial..."

United States v. Mashek, 606 F.3d 922, 929-930 (8th Cir. Iowa 2010) – "The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are non-testimonial statements..."

State v. Rodgers, 2007 WL 2183085 (Wash. App. Div. 3 Jul 31, 2007) (unpub) – "Mr. Rodgers contends the court erred by admitting Rite-Aid pseudoephedrine logs documenting purchases of pseudoephedrine by him. He argues that the admission of such evidence constituted

testimonial hearsay in violation of *Crawford* ... Mr. Flinn testified that the Rite-Aid store had voluntarily, and not at the direction of law enforcement officials, maintained a log of purchases of pseudoephedrine products. Mr. Flinn testified that the logs recorded the purchasers' driver's licenses and addresses, and that such records were completed in the regular course of business and made at or near the time of sale. RCW 5.45.020. The logs were thus not a 'solemn declaration' for prosecutorial purposes, excludable under *Crawford*. 541 U.S. at 51. The fact that the logs were used in a criminal prosecution against Mr. Rodgers did not transform their information into the functional equivalent of testimony."

➤ **Sub-Category: Trespass Notices**
(category added March 2009)

Liner v. Artus, 2008 WL 5114485 (S.D. N.Y. Dec 05, 2008) (unpub) (habeas) – "It may well be, as the Appellate Division recognized, that "trespass notices" are created in part with an eye to the possibility that they will later be used in court. [cite] But they are not created in order to memorialize witness testimony. Rather, they are created for the purpose of informing a suspected shoplifter that he is no longer welcome on the store's property, and is excluded from the store's general invitation to the public to enter its premises."

➤ **Sub-Category: Telephone Records**
(category added March 2013)

State v. Austin, __ So.3d __, 2014 WL 3450795 (La. App. 2 Cir. 7/16/14) – "The Tenth Circuit United States Court of Appeals in *U.S. v. Yeley-Davis*, 632 F.3d 673, 678–81 (10th Cir.2011) has determined that cellphone records of calls made and received, as well as affidavits certifying those records, are not testimonial and therefore not subject to the Confrontation Clause of the U.S. Constitution." – the Louisiana court agrees

Everroad v. State, 998 N.E.2d 739, 740-42 (Ind. App. 2013) transfer denied, 2014 WL 521084 (Ind. 2014) – " Exhibit 34 is simply a glossary of terms to guide the interpretation of an AT & T bill, providing definitions corresponding to abbreviations on the bill. ... It is not a solemn declaration for the purpose of establishing some fact. Nor was the legend compiled to establish a fact in a criminal proceeding. As such, it is not testimonial."

State v. Austin, 113 So. 3d 306 (La.App. 5 Cir. Mar. 13, 2013) – witness authenticated her own cell phone records – "[T]he Louisiana Supreme Court has held that telephone records do not constitute hearsay since they are 'generated solely by the electrical and mechanical operations of the computer and telephone equipment, and [are] not dependent upon the observations and reporting of a human declarant.' [cites] In addition, the U.S. Supreme Court has held that the Confrontation Clause applies only to testimonial hearsay. [cite] [¶] Consequently, since the records were properly authenticated by a person who was subject to cross-examination and because they do not constitute hearsay, defendant's confrontation right was not violated."

➤ **Sub-Category: Summaries / Compilations of Business Records**
(category added March 2009)

(This category includes charts and summaries under Rule 1006.)

United States v. Vallone, 698 F.3d 416 (7th Cir. Ill. 2012) – prosecution for sellers of abusive tax shelters – "[IRS agent] Welch instead testified as both a summary witness, identifying the tax returns and describing their contents, and as an expert, explaining the extent to which the returns had understated the taxpayers' actual income. [cite] Insofar as Welch's testimony summarized what the tax returns themselves declared, it did not implicate the Confrontation Clause. As *Crawford* recognizes, the Confrontation Clause only applies to testimonial statements. [cite] To describe what a taxpayer has claimed on a tax return is not to recount a testimonial statement."

People v. Youseff, 2009 WL 311742 (Cal. App. 2 Dist. Feb 10, 2009) (unpub) – "Simply because a document was created in response to a subpoena duces tecum from information gathered and kept in the ordinary course of business does not automatically mean it was produced 'with an eye toward trial.' In fact, it is a com-pilation of records existing before trial was contem-plate-d."

U.S. v. Happ, 2008 WL 5101214 (S.D. Ohio Nov 25, 2008) (unpub) (pretrial order) – "the Government's exhibits summarizing NCFE's business records in this case, are not testimonial hearsay and their admission will not violate Happ's Confrontation Clause rights."

Public Records and Court Filings

(see also business records, above; pt. 16, driving record, proof of service or mailing; pt. 15, autopsy reports, fingerprint evidence)

United States v. Perkins, __ F.Supp.3d __, 2015 WL 1263344 (D.D.C. Mar. 19, 2015), appeal pending – "Perkins argues that his trial counsel rendered ineffective assistance by failing to raise Confrontation Clause challenges to records and affidavits admitted into evidence at trial related to the Federal Deposit Insurance Corporation ("FDIC") insured status of the banks that were robbed... Perkins' claim fails because the official records and accompanying affidavits were not testimonial and, thus, do not invoke Confrontation Clause concerns."

United States v. Burwell, __ F.Supp.3d __, 2015 WL 222316, at *9-11 (D.D.C. Jan. 15, 2015) (§ 2255 proceeding), appeal pending – "Burwell next alleges that his trial and appellate counsel rendered ineffective assistance of counsel by failing to raise a Confrontation Clause challenge to records and affidavits admitted into evidence at trial to establish that the banks that were robbed were Federal Deposit Insurance Corporation ("FDIC") insured, one of the elements of Count II. ... Burwell's claim fails because the official records and accompanying affidavits were not testimonial..."

United States v. Lorenzo-Lucas, 775 F.3d 1008, 1009-11 (8th Cir. 2014) – warrants of deportation are non-testimonial

Adjei v. Commonwealth, 63 Va. App. 727, 763 S.E.2d 225 (Va. 2014) – "The record and applicable law demonstrate that preparing and maintaining records of alien applications for permanent residence and the agency's disposition of each application are necessary to the USCIS's administrative and adjudicatory functions. Thus, the objective circumstances in this case supported the finding that the challenged documents were prepared for administrative

purposes, not for use in an investigation or prosecution of a crime. As a result, we hold that the *747 documents were not testimonial..."

U.S. v. Lopez, 762 F.3d 852 (9th Cir. 2014) (as amended August 7, 2014) – "We have not yet addressed a Confrontation Clause challenge to the admissibility of a verification of removal as opposed to a warrant of removal. However, reasoning by analogy to *Bahena–Cardenas* and *Orozco–Acosta*, we conclude that like a warrant of removal, a verification of removal is nontestimonial."

U.S. v. Albino-Loe, 747 F.3d 1206, 1208 (9th Cir. 2014) – "Albino–Loe contends, among other things, that the admission into evidence during his criminal trial of a Notice to Appear, the document filed by the government to initiate removal proceedings before an immigration judge, violated his rights under the Confrontation Clause. We disagree, concluding that the statements made in a Notice to Appear are not testimonial." – As a separate issue, "Albino–Loe argues that admitting the certifications of authenticity violated his Confrontation Clause rights. We have however already held that 'a routine certification by the custodian of a domestic public record ... and a routine attestation to authority and signature ... are not testimonial in nature.' [cite] The certifications at issue here did not accomplish anything other than authenticating the A–File documents to which they were attached." (ellipses in original)

Commonwealth v. Reddy, 85 Mass. App. Ct. 104, 5 N.E.3d 1254 (Mass. App. 2014) – "'a completed return of service is admissible under the public records exception to the hearsay rule and ... is nontestimonial for purposes of the confrontation clause.'"

State v. Tayari-Garrett, 841 N.W.2d 644, 646-47 (Minn. App. 2014), review denied (Mar. 26, 2014) – contempt prosecution against an attorney – "Here, the orders issued by the district court are not testimonial as they merely reflected the status of the E.M.M. case when appellant failed to appear to represent her client. The orders were drafted before the state first requested that the district court hold her in constructive contempt and before charging her with criminal contempt. The orders were not created for the purpose of criminally prosecuting appellant."

Gaines v. State, 999 N.E.2d 999, 1001 (Ind. App. 2013) – "The primary purpose of the return of service is administrative—ensuring that the defendant received notice of the protective order. [cite] Although the return of service may be used later in a criminal prosecution, the return of service was not created solely for *1005 use in a pending or future criminal prosecution. *See Melendez–Diaz*,... As such, we conclude that the return of service was not testimonial..."

U.S. v. Morales, 720 F.3d 1194, 1197-99 (9th Cir. 2013) – "Like the warrants of removal considered in *Orozco–Acosta*, the Field 826s are nontestimonial because they were 'created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.' [cite]. As is evident from the form itself, as well as Agent Wycoff's testimony about its use, a Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. [cite] The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial. Even though statements within the form "may become 'relevant to later criminal prosecution,' " this potential future use "does not automatically place [the statements] within the ambit of

‘testimonial.’ ” [cite]. Accordingly, we hold that neither the Field 826 itself, nor the statements within it, implicate the Confrontation Clause."

State v. Copeland, 353 Or. 816, 306 P.3d 610, 612-14 (Or. 2013) – "we conclude that the out-of-court declaration made by the deputy sheriff who issued the certificate of service in the underlying FAPA proceeding here was not "witness" evidence that triggered defendant's confrontation right under Article I, section 11, because the certificate was an official record whose content was confined to a matter that the deputy sheriff was bound by an administrative duty to report, and it did not include investigative or gratuitous facts or opinions. In addition, we conclude that the certificate was not testimonial evidence under the Sixth Amendment."

United States v. Rojas-Pedroza, 716 F.3d 1253 (9th Cir. Cal. 2013) – "We have since extended *Orozco-Acosta* to a number of other A-file documents, concluding that they are likewise not made in anticipation of litigation and thus are non-testimonial."

Commonwealth v. Bell, 83 Mass. App. Ct. 82, 981 N.E.2d 220 (Mass. App. Ct. 2013) – SORNA case – "The defendant claims that the admission in evidence of a Texas sex offender registry document violated his Sixth Amendment right to confrontation.⁹ We disagree. ... The Texas records were certified documents created on forms produced by the crimes record service of the Texas Department of Public Safety. The document in question states it is to be used 'for sex offender registrant purposes only.' As in *Fox*, we conclude that the document was created 'for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.'"

United States v. Bustamante, 687 F.3d 1190, 1191-1194 (9th Cir. Cal. 2012) – "Our holding today does not question the general proposition that HN6 birth certificates, and official duplicates of them, are ordinary public records 'created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.' [cite] But Exhibit 1 is not a copy or duplicate of a birth certificate. ... Exhibit 1 is 'quite plainly' an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship."

State v. Hubbard, 169 Wn. App. 182, 279 P.3d 521 (Wash. Ct. App. 2012) – "Jeffrey G. Hubbard appeals his conviction of felony violation of a no-contact order. Hubbard argues that the trial court erred in admitting exhibit 1, a clerk's minute entry made during his sentencing on a prior conviction, which established that he was served in open court with a no-contact order. Hubbard contends that admission of the minute entry violated his Sixth Amendment confrontation rights. Because the clerk's minute entry is not a testimonial statement, we affirm."

State v. Shivers, 280 P.3d 635, 634-640 (Ariz. Ct. App. 2012) – written declaration of service of protective order is not testimonial – "The Declaration was created and filed with the court to serve administrative purposes as required by statute and would have been created regardless whether Shivers later violated the Order. Shivers was not being investigated for violating the Order at the time the Declaration was created and filed, and neither law enforcement nor the prosecution requested its creation. A reasonable person taking into account all surrounding circumstances would conclude the Declaration primarily served a contemporaneous administrative purpose rather than a prosecutorial one. [cite] Although the possibility existed the

Declaration could be used in a later prosecution if Shivers violated the Order, the Declaration remains non-testimonial because its purpose at the time of creation was not prosecutorial."

State v. Tisius, 362 S.W.3d 398 (Mo. 2012) – "Near the end of [penalty phase] trial, the State informed the court it intended to offer the certified copy of Tisius' conviction of possessing a prohibited item in the department of corrections. The State sought to read the docket entry showing Tisius entered an *Alford* plea² the complaint to establish the basis of the crime, and his sentence. Tisius objected to the portion of the complaint stating he 'knowingly possessed a metal object known as a boot shank, a weapon or item [of] personal property that could be used in such manner' as hearsay. The circuit court permitted the State to read the complaint up to the point that it said Tisius was charged with knowingly possessing a metal object 'commonly known as a boot shank.' ... While the complaint was prepared to instigate litigation, it was not created to preserve evidence. [cite] If Tisius wanted to confront the evidence against him in the complaint, he would have needed to not plead guilty to the charge."

Commonwealth v. Faust, 81 Mass. App. Ct. 498, 504-505, 964 N.E.2d 987 (Mass. App. Ct. 2012) – "The defendant finally claims that the admission without objection of a page of a police journal, which reflected that Alexander Amacon was the owner of the iPod and a GPS unit,ⁿ⁵ [*505] created a substantial [**993] risk of a miscarriage of justice as to that count of the complaint. The Commonwealth concedes that the journal was admitted in violation of the defendant's right to confront witnesses against him."

Hite v. State, __ S.E.2d __, 2012 Fulton County D. Rep. 1271, 2012 Ga. App. LEXIS 345 (Ga. Ct. App. Mar. 27, 2012) – "Unlike an analyst's report of tests done and conclusions drawn, however, the Roadblock Form in this case is a record of supervisory approval for the establishment of a roadblock for certain stated purposes. The testimony established that the form is created for the administration of the State Patrol's affairs, as it is prepared in every case of a road block, presumably for recordkeeping purposes. The fact that the form can be used in court, with an additional stamped certification from a custodian of records (in this case Puckett), does not change the primary purpose of the form from administrative to testimonial."

Commonwealth v. Fox, 81 Mass. App. Ct. 244, 961 N.E.2d 611 (Mass. App. Ct. 2012) – "On appeal, [defendant] argues that the admission of records kept by the Sex Offender Registry Board (SORB), in the absence of a SORB witness, violated his right under the Sixth Amendment to the United States Constitution to confront the witnesses against him. ... The documents were not created for the 'purpose of establishing an essential fact at trial.' [cite] These records are [*246] maintained for administrative purposes,... The introduction of the SORB records at issue here in the absence of a SORB witness did not violate the Sixth Amendment."

United States v. Phoeun Lang, 672 F.3d 17, 18-25 (1st Cir. Me. 2012) – prosecution for making false statement during naturalization process – an applicant fills out a N-445 form that asks about criminal charges, etc., and immediately before the oath ceremony a CIS official re-asks the questions verbally, noting the applicant's adherence to prior answers with a red checkmark on the N-445 form – "Lang's first argument on appeal is that the admission of form N-445 violated his constitutional right to confront the witnesses against him. According to Lang, the CIS agent's 'statements' in the N-445 form -- specifically, the verification checkmarks next to Lang's responses -- were admitted to prove that he made false statements to CIS. As such, they were testimonial hearsay requiring that the CIS officer who verified Lang's responses, not

Michaud, be present at trial and subject to cross-examination. ... The red checkmark next to the applicant's response demonstrates the CIS agent's compliance with the administrative protocol and the form is kept permanently in every applicant's file. ... we are convinced that Lang's N-445 form, like all others similarly generated, was a non-testimonial public record produced as a matter of administrative routine, for the primary purpose of determining Lang's eligibility for naturalization. ... The form was not testimonial."

United States v. Cabrera-Beltran, 660 F.3d 742, 746-747 (4th Cir. Va. 2011) – "At trial, the government used Treasury Enforcement Communications System (TECS) records to show that the defendant and other co-conspirators crossed the border on certain dates and in certain vehicles. ... Unlike the affidavits at issue in *Melendez-Diaz*, the TECS records in this case were not created for trial. To the contrary, the information contained in the TECS records was entered for the mere purpose of 'maintain[ing] a record of what [was] coming into the United States.'"

People v. Warrick, __ P.3d __, 2011 Colo. App. LEXIS 1745 (Colo. Ct. App. Oct. 27, 2011) – "Here, the booking reports and mittimus were not created to establish a material fact at any future criminal proceeding. Rather, they were created for routine administrative purposes. ... the booking reports and the mittimus here were not 'testimonial' under *Crawford* and did not trigger defendant's confrontation rights."

People v. Myers, 87 A.D.3d 826, 928 N.Y.S.2d 407 (N.Y. App. Div. 4th Dep't 2011) – "the orders of protection were not testimonial in nature"

Paige v. United States, 25 A.3d 74, 76-84 (D.C. 2011) – "a guilty plea which, of itself, is usually a solemn declaration made for the purpose of establishing facts."

State v. Tryon, 242 Ore. App. 51, 255 P.3d 498 (Or. Ct. App. 2011) – "Defendant appeals from a judgment imposing punitive sanctions against her for contempt based on her violation of a restraining order issued under the Elderly Persons and Persons with Disabilities Abuse Prevention Act. [cite]. She asserts that the trial court erred by admitting into evidence the return of service of the restraining order, in violation of her right of confrontation ... Although *Melendez-Diaz* rejected the argument that the state makes here—that all documents falling within the historical hearsay exception are admissible without confrontation—in this case, the return of service is readily distinguishable from the forensic certificates held to be testimonial in *Melendez-Diaz*. It was not made under oath and did not include any sworn testimony; thus it was not an affidavit. Nor was it prepared in response to a request made by law enforcement during the course of an investigation. In fact, the violation of the restraining order did not occur until well after the return of service was completed."

Commonwealth v. Ellis, 79 Mass. App. Ct. 330, 945 N.E.2d 983 (Mass. App. Ct. 2011) – DUI case – "On appeal, the defendant challenges the subsequent offense portion of the conviction on the grounds that (1) his confrontation rights, see *Melendez-Diaz* [cite], were violated by the introduction, at the subsequent offense trial, of Registry of Motor Vehicles (RMV) records and a probation record ... '[B]usiness and [*333] public records are generally admissible absent confrontation ... because -- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -- they are not testimonial.' [cites] 'Certified records of convictions are created to establish the fact of adjudication, so as to promote accountability to the public regarding official proceedings and

public knowledge of the outcomes of those proceedings.' [cites] Thus the certified conviction record in this case was properly admitted absent confrontation. ...

"In contrast, there was error under *Melendez-Diaz* in the admission of the probation certification. This record does not qualify as a nontestimonial business record under *Melendez-Diaz*. Rather, this record, which was generated on June 24, 2008, has every appearance of having been prepared in anticipation of litigation -- the litigation being the defendant's criminal trial for OUI as a fourth offense, which is the subject of this appeal. n6 In fact, the certification is addressed, as if it were a memorandum, to the assistant district attorney who would be the prosecutor."

United States v. Smith, 640 F.3d 358, 362-364 (D.C. Cir. 2011) – "In this case, the letters from the New York state court clerk describing Smith's prior convictions were created at the request of the Department of Justice shortly before Smith's trial. The clerk's letters were "made for the purpose of establishing or proving" a fact at trial. [cite] For Confrontation Clause purposes, they are not the same as an authenticated copy of an official record of conviction."

Commonwealth v. Shangkuan, 78 Mass. App. Ct. 827, 943 N.E.2d 466 (Mass. App. Ct. 2011), review denied, 459 Mass. 1111, 947 N.E.2d 43 (Mass., Apr. 27, 2011) – violation of restraining order – "documents "prepared specifically for use at [the defendant's] trial" are testimonial "[w]hether or not they qualify as business or official records." Thus, the fact that the return of service in this case is a public record does not of itself establish that it is not "testimonial" for purposes of the confrontation clause. We conclude that the primary purpose for which the return of service in this case was created is to serve the routine administrative functions of the court system, ensuring that the defendant received the fair notice to which he is statutorily and constitutionally entitled... Unlike the drug certificates at issue in *Melendez-Diaz*, however, a return of service is not created solely for use in a pending criminal prosecution. For this reason, it is not testimonial for purposes of the confrontation clause."

State v. Carter, 238 Ore. App. 417, 241 P.3d 1205 (Or. Ct. App. 2010) – "Here, although the warrant was offered as evidence on the failure to appear charge, it was not created for that purpose. Rather, the warrant was created for the purpose of causing defendant to appear in court to answer a reckless driving charge. It was created for administration of the trial court's process, not for the purpose of proving a fact at trial." - nontestimonial

People v. Leach, 405 Ill. App. 3d 297, 298-311, 939 N.E.2d 537, 345 Ill. Dec. 694 (Ill. App. Ct. 1st Dist. 2010) – "Embraced within the rubric of nontestimonial hearsay is the public records exception, records required by statute or authorized to be maintained by the nature of the office, evidencing matters properly required to be maintained and recorded. [cite] Like business records, the exception is based on the assumption that public officers will perform their duties, that they lack motive to falsify, and that public inspection to which many such records are subject will disclose inaccuracies. [cite] Records of the medical examiner are a species of 'public documents,' generally admissible at common law even in the absence of statutory authority."

Commonwealth v. Weeks, 77 Mass. App. Ct. 1, 3-8, 927 N.E.2d 1023 (Mass. App. Ct. 2010) – certified records of convictions are non-testimonial

Fowler v. State, 929 N.E.2d 875, 877-881 (Ind. Ct. App. 2010) – "The booking information printout introduced in this case was not testimonial evidence within the purview of *Crawford*.

Ricky's booking card recited biographical and physical identification information obtained solely for custodial purposes. The printout was not created to prove some fact at trial. We thus conclude that the document did not constitute testimonial hearsay, and the introduction of the information did not implicate Stacey's Sixth Amendment confrontation rights."

United States v. Villavicencio-Burrue, 608 F.3d 556, 560-561 (9th Cir. Cal. 2010) – "We have previously held that a warrant of removal is nontestimonial and that its admission therefore does not violate the Confrontation Clause. *E.g.*, *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005). Villavicencio contends that *Bahena-Cardenas* and its antecedents were abrogated by the Supreme Court's decision in *Melendez-Diaz*... We disagree..."

United States v. Orozco-Acosta, 607 F.3d 1156, 1161-1164 (9th Cir. Cal. 2010) – "We conclude that admission of the warrant of removal into evidence at Orozco-Acosta's trial did not violate the Sixth Amendment."

State v. McClenton, 781 N.W.2d 181, 186 (Minn. Ct. App. 2010) – "A jury trial was held and appellant was found guilty of first-degree aggravated robbery and fifth-degree possession. A subsequent Blakely trial took place on the aggravating factor of whether there was a pattern of criminal conduct ... Among other things, seven criminal complaints were admitted in connection with appellant's prior offenses. ... The state concedes that the probable-cause portion of the complaints, with the one exception, 6 were erroneously admitted and that the error was plain."

United States v. Caraballo, 595 F.3d 1214 (11th Cir. Fla. 2010) – I-213 form, entitled Record of Deportable/Inadmissible Alien – "The I-213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A-File. It is of little moment that an incidental or secondary use of the interviews underlying the I-213 forms actually furthered a prosecution. ... The district court did not violate Caraballo's constitutional rights in admitting the smuggled aliens's redacted I-213 forms."

United States v. Diaz-Gutierrez, 354 Fed. Appx. 774 (4th Cir. N.C. 2009) – "We conclude, as have all Circuits to have considered the question, that a warrant of deportation is nontestimonial and therefore 'not subject to the requirements of the Confrontation Clause.'"

United States v. Huete-Sandoval, 681 F. Supp. 2d 136, 139-40 (D. P.R. 2010) – "The exhibit which is at the center of the current dispute is a true print-out of pertinent information from the ATS Database which, in turn, contains records from all border crossings made via airplane or boat, not solely those which raise red flags for officials. The type of information stored in this database is categorized as 'biographical data' concerning passengers entering or leaving the United States via airplane or ship. ... Defendant is actually inviting the Court to extend the Supreme Court's holding in *Melendez-Diaz* to encompass data compiled as part of a routine exercise by a government agency which was later presented at evidence at a criminal trial. The Court expressly declines this invitation."

Commonwealth v. Gonsalves, __ N.E.2d __, 2009 WL 1547743 (Mass. App.Ct. Jun 05, 2009) – "Here, proof of the defendant's prior convictions came from court dockets which, by their nature, are not testimonial for purposes of a confrontation clause analysis. *See Crawford*..."

State v. Hix, 2009 WL 1491398 (N.J. Super. A.D. May 29, 2009) (unpub) – "We hold that a municipal ordinance adopting drug-free school zones and the map of such zones are not testimonial evidence under *Crawford*..."

State v. Williams, 2009 WL 1460141 (Ariz. App. Div. 2 May 21, 2009) (unpub) – "¶ 4 The sole issue in this appeal is whether the trial court's admission of Williams's prior conviction record to establish that he previously had a teardrop tattoo under his eye violated his Sixth Amendment Confrontation Clause rights. ... ¶13 Williams's physical description, including his tattoo, was included in the conviction record as part of the ministerial, routine preparation of such a document. [cites] Thus, the person who entered the information into Williams's conviction record could not be character-ized as a witness against him, and the notation of the teardrop tattoo was not testimonial. "

U.S. v. Villegas-Martinez, 2009 WL 1083587 (4th Cir.(Va.) Apr 22, 2009) (unpub) – warrant of deportation is "a self-authenticating public record, and hence is not considered to be testimonial hearsay under *Crawford*."

People v. Padilla, 2009 WL 808496 (Cal. App. 4 Dist. Mar 30, 2009) (unpub) – trial court took judicial notice of its own records that person named Prince had pled guilty to robbery – "the factual basis of Prince's guilty plea was not admitted to prove the underlying facts, *i.e.*, that he robbed Roberts and the Domino's, but rather to bolster Roberts' identification[of Prince and defendant as the robbers]. Therefore it was not testimonial..."

U.S. v. Marguet-Pillado, __ F.3d __, 2009 WL 792500, 09 Cal. Daily Op. Serv. 3912 (9th Cir Mar 27, 2009) – "In an attempt to prove that Carlos Marguet was not a citizen of the United States, the government submitted the Application from his immigration file (A-file) in which he applied for permanent resident status on the basis of his relationship to Michael Marguet. But Carlos Marguet was just a five-year-old boy at that time and, in fact, the document was filled out and signed by Michael Marguet. In it Michael Marguet declared that Carlos Marguet was born in Mexico and was a citizen of that country. ... [T]he Application was not testimonial. It was merely a statement of facts designed to have the government agree to receive Carlos Marguet as a permanent resident--in other words, it was just the setting out of what Michael Marguet saw as noncon-troversial factual information regarding Carlos Marguet. It surely was not set forth with an eye to a trial proceeding of any kind. As it was, no criminal proceeding commenced until more than thirty years later."

U.S. v. Moore, 2009 WL 350698 (9th Cir. Feb 12, 2009) (unpub) – "Moore claims the district court erred in admitting the A-file [alien file] documents... because they violate the Confrontation Clause. ... [the documents] were not made in anticipation of future litigation, but instead are records routinely made by governmental agencies. Additionally, these documents were contained within Moore's A-file, which is a public immigration record. [cite] Under our precedent, 'public records ... are not themselves testimonial in nature..."

Segundo v. State, , 270 S.W.3d 79 (Tex. Crim. App. Dec 10, 2008) – "standard 'boilerplate,' pre-printed language in a form entitled Board of Pardons and Paroles Proclamation of Revocation and Warrant of Arrest ... [is] nontestimonial under *Crawford*..."

People v. Garrett, 2008 WL 4639566 (Cal. App. 4 Dist. Oct 21, 2008) (unpub) – "the plea form was not hearsay. *Crawford* applies only to hearsay statements."

People v. Garrett, 2008 WL 5050448 (Cal. App. 2 Dist. Dec 01, 2008) (unpub) – "Appellant also contends that the minute orders showing guilty pleas in the two prior gang cases was inadmissible under the Confrontation Clause because the underlying pleas reflected in those orders were testimonial hearsay. [FN2] We do not agree. ... It is not objectively reasonable to view the pleas as obtained or given primarily for use in another criminal trial."

U.S. v. Hodge, 295 Fed.Appx. 597 (4th Cir. Oct 03, 2008) – Maryland Securities Commission cease-and-desist order "is obviously not testimonial in nature."

State v. J.G., 2008 WL 4194514 (Wash. App. Div. 1 Sep 15, 2008) (unpub) – underage possession of alcohol – "the certified copy of J.G.'s learner's permit is a public record containing no accusatory statements, testimony, or opinions. It contains only verifiable facts adduced by a government official in the regular course of his or her duties." – non-testimonial

U.S. v. Aguilar, 2008 WL 4185973 (9th Cir. Sep 09, 2008) (unpub) – "Alien-Registration Files ('A-Files')" are non-testimonial

People v. Morris, __ Cal. Rptr.3d __, 2008 WL 3918063 (Cal. App. 1 Dist. Aug 27, 2008) – "rap sheets fall outside of *Crawford* because they are 'prepared to document acts and events relating to convictions and imprisonments,' and not for the primary purpose of providing evidence in a trial."

State v. Marquardt, 2008 WL 3898010 (Minn. App. Aug 26, 2008) (unpub) – underage drinking – "the birth certificate, prepared as a public record without any anticipation that it would be used in litigation was not a 'testimonial' statement, therefore, not subject to the *Crawford* exclusion."

Pendergrass v. State, 889 N.E.2d 861 (Ind. App. Jul 08, 2008) – analyzing at length and rejecting claim that DNA reports are excluded from public records exception as police reports – and finding them non-testimonial

Black v. Beck, 2008 WL 2570916 (M.D. N.C. Jun 23, 2008) (unpub) (habeas) – statutory rape – certified copy of perpetrator's birth certificate non-testimonial public record

U.S. v. Li, 2008 WL 2337604 (4th Cir. Jun 06, 2008) (unpub) – immigration fraud – "Here, the district court did not err when it took judicial notice of the guilty plea [of corrupt government official involved in the fraud] because the taking of such notice did not result in the admission of a testimonial statement that would bring into play Li's rights guaranteed by the Confrontation Clause. *See Crawford*..."

U.S. v. Hart, 2008 WL 1900145 (E.D. Pa. Apr 28, 2008) (unpub) (§ 2255) – involving Certificates of Proof of Insured Status, necessary to establish federal jurisdiction – "The attachments to the Certifications are official governmental records and are not testimonial, therefore, *Crawford* does not apply to those documents. The Certifications themselves merely certify these documents as official records of the FDIC to support their admissibility pursuant to

the self-authentication rules of Federal Rules of Evidence 803(8) and 902(4). It is not clear whether the Certifications contain testimonial hearsay subject to *Crawford*." – [NOTE: In what sense is the author of such a certificate a "witness against" the accused? Opinion doesn't say.]

U.S. v. Mendez, 514 F.3d 1035 (10th Cir. Jan 24, 2008) – "As a public record, the ICE Central Index System is not testimonial."

People v. Hines, 2008 WL 444395 (Cal. App. 2 Dist. Feb 20, 2008) (unpub) – "It has long been concluded that '[d]espite its hearsay character and notwithstanding the unavailability of witnesses, documentary proof of a prior conviction does not violate the confrontation guaranty.' [cite] *Crawford* did not impact this longstanding rule. Documentary evidence of a prior conviction is not testimonial ... Such documents ... are simply the judicially-recorded manifestation of the results of a completed criminal proceeding."

Rockwell v. State, 176 P.3d 14 (Alaska App. Feb 15, 2008) – "The passport stamps and immigration card at issue here were not made and maintained for the primary purpose of criminal investigations, and the government employees who stamped the documents performed a ministerial duty that had nothing to do with prosecuting a particular person for criminal activity. We hold that the passport and immigration card are not 'testimonial hearsay' barred by *Crawford*."

U.S. v. Hyatt, 2008 WL 616055 (S.D. Ala. Mar 03, 2008) (unpub) – "the Court has discovered no Supreme Court or Eleventh Circuit case establishing, directly or by necessary implication, that a bankruptcy petition's silence as to ownership of a business is testimonial for Sixth Amendment purposes when used to oppose a defendant's exculpatory testimony that the debtor owned the business."

State v. Bailey, 2007 WL 3196296 (N.J. Super. A.D. Nov. 01, 2007) (unpub) – jail visitor logs are non-testimonial

U.S. v. Burton, 249 Fed.Appx. 882, 2007 WL 2914373 (2nd Cir. Oct. 05, 2007) (unpub) – "Burton's Confrontation-Clause challenge to the admission of jail records containing the addresses given to the jail by two inmates lacks merit because these records are not testimonial."

People v. Evans, 2007 WL 2800188 (Cal. App. 4 Dist. Sep 27, 2007) (unpub) – firearm offense – "In this case, we find that the Department of Justice's public record [regarding registered owner of gun] was not 'testimonial.' A gun seller's hearsay statement is not 'testimony' of a 'witness' used to 'prove a fact to be used at trial.' ... It is the public employee's function to record the incident around the time of the sale, irrespective of whether that 'fact' will be used in future litigation."

State v. Kronich, 161 P.3d 982 (Wash. 2007), overruled State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (Wash. 2012) – "[T]he Court's explicit acknowledgment that business records are not 'testimonial' evidence provides a basis for concluding that public records are also not 'testimonial.'" [fn] Thus, we agree with Division One of the Court of Appeals that Mr. Kronich's rights under the Confrontation Clause were not violated when the trial court admitted a Department of Licensing (DOL) certification of his driving record describing the status as "suspended/revoked."

Costley v. State, 175 Md.App. 90, 926 A.2d 769 (Md. Ct. Spec. App. 2007) – autopsy report – see excerpt above under "business records"

State v. Marshall, 114 Hawai'i 396, 163 P.3d 199 (Hawai'i App. 2007) – "[T]he State sought to admit two sworn statements of HPD Intoxilyzer Supervisor Dawson (Supervisor) that the Intoxilyzer used to test Marshall had been properly calibrated and tested for accuracy on October 4 and October 24, 2005. The State offered the statements pursuant to Hawaii Rules of Evidence (HRE) Rule 803(b)(8), the public records exception to the hearsay rule. ... [T]he Supervisor's sworn statements were not specific as to Marshall. The Supervisor's statements were "not designed primarily to 'establish or prove' some past fact," *Id.* at ___, 126 S.Ct. at 2276 (brackets omitted; emphasis added), but "to ensure that appropriate and uniform forensic alcohol testing is performed throughout the State of Hawai'i so that legal criteria are met and reliable and accurate results are assured." Hawai'i Administrative Rules (HAR) § 11-114-1(a). Rather than being a "testimonial" statement, Exhibit 4 was merely "a record of routine, nonadversarial matters made in a nonadversarial setting." *State v. Ofa*, 9 Haw.App. 130, 136, 828 P.2d 813, 817 (1992)."

Garza v. State, 2007 WL 2265073 (Tex. App.-Corpus Christi Aug 09, 2007) (unpub) – "court records concerning appellant's juvenile and adult criminal records ... which were properly admitted under the public records exception to the hearsay rule" are non-testimonial

U.S. v. Avila-Sifuentes, 2007 WL 2188345 (5th Cir. Jul 31, 2007) (unpub) – "Avila also argues that the admission of the warrant of deportation violated his right of confrontation and *Crawford v. Washington*, 541 U.S. 36 (2004), because the warrant was testimonial in nature. This argument is foreclosed by circuit precedent. *See United States v. Valdez-Maltos*, 443 F.3d 910, 911 (5th Cir.), *cert. denied*, 127 S.Ct. 265 (2006)."

State v. Pesec, 2007 WL 2164543, 2007-Ohio-3846 (Ohio App. 11 Dist. Jul 27, 2007) (unpub) – "Pesec also objects to the introduction of the actual civil court documents, contending that these documents should have been excluded as hearsay. We reject this argument. These documents are public records and therefore fall within the hearsay exception of Evid.R. 803(8). Moreover, only 'testimonial statements' are subject to scrutiny under the Confrontation Clause. Thus, public records are akin to business records, which the Supreme Court has deemed 'by their nature * * * not testimonial' and are not subject to the requirements of the Confrontation Clause."

People v. Williams, 183 P.3d 577 (Colo.App. Jun 14, 2007), cert. denied, 2008 WL 2174008 (Colo. May 27, 2008) – agreeing with prior opinion that "a laboratory report detailing the testing and weighing of cocaine" is admissible as business record over *Crawford* objection

Jackson v. U.S., 924 A.2d 1016 (D.C. 2007) – failure to appear prosecution – "Jackson's primary contention on appeal is that his rights under the Confrontation Clause of the Sixth Amendment, as construed in *Crawford*, supra, were violated because the trial court admitted into evidence the certified copies of the Superior Court docket entries and the Notice to Return to Court without testimony from the court clerk who created the records. ... Because the challenged documents were created in the regular course of court operations, primarily for administrative purposes rather than with a primary eye towards future prosecution, we are satisfied that they did not constitute testimonial statements and that their admission did not violate Jackson's rights under the Confrontation Clause."

U.S. v. Salinas-Valenciano, 2007 WL 987423 (10th Cir. 2007) (unpub) – " We agree with the government-and with *Lara-Ibanez*-that warrants of deportation are not testimonial. All circuits to have addressed the issue have held that admissions of warrants of deportation do not violate *Crawford*."

People v. Robbins, 2007 WL 778162 (Mich. App. 2007) (unpub) – "the autopsy and toxicology reports qualify as public records" and therefore nontestimonial – but body diagram prepared by pathologist in anticipation of litigation to establish element of crime may not be a public record

U.S. v. Torres-Villalobos , 487 F.3d 607 (8th Cir. May 09, 2007) – superseding prior opinion issued February 22, 2007) – "Warrants of deportation ... are properly characterized as non-testimonial official records that were prepared independent of this litigation." Non-testimonial

People v. McCallie, 37 A.D.3d 1129, 829 N.Y.S.2d 355, 2007 N.Y. Slip Op. 00869 (N.Y. A.D. 4 Dept. 2007) – "We reject defendant's contention that the court violated *Crawford* ... when it admitted into evidence prior certificates of conviction and a certified fingerprint analysis during the CPL 400.16 hearing [to determine if he were a persistent violent felony offender]; those materials were admissible pursuant to CPL 60.60 [pertaining specifically to certificate concerning judgments of conviction and fingerprints]." (citations omitted)

People v. Hernandez, 2007 WL 241264, *5 -6 (Cal. App. 2 Dist. 2007) – "Deputy Mayberry testified that police officers filled out field identification cards [on gangs] as part of their official duties and that they contained information observed by the recording officer. Thus, the field identification cards constituted admissible public records, and Mayberry, as a gang expert, properly could rely on and testify about the cards in forming his opinion. ... *Crawford* ... does not require a different result. *Crawford* stated without elaboration that business records generally did not constitute testimonial hearsay which must be excluded absent unavailability and prior ability to cross-examine."

United States v. Lara-Ibanez, 203 Fed.Appx. 200, 2006 WL 3086699, 2006 U.S. App. LEXIS 27328 (10th Cir. Wy. 2006) – "a warrant for deportation, being non-testimonial, was admissible against a defendant in a criminal case based on reentry after deportation."

Sproule v. State, 927 So. 2d 46 (Fla. Dist. Ct. App. 4th Dist. 2006) – A certified driving record is a public record and is non-testimonial under *Crawford*.

United States v. Rankin, 2005 CCA LEXIS 354 (N-M.C.C.A. 2005) –Service record entries for a period of unauthorized absence are not testimonial statements for purposes of the Sixth Amendment. They are business records and public records.

United States v. Cantellano, 2005 U.S. App. LEXIS 24526 (11th Cir. Fla. 2005) – A warrant of deportation record is a public record and non-testimonial since it is not prepared in anticipation of litigation and is a regularly kept record.

➤ **Sub-Category: Judgment Offered as Proof of Underlying Facts**
(category added June 2011)

United States v. Head, 707 F.3d 1026 (8th Cir. Minn. 2013) – defendant was charged with being an accessory after the fact to a federal crime committed by Donald Clark – Clark pled guilty – "Head argues on appeal that the district court violated her Sixth Amendment Confrontation Clause rights when it admitted the minute entry of Clark's guilty plea as conclusive proof that Clark committed the offense against the United States alleged in Head's superseding indictment. We agree. ... while a record of conviction is not testimonial if offered to prove the fact of conviction, it is testimonial if offered as 'proof of facts underlying the crime charged.' *Causevic* [next case]..."

United States v. Causevic, 636 F.3d 998 (8th Cir. Iowa 2011) – prosecution for making false statement with regard to permanent residence application – statement in issue was that he had not killed anyone – but he had been convicted of murder *in absentia* by Bosnian court – "criminal judgments may be admitted to show that a defendant has a prior conviction without violating the Confrontation Clause. [cite] But the defendant here challenges the government's use of a conviction for a significantly different purpose, namely, to show that he in fact committed the crime of which he was convicted. This is a difference that makes for a legal distinction. ... [W]e conclude that the Bosnian judgment at issue here was testimonial because the government used it as evidence that Mr. Causevic had lied when he said that he had not killed anyone."

➤ **Sub-Category: Rap Sheets and Pen Packs**
(category added March 2009)

State v. Goggin, 339 P.3d 983, 990-91 (Wash. Ct. App. 2014) – "¶ 39 Mr. Goggin's Idaho judgment and sentence was inherently trustworthy. It was not created in anticipation of litigation or to prove a fact at trial; therefore, it was not necessary to cross-examine the clerk who certified the document. A certified record not prepared for use in a criminal proceeding but created for the administration of an entity's affairs is not testimonial."

Sykes v. State, 148 So. 3d 677, 678-79 (Miss. Ct. App. 2014) – "the certified documents used to prove Sykes's prior convictions were not testimonial, and thus *Bullcoming* does not apply."

Scurlock v. State, 147 So. 3d 894, 895-96 (Miss. Ct. App. 2014) – "Scurlock claims that *Bullcoming* [cite] is an intervening decision from the United States Supreme Court, requiring the State to produce the person who certified the documents used to prove his prior convictions. However, Scurlock's argument fails, as he has not shown that under *Bullcoming*, self-authenticated records, of a defendant's prior convictions, are testimonial evidence that trigger a defendant's constitutional right to confront witnesses. Consequently, *Bullcoming* is not an intervening decision that allows Scurlock to escape the time-bar."

Kimmons v. State, __ So.3d __, 2014 WL 3409211 (Miss. App. 2014) – "Unlike *Bullcoming*, this case does not involve testimonial records, as certified copies of prior convictions are admissible absent confrontation under *Frazier*..."

Small v. State, 141 So. 3d 61 (Miss. App. 2014) – "¶ 24. The fatal flaw in Small's argument is that the certified copies of the indictments and sentencing orders, of which he complains, are not documents created solely for an evidentiary purpose. They were created for the administrative purpose of tracking criminal proceedings, quite different, for example, from laboratory reports declaring blood-alcohol content or a substance to be cocaine." – held: not testimonial

Rainey v. State, 132 So. 3d 1085, 1086-87 (Miss. App. 2014) – "*Crawford* ... did not apply to self-authenticating documents such as pen packs..."

Ford v. State, __ S.W.3d __, 2013 WL 6233898 (Miss. App. 2013), reh'g denied (Mar. 11, 2014) – "¶ 20. Ford asserts that the State's use of the certified pen-packs to prove his status as a habitual offender violated his constitutional right to confront the witnesses against him. ... This Court has previously determined that pen-packs are not testimonial statements, which would trigger an analysis pursuant to *Crawford*..."

State v. Payne, 108 So.3d 174 (La.App. 2 Cir. Dec. 12, 2012) – "unlike the affidavits at issue in *Melendez-Diaz*, *supra*, the custodian's affidavit in this case did not assess evidence to be used against the defendant, but merely certified that the documents provided were accurate copies of the original records of the Department of Public Safety and Corrections regarding the defendant. Pursuant to Section 15:529.1(F), the 'pen pack' was admissible and the trial court did not err in determining that the custodian of records was not required to testify."

People v. Davis, 2012 COA 56, __ P.3d __ (Colo. Ct. App. 2012) – "The trial court determined that defendant is a habitual offender. Defendant appeals this determination, alleging that (1) the trial court accepted evidence of his prior convictions in the form of 'pen packs' in violation of his right to confrontation... Defendant's contentions have been rejected in previous reported decisions..."

People v. Perez, 195 Cal. App. 4th 801, 802-804, 125 Cal. Rptr. 3d 723 (Cal. App. 4th Dist. 2011) – "In this case, in proving the occurrence of prior convictions the prosecution relied upon certified copies of the appellants' 'prison packets.' We reject the appellants' contention admission of the packets violated the confrontation clause of the Sixth Amendment. The documents in the prison packets were prepared for nontestimonial purposes and as such were admissible hearsay. Moreover, the certificates by which the prison packet documents were authenticated attested to matters which are outside the protection of the Sixth Amendment."

People v. Larson, 194 Cal. App. 4th 832 (Cal. App. 4th Dist. 2011) – "The matters in a prior-conviction packet under Penal Code section 969b are, however, nontestimonial in nature and thus not subject to *Crawford* and *Melendez-Diaz*."

People v. Moreno, 192 Cal. App. 4th 692, 121 Cal. Rptr. 3d 669 (Cal. App. 4th Dist. 2011) – "A bifurcated court trial was held on the allegations that defendant had certain prior convictions and prison terms. At the outset of this trial, defendant moved to exclude evidence offered pursuant to section 969b, commonly referred to as a "969b packet." Section 969b permits the use at trial of certified records of penal institutions to establish that a person has been convicted of a crime or has served time in a penal institution. n10 In this case, the 969b packet included fingerprint cards, abstracts of judgment, [*708] Federal Bureau of Investigation forms, a photograph, and a Department of Corrections and Rehabilitation log reflecting a chronological

history of actions pertaining to defendant.” – non-testimonial – *Melendez-Diaz* did not overrule *Taulton*

People v. Moore, ___ P.3d ___, 2010 Colo. App. LEXIS 1828, 11-17 (Colo. Ct. App. Dec. 9, 2010), cert. granted, 2011 Colo. LEXIS 747 (Colo., Sept. 26, 2011) – "Defendant next contends the trial court violated his Sixth Amendment right to confront the witnesses against him by admitting pen packs and certificates of authenticity into evidence at his habitual offender trial. ... Assuming, without deciding, that a confrontation clause challenge can be raised in a habitual proceeding, we discern no confrontation clause violation. ... These documents were created before defendant's habitual offender trial, and not for the purpose of establishing a material fact in any criminal proceeding. Rather, they were created for routine administrative purposes. Therefore, they were not testimonial..."

People v. Gonzalez, 2008 WL 4817055 (Cal. App. 4 Dist. Nov 06, 2008) (unpub) – jury found defendant guilty of being a felon in possession of firearm – on appeal, defendant claimed "admission of his 'rap sheets' to prove his prior convictions violated his Sixth Amendment confrontation rights ... Based on *Taulton*, the introduction and admission of Gonzalez's "rap sheets" did not violate his Sixth Amendment confrontation rights because the 'rap sheets' are official records prepared to provide his criminal history. 'Rap sheets' may ultimately be used as evidence in a criminal trial, as they were here, but they are not prepared for that purpose."

➤ Sub-Category: Prison Disciplinary Reports
(category added Oct. 2008)

Smith v. State, ___ S.W.3d ___, 2009 WL 1212500 (Tex. Crim. App. May 06, 2009) – pen packs – "two particular documents go beyond a sterile description and violate appellant's rights" – one judge writes separately, disagreeing with this holding

Dickey v. State, 2008 WL 3843531 (Tex. App.-Eastland Aug 14, 2008) (unpub) – distinguishing *Russeau*, below – "The sterile printout, merely listing TYC [Texas Youth Commission] incidents for which appellant was cited, does not contain any statements that are testimonial in nature."

Russeau v. State 171 S.W.3d 871 (Tex. Crim. App. 2005) – "The reports contained statements which appeared to have been written by corrections officers and which purported to document, in the most detailed and graphic of terms, numerous and repeated disciplinary offenses on the part of appellant while he was incarcerated. It further appeared that, in writing the statements, the corrections officers relied upon their own observations or, in several instances, the observations of others. None of the individuals who supposedly observed appellant's disciplinary offenses testified at his trial. Appellant's alleged disciplinary offenses included threatening physical harm and even death to others, refusing to work or cooperate, breaking out of his cell at night, exposing himself and masturbating in front of jailers and other inmates, verbally abusing jailers and other inmates, fighting with other inmates, and possessing contraband, including improvised weapons. The record also reflects that most of the written reports detailing appellant's alleged disciplinary offenses were read aloud to the jury at the punishment phase and that the prosecutor referred to the reports numerous times during his closing argument at that phase." – held:

testimonial – "the statements in the reports amounted to unsworn, ex parte affidavits of government employees and were the very type of evidence the Clause was intended to prohibit."

Absence of Public Record / Certificate of Non-Existence of Record (CNR)

Warning: Bizarrely enough, dicta in *Melendez-Diaz* gratuitously overrules older cases in this category

U.S. v. Maga, 475 Fed.Appx. 538 (6th Cir. 2012) – IRS 4340 forms, documenting non-filing of tax returns, are testimonial

State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (Wash. 2012) – "The teaching of *Melendez-Diaz*, however, is that certifications declaring the existence or nonexistence of public records are in fact testimonial statements, which may not be introduced into evidence absent confrontation. Accordingly, we now overrule our prior decisions to the extent they are contrary to United States Supreme Court precedent."

Timms v. United States, 25 A.3d 29, 31-34 (D.C. 2011) – "a CNR is 'testimonial,' and that a criminal defendant therefore has the right to cross-examine its author"

Lester v. United States, 25 A.3d 867, 867-870 (D.C. 2011) – "At Lester's trial, the government introduced into evidence a certificate attesting that Lester did not have a license to carry a pistol in the District of Columbia on the date of the murder. The Metropolitan Police Department clerk who signed the CNR after entering Lester's information into the computer and finding no record of a license for Lester did not testify. MPD Detective Eduardo Voysest, the officer who requested the search for a license, did testify. Detective Voysest told the jury that he had provided the clerk with the necessary information about Lester, written on a three-by-five card. Detective Voysest waited while the clerk typed the information into the computer, and he personally saw the result of the computer search from where he was standing, which he testified was: 'No record of license for Mr. Jeremiah Lester.' He also testified that he was present when the clerk prepared the CNR form on a typewriter after running the search. ... because Detective Voysest watched the clerk perform the search and could see the result of the search from where he was standing, there was no Confrontation Clause violation."

United States v. Valdovinos-Mendez, 641 F.3d 1031, 1034 (9th Cir. Cal. 2011) – "admission of a CNR is testimonial hearsay, requiring confrontation"

State v. Jasper, __ P.3d __, 2010 Wash. App. LEXIS 2100 (Wash. Ct. App. Sept. 20, 2010), modified, (Dec. 1, 2010), review granted, 170 Wn.2d 1025, 2011 Wash. LEXIS 84 (Feb. 1, 2011) – "An affidavit attesting that the affiant performed a diligent search of records and that the records revealed that the defendant's license to drive was suspended or revoked on a particular day contains testimonial assertions."

State v. Alvarez-Amador, 235 Ore. App. 402, 232 P.3d 989 (Or. Ct. App. 2010) – ID theft – "At trial, the state offered a certification from a custodian of records of the Social Security Administration (SSA). A police officer testified that he had asked the SSA to provide verification of the Social Security number. The certification [*405] states that two Social Security numbers, including the number identified in the indictment, 'do not belong to

[defendant]. These two numbers have been assigned by the Commissioner of the Social Security Administration to two other individuals whom [sic] both are now deceased.' ... The certification does not constitute an official record. Rather, it was apparently prepared in response to a police officer's request for information concerning defendant. The certification furnishes evidence that the number used by defendant was not his own. Under *Melendez-Diaz*, admission of the certification violated defendant's Sixth Amendment right to confrontation."

United States v. Orozco-Acosta, 607 F.3d 1156, 1161-1164 (9th Cir. Cal. 2010) – "the government concedes that the introduction of the CNR violated *Orozco-Acosta's* confrontation right..."

United States v. Martinez-Rios, 595 F.3d 581, 586 (5th Cir. Tex. 2010) – "CNR's thus certainly fall within the scope of *Melendez-Diaz*.ⁿ⁴ Because our holding in *Rueda-Rivera* that CNR's are not testimonial statements cannot survive *Melendez-Diaz*, *Rueda-Rivera* is overruled."

Little v. United States, 989 A.2d 1096 (D.C. 2010) – Appellant challenges the admission of the two certificates of no record of firearms registration and one certificate of no record of a license to carry a pistol ("CNRs"), because he contends that their admission undermined his rights conferred by the Confrontation Clause of the Sixth Amendment." – that was error, but it was unpreserved, and the error was not "plain" at the time of defendant's pre-*Melendez-Diaz* trial

United States v. Norwood, 603 F.3d 1063, 1068 (9th Cir. Apr. 1, 2010) (on remand from SCOTUS) – "As part of its case-in-chief, the government presented an affidavit prepared by Jodi Arndt, an employee at the Washington Department of Employment Security, which certified that "a diligent search of the department's files failed to disclose any record of wages reported for [Norwood] from January 1, 2004 through March 31, 2007." Although Arndt did not appear in person to testify, the court admitted her affidavit as circumstantial evidence that Norwood had no legal source for the large amounts of cash that were found on his person and in his car." – prosecution concedes error in light of M-D

Mitchell v. United States, 985 A.2d 1125, 1134-1135 (D.C. 2009) – "FN8 We recently held that admission of a CNR without producing the witness who prepared it violates a defendant's Sixth Amendment right to confrontation. *Tabaka v. United States*, 976 A.2d 173, 175-76 (D.C. 2009) (holding that in light of *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 174 L. Ed. 2d 314 (2009), CNRs are "inadmissible over objection without corresponding testimony [from the official] who had performed the search")."

Tabaka v. United States, 976 A.2d 173, 175-76 (D.C. 2009) – CNRs are testimonial

Washington v. State, 18 So. 3d 1221 (Fla. Dist. Ct. App. 4th Dist. Oct. 7, 2009) (opinion following grant of motion for rehearing – "we conclude that the 'certificate of non-licensure,' prepared by an employee of the State of Florida Licensing Division, Construction Industry Licensing Board and attesting that a search of its records revealed that no one named Randy L. Washington holds a license to engage in contracting in the State of Florida, is testimonial. Such certificate is accusatory, was introduced to establish an element of the crime, was prepared at the request of law enforcement as part of its investigation in this case, and is evaluative in the sense that it represents not simply the production of an existing record, but an assertion regarding the results of an individual's search of a database or databases. As such, the admission of the

document, over the defendant's Crawford objection, was error and a violation of the defendant's Sixth Amendment rights."

Millard v. U.S., 967 A.2d 155 (D.C. Mar 12, 2009), overruled by **Tabaka v. United States**, 976 A.2d 173, 175-76 (D.C. 2009) – "CNRs are not 'testimonial' for purposes of the Sixth Amendment Confrontation Clause. ... Notably, in the immigration context, where the government uses the absence of any record that an alien has been lawfully re-admitted to the United States as evidence supporting criminal prosecution for violation of an order of deportation, [FN16] every court to rule on the issue has concluded that CNRs are non-testimonial. [long string cite]"

Harris v. Commonwealth, 673 S.E.2d 483, 53 Va.App. 494 (Va. App. Mar 04, 2009) – "Over appellant's objection, the trial court accepted into evidence an affidavit from Virginia State Police Lieutenant William J. Reed, custodian of the records for the Virginia State Police Sex Offender Registry. The affidavit averred, 'The records of the Virginia Department of State Police, show that no Sex Offender Registration (Re-registration) form (SP-236A) have [sic] been filed for [Ivan L. Harris] between March 27, 2007 to June 19, 2007.'" – not testimonial

U.S. v. Norwood, ___ F.3d ___, 2009 WL 385923, 09 Cal. Daily Op. Serv. 1895 (9th Cir. Feb 18, 2009) – "As part of its case-in-chief, the government presented an affidavit prepared by Jodi Arndt, an employee at the Washington Department of Employment Security, which certified that 'a diligent search of the department's files failed to disclose any record of wages reported for [Norwood] from January 1, 2004 through March 31, 2007.' ... Our opinion in *Cervantes-Flores* also concluded that a certificate of nonexistence of a record (CNR), which contained language virtually identical to the affidavit at issue here, is nontestimonial in nature because it is similar to a business record."

Government of Virgin Islands v. Richardson, 2009 WL 102734 (D. Virgin Islands Jan 13, 2009) (unpub) (appeal from superior court; three-judge panel) – "At least three federal appellate courts have held that such certificates of non-existence of records are not testimonial under *Crawford*."

U.S. v. Bryant, 2008 WL 5070972 (4th Cir. Nov 25, 2008) (unpub) – "we conclude that the IRS CNR is not testimonial under *Crawford*."

U.S. v. Provencio-Sandoval, 272 Fed.Appx. 683 (10th Cir. Apr 03, 2008) (unpub) – "The government offered the CNR at trial to prove the fourth element, that is, that Mr. Provencio-Sandoval had not received permission to reapply for admission into the United States. ... [A]ll other circuits that have considered the matter have ruled that admitting CNRs does not violate the Confrontation Clause as interpreted in *Crawford*" – joining them

U.S. v. Mendez, 514 F.3d 1035 (10th Cir. Jan 24, 2008) – "In a recent unpublished decision this court stated that in cases in which a Certificate of Non-Existence Record ('CNR') is introduced into evidence to prove a person did not legally enter the country, the declarant is the person who actually performed the data search and did not discover a record pertaining to the defendant. [cites] We agree. In this case, no CNR was received into evidence, but rather Agent Hummel took the stand and testified to the search he ran [which produced no results]. Because the

Confrontation Clause 'restricts only statements meeting the traditional definition of hearsay,' Agent Hummel's in-court testimony did not violate the Sixth Amendment."

U.S. v. Earle, 488 F.3d 537 (1st Cir. Jun 06, 2007) – long discussion about whether CNR is testimonial, but then not resolving issue

Commonwealth v. Dickens, 2007 WL 1660379 (Va. Cir. Ct. Feb 20, 2007) (trial court order) – "The affidavit states: 'the records of the Virginia Department of State Police, show that no Sex Offender Registration (Re-registration) form(s) (either SP-236 or SP-236A) have been filed for this individual between November 18, 2005 to May 3, 2006.' ... The affidavit the Commonwealth sought to use in this case clearly falls within the aforementioned categories of 'core' testimonial statements."

U.S. v. Salinas-Valenciano, 2007 WL 987423 (10th Cir. 2007) (unpub) – "Three circuits have held that CNRs do not violate *Crawford*. *United States v. Urqhart*, 469 F.3d 745, 749 (8th Cir.2006); *United States v. Cervantes-Flores*, 421 F.3d 825, 830-34 (9th Cir.2005); *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir.2005) (per curiam)." - but neither adopting nor rejecting that rule, because the prosecution did not argue it and even forbidding the prosecution from arguing it on remand, even though the prosecution won in the trial court and had no reason to argue an alternative basis

United States v. Lara-Ibanez, 2006 U.S. App. LEXIS 27328 (10th Cir. 2006) – "A CNR to show that no record existed that defendant ever sought, let alone obtained, a certificate to reenter the United States" is non-testimonial.

United States v. Urqhart, 469 F.3d 745 (8th Cir. 2006) – "The court held that the admission of the CNR from defendant's alien-file did not violate his right to confrontation because it was nontestimonial evidence and, thus, did not require a showing of unavailability and prior opportunity of cross-examination; therefore, the district court properly admitted it under Fed. R. Evid. 803(10) as an exception to the hearsay rule."

United States v. Cervantes-Flores, 421 F.3d 825, 68 Fed. R. Evid. Serv. (CBC) 34 (9th. Cir. Cal. 2005) –Certificates of Non-Existence Record are non-testimonial.

United States v. Lopez-Montanez, 146 Fed. Appx. 180 (9th. Cir. Cal. 2005) – Certificates of Non-Existence Record are non-testimonial.

United States v. Salazar-Gonzalez, 445 F.3d 1208 (9th Cir. Cal. 2006) – A Certificate of Non-Existence of Record is a non-testimonial business record.

United States v. Rueda-Rivera, 396 F.3d 678 (5th Cir. Tex 2005), overruled, United States v. Martinez-Rios, 595 F.3d 581, 586 (5th Cir. Tex. 2010) – – Defendant was charged with re-entering the United States illegally. At trial, the prosecution introduced a Certificate of Nonexistence of Record ("CNR") as a business record. On appeal, the Court found *Crawford* did not apply to the record because it was not testimonial and did not require the testimony of the author of the record.

Tax Returns

(category added October, 2008)

United States v. Jewell, 614 F.3d 911, 924 (8th Cir. Ark. 2010) – stating in dicta that court had previously held tax returns to be non-testimonial

U.S. v. Kelley, 2009 WL 19083 (2nd Cir. Jan 05, 2009) (unpub) – securities fraud – "The tax forms at issue here are non-testimonial statements whose admission is not governed by *Crawford*."

U.S. v. Garth, 540 F.3d 766 (8th Cir. Sep 03, 2008) – conspiracy to defraud U.S. while working as tax return preparer – tax returns are non-testimonial

Former Testimony

(see also part 7, Adequacy of Opportunity to Cross-Examine)

State v. Nevins, 2007 WL 949487 (Ohio App. 2 Dist. 2007) (unpub) – "[A]lthough Pettis testified at the preliminary hearing that he selected 'someone' from the photo line-up, Pettis did not, at that time, specifically identify Nevins as his shooter, either by reiterating his prior photo array identification or by identifying him at the hearing itself. Accordingly, [the officer]'s testimony that Pettis identified Nevins from the photo array exceeded the scope of Pettis' preliminary hearing testimony, and it was not admissible under Evid.R. 804(B)(1) as former testimony." - therefore confrontation clause violation – [although there was evidence that witness "had been offered money not to testify," forfeiture is not discussed]

Dying Declarations

Commonwealth v. Williams, 2014 PA Super 249, 103 A.3d 354 (2014) – "[A] a dying declaration was admissible at common law against an accused without regard the accused's right to confront his accusers. It is unclear whether that rule survives after *Crawford* and its progeny. The *Crawford* majority [cite] and Justice Ginsberg's dissent in *Bryant* treat the question as an open one." – declining to resolve it

Commonwealth v. Gonzalez, 469 Mass. 410, 14 N.E.3d 282 (2014) – "The admission of a dying declaration does not implicate the defendant's constitutional right to confrontation."

State v. Hailes, 217 Md.App. 212, 92 A.3d 544, 547-48 (Md. Spec. App. 2014) – "This juggernaut of persuasive authority is irresistible. Maryland hereby joins the ranks.¹⁰ We hold that the Dying *252 Declaration, like Forfeiture by Wrongdoing, is exempted from the coverage of the Confrontation Clause. ... If the undergirding rule of *Crawford v. Washington*, based as it is on the originalist school of constitutional interpretation, is valid, so too is the Dying Declaration exception to that rule, based on precisely the same history-based mode of analysis. The rationales for both the rule and the exception to the rule rise or fall together. ... Some Dying Declarations are testimonial in nature; others are nontestimonial. For the common law Dying

Declaration, however, it does not make any difference. The Dying Declaration is not covered by the Confrontation Clause whether it is testimonial or nontestimonial."

People v. Robinson, 2013 IL App (1st) 102476, 377 Ill.Dec. 467, 2 N.E.3d 383, appeal pending (Mar. 2014) – "dying declarations were admissible in this case and the admission of those statements did not violate the sixth amendment, even if those statements were testimonial."

State v. Kennedy, 998 N.E.2d 1189, 1200-03 (Ohio App. 1st Dist. 2013) – "{¶ 64} In light of this case law, we hold that the Sixth Amendment incorporates an exception for 'the common law pedigree' of dying declarations, even testimonial ones, and that *Crawford* did not alter this rule."

Bam v. State, 2012-KA-00006-COA, 2013 WL 4516730 (Miss. App. 2013), reh'g denied (Dec. 3, 2013) – "¶ 54. In light of the fact that we are unaware of any federal or state court that has held the admission of a dying declaration offends a defendant's constitutional right to confront his or her accuser, we too find the admission of Brown's dying declaration did not violate Grindle's Sixth Amendment right to confrontation."

Commonwealth v. Middlemiss, 465 Mass. 627, 989 N.E.2d 871 (Mass. 2013) – "The defendant concedes that the admission of a dying declaration does not implicate the confrontation clause. We note that 'the confrontation clause 'is most naturally read as a reference to the right of confrontation at common law,' which recognized dying declarations as an exception to the right of confrontation. [cites] For this reason, 'in the unique instance of dying declarations, we ask only whether the statement is admissible as a common-law dying declaration, and not whether the statement is testimonial.'"

People v. Clay, 2011 NY Slip Op 5729, 926 N.Y.S.2d 598 (N.Y. App. Div. 2d Dep't 2011) – "Thus, we read *Crawford* to signify that the substance of the right of confrontation enshrined in the Constitution is informed by the contemporaneous understanding of that right at common law, and is not, instead, an abrogation of it. We therefore conclude that the Supreme Court, having suggested that the common-law right did not encompass dying declarations, would likely determine that the same is true of the Sixth Amendment." [NOTE: Despite finding that the confrontation clause never applied to dying declarations, the first paragraph of the opinion refers to them as an "exception" to the sixth amendment.]

State v. Beauchamp, 2011 WI 27, 796 N.W.2d 780 (Wis. 2011) – "We hold that the admission of the dying declaration statement violates neither Beauchamp's Sixth Amendment right to confront witnesses nor his corresponding right under the Wisconsin Constitution. ... [¶ 34] We therefore, like every state court that has considered the dying declaration exception since *Crawford*, take a position consistent with the language of *Crawford* and *Giles* and decline to hold that the constitutional right to confront witnesses is violated by the admission of statements under the dying declaration hearsay exception. As the State notes, no published decision of any state court in the country has eliminated the dying declaration hearsay exception based on the reading of selected language of *Crawford*." [NOTE: The concurrence speaks of an "exception to the Sixth Amendment guarantee of confrontation," which assumes its initial application.]

Satterwhite v. Commonwealth, 56 Va. App. 557, 560-568, 695 S.E.2d 555 (Va. Ct. App. 2010) – "Dominic Joyner was shot four times at close range. As he faded in and out of consciousness, he identified the shooter as Darin Satterwhite. Joyner later died from gunshot

wounds. ... [after lengthy review of precedent going back to 1845] The question remains whether Crawford shifted the legal paradigm so profoundly as to render this longstanding precedent unreliable. We think not. ... For these reasons, we hold Crawford did not upend the traditional view that dying declarations serve as an exception both to the common law hearsay rule and the constitutional right of a defendant to confront his accusers."

Sanford v. State, 695 S.E.2d 579, 2010 Fulton County D. Rep. 1625 (Ga. 2010) – "As to Sanford's urging that this Court should apply the analysis in *Crawford* ... to find the statements inadmissible, this Court previously has acknowledged with approval that the Supreme Court of the United States has expressly declined to extend its analysis to dying declarations."

State v. Minner, 311 S.W.3d 313 (Mo. Ct. App. Mar. 9, 2010) – "*Crawford* does not support exclusion of Terry's dying declaration to Hailey, even if that dying declaration is deemed to be testimonial hearsay."

People v. D'Arcy, 48 Cal. 4th 257, 226 P.3d 949, 106 Cal. Rptr. 3d 459 (Cal. 2010) – "Near the beginning of the tape [made by police officer], an unidentified emergency room doctor informed Laborde that her chances of survival were 'very poor.' She responded by asking, 'Am I going to die?' The doctor said, 'You're going to die.' n17 Laborde told the doctor, 'I want to die.' She then recounted the facts of the crime and said that defendant threw gasoline on her and lit her on fire with a cigarette lighter." – held: dying declaration – "admission of dying declarations, whether or not testimonial in nature, does not violate a defendant's Sixth Amendment right to confrontation."

State v. Beauchamp, 2010 WI App 42, 781 N.W.2d 2 (Wis. Ct. App. 2010), aff'd 2011 WI 27, 796 N.W.2d 780 (Wis. 2011) – "we view *Giles's* pronouncement as to whether the confrontation clause governs dying declarations as binding. ... Indeed, we are unaware of any post-*Crawford* court rejecting what *Giles* recognized as the dying-declaration exception to the confrontation clause. See, e.g. *State v. Lewis*, 235 S.W.3d 136, 148 (Tenn. 2007) ("Since *Crawford*, we found no jurisdiction that has excluded a testimonial dying declaration."). Receipt into evidence of Somerville's [***11] dying declarations did not violate Beauchamp's right to confrontation."

State v. Price, 154 Wn. App. 480, 228 P.3d 1276 (Wash. Ct. App. 2009) – DV victim, held hostage by abuser, wrote note to daughter before she was killed – the note read: "To AuBriana / From: Olga Mommy / Mommy Luv / Mr. Price / Shot Me / Dead / He thought / I Fooled Around / A Gun / to my / Head." – held: although victim presumably wasn't yet dying, it was a dying declaration – "¶20 The evidence shows that Carter was confronted by Price with a gun during a domestic violence dispute and he was angered even more by the police's arrival. This, together with evidence indicating that the note was written shortly before the shooting, is sufficient to establish that Carter wrote the note at a time when she reasonably believed her death was imminent."

Gardner v. State, 306 S.W.3d 274 (Tex. Crim. App. 2009) – "In his fifth point of error, appellant claims that the trial judge erred in permitting Erin Whitfield to testify to the contents of the 911 call Tammy made after she was shot. Appellant objected to Ms. Whitfield's testimony at trial, n19 arguing that this testimony was hearsay and that it violated the Confrontation Clause of both the federal and Texas constitutions. ... [W]e find that the 911 call was admissible as a dying

declaration... [FN20] Appellant concedes that if Tammy's 911 call qualified as a dying declaration, 'neither the Confrontation Clause nor Crawford ... or Davis ... would bar its admission.' [cite] Although this question was not explicitly addressed by the Supreme Court, appellant's concession seems well taken."

Wright v. State, 916 N.E.2d 269, 272-278 (Ind. Ct. App. 2009) – "Upon being dispatched to the scene at 1:19 a.m., Indianapolis Metropolitan Police Officer Robert Stradling observed an individual [R.A.], bleeding profusely and wearing no clothes, lying face down on Wilkins's front porch. ... Officer Stradling asked R.A., "Who did this?", and R.A. replied, "Sean." Tr. p. 237. Officer Stradling asked again, "Did you say Sean?", and R.A. confirmed this by nodding his head or repeating the name. Tr. p. 237. Officer Stradling then asked who "Sean" was, to which R.A. responded by saying, "Uncle" either once or twice. ... [Sean] Wright [nicknamed Uncle] concedes that the rule in *Crawford* has a well-recognized exception for dying declarations." – held: dying declarations

State v. Jones, 197 P.3d 815 (Kan. Dec 12, 2008) – "we are confident that, when given the opportunity to do so, the Supreme Court would confirm that a dying declaration may be admitted into evidence, even when it is testimonial in nature and is uncontroverted."

Hamilton v. Lafler, 2008 WL 5102243 (E.D. Mich. Dec 01, 2008) (unpub) (habeas) – "Detective Abdallah asked Mr. Moy to identify the shooter. However, Mr. Moy's right lung had been punctured. He did not identify his shooter; he only responded with the word "air." Mr. Moy was unable to respond to any further questions and died shortly after arriving at the hospital. ... Following *Crawford*, several courts have found a Confrontation Clause exception for dying declarations [multiple cites] ... Given that the victim was unable to testify at trial due to Petitioner's wrongful conduct, it cannot be said that the admission of his final words rendered Petitioner's trial fundamentally unfair." [NOTE: Victim also wasn't witness against defendant.]

State v. Bateman, 2008 WL 4756675 (Tenn. Crim. App. Oct 28, 2008) (unpub) – "this court's holding in *Lewis* is controlling and clearly creates an exception for dying declarations regardless of their testimonial or nontestimonial nature."

Watkins v. Ercole, 2008 WL 4179187 (S.D. N.Y. Sep 09, 2008) (unpub) (habeas) – "Here, [shooting victim] Mohammed Aljunaid's statements--"I am hit" and "I'm going to die"--are not testimonial as they have none of the hallmarks of testimonial statements as identified in *Crawford*..." – [NOTE: Dying declaration exception not actually mentioned. The issue was decided by process of elimination – it didn't fit into any category of testimonial.]

Commonwealth v. Nesbitt, 892 N.E.2d 299, 452 Mass. 236 (Mass. Aug 18, 2008) – "even if Brault's statement to Marcure were considered to be testimonial in fact, its admission as a 'dying declaration' would not, in our view, be contrary to Nesbitt's constitutional right of confrontation."

People v. Ingram, 382 Ill.App.3d 997, 888 N.E.2d 520, 321 Ill.Dec. 1 (Ill. App. 1 Dist. Apr 11, 2008) – "under the principles of *Crawford*, as further articulated in *Davis*, there is no constitutional impediment to admitting the non-testimonial statements under the dying declaration exception to the hearsay rule." – [NOTE: The court first previously found the statements non-testimonial because they were made to the shooting victim's friend. Since

Crawford by definition doesn't apply to non-testimonial statements, the discussion of dying declarations is dicta.]

State v. Boddien, 661 S.E.2d 23 (N.C. App. May 20, 2008) – "the confrontation clause allows an exception for testimonial dying declarations"

State v. Calhoun, 657 S.E.2d 424 (N.C. App. Mar 04, 2008) – "dying declarations are not violative of the Sixth Amendment" (citing and following cases from 5 states)

People v. Reed, 2007 WL 4565018 (Cal. App. 1 Dist. Dec 31, 2007) (unpub) – declarant refrained from giving the shooter's name, although he almost certainly knew it – "[S]ince *Crawford*, our Supreme Court has held that the dying declaration exception to the hearsay rule does not conflict with the Sixth Amendment ... Despite the gravity of [victim] Key's physical state after the shooting – paralysis, oxygen mask, vomiting blood – he was able to speak coherently, albeit slowly, to Detective Hedley, and his specific details about the shooter – age, complexion, residence (twice), hairstyle – implied a desire to have the police know who the shooter was, without having to give a name. The court did not abuse its discretion in admitting Key's statements to Hedley."

People v. Jackson, 2007 WL 3274845 (Mich. App. Nov 06, 2007) (unpub) – "The instant record establishes that Lloyd Smith, Jr., who was a physically weak, wheelchair-bound, 87-year-old man, endured four stab wounds to his neck. According to trial testimony, Lloyd, Jr. bled for a number of hours before assistance arrived. ... Notwithstanding that Lloyd, Jr. never voiced his cognizance that he had sustained a grave or mortal injury, the totality of the circumstances surrounding his statements identifying defendant as his assailant support the reasonable inference that he made the statements while believing that he faced impending death. ... On the basis of *Taylor* [see below], we conclude that the Sixth Amendment does not preclude the admission of Lloyd, Jr.'s statements as dying declarations." – also forfeiture by wrongdoing

State v. Lewis, 235 S.W.3d 136 (Tenn. 2007) – "Because the admissibility of the dying declaration is also deeply entrenched in the legal history of this state, it is also our view that this single hearsay exception survives the mandate of *Crawford* regardless of its testimonial nature."

State v. Taylor, 275 Mich.App. 177, 737 N.W.2d 790 (Mich. App. 2007), leave to appeal granted in part and amicus briefs solicited, 480 Mich. 946, 741 N.W.2d 24 (Mich. Nov 27, 2007) – "Immediately upon forcibly entering the house, police officers found several people in the house and found Lasater in his bedroom, bleeding profusely from gunshot wounds and the officers asked Lasater to identify the shooter. Though Lasater at first hesitated, after the officers advised Lasater that he 'might not make it' and asked him to identify his assailant, Lasater identified the defendant, by his nickname, as the shooter. Within minutes, emergency medical personnel arrived and an additional police officer arrived who again advised Lasater that he would not live much longer and asked him to identify his assailant and, once again, Lasater identified defendant as the shooter. After he was kept in an induced coma for a few weeks, Lasater died from his gunshot wounds. ... [W]e hold that, under *Crawford*, dying declarations are admissible as an historical exception to the Confrontation Clause." – following *People v. Monterroso*, 34 Cal. 4th 743, 764-765, 22 Cal. Rptr. 3d 1 (Cal. 2004)

Williams v. State, 2006 Fla. App. LEXIS 21303 (Fla. Dist. Ct. App. 3d. Dist. 2006) – “Defendant was charged with murdering his sister's ex-boyfriend. Witnesses identified defendant as letting himself into the victim's duplex, bring the victim outside, and eventually shooting the victim in the abdomen with a shotgun. Neighbors and police arrived on the scene within two minutes of the shooting to find the victim bleeding, screaming, and trying to push his intestines back into his abdomen. He told bystanders and the police that defendant, his girlfriend's brother, had shot him. The victim died a few hours later. *** The victim's statements were cumulative to his statements made to lay witnesses identifying defendant as the shooter. They were non-testimonial and admissible as dying declarations.

State v. *, 2006 Ohio 5009 (Ohio Ct. App. 2006) – “[A]llowing the police officer's testimony regarding the victim's dying declaration, under Evid. R. 804(B)(2), did not violate defendant's right to confrontation because it was an exception to the rule against hearsay evidence. Also, the victim made the statements while believing that his death was imminent (he died 30 minutes later), and the nature of the statements concerned the circumstances of his death. Although the statements were made to a police officer, the colloquy was not an interrogation and the victim did not make the statements in anticipation of a criminal prosecution.”

Harkins v. State, 122 Nev. Adv. Rep. 84 (2006) – “Defendant was convicted for shooting the victim to death. At trial, defendant alleged that he did so in self-defense. On appeal, the court held that the district court did not err by admitting the victim's statement that defendant shot him and was paid to do it, which was made in response to a 911 dispatcher's question, because the statement was a dying declaration and therefore was an exception to the confrontation protection afforded by the Sixth Amendment and because the statement was not testimonial, and therefore its admission did not violate defendant's Sixth Amendment rights.”

People v. Mayo, 140 Cal. App. 4th 535 (Cal. App. 2d Dist. 2006) – Deceased victim's statement at the scene “Why did you get Q blast me” was properly admitted as a dying declaration and was non-testimonial.

State v. Young, 710 N.W.2d 272 (Minn. 2006) – Dying declarations are non-testimonial.

Commonwealth v. Morgan, 69 Va. Cir. 228 (Va. Cir. Ct. 2005) – “After the victim had been shot seven times, he was alert, responsive, and praying. While the victim was being placed into the ambulance, a police officer asked him who shot him. The victim answered, “C-Murder shot me.” The victim later died from septic shock as a result of the gunshot wounds. Another officer, who had known defendant for a number of years, always knew him to answer to the name “C-Murder.” In addition, the police maintain a computerized database of nicknames with corresponding photographs. Defendant's photograph resulted when the nickname “C-Murder” was entered into that database. The court found that the victim believed he was about to die when he made the statement. The fact that law enforcement's questioning prompted the statement, did not render it inadmissible. Therefore, the statement qualified as an excited utterance and a dying declaration. Defendant forfeited his Sixth Amendment right to confrontation by causing the victim's death and thus procuring his absence from the proceedings.”

People v. Paul, 2005 NY Slip Op 8016 (N.Y. App. Div. 1st Dept. 2005) – Dying declarations made by the deceased victim to two civilian eyewitnesses were not non-testimonial under both Professor Amar and Professor Friedman's tests.

Wallace v. State, 2005 Ind. App. LEXIS 2088 (Ind. Ct. App. 2005) – “court held that the victim's statements to emergency medical personnel that defendant was the shooter were properly admitted as dying declarations under Ind. R. Evid. 804 or excited utterances under Ind. R. Evid. 803(2), and did not violate defendant's Sixth Amendment right to confrontation because the record was void of any suggestion that the medical personnel's inquiries were made for purposes of preserving it for trial; therefore the victim's answers were not "testimonial" statements.”

State v. Jones, 2005 Minn. App. Unpub. LEXIS 142 (2005) – The dying declaration of the victim was properly admitted at trial and *Crawford* has not abrogated Minnesota’s dying declaration law.

State v. Martin, 695 N.W.2d 578 (Minn 2005) – “Defendant was convicted of premeditated first-degree murder, first-degree murder while committing a burglary, second-degree assault, and two counts of kidnapping. On appeal, the court found that the trial court did not abuse its discretion in admitting the victim's statement identifying defendant as his assailant under the dying declaration exception to the hearsay rule, Minn. R. Evid. 804(b)(2), because the victim was shot in the chest and stabbed in the neck, was struggling to breathe, and lost consciousness and died less than an hour after making the statement. Admitting the statement as a dying declaration did not violate defendant's right to confrontation because an exception for dying declarations existed at common law and was not repudiated by the Sixth Amendment.” – upheld against collateral attack in **Martin v. Faries, 2009 WL 1047085 (D. Minn. Apr 20, 2009)** (unpub) (habeas) –

People v. Gilmore, 356 Ill. App. 3d 1023; 828 N.E.2d 293 (Ill App Ct 2005) – “Defendant, the victim, and the victim's roommate fought after defendant allegedly sexually assaulted the roommate's girlfriend. Defendant reportedly lost the confrontation, and the victim and roommate then returned to their residence. Early the next morning, the roommate heard a gunshot and found the victim lying on the floor. Defendant was taken to the hospital. Defendant told the doctor he was not doing well. The doctor told the victim he was in "rough shape." Two detectives were allowed to briefly question the victim, who told them that the person he had fought with the previous evening was the shooter. The victim also described the shooter. At trial, the victim's statements to police were admitted under the dying declaration exception to the hearsay rule. After defendant was convicted of murder and sentenced, the trial court summarily denied his pro se posttrial motion challenging the effectiveness of his counsel. On appeal, the appellate court found that admission of the dying declarations did not violate the state or federal Confrontation Clause and was proper.”

United States v. Jordan, 2005 U.S. Dist. LEXIS 3289, 66 Fed. R. Evid. Serv. (CBC) 790 (D. Colo. 2005) – “The victim was stabbed with a sharpened piece of metal in the main recreation yard of a federal penitentiary. Defendant was also an inmate there, and he was charged with second-degree murder, assault with intent to murder, assault with a dangerous weapon, and assault resulting in serious bodily injury. He moved to prevent plaintiff United States from using evidence of what had been characterized as the victim's dying declarations. The court noted that at three different points, the victim was questioned, and he identified defendant as the perpetrator. The United States wanted to use those statements under the dying declaration hearsay exception, the excitable utterance hearsay exception, and the Forfeiture by Wrongdoing

Doctrine hearsay exception. The court rejected all three arguments, finding that admission of a testimonial dying declaration after Crawford went against the sweeping prohibitions set forth in that case. The court also rejected the excited utterance argument, and found that the Forfeiture by Wrongdoing doctrine did not apply in the action.”

People v. Monterroso, 34 Cal. 4th 743; 22 Cal. Rptr. 3d 1; 101 P.3d 956 (2004) – Dying declarations are non-testimonial do not fall under *Crawford*.

State v. Nix, 2004 Ohio 5502 (2004) – Dying declarations do not fall under *Crawford*.

Statements Against Penal Interests

(see also Casual Remarks / Statements to Family, Friends, Co-Workers)

U.S. v. Romero, 2008 WL 5262311 (2nd Cir. Dec 18, 2008) (unpub) – with minimal discussion stating that statements made against penal interest are non-testimonial

U.S. v. Wexler, 522 F.3d 194 (2nd Cir. Apr 03, 2008) – painkiller OD victim recruited new patients for his script-writing doc – "Whatever the contours of the definition of 'testimonial,' [cite], it seems clear to us that statements against penal interest of the type made by Abler do not fall within them." – also made in furtherance of conspiracy that included the doc, who bilked insurance and Medicaid for his "treatment" of addicts

U.S. v. Udeozor, 515 F.3d 260 (4th Cir. Feb 01, 2008) – statements by defendant's ex-husband admitted as statements against penal interest – "Mr. Udeozor's statements are not testimonial because, objectively viewed, no reasonable person in Mr. Udeozor's position would have expected his statements to be used later at trial. Mr. Udeozor certainly did not expect that his statements would be used prosecutorially; in fact, he expected just the opposite."

State v. Short, 958 So.2d 93, 2006-1451 (La. App. 3 Cir. 2007) – "The statements made by Loncar to Freeman and Mapp were against his interest, as he indicated he was involved in the beating and robbing of Cupstid and was present when Cupstid was run over and shot. The statements made by Loncar were statements against his interest and Loncar was unavailable to testify, thus Loncar's statements to Freeman and Mapp were admissible under Article 804(B)(3) as statements against interest. ... The statements made by Loncar to Freeman and Mapp are not considered testimony at a preliminary hearing, before a grand jury, or at a former trial nor statements made during police interrogation. As noted in *State v. Miller*, 95 Conn.App. 362, 896 A.2d 844 (2006), *cert. denied*, 279 Conn. 907, 901 A.2d 1228 (2006), the statements at issue are the sort of remarks to an acquaintance that the Crawford court proclaimed to be nontestimonial. The court in *Miller*, went on to state that '[t]he courts of this land, both federal and state, are in agreement that statements made to friends in unofficial settings do not constitute testimonial hearsay.' *Id.* at 384 (citations omitted). Accordingly, we find that the statements made by Loncar to Freeman and Mapp are non-testimonial, and their admission did not violate the ruling in *Crawford*."

Parr v. Quarterman, 2006 U.S. App. LEXIS 29998 (5th Cir. Tx. 2006) – Statements against interest are non-testimonial.

Porterfield v. State, 2006 Alas. App. LEXIS 170 (Alaska Ct. App. 2006) – Incriminatory Statements of a co-defendant made to a friend are non-testimonial.

Texas v Springsteen, AP-74,223 (Tex. Crim App. 2006)- The co-defendant's statement "I did it" to an acquaintance was non-testimonial.

United States v. Johnson, 440 F.3d 832 (6th Cir. Ky. 2006) – "the admission of surreptitious recordings of conversations between one defendant and another coconspirator did not violate the second defendant's constitutional right of confrontation. Further, the evidence was properly admitted under Fed. R. Evid. 804(b)(3)."

State v. Hand, 107 Ohio St. 3d 378 (2006) – "Defendant killed his wife and one he hired to kill her. The supreme court held the accomplice's statements were admissible, under Ohio R. Evid. 804(B)(6), as defendant procured the accomplice's absence. The accomplice's statements admitting involvement in killing defendant's former wives were admissible under Ohio R. Evid. 804(B)(3), and saying he would have money after killing defendant's present wife was admissible under Ohio R. Evid. 803(3) to show he acted accordingly. The accomplice's statements admitting a conspiracy were admissible under Ohio R. Evid. 801(D)(2)(e), as defendant's similar statements independently showed the conspiracy. Defendant forfeited his right to confrontation by making the accomplice unavailable."

United States v. Ciarcia, 2005 U.S. Dist. LEXIS 7174 (D. Conn. 2005) – "When the witness refused to testify at trial in defendant's case despite the court's order to do so, he became an unavailable witness within the meaning of Fed. R. Evid. 804(a)(2). Because the United States Court of Appeals for the Second Circuit had not yet determined whether statements against penal interest fell within a firmly rooted hearsay exception, the statements had to bear adequate guarantees of trustworthiness to be admissible under the Confrontation Clause. The court held that all of the statements at issue bore adequate guarantees of trustworthiness where the statements were made to friends or confidants in private, non-coercive settings and did not involve the witness's knowing response to structured questioning in an investigative environment or a courtroom setting where the witness would reasonably expect that his responses might be used in future judicial proceedings. The court found that a reasonable person would have perceived the statements being offered by the government as being against his penal interest because the statements either implicated the witness in a money laundering scheme or the shooting of another person."

Gutierrez v. State, 150 S.W.3d 827 (Tex App Houston 14th Div 2004) – A non-testifying Co-Defendant gave a videotaped confession to the police regarding the involvement of the defendant in stealing drugs. At trial, the videotape was played. Although statements against penal interests generally do not violate *Crawford*, this videotaped statement did violate *Crawford* because the statement was given to the police.

People v. Deshazo, 469 Mich. 1036 (2004) – "a non-testifying co-defendant told the witness that defendants hired him to kill the victim, is admissible as a statement against penal interest under MRE 804(b)(3). The co-defendant's statement bears adequate indicia of reliability, in that it was voluntarily given to a friend or confederate, and was uttered spontaneously without prompting or inquiry. The statement was not made to law enforcement officers." This is a non-testimonial statement and not subject to *Crawford* analysis.

People v. Carrieri, 3 Misc. 3d 870, 778 N.Y.S.2d 854 (2004)- “based upon the analysis of *Crawford* and the facts of the instant matter, this court holds that the proposed use by the People of the plea minutes of the co-defendants is testimonial in nature. Therefore, the use of the minutes as proposed by the People, without the co-defendants being called as witnesses, would be violative of the Confrontation Clause. Accordingly, the plea minutes may not be used against defendant Carrieri at trial even though they may well be an exception to the hearsay rule as a Declaration against Penal Interest.”

US v. Jones, 371 F.3d 363 (7th Cir. Ind. 2004) – The *Bruton* line of cases deals with situations in which the confession of one defendant is offered at a joint trial where the statement is redacted to omit any explicit reference to the co-defendant and the jury is instructed to consider the statement only against the *declarant*. *Id.* Here, Rock, the declarant, was not present at the trial, so his confession was obviously intended to be used *against Jones*. Jones never had an opportunity to cross-examine Rock and thus, under *Crawford*, no part of Rock's confession should have been allowed into evidence.

Gutierrez v. Dorsey, 105 Fed. Appx. 229 (10th Cir. N.M. 2004) – A witness testified that her good friend, who was the girlfriend of the defendant, told her that she had been with the defendant, had planned the robbery, and had driven to the service station where the robbery took place with the defendant and others and that the defendant had a knife. The trial court admitted that testimony under New Mexico Rule of Evidence 11-804(B)(4) (hearsay exception for statements against interest) and there was no *Crawford* violation since the statement was non-testimonial.

United States v. Vogel, 2004-1 Trade Cas. (CCH) P74,362 (USDC Indiana) – Where co-defendant makes a statement implicating other co-defendants and invokes 5th Amendment at trial and does not testify, *Crawford* bars admission of the statement under FRE 804(b)(3) (statement against interest) because this violates the right to confront by the other co-defendants.

Learned Treatises

Commonwealth v. Durand, 457 Mass. 574, 575-601, 931 N.E.2d 950 (Mass. 2010) – “We disagree with the defendant's assertion that Dr. Goldberg's testimony concerning the content of the literature she reviewed constituted a confrontation clause violation. The studies to which she testified were not testimonial.”



Part 6: Varieties of Non-Testimonial Hearsay.

Statements to Family and Friends ("Casual Remarks")

(see also the immediately following categories; and part 5, Co-Conspirator Statements; and part 9, Excited Utterances Generally)

Grissom v. State, 296 Ga. 406, 410-11, 768 S.E.2d 494, 500 (Ga. 2015) – "as Dorsey's statements were made to a friend and not to a law enforcement officer, they were not testimonial in nature and their admission did not violate the Confrontation Clause."

United States v. Rodriguez, 591 F. App'x 897, 900-02 (11th Cir. 2015), cert. pet. filed – "As an initial matter, we conclude that the Confrontation Clause was not implicated here as the challenged statements were not testimonial in nature. *See Crawford*, ... Those statements plainly were not made with the primary purpose of aiding in a criminal investigation, as they were from private conversations Washington had with his girlfriend outside the trial context."

State v. Coones, 339 P.3d 375, 380 (Kan. 2014) – "Kathleen did not make the statement at issue to law enforcement or another agent of the state, but to her mother. The call was not part of a government investigation. And there were no formalities associated with it." – non-testimonial

State v. Kelly, 14-241 (La. App. 5 Cir. 10/29/14) (La. Ct. App. Oct. 29, 2014) – "Under the facts of this case discussed above—where the decedent Rodney made a statement to his sister moments after being shot and immediately prior to vomiting blood—we find that the statement was made without sufficient time for reflective thought and is not testimonial in nature." – [NOTE: also statement to family member, which is almost per se non-testimonial.]

Rea v. Gower, 47 F.Supp.3d 1026 (C.D. Cal. Sept. 19, 2014) (habeas) – "On direct examination, Nancy Sanchez, Vito Pratti's fiancée, testified that Pratti had been carrying a gun for several days before the shooting because he felt Petitioner 'was after him.' ... [T]he court of appeal's determination that the statements were nontestimonial was not objectively unreasonable."

State v. Owens, 151 So. 3d 86, 87-89 (La. Ct. App. 2014) – "Phone calls from an inmate to another private citizen are generally non-testimonial."

People v. Merriman, 60 Cal.4th 1, 177 Cal.Rptr.3d 1, 332 P.3d 1187 (Cal. 2014) – "We also reject defendant's assertion that the admission of [murder victim] Katrina's statements to [her friend] Torres violated his federal constitutional rights to due process and to confront the witnesses against him. ... Nor did its admission violate the confrontation clause. (*People v. Griffin* (2004) 33 Cal.4th 536, 579–580, fn. 19, 15 Cal.Rptr.3d 743, 93 P.3d 344 [admission of the declarant's out-of-court statement to a friend at school does not implicate the confrontation clause because it is not "'testimonial hearsay' within the meaning of" *Crawford* ...] ... For reasons previously discussed, we also reject defendant's further argument that the admission of Katrina's statement to her mother deprived him of his United States Constitution Sixth Amendment right to confront the witnesses against him."

Berry v. Capello, 576 Fed.Appx. 579 (6th Cir. 2014) (habeas) – "None of the challenged hearsay statements were testimonial. ... Shaquita Mack did not intend to bear testimony against Berry when she confided in her mother about the shooting."

State v. Kalmio, 846 N.W.2d 752, 755-65 (N.D. 2014) – discussing a variety of hearsay from a variety of sources, most of it between friends and family, finding no error with minimal legal analysis

Wilson v. State, 295 Ga. 84, 757 S.E.2d 825, 827 (Ga. 2014) – "Appellant also contends the admission of Mr. Sharp's statements to his daughter violated the Confrontation Clause. [cite] The trial court properly concluded, however, that a conversation between family members with no expectation that it would be used at a criminal trial was clearly not testimonial and therefore did not implicate the Sixth Amendment."

State v. Norah, 131 So. 3d 172, 179 (La. App. 4th Cir. 2013) – "Phone calls from an inmate to another private citizen are generally 'non-testimonial.'"

State v. Foster, 286 Neb. 826, 839 N.W.2d 783, 803-06 (Neb. 2013) – "Lower courts have generally determined that statements to friends, relatives, accomplices, and anyone outside the criminal justice system are not testimonial. ... A statement that is not intended for use in the prosecution of a crime and that law enforcement had no role in obtaining is not testimonial."

Commonwealth v. Kunkle, 79 A.3d 1173, 1186-87, 1190 (Pa. Super. 2013) – "[W]e agree with the trial court that 'the victim's statements to his friends and confidants were made in a casual setting and were non-testimonial in nature...'"

People v. Cleary, 2013 IL App (3d) 110610, 377 Ill.Dec. 273, 1 N.E.3d 1160, appeal pending (Mar. 2014) – future murder victim expressed fear of her killer in conversations with friends – "¶ 58 In addition, MeLisa's statements were clearly not made in a solemn fashion. Statements made formally, or where there are severe consequences for dishonesty, are considered to be sufficiently solemn. [cite] Here, MeLisa's statements were remarks to her friends—some of whom she had not known long—and family in the course of discussing her relationship. ... Based on these facts, we conclude MeLisa's statements were not solemn, and therefore her statements were not testimonial."

Thomas v. State, 134 So. 3d 357, 363 (Miss. App. 2013), reh'g denied (Mar. 11, 2014) – "¶ 20. Malley testified that prior to trial, he ran into Thomas and asked him how he was doing. According to Malley, Thomas replied that 'everything was going all right, except for his daddy, you know, had done turned [S]tate on him.' ... The statement here was not testimonial. It was not made under oath or for the purpose of later establishing a fact in a court proceeding. Rather, it was a statement made in a casual conversation." – [NOTE: It was the defendant's own statement but both the trial court and appellate court analyzed it as hearsay.]

State v. Lang, 128 So. 3d 330, 331-40 (La. App. 5th Cir. 2013) writ denied, 2013-2614 La. 5/2/14 – "The statements contained within the text messages were made in casual, private conversations and **18 did not come within the purview of any of the classes of testimonial statements mentioned in *Crawford*."

State v. Bowling, 232 W.Va. 529, 753 S.E.2d 27 (W. Va. 2013) cert. denied, 134 S. Ct. 1772 (U.S. 2014) – wife-killing case – statement by future victim to friend in private conversation is testimonial because she "specifically requested that Mr. Richmond tell her statement to others in the event she is shot." However, a different statement to a different friend was not testimonial

because it was "'made prior to and apart from any governmental investigation'" – even though the same was true of the former statement, too. Apparently the key factor is that the former statement included a reference to the police and the latter statement did not.

Harrison v. U.S., 76 A.3d 826, 835-37 (D.C. App. 2013) – "Prior to trial, the government sought leave to admit against both appellants a statement made by Harrison during a conversation with his then-girlfriend Toya Royals at the D.C. jail days after his arrest. ... Harrison's statement does not implicate Hopkins' rights under the confrontation clause because it is not testimonial."

People v. Maciel, 57 Cal.4th 482, 160 Cal.Rptr.3d 305, 304 P.3d 983, 1016-18 (Cal. 2013) – "because Torres made the recounted statements to his mother and sister, they were not testimonial."

State v. Gurule, 2013-NMSC-025, 303 P.3d 838 (N.M. 2013) – "Defendant Davis' statement to her son is more akin to the situation in which a person makes a casual remark to an acquaintance than to an individual who makes a formal statement to a government official as part of a police investigation. [cite] Moreover, it is not clear that a reasonable person in Defendant Davis' position would objectively believe that a statement made to his or her child would be used in a later criminal prosecution. [cite] Thus, Defendant Davis' statement lacks the hallmarks of a testimonial statement."

Billings v. State, 293 Ga. 99, 745 S.E.2d 583 (Ga. 2013) – *Bruton* issue – "The statements by Ross at issue here were made to his girlfriend more than two weeks before he was arrested; they were not a product of interrogation by law enforcement officers during an investigation intended to produce evidence for a criminal prosecution. [cites] Billings does not even argue that Ross's statements were testimonial, and they clearly were not." – therefore no *Bruton* problem

People v. Valles, 2013 COA 84, ___ P.3d ___ (Colo. Ct. App. 2013) – "[¶ 54] During the second trial, the prosecution elicited testimony from Hector Castillo Sr. — the father of Castillo Jr. — regarding his phone call with his son two days after the shooting. ... Here, both parties agree that Castillo Jr.'s statement was nontestimonial. Accordingly, the United States Constitution's Confrontation Clause is not implicated in this case."

Jackson v. State, ___ So.3d ___, 2013 Ala. Crim. App. LEXIS 15 (Ala. Crim. App. Mar. 29, 2013) – "The admission of testimony concerning [defendant's uncle] Elice Jackson's statement also did not violate Jackson's Confrontation Clause rights under *Crawford* Elice Jackson was deceased at the time of trial and was therefore clearly unavailable. Also, his statements to [defendant's father] Jackson, Sr., were not made to further a criminal investigation and thus were not testimonial hearsay. ... Elice Jackson's statements made to Jackson, Sr., were not testimonial and were more reliable as they were being made in private to his brother."

State v. Jones, 135 Ohio St.3d 10, 984 N.E.2d 948, 2012 Ohio 5677 (Ohio Dec. 6, 2012) – "[¶ 162] Delores's statements were made to a friend after Delores arrived at her home. Delores was crying and hysterical when she told Jeffries that her husband had told her that he killed the woman found in the cemetery. An objective witness would not reasonably believe that Delores's statements to her friend while in an emotional state, repeating what her husband had told her, would be available for later use at trial. Indeed, Delores did not call the police until after she told

Jeffries what Jones had told her. ... [¶ 164] For all of these reasons, we conclude that Delores's statements to Jeffries were not testimonial..."

Ward v. United States, 55 A.3d 840, 842-844 (D.C. 2012) – "Appellants contend first that admission of Hansen's statements violated their Sixth Amendment right to confront witnesses against them. We reject this claim as to statements Hansen made to her friends (Black, Gurley, and Holiday) because we discern no basis for treating them as testimonial."

State v. Clue, 139 Conn. App. 189, 55 A.3d 311 (Conn. App. Ct. 2012), appeal denied (2013) – "Here, we cannot discern from the record the context in which Dorothy Bogues described her assailant to her son, and thus we have no way to assess adequately whether her statements were testimonial hearsay that implicated the defendant's rights under the confrontation clause. Specifically, although Randall Bogues indicated in his trial testimony that police officers were present at his mother's house and speaking to her when he arrived, the record does not indicate clearly whether officers remained with Dorothy Bogues while she spoke to Randall Bogues regarding her attacker, whether officers asked Randall Bogues to obtain information from his mother and serve as an intermediary between his mother and the police, whether Dorothy Bogues described her assailant to her son in response to specific questioning or whether she volunteered the information to him, or, alternatively, whether Dorothy Bogues simply described her attacker to her son while he was comforting her after a harrowing experience, wholly outside the context of a law enforcement investigation." – therefore no unpreserved error shown

Commonwealth v. Ortiz, 463 Mass. 402, 974 N.E.2d 1079 (Mass. 2012) – "The defendant challenges the admission of the testimony of the victim's daughter that the victim told her that '[s]he was going to a restaurant, supposedly, to pick up [the defendant].' ... Although the statement constitutes hearsay, it was properly admitted as the victim's statement of a present intent to act. ... this statement is not testimonial in nature ..."

State v. Magee, 103 So.3d 285, 2012 La. LEXIS 2503 (La. Sept. 28, 2012) – statements made by murder victim to her cousin, describing defendant's actions and expressing her fear of him – "Contrary to the defendant's contentions, the Confrontation Clause of the Sixth Amendment does not pose an independent bar to the admission of these statements as they were clearly not 'testimonial' in nature, *i.e.*, they were not made to assist the investigation or prosecution of a crime that had not yet occurred."

State v. Williams, 2012 ME 63, 52 A.3d 911 (Me. 2012) – "Because George made the statements to Cassimy in private, intimate conversations, it is evident that she did not intend to establish facts that could reasonably be anticipated to be used at a later trial."

McNaughton v. State, 290 Ga. 894, 894-895, 725 S.E.2d 590 (Ga. 2012) – "None of the hearsay statements challenged by appellant were testimonial in nature in that they were made by the victim to a family member, friend, or co-worker before the commission of the crimes with no expectation that they would be used in a trial."

State v. Massey, 97 So.3d 13 (La.App. 5 Cir. Mar. 27, 2012) – "the recorded telephone conversation between the co-defendant and his father was made under circumstances in which it appears to be non-testimonial in nature and thus, does not violate the defendant's Sixth Amendment right to confrontation ..."

State v. Robinson, 293 Kan. 1002, 1021-1025 (Kan. 2012) – "the trial court permitted the State to introduce (1) [14-year-old pregnant murder victim] C.B.'s statements to her friend A.K. that C.B. had sexual intercourse with Robinson when C.B. was age 13, as well as on other occasions after her 14th birthday; (2) C.B.'s statements to A.K. regarding her plans to meet Robinson on the Friday of her death; (3) messages between C.B. and Robinson leading up to her death; and (4) C.B.'s text messages to, and [**1198] conversations with, A.K. and M.D. indicating she left the skating rink with Gentry and that she expected him to take her to meet Robinson. ... both parties agree that the challenged statements were nontestimonial."

Brown v. United States, 27 A.3d 127, 128-135 (D.C. 2011) – "Appellant's argument that [murder victim] Brown's statements were testimonial (and therefore barred by the Confrontation Clause) is also without merit. Brown's statements were made to his neighbors (and not police), the setting was frantic and informal, he was severely injured, and the 'statements and actions of both [Brown] and [his] interrogators' do not indicate that 'a person in [Brown's] situation would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution.'"

People v. Dobbey, 957 N.E.2d 142 (Ill. App. Ct. 1st Dist. 2011) – Robinson, Cole and Dorsey Williams were in a car – Defendant shot into the car, hitting Cole and Williams – Williams died within hours – at the scene "Robinson heard Williams say, 'I can't believe I'm shot. I'm shot. I'm shot.' Robinson then heard Dorsey [Williams] exclaim at least two times that it was defendant who shot him." – "Although the Bryant Court did not specifically address whether the confrontation inquiry for police interrogations applies equally to nonpolice interrogations or to situations such as the case at bar where spontaneous statements are made to nonpolice individuals, where such a similar statement under such similar circumstances was found to be nontestimonial when made in response to police questioning, we think it is also nontestimonial when made to a mere nonofficial individual. An objective evaluation of the circumstances in this case leads us to conclude that the comments made here, in the course of an ongoing emergency, were not testimonial."

Brown v. State, 69 So. 3d 316, 317-319 (Fla. Dist. Ct. App. 4th Dist. 2011) – "Most courts agree that a spontaneous statement to a friend or family member is not likely to be testimonial under *Crawford*."

People v. Blacksher, 52 Cal. 4th 769, 259 P.3d 370, 130 Cal. Rptr. 3d 191 (Cal. 2011) – "The fact that officers were somewhere at the scene did not transform Eva's words to family members into 'testimonial statements' as that term is understood in the *Crawford* context."

People v. Loy, 52 Cal. 4th 46, 50-57, 254 P.3d 980, 127 Cal. Rptr. 3d 679 (Cal. 2011) – In prior case, the court held that "The statement of a three-year-old declarant made to his aunt is more like a 'casual remark to an acquaintance' and is therefore not a testimonial statement under *Crawford*. ... The same is true here. [12-year-old] Monique's statement to [her friend] Sara was not testimonial for these purposes."

State v. Richardson, 71 So. 3d 492 (La. App. 2 Cir. June 22, 2011) – "The fact that a statement is made to a person who is not a government officer does not, as a bright line, necessarily mean that the statement is not 'testimonial' within the ambit of the Sixth Amendment."

Courts have been much more reluctant, however, to find a statement made to a non-governmental officer to be testimonial. ... In the case sub judice, C.T.'s statements to Ms. Patterson were merely an attempt to explain her situation to her neighbor so she could get help following the traumatic event. Considering C.T.'s near hysterical state, as described by Ms. Patterson, it is impossible to conclude that C.T. believed the statements she was making at that time, in an effort to get help after being raped and robbed in her home, would ultimately be used in a formal proceeding. Considering the totality of the circumstances, it can reasonably be concluded that C.T.'s statements to Ms. Patterson were not testimonial in nature..."

People v. Ardoin, 196 Cal. App. 4th 102, 134-139, 130 Cal. Rptr. 3d 1 (Cal. App. 1st Dist. 2011) – "n. 14 A statement is testimonial under *Crawford* if it was made in a formal proceeding or in response to structured police questioning, or obtained for the purpose of potentially using it in a criminal trial or determining if a criminal charge should issue. [cites] Jaquez's statement to his wife is not testimonial."

People v Clemente, 2011 NY Slip Op 3871, 84 A.D.3d 829; 922 N.Y.S.2d 193 (N.Y. App. Div. 2d Dep't 2011) – "The defendant's contention that admission of a hearsay statement made by the daughter of the decedent to her mother approximately one hour after the shooting deprived him of his Sixth Amendment right to confrontation under *Crawford* [cite] is unpreserved ... In any event, there was no *Crawford* violation, since the challenged statement was not testimonial in nature [cites]."

State v. Gurule, 2011 NMCA 63, __ N.M. __, 256 P.3d 992 (N.M. Ct. App. 2011), overruled, 2013-NMSC-025, 303 P.3d 838 (N.M. 2013)

People v Jones, 79 A.D.3d 1244, 912 N.Y.S.2d 746, 2010 NY Slip Op 9016 (N.Y. App. Div. 3d Dep't 2010) — "the statements were not, as defendant claims, precluded as testimonial [cites], since they were not made to police or their agents, but to the victim's mother in the immediate aftermath of a violent confrontation [cites]."

State v. Aguero, 2010 ND 210, P1-P18, 791 N.W.2d 1 (N.D. 2010) – " Moncada argues his Sixth Amendment right to confront witnesses against him was violated when the district court allowed a witness to testify about [victim] Damien Belgarde's statement that he was meeting Moncada at a grocery store on the night of the murders.... This Court has held statements made to friends or family generally are not testimonial statements, and the Confrontation Clause does not apply.... Damien Belgarde's statements to the witness were casual remarks made to a friend or acquaintance. [cite] We conclude the statements were not testimonial..."

People v. Bennett, __ N.W.2d __, 2010 Mich. App. LEXIS 2101, 1-6 (Mich. Ct. App. Nov. 2, 2010), leave to appeal denied (April 25, 2011) – "Benson argues that Fritz's testimony that Bennett told her that Benson killed the victim violated his right of confrontation. Bennett's statements were made to Fritz, a friend, and not within a formal proceeding. Thus, they were nontestimonial and do not implicate the confrontation clause. *Id.* Benson next argues that Kandler's testimony that Bennett told her cousin that Benson was threatening to kill the victim was a confrontation violation. Because this statement was to an acquaintance and there is no indication that it was made for the purposes of identifying the perpetrator of a crime, the statement was nontestimonial and did not implicate the Confrontation Clause."

Brown v. State, 288 Ga. 364, 368, 703 S.E.2d 609, 2010 Fulton County D. Rep. 3497 (Ga. 2010) – "The trial court admitted hearsay statements made by the victim to her mother and to Ms. Reynolds regarding prior physical abuse by Brown. Brown contends that admission of these statements violated Brown's right to confront witnesses as set forth in Crawford ... and Davis... However, the victim's hearsay statements were not remotely similar to the prior testimony or police interrogation described in those cases, as they were made in conversations with her friend and with her mother, before the commission of the crimes with which Brown was charged, and without any reasonable expectation that they would be used at a subsequent trial."

Jackson v. State, 288 Ga. 213, 702 S.E.2d 201, 2010 Fulton County D. Rep. 3619 (Ga. 2010) – "At trial, the victim's girlfriend and father both testified that the victim confided to them that he had broken into appellant's apartment and stolen a large amount of cash." – supplying motive for murder – "appellant's right to confront witnesses was not compromised because the statements in question were not testimonial. See Jenkins v. State, 278 Ga. 598 (2) (604 SE2d 789) (2004) (a statement is testimonial if it is made with the involvement of governmental officials)."

State v. Parker, __ S.W.3d __, 2010 Tenn. Crim. App. LEXIS 795, 10-29 (Tenn. Crim. App. Sept. 22, 2010), appeal granted (Feb. 16, 2011) – "We hold that the hearsay statements were nontestimonial. The victim was speaking to her neighbor directly after escaping an attack, and there was no indication she expected the statements to be used in the investigation or prosecution of her attacker."

State v. Hull, 788 N.W.2d 91, 100-101 (Minn. 2010) – "Wilczek's prediction that something would be amiss if he did not return by 6:00 p.m. falls into the category of a "casual remark to an acquaintance" not "a formal statement" to a police officer."

State v. Morales, 788 N.W.2d 737 (Minn. 2010) – "Here, Vega-Lara made the challenged statements to a friend; he was not being interrogated by the police and he did not make the statements before a grand jury, at a preliminary hearing, or at a trial. Based on these circumstances, we conclude that these statements are not testimonial..."

People v. Lynch, 50 Cal. 4th 693, 748-755, 237 P.3d 416; 114 Cal. Rptr. 3d 63 (Cal. 2010) – "Vickie never testified that an officer was present when her mother made the statements Vickie recounted. In the absence of such evidence, and because defendant does not assert that any statements Anna made to Vickie outside the presence of law enforcement personnel were testimonial, no Crawford claim appears."

United States v. Figueroa-Cartagena, 612 F.3d 69, 84-85 (1st Cir. P.R. 2010) – " the statements made by Alberto and his mother were not testimonial"

United States v. Castro-Davis, 612 F.3d 53, 65-66 (1st Cir. P.R. 2010) – companion case to Figueroa-Cartagena, above – recorded jailhouse phone calls – "[Alberto] did not make the statements to a police officer, during the course of an interrogation, or in a structured setting designed to elicit responses that intended to be used to prosecute him. Rather, Alberto had a conversation with a close family member without any intention of assisting in his own prosecution -- in fact, quite the opposite."

Brown v. Commonwealth, 313 S.W.3d 577 (Ky. 2010) – "At trial, the Commonwealth called Adam Dudley, one of Brown's friends, and asked him if, in one of their conversations, Brown had not admitted that he murdered Bland. Dudley denied that Brown had made such an admission to him or that he had repeated the admission to his girlfriend. Thereupon, the Commonwealth called the girlfriend, Stephanie McClain, who testified that Dudley had told her that in a phone conversation with Brown, Brown had confessed to Bland's murder. ... The Supreme Court has yet to provide a definition of "testimonial," but in *Crawford* it distinguished testimonial statements from casual remarks to friends. It is highly unlikely, therefore, that Dudley's remarks to his girlfriend, McClain, are to be deemed "testimonial" for *Crawford*'s purposes."

Miller v. Stovall, 608 F.3d 913, 916-918 (6th Cir. Mich. 2010) (habeas), GVR'd, 132 S.Ct. 573, 181 L.Ed. 418 (2011), on remand, **Miller v. Stovall, 742 F.3d 642 (6th Cir. 2014)** (habeas) – suicide note addressed to parents is testimonial, because suicide victim was former police officer who could foresee that it would be used as evidence against the co-conspirator he named in it – [NOTE: If the suicide victim had spoken to his parents instead of putting it in writing, the same words would surely have been non-testimonial, and indeed any argument in line with the Sixth Circuit's holding would have been regarded as frivolous.] – [NOTE: On remand, the Sixth Circuit grudgingly applied the law in effect at the time of the state court ruling, *Ohio v. Roberts*.]

Commonwealth v. Linton, 456 Mass. 534, 535-543, 924 N.E.2d 722 (Mass. 2010) – "At trial, the victim's father testified that in September of 2004, he received a telephone call from the victim in which she was crying and asked him to come get her. ... On the way back to her father's house, the victim, 'still hysterical,' told her father that she and the defendant had argued and that he had taken her telephone from her and cut the land-line telephone in the apartment. When she tried to leave the apartment, she said, the defendant blocked her way and began to choke her, and he continued to choke her until she lost consciousness. ... There is nothing in the record to suggest that the victim made the statements at issue for any other purpose than to explain to her father what had happened. There is no evidence that the victim reported the assault to the police or sought a protective order against the defendant under G. L. c. 209A, or that she asked her father to do so. A reasonable person in the victim's situation -- that is, still crying and hysterical after being choked to the point of unconsciousness -- would not have anticipated that her statements to her father would be used against the assailant when she did not report the crime to the police or the court. Consequently, the statements were not testimonial in fact."

State v. Morgan, 34 So. 3d 1127, 1130-1134 (La.App. 2 Cir. 2010) – "Under the *Crawford* analysis, the statements made by the victims which were admitted at trial did not constitute 'testimony.' The statement made by [elderly rape victim] R.H. to [*1143] Alice Carson was a call for help following an attack, not a statement that R.H. believed would be used in trial."

State v. Damper, 225 P.3d 1148, 1150-1153 (Ariz. Ct. App. 2010) – "¶12 We conclude the text message was not a testimonial statement. Whether it was an urgent cry for help or a more casual request to a friend, nothing in the message or its context suggests C. intended or believed it might later be used in a prosecution or at a trial. [cites] Nor do we agree with Damper that text messages are by nature necessarily testimonial. Like any other form of communication, a text message may be testimonial or non-testimonial, depending upon the circumstances and purpose for which it is made."

State v. Alvarez-Abrego, 154 Wn. App. 351, 225 P.3d 396 (Wash. Ct. App. 2010), review denied, 2010 Wash. LEXIS 454 (Wash., June 2, 2010) – 4-year-old crime witness's statement to mother is testimonial – "¶ 29 Although our court in *State v. Hopkins*, 137 Wn. App. 441, 453, 154 P.3d 250 (2007) stated bluntly that '[a] child's hearsay statements made to family members are nontestimonial,' we now clarify that such a rule requires some threshold evaluation of the underlying circumstances to meet the constitutional strictures of *Crawford* and *Davis*—an evaluation that the *Hopkins* court properly made. Here, the State failed to prove that the out-of-court statement in question was nontestimonial. Therefore, because RRR did not testify at trial, we hold that admission of her statements violated the confrontation clause."

United States v. Hanna, 353 Fed. Appx. 806, 806-812 (4th Cir. S.C. 2009) – "Appellant argues that Teresa's statements were barred under the Confrontation Clause of the United States Constitution. However, the Supreme Court has ruled that HN6 hearsay is not barred by the Confrontation Clause when the declarant fails to 'bear testimony.' *Crawford* ... In *Crawford*, the Supreme Court acknowledged that a "person who makes a casual remark to an acquaintance," such as Teresa's remarks to her friends and acquaintances, does not 'bear testimony' under the Confrontation Clause."

State v. Price, 154 Wn. App. 480, 228 P.3d 1276 (Wash. Ct. App. 2009) – DV victim, held hostage by abuser, wrote note to daughter before she was killed – the note read: "To AuBriana / From: Olga Mommy / Mommy Luv / Mr. Price / Shot Me / Dead / He thought / I Fooled Around / A Gun / to my / Head." – "the content of the note conveys an intimate communication, intended as parting words to a family member. It was addressed affectionately to Carter's daughter (as opposed to the authorities or "to whom it may concern"), and was written in verse, rather than as an accusation or bearing witness to a crime for the prosecution. Thus, the note was not testimonial and its admission does not raise confrontation concerns."

People v Johnson, 2009 NY Slip Op 7275, 66 A.D.3d 703; 885 N.Y.S.2d 628 (N.Y. App. Div. 2d Dep't 2009) – "The defendant contends that the admission of certain testimony at trial regarding statements made by the deceased victim, shortly after he was shot, deprived him of his constitutional right to confront the witnesses against him ... the statements made by the decedent to his mother and to his mother's tenant shortly after the shooting, as well as the statements initially made by the decedent to the police officer who responded to the scene, were nontestimonial in nature"

Anderson v. State, 286 Ga. 57, 685 S.E.2d 716, 2009 FCDR 3447 (Ga. 2009) – "Appellant claims the trial court erroneously allowed State's witness Vito Chapman, a friend of appellant who witnessed the shooting, to testify that Brandon Goss, another State's witness, told him immediately before the shooting that he had just seen appellant get a gun from the car in which appellant was a passenger that night.... [G]iven that the statement was not testimonial in nature, its admission did not violate *Crawford*. See *Lindsey v. State*, 282 Ga. 447, 452 (4) (651 SE2d 66) (2007) (statement is testimonial if made with involvement of government officers in production of testimonial evidence)."

State v. Sorenson, 770 N.W.2d 701, 2009 ND 147 (N.D. Jul 21, 2009) – "[¶ 20] Sorenson's statements to Nichols and other family members are not testimonial. Sorenson was not being interrogated, she was not making a formal statement, she was not being questioned by a

government officer, and the statements were not made with the expectation that they would be used in the prosecution."

Neal v. State, __ So.3d __, 2009 WL 1546621 (Miss. Jun 04, 2009) – "¶ 31. ... Neal's neighbor, Loerker, testified that when Cleveland's son, C.D., came back to her house, he complained to her that "his bedroom window was locked and he could hear his baby brother crying inside but nobody would answer the door or let him in and he said, 'that seems odd. My window is never locked.' " ... [¶ 35] C.D.'s statements to Loerker were not made for any prosecutorial purpose; in fact, neither C.D. nor Loerker even knew of Cleveland's death at the time the statement was made. Loerker's testimony about C.D.'s comments bore no resemblance to the core class of testimonial hearsay identified in *Crawford*. Therefore, we find that it was nontestimonial..."

People v. Beaudoin, 2009 WL 1068879 (Mich. App. Apr 21, 2009) (unpub) – "The prosecution elicited testimony from Zeeb that Beaudoin told her that he and Biller were planning on robbing Christopher McGinnis by having Biller take McGinnis's money by force. ... The challenged statements were voluntarily made to Zeeb, who was not working on behalf of the police. Because the statements are non-testimonial in nature they are not subject to the Confrontation Clause."

French v. Lafler, 2009 WL 799217 (E.D. Mich. Mar 24, 2009) (unpub) (habeas) – "Ms. Thomas's comment to Ms. White that Petitioner and his friends wanted to know whether they could sell drugs at the house on Westbrook was not prior testimony or a statement made during police interrogation. It was a statement made to a friend."

State v. Peebles, 2009 WL 737922, 2009-Ohio-1198 (Ohio App. 7 Dist. Mar 11, 2009) (unpub) – "{¶ 31} Here, the person to whom the declarant was speaking was her friend of many years. The friend thought of the declarant as her second mother and called her "mom", "ma" and "mother." (Tr. 295, 303-304). Sarah told her friend what appellant did to her in a private conversation while crying. These statements are not testimonial as an objective witness would not reasonably believe her statements to her friend explaining why she was upset would be available for later use at a trial."

Character v. State, 285 Ga. 112, 674 S.E.2d 280, 9 FCDR 776 (Ga. Mar 09, 2009) – future murder victim's statements to lifelong friend were nontestimonial – as were his statements at the crime scene made to another person

Stauffer v. Vasquez, 2009 WL 385446 (C.D. Cal. Feb 12, 2009) (unpub) (habeas) – wife secretly tape-recorded husband – "the statements were made during a private conversation and were nontestimonial."

People v. Gutierrez, 45 Cal. 4th 789, 200 P.3d 847, 89 Cal. Rptr. 3d 225 (Cal. Feb 19, 2009) – "Pinto testified that while she and defendant's three-year-old son [and Pinto's nephew] were driving to her mother's house on December 7, 1996, approximately two months following the death of Nakatani [the sister and mother, who had been choked to death with a cloth ligature], Pinto told the child that they were going to the cemetery to visit his mother's grave. In response, defendant's son told Pinto, "I'm going to untie my mommy." Pinto asked the boy "who told him that," and he replied that "his daddy and his mean friend tied up his mommy." The child made a

tying motion with his hands and pointed at his neck while making this statement. The boy stated that he hit defendant, told defendant to stop, and defendant carried him upstairs. ... The statement of a three-year-old de-clarent made to his aunt is more like "a casual remark to an acquaintance" and is therefore not a testimonial statement under *Crawford*."

Ferrer v. State, 2 So.3d 1111 (Fla. App. 4 Dist. Feb 18, 2009) (post-conviction) – "We specifically affirm the claim that counsel was deficient in failing to move to suppress appellant's recorded conversation at the police station with his codefendant. ... Their admission also did not violate appellant's right of confrontation, as they were not testimonial statements under *Crawford*..."

Pese v. Runnels, 2009 WL 248374 (N.D. Cal. Jan 29, 2009) (unpub) (habeas) – "Lemasino Taesali, Pollyann's sister, testified that before she died, Pollyann told her that she was angry with petitioner because he owed her some money." – not testimonial

People v. Graham, 2009 WL 223702 (Cal. App. 4 Dist. Jan 30, 2009) (unpub) – "The statements defendants made to Johnson after leaving the party and the next day while the five of them were conversing at Oard's residence, plus Oard's statements to Peterson, clearly do not fall within any definition of testimonial."

Guevara v. State, __ S.W.3d __, 2009 WL 196229 (Tex. App.-San Antonio Jan 28, 2009) – killer asked friend to provide false information to police – non-testimonial

People v. Posey, 2009 WL 151335 (Cal. App. 1 Dist. Jan 22, 2009) (unpub) – "Remarks to acquaintances, even if they describe criminal events, 'are not the concern of the confrontation clause.'"

Garcia v. Burge, 2009 WL 102142 (S.D. N.Y. Jan 15, 2009) (unpub) (habeas) – "Caraballo testified that Evelyn had told her that she saw Petitioner at Denise's home earlier in the day." – petitioner subsequently killed Evelyn – not testimonial

People v. Faith, 2009 WL 105690 (Cal. App. 3 Dist. Jan 16, 2009) (unpub) – conversation between aunt and victim "concerning anal intercourse was not 'testimonial' as that term is used in *Crawford*"

U.S. v. Scott, 2009 WL 36548 (S.D. N.Y. Jan 07, 2009) (unpub) (post-trial order) – "FN4. White's argument that Ms. Roberts' testimony was barred by *Crawford* ... is without merit because Mr. Farquharson's statements to her [they lived together] were not 'testimonial' in nature. There was no evidence that Mr. Farquharson 'had any awareness or expectation that [his] statements might later be used at trial.'"

Williams v. Adams, 2008 WL 5262710 (C.D. Cal. Dec 15, 2008) (unpub) (habeas) – "Bruce's spontaneous statement to his wife, uttered shortly after he had been shot and within the hearing of only members of his family, was not 'testimonial.'"

State v. Parks, 2 So.3d 470, 08-423 (La. App. 5 Cir. Nov 25, 2008) – "the [murder] victim's statements to her niece were non-testimonial. The statements do not come within the purview of any of the classes of testimonial statements mentioned in *Crawford*. [cite] The victim was

speaking to a friend, and not the police. [cite] Additionally, the victim had no expectation that her statement would be of later use to help establish that defendant committed a crime, as she spoke informally and without coercion."

People v. Weissert, 2008 WL 4958795 (Mich. App. Nov 20, 2008) (unpub) – "The prosecution sought to admit under MRE 804(b)(3) non-custodial, out-of-court, unsworn-to statements that Lewis voluntarily made to Anjanette at his initiation, in which Lewis inculpated both himself and defendant in Sibson's robbery and murder. ... Furthermore, we note that Anjanette's statements [*sic*] are not testimonial in nature, so defendant's right of confrontation was not violated."

State v. Schaer, 757 N.W.2d 630 (Iowa Nov 21, 2008) – DV case, recanting victim – "On June 3, 2004, Bergan spent the day with her stepsister, Sarah Reckner. Between 9 p.m. and 10 p.m. that evening, Reckner dropped off Bergan at the home Bergan shared with the defendant. Approximately fifteen minutes later, Reckner received a phone call from a hysterical Bergan, asking Reckner to pick her up. According to Reckner's trial testimony, Bergan told her 'they had gotten into a fight' and that Bergan had left the house." – not testimonial

Reitz v. Harrison, 2008 WL 4666392 (C.D. Cal. Oct 22, 2008) (unpub) (habeas) – "There is no indication that the statements [murder victim] Eva made to her son, nieces and friend were made with any anticipation of being used in court, nor is there any indication that it was foreseeable to Eva that the statements would be offered at trial. The statements at issue were clearly not 'the functional equivalent' of in-court testimony, 'formalized testimonial materials,' or intended 'for use at a later trial,' and are, therefore, not testimonial. [cite] Thus, the court of appeal's decision that the admitted statements did not violate Petitioner's right to confrontation under the Sixth Amendment..."

Doan v. Carter, 548 F.3d 449, 2008 WL 4999070 (6th Cir.(Ohio) Nov 26, 2008) (NO. 07-3516), rehearing and rehearing en banc denied (Feb 19, 2009 – "Moreover, in *Giles*, albeit in dicta, the Supreme Court specifically provided that '[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules,' because they are not testimonial within the meaning of the Confrontation Clause. 128 S.Ct. at 2693-94..."

Amos v. State, __ N.E.2d __, 2008 WL 4980396 (Ind. App. Nov 25, 2008) – "Here, [murder victim] Keyonia's statements to Lavonn were not testimonial as there was no evidence that they were made for purposes of future legal use; Lavonn was merely a concerned sister inquiring as to why Amos had called Keyonia.

Smith v. State, 667 S.E.2d 65, 284 Ga. 304, 8 FCDR 2964 (Ga. Sep 22, 2008) – "Smith contends the trial court erred in allowing witnesses to testify about statements Lundy made to them before she was killed [by Smith] ... None of the out-of-court statements by Lundy recounted at trial were even arguably 'testimonial' as the United States Supreme Court had used that term in its recent Confrontation Clause jurisprudence."

Wilkinson v. Hofmann, 572 F.Supp.2d 470 (D. Vt. Aug 19, 2008) – victim was not competent to testify under Vermont law because of prior perjury conviction – state court found his statement to cousin was non-testimonial – "[T]he Vermont Supreme Court applied *Crawford*

reasonably by relying on facts that distinguished Tom's statement from the examples given in *Crawford*."

Roberts v. State, 894 N.E.2d 1018 (Ind. App. Oct 15, 2008) – "Roberts first argues that the trial court improperly admitted testimony from three of Vanarsdale's co-workers and friends that he had threatened to kill her. He contends that this evidence was inadmissible because it violated his Sixth Amendment right to confront witnesses..." – not testimonial

U.S. v. Marchesano, 67 M.J. 535 (Army Ct. Crim. App. Oct 02, 2008) – "PM's statements to AK were not testimonial: '[It was] made by one 7-year child to another after a sleepover. There was no questioning by [AK] to elicit information. This scenario is not the functional equivalent of testimony under oath, such as an affidavit, custodial examination, deposition, confession, or prior testimony.'"

Coker v. Harry, 2008 WL 4377655 (W.D. Mich. Sep 23, 2008) (unpub) (habeas) – "In the present case, the statements made by Edgington, and testified to by Janes, were simply between friends, and bore none of the qualities of a testimonial statement as set forth in *Crawford*."

State v. Jones, 2008 WL 4378166 (Tenn. Crim. App. Sep 25, 2008) (unpub) – "Statements to friends and acquaintances, however, are nontestimonial."

Harris v. Budge, 2008 WL 4371772 (D. Nev. Sep 18, 2008) (unpub) (habeas) – conversation among friends not testimonial because it "does not fall within any of these categories" established by *Crawford* – (without explanation, the opinion describes the declarant as saying both "that a client had robbed her" and that she "had robbed a client")

Gilliam v. Com., 2008 WL 4291544 (Ky. Sep 18, 2008) (unpub) – in this case, the court analyzes an 80-year-old, seriously injured woman's statements to her own daughter as testimonial, without explaining why it is doing so

People v. Barragan, 2008 WL 4232017 (Cal. App. 3 Dist. Sep 17, 2008) (unpub) – "the statement made by Barragan to [girlfriend] Flores involved none of the factors highlighted in *Cage*. The record supports the trial court's findings and *Crawford* was therefore inapplicable."

People v. Hernandez, 2008 WL 3984220 (Cal. App. 2 Dist. Aug 29, 2008) (unpub) – "However, the statements Mariann made to her daughters clearly were not testimonial in nature."

Reitz v. Harrison, 2008 WL 2967235 (C.D. Cal. Aug 01, 2008) (unpub) (habeas) – "There is no indication that the statements Eva made to her son, nieces and friend were made with any anticipation of being used in court, nor is there any indication that it was foreseeable to Eva that the statements would be offered at trial." – especially not a trial for her own murder, presumably

People v. Medina, 861 N.Y.S.2d 546, 2008 N.Y. Slip Op. 06027 (N.Y. A.D. 4 Dept. Jul 03, 2008) – "the responses by the victim to his friend after sustaining a fatal wound 'bear no similarity to the kind of formal interrogation by authorities that the Supreme Court found to be part of the "Sixth Amendment's core concerns"' – because statements properly admitted under hearsay exception for excited utterance, court doesn't consider whether they were also dying declaration

People v. Colbert, 2008 WL 2553239 (Mich. App. Jun 26, 2008) (unpub) – "the victim's statements that she feared defendant and that she believed that defendant was stalking her were made to a boyfriend and to other social friends. The statements were made to describe the victim's perception of defendant's conduct and how she felt about defendant. None of the statements was made to law enforcement officers or under circumstances that objectively indicated a primary purpose of establishing past events for later use in a criminal prosecution. *Id.* Therefore, the statements were not testimonial in nature"

State v. Her, 750 N.W.2d 258 (Minn. May 29, 2008) – "We hold that Vang's statements to family members were nontestimonial and that their admission therefore did not violate Her's right to confrontation under the United States Constitution"

People v. Ingram, 382 Ill.App.3d 997, 888 N.E.2d 520, 321 Ill.Dec. 1 (Ill. App. 1 Dist. Apr 11, 2008) – shooting victim said to friend, Cameron, whose nickname was Luscious: "'Luscious, baby I'm dead. Luscious, baby I'm dead. I've been shot in the heart.' When Cameron asked, 'Who shot you?' Hicks responded, 'Pattyman shot me.' ... we find the statements are not testimonial in nature. ... there was no 'interrogation' as contemplated by the *Davis* standard and the conversation was not being conducted as interrogation to establish or prove past events potentially relevant to later criminal prosecutions. Rather, the conversation between Hicks and Cameron occurred as a natural consequence of the shooting. The record reflects this conversation occurred between friends immediately after Hicks, who was a friend of Cameron, was fatally shot." – also dying declaration

Mata v. State, 2008 WL 2715869 (Tex. App.-San Antonio Jul 09, 2008) (unpub) (replacing prior unpublished opinion issued May 14, 2008) – drive-by shooting – "Israel's comment to his brother or others in the car that he had shot a girl in the head was not 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' ... Israel's statement was not testimonial in nature..."

Riddick v. Com., 2008 WL 2019505 (Va. App. May 13, 2008) (unpub) – neighbor overheard pregnant murder victim scream: "don't hurt me, don't hurt my baby, don't hurt your baby, don't you want your baby" – held: non-testimonial

Scanlon v. Harkleroad, 2008 WL 1733612 (M.D. N.C. Apr 10, 2008) (unpub) (habeas) – "[T]he statement at issue was one by the victim's sister, Barbara Breeden, who testified that [murder victim] Ms. Harris had told her that Kim Senter had said that Petitioner had a key to Ms. Harris's home. ... Here however, there is no evidence to suggest that Kim Senter knew that her statements to Ms. Breeden would later be used at trial. The out-of-court statement objected to, therefore, clearly was not testimonial".

Garcia v. Burge, 2008 WL 627508 (S.D. N.Y. Feb 28, 2008) (unpub) (habeas) – defendant killed five people at three different locations – one of the victims went over to one of the other locations and saw defendant there, as she subsequently told her friend by phone – the victim also reported defendant said he would see her later that night – he did, and killed her – "Here, the statements that Evelyn made to Caraballo constituted casual remarks to an acquaintance which were not testimonial."

Steward v. Workman, 2008 WL 787018 (10th Cir. Mar 25, 2008) (unpub) (habeas) – "[murder victim] Amanda's statement was wholly different; rather than a statement made for the purposes of prosecution, the statement appears to have been a statement to a friend meant to allay concern for her safety following an argument that Amanda had with Mr. Steward."

Paraison v. State, 980 So.2d 1134 (Fla. App. 3 Dist. Mar 26, 2008) – elderly robbery victim told son what happened to her – "They are also admissible because the circumstances surrounding them objectively indicate that their primary purpose was not testimonial, but to relate to a close family member what had happened to garner assistance and support." – fact that officer may have overheard the conversation immaterial

Olson v. Com., 2008 WL 746651, *3+ (Ky. Mar 20, 2008) (unpub) – "Here, Dressman made the statements at issue during casual conversations with friends and acquaintances, and thus, we conclude that *Crawford* is inapplicable to the present case because the statements were clearly non-testimonial."

State v. Hudson, 2008 WL 740532, 2008-Ohio-1265 (Ohio App. 8 Dist. Mar 20, 2008) (unpub) – "{¶ 39} ... [Shooting victim] Claudio testified that he received a call from his aunt telling him that she heard rumors that Hudson wanted to kill him. ... {¶ 41} In this case, we do not find that the aunt's statement regarding the rumors was testimonial. At the time the statement was made, the crime had not even been committed and the aunt was making the statement for purposes of warning the victim. We do not find that the circumstances would lead an objective witness reasonably to believe the statement would be used at a later trial. Accordingly, we find no Confrontation Clause violation."

Bierenbaum v. Graham, 2008 WL 515035 (S.D. N.Y. Feb 25, 2008) (unpub) – "The declarations here at issue were confidences imparted by [deceased victim] Katz to her friends and relatives, and were in no sense intended to be official reports which would some day be aired in a court room. ... [E]ach of these statements was admitted to demonstrate Katz's state of mind, or the state of the Katz-Bierenbaum marriage. [cite] Statements not admitted for their truth do not implicate the Confrontation Clause."

Clarke v. U.S., 943 A.2d 555 (D.C. Feb 28, 2008) – "the issue we decide is whether Marlin's uninvited statement to his mother that he had just had gasoline thrown on him by appellant was 'testimonial' ... The fact alone that a statement was made 'to someone other than law enforcement personnel,' [cite] does not—so far as *Crawford* and *Davis* teach—make it nontestimonial, for the Court left that issue open in both cases. *See id.* Nevertheless, in a setting such as this one where Ms. Thomas had no affiliation, even remote, with law enforcement and nothing in Marlin's statement suggested that he meant her somehow to convey his utterance to the police, we think the fact that she was a lay person—indeed, a family member—must weigh against a finding that it was testimonial. [FN2] And, when we consider the other circumstances in which the statement was made, we are certain in concluding that Marlin 'was not acting as a witness; ... was not testifying,' [cite] when he told his mother of the assault." [NOTE: This seems like a very easy case, but it gets extended treatment.]

Moorer v. Jackson, 2008 WL 723540, *4+ (E.D.Mich. Mar 17, 2008) (unpub) (habeas) – Judge Robert H. Cleland assumes, without discussion, and without any apparent awareness that he's making an assumption, that statements made by murder victim to friends and family in the

days before his death were testimonial, but finds the "error" harmless – an alarmingly clueless opinion

Miller v. State, 658 S.E.2d 765, 8 FCDR 880 (Ga. Mar 17, 2008) – trial court admitted murder victim's statements to "individuals in whom the victim placed great confidence and to whom she turned for help in times of trouble ... The out-of-court statements admitted by the trial court were not made to government agents and are not even arguably 'testimonial' as that term is used in the United States Supreme Court's recent Confrontation Clause jurisprudence."

People v. Ignasiak, 2007 WL 4553063 (Mich. App. Dec 27, 2007) (unpub) – "Next, defendant asserts that the trial court erred in admitting the telephone recording of his sister, Kristina Ignasiak, discussing his involvement in the incident with a friend. Defendant claims that the recording was admitted in violation of his Sixth Amendment, U.S. Const, Am VI, right to confrontation. ... In speaking to her friend, Kristina briefly referenced defendant's legal problems. She said that "[defendant] went to his work and broke in and stole the Porsche and Dodge Viper ... he did 180 [miles per hour in the Porsche] ... and he crashed the \$90,000 Dodge Viper." At trial, Kristina testified that she could not recall who told her about the incident, but she claimed that it was not defendant. ... Defendant asserts that because the source of Kristina's knowledge about the incident is unknown, the admission of the recording constituted a *Crawford* violation. We find, however, that *Crawford* is inapplicable to the instant case, because the statements in question cannot be characterized as testimonial."

State v. Myers, 248 S.W.3d 19 (Mo. App. E.D. Jan 15, 2008), transfer denied (Feb 25, 2008 and Apr 15, 2008) – "Statements that are not made to law enforcement personnel or governmental agents are not testimonial in nature, and Confrontation Clause protection does not extend to those situations, though the law applying to hearsay may be applicable. [cite] [Deceased victim] Girlfriend's statement to [friend] Gercone was non-testimonial, and the Confrontation Clause would not operate to exclude it."

People v. Lopez, 2008 WL 152708 (Cal. App. 2 Dist. Jan 17, 2008) (unpub) – "Detective Modica testified that Diaz told him that the shooter was a Hispanic male in a black car. She then told him her son-in-law said that the vehicle was a Thunderbird and described the first two numbers on the license plate. ... Diaz's son-in-law's statements to his mother-in-law cannot be characterized as testimonial as they were not made in a police interview or at a court hearing. [cite] Statements made on the street from one individual to another where neither is connected to law enforcement are simply not testimonial in nature."

People v. Gantt, 48 A.D.3d 59, 848 N.Y.S.2d 156, 2007 N.Y. Slip Op. 10508 (N.Y.A.D. 1 Dept. Dec 27, 2007) – drug dealer shot, dying, tells two friends who shot him – "Moore's statement to his two friends, Haywood and Pinkston, as he lay bleeding on the ground, bear no similarity to the kind of formal interrogation by authorities that the Supreme Court found to be part of the 'Sixth Amendment's core concerns' (*Crawford*, 541 U.S. at 51). Nonetheless, defendant argues that when Moore, lying mortally wounded on a sidewalk, spoke to his two friends, he must have believed that his identification of defendant would enable the police to investigate and prosecute him. Suffice it to say that how his statements might be used in a police investigation and prosecution could not have been uppermost in Moore's mind at that moment."

State v. Ramirez, 936 A.2d 1254 (R.I. Dec 17, 2007) – "[Decedent] Sargent's statement to Limburg was a casual remark from one associate to another and not related to any official inquiry or proceeding. When Limburg arrived at Sargent's home, the decedent was engaged in a telephone conversation; Limburg asked about the caller and Sargent responded that it was the police and that he was an informant. There is no suggestion that Sargent spoke under the belief that his statement to Limburg would be used at a later trial (particularly the trial of his alleged killer), nor was it made for the purpose of proving a fact or a motive for his subsequent execution-style murder. *See Crawford*, ... This evidence, as in *Feliciano*, was a statement of a decedent made to a friend and constituted a casual remark between acquaintances, and not a testimonial declaration."

People v. Levine, 2007 WL 4248775, *15+ (Cal.App. 4 Dist. Dec 05, 2007) (unpub) – "Assuming *arguendo* that Levine's and Jerome's statements presented in Deborah's testimony were hearsay statements because they were offered for the truth of the matter, they were not testimonial. Both Levine and Jerome were speaking informally to family members."

Jones v. State, 940 A.2d 1 (Del. Dec 12, 2007) – "Here, Page's statements were nontestimonial in nature because they were casual remarks made to his girlfriend (Still). Although Still revealed these statements in a testimonial setting, this did not change the nature of Page's statements to her."

Commonwealth v. Lao, 450 Mass. 215, 877 N.E.2d 557 (Mass. 2007) – "[A]s to [murder victim] Alicia's statements to [daughter] Yessenia that the defendant had tried to run over Alicia with his car, the language of *Crawford* suggests that these statements likely would not have been considered testimonial. They were remarks to a relative, not to law enforcement officers, and there is nothing in the record to suggest that Alicia had any reasonable expectation that these particular comments to her daughter would be used prosecutorially at some later date. As such, the statements would have been admissible." – thus, counsel not ineffective for failing to object

People v. King, 2007 WL 4209366 (Mich. App. Nov 29, 2007) (unpub) – "Scarber made the statement to a friend for personal and conspiratorial reasons, not to an interrogator or other official for the purposes of trial, so the statement was not testimonial. *See Crawford* ..."

U.S. v. Jordan, 509 F.3d 191 (4th Cir. Dec 04, 2007) – defendant burned his victim, who lingered for 10 days with burns over 90% of his body – "The statements at issue were made by Octavia Brown, an alleged co-conspirator of Gordon and Jordan, to her friend Paul Adams. Adams picked up Brown on the night of Tabon's murder after receiving her frantic phone call. ... Brown was incarcerated on matters unrelated to this case and committed suicide in 2002. ... To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates."

People v. Cota, 2007 WL 3360054 (Cal. App. 4 Dist. Nov 14, 2007) (unpub) – "Here, I.S. testified that when she met [her 18-year-old niece] Veronica at the gate of the apartment complex, Veronica was trembling and appeared very nervous. Veronica told I.S. that a man had grabbed her with a cutter, forced her to get into a van, and forced her to orally copulate him. Veronica's statements were not testimonial. They were not made with the solemnity and purpose characteristic of testimony. Veronica's statements were not made in the context of 'structured questioning' by a police officer conducting a criminal investigation. (*Cage, supra*, 40 Cal.4th at p.

987.) The record shows Veronica had just been released by her assailant and wished to tell her aunt what had just happened to her before she went to the bathroom to wash her mouth out. The admission of Veronica's statements through I.S.'s testimony at trial therefore did not violate defendant's Sixth Amendment rights."

People v. Lisle, 376 Ill.App.3d 67, 877 N.E.2d 119, 315 Ill.Dec. 632 (Ill. App. 3 Dist. Oct 05, 2007) – "Angela Lee was called to testify and noted that she had been asleep at her home on 9th Avenue in Rock Island early in the morning on September 15, 2003, when her nephew, Ronald Hearn, woke her up by yelling her name from just outside the back door to her house. She turned over on the couch to look toward the back door and saw Hearn leaning against the doorway. Hearn stated he had been shot. [NOTE: In fact, he had been shot no fewer than five times.] After she helped her nephew get outside to wait for the emergency personnel to arrive, she began asking Hearn who shot him. At first Hearn told Lee, 'Roy shot,' but when Lee asked him if he meant Roy was the shooter, Hearn said no, and repeated the words, 'Roy shot.' [NOTE: Roy was in fact shot and killed.] When Lee asked Hearn to tell her "who did this to [him]," Hearn pulled her close to him and said the words, 'Steve, and Korey was with him.'" Lee testified that her nephew made the statements before any officers arrived at her house. ... A review of recent case law in our appellate districts indicates that there exist two developing theories regarding how to determine if a statement is testimonial in nature. [¶] In *People v. R.F.*, one panel of the First District held that '*Crawford* does not apply to statements made to nongovernmental personnel, such as family members or physicians.' ... A competing school of thought developing in our courts is that statements made to nongovernmental personnel can be testimonial in nature. ... Using the test announced by our supreme court in *Stechley*, and *Davis v. Washington*, 547 U.S. -- --, 165 L.Ed.2d 224, 126 S.Ct. 2266 (2006), as our guide, we hold Hearn's statement to Lee was not testimonial in nature."

State v. Silva, 2007-NMCA-117, 142 N.M. 686, 168 P.3d 1110 (N.M. App. Jun 26, 2007), cert. granted, 142 N.M. 436, 166 P.3d 1090, 2007-NMCERT-08 (Aug. 15, 2007) – [NOTE: The state Supreme Court granted certiorari to review non-*Crawford*-related issues. The defense did not seek review of the *Crawford* issue.] – co-perpetrator's conversation with his girlfriend not testimonial

People v. Ginnetti, 2007 WL 2711237 (Mich. App. Sep 18, 2007) (unpub) – "With respect to the statement made by Hills to his sister, it was non-testimonial; therefore, there was no Confrontation Clause violation if the prosecution established that the witness was unavailable, which was met, and the statement bore an adequate indicia of reliability, or fell within a firmly rooted hearsay exception."

State v. Mancini, 2007 WL 2363719 (Minn. App. Aug 21, 2007) (unpub) – DV case – "Here, the record reflects that (1) D.M. made the statements to the driver shortly after the assault occurred; (2) D.M. was in a very emotional state and in a lot of pain; and (3) D.M. made the statements to her close friend. The statement was essentially an excited utterance to a friend, who was more concerned about the situation than whether the statement would be used at trial. See *Ahmed*, 708 N.W.2d at 581. Therefore, the statements to D.M.'s friend are not testimonial."

State v. Williams, 648 S.E.2d 896 (N.C. App. 2007) – witness spoke to victim by telephone immediately before victim was murdered – witness was permitted to tell the jury about the conversation, in which the victim described the strangers who came to his door – "[T]he

statements the victim made to Ms. Howell were made during the course of a private conversation, outside the presence of any police officer. They were, in fact, made before any crime had occurred. There was no indication that the statements were made with the thought of a future trial in mind. ... Moreover, applying the recent test articulated in *Davis*, these statements were not made under circumstances that objectively indicated the purpose was to prove events potentially relevant to a later criminal prosecution. ... Therefore, we hold these statements were nontestimonial, and the trial court did not err by allowing the admission of this testimony."

Delgado v. State, 651 S.E.2d 201, 07 FCDR 2721 (Ga.App. Aug 16, 2007) – The 10-year-old victim of sexual abuse testified at trial. The prosecution also played a tape of a police officer's interview with her. During the interview, the child repeated words said to her by her cousin and aunt when she disclosed the abuse to them. Held: "We recognize that the statements of the absent declarants in the case at bar were made to the victim, not to the investigator who interviewed the victim. [FN8] But they were relayed by the victim on an audiotape made in the context of a formal investigation. The audiotape was created under 'circumstances which would lead an objective witness reasonably to believe' that any and all statements contained therein would be available for use at a later trial. Even if it could be said that the declarants were unavailable for trial, Delgado did not have a prior opportunity to cross-examine them. Accordingly, Delgado's constitutional right to confront witnesses was violated by the admission of the statements of his wife and daughter through the audiotaped interview of the victim." [NOTE: The victim's statement is testimonial, so therefore her cousin's and aunt's prior words to her were equally testimonial?!!] [But the "error" was harmless.]

Arroyo v. State, 239 S.W.3d 282 (Tex. App.-Tyler Jun 29, 2007) – "When the Court in *Crawford* uses the term 'confession,' it is referring to testimonial confessions. *Crawford*, 541 U.S. at 56, 124 S.Ct. at 1367. Hersain admitted his involvement in the murder to his brother, but his statements were not a testimonial 'confession' as described by *Crawford*."

State v. McCoy, 2007 WL 2244106, *2+ (N.C.App. Aug 07, 2007) (unpub) – "Laverne [murder victim's mother] testified that sometime between 28 April 2004 and 21 June 2004, [subsequent murder victim] Pinnix returned to the house and told Laverne that while Pinnix and Defendant were staying in a motel room, Defendant had hit Pinnix with a phone, put his hands around Pinnix's neck, and tried to strangle her. Pinnix was crying and showed Laverne her neck, which had choke marks on it. Laverne said Pinnix told her Defendant was trying to kill her. ... These statements were not made under circumstances that would lead an objective witness to reasonably believe that the statements would be available for later use at trial. Rather, the statements were made in a private conversation outside the presence of any police officer. We conclude that the trial court did not err by concluding that Crawford did not bar admission of the challenged testimony."

State v. Benton, 2007 WL 2217057, 2007-Ohio-3945 (Ohio App. 6 Dist. Aug 03, 2007) (unpub) – "{¶ 53} With respect to [rape victim] Andrea J.'s excited utterances to her mother, appellant presents no argument as to in what manner Andrea J. could have objectively believed that these statements would be available for use at trial later."

Freeburg v. Carter, 2007 WL 2220199 (W.D. Wash. Jul 30, 2007) (habeas) (unpub) – "The statements made by Mr. Kuhn in the presence of his aunt, Ms. Kuhn cannot be deemed testimonial because of their casual nature."

Paredes v. Quarterman, 2007 WL 760230 (W.D.Tex. March 8, 2007) (unpub) – "John Anthony Saenz's highly self-inculpatory declarations to his brother Eric and Tomas Ayala do not fall within even the broadest definition of the term 'testimonial' as employed in *Crawford*."

People v. Posey, 2007 WL 1932022 (Mich. App. Jul 03, 2007) (unpub) – "[I]n the instant case, the victim's statements were not testimonial. Rather, the statements were informal, made between the victim and his girlfriend and the victim and his sister. Thus, defendant's right to confrontation was not violated."

Freeman v. State, 230 S.W.3d 392 (Tex. App.-Eastland May 24, 2007) – "Spontaneous statements to acquaintances are not testimonial. *Woods v. State*, 152 S.W.3d 105, 114 (Tex.Crim.App.2004); *see also Crawford*, 541 U.S. at 51 ("[a]n 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"). Brewer testified that Miquel was a family friend. He had been at her apartment with her family, and she was taking him home when the shooting occurred. The comments he made to her were in immediate response to the shooting both had just observed. These comments were not testimonial, and the trial court did not err when it denied Freeman's objection."

State v. Athan, 158 P.3d 27 (Wash. 2007) – rape-murder victim's statements to friends about the defendant were repeated at trial to rebut defense of consensual sex – "We note *Crawford* is not implicated here because the statements were nontestimonial."

People v. Bell, 2007 WL 1653102, *23+ (Cal.App. 4 Dist. Jun 08, 2007) (unpub) – "Here, Long's statements to Seales were not made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. Long was simply chatting with a trusted friend, in a private setting. Thus, they were nontestimonial."

State v. Hawkins, 2007 WL 1412446 (N.C. App. May 15, 2007) (unpub) – "The victim did not make these statements in anticipation of prosecution. They were made to family members immediately after the assault. Her statements were made to explain why she was visibly injured and crying. The victim did not request any of these witnesses to contact the police or a magistrate. The statements were made neither during an interrogation nor in a formal interview. The victim's statements were non-testimonial."

State v. Camacho, 924 A.2d 99, 282 Conn. 328 (Conn. 2007) – Eric Henry and defendant killed four people – Henry made inculpatory remarks to two women (Martin & Fusco) that were admitted under the "dual inculpatory" exception to Connecticut's hearsay rule; statements to Martin were also admitted under co-conspirator exception – "With respect to Martin, Henry [co-defendant] made the contested statements to her on the night of the murders, in the privacy of their motel room, before the police had contacted them. ... With respect to Fusco, Henry confessed to her in the kitchen of her home voluntarily, without any prompting. Although he already had been questioned by police by the time he made his statements to her, he had not been arrested and the record bears no indication that Henry intended for his statement to Fusco to be used in the state's prosecution of the murders. [¶] In light of these circumstances, we conclude that Henry's statements to Martin and Fusco do not fall within the category of ex parte testimonial statements."

People v. Romero, 149 Cal.App.4th 29, 56 Cal.Rptr.3d 678 (Cal. App. 4 Dist. 2007) – "Here, Acosta Ramos's statement to his friend Ferguson was non-testimonial. It was not obtained for the purpose of potential use in a criminal trial or determining if a criminal charge should issue." (citations omitted)

Boyd v. State, 2007 WL 1075136, *2 -3 (Tex. App.-Amarillo, 2007) (unpub) – "Here, Jarrod's comment about looking for appellant to retrieve his portion of the stolen money could reasonably be deemed as against Jarrod's interests and not one which the declarant would want others to hear. Nor was it said under oath, at any trial, during any pretrial proceeding, or during discovery. Rather, the words were volunteered to appellant's girlfriend during a conversation in an apartment while explaining why the declarant sought appellant after the robbery." – not testimonial

State v. Hutchins 2007 WL 589852, *2 -3 (Wash. App. Div. 3, 2007) (unpub)- "[4-year-old] A.M.'s initial statement was not solicited. Ms. M. acted as a reasonable parent and asked some additional questions. A.M. had no reason to think her statements would be used in a trial. The court properly determined the statements were not testimonial and did not implicate *Crawford*. [¶] The statements A.M. made to [counselor] Ms. Harting were likewise not testimonial. She told Ms. Harting about the event and the counselor's purpose in talking to A.M. was not investigative."

People v. Abby 2007 WL 602562, *7 n.4 (Mich. App., 2007) (unpub) – "The statement at issue here was not testimonial ... Here, the evidence was derived in an informal setting between family members with no indication that the conversation was intended to further an investigation or prosecution. There was no police or prosecutorial involvement in the discussions."

State v. Long, 2007 WL 551306, *9 (Tenn. Crim. App. 2007) – excited utterance to family members not testimonial

U.S. v. Natson, 469 F.Supp.2d 1243 (M.D. Ga. November 22, 2006) – statements by murder victim to two friends and her mother were non-testimonial – minimal discussion

Brigrance v. Knowles, 2006 U.S. Dist. LEXIS 64862, 2006 WL 2522401 (E.D. Cal. Aug. 30, 2006) (unpub) (habeas) – "In this case, petitioner challenges Whitman's out-of-court statements to family and friends concerning her relationship with him. ... Because the challenged hearsay is not testimonial, there can be no Confrontation Clause violation and petitioner's claim fails on the merits."

Rubenstein v. State 941 So.2d 735 (Miss. 2006) – "¶ 24. Rubenstein argues the trial court improperly allowed trial witnesses to present hearsay testimony based on statements allegedly made to them by [murder victim] Annie. Rubenstein's argument focuses on the testimony of [lover, friends & sister] Sidney Page, Kay Kelly, Sue Bellow, and Carla Denham. ... ¶ 47. In this case, the statements Rubenstein claims violated his Sixth Amendment right to confront witnesses against him do not constitute testimonial hearsay."

Griffin v. State, 280 Ga. 683, 631 S.E.2d 671, 06 FCDR 1962 (Ga. 2006) – "One of the three murder victims owed money to defendant. Defendant argued that the trial court erred by

admitting a hearsay statement made by one of the victims before her death. A witness testified that, on one occasion, she and the victim returned to the victims' home and found defendant waiting there. The victim told the witness: "What is he doing here? He's not supposed to know where we live." The appellate court found that the victim was unavailable because she was deceased, and the statement was relevant to show defendant's motive, intent, and bent of mind. The statement was trustworthy because the victim was confiding to her close personal friend. Thus, the statement was properly admitted under the necessity exception" and was non-testimonial.

State v. Carlson, 2006 Wash. App. LEXIS 929, 132 Wash. App. 1058, 2006 WL 1237279 (Wash. Ct. App. 2006) (unpub) – The deceased victim's estranged husband and his mother were convicted in her murder. Prior to her murder, the victim informed family and friends that she was planning to divorce her husband and take the kids to move out of state. The court found that these state of mind statements were casual remarks not deemed testimonial and were non-testimonial. The court, however, found that these statements were not relevant and improperly admitted, thus the convictions were overturned.

State v. Miller, 95 Conn. App. 362, 896 A.2d 844 (Conn. Ct. App. 2006) – A casual remark to a friend is not deemed testimonial under *Crawford*.

U.S. v. Franklin, 415 F.3d 537, *545-546 (6th Cir. 2005) – "[T]he threshold question in this case is whether Clarke's statements to Wright were testimonial. It is clear that they were not. Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit the statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant. As *Crawford* itself indicates, and as we and other courts have held in the wake of *Crawford*, statements of this sort are not testimonial for purposes of the confrontation clause."

United States v. Manfre, 368 F.3d 832, 838 n.1 (8th Cir Ark 2004) – "Mr. Rush's comments were made to loved ones or acquaintances and are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

Statements to Co-Workers, Neighbors, Acquaintances, Attorneys, Etc.

(see also surrounding categories; and part 5, Co-Conspirator Statements; and part 9, Excited Utterances Generally)

State v. Wade, 346 P.3d 838, 848-49 (Wash. Ct. App. 2015) – this case finds that a conversation between two bank employees was testimonial, but the court doesn't even recognize the private nature of the conversation as an issue

State v. Wilcoxon, 185 Wash. App. 534, 341 P.3d 1019 (Wash. App. 2015), review granted, (Wash. June 3, 2015) – "[¶ 20] Nollette's statement to his acquaintance Solem was not testimonial in nature. No government official was involved in obtaining the statement and a reasonable person would not believe it would be used **1023 against Mr. Wilcoxon for the prosecution of a crime. Mr. Nollette simply was bragging about a successful heist; he was not

giving formal witness against his co-defendant. This statement was *542 not 'testimonial hearsay.' Rather, it was a 'casual remark' to an acquaintance."

State v. Call, 748 S.E.2d 185, 186-89 (N.C. App. 2013) – "[Walmart assistant manager] Dunn's statement was not made in direct response to police interrogation or at a formal proceeding while testifying. Rather, Dunn privately notified his colleague, Pedone, about a loss of product at the Wal-Mart store. This statement was made outside the presence of police and before defendant was arrested and charged. Thus, the statement falls outside the purview of the Sixth Amendment. [cite] Furthermore, Dunn's statement was not aimed at defendant, and it is unreasonable to believe that his conversation with Pedone would be relevant two years later at trial since defendant was not a suspect at the time this statement was made. Thus, Dunn's statement was non-testimonial.

People v. Lopez, 56 Cal. 4th 1028, 301 P.3d 1177, 157 Cal. Rptr. 3d 570 (Cal. 2013) – girl kidnapped, then murdered in retaliation for reporting crime – "Mindy's teacher testified that Mindy told him defendant had broken into her house, threatened her, held a knife to her neck and taken her to his aunt's house. ... Mindy's ... disclosure of the incident to a trusted teacher, like other 'informal statement[s] to a person not affiliated with law enforcement,' fall[s] outside the scope of the confrontation clause..." [second brackets added]

Batiste v. State, 121 So. 3d 808 (Miss. May 16, 2013) – victim reported unauthorized use of debit card to his bank, shortly before being killed – "[¶ 108] Galanis made the statements to the bank employees for the purpose of resolving the problem of money being missing from his account. Galanis made the statements to the bank employees while in the course of his discovering that money was missing and determining what remedies might be available. Galanis did not make the statements 'with an eye toward' their use at trial. Because Galanis's statements to Rice and Dailey were not primarily made for a prosecutorial purpose, they were nontestimonial..."

United States v. Shavers, 693 F.3d 363, 369-370 (3d Cir. Pa. 2012) – "White maintains that the District Court violated his right to confrontation by admitting [*395] [criminal associate] Gist's testimony about a statement that Lewis made to her that implicated White and Shavers in the robbery. ... There is no indication or argument that Lewis intended to incriminate Shavers and White or anticipated that Gist would be called to testify against them. Nor is there any suggestion that the conversation amounted to more than simply a 'casual remark to an acquaintance.' [cite] Finally, Gist's casual elicitation of Lewis's remarks bears no resemblance to the abusive governmental investigation tactics that the Sixth Amendment seeks to prevent."

Hughes v. State, 815 N.W.2d 602 (Minn. 2012) – "Because there is no evidence that his wife's divorce attorney was a government agent or that the statements were made with an eye toward a criminal prosecution, we reject Hughes's claim that his wife's statements to her divorce attorney were testimonial."

State v. Parker, 350 S.W.3d 883 (Tenn. 2011) – "The Court of Criminal Appeals held that Ms. Lackey's statements to [her neighbor] Mr. Trentham were nontestimonial. We agree. The victim indicated to Mr. Trentham that she had just escaped her apartment after her assailant heard a noise and left her bedroom to investigate. She was naked from the waist down, reflecting her

hurry, and 'scared to death.' The victim's appearance and statements implied that she feared her attacker might still be on the premises and that her emergency was ongoing."

Graure v. United States, 18 A.3d 743 (D.C. 2011) – burn victim, fatally injured in arson attack on crowded bar – "Here, all of the factors that the Supreme Court identified in *Bryant* support a conclusion that Djordjevic's statements were not testimonial. The questioners were not police officers but general manager Talebnejad (who was away from the club when the fire started) and manager Lazorchack (who was at the rear of the club when the fire started at the front of the building) — *i.e.*, acquaintances of Djordjevic who had not been in a position to witness the scenario of Djordjevic trying to wrest the gasoline can from appellant."

State v. Fick, 18 Neb. App. 666, 790 N.W.2d 890 (Neb. Ct. App. 2010) – rape of woman incapacitated by epileptic seizure – jury heard recording of what she was like as she recovered from seizures (*i.e.*, helpless) – "In this case, the audio recording does not contain any statements that even resemble testimonial statements." – also not hearsay, as court notes earlier

Grady v. Commonwealth, 325 S.W.3d 333 (Ky. 2010) – robbery at apartment complex – "Here, [landlord] Wheeler testified that she spoke with her tenants to check for 'any damage' and to see if her tenants 'were okay.' Importantly, like Hartsfield, the statements were made within minutes (approximately three or four minutes) after the event transpired. [NOTE: Why is that important?] Wheeler stated that at the time she spoke with Rapp and that he was a 'nervous wreck' and that Sanchez was so distraught that he was speaking in both English and Spanish. These statements were informal as they were not obtained by a trained interrogator and neither were they taken under interrogative circumstance. ... [T]hese statements were not made to law enforcement or their equivalents. They were informal and were not obtained under interrogative circumstances. ... However, even though the emergency was not ongoing ... we conclude that the statements were solicited by Wheeler out of concern for her property and her tenants wellbeing rather than from a desire to retrieve testimony that may be used against Appellant [*358] at trial. As a result, we cannot say that an objective observer would consider the primary purpose of the solicitation was for the purposes of a future prosecution."

State v. Serrano, 123 Conn. App. 530, 532-541, 1 A.3d 1277 (Conn. App. Ct. 2010) – "Shortly before 10:30 p.m., the defendant brandished a blunt object. Donna Franco, the defendant's roommate, also was standing in the yard. She implored the defendant not to strike the victim. At least two of the defendant's neighbors, Jonathan Mendez and Daniel Medina, overheard Franco's pleas. Mendez heard Franco say either, 'don't do it,' or, 'don't hit it,' while Medina heard Franco say, 'stop hitting him, you don't have to do that, don't hit him, you're going to kill him.' ... The circumstances of this case, viewed objectively, would not have led Franco reasonably to believe that her statements later could be used for prosecutorial purposes. [cite] Franco made the disputed statements without any degree of solemnity or reflection immediately before the defendant attacked the victim. Therefore, Franco reasonably could not have expected that she was bearing witness against the defendant when she implored him not to attack the victim. Because her statements were nontestimonial in nature, the confrontation clause of the sixth amendment was not implicated." [NOTE: A complicated way to arrive at a self-evident conclusion.]

Laine v. State, 786 N.W.2d 635, 637 (Minn. 2010) (postconviction challenge) – "Nowhere does *Giles* conclude that statements made by domestic abuse victims to friends and coworkers are

considered to be testimonial in nature and protected by the *Crawford* doctrine of prior testimonial statements. Accordingly, the postconviction court did not err in denying a new trial based on the *Giles* case."

People v. Letner and Tobin, 50 Cal. 4th 99, 199-200, 235 P.3d 62, 112 Cal. Rptr. 3d 746 (Cal. 2010) – "Use of the letters also did not violate Tobin's constitutional right to confront the witnesses against him, even were we to agree with his assertion that the letters were, to some degree, actually the statements of Danny Payne, who did not testify. Although Letner testified that the letter writing was supposedly part of a plan to gain leniency from the prosecution, there is no evidence in the record suggesting that Payne was acting as a law enforcement agent in this process. Therefore, the statements in the letters did not constitute "testimonial" evidence as that term has been defined after the United States Supreme Court's decision in *Crawford*..."

United States v. Manon, 608 F.3d 126, 137-139 (1st Cir. N.H. 2010) – Witness testified at trial: "He said there was a guy there that had drugs and that he offered to do - in exchange for us to do [*138] some plumbing and install a bathroom for him, that he'd give us drugs." – court concluded that the "statement is plainly not testimonial."

State v. Franklin, 308 S.W.3d 799, 802-827 (Tenn. 2010) – robbery victim asked unidentified civilian passerby to write down license plate of fleeing robber's car, and passerby did so, which led police to robber – modifying Davis "primary purpose" test as follows: "the law is clear that statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." [*817] [cite] To account for the absence of law enforcement in this case, we merely need to replace 'interrogation' with 'dialogue,' 'exchange,' or a similarly neutral term. Conversely, the statement is nontestimonial if the primary purpose is something other than establishing or proving past events potentially relevant to prosecution, such as providing or enabling assistance to resolve an ongoing emergency. [cite] An objective standard, focusing on the perspective of a reasonable person, governs the determination of the statement's primary purpose." – on facts of this case, passerby's statement was not testimonial

Washington v. State, 191 Md. App. 48, 94-95, 990 A.2d 549 (Md. Ct. Spec. App. 2010) – "[Future murder victim] Clark's statement to a fellow employee before either had the slightest intimation that anything was seriously amiss was obviously not testimonial."

U.S. v. US Infrastructure, Inc., 576 F.3d 1195 (11th Cir. (Ala.) Jul 29, 2009), cert. denied, 176 L. Ed. 2d 368 (2010) – "Given that McNair's statement to Dawson was part of a private conversation, it is "non-testimonial" within the meaning of *Crawford*..."

Banther v. State, 977 A.2d 870 (Del. Supr. Jul 29, 2009) – "[Future murder victim] Ravers' statement to pawnbroker Earl West that he wanted only \$5 for a ring pawn was not 'testimonial' and was correctly admitted under the state of mind hearsay exception."

Kennedy v. Warren, 2009 WL 1313327 (E.D. Mich. May 11, 2009) (unpub) (habeas) – "Co-defendant Parham's statements to acquaintance Michael Dixon were non-testimonial in nature. *Crawford* is thus inapplicable. Similarly, Bruton does not apply as Parham's remarks were made to an acquaintance, not the police or prosecuting authorities in a custodial setting."

People v. Munoz, 2009 WL 1483122 (Cal. App. 4 Dist. May 28, 2009) (unpub) – Defendant's wife threatened witness – "because the statements by Muñoz's wife were nontestimonial and came within an exception to the hearsay rule, Campos's testimony [repeating what she said] did not violate the confrontation clause"

People v. Garcia, 2009 WL 1315504 (Cal. App. 2 Dist. May 13, 2009) (unpub) – "the prosecution case included evidence that, on the afternoon of the shooting, [future victim] Zweig had given some of his guns to bartender Susan Generakos, and told her he was afraid appellant was going to kill him. Generakos so testified, over a defense hearsay objection." – not testimonial

People v. Hawkins, 2009 WL 1027212 (Mich.App. Apr 16, 2009) (unpub) – "In this case, a witness testified that a couple of days after the offense, two men informed her that they wanted to search her backyard for some keys. [FN2] The alleged statements of the two men did not involve prior trial testimony, nor were they made under circumstances in which the declarants reasonably would expect their statements to be used in a prosecutorial manner or would be available for use at a later trial. Thus, the statements are nontestimonial and they do not implicate the Confrontation Clause."

Hape v. State, __ N.E.2d __, 2009 WL 866857 (Ind. App. Mar 31, 2009) – "After trial, the parties learned that the jury, during deliberations, read text messages saved in Hape's cellular telephone that were previously undiscovered by the State and the defense. ... Here, Hape challenges the admission of text messages that were apparently sent to his cellular telephone by a person named 'Brett.' 'Brett' did not testify at trial, and Hape contends that the admission of the text messages violated his right under the Con-frontation Clause to have an opportunity to cross-examine 'Brett.' ... The relevant question, however, is the purpose for which the statements were made. There is no reason to believe that the statements about which Hape complains were made by 'Brett' with any intention that they be used in future legal proceedings. Further, the person to whom the statements were made was Hape, and he did not collect them for the purposes of any future legal utility. The Confrontation Clause does not act to bar these text messages because they are not testimonial." – [NOTE: In what sense were the messages "admitted"? Is that the correct way to analyze them?]

Cox v. State, 2009 WL 807491 (Tex. App.-Hous. (14 Dist.) Mar 19, 2009) (unpub) – "The statement in question consists of an out-of-court threat uttered by 'Black' to the Harris family. Specifically, 'Black' is said to have remarked, while driving past the Harris's home, that '[i]f something happened to [appellant] that he was going to ... kill [them] all. ... The statement in question was not made to a police officer or court official but, rather, was uttered to Fred Shepherd under circumstances that would not lead an objectively reasonable witness to believe that the statement would be available for use later at trial."

Williams v. Artus, 2009 WL 761441 (N.D. N.Y. Mar 19, 2009) (unpub) (habeas) – "Williams argues that the introduction of hearsay evidence concerning his prior abusive, controlling and threatening behavior toward the victim (testimony of complaints made by the victim to third parties about the way that Williams mistreated her) was erroneous and prejudicial. ... The testimony at issue in this case is clearly 'non-testimonial.' There is no indication that the

declarant had any reasonable expectation that the statements would be used in future judicial proceedings."

Latalladi v. People of Virgin Islands, 2009 WL 357943 (V.I. Feb 11, 2009) (unpub?) – victim of identity theft contested vet bill – "Both Moore and Briggs are private individuals not affiliated with law enforcement, and when Berry [victim] made the statements at issue she had no knowledge of the facts that led Moore's clinic to send her a bill for veterinary services, let alone that a crime may have been committed. Rather, Berry was merely disputing a bill she believed she received in error. Under these circumstances, it is not reasonable to believe that Berry uttered these statements with a reasonable expectation that they would later be used in a criminal trial. Accordingly, we hold that the statements attributed to Berry were non-testimonial ..."

People v. Taylor, 482 Mich. 368, 759 N.W.2d 361 (Mich. Dec 19, 2008) – "Scarber's statements to Ervin were nontestimonial because they were made informally to an acquaintance, not during a police interrogation or other formal proceeding, *see Crawford*, [cite], or under circumstances indicating that their 'primary purpose' was to 'establish or prove past events potentially relevant to later criminal prosecution,' *Davis*..."

Juarez v. State, 2009 WL 41648 (Tex. App.-Hous. Jan 08, 2009) (unpub) – "While at the home of a friend later on the day of the murders, appellant was speaking with the friend's mother, Lessa Sheppard, whom he some-times called 'mom,' and asked her 'how [she] would feel toward him if the police said that he had killed the two ladies.' When police interviewed Sheppard the next day, she reported to them what appellant had said. Sheppard also told the officers that appellant had been acting strange while speaking with her and told her that police might be looking for him. ... the statement was not testimonial in nature, but, rather, in the nature of a casual remark spontaneously made to an acquaintance."

State v. Franklin, 2009 WL 29893 (Tenn. Crim. App. Jan 05, 2009) (unpub) – robbery victim asked contractor who was working nearby to write down license number of robber's vehicle – contractor did so – "We conclude that the contractor's statement in this case was testimonial. ... The contractor returned to Yorkshire Cleaners with Polson and wrote the tag number down in order to assist any subsequent investigation. Under these circumstances, we conclude an objective witness would know the tag number would be used, at any later trial, to place the Defendant at the crime scene." [NOTE: Isn't it far more likely the contractor thought the tag number would be used to catch the robber? Is that the same thing?]

Bartholomew v. Van Boening, 2008 WL 5348218 (W.D. Wash. Dec 17, 2008) (unpub) (habeas) – "Annyas had just emerged from the woods onto a rural road, alone, beaten and bruised, damp, shaking from the cold and still in shock, when the Ensleys, total strangers and Good Samaritans, happened to pass by Annyas in their vehicle and stopped to provide her immediate help. Annyas' spur-of-the-moment statements to the Ensleys concerning what had just happened to her 'are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.'"

U.S. v. Siepker, 2008 WL 5273088 (N.D. Iowa Dec 18, 2008) (unpub) (§ 2255) – "Here, the statements attributed to Van Austin in Grayson's testimony are "non-testimonial". They are, as the prosecution argues, " 'casual' remark [s] to an acquaintance," without "the merest hint of an

expectation that the statement would be used against [Siepker] or anyone else at trial," so Crawford does not apply."

Garrison v. Ortiz, 296 Fed.Appx. 724 (10th Cir. Oct 21, 2008) (habeas) – "The relevant out-of-court statements admitted at Mr. Garrison's trial were made by Brent Pellerin, the victim of the crime. Approximately three weeks before he was murdered, Pellerin took a series of personal phone calls at his place of employment. These calls visibly upset Pellerin, and his manager, Richard Budnik, asked what was wrong. Pellerin replied that a friend from California was threatening to kill him." – a second incident was similar – "The out-of-court statements made by Pellerin are plainly not testimonial. Pellerin made the statements to explain his mood, not to prove that Mr. Garrison was, in fact, coming from California to kill him. [although he did] ... Moreover, the statements at issue were made informally to a person with no role in the enforcement of criminal laws, and thus bear none of the indicia of 'testimony.'"

People v. Torres, 2008 WL 4838578 (Cal. App. 5 Dist. Nov 10, 2008) (unpub) – "The out-of-court statement, qualifying as a spontaneous statement under Evidence Code section 1240, made to a civilian unconnected to law enforcement under circumstances in which the declarant could not reasonably anticipate it would be used in court, is not testimonial under *Crawford*..."

People v. Lara, 2008 WL 4215615 (Cal. App. 2 Dist. Sep 16, 2008) (unpub) – Heredia borrowed co-worker Chavez's cell phone – then told Chavez he had used it to call friends to alert them to the whereabouts of their enemies – the friends arrived and shot the enemies – "Heredia's statement is nontestimonial ... Whatever Heredia's purpose in confiding to Chavez, viewed objectively it was not " 'for the purpose of establishing or proving some fact' " as in a court of law. [cite] Indeed, Heredia specifically told Chavez not to repeat what he had told him."

People v. Larabee, 2008 WL 2697550 (Mich. App. Jul 10, 2008) (unpub) – defendant asked people in checkout line whether he should kill person, whom he then proceeded to kill – "we conclude that Larabee's statements to the Meijer employees are not 'testimonial.' [FN3] Larabee made his comments in passing while at a checkout lane to people he did not even know. Both Meijer employees testified that the comments were made in a joking or silly tone and they did not take them seriously. Indeed, these comments bear more resemblance to '[a]n off-hand, overheard remark' that the *Crawford* Court noted the confrontation clause was not designed to target, rather than a 'formal statement to government officers.' [cite] Under the circumstances, it can hardly be said that Larabee made these comments in anticipation of trial. Therefore, the statements at issue were not 'testimonial' hearsay..."

People v. Page, 44 Cal.4th 1, 186 P.3d 395 (Cal. Jun 26, 2008) – "In response to questioning from defendant's counsel, Holly Robles, a waitress at Coco's Restaurant, stated that when speaking of defendant to others [*i.e.*, other waitresses], she occasionally referred to defendant as a 'pervert,' and that she felt uncomfortable around him." – based on his sexually suggestive remarks to some of the waitresses (not Ms. Robles herself) – the prosecutor walked through the opened door with a follow-up question – "The discussion among waitresses concerning defendant's behavior, prior in time to the crimes and the investigation, was not 'testimonial' for purposes of the confrontation clause."

McFarland v. Deppisch, 2008 WL 2405035 (E.D. Wis. Jun 10, 2008) (unpub) (habeas) – "Another eyewitness, Jerome Glosson, also testified at trial. Glosson testified that he lived across

the street from [shooting victim] McNeal-Veasley and that he was on the porch to his second-floor apartment at the time of the shooting. ... Glosson also testified that a woman named Rochelle Ray, who lived across the street, told him she was McFarland's cousin. ... [following discussion of *Crawford*] Here, it seems clear that at least some of the statements challenged by McFarland should not have been admitted. Ray did not testify, and thus McFarland was not able to confront or cross-examine her regarding the statements she supposedly made to Glosson that she knew who the shooter was, that she was related to McFarland, and McNeal-Veasley had previously broken into Ray's apartment and had infected McFarland with a venereal disease. The statements were apparently offered to suggest a motive for McFarland's attack on McNeal-Veasley." – [NOTE: It's amazing that, at this late date, a federal judge could classify a conversation between neighbors as testimonial.]

U.S. v. Gedinez, 2008 WL 2228902 (2d Cir. May 29, 2008) (unpub) – "Gedinez's Sixth Amendment right of confrontation was not violated by the District Court's admission of a statement that Gedinez's non-testifying co-defendant made to an acquaintance. As an initial matter, we conclude that the statement was non-testimonial in nature. *Cf. Davis*... Because the statement standing alone does not otherwise connect Gedinez to the crime, even if the statement in question was testimonial, its admission did not violate the Confrontation Clause."

People v. Prasad, 2008 WL 1992032 (Cal. App. 1 Dist. May 09, 2008) (unpub) – DV victim asked co-worker if she could keep a secret, then showed bruises in women's room – also told minister in her church about the abuse – both non-testimonial – "As evidenced by her request to Mangarin to keep a 'secret,' the last thing Doe thought she was doing was 'testifying.' Rather, she was confiding in a friend about the beating she had suffered at the hands of defendant. ... Moreover, Doe's statements to Annette [minister] were not confined to past events, as Doe expressed great concern over the possibility that defendant would harm her brother in the future."

U.S. v. Pugh, 2008 WL 961564 (6th Cir. Apr 09, 2008), cert. denied (June 16, 2008) (unpub) – "no argument can be made that Walter was acting as a witness, i.e., 'bearing testimony,' against Tyreese when he made the statement to Luster. Luster was not a police officer or government agent seeking to elicit statements to further prosecution. To the contrary, Walter made the statement to Luster during a private, casual conversation in front of Tyreese. No reasonable person in Walter's position would 'anticipate his statement being used against [Tyreese] in investigating and prosecuting the crime.'"

State v. Ware, 2008 WL 516785 (Wis. App. Feb 28, 2008) (unpub) – "¶ 6 Kenneth Horn, a resident of the co-op, testified at trial that he caught Thome in the act of burglarizing his room. Horn testified that after Thome left the co-op he followed her for a couple of blocks, and he then returned to the co-op. At that point, Horn spoke to another resident of the co-op, Daniel Hooper, who told of seeing a black male in the co-op carrying things through a hall, including a guitar case. Hooper was reportedly out of the country at the time of trial and did not testify. ... [I]formal, spontaneous statements to friends, neighbors, or acquaintances are generally not considered testimonial. ... [¶ 11] There is no indication that a reasonable person in Hooper's position would have believed, or intended, that his simple, brief statement would be used in a subsequent prosecution. He was merely relating what he had just seen to his co-op housemates. His statement, therefore, was not 'testimonial.'"

People v. Sandusky, 2008 WL 723924 (Mich. App. Mar 18, 2008) (unpub) – "[Co-defendant] Allen's statements to Allard and McClain were not made to police or investigative authorities, or under circumstances that would lead an objective witness to reasonably believe that the statements would be available for later use at trial. Indeed, Sandusky concedes in his brief on appeal that the statements do not qualify as testimonial. Accordingly, their admission did not implicate Sandusky's right of confrontation."

State v. Calhoun, 657 S.E.2d 424 (N.C. App. Mar 04, 2008) – "Williams asked decedent who had shot him, and decedent told her that it was "Chico" and "Worm ." Williams asked decedent to squeeze her hand to confirm that "Chico" and "Worm" were the shooters, and decedent did so. Officer Hartman witnessed and recorded the identification. Williams later identified defendant as "Chico" ... [T]he statement was made to Williams, a private citizen. Thus, the Sixth Amendment is not implicated as the statements were non-testimonial." [NOTE: Also emergency and dying declaration.]

U.S. v. Diamond, 65 M.J. 876 (Army Ct. Crim. App. Dec 21, 2007) – "Doctor Theer's statements to Dr. Harbin and SSG Donald do not meet two of these three criteria [established by *Rankin*, 64 M.J. at 352]. Although they may have involved more than a routine gathering of facts, they were not made to law enforcement and it is apparent Dr. Theer did not intend they be used for prosecutorial purposes."

Sain v. State, 2007 WL 4462599 (Tex. App.-Fort Worth Dec 20, 2007) (unpub) – "Shepard, an assistant property manager at an apartment complex, met Elena and showed her an apartment on the day before her death. Shepard's testimony indicates that Elena's statements were volunteered. Spontaneous statements to acquaintances are not testimonial. [FN42] We, therefore, conclude that Elena's statements to Shepard were not testimonial and that admission of these hearsay statements did not violate the Confrontation Clause."

State v. Brown, 173 P.3d 612 (Kan. Dec 07, 2007) – "We conclude that statements made by an unidentified emotional bystander to another bystander (Hunt) within minutes of a shooting, were not testimonial because the statements were not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for use at a later trial. Hunt did not intend to seek testimony, the statements were not made to a law enforcement officer or other government official, and the statements lacked the formality of testimony. Because the statements made to Hunt were not testimonial, they did not implicate Brown's rights under the Confrontation Clause."

People v. Smith, 2007 WL 3407779 (Mich. App. Nov 15, 2007) (unpub) – "The record provides no support that the statements of defendant's young female coworkers were made to [civilian] Hargrove as solemn declarations or affirmations for the purpose of establishing a past fact. Rather, the statements were casual remarks made to an acquaintance."

People v. Seriales, 2007 WL 3208541 (Cal.App. 5 Dist. Nov 01, 2007) (unpub) – "Jiminez related to Armenta that, sometime in the couple of days between when Eric Jones was in the news and Zavala's arrest, he was present in the paint shed in back of Zavala's home when he overheard a conversation between appellant, Zavala, and Vidal. ... Jiminez acknowledged telling [DA's investigator] Flores that he heard appellant say, "we finally got that nigger[.]" then Vidal responded, "he won't be bothering us anymore [.]" and appellant then told the other

individuals who were present that if they said anything different than what he had told them to say, he was going to "stick a broom handle up their ass[.]" ... Vidal's statement, made as it was to a group of acquaintances in (they thought) private, was clearly not "testimonial" within the meaning of *Crawford* and the Sixth Amendment.

U.S. v. Williams, 506 F.3d 151 (2nd Cir. 2007) and 2007 WL 3105760 (2nd Cir. Oct 23, 2007) (unpub supplemental opinion), cert. denied (Feb. 19 and March 24, 2008) – "At trial, Baldwin testified that Bobby admitted to him on two separate occasions that he participated in the triple homicide. ... Johnson, echoing much of Baldwin's account, testified that Bobby told her that the victims were shot because of their debts. She then explained that Bobby told her that Michael shot the man in the driver's seat while Bobby shot at least one of the other passengers. ... Michael does not, nor could he, contend that Bobby's statements were testimonial; they bear none of the hallmarks of testimonial statements identified in *Crawford*."

Mims v. State, 238 S.W.3d 867 (Tex.App.-Hous. Oct 24, 2007) (previous opinion in case withdrawn) – "Shephard testified that Moten came to his house early in the morning and appeared 'scared and weird.' Shephard testified that Moten said that he did not want anybody to know he was at Shephard's house and that he had parked his car in the back of Shephard's house by a church. Moten told Shephard that appellant had been bumping his car and that the bumping of his car had caused him to hit a post. Moten said he was afraid because appellant was chasing him. [¶] Appellant arrived at Shephard's house 20 or 30 minutes after Moten. Shephard testified that, when appellant knocked on the door, Moten ran into the back room and told Shephard to tell appellant he was not there, which Shephard did." – Moten was murdered later that day – "[W]e cannot conclude that, when Moten told Shephard (1) that he parked his car behind the church, (2) that appellant was chasing him, and (3) that Moten requested that Shephard not tell appellant where he was, Moten would have reasonably expected the statements to be used at a later trial. ... We therefore conclude that the trial court did not violate appellant's constitutional right to confrontation and cross-examination by allowing Shephard to testify about his conversations with Moten."

Commonwealth v. Caparella, 70 Mass.App.Ct. 506, 874 N.E.2d 682 (Mass. App. Ct. Oct 16, 2007) – father and daughter embezzled from Massachusetts Special Olympics (MSO) – "The defendant contends that the admission of the 1999 statements by Tenglund [her father] violated her right of confrontation under the Sixth and Fourteenth Amendments of the United States Constitution as announced in *Crawford* ... Tenglund's 1999 statements to MSO supervisors attempted to rationalize the existence of a forbidden monetary account through which his daughter and he had processed hundreds of thousands of dollars over a period of five to six years. He should reasonably have expected that his answers to their inquiries would develop into information for an investigation or prosecution against them. Consequently we shall assume, without deciding, that the admission of his 1999 statements may have constituted hearsay and may have violated the standard of *Crawford*." – but harmless [NOTE: This is an assumption, not a holding, but it means that statements to supervisors are testimonial when made by crooks, but not otherwise.]

Garcia v. State, 246 S.W.3d 121 (Tex. App.-San Antonio Oct 10, 2007) – "Daniel D. Garcia was convicted of murdering his wife, Lesa Garcia ... Garcia argues that the trial court erred by overruling his objections to testimony that Lesa Garcia was afraid of him. ... Here, Lesa Garcia's statements were not testimony at a preliminary hearing, before a grand jury, or at a former trial.

Nor were her statements given in response to police interrogations. Instead, Lesa made the statements to her co-workers and friends, Patricia Bach and Mary Pruski; and to her divorce attorney, Sara Herrmann. We, therefore, hold that these statements were not testimonial. Thus, Garcia's constitutional right to confrontation was not violated."

Ridling v. State, 2007 WL 2792433 (Ark. Sept. 27, 2007) (unpub) – "While appellant implies that the statements here were testimonial, they were not. The statements by the victim that were admitted were made to the witnesses, who were not government officials. The victim did not give the statements in a formal declaration intended in preparation for litigation. He did not provide the statements in anticipation of a trial for his own murder. These statements by the victim were clearly within the category of more casual statement that the Court in *Crawford* excluded from its application."

Miller v. State, 2007 WL 2693851 (Tex. App.-Fort Worth Sep 13, 2007) (unpub) – defendant shot her boyfriend, a cop, and then herself – he died but she didn't – testimony of four witnesses that victim was separating from defendant was not testimonial – "Some of the statements were made at least a month before the shooting, and all of the statements were made to Officer Irby's friends at a time when no reasonable person in Officer Irby's position would have contemplated that the statements would be used in later legal proceedings. We therefore hold that Miller's Sixth Amendment rights were not violated because Officer Irby's statements to the four witnesses were nontestimonial statements."

Guilbeau v. Cain, 2007 WL 2478888, *4+ (W.D.La. Jul 31, 2007) (unpub) (habeas) – "In light of these formulations, [future murder victim] Chautin's non-custodial, contemporaneous and spontaneous statements to her employer do not qualify as 'testimonial'. The statements were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts and were not made in the context of any custodial examination or official interrogation. Rather, Chautin's statements were made during a purely private conversation with her employer, Mr. Garcia, under circumstances which would not lead an objective person 'reasonably to believe that the statement would be available for use at a later trial.' ... [A]s the State persuasively notes, it would be illogical, unreasonable and absurd for this court to find that Chautin made the statements to Garcia in anticipation of a trial following her murder."

State v. Miller, 284 Kan. 682, 163 P.3d 267 (Kan. Jul 27, 2007) – "[T]he statements involved in this case—made by Cuthbertson to Parbs while at Parbs' residence regarding both women's involvement with the defendant—were not testimonial. The statements were not made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' *Crawford*, 541 U.S. at 52. Nor were they made in the presence of police officers or other authorities. According to both Parbs and Cuthbertson, this was a very emotional conversation between the two women and was not subject to any of the formalities and procedures otherwise associated with testimonial hearsay."

People v. Chapman, 2007 WL 2189058 (Mich. App. Jul 31, 2007) (unpub) – "In this case, the statements made by Travis, Aaron and Anthony were not made to the police, and were not in the form of sworn testimony. Instead, the statements were offhand remarks made to acquaintances or others who were neither working for, nor acting on behalf of, the police or other government

authority. They were voluntarily made without any prompting. Consequently, the statements were non testimonial ..."

Gendron v. Lafler, 2007 WL 2005057 (E.D. Mich. Jul 10, 2007) (unpub) (habeas) – "Here, Victor Lopez's statements to Daniel Ortiz, an acquaintance at the bar, were non-testimonial in nature. *Crawford* is thus inapplicable to the matter at hand."

Rivera v. Ercole, 2007 WL 1988147 (S.D. N.Y. Jul 06, 2007) (unpub) (habeas) – "In this case, Margarita was not acting in any official capacity when she spoke to Doris after the stabbing. Moreover, Doris's statements were not made in response to any interrogation, or for purposes of criminal prosecution. Instead, Doris, traumatized by witnessing the near-fatal stabbing of her companion, acted instinctively and called Juan's sister to inform her of what happened. Because Doris's statements are not testimonial, there is no Confrontation Clause claim with respect to these statements."

Franklin v. State, 965 So.2d 79 (Fla. Jun 21, 2007) – "Most courts agree that a spontaneous statement to a friend or family member, such as [shooting victim] Lawley's statement to [co-worker] Ellis, is not likely to be testimonial under *Crawford*. ... In the instant case, the circumstances surrounding Lawley's statements to Ellis indicate that the statements were not testimonial. Lawley spontaneously made the statements to his friend. Lawley pounded on Ellis's truck in order to summon assistance and to relay to his friend what had happened to him." – (also excited utterance, seeking aid in medical emergency)

U.S. v. Malpica-Garcia, 489 F.3d 393 (1st Cir. 2007) – "Assuming, but not deciding, that Díaz-Pastrana's testimony that Carlitos Way paid 'prote' to Malpica-García was hearsay, the out-of-court statements were not testimonial within the meaning of *Crawford*. The record includes no indication that Díaz-Pastrana was repeating statements that Carlitos Way or his wife made to police, in an investigative context, or in a courtroom setting. Instead, such statements would have been made in the course of private conversations or in casual remarks that no one expected would be preserved or used later at trial."

U.S. v. Myton, 2007 WL 1492470 (2nd Cir. May 22, 2007) (unpub) – "The statements made by robbery victim Orland Davis to witness Raul Simon, concerning the provenance of Davis's marijuana, were not testimonial because they were patently not made 'under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial.'"

U.S. v. York, 2007 WL 1343801, *2+ (E.D. Mich. May 07, 2007) (unpub) – "In the absence of any contrary suggestion, the Court has no reason to conclude that Defendant York, in allegedly making that statement to a friend and co-conspirator, would have anticipated its use in a criminal investigation or prosecution. Accordingly, the alleged statement falls outside the constraints of *Crawford*."

People v. Hines, 39 A.D.3d 968, 833 N.Y.S.2d 721, 2007 N.Y. Slip Op. 03027 (N.Y. A.D. 3 Dept. 2007) – The victim, who could not recall the conversation, reportedly staggered to the neighbor's porch and, when asked by the neighbor 'what happened,' stated that her boyfriend had kicked her in the face. The neighbor, who was a paramedic, then inquired, 'how many times,'

resulting in the victim replying 'six to seven.' These did not constitute "testimonial" statements and, accordingly, they were not precluded by *Crawford*." (citations omitted)

Bailey v. State, 956 So.2d 1016 (Miss. App. 2007) – "We can find no indication that Joseph Fitzgerald's comments to Ms. Teat were 'testimonial' within the meaning established by *Crawford*. ... Mr. Fitzgerald's comments took place between two co-workers at a time when Bailey was not a suspect to Ms. Harris's murder because, at the time of Mr. Fitzgerald's comments, no one was aware that Ms. Harris had been murdered."

Turner v. State, 281 Ga. 647, 641 S.E.2d 527, 07 FCDR 516 (Ga. 2007) – police officer told colleagues his wife was trying to kill him – he was right - "Here, the objected to statements, although made to police officers, were not testimonial in nature. The record makes clear that Glenn Turner was speaking to his police-officer co-workers as his close friends when he made the statements indicating that he would not commit suicide and that his wife would probably have something to do with it if he died. The fact that Glenn worked as a police officer does not automatically convert any statement made to his colleagues into a testimonial statement, as the nature of Glenn's profession does not inherently change the nature of his statements."

State v. Jensen, 727 N.W.2d 518, 529 ¶ 31 (Wis. 2007) - statements to neighbor and child's teacher not testimonial

State v. Anderson 2007 WL 329419, *3-4 (N.C.App.,2007) (unpub) – doctor testified about what other doctors said – "The statements exchanged by T.A.'s doctors were neither elicited by police interrogation nor made in anticipation of a criminal prosecution. Thus, the statements are non-testimonial and do not implicate *Crawford*."

People v. Diaz, 2007 WL 241145, *5 -6 (Cal. App. 2 Dist. 2007) (unpub) – "[W]e doubt that under the circumstances present here, an objective expert medical witness would have reasonably believed his statement to a colleague that he agreed with the colleague would be available for use at a later trial, since the law is clear that such statements are *not* admissible, at least on direct examination."

Pope v. White, 184 Fed.Appx. 606, 2006 U.S. App. LEXIS 14388 (9th Cir. Cal. 2006) – State of mind hearsay statements are non-testimonial because an objective witness would not reasonably believe that a casual remark to an acquaintance would be later used in court.

State v. Mechling, 633 S.E.2d 311, 321-322 (W. Va. 2006) – DV victim's statements to neighbor – "The U.S. Supreme Court, in *Crawford* and *Davis*, seems to suggest that [victim] Ms. Thorn's statements would be non-testimonial to the extent that Mr. Alvarez [a neighbor who was not acting for law enforcement] was intervening to address an emergency and heard Ms. Thorn relate 'what is happening.' But those statements would be testimonial if the statements related 'what happened,' and the circumstances reflect a significant lapse of time before the statements were made to Mr. Alvarez." [Note: In *People v. Cage*, 40 Cal.4th 965, 155 P.3d 205, 56 Cal.Rptr.3d 789 (Cal. 2007), the court said: "we respectfully disagree with the reasoning of *Mechling*", referring to this passage.]

➤ **Sub-Category: Rap Videos**

United States v. Gamory, 635 F.3d 480, 488 (11th Cir. Fla. 2011) – "Over Gamory's objection, the government played a rap music video produced by HME in August 2006 that was discovered on the "YouTube" website during the trial. ... Because we find the video was not testimonial in nature, there is no Confrontation Clause error under any standard."

People v Anderson, 76 A.D.3d 980, 908 N.Y.S.2d 409, 2010 NY Slip Op 6590 (N.Y. App. Div. 2d Dep't 2010) – "The defendant's contention that the admission of a 'rap video' containing statements made by nontestifying codefendant Avery Green violated his right of confrontation under Crawford ... and Bruton ... is without merit as the statements were not testimonial in nature and did not implicate the defendant [cites]."

Statements to Co-Perpetrators, Fellow Gang Members or Fellow Prisoners

(see also part 5, co-conspirator statements)

United States v. Perez, __ Fed.Appx. __, 2015 WL 342933, at *4 (11th Cir. Jan. 28, 2015) – "We have said that private conversations concerning the criminal activities of the speakers are not testimonial."

State v. Payne, 440 Md. 680, 714-18, 104 A.3d 142, 162-64 (2014) – "the six wiretapped records in the present case were 'more akin to casual remarks to an acquaintance than formal declarations to an official' [cite] and, thus, were non-testimonial under *Crawford*."

Grimes v. State, 296 Ga. 337, 766 S.E.2d 72, 75-76 (2014) – "Since Slaton made the statements to [cellmate] Johnson and not to police, the statements were not testimonial and therefore created no problem under the Confrontation Clause."

Berry v. Capello, 576 Fed.Appx. 579 (6th Cir. 2014) (habeas) – "None of the challenged hearsay statements were testimonial. The statements Berry and Hamilton made to each other at the house on Vaughn Street shortly after Hernandez's murder arose during their private discussion of the crimes they had committed. Neither of them intended to bear testimony against the other at the time the statements were made."

Ayers v. State, 97 A.3d 1037 (Del. 2014) – "The team used wiretaps to monitor communications by Galen Brooks, the target of the investigation. On May 26, 2012, the police heard a phone conversation between Brooks and Michael Demby, which led them to believe that a drug deal was about to take place. ... The wiretap recordings are not testimonial under the Sixth Amendment because the declarants obviously did not expect their statements to be used against them, and because the statements were made in furtherance of a conspiracy."

People v. Hajek, 58 Cal.4th 1144, 171 Cal.Rptr.3d 234, 324 P.3d 88, 142 (Cal. 2014) – "Private communications between inmates [in this case, letters] are not testimonial, and their admission would not violate the principle laid down in *Crawford* that bars the use at trial of testimonial out-of-court statements as to which no opportunity for cross-examination was afforded."

U.S. v. Dargan, 738 F.3d 643, 645-47 (4th Cir. 2013) – "Harvey made the challenged statements to a cellmate in an informal setting—a scenario far afield from the type of declarations that represented the focus of *Crawford*'s concern. The Supreme Court itself has noted, as a general matter, that 'statements from one prisoner *651 to another' are 'clearly nontestimonial.'"

U.S. v. Figueroa, 729 F.3d 267, 276 n.14 (3d Cir. 2013), cert. denied, 134 S.Ct. 1037 (2014) – dirty Camden cops involved in conspiracy – one complained to another about a third's incompetent fake report – "Bayard's statement to Parry was not a testimonial statement."

People v. Maciel, 57 Cal.4th 482, 160 Cal.Rptr.3d 305, 304 P.3d 983, 1016-18 (Cal. 2013) – "Here the statements were not made to law enforcement but to fellow gang members and hence were not testimonial."

U.S. v. Curbelo, 726 F.3d 1260, 1264-65 (11th Cir. 2013) – wiretaps – "Even if the Government introduced Diaz's telephone conversations with Defendant and Herman Torres to prove the truth of the matters asserted, the three men had no reason to believe their conversations 'would be available for use at a later trial.'"

United States v. Clark, 717 F.3d 790, 795-798 (10th Cir. Okla. 2013) – "Mr. Gordon's statements were not made to law enforcement investigators, nor could a reasonable person in Mr. Gordon's position have objectively foreseen that the primary purpose for his statements was for use in the investigation or prosecution of the pump-and-dump conspiracy."

People v. Arauz, 210 Cal. App. 4th 1394 (Cal. App. 2d Dist. 2012) – "Where, as here, an accomplice inculcates himself and his codefendant to a fellow inmate/informant, his statements, if trustworthy, are admissible in the codefendant's trial. Such statements are declarations against penal interest, are not 'testimonial,' and their admission does not violate the confrontation clause as explained in *Crawford*..."

United States v. Berrios, 676 F.3d 118, 122-129 (3d Cir. V.I. 2012) – "Authorities intercepted a conversation between Berrios and Moore in a recreational yard at the detention facility during which they discussed, in detail, the Wendy's shooting and getaway, and their respective roles in it. ... in the present case, the contested statements bear none of the characteristics exhibited by testimonial statements. There is no indication that Berrios and Moore held the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded; there is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but 'casual remark[s] to an acquaintance.'"

People v Rodriguez, 92 A.D.3d 586, 940 N.Y.S.2d 565, 2012 NY Slip Op 1361 (N.Y. App. Div. 1st Dep't 2012) – "The codefendant's remark to the accomplice witness cannot be viewed as testimonial..."

People v Heard, 92 A.D.3d 1142, 938 N.Y.S.2d 672, 2012 NY Slip Op 1385 (N.Y. App. Div. 3d Dep't 2012) – "The admission into evidence of recordings of the phone conversations between defendant and Jones did not violate defendant's 6th Amendment right to confront a witness. ... The statements by Jones during phone conversations that she did not know were

being recorded while she negotiated cocaine transactions with defendant were not testimonial in nature..."

Bowens v. State, 80 So. 3d 1056, 1056-1058 (Fla. Dist. Ct. App. 4th Dist. 2012) – "No Florida case has addressed whether a surreptitious recording [*1058] is testimonial for purposes of Crawford. However, this issue has been addressed in other jurisdictions. ... In this case, Bowens's side of the surreptitiously recorded conversation is admissible as a party admission under section 90.803(18)(a), Florida Statutes. Michael's side of the conversation is admissible to place Bowens's statements into context. Further, the conversation between the two was not instigated or facilitated by any law enforcement officer or other person with the primary purpose of collecting evidence for criminal prosecution. Rather, it was a spontaneous conversation that happened to have occurred within the range of an audio recorder. Therefore, we find the trial court did not err in determining Michael's statements were nontestimonial..."

United States v. Pelletier, 666 F.3d 1, 9-10 (1st Cir. Me. 2011) – "Although we have not previously had occasion to apply *Davis* to the situation presented here -- statements made by one inmate to another -- we have little difficulty holding that such statements are not testimonial. Our position is consistent with that of both the Supreme Court, *see Davis*, 547 U.S. at 823 n.2 (noting, in dicta, that statements from one prisoner to another are "clearly nontestimonial") (citing *Dutton v. Evans*, 400 U.S. 74, 87-89, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (plurality opinion)), and other circuit courts that have held inmate conversations to be nontestimonial..."

Cox v. State, 421 Md. 630, 635-651, 28 A.3d 687 (Md. 2011) – "Mr. West testified that he had been arrested, on an unrelated weapons charge, on the same date as Petitioner and Johnson. According to Mr. West, he saw Petitioner and Mr. Johnson the next day in central booking. Mr. West explained that he had known Mr. Johnson for approximately fifteen years. According to Mr. West, Mr. Johnson told Mr. West about the murder and the subsequent arrest in detail, without provocation, while Petitioner stood close by, listening and occasionally filling in details." – non-testimonial

United States v. Lopez, 649 F.3d 1222, 1237-1238 (11th Cir. Fla. 2011) – "bragging to a friend about the fruits of a robbery is not testimonial."

State v. Usee, 800 N.W.2d 192, 195-198 (Minn. Ct. App. 2011) – "he record indicates that Ali and R.S. became acquaintances while incarcerated together and there is no evidence that R.S. was acting on the government's behalf when Ali made the statement. Thus, Ali would not reasonably believe that his statement inculpatory himself and appellant would be used in trial. Rather, it was a casual remark, not made with an eye toward trial, and therefore nontestimonial."

State v. Telles, 2011-NMCA-083, __ N.M. __, 261 P.3d 1097 (N.M. Ct. App. 2011) – curiously analyzing conversation between co-perpetrators as if one were an informant, which he was not, but reaching the correct conclusion that "the Confrontation Clause did not bar admission of the recorded police station conversation between Defendant and R.O."

United States v. Boyd, 640 F.3d 657, 663-665 (6th Cir. Tenn. 2011) – "The statements are also non-testimonial. Davidson made the statements to a companion, and a reasonable person in Davidson's position would not have anticipated the use of the statements in a criminal proceeding."

Orona v. State, 341 S.W.3d 452, 463-464 (Tex. App. Fort Worth 2011) – "Munn's statement to Osborne that he and Orona had "beat on Sartain" was a spontaneous, volunteered statement made in front of acquaintances." – non-testimonial

Cox v. State, 194 Md. App. 629, 5 A.3d 730 (Md. Ct. Spec. App. Sept. 17, 2010), 421 Md. 630, 28 A.3d 687 (2011) – " Mr. Michael West testified about a conversation that took place between Mr. Johnson, himself, and appellant.... Mr. West testified that Mr. Johnson told him, with appellant standing within 'arm's reach,' that he and appellant had murdered the victim, a person Mr. West had known for years. ... Here, Mr. Johnson's remarks to Mr. West, while in the recreational room of central booking, were not formal statements, they were not elicited in response to government questioning, and they were not made under circumstances in which a reasonable person would believe that the statements would be available for use at a later trial. Accordingly, Mr. Johnson's statements were not testimonial."

United States v. Dale, 614 F.3d 942, 954-956 (8th Cir. Mo. 2010), cert. denied (2011) – "Under any formulation of the rule, Dale's incriminating statements made to Smith were not testimonial. Indeed, it is clear enough that Dale had no idea Smith was wearing a wire, or that the incriminating statements he made to Smith would ultimately be used against him at trial. Had Dale known the authorities were listening in, he likely would not have admitted to committing two unsolved murders."

People v Robles, 72 A.D.3d 1520, 899 N.Y.S.2d 780, 2010 NY Slip Op 3553 (N.Y. App. Div. 4th Dep't 2010) – "the testimony of the girlfriend of another accomplice (second accomplice) concerning a conversation between the second accomplice and defendant did not violate defendant's right of confrontation because the statements of the second accomplice during that conversation were not themselves testimonial in nature"

Mathis v. State, __ S.E.2d __, 2009 WL 1395609 (Ga. App. May 20, 2009) – "Waller further alleges that the trial court erred in admitting (over his objection) the letters written by co-defendant Fortie to co-defendant Jackson, arguing that the letters incriminate him (Waller). Citing *Bruton v. United States* [FN50] and *Crawford v. Washington*, [FN51] Waller argues that because Fortie did not testify at trial and was therefore not available for cross-examination, Waller's Sixth Amendment rights were violated by admission of the letters. ... admission of the letters did not violate Waller's rights under *Crawford*... because the statements contained therein were not testimonial."

State v. Ransom, 207 P.3d 208 (Kan. May 15, 2009) – " Washington was watching the 10 p.m. news, which reported that officers were looking for a green Ford Taurus involved in the two shootings that eve-ning. Ransom would later confess that he, Miles, and Karlan laughed and "high-fived" each other after the news report because they believed officers had an inaccurate lead about the car. ... the facts surrounding the making of the unidentified *220 declarant's statement at issue here—" [T]hey [have] the wrong lead"—and the accompanying behavior of laughter and "high-fives" of the persons present persuade us that an objective witness would not reasonably believe that the statement would later be available for use in the prosecution of the crimes. The declarant's statement and the relieved and celebratory laughter and hand slaps were spontaneous expressions among friends watching television. No interview, by law enforcement

or otherwise, was taking place; thus no characteristics of an interview are subject to evaluation. The declarant's statement was not testimonial..."

People v. Willis, 2009 WL 1464367 (Cal. App. 2 Dist. May 27, 2009) (unpub) – "On August 7 Detective Steve Rubino caused appellant and Binns to be placed together in a jail cell that contained a hidden recording device. [FN5] An edited recording of the ensuing conversation between the co-defendants was played at trial, and jurors were provided with a transcript. ... None of the statements in the recording were out-of-court analogs of testimony. Appellant and Binns were not responding to questioning by law enforcement officials. They were friends or associates who had a casual conversation they obviously considered to be private. Their willingness to discuss their case and attempt to concoct exculpatory stories demonstrates they had no expectation their statements would be used prosecutorially. Indeed, the conversation as a whole clearly shows that the primary purpose of their statements to one another was not to establish past facts for use in a criminal prosecution, but to fabricate a false mutual story to attempt to escape criminal liability for Elliott's murder. Therefore, neither the statement in controversy nor anything else in the recording can be deemed testimonial."

Perez v. U.S., ___ A.2d ___, 2009 WL 774847 (D.C. Mar 26, 2009) – "FN43. Because the statement was made not to the police, but to a perceived ally who was not then a government informant or witness, it was not testimonial and there was no right to cross-examination under the Confrontation Clause."

People v. Ricketts, 2008 WL 5207352 (Cal. App. 4 Dist. Dec 15, 2008) (unpub) – "The issue, therefore, is whether Scott's statements in the kite are 'testimonial' for purposes of the confrontation clause. ... We hold that the statements are not testimonial and, therefore, Ricketts had no right to cross-examine Scott about them."

People v. Marquez, 2008 WL 5076458 (Cal. App. 2 Dist. Dec 02, 2008) (unpub) – "Defense counsel interposed a hearsay objection to Vidales testifying that Caldera said appellant had ordered Morales murdered. ... [¶] The challenged statement is not testimonial within the meaning of *Crawford*, nor was it not made to law enforcement or under circumstances giving rise to an inference it was obtained for its potential role in determining whether a criminal charge should issue or in a criminal court proceeding."

People v. Ibarra, 2008 WL 4329899 (Cal. App. 6 Dist. Sep 23, 2008) (unpub) – recorded calls from prison – "Ramos's statements made during the conversation with appellant do not meet the criteria for testimonial statements. The statements were taken, that is, recorded, for reasons as much related to the security of the penal institution as to establish some fact for use in a trial. The statements were clearly not given for the purpose ascribed to testimony, either. The participants in the conversation were actually taking pains to obscure their meaning so that what they said could not be used in such a manner. Considering all the circumstances that might reasonably bear on the intent of the participants in the conversation, that is, appellant and Ramos, the statements were most definitely not given for use as testimony."

People v. Barragan, 2008 WL 4232017 (Cal. App. 3 Dist. Sep 17, 2008) (unpub) – "Barragan's statements to Medina are not testimonial as post-*Crawford* cases have defined that term. ... Barragan was speaking to a mere acquaintance, a fellow inmate."

U.S. v. Pike, 2008 WL 4163242 (2nd Cir. Sep 05, 2008) (unpub) – "Pattison's statement was not testimonial because Pattison, while incarcerated, made the statement to a fellow inmate and would have had no reason to believe it would be used in a judicial proceeding."

U.S. v. Honken, 541 F.3d 1146 (8th Cir. Sep 12, 2008) – jailhouse informant tricked incarcerated co-defendant into drawing maps to where the bodies were buried, in order to facilitate a false confession by a third prisoner – "we conclude Johnson's maps are non-testimonial. ... Further, the maps obviously were not a 'solemn declaration' or a 'formal statement.' Rather, Johnson more likely was 'mak[ing]' a casual remark to an acquaintance."

State v. Hughes, 191 P.3d 268 (Kan. Aug 22, 2008) – "the statements Carapezza made to her cellmates were not testimonial" – [NOTE: Justice Johnson dissents from this holding on the sophistic ground that if it's a statement against penal interest for grounds of the hearsay rule, the speaker must have anticipated it would be used in a prosecution. He also argues that the prison environment changes the calculation of what is "against interest", and so the credibility determination should be made by the judge rather than the jury.]

U.S. v. Wright, 536 F.3d 819 (8th Cir. Aug 04, 2008) – "Before Conaway testified, Wright objected that testimony relating what Michael Birks said to Conaway that evening would violate Wright's Sixth Amendment Confrontation Clause rights because Birks was murdered later that night and therefore was unavailable and had not been subject to cross examination. The district court overruled the objection, and Conaway testified that Birks told him who had participated in the shooting." – held: not testimonial

People v. Priddy, 2008 WL 2812118 (Mich. App. Jul 22, 2008) (unpub) – "Bradshaw-Love's statements in letters to, and phone conversations with Priddy were not testimonial because she could not reasonably expect them to be used in a future prosecution and they were not made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

U.S. v. Berrios, 2008 WL 2704884 (D. V.I. Jul 08, 2008) (unpub) – "The flaw in Defendants' [Crawford] argument is that when Moore and Berrios were conversing with one another in the prison yard, their statements were not testimonial in nature."

U.S. v. Milburn, 2008 WL 2557973 (N.D. Cal. Jun 24, 2008) (unpub) (pretrial ruling) – prisoner phone calls – clever argument that because prisoner had no expectation of privacy under fourth amendment, because of signs warning calls would be recorded, therefore a reasonable person would expect them to be available for use at trial – "Not necessarily. First, the lack of an objectively reasonable expectation of privacy regarding the recorded jail calls did not mean that the calls had been made under circumstances that would lead an objective witness reasonably to believe that the statement would be later used at trial. There is a middle ground. After all, defendants were not speaking to police officers and were likely speaking in code to each other. Accordingly, while there was no reasonable expectation of privacy (given the taped signs in the telephone room), the circumstances could still be such that the speakers would not think that the statements would be used by police." – also co-conspirator statements

Wright v. Stovall, 2008 WL 2224271 (E.D. Mich. May 28, 2008) (unpub) (habeas) – "The most damaging evidence came from Daniel Bizovi, who was confined for a time in a cell next to

Dathan Price at the Wayne County Jail. ... Petitioner alleges that her right to due process was violated by the admission of Daniel Bizovi's testimony regarding what Dathan Price told Bizovi. ... The declarant here was Dathan Price, who approached Daniel Bizovi for help with his criminal case while the two of them were fellow detainees in the county jail. Although Bizovi ultimately used information that he acquired from Price to acquire a favorable deal in his own criminal case, Price's admissions did not amount to police interrogation. [cites] ... Dathan Price's comments to Daniel Bizovi were not 'testimonial.'"

Tran v. Felker, 2008 WL 1805820 (E.D. Cal. Apr 22, 2008) (unpub) (habeas) – gang expert "read excerpts from letters written by defendants and explained how those excerpts demonstrated elements of gang mentality. ... even if the letters were hearsay, their admission was not barred by *Crawford* because they were not testimonial in nature. Specifically, the letters were not statements to law enforcement given in the course of a criminal investigation. The letters are more akin to 'casual remarks to an acquaintance.'"

Coleman v. U.S., 948 A.2d 534 (D.C. May 22, 2008) – "Statements made in casual conversation between two inmates do not come within the Court's definition of testimonial statements. *See Crawford*..."

People v. Whitmore, 2008 WL 1970957 (Cal. App. 4 Dist. May 08, 2008) (unpub) – computer chats between people sharing child pornography internationally are non-testimonial

U.S. v. Hyles, 521 F.3d 946 (8th Cir. Apr 08, 2008) – "Here, the statements are non-testimonial. [cite] Neither [co-conspirators] Tyrese nor Cannon were making formal statements, nor were their 'statements elicited in response to government interrogation.' [cite] In other words, they did not bear testimony. [cite] Therefore, *Crawford* is inapplicable."

People v. Frazier, 2008 WL 782593, *1+ (Mich. App. Mar 25, 2008) (unpub) – "[T]here is considerable doubt whether the statements at issue in the present case are 'testimonial,' and therefore subject to a Confrontation Clause challenge. The statements here were not the result of custodial police interrogation ... Rather, defendants made the statements at issue here to friends and acquaintances, the victim's brother, and during a conversation overheard by a fellow inmate." – but case decided on ground that plain error was not shown

Perez v. State, 980 So.2d 1126 (Fla.App. 3 Dist. Mar 19, 2008) – on rehearing, superseding prior opinion issued Dec. 5, 2008 – "We agree that the first part of the statement where Laurencio confessed to Martin to his own involvement in the robbery was admissible ... The statement exposed the declarant, Laurencio, to criminal liability and did not violate the Confrontation Clause."

U.S. v. Hunter, 2008 WL 399150 (9th Cir. Feb 12, 2008) (unpub) – "Hunter also argues that the district court violated the Confrontation Clause by incorrectly admitting hearsay evidence. He claims the court improperly allowed a coconspirator to testify both that Hunter told him he was sending text messages to other coconspirators as well as the content of those text messages. ... The statements at issue in this case were clearly not 'the functional equivalent' of in-court testimony, 'formalized testimonial materials,' or intended 'for use at a later trial,' and are therefore not testimonial."

People v. Jefferson, 158 Cal.App.4th 830, 70 Cal.Rptr.3d 451 (Cal. App. 2 Dist. Jan 07, 2008), review filed (Feb 07, 2008) – gang members talked unguardedly in bugged cell – "Jefferson and Staten made no 'formal statement to government officers' because they never intended to speak to anyone connected with the government. This was no interrogation. No official with an agenda was asking questions and taking notes. No government player was inserting veiled threats or subtle cues to get the goods on these two. Jefferson and Staten were friends. They thought the police were gone and they could talk freely. On their own, they were trying to size up a frightening and perplexing situation. The last thing Jefferson and Staten thought they were doing was 'testifying.' Their conversation was not 'testimonial' because it was not 'a formal statement to government officers.'"

State v. Williams, 2007 WL 4139295 (N.J. Super. A.D. Nov 23, 2007) (unpub) – "Additionally, there is no Confrontation Clause violation here, because Holman's remark to his companion [*i.e.*, defendant, who was still in the act of shooting his victim] before the police arrived was clearly non-testimonial in nature."

People v. Harrison, 2007 WL 4100080 (Cal. App. 2 Dist. Nov 19, 2007) (unpub) – "There was no evidence to establish that [fellow prisoner and gang member] Miramontes was a police agent. If he were, the constitutional issues presented would be a violation of the right to counsel under the progeny of *Massiah* ... rather than *Crawford*. Miramontes was not asked to question Tovar. Tovar voluntarily made statements to Miramontes incriminating himself and Harrison. There is no evidence that Tovar would reasonably expect that his conversation with Miramontes would be used prosecutorially. *Crawford* is not implicated by Tovar's nontestimonial statement."

Commonwealth v. Burton, 450 Mass. 55, 876 N.E.2d 411 (Mass. 2007) – "[T]he conversation took place immediately after the murder when three of the joint venturers were still together, discussing what had happened, and when the murder weapon was hidden in an effort to evade detection. ... Certainly, just after the murder, in the privacy of an apartment, neither Cooper nor Taylor would have reasonably foreseen their statements being used in the investigation or prosecution of a crime."

Teniente v. State, 169 P.3d 512, 2007 WY 165 (Wyo. Oct 18, 2007) – "Jesse Magallenes... testified that as he walked into the jail before Eddie Magallenes' trial, Eddie yelled, 'Keep your mouth shut.' Defense counsel objected on the grounds that the testimony violated *Crawford*. ... The statements at issue do not fall within the categories of testimonial evidence described in *Crawford*—that the statements were within earshot of law enforcement does not allow them to rise to the level of 'testimonial' as described in *Crawford*."

U.S. v. Turner, 501 F.3d 59 (1st Cir. Aug 31, 2007) – tape recorded conversation between co-conspirators concerning a third person (defendant) they contemplated bringing into the conspiracy – "Merlino's secretly recorded statements were not 'testimonial,' within the meaning of *Crawford*. See generally *United States v. Brito*, 427 F.3d 53, 58-59 (1st Cir.2005); see also *Horton v. Allen*, 370 F.3d 75, 83-85 (1st Cir.2004) (conspirator's statement to witness during private conversation was not testimonial)."

People v. Leonel, 2007 WL 3077273 (Cal. App. 6 Dist. Oct 23, 2007) (unpub) – particularly stupid drive-by shooting – "Santos challenges the admission of Argomaniz's jail telephone conversations, and Argomaniz challenges the admission of Santos's jail telephone conversations."

They claim that the admission of this evidence violated their confrontation rights. ... Under *Davis* and *Cage*, the statements made by Argomaniz, Santos, and the recipients of their calls were all nontestimonial. None of the speakers on the recordings was acting "as a witness" (*Davis, supra*, --- U.S. at p. --- [126 S.Ct. at p. 2277]), and the conversations lacked the "formality" and "solemnity that characterizes testimony by witnesses." (*Cage, supra*, 40 Cal.4th at p. 987.) No "structured questioning" occurred, and Argomaniz, Santos and their friends made no apparent effort to "record or memorialize [their] statements for later use." (*Cage*, at p. 987.) Although Argomaniz, Santos and their friends were warned that the calls were "subject to monitoring and recording," it was obvious that they believed that their conversations were private. Indeed, it was clear that the "primary purpose" of these statements was not to establish past facts for use in a criminal prosecution, but to arrange for the destruction of evidence and fabrication of false stories aimed at concealing the crime from law enforcement. (*Cage*, at pp. 986-987.) For all of these reasons, the statements made during these telephone conversations were nontestimonial and therefore were not subject to the Confrontation Clause. Accordingly, the trial court did not err in overruling Confrontation Clause objections to the admission of this evidence."

People v. Mendoza, 2007 WL 3051719 (Cal. App. 5 Dist. Oct 19, 2007) (unpub) – "Garcia summoned his long-time acquaintance, Torres, to his hotel room. While they consumed methamphetamine and beer, Garcia told Torres about the murder. ... The question is not as simple as whether an out-of-court statement will be available for trial but whether it is reasonable to expect that it would be available for trial. An objective observer would not reasonably expect the informal, unplanned, casual, voluntary conversation between long-time friends consuming alcohol and methamphetamine in a hotel room to be available for use in a prosecution. ... The statement of Garcia to Torres did not occur under circumstances that had earmarks of solemnity and purpose characteristic of testimony. Defendants' argument shows only a mere chance that the statement might be used at trial. Such a chance is not enough to transform the statement into a testimonial statement."

[same case, different statements] "On February 26, 2003 all three defendants were in custody and scheduled for a court appearance. They were transported in a van that had been outfitted with several recording devices. Garcia and Mendoza were placed in the van first. Santana joined them several minutes later. [¶] A tape of the recording was played to the jurors. ... [W]e find that the statements were not testimonial. Although law enforcement placed the listening devices in the van, law enforcement had no involvement in initiating the conversation and had no participation in the van conversation other than providing the opportunity and taping it. The statement was not made to a law enforcement officer or agent; it was a conversation among the defendants that they initially believed was private. Such a statement is not testimonial."

U.S. v. Johnson, 2007 WL 2420786 (E.D. Mich. Aug 23, 2007) (unpub) – defendant's co-perpetrator (O'Reilly) described murder and robbery to cellmate (Nix-Bey), who was wearing a wire – recording was admitted against defendant – no error – "It could not have been anticipated by O'Reilly that his statements to Nix-Bey would be used against Defendant. As a matter of fact, O'Reilly minimized Defendant's participation in the crime. He stated that Defendant was 'expendable' and that the crime could have been committed without him. Furthermore, Nix-Bey was not a police officer, but was privy to O'Reilly's statements as his friend and confidant. [¶] O'Reilly's jailhouse admissions are not testimonial in nature within the meaning of *Crawford*." (record citation omitted)

Loredo v. State, 2007 WL 2380346 (Tex. App.-Tyler Aug 22, 2007) (unpub) – "A letter from one gang associate to another conducting gang business is not like an affidavit or a deposition and is not a statement one would expect to be used at trial to prove a fact. These letters are more like a casual remark to an acquaintance, *see Crawford*, 541 U.S. at 51, 124 S.Ct. at 1364, are not testimonial, and do not implicate the Confrontation Clause."

State v. Day, 925 A.2d 962 (R.I. July 2, 2007) – "In this case, a sheriff guarding the cells in which defendant and Floyd were being held overheard a conversation between them, during which they discussed who would be 'going down for' the crimes that had been committed a few days before. It is our opinion that the statement by Floyd was not testimonial. It was not 'made for the purpose of establishing or proving some fact'; indeed, it is not clear to us from the record that Floyd even knew that Sheriff Keeley was within hearing range. Consequently, the Confrontation Clause does not apply in this situation, and we must analyze the admissibility of Floyd's statement only in light of the Rhode Island Rules of Evidence."

Curry v. State, 228 S.W.3d 292 (Tex. App.-Waco May 16, 2007) – "The statements at issue here are those made during the brief conversation between Ali and Curry in the course of a drug transaction. This setting is not one which "would lead an objective witness reasonably to believe that the statement would be available" for later judicial proceedings. *Crawford*, 541 U.S. at 52, 124 S.Ct. at 1364. Further, Ali was speaking about events as they were happening and not as the result of "structured questioning" about past events. *See id.* at 53 n. 4, 124 S.Ct. at 1365 n. 4; *Davis v. Washington*, --- U.S. ---, ---, 126 S.Ct. 2266, 2274, 165 L.Ed.2d 224 (2006). Based on these circumstances, we hold that Ali's statements were not testimonial."

U.S. v. Gould, 2007 WL 1302593 (D. N.M. March 23, 2007) (unpub) – "Ms. Gould's statement to Wallen is not testimonial. Mr. Gould has not given the Court any reason to believe that a reasonable person in Ms. Gould's position would have foreseen that a passing statement to an inmate might be used in the investigation or prosecution of a crime."

People v. Duran, 2007 WL 805791, *8 -9 (Cal. App. 6 Dist. 2007) (unpub) – "Here the police neither interrogated defendant and his fellow gang members nor arranged for one of them to pose questions to the others. Unbeknownst to these individuals, the police merely taped their conversations. Thus, their statements consisted of "casual remark[s] to acquaintance[s]," and were nontestimonial in nature. (*Id.* at p. 51.) Accordingly, defendant was not deprived of his Sixth Amendment right to confront and cross-examine the witnesses against him."

United States v. Portocarrero-Reina, 2006 U.S. Dist. LEXIS 47080, 2006 WL 1980275 (M.D. Fla. 2006) (pretrial ruling) – "*Crawford* does not apply either to "casual remark[s] made to an acquaintance" or statements made unwittingly to a government informant, as those statements are not "testimonial"."

Statements to Victims

People v. Lugo, 87 A.D.3d 1403, 930 N.Y.S.2d 114 (N.Y. App. Div. 4th Dep't 2011) – "Defendant contends that the admission in evidence of his codefendant's statements to the victims through their testimony and the recording of the 911 call violated his right of

confrontation under *Crawford*... inasmuch as the codefendant did not testify. We reject that contention because the codefendant's statements 'were not themselves testimonial in nature'...

State v. Becker, 235 P.3d 424, 430-431 (Kan. 2010) – "These statements were made in the course of the criminal activity, not in the course of the subsequent investigation. Because the statements were not testimonial, that is to say, they were not made in the reasonable expectation of eventual use in a criminal proceeding, the statements also did not violate the Sixth Amendment Confrontation Clause."

State v. Johnstone, 2008 WL 2789386, 2008-Ohio-3495 (Ohio App. 5 Dist. Jul 07, 2008) (unpub) – after Swinson was shot, two eyewitnesses, Dunn and Waiters told him what had happened – "{¶ 41} We find Dunn and Waiters' statements to Swinson Appellant had shot him were nontestimonial statements. Dunn and Waiters made the statement to Swinson immediately after the shooting, as they tried to help and orientate the victim."

Commonwealth v. Duff, 2007 WL 4355272 (Mass. App. Ct. Dec 13, 2007) (unpub) – statements made by accessory, Cruz, to victims of fraud, intended to allay their suspicions – "the statements were not made to law enforcement officials and would not have been reasonably understood by Cruz to assist an investigation or to prosecute a crime. This renders them neither testimonial per se nor testimonial in fact." [NOTE: Also co-conspirator statements, presumably.]

Casual Statements to Police Officers

(category added March 2009)

This category is for the unusual situation in which a person says something to a police officer in his or her capacity as a police officer, but is not reporting a crime, requesting protection, etc.

State v. Bowling, 232 W.Va. 529, 753 S.E.2d 27 (W. Va. 2013) cert. denied, 134 S. Ct. 1772 (U.S. 2014) – wife-killing case – "[State Trooper] Palmateer, a friend of both Mr. and Mrs. Bowling, testified about an encounter he had with [future victim] Ms. Bowling sometime between late 2007 and early 2008. He stated that he was off duty and that he spoke with Ms. Bowling in a bar. ... Trp. Palmateer's statements [i.e., testimony] are testimonial. The evidence presented at trial indicated that Ms. Bowling knew Trp. Palmateer was a police officer. Also, Ms. Bowling was not making the statement for the purpose of receiving any kind of help from him to deal with an ongoing emergency..." [NOTE: The "cops have cooties" theory.]

Breedlove v. State, 291 Ga. 249, 728 S.E.2d 643, 2012 Fulton County D. Rep. 1908 (Ga. 2012) – "The investigator was a friend of a friend of the victim. He was employed by the sheriff's department as a special investigator with the narcotics team. The victim contacted him and asked to speak with him. The victim, the investigator, and the mutual friend met in the parking lot of a church. The victim told the investigator that Breedlove threatened her and she feared for her life. She added that Breedlove was becoming more and more angry and aggressive. The investigator suggested that the victim go to the authorities and file a written report. The victim responded that she was afraid to do that because Breedlove warned her against it. ... the victim was not reporting a crime to a policeman; she was not attempting to build a case against Breedlove; she was merely seeking advice from a knowledgeable friend, who happened to be a policeman, as to what she should do in a difficult situation. [cite] The victim's statements were not made during

the course of an ongoing investigation; they were not made with intent to prove past events pertaining to a subsequent criminal prosecution. Thus, the statements were not testimonial."

People v. Hill, 191 Cal. App. 4th 1104, 1127-1137, 120 Cal. Rptr. 3d 251 (Cal. App. 1st Dist. 2011) – "When 'an expert in gang structure relies on interviews conducted with former gang members over many years and not related to the particular case, no plausible understanding of 'testimonial' would encompass these statements.'"

State v. Vasquez, 287 Kan. 40, 194 P.3d 563 (Kan. Oct 17, 2008) – "On December 11, 1998, Robin told Police Officer Curtis William Starks that Vasquez was back in Kinsley. When Starks asked Robin if she was frightened, she said that she was not afraid of Vasquez unless he had been drinking. ... Robin also told Starks that she had sought a restraining order against Vasquez and would file a petition for a protection from abuse (PFA) order on the following Monday. ...

When the totality of circumstances surrounding Robin's first statements to Starks on the day of her murder are measured against these factors, the statements do not qualify as testimonial. Although they were made to a police officer and not during an ongoing emergency, they took the form of a fairly casual update. Robin let Starks know that Vasquez was back in town and that she intended to file a PFA action. The situation would not have led Robin to believe that the statements would later be available for use in the prosecution of a crime, and investigation of a crime was not Starks' purpose in responding to the information. Admission of Starks' testimony about Robin's statements therefore did not violate Vasquez' right to confront the witnesses against him."

Statements to Informants and Undercover Officers

(see also prior categories in this part; Background / Context Statements; Co-Conspirator Statements; Surreptitious Recordings)

Vaughn v. State, 13 N.E.3d 873 (Ind. App. 2014) – "The trial court also admitted audio recordings of the telephone calls placed by the CI to Vaughn to discuss where to meet. These recordings did not constitute hearsay. Any statement made by Vaughn on the recordings were not hearsay because they were statements by a party-opponent. [cite] Any statements made by the CI on the recording were merely designed to prompt Vaughn to speak and were not offered for the truth of the matter asserted. [cite] [¶] As previously explained, the Confrontation Clause does not prohibit the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

U.S. v. Tipton, 572 Fed.Appx. 743 (11th Cir. 2014) – "statements made to an undercover informant in the course of an investigation were non-testimonial because the statements 'clearly were not made under circumstances which would have led [the declarant] reasonably to believe that his statement would be available for use at a later trial.'"

U.S. v. Lopez, __ Fed. Appx. __, 2014 WL 2959023 (2d Cir. 2014) – "Appellants also raise a Sixth Amendment Confrontation Clause challenge to the introduction of certain covert recordings, without the defense opportunity to cross-examine the confidential source ... The argument is foreclosed by precedent. See *United States v. Burden*, 600 F.3d 204, 224–25 (2d Cir.2010) (holding that neither statements of the accused, nor of a confidential source, on a

surreptitious recording qualify as 'testimonial' statements for the purposes of the Confrontation Clause)."

U.S. v. MacInnes, ___ F.Supp.2d ___, 2014 WL 2439336 (E.D. Pa. 2014) – "Prior to trial, the Government moved in limine for a ruling permitting it to introduce, through Lieutenant Thomas, a statement Munsterman made to Thomas while Thomas was acting undercover. Munsterman sold two timber rattlesnakes to Thomas and then told Thomas he was planning on selling the other snakes in his possession to Glades. ... [fn 9] Among other reasons, Munsterman's statement cannot be considered testimonial because, as far as Munsterman knew, his statement was nothing more than a 'casual remark to an acquaintance.'"

Walker v. State, 406 S.W.3d 590 (Tex. App. Eastland Mar. 21, 2013) – "Citing *Crawford*, Appellant argues that Mourett's statements to [his common law wife] Martinez were testimonial because Martinez was a confidential informant and Mourett was a potential codefendant of Appellant, rendering their conversation akin to a police interrogation. Mourett's statements to Martinez, however, cannot be considered testimonial. Mourett made the statements in the course of a conversation initiated by Mourett. His statements to Martinez were neither 'official and formal in nature' nor 'solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact.' [cite] Viewed objectively, the statements were not made under circumstances indicating that the primary purpose was to enable police in a subsequent prosecution. Nor did Mourett make the statements under circumstances that would have objectively led him to believe that they would be available in a later trial. ... Mourett's statements to Martinez are clearly nontestimonial."

Rainey v. State, 319 Ga. App. 858, 864, 738 S.E.2d 685 (Ga. Ct. App. 2013) – "Here, the co-conspirator's statements were made to the undercover officer while making arrangements and attempting to consummate the attempted drug transaction, which were prior to the arrests. 'Such statements are not testimonial for purposes of *Crawford*.'"

United States v. Ciresi, 697 F.3d 19, 22-32 (1st Cir. R.I. 2012) – "The Court has also commented that statements made unwittingly to a government informant are 'clearly nontestimonial.' [cites] Ciresi attempts to dismiss these statements as mere dicta, but the Court's instruction cannot be cast aside so easily."

Brown v. Epps, 686 F.3d 281, 282-289 (5th Cir. Miss. 2012) (habeas) – recorded drug deal, which a nutty federal district judge concluded were testimonial – "The conversations did not consist of solemn declarations made for the purpose of establishing some fact.ⁿ³⁸ Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals' statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial.ⁿ³⁹ To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become "available" at trial.ⁿ⁴⁰ The unidentified individuals' statements were obviously not "prior testimony at a preliminary hearing, before a grand jury, or at a former trial."ⁿ⁴¹ They also were not part of a formal interrogation about past events—the conversations were informal cell-phone exchanges about future plans—and their primary purpose was not to create an out-of-court substitute for trial testimony.ⁿ⁴² Applying to this case an image from Justice Scalia's majority

opinion in *Davis*, "[n]o 'witness' goes into court to proclaim" that he will sell you crack cocaine [*289] in a Wal-Mart parking lot.ⁿ⁴³ An "objective analysis" would conclude that the "primary purpose" of the unidentified individuals' statements was to arrange the drug deal.ⁿ⁴⁴ Their purpose was "not to create a record for trial and thus is not within the scope of the [Confrontation] Clause."ⁿ⁴⁵ We conclude that the statements were nontestimonial." (brackets in original)

State v. Brist, 799 N.W.2d 238, 239-242 (Minn. Ct. App. 2011), aff'd, 812 N.W.2d 51 (Minn. 2012) – "Because a declarant's statement to an individual he believes to be unaffiliated with law enforcement is not akin to a solemn declaration made for the purpose of establishing a fact, such statements do not implicate the Confrontation Clause."

United States v. Stevens, 778 F. Supp. 2d 683, 687-692 (W.D. La. 2011) – "In several cases, the Fifth Circuit has found that statements unknowingly made to an undercover officer or agent are not testimonial in nature. ... By their very nature, statements to an undercover agent or informant are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial.... Accordingly, Crawford does not bar the admission of such statements at trial."

United States v. Farhane, 634 F.3d 127 (2d Cir. N.Y. 2011) – "'a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of Crawford.' As then-Judge Sotomayor explained in writing for the *Saget* panel, Crawford instructs that the critical factor in identifying a Confrontation Clause concern is "the declarant's awareness or expectation that his or her statements may later be used at a trial." Here, there is no question that in his conversations with Saeed and Soufan, Shah was unaware that he was speaking to agents for the government or that his statements might later be used at a trial." [NOTE: But in *Bryant*, Justice Sotomayor said to look at both parties' perspectives, at least in the emergency context.]

Williams v. State, 930 N.E.2d 602, 605-610 (Ind. Ct. App. 2010) – drug buy

United States v. Dale, 614 F.3d 942, 954-956 (8th Cir. Mo. 2010), cert. denied (2011) – statements to wired cellmate non-testimonial

Toney v. State, 695 S.E.2d 355, 2010 Fulton County D. Rep. 1685 (Ga. Ct. App. 2010) – "It is undisputed that Bottrell's statements were made to an undercover officer unknown to Bottrell, before Bottrell's arrest, while Bottrell negotiated and consummated the purchase of a half pound of methamphetamine with money provided by Toney. Such statements are not testimonial for purposes of *Crawford*."

Helms v. State, 38 So. 3d 182 (Fla. Dist. Ct. App. 1st Dist. 2010) – "This is an appeal from defendant's convictions for deriving support from the proceeds of prostitution... At trial, defendant objected to the admission of the audiotape containing the conversation between the escort and the undercover officer, claiming it violated his rights under the Confrontation Clause of the United States Constitution. ... Here, it cannot be said that a reasonable person, placed in the escort's position at the time the audiotape was made, would have anticipated the statements would later be used for prosecutorial purposes."

United States v. Smalls, 605 F.3d 765, 767-789 (10th Cir. N.M. 2010) – "a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of Crawford." *Saget*, 377 F.3d at 229 (Sotomayor, J.)... – the dissent would hold that "the government[']s purpose" should control

Lehman v. State, 926 N.E.2d 35, 36-42 (Ind. Ct. App. 2010) – "the conversations between [since-deceased CI] Howard and Lehman were short and referenced street drug-dealing terminology. ... These terms only have a specific significance with regard to the drug trade. During the conversations, Howard was questioning Lehman with regard to the drugs. As such, we find that Howard's statements were not introduced for the truth of the matter asserted and are therefore not hearsay." – therefore no confrontation clause issue – however, "The record reflects that at the beginning and end of the August 5 audiotape, Officer Slagel asked Howard to describe the deal. ... We agree with the State that these statements, made at the beginning and end of both audiotapes, qualify as testimonial." – a concurring judge would have affirmed on the basis that the CI's statements "constituted legally operative conduct"

U.S. v. Nighbert, 2009 WL 393773 (E.D. Ky. Feb 13, 2009) (unpub) (pretrial) – "the fact that [cooperating witness] Rummage was fully aware that the conversations were being record and that they would likely be used in prosecuting a crime is irrelevant. In regard to [defendant's co-conspirators] Lawson and Billings, while they may have been suspicious about possibly being taped, there is no indication that they intended to bear testimony against Nighbert during their con-versations with Rummage. In addition, the Court is doubtful that a reasonable person in Lawson's or Bill-ing's position would anticipate that their statements would later be used against Nighbert in a criminal investigation or prosecution." – also casual remarks, co-conspirator

U.S. v. Graham, 2008 WL 5424142 (D. S.D. Dec 27, 2008) (unpub) (pretrial order) – "Since *Crawford* was decided, at least four courts of appeals have directly addressed the issue of whether a statement made by a defendant unwittingly to a government informant is 'testimonial.' All four courts have held that such statements are not testimonial. [cites]"

State v. Kelley, 179 Ohio App.3d 666, 903 N.E.2d 365, 2008-Ohio-6598 (Ohio App. 7 Dist. Dec 10, 2008) – "¶ 13} The confidential informant's statements on the audio tape are not hearsay. They were not being offered for the truth of the matter asserted; rather, they are to show context. ... Consequently, there is no confrontation problem with the admission of the taped drug transaction."

McBean v. Warden, 2008 WL 5169549 (N.D. N.Y. Dec 09, 2008) (unpub) (habeas) – "The record establishes that Chandler was also a target of the investigation at issue and did not know that Investigator Fendick was an undercover police officer. ... Her statements were made in an unofficial setting, Chandler believed Fendick was a client, and her statements implicated her as jointly responsible for the drug transactions because she facilitated them by contacting Petitioner." – non-testimonial – also co-conspirator statements

U.S. v. Newell, 2008 WL 4402177 (D. Me. Sep 29, 2008) (unpub) (pretrial order) – tribal police chief (Nicholas) wore wire to meeting with governor (Newell) – "the statements made by Newell at this meeting do not clearly fall into the category of 'testimonial hearsay' and are far from garden-variety 'police interrogations.' Rather, Newell had no idea that Nicholas was wearing a

wire and no reasonable expectation that his statements would be available at a later trial. [cite] Because the statements are non-testimonial, *Crawford* is inapplicable."

People v. Adames, 53 A.D.3d 503, 862 N.Y.S.2d 80, 2008 N.Y. Slip Op. 06162 (N.Y. A.D. 2 Dept. Jul 01, 2008) – "[T]he recorded telephone conversations between the codefendant and an undercover police officer, in which the logistics for the subject criminal drug transaction were arranged, were properly admitted into evidence. ... those statements were not testimonial" – [NOTE: the theory might have been co-conspirator statements – the opinion is ambiguous]

U.S. v. Watson, 525 F.3d 583 (7th Cir. May 13, 2008) – "A statement unwittingly made to a confidential informant and recorded by the government is not "testimonial" for Confrontation Clause purposes."

U.S. v. Park, 278 Fed.Appx. 66 (2nd Cir. May 22, 2008) – ecstasy prosecution – "Park argues that the district court erroneously admitted, in violation of the Confrontation Clause, two phone conversations between DEA Agent Benjamin Yu, pretending to be Park, and an unidentified individual named "Jumbo." ... Because "Jumbo" was unaware of the identity of the agent during the phone calls, the statements at issue here are nontestimonial."

U.S. v. Tyree, 2008 WL 1371516, *2 (11th Cir. Apr 11, 2008) (unpub) – a third party, who said he was selling drugs on behalf of defendant ("Tommy told me"), "made the statement to a CI in the context of a controlled drug buy, a circumstance that would not have led him to believe reasonably that it would be available for use at a later trial."

Graves v. Romanowski, 2008 WL 362990, *5+ (E.D.Mich. Feb 11, 2008) (unpub) (habeas) – CI made recorded calls to defendant's co-conspirator to arrange cocaine purchase – "the admission of tape recorded statements of petitioner's co-conspirators which were made in furtherance of the drug conspiracy did not violate petitioner's Sixth Amendment right of confrontation."

State v. Garza-Irbe, 2008 WL 287948 (Wash. App. Div. 1 Feb 04, 2008) (unpub) – drug dealer was recorded discussing drug prices with CI – "Because the State did not offer the tape of this conversation to prove that these prices or the quality of the drugs were accurate, CH's statements were not hearsay." – and thus no *Crawford* problem

State v. Gonzales, 2008 WL 680750 (Iowa App. Mar 14, 2008) (unpub) – prostitution sting – underaged prostitute's "statements made during the sting were not testimonial"

State v. Aldrich, 2008 WL 757523, 2008-Ohio-1362 (Ohio App. 12 Dist. Mar 24, 2008) (unpub) – "{¶ 8} The recording of the transaction was introduced at trial through the police officer, who was wearing the wire that transmitted the conversations. ... {¶ 9} We find that the admission of the informant's statements on the tape did not violate the Confrontation Clause." – citing a context case and a casual remark case

McCulloch v. Horel, 2008 WL 755919 (C.D.Cal. Jan 31, 2008) (unpub) (habeas) – bizarre case of amateur crime "family" – "Petitioner argues that [co-conspirator] Weyand's taped statements to [informant] Hershberger were testimonial because law enforcement agents were extensively involved in setting up Hershberger's meeting with the McCullochs, and because the

purpose of the taped conversation was to produce evidence to be used at trial. ... Federal courts of appeals have generally concluded that when the speaker does not know that he is speaking to an informant, or otherwise does not reasonably expect that his statements may be used at trial, his statements are not testimonial under *Crawford*. ... Weyand had no reason to know that Hershberger would relay his statements to law enforcement, or that the conversation was taped. Weyand's taped statements to Hershberger, therefore, were not testimonial under *Crawford*. Weyand's statements during Hershberger's taped telephone conversation with the McCullochs were nontestimonial for the same reason."

Turner v. Com., 248 S.W.3d 543 (Ky. Mar 20, 2008) – "Two of the federal Circuit Courts of Appeal have addressed this issue and both have noted that an informant's recorded statements may well be testimonial, as the Supreme Court has described, since the informant is aware that his or her statements are being recorded by government agents for the very purpose of criminal prosecution. *United States v. Nettles*, 476 F.3d 508, 517 (7th Cir.2007); *United States v. Hendricks*, 395 F.3d 173 (3rd Cir.2005). Both Courts have held, however, that the informant's statements are not hearsay and thus that their admission does not violate *Crawford*, when they are offered not for their truth, but 'to put [the defendant]'s admissions on the tapes into context, making the admissions intelligible for the jury.' *United States v. Nettles*, 476 F.3d at 517 (citation and internal quotation marks omitted). We concur in this analysis"

Langley v. Com., 2008 WL 746462 (Ky. Mar 20, 2008) (unpub) – same result as *Turner*, above, but adding that informant's answer to officer's question after returning from buy was testimonial

U.S. v. Lenton, 2008 WL 686956 (N.D.Fla. Mar 13, 2008) (unpub) – "Ferrell's statements on the undercover recording do not qualify as testimonial evidence as contemplated by *Crawford*... [T]he conversation which occurred on the tape between Ferrell and the undercover officers was a drug buy negotiation, and 'it is clear that [Ferrell] never would have spoken to [the officers] in the first place' if he had known they were law enforcement officers since he was immediately arrested for selling drugs to them. *Id.* ... Here, the recording put the events of the evening in context and explained why the officers went to Defendant's house after Ferrell handed them two slabs of crack."

People v. Villano, 181 P.3d 1225 (Colo. App. Mar 06, 2008) – "In the course of and in furtherance of the conspiracy to buy and sell methamphetamine, Beltran gave the undercover officer information about his sources, and agreed and arranged to sell the drugs to the officer. Like the trial court, we conclude that those statements were not made in response to police interrogation, and that a reasonable person in Beltran's position would not make such incriminating statements if he believed they would later be used against him and his co-conspirators in the investigation or prosecution of the crime." – also co-conspirator

People v. Weary, 2008 WL 542677 (Cal. App. 3 Dist. Feb 29, 2008) (unpub) – pimping case, price quotes by non-testifying prostitute to undercover cop non-testimonial

Gibbs v. State, 2008 WL 314492 (Ind. App. Feb 06, 2008) (unpub) – "[T]he parties stipulated that the C.I. was unavailable to testify, apparently because he was incarcerated on an unrelated murder charge ... Instead, during a two-day trial on November 8 and 9, 2006, Officers Sholty and Klepinger testified, and the trial court admitted an audio-video recording of the third sale

into evidence over Gibbs's objection. ... Because we have already concluded that the recording did not contain hearsay, it follows that admission of the recording does not raise confrontation clause concerns."

State v. Garza-Irbe, 2008 WL 287948, *1+ (Wash. App. Div. 1 Feb 04, 2008) (unpub) – "Although it would be reasonable to assume that [wire-wearing informant] CH knew the tape would be offered as evidence at trial, the conversation memorialized on the tape did not contain the elements of formality cited by the *Crawford* Court."

U.S. v. Guerrero, 2008 WL 268695 (S.D. Fla. Jan 29, 2008) (unpub) (pretrial) – "The defendant argues that the admission of the videotaped meetings violates the Confrontation Clause. *Crawford* is inapplicable to the instant case because the subject videotapes are not testimonial."

U.S. v. Dimatteo, 2008 WL 186218 (E.D. Pa. Jan. 17, 2008) (unpub) (pretrial order) – "This court finds that the CW's statements on the tape recordings are themselves not being used to establish or prove any fact. Rather, Defendant's own statements are the real evidence offered by the tape recordings. Therefore, this court finds that use of the tape recordings, which include the CW's statements, does not violate Defendant's rights under the Confrontation Clause, even though the CW is dead and therefore, unavailable to testify or be cross-examined."

U.S. v. Wiig, 2008 WL 150218 (D. Neb. Jan 14, 2008) (unpub) (§ 2255 proceeding) – "An investigating officer's testimony concerning a CI may be introduced for the limited purpose of explaining the course of the police investigation."

U.S. v. Pike, 2007 WL 3114077 (S.D. Ohio Oct 22, 2007) (unpub) (pretrial order) – "the Court finds Pennington's statements to the undercover agent were not testimonial and therefore are not precluded by *Crawford*. ... Courts, post *Crawford*, have continued to hold that co-conspirator statements made to confidential informants are not testimonial in nature. ... Rather it is the expectation and belief of the declarant to determine whether or not the statement is 'testimonial' not the expectation or belief of the hearer. Statements by co-conspirators, such as Pennington, are made in the absence of the reasonable expectation that the statements will later be used in a formal proceeding or investigation, and in both situations the hearer is obtaining information on behalf of the Government."

Santos v. U.S., 2007 WL 2811610, *2 (N.D. Tex. Sep 26, 2007) (unpub) (§ 2255 motion) – "Equally immeritorious is Santos's claim that his rights under the Confrontation Clause of the Sixth Amendment were violated when the trial court allowed two government witnesses to testify regarding statements made by a confidential informant. ... [Defendant] has not—and could not—present a good-faith argument that the primary purpose of the statements made to the confidential informant regarding the ongoing drug trafficking operation was to establish or prove past events potentially relevant to his subsequent criminal prosecution."

State v. Sziva, 2007 WL 2809924, 2007-Ohio-5120 (Ohio App. 9 Dist. Sep 28, 2007) (unpub) – [arrestee telephoned supplier in cooperation with police, who recorded the calls] – "{¶ 18} In this case, Mr. Sziva was arguably acting as an agent of police when he engaged Mr. Phillips in the telephone conversations. Mr. Phillips, however, did not know that. Focusing on Mr. Phillips's reasonable expectation leads to the conclusion that his "primary purpose" would not have related

to later criminal prosecution. In fact, providing information to Mr. Sziva for use in a later criminal prosecution would have been no part of Mr. Phillips's purpose. His purposes were to ask Mr. Sziva whether everything was good and to update him on the progress of his trip back from Arizona. His statements, therefore, were not testimonial for purposes of the Confrontation Clause."

U.S. v. Alexander, 2007 WL 934714, *5 (11th Cir. 2007) (unpub) – "Delellis's statements that were introduced at trial were made to an undercover informant, Fairbrother, and an investigator, David. As such, pursuant to our holding in *Underwood*, [446 F.3d at 1347] those statements were not testimonial." – also co-conspirator statements

United States v. Dunklin, 2006 U.S. App. LEXIS 18069 (7th Cir. Ill. 2006) – Defendant's statements made to a confidential informant during a drug transaction were non-testimonial. "Dunklin—the target of this sting operation who engaged in informal conversations with a customer, not known to him to be an informant—did not make his statements here with any expectation that they would be used against him in a criminal trial. If anything, as a purveyor of an illegal substance, Dunklin made these statements believing the exact opposite. Moreover, unlike a witness giving testimony, Dunklin was not recounting past events on these tapes but was rather making candid, real-time comments about drug transactions in progress. Therefore, besides not being hearsay, Dunklin's statements on the tapes are also not testimonial and thus fall outside of the *Crawford* rule against testimonial hearsay. *See Davis*, 126 S. Ct. at 2275 (statements made "unwittingly" to a government informant are "clearly nontestimonial")."

United States v. Canady, 2005 U.S. App. LEXIS 14175 (4th Cir. N.C. 2005) – There was no violation to admit statements of the defendant's co-conspirator made to a confidential informant that the defendant was a part of the drug trafficking conspiracy. These statements were not testimonial since the co-conspirator clearly did not realize that his statements to the informant were going to be used against him at trial.

People v. Bogan, 152 Cal.App.4th 1070, 62 Cal.Rptr.3d 34 (Cal.App. 3 Dist. 2007) – (unpublished portion of opinion) "Defendant maintains that the statements made by Woods and Peters to undercover detectives Lockwood and Murry were testimonial under *Crawford*. This is incorrect. Woods and Peters did not know that these 'johns' were police officers when they negotiated the act of prostitution. The statements were not made during an interrogation, nor were the statements given in response to structured police questioning. The statements of the prostitutes in this case simply do not fall under the category of 'testimonial' statements as defined by the Supreme Court in *Crawford*. Therefore, the admission of the statements did not violate defendant's constitutional right of confrontation."

U.S. v. Vasquez, 2007 WL 2033354 (5th Cir. Jul 16, 2007) (unpub) – "There is nothing in the record, however, to suggest that Rodriguez was aware that his conversations with Agent Alaniz were being recorded. Instead, it appears that Rodriguez made the statements at issue unwittingly to an undercover officer. Thus, the statements are not testimonial and their admission does not violate the Vasquez brothers' Confrontation Clause rights."

U.S. v. Mooneyham 473 F.3d 280, 285-287 (6th Cir. 2007) – "McMahan was indisputably Mooneyham's co-conspirator, and the statement in question was clearly made in furtherance of the conspiracy because it was directed at a potentially recurring customer (Agent Williams) with

the intention of reassuring him of Mooneyham's reliability as a supplier. ... Because McMahan was not aware that Williams was a police officer, his remarks were not the product of interrogation and were not testimonial in nature. Hence, there was no *Crawford* error in the introduction of those remarks."

U.S. v. Ayal, 469 F.Supp.2d 357, 72 Fed. R. Evid. Serv. 173 (W.D. Va. 2007) – "[T]he Court has considered three factors in determining whether a statement is testimonial: first, the formal or systematic nature of the questioning, *Crawford*, 541 U.S. at 52-54, 124 S.Ct. 1354; second, the objective belief of the declarant as to whether the statement could be used in a future court proceeding, *id.* at 51, 124 S.Ct. 1354; and finally, the government agent's primary purpose in conducting any questioning of the declarant, *Davis*, 126 S.Ct. at 2278.

[¶] Here, Pope's out-of-court statements were made in a highly informal setting—over a cell phone. [FN4] Nothing in the record indicates that the incriminating statements resulted from a level of questioning so formal, systematic, or intensive as to be considered an interrogation. Furthermore, the declarant, Pope, had no expectation or any objective reason to believe his statements would be used in a future court proceeding by the government. He had no indication he was speaking to a government agent and believed he was taking part in a conversation necessary to facilitate a drug transaction. At all times during the conversation, Agent Snedeker presented himself as a buyer seeking to purchase crack cocaine."

People v. McBean, 2006 NY Slip Op 6091, 32 A.D.3d 549, 819 N.Y.S.2d 368, 370-371 (N.Y. App. Div. 3rd Dept. 2006) – Co-defendant's statements to an unknown undercover agent that implicated the defendant were non-testimonial for the reason that the co-defendant was unaware that she was speaking to an undercover agent, her statement lacked formality, and she did not anticipate that her statement would be used in trial. No *Crawford* violation.

➤ Sub-Category: Statements Unknowingly Made to Officer
(category added Oct. 2008)

People v. Paredes, 2009 WL 162169 (Cal. App. 2 Dist. Jan 26, 2009) (unpub) – "During the interview, a telephone in the Blazer rang constantly. Nash answered it. A female voice asked, "Who is this?" Nash said it is "Rider." The caller identified herself as "Joy." She said, "Tell my man Albert that there's some cops outside my motel room and I think they are looking for the G-ride that he's in." A "G-ride" is street slang for a stolen vehicle. Joy told Nash to tell Albert to "hurry up and dump it because the police were surrounding her motel room...." Nash hung up. [¶] Joy called back about three minutes later to ask whether Albert had dumped the car yet. She said the police were surrounding her motel and she did not want Albert to get "busted" in the car. ... informal statements made in an unstructured setting, such as statements made by potential drug purchasers in a telephone call to a dealer's residence, are not testimonial."

People v. Solis, 2008 WL 3508160 (Cal.App. 2 Dist. Aug 14, 2008) (unpub) – during drug bust and subsequent booking, officer answered suspect's cell phones – "What is important about the phone calls is not the truth of all the details mentioned, but rather the essential fact that the caller was trying to facilitate a drug transaction and expected to be able to do so with the person on the other end of the line. ... Villalobos's constitutional right to confrontation as outlined in *Crawford* was not violated by admission of the cell phone statements."

People v. Morgan, 125 Cal. App. 4th 935; 23 Cal. Rptr 3d 224 (Cal App 3rd Dist 2005) – “While officers were executing a search warrant to search for evidence of sale of methamphetamine, an officer answered the phone and heard the caller ask to buy drugs. The trial court admitted this statement into evidence. *** The court found no violation of the Confrontation Clause in admitting the caller's statements, which were not testimonial even though they were made to a police officer. The officer's minimal responses to the caller was not the involvement of government officers in the production of testimony with an eye toward trial that presented unique potential for prosecutorial abuse.”

Citizen Assisting Officer
(see also Background Statements; Citizen Assisting Victim)

People v. Whitfield, 2014 IL App (1st) 123135, 387 Ill.Dec. 868, 23 N.E.3d 560, appeal pending (Mar Term 2015) – patrolling officers heard gunshots and went to investigate – “¶ 27 Here, the record shows that the people on the porch merely pointed at defendant as police pursued their investigation of the incident and made an investigatory stop. There is no indication that these unidentified individuals witnessed the shooting that occurred on the 400 block of North Laverne Avenue, or that *566 they identified defendant as the offender. Under these circumstances, the testimony regarding this momentary encounter does not constitute inadmissible identification hearsay.”

People v Parson, 94 A.D.3d 577, 576-579, 944 N.Y.S.2d 18 (N.Y. App. Div. 1st Dep't 2012) – “An identified citizen witness waved to the police, pointed to defendant, and told an officer that defendant had a firearm. The officer testified that this witness, and a child who was a passenger in the witness's car, each displayed a frightened demeanor. ... The citizen witness, a caseworker for a foster care agency, testified at trial, but his child passenger, a client of the agency, did not. The witness testified at trial that the child pointed out of the car window while displaying an agitated demeanor, and that this caused the witness to turn around, look out the window, and see defendant pointing a weapon. ... even if the child's behavior constituted a nonverbal declaration, it was not offered for its truth. Instead, it was admissible 'for the legitimate nonhearsay purpose of completing the narrative and explaining' the events [cites]. Defendant's claim that the witness's testimony about the child's behavior violated the Confrontation Clause is without merit because the alleged nonverbal declaration was neither testimonial nor offered for its truth [cites].”

U.S. v. Dodds, 569 F.3d 336 (7th Cir. (Wis.) Jun 24, 2009) – “an unidentified person driving a red Dodge pulled alongside of [Officer] Koesterling's vehicle and told him that he had seen an African American male, wearing a black jacket and a black knit cap, pointing a gun at people two blocks away at the corner of 35th and Galena.” – officer went there, found defendant – “the admission of the witness's out-of-court statement did not violate Dodds' confrontation rights. ... the police were responding to a 911 call reporting “shots fired” and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.”

Thompson v. Director, 2009 WL 816107 (E.D. Tex. Mar 26, 2009) (unpub) (habeas) – no violation of confrontation clause when officer, pursuing a drunk driver, acted on citizen's tip

State v. Williams, 2009 WL 504686 (Wash. App. Div. 1 Mar 02, 2009) (unpub) – "While police were investigating Racheal Williams' possible participation in passing a counterfeit \$20 bill, an unknown bystander approached one of the detectives and volunteered the observation that Williams had earlier dropped something in a nearby trash can. After finding additional counterfeit bills in the trash can, the detective arrested Williams for forgery. But because there was no ongoing emergency and the primary purpose of the police investigation was to gather evidence for a potential criminal prosecution, the unknown declarant's statement describing Williams' past actions was testimonial hearsay and admitted in violation of the Sixth Amendment right to confrontation."

People v. Gamez, 2008 WL 4811891, 2008 N.Y. Slip Op. 52197(U), (N.Y. Supreme Ct. App. Term Oct 30, 2008) (unpub) – "The police officers testified as to what people in the crowd told them regarding a dog located at the scene of the incident. The statements by members of the public were not admitted for their truth, but were admitted to show why the police officers began their investigation to discover who was the owner of the dog, which investigation led them to defendant" – no *Crawford* violation

People v. Ryan, 2008 WL 4824094 (Cal. App. 1 Dist. Nov 07, 2008) (unpub) – "Arroyo testified he had contact with one of the 15 or 20 people outside the Club upon his arrival. That individual approached him and said, 'The person you guys are looking for is in that white Cadillac. His name is Stephen. But, careful, he has a gun.'" – others said similar things – "On review of the record we conclude that the statements made to [Officers] Watts and Arroyo were nontestimonial. ... The officers did not spend their brief time at the scene attempting to prepare a case for later prosecution, but instead in an attempt to evaluate, and to quell, a potentially dangerous situation. It was imperative for the officers to immediately determine whether: (1) the suspect was still in the vicinity; (2) he was a continued threat to public safety; and (3) there were any injuries resulting from the shots fired."

Segel v. State, 667 S.E.2d 670, 8 FCDR 2917 (Ga. App. Sep 09, 2008) – "Segel contends that the trial court erred by allowing the officer to testify that a bystander had asked him whether he was searching for a blue Corvette and then pointed toward a direction. Segel complains that he could not cross-examine the unidentified person, who was not called at trial. Segel's reliance upon *Crawford*, however, is misplaced because the cited exchange contained no testimonial statement. [FN9] The underlying circumstances showed that the primary purpose of the exchange between the officer and the bystander was to enable the officer to address an ongoing emergency."

State v. Parker, 2008 WL 2965925 (Minn. App. Aug 05, 2008) (unpub) – "Here, the officer's primary purpose was to identify and locate a suspect in a recent burglary, not to establish or prove any event relative to a later prosecution. Indeed, the state did not seek to call the declarant in its effort to prosecute Parker, and testimony regarding the declarant resulted from interrogation by Parker's attorney. Because the primary purpose of the interrogation was to identify and locate a suspect, not to establish or prove past events, the statement is non-testimonial..."

Williams v. State, __ S.E.2d __, 2008 WL 2440008 (Ga. App. Jun 18, 2008) – one officer chasing suspect "heard more than one person "screaming out that he had threw something" – another officer "ran past a group of people in the parking lot, several of whom 'stated that he had

[thrown] something" – it was cocaine – "we find that the bystanders' statements were not testimonial because the police officers did not elicit the statements and the primary purpose of the bystanders' shouts was to avert a crime in progress, not to establish or prove past events for a later criminal prosecution."

Belton v. Blaisdell, 2008 WL 925153, 2008 DNH 70 (D. N.H. Apr 02, 2008) (unpub) (habeas) Officer Peddle was chasing a bank robber, said to have escaped on foot – "Peddle came across Guptil, whom he asked whether he had seen anyone in the area and, when Guptil said he had, what the person looked like. Peddle then continued driving in the direction that Guptil indicated the suspect had run, still intending to cut him off. [¶] The nature of this interaction unquestionably shows an exchange intended, from the perspective of both parties, to catch a fleeing suspect in a violent crime. Under *Davis*, then, Guptil's declarations were not testimonial."

People v. Cruz, 2008 WL 467098 (Cal. App. 2 Dist. Feb 22, 2008) (unpub) – "out-of-court statement by a non-testifying witness that the shooter drove away from the crime scene in a red Thunderbird" non-testimonial

People v. Wilson, 2007 WL 2696494 (Cal. App. 2 Dist. Sep 17, 2007) (unpub) – officer chasing suspect – "The court admitted [Officer] Talmage's testimony that two unidentified civilians told him that 'they had seen the suspect run into the [Oceanside house] and that we had the right place' and 'He ran in there.' ... The prosecution did not offer the civilian statements that '[h]e ran in there' and you have 'the right place' to establish that, in fact, the appellant ran into the Oceanside house. Instead, the prosecution offered the statements for the non-hearsay purpose of explaining how the police pursuit unfolded and why Talmage and the other officers formed and held the perimeter around the Oceanside house. ... [B]ecause these civilian statements were relevant non-hearsay, the question of whether Talmage's testimony violated the confrontation clause of the Sixth Amendment need not be reached at all."

McGee v. State, 2007 WL 3104766 (Ind. App. Oct 25, 2007) (unpub) – violent street mugging – officer already aware of incident, and was already pursuing perpetrator – "As Sergeant Cheh followed McGee, an unidentified woman, possibly of Indian descent, flagged him down. The woman "appeared very excited," and was "flinging [and] flailing her arms" and shouting "very loud[ly]." (Tr. 227, 228, 229). She "almost stepped out" into traffic, and Sergeant Cheh nearly struck her with his vehicle. The woman pointed at McGee and shouted, "[T]he black man just robbed the white man." (Tr. 233). McGee turned and looked at Sergeant Cheh and the unidentified woman as they spoke. Sergeant Cheh advised the woman to stay where she was and continued to pursue McGee. ... Sergeant Cheh returned to the area in which he had left the unidentified woman, but she was no longer at the scene. ... Simply stated, the unidentified woman's statement was introduced at trial to identify McGee as the man who robbed Young at gunpoint. The statement, although not the product of police interrogation, was indisputably testimonial in nature."

State v. Bailey, 2007-Ohio-2014, 2007 WL 1226949, *8 (Ohio App. 1 Dist. 2007) (unpub) – "{¶ 50} In this case, the police officers testified that when they responded to a radio call about shots fired in the 1600 block of Westwood Avenue, a woman frantically flagged them down. The trial court did not allow the officers to specifically repeat what the woman had told them, but the officers were able to convey to the jury that she had provided them with information about the shooter, including a description of what he was wearing and where he might be located. The

record demonstrates that she made these statements to get aid from the police and to help the police in an emergency situation—locating a man in the dark of night who was armed and who had already fired a weapon. Therefore, her statements were nontestimonial, and the police officers' circumspect conveyance of these statements to the jury did not violate Bailey's constitutional right to confront the witnesses against him."

People v. Newland, 775 N.Y.S.2d 308 (2004) – Officer can testify to speaking with a bystander which then resulted in officer taking action that resulted in the location of evidence. This hearsay statement was not admitted for truth, but to show what action the officer took. "We conclude that a brief, informal remark to an officer conducting a field investigation, not made in response to "structured police questioning" should not be considered testimonial, since it "bears little resemblance to the civil-law abuses the Confrontation Clause targeted"."

Citizen Assisting Victim

(see also Background Statements; Citizen Assisting Officer)

State v. Washington, 260 S.W.3d 875 (Mo. App. E.D. Aug 26, 2008) – anonymous caller told victim of robbery who had done it – court analyzes private conversation as "background" without pausing to consider whether call to private person ought to be analyzed as if it were a call to police

People v. Gray, 2008 WL 2597558 (Mich. App. Jul 01, 2008) (unpub) – officer testified that victim told him about "'an anonymous call that he received saying that the person responsible for this case was the PlayStation 2 bandit' ... The tip given to the victim in this case, about which the police officer testified, was not testimonial, because it was not given to a law enforcement agent, but rather to the victim and, and there is nothing to suggest that the tipster was likely to believe that his tip would be used in a subsequent prosecution." [NOTE: Only one layer of hearsay analyzed.]

State v. Chavez, 2008-NMCA-125, 192 P.3d 1226, (N.M. App. June 20, 2008) – "The victim in this case arrived at his car in a parking lot to find the car door ajar. He was approached by an unknown man, who told him that someone had just taken a 'book' from the victim's car. The man handed the victim a note that contained information about the theft. ... The note was intended for the victim, and the use to which it would be put was solely at the victim's discretion. It was not solicited by or given to the police by the declarant, whose only apparent motive was helping the victim ascertain the identity of the thief. Because the statement is not testimonial, its admission is not barred by the Confrontation Clause."

Absent Witness's Private Writings

People v. Lopez, 56 Cal. 4th 1028, 301 P.3d 1177, 157 Cal. Rptr. 3d 570 (Cal. 2013) – girl kidnapped, then murdered in retaliation for reporting it – "Mindy's recording of the day's events in her private diary ..., like other 'informal statement[s] to a person not affiliated with law enforcement,' fall[s] outside the scope of the confrontation clause..." [second brackets added]

Sanchez v. State, 2012 MT 191, 366 Mont. 132; 285 P.3d 540 (Mont. 2012) (post-conviction relief) –

State v. Kaufman, 711 S.E.2d 607, 610-626 (W. Va. 2011) – murder victim's diary – "In the case sub judice, Appellant maintains that although the victim's diary does not neatly fit into the foregoing parameters [*621] set forth in *Mechling*, the diary, nevertheless, was testimonial for Confrontation Clause purposes. Appellant argues that during the time the diary was written, the couple's marriage was severely strained and Appellant had contemplated divorce. The victim was angry with him for having an extramarital affair and Appellant maintains she fabricated statements in her diary for the purpose of portraying Appellant in a bad light at his murder trial following her death by suicide. ... Appellant's argument, while creative, is speculative at best. First, the statements in the diary were clearly not made to a law enforcement officer in the course of an interrogation. Furthermore, the circumstances surrounding the making of the statements do not objectively indicate that there is no ongoing emergency,ⁿ³⁰ and that the primary purpose of the victim's diary was to establish or prove past events potentially relevant to later criminal prosecution. [cite]. Appellant's arguments notwithstanding, this Court is not persuaded that the victim's diary was made under circumstances which would have led her reasonably to believe that the diary would be available for use at a later trial date."

Self v. Rimmer, 2008 WL 2415727 (9th Cir. Jun 13, 2008) (unpub) (habeas) – "hearsay evidence found in the day planner and computer" of murder victim was non-testimonial

State v. Sanchez, 341 Mont. 240, 177 P.3d 444, 2008 MT 27 (Mont. Jan 31, 2008), denial of post-conviction relief affirmed, Sanchez v. State, 2012 MT 191, 366 Mont. 132; 285 P.3d 540 (Mont. 2012) – murder victim wrote note "to whom it may concern" which was found among her bills after her death – it said that if she was found to be ill or on the edge of death, or if she died, it was because the defendant had poisoned her – in fact he shot her – held: testimonial: "The note's substance indicates that the note's purpose was to explain her untimely death or poisoning, not to prevent or mitigate future harm. Aleasha's short note named the person she suspected would kill her and the method he threatened to use. In essence, Aleasha's note contained information that could establish or prove facts to answer questions regarding how, why, and by whom she had been harmed or killed. ... in a nine-line note, Aleasha documented the date and time that Sanchez threatened her, she named Sanchez as her suspected killer, she described Sanchez's motive, and she described his threatened method of execution. Though Aleasha did not address her note specifically to police officers, the note's substance and its comprehensive salutation indicate that it reasonably included law enforcement." [NOTE: The conclusion is only one of several possible interpretations, as concurring Justice Rice observes. But isn't it important that the communication was not actually made to a police officer? It's hard to see any of *Crawford's* "prosecutorial abuse" in this scenario. And as concurring Justice Warner points out, the note wasn't offered for the truth of the matter, anyway, since the victim was shot, not poisoned.]

U.S. v. Diamond, 65 M.J. 876 (Army Ct. Crim. App. Dec 21, 2007) – "The government also sought to admit a ten-page memorandum dated 27 January 2001 retrieved from Dr. Theer's personal laptop computer. ... Doctor Theer testified during a pretrial hearing regarding the defense's motion to quash a subpoena to produce the document. She said she prepared it to give to her attorney after her 27 January 2001 meeting with appellant. According to Dr. Theer, the document is a summary of an interview between Dr. Theer and appellant reflecting her questions

and his responses. During this pretrial hearing, defense counsel cross-examined Dr. Theer. ... The memorandum retrieved from Dr. Theer's laptop computer contained a summary of conversations between her and appellant made at the behest of her attorneys for her own potential defense in this matter. Her primary purpose was not prosecutorial in nature as she never meant for this document to fall into the hands of law enforcement personnel." [NOTE: Also (at least purportedly) defendant's own statements, and defense counsel had prior opportunity to cross-examine her.]

Parle v. Runnels, 387 F.3d 1030 (9th Cir Cal 2004) (habeas) – the defendant murdered his wife and the wife's diary was admitted into evidence to show the nature of their violent relationship – his murder conviction was final before *Crawford* came out – "We need not decide here whether *Crawford* applies retroactively. Because the out-of-court statements in question were not testimonial, they are not subject to the new *Crawford* rule. In supplemental briefing, petitioner conceded that the diary was not testimonial, for it was not created "under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial."

Foundation / Preliminary Questions of Fact / Chain of Custody
(this category includes documents called "affidavits" used to establish the foundation for other, self-authenticating documents)
(See also specific categories in part 15, Scientific Evidence.)

United States v. Gal, __ Fed.Appx. __ 2015 WL 1383754, at *4 (9th Cir. Mar. 27, 2015) – "an affidavit offered only to authenticate a record is not testimonial."

United States v. Perkins, __ F.Supp.3d __, 2015 WL 1263344 (D.D.C. Mar. 19, 2015), appeal pending – "The Court finds the affidavits were not testimonial within the meaning of the Confrontation Clause because the affidavits in question were created only to certify the authenticity of the public records, and not to provide substantive evidence against Perkins at trial."

United States v. Kubini, 304 F.R.D. 208, 217 (W.D. Pa. 2015) – "Business records may be authenticated through witness testimony or the use of written certifications that comply with Rule 902(11)... Courts that have addressed the issue have held that the admission of such written certifications to authenticate business records does not violate the Confrontation Clause to the extent that the statements contained therein are not testimonial."

United States v. Burwell, __ F.Supp.3d __, 2015 WL 222316, at *9-11 (D.D.C. Jan. 15, 2015) (§ 2255 proceeding), appeal pending – "The Court finds the affidavits were not testimonial within the meaning of the Confrontation Clause because the affidavits in question were created only to certify the authenticity of the public records, and not to provide substantive evidence against Burwell at trial."

United States v. Brinson, 772 F.3d 1314, 1316-18 (10th Cir. 2014) – "Mr. Brinson also contends that the district court violated his right to confrontation by admitting into evidence a certificate authenticating debit card records" under Fed.R. Evid. 902(11) – "this type of authenticating document is not 'testimonial'"

United States v. Stoddard, __ F.Supp.3d __, 2014 WL 6615443 (D.D.C. Nov. 24, 2014), appeal pending – FDIC-insured status was element of bank robbery – "Four pieces of evidence were admitted at trial establishing the insured status of four banks... the official records and accompanying affidavits were not testimonial..."

State v. Ziegler, 855 N.W.2d 551 (Minn. Ct. App. 2014) – " Ziegler's *558 argument conflates evidentiary requirements based on authenticity and foundation with the constitutional right of confrontation."

State v. Buckland, 313 Conn. 205, 96 A.3d 1163 (Conn. 2014) – "We agree with the state that neither *Melendez-Diaz* nor *Bullcoming* require every witness in the chain of custody to testify."

Vanwey v. State, __ So.3d __, 2014 WL 2058102 (Miss. App. 2014) – "self-authenticating records of a defendant's prior convictions are not testimonial evidence, and do not trigger a defendant's constitutional right to confront witnesses. ... The certified documents used to prove Vanwey's prior convictions are not testimonial, and the holding in *Bullcoming* does not change that."

U.S. v. Ortega, 750 F.3d 1020, 1025-27 (8th Cir. 2014) – "'chain of custody alone does not implicate the Confrontation *1026 Clause.' ... we conclude that it was not plain error for the district court to admit Ausili's testimony regarding the chain of custody for the composite samples."

City of Reno v. Howard, 318 P.3d 1063 (Nev. 2014) – "The fact that Van Cleave's declaration was offered only to lay the foundation for other evidence has no effect on its testimonial nature, and therefore has no effect on the rights provided by the Confrontation Clause." - [NOTE: Peculiarly, the paragraph preceding this extreme statement quotes from *Melendez-Diaz*'s footnote 1, which says the opposite.]

State v. Lui, 179 Wash.2d 457, 315 P.3d 493 (Wash. 2014), cert. denied, 2014 WL 1354998 (June 23, 2014) – " In no sense does an analyst become a 'witness' by extracting a sample for testing; the act is not testimonial because no statement has been made yet. This preliminary step in the analysis is essentially part of the chain of custody: an error at this stage goes to the weight and not the admissibility."

Speers v. State, 999 N.E.2d 850, 851-56 (Ind. 2013) cert. denied, 82 USLW 3673 (U.S. 2014) – "the witness about whom Speers complains was merely the technician who removed the sample for later testing and analysis—just one person involved in the chain of custody of the evidence. The question is whether the State was required to present this witness as well in order to honor Speers' constitutional right of confrontation. ... Essentially, there is no Confrontation Clause violation where the State introduces evidence and links in the chain of custody of that evidence are missing."

State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (S.C. 2013) – "[T]he evidence logs do not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items; thus, the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature..."

State v. Leibel, 838 N.W.2d 286 (Neb. 2013) – "We conclude that Hraban's and Johnson's statements authenticating that the records contained in exhibit 1 were true and exact copies, and were not 'testimonial.'"

U.S. v. Sharpton, 72 M.J. 777, 785-86 (A.F. Crim. App. 2013) – "Our superior court recently held that internal chain-of-custody documents and internal review worksheets contained within a drug testing report are not testimonial hearsay for purposes of the Confrontation Clause. *Tearman*..."

United States v. Tearman, 72 M.J. 54, 54-70 (C.A.A.F. 2013) – "The NMCCA described the chain-of-custody documents and internal review worksheets in relevant part: 'These eight pages, containing a total of thirty-seven individual chain of custody entries, all list a stamped or handwritten name, a signature or initials, a date, and a stamped entry indicating the purpose for the change in custody within the NDSL. . . . The internal review worksheets only contain names, signatures, and dates. None of the "comments" portions of these worksheets contain any notations. Nor do they certify the accuracy of any test results or adherence to any testing protocol.' . . . Based on all of the above, we agree with the NMCCA that none of the statements contained in the chain-of-custody documents and the internal review worksheets at issue are testimonial..."

State v. Brooks, 56 A.3d 1245 (N.H. 2012) – "Unlike the records themselves, however, the certifications of the business records were created for the sole purpose of litigation — that is, to authenticate documents pursuant to Rule 902(11). . . . We agree with the courts that have ruled that Rule 902(11) certifications are distinguishable from the certificates at issue in *Melendez-Diaz*. . . . we conclude that the admission of the records and the certifications did not violate the defendant's confrontation rights under the Federal Constitution."

United States v. Anekwu, 695 F.3d 967, 970-977 (9th Cir. Cal. 2012) – "The Supreme Court has not specifically addressed whether admitting certificates of authentication for documents violates a defendant's Confrontation Clause rights. . . . However, we have concluded that routine certifications of domestic public records are not testimonial. [cite] We have not addressed whether certificates of authenticity for business records are testimonial. Because there is no controlling authority on point, and because our cases indicate that the admission of the certificates of authentication did not violate the Confrontation Clause, we cannot conclude here that the district court plainly erred."

United States v. Johnson, 688 F.3d 494, 497-499 (8th Cir. N.D. 2012) – "First, we find that the government's decision not to call Jacobson—the lab supervisor who certified the lab report exhibit as a true copy of the original—did not violate Johnson's Confrontation Clause rights. '[C]ertificates of authenticity presented under Rule 902(11) are not testimonial.' . . . In this case, because the purpose of Jacobson's certification was to attest that the copy of the crime lab report was a true copy of the original—and not to prove the facts of the report's contents—we conclude the certification itself was not testimonial . . . Second, we find that the notations on the lab report by technician Schneider indicating when she checked the methamphetamine samples into and out of the lab—while relevant to the question of chain of custody—were not the kind of testimonial statements 'offered or admitted to prove the truth of the matter asserted.' [cite] And, chain of custody alone does not implicate the Confrontation Clause."

People v. Brown, 96 A.D.3d 869, 946 N.Y.S.2d 480 (N.Y. App. Div. 2d Dep't 2012) – "The defendant's contention that the use of a letter of certification to authenticate the hospital records deprived him of his Sixth Amendment right to confrontation under *Crawford* ... is unpreserved for appellate review ... and, in any event, without merit, since the challenged certificate was not testimonial in nature..."

State v. Anaya, 2012-NMCA-094, __ P.3d __ (N.M. Ct. App. 2012), cert. denied – "It is clear that not all foundational evidence implicates the Confrontation Clause. ... issues that are preliminary and foundational in nature are non-testimonial."

State v. Wixom, 820 N.W.2d 159 (Iowa Ct. App. 2012) – "The driving record and certification were not prepared specifically for use at Wixom's trial and were not 'testimony against petitioner.' Indeed, it is noteworthy that the Court in *Melendez-Diaz* specifically stated that '[a] clerk could by affidavit authenticate or provide a copy of an otherwise admissible record.'"

People v. Winters, 208 Cal. App. 4th Supp. 8, 10-16 (Cal. Super. Ct. 2012) – red light camera case – this confused opinion contains extended dicta proceeding from the assumption that the sixth amendment grants a right to confront foundational witnesses, without examining or even acknowledging the assumption

Commonwealth v. McLaughlin, 79 Mass. App. Ct. 670, 948 N.E.2d 1258 (Mass. App. Ct. 2011) – "In this instance, however, the defendant challenges not the introduction of the substance of the hospital records, but rather their certification by the hospital record keeper.... The certification form has some testimonial characteristics. The keeper of the records signed the form under the pains and penalties of perjury, and created the form in response to a subpoena. However, in *Melendez-Diaz* [cite] the United States Supreme Court made an explicit exception for 'a clerk's certificate authenticating an official record -- or a copy thereof -- for use as evidence.' *Id.* at 2538. ... [*678] In effect, the certification is doubly removed from a right of confrontation. It constitutes a nontestimonial authentication of records of nontestimonial information."

State v. Mares, 160 Wn. App. 558, 248 P.3d 140 (Wash. Ct. App. 2011) – "Although prepared for use at trial, a certificate of authenticity is not testimonial because it attests only to the existence of a particular public record and does not interpret the record nor certify its substance or effect. ... The certification here attests only to the authenticity of a public record. It offers neither an interpretation of the record nor any assertions about its relevance, substance, or effect." – non-testimonial

State v. Lee, 159 Wn. App. 795, 813-818, 247 P.3d 470 (Wash. Ct. App. 2011), review pending (Wash. Sept. 9, 2011) – "under *Melendez-Diaz*, a custodian may authenticate a business record by affidavit but cannot, without the opportunity for confrontation, create a record for the sole purpose of providing evidence against the defendant."

United States v. Yeley-Davis, 632 F.3d 673, 676-681 (10th Cir. Wyo. 2011), cert. denied (Apr. 25, 2011) – "we agree with other circuits who have held that HN9certificates of authenticity presented under Rule 902(11) are not testimonial."

People v. Moore, __ P.3d __, 2010 Colo. App. LEXIS 1828, 11-17 (Colo. Ct. App. Dec. 9, 2010), cert. granted, 2011 Colo. LEXIS 747 (Colo., Sept. 26, 2011) – "unlike the documents at issue in Melendez-Diaz and Hinojos-Mendoza, the certificates here only authenticated the documents contained in the pen packs. ... Thus, the certificates were not testimonial."

United States v. Jackson, 625 F.3d 875, 878-885 (5th Cir. Tex. 2010) – opinion withdrawn

United States v. Ayala, 601 F.3d 256, 271-272 (4th Cir. Md. 2010) – "Ayala challenges the admission of statements that he and his fellow MS-13 members made before a state grand jury. ... By introducing them, the government was simply laying a foundation to show that the statements were false and made in furtherance of the conspiracy. It did so by calling at trial witnesses Noe Cruz and Emilia Masaya, who testified about the group's plan to cover up their knowledge of the murder and who, of course, were subject to cross-examination. Accordingly, the admission of the grand jury statements did not violate the Confrontation Clause."

State v. Gibson, 2009 WL 1635211 (N.J. Super. A.D. Jun 12, 2009) (unpub) – "Defendant had no constitutional right to examine Tammy Moore, the evidence clerk who prepared the receipt documenting the blood sample's arrival at the Little Falls lab. ... the receipt was non-testimonial and not subject to the Confrontation Clause of the Sixth Amendment. *Crawford*..."

U.S. v. Kahre, __ F.Supp.2d __, 2009 WL 1111236 (D. Nev. Apr 20, 2009) (pretrial order) – "Although certifications under Rule 902(11) serve as a substitute for live testimony establishing the foundation for authenticating business records, they are not 'testimonial' in the *Crawford* sense and therefore do not offend the Confrontation Clause."

U.S. v. Schwartz, 2009 WL 532796 (3rd Cir. Mar 04, 2009) (unpub) – "Schwartz argues that the District Court violated the Confrontation Clause when it allowed the Government to use affidavits--rather than live testimony--to authenticate bank records covered by the hearsay exception for business records. ... Business records admitted pursuant to a hearsay exception, however, are not "testimonial" and therefore do not implicate the Confrontation Clause. [cite] Therefore, as the Court of Appeals for the Seventh Circuit has noted, "it would be odd to hold that the foundational evidence authenticating the records do[es]." [cite] We agree and note that other courts of appeals that have confronted this issue and the similar issue of authentication of public records are in accord."

U.S. v. Kos, 2008 WL 5084006 (W.D. N.C. Nov 25, 2008) (unpub) (pretrial order) – "Certifications of foreign business records are not the sort of testimonial evidence the Confrontation Clause bars. To be sure, the custodians would reasonably expect that their certifications would be used prosecutorially. However, a "business record certification ... does not serve independently as evidence in th[e] case; rather, it serves merely to lay a foundation for the admission of business records." [cite]. If the business records themselves are non-testimonial, [cites], it seems illogical to conclude that the document which authenticates them is testimonial."

State v. Tayman, __ A.2d __, 2008 WL 5088178, 2008 ME 177 (Me. Dec 04, 2008) – "[¶ 24] To be sure, the certification of the Secretary of State was created in response to the State's request and in anticipation of Tayman's trial. That fact, however, is not determinative in this instance. The certification serves only to confirm the authenticity of the underlying records of the Bureau, which themselves contain only routine, nontestimonial information. [cites] We find

nothing in the admission of the Secretary of State's certification that offends *Crawford* or implicates the Confrontation Clause."

U.S. v. Crockett, 586 F.Supp.2d 877 (E.D. Mich. Nov 14, 2008) – chemist who ran tests died before trial – "How the government will prove that Mr. Williams actually tested the substance that was lodged in the property room is not readily apparent, however. This issue was not discussed in the cases dealing with admission of laboratory test results through an expert who did not do the testing. [cite] The government's new expert might rely on the laboratory report prepared by Mr. Williams, but that reliance raises hearsay and Confrontation Clause concerns. ... The Court concludes that Mr. Williams's laboratory reports may not be used to authenticate the instrument printouts." – [NOTE: Opinion does not analyze whether the portions of report identifying the substance tested can be characterized as statements against the defendant, but seems to assume that if any part of a lab report is testimonial, it all is.]

State v. Shipley, 757 N.W.2d 228 (Iowa Jul 18, 2008), reh'g denied Nov. 13, 2008 – "the custodian of records in this case is certifying the authenticity of a copy of a preexisting document. In this setting, the custodian of records cannot be said to be an adverse witness providing testimony against the accused in any meaningful sense." – so certification of authentication of driving record is non-testimonial

State v. Doss, 754 N.W.2d 150 (Wis. Jul 15, 2008) – "¶ 40 Specifically, Doss argues that under *Crawford*, her constitutional rights were violated as a result of the circuit court allowing the State to rely on affidavits to authenticate the bank records. ... ¶ 42 ... the affidavits in this case do not constitute 'testimonial hearsay' under the Confrontation Clause. ... ¶ 47 The critical defining element of the affidavits accompanying the bank records in this case is that they fulfill a statutory procedure for verifying nontestimonial bank records and do not supply substantive evidence of guilt. The affidavits in this case are not the type of affidavits described in *Crawford*..."

Salt Lake City v. George, 189 P.3d 1284, 2008 UT App 257 (Utah App. Jul 03, 2008) – "¶ 13 Although the certificates/affidavits may be used ... 'to prove that the [breath alcohol] analysis was made and the instrument used was accurate,' [cite], the practice of using affidavits in this manner does not render the documents testimonial since the certificates/affidavits are prepared on a routine basis to test the accuracy of breath testing instruments in order to facilitate the repair, removal, or decertification of such instruments, and are not prepared to be used to convict a particular defendant of a crime."

State v. Sweet, 195 N.J. 357, 949 A.2d 809 (N.J. Jun 23, 2008), cert. denied, No. 08-381 (June 29, 2009) – "we are asked to address a common issue: whether the Confrontation Clause ... bar[s] the introduction into evidence of foundational documents concerning the operational status of a Breathalyzer, a device used to measure a subject's blood alcohol content. ... We reaffirm that '[t]he fact that [foundational documents] may be used to demonstrate that a device, which was used to conduct the breath tests for a particular defendant, was in good working order does not transform them into evidence of an element of the offense nor make them testimonial in the constitutional sense.' ... We therefore conclude that neither the ampoule testing certificates nor the breath testing instrument inspection certificates at issue are testimonial within the meaning of the Confrontation Clause..."

U.S. v. Qualls, 553 F.Supp.2d 241 (E.D. N.Y. May 19, 2008) (pretrial order) – "This court holds that the authentication of foreign business records pursuant to § 3505 does not violate the Confrontation Clause. ... The court cannot envision that the Supreme Court expressed continued support for the admission of a category of records yet prohibited the admission of records necessary to authenticate them."

State v. Granillo-Macias, 2008-NMCA-021, 143 N.M. 455, 176 P.3d 1187 (N.M. App. Dec 20, 2007), cert. denied, 2008-NMCERT-02 (Feb. 1, 2008) – "[T]he protections afforded by the Confrontation Clause do not extend to preliminary questions of fact.' ... [I]n proving preliminary questions of fact, the State is not utilizing a witness "against" the defendant under the Sixth Amendment."

U.S. v. Hemphill, 514 F.3d 1350 (D.C. Cir. Feb 08, 2008) – "It is unclear whether certifications are testimonial evidence, since they are, after all, affidavits prepared purposefully for use in prosecution; this court has not decided the question. *Compare United States v. Ellis*, 460 F.3d 920, 927 (7th Cir.2006), with *United States v. Adefehinti*, No. 04-3080, --- F.3d ---, 2007 WL 4386110, at *8-9 (D.C.Cir. Dec. 18, 2007)." – but not deciding issue

U.S. v. Jimenez, 513 F.3d 62 (3rd Cir. Jan 14, 2008) – "The Appellants do not challenge the information contained in the bank statements as hearsay, agreeing that the bank statements themselves are not testimonial and fall within the business records exception, but challenge only 'the testimonial statements in the certifications used to lay the foundation for their admission.' [cite] They claim that Rule 902(11) violates the Sixth Amendment's Confrontation Clause as applied to criminal defendants who do not have a chance to cross-examine the certification declarant under *Crawford*." – without deciding confrontation clause issue, holding any error was harmless precisely *because* the documents were merely foundational: "The declaration that the bank statements were kept in the ordinary course of the banks' businesses did not add to the Government's case against the defendants for submitting false loan applications. It was the information contained in the bank statements themselves, which is not contested on appeal, that the Government relied upon to make its case. The authenticity of the bank statements has never been challenged, [FN3] and the admission of the statements contained in the Rule 902(11) Certifications as related to the bank statements simply had no effect on the verdict."

U.S. v. Warshak, 2007 WL 4591208 (S.D. Ohio Dec 28, 2007) (unpub) (pretrial order) – "Defendants' Response is premised on the theory that the certification of the business records by their various custodians is barred by the Confrontation Clause, as interpreted by the Supreme Court in *Crawford* ... Having reviewed this matter, the Court agrees with the government that Defendants' Confrontation Clause objection lacks merit in relation to certifications of custodians of business records. The Court finds persuasive the holding in *United States v. Ellis*..."

U.S. v. Adefehinti, 510 F.3d 319 (D.C. Cir. Dec 18, 2007) – "Our disposition of this issue is simplified by the parties' joint acceptance of the Seventh Circuit's decision in *United States v. Ellis*, 460 F.3d 920 (7th Cir.2006). Starting from *Crawford's* explicit conclusion that business records 'by their nature were not testimonial' at the time of the Founding, *Crawford*, 541 U.S. at 56, the *Ellis* court extended that principle to evidence laying the foundation for such records' admission: 'Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence

authenticating the records do[es].’ 460 F.3d at 927. Adefehinti seeks not to reject but to distinguish *Ellis*. But he does so on grounds that we have already rejected ...”

State v. Bennett, 216 Ariz. 15, 162 P.3d 654 (Ariz. App. Div. 2 2007) – “The sole issue Bennett raises in this appeal is whether the admission of records of his prior convictions without testimony from the person who had prepared them and signed the attached authenticating affidavit violated his rights under the Confrontation Clause of the Sixth Amendment as explained in *Crawford* ... We held in *King* that prior conviction records are not testimonial ... [T]he affidavit at issue here, which contained the preparer’s attestation that the attached documents were ‘true and correct copies of original and/or original certified documents now contained in the master record file’ of the DOC merely ‘verif[ies] the chain of custody and authenticity of the underlying documentary evidence.’ *Id.* [107 P.3d] at 1061. The attached documents, not the affidavit, are what prove Bennett’s prior convictions. ... Because the records and affidavit were not testimonial, Bennett’s rights under the Confrontation Clause were not violated by their admission without the testimony of the persons who had prepared the records and signed the affidavit.”

State v. Kirkpatrick, 161 P.3d 990 (Wash. 2007), overruled State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (Wash. 2012) – “In *Crawford*, the Court suggested that business records are nontestimonial in part because they are not prepared with an eye toward trial. 541 U.S. at 51-52. In contrast, the public record here, at least the certification, was literally prepared for purposes of litigation and was intended to be relied upon by the State. Likewise, the DOL certification here was probably not kept in the normal course of DOL business. However, a more in-depth analysis of the function served by public records like those at issue suggests that such documents are appropriately analogized to business records and, accordingly, are not testimonial.”

State v. Doss, 305 Wis.2d 414, 740 N.W.2d 410, 2007 WI App 208 (Wis. App. 2007), reversed, State v. Doss, 754 N.W.2d 150 (Wis. Jul 15, 2008) –

In re State ex rel. C.D., 971 So.2d 496, 2007-1001 (La. App. 3 Cir. Oct. 5, 2007) – Louisiana law “allows a party to submit a document in place of a witness’s direct examination and requires a court to accept such a document as prima facie proof of the facts shown and of proper custody of the physical evidence, provided the certificate is in accordance with [various statutes]. If, at least five days prior to commencement of the trial, the party against whom such certificate is offered requests a subpoena be issued to the person who performed the examination or the person subpoenaed responds to the subpoena, the certificate shall not be prima facie proof of its contents or of proper custody.” – held: statute not unconstitutional under *Crawford* – “Upon careful review of the *Crawford* opinion, we find that *Crawford* is not controlling, believing the statutes at issue provide a party with notice that a certificate of analysis will be offered into evidence absent an objection. These statutes are a formalized means of effectuating a stipulation to the admissibility of matters which often are not in dispute.” – but absent evidence that proper notice was given, reversal required

U.S. v. Morgan, 505 F.3d 332 (5th Cir. Oct 17, 2007) – “Morgan claims that the use of Davies’s grand jury testimony to authenticate the business records used against her at trial violated the Confrontation Clause of the Sixth Amendment. ... [W]e hold that *Crawford* does not apply to the foundational evidence authenticating business records in preliminary determinations of the admissibility of evidence.”

United States v. Ellis, 460 F.3d 920 (7th Cir. Ind. 2006) – this is the leading case on Fed. R. Evid. 902(11), Certified Domestic Records of Regularly Conducted Activity, finding them non-testimonial

Frazier v. State 907 So.2d 985, 997-998 (Miss. App. 2005) – pen packs are not testimonial – "¶ 43 ... the decision in *Crawford* does not apply to self-authenticating documents under Rule 902(4) of the Mississippi Rules of Evidence."

United States v. Wittig, 2005 U.S. Dist. LEXIS 10067, 2005 WL 1227790, 67 Fed. R. Evid. Serv. 364 (D Kan 2005) – "This Court believes that witness affidavits in the form of [FRE] Rule 902(11) certifications fit within the Supreme Court's definition of testimonial statements."

Not Testimonial (not otherwise classified)

United States v. Mathis, 767 F.3d 1264, 1278-79 (11th Cir. 2014) cert. denied, No. 14-7814, 2015 WL 732182 (U.S. Feb. 23, 2015) – solicitation of minor prosecution, minor's texts to defendant non-testimonial – "Jerel's text messages were not testimonial statements and Mathis's right of confrontation was not violated by their admission at trial."

Lundin v. Kernan, __ Fed. Appx. __, 2014 WL 3512520 (9th Cir. 2014) (habeas) – gang graffiti, decoded, tipped off officers that a certain person had witnessed a murder – "The graffiti evidence and related testimony do not implicate the Confrontation Clause because the graffiti is non-testimonial."

United States v. Bourlier, 518 Fed. Appx. 848 (11th Cir. Fla. 2013) – script-selling doctor, several of whose patients OD'd – "The letter at issue here was from the medical examiner's office and was sent to Robert to request that he provide the examiner with Sara McCormick's medical records as part of the examiner's investigation into her death. It was simply a request for a patient's records without any accusations. Because the letter was not 'made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial,' [*855] [cite], and it did not have 'the primary purpose of accusing a targeted individual,' *Williams*, 132 S. Ct. at 2243, we find that it was not testimonial."

People v Pagan, 97 A.D.3d 963, 948 N.Y.S.2d 757 (N.Y. App. Div. 3d Dep't 2012) – "The detective's trial testimony that Abelove said he was defendant's attorney did not constitute testimonial hearsay in violation of the Confrontation Clause of the Sixth Amendment, as the statement was not pertinent to defendant's guilt or innocence of any element of the charged crimes and did not 'establish or prove past events potentially relevant to later criminal [*968] prosecution' [cite]."

People v. Thomas, 53 Cal. 4th 771, 269 P.3d 1109, 137 Cal. Rptr. 3d 533 (Cal. 2012) – "Defendant contends the trial court erred in admitting 10 drawings of the scene of the shootings of the two police officers, which were used to illustrate the testimony of eyewitnesses Margaretta Gully, De'Moryea Polidore, and Alicia Jordon. These drawings were prepared by a police artist based on interviews with the witnesses. Each of the witnesses testified that the exhibits accurately reflected what they saw, but in cross-examination, defense counsel elicited testimony

demonstrating that in some respects the drawings were not accurate or that they depicted details that the witnesses did not observe. ... because the [**1137] drawings were admitted solely to illustrate the witnesses' testimony, and not for the truth of the matters portrayed, they did not constitute inadmissible hearsay. [cite] Furthermore, the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'"

Minter v. State, 64 So. 3d 518, 523-524 (Miss. Ct. App. 2011) – "Here, the firearms-trace report here was not made for the purpose of prosecuting Minter; rather, it was produced by the ATF to establish the ownership of the pistol that was recovered. The ATF was not attempting to prosecute Minter when it produced the trace report, nor was the report the product of prior testimony or police interrogation. In short, the hearsay evidence did not violate Minter's Sixth Amendment right to confrontation because the evidence was not testimonial in nature."

Boyd v. Metrish, 2008 WL 2915343 (E.D. Mich. Jul 25, 2008) (unpub) (habeas) – "Petitioner asserts that he is entitled to habeas relief because the trial court erred in admitting the victim's testimony that everyone in the neighborhood knew about the sexual assault. Petitioner asserts that this testimony was hearsay and that its admission violated his confrontation rights. ... The victim's statements about what the neighbors knew were non-testimonial in nature."

U.S. v. Padron, 527 F.3d 1156 (11th Cir. May 13, 2008) – fraudulent personal injury lawsuit scam – stating in footnote of dicta that attorney demand letters to insurance companies "are not testimonial evidence"

Shalit v. U.S., 2008 WL 2025324, *1+ (S.D. Fla. May 09, 2008) (unpub) (§ 2255) – customer complaints to defendant's employer – " These complaints were sent to the company where Movant worked by customers dissatisfied with the company's service in an effort to resolve their dispute. Nothing about those complaints was formal or would lead an objective witness reasonably to believe that the complaints would be used in a prosecutorial manner or at a trial. ... *Crawford* does not apply."

People v. Jones, 2008 WL 509644 (Mich. App. Feb 26, 2008) (unpub) – "Defendant's mother in turn demanded to know how defendant might commit a robbery with stitches in his foot. The officer testified that there had been no mention to defendant's mother that defendant was suspected of such a crime. ... We conclude that the incriminating statement attributed to defendant's mother was not testimonial in nature. Although she was responding to questioning by the police, she did not offer incriminating information by way of any assertion on her part, but instead, according to the police witness, inadvertently signaled her understanding that the police were investigating a robbery in the course of asking a question intended to avert suspicions of defendant. Defendant's mother did not assert that a robbery had taken place, but rather asked how defendant might commit one with his injured foot. Defendant's mother was not answering a question from the police, but rather posing a question to challenge the wisdom of continuing to suspect defendant."

State v. Goza, 2007 WL 4442742, 2007-Ohio-6837 (Ohio App. 8 Dist. Dec 20, 2007) (unpub) – "{¶ 35} ... Thus, *Crawford* only applies to hearsay statements that are not subject to any hearsay exceptions." [NOTE: Really?? This would simplify life.]

Teniente v. State, 169 P.3d 512, 2007 WY 165 (Wyo. Oct 18, 2007) – "Jesse Magallenes... testified that as he walked into the jail before Eddie Magallenes' trial, Eddie yelled, 'Keep your mouth shut.' Defense counsel objected on the grounds that the testimony violated *Crawford*. The court overruled the objection, stating that the testimony was not offered for the truth of the matter asserted. Instead, the testimony was offered to perhaps show that Jesse was scared. The statements at issue do not fall within the categories of testimonial evidence described in *Crawford*—that the statements were within earshot of law enforcement does not allow them to rise to the level of 'testimonial' as described in *Crawford*."

Baker v. Commonwealth, 234 S.W.3d 389 (Ky. App. Sep 14, 2007) – following controlled buy, officer used tape recorder to make memo of events that had just occurred, and cooperating witness audibly spoke up in the background, stating the obvious ("They've got 'Percocet' wrote right on them") – "After careful consideration, we conclude that Daniel's statements to Detective Burch were not sufficiently formal to implicate the Confrontation Clause. Daniel's comments were unprompted, unsolicited, and spontaneous and were not the result of any prompting from Burch. We also note that the situation surrounding Daniel's statements was somewhat unique in that she was doing nothing more than verifying a version of events that Detective Burch had personally witnessed. Because of his own direct involvement, Burch had full knowledge of what had occurred. He was not conducting a formal post-incident investigation that required reliance on any information that Daniel provided him. He himself had been a participant, and Daniel was not telling him anything that he did not already know. Daniel's statements were not made under formal conditions that would give a witness time for reflection. We conclude that Daniel's recorded comments were not sufficiently formal to fall within the realm of testimonial hearsay. Therefore, the Confrontation Clause was not implicated."

U.S. v. Buelna, 2007 WL 3194833 (9th Cir. Oct 25, 2007) (unpub) – "We review for plain error whether Buelna's Sixth Amendment right to confront the witnesses against him was violated when Ted Verdugo testified that Scott Blaney told him Buelna had ten kilograms of cocaine. ... Blaney's statement was not ex parte testimony such as an affidavit or other pretrial statement reasonably expected to be used judicially. Nor was it formalized testimonial material such as a deposition or confession, or made under circumstances such that an objective witness would believe the statement would be available later for use at trial. Blaney would not have expected his statement to be used prosecutorially, reasonably believe it would be used at trial, or otherwise expect that it would be used as testimony. Because the statement was not testimonial, there was no error." (citations omitted) [NOTE: No further details are given in this summary opinion.]

State v. Taylor, 2007 WL 3026374 (Tenn. Crim. App. Oct 12, 2007) (unpub) – in dwi case, defendant's wife testified she had never seen him intoxicated, and state impeached her with evidence of his prior dwi conviction – "In this case, it was the Appellant who introduced the issue of character evidence at trial, and, clearly evidence challenging the character trait is not 'testimonial' within the meaning of *Crawford*."

Vallejo v. Bell, 2007 WL 2463239 (E.D.Mich. Aug 28, 2007) (unpub) (habeas) – shortly before shooting, defendant told acquaintance "we ain't got no problem with you" – "The statements at issue, which were not offered for the truth of the matter asserted, were spontaneously made by the perpetrator of a crime before the crime took place." – not testimonial – "[I]t makes no sense to assume that the unavailable declarant in this case made the statements at issue with the belief that they would be used as evidence against him or his cohorts in a later court proceeding. If that

were the case, it would logically follow that the unavailable declarant anticipated being apprehended and charged with crime prior to its perpetration."

People v. Senegal, 2007 WL 1874426 (Cal. App. 1 Dist. June 29, 2007) (unpub) - "the substance of the Delancey Street letter [that defendant had been terminated from the program] was not testimonial and was not dependent upon an evaluation of witness demeanor"

People v. Johnson, 2007 WL 1791887 (Mich. App. Jun 21, 2007) (unpub) – "Johnson moved for a mistrial after [wife] Vonda Johnson's counsel maintained in his opening statement that Vonda Johnson did not know that Johnson had guns in the house or prescription medication in his briefcase. The trial court gave a curative instruction and denied the motion. [¶] Vonda Johnson was not a witness against Johnson and did not make any statement. The comments in question were clearly and merely part of Vonda Johnson's counsel's opening statement. Therefore, we conclude that the right to confrontation is not implicated in this situation." (footnote omitted)

Wolfe v. Grams, 2007 WL 1655457 (E.D. Wis. Jun 07, 2007) (unpub) (habeas) – homicide victim wrote letters to three state judges, seeking to have his ex-lover's parole revoked – "In my opinion, the letter sent by Carter to the three state court judges seeking to have Wolfe's bond revoked is more akin to the 911 call in Davis than to the statements made by Amy Hannon to the police during their interview of her. First of all, the statements made therein are not the product of interrogation by anyone, much less interrogation by law enforcement officers."

U.S. v. Krieger, 2007 WL 1532087 (S.D.Ill. May 24, 2007) (unpub) – "During discovery, the government produced an autopsy report prepared by Dr. John A. Heidingsfelder, a Forensic Pathologist. The report indicated that Dr. Heidingsfelder had taken certain physical samples from Curry during his autopsy, including blood, bile and urine. Dr. Heidingsfelder has since fled the country to avoid various unrelated legal problems. ... There can be no doubt that, as Krieger suggests, the autopsy was 'conducted with an eye towards obtaining evidence of cause of death ... for use in a criminal prosecution.' (Doc. 59 at 9). Krieger offers no authority, however, supporting her claim that this fact transmogrifies physical evidence into testimonial evidence; the physical products of an autopsy cannot fit within any conceivable definition of testimonial."

U.S. v. Sine, 483 F.3d 990 (9th Cir. 2007), modified and republished, 493 F.3d 1021 (9th Cir. Jul 17, 2007) – in prior Ohio proceeding, Ohio Judge Carr made damning factual findings concerning the defendant – in California trial, the prosecution "asked more than two hundred questions of various defense witnesses about both the findings and the pervasively negative flavor of Judge Carr's order, providing in the course of doing so a thorough account of the order for the jury" – while some references constituted impermissible hearsay, not a *Crawford* violation – "Although he cites *Crawford* in passing, Sine does not argue that Judge Carr's statements were testimony, with good reason: There is no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial. *See United States v. Ballesteros-Selinger*, 454 F.3d 973, 974-75 (9th Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it 'was not made in anticipation of future litigation')."

U.S. v. Ramirez, 479 F.3d 1229 (10th Cir. 2007) – "Although the Court did not precisely define 'testimonial' in *Crawford*, we are certain that receipts from a private business transaction were not what the Court had in mind."

People v. Deals, 2007 WL 838961, *3 (Mich. App. 2007) (unpub) – "Brinkley requested a change of clothes and a ride to Niles, both of which Davis provided because he wanted the men out of his house. ... Brinkley's statement was not a testimonial statement, but rather a simple request to facilitate his flight from the attempted armed robbery of the Cottage Inn. Accordingly, the admission of Brinkley's statement did not violate defendant's right of confrontation."

Neloms v. Brown, 2007 WL 809703, *1 (S.D. N.Y. 2007) (unpub) – "Here, Santiago's statements – 'I got robbed' and '[t]hey going down' – are not testimonial" – made from upstairs window to neighbors in street

People v. Gonzales, 2007 WL 586635, *11 (Cal.App. 2 Dist. 2007) (unpub) – "The prosecution presented two certified minute orders to Detective Schmidt, which reflected Robert Gile's convictions ... There is nothing 'testimonial' about the fact of Gile's convictions, as shown by the court records; *Crawford* does not apply to the minute orders."

People v. Cooper, 148 Cal. App. 4th 731, 746, 56 Cal. Rptr. 3d 6, 26 (Cal.App. 2 Dist., 2007) (unpub) – "Photographs and videotapes are demonstrative evidence, depicting what the camera sees. ... They are not testimonial and they are not hearsay"

State v. Paiz, 2006-NMCA-144, 140 N.M. 815, 149 P.3d 579 (N.M. App. September 21, 2006) – "The materials with which Defendant takes issue, the intake report and the prior assessment, were prepared by Neilsen's colleagues at Hogares [a treatment facility]. The record contains no indication that either the declarants or the facility had any relationship with law enforcement, or that the documents were prepared in a manner to suggest possible law enforcement or prosecutorial abuse in order to facilitate proof in an anticipated criminal proceeding. As a result, neither the intake report nor the prior assessment can be characterized as 'testimonial' in nature. We therefore conclude the Confrontation Clause is not implicated."

United States v. Beach, 2006 U.S. App. LEXIS 22286 (4th Cir. N.C. 2006) – Photographs of seized evidence are not testimonial.

United States v. Vidrio-Osuna, 2006 U.S. App. LEXIS 16332 (9th Cir. Cal. 2006) – Birth certificates are non-testimonial.

Velez v. United States, 2006 U.S. Dist. LEXIS 46953 (S.D.N.Y. 2006) – "'there is no right to 'confront' witnesses upon whom police rely in obtaining probable cause.'"

Jensen v. Piller, 439 F.3d 1086 (9th Cir. Cal. 2006; as amended, Apr 27, 2006), cert. denied, 127 S.Ct. 261, 166 L.Ed.2d 202 (2006) – Admission of a deceased co-defendant's attorney-client privileged statements to his defense attorney were held non-testimonial. The statements do not "qualify as testimonial under any of the "formulations" of testimonial evidence offered in *Crawford*. Regarding *Crawford's* first and third formulations, Taylor could not have "reasonably expected [his statements to his attorney Rash] to be used prosecutorially" or "reasonably . . . believed that the statement[s] would be available for use at a later trial." *Crawford*, 541 U.S. at

51-52. Rash repeatedly explained to Taylor that their discussion was protected by the attorney-client privilege and promised that he "would never, ever, tell anyone." Taylor also told Rash that "he would go to prison before he would ever testify against anyone else who was involved in" Kevin James's murder, supporting the state's contention that Taylor never expected that his statements would be used at a later trial. In addition, the first formulation's reference to "custodial examinations" doubtless refers to interrogation by a government officer, rather than a prisoner being interviewed by his attorney. *Id.* at 51. Finally, despite their confessional nature, Taylor's statements to his attorney are not encompassed by the second formulation which concerns "formal" confessions. *Id.* at 52. In sum, because Taylor's statements to his attorney were not "testimonial," their admission in Jensen's trial was not precluded by *Crawford*."

United States v. Scheurer, 62 M.J. 100, 2005 CAAF LEXIS 1104 (2005) – Incriminatory statements made by defendant's wife to a co-worker of defendant were non-testimonial. (See also: Casual Remarks / Statements to Family, Friends and Co-Workers.)

State v. N.M.K., 129 Wn. App. 155, 118 P.3d 368 (Wash. Ct. App. 2005) – A certified copy of the absence of a driving record is nontestimonial. (See also: Absence of Public Record.)

State v. Peterson, 2005 N.C. App. LEXIS 1754 (NC Ct. App. 2005) – Statements by a police officer to explain subsequent action taken are not hearsay and non-testimonial under *Crawford*. (See also: Background / Context Statements.)

State v. Keodara, 2005 Wash. App. LEXIS 1703 (Wash. Ct. App. 2005) – "As officers responded to a burglary report, they observed defendant and two other men fleeing. A police officer deployed his canine to track the suspects and located them hiding in a tree. Defendant argued that the admission of the officer's testimony violated his right to confrontation because he repeatedly testified about what his canine "told" him during the search. *** The appellate court held that the officer's description of his interaction with his canine clearly relayed no testimonial hearsay by a declarant who would have reasonably expected his or her statement to be used in a criminal prosecution, and that the proper foundation for testimony regarding use of a tracking dog was laid and the officer did no more than testify to what was proper given that foundation." **Moral of the Story: Canine's are not declarants capable of providing testimonial evidence!**

People v. Taulton, 129 Cal App 4th 1218; 29 Cal Rptr 3d 203 (Cal App 4th Dist 2005) – Records of prior convictions are not testimonial and therefore are not subject to *Crawford*'s confrontation requirement.

United States v. Jones, 135 Fed. Appx. 651 (5th Cir. LA 2005) – Statements offered not for the truth of the matter asserted are non-testimonial. (See also: Non-Hearsay Statements / Statements Not for the Truth of Matter Asserted.)

State v. Vaster, 2005 Wash. App. LEXIS 465 (2005) – A Judgment of Conviction and Sentence is non-testimonial.

State v. Nelson, 2005 N.C. App. LEXIS 707 (2005) – Statements to private security guards are non-testimonial.

U.S. v Brown, 322 F.Supp.2d 101 (D. Mass. 2004) – There is no right to "confront" witnesses upon whom police rely in obtaining probable cause.

Police Dispatch

Commonwealth v. Whitaker, 460 Mass. 409, 421-423, 951 N.E.2d 873 (Mass. 2011) – "Detective Kelly testified that he had received a police dispatch saying that an ambulance had pulled over after the person they were transporting had said that he had possibly killed someone. The defendant did not object to the admission of this testimony. We conclude that the dispatcher's report was inadmissible hearsay but not testimonial in the circumstances."

Carson v. State, 2008 WL 1867148 (Tex. App.-Fort Worth Apr 24, 2008) (unpub) – "Appellant argues that he was denied his constitutional right of confrontation when he was not permitted to cross-examine the dispatcher regarding statements the dispatcher made to Officer Curtis regarding the third aggravated robbery attempt. ... the call Officer Curtis received from the police dispatcher was intended to alert him that his assistance was needed at a nearby location because of the occurrence of a crime. The call did not bear any of the official, formal qualities of police interactions that the Confrontation Clause was intended to protect against, and therefore, we determine that it was nontestimonial."



Part 7: Adequacy of Opportunity to Examine Declarant

Opportunity to Cross-Examine

(see also other categories in this part; part 8; and part 12, Child Available in Court but Did Not Testify)

Williams v. Bauman, 759 F.3d 630 (6th Cir. 2014) – statements given by a witness at a different defendant's preliminary hearing were admitted, although this defendant's counsel had an opportunity to cross-examine the witness only at this defendant's prelim – " By implication, the state court's position is that the Confrontation Clause permits the introduction of out-of-court testimonial statements against a defendant as long as the defendant was at some point able to ask the declarant questions under oath, even in an entirely different proceeding, even if the questions were about entirely different statements, and even if the defendant was prevented from learning about the very testimonial statements that are subsequently sought to be introduced against him at trial. [¶] It is difficult to square this reasoning with pertinent Supreme Court precedent, which exhibits a concern not about unexamined *persons* but about unexamined *testimony*. ... In other words, the Confrontation Clause does not require an opportunity for cross-examination merely to ensure that the defendant can at some point—perhaps in a different proceeding altogether—see the declarant in court in the flesh. It requires cross-examination to ensure that the defendant can attack the reliability of the particular statements that his accuser has made. [cite] It is therefore

difficult to interpret *Crawford*'s cross-examination requirement as failing to presuppose that the defendant has the ability to cross-examine the declarant about the out-of-court statements that are later sought to be admitted against him. [cite] Indeed, that appears to be the whole point of the rule." – but error, if any, was harmless

U.S. v. Vazquez, 73 M.J. 683 (A.F. Crim. App. 2014) – "The facts in this case, however, are that AM appeared in the courtroom and answered the questions posed to her by trial counsel. Although there were a few questions where she did not answer immediately, trial counsel followed up with other related questions that AM did answer. Trial defense counsel chose to ask AM only one question on cross-examination. There is no evidence that AM refused to answer any additional questions. We disagree with the military judge's determination that AM was not present as required by *Crawford*."

State v. Henderson, ___ So.3d ___, 2013 WL 5019652 (La. App. 1 Cir. 9/13/13) – "We do not read the words 'subject to cross-examination' in Article 801(D)(1) to mean 'actually cross-examined.' Defense counsel clearly had an opportunity to cross-examine Nelton regarding either or both of her statements to the police, and she made a strategic judgment to cross-examine Nelton on the impeaching statement only." – also decided under confrontation clause

State v. Baker, 2013 MT 113, 370 Mont. 43, 300 P.3d 696 (Mont. 2013) – child abuse case – "[*P23] H.B. was present at Baker's trial and was subject to cross-examination. Baker argues that his Confrontation Clause right to cross-examination of H.B. is the crux of his appeal. He asserts that this right was denied because the State did not ask H.B., on direct examination, about each statement she made during the prior recorded interview. Baker contends that this prevented his attorney from cross-examining H.B. on those important points. [summarizing testimony on direct]... [*P24] This testimony by H.B. provided sufficient opening for Baker's attorney to cross-examine about the inappropriate touching, what it entailed, and whether H.B. had told anyone else about it."

State v. Pollock, 251 Ore. App. 755, 284 P.3d 1222 (Or. Ct. App. 2012) – 5-year-old victim of abuse, the prosecutor didn't ask her in detail about facts but introduced DVD of her forensic interview – "Defendant contends that he nonetheless did not have an adequate opportunity to cross-examine the victim about her out-of-court statements, because she was, in effect, 'unavailable' for cross-examination on the inculpatory evidence, due to the prosecutor's failure to have elicited that evidence directly from the victim before introducing the DVD. n2 Defendant contends that, by not asking the victim directly about the abuse, the prosecutor effectively placed on defendant the burden to elicit the inculpatory testimony that he sought to impeach, a burden that he contends violated his right to confrontation. ... [W]e conclude that the state's tactical decision did not limit defendant's right to confrontation in this case. The choice whether and to what extent to cross-examine a witness always requires a weighing of benefits and risks. But where, as here, the victim has taken the witness stand and is available for cross-examination, the Confrontation clause is not implicated."

Jessop v. State, 368 S.W.3d 653 (Tex. App. Austin 2012) – "Smuts, the DNA forensic analyst, testified at trial and was subject to cross-examination regarding the DNA evidence about which appellant complains. Simply because she did not provide the answers to appellant's satisfaction does not mean appellant was denied the right to confront her."

United States v. Walker, 673 F.3d 649 (7th Cir. Ill. 2012) – "although it might seem that the confrontation issue was resolved when Logan himself called [informant] Ringswald, the government has made little effort to counter Logan's contention that his questioning of the informant was cabined to the point that there was no confrontation at all."

People v. Torres, 962 N.E.2d 919, 919-934 (Ill. 2012) – "The State argues that defense counsel's cross-examination of Pena at the preliminary hearing partook of the same 'motive and focus' as would a similar cross-examination at trial. We agree. ... [¶ 60] However, the motive-and-focus test cannot be our sole guide to a resolution in this instance. ... Though motive and focus have been identified as pertinent considerations by this court, two other factors have also been cited as relevant to the question of admission. ... Fairness, and indeed defendant's right to confrontation, demand an opportunity for adequate cross-examination of the witness at the preliminary hearing if that testimony is to be subsequently admitted against the defendant at trial. ... Beyond the freedom to fully question the witness regarding critical areas of observation and recall, to test him for any bias and prejudice, and to otherwise probe for matters affecting his credibility, what counsel knows while conducting the cross-examination may, in a given case, impact counsel's ability and opportunity to effectively cross-examine the witness at the prior hearing."

State v. Cabbell, 207 N.J. 311, 24 A.3d 758 (N.J. 2011) – "The court and prosecutor both warned Martin that her refusal to testify could subject her to contempt and a jail sentence. ... Because the witness continued to insist that she did not want to testify, the court decided to conduct a Rule 104 hearing out of the presence of the jury to determine the admissibility of Martin's out-of-court statement.¹ To this point, defendants were not given the opportunity to cross-examine Martin before the jury." – defense counsel examined Martin outside presence of jury at the contempt hearing, after which the judge mistakenly told defense counsel: "You had your opportunity to cross-examine her in front of the jury, outside the presence of the jury and you waived the opportunity." – that was untrue – "defendants' right of confrontation was not satisfied by giving defendants the opportunity to cross-examine Martin before the judge. ... A court has no authority to deny defendants their constitutional right of confrontation merely because it believes that cross-examination will be of little use."

Smith v. State, 25 So. 3d 264, 267-274 (Miss. 2009) (en banc) – "In the instant case, Davis's appearance on the witness stand at trial provided Smith with the opportunity to confront and cross-examine him, which is all that is required by the Confrontation Clause and Crawford. [cite] We find that Smith's Sixth Amendment right to confront his accuser, therefore, was not violated by the admission of Davis's statements, and that the Court of Appeals erred in so finding."

Vasquez v. Kirkland, 572 F.3d 1029 (9th Cir. (Cal.) Jul 20, 2009) (habeas) – "Zapata was the prosecution's key witness. Although Zapata is deaf and does not speak, she has never learned a standard form of sign language. She also has a very limited ability to read and write. She communicates with others using a combination of signs, gestures, facial expressions, and sounds. ... Vasquez is, however, unable to point us to any case in which the Supreme Court found a violation of a defendant's Confrontation Clause rights where the limitations on the effectiveness of cross-examination resulted from the witness's own physical impairments.... We empathize with the challenges that defense counsel faced in cross-examining Zapata. Those challenges, however, do not rise to a deprivation of the opportunity for effective cross-examination."

State v. Zamarripa, 199 P.3d 846, 2009-NMSC-001 (N.M. Dec 01, 2008) – witness asserted fifth amendment right, state extended use immunity – "However, the scope of the immunity only covered Baca's verification of the accuracy of the transcript of his statement; he was not immune from future prosecution based on his answers to substantive questioning on the events described in the statement. ... While Defendant may have been able to cross-examine Baca regarding the accuracy of the transcript of his statement, that limited questioning does not satisfy the demands of the Confrontation Clause." [3-2 decision]

State v. Whitaker, 2008 WL 4307998 (N.J.Super.A.D. Sep 18, 2008), officially published in part (but not *Crawford* discussion) at 402 N.J.Super. 495, 955 A.2d 322 (N.J.Super.A.D. Sep 18, 2008), certification granted by 197 N.J. 476, 963 A.2d 845 (N.J. Jan 20, 2009) –

"Although the two witnesses testified on direct and were cross-examined by the defense at trial, defendant contends that he was denied the right to confront his accusers under *Crawford* [cite] and *State v. Buda* [cite], because the witnesses' "'blackout drunk' condition at the time of the event effectively rendered them unavailable for confrontation." Defendant's contention on this point is also without merit."

Commonwealth v. Mattei, 72 Mass.App.Ct. 510, 892 N.E.2d 826 (Mass.App.Ct. Sep 03, 2008) – "The defendant bases his claim that the victim was 'unavailable for cross-examination' on an assertion that she could not remember what she had said in her 911 call to the police. The victim did so state. ... The victim's testimony, however, belies her statement that she could not remember, which seems to be true only in the limited sense that she could not then, at trial, recall everything she had said in the 911 call two years earlier. Much of what she said she did remember. Moreover, she had a remarkably detailed present memory of the events preceding her 911 call and could be effectively cross-examined on statements made to the dispatcher during the call."

Rice v. Commonwealth, 2008 WL 3890106 (Ky. Aug 21, 2008) (unpub) – "Here, Brown was sworn and offered testimony on both direct and cross-examination. Although Brown at various points in his testimony claimed no memory or outright denied making statements to police, he was nonetheless present and answered the questions posed to him on cross-examination."

People v. Gilliam, 2008 WL 2807227 (Cal. App. 2 Dist. Jul 22, 2008) (unpub) – "We agree with Courts of Appeal that have concluded, under similar circumstances, that a defendant is not denied his or her confrontation rights when a witness is evasive at trial."

Turner v. Runnels, 2008 WL 2705574 (N.D. Cal. Jul 10, 2008) (unpub) (habeas) – "On direct examination, Delgado answered a few preliminary questions. From that point on, Delgado was unable to answer further of the prosecutor, saying, 'I don't recall.' ... Because Delgado was available for cross examination, her failure to recollect the substance of her interviews with the police did not make her unavailable and did not result in a Confrontation Clause violation."

People v. Paul, 2008 WL 2673294 (Cal. App. 2 Dist. July 9, 2008) (unpub) – gang shooting – "Here, Talbert appeared at trial and was subject to cross-examination. While that examination was not effective because of Talbert's 'no comment' responses, he did provide some responses, and the jury was able to observe his demeanor. Further, the parties were free to argue the impact of his recalcitrant behavior on his credibility and on the issues in the case." – no c.c. violation

State v. Lewis, 2008 WL 2649497 (Minn. App. Jul 08, 2008) (unpub) – co-perpetrator cut deal with prosecution, then went all squirrely on the stand – "Minnesota courts have concluded that a witness is unavailable, for purposes of the Confrontation Clause, when the witness refuses to testify or invokes the Fifth Amendment's protection. ... But Ewing did not successfully invoke the protection of the Fifth Amendment and he did not simply refuse to testify. Even though Ewing refused to answer some of the prosecution's questions, he did answer questions posed both on direct and on cross-examination. Importantly, on cross-examination, Ewing was asked questions about his plea-hearing testimony; he responded to those questions and attempted to explain his plea-hearing testimony by indicating that he never identified the last name of the person with whom he committed the robbery. [cites] Lewis may be dissatisfied with Ewing's testimony, but dissatisfaction does not equate to denial of a defendant's constitutional right of confrontation."

State v. Jorgensen, 754 N.W.2d 77, 2008 WI 60 (Wis. Jun 13, 2008) – defendant, out on bail with a "no alcohol" condition, showed up drunk for a plea hearing – in subsequent prosecution for violating the terms of his bail, transcript of abortive plea hearing was read for the jury – "By reading the November 10 hearing transcript at Jorgensen's criminal trial, which essentially provided the jury with the judge's and the prosecutor's conclusions about Jorgensen's guilt, the circuit court itself seemingly testified against the defendant, and the prosecutor essentially testified against the defendant by virtue of the judge reading the transcript from the November 10 hearing. This highly prejudicial and largely inadmissible evidence was not subject to cross-examination. ... ¶ 39 Jorgensen's right to confrontation was also violated during the prosecutor's closing argument. [NOTE: !?!] The prosecutor took what the jury had improperly heard during the trial a step further. She 'testified' that Jorgensen was a 'chronic alcoholic' who did not acknowledge his problem, that on November 10 she smelled a strong odor of intoxicants from him, and that she knew Jorgensen was drunk that day in court. While the State did produce testimony regarding Jorgensen's level of intoxication on the date in question through the toxicologist, Jorgensen was still denied his right to confrontation and the right to have the State prove its case beyond a reasonable doubt."

State v. Mitchell, 378 S.C. 305, 662 S.E.2d 493 (S.C. App. May 22, 2008) – "In the present case, although Johnson took the stand, he refused to answer the solicitor's questions, was found in contempt, and was removed from the courtroom while still on direct examination and before his statement was introduced. We are simply at a loss to understand how Mitchell ever had the opportunity to cross-examine Johnson about his statement." – murder conviction overturned

Commonwealth v. Figueroa, 451 Mass. 566, 887 N.E.2d 1040 (Mass. Jun 05, 2008) – "The judge placed no limit on the cross-examination of [forgetful witness] Laboy, who did not refuse to answer any of the questions defense counsel asked." – opportunity sufficient

People v. Mason, 2008 WL 942012, *3+ (Mich. App. Apr 08, 2008) (unpub) – "To the extent defendant implies that the failure of Morris to recall or acknowledge his conversation with Vargas, frustrated or impeded his right to confront this witness, we note the Court's prior opinion indicating that the Confrontation Clause does not guarantee every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion or evasions. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination,

thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony."

People v. Bynum, 2008 WL 544232 (Cal. App. 6 Dist. Feb 29, 2008) (unpub) – "[T]he court expressly found that Bell willfully pretended not to remember and admitted the pretrial statement on that basis. ... Here, on direct examination, Bell was asked to explain statements he made to police; he was subject to cross-examination; and he was excused subject to recall. ... We reject defendant's claim that his 6th Amendment confrontation rights were violated by the admission of Bell's prior inconsistent statement to police as substantive evidence against him."

State v. Berry, 2007 WL 2258821 (Wash. App. Div. 2 Aug 07, 2007) (unpub) – "Neal [assault victim] did not respond to subpoenas from the State and walked out of Berry's previously scheduled trial, to which she was required to attend. ... [S]he eventually appeared at the trial [after the prosecution had rested]. The State indicated that it was willing and able to reopen its case and call her, but was also amenable to defense counsel calling Neal as a defense witness. Berry's counsel questioned Neal about the event and her statements to [Officer] Salinas. In this instance, Berry was not in a Catch-22 and had a full opportunity to confront Neal. ... Therefore, we hold that Berry's Sixth Amendment rights were not violated."

State v. Howell, 226 S.W.3d 892 (Mo. App. S.D. Jun 19, 2007) – "Defendant complains that his counsel was not able to effectively cross-examine [child] Victim, because she did not remember making the hearsay statements at issue, nor was she able to recall any details of the charged offense. ... The record clearly shows that Defendant had the opportunity to effectively cross-examine Victim under oath and call to the attention of the jury Victim's forgetfulness. Therefore, the Confrontation Clause was satisfied."

State v. Nelis, 733 N.W.2d 619, 2007 WI 58 (Wis. 2007) – After witness Stone testified, Police Chief Stone (presumably no relationship) took the stand, and revealed previously-undisclosed statements witness Stone had made to him – "Although Steve Stone testified at trial, Nelis argues that Steve Stone did not have the opportunity to explain or deny his alleged oral statements because the State did not examine him concerning such statements, and the oral statements were not made known prior to Police Chief Stone's testimony. The State argues that there was no violation of Nelis' right to confrontation under Crawford because Steve Stone testified at trial and was cross-examined by the defense. [¶] ¶ 46 Nelis' right to confrontation was not violated because 'the Confrontation Clause places no constraints at all' on the use of prior testimonial statements when the declarant appears for cross-examination, as did Steve Stone. ... Steve Stone testified at trial and was cross-examined concerning his statements to the police; therefore, Nelis' right to confrontation was not violated."

State v. Salazar, 216 Ariz. 316, 166 P.3d 107 (Ariz. App. Div. 1 June 12, 2007) – "Defendant argues that the admission of A.M.'s recorded statements, in light of her repeated inability to recall the incidents, violated his right to confront witnesses against him under both the United States and Arizona Constitutions. We disagree. ... Although A.M. was a reluctant witness, Defendant was not precluded or limited in his cross examination. Our review of the record does not reveal that A.M.'s inability or refusal to recall the incidents so frustrated cross-examination that admission of her out-of-court statements violated Defendant's confrontation rights."

State v. Kennedy, 957 So.2d 757 (La. 2007) rev'd on other grounds, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) – (death penalty for child rape case) – "The defendant argues that although the victim was physically present to testify, she was unable to respond to questioning in a meaningful way and simply adopted her videotaped statement, which was obtained without the presence of defense counsel or any opportunity to effectively cross-examine the witness either pre-trial or at trial. ... We disagree. ... In this case, the victim was able to answer the vast majority of the questions asked of her." [NOTE: This point was decided in terms of the witness's "availability."]

People v. West, 2007 WL 1491075, *4 (Mich. App. May 22, 2007) (unpub) – rape case – "Although the victim's biological age was 21 years old at the time of trial, the record showed that she had the mental capacity of a nine-year-old child. ... Defendant further argues that he was denied his right of confrontation by the victim's intransigence and lack of memory during cross-examination. ... Defendant was able to confront the victim. The victim testified under oath and was subjected to cross-examination, and the jury had the opportunity to observe her demeanor. Although the victim refused to answer certain questions and claimed memory problems, defense counsel used her lack of recall and unresponsiveness to contest the credibility of her testimony. ... Defendant was not denied his right of confrontation."

People v. Nava, 2007 WL 1123010, *7-8 (Cal. App. 2 Dist. 2007) (unpub) – "Martinez was present at trial and testified as to several matters related to the charges against Nava—she acknowledged knowing Nava and admitted her former boyfriend was a member of BMS—but answered, "I don't remember" in response to questions about the events surrounding the shooting itself, matters she had discussed at some length in her tape-recorded statement to Officer Rico. ... Moreover, the jury was able to observe Martinez's demeanor during her testimony, which included questions from both the prosecutor and defense counsel. [¶] Finally, although on cross-examination Martinez stated she would not respond to any inquiries about the shooting itself, Nava's counsel did not attempt to question Martinez about other matters that may have assisted Nava's defense. ... Under these circumstances Martinez's presence at trial, on the witness stand and available for cross-examination, satisfied the requirements of the confrontation clause."

U.S. v. Halteh, 2007 WL 806005, *1 (4th Cir. 2007) (unpub) – "A Confrontation Clause violation does not occur when the witness is before the court and subject to cross-examination about her prior testimonial statement. That a defendant opts not to cross-examine the witness does not compel a different conclusion."

U.S. v. Acosta, 475 F.3d 677 (5th Cir. 2007) – "Although we do not speculate as to hypothetical outcomes [*sic*], if Marrufo had steadfastly refused to answer all questions about Acosta's involvement, had denied making the prior statements, and had refused to answer questions on cross-examination, we might face a *Crawford* problem to which Acosta might be entitled to relief, even under the imposing plain error standard. In fact, if Marrufo had refused to answer a single question on cross-examination the *Crawford* analysis could have been challenging. [¶] But Marrufo acknowledged Acosta's presence during the offense and acknowledged making the prior statements. Thus, both of these subjects could be reached on cross-examination. Acosta made a tactical decision to avoid these questions, and Marrufo answered every question he was asked on cross-examination. Thus *Crawford* does not apply."

U.S. v. Stone, 2007 WL 600098, 5 (6th Cir. 2007) (unpub) – whether defendant had opportunity to cross-examine prosecution witness who repeatedly took the fifth on the stand, but nonetheless answered some questions – "Although Corley refused to answer a substantial number of the questions posed by the United States on direct examination, he offered responses to several of those questions. Stone was, therefore, not confronted with a situation in which any attempt at cross-examination would have been futile." – therefore confrontation clause satisfied

State v. Hagans, 135 Wash. App. 1043, 2006 WL 3308665, 2006 Wash. App. LEXIS 2474 (Wash. Ct. App. 2006) – "During defendant's trial, the [13-year-old] victim suffered a physical and emotional breakdown on the stand after over two hours of cross-examination. The next day, the victim's counselor stated that she had no memory of being on the stand or of the breakdown. The trial judge acknowledged concern over her state and said that she had definitely gone over the edge, and that it would not be helpful to put her over the edge again, so they should seek alternative ways of addressing the situation. An offer of proof consisting in part of the victim's testimony in a prior trial was read into evidence. Defendant was convicted of second-degree child rape. On appeal, the court found that while defendant's right to cross-examination under Wash. Const. art. 1, § 22 was limited, it was not violated. Defense counsel included those areas that he sought to cover in cross-examination in his offer of proof. The trial court gave defendant ample opportunity to cross-examine the victim. In almost three hours, defense counsel succeeded in pointing out numerous inconsistencies in the victim's testimony and past statements, and the victim admitted that she had lied many times in the past. Any error was harmless."

Hodges v. State, 2006 Tex. App. LEXIS 9050, 2006 WL 2986250 (Tex. App. 2006) (unpub) – The victim testified at trial, although could not recall the assault. The defendant chose to not cross examine, then on appeal argued that his right to confront was violated. The court held that there was not confrontation violation and admitting the victim's testimonial statements was proper since she took the stand.

Dickson v. State, 2281 Ga.App. 539, 636 S.E.2d 721, 06 FCDR 2949 (Ga. Ct. App. 2006) – "Defendant challenged his conviction, contending that the trial court improperly allowed into evidence his father's pretrial statement to an investigator and improperly prohibited him from introducing evidence suggesting that his brother had personal problems, possibly including the use of illegal drugs. As to the former, the appeals court agreed, finding that at his own bond hearing, defendant did not have a meaningful opportunity to cross-examine his father regarding his father's statement, as the focus of the bond hearing was whether to allow defendant to be released on bond, not whether the criminal allegations were supported. The reasonable doubt standard and the significant risk standard could not be equated, and determining whether a specific crime was committed reached different issues than determining the possibility of future bad conduct by a defendant."

In the Interest of S. S., 281 Ga.App. 781, 637 S.E.2d 151, 06 FCDR 3133 (Ga. Ct. App. 2006) – 14-year-old tried for molesting 6-year-old – non-jury juvenile court proceeding – judge and counsel met with victim in chambers – but, in judge's words, "she's not going to talk to us" – victim's statements to family members were admitted – defendant argued she was unavailable for cross-examination, but court disagreed: "we have held that a child who is uncommunicative, unresponsive or evasive during questioning is available" – and in this case the factfinder, the judge sitting without a jury, "witnessed the child's demeanor and unresponsiveness. Having observed the child's unwillingness or inability to answer questions, the judge then made a legal

ruling that the child was available but that no further purpose would be served by having the child examined in the open courtroom." – not an abuse of discretion

Rice v. State, 281 Ga. 149, 635 S.E.2d 707, 2006 Fulton County D. Rep. 3023 (Ga. 2006) – “although defendant's opportunity for cross-examination was perhaps not ideal given the fact that he had only six days' notice of the hearing, he was afforded a sufficient opportunity to cross-examine a witness who later died, and the lack of cross-examination was the result of him waiving that opportunity. Thus, the witness's deposition was admissible at trial.”

People v. Whitley, 11 Misc. 3d 1084A (N.Y. County Ct. 2006) – Introducing the prior trial testimony of two unavailable witnesses at this trial will not violate *Crawford* since the defendant had a previous opportunity to cross-examine.

People v. Desantiago, 365 Ill.App.3d 855, 850 N.E.2d 866, 303 Ill.Dec. 61 (Ill. App. Ct. 1st Dist. 2006), leave to appeal denied, 221 Ill.2d 650, 857 N.E.2d 676, 306 Ill.Dec. 277 (Ill. 2006) – “In the present case, during the course of a September 21, 2001, grand jury proceeding, Guerrero testified regarding the events of September 9, 2001. At trial, however, when he was called by the State to testify, Guerrero stated that he had recently been hit on the head with a shovel and, as a result, he recalled neither testifying at the September 21, 2001, grand jury proceeding nor the events of September 9, 2001. After the State attempted to refresh Guerrero's memory as to his prior testimony at the grand jury hearing, the Defendant's trial counsel cross-examined Defendant. During cross-examination, Defendant's trial counsel inquired whether Guerrero had been offered immunity by the State in exchange for his grand jury testimony and asked Guerrero whether he had ever helped Defendant commit any crimes. Guerrero answered Defendant's trial counsel's questions on cross-examination. The State then offered the testimony of Assistant State's Attorney Canellis, who confirmed that she witnessed Guerrero testify under oath at the September 9, 2001, grand jury proceeding. Defendant's trial counsel then cross-examined Assistant State's Attorney Canellis and the grand jury transcript was published to the jury. While Defendant concedes that Guerrero appeared as a witness at trial, Defendant cites to the United States Supreme Court opinion in *Crawford v. Washington* in support of his argument that the extent to which he was able to cross-examine Guerrero did not satisfy the confrontation clause. *** “the confrontation clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” (Emphasis in original.) *People v. Jones*, 156 Ill. 2d 225, 243-44, 620 N.E.2d 325, 189 Ill. Dec. 357 (1993), quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19, 106 S. Ct. 292, 294 (1985). This record confirms that Guerrero appeared and testified at trial, which permitted Defendant to cross-examine Guerrero and undermine his testimony by, inter alia, questions regarding Guerrero's criminal record; questions regarding Guerrero's inconsistent testimony; questions regarding Guerrero's drug and alcohol use on September 9, 2001; and questions regarding “the very fact that [Guerrero] has a bad memory.” *Mercer*, 864 A.2d at 114 n. 4, quoting *Owens*, 484 U.S. at 559. Therefore, we cannot agree with Defendant's assertion that his rights under the sixth amendment of the United States Constitution were violated simply because Defendant was unable to cross-examine Guerrero to the extent that he wished.”

State v. Pierre, 277 Conn. 42 (2006) – At trial, a friend of the defendant testified and was impeached with a prior inconsistent written statement. A lengthy letter written by this witness was introduced at trial that incriminated another individual (consistent with statements given by the defendant to police that two other individual committed the murder), but also incriminated

the defendant. This witness testified inconsistent with his written statement, acknowledged the written statement, including his signature on each page, yet denied writing the statement and saying that the police pieced the statement together from numerous other documents. The witness claimed no memory of the incriminating statements made by the other individual or the defendant. On appeal defendant objected to the inconsistent statement being admitted at trial and complained of his inability to conduct a full cross-examination due to the “memory loss” as well as being unable to cross examine the other subject. The court found that the inculpatory statement said to the witness from the other suspect was properly admitted as a statement against penal interest and adoptive admission against the current defendant, as well as an inconsistent statement against the testifying witness. There was no *Crawford* violation since the witness testified and was cross-examined, in spite of claimed memory loss, the defense was given a chance for an effective cross examination. Moreover, the other subject who inculpated himself to the witness was not testimony “against” this defendant to invoke Sixth Amendment protections.

People v. Carter, 36 Cal.4th 1114, 117 P.3d 476, 32 Cal.Rptr.3d 759 (2005), cert. denied, 126 S.Ct. 1881, 164 L.Ed.2d 570 (2006) – Defendant was charged with murdering three women. The ex-boyfriend of one victim testified at preliminary hearing and died before trial. Defendant objected to introducing the transcript of testimony at trial on the grounds that he did not have a sufficient opportunity to cross examine. The court denied the appeal on those grounds stating that the defendant is allowed “an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer.”

State v. Griffin, 128 Wash.App. 1053, Wash. App. LEXIS 1875, 2005 WL 17536842005 (Wash. Ct. App. 2005) – “A defendant who voluntarily chooses as a tactical defense matter not to pursue a certain avenue of questioning of a witness may not later assert that his right of confrontation was denied to him.” No *Crawford* violation for failure to cross examine on an issue when the witness testified at trial.

United States v. Kappell, 2005 FED App. 0333P (6th Cir. Mich. 2005) – The two child victims testified at trial pursuant to closed-circuit television. The defendant complained of a confrontation violation because during cross-examination, the children were inarticulate or unresponsive at times and should have been declared unavailable (thus precluding testimony of a psychotherapist and two physicians regarding statements made by the children). Defendant claimed there was no effective cross-examination. The Court rejected this arguments since the U.S. Supreme Court has held that “the Confrontation Clause guarantees only ‘an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”

U.S. v. Wilmore, 381 F.3d 868 (9th Cir. 2004) – prosecution properly impeached witness with grand jury testimony, but trial court erred by prohibiting defense counsel to ask questions on cross that would cause witness to take the fifth on account of potential perjury prosecution – “This left Wilmore with no opportunity to ‘confront’ Ms. John about why she testified the way she did before the grand jury or about whether that testimony was true” – held: violation
[NOTE: Although the opinion says “We believe that *Crawford* controls in this case”, no hearsay was admitted as substantive evidence, so far as the opinion reveals.]

People v. Thompson, 349 Ill. App. 3d 587; 812 NE2d 516 (Ill. App. Ct. 2004) - Victim did not testify at trial and there was no determination as to unavailability. Defendant testified and during cross-examination was impeached with a protective order previously obtained by the victim that contained statements of prior abuse. Defendant was convicted for aggravated battery. Use of the prior protective order containing statements by the victim of prior abuse violated *Crawford* because the victim was not subjected to cross-examination of those statements.

➤ Sub-Category: Remote Testimony by Adult Witness
(see pt. 12 for cases involving children)

Mathews v. State, 26 N.E.3d 130 (Ind. Ct. App. 2015) – witness made unavailable by poor health deposed by Skype – "Lucille's deposition was obtained pursuant to procedures designed to elicit the truth. She was sworn in by a Louisiana attorney before her deposition began. Defense counsel cross-examined Lucille. In addition, the deposition was audio-recorded and transcribed by a court reporter, and Lucille signed the deposition after it was transcribed."

State v. Rogerson, 855 N.W.2d 495, 496-511 (Iowa 2014) – " This case requires us to decide when the Sixth Amendment permits a witness to appear by live, two-way video instead of testifying in person. ... Applying Sixth Amendment precedent, we now hold that two-way videoconference testimony should not be substituted for in-person confrontation absent a showing of necessity to further an important public interest. ... The State did not present evidence that the witnesses were beyond the court's subpoena power or that they were unable to travel because of their injuries. Under *Craig* and the other precedents discussed above, this is insufficient. The State has not shown that the witnesses cannot appear in person or even that personal appearance would cause severe stress."

U.S. v. Mostafa, 14 F.Supp.3d 515 (S.D.N.Y. 2014) – "One of the witnesses whom the Government intends to call, Saajid Badat, has refused to come to the United States to testify. (ECF No. 291.) He has agreed, however, to provide testimony under oath by live closed-circuit television ('CCTV'). ... Based on what has been an elaborate process relating to this issue, the Court grants the Government's motion. Badat will be allowed to testify by live CCTV from the United Kingdom."

State v. Schwartz, 2014-NMCA-066, 327 P.3d 1108 (N.M. App. 2014), cert. denied 328 P.3d 1188 (N.M. 2014), cert. petition filed (Sept. 15, 2014) – "{1} Bruce Schwartz (Defendant) asserts that his rights under the confrontation clauses of the United States and New Mexico Constitutions were violated when the district court permitted four witnesses to testify by two-way video over the Internet [*i.e.*, Skype] without the necessary findings that use of video was necessary. We agree..."

People v. McCoy, 215 Cal. App. 4th 1510, 156 Cal. Rptr. 3d 382 (Cal. App. 3d Dist. 2013) – "Defendant Joe Lynn McCoy physically and sexually assaulted his girlfriend, Cindy H., fracturing her spine during the attack and rendering her a quadriplegic. Because Cindy H.'s medical condition provided reasonable grounds to fear she would be unable to testify at trial, she was examined conditionally during the preliminary hearing via two-way video. At trial, as anticipated, the video of this examination was played for the jury because Cindy H. was unable to testify." – no violation

State v. Seelig, 738 S.E.2d 427 (N.C. Ct. App. 2013) – defendant sold gluten-containing bread products from Costco and Sam's Club as gluten-free and homemade – "Defendant next contends that the trial court's admission of Sean Kraft's testimony from another state via 'live closed-circuit web broadcast' violated defendant's rights under the Confrontation Clauses contained in the Sixth Amendment to the Constitution of the United States and Article I, Section 23 of the Constitution of North Carolina. Mr. Kraft testified regarding the results of laboratory tests he performed on samples of defendant's bread products. ... This case, like those in other jurisdictions, implicates the State's interest in justly and efficiently resolving a criminal matter when a witness cannot travel because of his health. The trial court, as required by *Craig*, conducted a hearing and found that Mr. Kraft had a history of panic attacks, had suffered a severe panic attack on the day he was scheduled to fly from Nebraska to North Carolina for trial, was hospitalized as a result, and was unable to travel to North Carolina because of his medical condition. ... Thus, like the witnesses in *Craig*, Mr. Kraft 'testified under oath, w[as] subject to full cross-examination, and w[as] able to be observed by the judge, jury, and defendant as [he] testified.' [cite] Accordingly, the *Craig* test was satisfied here, and the trial court did not err in admitting Mr. Kraft's testimony."

State v. Smith, __ P.3d __, 2013 N.M. App. LEXIS 28 (N.M. Ct. App. Mar. 19, 2013) – "[¶ 1] This case requires us to determine whether the district court erred in permitting an analyst from the State's Scientific Laboratory Division (SLD) to testify at trial via a video conference as to the conduct and results of a blood test. We hold that the district court did not establish the requisite necessity for allowing video testimony in lieu of live testimony and, as a result, Defendant's rights under the Sixth Amendment to the United States Constitution were violated by the video conference testimony." – [NOTE: This opinion does not identify criteria a trial court could use in a future case to determine "necessity."]

Rivera v. State, 381 S.W.3d 710 (Tex. App. Beaumont Sept. 26, 2012) – "Rivera raises several issues in his appeal, contending (1) the trial court denied his federal and state rights of confrontation by allowing an active-duty soldier to testify by live videoconference... We conclude that under the circumstances, the preference for having witnesses testify in the courtroom must give way to the practical considerations involving Taylor's military obligation that made his physical presence impractical. The procedure the trial court followed, allowing Taylor to participate in the trial by live videoconference while in full view of those participating in the courtroom, did not violate Rivera's rights under the Confrontation Clause of the Sixth Amendment."

Paul v. State, __ S.W.3d __, 2012 Tex. App. LEXIS 6308, 1-3 (Tex. App. Tyler July 31, 2012), pet. dismissed w/o prejudice (Dec. 12, 2012) – "Appellant argues that the trial court violated his Due Process and Sixth Amendment Rights by permitting Jordan to testify via a web camera computer conferencing system from a remote location. ... Appellant contends that the fact that Jordan suffered from stage IV ovarian cancer alone is not the sort of strong public policy contemplated by the Supreme Court in *Craig*. ... [W]e hold that the trial court did not violate Appellant's Sixth Amendment rights by allowing Jordan to testify remotely via a computer video conferencing system."

Kramer v. State, 2012 WY 69, 277 P.3d 88 (Wyo. 2012) – "Kramer contends that the district court violated his federal constitutional right to confront Weller, the third occupant of the vehicle

who witnessed the events surrounding the shooting. Weller had since been committed to a mental institution in Montana. ... We conclude, in light of the facts of this case, that the court's decision to allow Weller to testify by video conference was justified. The two-part *Craig* test was satisfied here and we thereby affirm the district court."

People v. Buie, 2011 Mich. App. LEXIS 22, 1-35 (Mich. Ct. App. Jan. 11, 2011), appeal granted, 489 Mich. 938, 797 N.W.2d 640 (May 25, 2011), rev'd, People v. Buie, 491 Mich. 294, 817 N.W.2d 33 (Mich. 2012)

Rogers v. State, 40 So. 3d 888, 888-891 (Fla. Dist. Ct. App. 5th Dist. 2010) – " The appellant, Timothy David Rogers, posits that the trial court erred by allowing a state witness to testify by satellite from China at the trial of Mr. Rogers in Lake County, Florida. ... Under the facts of this case, however, we conclude that the confrontation rights of the appellant were protected, and thus we affirm." – analyzing "the three purposes of confrontation"

United States v. McGowan, 590 F.3d 446 (7th Cir. Ill. 2009) – victim testified by videotaped deposition, her health too bad to allow her to travel cross country for trial – "Nor was McGowan's Sixth Amendment right to confront the witnesses against him compromised by the procedure employed by the district court. We have already concluded that the court did not err in finding LaMie unavailable for trial. McGowan could not seriously challenge the other part of the analysis, whether he had an adequate opportunity for cross-examination. Crawford, 541 U.S. at 68. McGowan was able to fully cross-examine LaMie on several different occasions, during depositions to preserve her core testimony and during later depositions to address issues raised when additional documents were produced to the defense. Moreover, the district court noted several times that the videotapes allowed the jury to fully experience LaMie's testimony, to view her demeanor, to hear her voice and to determine her credibility. We have already held that there is no Confrontation Clause violation when admitting fully cross-examined testimony preserved by a properly conducted Rule 15 deposition, and that this holding had not changed after Crawford."

Commonwealth v. Atkinson, 2009 PA Super 239, 987 A.2d 743 (Pa. Super. Ct. 2009) – under the Pennsylvania Constitution, as interpreted, and despite amendment in 2003, the confrontation clause applies at pretrial suppression hearings – at the one in this case, "the Commonwealth presented testimony from an alleged co-conspirator, who was incarcerated in state prison, by use of a two-way videoconferencing system." – the long opinion assumes that *Crawford* applies under the state Constitution, too, and concludes: "We find that the use of the videoconferencing equipment violated Appellant's right to confrontation. No compelling state interest has been advanced. While efficiency and security are important concerns, they are not sufficient reasons to circumvent Appellant's constitutional right to confrontation." – distinguishing child abuse cases where a compelling interest can be shown

Bush v. State, 193 P.3d 203, 2008 WY 108 (Wyo. Sep 17, 2008), cert. pet. filed (Dec. 16, 2008) – prosecution witnesses were elderly couple, husband was too ill to travel, wife didn't want to leave her side – trial court allowed them to testify by "video teleconference" – "[¶ 53] We conclude the district court properly applied the *Craig* test. ... We hold that the district court properly admitted Mr. Martin's testimony by video conference and did not violate Mr. Bush's confrontation right."

United States v. Yates, 438 F.3d 1307, 19 Fla. L. Weekly Fed. C 279 (11th Cir. 2006) (en banc) – This case involved two adult victims of identity fraud who lived in Australia and were outside the subpoena power of the prosecutor's office. The victim testified via live two-way video conferencing. A three-judge panel overturned the conviction and held that the testimony violated *Crawford* and the Confrontation Clause, and distinguished the testimony from *Maryland v Craig* in that face-to-face testimony was required from the victims/accusers and that no public policy outweighed this (whereas in *Maryland v Craig* the public policy of avoiding trauma to the child allowed for CCTV testimony). The decision on en banc rehearing was written by the same judge and came to the same conclusion.

Prior Opportunity to Cross-Examine At Previous Trial / Sentencing Hearing

United States v. Richardson, 781 F.3d 237 (5th Cir. 2015) – first conviction was reversed because of violation of defendant's *Faretta* right to represent himself – "Richardson contends that Neville 'was not subject to the cross-examination secured by' the Confrontation Clause because his testimony was taken in violation of Richardson's constitutional right of self-representation." – in other words, because it was conducted by a lawyer instead of a layperson – "we find no violation of the Confrontation Clause."

People v. Wood, 307 Mich. App. 485, __ N.W.2d __ (Mich. App. 2014) – "defendant had ample opportunity to cross-examine [DNA analyst] Altesleben during his and Watson's joint preliminary examination. Altesleben testified at the preliminary examination on the very charges for which defendant stood trial. Defense counsel for both defendant and Watson cross-examined Altesleben during the preliminary examination; no indication exists that the district court limited their opportunities to cross-examine Altesleben, and the trial court admitted both cross-examinations at defendant's jury trial. ... defendant was not denied his right to confront witnesses against him."

Bolin v. State, 117 So.3d 728 (Fla. Feb. 21, 2013) – "Bolin contends that because of the years that have passed since Bolin's first trial, admitting [deceased witness] Coby's testimony in his second retrial violates *Crawford*. However, Bolin provides no support for his assertion and we find it without merit."

State v. Breedlove, 286 P.3d 1123, 1129-1132 (Kan. 2012) – "The district court allowed the testimony of Wilson, the store manager, and Carlyle, Breedlove's girlfriend in August 1995, to be read into the record before the jury. Statements that Sosa made at the first trial were also read into the record in an attempt to impeach his version of events regarding the September 3, 1995, carjacking. Breedlove contends that because these statements were made at a void trial, they became in effect a legal nullity, and he was consequently deprived of his constitutional right to confront witnesses against him. ... We hold that ... vacating the earlier trial did not render the sworn testimony from that trial void, did not remove the constitutional protections in place at that trial, and did not change the credibility of the testimony."

Berkman v. State, 976 N.E.2d 68, 71-72 (Ind. Ct. App. 2012) – "the trial court did not abuse its discretion in declaring Timmerman unavailable, and there is no dispute that Berkman cross-examined Timmerman during her prior testimony. Berkman's rights to confront the witnesses against him were not violated."

People v. Banks, 2012 COA 157, __ P.3d __ (Colo. Ct. App. 2012), reh'g denied – "Pettigrew was subject to prior cross-examination at the first trial. ... because Pettigrew was unavailable and was subjected to prior cross-examination, defendant's Confrontation Clause rights were not violated..."

Rolan v. Coleman, 680 F.3d 311, 326-327 (3d Cir. Pa. 2012) – "Because Francisco Santiago died before Rolan's retrial, the transcript of his testimony from Rolan's original trial and [*327] his preliminary hearing was read into evidence. ... The parties do not dispute the fact that Rolan cross-examined Francisco Santiago when he testified at the first trial. The issue here is whether prior counsel's cross-examination of Francisco Santiago was adequate under *Crawford* despite our previous finding that counsel was ineffective for other reasons. We hold that it was more than adequate."

Partin v. State, 82 So. 3d 31 (Fla. Dec. 1, 2011) – "because the trial court determined that Ulerly was unavailable under section 90.804 and that Partin had an opportunity to cross-examine her in a prior trial on the same subject matter, Partin was not deprived of his Sixth Amendment right to confrontation."

Martinez v. State, 327 S.W.3d 727, 729-730 (Tex. Crim. App. 2010), cert. denied (June 6, 2011) – "The record shows that DeAnda was 'unavailable' as a witness because he died after testifying in 1989. DeAnda's testimony during appellant's 1989 trial constituted "testimony given as a witness at another hearing." Finally, the record shows that appellant's attorneys did cross-examine DeAnda during the 1989 trial. Therefore, under the plain language of *Crawford*, DeAnda's former testimony was constitutionally admissible during appellant's 2009 punishment hearing."

State v. Arnold, 189 Ohio App. 3d 507, 939 N.E.2d 218 (Ohio Ct. App., Montgomery County 2010) – holding that cross-examination at the prior trial was not adequate, because prosecutors had not provided the witness's address in a timely fashion before the first trial, hindering defense preparation for the cross-examination – this case makes sense only as a discovery sanction disguised as a finding of a constitutional violation

People v. Rush, 928 N.E.2d 157, 160-168, 340 Ill. Dec. 438 (Ill. App. Ct. 1st Dist. 2010) – "Here, [since-deceased witness] Ginger's testimony from the first trial included portions in which she was questioned about prior inconsistent statements that she had made to ASA Black in September 1997, and to the grand jury in October 1997. Defendant concedes that these statements were properly admitted at the first trial... Defendant now claims that the statements were inadmissible at the second trial because he did not have an opportunity to cross-examine Ginger on them at the time the statements were actually made. We reject this argument because defendant did have an opportunity to cross-examine Ginger about these statements after she testified on direct examination at the first trial, and we find no basis to conclude, nor does defendant provide us with one, that *Crawford* or section 115-10.4 of the Code required the redaction of this properly admitted testimony from his first trial."

People v. Lee, 2009 WL 1027572 (Cal. App. 4 Dist. Apr 17, 2009) (unpub) – "Loehr testified at the first trial and appellant had the opportunity to cross-examine him then. The rationale underlying *Crawford* is not applicable here."

Sanchez v. Schriro, 2009 WL 775392 (D. Ariz. Mar 20, 2009) (unpub) (habeas) – witness died between two trials, opportunity at first trial sufficient

State v. Webster, 2009 WL 636092 (Tenn. Crim. App. Mar 11, 2009) (unpub) – "introduction of Vouris' testimony [from prior trial] did not violate the Defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution because, as noted above, Vouris was unavailable and the Defendant had a prior opportunity to cross-examine her."

U.S. v. Fitzgerald, 2009 WL 500467 (S.D. Cal. Feb 26, 2009) (unpub) (pretrial ruling) – "Due to the Government's *Brady* violation, Defendant was unable to present the tapes to the jury. ... Without them, the Court cannot find Defendant had an 'adequate opportunity' to cross-examine Dr. Kawesch. Further, there is no way to remedy the problem because Dr. Kawesch has died." – [NOTE: It's not explained how this situation is different from after-discovered evidence. This appears to be a *Brady* case with a little *Crawford* tossed in.]

State v. Smith, ___ A.2d ___, 2009 WL 260357 (Conn. App. Feb 10, 2009) – "defendant had an adequate and full opportunity [at prior trial] to cross-examine Norton and to address whether she was giving truthful testimony. ... no new evidence that would render the prior opportunity for cross-examination inadequate. ... We therefore conclude that the court properly admitted into evidence Norton's prior sworn testimony from the defendant's first trial."

Martin v. State, 284 Ga. 504, 668 S.E.2d 685 (Ga. Oct 27, 2008) – "On January 4, 2005, Martin pleaded guilty to all sixteen counts of his indictment, including the three murder charges. Immediately following the entry of his plea, a bench trial was held on the issue of sentencing, during which Ms. Wright testified for the State. In December of 2006, Martin was allowed to withdraw his guilty plea... Ms. Wright is now deceased... Ms. Wright is unavailable for trial, and Martin was afforded an adequate opportunity to cross-examine her. Therefore, the admission of Ms. Wright's prior testimony will not violate the Confrontation Clause."

State v. Ford, 2008 WL 3970913, 2008-Ohio-4373 (Ohio App. 10 Dist. Aug 28, 2008) (unpub) – "{¶ 90} Alaiend testified at the first trial and defendant's counsel cross-examined him. Even so, defendant essentially argues that Alaiend's testimony did not constitute 'former testimony' insofar as defendant's counsel was unable to cross-examine him regarding the DNA found on the gray sweatshirt. Although the DNA evidence was not brought forth at the first trial, defendant's counsel at the first trial had an opportunity and similar motive to develop any testimony regarding what the second intruder was wearing. Defendant's counsel did in fact cross-examine Alaiend regarding his ability to see what the intruders were wearing. Moreover, Alaiend was not an expert who could have provided testimony to rebut the state's expert concerning the DNA analysis conducted on the sample from the sweatshirt."

Echemendia v. McNeil, 2008 WL 2726917 (S.D. Fla. Jul 11, 2008) (unpub) (habeas) – "Here, there has been no showing that Echemendia's Confrontation Clause rights were violated when Detective Cabrera's testimony from the earlier trial was admitted. That testimony was given during a trial and hence was subject to cross-examination. *Cf. Crawford*..."

State v. Virgen, 2008 WL 2447383 (Ariz. App. Div. 1 Jun 12, 2008) (unpub) – victim of carjacking testified at first trial, then subsequently was involuntary committed to mental institution – prior testimony introduced at second trial – "¶ 18 Here, Fonseca had an opportunity to cross-examine S.A. at the prior trial, for Fonseca did, in fact, cross-examine S.A. at the prior trial. Defense counsel states that 'the alleged victim's mental health problems ... were not adequately explored on cross-examination in the previous trial.' However, '[t]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" [cite] Here, Fonseca not only had the opportunity to cross-examine S.A. on any relevant issue, but he also had the opportunity to pursue S.A.'s specific testimony that he was 'mentally distraught' and 'on medication' at the time of the carjacking. Fonseca could have offered expert testimony regarding S.A.'s mental state, or he could have sought S.A.'s mental health records and offered them as evidence. Fonseca chose to do none of these things. We therefore reject his argument."

People v. Biggs, 859 N.Y.S.2d 724, 725, 2008 N.Y. Slip Op. 05525 (N.Y. A.D. 2 Dept. Jun 10, 2008) – "the admission of the prior testimony did not violate the defendant's right to confrontation as the defendant had a full opportunity to cross-examine the witness at his two prior trials (*see Crawford...*)"

Cargle v. Sirmons, 2008 WL 822045 (W.D. Okla. Mar 26, 2008) (unpub) (habeas) – third trial – prior testimony from previous trials properly admitted

Commonwealth v. Carreiro, 2008 WL 141918 (Mass. App. Ct. Jan.15, 2008) (unpub) – "At the first trial, Faria testified against the defendant. However, Faria died prior to the start of the retrial. At the retrial, the prosecutor, over the defendant's objection, was permitted to introduce as substantive evidence a transcript of Faria's testimony from the first trial." – defense theory had changed between trials – "Consequently, he claims, the judge, by admitting Faria's prior testimony, denied him his constitutional right to confront a key witness against him." – discussing issue thoroughly as matter of state evidentiary law, but concluding in footnote 2 that *Crawford's* requirements "were met in this case", apparently per se

Romans v. Berghuis, 2007 WL 4247607 (E.D. Mich. Dec. 4, 2007) (unpub) (habeas) – "As the Michigan Court of Appeals found, Petitioner's counsel had a strong motive and a full opportunity to cross-examine Ms. Alexander at Petitioner's first trial. Therefore, the admission of Ms. Alexander's transcribed testimony during petitioner's second trial did not violate Petitioner's Confrontation Clause rights. *Crawford...*"

State v. Day, 925 A.2d 962 (R.I. 2007) – "The defendant argues that the trial justice erred in finding that defendant had had an adequate opportunity to cross-examine Floyd because the cross-examination of that witness occurred during a federal trial concerning a different charge. We disagree. ... In the present situation, it is clear to us that such a substantial identity of both issues and parties existed. While the specific crimes at issue in the two trials differed slightly, both trials related to the same sequence of events."

People v. Williams, 2007 WL 1094691 (Mich. App. April 12, 2007) (unpub), appeal denied, 478 Mich. 931, 732 N.W.2d 919 (Mich. Jun 26, 2007) – opportunity to cross-examine since-deceased witness at prior trial sufficient, even though additional impeaching evidence came to light following that trial

State v. Benn, 165 P.3d 1232 (Wash. 2007) – first murder conviction vacated on federal habeas review – "Benn contends that the trial court in his second trial improperly admitted Pete Hartman's prior testimony. In Benn's first trial, Hartman testified that Benn tried to hire him to kill victim Jack Dethlefsen. Benn, however, directed his attorney not to cross-examine Hartman because he feared Hartman would kill or harm his family. [FN2] Benn's attorney mistakenly believed he had to follow his client's direction and did not cross-examine Hartman. [FN3] Hartman died before Benn's second trial, and the trial court allowed the State to introduce Hartman's testimony from the first trial. Benn contends that admitting his prior testimony violated his Sixth Amendment confrontation clause rights ... FN3. This court previously held that the failure to cross-examine Hartman, although mistaken, did not constitute ineffective assistance of counsel. Benn contends that his belief that Hartman would kill or harm his family if he cross-examined him deprived him of any 'opportunity' to cross-examine Hartman within the meaning of the Sixth Amendment. ... We affirm the Court of Appeals and hold that Benn had the opportunity and similar motive to cross-examine Hartman in his first trial. Neither the court nor the State prevented Benn from cross-examining Hartman, and he had a similar motive in asserting his side of the issue."

People v. Williams, 477 Mich. 996, 725 N.W.2d 669 (Mich. 2007) – "we REVERSE the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion" – referring to: "Defendant relies on the notion that *Crawford* requires an adequate opportunity for cross-examination and that he did not have an opportunity to cross-examine Thomas adequately at the first trial, given that he could not cross-examine her regarding the new evidence that arose after the first trial. ... Under the specific circumstances of this case, I conclude that allowing Thomas's testimony at the retrial would not violate defendant's right to confront the witnesses against him. Defendant was given the opportunity at the earlier trial to cross-examine Thomas extensively regarding her credibility and her identification of defendant as the perpetrator of the charged crimes. Despite the surfacing of the new evidence, I believe that the earlier testimony survives a Confrontation Clause analysis." (2006 WL 3103041, *5 (Mich.App. 2006) (Meter, J., dissenting))

People v. Sanders, 857 N.E.2d 948 (Ill. App. Ct. 3d Dist. 2006) – "defendant argued that the trial court erred in admitting the prior testimony of State's medical expert who testified at defendant's first trial but had died prior to defendant's second trial. The appellate court found no error, noting that defendant had an opportunity to cross-examine the witness at the first trial and the published opinion about a contrary opinion by another doctor, which was published after the first trial."

United States v. Ozsusamlar, 428 F. Supp. 2d 161 (S.D.N.Y. 2006) – Admitting transcripts from a former trial of unavailable witnesses is proper under *Crawford* since the witnesses were previously cross-examined with a similar motive as in this case.

State v. Allen, 2006 N.C. App. LEXIS 1880 (N.C. Ct. App. 2006) – Two witnesses from defendant's first trial were unavailable for the second trial. The transcripts of their testimony from the first trial was properly admitted under *Crawford* since both witnesses were shown to be unavailable.

State v. Thompson, 2006 Wash. App. LEXIS 593 (Wash. App. 2006) – On re-trial, one witness was deceased and the second refused to testify. Both had testified at the first trial and the court found that admitting their trial testimony at the second trial did not violate *Crawford* because the defense had an opportunity to cross-examine at the first trial and similar motives for cross-examination.

United States v. Builes Medina, 167 Fed. Appx. 161 (11th Cir. Fla. 2006) – “Because Builes had a “similar motive” to cross examine Eisenberg at his first trial, Eisenberg’s prior testimony is admissible. The defendant must have a “similar motive” to cross examine the witness in the previous trial. Fed. R. Evid. 804(b)(1). A “similar motive does not mean identical motive.” [cite] Although Builes’s defense theory changed, the charges against him were identical, and the government presented Eisenberg’s testimony to prove the same element as at the first trial—that the passport Builes used was altered. [cite] Because the underlying issues were legally and factually similar, Builes’s motivation to cross-examine Eisenberg did not change. [cite] The district court did not abuse its discretion when it admitted Eisenberg’s testimony into evidence.”

Sena v. Spencer, 2006 U.S. Dist. LEXIS 9216 (D. Mass. 2006) – “Regarding the inmate’s argument that he was denied his Sixth Amendment right to confrontation when, in the second trial, the testimony of a witness from the first trial was admitted without making a good faith attempt to locate the witness, the state court reasonably concluded that the admission of the testimony did not violate the Confrontation Clause, because, inter alia, he had the opportunity to cross-examine the witness during the first trial.”

State v. Hannon, 703 N.W.2d 498 (Minn. 2005) – On retrial, defendant objected to the introduction of a transcript of a witness who testified at the first trial and died before the 2nd trial. The court rejected this argument on appeal and held the transcript did not violate *Crawford* since the witness was unavailable and had been previously subject to cross examination. “We further note that *Crawford* only requires that the defendant have a prior *opportunity* to cross-examine the witness. The opportunity need not actually be seized. While there may be a case where a prior opportunity was not adequate due to substantial circumstantial differences between the two proceedings, this is not that case.”

Farmer v. State, 2005 WY 162, 124 P.3d 699 (Wy. 2005) – A key witness testified at defendant’s first trial, but was not able to be located for the second trial. Admission of the transcript from the first trial did not violate defendant’s confrontation rights. Defendant claimed that the cross-examination at the first trial was insufficient. The court denied this claim and held that under federal rules, a defendant need only be given the “opportunity” to cross-examine, not a cross-examination that is effective.

State v. Manuel, 2005 Wash. App. LEXIS 369 (2005) – “Based on separate incidents involving a different victim at each location, the State charged defendant with one count of indecent liberties and one count of second degree rape. The roommate of the alleged rape victim testified as a witness for the State. The jury convicted defendant on the indecent liberties charge, but was unable to reach a verdict on the rape charge. A second trial on the rape charge was held, and the prosecutor informed defense counsel that the State would seek to introduce the videotaped testimony of the roommate at trial; the roommate was in Europe. Defendant argued that the trial court violated his constitutional right to confront and cross-examine the roommate by admitting her testimony from the prior trial despite the State’s failure to establish the

unavailability of the roommate. The appellate court ruled that the State made reasonable efforts to obtain the roommate's presence for the second trial by letter and subpoena before discovering that she had left the country shortly before trial began. The State sent a letter to the roommate's last known address informing her of the second trial, and sent a subpoena requiring her appearance at trial." No *Crawford* violation.

United States v. Garcia, 117 Fed. Appx. 162 (2nd Cir NY 2004) – Defendant was convicted and granted a new trial. At the second trial, a key witness who previously testified was unable to be found. The transcript of the prior testimony was admitted into evidence in the second trial. This is not a *Crawford* violation because the defense had an opportunity to cross-examine the witness at the prior trial and this satisfies the Confrontation Clause.

State v. Sherman, 2004 Wash. App. LEXIS 1131, 2004 WL 1203852 (Wash. Ct. App. 2004) - Defendant represented himself in his first trial and was convicted. In a retrial, Defendant had counsel but a main witness against the defendant was unavailable. The prosecutor admitted the testimony of the unavailable witness from the first trial. Defendant argued a *Crawford* violation because Defendant represented himself and did not fully develop cross-examination against the witness at the trial. The court held that a defendant must simply be afforded the **opportunity** to cross-examination and the court will not look to the quality of the cross-examination.

United States v. Avants, 367 F.3d 433 (5th Cir. Mass. 2004) –1966 murder that was tried in state court in 1996 (acquittal) and then tried in federal court in 1999. The main witness in the 1966 state trial died prior to the 1999 federal trial, but his 1966 trial testimony was proper to admit at 1999 trial. This met the *Crawford* test of unavailability and prior opportunity to cross-examine the witness.

Prior Opportunity to Cross-Examine at Preliminary Hearing
(see also related topics in this part)

Finding Opportunity Sufficient

State v. Bennett, __ S.W.3d __, 2015 WL 798793 (Mo. Ct. App. Feb. 25, 2015), transfer denied (Apr. 28, 2015)

State v. Reed, 441 S.W.3d 215, 215-16 (Mo. Ct. App. 2014) – "the victim died (of unrelated causes) after the preliminary hearing, which was not recorded. At trial, the prosecutor called two attendees of that preliminary hearing to describe the victim's prior testimony. Reed complains that this procedure violated the Confrontation Clause. We disagree."

State v. Gleason, 329 P.3d 1102 (Kan. 2014)

Williams v. Bauman, 759 F.3d 630 (6th Cir. 2014) – "a trial court's denial of a defendant's request to access potential impeachment evidence does not necessarily violate a defendant's confrontation rights"

State v. Richardson, 328 P.3d 504 (Idaho 2014)

State v. Garrido, 2013 UT App 245, 314 P.3d 1014, 1021-22 (Utah App. 2013), cert. denied, 320 P.3d 676 (Utah 2014)

People v. Lard, 994 N.E.2d 112, 2013 IL App (1st) 110836, 373 Ill. Dec. 627 (Ill. App. Ct. 1st Dist. 2013) – "The clause does not require that counsel have the same opportunity at a preliminary hearing to ask about every fact that may be relevant at trial."

Hicks v. Commonwealth, 60 Va. App. 237, 242, 725 S.E.2d 748 (Va. Ct. App. 2012)

Mathis v. State, 2012 OK CR 1, 271 P.3d 67 (Okla. Crim. App. 2012)

State v. Ross, 720 S.E.2d 403, 404-410 (N.C. Ct. App. 2011) – "our courts have never held that discovery must be complete for a cross-examination opportunity to be adequate"

State v. Lopez, 2011-NMSC-035, ¶¶ 11-12, 150 N.M. 179, 258 P.3d 458 (N.M. 2011)

People v. Blacksher, 52 Cal. 4th 769, 805, 259 P.3d 370, 402, 130 Cal. Rptr. 3d 191 (Cal. 2011)

People v. Hollinquest, 190 Cal. App. 4th 1534, 1540-1554 (Cal. App. 1st Dist. 2010, as corrected January 13, 2011) –

Commonwealth v. Wholaver, 989 A.2d 883, 889-890 (Pa. 2010) –

Payne v. Lemaster, 351 Fed. Appx. 302, 304 (10th Cir. N.M. 2009) –

State v. Mantz, 222 P.3d 471, 472-479 (Idaho Ct. App. 2009) –

Chavez v. State, 213 P.3d 476 (Nev. Jul 30, 2009) – very lengthy discussion

Adame v. Cate, 2009 WL 1069032 (S.D. Cal. Apr 21, 2009) (unpub) (habeas)

McInerney v. Helling, 2009 WL 801834 (D. Nev. Mar 25, 2009) (unpub) (habeas)

People v. Burrell, 2009 WL 691870 (Mich. App. Mar 17, 2009) (unpub)

Al-Timimi v. Jackson, 2009 WL 416482 (E.D. Mich. Feb 17, 2009) (unpub) (habeas) – the twist in this case is that the record of the preliminary hearing had to be reconstructed, but that didn't change the constitutional analysis

People v. Chandler, 2009 WL 389726 (Cal. App. 1 Dist. Feb 18, 2009) (unpub) – "Defendant's first argument is invented. She is unable to point to a single precedent sustaining her argument that the opportunity to cross-examine at the preliminary examination must be sufficiently "adequate" to satisfy the accused. The authorities merely hold that an accused is entitled to an opportunity to cross-examine. (*Crawford* ... Defendant had that at the preliminary examination. At no point at the preliminary examination was defendant's counsel impeded, curtailed, or denied."

Renteria v. Clark, 2009 WL 256575 (E.D. Cal. Feb 04, 2009) (unpub) (habeas)

People v. Beard, 2009 WL 179673 (Cal. App. 5 Dist. Jan 27, 2009) (unpub)

State v. Bowman, 2009 WL 111663 (Tenn. Crim.App. Jan 14, 2009) (unpub)

Samayoa v. Ayers, 2009 WL 62424 (S.D. Cal. Jan 09, 2009) (unpub) (habeas) – "similar motive' is a state evidentiary requirement, and not a requirement under the Confrontation Clause. The Supreme Court has refrained from conducting any similar motive inquiry in their Sixth Amendment cases, and Petitioner has not directed the Court's attention to any clearly established federal law that supports his position."

People v. Pereyda, 2009 WL 41575 (Cal. App. 2 Dist. Jan 08, 2009) (unpub)

Saetern v. California, 2008 WL 5382053 (E.D. Cal. Dec 22, 2008) (unpub) (habeas)

People v. Lopez, 2008 WL 4968244 (Cal. App. 4 Dist. Nov 24, 2008) (unpub) ("We conclude the cross-examination restrictions [cutting off inquiry into irrelevancies] were appropriate and did not violate Lopez's confrontation rights under *Crawford*.")

Sandoval v. Ulibarri, 548 F.3d 902 (10th Cir. Nov 24, 2008) –

People v. Weissert, 2008 WL 4958795 (Mich. App. Nov 20, 2008) (unpub) –

People v. Rodriguez, 2008 WL 4560222 (Cal. App. 2 Dist. Oct 14, 2008) (unpub) –

People v. Longoria, 2008 WL 4571949 (Cal. App. 2 Dist. Oct 15, 2008) (unpub) –

Riggs v. Yates, 2008 WL 4450323 (C.D. Cal. Sep 28, 2008) (unpub) (habeas)

Smith v. Harrison, 2008 WL 4396656 (C.D. Cal. Sep 24, 2008) (unpub) (habeas)

Graham v. Sisto, 2008 WL 4196577 (C.D. Cal. Sep 05, 2008) (unpub) (habeas)

People v. Lara, 2008 WL 4215615 (Cal. App. 2 Dist. Sep 16, 2008) (unpub) – "Lara cites no authority for the proposition that a witness's preliminary hearing testimony must be excluded if the defendant's cross-examination at the hearing was at odds with the new defense he wishes to raise at trial. Nor are we aware of any such authority."

People v. Vargas, 2008 WL 3984194 (Cal. App. 2 Dist. Aug 29, 2008) (unpub)

Hansen v. Adams, 2008 WL 3201224 (C.D. Cal. Aug 06, 2008) (unpub) (habeas)

Thompson v. State, ___ So.2d ___, 2008 WL 2940450 (Fla. App. 2 Dist. Aug 01, 2008)

Magdaleno v. Giurbino, 2008 WL 2906549 (9th Cir. Jul 29, 2008) (unpub) (habeas)

People v. Huerta, 2008 WL 2526382 (Cal. App. 2 Dist. Jun 26, 2008) (unpub)

People v. Bodian, 2008 WL 2568484 (Cal. App. 2 Dist. Jun 30, 2008) (unpub) – "The defense was made aware of the existence of the ledger before the preliminary hearing and had the opportunity to question Miller regarding the ledger entries at that time." – [NOTE: Was that opportunity necessary to satisfy the confrontation clause or just cited as evidence of lack of prejudice? – opinion doesn't clarify.]

Stewart v. Booker, 2008 WL 2478341 (E.D. Mich. Jun 17, 2008) (unpub) (habeas)

Stewart v. Booker, 2008 WL 2478341 (E.D. Mich. Jun 17, 2008) (unpub) (habeas)

Larrimore v. Scribner, 2008 WL 2397580 (C.D. Cal. June 12, 2008) (unpub) (habeas)

People v. Gandara, 2008 WL 2373809 (Cal. App. 4 Dist. Jun 12, 2008) (unpub) – "the admission of preliminary hearing testimony ... does not offend the confrontation clause of the federal Constitution simply because [Gandara] did not conduct a particular form of cross-examination that in hindsight might have been more effective.' [cites] To the extent Gandara suggests *Crawford v. Washington* requires a different result, we disagree."

People v. Jenkins, 2008 WL 2030920 (Cal. App. 3 Dist. May 13, 2008) (unpub) – preliminary hearing – "*Crawford* does not hold that testimonial hearsay may be admitted only if the defendant covered every conceivable point when cross-examining the witness in a prior proceeding: *Crawford* holds that the opportunity to cross-examine is sufficient."

People v. Valencia, 43 Cal.4th 268, 180 P.3d 351, 74 Cal.Rptr.3d 605 (Cal. Apr 14, 2008)

Kennedy v. Knowles, 2008 WL 906812 (N.D. Cal. Mar 31, 2008) (unpub) (habeas)

People v. Anderson, 2008 WL 933082 (Cal. App. 2 Dist. Apr 08, 2008) (unpub)

People v. Campbell, 2008 WL 867994 (Mich. App. Apr 01, 2008) (unpub) – "Defendant would likely have to cross-examine more vigorously, or at least as vigorously, at the preliminary hearing for the court to find there was no probable cause than he would have to at trial for the jury to find him not guilty. ... The use of Ford's preliminary examination testimony at trial did not violate defendant's right of confrontation."

People v. Kearney, 2008 WL 808919 (Cal.App. 1 Dist. Mar 27, 2008) (unpub) – "The fact that at the preliminary hearing Garcia repudiated her earlier statements to the officers neither changes this result nor means defendant's opportunity to cross-examine Garcia was not meaningful." – on the contrary, that was ideal result

People v. Williams, 2008 WL 239648 (Mich. App. Jan 29, 2008) (unpub) – since-deceased witness testified at separate preliminary hearings of two co-perpetrators – "We hold that Williams had an opportunity and similar motive to develop Banks's testimony. Notwithstanding that Williams's counsel did not have access to Coleman's preliminary examination transcript before Williams's preliminary examination, Williams's counsel did have the opportunity to cross-examine Banks and raise the issue of the credibility of his identification of Williams."

State v. Turner, 242 S.W.3d 770 (Mo. App. Southern Dist. Jan 16, 2008) – fact that preliminary hearing was conducted "at a time when discovery was not completed and had, in

fact, just begun" makes no difference – it was still an adequate opportunity to cross-examine absent witness

People v. Guess, 69 Cal.Rptr.3d 652 (Cal. App. 6 Dist. Dec 21, 2007), review granted and opinion superseded by People v. Guess, 178 P.3d 422, 73 Cal.Rptr.3d 441 (Cal. Mar 12, 2008) – On appeal, defendant argues that admission of Drayshonda's pretrial statements violated *Crawford* ... [H]e asserts that his 'counsel did not have a complete and adequate opportunity to cross-examine Drayshonda. Specifically, his late receipt of the taped statements precluded him from being able to fully prepare because he could not determine which statements on the tape were hers, or compare them against statements attributed to her in the police reports.' ... *Crawford* does not make admissible prior testimony only where the opportunity for cross-examination has been effectively exercised. ... In light of this authority, we reject defendant's claim that he was unable to adequately confront Drayshonda at the preliminary examination."

Johnson v. Jones, 2007 WL 4462210 (W.D. Okla. Dec 14, 2007) (unpub) (habeas) – "Mr. Johnson suggests that his opportunity for cross-examination of Dewan Debose was insufficient. See supra p. 8. At the preliminary hearing, Mr. Debose placed the Petitioner at the scene during the second attack. See Petition at p. 8. However, in a police interview, Mr. Debose allegedly told police that another man had approached the victim during the second attack and had knocked the victim's head against the concrete. See id. Mr. Johnson's attorney lacked this information at the preliminary hearing and did not question Mr. Debose about the discrepancy. See supra p. 8 n. 4. ... Thus, even if knowledge of the police interview might have affected the questioning at the preliminary hearing, Mr. Johnson's attorney had a full opportunity to cross-examine Dewan Debose at this proceeding. This opportunity is fatal to Mr. Johnson's habeas claim."

State v. Smith, 240 S.W.3d 753 (Mo. App. E.D. Dec 11, 2007) – victim's preliminary hearing testimony admitted at trial – "Defendant argues that the trial court's ruling violated the holding of *Crawford* because he had no opportunity to conduct discovery prior to his preliminary hearing. Defendant's argument is unpersuasive. ... [T]he lack of discovery before the preliminary hearing did not violate Defendant's rights under the Confrontation Clause as discussed in *Crawford*."

People v. Ashford, 2007 WL 3085462 (Mich. App. Oct 23, 2007) (unpub) – "[W]here a witness claims to remember nothing at trial, a defendant's right of confrontation is not violated by the admission of former testimony [*i.e.*, testimony at prelim]."

Thompson v. State, 2007 OK CR 38, 169 P.3d 1198 (Okla. Crim. App. Oct 11, 2007) – "The Supreme Court's recognition in *Crawford* that the defendant's right to cross examine the witnesses against him is at the core of the Sixth Amendment's confrontation right certainly implies that an unfair or distorting constriction of defense counsel's cross examination of key State witnesses could result in a violation of the Sixth Amendment, whether that unjustified constriction occurs during a trial or during preliminary hearing testimony that is later introduced into evidence at trial. [¶ 26] That, however, is not what happened in the current case. Defense counsel's cross examination of Britt and Norman at the preliminary hearing was more than adequate to satisfy Thompson's right to confront these witnesses. Hence the trial court did not abuse its discretion or violate Thompson's constitutional rights by allowing the State to introduce this preliminary hearing testimony at trial."

Simon v. Newland, 2007 WL 2874420 (N.D. Cal. Sep 28, 2007) (unpub) (habeas) – "[U]nder *Crawford*, there is no bar against introducing prior testimony where the witness is unavailable and defendant had the opportunity to cross-examine during the prior testimony. [cite] Those conditions existed here because petitioner had the opportunity to cross-examine at the preliminary hearing and the witnesses were legally precluded from testifying, and therefore unavailable, at the trial in this matter. [cite] Accordingly, there was no error in the use of the transcript ..."

People v. Sweat, 2007 WL 2052131 (Cal. App. 6 Dist. July 17, 2007) (unpub) – "The trial transcript indicates that all defense counsel had an opportunity to, and did, cross-examine O'Connell during the preliminary hearing. Therefore, O'Connell's statements were properly admitted under the *Crawford* standard."

State v. Stano, 284 Kan. 126, 159 P.3d 931 (Kan. Jun 08, 2007) – "the defendant argues that his prior opportunity to cross-examine Greene was not constitutionally adequate in light of certain evidence that only became known to the defense at trial. ... [T]he defendant had the opportunity to cross-examine Greene at the preliminary hearing and availed himself of that opportunity. ... His 'inability to cross-examine [Greene] a second time does not equate to a Confrontation Clause violation.'" (citation omitted)

People v. Mashatt, 2007 WL 1712694, *1 (Mich. App. Jun 14, 2007) (unpub) – "The prosecutor offered the victim's preliminary examination testimony at trial for the same issue for which it was presented at the preliminary examination, namely, to establish that defendant committed the charged assault with the necessary intent. Further, defendant had a reasonable opportunity and similar motive to explore the credibility of the victim's testimony. We find no indication that the magistrate at the preliminary examination limited defense counsel's ability to cross-examine the victim regarding his credibility."

U.S. v. Vining, 224 Fed.Appx. 487, 2007 WL 15800996 (6th Cir. May 31, 2007) (unpub) – transcript of state-court preliminary hearing used in federal trial – "Although Defendant's counsel had an opportunity to cross-examine Kuhn concerning Defendant's alleged threats, counsel did not cross-examine Kuhn. [¶] In light of these facts, we find that the district court properly concluded that Kuhn's testimony is not barred by the Sixth Amendment because the government made an adequate showing that Kuhn was unavailable and that Defendant had a prior opportunity to cross-examine Kuhn in the state court proceeding." (footnote omitted)

State v. Aaron, 218 S.W.3d 501 (Mo. App. W.D. 2007), application for transfer denied (May 1, 2007) - "Because *Griffin* can be broadly read to hold that preliminary hearing cross-examination – even in the absence of the sort of disclosures that discovery would produce – is adequate for confrontation purposes, *Griffin* is not plainly in conflict with *Crawford*. *See id.* This court is thus constrained to apply *Griffin* to the case at bar and find that the absence of discovery before the preliminary hearing at issue did not render Williams's testimony inadmissible at trial." – [NOTE: very long opinion, plainly suggesting author's disagreement]

People v. Bahabla, 2007 WL 2063115 (Cal.App. 1 Dist. 2007) (unpub) – "Our Supreme Court has 'routinely allowed admission of the preliminary hearing testimony of an unavailable witness....' [Cite] The rationale for the routine admission is that a criminal defendant's interest

and motive for cross-examination at the preliminary hearing is 'similar' to that at trial-and does not have to be identical. [cite]"

State v. Estrella, 277 Conn. 458, 893 A.2d 348 (Conn. 2006) – Defendant was convicted on the prior testimony of a witness who testified at probable cause hearing but claimed 5th Amendment privilege at trial. The court held the prior testimony transcript did not violate *Crawford*. "Measuring the defendant's ability to cross-examine Rivers on matters affecting his reliability and credibility in order to comport with the constitutional standards embodied in the right to cross-examine [cite] we are satisfied that the defendant was provided the requisite procedural safeguard to the right of confrontation."

State v. Henderson, 2006-NMCA-059, 139 N.M. 595, 136 P.3d 1005 (N.M. Ct. App. 2006) – the victim's preliminary hearing testimony was properly admitted into evidence during defendant's trial under N.M. R. Ann. 11-804(B)(1) because defendant had an opportunity and similar motive to cross-examine the victim during the preliminary hearing as he would have at trial, as defendant was freely allowed to cross-examine the victim without any restrictions, and there were no circumstances showing a real difference in defendant's motive to cross-examine the victim differently at the preliminary hearing than at trial.

Cabral v. Adams, 2006 U.S. Dist. LEXIS 52358 (N.D. Cal. 2006) – The preliminary hearing transcript of an unavailable witness may be admitted at trial and there is no *Crawford* violation.

Lewis v. Woodford, 2005 U.S. Dist. LEXIS 23686 (E.D. Cal. 2005) – "The magistrate judge correctly found that the use of an unavailable witness' preliminary hearing testimony, where the witness was subject to cross-examination, did not violate the Confrontation Clause."

State v. Stuart, 2005 WI 47 (2005) – Defendant's brother testified at preliminary hearing, but asserted the 5th Amendment at trial and did not testify. The transcript of the prior hearing was admitted at trial over objection. On appeal, the court ruled that the defendant did not have sufficient opportunity to cross-examine the brother. "In Wisconsin, a defendant has a statutory right at a preliminary hearing to cross-examine witnesses against him. Wis. Stat. § 970.03(5). N8 However, the scope of that cross-examination is limited to issues of plausibility, not credibility. State ex rel. Huser v. Rasmussen, 84 Wis. 2d 600, 614, 267 N.W.2d 285 (1978). This is because the preliminary hearing 'is intended to be a summary proceeding to determine essential or basic facts' relating to probable cause, not a 'full evidentiary trial on the issue of guilt beyond a reasonable doubt.'" Because of Wisconsin's rules on the scope of cross-examination at preliminary hearings, admitting the transcript violated *Crawford*.

Anaya v. Huskey, 2005 U.S. Dist. LEXIS 6104 (ND Cal 2005) – "Petitioner was convicted of continual sexual abuse of a child under the age of fourteen, his daughter... The daughter gave incriminating testimony at a preliminary hearing, but refused to testify at trial, and allegedly recanted. The court did not actively compel her presence, and defendant did not object to her absence or the use of her preliminary hearing testimony at trial. In his petition, he argued that the trial court violated his Sixth Amendment rights when it permitted the preliminary hearing testimony to be read to the jury. *** The court found the prior testimony admissible on prior inconsistent or unavailable witness grounds."

State v. McGowen, 2005 Tenn. Crim. App. LEXIS 913 (Tenn. Crim. App. 2005) – There is no *Crawford* violation when admitting the preliminary hearing transcript of an unavailable witness who was subject to cross examination.

State v. Young, 87 P.3d 308 (Kansas 2004) – A witness was unavailable for trial but testified at preliminary hearing. The Defendant was represented by counsel at his preliminary hearing and had an opportunity to cross-examine the witness. Although the Defendant claims that the witnesses statements at the preliminary hearing were inconsistent with statements he made at the crime scene, any inconsistency could have been addressed on cross-examination during the preliminary hearing. The Defendant's counsel did not cross-examination the witness at preliminary examination, but was afforded that opportunity. The Defendant's counsel's failure to cross-examine the witness does not equate to a Confrontation Clause violation and does not bar the preliminary hearing testimony from admission at trial due to unavailability of the witness.

State v. Newell, 2005 Ohio 2848 (Ohio Ct. App. 2005) – “The appellate court held that admission of the victim's preliminary hearing testimony did not violate defendant's right to confrontation because he did cross-examine the victim at the preliminary hearing.”

People v. Tinch, 2004 Mich. App. LEXIS 1834 (Mich. Ct. of Ap. 2004) – Use of a witnesses prior preliminary examination hearing testimony at trial is proper when witness is unavailable for trial and was subject to prior cross examination.

Finding Opportunity Insufficient

People v. Torres, 962 N.E.2d 919, 919-934 (Ill. 2012) –

People v. Hagos, __ P.3d __, 2009 Colo. App. LEXIS 1868, 10-65 (Colo. Ct. App. Oct. 29, 2009) – following **People v. Fry, 92 P.3d 970**

People v. Harvey, 57 A.D.3d 1446, 871 N.Y.S.2d 531, 2008 N.Y. Slip Op. 10329 (N.Y.A.D. 4 Dept. Dec 31, 2008) – "the court unduly restricted defense counsel's cross-examination of the victim at the preliminary hearing, and thus the admission in evidence of the preliminary hearing testimony deprived defendant of his right of confrontation"

People v. Al-Lahham, 2008 WL 5158897 (Mich. App. Dec 09, 2008) (unpub) – impatient judge sharply limited cross-examination during preliminary hearing, as in "I'm going to give you about five minutest o close it up..." – witness subsequently murdered – "By limiting defendant's counsel's opportunity to develop this line of questioning, the district court precluded defendant's counsel from effectively cross-examining Ozier. Because defendant's counsel did not have the opportunity to effectively cross-examine Ozier, the admission of Ozier's preliminary examination testimony against defendant without the opportunity to cross-examine Ozier would violate defendant's right to cross-examine the witnesses against him."

People v. Diaz, 2007 WL 1041472 (Cal. App. 4 Dist. April 9, 2007) (unpub) – on unusual facts, introducing prior testimony was *Crawford* error – "During cross-examination[during preliminary hearing], defense counsel inquired concerning [witness] Garza's use of marijuana or

methamphetamine the night before the crime. Counsel asked if it was true she had gone to the trolley station to use marijuana. Garza stated it was not. Counsel asked if Garza had used marijuana or methamphetamine the night before the crime. Garza stated she did not remember. The magistrate cut off questioning on the subject and struck the questions and answers, saying that the witness was in danger of incriminating herself. Counsel stated the reason for the questions was to assess her ability to perceive and recollect the events about which she had testified. The magistrate replied that given Garza's answers, her body language and the manner of her speech, her credibility was 'minimal at best.' ... During trial the prosecution stated it had been unable to locate Garza and asked that her testimony from the preliminary hearing be read to the jury pursuant to the former testimony exception to the hearsay rule (Evid.Code, § 1291.) Defense counsel stated that if that was done he wanted the reading to include the magistrate's assessment of Garza's credibility. Counsel explained that if Garza's former testimony was admitted, the jury would have no ability to view her demeanor and the sound of her voice, factors that were important to the magistrate in judging Garza's credibility. Counsel noted his questioning of Garza concerning her drug use had been curtailed by the magistrate based in part on its stated conclusions that Garza's testimony lacked credibility. The prosecutor did not object to defense counsel's request. [¶] The trial court denied counsel's request, stating there was no authority to admit the magistrate's comments. ... We conclude appellant was denied his right to confrontation when the trial court admitted Garza's testimony from the preliminary hearing. The magistrate's reaction to Garza's answers, her body language and the manner of her speech led him to conclude that her credibility was 'minimal at best.' Because the magistrate had already discounted Garza's testimony, because for the purposes of the preliminary hearing her testimony was not essential and because he wished to protect her from self-incrimination, he did not allow defense counsel to question her concerning her drug use around the time of the incident and presumably would not have allowed questioning concerning her drug use before her testimony."

People v. Fry, 92 P.3d 970 (Colo. Sup. Ct. 2004) - A witness testified at preliminary hearing and the defense attorney did not cross-examine the witness. Before trial, the witness died. The prosecutor admitted the deceased's witnesses hearing testimony at trial. The Colorado Supreme Court applied Crawford and overturned the conviction on the basis that preliminary hearings in Colorado do not provide an adequate opportunity to cross-examine witnesses. Therefore, Crawford was violation because the prior testimony was not subject to cross-examination. {NOTE: This case is in opposition to other cases addressing this issue and can be cited as relating strictly to Colorado procedures on preliminary hearings.}

➤ **Sub-Category: Alternative Seating Arrangement at Preliminary Hearing**
(category added Sept. 2012)

People v. Gonzales, 54 Cal. 4th 1234, 281 P.3d 834, 144 Cal. Rptr. 3d 757(Cal. 2012), cert. denied (2013) – child's testimony from preliminary hearing introduced at trial – "Here, as in *Sharp*, we conclude that the seating arrangement for the child witness's testimony was fully justified by the record, and defendant's confrontation rights were not violated when the videotape was introduced at trial. The seating arrangement at the preliminary hearing satisfied the central concerns of the confrontation clause: 'physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.' (*Craig* ..."

Prior Opportunity to Cross-Examine at Hearing
(other than preliminary hearing)

Finding Opportunity Sufficient

Commonwealth v. Housewright, 470 Mass. 665, 25 N.E.3d 273 (2015) – "The "reasonable opportunity" requirement was satisfied here, because the defendant had a reasonable opportunity to cross-examine the witness regarding her testimony on direct examination; defense counsel does not need to have had the same opportunity to question the witness about the testimony of other witnesses. [cites] Nor does a 'reasonable opportunity' mean that defense counsel must have obtained the same discovery at the time of the prior hearing as counsel has at the time of trial."

State v. Neyland, 2014-Ohio-1914, 139 Ohio St. 3d 353, 12 N.E.3d 1112 (Ohio 2014) – "*Crawford* requires only that the defendant have an opportunity to cross-examine the adverse witness **1147 at the prior proceeding—it does not require that the defendant have a similar motive at the prior proceeding. The prior motive requirement comes from the Federal Rules of Evidence, not the Confrontation Clause."

Petit v. State, 92 So. 3d 906, 911 (Fla. Dist. Ct. App. 4th Dist. 2012) – "*Crawford* requires only that the defendant have an opportunity to cross-examine the adverse witness at the prior proceeding—it does not require that the defendant have a similar motive at the prior proceeding. The prior motive requirement comes from the Federal Rules of Evidence, not the Confrontation Clause. ... [T]he Tenth Circuit has found that the opportunity for cross-examination under the Confrontation Clause is not the same as that contemplated under the Federal Rules of Evidence, which requires similarity of motive to develop testimony. The same is true in Florida and in the instant case—the rules of evidence for Florida and the Florida common law may require that prior testimony only be admitted if there is similarity of motive to develop testimony, but that is a separate analysis from *Crawford* and the Confrontation Clause. ... Therefore, the trial court did not err in admitting Joseph's prior testimony at the bond hearing over Petit's *Crawford* objection."

Blyden v. People of the Virgin Islands, 53 V.I. 637 (VI. 2010), aff'd, 2011 U.S. App. LEXIS 7969 (3d Cir. V.I., Apr. 19, 2011) – "Blyden argues that he did not have an adequate opportunity to confront Dowdye at the pre-trial suppression hearing because Blyden conducted only a limited direct examination of Dowdye. The People counter that Blyden's **direct examination** of Dowdye satisfies the right to confront adverse witnesses guaranteed by the Sixth Amendment.... there is no indication in the hearing transcript of any ruling by the trial judge which improperly limited or hindered Blyden's examination of Dowdye. [cite] Consequently, we do not find any error in the trial court's admission of Dowdye's prior testimony at trial." [NOTE: boldface added]

U.S. v. Doyle, 621 F. Supp. 2d 337 (W.D. Va. Jun 02, 2009) (post-trial ruling) – "I find that the defendant's motive for direct examination and redirect examination at the bond hearing, although not identical, was substantially similar to what his motivation would have been during cross-examination at trial. Thus, the testimony of [deceased witness] was properly admitted."

Torres v. State, 2009 WL 89695, *6+ (Tex. App.-San Antonio Jan 14, 2009) (unpub) – "Torres maintains that the defense was severely limited in its questioning at the suppression hearing. ... Any potential harm as to these two lines of questioning, however, was later

remedied at trial. ... Other than these two areas of cross-examination, Torres does not specify what further questions he would have asked Fulton at trial; without such a showing, we may not speculate as to how additional questioning would have benefitted Torres."

Kilgore v. State, 291 Ga.App. 892, 663 S.E.2d 302, 08 FCDR 2051 (Ga. App. Jun 16, 2008) – D.V. case – "Kilgore's counsel agreed that the state would read [uncooperative victim] Gibson's testimony from the transcript of a prior proceeding in the case. The prior proceeding was Kilgore's probation revocation hearing, but this fact was not revealed to the jury. In reading from the transcript, the state would ask Gibson to admit her earlier testimony, with the effect that the testimony would be published for the jury. [FN1] Gibson admitted at trial that the transcript reflected her testimony in an earlier proceeding but still refused to answer any questions. [NOTE: How did she admit it reflected her testimony without answering questions?] ... '[Her] sworn testimony at [Kilgore]'s probation revocation hearing concerned substantially the same issue as the trial of this case.... [Kilgore]'s probation revocation hearing was between substantially the same parties as was his trial. And [Gibson] was subject to cross-examination by [Kilgore]'s trial counsel at the probation revocation hearing.'" – hence no *Crawford* violation [NOTE: Because she was present in court and acknowledged the testimony was hers, she appeared for cross-examination, making the independent admissibility of the prior testimony immaterial. The court equates the rules of evidence with the confrontation clause without explaining why – but perhaps only because it was the easiest way to resolve the case.]

Zakouto v. Vare, 2008 WL 746990, *1 (D. Nev. Mar 18, 2008) (unpub) (habeas) – "The murder victim had testified in a family court proceeding, and Petitioner had cross-examined her. That testimony satisfies the requirements of the Confrontation Clause of the Sixth Amendment. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Reasonable jurists would not find this conclusion to be debatable."

State v. Harville, 2008 WL 427291 (Tenn. Crim. App. Feb 15, 2008) (unpub) – "In this case, the defendant cross-examined Officer Cousins during the pretrial hearing, so the defendant's right to confront the witness was satisfied."

State v. Taliaferro, 2008 WL 108756 (N.J. Super. A.D. January 11, 2008) (unpub) – "Here, assuming Laspina's out-of-court statements were testimonial, because of the extensive opportunity defendant had to cross-examine her at the *Wade* hearing those statements were properly admitted in evidence." – referring to *U.S. v. Wade*, 388 U.S. 218 (1967), pertaining to out of court identification procedures

State v. Mellon, 2007 WL 1319370 (Tenn. Crim. App. May 07, 2007) (unpub) – "During the trial, the State told the trial court that it wanted to call Edward Beeler, who had testified against the appellant during the appellant's prior sentencing hearing, to testify in front of the jury but that Beeler was refusing to testify. ... The trial court told Beeler that it was ordering him to testify, but he refused, stating, 'I'm worried ... about my health.' ... The appellant argues that his prior defense attorneys did not have a sufficient opportunity to cross-examine Beeler at the sentencing hearing because counsel's questions 'were geared at mitigating a potential death sentence' and were not asked 'to determine issues of the defendant's guilt or innocence.' However, we have reviewed a transcript of Beeler's prior testimony, and we conclude that the trial court did not abuse its discretion by denying the appellant's motion to exclude the testimony from evidence at trial. ... Beeler's direct examination testimony spans approximately five pages, and his cross-

examination testimony spans over seventeen pages. The transcript reveals that the appellant's attorneys not only had a prior opportunity to cross-examine Beeler, but that they thoroughly cross-examined him about his motives for coming forward with information about the appellant's confession, the appellant's use of alcohol and drugs on the night of the crimes, and Beeler's use of alcohol on the afternoon of August 24."

People v. Dolph-Hostetter, 2007 WL 981595 (Mich. App. April 3, 2007) (unpub) – trial court "admitted prior testimony from witness Rosalie Bowersox which was given at an earlier coroner's inquest proceeding. The trial court allowed the testimony after Bowersox testified at trial that because of health problems, she was unable to remember the events that were the subject of her prior testimony. ... Bowersox's prior testimony was inconsistent with her testimony at trial because Bowersox testified that she did not remember the events that were the subject of her prior testimony." – no confrontation clause violation

Rice v. State, 2006 Fulton County D. Rep. 3023 (Ga. 2006) – "although defendant's opportunity for cross-examination was perhaps not ideal given the fact that he had only six days' notice of the hearing, he was afforded a sufficient opportunity to cross-examine a witness who later died, and the lack of cross-examination was the result of him waiving that opportunity. Thus, the witness's deposition was admissible at trial."

State v. Mohamed, 130 P.3d 401 (Wash. Ct. App. 2006) – "Defendant's girlfriend called 911 and said that she had been assaulted. However, at a pretrial hearing, the girlfriend contended that she was actually assaulted by another individual. Defendant's counsel questioned the witness regarding her alleged fabrication. The girlfriend was not available at trial, but her testimony was admitted. Defendant appealed after he was convicted. In affirming, the appellate court determined that, because defendant had a prior opportunity to examine the witness about the testimonial statements, the State was permitted to use those statements at trial without violating defendant's confrontation rights under U.S. Const. amend VI. It did not matter that the questioning occurred on direct, rather than during cross examination. The fact that the State did not directly elicit her testimony at the pretrial hearing was of no moment because the State's objective was to gain admission of the 911 call, not to prove the elements of the crime. Under Wash. R. Evid. 804(b)(1), defendant's interest at the pretrial hearing was the same as it would have been at trial because it was equally pressing to show that the girlfriend's recantation was credible."

People v. Jurado, 38 Cal. 4th 72, 41 Cal. Rptr. 3d 319, 131 P.3d 400 (2006) – Defendant was convicted of murder and sentenced to death. "Defendant asserts that he did not have an adequate opportunity to cross-examine Brian Johnsen [a co-defendant sentenced to death in 1994] at the conditional examination because his attorneys later acquired additional information that would have been useful in cross-examining Johnsen. In particular, he calls our attention to the statements that Johnsen later made, after he had been charged with capital murder, n9 admitting that he was aware of and agreed with defendant's plan to kill Holloway. Again, however, the situation is no different than if Johnsen had testified at defendant's preliminary hearing or at a prior trial of defendant on the same charges. Absent wrongful failure to timely disclose by the prosecution, a defendant's subsequent discovery of material that might have proved useful in cross-examination is not grounds for excluding otherwise admissible prior testimony at trial."

Finding Opportunity Insufficient

Sanchez v. State, 354 S.W.3d 476 (Tex. Crim. App. 2011) – "We hold that a pre-trial hearing conducted under Code of Criminal Procedure Article 38.072 § 2(b)(2) is intended only to determine the reliability of the complainant's out-of-court statement; therefore, the defendant's opportunity for cross-examining the outcry witness at such a hearing is inadequate to allow the admission of the hearing testimony at trial. ... [T]he narrow range of discretion that Article 38.072 allows a trial court means that the credibility of the outcry witness is not a relevant issue at a hearing to determine admissibility of an outcry. A hearing in which the sought-after cross-examination would be necessarily irrelevant does not provide an adequate opportunity for cross-examination such that testimony from the hearing is admissible at a trial on the merits." – on remand for harm analysis, **Sanchez v. State, 383 S.W.3d 211 (Tex. App. San Ant. 2012)** –

People v. Gressett, 2007 WL 4305945 (Cal. App. 3 Dist. Dec 11, 2007) (unpub) – "On cross-examination of Redmond [at a suppression hearing], the prosecutor asked her whether on the night of the search she told any law enforcement officers that defendant was selling marijuana. ... Redmond denied making statements that the prosecutor attributed to her ... Because Redmond denied telling officers that defendant was selling the marijuana, and the prosecutor did not introduce any evidence at the suppression hearing that Redmond actually made such statements, the attempted impeachment failed. Consequently, defense counsel had no reason to, and thus no real opportunity to, question either Redmond or the officers about Redmond's purported statements. ... [T]he prosecutor elicited Redmond's prior testimony at the suppression hearing not for the truth of the matter asserted—that, as Redmond purportedly told officers, defendant was in fact selling the marijuana at his residence—but for the limited purpose of impeaching Redmond's testimony that defendant did not consent to the search of his residence. At trial, however, the evidence was elicited not for impeachment (indeed, Redmond did not testify at trial), but for the truth of the matter asserted (that defendant was selling the marijuana, as Redmond purportedly told the officers). Because the purpose for which the prior testimony was offered at trial was not the same as the purpose for which it was offered at the suppression hearing, we conclude it was not 'former testimony ... offered against a person who offered it in evidence in his own behalf on the former occasion'"

People v. Brown, 374 Ill.App.3d 726, 870 N.E.2d 1033, 312 Ill.Dec. 589 (Ill. App. 1 Dist. 2007) – "On retrial a jury found defendant, Henry Brown, guilty of the aggravated kidnapping and aggravated battery of Gaddis Johnson[who died before trial]. Defendant now argues that section 115-10.4 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-10.4 (West 2004)) did not authorize the introduction into evidence of testimony Johnson gave at defendant's bond hearing. We agree with defendant and therefore we reverse the conviction and again remand for a new trial. ... The judge told defense counsel [at the bond hearing] that counsel could not reserve for trial the cross-examination of Johnson on testimony about the aggravated battery and aggravated kidnapping. After the ruling counsel questioned Johnson about the offenses. The extended cross-examination uses 35 pages of the trial record. [¶] In effect the trial court sought to change the character of the bond hearing. As defense counsel pointed out at the bond hearing, the prosecutors questioned Johnson as though they expected him not to appear at trial. The trial court permitted the prosecution to proceed as though the bond hearing became an evidence deposition, which would preserve for trial Johnson's testimony on issues that had no bearing on the allegations that defendant violated the conditions of his bond. ... The attempt to convert the bond hearing to an evidentiary deposition did not change defense counsel's basic

motivation at the hearing. The court needed to decide only whether defendant contacted Johnson in violation of the conditions of the bond. While defense counsel had reason to attack that aspect of Johnson's testimony, he had no reason to reveal his trial strategy for impeaching Johnson's testimony concerning the kidnaping and battery. We hold that defense counsel did not have a similar motive for cross-examining Johnson at the bond hearing as he would have had for cross-examination at trial. Therefore Johnson's testimony about the kidnaping and battery from the bond hearing lacked the circumstantial guarantees of trustworthiness needed to make the testimony admissible under section 115-10.4."

[NOTE: While the legal analysis in this case begins with a couple paragraphs about *Crawford*, it seems to end up being decided on the state law issue. The case holds that an opportunity for full cross-examination, even when coupled with a judge's explicit ruling that no restrictions would be placed on its scope, and even when defense counsel *actually takes advantage* of the opportunity, is insufficient, on the ground on that defense counsel *may* have made a tactical decision to hold back some questions.]

Beasley v. State, 370 Ark. 238, 258 S.W.3d 728 (Ark. June 14, 2007) – "Beasley argues that the circuit court abused its discretion in allowing the State to introduce into evidence an absent witness's testimony from a bond-reduction hearing under the hearsay exception stated in Rules 804(a)(5) and (b)(1) of the Arkansas Rules of Evidence. ... Lakisha Smith and Lashay Elmore were at the apartment complex when the shooting occurred, and both gave statements to the police shortly after the murder. ... At the bond-reduction hearing, Beasley challenged the evidence arrayed against him. While Lakisha affirmed, under oath at the hearing, Beasley's presence at the scene and how he was dressed, she said the statement she had previously made identifying him as the shooter was 'a lie' and that she had only repeated to police what her friend Lashay told her to say. Lakisha now claimed at the bond-reduction hearing that she never saw who shot the victim. On cross-examination, the State impeached Lakisha with the prior inconsistent statement she gave to the police. ... We believe that the purpose of the proceeding reveals that a bond-reduction hearing is a limited hearing rather than a 'full-fledged' hearing. ... Beasley's motive at the bond-reduction hearing was to obtain a pretrial release from jail. While he may have attempted to obtain release by casting doubt on the strength of the State's case, we cannot say that Beasley had 'an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue.'" [NOTE: Even though the witness recanted?!?]

Prior Opportunity to Cross-Examine At Deposition

Finding Opportunity Sufficient

State v. Flores, __ S.W.3d __, 2014 WL 1887551 (Mo. App. W. Dist. 2014)

McKenzie v. State, 119 So. 3d 1145, 1147-48 (Miss. App. 2013)

Berkman v. State, 976 N.E.2d 68, 71-72 (Ind. Ct. App. 2012)

Reynolds v. State, __ So.3d __, 2010 Ala. Crim. App. LEXIS 94, 47-53 (Ala. Crim. App. Oct. 1, 2010) – after discussion, ultimately decided on lack of preservation

State v. Sosnoskie, 2009 WL 1393338, 2009-Ohio-2327, 2327 (Ohio App. 2 Dist. May 15, 2009) (unpub)

Thomas v. State, 966 N.E.2d 1267, 1268-1273 (Ind. Ct. App. 2012) (despite counsel's statement on record that he was conducting it as a discovery deposition, not a trial deposition)
Niebrugge v. State, 2009 WL 1499609 (Ind. App. May 29, 2009) (unpub)

State v. Carr, 2009 WL 1114481, 2009-Ohio-1942 (Ohio App. 2 Dist. Apr 17, 2009) (unpub) – "{¶ 11} Carr's primary argument is that he lacked a full opportunity to cross examine Fairman because counsel for co-defendant Jokova James also participated in the deposition. At that time, the cases against Carr and James had not been severed for separate trials. ... we find no violation of Carr's Sixth Amendment right to confront his accuser."

Morgan v. State, __ N.E.2d __, 2009 WL 943854 (Ind. App. Apr 07, 2009)

State v. Williams, 2009 WL 824822 (Ariz. App. Div. 2 Mar 30, 2009) (unpub) –

State v. Foster-DeBerry, 2008 MT 458N, 2008 WL 5412903 (Mont. Dec 31, 2008) (unpub) – summary affirmance, without discussion

State v. Hunt, 2008 WL 4569877 (Iowa App. Oct 15, 2008) (unpub) – when witness refused to testify, deposition offered into evidence – "Hunt's counsel objected on the ground that Hunt's original attorney had a different theory of the case which was irreconcilable with the defense being presented at trial" – held: that makes no difference doesn't matter – also

U.S. v. Rodriguez, 2008 WL 4080005 (D. Ariz. Aug 29, 2008) (unpub) (pretrial order) –

State v. Keener, 755 N.W.2d 462, 2008 ND 156 (N.D. Aug 28, 2008) – "While Laurie Keener was not personally present at the deposition, her attorney and Asa Keener were present, Laurie and Asa Keener argued a common defense at trial, and her attorney questioned Marvin Whisker at the deposition. Moreover, Laurie Keener was present at the preliminary hearing when Marvin Whisker testified, she had the opportunity to question him then, and her counsel asked Marvin Whisker questions similar to those asked at the deposition. Under these circumstances, we conclude Laurie Keener has not shown that the alleged error was prejudicial." – [NOTE: So is the case decided under harmless error or adequacy of prior opportunity? Unclear.]

U.S. v. Cannon, 539 F.3d 601 (7th Cir. Aug 20, 2008) – "we see no reason, post-*Crawford*, to question the constitutionality of admitting fully cross-examined testimony preserved by a properly conducted Rule 15 deposition."

People v. Yost, 278 Mich.App. 341, 749 N.W.2d 753 (Mich. App. Mar 27, 2008) – deposition to perpetuate testimony of witness due to be deported – "Defendant acknowledges that her trial counsel was present at the motion hearing where the trial court ordered the preservation of Sarmiento's testimony and had the opportunity to cross-examine Sarmiento. Nevertheless, defendant contends that the cross-examination was not constitutionally adequate because it did not include information that only became available after the cross-examination. We disagree." –

but court disagrees on factual grounds that the additional information was unimportant, rather than on the legal ground that it doesn't matter

State v. Hacheney, 160 Wash.2d 503, 158 P.3d 1152 (Wash. 2007), cert. denied, 128 S.Ct. 1079, 169 L.Ed.2d 820 (Jan 14, 2008) (death penalty case), later proceeding, **In re Pers. Restraint of Hacheney, 169 Wn. App. 1, __ P.3d __ (Wash. Ct. App. 2012)** – pretrial depositions of witnesses who planned to be out of the country at time of trial – challenged only on availability

Lucas v. State, 2007 WL 2257650 (Ind. App. Aug 08, 2007) (unpub) – "Acosta died before trial, so was unavailable to testify. Acosta's deposition was a "testimonial" statement for purposes of the Confrontation Clause. *Howard v. State*, 853 N.E.2d 461, 465 (Ind.2006) ("[W]itness statements made during depositions are generally understood and widely recognized as testimonial."). Therefore, unless Lucas was afforded an adequate opportunity to cross-examine Acosta at the deposition, the admission of the deposition violated Lucas's right of confrontation. [¶] The thrust of Lucas's argument is that he was not afforded an adequate opportunity to cross-examine Acosta because the purpose of the deposition was to determine what Acosta's trial testimony would be, and not to impeach her testimony. ... As Lucas had the opportunity to question Acosta to any extent that he liked, the admission of the deposition did not violate his right to confrontation under *Howard*."

State v. Irwin, 2007 WL 2758606, 2007-Ohio-4996 (Ohio App. 7 Dist. Sep 19, 2007) (unpub) – defendant, the caretaker of man dying of ALS or Lou Gehrig's Disease, physically abused him – victim's deposition was taken to perpetuate his testimony, and he died before trial – admission of the deposition was challenged on confrontation clause grounds, among other reasons because victim's condition limited his answers to "basic affirmative or negative responses to leading questions" – "As Appellee accurately points out, the meaningfulness or effectiveness of cross-examination is generally not a part of confrontation clause analysis. The only question regarding cross-examination that matters is whether there was an opportunity for cross-examination. *Crawford, supra*, 541 U.S. at 68, 124 S.Ct. 1354, 158 L.Ed.2d 177. Even if the defendant completely fails to cross-examine a witness, as long as the opportunity for cross-examination existed, the confrontation clause is protected." – claim that prosecution impermissibly used leading questions is not a confrontation clause question

Barger v. State of Oklahoma, 2007 WL 1748515 (10th Cir. Jun 19, 2007) (unpub) – (habeas) "Mr. Barger next claims the trial court abused its discretion in allowing the deposition of Mr. Smith to be used in lieu of live testimony in court, thereby denying the defendant the opportunity to confront witnesses against him in violation of the Sixth Amendment. ... Mr. Barger argues, however, that he did not have a proper opportunity to cross-examine because he changed counsel between the deposition and trial, and his trial counsel thus did not have an opportunity to cross-examine Mr. Smith. ... Barring evidence of ineffective counsel at the deposition, which is not claimed, we find no precedent suggesting that switching counsel in the midst of trial proceedings automatically renders cross-examination by the defendant's first counsel ineffective. Indeed, such a rule would invite parties to engage in the strategic replacement of counsel whenever an important witness, who had previously been cross-examined, becomes unavailable to testify at trial. Not surprisingly, neither this Court nor the Supreme Court has accepted such an argument, and we do not believe it warrants a certificate of appealability."

State v. Artis, 215 S.W.3d 327 (Mo. App. February 27, 2007) – "The admission of Corporal Thomas' deposition testimony did not violate Defendant's right to confrontation and cross-examination, because Corporal Thomas was unavailable [in Iraq] and Defendant, through his counsel, had a prior opportunity to cross-examine Corporal Thomas."

Howard v. State, 853 N.E.2d 461 (Ind. 2006) – pretrial deposition of 12-year-old victim sufficient to satisfy sixth amendment, but conviction reversed when there was inadequate showing that she was unavailable at trial

Oliver v. Hendricks, 2006 U.S. Dist. LEXIS 34914 (D.N.J. 2006) – A witness was terminally ill with cancer and unlikely to survive until trial. The witness was deposed and the defense was given an opportunity to cross examine at the deposition. At trial, the court found the witness to be unavailable and properly admitted the deposition. There was no *Crawford* violation.

State v. Griffin, 202 S.W.3d 670 (Mo. Ct. App. W.D. August 22, 2006) – because defendant had the right to cross-examine his 5-year-old daughter during her videotaped deposition through his attorney, he was not denied his constitutional right to confront and cross-examine the witnesses against him, even though he was not present during the taking of the deposition

Simmons v. State, 95 Ark. App. 114, 234 S.W.3d 321 (Ark. Ct. App. 2006) – "We hold that a deposition taken in anticipation of a future civil trial constitutes a 'testimonial' statement as required by *Crawford*. Therefore, we must determine whether the declarant was unavailable and whether Simmons had a prior opportunity to cross examine that declarant. It is clear to us that [victim] Desanto, because he was deceased [having committed suicide], was unavailable. Additionally, although Simmons's civil attorney chose not to cross examine Desanto during the deposition, criminal charges had been filed against Simmons, and his attorney had the opportunity to depose Desanto. The civil trial and the criminal trial involved the same facts and the same participants. The attorney for the co-defendant that cross examined Desanto had the same motive as Simmons-to discredit his testimony regarding the sexual encounters. Therefore, we find no error."

United States v. Smith, 2006 U.S. App. LEXIS 27144, 2006 WL 3833948 (11th Cir. 2006) (unpub) – The deposition of an unavailable witness, that allowed for cross examination by the defense, was properly admitted at trial and did not violate *Crawford*.

State v. Ash, 169 N.C.App. 715, 611 S.E.2d 855 (N.C. App. April 19, 2005) – Before admitting a videotaped deposition of a witness that was subject to cross-examination at the deposition, the court must first make a finding of unavailability. That finding did not occur in this case and, therefore, admission of the videotaped deposition (which was testimonial) was error – but harmless

United States v. Williams, 116 Fed. Appx. 890 (9th Cir. Nev. 2004) – The use of the deposition at trial did not violate the Confrontation Clause because the witness was unavailable for trial and defendant, through defense counsel, had an adequate opportunity to cross-examine the witness at the deposition. No *Crawford* violation.

Commonwealth v. Leak, 2011 PA Super 58, 22 A.3d 1036 (Pa. Super. Ct. 2011) – "we conclude that Leak was not denied access to any vital impeachment evidence at the time of the preliminary hearing, and that he had a full and fair opportunity to cross examine Martin."

Finding Opportunity Insufficient

Vilseis v. State, 117 So. 3d 867, 868-71 (Fla. 4th Dist. App. 2013) – "The admission of an eyewitness's discovery deposition as substantive evidence at trial compels reversal of this case because it violated the Confrontation Clause..." – [NOTE: The witness actually appeared at trial but her "uncontrollable chattering and her inability to discern where she was or what she was doing prevented her from intelligently answering the State's questions," rendering her "unavailable"]

State v. Rainsong, 807 N.W.2d 283, 284-289 (Iowa 2011) – "For some unknown reason, the State chose to proceed with the noticed deposition of Loren without first obtaining an order permitting the taking of the deposition under rule 2.13(2)(a). Without such an order, rule 2.13(2)(a) did not authorize the taking of the deposition of Loren. Accordingly, Rainsong had no obligation to participate in the noticed deposition. [¶] [*289] Because rule 2.13 did not authorize the taking of Loren's deposition, the noticed deposition was nothing more than an ex parte statement of Loren taken before a court reporter. In other words, the testimony of Loren was the equivalent of a sworn affidavit procured by the State. Therefore, Rainsong could not have waived his right to confrontation by failing to appear at a noticed deposition not authorized by our rules." – [NOTE: That last line doesn't follow logically, but you get the drift.]

Corona v. State, 64 So. 3d 1232, 1234-1235 (Fla. 2011) – reiterating prior holding that discovery deposition, as opposed to deposition to perpetuate testimony (Florida's statutes differentiate between them) is not an adequate opportunity to cross-examine

State v. Belvin, 986 So.2d 516 (Fla. May 01, 2008) – reiterating prior holding that discovery deposition, as opposed to deposition to perpetuate testimony (Florida's statutes differentiate between them) is not an adequate opportunity to cross-examine

Blanton v. State, 978 So.2d 149 (Fla. March 13, 2008) – Florida law distinguishes between discovery depositions (Rule 3.220) and depositions to perpetuate testimony (Rule 3.190) – the former is not an adequate opportunity to cross-examine – the majority opinion strongly implies that the latter would be adequate – two justices say that the majority actually holds that

State v. Contreras, 979 So.2d 896 (Fla. March 13, 2008) – as in *Blanton*

State v. Lopez, 974 So.2d 340 (Fla. Jan 10, 2008) – " Rule 3.220(h)(7) provides that a defendant is not to be physically present at a deposition except by stipulation of the parties. ... Thus, discovery depositions do not function as the equivalent of the cross-examination opportunity envisioned by *Crawford*. ... [W]e hold that the discovery deposition of [victim] Ruiz by defense counsel did not satisfy the requirement of an "opportunity to cross-examine" under *Crawford*."

Prior Opportunity to Cross-Examine in Civil Proceeding

Zakouto v. Benedetti, 383 Fed. Appx. 651 (9th Cir. Nev. 2010) (habeas) – "Zakouto contends that the trial court violated his confrontation rights by admitting into evidence the deceased victim's videotaped testimony from a prior family court proceeding. It is undisputed that the victim was unavailable to testify at trial and that Zakouto had an opportunity to cross-examine her at the earlier proceeding. Therefore, the state court's decision rejecting Zakouto's confrontation clause claim was neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); see also *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *United States v. Owens*, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988)." -- **affirming Zakouto v. Vare, 2008 WL 182256, 2008 U.S. Dist. LEXIS 7768 (D. Nev. Jan 15, 2008)** (unpub) (habeas)

People v. Osio, 2008 WL 4215657 (Cal. App. 2 Dist. Sep 16, 2008) (unpub) – "Osio, an attorney, was a friend of Henry and Alicia Waters [FN2] and the trustee of their living trust. After Henry's death, Alicia became convinced that Osio was stealing trust funds and filed a petition for an accounting. Osio deposed Alicia during the accounting litigation. She died in 2005.... At [subsequent criminal] trial, over defense objection, the court permitted the prosecution to introduce the transcript of Alicia's deposition from the accounting proceeding. ... Although Osio argues that he did not have the same interest or as much at stake in cross-examining a witness in a deposition taken for a civil proceeding as he would in a criminal proceeding, rendering his opportunity for cross-examination inadequate under the confrontation clause, when a defendant had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is sufficiently reliable to satisfy the confrontation requirement, regardless of whether subsequent circumstances bring into question the accuracy or completeness of the earlier testimony."

State v. Stein, 165 P.3d 16 (Wash.App. Div. 2 2007) – "Stein argues that by admitting prior testimony from a civil trial and a tape recording from a deposition, the trial court violated his right to confront the witnesses against him. ... *Crawford* merely requires a prior opportunity for cross-examination. And there is no dispute that Stein had the opportunity to cross-examine both Nicholas and Lund in the real estate contract litigation. ¶ 109 But Stein argues that he did not have a sufficiently similar motive to cross-examine Nicholas and Lund. Yet Stein cites only cases analyzing ER 804(b)(1) or its federal counterpart, Federal Rule of Evidence (FRE) 804(b)(1). [fn] Stein cites no case importing the 'similar motive' analysis of ER 804(b)(1) or FRE 804(b)(1) into the *Crawford* analysis. ¶ 110 Still, assuming that the 'similar motive' requirement applies to a *Crawford* analysis, we held in our first opinion that Stein's motive to cross-examine Nicholas and Lund was sufficiently similar to satisfy ER 804(b)(1)." (citations omitted)

Prior Opportunity to Cross-Examine Not Otherwise Classified

People v. McCoy, 215 Cal. App. 4th 1510, 156 Cal. Rptr. 3d 382 (Cal. App. 3d Dist. 2013) – "Defendant also argues the trial court violated his Sixth Amendment right of confrontation by allowing the conditional examination to be played for the jury because he possessed a substantially different interest and motive in cross-examining Cindy H. during that examination than he did at trial. We disagree."

State v. Rollins, 738 S.E.2d 440, 441-449 (N.C. Ct. App. 2013) – "In the instant case, defendant definitively had a prior opportunity to cross-examine Durham during his 2006 *Alford* plea hearing, and, as previously noted, had a similar motive to cross-examine Durham as he would have had at trial. Since defendant was afforded a prior opportunity to cross-examine Durham, under *Locklear*, defendant's confrontation rights were not violated."

In re Contempt of Sweeney, 2008 WL 1973721, 2008-Ohio-2187 (Ohio App. 8 Dist. May 08, 2008) (unpub) – PD held in contempt of court based on record of prior hearing – while she was present at prior hearing, she thought she was there as counsel for her client and didn't realize her own guilt would be determined based on the record she made – held: sixth amendment violation (also due process)

U.S. v. Cabrera-Frattini, 65 M.J. 950 (Naval-Marine Ct. Crim. App. Feb 28, 2008) – (on remand; see summary elsewhere in Outline) "The Supreme Court has declined to assess the effectiveness of questioning when an appellant has been given an opportunity for cross-examination. ... The portions of the *Roberts* and *Fensterer* opinions, withholding inquiry into the effectiveness of prior cross-examination, were not disturbed by the subsequent holding in *Crawford*, [FN5] and we decline to abandon them." – full and fair opportunity sufficient

Seaton v. State, 101 Ark.App. 201, __ S.W.3d __, 2008 WL 240268 (Ark. App. Jan 30, 2008) – "However, appellant did not have a prior opportunity to cross-examine his sister. The State appears to realize this difficulty because it offers alternative reasons to affirm the trial court on this constitutional ruling. ... Neither are persuasive, and we are compelled to agree with appellant and reverse on this issue."

State v. Basargin, 213 Or.App. 515, 162 P.3d 325 (Or. App. 2007) – "Before trial, defendant stipulated that the children's hearsay statements to [neighbor] Brannies [reporting violence against their mother] qualified as 'excited utterances' and were admissible as such. The trial court then conducted in camera interviews with the children in order to ascertain the reliability of their statements. The court determined that NA's account was consistent and reliable, but that her younger brother's statements seemed confused and were not sufficiently reliable to be admissible. The court's interviews with the children were off the record, and there is no indication whether the parties were permitted to ask questions of the children at the time. ... In this case, we are unable to discern whether, during the course of the court's pretrial interview with the children, the parties were given an opportunity to question the children. If defendant was afforded such an opportunity, then his confrontation rights were satisfied and admission of NA's statements was not erroneous. Because we cannot tell, from the 'face of the record,' whether defendant's confrontation rights were violated, we cannot reach the issue as plain error." [NOTE: The apparent assumption that an in-camera interview satisfies the cross-examination requirement seems dubious, although the case's result is certainly correct. The children's statements were non-testimonial – excited utterances made to a neighbor – and defendant seems to have waived any objection to their admission, anyway.]

State v. Sudduth 149 P.3d 547 (table), 2007 WL 92638, **5 (Kan. App. 2007) (unpub) – evidence of earlier robbery admitted to show M.O., but witnesses to earlier robbery not called – "Sudduth could have availed himself of an opportunity to cross-examine the witnesses against him in the prior criminal proceedings. If he relinquished that right by pleading to the charges, he

cannot now complain of a lost opportunity. However, we agree that the record is devoid of any evidence of witness unavailability."

Declarant Testifies as Defense Witness

State v. Magee, 116 So. 3d 948 (La.App. 4 Cir. 2013) – DV case – "This case is factually distinguishable from *Melendez-Diaz* because each witness who took a statement from C.B. that was used at trial also testified at trial. Further, [*964] C.B. testified at trial, and the defendant was thereby afforded the opportunity to confront his accusers at trial."

State v. Zaragoza, 2012 UT App 268, 287 P.3d 510 (Utah Ct. App. 2012) – "[¶ 9] Even if we were to conclude that the trial court erred in finding that Defendant's acts were the type of conduct that justifies forfeiture of his rights under the confrontation clause, we conclude any such error was harmless because Defendant was not denied his right to confront Wife. At trial, Defendant called Wife to testify. Wife testified and willingly answered defense counsel's questions. Because Defendant was provided a sufficient opportunity to cross-examine Wife, we conclude that he was afforded his right to confrontation."

People v. Connolly, 406 Ill. App. 3d 1022, 942 N.E.2d 71, 347 Ill. Dec. 238 (Ill. App. Ct. 3d Dist. 2011), appeal denied (March 30, 2011) – "[D.V. victim] Melissa testified for the defense. ... Melissa did not testify for the State, so she was not subject to cross-examination for purposes of the sixth amendment confrontation clause." [NOTE: That's just dumb. He would have gotten more favorable evidence from her if she cooperated with the prosecution?? The allocation of the burden of production is logically unrelated to confrontation.]

Rodriguez v. State, 2010 WY 170, 245 P.3d 818 (Wyo. 2010) – "The flaw in Mr. Rodriguez's argument is that RH was not unavailable as a witness. She was available. The prosecution did not call her as a witness because, as the prosecutor explained in his opening statement, she later denied that Mr. Rodriguez had hit her. Defense counsel was aware that the prosecution was not going to call RH as a witness, and in his opening statement, indicated that the defense would call her, and told the jury her testimony would be 'that there was no touching . . . that nothing happened; that this is not a domestic battery.' When the defense called her as a witness, her testimony, as anticipated, was favorable to Mr. Rodriguez. Because RH was available as a witness, and Mr. Rodriguez had an opportunity to confront her, he was not denied his constitutional right to confront the witness."

Commonwealth v. Barton-Martin, 5 A.3d 363, 2010 PA Super 163 (Pa. Super. Ct. 2010), appeal denied (Sept. 27, 2011) – holding that drunk driver's rights were violated when lab technician wasn't called by the state – "We also note that the testimony of the lab technician, Ms. Stewart, presented as part of Appellant's defense, and not as part of the Commonwealth's case-in-chief, was insufficient to satisfy Appellant's right to confrontation. Indeed, as expressly set forth by the Court in *Melendez-Diaz*, 'the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.' [cite] The Commonwealth failed to fulfill its burden in this matter." [NOTE: Burden of production = constitutional right of confrontation. Oh-kayyyy....]

Blyden v. People of the Virgin Islands, 53 V.I. 637 (VI. 2010), aff'd, 2011 U.S. App. LEXIS 7969 (3d Cir. V.I., Apr. 19, 2011) – "Blyden argues that he did not have an adequate opportunity to confront Dowdye at the pre-trial suppression hearing because Blyden conducted only a limited **direct examination** of Dowdye. [T]here is no indication in the hearing transcript of any ruling by the trial judge which improperly limited or hindered Blyden's examination of Dowdye. [cite] Consequently, we do not find any error in the trial court's admission of Dowdye's prior testimony at trial." [NOTE: Boldface added]

State v. Peeples, 2009 WL 737922, 2009-Ohio-1198 (Ohio App. 7 Dist. Mar 11, 2009) (unpub) – "{¶ 48} ... We note that Sarah testified against appellant at the preliminary hearing. Thus, he had a prior opportunity to cross-examine her. Still, it is generally stated that in order to allow the statement, the declarant must also be unavailable. [cite] Although Sarah was changing her testimony and refusing to testify in accordance with her prior statements, she was available and did in fact testify for the defense."

State v. Rickett, 967 A.2d 671, 2009 ME 22 (Me. Mar 10, 2009) – D.V. case – "[¶ 17] Rickett's wife appeared at trial as a witness for Rickett to explain the statements she had made during the course of the 911 calls. Therefore, even if the tapes had contained testimonial statements, their admission would not have violated the Confrontation Clause."

People v. Arnold, 2008 WL 773082, *2+ (Cal.App. 4 Dist. Mar 25, 2008) (unpub) – D.V. case – "[A]fter initially making herself unavailable to be confronted about her pretrial statements by invoking the Fifth Amendment and refusing to testify about the crimes, the victim changed her mind and testified, for the defense, thus subjecting herself to examination and cross-examination about her pretrial statements. Therefore, there could not possibly have been a *Crawford* violation in the admission of her statements."

People v. Rebman, 2007 WL 2744629 (Mich. App. Sep 20, 2007) (unpub) – "Somewhat unusually, complainant was defendant's sole witness at trial. She testified that she had lied to the police about defendant striking her. She maintained that she did so because she wanted the police to remove him from her home due to his drinking and suicide attempts. The police had told her during an earlier call that they could not interfere unless she claimed that he had assaulted her. She also stated that shortly after the incident she wrote letters to the police and assistant prosecutor apologizing for the trouble, and stating that her initial report was not truthful. Thus, unlike the circumstances in *Crawford, supra*, and *Davis, supra*, complainant was present at trial and actually testified. ... Here, while the circumstances were somewhat unusual, defendant had an ample opportunity to question complainant at trial about her previous statement and present her explanation to the jury. We thus find that defendant's right to confrontation was not violated." Upheld by *Rebman v. Ludwick*, 2009 WL 2923156 (E.D.Mich. Sep 10, 2009) (unpub) (habeas)

People v. Hin, 2007 WL 529816 (Cal.App. 1 Dist. 2007) (unpub) – Hearsay introduced by prosecution, declarant subsequently called by defense – confrontation clause satisfied

Adult Declarant Testifies: Loss of Memory / Freezes on the Stand / Refuses to Answer
(see also following section)

As in others areas of *Crawford* jurisprudence, there is something of a double standard, with prior statements more readily admitted when the witness is adult who fakes an inability to recall than a child too traumatized (or too non-adult) to testify.

NOTE: The Second Division of the Illinois Appellate Court declared: "The issue presented by the admission of hearsay is constitutionally identical in a child sex abuse case and a murder case, and the response of the sixth amendment is identical in both types of cases." *People v. Garcia-Cordova*, 963 N.E.2d 355, ¶ 66 (Ill. App. Ct. 2d Dist. 2011). This might sound like boilerplate commitment to equal justice under law, but many courts effectively hold just the opposite, and a few do so openly, such *State v. Moreno-Garcia*, 260 P.3d 522, 527 (Or. Ct. App. 2011).

Commonwealth v. DaSilva, 471 Mass. 71, 27 N.E.3d 383 (2015) – "Although at times he claimed an inability to remember what he told the grand jury, the judge found that he was feigning memory loss. Clarimundo did not refuse to answer questions posed by defense counsel, who was able to fully probe Clarimundo's inconsistencies. We conclude that in these circumstances the defendant had an opportunity to effectively cross-examine Clarimundo. There was no deprivation *79 of due process or the right to confront and cross-examine the witness."

People v. DiTommaso, 127 A.D.3d 11, 19, 2 N.Y.S.3d 494, 500 (N.Y. App. Div. 2015) – "Although Woods maintained that he did not know whether his recollection had been reinforced or created by his discussions with the prosecutor over the last six years, a witness's inability to recall or remember does not deprive a defendant of the opportunity to cross-examine the witness [cite]."

People v. Sanchez, 232 Cal. App. 4th 197, 181 Cal. Rptr. 3d 360, 373-74 (2014), reh'g denied (Dec. 24, 2014), reh'g denied (Jan. 5, 2015), review granted and opinion superseded, No. S223722, 2015 WL 1063950 (Cal. Mar. 11, 2015) – "A witness who 'refuses to answer any question on direct or cross-examination denies a defendant the right to confrontation which contemplates a meaningful opportunity to cross-examine the witness.' [cites] By contrast, a witness who suffers from memory loss—real or feigned—is considered 'subject to cross-examination' because his presence and responses provide the "jury with the opportunity to see [his] demeanor and assess [his] credibility.' [cites] [¶] At issue here is whether Rosario is more akin to a witness who refuses to answer questions or one who feigns memory loss. We conclude that, despite Rosario's selective memory and evasiveness, the confrontation clause was satisfied because '[his] presence at trial as a testifying witness gave the jury the opportunity to assess [his] demeanor and whether any credibility should be given to [his] testimony.'"

People v. Murillo, 231 Cal. App. 4th 448, 179 Cal. Rptr. 3d 891 (Cal. App. 2014), as modified (Dec. 9, 2014) – an adult witness's "refusal to answer over 100 leading questions while the prosecutor read to the jury from his police interviews denied Murillo the opportunity to cross-examine on what was tantamount to devastating adverse testimony." – [NOTE: court goes on to make preposterous suggestions about how to avoid the constitutional problem – for example, defense counsel could commit ineffective assistance by entering into a stipulation – p. 899.]

State v. Davis, 128 So. 3d 1162, 1163-69 (La. App. 5th Cir. 2013) – " Based on *Owens* and *Crawford*, a declarant's appearance and subjection to cross-examination at trial are all that is necessary to satisfy the Confrontation Clause, even if the declarant suffers from memory loss."

McAtee v. Commonwealth, 413 S.W.3d 608, 614-15 (Ky. 2013) – "We once again hold that a testifying witness alleging memory loss 'appears at trial' for purposes of cross-examination, and does not implicate a Sixth Amendment violation. ... we hold that the Confrontation Clause is not implicated by a witness claiming memory loss if he or she takes the stand at trial and is subject to cross-examination."

State v. Rodriguez, 139 Conn. App. 594, 56 A.3d 980 (Conn. App. Ct. 2012) – "'a witness' claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the confrontation clause ... so long as the witness appears at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination.' ... While the defendant ultimately was not satisfied with the content of Whittingham's responses on cross-examination, we do not find that the court's decision to admit into evidence the prior statement to police deprived the defendant of his rights under the confrontation clause."

United States v. Romo-Chavez, 681 F.3d 955 (9th Cir. Ariz. 2012) – "All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections."

Diggs v. United States, 28 A.3d 585 (D.C. 2011) – "Each appellant challenges the admission in evidence of out-of-court statements made by a government witness named Mark Fisher, who reported them to the police and testified against them before the grand jury; they argue that because Fisher professed to have suffered brain damage and consequent memory loss, he was not available for cross-examination within the meaning of the Confrontation Clause, and that his statements were inadmissible hearsay. ... It makes no difference that Fisher claimed to be unable to remember the events in issue; the Clause 'includes no guarantee [*594] that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion.'n7 Thus it is settled that memory loss, whether genuine or feigned, does not deprive the defendant of the meaningful opportunity to cross-examine that the Confrontation Clause requires."

Goforth v. State, 70 So. 3d 174, 176-187 (Miss. 2011) – "We find that Rigdon, though physically present at trial, did not have the requisite, minimal ability or capacity to act. Significantly, no one here disputes that Rigdon's total loss of memory was genuine. ... This total lack of memory deprived Goforth any opportunity to inquire about potential bias or the circumstances surrounding Rigdon's statement. In sum, Goforth simply had no opportunity to cross-examine Ridgon about his statement. ... We find that, under the Mississippi Constitution, Goforth did not have a constitutionally adequate opportunity to cross-examine Rigdon at trial or beforehand."

Davis v. State, 2011 Ark. 373, __ S.W.3d __ (Ark. 2011) – "Detective Tommy Hudson interviewed Davis's sister, Latasha Smith. Smith informed Detective Hudson that on February 13, 2008, Davis told her that he 'killed somebody.' When she inquired further, Davis stated that he shot 'that man that got killed on Meadowcliff.' ... Smith testified on direct examination that while she remembered giving a statement to Detective Hudson, she did not remember the subject matter of their discussion. Despite her lack of memory, however, she testified that she did not lie to police officers and that any statement given to Detective Hudson was truthful. ... Davis did not conduct a cross-examination.... While Davis does not dispute that Smith was present at trial,

he asserts that he was unable to effectively cross-examine her due to her lack of memory. We disagree and find no Sixth Amendment violation where Davis declined the opportunity to confront the witness through cross-examination. ... The fact that Smith was unable to recall the details of her out-of-court statement on direct examination is of no consequence"

Woodall v. State, 336 S.W.3d 634, 635-647 (Tex. Crim. App. 2011) – "We believe that, under the facts of this case, memory loss did not render Pinedo 'absent' for Confrontation Clause purposes. ... memory loss does not render a witness "absent" for Confrontation Clause purposes if she is present in court and testifying."

People v. Martin, 408 Ill. App. 3d 891, 946 N.E.2d 990, 349 Ill. Dec. 494 (Ill. App. Ct. 2d Dist. 2011) – " Here, Hosey physically appeared at trial and was cross-examined by defense counsel. She was able to answer questions and willingly did so. We agree that her alleged lack of memory did not create confrontation-clause problems merely because it precluded her from being cross-examined to the extent that Martin would have liked. Therefore, the admission of Hosey's written statement did not violate Martin's right to confront the witnesses against him." [NOTE: This case includes an explicit comparison with cases involving traumatized child witnesses. The constitutional difference is that the children were declared incompetent to testify, even though that's not a constitutional standard – and the net result at trial was the same.]

State v. Moore, 57 So. 3d 1033 (La.App. 4 Cir. Oct. 13, 2010), reh'g granted on non-Crawford issues and affirmed, 57 So. 3d 1033 (La.App. 4 Cir. Jan. 26, 2011), writ denied (Sept. 2, 2011) – "The state argues that no violation of the Confrontation Clause exists because the declarant, Ms. Fox, was available for cross-examination. However, the court previously declared her as unavailable pursuant to La. C.E. art 804(B)(3) because she was either unresponsive or could not remember anything despite the state's attempt to refresh her memory with her statement. Because she was declared unavailable by the court, defense counsel **rightfully declined to cross-examine Ms. Fox** as she already stated that she could not remember anything surrounding the robbery including giving a statement. [cite] Because Moore was not provided with a prior opportunity to confront Ms. Fox, the district court erred by admitting the statement of Ms. Fox at trial." [NOTE: Boldface added to show up the silliness of this very confused ruling.]

State v. Harding, 323 S.W.3d 810 (Mo. Ct. App. Sept. 21, 2010) – "[DNA analyst] Bolinger testified at trial and was subject to cross-examination. Whether or not Bolinger could answer specific questions posed by Harding did not deny Harding his rights to confront her under the Sixth Amendment."

State v. Santos, 238 P.3d 162, 163-167 (Haw. 2010) – "under Crawford, a witness who appears at trial and testifies satisfies the confrontation clause, even though the witness claims a lack of memory that precludes them from testifying about the subject matter of their out-of-court statement..."

People v. Cowan, 50 Cal. 4th 401, 415-427, 236 P.3d 1074; 113 Cal. Rptr. 3d 850 (Cal. 2010) – " Defendant contends there can be no constitutionally effective cross-examination when the witness cannot recall the facts related in the hearsay statement. [cites] But the high court has squarely rejected that contention, concluding that "when a hearsay declarant is present at trial and subject to unrestricted cross-examination," "the traditional protections of the oath, cross-

examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements," notwithstanding the witness's claimed memory loss about the facts related in the hearsay statement. (United States v. Owens (1988) 484 U.S. 554, 559–560 [98 L. Ed. 2d 951, 108 S. Ct. 838].) Nothing in Crawford casts doubt on the continuing vitality of Owens."

People v. Tracewski, 927 N.E.2d 1271, 1271-1276, 340 Ill. Dec. 260 (Ill. App. Ct. 4th Dist. 2010) – "Gipson identified defendant in open court but stated she did not recall the events from March 25, 2007, because she had been drinking for a month straight. However, Gipson acknowledged writing and signing the statement in State's exhibit No. 1, which was dated March 25, 2007, and stated as follows: '[Defendant] kicked Lyle Hudson's door and then hit him and myself. She kicked me in my head and arm.' ... Gipson physically appeared at trial and was subject to cross-examination by defense counsel. 'There are no confrontation[-]clause problems merely because the witness's memory problems preclude him from being cross-examined to the extent the parties would have liked.' [***265] [*1276] [cite] Therefore, the admission of Gipson's written statement did not violate defendant's sixth-amendment right to confront the witnesses against her."

Gober v. State, 300 Ga. App. 202, 684 S.E.2d 675, 2009 FCDR 3113 (Ga. Ct. App. Sept. 23, 2009) – "Gober claims that he was effectively denied his right to confront the acquaintance because the acquaintance initially sought to invoke his Fifth Amendment privilege (which the court held was unavailable) and then repeatedly answered that he did not remember the events in question. But the acquaintance not only gave substantive answers to other questions posed by the State, he responded to several of Gober's own cross-examination questions with answers such as that he (the acquaintance) lived with his grandmother, that he was not at the apartment complex on the date in question, that he loved playing basketball and other sports, and that he did not know Gober. Thus... the witness did not completely refuse to testify... Accordingly, Gober was afforded his Sixth Amendment right to confrontation."

Green v. State, __ S.E.2d __, 2009 WL 1362864 (Ga. App. May 18, 2009) – "Robinson was on the witness stand and subject to cross-examination, but defense counsel expressly declined the opportunity to cross-examine him. Hence, no effort was made by defense counsel to ascertain whether Green would continue his refusal to answer certain questions or "would offer testimony in explanation of his [prior trial testimony] or in exculpation of [Green]." Id. at 610(2). Under these circumstances, Green "was not denied the right of confrontation, he simply did not exercise it," and he has waived any objection he may have had on confrontation clause grounds."

People v. Leonard, __ N.E.2d __, 2009 WL 1515204 (Ill. App. 3 Dist. May 26, 2009) – "Jackson took the stand, testified under oath, and responded to the questions presented him. That Leonard was not able to cross-examine Jackson to the extent he would have liked does not rise to a violation of his right to confront Jackson. Jackson's supposed gaps in memory, while making cross-examination of him challenging, did not preclude the opportunity for cross-examination."

People v. Greenwood, 2009 WL 1334837 (Cal. App. 2 Dist. May 14, 2009) (unpub) – "The logic of *Owens* has not been undermined by *Crawford*. ... Franklin appeared at trial and testified. He was cross-examined and then released subject to recall for further examination. The jury had the opportunity to assess Franklin's demeanor as a witness and to evaluate the credibility of his extra-judicial statements. The confrontation clause was not violated."

Beltran v. Runnels, 2009 WL 1279346 (C.D. Cal. May 04, 2009) (unpub) (habeas) – "both Espinoza and Rodriguez were present at trial and testified at length. Although their evasive testimony "narrowed the practical scope of cross-examination," neither witness outright refused to answer questions. [cite] In other words, despite the fact that both witnesses testified that they did not know or could not recall most of the events concerning the shooting, they nevertheless were available for the defense to cross-examine."

Soto v. State, __ S.E.2d __, 2009 WL 1174458 (Ga. May 04, 2009) – " Here, defendant was given no opportunity whatsoever to cross-examine Wiedeman because Wiedeman "shut down" in the midst of direct-examination and refused to answer further questions posed by either the prosecution or the defense. We must conclude, therefore, that the admission of Wiedeman's prior statements violated defendant's right of confrontation."

U.S. v. Burge, 2009 WL 1108488 (N.D. Ill. Apr 23, 2009) (unpub) (pretrial order) – criminal prosecution of cop, witness had died by trial – "FN 8 ... the Confrontation Clause does not prohibit the admission of the testimony of an unavailable witness who, in a prior proceeding, took the Fifth Amendment as to matters collateral to the witness's direct testimony."

State v. Martinez, 2009 WL 817088 (Minn. App. Mar 31, 2009) (unpub) – "because Value absolutely refused to testify to anything, he effectively foreclosed Martinez's opportunity to cross-examine him. [cites] Although a defendant is not guaranteed the right of successful cross-examination, a meaningful opportunity to ask questions is inherent in the protection of the Confrontation Clause."

Delao v. Kirkland, 2009 WL 635681 (C.D. Cal. Jan 06, 2009) (unpub) (habeas) – "Although counsel was frustrated by Juan's professed lack of memory (which the trial court attributed to deliberate evasiveness and fear rather than "physical amnesia" [cite], [t]he Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion.' [cite] As defense counsel had a full and fair opportunity to expose Juan's infirmities through cross-examination and to call to the attention of the jury, the reasons to give scant weight to his prior statements and his trial testimony, no Confrontation Clause violation occurred here."

State v. Ata, __ N.E.2d __, 2009 WL 537153 (N.H. Mar 05, 2009) – "Given that *Green*, *Fensterer* and *Owens* remain good law under the Federal Constitution, we see no reason to depart from them under the State Constitution." – stating that the three cases stand for the proposition "that the presence of a witness at trial for cross-examination removes any bar raised by the Confrontation Clause, regardless of the degree of the witness's memory impairment."

People v. Guerrero, 2009 WL 503522 (Cal. App. 4 Dist. Mar 02, 2009) (unpub) – "Perez was present at trial and available for cross-examination by defendant. Perez did not refuse to testify but instead, as discussed ante, feigned memory loss with regard to specific aspects of the events that transpired on September 7, 2007. The admission of Perez's prior statements, therefore, did not violate the confrontation clause."

People v. Jesus, 2009 WL 259373, 2009 Guam 2 (Guam Terr. Feb. 4, 2009) – DV case – "Clearly Jesus' confrontation rights were not violated. The defense had extensive opportunity to

cross-examine [victim] Gadia and she cooperated in answering his questions. Gadia demonstrated a significant degree of memory to answer the defense's questions in detail about the events leading up to the auto-pedestrian collision. Moreover, Gadia was able to explain the reason why she may have made the previous statements that she testified to not remember making. [¶] Jesus' argument that admitting Gadia's state-ments contained in Nakamura's report violated the Confrontation Clause because she could not remember making the statements is untenable."

People v. Hampton, 899 N.E.2d 532 (Ill. App. 1 Dist. Dec 05, 2008) – "Here, Lockwood appeared for cross-examination and answered all questions posed, even though his professed memory loss prevented him from recalling details from the shooting and his testimony. We cannot agree with defendant's argument that his confrontation rights were violated because he was unable to cross-examine Lockwood to the extent he would have liked."

People v. Clark, 2008 WL 5053535 (Mich. App. Oct 14, 2008) (unpub) – "At trial, Officer Stevenson testified that each of the accomplices had identified defendant as the gunman. Two of the acquaintances, Minor and Hicks, fulfilled their agreement to testify and confirmed their statements to the police officer that interviewed them. Jones and Etheridge, the other two acquaintances, refused to testify." – held: *Crawford* violation (but harmless), even though Jones actually took the stand before the jury and refused to testify

State v. Holness, 289 Conn. 535, 958 A.2d 754 (Conn. Nov 18, 2008) – "the defendant contends that, because Smith testified that the police never had obtained a written statement from him, Smith was functionally unavailable for cross-examination, and, therefore, the state was barred, under *Crawford* ... from introducing the statement into evidence. ... Although Smith testified that he had never provided the police with a written statement, he took the stand, swore to testify truthfully, was subject to extensive cross-examination by defense counsel and answered all questions posed to him. ... Consequently, there is no reason to conclude that Smith was functionally unavailable for cross-examination merely because he claimed that he had not given the police a written statement."

State v. Banks, 271 S.W.3d 90 (Tenn. Nov 07, 2008) – " The two head wounds that Mr. Atilebawi received at the hands of Mr. Banks were devastating and serious. Bullet and bone fragments were surgically removed from Mr. Atilebawi's brain, and surgeons were required to remove a portion of Mr. Atilebawi's temporal lobe that controls speech, memory, and personality. As a result of his injuries, Mr. Atilebawi was rendered susceptible to seizures and was left with cognitive problems, which manifest themselves in the form of speech difficulties and memory problems. ... [Despite memory problems,] Mr. Atilebawi was available and in fact was cross-examined by Mr. Banks 'face to face.' Mr. Banks was not deprived of his right to confront Mr. Atilebawi, and his contention otherwise is wholly without merit."

Blunt v. U.S., 959 A.2d 721 (D.C. Oct 30, 2008) – "feigned inability to recall" does not make witness unavailable for cross-examination, where witness "asserted no privilege and did not refuse to answer questions."

State v. Legere, 958 A.2d 969 (N.H. Oct 15, 2008) – "Regardless of the authenticity of Diabo's claim of memory loss, because she was present at trial and subject to whatever cross-

examination the defense wished to attempt, the jury had the opportunity to assess her credibility and, by extension, the credibility of her earlier statement."

Smith v. State, ___ So.2d ___, 2008 WL 4482521, *1+ (Miss.App. Oct 07, 2008), rehearing denied (Feb 24, 2009), rev'd, 25 So. 3d 264, 267-274 (Miss. 2009) –

State v. Weighall, 2008 WL 4062755 (Wash. App. Div. 2 Sep 03, 2008) (unpub) – "When, as here, the witness claims to not remember the events or his prior statements and the State did not structure its direct examination to shield the witness from questions about the events, *see Price*, 158 Wn.2d at 647-48, the confrontation clause is satisfied when the State asks the witness 'questions about the events at issue and about his or her prior statements, but [the witness] answers that he or she is unable to remember the charged events or the prior statements.'"

State v. Davis, 109 Conn.App. 187, 951 A.2d 31 (Conn. App. Jul 22, 2008) – "the victim testified that he did not remember anything that occurred after the shooting. It is well established that 'a witness' claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the confrontation clause under *Crawford*, so long as the witness appears at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination.'"

State v. Bryant, 2008 WL 2487253, *10+, 2008-Ohio-3078, 3078+ (Ohio App. 12 Dist. Jun 23, 2008) (unpub) – "{¶ 51} The record demonstrates that Stephens appeared at trial and was subject to cross-examination by appellant's counsel. On direct examination, Stephens testified that she has no recollection of the dates on which the events in question occurred as a result of experiencing two strokes. ... {¶ 52} Since the record demonstrates Stephens was present and testified at trial, and that appellant was afforded the opportunity to question Stephens concerning her statements, we find the Sixth Amendment right to confrontation was not implicated in this case."

Larrimore v. Scribner, 2008 WL 2397580 (C.D. Cal. June 12, 2008) (unpub) (habeas) – "As petitioner has not submitted any evidence demonstrating that the prosecution could have made additional efforts to locate Ms. Cornista, he has failed to rebut the presumption of correctness that attaches to the state court's determination."

McIntosh v. Com., 2008 WL 2167894 (Ky. May 22, 2008) (unpub) – "Although *Crawford* did not discuss what it means for a witness to 'appear for cross-examination,' *Crawford* did not overrule *Owens*, and several courts have held that under *Owens* a witness 'appears for cross-examination' if he willingly takes the stand, answers questions in whatever manner, and exposes his demeanor to the jury, thus giving the defense an opportunity to address the witness's prior testimonial statements. [cites] We agree with these Courts that *Owens* remains controlling..."

People v. Mason, 2008 WL 942012, *3+ (Mich.App. Apr 08, 2008) (unpub) – "To the extent defendant implies that the failure of [victim] Morris to recall or acknowledge his conversation with [Officer] Vargas, frustrated or impeded his right to confront this witness," court rejects implication under *Owens*

People v. Madriles, 2008 WL 2009753 (Cal. App. 2 Dist. May 12, 2008) (unpub) – "The Supreme Court has also rejected the claim that a witness does not truly appear for cross-

examination when the witness denies any memory of the prior statement. (*U.S. v. Owens* (1988) 484 U.S. 554, 559-560.)"

Vaughn v. Runnels, 2008 WL 1734741 (N.D. Cal. Apr 11, 2008) (unpub) (habeas) – "Because Jordan was available for cross examination, his failure to recollect anything from the tape-recorded interviews with the police officers did not make him unavailable and did not result in a Confrontation Clause violation."

State v. Holliday, 745 N.W.2d 556 (Minn. Mar 06, 2008) – "The Confrontation Clause is satisfied by a declarant's appearance at trial for cross-examination, and it is for the factfinder to evaluate a declarant's credibility. Accordingly, A.A.'s memory infirmities were exposed at trial, and the district court determined that he was not a credible witness and gave his statements 'little if any weight.' We hold that the admission at trial of A.A.'s prior statements did not violate appellant's Confrontation Clause rights." – but adding in dicta: "We note that our resolution of this case might have been different if appellant had been convicted by a jury and we thus had no indication as to what actually influenced the guilty verdict."

Abney v. Com., 51 Va.App. 337, 657 S.E.2d 796 (Va. App. Mar 04, 2008) – "FN2. Issues regarding memory loss for hearsay purposes and what constitutes availability for cross-examination for purposes of the Confrontation Clause are subject to distinct considerations; and the overriding constitutional consideration in this context is that the lack of memory of a witness at trial does not necessarily implicate the Confrontation Clause."

People v. George, 2007 WL 4216988 (Cal. App. 1 Dist. Nov 30, 2007) (unpub) – out of court statements by two witnesses admitted into evidence – both witnesses took the stand – "Appellant asserts he had no opportunity to cross-examine the witnesses in the present case because they had no memory of the events in question. ... [T]he three purposes of the confrontation clause were satisfied. First, although John Rogers and Isaac [FN10] were reluctant to testify, [FN11] were generally evasive, and initially stated they did not remember anything about the March 17 incident, further questioning revealed that they were at the Rogers residence that day, that John Rogers spoke to an officer about the shooting, and that Isaac had provided the officer with the fragments of the bullet that hit the car. Their testimony provided the jury with sufficient information to confirm that it had before it conflicting statements of the same witnesses. [¶] Second, defense counsel had the opportunity to cross-examine both witnesses, and utilized the opportunity to question Isaac. Although he did not cross-examine John Rogers, "[w]hether or not a witness is actually cross-examined, the fact the defendant has an adequate opportunity to carry out such an inquiry satisfies the confrontation clause [citation]. [¶] Finally, the function of confrontation in subjecting the witness's demeanor to the scrutiny of the jury was undoubtedly served in this case, as the jury was able to weigh the testimony of John Rogers and Isaac after observing their demeanor in court, and was able to determine whether their statements to police were more or less credible than the statements they made in court."

People v. Leon, 2007 WL 4112101 (Cal. App. 2 Dist. Nov 20, 2007) (unpub) – "Here, in contrast [to cases in which the witness refuses to testify at all], the cross-examination of Lujan was not meaningless, as she revealed several telling facts: that she was familiar with defendant and was afraid of his friends. In addition, her memory loss was also selective, as she remembered hearing shots and recalled Officer Bancalari's name. The jury was given the choice to decide whether her story about the loss of memory was credible. On this record, there was a reasonable

basis upon which the court could conclude that the witness's responses were deliberately evasive or untruthful. Thus, admission of her statements to the police was proper."

Reyes v. U.S., 933 A.2d 785 (D.C. Aug 16, 2007) – "Reyes separately argues that the admission of Officer Dove's testimony violated his Sixth Amendment right to confront witnesses. Specifically, Reyes claims that although Coe was physically present at trial, he was essentially unavailable for cross-examination because he lacked sufficient memory. ... In this case, because Coe testified at trial and was available, Reyes' Sixth Amendment right to confront witnesses was not infringed."

People v. Sutton, 874 N.E.2d 212, 314 Ill. Dec. 302 (Ill. App. 1 Dist. Aug 14, 2007) – "Officer Timothy Moroney rode with [shooting victim] Janik in an ambulance to the hospital. On the way to the hospital, Janik allegedly gave the officer a brief account of events leading up to the shootings along with a general description of the assailant. ... At trial, however, Janik had no memory of his conversation with Officer Moroney. [¶] Doctors discovered that although Janik's gunshot wound to the head had not penetrated his cranium or caused major vascular injuries, he had suffered amnesia regarding the offense. ... [T]he statements elicited from Janik in the ambulance are admissible and not subject to *Crawford* and *Davis*, since the record and relevant case law indicate he is available for cross-examination."

People v. Ashford, 2007 WL 3085462 (Mich. App. Oct 23, 2007) (unpub) – "A witness may be considered available for cross-examination for purposes of the Confrontation Clause, and at the same time, unavailable for purposes of MRE 804. Although Bush claimed not to remember his former testimony, he was present at trial and available for cross-examination, but defense counsel elected not to ask any questions. Bush was cross-examined at the preliminary examination." (citation omitted)

State v. Dugan, 2007 WL 2823300 (Wash. App. Div. 1 Oct 01, 2007) (unpub) – "Dugan appeals, arguing that the trial court violated his constitutional right to confrontation under *Crawford v. Washington* [FN1] by allowing witnesses to testify about certain out-of-court statements Mack made to them. But Mack testified at the trial and was subject to cross-examination. And while Mack claimed to remember very little about the events in question or the substance of her hearsay statements to the other witnesses, we conclude that Mack's apparent inability to remember does not implicate *Crawford* nor foreclose admission of her pretrial statements."

Martinez v. State, 2007 WL 2790174 (Tex. App.-Hous. Sep 27, 2007) (plurality opinion) (unpub) – "Flores was physically present at trial, had use immunity, [FN2] and had no legitimate Fifth Amendment privilege (because he had already been convicted of the same offense), but he refused to testify. ... Because the State has not alleged a forfeiture by wrongdoing by appellant, the foregoing language in *Davis* indicates that the admission of Flores's statement was a Confrontation Clause violation even if his refusal to testify was wrongful and prevented the admission of reliable evidence. However, because we conclude below that any error in admitting this evidence was harmless, we need not reach a holding on error."

In re Kurtis Kitzmiller, 2007-Ohio-4565, 2007 WL 2482618 (Ohio App. 5 Dist. Sept. 4, 2007) (unpub) – "{¶ 38} [A]ppellant argues the trial court allowance of testimony concerning the out-of-court statements of appellant's mother, Lori Cartt, who was the victim of the domestic

violence deprived appellant of his constitutional right to confront witnesses ... {¶ 39} In the case at bar, two days prior to Ms. Cartt alleging appellant assaulted her, Ms. Cartt was in a life threatening car accident. Because Ms. Cartt received heavy doses of medication while in the hospital and after returning home from the hospital, Ms. Cartt had almost no recollection of what occurred on August 25, 2006 and for two weeks following her accident. ... Because of Ms. Cartt's limited memory of what occurred on August 25, 2006, and in order to prove the elements of domestic violence against appellant, the State had Ms. Cartt read her written statement to police into the record. ... {¶ 44} We conclude that a witness' claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the confrontation clause under Crawford, so long as the witness appears at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination."

People v. Gunder, 151 Cal. App.4th 412, 59 Cal. Rptr.3d 817 (Cal. App. 3 Dist. 2007) – "As 'the Confrontation Clause places no constraints at all on the use of [the] prior testimonial statements' of witnesses who appear at trial (*id.* at p. 59, fn. 9), the question is whether a witness who appears at trial but feigns a lack of memory should nonetheless be considered unavailable, rendering the January 2004 interview inadmissible. ... [A] witness may be both unavailable for purposes of admitting hearsay evidence yet available to cross-examine. ... The circumstance of feigned memory loss is not parallel to an entire refusal to testify. The witness feigning memory loss is in fact subject to cross-examination, providing a jury with the opportunity to see the demeanor and assess the credibility of the witness, which in turn gives it a basis for judging the prior hearsay statement's credibility. '[W]hen a hearsay declarant is present at trial and subject to unrestricted cross-examination ... the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness's demeanor satisfy the constitutional requirements.' (*United States v. Owens, supra*, 484 U.S. at p. 560.) In the face of an asserted loss of memory, these protections 'will of course not always achieve success, but successful cross-examination is not the constitutional guarantee.' (*Ibid.*)"

People v. Bakr, 869 N.E.2d 1010, 312 Ill.Dec. 19 (Ill. App. 1 Dist. 2007) – "[N]o confrontation clause problems exist simply because a declarant's alleged memory problems precluded the declarant from being cross-examined to the extent that defense counsel would have liked. .. Here, defendant contends that Nevarez's and Montelongo's ability to recall neither 'making their statements nor the incident that was the subject of their statements' rendered the witnesses 'unavailable' for effective confrontation, and therefore the admission of their videotaped statements into evidence deprived defendant of his rights under the confrontation clause. Contrary to defendant's assertion that Nevarez and Montelongo were unavailable, this record confirms that both Nevarez and Montelongo physically appeared at trial and were subject to cross-examination by defendant's defense counsel. Defense counsel was afforded the opportunity to cross-examine the witnesses on issues such as the witnesses' bias and the witnesses' motive to lie. Furthermore, defense counsel elicited testimony on cross-examination from Nevarez that he said "whatever he would to get him out of trouble" and from Montelongo that "he said whatever he needed to get out of the police station." In doing so, defendant had the ability to impeach the witnesses' credibility, therefore satisfying the confrontation clause's goal of challenging the reliability of adverse evidence. Faced with this record, which confirms that Navarez and Montelongo were present at trial and subject to cross-examination, we cannot agree with defendant's contention that his constitutional rights under the confrontation clause were violated by the admission of Navarez's and Montelongo's videotaped statements."

Cole v. State, 922 A.2d 364 (Del. 2007) – defendant's girlfriend, called by state, claimed she didn't remember giving statements to police – court followed its earlier decision in co-defendant's appeal, *Johnson v. State*, No. 429, 2004 (July 1, 2005), which held: "The mere fact that Warner's [reluctant witness's] recollection was limited does not make her unavailable for cross-examination for Confrontation Clause purposes."

U.S. v. Ghilarducci, 480 F.3d 542 (7th Cir. 2007) – "The weight of authority suggests that there was no Confrontation Clause violation on these facts. Sova did not claim a total loss of memory regarding the events. Rather, he cooperated with defense counsel's questioning and succeeded in answering a great number of questions. Ghilarducci's counsel tested Sova's credibility, probing into the severity of Sova's grand mal seizure, whether he had been compensated for his trial or grand jury testimony, and the extensiveness of his contact with government attorneys or agents. By referencing documents that memorialized his interactions with Ghilarducci, Sova was also able to answer some questions on that topic. Therefore, we doubt that Ghilarducci's opportunity to cross-examine Sova fell below constitutional standards." – but even if error, harmless

People v. Hampton, 225 Ill.2d 238, 867 N.E.2d 957, 310 Ill.Dec. 906 (Ill. 2007) – according to Appellate Court decision in case, the out of court declarant was present in the courtroom but refused to testify, even under threat of contempt of court – "The State conceded that admission of the codefendant's statement violated the confrontation clause under *Crawford*..."

People v. Cottle, 2007 WL 778402, *1 (Mich. App. 2007) (unpub) – "Spencer and Mazique testified at trial. However, they both claimed they could not remember the events of that day. Spencer claimed she simply did not remember the events, although her alcohol consumption that day may have played a role in her memory loss. Mazique explained that in July 2003, she suffered a stroke, and had memory problems ever since." – preliminary examination testimony admitted – confrontation clause satisfied by opportunity to cross-examine – moreover, witnesses were cross-examined at trial – "Although a finding that Spencer was both available for cross-examination, yet not available to testify, seems inconsistent, there is no requirement that the two characterizations be identical because they are made for different purposes."

People v. Dolph-Hostetter, 2007 WL 981595, 1 -2 (Mich. App. 2007) (unpub) – "Here, Bowersox testified at trial, and defendant had the opportunity to cross-examine her. Although Bowersox testified that she was not able to remember the earlier events, as previously discussed, she was still available for cross-examination within the meaning of the Confrontation Clause. Therefore, defendant's right of confrontation was not violated."

State v. Real [sic], 214 Ariz. 232, 150 P.3d 805 (Ariz. App. Div. 2, 2007) – drunk driving, officer has no memory of particular driver, must rely on report – "But the Court in *Crawford* did not expressly overrule *Owens* [484 U.S. at 559] or other cases suggesting that there is no Confrontation Clause violation when the court admits prior statements the witness does not remember making, if the witness testifies."

Hillard v. State, 950 So.2d 224 (Miss. App. 2007) – assuming without actually addressing the issue that *Crawford* is violated when hearsay declarant is present in courtroom but refuses to testify

State v. Miller, 2007 WL 329125, *4 (Minn. App. 2007) (unpub) – murder witness too scared to testify, denies everything – "Dissatisfaction with a witness's answers and lapses in memory do not equate to denial of a defendant's constitutional right of confrontation. ... [B]ecause Brown did testify at trial, the Confrontation Clause placed no constraint on the use of his prior statement. Appellant received an opportunity for cross-examination, and there was no *Crawford* violation. Ultimately, the jury was provided with an opportunity to judge Brown's credibility."

Newsome v. Ryan, 2007 WL 433282, *15 (S.D. Cal. 2007) (unpub) – "Here, the forgetful witnesses were present and testified at the retrial. ... Petitioner had the opportunity to cross-examine the forgetful witnesses, even if he chose not to do so. The jury was able to assess both the forgetful witnesses' and the testifying officers' demeanor and credibility. Admitting the out-of-court statements into evidence after the forgetful witnesses were excused does not violate the Sixth Amendment."

State v. Rockette, 2006 WI App 103 (Wisc. Ct. App. 2006) – "Defendant was convicted for his participation in the victim's shooting death. On appeal, the court held that a witness's claimed inability to remember earlier testimonial statements did not implicate the requirements of the Confrontation Clause under *Crawford* because he was present at trial, took an oath to testify truthfully and answered the questions put to him during cross-examination."

Nolan v. State, 122 Nev. Adv. Rep. 33 (2006) – "Nolan argues that allowing a detective to read portions of a statement Weishaar gave violated his confrontation rights under the Sixth Amendment. For a Confrontation Clause violation to occur, a witness must make a testimonial statement. The witness who made the testimonial statement must then be unavailable at trial and the defendant must have been deprived of an opportunity to cross-examine that witness on that statement. While the statements Weishaar made to the detective may have been testimonial, Weishaar was available at trial and was subject to cross-examination by Nolan. Although her memory was severely compromised, Nolan could cross-examine her about her lack of memory. Thus, Nolan's Sixth Amendment right to confront Weishaar was not violated."

People v. Desantiago, 2006 Ill. App. LEXIS 349 (Ill. App. Ct. 1st Dist. 2006) – "In the present case, during the course of a September 21, 2001, grand jury proceeding, Guerrero testified regarding the events of September 9, 2001. At trial, however, when he was called by the State to testify, Guerrero stated that he had recently been hit on the head with a shovel and, as a result, he recalled neither testifying at the September 21, 2001, grand jury proceeding nor the events of September 9, 2001. After the State attempted to refresh Guerrero's memory as to his prior testimony at the grand jury hearing, the Defendant's trial counsel cross-examined Defendant. During cross-examination, Defendant's trial counsel inquired whether Guerrero had been offered immunity by the State in exchange for his grand jury testimony and asked Guerrero whether he had ever helped Defendant commit any crimes. Guerrero answered Defendant's trial counsel's questions on cross-examination. The State then offered the testimony of Assistant State's Attorney Canellis, who confirmed that she witnessed Guerrero testify under oath at the September 9, 2001, grand jury proceeding. Defendant's trial counsel then cross-examined Assistant State's Attorney Canellis and the grand jury transcript was published to the jury. While Defendant concedes that Guerrero appeared as a witness at trial, Defendant cites to the United States Supreme Court opinion in *Crawford v. Washington* in support of his argument that the extent to which he was able to cross-examine Guerrero did not satisfy the confrontation clause. *** "the confrontation clause guarantees an *opportunity* for effective cross-examination, not

cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Emphasis in original.) *People v. Jones*, 156 Ill. 2d 225, 243-44, 620 N.E.2d 325, 189 Ill. Dec. 357 (1993), quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19, 106 S. Ct. 292, 294 (1985). This record confirms that Guerrero appeared and testified at trial, which permitted Defendant to cross-examine Guerrero and undermine his testimony by, inter alia, questions regarding Guerrero's criminal record; questions regarding Guerrero's inconsistent testimony; questions regarding Guerrero's drug and alcohol use on September 9, 2001; and questions regarding "the very fact that [Guerrero] has a bad memory." *Mercer*, 864 A.2d at 114 n. 4, quoting *Owens*, 484 U.S. at 559. Therefore, we cannot agree with Defendant's assertion that his rights under the sixth amendment of the United States Constitution were violated simply because Defendant was unable to cross-examine Guerrero to the extent that he wished."

State v. Miller, 918 So. 2d 350 (Fla. Dist. Ct. App. 1st Dist. 2005) – "Although the witness testified at trial, he claimed he had been hit on the head with a barbell and, consequently, could not remember the basis for his previous statement. Because the witness had a faulty memory, the trial court concluded the defendant lacked the opportunity for meaningful cross-examination. The appellate court noted that the witness was present at trial. He testified his prior statement was given under oath, he would have made an effort to accurately tell the truth while giving the statement, and the information contained in the statement would have been fresher in his memory. He further testified he could not remember the basis for his prior statement, because he had subsequently been hit on the head with a barbell. Defendant had an opportunity to cross-examine the witness as to his prior statement and faulty memory. Since the witness was present at trial and available for cross-examination, the introduction of his prior testimonial statements was permissible."

Fowler v. State, 829 N.E.2d 459 (Ind. 2005) – "Defendant argued that his wife's statements to police were inadmissible hearsay and that they were the only evidence supporting his conviction. The supreme court found that the statements were properly admitted as an excited utterance because they were made only 15 minutes after the officer was dispatched and the wife was still under the stress of the event. Defendant also argued that the officer's testimony reporting his wife's statements violated the Confrontation Clause. Defendant contended that he did not have an opportunity to cross-examine his wife because she refused to answer questions from defense counsel on cross-examination. The supreme court held that defendant forfeited his rights to confrontation by failing to request an order directing his wife to respond. By choosing to allow his wife to leave the witness stand without challenging her refusal to answer questions and then choosing not to recall her to the stand after the admission of the officer's testimony, defendant's right to further confrontation was forfeited."

Johnson v. State, 878 A.2d 422 (Del. 2005) – When a witness testifies and is subject to cross examination, the fact that the witness has lack of memory (whether believable or not) does not violate *Crawford* because the defense attorney may cross examine the witness on the lack of memory. *Crawford* does not require an effective cross examination, just the opportunity for cross examination.

People v. Bueno, 829 NE2d 402 (Ill App Ct 2005) - "The witness (who admitted having lent the gun used in a drive-by shooting) originally implicated as the shooter a person who was incarcerated at the time. When the witness was being questioned about another matter, he gave a second statement to police, and this led to defendant's arrest. The witness appeared at defendant's

trial, but resisted answering questions about the second statement, and the defense did not raise the matter on cross-examination. The appellate court held that there were no Confrontation Clause issues regarding substantive admissibility of the second statement, because the witness was there at trial, and could have been cross-examined on the subject.” No *Crawford* violation.

People v. Martinez, 810 N.E. 2d. 199 (2004) – Witness could not recall a written statement she made after witnessing a crime. Prior inconsistent statement hearsay exception (FRE 801(d)(1)) allowed admission of the written statement as a result of witnesses lapse in memory. No *Crawford* violation since witness was available for cross examination. “Our Supreme Court consistently has held that judicial opinions announcing new constitutional rules applicable to criminal cases are retroactive to all cases – such as this one – pending on direct review at the time the new constitutional rule is declared.” This case can be cited for under PA Rule 803.1 inconsistent statement by witness arguments.

State v. Williams, 889 So.2d 1093, 1099-1100 (La.App. 5 Cir. Nov. 30, 2004) – “when called by the State, Arvel Gurganus refused to be sworn in and asserted his Fifth Amendment privilege refusing to testify even if the court granted the motion to compel his testimony.FN8 The State argued that the defendant could not assert a Fifth Amendment privilege because he had already been convicted but, regardless, could be compelled to testify under penalty of contempt, after being given testimonial immunity, except for perjury.FN9 The trial court found that Gurganus was immune from prosecution and compelled him to testify. When Gurganus refused to testify, the trial court allowed the State to question him before the jury about his refusal to testify and his statement to the police. Gurganus relented and did answer questions, insisting that *1100 he did not give a statement to the police, had no knowledge about the questions being asked by the prosecutor, and that the State had the ‘wrong person.’” – holding that because this conduct meets the standard for unavailability under LSA-C.E. art. 804, therefore admission of witness's prior statement to police violated *Crawford* – holding narrowed by State v. Davis, 128 So. 3d 1162, 1163-69 (La. App. 5th Cir. 2013) (“the witness in *Williams* denied giving a statement to the police whereas the witness in the present case only testified she could not remember giving a statement...”)

Clark v. State 891 So.2d 136 (Miss. 2004) – “¶ 16. Similarly, Clark's accomplice, Barnes, unquestionably gave a testimonial statement to Officer Rusty Keys regarding the armed robbery of the Amoco. Although Barnes initially took the stand at trial, he promptly informed the trial court that he would not testify. After deliberation by the trial court, Officer Keys was allowed to read Barnes's statement to the jury in spite of Clark's objection. Consequently, Clark was not afforded an opportunity to cross-examine Barnes. This is the very kind of violation that *Crawford* seeks to abolish. Therefore, the trial court erred in admitting Barnes' testimonial statement where and Clark lacked an opportunity for cross-examination of Barnes.”

Child Declarant Testifies: Loss of Memory / Freezes on the Stand / Refuses to Answer
(see also preceding section)

As in some other areas of *Crawford* jurisprudence, there is sometimes a double standard, with prior statements more readily admitted when the forgetful / uncooperative witness is adult.

NOTE: The Second Division of the Illinois Appellate Court declared: "The issue presented by the admission of hearsay is constitutionally identical in a child sex abuse case and a murder case, and the response of the sixth amendment is identical in both types of cases." *People v. Garcia-Cordova*, 963 N.E.2d 355, ¶ 66 (Ill. App. Ct. 2d Dist. 2011). This might sound like boilerplate commitment to equal justice under law, but many courts effectively hold just the opposite, and a few do so openly, such as *State v. Moreno-Garcia*, 260 P.3d 522, 527 (Or. Ct. App. 2011).

In re N.C., 105 A.3d 1199 (Pa. 2014) – sexual abuse of 3-year-old, who was 4 at time of hearing – "A.D.'s inability to speak and physical recoiling simply is not of the ilk of the witnesses in the caselaw to which the Commonwealth cites who either could not remember certain details or refused to cooperate with counsel. As such, the Superior Court correctly determined that the juvenile court improperly deemed A.D. to have been available for cross-examination" – [NOTE: Adults who refuse to answer are "available," but not children who do the same thing. How about adults with developmental disabilities – to which "ilk" do they belong? Lesson to Pennsylvania child abuse prosecutors: teach your victims to recite the code phrase "I don't remember" whenever they get overwhelmed.]

State v. Graham, 148 So.3d 601 (La. App. 1 Cir. 7/3/14) – "the victim was called to the stand at trial. At that time, she was nine years old. She had no idea why she was in court and did not recognize the defendant in court. She also did not remember what had occurred when she was four years old and did not remember giving a recorded statement." – affirming trial court's ruling that "there was no confrontation clause violation in admitting a prior recorded statement of a witness, where the witness was produced at trial, even when the witness had a complete lack of memory of the prior events."

People v. Kennebrew, 2014 IL App (2d) 1211, 69383 Ill.Dec. 57, 13 N.E.3d 808 (Ill. App. 2014) – "[¶ 35] We find a significant difference between *Learn*, where the witness answered nothing more than preliminary questions,³ and this case, where D.C. either did not remember or did not know the answers to some, but not all, questions posed to her about the alleged offenses. Defendants such as defendant here should not rely on *Learn* beyond the situation that *Learn* addressed: the situation where a child-witness, though physically present at trial, failed to provide any testimony regarding the alleged offenses—and, importantly, 'any testimony' may include testimony to a lack of memory. ... ¶ 38 We make a critical distinction between whether a witness provided 'testimony' under section 115–10(b)(2)(A) and whether a witness was 'available' for purposes *819 **68 of the confrontation clause. ... Generally, if a witness physically appears, takes the stand under oath, and willingly answers counsel's questions, that witness is 'available' for cross-examination for purposes of the confrontation clause."

U.S. v. Vazquez, 73 M.J. 683 (A.F. Crim. App. 2014) – "We conclude that AM was present for trial and was subject to cross-examination. She took the stand, took the oath in a fashion appropriate for children, and was subject to questioning. She did not refuse to answer questions, cry so hard she was unable to answer, or otherwise make herself 'not present.'"

In re Brandon P., 381 Ill.Dec. 501, 10 N.E.3d 910 (Ill. 2014) – explicitly adopting a double standard, applicable only to cases involving crimes against young children, by merging a statutory inquiry into the constitutional analysis – "*Stechly* held that fear and youth are factors to be considered by a court in determining whether a child witness is unavailable." – thus a child can simultaneously appear for cross-examination and be unavailable for cross-examination

In re Brandon P., 372 Ill.Dec. 809, 992 N.E.2d 651, 664-67 (Ill. App. 4th Dist. 2013), harshly criticized but ultimately affirmed on harmless error grounds by In re Brandon P., 381 Ill.Dec. 501, 10 N.E.3d 910 (Ill. 2014) – "M.J. was present for cross-examination but did not answer any questions about the events which were the subject of her statements to Hogren because defense counsel did not ask M.J. any questions about those events. Despite M.J.'s apparent unwillingness or inability to testify on direct examination about these events, M.J. "appeared" for cross-examination at trial within the meaning of the confrontation clause. M.J. appeared for cross-examination because defense counsel could have cross-examined her but chose not to do so. M.J.'s failure to testify about her statements to Hogren on direct examination does not relieve respondent of his obligation to cross-examine M.J."

In re N.C., 2013 PA Super 229, 74 A.3d 271, 272-78 (Pa. Super. 2013), reargument denied (Oct. 1, 2013), appeal granted (March 7, 2014) – "Thus, [4-year-old] A.D. refused to testify about the incident *on direct examination* and eventually was unable to provide *any* response to the prosecutor's questions. Based upon the record before us, we conclude that the juvenile court improperly deemed A.D. 'available' for purposes of the Sixth Amendment. The record simply does not support a determination that A.D. was available for cross-examination by defense counsel."

State v. Williams, 400 S.W.3d 904 (Mo. Ct. App. 2013) – "Victim [7 at time of offenses] was present at trial, took the stand, and answered questions. She also testified about some of the allegations. Although she demonstrated emotional difficulty, and, at one point refused to retake the stand, she did return to the stand, and Defendant's attorney was offered the opportunity to ask her questions face to face. Counsel chose not to conduct cross-examination. These facts show Victim testified at trial and was available for cross-examination regarding both her in court testimony and questions about her testimony contained in Exhibit 1, the previously videotaped statement of Victim at the Child Advocacy Center. Consequently, the admission of State's Exhibit 1 did not violate Defendant's rights under the Confrontation Clause."

State v. Vallo, 117 So. 3d 268, 268-281 (La.App. 2 Cir. 2013), rev'd by State v. Vallo, 131 So. 3d 835 (La. 2014) — the since-reversed opinion had effectively held that *Fensterer*, 474 U.S. at 20, and *Crawford's* note 9 do not apply in child abuse cases in Louisiana – the Supreme Court decision was, however, based on procedure, not the merits

Maurer v. State, 320 Ga. App. 585, 740 S.E.2d 318 (Ga. Ct. App. 2013) – child testified but refused to answer questions because, she said, the family had forgiven the molester – "The Supreme Court of Georgia has recently held that to comport with the Confrontation Clause, the child whose statements are at issue must actually testify at trial. [cite] But **[**323]** former OCGA § 24-3-16 'does not require the child to corroborate the hearsay testimony.' ... Moreover, we find no authority requiring that V. G. be compelled to testify about the incident." – no violation

State v. Cameron M., 307 Conn. 504, 55 A.3d 272 (Conn. 2012) – "[*513] At trial, the victim, who was then six years old, testified that she remembered the interview taking place, but not its content,¹² and did not remember anything from when she was three years old, going to the defendant's house, wearing diapers or 'playing any games' with the defendant. She further testified that she remembers the defendant hugging and kissing her on her head, but not any

place else. She also testified that no one 'bites' her and that the defendant is a 'nice daddy' who has never been a 'bad daddy.'¹³ The defendant elected not to cross-examine the victim. ... We agree with the state and conclude that the victim was available at trial for cross-examination as contemplated by *Crawford*."

People v. Stackhouse, 2012 COA 202, __ P.3D __, 2012 Colo. App. LEXIS 1912 (Colo. Ct. App. 2012) – "[¶ 28] Here, M.A. testified at trial regarding the same abuse that was described by the other witnesses. She was available for cross-examination and, notwithstanding her inability to remember having told others about the incidents, defendant in fact conducted an effective cross-examination of her. Defendant's rights to confrontation, to due process, and to a fair trial were not violated."

State v. Toohey, 2012 SD 51, 816 N.W.2d 120 (S.D. 2012) – child victim had difficult time testifying, but got through it without completely shutting down – "[¶ 17] Here, K.M. did more than simply appear in court. She was able to testify about when and where the incidents with Toohey took place, the details leading up to the rape, and what was said. ... K.M. responded to every question. Toohey's counsel chose not to ask questions about penetration. ... We conclude that K.M. was available for cross-examination, and thus Toohey was not denied cross-examination under the Confrontation Clause."

People v. Sundling, 358 Ill.Dec. 492, 965 N.E.2d 563 (Ill. App. Ct. 2d Dist. 2012) – "We adhere to the rationale of *Garcia-Cordova II* and determine that the memory-loss rule applies to M.D.B. as well because he could not recall some of the details of his encounter with defendant. ... The key inquiry is whether M.D.B. was present for cross-examination and answered questions asked of him. Because he was present for cross-examination and answered questions, the confrontation clause placed absolutely no constraints on the use of M.D.B.'s prior statements to [Detective] Plant. ... For purposes of the confrontation clause, because M.D.B. "appeared" for cross-examination at trial within the meaning of *Crawford*, any of his prior statements offered at trial was a constitutional nonevent."

People v. Garcia-Cordova, 963 N.E.2d 355 (Ill. App. Ct. 2d Dist. 2011) – "Thus, the United States Supreme Court and the Illinois Supreme Court have squarely held that a witness's memory loss does not implicate the confrontation clause. We conclude that our supreme court in *Kitch* did not hold otherwise... In the present case, C.R. answered the questions put to her either verbally or with a head shake except for the question of what defendant's hand was doing, to which she made no response. Her answers that she did not recall why she spoke with Kruschwitz and did not recall anything happening in her bedroom or on the couch place this case within the *Fensterer-Owens-Flores-Sutton* doctrine. ... [W]e believe that those cases all stand for the broader principle that the confrontation clause is not implicated where a hearsay declarant is present at trial and subject to unrestricted cross-examination. Memory loss can occur on a continuum. We do not have to decide at what point it may become a denial of the right of confrontation, because in the instant case, C.R. testified in enough detail that she could have been cross-examined."

People v. Clark, 52 Cal. 4th 856, 927-928, 261 P.3d 243, 131 Cal. Rptr. 3d 225 (Cal. 2011) – "Defendant acknowledges Angie's presence at trial, but points out that she could not remember the interview with Dr. Fisher. ... defense counsel cross-examined Angie extensively and elicited from her that she could not remember various details of the crimes. Her inability to recall making

the statement to Dr. Fisher was a factor for the jury to consider in determining the weight to give that evidence, but did not render its admission a violation of the confrontation clause."

In re M.H.V.-P., 341 S.W.3d 553, 553-557 (Tex. App. El Paso 2011) – high school classmate of juvenile delinquent – "Accordingly, although L.C. could not remember the details of her prior written statement [to school security officer], because she was present and testifying at the time her statement was admitted, she was not 'absent' for Confrontation Clause purposes. [cite] Therefore, despite the testimonial nature of her statement, we hold that the Confrontation Clause was not implicated in this case."

State v. Biggs, 333 S.W.3d 472, 475 (Mo. 2011) – "Biggs admits that his son was available to testify, but argues that he was 'unavailable' because of his testimony that "he could not remember," "it did not happen" or "he did not know" to all essential elements of the offense. Biggs argues that because the boy was essentially unavailable, Biggs was denied his opportunity for meaningful cross-examination of his son and, therefore, the admission of the section 491.075 testimony violates the confrontation clause. ... Because the child was on the stand, answered Biggs' attorney's questions and was cooperative, the boy was available. Superficially, of course, the boy's testimony at trial was favorable to his father, but the jury obviously did not believe it. In any event, the evidence did not violate the confrontation clause."

Conn v. State, 300 Ga. App. 193, 685 S.E.2d 745, 2009 FCDR 3110 (Ga. Ct. App. Sept. 23, 2009) – "On direct examination, Conn's daughter answered general background questions but gave primarily non-verbal responses -- nodding her head "yes" or shaking her [*4] head "no" -- to more specific questions concerning the molestation. The state tried various ways of eliciting verbal responses, including allowing the girl to take a short break, but with limited success. Then the following exchange occurred: State: Well, I don't have any more questions, but [defense counsel] may have a couple of questions, okay? [¶] Witness: (Whereupon, witness nods head affirmatively.) [¶] Defense: No questions, your Honor. ... Conn's daughter was made available for cross-examination at trial, but counsel chose not to question her. fn6 Under these circumstances, the court did not abuse its discretion when it admitted the video recording of the girl's statement into evidence."

People v. Learn, 396 Ill. App. 3d 891, 919 N.E.2d 1042, 336 Ill. Dec. 117 (Ill. App. Ct. 2d Dist. 2009) – "The State did call K.O. [4 years old at time of abuse] as a witness. However, our review of K.O.'s 'testimony' leads us to conclude that she did not testify pursuant to section 115-10. It took 10 pages of questioning before K.O. even admitted that a person named Jimmy existed; the only information that K.O. gave about Jimmy was that he was the husband of K.O.'s Aunt Alberteeta and that K.O. did not like Jimmy, although she did not know why. After a few more pages of questions, during which K.O. was asked about going to the police station and whether she had been asked some questions there, K.O. put down her head and began to cry. After a short recess, the State asked whether K.O. felt better. After K.O. responded that she did not know, the State informed the court that it had no more questions. ... As in the case before us, there was nothing for defense counsel to cross-examine; the victim did not confront the defendant and accuse him of anything." – 2-1 decision [NOTE: The *victim* has to confront the *defendant*?!?!] [Note, too, the self-contradiction: the victim provided testimonial hearsay, the equivalent of testimony, as a "witness against" the perpetrator, with sufficient prejudicial force to justify overturning the jury's verdict – and at the same time, she didn't accuse the defendant of anything.] – **In re Brandon P., 372 Ill. Dec. 809, 992 N.E.2d 651, 664-67 (Ill. App. 4th Dist.**

2013), *aff'd on harmless error grounds*, 381 Ill.Dec. 501, 10 N.E.3d 910 (Ill. 2014), refers to *Learn* as "a case that much of the Illinois judiciary has distanced itself from"

People v. Bryant, 391 Ill.App.3d 1072, 330 Ill.Dec. 678, 909 N.E.2d 391 (Ill. App. 4 Dist. Jun 17, 2009) –

People v. Sharp, 391 Ill.App.3d 947, 330 Ill.Dec. 949, 909 N.E.2d 971 (Ill. App. 4 Dist. Jun 26, 2009) –

People v. Kitch, 392 Ill.App.3d 108, 333 Ill.Dec. 508, 915 N.E.2d 29 (Ill. App. 4 Dist. Jun 25, 2009), *aff'd* 239 Ill.2d 452, 347 Ill.Dec. 655, 942 N.E.2d 1235 (Ill. 2009) –

These three child sexual abuse cases all hold that the victim "appeared for cross-examination" despite various lacunae or shortcomings in their testimony. All three opinions are exhaustive. But see *Learn*, above, which reaches the opposite result, demonstrating how arbitrary and unpredictable these rulings are (or, if you prefer, how "fact-dependent").

Yanez v. Minnesota, 562 F.3d 958 (8th Cir. Apr 15, 2009) – "Yanez claims that despite the fact that L.P. physically took the stand, she was "unavailable" as a witness for constitutional purposes under clearly established Supreme Court precedent because she lacked sufficient memory to allow for "effective" cross-examination. ... As discussed above, L.P. appeared for cross-examination at trial. And she was more than just physically present: she took the oath, took the stand, and was subject to questioning. ... Yanez's cross-examination provided him an opportunity to remind the jury of L.P.'s inability to recall the abuse or any details related to the criminal acts and thus call into question her reliability."

Cookson v. Schwartz, 556 F.3d 647 (7th Cir. Feb 23, 2009) (habeas) – "Mr. Cookson submits that the admission of [8- or 9-year-old] A.C.'s statements to Wiese and Gonzalez violated the Confrontation Clause because A.C. could not remember making the statements--or, indeed, ever speaking to Wiese and Gonzalez at all--and therefore he could not cross-examine her about them. He relies upon *Crawford*... Mr. Cookson submits that, although A.C. testified at trial, she was not 'available,' for Confrontation Clause purposes, because she did not remember making the statements and therefore could not be cross-examined about them. ... To the extent that A.C.'s testimony at trial was consistent with her testimony in her statements to Wiese and Gonzalez, cross-examination on the trial testimony--which Mr. Cookson had a full opportunity to conduct--was effectively cross-examination on the hearsay statements as well. And to the extent that her testimony was inconsistent with her earlier statements, Mr. Cookson was free to point out the inconsistencies to the jury. In sum, Mr. Cookson had ample opportunity to confront his accuser at trial."

State v. Nyhammer, 197 N.J. 383, 963 A.2d 316 (N.J. Feb 03, 2009) – "We now hold that the admission of Amanda's videotape statement did not violate either the federal or state Confrontation Clause. Although defendant had the opportunity to cross-examine Amanda on the core allegations contained in that statement, he declined to do so at trial. However unresponsive Amanda may have been on direct-examination, as contended by defendant, he had the opportunity to question her on the inculpatory statements and descriptions she gave in her taped interview. ... defense counsel chose not to cross-examine Amanda about the core accusations in the taped interview, perhaps for good reason, fearing that such questioning might have elicited the type of damning responses that eluded the prosecutor on direct-examination. That counsel decided to forgo critical cross-examination because of Amanda's unresponsiveness to many

questions on direct does not mean that defendant was denied the opportunity for cross-examination."

State v. Perry, 275 S.W.3d 237 (Mo. Jan 27, 2009) – "Victim did not simply sit silent on the stand. While she was reluctant to testify at first, after some preliminary questioning and a break, she did repeat most of her allegations... Victim was subjected to cross-examination... While no doubt defense counsel had to weigh his desire to engage in such questioning with his desire not to bully a child witness and not to repeat her most damning allegations, this is the type of strategy decision that occurs in any cross-examination. In the end, 'the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witnesses' demeanor [all contribute to satisfying] the constitutional requirements.'"

In re Rolandis G., 902 N.E.2d 600, 327 Ill.Dec. 479, 232 Ill.2d 13 (Ill. Nov 20, 2008), rehearing denied (Jan 26, 2009) – 6 or 7-year-old victim of oral rape by older boy – original juvenile proceeding predated *Crawford* [!!] – "The matter proceeded to trial and Von was called as the first witness. Von answered a few preliminary questions about himself and made an in-court identification of Rolandis, stating that Rolandis was someone he had known from the neighborhood. However, when asked about events that occurred on June 25, 2002, Von resolutely refused to respond. Even after he was given a short recess to speak to his mother and a child advocate, Von could not bring himself to answer questions about the allegations concerning Rolandis. The court offered defense counsel the opportunity to cross-examine Von, but she declined to do so." – state conceded child was unavailable for cross-examination – post-*Crawford*, an ill-advised concession

State v. Scott, 2008 WL 4662487 (Ariz. App. Div. 1 Oct 16, 2008) (unpub) – "We decline defendant's request that we find the victim was 'unavailable due to her lack of memory.' Although the victim could not remember the dates of the incidents, she did testify that defendant had engaged in specific sexually inappropriate behavior, which she described, and she responded to each of defendant's questions on cross-examination. On this record, we find that the victim was not unavailable..."

Mishler v. State, 894 N.E.2d 1095 (Ind. App. Oct 23, 2008) – "At a jury trial that commenced on September 24, 2007, B.P. testified that Mishler 'put his finger in [her] private and licked it.' [cite] However, on cross-examination, B.P. testified that the alleged incidents "may have been a dream." [cite] B.P. further testified that Passerallo [her mother and Mishler's fiancée] talked to her on multiple occasions about the possibility that she had only dreamed about Mishler's actions. ... 'the feigned or real absence of memory is itself a factor for the trier of fact to establish, but does not render the witness unavailable.'"

People v. Marquez, 2008 WL 4194011 (Cal. App. 3 Dist. Sep 12, 2008) (unpub) – "Defendant argues the MDIC recordings should have been excluded because N.'s 'large memory lapse' denied him the right to a meaningful and effective cross-examination and violated his right to confrontation. ... loss of memory provides no basis for a confrontation clause argument."

People v. Nugent, 2008 WL 4062073 (Cal. App. 4 Dist. Sep 03, 2008) (unpub) – "Jane's inability to recollect her statements or conversations with others, whether real or feigned, did not deprive defendant of his ability to cross-examine." – [NOTE: Jane was 6 or 7 at time of disclosure.]

In re T.T., 892 N.E.2d 1163 323 Ill.Dec. 171 (Ill.App. 1 Dist. Jul 25, 2008) – the latest opinion in a case involving a 2002 (*i.e.*, pre-*Crawford*) juvenile adjudication – "Here, G.F. [7 at time of incident] responded to general questions about her family and school, demonstrated she knew the difference between the truth and a lie, identified respondent in court, and explained how she came to be at his home on the dates of the alleged assaults. However, as soon as the questions became more specific about the assault, G.F. stopped answering questions." – judge refused to permit leading questions – apparently the defense did not attempt cross-examination, but it's not clear if that was because of a ruling from the judge – in unclear opinion, court apparently equates unavailability under confrontation clause with the Rule 804 standard and finds child not available for cross-examination

U.S. v. Russell, 66 M.J. 597 (Army Ct. Crim. App. Apr 29, 2008) – 6-year-old answered some questions, then said she was scared and refused to answer specific questions about sexual abuse – "We note, without resolving, the possibility MR's physical presence and limited testimony at trial satisfied appellant's right to confrontation under the Sixth Amendment." – but trial court ruling that child did not appear for cross-examination seemingly reviewed under abuse of discretion standard: "Since there is no absolute line as to what constitutes sufficient cross-examination for a child witness, we will not disturb the decision of the military judge." – [NOTE: There is no doubt that an adult witness who answered some questions but then clammed up for fear of retaliation, or a snitch jacket, would be considered available for sixth amendment purposes.]

State v. Simpson, 286 Conn. 634, 945 A.2d 449 (Conn. Apr 29, 2008) – "defendant was not denied an opportunity to cross-examine E because she was not "functionally unavailable" under *Crawford*. [FN19] Indeed, we note that the defendant cross-examined E extensively about her memory and perception, eliciting facts including her belief in Santa Claus and his elves, her vision, and her understanding of the difference between truth and lies, and fantasy and reality, and also that she takes two medications for her "temper." With respect to the specific allegations, the defendant also cross-examined E extensively and elicited testimony that she had never seen a man or boy without his clothing on, and that she did not remember participating in the videotaped interview or making the accusation that the defendant had touched her with his penis, that she got in trouble when she was younger for touching herself, and that she was not afraid of the defendant. Finally, the defendant was able to utilize this information in his closing arguments to the jury. Accordingly, we conclude that the defendant had an ample opportunity to cross-examine E effectively, and, therefore, his confrontation clause rights were not violated by the admission into evidence of the videotaped statement."

People v. Clarke, 2008 WL 1063349, *2+ (Mich.App. Apr 10, 2008) (unpub) (pretrial appeal) – "The victim [defendant's daughter, 16 at the time of the prelim] was present at the preliminary examination and did testify. She responded to many of the prosecutor's questions. She testified that she wrote the statement and that its contents were true. She did not wish to testify regarding the 'unusual things' that occurred between her and her father. She simply refused to answer questions regarding this subject. She clearly denied, however, that defendant put his penis inside her vagina or his mouth on her vagina. Defendant made no attempt to question the victim. Defendant had an opportunity to probe the reasons for the victim's refusal, to test her memory, or to uncover prejudices or biases. He did not take this opportunity. There is no basis for concluding that defendant's opportunity to cross-examine the victim was deficient when no attempt to even define the contours of her refusal to cooperate was made. The victim was sufficiently available

for cross-examination to satisfy the Confrontation Clause." [NOTE: Does *Crawford* apply at a preliminary hearing? That seems assumed, perhaps only because the ruling will also dictate what happens at trial.]

State v. Dodgen, 2008 WL 699269 (Wash. App. Div. 1 Mar 17, 2008) (unpub) – "Contrary to Dodgen's suggestion, a child witness who is unable to remember relevant events or prior disclosures is not unavailable for confrontation clause purposes under *Crawford*."

People v. Pull, 2008 WL 607305, *2+ (Cal.App. 5 Dist. Mar 06, 2008) (unpub) – victim, 6 at time of molestation, was initially too scared to ID defendant, and said the molestation occurred "ten hundred times" – defense argued she was unavailable to cross because of her "magical thinking" – court rejects argument – "[T]he record illustrates that she was an understandably fearful witness, not that she was an incompetent or unavailable witness."

State v. Sullivan, 217 Or.App. 208, 174 P.3d 1095 (Or. App. Dec 26, 2007), review denied, 344 Or. 539, 186 P.3d 285 (Or. May 07, 2008) – abuse victim, 12 at time of trial, "testified that defendant had touched her with his hands while in various locations, including in her bedroom and in a van. She said that defendant touched her in a 'place where there's clothes normally.' She did not audibly respond, however, to questions about precisely where she had been touched or what she was wearing at the time. She testified that she was not afraid to answer the questions and that she was not suffering from an inability to remember her answers. But, when pressed for details about the events at issue, the victim did not respond. [¶]

Defense counsel cross-examined the victim. She readily answered questions about her family, about her memories of various family events, and about her activities at school. She answered questions about defendant, in particular, and various activities she engaged in with him. She testified that she did not recall a conversation with defendant about inappropriate touching. When questioned about whether 'something bad' happened to a classmate of hers, she replied, 'I don't really want to talk about it, because that's not anybody in here's business.' [¶] On redirect, the state asked the victim whether she was having 'a hard time talking about these things,' and she replied 'yeah.' There was no further examination of the victim. ... According to defendant, the testimony was inadmissible because the victim's testimony was so meager as to render her effectively unavailable for cross-examination. ... In this case, defendant was given a full and fair opportunity to cross-examine the victim about her testimony and about her lack of memory about certain specifics and then to argue that, because of the nature of her answers, 'scant weight' should be given to the testimony. *Fensterer*, 474 U.S. at 20. The fact that she chose to respond selectively to the questions does not render her 'unavailable' under either the state or federal constitution."

State v. Homz, 2007 WL 4322983 (Wis. App. Dec 12, 2007) (unpub) – "[¶ 19] Homz further contends that he could not effectively cross-examine the victim because of her young age and the fact that she testified that she forgot about 'the gross thing' that happened on the couch. ... [¶ 24] Here, the victim testified at trial and was subject to cross-examination, the crux of a defendant's right to confrontation." – claimed lack of memory does not change that

State v. Villanueva, 2007 WL 4106261 (Minn.App. Nov 20, 2007) (unpub) – "Appellant argues that '[adult eyewitness] Dawson had no memory whatsoever of the sexual act' [due to alcohol intoxication] and that *Crawford* requires that a witness must not only be present in court but must also be able to defend and explain the statement. Appellant misconstrues *Crawford*. ...

[W]here an out-of-court declarant appears for cross-examination, 'the Confrontation Clause guarantees only an opportunity for effective cross-examination' and the fact that the witness suffered a lapse in memory does not deny a defendant that opportunity."

State v. Noah, 284 Kan. 608, 162 P.3d 799 (Kan. Jul 27, 2007) – "The State called [12-year-old victim] T.C. as a witness at the preliminary hearing. The trial court permitted T.C. to have her mother with her while she testified. The prosecutor questioned T.C. only about the first incident she reported to Portenier. During cross-examination regarding some of the alleged incidents, T.C. became emotional. The district court ordered two recesses to allow T.C. to compose herself. Nevertheless, the cross-examination was cut short when T.C. began crying and was unable to continue testifying." – [NOTE: Later, the opinion specifies that "T.C. testified in accordance with Portenier's testimony regarding four of the seven specific incidents, even though she could not remember one of the incidents. However, Noah [*i.e.*, defendant] did not have an opportunity to inquire about T.C.'s motives for making the accusations against him."] – "Following T.C.'s preliminary hearing testimony, the State moved to disqualify T.C. as a witness pursuant to K.S.A. 60-460(dd). The trial court continued the preliminary hearing and ordered a psychological evaluation of T.C. to determine the probability, nature, and extent of any psychological injury she could suffer if she testified again. Noah objected to the State's motion to declare T.C. unavailable as a witness. [¶] Marie Shields, an evaluator with the High Plains Mental Health Center, interviewed T.C. and concluded that T.C. would not be able to testify without "freezing up." Based on this evidence, the district court ruled that T.C. was unavailable as a witness. Concluding that the statements T.C. made to her brother, her mother, and Portenier were reliable and not induced by threats or promises, the district court held that T.C.'s statements to all parties were admissible pursuant to K.S.A. 60-460(dd). ... Although the State concedes that T.C.'s hearsay statements to Portenier and Shields were testimonial under *Crawford*, 541 U.S. 36, the State argues that the statements were admissible because Noah had a prior opportunity to cross-examine T.C. during the preliminary hearing. ... Although *Crawford* requires an opportunity for cross-examination before hearsay can be admitted, it provides no guidance for how much cross-examination is required to afford the defendant an adequate opportunity. ... Our review of the entire record under these specific facts leads us to disagree with the State's argument that Noah had a sufficient opportunity to effectively cross-examine T.C. However, in reaching this conclusion, we also reject Noah's argument that the cross-examination is not sufficient until defense counsel determines that it is or unless it is completed. Rather, we adopt the case-by-case approach used by the *Acosta* and *Wilmore* courts."

State v. Broecker, 2007 WL 840498, n. 4 (Wis. App. Mar. 21, 2007) (unpub) – "There is no confrontation issue here because the girls testified at the trial and were subject to cross-examination." – even though 9-year-old flatly denied events had occurred or that she had told anybody about them, and 6-year-old largely denied everything

State v. Glave, 2007 WL 274795, *3 (Wash. App. Div. 2 2007) (unpub) – "But *Crawford* is not implicated by the use of out-of-court statements when the declarant testifies and is available for cross-examination at a trial. 541 U.S. at 59 n. 9. This is true even if the declarant does not remember making the out-of-court statement and even if she does not remember the substance of her statement. *State v. Price*, 158 Wn.2d 630, 650, 146 P.3d 1183 (2006)."

State v. Nyhammer, 396 N.J. Super. 72, 932 A.2d 33 (N.J. Super. A.D. 2007), reversed, 197 N.J. 383, 963 A.2d 316 (N.J. Feb 03, 2009)

State v. Hagans, 2006 Wash. App. LEXIS 2474 (Wash. Ct. App. 2006) – “During defendant's trial, the [13-year-old] victim suffered a physical and emotional breakdown on the stand after over two hours of cross-examination. The next day, the victim's counselor stated that she had no memory of being on the stand or of the breakdown. The trial judge acknowledged concern over her state and said that she had definitely gone over the edge, and that it would not be helpful to put her over the edge again, so they should seek alternative ways of addressing the situation. An offer of proof consisting in part of the victim's testimony in a prior trial was read into evidence. Defendant was convicted of second-degree child rape. On appeal, the court found that while defendant's right to cross-examination under Wash. Const. art. 1, § 22 was limited, it was not violated. Defense counsel included those areas that he sought to cover in cross-examination in his offer of proof. The trial court gave defendant ample opportunity to cross-examine the victim. In almost three hours, defense counsel succeeded in pointing out numerous inconsistencies in the victim's testimony and past statements, and the victim admitted that she had lied many times in the past. Any error was harmless.”

State v. Price, 146 P.3d 1183 (Wash. 2006) – “Defendant was convicted for sexually abusing the four-year-old victim, who attended a licensed day care run by defendant's wife. Defendant appealed, arguing that because the victim testified that she could not remember the relevant events or her disclosures to her mother and a detective, she was unavailable for confrontation clause purposes, and therefore the admission of her prior statements was improper because defendant had no prior opportunity to cross-examine the victim. The appellate court disagreed and affirmed. On appeal, the court affirmed defendant's convictions, holding that the admission of the victim's out-of-court statements did not violate defendant's rights because: (1) the victim was physically present in the courtroom; (2) she confronted defendant face-to-face; (3) she was competent to testify and testified under oath; (4) the prosecutor asked her directly if defendant had touched her and she asked the victim to tell the jury what she had said to her mother and the detective; and (5) the defense retained the full opportunity to cross-examine her and called attention to her lack of memory in closing.”

Commonwealth v. Cesar, 2006 PA Super 328, 911 A.2d 978 (Pa. Super. Ct. 2006) – “The trial court did not abuse its discretion in finding that the victim's lack of memory on some subjects did not make her unavailable under Pa. R. Evid. 804(a)(3) because she was able to answer questions about the time and place of the incident and her feelings and actions before, during, and following the incident. Defendant was not denied his Sixth Amendment confrontation rights because he had opportunities to cross-examine the victim. Her hearsay statements were properly admitted under the tender years exception of 42 Pa.C.S. § 5985.1.”

Pantano v. State, 138 P.3d 477 (Nev. 2006) – The 7-year-old child victim testified at preliminary hearing and trial but was unable to testify to the sexual abuse. She answered “I don't know” to many questions and the defendant alleged a lack of opportunity to cross examine. Statements that the child made to her parents and a detective were then admitted at trial. The appellate court found that the defense had an opportunity to cross examine and, therefore, there was no *Crawford* violation in admitting the hearsay statements.

Randall v. State, 2006 Del. LEXIS 437 (Del. 2006) – “At the time of the incident that led to the adjudication, the juvenile was 14 years old. The victim was his four-year-old cousin. The victim had complained of pain to her mother, showed signs of vaginal swelling, and was taken to the

hospital. Eight days later, the victim's mother took her to a child advocacy center at the hospital where a forensic interviewer met with the victim and videotaped the interview. During that interview, the victim disclosed that the juvenile had digitally penetrated her vagina. During trial, the victim was unresponsive on the stand, and the prosecutor thereafter introduced the videotape, which the trial court accepted into evidence over the juvenile's objections. On appeal, the juvenile claimed that the family court erred in admitting the victim's out-of-court statements in violation of the tender years statute, Del. Code Ann. Tit. 11, § 3513, and in violation of his confrontation clause rights under the United States and Delaware Constitutions. The court disagreed since the juvenile had notice of the statement made by the victim and made a strategic decision not to cross-examine the victim.” “Randall contends that the State failed to substantiate fully the statements on the tape during direct, which prevented him from exercising any meaningful or effective cross-examination of the victim. *** After the victim testified on direct examination, Randall made a strategic decision to not cross-examine her. Therefore, we do not need to address the merits of this claim. One cannot make a strategic decision to not cross-examine a witness and later allege a constitutional violation occurred as a result of this very strategy.”

Phillips v. Kernan, 2006 U.S. Dist. LEXIS 8941 (E.D. Cal. 2006) – Defendant was convicted of multiple counts of child sexual abuse with seven victims. One victim, who was 7 years old at the time of trial, had no memory of the abuse and did not recognize the defendant. The foster mother testified about inappropriate sexualized behavior of the child when she was 3 years old; a police investigator testified as to his interview with the victim when she was 4 years old. The child testified at trial but had memory loss. The defense was given an opportunity to cross examine, but they passed due to her memory loss. On appeal, defendant claimed a *Crawford* violation that he was not permitted to cross-examine the child before statements by the foster mother and police investigator were admitted. “In the instant case, S.R. testified at trial. RT at 554-556. Although petitioner's counsel chose not to cross-examine her (because she understandably had no recollection of the interview or event at all), he had the "opportunity" to do so. RT at 556. Because S.R. testified at trial and petitioner had an opportunity to cross-examine her, no Confrontation Clause violation occurred by the admission of her prior statements.”

United States v. Ricks, 166 Fed. Appx. 37 (4th Cir. N.C. 2006) – “Ricks argues that even though his stepdaughter was present, he was effectively denied the right to cross-examine her because she testified with the assistance of an interpreter (after the court found her answers to its questions inaudible), and because she claimed not to remember making the accusations in question. This argument fundamentally misunderstands the Sixth Amendment's guarantee, however. ... Here, because the defendant had a sufficient opportunity to question his stepdaughter and to further develop any inconsistencies between her statements in court and her out of court accusations conveyed by other witnesses – indeed, she directly answered every question asked by his attorney – Ricks was not deprived of his rights under the Confrontation Clause.”

State v. Painter, 2005 N.C. App. LEXIS 2000 (N.C. Ct. App. 2005) – Seven year old victim testified at trial but had some memory problems. Subsequently, statements made by the child to a social worker and treating physician were admitted at trial. Defendant objected on *Crawford* grounds in that he was not able to conduct a thorough cross-examination due to memory

problems with the child. The court disagreed and held that the child satisfied *Crawford* and the Sixth Amendment by testifying and being subject to cross-examination.

In re K.R.O., 2005 Minn. App. Unpub. LEXIS 362 (2005) – Defendant, a juvenile, adjudicated on a sexual assault against a 5 year old victim, argued that although the victim testified, she was not competent to testify (in spite of the court’s ruling that she was competent) and this prevented the defense from an effective cross-examination. As such, admitting the victim’s forensic interview after her testimony violated *Crawford*. The Court disagreed and held that although the defense had a limited cross-examination, the child was competent and did testify and, therefore, admitting the forensic interview was proper under *Crawford*.

United States v. Kappell, 2005 FED App. 0333P (6th Cir. Mich. 2005) – The two child victims testified at trial pursuant to closed-circuit television. The defendant complained of a confrontation violation because during cross-examination, the children were inarticulate or unresponsive at times and should have been declared unavailable (thus precluding testimony of a psychotherapist and two physicians regarding statements made by the children). Defendant claimed there was no effective cross-examination. The Court rejected this arguments since the U.S. Supreme Court has held that “the Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”

State v. McKinney, 699 N.W.2d 471, 2005 SD 73 (S.D. 2005) – The child victim testified at trial but “did not know” or “could not remember” certain facts. Statements the child made during a forensic interview were also introduced. Defendant appealed regarding the statements to the forensic interviewer and complained that “his cross-examination was not “full and effective” because on approximately twenty occasions J.H. answered his questions indicating that she “did not know” or “could not remember” certain facts. A detailed review of J.H.’s testimony reflects that these answers were in response to five types of questions.” The court found that the child was available and was subject to cross examination and, therefore, all admissible hearsay could be admitted regardless of its testimonial nature.

Randolph v. State, 2005 Del. LEXIS 243, 2005 WL 1653635 (Del. 2005) – Defendant, who was 13 years old at the time, was charged with rape and unlawful sexual contact involving his five-year-old sister. During the trial, the victim was unable to implicate defendant and provided nonsensical responses to the questions. Held: The mere fact that the victim had difficulty answering questions and provided nonsensical responses on direct examination did not make her unavailable for confrontation clause purposes.

Yanez v. Minnesota, 2007 WL 2973839 (D. Minn. Oct 09, 2007), order withdrawn and new order issued, 2007 WL 3138639 (D. Minn. Oct 17, 2007) (unpub) (habeas) – continuation of case summarized immediately below – “At trial, the victim testified that she could not remember what she told adults about Petitioner’s actions, nor could she remember what Petitioner did to her. The trial court, apparently operating under the framework established by *Ohio v. Roberts*, 448 U.S. 56 (1980), [FN1] admitted as substantive evidence the victim’s videotaped discussions with a social worker and police regarding Petitioner’s actions. [¶] Petitioner contends that the victim’s trial testimony rendered her unavailable for meaningful cross-examination and that, under the rule announced in *Crawford v. Washington*, 541 U.S. 36 (2004), the use of her previous videotaped descriptions of the abuse violated Petitioner’s rights under the Confrontation

Clause. [FN2] U.S. Const. amend IV. However, as both the state courts and the Magistrate Judge noted, the victim did appear at trial and did take the stand. The fact that she was unable to remember salient facts does not render her an unavailable witness for purposes of a Confrontation Clause inquiry. Indeed, there is no dispute that Petitioner's attorney did cross-examine the victim, although the cross-examination did not elicit any information about the abuse other than the victim's inability to remember."

State v. Yanez, 2005 Minn. App. LEXIS 412, 2005 WL 894649 (Minn Ct App 2005) – 9 year old victim had memory lapses while testifying at trial – Held: despite her memory lapses, the victim was available and the admission of her out-of-court statements did not deny defendant his right to confrontation.

Bockting v. Bayer, 399 F.3d 1010 (9th Cir Nev 2005), rev'd by U.S. Supreme Court on retroactivity issue

People v. Harless, 125 Cal. App. 4th 70, 22 Cal. Rptr. 3d 625 (Cal App 6th Dist 2004) – A child victim was present at trial but could not remember what she had said or to whom she had said it. The prosecutor introduced the child's prior inconsistent statement describing the molestation. Held: in spite of some memory loss, child was available for cross-examination. Therefore, there was no *Crawford* violation.

People v. Rolandis G. (In re Rolandis G.), 352 Il. App. 3d 776, 817 N.E.2d 183 (Ill App Ct 2004), rev'd, 902 N.E.2d 600, 327 Ill.Dec. 479, 232 Ill.2d 13 (Ill. Nov 20, 2008), rehearing denied (Jan 26, 2009) –

People v. Warner, 199 Cal. App. 4th 331 (Cal. App. 3d Dist. 2004) - The victim was 3 years old (4 years old at the time of trial). In a forensic interview, the victim said the touching by her dad happened lots of times. The victim's mother telephoned defendant (her husband) in a phone sting and he admitted to touching the child. In an interrogation with the detective, the defendant admitted to 3 touchings. At trial, the child didn't recall the forensic interview and only admitted to one touching on the witness stand. The prosecutor moved to admit the child's statement. The court found that since the victim testified at trial and was subject to cross-examination, in spite of her lack of memory, the defendant's statement could come in as there was sufficient corpus delicti established. No *Crawford* violation.

People v. Phan, 2004 Cal. App. Unpub. LEXIS 5047, 2004 WL 1175334 (Cal. 2004) – Child victim testified at trial concerning statements she made to police officers regarding sexual assault. At trial, child victim had poor recollection regarding police interviews – *Crawford* satisfied



Part 8: Availability or Unavailability of Witness

Although *Crawford* purports to represent a return to the text of the confrontation clause, it also holds that the confrontation clause incorporates the Fed. R. Evid. 804 requirement of unavailability. It is difficult, conceptually, to see what interest other than inertia is served by this common-law addendum to the constitutional text, which hearkens back to the hearsay rule's origin as a specialized best evidence rule.

Availability or Unavailability of Witness

(see also part 7, Opportunity to Cross-Examine and Refuses to Answer)

Commonwealth v. Housewright, 470 Mass. 665, 25 N.E.3d 273 (2015) – "The doctor's medical opinion 'that the stress of testifying in court might be detrimental to her health' offered no guidance as to the likelihood that testifying **284 would have an adverse health consequence or as to the severity of the health consequence." – unavailability not shown

People v. Wood, 307 Mich. App. 485, 862 N.W.2d 7 (Mich. App. 2014) – "The prosecution moved to admit at trial [DNA analyst] Altesleben's preliminary examination testimony based on a doctor's order confining her to 'bed rest as a result of complications associated with her pregnancy.' ... We find that the trial court did not err in determining that Altesleben was unavailable..."

State v. Johnson, 2013-0343 (La. App. 4 Cir. 10/1/14), 151 So. 3d 683 (La. Ct. App. 2014) – witness Johnson had testified, subject to cross-examination, at previous trial – agent "testified that he attempted to execute a State writ of habeas corpus on Mr. Johnson, but was unsuccessful in transporting him to New Orleans from the custody of the Bureau of Prisons in Cumberland, Maryland. When Agent Jurina arrived at the federal prison on April 22, 2012, the prison was on lock-down, and he was told that Mr. Johnson was being non-compliant and argumentative. He testified that there was concern with regard to the ability to transport Mr. Johnson via airplane to New Orleans because he had the potential of becoming very aggressive. At the hearing, the State asked the trial court to take judicial notice of Mr. Johnson's behavior during the previous trial for the murder of Mr. Williams. Specifically, the court noted that Mr. Johnson had to be forcefully removed by sheriff's deputies from the vehicle to the courtroom, on the court's order, because of his hostile demeanor while on the stand and after testifying." – finding of unavailability upheld

State v. Gleason, 329 P.3d 1102 (Kan. 2014) – "we affirm the district court's determination that Thompson's refusal to testify [at trial] rendered him unavailable" – permitting use of preliminary hearing testimony

State v. Garrido, 2013 UT App 245, 314 P.3d 1014, 1021-22 (Utah App. 2013), cert. denied, 320 P.3d 676 (Utah 2014) – DV case – "¶ 17 ... We conclude that Victim was unavailable. Victim persistently refused to testify prior to trial, was resistant to service, and was absent when called. The trial court made a finding that Victim was unavailable and asked that a stand-in witness come forward to read Victim's preliminary hearing testimony. Although Victim then suddenly appeared, she did so only to shout from the gallery that she would not be testifying. A bailiff went after her when she then fled the courtroom, but she had already disappeared. ... Victim was absent for all but a brief moment of the trial, during which she refused to take the stand and then fled. It was, therefore, not error for the court to determine Victim was unavailable

because she 'refus[ed] to testify' and was 'absent from the hearing,' and on that basis to admit her preliminary hearing testimony into evidence."

State v. Tribble, 2012 VT 105, ¶ 38, ___ A.2d ___ (Vt. 2012) – "[¶ 24] The Court's conclusion that even out-of-court testimony previously subject to cross-examination by defendant may be considered at trial only if the witness is unavailable is consistent with its recognition that the significance of 'confrontation' is not limited to the interaction between, and effect on, the witness and defendant; the United States Supreme Court has repeatedly recognized that the presence of the factfinder is part and parcel of an effective exercise of the Confrontation Clause right. ... [¶ 33] Considering these cases, we cannot conclude based on the evidence in the record that Dr. Morrow was unavailable. Dr. Morrow indicated that attending the trial in person 'would be immensely inconvenient' for him and his employer, but also undisputedly indicated his willingness to return from New Zealand for the trial and that he would require a business class ticket. The State knew where Dr. Morrow was, and Dr. Morrow was willing to testify at the trial if the State made the necessary arrangements. There is no evidence that Dr. Morrow required the State to invoke any formal process to secure his attendance. The only two impediments to Dr. Morrow's testifying at the trial were inconvenience and cost. We have expressly rejected both of these as factors sufficient to support a finding of unavailability. [cites] Accordingly, we conclude that the trial court's determination that Dr. Morrow was unavailable is unsupported by the record and erroneous as a matter of law."

State v. Jones, ___ N.E.2d ___, 2012 Ohio 5677 (Ohio Dec. 6, 2012) – "we hold that even though Delores testified at trial, she was unavailable for purposes of the Confrontation Clause because Jones invoked the spousal privilege."

Knox v. State, 98 So. 3d 679 (Fla. Dist. Ct. App. 4th Dist. 2012) – "[Defendant] primarily argues that the trial court violated the Confrontation Clause by allowing the state to perpetuate the videotaped testimony of one of the three victims and present that videotaped testimony at trial. We agree with the defendant's argument... the state filed a motion to perpetuate the out-of-state victim's testimony. According to the motion, the victim informed the state that 'she is unable to [*681] travel again to Florida due to the economic hardship it would present her.' ... What is missing from the motion and affidavit is any explanation of why the state could not have remedied the out-of-state victim's alleged economic hardship. That is, the victim did not quantify the cost of her transportation, travel-related expenses, and presumed one day's lost pay, and the state did not explain why it was unable to pay those costs when various statutes allow for such payments."

People v. Torres, 962 N.E.2d 919, 919-934 (Ill. 2012) – "As the California Supreme Court's well-reasoned and scholarly opinion in *People v. Herrera*, 49 Cal. 4th 613, 110 Cal. Rptr. 3d 729, 232 P.3d 710, 716-21 (Cal. 2010), amply demonstrates, simply establishing the fact of deportation, in support of unavailability, may no longer be enough to establish that requisite for admission."

Mathis v. State, 2012 OK CR 1, 271 P.3d 67 (Okla. Crim. App. 2012) – witness said she would come from Texas, but on the day of trial didn't show up – "[¶ 23] This Court finds that the trial court did not abuse its discretion by declaring Richardson unavailable and allowing her earlier testimony to be read at trial."

Craft v. State, __ So.3d __, 2011 Ala. Crim. App. LEXIS 71, 9-14 (Ala. Crim. App. Sept. 30, 2011) – "Contrary to Craft's apparent belief, to show the unavailability of a witness no Alabama or Federal caselaw requires the State to always subpoena the witness or to prove that the witness's attendance at trial is impossible. The State is only required to make a reasonable good-faith effort to present the witness at trial."

United States v. Gabrion, 648 F.3d 307, 339-340 (6th Cir. Mich. 2011), vacated and stay granted for en banc review 2011 U.S. App. LEXIS 23290 (6th Cir. Nov. 17, 2011) – "The government made a sufficient showing regarding the unavailability of both women through its in-court representations and correspondence from their physician."

State v. Lehr, 254 P.3d 379, 383-384 (Ariz. 2011) – "A witness's 'refusal to testify . . . [makes] him 'unavailable' for Confrontation Clause purposes.'" (alterations in original)

Boatner v. State, 934 N.E.2d 184 (Ind. Ct. App. 2010) – "[fn 4] We further note that simply because A.J. did not testify does not mean she was "unavailable" for purposes of the confrontation clause. A witness is not "unavailable" simply because the witness does not take the stand. [cite] A witness is 'available' if the attendance of the witness can be obtained through subpoena or otherwise."

People v. Herrera, 49 Cal. 4th 613, 628-632, 232 P.3d 710, 110 Cal. Rptr. 3d 729 (Cal. 2010) – "when a criminal trial is at issue, unavailability in the constitutional sense does not invariably turn on the inability of the state court to compel the out-of-state witness's attendance through its own process, but also takes into consideration the existence of agreements or established procedures for securing a witness's presence that depend on the voluntary assistance of another government. (Mancusi, supra, 408 U.S. at pp. 211–213.) Where such options exist, the extent to which the prosecution had the opportunity to utilize them and endeavored to do so is relevant in determining whether the obligations to act in good faith and with due diligence have been met."

State ex rel. D. G., 40 So. 3d 409 (La.App. 4 Cir. May 27, 2010) (on remand from SCOTUS) – "On remand from the Supreme Court, D.G. again contends that the prosecution should have called J.G. as a witness and that D.G.'s confrontation rights were not adequately protected by merely having J.G. available in court for D.G. to call as a witness. However, . . . we find J.G.'s availability in court was sufficient and that it was not necessary for the prosecution to call him as a witness. In the instant case there was no 'risk of adverse witness no-shows,' and no burden was placed on D.G. to bring J.G. into court -- he was already there. Therefore, in applying the *Melendez-Diaz* rationale to the failure of the prosecution to call J.G. as a witness, we again find no violation of D.G.'s right of confrontation."

State v. Cox, 779 N.W.2d 844, 846-853 (Minn. 2010) – "In this appeal, Cox argues that the admission at trial of grand jury testimony of a potential State witness who expressed reluctance to testify at trial, was released from a subpoena, and did not testify at trial, violated his confrontation rights under the United States Constitution. We conclude that admission of the testimony was constitutional error. . . . [W]e conclude that the State failed to establish by a preponderance of the evidence that S.T. was unavailable to testify at Cox's trial for purposes of the Confrontation Clause. Because the State did not establish the unavailability predicate of the forfeiture-of-confrontation-rights test, the forfeiture-by-wrongdoing exception does not apply. . . ."

Cargle v. Workman, 2009 WL 1507539 (10th Cir.(Okla.) May 29, 2009) (unpub) (habeas) – "Luke Jones testified for the prosecution at Cargle's first and second trials. At Cargle's third trial, he refused to testify. The state trial judge conducted an in camera hearing to question Jones on his unwillingness to testify and determine his availability as a witness. Jones stated he refused to testify because the State had allegedly not fulfilled promises that motivated his earlier testimony. He refused to answer questions about the case asked by the prosecution, the defense, and the judge. The judge told Jones he could hold him in contempt for not testifying. Over defense counsel's objection, the district judge determined Jones' refusal to testify made him an unavailable witness and allowed his prior testimony, including cross-examination, to be read to the jury. ... The empty formality of specifically ordering Jones to testify is not required. [cite] Calling Jones to the stand and forcing him to refuse to testify might have provided high drama but refusing to do so did not violate Cargle's right to confront the witnesses against him."

State v. McGee, __ S.W.3d __, 2009 WL 755361 (Mo. App. E.D. Mar 24, 2009) – detailed health history of elderly victim, including medical records, sufficient to prove her unavailability

People v. Byron, 170 Cal.App.4th 657, 88 Cal.Rptr.3d 386 (Cal. App. 2 Dist. Jan 23, 2009) – DV case – "We conclude this record clearly demonstrates [victim] Sowers's unavailability at trial was not the result of the prosecution's lack of diligence, and that despite her brief appearance at the courthouse during the trial she continued to make herself unavailable as a witness. And even if Byron was not the direct cause of that unavailability, it appears he was in contact with Sowers and probably even knew where she could be located. In these circumstances, the trial court did not err by finding the unavailability requirement of Evidence Code section 240 had been met."

State v. Brown, 961 A.2d 481 (Conn. App. Jan 13, 2009) – defendant shot his brother – "At trial, the victim refused to testify or state his name. ... Because the victim refused to testify in this case, the defendant had no opportunity to cross-examine him on these statements." – testimonial statements to police officer identifying shooter erroneously admitted

Smith v. State, __ So.2d __, 2008 WL 4482521, *1+ (Miss.App. Oct 07, 2008), rehearing denied (Feb 24, 2009), rev'd, 25 So. 3d 264, 267-274 (Miss. 2009) –

Bush v. State, 193 P.3d 203, 2008 WY 108 (Wyo. Sep 17, 2008), cert. pet. filed (Dec. 16, 2008) – "We conclude the daughter was not unavailable for purposes of the confrontation clause. Rather, she appeared at trial, was placed under oath and testified. Thus, Mr. Bush was confronted with the witness and had the opportunity to cross-examine her and the Sixth Amendment was satisfied." – [NOTE: But see footnote 4, discussed in following sub-category.]

Womack v. State, 2008 WL 3917807 (Tex. App.-Dallas Aug 27, 2008) (unpub) – DV victim "Jamison appeared at trial pursuant to a subpoena and was sworn in. Jamison did not assert a testimonial privilege but stated she did not wish to testify. During cross-examination, Jamison authenticated her signature on the affidavit of non-prosecution and confirmed she did not wish to answer questions or provide any details of the incident. Neither the State or the defense requested that the court order Jamison to testify." – held: no showing of unavailability

Turner v. Runnels, 2008 WL 2705574 (N.D. Cal. Jul 10, 2008) (unpub) (habeas) – "Because Delgado was available for cross examination, her failure to recollect the substance of her

interviews with the police did not make her unavailable and did not result in a Confrontation Clause violation." – same was true with regard to second witness, too

State v. Cannon, 254 S.W.3d 287 (Tenn. Apr 29, 2008) – "The trial court, and apparently the defense counsel, accepted ADA Moore's unsubstantiated assertion that M.N. was unavailable to testify because of dementia and Alzheimer's disease. However, the State offered no proof to establish unavailability, such as testimony concerning M.N.'s mental condition from either a physician or a relative. [FN11] Although we resolve this appeal on other grounds, we emphasize that unavailability must be supported by proof, not by unsupported statements of counsel." – [NOTE: Why? The opinion doesn't say.]

State v. Belvin, 986 So.2d 516 (Fla. May 01, 2008) – "Belvin's counsel repeatedly told the trial court that technician Smith was 'not available to anybody at this point' because she allegedly had left the State in order to avoid a misdemeanor battery charge. Because there was no evidence to contradict these statements, the State met its burden of showing that technician Smith was unavailable at trial."

State v. Johnson, 982 So.2d 672 (Fla. May 01, 2008) – "Despite Deakin's willingness to fly down the next day to testify, the State was hesitant to spend the resources to do so. Instead, the State elected to proceed without Deakin, under the trial court's suggestion. The State, under these circumstances, did not show that Deakin was unavailable to testify at trial."

People v. Green, 2008 WL 2010265 (Cal. App. 1 Dist. May 12, 2008) (unpub) – In "*People v. Reed* (1996) 13 Cal.4th 217 ... the court held that a preliminary hearing transcript offered to prove the circumstances of a prior conviction was properly admitted pursuant to the hearsay exception in Evidence Code section 1291, because the witnesses who testified in the preliminary hearing were legally unavailable. (*Reed*, at pp. 229, 231.) Witnesses were found to be legally unavailable because... the prosecution could not present any evidence outside the record of conviction." – *Crawford* did not change that

State v. Sullivan, 217 Or.App. 208, 174 P.3d 1095 (Or. App. Dec 26, 2007) – abuse victim, 12 at time of trial – "In this case, defendant was given a full and fair opportunity to cross-examine the victim about her testimony and about her lack of memory about certain specifics and then to argue that, because of the nature of her answers, 'scant weight' should be given to the testimony. *Fensterer*, 474 U.S. at 20. The fact that she chose to respond selectively to the questions does not render her 'unavailable' under either the state or federal constitution."

State v. Reyes-Mauro, 217 Or.App. 315, 175 P.3d 998 (Or. App. Dec 26, 2007) – "Ortega agreed to plead guilty to certain charges and to testify at defendant's trial. When called as a witness, however, he refused to testify about defendant's involvement in the crimes, despite being ordered by the court to do so. The trial court concluded that Ortega was unavailable as a witness and therefore allowed the state to offer testimony by a police officer, Rendon, regarding statements Ortega made during an April 2003 interview. ... The state concedes that, under *Crawford*, admission of the evidence was erroneous, but argues that the error was harmless in light of the other evidence in the record." – court agrees [NOTE: Without criticizing the state's strategy, which was successful, an argument can be made that a witness's lack of cooperation is as irrelevant to the confrontation clause issue as a genuine attack of amnesia would be.]

State v. Villanueva, 2007 WL 4106261 (Minn.App. Nov 20, 2007) (unpub) – "Appellant nonetheless argues that because Dawson met the definition of unavailable under Minn. R. Evid. 804(a)(3), that is, he 'testifie[d] to a lack of memory of the subject matter of the declarant's statement,' that he was also unavailable under *Crawford*. We disagree. [¶] Clearly, witness availability under *Crawford* implicates the right of confrontation, which is a separate inquiry from considerations of admissibility under an exception to the hearsay rule. We read *Crawford* to require that 'the declarant appears for cross-examination at trial' regardless of whether the declarant has memory lapses. *Crawford*, 541 U.S. at 59-60 n.9 ... Here, the witness appeared at trial and was subject to cross-examination. Thus, we see no *Crawford* violation."

State v. Steen, 215 Or.App. 635, 170 P.3d 1126 (Or. App. Oct 31, 2007) – odd case involving mentally ill offender and informal trial procedure, apparently agreed-to but not stipulated with sufficient explicitness on the record – officer repeated what battery victim said at the scene, defendant appealed on *Crawford* basis, but the court's opinion also discusses state evidentiary law and the Oregon Constitution, making it unclear on what basis it's decided – "In short, the record indisputably demonstrates that, as a matter of law, the state failed to prove G's unavailability. That indisputable failure compels the conclusion that admitting the hearsay was plain error."

Thompson v. State, 2007 OK CR 38, 169 P.3d 1198 (Okla. Crim. App. Oct 11, 2007) – gang murder, two witnesses refused to testify at trial and their preliminary hearing testimony was admitted instead – "¶ 18 Thompson initially challenges the trial court's finding that Norman and Britt were 'unavailable,' under 21 O.S.Supp.2002, § 2804. [FN25] 'Unavailability' in this context 'includes the situation in which the declarant ... [p]ersists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.' ... ¶ 19 Thompson correctly notes that the trial court never specifically ordered Britt and Norman to testify. Yet the record makes clear that the trial court applied reasonable pressure on the witnesses to testify, but recognized the futility of the effort given the circumstances of the case. Norman was quite clear that he feared for his life and for the safety of his children if he testified. Britt downplayed his fearfulness and was unclear about whether he had been threatened. Nevertheless, this Court will not ignore the actual circumstances of this gang case. This murder appears to have been motivated solely by gang rivalry, and evidence was introduced at trial (and is commonly known) about the potential for and resulting fear of reprisal against witnesses that often accompanies such cases. We credit the ability of the district court to evaluate these factors, and we will give broad deference to the district court's appraisal of the realities of a particular case in this context. [FN28] We conclude that the district court did not abuse its discretion in finding that both Norman and Britt were 'unavailable' as trial witnesses in this case."

People v. Lisle, 376 Ill.App.3d 67, 877 N.E.2d 119, 315 Ill.Dec. 632 (Ill. App. 3 Dist. 2007) – "Defendant notes that Hearn was incarcerated at the time of the trial. Therefore, defendant claims that the State impermissibly circumvented his right to confrontation by introducing his statement to Lee while holding him in confinement. ... Defendant's arguments concerning the 'availability' of Hearn are unavailing. It is true that the *Barber* Court held the State violated the defendant's right to confrontation when it was allowed to admit hearsay statements of someone incarcerated in a federal penitentiary without attempting to secure the declarant's presence at trial. ... Undoubtedly, the statements at issue in *Barber* were testimonial in nature and, therefore, pursuant to *Crawford*, could only be admitted today if the defendant were allowed a meaningful opportunity to cross-examine the declarant. But, to read *Barber* to hold, as defendant urges, that

no hearsay statements are ever admissible if the declarant is incarcerated, or otherwise 'available,' is an untenable expansion of *Barber* which ignores other, more recent United States Supreme Court jurisprudence. ... [W]e reject defendant's argument that his rights under the confrontation clause were violated when the State was allowed to introduce Hearn's excited utterance through Lee's testimony while Hearn was 'available' to testify."

Proctor v. State, 874 N.E.2d 1000 (Ind. App. Oct 03, 2007) – "Croxall's neighbor, Sheila Proctor, talked to police the day of the incident. ... In this second trial, Sheila testified that she was unable to remember the details of the day in question due to her mental condition and the medication she was taking for various conditions, which caused her to have 'blackouts.' ... Here, the admission of Sheila's taped statement presented no violation of Proctor's Sixth Amendment right to confrontation on the basis of *Crawford* because Sheila was present at trial, she testified, and she was subject to cross-examination. ... [E]ven if a witness is determined to be 'unavailable' under Rule 804(a), that determination does not render the person unavailable for cross-examination for purposes of the Confrontation Clause. ... 'The feigned or real absence of memory is itself a factor for the trier of fact to establish, but does not render the witness unavailable.' A witness who is present and responds willingly to questions is 'available for cross-examination' as this phrase is used in *Crawford* in discussing the Confrontation Clause." (quoting *Fowler v. State*, 829 N.E.2d 459, 466 (Ind. 2005)) (citations omitted).

State v. Nyhammer, 396 N.J. Super. 72, 932 A.2d 33 (N.J. Super. A.D. 2007), reversed, 197 N.J. 383, 963 A.2d 316 (N.J. Feb 03, 2009)

State v. Sine, 214 Or. App. 656, 167 P.3d 485 (Or. App. 2007) – The state subpoenaed witness who appeared but invoked her spousal privilege – held: not available – "Mere presence, without testimony and the opportunity for cross-examination, is not enough."

State v. Hagar, 2007 WL 2410114 (Kan. App. Aug 24, 2007) (unpub) – "In *State v. Young*, 277 Kan. 588, Syl. ¶ 20, 87 P.3d 308 (2004), our Supreme Court held that a witness who does not recall making earlier statements or who simply refuses to testify is not considered available for cross-examination at trial." – therefore admitting "forgetful" witness's statements to police was error

State v. Fields, 115 Hawai'i 503, 168 P.3d 955 (Hawai'i Aug 30, 2007), as Amended on Denial of Reconsideration, 2007 WL 2985292 (Oct. 10, 2007) – DV case – "Here, Staggs [victim] claimed memory loss as to her prior statement on direct examination by the prosecution. Indeed, she claimed that she could not even remember the incident in question. On cross-examination, however, she willingly and informatively responded to virtually all of the questions posed by Fields' counsel. ... Given the foregoing, we do not think that Fields' opportunity for cross-examination was insufficient." (record references omitted) [NOTE: The opinion contains a very long discussion of the meaning of "available for cross-examination."]

State v. Santiago, 103 Conn.App. 406, 931 A.2d 298 (Conn. App. 2007) – "Outside of the jury's presence, the court questioned Cross as to his willingness to testify and informed him of his obligation to do so. Cross became quite disruptive, cursed and stated that he would not say anything. The court, warning Cross that he could be found in contempt of court, did find him in contempt when he continued to refuse to testify and continued to be disrespectful in the courtroom. The court had him physically removed. ... The defendant does not contest the fact

that Cross was unavailable because of his refusal to testify. [FN15] ... 'In determining whether the declarant is unavailable, we employ the definitions set forth in rule 804(a) of the Federal Rules of Evidence.'"

U.S. v. Yida, 498 F.3d 945 (9th Cir. 2007) – prosecution released key witness to DHS for deportation based on his promise to return to this country voluntarily for trial, a promise he did not keep – "Rule 804(b)(1) implements the command of the Sixth Amendment's Confrontation Clause: 'the accused shall enjoy the right ... to be confronted with the witnesses against him.' U.S. Const. amend. VI. The prosecution may not offer proof of a prior statement that is testimonial in nature unless (1) the accused has had, will have, or has forfeited the opportunity to 'be confronted with' the witness who made the statement, and (2) the witness is unavailable to testify at trial. *See Crawford* ... The constitutional requirement that a witness be 'unavailable' before his prior testimony is admissible stands on separate footing that is independent of and in addition to the requirement of a prior opportunity for cross-examination." – But after this windup, the opinion concludes: "Because we ground our opinion on interpretation of Federal Rule of Evidence 804, we have no need to reach and do not decide whether the Sixth Amendment imposes constitutional requirements concerning unavailability that require the same result."

People v. Castillo, 2007 WL 3151689 (Cal. App. 4 Dist. Oct 30, 2007) (unpub) – "Deleon refused to testify. Initially, she cited the Fifth Amendment; however, even after the prosecutor offered her immunity and the trial court ordered her to testify, she still refused, in the presence of the jury, and she was held in contempt. ... Deleon was unavailable to testify at trial, and defendant had had no previous opportunity to cross-examine her. Accordingly, the admission of the officer's testimony about her out-of-court statements violated the federal confrontation clause." – [NOTE: The opinion contains no further discussion of the point.]

State v. Pietluck, 2007 WL 3010550 (Wis. App. Oct 17, 2007) (unpub) – "Pietluck was convicted of physical abuse of a child. The incident occurred on April 24, 2005, when Pietluck punched his daughter, Jacqueline, in the face, bruising her eye. ... ¶ 5 Pietluck went to trial. The first witness called by the State was Jacqueline. When Jacqueline took the stand, she answered many of the questions asked by saying, 'I don't remember,' or 'I don't know.' ... Pietluck first argues that the trial court erred because it did not make a finding that the witness was available. Further, Pietluck argues that there was no meaningful cross-examination of the witness because Jacqueline responded to the questions by saying, 'I don't know.' ... ¶ 17 We conclude in this case that the witness appeared for cross-examination as defined in these previous cases. She was present at trial for cross-examination, took the oath to answer truthfully, and answered the questions put to her by defense counsel. The fact that she answered many, but not all, of the questions by saying she did not remember or recall does not change this conclusion."

In re Welfare of S.L.G., 2007 WL 2609801 (Minn. App. Sept. 11, 2007) (unpub) – "Appellant argues that even though M.G. took the stand, she was unavailable for purposes of *Crawford* because M.G. [3-year-old at time of incident, 4 at time of hearing] was unable to testify about the alleged sexual assault. We disagree. ... Dissatisfaction with a witness's answers and lapses in memory do not equate to denial of a defendant's constitutional right of confrontation."

Haliym v. Mitchell, 492 F.3d 680 (6th Cir. Jul 13, 2007) (habeas) (death penalty case) – "At trial, Albert, the seven-year-old son of victim Joann Richards, testified as an eyewitness to the

stabblings." – [NOTE: The opinion eccentrically withholds this crucial fact until after the following.] – in dicta, holding that witness's competence under common-law standards is an element of the confrontation right: "The opportunity to ask questions that a witness must answer under oath is crucial because the oath awakens the conscience and, perhaps more importantly, implicates the perjury statutes. [fn] The oath is a necessary ingredient of a right to cross-examination that tests the witness' testimony for consistency against itself and the external world, as well as exposing bias, lack of capacity, credibility problems, or other deficiencies that undermine the value of the testimony to the trier of fact. Likewise, some minimum capacity for recording and relaying truthful information is a precondition to a meaningful oath to tell the truth, which is a necessary element of cross-examination. Although we do not attempt to define that minimum capacity, we consider it satisfied for purposes of the Confrontation Clause if the witness is able to understand the concept of the truth and his duty to present truthful information to the court." – this is dicta because Albert was competent to testify

Commonwealth v. Newman, 69 Mass.App.Ct. 495, 868 N.E.2d 946 (Mass. App. Ct July 2, 2007), appeal denied, 449 Mass. 1111, 873 N.E.2d 248 (Mass. Sep 11, 2007) – "In all relevant respects, this case is governed by *Commonwealth v. Sineiro, supra*, in which the Supreme Judicial Court held that it was proper to admit for substantive consideration by the jury the probable cause testimony of a witness who feigned memory loss at trial. [cite] [FN4] As the court in *Sineiro* explained, in such circumstances the defendant's right to confrontation is not jeopardized, because the witness has taken the stand at the defendant's trial and is available for cross-examination. [cite] [¶] Contrary to the defendant's position, there is nothing in *Crawford* ... that calls into question *Sineiro's* analysis of the right to confrontation. ... 'Availability' means that the declarant is present at trial to defend or explain the prior statement. [cite] ... Here, both declarants appeared and testified at trial. The defendant had the opportunity to cross-examine them and did so at length... The defendant had ample opportunity to cross-examine the witnesses, and their answers to his questions—while perhaps not what he would have preferred—were responsive. Indeed, the equivocations and inconsistencies in the witnesses' testimony were fertile ground for the defendant to explore and use to his advantage."

State v. Martin, 100 Conn. App. 742, 919 A.2d 508 (Conn. App. 2007) – "In the defendant's first trial, Profit, testified about his and Carlton Martin's involvement in the purchase of the gun that was used in the robbery. When Profit was called by the state to testify at the defendant's retrial, outside the presence of the jury, he indicated that he would not answer any questions from the state, defense counsel or the court. When questioned by the court, Profit stated again that he would not answer any questions and claimed that he was invoking his fifth amendment rights. ... The record amply supports the state's contention that the court did not determine Profit's unavailability on the basis of his invocation of a privilege but rather on his refusal to answer any questions presented to him. ... Accordingly, we conclude that the defendant's constitutional rights were not violated when Profit's prior testimony was admitted."

U.S. v. Cabrera-Frattini, 65 M.J. 241 (U.S. Armed Forces Jun 22, 2007) (reversing the lower court opinion found at 2006 WL 4572869) – "We are asked in this case to determine whether the military judge abused his discretion by finding a thirteen-year-old witness suffering from bipolar disorder and post-traumatic stress syndrome unavailable for Confrontation Clause purposes based on the witness's medical records and the testimony of a board-certified child psychiatrist that testifying would be detrimental to the witness's mental and physical health, including possible suicide at both the time of trial and the foreseeable future. We hold that the military

judge did not abuse his discretion by ruling that the witness was unavailable. ... The charges referred against Appellee arise from sexual intercourse he had with TO while another Marine anally sodomized her. TO, then a twelve-year-old girl, is unrelated to Appellee. ... The lower court held that the military judge erred by finding TO unavailable based solely on the evidence presented by the Government. The question that divided the lower court was whether the trial judge took sufficient steps to determine that TO was unavailable for trial. The majority concluded that the military judge should have required more, such as an updated prognosis, an independent medical opinion from a court-appointed expert, a recent letter from TO or her mother, or explicit exploration of the alternative of remote testimony. There could be a case where the alternative steps proposed by the lower court might be warranted. But in this case, Dr. Bock established both that TO was suffering from a serious mental illness that would likely demand years of medication and therapy to control, and that the risk of suicide was ongoing and would be exacerbated by testifying in any forum in the foreseeable future. ... We decline to hold that while non-amenability and refusal of a witness to voluntarily appear can establish constitutional unavailability, a life-threatening illness can not."

Wilson v. State, 2007 WL 2193347 (Tex. App.-Dallas Aug 01, 2007) (unpub) – "Before the jury, the State offered Emeory's statement through the detective. Wilson objected that the lack of cross-examination violated his constitutional rights. The State responded that it had subpoenaed Emeory, granted him testimonial immunity, and 'if defense counsel wishes to cross examine him, he is here and available for cross-examination.' The trial court overruled the objection and admitted the out-of-court statement. ... The State, however, takes the position that if the witness is available but the defendant chooses not to call him, the defendant waives his right of confrontation. We disagree. ... As the party offering the out-of-court statement, the State has the burden of showing the statement is admissible—the State must show in the first instance that the declarant is unavailable; and, if so, it must then show the defendant had a prior opportunity to cross-examine the declarant. *Bratton*, 156 S.W.3d at 694 (citing cases). The holding urged by the State would eliminate the first element of the State's burden under *Crawford*—proof that the witness who made the out-of-court testimonial statement was unavailable to testify. *See Crawford*, 541 U.S. at 59. Because Emeory was available to testify, the State failed to make the initial showing required for admission of the out-of-court statement."

People v. Bahabla, 2007 WL 2063115 (Cal.App. 1 Dist. 2007) (unpub) – "The trial court properly found [rape victim] C. to be unavailable, and her preliminary hearing testimony admissible, under the pertinent provisions of the Evidence Code. Defendant had the opportunity to cross-examine C. at the preliminary hearing, and did in fact do so. There is no violation of the right to confrontation. (*See Crawford, supra*, 541 U.S. at pp. 59, 68.)" – describing in detail prosecution's attempts to get C. to testify and emphasizing the lateness of her decision not to cooperate

State v. Coder, 2007 WL 2011166 (N.J. Super. A.D. Jul 12, 2007) (unpub) – "At the outset, we note our disagreement with the judge's finding that J.B. was 'available' to testify. While she was physically present, her responses on voir dire demonstrate that cross-examination would have been utterly fruitless. As a result, she was unavailable for Confrontation Clause purposes." [NOTE: Does this same logic apply to lying gang members, slick "expert" witnesses and genuinely amnesiac adults, too?]

State v. Greene, 2007 WL 1223906, *17+ (N.J. Super. A.D. Apr 27, 2007) (unpub) – "First, *Crawford* permits the use of hearsay in some circumstances but only if the declarant is unavailable. Here, the record is bereft of any evidence to suggest that the dispatcher was unavailable to testify as to that what he said to Officer Roseman over the police radio."

State v. Ramirez, 101 Conn. App. 283, 921 A.2d 702 (Conn. App. 2007) – "[D]uring the defendant's first trial, Waye then gave testimony concerning this statement [a statement she had made to police]... Because Waye's statement was made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, the statement was testimonial in nature and therefore required evidence that Waye was not available to testify at the defendant's trial. The state provided no evidence of Waye's unavailability to testify, and it also did not provide the defendant with an opportunity to cross-examine Waye with regard to her statement prior to trial. The court's admission of Waye's statement, therefore, violated the defendant's right of confrontation pursuant to *Crawford*." [NOTE: Why didn't the defendant have the opportunity to cross-examine her at the first trial?]

State v. Kennedy, 957 So.2d 757, 2005-1981 (La. 2007), rev'd on other grounds, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) – (death penalty for child rape case) – "The defendant argues that although the victim was physically present to testify, she was unable to respond to questioning in a meaningful way and simply adopted her videotaped statement, which was obtained without the presence of defense counsel or any opportunity to effectively cross-examine the witness either pre-trial or at trial. Defendant contends that the victim's poor memory rendered her unavailable for cross-examination despite her physical presence on the stand. [¶] We disagree. A witness may be physically present in a courtroom and still be 'unavailable.' ... We disagree. ... In this case, the victim was able to answer the vast majority of the questions asked of her. ... The fact that she could not remember meeting with specific people during the investigation and that she did not remember making the first videotape with Dr. McDermott does not render her 'unavailable' for purposes of the statute or the constitution. She was clearly able to 'defend or explain' the videotaped statement at trial. These assignments of error lack merit."

State v. Artis, 215 S.W.3d 327 (Mo. App. 2007) – officer deployed to Iraq unavailable – deposition testimony admissible

Howard v. State, 853 N.E.2d 461 (Ind. 2006) – 12-year-old victim of abuse – because there had been no showing that the child was unavailable for trial within the meaning of the protected person statute, the trial court violated defendant's Sixth Amendment right to confrontation by allowing the deposition into evidence. Although the record showed that the child was upset when called upon to testify, there was no testimony by a medical or mental health professional about the nature and extent of her condition.

➤ Relationship of Confrontation Clause Availability and Rule 804 Availability

State v. Kitt, 284 Neb. 611, 612-621 (Neb. 2012) – "The [Court of Appeals'] analysis appears to assume that 'unavailability' under the hearsay evidence rules equates with 'unavailability' under Confrontation Clause constitutional principles. To the extent such equation was made, we caution against it."

Petit v. State, 92 So. 3d 906, 908-917 (Fla. Dist. Ct. App. 4th Dist. 2012) – "But the Florida Supreme Court has defined unavailability for Confrontation Clause purposes much more broadly than section 90.804(1)..."

State v. Beadle, 173 Wn.2d 97, 265 P.3d 863 (Wash. 2011) – "¶46 As the State correctly points out, there is a critical distinction between unavailability for confrontation clause purposes and unavailability for evidentiary purposes."

State v. Moore, 57 So. 3d 1033 (La.App. 4 Cir. Oct. 13, 2010), reh'g granted on non-Crawford issues and affirmed, 57 So. 3d 1033 (La.App. 4 Cir. Jan. 26, 2011), writ denied (Sept. 2, 2011) – implicitly finding the two types of unavailability to be one and the same, without analysis

People v. Jesus, 2009 WL 259373, 2009 Guam 2 (Guam Terr. Feb. 4, 2009) – in *Owens*, "The Supreme Court spoke directly on the issue of whether a declarant who is "unavailable" for the purposes of the Federal Rules of Evidence ("FRE") 804(a)(3), could be available to satisfy the Confrontation Clause of the Constitution." – answer: yes, quoting 484 U.S. at 563-64

Bush v. State, 193 P.3d 203, 2008 WY 108 (Wyo. Sep 17, 2008), cert. pet. filed (Dec. 16, 2008) – "FN4. ... we are cognizant of the following paradox: the same person can be both 'subject to cross-examination' under W.R.E. 801(d)(1) and 'unavailable as a witness' under W.R.E. 804(a) ... For purposes of Mr. Bush's confrontation claim, what is important is that his daughter was present, testified and was subject to cross-examination concerning her statements. That the defense chose not to cross-examine her also does not affect our conclusion. [cite] Had it done so and had she continued to deny any memory of the events or her statements, an argument could have been made that she was 'unavailable' because she was not cross-examinable." – [NOTE: This dictum seems wrong on multiple counts. It's not a "paradox" that the same word is given different meanings in different contexts. The fact that the defense chose not to cross-examination means they waived the right to do so. And a person in the witness box who answers questions is "cross-examinable" regardless of the content of those answers.]

State v. Weighall, 2008 WL 4062755 (Wash. App. Div. 2 Sep 03, 2008) (unpub) – "Both the United States Supreme Court and the Washington Supreme Court have drawn a distinction between unavailability for confrontation clause purposes and unavailability under the rules of evidence. [cites] Thus, while Fowler may have been unavailable for purposes of ER 804(a)(3), the rule does not govern whether he was unavailable under the confrontation clause."

State v. Real, 214 Ariz. 232, 150 P.3d 805 (Ariz. App. Div. 2, 2007) – witness "unavailable" under 804 due to lack of memory may nonetheless be "available" for sixth amendment purposes, if present in courtroom and cross-examined – "But the Supreme Court has separated the states' hearsay rules and analysis from the constitutional Confrontation Clause analysis."

What Does It Means to "Appear for Cross-Examination"?

(category added July 2009)

People v. Bryant, __ N.E.2d __, 2009 WL 1794806 (Ill. App. 4 Dist. Jun 17, 2009) –
People v. Sharp, __ N.E.2d __, 2009 WL 1846511 (Ill. App. 4 Dist. Jun 26, 2009) –

People v. Kitch, __ N.E.2d __, 2009 WL 1846520 (Ill. App. 4 Dist. Jun 25, 2009) –
These three child sex abuse cases all explicitly address the question posed by the heading of this category and provide thorough answers. All three opinions are exhaustive.

Sufficiency of Prosecution Efforts to Locate Absent Witness (Due Diligence)

Although *Crawford* purported to return to the text of the sixth amendment to decide what hearsay is "testimonial," it also imposed a requirement of unavailability (except when the witness is present in court), which is not text-based. Because cases addressing the adequacy of the prosecution's efforts to locate the absent witness are necessarily fact-dependent, this section will generally just list new cases that discuss the adequacy or inadequacy of specific efforts.

State Cases (arranged alphabetically by state)

State v. Rivera, 226 Ariz. 325, 329-330, 247 P.3d 560 (Ariz. Ct. App. 2011) – sufficient
State v. Virgen, 2008 WL 2447383 (Ariz. App. Div. 1 Jun 12, 2008) (unpub)

Seaton v. State, __ S.W.3d __, 101 Ark.App. 201, 2008 WL 240268 (Ark. App. Jan 30, 2008)

State v. McCabe, 2007 WL 5187915 (Ariz. App. Div. 1 Aug 07, 2007) (unpub) – elderly robbery victim had been deposed before trial; prosecution and trial judge not required to interrupt his medical care for trial in order to provide live testimony

People v. Roldan, 205 Cal. App. 4th 969, 985, 141 Cal. Rptr. 3d 88 (Cal. App. 4th Dist. 2012) – insufficient

People v. Herrera, 49 Cal. 4th 613, 628-632, 232 P.3d 710, 110 Cal. Rptr. 3d 729 (Cal. 2010) – sufficient

People v. Friend, 47 Cal.4th 1, 211 P.3d 520, 97 Cal.Rptr.3d 1, (Cal. Jul 20, 2009) – sufficient

People v. Brown, 2009 WL 485269 (Cal. App. 2 Dist. Feb 27, 2009) (unpub) - sufficient

People v. Chandler, 2009 WL 389726 (Cal. App. 1 Dist. Feb 18, 2009) (unpub) - sufficient

People v. Bunyard, __ P.3d __, __ Cal.Rptr.3d __, 2009 WL 426264 (Cal. Feb 23, 2009) - sufficient

People v. Ramirez, 2009 WL 265706 (Cal.App. 4 Dist. Feb 05, 2009) (unpub) - sufficient

People v. Beard, 2009 WL 179673 (Cal. App. 5 Dist. Jan 27, 2009) (unpub) - sufficient

People v. Paul, 2009 WL 27073 (Cal. App. 2 Dist. Jan 06, 2009) (unpub) – sufficient

People v. Rodriguez, 2008 WL 4560222 (Cal. App. 2 Dist. Oct 14, 2008) (unpub) – sufficient

People v. Longoria, 2008 WL 4571949 (Cal. App. 2 Dist. Oct 15, 2008) (unpub) – sufficient

People v. Faz, 2008 WL 4294946, *4 (Cal.App. 4 Dist. Sep 22, 2008) (unpub) – insufficient –

"The prosecutor did not call any witnesses to support his argument that due diligence had been exercised to secure the victim's presence at trial. ... [B]ecause defendant disputed the admissibility of the victim's preliminary hearing testimony based in part upon her purported unavailability, the prosecutor had the burden to produce competent evidence showing reasonable diligence was exercised in attempting to secure the victim's attendance at trial. ... The prosecutor's unsworn statements do not constitute competent evidence."

People v. Leal, 2008 WL 2656114 (Cal. App. 6 Dist. Jul 08, 2008) (unpub) – sufficient

People v. Huerta, 2008 WL 2526382 (Cal. App. 2 Dist. Jun 26, 2008) (unpub) – sufficient

People v. De La Cruz, 2008 WL 2569262 (Cal. App. 2 Dist. Jun 30, 2008) (unpub) – sufficient

People v. Crawford, 2008 WL 2010264 (Cal. App. 1 Dist. May 12, 2008) (unpub) – sufficient

People v. Smith, 2008 WL 2010374 (Cal. App. 4 Dist. May 12, 2008) (unpub) – insufficient

People v. Valencia, 43 Cal.4th 268, 180 P.3d 351, 74 Cal.Rptr.3d 605 (Cal. Apr 14, 2008) –

People v. Monroe, 2008 WL 544221 (Cal. App. 4 Dist. Feb 29, 2008) (unpub) –

People v. Griffin, 2008 WL 307835, *307835+ (Cal.App. 2 Dist. Feb 05, 2008) (unpub) –

People v. Flores, 2007 WL 4500386 (Cal. App. 4 Dist. Dec 24, 2007) (unpub) – "An appellate court 'will not reverse a trial court's [due diligence] determination ... simply because the defendant can conceive of some further step or avenue left unexplored by the prosecution.'"

People v. Polanco, 2007 WL 4555285 (Cal. App. 2 Dist. Dec 28, 2007) (unpub) – victim went home to Colombia

People v. Evert, 2007 WL 1970052, *2+ (Cal. App. 1 Dist. Jul 09, 2007) (unpub) – insufficient

People v. Banks, 2012 COA 157, __ P.3d __ (Colo. Ct. App. 2012), reh'g denied – sufficient

State v. Morquecho, 138 Conn. App. 841, 862, 54 A.3d 609 (Conn. App. Ct. 2012)

State v. Smith, 112 Conn. App. 592, 963 A.2d 104 (Conn. App. Feb 10, 2009) –

State v. Wright, 107 Conn.App. 85, 943 A.2d 1159 (Conn. App. Apr 15, 2008) –

Brooks v. United States, 39 A.3d 873 (D.C. 2012) – insufficient

Petit v. State, 92 So. 3d 906, 911 (Fla. Dist. Ct. App. 4th Dist. 2012)

Essex v. State, 958 So.2d 431 (Fla. App. 4 Dist. 2007)

Thomas v. State, 290 Ga. 653, 723 S.E.2d 885, 2012 Fulton County D. Rep. 742 (Ga. 2012) – sufficient ("More might always be done, but we cannot say that the trial court abused its discretion in determining that the State had used due diligence...")

State v. Vinhaca, 2009 WL 1144934 (Hawai'i App. Apr 29, 2009) (unpub) (equating constitutional and Rule 804 standards)

Berkman v. State, 976 N.E.2d 68, 71-72 (Ind. Ct. App. 2012) – sufficient

Kendrick v. State, 947 N.E.2d 509, 515-516 (Ind. Ct. App. 2011) – sufficient

Beldon v. State, __ N.E.2d __, 2009 WL 1424616 (Ind. App. May 21, 2009) – "The record does not reflect that the State made a good faith effort to obtain Dr. Bache's attendance at trial. ... [A] busy work schedule is not sufficient to circumvent the constitutional right to confrontation."

Tiller v. State, __ N.E.2d __, 2008 WL 4878459 (Ind. App. Nov 13, 2008) –

People v. Decosey, 2009 WL 1068878 (Mich. App. Apr 21, 2009) (unpub) – sufficient

Hernandez v. State, __ P.3d __, 2008 WL 2928790, 124 Nev. 60 (Nev. Jul 31, 2008) – insufficient

State v. Arnold, 189 Ohio App. 3d 507, 939 N.E.2d 218 (Ohio Ct. App., Montgomery County 2010) – sufficient

State v. Ford, 2008 WL 3970913, 2008-Ohio-4373 (Ohio App. 10 Dist. Aug 28, 2008)
(unpub) – sufficient

State v. Starr, 269 Or. App. 97, 344 P.3d 100 (2015) – sufficient (state constitution)

State v. Simmons, 241 Ore. App. 439, 250 P.3d 431 (Or. Ct. App. 2011) – insufficient

State v. Ramirez, 936 A.2d 1254 (R.I. Dec 17, 2007) – "We are satisfied that a significant search was undertaken for Bogan before he was declared unavailable. ... Although defendant questioned the length of time devoted to the search, he failed to challenge the fact that the prosecutor made oral representations to the trial justice or the veracity of those statements; nor did defendant request an evidentiary hearing. Affording the trial justice appropriate discretion, we decline to disturb the ruling that Bogan was unavailable."

State v. Jackson, __ S.W.3d __, 2011 Tenn. Crim. App. LEXIS 337, 20-21 (Tenn. Crim. App. May 11, 2011) – sufficient

State v. Sharp, __ S.W.3d __, 2010 Tenn. Crim. App. LEXIS 164 (Tenn. Crim. App. Feb. 22, 2010) – (insufficient)

State v. Webster, 2009 WL 636092 (Tenn. Crim. App. Mar 11, 2009) (unpub) – sufficient

State v. Hacheney, 158 P.3d 1152 (Wash. May 31, 2007) – "A witness's absence from the jurisdiction, without more, is not enough to satisfy the confrontation clause's unavailability requirement. ... The question of unavailability is 'one of fact to be determined by the trial judge' ..."

Federal Cases (arranged numerically by circuit)

United States v. Ozsusamlar, 349 Fed. Appx. 610, 612 (2d Cir. N.Y. 2009) – sufficient

Cooper v. Norris, 2008 WL 2115218 (E.D. Ark. May 19, 2008) (unpub) (habeas) – sufficient

U.S. v. Tirado-Tirado, 563 F.3d 117 (5th Cir. Mar 19, 2009) – insufficient

Earhart v. Konteh, 589 F.3d 337, 340-352 (6th Cir. Ohio 2009) (habeas) – "The trial proceeded before a jury and each alleged victim personally testified about Earhart's actions on the evening of the birthday party with the exception of F.T. The State sought to introduce a videotape deposition of F.T. in place of her live testimony, explaining that F.T. had a long-planned vacation that the State did not wish to interrupt. Earhart was present at the deposition, was able to fully cross-examine F.T., and understood that the deposition could be used at trial. However, Earhart objected to the admission of the deposition, arguing that the State had failed to show that F.T. was constitutionally unavailable. ... Because of its complete lack of effort to secure her presence, Ohio cannot argue that it made the required 'good-faith effort to obtain' F.T.'s presence. [cite] Thus, despite the fact that Earhart had an opportunity to cross examine F.T., the videotape was not admissible because F.T. was not unavailable."

Cross v. Hardy, 632 F.3d 356, 356-363 (7th Cir. Ill. 2011), reversed by unanimous Court (Dec. 12, 2011) – finding efforts constitutionally inadequate, illegitimately rejecting state court

factual findings, in a rape case – the opinion provides a lot of space for completely gratuitous derogatory allegations about the female victim, suggesting the real reason for this stretch of an opinion

Reed v. Hathaway, 596 F.Supp.2d 1200 (C.D. Ill. Jan 30, 2009) (habeas) – "The rule is not that the government must do everything it can to get a witness to testify, rather only that it make a rea-sonable, good faith effort to get the witness into court." – efforts sufficient

United States v. Hite, 364 F.3d 874 (7th Cir 2004) – Prosecutors still must follow the federal rule of good faith in trying to find a witness in order to successfully argue that the witness is unavailable.

Adame v. Cate, 2009 WL 1069032 (S.D. Cal. Apr 21, 2009) (unpub) (habeas) – sufficient

Riggs v. Yates, 2008 WL 4450323 (C.D. Cal. Sep 28, 2008) (unpub) (habeas) – sufficient

U.S. v. Rodriguez, 2008 WL 4080005 (D. Ariz. Aug 29, 2008) (unpub) (pretrial order) – sufficient

Graham v. Sisto, 2008 WL 4196577 (C.D. Cal. Sep 05, 2008) (unpub) (habeas) – sufficient

Hansen v. Adams, 2008 WL 3201224 (C.D. Cal. Aug 06, 2008) (unpub) (habeas) – sufficient

Magdaleno v. Giurbino, 2008 WL 2906549 (9th Cir. Jul 29, 2008) (unpub) (habeas) – sufficient

Berreondo v. Adams, 2008 WL 2684790 (C.D. Cal. Jul 07, 2008) (unpub) (habeas) – sufficient

Mendoza v. Sisto, 2008 WL 2025144 (E.D. Cal. May 09, 2008) (unpub) (habeas) – sufficient

Eun Suk Joo v. Marshall, 2008 WL 2051738 (C.D. Cal. May 09, 2008) (unpub) (habeas) – sufficient

Johnson v. Horel, 2008 WL 624707 (C.D. Cal. Mar 05, 2008) (unpub) (habeas) – efforts over two months "sufficiently far reaching to establish good faith"

Cooper v. McGrath, 314 F.Supp. 2d 967 (S.D. Cal. 2004) – Prosecutors must exercise due diligence in finding witness before submitting preliminary hearing transcript testimony at trial.

Malone v. Six, 2008 298 Fed.Appx. 782 (10th Cir. Oct 31, 2008) (habeas) – efforts sufficient [NOTE: Although the case arises on collateral review, court applies direct review standard.]

Flournoy v. McKune, 2008 WL 467015 (10th Cir. Feb 20, 2008) (unpub) (habeas) – [NOTE: It appears this case could have been decided on retroactivity grounds.]

Malone v. McKune, 2007 WL 2317114 (D. Kan. Aug 09, 2007) (unpub) – detailing prosecution efforts to obtain attendance of witness and finding them sufficient to demonstrate unavailability for sixth amendment purposes

Sufficiency of Prosecution's Efforts to Persuade Reluctant Witness to Testify

(category added Dec. 2011)

State v. Beadle, 173 Wn.2d 97, 265 P.3d 863 (Wash. 2011) – "¶49 Despite its efforts, the State was unable to coax B.A. into the courtroom or to agree to testify through either of these alternative means. It is difficult to imagine what more the State could have done to produce B.A. as a witness, short of dragging her, kicking and screaming, into the courtroom. B.A.'s dramatic meltdown on the first day of the child hearsay hearing, coupled with her psychiatric diagnoses of PTSD, provides ample evidence from which a court reasonably could infer that B.A. would remain unwilling and unable to testify in open court or even via alternative means, such as closed-circuit television. The law requires only 'reasonable,' efforts—not 'futile acts.'... ¶52 On

this record we hold that the State met its burden to show B.A. was 'unavailable' under the constitutional good faith standard."

Prosecution's Decision Not to Grant Immunity
(category added Dec. 2010)

People v. Hollinquest, 190 Cal. App. 4th 1534, 1540-1554 (Cal. App. 1st Dist. 2010, as corrected January 13, 2011) – "We move to defendant's contention that the prosecutor committed misconduct by failing to grant Buchanan immunity at trial, and the trial court therefore erred by finding that he was an unavailable witness. ... [T]he record here is devoid of any evidence suggesting to us in any way that threats, intimidation or coercion was exerted upon Buchanan by the prosecution that precluded him from making a free and voluntary choice not to testify. [cites] The prosecution did not intentionally distort the factfinding process by taking affirmative steps to prevent Buchanan from testifying or grant immunity to other witnesses while denying immunity to him." – properly found unavailable



Part 9: Excited Utterances & 911 Tapes (see also Part 13)

911 Calls by Victim

Owens v. State, 329 Ga. App. 455, 765 S.E.2d 653 (2014) – "Here, the evidence supported the trial court's factual determination that both of the victim's calls to 911 were made to seek assistance in the course of a situation involving immediate danger to him."

People v. Haskins, 121 A.D.3d 1181, 994 N.Y.S.2d 696 (N.Y. App. Div. 3d Dep't 2014), leave to appeal denied, 24 N.Y.3d 1120 (2015) – burglary victim called 911 to report a break-in – "Here, the victim's statements on the 911 recording were nontestimonial [cites]."

Commonwealth v. Williams, 2014 PA Super 249, 103 A.3d 354 (2014) – "The *Bryant* Court considered an ongoing emergency 'among the most important circumstances informing the 'primary purpose' of an interrogation.' *Id.* at 1157. Thus, the ongoing emergency in this case is highly indicative of Serrano's primary purpose in making her statements. In addition, Serrano's conversation with the 911 operators was highly informal. ... For all of the foregoing reasons, we conclude the primary purpose of Serrano's statements during the 911 call was to seek medical assistance and assist first responders in addressing an ongoing emergency. Her statements were not testimonial..."

State v. Reynolds, 152 Conn. App. 318, 97 A.3d 999 (Conn. App. 2014) – "The circumstances of the 911 call Brown made on October 23, 2008, are closely analogous with those identified in *Davis*... she clearly described the then current situation as she observed it..."

People v. Kenyon, 970 N.Y.S.2d 638, 640-42 (N.Y. App. Div. 3d Dept. 2013) leave to appeal denied, 21 N.Y.3d 1075 (2013) – "To the extent that defendant contends that the admission of the victim's 911 call violated his constitutional right to confront the witnesses against him (cite), we note that '[t]he statements on the tape were not testimonial, as their purpose was to enable the police to meet an ongoing emergency and apprehend the perpetrator, not to provide evidence for later prosecution' (cite). Under these circumstances, no *Crawford* violation occurred."

State v. Reed, 168 Wn. App. 553, 278 P.3d 203 (Wash. Ct. App. 2012) – "the trial court properly determined that Ta's statements in the first 911 call were nontestimonial. ... Although the record does not indicate that Ta was being choked or punched during [*566] her conversation with the operator, Ta made clear that Reed's actions occurred in the recent past. ... Indeed, Ta stated during the call that Reed was 'threatening me right now.' Moreover, the operator's focus on ascertaining Ta's location indicates that the primary purpose of the interrogation was to provide emergency assistance. The record does not reflect that the operator was attempting merely to determine 'what had happened in the past.' *Davis*... In addition, there is little doubt that a reasonable listener would conclude that Reed posed a bona fide physical threat to Ta. Reed was present throughout the call and can be heard shouting angrily in the background. Finally, the lack of formality of the interrogation favors admissibility—Ta made these statements from an unsafe location, outside of police protection, and in the presence of an angry, vocal assailant."

Davis v. State, 2011 OK CR 29, 268 P.3d 86 (Okla. Crim. App. 2011) – "Appellant asserts the trial court committed reversible error in admitting State's Exhibit 100, a recording of the 911 emergency call made by Hooks from the crime scene within minutes of being shot. ... [*P151] The recording begins with a series of screams, then goes silent for over a minute. Hooks later tells the operator that she, her sister, and her brother-in-law had been shot and an ambulance was needed. In the background, children can be heard crying and screaming. One of the children got on the phone and told the operator his mother was 'dying' and that there is 'blood all over the kitchen floor'. When asked who shot his mother, the child replied that he does not know, that they were asleep and then heard someone start screaming. The sounds of the responding officers attempting to remove the children from the apartment finish out the call. ... The recording in this case did not constitute testimonial evidence and is just the type of 911 call evidence the United States Supreme Court approved in *Davis*..."

People v Shaver, 86 A.D.3d 800, 927 N.Y.S.2d 226 (N.Y. App. Div. 3d Dep't 2011) – "The court admitted into evidence a 911 call made by the victim and her mother immediately after the incident. The statements on the tape were not testimonial, as their purpose was to enable the police to meet an ongoing emergency and apprehend the perpetrator, not to provide evidence for later prosecution."

Commonwealth v. Beatrice, 460 Mass. 255, 951 N.E.2d 26 (Mass. 2011) – "Here, based on the victim's report to the 911 operator, she had "just" been severely beaten by her boy friend and agreed she wanted an ambulance, but there is no suggestion that her injuries were serious or life threatening, that her boy friend was armed with a dangerous weapon, or that her boy friend posed

any risk to the public at large. Nor does she suggest that she was being beaten at the time of her telephone call or that her boy friend was presently where she was. In these circumstances, a reasonable person would believe there was an ongoing emergency only if there was a continuing risk to the victim, that is, a substantial risk that her assailant may find her and continue his assault on her before the police arrived on the scene. ... We conclude, based on the tape-recorded call and reasonable inferences from its content, that the judge did not err in finding an ongoing emergency because, objectively, the circumstances reasonably indicated that the victim continued to be at substantial risk at the time of the telephone call." [NOTE: This seems to imply the risk must be real rather than merely perceived, which is wrong under *Bryant*, which says: "If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause." n.8]

Doles v. State, 2011 Ark. App. 476, __ S.W.3d __ (Ark. Ct. App. 2011) – "In this case, the purpose of Ashley Crowley's statement to the 911 operator was to obtain assistance in an emergency. She called 911 because Doles had a shotgun and was threatening to shoot her with it, and she needed police assistance. Accordingly, the circuit court did not err in allowing the recording of the 911 call to come into evidence over Doles's confrontation-clause objection."

People v Legere, 2011 NY Slip Op 1039, 81 A.D.3d 746, 916 N.Y.S.2d 187 (N.Y. App. Div. 2d Dep't 2011) – "The charges against the defendant arise from a September 10, 2004, incident in which the defendant allegedly shot and killed two New York City Police Department detectives, Detective Robert Parker and Detective Patrick Rafferty. ... Here, the evidence shows that in making the 911 call and in making statements to another officer, Detective Parker's primary purpose was to obtain emergency aid for himself and for Detective Rafferty, and to prevent further harm by the perpetrator, who at that point was still at large and armed. Under these circumstances, the 911 call and testimony as to Detective Parker's statements to another police officer were nontestimonial in nature."

Commonwealth v. McNulty, 458 Mass. 305, 937 N.E.2d 16 (Mass. 2010) – "Contrary to the defendant's argument, admission of this 911 call did not violate Crawford ... the trial judge properly could, and did, find that Tatiana was seeking help for an ongoing medical emergency, and did not anticipate that her statements would be used for purposes of prosecution."

People v. Johnson, 189 Cal. App. 4th 1216, 1218-1227, 117 Cal. Rptr. 3d 132 (Cal. App. 1st Dist. 2010) – "We reject a reading of Davis that would require that challenged statements be made while the actual assault is ongoing in order to be nontestimonial. ... [T]he facts recited in Davis do not establish that the assault was literally ongoing during the call. ... Accordingly, Davis supports a conclusion that statements made immediately after, and in response to, a violent assault should be treated as presumptively made during a contemporaneous emergency."

People v. Chmura, 930 N.E.2d 431 (Ill. App. Ct. 2d Dist. 2010) – "in this case there can be no dispute that, when the dispatcher asked the caller whether her husband hit, punched, or pushed her, the information previously conveyed by the caller indicated an ongoing emergency. The caller had stated that her husband "beat the shit" out of her. Although she had fled to a neighbor's house, the danger remained that her husband might follow her there. Far more importantly, the caller had indicated that, in fleeing, she had been forced to leave her two-year-old son behind with her husband. It is likewise clear that the primary purpose of the dispatcher's question was to

assist police (and perhaps paramedics) in responding to the emergency. When we consider statements made in response to questioning by police officers and other law enforcement personnel, our focus is on the intent of the questioner in eliciting the statement. *Stechly*... In these objective circumstances, it was imperative for the dispatcher to try to determine how much danger the caller's son was in and what type and degree of violent behavior the responding officers might encounter upon confronting the caller's husband. From this standpoint, it would have been irresponsible not to ask the caller to clarify the statement, 'he beat the shit out of me.' Likewise, in determining whether an emergency medical response was necessary, the dispatcher would have been irresponsible to rely on the caller's opinion that she did not need an ambulance, without some elaboration on the nature of the beating the caller's husband allegedly administered. We note that the dispatcher posed the question early in the conversation, when the caller's account was still sketchy. Could the dispatcher have formulated a less suggestive question? Perhaps, but the dispatcher was responding to a possible emergency, and we will not parse her words as if she had the luxury of time with which to choose them."

Commonwealth v. Simon, 456 Mass. 280, 923 N.E.2d 58 (Mass. 2010) – "since most of the statements made by the victim during an emergency call to a 911 dispatcher were made to obtain urgent medical attention and, therefore, were nontestimonial, we affirm the denial of the defendant's motion in limine with respect to those statements. However, we conclude that certain statements in response to the dispatcher's inquiries were testimonial, and order those portions redacted. ... When the victim reported the shooting and robbery, the dispatcher did not know whether the perpetrator was still in the vicinity. fn.12 Accordingly, the statements in the 911 telephone call in which the victim identified the nature of the emergency and described the shooter were not testimonial per se."

Clark v. State, 188 Md. App. 110, 981 A.2d 666 (Md. Ct. Spec. App. 2009) – "we are persuaded that Thomas's statements in her two 911 calls were not testimonial. The primary concern of a person in her situation was to get help, not to create evidence for use in a future prosecution against appellant. The assault had just occurred and the stated purpose of her call was to get immediate medical and police help. Contrary to appellant's argument, the emergency had not concluded, as evidenced by Thomas's distraught sobbing voice and her response that appellant had just left but she knew he was going to come back. ... Moreover, there was no knowing response to a line of structured questioning taking place in a formal investigative environment. The purpose of the 911 operator's questions was to decide what, if any, action was necessary to prevent further harm."

State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (Wash. 2009) – "¶2 Defendant Timothy Pugh and Bridgette Pugh are married. In November 2004, Bridgette Pugh n1 obtained a no-contact order preventing Pugh from contacting her. On March 21, 2005, the Pughs were together at the apartment of a friend in Des Moines. At 3:13 a.m., Bridgette called 911. She reported, "My husband was beating me up really bad." Clerk's Papers (CP) (Tr. of 911 Call) at 215. When asked if he was still there, she said, "No he's walking away." Id. at 216. She provided a description of the defendant in response to the operator's questions. Id. at 216-18. When the operator asked her whether he was still there, Mrs. Pugh said, "He's just outside." Id. at 218. She said that he did not have a vehicle and he was walking toward the street. Id. She again reported being beaten but this time stated it in the present sense, "He's beating me up (unintelligible)." Id. at 219. She said she needed an ambulance. ... ¶15 We conclude that Mrs. Pugh's statements were nontestimonial and that no violation of the Sixth Amendment occurred given the back and forth,

conflicting statements about Pugh's presence and the possible threat he posed, and Bridgette Pugh's request for an ambulance."

People v Phillips, 2009 NY Slip Op 9682, 68 A.D.3d 1137; 892 N.Y.S.2d 157 (N.Y. App. Div. 2d Dep't 2009) – "contrary to the defendant's contention, the Supreme Court did not violate his Sixth Amendment right to confrontation at either trial by admitting into evidence the recorded 911 calls in which a nontestifying complainant sought help in an ongoing emergency situation"

People v. Banos, 178 Cal. App. 4th 483, 486-505 (Cal. App. 2d Dist. 2009), review denied (2010) – "When [future murder victim] Cortez called 911, she told the dispatch officer she was calling from a phone booth because defendant was at her apartment and she was afraid to return home. ... Cortez's primary purpose for making the statements to the 911 dispatch officer was to gain police protection. The statements were not yet the product of an interrogation, rather they were made to police conducting an investigation into an ongoing emergency. Accordingly, we conclude they were nontestimonial under Davis."

Banther v. State, 977 A.2d 870 (Del. Supr. Jul 29, 2009) – "[Future murder victim] Ravers' telephone and in-person communications to Harrington Police dispatcher Cheryl Knotts-Woods are not "testimonial" in nature and were admissible as hearsay exceptions for present sense impression and existing mental or emotional condition. [FN52] Unlike other police contacts that might generate "testimonial" responses, Ravers' statements were not part of any judicial proceeding [FN53] and no crime had been committed at the time they were given. [FN54] Therefore, the victim's remarks were not in response to a police interrogation."

Moore v. State, 2009 WL 1470395 (Nev. Feb. 27, 2009) (unpub) – "Jackson initiated the phone call for emergency assistance: the record indicates that Jackson placed the call shortly after she was battered, suffocated, and sexually assaulted and she made the call from a payphone in an unfamiliar location. Jackson placed the call because she wanted the government to come to her aid and not because she wanted to prepare trial evidence."

Nguyen v. Felker, 2009 WL 1246693 (N.D. Cal. May 05, 2009) (unpub) (habeas) – "Bui's statements to the 911 operator (through a translator) on June 2, 2002 were nontestimonial under the guidelines set out in *Davis*. At the time she made those statements, Nguyen was present and had threatened to kill her that day, and she asked the police to "rush over" because Nguyen was trying to kill her."

People v. Smith, 2009 WL 1219939 (Cal. App. 2 Dist. May 06, 2009) (unpub) – girls (ages not given) were mugged, went home, called 911 – "it is clear that Cecilia's statements were nontestimonial. ... The 911 operator merely listened to Cecilia--asking no questions until the end of the portion played to the jury. The operator asked if the perpetrator took the necklace off, and if he took the necklace with him. Objectively viewed, these questions had the sole purpose of determining if police assistance was called for. There was none of the "formality and solemnity" characteristic of testimony given at trial. We believe the statements here were not given for a testimonial purpose, and it would be an overly broad application of the concept of testimonial statements to classify them as such."

People v. Gates, 2009 WL 684992 (Cal. App. 4 Dist. Mar 17, 2009) (unpub) – "The victim called 911 and reported that her boyfriend "beat the shit out of her" and kicked her son. She said

defendant had taken off "just now[.]" "a few minutes ago." In response to the dispatcher's question, she gave defendant's name and volunteered that he was driving a white Isuzu Rodeo. She was asked if she needed medical aid and she replied "probably, yeah." She was transferred to the fire department and repeated that her boyfriend had "just beat the shit out of me" and kicked her son. She was asked if defendant was coming back and she said she did not know. In response to a question, she told the fire department dispatcher defendant's name." – non-testimonial

State v. Rickett, 967 A.2d 671, 2009 ME 22 (Me. Mar 10, 2009) – "[¶ 2] At around 8:30 p.m. on December 10, 2006, Timothy Rickett's wife called 911 from her cellular phone and spoke to a Maine State Police dispatcher to request that an officer be sent to her home in Gray. In response to questioning by the dispatcher, Rickett's wife stated that she and Rickett had a verbal argument that escalated and resulted in Rickett grabbing her by the throat and punching her in the face. The dispatcher asked questions to assess the situation, such as how her injuries were caused, the extent of her injuries, what had precipitated the fight, and whether Rickett had any weapons available to him. In addition to answering each of these questions, Rickett's wife informed the dispatcher that Rickett had threatened to kill her if she called the police, and that she could not leave the area because Rickett had locked the car and had taken the keys. ... [¶ 14] The trial court properly found that the circumstances of Rickett's wife's 911 calls objectively indicate that their primary purpose was to enable police assistance to meet an ongoing emergency."

People v. Beard, 2009 WL 179673 (Cal. App. 5 Dist. Jan 27, 2009) (unpub) – good Samaritan (Perez) interrupted attack and called 911 – "When [victim] Attaway came to Perez and was put on the phone, Attaway was still emotionally distraught. Beard had just driven off. Attaway was not at her home, she was on an unknown street, late at night and vulnerable. The 911 operator was attempting to obtain information to allow the police to respond to Perez's call and to resolve the present emergency. It was imperative for the operator to discover the perpetrator's identity; where he was or had gone; whether he was under the influence; whether he had a weapon; and whether there were children with him. The operator asked all these questions. In addition, although Attaway declined an offer of medical assistance, the operator knew that Attaway had just suffered a serious beating and needed to verify that Attaway did not actually need medical attention. [¶] The call falls squarely within the parameters set by *Davis*. The statements were not testimonial..."

People v. Byron, 170 Cal.App.4th 657, 88 Cal.Rptr.3d 386 (Cal. App. 2 Dist. Jan 23, 2009) – "Christine Sowers called 911 and told the operator she had just been assaulted by her boyfriend, defendant Mike Byron. She said Byron came over to her apartment and demanded money. A fight ensued, during which Byron bit her cheek, tried to choke her, and punched her in the back. ... Sowers's statements to the 911 operator ... were nontestimonial because the primary purpose in giving and receiving them [was] to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial."

U.S. v. Harper, 2009 WL 140125 (W.D. N.Y. Jan 20, 2009) (unpub) (pretrial) – "Mrs. Harper, called 911 and reported that her son Glen had just called her and stated that he was coming with a gun to shoot her and her husband. During the call, she also reported that Glen had just driven by her and that he was at that moment at the family home on Third Street, not far from where Mrs. Harper was calling. ... Nor does admission of the printout [of the call] give rise to any Confrontation Clause issues. The Confrontation Clause applies only to testimonial statements.

Statements admitted as excited utterances or present sense impressions are nontestimonial and thus do not implicate the Confrontation Clause. *See Davis ...*"

Commonwealth v. Everett, 73 Mass.App.Ct. 1115, 899 N.E.2d 118 (Table), 2009 WL 102755 (Mass. App. Ct. Jan 16, 2009) (unpub) – "The victim then called 911 and spoke with a police dispatcher. As reflected in the recording of the telephone call, [FN1] the conversation began as follows: 'CALLER: "Quickly I need the cops. 21 Bradford Street. He's taking off. I just got beat up. My face is all broken up. He has a um Escalade truck, TRACEE. 21 Bradford Street.' [¶] The call was brief, lasting less than two minutes. During the remainder of the call, the dispatcher repeatedly asked the victim to slow down and reassured her that the police would find the defendant. ... the statements at issue were not testimonial."

State v. Sapienza, 2009 WL 62992 (N.J. Super. A.D. Jan 13, 2009) (unpub) – "Applying the Davis analysis, we agree with the trial judge that Margaret's statements to the 911 operator objectively reflect she was seeking police assistance to meet an ongoing emergency. She was hiding outside her home, dressed in pajamas, and barefoot despite the low temperature. Her voice reflected she was excited and scared; at times she whispered and at other times she was difficult to understand. ... In addition, it is clear she was not reciting statements to build a foundation for a criminal prosecution. [cite] Therefore, Margaret's statements were not testimonial and properly admitted."

State v. Coleman, 2008 WL 5221063 (N.C. App. Dec 16, 2008) (unpub) – "The victim, Michael Lee Russell, made a 911 call on 19 January 2006, around 11:00 p.m. In the call the victim stated he had been bound and robbed at gunpoint by Steven Coleman and his wife, defendant. The victim's statement to the 911 operator was descriptive of the crime and fully identified the Colemans as the perpetrators. ... Defendant argues that because the robbery had ended about an hour prior to the victim's 911 call, that he was not reporting events as they occurred and the emergency was not ongoing. However, the evidence demonstrated that the reason for the delay in the 911 call was that the robbers had tied up the victim and it took him an hour to free himself so that he could make the call." – not testimonial

State v. DeBauche, 2008 WL 5146870 (Wis. App. Dec 09, 2008) (unpub) – one of the rare cases in which 911 caller literally described the crime as it occurred – "[¶] 17 As Angell's testimony demonstrates, Jane Jenson was facing an ongoing emergency throughout the course of her 911 call. [cite] The call began with a request for police assistance and a report of a man on the property with a gun. The discussion ended with Jane Jenson's report that she had been shot." – not testimonial

Thomas v. State, 284 Ga. 540, 668 S.E.2d 711 (Ga. Oct 27, 2008) – neighbor called 911 and "acted as a conduit between the 911 operator" and victim – victim also identified attacker to EMT – "We agree that the statements identifying Thomas as the assailant were nontestimonial and not subject to the Sixth Amendment's Confrontation Clause as the victim was speaking about events 'as they were actually happening' [cite] and the primary purpose of the questioning 'was to enable police assistance to meet an ongoing emergency.'"

State v. Lawson, 1 So.3d 516, 08-123 (La. App. 5 Cir. Nov 12, 2008) – "During the second call made a minute later, the victim said she had just called asking for the police. She then said frantically, 'Let me go. My boyfriend just punched me in the face and threw me on the floor and I

need the police to get here as soon as possible.' The victim's voice was shaking. In response to questioning, the victim stated that her boyfriend was still there ..." – not testimonial

State v. Rinehart, 2008 WL 4823571, 2008-Ohio-5770 (Ohio App. 4 Dist. Nov 06, 2008) (unpub) – "{¶ 2} First, Rinehart argues that the trial court committed plain error and violated his constitutional right to confront the witnesses against him when it allowed the prosecution to play a 911 tape in which the victim identified Rinehart as being present at the time of the shooting. Because the primary purpose of the dispatcher's questioning was to gather information about an ongoing emergency, rather than to establish the facts of past criminal conduct, the victim's statement identifying Rinehart was not testimonial in nature."

Womack v. State, 2008 WL 3917807 (Tex. App.-Dallas Aug 27, 2008) (unpub) – "ith regard to the first *Davis* factor, the record shows that Jamison's 9-1-1 call described events that had already occurred in connection with her alleged assault. Jamison's concern for the safety of the child, however, was a present concern. As to the second *Davis* factor, a reasonable listener could conclude there was an ongoing emergency. Although Jamison was safely away from the residence, the baby remained there."

Commonwealth v. Nesbitt, 892 N.E.2d 299, 452 Mass. 236 (Mass. Aug 18, 2008) – "At 11:58 P.M. on October 1, 2003, Dawne Brault dialed 911 from her home in Attleboro, exclaiming "Oh, God. Hurry up and help me." When the police dispatcher asked Brault what the problem was, she responded: "(Inaudible) just came into my house and tried to kill me." When asked to repeat who had come into her home, Brault stated, "Ralph Nesbitt." In response to further questions, she told the operator that Nesbitt was gone and pleaded for help to "hurry up. I don't want to die." Paramedics responded to the scene and transported Brault to Sturdy Memorial Hospital where she died ten minutes later of multiple stab wounds to her arms and torso." – not testimonial

Martin v. Warden Forcht Wade Correctional Center, 289 Fed.Appx. 682 (5th Cir. Jul 22, 2008) (habeas) – victim's "statements to the 911 operator were nontestimonial" – [NOTE: The facts are given in the summary of district court decision, which follows.]

Martin v. Michael, 2007 WL 1428672 (W.D. La. 2007) (unpub), **aff'd 2008 WL 2831938 (5th Cir. July 22, 2008)** (unpub) – habeas – victim told 911 operator, "I need an ambulance at 1623 Perry. Jessie Martin done stabbed me." – "Viewing the facts in light of the Court's decision in *Davis*, the undersigned concludes that Claudia Evans' statements on the 911 tape were non-testimonial and, therefore, that their admission did not implicate the Confrontation Clause. When the exchange is viewed objectively, it is clear that the primary purpose of Evans' identification of Martin as her attacker and of the questioning by the 911 operator was to address and resolve the ongoing emergency. At the time Evans initiated the 911 call, she had been stabbed seven times and was in need of medical attention. It is clear from the sound of Evans' voice on the tape that she was having trouble breathing and was in considerable distress, which is evidenced by her repeated pleas for the operator to send help. Furthermore, the questions posed by the operator were necessary to allow her to evaluate the situation and provided much-needed assistance to Evans."

Smith v. United States, 947 A.2d 1131 (D.C. May 01, 2008) – "the trial judge found, and we agree, that hearsay statements about the forcible entry and physical attack upon complainant shortly before her call for help came well within the scope of nontestimonial circumstances

because they objectively indicate that their main purpose was to summon help for an ongoing emergency." – even though victim had left house and didn't know precise location of attacker, her non-resident husband

Thompson v. State, 291 Ga.App. 355, 662 S.E.2d 135, 08 FCDR 1543 (Ga. App. Apr 18, 2008) – "Here, the caller advised that she had been hit, had a swollen face, and was experiencing serious bleeding. Although she did advise of the perpetrator's location in a different apartment, her call was made with such immediacy after the attack that, upon the officer's arrival, Pope was scared and crying, and blood was running down her chin, shirt, and pants. In light of the caller's immediate need for medical attention and the proximity in time between the call and the attack, we hold that the trial court did not err in ruling that the call was nontestimonial in nature, in that it was made to seek assistance in a situation involving immediate danger."

People v. Dominguez, 382 Ill.App.3d 757, 888 N.E.2d 1205, 321 Ill.Dec. 272 (Ill. App. 2 Dist. May 14, 2008) – "Any reasonable listener of the 911 tape would conclude that [D.V. victim] Cook was facing an ongoing emergency and was describing events as they were unfolding. ... Cook was crying and hysterical as the operator attempted to gather details on the current circumstances that required police assistance. Specifically, the operator elicited from Cook why she was fleeing defendant, what her injuries were, where she was located, and where she left defendant. The 911 operator's obvious intent was to determine where police should be dispatched and what potential threat Cook or the police may be facing. Under this analysis, the 911 tape was not testimonial evidence."

Smith v. U.S., 947 A.2d 1131 (D.C. May 01, 2008) – "Shortly after nine o'clock one morning, the complaining witness, the estranged wife of appellant, called the emergency telephone police operator on 911 to report that she had just been physically attacked by her husband. As is customary, the call was recorded on tape. When first connected to the 911 operator, complainant appeared to be extremely excited and anxious. She immediately pleaded for help and attention. ... Turning to the present case, the trial judge found, and we agree, that hearsay statements about the forcible entry and physical attack upon complainant shortly before her call for help came well within the scope of nontestimonial circumstances because they objectively indicate that their main purpose was to summon help for an ongoing emergency."

Thompson v. State, 291 Ga.App. 355, 662 S.E.2d 135, 08 FCDR 1543 (Ga. App. Apr 18, 2008) – "Here, the caller advised that she had been hit, had a swollen face, and was experiencing serious bleeding. Although she did advise of the perpetrator's location in a different apartment, her call was made with such immediacy after the attack that, upon the officer's arrival, Pope [the victim] was scared and crying, and blood was running down her chin, shirt, and pants. In light of the caller's immediate need for medical attention and the proximity in time between the call and the attack, we hold that the trial court did not err in ruling that the call was nontestimonial in nature, in that it was made to seek assistance in a situation involving immediate danger."

People v. Gragg, 2008 WL 933554 (Cal. App. 3 Dist. Apr 08, 2008) (unpub) – "On the afternoon of January 4, 2006, Jade Sprickman telephoned the 911 operator and asked for help, stating her ex-boyfriend (defendant) had called and said he was on his way to kill her and her current boyfriend, adding, 'Please, please, please! ... Hurry, hurry, please!' Gasping, and every intonation freighted with distress, she said that she had just gotten off the phone with defendant, who threatened that he was on his way to her house. 'He's coming to kill me right now. He's

gonna peel me back.' When asked where he might be coming from, she said that defendant just got out of prison and she had no idea, that he was in a program, a halfway house, but that he had left it two days earlier." – officer came, stayed for awhile, then left, then victim called 911 again to report that defendant had just shown up at her house – "The calls were contemporaneous with the ongoing threats and the questions and responses were about information needed to assess the threats and triage the police response to the reports. Accordingly, the trial court did not err in overruling defendant's *Crawford* objection."

State v. Taylor, 2008 WL 834437, 2008-Ohio-1462 (Ohio App. 9 Dist. Mar 31, 2008) – "{¶ 1} Michael Taylor poured gasoline on Lisa Smith and her porch and tried to set them on fire." – she called 911 – "{¶ 42} Regarding the 911 call, ... because the call detailed events as they were actually happening, its introduction did not violate the Confrontation Clause."

People v. Monroe, 2008 WL 544221 (Cal. App. 4 Dist. Feb 29, 2008) (unpub) – "S.T.'s 911 call was not testimonial under *Crawford* and *Davis*. Her primary purpose in making the call was to secure police assistance to meet an ongoing emergency and get medical attention following her rape. As in *Davis*, the questions by the 911 dispatcher demonstrated that the operator's primary purpose was to obtain crucial information necessary to aid the police in meeting the emergency and not to establish or prove some past fact." [Note dual inquiry into purposes of both caller and operator.]

State v. Camarena, 344 Or. 28, 176 P.3d 380 (Ore. Jan. 25, 2008) – "Second, ... a reasonable person could infer from the complainant's responses that she faced an ongoing emergency. The complainant was shaken and had sustained an injury to her eye. Defendant's exact whereabouts were unknown when the complainant spoke with the 9-1-1 operator and there was a reasonable likelihood that defendant might immediately return to their apartment, given the extremely short period of time between his exit and the complainant's 9-1-1 telephone call. Third, in light of that possibility, the complainant's identification of her boyfriend as her assailant, as well as her location, were both necessary to help terminate that ongoing emergency. And, fourth, it was reasonable to infer from complainant's statements that the environment from which she was calling would be neither tranquil nor reasonably safe until aid arrived, given the possibility of defendant's return. [¶] Under the criteria established by the Supreme Court in *Davis*, we conclude that the complainant's initial 9-1-1 responses, [cite] were nontestimonial"

People v. Wurth, 2008 WL 44483, *1+ (Cal.App. 2 Dist. Jan 03, 2008) (unpub) – "A victim's report of a crime in a 911 call is not testimonial if the call is made during an assault and the statement is obtained to respond to an emergency, rather than to investigate and prosecute a crime. ... In the course of [DV victim] Rohus' call to 911, she did provide facts relevant to prosecution. She identified appellant by name and provided his date of birth, the make of his truck and the direction he was heading. However, substantial evidence supports the trial court's determination that the primary purpose of taking this information was to assess an ongoing emergency and to render aid."

Dixon v. State, 244 S.W.3d 472 (Tex. App.-Hous. Nov 29, 2007) – "Brownfield told the 9-1-1 operator that the assault occurred in her car, and she did not know what to do. Brownfield stated she did not think the assailant would come to her home; however, the assailant was currently wanted by the police for aggravated assault, the assailant threatened to kill Brownfield and her entire family; and the door to her trailer 'doesn't lock very good.' Although Brownfield stated she

did not need an ambulance, Brownfield told the 9-1-1 operator that she believed her finger was broken, and inquired about how long it would take the police to arrive. Brownfield's statements were made in the course of a conversation initiated by the victim of a crime, and were neither 'official and formal in nature' nor 'solemn declaration[s] made for the purpose of establishing some fact.' [cites] Viewed objectively, the primary purpose of Brownfield's 9-1-1 call and her statements to the operator was to 'cry for help.' [cite] [¶] Similarly, the primary purpose of the 9-1-1 operator's questions and Brownfield's responses to those questions was to determine if Brownfield was physically injured and in need of medical assistance, and to assess the potential for a continuing threat to Brownfield's safety or the safety of the responding officer."

People v. Williams, 44 A.D.3d 326, 326-27, 843 N.Y.S.2d 33, 34-35, 2007 N.Y. Slip Op. 07339 (October 04, 2007) – "The court properly admitted as excited utterances the nontestifying declarant's statements to a 911 operator that he had just encountered two armed intruders in his apartment building. ... The admission of the excited utterances did not violate defendant's right to confrontation, since the statements were primarily made 'to enable police assistance to meet an ongoing emergency'"

Santacruz v. State, 237 S.W.3d 822 (Tex. App.-Hous. Sep 27, 2007) (on rehearing) – "Around 10:30 p.m. on May 4, 2004, the complainant Nelly Canales called 9-1-1 and requested that an ambulance and police be sent to her location. When asked why an ambulance was needed, Canales stated that her husband had hit her in the mouth. When asked if she had been sexually assaulted, she stated that her husband had hit her with his rifle. Canales later stated that this incident had occurred at her house about ten to fifteen minutes earlier and that she had taken her children to her mother's house, and had placed the 9-1-1 call from there. ... As to the first consideration discussed by the *Davis* court, Canales was describing her current emergency situation and seeking help. However, as to the three sentences in which Canales refers to the offense in question, Canales was not describing events as they were actually happening; instead, she was describing events that had occurred ten to fifteen minutes earlier. Our dissenting colleague seems to indicate that, under *Davis*, a 9-1-1 caller must be describing a criminal offense as it is happening, with the perpetrator present, for the caller's statements to be nontestimonial. *See post* at pp. 3-4. The *Davis* court did not so hold; rather, it stated that this is only one factor to be considered in determining whether statements were made under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. *See id.*, 126 S.Ct. at 2273-77. Courts applying *Davis* have held statements to be nontestimonial even though they were not describing events as they were happening. ... As to the second factor, a review of the tape shows that any reasonable listener would recognize Canales was facing an ongoing emergency. She was injured and bleeding from the assault wounds to her mouth. She was in distress and was seeking medical attention for her injuries. ... Canales's statements on the tape were nontestimonial."

Taylor v. State, 2007 WL 2505626 (Tex.App.-Eastland September 06, 2007) (unpub) – taxi driver, victim of robbery and attempted rape, "ran to a convenience store and tried to use a pay phone to call for help. She was dazed and confused and was having trouble making the call. She saw both of the men coming toward her. They looked 'menacingly.' She ran toward the middle of the street where the men caught up with her and began beating her in the head. A truck driver started 'blaring his horn' and stopped to help her. The victim was then able to successfully make a 9-1-1 call." – tape of call was non-testimonial [NOTE: Victim also testified, so there was no *Crawford* issue for that reason alone.]

State v. Pugh, 2007 WL 2171361 (Wash. App. Div. 1 Jul 30, 2007) (unpub) – "[T]he questions asked by the operator 'were designed to gather information necessary to enable the police to respond to the emergency situation.' *Williams*, 136 Wn.App. at 503. The operator asked questions about Timothy's appearance, his location, whether he was alone, if he was armed and if he had been drinking. Answers to these questions would provide police officers with valuable information needed to safely resolve a potentially dangerous domestic violence situation. They were 'to enable police assistance to meet an ongoing emergency, rather than to establish or prove past events, potentially relevant to later criminal proceedings.' *Id.* at 504. As a result, the 911 call was non-testimonial."

People v. Wilson, 2007 WL 1941443 (Cal. App. 3 Dist. Jul 05, 2007) (unpub) – "The environment in which the call was made was not tranquil by any stretch of the imagination. Neither Percy nor the Bessers had ever seen or met Brandy, who clearly was not out visiting neighbors and discussing the incident after the fact. Brandy was upset and emotional, and her only apparent goal was to find a phone to call for help. The 911 operator's inquiry, 'Where is this occurring at?' demonstrates that the operator understood the situation to be an ongoing emergency. The remainder of the call was limited to the dispatcher's inquiries to determine whether Brandy was okay, find out who her assailant was and determine Brandy's location in order to properly direct law enforcement to the scene, all questions focused on addressing an ongoing emergency, not to establish or prove past events potentially relevant to later criminal prosecution."

State v. Hewson, 642 S.E.2d 459 (N.C. App. 2007) – "Over Defendant's renewed objection, a recording of the 911 call was played for the jury. During the 911 call, the victim reported that she had been shot and was bleeding. She said, '[m]y husband is shooting me.' Bennett [dispatcher] testified that while she was on the line she could hear shots being fired. ... [I]n the present case, as in *Davis*, the colloquy between Bennett and the victim was not designed to establish a past fact, but 'to describe current circumstances requiring police assistance.' *Id.* at ----, 158 L.Ed.2d at 240. Therefore, the victim's statements were not testimonial."

People v. Nguyen, 2007 WL 1207233, *4 (Cal. App. 4 Dist. 2007) (unpub) – DV victim, Tran, phoned 911 half an hour after defendant left – "Moreover, it is evident from the nature of the questions that the 911 operator's primary purpose was to obtain crucial information necessary to aid the police in meeting the emergency and not to establish or prove some past fact. For example, many of the operator's questions were directed towards determining Tran's location and the type of help she needed. The operator also asked for a description of the assailant, his location, and whether he possessed any weapons. As *Davis* explains, this is necessary 'so that the dispatched officers might know whether they would be encountering a violent felon.' (*Davis, supra*, 547 U.S. at p. ---- [126 S.Ct. at p. 2276].) Admission of Tran's statements in the 911 call did not violate defendant's confrontation rights under the Sixth Amendment."

Williams v. State, 967 So.2d 735, n.11 (Fla. Jun 21, 2007) – "[Murder victim] Dyke's responses to the 911 operator's questions were not testimonial because Dyke was seeking emergency medical assistance for her life-threatening injuries." (dicta; issue was unpreserved)

U.S. v. Arnold, 486 F.3d 177 (6th Cir. 2007) (en banc) – "When Gordon fled from her gun-wielding assailant [her mother's boyfriend], the defendant remained at large and remained (in the present tense) 'fixing to shoot' her. *See id.* [Davis] at 2276 ('McCottry was speaking about events as they were actually happening, rather than describing past events.') (internal quotation marks and brackets omitted). The tape of the 911 call itself makes clear that Gordon had made 'a call for help against [a] bona fide physical threat.' *Id.* The 911 operator's handling of the call shows that she was trying to 'elicit[] statements ... necessary to be able to resolve the present emergency,' *id.* (emphasis omitted), by attempting to compose Gordon and by seeking to understand the gravity of the peril she faced. Gordon's frantic responses 'were provided over the phone, in an environment that was not tranquil, or even ... safe' because she had just left the house and had no reason to know whether Arnold was following her or not. *Id.* at 2277. The fear that the district court noted in Gordon's voice communicated that she was scarcely concerned with testifying to anything but simply was seeking protection from a man with a gun who had killed before and who had threatened to kill again. The primary purpose and effect of the 911 operator's questioning was to resolve the crisis, with the questions and answers coming in spite of, not because of, the possibility of a later criminal trial."

State v. Greene, 2007 WL 1223906 (N.J. Super. A.D. April 27, 2007) (unpub) – "Heiman's 9-1-1 call was made after the robbery occurred and contained Heiman's description of what had already happened rather than what was then happening. Accordingly, Heiman's 9-1-1 call resembled that part of the 9-1-1 call in *Davis* that occurred after Davis had left the premises and, as held by the Court, was testimonial and barred by the Confrontation Clause. Thus, the police dispatcher's statements to Officer Roseman about what Heiman had said to the 9-1-1 operator were testimonial and could not be admitted through hearsay testimony." [NOTE: Heiman testified at trial, so under *Crawford* there was no confrontation clause impediment to the admission of hearsay by him. See "Declarant Testifies (list)."]

State v. Bennett, 218 S.W.3d 604 (Mo. App. 2007) – "The circumstances surrounding the two 911 calls clearly indicate that the questions of the 911 dispatcher were designed to help the police and Jason deal with an ongoing emergency. Jason had just escaped from his apartment where three armed men had broken in and assaulted the apartment's occupants. The first thing Jason said to the 911 dispatcher was 'they got my little baby brothers.' Throughout both calls Jason was worried about his brothers and mother who were still in the apartment with the three armed intruders. The 911 dispatcher's questions were aimed at ascertaining what the situation was like and where it was taking place. She also had to continually tell Jason not to go back to the apartment where he believed the three armed intruders still had his mother and brothers. [¶] Even during the second 911 call the emergency was ongoing. Jason called to see 'how close the cops are' and ask if the cops had got 'a hold of my mom.' He told the dispatcher he was 'afraid [the intruders are] going to hurt my mom.' At the end of the second call the police still had not arrived and Jason and the 911 dispatcher had no idea whether the three armed men were still in the apartment or whether they had left. The 911 dispatcher told Jason to 'remain there where you are, and wait till an officer makes contact with you.' Jason said, 'they might already be gone by now.' [¶] Viewed objectively, both 911 calls show that the 911 dispatcher's questions and Jason's answers was an interrogation conducted to enable police assistance to meet an ongoing emergency. Therefore, these statements were nontestimonial and the Confrontation Clause does not prohibit their admission."

Gayden v. State, 863 N.E.2d 1193 (Ind. App. 2007) – "Gayden argues that Epperson's entire 911 call should have been excluded because it was testimonial. Jones testified that Epperson had driven approximately one-half mile away from Gayden's house before she called 911. Gayden suggests that because the women were somewhat removed from the scene of the crime, they were not in the midst of an ongoing emergency. We note, however, that Jones testified that there had been gunshots and a violent smashing of Epperson's windshield only minutes before. Also, Epperson's voice sounds rather frantic at the beginning of the recording. ... This portion of the 911 call clearly enabled the operator to send police assistance to assess the situation and locate the perpetrator, making Epperson's statements non-testimonial pursuant to the Supreme Court's rationale in *Davis*."

People v. Avila, 2007 WL 1129204, *8-11 (Cal. App. 6 Dist. 2007) (unpub) – victim of shooting drove to police station, the front desk of which was unmanned, and called 911 from inside the station – "The trial court reasonably found Martinez's 911 call to have been made under the stress and excitement of the shooting just 10 minutes before the call. ... The language Martinez employed during the call shows a lack of reflection. Not only are her recollections of the incident and her beliefs as to the motivation for it presented chaotically, but Martinez was unable to calm herself sufficiently to listen to and respond to the operator's questions. Martinez's statements were apparently generated from her own internal responses to a life-threatening, frightening attack. ... It would be unreasonable to prohibit evidence concerning spontaneous declarations in every case where they are promoted by a simple inquiry as to what happened. Clearly, Martinez was reporting a crime and seeking help, and the operator was trying to get enough information from her for police to conduct an investigation." (citation omitted)

People v. Johnson, 2007 WL 778442, *1 (Mich. App. 2007) (unpub) - "On August 16, 2004, just before 5:00 a.m., defendant entered Melissa Lutz's apartment in Ann Arbor. Hearing a stranger in her apartment, Lutz called 911. Police officers arrived at Lutz's apartment while defendant was still inside the apartment. They arrested defendant when he walked out of the apartment. ... Lutz's statements were not made to establish or prove past event, but were made to enable police assistance to meet an ongoing emergency and thus were nontestimonial."

State v. Williams, 150 P.3d 111, 120 (Wash. App. Div. 1 2007) – "The circumstances under which the 911 call at issue in this case was made indicate that the primary purpose of the call was to secure police assistance to meet an ongoing emergency. The call was made very shortly after the incident took place. Moreover, many of Otis' statements during the call clearly demonstrated that her over-riding purpose for calling 911 was to secure police assistance to ensure her safety and the safety of her children. *** During the call, Otis did provide information of past facts in response to questions by the 911 operator and state that she wanted the men involved arrested. As a whole, however, the 911 call was made under circumstances objectively indicating that the primary purpose of the questions asked by the 911 operator and the statements made by Otis were to enable police assistance to meet an ongoing emergency, rather than to establish or prove past events potentially relevant to later criminal proceedings. Accordingly, the 911 call was not testimonial."

Marino v. Barbary, 2007 U.S. Dist. LEXIS 11, 2007 WL 14561 (E.D. N.Y. 2007) (unpub) – habeas corpus – victim's statements to 911 operator properly admitted as trial as non-testimonial

Cross v. Commonwealth, 2007 WL 121823, *6 (Ky. App. 2007) (unpub) (on remand from SCOTUS for reconsideration in light of *Davis*) – "In the case at hand, the victim made the 911 call in the immediate wake of the home intrusion, assault, and robbery perpetrated by the appellant. The call was without any aforethought of giving a statement for later use against Cross in a court proceeding. Hence, the statements are not excludable pursuant to the confrontation clause under *Crawford* and *Davis*."

People v. Mitchell, 35 A.D.3d 507, 826 N.Y.S.2d 144, 2006 N.Y. Slip Op. 09280 (N.Y. 2d Dept. Dec. 05, 2006) – "the admission of the tape of a caller's statements to the 911 operator did not violate the defendant's right to confrontation because the statements were not testimonial" – no additional facts given

People v. Drummond, 34 A.D.3d 492, 492-93, 824 N.Y.S.2d 126, 2006 N.Y. Slip Op. 08144 (N.Y. A.D. 2d Dept. Nov. 8, 2006) – "The defendant contends that the admission into evidence of a tape of a 911 emergency telephone call in which the complainant sought help in an ongoing emergency situation violated his right under the Confrontation Clause. ... admission of the complainant's statements to the 911 operator did not violate the defendant's right of confrontation because the statements were not testimonial"

State v. Camarena, 208 Or.App. 575, 145 P.3d 267 (Or.App. 2006), aff'd, 344 Or. 28, 176 P.3d 380 (Or. Jan 25, 2008) –

Jackson v. State, 931 So.2d 1062 (Fla. Dist. Ct. App. 4th Dist. 2006) – "Jackson, on probation for aggravated battery, was violated for an incident in which her fiancé, the victim, called 911 for help. He told the dispatcher and, later, the responding officer, that Jackson, apparently intoxicated, had rammed his vehicle with hers, more than once, and had hit him in the mouth. The victim did not testify. The evidence included admission of a tape of the 911 call from the victim and a written victim statement given to the police. ... Initially, we conclude that the record supports the trial court's conclusion that the 911 tape was an excited utterance, and not hearsay. Further, the 911 tape described events as they were actually happening and was neither testimonial, nor violative of *Crawford* in any circumstance." – [NOTE: The opinion then adds that *Crawford* doesn't apply in probation hearings, rendering the foregoing dicta.]

➤ Sub-Category: 911 Caller Relays Statements from Victim

State v. Largo, 2012 NMSC 15, 278 P.3d 532 (N.M. 2012) – murder case – "[T]he district court admitted into evidence portions of the 911 tape where Victim communicated to the 911 operator, through Stevic, that Defendant had shot her. ... the 911 operator asked a series of questions, similar to the questions posed by the police officers in Bryant, that were targeted to assess the seriousness of the ongoing emergency. The 911 operator asked questions regarding where the shooter went, the type of vehicle he was using, the name of the victim, the type of gun used, who the shooter was, and Victim's medical condition." – non-testimonial

State v. Barthelemy, 32 So. 3d 999, 1012 (La.App. 4 Cir. 2010) – "Ms. Smith fled the crime scene in fear for her life; her companion had just been shot several times and killed; and as she fled the scene, she heard a car drive away. The 911 call was made by the occupants of a nearby home, where Ms. Smith sought refuge, but was not allowed to enter. The description of the

perpetrator was plainly part of the investigation of the ongoing emergency - the realistic fear that Mr. Caccioppo's killers might come after her. Moreover, information concerning the perpetrator or perpetrators' description was useful information for officers responding to the Lake Vista residence in the event that more than one individual was outside the house when they arrived." – non-testimonial

911 Calls by Witness

Bruce v. State, 2015 WY 46, 346 P.3d 909 (Wyo. 2015) – "Mr. Laster made the 911 call because his wife was unable to make the call for herself, because he was concerned about his wife's head injury, and because he was seeking immediate medical assistance for his wife. ... The statements are testimonial only if the context in which they were made indicates that Mr. Laster's purpose in making the statements was to assist in a future prosecution, and in this case, we find nothing to suggest such a purpose."

State v. Ise, 460 S.W.3d 448 (Mo. Ct. App. Feb. 10, 2015), reh'g and/or transfer denied (Mar. 31, 2015), transfer denied (May 26, 2015) – "We find that the 911 tapes also survive confrontation clause analysis. ... all three very brief calls clearly evidence nontestimonial statements made to enable police to meet an ongoing emergency."

People v. Warren, 124 A.D.3d 699, 998 N.Y.S.2d 455 (2015) – "the admission at trial of the 911 caller's statements did not violate his right to confrontation, as the primary purpose of the statements was to obtain an emergency response to an individual with a firearm; thus, they were not testimonial in nature" – even though defendant was not threatening anyone with the firearm but merely had it in his possession while sitting in a car

Alston v. State, 329 Ga. App. 44, 49-51, 763 S.E.2d 504, 509-10 (2014) – "Statements that are made during a 911 call, including statements identifying the perpetrator of a crime, while the incident is on-going and the perpetrator is still at large with the purpose of enabling the police to meet an on-going emergency are not testimonial in nature."

Hereford v. State, 444 S.W.3d 346, 348-53 (Tex. App. 2014) – unnamed person called 911 to give detailed information about drug dealing from a particular hotel room – "One cannot reasonably infer from that rather sparse verbiage that the caller was seeking help or was otherwise facing some immediate threat to his or her safety or well-being. ... The primary, if not sole, purpose of the terse exchange at bar was for the purpose of developing 'a factual predicate for later litigation' or investigating a crime. So, the anonymous statements reiterated by the police were testimonial."

State v. Lewis, __ So.3d __, 2014 WL 4242870 (La. App. 4 Cir. 8/27/14) – extremely drunk driver speeding on road hit car, killing one person and seriously injuring another – "The defendant complains that the recordings were of 911 calls from people describing the accident. Under these circumstances, where the 911 calls were describing a present emergency, we find no error in the trial court's ruling denying the defendant's motion to exclude them."

State v. Falkins, 880 So.2d 903 (La. App. 4 Cir. 2014) – "In the present case, the State was allowed to introduce recordings of three separate calls to 911 into evidence. The record indicates

that all three of the calls were placed within a span of only five minutes. The first call was placed by the victim, Kiera, at 6:34 a.m.; the second call was placed by the apartment's security worker, Joy, at 6:37 a.m.; and the third call was placed by the victim's sister, Kathy, at 6:39 a.m. ... Under the circumstances of this case, there is no doubt that the statements made in each of the three phone calls to 911 were nontestimonial in nature because the circumstances objectively indicated that they were given to assist police officers in responding to an ongoing emergency."

People v. Bonds, 987 N.Y.S.2d 428, 987 N.Y.S.2d 428 (N.Y. App. Div. 2d Dept. 2014) – "the admission of the contents of the 911 emergency telephone call made by the third person was also proper under the excited utterance exception to the hearsay rule, and did not constitute a confrontation clause violation in any event..."

State v. Norah, 131 So. 3d 172, 179 (La. App. 4th Cir. 2013) – "The defendants assert that their rights under the Confrontation Clause were violated when these persons that dialed 9–1–1 and identified the red Monte Carlo and the perpetrator's clothing were not called to testify, and, thus, were not subjected to cross-examination. The statements on the recordings of the 9–1–1 calls are 'non-testimonial,' and were made 'to enable police assistance to meet an ongoing emergency.'"

State v. Sisneros, 2013-NMSC-049, 314 P.3d 665 (N.M. 2013) – "{3} As he entered the house, Navarro asked Levi if he was expecting anyone, because a person wearing a dark beanie and sunglasses was sitting in a gray Cavalier parked in front of the house. ... {4} Shortly thereafter, the sound of gunshots pulled Robyn's attention away from the dishes, and she raced to the front door knowing that Levi was outside. Standing in the doorway, Navarro told her, 'Call 911. Levi's been shot.' She grabbed a phone and dialed 911... {5} ... Robyn told the 911 operator what Navarro had told her about the description of the shooter and the car, as well as the direction the shooter fled." – Navarro did not testify but Robyn did – "{14} ... The 911 operator asked questions in the wake of a sudden and unexplained shooting to gather information necessary for first responders to manage an ongoing emergency. Like *Largo*, the questions included the name and medical condition of the victim, the injury sustained, the identity of the shooter, a description of the shooter, and where the shooter went. The operator's questions do not suggest an inquiry into past criminal conduct or an effort to prepare a criminal case for investigation and prosecution." – the opinion also considers both Robyn's and Navarro's emotional state after the shooting – held: Navarro's statements, relayed by Robyn, were not testimonial – [NOTE: It's unclear why the 911 operator's motives for asking Robyn questions have any bearing on the proper categorization of statements Navarro made to Robyn prior to initiation of the call.]

State v. McWilliams, 311 P.3d 584 (Wash. App. Div. 2 2013) review denied, 318 P.3d 279 (Wash. 2014) – "¶ 38 The store clerk made the 911 call to inform police of a fistfight. While on the **593 phone, the store clerk told police that a white person fired a shot, which shattered the store's window and hit another store clerk in the leg. Thus, the 911 recording captured events as they occurred and where the speaker faced an ongoing emergency. The nature of the questions and the lack of formality all show that the clerk's statements were made in the course of an ongoing emergency and were not testimonial..."

West v. State, 406 S.W.3d 748, 764-65 (Tex. App.--Hous. [14th Dist.] 2013), petition for discretionary review refused (Dec. 18, 2013) – "Because the 9–1–1 call was properly offered and admitted, not to prove the truth of the matter—that appellant committed aggravated

kidnapping—but rather for the non-hearsay purpose of explaining how and why police responded to the Stewart Beach area, the statement was not hearsay, did not implicate appellant's confrontation clause rights, and was admissible under *Crawford*." [NOTE: Same result could be reached more directly under the emergency doctrine of *Davis* and *Bryant*.]

People v Dockery, 107 A.D.3d 913, 969 N.Y.S.2d 62 (N.Y. App. Div. 2d Dep't 2013) – "the defendant preserved for appellate review his contention that the Supreme Court erred in admitting into evidence a recording of a 911 emergency [*914] call from an anonymous caller who claimed to have witnessed the shooting [cite]. However, such admission was not error. ... The call was nontestimonial in nature, since its primary purpose was to obtain an emergency response to the shooting [cites]."

State v. Williams, 2013 Ohio 726, 987 N.E.2d 322 (Ohio Ct. App., Lucas County 2013), appeal not accepted for review (June 5, 2013) – "[¶ 7] Appellant and Mrs. Williams resided at 2212 Walnut, Toledo, Ohio. The record is clear that the altercation between them on October 8, 2010, began in the house on Walnut. At some point in the altercation, Mrs. Williams ran from the house and outside to the street. Appellant followed. [¶ 8] Appellant argues that he did not strike Mrs. Williams when they were outside of the house and that there was no ongoing emergency when the neighbor (who was outside) called 911. ... [¶ 13] The evidence at trial was that Mrs. Williams was yelling for help and remained in the grasp of appellant at the time of the call. Both Mrs. Williams and the neighbor caller were yelling at the time of the call. This was not a call to report a historical event. [¶ 14] Viewed objectively, the primary purpose of the statements by the neighbor in the 911 call was to seek police assistance to aid Mrs. Williams in an ongoing emergency involving domestic violence. We conclude that statements in the 911 call were nontestimonial..."

Jackson v. State, __ So.3d __, 2013 Ala. Crim. App. LEXIS 15 (Ala. Crim. App. Mar. 29, 2013) – "The 911 call in this case was made to provide information to enable police to respond to a perceived ongoing emergency. Therefore, the call was not testimonial and its admission did not run afoul of Jackson's rights to confrontation."

State v. Thomas, 106 So. 3d 665 (La.App. 4 Cir. Dec. 6, 2012) – "In this case, while the 911 caller was not the crime victim reporting the crime, she nevertheless was reporting multiple gunshots close to her home. The evidence indicates that the 911 call was made shortly after the shots were fired, given that the caller was afraid to peer out of her window to get a better description of the shooter for fear of being shot. Similarly, when asked by the 911 operator of the shooter's whereabouts, the caller replied that she was not going outside to see where he went. The purpose of the 911 call by 'Shelly' was to meet an ongoing emergency involving multiple gunshots near her home, not to give police specific information so they could track down and apprehend the suspect." – non-testimonial

Gordon v. State, 318 Ga. App. 767, 734 S.E.2d 777, 2012 Fulton County D. Rep. 3921 (Ga. Ct. App. 2012) – "An eyewitness saw the shooting, followed the Chevrolet, and called 911. While the eyewitness remained on the line with the 911 operator, police relayed the eyewitness's description of the car Gordon was driving to officers in the field. ... The... description provided to the officer by the eyewitness while police were in pursuit meets the 'ongoing emergency' test and was therefore 'nontestimonial.'"

Matter of Donte W., 99 A.D.3d 490, 952 N.Y.S.2d 132 (N.Y. App. Div. 1st Dep't 2012) – "Appellant challenges a 911 call, in which a nontestifying declarant describes the ongoing incident and refers to appellant by name, as violating his right of confrontation... there was no Confrontation Clause violation because the call was made 'to enable police assistance to meet an ongoing emergency'..."

Petit v. State, 92 So. 3d 906, 911 (Fla. Dist. Ct. App. 4th Dist. 2012) – "We have no trouble concluding that the primary purpose of the 911 operator's questions was to determine whether an ongoing emergency existed in the first place and thus the statements from this call were nontestimonial. ... In [a second] call, the 911 operator's questions were once again designed to gather basic background information to determine if an ongoing emergency even existed. The statements during this call were also nontestimonial." – [NOTE: This analysis looks only at the operator's purpose, not the declarant's, which is contrary to *Bryant*.]

United States v. Mouzone, 687 F.3d 207, 215 (4th Cir. Md. 2012) – "We recognize at the outset that although a 911 call may qualify as a police interrogation, [cite], such calls are not inherently testimonial. ... Here, in the three calls that the district court admitted, each caller simply reported his observation of events as they unfolded. The call transcripts do not reveal questioning by the 911 operator that indicates an attempt 'to establish or prove past events.' Rather, the transcripts simply reflect an effort to meet the needs of the 'ongoing emergency.' Thus, we conclude that the calls were nontestimonial..."

State v. Sharpless, 725 S.E.2d 894, 896-898 (N.C. Ct. App. 2012), review denied, 731 S.E.2d 159 – "Defendant's second argument on appeal is that the trial court erred in allowing the State to offer into evidence the 911 report, including the phone call of an anonymous citizen that officers should treat the third victim at the hospital as a suspect because he had been involved in a narcotics robbery. Specifically, defendant contends the anonymous call was hearsay and thus incompetent evidence. We agree."

London v. State, 75 So. 3d 357, 357-360 (Fla. Dist. Ct. App. 1st Dist. 2011) – "The 911 recording here was clearly non-testimonial. All of Ms. London's statements on the recording dealt with the ongoing emergency and allowed the 911 operator to deal appropriately with the situation. Ms. London's identification of appellant as the assailant was in response to a question asked for the purpose of providing assistance to the emergency. At the time of the statement, the operator could not be certain what to inform emergency responders, aside from [*360] the fact that a woman was suffering blood loss. The circumstances could have been anything from a nosebleed due to a blow to the face, to a shooting, to a bad fall. All of these occurrences would have required different treatments and priorities for the emergency responders. The operator was not asking questions to build evidence for a criminal case. At the time of the question, there was no reason for the operator to even suspect that a criminal action had taken place."

Langley v. State, 421 Md. 560, 28 A.3d 646 (Md. 2011) – "In the present case, an individual walked into the carry-out store and killed the store's owner with a gunshot to the head. The caller relayed to the 9-1-1 dispatcher that a shooting had 'just occurred.' (Emphasis added.)ⁿ⁶ After waiting for the 9-1-1 dispatcher to give the caller another number to call, the caller exclaims, 'Hurry up. It just happening.' The caller informs the dispatcher that he had 'seen the guy' and that he knew the color and the tag number of the getaway vehicle, and approximately what the assailant was wearing. The facts of this case, then, are similar to those with which the Supreme

Court in *Bryant* dealt, as both involve assailants inflicting wounds with a firearm, and the declarant relaying identifying information to law enforcement personnel.ⁿ⁷ After *Bryant*, it is of little matter that the purpose of the call was not to stop the immediate shooting or get medical assistance; all that matters for purposes of the "ongoing emergency" analysis is that the caller in the present case was reporting a shooting that was "just happening," and that the [*578] shooter was fleeing, thus remaining potentially a threat to responding authorities and the public at large."

Commonwealth v. McLaughlin, 79 Mass. App. Ct. 670, 948 N.E.2d 1258 (Mass. App. Ct. 2011) – drunk driving case – "Did the introduction of reference to statements from unknown 911 telephone callers deprive the defendant [*681] of his right to confrontation under either the Sixth Amendment or art. 12 of the Massachusetts Declaration of Rights? ... In our circumstances, the 911 telephone callers were alerting the police to an ongoing threat posed by a conspicuously dangerous driver. They were urgent, and not testimonial, communications."

State v. Collins, 65 So. 3d 271 (La.App. 4 Cir. 2011) – "In the matter before us, the 911 calls ranged from descriptions of suspicious persons running with guns to people reporting the shooting. Defendants specifically object to the call from a caller identified only as 'Tashia,' who identified Defendants Collins and Taylor by name and provided the path they were running. [¶] Applying *Davis* to the facts before us, we find that the 911 calls were non-testimonial..."

State v. McKinney, 336 S.W.3d 499, 501-504 (Mo. Ct. App. 2011) – witness called 911 to say "A girl is getting beat. ... "And he's just kickin' the crap out of her on the ground." – "In the instant case, the 911 caller was clearly "describing events as they were actually happening" and "was warning the police of an ongoing emergency." [cites] As such, the statements in the 911 tape were not testimonial..."

People v. Gann, 193 Cal. App. 4th 994, 123 Cal. Rptr. 3d 208 (Cal. App. 4th Dist. 2011) – "a 911 call made during the course of an emergency situation is ordinarily made for the primary nontestimonial purpose of alerting the police about the situation and to provide information germane to dealing with the emergency. Applying the analysis of those cases here, we conclude that Hansen's statements to the 911 operator were not testimonial under *Crawford*, ... The dispatcher was primarily concerned with what was happening at the moment in order to obtain information that would assist responding officers in rendering aid to the victims and finding the escaping perpetrator—not to secure a conviction in a court trial. The information given was not formal or structured. Because the statements that Hansen made to the 911 operator were not testimonial in nature, they were not subject to the requirements of *Crawford*."

People v. Emiliano, 2011 NY Slip Op 625, 81 A.D.3d 436; 916 N.Y.S.2d 61 (N.Y. App. Div. 1st Dep't 2011) – "Regardless of whether defendant may have wanted to interview the [anonymous] caller or call her as a defense witness, the 911 tape was admissible as an exception to the hearsay rule, irrespective of the absence of cross-examination. It qualified, inter alia, as a present sense impression [cite], and it was not testimonial for Confrontation Clause purposes [cite]."

Landaverde v. State, 305 Ga. App. 488, 699 S.E.2d 816, 2010 Fulton County D. Rep. 2694 (Ga. Ct. App. Aug. 2, 2010) – "Following the rationale in *Davis*, our Supreme Court similarly held in *Thomas* that statements elicited as part of a 911 call were nontestimonial in nature as they

were made while the incident was still ongoing and the perpetrator was at large." – same result here

Dixon v. State, 906 A.2d 1271 (Del. 2010) – "In *Davis*, the Supreme Court held that the 911 caller's statements identifying the defendant were not testimonial. [¶] We reach the same conclusion in Dixon's case with regard to Hackett's statements to the 911 dispatcher that described and identified Dixon for the purpose of having him apprehended by the police."

People v. Brown, 72 A.D.3d 445, 896 N.Y.S.2d 871, 2010 NY Slip Op 2839, 1 (N.Y. App. Div. 1st Dep't 2010) – "The court properly permitted the People to introduce a tape of a 911 call made by an unidentified declarant."

Reyes v. State, 314 S.W.3d 74 (Tex. App. San Antonio Mar. 17, 2010) – "On February 23, 2007, Reyes's son called 911 at his mother's request to seek medical help. According to the 911 recording, the child requested assistance because his father 'beat my mom.' The caller expressed concern that his mother's leg may be broken because she was limping and his mother was 'all beat up and she can't move.' The child answered the 911 operator's questions as to whether Reyes had been drinking and possessed weapons. ... We agree with the trial court that the statements contained in the 911 recording are not testimonial."

Wilder v. Commonwealth, 55 Va. App. 579; 687 S.E.2d 542 (Va. Ct. App. 2010) – "Norfolk police received a 911 call from Joe Madison ("Madison"), a homeless man who slept in the woods behind a stockyard" – Madison reported a burglary in progress at a commercial building – "Viewing the facts of this case in light of the framework provided by *Davis*, we agree with Wilder that the statements contained in the 911 tape recording were testimonial in nature. Unlike the caller in *Davis*, Madison was not 'call[ing] for help against a bona fide physical threat.' [cite] In fact, Madison acknowledged during the call that Wilder and Brooks did not see him. Nor was there evidence in the record suggesting that the actions of Wilder and Brooks represented a danger to others. Although Madison was describing events 'as they were actually happening,' the facts in this record do not demonstrate that he 'fac[ed] an ongoing emergency that called for help.'.... Instead, Madison called 911 and calmly provided a narrative report of a larceny in progress. ... As the Supreme Court recognized, 'one might call 911 to provide a narrative report of a crime absent any imminent danger' *Davis*, 547 U.S. at 828. That is precisely what occurred in this case." [Note: By "danger to others," the court apparently meant "danger of immediate violence." Might the owner of the business being burgled have considered the burglars a danger?]

People v Osbourne, 2010 NY Slip Op 288, 69 A.D.3d 764, 894 N.Y.S.2d 61 (N.Y. App. Div. 2d Dep't 2010) – "The admission of an audiotape of an anonymous caller's statements to the 911 emergency telephone operator did not violate the defendant's right to confrontation because the statements were not testimonial..."

Reed v. Commonwealth, __ S.W.3d __, 2009 Ky. App. LEXIS 171, 2009 WL 2971749 (Ky. App. Sep 18, 2009) – "Appellant next contends that a 9-1-1 recording of an anonymous caller should not have been admitted into evidence. The caller reported that a vehicle, roughly matching Appellant's vehicle, was driving erratically and had struck a guard rail. The caller indicated that the vehicle was traveling in the direction of the point where the fatal accident later occurred. The call was placed at 5:12 p.m., six minutes before the accident. Appellant asserts that

admission of the 9-1-1 call violated his confrontation rights... In this instance, the 9-1-1 caller was reporting to the emergency operator that he was seeing a dangerous circumstance as it was unfolding. Whether concerned for his own safety or for the safety of other drivers on the highway, the caller was clearly seeking police assistance to address what he perceived as an imminent, ongoing safety threat. With respect to conclusory statements made in response to the operator's follow-up questions, which may have evolved into testimonial statements, the trial court properly ordered redaction. Thus, only the safety concerns expressed by the 9-1-1 caller were admitted in evidence. Accordingly, admission of the 9-1-1 call did not violate the rule in *Davis* nor the Sixth Amendment Right of Confrontation as it was not testimonial."

State v. Bynum, 299 S.W.3d 52, 59 (Mo. Ct. App. 2009) – "The State called police officer John Clobes as a rebuttal witness and used his testimony to introduce a 911 call that Mother made on February 18, 2005. fn5 During the call Mother informed the 911 operator that she had just learned that her daughter W.B. had been raped by an uncle who was incarcerated at that time. ... we agree with Defendant that Mother's statements on the call are testimonial."

Glover v. State, __ S.E.2d __, 2009 WL 1505363 (Ga. June 01, 2009) – "the jury was permitted to hear an audiotape of two 911 calls made by bystanders to report the shooting." – no error

Niebrugge v. State, 2009 WL 1499609 (Ind. App. May 29, 2009) (unpub) – "Both calls occurred while Niebrugge, who had just shot a gun through the back door, was still in the house with two women. Both calls described current events, and they enabled police to meet an ongoing emergency. Importantly, the police had not yet arrived at Pritchard's home at the time of Schunk's second call. As such, the 911 calls are nontestimonial, and their admission did not violate Niebrugge's Sixth Amendment rights."

State v. Basil, 2009 WL 1174777, 2009 N.J. Super. Unpub. LEXIS 1038 (N.J. Super. A.D. May 04, 2009) (unpub), **result left undisturbed in an incredibly fractured decision, State v. Basil, 202 N.J. 570, 998 A.2d 472 (N.J. 2010)** – "we find that the content of the 9-1-1 call was non-testimonial in nature, since it was elicited to permit the police to respond to an emergency."

People v. Williams, 2009 WL 1176823 (Cal. App. 2 Dist. May 04, 2009) (unpub) – "an anonymous caller made a 911 call, stating that a man had 'just beat up this girl' with his hands, and the victim needed a paramedic immediately." – not testimonial – "a 911 call made during the course of an emergency situation is ordinarily made for a non-testimonial purpose. Its primary purpose is to alert the police of the situation and provide information germane to dealing with it."

State v. Collins, 2009 WL 825792 (Wash. App. Div. 2 Mar 31, 2009) (unpub) – "During Collins's arrest, a nearby resident called 911 to request assistance for the two officers. She described events as they happened. She said that two officers were trying to arrest a man, that he was resisting, that the officers were tasing him and trying to get the man on the ground, but it wasn't working and the officers needed help. The caller said that the man had a friend who was interfering, then stated that the man was trying to run from the officers and indicated that more police were needed. She described the other man as being 'really defiant.' ... Here, the caller's statements were clearly meant to 'resolve the present emergency,' rather than simply telling a story about events that had happened in the past."

Perigan v. State, 2009 WL 822078 (Ind. App. Mar 27, 2009) (unpub) – "our review of them reveals that both calls were made during an emergency. Screaming and shouting can be heard in the background, and the callers relate what Perigan was doing at that moment. For example, Head said, 'He's ready to kill people.... I need some-body out here. He's going off on a neighbor.' State's Exhibit 1. Norrington's wife said, 'We need someone here now. A man is beating up on a little girl.' State's Exhibit 2. At the end of the call, Mrs. Norrington dropped the phone, and screaming, yelling, and crying can be heard in the background. Clearly, the callers were relating the events as they were actually happening, and they were both facing an ongoing emergency."

Chase v. State, 2009 WL 722253 (Tex. App.-Austin Mar 19, 2009) (unpub) – 911 call regarding erratic driving not testimonial

U.S. v. Robinson, 2008 WL 5377743 (10th Cir. Dec 24, 2008) (unpub) – "we agree with the government that the statements in the 911 call were not testimonial. They were made 'to enable police assistance to meet an ongoing emergency,' namely that a man with a gun outside the apartment who was threatening two women (according to the caller)."

Commonwealth v. Rolan, 964 A.2d 398, 2008 PA Super 291 (Pa. Super. Dec. 23, 2008) – "a 911 call FN13 contemporaneous with the shooting, made at 8:46 P.M., which reported that someone had been shot and mentioned, on questioning from the radio dispatcher, that a man with a rifle was seen entering the abandoned building" – not testimonial

People v. Motley, 2008 WL 4684871 (Cal. App. 3 Dist. Oct 24, 2008) (unpub) – "Although the caller and the unidentified witness described things that happened in the past, the shooting had just happened five minutes earlier, and the women could not be certain that they were not still in danger. The questions asked were to resolve the emergency and identify the perpetrators, *i.e.*, where the callers were, at what kind of car the suspects were shooting, whether anyone got hit, how many shots were fired, whether the shooters were still there, and which direction they went. Finally, the conversation was not formal, and was not given in a tranquil environment."

People v. Ward, 868 N.Y.S.2d 297, 2008 N.Y. Slip Op. 09634 (N.Y. App. Div. 2 Dept. Dec. 2, 2008) – "The defendant claims that the testimony regarding a report of 'shots fired,' based upon a 911 call, violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. ... statements contained in 911 calls made to obtain police assistance for an ongoing emergency are not necessarily testimonial in nature and do not violate the Confrontation Clause..."

State v. Morales, 2008 WL 4183332, 2008-Ohio-4619 (Ohio App. 6 Dist. Sep 12, 2008) (unpub) – "{¶ 23} Here, the evidence reveals that the 911 call took place immediately after the shooting, as the shooter was walking away from the scene, not yet out of the sight of the caller. The frantic words and tone of the caller certainly indicate that she was facing an ongoing emergency. The statements elicited from her, including the identity of the assailant, were, in this case, necessary to resolve the present emergency, rather than simply to learn what had happened in the past. [cite] As such, the caller's statements were clearly nontestimonial."

Davis v. State, 2008 WL 3877696 (Tex. App.-Austin Aug 20, 2008) (unpub) – DWI – "Here, the 911 recording was made while Davis was still at Bennett's house. Bennett told the dispatcher that she had had Davis 'removed' from the house the day before, but that he had returned. In the

middle of the call, although Bennett thought that Davis might be leaving the house, she later told the dispatcher that 'he's back.' Bennett also told the dispatcher that Davis was 'drunk' and that he was being 'verbally abusive' and 'in my face.' These circumstances objectively indicate that the primary purpose of the statements made during the call was to enable police assistance to meet an ongoing emergency, namely, a domestic disturbance involving at least one possibly intoxicated individual." – [NOTE: On hearsay issue, court had already determined statements weren't offered for their truth – it was a DWI prosecution – which should have resolved the c.c. issue, too.]

Caison v. Commonwealth, __ S.E.2d __, 2008 WL 2884089 (Va. App. Jul 29, 2008) – eyewitness to fatal stabbing called 911 – "Applying the primary purpose doctrine to the facts of this case, we conclude that McLachlan's statements to the 911 operator were not testimonial in nature. Viewing the circumstances objectively, it is clear that McLachlan faced an ongoing emergency manifested by two sources of distress: Green's life-threatening condition and the present and proximate danger that appellant, a potentially armed assailant who had stabbed Green and fled into the neighborhood, would return to the scene to injure Green, McLachlan, or Gann."

Kirtland Hills v. Hall, 2008 WL 2635477, 2008-Ohio-3391 (Ohio App. 11 Dist. Jul 03, 2008) (unpub) – concerned motorist called in report of drunk driver – non-testimonial

Allen v. Com., 2008 WL 2484952 (Ky. Jun 19, 2008) (unpub) – 2½-year-old victim of abuse died – five 911 calls were introduced into evidence – "In the fifth call placed to 911, a caller, identifying himself only as from the Whitesburg Police Department, has a conversation with the 911 operator involving several testimonial hearsay and double hearsay statements. The caller gives statements as to what other officers have told him and as to what a janitor told an officer, who then, in turn, told the caller. Initially, the caller states that "it was the foster parents." Although there is some ambiguity as to exactly what the caller is implying in this statement, the rest of the conversation clarifies the insinuation. The caller indicates that the child was dead and that other officers told him to call for a state trooper to investigate the death. He stated that the family members had previously been rowdy and upset. Further, the caller indicates that the child had bruises all over his body and that nurses had examined the body more closely and found additional bruising. The caller then stated that the child had 'handprints around the neck, bruises on the inner thigh, and a black eye.' Nobody from the Whitesburg Police Department was called to testify at trial." – held: "clearly testimonial"

People v. Nunez, 857 N.Y.S.2d 854, 2008 N.Y. Slip Op. 04174 (N.Y.A.D. 4 Dept. May 02, 2008) – "We reject the contention of defendant that the court erred in admitting in evidence the 911 tapes of various eyewitnesses to the initial beating. The statements on those tapes were not 'testimonial' within the meaning of *Crawford* ... because the callers were describing ongoing circumstances that required police assistance [cites]."

People v. Mark, 2008 WL 1961155 (Cal. App. 3 Dist. May 07, 2008) (unpub) – passerby observed jewel thief fleeing business and followed him, calling 911 during chase – "We conclude Pumar's statements, when viewed objectively, were not for the primary purpose of establishing or proving past facts for possible use in a criminal trial, but were primarily given, by way of a 911 call, to assist law enforcement in dealing with a contemporaneous emergency, the continuing escape of defendant from the scene of his theft. [cite] Although Pumar was not the

victim of defendant's crimes, or a percipient witness to the actual theft, circumstantial evidence indicates she was a percipient witness to Krayenbuhl's chase of the thief. ... She called 911 to relay her observations to the police to assist them in responding to the location of the thief thereby preventing his further escape. Although some of Pumar's statements related past events—she and her husband saw the chase, they stopped and asked what was happening, they were told of the theft, they followed the man as he got into a car that proceeded onto the freeway—such details were given as context explaining the reason for the call, which related to an ongoing emergency since defendant had not yet been apprehended. Pumar's identification of the model, color and license plate number of the car was necessary for the police to respond to the area to look for defendant. As Pumar's statements were made to enable police to meet an ongoing emergency, specifically defendant's flight from the scene of a crime, they were not testimonial. The admission of such statements at trial did not violate defendant's confrontation rights under *Crawford*.

People v. Rodriguez, 50 A.D.3d 476, 857 N.Y.S.2d 74, 2008 N.Y. Slip Op. 03396 (N.Y. A.D. 1 Dept. Apr 17, 2008) – "The trial court properly admitted, under the present sense impression exception to the hearsay rule, two nontestifying declarants' statements to 911 operators describing the victim's pursuit of defendant and his accomplice [cite]. Furthermore, the 911 calls were not testimonial within the meaning of *Crawford* ... as the statements in the calls were primarily made 'to enable police assistance to meet an ongoing emergency'" [cites].

Vanevery v. State, 980 So.2d 1105 (Fla. App. 4 Dist. Feb 13, 2008) – after hitting and killing a bicyclist, defendant fled scene and went to acquaintance's house – acquaintance called 911 surreptitiously – not testimonial [NOTE: the discussion pertains only to evidentiary rules, but *Crawford* was raised by the defendant and the non-testimonial conclusion seems implied.]

Walden v. State, 2008 WL 657831, *1+ (Fla.App. 2 Dist. Mar 12, 2008) (unpub) – no facts given, just a string cite to four cases finding 911 calls non-testimonial

State v. Bergevine, 942 A.2d 974 (R.I. Mar. 14, 2008) – father returned home unexpectedly to find adult male babysitter in act of molesting 17-month-old daughter – "the admission of the 911 tape recording does not implicate, nor does defendant so argue, an issue under *Crawford* ... and *Davis* ... Mr. Matheson described events as they were happening. He described defendant's actions and his whereabouts with the primary purpose of enabling police assistance. ... Moreover, Mr. Matheson did, in fact, testify at trial and was thus available for cross-examination."

State v. Rose, 2008 WL 740563, *6+, 2008-Ohio-1263, 1263+ (Ohio App. 8 Dist. Mar 20, 2008) (unpub) – "{¶ 40} As in *Davis*, the 911 calls made in this case were nontestimonial because their primary purpose was to enable police to meet an ongoing emergency. Moreover, there is nothing in the previously mentioned 911 call that would lead a reasonable juror to conclude that the statements, 'he's crazy. He'll shoot at them' were a comment on Rose's criminal past. Also, the caller had narrated a sequence of events that detailed how 'this boy is beating this girl up.' The caller described how the woman fled, but Rose took out a gun and pointed it at the woman. These comments, viewed in context, appeared to apply to Rose's actions at the time the call was being made and not as a comment on his criminal history."

Key v. State, 657 S.E.2d 273 (Ga. App. Jan 25, 2008) – "Gwinnett County 911 Dispatch received a call from a man who identified himself as Steven Jones. Jones reported that he was following a silver SUV, later shown to have been driven by Key, that was being driven erratically on Interstate 85 North. Jones remained on the line with 911 Dispatch, continually providing updates on the location of the SUV until police officers arrived on the scene and performed a traffic stop. ... Here, the primary purpose of Jones' 911 call was to prevent immediate harm to the public, not to establish evidentiary facts for a future prosecution against Key. In calling 911, Jones repeatedly made clear that he believed that the driver of the SUV was 'going to cause an accident' or was 'going to hurt somebody.' His purpose did not become testimonial based on his assertions that the driver of the SUV was 'drunk.' Instead, such statements reflect his attempt to convey to 911 Dispatch the urgency of the situation and to emphasize the need for immediate police assistance. As a result, the trial court did not err in determining that Jones' 911 call was nontestimonial, and that the Confrontation Clause did not prohibit its admission."

U.S. v. Proctor, 505 F.3d 366 (5th Cir. Oct 22, 2007), cert. denied, 76 USLW 3455 (Feb. 25, 2008) – "Viewing the facts of this case in light of *Davis*, Yogi's statements to the 911 operator were nontestimonial. Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine 'whether they would be encountering a violent felon.' *Id.* at 2276. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the 911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency – not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi and Fairley. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency. Because the tape-recording of the 911 call is nontestimonial, it does not implicate Proctor's right to confrontation, and its admission was not in error. *See United States v. Thomas*, 453 F.3d 838, 844 (7th Cir.2006) (concluding that tape-recording of 911 call from an anonymous caller is nontestimonial and, therefore, does not implicate the Confrontation Clause)."

Collins v. State, 873 N.E.2d 149 (Ind. App. 2007) – "After Collins dropped him at home, Downs and his girlfriend removed approximately fifty to sixty marijuana plants from the garage. Then, at approximately 2:34 a.m., Downs called 911 and told the dispatcher that Collins 'had shot a Michele girl, but he did not know her last name.' ... Applying the *Davis* factors, we conclude that, under the circumstances, the questions Grant County Sheriff's dispatcher Kathy Baker asked Downs objectively had the primary purpose of enabling police to meet an ongoing emergency, i.e., the capture of an alleged murderer who was then at large and very possibly armed and dangerous. ... [A]lthough Downs primarily told Baker of past events, those

occurrences served to establish whether Collins posed a present danger; the police could only deal with the situation in an appropriate manner by knowing Collins's identity, what he had done, the type of vehicle he might be driving, and where he might be. Second, we conclude that, despite his delay in calling authorities, Downs was, in fact, facing an ongoing emergency. Downs had just seen Collins shoot Jaynes in the head, did not know his whereabouts, and had been threatened with death if he told anyone what he had seen. If Collins had returned to find Downs on the telephone with the authorities, Downs could reasonably have believed that Collins would kill him as well. Third, Baker's questions were designed to meet the current emergency by establishing the shooter's identity, what sort of vehicle he might be driving, and where he might have been at the time, all of which would aid in his apprehension. Finally, the conversation occurred during a very informal 911 call, with the agitated Downs providing answers regarding an ongoing emergency over the phone, not, for example, calmly relating past events in a relatively tranquil police station interrogation room."

U.S. v. Cadieux, 500 F.3d 37 (1st Cir. 2007) – "Under the *Davis* guideposts, the statements recorded during the 911 call are nontestimonial hearsay. The daughter is speaking about events in real time, as she witnessed them transpire through a window in her home; at no point is there a description of past events. She specifically requests police assistance. The dispatcher's questions are tailored to identify the location of the emergency, its nature, and perpetrator. Finally, Jolene Nye [*i.e.*, the daughter] is hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe. ... 'Ordinarily, statements made to the police while the declarant or others are still in personal danger cannot be said to have been made with consideration of their legal ramifications.' *Brito*, 427 F.3d at 62."

Barron v. State, 990 So.2d 1098 (Fla. App. 3 Dist. Aug 22, 2007) – "The first issue we address is whether the trial court erred by permitting the State to introduce a 911 tape containing two anonymous calls. ... The anonymous calls were placed close to the violent events [*i.e.*, shooting], thereby precluding an opportunity to contrive or misrepresent. Therefore, we find that the trial court properly admitted the two anonymous calls as either spontaneous statements or excited utterances. [¶] As the calls were made to obtain assistance rather than in response to police questioning, we additionally conclude that they were nontestimonial in nature and, therefore, do not violate the Sixth Amendment or the holding in *Crawford v. Washington*, 541 U.S. 36 (2004)."

Jackson v. Senkowski, Slip Copy, 2007 WL 2275848 (E.D. N.Y. August 07, 2007) (unpub) (habeas) – 911 tape – "Lloyd's statements on it were quintessential excited utterances, made to the police to summon help for a mortally wounded man. They qualified for an exception to the hearsay rule, *cf.* Fed.R.Evid. 803(2), and did not implicate the Confrontation Clause." [NOTE: This case was final before *Crawford* was decided and should have been decided on retroactivity.]

State v. Torelli, 103 Conn.App. 646, 931 A.2d 337 (Conn. App. 2007) – "[S]tatements made by 911 callers reporting an ongoing emergency do not constitute "testimonial" statements that are rendered inadmissible by the provisions of the confrontation clause contained in the sixth amendment to the United States constitution."

Johnson v. State, 2007 WL 3088255 (Ark. App. Oct 24, 2007) (unpub) – street altercation producing death, witnessed by three people who called 911, two of them anonymously – "the 911 calls made in this case, which were clearly made as the events were unfolding and which

were clearly made to assist the police and emergency personnel in resolving the situation. Thus, we hold that the trial court's admission of the anonymous calls did not violate appellant's Sixth Amendment confrontation right."

People v. Gilford, 2007 WL 2783322 (Cal. App. 1 Dist. Sep 26, 2007) (unpub) – " Here, the trial court held an evidentiary hearing before granting the prosecution's request to admit J.'s tape. At that hearing, the 911 dispatcher was asked to explain her questions to J. She testified that she had been trained to ask 911 callers "the name of the caller, the circumstances that are occurring—what's happening, what do you see; do you know who is involved by name—if you don't know them by name, can you describe them; weapons involvement, if any; and if you know the name and/or date of birth of any of the involved parties." When asked why those questions are asked, she responded, "Those are to enable us to send the appropriate response so we can dispatch the police, if we need to send an ambulance or medical aid [a]nd then to maintain officer safety, to determine if there are any weapons on scene, so that we can send additional officers that they be aware of officer safety situation." The dispatcher confirmed that "if there's a perpetrator out there, either on the scene, as you're receiving the call, or recently has maybe left the scene, that you have a description of that person, so that you can tell the officers, for example, he's got a black hat and white shirt on...." She also testified that upon receiving this information she passes it to the officers as they approach the scene, confirming that she asked J. the name of the assailant and the description of the car for this reason. [¶] With this evidentiary background, it is difficult to distinguish J.'s call from the call in *Davis*."

People v. Guevara, 2007 WL 2111014 (Cal. App. 2 Dist. Jul 24, 2007) (unpub) – "Soon thereafter, while Olivia was sitting with Jose Vargas, appellant entered the bar and asked Olivia to come outside. She refused. Appellant took out a knife and stabbed her twice in the stomach. ... Ana Ramirez, a bar employee, called 911. In this call, Ramirez identified the stabber as Olivia's husband. Ramirez was unavailable at trial. ... Appellant contends that Ramirez's 911 call was 'testimony' within the meaning of Crawford and Davis, and that its admission constituted prejudicial error. We find the initial questions and answers of the 911 call to be non-testimonial, but the latter ones testimonial. ... The operator's next questions were "Okay, where are you guys?" followed by "What address do you have?" She then asked "Where is the person that is injured?" and "Is she inside with you?" These initial questions were clearly necessary to direct paramedics and police to the scene to resolve the emergency. [¶] The 911 operator next asked who stabbed the victim. Ramirez replied: "Uh, her husband." The 911 operator asked "Okay, did you see him?" The fact that the stabbing had apparently stopped did not mean that the assailant had left the scene. The 911 operator's questions could objectively and reasonably be understood as gathering information to determine whether paramedics and police should be prepared for the presence of the assailant at the scene, and so were not testimonial."

People v. Bahabla, 2007 WL 2063115 (Cal.App. 1 Dist. 2007) (unpub) – "Kristina Pickett testified at trial. At approximately 9:00 p.m. on December 16, 2003, she was in her apartment watching television with her boyfriend. There was a knock at the door. Pickett opened the door and saw 'a young woman hunched over like she had the worst cramps in the world, that either she had had some trauma to her stomach or she was just in horrible pain.' [¶] The woman 'was screaming for help, that she had been raped.' ... [¶] Pickett called 911. C. did not calm down while Pickett spoke to the 911 operator. ... In proceedings on a motion in limine, the court redacted most of Pickett's statements on the tape of the 911 call, except where Pickett was simply relaying C.'s statements to the dispatcher. The redacted tape of the 911 call was played to the

jury after Pickett's testimony. The dispatcher obtained statements from C., who was still crying, regarding what had happened, where she was, and how she was injured. The dispatcher sent an ambulance to Pickett's apartment. But the dispatcher also obtained statements from C. about the incident and about identifying characteristics of her assailant, including his clothing and his accent." – C. did not testify – 911 call was not testimonial

State v. Mason, 2007 WL 1174898 (Tenn. Crim. App. Apr 20, 2007) (unpub) – "On the tape, a caller informed the 9-1-1 center that 'Alonzo Mason [is] shooting guns at 701 Deery Street; come pick his ass up before somebody kill [sic] him.' The caller stated that the defendant was '[d]riving a white [Chevrolet] Lumina; him and a girl named Teka.' The caller added, '[w]e ducked when they shot ... [m]y granny sitting [sic] right here in this chair. Lock his ass up before somebody kill [sic] him.'" – all alterations in original – "Although, as we have pointed out, the defendant has not pinned his claim to exclude the 9-1-1 call from evidence on the Sixth Amendment Confrontation Clause, we see indications that the evidence may have been excludable on this basis, as well. ... [T]he 9-1-1 caller may have been describing a completed event and, in any event, identified the defendant by name, vehicle, and companion and actively sought the defendant's arrest. If these factors define the call as testimonial, the lack of an opportunity to cross-examine even an unavailable declarant yields the statement inadmissible pursuant to the Confrontation Clause." – (all alterations but the last in original) [NOTE: This case was actually decided on state evidentiary basis.]

State v. Mitchell, 171 Ohio App.3d 225, 870 N.E.2d 228, 2007-Ohio-1696 (Ohio App. April 12, 2007) – "Defendant continued to beat her [*i.e.*, his wife] at this location. Eventually, a fight broke out when defendant pocketed two marijuana 'joints.' His mother became angry and wanted him out of the house. Santiago testified that defendant "kept coming after her" and swinging at people. Defendant actually hit his two-year-old niece when swinging at his sister. {¶ 5} Both Santiago and defendant confirmed that several calls were made to 911 from defendant's mother's residence. ... {¶ 17} As was the case in *Davis*, the 911 callers in this case were seeking help against a perceived physical threat. The 911 calls in this case reflect a chaotic, noisy scene and an environment that was not tranquil. {¶ 18} Under the totality of these circumstances, the 911 callers were not acting as testifying witnesses, and their statements do not qualify as testimonial in nature."

People v. Hayes, 2007 WL 1366492 (Cal. App. 5 Dist. 2007) (unpub) – "The call by [neighbor] Martinez was a call for help made as [murder victim] Rochelle had just climbed through Martinez's window, having been beaten up by defendant. It was a bona fide call for help. Rochelle could be heard throwing up in the background. Rochelle was crying at the time. The questions asked were in the nature of determining the type of emergency and the nature of the person law enforcement would be encountering. The call was not tranquil but was a frantic call for help. [¶] The circumstances of the call made by Martinez objectively indicate that the primary purpose of the questioning was to enable police assistance to meet an ongoing emergency. As such, the call was not subject to the rule of *Crawford*." – also, statements of murder victim, whose voice could be heard in the background, admissible under forfeiture by wrongdoing rule

People v. Coleman, 2007 WL 1086756 (Cal App. 3 Dist. 2007) (unpub) – "Johnson's statement that Mitchell had been shot and the 911 operator's question 'By who?' were not testimonial. As *Davis* explained, an operator's effort to establish the identity of an assailant so

that the dispatched officers might know whether they would be encountering a violent felon is necessary to resolve a present emergency."

State v. Cannon, 215 S.W.3d 295 (Mo. App. 2007) – "[U]nder the *Davis* test, the issue is not whether the caller is providing information but, rather, 'whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements.' *Davis*, 126 S.Ct. at 2276. Here, Bradford was describing a situation of potential violence – a car accident, a large group of young people gathered in the street, and the possible presence of weapons. ... [¶] Moreover, the 911 operator's questions about armed individuals were directed at identifying potential threats to police and public safety. The operator was clearly attempting to establish who might pose a physical threat to the police and others in the crowd. ... [¶] The tape of the 911 call clearly survives the test for testimonial statements."

In re Jovany M., 2007 WL 594423 (Cal. App. 4 Dist. 2007) (unpub) – "The threat of danger at the time of Lopez's 911 call is sufficient to categorize it as an urgent request for protection from a violent situation, not a testimonial report of a past event. True, Lopez was not the target of the shooting and appeared to be in no immediate danger. Nonetheless, the shooting had just occurred and it was essential for the safety of the police officers responding to know the identity of the shooter and the car in which he was riding."

People v. Howard 2007 WL 466063 (Mich. App. 2007) (unpub) – "The statements made during the 911 calls in this case were similar to those made in *Davis*. Specifically, here, the callers frantically described a shooting that had just occurred in the area of 214 West Savannah and described two suspects who were involved and still near the scene as well as the truck in the alley and the man who had been shot. Given that these calls were made during an ongoing emergency to request police assistance, they were nontestimonial"

People v. Givhan, 2007 WL 486720 (Mich. App. 2007) (unpub) – "Although, the *Davis* Court recognized that a 911 call could evolve into an interrogation of the caller and thus result in testimonial evidence, *id.* at 2277, there is no indication in this case that the 911 caller went beyond providing the information necessary to explain the threat to the police and direct them to the location. Therefore, whether the caller offered the statement about the gun spontaneously or in response to directed questions from the operator is irrelevant."

O'Garro v. Ercole, 2007 U.S. Dist. LEXIS 9518, 2007 WL 401194 (S.D. NY 2007) (unpub) - habeas corpus – subsequent customer in store called 911 on behalf of clerk who had been robbed a short time before – "The Report found that admission of the tape did not implicate the Confrontation Clause because the trial court admitted it for a non-hearsay purpose [i.e., to provide context] and instructed the jury it was not to consider the tape evidence of the truth of the matter asserted therein." – district court agreed

Williams v. State, 960 So.2d 506 (Miss. App. Oct. 24, 2006), cert. denied, 959 So.2d 1051 (Miss. Jul 19, 2007), cert. denied, 128 S.Ct. 722, 169 L.Ed.2d 565 (Dec 03, 2007) – "¶ 15 ... Tragelia called 911 upon discovering Elliot was missing. Tragelia told the 911 operator she believed Williams abducted Elliot against her will. She made the call to initiate an investigation as to Elliot's whereabouts, not to prove that Williams was in fact the kidnaper. ... [I]n the current case, Tragelia was not a witness, nor did she recount a past crime. Tragelia called 911 in desperation to find her friend, whom she believed had been abducted by Williams. The

statements illustrated the beginning of the search for Elliot and did not go to prove Williams's guilt or innocence. Thus, the statements did not ... violate the Confrontation Clause."

People v. Conyers, 33 A.D.3d 929, 824 N.Y.S.2d 301 (N.Y. App. Div. 2nd Dept. 2006) – "The People sought to introduce tape recordings of defendant's sister's 911 calls into evidence. ... [T]he trial court admitted the tape recordings under the excited utterance and present sense impression exceptions to the hearsay rule. ... However, contrary to defendant's contention, the 911 calls were not "testimonial" within the meaning of *Crawford*. The 911 calls were made to obtain police assistance and the statements did not result from questioning designed to establish or prove a past fact. Therefore, the admission of the tape recordings did not violate defendant's Sixth Amendment right to confrontation within the meaning of *Crawford* and its progeny."

Kimbrell v. State, 280 Ga.App. 867, 635 S.E.2d 237, 06 FCDR 2553 (Ga. Ct. App. 2006) – "concerned citizen 911 call that reported a white male driving a red Harley-Davidson motorcycle wearing only a pair of black boxer shorts" – "911 calls, however, are not testimonial since, rather than being made for the purpose of proving a past event, they are not premeditated and are made to prevent or stop an ongoing crime. 'Under Georgia law, the 911 statements were admissible as part of the *res gestae* or as an excited utterance.' Thus, *Crawford* is here inapplicable, and the trial court did not err in admitting the 911 call." (citations omitted) – [NOTE: also not admitted for truth but to explain police action; and apparently not an accusation that defendant was drunk but only that he was almost nude.]

United States v. Thomas, 453 F.3d 838 (7th Cir. 2006) – apparent mutual combat situation involving guns – "During the course of the three minute and fifty-three second recording[of 911 call], the caller reported that someone had been shot outside of her apartment, and that '... the guy who shot him is still out there.' Trial Exh. 1. The emergency operator then asked a series of questions about the facts of the situation and the caller narrated what she was seeing as it happened." – "When viewing the facts in light of *Davis*, we find that the anonymous caller's statement to the 911 operator was nontestimonial. ... Similarly, the caller here described an emergency as it happened. ... Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*."

➤ Sub-Category: Non-Emergency Requests for Police Assistance
(category added Sept. 2012)

United States v. Polidore, 690 F.3d 705 (5th Cir. Tex. 2012), cert. applied for – "On the night of Polidore's arrest, two anonymous 911 calls made by the same individual alerted the police to possible criminal activity [*i.e.*, drug dealing on the street]. ... The interrogations in this case do not fit neatly into the categories contemplated by the limited holdings recently issued by the Supreme Court. ... Here, however, we cannot decide whether the declarant's statements were testimonial based primarily on the existence *vel non* of an ongoing emergency.ⁿ⁴ Unlike the declarant's statements in *Bryant* or in the two cases decided in *Davis*, the primary purpose of the interrogations in this case [by the 911 operator] was neither to 'enable police assistance to meet

an ongoing emergency' nor to 'establish or prove past events potentially relevant to later criminal prosecution.' [cite] Rather, the primary purpose of the interrogation was to gather information necessary for the police to respond to a report of ongoing criminal activity. ... [T]he primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. Like a statement made to 'resolve an ongoing emergency,' the caller's 'purpose [was] not to provide a solemn declaration for use at trial, but to bring to an end an ongoing [drug trafficking crime],' [cite] even though the crime did not constitute an 'ongoing emergency.' ... Accordingly, the 911 caller's statements did not constitute testimonial hearsay..." - [NOTE: Interestingly, the dissenting judge, Southwick, thinks the call should be classified as testimonial because, among other factors, "this caller gave some indications of his animus specifically toward Polidore and towards drug dealers generally." In other words, a statement's status as testimonial depends on the declarant's subjective motivation; if the caller liked drug dealers generally, it wouldn't be testimonial.]

➤ **Sub-Category: Whether 911 Operators Are Police Agents**

Davis's footnote 2 says: " If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police." Although footnote 2 explicitly left the issue open, the issue has rarely been litigated. This new sub-category will list the exceptions.

State v. Camarena, 344 Or. 28, 36-37, 176 P.3d 380 (Ore. Jan. 25, 2008) – "Because the statute defines 9-1-1 operators as informational conduits for both public and private safety agencies, their statutory role extends well beyond law enforcement functions and the law enforcement sector. In our view, the legislature's definition of "emergency telephone worker" effectively prevents this court from categorizing, as a matter of law, all 9-1-1 operators as de facto police officers." – court then makes the same footnote 2 assumption

On-the-Scene Questioning by Police: Child Declarant **(see also other categories in this part; and part 3, Citizen Assisting Officer)**

The *Siler* case decided by the Ohio Supreme Court makes explicit something that had been implicit in some prior cases: when evaluating on-the-scene questioning by a police officer, the constitutional test varies with the age of the declarant. (Is an equal protection issue lurking here? Or a victim's rights issue under state constitutions?) As can be seen in the next category of this Outline, when the declarant is a grown-up, the declarant's purpose and expectations are taken into consideration, and indeed are frequently dispositive. But when the declarant is very young, *Siler* declares that the declarant's purpose and expectations are irrelevant.

Ironically, the Ohio Supreme Court claims in *Siler* to be holding that "the age of a declarant is not determinative of whether or not a testimonial statement has been made during a police interrogation." Perhaps the justices believe that, but the effect of their decision is exactly the opposite: the age of the declarant determines whether the "objective" purpose of the interview is measured solely from the perspective of the officer, or whether the declarant's state of mind is also factored in. Naturally, when the "objective purpose" of the interview is equated with the

subjective purpose of the officer – which is the practical meaning of *Siler's* refusal to consider the subjective experience of the other party to the conversation – the resulting statement is pretty much automatically testimonial. Thus the *Siler* test can be thought of as a convoluted, Rube Goldberg *per se* rule, applicable only to cases involving very young declarants.

UPDATE: *Bryant's* confirmation that in emergency cases, the perspective of both declarant and listener must be considered, calls *Siler* and a host of similar cases into question.

Commonwealth v. Patterson, 79 Mass. App. Ct. 316, 946 N.E.2d 130 (Mass. App. Ct. 2011) – "Responding to an abandoned 911 telephone call, n1 police went to 48 Forest Street in Franklin where, as they approached, they saw a scared and crying five year old girl, who was repeatedly yelling, 'no police.' Near her was her mother, who appeared shaken and nervous. The police entered the residence and saw an empty gun holster on the kitchen floor. At that point, the defendant entered the kitchen from the living room and the child said, 'He pushed Mommy into the wall. He had a gun.' ... The child's statement here was made spontaneously, without police questioning, as the officers walked into a volatile and unstable scene of domestic disturbance. There is nothing to suggest that the statement was made for any purpose other than to secure aid, let alone that the five year old child had in mind that the statement would or could be used to prove some fact at a future criminal trial. The statement, accordingly, was not testimonial for purposes of the Sixth Amendment."

State v. Rufus, 2008 WL 4681392, 2008-Ohio-5478 (Ohio App. 8 Dist. Oct 23, 2008) (unpub) – DV case, child-witness – "{¶ 18} In the case at bar, just as in *Hammon*, the statements made to the police officer by the eight-year-old child were made after the police had secured the scene. The primary purpose of the interrogation was to establish past events relevant to later prosecution. The police officer testified that the police were trying to determine who was the primary aggressor, and they based their decision on the information obtained. Accordingly, the statements made by the eight-year-old child were testimonial and thus inadmissible because he did not testify."

People v. Duchine, 2008 WL 1991998 (Cal. App. 1 Dist. May 08, 2008) (unpub) – "A jury convicted defendant Eric Duchine of committing a lewd or lascivious act upon a child under the age of 14. ... Jane Doe's statement of her name, age, and birth date was not testimonial. The police officer was dispatched to a hospital to interview a possible victim, and his questions asking for name and birth date were meant to elicit basic preliminary information necessary to establish the speaker's identity. The trial court properly recognized that this preliminary information was not testimonial, while excluding substantive accusatory statements by Jane that were testimonial."

State v. Siler, 116 Ohio St.3d 39, 876 N.E.2d 534, 2007-Ohio-5637 (Ohio Oct 25, 2007), cert. denied, 128 S.Ct. 1709, 170 L.Ed.2d 534 (Mar 24, 2008) – on remand from SCOTUS – three-year-old boy apparently witnessed his father kill his mother by strangling and then hanging her in the garage, and was left alone with the body for some hours – "{¶ 8} Detective Larry Martin, a trained child interviewer, arrived shortly thereafter [*i.e.*, after murder was discovered] wearing plain clothes with a vest that concealed his badge and gun. While Nathan sat on his grandfather's lap, Martin lay next to them on the ground and began talking to Nathan. Nathan eventually began to ask for his mother and to go back into the house; according to Martin, Nathan also said that his mother was in the garage 'sleeping standing.' As a result of the questioning, Martin learned that

Nathan's father, Brian [*i.e.*, the defendant], had been there the previous night, that he had scared Nathan by banging on the door, and that he had fought with Barbara in the garage. Nathan also told Martin that Brian had placed the yellow rope around her neck. ... As part of its case-in-chief, the state called Deputy Singleton and Detective Martin to testify about Nathan's statements, and, over Siler's repeated objections, the trial court admitted the testimony as excited utterances pursuant to Evid.R. 803. ... {¶ 29} Since *Davis*, courts have consistently applied the primary-purpose test to statements that a child declarant made to police or those determined to be police agents, and we are aware of no courts that continue to apply the objective-witness test in such cases. {¶ 33} The court's analysis in *Davis*, however, does not focus on the expectations of the declarant in order to determine whether statements are testimonial; rather, the test set forth in *Davis* centers on the statements and the objective circumstances indicating the primary purpose of the interrogation. 126 S.Ct. at 2273-2274, 165 L.Ed.2d 224. In this way, the argument by the state and APRI that we should focus on the cognitive limitations of a child who made the statements to police is inconsistent with the primary-purpose test. ... {¶ 40} Significantly, several courts have expressly rejected the state's and APRI's argument that a child's statements are necessarily testimonial when the child would not be able to understand that the statements would be used in a later criminal proceeding. ... {¶ 41} Thus, we conclude that the age of a declarant is not determinative of whether or not a testimonial statement has been made during a police interrogation. {¶ 42} Our conclusions in this case regarding a police interrogation of a child do not affect our decision in *Stahl*, which applied the objective-witness test to determine whether a declarant had made testimonial statements during an interview conducted by a nurse at a DOVE unit for purposes other than to investigate a past crime. In this regard, we agree with the Supreme Court of Illinois, in *People v. Stechly*, which recently concluded that the objective-witness test applied to statements that a five-year-old child made to her mother but that the primary-purpose test set forth in *Davis* applied to statements that she made during an interrogation conducted by an agent of the police."

State v. Ohlson, 162 Wash.2d 1, 168 P.3d 1273 (Wash. Oct 18, 2007) – defendant, while yelling racial slurs, repeatedly attempted to run over "two minors, L.F. and D.L", their ages not otherwise specified – the first officer on scene spoke to D.L., who was "pretty upset" and "pretty shaken up" – "¶ 39 However, applying *Davis* to the facts presented here, we nonetheless conclude that D.L.'s statements in response to Officer Gray's interrogation were nontestimonial. [FN3] The circumstances of Officer Gray's interrogation of D.L. objectively indicate that the primary purpose of that interrogation was to enable police assistance to meet an ongoing emergency."

People v. Thompson, 2007 WL 2141416 (Mich. App. Jul 26, 2007) (unpub) – [Quintuple murder] – "Apparently during these events, [13-year-old] Christina had been bound and, at some point, defendant ordered Christina to remove her clothing. Defendant decided not to kill Christina. Somehow, Christina managed to escape the house the following morning. She ran to a neighboring house, wearing nothing but a bra, and banged on the door. When Carlin Stephens, who resided at the home, opened the door, Christina told her that someone had killed her sister and her sister's children. Stephens, noticing that Christina looked 'terrified,' called the police and provided Christina with clothing. [¶] Officers quickly responded to the scene. When Officer Sophia Devone questioned Christina about the recent events, Christina exclaimed that her family was dead next door. Soon thereafter, Christina saw defendant outside his home. Christina pointed to defendant and repeatedly exclaimed to Devone, 'That's him!' ... Defendant argues that statements that Christina made to the officers at the scene were testimonial in nature and,

therefore, should not have been admitted in evidence. We do not agree. Instead, we conclude that Christina made these statements in response to police questioning under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency."

State v. Graves, 212 Or.App. 196, 157 P.3d 295 (Or. App. 2007), adhered to on remand, State v. Graves, 224 Or.App. 157, 197 P.3d 74 (Or. App. Nov 26, 2008) –

– "D, a 14-year-old child, awoke to the sound of his mother screaming and called 9-1-1. The 9-1-1 call was short; D indicated that his mother had been kicked in the face and then the phone line disconnected. Police were immediately dispatched to the location of the domestic disturbance. [¶] After arriving at the house, the officers knocked on the door and rang the doorbell. Although the officers could see people moving inside the home, no one answered the door. The officers persisted because they were concerned for the safety of the people inside the home. Eventually D stuck his head out of an upstairs window and shouted down to the officers, '[s]he won't come to the door.' D also told the officers that defendant had kicked his mother, Robinson, in the face while she was sleeping and that defendant had since left the home." – held: this statement was nontestimonial because it "was made under circumstances that objectively indicate that the primary purpose of the officer's question was to enable the officer to respond to a *potential* ongoing emergency, because the officers were responding to a domestic disturbance where the 9-1-1 call had been disconnected and the people inside the home would not answer the door. Under those circumstances, it was reasonable for the officer to be concerned for the safety of the occupants of the home, even if the victims indicated that defendant was not inside the home." -

Once officers were inside home, "The officer asked D to come out of his bedroom and D emerged from his room holding an eight-inch butcher knife; D explained to the officer that the knife was for protection, because defendant told D that he would come back to kill them. At trial, the officer testified that D appeared frightened, had tears in his eyes, and his body was shaking when he explained the incident to the officer. D told the officer that, when he heard his mother screaming, he went into the hallway and saw defendant, his mother's boyfriend, slamming her up against the wall. D also stated that during the incident his mother was screaming that defendant had kicked her in the face." – Held: this was testimonial – "The objective circumstances surrounding the second statement indicate that there was no longer an ongoing emergency and the primary purpose of that statement was to elicit information from D regarding an incident that occurred in the past for use in a future criminal prosecution."

Bell v. State, 928 So. 2d 951 (Miss. Ct. App. 2006) – (pre-Davis/Hammon case) Defendant was convicted of killing the mother of his 2 daughters (ages 4 and 5) witnessed the murder.

"Adrienne and Ashley were legally unavailable to testify during trial. Numerous police officers testified as to what Adrienne and Ashley said to them on the morning that Charity was found murdered. Those police officers went to Charity's house only after Mr. Thompson reported finding Charity murdered. Adrienne and Ashley gave their statements as a result of questions asked by police officers. The police officers asked those questions with the intent to surmise the events surrounding Charity's murder. The act of questioning, sometimes termed 'interrogation,' was in the strict context of the investigation. There can be no doubt that the girls' hearsay statements, offered through other witnesses because the girls were unavailable, qualifies as prior testimony made during police interrogations. Likewise, there can be no doubt that Bell never had the opportunity to cross-examine his daughters and he could not do so through cross-examination

of the police officers following their hearsay testimony gleaned from police interrogations. Therefore, Bell had no opportunity to cross-examine the witnesses against him. Such evidence is one of the few specific examples of prohibited evidence mentioned in *Crawford*. Thus, we are of the opinion that the hearsay testimony at issue resulted in a violation of Bell's constitutional rights.”

On-the-Scene Questioning: Adult Declarant: Domestic Violence Cases
(see also other categories in this part; and part 3, Citizen Assisting Officer)

Note: Where the opinion does not specify the age of the declarant, he or she is assumed to be adult. Note also: The phrase "domestic violence" as used for purposes of this category is limited to intimate partner violence. In many states the criminal offense of domestic violence is defined more broadly.

In theory, there is no reason the confrontation clause analysis should be different in D.V. cases. In practice, it sometimes is. *Davis / Hammon* held that the emergency in the Hammon household was over when as the police arrived and separated the abuser and his victim. The declarant's perception of her situation, and the purpose of her own utterance, didn't count. Some lower courts have made that virtually a *per se* rule: when batterer and victim are physically separated, the emergency is over. In non-D.V. cases, courts have more flexibility to examine the facts, and are more likely to view the matter from the victim's point of view, ruling that the emergency continues for some indefinite (if relatively short) period of time after the last blow is struck.

Andrade v. United States, 106 A.3d 386 (D.C. 2015) – lengthy, detailed, fact-specific opinion, essentially one massively-long multi-factor test, concluding that DV victim's statements were testimonial

McQuay v. State, 10 N.E.3d 593, 2014 WL 2615404 (Ind. App. 2014) – public DV scene reported to police by eyewitnesses – first officer on scene asks very upset woman her name and the name of her attacker – "Here, the State's evidence demonstrates that R.S.'s statements identifying herself and McQuay to Officer Williams at the scene were excited utterances... The crux of McQuay's argument under the Sixth Amendment is based on Officer Williams' subjective impressions at the scene. But this is not the correct analysis. Rather, we assess whether a defendant's confrontation rights have been violated objectively. ... In sum, Officer Williams responded to a call of a woman being attacked. He did not know why, where, or when the attack had occurred at the moment of his response. Nor did he know the location of the attacker or anything else about the circumstances in which the crime had occurred. His request for R.S.'s name and the identity of her attacker was information that allowed Officer Williams to 'assess the situation, the threat to [his] own safety, and the possible danger to the potential victim and the public, including to allow [him] to ascertain whether [he] would be encountering a violent felon.'"

State v. Haygood, 409 S.C. 420, 762 S.E.2d 69 (S.C. App. 2014) – a second-stage appeal from a no-record magistrate court trial, with extremely skimpy record – a judge concurring in the result writes: "While I am aware that an appellate court may engage in a *Crawford* analysis, I do not believe this court can perform such an analysis here given the summary of the testimony and the lack of findings by the magistrate and the circuit court as to this issue." (Thomas, J.,

concurring in result only) – the majority "overcome" this problem by effectively creating the presumption that, on a doubtful record, all statements made during a DV investigation are testimonial

Wright v. State, 2014 Ark. App. 231, 434 S.W.3d 401 (Ark. App. 2014) – "The nature of the crime committed against Ms. Wright was undisputedly one of domestic violence. The offense was not committed by a stranger, but rather by her husband, appellant. It is also undisputed that by the time Officer Alberson questioned Ms. Wright, appellant had fled the scene. The information Officer Alberson obtained would have suggested to an objectively reasonable person that appellant did not pose an ongoing threat to the public, to Ms. Wright, or to the police. Because Ms. Wright's out-of-court statements to Officer Alberson were not made in the context of an ongoing emergency, we hold that they were testimonial hearsay when repeated in court by Officer Alberson..."

Frye v. U.S., 86 A.3d 568, 569-84 (D.C. App. 2014) – defendant "contends on appeal that Ms. Parker's statements in answer to the lone question 'what happened' by a police officer responding to a report of an assault were admitted in evidence in violation of his constitutional right to confront Parker, who did not testify at trial. ... Parker's narration of the events took under two minutes, throughout which she was 'shaking ... and ... crying.' She had abrasions on her arms and neck... What *Bryant* and *Davis* tell us, in sum, is that in the immediate wake of a violent assault, Parker's emotional re-enactment and implicit appeal for safety—hers and the children's—should not be mistaken for a primary purpose on her part to establish facts relevant to an eventual prosecution. ... 'Mixed motives,' as the Court implied in *Bryant*, 131 S.Ct. at 1161, are almost inevitable in the first stages of police response to an emergency call, because '[p]olice officers in our society function as both first responders and criminal investigators.' ... We therefore agree with the trial court that the government met its burden of showing that Parker's statements were not testimonial." – one judge dissented

People v. Anderson, 114 A.D.3d 1083, 981 N.Y.S.2d 200, 202-03 (N.Y. App. Div. 3d Dept. 2014) leave to appeal denied, 22 N.Y.3d 1196 (2014) – "The video reveals that the officer encountered Stokes immediately upon arriving at the scene. She was bleeding profusely from her head and complaining of dizziness. The officer asked Stokes about her assailant's location, description and name, where the attack had occurred, and whether there were other victims, promptly relaying her answers to other police officers and emergency medical personnel who were dispatched to locate and assist Moore and pursue defendant. After the first few minutes, the officer asked no further questions about the incident, concentrating instead on attempting to calm Stokes as she became increasingly agitated and apprehensive about, among other things, the fact that defendant had not been found. ... The video reveals that the officer's primary purpose in questioning Stokes was 'to enable the police to meet an ongoing emergency and apprehend the perpetrator, not to provide evidence for later prosecution,' and *Crawford* does not preclude such nontestimonial statements [cites]."

King v. State, 985 N.E.2d 755, 757-759 (Ind. Ct. App. 2013) – "Officer Rossman arrived at the leasing office two or three minutes after Carpenter's 911 call. He observed 'swelling and redness' around C.M.'s right eye and 'red marks' around her throat. (Tr. at 7.) C.M. was 'upset and crying.' (Id.) She identified her attacker as King, and indicated King had her eleven-month-old [*759] son with him and she was concerned for the child's safety. Based on C.M.'s demeanor, the proximity in time to the infliction of her injuries, and the immediate possibility of danger to her

child, we hold C.M.'s statements to Officer Rossman were non-testimonial and therefore admissible."

Milford v. State, 291 Ga. 347, 729 S.E.2d 352, 2012 Fulton County D. Rep. 2171 (Ga. 2012)

– "appellant and his accomplice approached the victim and robbed him at gunpoint for his bicycle. After taking the bicycle, appellant saw the victim talking on his cell phone. Believing the victim was calling the police, appellant chased him down and shot him in the throat. ... A responding officer found the victim bleeding profusely. The victim told the officer that he had been approached by two [**354] individuals who took his bicycle at gunpoint and then shot him in the throat. [He died.] ... The statements were made to meet an ongoing emergency and were therefore non-testimonial in nature. ... The statements elicited by the officer from the victim were necessary to apprehend two dangerous armed criminals on the loose. *See Michigan v. Bryant*..."

Edwards-Freeman v. State, 93 So. 3d 497, 497-501 (Fla. Dist. Ct. App. 4th Dist. 2012) –

"The deputy testified that he responded to a 911 call regarding shots fired in a residential neighborhood. When the deputy arrived at the scene, the [**2] two alleged victims flagged him down from a vehicle in the street. The deputy asked the men for the shooter's location. The men pointed to the defendant's house. The deputy went to the defendant's house and detained the defendant without incident. [¶] The deputy then returned to the alleged victims to find out what happened. ... Here, the statements which the alleged nontestifying victim made after the deputy detained the defendant were testimonial. Once the deputy detained the defendant, there was no ongoing emergency. Instead, the deputy's primary purpose of questioning the alleged nontestifying victim was to establish what occurred between the defendant and the alleged victims for a later criminal prosecution. Thus, the trial court erred in overruling the defendant's Confrontation Clause objection." – [NOTE: Interestingly, this analysis assumes the defendant is guilty. If the cop got the wrong guy, would the conversation have been non-testimonial?]

State v. Hausner, 280 P.3d 604, 621 (Ariz. 2012) – "Hausner also objected to testimony by two police officers regarding statements made by victims Perez and Rodriguez. Neither victim was available to testify at trial, but the officers testified to statements made by each victim when the officers arrived on the scenes. The trial court admitted the statements as excited utterances. (Although Hausner initially argued that admission of these statements violated the Confrontation Clause, he abandoned that argument in light of *Michigan v. Bryant*, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), as it is clear that the statements were not testimonial.)"

Sandefur v. State, 945 N.E.2d 785 (Ind. Ct. App. 2011) – "Vanarman's statement is nontestimonial because it was made in an attempt to gain police assistance for an ongoing emergency. She had been recently injured, and Sandefur had her cornered when Officer [*790] Thompson arrived on the scene. Sandefur told Officer Thompson that someone else had attacked Vanarman; Vanarman furtively indicated that this was not true so that Officer Thompson would provide the assistance that she needed. Because her statement was nontestimonial, its admission did not violate Sandefur's right to confrontation."

Cadoree v. State, 331 S.W.3d 514, 528-529 (Tex. App. Houston 14th Dist. 2011), pet. ref'd (June 15, 2011) – "when Officer Ashraf first met with Swinney, she was crying, "[r]eal shaky," "[v]ery nervous," and too "scared" to speak with him. After he hugged her and brought her outside, she finally confided, "[T]here is a guy in my house that I want out of my house. I'm very

scared of him. He's scaring me and he's selling drugs out of my house. I want him out." As Officer Ashraf and Swinney approached her house, she was "really scared" and agreed to allow Officer Ashraf to help her only after coaxing. She also kept repeating appellant's name. ... Swinney's statements were non-testimonial and did not violate appellant's confrontation rights because they were made primarily to assist Officer Ashraf during an ongoing emergency."

People v. Connolly, 406 Ill. App. 3d 1022, 942 N.E.2d 71, 347 Ill. Dec. 238 (Ill. App. Ct. 3d Dist. 2011), appeal denied (March 30, 2011) – "[Officer] Muehlbauer testified that when he arrived at the scene, Melissa was still at the scene and she appeared upset, nervous, and agitated. He first talked to Melissa. She told him that the defendant had pulled her out of her vehicle and battered her about the head, and that the defendant had set the child in the middle of the street. The defendant had also taken the child. After questioning the two other witnesses at the scene, assessing the ongoing situation, Muehlbauer proceeded to try to locate the defendant and the child. In fact, he eventually located the child and then returned the child to his mother, Melissa. We conclude that Melissa's statements to Muehlbauer were nontestimonial because Muehlbauer was addressing an ongoing emergency." [NOTE: Judge Wright dissented.]

State v. Metzger, 2010 ME 67, 999 A.2d 947 (Me. 2010) – "Less than one minute after seeing the victim, only two and one-half minutes after getting the initial call, Bell asked her two questions that are central to this appeal. He first asked, 'What happened?' He then asked her whether she was hurt and, 'Who did it?' ... Viewed objectively, the primary purpose of Bell's questions to the victim was to enable police assistance to meet an ongoing emergency. Accordingly, the victim's answers constituted nontestimonial evidence, and the Confrontation Clause did not bar Bell's recital of those answers at trial."

State v. Fry, 125 Ohio St. 3d 163; 2010 Ohio 1017; 926 N.E.2d 1239; (Ohio 2010) – "As in *Hammon*, here there was no ongoing emergency, and [DV and future murder victim] Hardison was no longer in any imminent danger when she talked to [Officer] Hackathorn. Fry had already been removed from the apartment and had been taken to the cruiser. Hackathorn's primary purpose in interrogating Hardison was to investigate a possible crime. Hardison's statements related to past events and what happened rather than what was currently happening. Accordingly, her statements were testimonial."

State v. Richardson, 2010 Ohio 471, 2010 Ohio App. LEXIS 389 (Ohio Ct. App., Lucas County Feb. 12, 2010) – "[59] As to Rivera's statements to police on May 23, 2006, the record contains testimony that Giesige and his partner were called to Rivera's apartment because of a domestic disturbance, when they heard appellant say he wanted to bash in Rivera's skull. Immediately upon entering the apartment, they heard Rivera, who was covered in blood and holding appellant at bay with a knife, say 'I'm glad you guys came because he would have killed me.' [60] Upon consideration, we find that Rivera's statements to police were not testimonial in nature, since they were made under circumstances that indicate their primary purpose was to obtain police assistance during an emergency situation."

People v. Banos, 178 Cal. App. 4th 483, 486-505 (Cal. App. 2d Dist. 2009), review denied (2010) – "When Officer Rojas questioned [future murder victim] Cortez at the telephone booth shortly after her call to 911, he was responding to an ongoing emergency. ... Rojas's primary purpose in questioning Cortez was to ascertain what was happening in order to resolve a

dangerous situation: defendant was at Cortez's apartment and she was afraid to go home. Cortez's statements to Rojas were nontestimonial."

State v. Lucas, 965 A.2d 75, 407 Md. 307 (Md. Feb 19, 2009) – "We are asked to decide whether responsive statements made by a visibly upset woman, while standing in her apartment doorway, to a police officer responding to a 'domestic' call, were testimonial and therefore inadmissible under the Sixth Amendment's Confrontation Clause. These statements were made in response to the officer asking her 'what happened' and 'where she got the marks [.]'" – answer: yes – "Mulligan [victim] was protected by police and no longer under any apparent imminent danger when she spoke with Fowler ... Having already encountered Lucas [abuser] outside of Mulligan's apartment, Fowler's initial inquiries were not necessary to 'know whom they [were] dealing with in order to assess the situation, the threat to their own safety, and possible danger to' Mulligan. ... The circumstances here are distinct from those in which officers encountered victims with apparent severe injuries requiring immediate medical attention and/or where an assailant had not yet been located. ... although Mulligan was visibly upset and exhibited injuries, there is no indication in the record that the officers administered or called for emergency medical assistance upon observing her condition." – [NOTE: "Emergency" equated with "imminent danger" or "severe injuries." More significantly, the opinion uses the information *obtained by* the officer's initial inquiries to determine that the initial inquiries were, in retrospect, unnecessary to resolve an emergency.]

Hawkins v. State, 2009 WL 214623 (Ind. App. Jan 30, 2009) (unpub) – "Fort Wayne Police Officer Alisia Wallace responded to the alleged domestic disturbance. ... Officer Wallace was met at the door by Hunt, who had a severely swollen left cheek. ... Officer Wallace asked Hunt to come outside in the hallway so that she could speak with her. Officer Wallace asked Hunt 'what happened to her face.' [cite] Hunt told Officer Wallace 'I got my ass beat' by Hawkins. [cite] ... Applying the first of the *Davis* factors, we observe that although Hunt spoke in the past tense, it was an explanation of the circumstances at issue to Officer Wallace, who was responding to a 911 call, and it was relevant to Officer Wallace's assessment of the situation at hand. Second, Officer Wallace's questions were in an effort to determine whether Hunt was facing an ongoing emergency. Hawkins and Hunt were the only two adults present when Officer Wallace was dispatched to the alleged domestic disturbance at their apartment, and Hunt was noticeably injured. Officer Wallace needed to ask Hunt what happened in order to determine whether Hunt faced an ongoing emergency or further abuse if left home alone with Hawkins. Third, Officer Wallace's question eliciting Hunt's statement was merely 'what happened to [your] face' suggesting its focus was upon addressing the emergency situation at hand rather than eliciting a detailed recitation of past events. Finally, at the time of her conversation with Officer Wallace, Hunt was at the site of the emergency situation. She was severely bruised and crying. There was little formality to this situation. In sum, the circumstances surrounding Officer Wallace's conversation with Hunt objectively indicate that the primary purpose of the conversation was to assist police in meeting an ongoing emergency. As such, Hunt's statement was nontestimonial "

People v. Byron, 170 Cal.App.4th 657, 88 Cal.Rptr.3d 386 (Cal. App. 2 Dist. Jan 23, 2009) – "Deputy Sheriff Robert Wilkinson went to Sowers's apartment in response to the 911 call. When he arrived, an ambulance and paramedics were already present and Sowers was on a gurney waiting to be taken to the hospital. Wilkinson testified he spoke to Sowers 'briefly just to get a brief description of the suspect. And so we can put out a crime broadcast to have other units

search the area for him.' ... Sowers's statements ... to Officer Wilkinson at the scene were nontestimonial because the primary purpose in giving and receiving them [was] to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.'" – later interview in hospital was testimonial

Tubbs v. State, 2008 WL 5423897 (Ark. App. Dec 31, 2008) (unpub) – "The State points to the testimony that the officers considered the situation an emergency when they entered the motel room, that Keys was visibly upset when the officers arrived, and that Keys's statements were made within two to three minutes of the officers' arrival. ... As was the case in *Hammon*, when officers arrived at the motel and found Keys and Tubbs, there was no emergency. While it appeared as though a domestic dispute may have occurred (Keys had some injuries and the room was a mess), it was clear that the dispute was over. Moreover, Tubbs was asleep."

James v. Marshall, 2008 WL 4601238 (C.D. Cal. Aug 13, 2008) (unpub) (habeas) – magistrate recommendation adopted by district judge – husband shot woman in the face – "[EMT] Dinger and a deputy got into the ambulance with the victim (R.T. 176). They were trying to get her to calm down and leave the oxygen mask on (R.T. 176). She had a lot of blood in her mouth, and they were trying to suction her, but as it turned out she did the suctioning herself because she could do a better job of it (R.T. 176). The deputy then asked the victim: "Did your husband shoot you?" (R.T. 176). The victim's response was unintelligible because she had a lot of nerve damage to her tongue (R.T. 177, 185-86). The deputy asked: "Did your son shoot you," to which the victim answered: "No." (R.T. 177, 186). Dinger asked: "Did your husband shoot you?" (R.T. 177, 186). The victim said: "He hit me, then shot me." (R.T. 178, 186). Dinger turned around to see if the deputy had heard the statement, but the deputy had already left (R.T. 177-78). Dinger testified that he asked the victim whether her husband had shot her because the paramedics and deputies worked as a team, and Dinger was trying to help the deputies (R.T. 191). Dinger said "[a] lot of times the patients will answer our questions versus not answering the deputies" (R.T. 191). ... In Petitioner's case, the challenged statement was not made by a "frantic" witness reporting events then "actually happening," but rather was made: (1) after the deputies had determined that the crime scene was "safe" and had so signaled the paramedics; (2) after the victim had received medical treatment for eight to ten minutes inside the house; (3) after Petitioner had admitted to deputies that he shot his wife; (4) after deputies had taken custody of the gun; (5) after the victim had been taken from the house on a gurney and loaded into an ambulance; and (6) either during or after the deputies' questioning of Petitioner. Nothing in the record shows the victim believed that she or anyone else was still in danger of injury or further injury. There was no ongoing emergency in the sense of a perpetrator being unknown or still at large. The primary purpose of the interrogation in the ambulance was not to enable deputies to meet an "ongoing emergency," but rather "to establish or prove past events potentially relevant to later criminal prosecution." [FN5] The fact that Paramedic Dinger asked the question precipitating the statement does not dispel this conclusion, for he testified he asked the question in an effort to assist his deputy "team.'" [NOTE: Paramedic didn't act at request of deputy.]

Rodriguez v. State, 274 S.W.3d 760 (Tex. App.-San Antonio Oct 01, 2008) – "M.G.'s statements to Officer Hovis that she had 'escaped' from inside the house where she had been assaulted by her boyfriend, her exhibition of the injury to her lip, and her statement that her boyfriend was probably in the bedroom were not testimonial, and their admission into evidence did not violate Rodriguez's rights under the Confrontation Clause."

People v. Webb, 2008 WL 3906837 (Cal. App. 2 Dist. Aug 26, 2008) (unpub) – defendant told an acquaintance, "I just got through whacking my girl." – he shot her and left her on the sidewalk – "Washington [the victim] grabbed [Officer] Pierce's wrist and said "Please help me. I'm dying." Pierce replied, "I want to help you, honey. Tell me who did this to you." ... Washington responded, "My old man," Pierce asked for the person's name, and Washington answered, "Marty Paul Webb." Pierce had worked in the area [Skid Row] about a year, was familiar with the area, and did not recognize the name. Pierce asked Washington "what ... do people call him down there as a moniker," and she replied, "Hoover Jack." ... Although the shooting already had occurred, its aftermath presented an ongoing emergency." – non-testimonial

Brooks v. Dormire, 2008 WL 3159331 (E.D. Mo. 2008) (unpub) (habeas) – "On October 29, 2000, petitioner's girlfriend Bonnie Sue Hawkins appeared at her neighbor's door covered in blood. Ms. Hawkins stated that petitioner had struck her with a baseball bat. Police officers responded and were again informed by Ms. Hawkins that petitioner wrapped toilet paper around the handle of a baseball bat and struck her. She stated that petitioner was upset because she was trying to end their relationship and had refused to have sex with him. Ms. Hawkins was taken to a hospital by ambulance. She told the paramedics and the emergency room staff that her injuries had been caused by petitioner. Ms. Hawkins died the next day from a brain hemorrhage." – all statements non-testimonial

People v. Suniga, 2008 WL 3090622 (Cal. App. 5 Dist. Jul 03, 2008) (unpub) – facts unclear, but statements made by a subsequently-murdered DV victim are testimonial when made to officer approximately an hour after attack – the attacker and victim were separated, but only because he pushed her out of car, kicked her while she was on the ground and "[s]he ran off" – this was at midnight on the road somewhere – which doesn't suggest an altogether tranquil atmosphere – court examines only "the primary purpose for which [Officer] Meek took Cindy's statement", not her purpose in making it

People v. Shipley, 2008 WL 2461811 (Cal. App. 3 Dist. Jun 19, 2008) (unpub) – "To assess Cheryl's request for assistance and the threat to her and to first responders, the 911 operator and Deputy Wright needed to know what had happened to place her in such circumstances and how to enable police assistance. Accordingly, we conclude that Cheryl's statements during the 911 call and in the initial interview with Deputy Wright were nontestimonial."

State v. Martin, 885 N.E.2d 18 (Ind. App. Apr 25, 2008) – " Brooks did tell Officers Caudill and Hoffman about past events, alleging that Martin had hit her and driven away with her children in a car with one door open, but as in Collins, this information was relevant to establish whether this man posed a present danger, particularly to Brooks's children. Second, although Brooks herself was not in danger when she made these statements to police, she was experiencing an ongoing emergency in that she did not know where her children were and she feared for their safety. Third, the officers' questions to Brooks sought to resolve the ongoing emergency by establishing Martin's identity, the type of car he was driving, and his state of mind. Finally, at the time of her conversation with the officers, Brooks was sitting by the side of the road just minutes after watching her children being driven away by the man who had battered her. She was hysterical and had blood all over her face. Clearly, there was little formality to this situation." – held: non-testimonial

State v. Bonvillain, 2008 WL 2064978, 2007-2248 (La.App. 1 Cir. May 02, 2008) (unpub) – husband murdered estranged wife by drugging her and then sealing her in airtight box – statements made by the victim to police prior to her death, in which she said she was afraid the defendant was going to kill her, were admitted – "As the state correctly notes in its brief, each of the statements in question was made in the course of police interrogation and for the sole purpose of resolving the ongoing domestic situation. According to the officers, at the time of the statements, the victim was visibly shaken and afraid. Each time she was running from the defendant and she feared for her life. Furthermore, the questions posed by each officer and the victim's responses thereto were necessary to evaluate the situation under investigation at that particular time. [cite] Contrary to the defendant's assertions, the statements were nontestimonial in nature..."

Vinson v. State, 252 S.W.3d 336 (Tex. Crim. App. Jan 16, 2008) – see also **opinion on remand for harm analysis, 266 S.W.3d 65 (Tex. App.-Hous. Aug 21, 2008)** – "Harris County Deputy Sheriff Stephen Chapman responded to a report by a 9-1-1 dispatch operator of a possible emergency at the apartment belonging to Lalanina Hollimon and the appellant. ... When Chapman arrived at the scene, Hollimon answered the door and appeared to be bleeding and in pain from recently inflicted injuries. Chapman asked her what had happened and Hollimon responded that her boyfriend had assaulted her. These statements constitute the first portion of Hollimon's statements. As the appellant does not contest the admissibility of these statements, we need not further address them in this opinion. [FN2] FN2. The appellant did contest the admissibility of these statements before the court of appeals, but that court held that the statements were nontestimonial and the appellant does not presently challenge that conclusion in his petition for discretionary review. [¶] Hollimon then identified her assailant as "Vinson," the appellant, and recounted the details of the assault, claiming that her assailant had knocked the phone out of her hand when she called 9-1-1. These statements constitute the second portion of Hollimon's statements. It is these statements that the appellant presently asserts were testimonial for Confrontation Clause purposes. During the questioning, the appellant came into the room and demanded that Hollimon 'tell [the deputy] the truth' and 'don't let them take me to jail.' Chapman noted that the appellant was 'very excited,' shirtless, and sweating profusely. Chapman secured the appellant by placing him in the back of his patrol car, and then resumed questioning Hollimon. ... The appellant first claims that Hollimon's identification of him as "Vinson" was testimonial in nature and thus violated the Confrontation Clause when Chapman testified to this statement. We disagree. ... We agree with the court of appeals that up to this point, before the appellant had been secured in the patrol car, the trial court could rationally have concluded that any interrogation was nontestimonial."

State v. Craig, 2008 WL 131098 (N.C. App. Jan. 15, 2008), upheld on collateral review by Craig v. Hunt, 2009 WL 454617 (W.D. N.C. Feb 23, 2009) (unpub) (habeas) – on two previous occasions, murder victim had called 911 after defendant abused her – police officers were permitted to testify about what she said when they responded to the calls – "Even though defendant was not present when the officers arrived, the officers were responding to an emergency call and could not have knowledge of the risks to the victim or themselves unless they questioned the victim to determine the situation. Officers may, and should, respond to 911 calls as if they are emergencies until they obtain sufficient information that indicates otherwise. [¶] The record indicates that the questioning never went beyond this initial informal interview to establish the facts surrounding the call and determine that the victim and officers were not in any risk of harm. ... Therefore, the statements by the victim were nontestimonial"

Lewis v. U.S., 938 A.2d 771 (D.C. Dec 31, 2007) – "Given the ongoing emergency and [DV citim] Ms. Coleman's obvious distress, we are satisfied that her initial, spontaneous statements [to responding officer] were clearly non-testimonial. [cites] That some of her statements were made in response to questions by the police does not transform the encounter into a testimonial interrogation, even in the broadest, most "colloquial" sense of the term. [cite] The questions posed were not investigatory in nature, but were designed to gather information necessary to respond to the emergency. Such preliminary questions—"Who was trying to kill you?", "Do you need medical attention?", "What did he do?", "How did you get cut on your head?"—are routine inquiries that enable the police to assess the risk of danger, ensure the safety of the victim and the community, and secure any needed medical treatment."

People v. Garces, 2007 WL 4384935 (Cal. App. 4 Dist. Dec 17, 2007) (unpub) – Cuban victim of domestic violence interviewed by officer soon after beating – "[Officer] Cimmarrusti related Yamile had explained that an individual in Cuba who made domestic violence complaints would have her hand cut off for retaliation if the police were involved." – held: testimonial, because emergency was over [NOTE: Was the statement really offered for the truth of the matter asserted, that a DV victim in Cuba who complained would have her hand severed???

Commonwealth v. Lao, 450 Mass. 215, 877 N.E.2d 557 (Mass. Dec. 10, 2007) – "[A]s to [murder victim] Alicia's statements to Officer Bonita after he arrived at her home in response to the 911 call, the language of *Crawford* suggests that these statements would have qualified as testimonial. As enunciated in *Crawford*, testimonial statements include those made by an individual during a police interrogation." – failure to object is ineffective assistance of counsel

Long v. U.S., 940 A.2d 87 (D.C. Nov 15, 2007) – "On July 26, 2002, at approximately 1:00 p.m., Officer Christopher James was driving in a marked police cruiser when a man on the sidewalk flagged him down. This man, later identified as Jeffrey Dunn, was bleeding from a laceration on his face that stretched from his forehead to his chin and was about a quarter-inch wide. Mr. Dunn, who was 'covered in blood' despite having a towel in his hand to help stop the bleeding, was extremely upset and 'hyper.' Officer James asked, 'What happened?' and 'Who did this to you?' Mr. Dunn did not respond directly, but instead paced up and down the sidewalk while emphatically repeating, 'Look what she did to my face.' Officer James called for a paramedic unit and for backup assistance. Officer Reuben Jefferson responded to the backup request within a minute, and the paramedics arrived shortly thereafter. Upon Officer Jefferson's arrival, Mr. Dunn said, 'Look what the bitch done, she cut my face.' ... Because Mr. Dunn's statements were uttered in the course of an ongoing emergency, with the primary purpose of facilitating a response to that emergency, and because they were not the solemn and formal statements that one typically associates with testimony, we conclude that they were not 'testimonial' statements as that term is used in *Crawford* and *Davis*."

People v. Mackey, 2007 WL 2439459, 2007 N.Y. Slip Op. 51664(U) (N.Y. Sup. App. Term Aug 30, 2007) (unpub) – "The statements made by the nontestifying victim immediately after she flagged down the police, describing the nature and location of the assaultive conduct in response to the police inquiries as to 'what was wrong,' were not testimonial in nature, and their admission did not violate defendant's confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004) (see *People v. Bradley*, 8 NY3d 124 [2006]; *People v. Smith*, 37 AD3d 333 [2007], *lv denied* 8 NY3d 950 [2007])."

State v. Warsame, 735 N.W.2d 684 (Minn. 2007) – "We conclude that [a police officer's] questions addressing a [domestic violence] victim's medical condition may qualify as an interrogation designed to meet an ongoing emergency. As first responders to emergencies, police are often required to assess a party's injuries and determine whether those injuries must be immediately addressed and whether the party requires additional assistance from paramedics or other health care professionals. In order to make that assessment, officers must inevitably learn the circumstances by which the party was injured, and if the circumstances of the questions and answers objectively indicate that gaining such information is the primary purpose of the interrogation, then the party's statements are nontestimonial. We acknowledge that information about a victim's injury and its cause may be useful in a later prosecution, but for Confrontation Clause purposes, it is the primary purpose of the interrogation that is dispositive. [¶] Here, the objective circumstances of the interrogation indicate that the primary purpose of at least the initial part of the interrogation was to enable Wilson to address N.A.'s medical condition. ... In order for Wilson to properly address the bump on N.A.'s head and the bruising on her neck, there is no question that the circumstances under which N.A. was physically hurt were relevant. ... We conclude that Wilson's questions and N.A.'s answers, at least so far as they pertained to N.A.'s treatment, were necessary to resolve N.A.'s apparent medical emergency."

People v. Saracoglu, 152 Cal.App.4th 1584, 62 Cal.Rptr.3d 418 (Cal. App. 2 Dist. 2007) – [refusing to accept AG's concession that statements made by DV victim at stationhouse were testimonial, when the victim took herself to the station and approximately 30 minutes had elapsed since attack] "Although the situation here falls somewhere in between the facts of *Davis* and the facts of *Hammon*, we conclude Rachel's initial conversation with Officer Hawkins was closer to *Davis* than to *Hammon*. Objectively viewed, the primary purpose of Rachel's initial interrogation by Hawkins was 'to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.' (*People v. Cage, supra*, 40 Cal.4th at p. 984.)" – **writ of habeas corpus granted, Saracoglu v. Walker, 2010 U.S. Dist. LEXIS 27640, 1-43 (C.D. Cal. Jan. 27, 2010), adopted by district court, 2010 U.S. Dist. LEXIS 27636 (C.D. Cal. Mar. 23, 2010)** –

Thai v. State, 2007 WL 2193309 (Tex. App.-Dallas Aug 01, 2007) (unpub) – "Responding to the call, [officer] Williams heard fighting in an apartment. He knocked, and Nguyen answered. She ran behind Williams, saying Thai 'is going crazy, he hit me, and he is smashing everything.' While she was saying that, Thai came toward the door. Williams testified Thai cursed, threatened bodily injury to him, and had to be restrained. These facts show an ongoing emergency when Williams arrived on the scene. Even assuming Williams asked Nguyen any questions, we conclude Nguyen's first statement was made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency."

Mason v. State, 225 S.W.3d 902 (Tex. App.-Dallas Jun 13, 2007) – (on remand from SCOTUS) – "There was no emergency in progress when [Officer] Blasingame arrived, and he observed no signs of a struggle or disturbance. ... The complainant did not seek medical treatment, nor were paramedics called. ... [W]e conclude the complainant's out-of-court oral statements resulted from an 'interrogation' within the meaning of the Sixth Amendment. We further conclude the facts in this case show objectively Blasingame was conducting an investigation into past possible criminal conduct when he questioned the complainant in this

case. Formality can be found here for two of the reasons it was found in *Hammon*, i.e., separate questioning of appellant and the complainant, and Texas law making a false report to a peace officer a crime. The statements were 'an obvious substitute for live testimony, were inherently testimonial, and did precisely what a witness does on direct examination.' We hold the complainant's statements to Blasingame were testimonial." (citations omitted)

State v. Mendoza-Lazaro, 211 Or. App. 349, 155 P.3d 63 (Or. App. 2007), opinion adhered to on remand, ___ P.3d ___, 2008 WL 5412468 (Or. App. Dec 31, 2008) – "After the police received a call reporting a domestic disturbance, Deputy Hickam was dispatched to the scene. When he arrived, defendant's girlfriend, who was outside the residence with her two children, waved him down. Hickam observed that she was crying, that she had blood running down the side of her lip and several scratches on her neck, and that she was missing a tooth. The children, clinging to her, were also crying. After Hickam learned the names and ages of the children, they were moved to the manager's apartment, where the manager calmed them down by playing a children's video. Defendant's girlfriend then told Hickam defendant's identity and that she had been assaulted by him during an argument in their apartment, where she indicated he could still be found." – officer then talked with defendant – "Hickam then returned to the manager's apartment to get 'an additional statement' from the girlfriend." – Held: first statement nontestimonial, second statement testimonial

Marino v. Berbary, 2007 U.S. Dist. LEXIS 11, 2007 WL 14561 (E.D. N.Y. 2007) (unpub) – (habeas) – DV case – "In light of the responding officer's testimony that [victim] Rowe was still 'very excited, hysterical, and crying' when she made her statements, the Court concludes that the Appellate Division's adjudication was not contrary to *Crawford* since Rowe's statements, unlike the statements in *Crawford*, were not 'knowingly given in response to structured police questioning.'"

People v. Pedroza, 147 Cal.App.4th 784, 54 Cal.Rptr.3d 636 (Cal. App. 2 Dist. 2007) – husband severely burned his wife, as she was dying she made statements to deputies, admitted under Evidence Code § 1240 (spontaneous statements) – "Both Officer Ellis and Sergeant Lamping encountered the victim and asked one question: What happened? Ellis followed up by asking Rodriguez how she was burned. Lamping asked nothing else. In response, the victim said that Steve threw gas on her and burned her. Officer Ellis estimated that he spoke to the victim for approximately 10 to 15 seconds. Sergeant Lamping said he was with her for a few seconds. The victim's response, given minutes after she had sustained severe burns and while she was still suffering from the resulting intense pain, certainly suggests her statements were the product of the stress of the moment, not deliberation." – another officer asked more questions and spoke with her longer, but because "the victim was having difficulty providing more than one word answers. She was moaning in pain and shaking" the statements were admissible as spontaneous statements and therefore weren't testimonial – following *People v. Corella*, 122 Cal.App.4th 461, 469, 18 Cal.Rptr.3d 770 (2004) – upheld by **Pedroza v. Warden, 2008 WL 5209971 (C.D. Cal. Dec 09, 2008)** (unpub) (habeas)

State v. McKenzie, 2006 Ohio 5725, 2006 WL 3095671 (Ohio Ct. App. 8 Dist. 2006) (unpub) – "The officer testified that he had been responding to a very early morning call (apparently unrelated to this incident) and observed McKenzie walking down the street. The officer then saw the victim run out of an apartment door, waving her arms and yelling, 'that's him, that's him. ... Perhaps there was an element of accusation in the statement, but any identification is accusatory

in nature. One cannot alert the police to the presence of a perpetrator of a crime without being accusatory. That fact alone does not render the statement testimonial. By the court's own reckoning, the victim was still in a 'hysterical state of mind' at the time she flagged down the officer. We find her identification of McKenzie as the perpetrator of an ongoing altercation was primarily intended for police assistance." – and thus non-testimonial – but statements the victim made after McKenzie had been secured in the police car were testimonial in nature.

Vinson v. State, 221 S.W.3d 256 (Tex.App.-Hous. 2006), aff'd in part and rev'd in part, Vinson v. State, 252 S.W.3d 336 (Tex. Crim. App. Jan 16, 2008), opinion on remand for harm analysis, 266 S.W.3d 65 (Tex. App.-Hous. Aug 21, 2008) –

State v. Ly, 2006 Minn. App. Unpub. LEXIS 853, 2006 WL 2255692 (Minn. Ct. App. 2006) (unpub) – "[T]wo police officers heard a woman screaming and then heard a male voice yell, 'Shut up, b-' and 'I'm going to f-ing hit you.' After identifying the car from which the noise was emanating, one of the officers approached and opened the car's door. Appellant Hua Ly was in the driver's seat and a woman later identified as Edith Lee was in the passenger's seat. Lee, with whom Ly has a child in common, was crying and bleeding from her mouth." - statements by victim at scene were non-testimonial – [Note: some of the statements were not offered for the truth, and one did not accuse defendant of anything, so that the declarant was not a "witness against" him.]

On-the-Scene Questioning: Adult Declarant: Violent Crimes (non-D.V.)

(NOTE: *Michigan v. Bryant* now governs these situations.)

People v. Chism, 58 Cal.4th 1266, 171 Cal.Rptr.3d 347 (Cal. 2014) – eyewitness to events surrounding a liquor store shooting spoke to first officer on scene – "The circumstances of the encounter, which took place outside a store where a shooting had recently occurred, reveal that Miller and Officer Romero spoke to each other in order to deal with an ongoing emergency. It was objectively reasonable for Officer Romero to believe the suspects, one of whom presumably was still armed with a gun, remained at large and posed an immediate threat to officers responding to the shooting and the public. We are convinced that Miller's additional statements concerning his observations and descriptions of the suspects were made for the primary purpose of meeting an ongoing emergency and not to produce evidence for use at a later trial."

Johnson v. State, 294 Ga. 86, 750 S.E.2d 347, 352-53 (Ga. 2013), reconsideration denied (Nov. 18, 2013) – "Over appellant's objection, the trial court allowed the State to present similar transaction evidence related to appellants' prior conviction ... Appellant further argues that admission of statements made by the now-deceased victim of the previous assault violated his rights under the Confrontation Clause. See *Crawford*, supra. We disagree. ... Here, the challenged statements were made by the victim of the prior crime to a law enforcement officer minutes after the crime to meet an ongoing emergency; therefore, they were not testimonial..."

Delhall v. State, 95 So. 3d 134, 141-160 (Fla. 2012) – "In light of the holding in *Bryant*, and its similarity to the instant case, this Court finds that [shooting victim] McCrae's statements to Officer Hufnagel, admissible under Florida law as excited utterances, were not testimonial and thus not barred by the Confrontation Clause."

State v. Largo, 2012 NMSC 15, 278 P.3d 532 (N.M. 2012) – murder case – "when Deputy Marble arrived he asked Victim 'What happened?' These are precisely the types of questions the Bryant Court concluded, in light of the surrounding circumstances, 'solicit[] the information necessary to enable [first responders] to meet an ongoing emergency.'" (brackets in original)

State v. Glenn, 725 S.E.2d 58, 59-68 (N.C. Ct. App. 2012) – "In the instant case, defendant voluntarily released [rape victim] Hooper from his car and drove away. There was no indication that defendant would return to the area to harm Hooper again. Unlike the assailant in Bryant, who was armed with a gun, defendant in the instant case only displayed a knife to threaten Hooper. There was no evidence that Hooper sustained any injuries from the knife. ... Hooper's statement to Officer Baker was clearly testimonial." [NOTE: Rape at knifepoint doesn't count as an injury from the knife – shades of the old "utmost resistance" doctrine.]

Brock v. State, 203 Md. App. 245, 37 A.3d 1030 (Md. Ct. Spec. App. 2012) – "Viewed objectively, the total circumstances surrounding Pryor's March 1, 2009 Statement to Officer Admeged make clear that 'the primary purpose' of the officer's questioning of Pryor was to meet an ongoing emergency. When Officer Admeged arrived at the Tavern, he knew only that there had been a 'cutting.' Upon entering the Tavern, he observed Gause lying on the dance floor, bleeding profusely and obviously in extremis. He saw another man, later determined to be Pryor, 'pacing' nearby and bleeding from his hands. At that point in time, Officer Admeged was aware that one man (Gause) had been very seriously injured and another man (Pryor) also was bleeding. He did not know the exact type of [*264] weapon involved (although he would have thought it was a knife or similar dangerous instrument), who the perpetrator was, or whether the perpetrator still was present in the Tavern or its parking lot, both of which were filled with people. Under the circumstances, Officer Admeged reasonably could have suspected that Pryor was the perpetrator. [¶] Officer Admeged asked Pryor, 'What's going on? . . . What's happening?' -- questions that obviously suggest that the officer was trying to learn the present basic facts about the nature of the crime or crimes and the parties involved. He did not sit down with Pryor and take a statement or even take notes while he spoke to Pryor. He called for medical assistance twice between the time he arrived and the time he finished speaking with Pryor. Viewed objectively, all these facts create a picture of an ongoing emergency. [¶] Pryor's answers to Officer Admeged's questions strongly suggest a primary purpose of assisting the police to respond to the ongoing emergency by apprehending the perpetrator."

Sanders v. State, 77 So. 3d 484, 485-486 (Miss. 2012) – "[Deputy] Hendry was dispatched to Sherman's house after a 911 call reporting a person yelling for help and blowing a horn in his yard. When Hendry arrived and approached Sherman, he 'immediately noticed he had large lesions on his skin' and that 'large portions of skin were hanging from his chest area and arm ' At that point, Hendry asked one question, 'what happened,' to which Sherman replied that his wife had poured burning oil on him while he was asleep." – non-testimonial

Render v. State, 347 S.W.3d 905, 908-920 (Tex. App. Eastland 2011) – officer responded to report of fight, arrived to find combatants separated – after talking to several people, talked to Holland, who'd been attacked by defendant, and who seemed dazed but "pretty calm", and who died later that day as a result of brain injury – "At trial, the State did not assert, and the trial court did not conclude, that Holland's statements to Officer Grusendorf were nontestimonial. The evidence shows that no ongoing emergency existed when Holland made the statements to Officer Grusendorf. Instead, the statements were made to establish or prove past events potentially

relevant to a later criminal prosecution. As such, Holland's statements were testimonial in nature."

People v. Blacksher, 52 Cal. 4th 769, 259 P.3d 370, 130 Cal. Rptr. 3d 191 (Cal. 2011) – "Officer Nielsen arrived within four minutes of Adams's 911 call. The bodies were still inside. Eva did not know if defendant was still present. During a 10 to 15 minute conversation Officer Nielsen asked Eva questions about the shooting, what defendant was wearing and whether he was armed. Nielsen took notes so he could relay information to the dispatcher and other officers. During this period it was ascertained that defendant was neither in Eva's house nor the cottage behind it. Thus, the shooter had fled the scene and was presumed to be armed with the firearm that was the murder weapon. His motive and whereabouts were unknown. The audio recording of police radio traffic confirms that during the initial 15 minutes following the 911 call officers were trying to assess the emergency and determine whether the shooter was dead or still in the neighborhood. It was objectively reasonable to believe that an armed shooter remained at large and presented an emergency situation." – non-testimonial

People v. Clay, 2011 NY Slip Op 5729, 926 N.Y.S.2d 598 (N.Y. App. Div. 2d Dep't 2011) – "The principal issues presented on this appeal are whether a statement uttered by a victim of a shooting shortly before his death, in response to an inquiry by a police officer regarding the identity of the shooter, constituted testimonial evidence ... Here, McGee was not the first officer to arrive on the scene. Rather, there were other officers and a police van already present, and another officer with Isaacs himself. It stands to reason that the other officers would have already endeavored to determine the nature of any emergency that may have existed and to implement such actions as they deemed necessary to deal with the emergency. ... Isaacs, having already been attended to by a police officer who had responded to the scene before McGee, and having been advised that he probably was not going to 'make it,' could only have reasonably expected that his response to McGee's pointed inquiry would 'be used prosecutorially [cite]." [NOTE: What a bizarre fantasy, that a person dying of a gunshot wound would be thinking about the courtroom use of his dying words!! The standard must be: what a reasonable lawyer who *isn't* dying of gunshot wounds would think about, if in the position of a person who *is* dying of gunshot wounds, minus the distraction of actually, you know, dying of gunshot wounds.]

State v. Gutierrez, 2011-NMCA-088, __ P.3d __ (N.M. Ct. App. 2011), cert. denied – "[¶ 15] The circumstances in this case are of the type associated with non-testimonial statements. The videotape at issue was taken from a police officer's patrol car when the officer was responding to a call about a fight in progress. The officer testified that at the time the video was recorded, the police were "still trying to figure out . . . if [they were] still looking for other suspects, if the guys [on the videotape were] just victims or suspects . . . and if there [were] any other victims that [they were] not aware of." The officer arrived to find four men at the scene, two of whom had been stabbed. He explained that the two injured men "were just blurting out statements and were in a lot of pain[,] and the uninjured men were not talking. ... [¶ 16] We therefore conclude that the statements were non-testimonial."

Johnson v. United States, 17 A.3d 621 (D.C. 2011) – "Shortly after 2:00 a.m. on July 20, 2004, Joshua Arrington was shot six times at close range, sustaining gunshot wounds to the chest and rib cage, while sitting in his car. He staggered out of the car and collapsed, at which point a neighbor called 911. Metropolitan Police Department Officer Mikal Ba'th was the first to arrive on the scene. He asked Arrington a series of questions as Arrington lapsed in and out of

consciousness, [**3] often closing his eyes "as if he wanted to go to sleep, or as if a person was going to sleep." Officer Ba'th sometimes had to repeat his questions. In response to Officer Ba'th's questioning, Arrington stated, inter alia, that his name was Joshua; that he had been shot while sitting in the car; that the person who shot him was Antonio Johnson; that Johnson had left the area in a white Marquis; and that Officer Ba'th should contact his grandmother. Arrington died a few hours after getting to the hospital. ... In light of the Supreme Court's recent decision in *Michigan v. Bryant* [cite], on facts functionally indistinguishable from those in this case, the Sixth Amendment issue is not a close one." [NOTE: Ruled a dying declaration for purposes of hearsay rule.]

People v. Thomas, 51 Cal. 4th 449, 247 P.3d 886, 121 Cal. Rptr. 3d 521 (Cal. 2011) – "when Deputy Calzada asked McCowan what had happened, McCowan replied: "Thomas in cell nineteen cut me." Deputy Calzada described McCowan as "obviously distressed." ... Like the 911 operator in Davis, Deputy Calzada was responding to an emergency situation. Like the emergency room physician in Cage, he asked the victim a simple question to determine what had occurred so he could determine what needed to be done to address the situation. Deputy Calzada did not conduct a formal interrogation, and McCowan's response was not testimonial within the meaning of Crawford."

People v Shaw, 2011 NY Slip Op 99, 80 A.D.3d 465, 914 N.Y.S.2d 155 (N.Y. App. Div. 1st Dep't 2011) – "The first declaration was made to a police officer who responded shortly after the crime. This statement was not testimonial, because it was primarily made 'to enable police assistance to meet an ongoing emergency'..."

People v. Nelson, 190 Cal. App. 4th 1453, 1456-1468 (Cal. App. 4th Dist. 2010) – "statements in response to police inquiries at the crime scene are not testimonial if the inquiries were designed to ascertain whether there was an ongoing threat to the safety of the victim, the officers, or the public. [cites] For example, questioning a victim to identify a perpetrator for purposes of immediate apprehension of the perpetrator for safety reasons does not yield a testimonial statement."

State v. Washington, 2010 Ohio 3175 (Ohio Ct. App., Hamilton County July 9, 2010) – "Sergeant Michael Machenheimer and Officer Ronald Fuller from the Cincinnati police arrived on the scene while Williams was lying injured in the street. Machenheimer asked Williams if he knew who had shot him, and he said, "Yes, his name is Kendal." Fuller testified that Williams had told him that "Kendal shot me."... the police were responding to the present emergency of Williams's shooting; they were trying to assist him and to catch the shooter before he endangered anyone else. Therefore, Williams's statements were not testimonial..."

Zanders v. United States, 999 A.2d 149, 153-155 (D.C. 2010) – "Appellant had been robbed by Lancaster at gunpoint in the past and on May 17, 2000, a fight ensued between them in which Lancaster was stabbed and shots were fired. The bleeding Lancaster started to walk away with his brother Jamar, was taken by a passerby to a nearby fire station, and, from there, by ambulance to a hospital where he was treated for an open wound in the chest cavity. At the fire station, Lancaster was questioned by Metropolitan Police Department (MPD) Officer Kevin Raynor. Lancaster told the officer that he had been approached on a basketball court by three acquaintances, one of whom, appellant, had stabbed him, and another had shot at him. Lancaster repeated the accusation at the hospital when he was questioned by MPD Detective George

DeSilva. ... On appeal, the government concedes that Lancaster's statements were given to police officers who were investigating the fight and stabbing, and are therefore testimonial for purposes of the Confrontation Clause." [NOTE: Pre-*Bryant*.]

Commonwealth v. Simon, 456 Mass. 280, 923 N.E.2d 58 (Mass. 2010) – "Although much of the 911 call was not testimonial per se, five statements contained therein were testimonial per se because, viewed objectively, they would not have helped resolve the ongoing emergency or secure the crime scene. *See Davis*, supra at 827. Two of these statements described the shooting itself in detail, and the other three statements informed the dispatcher that the assailant 'worked out' at Mike's Gym."

People v Shaw, 2009 NY Slip Op 9157, 68 A.D.3d 507; 890 N.Y.S.2d 524 (N.Y. App. Div. 1st Dep't 2009) – "The court did not violate defendant's right of confrontation when it received two declarations by the nontestifying victim in which she described being raped, since neither declaration was testimonial. The victim died before defendant was identified, years later, by means of DNA evidence. At trial, the sole issue was consent. [¶] The first declaration was made to a police officer who [**508] responded shortly after the crime. This statement was not testimonial, because it was primarily made 'to enable police assistance to meet an ongoing emergency'"

Wilson v. State, 296 S.W.3d 140 (Tex. App.-Hous. (14 Dist.) Jul 30, 2009) – "[Officer] Castillo arrived at the crime scene almost immediately after learning that a burglary was in progress. In hindsight, it appears that the burglary may have ended shortly before he arrived. [FN6] However, the suspect had just fled and was still at large, and his whereabouts were unknown. Thus, although some of Baez's statements dealt with events that had recently occurred, Castillo was also interested in what was presently happening, including the suspect's physical description and location. Thus, the record reflects that the primary purpose of his questioning was not to document a past crime, but instead to assess the situation, secure the crime scene, decide on the size of the dragnet necessary to apprehend the suspect, locate him, [FN7] and arrest him in order to end the ongoing emergency situation. ... The fact that the suspect was still loose carries particular significance here."

State v. Koslowski, __ P.3d __, 2009 WL 1709639 (Wash. Jun 18, 2009) – very lengthy 4-3 opinion applying multi-factor test to determine that woman who had been the victim of a home invasion robbery and had been tied up by burglar provided testimonial statements to the first police officers who arrived within minutes of her first call and while she was still on the line with the 911 operator

People v. Bryant, __ N.W.2d __, 2009 WL 1677569 (Mich. Jun 10, 2009) – very lengthy 4-3 opinion applying multi-factor test to determine that man who had been shot provided testimonial statements to police as he lay dying on the pavement at a gas station – after all, the shooting was over at that point

People v. Mendoza, 2009 WL 1211656 (Cal. App. 4 Dist. May 05, 2009) (unpub) – "When Officer Hays arrived at the scene shortly after the assault, he found Cruz hunched over on a concrete block wall, bleeding, short of breath and highly distressed. Cruz was in obvious pain, and paramedics had not yet arrived. Several people were standing around, and Hays was unsure whether the attacker was among them. Because people were trying to leave the area, Officer

Hays asked Cruz, "Who did this[?]" to obtain information about the suspect and for purposes of officer safety. [¶] These facts, viewed objectively, support the conclusion that Cruz's statement identifying Mendoza was nontestimonial."

State v. Sorto, 2009 WL 877669 (Wash. App. Div. 1 Mar 30, 2009) (unpub) – "Considering the factors here, the statements Salazar made to Hairston were not testimonial. They were made only seconds after the shooting occurred to the first officer who arrived on the scene. Also, as in Ohlson, the statements were made while the shooter was still at large, and here the threat posed to public safety was even greater: the victim had been shot several times and was nearly dead. The need for the information provided by Salazar was also great: he was the only witness, and his description assisted the police in the search for the shooter. Finally, the formality of the questioning was minimal. Hairston was performing several tasks at the scene and received just enough information from Salazar to broadcast it to other officers."

Clark v. State, __ S.W.3d __, 2009 WL 857607 (Tex. App.-Beaumont Apr 01, 2009) – "[Officer] Mireles saw Woods on the floor in the doorway of the apartment. She held a towel to her bleeding stomach and appeared to be in pain. She was kicking her feet, labored in her breathing, moaning, rolling her head, and fluttering her eyes. Mireles asked her what happened and she responded, 'He shot me.' Mireles was unsure of who she was referring to and asked her again. She again stated, 'He shot me,' and then pointed to Clark. At the time, no one had come forward as a witness, and EMS had not begun treating her. Mireles was trying to secure the crime scene. ... Mireles testified that when he asked Woods what happened, he was trying to secure the crime scene. Clark was in custody but no witnesses had come forward, and Mireles did not know if Clark was the correct suspect. Mireles wanted to know whether he had the correct suspect. Woods had not received medical treatment. Mireles asked her what happened in part to determine whether "it was a gunshot wound or a stab wound or something for EMS." Mireles testified his normal and customary initial investigation involves asking for the information to determine what happened, and also in the event "she wasn't going to live," he would "have something." [FN2] The questioning was in Clark's presence. The events were not deliberately recounted in a step-by-step fashion, and the questioning was not formal. Woods's statements were made at the scene while the situation was still in progress and while Woods was in distress. ... The trial court could reasonably conclude the primary purpose of the interrogation--even though not the only purpose--was to enable police assistance to meet the ongoing emergency." – not testimonial

State v. Smith, 2009 WL 774817 (N.J. Super. A.D. Mar 26, 2009) (unpub) – "In broken English, Chen told the officer that he was struck in the head with a stick-like object about two feet in length. Chen described his assailant as a black male, about five foot eight inches tall, thin, with short hair and wearing a black t-shirt. While the officer was speaking with him, Chen's legs went weak and he collapsed. Officer McKinley, a certified EMT, administered first aid to Chen. He placed an oxygen mask on Chen and put pressure against Chen's head wound. ... McKinley's questions to Chen were in an effort to meet an ongoing emergency, which is a nontestimonial situation."

Pritchard v. State, 2009 WL 112717 (Tex. App.-Fort Worth Jan 15, 2009) (unpub) – home invasion robbery – victim Mr. Marten "was eighty-one years of age and partially paralyzed" – "Officer Betty King, an officer who responded to Mr. Marten's 911 call, testified for the State at trial. [FN2] She explained that she arrived at the Marten residence within three or four minutes

after she received the dispatch and found Mr. Marten bleeding from his forehead and eyebrow, very disoriented, and calling out for his wife. Officer King testified that Mr. Mar-ten 'was horrified. He was very concerned for the safety of his wife.' After making a protective sweep of the house and finding no one else in the home, she asked him what had happened and said she needed some information in order to look for his wife. Officer King said that it was 'hard to keep him on track because of his fear for the safety of his wife.' Mr. Marten explained what had happened, including that the man took his wallet from his pocket and struck him twice in the head with an object. He also described the man to the officer... the circumstances surrounding Mr. Marten's statements objectively indicate the primary purpose of the questioning was to enable police to meet an ongoing emergency--locating Mrs. Marten and the suspect."

People v. Johnson, 2009 WL 27427 (Cal. App. 4 Dist. Jan 06, 2009) (unpub) – rape of resident in residential home for mentally ill – "[Officer] Anderson's purpose in speaking with the victim was first to elicit a description of the suspect so he could notify other officers and then to obtain details of the incident. About 10 minutes after he started speaking with the victim she [provided description]. At that point he issued a broadcast to officers in the area to look for the suspect." – trial court correctly held that statements up to time of broadcast were non-testimonial

State v. Jones, 197 P.3d 815 (Kan. Dec 12, 2008) – "The first persons to attend to Wright after the shooting were the paramedics who accompanied him in the ambulance. Wright was paralyzed and obviously aware that he had been seriously wounded; there was apparently no opportunity for him to be interrogated by an investigating law enforcement officer at the scene. Although Wright was in the midst of a medical emergency, the paramedics' questions at issue here were not designed to deal with the immediate danger. Rather, the questions about the identity of the shooter related to past events and sought information above and beyond what was necessary to administer medical care. Accordingly, Wright would have reasonably believed that his answers would be passed along to law enforcement officers and would later be available for use in prosecuting the shooter." [NOTE: In describing what a paralyzed, dying shooting victim "would have reasonably believed", the court doesn't consider what a person in that situation would *actually* have been thinking, but only what he *might have* thought had his attention been directed that way. It seems safe to assume the uppermost thoughts in his mind didn't include the reception of evidence at a trial for his murder.]

The opinion continues:

"Granted, the paramedics testified that the questioning of a patient fulfills a medical purpose by assuring the paramedic that the patient's airway remains open and by assisting in maintaining the patient's consciousness. However, that purpose does not explain the content of the questions which were asked. The fire department paramedic acknowledged that the information obtained through their questioning often helps the police where the patient has been transported from the scene quickly, before any police investigation could occur. Here, the specific questions asked were obviously designed to obtain such helpful information for law enforcement. In that light, the interview formed a part of a governmental investigation into past events." – hence, testimonial – [NOTE: So whose perspective counts, the victim's or the paramedics?]

Harris v. Quarterman, 2008 WL 4791375 (N.D. Tex. Oct 30, 2008) (unpub) (habeas) – "Officer Cruz responded to a 911 call and took the necessary information to try and determine what had happened and locate the suspect. The purpose of Officer Cruz' testimony about what

the two women told him was not to prove past events that would be relevant to later prosecution."

People v. Torres, 2008 WL 4838578 (Cal. App. 5 Dist. Nov 10, 2008) (unpub) – "Borrero testified that, when she came out of the bar just after the stabbing, she heard people saying that 'Checko did it.' Blanco testified that, when he was stabbed, he could not see his assailant but he could hear people yelling that 'Checko did it.'" – not testimonial

Gutierrez v. Yates, 2008 WL 4217865 (C.D. Cal. Apr 08, 2008) (unpub) (habeas) – "Here, Sandra's unprompted statements that she was being raped and that the culprits had a gun, made when she jumped out of the car naked and was seeking help, were nontestimonial. The circumstances objectively indicate that the primary purpose of Sandra's statements to the police was to enable the police to meet an ongoing emergency. Sandra's assaulters were still in her immediate presence and she was describing the current dangerous situation. Thus, admission of these statements did not violate *Crawford*."

People v. Romero, 44 Cal.4th 386, 187 P.3d 56, 79 Cal.Rptr.3d 334 (Cal. Jul 14, 2008) – "we conclude that victim Schmidt's statements to Officer Burke were not testimonial. Officer Burke, responding to an emergency call, encountered an agitated victim of a serious assault, who described defendant's attack on him with a small ax. The statements provided the police with information necessary for them to assess and deal with the situation, including taking steps to evaluate potential threats to others by the perpetrators, and to apprehend the perpetrators. The statements were not made primarily for the purpose of producing evidence for a later trial and thus were not testimonial. The same is true of the statements pertaining to identification. The primary purpose of the police in asking victim Schmidt to identify whether the detained individuals were the perpetrators, an identification made within five minutes of the arrival of the police, was to determine whether the perpetrators had been apprehended and the emergency situation had ended or whether the perpetrators were still at large so as to pose an immediate threat."

State v. Garnica, 2008 WL 2582492 (Wash. App. Div. 1 Jun 30, 2008) (unpub) – responding to confused reports of family emergency involving Spanish-speaking family, non-Spanish speaking officer "took M.A. aside, [upon which] she noticed that M.A. had a redness on her head. Officer Tierney testified that M.A. 'told me that she had been hit; and then she told me that she had been raped.' M.A.'s knees were muddy and her socks and shoes were soaked." – in trial court prosecution conceded statements were testimonial – after long discussion of case law, and minimal attempt to apply case law to the facts, court agrees statement was testimonial but its admission harmless – [NOTE: Because officer was still in process of finding out what, if anything, had happened, the statements should have been classified as non-testimonial.]

State ex rel. J.A., 195 N.J. 324, 949 A.2d 790 (N.J. Jun 23, 2008) – "The witness to the robbery of Juana Chavez provided information to Officer Semmel approximately ten minutes after the completion of that crime. The declarant followed Chavez's assailants immediately after witnessing the robbery and cut short his pursuit at Public School 30. When he met with Officer Semmel several minutes later, he related information about a past event—the robbery and flight of the robbers. That the witness may have volunteered the information or responded to open-ended questions does not change the calculus of whether his statements were testimonial. *See Davis*... Like in *Hammon*, the non-testifying witness here told the police officer 'what [had] happened.'"

[cite] There was no ongoing emergency—no immediate danger—implicating either the witness or the victim, both of whom were in the company of police officers at the time of the 'interrogation' at Public School 30."

State v. Bitsue, 2007 WL 5249023 (Ariz. App. Div. 1 Dec 04, 2007) (unpub) – "When the officer saw that the [stabbing] victim's arm was bleeding, the officer asked someone to give the victim a T-shirt to staunch the flow of blood. It was during these initial events that the victim spontaneously lifted his uninjured arm and pointed to Appellant. This was at a time when the officers were still sorting out the players and making sure that there was no longer any danger to anyone present. The assailant or assailants, after all, were likely among the group still at the scene and could be presumed to still be in possession of one or more knives." – victim spoke only Spanish, officer didn't know Spanish, so the only communication was by gesture – held: pointing was non-testimonial – [NOTE: Opinion doesn't discuss whether a gesture can ever be "testimonial."]

Pugh v. Wynder, 2008 WL 2412978 (E.D.Pa. Jun 10, 2008) (unpub) (habeas) – "After making a bank withdrawal, Bianco was robbed and assaulted. In his attempt to stop the perpetrator, Bianco was dragged by a car being used for the escape. As Officer Rice arrived at the scene, the perpetrator had not yet been apprehended. Finding Bianco prone in the street and bleeding, he asked Bianco what happened. Bianco responded that he had been robbed and gave a description of the assailant." – non-testimonial

Government of Virgin Islands v. Williams, 2008 WL 2206647 (D.Virgin Islands May 19, 2008) (3-judge panel; on appeal from Virgin Islands Superior Court) – kidnapping and shooting – "The officers found an individual named Travis Poleon ("Poleon") conscious and lying face down with a gunshot wound." – Poleon said, "I feel like I going die" and an officer testified: "I saw his condition and from my experience I saw the desperation. I saw the wound that he had, the blood—the color of the blood.... His eyes was like rolling. He was in severe pain and I figured that he needed some immediate help." – Poleon said he was shot by "Marv" – he subsequently died – the superior court held the identification was testimonial but, on appeal, the district court reversed – "any reasonable observer would have concluded that Poleon and the police were facing an ongoing emergency."

Ruiz v. Horel, 2008 WL 1829998, *12+ (C.D. Cal. Apr 21, 2008) (unpub) (habeas) – "Deputy Ruiz testified that he and his partner responded to the radio call and (within five minutes of the call) saw Aguilar lying on the sidewalk. Aguilar was clenching his wounded knee, was squinting his eyes, was gritting his teeth, was concerned about his wound, and appeared to be in pain. Deputy Ruiz asked Aguilar his name and some questions in order to identify possible suspects. Aguilar said he was walking westbound on 106th Street from Freeman Avenue when two Hispanic men in a red compact car drove by, asked him what barrio he was from, and fired two or three rounds at him (one of which struck his knee). The conversation lasted no more than five minutes. ... Here, the Court agrees with the California Court of Appeal's conclusion that Aguilar's statements to Deputy Ruiz were nontestimonial."

People v. McKinney, 2008 WL 2031350 (Cal. App. 4 Dist. May 13, 2008) (unpub) – 77-year-old was mugged, suffering incapacitating injuries – "Viewed objectively, the circumstances presented when [Officer] Besuzzi responded to the bank's parking lot where [victim] Warren lay injured and bleeding, assisted only by [civilian passerby] Stoltenberg's comforting presence,

depicted an ongoing emergency and his actions reflect he treated it as such. After asking Warren what happened and learning the number of perpetrators, a description of them, plus the direction in which they left, Besuzzi broadcast this information to other police units. ... Defendant attempts to bolster his claim an ongoing emergency no longer existed by asserting that when Besuzzi arrived '[t]he perpetrators long before had fled....' ... But until he spoke with Warren, there was no way for Besuzzi to know when the attack had occurred."

Hester v. State, 283 Ga. 367, 659 S.E.2d 600, 08 FCDR 1099 (Ga. Mar 31, 2008) – "Officer Kaufman went back into the house to check on Ms. Parris. He 'asked her what happened, and she told [him], 'That bitch hit me in the head with a big piece of glass.'" – she soon died from blood loss – "The evidence shows that Ms. Parris was on the floor, was moaning, and had apparently lost a large amount of blood. '[A]ny reasonable listener would recognize that [she] was facing an ongoing emergency.' [cite] Officer Kaufman had the responsibility of securing the area within minutes of the occurrence of a serious injury. Fulfilling that responsibility would logically involve an attempt to determine every possible cause of injury to persons in the area, so that any continuation or repetition of that cause could be prevented. Thus, the statement which the police officer elicited from Ms. Parris was 'necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past.' [cite] Furthermore, the interrogation was strikingly informal and brief, in an environment which was neither tranquil nor clearly safe."

State v. Buckenberger, 984 So.2d 751 (La. App. 1 Cir. Feb. 8, 2008) – rape and attempted murder – "Officer Jarrell testified that upon separating the defendant and the victim, the victim was hysterical and bleeding. The victim began to tell Officer Jarrell what happened, but the defendant approached and had to be restrained by Officer Jarrell and other witnesses to the events, including Stephens. Officer Jarrell returned to the victim, who was still hysterical, and she told him what had just happened. We find no error in the trial court's admission of Officer Jarrell's testimony regarding the victim's nontestimonial statements, made during the continuing emergency situation."

People v. Matamoros, 2007 WL 2938431 (Cal. App. 2 Dist. Oct 10, 2007) (unpub) – police officer spoke to clerk 15 minutes after armed robbery – "The statements were testimonial in nature, given to Officer Tanner under circumstances imparting the formality and solemnity characteristic of testimony. Objectively viewed, the primary purpose of Agayan's statements to Officer Tanner was for possible use as evidence to prove the robbery in a criminal trial. Agayan made the statements in response to questions by Officer Tanner under circumstances in which she might have been criminally liable had she made deliberately false statements, and there was no evidence that the statements were given or received to deal with an emergency situation."

People v. Bolling, 49 A.D.3d 1330, 853 N.Y.S.2d 803, 2008 N.Y. Slip Op. 02654 (N.Y.A.D. 4 Dept. Mar 21, 2008) – "Contrary to the contention of defendant, the court properly admitted the testimony of a police officer with respect to the out-of-court declaration of the victim under the excited utterance exception to the hearsay rule [W]e conclude that the statement of the victim to the police officer was made during the course of an 'ongoing emergency' and thus was not testimonial"

People v. Bryant, 2007 WL 67541 (Mich. App. Mar. 6, 2007), rev'd, __ N.W.2d __, 2009 WL 1677569 (Mich. Jun 10, 2009) –

Commonwealth v. Burgess, 450 Mass. 422, 879 N.E.2d 63 (Mass. Jan 11, 2008) – father complained to police about son in months before son killed him – "All but one of the victim's statements to Officer Hassan on February 23 were testimonial. The victim's response, "No, it's not" to Hassan's initial inquiry whether "everything was okay" is nontestimonial. Hassan had just arrived in response to a 911 hang-up call, had heard loud voices arguing and yelling, and saw a person who "was shaking." In these circumstances, the officer's query and the victim's response were part of an attempt by the police to comprehend and deal with what appeared to be a volatile situation. [cite] Further, the victim's response was not testimonial in fact, as a reasonable person in the victim's position would not anticipate that his response regarding whether the general situation was "okay" would be used against a specific defendant in investigating and prosecuting a crime. [FN6]Id. In contrast, the officer's subsequent questions and the victim's responses were testimonial per se, as it was then visible to the officer that the defendant was not behaving dangerously; the victim was providing more extended answers to the officer's inquiries; and it was reasonable to conclude that his responses could subsequently be used in a prosecution of the defendant." [NOTE: No discussion of forfeiture.]

People v. Gantt, 48 A.D.3d 59, 848 N.Y.S.2d 156, 2007 N.Y. Slip Op. 10508 (N.Y. A.D. 1 Dept. Dec 27, 2007) – "While [mortally-wounded shooting victim] Moore's statement was in response to [Officer] McDermott's question, that solitary inquiry, posed to Moore in the course of a fast-moving on-the-scene crime investigation, is hardly the sort of structured police investigation to which *Crawford* is directed. As in *Nieves-Andino*, Officer McDermott, responding to the scene of a shooting that had just occurred, could not have been certain that the assailant posed no further threat to the victim or the onlookers."

People v. Felix, 2007 WL 4396016 (Cal. App. 4 Dist. Dec 18, 2007) (unpub) – "The record reflects that within minutes of the stabbing, [Officer] Smith arrived on the scene in response to a call about an assault with a deadly weapon. Sanchez was on the ground, bleeding from the stomach, and several other people were running around in the area. After attempting to secure the area with his partner, Smith had a very brief conversation with Sanchez, during which he asked Sanchez what happened. Quite clearly, Smith was responding to an ongoing emergency. And since he couldn't understand Sanchez's responses [which were in Spanish], there was no way for him to get a handle on the situation." – whether Spanish-speaking bystander translated for officer, or instead relayed his own prior conversation with victim, is unclear on record but makes no difference – either way, a response to emergency

U.S. v. Cubie, 2007 WL 3223299 (E.D. Wis. Oct 26, 2007) (unpub) (pretrial order) – "Before the court is defendant Terry's motion in limine to exclude statements allegedly made by Earl Benion on September 19, 2002, to first responders between the time he was shot and the time he died. Defendant Nicksion has moved to adopt defendant Terry's motion. ... The statements at issue do not qualify as dying declarations. This is not a prosecution for homicide, as required for admission under Rule 804(b)(2). Further, in the course of making his statements, Benion asked that someone call his parole officer and at one point became uncooperative when questioned by police. These facts and circumstances do not indicate that Benion had a settled hopeless expectation of imminent death when making his statements. ... Even if Benion's statements were to qualify as excited utterances, the Sixth Amendment Confrontation Clause bars their admission. The statements, given in response to questioning by police and firefighters after the

shooting, are testimonial statements under *Crawford* ... and *Davis* ..., and the defendants did not have prior opportunity for cross examination."

People v. Dasque, 841 N.Y.S.2d 896, 2007 N.Y. Slip Op. 07454 (N.Y. A.D. 2 Dept. 2007) – "The defendant failed to preserve for appellate review her contention that her right to confront a witness was violated by the admission into evidence of a statement made by her half-sister, Jeanine Dasque, to a responding police officer that the defendant had assaulted her ... In any event, the claim is without merit where the victim's statement was not testimonial (*see Davis v. Washington*, 126 S Ct 2266; *People v. Nieves-Andino*, 9 NY3d 12; *People v. Bradley*, 8 NY3d 124)." [NOTE: No further facts are given, but the two cited N.Y. cases involved officers' initial questions to seriously injured victims.]

People v. Sutton, 874 N.E.2d 212, 314 Ill. Dec. 302 (Ill. App. 1 Dist. Aug 14, 2007) – "Shortly after midnight on February 14, 1991, police officers responded to the call of a man ringing doorbells of houses located on the 4000 block of Forest Avenue in Brookfield, Illinois. Upon their arrival police found David Janik staggering and bleeding. Janik told police he had been shot and robbed and that his girlfriend had also been shot. Police discovered Janik's girlfriend, Monica Rinaldi, lying across the backseat of her car parked in a nearby alley. Rinaldi was unclothed and had sustained a fatal gunshot wound to the head. ... Under these circumstances any reasonable observer would deduce that the primary purpose of the initial interrogation was to ascertain if there was an ongoing emergency and if so, to obtain information necessary to resolve that emergency. We consequently find that the on-the-scene statements elicited from Janik were nontestimonial in nature and therefore not subject to *Crawford* and *Davis*."

State v. Trikilis, 2007 WL 2982643, 2007-Ohio-5475 (Ohio App. 9 Dist. Oct 15, 2007) (unpub) – at retrial, defendant was convicted of assault at a jail facility for melee requiring six officers to restrain him – one officer asked if anyone was hurt, and at trial repeated (in response to defendant's own question) what another officer said in response – "Cavanaugh did not knowingly provide testimonial statements in response to structured police questioning; he merely responded to a general query to all officers involved in subduing Mr. Trikilis. This is not the structured police questioning challenged in *Crawford*. Therefore, *Crawford* does not bar introduction of this testimony."

Anderson v. State, 163 P.3d 1000 (Alaska App. Aug 03, 2007) – "Anchorage Police Officer Pamela Nelson was dispatched to the scene of a reported assault. When Officer Nelson arrived, a woman informed her that a man (later identified as Carroll Nelson) was injured in a building across the street. The woman then led Officer Nelson across the street to an apartment. ... When they reached a small room in the back of the apartment, Officer Nelson saw Carroll Nelson lying in a fetal position, wrapped in something resembling a discarded piece of carpet. Robinson [note: not the officer] asked Carroll Nelson if he was all right, and Carroll Nelson responded that he was hurt and having a hard time breathing. When Officer Nelson removed the material covering Carroll Nelson, she saw that Carroll Nelson was shirtless and that he had several obvious bruises on his torso. Officer Nelson asked Carroll Nelson what happened. Carroll Nelson told Officer Nelson that Anderson had hit him with a pipe. ... Viewed objectively, the circumstances surrounding Officer Nelson's questions to Carroll Nelson demonstrate that her primary purpose was to respond to an ongoing situation: to determine the nature and extent of Carroll Nelson's injuries, and to determine the type of assistance he might need. According to the officer's testimony, when she arrived at the apartment, she had been told that someone was

hurt and needed help, but she did not know that a crime had been committed. And, just before Officer Nelson questioned Carroll Nelson, the officer heard Carroll Nelson tell the woman that he was hurt, and that he was having a hard time breathing. [¶] Under these circumstances, the primary focus of Officer Nelson's question—"What happened?"—was to sort out an ongoing emergency situation rather than to investigate a past crime. We note that even after Carroll Nelson told Officer Nelson that Anderson had hit him with a pipe, Officer Nelson did not respond by questioning Carroll Nelson further about how he got injured. Rather, Officer Nelson's follow-up questions were directed toward ascertaining the nature and extent of Carroll Nelson's injuries. ... Carroll Nelson's statement to Officer Nelson—that Joe had hit him with a pipe—was non-testimonial under the tests set forth in *Crawford* and *Davis*."

Martinez v. State, 236 S.W.3d 361 (Tex. App.-Fort Worth July 19, 2007) – "Detective Martinez walked up the service ramp and towards the Oldsmobile just as Officer Holsey was patting C.D. down; because C.D. was facing him (and facing away from Officer Holsey), he noticed a suspicious bulge in C.D.'s pants. Officer Holsey told C.D. to stand at the guard rail. Neither C.D. nor the other passenger were handcuffed at this point. Detective Martinez, concerned that Officer Holsey did not see the bulge and that C.D. might have a weapon hidden there, approached C.D. and the other male passenger at the guardrail and asked C.D. what was in his pants. C.D. immediately started crying, looked at the patrol car where appellant was sitting, and responded that he did not know what it was and that appellant had given it to him to hide. Detective Martinez told C.D. to pull it out, and C.D. removed the plastic bag of drugs from his pants. ... When viewed objectively, because the officers were potentially in danger, Detective Martinez's preliminary question was motivated by a need to secure the scene, and C.D.'s initial answer was in response to the officer's attempt to secure the scene and to resolve a potential emergency. Thus, we conclude that C.D.'s initial statement was not the product of custodial police interrogation, nor was it a response to tactically structured police questioning. Therefore, we agree with the trial court that C.D.'s statement that appellant had given him the bag to hide was nontestimonial." (citations omitted)

People v. Nieves-Andino, 9 N.Y.3d 12, 872 N.E.2d 1188, 840 N.Y.S.2d 882, 2007 N.Y. Slip Op. 05584 (N.Y. 2007) – "Officer Doyle arrived at the scene of a recent shooting and, as soon as he had summoned medical help, asked the victim what had happened. Given the speed and sequence of events, the officer could not have been certain that the assailant posed no further danger to Millares or to the onlookers. His brief solicitation of pedigree information and information about the attacker's identity was part of Officer Doyle's reasonable efforts to assess what had happened to cause Millares's injuries and whether there was any continuing danger to the others in the vicinity. In other words, the primary purpose of his inquiry was to find out the nature of the attack, 'so that he could decide what, if any, action was necessary to prevent further harm' (*Bradley*, 8 NY3d at 127). '[T]he nature of what was asked and answered ... viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn ... what had happened in the past' (*Davis*, 126 S Ct at 2276). In short, Officer Doyle, like the officer in *Bradley*, reasonably assumed that there was an ongoing emergency. It follows that Millares's responses to Officer Doyle's inquiries were nontestimonial (*see Bradley*, 8 NY3d at 128) and that their admission did not implicate defendant's right to confrontation."

People v. Williams, 2007 WL 1805628, 2007 N.Y. Slip Op. 51255(U) (N.Y. Sup. Jun 25, 2007) (unpub) – "In the case at bar, Detective Castrogiovanni and his partner were dealing with

an unknown situation involving multiple gunshots. As the first police officers on the scene they approached the scene cautiously while scanning the area for armed individuals. At that time, moments after the gunshots, the officers were concerned about whether anyone in the area was armed; who was the perpetrator; was the threat ongoing; was anyone injured and to what extent, and if other individuals were in jeopardy. In short, the officers were focused on responding to what was clearly an urgent and possibly ongoing threat to public safety. [¶] As the detective approached the apparently wounded victim, he was continually on the alert for weapons and checked to see if Mr. Williams was armed. Mr. Williams was conscious and responsive, yet clearly in great pain from what were mortal wounds. The detective's questions were necessarily an attempt to secure the scene and safeguard the area. Castrogiovanni needed to quickly ascertain details and the only source of information initially appeared to be Mr. Williams. The scene was chaotic, with Micheal Williams gravely wounded, people running about and Mrs. Williams screaming for her missing grandson. Castrogiovanni's questions, which took place over a few brief minutes, were clearly designed to meet an ongoing emergency. Until the detective clarified the situation he had no way of knowing if the perpetrator was one of the bystanders in the area; anyone in close proximity to the victim was a likely suspect. Information as to the identity of the gunman was highly relevant to the police at the scene. [¶] As in *Bradley*, Detective Castrogiovanni's prime motivation could have only been to ensure the victim's safety, and investigate the crime second. The victim's statements to Detective Castrogiovanni are non-testimonial."

State v. Davis, 2007-Ohio-3419, 2007 WL 1934364 (Ohio App. 8 Dist. July 5, 2007) (unpub) – "{¶ 15} During the trial, one of the responding police officers testified that he spoke to Hillman and Haywood at the scene. He testified that when he first arrived, Haywood was jumping, shaking, and screaming. He testified that she was hyperventilating, crying, and could barely speak. Haywood told the officer that Davis had shot Suggs. When the prosecutor asked him at trial, 'Did she [Haywood] indicate to you whether or not Mr. Davis had a weapon during this scenario,' the officer responded 'Yes, she said he had a gun.' No objection was made to this testimony. ... [¶ 24] Haywood's statements to the officer indicate that the primary purpose of her statement was to enable the police to respond to an ongoing emergency, not to establish or prove events potentially relevant to a criminal prosecution. ... [¶ 28] [Haywood] was present when Davis allegedly shot into the house where she was located. Her friend Suggs was shot, and one of Hillman's children was nearly shot. Davis had fled the scene, and the police had not yet apprehended him when Haywood told the police he had a gun. ... {¶ 29} We find that the specific facts of this case objectively indicate that there was an ongoing emergency at the time Haywood told the police that Davis had a gun. We further find that Haywood's statements were not made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Thus, we find her statement to be nontestimonial."

Franklin v. State, 965 So.2d 79 (Fla. Jun 21, 2007), reh'g denied (Sept. 10, 2007) – "Applying the reasoning of *Davis* to the instant case, we conclude that the victim's statements to the responding officer that were introduced during the guilt phase of trial were not testimonial in nature. The circumstances of the officer's questioning indicate that its primary purpose was to assist in an ongoing emergency. Lawley was under considerable pain and distress and was having difficulty breathing when he was responding to the officer's questions. These statements were made shortly after Lawley had been shot and before emergency personnel had even arrived

on the scene. There were no indicia of formality in this questioning by the officer." (footnote omitted)

U.S. v. Arnold, 486 F.3d 177 (6th Cir. 2007) (en banc) – "While the fact that Gordon's initial statement was unprompted and thus not in response to police interrogation does not by itself answer the inquiry, *Davis*, 126 S.Ct. at 2274 n. 1, this reality at least suggests that the statement was nontestimonial. So, too, does the distress that the officers described in her voice, the present tense of the emergency, the officers' efforts to calm her and the targeted questioning of the officers as to the nature of the threat, all of which suggested that the engagement had not reached the stage of a retrospective inquiry into an emergency gone by. No reasonable officer could arrive at a scene while the victim was still 'screaming' and 'crying' about a recent threat to her life by an individual who had a gun and who was likely still in the vicinity without perceiving that an emergency still existed. And nothing that Gordon told them, and certainly nothing about the way she told it to them, would have allayed concerns of a continuing threat to Gordon and the public safety, to say nothing of officer safety."

The officers asked victim to describe the suspect's gun – "During the few moments the officers spoke to Gordon, moreover, the primary purpose, measured objectively, of the question they asked her—for 'a description of the gun,' JA 133—was to avert the crisis at hand, not to develop a backward-looking record of the crime. Contrary to the contention of the partial dissent, this question did not transform the encounter into a testimonial interrogation. Asking the victim to describe the gun represented one way of exploring the authenticity of her claim, one way in other words of determining whether the emergency was real. And having learned who the suspect was and having learned that he was armed, they surely were permitted to determine what kind of weapon he was carrying and whether it was loaded—information that has more to do with preempting the commission of future crimes than with worrying about the prosecution of completed ones. What officers would not want this information—either to measure the threat to the public or to measure the threat to themselves?"

People v. Brenn, 152 Cal.App.4th 166, 60 Cal.Rptr.3d 830 (Cal. App. 4 Dist. June 18, 2007), Review Denied Oct. 10, 2007 – "[Officer] Taylor had but a few moments with [stabbing victim] Zupsic before the paramedics arrived, and during this brief period of time he was only able to ask Zupsic a few general questions about what was going on. He was there to assist Zupsic, not to prepare for trial. As one court has observed, 'Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation.' Such unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police 'interrogation' as that term is used in *Crawford*. [Citations.]" (*People v. Corella, supra*, 122 Cal.App.4th at p. 469.) Because of the informality, brevity and unstructured nature of the exchange between Zupsic and Officer Taylor, we find Zupsic's statements to the officer were nontestimonial. Therefore, they were outside the scope of *Crawford*."

Williams v. State, 2007 WL 1721467 (Ind. App. Jun 15, 2007) (unpub) – "The State contends that Bryant's statements were non-testimonial 'because they were made to enable to [sic] officer to respond to an ongoing emergency, i.e., the apprehension of the fleeing car.' We believe the State's argument would allow the on-going emergency exception explained in *Davis* to swallow the rule. ... Because Williams had gotten back into the car and had driven away at the time Bryant made the statements to the police we do not believe the emergency was still ongoing.

Accordingly, [Officer] Widmer's recount of Bryant's statements was admitted in violation of Williams's Sixth Amendment right to confront witnesses." (record citation omitted)

Martin v. Michael, 2007 WL 1428672 (W.D. La. 2007) (unpub) (habeas) – "Although an ambulance was presumably already en route to Evans' location, Officer Reynolds testified that, when he arrived at the scene, Evans was sitting in her kitchen with visible stab wounds and with blood all over her and the floor around her. Officer Reynolds plugged the stab wounds with his fingers and then asked Evans, who was sweaty and having trouble breathing, who stabbed her. Clearly, as in *Clemmons*, Officer Reynolds' questioning, viewed objectively, was necessary for him to assess the situation and the meet the ongoing emergency. Therefore, because Evans' implication of Martin in response to Officer Reynolds' question was not testimonial, its admission does not implicate the Confrontation Clause."

State v. Taylor, 275 Mich.App. 177, 737 N.W.2d 790 (Mich. App. 2007), appeal granted in part and amicus briefs solicited, 480 Mich. 946, 741 N.W.2d 24 (Mich. Nov 27, 2007) – "When, as here, police officers arrive at the crime scene immediately after a shooting, with a number of people in the house, and where the victim – who is clearly dying of multiple gunshot wounds – identifies his assailant, the identifying statements given to the police are nontestimonial under *Crawford*."

People v. Stevenson, 2007 WL 740935, *1 (Cal. App. 2 Dist., 2007) (unpub) – "When Officer Rodriguez came upon him, Shorts had only minutes before been shot and beaten only 100 feet away. Shorts was screaming. His statements to Officer Rodriguez were unprompted; at the time police had not even begun making initial inquires of Shorts or witnesses. Shorts gave the officer the generic information about his injuries and where it occurred. According to Rodriguez, Shorts acted fearful as if Shorts believed his assailants were still in the area. In addition, Officer Rodriguez indicated that he was still in the mode of securing the area and checking for additional victims at the time Shorts called out to him. Given the totality of these circumstances, we conclude Shorts' statement to Officer Rodriguez was tantamount to a cry for help during an on-going emergency; Shorts provided police information enabling officers immediately to address a threatening situation. Thus under *Davis* and *Crawford* the statement was non-testimonial and its introduction did not violate the Confrontation Clause of the Sixth Amendment."

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668 (Ariz. Ct. App. 2006) – Officer saw man staggering in roadway, thought he was intoxicated, then realized he was bleeding – "¶ 16 First, assuming [Officer] Othie's brief questioning of the victim during his one-minute encounter with him constituted 'interrogation,' nothing in the record suggests the victim 'would [have] reasonably expect[ed] [his statement] to be used prosecutorially or ... made [it] under circumstances that would lead an objective witness reasonably to believe the statement would be available for use at a later trial.' *Parks*, 211 Ariz. 19, ¶ 36, 116 P.3d at 639; *see also Crawford*, 541 U.S. at 51-52, 124 S.Ct. at 1364; *King*, 212 Ariz. 372, ¶¶ 19-21, 132 P.3d at 315-16; *State v. Rodriguez*, 722 N.W.2d 136 (Wis.Ct.App.2006) (domestic violence victim's excited utterances to investigating officer, in which she described incident in detail and identified assailant, deemed nontestimonial). The record does not reflect that the semi-conscious victim was even aware that the person to whom he spoke was a law enforcement officer. As the state correctly points out, S. 'did not identify *any* of the persons who 'jumped' him and took his vehicle,' 'provided no details concerning what those persons did to him,' and 'never mentioned, nor implicated, [Alvarez].' Nor

did Deputy Othick ask for any such information." – held: victim's statements to officer were nontestimonial

State v. Reardon, 168 Ohio App.3d 386, 860 N.E.2d 141 (Ohio Ct. App. 6 Dist. 2006), appeal not allowed, 112 Ohio St.3d 1409, 858 N.E.2d 819 (2006) – Home invasion robbery attempt – "¶ 9} The scene in the victims' kitchen was emotional and chaotic. Officer Haynes struggled to get coherent information from the victims while they were in this state of agitation. Although the exact timing of the statement is unclear from the record, at some point Bair blurted out, 'It's that fucker Albert Quinn, and * * * it's that fat fucker Reardon with the lazy eye down at the end of the street.' At the time she spoke, Officer Haynes noted Bair was still 'hysterical' and the general atmosphere was still very chaotic. This entire episode occurred within three to five minutes after the police arrived." - "¶ 15} The court [in *Davis*] also established three factors to consider in determining whether a statement fits this definition. The statement is nontestimonial where it is made to identify current conditions. *Id.*, ---U.S. ---, 126 S.Ct. at 2276, 165 L.Ed.2d 224. The key here is that the emergency must be ongoing. If the danger is ongoing, the statement is more likely to be nontestimonial. *Id.* Second, the officer must tailor questions to resolving the emergency rather than gathering the facts about the emergency as it passed. *Id.* Questions designed to promote safety in an ongoing emergency are nontestimonial as a matter of public policy because officers need to know the character of the individuals they are pursuing. *Id.* Finally, the formality of the questioning is an indicator. The emotional state of the declarant, the tranquility of the environment, and the relative safety of the parties involved all shed light on the testimonial nature of the statement. *Id.*, --- U.S. ---, 126 S.Ct. at 2277, 165 L.Ed.2d 224. The more chaos in the situation, the less likely that the statement is testimonial. *Id.*" – Under this three-part test, identification of defendant by his lazy eye "is clearly nontestimonial"

Matter of German F., 2006 NY Slip Op 26341, 13 Misc.3d 642, 821 N.Y.S.2d 410 (N.Y. Fam. Ct. 2006) – In this juvenile delinquency proceeding, a responding officer testified to statements made by the victim after being stabbed and still lying prone on the ground. On appeal, the court found that the statements of the victim were non-testimonial. "[I]t is clear that the victim's statement was made to Police Officer Gschlecht in response to the officer's questions. However, Gschlecht's questions to the victim occurred on the street where the victim was lying prone on the sidewalk moments after the officer had observed the victim essentially surrounded by the respondents and two others and there was also a larger 'hostile' crowd encircling the victim and the three apparent perpetrators. Additionally, once Gschlecht observed blood on the victim's pants and socks as well as a large cut on the victim's lower leg, the officer's questions were clearly intended to deal with an ongoing emergency in a volatile atmosphere. Therefore, the victim's statements made in response to the police officer's questions are 'non-testimonial' under both *Crawford* and *Davis* because the purpose of the officer's interrogation was to enable him to assist the victim in an emergency situation rather than to 'establish or prove past events potentially relevant to later criminal prosecution.'"

United States v. Clemmons, 461 F.3d 1057, 71 Fed. R. Evid. Serv. 102 (8th Cir. 2006) – "Officers Steven Lester and Lawrence Cory were dispatched to an address in Kansas City, Missouri. When they arrived, they found Williams lying on the ground with a pool of blood gathering on his right leg. Officer Lester testified that Williams was talking on his cell phone in a calm voice. Officer Lester, who could tell that Williams had been shot, approached Williams and asked him to end the call. Williams did so, whereupon Lester asked Williams who had shot him. Williams answered that Antonio Clemmons had shot him and had stolen his Mac-11 pistol." –

subsequently, while defendant was in prison, Williams was murdered – "Viewing the facts in the light of the Supreme Court's decision in Davis, we conclude that Williams's statements to Officer Lester were nontestimonial. The circumstances, viewed objectively, indicate that the primary purpose of Lester's questions was to enable him to assess the situation and to meet the needs of the victim. ... Any reasonable observer would understand that Williams was facing an ongoing emergency and that the purpose of the interrogation was to enable police assistance to meet that emergency. Accordingly, because Williams's statements were nontestimonial, they do not implicate Clemmons's right to confrontation."

On-the-Scene Questioning by Police: Adult Declarant: Robbery or Burglary Without Injury

Note: This category includes only victims who were not physically harmed by their victimizers. If the victim was physically injured, the case goes in the prior category. Statements made by an injured person are, as a broad generalization, more likely to be found non-testimonial.

Amador v. State, 376 S.W.3d 339, 339-345 (Tex. App. Houston 14th Dist. 2012) – "The statements in question were made to Officer Grifno as he was responding to a report of an armed robbery while at the scene of the crime and shortly after the crime had occurred. Grifno testified that he arrived at the scene within minutes of receiving the call. He said that he had reason to believe at the time that armed assailants were still in the area and his primary goal was to '[p]ut out as much information about the suspect as [he could] over the radio for any other officers in the area.' ... Consequently, the statements were nontestimonial..."

People v. Burney, 963 N.E.2d 430 (Ill. App. Ct. 4th Dist. 2011) – "we find the statements Krause made to Deputy Ayres were not testimonial and thus did not violate the confrontation clause. Krause made the statements in response to an ongoing emergency. At the time the statements were made, the suspect had not been found. A man who had barged into an elderly woman's home demanding her car keys was still on the loose, and it is reasonable to conclude the police interrogation of Krause sought to bring an end to the situation. Deputy Ayres also found Krause to be upset and shaking, making it likely she did not have the primary purpose to establish or prove past events relevant to a future prosecution. [¶54] Nothing indicates Deputy Ayres engaged in a structured interrogation in this case. Krause's responses focused on what happened and what the intruder was wearing. Although Krause's statements were made in her house, obviously a more sterile and controlled environment than the parking lot of the gas station found in Bryant, the informality of the encounter suggests Deputy Ayres was seeking to discern the facts of the ongoing emergency. This was not a situation where the officer, with pen in hand after the emergency had ended and reports were being contemplated or prepared, asked the victim, "Okay, Ms. Krause, let's start again from the beginning and tell me what happened." [cite] Krause's statements also do not fall within the 'solemn' nature contemplated by *Stechly*. The circumstances in which Krause made her statements were not similar to those given by a witness on direct examination or a victim at a police-station interview."

Battle v. State, 19 So. 3d 1045 (Fla. Dist. Ct. App. 4th Dist. Sept. 30, 2009) – "The detective testified that he had observed Battle running along a sidewalk with socks on his hands, ducking and hiding between parked cars. This detective and the officer accompanying him found Battle's behavior highly suspicious. The detective followed Battle in the marked police unit while the

officer exited the car and chased Battle. After some physical struggle, the officer was able to tackle Battle to the ground and handcuff him. ... As the detective and the officer detained Battle, four Hispanic men ran toward them. The detective discovered, after speaking with the men, that someone took money from their home. A search of Battle's person revealed he carried the exact amount and denomination of money that the witnesses claimed was missing. [¶] Because the Hispanic men did not speak more than broken English, a Spanish-speaking officer was called to the scene to help the witnesses make an identification of Battle. The witnesses identified Battle as the intruder that they saw inside their home minutes before their conversation with the police. At the time of trial, two of the witnesses had returned to Mexico. ... Here, the witnesses' statements were made between fifteen and twenty minutes after the burglary while Battle was in police custody, and so were not solicited by the police in attempts to respond to an ongoing emergency. ... The admission of these testimonial statements violated Battle's constitutional rights." [NOTE to robbers: choose your victims carefully.]

Arteaga-Lansaw v. People, 159 P.3d 107 (Colo. May 21, 2007) – nurse's aide providing home care stole from 98-year-old – "Here, there can be no question that when Keck [the 98-year-old] talked to Agent Lopez, there was no ongoing emergency. She was reporting a crime that had taken place days, if not weeks, before. Although she may have been upset when the police arrived, Keck was not being victimized or threatened at that moment. Her statements to Agent Lopez were clearly testimonial ..."

People v. Smith, 37 A.D.3d 333, 830 N.Y.S.2d 138, 2007 N.Y. Slip Op. 01467 (N.Y. A.D. 1 Dept. 2007) – "The court properly admitted as excited utterances the nontestifying victim's statements to the responding police officer, Landers, upon his arrival at the scene, describing the theft and informing the officer that the perpetrator had displayed a knife, as well as his statement, moments later, as to the perpetrator's flight. ... The ongoing emergency consisted of the immediate flight of an armed and dangerous person from the scene and his possible continuing presence nearby. The perpetrator described in the declarant's excited utterances posed a threat to the pursuing officer, as well as a continuing threat to the declarant, and the officer needed to assess that situation."

People v. Watson, 827 N.Y.S.2d 822, 834-837 (N.Y. Sup. 2007) – "Applying the primary purpose test, it is obvious that the sole purpose for [robbery victim] Alexander's first statement to the officers immediately after experiencing the gun-point robbery was to alert the police to what had just occurred and insure their awareness of defendant's involvement in the crime. Alexander was bleeding and frantic. The communication was assuredly made to enable the police to address the ongoing emergency, identify the perpetrator and secure protection from any further harm. The speaker was not acting as a witness; he was seeking assistance. ... Alexander's first statement is outside *Crawford's* purview not because it was an excited utterance, but due to the circumstances under which it was made. ... Alexander's second statement, made in response to the first question asked by the officer, revealed that defendant had acted alone and not with anyone else. Objectively viewed, this statement, although made in response to a question, was, like the first, provided before the crime scene was fully secured for the purpose of resolving the emergency situation, and, similarly, was not testimonial. ... The third statement made by Alexander, unlike the previous two, occurred after the area had been secured and after the emergency had calmed. Loydgren had the defendant in custody and was no longer on a search for an additional suspect." – third statement was testimonial

People v. Zuniga 2007 WL 576138, *4 -8 (Cal. App. 6 Dist.,2007) (unpub) – victim of robbery approached officer on street some hours after incident – "Thus, at a minimum, some of Guray's statements—for example, that her car keys had been stolen when three persons she knew as Cootie, Travieso and Jesse came into an apartment nearby and robbed her and her two friends—must be considered nontestimonial. To resolve that, in fact, there was no ongoing emergency, Officer Hicks would have had to learn these basic facts about Guray's immediate situation. However, as soon as Officer Hicks learned that these events had happened hours rather than minutes before Guray contacted him, and he began to elicit details of the events, such as the color of the gun, or who entered first, Guray's statements became testimonial."

People v. Wilburn, 2008 WL 352469 (Cal. App. 5 Dist. Feb 11, 2008) (unpub) – convenience store clerk called store owner after midnight, saying he had just been robbed – "In the instant case, appellant acknowledges that [clerk] Singh's statements were not made to a law enforcement officer as part of the robbery investigation, but asserts that Singh's telephone call to [boss] Sandhu was made for a similar reason—to report to Sandhu that his store had been robbed and ask for further instruction—such that Singh's statements were testimonial in nature under *Crawford*... Singh's telephone call to Sandhu hardly amounted to a calm report of a noteworthy event. Instead, Singh was clearly upset and obviously felt the need to call someone for help. ... Given these circumstances, Singh's statements to Sandhu during their telephone call were not given or taken 'primarily for the purpose ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial.'"

Fields v. State, 283 Ga.App. 208, 641 S.E.2d 218, 07 FCDR 151 (Ga. App. 2007) – "The evidence supports a finding that the Subway employee made her statements to the manager while she was hysterical because Fields had just attempted to rob her at gunpoint. ... [The statements] were not made to a police officer during a subsequent investigation of the crime, nor were they made to an officer or 911 operator for the purpose of proving a fact regarding some past event. Accordingly, the statements at issue here were not testimonial in nature, and *Crawford* does not apply to them."

On-the-Scene Questioning: Other Crimes

Philpot v. State, 309 Ga. App. 196, 709 S.E.2d 831, 2011 Fulton County D. Rep. 1070 (Ga. Ct. App. 2011) – "We first address Philpot's contention that the trial court erred by admitting the out-of-court statements that the victim of his prior burglary provided to the officer who investigated that crime. ... After speaking with the officer for a few more minutes, the prior victim looked out her window and exclaimed that the burglar (Philpot) was standing in the back yard of a home across the street. Consequently, the officer immediately began chasing Philpot and eventually arrested him. [¶] Given our review of the record, we conclude that the prior victim's statements to the officer were primarily offered to enable police assistance to meet an ongoing emergency, and are therefore nontestimonial in nature; as such, the complained-of statements do not implicate the safeguards afforded by the Confrontation Clause."

State v. Watts, 2008 WL 2931625, 2008-Ohio-3792 (Ohio App. 8 Dist. Jul 31, 2008) (unpub) – following high-speed chase and crash, police found passenger in defendant's car – "[¶] 22} ... [W]e conclude that the initial police inquiries into Taylor's condition elicited non-testimonial hearsay statements as to her fearfulness, and her physical condition. We find, however, that

Taylor's hearsay statements that she wanted to be let out of the vehicle but defendant would not let her out, that she wanted defendant to stop, and that he would not do so, are all statements which have evolved well beyond information needed to address the exigency of the situation to the prohibited area of testimonial statements." [NOTE: Were the testimonial statements made in response to interrogation, or spontaneous? Opinion doesn't say.]

Waters v. State, 2008 WL 2699738 (Tex. App.-Dallas Jul 11, 2008) (unpub) – trespass – woman asked officer for assistance in ejecting her child's father from her car – officer allowed to repeat what she told him about situation, ownership of vehicle, etc. – "the primary purpose of [Officer] Mitchell's questions was to render aid" – not testimonial

On-the-Scene Questioning: Possibly-Suicidal Subject

People v. Lutz, 2008 WL 2812134 (Mich. App. Jul 22, 2008) (unpub) – "Thus, testimony from Detective Declerq that defendant's wife contacted him about suicidal messages left for her by defendant would not have been barred by the Confrontation Clause because, viewed objectively, the circumstances indicate that her statements to the detective were primarily made to obtain police assistance with regard to an ongoing emergency, i.e., to obtain police assistance in preventing defendant from committing suicide."

People v. Morgan, 2007 WL 3015242 (Mich. App. Oct 16, 2007) (unpub) – "Defendant's wife, Karen Morgan, told a 911 dispatcher that she argued with her husband, he threatened to harm himself, she heard him fire a shot in their home, and she was concerned for his well-being. ... Here, Officer Allen arrived only a few minutes after Karen's 911 telephone call and was the first to speak with Karen. He was aware that a gunshot had been fired and was told that the 'gunman' was still in the home. Officer Allen needed to know whom he was dealing with in order to assess the situation, the threat to the officers' safety, and of any possible danger to potential victims. *Hiibel, supra* at 186. His questions regarding what happened, who shot the weapon, whether others were inside the house, and how many weapons defendant owned, were relevant, not primarily to build a case against defendant in the future, but to obtain sufficient information to allow police to 'address the exigency of the moment.' *Davis, supra* at 2277; *Walker, supra* at 64. Thus, Officer Allen's testimony was properly admitted and did not offend defendant's constitutional rights."

Statements to EMTs (category added Dec. 2010)

Commonwealth v. Williams, 2014 PA Super 249, 103 A.3d 354 (2014) – "Appellant concedes that [victim] Serrano's statements to assist [EMT] Hirsch in assessing the medical emergency are non-testimonial."

Sanders v. State, 77 So. 3d 484, 485-486 (Miss. 2012) – "[EMT] Munger was dispatched to the scene for a 'medical emergency involving a burn patient.' When he arrived, he testified that he noticed second-and third-degree burns on Sherman's head, upper body, arms and hands. He asked 'what happened' to 'determine how [he] needed to treat [Sherman] medically.' We find that the 'primary purpose' of Munger's inquiry as to 'what happened' was to ascertain the cause of

Sherman's injuries in order to treat him properly. Thus, we conclude that Sanders's Sixth Amendment right to confront the witnesses against her was not violated when the first responders were allowed to relay Sherman's statements."

People v. Nelson, 190 Cal. App. 4th 1453, 1456-1468 (Cal. App. 4th Dist. 2010) – "we conclude Marquez's statement in the ambulance to [EMT] Witt was not testimonial. When Marquez made the statement, he was severely injured from a gunshot wound to the stomach, he was lying in an ambulance en route to the hospital, and he appeared to be on the verge of death. These circumstances lack the solemnity and formality associated with a testimonial statement and are far different from, for example, the scenario in Davis where the officer separated the wife from her husband and had her write out an affidavit describing the incident. Although the victim in Cage was questioned by the police while awaiting treatment at the emergency room, there is no indication the victim (who had been cut with glass) was in jeopardy of dying. Given Marquez's physical condition and the brevity of his response, it is unlikely that a reasonable person would construe his statement as a solemn declaration that could lead to criminal charges if it was deliberately fabricated. Further, HN8a statement consisting of two words in response to a single question, made by a declarant lying close to death in an ambulance, cannot be characterized as an 'out-of-court analog[]' of the testimony given by an alert witness while sitting in court."

Excited Utterances Generally / "Calls for Help"
(see also part 6, statements to friends, neighbors, etc.)

State v. Coones, 339 P.3d 375, 380 (Kan. 2014) – "The key evidence was testimony that Kathleen called her mother in a panic about 10 minutes before police discovered her body to say that Coones was in the house to kill her and her husband. ... Kathleen was speaking about an ongoing emergency: An intruder was inside her home and she was in immediate danger" – non-testimonial

Almaguer v. State, __ S.W.3d __, 2014 WL 5088386 (Tex. App. Oct. 9, 2014), pet. ref'd (Mar. 18, 2015) – on rehearing, replacing earlier opinion – mother of multiple children killed one of them – "Almaguer contends that the trial court reversibly erred by admitting 'out-of-court statements/writings and drawings' made by Almaguer's [8-year-old] son, 'Marco,' in violation of Confrontation Clause... Almaguer's argument centers on a statement and three drawings/writings, admitted as State's Exhibits 146, 147, and 148, made by Almaguer's son, Marco, during a 'grieve session' at the Child Advocacy Center in Edinburg, Texas on June 17, 2008, shortly after Ismael's death. ... Fuentes testified that she waited for a police investigator to arrive at the Child Advocacy Center to interview the children before she re-entered Marco's room. Fuentes stated that at that point, Marco provided her with 'three different pictures that he had drawn' for her. Fuentes testified that no one requested or directed Marco to draw." – the drawings depicted the murder – "we conclude that these hearsay statements were not inadmissible because they fell under the excited utterance exception. ... we conclude that the guarantees of the Confrontation Clause were not violated..."

U.S. v. Liera-Morales, 759 F.3d 1105 (9th Cir. 2014) – mother of kidnap victim, in presence of officer, phoned kidnappers – "Agent Goyco instructed Avila to call the captors to determine her son's location and to coordinate a meeting between the captors and undercover agent 'Tony.'"

Agent Goyco then gave Avila's information to the Tucson ICE agents coordinating the rescue mission. Even though Agent Goyco later memorialized Avila's statements in a written report, the *primary* purpose of the telephone call itself was not to establish 'the facts of a past crime' or to 'provide evidence to convict' Liera–Morales. ... Significantly, Liera–Morales acknowledged at oral argument that the three purposes of the telephone call were to gauge whether Aguilar was alive, to determine the nature and extent of the hostage situation, and to save Aguilar's life."

Taylor v. Connelly, ___ F.Supp.2d ___, 2014 WL 1814153 (E.D. N.Y. 2014) (habeas) – "The Petitioner further contends that the trial court improperly admitted the police radio recordings for additional assistance after the Petitioner's arrest as excited utterances and present sense impressions. ... '[T]he call was nontestimonial in nature, since its primary purpose was to obtain an emergency response to the shooting.'"

Commonwealth v. Tassinari, 466 Mass. 340, 995 N.E.2d 42, 49-50 (Mass. 2013) – "The contested testimony constitutes an excited utterance because there was a 'sufficiently startling' event and the victim's reaction was spontaneous, rather than the 'result of reflective thought.' [cite] The statements were not testimonial in nature because they 'were not made in a deposition, affidavit, confession, or prior testimony, or in response to law enforcement interrogation.'" [cite]

People v. Brown, 2013 IL App (2d) 110327, 988 N.E.2d 706, 370 Ill. Dec. 508 (Ill. App. Ct. 2d Dist. 2013) – "Defendant contends that the admission of [mother] Kathy's testimony that [her 5-year-old son] Caden told her that defendant had pushed him was error. Resolution of this argument turns on whether Caden's statement was testimonial. ... Caden's statement was similarly intended to meet an ongoing emergency, namely, two incidents of domestic battery. ... As such, the statement was not testimonial." [NOTE: A 5-year-old's statement to his mother will never be testimonial, with a theoretical exception for truly bizarre circumstances.]

United States v. Preston, 706 F.3d 1106, 1119 (9th Cir. 2013), as amended (Feb. 27, 2013), reh'g en banc granted, 727 F.3d 894 (9th Cir. 2013) – "Excited utterances are nontestimonial."

State v. Jones, 135 Ohio St. 3d 10, 2012 Ohio 5677, 984 N.E.2d 948 (Ohio Dec. 6, 2012) – "[¶ 135] [Officer] Morrison drove to Jeffries's home immediately after the call and met Delores inside the house. 9 Morrison described his meeting with Delores: A: I couldn't quite figure her out at first, she kept running back and forth, looking out the windows and pacing, making sure no one was coming. She was hyperventilating and basically hysterical with me. And basically I said: Look, you called me. And that's when I asked her: Do you have something you need to tell me? You called me out. And she said: My husband is the one that killed that girl in the cemetery. ... [¶ 156] Viewed objectively, the totality of circumstances surrounding Delores's statements to Morrison demonstrate that the 'primary purpose' of Morrison's questioning was to obtain information about Yates's murder. ... [¶ 159] For all of these reasons, we conclude that Delores's statements to Morrison were testimonial, and their admission into evidence violated the Confrontation Clause."

Bonilla v. State, 289 Ga. 862, 717 S.E.2d 166, 2011 Fulton County D. Rep. 3191 (Ga. 2011) – "Cruz then heard Reyes say, 'He got me,' and saw Reyes touch his chest. He had been stabbed. ... Reyes's statement was not made to an investigating police officer or even a 911 operator, but informally to bystanders as events were actually happening and just after he had suffered a serious stabbing. He was telling the bystanders what had occurred and seeking help, not making

a statement in contemplation of its use at a later trial. ... Thus, Reyes's statement was not testimonial, and the Confrontation Clause did not prohibit the introduction of Cruz's testimony recounting it."

Brown v. United States, 27 A.3d 127, 128-135 (D.C. 2011) – "Brown's statements were made to his neighbors (and not police), the setting was frantic and informal, he was severely injured, and the 'statements and actions of both [Brown] and [his] interrogators' do not indicate that 'a person in [Brown's] situation would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution.'"

State v. Richardson, 71 So. 3d 492 (La. App. 2 Cir. June 22, 2011) – "C.T.'s statements to Ms. Patterson were merely an attempt to explain her situation to her neighbor so she could get help following the traumatic event. Considering C.T.'s near hysterical state, as described by Ms. Patterson, it is impossible to conclude that C.T. believed the statements she was making at that time, in an effort to get help after being raped and robbed in her home, would ultimately be used in a formal proceeding. Considering the totality of the circumstances, it can reasonably be concluded that C.T.'s statements to Ms. Patterson were not testimonial in nature..."

Graure v. United States, 18 A.3d 743 (D.C. 2011) – burn victim, fatally injured in arson attack on crowded bar – "Here, all of the factors that the Supreme Court identified in *Bryant* support a conclusion that Djordjevic's statements were not testimonial." [NOTE: In addition, they were made to co-workers, not to police.]

State v. Franklin, 308 S.W.3d 799, 802-827 (Tenn. 2010) – "Under these circumstances, we conclude that the contractor was simply responding to a plea for help from a distressed individual in need of assistance. An employee from the business next door to his job site claimed that she was robbed and asked him to observe a tag number of a vehicle belonging to a man who was leaving the premises. In the heat of that moment, a reasonable person in the contractor's position would have had very little time to think. He was merely providing requested assistance. The fact that the tag number became relevant to a later prosecution does not automatically make the tag number 'testimonial.'"

People v. Burrell, 2009 WL 691870 (Mich. App. Mar 17, 2009) (unpub) – "the declarant's statement, identifying defendant as the shooter to the police officer, was made while under the excitement of the event. Id. Sergeant Daniel McInnis responded to the scene shortly after the shooting occurred and described a chaotic scene. The crowd was frantically milling around, demanding that the police get help for Rice. This testimony supported that the crowd was still under the influence of the event and that the declarant lacked the reflective capacity essential for fabrication. ... the evidence was clearly not testimonial in nature..."

Hartsfield v. Com., __ S.W.3d __, 2009 WL 425008 (Ky. Feb 19, 2009) – rape victim's excited utterances to passerby and daughter – "We do not regard the excited utterances identified here as testimonial." – bizarrely, the court characterizes this as a "more difficult issue"

Tubbs v. State, 2008 WL 5423897 (Ark. App. Dec 31, 2008) (unpub) – "FN2. Although not argued by Tubbs on appeal, it is inherent in our holding that because there was no emergency at the time the statements of Keys were made, there was no basis for admitting them under the excited-utterance exception to the hearsay rule." [NOTE: This makes no sense.]

U.S. v. Romero, 2008 WL 5262311 (2nd Cir. Dec 18, 2008) (unpub) – with minimal discussion stating that excited utterances are non-testimonial

McCloy v. Berghuis, 2008 WL 5062895 (W.D. Mich. Nov 25, 2008) (unpub) (habeas) – "The statements made by the child witnesses as they ran from the house immediately after the murder were uttered to their parents and neighbors, not to police investigators. The Confrontation Clause simply does not apply..."

Commonwealth v. Nesbitt, 892 N.E.2d 299, 452 Mass. 236 (Mass. Aug 18, 2008) – stabbing victim's neighbor heard strange sounds and went to investigate – "he noticed that the front screen door was covered in a 'massive amount of blood,' and he quickly found Brault lying 'on the floor just covered in blood,' with her feet up against the screen door and her body leaning against the storm door in her front hallway. Marcure asked her what had happened and Brault told him, 'Ralph did this to me, and don't let me die.' ... The statement, while not made to a law enforcement agent, must still be evaluated to determine whether it was 'testimonial in fact.' ... The gravity of Brault's physical injuries, and the immediate threat posed by those injuries, would likely preclude a reasonable person in her position from anticipating any nonimmediate future event, including a police investigation or a prosecution of the perpetrator." – not testimonial

Tarver v. State, 2008 WL 2514312 (Tex. App.-Dallas Jun 25, 2008) (unpub) – defendant robbed pet store – store manager went out door after him, then quickly returned, looking scared, and told clerk "He has a gun" – held: "the statement, viewed objectively, appears to be an excited utterance made to a coworker to explain [manager] Hunt's return to the pet store 'just a few seconds' after running outside after appellant."

People v. Martinez, 2008 WL 2347864 (Cal. App. 2 Dist. Jun 10, 2008) (unpub) – "FN1. Usually, spontaneous declarations do not violate the Sixth Amendment right to confront under *Crawford*..."

State v. Boggs, 218 Ariz. 325, 185 P.3d 111 (Ariz. Jun 16, 2008) (as amended) – fast food worker, shot during robbery, spoke to customer and then to police officer before dying – "¶ 57 The admission of Alvarado's statements did not violate Boggs' right to confrontation. As she lay dying on the ground just outside the restaurant, Alvarado told Vargas that 'men entered,' 'they were robbing,' and that she thought 'they were still robbing.' When Officer Beutal arrived, she told him that two people were in the store and repeatedly asked him for help. ¶ 58 The circumstances in which Alvarado made the statements indicate that she was seeking aid for herself and the others inside the store to meet an ongoing emergency."

People v. Donahue, 50 A.D.3d 820, 854 N.Y.S.2d 653, 2008 N.Y. Slip Op. 03240 (N.Y. A.D. 2 Dept. Apr 08, 2008) – "Contrary to the defendant's contention, the County Court properly admitted into evidence statements made by the decedent after the fire in question under the excited utterance exception to the hearsay rule [cite]. Further, the admission of these statements did not violate the defendant's right to confrontation because they were not testimonial in nature"

Clarke v. U.S., 943 A.2d 555 (D.C. Feb 28, 2008) – "It is no answer to say that, under *Crawford* and *Davis*, the earmarks of an excited utterance—spontaneity, lack of reflection or forethought, a reflexive response to a traumatic event—do not shield it from constitutional

scrutiny when the statement was made to law enforcement personnel; in the distinctly different setting of communication to a family member, at least, those features inescapably weigh against a finding that the statement was 'solemn,' 'formal,' or 'purpose[ful]' enough to be testimonial."

Wall v. State, __ S.W.3d __, 2008 WL 451862 (Tex. App.-Corpus Christi Feb 21, 2008), pet. ref'd (June 11, 2008) – "The court of criminal appeals has since unequivocally held that a testimonial 'statement that also qualifies as an excited utterance exception under the Texas hearsay rule does not alter its testimonial nature.'" (quoting *Wall v. State*, 184 S.W.3d 730, 740 (Tex. Jan. 18, 2006), which in turn quoted *U.S. v. Brito*, 427 F.3d 53, 60 (1st Cir.2005)) [NOTE: Isn't this tautological? It certainly doesn't help to answer the initial question, whether the statement is testimonial.]

State v. Slater, 285 Conn. 162, 939 A.2d 1105 (Conn. Jan 22, 2008) – "The [rape] victim's statements were not a 'solemn' declaration that established a record of past events, but, rather, when taken in context, a cry meant to elicit help from passersby. [FN11] Several factors support this conclusion. First, the victim was walking down the street at a fast pace crying and screaming, when she made the statements. Like the victim in *Davis*, the victim in the present case clearly was seeking aid, not relating information. Second, when [neighbors] Jones and Kilcran approached the victim, there was no indication that their primary purpose was to do anything but to aid her. They are not police officers and did not seek to investigate or elicit any information from her about the attack. They merely took her inside and telephoned the police. Third, as in *Davis*, the victim's statements were not made or obtained with any degree of formality, solemnity or reflection." – but, in footnote 11, the court rejects the claim "that a cry for help or, in evidence parlance, an excited utterance, could not by definition be a testimonial statement because the apparent frantic state of mind of the declarant would make it impossible objectively to find that the statement was made with the reasonable expectation that it could later be used at trial", pointing out that "*Hammon* involved an excited utterance"

State v. Ohlson, 162 Wash.2d 1, 168 P.3d 1273 (Wash. Oct 18, 2007) – defendant, while yelling racial slurs, attempted to run over "two minors" – "¶ 38 The reasoning of *Davis* and its focus on the primary purpose for which statements were obtained seem to have implicitly foreclosed any *per se* rule that excited utterances cannot be testimonial. ... We therefore reverse the Court of Appeals decision to the extent that it announced a *per se* rule that excited utterances cannot be testimonial."

People v. Lisle, 376 Ill.App.3d 67, 877 N.E.2d 119, 315 Ill.Dec. 632 (Ill. App. 3 Dist. Oct 05, 2007), appeal denied, 226 Ill.2d 598, 879 N.E.2d 935, 316 Ill.Dec. 547 (Ill. Nov 29, 2007) – "Just as the declarant in *Davis*, [shooting victim] Hearn was in need of protection from his assailant when he made the statement to Lee. He was also in dire need of medical attention. Had Hearn made the exact same statement to a 911 operator, *Davis* would mandate that we find the statement nontestimonial in nature. Using the *Stechley* 'objective circumstances' test, we find that a reasonable person shot five times who has just made his way to his aunt's house and who has not received protection from his assailant or medical attention would not have anticipated that the statement to his aunt would be used in prosecution. He would, undoubtedly, have anticipated that identifying his assailant to his aunt would allow his aunt to take precautionary measures should the assailant also arrive at her residence. Therefore, Hearn's statement to Lee was nontestimonial in nature."

In re Anthony P., 2007 WL 2994619, *7+ (Cal.App. 2 Dist. Oct 16, 2007) (unpub) – "At 8:00 p.m. on April 18, Armando V. sent his son Bryan V. to retrieve some items from Armando's blue Mazda, which was parked near his apartment in Long Beach. Armando testified as follows: When Bryan returned about 15 minutes later, he told Armando that while he was inside the car, three "kids" approached the car and told him to open the car's doors, which were locked. When Bryan refused, one of them took out a gun and pointed it at him. Bryan then opened the car's doors, after which they took the car keys from him and ordered him to sit in the car. They drove the car about five blocks before letting him leave the car. ... Appellant contends that Armando's testimony contravened his right of confrontation under the Sixth Amendment of the United States Constitution. ... We conclude that appellant's contention fails because Bryan spoke spontaneously to his father. [FN8] In *People v. Pedroza* (2007) 147 Cal.App.4th 784, 791-794, this court held that a victim's statements to police officers immediately after she was removed from a burning house were admissible as spontaneous declarations under section 1240 [California's excited utterance exception]. Following an examination of Crawford and Davis, we concluded: "[I]t is difficult to identify any circumstances under which a section 1240 spontaneous statement would be 'testimonial'." (Quoting *People v. Corella* (2004) 122 Cal.App.4th 461, 469.)"

People v. Perkins, 2007 WL 2781034 (Mich. App. Sep 25, 2007) (unpub) – shooting victim brought to hospital by girlfriend, the declarant – "In this case, the statements the declarant made immediately upon her arrival at the hospital were clearly nontestimonial. These statements consisted mainly of repeated exclamations that defendant had shot the victim and appeals to the hospital staff to help the victim. The declarant was 'hysterical' and the victim was lying in the back of the van covered with blood. The purpose of the statements was to tell the officer and hospital staff that the victim had been shot in order to ask for their assistance. Therefore, the declarant's statements were not designed to 'establis[h] or prov[e] some past fact,' but were made in the midst of an emergency for the purpose of obtaining help from hospital staff."

Nalley v. State, 2007 WL 2254539 (Del. Supr. Aug 06, 2007) (unpub) – defendant fled from a traffic stop, abandoning his vehicle – "Nalley fled into the Glendale neighborhood, and [Officers] Mayer and Melvin pursued him. ... As [Officer] Melvin got out of his cruiser and began to search the area, a neighborhood bystander yelled that the driver had run 'between the yards and over towards Cynthia.' That bystander also shouted that the individual who left the truck was a black male, wearing a white t-shirt and shorts." – the tip was accurate and defendant was arrested soon afterward – "[I]n the present case, a person hurriedly fleeing from a car in a neighborhood followed by police officers at night could reasonably prompt an excited utterance from local residents. Therefore, we find the bystander's statements to be nontestimonial excited utterances that are admissible in accordance with the holding in *Davis*." [NOTE: Also non-hearsay background / context statement to explain officer's actions.]

Rivera v. Ercole, 2007 WL 1988147 (S.D. N.Y. Jul 06, 2007) (unpub) (habeas) – "Here, Doris's statements to Margarita, 'Your brother just got stabbed.... He got stabbed by Angel.... Your ex-boyfriend,' made during a phone call minutes after the stabbing are nontestimonial. As Justice Cohen found, Doris's statements qualified as excited utterances because they were made almost immediately after she witnessed the startling event of Petitioner's attack on Juan. [¶] Excited utterances, generally, are not testimonial."

United States v. Bifulco, 2007 WL 1288214 (W.D. N.Y. May 1, 2007) (unpub) (§ 2255 action) – "*Crawford* prohibits only testimonial hearsay, not all hearsay. Statements offered under the excited utterance or present sense impression exceptions to the hearsay rule, Fed.R.Evid. 803(1)-(2), which was the case here, are not considered testimonial."

Franklin v. State, 965 So.2d 79 (Fla. Jun 21, 2007) – "[Shooting victim] Lawley made these statements in the midst of a medical emergency: he had just been shot and was struggling for breath. Thus, even if this claim had been preserved by a proper objection, Franklin would not be entitled to relief because Lawley's excited utterances to his friend Ellis were not testimonial."

People v. Chaney, 148 Cal.App.4th 772, 56 Cal.Rptr.3d 128 (Cal. App. 4 Dist. 2007) – "The questions posed to [witness] Lopez by [Officer] Colegrove were asked to determine the *exact nature* of the emergency. The officers had approached the apartment to serve an arrest warrant, and they were met with a screaming, hysterical group of people who were wild and incomprehensible even after Chaney had fled. Colegrove's inquiry was not directed to the simple task of serving the warrant; it was directed at determining what had happened, what *might* happen in the next few minutes, and the nature of the emergency involved. As such, Lopez's answers fell under the *Davis* definition of nontestimonial statements, as distinct from testimonial statements as defined in the companion case of *Hammon*." (italics in original)

Commonwealth v. Gonzalez, 68 Mass. App. Ct. 620, 626-627, 863 N.E.2d 958, 964-965 (Mass. App. Ct. 2007) – "We conclude that it was error to admit Rivera's statement. Rivera did not testify and was not, therefore, available for cross-examination. After telling the police that the shots came from a silver Jeep driven by the defendant, Rivera added that he would deny the statement if Officer Algarin told anyone. This additional caveat indicates that Rivera's statement was a product of reflection and, despite the fact that he had been crying earlier, was not an excited utterance."

State v. Mason, 2007 WL 1174898, *1, *3 (Tenn. Crim. App. 2007) (unpub) – "[A] caller informed the 9-1-1 center that 'Alonzo Mason [is] shooting guns at 701 Deery Street; come pick his ass up before somebody kill [sic] him.' The caller stated that the defendant was '[d]riving a white [Chevrolet] Lumina; him and a girl named Teka.' The caller added, '[w]e ducked when they shot ... [m]y granny sitting [sic] right here in this chair. Lock his ass up before somebody kill [sic] him.'" (brackets in original) [**Note:** Granny wasn't hit.] – not an excited utterance under state law – In addition: "In the present case, the 9-1-1 caller may have been describing a completed event and, in any event, identified the defendant by name, vehicle, and companion and actively sought the defendant's arrest. If these factors define the call as testimonial, the lack of an opportunity to cross-examine even an unavailable declarant yields the statement inadmissible pursuant to the Confrontation Clause."

People v. Jordan, 2007 WL 1160009, *4 (Mich. App. 2007) (unpub) – "The 73-year-old victim, clothed in her nightgown, was outside in the early morning hours yelling for help because she had just been raped and robbed. She had yet to have a police response to her calls for help and was in need of emergency medical treatment. Under the circumstances, 'any reasonable listener would recognize that [the victim] was facing an ongoing emergency.' *Davis, supra* at 2276. Because all statements by the victim were necessary to resolving the ongoing emergency, the statements were nontestimonial. *Id.*"

State v. Long, 2007 WL 551306, *8-9 (Tenn. Crim. App. 2007) (unpub) – "In this case, we conclude that Falon's statements to her cousin and sister were non-testimonial in nature. An objective witness would not reasonably believe that Falon's statements were made when she was acting as a witness against the defendant, or made for use in a future legal proceeding. Instead, Falon was voicing her concerns to members of her family relating that the defendant had just tried to hurt her."

State v. Thomas, 98 Conn. App. 384, 909 A.2d 57 (Conn. 2006) – witness saw defendant put bag in dumpster, thought it was narcotics, opened it and found murder weapon with victim's name on it – said, "He ain't going to get away with this" – Held: Spontaneous utterances made in the presence of civilian witnesses, not law enforcement, are not testimonial.

State v. Annyas, 2006 Wash. App. LEXIS 2106, 2006 WL 2724070 (Wash. Ct. App. 2006) (unpub) – "In considering whether the admission of hearsay statements that qualify as excited utterances are testimonial, this court has declined to adopt a per se rule that such statements are not testimonial. Nevertheless, contemporaneous statements made under the stress of a traumatic event generally do not implicate the Confrontation Clause.[citations omitted] ... "[T]he critical question in determining whether out-of-court hearsay statements are testimonial is whether the circumstances objectively indicate the *declarant's* purpose. ... While driving through Walker Valley, a very isolated and rural part of the county, they saw a woman alone by the side of the road. The Ensleys turned their truck around and stopped to see if the woman needed help. Colleen [victim] was wet and shaking from the cold. She was gripping a pair of jumper cables and appeared to be in shock. Colleen's statements to the Ensleys as they drove to Burlington were made while she was under the stress of the recent kidnapping and assault. The Ensleys were not involved in law enforcement, and there is no indication Colleen made her statements for prosecutorial purposes, especially in light of her refusal to involve law enforcement by going to a hospital emergency room. The objective circumstances indicate Colleen's statements to the Ensleys were not testimonial." – but statements made to ER doctor two days later, with police officers present in the room, were testimonial

Medina v. State, 122 Nev. 346, 143 P.3d 471 (Nev. 2006) – "The focus of this appeal concerns the testimony of [victim] Ryer's neighbor, Dorothy Golden. The day after the rape occurred, Golden noticed something unusual; Ryer's porch light was on all day. When Golden couldn't reach Ryer by telephone, she went to Ryer's apartment, knocked on the front door and yelled for Ryer to come out. [¶] After a few knocks, Ryer answered the door in her bra and blood-soaked underwear. Golden testified that when Ryer opened the door, Ryer stated, 'Look at me. Look at me. I've been raped.' Golden stated that Ryer 'had on a bra and panties, and her panties were drenched in blood. And she had cuts on her thighs, and her hair was all over her head. And she just looked like a ghost. She just looked horrified.' Golden further testified that Ryer was crying, appeared pale and shaken, and that she had bruises on her arms and throat." – not testimonial on theory that the "statement was not one that Ryer would reasonably expect to be used prosecutorially because Ryer made the statement to a neighbor and had yet to contact the police or emergency services herself" – also excited utterance for state hearsay rule despite passage of a day

Spontaneous Statements Not in Response to Questioning

State v. Reed, 168 Wn. App. 553, 278 P.3d 203 (Wash. Ct. App. 2012) – "¶5 Renton Police Officer Robert Bagsby was the first officer to arrive at the scene. Upon Officer Bagsby's arrival, Ta ran to his patrol car. Without prompting, Ta exclaimed that 'my boyfriend beat me up, choked me, [and] wouldn't let me out of my car.' Ta was 'hysterical' and 'crying uncontrollably.' She was out of breath and spoke in 'short, brief sentences.' ... [¶29] because an objective evaluation of the circumstances makes clear that Ta's initial, spontaneous statements were primarily intended to secure police assistance, the trial court did not err by determining that these statements did not implicate the confrontation clause."

State v. Barfield, 81 So. 3d 760 (La.App. 3 Cir. 2011) – wife called deputy to report her husband was fleeing house arrest – "Mrs. Barfield called Deputy Sasser to report not only the instant crime but also additional offenses of which she was the victim. The call was near in time to Defendant's flight from home because almost immediately after Deputy Sasser's conversation with Mrs. Barfield ended, the company monitoring Defendant's home incarceration notified Deputy Sasser that its system alerted. ... Mrs. Barfield's report to Deputy Sasser is analogous to the 911 call made in Davis, the statement was nontestimonial in nature; therefore, its admission into evidence did not violate the Confrontation Clause."

Commonwealth v. Smith, 460 Mass. 385, 951 N.E.2d 674 (Mass. 2011) – "Sergeant Owens knocked on the door, announced, 'Boston Police,' and asked if anyone was home; there was no answer. As the officers began to leave the hallway, Penn quickly ran out of the apartment with her hands up. According to the officers, she appeared 'visibly shaken,' 'very nervous,' and 'frantic.' Penn stated, 'He has a gun. He's wrapping it in a black sock.' ... We conclude that Penn's out-of-court statement was made during the course of an ongoing emergency and was, therefore, nontestimonial."

Boatner v. State, 934 N.E.2d 184 (Ind. Ct. App. 2010) – "Here, there is no indication that Deputy Earles' primary purpose in speaking with A.J. was to establish or prove past events potentially relevant to later prosecution. To the contrary, Deputy Earles was sitting in his car when A.J. quickly approached him and, before he could even ask a question, told him that Boatner had pushed her down and hit her in the face. We therefore conclude that, even if Boatner had properly preserved his Crawford confrontation claim, A.J.'s statement was not testimonial."

Commonwealth v. Robinson, 451 Mass. 672, 888 N.E.2d 926 (Mass. Jun 19, 2008) – robbery victim and brother chased two robbers into building, then stood guard outside and called police – "As the officers escorted the defendant and Marcial out of the building, Mario and Francisco recognized them as the two men who had beaten and robbed Mario. Mario ran toward the officers, pointed to the defendant and Marcial, and stated, 'That's the two guys.' The statement was not in response to any question by the officers." – held: non-testimonial

Phipps v. Wilkinson, 2008 WL 2233968 (E.D. La. May 29, 2008) (unpub) (habeas) – shooting inside a nightclub – "Petitioner argues that the trial court's admission of the hearsay testimony of police officials regarding the identification, by fleeing patrons, of petitioner as the shooter, ... along with Yulon James's testimony that seconds after the shooting people were screaming petitioner's name, identifying him as the shooter, constituted a violation of his Sixth Amendment right to confront the witnesses against him. ... [I]t is clear that the shouted statements to police officials, along with the shouts overheard by Yulon James, from fleeing club patrons regarding who had shot the victim, constituted nontestimonial statements."

People v. Wilburn, 2008 WL 352469 (Cal. App. 5 Dist. Feb 11, 2008) (unpub) – woman on street told officer she had seen the robbers flee in a certain direction, but she refused to give her name and even said “she shouldn’t be here talking to [the officer] right now” – “In the instant case, it is reasonable to infer that the anonymous woman approached Officer Serrano because she was frightened about what she had just seen – two men running from the liquor store, hearing a gunshot, and the obvious realization that at least one man was armed. The only objectively reasonable inference to be drawn is that Officer Serrano’s brief conversation with her was designed to resolve whether there was some ongoing emergency, given her obvious distress, and if the suspects were still in the vicinity or at large, such that her statements were nontestimonial. More importantly, however, the woman approached Officer Serrano and willingly disclosed what she had seen. There is no evidence—direct or circumstantial—that Officer Serrano had to ‘coax’ the story from her, or that he took a formal statement. Instead, Serrano admittedly tried to ‘coax’ her personal identifying information, but she adamantly refused and apparently disappeared into the night.” [NOTE: Fact that she refused to give her name also means she had no intention of providing testimony for use in a trial.]

State v. Smith, 2008 WL 220749 (Wis. App. Jan. 29, 2008) (unpub) – ¶ 20 At trial, Officer Delie recounted the victim’s exclamations; they were not in response to police questioning but were spontaneously exclaimed while police were performing their public safety caretaker role of responding to a 9-1-1 call for help. ... Consequently, admitting the declarant-victim’s hearsay statements, pursuant to the excited utterance exception to the hearsay rule, passes constitutional muster pursuant to *Davis*."

Sain v. State, 2007 WL 4462599 (Tex. App.-Fort Worth Dec 20, 2007) (unpub) – "Here, [Officer] Langon was not interviewing or interrogating [her neighbor, the murder victim] Elena. Rather, Elena informally approached Langon to request immediate assistance because she believed that she was in danger. Langon stated that Elena was desperate to get back into the house while appellant was not home. Generally, statements that are made to police while the declarant believes that she is in personal danger are not made with consideration of their legal ramifications because the declarant speaks out of urgency and a desire to obtain a prompt response. [FN48] [¶] For these reasons, we conclude that Elena’s statements to Langon were not testimonial."

People v. Lewis, 2007 WL 4206637 (Cal.App. 1 Dist. Nov 29, 2007) (unpub) – "Bleyle then told Officer Leon, without any further questioning, that the defendant had punched her in the face, identified the defendant as her husband, and provided a description of him. Officer Leon relayed the information to the San Rafael Police dispatcher so that other officers could begin searching for defendant. [¶] While Officer Leon was broadcasting the information Bleyle had just given him, he overheard her talking on her cell phone. Bleyle 'pretty much screamed' into her cell phone: "'Why did you do this to me? Why did you hit me?'" Officer Leon asked her if she was speaking with defendant and Bleyle confirmed she was. Officer Leon asked for the phone, but when Bleyle handed it over she stated that she thought defendant had " 'hung up.' " There was, in fact, no one on the line when Officer Leon received the phone. ... Officer Leon did not elicit any information from Bleyle while she was on her cell phone. [cite] All the statements by Bleyle on her cell phone that Officer Leon testified about were simply ones that he overheard during the course of his other duties. Bleyle’s one response to a question by Officer Leon while she was on her cell phone, 'I think he hung up,' was not given in an effort to provide

information about defendant's guilt or innocence. Rather, Bleyle was simply relaying information to Officer Leon so that he would be aware of that fact when he picked up the phone. Thus, Bleyle's statements while on the phone were not testimonial and defendant's constitutional rights were not violated by their admission." [NOTE: Also casual remark.]

People v. Chavez, 2007 WL 4201292 (Cal. App. 2 Dist. Nov 29, 2007) (unpub) – "Los Angeles Police Officer Fernando Chavez responded to a motel on La Brea Avenue. In the parking lot, he encountered Susan and Maria Galindo; who were hysterical, and Abaroa, who lay on the ground moaning, with blood on his pants. Yelling, one of the women told Officer Chavez Abaroa had been shot. ... Here, assuming arguing that Galindo's exclamation was a product of interrogation, it fell naturally within the first *Davis* category, of statements made to enable assistance in emergencies. Officer Chavez responded to it by obtaining an ambulance for Araboa. The statement was not inadmissible."

McGee v. State, 2007 WL 3104766 (Ind. App. Oct 25, 2007) (unpub) – violent street mugging – "As Sergeant Cheh followed McGee, an unidentified woman, possibly of Indian descent, flagged him down. The woman "appeared very excited," and was "flinging [and] flailing her arms" and shouting "very loud[ly]." (Tr. 227, 228, 229). She "almost stepped out" into traffic, and Sergeant Cheh nearly struck her with his vehicle. The woman pointed at McGee and shouted, "[T]he black man just robbed the white man." (Tr. 233). McGee turned and looked at Sergeant Cheh and the unidentified woman as they spoke. Sergeant Cheh advised the woman to stay where she was and continued to pursue McGee. ... Sergeant Cheh returned to the area in which he had left the unidentified woman, but she was no longer at the scene. ... Simply stated, the unidentified woman's statement was introduced at trial to identify McGee as the man who robbed Young at gunpoint. The statement, although not the product of police interrogation, was indisputably testimonial in nature." [NOTE: It's disputable. See the other cases in this section.]

People v. Wilson, 2007 WL 2696494 (Cal. App. 2 Dist. Sep 17, 2007) (unpub) – officer chasing suspect – "The court admitted [Officer] Talmage's testimony that two unidentified civilians told him that 'they had seen the suspect run into the [Oceanside house] and that we had the right place' and 'He ran in there.' ... Even if the prosecution had offered the civilian statements for their truth, the statements are non-testimonial and would not have caused the declarants to become witnesses within the meaning of the Sixth Amendment. (*Crawford v. Washington* (2004) 541 U.S. 36, 51.) A statement is non-testimonial when circumstances objectively indicate that the primary purpose of a declarant's statement is to assist police in an ongoing emergency."

People v. Scott, 2007 WL 2459116 (Cal. App. 1 Dist. Aug 30, 2007) (unpub) – "Officer Tisdale testified that the victim's husband asked the officer 'Why aren't you going to get this person?' ... Admission of the husband's statement did not implicate the right to confront witnesses because the statement was not hearsay, and not testimonial."

People v. Saracoglu, 152 Cal.App.4th 1584, 62 Cal.Rptr.3d 418 (Cal. App. 2 Dist. 2007) – "The record does not indicate what questions, if any, [officer] Hawkins asked [victim] Rachel; Hawkins testified only that, after hearing Rachel's account of the incident, he asked if she wanted an emergency protective order. Not knowing precisely how Rachel's initial account was elicited does not alter the analysis. As *Davis* said, "Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against

[a] bona fide physical threat..." (*Davis v. Washington, supra*, 547 U.S. at p. ---- [126 S.Ct. at p. 2276].) Here, too, Rachel's initial statement to Hawkins was plainly a plea for help in the face of a bona fide physical threat." – **writ of habeas corpus granted, Saracoglu v. Walker, 2010 U.S. Dist. LEXIS 27640, 1-43 (C.D. Cal. Jan. 27, 2010), adopted by district court, 2010 U.S. Dist. LEXIS 27636 (C.D. Cal. Mar. 23, 2010) –**

People v. Thompson, 2007 WL 2141416 (Mich.App. Jul 26, 2007) (unpub) – [Quintuple murder] – "[13-year-old] Christina's repeated exclamations to the officers, in which she pointed out defendant to the officers immediately after she saw defendant outside his house, are also not testimonial in nature. Christina did not make these exclamations in response to police questioning. Instead, she independently made the challenged exclamations to police in order to assist the police in an ongoing emergency, namely, apprehending defendant, who had just killed five people, was at large, and was likely dangerous."

U.S. v. Arnold, 486 F.3d 177 (6th Cir. 2007) (en banc) – "Gordon's statement to the officers when Arnold returned to the scene bears even less resemblance to testimony than her initial statement to the officers. Her exclamation—'that's him, that's the guy that pulled the gun on me'—was prompted not by ex parte questioning by the officers but by Arnold's sudden reappearance. When she not only described Arnold as her assailant but also added that 'he's got a gun on him,' JA 116, no one can doubt that Gordon and the officers faced a risky situation or that Gordon sought to obtain their protection. This was not a statement prepared for court. 'No "witness," after all, 'goes into court to proclaim an emergency and seek help.' *Davis*, 126 S.Ct. at 2277. The statement thus "was not 'a weaker substitute for live testimony' at trial," *id.* (quoting *United States v. Inadi*, 475 U.S. 387, 394 (1986)), but had independent evidentiary value separate and apart from any "courtroom analogue[]," *id.* It was nontestimonial.

U.S. v. Cannon, 2007 WL 951407 (3rd Cir. 2007) (unpub) – "[Officer] Darden next testified that just seconds after Cannon had passed him, another member of the group, an unidentified woman, approached the officer and told him that Cannon had a gun. ... [I]t is evident the unidentified woman's statement was made during an ongoing emergency. She was not describing a past event at some remove in time, but warning the officer about a present characteristic of a man who had just slipped past him. Admittedly, the woman's statement was not an outright call for help. Nevertheless, the statement warned police about a present and proximate danger. In sum, we find the woman's statement described an event as it was unfolding and helped ensure the safety of police and those in the area of the disturbance. As a consequence, the statement was nontestimonial and Cannon did not have a right to confront the woman who made it."

Commonwealth v. Boone, 68 Mass. App. Ct. 1114, 2007 WL 947014 (Mass. App. 2007) (unpub) – "At trial, a responding police officer testified that, after he had arrived at the scene and called for an ambulance for Albertazzi, several unknown witnesses approached him while he was involved in 'crowd control' outside the bar and indicated that the defendant had cut LaRosa's face with a beer bottle during the course of a fight. The officer stated that the declarants were 'pretty excited.' ... Whether the out-of-court statements were testimonial and should not have been admitted is a close question in this case. Nevertheless, because the defendant did not object to their admission at trial, we review his claim only to determine whether any error created a substantial risk of a miscarriage of justice". – it didn't

State v. Smith, 2006 WI App 223, 2006 Wisc. App. LEXIS 852, 2006 WL 2670391 (Wisc. Ct. App. 2006) (unpub), vacated and new opinion substituted, State v. Smith, 2008 WL 220749 (Wis. App. Jan. 29, 2008) (unpub) –

When Does Emergency End?: Domestic Violence Cases
(see also Part 9; Primary Purpose; On-the-Scene Questioning)

Contrary to unthinking remarks found in a dismaying number of opinions, the victim in *Davis* called 911 after her abuser had left the scene – which, of course, is what you'd expect. See the summary of the facts of *Davis* on page 2 of this Outline, and the category in part 1, "Cases Misstating the Facts of *Davis*".

See the note under "On-the-Scene Questioning by Police: Adult Declarant: Domestic Violence Cases" regarding the double standard involving D.V. cases.

Davis states that "a conversation which begins as an interrogation to determine the need for emergency assistance" can "'evolve into testimonial statements,' once that purpose has been achieved. ... Through in limine procedure, [courts] should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence." In practical effect, this requires trial courts to conduct something akin to the statement-by-statement analysis of *Williamson v. U.S.*, 512 U.S. 594 (1994).

The psychological invalidity of *Davis*'s bright-line distinction between emergency and non-emergency is powerfully demonstrated in two articles by Professor Deborah Tuerkheimer, "Exigency," 49 Ariz. L. Rev. 801, 816-819 (2007), and "Crawford's Triangle: Domestic Violence and the Right of Confrontation," 85 N.C. L. Rev. 1 (Dec. 2006).

Commonwealth v. Williams, 2014 PA Super 249, 103 A.3d 354 (2014) – defendant poured gasoline on woman and set her on fire – she was able to call 911, but died of the burns six weeks later – "In the case on appeal, Appellant was not in Serrano's immediate presence during the 911 conversation. Nonetheless, we believe other factors present here but absent in *Davis* indicate an ongoing emergency. For instance, Serrano was severely and mortally wounded at the time of the 911 call. ... Serrano repeatedly and frantically pled for help during the 911 call, and repeatedly stated she felt ready to pass out. Serrano's demeanor, her repeated pleas for immediate help, and her severe injuries plainly indicate the presence of an ongoing emergency. [¶] In addition, Serrano's account of the fire's origin was necessary to aid firefighters in containing the fire."

State v. Reed, 168 Wn. App. 553, 278 P.3d 203 (Wash. Ct. App. 2012) – "insofar as Reed asserts that the absence of an assailant from the scene of a domestic assault necessarily establishes the lack of an emergency, Reed is mistaken. ... Here, Ta was alone and injured, and her assailant was still at large. The operator was aware that Reed, having driven away only moments before Ta placed the call, was highly mobile and could potentially return to the scene to resume the assault."

State v. Metzger, 2010 ME 67, 999 A.2d 947, 952-53 (Me. 2010) – "it was reasonable for [Officer] Bell to conclude upon his arrival that the victim was facing an ongoing emergency, as

she was on the floor having just been beaten by an assailant who might still be nearby within range of another attack on the victim or himself. The victim's demeanor, described by Bell as crying and still scared, further evidenced an ongoing situation as opposed to one that had been resolved. [¶ 19] Contrary to Metzger's suggestion, the "ongoing emergency" in this case was not limited to the victim's medical condition and did not automatically end when Bell called for an ambulance. n4 An ongoing emergency may include situations, like the one encountered by Bell here, where the officer has been unable to identify the suspect and satisfy himself that no one is in further danger."

People v. Banos, 178 Cal. App. 4th 483, 486-505 (Cal. App. 2d Dist. 2009), review denied (2010) – "[Officer] Armendariz described [future murder victim] Cortez as "excited" and "upset," but apparently not "distraught" like the witness in *Saracoglu*, a factor the court there relied upon to find the emergency was ongoing. Also in contrast to *Saracoglu*, defendant was not physically present with Cortez at her home; his whereabouts had not nullified a familiar place of safety for her." - [NOTE: The constitutional question turns on the officer's choice of adjectives??]

Hunt v. State, 218 P.3d 516, 2009 OK CR 21 (Okla. Crim. App. Jul 24, 2009) – "In the present case, Appellant was asleep on the couch in the apartment as the victim went outside the make the 911 call. Under the particular facts of this case, we find the statements more akin to those made by Ms. Hammonds and therefore testimonial."

Snider v. State, __ S.W.3d __, 2009 WL 1685169 (Ark. App. Jun 17, 2009) – ex-boyfriend Snider came to house to kill woman (Blackwell), but her current boyfriend overpowered him, beat him severely and shot him in the leg – police interviewed her 30 minutes after these events – her "interview was clearly obtained after the emergency had passed and was conducted as part of a criminal investigation. Accordingly, we agree that Blackwell's videotaped interview qualifies as testimonial hearsay, and Snider's Sixth Amendment rights under the Confrontation Clause were violated."

Nguyen v. Felker, 2009 WL 1246693 (N.D. Cal. May 05, 2009) (unpub) (habeas) – "Bui's statements to officer Nickl on March 26, 1999 (that Nguyen had hit and kicked her before she sum-moned police) and Bui's statements to officer Jim on October 27, 2001 (that Nguyen had repeatedly hit her and stopped when she threatened to call police) were testimonial because the emergency had ended..." – likewise statements made after abuser was arrested

State v. Moorer, 2009 WL 818945, 2009-Ohio-1494 (Ohio App. 9 Dist. Mar 31, 2009) (unpub) – "{¶ 4} Mr. Moorer's second assignment of error is that the admission of the 911 recording violated his constitutional right to confrontation. He has argued that, because Ms. Washington was calling from a different address, there was no present emergency to resolve. ... {¶ 9} An objective review of the 911 recording indicates that the primary purpose of the conversation was to enable the police to meet an ongoing emergency. While Ms. Washington may have escaped to a neighbor's apartment, she said that Mr. Moorer was still violent and was currently fighting with her neighbor." – not testimonial

People v. Kelly, 2009 WL 763539 (Mich. App. Mar 24, 2009) (unpub) – future murder victim's statements to police about various acts of DV testimonial when "she made the statements in places of relative safety. She was protected by law enforcement, and defendant was not present."

– however, another statement "was nontestimonial. Her statement that the pain in her head was a result of an assault by defendant was given to enable [Lieutenant] Wagester to render emergency medical assistance."

People v. Gates, 2009 WL 684992 (Cal. App. 4 Dist. Mar 17, 2009) (unpub) – "Contrary to defendant's claim, the victim was, indeed, facing an ongoing emergency, *i.e.*, she had just gotten the 'shit' beat out of her and needed medical attention, as did one of her sons. Moreover, she did not know whether defendant would return, which represented a bona fide physical threat as did the one in *Davis*."

People v. Hudnall-Johnson, 2009 WL 499151 (Cal.App. 1 Dist. Feb 27, 2009) (unpub) – male DV victim "Hudnall's statements to the police were made after the violent incident was over. Hudnall was calm and did not want to pursue charges against appellant, and there was no reason to suspect appellant posed any risk to anyone other than Hudnall. The police were investigating what had hap-pened, not facing an ongoing emergency situation." – testimonial

Commonwealth v. Everett, 73 Mass.App.Ct. 1115, 899 N.E.2d 118 (Table), 2009 WL 102755 (Mass. App. Ct. Jan 16, 2009) (unpub) – "Although it is true, as the defendant asserts, that the assault had apparently ended at the time the victim made the 911 call, the urgency, including the need for medical assistance, had not subsided."

Commonwealth v. Depina, 2009 WL 36138 (Mass. App.Ct. Jan 08, 2009) (unpub) – DV victim who went to fire station and received first aid was not facing ongoing emergency – "The statements here identifying the perpetrator were not relevant to any medical treatment Rodriguez-Medina might have needed. ... By the time Rodriguez-Medina made the statements, she was safe in the firehouse, away from the scene of the crime and its perpetrator." [NOTE the incongruous application of the legal concept of relevance to the provision of medical treatment.]

Tubbs v. State, 2008 WL 5423897 (Ark. App. Dec 31, 2008) (unpub) – "Just as in *Hammon*, as soon as police arrived, Keys was no longer alone, but under police protection. She was immediately separated from Tubbs. The statements she gave two to three minutes after officers arrived were statements telling the story about what had happened. The statements were elicited as part of the investigation about the crime committed; not to determine how to resolve an emergency." [NOTE: This sounds like a per se rule. Is it?]

Toledo v. Sailes, 904 N.E.2d 543, 2008-Ohio-6400 (Ohio App. 6 Dist. Dec 05, 2008) – "{¶ 6} ... Upon arriving at the house, one officer interviewed appellant while another spoke to his girlfriend, Sharita, who was in an upstairs bedroom. ... {¶ 17} After careful consideration of the testimony in the case before us, we find that Sharita's statements were made after the two officers had secured the scene. There is no evidence of an ongoing emergency at the time the officers arrived or while they remained. We find that the primary purpose of the officer's interrogation of Sharita was to clarify Sharita's version of past events that could be relevant to later prosecution. {¶ 18} Accordingly, we find that Sharita's statements were testimonial..."

Thomas v. State, 284 Ga. 540, 668 S.E.2d 711 (Ga. Oct 27, 2008) – "A life-flight helicopter arrived and flight paramedic Derrick Moody asked the victim what happened. She stated that she had been shot by her ex-husband. ... We agree that the statements identifying Thomas as the assailant were nontestimonial and not subject to the Sixth Amendment's Confrontation Clause as

the victim was speaking about events 'as they were actually happening' [cite] and the primary purpose of the questioning 'was to enable police assistance to meet an ongoing emergency.'"

James v. Marshall, 2008 WL 4601238 (C.D. Cal. Aug 13, 2008) (unpub) (habeas) – woman shot in face, died after four days – while in the ambulance, as paramedics tried to suction blood out of her mouth, the emergency was over – "FN5. The victim's injury may have presented an ongoing medical emergency, but the interrogation [by an EMT] was irrelevant to addressing that emergency. Any medical emergency of the victim remained the same regardless of the identity of the shooter." [NOTE: So? Although not explicit, the assumption seems to be that the existence of an emergency isn't determined by the declarant's situation, but by the officer's.]

Rodriguez v. State, 274 S.W.3d 760 (Tex. App.-San Antonio Oct 01, 2008) – D.V. case – "After Officer Hovis located Rodriguez in the bedroom and detained him, any emergency that may have existed earlier was over. The officer's subsequent questioning of M.G. was designed to discover what happened in the past and to memorialize events for later prosecution. Her responses were therefore testimonial."

People v. Webb, 2008 WL 3906837 (Cal. App. 2 Dist. Aug 26, 2008) (unpub) – "Although the shooting already had occurred, its aftermath presented an ongoing emergency. When [Officer] Pierce saw [Victim] Washington, he was concerned about her medical condition. Replying to Washington's cry for help, Pierce did not say that he wanted to prosecute anyone but said, 'I want to help you, honey. Tell me who did this to you.' Pierce testified he asked his questions because 'I was concerned there was an armed suspect in the area, numerous pedestrians, numerous ... medical personnel responding to the area along with other officers.' At the time, appellant's location was unknown and, for all Pierce knew, appellant could have returned. Pierce was entitled to ask Washington questions to resolve the present emergency, including asking her for the identity of the shooter. The officers were entitled to 'know whether they would be encountering a violent felon.'"

State v. Shea, 965 A.2d 504, 2008 VT 114 (Vt. Aug 14, 2008) – "The fact that the crime had only recently occurred was held, on its own, to be unimportant. ... The fact that a complainant is injured may be relevant if the complainant requires emergency medical attention..." – but concluding on facts of case: "¶ 24. The officer found the complainant bleeding, frantic, and crying. He could determine the complainant's need for immediate medical attention only by asking her questions. The officer did not know the extent of complainant's injuries when she made her initial statement. [cite]. Finally, he needed to identify the alleged perpetrator in order to prevent the defendant from harming anyone on the scene. ... ¶ 26. For the above reasons, we conclude, as the trial court did, that the initial basic information disclosed by the complainant, including the name of the perpetrator, was nontestimonial. After the officer secured the scene and determined that the complainant did not need emergency medical treatment, his questioning of complainant obtained testimonial information." – [NOTE: The statement of the test is inconsistent with the holding of the case, since the critical question turned out to be not whether the woman required emergency medical condition, but whether the officer was trying to find out if she did.]

People v. Suniga, 2008 WL 3090622 (Cal. App. 5 Dist. Jul 03, 2008) (unpub) – subsequently-murdered woman beaten by side of road until she "ran off" at midnight – "Viewed objectively, the primary purpose for which [Officer] Meek took Cindy's statement was not to deal with a

contemporaneous emergency, but to produce evidence about past events for possible use at a criminal trial." – testimonial [*cf. Shipley*, next case down] – same victim reported domestic violence on another occasion, when same man had a shotgun – "Although appellant was not at the house when Officer Pree arrived, his whereabouts apparently were unknown and there was the possibility he might regain access to the firearm. Thus, even though Cindy was now somewhat protected because an officer was present, both she and the officer reasonably could have been in danger. Accordingly, we find no Sixth Amendment violation." – [NOTE: First statement viewed solely from officer's perspective, second from both speaker's and listener's perspective. Is the key question whether the *officer* faced an emergency?]

People v. Shipley, 2008 WL 2461811 (Cal. App. 3 Dist. Jun 19, 2008) (unpub) – "In our view, a bleeding battered woman alone on the street late at night, who has a little one at home, who wants to go home but is afraid to do so without police assistance, qualifies as an ongoing emergency. Such circumstances objectively indicate that the primary purpose of the interrogation is to enable police assistance to meet that emergency." – but emergency was over "[o]nce defendant had been taken into custody and secured in Deputy Wright's patrol vehicle and Cheryl was restored to her home with Officer Wright standing by"

State v. Her, 750 N.W.2d 258 (Minn. May 29, 2008), on remand from SCOTUS, remanding case to district court for evidentiary hearing, State v. Her, 781 N.W.2d 869, 870-880 (Minn. 2010) – "the evidence shows that [D.V. and eventual murder victim] Vang reported a completed assault to police, an event that was over by the time police arrived. The State did not offer any evidence of the 911 call in this case. Rather, the record discloses only that Vang called police to meet her at a restaurant after she had gotten away from her attacker and after her attacker had left the scene. Baumhofer found Vang alone inside the restaurant, expecting police to arrive. From the testimony the State offered, it is clear that Vang described an event that had ended." – [NOTE: This analysis rests on the unspoken assumption when Justice Scalia said "events" in *Davis*, he really meant "crimes."]

People v. Dominguez, 382 Ill.App.3d 757, 888 N.E.2d 1205, 321 Ill.Dec. 272 (Ill. App. 2 Dist. May 14, 2008) – D.V. case – "Any reasonable listener of the 911 tape would conclude that Cook was facing an ongoing emergency and was describing events as they were unfolding. While her injuries may have occurred during the overnight hours, as defendant argues vehemently, Cook [who was apparently very drunk when beaten] did not become cognizant of her injuries until she was able to break away from defendant and entered her vehicle [in the morning, seeing her injured face in the rear-view mirror]."

Smith v. U.S., 947 A.2d 1131 (D.C. May 01, 2008) – "In essence appellant argues that, unlike the *Lewis* case where the assaultive spouse was still on the scene when the police arrived, in this case there was no existing imminent threat to the complainant and thus the emergency had ended. This view of the case is unduly restrictive. Indeed to make the actual physical presence of the alleged wrongdoer a dominant factor in determining whether there is an ongoing emergency, narrows and distorts the guiding principle to be applied to a wide range of circumstances. In the circumstances here, it is undisputed that when complainant made the 911 call, she did not know appellant's location, could not know if the attack had ended, and feared he might return. Giving consideration to all of the circumstances, we conclude the trial judge did not err in admitting the early portions of the recording reflecting her request for police assistance and also her conversations with the ambulance dispatcher."

In re Johnathan C., 2008 WL 501352 (Cal.App. 1 Dist. February 26, 2008) (unpub) – outdoor domestic violence – officer arrived in time to see male juvenile throwing to the ground the mother of his child – after they were separated, victim told officer what happened – the opinion says that the victim's "statements to [the officer] were admitted as spontaneous utterances", without specifying exactly what statements, but apparently the entire narrative – "The circumstances of T.B.'s statement bear similarities to the facts in both Hammon and Davis, making it something of a close case. We conclude, however, that the circumstances are closer to those in Davis and objectively indicate that the primary purpose of the interrogation was to enable law enforcement to respond to a contemporaneous emergency." – although physical struggle was over, it was "effectively contemporaneous" with victim's statement – "We do not read *Davis* to require that, in order to establish a present emergency, the declarant must literally be under attack at the time the statement is made." [NOTE: No discussion of *Crawford's* applicability in juvenile proceedings.]

State v. Camarena, 344 Or. 28, 176 P.3d 380 (Ore. Jan. 25, 2008) – "[A]lthough the relevant portions of complainant's 9-1-1 telephone call clearly describe an attack that had passed, the call occurred within one minute of the attack, or just after defendant had left the couple's residence. The temporal proximity of that assault does not match, exactly, that of the attack that took place in Davis, but in our view, the scant 60 seconds that separate them is insufficient to suggest that the danger of a renewed assault had fully abated. As the Court of Appeals noted, defendant had just left; he could as easily have returned before the police arrived.

Commonwealth v. Burgess, 450 Mass. 422, 879 N.E.2d 63 (Mass. Jan 11, 2008) – father complained to police about son in months before son killed him – "The victim's statements to Officer Borriello on February 10 were per se testimonial because they were made in response to police interrogation that was not meant to secure a volatile situation or procure needed medical attention. [cite] The circumstances indicated that there was no ongoing emergency, [cite]. Although the victim appeared distressed, whatever may have prompted his call to the police had ended." [NOTE: No discussion of forfeiture.]

Commonwealth v. Pelletier, 71 Mass.App.Ct. 67, 879 N.E.2d 125 (Mass. App. Ct. Jan 15, 2008) – "In response to a 911 call from the defendant, police Officer Thomas Cuddy arrived at a rooming house in Lawrence and found the defendant and his wife standing outside. As the wife had serious facial injuries, Cuddy's first concern was with her 'health and well being.' He immediately called an ambulance. Thereafter, Cuddy separated the wife from the defendant so that she was about fifty feet away from him with her back turned toward him. The wife appeared nervous and confused. When he asked her what happened, she stated that she 'fell down the stairs.' ... The wife's injuries were so severe that she was bedridden, could not eat, and had to be fed a liquid diet. ... In the present case, although there was originally a medical emergency, by the time the defendant's wife answered the question, 'What happened?' the ambulance had been called and the urgency had subsided. [cite] Thus, the wife's answer to Cuddy's question cannot be viewed as nontestimonial ..."

Vinson v. State, 252 S.W.3d 336 (Tex. Crim. App. Jan 16, 2008) – see opinion on remand for harm analysis, 266 S.W.3d 65 (Tex. App.-Hous. Aug 21, 2008) – – DV case – "[Deputy] Chapman had removed the appellant prior to interviewing [victim] Hollimon about the details of the assault. Because the appellant was not present during the recounting of the assault, and no

other *Davis* factors indicate that an emergency situation was still in progress, Hollimon's statements to Chapman concerning the details of the assault were testimonial in nature and thus inadmissible under *Crawford*."

Lewis v. U.S., 938 A.2d 771 (D.C. Dec 31, 2007) – "The statements that [DV victim] Ms. Coleman made after she got out of the car must be viewed differently. By that time Officer Harris had arrived; the scene was much less chaotic than when Officer Conway first found Ms. Coleman sitting in the car, "bleeding from the head and face area." The exigencies of the initial situation had subsided. Officer Conway had obtained sufficient information to respond to the emergency, and Officer Harris had detained appellant and was questioning him. As in *Hammon*, the scene had been secured and the parties separated. There was also a discernible change in the type of questions Officer Conway asked. Instead of questions designed to respond to the emergency, he began asking more detailed questions about how the assault occurred and what had happened before it began. We conclude, therefore, that the primary purpose of this second round of questioning was to investigate the incident in order to obtain information for use in a future prosecution. [cite] Thus these statements were testimonial ..."

People v. Trevizo, 181 P.3d 375 (Colo. App. Dec 13, 2007) – Victim, who committed suicide before trial, "awoke in her bedroom to find defendant [her estranged husband] standing next to her bed. Defendant beat her on the head and body with a bicycle pump. The victim ran out of the bedroom and out of the house and went to a neighbor's house. She told one of her sons to call 911. [¶] Two police officers were dispatched in response to the 911 call, and they arrived at the scene within a few minutes. The victim was sitting at the dining room table crying and visibly upset, holding a towel to her bleeding head. She stated to one of the officers that her husband had broken into the house and had beaten her, that she had a restraining order against him, and that he had fled the scene. ... We conclude that, here, there was no ongoing emergency at the time the statements were made; when they were made, there was no immediate threat to the victim, defendant had left the scene, and the police had control of the situation. ... In addition, the victim's statements were explanations of past events, not simply a description of ongoing events."

Commonwealth v. Lao, 450 Mass. 215, 877 N.E.2d 557 (Mass. 2007) – "First, as to [murder victim] Alicia's 911 call reporting the defendant's alleged attempt to run over her with his vehicle, the language of *Crawford* suggests that the call would have qualified as a testimonial statement. After Alicia arrived home from dinner with the defendant and before she made the 911 call, Alicia engaged in a conversation with Yessenia about the events of the evening, she spoke with the defendant at least once by telephone, and she called her mother to discuss the defendant's conduct. Alicia was not in imminent personal peril at the time the 911 call was made because the defendant already had left the scene of the incident. Therefore, Alicia's 911 call was not the reporting of an emergency situation, but, rather, was a 'solemn declaration ...'"

Dixon v. State, 244 S.W.3d 472 (Tex. App.-Hous. Nov 29, 2007) – "While [Officer] Russell's conversation with [DV victim] Brownfield may have begun as an interrogation to determine the need for emergency assistance, it quickly evolved into a police investigation conducted for the primary purpose of collecting information for a future prosecution. ... The fact that Russell was filling out paperwork and gathering detailed information for the district attorney indicates he was neither 'assessing and securing the scene' nor primarily concerned with the immediate safety of himself or Brownfield."

Toledo v. Loggins, 2007 WL 3227385, 2007-Ohio-5887 (Ohio App. 6 Dist. Nov 02, 2007) (unpub) – "{¶ 25} Upon review, we agree with appellant that the facts at issue are very similar to the *Hammon* facts. In both cases, the police arrived some time after the 911 call [here, 2 hours later], there was no emergency in progress, the parties were questioned separately, and the alleged victim appeared frightened. Accordingly, because the victim's statements were testimonial, the trial court erred in allowing the hearsay statements, as testified to by Officer Harrison, into evidence."

State v. Siler, 116 Ohio St.3d 39, 876 N.E.2d 534, 2007-Ohio-5637 (Ohio Oct 25, 2007), cert. denied, 128 S.Ct. 1709, 170 L.Ed.2d 534 (Mar. 24, 2008) – on remand from SCOTUS – three-year-old boy witnessed his father kill his mother by strangling her then hanging her in the garage – the boy was left alone with the body overnight – during conversation with a detective "shortly" after discovery of the murder, the boy described his mother as "sleeping standing" – "As a result of the questioning, [Detective] Martin learned that Nathan's father, Brian, had been there the previous night, that he had scared Nathan by banging on the door, and that he had fought with Barbara in the garage. Nathan also told Martin that Brian had placed the yellow rope around her neck. ... [during the conversation, Nathan] began crying ... {¶ 43} The record reveals that before Detective Martin arrived at the scene, Deputy Singleton had entered the home, awakened Nathan, and taken him outside. The Ashland County Sheriff's Office had secured the crime scene and had begun its investigation into Barbara's death. Martin testified that he had been briefed before he began questioning Nathan, that Nathan did not appear nervous or upset, and that Nathan was sitting in his grandfather's lap during the questioning. Thus, this record does not reflect the existence of an ongoing emergency." [NOTE: No, seriously, that's what it says. For a three-year-old to watch his father murder his mother, and be left alone with the body for hours, does not constitute an emergency, once he has been removed from the house. Obviously, the court is either equating "emergency" with "immediate physical threat," or else evaluating the situation strictly from the officer's perspective, or both.]

State v. Pugh, 2007 WL 2171361 (Wash. App. Div. 1 Jul 30, 2007) (unpub) – "Timothy attempts to characterize the 911 call as testimonial because it recounts events that just happened and Bridgette was out of danger because her husband had left the premises. Bridgette's 911 call does begin with a statement about what had already happened. 'My husband was beating me up really bad.' She does tell the operator that her husband is walking away. She does not however say he is far away and that he is no longer a threat. This court has previously found that a 911 statement after an event was still nontestimonial if it indicated an ongoing emergency. ... Her concern about another beating if she encountered Timothy reflected that she thought he may still be close by, and clearly felt that he remained a danger to her. These factors, combined with the chaos and fear of the situation, demonstrate that the statements were made to gain help and resolve the emergency."

People v. Saracoglu, 152 Cal.App.4th 1584, 62 Cal.Rptr.3d 418 (Cal. App. 2 Dist. 2007) – "The fact [DV victim] Rachel went directly to the police station instead of calling 911 does not, in our view, alter the analysis either. Under the facts of this case, Rachel's trip to the station was, in effect, the functional equivalent of making a 911 call. This conclusion is consistent with *Davis's* characterization of 911 operators as 'agents of law enforcement when they conduct interrogations of 911 callers.' (*Davis v. Washington, supra*, 547 U.S. at p. ---- [126 S.Ct. at p. 2274].) Under the unusual facts of this case, it just happened that Rachel's plea for assistance was

made to a police officer rather than a 911 operator. ... Saracoglu argues there was no ongoing emergency because Rachel had reached a place of safety and, therefore, was not facing any imminent harm. We disagree. The safety of the station house was only temporary because Rachel could not go home again until the situation was resolved. The emergency was ongoing because Saracoglu had threatened to kill Rachel if she went to the police." – **writ of habeas corpus granted, Saracoglu v. Walker, 2010 U.S. Dist. LEXIS 27640, 1-43 (C.D. Cal. Jan. 27, 2010), adopted by district court, 2010 U.S. Dist. LEXIS 27636 (C.D. Cal. Mar. 23, 2010)** –

People v. Guevara, 2007 WL 2111014 (Cal. App. 2 Dist. Jul 24, 2007) (unpub) – "[A]fter [witness] Ramirez told the 911 operator that Olivia's husband had stabbed her, the operator asked: 'Okay, did you see him?' Ramirez replied: 'Yeah, he ran out of--.' At that point, it was clear that the ongoing emergency related to the stabbing itself was over. The 911 operator continued to ask Ramirez about the assailant's age, appearance and method of travel, but these questions were designed to aid the police in apprehending a suspect, not resolve an emergency at the crime scene. Ramirez's responses to these questions about the stabbing were testimonial." [NOTE the unexamined dichotomy: apprehending a suspect is the opposite of resolving an emergency.]

Zapata v. State, 232 S.W.3d 254 (Tex. App.-Hous. 2007) – superseding withdrawn prior opinion issued May 17, 2007) – DV case – "The complainant's statements indicate that although she had been recently assaulted, she was able to make an emergency call, leave the residence, and wait for emergency assistance outside the residence and away from appellant. Appellant and the complainant were separated when Officer Harnar arrived, and there is no evidence that there was an ongoing conflict between the two. Additionally, the complainant's statements describe past events rather than events as they were actually happening. ... [H]er statements were testimonial."

People v. Johnson, 150 Cal.App.4th 1467, 59 Cal.Rptr.3d 405, (Cal.App. 6 Dist. May 22, 2007), as modified on denial of rehearing (June 18, 2007) – "Epifanio Sevillo, a former public safety officer with the City of Marina, testified about defendant's involvement in a prior incident of domestic violence. ... Defendant claims that the trial court erred in permitting evidence of the prior victim's 1995 statement to Sevillo, 'He punched me in the face, look at my nose.' ... The facts surrounding the prior victim's statement to Sevillo do straddle the line between the two cases decided in *Davis*. We decide the issue by applying the test set forth by the court: Did the circumstances objectively indicate that there was an ongoing emergency when the victim made the statement to Sevillo? We think they do. Sevillo heard the woman screaming as he stood at the door; the man who answered the door had blood on his hands; and the woman in the bathroom had a bloody, broken nose. That is the only information the officer had when he asked 'What happened?' Indeed, although he might have suspected domestic violence, Sevillo did not know at that point whether or not a crime had been committed. The officer interrupted an ongoing emergency and obtained information from the victim in order to assess the situation. Thus, her statement to him was not testimonial."

Young v. State, 2007 WL 1345592, *4 -6 (Ind.App.,2007) (unpub) – boyfriend (Young) stabbed and slightly wounded girlfriend (Della), and stabbed and seriously injured girlfriend's daughter – "Officer Dixon testified that he spoke to Della approximately two minutes after Young was placed in handcuffs and all objects in the room were secured. Although Della had been 'hysterical' during the incident, she began calming down, according to Officer Dixon,

although she was still “mad and upset” when first talking to Officer Dixon. Tr. At 69, 72. Officer Dixon testified that Della told him she had been involved in a physical altercation with her boyfriend, Young, and that he had stabbed her with a screwdriver. According to Officer Dixon, Della then reached between the couches, grabbed the screwdriver, and held it over her head, saying 'This right here.' ... [E]ven the State concedes that the disputed statements were likely testimonial under the *Davis* standard: Della was being questioned about Young's past conduct; the emergency in progress had ended and Young was in handcuffs when Officer Dixon asked the questions eliciting the disputed statements; and the nature of Officer Dixon's questions was to learn about what had happened in the past rather than to resolve any emergency. We recognize there is conflicting evidence regarding the formality of the proceedings but do not believe this element alters the apparent testimonial nature of the statements as evidenced by the above elements." (footnote omitted) – but error was harmless

People v. Cage, 40 Cal.4th 965, 56 Cal. Rptr.3d 789, 155 P.3d 205 (Cal. 2007) – mother slashed her 15-year-old son's face with glass – "[W]hile John was awaiting treatment in the emergency room, [Officer] Mullin asked John to describe "what [had] happened *between [him] and the defendant.*" (Italics added.) [¶] Thus, by the time Mullin spoke with John in the hospital, the incident that caused John's injury had been over for more than an hour. The alleged assailant and the alleged victim were geographically separated, John had left the scene of the injury, and he thereafter had been taken to a remote location to receive medical treatment. Though he apparently had not yet been treated by a doctor when Mullin questioned him, he was in no danger of further violence as to which contemporaneous police intervention might be required. [¶] Of course, John remained in need of prompt acute care by a physician for his injury. To that extent, there remained an ongoing emergency. Thus, if the primary purpose of the hospital conversation between Mullin and John, viewed objectively, had been to facilitate such emergency treatment, the statements thereby elicited might well not have the character of testimony. [¶] However, there is no evidence the interview was so intended. Mullin had not previously been involved in John's emergency treatment. His role throughout had been as an investigating police officer. He arrived at the hospital only after John was already in medical hands. Mullin's clear purpose in coming to speak with John at this juncture was not to deal with a *present emergency*, but to obtain a fresh account of *past events involving defendant* as part of an inquiry into possible criminal activity. Indeed, the form of Mullin's question assumed that defendant might be the perpetrator of John's injury." – testimonial

State v. Tyler, 155 P.3d 1002, 1007 (Wash. App. Div. 3, 2007) – "¶ 3 Officer Bishop asked Mr. Tyler to sit down on the steps of a nearby house while the officer spoke to Ms. Greer, who was crying and hyperventilating. She responded in a whisper to the officer's questions and kept her back to Mr. Tyler. Officer Bishop believed that she was doing this to prevent Mr. Tyler from overhearing the conversation. ¶ 4 Ms. Greer repeatedly requested help from the officer during his questioning. She also stated that Mr. Tyler would kill her if she told police about what was going on. ... [¶ 18] The officers may have thought there was some initial exigency, but that exigency was terminated as soon as law enforcement separated Ms. Greer and Mr. Tyler. ... [¶ 19] Ms. Greer's statements were testimonial."

Heard v. Commonwealth, 217 S.W.3d 240 (Ky. 2007) - "There was no ongoing emergency with respect to the events Angel recounted. She was safely in the presence of one or more police officers and the statements concerned violations of law. Angel's statements to Officer Gilbert were clearly testimonial and they should not have been allowed into evidence."

People v. Coleman, 2007 WL 1086756, *6-8 (Cal App. 3 Dist. 2007) (unpub) – witness reported shooting – "The 911 operator returned to the line and asked again who shot Mitchell. Johnson responded with defendant's address and her nickname, 'Misses.' She also told the operator the shooting happened at the address as Mitchell was trying to break up with the woman. The 911 operator asked, 'Is she still there?' The police arrived and the call ended. [¶] It is this final exchange that possibly slips from emergency information to testimonial statements. Although Mitchell remained wounded and in need of help, the prior conversations with the 911 operator and the fire department dispatcher provided immediate, necessary information. The second exchange with the 911 operator veers more closely into questions attempting to learn what had taken place in the past." – but harmless

People v. Nguyen, 2007 WL 1207233, *4 (Cal. App. 4 Dist. 2007) (unpub) – "Defendant contends Tran's statements to the 911 operator constituted inadmissible testimonial evidence because they described his past criminal conduct rather than an ongoing emergency situation. The evidence is to the contrary. Although the defendant left approximately a half hour earlier, Tran was in an ongoing emergency situation until the police arrived because there was a reasonable possibility defendant would return at any minute and beat her again. Her fear was reasonable because defendant had already beaten her earlier that day. The 911 operator told her to lock all of the doors and windows until the police arrived. In response, she said, 'Yes, I already locked all the doors, I'm so scared.'"

State v. Wright, 726 N.W.2d 464, 474 -475, 476 (Minn. 2007) (most recent installment in long-running case) – "We conclude that the latter part of R.R.'s 911 call – that is, the part of the call after the operator relayed to R.R.'s sister that Wright was in custody – is distinguishable from the post-emergency part of the *Davis* call with regard to the second of the foregoing indicia articulated by the Supreme Court. ... The primary purpose of the post-emergency exchange in *Davis* was to establish or prove facts. Here, the 911 operator apparently attempted to terminate the call after relaying to R.R.'s sister the information that police had apprehended Wright. ... The foregoing statement would have been the end of the call, but for R.R.'s sister's explicitly expressed need for reassurance that the police had really apprehended Wright, not someone else, and that the police would take the apartment keys away from him. After making the foregoing statement, the 911 operator did not attempt to establish or prove any facts; her sole purpose was to calm R.R.'s sister and to encourage her to return to the apartment to wait for the police to arrive. Similarly, the sole purpose of the sister's comments and questions was to ascertain that the emergency was indeed over. In seeking reassurance from the 911 operator, the sister repeated a number of facts already established by R.R. – including Wright's name and physical description- but it cannot be said that the primary purpose of any part of the 911 call was to establish or prove past events potentially relevant to later criminal prosecution. We therefore hold that the district court did not violate the Confrontation Clause when it admitted all of the 911 call."

State v. Kemp, 212 S.W.3d 135 (Mo. 2007) – woman, Jackie, fled down street, naked from waist up, and "banging and screaming at [neighbor's] door" – "Any reasonable listener would recognize that Jackie was facing an ongoing emergency. ... These circumstances indicate that, although Jackie was inside the Johnson [*i.e.*, neighbor] home, she and her neighbors were in the midst of an ongoing emergency. [¶] The questions the operator asked were directed at enabling police assistance to meet the ongoing emergency. ... Thus, questions about Kemp's name were

directed at resolving the present emergency."

State v. Holmes, 2007 WL 486736, *4 -5 (N.J. Super. A.D. 2007) (unpub) – "We further note that Young's statements to Bethea were to an acquaintance, not a law enforcement officer. Moreover, Young made her statements to Bethea when she sought refuge in Bethea's home. Apparently, Young remained fearful of a further attack, even while in Bethea's home. Arguably, the emergency did not end until the police arrived. In these circumstances, it would appear that when Young made her statements to Bethea, she 'was not acting as a *witness*; [and] she was not *testifying*.'" (quoting *Davis*) – [note: this is dicta, because the case was decided on harmless error]

When Does Emergency End?: Non-D.V. Cases

(NOTE: *Michigan v. Bryant* now governs most of these cases.)

State v. Perez, 184 Wash. App. 321, 337 P.3d 352 (2014) – one prisoner attempted to kill another by strangulation in dayroom – "¶ 50 Perez asserts the initial statements Hindal made to Sergeant Walters and Officer Misiano were testimonial because Perez had left Dayroom 2, Hindal was secure, and the emergency had been resolved. Viewed objectively, the record does not support his assertion. ¶ 51 The initial statements Hindal made to Sergeant Walters and Officer Misiano were related to events that occurred just minutes earlier. Where statements are made 'within minutes of the assault,' such statements may properly be considered as 'contemporaneous[] with the events described.' ... [¶54] The initial statements Hindal made to Officer Misiano and Sergeant Walters fall squarely under the ongoing emergency exception."

U.S. v. Parnell, 32 F.Supp.3d 1300 (M.D. Ga. 2014) (pretrial) – prosecution for sale of salmonella-contaminated peanuts – "The microbiological testing records produced by federal and state entities during the salmonella outbreak present a closer question. The Court is persuaded, however, that the primary purpose of those records was to address an ongoing emergency. After all, when federal and state regulatory agencies responded to the PCA facility, they were tasked with ending or at least mitigating a deadly salmonella outbreak sweeping across the country. Testing PCA's products and facility was critical to locate and isolate the infected food. Both Stewart Parnell and the Government agree that salmonella is a dangerous, even deadly, substance. And because PCA distributed its allegedly tainted products nationwide, the emergency in late 2008 and early 2009 was massive in significance and scale." – in other words, the emergency continued for weeks or months

State v. Norah, 131 So. 3d 172, 179 (La. App. 4th Cir. 2013) – "Crimes, such as aggravated assault and murder, have much broader 'zones of danger' which can extend to the public-at-large and the police. *Id.* The scope and duration of an 'ongoing emergency' can also fluctuate based on consideration of a number of factors, including the type of weapon used in the crime, and the extent and nature of the victim's injuries."

State v. Sisneros, 2013-NMSC-049, 314 P.3d 665 (N.M. 2013) – "{11} ... [A]n ongoing emergency does not necessarily cease, rendering the information collected by an interrogator testimonial, as soon as the suspect leaves, particularly when the suspect is armed, remains on the

loose, and his motives are unclear. [cite] When an armed suspect is afoot, the scope of ongoing danger expands to include any risk to the general public as well as to law enforcement."

State v. Lewis, 125 So. 3d 1252, 1261-62 (La. App. 4th Cir. 2013) – witness to shooting gave a statement at the station on the day of the shooting – the opinion doesn't specify how much time had passed – "We find that the State's assertion that Tonika Allen's statement was non-testimonial hearsay in that it was given in order to assist the police address an ongoing emergency is questionable. Considering the U.S. Supreme Court's holding in *Davis*, we find that her statement was testimonial hearsay as the primary purpose of her interrogation was to establish or prove past events potentially relevant to later criminal prosecution."

Commonwealth v. Middlemiss, 465 Mass. 627, 989 N.E.2d 871 (Mass. 2013) – victim shot five times but called 911, later dying in ambulance en route to hospital – "The victim was asked not about the circumstances leading up to the shooting, but only about the nature of his injuries, where he was located, who shot him, and where the shooter might be. The primary purpose of the interrogation was plainly nontestimonial, and the judge did not commit constitutional error by admitting the victim's statements at trial." – circumstances were also "highly informal"

State v. Surbaugh, 737 S.E.2d 240 (W. Va. 2012) – "The statements in question were made by Mr. Surbaugh to law enforcement and to various other people, including the paramedic taking care of him at his house, the nurse in the emergency room, the physician's assistant and his treating physician. The petitioner argues that the circuit court erred when it admitted these statements, all taken within the four hours between the shooting and his death, because these statements were testimonial in nature, precluding cross-examination. ... Examining the circumstances under which Mr. Surbaugh made his statements, we believe the record shows that that these statements were non-testimonial in nature and were, therefore, admissible. At the time these statements were taken, there was a medical emergency in the Surbaugh household. Mr. Surbaugh had been shot, was clearly injured and was in need of medical treatment. Because of the petitioner's conflicting explanations of what had happened, law enforcement had a present need to know what happened from Mr. Surbaugh's point of view, so as to aid their investigation of the shooting and how Mr. Surbaugh was injured. This included a need to ensure that all members of the household were safe and that the neighborhood was safe. Finally, in view of the treatment being rendered, the medical personnel needed to understand the mechanism of how Mr. Surbaugh was injured. [¶] The statement made by Mr. Surbaugh directly to law enforcement is likewise non-testimonial. Again, at the time of this statement, it was still unclear to the officers whether they were dealing with a deliberate shooting by another person who could pose a continuing threat or a suicide attempt. The situation was clearly an emergency."

State v. Hugle, 104 So. 3d 598 (La.App. 4 Cir. 2012) – "At the time the statements were given, the police were actively engaged in searching for the shooter, who was still at large and posed a danger to the police, the public and the witnesses to the shooting. [cite] The statements were nontestimonial..."

State v. Clue, 139 Conn. App. 189, 55 A.3d 311 (Conn. App. Ct. 2012), appeal denied (2013) – "According to the defendant, because Dorothy Bogues made the [911] call after the assailant fled her home, there was no ongoing emergency, and her statements on the call therefore were inadmissible testimonial hearsay. We are not persuaded. ... In lieu of using *Bryant's* guidance on what constitutes an 'ongoing emergency,' the defendant instead urges us to draw a line at

Dorothy Bogues' door and conclude that once the intruder stepped outside her house, any emergency ceased. We reject this assertion. *Bryant* made clear that emergency situations can extend beyond the initial victim and pose a threat to police and the public, and that the determination of whether an emergency situation exists is highly context-driven."

Hughes v. State, 2012 Ark. App. 586, __ S.W.3d __ (Ark. Ct. App. 2012) – "appellant shot Ms. Hooks in the face. Ms. Hooks ran to a nearby house seeking help, and she was taken by ambulance to the hospital, but she died two days later. ... This detective stated that at the emergency room, Ms. Hooks said that appellant shot her. ... There can be no dispute that this statement, made to a detective as part of this criminal investigation, was 'testimonial' as contemplated by the Confrontation Clause." [NOTE: No dispute?? On the contrary, it seems dubious.]

Petit v. State, 92 So. 3d 906 (Fla. Dist. Ct. App. 4th Dist. 2012) – "We note first that multiple armed suspects were still on the loose, posing a substantial risk to the public at large. Indeed, this substantial risk to the public culminated in the armed suspects causing a collision that took one life and grievously injured multiple third parties. Exacerbating the situation, two of the robbery victims were speedily pursuing the armed [*917] suspects on a major public highway. [Victim] Saint Remy told the 911 operator that the suspects were speeding and driving erratically. If these circumstances cannot be classified as an ongoing emergency, we have trouble imagining what would."

State v. Glenn, 725 S.E.2d 58, 59-68 (N.C. Ct. App. 2012) – rape case – "When Officer Baker spoke to Hooper, he asked her if she wanted medical attention, but she refused. He also asked her what happened. Thus, Officer Baker assessed the situation, determined there was no immediate threat and then gathered the information. Furthermore, Hooper told Officer Baker that defendant voluntarily released her from his car and then Hooper walked to the Waffle House. Officer Baker was aware that the situation that instigated the 911 call had ended. Therefore, even if Officer Baker believed there was an ongoing emergency when he arrived at the Waffle House, Hooper's statement transitioned from a nontestimonial statement into a testimonial statement after Officer Baker determined that no ongoing emergency existed." [NOTE: When exactly did that transition take place? Is requesting medical attention the sine qua non of an emergency?]

Taylor v. State, 2011 OK CR 8, 248 P.3d 362 (Okla. Crim. App. 2011) – "The morning after the shooting, a police detective interviewed Appellant's grandmother. She told the detective that she had seen Appellant around 10:30 p.m. the night before. He ran into her apartment, sweating, and hid in a bedroom closet. When she asked him what was wrong, he said 'Nothing.' ... Applying the analysis in *Davis* to the circumstances in this case, we find the facts that two men had been shot, and that the suspect or suspects remained at large, are not dispositive of whether the hearsay statement has an emergency purpose, and is therefore non-testimonial under *Davis*. The relevant focus is clearly on what is happening to the hearsay declarant when the statements are made, rather than broader concerns of the police or the public at large. ... We conclude from these authorities that the statements of Appellant's grandmother were testimonial, and thus subject to the requirement of confrontation." [NOTE: The discussion is questionable after *Bryant*.]

People v. Nelson, 190 Cal. App. 4th 1453, 1456-1468 (Cal. App. 4th Dist. 2010) – "The circumstances also show that at the time of [EMT] Witt's inquiry [inside an ambulance], the

shooting had just recently occurred and the shooter was still unidentified and at large. n9 Although Marquez was no longer in immediate danger from the shooter, there was still a possibility that the unidentified shooter could pose an immediate threat to other persons. This is not a case involving a domestic disturbance (as discussed in Davis and Cage), where the assailant was identified and the geographic separation of the victim and the assailant would suggest the immediate threat of danger to both the victim and the public was over. Witt's inquiry about the identity of the shooter was a basic question that was crucial to an evaluation by the police whether there was an ongoing danger to the public."

Marshall v. State, 45 So. 3d 475, 475-479 (Fla. Dist. Ct. App. 3d Dist. 2010) (denial of rehearing en banc), cert. denied, 131 S. Ct. 2959, 180 L. Ed. 2d 249 (U.S., June 6, 2011) – on denial of rehearing en banc, Judge Gerstein takes solace from the knowledge that "[t]his dissent, at least, let's [*sic*] Henry Marshall know that others listen to his plight. These others feel that the importance, predictability, and purity of law are noble goals for judges and justices." – Marshall robbed a man at gunpoint – his "plight" was that he was convicted – Gerstein would have held that the emergency was over as soon as Marshall fled – "If the Florida Supreme Court does not step in to clarify whether an armed robbery, strong arm robbery, or a purse snatch constitutes an ongoing emergency, then we are sadly headed towards jurisprudential entropy." – but the prediction is hard to test, given uncertainty about what the judge thinks "entropy" means

State v. Parker, __ S.W.3d __, 2010 Tenn. Crim. App. LEXIS 795, 10-29 (Tenn. Crim. App. Sept. 22, 2010), appeal granted (Feb. 16, 2011) – 65-year-old woman fled from attempted rape, after suffering a subdural hematoma that was not diagnosed – she died the next day – "[T]he victim seemed so upset when speaking with the officers that she could not remember her age... Deputy Benton arrived at the scene approximately five to eight minutes after receiving the 9-1-1 call from Mr. Trentham, and upon the deputy's arrival, the victim informed him of past events. At this point, nothing indicated that the victim's description of the assailant related to an ongoing emergency. ... In light of our high court's ruling in Lewis, we hold that the victim's statements were testimonial."

State v. Franklin, 308 S.W.3d 799, 802-827 (Tenn. 2010) – "Even after the actual crime has ended, the emergency may continue as long as the perpetrator might be found in the vicinity. ... when [robbery victim] Polson got the contractor's attention and asked him to write down the tag number while the perpetrator of the robbery was in the parking lot just outside the store, a reasonable person in her position would have thought that the emergency was ongoing and she remained in harm's way. For such a reasonable person preoccupied with obtaining help for an ongoing emergency, the primary purpose of asking for the tag number would not be establishing or proving past events for the benefit of a later criminal prosecution, but to assist in capturing the perpetrator."

Commonwealth v. Allshouse, 985 A.2d 847 (Pa. 2009) cert. granted, summarily vacated and remanded, Allshouse v. Pennsylvania, 131 S. Ct. 1597, 179 L. Ed. 2d 495 (2011), reaffirmed, Commonwealth v. Allshouse, 36 A.3d 163, 165-190 (Pa. 2012) — defendant broke arm of 7-month-old, J.A. – also living in the house was A.A., a 4-year-old – "On May 27, 2004, Appellant suggested to [CYS caseworker] Geist that 'possibly [A.A.] had caused injury to [J.A.]' NT. Hearing, 9/16/05, at 9. n3 [*850] Accordingly, that same day, Geist went to A.A.'s paternal grandparents' home to speak with A.A. Geist and A.A. sat and talked on the front porch of the house, while A.A.'s grandparents, siblings, and others were inside. During the interview, A.A.

told Geist that Appellant had caused J.A.'s injury. ... We conclude that A.A.'s statement to Geist was nontestimonial under Davis because it was given during an ongoing emergency. Specifically, we note that, although Appellant asserts that any ongoing emergency ended with J.A.'s removal from the family home on May 20, 2004, the validity of this assertion is premised on Appellant having caused J.A.'s injury. On May 27, 2004, however, Appellant told Geist that he believed A.A. had caused J.A.'s injury. N.T. Trial, 9/19/05, at 128. It was thus incumbent upon Geist to immediately investigate the matter further, because, at that time, A.A. and J.A. were together in their grandparents' home, where A.A. could do further harm to J.A. Indeed, Geist interviewed A.A. the same day that Appellant told Geist he believed A.A. caused J.A.'s injury."

Shorter v. State, 33 So. 3d 512 (Miss. Ct. App. Nov. 24, 2009) – "At the beginning of her 911 call, Angelique told the police that someone had been shot. She then identified the victim as Boutwell, and the person who had shot Boutwell as Shorter. ... [¶46.] Under these circumstances, taking into account the Supreme Court's explanation of the testimonial/nontestimonial distinction in Davis, we find that there was an ongoing emergency taking place when the statements were made. [cite] A man who had been shot, Boutwell, was barely alive, and the armed gunman who had pulled the trigger, Shorter, continued to remain in the house with Angelique and her child. Furthermore, Shorter shot Boutwell because he believed he was having an affair with his wife, Angelique, and Shorter was still on the premises at the time of Angelique's 911 call. There is nothing in the record to establish involvement by the State to produce testimony with an eye toward trial. Rather, Angelique was clearly describing present events, and she was seeking help. Therefore, her statements to law enforcement were nontestimonial..."

Wright v. State, 916 N.E.2d 269, 272-278 (Ind. Ct. App. 2009) – "we conclude that R.A.'s statements were not testimonial. While R.A.'s statements referenced the stabbing acts, which had technically occurred in the (very recent) past, they also referenced his very present injuries. Given the immediacy of these injuries at the time of R.A.'s statements, we cannot say that he was merely referencing past, or even recent past, events. With respect to the second factor, R.A.'s condition in itself adequately demonstrates the emergency nature of the situation. In addition, Officer Stradling and R.A. were awaiting paramedics, and, indeed, the homicide unit, at the time of R.A.'s statements. Regarding the third factor, Officer Stradling, who had found a bloody R.A. on a neighbor's front porch in the middle of the night, was merely attempting to address what was clearly an unresolved situation. To the extent Officer Stradling's inquiry into the perpetrator's identity is claimed to be investigatory, such inquiries have been deemed necessary to resolve situations--such as the one at issue here--where it is imperative that dispatched officers know they might be encountering a violent felon. See Davis, 547 U.S. at 827. Finally, there is little question as to the informal nature of this "interrogation," which occurred when Officer Stradling was dispatched to assist R.A. as he lay dying, in the middle of the night, on his neighbor's front doorstep. We are convinced that R.A.'s statements were elicited for purposes of resolving the emergency at hand, not in preparation for future litigation, and were therefore nontestimonial. Accordingly, we reject Wright's claim that the introduction of such statements into evidence violated his Sixth Amendment right to confrontation."

State v. Koslowski, __ P.3d __, 2009 WL 1709639 (Wash. June 18, 2009) – very lengthy 4-3 opinion applying multi-factor test to determine that woman who had been the victim of a home invasion robbery and had been tied up by burglar provided testimonial statements to the first

police officers who arrived within minutes of her call to 911 – her answers to the first officers indicated that the suspect did not pose an immediate danger to the officers, so therefore there was no emergency

People v. Bryant, __ N.W.2d __, 2009 WL 1677569 (Mich. June 10, 2009), cert. granted (2010) – very lengthy 4-3 opinion applying multi-factor test to determine that man who had been shot provided testimonial statements to police as he lay dying on the pavement at a gas station – conclusion based on the content of the statements, which showed that "there was no present or imminent criminal threat" – criticizing Court of Appeals decision to the contrary for "confusing a medical emergency with the emergency circumstances of an ongoing criminal episode." – the latter, by implication, is the only kind of emergency that counts – this opinion, predictably, also misstates facts of *Davis*

Glover v. State, __ S.E.2d __, 2009 WL 1505363 (Ga. June 01, 2009) – "Here the [911] calls were made while the incident was still ongoing, the perpetrator was at large, and the nature of the operator's questions were to assist the police in meeting an ongoing emergency. *Id.* Thus, the statements were nontestimonial and the Confrontation Clause is not implicated."

People v. Smith, 2009 WL 1219939 (Cal. App. 2 Dist. May 06, 2009) (unpub) – girls (ages not given) mugged on street, went home, one of them called 911 – "it is clear that Cecilia's statements were nontestimonial. Although the girls were no longer in immediate danger, Erika's testimony made clear that the girls went directly home after appellant told them to walk away and that Cecilia made the call as soon as they arrived home. She therefore made the 911 call at the first opportunity, and the recording reveals the agitation in her voice." – emergency not over

People v. Sutton, __ N.E.2d __, 2009 WL 1012020 (Ill. Apr 16, 2009) – carjacking/murder in which one shooting victim, Janik, survived – "We disagree with defendant that the emergency in this case had ended because the offender was no longer on the scene. ... A bloody and staggering Janik approached the officers and said he had been robbed and shot and that his girlfriend had been shot. In approaching the officers, Janik was seeking help. At this point, the officers could not have known whether the assailant posed further danger to Janik or others and did not know whether the violence had ended or might continue elsewhere. The officers did not know whether the perpetrator was still in the immediate area or whether he would return to the area." – his initial statements to police were non-testimonial – however, his statements to an officer inside the ambulance were testimonial – "Although the offender was still at large when Officer Moroney questioned Janik in the ambulance, our review of the record indicates that Moroney's interrogation was not directed at addressing an ongoing emergency. ... Moroney testified, 'I asked him, can you please tell me again exactly what happened tonight.' Janik then gave Moroney a narrative of the events of the evening." – [NOTE: This is all dicta, because Janik testified.]

State v. Smith, 2009 WL 774817 (N.J. Super. A.D. Mar 26, 2009) (unpub) – "At the time McKinley questioned him, [mugging victim] Chen appeared to be in shock, he was bleeding, and he collapsed during the conversation. Indeed, while speaking with Chen, McKinley administered first aid by placing an oxygen mask on Chen and tried to suppress the bleeding from Chen's head lacerations. McKinley's questions to Chen were in an effort to meet an ongoing emergency, which is a nontestimonial situation."

State v. Brown, 961 A.2d 481 (Conn. App. Jan 13, 2009) – "The [shooting] victim was under no present threat of the defendant, as the victim had fled the scene of the shooting and was undergoing treatment for his injuries. He was in the presence of emergency medical staff and a police officer when he made this statement." – accordingly, emergency was over [NOTE unexamined assumption that "emergency" means danger of immediate further harm]

State v. Coleman, 2008 WL 5221063 (N.C. App. Dec 16, 2008) (unpub) – 911 call made an hour after robbery – "the evidence demonstrated that the reason for the delay in the 911 call was that the robbers had tied up the victim and it took him an hour to free himself so that he could make the call. In the call, which lasted only 3 minutes, 18 seconds, the victim immediately identified defendant and Mr. Coleman and said that they had threatened to kill him, they had a gun, and that he was scared and needed help. It is clear from the tape that the victim is asking for assistance and is not responding to an interrogation aimed at establishing a past fact."

People v. Jones, 2008 WL 4684066 (Mich. App. Oct. 23, 2008) (unpub) – "At trial, Officer Candace Miles testified that Jerome Tucker, who lived down the street from Clark, told her that he heard six gunshots at approximately 8:05 p.m. She interviewed him at about 8:30 p.m. ... Miles talked to Tucker approximately 25 minutes after Tucker heard the gunshots. No suspects had been apprehended at that time. Tucker's statements were clearly for purposes of establishing the status of the current situation rather than solely directed at establishing facts for later criminal prosecution." – [NOTE: Also non-inculpatory. Tucker wasn't "witness against" anyone.]

State v. Monroe, 2008 WL 4838649 (Del. Super. Oct 31, 2008) (unpub) (pretrial order) – "[Shooting victim] Ferrell's statements made to police officers first at Wilmington Hospital and later at Christiana Hospital are inadmissible. ... Ferrell's statements to the police were made well after the shooting and there was no 'ongoing emergency.'"

State v. Rinehart, 2008 WL 4823571, 2008-Ohio-5770 (Ohio App. 4 Dist. Nov 06, 2008) (unpub) – "{¶ 26} We do not believe that the statement identifying Rinehart was testimonial, *i.e.*, that the primary purpose of that interrogation was to establish the facts of a past crime. We recognize that Wright and Rinehart had, as it turned out, fled the scene and no longer actually posed an immediate danger to Cottrill or to Chaney. ... [N]either Cottrill, Chaney, nor the 911 dispatcher knew that Rinehart no longer posed an immediate danger. Chaney stated in the 911 tape that he did not know for certain whether Rinehart had left. ... Because no one knew that the scene was secure, and because the primary purpose of the interrogation was to gather information about the situation emergency responders would encounter on arriving, Cottrill's identification was not a testimonial statement..." [NOTE: Compare *Cuyuch*, the next case below.]

Cuyuch v. State, 667 S.E.2d 85, 284 Ga. 290, 8 FCDR 2984 (Ga. Sep 22, 2008) – one roommate cut another – victim and witness didn't speak English, officer didn't speak Spanish – "In the present case, we assume without deciding that the primary purpose of Pasqual's statements to Officer Isin--that his roommate had cut him and was still at home--were made to enable Officer Isin to meet an ongoing emergency and thus were nontestimonial in nature. It is clear, however, that the primary purpose of Pasqual's identification of Cuyuch at the crime scene was to establish past facts with a view to a future prosecution. As such, Pasqual's statement identifying Cuyuch was testimonial in nature... In any event, however, Lorenzo's statements that he knew that the knife was in the front yard and that Cuyuch was the person who had stabbed

Pasqual cannot be said to have been given primarily to assist in providing aid to Pasqual. Instead, these statements, made in response to a question by Sergeant Lummus through the translator as to who needed help, were describing past events and identified and reported Cuyuch as *90 the perpetrator of a past crime. At that point, Lorenzo was effectively 'acting as a witness' [FN20] against Cuyuch." [NOTE: A bizarre decision. An officer trying to find out if the perpetrator of a violent crime is still on the premises, and where the weapon is presently located, is *obviously* dealing with an ongoing emergency.]

Gutierrez v. Yates, 2008 WL 4217865 (C.D. Cal. Apr 08, 2008) (unpub) (habeas) – naked rape victim escaped from attackers and ran to officers – initial statements non-testimonial – "Sandra's subsequent statements to Schwab, however, were made several minutes after police arrived, and, more importantly, after petitioner and his cohort had been handcuffed, detained, and separated from Sandra. [cite]. In fact, some of these statements, in which Sandra detailed the entire encounter with petitioner and Ruiz, were made thirty minutes later, when Schwab was driving Sandra to the hospital. [cite]. Sandra's statements were not made in response to an ongoing emergency. To the contrary, Sandra was no longer in danger [FN8] and that the primary purpose of the interview was to establish or prove past events potentially relevant to later criminal prosecution. Therefore these later statements were testimonial." – [NOTE: So "emergency" and "in danger" are the same?]

Caison v. Commonwealth, 52 Va.App. 423, 663 S.E.2d 553 (Va. App. Jul 29, 2008) – eyewitness to fatal stabbing called 911 – " McLachlan described the events as they were happening. She spoke of whether Green was conscious, bleeding, and breathing as the deteriorating condition was actually occurring. ... The nature of what was asked [by the 911 operator] and answered was necessary to enable the police to arrange for the arrival of the appropriate medical services to treat Green's injuries and to warn police that appellant, a dangerous and potentially armed man, ran at-large in the neighborhood. Because McLachlan rendered aid to a dying man while facing the threat of appellant's return to the scene, she was 'in an environment that was neither tranquil nor safe.'"

State ex rel. J.A., 195 N.J. 324, 949 A.2d 790 (N.J. Jun 23, 2008) (Albin, J., for the court) – eyewitness to robbery followed perpetrators, then spoke to officer 10 minutes after attack – "There was no ongoing emergency–no immediate danger–implicating either the witness or the victim, both of whom were in the company of police officers at the time of the 'interrogation'" – rejecting arguments that emergency continues while suspects are at large since "neither the declarant nor victim is in danger" (apparently per se, because the police were present) – and adding in footnote 14 that the "record in this case does not involve flight with a weapon that might present an ongoing emergency" – [NOTE: This equates "ongoing emergency" with "immediate danger", which is not what *Davis* said. *Davis* spoke instead of "events" as they were happening, a much broader description.]

State v. Buda, 195 N.J. 278, 949 A.2d 761 (N.J. Jun 23, 2008) (Justice Albin, dissenting) – severely-injured 3-year-old abuse victim interviewed at the beginning of his 2-week hospital stay – the **dissent** would have held that "because he was in no immediate danger when he spoke with the DYFS worker, given the police presence in the hospital and his separation from defendant, his statements were testimonial" – this is the **dissent**, **not** the holding – it's included here only because it shows that three members of the New Jersey Supreme Court equate the "events"

mentioned in *Davis* with "immediate physical danger" – which isn't what *Davis* said – the dissent also misstates the facts in *Davis*, as noted in part 1

Pugh v. Wynder, 2008 WL 2412978 (E.D.Pa. Jun 10, 2008) (unpub) (habeas) – " In this case, the state courts concluded, and the Magistrate Judge agreed, that an emergency was ongoing because the perpetrator was speeding away in a car, fleeing the scene. [cite] Petitioner disagrees. Petitioner argues ... that '[w]hile there was certainly an investigation going on, any semblance of an emergency had passed.' [cite] [¶] Petitioner's argument is misguided. As Officer Rice arrived to the scene, the victim had just been robbed and injured. Officer Rice understandably asked the victim, who was bleeding, what had happened. Considering these circumstances, the Court agrees that Officer Rice was responding to an ongoing emergency. As in *Davis*, the questions were designed to respond to ongoing events—both the injuries to Bianco and the fleeing perpetrator. This is true even of Officer Rice's 'effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon.' *Id.* Subsequent events—where Petitioner apparently crashed his car and then hid under it—only highlight that an emergency was still underway. For all these reasons, the statements were non-testimonial, and therefore do not offend the Confrontation Clause."

Government of Virgin Islands v. Williams, __ F.Supp.2d __, 2008 WL 2206647 (D.Virgin Islands May 19, 2008) (3-judge panel; on appeal from Virgin Islands Superior Court) – emergency still ongoing when victim of kidnapping / shooting was experiencing difficulty breathing, in severe pain "and he was constantly groaning stating that he cannot speak" (he died soon after) – and when hood of car suspected of being used in the kidnapping was still warm

State v. Cannon, 254 S.W.3d 287 (Tenn. Apr 29, 2008) – 82-year-old woman was raped – "On November 18, 1999, eighty-two year old M.N. [FN1] reported that an unknown assailant raped her late in the afternoon in her Hamilton County home. Officer Damany Norwood ... was the first police officer to respond to M.N.'s 911 call. Officer Norwood testified that M.N. was visibly upset and that her whole body was shaking. M.N. described the attack and the perpetrator to Officer Norwood, who recorded her statements. ... When Officer Norwood spoke to M.N., there was no longer an ongoing emergency. [!] ... Thus, M.N.'s statements to Officer Norwood were testimonial. ... Similarly, M.N.'s statements to Detective Dudley at the emergency room were testimonial. Detective Dudley's interrogation occurred after emergency room medical personnel had examined and stabilized M .N." – in addition, statements made to SANE nurse during course of physical examination were similarly testimonial – "M.N. had already been examined by a nurse and the emergency room physician before [SANE practitioner] Nurse Redolfo interviewed her, so there was no ongoing emergency." – apparently per se – [NOTE: Tennessee has very eccentric ideas about what constitutes an "emergency." See also *Lewis*, described below.]

People v. McKinney, 2008 WL 2031350 (Cal. App. 4 Dist. May 13, 2008) (unpub) – 77-year-old was mugged, suffering incapacitating injuries – "Contrary to defendant's assertion, since Besuzzi was the first police officer to reach Warren, arriving even before the paramedics, the crime scene was not 'contained' with Warren 'protected' and 'safely within the control of the' police."

Sanon v. State, 978 So.2d 275 (Fla. App. 4 Dist. Apr 16, 2008) – "Appellant was convicted of felony cruelty to an animal as a result of a dog being dropped from a fifth floor apartment. ... The officer testified that he and a trainee officer were driving in a gated community when he saw

a boy talking on a cell phone, crying and flailing his arms. When the officer asked the boy what had happened, the boy responded that his father had thrown his dog off the balcony. ... We conclude that, because there was no ongoing emergency, because the event described by the son had occurred twenty minutes earlier, and because the officers approached the son rather than the other way around, the son's statement incriminating his father was testimonial and not admissible under *Crawford*." [NOTE: Would the result have been the same if the victim was a person rather than a dog? If so, does the result depend on the value the appellate judge places on the victim's life, or whether he/she concludes the child's grief is proportionate to the death?]

Paraison v. State, 980 So.2d 1134 (Fla. App. 3 Dist. Mar 26, 2008) – "Paraison's convictions for armed burglary with assault/battery, kidnapping with a weapon, and armed robbery with a firearm stem from an early morning burglary of an elderly woman, Mrs. Whitehead, during which Mrs. Whitehead was battered, robbed, and bound with duct tape. ... Mrs. Whitehead was found lying on the kitchen floor in her nightgown with remnants of duct tape wrapped around her wrists, face and neck. Although nervous and apparently in shock, Mrs. Whitehead was able to tell two police officers (Officers Dixon and Hayes) and her son what had occurred that night." – she died before trial – "In this case, there was no ongoing emergency at the time Officer Hayes interviewed Mrs. Whitehead. Officer Hayes was simply interviewing the victim of a crime to ascertain the facts necessary to establish criminal activity, assist in further investigation, and further a possible future prosecution. Because Mrs. Whitehead's statements to Officer Hayes were testimonial, they fall within *Crawford*. And, because Paraison had no opportunity to cross-examine Mrs. Whitehead before her death and she will be unavailable to testify at trial, her statements to Officer Hayes should have been precluded."

Royster v. Ercole, 2008 WL 542505 (S.D. N.Y. Feb 29, 2008) (unpub) (habeas) – *Crawford* claim is procedurally barred – but in alternative holding adding: "Here, Ms. Lovelace placed the 911 call within minutes after Mr. Royster shot at the cab in which she was a passenger. (Tr. At 27). Mr. Ndaw testified that Ms. Lovelace immediately called 911 from a pay phone where they had pulled over, just blocks away from the shooting. (Tr. At 330-31). Evidence from Mr. Royster's trial showed that Ms. Lovelace was 'screaming' into the phone and 'carrying on' (Tr. At 437), much as the declarant had given 'frantic answers' in *Davis*. ... Furthermore, as in *Davis*, the answers given by Ms. Lovelace to the 911 operator were characteristic of someone hoping to 'resolve a present emergency.' Thus, the 911 tape was nontestimonial, and Mr. Royster's Confrontation Clause claim based on its admission lacks merit."

State v. Lopez, 974 So.2d 340 (Fla. Jan 10, 2008) – "Police officers were dispatched to an apartment complex in Tallahassee to investigate a reported kidnapping and assault. The alleged victim, Hector Ruiz, met the police officers in the parking lot and told Officer Mel Gaston that a man had abducted him in his own car at gunpoint. Ruiz appeared upset and nervous as he spoke to the officer. Ruiz surreptitiously indicated that Lopez, who was also standing in the parking lot, was the person who had pointed a gun at him and forced him out of his home. ... [W]e conclude that Ruiz's statement to Officer Gaston was testimonial, and is therefore within the scope of *Crawford*. The circumstances here indicate that there was no ongoing emergency at the time Officer Gaston questioned Ruiz. Officer Gaston arrived at the scene of the crime six to eight minutes after the crime had been reported. [cite] At the time Officer Gaston approached him, Ruiz was standing in a parking lot about twenty-five yards away from Lopez, separated from his alleged abductor in much the same way the declarant in *Hammon* was separated from defendant

Hammon when the police arrived." [NOTE: Even though police did not learn the present whereabouts of the gun until immediately after this exchange.]

People v. Rodriguez, 47 A.D.3d 406, 850 N.Y.S.2d 26, 2008 N.Y. Slip Op. 00039 (N.Y. A.D. 1 Dept. Jan 03, 2008) – at trial, there was "testimony that after the codefendant assisted an officer in locating the weapons used in the crime, the codefendant told the officer those were the firearms 'they' had buried in the snow. ... We decline to review this unpreserved claim in the interest of justice. Were we to review it, we would find that the evidence was not testimonial [cites] because, to the extent that there was any police interrogation, the declarations were made 'under circumstances objectively indicating that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency' [cite] that had not abated. The ongoing emergency consisted of the presence of loaded firearms at a playground. Even after locating two weapons, the officer needed to confirm that no other weapons were present [cite]."

People v. Chavez, 2007 WL 4201292 (Cal. App. 2 Dist. Nov 29, 2007) (unpub) – "Detective Carillo spent about a half hour with [shooting witness] Galindo, and from his own account their interaction involved interrogation. To a limited extent, such as the request for photos, his inquiries might be inferred to have been directed at an emergency, of an armed attacker at large. But overall, the danger at the motel had passed, and Galindo's comprehensive statement was more in the nature of one taken to establish past facts, for use against appellant." – held: testimonial – same was true, only more so, of second interview with witness the following day – furthermore, interview with shooting victim in the hospital 45 minutes after his arrival also produced testimonial statements

State v. Lewis, 235 S.W.3d 136 (Tenn. 2007) – antique dealer shot in the chest by robber posing as potential seller of vases, dying shortly after the shooting – "Detective Mike Chastain of the Metro Police Department Armed Robbery unit arrived at the scene prior to the paramedics and observed the victim lying on the floor at the rear of the store. The victim, who was in 'obvious pain' and 'blood[-]soaked,' identified himself to the detective and when asked if he had been robbed, responded, '[H]e tried to.' ... When the paramedics arrived and initiated treatment, the victim pointed with both of his hands and said, '[O]fficer, officer, the lady's information is on the desk.' When asked about what 'lady' to whom he was referring, the victim responded, '[T]he lady with the vases.' On further questioning about whether the 'lady' was connected to the robbery and shooting, the victim stated, 'I know she is.' Another detective found a piece of paper on the counter bearing the name 'Sabrina Lewis,' what appeared to be a driver's license number, and the words 'two vases.' ... It is our view that the victim's statement to Detective Chastain, that he 'knew' that 'the lady with the vases' was involved in the offenses, qualifies as testimonial.FN6 The assailant had left the store. The victim had talked to Summers and Farmer [clerks from a nearby pharmacy] who were first to arrive at the scene. The 911 call had already been made.FN7 In *Davis*, the Court pointed out that 'the fact that [statements were] given at an alleged crime scene and were 'initial inquiries' is immaterial.' *Id.* While the victim's statements here took place at the crime scene, they were responses to inquiries by the investigating officers. Even though the victim was in a state of distress from his wounds, his comments did not describe an 'ongoing emergency,' as defined in *Crawford*, and were instead descriptions of recent, but past, criminal activity as in *Hammon*." [NOTE: I bet the dying man *thought* his death was an emergency.]

People v. Sutton, 874 N.E.2d 212, 314 Ill. Dec. 302 (Ill. App. 1 Dist. Aug 14, 2007) – "Officer Timothy Moroney rode with [shooting victim] Janik in an ambulance to the hospital. On the way

to the hospital, Janik allegedly gave the officer a brief account of events leading up to the shootings along with a general description of the assailant. ... In regard to the interrogation in the ambulance, the circumstances objectively indicate that the primary purpose of this interrogation was to establish the facts of a past crime rather than ascertain or resolve an ongoing emergency. Once the police secured Janik's safety and called the ambulance, their interrogation evolved and they elicited testimonial responses."

State v. Mason, 160 Wash.2d 910, 162 P.3d 396 (Wash. 2007), overruled in part by *Giles v. California* as recognized in *State v. Fallentine*, 2009 WL 151643 (Wash. App. Div. 1 Jan 20, 2009) (unpub) – (1) "An emergency occurred—[subsequent murder victim] Santoso was assaulted and kidnapped by Mason. The emergency ended, Santoso went to sleep, awoke the next day, and then reported the crime. It is surely true that Santoso was afraid and wanted protection from a very real threat. Almost every person reporting a crime, in some sense, seeks the protection of the police. But the test announced by the Supreme Court in *Davis* looks to the 'primary purpose' of the interrogation. *Davis*, 126 S.Ct. at 2274. A prerequisite, the court announced, is that an emergency is 'ongoing.' *Id.* The reason is that a statement made when there is no ongoing emergency does not 'objectively indicat[e] that the primary purpose ... is to enable police assistance to meet an ongoing emergency.' *Id.* at 2273. The significant lapse of time between the emergency Santoso endured and his report to Corporal Haslip, combined with the fact that the statements were made miles away from the scene of the emergency in a safe police station, convince us the statements were testimonial."

(2) "Finally, Mason challenges the testimony of Linda Webb, a domestic violence victim's advocate, who testified that while she helped Santoso form a safety plan he was reluctant and afraid. She repeated Santoso's statements following Mason's release from jail: Santoso said he believed Mason would kill him and begged for the safe haven of jail. Webb reported Santoso's statement that he felt threatened because of Mason's family relationship with a police officer. She reported that he based this belief on his experience in Indonesia. She explained that Santoso said he could not relocate because his family in Indonesia depended on his earnings; he could not risk losing his job and thus starving his family. ... Santoso may have, in his own mind, been securing protection, but the test is objective. ... Santoso's personal reasons are not dispositive. [¶] Santoso's statements were made outside the context of an emergency. He met with Webb six days after the assault, and called her a couple days after that when Mason was released from jail. Santoso was certainly afraid and certainly sought protection. However, he did not describe events as they happen 'to resolve the present emergency.' *Davis*, 126 S.Ct. at 2276. His statements were not 'a call for help against [a] bona fide physical threat.' *Id.*" [NOTE: This seems remarkably cavalier, given that Mason did, in fact, kill Santoso within days. How much more bona fide can a threat get?]

People v. Gonzales, 2007 WL 2247423 (Cal.App. 2 Dist. Aug 07, 2007) (unpub) – gas station gang shooting – "Simon [victim's girlfriend] was a percipient witness who had identified appellant but was afraid to testify because the present case was gang-related. During a hearing on October 14, 2005, Simon told the court she did not want to testify, and she refused to answer questions posed by the prosecutor. ... In the present case (and unlike the one that *Davis* concluded involved nontestimonial statements) the arguably pertinent crime, murder, had been completed before the witness, Simon, gave her statements. Appellant had left the scene before Simon made her statements to [Officer] Azpilicueta. Any emergency arguably involved, not police intervention in an ongoing crime, but paramedics treating the victim of a past crime.

Azpilicueta testified he interviewed Simon to obtain and broadcast suspect information, and to prepare a police report. We conclude the trial court violated appellant's right to confrontation as explicated by Crawford by receiving in evidence Simon's hearsay statements to Azpilicueta."

People v. Nieves-Andino, 9 N.Y.3d 12, 872 N.E.2d 1188, 840 N.Y.S.2d 882, 2007 N.Y. Slip Op. 05584 (N.Y. June 28, 2007) – "Jose Millares was shot in the early hours of November 28, 2000 on the Bronx street where he sold drugs. His associate Michael O'Carroll called 911.

Within minutes, two police officers arrived on the scene, and immediately went to Millares, who was lying, half on the street, half on the sidewalk, between two parked cars. There was a small crowd of onlookers. Officer Doyle bent down to observe the victim more closely. He was bleeding and grimacing with pain. As soon as Officer Doyle had summoned an ambulance, he spoke with Millares, who replied in a low voice. The officer asked for, and Millares gave, his name, address and phone number. The officer then asked Millares what had happened. Millares responded that he had argued with a man named Bori, who had shot him three times, and he told the officer Bori's address. ... Defendant argues that, when the assailant, having left the crime scene, no longer poses a physical threat to the victim, the primary purpose of a police officer's questioning of the victim cannot be to meet an ongoing emergency. We do not believe that *Davis* imposed such a restricted interpretation of what constitutes a continuing emergency. Whether an officer's primary reason for making an inquiry was to deal with an emergency is a fact-based question that must necessarily be answered on a case-by-case basis. Even when the assailant has fled, the circumstances of the police officer's questioning of the victim may objectively indicate that the officer reasonably assumed an ongoing emergency and acted with the primary purpose of preventing further harm. ... Given the speed and sequence of events, the officer could not have been certain that the assailant posed no further danger to Millares or to the onlookers. His brief solicitation of pedigree information and information about the attacker's identity was part of Officer Doyle's reasonable efforts to assess what had happened to cause Millares's injuries and whether there was any continuing danger to the others in the vicinity." – non-testimonial by a 4-3 vote

[NOTE: The dissent, which garnered three votes, would equate "emergency" with "medical emergency" and hold that, as soon as the officer radioed for an ambulance, his actions were no longer directed toward coping with the emergency but toward solving a past crime. The officers arrived at the scene "[w]ithin minutes" of the shooting, but the possibility that an armed killer was nearby, or only a couple minutes away, did not render it an emergency, because there was no "indication that the assailant was still on the scene" – *i.e.*, he didn't shoot the cops, so in retrospect there was no risk that he would do so.]

U.S. v. Arnold, 486 F.3d 177 (6th Cir. 2007) (en banc) – "Nor had the 'exigency of the moment ... ended,' *id.* [*Davis*] at 2277, before Gordon made the 911 call. While Gordon left the house and entered her car around the corner before making the 911 call rather than trying to make the call in Arnold's presence, that did not make the emergency less real or less pressing. It is one thing for the assailant to start 'runnin[g]' after his victim calls 911, to leave in a car and to give the victim an opportunity to lock the door, all of which happened in *Davis* and all of which suggested that the responses to the 911 operator may have evolved into testimonial hearsay. *Id.* at 2271, 2277. It is another thing for the victim to flee the house and for the assailant still to be 'fixing to shoot' her. In *Davis*, the assailant left the scene in a car because he knew the police were on their way, and there thus was no reason to think that he would be back—factors that markedly diminished the peril the victim faced. Gordon by contrast left the residence, went

around the corner and called the police. At the time she made the call, she had no reason to know whether Arnold had stayed in the residence or was following her. What she did know is that he had a gun; he had just threatened her; he was still in the vicinity; there was still 'somebody runnin' around with a gun' nearby, *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir.2006) (internal quotation marks omitted); there was in short an 'emergency in progress,' *Davis*, 126 S.Ct. at 2278."

State v. Koslowski, 2007 WL 1719930 (Wash. App. Div. 3 Jun 14, 2007) (unpub) – victim of home-invasion robbery interviewed by police – "Ms. Alvarez was seeking help and protection from the police. She gave the officers information to apprehend an armed suspect. An officer also testified he was trying to get as much information as possible so he could relay it to other officers in the field. In these circumstances, Ms. Alvarez's statements were not testimonial."

People v. Brenn, 152 Cal.App.4th 166, 60 Cal.Rptr.3d 830 (Cal. App. 4 Dist. June 18, 2007), Review Denied Oct. 10, 2007 – "Appellant questions whether [stabbing victim] Zupsic was facing an emergency at all, given that he had gone next door to call the police. This is an argument much easier to make from a law office than from 100 feet from someone who has just stabbed you. At the time of the call, Zupsic was suffering from a fresh stab wound, appellant was still at large, and it was unclear whether he still had any weapons or was searching for Zupsic. It was known—as is clear from Zupsic's statements—that appellant was 'mentally ill' and had attacked his girlfriend in conjunction with the stabbing episode. It is hard to construct a definition of the word 'emergency' that this scenario does not fit."

Martin v. Michael, 2007 WL 1428672 (W.D. La. 2007) (unpub) – habeas – "[E]ven if the 911 call was made after Martin had fled the scene of the attack, it cannot be said that the emergency ended at that point. The fact remains that, at the time Evans made the 911 call, she had seven stab wounds, was bleeding heavily, and was in need of medical attention. The undersigned concludes that it would be clear to any reasonable listener that Evans and the 911 operator were dealing with an ongoing emergency."

Gayden v. State, 863 N.E.2d 1193 (Ind. App. 2007), transfer denied (June 13, 2007) – "Here, the 911 recording contained non-testimonial evidence *and* evidence that is arguably testimonial. Gayden purposefully objected to the entire recording as testimonial, on the basis that Epperson's purpose in making the call, from the beginning, was to make incriminating statements about Gayden. Because at least a portion of the recording included non-testimonial evidence, the trial court did not abuse its discretion by overruling Gayden's objection to the entire recording, and the issue is waived for review."

People v. Zuniga, 2007 WL 576138, *8 (Cal. App. 6 Dist. 2007) (unpub) – "To resolve that, in fact, there was no ongoing emergency, Officer Hicks would have had to learn these basic facts about Guray's immediate situation. However, as soon as Officer Hicks learned that these events had happened hours rather than minutes before Guray contacted him, and he began to elicit details of the events, such as the color of the gun, or who entered first, Guray's statements became testimonial. Thus, we conclude that the balance of Guray's statements to Officer Hicks were inadmissible under *Crawford* and *Davis*."

People v. Coyazo, 2007 WL 1152683 (Cal. App. 4 Dist. 2007) (replacing prior opinion found at 2007 WL 60776, *8) – gay bashing, car theft, shooting – "Perhaps there was no ongoing *police*

emergency, but there was indeed an ongoing emergency, and Carillo was directed to keep Janosik talking, presumably in an attempt to keep him conscious. Janosik was severely injured, bleeding, and in need of immediate medical attention. Until assistance arrived, Janosik's medical condition rendered the situation an ongoing emergency. His statements, made to a civilian, were made in the context of seeking that help. The questions were not 'part of an investigation into possibly criminal past conduct.' (*Id.* at p. 2278.) We therefore find no *Crawford* violation."

People v. Watson, 827 N.Y.S.2d 822, 834-837 (N.Y. Sup. 2007) – Victim of armed robbery made three statements to police – first two were non-testimonial – "The third statement made by Alexander, unlike the previous two, occurred after the area had been secured and after the emergency had calmed. Loydgren [officer] had the defendant in custody and was no longer on a search for an additional suspect."

State v. Warsame, 723 N.W.2d 637 (Minn. Ct. App. 2006), on remand from SCOTUS for reconsideration in light of *Davis*, *aff'd*, 735 N.W.2d 684 (Minn. 2007)

➤ Sub-Category: When Does Emergency End? Facts of *Davis v. Washington*

Sanon v. State, 978 So.2d 275 (Fla. App. 4 Dist. Apr 16, 2008), states: "The problem with the state's argument is that here there was no ongoing emergency, as in *Davis*, where the victim was speaking to a 911 operator while she was being attacked." This is false, as even a moment of reflection ought to reveal: victims of domestic violence rarely call 911 before an attack begins, and it's almost as rare for attackers to permit their victims to call 911 while the attack is underway.

The bizarre assumption that Ms. McCottry, the victim in *Davis*, "was speaking to a 911 operator while she was being attacked" stems from the following passage in the Supreme Court's opinion: "McCottry was speaking about events *as they were actually happening*, rather than 'describ[ing] past events'". 547 S.Ct. at 827 (italics and brackets in original; citations omitted).

But "events happening" does not mean the same thing as "crimes being committed."

The Washington Supreme Court opinion in the case is quite clear on the sequence of events: "McCottry identified her assailant as Adrian Davis. She told the operator that Davis had used his fists to beat her and that *he had left the residence moments earlier.*" *State v. Davis*, 111 P.3d 844, ¶ 3 (Wash. 2005), *aff'd*, 547 U.S. 813 (2006) (italics added).

In other words, the entire 911 call in *Davis* occurred after Mr. Davis had left the premises.

Geographical Considerations

People v. Suniga, 2008 WL 3090622 (Cal. App. 5 Dist. Jul 03, 2008) (unpub) – DV murder, issue is admissibility of prior reports of abuse – "Although appellant was not at the house when Officer Pree arrived, his whereabouts apparently were unknown and there was the possibility he might regain access to the firearm. Thus, even though Cindy was now somewhat protected because an officer was present, both she and the officer reasonably could have been in danger.

Accordingly, we find no Sixth Amendment violation." – with regard to different incident: "Although Cindy and appellant were physically separated when Officer Alfano contacted her, she had had to leave her home due to appellant's violence, and, given the early morning hour, it was reasonable to infer that Cindy could not return home until the situation was resolved. Under the circumstances, her statements were not testimonial in nature."

State v. Camarena, 344 Or. 28, 176 P.3d 380 (Ore. Jan. 25, 2008) – DV case – "[D]efendant had just left; he could as easily have returned before the police arrived."

State v. Smith, 240 S.W.3d 753 (Mo. App. E.D. Dec 11, 2007) – "Moreover, because Wife traveled to the police station to report a crime, it is clear that the purpose of her interrogation was to 'establish past events potentially relevant to later criminal prosecutions.'"

Santacruz v. State, 237 S.W.3d 822 (Tex. App.-Hous. Sep 27, 2007) (on rehearing) – DV case – "Appellant recently had been enraged with his estranged wife and brutally assaulted her at their nearby home. He then fled with his brother-in-law. Although Canales did leave her house to seek refuge in her mother's house, it is objectively reasonable to conclude there was a risk in this domestic context that appellant would appear at Canales's mother's house."

People v. Gilford, 2007 WL 2783322 (Cal. App. 1 Dist. Sep 26, 2007) (unpub) – "Defendant properly points out that, unlike the victim in *Davis*, J. did not give an account of events as they unfolded, since defendant had already run away by the time J. made his call. This single factor is not, however, determinative of the constitutional analysis. As the above summary of the court's holding suggests, the court's primary focus was on the purpose of the caller in talking to the police and the purpose of the police in questioning the caller. When that purpose is "to enable police assistance to meet an ongoing emergency" (*Davis, supra*, 126 S.Ct. at p. 2273), the call does not constitute "testimony." That the call is made while the crime is still occurring is simply one factor in determining the purpose of the call and the questions. It is plain that J. made his call to get assistance, and because the police had not yet arrived at the scene when the dispatcher was questioning J. about the attacker and his car, it appears that the dispatcher's questions were asked for the purpose of assisting the officers in responding to an unknown situation at the scene. That the attacker had fled the scene when the call was made did not necessarily mean that the emergency was over."

State v. Mancini, 2007 WL 2363719 (Minn. App. Aug 21, 2007) (unpub) – "Here, the record reflects that Officers Robert Buth and Trygve Sand were sent to an address to investigate a domestic disturbance. As the officers approached the address, they observed a black car pull over to the curb and the driver signal to the police. When the officers stopped, they noticed a significant amount of blood on the passenger's face, and were informed by the driver that she was taking her passenger to the hospital. At that point, the officers and the victim got out of their vehicles and further investigation revealed that the passenger's name was D.M. and that she was involved in the domestic disturbance that the officers had been dispatched to investigate. The officers proceeded to inquire into the circumstances of the domestic disturbance. D.M., who 'was crying, mad, and upset,' informed the officers that she had been assaulted by appellant, her estranged husband. Over defense objection, Officer Buth testified at trial that he was told by D.M. that appellant punched and kicked her 'a hundred times.' ... At the time the officers questioned D.M., the domestic dispute was over and D.M. was at least a block or two from the scene. ... Because the emergency was no longer in progress when the officers were attempting to

determine 'what happened' rather than 'what is happening,' the statements D.M. made to police were testimonial."

State v. Warsame, 735 N.W.2d 684 (Minn. 2007) – D.V. victim's phone lines were cut, and she was walking to police station when officer happened upon her – "Warsame further argues that any emergency cannot be expanded beyond [his victim] N.A.'s situation because *Davis/Hammon* defines emergency narrowly to include only "an immediate and continuing threat," not "[p]ossible concerns and emergencies." We conclude that the *Davis/Hammon* test should not be interpreted so narrowly. [¶] In effect, Warsame interprets the *Davis/Hammon* test to circumscribe what may constitute an ongoing emergency to a narrow geographic proximity, based on the declarant's location. We acknowledge such an interpretation comports with the facts in *Davis, Hammon, and Wright*, but we conclude that the Supreme Court did not intend to restrict what may constitute an ongoing emergency to such a limited area. ... Although the police in the Hammon case were encountering the alleged assailant at the scene of the crime, where the victim remained, the necessity to assess the assailant and any threat to personal safety is equally applicable when the police are pursuing that assailant outside of the victim's proximity. ... We conclude that extending an emergency beyond the declarant's geographic proximity comports with the fundamental concern the Supreme Court considered in *Davis/Hammon*, which was distinguishing between interrogations by the police for the purpose of addressing ongoing emergencies and interrogations for the purpose of gathering evidence for trial. We conclude that if the objective circumstances of the interrogation indicate that the primary purpose is to address an ongoing emergency, regardless of where that emergency is occurring, a declarant's statements are nontestimonial."

Pre-Davis / Hammon Excited Utterance Cases

Smith v. State, 2006 Tex. App. LEXIS 5173, 2006 WL 1653356 (Tex. Crim. App. 2006) (unpub) – "Defendant appealed his conviction stemming from an assault on his wife, but the court affirmed, stating that the evidence was sufficient to support the conviction. The officer testified that he observed raised red marks on the victim's neck and forehead and the officer stated that the injuries sustained appeared to have been recent and consistent with assault. A jury could have rationally inferred that defendant caused the raised red marks to appear on her forehead at the time he slammed her head against the wall, and thus, inferred that the marks would not have been there prior to that point. Further, the officer's testimony regarding statements made to him by the victim upon his arrival at the scene were appropriate under Tex. R. Evid. 803(2) because a reasonable person could have concluded that the victim made the statement at issue while under the excitement, fear, or pain of the event at the time she made the statement. Additionally, his Sixth Amendment right to confrontation was not violated because those statements were not testimonial in nature."

People v. Nieves-Andino, 30 A.D.3d 1137, 815 N.Y.S.2d 577, 2006 N.Y. Slip Op. 04361, (N.Y. A.D. 1 Dept. 2006), leave to appeal granted, 7 N.Y.3d 850, 857 N.E.2d 75, 823 N.Y.S.2d 780 (2006) – "Defendant's right of confrontation was not violated when the court admitted, as an excited utterance, the murder victim's declaration to the first officer on the scene that he had an argument with defendant (whom he identified by his nickname) and that defendant shot him three times. ... Here, aside from asking the victim some pedigree questions, the officer simply asked 'What happened.' Accordingly, the victim's response was not testimonial".

In the Interest of J.A., 385 N.J.Super. 544, 897 A.2d 1119 (N.J. App. Div. 2006), overruled by State ex rel. J.A., 195 N.J. 324, 949 A.2d 790 (N.J. Jun 23, 2008) –

State v. Hall, 2006 N.C. App. LEXIS 952, 2006 WL 1147290 (N.C. Ct. App. 2006) – “[The officer] testified that as he was exiting his car, before he spoke, she started shouting, “My son shot him. Help him. Help him. My son, Eric, shot him.” Furthermore, another officer who arrived on the scene twenty minutes later testified that Ms. Hall was still so agitated that he was unable to question her. As Ms. Hall made these statements to Officer Crist spontaneously, not in response to police questioning, and while still excited from the event, we conclude that her statements, like those of the victim in *Forrest*, were not testimonial and thus their admission did not violate defendant's Confrontation Clause rights under *Crawford*.”

Bell v. State, 928 So. 2d 951 (Miss. Ct. App. 2006) – Defendant was convicted of killing the mother of his 2 daughters (ages 4 and 5) witnessed the murder. “Adrienne and Ashley were legally unavailable to testify during trial. Numerous police officers testified as to what Adrienne and Ashley said to them on the morning that Charity was found murdered. Those police officers went to Charity's house only after Mr. Thompson reported finding Charity murdered. Adrienne and Ashley gave their statements as a result of questions asked by police officers. The police officers asked those questions with the intent to surmise the events surrounding Charity's murder. The act of questioning, sometimes termed 'interrogation,' was in the strict context of the investigation. There can be no doubt that the girls' hearsay statements, offered through other witnesses because the girls were unavailable, qualifies as prior testimony made during police interrogations. Likewise, there can be no doubt that Bell never had the opportunity to cross-examine his daughters and he could not do so through cross-examination of the police officers following their hearsay testimony gleaned from police interrogations. Therefore, Bell had no opportunity to cross-examine the witnesses against him. Such evidence is one of the few specific examples of prohibited evidence mentioned in *Crawford*. Thus, we are of the opinion that the hearsay testimony at issue resulted in a violation of Bell's constitutional rights.”

People v. Sanchez, 138 Cal. App. 4th 1085 (Cal. App. 2d Dist. 2006), review dismissed, cause remanded, 169 P.3d 885, 67 Cal.Rptr.3d 464 (Cal. Oct 10, 2007) - Defendant killed another driver while driving at an extremely high speed while intoxicated – admission of 911 tapes and transcripts from other motorists on the road were not testimonial

State v. King, 132 P.3d 311 (Ariz. Ct. App. 2006) – Defendant was convicted of animal cruelty for killing two puppies. The owner of the puppies was not available for court, but his 911 call and statements to police were admitted as excited utterances. The court disagreed and found that, although excited, an objective person in the declarant's position would have expected that his statements to police and 911 were accusatory and would be later used in court. The court distinguished between “loud cries for help” (which are invariably non-testimonial) and “identifying a suspect or reporting evidence” (which are testimonial)..

Neal v. State, 186 S.W.3d 690 (Tex. App. 2006) – “Defendant's ex-girlfriend called 911 and reported that defendant had broken into her apartment and assaulted her. She told a responding police officer that, after she dialed 911, defendant grabbed the telephone from her and threw it across the room. She did not testify. *** The trial court did not violate defendant's confrontation rights by admitting the recording of the 911 call because the recorded statements were not testimonial. Because the call was made during a crime in progress and made in urgency and with

the desire for a prompt response by the police, it was not made under circumstances that would lead an objective witness to reasonably believe the statements would be available for use at a later trial. The statements qualified as an excited utterance under Tex. R. Evid. 803(2).”

State v. Johnson, 2006 Ohio 1232 (Ohio Ct. App. 2006) – “Two police officers were outside a bar ticketing cars that were illegally parked when a woman ran out of the bar and told one of the officers that there was a male in the bar with a yellow fleece shirt on with a shotgun. Another man ran up to the other officer and told him that the bouncer was pointing a shotgun at people. The officers entered the bar and observed defendant, who was wearing a yellow fleece vest, shutting a vanity door where a shotgun was subsequently found. In defendant's subsequent criminal prosecution, the trial court allowed the officers to testify as to the statements of the woman and the man. Defendant was later convicted. On appeal, the court held that the admission of the excited utterances into evidence did not violate the Confrontation Clause in U.S. Const. amend. VI. The facts that the declarants voluntarily came to the officers' vehicle, that they were panicky, that they immediately left the scene, and that the officers observed a crowd of people leaving the bar shouting that someone had a gun showed that the excited utterances were not testimonial statements made for the purpose of initiating police action against persons engaged in illegal acts.”

Commonwealth v. Tang, 66 Mass. App. Ct. 53, 845 N.E.2d 407 (Mass. App. Ct. 2006) – A young child witnessed a shooting and was still under the excitement of the moment when police officers arrived to secure the scene. The defendant was convicted and on appeal, the court held that the child's statements were non-testimonial. “Emergency questioning designed to secure a volatile scene or provide medical care, however, is not related to the investigation of a crime and does not constitute interrogation. “Such questioning is considered part of the government's peacekeeping or community care function,” *ibid.*, and “cannot be said to be interrogation. Because the questioning is not interrogation, any out-of-court statements it elicits are not testimonial per se and must be evaluated on a case-by-case basis to determine whether they are testimonial in fact.” *Id.* at 10. Whether the questioning at issue had its genesis in the community caretaking function or the need to secure a volatile scene, on the one hand, rather than in the investigative function, on the other, “does not depend . . . on answers to police questions, but on the existence of objective circumstances.” *Ibid.* Whether incriminating out-of-court statements that are determined not to be testimonial per se are nonetheless testimonial in fact depends upon “whether a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting a crime.” *Id.* at 12-13. *** We see nothing in the record to suggest that the questions put to Michael were in aid of the investigation or prosecution of a crime. Unlike *Commonwealth v. Rodriguez*, 445 Mass. 1003, 1004, 833 N.E.2d 134 (2005), the statements were not made in the context of a “secure scene,” nor were they “made in response to investigatory interrogation.” See *Commonwealth v. Williams*, 65 Mass. App. Ct. 9, 12-13, 836 N.E.2d 335 (2005). The statements that Michael made were not even directly responsive to the questions asked him, and the questions that had been put to him were posed in the context of an emergency for the purpose of securing a volatile scene. The statements are not testimonial per se.”

Pitts v. State, 280 Ga. 288, 627 S.E.2d 17, 2006 Fulton County D. Rep. 591 (Ga. 2006) – “The 911 phone call in this case was made by Amy Pitts, the wife of the defendant Ryan Craig Pitts and victim of the crime, while the crime was ongoing. She stated that her husband had broken into her home, that another man was on the porch, and that she needed police to

immediately come to her home and help her. After describing the situation, Amy is heard screaming "Get away from me," and the call was disconnected. The 911 operator called back immediately, and after several attempts, eventually got Amy back on the phone. After stating much of the same information again, the call was once again disconnected. The 911 operator again called back, and when Amy was finally able to answer the call, she told the operator that the defendant was running around the house without any clothes on, that he was violating his parole by being in the house, and that she needed assistance. After Amy again is heard screaming at the defendant, the call was disconnected for a final time." - "When Amy Pitts explained to the operator that her husband had violated his parole and that he was "wanted," she came close to providing testimonial evidence. FN20 Because the crime was still ongoing in her immediate presence, however, her primary purpose remained the prevention of immediate harm to herself, and her statements regarding her husband's parole violation were made to illustrate the prior difficulties that made the current situation such a dangerous one."

Bartee v. State, 922 So.2d 1065 (Fla. Ct. App. 5th Dist. 2006) – "Defendant challenged his convictions, contending that the trial court erred by admitting into evidence the tapes of certain 911 calls, as well as the testimony of a police officer concerning certain statements made by the victim. The appeals court agreed with defendant as to the victim's statements. But, evidence within the 911 calls bore the hallmarks of excited utterances or spontaneous statements, and were properly admitted as such. Further, the statements were not necessarily testimonial in nature, were not made in response to police interrogation, and did not seem to fit any of the categories set out in *Crawford*. However, the unavailable victim's statements to the officer, in response to questioning, albeit excited utterances, were testimonial in character. Because she was not available for cross-examination, her statements should have been excluded."

In re Fernando R., 137 Cal. App. 4th 148; 40 Cal. Rptr. 3d 61 (Cal. App. 6th Dist. 2006) – A robbery victim was unavailable to testify at trial, but 2 bystanders testified to hearing the victim screaming, and a police officer arrived and took statements from the victim. The statements to the police officer were held to be testimonial. "The determination of whether a statement is the product of police interrogation and thus testimonial, in our view, does not rest upon one feature, such as whether the statement occurred in a "formal" setting, was the product of "structured questioning," or constituted a spontaneous statement. Instead, the resolution of whether a statement was the product of police interrogation requires a fact-specific inquiry into a variety of circumstances. (See *State v. Wright* (Minn. 2005) 701 N.W.2d 802, 812-813; *State v. Parks*, *supra*, 116 P.3d at p. 642.) These factors include the time at which the statement was given in relationship to the crime; the status of the police investigation at the time the statement was given, including the extent of police knowledge concerning the occurrence of a crime, potential suspects, and potential victims; whether the crime scene has been secured; the identity of the person hearing the statement (i.e., whether that person was a governmental authority); whether the declarant volunteered the statement or whether the person hearing the statement solicited it; the declarant's purpose for speaking and his or her mental state at the time; the location where the statement was given; whether the statement was recorded, and if so, by what means; the level of detail provided by the declarant; and whether all or part of the statement was in response to questioning. Based upon a consideration of all of the circumstances presented here, we conclude that Durward's statement was the product of police interrogation and therefore testimonial. This result is consistent with *Crawford*'s teachings that a determination of whether a statement is "testimonial" or whether a police interview of a witness is an "interrogation" cannot be made by

arbitrary or narrow applications of those terms. Rather, all of the facts and circumstances surrounding the witness's statement must be considered.

Wilson v. State, 195 S.W.3d 193 (Tex. App. 2006) – The 4 year old child of the victim witnessed her mother being murdered. Still in an excited state, the child, who primarily communicates via sign language, signed to her father, in the presence of a police officer, what she witnessed. The child did not testify at trial, and the statements made to her father in the presence of the police officer were non-testimonial and properly admitted at trial.

Tennessee v. Maclin and Tennessee v. Anderson, 183 S.W.3d 335 (Tenn. 2006) - “The Supreme Court of Tennessee consolidated two criminal appeals to determine whether the admission at trial of an unavailable witness's excited utterance to law enforcement officers at the crime scene violated the defendant's confrontation rights under the Sixth Amendment and Tenn. Const. art. I, § 9. The court concluded that, if the statement was determined to be testimonial, then it was inadmissible unless the witness was unavailable and the defendant had a prior opportunity for cross-examination. If the statement was not testimonial, the statement was admissible if it bore sufficient indicia of reliability. In the first case, the deceased victim's statements that defendant assaulted her were made in response to police questioning; they were testimonial and could not be admitted because she was unavailable for cross-examination. In the second case, statements from eyewitnesses who saw defendant burglarize a building were made under the excitement of the startling event; the admission of these non-testimonial "excited utterances" under Tenn. R. Evid. 803(2) did not violate defendant's confrontation rights.

State v. Ohlson, 2005 Wash. App. LEXIS 3241 (Wash. Ct. App. 2005) – “excited utterances should not be considered as statements that "bear witness." Using this analysis, along with our review of the trial court's conclusion that [the] statements were an excited utterance, we adopt a per se rule and hold that excited utterances cannot be testimonial under **Crawford**.”

Commonwealth v. Morgan, 2005 Va. Cir. LEXIS 189 (Va. Cir. Ct. 2005) – “After the victim had been shot seven times, he was alert, responsive, and praying. While the victim was being placed into the ambulance, a police officer asked him who shot him. The victim answered, "C-Murder shot me." The victim later died from septic shock as a result of the gunshot wounds. Another officer, who had known defendant for a number of years, always knew him to answer to the name "C-Murder." In addition, the police maintain a computerized database of nicknames with corresponding photographs. Defendant's photograph resulted when the nickname "C-Murder" was entered into that database. The court found that the victim believed he was about to die when he made the statement. The fact that law enforcement's questioning prompted the statement, did not render it inadmissible. Therefore, the statement qualified as an excited utterance and a dying declaration. Defendant forfeited his Sixth Amendment right to confrontation by causing the victim's death and thus procuring his absence from the proceedings.”

People v. Cevallos-Acosta, 2005 Colo. App. LEXIS 1960 (Colo. Ct. App. 2005) – “We further conclude that the background statement in the 911 call here was nontestimonial, for the following reasons: the caller was seeking immediate help for the victim; the circumstances were exigent; and the statement from the unidentified declarant was neither elicited by nor made to anybody with authority. Hence, admission of the statement does not violate defendant's confrontation rights under **Crawford**.”

United States v. Hadley, 2005 FED App. 0465P (6th Cir. Tenn. 2005) – In this felon in possession of a firearm case, the defendant’s wife did not testify, but her statements were deemed non-testimonial excited utterances. “The non-testimonial nature of those statements to the police was demonstrated by (1) the statements being made within only a few short minutes after defendant and his wife had engaged in a domestic dispute serious enough to warrant two 911 calls by their household guests; (2) the resulting police intervention was initiated by someone within the residence, and not by the authorities or by the wife herself; (3) when the police arrived at the residence, the wife immediately emerged and blurted out the challenged statements ("he has a gun" and "he's going to kill me") without any questioning or prompting whatsoever; and (4) her statements were not overly detailed or "testimonial" in nature but were limited to the information necessary for the police officers to address the immediate exigencies of the situation.”

Salt Lake City v. Williams, 2005 UT App 493, 128 P.3d 47 (Utah App. 2005) – “Defendant argued, inter alia, that the trial court violated his Sixth Amendment right to confrontation by admitting the victim's hearsay statements regarding an exclamation when she saw defendant and her statement to the 911 operator that defendant had just threatened to kill her. The court of appeals disagreed. The victim's statement that defendant had threatened to kill her was made while the incident was occurring and during a call placed to 911 for the purpose of seeking protection from immediate danger. At the time the statement was made, defendant had blocked the victim's vehicle with his own and was approaching her in a rage. The call was initiated by the victim, not by the police. Furthermore, the information conveyed was designed to communicate the nature and seriousness of the problem. There was nothing to suggest that the victim objectively foresaw that the statement might be used to prosecute defendant. Therefore, the statement (even though relayed through the victim's friend to the 911 operator) was non-testimonial and admissible as an excited utterance. She was startled both by the initial recognition of defendant and also by his threat to kill her.”

Delgado v. State, 2005 Tex. App. LEXIS 9161(Tex. App. 2005) – “Police responding to an emergency call found the victim's body in defendant's apartment. An emergency operator testified that she received a call from defendant's roommate, who was an illegal alien. The roommate told the operator, after seeking and receiving assurances that he would not be deported, that defendant was about to commit a murder. Both the operator and the police officer who found the body testified that the roommate appeared very excited. The roommate was not present at trial. The court, in affirming defendant's conviction, found no error in the trial court's admission of statements made by the roommate. The hearsay exception for excited utterances under Tex. R. Evid. 803(2) was applicable. The court also found no violation of defendant's right to confrontation because statements made to officers responding to a call during the initial assessment and securing of a crime scene were not testimonial. Although the roommate was worried about deportation, he did not make his statements with the expectation that they might be used in a future judicial proceeding.”

Hudson v. State, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005) – “An emergency medical technician (EMT) and two officers testified that the complainant told them that defendant was her common-law husband and that he had punched her in the eye, grabbed her, and put her in a dumpster. The court found that their testimony was properly admitted as excited utterance under Tex. R. Evid. 803(2) because the complainant was visibly shaken and

highly upset. Her intoxication did not negate her state of excitement. The admission of the excited utterance did not violate the Confrontation Clause.”

State v. Kemp, 2005 Mo. App. LEXIS 1660 (Mo. Ct. App. 2005) – “On review, defendant raised three points related to the admission of out-of-court statements made by the victim, who was not present at trial, to her neighbors (the husband and the wife). The appellate court found that the admission of the victim's statements made to the 911 operator through the wife did not violate defendant's right to confrontation as they did not directly fall into any of the four categories of the term "testimonial." The statements were obtained right after the victim was found running down the street half-naked and hysterical. Only a few minutes had passed from the time the victim was contacted by the husband until his wife conveyed the victim's statements to the 911 operator. These statements were made for the purpose of obtaining help and police assistance, not for the purpose of aiding a police investigation and prosecution. Further, it was not an abuse of discretion to admit the statements made at different times to the husband and the wife as the victim was still frantic, had just escaped from defendant, and did not make the statements after reflective thought; thus, they were admissible under the excited utterance exception to the hearsay rule.”

Commonwealth v. Jackson, 2005 Mass. Super. LEXIS 490 (Mass. Super. Ct. 2005) – “An elderly woman, apparently alone in her home after dark, called 911 and reported that an unknown intruder had entered and might still be on the grounds. Throughout the 911 conversation, the alleged victim spoke in a tone of fearfulness, conveying concern for her safety. Some time after the conclusion of the call, police located defendant crouching down in the yard of a nearby house. Defendant was charged with burglary and other offenses. When the alleged victim declined to testify at trial, the Commonwealth sought to introduce the 911 call to prove the burglary charge against defendant. The court found that, under the confrontation clause of U.S. Const. amend. VI, the questioning by the police dispatcher was for the purpose of securing a volatile scene and that the victim's statements in response thereto were not testimonial per se. However, because a reasonable person in the victim's position would have anticipated their use for investigation or prosecution, the statements were testimonial in fact. Consequently, they were inadmissible at trial.”

Wallace v. State, 2005 Ind. App. LEXIS 2088 (Ind. Ct. App. 2005) – “court held that the victim's statements to emergency medical personnel that defendant was the shooter were properly admitted as dying declarations under Ind. R. Evid. 804 or excited utterances under Ind. R. Evid. 803(2), and did not violate defendant's Sixth Amendment right to confrontation because the record was void of any suggestion that the medical personnel's inquiries were made for purposes of preserving it for trial; therefore the victim's answers were not "testimonial" statements.”

United States v. Brito, 427 F.3d 53 (1st Cir. Mass. 2005) – “An anonymous woman called 911 and told the operator that she had just seen a man with a gun in his hand and that, as she was pulling out and driving down the street, the man pointed the gun at her and acted like he was shooting at her car. The woman described the man and the officers that were dispatched spotted defendant, who matched the description. As defendant fled, he dropped a pistol, which was picked up by an officer. A tape of the 911 call was admitted at trial. Defendant argued that the admission violated his Sixth Amendment right to confrontation because he was not able to confront and cross-examine the anonymous speaker. The court held that the district court

properly admitted the call as an excited utterance. The court held that the call was nontestimonial because the urgency of the situation overwhelmed the caller's capacity to appreciate the potential long-range use of her words.”

Compan v. People, 2005 Colo. LEXIS 873 (2005) – The victim, wife of the defendant, did not appear at trial to testify. Statements made by the victim to a friend while still under the stress from the assault were properly admitted as they were non-testimonial.

Lagunas v. State, 187 S.W.3d 503 (Tex. App.-Austin 2005) – Defendant was charged with kidnapping and burglary. On appeal, “Defendant argued that the admission of a child witness's hearsay statements violated his right to confrontation. The court of appeals disagreed. The child's age and her emotional state were factors strongly suggesting that her statements to the officer were non-testimonial. Considering the context, the statements amounted to a small child's expressions of fear arising from her mother's absence. When an officer located the child, he asked her name and told her that he was a police officer. He then noticed that she was “terrified” and crying. The officer's exchange with the child was unlike the sort of formalized or structured interrogation that has been held to give rise to testimonial hearsay. To the contrary, it was closer in nature to a preliminary question in which the officer sought to clarify the child's spontaneous statement that her mother was dead. There was not time to formulate careful, structured questioning. Significantly, after calming the child, the officer asked her no further questions regarding the circumstances of her mother's disappearance.”

Commonwealth v. Foley, 445 Mass. 1001, 833 N.E.2d 130 (Mass. 2005), cert. denied, 126 S.Ct. 2980, 165 L.Ed.2d 990 (2006) – “The police arrived at a home and encountered the adult victim and four children, crouched on a bed. The victim was crying, and the children looked horrified. One of the children pointed to a bedroom. The officer found defendant and took him into custody. The officer then interviewed the victim who identified defendant as her assailant and gave extensive details about the attack. At trial, the adult victim invoked her marital privilege. The officer was allowed to testify to her statements. The appellate court held that the initial responses did not involve interrogation as the purpose behind the questioning involved a community caretaking function. However, statements made in response to questioning after the scene was secure and the victim declined medical attention were made in response to investigatory interrogation. Their admission violated the Sixth Amendment.”

Marquardt v. State, 2005 Md. App. LEXIS 188 (Md. Ct. Spec. App. 2005) – A 911 call from a victim of domestic violence, made as the assault was in progress, was not testimonial under *Crawford*. The victim was requesting help, not formalizing a statement concerning a crime.

State v. Primo, 2005 Ohio 3903 (Ohio Ct. App. 2005) – “Defendant, a nurse's assistant at a nursing care facility, touched the breast of an elderly female patient. Defendant argued that the trial court erred when it admitted the victim's statements as excited utterances. The appellate court held that the victim's statements were excited utterances, pursuant to Ohio R. Evid. 803(2), as the statements related to the startling event while the victim was still under the stress caused by the event. The victim made the statements to a nurse's assistant and two nursing supervisors when they entered her room and inquired about her well-being. The victim began crying and indicated that a black man had pinched or grabbed her breast. The statements in question were not testimonial in nature, and the admission of the statements by the trial court did not violate defendant's right to confrontation.”

People v. Bradley, 2005 N.Y. App. Div. LEXIS 8142 (NY App. Div. 1st Dept. 2005) – “A police officer responded to a 911 call and defendant's girlfriend, who was bleeding profusely, indicated that defendant had thrown her through a glass door. Defendant was arrested. At trial, the girlfriend's bloody clothing was introduced, as were medical records of her treatment, photographs of the apartment, and protective orders against defendant. The chief evidence was the victim's out-of-court statement to the police officer, which was admitted as an excited utterance. Defendant denied causing the injuries, but he was convicted by a jury. On appeal, the court held that the statement of the victim was not testimonial within the contemplation of Crawford, and as such, defendant's constitutional rights to confrontation and due process were not violated. The answer came as a result of a general, non-specific question by the police, which was not interrogatory in nature, such that the statement was not deemed testimonial.”

Gamble v. State, 831 N.E.2d 178 (Ind. Ct. App. 2005) – “The evidence indicated that defendant shot the victim with a shotgun after a dispute over money arose. After the shooting, two people called 911 to report the incident. Defendant argued that the trial court erred in admitting the 911 calls into evidence because the calls were testimonial in nature and the admission thus violated his Sixth Amendment right to confront the witnesses. The appellate court could not say that 911 operators were principally motivated by a desire to preserve statements for future investigations or prosecution. Furthermore, it was the principal motive of the callers to alert emergency medical personnel that someone had been shot. Under these circumstances, the court held that the callers' statements were not testimonial and the admission of the tapes did not violate defendant's Sixth Amendment right to confrontation.”

State v. Parks, 116 P.3d 631 (Ariz. Ct. App. 2005) – “The trial court found Cory had witnessed a startling event, and that his statements to Manor about the shooting were made under the stress of that event and were spontaneous. The trial court did not abuse its discretion in finding Cory's statements to Manor were excited utterances. Nevertheless, as we discuss below, Cory's statements had testimonial significance, and were made during the course of a police interrogation.” After the officer determined that the declarant had witnessed the shooting, he was separated from others. The officer was operating in an “investigative mode and was attempting to ensure that their recollections would remain their own and have more prosecutorial force. These circumstances demonstrate that at the time Manor began to question Cory, the purpose of his questioning was to obtain information regarding a potential crime. Further, although emotional and upset, Cory appeared to have appreciated that what he had witnessed would have significance to a future criminal prosecution.”

United States v. Brun, 2005 U.S. App. LEXIS 15747 (8th Cir. Minn. 2005) – “Police received two 911 calls. In the first call, the victim's nephew requested assistance because defendant and the victim were arguing. Twenty minutes later, the victim called 911, stating that defendant was drunk and fired a rifle into the bathroom. When police arrived, they spoke to the victim and her nephew and later completed a report. At trial, the victim testified inconsistently with her 911 statement. Her nephew was unavailable. Both 911 statements and the victim's statements in the police report were admitted into evidence as excited utterances. On appeal, the court affirmed. Although the nephew did not testify, admission of his 911 statements did not violate defendant's confrontation clause rights. His 911 statements were excited utterances, and they were admissible despite his unavailability because they fell within an established hearsay exception. Similarly, the victim's 911 statements were properly admitted as excited utterances. Additionally,

the victim's statements to the police who responded to the 911 call were excited utterances. The victim was visibly distraught, and her spontaneous statements were not made in response to suggestive questioning by the police.”

Tyler v. State, 2005 Tex. App. LEXIS 4742(Tex. App. 2005) – Statements made to police officers by a gun shot victim immediately before going in to surgery were excited utterances and non-testimonial.

People v. Royster, 18 AD 3d 375; 795 NYS 2d 560 (NY App Div 1st Dept 2005) – The complainant's 911 call was properly admitted at trial as an excited utterance and the tape was non-testimonial because the 911 operator did not ask the caller anything except her location and whether she was injured.

State v. Hembergt, 269 Neb. 840 (2005) – The victim did not testify at trial, but her excited utterances were held to be non-testimonial and admissible at trial. “The record clearly established the element of spontaneity necessary for the victim's statements to be an excited utterance. According to the police officer's testimony, the victim said that the assault had occurred moments prior to the officers' arrival and her statement was volunteered. Assuming the officer's testimony to be correct, there had not been time for the exciting influence to have been dissipated. Given the officer's testimony, the trial court did not err in concluding that foundation for the excited utterance exception to the hearsay rule had been established. Defendant's claim that the statements were made in response to police questioning was contradicted by the record. When asked, the officer specifically testified that the victim's statements were made before any questions were asked. Asking the victim whether there were weapons in the house did not undermine the conclusion that she was still speaking under the stress of nervous excitement and shock produced by the act.”

People v. Rincon, 129 Cal. App. 4th 738; 28 Cal. Rptr 3d 844 (Cal App 2nd Dist 2005) – “Defendant argued that the attempted murder victim's statements to a prosecution witness were wrongly admitted and that their use at trial violated his Sixth Amendment right of confrontation. The court held that the out-of-court statements made by the attempted murder victim to a prosecution witness were admissible as spontaneous statements under Cal. Evid. Code § 1240. The victim's statements lacked any degree of legal or procedural formality. Rather, the victim, who was shot in the ankle during a gun battle, spoke to the witness, a civilian and former gang member, at the witness's home in the immediate aftermath of the shooting. The victim could not reasonably have anticipated that the witness would relate the statements to law enforcement or that the statements would somehow be used in court. Substantial evidence supported a finding that the victim spoke immediately upon the hurt received, while under the stress of excitement caused by the shooting, and before he had time to devise or contrive any thing for his own advantage. Thus, the victim's out-of-court statements were not testimonial, and their use against defendant at trial did not violate the Sixth Amendment.”

Massey v. Lamarque, 2005 U.S. App. LEXIS 8990 (9th Cir Cal 2005) – Spontaneous statements on a 911 tape were non-testimonial and did not require the declarant to testify.

State v. Mason, 127 Wn. App. 554; 110 P.3d 245 (Wash Ct App 2005), aff'd in part, 160 Wash.2d 910, 162 P.3d 396 (Wash. 2007)

State v. Wilkinson, 2005 VT 46 (2005) – “Defendant was accused of pointing a gun at and threatening to kill the victim, his stepson. The victim told defendant's cousin that defendant had pulled a gun on him, that he was frightened, and that he thought defendant was going to kill him. The victim had been convicted of perjury and was therefore incompetent to testify under Vt. Stat. Ann. Tit. 13, § 2907. The trial court admitted the victim's statement to the cousin as an excited utterance under Vt. R. Evid. 803(2). Defendant argued that his confrontation rights were violated because the statement was "testimonial" within the meaning of Crawford. The appellate court disagreed. The statement was not "testimonial" because it was not given to police and was not made during course of the police investigation; the victim was excitedly expressing his fear to a friend.”

Spencer v. State, 162 SW3d 877 (Tex App Houston 14th Dist 2005) – “Defendant's girlfriend did not testify at trial, but the trial court allowed the two officers who responded to the girlfriend's 911 call to testify that she told them that defendant had hit her. The trial court admitted the girlfriend's initial statements to the officers under the excited utterance exception to the hearsay rule. Defendant claimed the ruling deprived him of his right to confront witnesses against him under the Sixth and Fourteenth Amendments to the United States Constitution. The court held that the girlfriend's statements to the officers were not "testimonial," under the Crawford test for analyzing confrontation claims because the girlfriend initiated the contact by summoning the police for help, and the officers' preliminary question at the scene was designed to ensure the safety of those on the scene and did not amount to interrogation. The court noted that even if the girlfriend's statements were made in response to questioning, preliminary questions when police arrive at a crime scene to assess and secure the scene did not constitute interrogation because they bore no indicia of the formal, structured questions necessary for statements to be testimonial.”

State v. Quintero, 2005 Tenn. Crim. App. LEXIS 383 (Tenn Crim App 2005) – Excited utterances are non-testimonial under *Crawford*.

State v. Byrd, 2005 Ohio 1902 (Ohio Ct App 2005) – The 911 tape containing excited utterances of the non-testify victim was deemed non-testimonial and properly admitted at trial.

Towbridge v. State, 898 So. 2d 1205 (Fla Dist Ct Ap 3rd Dist 2005) – *Crawford* does not apply to spontaneous statements.

Anderson v. State, 111 P.3d 350 (Alaska Ct Ap 2005) – “The police responded to a report of an assault, and when they arrived, they found the victim. When the officer asked the victim what had happened, the victim answered that defendant had hit him with a pipe. At defendant's trial, the victim did not testify, but his out-of-court statement was presented to the jury through the hearsay testimony of the officer. The trial court ruled that the victim's statement was admissible as an excited utterance. The trial court's decision was affirmed on appeal, however, the case was remanded to the appellate court to review the case in light of the U.S. Supreme Court decision in Crawford. The issue in the instant case was whether the victim's response to the officer's question, "What happened?" qualified as "testimonial" hearsay under Crawford. The appellate court ruled that the victim's response was not "testimonial" for purposes of the Confrontation Clause. An excited utterance by a crime victim to a police officer, made in response to minimal questioning, was not testimonial. The appellate court followed the emerging majority view on the admissibility of excited responses to brief on-the-scene questioning by police officers.”

State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (S.C. App. 2005), constitutional ruling vacated as unnecessary to disposition of the case by State v. Staten, 374 S.C. 9, 647 S.E.2d 207 (S.C. 2007) – "Defendant was found to be involved in the shooting death of a college student. On appeal, the court found that defendant's right to confront a witness under the Sixth Amendment, applicable to the states through the Fourteenth Amendment, and under S.C. Const. art. I, § 14 was not violated by the testimony of the victim's roommate that the victim had told the roommate that defendant had earlier pulled a gun on him, as the statement was nontestimonial in that it was not made for later use at trial and it fell under the excited utterance hearsay exception of S.C. R. Evid. 803(2)." **(NOTE: An article written by the original author of this outline was cited as authority in this decision.)**

People v. Coleman, 16 AD 3d 254; 791 NYS 2d 112 (NY App Div 1st Dept 2005) – "The trial court properly admitted the "911" tape. The "911" operator requested and obtained a description of the assailant but otherwise only asked the caller to repeat information he had already volunteered. The "911" tape evidence satisfied both the excited utterance and present sense impression exceptions to the hearsay rule. The "911" tape was not "testimonial" under the U.S. Supreme Court's Crawford v. Washington Confrontation Clause decision. The information conveyed by the "911" caller was for the purpose of urgently seeking police intervention for badly bleeding victims, did not result from structured questioning pursuant to a protocol, and requested only a description of the attacker and information already volunteered. The primary reason for the "911" call was for urgent assistance and was not to phone in an anonymous accusation. In Crawford, the focus of the right to confront testimonial statements was primarily directed at evidence bearing a resemblance to depositions and affidavits, even if unsworn. Crawford did not support the proposition that virtually every report of criminal activity, knowingly made to the authorities, was to be viewed as testimonial."

United States v. Jordan, 2005 U.S. Dist. LEXIS 3289 (D. Colo. 2005) – "The victim was stabbed with a sharpened piece of metal in the main recreation yard of a federal penitentiary. Defendant was also an inmate there, and he was charged with second-degree murder, assault with intent to murder, assault with a dangerous weapon, and assault resulting in serious bodily injury. He moved to prevent plaintiff United States from using evidence of what had been characterized as the victim's dying declarations. The court noted that at three different points, the victim was questioned, and he identified defendant as the perpetrator. The United States wanted to use those statements under the dying declaration hearsay exception, the excited utterance hearsay exception, and the Forfeiture by Wrongdoing Doctrine hearsay exception. The court rejected all three arguments, finding that admission of a testimonial dying declaration after Crawford went against the sweeping prohibitions set forth in that case. The court also rejected the excited utterance argument, and found that the Forfeiture by Wrongdoing doctrine did not apply in the action."

State v. Alvarez, 107 P.3d 350 (Ariz Ct App 2005) – "Defendant said his two companions pulled a man out of his rental car and beat him; defendant and the companions drove off in the car. Before dying of his injuries, the victim told police he had been assaulted by three men who stole his car. Defendant and two other men were seen in rental car. Blood was found on defendant's shoe, on the companion's clothes, and on concrete blocks found at the murder scene. The appellate court held that, as the evidence had been sufficient to convict defendant of the crimes, the trial court properly denied his motion for a judgment of acquittal. Instructions

concerning reasonable doubt and the elements of felony murder were proper. As the victim had been staggering, bleeding, slipping in and out of consciousness, and asking for medical help, the trial court properly found that he had been under the stress of a startling event; his statement was thus admissible under Ariz. R. Evid. 803(2) as an excited utterance. Since police did not know a crime had been committed when they questioned the victim, his statement was non-testimonial hearsay outside the scope of *Crawford* and its admission did not violate defendant's Sixth Amendment confrontation rights.”

Key v. State, 2005 Tex. App. LEXIS 1573 (2005) – “When Tyler Police Officer Kevin Mobley answered a disturbance call one night, he found Appellant and Rachel Bailey sitting outside on the ground, arguing. Bailey told Officer Mobley that she had been restrained by Appellant since seven o'clock that morning. She had just run from the house and Appellant had grabbed her and pulled her to the ground, causing several injuries. She had bruises on her arms, consistent with fingers grabbing and pressure being applied to the arms with a hand. She had several injuries about her body, arms, and legs. Bailey indicated that she feared Appellant. Appellant was arrested and charged with assaulting Bailey. Officer Mobley and Officer Chris Calloway, who assisted that night, testified at the trial. Bailey did not testify.” Victim’s statements found to be non-testimonial and did not violate *Crawford*.

State v. Anderson, 2005 Tenn. Crim. App. LEXIS 62 (Tenn Crim App 2005) – “Defendant argued that the trial court erred by allowing hearsay statements of eyewitnesses to be introduced through the testimony of a police officer as an excited utterance, thereby violating his right to confront witnesses against him. The appellate court determined that it was clear from the officer's testimony that the juveniles had just witnessed the break-in and were excited to report what they had witnessed. The juveniles' statements described the startling event that they had personally observed. The statements were made in reaction to the exciting event that they had just observed. The brief passage of time between the event and the statements weighed in favor of a finding that the statements were made under the stress or excitement of witnessing a break-in. The statements were not made at a preliminary hearing, grand jury, or former trial. Because an excited utterance was a reactionary event of the senses made without reflection or deliberation, it could not be testimonial in that such a statement had not been made in contemplation of its use in a future trial. Therefore, their admission presented no violation of defendant's Sixth Amendment Confrontation Clause rights.”

Commonwealth v. Gray, 2005 PA Super 22 (PA Super Ct 2005) – “an unsolicited excited utterance to police that is made to obtain assistance during the commission of a crime would not constitute a statement made in contemplation of prosecution. In such a situation, the declarant is not subject to police interrogation and is not influenced by reason or deliberation. The declarant volunteers this information in effort to remedy a perceived emergency, not to create a record against another for use in a future prosecution.” No *Crawford* violation.

State v. Wright, 2005 Minn. App. LEXIS 95 (Minn Ct of Ap 2005) – “Defendant argued, inter alia, that the trial court erred by admitting the hearsay statements of an unavailable witness who lived near the shooting. The court of appeals disagreed. The witness took the initiative to make the 911 call and he volunteered his statements to the officer at the scene. There was no indication that the witness was subjected to structured questioning by the officer, nor was there any indication that he should have reasonably expected his statements to be used at defendant's trial more than one year later. At the time the witness made the statements, he had not been

notified that a crime had been committed, so it would have been objectively unreasonable to believe that his statements would be used at a later trial. Therefore, the statements were not testimonial. The State presented a strong case, so much so that defendant did not appeal on sufficiency of the evidence grounds. The combination of the relatively light importance attached to the witness's testimony, the corroborative evidence surrounding the incident, and the strength of the State's case showed that admittance of the hearsay statements, if done in error, was harmless beyond a reasonable doubt.”

People v. King, 2005 Colo. App. LEXIS 111 (Colo Ct of Ap 2005) – “where, as here, a victim makes an excited utterance to a police officer, in a noncustodial setting and without indicia of formality, the statement is nontestimonial interrogation under *Crawford*.”

Ariz. V. Aguilar, 107 P.3d 377 (Ariz Ct of Ap 2005) – “In this opinion, we apply the Court's revised approach in order to determine whether a particular type of hearsay-excepted out-of-court statement, the excited utterance, is testimonial. Because we find that an excited utterance heard and testified to by a lay witness does not fit within *Crawford's* definition of testimonial, as we understand that term, we find no error in the trial court's admission of certain excited utterances that inculcated Defendant.”

People v. West, 355 Ill.App.3d 28 (Ill App Ct 2004), not followed by People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675, 318 Ill.Dec. 707 (Ill.App. 1 Dist. Feb. 25, 3008) – “The victim was kidnapped, robbed and raped, but was murdered prior to trial. Immediately after the crimes, the victim ran to a house and the police were called. Although statements made by the victim to police officers when being questioned at the hospital were deemed testimonial and excluded on appeal pursuant to *Crawford*, the appeals court upheld the admission of statements made by the victim to an officer who arrived at the house when the victim was calling for medical help. The court held that “the questions posed by the officer were preliminary in nature and for the purpose of attending to [the victim’s] medical concerns, not for the purpose of producing evidence in anticipation of a potential criminal prosecution.” As to statements made to the 911 operator, the court held “we find that those statements made to the 911 dispatcher concerning the nature of the alleged attack, [the victim’s] medical needs, and her age and location are not testimonial in nature, and were properly admitted at trial. These statements were given immediately after [the victim] was brutally assaulted and in a state of shock for the purpose of requesting medical and police assistance. Further, the dispatcher's questions concerning what was wrong, whether [the victim] was in need of an ambulance, what her age was, and where she was located were posed in order to gather information about the situation and to secure medical attention for her, not to produce evidence in anticipation of a potential criminal prosecution. However, those statements made by [the victim] which described her vehicle, the direction in which her assailants fled, and the items of personal property they took are testimonial in nature. These statements were made in response to questions posed by the dispatcher for the stated purpose of involving the police. As such, [the victim’s] responses are comparable to those obtained through official questioning for the purpose of producing evidence in anticipation of a potential criminal proceeding, and their use at trial to secure the defendant's conviction implicates the central concerns underlying the confrontation clause. Accordingly, we find that the portion of [the victim’s] statement to the dispatcher which described her vehicle, the direction in which her assailants fled, and the items of personal property they took are testimonial in nature, and their admission at trial violated the defendant's right of confrontation.”

United States v. Griggs, 2004 U.S. Dist. LEXIS 23695 (SDNY 2004) – “The government seeks to introduce testimony by a police officer, summoned to the scene from the police precinct across the street, who heard the statement “Gun! Gun! He's got a gun!” and observed the declarant gesture at the defendant to identify the person to whom his statement had referred. The government has indicated that this witness has not been found by government investigators. The government seeks to introduce this testimony pursuant to the hearsay exceptions for either excited utterances or present sense impressions. Although the Crawford court did not provide a definition for what constitutes a “testimonial” statement, the Second Circuit has subsequently stated that a declarant's statements are testimonial if they are “knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings.” Therefore, these statements fall within both hearsay exceptions and are not testimonial.

Wilson v. State, 151 S.W.3d 694 (Tex App Ft Worth 2004) – “A few days after the robbery, a police officer saw a car that matched the description given by the victim. Defendant, the driver, matched the physical description given by the victim. The officer told defendant to exit the car, but defendant took off instead. The car eventually came to a stop, and defendant and two others took off running through a field. Defendant's girlfriend approached the officers and told police defendant's initials and gave them his wallet. The court held that the girlfriend's statements were nontestimonial and that Crawford did not apply. She initiated the interaction with the officers, her statements were made in the course of her inquiring about her car and the missing occupants, and she was not responding to tactically structured police questioning. The trial court properly admitted the statements [as excited utterances]. The officers testified that the girlfriend seemed upset and nervous and looked like she was about to cry. A reasonable person could conclude that she made the statements while under stress, fear, or excitement from seeing her car wrecked, abandoned, and surrounded by police officers, knowing that she had lent the car to her boyfriend.”

State v. Nelson, 2004 Ohio 6153 (2004) – Admission of a 911 tape having the victim as caller on the tape was nontestimonial and did not violate *Crawford* when the victim was unavailable for trial.

State v. Powers, 99 P.3d 1262 (2004) – “The court held that the trial court, on a case-by-case basis, could best assess the proposed admission of a 911 recording as testimonial or nontestimonial and whether the statement originated from interrogation. Despite the seriousness of defendant's alleged conduct, the victim's call was not part of the criminal incident itself or a request for help entitling the State to prove their case without affording defendant the opportunity to cross-examine the victim, a right case law protected. The record showed that the victim called 911 to report defendant's violation of the order and described him to assist in his apprehension, rather than to protect herself from his return. Thus, her statements were testimonial and were erroneously admitted at trial when she became unavailable. Because the 911 tape was the only evidence establishing the corpus delicti, without it, defendant's statements to police were inadmissible.”

People v. Victors, 819 N.E.2d 311, 353 Ill. App. 3d 801 (Ill App Ct 2004) – The victim of an assault made out-of-court statements to a police officer at the scene. Before making these statements, the victim had previously spoken with another officer for about 5 minutes. At trial, the victim did not testify and the court admitted the statements to the officer as excited

utterances. On appeal, the court found the statements were not excited utterances due to the intervening interview by the first officer and, therefore, declared the statements to the 2nd officer to be testimonial and required the victim to testify at trial.

Lopez v. State, 888 So.2d 693 (Fla Dist Ct App 1st Div 2004) – Police officers were dispatched and located the victim of an alleged carjacking. The officer asked the victim what happened and the victim, nervous and upset, told the officer he was abducted at gunpoint and then pointed to the defendant who was standing nearby. A short time later, the victim told the officer that the gun was still located in his car. The victim could not be located for trial and the prosecutor admitted the statements as excited utterances. On appeal, the court affirmed that the statements were excited utterances but that there cannot be a blanket rule that all excited utterances are “automatically excluded from the class of testimonial statements.” The court found “these statements were not made to a person in authority for the purpose of accusing someone, or in the words of the Supreme Court, to “bear testimony” against someone. In contrast, a startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect. In this situation, the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made. These principles lead us to conclude that the statement at issue was a testimonial statement. While it is true that Ruiz was nervous and speaking rapidly, he surely must have expected that the statement he made to Officer Gaston might be used in court against the defendant. He knew that Gaston was a policeman who was on the scene in an official capacity to investigate a reported crime. Even in his excitement, Ruiz knew that he was making a formal report of the incident and that his report would be used against the defendant.”

Rogers v. State, 814 N.E.2d 695 (Ind Ct App 2004) – At the scene, a police officer took a statement from the victim. The victim was injured (cut on the forehead that was bleeding), visibly upset and shaking all over and did not appear to be aware of what was going on around him. The victim did give a statement to the officer identifying his assailant and demeanor. The court found the statement by the victim to be excited utterances and not testimonial. The very concept of an excited utterance (a declaration from one who has recently suffered an overpowering experience is likely to be truthful) is such that it is difficult to perceive how such a statement could ever be “testimonial.

State v. Orndorff, 95 P.3d 406 (Wash. 2004) – “Defendants entered the victim's home and threatened two children with guns while looking for the victim. They further struck the victim with a rifle, causing profuse bleeding. *** Coble's excited utterance fits into none of these categories. It was not a declaration or affirmation made to establish or prove some fact; it was not prior testimony or a statement given in response to police questioning; and Coble had no reason to expect that her statement would be used prosecutorially. Rather, Coble's statement was a spontaneous declaration made in response to the stressful incident she was experiencing. We hold that Coble's excited utterance was not testimonial ...”

State v. Barnes, 2004 Me. 105, 854 A.2d 208 (2004) – “Defendant argued that the admission of his mother's statements to a police officer following an earlier alleged assault constituted a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. Specifically, the issue was whether the statements were “testimonial” in nature. The state supreme court concluded that the admission of the statements did not violate the Confrontation

Clause for several reasons. First, the police did not seek the mother out. She went to the police station on her own. Second, her statements were made when she was still under the stress of the alleged assault. Third, she was not responding to tactically structured police questioning, but was instead seeking safety and aid. The police were not questioning her regarding known criminal activity. Thus, the interaction between defendant's mother and the officer was not structured police interrogation triggering the cross-examination requirement of the Confrontation Clause. Nor did the victim's words in any other way constitute a "testimonial" statement. Therefore, it was not obvious error for the trial court to admit the officer's testimony."

People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Sup. Ct. 2004) – “the Court denies the motion because the 911 call here is not 'testimonial' in nature as the term 'testimonial' is used in *Crawford*.” “It is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather, the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril.” “The 911 call – usually, a hurried and panicked conversation between an injured victim and a police telephone operator – is simply *not* equivalent to a formal pretrial examination by a Justice of the Peace in Reformation England. If anything, it is the electronically augmented equivalent of a loud cry for help.” “Moreover, a 911 call can usually be seen as part of the criminal incident itself, rather than as part of the prosecution that follows. Many 911 calls are made while an assault or homicide is still in progress. Most other 911 calls are made in the *immediate* aftermath of the crime. Indeed, the reason why a 911 call can qualify as an "excited utterance" exempt from the rules of evidence barring hearsay is that very little time has passed between the exciting event itself and the call for help; the 911 call qualifies as an excited utterance precisely because there has been no opportunity for the caller to reflect and falsify her (or his) account of events.” (NOTE: On 11-26-04, the underlying facts regarding the 911 caller and the time of call came in to question as not being accurate in this opinion. The 911 caller was a neighbor, not the victim, and the call was made 9 hours after the alleged crime. The Judge writing the opinion is standing behind his reasoning, but attorneys should be aware that the facts outlined in the decision are not wholly accurate.)

People v. Cortes, 24 Misc. 3d 575, 781 N.Y.S.2d 401 (2004) – 911 tape is testimonial and the caller must be present at trial in order to admit the tape. “The first emergency call on the 911 tape was made by a male observer who could not be located by the prosecution and was therefore unavailable for cross-examination at trial. *** The 911 operator asked questions about the shooter's location, description, and direction of movement, all necessary for the police to conduct their investigation. *** The tape shows that the caller supplied information to the 911 operator in response to the operator's questions and that he also gave relevant information before the question was asked. *** The circumstances of some 911 calls, particularly those reporting a crime, are within the definition of interrogation. *** The police department collects information about crimes through callers to 911 who either are aware of the needed information because they have been told by public communications or because they are specifically asked by operators. The method for taking the calls falls within the definition of interrogation. *** The admission of 911 calls in New York is premised on the theory of spontaneous declaration, excited utterance or present sense impression. When a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding; it makes no difference what the caller believes.”

People v. Caudillo, 2004 Cal. App. LEXIS 1691 (Cal App 6th Dist 2004) – “the caller made the call immediately after witnessing the shooting. The caller could still see the Lincoln nearby. Although she had left the scene by the end of the call, she indicated that she was still afraid by stating that she did not want to give her cell phone number and did not want to “drive back by.” She was clearly excited and stressed by the incident.” *** “First, the 911 call was not “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” The 911 call was initiated by a witness to a shooting. The declarant was speaking to a dispatcher who was attempting to obtain information to assist the police in responding appropriately, by providing assistance to any victims and apprehending the gunman to prevent any further violence. The call in this case stands in stark contrast to the statement in *Crawford*, which was made during a formal police interrogation after both the defendant and the declarant had been arrested. Here, the call occurred before any arrests were even made. Second, the 911 call cannot be described as an “extrajudicial statement[] ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” The 911 call was an informal report of a recent shooting; its purpose was to advise the police of the situation so that they could take appropriate action to protect the community. Finally, the 911 call was not “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” This was a classic 911 call, made immediately after a crime was committed. The caller was simply requesting help from the police by describing what she saw without thinking about whether her statements would be used at a later trial. In conclusion, we do not believe that a 911 call such as the one admitted in this case was within the contemplation of the *Crawford* court when it concluded that the Confrontation Clause of the Sixth Amendment bars introduction of “testimonial” statements. The call here was initiated by a citizen witness to a crime; it was not initiated by the government or an agent of the government. The details provided by the caller were elicited in order to facilitate appropriate police response, not to provide evidence to be used at a later trial. Under the circumstances in this case, we believe that the admission of the 911 call did not violate the Confrontation Clause.

State v. Wright, 686 N.W.2d 295 (Minn Ct App 2004) – 911 tape of frantic victims requesting help was held non-testimonial and an excited utterance.

State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004) - spontaneous statements by victim made after being rescued from a kidnapping and made to non-questioning police officer were excited utterances and non-testimonial. No *Crawford* analysis needed.

People v. Rivera, 778 N.Y.S.2d 28 (N.Y. App. Div. 1st Dept 2004) – Excited utterance hearsay exception is not testimonial. “The court properly admitted the victim's girlfriend's telephoned statement to the victim's sister, identifying defendant as the assailant, under the excited utterance exception to the hearsay rule. This declaration, made within minutes of the stabbing by a crying, screaming declarant, was clearly made under the continuing stress and excitement caused by the startling event, and was not made under the impetus of studied reflection”

Leavitt v. Arave, 371 F.2d 663 (9th Cir. Idaho 2004) – The victim was brutally murdered by an intruder in her home. The night before the murder, she frantically called 911 regarding a prowler trying to enter her home and she named the defendant as the prowler. “Among other things, she said that she thought the prowler was Leavitt, because he had tried to talk himself into her home

earlier that day, but she had refused him entry. Leavitt claims that the admission of the hearsay testimony violated his rights” *** “The Idaho courts relied upon the state's residual exception, which is not firmly rooted, but the evidence could properly have come in under the excited utterance exception, which is. *See Wright*, 497 U.S. at 817, 820, 110 S. Ct. at 3147, 3149. We have considered the circumstances and have no doubt that the victim was speaking while under the baleful influence of an exceedingly stressful event – the attempt by an intruder to break into her home. Nor do we doubt that she lacked the time or the incentive to reflect upon and confabulate a story. Thus, the evidence properly came in as an excited utterance. There was no violation of Leavitt's constitutional rights.” *** “We do not think that Elg's statements to the police she called to her home fall within the compass of these examples. Elg, 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. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate “the principal evil at which the Confrontation Clause was directed[.]” “

People v. Corella, 122 Cal. App. 4th 461 (Cal App 2d Dist 2004) – Defendant assaulted his wife and she called 911 and reported the assault. She also repeated the accusation to police and medical personnel. At preliminary hearing, the victim recanted her accusation and admitted to giving a false statement. The victim did not testify at trial and her statements to the police were admitted. The conviction was upheld on appeal as not violating *Crawford* because the victim initiated the 911 call, not the police. Moreover, the victim provided spontaneous statements describing the assault and this did not rise to level of interrogation. Preliminary questions by a police officer at the scene is not an interrogation. Although the spontaneous statements were admitted at trial, these statements were made without reflection or deliberation and could not have been made in contemplation of testimonial use at trial.



Part 10: Effectiveness of Limiting Instruction

Some courts hold that limiting instructions prevent (or cure) *Crawford* error, while others consider the limiting instruction in harmless error analysis.

Limiting Instruction Eliminates Issue

People v. Peyton, 229 Cal. App. 4th 1063, 1075-77, 177 Cal. Rptr. 3d 823, 833-34 (2014), review denied (Nov. 25, 2014) – “Gutierrez's statement about recent auto theft was not admitted to prove the truth of the matter asserted but to explain why Detective Medina asked Gutierrez to wear a “wire” and record a conversation with appellant. The jury received a limiting instruction and was instructed at the conclusion of the trial that evidence admitted for a limited purpose was not to be considered for any other purpose. (CALCRIM 303.) It is presumed that the jury understood and followed the instructions.”

United States v. Johnson, 767 F.3d 815, 817-24 (9th Cir. 2014) – “To the extent that there was any risk that the jury might rely on Burgess's statements when deciding Williams's guilt, the trial judge properly gave a limiting instruction, informing the jury that Burgess's statements were

admissible against Johnson only. There is a strong presumption that jurors follow a court's instructions."

De La Fuente v. State, 432 S.W.3d 415, 423-24 (Tex. App.--San Antonio 2014) – "Officer Reyes stated that he learned De La Fuente 'had been boasting about committing the shooting.' ... Here, assuming Reyes's testimony was improper, any error was cured by the trial court's instruction to disregard."

Coleman v. State, 325 Ga.App. 700, 753 S.E.2d 449, 454-55 (Ga. App. 2014), reconsideration denied (Feb. 7, 2014) – "we presume the jury followed the trial court's limiting instruction ..."

State v. Frasquillo, 161 Wn. App. 907, 255 P.3d 813 (Wash. Ct. App. 2011) – co-defendant's statement to police that gun belonged to defendant, offered to prove co-defendant's constructive possession of gun – "the court instructed the jury not to consider the statements of one defendant as evidence against the other, precluding the jury from considering Joseph's statement as evidence that David owned the shotgun. *Crawford* therefore does not apply and David's argument on this point fails."

United States v. Celestin, 612 F.3d 14, 19-20 (1st Cir. Mass. 2010) – "in light of the district court's limiting instruction, we find there was no violation of Celestin's Confrontation Clause rights."

United States v. Hendrickson, 2010 U.S. Dist. LEXIS 40439, 19-21, 2010-1 U.S. Tax Cas. (CCH) P50,368; 105 A.F.T.R.2d (RIA) 2079 (E.D. Mich. 2010) (order on motion for new trial) – "In light of this instruction, the admission of the IRS records did not run afoul of *Melendez-Diaz* or the Supreme Court's other Confrontation Clause decisions."

McWatters v. State, 36 So. 3d 613 (Fla. Mar. 18, 2010), re'g denied (June 2, 2010) – "In this case, the trial court took the additional precaution of giving a limiting instruction to the jury... Because the statements were not offered for the truth of the matter asserted, we find that McWatters' reliance on *Crawford* is unwarranted."

State v. George, 150 Wn. App. 110, 206 P.3d 697 (Wash.App. Div. 2 May 12, 2009) (published in part) – "The court sustained counsel's objection and ordered the jury to disregard Rackley's statement. Thus, there is no *Crawford* violation." (from unpublished portion)

State v. Basil, 2009 WL 1174777, 2009 N.J. Super. Unpub. LEXIS 1038 (N.J. Super. A.D. May 04, 2009) (unpub), **result left undisturbed in an incredibly fractured decision, State v. Basil, 202 N.J. 570, 998 A.2d 472 (N.J. 2010)** – testimony regarding 911 call "was more detailed than the Court permitted in *State v. Bankston*, 63 N.J. 263, 268 (1973), which limited police testimony as to why an officer re-sponded to a particular location to a statement that the response occurred as the result of 'information received.' Nonetheless, in light of the judge's instruction to the jury that the statement should not be con-sidered for its truth, we do not regard its admission as resulting in reversible error."

People v. Garcia, 2009 WL 1133343 (Cal. App. 1 Dist. Apr 28, 2009) (unpub) – DV murder – "However, at the request of defense counsel, the trial court instructed the jury that the officers'

testimony regarding Rodriguez's statements could not be used 'to prove that certain acts of violence occurred,' but could only be considered 'insofar as that the mak-ing of such statements may reflect the fear of Nicole, the alleged victim [in] this matter, or some other state of mind of Nicole Rodriguez.' Thus, because the trial court made clear to the jury that this evidence was nonhearsay, the Sixth Amendment was not implicated and appellant's confrontation rights were not violated." – [NOTE: Statements should have been admissible under Souter / Breyer holding in *Giles*.]

U.S. v. Bermea-Boone, __ F.3d __, 2009 WL 1078656 (7th Cir. Apr 23, 2009) – "Here, although the statement was improper, it was immediately treated as such by the district court. ... In our view, it is clear that whatever the error, it was cured by the district court..." – [NOTE: Curiously enough, there was no statement – the witness was interrupted before getting it out.]

People v. Theus, 2009 WL 1039832 (Cal. App. 2 Dist. Apr 20, 2009) (unpub) – trial court "admonished the jury that Whitman's statements were not being offered for the truth of the matter asserted, but only to explain why the detective retrieved particular items during the search of Whitman's house. This limiting instruction prevented an improper use of Whitman's statement."

Porter v. Yates, 2009 WL 412127 (C.D. Cal. Feb 13, 2009) (unpub) (habeas) – "the trial court contemporaneously admonished the jury that the statements were being offered merely 'to explain [petitioner]'s comments and his actions af-terwards not for the truth of what is being offered there.' ... Thus, [co-defendant] Hambly's statements and [Detective] Carver's comments were not hearsay. ... Because the statements were being offered for a nonhearsay purpose, the Confrontation Clause was not implicated."

State v. Roberts, 951 A.2d 803, 2008 ME 112 (Me. Jul 08, 2008) – D.V. murder – "[¶ 34] ... The trial court's instruction to the jury establishes that the affidavit was not admitted for the truth of the matters asserted in it."

Moore v. State, 1 So.3d 871 (Miss. App. Jun 24, 2008) – anonymous tip admitted to explain why officers put defendant's picture in photo array – "we find that the trial judge's limiting instruction was sufficient to avoid any confrontation clause violations"

Bloom v. People, 185 P.3d 797 (Colo. Jun 09, 2008) – "The Confrontation Clause prohibits the admission of out-of-court statements as evidence against the accused. *Crawford* ... In this case, however, Gouge's reference to Ellis's polygraph results was not admitted into evidence. To the contrary, the trial court expressly instructed the jury not to use the statement for any purpose whatsoever at the time the reference was made, and the court repeated that instruction in written form to the jury before deliberations. We presume that the jury followed these instructions. [cites] Therefore, we hold that the trial court did not violate Bloom's right to confront the witnesses against her."

U.S. v. Harper, 2008 WL 1984267 (5th Cir. May 08, 2008) (unpub) (on rehearing) – under *Richardson*, no *Crawford* violation when jury was instructed to disregard a remark that only inferentially (if that) implicated defendant

Nelson v. Bradshaw, 2008 WL 1901392 (N.D. Ohio Apr 25, 2008) (unpub) (habeas) – " Mr. Nelson has failed to demonstrate that the trial court's decision ran afoul of this objective [*i.e.*, *Crawford*] where the testimony was not admitted and the jury was immediately and directly admonished to disregard the statements. The state appeals court's determination not to treat, as a confrontation clause issue, testimony that was not admitted at trial was a reasonable application of clearly established federal law."

U.S. v. Wilson, 2007 WL 2174571 (11th Cir. Jul 30, 2007) (unpub) – "The court instructed the jury not to credit the confidential informant's statements as truth, because they were only being provided as context for Dawkins's statements. Accordingly, the recording was not hearsay, nor did it violate Wilson's constitutional right to confrontation ..."

Benjamin v. Cunningham, 2007 WL 2127212 (E.D. N.Y. Jul 25, 2007) (unpub) – jury was instructed hearsay was only to be considered as evidence of witness's state of mind, and therefore was not testimonial

U.S. v. Homick-Van Berry, 2007 WL 2050873 (3rd Cir. Jul 18, 2007) (unpub) – "*Crawford* and its progeny are inapplicable here, however, because the District Court admitted Clinton's statements against him alone, and specifically instructed jurors that they 'may not consider Clinton Van Berry's statements to the FBI on December 17th in any way against Nadine Van Berry.' ... We find, therefore, no Sixth Amendment violation under *Crawford*."

U.S. v. James, 487 F.3d 518 (7th Cir. 2007) – "The district court's limiting instructions confined the jury's consideration of Dubon's statements to Agent DePodesta to non-hearsay purposes. The testimony elicited from Agent DePodesta conformed to those limiting instructions. Agent DePodesta's testimony regarding Mr. James' prior dealings with Dubon were not excludable as hearsay. ... Because Agent DePodesta's testimony as to Dubon's prior dealings with Mr. James was not hearsay and Mr. James had the opportunity to cross-examine Agent DePodesta, there is no violation of the Confrontation Clause."

People v. Lopez, 2007 WL 738787, *9 (Cal. App. 5 Dist. 2007) (unpub) – "*Crawford* is not applicable here because, as previously discussed, it is reasonable to presume that the jury followed the trial court's instructions to only consider the statements against the declarant defendant and not against the nondeclarant defendants. Because the statements were properly admitted under *Bruton* and their admissibility was limited to only the declarant defendant, the testimonial evidence was not admitted against the nondeclarant defendants and the right to confrontation is not involved. The nondeclarant defendants had no need to engage in cross-examination because the testimonial evidence was not admitted against them."

Com. V. Thomas, 448 Mass. 180, 188, 859 N.E.2d 813, 819-820 (Mass. 2007) – "Assuming ... that the *Crawford* decision might apply retroactively, the testimony was properly admitted for a nonhearsay purpose that was carefully defined by the judge in a limiting instruction."

U.S. v. Acosta, 475 F.3d 677, 683-684 (5th Cir. 2007) – "The court admitted the statement with the limiting instruction that it was 'not being allowed into evidence to prove whether the contents of the exhibit are true or not true. In other words, it is not being offered to establish the truthfulness of what it says.' [¶] Juries are presumed to follow limiting instructions. *United States*

v. Bieganowski, 313 F.3d 264, 288 (5th Cir.2002). Because the statement was not admitted to establish the truth of the matter asserted, it does not contravene *Crawford*."

State v. Collins, 2006 WL 2843229, *6 (Tenn. Crim. App. 2006)

McCoy v. U.S., 890 A.2d 204, 215-216 (D.C. 2006) – "The facts here do not trigger a *Crawford* issue, because Woodard's statement was offered only against Woodard, and not against McCoy, as the court's instructions to the jury made clear. ... 'Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant. This accords with the almost invariable assumption of the law that jurors follow their instructions.' *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)."

State v. Carpenter, 275 Conn. 785, 821, 882 A.2d 604, 629 (Conn. 2005) – "In the present case, the trial court permitted the state to introduce the affidavit not for its truth, but to assist the jury in understanding the reasons for Kidder's recommendations to the Probate Court. Defense counsel recognized this purpose when he specifically requested, and the trial court subsequently gave, a limiting instruction to the jury to that effect. We therefore conclude that the defendant's constitutional claim must fail because the admission of out-of-court statements for purposes other than their truth raises no confrontation clause issues. See *Crawford v. Washington*, supra, at 59-60 n. 9, 124 S.Ct. 1354, citing *Tennessee v. Street*, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)."

State v. Ruggiero, 211 Ariz. 262, 120 P.3d 690 (Ariz. App. Div. 2 2005) – "As the state correctly points out, neither *Bruton* nor *Crawford* is controlling here because the state introduced the lieutenant's rebuttal testimony about Soto's out-of-court statement not to prove that Ruggiero had killed the victim, but solely to impeach Soto's prior statement to his girlfriend that he had done so. ... In view of the limited purpose for which the lieutenant's rebuttal testimony was admitted and the trial court's limiting instructions relating thereto, we find no constitutional error in the court's admission of this evidence."

Le v. State, 913 So.2d 913 (Miss. 2005) - "¶ 98. ... *Crawford* is distinguishable from the case sub judice ... in the case sub judice, the trial court gave a limiting instruction to the jury which explained that Tran's statement to law enforcement was not to be considered in determining Le's guilt or innocence, but was only to be considered for limited purposes of determining the credibility of Tran's statements."

People v. Beloney 2006 WL 3813676, *16 (Cal. App. 6 Dist. 2006) (unpub) – "Had the statements by Edmond and Edwin been admitted against Avery, that admission would undoubtedly be *Crawford* error. (*Song, supra*, 124 Cal.App.4th at p. 982.) Here, however, the trial court instructed the jury that statements by Edmond were not to be considered against any other defendant, and the court similarly instructed that the statements made by Edwin were not to be considered against any other defendant."

People v. Villegas, 2005 WL 2812795, *5-6 (Mich. App. 2005), appeal denied, 480 Mich. 931, 740 N.W.2d 304 (Mich. Nov 02, 2007)

Limiting Instruction Makes Any Error Harmless

U.S. v. Rittweger, 274 Fed.Appx. 78 (2nd Cir. Apr 23, 2008) (unpub) – "the limiting instructions given by Judge Koeltl were sufficient to render any *Crawford* error harmless beyond a reasonable doubt."

People v. Torres, 2008 WL 256752 (Cal. App. 5 Dist. Jan. 31, 2008) (unpub) – "Since Lawrence's statements did not directly or indirectly incriminate either Jose or Willie, the *Aranda-Bruton* rule was inapplicable and any *Crawford* error was cured by the limiting instruction."

U.S. v. Santos, 449 F.3d 93, 100 (2d Cir. 2006) – "Our *Crawford* harmless error analysis relates only to the government's evidence of the first element—the existence of a conspiracy to rob. The *Crawford* inquiry only involves this first element because, as mentioned above, the district court instructed the jury to consider K. Rodriguez's post-arrest statement for the sole purpose of establishing the existence of a conspiracy to rob. We presume that the jury followed the instruction not to consider K. Rodriguez's post-arrest statement when considering whether the government established the second element—that A. Rodriguez, Delarosa, and Vazquez Baez, *participated in* the conspiracy. *See McClain*, 377 F.3d at 223. There are no circumstances in this case that counsel us to deviate from this presumption. *See United States v. Downing*, 297 F.3d 52, 59 (2d Cir.2002) ('Absent evidence to the contrary, we must presume that juries understand and abide by a district court's limiting instructions.')."

People v. Saenz, 27 A.D.3d 379, 380, 811 N.Y.S.2d 395, 396 (N.Y. A.D. 1 Dept. 2006) – error in admission of nontestifying codefendant's plea allocution harmless, when it was "accompanied by careful limiting instructions that the jury presumably followed" – [Note: Court says another reason it was harmless was that it "did not implicate defendant", which would seem to mean the declarant wasn't a "witness against" the defendant.]

State v. Gomez, 163 S.W.3d 632, *648 (Tenn. 2005), certiorari granted, judgment vacated and remanded for reconsideration of sentencing issue, 127 S.Ct. 1209, 167 L.Ed.2d 36 (2007) – (this case had both *Crawford* and *Apprendi/Blakely/Booker/Cunningham* issues) – "Furthermore, we conclude that the *Crawford* error in this case is harmless beyond a reasonable doubt. Guartos' statement did not directly implicate Londono or Gomez. Immediately after each detective testified about the statement, the trial court provided a cautionary instruction to the jury, limiting the jury's consideration of the testimony about the statement to the issue of whether the conspiracy existed and forbidding its consideration as to whether a particular defendant joined in the charged conspiracy. Jurors are presumed to follow the instructions of the trial court."

A.S. Goldmen, Inc. v. Phillips, 2006 WL 1881146, *33 (S.D. N.Y. 2006) (unpub) (habeas) – (citing numerous cases)

U.S. v. Lewis, 144 Fed.Appx. 131, *133 (2d Cir. 2005)

Limiting Instruction Ineffective

People v. Murillo, 231 Cal. App. 4th 448, 179 Cal. Rptr. 3d 891 (Cal. App. 2014), as modified (Dec. 9, 2014) – "Ordinarily, we assume the jurors follow the trial court's instructions, even when the Confrontation Clause is implicated." – but offering only conclusory explanation why it rejected the assumption in this case

State v. Ricks, 2013-Ohio-3712, 136 Ohio St.3d 356, 995 N.E.2d 1181, 1189 (Ohio 2013) – while this opinion sets out the trial court's limiting instruction at length, it never explains why it was inadequate – only the concurrence discusses it

U.S. v. Riggi, 541 F.3d 94 (2nd Cir. Sep 04, 2008) – "While we ordinarily 'presume that juries follow limiting instructions,' [cite] it is inappropriate to do so 'where the prejudicial spillover was so overwhelming, they cannot be presumed to be effective,' [cite]. Under the particular circumstances of the trial in this case, there was an 'overwhelming probability that the jury [was] unable to follow the court's instructions.'" – as shown by "the alignment of the verdicts" – fact-intensive analysis – this was a multi-defendant mob trial

Smith v. State, 986 So.2d 290 (Miss. Jun 26, 2008) – "¶ 29. In accordance with *Bruton*, this Court continues to hold that a violation of the Confrontation Clause by admission of a codefendant's out-of-court statement which implicates the defendant in a crime cannot be cured by the granting of a cautionary instruction such as the ones entered in this case."

U.S. v. Becker, 502 F.3d 122 (2nd Cir. Sep 13, 2007) – trial court admitted plea allocutions of 11 co-conspirators – "Precisely because the presumption that juries follow limiting instructions is a strong one, it is imperative that such instructions be clear and unequivocal. The district court explicitly instructed jurors not to consider the plea allocutions as proof of Becker's membership in the conspiracy, but did not mention other forbidden purposes. As a result, a reasonable juror might have assumed that she was permitted to consider the allocutions as to Becker's intent to commit securities fraud. ... Even assuming that the district court's limiting instructions did, as the government suggests, imply that the plea allocutions could not be considered for any purpose other than Becker's membership in the conspiracy, we conclude that it would be 'quixotic' to expect jurors to follow them."

Absence of Limiting Instruction (category added March 2009)

United States v. Gayekpar, 678 F.3d 629, 632-634 (8th Cir. Minn. 2012) – Bruton issue – "If the only question in this case were the sufficiency of the redaction, then we would find no error. ... the redaction was sufficient to allow the pragmatic presumption that a jury would follow a limiting instruction. ... Unfortunately, however, there was no limiting instruction in this case. ... The admission of Boe's statement thus violated Gayekpar's rights under the Sixth Amendment, and the error was plain."

Commonwealth v. King, 959 A.2d 405, 2008 PA Super 243 (Pa. Super. Oct 17, 2008) – ¶ 12 ... the statement, if it had been offered solely as motive, would not have constituted hearsay and would have been properly admitted. However, since the jury was not instructed with respect to the manner in which such evidence of motive was to be regarded, the statement must be

considered as substantive evidence admitted for the truth of the matter asserted, which clearly rendered it hearsay." [NOTE: No indication that defendant requested such an instruction.]

Sapp v. State, 2007 WL 1120470 (Tex. App.-Hous. 2007) (unpub) – "The State argues that the document was not hearsay because it was not offered for the truth of the matter asserted. This is simply not true. No matter what the State's intention was in offering the document into evidence, the offer was not limited in any way, and was therefore an offer for all purposes, including the truth of the matter asserted. *See Hammock v. State*, 46 S.W.3d 889, 895 (Tex.Crim.App.2001). The State's closing argument, stating the reasons why the State admitted the document into evidence is not the same as limiting the offer of the evidence. The evidence was offered for all purposes, and it was error to admit the document for the truth of the matter asserted." – [Note: It's admitted for the truth unless there's an explicit limiting instruction?]

Limiting Instructions Generally (category added September 2013)

U.S. v. Wright, 722 F.3d 1064, 1065-68 (7th Cir. 2013) – "But while this kind of boilerplate instruction might not be reversible error under our precedent, we are concerned that generic jury instructions unadapted to the particulars of a case may fail to give the practical guidance that lay jurors need. [FN] If scenarios like these arise in the future, and instructions are to be given, those instructions should tell the jury—directly and concretely—what it can and cannot consider, and why. For example, the jury could have been told that the CI's half of the conversation was being played only so that it could understand what Wright was responding to, and that the CI's questions and statements standing alone were not to be considered as evidence of Wright's guilt."



Part 11(A): Waiver and Post-*Giles* Forfeiture Cases

***Giles v. California*, 554 U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (June 25, 2008)**, ruled that a defendant does not forfeit the right to confront a witness he killed or intimidated unless he killed or intimidated the witness with the purpose or intent of preventing the witness from testifying. A lengthy instant analysis of *Giles* can be found in part 1 of this Outline. The decision is fractured and the main opinion is unclear, providing many opportunities for wrong results.

Determining Which Is (Are) the Majority Opinion(s) in *Giles*

As noted in part I of this outline, the various opinions in *Giles* add up to two different majorities.

***Crawford v. Commonwealth*, 55 Va. App. 457, 686 S.E.2d 557 (Va. Ct. App. 2009), aff'd *Crawford v. Commonwealth*, 281 Va. 84, 704 S.E.2d 107 (Va. 2011)** – "fn11 *Giles* was a plurality opinion of the Supreme Court. Therefore, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds

...'" [cites] By "join[ing] all but Part II-D-2 of [Justice Scalia's] opinion," Justices Souter and Ginsburg's concurrence provided a clear majority on the remaining portions of the opinion. Giles [cite]. Thus, Justice Scalia's opinion, minus Part II-D-2, constitutes the holding of Giles, as it is the narrowest position of at least five Justices concurring in the result."

Mental State Required for Forfeiture

(as noted in part I, *Giles* does not actually require specific intent)

Smiley v. State, 216 Md.App. 1, 84 A.3d 190 (Md. Spec. App. 2014), cert. granted, 89 A.3d 1104 (Md. April 18, 2014) – "It is a specific-intent doctrine." – [NOTE: *Giles* itself doesn't say that.]

People v. Roscoe, 303 Mich.App. 633, 846 N.W.2d 402, 406-09 (Mich. App. 2014) – "The trial court's admission of the victim's August 23, 2006 statement *408 violated both the rules of evidence and defendant's right to confront the witness because the trial court failed to make a factual finding that defendant had the requisite specific intent."

State v. Franklin, 307 P.3d 983, 984-89 (Ariz. App. 1st Div. 2013) – "Knowingly inducing a person to avoid attending trial under A.R.S. § 13–2804.A fits within conduct designed to deliberately cause unavailability under Rule 804(b)(6)."

People v. Burns, 494 Mich. 104, 832 N.W.2d 738 (Mich. 2013) – "Insofar as it applies to the Sixth Amendment, however, the forfeiture doctrine requires that the defendant must have specifically intended that his wrongdoing would render the witness unavailable to testify." - [NOTE: *Giles* doesn't require specific intent.]

State v. Belone, 285 P.3d 378, 378-383 (Kan. 2012) – trial held before *Giles* – "The State did not show that Belone killed Begay for the purpose of preventing her from testifying at trial. At most, the evidence suggested that the killing was motivated by jealousy. Moreover, the State's attempt to carve out a different rule for domestic violence cases is unavailing. Accordingly, we affirm the Court of Appeals' holding that the district court erred in admitting Begay's testimonial statements to the police ..." – [NOTE: A majority of the U.S. Supreme Court, rather than the Kansas prosecutors, "carved out an exception" for abusive relationships, although it's not really an exception at all but rather an application of *Giles*. See the opinions of Souter and Breyer.] – opinion following retrial, **State v. Belone, 51 Kan. App. 2d 179, 343 P.3d 128 (2015)**

State v. Fraser, 170 Wn. App. 13, 282 P.3d 152 (Wash. Ct. App. 2012) – "To the extent *Mason* holds that the exception applies even where the defendant did not commit the wrongful act with the specific intent to prevent testimony, *Giles* overrules it." – [NOTE: *Giles* doesn't require specific intent in the technical sense; the phrase appears only once in the majority opinion, in a riposte to the dissent.]

Commonwealth v. Szerlong, 457 Mass. 858, 859-871, 933 N.E.2d 633 (Mass. 2010) – "In the context of forfeiture by wrongdoing, we conclude that the state of mind requirement is the same regardless whether it is described as intent, design, or purpose."

➤ Sub-Category: Mixed Motives or Purposes
(category added March 2013)

State v. Supanchick, 354 Or. 737, 323 P.3d 231 (Or. 2014) – "Finally, defendant suggests that his wife's statements were admissible under OEC 804(3)(g) only if his "primary purpose" in killing her was to make her unavailable as a witness. The text of the rule does not impose that requirement. It provides that a declarant's statements are admissible if the party against whom they are offered engaged in wrongdoing that was 'intended to [and did] cause the declarant to be unavailable as a witness.' Nothing in the text of the rule requires that a party have had only a single purpose in engaging in wrongdoing, nor does anything in the text of the rule require that one purpose predominate over another. Rather, if one purpose for killing his wife was to make her unavailable as a witness, as the trial court found, then the trial court could find that defendant intended to make his wife unavailable, as OEC 804(3)(g) requires."

United States v. Jackson, 706 F.3d 264, 265-270 (4th Cir. Va. 2013) – "Jackson argues that the forfeiture-by-wrongdoing exception to the Confrontation Clause, upon which the district court relied in admitting Greene's statement, does not apply unless a criminal defendant's sole motivation in making a witness unavailable was to prevent that witness's testimony. We hold, however, that so long as a defendant intends to prevent a witness from testifying, the forfeiture-by-wrongdoing exception applies even if the defendant also had other motivations for harming the witness. ... Accepting Jackson's view would play roulette with the safety of cooperating witnesses, who often face immense stress and danger when testifying against co-conspirators and other criminal defendants. ... Our decision to construe the forfeiture-by-wrongdoing exception to apply even when a defendant has multiple motivations for harming a witness places us in accord with our sister circuits and with several state courts. [citing cases]"

State v. Supanchick, 245 Ore. App. 651, 263 P.3d 378 (Or. Ct. App. 2011) – "We first reject defendant's contention that, in order for OEC 804(3)(g) to apply, his wrongful conduct had to be planned with the primary objective of preventing the declarant from testifying. ... The text contains no requirement that the wrongful conduct be for the sole or primary purpose of causing a witness to be unavailable. Rather, the conduct need only be 'intended' to cause that result."

General Forfeiture Cases

(category added October, 2008; renamed Sept. 2012)

see also "Type of Evidence Needed Generally" in this part

(While nearly all forfeiture-by-wrongdoing cases are the same in outline, the facts provable by the prosecution vary widely from case to case. Moreover, *Giles* is so unclear that the standards employed by different judges vary a good deal, too. For both reasons, it is difficult to sort the cases; many seem limited to their facts, even as similar facts lead to different results in different courts. This catch-all category gathers holdings that don't fit into any more specific category.)

State v. Griffin, 14-251 (La. App. 5 Cir. 3/11/15), __ So.3d __ (La. Ct. App. Mar. 11, 2015) – "Investigation into Smith's murder pointed to McClure's brother as the shooter, whose only apparent motive was the fact Smith was the only witness in the murder case pending against Defendant and McClure. Numerous jailhouse phone conversations following Defendant's arrest for Pierce's murder established that Defendant engaged in discussions with multiple individuals about Smith being the only eyewitness to Pierce's murder. The phone calls demonstrated

Defendant's desire and effort to procure Smith's unavailability for trial. ... Based on this evidence, we find no error in the trial court's determination that the State met its burden of proving by a preponderance of the evidence that Defendant engaged or acquiesced in wrongdoing intended to procure Smith's unavailability for trial..." – no sixth amendment violation

State v. McClure, 14-253 (La. App. 5 Cir. 3/11/15), __ So.3d __ (La. Ct. App. Mar. 11, 2015) – [companion to preceding case, *Griffin*, and reaching same result]

People v. Ali, 123 A.D.3d 1137, 999 N.Y.S.2d 530 (2014) – "the People presented clear and convincing evidence that the defendant's intentional misconduct caused the complainant to be unavailable to testify at the trial" – evidence not otherwise described

Brittain v. State, 329 Ga. App. 689, 766 S.E.2d 106 (Ga. App. 2014) – "[victim and witness] Jones immediately moved out of the Clayton County residence she had shared with [murder victim] Brutus, and in fact moved five times within the next year out of fear. However, in June 2008, Jones—who was accompanied by a good friend—applied for food stamps through Fulton County DFCS, where one of Brittain's paramours, Montessia Tinch, worked as a food-stamp processor. ... [A]s part of Tinch's job with DFCS, she could access an applicant's home address.³ Tragically, two days after Jones applied for food stamps, she went missing under circumstances indicative of foul play (more fully described *infra*), and was never heard from again. ... [C]ontrary to Brittain's contentions that there was a lack of proof to show that the doctrine of forfeiture by wrongdoing should apply, the record reflects that the trial court was presented with ample evidence to support its finding by a preponderance of the evidence, and that finding was not clearly erroneous.²⁹ As such, Brittain has not established any violation of his Confrontation Clause rights."

State v. Johnson, 2013-0343 (La. App. 4 Cir. 10/1/14), 151 So. 3d 683, 686-88 (La. Ct. App. 2014) – "Here, the State introduced evidence that Mr. Hymel gave a statement to Detective McCleary in which he said that he saw the defendant shoot Mr. Williams. Detective McCleary testified that Mr. Hymel feared retaliation so they listed him as a 'known witness' in police reports and that his name was redacted from his statement.⁵ On April 29, 2009, at a hearing on the defense's motion to suppress an identification, the defense complained that they did not know the identity of the "known witness." During the hearing, the State provided the defense with a photograph of the man Mr. Hymel had identified as the shooter. This was a photograph of the defendant. The State did not initially realize it, but Mr. Hymel's name and signature were on the back of that photograph. Mr. Hymel was killed later that day. ... We find that the State established by a preponderance of evidence, as provided in Louisiana Code of Evidence article 804(B)(7)(b), that the defendant procured or acquiesced in the murder of Mr. Hymel, thereby making him unavailable to testify. As such, the trial judge did not err in ruling that Mr. Hymel's statement was admissible under the forfeiture by wrongdoing exception to the hearsay rule." – the confrontation clause is discussed at length earlier in opinion

United States v. Johnson, 767 F.3d 815, 817-24 (9th Cir. 2014) – "The court did not err in concluding that the Government produced sufficient evidence to demonstrate that Johnson had intentionally prevented Burgess from testifying. ... [I]t could reasonably be inferred that Johnson had informed other Hoover gang members of Burgess's identity so that they could threaten her against testifying. As the district court noted, Burgess began receiving threats one day after the

defense attorneys were permitted to disclose the witness lists to their clients. Johnson's attorney visited him on that same day, and Johnson had previously expressed interest in receiving the witness list."

State v. Dobbs, 180 Wash.2d 1, 320 P.3d 705 (Wash. 2014) – "¶ 24 Taken together, these facts show that Dobbs was armed, consistently threatened C.R. if she cooperated with the police, and followed through on these threats by showing up at her house with a gun on multiple occasions, once even shooting at it. Any rational individual would fear testifying against such a person. And indeed, C.R. was terrified of Dobbs. She knew he carried a gun, and she knew his threats were escalating. She told police over and over that she was scared that Dobbs was going to kill her. And Dobbs specifically threatened her from jail, warning her not to press charges. The only purpose such a threat could have would be to intimidate C.R. into not participating in the criminal proceedings against Dobbs. The trial judge reviewed the evidence and made a finding of fact that there was clear, cogent, and convincing evidence that Dobbs's violence and intimidation aimed at C.R. was the cause of her decision against testifying against him at trial. Based on our review of the record, we find that his decision was supported by substantial evidence." – incredibly, one justice dissented from this holding

Smiley v. State, 216 Md.App. 1, 84 A.3d 190, 198 (Md. Spec. App. 2014) cert. granted, 89 A.3d 1104 (Md. April 18, 2014) – "Under Section 10–901, the proof of wrongdoing in this case requires proof of two different elements—the effective *actus reus* of murdering Elmer Duffy and the effective *mens rea* of doing so with a particular specific intent, to wit, the intent to prevent Elmer Duffy from testifying. These two intercepted telephone calls from the appellant supply the motivation and the specific intent to get rid of Elmer Duffy as a witness *par excellence*. In terms of intent, no more could be asked for."

State v. Miller, 234 Ariz. 31, 316 P.3d 1219, 1224 (Ariz. 2013) cert. denied, 82 USLW 3685 (2014) – "¶ 3 Miller blamed Steven for the indictment and told several people that he wanted to have Steven and Tammy killed. He tried to recruit four different men to kill them and their family. On February 21, 2006, three months after the arson, the police found the five victims—Steven, Tammy, Steven's brother Shane, and Tammy's children, Cassandra and Jacob—shot to death in their home. ... ¶ 20 Miller's hearsay claim fails because Tammy's and Steven's statements were admissible under the forfeiture-by-wrongdoing exception ... Miller argues that this exception permits hearsay only in the trial for which the defendant silenced the witness—here, the arson case. But Rule 804(b)(6) contains no such limitation. Moreover, such a restriction would frustrate the rule's purpose of preventing a defendant from benefiting from his wrongdoing ... Thus, the trial court did not err, on either hearsay or confrontation grounds, in admitting the statements."

Jenkins v. U.S., 80 A.3d 978, 984-98 (D.C. App. 2013) – "The finding that Jenkins and Israel conspired with the specific intent to prevent Evans from testifying was not clearly erroneous. There was ample evidence, including the recorded jail calls and Jenkins's actions on the night Evans was last seen, that appellants conspired to kill Evans. As to their purpose, Evans's statement to Robertson that Jenkins had confronted him in Adams Morgan about snitching on Israel, in conjunction with Israel's awareness (after speaking with Detective Credle) that he was the main suspect in the Columbia Road shootings and the testimony that Evans was present during the shootings and had identified Israel, furnished a sufficient evidentiary basis for the court to find it more likely than not that appellants intended to prevent Evans from testifying

against Israel. No other motive on their part for killing Evans was adduced. Finally, the evidence supported a finding by a preponderance that it was Jenkins who was the cause of Evans's absence..."

Commonwealth v. Kunkle, 79 A.3d 1173, 1186-87, 1190 (Pa. Super. 2013) – one party to custody battle eliminated the other - although opinion is not entirely clear, it seems to be equating the constitutional forfeiture doctrine with Pa.R.E. 804(b)(6)

People v. Hung Thanh Mai, 57 Cal.4th 986, 161 Cal.Rptr.3d 1, 305 P.3d 1175, 1214 (Cal. 2013) – the opinion does not directly quote the testimony, but apparently defendant explicitly told friend that he shot cop because he "wanted to leave no witnesses" – "the doctrine of 'forfeiture by wrongdoing' precludes defendant from claiming his constitutional rights were violated because he was unable to confront, in court, an out-of-court declarant whom he killed, as the undisputed evidence shows, to prevent the declarant from appearing as a witness against him."

People v. McDade, 301 Mich.App. 343, 836 N.W.2d 266 (Mich. Ct. App. June 18, 2013) – Stafford, a witness to shooting, was housed in same jail as defendant, and defendant sent a note to him, after which Stafford refused to testify – "Here, the note that was passed to Stafford in jail did reflect an effort specifically designed to prevent Stafford from testifying; there was an intent to make him unavailable. The notes from Stafford arguably might suggest that Stafford, on his own volition, did not intend to testify regardless of the note from Kellumn/defendant. Nevertheless, the note to Stafford was clearly intended or designed to keep Stafford off the witness stand, and one could reasonably infer that Stafford did not testify because of the note."

Ward v. United States, 55 A.3d 840, 842-844 (D.C. 2012) – "we agree with other courts that the forfeiture-by-wrongdoing doctrine is not so limited in application that it overcomes the hearsay bar only where the murdered witness was to testify against her killer.⁹ We discern no reason why the doctrine should not apply where, by a preponderance of the evidence, the trial court finds that a defendant procured a witness's death to benefit some other person."

People v. Peters, 98 A.D.3d 587, 587-588, 949 N.Y.S.2d 491 (N.Y. App. Div. 2d Dep't 2012) – "On March 22, 2003, the defendant was involved in a minor car accident with Winston Williams; at the scene of the accident he allegedly threatened Williams with a gun in order to coerce him into paying for the damage to the defendant's car. The police arrested the defendant at the accident scene for possession of a weapon. On March 26, 2003, Williams testified about the incident at a grand jury proceeding. On March 31, 2003, Williams was shot and killed, and the defendant was subsequently arrested and charged with his murder. ... The Supreme Court correctly admitted the grand jury testimony of the deceased victim into evidence and allowed it to be read to the jury. The People established, by clear and convincing evidence, [**493] that the defendant was involved in the murder of the victim, thereby permitting the People to offer at trial the victim's grand jury testimony with respect to the weapon possession charge..."

United States v. Dinkins, 691 F.3d 358 (4th Cir. Md. 2012) – "In January 2006, Dowery testified in the state trial of Parker and Love.ⁿ⁵ After the attempt on Dowery's life in October 2005, measures were taken to protect him as a witness, and he was relocated for his safety outside the Bartlett neighborhood. However, even with these measures in place, Dowery received a message from Gilbert through Dowery's son Cecil, also a member of Special, in which

Gilbert threatened: 'I know where you are at. I know where you walk your girl to the bus stop. I can get you out there. Don't come around here.' ... Gilbert and Goods shot Dowery several times on Thanksgiving Day, and Dowery died from those wounds. ... [W]e conclude that the district court properly admitted the Dowery hearsay statements against Dinkins under the forfeiture-by-wrongdoing exception to the Confrontation Clause pursuant to *Pinkerton* principles of conspiratorial liability."

People v. Hampton, 406 Ill. App. 3d 925, 941 N.E.2d 228, 346 Ill. Dec. 670 (Ill. App. Ct. 1st Dist. 2010), appeal denied (May 25, 2011) – "Here, we believe the State established by a preponderance of the evidence that defendant engaged in conduct intended to render Durr unavailable to testify against him at trial. First, the 'guess who?' letter was properly considered as evidence of defendant's intent to wrongfully procure Durr's absence at trial. It is undisputed that defendant was the author of the letter and Durr was the intended recipient. The letter was mailed on June 28, 2002, four days after defendant's trial began. Defendant discusses trial evidence in the letter and tells Durr he will be called to court to testify on July 16, 2002. Defendant repeatedly tells Durr to 'plead the fifth' because the '[S]tate really need[s] you to get down on me to get a conviction.' Defendant instructs Durr to 'tell your mother to call the [public defender] and get him to file a motion for you to plead the [fifth] so you don't have to come back here.' Defendant ends the letter by telling Durr not to 'get down on me man' and to '[m]ake sure you call my momma o.k.' As noted by the trial court, although Durr never received the letter [which was intercepted by jail authorities], it is evidence of defendant's intent to influence Durr not to testify at defendant's trial."

State v. Fry, 125 Ohio St. 3d 163; 2010 Ohio 1017; 926 N.E.2d 1239; (Ohio 2010) – "Similarly, the record demonstrates that Fry's killing of Hardison was 'designed' to prevent her from testifying against him in any future criminal proceedings. While in jail and awaiting a court hearing on assault charges, Fry made several phone calls to Hardison and his mother about the case. He began coercing Hardison to drop the charges against him and threatening her if she did not. After Fry received the paperwork that Hardison had signed against him, Fry told her, 'You don't know me.' He said, 'I got two of them under my belt * * * toe tags.' He then told Hardison to 'fix this, fix this.' [¶108] The jury also found Fry guilty of Specification Two of Count One for purposely killing Hardison to prevent her testimony in another criminal proceeding or killing her in retaliation for her testimony in any criminal proceeding under R.C. 2929.04(A)(8). Thus, the jury's verdict supports the conclusion that Fry forfeited his right to confront Hardison's statement to police. Based on the foregoing, Hardison's statements to [Officer] Hackathorn were properly admitted."

State v. Cox, 779 N.W.2d 844, 846-853 (Minn. 2010) – "As a practical matter, after *Giles*, the forfeiture-by-wrongdoing exception requires the State to prove (1) that the declarant-witness is unavailable, (2) that the defendant engaged in wrongful conduct, (3) that the wrongful conduct procured the unavailability of the witness and (4) that the defendant intended to procure the unavailability of the witness."

United States v. Hanna, 353 Fed. Appx. 806, 806-812 (4th Cir. S.C. 2009) – "In this case, it is undisputed that Darry allegedly killed Teresa for the insurance proceeds and not with the purpose of making her unavailable to testify. Accordingly, the contested statements cannot be admitted under the forfeiture-by-wrongdoing exception."

Parker v. Commonwealth, 291 S.W.3d 647 (Ky. May 21, 2009) – "Under *Giles*, we must determine not only whether there was sufficient evidence that Parker caused Stephenson's unavailability; but we must further determine whether there was sufficient evidence to show that Parker's motivation in causing Stephenson's absence was to prevent Stephenson from testifying. Unfortunately, the *Giles* opinion does not provide clear guidance in how to approach these thorny issues."

People v. Decosey, 2009 WL 1068878 (Mich. App. Apr 21, 2009) (unpub) – "Here, Detective Timothy DeVries testified that he reviewed telephone calls placed from the Kent County Jail by defendant before the start of trial. Defendant telephoned Nachica and informed her that he loved her and that the two would be married after he was released. Nachica agreed not to appear at court or cooperate with the detectives. Defendant telephoned another friend and stated he planned on continuing a relationship with a woman named Brittany after his release, but, according to DeVries, defendant indicated that he 'needed Nachica to cooperate, not come into court, so she was supposed to think that he was going to be coming back to her....' Because defendant manipulated and influenced Nachica so that she refused to cooperate with police and failed to appear at court to testify, defendant waived any right to confront Nachica at trial pursuant to the doctrine of forfeiture by wrongdoing."

People v. Giles, 2009 WL 457832 (Cal. App. 2 Dist. Feb 25, 2009) (unpub) – the original – remanded for further proceeding without prejudice to another finding of forfeiture

State v. Fallentine, 2009 WL 151643 (Wash. App. Div. 1 Jan 20, 2009) (unpub) – "[Social worker] Fourre stated she had visited Clark in jail after the earlier hearing. She asked him why he would not testify against Fallentine, and Clark told her, 'I can't, I can't look at Conrad in the eye and rat him out like that.' [FN27] When asked why, he replied, 'Don't you remember what happened last time I told the truth to the fire investigator ... ?' [FN28] Fourre understood this to be a reference to Clark's fearful response after his confession to O'Toole. Clark said, 'I want to be able to walk out of here and not have to look over my shoulder all the time. I don't know what kind of connections Conrad has in here or on the outside, and I want to be able to be free of all this shit.' [FN29] Clark also said he did not want to be seen as a snitch inside the jail 'on top of everything else.' [FN30] Fourre testified that after Clark's second interview with O'Toole, she found him on the floor in a fetal position, sobbing. He told her Fallentine had said that if Clark 'rolled on him,' [FN31] Fallentine would have the Gypsy Jokers 'put a hit' on Clark. [FN32] ... Viewed in the light most favorable to the State, [FN33] the evidence shows Fallentine told Clark if Clark testified against him, he would be killed, and that threat actually prevented Clark from testifying. [¶] The court did not err in admitting Clark's hearsay statements under the forfeiture by wrongdoing doctrine."

U.S. v. Vallee, 2008 WL 5411079 (2nd Cir. Dec 30, 2008) (unpub) – "Vallee urges this Court to overrule our cases which hold that '[a] defendant who wrongfully and intentionally renders a declarant unavailable as a witness in any proceeding forfeits the right to exclude ... the declarant's statements at that proceeding and any subsequent proceeding.' (internal quotation marks omitted) (emphasis added). *Giles* does not cast doubt on this controlling precedent and therefore we decline to overrule it."

Roberson v. U.S., 961 A.2d 1092 (D.C. Dec 18, 2008) – "While other inferences are possible, we think that the foregoing facts in their totality permitted the trial court to find it more likely

than not that Roberson and Roberts had planned to eliminate Lee as a witness." – forfeiture established

Brown v. Smith, 2008 WL 4922014 (S.D. N.Y. Nov 12, 2008) (unpub) (habeas) – "There was ample evidence presented at the *Sirois* hearing to enable the state court to find that Ms. Telfer was genuinely afraid to testify. Ms. Telfer testified that she had been approached by petitioner's mother and girlfriend, both of whom exhibited hostility toward her and demonstrated an awareness that Ms. Telfer was listed as an eyewitness on a police report. [cite] Mr. Swinney, the private investigator, had sought out Ms. Telfer repeatedly, both at home and at work, without providing his contact information or identifying his client. [cite] Ms. Telfer had found a threatening note, along with two live bullets, in an envelope on her windshield the night before she was scheduled to testify. [cite] The trial judge noted that Ms. Telfer's demeanor while testifying also indicated her intense fear."

Commonwealth v. King, 959 A.2d 405, 2008 PA Super 243 (Pa. Super. Oct 17, 2008) – commonwealth presented evidence that killing was "in retaliation for Mr. Giles's cooperation in connection with a criminal investigation of Appellant. Special Agent Charles Doerr of the [ATF] testified that he had been investigating the ownership of a handgun that had been used in the Philadelphia County murder of Faheem Thomas-Childs. Special Agent Doerr interviewed Mr. Giles, who had purchased the gun, and Mr. Giles informed the ATF agent that he had bought the gun for Appellant." – evidence satisfied Pa.R.E. 804(b)(6), which is identical to federal 804(b)(6), and therefore automatically met federal constitutional standard

Ware v. Harry, 2008 WL 4852972 (E.D. Mich. 2008) (unpub) (habeas) – "FN1. It is uncontested that Petitioner beat his victim to death with a table leg and then told all witnesses present, 'if it gets out I know who to go to' and 'I know everybody in this house right now ... [i]f this shit go any further y'all next.' ... Petitioner's threat, made after beating a man to death with a table leg, was coercive enough to 'destroy the integrity of the criminal trial system' by preventing a witness from testifying at trial. *Davis*, 547 U.S. at 833. Petitioner's argument that his action was something less than 'extreme' is unavailing, and the court finds the doctrine of forfeiture by wrongdoing was correctly applied at his trial."

State v. Milan, 2008 WL 4378172 (Tenn. Crim. App. Sep 26, 2008) (unpub) – statements made by victim following prior DV were admitted at trial for her subsequent murder – "the evidence established that on the night of the assault, the appellant cut the victim. Later, the appellant returned to the apartment to find the victim and Wendy Tolbert there with the police. The appellant told Tolbert that 'this was all [Tolbert's] fault,' demonstrating that he was upset the victim had contacted Tolbert for help. The evidence also established that after the assault, the appellant and the victim stopped living together. The appellant's preliminary hearing was scheduled to take place on November 8, 2002, just two days after he killed the victim. On the day of the victim's death, her brother found a letter on her apartment door, apparently to remind her that she was to appear in court for the hearing. In light of this evidence, we find that the appellant killed the victim, at least in part, with the intent to procure her from testifying against him at the preliminary hearing and that the victim's statement was admissible under the forfeiture by wrongdoing exception to the hearsay rule. Therefore, reading the statement for the jury also did not violate the appellant's right to confrontation. *See Giles*..."

Urias v. Horel, 2008 WL 4363064 (C.D. Cal. Sep 23, 2008) (unpub) (habeas) – "the prosecutor argued that the defendant cannot kill a witness and then complain that he cannot cross-examine the corpse. ... Here, the jury found that the witness (Singleton) was killed because he was a witness to a crime. (See 19 RT 3588). Thus, under *Giles*, no Confrontation Clause violation occurred here since there was sufficient evidence to justify admission of Singleton's uncontroverted statements to police under the forfeiture by wrongdoing exception." – [NOTE: It's unclear in what sense the jury made that finding – whether it the prosecution's theory of the case, or there a special interrogatory, etc. The record reference isn't otherwise explained. NOTE, also, no discussion of retroactivity of *Giles*.]

People v. Faz, 2008 WL 4294946, *4 (Cal.App. 4 Dist. Sep 22, 2008) (unpub) – "A trial court may find that a defendant has forfeited his right to object on confrontation clause grounds if the prosecution has proven that it was the defendant's wrongdoing that caused the witness to be unavailable. ... [W]e note that the unsworn statement of a prosecutor is not evidence. ... No evidence was presented to support the allegation that the victim was genuinely unavailable or that defendant was responsible for the victim not attending trial. Accordingly, the trial court erred by finding that defendant forfeited his Sixth Amendment right to confront witnesses against him, because the court's finding must be supported by a preponderance of the evidence. Consequently, defendant's Sixth Amendment right to confront witnesses was violated when the victim's prior testimony was introduced at trial."

People v. Gibbs 2008 WL 4149033 (Mich. App. Sept. 9, 2008) – "We also agree with defendant that [murder victim] Dubay's out-of-court statements were not admissible under MRE 804(b)(6). ... *see also Giles v. California*, --- U.S. ---; 128 S Ct 2678; --- L.Ed.2d ---- (2008) (explaining that FRE 804(b)(6) codifies the common law forfeiture by wrongdoing doctrine, which only permits the admission of uncontroverted testimony upon a showing that the defendant intended to prevent the witness from testifying). No evidence indicated that defendant engaged in any wrongdoing with the intent to make Dubay unavailable as a witness at trial." – no legal proceedings pending at the time of murder – apparently decided under state evidentiary rule

U.S. v. Taylor, 2008 WL 4186934 (E.D. Tenn. Sep 05, 2008) (unpub) (mid-trial order) – "Because [murder victim] Luck's statement was testimonial, Defendant has the right to cross-examine Luck. But the government argues Defendant has forfeited that right. This issue presents a close factual question, and on balance the Court concludes Defendant has not forfeited his right. ... Pre-*Giles*, the forfeiture rule would apply here. For the purposes of this motion, the defense barely contests that Defendant killed Luck, and the evidence offered by the government supports that Defendant did kill Luck. Thus, prior to *Giles*, the Court would have admitted Luck's statement because Defendant was responsible for Luck's absence. But since the ruling in *Giles*, the government must also show that Defendant intended to prevent Luck from testifying." – although the prosecution's theory was that defendant killed him for that very reason, the evidence of motive was based on inferences – court found particularly significant that while Luck was shot multiple times, defendant left him before he died – "Although Luck would die later that day, the fact that Defendant did not ensure he was dead leads the Court to conclude the government has not proved Defendant intended to kill Luck to prevent him from being a witness." [NOTE: Compare *Dednam*, below.]

Proffitt v. State, 191 P.3d 963, 2008 WY 102 (Wyo. Aug 29, 2008) – "Very recently, in *Giles v. California*, ... the Court identified "forfeiture by wrongdoing" as one such common law

exception. The holding of *Giles* most pertinent to our present discussion is that forfeiture by wrongdoing does not apply unless the wrongful conduct of the defendant was specifically designed or intended to prevent the witness from testifying. *Id.* at ----, 128 S.Ct. at 2687. [¶ 9] The district court in this case was very careful in applying the forfeiture by wrongdoing doctrine. The court held a pretrial hearing on the issue, and it deferred ruling until several State witnesses had testified at trial, clearly linking B.C.'s death to the appellant's wrongful conduct, and clearly establishing that B.C. was killed specifically to silence him as a witness against the appellant. We are satisfied that the facts and procedures of this case meet the dictates of *Giles*." –it doesn't matter that witness was killed to keep him from testifying in a different case

People v. Webb, 2008 WL 3906837 (Cal. App. 2 Dist. Aug 26, 2008) (unpub) – "In the present case, the trial court (which did not have the benefit of the *Giles II* decision) concluded the forfeiture rule applied because appellant's wrongdoing rendered Washington unavailable, failed to discuss whether appellant had the intent (that is, purpose) to prevent her from testifying, and therefore used the same theory of forfeiture which *Giles II* concluded was erroneous. We conclude the trial court erred by concluding appellant forfeited by wrongdoing his right to confrontation claim." – [NOTE: The opinion contains no independent analysis of forfeiture, as the statements at issue were non-testimonial.]

State v. McLaughlin, 265 S.W.3d 257 (Mo. Aug 26, 2008) – "Scott McLaughlin and Beverly Guenther began a tempestuous relationship shortly after they met in 2002. For several months, the two lived together, but their cohabitation was marked by break-ups that were sometimes so serious that Ms. Guenther would obtain a restraining order against Mr. McLaughlin. In the spring of 2003, they ended their amorous relationship" – and in November he raped and killed her – "Under *Giles*, those parameters [of the forfeiture doctrine] are not as circumscribed as defense counsel argues, at least in the context of cases involving domestic violence. ... This holding does not aid Mr. McLaughlin, however, for *Giles* went on to specifically discuss the application of the doctrine to cases of domestic violence in which the defendant has allegedly murdered the victim. In so doing, it indicated that past acts of violence resulting in murder may be admissible ... FN10. The trial court's finding that Mr. McLaughlin intended to make Ms. Guenther unavailable as a witness, both in the burglary and in the abuse cases, and murdered her to procure her unavailability as a witness, is supported by ample evidence. Ms. Guenther's statements prior to her death about defendant's stalking of her, threats to her, and abusive conduct were made during the time that she was attempting to break from the relationship and had filed for orders of protection and sought protection from the police so that she could safely go from work to home. The police were prosecuting him for burglary of her home less than a month prior to the murder, and during the succeeding month he was seen watching her home. The latest order of protection had been entered the very day of her death, November 20, 2003, and a hearing on the order of protection had been set for the very next day." [NOTE: This was appeal from murder conviction. McLaughlin was separately found guilty of burglarizing Ms. Guenther's home.]

Davis v. State, 268 S.W.3d 683 (Tex.App.-Fort Worth Aug 26, 2008), pet. ref'd (March 11, 2008) – defendant abused the victim 6 months before he killed her, and at his murder trial and officer repeated things she had said on the earlier occasion – under *Giles*, "a defendant does not waive his Confrontation Clause rights under the forfeiture by wrongdoing exception unless the defendant engaged in the wrongful conduct specifically for the purpose of preventing the witness from testifying. [cite] [¶] Here, there is no evidence that Davis murdered Latarsha to prevent her from testifying. Therefore, applying the United States Supreme Court's holding in *Giles*--which

is binding on this court--to the present facts, and in the absence of evidence that Davis killed Latarsha specifically to prevent her from testifying, we cannot hold that Davis forfeited his right to confront Latarsha by killing her." – [NOTE: This is a misreading of *Giles*. Five justices said that an abusive relationship alone can establish forfeiture, and Justice Scalia's majority opinion concluded that the entire history of abuse is "highly relevant" to the question. See *McLaughlin*, the next case summary above this one. The Texas court seems to have jumped to the conclusion that *Giles* requires a showing of specific intent, but *Giles* does not say that.]

Dednam v. Norris, 2008 WL 4006997 (E.D. Ark. Aug 25, 2008) (unpub) (habeas) – "Petitioner was convicted of murdering Jerry Otis ("Otis") to keep Otis from testifying at the trial of Petitioner's cousin, Antoine Baker ("Baker"). Otis had been robbed at gunpoint, and during a police interview conducted by Little Rock Detective Lynda Keel ("Keel"), Otis identified Baker as one of his assailants. After the identification, Baker was arrested and charged with aggravated robbery. Otis was the only eyewitness to the robbery. [¶] Shortly after Baker's arrest, Otis was murdered, and Petitioner was charged in the homicide. ... In the wake of *Giles*, there are only two forms of out-of-court testimonial statements that can be admitted into evidence based on the forfeiture-by-wrongdoing doctrine: (1) declarations made by a declarant who was "on brink of death and aware that he was dying," and (2) statements of a declarant "who was 'detained' or 'kept away' by 'means or procurement of defendant.' ... Petitioner was convicted of murdering Otis to prevent him from testifying against someone other than himself, in a trial for a crime in which Petitioner is alleged to have played no part, i.e., the armed robbery. These distinctions, however, provide no safe harbor for Petitioner. The rule of forfeiture by wrongdoing applies whether a defendant was involved in the murder of a potential witness in his own case or in a case against another person." – [NOTE: The dying declaration exception, *Crawford* stated, was *sui generis* – not an aspect of the forfeiture principle. Note, also, that the state's theory of motive is sufficient to establish the purpose or intent required by *Giles*. Cf. *Taylor*, above.]

U.S. v. Wright, 536 F.3d 819 (8th Cir. Aug 04, 2008) – in dicta (because statements weren't testimonial) stating: "FN3. ... We note that the common law exception at issue in *Giles* is not necessarily co-extensive with the forfeiture-by-wrongdoing hearsay exception codified in Rule 804(b)(6) of the Federal Rule of Evidence."

People v. Osorio, 165 Cal.App.4th 603, 81 Cal.Rptr.3d 167 (Cal. App. 4 Dist. Jul 30, 2008) – in dicta (after finding state had not properly raised issue below), stating: "In *Giles*, the Supreme Court recently clarified that the forfeiture by wrongdoing exception applies only where the defendant acted with the intent or purpose of making the witness unavailable to testify at trial. Although the court did not expressly specify any particular procedure or level of proof required for determining whether the doctrine applies, it recognized that where the defendant is on trial for the witness's murder, the trial court must conduct an evidentiary hearing before admitting the witness's statement if the defendant objects to its admission. [cite] At the hearing, the prosecution cannot rely solely on the unavailable witness's uncontroverted testimony, but must present independent corroborative evidence supporting the forfeiture finding. The prosecution also must show the unavailable witness's prior statement falls within a recognized hearsay exception and the probative value of the proffered evidence outweighs its prejudicial effect." – [NOTE: No authority offered for dictum that corroborative evidence is required.]

Robinson v. Mississippi, 2008 WL 2954946 (N.D. Miss. Jul 29, 2008) (unpub) (habeas) – in dicta, stating "Even if hearsay testimony of the victim Hampton had been introduced at trial,

Robinson lost his right to object to its introduction on confrontation clause grounds under the doctrine of forfeiture by wrongdoing. ... The state introduced overwhelming evidence to support its claim that Robinson conspired to murder the victim, thus causing the victim to be unavailable to testify. Therefore, under the doctrine of forfeiture by wrongdoing, Robinson is barred from raising a confrontation clause claim.

Robinson v. Mississippi, 2008 WL 2954946 (N.D. Miss. Jul 29, 2008) (unpub) (habeas) – in dicta, stating "Even if hearsay testimony of the victim Hampton had been introduced at trial, Robinson lost his right to object to its introduction on confrontation clause grounds under the doctrine of forfeiture by wrongdoing. ... The state introduced overwhelming evidence to support its claim that Robinson conspired to murder the victim, thus causing the victim to be unavailable to testify. Therefore, under the doctrine of forfeiture by wrongdoing, Robinson is barred from raising a confrontation clause claim. [FN1] FN1. The Supreme Court, in a very recent decision, upheld the doctrine of forfeiture by wrongdoing, but clarified the doctrine to encompass only those defendants who procure the absence of a witness for the very purpose of keeping that witness from testifying. *Giles* [cite]. This holding would have no effect on the present case, however, under the general rule prohibiting retroactive application of newly announced rules. *See Teague* [cite]. The exceptions to this general rule do not apply in the instant case. Even if the court were to apply the rule set forth in *Giles*, use of the victim's testimony would be permitted 'when, for example, the defendant is on trial for murdering a witness to prevent his testimony.' *See Giles, supra* at n. 6. That is the fact pattern currently before the court."

In re T.T., 892 N.E.2d 1163, 323 Ill.Dec. 171 (Ill.App. 1 Dist. Jul 25, 2008) – remand order for hearing on forfeiture, without citation to *Giles* – apparently on assumption that Illinois Supreme Court's *Stechly* standard continues to control – issue phrased this way: "On remand, a factual determination should be made as to whether the State can show by a preponderance of the evidence that defendant forfeited his confrontation claim by intentionally intimidating G.F. not to talk about the offenses, ..."

Fields v. Fabian, 2008 WL 2788057 (D. Minn. Jul 15, 2008) (unpub) (habeas) – "The facts show that one month before trial, eyewitness Dennis Johnson received a call from Petitioner from the jail where Petitioner was incarcerated. ... On the phone call, Petitioner told Johnson that his trial was coming up and that Johnson should not testify against him. He also asked Johnson why he didn't hang around with Petitioner's family any more. Johnson testified that he viewed the call as an indirect threat for him not to testify at the trial. As a result, Johnson did not respond to the State's subpoena and had to be taken into custody. Only after the trial court informed Johnson about his obligations and the court's contempt powers did Johnson reluctantly agree to testify at Petitioner's trial. [¶] During Johnson's testimony at trial, two of Petitioner's relatives walked in, sat down in the front row and maintained eye contact with Johnson. Johnson asked for a recess and thereafter refused to testify because he was afraid for his safety. He was also concerned about the safety of his grandmother." – held: petitioner failed to prove by required clear and convincing evidence that state court's factual finding (that defendant intended to prevent witness from testifying) was incorrect – no sixth amendment violation

People v. Suniga, 2008 WL 3090622 (Cal. App. 5 Dist. Jul 03, 2008) (unpub) – "After oral argument, however, the U.S. Supreme Court vacated the California Supreme Court's opinion and held that the forfeiture rule applies only where a defendant engaged in conduct designed to prevent a witness from testifying, so that unconflicted testimony will not be admissible without

a showing the defendant intended to prevent the absent witness from testifying. (*Giles v. California* [cite].) As there was no suggestion here that the homicide expressed appellant's intent to stop Cindy from reporting abuse or cooperating with a criminal prosecution, we will address his confrontation claim on the merits." – [NOTE: The court did not consider the course of the abusive relationship, contrary to the Scalia majority, or the Souter / Breyer second majority opinion, perhaps because it was easy to affirm the murder convictions on other grounds.]

Retroactivity of *Giles*
(category added July 2009)

Ponce v. Felker, 606 F.3d 596, 597 (9th Cir. Cal. 2010) – "*Giles* established a new rule that does not apply retroactively."

Meeks v. McKune, 354 Fed. Appx. 348, 349-355 (10th Cir. Kan. 2009) (habeas) – *Giles* not a watershed rule, and therefore is not retroactive - **affirming Meeks v. McKune, 2009 WL 975135 (D. Kan. Apr 09, 2009)** (unpub) (habeas)

Abusive Relationship
(category added March 2009)

In *Giles*, Justice Souter, joined by Justice Ginsburg, wrote: "the element of intention [required by the majority opinion] would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger."

Justice Breyer, joined by Justices Stevens and Kennedy, quotes this passage from Souter's concurrence and adds: "This seems to say that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim. Doing so when, in fact, the abuser may have had other matters in mind apart from preventing the witness from testifying, is in effect not to insist upon a showing of 'purpose.' Consequently, I agree with this formulation, though I would apply a simple intent requirement across the board."

That makes five votes in favor of Justice Souter's statement. Prosecutors should *always* argue forfeiture when it can be shown that the defendant had a history of abusing his murder victim.

State v. Hosier, 454 S.W.3d 883, 883-91 (Mo. 2015), reh'g denied (Mar. 31, 2015), cert. pet. filed – "Defendant next argues that the admission of Victim's statements on the application for an order of protection violated the Sixth Amendment confrontation clause.... Assuming the statements were inadmissible under the confrontation clause, they are admissible under the forfeiture by wrongdoing doctrine.... *Giles* addresses the intersection of the confrontation clause and the forfeiture by wrongdoing doctrine in the context of abusive relationships:... Under *Giles* and *McLaughlin*, Victim's statements were admissible under the forfeiture by wrongdoing doctrine as Defendant's actions were intended to cause Victim to be unavailable to testify." –

[NOTE: The statements were obviously not intended as evidence in a criminal prosecution, but precisely to avoid such a prosecution.]

Bibbs v. State, 371 S.W.3d 564, 565-568 (Tex. App. Amarillo 2012) – "The evidence regarding appellant's motives for shooting Candy include a theory that he did so to keep her from testifying before an administrative panel convened to possibly revoke appellant's parole. However, the evidence was also presented that the trouble between appellant and Candy was just as likely tied to appellant's obsession with Candy after she decided to terminate their relationship. Accordingly, we do not find the application of the forfeiture of appellant's rights to confrontation because of his conduct to be applicable in this case." – [NOTE: Effectively the court requires that a desire to silence the witness be the *sole* purpose for shooting her, which puts the court in an extreme minority.] – disagreed with by **State v. Supanchick, 354 Or. 737, 323 P.3d 231 (Or. 2014)** ("Not only did the Texas Court of Appeals not identify what in *Giles* led it to that conclusion, but its reasoning is difficult to reconcile with what *Giles* actually said.")

State v. Baldwin, 2010 WI App 162, 330 Wis. 2d 500, 794 N.W.2d 769 (Wis. Ct. App. 2010) – "[¶ 40] The holding in *Giles* did not explicitly dictate the method by which the State must prove the defendant's intent to prevent the declarant from appearing and testifying. However, the majority addressed the issue when responding to the dissent's concern that the majority's narrow view of the doctrine could negatively impact domestic violence cases. Significantly, the majority noted that evidence of past abuse or threats was "highly relevant" to the proof of the defendant's intent to prevent the victim from testifying. ... Baldwin's past physical violence and threats to R.Z. are "highly relevant" to a finding of wrongdoing by forfeiture, even if alone such evidence is not sufficient proof of his present intent. ... we note that Baldwin does not challenge the sufficiency of the record to support the trial court's factual findings that he intimidated R.Z., preventing her from appearing to testify at trial. Indeed, Baldwin could not challenge the sufficiency of the evidence because the jury subsequently found Baldwin guilty, beyond a reasonable doubt, of three counts of intimidating R.Z. based on that same evidence. The jury's findings confirm the trial court's earlier finding of intimidation by a preponderance of the evidence."

People v Smith, 907 N.Y.S.2d 860, 2010 NY Slip Op 20392, 29 Misc. 3d 1056 (N.Y. Sup. Ct. 2010) – "In this case the defense argues that the recorded conversations contain no threats of harm or efforts at intimidation sufficient to prove defendant's intent to silence the witness. Although that is certainly the tenor of the calls, it is not only outright threats that can demonstrate the intent to stay a witness' cooperation, but 'persuasion and control by a defendant' [cite], 'coercion, undue influence or pressure' [cite] and repeated telephone calls [cite]. [¶] The power, control, domination and coercion exercised in abusive relationships can be expressed in terms of violence certainly, but just as real in repeated calls sounding expressions of love and concern. Orders of Protection are therefore issued by courts as much to prevent assaults on the psyche of a vulnerable victim as to prevent assaults on her person. [¶] In this case, the defendant, indicted for five separate incidents of domestic assault, called the victim over 300 times in violation of a court order. This onslaught of attention cannot be viewed in a vacuum, but understood in relation to the surrounding circumstances. The court has been shown, by clear and convincing evidence that the wrongdoing of the defendant has caused the victim to stop cooperating with the prosecution. Thus, in the event she fails to testify at trial, or her trial testimony is contrary to her grand jury testimony, the People shall be permitted to use the grand jury minutes as evidence on their direct case."

Crawford v. Commonwealth, 55 Va. App. 457, 686 S.E.2d 557 (Va. Ct. App. 2009), aff'd Crawford v. Commonwealth, 281 Va. 84, 704 S.E.2d 107 (Va. 2011) – "By not considering Crawford's intent, the trial court incorrectly applied the forfeiture by wrongdoing doctrine, as it was defined in *Giles*. Thus, the trial court erred in its analysis for admitting the affidavit on that basis. [¶] If this were the end of our analysis, we would remand this case back to the trial court for it to determine on retrial whether an intent on the part of Crawford 'to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution' can be reasonably inferred from the facts and circumstances of the case." – instead affirming on different grounds

People v. Banos, 178 Cal. App. 4th 483, 486-505 (Cal. App. 2d Dist. 2009), review denied (2010) – "In its supplemental briefing, the People argue that forfeiture by wrongdoing is implicated not only when the defendant intends to prevent a witness from testifying in court but also when the defendant's efforts were designed to dissuade the witness from cooperating with the police or other law enforcement authorities. We agree, and hold that the forfeiture by wrongdoing doctrine applies in both settings. ... The use of the disjunctive "or," in our view, reflects the court's intent to designate two alternative ways of satisfying the factual predicate for application of the forfeiture by wrongdoing doctrine: evidence that the defendant (1) intended to stop the witness from reporting abuse to the authorities; or (2) intended to stop the witness from testifying in a criminal proceeding. ... Our final observation is that nothing in *Crawford*, *Davis*, *Giles I* or *Giles II* suggests that the defendant's sole purpose in killing the victim must be to stop the victim from cooperating with authorities or testifying against the defendant. It strikes us as illogical and inconsistent with the equitable nature of the doctrine to hold that a defendant who otherwise would forfeit confrontation rights by his wrongdoing (intent to dissuade a witness) suddenly regains those confrontation rights if he can demonstrate another evil motive for his conduct. In the absence of clear directions on this point from the United States Supreme Court or our Supreme Court, we decline to create such a rule. [¶] Substantial evidence exists that defendant harbored the requisite motive. That he may have simultaneously intended revenge for Cortez, or to stop what he believed was her supernatural control over him, is of no assistance to him."

Hunt v. State, 218 P.3d 516, 2009 OK CR 21 (Okla. Crim. App. Jul 24, 2009) – "[¶] 11 Certain statements on the tape clearly illustrate the decedent's [*i.e.*, future murder victim's] fear of Appellant and therefore her state of mind. However, there are also statements on the tape accusing Appellant of causing her injuries due to a beating she received from him two and half hours earlier because she asked him to drive her to a nearby fast food restaurant. [FN4] These accusatory statements, relating past events, would be the same as live testimony if Appellant had gone to trial for the assault on the decedent. Therefore, those portions of the 911 tape were inherently testimonial and subject to the confrontation requirement. *See Crawford*..."

Nguyen v. Felker, 2009 WL 1246693 (N.D. Cal. May 05, 2009) (unpub) (habeas) – despite history of classic abusive relationship culminating in murder, finding "under *Giles*, Nguyen did not forfeit his right of confrontation with regard to any of Bui's statements."

People v. Kelly, 2009 WL 763539 (Mich. App. Mar 24, 2009) (unpub) – DV murder after numerous prior acts of DV – "Plaintiff contends that, even if [victim] Sharrow's statements were testimonial, the statements were admissible because defendant, by making Sharrow unavailable

to testify at trial, forfeited his right of confrontation. We disagree. The forfeiture by wrongdoing doctrine only applies when the defendant engaged in conduct designed to prevent the witness from testifying. *Giles* ... There is no evidence in the record to suggest that defendant assaulted Sharrow on November 25, 2006, in order to prevent her from testifying. Accordingly, the forfeiture by wrongdoing doctrine does not apply to the present case, and the trial court erred in holding that defendant had forfeited his right of confrontation." – [NOTE: This analysis is directly contrary to the Breyer/Souter majority opinion.]

People v. Giles, 2009 WL 457832 (Cal. App. 2 Dist. Feb 25, 2009) (unpub) – "In the domestic violence context, if 'an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution--rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.'" – remanding for hearing

People v. Moran, 2009 WL 162293 (Cal. App. 2 Dist. Jan 26, 2009) (unpub) – abusive relationship, woman eventually murdered – she had previously reported abuse to the police, which the trial court permitted under the pre-*Giles* forfeiture rule – "As defendant correctly states, the trial court found that Vassei's statements were testimonial within the meaning of *Crawford*. Thus, given the current state of the law, the evidence was inadmissible. We agree with defendant that the Attorney General has the burden of establishing the trial court's ruling constituted an abuse of discretion. [cite] He has not attempted to do so." – no discussion of the Souter / Breyer holding

State v. McLaughlin, 272 S.W.3d 506 (Mo. App. E.D. Dec 30, 2008) – "In this case, the evidence before the trial court was precisely the type of evidence specified in *Giles*. In her victim-impact statement, [burglary and subsequent murder victim] Ms. Guenther explained that Defendant threatened her and her friends, and that he showed up at her job and watched 'everything' that she did. Significantly, Defendant's abusive and threatening conduct occurred at the time he was charged with burglarizing Ms. Guenther's trailer and was done in spite of a restraining order against him. Additionally, the State established that Defendant murdered Ms. Guenther within one month after Defendant was formally charged with burglarizing her mobile home." – forfeiture established [NOTE: This was appeal from burglary conviction. McLaughlin was separately found guilty of murdering Ms. Guenther.]

Crawford v. Commonwealth, 53 Va.App. 138, 670 S.E.2d 15 (Va. App. Dec 23, 2008), superseded by Crawford v. Commonwealth, 55 Va. App. 457, 686 S.E.2d 557 (Va. Ct. App. 2009), aff'd by Crawford v. Commonwealth, 281 Va. 84, 704 S.E.2d 107 (Va. 2011) –

People v. Baker, 2008 WL 4762776 (Mich. App. Oct 30, 2008) (unpub) – despite well-documented history of "classic abusive relationship," finding: "Because the trial court failed to require a showing that defendant intended to prevent Singleton from testifying, and there was no evidence suggesting that defendant killed Singleton for that purpose, the trial court erred in concluding that defendant forfeited his right to confront Singleton."

Recantation

(category added March 2012)

People v Turnquest, 35 Misc. 3d 329, 938 N.Y.S.2d 749, 2012 NY Slip Op 22019 (N.Y. Sup. Ct. 2012) – "It is true that ordinarily a *Sirois* forfeiture occurs where the defendant's misconduct procures or causes a witness's physical absence [cites], or a witness's silence [cites]. There is, however, no good reason to depart from the long-standing *Sirois* forfeiture-by-misconduct rule simply because the defendant, rather than causing a witness to disappear or fall silent, instead causes the physically available witness to recant her initial accounts of the crime and to offer a completely different version in proposed testimony. [¶] Indeed, the underlying facts in several cases aptly demonstrate that the distinction which defendant attempts to draw amounts to a distinction without a difference. ... Significantly, the public policy goals of the forfeiture-by-misconduct rule — to protect the 'integrity of the adversary process' and to prevent a person from 'tak[ing] advantage of his own wrong' [cite] — are just as necessary and essential when a defendant's misconduct causes a witness to recant her initial accusations and to manufacture a newer version of the 'truth.' Misconduct which causes a witness to recant her initial account (and possibly commit perjury), for example, is just as disruptive to the adversarial process as misconduct which causes a witness to disappear or keep quiet."

Marriage for Purposes of Establishing Marital Privilege

Commonwealth v. Szerlong, 457 Mass. 858, 859-871, 933 N.E.2d 633 (Mass. 2010) – "We also conclude that the hearsay evidence was properly admitted where the defendant forfeited his confrontation and hearsay objections to the admission of the victim's statements because he intended, by marrying the victim, to enable her to exercise her spousal privilege and thereby make her unavailable to testify at trial."

Child Abuse Cases

(category added March 2009)

State v. Ivey, 427 S.W.3d 854 (Mo. App. W. Dist. 2014) – "The State cites to no authority, and we are aware of none, where the forfeiture by wrongdoing doctrine has been applied to permit the admission of testimonial out-of-court statements by a child victim who has been declared 'unavailable' because testifying in the personal presence of her abuser would cause psychological or emotional trauma. We can articulate an argument that the forfeiture by wrongdoing doctrine should apply in such cases, as a witness's absence can be procured by intimidation and harassment no less effectively than by secreting away or murdering the witness. We are mindful, however, that reliance on the forfeiture by wrongdoing doctrine to shelter a child victim from cross-examination could abrogate Sixth Amendment confrontation rights in nearly every situation where a child is deemed 'unavailable' under section 491.075.1(2)(c). [¶] We need not resolve this issue of first impression."

People v. Burns, 494 Mich. 104, 832 N.W.2d 738 (Mich. 2013) – "Defendant's instruction to CB not to report the abuse was made before there was any indication that the abuse had been reported or discovered. While the timing of the wrongdoing is by itself not determinative, it can inform the inquiry: a defendant's wrongdoing after the underlying criminal activity has been

reported or discovered is inherently more suspect, and can give rise to a strong inference of intent to cause a declarant's unavailability." – [NOTE: Because a child molester can't foresee the possibility of getting into legal trouble if the child tells?] – "defendant's contemporaneous statements to CB are as consistent with the inference that defendant's intention was that the alleged abuse go undiscovered as they are with an inference that defendant specifically intended to prevent CB from [*117] testifying.n39 Further, assuming defendant knew that CB would not disclose the abuse because of his directive, that knowledge is not necessarily the equivalent of the specific intent to cause CB's unavailability to testify as required by MRE 804(b)(6). Attempting to equate the two in every circumstance improperly assumes that a defendant's knowledge is always the same as a defendant's purpose." – [NOTE: Some mighty fine hair-splitting.]

State v. Poole, 2010 UT 25, 232 P.3d 519 (Utah 2010) – "While we recognize the doctrine of forfeiture by wrongdoing, the procedural posture of Mr. Poole's criminal prosecution prevents us from determining whether he has forfeited his right to confrontation at this time. The district court's decision on this issue was premature; neither this court nor the district court is yet in a position to know whether the victim of Mr. Poole's alleged criminal acts will be unavailable at trial until the time of that trial. ... Such a witness could conceivably have a change of heart and opt to testify despite earlier pronouncements to the contrary."

In re Rolandis G., 902 N.E.2d 600, 327 Ill.Dec. 479, 232 Ill.2d 13 (Ill. Nov 20, 2008), rehearing denied (Jan 26, 2009) – juvenile rapist made 6-year-old victim "pinky swear" not to tell anyone what happened in an attempt to keep his crime a secret. However, there is nothing in the record to indicate that when respondent extracted the promise from Von, he did so in contemplation of some future trial. Thus, whether Von's refusal to testify at trial was due to his embarrassment or because of his 'pinky swear' to respondent is of no matter." – [NOTE: Would the state be required to show that an adult child abuser was subjectively contemplating a future trial, as opposed to simply trying to avoid "getting in trouble," if he similarly made a child swear not to tell?]

Evidence of Reason for Witness's Silence

(category added March 2009)

(see also "Abuse Relationship," above)

People v. Smart, 989 N.Y.S.2d 631, 633-42 (N.Y. 2014) – "Taken together with the proof of defendant's *223 misconduct, Doe's reported admission that fear of self-incrimination was not prompting her refusal to testify logically suggested that she had another motivation: her love or fear of defendant, or both, which he had aroused by his threats and pleas in a deliberate attempt to keep her off the witness stand."

Tarley v. State, 420 S.W.3d 204, 205-06 (Tex. App.--Hous. [1st Dist.] 2013), petition for discretionary review refused (May 21, 2014) – "Tarley assaulted Gentles and confined her to his apartment after Gentles told him that she would not testify in his favor. A few days later, Gentles moved to Florida without giving the police an address. Tarley points out that no witness testified that Tarley's wrongdoing caused Gentles' unavailability as a witness. The trial court, however, reasonably could infer from the evidence presented that Tarley's second assault of Gentles was deliberately designed to intimidate her to keep her from testifying."

State v. Warner, 116 So. 3d 811 (La.App. 4 Cir. 2013) – "Still outside the presence of the jury, Ms. Stark testified that she was receiving threats and had informed victim advocates about these threats. According to Ms. Stark, people came to her and told her to 'stay out of it because of my son's sake and I got a one year old son.' Ms. Stark testified that she was afraid to testify because of threats she had received — not threats of prosecution but threats of physical danger. ... The court asked her if she was scared, and she admitted that she was. ... The next day, just before Ms. Stark was to be called to the stand in front of the jury, the court again recessed the jury to consider Ms. Stark's testimony. At this time, counsel for Ms. Stark informed the court that there had been possible contact between Ms. Stark and Mr. Warner while they were being transported to the court [*815] from jail that day. [!] ... Article 804(B)(7) does not require that the person who will benefit must be the person who actually threatens a witness. ... Considering the totality of the facts below, we cannot say that the trial court erred in finding that the State proved, by a preponderance of the evidence that Mr. Warner 'engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the witness.'"

Bibbs v. State, 371 S.W.3d 564, 565-568 (Tex. App. Amarillo 2012) – "The evidence regarding appellant's motives for shooting Candy include a theory that he did so to keep her from testifying before an administrative panel convened to possibly revoke appellant's parole. However, the evidence was also presented that the trouble between appellant and Candy was just as likely tied to appellant's obsession with Candy after she decided to terminate their relationship. Accordingly, we do not find the application of the forfeiture of appellant's rights to confrontation because of his conduct to be applicable in this case." – [NOTE: Effectively the court requires that a desire to silence the witness be the *sole* purpose for shooting her, which puts the court in an extreme minority.] – disagreed with by **State v. Supanchick, 354 Or. 737, 323 P.3d 231 (Or. 2014)** ("Not only did the Texas Court of Appeals not identify what in *Giles* led it to that conclusion, but its reasoning is difficult to reconcile with what *Giles* actually said.")

Lucas v. State, 67 So. 3d 332, 333-336 (Fla. Dist. Ct. App. 4th Dist. 2011) – "We also find that the trial court's admission of Glushko's statement did not violate the Confrontation Clause, as Glushko's unavailability at trial was at appellant's behest. [*Giles* cite] The doctrine of forfeiture by wrongdoing permits the introduction of statements where a witness is "detained" or "kept away" by the procurement of the defendant. [cite] The tapes of jail conversations between appellant and Glushko corroborate that appellant wrongfully procured the unavailability of the witness."

State v. Her, 781 N.W.2d 869, 870-880 (Minn. 2010) (on remand from SCOTUS, remanding case to district court for evidentiary hearing) –

People v McCrae, 2010 NY Slip Op 284, 69 A.D.3d 759, 895 N.Y.S.2d 101 (N.Y. App. Div. 2d Dep't 2010) – " Upon the conclusion of the *Sirois* hearing, the trial court properly determined that there was clear and convincing evidence that the defendant was involved in the murder of James McCrae [cite] and, on that basis, properly admitted James McCrae's grand jury testimony into evidence at the trial on the first indictment under the 'forfeiture by wrongdoing' doctrine (*Giles v California* ...) Evidence consisted of testimony that James McCrae had been approached a month or two before the murder and asked, on behalf of the defendant, to drop the initial charges, that the defendant had stated to another witness that he (the defendant) wasn't worried about the attempted murder trial, as he was going to have James McCrae killed, and that,

at the scene of the second shooting, James McCrae stated, before his death, that he had been shot by 'Skip,' which was the defendant's nickname [cite]. ... On this record, the evidence is clear and convincing that any murder of James McCrae by the defendant was designed and intended to prevent James McCrae from testifying at trial."

Perkins v. Herbert, 596 F.3d 161 (2d Cir. N.Y. 2010) (habeas) – this decision provides a primer on how to successfully intimidate witnesses – it finds no forfeiture because the defendant successfully distanced himself from efforts on his behalf

People v. Garcia, 168 Cal.App.4th 26185 Cal.Rptr.3d 393 (Cal. App. 4 Dist. Nov 14, 2008) – "We conclude the court acted within its discretion in admitting Wila 1 [*i.e.*, a prison kite], because it was relevant for the nonhearsay purpose of showing why Flores and Cheech were afraid to testify. [FN16] 'Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. [Citations .] Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible. [Citation.] It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible.'" (brackets in original; internal quotation marks omitted)

"Acquiesced in Wrongdoing" / Forfeiture via Conspiracy
(category added March 2009; renamed Sept. 2012)

United States v. Dinkins, 691 F.3d 358, 384-85 (4th Cir. Md. 2012) – "We now conclude that traditional principles of conspiracy liability are applicable with [*385] in the forfeiture-by-wrongdoing analysis. ... Mere participation in a conspiracy will not trigger the admission of testimonial statements under a forfeiture-by-wrongdoing theory. Instead, a defendant in such circumstances would only waive his Confrontation Clause rights when (1) the defendant participated directly in planning or procuring the declarant's unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy."

Brown v. Smith, 2008 WL 4922014 (S.D. N.Y. Nov 12, 2008) (unpub) (habeas) – "There was also more than sufficient evidence of a clear and convincing nature from which the trial judge could conclude that petitioner caused, or acquiesced in, these threats to Ms. Telfer." – detailing evidence in question

U.S. v. Marchesano, 67 M.J. 535 (Army Ct. Crim. App. Oct 02, 2008) – "We ... adopt a definition of the terms "acquiesce[]" and "wrongdoing" using their ordinary plain meaning. See *Nix v. Heddon*, 149 U.S. 304, 306 (1893). However, use of this principle still requires some "design" on the part of appellant for the declarant to be deemed unavailable as a witness. *Giles*, 554 U.S. ----, 128 S.Ct. at 2683. While a military judge may impute the wrongful actions of a third-party to appellant, there must still be a determination at trial that appellant intended the witness be absent through the wrongful act of another."

Forfeiture by Collusion with Declarant

Commonwealth v. Szerlong, 457 Mass. 858, 859-871, 933 N.E.2d 633 (Mass. 2010) – "The defendant argues that the intent requirement of *Giles* requires us to narrow our holding in *Edwards* that forfeiture by wrongdoing may be established by collusion between the defendant and the unavailable witness. We conclude that our decision in *Edwards* is consistent with the Supreme Court's decision in *Giles*."

Use of Hearsay to Establish Forfeiture
(category added March 2009)

Jenkins v. U.S., 80 A.3d 978, 984-98 (D.C. App. 2013) – "Generally speaking, it is appropriate and common for judges to consider the substance of proffered hearsay together with independent evidence in determining whether a hearsay exception is available;⁴⁵ and this court has implicitly approved such consideration in its forfeiture-by-wrongdoing cases.⁴⁶ Courts in other jurisdictions have done likewise.⁴⁷ There are good reasons to allow it, as discussed in *Bourjaily*,⁴⁸ and we perceive no principled reason to forbid it *per se*."

State v. Poole, 2010 UT 25, 232 P.3d 519 (Utah 2010) – "we note that the district court may not consider hearsay evidence in evaluating the admission of out-of-court statements on the basis of forfeiture by wrongdoing. ... The application of forfeiture by wrongdoing acts to abrogate a significant constitutional protection. We do not believe that it should be easily forfeited and thus we require the district courts of this state to apply the rules of evidence, including the rules controlling the admission of hearsay evidence, when they consider whether a criminal defendant has forfeited the right to confrontation."

Roberson v. U.S., 961 A.2d 1092 (D.C. Dec 18, 2008) – "In principle, a trial court may rely on trustworthy hearsay in ruling on questions of admissibility, even where (as in this case) the question concerns the defendant's constitutional rights. [FN11] We do note the fact that Redd's statements to the police (like Lee's statements) constituted not just ordinary hearsay, but testimonial hearsay subject to the requirements of the Sixth Amendment's Confrontation Clause. [FN12] Notwithstanding the general rule that a court may rely on hearsay in deciding whether evidence is admissible, it is an open question whether the Confrontation Clause allows the court to rely on testimonial hearsay that is not subject to cross-examination in ruling on the admissibility of evidence against a criminal defendant. We have found little post-*Crawford* authority on point. [FN13] However, Roberson did not object on Sixth Amendment grounds to the trial court's consideration of testimonial hearsay in this context, nor has he raised that objection on appeal. We therefore decline to reach the question."

Relationship to Forfeiture Under Evidence Rules

People v. Hanson, __ N.E.2d __, 2010 Ill. LEXIS 967, 23-40 (Ill. June 24, 2010) – "The doctrine of forfeiture by wrongdoing is not limited to evidentiary questions that raise *Crawford* concerns. Rather, Rule 804(b)(6) is a general exception to the hearsay rule. We have already expressed that the rule is coextensive with the common law doctrine. Stechly, 225 Ill. 2d at 272-73. ... although left unsaid in Stechly as a matter of Illinois law, we now expressly recognize that the doctrine serves both as an exception to the hearsay rule and to extinguish confrontation clause claims."

Roberts v. State, 894 N.E.2d 1018 (Ind. App. Oct 15, 2008) – "we accept the Supreme Court's invitation to take a slightly broader view of the doctrine of forfeiture by wrongdoing as advocated by Justice Breyer in his dissent in *Giles* as it applies to non-testimonial statements under Indiana law. ... Specifically, we hold that a party, who has rendered a witness unavailable for cross-examination through a criminal act, including homicide, may not object to the introduction of hearsay statements by the witness as being inadmissible under the Indiana Rules of Evidence."

Retaliation for Past Testimony
(category added Dec. 2010)

United States v. Henderson, 626 F.3d 326, 331-335 (6th Cir. Ohio 2010) – "Defendant-appellant Thomas A. Henderson was convicted of bank robbery in 1981. Within three years after his release from prison, two persons who had assisted law enforcement authorities in the bank robbery prosecution were shot to death, in 1996 and 1998, respectively. ... [B]ecause Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against him in the bank robbery prosecution in 1981, and because there is no evidence that Bass and Washington were killed to prevent them from testifying against him in relation to any other offense, Henderson argues the forfeiture-by-wrongdoing doctrine has no application in this case. Indeed, there is no evidence that Henderson engaged in conduct designed to prevent Bass and Washington from testifying against him. In the wake of the *Giles* ruling, the district court's reliance on the forfeiture-by-wrongdoing doctrine is seen to have been misplaced."

Type of Evidence Needed Generally

People v. Smart, 989 N.Y.S.2d 631, 633-42 (N.Y. 2014) – "Because witness **638 tampering is a surreptitious activity rarely admitted by the defendant or the witness, few cases will involve direct evidence of this causal link between the defendant's misconduct and the witness's refusal to testify or failure to appear in court [cites]. Therefore, at a hearing held pursuant to *Sirois* and *Geraci*, the court may infer the requisite causation from the evidence of the defendant's coercive behavior and the actions taken by the witness in direct response to or within a close *221 temporal proximity to that misconduct [cites]." – "we think it better to follow the flexible approach reflected in certain decisions of the Appellate Division which rely heavily on circumstantial evidence and the sequence of events to determine a defendant's role in compelling a witness not to testify [cites]."

State v. Dobbs, 180 Wash.2d 1, 320 P.3d 705 (Wash. 2014) – "¶ 29 ... We cannot and do not require a direct statement from the witness who is intimidated into silence because such a requirement would exclude almost all absent witnesses' testimony, regardless of evidence of witness intimidation. ... [B]y definition, a witness who was intimidated into silence will not come forward to say as much."

Smiley v. State, 216 Md.App. 1, 84 A.3d 190 (Md. Spec. App. 2014), cert. granted, 89 A.3d 1104 (Md. April 18, 2014) – while awaiting trial defendant gave his nephew, Parker, the assignment of eliminating a witness – at the time of defendant's trial, Parker had been indicted

but not convicted for the murder – "It would be absurd to hold that the appellant's pretrial hearing on the hearsay issue in this case could not move forward until Parker's trial for murder had been concluded. It would be equally absurd to hold that Parker's guilt of murder would have to be proved at the appellant's evidentiary hearing as a veritable trial within a trial or, in this case, a veritable trial within a pretrial hearing. Parker's indictment for murder was admissible evidence at the evidentiary hearing to help show the appellant's involvement in procuring the witness's unavailability."

People v. Copney, 969 N.Y.S.2d 898, 41 Misc.3d 250 (N.Y. Sup. Ct. 2013) – "Lastly, although there was conflicting testimony as to whether the calls caused the complainant's unavailability, it is clear to the court that it did. Although all analogies are lacking, the tort law concept of *res ipsa loquitur* is helpful. ... The complainant would not ordinarily stop cooperating with the district attorney but for the agency of the defendant's calls in which she did not voluntarily act or contribute. Thus it is clear that the wrongful calls of the defendant, aimed and intended to silence the witness, made and caused her to be unavailable to the People."

State v. Franklin, 307 P.3d 983, 984-89 (Ariz. App. 1st Div. 2013) – "[¶ 14] A 'wrongdoing' under the forfeiture exception generally entails 'some wrongful act on the part of the defendant.' ... ¶ 15 While a criminal act is not necessary to invoke the doctrine, [cite] witness tampering is a classic form of wrongdoing that can lead to forfeiture. ... Defendant argues that the wrongdoing must be in the form of some type of threat, request or directive. We find no such limits in the law—any form of witness tampering can constitute a 'wrongdoing' for purposes of invoking the forfeiture exception under Rule 804(b)(6). ... [¶ 23] we agree with the trial court's finding that in speaking with Victim more than fifty times, Defendant engaged in wrongdoing for purposes of Rule 804(b)(6)." [NOTE: Also decided under confrontation clause.]

State v. Zaragoza, 2012 UT App 268, 287 P.3d 510 (Utah Ct. App. 2012) – "[¶ 8] ... In this case, the trial court applied the forfeiture-by-wrongdoing doctrine to reach its conclusion that Defendant caused Wife's unavailability through the wrongful act of contacting Wife 276 times by phone. The trial court found that the calls were intended to influence her and were made in violation of the court's no-contact order." – held: sufficient to establish forfeiture

People v. Jones, 207 Cal. App. 4th 1392, 144 Cal. Rptr. 3d 571 (Cal. App. 2d Dist. 2012) – "Defendant placed 12 phone calls to [DV victim] Durden that consisted of about 10 hours of conversation. Detective Parente prepared a recording and transcript of portions of the conversations. The recording was played for the jurors, and the transcript was provided to the jurors. Those recordings included what the trial court suggested were threats by defendant to dissuade Durden from testifying in his case. ... Defendant contends that the doctrine of forfeiture by wrongdoing applies only to statements by victim witnesses who were murdered to prevent their testimony and not to statements by corroborating witnesses whose testimony was prevented by means other than murder. ... The rationale behind the doctrine does not support such a limitation."

State v. Thompson, 305 Conn. 412, 45 A.3d 605 (Conn. 2012) – "Having examined the record, we conclude that the trial court did not abuse its discretion in finding that the state had proven, by a preponderance of the evidence, that the defendant rendered Glace unavailable to testify. The defendant's incriminating comments to Nelson, his contacts with his brother, the timing of the murder following the state's decision to prosecute, the circumstances surrounding the murder, the

encoded telephone conversations between the defendant and his brother, and the fact that the defendant was the only person to benefit from Glace's death could have induced a reasonable belief in the mind of the trier that it was more probable than not that the defendant intentionally procured her unavailability at trial by arranging for her murder."

State v. Dobbs, 167 Wn. App. 905, 906-921, 276 P.3d 324 (Wash. Ct. App. 2012), review granted (Oct. 2012) – "¶18 Dobbs argues that the trial court erred in applying the doctrine of forfeiture by wrongdoing because the State failed to present direct evidence that Dobbs procured C.R.'s unavailability or establish any causal link between his alleged malfeasance and her absence at trial. We disagree. ... ¶21 Dobbs argues that the trial court could consider only those actions he took after the State initiated criminal proceedings. We disagree." – in short, factfinder can permissibly draw inferences – the opinion drew a dissent that amounts to contending that the state should be required to present the testimony of the witness explaining why she's not testifying ("Although the record is replete with allegations about Dobbs' conduct toward the alleged victim [note to Judge Van Deren: it's no longer 'alleged' after he's convicted], the record lacks even a scintilla of evidence about why the witness actually chose to not attend trial.")

Hammond v. Commonwealth, 366 S.W.3d 425, 427-435 (Ky. 2012) – "Appellant next argues that the trial court erred by allowing the Commonwealth to admit into evidence the audio recordings of Troya Sheckles's statement to police investigators. Sheckles was the only eyewitness to the Sawyers murder and the related crimes but, as noted above in footnote 1, she was unavailable as a witness because she was murdered before Appellant's trial began. ... To sustain its burden of proving that Appellant procured Sheckles's unavailability as a witness, the Commonwealth presented the trial court with an eighty-four page set of documents pertaining to the investigation by police into Sheckles's murder.ⁿ⁴ The prosecutor then outlined for the trial court his theory of how Appellant arranged for Sheckles to be killed. The prosecutor averred that his theory was supported by information gleaned from the stack of documents. There was no formal evidentiary hearing. No live witnesses testified to establish the verity of the documents or to be cross-examined about the contents or preparation of the documents. There was no stipulation of facts or evidence." – not good enough

People v. Peterson, 968 N.E.2d 204, 206-214 (Ill. App. Ct. 3d Dist. 2012) – section 115-10.6 of the Code of Criminal Procedure of 1963 requires proof that statements are "reliable" (and not merely deemed reliable enough by the perpetrator that he kills to suppress them!) – but "In 2007, our supreme court expressly adopted the common law doctrine as the law of Illinois. ... the common law rule allows for the admission of qualifying hearsay statements even if there is no showing that such statements are reliable. ... Accordingly, the conflict between section 115-10.6 of the Code and the forfeiture by wrongdoing rule adopted in *Stechly* and *Hanson* (and codified in Rule of Evidence 804(b)(5)) must be resolved in favor of the pronouncements of our supreme court."

State v. Weathers, 724 S.E.2d 114 (N.C. Ct. App. Mar. 20, 2012) – "Wilson was one of the State's chief witnesses at trial. During his direct examination on 28 February 2011, Wilson was shaking while testifying about Defendant's involvement in the murder. When he returned to the stand on 2 March, he "began to testify, but within a few minutes became distraught and indicated he did not wish to make any other statements." Wilson was shaking more noticeably than he had been on 28 February, and laid his head down on top of the witness stand and began to cry. Wilson became even more upset when a young man dressed in street clothes entered the

courtroom. When asked if he had been threatened, Wilson responded, 'I don't even want to answer that question.' ... First, Wilson disclosed that, as they were being transported to the courthouse for trial, Defendant threatened to kill Wilson and his family. A detention officer also testified that she heard Defendant threaten Wilson. Second, in a taped interview with homicide detectives and assistant district attorneys, Wilson repeatedly expressed his concern that his life and the lives of his family members were in jeopardy. ... Finally, Defendant made several phone calls that evidenced his intent to intimidate Wilson. ... One of the parties Defendant spoke to said he would be in court on the morning of 2 March 2011. On that date, Wilson, who had already been hesitant and fearful on the stand, became even more emotional and 'broke down' when he saw a young man dressed in street clothes indicative of gang attire enter the courtroom. ... The evidence here could hardly be more egregious. We see no error in the trial court's determination that Defendant forfeited his right to confront Wilson."

People v Turnquest, 35 Misc. 3d 329, 938 N.Y.S.2d 749, 2012 NY Slip Op 22019 (N.Y. Sup. Ct. 2012) – "'given the inherently surreptitious nature of witness tampering' [cite] and given the fact 'that a defendant engaging in such conduct will rarely do so openly, resorting instead to subterfuge' [cite], the People may use 'circumstantial evidence . . . to establish in whole or in part, that a witness's unavailability was procured by the defendant' [cite]. Indeed, often times the People 'will be able to rely on nothing more than circumstantial proof and the logical inferences that can be drawn therefrom' [cites]."

Render v. State, 347 S.W.3d 905, 908-920 (Tex. App. Eastland 2011) – "The State presented evidence that appellant killed Holland. However, there is no evidence that appellant killed Holland to prevent him from testifying. ... Therefore, the trial court erred by ruling that appellant forfeited his right to confront Holland and by admitting evidence of Holland's statements."

People v Encarnacion, 2011 NY Slip Op 5433, 87 A.D.3d 81, 926 N.Y.S.2d 446 (N.Y. App. Div. 1st Dep't 2011) – "The prosecution averred that based on defendant's misconduct, Ofelia had stopped cooperating with them and was refusing to testify at trial. The trial court then correctly held a *Sirois* hearing. Nancy Torres (Nancy), Ofelia's mother, testified that in January 2005, after the instant crimes, defendant began to call her home several times a day, requesting to speak to Ofelia. Thereafter defendant began to call Ofelia on her cell phone. Specifically, Nancy testified that defendant called her home in excess of 1,000 times. Telephone records received in evidence corroborated Nancy's testimony, establishing that defendant called Ofelia's residence from jail in excess of 150 times. On one occasion, Nancy overheard a telephone conversation between Ofelia and defendant where Ofelia discussed tailoring her testimony to lessen defendant's prison time.... Thereafter, Ofelia's original version of the events, the version she had already testified to before the grand jury, changed, and she now contended that it was Johnny, rather than defendant, who stabbed her. Later and after a brief hospitalization, Ofelia admitted that she had lied, changing her original story only because defendant so demanded. ... We agree that the evidence presented at the hearing circumstantially established that defendant engaged in misconduct which induced Ofelia's refusal to testify at trial by threatening her with violence if in fact she chose to testify." [NOTE: Incredibly, the concurring judge writes: "the evidence of the number of phone calls defendant made to Ofelia ... has little or no probative value on the critical question of whether defendant threatened Ofelia or otherwise committed misconduct that induced her not to testify." It can't be easy to achieve that level of cluelessness.]

People v. Hampton, 406 Ill. App. 3d 925, 941 N.E.2d 228, 346 Ill. Dec. 670 (Ill. App. Ct. 1st Dist. 2010), appeal denied (May 25, 2011) – "The record supports the trial court's finding that defendant and his mother engaged in a concerted effort to influence Durr not to testify. We reject defendant's contention that the State was required to show defendant actually caused Durr's unavailability. [cites] The State proved what it needed to: that defendant engaged in conduct intended to render Durr unavailable to testify at defendant's trial. ... Because the State established by a preponderance of the evidence that defendant engaged in conduct intended to render Durr unavailable to testify against him at trial, defendant forfeited his right to claim a confrontation clause violation under the forfeiture-by-wrongdoing doctrine."

Commonwealth v. Szerlong, 457 Mass. 858, 859-871, 933 N.E.2d 633 (Mass. 2010) – "Nor does *Giles* require us to revisit our conclusion in *Edwards* that the wrongdoing that may justify forfeiture need not be criminal. See *Edwards*, supra at 540, 542. The Supreme Court in *Giles*, supra at 2686, declared that the wrongdoing that may warrant forfeiture of a defendant's confrontation rights was "conduct designed to prevent a witness from testifying." Indeed, in *Reynolds*, supra at 159-160, forfeiture by wrongdoing was found where the witness, who was the defendant's second wife, lived with the defendant but had left home for three weeks to avoid being served with a subpoena, and where the defendant told the process server that she was not at home but would not say where she was. There was no allegation that the defendant had made the witness unavailable through a criminal act."

People v. Hagos, 250 P.3d 596 (Colo. Ct. App. Oct. 29, 2009) – remanding for evidentiary hearing with minimal discussion

Parker v. Commonwealth, 291 S.W.3d 647 (Ky. May 21, 2009) – "Turning again to the case at hand, we must first determine whether the Commonwealth met its burden of establishing by a preponderance of the evidence that Parker either engaged in--or at least acquiesced in--wrongdoing designed to prevent Stephenson from testifying. We find the Commonwealth met its burden. As mentioned before, Coffey testified that he loaned Parker money and lent him a gun and that Parker gave the money and gun to Warfield to kill Stephenson. Wright also testified that he saw Warfield fleeing the area of Stephenson's murder. [¶] We conclude that *Giles* was satisfied because, although it did not have to do so, the trial court--and later the jury--could certainly have reasonably inferred from all of the unique facts and circumstances of this case that Parker was motivated to kill Stephenson in order to prevent him from testifying that Parker shot Baker. [FN63] The dual motive of revenge and prevention of future testimony was the central point of the Commonwealth's theory of the case."

People v. Ramirez, 2008 WL 4712822 (Cal. App. 4 Dist. Oct 28, 2008) (unpub) – "Here, while there was certainly evidence that defendant killed Bertha and that he thereby made her unavailable to testify against him, there was no evidence that he killed her with that particular intent. Accordingly, when the trial court ruled that her statements were admissible based on forfeiture by wrongdoing, it also erred."

Right to Confront Witness at Pretrial Forfeiture Hearing

People v. Williams, 125 A.D.3d 697, 2 N.Y.S.3d 612 (N.Y. App. Div. 2015) – defendant has right to confront witness at a pretrial *Sirois* (i.e., forfeiture by wrongdoing) hearing – no word on whether a person can forfeit their right to confront witness at a *Sirois* hearing, but presumably

a finding of forfeiture would require a pre-*Sirois* hearing, at which defendant would have right to confront the witness, which could be subject to forfeiture at a pre-pre-*Sirois* hearing, and so on into infinity

Standard of Proof

Giles did not address this point.

People v. Ali, 123 A.D.3d 1137, 999 N.Y.S.2d 530 (2014) – clear and convincing

Brittain v. State, 329 Ga. App. 689, 696, 766 S.E.2d 106, 113 (Ga. App. 2014) – preponderance

United States v. Johnson, 767 F.3d 815, 817-24 (9th Cir. 2014) – preponderance

People v. Smart, 989 N.Y.S.2d 631, 633-42 (N.Y. 2014) – clear and convincing

State v. Dobbs, 180 Wash.2d 1, 320 P.3d 705 (Wash. 2014) – "¶ 21 ... we conclude that a defendant forfeits the Sixth Amendment right to confront a witness when clear, cogent, and convincing evidence shows that the witness has been made unavailable by the wrongdoing of the defendant, and that the defendant engaged in the wrongful conduct with the intention to prevent the witness from testifying. ¶ 22 When the standard of proof is clear, cogent, and convincing evidence, the fact at issue must be shown to be 'highly probable.' ... ¶ 31 Forfeiture by wrongdoing requires clear, cogent, and convincing evidence. It does not require a showing beyond a reasonable doubt. A court does not need to rule out all possibilities for a witness's absence; it needs only to find that it is highly probable that the defendant intentionally caused it."

State v. Supanchick, 354 Or. 737, 323 P.3d 231 (Or. 2014) – preponderance

Jenkins v. U.S., 80 A.3d 978, 984-98 (D.C. App. 2013) – "more likely than not"

State v. Thompson, 305 Conn. 412, 45 A.3d 605 (Conn. 2012) – preponderance (collecting cases)

State v. Baldwin, 2010 WI App 162, 330 Wis. 2d 500, 794 N.W.2d 769 (Wis. Ct. App. 2010) – preponderance

State v. Poole, 2010 UT 25, 232 P.3d 519 (Utah 2010) – "The majority of the courts addressing the forfeiture issue have applied a preponderance of the evidence standard. ... On balance, we believe this court should adopt the majority view."

Parker v. Commonwealth, 291 S.W.3d 647 (Ky. May 21, 2009) – preponderance

Roberson v. U.S., 961 A.2d 1092 (D.C. Dec 18, 2008) – preponderance

U.S. v. Marchesano, 67 M.J. 535 (Army Ct. Crim. App. Oct 02, 2008) – preponderance

State v. Her, 750 N.W.2d 258 (Minn. May 29, 2008) on remand from SCOTUS, remanding case to district court for evidentiary hearing, State v. Her, 781 N.W.2d 869, 870-880 (Minn. 2010) – preponderance

Vasquez v. People, 173 P.3d 1099 (Colo. 2007) – preponderance

U.S. v. Johnson, 495 F.3d 951 (8th Cir. Jul 30, 2007) – preponderance

State v. Mason, 160 Wash.2d 910, 162 P.3d 396 (Wash. 2007) – clear & convincing

Gatlin v. U.S., 925 A.2d 594 (D.C. 2007) – preponderance

Doan v. Voorhies, 2007 WL 894559 (S.D. Ohio 2007) (unpub) (habeas) – preponderance

People v. Giles, 40 Cal.4th 833, 152 P.3d 433, 55 Cal.Rptr.3d 133 (Cal. 2007), rev'd on other grounds – preponderance

State v. Jensen 727 N.W.2d 518, ¶ 56 (Wis. 2007) – preponderance

People v. Jones, 270 Mich.App. 208, 714 N.W.2d 362 (Mich. App. 2006) – preponderance

Perkins v. Walsh, 2006 U.S. Dist. LEXIS 87955, 2006 WL 3498285 (E.D. N.Y. 2006) – *Crawford* did not disturb the long-standing rule on forfeiture by wrongdoing. In this case, the New York state court applied a clear and convincing evidence standard which is a higher standard than the 2nd Circuit's preponderance of the evidence standard. The application of forfeiture by wrongdoing against the defendant in this case was proper. [NOTE: The governing New York precedent is pre-*Crawford*: *People v. Geraci*, 85 N.Y.2d 359, 625 N.Y.S.2d 469 (1995), requires clear and convincing proof.]

True Waiver

(see also pt. 4, Opening the Door; cases involving waiver by non-preservation are omitted from the Outline, which is fat enough without them)

Byers v. State, __ So.3d __, 2014 WL 3583515 (Miss. App. 2014) – "¶ 6. A video of Tiffany's forensic interview conducted by Clark was admitted at trial. Byers claims that the admission of this evidence violated his right to confront witnesses under the Sixth Amendment of the United States Constitution. ... ¶ 7. However, there was no objection to the admission of this video into evidence. In fact, Byers's counsel requested that the video be shown to the jury, stating: 'There is a forensic video of this child where she spoke to the interviewer, and I believe that would be a much better vehicle for this jury to see what this child has to say.' 'The constitutional right of confrontation, like other constitutional rights, is forfeited if it is not asserted at the trial level.'"

State v. Jim, 2014-NMCA-089, 332 P.3d 870 (N.M. App. 2014), cert. denied, 328 P.3d 1188 (N.M. 2014) – When offered an opportunity to agree to a redaction of the interview transcript, defense counsel said, "let's just go with the truth and let's let it all, let's let everything else in" – "{21} We conclude that the option to redact all references to unavailable witness statements

contained in the police interview transcript appropriately safeguarded Defendant's Sixth Amendment right to confront the witnesses against him. ... {22} Second, it appears that Defendant waived his constitutional objection and invited the error."

State v. Dague, 325 Ga.App. 202, 750 S.E.2d 476 (Ga. App. 2013), reconsideration denied (Dec. 3, 2013) – "not only did Dague fail to raise a Confrontation Clause objection at trial, he deliberately declined the opportunity to question P.C. before the *211 jury, 'thereby waiving his right to confront the child witness.'"

State v. Keck, 2013-Ohio-5160, 137 Ohio St. 3d 550, 1 N.E.3d 403 (Ohio 2013) – "{¶ 18} When a defendant has stipulated to the admissibility and content of a nontestifying analyst's scientific report, the testimony of a witness who relied on that report does not violate the defendant's right to confrontation. When Keck stipulated to Losko's report, he waived any later Confrontation Clause challenge to the use of the report by other witnesses."

Walker v. State, 322 Ga. App. 158, 744 S.E.2d 349 (Ga. Ct. App. 2013) – "The older [9 years old] victim did not testify. The state decided not to call her 'due to [her] emotional state,' but informed the court that she was available, should the court decide to call her." – following examination out of presence of jury, defense counsel "conferred with Walker and then informed the court that '[t]he defense does not request the court call her as the court's witness. We do not intend to call her as our witness.' ... Walker was given the opportunity to question the child and chose not to. Under these circumstances, it is clear that Walker 'waive[d] his right to confront the child witness.'"

People v. McCoy, 215 Cal. App. 4th 1510, 156 Cal. Rptr. 3d 382 (Cal. App. 3d Dist. 2013) – remote testimony by disabled adult – "at no time during trial did defendant object to the playing of the conditional examination based on the position of the camera equipment during the examination. ... We conclude defendant has forfeited the contention that playing the conditional examination for the jury violated his Sixth Amendment right to confront his accuser face-to-face because the camera equipment was not set up to allow Cindy H. to see him while she testified."

State v. O'Cain, 169 Wn. App. 228, 279 P.3d 926 (Wash. Ct. App. 2012) – "In other contexts, the distinction between 'waiver' and 'forfeiture' has been held to be of significance. Here, however, Justice Scalia, on behalf of the Court, uses the terms interchangeably. Legal scholars may choose to opine at length in scholarly journals on the propriety, or lack of same, of the interchangeable use of these terms. As judges, however, we need not express such angst over word choice. As a simple matter of constitutional jurisprudence, if the United States Supreme Court, in the confrontation clause context, assigns no significance to the traditional distinction between 'waiver' and 'forfeiture,' then neither should we. To the extent that the Supreme Court uses the terms interchangeably, that is the law."

State v. Hayes, 165 Wn. App. 507, 265 P.3d 982 (Wash. Ct. App. 2011) – "the record supports a conclusion that Hayes knew about the issue but made a deliberate decision not to litigate with the trial court. [cite] Accordingly, we conclude that Hayes waived his confrontation clause claims and we decline to review them."

State v. Rivera, 129 Conn. App. 619, 635-636, 22 A.3d 636 (Conn. App. Ct. 2011), appeal denied – "Accordingly, because defense counsel consented to the admission of evidence that the

defendant now claims deprived him of his sixth amendment right of confrontation, and thereafter used it in a manner indicating that the decision was reached as a matter of trial tactics, we conclude that the defendant has waived this claim on direct appeal."

People v Morales, 2011 NY Slip Op 4537, 86 A.D.3d 147, 924 N.Y.S.2d 62 (N.Y. App. Div. 1st Dep't 2011) – gang expert testimony – "The record establishes, however, that, as the People maintain, defendant not only failed to raise such objections, but also affirmatively waived them and, indeed, sought to use the evidence in question for his own strategic ends. It is evident that this was part of a coherent strategy under which the defense acknowledged defendant's admitted gang membership and gun possession but maintained that he was a lower-tier member who was not implicated in most of the gang's criminal activity, lacked any responsibility for the shootings at issue, and did not share the terroristic intent attributed [**165] to the gang as a whole n20 Under these circumstances, defendant, through counsel, intelligently and knowingly waived his right to complain about the *Crawford* violation..."

State v. Grove, 259 P.3d 629, 631-639 (Idaho Ct. App. 2011) – " we conclude that we cannot ascertain from the record whether Grove's failure to object to Dr. Ross's and Dr. Harper's testimony as to Dr. Reichard's findings and conclusions was not a tactical decision--the record simply does not eliminate the possibility that the failure to object was strategic. ... [We] conclude here that Grove cannot challenge admission of the testimony for the first time on appeal."

People v Morales, 911 N.Y.S.2d 21, 2010 NY Slip Op 8012, 14-15 (N.Y. App. Div. 1st Dep't 2010) – "defendant asks that he be granted a new trial in the interest of justice on the further ground that the admission into evidence (without objection by defense counsel) of Detective Shanahan's testimony as a purported expert on gang behavior, and of Shanahan's PowerPoint presentation on the SJB's history and criminal activity, incorporated numerous hearsay statements, contrary to the dictates of the Confrontation Clause ... The record establishes, however, that, as the People maintain, defendant not only failed to raise such objections, but also affirmatively waived them and, indeed, sought to use the evidence in question for his own strategic ends. It is evident that this was part of a coherent strategy under which the defense acknowledged defendant's admitted gang membership and gun possession but maintained that he was a lower-tier member who was not implicated in most of the gang's criminal activity, lacked any responsibility for the shootings at issue, and did not share the terroristic intent attributed to the gang as a whole n19. Under these circumstances, defendant, through counsel, intelligently and knowingly waived his right to complain about the *Crawford* violation..."

State v. Poole, 2010 UT 25, 232 P.3d 519 (Utah 2010) – "we do not believe the facts of this case support a finding that Mr. Poole waived the right to confront C.P. Under the doctrine of waiver, a criminal defendant may waive the right to confrontation 'only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'" [NOTE: Huh?]

Brooks v. United States, 993 A.2d 1090, 1092 (D.C. 2010) – "Appellant challenges his conviction, after a bench trial, for possession of heroin, arguing that the trial court committed reversible error when it denied his mid-trial request to withdraw his express waiver of the right to confront a government chemist. Finding no abuse of discretion, we affirm."

State v. Pasqualone, __ N.E.2d. __, 2009 WL 250473, 2009-Ohio-315 (Ohio Feb 04, 2009) – cocaine – "¶ 32} When a defendant who is represented by counsel does not demand the testimony of the analyst pursuant to R.C. 2925.51, it can be presumed that the attorney is acting in the best interests of the client, and a trial court is not obligated to conduct a specific inquiry of the defendant to determine if the situation might possibly be otherwise. ... ¶ 33} For the foregoing reasons, we hold that an attorney may waive a client's Sixth Amendment right to confrontation in the appropriate situation."

Commonwealth v. Baumhammers, 960 A.2d 59 (Pa. Nov 20, 2008) – "Appellant argues that his rights under the Sixth Amendment Confrontation Clause were violated when the Commonwealth's psychiatric expert witness, Dr. Welner, testified regarding statements made to him by individuals who did not testify at trial. ... If Appellant was troubled by the purported hearsay testimony given by Dr. Welner, he did not need support from the specific legal principles later announced in *Crawford* to pursue his objections. Thus, there is no question that Appellant has waived this issue."

State v. Holness, 289 Conn. 535, 958 A.2d 754 (Conn. Nov 18, 2008) – "Although a defendant will not be deemed to have waived certain constitutional rights unless the state can demonstrate that the defendant's waiver was knowing and intelligent; ... that requirement is inapplicable when, as in the present case, counsel has waived a potential constitutional claim in the exercise of his or her professional judgment. ... In our adversary system, the trial court was entitled to presume that defense counsel was familiar with *Crawford* and had acted competently in determining that the limiting instruction was adequate to safeguard the defendant's sixth amendment rights."

People v. Marquez, 2008 WL 4194011 (Cal. App. 3 Dist. Sep 12, 2008) (unpub) – "because defendant declined to cross examine N., he cannot now claim he was deprived of the right to confront her at trial."

U.S. v. Cook, 2008 WL 2872629 (9th Cir. Jul 24, 2008) (unpub) – "Cook consented to the use of Laura Cook's testimony against him and therefore waived any Confrontation Clause argument."

Tenore v. Campbell, 2008 WL 2477394 (N.D. Cal. Jun 18, 2008) (unpub) (habeas) – child sexual abuse – "It is now well established that defense counsel may waive a defendant's Sixth Amendment right to confrontation so long as the defendant does not dissent from his attorney's decision and the decision is one of trial tactics or strategy that might be considered sound. ... At the beginning of Tenore's trial, counsel stipulated that, instead of bringing in the victims to testify, the transcript of the girls' testimony before the grand jury would be admitted. The videotape of the police interview with one victim was also admitted." – defense counsel made that decision both because the inconsistencies in their statements could be fully explored without their testimony, and because the "'emotional appeal and draw' that could be expected from the girls' appearance" would aid the prosecution – held: waiver valid

Renteria v. Subia, 2008 WL 2413998 (C.D. Cal. Jun 13, 2008) (unpub) (habeas) – 5-year-old was eyewitness to father's murder of mother – father's lawyer chose not to require state to put child on the stand because "[i]f I call her [i.e., Kaylee] the jury will hate me and make me out to be a monster for putting a 5-year-old on the stand." – the court concludes: "defendant forfeited

his right to cross-examine Kaylee" although it was really just plain old waiver, the intelligent relinquishment of a known right

People v. Avila, 2008 WL 152707, n.3 (Cal. App. 2 Dist. Jan 17, 2008) (unpub) – in this unusual situation, the prosecution raised a *Crawford* concern with regard to testimony elicited by defense counsel, who thought the non-testifying co-defendant's statement benefited his client – the trial judge concluded it was a strategic decision on counsel's part – no actual ruling on appeal

State v. Raney, 217 Or.App. 470, 175 P.3d 1024 (Or. App. Jan 23, 2008) – (on motion for reconsideration of prior opinion) "Because multiple inferences may be drawn as to why defendant did not object—including a strong inference that he consciously elected not to assert his confrontation rights—the claim of error that defendant makes for the first time on appeal is not one that appears on the face of the record."

State v. Cox, 2008 WL 34786 (N.J. Super. A.D. Jan 02, 2008) (unreported) – "Defendant waived his right to confrontation and stipulated that the suspected contraband was heroin, crack and cocaine, because his defense was that he was arrested as a passerby and had no connection with the apartment."

State v. Frazier, 375 S.C. 575, 654 S.E.2d 280 (S.C. 2007) – trial court first admitted statements, finding them non-testimonial, then reconsidered and struck all the testimony but five words – defense counsel agreed – therefore defendant cannot complain about those five words on appeal

Stringer v. State, 241 S.W.3d 52 (Tex. Crim. App. Nov 07, 2007), on remand, Stringer v. State, __ S.W.3d __, 2008 WL 4661830 (Tex. App.-Fort Worth Oct 23, 2008) – construing a written waiver of confrontation rights

Coleman v. People, 169 P.3d 659 (Colo. 2007) – "Coleman's defense counsel waived Coleman's right to confront the technician who prepared the report at trial by failing to comply with section 16-3-309(5), C.R.S. (2006). Section 16-3-309(5) requires that, prior to the introduction of a laboratory report at trial, a party must give timely notice in order to require the presence at trial of the lab technician who prepared the report. In *People v. Hinojos-Mendoza*, No. 05SC881 (Colo.----, 2007) [169 P.3d 662, decided the same day], the Court holds that the procedural requirements in the statute do not deny the right of confrontation."

U.S. v. Ziskind, 491 F.3d 10 (1st Cir. 2007) – "On appeal, Ziskind's only challenge to his conviction concerns the admission of a stipulation that his co-conspirator, John Murray, had previously pleaded guilty to the counts of the indictment with which he was being charged. Ziskind argues, on appeal, that the admission of this stipulation violated his Sixth Amendment right to confront adverse witnesses under *Crawford v. Washington*, 541 U.S. 36 (2004). The government argues that Ziskind waived this argument by agreeing to the stipulation or, at a minimum, forfeited it by not raising a *Crawford*-type claim below. ... The government's contention that Ziskind waived his *Crawford* objection by agreeing to the stipulation poses a difficult question. On the one hand, no contemporaneous objection was lodged when the signed stipulation was admitted into evidence. On the other hand, throughout the proceeding, Ziskind claimed that the admission of the stipulation presented a possible *Bruton* problem to the extent that it implicated Ziskind in the conspiracy. Waiver, which ordinarily precludes any appellate

consideration of an issue, requires a showing that the party intentionally relinquished or abandoned an argument. *See United States v. Rodriguez*, 311 F.3d 435, 437 (1st Cir.2002). The record can be read to support Ziskind's contention that he did not agree, without reservation, to the admissibility of the stipulation. Thus, a reasonable argument could be made, that Ziskind at least preserved an objection to the stipulation under *Bruton* and did not intentionally relinquish any appellate argument concerning the stipulation. [¶] But, regardless of whether a *Bruton* objection was preserved, Ziskind has not argued *Bruton* on appeal. Instead, he has argued that the admission of the stipulation was unconstitutional under *Crawford* ... Thus, Ziskind's *Crawford* argument is forfeited, and we therefore review it only for plain error."

State v. Birth, 158 P.3d 345 (Kan. App. 2007) – "a defendant waives his or her right to confrontation by opening the door to inadmissible hearsay." [Case described in more detail under Testimonial Statements Offered by Defendant / Opening the Door / Rule of Completeness.]

State v. Kent, 391 N.J.Super. 352, 918 A.2d 626 (N.J. Super. A.D. 2007) – "we deem it appropriate prospectively to require, as a condition of our treatment of lab reports and blood sample certificates as 'testimonial' documents, that defense counsel provide reasonable advance notice to prosecutors that they wish to cross-examine the authors of those documents at trial. In the absence of such reasonable notice, a defendant shall be deemed to have waived his or her right to confrontation."

People v. Jordan, 2007 WL 1160009, *4 (Mich. App. 2007) (unpub) – "We also conclude that defendant declined to object to the victim's statements to the detective as a matter of trial strategy. Defendant argued in his opening statement that the evidence would show that the victim did not initially complain to police that she had been raped and that she only did so after being questioned by the friend. It does not appear that defendant could have shown this discrepancy without the hearsay testimony of the detective regarding what the victim told him, which likely explains why defendant still did not object after the trial court indicated that the excited utterance exception might not apply to the victim's statements to the detective. Thus, even assuming that the trial court should have ruled these statements inadmissible despite defendant's failure to object, any alleged error cannot be an error requiring reversal."

Morton v. Commonwealth, 2007 WL 325775, *1 (Va. App. 2007) (unpub) – "'a defendant's failure timely to notify the Commonwealth of his desire to confront the forensic analyst at trial constitutes a waiver of that right.'" (quoting *Brooks v. Commonwealth*, 49 Va. App. 155, 168, 638 S.E.2d 131, 138 (2006))

State v. Lasnetski, 696 N.W.2d 387, 391-395 (Minn. App. 2005) – "The state argues that, even if Mrs. Lasnetski's statements to Deputy Kujawa were testimonial under *Crawford*, appellant waived his rights under both the Confrontation Clause and the spousal-immunity privilege by calling his wife to testify at trial. We agree." [Note: Case also holds that because his wife testified as a defense witness, "appellant was afforded the opportunity to confront the declarant."]

➤ Sub-Category: Waiver by Lawyer

U.S. v. Monserrate-Valentin, 729 F.3d 31, 55-56 (1st Cir. 2013) – "the district judge warned Monserrate's counsel that her question was going to elicit hearsay from Agent Torres and gave

her an opportunity to withdraw it. She chose not to. As such, we conclude that any objection as to the admission of this testimony is waived."

United States v. Zepeda, 705 F.3d 1052, 1054 (9th Cir. Ariz. 2013) – "our case law recognizes that 'defense counsel may waive an accused's constitutional rights as a part of trial strategy.' [cite] Counsel's authority extends to waivers of the accused's Sixth Amendment right to cross-examination and confrontation as a matter of trial tactics or strategy."

State v. Tribble, 2012 VT 105, ¶ 38, 67 A.3d 210 (Vt. 2012) – "Assuming, without deciding, that counsel can in some circumstances stipulate to a waiver of defendant's Confrontation Clause rights pursuant to a prudent trial strategy, in this case, where defendant timely objected to such a waiver on the record, the purported waiver is invalid. Accordingly, the trial court erred in admitting the out-of-court testimony of Dr. Morrow over defendant's objection."

Commonwealth v. Myers, 82 Mass. App. Ct. 172, 971 N.E.2d 815 (Mass. App. Ct. 2012) – "After careful consideration of these precedents, we conclude that a defendant's waiver of the right to confront the analyst before admission in evidence of a drug analysis certificate does not require a colloquy between judge and defendant to confirm the defendant's personal waiver. So long as defense counsel's waiver occurs in the presence of the defendant, the defendant does not object, and the waiver objectively appears to further legitimate trial strategy, a judge exercising sound discretion need only conduct a colloquy with a defendant in circumstances of detectable disagreement, confusion, or uncertainty on [**824] the part of the defendant."

People v. Buie, 491 Mich. 294, 817 N.W.2d 33 (Mich. 2012) – "There is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel. ... we reaffirm the rule applied in *Murray*, and consonant with the rule applied in a majority of state and federal courts, that where the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record.¹⁰ ... In reaffirming this rule, we also clarify that the right of confrontation is not a right that must be personally waived by the defendant in Michigan..."

People v. Buie, 2011 Mich. App. LEXIS 22, 1-35 (Mich. Ct. App. Jan. 11, 2011), appeal granted, 489 Mich. 938, 797 N.W.2d 640 (May 25, 2011), rev'd, People v. Buie, 491 Mich. 294, 817 N.W.2d 33 (Mich. 2012)

United States v. Williams, 632 F.3d 129, 130-133 (4th Cir. S.C. 2011) – after discussing whether lawyer's waiver requires explicit concurrence from defendant – "While this Court is inclined to require that defendants make a clear waiver of their Sixth Amendment right, the Court need not reach this question here since both counsel and the district court were aware that Williams objected to the introduction of the stipulation. We can find no reasoning or case law that would uphold a waiver of a Sixth Amendment right by defense counsel over a defendant's objection."

United States v. Robinson, 617 F.3d 984 (8th Cir. Mo. Aug. 18, 2010) – "Robinson maintains that though his trial counsel stipulated to Brooks's [drug analysis] testimony, Robinson himself did not personally waive or acquiesce in counsel's attempted waiver. We disagree. Where the defendant is "aware of the stipulation . . . [and does] not object to the stipulation in court," we presume that he has acquiesced in his counsel's stipulation. *Id.* Here, Robinson's counsel

stipulated to the evidence prior to trial, and Robinson made no objection. Then, at trial, Robinson's counsel again stipulated to the evidence saying "I think I stipulated to that by mistake, but that's fine." And, again, Robinson made no objection. Without making his objection known, we presume that Robinson acquiesced in his counsel's stipulation. Thus, we find no error in the district court's admission of the evidence."

United States v. Lopez-Medina, 596 F.3d 716, 731-733 (10th Cir. Utah 2010) – "Similar to waiver by stipulating to the admission of evidence, counsel in a criminal case may waive a client's Sixth Amendment right of confrontation by opening the door, 'so long as the defendant does not dissent from his attorney's decision and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy.'"

Part 11(B): Pre-*Giles* Forfeiture Cases

Pre-*Giles*: Forfeiture Generally / Type of Evidence Needed

IMPORTANT NOTE: See the discussion of *Giles v. California*, 554 U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (June 25, 2008), in part 1 of this Outline. Many of the following cases remain good law, but probably not all of them, or in every detail.

Ware v. Harry, 2008 WL 1808326 (E.D. Mich. Apr 21, 2008) (unpub) (habeas) – "In rejecting petitioner's confrontation claim, the court of appeals explained that Harrell had reported to the police that petitioner had threatened those who had witnessed the killing with death if they talked about the incident. Specifically, petitioner told the witnesses 'if it gets out I know who to go to' and 'I know everybody in this house right now ... [i]f this shit go any further y'all next.' *See id.* Both officers who spoke with Harrell testified that Harrell was visibly frightened by the prospect of testifying against petitioner, and had expressed her fear on a number of occasions. *See id.* In light of this evidence, the court of appeals reasoned, "the trial judge could conclude, by a preponderance of the evidence, that defendant engaged in wrongdoing that was intended to, and did, procure the unavailability of Harrell as a witness." *Id.* The Court should conclude that this determination was reasonable." – also noting that "Although Harrell's statement was hearsay, it was admissible for purposes of determining the applicability of the forfeiture by wrongdoing rule."

U.S. v. Williams, 2008 WL 2091152 (D. Md. May 16, 2008) (unpub) (sentencing memorandum) – dealer killed informant, and his drug sentence was adjusted upward – "When a defendant's misconduct causes a witness to be unavailable at trial, he forfeits the right to object to that witness's out-of-court statements. ... As Welshons's unavailability for cross-examination was procured by Williams, the consideration of her statements to TFO Deveau does not offend the Sixth Amendment." - [NOTE: Applicability of *Crawford* to sentencing not addressed, but apparently assumed on the basis of *Apprendi* line of cases.]

U.S. v. Parks, 278 Fed.Appx. 527 (6th Cir. May 16, 2008) – "The Government offered the testimony of witnesses who stated that Defendant intimidated and threatened Ruffin in order to

prevent her from testifying." – but not deciding whether that was sufficient, because any error was harmless

Perkins v. Herbert, 537 F.Supp.2d 481 (W.D. N.Y. Mar 10, 2008) (habeas) – granting writ when evidence showed defendant himself didn't intimidate the witness or cause others to do the job for him, but rather was the unintended beneficiary of intimidation perpetrated by a co-defendant – the opinion unhelpfully refers to "waiver by misconduct" rather than forfeiture

Sohail v. State, 264 S.W.3d 251 (Tex. App.-Hous. Feb 21, 2008), pet. ref'd (Oct. 1, 2008) – "physical unavailability is not the only way to find forfeiture by wrongdoing. Intimidation is a well-recognized basis for employment of forfeiture by wrongdoing."

People v. Banos, 2008 WL 223824 (Cal.App. 2 Dist. Jan 29, 2008), summarily reversed and remanded for reconsideration in light of *Giles*, 2008 WL 2463827 (Oct. 6, 2008)

People v. Cortez, 2008 WL 142700 (Cal. App. 2 Dist. Jan 16, 2008) (unpub) – defendant and companions "shot Wenrich twice in the head, once in the chest and once in the hip. ... Wenrich survived for 14 months after the shooting. For much of that time, he was hospitalized and heavily medicated." – but on several occasions identified defendant as the shooter – applying *Giles* to find forfeiture

People v. Garces, 2007 WL 4384935 (Cal. App. 4 Dist. Dec 17, 2007) (unpub) – murder victim's prior statements, applying *Giles* to find forfeiture

Pena v. People, 173 P.3d 1107 (Colo. 2007) – "Following the filing of the [sexual assault] charge, the victim disappeared. Several days later her body was found. Pena fled to Mexico until 2001, when he was apprehended and charged with the girl's murder. Pena was convicted and sentenced to life in prison without the possibility of parole. His conviction was affirmed by the court of appeals, and this court denied certiorari. ... In February 2002, Pena went to trial on the sexual assault charge. Over Pena's objection, the jury heard testimony from several witnesses recounting out-of-court statements made by the victim. ... In the murder proceeding, the jury heard evidence of Pena's motive to kill the victim, including evidence of the sexual assault and of Pena's efforts to persuade the victim to drop the sexual assault charge. The court of appeals in the present case concluded that the guilty verdict in the murder trial constitutes sufficient evidence that Pena murdered the victim with the intent to make her unavailable as a witness. ... [W]e affirm the court of appeals' holding that Pena forfeited his right of confrontation in this case. ... Adjudicated facts from the murder proceeding establish that Pena killed the victim with the motive to silence her as a witness."

Vasquez v. People, 173 P.3d 1099 (Colo. 2007) – "Until now, no state jurisdiction employing the intent requirement has addressed a fact scenario in which a defendant had the requisite intent to work a forfeiture in one proceeding, then subsequently benefited (perhaps unwittingly) from the witness's unavailability in additional proceedings." – holding that the forfeiture applies in all proceedings, even those unforeseen by the perpetrator

Hodges v. Attorney General, State of Fla., 506 F.3d 1337 (11th Cir. 2007) (habeas) – " In 1986 Betty Ricks, a twenty-year-old convenience store clerk, filed a criminal complaint against George Michael Hodges charging him with indecent exposure. After his other efforts to dissuade

her from prosecuting him failed, Hodges shot Ms. Ricks twice in the head and neck with a rifle, killing her. That saved Hodges from the indecent exposure charge, a misdemeanor, but it landed him on Florida's death row where he has been for the last eighteen years. ... There is no more thorough way to obtain the absence of a witness than by murdering her, and no more deserving circumstance for application of the rule of forfeiture by wrongdoing."

State v. Rodriguez, 743 N.W.2d 460, 2007 WI App 252 (Wis. App. Oct 02, 2007) – on remand from Wisconsin Supreme Court for reconsideration in light of *State v. Jensen*, 2007 WI 26, 299 Wis.2d 267, 727 N.W.2d 518 (Wis. 2007) – "Rodriguez was charged in the original criminal complaint with battery; his victims were Jill LaMoore, who was his girlfriend, and her daughter, who was seven years old. He was also charged with intimidation of a victim based upon a supporting affidavit that alleged that he threatened LaMoore with a 'bloodbath' and that he would stab her if she ever called the police again." – victims did not appear at trial, their statements to police were admitted – the State presented "audiotapes of multiple telephone calls made by Rodriguez from the House of Correction in which Rodriguez urged his brother, Luis, to tell LaMoore not to testify. ... ¶ 18 Rodriguez argues that there is no proof of intimidation of a witness because Luis denies having passed on the message to LaMoore and because the State did not prove that Luis actually delivered the message. Such proof would compel the State either to find the missing witness and persuade her to testify about whether she was intimidated (which would remove *Crawford* confrontation issues because she would no longer be unavailable) or to persuade Luis to incriminate himself by admitting that he took action to intimidate the witness. We do not believe that *Jensen* imposes such impossible alternatives on the State, and that the impossibility of such alternatives may have also been a reason that *Jensen* requires proof only by a preponderance of credible evidence, *i.e.*, that defendant's misconduct was a cause of the witness's absence is more likely than not. ... ¶ 20 Because we conclude that Rodriguez forfeited, by his wrongful conduct, his right to confront LaMoore and her daughter, we do not decide whether the statements by LaMoore or her daughter were testimonial." [NOTE: Concurrence would affirm on the ground that the statements were not testimonial.]

State v. Irwin, 2007 WL 2758606, 2007-Ohio-4996 (Ohio App. 7 Dist. Sep 19, 2007) (unpub) – "¶ 18} It should be also kept in mind that *Crawford* explicitly preserved the principle that an accused has forfeited his confrontation right where the accused's own misconduct is responsible for a witness's unavailability. ... Appellant was charged with multiple counts of assault against a man already dying from Lou Gehrig's disease. Appellant is now arguing that her confrontation rights have been violated because the victim was not available for trial (because he died) and because Mr. Hoopes' poor physical condition prevented him from giving complete answers at his deposition. It can certainly be argued that the various acts of assault, including beatings to his head, body, and groin, contributed to Mr. Hoopes' deteriorating condition. In fact, this was established at trial. (Tr., p. 315.) It is exceedingly difficult to accept the argument that Appellant could repeatedly assault a dying man and also demand to have the victim's deposition testimony excluded from trial on the grounds that his poor health created a confrontation clause violation."

U.S. v. Johnson, 495 F.3d 951 (8th Cir. 2007) – [federal death penalty case, involving five murders] – "The fact that Johnson may have only aided and abetted the procurement of the witnesses' unavailability is of little moment. If a defendant's role as an aider and abettor may constitute sufficient participation in a murder to warrant the imposition of a death sentence, such conduct should also suffice for the forfeiture of hearsay and confrontation objections. In other words, it 'would make little sense to limit forfeiture of a defendant's trial rights to a narrower set

of facts than would be sufficient to sustain a conviction and corresponding loss of liberty.' *United States v. Cherry*, 217 F.3d 811, 818 (10th Cir.2000)".

People v. Jernigan, 41 A.D.3d 331, 838 N.Y.S.2d 81, 2007 N.Y. Slip Op. 05629 (N.Y. June 28, 2007) – " Defendant was convicted of brutally and repeatedly slashing his former girlfriend with a razor. When the victim failed to appear for trial, the court conducted a *Sirois* hearing [cite] where the People proved, by clear and convincing evidence, that defendant's misconduct procured her unavailability for trial [cite]. Accordingly, the court properly allowed the People to introduce her grand jury testimony at trial. ... There was extensive direct and circumstantial evidence of defendant's wrongdoing, including phone messages that defendant left on the victim's answering machine in which he implored her not to testify against him, and evidence that he made an additional 59 calls to her whose content could not be determined. Contrary to defendant's argument, the People were not required to prove that he made any threats. Instead, the evidence fully supported the conclusion that defendant wrongfully made use of his relationship with the victim in order to pressure her to violate her duty to testify"

State v. Mason, 160 Wash.2d 910, 162 P.3d 396 (Wash. 2007) – "¶ 26 We agree that equity compels adopting the doctrine of forfeiture by wrongdoing. In this case, we will not allow Mason to complain that he was unable to confront Santoso when Mason bears responsibility for Santoso's unavailability. Mason made his right impossible to implement; he has only himself to blame for its loss."

Smith v. State, 2007 WL 2066291 (Tex. App.-Austin Jul 18, 2007) (unpub) – "In this case, several recorded phone calls between Smith and Patrice were admitted into evidence for the purpose of showing that Smith repeatedly asked Patrice not to testify against him. In his brief, Smith 'reluctantly concedes' that he may have waived his right to confrontation under the doctrine of forfeiture by wrongdoing. The trial court could have reasonably concluded that the admission of Patrice's statement to Officer Pietrowski did not violate Smith's confrontation rights under the doctrine of forfeiture of wrongdoing. Therefore, Smith has failed to demonstrate that his counsel's failure to object to the statements on Confrontation Clause grounds fell below an objective standard of reasonableness as required by the first prong of *Strickland*."

State v. Weaver, 733 N.W.2d 793 (Minn. App. Jul 03, 2007) – "[A] defendant may be deemed to forfeit his right to confrontation by absconding, such as when there is a terminally ill witness. Here, however, while appellant left the state after being indicted, there is no indication that he knew Regions Hospital would destroy its records after two years. We therefore reject the state's argument that appellant has forfeited or waived his right to confront the laboratory technician by fleeing and evading trial for four years."

Gatlin v. U.S., 925 A.2d 594 (D.C. 2007) – "The trial judge carefully and thoroughly articulated her rationale for applying co-conspirator liability principles, demonstrating the existence of an agreement (among Mr. Champion, Mr. Gatlin, and Mr. Oliver) and a conspiracy to intimidate government witnesses; as well as the evidence (through the testimony of Mr. Ray, Mr. Smith, Ms. Levy, Ms. Evans, Ms. Hunter, and Ms. Johnson) showing Mr. Gatlin's involvement in the conspiracy; and the murder of Mr. Jones on the same day that Mr. Oliver intimidated both Mr. Jones and Ms. Levy about testifying. It was reasonably foreseeable that intimidation of and threats to witnesses could result in the murder of a witness. In short, the trial

court's application of Pinkerton co-conspirator liability principles to support the admission of Mr. Jones' grand jury testimony must be sustained on this record."

Boyd v. State, 866 N.E.2d 855 (Ind. App. May 25, 2007) – "Our supreme court has also recognized that a defendant can forfeit the right to confrontation. *See Fowler v. State*, 829 N.E.2d 459, 470 (Ind.2005) ('By choosing to allow Roar to leave the witness stand without challenging her refusal to answer questions on cross-examination and then choosing to not recall her to the stand after her statement was admitted through Decker's testimony, Fowler's right to further confrontation was forfeited.'). *cert. denied*, 126 S.Ct. 2862. Regarding forfeiture by wrongdoing, the *Fowler* court observed that although Indiana courts have never addressed the applicability of this doctrine to a Confrontation Clause violation, the doctrine has a lengthy history and is recognized by the federal courts and courts of several sister states. *Id.* at 468. [¶] We see no reason why a defendant, who by his or her own wrongdoing renders a witness unavailable to testify, would not forfeit the Sixth Amendment right to confront that witness at trial. To hold otherwise would permit a defendant to benefit from his or her wrongful act, which in this case was murdering the witness."

State v. Byrd, 393 N.J.Super. 218, 923 A.2d 242 (N.J. Super. A.D. 2007) – deciding, as a matter of state evidentiary law rather than under confrontation clause, not to decide whether to recognize forfeiture principle "given the significant and far-reaching implications of the proposed hearsay exception" [NOTE: If recognizing the exception has significant and far-reaching implications, what about the implications of *not* recognizing it??]

People v. Hayes, 2007 WL 1366492, *5 (Cal. App. 5 Dist. 2007) (unpub) – "In order to apply the forfeiture-by-wrongdoing doctrine, certain things must be shown. "First, the witness should be genuinely unavailable to testify and the unavailability for cross-examination should be caused by the defendant's intentional criminal act. Second, a trial court cannot make a forfeiture finding based solely on the unavailable witness's uncontroverted testimony; there must be independent corroborative evidence that supports the forfeiture finding." (People v. Giles, *supra*, 40 Cal.4th at p. 854.)"

U.S. v. Stewart, 485 F.3d 666 (2nd Cir. 2007) – defendant shot rival drug dealer, threatened to kill him if he cooperated with police, then arranged for accomplice to kill him – "[T]he district court found that the government had shown 'by a preponderance of the evidence that Mr. Stewart acted through Mr. Dixon to secure the absence of the witness, Robert Thompson, and that [he did] so with intent to do just that.' ... First, the government was not required to show Stewart's involvement in Dixon's murder of Ragga by 'direct evidence.' Both the existence of a conspiracy and a given defendant's participation in it with the requisite knowledge and criminal intent may be established through circumstantial evidence."

State v. Tyler, 155 P.3d 1002, *1007 (Wash. App. Div. 3, 2007) – even where state prevails below, "The State was required to invoke this [forfeiture] doctrine at trial to have preserved this issue for review on appeal."

People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333, 312 Ill.Dec. 268 (Ill. 2007) – in child sex abuse case, evidence that "defendant had warned her not to recount the incident" and "that defendant had said he would hurt her if she discussed it", sufficient to warrant remand for hearing on forfeiture by wrongdoing – [NOTE: Immediately after lengthy discussion of

forfeiture principle, plurality opinion states: "After *Crawford*, a testimonial statement of a witness who does not testify at trial is *never* admissible unless (1) the witness is unavailable to testify, and (2) the defendant had a prior opportunity for cross-examination." (Italics in original.) The italicized "never" is flatly contradicted by the immediately preceding discussion of forfeiture.]

People v. Romero, 149 Cal.App.4th 29, 56 Cal.Rptr.3d 678 (Cal. App. 4 Dist. 2007), as modified on denial of rehearing (Apr 18, 2007), review denied (Jun 13, 2007) - "There were only two witnesses to Acosta Ramos's death: appellant and Acosta Ramos. As in *Giles*, appellant admitted killing the victim but attempted to use the victim's own prior statements to establish his claim of self-defense. Under these circumstances appellant forfeited his right to raise a confrontation clause objection to Acosta Ramos's statement to Ferguson."

Buckman v. Commonwealth, 2007 WL 858815, *2-3 (Ky. 2007) (unpub) – girlfriend rather than defendant himself intimidated absent witness – "the prosecutor clearly established by a preponderance of the evidence wrongdoing by Camille Ford that procured the absence of [witness] and that Buckman at the very least acquiesced in this. Both Ford and Detective James Hellinger testified that a charge of intimidating a witness was brought by [witness] against Ford. Detective Hellinger also testified to repeated phone calls from Ford to [witness]." – (Justice McAnulty dissented from finding of forfeiture, writing: "I do not believe appellant's mere knowledge of the actions of Camille Ford, his girlfriend, provided a sufficient nexus to establish by a preponderance of the evidence that appellant himself procured the absence of the witness.")

People v. Vasquez, 155 P.3d 565 (Colo. Ct. App. 2006), overruled in part, Vasquez v. People, 173 P.3d 1099 (Colo. 2007) –

United States v. Ervin, 209 Fed.Appx. 519, 2006 WL 3791300, 2006 U.S. App. LEXIS 32054 (6th Cir. Ohio 2006) (unpub) – "A Federal Bureau of Investigations (FBI) cooperating witness was car-jacked and kidnaped at gunpoint by defendants. He called his FBI contact, via cell phone, and told him what was happening. A meeting to exchange the witness for a purported ransom was arranged between the FBI and defendants. The man, the woman, and the witness were in the same vehicle. As an FBI agent approached the vehicle, the man, driving it, surged the vehicle towards the agent. The agent fired, wounding the man and killing the witness. The woman exited the vehicle and fired two shots at the agents, but then surrendered. The court held that both the man and the woman were responsible for the witness's unavailability because they put in motion the events that led to a confrontation between themselves and FBI agents; more immediately, the man's attempt to run down an FBI agent caused the agent to shoot in self-defense which in turn killed the witness. Therefore, defendants forfeited the right to confront the witness, even if their intent was not to prevent his testimony. Thus, the FBI contact's testimony about the cell phone conversations were admissible."

State v. Ards, 295 Wis.2d 842, 2006 WI App 175, 2006 WL 1911681 (Wis. Ct. App. 2006) – "Ards next contends that admitting Dotson's statements into evidence violated his confrontation clause rights because there was insufficient evidence to find that Ards induced Dotson's unavailability for trial. However, in a hearing on the matter the State introduced evidence of recorded telephone conversations indicating that Ards and his mother not only persuaded Dotson not to appear at trial, but helped her avoid compulsory appearance on a material witness warrant. The record of these calls provided sufficient evidence to support the trial court's finding that

Ards procured Dotson's failure to appear, under either the preponderance of the evidence standard most courts apply, or the clear and convincing evidence standard that Ards wants applied. He therefore forfeited his right to confront Dotson.”

United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006) – Defendant argued that forfeiture of his confrontation rights cannot occur from the conduct of co-conspirators killing the primary witness against him. “As a legal matter, the court agreed with the government that a defendant forfeits his right to confront a witness if his coconspirators caused the unavailability of that witness through misconduct and if their action was within the scope and in furtherance of the conspiracy, as well as reasonably foreseeable to conspirators. The court found that Sweeney [co-conspirator] ‘was directly involved in procuring the absence of . . . Smith as a witness by . . . inducing a co-conspirator to kill’ him, and that ‘Carson's murder of Smith, either alone or in conjunction with others, made [Smith] unavailable as a witness for the government in this case.’ ‘[T]hese co-conspirators,’ the district court said, forfeited ‘their confrontation and hearsay objections to statements about acts in furtherance of, within the scope and reasonably foreseeable to all of them.’”

Gonzalez v. State, 195 S.W.3d 114 (Tex. Crim. App. 2006) – “Defendant was convicted for shooting the victims to death. After the police arrived, one victim identified the shooter as a relative of a neighbor and stated that he had stolen their truck. Defendant appealed, arguing that the trial court violated his right to confrontation by admitting into evidence the victim's statements to the police officers as hearsay. On appeal, the court held that defendant forfeited, by his own misconduct of fatally shooting the victim during a robbery or the burglary of her home, his right to confront the victim in court about the hearsay statements she made before she died, and therefore her statements were properly admitted into evidence. The evidence strongly suggested that the procurement of the victim's absence was motivated, at least in part, by defendant's desire to permanently silence her and prevent her from identifying him. The victims knew defendant, they were friends with his grandmother, and defendant entered the victims' home without a disguise and with a very distinguishing characteristic: his dark hair dyed blonde.”

State v. Romero, 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, 2006 NMCA 45, (N.M. Ct. App. 2006), aff'd, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694 (N.M. Mar 15, 2007), reh'g denied (Apr 11, 2007) – The defendant was charged with domestic assault/rape and before trial, his wife was found dead in his bed and he was charged and convicted with her murder, but the conviction was overturned. In introducing certain statements during the domestic assault/rape trial, the prosecutor argued forfeiture. The court of appeals disagreed and found “the State is required to prove that Defendant procured the victim's absence with the intent to prevent her from testifying. We express no opinion on a proper finding under these facts. We do note that the trial court should hold a new trial and exclude those statements which are testimonial in nature only if it finds that Defendant was not in any way motivated by a desire to prevent the victim from testifying when he committed the acts that contributed to her death.”

State v. Ivy, 188 S.W.3d 132 (2006) – “We hold that the trial court correctly determined that Thomas's statements were admissible under Rule 804(b)(6) of the Tennessee Rules of Evidence. The preponderance of the evidence supported the trial court's finding that Ivy killed Thomas to prevent her from contacting police about his aggravated assault on June 6, 2001. Ivy followed Thomas as she drove to and from the Criminal Justice Center in Memphis, Tennessee, to swear

out a warrant against him that was never served. He killed her only two days later. Given these facts, we disagree with the Court of Criminals Appeals' view that Rule 804(b)(6) required that Ivy had to know about the issuance of an arrest warrant for the aggravated assault; moreover, there was no requirement that Ivy's *sole* intention had to be preventing Thomas from testifying against him in a proceeding based on the aggravated assault."

Commonwealth v. Morgan, 2005 Va. Cir. LEXIS 189 (Va. Cir. Ct. 2005) – "After the victim had been shot seven times, he was alert, responsive, and praying. While the victim was being placed into the ambulance, a police officer asked him who shot him. The victim answered, "C-Murder shot me." The victim later died from septic shock as a result of the gunshot wounds. Another officer, who had known defendant for a number of years, always knew him to answer to the name "C-Murder." In addition, the police maintain a computerized database of nicknames with corresponding photographs. Defendant's photograph resulted when the nickname "C-Murder" was entered into that database. The court found that the victim believed he was about to die when he made the statement. The fact that law enforcement's questioning prompted the statement, did not render it inadmissible. Therefore, the statement qualified as an excited utterance and a dying declaration. Defendant forfeited his Sixth Amendment right to confrontation by causing the victim's death and thus procuring his absence from the proceedings."

State v. Hand, 107 Ohio St. 3d 378, 840 N.E.2d 151, 2006-Ohio-18 (2006) – "Defendant killed his wife and one he hired to kill her. The supreme court held the accomplice's statements were admissible, under Ohio R. Evid. 804(B)(6), as defendant procured the accomplice's absence. The accomplice's statements admitting involvement in killing defendant's former wives were admissible under Ohio R. Evid. 804(B)(3), and saying he would have money after killing defendant's present wife was admissible under Ohio R. Evid. 803(3) to show he acted accordingly. The accomplice's statements admitting a conspiracy were admissible under Ohio R. Evid. 801(D)(2)(e), as defendant's similar statements independently showed the conspiracy. Defendant forfeited his right to confrontation by making the accomplice unavailable."

People v. Hampton, 363 Ill. App.3d 293, 842 N.E.2d 1124, 299 Ill. Dec. 772 (Ill. App. 1 Dist. 2005), as modified on denial of rehearing (Feb 27, 2006), rev'd in part on other grounds, 225 Ill.2d 238, 867 N.E.2d 957, 310 Ill.Dec. 906 (Ill. 2007) – "We conclude that any conduct by an accused intended to render a witness against him unavailable to testify is wrongful and may result in forfeiture of the accused's privilege to be confronted by that witness." – (Illinois Supreme Court decision says: "[W]e dismiss this appeal and vacate the portion of the appellate court's judgment addressing issues other than the confrontation clause claim and the possible forfeiture of that claim by wrongdoing. ... The cause is remanded to the circuit court to conduct the evidentiary hearing on forfeiture by wrongdoing. On remand, we refer the trial court to our recent decision in *People v. Stechly*, No. 97544, 2007 WL 1149969, __ Ill.2d __, __ Ill.Dec. __, __ N.E.2d __ (April 19, 2007), for direction on conducting that hearing.")

United States v. Johnson, 403 F.Supp.2d 721 (N.D. Iowa 2005) – Defendant was charged in a 1993 drug trafficking case, which was later dismissed because key witnesses disappeared. In 2000, defendant was charged for killing those witnesses. Forfeiture was granted against this defendant in regard to hearsay statements made by two of the murder victims. "In *Emery*, the court held that the exception *is* applicable to a missing witness's statements even in a trial for the murder of that witness, not just in a trial for the underlying crimes about which the defendant

allegedly feared that the missing witness would testify. *Id.* (involving a charge of killing a federal informant in violation of 18 U.S.C. § 1512(a)(1)(C)). This court now adds that the "forfeiture by wrongdoing" exception also does not allow the admission of any statement by any "murder victim" in any proceeding, thus creating some umbrella "murder victim's" exception. Rather, as *Emery* explains and FED. R. EVID. 804(b)(6) requires, the murder victim's statements are only admissible against a defendant who wrongfully prevented future testimony from that witness or potential witness. *See Emery*, 186 F.3d at 926 (the "forfeiture by wrongdoing" exception applies where the defendant has wrongfully procured the absence of the witness or potential witness); FED. R. EVID. 804(b)(6) (the "forfeiture by wrongdoing" exception applies to "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness")."

State v. Turner, 2005 Minn. App. Unpub. LEXIS 420 (2005) – “Here, the district court found that Turner wrongfully contacted J.J. and attempted to coerce or influence her not to cooperate with the state and to make herself unavailable for trial. It determined that J.J. was unavailable to the state because of Turner's wrongdoing. Turner violated a no-contact order by calling J.J. He told her not to get caught, not to answer the door, and to "get lost" for two weeks. The state was unable to serve J.J. with a subpoena and was not, therefore, able to call her to testify. We conclude that the district court did not abuse its discretion by determining that Turner's conduct was wrongful and prevented J.J. from testifying in the state's case and that Turner, therefore, waived his right to complain that his constitutional rights were violated by the admission of J.J.'s statements to the apartment's tenant and to the police officer.”

United States v. Montague, 421 F.3d 1099 (10th Cir. Utah 2005) – “During the investigation of a domestic violence complaint filed by defendant's wife, police officers seized three firearms after the wife indicated that there were two firearms in the house and one in defendant's truck. Although the wife testified before the grand jury that the firearms belonged to defendant, she refused to testify at defendant's trial and invoked her marital privilege. On appeal, defendant argued that the district court violated his Sixth Amendment right to confront witnesses by admitting at trial the grand jury testimony of his wife. The court held that the district court did not clearly err in finding that defendant procured his wife's unavailability. The evidence showed that after defendant was arrested, he repeatedly communicated with his wife in violation of a no-contact court order. Therefore, the testimony was properly admitted under Fed. R. Evid. 804(b)(6).”

United States v. Mayhew, 380 F.Supp.2d 961 (S.D. Ohio 2005) – Defendant shot and killed his ex-girlfriend and her fiancée and kidnapped their daughter. Defendant was approached by a police officer while on the run and killed the officer. During a chase which resulted in a roadblock of the defendant, the defendant shot his daughter and shot himself. While en route to the hospital, the daughter told a police officer of the shootings and the kidnapping, all of which was tape recorded by the officer. The daughter later died. Admitting the tape recorded statement at trial was appropriate since the defendant forfeited his right to confront his daughter since he killed her. “Equitable considerations demand that a defendant forfeits his Confrontation Clause rights if the court determines by a preponderance of the evidence that the declarant is unable to testify because the defendant intentionally murdered her, regardless of whether the defendant is standing trial for the identical crime that caused the declarant's unavailability”

People v. Melchor, 362 Ill.App.3d 335, 841 N.E.2d 420, 299 Ill. Dec. 8 (Ill. App. 1 Dist. 2005), holding that forfeiture does not apply where defendant's wrongdoing consists of jumping bail and remaining a fugitive for 10 years, during which time sole eyewitness dies of drug overdose, **vacated** on ground that intermediate court should have decided non-constitutional hearsay issue first, **___ N.E.2d ___, 226 Ill.2d 24 (Ill. Jun 07, 2007)**, on remand to appellate court, conviction reversed on non-constitutional hearsay ground, **People v. Melchor, ___ N.E.2d ___, 2007 WL 2821990 (Ill.App. 1 Dist. Sep 28, 2007)**

United States v. Gray, 405 F.3d 227 (4th Cir 2005) – This case has a good background and analysis of the forfeiture by wrongdoing principle. “Although out-of-court statements ordinarily may not be admitted to prove the truth of the matters asserted, the doctrine of forfeiture by wrongdoing allows such statements to be admitted where the defendant's own misconduct rendered the declarant unavailable as a witness at trial. The Supreme Court applied this doctrine in *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1878), stating that “the Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.” *Id.* at 158. By 1996, every circuit to address the issue had recognized this doctrine. *See United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996); *United States v. Mastrangelo*, 693 F.2d 269, 273-74 (2d Cir. 1982); *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982); *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. 1982); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979); *United States v. Carlson*, 547 F.2d 1346, 1357 (8th Cir. 1976). *** We conclude that Rule 804(b)(6) applies *whenever* the defendant's wrongdoing was intended to, and did, render the declarant unavailable as a witness against the defendant, without regard to the nature of the charges at the trial in which the declarant's statements are offered.”

United States v. Jordan, 2005 U.S. Dist. LEXIS 3289 (D. Colo. 2005) – “The victim was stabbed with a sharpened piece of metal in the main recreation yard of a federal penitentiary. Defendant was also an inmate there, and he was charged with second-degree murder, assault with intent to murder, assault with a dangerous weapon, and assault resulting in serious bodily injury. He moved to prevent plaintiff United States from using evidence of what had been characterized as the victim's dying declarations. The court noted that at three different points, the victim was questioned, and he identified defendant as the perpetrator. The United States wanted to use those statements under the dying declaration hearsay exception, the excited utterance hearsay exception, and the Forfeiture by Wrongdoing Doctrine hearsay exception. The court rejected all three arguments, finding that admission of a testimonial dying declaration after *Crawford* went against the sweeping prohibitions set forth in that case. The court also rejected the excited utterance argument, and found that the Forfeiture by Wrongdoing doctrine did not apply in the action.”

United States v. Garcia-Meza, 403 F.3d 364, 66 Fed. R. Evid. Serv. 1131, 2005 FED App. 0159P (6th Cir. 2005) - Defendant admitted to killing his wife. At trial, the prosecutor admitted excited utterances from the deceased wife through the testimony of police officers. Defendant was convicted and on appeal argued that admitting the excited utterances violated *Crawford* and that forfeiture should not be applied because he did not intend to prevent her from testifying when killing her. The Court held that the defendant made his wife unavailable to testify as a result of killing her and, therefore, forfeited the right to argue a Sixth Amendment violation. The court further held that the Defendant need not specifically intend to prevent the witness from

testifying because forfeiture is applied based on equitable grounds and does not contain a specific intent provision.

People v. Moore, 117 P.3d 1 (Colo. Ct. App. 2004) – Defendant stabbed his wife and while she was in the ambulance and in an excited state of mind, she informed a police officer that her husband stabbed her. The victim ultimately died from the stabbing. The court ruled that the defendant's wrongdoing in killing his wife forfeited his right to cross-examine her regarding her excited utterance to the police officer and the statement was allowed into evidence.

State v. Meeks, 277 Kan. 609 (2004)– “In the instant case, Officer Hall was arguably conducting an interrogation when he asked Green if he knew who shot him, thus making the response testimonial. Moreover, Meeks was not given the opportunity to confront Green through cross-examination because Green died before testifying at trial. We need not determine whether the response was testimonial or not, however, because we hold that Meeks forfeited his right to confrontation by killing the witness, Green.”

Francis v. Duncan, 2004 U.S. Dist. LEXIS 16670 (SDNY 2004)– Defendant telephoned death threats to his robbery victim that caused her to not testify at trial. The court ruled that the Defendant forfeited his right to confront the victim and the victim's grand jury testimony was admissible at trial, as was her statements regarding fear of dying.

People v Jiles, 122 Cal. App. 4th 504; 18 Cal. Rptr. 3d 790 (Cal Ct App 4th Dist Div 2, 2004) – Defendant admitted to stabbing his wife and ultimately resulted in her death. At the scene, the victim identified the defendant as her assailant. On appeal, the court did not address whether a dying declaration would be a non-testimonial statement for purposes of *Crawford* but instead focused on the forfeiture provision to confirm proper admission at trial of the statement.

People v. Giles, 123 Cal. App. 4th 475 (Cal App 2d 2004), aff'd, 40 Cal.4th 833, 152 P.3d 433, 55 Cal.Rptr.3d 133 (2007) – Statements of the deceased victim, told to a police officer in a previous altercation, were admitted during the murder trial. The court found that the defendant forfeited his right to cross examine the victim regarding the statements previously made due to his admitted wrongdoing in killing the victim. The court applied a clear and convincing standard.

New Jersey v Sheppard, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984) – Prosecutor can use acts during the commission of the crime to show procurement by Defendant to induce unavailability of victim or witness. If victim or witness refuses to testify, cannot remember, becomes non-responsive during questioning, this argument should be made to show that Defendant forfeited Confrontation right due to wrongdoing.

Whether Proof of Subjective Intent to Procure Witness's Absence Is Required

IMPORTANT NOTE: See the discussion of *Giles v. California*, 554 U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (June 25, 2008), in part 1 of this Outline. Because *Giles* held that *some* type of subjective purpose is required – though apparently not ordinary specific intent – the summaries formerly collected here are obsolete and have been deleted, although the citations remain.

State v. Her, 750 N.W.2d 258 (Minn. May 29, 2008) on remand from SCOTUS, remanding case to district court for evidentiary hearing, State v. Her, 781 N.W.2d 869, 870-880 (Minn. 2010) –

U.S. v. Parks, 278 Fed.Appx. 527 (6th Cir. May 16, 2008)

Sohail v. State, 264 S.W.3d 251 (Tex. App.-Hous. Feb 21, 2008), pet. ref'd (Oct. 1, 2008)

Morales v. Campbell, 2008 WL 413746, *1+ (N.D. Cal. Feb 13, 2008) (unpub) (habeas)

State v. Sanchez, 341 Mont. 240, 177 P.3d 444, 2008 MT 27 (Mont. Jan 31, 2008)

People v. Cortez, 2008 WL 142700 (Cal. App. 2 Dist. Jan 16, 2008) (unpub)

Vasquez v. People, 173 P.3d 1099 (Colo. 2007)

U.S. v. Cubie, 2007 WL 3223299 (E.D. Wis. Oct 26, 2007) (unpub) (pretrial order)

State v. Mason, 160 Wash.2d 910, 162 P.3d 396 (Wash. 2007)

People v. Moreno, 160 P.3d 242 (Colo. 2007)

State v. Throm, 2007 WL 1500274 (Wis. App. May 24, 2007) (unpub)

People v. Hayes, 2007 WL 1366492, *5 (Cal. App. 5 Dist. May 9, 2007) (unpub)

People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333, 312 Ill.Dec. 268 (Ill. 2007)

State v. Romero, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694 (N.M. 2007), cert. pet. filed (July 6, 2007)

Doan v. Voorhies, 2007 WL 894559, *17 -18 (S.D. Ohio 2007) (unpub)

People v. Giles, 40 Cal.4th 833, 152 P.3d 433, 55 Cal.Rptr.3d 133 (Cal. 2007)

State v. Jensen 727 N.W.2d 518, 535 ¶ 52 (Wis. 2007)

People v. Costello, 146 Cal.App.4th 973, 53 Cal.Rptr.3d 288, 301-302 (Cal. App. 4 Dist. 2007)

U.S. v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005)

➤ Pre-Giles Sub-Category: Relationship of FRE 804(b)(6) to Forfeiture Principle

IMPORTANT NOTE: See the discussion of *Giles v. California*, 554 U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (June 25, 2008), in part 1 of this Outline. *Giles* implies, without actually saying, that the constitutional forfeiture rule and Fed. R. Evid. 804(b)(6) are identical.

Morales v. Campbell, 2008 WL 413746, *1+ (N.D. Cal. Feb 13, 2008) (unpub) (habeas) – "Petitioner's forfeiture argument, although superficially logical, is untenable because petitioner errs by conflating the common law rule of equitable forfeiture of the right of confrontation with the more recently developed and distinct FRE 804(b)(6)."

U.S. v. Johnson, 495 F.3d 951 (8th Cir. Jul 30, 2007) – [federal death penalty case, involving five murders] – "We observe first that the scope of the forfeiture by wrongdoing doctrine under common law may differ from the version of the doctrine established by Rule 804(b)(6). ... Because the requirements for forfeiture under Rule 804(b)(6) are arguably more stringent than those under the common law version of the doctrine, a matter we need not and do not resolve today, and because the statements at issue here must, in any case, be admissible under the Federal Rules of Evidence (any forfeiture of Johnson's confrontation rights notwithstanding), our analysis will focus on the requirements of the Rule 804(b)(6)."

U.S. v. Martinez, 476 F.3d 961 (D.C. Cir. 2007) – "Even assuming Lopez [informant] was killed by the Herrera Organization [defendant's own organization], Martinez argues that Lopez's murder was not 'intended to' procure Lopez's unavailability as a witness. Instead, Martinez contends that the Herrera Organization would have murdered Lopez to retaliate for the loss of the March 16th cocaine shipment. Martinez's argument is based on a false either-or dichotomy. It is surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying. See *Carson*, 455 F.3d at 360-61 & n. 21, 364 n. 23. The two purposes often go hand-in-glove, and this case is just another good example. Martinez's argument would have the perverse consequence, moreover, of allowing criminals to murder informants and thereby prevent admission of the informants' statements-just so long as the criminal could show that the intent was retaliation (which the criminal almost always could do). The text of Rule 804(b)(6) does not support such an absurd and dangerous principle."

U.S. v. Natson, 469 F.Supp.2d 1243, 1251-52 (M.D. Ga. November 22, 2006) – "It is correct that for Confrontation Clause purposes a defendant who eliminates a witness forfeits any constitutional right to confront that witness later regardless of the defendant's motive. However, Federal Rule of Evidence 804(b)(6) is narrower than this Confrontation Clause exception."

Pre-Giles: Forfeiture Distinguished from Waiver

IMPORTANT NOTE: See the discussion of *Giles v. California*, 554 U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (June 25, 2008), in part 1 of this Outline. Many of the following cases remain good law, but probably not all of them, or in every detail.. After *Giles*, the distinction remains valid but is less significant.

U.S. v. Johnson, 495 F.3d 951 (8th Cir. Jul 30, 2007) – "Johnson asserts that the forfeiture rule is inapplicable because she did not knowingly or intentionally waive her confrontation rights. This argument is unavailing, as courts have consistently concluded that the forfeiture by wrongdoing doctrine rests on the defendant's wrongdoing rather than on a knowing and intelligent waiver."

State v. Mason, 160 Wash.2d 910, 162 P.3d 396 (Wash. 2007) – "Mason argues a forfeiture is equal to a waiver and thus he cannot lose his right of confrontation unless he knowingly and intelligently waives it. Therefore, he reasons, those who obtain witnesses' absences for a reason other than to prevent their testimony have not knowingly and intelligently waived their confrontation rights and thus evade the rule of forfeiture. [fn] We disagree. ¶ 28 The rule of forfeiture is distinct from waiver."

People v. Giles, 40 Cal.4th 833, 152 P.3d 433, 55 Cal.Rptr.3d 133 (Cal. 2007) - "Thus, it appears that the intent-to-silence element required by some cases evolved from the erroneous characterization of the forfeiture doctrine as the waiver by misconduct doctrine. Because a waiver is an intelligent relinquishment of a known right, the intent-to-silence element was added to establish the defendant was on notice that the declarant was a potential witness and therefore knowingly relinquished the right to cross-examine that witness. (*See United States v. Houlihan, supra*, 92 F.3d at pp. 1279-1280 .) But, '[t]he Supreme Court's recent affirmation of the 'essentially equitable grounds' for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive.'" (*Garcia-Meza, supra*, 403 F.3d at p. 370.)

People v. Costello, 146 Cal.App.4th 973, 53 Cal.Rptr.3d 288 (Cal. App. 4 Dist. 2007) – very thorough discussion of forfeiture / waiver distinction

U.S. v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005) – much-cited case on forfeiture / waiver distinction

Pre-Giles: Prosecution for Same Act that Made Witness Unavailable

IMPORTANT NOTE: See the discussion of *Giles v. California*, 554 U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (June 25, 2008), in part 1 of this Outline. The logic of *Giles* would seem to call the following cases into question.

U.S. v. Stewart, 485 F.3d 666 (2nd Cir. 2007) – "[T]he forfeiture-by-wrongdoing principle made the testimony as to Ragga's statements admissible at Stewart's trial on the present federal charges [for conspiracy to murder Ragga, among many other things] even though Stewart's efforts had been focused on preventing Ragga from testifying at a different trial, to wit, Stewart's state trial for assault, rather than the trial in the present federal case (which had not yet been initiated)."

Doan v. Voorhies, 2007 WL 894559, *17-18 (S.D. Ohio 2007) (unpub) – habeas – "the exception may be applied even where the defendant is on trial for the murder of the hearsay declarant."

People v. Giles, 40 Cal.4th 833, 152 P.3d 433, 55 Cal.Rptr.3d 133 (Cal. 2007) – forfeiture can apply even when the alleged wrongdoing is the same as the offense for which defendant is on trial, i.e., when he's on trial for murdering the witness whose unavailability he procured

Carrillo v. State, 2007 WL 541598, *6 (Tex. App.-Austin, 2007) (unpub) – "[T]he court of criminal appeals has recently expanded the doctrine, stating that it 'may apply even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable.'" (quoting *Gonzalez v. State*, 195 S.W.3d 114, 125 (Tex. 2006), *cert. denied*, 127 S.Ct. 564 (2006))

Pre-Giles Procedure for Proving Forfeiture

IMPORTANT NOTE: See the discussion of *Giles v. California*, 554 U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (June 25, 2008), in part 1 of this Outline. Many of the following cases remain good law, but probably not all of them, or in every detail.

State v. Her, 750 N.W.2d 258 (Minn. May 29, 2008) on remand from SCOTUS, remanding case to district court for evidentiary hearing, State v. Her, 781 N.W.2d 869, 870-880 (Minn. 2010) – "In cases where the forfeiture-by-wrongdoing doctrine is at issue, the district court should resolve the matter consistent with its obligations to make determinations on the admissibility of evidence. ... The forfeiture inquiry must be done outside the presence of the jury, and the jury is to be given no information about the court's ruling."

Vasquez v. People, 173 P.3d 1099 (Colo. 2007) – "We also join the jurisdictions that require an evidentiary hearing before a determination of forfeiture can be made. Outside the presence of the jury, the prosecution shall have the opportunity to prove by a preponderance of the evidence the elements of the doctrine of forfeiture by wrongdoing. Because the defendant's possible forfeiture of his confrontation rights is a preliminary question going to the admissibility of evidence, the hearing will be governed by CRE 104(a), which states that the determination shall not be bound by the rules of evidence except those with respect to privileges. Thus hearsay evidence, including the unavailable witness's out-of-court statements, will be admissible. The trial court's findings at the hearing will not be disturbed unless they are clearly erroneous."

People v. Younger, 2007 WL 1848976 (Cal. App. 1 Dist. Jun 28, 2007) (unpub) – "The forfeiture doctrine applies where a preponderance of the evidence permits a finding, based on 'independent corroborative evidence' in addition to the unavailable witness's uncontroverted testimony, that the 'unavailability [of the declarant] for cross-examination [was] caused by the defendant's intentional criminal act.' (*Giles, supra*, 40 Cal.4th at p. 854.)"

State v. Byrd, 393 N.J.Super. 218, 923 A.2d 242 (N.J. Super. A.D. 2007) – "The State argues that the defendants forfeited their Sixth Amendment right of confrontation by threatening Bush with physical harm should he testify against them. Defendants challenge that proposition, contending the ex parte interview of Bush in camera, again deprived them of their Sixth Amendment right of confrontation. We agree. *State v. Budis, supra*, 125 N.J. at 530. The ex parte procedure employed here was at variance with the full evidentiary hearings conducted outside the presence of the jury in forfeiture-by-wrongdoing cases." [NOTE: This seems to recognize a sixth amendment right to confront witnesses who *don't* testify at trial. However, the court went on to reverse on state evidentiary grounds, and it's unclear which holding is dicta.]

Buckman v. Commonwealth, 2007 WL 858815, *2-3 (Ky. 2007) (unpub) – "once the proponent of the hearsay introduces evidence establishing good reason to believe that the defendant has intentionally procured the absence of the witness, the burden then shifts to the opposing party to offer credible evidence to the contrary." – preponderance standard

Use of Forfeiture Principle Against the Prosecution

Morgan v. State, __ N.E.2d __, 2009 WL 943854 (Ind. App. Apr 07, 2009) – "Morgan attempts to equate the State's alleged "negligence" [in ensuring witness's availability] with "wrongdoing." Morgan's argument is unpersuasive because the "wrongdoing" must be for the "purpose of preventing the witness from attending or testifying." There is no evidence that the State's alleged failure to monitor Brasher more closely was for the purpose of prevent-ing him from testifying."

State v. Mancini, 2007 WL 2363719 (Minn. App. Aug 21, 2007) (unpub) – "The final issue on appeal is whether the forfeiture by wrongdoing doctrine applies to the state. ... Here, appellant asserts that the forfeiture by wrongdoing rule should be applied against [DV victim] D.M. Appellant claims that he was deprived of his right to cross-examine D.M. about the assault because she asserted the Fifth Amendment and that the state, by refusing to grant her immunity, was complicit in hiding exculpatory evidence from the jury. ... The record reflects that D.M. asserted her Fifth Amendment rights because she was concerned about charges stemming from the domestic dispute. The state's refusal to grant D.M. immunity demonstrates that it was interested in seeking the truth and to hold D.M. responsible for any wrongdoing she may have committed. ... Although appellant seems to claim otherwise, the state was under no obligation to grant D.M. immunity, nor was there any wrongdoing by the state in declining to grant D.M. immunity. Accordingly, appellant's forfeiture argument is without merit."



Part 12: Child Abuse Cases

Ohio v. Clark, 576 U.S. __, 135 S.Ct. 2173 (2015): "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." Any prosecutor working on a child abuse case involving hearsay issues needs to read *Ohio v. Clark* very carefully.

Factors to consider regarding child statements

- Research studies show that young children (below the age of 10) are unlikely to comprehend that a forensic interview may be used at trial (i.e., reasonable person standard)
- Remember that the status of interviewers (i.e., police officers or state CPS workers) will be considered by the court
- A key issue will be the involvement of law enforcement in setting up the interview
- Forfeiture should be considered if the child is too scared to testify.

- If the court has found the child to be incompetent to testify at trial due to young age, then the court should be given arguments that the child could then not objectively understand that prior statements (i.e., at a forensic interview) would later be used in court since the child could not cognitively understand the process
 - As the Minnesota Supreme Court pointed out in *Krasky*, 736 N.W.2d 636, "it would be an odd outcome if we were to hold that, while T.K. is not competent to be called to the stand to give testimony in court, her out-of-court statements to Carney are nonetheless inadmissible because they are testimonial in nature."
- Truth/lie questions in a forensic interview will remind the judge of an oath for purposes of testifying in court and should be avoided (see the Idaho *Hooper* case for a virtual primer on what *not* to do)
- First disclosure (or Tender Years) statements are generally non-testimonial since the first disclosure is often to a non-governmental agent (parent, teacher, friend, counselor).
- Spontaneous statements by children to caregivers are non-testimonial
- Court Procedures regarding child testimony
 - If the child has poor memory or freezes on the witness stand, there should be no *Crawford* issue since the child is still available for confrontation, but in some states (New Jersey in particular) the courts go the other way
 - If the child testified at preliminary hearing but is unavailable for trial, the transcript can be admitted without violating *Crawford*
 - Testimony by closed-circuit television per *Maryland v Craig* does not violate *Crawford*.

Here is the argument in favor of admitting forensic interviews: Forensic interviews are not primarily for the purpose of criminal prosecution. A trained forensic interviewer will interview a child to see if any abuse/neglect occurred, to determine who the assailant is, to determine whether the child needs medical treatment or psychological treatment, to give information to protective services regarding removal of the child from the home and safety issues regarding the home.

In the "Child First Doctrine," the child always comes first in a forensic interview (not getting evidence, not getting a disclosure, and not getting a prosecutable case) and adhering to this doctrine will provide another strong argument that forensic interviews are not testimonial.

Moreover, young children will not objectively understand that their statement could potentially be later used in a court proceeding. Most children do not understand what court is and, therefore, cannot understand that statements made in a forensic interview could be used in court.

A lot of courts reject the argument that the child doesn't realize he/she is giving testimony. But those same courts will accept an identical argument when used in connection with an adult, such as a dealer's statements to an undercover cop or informant. In those cases, judges routinely hold that because the declarant obviously had no clue he/she was giving information for use at a trial, therefore the statements are non-testimonial. (See, part 6, "Statements to Informants and Undercover Officers.") Prosecutors shouldn't be shy about pointing out the double standard.

Advice to prosecutors:

- Be sure to warn interviewers against incorporating a truth/lie protocol during the interview, because that so closely resembles the giving of an oath.
- The interviewer should never ask a child what they want to have happen to the assailant, which allows the defense to argue that the child was knowingly making the statement to punish.
- Interviewers should avoid using the word "forensic," because judges tend to seize upon its usage (which, it must be said, is much simpler than trying to decipher the confusing, conflicting precedent).

If a state Tender Years statute allows for the admission of certain child hearsay statements without the child taking the stand, that portion of the statute violates *Crawford* to the extent the statements at issue are testimonial. However, if the Tender Years statute also allows for the admission of child hearsay statements if the child testifies, the statute satisfies *Crawford*.

When children testifies via closed-circuit television (pursuant to analysis under the state's statute), a *Crawford* analysis is not required because the child is present in court for purposes of cross-examination and confrontation by the defendant.

NOTE: The Second Division of the Illinois Appellate Court declared: "The issue presented by the admission of hearsay is constitutionally identical in a child sex abuse case and a murder case, and the response of the sixth amendment is identical in both types of cases." *People v. Garcia-Cordova*, 963 N.E.2d 355, ¶ 66 (Ill. App. Ct. 2d Dist. 2011). This might sound like boilerplate commitment to equal justice under law, but many courts effectively hold just the opposite, and a few do so openly, such as *State v. Moreno-Garcia*, 260 P.3d 522, 527 (Or. Ct. App. 2011) ("in the context of a child abuse investigation, the victim's purpose in making a statement is less important than the other factors").

Forensic / Police Interviews

(see also Medical and Psychological Examinations / Interviews of Children)
(some older cases may be called into question by *Ohio v. Clark*)

N.W. v. State, 2015 Ark. App. 57, 454 S.W.3d 271 (2015) – "Here, there was no evidence that the interview was to determine if any medical treatment was necessary. The interview was watched by the police detective, the interviewer consulted with the detective to make sure all questions he wanted asked were asked, and the detective took a copy of the interview with *10 him when he left. All of these factors lead our court to conclude that N.A.J.'s statement was testimonial."

In re N.C., 105 A.3d 1199 (Pa. 2014) – " It is undisputed that A.D.'s video-taped, forensic interview conducted at Western Pennsylvania Cares was testimonial under *Crawford* and its progeny..."

State v. McCoy, __ S.W.3d __, 2014 WL 6725695 (Tenn. Dec. 1, 2014) – "The defendant was indicted for seven counts of rape of a child. Prior to trial, the State sought permission to offer as evidence a video-recorded statement made by the child victim to a forensic interviewer. ... the

first question in the case before us is whether the video-recorded statement the State seeks to have admitted at trial is testimonial under *Crawford*. [cite] We hold that it is. ... [W]e hold that notwithstanding the testimonial nature of video-recorded statements taken pursuant to Tennessee Code Annotated section 24-7-123, the admission of these statements does not violate a defendant's right of confrontation so long as the child witness authenticates the video recording and appears for cross-examination at trial, as required by our statute."

People v. Kennebrew, 2014 IL App (2d) 1211, 69383 Ill.Dec. 57, 13 N.E.3d 808 (Ill. App. 2014) – "¶ 8 The State played for the jury a videotaped interview between Marisol Tischman and D.C. at the Children's Center on January 16, 2008. ... [¶ 34] The parties do not debate whether D.C.'s statements in the videotape were testimonial, but we find that they were: the statements were not for the primary purpose of treatment, medical or otherwise, but rather were for purposes of establishing whether someone had abused her-and thus providing information for a potential, future prosecution."

State v. Maguire, 310 Conn. 535, 78 A.3d 828, 850 (Conn. 2013) – "[U]nder the standard adopted in *Arroyo*, a victim's statements during a forensic interview may be deemed nontestimonial only if the essential purpose of the interview is to provide medical assistance to the victim."

In re N.C., 2013 PA Super 229, 74 A.3d 271, 272-78 (Pa. Super. 2013), reargument denied (Oct. 1, 2013) – victim was 4 years old at time of adjudicatory hearing – "Thus, the record reflects that the interview took place nineteen days after the incident. There is no evidence that the interview took place during the existence of an ongoing emergency. The record reflects no evidence that A.D.'s statements were obtained for a purpose other than for later use in criminal proceedings. The statements were not used for treatment purposes.^[FN] While the interview was conducted in an informal setting, the record reflects that the interview was conducted as part of the criminal investigation, and in consultation with law enforcement officials. Moreover, the interview was the only means by which law enforcement officials gathered evidence from A.D. for the criminal prosecution of N.C. Based upon the evidence of record, A.D.'s statements at the interview were testimonial in nature." – [NOTE: Declarant's perspective entirely disregarded, contrary to both the majority's and Scalia's opinions in *Bryant*.]

Whorton v. State, 321 Ga. App. 335, 741 S.E.2d 653 (Ga. Ct. App. 2013) – forensic interviews are testimonial, apparently per se, under *Hatley* – the phrase "forensic interview" is not defined

People v. Phillips, __ P.3d __, 2012 COA 176 (Colo. Ct. App. 2012) – "[¶ 131] As to the existence of an ongoing emergency, again, though not the typical 'ongoing emergency' situation, this situation is analogous to the one present in *Bryant*. [cite] The public school employees had reported C.G.'s injuries and allegations to the Department, and the caseworker performed the interview to determine what had happened to C.G. Thus, the purpose of the interrogation was not to gather information or evidence relevant to a later criminal prosecution, but to gather more information to determine an appropriate future course of action in a civil child protection case."

Hatley v. State, 290 Ga. 480, 722 S.E.2d 67, 2012 Fulton County D. Rep. 377 (Ga. 2012) – "C. C.'s statement to the forensic interviewer, made several [**72] weeks after the crimes, was testimonial."

Commonwealth v. Allshouse, 36 A.3d 163, 165-190 (Pa. 2012) – "We must also consider the statements and actions of both A.A. and [caseworker] Geist, as well as the formality of the circumstances surrounding the interview. ... [W]e hold that A.A.'s statement to Geist was nontestimonial, and its admission at trial did not violate Appellant's rights under the Confrontation Clause."

State v. Hawkins, 78 So. 3d 293 (La.App. 4 Cir. 2011) – "Defendant asserts that the trial court erred in admitting the video/audio taped interview of the [6-year-old] victim over the defense's objection because the forensic investigator, Ahna Patterson, who conducted the interview, did not testify at trial; relator argues that the inability to cross-examine Ms. Patterson violated his due process confrontation rights. ... the core protection in the Sixth Amendment Confrontation Clause is the right to confront the accuser. The interviewer is not the accuser; the victim is the accuser."

State v. Arnold, 126 Ohio St. 3d 290, 2010 Ohio 2742, 933 N.E.2d 775 (Ohio June 17, 2010) – "Arnold argues that statements that M.A. made to social worker Kerri Marshall at the Center for Child and Family Advocacy at Nationwide Children's Hospital ("CCFA") were admitted contrary to his rights under the Confrontation Clause... In interviewing M.A. at the CCFA, Marshall occupied dual capacities: she was both a forensic interviewer collecting information for use by the police and a medical interviewer eliciting information necessary for diagnosis and treatment. We hold that statements made to interviewers at child-advocacy centers that are made for medical diagnosis and treatment are nontestimonial and are admissible without offending the Confrontation Clause. ... We further hold that statements made to interviewers at child-advocacy centers that serve primarily a forensic or investigative purpose are testimonial and are inadmissible pursuant to the Confrontation Clause."

Styron v. State, 34 So. 3d 724 (Ala. Crim. App. Oct. 9, 2009) – "Burns interviewed the children in her capacity as an employee of DHR specializing in child sexual-abuse claims. At the time Burns interviewed E.A. and R.D.A., a criminal investigation into the claims against Styron was well underway... Although the evidence does support the State's contention insofar as Burns was charged with attending to E.A.'s and R.D.A.'s mental and physical well-being in the aftermath of the allegations of molestation, the evidence also indicates that Burns was the first government employee to interview the children regarding the molestation allegations. ... Certainly, statements made to Burns might be used to corroborate the statements made by the children to E.J.A. Under the circumstances of the instant case, Burns's interview with the children was closely tied to the continuing criminal investigation of the molestation of E.A. and R.D.A. Therefore, E.A.'s and R.D.A.'s statements to Burns fit within the scope of 'testimonial' hearsay that Crawford v. Washington holds is subject to the Confrontation Clause." [NOTE: Defendant confessed to police 4 days before Burns interviewed the children.]

People v. Learn, 396 Ill. App. 3d 891, 919 N.E.2d 1042, 336 Ill. Dec. 117 (Ill. App. Ct. 2d Dist. 2009) – very young child's statements to police officers testimonial - **In re Brandon P., 372 Ill.Dec. 809, 992 N.E.2d 651, 664-67 (Ill. App. 4th Dist. 2013)**, refers to *Learn* as "a case that much of the Illinois judiciary has distanced itself from"

Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. (Minn.) Aug 06, 2009), cert. denied, 130 S. Ct. 1081, 175 L. Ed. 2d 928 (2010) – (habeas) – social worker was asked by police to conduct

interview on behalf of police, making it a police interview by proxy – child-declarant's understanding and motive are immaterial [NOTE: *Bobadilla*'s special rule for children is inconsistent with *Bryant*, which requires examining both parties' purposes.]

Sisavath v. California, 2009 WL 361952 (E.D. Cal. Feb 12, 2009) (unpub) (habeas) – finding nothing wrong with analysis in *People v. Sisavath*, 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753 (Cal. App. 2004)

Wright v. State, 673 S.E.2d 249, 9 FCDR 580 (Ga. Feb 23, 2009) – "On July 20, 2002, a military police officer responded to a domestic disturbance call made by the victim's mother. [FN3] When the officer arrived, the victim had a bruise on her face and was holding an ice pack on it. The officer, who had been trained on interviewing children, testified that when she asked the victim what happened, the victim, who was three or four at the time, repeatedly said 'Daddy did it.' In its order denying appellant's motion for new trial, the trial court found that the child's words were non-testimonial because they were in response to the officer's question as to what happened. [¶] The trial court erred in admitting this evidence because the victim's statements were testimonial and violated appellant's Sixth Amendment right to confrontation. *Crawford* ... As opposed to statements made in response to garnering police assistance during an ongoing emergency (such as statements elicited during a 911 call to determine the need for assistance), here the child's words were statements in response to a question by law enforcement after the emergency had already ended and were reflective of past events and, as such, were testimonial in nature."

State v. Nyhammer, 197 N.J. 383, 963 A.2d 316 (N.J. Feb 03, 2009) – "Based on *Crawford*, there is no question that Amanda's videotape statement--given to a law enforcement officer investigating a crime--constitutes testimonial hearsay for Sixth Amendment purposes."

Folks v. State, 2008 OK CR 29, 207 P.3d 379 (Okla. Crim. App. Dec 19, 2008) – In gratuitous dicta (because the child testified in this case) Justice A. Johnson specially concurred to state: "Statements made by a child victim during a forensic interview in a child abuse investigation constitute testimonial hearsay in the criminal trial of the alleged perpetrator."

People v. Nugent, 2008 WL 4062073 (Cal. App. 4 Dist. Sep 03, 2008) (unpub) – where detective "set up a forensic interview with Jane to investigate the case against defendant. The primary purpose of Jane's interview was to establish facts regarding any acts of molestation that would be used in a criminal prosecution against defendant. The interview was conducted by a trained social worker, whose goal it was to elicit a truthful recollection from the child of past events that were criminal in nature. The interview rooms were located either at a law enforcement venue (the district attorney's office) or at a hospital." – [NOTE: This is weak. DA's office *or* hospital? The detective's purpose determines the purpose of the social worker's questions and the child's answers? Because the past events were criminal in nature (and how does the social worker know that before asking?) therefore information about them is automatically testimonial?]

In re T.T., 892 N.E.2d 1163, 323 Ill.Dec. 171 (Ill.App. 1 Dist. Jul 25, 2008) – 7-year-old victim's statements to detective at police station 6 months after assault were testimonial, as were statements to a Department of Children and Family Services investigator

State v. Lortz, 2008 WL 2514053, 2008-Ohio-3108 (Ohio App. 9 Dist. Jun 25, 2008) (unpub) – small child's statements to hospital social worker non-testimonial

State v. Ball, 2008 WL 2246656, 2008-Ohio-2648 (Ohio App. 10 Dist. Jun 03, 2008) (unpub) – "[¶ 16] In the case sub judice, we conclude that C.B.'s statements were not testimonial. C.B. made her statements while she was interviewed by a social worker at Columbus Children's Hospital. The social worker did not work for the state or a governmental agency. [cite] Additionally, the purpose of the interview was to gather information for the hospital's medical staff to treat C.B., not to investigate acts of alleged sexual abuse. *Crawford* (testimonial statements include those made under police questioning). Although other people, including a detective from the Franklin County Sheriff's Office, watched the interview, there is nothing in the record that would demonstrate that C.B. was aware these persons were watching the interview."

State v. Contreras, 979 So.2d 896 (Fla. Mar 13, 2008) – "As explained by the Fourth District, the facts of the instant case show that the coordinator of the Child Protection Team, while working with the county sheriff, took a statement from the victim regarding the allegations of sexual molestation. [cite] The interview was conducted and videotaped at a local shelter for victims of domestic violence. While the law enforcement officer was not in the room during the interview, he was connected electronically to the CPT coordinator in order to suggest questions. [cite] In light of the police presence and the electronic connection, we conclude that the CPT coordinator was serving as a police proxy in this interview."

State v. Simpson, 286 Conn. 634, 945 A.2d 449 (Conn. Apr 29, 2008) – assuming without deciding 5-year-old's statements to social worker were testimonial, then dropping footnote 18: "*But see State v. Arroyo, supra*, 284 Conn. At 631-33 (concluding that statements made by child victim of sexual abuse during interview by clinical social worker at hospital were not testimonial, despite fact that law enforcement personnel were permitted to observe interview and retain audiotapes of it because primary purpose of interviews was to provide medical assistance to victim)."

Seely v. State, 282 S.W.3d 778, 373 Ark. 141 (Ark. Apr 10, 2008), cert. denied, 129 S.Ct. 218, 172 L.Ed.2d 169 (Oct 06, 2008) – 3-year-old's statements to social worker non-testimonial – "The question of whether Smith was acting as a government agent must turn on the primary purpose of her interview with J.B. ... Given Smith's prior testimony in child-abuse cases and her provision of information to police officers and prosecutors, it seems clear that she would have anticipated during her interview with J.B. that the information she gathered might be used in a subsequent prosecution. It does not necessarily follow, though, that the primary purpose of Smith's interview with J.B. was to collect evidence rather than to provide medical treatment. J.B. was experiencing pain and was about to be given a medical examination. Smith testified that her interview with J.B. was primarily for the purpose of defining the scope of that medical examination. [¶] Furthermore, the proper treatment of J.B. included ensuring her continued safety. ... Nor did a police officer or other law-enforcement official instigate, observe, or participate in the J.B.-Smith interview. ... J.B. was a very young child who was in pain and who wanted to see a doctor. There is no indication that J.B. was told that the interview was taking place because police officers needed to know what had happened to her. ... We hold that J.B.'s statements to Trish Smith were nontestimonial based on the fact that, using an objective standard, the primary purpose of the interview was medical treatment."

State v. Hooper, 145 Idaho 139, 176 P.3d 911 (Idaho Dec. 24, 2007) – "At the beginning of the interview, [forensic interviewer] Helmick showed A.H. the camera and stated "That's where my special camera is and that makes it so I don't have to write everything down we talk about, cause I forget stuff sometimes, okay? ... and my friend John [Detective Plaza] is watching to make sure that I remember to ask all the questions I need to ask, okay?" Helmick commenced the interview by describing certain rules to A.H. with regard to telling the truth: "Make sure that what we talk about is only the truth in here, okay?" Helmick then proceeded to ask questions regarding the event in question. She sought details, including questions seeking to identify the perpetrator: Who is that? What was his name? Where were you when that happened? How many times did it happen? Toward the end of the interview, Helmick consulted with the detective. When she returned to the room, she said "I did forget just a couple things," and continued to ask a few questions regarding specific details of what happened in the bathroom. At the end of the interview the detective talked with Helmick and Crystal Hooper, then collected the videotape and two swabs taken during the physical examination and put them into evidence storage at the Payette Police Department. The police also returned to the Hoopers' home to collect additional evidence following the interview. These factors suggest the STAR Center interviewer was working in concert with the police to establish or prove past events relevant to a later criminal prosecution. [¶] Based on the foregoing facts, we hold the videotaped statements were testimonial under *Crawford* and *Davis*." [NOTE: This case, which was investigated pre-*Crawford*, is a catalogue of things to avoid post-*Crawford*.]

State v. Arroyo, 284 Conn. 597, 935 A.2d 975 (Conn. Dec 11, 2007), modified by State v. Maguire, 310 Conn. 535, 78 A.3d 828, 850 (Conn. 2013) – child disclosed during third interview with "licensed clinical social worker and forensic interviewer" – "Declarants who make statements, even regarding a possible crime, in order to obtain assistance, do not do so with the intent or expectation of assisting the state in building a case against a defendant, nor do the recipients of such statements act with such intent or expectation. As the court stated in *Davis*, when making statements in order to obtain emergency assistance, '[the victim] simply was not acting as a witness; she was not testifying No witness goes into court to proclaim an emergency and seek help.' [FN20.] We recognize that other jurisdictions have concluded that statements made to a forensic interviewer are testimonial. The majority of these opinions, however, are factually distinguishable from the present case because most involve much more significant involvement in and control of the subject interviews by law enforcement. ... Decisions from other jurisdictions, also concluding that statements made to a forensic interviewer are testimonial under *Davis*, although more factually similar to the present case, are unpersuasive." [analyzing cases in some depth]

State v. Bentley, 739 N.W.2d 296 (Iowa Sep 28, 2007) – "The issue presented in this interlocutory appeal is whether the videotaped statements of J.G., a ten-year-old child, are admissible under the Confrontation Clause of the United States Constitution at James Bentley's trial on sexual abuse charges. ... During the videotaped interview, J.G. made numerous statements alleging James Bentley sexually abused her. Bentley's brother murdered J.G. on or around March 24, 2005. ... [W]e conclude the interview of J.G. was essentially a substitute for police interrogation at the station house. Representatives of the police department and DHS were present and participated in the interview. J.G. was informed at the outset of the conversation that a police officer was present and listening. The questions posed were calculated to elicit from J.G. factual details of the past criminal acts that Bentley had allegedly perpetrated against her. When

the interview was concluded, the officer left the CPC with a videotaped copy of the interview which she considered evidence to be used against Bentley. The recorded interview conducted with the participation of a police officer is in our view a "modern practice[] with closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford*, 541 at 1374, 158 L.Ed.2d at 203. ... We leave for another day the decision whether statements made by children during interrogations conducted by forensic interviewers without police participation are testimonial."

Seely v. State, 100 Ark.App. 33, 263 S.W.3d 559 (Ark. App. Sep 26, 2007), rev'd, Seely v. State, ___ S.W.3d ___, 373 Ark. 141 (Ark. Apr 10, 2008), cert. denied, 129 S.Ct. 218, 172 L.Ed.2d 169 (Oct 06, 2008) 2008 WL 963516 (Ark. Apr 10, 2008)

Williams v. State, 970 So.2d 727 (Miss. App. Sep 04, 2007) – interview by social worker with Dept. of Human Services – "¶ 22. The interview at issue occurred at a non-profit, non-governmental entity. However, the interview arose based on a report to a police department and a referral to the Panola County Department of Human Services, which, due to a lack of proper recording equipment, then referred Jane to the Family Crisis Center. A law enforcement officer observed that interview, after having gathered evidence by recording phone conversations. Based on the fact that law enforcement was intimately involved in obtaining the interview and was present at the interview, we conclude that this videotaped forensic interview was testimonial in nature, as contemplated by *Crawford*."

In re Welfare of S.L.G., 2007 WL 2609801 (Minn. App. Sept. 11, 2007) (unpub) – "Similar to *Bobadilla*, [709 N.W.2d 243, 246-47 (Minn.2006)] M.G. was three years old at the time of the alleged assault, and the interview at CornerHouse took place about two weeks after the alleged assault occurred. In light of the supreme court's decision in *Bobadilla*, M.G.'s statements during the CornerHouse interview were not testimonial."

State v. Kennedy, 957 So.2d 757, 2005-1981 (La. 2007), rev'd on other grounds, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) – (death penalty for child rape case) "[I]t is difficult to contend that a child victim's videotaped accusation, which was obtained by the state in preparation for trial long after the emergency, as in the instant case, is anything other than clearly testimonial. The videotaped statement constitutes an out-of-court statement offered to prove the truth of the matter asserted, i.e., that the defendant raped the victim."

People v. Cage, 40 Cal.4th 965, 155 P.3d 205, 56 Cal.Rptr.3d 789 (Cal. 2007) – "In *Davis* the United States Supreme Court has since refined the definition of testimonial statements. But the statement at issue in *Sisavath* [*People v. Sisavath*, 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753 (Cal. App. 2004)] might well be considered testimonial even under the more recent formulation. It was made in a formal setting, after criminal proceedings had commenced. It was elicited by a trained interviewer, in the presence of law enforcement personnel, with the manifest object of obtaining criminal evidence. The MDIC agent was simply acting as a law enforcement interrogator in the circumstances."

In re S.R., 920 A.2d 1262 (Pa. Super. 2007) – "¶ 21 Much as the Commonwealth tries, it is hard to imagine that the police calling in a 'forensic specialist,' viewing the proceeding through one-way glass, conferring with the examiner, and having the examiner prepare questioning as if it were direct examination in court could be anything other than a step in the government's effort

to prepare testimony for court. The interview was the functional equivalent of a police interrogation; such statements are inherently testimonial because they 'are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination.' **Davis**, 126 S.Ct. at 2278 (emphasis in original). An objective view of the primary purpose of these statements, looking at the nature and circumstances of the questioning, indicates the statements to [Philadelphia Children's Alliance forensic interview specialist] Block were testimonial."

State v. Pitt, 209 Ore. App. 270, 147 P3d 940 (Ore. App. 2006), opinion adhered to on rehearing, with opinion, 212 Or.App. 523, 159 P.3d 329 (Ore. App. 2007) – “we readily conclude that the children's interview with Broderick at the Lane County Child Advocacy Center were "testimonial" under *Mack* and *Davis*. The circumstances of the interview do not differ in a meaningful way from those in *Mack*. In this case, as in that one, the interviewer interviewed and elicited statements from a young child "so that police officers could videotape them for use in a criminal proceeding." *Mack*, 337 Ore. At 593. Although, as in *Mack*, the interviews were not conducted by a police officer, they were conducted for the express purpose of furthering a police investigation, with a police officer recording them and with the interviewer explicitly attempting to solicit information from the children that would be useful for defendant's prosecution. Broderick testified that the "whole idea" of the operation is that parents know that their children are interviewed on tape so that their statements can be used in the course of a prosecution. Under *Mack*, therefore, Broderick was acting as an "agent" for the police. 337 Ore. At 594. Under *Davis*, the children's videotaped statements to Broderick likewise are unquestionably testimonial, because their primary purpose was to "establish or prove past events potentially relevant to later criminal prosecution.””

State v. Justus, 205 S.W.3d 872 (Mo. 2006) – The child victim was almost 4 years old when she disclosed abuse to Debey, a social worker acting on a hotline tip. The victim was subsequently formally interviewed by a second social worker, Estes, who videotaped what she called "'an official legal interview done for law enforcement'" The court found statements to both social workers to be testimonial. “In both interviews, S.J.'s statements were made in a formal setting in a question-and-answer format. S.J.'s statements to Debey were made as part of a government investigation of a hotline call. They were made in a governmental facility. Likewise, the statements made to Estes were made in an interview room in response to direct questioning. Although Estes is not a government worker, she was acting as a government agent when she interviewed S.J., as the division of family services made the referral to Estes to perform a "forensic interview" on S.J. In Estes' words, this meant "an official interview done for law enforcement." Estes' interview was performed to preserve S.J.'s testimony for trial. Once S.J. began to disclose details about the abuse, Estes escorted her to another room for the sole purpose of recording the conversation. Even at four years old, S.J. – who told Estes that she would tell a judge what her father had done – was aware that her statements could be used to prosecute Justus. Estes was at least as aware of the purpose of the interview. S.J.'s statements were not produced in the midst of an "on going emergency." Rather, the evidence shows that S.J. was not in any immediate danger. S.J. was speaking about past events, about what Justus *had* done. Her demeanor in the videotaped interview was calm, and in both interviews she was playing or coloring near and sometimes during the time she made the statements. While there is no doubt that one purpose of the interrogations was to enable assistance to the child, the circumstances indicate that their primary purpose was to establish or prove past events potentially relevant to later criminal prosecution.”

People v. Sharp, 2006 Colo. App. LEXIS 2069 (Colo. Ct. App. 2006) – “Here, a police detective arranged for C to be taken to a children's advocacy center to be interviewed by a private forensic interviewer. Although C did not indicate that she understood why she was being interviewed or that she was aware of the police detective's presence at the center, the detective testified at trial to observing the interview on a video monitor in the next room. Near the end of the interview, the interviewer excused herself to "see if [she has] to ask [C] any more questions." When she returned, the interviewer asked C specific questions regarding the location and nature of the assaults. While the interviewer was asking C follow-up questions, someone knocked on the door and talked to her. A few minutes later, the interviewer told C that she had "a helper in the next room" and asked C if it was okay to bring in the "helper." C refused to let the "helper" join them, and the interview ended shortly thereafter. Under these facts, we conclude the child's videotaped statements to the private forensic interviewer were the functional equivalent of police interrogation and were testimonial. The police detective arranged, and, to a certain extent, directed the interview even though the detective was not physically present in the room with C. Moreover, the purpose of the interview was to elicit statements that would be used at a later criminal trial to convict the perpetrator. *** Similar to the testimonial statements made in *Davis*, defendant was not present during the interview; in response to the interviewer's questions, the statements deliberately recounted how potentially criminal past events began and progressed; and the statements were made some time after the events described were over. Thus, like the *Davis* Court, we conclude that such statements are inherently testimonial because they "are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination."”

State v. Hooper, 2006 Ida. App. LEXIS 83, 2006 WL 2328233 (Idaho Ct. App. 2006), affirmed, State v. Hooper, 145 Idaho 139, 176 P.3d 911 (Idaho Dec 24, 2007)

State v. Blue, 2006 N.D. 134, 717 N.W.2d 558 (2006) – “After the [four-year-old] victim's mother was concerned that defendant had abused the child victim, the child was referred to the North Dakota Child's Advocacy Center where a forensic interviewer conducted a videotaped interview with the child while a police officer watched on a television from a different room. The trial court admitted the videotape into evidence and the child did not testify at the trial. The child had been present at a preliminary hearing where she sat on her mother's lap and answered certain questions. The court held that it was error for the trial court to admit the videotape into evidence, under the guidelines set forth by the United States Supreme Court in *Crawford*. *** The introduction of the videotape testimony impacted defendant's Sixth Amendment right to confrontation in violation of *Crawford* and the violation was not harmless beyond a reasonable doubt. *** In this case, the videotape of the child's statement to the forensic interviewer was testimonial as defined under *Crawford*. The statement was made with police involvement. Statements made to non-government questioners acting in concert with or as an agent of the government are likely testimonial statements under *Crawford*.” ➔ – **but see State v. Arroyo, 284 Conn. 597, 935 A.2d 975, n.20 (Conn. Dec 11, 2007)** – “We find *Blue* unpersuasive for two reasons. First, the requirement that interview statements must serve only medical purposes in order to be considered nontestimonial ignores the reasoning employed in *Davis*, which bases the determination of the testimonial or nontestimonial character of interview statements on the "primary purpose" of the interview. *Davis v. Washington, supra*, at 126 S.Ct. 2273. Requiring that an interview serve an exclusively medical purpose in order to be considered nontestimonial, therefore, is simply not based on an accurate reading of *Davis*. The mere fact that police are involved, as in the present case, because they are made privy to the information obtained in the

interview, is not sufficient, without more, to render the interviews testimonial. The question, under *Davis*, is instead whether the primary purpose of the interview is to "establish or prove past events potentially relevant to a later criminal prosecution...." (Internal quotation marks omitted.) *State v. Blue*, *supra*, at 717 N.W.2d 565, quoting *Davis v. Washington*, *supra*, at 2274. Second, we disagree that a forensic interviewer must be responding to an ongoing emergency in order for statements made to such an actor to be deemed nontestimonial. Such a requirement ignores the distinction between a forensic interviewer and a police officer. The court in *Davis* sought to determine under what circumstances statements made to a police officer would be considered testimonial, and suggested that the key task is to determine the function of the interview or interrogation, namely, whether the officer sought, in asking questions, to obtain information for the primary purpose of providing assistance to the victim or for the primary purpose of building a case against the defendant. When police officers provide assistance to victims, it is generally when there is an ongoing emergency, so it makes sense in that context to require that the statements be contemporaneous with the subject events. A social worker or forensic interviewer, however, by the very nature of the assistance provided to a victim, always does so after the immediate emergency has passed. A victim of sexual assault does not seek counseling or mental health assessment during the assault. Therefore, the interview, and the statements derived therefrom, will always involve past events. The question is whether the statements were elicited with the primary purpose of establishing those past events to build a case against the defendant, or with the purpose of assisting the victim.

State v. Henderson, 129 P.3d 646 (Kan. Ct. App. 2006), *aff'd*, 160 P.3d 776 (Kan. 2007) –

State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006), *cert. denied*, 549 U.S. 953 (2006), *habeas corpus granted*, *Bobadilla v. Carlson*, 570 F.Supp.2d 1098 (D. Minn. Jul 16, 2008), *aff'd* *Bobadilla v. Carlson*, 575 F.3d 785 (8th Cir. (Minn.) Aug 06, 2009), *cert. denied*, 130 S. Ct. 1081, 175 L. Ed. 2d 928 (2010) – The 3 year old victim disclosed penetration by the defendant to his mother. At a forensic interview with a CPS worker and police officer, the child also disclosed penetration. At a competency hearing, the 3 year old was declared incompetent to testify. The prosecutor admitted all the child's statements, including the videotaped forensic interview. On appeal, the court declared the forensic interview to be non-testimonial and focused on the statutory purpose of a forensic interview to protect the health and welfare of the child, and not having a substantial eye toward trial. In spite of the interview conducted by a governmentally employed CPS worker, and being conducted as a law enforcement center, the court found the interview to be non-testimonial since the purpose was to determine whether any abuse occurred and, if so, what steps to take to protect the health and welfare of the child. The Court also acknowledged that a child of that age would not "understand the legal system and the consequences of statements made during the legal process." [NOTE: The habeas opinions, which create a special rule for children, disregarding their perspective, is inconsistent with *Davis* and especially *Bryant* – and with the constitutional (and moral) requirement of equal protection of the laws.]

Flores v. State, 121 Nev. 706, 120 P.3d 1170 (Nev. 2005) – The five year old victim (Zoraida) was abused by her step mother and ultimately died from blunt force trauma to the head. The biological daughter (Sylvia) of the defendant witnessed the attack and told her foster mom (Ms. Diaz). Sylvia was declared unavailable to testify due to trauma. Statements she made to a child abuse investigator Durgin and CPS Investigator Goodman were introduced at trial. In addressing the three formulations of what might be deemed testimonial statements as outlined in *Crawford*,

Sylvia's statements do not meet the first or second formulation. "Second, given Sylvia's age and relationship to Flores, it is unlikely that she intended to testify through the surrogates or that she "reasonably expected" that the statements would be used criminally against her mother. *** We conclude, however, that two of Sylvia's statements were "testimonial" under the third illustration, as they were statements that, under the circumstances of their making, "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Under the third illustration the Court impliedly establishes a "reasonable person" test for when a declarant has made a testimonial statement. Applying this third test, we conclude that the statements to Durgin and Godman were clearly testimonial under Crawford because both were either police operatives or were tasked with reporting instances of child abuse for prosecution. *** With regard to the child's statements to Ms. Diaz, we conclude that these statements, which were spontaneously made at home while Ms. Diaz was caring for the child, were not such that a reasonable person would anticipate their use for prosecutorial purposes. "

Contreras v. State, 910 So.2d 901 (Fla. Dist. Ct. App. 4th Dist. 2005), approved in part and quashed in part, 979 So.2d 896 (Mar. 13, 2008)

D.G.B. v. State, 2005 Ind. App. LEXIS 1584 (Ind. Ct. App. 2005) – Juvenile defendant was charged with molesting a 6 year old victim. At trial, the forensic interview of the victim was introduced as the victim did not testify due to trauma. On appeal the court determined that the forensic interview was testimonial since the interview was conducted by a police officer attempting to gather evidence of a crime.

People v. R.F., 355 Ill. App. 3d 992; 825 N.E.2d 287 (Ill Ct of Ap 2005) – Statements made by the 3 year old victim to her mom and grandmother about the defendant pinching and kissing her vaginal area were properly admitted and were non-testimonial statements. The statements were made to family members and not government personnel. The child did not testify at trial due to her age and fear. However, statements made by the child to a police investigator who interviewed the child were deemed testimonial because the officer "was acting in an investigative capacity for the purpose of producing evidence in anticipation of a criminal prosecution."

State v. Mack, 337 Or. 586, 101 P.3d 349 (Ore. 2004) – "A social worker interviewed the victim's three-year-old brother who was in the house when the victim died. The interviews were videotaped. Defendant argued that under the Confrontation Clause of the Sixth Amendment, the statements were testimonial and thus inadmissible. The court affirmed, holding that under Crawford, a United States Supreme Court case that was decided five days after the State filed its motion in limine to determine admissibility, the child's statements to the social worker fell within the core class of testimonial evidence that Crawford identified. There could be little doubt that if the police officers had conducted the interviews, the resulting statements would be testimonial. The social worker was serving as a proxy for the police. She took over the first interview when the interviewing officer was unable to establish a dialogue with the child and she continued in that role in the second interview and elicited statements from the child so that police officers could videotape them for use in a criminal proceeding. Under Crawford, admitting the child's statements to the social worker would violate the Confrontation Clause."

People v. Argomaniz-Ramirez, 102 P.3d 1015 (Colo. 2004) – “prior recorded statements made by children to law enforcement officials may be introduced into evidence when the children testify at trial.”

Somervell v. State, 29 Fla. L. Weekly D 1739 (Fla. Dist. Ct. App. 5th Dist 2004) – A videotaped forensic interview, conducted by a police officer, of the 8 year old victim was properly admitted at trial after the child victim had already testified. This did not violate the confrontation clause and a Crawford hearing was not necessary.

United States v. Bordeaux, 400 F.3d 548 (8th Cir. SD 2005) – The court held that defendant's Sixth Amendment rights were violated by the admission of a statement that the victim made out of court to a "forensic interviewer." The victim's statements were testimonial because the purpose of the interview was to collect information about the alleged sexual abuse for law enforcement. “The formality of the questioning and the government involvement in it are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a "forensic" interview, meaning that it "pertained to, [was] connected with, or [was to be] used in courts of law." *Oxford English Dictionary Online Edition* (taken from second print ed. 1989). That [the child's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.”

State v. Snowden, 867 A.2d 314 (Md. Sup. Ct. 2005) – This case involved 2 child victims of sexual abuse (ages 8 and 10). The children did not testify at trial, but the CPS worker who interviewed the children testified to the statements made during the interview. “As soon as the police investigation of the girls' allegations got under way, they were interviewed, in accordance with Maryland practice, by a state social worker at a child protective facility. The statements elicited by the social worker were introduced at trial after the trial court determined that the girls were unavailable to testify because of potential trauma. Defense counsel expressed state and federal constitutional objections at that time, and those objections preserved the issue for appeal. While appeal to the intermediate court was pending, the nation's highest court clarified the extent of confrontation rights in the *Crawford* decision, holding that an unavailable declarant's testimonial statements, that is, statements that a declarant objectively would know were likely to be used in a prosecution, could not be used at trial unless there had been a prior opportunity to cross-examine the declarant. Although the girls were young, there was no reason to think that they were not well aware that the statements were being taken because of the police investigation their accusations had launched, so the statements were testimonial, not therapeutic, in their basic nature.” The court imposed an objective ordinary person standard on these child victims, pointed out that the interviews were conducted at a county-owned facility, and that the purpose of the CPS worker conducting the interview was to gather evidence for prosecution. “We find that where an objective person in the position of the declarant would be aware that the statement-taker is an agent of the government, governmental involvement is a relevant, and indeed weighty, factor in determining whether any statements made would be deemed testimonial in nature. *** Although we recognize that there may be situations where a child may be so young or immature that he or she would be unable to understand the testimonial nature of his or her statements, we are unwilling to conclude that, as a matter of law, young children's statements

cannot possess the same testimonial nature as those of other, more clearly competent declarants.”

Starr v. State, 269 Ga. App. 466, 604 S.E.2d 297 (GA Ct App 2004) – One videotaped statement from the child victim was admitted at trial. Although the child did not testify, the child was in court and available for cross examination. The defense did not object to the admission of the videotaped statements. The court found no confrontation violation.

Statements to Caseworker / Protective Services or Family Services Employee
(category added June 2013)

(NOTE: When the court determines the interviewer was acting as an agent of police, the case is categorized under Forensic / Police Interviews, above.)

(Some older cases are called into question by *Ohio v. Clark*.)

People v. Phillips, 315 P.3d 136, 2012 COA 176 (Colo. Ct. App. 2012) – “[¶ 131] As to the existence of an ongoing emergency, again, though not the typical 'ongoing emergency' situation, this situation is analogous to the one present in *Bryant*. [cite] The public school employees had reported C.G.'s injuries and allegations to the Department, and the caseworker performed the interview to determine what had happened to C.G. Thus, the purpose of the interrogation was not to gather information or evidence relevant to a later criminal prosecution, but to gather more information to determine an appropriate future course of action in a civil child protection case.”

Commonwealth v. Allshouse, 36 A.3d 163, 165-190 (Pa. 2012) – “We must also consider the statements and actions of both A.A. and [caseworker] Geist, as well as the formality of the circumstances surrounding the interview. ... [W]e hold that A.A.'s statement to Geist was nontestimonial, and its admission at trial did not violate Appellant's rights under the Confrontation Clause.”

Kelly v. State, 321 S.W.3d 583 (Tex. App. Houston 14th Dist. June 17, 2010) – “The hearsay repeated by Kemp and the DFPS [Dept. of Family & Protective Services] workers was collected as part of an investigation into the children's allegations. It is difficult to see how these statements were not testimonial in nature.” – [NOTE: The investigation was initiated by DFPS, which however involved law enforcement early on, making this something of a hybrid case.]

State v. Buda, 195 N.J. 278, 949 A.2d 761 (N.J. Jun 23, 2008) – “After being rushed to the hospital on October 18, 2002, and suffering from severe injuries that resulted in a two-week hospitalization, a DYFS worker – in a one-on-one interview with a sobbing and emotional three-year-old boy – asked N.M. if anyone had beaten him. N.M.'s response is as telling as it is heartwrenching: he replied that 'Dad says nobody beat me. I fell when I was sleeping in my room.' Again, N.M. did not testify at trial and he was not subject to cross-examination at some time earlier. Thus, whether that hearsay statement is admissible... hinges on whether the statement was testimonial. As with N.M.'s earlier statement, we conclude that it was nontestimonial. ... Here the DYFS worker was doing precisely her job: she was not collecting information about past events for prosecutorial purposes, but gathering data in order to assure a child's future well-being. ... The division of duties here was clear: while the Prosecutor's Office investigator was charged with collecting evidence of the crimes visited on N.M., the DYFS worker was responsible for ensuring N.M.'s continued safety and well-being. Viewed in its proper context, N.M.'s statement to the DYFS worker was a statement seeking to end defendant's

then-present reign of terror over N.M., a statement no different than the domestic abuse victim's 911 call Davis instructs is nontestimonial." – [NOTE: No discussion of whether the statements were admitted for the truth of the matter asserted, which they plainly weren't except perhaps for "Dad says," which would seem on its face to be defendant's own statement, made by one authorized to speak for him.]

In re Welfare of G.E.F., 2007 WL 2993812, 2007 Minn. App. Unpub. Lexis 1042 (Minn. App. Oct 16, 2007) (unpub) – "The district court found that C.A.W., who was five years old, was not competent to testify at trial. The state then moved to admit a videotaped interview of C.A.W. conducted by Sonya Becker, a child-protection social worker. ... Becker conducted the interview using the CornerHouse protocol, which uses nondirective questioning. ... Becker's purpose in conducting the interview was to comply with the statutory procedure, and her primary concerns were what had happened to C.A.W. and the state of C.A.W.'s current health and welfare. Becker used nondirective questioning to elicit and assess this information. Although Becker did not interview C.A.W. until four days after the alleged abuse and the suspect was not a family or household member, '[t]he harms of child abuse are not limited to the abused child's physical well-being.' Krasky, 2007 WL 2264711, at *4. The record does not suggest that Becker's primary purpose in interviewing C.A.W. or C.A.W.'s primary purpose in speaking to Becker was to produce evidence for trial. [¶] We hold that C.A.W.'s statements were nontestimonial."

In re C.C., 2007-Ohio-2226, 2007 WL 1366431 (Ohio App. 8 Dist. 2007) (unpub) – Cuyahoga County Department of Children and Family Services social worker, after being contacted by police, interviewed 4-year-old twin victims – Held: statements admissible under medical diagnosis and treatment hearsay exception (¶ 42) – " {¶ 46} In this matter, as noted previously, the statements to [social worker] Petrus came within the realm of diagnosis and treatment as they arose as Petrus was endeavoring to determine whether sexual abuse was indicated, whether the children remained at risk and whether the twins would need to be referred to counseling. The testimony was not 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, [or] custodial examinations,' was not an extrajudicial statement and was not a 'statement made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' Accordingly, the statement was not testimonial and its admission did not violate appellant's rights to confrontation."

State v. Justus, 205 S.W.3d 872 (Mo. 2006) – The child victim was almost 4 years old when she disclosed abuse to Debey, a social worker acting on a hotline tip. The court found the child's statements to be testimonial. "S.J.'s statements to Debey were made as part of a government investigation of a hotline call. They were made in a governmental facility." [NOTE: This is lame analysis, but it was an early case, and anyway a second interview with a different social worker was much more clearly testimonial.]

Rangel v. State, 199 S.W.3d 523 (Tex. App. – Ft. Worth, 2006), petitions for review dismissed as improvidently granted (Feb. 13, 2008) – "The CPS investigator did not even interview C.R. until two months after CPS removed her from her home. Additionally, when C.R. talked with the investigator, she was not facing an ongoing emergency. C.R. had already been removed from her home, was placed in foster care, and was receiving counseling for the abuse. When viewed objectively, the nature of what was asked and answered during the interview was such that C.R.'s statements were elicited simply to learn about what had happened in the past.

Finally, C.R., like the declarant in *Crawford*, was responding calmly, at the Children's Advocacy Center, to a series of questions, with the investigator videotaping her answers. See *id.* at 2277. We hold that the present case is clearly distinguishable from the facts in *Davis*, and similar to the facts in *Crawford*. Moreover, the structured, formalized questioning of C.R. by the investigator, regardless of whether the statement was sworn or unsworn, is more akin to the types of *ex parte* examination discussed and condemned in *Crawford* than a "casual remark to an acquaintance" or even to initial statements made to a police officer responding to a call. *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. Furthermore, during the interview Cleveland stated that she was asking C.R. questions to make sure that "it" did not happen again. Regardless of whether C.R. understood the full extent to which her answers could be used, i.e., as testimony in a criminal prosecution of appellant, we believe, either under a subjective standard or an objective standard, that a four-year-old child would be able to perceive this as meaning that her words would be used to establish or prove some fact—i.e., that he sexually assaulted her—and that the establishment of that fact was necessary so that a person in authority, whether the investigator or someone else, would make appellant stop.”

Reasonable Child Analysis / Children’s State of Mind

J. D. B. v. North Carolina, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011), held that "a child's age properly informs the *Miranda* custody analysis". Is there any reason it shouldn't similarly inform the *Crawford* testimonial analysis?

***Ohio v. Clark*, 576 U.S. ___, 135 S.Ct. 2173 (2015):** "Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool children understand the details of our criminal justice system. Rather, '[r]esearch on children's understanding of the legal system finds that' young children 'have little understanding of prosecution.'"

***United States v. Squire*, 72 M.J. 285 (C.A.A.F. 2013)** – "evaluating the exchange from the perspective of the declarant,ⁿ¹¹ we are confident that a reasonable victim of SL's age, under these circumstances, would not understand the purpose of her statements as creating 'an out-of-court substitute for trial testimony.'"

***Commonwealth v. Allshouse*, 36 A.3d 163, 165-190 (Pa. 2012)** – "we agree with the position taken by the Colorado Supreme Court in *People v. Vigil*: 'An assessment of whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial involves an analysis of the expectations of a reasonable person in the position of the declarant. Expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic for analysis.' 127 P.3d 916, 925 (Colo. 2006) (citing, *inter alia*, *Lagunas v. State*, 187 S.W.3d 503 (Tex.App. 2005) (considering a declarant's age as a circumstance relevant to the inquiry of whether the child's statement constituted testimonial evidence)). Indeed, we conclude this approach is consistent with *Bryant's* requirement that a court consider all of the relevant circumstances when determining whether a declarant's statements are testimonial."

***State v. Beadle*, 173 Wn.2d 97, 265 P.3d 863 (Wash. 2011)** – rape of 4-year-old – "¶24 Following *Crawford*, in *Shafer*, this court announced a declarant-centric standard for determining whether an out-of-court statement made to a nongovernmental witness is testimonial. ... ¶29 Based on the evolution of the law since *Shafer*, we conclude that the *Shafer* standard does not

apply to statements made to law enforcement. ¶30 [**870] In this case B.A.'s out-of-court statements to [social worker] Jensen and Detective Buster were made in the course of a police interrogation. Although Jensen was not a law enforcement officer, she was present only to assist the police department—not to protect B.A.'s welfare in her capacity as a CPS employee. n10 Accordingly, we consider the primary purpose of the interrogation to determine whether B.A.'s statements were testimonial."

McCloy v. Berghuis, 2008 WL 5062895 (W.D. Mich. Nov 25, 2008) (unpub) (habeas) – "Contrary to petitioner's argument, the fact that the children may have made some of their statements in response to questions by adults does not change this result. No reasonable children in that circumstance would believe that their terrified shouts, or their responses to their parents' questions, would be part of a police investigation."

Commonwealth v. Hutchinson, 2008 WL 4975829 (Mass. App.Ct. Nov 25, 2008) (unpub) – "The defendant shouted an obscenity-laced threat at Laura, a ten year old child. Laura ran back to her house and relayed the threat to her mother, crying so hard that her mother had difficulty understanding her. [FN4] Tr. at 1/90. Given these circumstances, and especially Laura's age, 'a reasonable person in [Laura's] position would not anticipate the statement's being used against the accused in investigating and prosecuting a crime.'"

State v. Barnes, 149 Ohio Misc.2d 1, 896 N.E.2d 1033, 2008-Ohio-5609 (Ohio Com. Pl. Jun 27, 2008) (pretrial) – child victim – "{¶ 71} Based upon the foregoing, the court finds that an objectively reasonable person would believe that the purpose of their statements was for medical and psychological diagnosis or treatment, and not for use in court. The court therefore finds that the statements are nontestimonial in nature and *Crawford* is inapplicable."

Bobadilla v. Carlson, 570 F.Supp.2d 1098 (D. Minn. Jul 16, 2008) (habeas), **aff'd Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. (Minn.) Aug 06, 2009), cert. denied, 130 S. Ct. 1081; 175 L. Ed. 2d 928 (2010)** –

– "Nothing in *Crawford* suggests that statements taken during police interrogations are not "testimonial" if the statements are given by young children. To hold that a young child's statement during a police interrogation is "nontestimonial" because of the age of the declarant would require carving out an exception to *Crawford*'s repeated and categorical assertion that statements taken in the course of police interrogations are "testimonial." Such an exception finds no support in the text of *Crawford*, and it would be exceedingly difficult to justify in light of *Crawford*'s assertions that government involvement in the production of testimony presents a "unique potential for prosecutorial abuse," [cite], and that police interrogations are one of "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." [cite] It would be extraordinary to hold that, notwithstanding the potential for prosecutorial abuse, the Confrontation Clause permits an exception for what is otherwise, without question, "testimonial" hearsay on the sole basis that the declarant is particularly young (and thus more vulnerable to manipulation than an adult)." – [NOTE: The judge doesn't seem aware that he is doing exactly what he condemns in others: creating a special rule for young children. Compare the many, many cases holding that an adult who doesn't understand his or her statements will be used prosecutorially, e.g., statements to an undercover officer, are non-testimonial. Why should the analysis be different "on the sole basis that the declarant is particularly young"?]

In re T.T., 892 N.E.2d 1163, 323 Ill.Dec. 171 (Ill.App. 1 Dist. Jul 25, 2008) (concurrence of O'Mara Frossard, J.) – "Due to the tender age of [7-year-old] G.F., she may not have fully appreciated the fact that she was bearing witness against the minor-respondent. That fact is not particularly significant because *Crawford* has indicated that the perception of the witness can only be revealed by cross-examination. *Crawford*, 541 U.S. at 66... " – [NOTE: Huh?]

Bobadilla v. Carlson, 2008 WL 2788011 (D. Minn. Mar 25, 2008) (unpub) (habeas), magistrate's recommendation rejected and writ of habeas corpus granted, **Bobadilla v. Carlson, 570 F.Supp.2d 1098 (D. Minn. Jul 16, 2008)** (habeas), *aff'd* **Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. (Minn.) Aug 06, 2009)**, *cert. denied*, 130 S. Ct. 1081; 175 L. Ed. 2d 928 (2010)

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State v. Bentley, 739 N.W.2d 296 (Iowa Sep 28, 2007) – "The State asserts J.G.'s statements are nontestimonial because a reasonable child of J.G.'s chronological age (10) and functional age (7) would not have understood her statements would be used to prosecute the defendant. We conclude, however, an analysis of the purpose of the statements from the declarant's perspective is unnecessary under the circumstances presented here. J.G.'s testimonial statements lie at the very core of the definition of "testimonial," and fall within the category of *ex parte* examinations against which the Confrontation Clause was directed."

In re Welfare of G.E.F., 2007 WL 2993812 (Minn. App. Oct 16, 2007) (unpub) – "This case concerns the trial of a 13-year-old boy accused of sexually abusing two young girls, one five years old and the other eight. ... The district court found that C.A.W., who was five years old, was not competent to testify at trial. The state then moved to admit a videotaped interview of C.A.W. conducted by Sonya Becker, a child-protection social worker. ... Becker interviewed C.A.W. while another social worker watched the interview on a closed-circuit television in a separate room. Becker conducted the interview using the CornerHouse protocol, which uses nondirective questioning. ... Following *Crawford*, the Minnesota Supreme Court set forth a multifactor test to determine whether a statement was testimonial. *State v. Wright*, 701 N.W.2d 802, 81213 (Minn.2005) (*Wright II*), *vacated* 126 S.Ct. 2979 (2006). After *Wright II*, the court clarified that this test focuses primarily on the declarant's purpose in speaking and the government interrogator's purpose in questioning. *State v. Bobadilla*, 709 N.W.2d 243, 250 (Minn.2006). ... In *Krasky*, ... [the Minnesota Supreme Court] explicitly reaffirmed the precedential value of *Bobadilla* and *Scacchetti*. *State v. Krasky*, 736 N.W.2d 636, 642-43, (Minn.2007). The court stressed that *Davis* was limited to its facts and the proper focus to determine whether a statement is testimonial remains on the primary purposes for eliciting and making the statement. *Id.* [¶] In light of the supreme court's most recent decision, we conclude that C.A.W.'s statements were nontestimonial."

Lollis v. State, 232 S.W.3d 803 (Tex.App.-Texarkana 2007) – "[T]here is no evidence that, from the perspective of the children, the ongoing relationship with Clark was anything but counseling. And that is the proper perspective from which we view the context of the statements. *See Wall*, 184 S.W.3d at 742-43." [NOTE: Court also notes the ambiguity of Davis's primary purpose test. See part 1, *Whose Primary Purpose?*]

State v. Krasky, 736 N.W.2d 636 (Minn. 2007) – "In both *Bobadilla* and *Scacchetti*, we noted that it was unlikely the child complainant knew that the statements could be used at trial against an abuser. *See Scacchetti*, 711 N.W.2d at 516; *Bobadilla*, 709 N.W.2d at 255. While we do not decide this case on the grounds that [6-year-old] T.K. did not know her statements might be used

at trial, we note that it would be an odd outcome if we were to hold that, while T.K. is not competent to be called to the stand to give testimony in court, her out-of-court statements to Carney are nonetheless inadmissible because they are testimonial in nature."

State v. Henderson, 160 P.3d 776 (Kan. 2007) – "The amicus American Prosecutors Research Institute urges us to adopt an age-equivalent standard when determining whether a child's statement is testimonial. In support, it cites six studies evaluating what children understand about court and court-related concepts. Like the Court of Appeals, we expressly reject its specific argument that the videotaped interview was not testimonial solely because a 3-year-old child would have no reasonable expectation her statements will later be used at trial. We observe that its argument heavily relies upon the language from *Crawford*, 541 U.S. at 51-52, that describes testimonial statements as those 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' Indeed, the case upon which it principally relies, *State v. Bobadilla*, 709 N.W.2d 243 (Minn.2006), was decided before *Davis*. We also observe that under the Institute's argument, the prosecution is allowed to have its cake and eat it too: The victim is too young to be competent to testify, as the district court found with 3-year-old F.J.I., but not too young to have her statement placed in evidence by the State with no attendant defense right to confront and cross-examine. [¶] In the instant case concerning child victim testimony, we agree with the Missouri Supreme Court in *Justus*: A young victim's awareness, or lack thereof, that her statement would be used to prosecute, is not dispositive of whether her statement is testimonial. Rather, it is but one factor to consider in light of *Davis*' guidance after *Crawford*. Until we receive further guidance from the United States Supreme Court, our test is an 'objective, totality of the circumstances' test to determine the primary purpose of the interview, as discussed and seemingly applied in *Davis*." [NOTE: The "cake" remark is weird in numerous ways, above all in its disregard for the victim. The idea seems to be that the role of the court is to make sure one party to the litigation doesn't get an advantage, rather than to enforce democratically-enacted laws or more generally to seek justice. Note, also, that the underlying idea seems to be that *Davis* overruled *Crawford*'s definition of "testimonial."]

People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333, 312 Ill.Dec. 268 (Ill. 2007) – "In accordance with the weight of authority, as well as Professor Friedman's analysis, we believe that the better view is to treat the child's age as one of the objective circumstances to be taken into account in determining whether a reasonable person in his or her circumstances would have understood that their statement would be available for use at a later trial."

In re S.R., 920 A.2d 1262 (Pa. Super. 2007) – with regard to *Crawford*'s reference to the perception of an objective witness – "While the Commonwealth takes the position that this means the *witness* must think the statement can be used at trial, and therefore a four-year-old would not know why the statement is taken and it should not be considered 'testimonial,' that is not a fair reading of what is actually an aside in *Crawford*.... The Commonwealth, as part of its argument that one should assess what the child thinks of the interview, implies that we should treat child abuse cases differently. The Commonwealth relies heavily on the case of *State v. Bobadilla*, 709 N.W.2d 243 (Minn.2006). ... Notably, this case was decided four months prior to *Davis*, ... It is clear that the Supreme Court will not countenance such an exception. In *Davis*, the Court rejected the concept that there should be more flexibility in domestic abuse cases, just as it is argued that there should be more flexibility in child abuse cases." [NOTE: This holding seems to miss the point, which has nothing to do with "flexibility" in the abstract.]

State v. Dyer, 2007 WL 1084460, *4 (Ohio App. 8 Dist., 2007) (unpub) – “{¶ 14} Therefore, we conclude that, under the circumstances of the instant case, [8- or 9-year-old] B.D.'s statements to McHugh are nontestimonial. Our review of the record reveals nothing to indicate that B.D., or a typical child of her age, would have reasonably believed that her statements would be used later for trial.”

State v. Kolosso, 2007 WL 1120559 (Wis. App. 2007) (unpub) – “Focusing on the declarant's intent, a reasonable person in the child's position would not have anticipated her statement being used in the investigation or prosecution of a crime.”

State v. Williams, 2006 Tenn. Crim. App. LEXIS 920 (2006) – “In this case, the [4-year-old] victim, a young child, made her declarations to her mother in the bathroom of her own home because she was in pain and her mother asked her why. Under these circumstances, no “objective witness” could “reasonably” believe these simple statements were uttered by a child for use at a future criminal trial. Therefore, we conclude they were not testimonial.”

State v. Johnson, 2006 Ohio 5195 (Ohio Ct. App. 2006) – “[T]here is nothing in the record to indicate that J.B., at the time only nine years old, would have realized that her statements [to medical staff] would be available for use at a later trial.”

Rangel v. State, 2006 Tex. App. LEXIS 6655 (Tex. App. 2006), petitions for review dismissed as improvidently granted (Feb. 13, 2008) – “[D]uring the interview Cleveland stated that she was asking C.R. questions to make sure that “it” did not happen again. Regardless of whether C.R. understood the full extent to which her answers could be used, i.e., as testimony in a criminal prosecution of appellant, we believe, either under a subjective standard or an objective standard, that a four-year-old child would be able to perceive this as meaning that her words would be used to establish or prove some fact—i.e., that he sexually assaulted her—and that the establishment of that fact was necessary so that a person in authority, whether the investigator or someone else, would make appellant stop.”

McDonald v. State, 2006 Tex. App. LEXIS 7416 (Tex. App. 2006) – “The trial court allowed a nurse to testify about statements made to him by the two-year-old victim during an examination for possible sexual assault that “Daddy did it” and “Daddy hit me.” The court held that the child's statements were nontestimonial and exceptions to the hearsay rule in accordance with Tex. R. Evid. 803(4). It was illogical to conclude that the child would have considered whether her statements to the nurse regarding bruises on her body would reach prosecutorial authorities and be used against defendant. The fact that the nurse was not a licensed physician had no bearing on his ability to testify in accordance with Rule 803(4), and he was performing sufficient functions to bring him within the rule's scope.”

In re A. J. A., 2006 Minn. App. Unpub. LEXIS 988 (Minn. Ct. App. 2006) – After the 5-year-old child spontaneously disclosed abuse to her parents, the police recommended they take the child to MCRC for a medical exam and interview. A registered nurse examined and interviewed the child and then reported her findings to the police as required under Minnesota law. The court found that a reasonable 5-year-old would not expect her statements to the nurse to later be used in court.

State v. Copley, 2006 Ohio 2737 (Ohio Ct. App. 2006) – “In his reply brief, appellant challenges the statements H.M. made to his mother (which the trial court allowed, not for the truth of the matter asserted, but to “explain actions”) as in contravention of *Crawford* (holding that testimonial out-of-court statements are inadmissible unless declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant). We do not, however, find the unsolicited statements of a three-year-old child to his mother in the present case to be testimonial in nature, i.e., made with the realization that they would be used in the prosecution of a criminal trial.”

Commonwealth v. DeOliveira, 447 Mass. 56 (2006) – “The [6-year-old] child told a social worker that defendant had penetrated her mouth, anus, and vagina with his penis. Police took her to an emergency room for a medical assessment; the child repeated her claims to the examining doctor. He testified that he worked independently of the police and that he examined the child to determine whether there was sexual abuse, whether she was injured, and whether she needed treatment. The Commonwealth agreed to redact any reference to defendant from the doctor's testimony. The trial court found the child was unavailable to testify and held that admission of her statements to the doctor would violate defendant's right of confrontation under *Crawford v. Washington*. The high court disagreed. The child's statement was not “testimonial per se”; although police were present at the hospital, there was no indication they were present during the doctor's examination, or that they had instructed him on how to conduct it. Nor were the statements “testimonial in fact,” as a reasonable person in the child's position, and armed with her knowledge, could not have anticipated that her statements might be used in a prosecution against defendant.

State v. Brigman, 632 S.E.2d 498 (N.C. Ct. App. 2006) – “At the time of his medical examination by Dr. Conroy, Child 3 was not quite three years old. This Court found in the case against Kimberly Brigman that it was highly unlikely that Child 2, who was almost six when he made statements to his foster parents, understood his statements might be used at a subsequent trial. *Brigman*, 171 N.C. App. At 312-13, 615 S.E.2d at 25-26. We cannot conclude that a reasonable child under three years of age would know or should know that his statements might later be used at a trial. Therefore, we hold Child 3's statement to Dr. Conroy was not testimonial, and defendant's right to confrontation was not violated.”

Miller v. Fleming, 2006 U.S. Dist. LEXIS 17284 (W.D. Wash. 2006) – Defendant was convicted of molesting a 7 year old child. On appeal, the defendant argued that the child's statements to a nurse and doctor were testimonial. “The Court agrees with the reasoning adopted by the Colorado Supreme Court in *Vigil* and finds that the circumstances in this case are similar. As in *Vigil*, the Court finds that an objective seven-year old would not believe that her statements to medical professionals would be available for use at a later trial under the circumstances here. Therefore, the Court finds that K.'s statements to Nurse Martinez and Dr. Minten were not testimonial under *Crawford*.”

State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006), cert. denied, 549 U.S. 953 (2006), habeas corpus granted, Bobadilla v. Carlson, 570 F.Supp.2d 1098 (D. Minn. Jul 16, 2008), aff'd Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. (Minn.) Aug 06, 2009), cert. denied, 130 S. Ct. 1081; 175 L. Ed. 2d 928 (2010) – The 3 year old victim disclosed penetration by the defendant to his mother. At a forensic interview with a CPS worker and police officer, the child also disclosed penetration. At a competency hearing, the 3 year old was declared incompetent to

testify. The prosecutor admitted all the child's statements, including the videotaped forensic interview. On appeal, the court declared the forensic interview to be non-testimonial and indicated that a child of that age could not under the legal process or the consequences that his statement would be used in court.

People v. Vigil, 127 P.3d 916 (Colo. 2006) – “the Supreme Court first concludes that Crawford does not require Vigil to have had a prior opportunity to cross-examine the child because the child's statements were not testimonial. In determining the statements were not testimonial, the Supreme Court holds that (1) the circumstances under which the child made statements did not constitute the functional equivalent of police interrogation and (2) an objectively reasonable child in the declarant's position would not have believed that his statements to the doctor or his statements to his father and his father's friend would be available for use at a later trial. *** As the doctor testified at trial, his purpose in questioning the child was to determine whether the child would "say something that could help [the medical personnel] understand what the potential injuries were." The child's responses helped the doctor develop his opinion regarding whether a sexual assault had occurred and how best to treat the child. Thus, rather than being an agent of the police, the doctor's job involved identifying and treating sexual abuse. The fact that the doctor was a member of a child protection team does not, in and of itself, make him a government official absent a more direct and controlling police presence, such as the presence demonstrated in Mack, 337 Ore. 586, 101 P.3d 349 (Or. 2004), and Snowden, 385 Md. 64, 867 A.2d 314 (Md. 2005). *** We hold that the "objective witness" language in Crawford refers to an objectively reasonable person in the declarant's position. Applying this test to the instant case, we determine that an objectively reasonable person in the declarant's position would not have believed that his statements to the doctor would be available for use at a later trial. *** an objective seven-year-old child would reasonably be interested in feeling better and would intend his statements to describe the source of his pain and his symptoms. In addition, an objectively reasonable seven-year-old child would expect that a doctor would use his statements to make him feel better and to formulate a medical diagnosis. He would not foresee the statements being used in a later trial. Thus, from the perspective of an objective witness in the child's position, it would be reasonable to assume that this examination was only for the purpose of medical diagnosis, and not related to the criminal prosecution. No police officer was present at the time of the examination, nor was the examination conducted at the police department. The child, the doctor, and the child's mother were present in the examination room.”

State v. Blount, 2005 N.C. App. LEXIS 2606, 2005 WL 3289256 (N.C. Ct. App. 2005) – The 3 year old victim was sexually abused by her mother's boyfriend and informed 4 people of the assault (her grandmother, a friend, and 2 counselors). The child was unable to testify at trial, but the statements to the 4 people were admitted. The statements to the 2 counselors were held to be non-testimonial. “We hold, considering the surrounding circumstances, that a reasonable child in the victim's position would have no reason to know or believe her statements would be used in a subsequent trial. The victim was referred to Meadows, then a counselor at a private, non-profit child counseling center, by Department of Social Services social worker Angela Beasley. Meadows testified that in her sessions the child is never encouraged to disclose abuse, but is given the opportunity to do so in an environment where she feels secure enough to speak freely. Meadows testified that not all children disclose any abuse. There is no evidence in the record that Meadows ever discussed the potential for any criminal consequences for defendant. There is no evidence that Meadows ever discussed with the victim any potential punishment for the defendant. Roberts is a therapist in Dare County. The victim was referred to Roberts for follow

up counseling after her sessions with Meadows, and at the time of trial had participated in approximately forty sessions with Roberts. Roberts testified that she assured the victim that their conversations were confidential, and that Roberts could not disclose their conversations to anyone. There is no evidence in the record that the victim was made aware in any way that her statements could be used against defendant for prosecution, or that Roberts ever discussed any potential consequences to defendant. In fact, review of the entire record reveals no evidence that the victim was ever made to understand by anyone that defendant could face criminal trial and punishment as a result of what he had done to her. The victim was three or four years old when she made her first statements to Meadows and Roberts implicating defendant (the record does not include the child's date of birth, but she was five at the time of the trial, and first spoke with Meadows and Roberts some fourteen months previously). **It is "highly implausible" that a three or four year old would have reason to know, nor even understand, that her statements might be used in a later trial."**

United States v. Coulter, 62 M.J. 520 (Navy-Marine Corps. Crim. App. 2005) – Two year old child spontaneously disclosed that she had been touched by defendant. These statements held non-testimonial because the statements to her parents were not the type of testimonial statements outlined in Crawford. “At the same time, the circumstances under which this two-year-old declarant made her statements would not lead an objective witness to reasonably believe that the statements would be available for use at a later trial. Two-year-old [victim] could no more appreciate the possible future uses of her statements than she could understand the significance of what she was communicating.”

In re D.L., 2005 Ohio 2320, 2005 WL 1119809 (Ohio Ct Ap 2005) (unpub) – Three year old victim: “Our review of the record shows no circumstances to indicate the victim, or a reasonable child of her age, would have believed her statements were for anything other than for medical treatment.”

Lagunas v. State, 187 S.W.3d 503 (Tex. App.-Austin 2005) – Defendant was charged with kidnapping and burglary. On appeal, the defendant argued that the admission of a 4 year old child witness's hearsay statements violated his right to confrontation. “The court of appeals disagreed. The child's age and her emotional state were factors strongly suggesting that her statements to the officer were non-testimonial. Considering the context, the statements amounted to a small child's expressions of fear arising from her mother's absence. When an officer located the child, he asked her name and told her that he was a police officer. He then noticed that she was "terrified" and crying. The officer's exchange with the child was unlike the sort of formalized or structured interrogation that has been held to give rise to testimonial hearsay. To the contrary, it was closer in nature to a preliminary question in which the officer sought to clarify the child's spontaneous statement that her mother was dead. There was not time to formulate careful, structured questioning. Significantly, after calming the child, the officer asked her no further questions regarding the circumstances of her mother's disappearance.”

State v. Dezee, 125 Wash.App. 1009, 2005 Wash. App. LEXIS 104, 2005 WL 246190 (Wash.App. Div. 1 Jan 18, 2005) – Nothing in the record supports the conclusion that [the child], a nine year old, reasonably believed the statements to her mother could or would be available for use in a trial.

Whether Forensic Interviewer Is Agent of Law Enforcement

United States v. DeLeon, 678 F.3d 317, 319-330 (4th Cir. Md. 2012) – "[Counselor] Thomas acknowledged that she worked with law enforcement when necessary in her capacity as the FAP treatment manager. [¶] But although the FAP incorporates reporting requirements and a security component, these factors alone do not render Jordan's statements to Thomas testimonial. ... Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement."

Commonwealth v. Allshouse, 36 A.3d 163, 165-190 (Pa. 2012) – "for purposes of our analysis herein, we will construe [CYS caseworker] Geist, who was contacted by hospital officials when J.A. was brought into the emergency room, and who was responsible for ensuring the safety of J.A. upon J.A.'s removal from the family home, as an agent of law enforcement."

Jordan v. State, __ So.3d __, 2010 Miss. App. LEXIS 497, 20-23 (Miss. Ct. App. Sept. 14, 2010), rehearing en banc denied (Miss. Ct. App., June 7, 2011), certiorari granted (Miss. Sept. 8, 2011) – horrendous case – "[¶ 45] In this case, A.B.'s forensic interview was set up by DHS and administered by a non-profit entity; it did not arise based on a police investigation." – non-testimonial

Commonwealth v. Allshouse, 985 A.2d 847, 849-871 (Pa. 2009) cert. granted, summarily vacated and remanded, Allshouse v. Pennsylvania, 131 S. Ct. 1597, 179 L. Ed. 2d 495 (2011), reaffirmed Commonwealth v. Allshouse, 36 A.3d 163, 165-190 (Pa. 2012) – "Similarly, we conclude that, in the instant case, [CYS caseworker] Geist, who was contacted by hospital officials when [7-month-old] J.A. was brought into the emergency room, and who was responsible for ensuring the safety of J.A. upon J.A.'s removal from the family home, should be construed to be an agent of law enforcement for purposes of a Davis analysis." [NOTE: Ensuring the safety of a child makes one a cop? Justice Baer departs from the majority on this point.]

Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. (Minn.) Aug 06, 2009), cert. denied, 130 S. Ct. 1081; 175 L. Ed. 2d 928 (2010) – (habeas) – "The only significant difference between the interview involved in the present case and the one held to be testimonial in *Crawford* is instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same. We find this to be a distinction without a difference." – [NOTE: The genuinely significant difference is the respective motives and intentions of the two out-of-court declarants, but the Eighth Circuit concludes that distinction is immaterial so long as the declarant in question is an abused child. Compare an adult drug dealer talking to a wired informant while the officer sits silent out of sight.]

In re Rolandis G., 902 N.E.2d 600, 327 Ill.Dec. 479, 232 Ill.2d 133 (Ill. Nov 20, 2008), rehearing denied (Jan 26, 2009) – child advocate (Weber) interviewed child rape victim – "Although Weber did not testify and the record is silent as to the actual purpose of her interview with Von, the record, from an objective viewpoint, indicates that the interview took place at the behest of the police so that a more detailed account of the alleged sexual abuse could be obtained by a trained interviewer and memorialized on videotape. Moreover, because the interview was witnessed by Detective Swanberg and a copy of the videotaped interview immediately turned over to him 'as evidence' upon completion of the interview, the objective circumstances indicate that Von's statement was the product of an interrogation, conducted on behalf of the police,

intended to gather information and establish past acts for future prosecution. Clearly, then, it must be concluded that Weber was acting as a representative of the police, assisting in their investigation of an alleged child sexual abuse, when she interviewed Von." – another list of factors provided a few paragraphs later on – [NOTE: Concurrence by Justice Kilbride says the proper analysis examines what a hypothetical adult (first layer of speculation) in the child's position (assuming that could happen, a second layer of speculation) would have thought (a third layer) about the likelihood (fourth layer) of future trial.]

In re T.T., 892 N.E.2d 1163, 323 Ill.Dec. 171 (Ill.App. 1 Dist. Jul 25, 2008) – "We recognize that our supreme court, in addressing whether responsibility for destruction of evidence by DCFS [Department of Children and Family Services] could be imputed to the State's Attorney, rejected the notion that child protective service investigators are a prosecutorial arm of the State simply by virtue of their mandate to investigate reports of suspected child abuse and neglect. [cite] However, 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." – although the opinion is quite long, it never actually says what facts support its conclusion that the investigator was a government agent in the particular case – ironically enough, the majority opinion then says that "[v]ague standards are manipulable" while the concurrence emphasizes that "whether a statement is testimonial in nature cannot be answered in a vacuum, but requires examination of the totality of the circumstances surrounding the statement"

State v. Arnold, 2008 WL 2698885, 2008-Ohio-3471 (Ohio App. 10 Dist. Jul 10, 2008) (unpub) – {¶ 28} In light of these circumstances, we conclude that [licensed social worker] Marshall did not act as an 'agent of the police' when she questioned the victim. She was not an employee of the State but, rather, was employed by the hospital. She testified that her purpose in interviewing the child was for medical diagnosis and/or treatment. She passed along the information she obtained to a nurse who used that information to guide the physical examination of the victim. Other than passive observation, there was no police involvement during the interview and the victim did not have any indication of a police presence. The fact that the interview was recorded and subsequently provided to the State for use in the prosecution of a sexual offense does not make Marshall an agent of the police or a law enforcement officer."

State v. Buda, 195 N.J. 278, 949 A.2d 761 (N.J. Jun 23, 2008) – "Although some may intimate that the DYFS worker stands in the shoes of a police officer ..., we reject that construction. ... the primary obligation of a DYFS worker is not to collect evidence of past events to secure the prosecution of an offender, but to protect prospectively a child in need."

Seely v. State, __ S.W.3d __, 373 Ark. 141 (Ark. Apr 10, 2008) – 3-year-old's statements to social worker non-testimonial – "Where a statement is made to a government official, it is presumptively testimonial, but the statement can be shown to be nontestimonial where the primary purpose of the statement is to obtain assistance in an emergency. [cite] Where a statement is made to a nonofficial, it is presumptively nontestimonial, but can be shown to be testimonial if the primary purpose of the statement is to create evidence for use in court."

In re C.C., 2007-Ohio-2226, 2007 WL 1366431 (Ohio App. 8 Dist. 2007) (unpub) – fact that statement was made to government social worker doesn't mean it wasn't made for medical diagnosis or treatment (¶¶ 41-46)

State v. Hopkins, 154 P.3d 250 (Wash. App. Div. 2 2007) – "The second meeting between [Child Protective Services social worker] Mahaulu-Stephens and MH, however, did produce incriminating statements, which the State used against Hopkins at trial. This second meeting was even more removed from any ongoing emergency than their first meeting. Moreover, at this second meeting, Mahaulu-Stephens was also acting in a government capacity for CPS and, in that capacity, she obtained statements from MH that the State used to prosecute Hopkins. [¶] We hold, therefore, that MH's hearsay disclosures to Mahaulu-Stephens, during the second interview were "testimonial" under *Crawford* and, therefore, their admission at trial violated Hopkins' Sixth Amendment protections because MH did not testify at trial." [¶¶ 41-42]

Morrison v. State, 2007 WL 614143, *3 (Tex.App.-Fort Worth 2007) (unpub) – "Paschall was a child forensic interviewer with the Crimes Against Children Unit for the Tarrant County District Attorney's office; therefore, J.H.'s statements to her were similar to statements derived from a police interrogation, a context indisputably testimonial."

State v. Courtney, 696 N.W.2d 73 (Minn. Sup. Ct. 2005) – In this domestic violence case, the victim gave a tape recorded statement to police and her 6-yr old daughter gave a videotaped interview of what she witnessed. At trial, the victim testified for the defendant and recanted her statement. The prosecutor introduced the audio and video tapes pursuant to the residual/catchall hearsay exception. The Court of Appeals held that the statement was testimonial, however, there was no *Crawford* violation since the victim was present for cross examination. However, the videotaped statement of the daughter was declared to be testimonial and a violation of *Crawford* since she was not subject to cross examination. The Court went on to say that because the CPS worker along with a police officer interviewed the child for purposes of developing a case against the defendant, that the statement was testimonial. The Supreme Court, however, reversed the conviction and in relation to the child's videotaped statement, the Court did not decide whether the statement was testimonial because admission of the child's interview was harmless error

People v. Geno, 261 Mich. App. 624 (2004) – "Defendant's conviction arises out of the sexual assault of the two-year-old daughter of defendant's girlfriend. When the victim's father picked the victim up from the home of her mother and defendant, he noticed that she was acting uncomfortable and did not want her father to change her. Once he did, her father noticed irritation and bruising around the child's vaginal area as well as blood in the child's pull-up. Her father contacted Children's Protective Services, which arranged to have an assessment and interview of the child by the Children's Assessment Center. At the interview, the victim asked the interviewer to accompany her to the bathroom. The interviewer noticed blood in the child's pull-up and asked the child if she "had an owie?" The child answered, "yes, Dale [defendant] hurts me here," pointing to her vaginal area. Defendant was questioned by a City of Muskegon police detective and explained that some weeks earlier, he had changed the child and may have hurt her. He denied, however, touching her in a sexual way. During subsequent police interviews, defendant admitted that he was molested as a child, that he was sexually attracted to children, and that he had sexually fantasized about the victim. He also explained that while wiping the victim in the course of changing her, he may have accidentally inserted his finger into the victim's vagina. Defendant later wrote and signed a statement in which he admitted that his finger "penetrated her vaginal lips slightly" and that he "was slightly aroused because my finger accidentally touched her vagina". However, we conclude that the child's statement did not

constitute testimonial evidence under Crawford, and therefore was not barred by the Confrontation Clause. The child's statement was made to the executive director of the Children's Assessment Center, not to a government employee, and the child's answer to the question of whether she had an "owie" was not a statement in the nature of "*ex parte* in-court testimony or its functional equivalent".

Whether Doctor, Nurse or Teacher Is Agent of Law Enforcement

(category added March 2013)

***Ohio v. Clark*, 576 U.S. __, 135 S.Ct. 2173 (2015):** "It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality. ... And mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gather evidence for a prosecution."

***State v. Clark*, 137 Ohio St.3d 346, 999 N.E.2d 592, 2013-Ohio-4731 (Ohio 2013), cert. pet. filed (May 8, 2014), overruled by *Ohio v. Clark*, 576 U.S. __, 135 S.Ct. 2173 (2015)**

***State v. Anwar S.*, 141 Conn. App. 355, 61 A.3d 1129 (Conn. App. Ct. 2013)** – "We disagree with the defendant's assertion that [nurse practitioner] Murphy, as a member of the team established pursuant to General Statutes § 17a-106a [*i.e.*, a multidisciplinary team], was operating as law enforcement personnel. ... We conclude that Murphy's status as a team member is insufficient, by itself, to render her law enforcement personnel and, thus, the laboratory results in this case were not generated at the behest of law enforcement."

Welfare Checks of the Home

(category added Dec. 31, 2012)

***People v. Phillips*, __ P.3d __, 2012 COA 176 (Colo. Ct. App. 2012)** – "[¶ 121] ... C.G.'s other statements to the police officer during the welfare check were hearsay. See CRE 801(c). We further conclude, however, that C.G.'s hearsay statements to the police officer were nontestimonial because the primary purpose of the interrogation was not 'to establish or prove past events potentially relevant to later criminal prosecution,' [cites] but instead to ascertain the conditions of the home and of the children."

Medical and Psychological Examinations / Interviews of Children

(see also part 5, Medical Diagnosis /Treatment; and Forensic Interviews, above; and note that some courts don't distinguish between interviews conducted by social workers and those conducted by nurses or doctors.)

(Some older cases are called into question by *Ohio v. Clark*.)

***United States v. Squire*, 72 M.J. 285 (C.A.A.F. 2013)** – "We granted review of this case to determine whether statements made to two medical doctors by an eight-year-old victim of a sexual assault were testimonial hearsay.ⁿ² We hold that the statements were not testimonial... Dr. Montgomery was an emergency room physician who did not conduct a forensic examination.

In taking the patient history, Dr. Montgomery's questions to SL were narrow in scope, fact oriented, and limited to addressing SL's emergency medical condition and its causes. Finally, the primary purpose of the statements was to facilitate medical treatment for a possible sexual assault." – not testimonial

State v. Miller, 293 Kan. 535, 264 P.3d 461 (Kan. 2011) – SANE exam – "As the State points out, numerous other states have considered the question of whether statements made by sexual assault victims to medical professionals are testimonial. Our review of the decisions cited by the parties and many other decisions reveals that jurisdictions are divided on this issue. It seems, however, that the majority of jurisdictions have determined that when there is a medical purpose to the examination, the statements are nontestimonial. ... At the outset [25 pages into the Pacific Reporter version of the opinion!!], it is important to note there is no evidence in the record that any law enforcement officer was present during the SANE's examination of [4-year-old] N.A. ... We conclude the SANE was acting as an agent of law enforcement when performing the role of collecting evidence and completing the KBI evidence kit. Any inquiries made solely for the purpose of recording answers on a KBI form would produce testimonial statements in most circumstances. However, inquiries made for the sole purpose of medical treatment, or even for a dual purpose that includes treatment, may produce nontestimonial statements, depending on other circumstances. ... Objectively, there is evidence in the record, beyond the SANE's testimony, that suggests a medical purpose to the examination. ... The record clearly establishes that N.A. suffered injuries from the attack... An objective evaluation of the totality of the circumstances leads us to the conclusion that N.A.'s statements in response to the SANE's inquiry about what happened were nontestimonial. These circumstances include N.A.'s age, her complaint that she was 'hurting,' the mother's decision to seek medical treatment independent of any request to do so by law enforcement officers, the SANE's action of asking questions common to all medical examinations, and the SANE's action of providing some medical treatment." – [NOTE: This comes close to laying down requirements for the post-attack behavior of victims – something early 20th century courts used to do routinely in rape cases.]

State v. Anderson, 171 Wn.2d 764, 254 P.3d 815 (Wash. 2011) – "nurse Young's testimony regarding C.C.S.'s statements as related to her from the detective were erroneously admitted." – double hearsay problem

Sanders v. Commonwealth, 282 Va. 154, 711 S.E.2d 213 (Va. 2011) – "Beyond question, there is a forensic aspect to Dr. Clayton's duties as a child abuse pediatrician. ... Nevertheless, Dr. Clayton also provided medical diagnosis and treatment to CL. ... Here, Dr. Clayton after observing a vaginal discharge sent CL's urine and vaginal swabs for routine testing of sexually transmitted infections. There is no evidence that law enforcement requested this testing. There is also no evidence that Dr. Clayton knew that Sanders had chlamydia, as that fact was not disclosed to investigators until after Dr. Clayton's examination of CL. Furthermore, the test for chlamydia is a diagnostic test to determine if a 'medical condition' exists, and that unlike a DNA test, it does not provide information regarding the source of the infection. Lastly, when the testing results came back positive for chlamydia, Dr. Sanders actually treated CL and cured the infection. [¶] Under these circumstances, Dr. Clayton's medical examination of CL served a dual purpose: (1) to gather forensic information to investigate and potentially prosecute a defendant for the alleged offenses and (2) to obtain information necessary for medical diagnosis and treatment of the victim. The laboratory report was for medical treatment purposes as it was created to permit Dr. Clayton to medically diagnose and treat CL for sexually transmitted

infections. Because reports created for medical treatment purposes are nontestimonial, Sanders' Sixth Amendment right to confront witnesses against him was not violated."

State v. Moreno-Garcia, 243 Ore. App. 571, 260 P.3d 522 (Or. Ct. App. 2011) – "Although we agree with the state that CARES's functions are diagnostic and forensic, the forensic aspect is pervasive.... Although one purpose of the exam and interview was to ensure that the children were safe, another was to see if they too were being abused [these are different things??] ... Although the record does not reveal whether, as in S. P., law enforcement officials in this case observed the interview through a one-way mirror and listened to the examination from another room—facts that might distinguish this case from S. P.—the state, as proponent of the hearsay evidence, had the burden of adducing facts that might have established that the statements were nontestimonial and therefore admissible, but it failed to do so." [NOTE: In other words, statements by a child to a medical professional are presumed testimonial, even in the absence of evidence supporting that conclusion. This case explicitly states, at p. 579, that Oregon courts adjust the constitutional standards in child abuse cases to the benefit of accused abusers – a rare public acknowledgment of the double standard.]

People v Duhs, 2011 NY Slip Op 2441, 16 N.Y.3d 405, 947 N.E.2d 617, 922 N.Y.S.2d 843 (2011) – " Defendant, who was babysitting his girlfriend's three-year-old son, allegedly placed the child's feet and lower legs into a tub filled with scalding hot water, resulting in second and third degree burns. ... At trial, the court permitted the pediatrician to testify about a statement the child made outside the presence of his mother and defendant. Specifically, when the pediatrician asked the child why he did not get out of the tub, he responded, 'he wouldn't let me out.' ... Supreme Court properly concluded that the child's statement was germane to his medical diagnosis and treatment and therefore was properly admitted under that exception to the hearsay rule. ... the primary purpose of the pediatrician's inquiry was to determine the mechanism of injury so she could render a diagnosis and administer medical treatment. Moreover, the Supreme Court has noted that 'statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules' and not the Confrontation Clause (*Giles v California v California*, 554 US 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 [2008]; see *Bryant*, 562 U.S. at , 131 S. Ct. 1143 n 9)." – petition granted by **Duhs v. Capra, __ F.Supp.3d __, 2015 WL 428321, at *16-30 (E.D.N.Y. Feb. 3, 2015), appealing pending** (habeas) – a pre-*Ohio v. Clark* decision

People v. Vargas, 178 Cal. App. 4th 647, 650-664 (Cal. App. 2d Dist. 2009), review denied (2010) – 14- to 17-year-old rape victim's statements to sexual assault nurse examiner were testimonial, but error harmless – SANE-type exam

Vega v. State, 236 P.3d 632, 635-638 (Nev. 2010) – "The victim underwent a sexual abuse examination by Nurse Phyllis Suiter at the Clark County Child Advocacy Center. ... Because Suiter was unavailable to testify at trial, the State asked Dr. Neha Mehta to review Suiter's examination report and the diagram and video of the examination. ... To the extent that Dr. Mehta's testimony admitted Suiter's written report, including Suiter's questions, the victim's responses detailing the victim's medical history and history of sexual abuse, and Suiter's observations and findings without Suiter being subject to cross-examination, we conclude that this violated the Confrontation Clause, Crawford, and Melendez-Diaz. In contrast, however, after reviewing the video recording and the diagram of the gynecological examination, Dr. Mehta offered her independent opinion as an expert witness that there was a "healed transection" on the

victim's hymen. We conclude that Dr. Mehta's independent opinion based on the diagram and video recording does not violate the Confrontation Clause, Crawford, or Melendez-Diaz because Dr. Mehta's judgment, proficiency, and methodology were subject to cross-examination."

In re T. L., 186 Ohio App. 3d 42, 2010 Ohio 402; 926 N.E.2d 346 (Ohio Ct. App., Medina County 2010) – "[¶7] The juvenile argues that the trial court erred by admitting statements made by the child to Jill Mearing, an intake social worker for Medina County Jobs and Family Services ("JFS"). This Court disagrees. ... [¶17] this Court concludes that the trial court did not abuse its discretion by admitting the child victim's hearsay statements pursuant to Evid.R. 803(4). Moreover, such statements do not violate the Confrontation Clause."

Anthony v. State, 23 So. 3d 611, 613-622 (Miss. Ct. App. 2009) – "Although Anthony argues the abuse record was testimonial because it was required under Texas law, we find the abuse record was not created for the purpose of aiding the prosecution and is not testimonial under Crawford and its progeny. Dr. Sanford made it abundantly clear that the abuse record was used in the treatment of B.A. Therefore, under our plain-error review, we find no error occurred at trial."

People v. Belknap, 396 Ill. App. 3d 183, 918 N.E.2d 1233, 335 Ill. Dec. 420 (Ill. App. Ct. 3d Dist. 2009) – Erin, the mother of dying 5-year-old, asked paramedic in ambulance, "Did he hurt her?", after which she said, "I will never trust him with her again." – "In this case, Erin's statements to [paramedic] Connor were not testimonial. Connor was a member of the emergency medical personnel who were providing care for Silven and was not acting as an agent of the State. In addition, a reasonable person in Erin's circumstances would not have believed that her statements could be used in a criminal prosecution against the defendant. Erin made her statements to Connor after receiving information from Dr. Dabash that Silven had been hit multiple times and her brain was bleeding. Her statements were not made in response to any questioning by Connor. Erin did not identify the defendant, or anyone else, as the person who hit Silven. Rather, Erin's initial statement was a question to Connor followed by a statement that she would never trust 'him' with Silven again. A reasonable person would not conclude that these ambiguous statements would be used in a criminal prosecution. Thus, Erin's statements were not testimonial."

Chavez v. State, 213 P.3d 476 (Nev. Jul 30, 2009) – "Chavez next argues that his Confrontation Clause rights were violated when [deceased victim] D.C.'s therapist, Evarts, was allowed to testify as to how D.C. had answered a question on a medical form. Evarts testified that D.C. wrote that at 'five years old, her dad ripped open her vagina.' [¶] We first consider Crawford's threshold question of whether the statement being offered is testimonial in nature. While we acknowledge that the police likely referred D.C. to Evarts, there is no evidence that Evarts' time with D.C. served the purpose of furthering the investigation of D.C.'s sexual abuse allegations. Rather, their time together served the primary purpose of helping D.C. psychologically heal from five years of abuse. One quarter of Evarts' practice was made up of child assault victims. Her general practice was to have patients fill out a medical form upon their first visit. The question that elicited the response at issue did not ask anything specific about an act of sexual assault. Rather, it asked if the patient had been to the hospital or required stitches. Given the context in which it was asked, by a family therapist specializing in sexual assault victims and for the purpose of diagnosis and treatment, we conclude that D.C.'s written statement was not testimonial."

People v. Spangler, 285 Mich. App. 136; 774 N.W.2d 702 (Mich. App. Jul 21, 2009) – "in order to determine whether a sexual abuse victim's statements to a SANE are testimonial, the reviewing court must consider the totality of the circumstances of the victim's statements and determine whether the circumstances objectively indicated that the state-ments would be available for use in a later prosecu-tion or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an on-going emergency." – listing 13 (!) factors to consider, and adding that "it is by no means an exhaustive list"

State v. Miller, 42 Kan. App. 2d 12, 208 P.3d 774 (2009) (Kan. App. Jun 05, 2009), aff'd, 293 Kan. 535, 264 P.3d 461 (Kan. 2011) –

Reyes v. State, 2009 WL 1165547 (Tex. App.-Eastland Apr 30, 2009) (unpub) – child's statements to pediatric nurse practitioner non-testimonial

State v. Gilfillan, 2009 WL 638264, 2009-Ohio-1104 (Ohio App. 10 Dist. Mar 12, 2009) (unpub) – 4-year-old's statements to social worker non-testimonial

People v. Figueroa, 2009 WL 637308 (Mich. App. Mar 12, 2009) (unpub) – "Defendant argues that the trial court violated his right to cross-examine the witnesses against him when it permitted a nurse to testify about the state-ments that his three-year-old daughter, the complainant in this case, made at the hospital after she was allegedly sexually assaulted. ... This Court has previously held that a child's statements to a non-governmental employee about possible abuse were not testimonial. [cite] In addition, courts from other jurisdictions have determined that statements to a medical professional are not testimonial in the absence of evidence that, under the circumstances, an objective witness would reasonably have believed that the statement would be available for use at a later trial." – police officer took the child and her mother to the hospital – actual holding is that any error was not plain

State v. Swanigan, 2009 WL 580732, 2009-Ohio-978 (Ohio App. 5 Dist. Mar 04, 2009) (unpub) – "{¶ 20} We find the statements made by the child victims to the SANE nurses in the case sub judice were not testimonial in nature. ... {¶ 68} ... The expectation of the declarant at the time was to receive medical treatment, not that the statement would later be available for trial."

State v. Ferguson, 2008 WL 5265893, 2008-Ohio-6677 (Ohio App. 10 Dist. Dec 18, 2008) (unpub) – "{¶ 45} We have previously held that a child's state-ments to Assessment Center social workers were not testimonial and that Crawford and the Confrontation Clause did not bar admission of the statements. [cites]"

State v. Alne, 219 Or.App. 583, 184 P.3d 1164 (Or. App. May 07, 2008) – 4-year-old statement was examined by pediatric nurse practitioner, then interviewed by a social worker, at a CARES clinic [a medical clinic specifically set up to treat child abuse] – "It is impossible to meaningfully distinguish the statements that C made to CARES personnel here from the statements at issue in *Mack* and *Pitt*. Moreover, in two cases decided since *Pitt*, we have determined that a child's statements to CARES personnel were testimonial and that their admission was erroneous. [cites] In light of those cases, we conclude that the trial court

committed plain error in admitting C's out-of-court statements through the testimony of CARES personnel and through the videotape of the evaluation." – [NOTE: No distinction between statements to nurse and to social worker.]

State ex rel. Juvenile Dept. of Multnomah County v. S.P., 218 Or.App. 131, 178 P.3d 318 (Or. App. Feb 20, 2008) – long, meandering opinion concludes that 3-year-old's statements to CARES interviewer were testimonial [CARES is medical clinic specifically set up to treat child abuse – and the law hates innovation] – "Ultimately, on this record, CARES' purpose of developing and preserving an accurate account of alleged abuse for law enforcement authorities is inextricable from its medical diagnostic purpose. The two are concurrent and coequal; both are 'primary' in the sense that neither takes precedence over the other. ... In sum, the preservation of evidence for purposes of future criminal investigation and potential prosecution was a concurrent 'primary purpose' of the CARES interview process. ... CARES was, to a substantial extent, serving as a proxy for the police," [cite] in interviewing N. Consequently, N's statements during the CARES interview were 'testimonial'—and, under *Crawford*, the juvenile court erred in admitting those statements into evidence." [NOTE: Primary equals concurrently primary, but "substantial extent" is primary-primary. Everybody clear on that?]

U.S. v. Marchesano, 67 M.J. 535 (Army Ct. Crim. App. Oct 02, 2008) – although issue was not pursued on appeal, note 13 states that 7-year-old's statements to doctor non-testimonial

In re T.T., 892 N.E.2d 1163, 323 Ill.Dec. 171 (Ill.App. 1 Dist. Jul 25, 2008) – "Regarding G.F.'s hearsay statements to Dr. Lorand, we find that [7-year-old] G .F.'s statements describing the cause of symptoms or pain or the general character of the assault were not testimonial in nature. However, G.F.'s statement identifying respondent as the perpetrator was testimonial..." – holding that statements for medical diagnosis or treatment are non-testimonial "where such statements do not accuse or identify the perpetrator of the assault" – but doesn't clearly explain the basis for the exception – is it medically appropriate to return an abused child to abuser?

State v. Arnold, 2008 WL 2698885, 2008-Ohio-3471 (Ohio App. 10 Dist. Jul 10, 2008) (unpub) – "{¶ 29} Because [social worker] Marshall was not acting as a police agent during her questioning of the child, we must apply the objective witness test to determine whether or not the child's statements were testimonial. {¶ 30} Here, there is no evidence that the child realized that her statements would be available for use at a later trial. The child was only four-years old at the time of the interview. It is highly unlikely that she realized her statements would be available for later use. ... Accordingly, the victim's statements during the interview were nontestimonial."

State v. Lortz, 2008 WL 2514053, 2008-Ohio-3108 (Ohio App. 9 Dist. Jun 25, 2008) (unpub) – child's statements to nurse non-testimonial

De La Paz v. State, 273 S.W.3d 671 (Tex. Crim. App. Jun 18, 2008), reh'g denied (Sept. 10, 2008) – child's statements to hospital workers recorded in hospital records – holding that the prosecution had failed to carry its burden of proving the statements were *non*-testimonial – in other words, non-erroneous admission of non-testimonial statements *may* be reversible error under *Crawford*, depending not on the statements themselves but on the evidence presented or proffered by the prosecution regarding their proper classification – even after prosecution prevailed in the trial court, it should have insisted on continuing to litigate the issue to make a better record for appeal

State v. Contreras, 979 So.2d 896 (Fla. Mar 13, 2008) – "Courts have also concluded that a child victim's statements to a medical professional are not testimonial when the statements regard the nature of the alleged attack or the cause of the child's symptoms and pain."

State v. Alne, 184 P.3d 1164, 219 Or.App. 583, 2008 WL 1959496 (Or. App. May 07, 2008) – 4-year-old statement was examined by pediatric nurse practitioner, then interviewed by a social worker, at a CARES clinic – court draws no distinction between the professions, lumping them together as "CARES personnel"

People v. Lewis, 2008 WL 681146 (Mich. App. March 13, 2008) (unpub) – "Defendant first argues that his constitutional right to confrontation was violated when hearsay statements from the [4-year-old] complainant were elicited from a nurse and a physician who examined the complainant while he was in the emergency room. Both the nurse and physician testified that upon questioning the complainant regarding what had happened, he told them that defendant had hit him. ... We hold that the testimony elicited from the examining nurse regarding the statement by the complainant was properly admitted at trial because the statement was not testimonial in nature under the guidelines offered in Crawford and Davis. The statement was not a solemn declaration or affirmation made to establish or prove some fact, the four-year-old declarant did not reasonably expect the statement to be used in a prosecution, the statement was not the functional equivalent of ex parte in-court testimony, there is no indication that the nurse was acting on behalf of the police or questioning the child in an effort to obtain information to be used in a prosecution, and the primary purpose of her questioning was to address the child's injuries in the context of providing appropriate medical treatment. [¶] With respect to the examining physician, the issue is not quite as clear cut." – because the doctor testified she understood the potential for future court proceedings, but concluding statement to her was non-testimonial, too

State v. Norby, 218 Or.App. 609, 180 P.3d 752 (Or. App. Mar 19, 2008) – 3-year-old's "spontaneous" statements to CARES physician were testimonial, on the theory that "'if the police officers had conducted these interviews with [the victim], the resulting statements would be testimonial'" – and not harmless, although cumulative of many other non-testimonial statements by child, because jury would likewise perceive it to be *particularly* trustworthy, given the doctor's expertise – [NOTE: This comes close to saying error is harmful if it is sufficiently reliable that it would have been admissible under the confrontation clause during the *Ohio v. Roberts* era, which some might consider a touch ironic.]

State v. Brown, 2008 WL 553247, 2008-Ohio-832 (Ohio App. 11 Dist. Feb 29, 2008) (unpub) – "{¶ 74} Rather than emphasizing the selfish-interest rationale, the Court in *Dever* held, 'the cornerstone of admissibility under Evid.R. 803(4),' when the declarant is a young child is 'whether the statements are reasonably pertinent to diagnosis or treatment.' Id. at ¶ 22 (citation omitted). ... {¶ 132} With regard to D.'s statements to Nurse Johnson, which were properly admitted as falling under Evid.R. 803(4) governing statements made for purposes of medical diagnosis or treatment, the Supreme Court of Ohio has recently held that '[s]tatements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under Crawford, because they are not even remotely related to the evils which the Confrontation Clause was designed to avoid.'" [NOTE: The dissenting judge would hold statements to medical provider are testimonial because "all the adults involved understood" the exam was not medical – entirely

discounting declarant's perception – and because it was "clearly not medically necessary", making the constitutional question turn on a non-medical professional's medical judgment without explaining the source of the supposed necessity requirement.]

State v. Krasky, 736 N.W.2d 636 (Minn. 2007) – 18 months after defendant's last contact with 6-year-old – "On May 12, 2004, the Willmar Police Department received a child protection report concerning T.K. (presumably made by the foster mother). Thereafter, Timothy Manuel, a detective with the Willmar Police Department, and Charlotte Hand, a social worker with Kandiyohi County Family Services who conducts child protection investigations, discussed the situation and decided to have Midwest Children's Resource Center (MCRC) interview and examine T.K. [fn] On May 20, 2004, T.K.'s foster mother gave T.K. a ride to MCRC where they were met by Hand and Tina Mages, the girls' adoption social worker. ... MCRC nurse Margaret Carney first spoke to the foster mother, who described T.K.'s inappropriate behavior and the comments T.K. made regarding the sexual abuse. The foster mother also relayed some limited medical history. While Hand and Mages watched from an observation room, Carney interviewed T.K. and performed a physical examination of her. The interview and the examination were videotaped, although the physical exam was conducted out of view of the camera. Carney told T.K. that T.K. was being assessed in order to evaluate T.K.'s health and it was important for T.K. to tell the truth. During the assessment, T.K. repeatedly stated that Krasky touched her genitals, penetrated her, and made her touch his genitals. Following the assessment, Carney tested T.K. for sexually transmitted diseases and made a recommendation for psychotherapy by a therapist who specializes in children who have been sexually abused. ... The sole issue in this case is whether statements made by a child victim to a nurse at MCRC are testimonial, and therefore inadmissible under the Confrontation Clause. ... In this case, the assessment of T.K. was conducted at a children's hospital rather than at a law enforcement center, and no law enforcement officer was present. The referral to MCRC was a joint decision made by social services and law enforcement, but there is no indication that the MCRC nurse who conducted the assessment of T.K. in this case was acting as a proxy for law enforcement. Accordingly, T.K.'s statements to Carney are clearly less the product of a police interrogation than the statements at issue in *Bobadilla*. As in *Scacchetti*, we conclude that a nurse practitioner employed by MCRC is not a government actor. 711 N.W.2d at 514-15. ... We conclude that T.K.'s statements to Carney are nontestimonial and admission of those statements will not violate Krasky's right of confrontation under the Sixth Amendment."

State v. Goza, 2007 WL 4442742, 2007-Ohio-6837 (Ohio App. 8 Dist. Dec 20, 2007) (unpub) – "{¶ 38} ... The social worker's job went beyond the nurse's job. His duties included determining whether [3-year-old] K.J. needed medical care or psychological help. As such, it is clear that the interview was for the purpose of medical diagnosis. ... {¶ 40} Appellant also challenges the admissibility of statements [3-year-old] K.J. made to nurse Goellnitz at Fairview General Hospital. Generally, statements made by sexual abuse victims to nurses are considered non-testimonial. [cite] Patients are naturally motivated to be truthful with their [health care professionals] so that they may obtain effective treatment. [cite] Admitting such statements usually depends on the declarant's perception while making the statements. [cite] Here, K.J. was seeing nurse Goellnitz because of her attack. She did not perceive the possibility of her statements being used in a trial. In fact, she probably does not know much about trials or the criminal justice system. She spoke to nurse Goellnitz believing that the nurse would help her after her terrible ordeal."

State v. D.H., 2007 WL 3293361, 2007-Ohio-5970 (Ohio App. 10 Dist. Nov 08, 2007) (unpub) – "H.H. was three years old when the sexual abuse occurred, and H.H. was almost five years old during the hearing. ... Lampkins is a social worker and forensic interviewer for the Advocacy Center. The Advocacy Center is a division of Children's Hospital ... {¶ 46} Utilizing the above-noted considerations, we conclude that the facts of this case establish that H.H. made statements to Lampkins for purposes of medical diagnosis and treatment, and we may infer that H.H. was sufficiently aware of such." – thus non-testimonial {¶ 53}

People v. Gilford, 2007 WL 2783322 (Cal. App. 1 Dist. Sep 26, 2007) (unpub) – "[T]he testimony during this hearing established that the information provided to the nurses and the emergency room physician was given for the primary purpose of facilitating the victim's treatment, even if the medical personnel were aware that information suggesting suicidal or criminal behavior would need to be reported."

State v. Ortega, 2008-NMCA-001, 143 N.M. 261, 175 P.3d 929 (N.M.App. Sept. 19, 2007), cert. denied, 2007-NMCERT-12, 175 P.3d 307 (N.M. Dec 10, 2007), overruled in part by State v. Mendez, 2010-NMSC-044, 148 N.M. 761, 242 P.3d 328 – upon learning her 8-year-old daughter had been raped, mother took child to emergency room – held: any statements made by child to SANE nurse were not for purposes of medical diagnosis or treatment, in the absence of evidence that the SANE nurse provided medical treatment – that is, purpose of exam depends on whether the diagnosis leads to treatment – mere diagnosis is not enough to make it a statement for purposes of diagnosis – going on to state that for the same reason the statements were testimonial – "In a case such as this ... the victim's own body is the crime scene" and therefore an examining medical professional is a "forensic investigator" – the child, once victimized, ceases to be a person and becomes a thing

State v. Muttart, 116 Ohio St.3d 5, 875 N.E.2d 944, 2007-Ohio-5267 (Ohio Oct 11, 2007), cert. denied, 128 S.Ct. 2473 (May 19, 2008) – "{¶ 40} But the presumption of reliability in the medical hearsay exception is not based exclusively on selfish-motive doctrine. It is also premised on the professional-reliance factor. ... Other appellate courts also recognize the inherent reliability of a statement that is reliable enough to serve as a basis for medical diagnosis, *id.*, citing *United States v. Renville* (C.A.8, 1985), 779 F.2d 430, 436, finding that 'physicians, by virtue of their training and experience, are quite competent to determine whether particular information given to them in the course of a professional evaluation is 'reasonably pertinent to diagnosis or treatment,' and are not prone to rely upon inaccurate or false data in making a diagnosis or in prescribing a course of treatment.' *King v. People* (Colo.1992), 785 P.2d 596, 602. We believe that the secondary rationale of professional reliance is of great import in abuse cases. ... Although physicians and psychotherapists are not infallible when diagnosing abuse, we believe that their education, training, experience, and expertise make them at least as well equipped as judges to detect and consider those possibilities. ... The salient inquiry here is not A.M.'s competency [to testify] but whether her statements were made for purposes of diagnosis and treatment rather than for some other purpose. ... {¶ 49} The trial court's considerations of the purpose of the child's statements will depend on the facts of the particular case. At a minimum, we believe that a nonexhaustive list of considerations includes (1) whether the child was questioned in a leading or suggestive manner; (2) whether there is a motive to fabricate, such as a pending legal proceeding such as a "bitter custody battle,"; and (3) whether the child understood the need to tell the physician the truth. In addition, the court may be guided by the age of the child making the statements, [FN6] which might suggest the absence or presence of an

ability to fabricate, and the consistency of her declarations. In addition, the court should be aware of the manner in which a physician or other medical provider elicited or pursued a disclosure of abuse by a child victim, as shown by evidence of the proper protocol for interviewing children alleging sexual abuse." (citations omitted) ... {¶ 61} Here, we have no concern that the statements at issue were testimonial in nature. The statements made by A.M. were not made in the context of in-court testimony or its equivalent. There is no suggestion that they were elicited as part of the police investigation or in a sworn statement with intention of preserving the statement for trial or that they were a pretext or façade for state action. To the contrary, the initial statements made to Hinojosa [*i.e.*, mother], McQuiston, and Higgins were deemed to be excited utterances, and the statements to Jones and Crego-Stahl are not shown to have been fostered by the state rather than by Hinojosa acting in furtherance of medical diagnosis and treatment on behalf of A.M. ... The fact that the information gathered by the medical personnel in this case was subsequently used by the state does not change the fact that the statements were not made for the state's use. {¶ 63} Statements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford*, because they are not even remotely related to the evils which the Confrontation Clause was designed to avoid."

State v. Orsborne, 2007 WL 3132381, 2007-Ohio-5776 (Ohio App. 3 Dist. Oct 29, 2007) (unpub) – "{¶ 11} In the present case, Orsborne is arguing the trial court erred in admitting the out-of-court statements that [4-year-old] S.F. made to a sexual assault nurse examiner (S.A.N.E.) nurse, and to her grandmother. {¶ 12} In determining whether the statements S.F. made to the nurse and to her grandmother were testimonial, we must focus on the expectations of S.F. at the time she made the statements. ... {¶ 14} Generally, 'statements made by child abuse victims to medical providers are not testimonial in nature.' *State v. Johnson*, 12th Dist. No. CA2005-10-422, 2006-Ohio-5195, ¶ 50, citations omitted. ... {¶ 16} In the present case, the statements that S.F. made to the S.A.N.E. nurse were made during a medical examination. There is nothing in the record to indicate that the four year old child victim would believe that telling a nurse was the equivalent to telling a police officer, or that she realized that the statement she made to the nurse could be used at a trial. Thus, S.F.'s statements to the S.A.N.E. nurse were not testimonial." – rejecting the argument that "a reasonable declarant, in this case a four year old, would expect her statements accusing someone of sexual contact would be equal to tattling"

State v. Tapke, 2007 WL 2812310, 2007-Ohio-5124 (Ohio App. 1 Dist. Sep 28, 2007) (unpub) – "{¶ 72} Turning to D.S.'s statements, we note that, in general, courts have held that statements made by child-abuse victims to medical providers are not testimonial in nature. ... [A]fter informing the police and her parents of the sexual abuse, D.S. went to the emergency room, where the social worker interviewed her prior to her examination. Since D.S. had made her statements during an emergency-room examination, an objective witness would have believed that any statements made were for health-related reasons and not for use later at trial. We note that the social worker took D.S.'s history again at the Mayerson Center, which was the part of Children's Hospital specializing in child sexual abuse, after the emergency-room doctor had referred D.S. to the center. But, again, the primary purpose of this history was to assist Dr. Shapiro in his medical examination of D.S. ... Because there is no evidence of record that D.S. could have objectively believed that her statements would be available for use at a later trial, we hold that her statements were not testimonial."

State v. Bentley, 739 N.W.2d 296 (Iowa Sep 28, 2007), cert. denied, 128 S.Ct. 1655 (March 27, 2008) – "Although one of the significant purposes of the interrogation was surely to protect

and advance the treatment of J.G., as we have discussed above, the extensive involvement of the police in the interview rendered J.G.'s statements testimonial."

State v. Spencer, 339 Mont. 227, 169 P.3d 384 (Mont. Sep 25, 2007) – "R.S. and S.S. began seeing Maggie Moffatt, a licensed clinical professional counselor. During the counseling sessions, S.S. made several statements indicating that Spencer had sexually abused S.S. ... Ms. Moffatt's interactions with S.S. and R.S. took place in her office, often while she played on the floor with them. ... Ms. Moffatt's purpose was to help counsel S.S. and R.S. Based on these circumstances, the primary purpose of Ms. Moffatt's interaction with S.S. and R.S. was to provide them counseling, not to establish past facts from them for use in Spencer's prosecution. ... ¶ 25 We hold that S.S.'s statements were non-testimonial. Thus, the introduction of S.S.'s hearsay statements did not violate Spencer's Sixth Amendment right to confrontation."

Coates v. State, 175 Md.App. 588, 930 A.2d 1140 (Md. Ct. Spec. App. Aug 31, 2007), aff'd on state law grounds, 950 A.2d 114 (Md. June 13, 2008) – long, disorganized opinion concluding that because the abused child was too young to possess "'the concerned physical self-interest'" of an adult patient, therefore her statements to a medical provider were not for medical diagnosis or treatment, regardless of whether medical diagnosis and treatment were in fact provided – decided as a matter of state evidentiary law, although *Crawford* issue was also raised

State v. Petitto, 2007 WL 2200478, 2007-Ohio-3901 (Ohio App. 8 Dist. Aug 02, 2007) (unpub) – " Dr. Wyse and nurse Russo testified about R.C.'s diagnosis and treatment. The statements were not testimonial but, rather, were for the purpose of medical diagnosis and treatment, which is excepted from the hearsay rule. ... Petrus, the employee from the Cuyahoga County Department of Children and Family Services, testified relative to his assessment of whether R.C. was safe at the time and whether she needed follow-up medical and/or counseling services. Such testimony was not testimonial in nature and fell within the medical diagnosis or treatment exception to the hearsay rule."

Lollis v. State, 232 S.W.3d 803 (Tex. App.-Texarkana 2007) – "In the course of essentially weekly counseling sessions occurring over a period of approximately three and one-half months during the middle of 2006, three-year-old A.T. told licensed professional counselor Reba Clark that Nathaniel D. Lollis 'hurt her,' ... During those sessions, A.T.'s two older brothers, C.T. and J.J.T., also made comments to Clark that they, too, had received abuse from Lollis. ... There is no evidence that the statements challenged by Lollis were made in any formal setting or that Clark was actually asking questions that elicited the statements. Nothing suggests that Clark engaged in any structured questioning or investigation such as police officers or detectives tend to do after an emergency ceases. While evidence suggests that Clark likely initiated the conversations, Clark testified that her purpose was therapeutic, that is, treatment of the children, not the perpetuation of testimony. The three children made their statements to Clark in the context of counseling over approximately three and one-half months of approximately weekly counseling sessions. The children were unsophisticated and immature, and each was a victim within the context of the statement each made. Here, the statements were made by very young children—A.T. was three years old, and her brothers were five and seven, respectively—to Clark, a licensed professional counselor and family therapist, in the course of treatment to deal with behavioral problems and abuse issues. While one could portray Clark as an agent of government, she practices as a sole proprietor and independent contractor, not as an employee of any agency. Her obligations were to provide treatment to the children. She approached her counseling

subjects to put them at ease and to befriend them, in other words, to play the role of a friend rather than an imposing governmental figure. ... The evidence suggests that Clark's regular counseling sessions with these three children were intended primarily as therapy to assist the children in recovering from abusive experiences. The alternative reading—that the sessions constituted a long and single-minded effort by the State to obtain hearsay testimony—seems strained and is contrary to the evidence. We conclude, as apparently did the trial court, that, from the standpoint of either Clark or the State, this relationship was primarily one of counseling rather than one of trial preparation." – children's statements were non-testimonial

Delapaz v. State, 229 S.W.3d 795 (Tex.App.-Eastland Jun 14, 2007), overruled by De La Paz v. State, 273 S.W.3d 671 (Tex. Crim. App. Jun 18, 2008), reh'g denied (Sept. 10, 2008)

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U.S. v. Gardinier, 65 M.J. 60, 2007 WL 1650053 (U.S. Armed Forces 2007) – child's statements to sexual assault nurse examiner were testimonial hearsay – " We determine that on balance the evidence tips towards a conclusion that the statements were elicited in response to law enforcement inquiry with the primary purpose of producing evidence with an eye toward trial. ... [One particular] question reflects more of a law enforcement purpose and less of a medical treatment purpose. ... We recognize that the referral of an alleged victim to a medical professional by law enforcement or trial counsel does not always establish that the statements at issue were made in response to a law enforcement or prosecution inquiry or elicited with an eye toward prosecution. Here, however, the evidence indicates that Ms. Sievers[a nurse], who specialized in conducting forensic medical examinations, performed a forensic medical exam on KG at the behest of law enforcement with the forensic needs of law enforcement and prosecution in mind. Under the totality of the circumstances presented here, KG's statements to Ms. Sievers are testimonial and were admitted in error." (citation omitted) [NOTE: The court's all-or-nothing, one-or-the-other approach seems inconsistent with *Davis's* suggestion that courts redact testimonial portions of a statement.]

In re C.C., 2007-Ohio-2226, 2007 WL 1366431 (Ohio App. 8 Dist. 2007) (unpub) – statement to government social worker made for medical diagnosis or treatment and hence nontestimonial (¶¶ 41-46)

People v. Cage, 40 Cal.4th 965, 155 P.3d 205, 56 Cal.Rptr.3d 789 (Cal. 2007) – "[W]hen [15-year-old] John was seen by [ER physician] Dr. Russell, he needed immediate acute treatment for a five- or six-inch laceration on the side of his face and neck. As Dr. Russell explained, his sole object in asking John "what happened" was to determine, in accordance with his standard medical procedure, the exact nature of the wound, and thus the correct mode of treatment. The question was neutral in form, and though John responded by identifying defendant as his assailant, Dr. Russell did not pursue that avenue further. Objectively viewed, the primary purpose of the question, and the answer, was not to establish or prove past facts for possible criminal use, but to help Dr. Russell deal with the immediate medical situation he faced. It was thus akin to the 911 operator's emergency questioning of Michelle McCottry in *Davis*. [¶] Moreover, the context of the conversation had none of the formality or solemnity that characterizes testimony by witnesses. In speaking with Dr. Russell, John did not confront structured questioning by law enforcement authorities. There is no evidence that Dr. Russell was acting in conjunction with law enforcement, or that his question about the cause of John's injury had any evidence-gathering aim. So far as the record discloses, Dr. Russell made no effort to

record or memorialize John's statements for later legal use. John faced no criminal sanction for any false statements he might make. The question and answer occurred in a private conversation between a patient and his doctor, by which both presumably sought only to ensure John's proper treatment."

State v. Foreman, 212 Or.App. 109, 157 P.3d 228 (Or. App. April 11, 2007) – where claimed *Crawford* error was unpreserved, court will consider it only if issue is not reasonably in dispute – "In this case, a reasonable dispute exists as to whether [3-year-old] G's statements [to doctor] were made primarily for purposes of diagnosis and treatment rather than to assist in a police investigation. There were no police officers present when [Dr.] Chervenak interviewed G, and there is no indication in the record that Chervenak conducted the interview specifically for use in later criminal proceedings or was otherwise acting as an agent or proxy for the police." – distinguishing *State v. Pitt*, 209 Or. App. 270, 147 P.3d 940 (Or. App. 2006), described above under Forensic Interviews

State v. Becker, 211 Or.App. 1, 153 P.3d 158 (Or. App. 2007) – "[Dr.] Steinberg's and [social worker] VanNess's statements are the only portions of the CARES report that fall under the ambit of defendant's Sixth Amendment challenge. Assuming without deciding that the admission of the CARES report was error under *Crawford*, we inquire whether the error was harmless beyond a reasonable doubt."

State v. Wyble, 211 S.W.3d 125, 131-132 (Mo. App. 2007) – "The child's statements in the emergency room, to the effect that she did not want anyone to touch her private areas, as reported by the nurse, were made in connection with the diagnosis and treatment of the redness and discomfort she was experiencing. They were related to the child's then present experience, not to past events. The child was not calm, but was distressed. While medical personnel are, of course, required to report indications of child abuse, there were no statements made by the child about past events. No steps were taken to identify a perpetrator, and the child made no statements as to a perpetrator." – not testimonial

Morrison v. State 2007 WL 614143, *4 (Tex.App.-Fort Worth,2007) (unpub) – "Statements [by 4-year-old] describing sexual abuse in a sexual assault examination are pertinent to medical diagnosis and treatment because the purpose of such an examination is to ascertain whether the complainant has been sexually assaulted and to determine whether medical attention is required."

Commonwealth v. Garces, 2006 WL 4722262, 82 Pa. D. & C.4th 178 (Pa. Com. Pl. Aug 24, 2006) – [trial court order] – 4-year-old was interviewed by "a forensic interviewer" and then examined by a pediatrician – although the child was found incompetent to testify in court, being "developmentally delayed", he nonetheless provided testimonial hearsay outside of court – "After carefully reviewing the record, we conclude that the primary purpose of MQ's statements to Dr. Taroli and Ms. Demark was to aid the police in obtaining information relevant to the Commonwealth's investigation into the alleged sexual assault, rather than for medical diagnosis and treatment. Although Dr. Taroli maintained that she does not conduct the interviews and examinations on behalf of the police, we find that the police retained the services of the center as part of their investigative work. Therefore, we conclude, as did our colleagues, that in such circumstances the child victim's hearsay statements to Dr. Taroli and Ms. Demark are testimonial and, therefore, may not be admitted at trial." – [NOTE: Thus the "primary purpose" of the

medical exam isn't the doctor's purpose or the patient's purpose, but the purpose of the police in arranging the exam.]

State v. Jordan, 2006 Ohio 6224 (Ohio Ct. App. 2006) – “this court has held that statements by a rape victim during a medical intake proceeding are not testimonial: “Statements made by child abuse victims to medical providers are normally not testimonial. * * * [The victim] made her statements while she was interviewed by a social worker at Columbus Children's Hospital. The social worker did not work for the state or a governmental agency. * * * [T]he purpose of the interview was to gather information for the hospital's medical staff to treat [the victim], not to investigate acts of alleged sexual abuse.””

State v. Johnson, 2006 Ohio 5195 (Ohio Ct. App. 2006) – “In general, statements made by child abuse victims to medical providers are not testimonial in nature. See, e.g., *State v. Sheppard*, 164 Ohio App.3d 372, 2005 Ohio 6065, P30, 842 N.E.2d 561; *Edinger* at P82; *In re D.L.*, Cuyahoga App. No. 84643, 2005 Ohio 2320, P20. Applying the reasoning of *Crawford* and *Davis*, we reach the same conclusion in the present case. J.B. made the statements while seeking treatment at a hospital, not in the course of police questioning. The statements were provided so that the hospital's medical staff could treat her, not to investigate acts of alleged sexual abuse, nor to determine the identity of the perpetrator of the abuse. See *Crawford* at 68. Additionally, there is nothing in the record to indicate that J.B., at the time only nine years old, would have realized that her statements would be available for use at a later trial. See *Edinger* at P90 (finding it “highly doubtful” that a six-year-old had any idea that her statements would be preserved for use at a later trial).”

State v. Krasky, 721 N.W.2d 916 (Minn. Ct. App. 2006), rev'd, 736 N.W.2d 636 (Aug. 9, 2007) –

In re A. J. A., 2006 Minn. App. Unpub. LEXIS 988 (Minn. Ct. App. 2006) – After the 5-year-old child spontaneously disclosed abuse to her parents, the police recommended they take the child to MCRC for a medical exam and interview. A registered nurse examined and interviewed the child and then reported her findings to the police as required under Minnesota law. The nurse was a non-governmental agent because the police were not present and did not participate in the interview. The nurse testified that she would reject any interference by the police, including recommended questions. The fact that the police recommended the child go to MCRC is not a determinative factor to make the child's statements testimonial.

Commonwealth v. DeOliveira, 447 Mass. 56 (2006) – “The [6-year-old] child told a social worker that defendant had penetrated her mouth, anus, and vagina with his penis. Police took her to an emergency room for a medical assessment; the child repeated her claims to the examining doctor. He testified that he worked independently of the police and that he examined the child to determine whether there was sexual abuse, whether she was injured, and whether she needed treatment. The Commonwealth agreed to redact any reference to defendant from the doctor's testimony. The trial court found the child was unavailable to testify and held that admission of her statements to the doctor would violate defendant's right of confrontation under *Crawford v. Washington*. The high court disagreed. The child's statement was not “testimonial per se”; although police were present at the hospital, there was no indication they were present during the doctor's examination, or that they had instructed him on how to conduct it. Nor were the statements “testimonial in fact,” as a reasonable person in the child's position, and armed with

her knowledge, could not have anticipated that her statements might be used in a prosecution against defendant.

Griner v. State, 899 A.2d 189 (Md. Ct. Spec. App. 2006) – “We conclude that the trial court correctly found that [the child victim’s] statements to [the nurse] were not testimonial. [The nurse] examined and questioned [the child] as a routine preliminary procedure necessary prior to admitting him to the pediatrics ward. [The nurse’s] questioning of [the child] was not the equivalent of a police interrogation. Kaur was a nurse on the pediatrics ward performing her regular duties. The purpose of [the nurse’s] examination was to assess [the child’s] condition, obtain his vital signs, and administer any necessary medications. Upon meeting [the child], the nurse] informed him that she was a nurse and that she was going to take care of him. The purpose of her questioning was "to gather information so we could pass that on to the doctors and collaborate on the plan of care" and establish a good treatment plan. [The child] was unafraid, smiling, wanted to play, and told Nurse Kaur that he was not in any pain. Under the standards enunciated in *Crawford*, Chase's statements to [the nurse] were not testimonial.”

State v. Brigman, 2006 N.C. App. LEXIS 1071 (N.C. Ct. App. 2006) – “At the time of his medical examination by Dr. Conroy, Child 3 was not quite three years old. This Court found in the case against Kimberly Brigman that it was highly unlikely that Child 2, who was almost six when he made statements to his foster parents, understood his statements might be used at a subsequent trial. *Brigman*, 171 N.C. App. At 312-13, 615 S.E.2d at 25-26. We cannot conclude that a reasonable child under three years of age would know or should know that his statements might later be used at a trial. Therefore, we hold Child 3's statement to Dr. Conroy was not testimonial, and defendant's right to confrontation was not violated.”

State v. Muttart, 2006 Ohio 2506 (Ohio Ct. App. 2006), rev'd in part and aff'd in part, 116 Ohio St.3d 5, 875 N.E.2d 944, 2007-Ohio-5267 (Ohio Oct 11, 2007), cert. denied, 128 S.Ct. 2473 (May 19, 2008) –

State v. Edinger, 2006 Ohio 1527 (Ohio Ct. App. 2006) – “[The child] was interviewed by a social worker specifically employed by Children's Hospital in the Child Advocacy Center, which is a part of Children's Hospital itself. Secondly, the social worker testified that the interview with the child was solely for the purposes of medical treatment and diagnosis. In the present case, the role of the social worker did not involve reporting to the police and did not involve decisions to remove the child from the home. The stated function of the social worker was specifically for medical treatment and diagnosis. While it is true that the police were permitted to observe the interview by way of closed circuit television, the police did not contact the social worker to set up the interview as happened in the *Woods* case, nor was the child aware of their presence.”

State v. Scacchetti, 711 N.W.2d 508 (Minn. 2006) – Defendant was convicted of sexual abuse of a 3-1/2 year old child. The child was not competent to testify, but statements made by the child to a nurse during a medical assessment was admitted. This court held that the child’s statements were non-testimonial. The nurse followed a protocol that consisted of a verbal exam and physical exam. The exam was videotaped according to protocol which allows for subsequent review by a physician. The nurse saw the child twice: once for an exam and then for a follow-up assessment. The Court relied on 8 factors set forth in *MN v Wright* and clarification made in *Bobadilla v MN*: “We clarified that, of the factors, the central considerations are "the purpose of the statements from the perspective of the declarant and from the perspective of the

government questioner," in other words, "whether either a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial." The Court found that the nurse was not a governmental agent since the child did not come for her assessment via a governmental agent. However, the court noted: "Even if we had concluded that [the nurse] was acting in concert with or as an agent of the government, our conclusion that [the child's] statements to [the nurse] are not testimonial would not change. The record here indicates that [the nurse's] purpose in interviewing and examining [the child] was to assess her medical condition. Both [the nurse and physician] testified that their purpose in evaluating children such as [this child] is to determine whether the child has been abused and, if necessary, to connect the child and family to appropriate services. There is no evidence or other testimony in the record to the contrary. The fact that MCRC generally does not have ongoing contact with the child after the assessment does not minimize the medical purpose for which the assessment is conducted." "Moreover, the mere fact that [the nurse] may be called to testify in court regarding sexual abuse cases does not transform the medical purpose of the assessments into a prosecutorial purpose, nor is there any evidence that [the nurse] had a prosecutorial purpose here. *** Thus, even if we were to conclude that [the nurse's] assessments of the child] had, as a secondary purpose, the preservation of testimony for trial, [the child's] statement would still not be testimonial. Because the broad purpose of [the nurse's] assessments was [the child's] medical health, any subsequent testimony that [the nurse] was required to give did not change her assessment purpose."

People v. Vigil, 127 P.3d 916 (Colo. 2006) – See description above.

Foley v. State 914 So.2d 677 (Miss. 2005) – 5-year-old made disclosures to therapist, sexual assault examiner and social worker – "Foley failed to argue or show that the therapists or medical professionals who testified concerning statements made by K.F. had contacted the police or were being used by the police as a means to interrogate K.F. or investigate her claims. [cite] K.F.'s statements were made as a part of neutral medical evaluations and thus do not meet *Crawford's* 'testimonial' criterion. Thus, Foley's *Crawford* argument is without merit."

In re D.L., 2005 Ohio 2320 (Ohio Ct. App. 8 Dist. 2005) (unpub) – Defendant was found delinquent for engaging in sexual conduct with his 3-year-old cousin. The victim was found incompetent to testify at trial. The social worker who interviewed the child testified that victim gave great detail similar to the disclosure to her mother. The victim was taken to the hospital and given a physical exam. The exam revealed nothing. However, the pediatric nurse practitioner concluded that abuse was probable, based on the victim's description of events. The victim's statements to the practitioner were held non-testimonial and properly admitted under the medical history hearsay exception despite the ruling that the victim was not competent to testify. There was no evidence to show that the nurse practitioner was working on behalf of, or in conjunction with, investigating police officers for the purpose of developing the case against the defendant. The nurse took statements from the victim to evaluate how likely it was that she had been abused and to determine what laboratory tests and medical treatment might be needed. The nurse further considered information from the victim's medical history to aid her in making her assessment and conducted a physical evaluation of the victim. There was no evidence that the victim was interviewed for the express purpose of developing her testimony for use at trial. The court went on to say "**Our review of the record shows no circumstances to indicate the victim, or a reasonable child of her age, would have believed her statements were for anything other than for medical treatment.**" The court further held, "because an incompetency ruling is a declaration that the witness is incapable of understanding an oath, or

liable to give an incoherent statement as to the subject and cannot properly communicate to the jury, it does not make for a conclusion that all out-of-court statements are per se inadmissible when a witness is declared incompetent. This may be particularly true in the case of young children. Simply because a child is deemed incompetent for purposes of testifying does not make the child's statements per se inadmissible.”

➤ **Sub-Category: Statements Made During Ongoing Therapy**

State v. Bowling, 232 W.Va. 529, 753 S.E.2d 27 (W. Va. 2013) cert. denied, 134 S. Ct. 1772 (U.S. 2014) – “The final witness Mr. Bowling contends provided testimonial hearsay is Gina Jarrell ('Ms. Jarrell'). Ms. Jarrell is the psychotherapist who treated Ms. Bowling's two children after Ms. Bowling's death [her husband murdered her]. ... Mr. Bowling asserts that because treatment was sought for the children after Ms. Bowling's death, the evidence is necessarily testimonial. We do not agree.”

United States v. DeLeon, 678 F.3d 317, 319-330 (4th Cir. Md. 2012) – “Approximately five months before his death, Jordan and his family met with Beth Thomas, a licensed social worker serving as the treatment manager with the Air Force Family Advocacy Program ("FAP"). Jordan's teacher had referred Jordan to the FAP after she observed a bruise on his forehead. ... But although the FAP incorporates reporting requirements and a security component, these factors alone do not render Jordan's statements to Thomas testimonial. ... [Counselor] Thomas used the information she gathered from Jordan and his family to [*325] develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. These actions are consistent with Thomas's testimony that, in cases like this one, her 'primary purpose [was] to provide the treatment and assistance that the family needs.' [¶] Evaluating the primary purpose of a child declarant like Jordan is a bit more difficult. ... Considering the question de novo, we are satisfied—after reviewing Thomas and Jordan's conduct and statements—that the primary purpose of reasonable participants in such a meeting would not have been the preservation of evidence for a future criminal prosecution.”

Jordan v. State, 80 So. 3d 817 (Miss. Ct. App. Sept. 14, 2010), rehearing en banc denied (Miss. Ct. App., June 7, 2011), certiorari dismissed (Feb. 16, 2012) – horrendous case – “statements A.B. made to Smith occurred in the course of therapy” – non-testimonial

Bishop v. State, 982 So.2d 371 (Miss. March 13, 2008) – “On June 6, 2006, [4-year-old] C.C. attended her first therapeutic session with Brenda Donald, which included play therapy. At the time of the pre-trial hearing in this case, Donald and C.C. had completed nine or ten therapy sessions. During the course of her therapy with Donald, C.C. made very detailed statements regarding the sexual abuse that she endured by Bishop. ... ¶ 13. ... [T]he trial court determined that Brenda Donald's interactions with C.C. were strictly for the purposes of treatment and not for any prosecutorial purpose. ... The evidence reflects that C.C. was brought to Donald by her family members solely for treatment purposes. From the testimony of Donald, the trial court found 'nothing to indicate that the child's statements were suggested or solicited by Donald, that many of them were spontaneous narratives and that they were obtained for medical and psychological treatment.' ¶ 14. For the foregoing reasons, we hold that the trial court was correct

in its determination that the statements made by C.C. ... to Brenda Donald were non-testimonial in nature."

Competence of Child Witness

Harris v. Com., 2009 WL 350615 (Ky. App. Feb 13, 2009) (unpub) – estranged husband "took the children to the office of Patricia Reynolds ("Reynolds"), a social worker who had been previously involved with the family in Owsley County. At that meeting, Reynolds noticed three small lesions on [5-year-old] A.H.'s arm. When asked, A.H. told Reynolds and Charles that Bridget had burned her with a cigarette. ... A.H.'s statements to Reynolds were made in furtherance of the investigation of the alleged abuse and, therefore, would qualify as 'testimonial' under *Crawford*..." [NOTE: This is dicta, since the court found the statement inadmissible under Kentucky evidence rules on the deeply ironic ground that the child's incompetence as a witness made his hearsay too unreliable. So on the one hand the girl was unable to give testimony, but on the other hand she did so while speaking to a social worker with whom she had an ongoing therapeutic relationship.]

In re Welfare of A.H.A., III, 2008 WL 467421 (Minn. App. Feb 12, 2008) (unpub) – "When asked about the allegations, all [4-year-old] M.S. would say is that she did not like A.H.A. because '[h]e did it,' but that she likes A.H.A.'s girlfriend because '[s]he did not do it.' When asked what 'it' was, she said to the prosecutor 'I told you.' After repeated, unsuccessful attempts to elicit details from M.S., the prosecution ended its examination. M.S.'s testimony does not show, either affirmatively or negatively, whether she was able to recall the specifics of the allegations. But this is not a matter of competency. Her competency was established when she demonstrated that she could tell the truth and recall facts generally."

State v. D.H., 2007 WL 3293361, 2007-Ohio-5970 (Ohio App. 10 Dist. Nov 08, 2007) (unpub) – "H.H. was three years old when the sexual abuse occurred, and H.H. was almost five years old during the hearing. ... [W]e conclude that a trial court's determination that a child under ten years of age is incompetent to testify does not, by itself, undermine the child's out-of-court statement or the admissibility of the statement under Evid.R. 803(4)." – also no *Crawford* violation

State v. Muttart, 116 Ohio St.3d 5, 875 N.E.2d 944, 2007-Ohio-5267 (Ohio 2007), cert. denied, 128 S.Ct. 2473 (May 19, 2008) – "We hold that regardless of whether a child less than ten years old has been determined to be competent to testify pursuant to Evid.R. 601, the child's statements may be admitted at trial as an exception to the hearsay rule pursuant to Evid.R. 803(4) if they were made for purposes of medical diagnosis or treatment. ... Statements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford*, because they are not even remotely related to the evils which the Confrontation Clause was designed to avoid."

State v. Velez, 2007 WL 2809919, 2007-Ohio-5122 (Ohio App. 9 Dist. Sep 28, 2007) (unpub) – "On May 22, 2006, a hearing was held to determine if A.W. was competent to testify. The trial court deemed her competent. At the time of the trial, A.W. was seven years old ... In our disposition of Appellant's first assignment of error, we found that the trial court did not err when it determined A.W. competent to testify. Accordingly, Appellant had the opportunity to confront

the witness in front of him and the admission of these statements did not violate the Confrontation Clause."

Morrison v. State 2007 WL 614143, *5 (Tex.App.-Fort Worth,2007) (unpub) – "After reviewing [4-year-old] J.H.'s testimony, we conclude that the trial court abused its discretion in finding J.H. competent to testify. *Woods*, 14 S.W.3d at 451. Although J.H. may have demonstrated to the trial court that he had the ability to intelligently observe events, based on his ability to recognize colors and recite numbers and the alphabet, and that he understood his responsibility to tell the truth by promising to do so, he was unable to demonstrate that he had the capacity to recollect and narrate events relating to the transaction at issue." [Does competence = memory?]

Purvis v. State, , 829 N.E.2d 572 (Ind. Ct. App. 2005) - The 10-year-old victim testified at a hearing under the Protected Persons Statute to determine his competency to testify. The defendant was allowed to cross-examine the child at the hearing. The child was found incompetent to testify and did not testify at trial. The court admitted excited utterances of the child to his mother and her boyfriend, and statements to a police officer. On appeal, the court found that although the child had been subject to some cross examination at the PPS hearing, "M.B.'s testimony at the hearing did not constitute cross-examination for *Crawford* purposes, because the trial court determined that M.B. was unable to understand the nature and obligation of an oath. Since M.B. was incompetent to testify, Purvis's cross-examination of M.B. at the hearing did not satisfy the requirements of *Crawford* because Purvis lacked an opportunity for "full, adequate, and effective cross-examination." The court went on to hold that "a witness unable to appreciate the obligation to testify truthfully cannot be effectively cross-examined for *Crawford* purposes."

People ex rel. R.A.S., 111 P.3d 487 (Colo. App. 2004) – This case involved a juvenile defendant who molested a 4 year old child. The child disclosed to his mother and then during a forensic interview with a trained police officer. At trial, the child was to go through a competency hearing, but the hearing was not held. Instead, the child's statements to his mother and during the forensic interview were admitted at trial. The forensic interview was videotaped and the video was played at trial. The court did not make a conclusion about the child's unavailability since the prosecutor and defense attorney agreed that the child did not meet the competency requirements. On appeal, the court found that the statements by the child to the forensic interviewer were testimonial. Although the juvenile defendant stipulated that the child was incompetent to testify, the defendant did not waive his confrontation rights. The court found that the defendant merely waived unavailability of the child, not the right to confront. The hearsay statements to the mother were not addressed on appeal. Case was reversed in light of *Crawford*.

Statements to Parents, Other Relatives, Teachers, First Disclosures and Tender Years Statutes

***Ohio v. Clark*, 576 U.S. ___, 135 S.Ct. 2173 (2015):** "Statements by very young children will rarely, if ever, implicate the Confrontation Clause."

State v. Lambert, 232 W.Va. 104, 750 S.E.2d 657, 660-62 (W. Va. 2013) – "Clearly, under our case law there is no *Crawford/Mechling* question presented with respect to the statement made by [4-year-old] S.W. to her mother..."

State v. Clark, 137 Ohio St.3d 346, 999 N.E.2d 592, 2013-Ohio-4731 (Ohio 2013), cert. pet. filed (May 8, 2014) – "{¶ 1} The issue in this case is whether the trial court violated Darius Clark's constitutional right to confront the witnesses against him when it admitted a hearsay statement that three-and-a-half-year-old L.P. made to his preschool teacher, Debra Jones, in response to questions asked about injuries to his eye and marks on his face observed upon his arrival at a preschool day care. ... {¶ 36} Statements elicited from a child by a teacher in the absence of an ongoing emergency and for the primary purpose of gathering information of past criminal conduct and identifying the alleged perpetrator of suspected child abuse are testimonial in nature..."

People v. Phillips, __ P.3d __, 2012 COA 176 (Colo. Ct. App. 2012) – "[¶ 114] We conclude C.G.'s hearsay statements to the public school employees were nontestimonial because the primary purpose of the questioning was not to 'establish or prove past events potentially relevant to later criminal prosecution,' [cites] but instead to assess C.G.'s injury and determine whether human services should be notified."

State v. Pollock, 251 Ore. App. 755, 284 P.3d 1222 (Or. Ct. App. 2012) – "Here, we have no difficulty concluding that the victim's statements, spontaneously made to her mother during conversation while riding in the back seat of the family vehicle and without law enforcement presence, were not testimonial."

Hatley v. State, 290 Ga. 480, 722 S.E.2d 67, 2012 Fulton County D. Rep. 377 (Ga. 2012) – "we conclude that C. C.'s statements to her mother were nontestimonial"

Commonwealth v. Kemmerer, 2011 PA Super 220, 33 A.3d 39 (Pa. Super. Ct. 2011) – "In this case, M.S. also testified at both the pretrial TYHA hearing, and at trial via closed circuit television, regarding Appellant's conduct, and Appellant likewise had ample opportunity to confront and cross-examine M.S. ... Accordingly, we detect no error on the part of the trial court in permitting the Commonwealth to introduce [via tender years statute] the out-of-court statements of the victim through the testimony of [social worker] Ms. Reviello."

People v. Lara, 958 N.E.2d 719, 721-725, 354 Ill. Dec. 787 (Ill. App. Ct. 4th Dist. 2011) – following *Kitch*, the next case down

People v. Kitch, 239 Ill. 2d 452, 942 N.E.2d 1235, 347 Ill. Dec. 655 (Ill. 2011) – "That a hearsay statement admitted under section 115-10 must meet the additional reliability requirement of subsection (b)(1) is not problematic. [cite] Indeed, the requirement of "sufficient safeguards of reliability" provides defendants with additional protection, i.e., "protection over and above the confrontation clause." [cite] This additional reliability requirement does not affect the constitutionality of section 115-10 because hearsay testimony still must satisfy *Crawford's* constitutional requirements, in addition to the statutory requirement of reliability."

People v. Atherton, 406 Ill. App. 3d 598, 940 N.E.2d 775, 346 Ill. Dec. 406, 780-785 (Ill. App. Ct. 2d Dist. 2010), appeal denied (Jan. 26, 2011) – " We next address the defendant's

argument that, in light of Crawford ..., section 115-10 of the Code (725 ILCS 5/115-10 (West 2002)) is unconstitutional, such that the trial court erred in allowing the jury to consider testimony pursuant to that section of the Code. ... [W]hen a child sex abuse victim appears at trial and is subject to cross-examination, any prior statement of the victim being offered pursuant to section 115-10 of the Code is a nonevent. [cite] [¶] Here, the victim testified at trial and was subject to cross-examination. As such, none of the statements admitted pursuant to section 115-10 were improper under Crawford."

State v. Ahmed, 782 N.W.2d 253, 258-259 (Minn. Ct. App. 2010) – "The interview at CornerHouse was arranged by the lead police investigator as a standard part of the investigation of child abuse. A police officer drove [3-year-old] F.B. to CornerHouse. Therefore any statement made in the interview is arguably testimonial. *See Bobadilla v. Carlson*, 575 F.3d 785, 791 (8th Cir. 2009) (concluding that statements by child victim in interview by social worker as part of police investigation were testimonial). ... But H.A. made his statement to F.B. [his grandmother] when he first saw her in the lobby, outside of the interview room and before the interview began. Neither the police officer nor the social worker was involved in F.B.'s conversation with H.A. There was no evidence that F.B. was acting in any manner but on her own behalf when she asked H.A. about his injuries and who caused them. H.A. was expressing pain to a close relative from whom he expected help and comfort. On this record, the admission of his statement does not implicate Ahmed's Sixth Amendment right to confrontation."

State v. Ramos, 331 S.W.3d 408 (Tenn. Crim. App. Mar. 3, 2010) – "Mrs. Martinez saw J.M. come out of Appellant's bedroom. The child met her approximately half-way down the steps and told her mother that '[Appellant] touch me here; it hurts.' The child pointed to her vaginal area.... the statement made by J.M. to her mother is not 'testimonial hearsay'..."

Styron v. State, 34 So. 3d 724 (Ala. Crim. App. Oct. 9, 2009) – "At the time E.J.A. questioned the children, she clearly did so out of concern for the children in her role as the children's aunt and not in contemplation of a criminal investigation or trial. Accordingly, the statements E.A. and R.D.A. made to E.J.A. were nontestimonial under Crawford. Spontaneous utterances and responses to inquiries by family members under the circumstances of the instant case do not bear the indicia of 'formal statement[s] to government officers,' but are instead more analogous to 'a casual remark to an acquaintance.'"

People v. Learn, 396 Ill. App. 3d 891, 919 N.E.2d 1042, 336 Ill. Dec. 117 (Ill. App. Ct. 2d Dist. 2009) – "We cannot conclude that K.O.'s statements to her father were testimonial." – but in Illinois, this requires extended analysis - **In re Brandon P., 372 Ill.Dec. 809, 992 N.E.2d 651, 664-67 (Ill. App. 4th Dist. 2013)**, refers to *Learn* as "a case that much of the Illinois judiciary has distanced itself from"

State v. Sanchez, __ P.3d __, 2009 WL 1406996 (Idaho App. May 21, 2009) – " the statements made here were of a [two and a half year old] child to her mother on the telephone while her mother was in jail. There was no interrogation. The statements were not made in response to questioning akin to that which might be expected in the courtroom. [Davis cite] We reject Sanchez's contention that a child's statements to her mother are the functional equivalent of an adult calling the police."

Eubanks v. State, 28 So. 3d 607 (Miss. App. Jun 02, 2009) – "¶ 13. Eubanks argues that the trial court erred in admitting the hearsay testimony of two-year, eleven-month-old Inecia [who spoke to her mother, Johnson]. ... ¶ 29. From our review of the record, it is evident that Johnson was neither a police officer, nor was she 'working in connection with the police for the purpose of prosecuting the accused' at the time she received Inecia's hearsay statement. Accordingly, the hearsay statement was non-testimonial in nature, and the Confrontation Clause is inapplicable."

Springman v. State, 2009 WL 1491486 (Nev. Feb 10, 2009) (unpub) – "Statements made in response to a parent or guardian's questions regarding possible sexual contact between the child and another person are non-testimonial."

State v. Coder, 198 N.J. 451, 968 A.2d 1175 (N.J. May 04, 2009) – "both the trial court and the Appellate Division ruled that the out-of-court statements of sexual assault made by a three-year-old girl to her mother, although hearsay, were admissible under the 'tender years' exception to the hearsay rule, and that the admission of those hearsay statements did not run afoul of the Confrontation Clause." – non-testimonial – "Because Joyce's hearsay statements lack any indicia that they resulted from law enforcement efforts 'to establish or prove past events potentially relevant to later criminal prosecution[.],' *Davis*, [cite] we do not hesitate in concluding that Joyce's hearsay statements to her mother were nontestimonial and, hence, defendant's Confrontation Clause rights were not compromised by the admission of those statements into evidence."

Davenport v. Davis, 2009 WL 960411 (E.D. Mich. Apr 07, 2009) (unpub) (habeas) – "Because the [10-year-old] victim made these statements to her grandmother, uncle and friend, they were non-testimonial in nature and their admission did not violate petitioner's Confrontation Clause rights."

State v. Perry, __ S.W.3d __, 2009 WL 186061 (Mo. Jan 27, 2009) – "As this Court noted in *Justus*, 205 S.W.3d at 881, section 491.075(b) clearly is consistent with the Confrontation Clause to the extent that it permits introduction of non-testimonial statements, such as the statements made to Mother and Stepfather here prior to the involvement of the police, or to the extent it permits introduction of statements as to which prior cross-examination was available."

State v. Brock, 2008 WL 2582574, 2008-Ohio-3220 (Ohio App. 3 Dist. Jun 30, 2008) (unpub) – "{¶ 41} In the case sub judice, the statements in question were made by Lizzy to her Grandmother Charlene immediately after the abuse occurred. ... {¶ 43} This Court has previously held that when a child discloses abuse to a family member, those statements are not testimonial in nature."

State v. Buda, 195 N.J. 278, 949 A.2d 761 (N.J. Jun 23, 2008) – "Because spontaneous statements do not bear the indicia of 'a formal statement to government officers' but instead are akin to 'a casual remark to an acquaintance[.],' [cite] we conclude, much as the Appellate Division did, that [3-year-old] N.M.'s July 2002 spontaneous and unprompted hearsay statement to his mother that 'Daddy beat me' is nontestimonial." – 4-3 decision – the dissent agrees this statement was non-testimonial (it disagreed regarding a different statement), but would have reached that conclusion based on the fact that the mother was not working for law enforcement

State v. Contreras, 979 So.2d 896 (Fla. Mar 13, 2008) – "Other courts have concluded that a child's spontaneous statement to a friend or family member is not likely to be testimonial. ... Such spontaneous statements to someone other than law enforcement personnel are not 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Crawford*..."

U.S. v. Russell, 66 M.J. 597 (Army Ct. Crim. App. Apr 29, 2008) – 6-year-old MR's first disclosure to mother (YH) of friend, who observed the girls acting out a sex game and questioned her about it, was non-testimonial – "We find MR's statements to YH were nontestimonial under *Crawford* because there was no governmental involvement and no anticipation that such statements would be used at trial. ... Her role was analogous to someone in loco parentis... We are thus fully satisfied that YH was not engaged in an attempt to collect evidence for later use in a criminal proceeding."

Seely v. State, __ S.W.3d __, 2008 WL 963516 (Ark. Apr 10, 2008) – 3-year-old's statements to mother non-testimonial –

Bishop v. State, 982 So.2d 371 (Miss. March 13, 2008) – while mother was bathing her, 4-year-old disclosed abuse – not testimonial

State v. Shelton, 218 Or.App. 652, 180 P.3d 155 (Or. App. Mar 19, 2008) – "Here, nothing suggests that the primary purpose of either [teenaged babysitter / housemate] Brittany or [4-year-old] T was to establish some fact to be used subsequently in a criminal prosecution. Rather, Brittany's testimony indicates that she asked T whether she had been touched because she was concerned for T's welfare, or perhaps out of curiosity, and not because she wanted defendant to be prosecuted. Further, and more significantly, there was no police or prosecutorial involvement in the conversation during which T told Brittany about defendant's actions. Accordingly, T's statements to Brittany were not testimonial and were properly admitted."

State v. Brown, 2008 WL 553247, 2008-Ohio-832 (Ohio App. 11 Dist. Feb 29, 2008) (unpub) – "{¶ 130} ... [6-year-old] D.'s statements to her mother, as properly admitted under the 'excited utterance' exception, are clearly non-testimonial, since they were not made to police or other governmental authorities"

In re Brooks, 2008 WL 142537, 2008-Ohio-119 (Ohio App. 5 Dist. Jan 14, 2008) (unpub) – 4-year-old victim, Gavri, spoke to cousin-by-marriage, Cloud, who was babysitting her – "{¶ 57} We find Gavri's statements to Cloud are non-testimonial. The statements made by Gavri were not made in the context of in-court testimony or its equivalent. There is no suggestion such statements were elicited as part of the police investigation or in a sworn statement with intention of preserving the statement for trial or that they were a pretext or façade for state action. To the contrary, we have found the statements made to Cloud were excited utterances. Accordingly, we find the trial court did not violate Appellant's Right of Confrontation by admitting Gavri's statements."

State v. Downey, 2008 WL 142117 (Kan. App. Jan 11, 2008) (unpub) – "On December 16, 1994, an information was filed alleging that Downey had sexually abused S.R., a 2-year-old girl, in Reno County, Kansas, during September 1994. This is the fifth appeal. ... Downey did not deny he had sexually abused S.R. [but claimed he did so in other states] ... In the present case,

S.R.'s statements were made to [her grandmother] Premont, not to the police. There was no suggestion below that Premont had any contact with the police before S.R. made the statements. ... Cases from other jurisdictions show that statements made by young children to persons not working for the police are typically nontestimonial." – specifically declining to accept Professor Friedman's suggestion, 10 years ago, that any statement describing one's own victimization to anybody is automatically testimonial in Friedman, "Confrontation: The Search for Basic Principles," 86 Geo. L.J. 1011, 1042-43 (1998)

State v. Arroyo, 284 Conn. 597, 935 A.2d 975 (Conn. Dec 11, 2007) – "The defendant's third and final confrontation challenge is directed at the testimony of Gonzalez, the victim's kindergarten teacher, regarding the statements the child made to her regarding the defendant. The circumstances of this interview, however, did not even remotely resemble an interview that would be considered to elicit testimonial statements under *Davis* and *Crawford*. The child met with the teacher at her mother's request because the mother trusted the teacher and was concerned when she discovered that the child had tested positive yet again for chlamydia, and there is no suggestion in the record that the teacher performed any investigatory function whatsoever. The admission of the statements did not implicate the defendant's right to confrontation."

Seely v. State, 100 Ark.App. 33, __ S.W.2d __, 100 Ark.App. 33, (Ark. App. Sep 26, 2007), rev'd, Seely v. State, __ S.W.3d __, 2008 WL 963516 (Ark. Apr 10, 2008)

State v. Orsborne, 2007 WL 3132381, 2007-Ohio-5776 (Ohio App. 3 Dist. Oct 29, 2007) (unpub) – "{¶ 18} The child-victim's statements to her grandmother were not made under a circumstance indicating to the child-victim that the statement would be used in a trial. Rather, S.F., who was four years old at the time of her statement, made her statement in response to a question from her grandmother on why she was whining while urinating. S.F. would not expect that her statement to her grandmother would be used in a trial. {¶ 19} After reviewing the record, we hold that S.F.'s statements ... to her grandmother did not constitute testimonial statements, and therefore, the prosecution[']s introduction of the statements at trial did not violate the Confrontation Clause."

In re Allen, 2007 WL 2757158 (Wash. App. Div. 1 Sep 24, 2007) (unpub) – "At the civil commitment hearing, Hines testified that in July 1994, she was visiting a friend who lived in an apartment complex. Five year old C.H. lived there also, and was missing the day Hines visited. Police and C.H.'s mother were looking for her. As Hines left the complex, she saw Allen carrying a little girl who was visibly upset. Hines realized it was C.H., approached Allen, and took the little girl away from him: ... ' I did, said honey, are you okay, did he hurt you, did he touch you anywhere, and she said he touched her.' ... C.H.'s statement, while not a casual remark or entirely spontaneous, was not the result of leading questions or a structured interrogation. No government officials were involved. C.H. was visibly upset when Hines saw her with Allen. Hines' question was not out of the ordinary, and C.H. did not respond contemplating that her statement would be used against Allen later."

People v. Harris, 2007 WL 2447265 (Cal. App. 2 Dist. Aug 30, 2007) (unpub) – "Appellant urges that the trial court abused its discretion in admitting [4-year-old murder victim] Christian's statements to school officials identifying appellant as the person who had inflicted the injuries ... [T]he inquiries made to Christian were not in a formal setting, or conducted by a trained forensic

specialist. No law enforcement officials were in attendance, and no criminal charges had been filed against appellant. We conclude that under the circumstances, an objective witness would not believe that the statements were primarily for the purpose of proving past facts for use in a future criminal trial. [¶] We hold that Christian's statements were not testimonial ..."

State v. Coder, 2007 WL 2011166 (N.J. Super. A.D. Jul 12, 2007) (unpub) – "Nevertheless, we conclude that J.B.'s several statements to her mother were not testimonial. The statements were made before any police involvement. The first statement made to D.B. was made before the police were even contacted about the incident. Additionally, the statement was made shortly after the incident occurred when J.B. was frightened, nervous and very scared. The record also shows that while the statements were in response to questioning, the questions were open-ended and designed to determine if J.B. was physically injured. The second statement came within an hour of the alleged assault when D.B., while waiting for police, sought to determine the events that caused J.B. to point to her vagina and buttocks and to say, 'Mommy, it hurts.' There is no indication in the record that D.B. was asking these questions in the hopes of obtaining evidence for a future prosecution against defendant. This was simply a situation where a mother was attempting to determine if her young daughter was injured, and if so, how and to what extent. There was no confrontation violation under the circumstances."

State v. Howell, 226 S.W.3d 892 (Mo. App. S.D. 2007) – child rape victim gave videotaped statement to Child Advocacy Center interviewer – child testified, but had trouble remembering, and videotape was admitted under Tender Years statute – "The record clearly shows that Defendant had the opportunity to effectively cross-examine Victim under oath and call to the attention of the jury Victim's forgetfulness. Therefore, the Confrontation Clause was satisfied. ... The trial court did not err in admitting Victim's video-taped statement, because Defendant was given the opportunity for effective cross-examination."

McCarty v. State, 227 S.W.3d 415 (Tex. App.-Texarkana 2007) – " The complainant's statement made to her grandmother was not testimonial. These facts and circumstances demonstrate the statement's nontestimonial character: the declaration was not made in any formal setting or structured environment; it was not made to an officer or in connection with any kind of investigation; it was made at a time when McCarty was not under suspicion; it was not made in response to any question; it was made during or immediately after the event that produced it; it was a spontaneous excited utterance made while the complainant was in the grip of fear and without time for reflection; it was more in the nature of a cry for help than testimony; and the tender age and excited state of the complainant weigh against the statement being testimonial."

In re N.D.C., 229 S.W.3d 602 (Mo. Jun 12, 2007) – "The juvenile office brought delinquency charges against N.D.C., a juvenile, alleging that he sodomized his four-year old step-sister, J.C. When J.C. refused to testify, the juvenile office sought to introduce her statements through the testimony of her mother, A.C. (N.D.C.'s step-mother). ... Given *Crawford's* definition of testimonial hearsay subject to confrontation clause protection, this Court, too, must conclude that J.C.'s statement to her mother was non-testimonial. As such, *Crawford* does not afford sixth amendment protection, and the statement is admissible under section 491.075."

State v. Burr, 392 N.J. Super. 538, 921 A.2d 1135 (N.J. Super. A.D. 2007) – "On appeal, defendant first contends that *N.J.R.E.* 803(c)(27) is unconstitutional on its face in light of the United States Supreme Court decision in *Crawford*. More specifically, defendant argues that

Crawford renders the tender years exception unconstitutional because the rule allows the admission of testimonial hearsay that has not been the subject of cross-examination. We reject defendant's argument as unsupported by the facts of this case. ... *N.J.R.E.* 803(c)(27) provides for admissibility in two circumstances, first when the child "testifies at trial," and second, when the child is unavailable as a witness but there is corroborating proof of the sexual abuse. In this case, the second part of the rule does not apply because there is no claim that A.A. was unavailable; in fact, she was available. As a result, we express no view [*sic*] on whether the 'unavailable' prong of the tender years exception survives *Crawford*, although we entertain considerable doubt that it does. [¶] In this case, the child testified, which fell within the first prong of 803(c)(27), and she was available for and was in fact subjected to cross-examination, thereby satisfying *Crawford*."

Commonwealth v. Allshouse, 924 A.2d 1215, 2007 PA Super 109 (Pa. Super. 2007), aff'd, 985 A.2d 847, 849-871 (Pa. 2009) cert. granted, summarily vacated and remanded Allshouse v. Pennsylvania, 131 S. Ct. 1597, 179 L. Ed. 2d 495 (2011), reaffirmed Commonwealth v. Allshouse, 36 A.3d 163, 165-190 (Pa. 2012) – defendant broke arm of 7-month-old baby, then told doctors the baby's 4-year-old sister, A.A., was responsible – CYS caseworker John Geist interviewed A.A. a week after the incident – "¶ 26 Examining the facts and circumstances of this interview leads us to the conclusion that A.A.'s statements are admissible as non-testimonial under *Crawford*, should a hearsay exception prove applicable. *See infra*. While we recognize Geist conducted the interview a full seven days after the assault, the intentions of Geist and A.A. as well as the attendant environmental factors indicate A.A.'s statements are, indeed, non-testimonial in nature. ... ¶ 27 Presently, appellant does not dispute Geist's contention that he only wanted to interview A.A. after appellant accused the young girl of harming J.A., and it would be absurd to assume A.A. had intended to give statements for use in a legal proceeding. ... [T]here is little question Geist's *primary purpose* in interviewing A.A. was not to establish past events which would be potentially relevant in a criminal trial, but to ensure both A.A. and her siblings' welfare was secure while they remained in the custody of their grandparents. ... ¶ 28 Furthermore, the environment surrounding the interview does not indicate A.A.'s statements were testimonial. As noted above, Geist was dressed casually and the interview was conducted on neutral ground. Additionally, Geist had no control over the interviewing environment—as his inquiries were cut short after appellant's brother intervened. *See Davis, supra* at 2278. There was simply no semblance of formality during the interview. ¶ 29 In sum, we do not view the Supreme Court's primary purpose test as being reliant solely on the temporal relationship between the statement and the wrong the statement describes and, instead, view the test as encompassing the broader range of factors applied in *Davis*. Inasmuch as this is the case, we conclude Geist's testimony is non-testimonial."

State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (S.C. 2007) – "The hearsay statement at issue in the instant case was made by a two-and-a-half year old girl to her caretakers immediately after they discovered blood coming from her vaginal area. The victim indicated that her 'tooch' hurt, and Marla asked what happened. The victim responded by saying appellant 'did it,' and then quickly stating he 'didn't do nothing.' [¶] We find the victim's statement to Marla is clearly nontestimonial. Significantly, the victim's statement is much more akin to a remark to an acquaintance rather than a formal statement to government officers. *See Crawford v. Washington*, 541 U.S. at 51. Given the circumstances surrounding the victim's statement identifying appellant as the person who hurt her, as well as to whom the statement was made, the statement does not amount to 'a solemn declaration or affirmation made for the purpose of

establishing or proving some fact.' *Id.* Significantly, Marla's questions, as well as the victim's responses, were not designed to implicate the criminal assailant, but to ascertain the nature of the child's injury. *Cf. State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 61 (2006) (generally, statements made outside of an official investigatory or judicial context are nontestimonial)."

In re S.R., 920 A.2d 1262 (Pa. Super. 2007) – "¶ 23 A mother's questions to her child in response to her child's disturbing behavior cannot objectively be viewed in these circumstances as a step toward investigation or trial. Such a characterization ignores the nature of the relationship and a parent's basic instincts. Like the statements in *Davis*, B.K.'s [mother's] questioning was an attempt to address the immediate situation." – "¶ 26 We note that the Pennsylvania Legislature in enacting the Tender Years Statute tried to ... create greater flexibility when it comes to the testimony of children claiming abuse, carving out an exception to the Confrontation Clause. This Court and the Pennsylvania Supreme Court upheld that Act as a valid legislative prerogative. However, the United States Supreme Court has not, and we are bound by its determination that testimonial statements are not subject to the 'tender years' exception to the hearsay rule as that violates the Sixth Amendment right to confrontation."

State v. Kolosso, 2007 WL 1120559 (Wis. App. 2007) (unpub) – "Statements made to loved ones or acquaintances are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks. *See State v. Manuel*, 2005 WI 75, ¶ 35, 281 Wis.2d 554, 697 N.W.2d 811. A statement is not testimonial if the declarant would not reasonably expect the statement to be reported to the police. *Id.* ... The declarant's statement must be evaluated to determine whether it is, on the one hand, overtly or covertly intended by the speaker to implicate an accused at a later judicial proceeding, or, on the other hand, is a burst of stress-generated words whose main function is to get help and succor, or to secure safety, and are thus devoid of the possibility of fabrication, coaching, or confabulation. ... Here, the child's statements to her father are not testimonial. The statements were not elicited or made with an eye toward trial. They were made within ten minutes of the crime, before any police involvement, while the child was still crying, as she sought comfort and protection from her father while the perpetrator was still present."

State v. Wyble, 211 S.W.3d 125, 131 -133 (Mo. App. 2007) – "The child's statements made to her mother and grandmother were given in an informal, unstructured setting, and were generally spontaneous." – not testimonial

State v. Hopkins, 137 Wash. App. 441, 154 P.3d 250 (Wash. App. Div. 2, 2007) – "A child's hearsay statements made to family members are nontestimonial and, thus, do not violate a criminal defendant's Sixth Amendment Rights." ¶ 30.

Tillman v. State 2007 WL 506488, *1-3 (Ind. App. 2007) (unpub) – 3-year-old's statements admitted pursuant to Protected Persons Statute – "S.M.'s statements to her mother and neighbor are not testimonial."

State v. Williams, 2006 Tenn. Crim. App. LEXIS 920 (2006) – "In this case, the [4-year-old] victim, a young child, made her declarations to her mother in the bathroom of her own home because she was in pain and her mother asked her why. Under these circumstances, no "objective witness" could "reasonably" believe these simple statements were uttered by a child for use at a future criminal trial. Therefore, we conclude they were not testimonial."

Pantano v. State, 138 P.3d 477 (Nev. 2006) – The 7-year-old child was able to testify at trial and statements to her parents were also admitted. “The child's statements to her father were nontestimonial in nature. A parent questioning his or her child regarding possible sexual abuse was inquiring into the health, safety, and well-being of the child. To characterize such parental questioning as the gathering of evidence for purposes of litigation would unnecessarily and undesirably militate against a parent's ability to support and nurture a child at a time when the child most needed that support.”

Hobgood v. State, 926 So. 2d 847 (Miss. 2006) – “Following the meeting with a psychotherapist, the victim was taken to a medical center where he met with a doctor. The victim gave a vivid description of the sexual abuse to the doctor. The doctor testified that his physical examination of the victim was consistent with the description of abuse the victim had given him. While at the medical center, the victim also met with a police officer and described what defendant had done. The officer also questioned the victim's grandmother and a social worker with whom the victim had met. The supreme court found that the grandmother, babysitter, psychotherapist, and doctor were not working in connection with the police. Further, their statements were not made for the purpose of aiding in the prosecution. Thus, their statements did not violate the Confrontation Clause under U.S. Const. amends. VI and XIV and Miss. Const. art. III, § 26. But, the statements testified to by the police officer and a detective were testimonial and should have been excluded.”

Robbins v. State, 2005 Tex. App. LEXIS 9201 (Tex. App. 2005) – “Defendant was convicted after the victim claimed he improperly touched her and had placed cameras in her room to videotape her. The court affirmed. The trial court did not err in admitting the testimony of the victim's school counselor as statements from an outcry witness under Tex. Code Crim. Proc. Ann. Art. 38.072, § 2(a)(2) (2005). The State did not attempt to present out-of-court testimonial evidence, contrary to the Confrontation Clause, both the outcry witness and the victim were available at trial, and defendant had an opportunity to cross-examine them both.”

Lawson v. State, 2005 Md. LEXIS 663 (MD. 2005) – Maryland's Tender Years statute, permitting a social worker to testify to what a child said during an interview, is still valid if the child also testifies at trial. There is no *Crawford* violation due to the child being available for cross-examination.

Commonwealth v. King, 2005 Mass. LEXIS 541 (2005) – Defendant was convicted of raping his 4 year old daughter. The child testified at trial and statements she made to her mother and a police officer were also admitted under the “fresh complaint” rule. Defendant argued that the fresh complaint rule violates *Crawford*. The court modified the rule and announced the “first complaint rule.” The court held that since the child testified and was subject to cross-examination, the first complaint statements were properly admitted.

Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2005) – The 10-year-old victim disclosed abuse by the defendant to his mother and her boyfriend. The victim did not testify at trial due to being found incompetent and the trial admitted these statements as excited utterances. On appeal, the court found that the statements made to the mother and boyfriend were non-testimonial as the victim was being asked what happened and whether the child had been harmed. “M.B.'s statements to Gray and Shawn were not elicited for the purpose of preparing to prosecute anyone

but rather to gain information about what happened, find out if M.B. was harmed, and remedy any harm that had befallen him.” The victim’s statements to a police officer, however, were deemed testimonial. “We do not hold that every statement by a crime victim to a police officer is testimonial. We hold only that M.B.’s statements to Officer Cuthbertson were testimonial under the specific circumstances of this case, where Shawn had briefed the officer on the facts before he questioned M.B. and where he repeated his questioning to M.B. multiple times for the purpose of obtaining evidence to be used to prosecute Purvis.”

People v. Cannon, 2005 Ill. App. LEXIS 622 (Ill. Ct. App. 2005) – “On appeal, defendant argued that 725 Ill. Comp. Stat. Ann. 5/115-10 (2002), which allowed for the introduction of the victim’s statements to third persons at his trial, was unconstitutional on its face and that the wrongfully admitted statements resulted in his conviction. The appellate court concluded that 725 Ill. Comp. Stat. Ann. 5/115-10(b)(1) and (b)(2)(A) interacted to specifically provide that a victim’s hearsay statements should be admitted only when there were sufficient safeguards of reliability surrounding the statements and the victim actually testified at trial. Thus, in requiring the appearance of the victim at trial, the statutory procedure was wholly consistent with the holding of *Crawford* and, in and of itself, suffered no constitutional impediment. The appellate court found 725 Ill. Comp. Stat. Ann. 5/115-10(b)(2)(A) to be severable from any other allegedly unconstitutional provisions in 725 Ill. Comp. Stat. Ann. 5/115-10.”

State v. Carothers, 2005 SD 16 (2005) – In a pre-trial hearing brought by the prosecution regarding admissibility of the 4-year-old child’s statements, the trial court wrongly ruled that *Crawford* required cross-examination at the moment that the statements were originally made (rather than requiring cross-examination at trial. In overruling this opinion, the South Dakota Supreme Court held: “Section 19-16-38 authorized the admission of a child’s prior statement of sexual abuse, and, pursuant to that section, the State announced that it would be introducing in evidence, at defendant’s trial on child sexual abuse charges, statements made by the four-year-old child to a social worker. The trial court decided that in line with the recent reworking of the test for admissibility of out-of-court statements in the *Crawford* decision, admission of the statements would violate defendant’s Sixth Amendment rights. The court held, in agreement with many courts of other jurisdictions that had considered the issue, that defendant’s confrontation rights would have been violated only if the child had not been available to testify at trial, where she would face cross-examination. Since the State planned to call her as a witness, her prior statements could also be offered in evidence. It was premature to rule on whether, because of her young age at the time of the events in question and fading memory, the child would eventually be found unavailable to testify as a matter of law, in which case her earlier statements would be excluded.”

T.P. v. State, 2004 Ala. Crim. App. LEXIS 236 (Ala Crim App 2004) – This case addressed Alabama’s Tender Years statute which provides for hearsay statements of children under age 12 to be admitted at trial if the child testifies or if the child is found to be unavailable. The statute does not address previous cross-examination by the child. In this case, the child did not testify at trial or any other hearing and the statements admitted at trial were the result of an interview conducted by DHR social worker and a police investigator as part of a criminal investigation. The court found that because the interview was intended to be used as an investigative tool for a potential criminal prosecution, the interview is similar to a police interrogation and, thus, falls within the definition of “testimonial.”

Spontaneous Statements

***Ohio v. Clark*, 576 U.S. ___, 135 S.Ct. 2173 (2015):** "Statements by very young children will rarely, if ever, implicate the Confrontation Clause."

Mix v. Evans, 2008 WL 4949013 (C.D. Cal. Nov 17, 2008) (unpub) (habeas) – "Child Protective Services Worker Dean Balaszi ("Balaszi") testified that he drove the victim, Anna Clark ("Clark"), [FN3] to his office so that he could find her a "placement for the night," i.e., a foster home. (See RT 417). Once Clark was in Balaszi's car, she began to cry and Balaszi asked, "Are you okay?" (RT 418). Balaszi testified that Clark told him that Petitioner had touched her. (See id.). When the prosecutor asked Balaszi "Where did she say he touched her?" ... Balaszi testified that "[Clark] didn't really say where he had touched her. She pointed to the crotch area between her legs with her right index finger and she said, 'Right there.' ... ar from a police interview, Balaszi, a Child Protective Services worker, merely asked Clark if she was okay because she had begun crying. ... Clark's statements to Balaszi were not testimonial because they were completely lacking the level of formality and accusation that the Supreme Court has required."

People v. Leonardo, 2007 WL 123957, *2 (Cal. App. 5 Dist. 2007) (unpub) – child endangerment by drunk driving – officer asked child "whether Leonardo was her daddy and M.L. spontaneously replied, 'I told my daddy to slow down but he wouldn't.'" - held: testimonial, apparently because it was made in response to police question

People v. Guevara, 2007 WL 118880, *7 (Cal.App. 4 Dist. 2007) – "Regina was one of several children playing outside when Ms. Munoz heard what she estimated to be about five gunshots. Ms. Munoz ran to a window and yelled at the children to get in the house. Regina 'was just, like, hysterical' and as she ran toward Ms. Munoz's house, Regina yelled, 'It was Abacuc. It was Abacuc. It was Abacuc.' ... Although Regina did identify the shooter, the purpose of her statement was not to prove or establish that fact. Instead, and to the extent her statement had a purpose, it was to describe the startling event she had just that moment observed, namely, Abacuc repeatedly firing a gun at people. The statement was nearly contemporaneous with the event itself and was intended to describe or explain the event rather than to provide information necessary either to prove or investigate the crime. Because Regina's statement does not include any of the formalities normally associated with the giving of testimony, and because Regina made the statement at nearly the same moment the crime occurred and for the purpose of describing what had just happened, we conclude that the statement was not testimonial."

State v. Buda, 389 N.J.Super. 241, 912 A.2d 735 (N.J. Super. A.D. 2006), overruled by **State v. Buda**, 195 N.J. 278, 949 A.2d 761 (N.J. Jun 23, 2008) –

In re A. J. A., 2006 Minn. App. Unpub. LEXIS 988 (Minn. Ct. App. 2006) – A spontaneous statement of abuse by a 5-year-old to her parents is non-testimonial for the reason that the parents were not governmental agents to invoke *Crawford*.

State v. Shafer, 2006 Wash. LEXIS 178 (2006) – A 3-year-old victim disclosed abuse to her mother and did not testify at trial. The court found the statements to be non-testimonial. "Without prompting, T.C. told her mother about her encounter with Shafer, and she did so upon

awaking from sleep. T.C.'s mother then responded in a manner that one would expect of a concerned parent under the circumstances-she inquired further. While T.C.'s statements in response to her mother's questioning were not entirely spontaneous, they were not the result of leading questions or a structured interrogation. Furthermore, the police were not involved, and T.C. had no reason to expect that her statements would be used at a trial. N8 For these reasons, we conclude that T.C.'s statements to her mother were nontestimonial and, thus, do not run afoul of *Crawford* .”

People v. R.F., 355 Ill. App. 3d 992; 825 N.E.2d 287 (Ill Ct of Ap 2005) – Statements made by the 3 year old victim to her mom and grandmother about the defendant pinching and kissing her vaginal area were properly admitted and were non-testimonial statements. The statements were made to family members and not government personnel. The child did not testify at trial due to fear and anxiety. However, statements made by the child to a police investigator who interviewed the child were deemed testimonial because the officer “was acting in an investigative capacity for the purpose of producing evidence in anticipation of a criminal prosecution.”

State v. Aaron L., 272 Conn. 798, 865 A.2d 1135 (2005) – “The victim, who was two and one-half years old at the time, made the statement spontaneously and to a close family member more than seven years before the defendant was arrested. In light of these circumstances, the victim's communication to her mother clearly does not fall within the core category of ex parte testimonial statements that the court was concerned with in *Crawford*. See (“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”). Accordingly, because the victim's statement was nontestimonial in nature, application of the *Roberts* test remains appropriate.”

State v. Dezee, 2005 Wash. App. LEXIS 104 (Wash Ct App 2005) – The child’s “statements were spontaneous. They were made initially to her mother while riding in the car to a class. The statements to her mother appear to have been made for the personal purposes of expressing her repugnance at the act and trying to enlist her mother's help in coping with its effects. The record does not indicate [the child] asked her parents to take any action against Dezee. The record does not indicate that in the months between her disclosure to her mother and her mother's report to the police [the child] expressed any thought or concern about police involvement or a legal proceeding. Nothing in the record supports the conclusion that [the child], a nine year old, reasonably believed the statements to her mother could or would be available for use in a trial. We conclude that [the child's] statements to her mother were not testimonial within the analysis contained in *Crawford* and were therefore properly admitted.”

State v. Doe (In re Doe), 140 Idaho 873; 103 P.3d 967 (2004) – The 4 year old victim was digitally penetrated by her 14 year old uncle at a campground. Twenty minutes later, the victim was heard by the defendant’s mother crying and blurted out “he put his finger in her bum and that it hurt really bad.” A few second later, a still hysterical child repeated the same statement to her mother and grandmother and pointed at her vaginal area to show where he had put his finger. After an evidentiary hearing under the Juvenile Corrections Act, the defendant was placed on probation with a suspended commitment. The magistrate considered the statements of the child victim without the child testifying. On appeal, the court found that this did not violate *Crawford* because the statements were excited utterances, made without prompting or questioning within

minutes of the injury. The court considered the youthful age of the child in finding the statements were non-testimonial.

Herrera-Vega v. State, 29 Fla. L. Weekly D 2361 (Fla Dist Ct App 5th Dist 2004) – A 3-year old child spontaneously told her mother, as she was putting on the child's underpants, that the defendant had placed his tongue in her "private parts." The child reluctantly repeated the story to her father minutes later. The father confronted the defendant who admitted to touching the child sexually with both his penis and tongue. The police were called and the defendant confessed to multiple sexual contacts with the child. The child refused to repeat to anyone else what she had told her parents about the incident. She was therefore found to be "unavailable" as a witness for trial and no attempt was made to call her to testify. The prosecutor offered two forms of evidence that Vega had sexually abused the child: the hearsay testimony from the victim's parents and Vega's confession. On appeal, the court found the child's statements to both parents to be non-testimonial because testimonial evidence does not appear to include spontaneous statements made by a child to her mother while being dressed or to her father.

Constitutional Validity of Child Abuse Evidence Statutes

State v. Comeaux, 82 So. 3d 1287 (La.App. 3 Cir. 2012) – "La.R.S. 15:440.5(B) allows the State to both enter the [forensic interview] videotape into evidence and call the protected person as a witness at trial. This statute 'does not violate defendant's constitutional right of confrontation.'"

Hatley v. State, 290 Ga. 480, 722 S.E.2d 67, 2012 Fulton County D. Rep. 377 (Ga. 2012) – "we must conclude that the Child Hearsay Statute, as construed by this Court in *Sosebee*, supra, and in other appellate cases, cannot pass constitutional muster because it fails to put the onus on the prosecution to put the child victim on the witness stand to confront the defendant. Any cases suggesting the contrary are hereby [**71] overruled. ... Accordingly, we now interpret OCGA § 24-3-16, consistent with the demands of *Melendez-Diaz*, to require the prosecution to notify the defendant within a reasonable period of time prior to trial of its intent to use a child victim's hearsay statements and to give the defendant an opportunity to raise a Confrontation Clause [*484] objection. If the defendant objects, and the State wishes to introduce hearsay statements under OCGA § 24-3-16, the State must present the child witness at trial; if the defendant does not object, the State can introduce the child victim's hearsay statements subject to the trial court's determination that the circumstances of the statements provide sufficient indicia of reliability."

Other Hearsay Statements

People v. Jackson 726 N.W.2d 727 (Mich.,2007) – 4-3 decision, vigorous dissent on rape shield holding, no details given – "Further, the father's hearsay statement made to the police about the event in controversy should not be admitted because it constituted error in light of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)."

State v. Siler, 164 Ohio App.3d 680, 2005-Ohio-6591, 843 N.E.2d 863 (Ohio Ct. App. 2005), aff'd, 116 Ohio St.3d 39, 876 N.E.2d 534, 2007-Ohio-5637 (Ohio Oct 25, 2007), cert. denied, 128 S.Ct. 1709, 170 L.Ed.2d 534 (Mar 24, 2008)

United States v. Peneaux, 2005 U.S. App. LEXIS 28877 (8th Cir. S.D. 2005) – Two children (ages 2 and 3) were removed from their home upon allegations that the father had abused their older sister. The 3 year old disclosed sexual and physical abuse and testified at trial two years later. The younger child did not testify, but statements he made about physical abuse to his foster mother and a physician were admitted at trial. These statements were deemed non-testimonial on appeal. “N.P. was taken to Dr. Strong by his foster parents for a medical examination after they noticed “some marks on his body”. Dr. Strong is a pediatrician, and no forensic interview preceded her meeting with N.P. Dr. Strong’s interview with N.P. was for the purpose of ensuring his health and protection, and there is no evidence that the interview resulted in any referral to law enforcement. The interview lacked the “formality of ... questioning,” the substantial “government involvement,” and “the law enforcement purpose” present in *Bordeaux*. 400 F.3d at 555-56. Dr. Strong testified at trial and was available for cross examination about her physical findings and about her interview with N.P. Although N.P. did not testify, his statements to Dr. Strong about his burn were merely cumulative to the testimony other witnesses had given without objection about what N.P. had said about his scar. N.P. was also not the victim of the charged offense, unlike the child whose interview at issue in *Bordeaux*. Where statements are made to a physician seeking to give medical aid in the form of diagnosis or treatment, they are presumptively nontestimonial.”

State v. James, 2005 Wisc. App. LEXIS 610 (Wisc. Ct. App. 2005) – “The action arose when the State, pursuant to Wis. Stat. § 908.08 (2003-04), sought to introduce the videotaped statements of two child witnesses in a sexual assault trial in lieu of full-blown live direct examination and to subsequently make the children available for questioning at the defendant’s request. The trial court sustained defendant’s objection to this mode of testimonial presentation, observing that in its past experience, child witnesses sometimes refused to submit to cross-examination, thereby necessitating a mistrial in order to avert a violation of defendant’s Sixth Amendment right. Invoking Wis. Stat. §§ 904.03, 906.11 and 908.08(3) (2003-04), the trial court required any live testimony to occur first.” Having the witnesses testify prior to admitting other out-of-court statements satisfies *Crawford*.

People v. Cookson, 215 Ill. 2d 194; 830 N.E.2d 484 (2005) – The victim was seven years old when she was turned over to the police department and taken into protective custody. The child disclosed sexual abuse to the DCFS worker, to a police officer who conducted the forensic interview, and her foster parents among others. The child testified at trial and, therefore, all other admissible hearsay statements may be admitted at trial and this satisfies *Crawford* and the confrontation clause.

State v. Fisher, 108 P.3d 1262 (2005) – “The victim, a 29-month-old child, told a family practice physician that defendant hit him in his forehead and defendant was subsequently convicted of second-degree child assault. On appeal the court affirmed, stating that there was no indication of a purpose to prepare testimony for trial and no government involvement. Nor was the statement given under circumstances in which its use in a prosecution was reasonably foreseeable by an objective observer. Further, the statement was made in the context where a declarant knew that his comments related to medical treatment and thus, the victim’s statement was properly admitted under Wash. R. Evid. 803(a)(4).”

State v. Causey, 30 Fla. L. Weekly D 820 (Fla Dist Ct App 5th Dist 2005) – “Defendant was charged with committing the crime of sexual battery upon a person less than 12 years of age by a person older than 18 years of age. The State filed a notice of its intent to use child hearsay testimony at the defendant's trial pursuant to Fla. Stat. ch. 90.803(23)(b) (2001). Specifically, the State indicated its intent to offer statements made by the alleged child victim to her mother, a friend, a member of the Child Protection Team, and two doctors. The trial court ruled that any testimonial statements made by the alleged child victim in the course of investigation, or which met the definition set forth in § 90.803(22), and which were not otherwise admissible were barred by *Crawford v. Washington* unless defendant or counsel were allowed to be present and cross-examine such statements. The State argued that *Crawford* did not require defendant or his counsel to be present at the time the witness's statement was made or to be given an opportunity to cross-examine the witness at that time. The court agreed, finding that the ruling in *Crawford* merely required that a defendant have an opportunity at some time prior to trial to cross-examine the witness.”

United States v. Wipf, 397 F.3d 677 (8th Cir Minn 2005) – “Defendant worked as a custodian and gym teacher at a mission school on the Red Lake Indian Reservation. A former student reported to the police that he had been molested by defendant. The police investigated the allegation and defendant was arrested in a hotel room sharing a bed with young boys. A search warrant was executed at defendant's home where they found child pornography including a videotape of defendant sexually assaulting a young boy. The appellate court found that there was no Confrontation Clause violation with respect to the testimony of the psychologist about his interviews with two of the victims and the trial testimony of the victims mirrored the testimony of the psychologist. The testimony of the boy discovered through the videotape should not have been excluded under the "fruit of the poisonous tree" doctrine because the boy testified willingly and gave the same account of his relationship with defendant as what he had told the psychologist. The officer's statement that he wanted to tell defendant of the situation and to explain the charges against him, after defendant had requested an attorney, did not amount to a custodial interrogation.”

State v. Harr, 2004 Ohio 5771 (2004) – “The victim was a seven-year-old girl. At trial, the victim was unable to testify as she sobbed uncontrollably. The trial court allowed her mother to testify as to what the victim said when the mother questioned her about the incident. The appellate court held that the trial court abused its discretion in admitting the hearsay testimony of the mother. The victim's statements to her mother were given nearly two weeks after the "startling event" and after the child was confronted by her mother for disobeying her order not to enter a stranger's apartment, and only after she interrogated the child with leading questions. Thus, the trial court abused its discretion in finding that victim's statements to her mother were admissible as excited utterances.”

State v. McClanahan, 2004 Wash. App. LEXIS 597 (2004) – “The trial court determined that [the child] was competent to testify at trial, and after reviewing and reflecting on necessary legal factors, determined the child hearsay statements made to her teacher, her mother and the child interview specialist bore sufficient indicia of reliability to be admissible at trial. Other statements [the child] made were admitted as statements to medical professionals. Under the facts of this case there is no *Crawford* confrontation issue regarding the admission of the child hearsay statement because the declarant was a witness at trial and McClanahan was afforded the opportunity to cross-examine.”

State v. Vaught, 268 Neb. 316 (Neb. Sup. Ct. 2004) - This case involved a 4-yr old victim of sexual abuse who informed a physician during a medical examine about the identity of the defendant. "We believe on the facts of this case that the victim's statement to the doctor was not a "testimonial" statement under *Crawford*. As discussed above, the victim's identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment. In the present case, 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. {NOTE: It does not appear that the victim testified at any hearing in this case.}

Poor Memory / Child Freezes on the Stand / Limited Cross-Examination

Cases in this category have been moved to part 7, dealing with the adequacy of the opportunity to confront the witness.

Prior Testimony of Child / Unavailable for Trial

State v. Flores, __ S.W.3d __, 2014 WL 1887551 (Mo. App. W. Dist. 2014) – "Flores was originally indicted in May 2006 based on the same allegations that he and Mother had sexually abused K.J. and C.J. ... the court ordered that the girls' prior out-of-court statements would be admissible as substantive evidence and that their trial testimony would be presented via video deposition. ... Flores and Mother were tried jointly in 2007. Both were convicted of two counts of first-degree statutory sodomy, and both subsequently had their convictions separately vacated." – retrial and reconviction in 2012 – "Flores makes no complaint about the circuit court's initial determination that the girls were legally unavailable to testify live at trial in 2007. His complaint is that five years later, at his 2012 trial, the court permitted the State to again introduce the children's out-of-court statements and their 2007 video depositions without conducting a new Chapter 491 hearing and making new findings as to whether the girls were legally unavailable at that time." – here, the evidence showed that the judge had, in fact, made findings to that effect in mother's separate retrial – no violation

U.S. v. Cabrera-Frattini, 65 M.J. 241 (U.S. Armed Forces Jun 22, 2007) – allowing use of videotaped deposition of unavailable child sexual abuse victim, who was 12 at time of incident – see excerpt above under "availability or unavailability of witness"

State v. Griffin, 202 S.W.3d 670 (Mo. Ct. App. W.D. August 22, 2006) – "Defendant was convicted for sexually abusing his five-year-old daughter. During his trial, the trial court admitted into evidence the daughter's videotaped deposition in lieu of live testimony under Mo. Rev. Stat. § 491.680; defendant was not present during the deposition under Mo. Rev. Stat. § 491.685 because the trial court found that significant emotional or psychological trauma would result to the daughter if defendant was present. On appeal, the court held that because defendant had the right to cross-examine his daughter during her videotaped deposition through his

attorney, he was not denied his constitutional right to confront and cross-examine the witnesses against him, even though he was not present.”

Anaya v. Huskey, 2005 U.S. Dist. LEXIS 6104 (ND Cal 2005) – “Petitioner was convicted of continual sexual abuse of a child under the age of fourteen, his daughter, in violation of Cal. Penal Code § 288.5(a). The daughter gave incriminating testimony at a preliminary hearing, but refused to testify at trial, and allegedly recanted. The court did not actively compel her presence, and defendant did not object to her absence or the use of her preliminary hearing testimony at trial. In his petition, he argued that the trial court violated his Sixth Amendment rights when it permitted the preliminary hearing testimony to be read to the jury. *** The court found the prior testimony admissible on prior inconsistent or unavailable witness grounds.”

Child Available in Court but Did Not Testify
(see also Opportunity to Cross-Examine)

State ex rel. D. G., 2010 La. App. LEXIS 815 (La.App. 4 Cir. May 27, 2010), on remand from D. G. v. Louisiana, 130 S. Ct. 1729, 176 L. Ed. 2d 176 (2010) – “In our original opinion we noted that J.G. ‘was available at the courthouse during the hearing below.’ ... we find J.G.’s availability in court was sufficient and that it was not necessary for the prosecution to call him as a witness. In the instant case there was no ‘risk of adverse witness no-shows,’ and no burden was placed on D.G. to bring J.G. into court -- he was already there. Therefore, in applying the *Melendez-Diaz* rationale to the failure of the prosecution to call J.G. as a witness, we again find no violation of D.G.’s right of confrontation.” [Note: SCOTUS weirdly remanded for reconsideration in light of *M-D*, although the case had nothing to do with the situation addressed in *M-D*.]

Williams v. State, 660 S.E.2d 740, 08 FCDR 1381 (Ga. App. Mar 04, 2008) (substitute opinion) – “Williams’s trial counsel subpoenaed the [7-year-old] victim and announced that he intended to call her as a trial witness. Although the victim ultimately was not called to testify, the record established that the victim was present and available for cross-examination. Consequently, there was no *Crawford* violation presented in this case.”

In re S.R., 920 A.2d 1262, ¶¶ 20, 25 (Pa. Super. 2007) – “¶ 2 When L.K. was put on the stand, she broke down and was unable to testify. It is agreed that she was therefore unavailable.” – admission of her out-of-court statements under Tender Years statute violated *Crawford*

Morrison v. State 2007 WL 614143, *2-3 and n.5 (Tex.App.-Fort Worth 2007) (unpub) – an unclear opinion that seems to say that opportunity to cross-examine child is insufficient to satisfy confrontation clause where the child’s direct testimony does not establish elements of offense, and/or child is determined to be incompetent – but hearsay also found to be admissible as statements for medical treatment, and its admission harmless

Howell v. State, 278 Ga. App. 634, 629 S.E.2d 398 (Ga. Ct. App. 2006) – “In the instant case, the court inquired as to the child’s availability to testify immediately after the state indicated that it wished to introduce the statements the victim made to others. The court also explained that both parties would have the opportunity to call the victim as a witness. When defense counsel was asked at the close of the state’s case whether he intended to present any witnesses, he stated “only my defendant, possibly.” Howell cannot decide not to call the victim as a witness at trial,

then complain on appeal that his right to confrontation was violated. As the victim was available for cross-examination, the trial court did not abuse its discretion when it admitted the testimony.” Introduction of the videotaped forensic interview was proper.

Testifying Remotely or by Videotape

People v. Beltran, 110 A.D.3d 153, 970 N.Y.S.2d 289, 296 (N.Y. App. Div. 2d Dept. 2013) – “Moreover, in contrast to *Maryland v. Craig*, here, the child testified by way of two-way closed circuit television, so that she could see the defendant during her testimony, and the defendant could see her. This two-way system allowed for face-to-face confrontation between the defendant and the child... since the child appeared and was cross-examined by the defendant, the defendant's confrontation rights, as described in *Crawford* ..., were not violated [cite].”

State v. Lanford, 736 S.E.2d 619, 621-622 (N.C. Ct. App. 2013) – “Defendant does not contend that his ability to confront his accuser was inhibited in any way other than the use of CCTV. *Jackson* is binding on this Court and we apply it here. [cite] Therefore, as in *Jackson*, we hold that his rights under the Sixth Amendment's Confrontation Clause and the North Carolina Constitution were not violated.”

People v. Lujan, 211 Cal. App. 4th 1499, 150 Cal. Rptr. 3d 727 (Cal. App. 2d Dist. 2012) – “We hold that child witnesses shown to be traumatized by face-to-face confrontation may testify remotely without violating a defendant's confrontation clause rights, whether or not those witnesses are victims of an independent crime committed by that defendant.” – that is, *Maryland v. Craig* protects child witnesses as well as child victims

State v. Jackson, 717 S.E.2d 35, 37-40 (N.C. Ct. App. 2011) – “As C.G.'s trial testimony was subjected to rigorous adversarial testing thereby, effective confrontation was preserved, and the use of one-way CCTV to procure her evidence did not offend the Constitution, despite the lack of face-to-face confrontation.”

People v. Powell, 194 Cal. App. 4th 1268 (Cal. App. 6th Dist. 2011) – following *Craig*

State v. Ruiz, 124 Conn. App. 118, 119-128, 3 A.3d 1021 (Conn. App. Ct. 2010) – “[fn 8] We note that our Supreme Court in *State v. Arroyo*, supra, 284 Conn. 622 n.18, squarely rejected the defendant's argument that *Crawford* undermined the constitutional underpinnings of *Maryland v. Craig*, ... in which the United States Supreme Court upheld a Maryland statute that permitted a child to testify outside the defendant's presence.” – “In the present case, the court's finding that the state showed, by clear and convincing evidence, that if N testified in the defendant's presence, her testimony would be less reliable or accurate was not clearly erroneous. The defendant's right to confrontation is not violated when the state makes that showing.”

State v. Carper, 41 So. 3d 605 (La.App. 2 Cir. June 9, 2010) – “In the instant case, the fact that the child witnesses were not called to the stand by the state is a fatal error to the prosecution. The United States and Louisiana Constitutions and the jurisprudence interpreting them mandate that, if a defendant timely asserts his right to confront the victim in a jury trial in which a videotaped interview under La. R. S. 15:440.5 or La. Ch. C. art. 326 is sought to be introduced, the prosecution must call the victim to testify and make an inquiry into the victim's competency

before tendering the victim for cross-examination. This testimony may be presented by closed circuit, if the requirements of La. R.S. 15:283 are met. ... the use of the videotaped interviews, without affording the defendant an opportunity to exercise his right of cross-examination, violated the defendant's Sixth Amendment right of confrontation..."

Coronado v. State, 310 S.W.3d 156 (Tex. App. Amarillo 2010), rev'd, Coronado v. State, 351 S.W.3d 315, 315-343 (Tex. Crim. App. 2011)

Lopez v. State, 2008 WL 5423104 (Tex. App.-Austin Dec 31, 2008) (unpub) – "*Crawford*'s holding that confrontation is the key to the admissibility of testimony does not overrule the Court's earlier statements that actual face-to-face confrontation is not indispensable or required in 'every instance in which testimony is admitted against a defendant.' *Craig*, 497 U.S. at 847."

In re Noel O., 19 Misc.3d 418, 855 N.Y.S.2d 318, 2008 N.Y. Slip Op. 28029 (N.Y. Fam. Ct. Jan. 29, 2008) – "Notwithstanding the constitutional guarantee of the right of confrontation, which literally commands that adverse witnesses testify in the presence of the accused [cites], most of the States, including New York, have enacted statutes which allow a child to testify outside of the presence of the accused under certain circumstances (*see, Maryland v. Craig* ...) ... [n.5] Because the child's testimony is given in court under article 65 [cites] the statute does not violate *Crawford v. Washington* which clearly prohibits the introduction of testimonial statements by a witness who does not appear at trial [cites]."

Roadcap v. Com., 50 Va.App. 732, 653 S.E.2d 620 (Va. App. Dec 18, 2007) – "Roadcap also argues the trial court violated his federal and state confrontation clause rights by refusing to train the camera on him while his children were on the witness stand. ... [T]he two-way closed-circuit method used in Roadcap's case, despite the witnesses' inability to see Roadcap, does not violate his confrontation clause rights."

U.S. v. Pack, 65 M.J. 381 (U.S. Armed Forces Dec 12, 2007) – "We join the weight of authority in holding that *Craig* continues to control the questions whether, when, and how, remote testimony by a child witness in a criminal trial is constitutional." [citing cases]

State v. Arroyo, 284 Conn. 597, 935 A.2d 975 (Conn. Dec 11, 2007) – 5-year-old victim's testimony taken outside the presence of the defendant via videotape – "Because we have concluded that under such conditions the videotaped testimony is the functional equivalent of in-court testimony, it was not testimonial hearsay and therefore does not fall within the ambit of *Crawford*. Our conclusion finds further support in the facts that the procedure was not *ex parte* and did not deprive the defendant of the opportunity for cross-examination. Therefore, the victim's testimony was not the type of prior testimony that implicates the core concerns of the confrontation clause."

Pesquera v. Jackson, 2007 WL 2874219 (E.D. Mich. Sep 25, 2007) (unpub) (habeas) – "In this case, the child witnesses appeared and testified at trial pursuant to special courtroom arrangements, as allowed by state statute and the Supreme Court's decision in *Craig*. Moreover, Petitioner was able to view those witnesses and to fully cross-examine them with the assistance of defense counsel."

State v. Paulson 2007 WL 461323 (Iowa App. 2007) – "*Crawford* does not prohibit the procedure outlined in the Iowa statute." [*i.e.*, allowing minor to testify by closed-circuit television]

United States v. Pack, 2006 CCA LEXIS 286, 2006 WL 4579021 (Navy-Marine Corps. C.C.A. 2006), aff'd, 65 M.J. 381 (U.S. Armed Forces Dec 12, 2007)

State v. Blanchette, 134 P.3d 19 (Kan. Ct. App. 2006) – "The decision in *Crawford* does not affect the constitutionality of K.S.A. 22-3434, which allows a child victim to testify by closed-circuit television under certain strict conditions and such testimony is subject to cross-examination in full view of the defendant and the jury."

United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005) – Defendant was tried for sexual abuse on a minor child (age unknown). Although the victim initially took the witness stand at trial, she was too afraid to testify. During an in chambers review, the Judge ruled that the child could testify via two-way closed circuit television under. After conviction and on appeal, the court held that the testimony via two-way closed circuit TV denied defendant his Sixth Amendment right to confront the victim because the district court found that the victim's fear of defendant was only one reason why she could not testify in open court; it did not find that the victim's fear was the dominant reason. The case was remanded for a new trial where additional facts may be established to satisfy *Maryland v Craig*.

➤Sub-Category: Cross-Examination by Written Interrogatories
(category added Dec. 2011)

Coronado v. State, 351 S.W.3d 315 (Tex. Crim. App. 2011) – "We granted review of this case to determine whether the videotape procedures set out in Article 38.071, § 2,n1 including the use of written interrogatories in lieu of live testimony and cross-examination, satisfy the Sixth Amendment rights of confrontation and cross-examination under the Supreme [*317] Court's *Crawford*n2 line of cases.n3 In this aggravated-sexual-assault-of-a-child prosecution, the court of appeals found "no error in the trial court's decision to allow cross-examination through written questions only" and to admit the child complainant's two videotaped interviews with a child-abuse forensic examiner instead of requiring live testimony. .. Although we agree that HN1there must be balance between a defendant's right to confrontation and a societal need to protect fragile and traumatized child victims, that balance cannot constitutionally be struck by the method set out in Section 2 of Article 38.071. On federal constitutional matters, we are obliged to follow the dictates of the United States Supreme Court regardless of our own notions.n5 We therefore reverse the judgment of the court of appeals because it erroneously held that constitutionally adequate cross-examination can be done through the use of written interrogatories posed by a 'neutral' forensic interviewer more than a year after the initial interview." – "The ex parte 'written interrogatory' procedure used in this case would not pass muster under *Craig*, the very case that the State and the court of appeals relied upon. In *Craig*, the majority held that the right of confrontation was not unconstitutionally gouged because every other aspect of the right to confrontation except face-to-face confrontation in the courtroom was given full force.n85"

➤ **Sub-Category: Relationship of *Crawford* and *Maryland v. Craig***

People v. Lujan, 211 Cal. App. 4th 1499, 150 Cal. Rptr. 3d 727 (Cal. App. 2d Dist. 2012) – "Our Supreme Court recently rejected the argument that *Crawford* modified the United States Supreme Court's approach to determining when face-to-face testimony is required."

People v. Phillips, __ P.3d __, 2012 COA 176 (Colo. Ct. App. 2012) – "[¶ 53] ... But, the United States Supreme Court has not held that *Crawford* overruled *Craig*. Until the Court explicitly overrules its own precedent, we are not at liberty to infer otherwise."

People v. Gonzales, 54 Cal. 4th 1234, 281 P.3d 834, 144 Cal. Rptr. 3d 757 (Cal. 2012), cert. denied (2013) – "Defendant argues that *Craig* is no longer viable. ... *Craig* remains good law."

State v. Jackson, 717 S.E.2d 35, 37-40 (N.C. Ct. App. 2011) – "we observe an enduring reliance on *Craig* in other jurisdictions. [cites] In fact, many courts have examined the exact argument advanced here and have explicitly upheld *Craig* as governing whether a child victim's CCTV testimony violates the Confrontation Clause. [cites] Moreover, we have found no case which holds *Craig* and *Crawford* cannot co-exist. [cites] For the reasons detailed below, we join the weight of authority."

State v. Stock, 2011 MT 131, 361 Mont. 1, 256 P.3d 899 (Mont. 2011) – "[¶ 25] Without much legal analysis to bolster his assertions, Stock argues that *Crawford* implicitly overruled *Craig* and expressed a preference for literal confrontation. We disagree. *Crawford* did not overrule or even address *Craig*, nor have we found any other state or federal case in which a court has concluded *Crawford* overruled *Craig*."

U.S. v. Pauly, 2008 WL 3538676 (A.F. Ct. Crim. App. Aug 11, 2008) (unpub) – "Our superior court in *United States v. Pack*, 65 M.J. 381 (C.A.A.F.2007) has ruled that the holding in *Maryland v. Craig*... permitting remote live testimony of a child was not overruled by *Crawford*..."

Guese v. State, 248 S.W.3d 69, n.3, (Mo. App. S.D. Jan 24, 2008), transfer denied (April 15, 2008) – "Although *Craig* was decided before *Crawford*, the Western District of this Court found that *Crawford* did not overrule *Craig* in *State v. Griffin*, 202 S.W.3d 670, 680-81 (Mo.App.W.D.2006)."

Roadcap v. Com., 50 Va.App. 732, 653 S.E.2d 620 (Va. App. Dec 18, 2007) – "Roadcap nonetheless suggests we 'make new law' (his expression) by reexamining the underlying logic of *Craig* in light of newer, but distinguishable, decisions like *Crawford v. Washington*, 541 U.S. 36 (2004)—which he claims recognizes a more robust application of confrontation clause rights. We decline the invitation. As nearly all courts and commentators have agreed, *Crawford* did not overrule *Craig*."

U.S. v. Pack, 65 M.J. 381 (U.S. Armed Forces Dec 12, 2007) – "*Crawford* did not purport to overrule *Craig* explicitly; *Craig* is not even cited in the opinion."

Pesquera v. Jackson, 2007 WL 2874219 (E.D. Mich. Sep 25, 2007) (unpub) (habeas) – "The Supreme Court did not state that it was overruling *Craig* in *Crawford* and this Court is not free to so decide."

State v. Griffin, 202 S.W.3d 670 (Mo. Ct. App. W.D. August 22, 2006) – "The holdings in *Craig* and *Naucke* predated the Supreme Court's opinion in *Crawford*. Neither the United State Supreme Court nor the Missouri Supreme Court has addressed whether the decision in *Crawford* impacts the United States Supreme Court's holding in *Craig*. Courts in other jurisdictions have considered the issue, however, and found that *Crawford* did not overrule or otherwise abrogate *Craig*. [cites] The Missouri Supreme Court's decision in *Naucke* is based on the United States Supreme Court's decision in *Craig* and, with the continued viability of *Craig*, *Naucke* remains viable as well."

State v. Henriod, 131 P.3d 232, 2006 UT 11 (Utah 2006) – "We disagree with the conclusion of the district court that *Crawford* abrogated *Craig*. The *Crawford* majority opinion not only failed to explicitly overrule *Craig*, but also failed to even mention it. Moreover, we do not believe *Crawford* implicitly overruled *Craig* because neither the majority nor the concurrence even discussed out-of-court testimony by child witnesses. By its own terms, the *Crawford* holding is limited to testimonial hearsay."

State v. Vogelsberg, 297 Wis.2d 519, 724 N.W.2d 649 (Wisc. Ct. App. 2006), cert. denied, 127 S.Ct. 2265, 167 L.Ed.2d 1093 (May 14, 2007) – "¶ 14 Had the Supreme Court intended to overrule *Craig*, it would have done so explicitly. The majority opinion in *Crawford* does not discuss *Craig* or even mention it in passing. The only precedent that *Crawford* overruled was *Roberts*, and then, only with respect to testimonial statements. [cite] ¶ 15 We conclude that *Crawford* and *Craig* address distinct confrontation questions."

Alternative Courtroom Lay-Out

Guese v. State, 248 S.W.3d 69 (Mo. App. S.D. Jan 24, 2008) – "When the victim testified, the court made arrangements to situate the witness stand so that it directly faced the jury. The court also allowed the victim to sit near her mother. The position of the witness stand allowed the child victim to testify without being required to face Movant directly. ... Movant's confrontation rights were not at issue in this case"

State v. Vogelsberg, 297 Wis.2d 519, 724 N.W.2d 649 (Wisc. Ct. App. 2006), cert. denied, 127 S.Ct. 2265, 167 L.Ed.2d 1093 (May 14, 2007) – "we conclude that the trial court's use of a barrier between Vogelsberg and the child witness was appropriate and did not violate Vogelsberg's confrontation right."

Mandated Reporters / Agents of Law Enforcement

Ohio v. Clark, 576 U.S. ___, 135 S.Ct. 2173, 2183 (June 18, 2015) – "[Mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution." – Justice Thomas begins his concurrence as follows: "I agree with the Court that Ohio mandatory

reporters are not agents of law enforcement..." – but, oddly, Justice Scalia begins *his* concurrence by stating that the Court did not decide the question

Duhs v. Capra, __ F.Supp.3d __, 2015 WL 428321, at *16-30 (E.D.N.Y. Feb. 3, 2015), appealing pending (habeas) – a pre-*Ohio v. Clark* decision – "Mandatory-reporting laws transform typical recipients of information about abuse into conduits for use by the government, including for criminal investigations and prosecutions. ... The [medical] resident's purpose was, as a matter of law, in substantial measure, to fulfill her obligations to interrogate so she could report possible abuse." – [NOTE: Apparently as a matter of "clearly established Federal law, as determined by the Supreme Court" under § 2254!!! – *but cf. Ohio v. Clark*, the first case in which the Supreme Court addressed the topic. It's impossible to avoid the conclusion that Judge Weinstein is seriously burnt out – this decision, replete with credibility determinations, hardly even pretends to follow habeas law.]

State v. Clark, 137 Ohio St.3d 346, 999 N.E.2d 592, 2013-Ohio-4731 (Ohio 2013), cert. pet. filed (May 8, 2014) – "[¶ 4} At the time [preschool teacher] Jones questioned [3 year old] L.P., she acted as an agent of the state for purposes of law enforcement because at a minimum, teachers act in at least a dual capacity, fulfilling their obligations both as instructors and also as state agents to report suspected child abuse pursuant to R.C. 2151.421, which exposes them to liability if they fail to fulfill this mandatory duty."

United States v. Squire, 72 M.J. 285 (C.A.A.F. 2013) – "Here, the connection to law enforcement is the general requirement that Dr. Hyden, as a mandatory reporter under [*289] Hawaii law, must report and document possible sexual abuse of children after conducting a forensic examination. We do not believe that this general requirement, which broadly covers health care professionals, employees of public and private schools, child care providers, and providers of recreational and sports activities, [cite], is alone sufficient to establish that Dr. Hyden was acting in a law enforcement capacity."

United States v. Cameron, 699 F.3d 621 (1st Cir. Me. 2012) (corrected December 21, 2012) – child pornography – "Given that Yahoo! created CP Reports referring to "Suspect[s]" and sent them to an organization that is given a government grant to forward any such reports to law enforcement, it is clear that under the 'objective test' required by *Williams*, 132 S. Ct. at 2243, the primary purpose of the CP Reports was to 'establish[] or prov[e] past events potentially relevant to later criminal prosecution.' ... We recognize that both cases in *Davis* involved 'interrogations,' [cite] and that the CP Reports here did not result from any 'interrogation' of Yahoo!. However, as noted above, Yahoo! was obligated under federal law to report any child pornography it became aware of to NCMEC [National Center for Missing and Exploited Children]."

People v. Phillips, __ P.3d __, 2012 COA 176 (Colo. Ct. App. 2012) – "[¶ 139] ... statements are not rendered testimonial solely because they are made to persons who are subject to mandatory reporting requirements..."

People v Duhs, 2011 NY Slip Op 2441, 16 N.Y.3d 405, 947 N.E.2d 617, 922 N.Y.S.2d 843 (2011) – "it is of no moment that the pediatrician may have had a secondary motive [*4] for her inquiry, namely, to fulfill her ethical and legal duty, as a mandatory reporter of child abuse, to investigate whether the child was potentially a victim of abuse. Her first and paramount duty was to render medical assistance to an injured child." – petition granted by **Duhs v. Capra, __**

F.Supp.3d __, 2015 WL 428321, at *16-30 (E.D.N.Y. Feb. 3, 2015), appealing pending (habeas), a pre-*Ohio v. Clark* decision

State v. Holzknecht, 157 Wn. App. 754, 238 P.3d 1233 (Wash. Ct. App. 2010), review denied (Feb. 2, 2011) – "On December 1, 2007, two-month-old Grace Holzknecht was admitted to Children's Hospital with three leg fractures. Doctors determined the fractures were not caused by accidental trauma. Grace's father was charged with assault.... [¶ 54] Holzknecht contends the nontestifying doctors' reports were created not for treatment purposes but for the purpose of litigation, and are therefore testimonial. He relies on the fact that Dr. Sugar was part of the child protective team, which works with law enforcement and Child Protective Services (CPS) to assess whether patient injuries constitute child abuse. Because Dr. Sugar asked the other doctors to evaluate Grace, Holzknecht alleges they too must have done their work in anticipation of litigation. ¶55 The record does not support this contention. Definitive diagnosis is necessary to proper treatment, and even if the evaluating physicians knew of the potential criminal charge, their conclusions were also pertinent to treatment. Dr. Sugar testified that she was able to rule out other causes for the fractures because the specialists evaluated Grace and found no reason for her to have weak bones. The record does not show whether the doctors whose opinions she cited were also part of the child protective team, whether they were acting in that capacity when they evaluated Grace, or whether they knew they were giving opinions in a case of suspected child abuse." [NOTE: Isn't there a fairly basic difference between knowing a prosecution is possible when preparing documents and preparing documents for purposes of the prosecution?]

In re Rolandis G., 902 N.E.2d 600, 327 Ill.Dec. 479, 232 Ill.2d 13 (Ill. Nov 20, 2008), rehearing denied (Jan 26, 2009) – "The child advocate who interviewed Von was employed by a licensed advocacy center and, pursuant to the Children's Advocacy Center Act, this Center not only worked in concert with other agencies involved in the investigation and prosecution of child sexual abuse, it was obligated to share information it obtained with the police."

State v. Buda, 195 N.J. 278, 949 A.2d 761 (N.J. Jun 23, 2008) – Division of Youth and Family Services representative, interviewing severely injured 3-year-old abuse victim in hospital, is not made "an extension of law enforcement" by mandatory reporting requirement – "every physician – including those employed full time by the State or other governmental instrumentality – is legally bound immediately to report a gunshot wound to law enforcement authorities. [cite] Yet, no one would daresay that, in doing so, that physician has ipso facto become an extension of law enforcement. The same result must obtain when a DYFS worker reports an instance of child abuse or neglect to the proper authorities: that report is something the DYFS worker is required to do in addition to her paramount duty to care for the safety of children."

Seely v. State, __ S.W.3d __, 2008 WL 963516 (Ark. Apr 10, 2008) – 3-year-old's statements to mothers: "As other courts have noted, 'simply because 'parents turn over information about crimes to law enforcement authorities does not transform their interactions with their children into police investigations.'" – same child's statements to social worker: "we observe that Smith had a duty to report child abuse to the Child Abuse Hotline. We conclude, though, that this duty to report, by itself, did not render all statements made by J.B. to her testimonial."

State v. Muttart, 116 Ohio St.3d 5, 875 N.E.2d 944, 2007-Ohio-5267 (Ohio Oct 11, 2007), cert. denied (May 19, 2008) – "The fact that the information gathered by the medical personnel

in this case was subsequently used by the state does not change the fact that the statements were not made for the state's use."

State v. Spencer, 339 Mont. 227, 169 P.3d 384 (Mont. Sep 25, 2007) – "¶ 18 Spencer claims that Ms. Moffatt and Lisa Weaver were acting under color of law as State investigators for the purpose of criminally prosecuting him. Spencer bases this assertion primarily on the fact that foster parents and social workers are statutorily required to report child abuse or neglect to DPHHS. ... Spencer is correct that § 41-3-201, MCA, requires foster parents and social workers to report suspected child abuse or neglect. In addition to foster parents and social workers, the statute also requires reporting by physicians, residents, interns, and other hospital staff; nurses, osteopaths, chiropractors, podiatrists, medical examiners, coroners, dentists, optometrists, and other health or mental health professionals; religious healers; school teachers and school employees; day-care facility staff; and, clergy members, among others. Section 41-3-201, MCA. There is no indication, however, that the Legislature intended to deputize this litany of professionals and individuals into law enforcement, and we refuse to attach that significance to the duty to report."

Seely v. State, 100 Ark.App. 33, __ S.E.2d __, 2007 WL 2781965 (Ark. App. Sep 26, 2007), rev'd, Seely v. State, 2008 WL 963516 (Ark. Apr 10, 2008)

People v. Mendoza, 2007 WL 3051719 (Cal. App. 5 Dist. Oct 19, 2007) (unpub) – defendant described murder to a friend who, unknown to the declarant, hoped to get a reduced sentence on an unrelated drug charge by supplying information to authorities – held: hope of reduced sentence did not turn friend into police agent for *Crawford* purposes – "Although Torres had a case pending sentencing for several months and was looking for any information about any criminal activity to report to law enforcement in the hope that he would receive a lighter sentence, it would be erroneous to characterize every conversation that Torres had with anyone involving any criminal activity after his plea and before his sentencing as testimonial."

People v. Harris, 2007 WL 2447265 (Cal. App. 2 Dist. Aug 30, 2007) (unpub) – "The mandated reporting requirement for teachers cited by appellant, is similar to the reporting statute for doctors: teachers are required to report child abuse or neglect that they have knowledge of or suspect (11166, subd. (f)). They are not required to determine whether the minor was abused for purposes of criminal prosecution." – concern about potential civil liability doesn't count

State v. Krasky, 736 N.W.2d 636 (Minn. 2007) – "The statement in the police report indicating that a police officer and a child protection worker jointly concluded that 'the best way to proceed with the investigation was to have [MCRC] do an interview with [T.K.] along with a medical exam' does not change our conclusions. Joint decisions of this type are required by Minn.Stat. § 626.556, subd. 10a (2006). As we noted in *Bobadilla*, the purpose of that statute is not the prosecution of criminals or the collection of evidence for trial. Instead, the statute declares that [¶] 'the public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse ...' As *Bobadilla* suggests, compliance with this statutory scheme, which is focused on protection of children's health and welfare, does not render the statements of a child sexual abuse complainant testimonial."

People v. Cage, 40 Cal.4th 965, 155 P.3d 205, 56 Cal.Rptr.3d 789 (Cal. 2007) – "We conclude, however, that [ER physician] Dr. Russell's mere status as a mandated reporter did not render [15-

year-old victim] John's statement to him testimonial. [¶] Significantly, the reporting statute does not oblige a doctor to *investigate* or *ascertain*, for purposes of possible criminal prosecution, whether a patient has suffered such abuse. The physician's sole duty is to make a report 'whenever [he or she] in his or her professional capacity or within the scope of his or her employment, *has knowledge of* or observes a child whom the [physician] *knows or reasonably suspects* has been the victim' of abuse or neglect. (§ 11166, subd. (a), italics added.) [¶] The mere fact that doctors must report abuse they *see, suspect, or know of* in the course of practice does not transform them into *investigative agents* of law enforcement. Nor does it convert their medically motivated questions during the examination of minor patients into investigatory interrogations that elicit testimonial responses. Here, despite Dr. Russell's incidental status as a mandatory reporter of suspected abuse, 'the circumstances objectively indicate' that the 'primary purpose' of his question, and John's answer, was to pinpoint the nature of a serious acute injury in order to provide immediate treatment, not to establish, for potential criminal purposes, that John was abused."

Commonwealth v. Allshouse, 924 A.2d 1215, 2007 PA Super 109 (Pa. Super. 2007) aff'd, 985 A.2d 847, 849-871 (Pa. 2009) cert. granted, summarily vacated and remanded, Allshouse v. Pennsylvania, 131 S. Ct. 1597, 179 L. Ed. 2d 495 (2011), reaffirmed Commonwealth v. Allshouse, 36 A.3d 163, 165-190 (Pa. 2012) – child's statements to social worker not testimonial – considering as one among several factors that social worker "did *not* report A.A.'s [4-year-old's] statements to law enforcement but, rather, notified his CYS supervisor of them after the interview, even though he had the option of reporting the incident to the police." (Italics added.)

State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (S.C. 2007) – "[S]imply because 'parents turn over information about crimes to law enforcement authorities does not transform their interactions with their children into police investigations.'" (quoting *Purvis v. State*, 829 N.E.2d 572, 579 (Ind. Ct. App. 2005), *cert. denied*, 126 S.Ct. 1580, 164 L.Ed.2d 310 (2006))

People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333, 312 Ill.Dec. 268 (Ill. 2007) (plurality opinion) – Five-year-old victim's statements to Grote, described as "a clinical specialist in charge of the hospital's child-abuse team", and Yates, described as "a social worker at the school where M.M. attended kindergarten", were testimonial – The fact that both were mandated reporters "substantially buttress[es] our conclusion that in this case, in conducting their interviews of the victim, M.M., Grote and Yates were acting as agents of law enforcement for purposes of confrontation clause analysis." – but adding that not all mandated reporters are necessarily agents of law enforcement all the time

Tips by Non-Mandated Reporters to Child Protective Services

Wells v. State, 241 S.W.3d 172 (Tex. App.-Eastland Oct 25, 2007) – "Wells argues that the trial court erred by admitting CPS records containing statements from a witness that he was not given the opportunity to cross-examine. The State offered records from the 1992 CPS investigation under the business records exception to the hearsay rule. These records included an intake form that indicated that an unnamed 'collateral' person, who had lived with Wells the last few months, reported that Wells [stepfather] had watched the [9-13 year old] victim [his stepdaughter] shower and dress, had inappropriately touched the victim, and had made

inappropriate comments. ... The record provides scant detail of the 1992 conversation between CPS and the collateral source. ... However, we do know that the collateral source described criminal behavior that had already occurred. This is significant because, as the Supreme Court noted in *Davis*, statements describing past criminal events are inherently testimonial since this mimics what a witness does on direct examination. *Id.* at 2278. *Davis* would, therefore, seemingly indicate that the collateral source's allegations were testimonial, but both *Crawford* and *Davis* involved statements to police officers, [FN3] and the Supreme Court has specifically reserved for future determination whether and when statements made to someone other than a law enforcement official are testimonial. 126 S.Ct. at 2274 n. 2. ... CPS has broad investigatory authority and responsibility over allegations of abuse committed against a child by their parent or caretaker, [FN4] and it is statutorily required to investigate anonymous reports of child abuse. [FN5] Whether the collateral source subjectively appreciated this, the record does not disclose, but knowledge of the law is imputed. ... Because the collateral source was reporting past criminal behavior by Wells to an organization statutorily required to investigate such complaints and because the record contains no evidence that the contact served anything other than an investigative purpose, we find that the statements were testimonial. By this we do not hold that all third-party contact with CPS implicates the Confrontation Clause, merely that the collateral source's allegations in this case were testimonial. Because the allegations were testimonial and because Wells did not have the opportunity to cross-examine the collateral source, the trial court erred by admitting the 1992 CPS intake form."

[NOTE: By its nature, a report of a stepfather's ongoing sexual abuse of a stepchild, the situation here, isn't solely a report of past criminal behavior. It is also, predominantly, an attempt to protect the child from future offenses, *i.e.*, the continuation of the behavior. Why else was it made to CPS rather than the police? Furthermore, CPS's authority to "investigate" child abuse isn't the same as authority to arrest or prosecute the perpetrator. If *Crawford* doesn't apply in civil litigation, why does it apply to civil investigations?]



Part 13: Domestic Violence Cases

NOTE: Most DV cases are categorized elsewhere in this outline, according to the specific legal issues identified by the authoring judge. *See*, in particular, Parts 9 and 11(A), dealing with excited utterances & 911 tapes and forfeiture by wrongdoing, respectively.

- Excited Utterances are not testimonial (mostly)
- 911 Tapes – can go either way
 - Is the caller requesting help or seeking immediate protection during an emergency– non-testimonial
 - Is the caller reporting a crime after the fact – testimonial
 - (the distinction, unfortunately, seems frequently arbitrary)

Volunteered Statements to Police

People v. Saddler, 2008 WL 660271 (Cal. App. 4 Dist. March 13, 2008) (unpub) – on rehearing, superseding prior opinion of Dec. 7, 2007 – "By trial brief, the prosecutor noted her intention to offer pursuant to the spontaneous declaration exception to the hearsay rule the statement of an unknown witness to a police officer that a man was using a woman as a punching bag under a bridge. The resulting investigation led the officer to appellant and Victoria. ... The statement made by the declarant here was not the product of an interrogation and was not testimonial in nature. It was properly admitted by the trial court."

State v. Pompey, 934 A.2d 210 (R.I. 2007) – "Officer O'Rourke testified that at 9:30 p.m. on October 12, 2005, he was called to a domestic disturbance at 29 Salmon Street. The complainant answered the door and appeared 'all scratched up and her T-shirt was ripped.' He said that complainant was very upset and physically shaking, and she spoke in a 'high voice.' Before he asked her any questions, she told Officer O'Rourke that 'Wu Wu [*i.e.*, defendant] beat me up.' ... Having reviewed the testimony in this case in the context in which the out-of-court statement was made, we are of the opinion that the complainant's statement that 'Wu Wu beat me up' was nontestimonial and made voluntarily during the initial response of the police officer to an emergency call for assistance."

State v. Warsame, 735 N.W.2d 684 (Minn. 2007) – "Shortly after midnight on October 24, 2004, the Eden Prairie Police Department received a 911 call from an individual concerning an incident at a neighboring home, located less than two blocks from the police department. Officer John Wilson responded to the call, and as he approached the address where the 911 call originated, he encountered a woman [N.A.] walking in the middle of the street. Before Wilson was able to get out of his car or speak to the woman, she stated, 'My boyfriend just beat me up.' ... After having been struck on the head with a pan and choked, N.A. attempted to call 911 but was unable to do so because the telephone lines in her home had been cut. N.A. left her home and took to the street with injuries at a time when she was in obvious distress and when Warsame was still at large. These are not circumstances indicating that N.A.'s primary purpose for talking to the police was to prosecute Warsame, as that purpose could have been achieved after she recovered for a period of time and sought medical attention. Instead, N.A. was seeking help by walking to the police department, located approximately two blocks from her home. We conclude that N.A.'s initial, volunteered statement is nontestimonial and therefore admissible at Warsame's trial."

Statements Made During Welfare Check

(category added June 2012)

Hughes v. State, 815 N.W.2d 602 (Minn. 2012) – "We conclude that none of the statements made by Hughes's wife during the welfare check, which were introduced through Officer Davis's testimony, were testimonial. While the officers conducting the welfare check went to the Hugheses' home because a coworker of Hughes's wife told the police that Hughes's wife had not shown up for work, and that the coworker was concerned that Hughes's wife was being held at her home against her will, there is nothing in the record suggesting that the questions the officers asked of Hughes's wife were aimed at anything other than assessing the situation and determining whether she needed any assistance. Nor is there any evidence to suggest that

Hughes's wife made these statements to the officers with an eye toward a criminal prosecution of Hughes. Further, it can be inferred that the officers never saw or heard anything that would have suggested to them [*18] that a crime had been or was about to be committed."

Excited Utterances / 911 Calls
(new cases are found in Part 9)

U.S. v. Crudup, 65 M.J. 907 (Army Ct. Crim. App. Jan 18, 2008) – defendant pulled wife to ground and kicked her as she was holding their baby, in full view of neighbors – "Approximately fifteen to twenty minutes after arrival at the scene, SGT Vasquez proceeded to the neighbor's house four doors down where he found appellant's wife with a bruised and swollen face. She appeared to have been crying, was clearly upset, and told SGT Vasquez appellant pushed her to the ground while she was holding their infant son, punched and kicked her, and also kicked their son in the face. ... We find Porche Crudup's statements to SGT Vasquez were testimonial and were admitted in violation of the requirements set forth in Crawford. ... Moreover, the primary purpose of the police questioning was not to enable the officer to assess the situation and to meet the needs of the victim, but was clearly with an 'eye toward trial[.]' *Id.* The MPs did not take Porche's statements immediately after arriving on the scene, but first spoke with appellant to obtain his version of events. They did not take Porche's statements until after she had already left the scene and she diffused any immediate danger by taking refuge at a residence separate from appellant."

People v. Lewis, 2007 WL 4206637 (Cal.App. 1 Dist. Nov 29, 2007) (unpub) – "As Officer Leon approached Bleyle he noticed that she was holding her face in her hands and crying loudly. Once Officer Leon caught up to Bleyle, he asked her 'what happened and if she was okay.' She did not respond to his initial inquiries, continuing to cry. According to the officer, Bleyle was 'very shaken up' when he first encountered her. Officer Leon asked her again and, after taking time to catch her breath, Bleyle moved one of her hands so Officer Leon could see her face and said: "'Look at my face, look at what he did to me.'" Officer Leon noticed a "large, swollen lump" above her left eye as well as redness and bruising around the same eye. [¶] Bleyle then told Officer Leon, without any further questioning, that the defendant had punched her in the face, identified the defendant as her husband, and provided a description of him. ... Defendant's reliance on the syntax of Officer Leon's questions is misplaced. ... [T]he mere fact that Officer Leon phrased his questions so that they sought information about the past does not negate the fact that he intended to elicit responses in order to assess the situation and provide assistance in the face of the ongoing emergency. ... Officer Leon's initial questions to Bleyle on the street, viewed objectively, were primarily to obtain necessary background information and enable him to meet an 'ongoing emergency.'"

Rankins v. Commonwealth, 237 S.W.3d 128 (Ky. 2007) – "The 911 call came in at approximately 9:55 p.m., and Officer Brown arrived at the scene only a minute or two later. Upon arriving, he was flagged down by the victim, Nicole Weaver. She was alone and leaning against a building, slumped over with one arm holding her ribs. She was crying, upset, and visibly in pain. Her face was swollen and she was having problems breathing. Officer Brown asked Weaver what happened, and she went into detail. ... The facts of the present case are similar to those in *Hammon*. Here, the police officer responded to a call, and discovered Nicole Weaver. She proceeded to tell the officer "what happened," recounting the assault by Rankin.

Under Davis and Crawford, Weaver's statements are testimonial. [FN9] The Sixth Amendment prescribes that the only method for testing their reliability is through cross-examination."

[NOTE: Two justices disagreed, concluding that the declarant "was clearly injured when the officer arrived on the scene. The perpetrator was nowhere in sight, nor did the officer have any idea exactly what he was confronting. When he asked her what had happened, he was obviously attempting to meet an ongoing emergency."]

State v. Ratner, 953 So.2d 36 (Fla. App. 4 Dist. 2007) – Officer testified: "I was in the parking lot sitting in my police car. A car pulled into the parking lot. A lady got out of her car. I saw her walking toward me. It was apparent that she had either been battered or had an accident. Her eyes were swollen. She was bleeding from the left eyebrow, and she was crying. I stepped out of my vehicle and my exact words were, my goodness what happened to you?" – she replied that her husband had beat her – court doesn't address confrontation clause issue because trial court didn't find it was excited utterance, but adds: "In order for the statement to the officer to be admissible as an excited utterance, the state would have to demonstrate that the wife did not have time for reflective thought between the beating and the statement to the officer. There is evidence that, after she was battered, the wife gathered up her small child and dog, put them both in the car, and then drove to the police station. On this record, the state has not carried its burden of demonstrating that there was no time for reflective thought." (citation omitted) – but remanding for hearing [Note: Does the act of caring for others make it a non-excited utterance???]

State v. Kemp, 212 S.W.3d 135 (Mo. 2007) – "Jackie made the statements to Michael and Laura to seek immediate emergency help, not to bear testimony. Her statements to them were not testimonial and the Confrontation Clause does not bar their admission."

State v. Wright, 726 N.W.2d 464, *474 -475, 476 (Minn., 2007) – Under *Davis/Hammon*, statements made to police after batterer in custody testimonial, apparently per se

State v. Quinn, 2007 WL 625895, ¶ 36 (Ohio App. 6 Dist., 2007) (unpub) – (Note: this is an unpublished post-*Stahl* decision reaffirming a prior, pre-*Stahl* decision involving same incident, *State v. Reardon*, 2006-Ohio-3984, 860 N.E.2d 141) – home invasion robbery – "Upon consideration of the evidence, we find that Bair did not make her identification statements with the intent that they be used as testimonial evidence against appellant. She was still experiencing the stress of the robbery and was answering the officer's questions solely to aid the police in the apprehension of the perpetrators. Under the circumstances of this case, a reasonable person would not have believed that their answers to the officer's questions would be used against the perpetrators at trial. Therefore, we find that Bair's statements were non-testimonial and that the Confrontation Clause was not violated in this case." [¶ 36]

State v. Riley, 2007 WL 625898, ¶ 20 (Ohio App. 6 Dist., 2007) (unpub) – "Clearly, Ovideo's emergency telephone call was made solely to assist police in an emergency of the moment-to alert law enforcement that he witnessed a crime in process. He told the dispatcher to hurry because he could hear sounds of distress from inside the Delgados' residence, and he was afraid get closer to look at the Cadillac's license plate. Ovideo's statements in the telephone call were non-testimonial; therefore, our inquiry ends without application of the Confrontation Clause."

City of Cleveland v. Colon, 2007 WL 179082, *4 -5 (Ohio App. 8 Dist., 2007) (unpub) – “¶ 23} The facts in this case objectively indicate that at the time the statements were made, the police officer was assisting the victim with an ongoing emergency. The suspect had just left the scene after beating the victim, the victim was bleeding from the face, and she was upset and crying. Additionally, the victim made the statements with the primary purpose of enabling the police to “meet an ongoing emergency,” i.e., to apprehend the person involved. We also note, as discussed below, that the statements made by the victim were excited utterances. We are cognizant that the rationale for admitting hearsay statements pursuant to the excited utterance exception is that the declarant is unable, because of the startling event, to reflect on the statement sufficiently to fabricate it. *State v. Wallace* (1988), 37 Ohio St.3d 87, 88. We do not believe that the statements made by the victim were under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Accordingly, we find that the statements were nontestimonial in nature.” (boldface added)

People v. Bradley, 8 N.Y.3d 124, 862 N.E.2d 79, 830 N.Y.S.2d 1, 2006 N.Y. Slip Op. 09501 (N.Y. 2006) – “Defendant had physically attacked his girlfriend at a time when two orders of protection directing him to stay away from the victim were in force. The People's only witness at trial was the police officer who testified that, in response to a 911 call, he arrived at the door of an apartment and was met there by the victim, who was visibly shaken, had blood on her face and clothing, was bleeding profusely from one hand, and walked with a noticeable limp. The police officer asked her what happened, and she stated her boyfriend threw her through a glass door. Because the victim was unavailable for trial, the police officer was allowed to testify about the events and the victim's statement. The appellate court found that the victim's statement was clearly not testimonial. The police officer's first concern upon finding the victim emotionally upset and smeared with blood was to find out what had happened so that he could decide how to prevent further harm. Consequently, defendant's rights under the Confrontation Clauses of U.S. Const. amend. VI and N.Y. Const. art. I, § 6 were not violated by the admission into evidence of the victim's statement.”

State v. Washington, 2006 Minn. App. LEXIS 169 (Minn. Ct. App. 2006) – “The 911 conversation was made under circumstances objectively indicating that the primary purpose of the interrogation was to enable police to meet an ongoing emergency. Further, the 911 recording was made shortly after the first assault, and the tape apparently recorded a second assault in progress. The recording was therefore highly probative of whether the victim was actually assaulted.”

Commonwealth v. Galicia, 447 Mass. 737, 857 N.E.2d 463 (Mass. 2006) – “The supreme judicial court concluded that the 911 recording was admissible as it concerned an assault that was actually happening and that any reasonable listener would have concluded constituted an ongoing emergency. The statements bore no witness to any event but identified an exigent circumstance and provided law enforcement with information necessary to assess the current level of dangerousness of the situation. The statements to the officers should not have been admitted because by the time they were made, the emergent nature of the situation was over.”

State v. McKenzie, 2006 Ohio 5725 (Ohio Ct. App. 2006) – “The officer testified that he had been responding to a very early morning call (apparently unrelated to this incident) and observed McKenzie walking down the street. The officer then saw the victim run out of an apartment door, waving her arms and yelling, “that's him, that's him. He's the one that just hit me.” The officer

exited his vehicle and approached McKenzie. McKenzie said, "all we was doing is arguing." The officer put McKenzie in the police car and "drove across the street to conduct a further interview with [the victim]." The officer noted the victim had a two-inch "swollen knot right in the middle of her forehead." The victim told the officer that she and McKenzie had an argument and that he grabbed her, threw her on the bed and began to choke her. He struck her several times with a closed fist and took his thumb and dug it into her eye socket, as though trying to pop the eyeball out. The officer testified that in addition to the knot on her head, the victim's eye had nearly swollen shut. *** The victim's statement, taken in context, was made in the midst of an ongoing emergency and not for testimonial purposes. *** We agree with the court that any statements the victim made after McKenzie had been secured in the police car were testimonial in nature."

Vinson v. State, 2006 Tex. App. LEXIS 7036 (Tex. App. 2006), aff'd in part and rev'd in part, Vinson v. State, 252 S.W.3d 336 (Tex. Crim. App. Jan 16, 2008), on remand for harm analysis, 266 S.W.3d 65 (Tex. App.-Hous. Aug 21, 2008)

State v. Ly, 2006 Minn. App. Unpub. LEXIS 853 (Minn. Ct. App. 2006) – "Police officers heard a male voice threaten to "hit you" coming from a car in which they found defendant and the victim. The victim was crying and had fresh blood running from her mouth. Defendant admitted to the officers that he punched the victim in the face because "she was hitting him all over." The victim and defendant had a child in common. In addition, defendant's confrontation rights were not violated because the officers, responding to an emergency situation, were not engaged in formal questioning when the victim made her first statement. In light of the victim's emotional state and the officers' need to gain control over "a threatening situation," the victim's statement was not testimonial."

Davis v. Washington, 126 S. Ct. 2266; 165 L. Ed. 2d 224 (2006) – The victim who had filed the no-contact order against defendant called 911 but hung up. The 911 operator called her back, at which time the woman stated that defendant was "jumpin' on" her. She told the operator that defendant had used his fists to beat her. On appeal, the court was asked to determine whether the admission of the 911 call violated defendant's Sixth Amendment right to confrontation. The Court held the statements to be non-testimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency."

Hammon v. State, 126 S. Ct. 2266; 165 L. Ed. 2d 224 (2006) – "The victim, defendant's wife, did not testify at trial, but had described defendant's violent conduct to arriving police officers. She memorialized the same account by affidavit. The trial court admitted her statements as excited utterances. The statements were held to be testimonial. "They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"

State v. Nouaim, 2006 N.C. App. LEXIS 232 (N.C. Ct. App. 2006) – Defendant was convicted of violating a restraining order. "Leah's statements to Officer Burgin were not testimonial. Officer Burgin testified that upon his arrival, Leah was sitting in her car with her children and "was looking around as if she was looking for someone." She had suffered an obvious injury to her neck as a result of the assault, and she was visibly "nervous." Officer Burgin asked her generally "as to the nature of the assault and why she had called." Leah told Officer Burgin how

the arguments began and how defendant grabbed her and caused an injury to her neck. Leah's statements were not made in anticipation of trial. Officer Burgin's questions were "not made in anticipation of eventual prosecution, but [were] made to assist in securing the scene and apprehending the suspect." *Lewis*, 360 N.C. at 19, 619 S.E.2d at 842."

State v. Mizenko, 2006 MT 11 (2006) – "Defendant was charged in the assault on his wife. She did not testify at trial, but her neighbor, the 911 operator, and the responding officer did. Defendant had objected to the hearsay statements on the ground that they denied him the right to confrontation under U.S. Const. amend. VI, but the trial court admitted the statements. Defendant was convicted and the court affirmed on appeal. The court held that generally, when a declarant knowingly spoke to a government agent, the statements were presumed testimonial. Because the 911-taped statements that defendant had hurt his wife were admitted without objection, the operator's testimony and the officer's testimony about the same actions, even if objectionable, were cumulative and thus harmless error. As to the neighbor's testimony about what defendant's wife said, given that the wife was in distress and addressing a non-governmental agent, she had no objective reason to believe or anticipate that her statement was going to be used in court. The wife's statement was non-testimonial, the admission of the neighbor's hearsay testimony did not offend the Confrontation Clause, and was admissible under Mont. R. Evid. 803(2)."

Marquardt v. State, 2005 Md. App. LEXIS 188 (Md. Ct. Spec. App. 2005) – A 911 call from a victim of domestic violence, made as the assault was in progress, was not testimonial under *Crawford*. The victim was requesting help, not formalizing a statement concerning a crime.

Spencer v. State, 162 S.W.3d 877 (Texas App Houston 14th Dist 2005) – "Defendant's girlfriend did not testify at trial, but the trial court allowed the two officers who responded to the girlfriend's 911 call to testify that she told them that defendant had hit her. The trial court admitted the girlfriend's initial statements to the officers under the excited utterance exception to the hearsay rule. Defendant claimed the ruling deprived him of his right to confront witnesses against him under the Sixth and Fourteenth Amendments to the United States Constitution. The court held that the girlfriend's statements to the officers were not "testimonial," under the *Crawford* test for analyzing confrontation claims because the girlfriend initiated the contact by summoning the police for help, and the officers' preliminary question at the scene was designed to ensure the safety of those on the scene and did not amount to interrogation. The court noted that even if the girlfriend's statements were made in response to questioning, preliminary questions when police arrive at a crime scene to assess and secure the scene did not constitute interrogation because they bore no indicia of the formal, structured questions necessary for statements to be testimonial."

Pitts v. State, 272 Ga. App. 182; 612 S.E.2d 1 (GA Ct of Ap 2005) – The defendant was charged with domestic violence involving his wife. The victim asserted marital privilege and did not testify at trial. "We hold that the statements the victim made to deputies after they arrived on the scene and arrested Pitts are testimonial since the statements resulted from police questioning during the investigation of a crime. At the time these statements were made, Pitts had already been handcuffed, taken outside, and placed in a patrol car. The victim made statements to government officials which a person would reasonably believe would be available for use at a later trial. Therefore, under *Crawford*, we are constrained to hold that the admission of these statements at trial infringed upon Pitts' constitutional right to confront the witness against him

since he had not had a prior opportunity to cross-examine the declarant about the contents of the hearsay statements. *** The 911 calls, however, do not come within the ambit of *Crawford*. Here, the caller's statements were made while the incident was actually in progress. The statements were not made for the purpose of establishing or proving a fact regarding some past event, but for the purpose of preventing or stopping a crime as it was actually occurring. The caller was requesting that police come to her home to remove Pitts, who she said had broken into her house. The statements made during the 911 calls were made without premeditation or afterthought. Accordingly, the 911 tape was not testimonial. ""

State v. Powers, 99 P.3d 1262 (2004) – “The court held that the trial court, on a case-by-case basis, could best assess the proposed admission of a 911 recording as testimonial or nontestimonial and whether the statement originated from interrogation. Despite the seriousness of defendant's alleged conduct, the victim's call was not part of the criminal incident itself or a request for help entitling the State to prove their case without affording defendant the opportunity to cross-examine the victim, a right case law protected. The record showed that the victim called 911 to report defendant's violation of the order and described him to assist in his apprehension, rather than to protect herself from his return. Thus, her statements were testimonial and were erroneously admitted at trial when she became unavailable. Because the 911 tape was the only evidence establishing the corpus delicti, without it, defendant's statements to police were inadmissible.”

State v. Barnes, 2004 ME 105, 854 A.2d 208 (2004) – “Defendant argued that the admission of his mother's statements to a police officer following an earlier alleged assault constituted a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. Specifically, the issue was whether the statements were "testimonial" in nature. The state supreme court concluded that the admission of the statements did not violate the Confrontation Clause for several reasons. First, the police did not seek the mother out. She went to the police station on her own. Second, her statements were made when she was still under the stress of the alleged assault. Third, she was not responding to tactically structured police questioning, but was instead seeking safety and aid. The police were not questioning her regarding known criminal activity. Thus, the interaction between defendant's mother and the officer was not structured police interrogation triggering the cross-examination requirement of the Confrontation Clause. Nor did the victim's words in any other way constitute a "testimonial" statement. Therefore, it was not obvious error for the trial court to admit the officer's testimony.”

People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Sup. Ct. 2004) and People v. Cortes, 2004 N.Y. Misc. LEXIS 663 (2004) – See previous section regarding Excited Utterances in relation to 911 calls

People v. Hunter, 2004 Cal. App. Unpub. LEXIS 5548 (2004) - The victim was unavailable for trial and due diligence had been exercised in attempting to serve her with a subpoena. Victim had also invoked her Fifth Amendment privilege not to testify at the preliminary hearing against her husband. The trial court ruled that the recording of the victim's conversation with the 911 operator on the night of the assault was admissible, that the victim's statements to the police were admissible under Evidence Code section 1370, and that statements made by the victim to her neighbor and others were admissible under Evidence Code section 1240. “At trial, the neighbor testified that when his wife brought the victim to their apartment she was bleeding around her face and very upset. She told him that her boyfriend had beaten her. The neighbor called the

police and the victim told the dispatcher that her boyfriend, Keith Hunter, had beaten her. She called two more people from his phone and told each of them that Hunter had beaten her. The responding officer also testified that the victim had told him that her live-in boyfriend, Keith Hunter, had beaten her. Despite the finding of unavailability, the victim ultimately testified at trial when called by the defense. Although this court requested supplemental briefing on the applicability of *Crawford* after reviewing the briefs submitted by both parties and the record we agree that *Crawford* has no application to this case. The victim whose hearsay statements were received in evidence did in fact testify. She stated that she had lied to the police and that in reality she was injured in a fight with another woman.”

People v. Corella, 122 Cal. App. 4th 461 (Cal App 2d Dist 2004) – Defendant assaulted his wife and she called 911 and reported the assault. She also repeated the accusation to police and medical personnel. At preliminary hearing, the victim recanted her accusation and admitted to giving a false statement. The victim did not testify at trial and her statements to the police were admitted. The conviction was upheld on appeal as not violating *Crawford* because the victim initiated the 911 call, not the police. Moreover, the victim provided spontaneous statements describing the assault and this did not rise to level of interrogation. Preliminary questions by a police officer at the scene is not an interrogation. Although the spontaneous statements were admitted at trial, these statements were made without reflection or deliberation and could not have been made in contemplation of testimonial use at trial.

People v. Victors, 353 Ill. App. 3d 801, 819 N.E.2d 311 (Ill App Ct 2004) – The victim of an assault made out-of-court statements to a police officer at the scene. Before making these statements, the victim had previously spoken with another officer for about 5 minutes. At trial, the victim did not testify and the court admitted the statements to the officer as excited utterances. On appeal, the court found the statements were not excited utterances due to the intervening interview by the first officer and, therefore, declared the statements to the 2nd officer to be testimonial and required the victim to testify at trial.

Statements to Firefighters and Other Non-Police Officials
(category added December 2012)

People v. Pham, 987 N.Y.S.2d 687, 987 N.Y.S.2d 687 (N.Y. App. Div. 3d Dept. 2014) – “The physician who examined the victim testified that all of the information in the medical records was relevant to and gathered for purposes of diagnosis or treatment, and the primary purpose of the examination was to care for the patient's health and safety, although a secondary purpose of the forensic examination was to gather evidence that could be used in the future for purposes of prosecution. ... [T]he statements were not testimonial [cite].”

Young v. State, 980 N.E.2d 412, 416-422 (Ind. Ct. App. 2012) – “Here, Medrano arrived at the fire station crying, scared, bruised, with an abrasion on her hand, and holding an infant child. The reasons for Medrano's physical [*420] and emotional state were unknown. Medrano's responses to the firefighters' initial questions showed that Young's whereabouts were not then known, and that he had taken the couple's older child with him. ... we conclude that the firefighters' initial inquiries into the situation were proper to assess the situation, to determine the extent of harm Medrano had suffered, and to determine whether the child with Young was at risk. Such inquiries are permissible under *Crawford*, and we hold that the inquiries at issue were permissible here. ... we hold that to the extent that the questioning at issue was formal, *i.e.*, on a

bench outside a fire station, it was a level of formality commensurate with the nature of Medrano's visit, a visit she herself chose to make. We therefore hold that any formality in the firefighters' questioning of Medrano was of an extremely low level and was invited and created by Medrano herself. [¶] For all of these reasons, we hold that the primary purpose of the firefighters' questioning of Medrano was to enable public, government assistance to Medrano in an ongoing emergency rather than to prove past events potentially relevant to future criminal prosecution. Therefore, the admission of Medrano's statements to the firefighters did not violate Young's confrontation rights..."

Commonwealth v. Depina, 2009 WL 36138, 2009 Mass. App. Unpub. LEXIS 79 (Mass. App.Ct. Jan 08, 2009), review denied, 453 Mass. 1106, 904 N.E.2d 429 (2009) – DV victim came to firehouse, firefighter provided first aid and asked what happened – "assuming [FD] Officer Gaylord was not a law enforcement agent within the meaning of *Gonsalves*, the statements of [victim] Rodriguez-Medina were nonetheless 'testimonial in fact' because 'a reasonable person in the declarant's position would anticipate [her] statement being used against the accused in investigating and prosecuting a crime.'"

Service of Restraining Orders

People v. Saffold, 2005 Daily Journal DAR 3473 (Cal App 2nd Dist 2005) – "The trial court admitted evidence of the proof of service of the temporary restraining order upon defendant in jail. The charges against him arose from his violation of that order. Defendant argued that the admission of the proof of service and related documents violated his Sixth Amendment constitutional right to confront witnesses because the deputy did not testify at trial and identify him as the person that he served. Thus, he argued, the State did not establish his actual knowledge of the order. In affirming, the court found that the trial court properly admitted evidence of the proof of service because it was not a "testimonial" statement within Crawford, which concerned pretrial statements given to government officers in a preliminary hearing, grand jury, a former trial, or police interrogations, among other settings. The deputy was not an accuser making a statement to government officers; he did not give testimony against defendant by serving the restraining order and completing the proof of service. He served defendant in the routine performance of his duties, and his testimony would have served primarily to authenticate the proof of service."

Protective Orders / Applications for Protective Orders

Crawford v. Commonwealth, 281 Va. 84, 704 S.E.2d 107 (Va. 2011) – "In this case, Sarah executed an affidavit for use in an ex parte court proceeding, and given the nature of the statements themselves, which describe violent, criminal acts, an objective witness would reasonably "believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52. Additionally, Sarah's statements were not made in the context of an ongoing emergency in order to enable police to help resolve that ongoing emergency. Instead, Sarah's affidavit described past events that had taken place days, weeks, and even months previously—the very purpose of which was to "establish or prove past events potentially relevant to later criminal prosecution." Davis, 547 U.S. at 822. Despite the fact that the immediate purpose of the

affidavit was to obtain a protective order in a civil case, the facts recited were, nonetheless, 'potentially relevant to later criminal prosecution.'" – testimonial

Brown v. State, 288 Ga. 404, 703 S.E.2d 624, 2010 Fulton County D. Rep. 4071 (Ga. 2010) – "Appellant next takes issue with the trial court's admission of a verified petition executed by the victim when she sought a temporary protective order from the Superior Court of Clarke County eleven days before her death. ... The trial court ruled the petition for a temporary protective order was non-testimonial because it was an emergency request for the court to act and therefore similar to a call to 911 for emergency help. We disagree with the trial court's rationale. ... The victim's sworn statement did not report events as they were actually happening and therefore differs from a call to 911 for emergency assistance. ... Inasmuch as the victim's sworn statement was testimonial in nature, it was error to admit it over appellant's objection that it violated his Sixth Amendment right to confrontation." [NOTE: A reasonable person in the victim's position would have known her statement would be evidence in her murderer's trial?]

Crawford v. Commonwealth, 55 Va. App. 457, 686 S.E.2d 557 (Va. Ct. App. 2009) (en banc), aff'd Crawford v. Commonwealth, 281 Va. 84, 704 S.E.2d 107 (Va. 2011) – "The statements at issue in this appeal are contained within an 'Affidavit for Preliminary Protective Order.' ... it is clear that the primary purpose of the affidavit is not to initiate or further a criminal prosecution, but rather 'to protect the health and safety of the petitioner' from an abuser by obtaining an ex parte preliminary protective order, a proceeding that is purely civil in nature.... Because the primary purpose of the affidavit was not to 'prove past events potentially relevant to later criminal prosecution' but rather to obtain a civil, preliminary protective [**569] order, we hold that the statements contained therein were nontestimonial under Davis and, therefore, did not implicate Crawford's Sixth Amendment right to confrontation."

Crawford v. Commonwealth, 53 Va.App. 138, 670 S.E.2d 15 (Va. App. Dec 23, 2008), superseded by Crawford v. Commonwealth, 55 Va. App. 457, 686 S.E.2d 557 (Va. Ct. App. 2009) (en banc) –

State v. Boretsky, 2008 WL 4057972 (N.J. Super.A.D. Aug 28, 2008) (unpub) – "the State introduced statements concerning the 1999 incident that Lana had made on January 19, 2002, to the municipal court judge who, by telephone, considered her application for a TRO. ... It is beyond question that the statement to the municipal judge was testimonial evidence under the *Crawford* rule."

State v. Roberts, 951 A.2d 803, 2008 ME 112 (Me. Jul 08, 2008) – D.V. murder – "[¶ 34] Contrary to Roberts's contention, admission of the August protection from abuse affidavit did not implicate Roberts's Confrontation Clause rights because Mendoza's statements contained therein were not offered for their truth."

Owens v. Com., 2008 WL 926253 (Va. App. Apr 08, 2008) (unpub) – " the juvenile and domestic relations district court issued an emergency protective order forbidding Owens from having any contact with Tara [wife/murder victim] for a week. ... In this case, the Commonwealth offered the protective order into evidence not to prove that Owens in fact assaulted Tara or that the JDR district court thought enough of the allegation to forbid him from seeing her for a week. The protective order was offered to establish Owens's motive in killing Tara. ... Its admission into evidence did not offend the hearsay rule and, as a result, could not

constitute testimonial hearsay in violation of the Confrontation Clause. ... FN1. Given our holding, we need not address whether the protective order would be testimonial even if hearsay."

Brunson v. State, 2006 Ark. LEXIS 634 (Ark. 2006) – "At trial the orders were admitted into evidence merely to corroborate the testimony by various witnesses that Gloria had obtained a protective order against Brunson and that Brunson violated that order. The orders contained only a passing *pro forma* remark concerning Gloria's claims of domestic abuse. Moreover, the State did not need the orders to prove that Brunson abused Gloria because it presented independent testimony from Lorraine Graham that Brunson physically abused Gloria. We conclude that the protective orders were not admitted for a hearsay purpose—that is, to show that Gloria was abused. Rather, the orders were admitted as an operative fact, to show that Gloria had in fact sought and obtained orders of protection, thereby indicating the state of the marital relationship. Thus, *Crawford* is inapposite, and we hold that the circuit court did not abuse its discretion in admitting the orders."

People v. Thompson, 349 Ill. App. 3d 587; 812 NE2d 516 (Ill. App. Ct. 2004) - Victim did not testify at trial and there was no determination as to unavailability. Defendant testified and during cross-examination was impeached with a protective order previously obtained by the victim that contained statements of prior abuse. Defendant was convicted for aggravated battery. Use of the prior protective order containing statements by the victim of prior abuse violated *Crawford* because the victim was not subjected to cross-examination of those statements.

Mandated Reporting of Domestic Abuse

State v. Bella, 231 Ore. App. 420, 220 P.3d 128 (Or. Ct. App. 2009) – "Nothing in the wording of the [mandatory reporting} statute suggests—much less compels, as defendant contends—the conclusion that it alters the purpose of an encounter between a physician and a patient. ... In other words, if the primary purpose of an encounter between a physician and a patient is the provision of medical treatment, the fact that the statute imposes an obligation to report any suspected nonaccidental injury of which the physician may learn during that process does not alter the primary purpose of the encounter itself."

Krizman v. Horel, 2008 WL 2367297 (C.D. Cal. Jun 10, 2008) (unpub) (habeas) – "The Court rejects petitioner's argument that the duty of Mrs. Krizman's medical providers to report domestic abuse to the authorities necessarily transformed Mrs. Krizman's statements into testimonial hearsay. At the time of Mrs. Krizman's visit with her medical providers, neither Nurse Warren nor Dr. Kaplan had a role in any police investigation, and neither were working on behalf of or in conjunction with the police to develop evidence for the prosecution. As the state court reasonably concluded, the evidence indicated that Mrs. Krizman's discussions regarding her injuries were for the purpose of medical diagnosis and treatment. There is no indication that a reasonable person in Mrs. Krizman's position would have expected, or intended, her statements to be used against petitioner in a later proceeding. [cites] In short, the Court finds that under these circumstances, the duty to report spousal abuse would not bear upon an objective witness' understanding of Mrs. Krizman's discussions with Nurse Warren and Dr. Kaplan concerning her injuries."



Part 14: Elder Abuse and Disabled Adults

- Statements to Police or Protective Services
 - Many incidents of elder abuse are rendered unprosecutable by the victim's physical frailty.
- Statements to Medical Professionals
- Statements to Family or Others

Statements to Police or Protective Services

State v. Lewis, 361 N.C. 541, 648 S.E.2d 824 (N.C. 2007) – on remand from SCOTUS – "Defendant was indicted for assault with a deadly weapon inflicting serious injury on eighty-year-old Nellie Joyner Carlson ("Carlson"); felony breaking and entering into Carlson's residence at 1312 Glenwood Towers, a public housing development for senior citizens located in Raleigh, North Carolina; and robbery of currency valued at approximately three dollars from Carlson perpetrated through use of a dangerous weapon at the time of the assault. ... Carlson, the only witness to the crimes, died before defendant's trial, and the State relied in part on the testimony of Officer Narley Cashwell ("Cashwell") and Detective Mark Utley ("Utley") of the Raleigh Police Department regarding statements Carlson made during their investigation of the offenses. ... Carlson's statements to Officer Cashwell were testimonial, and admission of those statements at trial violated defendant's right to confrontation because she was not afforded an opportunity to cross-examine Carlson." [NOTE: Carlson, a cancer patient, died about 7 weeks after the attack, but not directly as a result of it.]

People v. Cooper, 2007 WL 475789, *1, *7-10 (Cal. App. 2 Dist. 2007) (unpub) – "The trial court here abused its discretion by excluding the two videotaped interviews. It relied upon the language in *Crawford* that police interrogations are testimonial, from which it erroneously extrapolated that any statement to a police officer is testimonial and subject to the confrontation clause, a conclusion rejected in *Davis*. ... The circumstances of the interview objectively indicate that its primary purpose was to assess Nelson's mental and physical condition and deal with her potentially critical need for assistance and protection." – also, statements non-testimonial when offered to show victim's mental state

However: "The February interview did evolve, in part, into testimonial questioning regarding Nelson's relationship with defendant, his involvement in her financial affairs, and her feelings towards him, aimed at implicating him for elder abuse. Because defendant had no opportunity to confront Nelson, admission of the responses to those types of questions is precluded by the confrontation clause."

Commonwealth v. Jackson, 2005 Mass. Super. LEXIS 490 (Mass. Super. Ct. 2005) – "An elderly woman, apparently alone in her home after dark, called 911 and reported that an unknown intruder had entered and might still be on the grounds. Throughout the 911 conversation, the alleged victim spoke in a tone of fearfulness, conveying concern for her safety. Some time after the conclusion of the call, police located defendant crouching down in the yard

of a nearby house. Defendant was charged with burglary and other offenses. When the alleged victim declined to testify at trial, the Commonwealth sought to introduce the 911 call to prove the burglary charge against defendant. The court found that, under the confrontation clause of U.S. Const. amend. VI, the questioning by the police dispatcher was for the purpose of securing a volatile scene and that the victim's statements in response thereto were not testimonial per se. However, because a reasonable person in the victim's position would have anticipated their use for investigation or prosecution, the statements were testimonial in fact. Consequently, they were inadmissible at trial."

People v Pirwani, 119 Cal. App. 4th 770, 14 Cal. Rptr. 3d 673 (Cal App 6th Dist 2004) – Defendant was a caretaker for victim, a dependent adult. Victim came into a large sum of money in August 1999, which was gone by February 2001. Threatened with eviction from her care facility for nonpayment of rent, she disclosed that she had entrusted the management of her finances to defendant. Shortly thereafter, victim died. Defendant was convicted of stealing victim's money. Defendant contends that her constitutional rights were violated at trial by the admission of two hearsay statements by victim: (1) a videotaped statement made by victim to police two days before she died, admitted into evidence pursuant to Evidence Code section 1380; and (2) a statement victim made to her social worker's supervisor the day after she spoke to the police for the first time, admitted as a spontaneous declaration pursuant to Evidence Code section 1240. The Attorney General conceded that *Crawford* rendered Evidence Code section 1380 unconstitutional, and that victim's videotaped statement to police was therefore erroneously admitted. The Court agreed and also concluded that victim's statement to her social worker's supervisor should not have been admitted as a spontaneous declaration. Case reversed.

Statements to Medical Professionals

Gilliam v. Com., 2008 WL 4291544 (Ky. Sep 18, 2008) (unpub) – "When the EMT arrived, he found [80-year-old] Janie sitting in a chair wearing her blood-soaked nightgown. She had numerous lacerations and contusions on her body, but was oriented to time, place, and person. The EMT further testified that Janie told him 'her oldest son had beat her up.' A subsequent examination of Janie in the emergency room revealed that her injuries were severe. She had a fracture in her spine which could have resulted in death or paralysis had it gone untreated. ... Turning to the admissibility of Janie's statement to the EMT, we find there was no ongoing emergency when Janie made the statement. Therefore, the statement was testimonial hearsay. Furthermore, we find the statement Janie made to the EMT to be akin to the statement at issue in *Rankins* [cite]. In *Rankins*, '[T]he police officer responded to a call, and discovered [the victim]. She proceeded to tell the officer 'what happened,' recounting the assault by Rankin.' [cite] Like the victim in Rankin, Janie was telling the EMT 'what happened.' Thus, her statement was testimonial." – statement also not made for purposes of medical diagnosis or treatment as "[t]he Commonwealth has failed to show how the identity of Janie's attacker was necessary for the treatment of the injuries she received." – [NOTE: An EMT is the same as a policeman? The test for medical diagnosis / treatment isn't the purpose of *either* the EMT *or* the patient, but whether a judge thinks the detail contained in a particular answer was *necessary*?]

State v. Dorsey, 2008 WL 2571851, 2008-Ohio-2515 (Ohio App. 5 Dist. May 23, 2008) (unpub) – 80-year-old rape victim, medically unable to testify – "statement to Kailey Mahan a forensic nurse and the coordinator of the Sexual Assault Nurse Examiner Program identifying

appellant as her assailant" is non-testimonial – "{¶ 75} ... Ms. Parker had already identified appellant as her assailant to the police before Nurse Mahan treated her. As was true in *Stahl*, *supra*, 'Having already identified the perpetrator to police, [Ms. Parker] could reasonably have assumed that repeating the same information to a nurse or other medical professional served a separate and distinct medical purpose...'"

State v. Cannon, 254 S.W.3d 287 (Tenn. Apr 29, 2008) – "We conclude therefore that [82-year-old] M.N.'s medical records containing her out-of-court statements to emergency room medical personnel that she had been raped were nontestimonial..." – but "M.N.'s statements to [SANE practitioner] Nurse Redolfo were not 'reasonably pertinent to diagnosis and treatment.' Id. Emergency room medical personnel had examined and stabilized M.N. before she spoke with Nurse Redolfo." – even though the SANE nurse performed a physical examination

State v. Cook, 2007 WL 475444, 2007-Ohio-625 (Ohio App. 8 Dist., 2007) (unpub) – elderly patient sexually assaulted by male nurse – "{¶ 24} The victim's statements to Nurse Schoenbeck were made in a unique setting. The assault occurred on the hospital premises while she was a patient; therefore, Schoenbeck, as the supervising nurse on call at the time of the assault, conducted the initial internal investigation on behalf of the hospital. However, she also performed the medical exam on the victim to ascertain if she was injured. In this situation, Schoenbeck operated both as a supervisor conducting an internal investigation regarding a complaint against an employee, and a medical person administering aid to the patient. In such a situation, we conclude the victim's statements to Schoenbeck were nontestimonial." ... "{¶ 26} Moreover, Schoenbeck's investigation of what occurred went towards gathering information for the hospital's internal investigation of the matter and not for developing testimony against Cook. That is, she was not collecting the statements for prosecutorial purposes, but for the hospital's internal investigation and to assess the risk Eric Cook posed to patients, and the proper disciplinary procedure to be followed."

People v. Oehrke, 369 Ill.App.3d 63, 860 N.E.2d 416, 307 Ill.Dec. 762 (Ill. App. Ct. 1st Dist. 2006), petition for leave to appeal denied (March 28, 2007) – "Defendant's 91-year-old mother was taken to a hospital emergency room. She had a one-inch bleeding wound on the top of her head, old bruising on the right side of her face, and multiple areas of bruising on her body. Defendant lived with her and was her sole caregiver. Two months later, she died of unrelated causes. Based on the mother's injuries, defendant was charged with aggravated battery. At trial, the trial court allowed into evidence statements that the mother made in the hospital in response to questions from a doctor and nurse. The statements were to the effect that the mother did not know why the son kept hitting her. However, the doctor and nurse did not ask the questions to assist in medical diagnosis and treatment but, instead, asked them to protect her from an abusive environment. The trial court found defendant guilty. On appeal, the appellate court found that the statements were not admissible pursuant to the common law hearsay exception that addressed statements made for the purpose of obtaining medical diagnosis or treatment because the statements elicited involved an attempt to protect the mother, and admission of the statements was not harmless error."

Medina v. State, 122 Nev. 346, 143 P.3d 471 (Nev. 2006) – "Defendant was convicted of five counts of sexual assault of a victim 65 years or older, one count of battery with intent to commit a crime, victim 65 years or older, and one count of first-degree kidnapping of a victim 65 years or older. The victim died before defendant's trial began. On appeal, the court found that ...

the testimony of a forensics nurse about what the victim told her during the sexual assault examination did violate the Confrontation Clause because the nurse was a police operative. ... She testified that she is a "forensics nurse" and that she gathers evidence for the prosecution for possible use in later prosecutions. As such, the circumstances under which Ryer made the statements to Adams would lead an objective witness to reasonably believe that the statements would be available for use at a later trial."

State v. Primo, 2005 Ohio 3903 (Ohio Ct. App. 2005) – "Defendant, a nurse's assistant at a nursing care facility, touched the breast of an elderly female patient. Defendant argued that the trial court erred when it admitted the victim's statements as excited utterances. The appellate court held that the victim's statements were excited utterances, pursuant to Ohio R. Evid. 803(2), as the statements related to the startling event while the victim was still under the stress caused by the event. The victim made the statements to a nurse's assistant and two nursing supervisors when they entered her room and inquired about her well-being. The victim began crying and indicated that a black man had pinched or grabbed her breast. The statements in question were not testimonial in nature, and the admission of the statements by the trial court did not violate defendant's right to confrontation."

State v. Johnson, 2005 Del. Super. LEXIS 253 (Del. Super. Ct. 2005) – "The elderly victim had expressed fear of defendant, her former handyman, after an earlier burglary, and she did not want to discuss the alleged later rape with police at all. She did make many statements to medical professionals, immediately after the incident and after her return to her winter home, and to her children. Except for a few statements to a nurse who had a role in gathering forensic evidence, the court held that most of the statements were nontestimonial in nature under a Sixth Amendment analysis, so that they would be admissible if they fell within a deeply rooted hearsay exception under Del. R. Evid. 803 and bore indicia of reliability. Many of the statements were clearly admissible as made for purposes of obtaining medical treatment, and others were excited utterances. Statements of the victim's then-existing state of mind with regard to fears of returning to the house were admissible, but other statements that would have related to the history of the victim's fears of defendant were not. Finally, since there was plenty of other evidence as to the victim's medical condition, the court declined to admit her medical treatment records as business records."

Statements to Family or Others

Gilliam v. Com., 2008 WL 4291544 (Ky. Sep 18, 2008) (unpub) – "Carolyn went to the home of her other brother, Harold, so that he could help her look for their mother. She found [her 80-year-old mother] Janie sitting in a chair on Harold's front porch, wearing her nightgown and covered in blood. Carolyn immediately asked, 'Mother, what's wrong with you?' Janie replied, 'James beat me up, threw me out of the trailer, and tried to kill me.'" – held: not testimonial because made in response to emergency – in other words, court assumes statement by elderly woman to her own daughter would be testimonial if made in other circumstances

State v. Brocca, 979 So.2d 430 (Fla. App. 3 Dist. Apr 23, 2008) – "The State charged Daniel Brocca ("Brocca") with sexual battery of a thirty-two-year-old, mentally disabled adult after the victim told his mother about the incident, and she reported it to the police. ... Turning first to the statements the victim made to his mother, we conclude that they are nontestimonial."

People v. Jordan, 2007 WL 1160009, *4 (Mich. App. 2007) (unpub) – Defendant broke into a 73-year-old woman's house, robbed and raped her – police responded to the wrong address and defendant wasn't caught until a DNA match was made years later – in the meantime the victim had died – "The victim then went outside in her nightgown yelling for help. The owner/operator of a service station (Ferris) across the street responded and 911 was again called. ... When Ferris first encountered the victim she told him that she had been raped ... Defendant further argues that Ferris should be considered an agent of the police because 'he acted as a police agent in relaying [the victim's] report to the 911 operator and must have been seen as an agent ... by the declarant [because] she told him "to please call the police.'" ... [W]e conclude that Ferris was not an agent of the police. Although Ferris relayed information to the police at the request of the victim, this would at most *arguably* make him an agent of the victim."

Medina v. State, 2006 Nev. LEXIS 112 (2006) – "Defendant was convicted of five counts of sexual assault of a victim 65 years or older, one count of battery with intent to commit a crime, victim 65 years or older, and one count of first-degree kidnapping of a victim 65 years or older. The victim died before defendant's trial began. On appeal, the court found that the victim's statement to a neighbor that she was raped, which was made the day after the rape, was an excited utterance under Nev. Rev. Stat. § 51.095. The statement was uttered in response to the appearance of the neighbor, a rescuer. The victim had not yet changed out of her blood-soaked undergarments or attempted to seek help from emergency services. The neighbor's testimony did not violate the Confrontation Clause of the United States Constitution because the victim's statement to her was not testimonial."

Victims with Dementia (category added June 2011)

Commonwealth v. Figueroa, 79 Mass. App. Ct. 389, 946 N.E.2d 142 (Mass. App. Ct. 2011) – "The incident at issue [rape] took place in a nursing home where the eighty-six year old victim, who suffered from dementia, was a patient. The inquiries made by Smith and Miller, in the informal setting of the victim's room, were related to medical care even though they were made in an effort to determine what had occurred. The victim's response, which indicated that the defendant had done 'the test' again, further demonstrates that the victim understood the question to be about her medical condition."

Developmentally Disabled Victims

State v. Brocca, 979 So.2d 430 (Fla. App. 3 Dist. Apr 23, 2008) – "The State charged Daniel Brocca ("Brocca") with sexual battery of a thirty-two-year-old, mentally disabled adult after the victim told his mother about the incident, and she reported it to the police. ... Turning next to the victim's statements to the State Attorney interviewer, we conclude that these statements are testimonial because: (1) they were made to a government agent; (2) while there was no ongoing emergency; and (3) the primary purpose of the interrogation was to establish or prove past events in connection with the criminal prosecution." – [NOTE: *Whose* primary purpose? Opinion doesn't say.]

People v. West, 2007 WL 1491075, *4 (Mich. App. May 22, 2007) (unpub) – rape case – "Although the victim's biological age was 21 years old at the time of trial, the record showed that she had the mental capacity of a nine-year-old child. A Pontiac school psychologist testified that, according to the victim's 2000 psychological evaluation, she 'is functioning in the lower realm of the mildly impaired, mildly developmentally disabled, mildly to moderately impaired range of retardation.' The victim is one point from a 'moderately retarded' classification. The psychologist explained that a person with an average intelligence has an IQ score of between 90 and 109, but the victim's overall IQ score is 56. The psychologist testified that the victim is functioning as a nine-year-old child, that 'both her expressive and receptive language skills are very depressed,' and she has "mental confusion" in understanding questions. ... Defendant further argues that he was denied his right of confrontation by the victim's intransigence and lack of memory during cross-examination. ... Defendant was able to confront the victim. The victim testified under oath and was subjected to cross-examination, and the jury had the opportunity to observe her demeanor. Although the victim refused to answer certain questions and claimed memory problems, defense counsel used her lack of recall and unresponsiveness to contest the credibility of her testimony. ... Defendant was not denied his right of confrontation."

State v. Hosty, 944 So.2d 255 (Fla. 2006) – Florida's hearsay statute for mentally disabled adults is constitutional if the statements are non-testimonial (i.e., statements by the victim to a teacher), but the statute is unconstitutional for testimonial statements (i.e., statements by the victim to a police officer). The court opted to not address the statute as to elderly adults.

State v. Eichholz, 2006 Minn. App. Unpub. LEXIS 759 (Minn. Ct. App. 2006) – The defendant was convicted of sexually assaulting his adult daughter who is developmentally functioning as a 2-3 year old. The court decided that the victim's statements to her caregiver and a nurse were non-testimonial and relied on their prior decisions in *Bobadilla*, *Scacchetti* and *Krasky* where the reasonable standard was addressed from the viewpoint of a young child. "The government was in no way involved with taking or eliciting the statements. DME was incompetent to testify at trial, as she functions at the level of a two- to three-year-old child. There is no evidence that DME is capable of understanding any alleged prosecutorial purpose behind the examination or her statements. Nor is there any evidence that the statements were elicited for any prosecutorial purpose. DME was brought to the hospital for a medical exam, conducted in the interest of her health and welfare."

Mandated Reporting of Elder Abuse (category added June 2011)

Commonwealth v. Figueroa, 79 Mass. App. Ct. 389, 946 N.E.2d 142 (Mass. App. Ct. 2011) – rape perpetrated on nursing home patient with early dementia – "[T]he fact that [nurse supervisor] Miller knew she would have to notify the police about the assault does not inform [*399] the inquiry [as to whether victim's statements were testimonial]. ... n8 In any event, Miller testified at the motion in limine hearing that when she questioned the victim, she was not thinking she was going to have to report it to the police. It was only after she heard what the victim told her that she knew she would have to notify the police." [NOTE: That last bit is a helpful thing to bring out when this argument is encountered.]



Part 15: Scientific Evidence

With regard to all forms of scientific evidence, questions repeatedly arise as to the proper witness(es). The fact that an analyst touched or manipulated evidence later analyzed by someone else does not necessarily make the analyst's testimony indispensable. In addition to various sections below, *see also* part 6, "Foundation / Preliminary Questions of Fact / Chain of Custody."

Breath Analysis Instrument Certification Reports, Reference Solutions, etc.

Melendez-Diaz says in dicta: "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." (Fn. 1)

People v. McCombs, 47 Misc. 3d 44, 48, 6 N.Y.S.3d 903, 906 (N.Y. App. Term. 2015) – "Confrontation Clause challenges [cite] to the admission of a breath testing machine's calibration and maintenance documents under the business records exception to the hearsay rule [cite] have been considered and rejected [cite]."

People v. Lewis, 124 A.D.3d 1389, 999 N.Y.S.2d 661 (2015) – "'documents pertaining to the routine inspection, maintenance and calibration of breathalyzer machines are nontestimonial under *Crawford* and its progeny'"

People v. Lin, 46 Misc. 3d 20, 20-26, 998 N.Y.S.2d 558, 559-63 (N.Y. App. Term 2014) – "'documents pertaining to the routine inspection, maintenance and calibration of breathalyzer machines are nontestimonial under *Crawford* and its progeny' [cites]. Thus, all issues relating to the determination of whether a testing device is working properly prior to the commencement of a test are resolved by certified copies of documentation relating to the inspection, maintenance and calibration of the instrument and any solutions used, the admission of which, pursuant to the business records exception to the hearsay rule, requires no testimony by those responsible for the inspections, maintenance, and calibrations [cite]."

State v. Hawley, 149 So. 3d 1211, 1212-20 (La. 2014) – "We granted this writ application to determine whether the state's introduction into evidence of the certification form attesting to the inspection and maintenance of the Intoxilyzer 5000 machine, and the certification form attesting to the qualifications of the maintenance technician who inspected, maintained and certified the machine, without producing the testimony of the technician, violated Mr. Hawley's Sixth Amendment right to confrontation. For the following reasons, we hold these forms are nontestimonial, and thus they are not subject to Confrontation Clause requirements." – overturning unpublished Ct. App. decision to contrary

Fyfe v. State, 334 P.3d 183 (Alaska App. 2014) – "Fyfe argues that *Abyo* and *McCarthy* were wrongly decided and should be overruled. We adhere to those decisions and uphold the superior court's decision to admit the verification of calibration reports in this case."

State v. Maga, 96 A.3d 934 (N.H. 2014) – "Unlike the certificates in *Melendez-Diaz*, the breathalyzer certificate here did not provide case-specific evidence against a particular

defendant. ... [T]his type of certificate does not establish an element of the offense of driving under the influence. ... Thus, the primary purpose of the certificate is to ensure the reliability and quality of the testing machine used by the police, and therefore serves only as the foundation for the admission of substantive evidence. ... Accordingly, we hold that the certificate attesting that the breathalyzer was in working order is nontestimonial..."

Beard v. State, 421 S.W.3d 676 (Tex. App.--Waco 2013), pet. ref'd (Apr. 2, 2014) – "Based on the reasoning and conclusions of *Boutang* and *Alcaraz*, we agree with the San Antonio Court of Appeals and hold that Brown's testimony regarding the operation of the Intoxilyzer and the use of the reference sample solution were not testimonial..."

Anderson v. State, 317 P.3d 1108 (Wyo. 2014) – "[¶ 38] ... the annual certification at issue in the instant case is not testimonial."

Phillips v. State, 324 Ga.App. 728, 751 S.E.2d 526, 531 (Ga. App. 2013) – "As the Supreme Court of Georgia has held 'an inspection certificate [of the instrument used to conduct a breath test] prepared under OCGA § 40-6-392(f) was not testimonial and was admissible.'"

Russell v. State, 126 So. 3d 145, 148 (Miss. App. 2013) – "'[R]ecords pertaining to intoxilyzer inspection, maintenance, or calibration are indeed nontestimonial in nature, and thus, their admission into evidence is not violative of the Confrontation Clause of the Sixth Amendment.' *Matthies v. State*, 85 So.3d 838, 844 (¶ 19) (Miss.2012)."

People v. Cook, 111 A.D.3d 1169, 975 N.Y.S.2d 505, 506 (N.Y. App. Div. 3d Dept. 2013) leave to appeal denied, 984 N.Y.S.2d 639 (N.Y. 2014) – "The maintenance records were prepared by employees of the State Police Forensic Investigation Center and were kept in the regular course of business. While defendant argues that the records were testimonial in nature because their purpose was to prove an element of the crime at trial, the Court of Appeals has recently rejected this argument..." (citing *Pealer*)

State v. Sagdal, 258 Or.App. 890, 311 P.3d 941, 942 (Or. App. 2013) review allowed, 325 P.3d 33 (Or. 2014) – "This issue is controlled by our earlier decisions in *State v. Norman*, [cite and parenthetical], and *State v. Bergin*..."

State v. Dial, 2013 -Ohio- 3980, 998 N.E.2d 821, 822-27 (Ohio App. 3d Dist. 2013) – "the Statement documents a pre-stop, pre-arrest test that was administered on a particular machine, not a particular defendant. {¶ 21} We therefore hold that the Statement is not testimonial, and its admission *827 into evidence at the suppression hearing absent Dial's ability to examine Norbeck did not violate her right under the Confrontation Clause..."

Commonwealth v. Dyarman, 73 A.3d 565, 566-74 (Pa. 2013) – "We granted review to determine whether the admission of accuracy and calibration certificates for breath test machines without testimony from the individual who performed the testing and prepared the certificates violated appellant's Sixth Amendment right to confrontation. Under the circumstances of this case, we hold appellant's Sixth Amendment right was not violated... Whether *Williams* creates a 'new' test, superseding *Melendez-Diaz* and *Bullcoming*, does not need to be addressed here, for the certificates at issue are nontestimonial for purposes of the Confrontation Clause under both *Melendez-Diaz/Bullcoming* and *Williams*. The calibration and accuracy certificates were not

prepared for the primary purpose of providing evidence in a criminal case, let alone for the primary purpose of accusing appellant."

People v Menegan, 107 A.D.3d 1166, 967 N.Y.S.2d 461 (N.Y. App. Div. 3d Dep't 2013) – "documents pertaining to the routine inspection, maintenance and calibration of breathalyzer machines are nontestimonial under *Crawford* and its progeny"

Alcaraz v. State, 401 S.W.3d 277 (Tex. App. San Antonio Mar. 13, 2013) – "The second issue we must address is whether creating and maintaining the 'reference samples' to be used in breathalyzer machines is 'testimonial' for purposes of the Confrontation Clause, requiring the creator to personally testify at trial. ... [W]e conclude creating 'reference samples' for use in establishing the accuracy and validity of a breathalyzer testing machine is not "testimonial" for purposes of the Confrontation Clause."

Boutang v. State, 402 S.W.3d 782 (Tex. App. San Antonio Feb. 27, 2013) – "we hold the maintenance records fall under the category of 'documents prepared in the regular course of equipment maintenance,' which the *Melendez-Diaz* Court specifically stated qualified as nontestimonial records."

People v Pealer, 985 N.E.2d 903, 962 N.Y.S.2d 592, 20 N.Y.3d 447, 451 (N.Y. 2013) – "The question presented in this appeal is whether records pertaining to the routine inspection, maintenance and calibration of breathalyzer machines can be offered as evidence in a criminal trial without producing the persons who created the records. We hold that because such documents are nontestimonial, the records are not subject to the Confrontation Clause requirements set forth in *Crawford*..."

Jones v. State, 982 N.E.2d 417, 419-428 (Ind. Ct. App. 2013) – after *Williams*, "we reframe" the analysis in prior cases but "reaffirm our prior precedents and conclude that the Certification was nontestimonial and that the court did not err in admitting it."

State v. Benson, 287 P.3d 927 (Kan. 2012) – "we hold that the certificate of calibration is not a testimonial statement and is not subject to the Confrontation Clause requirements of *Crawford*."

Chambers v. State, __ S.W.3d __, 2012 Ark. 407, 1-12 (Ark. 2012) – "we hold that the certificates were nontestimonial in nature and thus no Confrontation Clause violation occurred."

McCarthy v. State, 285 P.3d 285, 289-290 (Alaska Ct. App. 2012) – "McCarthy acknowledges that, both before and after *Melendez-Diaz*, this Court has held that Datamaster calibration reports are non-testimonial business records, and that therefore the admission of these reports does not implicate the confrontation clause. ... Several courts have considered this same issue since the United States Supreme Court issued its decision in *Melendez-Diaz*, and these courts have almost uniformly agreed that breath machine calibration records are non-testimonial. n9 We therefore adhere to our prior decisions on this issue."

Chambers v. State, 2012 Ark. App. 383, __ SW.3d __ (Ark. Ct. App. 2012), aff'd, Chambers v. State, __ S.W.3d __, 2012 Ark. 407, 1-12 (Ark. 2012) – "The certificates at issue in this case are not testimonial statements. These particular certificates were not prepared for the purpose of prosecuting Chambers. They were prepared for the purposes of certifying that Officer

Beck had received training on how to use the machine and certifying that the machine at issue was calibrated at a particular time and found to be accurate. The certificates are no more testimonial than a diploma or a certificate indicating that an elevator or a fire extinguisher has been tested and is operable."

Matthies v. State, 85 So. 3d 838, 839-847 (Miss. 2012) – "we specifically state that records pertaining to intoxilyzer inspection, maintenance, or calibration are indeed nontestimonial in nature, and thus, their admission into evidence is not violative of the Confrontation Clause of the Sixth Amendment. We are firmly convinced that our decision today is not in conflict with *Crawford*, *Melendez-Diaz*, or *Bullcoming*." [NOTE: Four justices dissent from this uncontroversial holding, showing how easy it is to justify any result with scraps of rhetoric from *Melendez-Diaz* and *Bullcoming*.]

State v. Kramer, 278 P.3d 431, 431-433 (Idaho Ct. App. 2012) – "Unlike the reports in *Melendez-Diaz* and *Bullcoming*, the Intoxilyzer 5000 certificates admitted over Kramer's objection in this case were not direct proof of an element of the crime of driving under the influence. The certificates admitted regarding the calibration of the testing instrument were not offered to prove that Kramer's BAC was above the legal limit; rather, the certificates were admitted as proof that the testing instrument was working properly. ... The Intoxilyzer 5000 certificates admitted into evidence are not testimonial..."

People v Hulbert, 93 A.D.3d 953, 939 N.Y.S.2d 661, 2012 NY Slip Op 1698 (N.Y. App. Div. 3d Dep't 2012) – "He now appeals, contending solely that County Court erred in admitting into evidence two breath test machine maintenance and calibration records and a simulator solution certification. ... Here, the documents at issue, which were not created solely for the purpose of prosecuting defendant, contained statements that the breath test machine had been routinely tested to ensure that it accurately measured a sample of simulator solution and also contained an analysis of the simulator solution that had been used." – non-testimonial

State v. Britt, 283 Neb. 600, __ N.W.2d __ (Neb. 2012) – "On appeal, the Nebraska Court of Appeals concluded, inter alia, that the admission of a certificate containing a chemical analysis certification of the alcohol breath simulator solution used to test the machine that was used to test Britt's breath did not violate the Confrontation Clause and affirmed the district court order. We granted Britt's petition for further review. We affirm. ... We conclude that the Court of Appeals did not err when it determined that the certificate was not testimonial and not subject to confrontation analysis."

Commonwealth v. Dyarman, 2011 PA Super 245, 33 A.3d 104 (Pa. Super. Ct. 2011), appeal granted (April 16, 2012) – "the calibration logs were admitted into evidence to establish the chain of custody and accuracy of the device used to test Appellant's BAC; they were not created in anticipation of Appellant's particular litigation, or used to prove an element of a crime for which Appellant was charged. Therefore, although relevant evidence, the logs were not 'testimonial'..."

People v Pealer, 89 A.D.3d 1504, 933 N.Y.S.2d 473, 2011 NY Slip Op 8397 (N.Y. App. Div. 4th Dep't 2011) – "the statements contained in the breath test documents are not accusatory in the sense that they do not establish an element of the crimes. Indeed, standing alone, the documents shed no light on defendant's guilt or innocence ... Thus, the government employees

who prepared the records were 'not defendant's accuser[s]' in any but the most attenuated sense' ... Contrary to defendant's contention, this case is distinguishable from *Bullcoming*... the breath test documents were offered merely to show that the breath test machine functioned properly, which is not an element of DWI."

Matthies v. State, __ So.3d __, 2011 Miss. App. LEXIS 300, 9-10 (Miss. Ct. App. May 31, 2011) – "[¶ 5] The precise issue before us is whether, for the proper admission of intoxilyzer calibration records, the Confrontation Clause requires the person who calibrated the intoxilyzer to testify. ... [¶ 13] Though the intoxilyzer was calibrated for use in criminal prosecutions, the certificates were not specifically prepared with an eye on prosecuting Matthies. Therefore, the calibration records in this case are different from the lab analysts' certificates at issue in *Melendez-Diaz*... [¶ 14] we affirm the circuit court's judgment and join the numerous other jurisdictions that have found *Melendez-Diaz* does not always require the person who calibrated an intoxilyzer to testify for the proper admission of the calibration records."

Commonwealth v. Zeininger, 459 Mass. 775, 947 N.E.2d 1060 (Mass. 2011), cert. denied (Oct. 17, 2011) – "The principal issue in this case is whether an annual certification, and accompanying diagnostic records, attesting to the proper functioning of the breathalyzer machine used to test a defendant's blood alcohol content were admissible in a criminal prosecution for operating a motor vehicle while under the influence of intoxicating liquor, G. L. c. 90, § 24 (1) (a) (1), without the live testimony of the technician who had performed the certification test on the machine. The certification and supporting records were created as part of a regulatory program providing standardized mechanisms for the routine maintenance of all breathalyzer machines throughout the Commonwealth. Given this fact, we conclude that they were admissible in evidence as business records pursuant to G. L. c. 233, § 78, and were not testimonial statements..."

People v Damato, 79 A.D.3d 1060, 913 N.Y.S.2d 740, 2010 NY Slip Op 9525, 1-2 (N.Y. App. Div. 2d Dep't 2010) – "Contrary to the defendant's contention, his constitutional right to confront adverse witnesses was not violated by the admission of calibration certificates referable to the breathalyzer machine employed by the police to test his blood alcohol level after he was stopped and detained, since the certificates are not testimonial..."

People v. Jacobs, 405 Ill. App. 3d 210, 212-219, 939 N.E.2d 64, 345 Ill. Dec. 335 (Ill. App. Ct. 4th Dist. 2010) – "We find the testimony and logbooks provided in this case as to the certification of the Breathalyzer were not testimonial and established a sufficient foundation that it was regularly tested and accurate. We also find our decision is not contravened by the Supreme Court's decision in *Melendez-Diaz*."

Jacobson v. State, 306 Ga. App. 815, 817-818, 703 S.E.2d 376, 2010 Fulton County D. Rep. 3747 (Ga. Ct. App. 2010) – "we have already held that certificates of inspection for the Intoxilyzer 5000 'do not fall within the class of documents prohibited by *Melendez-Diaz* because they are not generated for the prosecution of a particular defendant.'"

Ritter v. State, 306 Ga. App. 689, 703 S.E.2d 8, 2010 Fulton County D. Rep. 3074 (Ga. Ct. App. Sept. 16, 2010) – "In the instant case, the certificates at issue do not fall within the class of documents prohibited by *Melendez-Diaz* because they are not generated for the prosecution of a particular defendant."

State v. Lindner, 252 P.3d 1033, 1-9 (Ariz. Ct. App. Sept. 28, 2010) – "The Melendez-Diaz decision accordingly did not overrule our holding in *Bohsancurt* that the Intoxilyzer calibration and quality assurance records are nontestimonial, and instead expressly noted that it would not go so far as to say these types of records were testimonial."

Settlemire v. State, 323 S.W.3d 520 (Tex. App. Fort Worth July 8, 2010), pet. ref'd (2010) – "Settlemire contends that the intoxilyzer maintenance records and breath test results are testimonial in nature and that the trial court erred in admitting those records over his objection. ... The Court in Melendez-Diaz was apparently aware that its holding might be construed to extend to technical analysts who calibrate and operate equipment, such as the person who supervised Settlemire's intoxilyzer test equipment here. [citing M-D n.1]... We shall not construe Melendez-Diaz as doing what the Court clearly stated it was not doing. We hold that Settlemire's rights of confrontation were not violated."

People v Lent, 29 Misc. 3d 14, 908 N.Y. Supp.2d 804, 2010 NY Slip Op 20283 (N.Y. App. Term July 16, 2010), leave to appeal denied, 908 N.Y.S.2d 166 (Aug. 31, 2010) – "While the purpose of accurate breath-alcohol measuring machines is to produce evidence that may be used at trial, the calibration and maintenance documents in relation to the machines are not testimonial. Calibration and maintenance records are created 'in recognition of their necessity in the event of litigation and constitut[e] a part of the foundational predicate for the admission of BAC test evidence' [cite]. However, such records do not result from structured police questioning, they are not created in response to any effort at gathering incriminating evidence against a particular accused, they reflect objective facts without discretionary aspect, they do not involve opinions or conclusions relevant to a particular investigation, and they do not constitute 'a direct accusation of an essential element of any offense' [cite]. Additionally, such records satisfy the Rawlins criteria to the extent that they were not 'prepared in a manner resembling ex parte examination.' In light of the purpose of creating the documents, there is no reason to suspect a preparer's 'motive' to accomplish anything other than 'to fulfill [the] official mandate that the machines be maintained in working order'..."

State v. Johnson, 233 P.3d 290 (Kan. Ct. App. 2010) – "Johnson recognizes this issue has been decided directly against him in *State v. Dukes*,...: 'Documents showing certification or calibration of a breath-test machine or certification of the machine operator do not constitute testimonial evidence under *Crawford*' ... Johnson encourages us to grant his claim based on the recent United States Supreme Court decision in *Melendez-Diaz* ... We do not find the facts in *Melendez-Diaz* to be comparable, where the evidence there was a certificate of a state laboratory analysis stating that drugs seized by the police were cocaine of a certain quantity. That dealt with an element of the crime and not just the certification of a machine."

Ramirez v. State, 928 N.E.2d 214, 215 (Ind. Ct. App. 2010) – "This is the first time since *Melendez-Diaz* that we have reexamined whether breath test inspection certificates are testimonial and subject to the confrontation right, but we see no reason that *Melendez-Diaz* disturbs this Court's holdings in *Johnson*, *Jarrell*, *Rembusch*, and *Napier*."

People v. Carreira, 2010 NY Slip Op 20014; 27 Misc. 3d 293; 893 N.Y.S.2d 844 (N.Y. City Ct. 2010) – "For reasons discussed below, the Court finds that both the simulator solution and calibration records are testimonial for Sixth Amendment purposes and therefore inadmissible

absent live testimony by those who prepared them." – acknowledging that "[t]he Court's decision contradicts most other New York courts which have considered this issue. They have found both calibration and solution records non-testimonial for Confrontation Clause purposes. [cites]"

State v. Bergin, 231 Ore. App. 36, 217 P.3d 1087 (Or. App. Sep 23, 2009) – "Defendant petitions for reconsideration of our disposition in *State v. Bergin*, 229 Or.App. 236, 211 P3d 984 (2009). In that case, we affirmed without opinion his conviction for driving under the influence of intoxicants (DUII). He argued that the trial court erred in admitting, over his objection, certificates attesting to the accuracy of the Intoxilyzer that was used to test his breath, because the state had not demonstrated that the technician who created the certificates was unavailable at trial and that defendant previously had had the opportunity to cross-examine him or her. Defendant correctly infers that we affirmed his conviction because ... his argument based on the Sixth Amendment to the United States Constitution was decided adversely to his position in *State v. Norman* ... In his petition for reconsideration, he now argues that, eight days after our decision in his case, the United States Supreme Court 'implicitly overruled *Norman*' in *Melendez-Diaz* We grant defendant's petition and, on reconsideration, adhere to our former disposition, because we conclude that *Melendez-Diaz* did not overrule *Norman*."

People v. Heyanka, 2009 NY Slip Op 29379; 25 Misc. 3d 978; 886 N.Y.S.2d 801 (N.Y. Dist. Ct. Aug 19, 2009) (trial judge order) – "Each of the exhibits at issue consists of a certification of analysis of breath alcohol simulator solution prepared by a toxicology technician at the New York State Police Headquarters Crime Laboratory, accompanied by certification that the document is an exact photocopy of the original record of the New York State Police Headquarters Crime Laboratory and was made in the regular course of business. ... The reports at issue in this trial similarly were prepared with the reasonable expectation that they would be used in criminal prosecutions. The reports are testimonial in nature, and their admission into evidence, in the absence of the technician or analyst who prepared them, violates the defendant's Sixth Amendment right to confrontation." [NOTE: For an example of New York opinion coming to opposite conclusion, and criticizing *Heyanka* for ignoring *M-D's* footnote 1, see *People v. Di Bari*, 26 Misc. 3d 1222A, 2010 N.Y. Misc. LEXIS 238, 2010 NY Slip Op 50191U (Justice Court, 2010).]

State v. Marrone, 292 S.W.3d 577 (Mo. App. S.D. Sep 15, 2009) – "Contrary to Appellant's argument, the maintenance report in this case was not created in preparation for trial. Missouri courts have stated that breathalyzer maintenance reports are considered non-testimonial."

People v. Brooks, 2008 WL 4934628, 2008 N.Y. Slip Op. 52323(U) (N.Y. Sup. Nov 19, 2008) (unpub) – "this Court holds that the calibration records satisfy the requirements of CPLR § 4518 to qualify as a business record and are not testimonial under the parameters of *Crawford*."

Rowe v. Commonwealth, 2008 WL 4754923 (Ky. App. Oct 31, 2008) (unpub) – "the breath alcohol test technician who serviced and calibrated the machine is not required to testify in-court"

People v. Russell, 385 Ill.App.3d 468, 895 N.E.2d 1131, 324 Ill.Dec. 416 (Ill. App. 3 Dist. Oct 02, 2008), appeal denied, (Ill. Jan 28, 2009) – "In *People v. So Young Kim*, 368 Ill.App.3d 717, 859 N.E.2d 92 (2006), the court ruled that an affidavit certifying the accuracy of a Breathalyzer did not violate the confrontation clause under *Crawford*. ... We adopt the reasoning of I and hold

that admission of affidavits and the log book entries certifying the accuracy of police breath alcohol testing machines (exhibits 4, 5 and 6) does not violate defendant Crawford's [*sic*] right to confront witnesses against him." – [NOTE: One judge dissents.]

State v. Benson, 2008 WL 4416028 (Kan. App. Sep 26, 2008) (unpub) – "A number of jurisdictions have held that certification or calibration regarding a breathalyzer machine is not testimonial evidence. *See Crawford*. [many cites] [¶] A calibration certificate is prepared as a routine administrative matter required by the State and is not prepared in anticipation of any particular criminal proceeding. The certificate is nontestimonial..."

People v. Stevenson, 2008 WL 4344902, 2008 N.Y. Slip Op. 51933(U) (N.Y. Sup. App. Term Sep 24, 2008) (unpub) – "Documents relating to the proper working condition of the breathalyzer machine were not testimonial in nature"

Salt Lake City v. George, 189 P.3d 1284, 2008 UT App 257 (Utah App. Jul 03, 2008) – "Because the certificates/affidavits contain only factual memorializations generated by a standardized test of a scientific machine and are created as part of a routine calibration test, we conclude that the certificates/affidavits are prepared to ensure that the breath testing instrument is accurate rather than directed to the prosecution of a specific defendant. [citing cases] As a result the documents are not testimonial."

State v. Sweet, 195 N.J. 357, 949 A.2d 809 (N.J. Jun 23, 2008), cert. denied, No. 08-381 (June 29, 2009) – "We therefore conclude that neither the ampoule testing certificates nor the breath testing instrument inspection certificates at issue are testimonial within the meaning of the Confrontation Clause..."

State v. Belvin, 986 So.2d 516 (Fla. May 01, 2008) – Under a Florida statute, a "breath test affidavit" includes both the results of the test and the instrument certification report – "Applying the rationales of *Davis* and *Crawford* to the instant case, we conclude that the breath test affidavit is testimonial."

State v. Wang, 2008 WL 1932305, 2008-Ohio-2144 (Ohio App. 5 Dist. April 28, 2008) (unpub) – "{¶ 27} Appellant argues that the statements concerning the radio used during the RFI check, the accuracy of the thermometer, and the refrigeration of the solution contained in the addendum prepared by the Senior Operator are testimonial statements as described in *Crawford* We disagree."

Wimbish v. Com., 51 Va.App. 474, 658 S.E.2d 715 (Va. App. Apr 08, 2008) – "Since *Crawford* was decided, several other jurisdictions have addressed the issue of whether similar maintenance logs are testimonial. [FN3] Those courts that have held that maintenance logs are nontestimonial have generally done so for one of two reasons. One line of cases holds that maintenance logs are not testimonial because they are business records 'made and maintained in the ordinary course of business.' [cites] A second line of cases holds that maintenance logs are not testimonial because they are not evidence 'against' any particular defendant. [cites] We find the analysis supporting both lines of cases persuasive."

State v. Chun, 194 N.J. 54, 943 A.2d 114 (N.J. Mar 17, 2008) – documents pertaining to operator's qualifications and good working order of Alcotest device are non-testimonial

State v. Luke, 2008 WL 218014 (Hawai'i App. Jan. 28, 2008) (unpub) – summary disposition order – non-testifying witness's "assertions in State's Exhibits 3 and 4 about the Intoxilyzer's accuracy" are not testimonial

State v. Johnson, 879 N.E.2d 649 (Ind. App. Jan. 25, 2008) – reaffirming prior decisions holding breath test certification documents are non-testimonial

State v. Granillo-Macias, 2008-NMCA-021, 143 N.M. 455, 176 P.3d 1187 (N.M. App. Dec 20, 2007), cert. denied, 2008-NMCERT-02 (Feb. 1, 2008) – prosecution may establish that breathalyzer is functioning properly and certified through hearsay – "[¶21] It is important to note the distinction between (1) preliminary factual evidence (testimony as to certification) to establish a foundation for the admission of evidence to be used at trial (the breath test results), and (2) the evidence to be used at trial (the breath test results). The witness that Defendant demands for cross-examination would present nothing more than preliminary factual evidence to establish a foundation for the admission of evidence to be used at trial. ... '[t]he protections afforded by the Confrontation Clause do not extend to preliminary questions of fact.'"

State v. Dukes, 174 P.3d 914 (Kan. App. Jan 18, 2008) – "We begin by noting that courts in 14 other jurisdictions have held that proof of the breath-test machine's calibration or certification is not testimonial evidence and thus not subject to Confrontation Clause restrictions under *Crawford*. [listing cases] ... The *Crawford* Court noted that business records are not necessarily testimonial. 541 U.S. at 56. We agree with the vast majority of courts that have determined that records showing certification or calibration of breath-test machines and operators are not testimonial and thus not subject to *Crawford's* requirement that a witness be produced for cross-examination." [NOTE: The *Crawford* Court noted that business records are, "by their nature", non-testimonial, which is rather different!]

State v. Buttolph, 969 So.2d 1209 (Fla. App. 4 Dist. Dec 12, 2007) – "The state appeals a county court non-final order in a DUI case to the effect that the annual inspection reports of breath testing instruments are testimonial under *Crawford* ... The court certified the question to this court as one of great public importance. We have discretionary jurisdiction to review such an order. [cite] [¶] Shortly after the state's initial brief was filed, we held in *Pflieder v. State*, 952 So.2d 1251 (Fla. 4th DCA 2007), that these annual inspection reports are nontestimonial under *Crawford*, which is contrary to the trial court's ruling."

City of Cincinnati v. Kieser, 2007 WL 2458416, 2007-Ohio-4467 (Ohio App. 1 Dist. Aug 31, 2007) (unpub) – adhering to prior rulings that "a [batch and bottle] certification is nontestimonial within the meaning of *Crawford v. Washington*."

People v. Hagadorn, 2007 WL 2380301 (Mich. App. Aug 21, 2007) (unpub) – "Defendant further argues that *Crawford v. Washington*, 541 U.S. 36, 42; 124 S Ct 1354; 158 L.Ed.2d 177 (2004), prohibited admission of the DataMaster logs without the opportunity to confront Marvin Guyer, the Class IV operator who conducted the 120-day tests on the machine. ... Because the DataMaster logs in the instant case were also properly admitted under the business-records exception to the hearsay rule, they likewise were not testimonial and *Crawford* is not implicated. The cases that defendant cites on appeal are distinguishable in that the laboratory reports at issue in those cases pertained to particular suspects. In the instant case, however, the DataMaster logs

did not pertain to defendant, but were maintained merely as a record evidencing the routine testing of the machine. "

Abyo v. State, 166 P.3d 55 (Alaska App. Aug 10, 2007) – "At trial, the State attempted to introduce documents to verify that the DataMaster breath test machine was properly calibrated. Abyo objected, claiming that he had a right to cross-examine the author of the documents under *Crawford v. Washington*. ... Before *Crawford*, this court and our supreme court held that verification of calibration reports were admissible without subjecting the author to cross-examination, but we have not decided the issue since then. [fn] We therefore must decide whether verification of calibration reports are testimonial under *Crawford*. ... Verification of calibration reports are mandated by the administrative rules, [fn] are created whether or not the DataMaster machine whose calibration is being verified is used, [fn] and are not created in anticipation of litigation in a particular case. We therefore find that verification of calibration documents for breath test machines are nontestimonial and reaffirm that their introduction without cross-examination of the author does not implicate the confrontation clause. The court did not err in allowing the State to introduce the verification of calibration documents without subjecting the author to cross-examination."

State v. Marshall, 114 Hawai'i 396, 163 P.3d 199 (Hawai'i App. Jun 22, 2007), cert. denied (with dissent), 117 Hawai'i 234, 177 P.3d 1278 (Hawai'i Dec 13, 2007) – "While Hawai'i appellate courts have not ruled on the admissibility of sworn statements made by Intoxilyzer supervisors since the Supreme Court's decision in *Crawford*, the majority of state courts considering the issue have decided that *Crawford* does not bar the use of documentary evidence to establish the foundation for breath test results: [list of cases omitted]. While not controlling, the cases do amount to persuasive legal authority that the Supervisor's statements were not 'testimonial' hearsay."

State v. Dorman, 393 N.J.Super. 28, 922 A.2d 766 (N.J. Super. A.D. May 11, 2007), certification granted, State v. Dorman, 192 N.J. 475, 932 A.2d 26 (N.J. Sep 11, 2007) – "[I]n *Renshaw*[390 N.J.Super. 456, 915 A.2d 1081 (App.Div.2007)], we held that a blood test certificate issued pursuant to N.J.S.A. 2A:62A-11 is 'testimonial' under *Crawford*, and therefore triggers a defendant's right to confrontation. *Id.* at 467. Similarly, in *State v. Kent*, --- N .J.Super. ---- (App.Div.2007) (slip op. at 2-3), we reaffirmed our holding in *State v. Berezansky*, 386 N.J.Super. 84, 94, 899 A.2d 306 (App.Div.2006), that a State Police chemist's laboratory report is 'testimonial' under *Crawford*, and thus cannot be used in lieu of presenting the testimony of the chemist who actually performed the test. [¶] These decisions have a common element triggering a defendant's right of confrontation: the State's use of a document created for the specific purpose of establishing an essential element of the offense. By contrast, the certificates of operability at issue here were not created with any specific case in mind. These operability certificates are intended to document the regular business function of maintaining a particular breathalyzer machine. As such, these documents are properly admissible as a business record under N.J.R .E. 803(c)(6)." – collecting cases from other states coming to same conclusion

Pflieger v. State, 952 So.2d 1251 (Fla. App. 4 Dist. 2007) – "Annual inspection reports contain an inspector's technical review of the Intoxilyzer 5000 pursuant to the applicable administrative requirements. ... [T]he actual maintenance report is not compiled during the investigation of a particular crime, as *Crawford* contemplates. *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 129 P.3d 471, 477 (2006). The evidence is not "against" any particular defendant. *Id.*; see *Crawford*, 541

U.S. at 51, 124 S.Ct. 1354 (confrontation clause "applies to 'witnesses' against the accused"). "[D]ocuments establishing the existence or absence of some objective fact, rather than detailing the criminal wrongdoing of the defendant, are not 'testimonial.'" *Michels v. Commonwealth*, 47 Va.App. 461, 624 S.E.2d 675, 678 (2006). [¶] Taking the above cases and the purpose behind annual inspection reports into consideration, we hold that those reports are non-testimonial. An inspection report, like the hospital record of a blood test, is intended for the non-testimonial purpose of making sure the machine is working properly or for accurate medical treatment, respectively. Using these reports for a litigation purpose is a secondary purpose and therefore does not raise the concerns expressed in *Crawford* of unreliability."

Granville v. Graziano, 2007-Ohio-1152, 2007 WL 764765, *2 -3 (Ohio App. 5 Dist. 2007) (unpub) – "Exhibit 1 contains documents evidencing the breath test results and instrument checks performed on the BAC Datamaster breath machine on dates prior and subsequent to the date of Appellee's arrest. The instrument checks were performed by Sergeant David Dudgeon of the Granville Police Department. Exhibit 1 also contains documents executed by the Director of the Ohio Department of Health evidencing the status of Wilson and Dudgeon as Senior Operators qualified to perform instrument checks and operate the BAC Datamaster as well as certification of batch solution used to perform the instrument checks." – documents in Exhibit 1 were non-testimonial – following *Village of Granville v. Eastman*, 2006-Ohio-6237, 2006 WL 3423372 (Ohio App. 5 Dist., Nov. 27, 2006), and *State v. Pumphrey*, 2007-Ohio-251, 2007 WL 172034 (Ohio App. 5th Dist., Jan. 22, 2007)

State v. Fischer, 272 Neb. 963, 726 N.W.2d 176 (Neb. 2007) – drunk driving, "certifications regarding the concentration of the alcohol breath simulator solution" – "Exhibit 11 was prepared in a routine manner without regard to whether the certification related to any particular defendant. Indeed, the statements in exhibit 11 were made in February 2004, and the crime in this case did not occur until June 2004. The statements made in exhibit 11 were too attenuated from the prosecution of the charges against Fischer for the statements to be 'testimonial' in the sense required under *Crawford*, *Davis*, and the Confrontation Clause."

State v. Barber, 2006 Ore. App. LEXIS 1938 (Or. Ct. App. 2006) – Certification records of the breath test machine are non-testimonial public records.

Vill. Of Granville v. Eastman, 2006 Ohio 6237 (Ohio Ct. App. 2006) – Certification documents of the BAC Datamaster are non-testimonial business records.

People v. Hrubecky, 236 N.Y.L.J. 116 (2006) – On appeal, the court applied the Davis/Hammon primary purpose test to whether evidence of test ampules, certified copies of simulator solution certification, and calibration/maintenance records of a breath test instrument were testimonial. The court found the evidence to be non-testimonial as it did not offer testimony against the defendant, but instead certified the equipment.

People v. Kim, 2006 Ill. App. LEXIS 1038 (Ill. App. Ct. 2d Dist. 2006) – "Defendant argued that admitting the affidavit of an officer who certified the Breathalyzer machine that was used to determine her breath-alcohol content deprived her of her right to confront the witnesses against her. The appellate court concluded that a Breathalyzer certification was not testimonial in nature as the accuracy of a breath-test machine could be proved through introduction of the logbook, which was a public record and thus subject to a traditional hearsay exception. Moreover, a

Breathalyzer test certification was not compiled during the investigation of a particular crime and was not used against any particular defendant. The document at issue did no more than establish that the officer had tested the machine and that it was working properly. The abstract possibility that the document may have been used in a future trial was not the same as a conclusion that the statement was prepared specifically for litigation.”

Rackoff v. State, 2006 Ga. LEXIS 978 (Ga. 2006) – “The inspection certificate was not testimonial hearsay and was admissible because it was a business record that was not made in an investigatory or adversarial setting or generated in anticipation of the prosecution of a particular defendant.”

State v. Shisler, 2006 Ohio 5265 (Ohio Ct. App. 2006) – “A breathalyzer must be checked at least once every seven days with instrument check solution approved by the director of health: The trial court did not err in finding that a certificate signed by the director of health attesting to this fact was not "testimonial" as contemplated by Crawford, when the check-solution certificate was not the product of an ex parte examination and was not prepared to be used specifically against the defendant.”

People v. Lebrecht, 2006 NY Slip Op 26347 (N.Y. App. Term. 2006) – Breath test certification and maintenance records are non-testimonial. “The certificates were prepared in the course of the certifier's routine official duties and "systematically" produced "in the conduct of [FIC] business" (*People v Kennedy*, 68 N.Y.2d 569, 579, 503 N.E.2d 501, 510 N.Y.S.2d 853 [1986]) to fulfill an official mandate that the machines be maintained in working order. Although prepared, to an extent, in recognition of their necessity in the event of litigation and constituting a part of the foundational predicate for the admission of BAC test evidence, the certificates did not result from structured police questioning, they were not created at official request ‘to gather incriminating evidence against a particular individual.’ *** Proof that a BAC testing machine functions properly may exonerate as well as incriminate and represents merely the application of an objective procedure which does not involve "the exercise of judgment and discretion, expressions of opinion, and making conclusions.”

Jarrell v. State, 2006 Ind. App. LEXIS 1680 (Ind. Ct. App. 2006) – Inspection certificates of the breath-test machine are non-testimonial.

Neal v. State, 2006 Ga. App. LEXIS 1068 (Ga. Ct. App. 2006) – Self-authenticating certificates of inspection of the Intoxilyzer are business records and non-testimonial.

Luginbyhl v. Commonwealth, 48 Va. App. 58; 628 S.E.2d 74 (VA. Ct. App. 2006) – “An officer stopped defendant's car after seeing three cars in front of him brake abruptly in order to avoid colliding with it. A breath analysis at the police station showed a blood alcohol concentration of 0.24 percent. Defendant argued that the breath analysis result and the accompanying certificate were "testimonial" evidence proscribed by the Confrontation Clause. The court stated that even if the admission of the result and the certificate was a constitutional error, the error was harmless. “

Commonwealth v. Walther, 189 S.W.3d 570 (Ky. 2006) – “The certified question asked whether a certified copy of a breath-alcohol machine's maintenance and test records could be admitted into evidence to show compliance with 500 Ky. Admin. Regs. 8:020, § 2(1), without in-

court testimony by the technician who performed the maintenance and tests. The Commonwealth did not assert either that the technician was unavailable for trial or that defendant had a prior opportunity to cross-examine him. Thus, the only issue was whether the notations the technician made in the documents reflecting his maintenance and the results of his tests on the machine were testimonial for purposes of the Confrontation Clause of the Sixth Amendment and the holding in *Crawford v. Washington*. The court concluded that the technician's notations were not testimonial. The technician did not make the notations for the purpose of proving defendant's guilt. The notations pertained only to whether certain tests were performed, the results of those tests, and whether the machine should continue in use or be referred to the manufacturer for repairs. The technician's records had a primary business purpose that existed even in the absence of the litigation in this case.”

Pierce v. State, 2006 Fulton County D. Rep. 928 (Ga. Ct. App. 2006) – Intoxilyzer 5000 certification certificates are non-testimonial business records.

Bohsancurt v. Eisenberg, 129 P.3d 471 (Ariz. Ct. App. 2006) – “The State argued that the superior court erred in finding that the QARs [quality assurance reports] for the Intoxilyzer 5000 breath-testing machine were inadmissible because they were testimonial under *Crawford*. The court reversed the superior court ruling. The court held that based on its conclusions that the QARs qualified as both business records and public records under Ariz. R. Evid. 803 and did not contain evidence against individual defendants, the QARs were not testimonial; thus, the Sixth Amendment did not bar admission of the QARs even though the QA specialist who prepared them was not subject to cross-examination. The court noted that Ariz. Admin. Code 9-14-404, required that the Intoxilyzer 5000 machines be tested and the results recorded every 31 days, regardless of whether any particular machine was to be used in any driving under the influence (DUI) litigation. Also, the court found that the QARs did not fall within the exclusion in Ariz. R. Evid. 803(8)(B) for investigative police reports because the QA specialists had no interest in whether the certifications produced evidence that was favorable or adverse to a particular defendant; thus, the records did not lack trustworthiness.”

State v. Godshalk, 381 N.J. Super. 326 (Law Div. 2005) – “Defendant challenged his conviction, specifically, the admission of the Breath Testing Instrument Inspection certificates at trial under *Crawford v. Washington*, asserting that because the State did not produce the inspecting trooper at trial, he was deprived of his Sixth Amendment right to confrontation and cross-examination. The instant court disagreed as the inspection certificates were not within the “testimonial evidence” category of *Crawford* because they were business, and official, records of the New Jersey State Police. Thus, they were admissible under N.J. R. Evid. 803(c)(6) and (8). Furthermore, the coordinator's inspection certificates satisfied the State's burden of proving that the Pennsauken breathalyzer was appropriately tested for accuracy and that it was in proper working condition at the time defendant was tested. The tests were administered by a qualified operator, and the tests were conducted in accordance with accepted procedures. Given the credible testimony of the other officers involved, defendant's conviction was upheld.”

State v. Norman, 2005 Ore. App. LEXIS 1573 (Ore. Ct. App. 2005) – “the certifications of the accuracy of an Intoxilyzer machine in Oregon are more akin to hearsay statements that were not considered testimonial in nature at common law, such as public or business records.”

People v. Mellott, 2005 NY Slip Op 51989U (N.Y.J. Ct. 2005) – “The foundation breath documents herein, i.e. the Operational Checklist, the Weekly Simulator test record, the Certificate of Calibration and the Certificate of Analysis of the Simulator Solution, are nontestimonial documents. Said documents were made in the regular course of business, by a government agency. They were prepared without a particular individual in mind. They report the results of objective tests or measurements, which by definition are not subject to interpretation. Said documents are valid business records as defined by C.P.L.R. 4518 (a). As a result, admittance of said foundation breath test documents, without requiring the preparer of those documents to appear and testify at the trial, would not violate the defendant's Sixth Amendment right to confront the witnesses against him.”

Green v. DeMarco, 2005 NY Slip Op 25528 (N.Y. Sup. Ct. 2005) – “the documents certifying their proper functioning were not prepared solely to aid in criminal prosecution, and were entirely admissible as business records.”

People v. Fisher, 2005 NY Slip Op 51726U (N.Y. City Ct. 2005) – Very lengthy opinion that held that DWI foundational documents are not "testimonial" under the Confrontation Clause and are admissible as business records.

Rembusch v. State, 2005 Ind. App. LEXIS 2087 (Ind. Ct. App. 2005) – “The court rejected defendant's claim that the admission of the breath machine certification and a BAC DataMaster Evidence Ticket violated the Confrontation Clause and his right to meaningful cross-examination, because the procedures permitted by the Indiana Supreme Court and legislature for establishing a foundation for the admission of the certifications regarding the breath test machine and the regulations of the Toxicology Department did not run afoul of the rule announced in Crawford v. Washington, and the Confrontation Clause. Also, the certificates regarding the inspection and compliance with relevant regulations of breath test instruments were admissible under Ind. Code § 9-30-6-5(c)(1).”

People v. Krueger, 2005 NY Slip Op 25382 (N.Y.J. Ct. 2005) – Breath test instrument certification records are non-testimonial business records.

Rackoff v. State, 2005 Ga. App. LEXIS 1103 (Ga. Ct. App. 2005) – The inspection certificate on a breath testing instrument is a business record and non-testimonial

People v. Kanhai, 8 Misc. 3d 447; 797 N.Y.S.2d 870 (NY City Crim Ct 2005) – “The prosecution offered into evidence, as business records, five exhibits containing statements of individuals who were not called to testify at trial. Three of the exhibits were certified copies of field unit inspection reports of tests conducted by a New York City Police Department (NYPD) technician on the intoxilyzer machine which was used to conduct the breath analysis of defendant. One exhibit was a certified copy of a record of the analysis of the simulator solution lot test conducted by the New York State Police Laboratory and used in the breath alcohol test of defendant. One exhibit was a certified copy of the calibration test conducted by an NYPD technician on the intoxilyzer machine used in the case. Defendant objected to the introduction of the exhibits, and any testimony concerning them, on the ground that their admission violated his Sixth Amendment right of confrontation. The court found that the records were not testimonial in nature, were properly certified, and met all the requirements of business records pursuant to N.Y.

C.P.L.R. 4518 and were admissible into evidence against defendant as was all testimony concerning the documents.”

People v Orpin, 796 N.Y.S.2d 512 (NYJ Ct 2005) – At trial, the prosecution offered into evidence (1) the record of inspection, maintenance, and calibration prepared by the New York Division of Criminal Justice Services for the Datamaster used in this case and (2) a certification of analysis of the 0.10% Breath Alcohol Simulator Solution prepared by the New York State Police Forensic Investigation Center for reference solution lot number 04040. The court noted that although these are business records and generally non-testimonial under *Crawford*, these type of documents were prepared in anticipation of prosecution and the preparers of the reports would have know this. Therefore, these two documents were held to be testimonial requiring the testimony of the preparers of each report.

Napier v. State, 827 N.E.2d 565 (Ind Ct App 2005) – On rehearing, the court affirmed its original position that “certificates of inspection and compliance are not testimonial in nature and, thus, do not fall within the rule announced in *Crawford*. *Id.* In our view, a defendant's inability to cross-examine information that is contained in the certificates is not the same type of evidence that concerned the *Crawford* court.” The court further held that operator certifications are ministerial in nature and therefore non-testimonial and “there is no requirement that live testimony must be offered as to instrument or operator certification.”

State v. William, 199 Ore. App. 191; 110 P.3d 1114 (Or Ct App 2005) – Documentary evidence of the accuracy of an Intoxilyzer is non-testimonial and does not require the testimony of the technician who prepared the documents. Public and official records have constituted an exception to the confrontation rights guarantee and their admission does not violate *Crawford*.

State v. Carter, 2005 MT 87 (2005) – “the nontestimonial pieces of evidence at issue here, the weekly and yearly certification reports for the Intoxilizer 5000, do not implicate Carter's constitutional right of confrontation. Therefore Carter is not entitled to a new trial.”

Shiver v. State, 30 Fla. L. Weekly D 653 (Fla. Dist. Ct. App. 1st Dist. 2005) – “The state trooper who arrested defendant testified at trial that he administered two breath tests, which determined defendant's blood alcohol level. The State of Florida, over objection and relying on Fla. Stat. ch. 316.1934(5) (2002), offered into evidence an affidavit that was prepared by the trooper of the results of defendant's breath test. The affidavit was also relied upon by the State, pursuant to Fla. Stat. ch. 316.1934(5)(e), to establish the date of performance of the most recent required maintenance of the test instrument by another trooper. Defense counsel argued that the State failed to prove the instrument was properly calibrated, and the admission of the affidavit violated defendant's due process rights. On appeal, the court found that parts of the affidavit constituted testimonial hearsay evidence regarding when the statutorily required maintenance of the instrument was performed. Because defendant was unable to challenge the accuracy of the instrument by the constitutionally mandated method of cross-examination of the person who performed the maintenance, introduction of the affidavit violated defendant's right to confront witnesses, and was not harmless error.”

State v. Anaya, 2012 NMCA 94, __ P.3d __ (N.M. Ct. App. 2012), cert. denied – "In essence, Defendant argues that, along with the opportunity to confront the officer operating the IR 5000 at the time of his breath test, the Confrontation Clause also requires that he have the opportunity to challenge the underlying accuracy and reliability of the IR 5000 through mandatory cross-examination of witnesses knowledgeable about the manufacture of the IR 5000 machine and its scientific calibration. We disagree... Nothing in *Melendez-Diaz* or *Bullcoming* requires the State to produce a witness and provide foundational testimony that the IR 5000 is scientifically accurate and reliable in measuring the alcohol level in a person's breath. ... the scientific aspects of the IR 5000 machine are non-testimonial facts and do not implicate the Confrontation Clause."

➤ Sub-Category: Certification of Operator
(category added June 2013)

State v. Johnson, 301 P.3d 287, 298-299 (Kan. 2013) – "The records establishing that the Sedgwick County Sheriff's Department and Deputy Kooser were certified to conduct Intoxilyzer 5000 testing were not created for the purpose of prosecuting any specific defendant or for the purpose of establishing the elements of any specified criminal offense. Rather, the documents were created in order to authorize the administration of the necessary law enforcement duties of the Sedgwick County Sheriff's Department and one of its duly commissioned deputies. Accordingly, we hold that the certifications of law enforcement agencies and individual officers that simply establish their respective authority to conduct testing on a particular breathalyzer machine are not testimonial statements subject to the Confrontation Clause requirements of *Crawford*."

Breath Test Results / Refusals

Warning: *Melendez-Diaz* / *Bullcoming* / *Williams* may call older cases into question.

State v. Barone, 154 Conn. App. 543, 107 A.3d 490 (2015) – "The defendant specifically argues that four witnesses were required to testify in order to satisfy the confrontation clause: ... In the present case, the state called as witnesses Christos, who performed the breath tests, and Powers, an expert, who explained the results of the breath tests. ... We, therefore, agree with the state that the defendant was not denied his constitutional right of confrontation under the federal constitution by the admission of the Draeger machine [Draeger Alcotest 9510] reports..."
[NOTE: The issue is never who else the prosecution could have called, but whether the evidence presented was excludable.]

Miller v. State, 152 So. 3d 1184, 1187-88 (Miss. Ct. App. 2014) – " Here, through the testimony of Trooper McBride, all three prongs of the test were satisfied. Trooper McBride testified as to the proper procedure he followed in administering the test; he testified that he was certified to operate the machine; and the certificate of calibration and Trooper McBride's certification were admitted into the record. The intoxilyzer test is admissible because it does not violate the Confrontation Clause."

People v. Lin, 46 Misc. 3d 20, 20-26, 998 N.Y.S.2d 558, 559-63 (N.Y. App. Term 2014) – "An Intoxilyzer 5000 test result printout is testimonial by these standards, and, normally, absent a

showing of the unavailability of the tester or a prior opportunity to cross-examine the tester [cite], the person who performed the test must be produced for cross-examination if the test results are to be admitted into evidence."

Alcaraz v. State, 401 S.W.3d 277 (Tex. App. San Antonio Mar. 13, 2013) – the state presented the testimony of Debra Stephens, "a senior forensic scientist and technical supervisor with the Bexar County Breath Testing Program. She is the custodian of records for all the breathalyzer machines in Bexar County. Stephens recently assumed the position of senior forensic analyst—a position previously held by George Allen McDougall, who had retired. ... [A]t the time appellant's breath test was administered, McDougall was still the person in charge of maintaining the Intoxilyzer machines and creating the reference solutions. The reference solution used in appellant's case was created in McDougall's laboratory. McDougall did not testify at the trial. ... Appellant was entitled to confront the 'witnesses against him' upon the admission of the breathalyzer results alleging he was intoxicated. Appellant 'confronted' both Deputy Lopez and Stephens. Accordingly, we conclude there was no violation of appellant's rights under the Confrontation Clause when the breathalyzer test results reporting his BAC were admitted into evidence without the testimony of McDougall."

People v Umpierre, 951 N.Y.S.2d 382, 382-387 (N.Y. Sup. Ct. 2012) – "Officer Rizzo administered a field breathalyzer test [cite] to establish Defendant's blood alcohol level at the scene and a follow up Intoxilyzer 5000 test at the 45th precinct ... The Court concludes that permitting blood alcohol test(s) results to be introduced into evidence here, without Defendant being allowed to question Officer Rizzo, violates Defendant's confrontational rights..." – [NOTE: The opinion is poorly-written as well as confused, making it difficult to know what the judge is trying to say, but he seems to be analyzing evidence that was *not* admitted, which may raise a question of lack of personal knowledge or insufficient foundation but isn't a confrontation clause issue. There is no constitutional right to confront non-witnesses.]

Cranston v. State, 936 N.E.2d 342 (Ind. Ct. App. 2010) – "Datamaster evidence tickets are non-testimonial non-hearsay."

People v. Dinardo, 290 Mich. App. 280, 801 N.W.2d 73 (Mich. Ct. App. Oct. 12, 2010) – "A Datamaster ticket apparently states the blood-alcohol percentage for each sample, the time when the testing procedure began (including the observation period before the test), and the exact time when each sample was taken and analyzed. ... We conclude that the Datamaster ticket at issue in this case was neither 'testimonial' in the constitutional sense nor 'hearsay' under Michigan law."

State v. Henderson, 2008 WL 4416025 (Kan. App. Sep 26, 2008) (unpub) – "Henderson next argues that breath test refusals are entitled to Fifth [sic] Amendment protections because they are testimonial in nature when analyzed under *Crawford*" – argument rejected, following *State v. Wahweotten*, 36 Kan.App.2d 568, 143 P.3d 58 (Kan. App. 2006)

State v. Belvin, 986 So.2d 516 (Fla. May 01, 2008) – "Applying the rationales of *Davis* and *Crawford* to the instant case, we conclude that the breath test affidavit is testimonial. First, the affidavit was "acting as a witness" against the accused. ... Second, the affidavit was not created during an ongoing emergency or contemporaneously with the crime. ... Finally, the affidavit falls squarely into the category of "formalized testimonial materials, such as affidavits," which the Supreme Court listed in the various formulations of the core class of "testimonial"

statements. *Crawford*, ... A breath test affidavit is created under circumstances where the technician is expecting it will be used at a later trial. More precisely, the sole purpose of a breath test affidavit is to authenticate the results of the test for use at trial." – [NOTE: The *affidavit* was acting as a witness?? Not the declarant? The court apparently adopts this wording because, of course, the source of the crucial information is the machine, not the tech.]

Wimbish v. Commonwealth, 51 Va.App. 474, 658 S.E.2d 715 (Va. App. Apr 08, 2008) – "The issue in this case is whether portions of the Certificate of Analysis, namely the breath test results and the attestation clause, are 'testimonial' and, thus, subject to the Confrontation Clause. ... Although there is much dispute over what specific types of evidence fall within the scope of the Confrontation Clause, under even the broadest interpretation the clause applies only to out-of-court statements made by witnesses. Thus, the right of confrontation does not affect the admissibility of evidence that is not a statement made by a witness. ... The Intoxilyzer 5000... is not a witness or declarant capable of making statements. ... Because the breath test result is not a statement made by a witness, the Confrontation Clause does not place any restrictions on its admission."

State v. Chun, 194 N.J. 54, 943 A.2d 114 (N.J. Mar 17, 2008) – "we conclude that the AIR [Alcohol Influence Report] is not testimonial in the sense that was intended by the Framers of the Confrontation Clause."

Phillips v. State, 289 Ga.App. 281, 656 S.E.2d 905, 08 FCDR 292 (Ga. App. Jan 24, 2008) – "Although we find no error in the trial court's admission of the breath test results, [FN2] we note that any error in that regard would be harmless because the jury acquitted Phillips of driving under the influence with an unlawful blood alcohol concentration."

Sobota v. State, 933 So. 2d 1277 (Fla. Dist. Ct. App. 2nd Dist. 2006) – DWI case – "Our resolution of the issue presented in this appeal is governed by this court's opinion in *Johnson v. State*, 929 So.2d 4 (Fla. 2d DCA 2005), *review granted*, 924 So.2d 810 (Fla.2006). In *Johnson*, this court discussed *Crawford* and held that 'an FDLE lab report prepared pursuant to police investigation and admitted to establish an element of a crime is testimonial hearsay even if it is admitted as a business record.' *Id.* at 7." – certifying question to Florida Supreme Court

Williams v. State, 933 So. 2d 1283 (Fla. Dist. Ct. App. 2nd Dist. 2006) – under authority of *Johnson*, finding breath test result testimonial but certifying question to Florida Supreme Court

State v. Berezansky, 386 N.J. Super. 84, 899 A.2d 306 (N.J. App. Div. 2006), certification granted, 191 N.J. 317, 923 A.2d 231 (N.J. May 16, 2007) – DWI case – "Defendant was involved in an auto accident; an officer detected alcohol on his breath, and had his blood drawn at a hospital. The blood was tested at a police lab; the State failed to comply with defendant's requests for documentation pertaining to the lab certificate or the tests performed. Defendant argued that the admission of the lab certificate without the testimony of its preparer violated his right of confrontation under the U.S. and New Jersey Constitutions. The appellate court agreed. Defendant's demand on the State was sufficiently particular to convey his intention to exercise his right of confrontation. The certificate was not admissible under the business or government record exceptions to the hearsay rule, N.J. R. Evid. 803(c)(6) and (8), respectively. It was not a record prepared or maintained in the ordinary course of government business, but was prepared

in order to prove an element of the crime and offered in lieu of producing the qualified individual who actually performed the test.”

Luginbyhl v. Commonwealth, 48 Va. App. 58; 628 S.E.2d 74 (VA. Ct. App. 2006) – “An officer stopped defendant's car after seeing three cars in front of him brake abruptly in order to avoid colliding with it. A breath analysis at the police station showed a blood alcohol concentration of 0.24 percent. Defendant argued that the breath analysis result and the accompanying certificate were "testimonial" evidence proscribed by the Confrontation Clause. The court stated that even if the admission of the result and the certificate was a constitutional error, the error was harmless. “

Belvin v. State, 31 Fla. L. Weekly D 744 (Fla. Dist. Ct. App. 4th Dist. 2006) – “Defendant submitted to a breath test after his arrest for DUI. At trial, the arresting officer testified that he made the traffic stop and requested the breath samples. The breath test technician who administered the breath test and prepared the breath test affidavit did not testify. Defendant objected to introduction of the affidavit without the breath test technician being present at trial and subject to cross-examination. The State of Florida contended that the test results were admissible under Fla. Stat. §§ 316.1934(5) and 90.803(8). The trial court overruled defendant's objection and admitted the affidavit into evidence. On appeal, the court found that those portions of the affidavit pertaining to the breath test technician's procedures and observations in administering the breath test constituted testimonial evidence.”

Rembusch v. State, 2005 Ind. App. LEXIS 2087 (Ind. Ct. App. 2005) – “The court rejected defendant's claim that the admission of the breath machine certification and a BAC DataMaster Evidence Ticket violated the Confrontation Clause and his right to meaningful cross-examination, because the procedures permitted by the Indiana Supreme Court and legislature for establishing a foundation for the admission of the certifications regarding the breath test machine and the regulations of the Toxicology Department did not run afoul of the rule announced in *Crawford v. Washington*, and the Confrontation Clause. Also, the certificates regarding the inspection and compliance with relevant regulations of breath test instruments were admissible under Ind. Code § 9-30-6-5(c)(1).”

Belvin v. State, 30 Fla. L. Weekly D 1421 (Fla. Dist. Ct. App. 4th Dist. 2005) – “The state maintains that, because sections 316.1934(5) and 90.803(8) expressly state that breath test affidavits are public records and reports, they are not testimonial. But the statutory listing of breath test affidavits under the public records and reports exception to the hearsay rule does not control whether they are testimonial under *Crawford*. As mentioned above, these affidavits are prepared for use at a criminal prosecution. They are pretrial statements expected to be admitted into evidence at trial. As such, they fit under *Crawford's* definition of testimonial evidence and are subject to the requirements articulated in *Crawford*. ”

Blood Draw Reports

Warning: *Melendez-Diaz* / *Bullcoming* / *Williams* may call older cases into question.

Little v. Commonwealth, 422 S.W.3d 238, 240-41 (Ky. 2013), reh'g denied (Mar. 20, 2014) – drunk driving crash in which perpetrator was also injured – hospital tested his blood upon his admission – “The record establishes that Little was treated at University Hospital for injuries he

received in the collision, including emergency surgery for a fractured femur. This comprehensive blood analysis report was clearly intended for the primary purpose of providing that medical treatment to Little, and was not intended to establish or prove a fact or serve as a 'substitute for trial testimony.'"

Commonwealth v. Yohe, 79 A.3d 520, 523-43 (Pa. 2013) – "we consider whether the Toxicology Report is testimonial. Examining the facts of the testimonial statements considered in *Melendez-Diaz* and *Bullcoming*, we conclude that it is. The fact at issue at Appellant's trial was whether he was driving while intoxicated; the Toxicology Report addressed this fact by identifying the alcohol content of his blood, serving the identical function of live, in-court testimony. ... In all material respects, the Toxicology Report at issue herein resembles those in *Melendez-Diaz* and *Bullcoming*, because here, as in those cases, a law enforcement officer provided evidence to a laboratory for scientific testing, which produced a report concerning the result of this analysis formalized in a signed document."

Commonwealth v. Gatlos, 76 A.3d 44, 63-65 (Pa. Super. 2013) – "Applying *Yohe* to this matter, we hold that the testimony of Dr. Cohn did not violate Appellant's Sixth Amendment right to confrontation. Indeed, similar to our analysis in *Yohe*, while Dr. Cohn did not perform the actual tests on Appellant's blood, he reviewed and analyzed the printouts from the various tests conducted by lab technicians. Upon completion of this review, Dr. Cohn authored the report with regard to Appellant's test results. Furthermore, Dr. Cohn responded to cross-examination..."

Commonwealth v. Weaver, 76 A.3d 562, 563 (Pa. Super. 2013) – "In this case, Appellant's Confrontation Clause challenge cannot be sustained because every person who was involved in the testing and analysis of his blood was presented as a witness at trial. ... No reports were introduced into evidence by someone who did not prepare them and the results of no tests were revealed absent the testimony of the analyst who performed the test. Appellant's Confrontation Clause challenge is frivolous."

State v. Severinson, 833 N.W.2d 517, 518-21 (N.D. 2013) – "Amber Vetter, a forensic scientist for the North Dakota Crime Laboratory, performed the blood analysis and included her findings in the analytical report. Severinson objected to admission of the analytical report under N.D.R.Ev. 707, arguing the State was required to produce Ahmad Akhtar, the individual who conducted the peer review of Vetter's analytical report. ... [¶ 15] The ultimate issue here is whether Akhtar made a testimonial statement in an analytical report. ... [¶ 16] ... Akhtar's report was not testimonial and the State was not required to produce him under N.D.R.Ev. 707 and the Confrontation Clause."

State ex rel. Madden v. Rustad, 2012 ND 242, 823 N.W.2d 767 (N.D. 2012) – "the State is not required to provide the Director [of the State Crime Laboratory] as a witness at trial to satisfy the Confrontation Clause because this record does not establish the Director conducted or otherwise participated in the blood analysis or made any testimonial statements in analytical reports."

Connors v. State, 92 So. 3d 676, 678-685 (Miss. 2012) – "[D]uring Detective Haygood's testimony, the State introduced a toxicology report of Connors's blood prepared by Alyssa Purcell of the Mississippi Crime Laboratory. The report stated that Connors's blood had tested positive for caffeine, oxycodone, and metabolite opiates. The State did not call Purcell to testify. ... Plainly, under *Melendez-Diaz*, the forensic reports at issue were testimonial in nature."

McMullen v. State, 316 Ga. App. 684, 730 S.E.2d 151, 2012 Fulton County D. Rep. 2446 (Ga. Ct. App. 2012) – vehicular homicide, blood test found methamphetamine and morphine – "We agree with McMullen that the law does not generally permit the State to admit an inculpatory forensic laboratory report via the 'surrogate testimony' of a scientist who neither participated in, observed, or analyzed a test on a blood sample, but whose opinion instead relies upon the affidavit of a nontestifying laboratory analyst; such testimony violates a defendant's Sixth Amendment right to confront the witness against him or her.ⁿ⁴⁵ This, however, did not happen in the case sub judice. ... Although the State's expert witness admitted that he did not physically place McMullen's blood sample into the instrumentation and perform the tests himself, he examined and analyzed 'every piece of data' that was produced, drew conclusions from that data, and then testified regarding his independent expert opinion derived from [*695] that data.ⁿ⁴⁶ The expert further testified that the data report itself contains information regarding calibrations and controls run prior to and after the testing of McMullen's blood from which it was possible for him to confirm both that the instrument was in proper working order and that the tests were performed correctly. ... [B]ecause the expert personally viewed and analyzed the data which formed the basis of the expert opinion about which he testified, he was not acting as a mere 'surrogate,'ⁿ⁴⁸ but rather 'had a substantial personal connection to the scientific test at issue.'ⁿ⁴⁹ It follows then, that the expert witness's testimony did not violate McMullen's Sixth Amendment confrontation right.ⁿ⁵⁰"

State v. Lopez, 55 Cal. 4th 569, 286 P.3d 469, 147 Cal. Rptr. 3d 559 (Oct. 15, 2012) – after concluding that printout from machine is non-testimonial – "Of significance here is the indication on page 1 of nontestifying analyst Peña's laboratory report that defendant's blood sample was labeled with laboratory No. 070-7737, which was entered by laboratory assistant Constantino. ... It is undisputed that Constantino's notation linking defendant's name to blood sample No. 070-7737 [**479] was admitted for its truth. ... The notation in question does not meet the high court's requirement that to be testimonial the out-of-court statement must have been made with formality or solemnity. ... neither Constantino nor Peña signed, certified, or swore to the truth of the contents of page 1 of the report. ... Thus, the notation on the chart linking defendant's name to blood sample No. 070-7737 is nothing more than an informal record of data for internal purposes, as is indicated by the small printed statement near the top of the chart: 'for lab use only.' Such a notation, in our view, is not prepared with the formality required by the high court for testimonial statements." – [NOTE: This opinion is one of three companion cases, and comes with a thoughtful and useful concurrence.]

State v. Dilboy, 163 N.H. 760, 48 A.3d 983 (N.H. 2012) – "Undoubtedly, if a forensic report created by a non-testifying analyst had been admitted against the defendant at trial in this case, it would violate the Confrontation Clause under both *Melendez-Diaz* and *Bullcoming*. However, no such reports were admitted. ... The admission of Wagner's statements would violate the Confrontation Clause only if he recited the statements of a non-testifying witness, rather than his own opinions or conclusions based upon his review of the raw data. ... Ultimately, there is no factual record that supports the defendant's theory of relief."

State v. Sorensen, 283 Neb. 932, 814 N.W.2d 371 (Neb. 2012) – "At issue on appeal is whether Sorensen's confrontation rights were violated when the county court admitted into evidence the affidavit of the nurse who performed Sorensen's blood draw without also requiring that nurse to testify at trial. We find that the county court erred in admitting the affidavit... The Certificate

itself was filled out at the request of law enforcement under authority of [statute], which expressly provides that either law enforcement or the defendant may request such a certificate when a blood draw is performed in connection with an arrest under [statute]—one of the charged violations in this case. [Statute] further provides that the certificate 'shall be admissible in any proceeding as evidence of the statements contained in the certificate.' Given this, ... it cannot be said that this Certificate and its statements were too attenuated to be testimonial."

People v Goodreau, 34 Misc. 3d 839, 936 N.Y.S.2d 510, 2011 NY Slip Op 21466 (N.Y. County Ct. 2011) – DWI – "At trial, the lab person who tested the blood sample did not testify, instead her supervisor testified. ... The admission of the blood test results was error. ... n1 The court has considered *People v Rawlins*, [cite], involving DNA evidence, and to the extent this opinion conflicts with that decision, this court is bound by the more recent precedent of *Bullcoming*. *Rawlins* may also be distinguished because *Rawlins* involved DNA evidence, while *Bullcoming* and the present case involve blood alcohol test results."

Peters v. Commonwealth, 345 S.W.3d 838, 839-844 (Ky. 2011) – "Pursuant to *Melendez-Diaz*, the KSP lab report is a testimonial statement. The report, which states Appellant's blood was tested for drugs and found to contain methamphetamine, is essentially identical to the certificates of analysis held to be testimonial statements in *Melendez-Diaz*. Because the report is a testimonial statement, neither it, nor its contents, could be admitted at trial in the absence of the declarant..."

State v. Rehmann, 419 N.J. Super. 451, 17 A.3d 278 (App. Div. 2011) – "Because he was the author of the laboratory certificate and because he supervised another's operation of the gas chromatograph, Maxwell was the appropriate person to be called to testify about the results of the testing of defendant's blood sample."

State v. Ducasse, 2010 ME 117, 8 A.3d 1252 (Me. 2010) – "Ducasse contends that the court violated her Sixth Amendment right to confront witnesses by admitting in evidence a certificate of compliance from the manufacturer of the blood collection tubes in the blood-alcohol kit used to collect Ducasse's blood sample. ... the certificate of compliance is not a "'sworn certificate[] addressing scientific analysis prepared for purposes of a criminal prosecution.' It is a manufacturer's certificate addressing its compliance with manufacturing specifications." – non-testimonial

Commonwealth v. Barton-Martin, 5 A.3d 363, 2010 PA Super 163 (Pa. Super. Ct. 2010), appeal denied (Sept. 27, 2011) – "Because the Commonwealth did not summon at trial the analyst who prepared Appellant's lab report, we conclude that Appellant's rights under the Confrontation Clause were violated and that the lab report showing her blood-alcohol content was inadmissible." [NOTE: The technician testified as a defense witness, but direct-examining her was not equivalent to cross-examining her, because it was the prosecution's burden to produce her – a little confusion between procedural burdens and fundamental constitutional rights.]

State v. Nez, 2010-NMCA-092, 148 N.M. 914, 242 P.3d 481 (N.M. Ct. App. July 20, 2010), cert. denied, (Sept. 15, 2010) – "[¶ 14] We hold that the foregoing evidence relating to the the blood drawer's identity and qualification and to the manner of drawing the blood satisfied the State's foundation burden for admission of the report sufficient to withstand Defendant's

objection to admission of the report ... [¶ 16] [W]e see no basis on which to deny admission of the blood-alcohol report on confrontation grounds because the blood drawer is not present at trial to be cross-examined."

State v. Gietzen, 2010 ND 82, 786 N.W.2d 1 (N.D. May 11, 2010) – "Unlike *Melendez-Diaz*, the scientist analyzing Gietzen's blood sample testified at trial. Gietzen attempts to extend his confrontational rights to include confrontation of his blood-drawing nurse and the deputy state toxicologist, whose statements serve no other purpose than to establish that Gietzen's blood sample was properly obtained. The Supreme Court foresaw this argument and discussed its relevance and applicability [in footnote 1 of *M-D*] ... Here, the statements of Gietzen's nurse fall squarely within footnote one because they serve the evidentiary function of establishing the propriety of Gietzen's blood draw, not the conclusory function of establishing Gietzen's blood-alcohol concentration was greater than 0.08 percent."

State v. Dilboy, 999 A.2d 1092, 160 N.H. 135, 139-142 (N.H. 2010) cert. granted, summarily vacated and remanded, Dilboy v. New Hampshire, 131 S. Ct. 3089, 180 L. Ed. 2d 911 (U.S. 2011) (June 28, 2011), affirmed on remand, State v. Dilboy, 163 N.H. 760, 48 A.3d 983 (N.H. 2012) – supervisor may testify about his own conclusions based on results obtained by lab employee

Goodman v. State, 302 S.W.3d 462 (Tex. App. Texarkana 2009) – "Goodman also contends that the trial court erred by allowing into evidence the hospital blood-test results showing his excessive blood-alcohol level. His argument is phrased as a violation of his constitutional right to confrontation... To reach that argument, however, the laboratory report must be 'testimonial' evidence and thus subject to the Confrontation Clause, as explained in *Crawford*." – Under *Davis*, "Our task, therefore, is to review the trial court's decision on whether the blood-alcohol test was made primarily for the purpose of establishing or proving past events relevant to a later prosecution. ... Kimberly Miller, a nurse who cared for Goodman, testified that his blood was drawn that day for medical care, not at law enforcement request. ... Thus, the court could conclude that the report was not testimonial and that *Crawford* was therefore not implicated."

Deeds v. State, 27 So. 3d 1135, 1143 (Miss. 2009) – "Deeds also claims that, because the State never identified the person who drew his blood, and because he was consequently unable to cross-examine that individual, his Sixth Amendment right to confront witnesses was violated. ... Neither the procedure used to draw Deeds's blood, nor the physical blood specimen itself, are statements, nor do they constitute nonverbal conduct intended as an assertion. Contrary to the defendant's claims, the unidentified nurse was not a witness against Deeds. ... the *Melendez-Diaz* Court was clear that it does not require 'that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person or as part of the prosecution's case.' ... We find that the admission of the results of the blood test did not violate Deeds's Sixth Amendment right to confront witnesses testifying against him."

People v. Lopez, 220 P.3d 240 (Cal. 2009). supplemental briefing ordered (July 13, 2011) – "The petition for review is granted. [¶] The parties will brief and argue the following issues: (1) Was defendant denied his right of confrontation under the Sixth Amendment when the trial court admitted into evidence the results of blood-alcohol level tests and a report prepared by a criminalist who did not testify at trial? (2) Was the error prejudicial in light of the testimony of a

supervising criminalist about testing procedures at the lab? (3) How does the decision of the United States Supreme Court in *Melendez-Diaz* ... affect this court's decision in *People v. Geier* ...?"

People v. Lopez, 2009 WL 1280867 (Cal. App. 4 Dist. May 11, 2009), review granted 220 P.3d 240 (2009) (unpub) – blood alcohol laboratory report "was made in the course of regularly conducted business activity and qualified as a nontestimonial business record under *Crawford*."

State v. Ezekian, 2009 WL 17854 (N.J. Super. A.D. Jan 05, 2009) (unpub) – blood test certificates are testimonial

State v. Silva, 960 A.2d 715 (N.H. Nov 20, 2008) – defendant convicted of dispensing controlled drug with death resulting – "the laboratory report itself was not testimonial. It 'did not establish or prove past events and did not look forward to later criminal prosecution'; it merely reported that the blood samples contained morphine. [cite] The laboratory report was "not directly accusatory, in the sense that [it] linked the defendant to the crime[]." [cite] Instead, the report established that the victim had heroin or morphine in her body when she died. It did not establish that the defendant had dispensed heroin to her. Considering the circumstances in this case, we hold that the toxicology report was not testimonial hearsay."

State v. Hinchman, __ S.E.2d __, 2008 WL 4202568 (N.C. App. Sep 16, 2008) – "this Court has held that the affidavit of a chemical analyst is nontestimonial evidence under *Crawford* when the 'affidavit [i]s limited to his objective analysis of the evidence and routine chain of custody information.'"

State v. Bullcoming, 2008-NMCA-097, 189 P.3d 679 (N.M. App. Jun 04, 2008), cert. granted, 08-NMCERT-07 (July 21, 2008) – "On appeal, Defendant argues that the district court erred in allowing the blood draw results. ... We begin and end our legal analysis with *Dedman* because it is dispositive. ... It stated that 'ordinarily a blood alcohol report is admissible as a public record and presents no issue under the Confrontation Clause because the report is non-testimonial and satisfies' the test of *Ohio v. Roberts*..."

Villasana v. State, 2008 WL 2841199 (Tex. App.-Dallas Jul 24, 2008) (unpub) – "The toxicology report contains no testimony. There are no statements by the person who drew appellant's blood, nor are there any statements about the qualifications of that person or how the blood was drawn. In fact, there is no reference to the person who drew the blood at all. The report states that a blood specimen was received in the Austin DPS lab from the Garland DPS lab. The report is signed by Erwin, who testified at trial and was cross-examined by appellant. [¶] The toxicology report does not fall within the categories of testimonial evidence described in *Crawford*."

U.S. v. Davis, 278 Fed.Appx. 263 (4th Cir. May 19, 2008) – "We recently concluded that data generated by lab machines from the testing of a blood sample taken by a lab technician was not a testimonial statement for Confrontation Clause purposes. *United States v. Washington*, 498 F.3d 225, 229 (4th Cir.2007), *pet. for cert. filed*..."

U.S. v. Brown, 271 Fed.Appx. 791 (10th Cir. Mar 31, 2008) (unpub) – intoxicated suspect arrested at scene of one-car crash – hospital toxicology report is non-testimonial

State v. Earl, 2008 WL 383337 (Wash. App. Div. 2 Feb 12, 2008) (unpub) – incest case, paternity test – " We hold that Exhibit 2A, the blood draw form, is a nontestimonial business record because (1) it contains only verifiable facts; (2) it does not contain an accusatory statement; (3) cross examination would be impractical and unnecessary; and (4) cross examination would not further the truth-seeking purpose of the Confrontation Clause."

Sellers v. State, 973 So.2d 543 (Fla. App. 1 Dist. Dec 31, 2007) – "Reports that are produced in furtherance of a police investigation constitute testimonial hearsay. [cites] However, drug or alcohol tests performed by a hospital in the usual course of business are admissible as business records. [cites] ... Here, we find that the blood test record admitted into evidence is not testimonial; therefore, there was no violation of Appellant's right to confrontation. The blood test in question was performed only because Appellant's emergency room doctor required the test in order to properly diagnose and treat Appellant's injuries. It was not ordered by law enforcement and was not performed in the furtherance of a criminal prosecution. ... Accordingly, we agree with the trial court that a *Crawford* violation did not take place." [NOTE: This means that reports of the exact same blood test will be testimonial sometimes and non-testimonial other times.]

State v. Boon, 2007 WL 4245040 (Tenn. Crim. App. Dec 04, 2007) (unpub) – "Defendant argues that the trial court erred by permitting TBI forensic toxicologist Dawn Swiney to testify about the reliability and accuracy of the gas chromatogram machine used to determine Defendant's blood alcohol content (BAC), and about the reliability and accuracy of the blood alcohol testing kits used by law enforcement agencies to send blood samples to the TBI lab. Defendant asserts that by these errors, the trial court also erred by admitting into evidence the alcohol report from the TBI lab, which showed that Defendant had a BAC of 0.16. ... Since the record is not clear that the pertinent testimony of Ms. Swiney was hearsay, much less testimonial hearsay, Defendant is not entitled to relief on this issue."

State v. O'Maley, 932 A.2d 1 (N.H. 2007), cert. denied, No. 07-7577 (June 29, 2009), overruled in part by State v. Dilboy, 999 A.2d 1092, 160 N.H. 135, 139-142 (N.H. 2010) – "The blood sample collection form did not accuse the defendant of any wrongdoing. It merely gave information about the technician who withdrew the blood and about the draw itself (e.g., time drawn, cleanser used). ... Nor did the form describe any of the defendant's past conduct. Rather, it constituted the technician's contemporaneous recordation of observable events. *Geier*, 161 P.3d at ----. The technician filled out the blood sample collection form at the same time or shortly after she drew the defendant's blood. Further, the information supplied on the form was not requested by law enforcement, but was required by pertinent administrative rules. ... Moreover, the technician's statements on the blood sample collection form were not a "weaker substitute for live testimony at trial." *Davis*, 126 S.Ct. 2277 (quotation omitted). If the technician had been called to testify at trial, she "would merely have authenticated the document." *Geier*, 161 P.3d at ----; see *State v. Coombs*, 149 N.H. 319, 323 (2003). Although she signed the blood sample collection form, she likely "would be unable to recall from actual memory information related to [its] specific contents and would rely instead upon the record of ... her own action." *Geier*, 161 P.3d at ---- (quotation omitted); see *Coombs*, 149 N.H. at 323. ... We hold, therefore, that it is not testimonial within the meaning of *Crawford* and *Davis*."

State v. Salabounis, 2007 WL 3170278 (Wis. App. Oct 31, 2007) (unpub) – "Salabounis argues that Loepke's [*i.e.*, the nurse who drew the blood] 'statement,' which consists of her signature with the registered nurse designation on the blood test result, is testimonial because an 'objective witness reasonably [would] believe that the statement would be available for use at a later trial.' ... Salabounis conceded, and we agree, that *Crawford* is not implicated because the State did not rely on Loepke's signature on the form to establish compliance with Wis. Stat. § 343.305(5)(b)."

State v. Kent, 391 N.J.Super. 352, 918 A.2d 626 (N.J. Super. A.D. 2007) – *Crawford* requires the exclusion of "a blood test certificate prepared pursuant to *N.J.S.A.* 2A:62A-11 by a hospital employee who had extracted blood from the defendant driver at the request of a police officer." – but requiring defense to provide advance notice of intent to call technician on pain of waiver

State v. O'Maley, 932 A.2d 1 (N.H. 2007) cert. denied, No. 07-7577 (June 29, 2009), overruled in part by State v. Dilboy, 999 A.2d 1092, 160 N.H. 135, 139-142 (N.H. 2010) – DWI – "The results generated from the blood test were neutral, as the tests could have led either to incriminatory or exculpatory results. *Geier*, 161 P.3d at ----. Moreover, to the extent that the actual reported test result is deemed to be accusatory, this result was reached and conveyed not through the nontestifying analyst's report, but by Dr. Wagner, the testifying witness. ... Further, had the analyst appeared at the hearing, she "would almost certainly not remember her performance of [the] specific test [of the defendant's blood] months later." *Coombs*, 149 N.H. at 323. Her testimony would have been nearly identical to that of Dr. Wagner [who did testify] as it "would concern her general knowledge of the State Laboratory's test procedures and protocols, quality control measures, specific levels of review and chain of custody matters." *Id.* Given these circumstances, we conclude that the blood tests were not testimonial."

State v. Ruggles, 214 Or.App. 612, 167 P.3d 471 (Or. App. Aug 29, 2007), opinion adhered to as modified on reconsideration, 217 Or.App. 384, ___ P.3d ___ (Or.App. Dec 26, 2007) – DUI case – "Defendant also argues that the admission of the report without the testimony of the technicians who performed the tests of the blood sample violates his rights to confront witnesses under the state and federal constitutions. ... [Certifying scientist] Mollahan's testimony, however, was not about what an out-of-court declarant said; it was about what a testing machine indicated. That testimony was not hearsay. ... His oral testimony and written report, then, were statements made at trial and offered in evidence to prove the truth of his own observations-the content of readings generated by a machine. ... The written report was not a hearsay statement, and defendant's cross-examination of Mollahan satisfied his constitutional rights to confront witnesses." [NOTE: The modification was concerned with state law evidentiary issue.]

U.S. v. Washington, 498 F.3d 225 (4th Cir. 2007), cert. denied, No. 07-8291 (June 29, 2009) – DWI case – a comprehensive opinion involving a blood sample, giving multiple reasons why the results are not testimonial hearsay, including this one: "Finally, the supposed 'hearsay statements' made by the machines were not 'testimonial' in that they did not involve the relation of a past fact of history as would be done by a witness. ... To the extent that they [*i.e.*, readouts from the machines] contain assertions of fact, they say simply that 'this blood sample that has been put into the machine tests positive for PCP and alcohol.' The machine's 'statement' relates solely to the present condition of the blood, without making any links to the past. While Dr. Levine did provide 'testimony' connecting the blood sample with Washington's past behavior, this testimony was presented in court in conformity with the Confrontation Clause, was properly authenticated, and is not challenged on appeal."

State v. Kent, 391 N.J.Super. 352, 918 A.2d 626 (N.J. Super. A.D. 2007) – DWI case – lab reports are inadmissible "because they were 'prepared specifically in order to prove an element of the [DWI charge] and offered in lieu of producing the qualified individual who actually performed the test.'" – but requiring defense to provide advance notice of intent to call technician on pain of waiver

Granville v. Graziano, 2007-Ohio-1152, 2007 WL 764765, *2 -3 (Ohio App. 5 Dist. 2007) (unpub) – blood alcohol test results non-testimonial

State v. Moss, 215 Ariz. 385, 160 P.3d 1143, (Ariz. App. Div. 1 May 29, 2007) – driver seriously injured other motorists – blood sample tested by private laboratory came back positive for methamphetamine and amphetamine, but laboratory closed down and criminalist who performed test could not be located – "The State sought to have Dr. Raymond Kelly, former director of the private laboratory, offer his opinion at trial that Moss was impaired by methamphetamine based on his review of the blood test results, the drug recognition expert evaluation, and the police reports. The State also intended to have Dr. Kelly testify to the blood test results themselves in lieu of testimony from the non-testifying criminalists. ... The trial court had discretion to determine under these facts that the test results would likely be considered by the jury as conclusions of the non-testifying criminalists who performed the analysis, thereby potentially triggering Moss's confrontation rights. ... If proposed out-of-court statements will probably be considered by the jury for the truth of the matters stated therein, the evidence should be considered the functional equivalent of hearsay for Confrontation Clause purposes even though it might traditionally be considered as facts or data relied upon by an expert under Rule 703. ... [W]e conclude that the proposed testimony of Dr. Kelly contains significant elements of hearsay and the functional equivalent of hearsay for Confrontation Clause purposes. ... We conclude that the proposed testimony of Dr. Kelly reporting Moss's blood test results would constitute testimonial evidence within the meaning of Crawford. The criminalists who performed the blood tests and interpreted the results surely expected their statements of the results to be used prosecutorially. That was the primary reason for analyzing the blood. The testimony by Dr. Kelly reporting the results would be, in essence, an accusation by the absent criminalists that Moss had ingested methamphetamine before the accident. Therefore, Dr. Kelly's proposed evidence is testimonial under *Crawford*, triggering the protections of the Confrontation Clause."

[NOTE: According to a Westlaw search, the phrase "functional equivalent of hearsay" has never previously appeared in any judicial opinion. The idea that a trial court has discretion to decide if evidence is or is not hearsay also appears to be novel.]

United States v. Ellis, 460 F.3d 920 (7th Cir. Ind. 2006) – defendant was charged with being a user of controlled substance in possession of firearm – blood and urine results introduced to prove he used meth – neither results nor certification is testimonial

State v. Sickmann, 2006 Minn. App. Unpub. LEXIS 1329 (Minn. Ct. App. 2006) – "In this appeal from conviction of DWI, defendant argued that his Sixth Amendment rights under the Confrontation Clause were violated when the person who withdrew his blood was not called to testify. A medical-personnel certificate was submitted instead, along with the lab report indicating the blood-alcohol level. Defendant contended that his blood was not withdrawn by a qualified person and that the State did not meet its burden of proof in establishing that the test

was reliable and its administration conformed to the procedure necessary to ensure reliability. The State argued that the certificate of the person drawing blood was not testimonial, but was more akin to a business record. The court disagreed, finding that the medical-personnel certificate was testimonial because it contained statements that one would reasonably expect to be used prosecutorially and be available for trial.”

State v. Sextro, 2006 Neb. App. LEXIS 64 (Neb. Ct. App. 2006) – “we conclude that the county court erred in allowing the affidavit over Sextro's confrontation objection. As noted above, extrajudicial statements made in affidavits, with the express purpose of being used against a defendant at trial and in lieu of live testimony, fit squarely within the definition of "testimonial" evidence contemplated by the U.S. Supreme Court's Confrontation Clause analysis. See, *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005); *State v. Vaught*, *supra*. The nurse practitioner's affidavit in this case, in addition to providing evidence of the chain of custody of Sextro's blood sample, contained the nurse practitioner's attestation that the blood was withdrawn "in a medically acceptable manner." This was harmless error.

City of Las Vegas v. Walsh, 121 Nev. Adv. Rep. 85 (2005), overruled by City of Reno v. Howard, 318 P.3d 1063, 1064-68 (Nev. 2014) –

Felix v. State, 2005 Tex. App. LEXIS 9865 (Tex. App. 2005) – Blood alcohol test results are non-testimonial under *Crawford*.

State v. Dedman, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628 (N.M. 2004) – Blood alcohol reports are not testimonial. “A blood alcohol report is generated by SLD personnel (Scientific Laboratory Division of the Department of Health), not law enforcement, and the report is not investigative or prosecutorial. Although the report is prepared for trial, the process is routine, non-adversarial, and made to ensure an accurate measurement. While a government officer prepared the report, she is not producing testimony for trial. Finally, a blood alcohol report is very different from the other examples of testimonial hearsay evidence: "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations."

➤ Sub-Category: Phlebotomist / Nurse Who Drew Blood

(category added September 2012)

(See also part 6, "Foundation / Preliminary Questions of Fact / Chain of Custody.")

People v. Barry, 2015 COA 4, 349 P.3d 1139 (Colo. App. January 29, 2015) – “¶ 79 The People concede, and we agree, that the certification (a portion of Exhibit 156) stating that defendant's blood was drawn by venipuncture and signed by the EMT who withdrew defendant's blood, is a hearsay testimonial statement."

State v. Garnenez, 2015-NMCA-022, 344 P.3d 1054 (N.M. Ct. App. Nov. 19, 2014) – "{37} To the extent Defendant contends that live testimony from the nurses who performed Defendant's blood draw was needed to satisfy the requirements of the Confrontation Clause, we disagree."

State v. Guzman, 439 S.W.3d 482 (Tex. App.--San Antonio 2014) – "Appellee, Paul Guzman, was charged with driving while intoxicated. ... Appellee filed a motion to suppress the results,

arguing that the death of Karen Eley, the nurse who performed the blood draw, prevented him from confronting her as a witness. ... we conclude appellee's rights under the Confrontation Clause will not be violated by the unavailability of the nurse who merely performed the blood draw."

City of Reno v. Howard, 318 P.3d 1063 (Nev. 2014) – "In Nevada, the declaration of a person who collects a criminal defendant's blood for evidentiary testing may be admitted at trial. ... At Lee's bench trial, the City sought to introduce into evidence the declaration of Shirley Van Cleave, a phlebotomist who collected Lee's blood for evidentiary testing after Lee's arrest. ... The parties do not dispute that Van Cleave's declaration was made and offered pursuant to NRS 50.315(4) and thus is testimonial hearsay."

Mitchell v. State, 419 S.W.3d 655, 658-59 (Tex. App.--San Antonio 2013), petition for discretionary review refused (Apr. 30, 2014) – intoxication manslaughter – "Officer Allen submitted an analysis request form for the blood testing. Lois *659 Peterson, the nurse on duty, drew a blood sample from Mitchell's arm in the presence of Officer Allen. Nurse Peterson did not testify at the trial. ... Mitchell argues the request form was testimonial in nature and the State's failure to call Nurse Peterson, as a witness substantiating the blood draw, denied him the ability to cross-examine her. ... [R]egardless of whether the request form was testimonial, the analyst who performed any and all testing on Mitchell's blood was called to testify and was cross-examined by the defense. Mitchell's Sixth Amendment rights were not violated." – [NOTE: The form was Allen's statement, not Peterson's, so the argument was a non sequitur.]

Adkins v. State, 418 S.W.3d 856, 861-62 (Tex. App.--Hous. [14th Dist.] 2013) – DWI case – "The State presented the analyst who performed the blood analysis in its case-in-chief. At the time it offered the results of the test, appellant objected and argued that the State also had to call the nurse³ who drew appellant's blood. Appellant argued that the nurse's testimony was essential under the third prong of *Kelly*⁴ and that without that testimony first, admitting the blood test results violated his right to confrontation. ... Appellant essentially asks this court to extend *Bullcoming* and the Court of Criminal Appeals' recent decision in *Burch v. State*, 401 S.W.3d 634 (Tex.Crim.App.2013), to the person who merely draws the blood—the so-called 'pre-analytical' stage of the blood analysis. We respectfully decline appellant's invitation to extend these holdings to a nurse who merely draws the blood, is not involved in the actual blood analysis, and does not provide any statement that appears within or accompanies the blood test results." – [NOTE: The confrontation clause regulates in-court testimony. It doesn't dictate the prosecution's witness list.]

State ex rel. Roseland v. Herauf, 2012 ND 151, 819 N.W.2d 546 (N.D. 2012) – "under the statute, a prerequisite to admission of an analytical report is a signed statement from the individual medically qualified to draw the blood sample that the blood sample was properly drawn. ... Rather than a foundational requirement, [cites], we conclude the 'signed statement' contemplated under N.D.C.C. § 39-20-07(10) constitutes a testimonial statement." – [NOTE: In other words, the statute alters the constitutional status of foundational testimony, transforming it into a testimonial statement.]

State v. Lutz, 2012 ND 156, 820 N.W.2d 111 (N.D. 2012) – same as *Herauf*, above

Commonwealth v. Shaffer, 2012 PA Super 64, 40 A.3d 1250 (Pa. Super. Ct. 2012) – "*Melendez-Diaz* does not, as Shaffer would suggest, place an additional requirement upon the Commonwealth to call the phlebotomist who physically drew defendant's blood at the hospital. There was no report authored by the phlebotomist that the Commonwealth attempted to enter into evidence. The phlebotomist was merely an individual involved in the chain of custody of Shaffer's blood sample."

State v. Renshaw, 390 N.J.Super. 456, 915 A.2d 1081 (N.J.Super.A.D.,2007) – drunken driving – after drawing blood, phlebotomist provided officer with "Uniform Certification for Bodily Specimens Taken in a Medically Acceptable Manner" – held: certificate is testimonial

State v. Watkins, 2006 Del. C.P. LEXIS 66, 2006 WL 2666227 (Del. Com. Pl. 2006) – "The drawing of blood by the phlebotomist is not testimonial in nature; it is merely a procedure used to collect the blood for analysis of alcohol content. Therefore, I do not find *Crawford* has application to this case."

➤ Sub-Category: Volatiles Used in Chemical Test
(category added September 2012)

State v. Lutz, 2012 ND 156, 820 N.W.2d 111 (N.D. 2012) – "The State notified Lutz of its intent to introduce an analytical report at trial under N.D.R.Ev. 707. Lutz objected and demanded the State produce the arresting officer, the nurse who drew his blood sample, the lab analysts, including Stephanie Kleinjan, who conducted the chemical test, and Lisa Hentges, who prepared the volatiles solution used during the chemical test ... Hentges's expected testimony falls squarely within footnote one of *Melendez-Diaz*. At oral argument, Lutz conceded that Hentges would not comment about the analytical report and her testimony would be limited to her preparation of the volatiles solution, which relates to the chain of custody or the accuracy of the testing procedure. *See id.* Additionally, indicative factors that a statement is testimonial include whether the statement is one that declarants would reasonably believe would be used prosecutorially and whether the statement was made under circumstances that would lead an objective witness to reasonably believe the statement would be used at a later trial. [cites] Here, the exhibit attached to Lutz's motion in limine reflects that Hentges prepared the volatiles solution on June 27, 2011, three months before Lutz was charged with driving under the influence...." – [NOTE: If the court required volatiles-preparers to testify, then a reasonable volatiles-preparer would expect that any statement would be used at a later trial, no?]

DNA Reports / Population Statistics

(see also other categories in this part, and pt. 4, Business Records and Public Records)

Warning: *Melendez-Diaz* / *Bullcoming* call the older cases into question, and *Williams* may do the same for some of some relatively recent ones.

People v. Cartagena, 126 A.D.3d 913, 7 N.Y.S.3d 150 (N.Y. App. Div. 2015) – "The defendant correctly contends that his rights under the Confrontation Clause of the Sixth Amendment were violated when the Supreme Court admitted a nontestifying DNA analyst's report linking the defendant to DNA evidence recovered *152 at the crime scene [cites]."

People v. Gonzalez, 991 N.Y.S.2d 340 (N.Y. App. Div. 2d Dept. 2014) – "The People correctly concede that the defendant's rights under the Confrontation Clause (*see* U.S. Const. 6th Amend.) were violated when the Supreme Court admitted a nontestifying DNA analyst's report directly linking the defendant to a firearm recovered from a codefendant's residence [cite]."

Commonwealth v. Tassone, 468 Mass. 391, 11 N.E.3d 67 (Mass. 2014) – "Tiffany Roy, another chemist at the State police crime laboratory, testified that the swab from the eyeglasses was sent to the Cellmark laboratory (Cellmark) in Texas for DNA testing, which generated a DNA profile from the swab, but no one from the Cellmark laboratory testified regarding the actual testing of that swab or the generation of a DNA profile from that swab. ... Where neither of the two independent grounds relied on by the plurality [in *Williams*] would apply to the facts in the instant case, we do not agree with the Appeals Court that the admissibility of *399 Roy's testimony 'must follow from the judgment in that case.'" – but ultimately reversing conviction based on state evidence law rather than the confrontation clause

State v. Lui, 179 Wash.2d 457, 315 P.3d 493 (Wash. 2014), cert. denied, 2014 WL 1354998 (June 23, 2014) – "¶ 67 Accordingly, the only "witness against" the defendant in the course of the DNA testing process is the final analyst who examines the machine-generated data, creates a DNA profile, and makes a determination that the defendant's profile matches some other profile. Absent that expert analysis, we are left with an abstract graph or set of numbers that has no bearing on the trial."

U.S. v. Pritchard, __ F.Supp.2d __, 2014 WL 341091 (C.D. Cal. 2014) (pre-trial) – "Defendants contend that, to the extent it relies on external sources such as published databases of population frequencies for a core set of genetic markers, Ms. Putinier's statistical analysis testimony would violate their rights under the Confrontation Clause. ... None of these external sources—which could refer to the Popstats software used by Ms. Putinier, the Budowle databases upon which that software relies, or the FBI's CODIS index of DNA profiles—is testimonial."

State v. Danastasio, 133 So. 3d 224, 233-36 (La. App. 4th Cir. 2014) – in substantive part verbatim the same as *Webb*, below

State v. Webb, 133 So. 3d 258, 276-81 (La. App. 4th Cir. 2014) – "the State's expert witnesses' testimony and the DNA report compiled by Reliagene were not testimonial evidence... The report in this case was compiled by Reliagene, an accredited laboratory, which tested the evidence obtained from the victim's rape exam kit and rendered a report on its findings. The State's experts, Ms. Pineda and Ms. Delatte, testified that each reviewed the laboratory report, prior to, and at trial, and deemed the findings accurate. The experts guided the jury through the raw data upon which the testing was based and explained precisely how the male DNA profile was extracted from that data. ... The primary purpose of the testing was not to target a specific or known suspect, as in *Bullcoming* and *Melendez-Diaz*, but rather to catch an unknown rapist."

People v. Washington, 968 N.Y.S.2d 184, 186-87, 108 A.D.3d 576 (N.Y. App. Div. 2d Dept. 2013) – "The **187 court properly admitted files prepared by the New York City Medical Examiner's Office containing DNA profiles derived from the testing of evidence recovered from the crime scenes, since the documents containing the DNA profiles, which were prepared prior to the defendant's arrest, 'did not, standing alone, link [him] to the crime'" [cite]."

People v. Fucito, 969 N.Y.S.2d 563, 564 (N.Y. App. Div. 2d Dept. 2013) – "Each of these reports consisted of a DNA profile developed from samples extracted from items found at the crime scene. The reports contained no conclusions, interpretations, comparisons, or subjective analyses, and 'consisted of merely machine-generated graphs' and raw data (cite). Accordingly, the reports were not 'testimonial' in nature (cite)."

Galloway v. State, 122 So. 3d 614 (Miss. June 6, 2013) – CODIS database – "Placing this physical evidence in a database with other physical evidence—i.e., other DNA profiles—does not convert the nature of the evidence, even if the purpose of pooling the profiles is to allow comparisons that identify criminals. [cite] The database is comprised of physical, nontestimonial evidence. Further, the acts of writing computer programs that allow a comparison of samples of physical evidence or that calculate probabilities of a particular sample occurring in a defined population are nontestimonial actions."

State v. Taylor, 118 So. 3d 65 (La.App. 4 Cir. 2013) – defendant, a serial sex offender, was identified through CODIS hit based on sample taken from him in Texas – held: in this Louisiana prosecution, the confrontation clause did not require calling DNA witnesses from Texas – "under *Williams* and *Bolden*, any evidence introduced as to that CODIS match... did not violate Taylor's rights under the Confrontation Clause."

Young v. United States, 63 A.3d 1033, 1035-1049 (D.C. 2013) – [NOTE: If you practice in DC, you may have to try to make sense of this tortured opinion, which reverses a conviction because an insufficient number of technicians testified but then, at the end, specifically says it is not holding that *every* analyst or technician must testify.]

People v. Barba, 215 Cal. App. 4th 712, 155 Cal. Rptr. 3d 707 (Cal. App. 2d Dist. 2013), cert. denied (Nov. 12, 2013) – "Under the interpretive rule announced in *Dungo*, we may affirm if we can find that there was no Confrontation Clause violation under the rationales employed by both the plurality and Justice Thomas's concurring opinion in *Williams*. In our view, Justice Thomas would likely affirm because the DNA reports created by Wong for this case were not sworn or certified declarations of fact that attested to their accuracy and reliability, and were therefore not sufficiently formal or solemn enough to invoke the protections of the Confrontation Clause. [cite, fn] We must then determine whether the *Williams* plurality would have reached the same result, albeit for different reasons." [NOTE: It would.]

People v. Johnson, 987 N.E.2d 412, 369 Ill. Dec. 785 (Ill. App. Ct. 1st Dist. 2013) – [¶ 36] ... Martin testified she performed the analysis and testing on the evidence she received and compared those findings with defendant's buccal swab and the victim's blood standard. Defendant does not point to any evidence in the record that Martin did not perform the testing and analysis that formed the basis of her opinion testimony. We conclude no Crawford violation existed because Martin's testimony was based on her personal testing and analysis of the evidence she received."

State v. Grimes, 109 So. 3d 1007, 1007-1036 (La.App. 4 Cir. 2013) – serial rapist, multiple investigations – "In the instant case, however, unlike in *Williams*—but like in *Bullcoming* and *Melendez-Diaz*—the forensic reports that were referred to by DNA experts Gina Pineda and Anne Montgomery during their testimony at the defendant's trial were admitted into evidence. ...

Thus, under *Williams*, even if forensic DNA reports are admitted in evidence without in-court testimony of the scientist/analyst who either signed the certification or performed or observed the test reported in the certification (*see Bullcoming*), generally, there is no Sixth Amendment Confrontation Clause violation because the reports are not testimonial." – However, "Ms. Montgomery also identified State Exhibit 46, a May 18, 2006 seven-page NOPD DNA lab report by Jennifer Schroeder that was certified by Ms. Montgomery as DNA Technical Leader ... This May 2006 report was generated after the defendant had been targeted as a suspect ... this May 2006 report arguably constitutes testimonial evidence as contemplated by the Confrontation Clause. However, given that Anne Montgomery, who testified at trial, certified this seven-page report, even assuming that it might be considered testimonial evidence, the report was fully admissible under *Bullcoming* and *Melendez-Diaz*." [NOTE: This opinion has a fantasyland concurrence by Judge Bonin, who laments the passing of the Good Old Days of *Crawford*.]

State v. Marshall, ___ So.3d ___, 2013 La. App. LEXIS 355, 11-16 (La.App. 4 Cir. Feb. 27, 2013) – trial court "allowed the State to introduce at trial the DNA certificate of analysis instead of presenting the testimony of the analyst who performed the testing. ... Applying the guidance in *Crawford* to this case, the DNA certificate of analysis admitted at trial is testimonial."

State v. Poole, 733 S.E.2d 564, 567-569 (N.C. Ct. App. 2012) – "The lab report prepared by Agent Howell was a forensic analysis prepared for the prosecution of a criminal charge and was therefore 'testimonial' evidence. [cite] Agent Howell was unavailable to testify at trial because she 'was not released from a subpoena from another county[.]' The State has failed to show that Defendant was given a prior opportunity to cross-examine Agent Howell. Accordingly, the admission into evidence of the lab report violated Defendant's confrontation right."

State v. Clark, 107 So. 3d 644 (La.App. 2 Cir. Oct. 3, 2012) – "An analyst's report and certification regarding forensic evidence is considered a testimonial statement and is subject to confrontation clause requirements."

Littleton v. State, 372 S.W.3d 926, 927-931 (Mo. Ct. App. 2012) – "However, prior to trial, State's technician who performed the DNA testing suffered a medical emergency and was unable to testify. In the technician's place, State intended to offer the testimony of Mary Beth Karr ("Karr"), the technician's supervisor. ... Karr testified that her own conclusion that the DNA evidence recovered from the car belonged to Littleton was independent of the technician's conclusion of the same. Karr also testified that, although she did not perform the actual DNA testing, the only difference between what she did and what the technician did was that the technician added the chemicals to break open the cells. ... Given the facts before us, we find no Sixth Amendment Confrontation Clause violation."

State v. Deadwiller, 2012 WI App 89, 343 Wis. 2d 703, 820 N.W.2d 149 (Wis. Ct. App. 2012) – "[*P12] We need not parse in any great detail the philosophical underpinnings of the various opinions in *Williams* because although they disagreed as to their rationale, five justices agreed at the core that the outside laboratory's report was not testimonial. This conclusion governs this case, and we do not have to delve beyond this core ... [*P14] We are bound in this case by the judgment in *Williams*, and the narrowest holding agreed-to by a [**713] majority (albeit with different rationales) is that the Illinois DNA technician's reliance on the outside laboratory's report did not violate Williams's right to confrontation because the report was not 'testimonial' ... Under the facts here, the Orchid Cellmark report was not 'testimonial.'"

State v. Lopez, 45 A.3d 1, 2-20 (R.I. 2012) – "Quartaro was integrally involved in the entire process of DNA testing, analysis, and certification, and he formulated the allele table and provided expert testimony at trial concerning the conclusions he drew therefrom. [¶] Acting as a supervisor at Cellmark, Quartaro directed specific analysts to perform each stage of the DNA testing on each of the seven samples. After the first three stages of the DNA testing were completed, he then reviewed the entire case file and confirmed that all protocols were followed properly by examining the other analysts' notes, their affirmations that protocols were followed, as well as their conclusions. Most importantly, Quartaro personally reviewed and independently analyzed all the raw data, formulated the allele table, and then articulated his own final conclusions concerning the DNA profiles and their corresponding matches. Those final conclusions are the very statements—the statements of Quartaro—at issue in this case. ... He testified as to his own conclusions; he did not act as a conduit of the opinions of, or parrot the data produced by, other analysts. ... Quartaro, as the author of the DNA profiles at issue, was the very witness that the Supreme Court deemed necessary in *Bullcoming*..."

However – "we conclude that the numerical identifiers in the allele table constituted testimonial statements that are subject to the dictates of the Confrontation Clause." – unclear why this discussion is included in the opinion, since the table was created by the testifying witness

Disharoon v. State, 291 Ga. 45, 727 S.E.2d 465, 2012 Fulton County D. Rep. 1593 (Ga. 2012) – "We therefore granted certiorari to determine whether, in light of *Bullcoming*, the Court of Appeals erred in holding that no violation of the Confrontation Clause occurred where an expert was allowed to testify about the results of DNA testing when that testifying expert was not the one who performed every step of the test. As explained more fully below, because the record reveals that no violation of the Confrontation Clause occurred under the facts of these cases, we affirm the judgment of the Court of Appeals. ... Here, however, the level of participation in the DNA testing by the testifying witness was significantly greater than that of the testifying witness in *Bullcoming*. The testifying witness, Pickens, completed every step of the test with the exception of only being present while another technician merely placed the 96 test samples and controls into the scientific instrument that was used to complete a single step of the testing. The United States Supreme Court has signaled that *Bullcoming* would not apply under such circumstances... Here, Pickens was the supervisor, she drafted the report, and had a substantial personal connection to the scientific test at issue (having actually performed the vast majority of the testing herself)." – no violation

People v Oliver, 92 A.D.3d 900, 938 N.Y.S.2d 619, 2012 NY Slip Op 1486 (N.Y. App. Div. 2d Dep't 2012) – "Moreover, as the defendant contends, his right to confrontation (see US Const 6th Amend) was violated at trial. Robert Baumann, a forensic scientist employed by the Suffolk County Crime Laboratory, testified that DNA material recovered from the crime scene was uploaded by his office into a database, that he was informed several days later that the DNA profile from the crime scene matched a profile in that database, and that, approximately two weeks later, 'Albany' informed him that the profile in the database that matched the DNA recovered from the crime scene was the defendant's profile. This evidence constituted testimonial hearsay..."

State v. Benefield, 2012 Conn. Super. LEXIS 238, 1-30 (Conn. Super. Ct. Jan. 10, 2012) (unpub) – lab technician's notations of lab numbers on slides are non-testimonial

People v Morrison, 90 A.D.3d 1554, 935 N.Y.S.2d 234, 2011 NY Slip Op 9450 (N.Y. App. Div. 4th Dep't 2011) – "the analyst who performed the tests and concluded that the DNA mixture profile from the vaginal swab sample was consistent with DNA from the victim mixed with DNA from defendant was never called to testify. [**237] Contrary to the People's contention, the analyst who was called to testify, i.e., the supervisor of the other analyst, did not perform her own independent review and analysis of the DNA data. Rather, her testimony makes clear that she had nothing to do with the analysis performed by [*1557] the uncalled witness, and that her only involvement was simply reading the report after it was completed to ensure that the uncalled witness followed proper procedure. The People could not substitute her testimony for that of the actual analyst who performed the tests in order to avoid a violation of the Confrontation Clause (*see Bullcoming...*)"

United States v. Summers, 666 F.3d 192, 195-205 (4th Cir. Md. 2011), cert. denied, 133 S. Ct. 181, 184 L. Ed. 2d 91 (2012) – "A more substantial question is presented by the absence at trial of the analysts responsible for conducting the DNA tests on the jacket, the results of which provided the basis for Shea's testimony and the preparation of his report. We perceive little difficulty with the admission of Shea's testimony, given the predominance therein of his independent, subjective opinion and judgment relative to the lesser emphasis accorded the objective raw data generated by the analysts. ... On the witness stand, Shea painstakingly explained the process whereby he, and he alone, evaluated the data to reach the conclusion that, to a reasonable degree of [*202] scientific certainty, Summers was the major contributor of the DNA recovered from the jacket. ... Far from being 'a conduit or transmitter' of what his subordinate analysts had concluded about the jacket, Shea's opinion was an 'original product' that could be (and was) readily 'tested through cross-examination.'" [NOTE: While the Supreme Court denied certiorari in Summers, it granted cert in a case that did no more than cite to Summers as controlling authority, remanded it for reconsideration in light of Williams. *United States v. Shanton*, 462 Fed. Appx. 297 (4th Cir. Md., 2012), GVR'd by **Shanton v. United States, 133 S. Ct. 181, 184 L. Ed. 2d 5 (2012).**]

Commonwealth v. McGrail, 80 Mass. App. Ct. 339, 952 N.E.2d 969 (Mass. App. Ct. 2011) – "During Cunningham's direct examination, the Commonwealth displayed for the jury and marked for identification several charts detailing specific DNA test results (generated from an analysis performed by nontestifying analyst Elizabeth Lewandowski that was [**975] based on the samples taken from both the motor vehicle and the defendantn8). In his testimony, Cunningham referenced the charts (which were never admitted into evidencen9) and specific numerical figures on the charts assigned by the nontestifying analyst. The Commonwealth concedes correctly that these details were entered in evidence in error and that the admission constitutes a violation of the defendant's State and Federal constitutional rights to confront and cross-examine witnesses against him."

Derr v. State, 422 Md. 211, 29 A.3d 533 (Md. 2011), vacated by Maryland v. Derr, 133 S.Ct. 63 (2013), superseded on remand 73 A.3d 254, 258-73 (Md. 2013) – before being vacated and superseded, this opinion was rejected in **United States v. Summers, 666 F.3d 192, 195-205 (4th Cir. Md. 2011)**, leading to different confrontation clauses in Maryland's state and federal courts – also criticized in **State v. Lopez, 45 A.3d 1, 2-20 (R.I. 2012)**

State v. McElveen, 73 So. 3d 1033, 1096-1100 (La.App. 4 Cir. 2011) – "the report in this case is clearly testimonial"

Disharoon v. State, __, S.E.2d __, 2012 Fulton County D. Rep. 1593, 2012 Ga. LEXIS 439 (Ga. May 7, 2012) – "Pickens was the supervisor, she drafted the report, and had a substantial personal connection to the scientific test at issue (having actually performed the vast majority of the testing herself). Because the present cases do not involve facts and circumstances that are controlled by the United States Supreme Court's decision in *Bullcoming*, the Court of Appeals did not err in holding that it was not a violation of the Confrontation Clause to allow Pickens' testimony in these cases."

McIntyre v. State, 311 Ga. App. 173, 715 S.E.2d 431, 2011 Fulton County D. Rep. 2263 (Ga. Ct. App. 2011), aff'd sub nom. Disharoon v. State, 2012 Fulton County D. Rep. 1593 (May 7, 2012) – "Pickens testified that other technicians in the laboratory conducted the tests on the samples, and she relied upon those tests when crafting her report. The Defendants contend that this testimony was inadmissible hearsay and a violation of their Sixth Amendment confrontation rights, citing *Melendez-Diaz v. Massachusetts*.²¹ This argument, however, was previously rejected by this Court in *Carolina v. State*,²² and we decline to revisit it."

People v Encarnacion, 2011 NY Slip Op 5433, 87 A.D.3d 81, 926 N.Y.S.2d 446 (N.Y. App. Div. 1st Dep't 2011) – "Clearly, with regard to the portion of Coye's testimony that defendant challenges on appeal - that concerning the pair of jeans she did not personally test - the same did not violate his [*92] right of confrontation. The DNA evidence about which Coye testified is the same kind that our courts have found do not violate the Confrontation Clause, namely DNA testing performed by the non-testifying analyst yielding non-accusatory raw data (*Brown* at 340; *Rawlins* at 158-159; *Thompson* at 866). Thus, the trial court properly allowed Coye's testimony."

Ware v. State, __ So.3d __, 2011 Ala. Crim. App. LEXIS 19 (Ala. Crim. App. Mar. 25, 2011) – "Regarding the Orchid laboratory technicians, as in *Magyari*, we can see no potential for prosecutorial abuse by their absence from trial. Under these circumstances there was no potential for prosecutorial influence or abuse. For all of these reasons, the test and data entries of the Orchid laboratory technicians cannot be considered evidence that bears witness against Ware. Their work product is thus nontestimonial."

People v. Johnson, 406 Ill. App. 3d 114, 940 N.E.2d 264, 346 Ill. Dec. 264, 265-272 (Ill. App. Ct. 1st Dist. 2010) – "Word, a Cellmark analyst, testified about the laboratory's procedures and practices regarding DNA testing, though she did not participate in the testing. She used the report that was prepared as the basis of her expert opinion that the proper procedures were followed in the analysis. Defendant's attorney was able to cross-examine Word about the basis of her opinion and called attention to the fact that she did not participate in the testing and that she assumed that the analysts properly documented each part of the testing, as required by Cellmark." – no violation

People v. Johnson, 406 Ill. App. 3d 805, 941 N.E.2d 242, 346 Ill. Dec. 684 (Ill. App. Ct. 1st Dist. 2010), appeal denied (March 30, 2011) – "Here, as in *Williams*, the report was not offered to prove the truth of Cellmark's findings; instead, Ginglesberger testified regarding the report to provide a basis for her own opinion."

Aguilar v. Commonwealth, 699 S.E.2d 215 (Va. 2010), cert. denied, 131 S. Ct. 3089 (June 28, 2011) – "Here, the only "declaration[s]" or "affirmation[s]" contained in the admitted certificates of analysis were [testifying expert] Himes'. Unlike his in-court testimony that discussed the [preparatory lab] work of Columbo and Morris, the certificates of analysis did not contain information describing the steps involved in conducting a DNA analysis, such as the preliminary screening and the amplification process, nor did they reference the findings of any person other than Himes. Instead, the certificates primarily contained Himes' conclusions about the DNA profiles that were developed from the various samples." – thus defendant had no right to confront Columbo and Morris

Commonwealth v. Barbosa, 457 Mass. 773, 782-783, 933 N.E.2d 93 (Mass. 2010) – "The defendant argues, and the Commonwealth concedes, that [*783] Delatore's table showing the results of the DNA testing was testimonial hearsay admitted in violation of the confrontation clause, as was Lynch's testimony conveying the information in the table to the jury." – "We also reject the premise that, in DNA analysis, there is no meaningful distinction between the opinion and the underlying fact finding. "The human genome sequence is almost exactly the same (99.9%) in all people." Human Genome Program, U.S. Dep't of Energy, Genomics and Its Impact on Science and Society: A 2008 Primer 3 (2008). Therefore, the mere fact that the characteristics of certain alleles of a defendant's DNA matches the characteristics of alleles of DNA found at a crime scene says almost nothing about the likelihood that the defendant was present at the crime scene unless the jury learn from an expert about the nature of the DNA profile used."

Commonwealth v. Banville, 457 Mass. 530, 540-542, 931 N.E.2d 457 (Mass. 2010) – "Here, the DNA profiles prepared by the nontestifying chemist were undoubtedly testimonial hearsay, but [*541] the profiles themselves were not admitted in evidence and the witness did not testify to their contents. ... Barber's testimony that the DNA profiles she developed were a "match" to those developed by the nontestifying chemist constitutes testimonial hearsay as to those developed by the nontestifying chemist. That is a violation of the defendant's right under the Sixth Amendment ..."

People v. Miller, 187 Cal. App. 4th 902, 904-915, 114 Cal. Rptr. 3d 629 (Cal. App. 4th Dist. 2010), depublished on grant of review (2010), review dismissed (May 22, 2013) – holding Geier was not overruled by Melendez-Diaz

People v. Williams, 238 Ill. 2d 125, 939 N.E.2d 268, 345 Ill. Dec. 425 (Ill. July 15, 2010), cert. granted No. 10-8505 (oral argument scheduled Dec. 6, 2011) – "The defendant's suggestion that Lambatos was merely a "conduit" for Cellmark's report and that the report was entirely dispositive of Lambatos' opinion, and thus hearsay, is not compelling. Her testimony consisted of her expert comparison of the DNA profile in the ISP database with the DNA profile from the kit prepared by Cellmark. She used her own expertise to compare the two profiles before her: the blood sample prepared by Kooi and the semen sample prepared by Cellmark. She also did not observe any problems in the chain of custody or any signs of contamination or degradation of the evidence. Lambatos ultimately agreed with Cellmark's results regarding the male DNA profile. But Lambatos additionally made her own visual and interpretive comparisons of the peaks on the electropherogram and the table of alleles to make a conclusion on the critical issue: that there was a match to the defendant's genetic profile. Accordingly, Cellmark's report was not used for the truth of the matter asserted and was not hearsay."

Marshall v. State, 2010 OK CR 8, 232 P.3d 467 (Okla. Crim. App. 2010) – "Appellant contends he was denied a fair trial when Mr. Jonathan Wilson of the Tulsa Police Department Forensic Laboratory was [**474] allowed to testify as a substitute for Dr. Valerie Fuller regarding the DNA testing she had conducted. ... At trial, Mr. Wilson testified solely to the findings of Dr. Fuller's DNA report. He was repeatedly asked whether Dr. Fuller had a finding regarding a specific item of evidence. Mr. Wilson answered those questions by reading from Dr. Fuller's report. Mr. Wilson did not offer his own opinions concerning the DNA findings. Under these circumstances, Appellant's rights under the Confrontation Clause were violated..."

People v Diggs, 2010 NY Slip Op 4613, 73 A.D.3d 1210, 900 N.Y.S.2d 918 (N.Y. App. Div. 2d Dep't 2010) – "The defendant's contentions regarding DNA evidence adduced at trial are unpreserved for appellate review In any event, the defendant's contentions are without merit..."

United States v. Boyd, 686 F. Supp. 2d 382, 383-386 (S.D.N.Y. 2010) – "Only the final stage of the DNA testing involved the type of analytical judgment for which a certificate would be an inadequate substitute for in-court testimony under the Sixth Amendment."

People v Dail, 2010 NY Slip Op 532, 69 A.D.3d 873, 894 N.Y.S.2d 78 (N.Y. App. Div. 2d Dep't 2010) – "the defendant's Sixth Amendment right to confront his accusers was not violated by the admission of lab reports generated by employees of the Nassau County Medical Examiner's Office (hereinafter the Medical Examiner's Office), who recorded the results of DNA tests performed on the defendant's saliva and items recovered from the burglarized residences. A foundation for the admission of these reports as business records was established through the testimony of a forensic geneticist employed by the Medical Examiner's Office... Moreover, the reports consisted of contemporaneously recorded objective facts which did not, standing alone, link the defendant to the crime [cites]. Rather, the critical determination linking the defendant to the crimes was made by the forensic geneticist who testified..."

People v Thompson, 2010 NY Slip Op 1001; 70 A.D.3d 866; 895 N.Y.S.2d 148 (N.Y. App. Div. 2d Dep't 2010) – "Contrary to the defendant's contention, his right to confrontation (see US Const 6th Amend) was not violated by the admission into evidence of reports generated by two private laboratories, each of which consisted of a DNA profile developed from blood samples extracted from the crime scenes. These reports were not "testimonial" (*Crawford* ...) because they "consisted of merely machine-generated graphs" and raw data [cite]. The reports contained no conclusions, interpretations, comparisons, or subjective analyses (id.). Contrary to the defendant's [**867] contention, the People were not required to present the testimony of each technician who actually developed the reports, as they "would not have been able to offer any testimony other than how they performed certain procedures" (id.). They did not perform any analyses of the DNA samples involved in this case, and played no role in linking the defendant's DNA to the profiles developed from the samples extracted from the crime scene."

State v. Appleby, 289 Kan. 1017, 221 P.3d 525 (Kan. 2009) – "applying the tests utilized in *Melendez-Diaz*, we conclude the population frequency data and the statistical programs used to make that data meaningful are nontestimonial. We first note that DNA itself is physical evidence and is nontestimonial. ... Placing this physical evidence in a database with other physical evidence--i.e., other DNA profiles--does not convert the nature of the evidence, even if the

purpose of pooling the profiles is to allow comparisons that identify criminals. [cites] The database is comprised of physical, nontestimonial evidence. Further, the acts of writing computer programs that allow a comparison of samples of physical evidence or that calculate probabilities of a particular sample occurring in a defined population are nontestimonial actions. In other words, neither the database nor the statistical program are functionally identical to live, in-court testimony, doing what a witness does on direct examination. Rather, it is the expert's opinion, which is subjected to cross-examination, that is testimonial.

People v. Johnson, 394 Ill. App. 3d 1027, 915 N.E.2d 845, 333 Ill. Dec. 774 (Ill.App. 1 Dist. Sep 18, 2009) – "Word, a Cellmark analyst, testified about the laboratory's procedures and practices regarding DNA testing, though she did not participate in the testing. She used the report that was prepared as the basis of her expert opinion that the proper procedures were followed in the analysis. De-fendant's attorney was able to cross-examine Word about the basis of her opinion and called attention to the fact that she did not participate in the testing and that she assumed that the analysts properly docu-mented each part of the testing, as required by Cellmark. The same reasoning holds true for Schoon. He used the Cellmark report as the basis for part of his opinion that the male DNA profile obtained from the crime scene matched defendant's DNA. The Cellmark report was not offered to prove the truth of its contents, but was used as part of the bases for two experts' opinions. Accordingly, we find no Crawford violation in this case, and thus, no error..."

Smith v. State, 28 So. 3d 838, 845-855 (Fla. 2009) – "Here, it was the supervisor in her capacity as the head of an FBI DNA-analysis team who evaluated the raw test results obtained by the biologists on her team and compared the DNA sample found on the victim's shirt to the sample taken from Smith. She was the person who concluded that Smith's DNA matched the DNA from the shirt and calculated the probability of a random individual from the pertinent sample group submitting a DNA sample that matched the sample obtained from the shirt. Thus, although the FBI team supervisor did not perform each actual test on the material found on the shirt and the buccal swab taken from Smith, she was the person who interpreted the data obtained from the testing and formulated the conclusions that incriminated Smith in the sexual battery. Thus, while the results that the supervisor obtained in this case were indubitably testimonial in nature, she was present at trial and subject to cross-examination with regard to those results."

Bradberry v. State, ___ S.E.2d ___, 2009 WL 1176389 (Ga. App. May 04, 2009) – "Bradberry argues that the court erred in admitting the testimony of the DNA expert, who identified the semen in the daughter's vaginal cavity as Bradberry's. Specifically, he contends that two lab technicians who participated in the process did not testify at trial, and that therefore he was denied his right of confrontation under the Sixth Amendment. *See Crawford v. Washington*. [FN12] We discern no constitutional violation. ... As here, the expert in *Dunn* testified regarding the procedures used to establish that the substance tested was the substance that came from the defendant, and no conclusions from the technicians were submitted to the jury, which sufficed to satisfy any constitutional concerns."

People v. Johnson, 2009 WL 1124479 (Cal. App. 3 Dist. Apr 28, 2009) (unpub) – following *Geier*

Meras v. Sisto, 2009 WL 382641 (E.D. Cal. Feb 13, 2009) (unpub) (habeas) – "The appellate court concluded that the report was non testimonial as it fell within the business records

exception to the hearsay rule set forth in California Evidence Code § 1271. The decision by the California Court of Appeal on this issue cannot be deemed to have been contrary to or an unreasonable application of clearly established Federal law."

People v. Alcaraz, 2009 WL 200251 (Cal. App. 2 Dist. Jan 29, 2009) (unpub) – "*Geier* holds that forensic laboratory re-ports are nontestimonial and, therefore, admissible under *Crawford*. [cite] Alcaraz argues that *Geier* was wrongly decided and that some other state courts have reached a different result, but we are bound by the decisions of our Supreme Court."

People v. Holland, 2009 WL 80356 (Mich. App. Jan 13, 2009) (unpub) – "When determining whether a forensic analyst's laboratory report is testimonial in nature, this Court may consider whether the report contains sub-jjective statements or analytic opinions. ... The more significant question is whether Kowaleski's testimony that she used a DNA profile obtained by her colleague, Kelly Lewis, from a buc-cal swab taken from defendant [FN5] to compare against the Y-STR profile that was obtained from a swab on the victim's shirt requires reversal. ... Because it is not plain from the record that Lewis conducted any subjective analysis in arriving at the DNA profile for defendant, we conclude that defendant has failed to show a plain violation of his right of confrontation."

People v. Jenkins, 55 A.D.3d 850, 869 N.Y.S.2d 539, 2008 N.Y. Slip Op. 08146 (N.Y. A.D. 2 Dept. Oct 21, 2008) – "records of independent laboratories reflecting DNA test procedures and results are nontestimonial in nature, as DNA test results are not directly accusatory and law enforcement officials can not influence the tests' outcomes [cite]. Rather, the test results reflected by the admissible business records of Cellmark were compared to the defendant's known DNA profile by Kara Keblish, a criminologist employed by the Medical Examiner's office, who testified at trial and was subject to cross-examination regarding her opinions. Therefore, the defendant's right to confrontation was not violated [cite]."

State v. Bruce, 2008 WL 4801648, 2008-Ohio-5709 (Ohio App. 5 Dist. Oct 31, 2008) (unpub) – "{¶ 43} In the case at bar, appellant is not challenging the 'matching' portion of the DNA analysis; appellant is only challenging the statistical portion of the DNA test evidence. ... ¶ 62} We find the statistical DNA evidence the State presented in an effort to identify appellant as a accomplice in the killing is not 'testimonial' under *Crawford*"

Gray v. Epps, 2008 WL 4793796 (S.D. Miss. Oct 27, 2008) (unpub) (habeas) – state court did not violate clearly established federal law by finding that DNA expert "was entitled to rely on data generated by others"

State v. Mangos, 957 A.2d 89, 2008 ME 150 (Me. Oct 07, 2008) – "[¶ 13] Keune's statement in her report that she had examined the t-shirt and bandanna and created the swabs from those items is testimonial because she made it in furtherance of a police investigation. Thus, the State must prove Keune's unavailability and that Mangos had a prior opportunity to cross-examine her. The State did not prove either of these, and thus, Mangos's confrontation rights were violated." – [NOTE: This seems obviously wrong, since Mangos did not provide evidence against the defendant, but tht issue isn't addressed in the opinion.]

People v. Williams, 385 Ill.App.3d 359, 895 N.E.2d 961, 324 Ill.Dec. 246 (Ill. App. 1 Dist. Aug 27, 2008), reh'g denied (Oct. 14, 2008), review granted – "Cellmark's report was not

offered for the truth of the matter asserted; rather, it was offered to provide a basis for [testifying expert] Lambatos' opinion." – no confrontation clause problem

Pendergrass v. State, 889 N.E.2d 861 (Ind. App. Jul 08, 2008) – DNA was used to prove paternity of aborted fetus of 12-year-old – DNA reports "were not admitted to prove that Pendergrass molested C.P., instead they merely provided context for Dr. Conneally's opinion [about paternity]. Both documents clarify the procedures and basis for the parental probability percentage as calculated by Dr. Conneally. In sum, we conclude that the admission of [the reports] did not implicate Pendergrass' right to confront the witnesses against him."

Campos v. State, 256 S.W.3d 757 (Tex. App.-Hous. May 27, 2008), overruled on other grounds by **Lee v. State, 418 S.W.3d 892, 893-901 (Tex. App.--Hous. [14th Dist.] 2013)**, **petition for discretionary review refused (Mar. 12, 2014)** – "[crime lab supervisor] Smejkal testified in detail as to the standard operating procedures the laboratory follows when performing DNA testing. The DNA report consisted of raw data-DNA profiles obtained from blood found on appellant's and [murder victim] Nguyen's jumpsuits. By following established protocols, the DNA profiles were generated as part of a routine process meant to ensure accurate analysis. Because the report provided factual evidence which had the potential to support appellant's conviction or exonerate him, it was not accusatory. The DNA report was thus neutral: the DNA profiles shed no light on appellant's guilt absent an expert opinion as to what those profiles revealed. It was left to Smejkal to draw from this evidence the inference that the victim's DNA matched DNA found on appellant's jumpsuit. Smejkal testified that she agreed with the results the technician reached in performing her analysis and that Nguyen could not be excluded as a contributor to the blood stain found on appellant's jumpsuit.FN5 Appellant had ample opportunity to cross examine Smejkal regarding the inferences and conclusions she drew from the DNA profiles. We conclude the report did not testify or bear witness against appellant within the meaning of Crawford and Davis."

People v. Brown, 50 A.D.3d 1154, 856 N.Y.S.2d 672, 2008 N.Y. Slip Op. 04102 (N.Y. A.D. 2 Dept. Apr 29, 2008) – "At trial, the Supreme Court admitted into evidence, as a business record, the file of the Office of the Chief Medical Examiner (hereinafter OCME), which included DNA reports produced from the sexual assault evidence kit and oral swabs taken from the defendant. ... Contrary to the defendant's contention, the DNA evidence ... did not violate his Sixth Amendment right to confront his accusers (*see Crawford* ..."

People v. Rawlins, 10 N.Y.3d 136, 884 N.E.2d 1019, 855 N.Y.S.2d 20, 2008 N.Y. Slip Op. 01420 (N.Y. Feb 19, 2008) cert. denied sub nom. Meekins v. New York, No. 07-10845 (May 09, 2008) – DNA report is non-testimonial [NOTE: Curiously, the same opinion holds that fingerprint reports are testimonial, although as the concurring judge notes, "the distinctions advanced by the majority do not explain why the fingerprint comparison ... was testimonial, but the DNA profile... was not."]

People v. Mitchell, 851 N.Y.S.2d 592, 47 A.D.3d 843, 2008 N.Y. Slip Op. 00541 (N.Y. A.D. 2 Dept. Jan 22, 2008) – "the DNA evidence was properly admitted under the business record exception to the hearsay rule [cites] and admitting that evidence did not violate the defendant's right of confrontation"

State v. Cosme, 2007 WL 926357, 2007-Ohio-1454 (Ohio App. 8 Dist. March 29, 2007), aff'd 117 Ohio St.3d 74, 881 N.E.2d 864, 2008-Ohio-500 (Feb. 13, 2008), cert. denied, No. 07-10908 (June 29, 2009) – "[¶ 1] The judgment of the court of appeals is affirmed on the authority of *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840, 879 N.E.2d 745." - [NOTE: That's the Ohio Supreme Court's opinion in its entirety. On June 29, 2009, the Supreme Court granted certiorari in *Crager*, summarily vacated it, and remanded for further consideration in light of *Melendez-Diaz*. But the Court denied certiorari in *Cosme*. Go figure.]

State v. Crager, 116 Ohio St.3d 369, 879 N.E.2d 745, 2007-Ohio-6840 (Ohio Dec 27, 2007) vacated and remanded, 129 S. Ct. 2856, 174 L. Ed. 2d 598 (2009), reversed and remanded, 116 Ohio St. 3d 369, 2007 Ohio 6840, 879 N.E.2d 745 (2007) – "1. Records of scientific tests are not 'testimonial' under *Crawford* ..." [syllabus] – "{¶ 39} This case presents the issue of whether the DNA reports, even though properly admissible as business records under the applicable exception to the hearsay rule, might nevertheless violate the Sixth Amendment... {¶ 51} The autopsy report at issue in *Craig* is not distinguishable from the DNA reports in this case. Like that autopsy report, the DNA reports here are nontestimonial. We reject the position that these DNA reports are different because the lab work that produced them was done at the request of the prosecution or because it was reasonably expected that the reports would be used in a criminal trial. ... {¶ 55} We fully agree with those courts that have rejected arguments regarding the 'testimonial' nature of scientific test reports such as the DNA reports involved in this case. ... {¶ 72} ... The DNA reports at issue in this case are no different from the autopsy report at issue in *Craig* for Confrontation Clause purposes. Under Evid.R. 803(6), the reports are business records of scientific tests that are nontestimonial under *Crawford* and *Davis*. ... {¶ 78} For all the foregoing reasons, we hold that records of scientific tests are not 'testimonial' under *Crawford*. This conclusion applies to include those situations in which the tests are conducted by a government agency at the request of the state for the specific purpose of potentially being used as evidence in the criminal prosecution of a particular individual." - two justices dissent

People v. Larkin, 2007 WL 4261677 (Cal. App. 2 Dist. Dec 06, 2007) (unpub) – "In his opening brief, Larkin contends that his Sixth Amendment right of confrontation was violated when the trial court permitted former Cellmark employee Word to testify about DNA tests that she did not perform because the test results were 'testimonial' as contemplated by *Crawford* ... After Larkin filed his brief, our Supreme Court expressly rejected this claim. (*People v. Geier* (2007) 41 Cal.4th 555, 596-607.)"

People v. Barba, 2007 WL 4125230 (Cal. App. 2 Dist. Nov 21, 2007) (unpub), cert. granted, summarily vacated and remanded, 557 U.S. 930 (June 29, 2009), 2010 Cal. LEXIS 4428 (Cal., May 12, 2010) (denying petition without prejudice), cert. granted, summarily vacated and remanded (again!), 131 S. Ct. 3088, 180 L. Ed. 2d 911 (June 28, 2011), 2012 Cal. LEXIS 3385 (Cal., Apr. 11, 2012) (denying petition without prejudice), cert. granted, summarily vacated and remanded (third time!), 133 S. Ct. 609, 184 L. Ed. 2d 390 (Nov. 13, 2012) –

People v. Geier, 41 Cal.4th 555, 161 P.3d 104, 61 Cal.Rptr.3d 580 (Cal. 2007), cert. denied No. 07-7770 (June 29, 2009) – DNA reports are non-testimonial

Anderson v. Commonwealth, 650 S.E.2d 702 (Va. 2007) – "Code § 19.2-187.01 contains a presumption that the Department of Forensic Science maintained a proper chain of custody at all

times while the samples were in its possession. ... Anderson has no Confrontation Clause violation regarding the presumption afforded by Code § 19.2-187.01 because the presumption is not testimonial in nature. Simply stated, the evidentiary presumption regarding chain of custody is relevant to the admissibility of the evidence. It is the substance of the evidence, namely the content of the certificate, that is a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact' accusatory to Anderson."

People v. Meekins, 2006 NY Slip Op 9018 (N.Y. App. Div. 2d Dept. 2006), aff'd sub nom. People v. Rawlins, 10 N.Y.3d 136, 884 N.E.2d 1019, 855 N.Y.S.2d 20, 2008 WL 423397, 2008 N.Y. Slip Op. 01420 (N.Y. Feb 19, 2008), cert. denied sub nom. Meekins v. New York, No. 07-10845 (May 09, 2008)

United States v. Adams, 2006 U.S. App. LEXIS 17291 (3rd Cir. N.J. 2006) - "Defendants argued that testimony regarding STR/PCR Deoxyribonucleic Acid (DNA) analysis violated Fed. R. Evid. 702 because it was unreliable, and Fed. R. Evid. 602 and the Confrontation Clause of the Sixth Amendment because it was provided by a witness who did not conduct the tests himself and who thus did not have personal knowledge of the matter about which he testified. The present case was governed by the Trala case. The district court did not abuse its discretion in finding that the STR/PCR DNA testimony was sufficiently reliable. Since Rule 602 was subject to the provisions of Fed. R. Evid. 703, defendants' Rule 602 challenge was without merit. They were not denied their constitutional right to confrontation when the district court permitted the government's expert witness to testify. Their reliance on the Crawford case was untenable. Nothing prevented them from calling the DNA laboratory personnel who had actually performed, or possibly failed to perform, the DNA tests to testify."

State v. Hocutt, 628 S.E.2d 832 (N.C. Ct. App. 2006) – "Defendant also contends that the court erred when it permitted an SBI agent to testify about the results of DNA tests performed by a different agent who did not testify. Defendant argues that this violated his constitutional rights under the Confrontation Clause of the Sixth Amendment, as interpreted by the United States Supreme Court in *Crawford v Washington*. 541 U.S. 36, 124 S.Ct. 1354, 158 L.ed. 2d 177 (2004). In *Crawford*, the Court held that for testimonial evidence to be admitted against a defendant, the Confrontation Clause requires witness unavailability and a prior opportunity for cross-examination by the defendant. *Id.* at 68, 158 L. Ed. 2d at 203. However, *Crawford* left it to the States to determine how to address non-testimonial hearsay. *Id.* This Court has previously held that one SBI agent's testimony about the results of analysis conducted by another agent is non-testimonial under *Crawford*, and thus does not violate the Confrontation Clause."

State v. Forte, 360 N.C. 427, 629 S.E.2d 137 (N.C. 2006) – "State investigative reports were admitted even though the person who made the reports did not testify; they described DNA test results, and his supervisor testified. The court ruled in part that the reports were properly admitted as business records under N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 803(6) (2005), as they were not testimonial but were neutral and were not prepared for trial. Further, they were admissible under N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 803(8), as public records; they concerned routine matters and recorded only ministerial observations."

People v. Grogan, 2006 NY Slip Op 2783 (N.Y. App. Div. 1st Dept. 2006) – "Eight years after the complainant was raped by an unknown assailant, an indictment was filed against defendant. At trial, the DNA reports were admitted through the testimony of the laboratory director and

through a criminalist at the medical examiner's office. The trial court also admitted, as a business record, a DNA report prepared on defendant's blood by the criminalist. The appellate court held that although the indictment was filed eight years after the rape, defendant's whereabouts were continuously unknown and continuously unascertainable by the exercise of reasonable diligence until the his DNA profile from the rape kit was matched to the DNA profile in the databank. Admission of the DNA reports produced from the rape kit as business records did not violate defendant's right to confrontation because they were not testimonial. Moreover, defendant was afforded the opportunity to cross-examine the criminalist as to the preparation, authenticity, and methodology of the testing and the result. Consequently, the trial court properly denied defendant's § 330.30 motion to set aside the verdict."

State v. Lewis, 2006 Tenn. Crim. App. LEXIS 237 (Tenn. Crim. App. 2006) - The defendant appealed his negligent homicide and robbery conviction on several issues. One issue related to the trial allowing a DNA expert to testify about results conducted by another technician. "In the case before us, the laboratory technician's participation was limited to the mechanically objective preparatory procedure required for Dr. Melton's ultimate interpretation and analysis of the DNA sample. Dr. Melton checked the computations of the technician and verified during her testimony that the technician would have followed the standard laboratory procedures. See, e.g., *Sherman*, 62 F.3d at 142. Furthermore, Dr. Melton explained that the procedures for DNA testing are generally accepted within the scientific community as reliable. Further, she testified that she routinely supervised the tests performed by the laboratory technicians. Dr. Melton was justified in her reliance on the procedures performed by the laboratory technician. The laboratory reports contain the particularized guaranties of trustworthiness to keep them from violating a defendant's rights under the Confrontation Clause. Additionally, the defense was able to thoroughly cross-examine Dr. Melton as to the samples, procedures, safeguards and results reached in the present case. Thus, we conclude that Dr. Melton's testimony was properly admitted under a firmly rooted hearsay exception, Tennessee Rule of Evidence 703, n3 and the admission of her testimony did not violate the appellant's confrontation rights.

People v. Baylor, 2006 NY Slip Op 167 (N.Y. App. Div. 2d Dep't 2006) - "At trial, the People offered into evidence reports containing the results of DNA testing performed on samples collected from the complainants and the defendant. The DNA reports were offered through the testimony of an expert in forensic biology employed by the Medical Examiner's Office of the City of New York. The expert supervised other public employees who conducted the tests performed upon the samples, but he did not engage in all of the actual testing procedures." The reports were non-testimonial business records.

State v. Crager, 164 Ohio App.3d 816, 844 N.E.2d 390, 2005-Ohio-6868 (Ohio Ct. App. 2005), overruled, 116 Ohio St.3d 369, 879 N.E.2d 745, 2007-Ohio-6840 (Ohio Dec 27, 2007), vacated and remanded, 129 S. Ct. 2856, 174 L. Ed. 2d 598 (2009), reversed and remanded, 116 Ohio St. 3d 369, 2007 Ohio 6840, 879 N.E.2d 745 (2007) –

State v. Rogers, 615 S.E.2d 435 (NC Ct. App. 2005) – "Expert witnesses are generally allowed to rely on otherwise inadmissible evidence to formulate their opinions without running afoul of the Confrontation Clause. *** The testimony concerning Special Agent Earle's involvement simply explained to the jury how the CODIS data came to the attention of Special Agent Budzynski. It was not offered to establish the CODIS match. Special Agent Budzynski testified

that he conducted his own independent analysis of the data, concluded that the two DNA profiles matched, and presented the results of his analysis to the jury.”

State v. Watts, 616 S.E.2d 290 (NC Ct. App. 2005) - “Defendant argued that a witness tendered as an expert in forensic DNA analysis was not qualified to testify on population statistics. The appellate court disagreed, noting that a population-statistical analysis is part of DNA analysis, and that North Carolina case law supported the admission of such testimony by forensic DNA analysis experts. The fact that the expert relied on the results of an analysis conducted by an absent colleague did not violate defendant's Sixth Amendment right to confrontation.”

People v. Brown, 2005 NY Slip Op 25303 (NY Sup. Ct. 2005) – “The charges against defendant arose out of an incident in 1993 and were based on DNA evidence that was developed in 2002 and 2004. The prosecution's expert had reviewed the records technicians prepared regarding both the 2002 testing of a swab that had been taken from the victim and held since 1993 and the 2004 swab taken from defendant at some later date. The expert did not perform the actual DNA testing herself. Defendant argued that the testing constituted "testimonial" evidence and that under Crawford, his Sixth Amendment rights were violated because he was not given the opportunity to confront the technicians who performed the actual testing. The court disagreed. The notes and records prepared by the technicians were not made for investigative or prosecutorial purposes but, rather, were made for the routine purpose of ensuring the accuracy of the testing done in the laboratory and as a foundation for formulating a DNA profile. As such, they were not "testimonial" in nature, and there was no Sixth Amendment right of confrontation as to the technicians. There were no constitutional grounds for reversal of the judgment.”

Ellis v. Phillips, 2005 U.S. Dist. LEXIS 13910 (S.D. N.Y. 2005) – “The Confrontation Clause was not violated by allowing one expert to testify as to DNA test results when the expert who conducted the tests was unavailable due to cancer under the business record exception to the hearsay rule.”

Person Who Gathered Material for DNA Testing

(category added Dec. 2012)

(See also the two following categories; and part 6, "Foundation / Preliminary Questions of Fact / Chain of Custody.")

People v. Payne, 115 A.D.3d 439, 981 N.Y.S.2d 521 (N.Y. App. Div. 1st Dept. 2014) – "Defendant's right of confrontation was not violated by testimony by the People's expert DNA analyst that referred to data gathered by nontestifying technicians [cites]."

State v. Lui, 179 Wash.2d 457, 315 P.3d 493 (Wash. 2014), cert. denied, 2014 WL 1354998 (June 23, 2014) – "[¶ 49] we are interested in experts who makes statements to the court, not people who 'la[y] hands on the evidence...'"

U.S. v. Murray, 540 Fed.Appx. 918 (11th Cir. 2013) (per curiam) – "Murray argues that the Confrontation Clause requires the biologists who conducted the underlying DNA tests to be present at trial or be subjected to cross-examination before trial. He is mistaken." [NOTE: This opinion appears to treat the Alito plurality opinion in *Williams* as a majority opinion.]

Johnson v. State, 117 So. 3d 1238, 1239-45 (Fla. 3d Dist. App. 2013) – sperm gathered by Dr. Silla, a non-testifying ER doctor – "the person who actually performed the DNA test, Sharon Hinz, testified and was cross-examined by defense counsel at trial. Moreover, Nurse Carter, who was present and assisted Dr. Silla in his examination and his collection of the evidence, also signed the report documenting the events, and she also testified and was cross-examined by defense counsel at trial. We therefore find that, because the defendant had an ample opportunity to confront and question Nurse Carter and Ms. Hinz at trial, his Sixth Amendment rights were not violated by the admission of Dr. Silla's report."

Speers v. State, 988 N.E.2d 1238, 1240-1241 (Ind. Ct. App. 2013) – "Speers contends that his confrontation rights were violated because the lab technician (Nichole Stickle), who transferred the suspected blood from the glass to white cloths for testing by James, did not testify. ... There is no indication that the technician's role in the DNA testing involved a material exercise of judgment or analysis. On the contrary, it is evident that this preliminary stage required the technician to perform a largely mechanical task. '[A]bsent some reason to believe there was error or falsification, the need to call such a technician as a witness may not become a constitutional necessity.'"

Pollard v. State, 392 S.W.3d 785 (Tex. App. Waco Oct. 11, 2012) (on reh'g), pet. ref'd (Mar. 6, 2013) – "Pollard argued at the hearing on one of his motions to suppress that: 'To the extent that Brandi Mohler is relying upon swabbing done by another expert who is not subject to cross-examination, we would object on confrontation grounds under the state and federal Constitution.' Pollard later clarified his objection, stating the following: 'We consider this lynch pin. The swabbing of the spoon that—from which DNA was extracted is testimonial evidence. We contend it—in fact, it meets the requirements of testimonial evidence under Crawford and would object to any evidence offered by the expert Brandi Mohler that relies on the testimonial evidence, the swabbing of the spoon.' ... The State argues that this argument must fail because Burgett's proposed testimony—that she swabbed the spoon and placed it in the freezer for Mohler to examine later—would have been limited to establishing the chain of custody and authenticity of the sample. ... [N]either *Melendez-Diaz* nor *Bullcoming* required: (1) the State to present Burgett, in addition to Mohler, to testify about the DNA testing; or (2) the trial court to exclude Mohler's testimony in light of Burgett's absence. ... However, we do not express an opinion as to whether or not the results of Burgett's testing amount to testimonial statements, as such a conclusion is unnecessary given the analysis above." [NOTE: The opinion refers at least three times to Burgett's "testing," but it's unclear what that means given that both parties described her as merely swabbing the spoon.]

DNA / Serology: Testimony by Supervisor, Colleague or Technical Reviewer

(category added Dec. 2012)

(this category and the next substantially overlap)

People v. Cartagena, 126 A.D.3d 913, 7 N.Y.S.3d 150 (N.Y. App. Div. 2015) – " Here, in addition to the erroneously admitted report, the People presented evidence directly linking the defendant to the burglary. Specifically, the nontestifying analyst's supervisor testified that she herself analyzed the raw data from the evidence collected at the crime scene and the DNA collected from the defendant and drew her own conclusions. Thus, the erroneously admitted

report was cumulative, as the expert who did testify reached that same conclusion after comparing the same raw data relied upon by the nontestifying analyst."

State v. Roach, 219 N.J. 58, 95 A.3d 683 (N.J. 2014) – "we conclude that a defendant's federal and state confrontation rights are satisfied so long as the testifying witness is qualified to perform, and did in fact perform, an independent review of testing data and processes, rather than merely read from or vouch for another analyst's report or conclusions."

Norton v. State, 217 Md.App. 388, 94 A.3d 110, 111-21 (Md. Spec. App. 2014) – "Viewing the Cline report [DNA test results] as a whole, we conclude that it is sufficiently formalized to render it testimonial. ... We further hold that the circuit court erred by permitting Cariola's testimony regarding the Cline report, and by admitting the Cline report through the testimony of Cariola. Cariola acknowledged that he did not perform any analysis of Norton's DNA sample but merely reviewed the Cline report and associated lab notes and data after the analysis was performed. Such surrogate testimony is plainly insufficient under *Bullcoming*..."

State v. Dorais, 2014-NMCA-__, __ P.3d __ (N.M. App. 2014) – "But there is no evidence that the testifying witness observed the conduct of the test. Indeed, the facts here are nearly exactly like those in *Bullcoming*, to wit: (1) a certified report showing Defendant's blood alcohol content was admitted into evidence, (2) the analyst who certified the results of the blood testing did not testify, (3) another SLD employee—who reviewed the analyst's documentation but did not observe the testing—testified, including about the results of the test. *See Bullcoming*, 131 S.Ct. at 2709–11. Discerning no material difference between the facts here and those in *Bullcoming*, we conclude that Defendant's right to confront the analyst whose certified statement was admitted into evidence was violated." – [NOTE: The opinion does not specify whether the testifying witness testified to her own opinion or merely relayed the opinion of someone else. The case appears to turn on the simple question of whose eyes were on the mass spectrometer.]

State v. Chisolm, 139 So. 3d 1091 (La. App. 2d Cir. 2014) – under notice and demand statute, defendant waived right to confront Torres, the analyst who performed the testing – "However, rather than merely introducing the report into evidence, the state elected to call Dr. Esparza as a witness to testify as an expert in DNA analysis. Dr. Esparza testified that she performed a technical review of Ms. **19 Torres' work in this case. Although Dr. Esparza did not actually perform the testing, she confirmed that the proper protocols were used, examined the data, and testified regarding her own conclusions. Dr. Esparza's conclusions corroborated the conclusions reached by Ms. Torres—that the DNA found on the shirt was the defendant's DNA. Therefore, we find that the trial court did not err in allowing Dr. Esparza to testify."

Ex parte Ware, __ So.3d __, 2014 WL 210106 (Ala. 2014) – "We conclude that Kokoszka's testimony in this case satisfied the purpose of the Confrontation Clause. Kokoszka signed the DNA-profile report and initialed each page of Cellmark's 'case file' that was also admitted into evidence."

Hosch v. State, __ So.3d __, CR-10-0188, 2013 WL 5966906 (Ala. Crim. App. 2013) – "Hosch argues that the trial court erred when it permitted Phyllis Rollan, a section chief at the Alabama Department of Forensic Sciences ("DFS"), to testify about reports of DNA analysis that had been prepared by other analysts. ... This Court has previously held that admission of the

report and testimony in these circumstances does not violate either the Confrontation Clause or any United States Supreme Court precedent. *Ware*..."

People v. Medrano-Bustamante, ___ P.3d ___, 2013 COA 139 (Colo. App. 2013), reh'g denied (Dec. 5, 2013) – "[Burbach] supervised and reviewed the process and, ultimately, approved and certified the lab report. Without Burbach's review and approval, the lab report would not be returned to the requesting law enforcement agency. Thus, once the lab report certified by Burbach was introduced through her testimony, she became a witness that defendant had the right to confront. [cite] Because defendant cross-examined Burbach at trial, his confrontation rights were satisfied."

Commonwealth v. Yohe, 79 A.3d 520, 523-43 (Pa. 2013) – "Based on these facts, we hold that Dr. Blum is the analyst who determined Appellant's BAC. Although he relied on the raw data produced by the lab technicians and utilized this raw data in reaching an expert opinion premised on his evaluation of the case file, he is the only individual who engaged in the critical comparative analysis of the results of the gas chromatograph tests and the enzymatic assay and determined Appellant's BAC. Dr. Blum was at the top of the inferential chain, and utilized the data that preceded his analysis in reaching his conclusion. ... He was, therefore the certifying analyst who authored the Toxicology Report, and the analyst whom Appellant had a right to confront."

Galloway v. State, 122 So. 3d 614 (Miss. June 6, 2013) – "Dubourg, as the technical reviewer assigned to the case, was familiar with each step of the complex testing process conducted by Golden, and Dubourg performed her own analysis of the data. [cite] Dubourg personally analyzed the data generated by each test conducted by Golden and signed the report. Given Dubourg's knowledge about the underlying testing process and the report itself, any questions regarding the accuracy of the report due to possible contamination of the DNA samples could have been asked of Dubourg. ... we find that no Confrontation Clause violation occurred in this case."

Young v. United States, 63 A.3d 1033, 1035-1049 (D.C. 2013) – "[W]ithout evidence that [testifying expert] performed or observed the generation of the DNA profiles (and, perhaps, the computer calculation of the RMP [random match probability]) herself, her supervisory role and independent evaluation of her subordinates' work product are not enough to satisfy the Confrontation Clause because they do not alter the fact that she relayed testimonial hearsay." [NOTE: The supervisor must observe the computer as it calculates the random match probability?? At least the court said "perhaps," so maybe the judges were just joshing...]

State v. Manion, 173 Wn. App. 610, 295 P.3d 270 (Wash. Ct. App. 2013) – "¶2 The DNA expert who testified at the fact-finding hearing was the technical peer reviewer of the evidence originally examined by another analyst. The other analyst was unavailable as a witness for the hearing. The expert who testified at the hearing conducted an independent review [***2] of the DNA evidence and gave her independent opinion. This opinion was consistent with the conclusions of the unavailable witness. Based on this record, we conclude that there was no violation of the Confrontation Clause."

Estrada v. State, 319 Ga. App. 762, 765-766, 738 S.E.2d 344 (Ga. Ct. App. 2013) – "*Bullcoming* disallowed surrogate testimony by a scientist who did not sign a lab certification or

perform or observe the testing.ⁿ¹⁶ Here, by contrast, the witness was a supervisor personally familiar with the techniques performed, and he testified that the sample was assigned to an analyst personally supervised by the witness. The analyst, who was [*766] still employed at the lab but unable to testify due to a scheduling conflict, had documented each step of the process, which was reviewed by the supervisor to determine if all the procedures were performed correctly and whether the supervisor agreed with the outcome of the analysis. Based on this review, the supervisor testified (and was subject to cross-examination) as to his opinion of the data and results. Under these facts, reversal is not required.ⁿ¹⁷"

Martin v. State, 60 A.3d 1100 (Del. 2013) – alcohol blood test – "Here, the testifying laboratory manager who ultimately certified the report testified before the jury, but the manager neither observed nor performed the test. We hold that the absent analyst's testimonial representations were admitted for their truth on an issue central to the case, which violated the Defendant's right to confront the witnesses against him." – in the usual protocol, the technician, Wert, "performs the extractions, places the final products into the machine, allows the machine to run, and processes the data. Finally, Wert prints out the data for all of the samples into a batch report." – [the opinion does not explain what "processing the data" means] – "We recognize that for the purpose of determining whether Wert's batch reports are testimonial, the instant case falls somewhere between *Bullcoming* and *Williams*. ... The U.S. Supreme Court very clearly held in *Bullcoming* that the defendant must be able to confront the certifying analyst when her report is submitted into evidence.ⁿ⁷² We now hold that the defendant has the right to confront the testing analyst as well, where the certifying and testing analyst are not the same person and the certifying analyst does not observe the testing process.ⁿ⁷³" – [NOTE: This very long and analytically fuzzy opinion nicely illustrates the difficulty of trying to apply SCOTUS precedents to a novel fact situation. There are repeated decision points where the flow chart lacks links.]

People v. Holmes, 212 Cal. App. 4th 431, 150 Cal. Rptr. 3d 914 (Cal. App. 2d Dist. 2012) – "Three supervising criminalists [two of them technical reviewers] from these three labs offered opinions at trial, over defense objection, based on DNA tests that they did not personally perform. ... Each of the experts reached his or her own conclusions based, at least in part, upon the data and profiles generated by other analysts. ... That a statement is prepared for use at trial is not alone sufficient to render it 'testimonial' under any formulation of that term yet adopted by a majority of the United States Supreme Court justices or the California Supreme Court. ... The forensic data and reports in this case lack 'formality.' They are unsworn, uncertified records of objective fact. Unsworn statements that 'merely record objective facts' are not sufficiently formal to be testimonial. ... the forensic analysis relied on by the [*439] DNA experts in this case was not testimonial..."

Jamerson v. State, 383 S.W.3d 309 (Tex. App. Dallas 2012) – "In this case, Fitzwater, as the technical reviewer assigned to the case, was familiar with each step of the complex testing process and performed her own analysis of the data to compare with Johnson's to confirm that Johnson's analysis was correct. [cite] She personally reviewed the data used in each phase of Johnson's work. She was able to describe the precise process of the [*313] testing because she was familiar with the protocols used in her laboratory. Her testimony was an explanation of her work in the case, rather than an after-the-fact explanation of Johnson's work. Moreover, neither she nor Johnson had any way of knowing whether the DNA testing in the case would incriminate or exonerate appellant. ... Fitzwater did not act as a conduit for Johnson's conclusions but rather testified about what she observed and concluded in reviewing the data Johnson's work produced.

... At the time the State offered Fitzwater's testimony, the report was not admitted into evidence. Appellant, however, had ample opportunity to confront Fitzwater about the complex process used in the DNA testing, the data gathered, and the analysis she personally performed to evaluate Johnson's analysis. Accordingly, his rights under the Confrontation Clause were satisfied in this case."

State v. Poole, 733 S.E.2d 564, 567-569 (N.C. Ct. App. 2012) – "Agent Gregory's testimony was based upon the lab report prepared by Agent Howell, and as noted above, the State has failed to show that Defendant was given a prior opportunity to cross-examine Agent Howell. We must therefore determine whether Agent Gregory 'was offering an independent opinion or merely summarizing another non-testifying expert's report or analysis[.]' ... As in *Williams*, we find the following facts to be decisive: there is no indication in the record that Agent Gregory performed any tests on Exhibit 3-A, nor is there any indication that Agent Gregory was present when Agent Howell performed tests on Exhibit 3A." – therefore error

Leger v. State, 291 Ga. 584, 732 S.E.2d 53, 2012 Fulton County D. Rep. 2912 (Ga. 2012) – "This Court has previously held that a supervisor of such testing can testify without offending the confrontation clause. *Disharoon*... [fn.5] although it may not be possible to definitively state the Court's prevailing view on this issue, the Court's opinion in *Williams* does not appear to affect the approach we recently took in *Disharoon* and follow today."

Littleton v. State, 372 S.W.3d 926, 927-931 (Mo. Ct. App. 2012) – "Here, the laboratory report prepared by the absent technician was not admitted into evidence. Instead, the State offered [supervisor] Karr's testimony as to her own findings relating to the DNA identification evidence recovered from Galbreath's vehicle. ... Had Karr's testimony merely recited the findings presented in the laboratory report, we would have Confrontation Clause concerns as Karr would be testifying as to findings made by a technician who was not available to the accused for cross-examination. But such is not the case here. Instead, Karr's testimony was based on her personal knowledge of the DNA testing and results. Karr specifically testified that the conclusions she made regarding the DNA found in Galbreath's vehicle were independent of the findings of the technician who drafted the laboratory report, and of the report itself. ... Given the facts before us, we find no Sixth Amendment Confrontation Clause violation."

McWilliams v. State, 367 S.W.3d 817 (Tex. App. Houston 14th Dist. 2012) – "The facts of the present case are distinguishable from those in *Bullcoming* and consistent with the exception that Justice Sotomayor identified. Rhonda Craig was a supervisor, involved with every aspect of the testing process, first by determining which samples should be tested, which tests should be conducted and in what order, then through supervision, then through analysis of the data, and lastly by writing the report. She had a direct connection to the scientific test at issue. The appellant's Confrontation Clause rights were not violated by admission of Craig's testimony."

Commonwealth v. Yohe, 2012 PA Super 34, 39 A.3d 381 (Pa. Super. Ct. 2012), aff'd **Commonwealth v. Yohe, 79 A.3d 520, 523-43 (Pa. 2013)** – "We concede that Dr. Blum is in a similar position as the testifying witnesses in *Barton-Martin* and [*390] *Bullcoming* in that he did not personally handle the defendant's blood sample, prepare the aliquots, or physically place the aliquots in the testing apparatuses. However, unlike the testifying witnesses in *Barton-Martin* and *Bullcoming*, Dr. Blum did certify the results of the testing and author the report sought to be admitted as evidence against Appellee. We conclude this distinction is dispositive of the issue

presented. [¶] As declared in *Bullcoming*, it is the certification and the written report that constitute the "testimonial statement" triggering the Sixth Amendment right of confrontation. [cite]. Appellee is not limited in his cross-examination of Dr. Blum as suggested by the trial court simply because there may be questions he cannot answer due to the fact he did not perform a specific task in the course of processing Appellee's blood sample. What is relevant to Appellee's right of confrontation is the basis for the findings in the report and the certification of those results. Dr. Blum, as the certifying analyst and signatory to the report, is the person who can respond to questions about the reasons for his certification and the bases for the factual assertions in the report. The fact that NMS Labs chose not to have the individual who physically performed the testing certify the results and author the report may be an issue relevant to the weight of the certification, but it is not a confrontation issue. This is true so long as Dr. Blum's certification is based on a true analysis and not merely a parroting of a prior analysis supplied by another individual."

Commonwealth v. Taskey, 78 Mass. App. Ct. 787, 941 N.E.2d 713 (Mass. App. Ct. 2011) – supervisor Walsh testified, not analyst McKillop – "Although the defendant objected generally to Walsh's testimony, counsel did not identify any element of the DNA testing, analysis, or judgment, which Walsh had not independently reviewed and about which she could not undergo cross-examination. On those points, the substituted witness was not channeling forward the testimony of an absent witness, but presenting and answering for her own observations. Defense counsel had full opportunity to confront her upon the process of DNA identification. ...

People v. Johnson, 406 Ill. App. 3d 805, 941 N.E.2d 242, 346 Ill. Dec. 684 (Ill. App. Ct. 1st Dist. 2010), appeal denied (March 30, 2011) – "Ginglesberger--unlike the DNA expert in Williams--was an actual Cellmark representative, subject to cross-examination by defense counsel. Accepting defendant's contentions as true in this case would require each and every individual involved in the testing and analysis of DNA to testify at trial."

Gardner v. United States, 999 A.2d 55, 58-62 (D.C. 2010) – "'an expert's use of testimonial hearsay is a matter of degree. . . . The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.' United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009)... Dr. Cotton's and Dr. Zervos's explicit reliance on and references to the reports prepared by third parties make it impossible to disaggregate their opinion testimony from evidence admitted in violation of the Confrontation Clause. Moreover, in the absence of a limiting jury instruction, such an analysis would be irrelevant because the jury clearly did not ignore the improper expert testimony."

People v. Johnson, 406 Ill. App. 3d 805, 941 N.E.2d 242 (Ill. App. Ct. 1st Dist. 2010), cert. denied, 133 S. Ct. 56, 183 L. Ed. 2d 709 (2012) – "Here, as in *Williams*, the report was not offered to prove the truth of Cellmark's findings; instead, Ginglesberger testified regarding the report to provide a basis for her own opinion. [¶] Moreover, Ginglesberger--unlike the DNA expert in *Williams*--was an actual Cellmark representative, subject to cross-examination by defense counsel. Accepting defendant's contentions as true in this case would require each and every individual involved in the testing and analysis of DNA to testify at trial. [¶] Because the report was not offered to prove the truth of Cellmark's findings, the confrontation clause was not violated."

U.S. v. Richardson, 537 F.3d 951 (8th Cir. Aug 12, 2008) – DNA – "Although she [*i.e.*, testifying scientist] did not actually perform the tests, she had an independent responsibility to do the peer review. Her testimony concerned her independent conclusions derived from another scientist's tests results and did not violate the Confrontation Clause."

Pendergrass v. State, 889 N.E.2d 861 (Ind. App. Jul 08, 2008) – "we conclude that the trial court properly admitted State's Exhibits 1, 2, and 3 and related testimony concerning DNA analysis and the subsequent test result without the testimony of the laboratory technician who performed the actual testing"

Campos v. State, 256 S.W.3d 757 (Tex. App.-Hous. May 27, 2008), overruled on other grounds by **Lee v. State, 418 S.W.3d 892, 893-901 (Tex. App.--Hous. [14th Dist.] 2013)**, **petition for discretionary review refused (Mar. 12, 2014)** – "Because we conclude the DNA report was nontestimonial and because appellant had an opportunity to cross examine [supervisor] Smejkal regarding her opinions about the report [prepared by unavailable analyst], we find no Confrontation Clause violation." – same result with respect to medical examiner's testimony based on autopsy report prepared by unavailable predecessor in office

People v. Brown, 50 A.D.3d 1154, 856 N.Y.S.2d 672,, 2008 N.Y. Slip Op. 04102 (N.Y. A.D. 2 Dept. Apr 29, 2008) – "At trial, the Supreme Court admitted into evidence, as a business record, the file of the Office of the Chief Medical Examiner (hereinafter OCME), which included DNA reports produced from the sexual assault evidence kit and oral swabs taken from the defendant. These exhibits were admitted through the testimony of an OCME forensic biologist, who testified that the data upon which she based her opinions was generated by employees of both the OCME and a private laboratory that subcontracted with the OCME, and that she had confirmed the accuracy of the private laboratory's finding. Contrary to the defendant's contention, the DNA evidence ... did not violate his Sixth Amendment right to confront his accusers (see Crawford ..."

State v. Triplett, 2008 WL 302403, 2008-Ohio-367 (Ohio App. 6 Dist. Jan 18, 2008) – Crager (see below) "held that 'records of scientific tests are not testimonial under Crawford ' and that '[a] criminal defendant's constitutional right to confrontation is not violated when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing. [cite] In accordance with Crager, we find that appellant's right to confrontation of witnesses was not violated by the testimony of BCI analyst, Julie Cox."

U.S. v. Washington, 498 F.3d 225 (4th Cir. 2007)), cert. denied, No. 07-8291 (June 29, 2009) – "In the case before us, the 'statements' in question are alleged to be the assertions that Washington's blood sample contained PCP and alcohol. But those statements were never made by the technicians who tested the blood. The most the technicians could have said was that the printed data from their chromatograph machines showed that the blood contained PCP and alcohol. The machine printout is the only source of the statement, and no person viewed a blood sample and concluded that it contained PCP and alcohol. Yet, the very same data that would have permitted the lab technicians to say that the blood contained PCP and alcohol were also seen and interpreted by Dr. Levine. ... Thus, the statements to which Dr. Levine testified in court--the blood sample contained PCP and alcohol--did not come from the out-of-court technicians, and so there was no violation of the Confrontation Clause."

State v. Cosme, 2007 WL 926357, 2007-Ohio-1454 (Ohio App. 8 Dist. March 29, 2007), aff'd 117 Ohio St.3d 74, 881 N.E.2d 864, 2008-Ohio-500 (Feb. 13, 2008), cert. denied, 557 U.S. 934 (June 29, 2009) – the Court of Appeals held: "[¶ 26] Word admittedly did not perform the actual DNA analysis that comprised the report; however, she played an integral role in ensuring the scientific integrity of the report. ...[¶ 28] Not only did Word directly review appellant's DNA report, qualifying her to offer testimony about it, she also signed the report. Because the document bears Word's signature, her testimony regarding the documents did not constitute inadmissible hearsay, and the trial court did not err when it admitted her testimony." – the Ohio Supreme Court held: "[¶ 1] The judgment of the court of appeals is affirmed on the authority of *State v. Crager*..." On June 29, 2009, the Supreme Court granted certiorari in *Crager*, summarily vacated it, and remanded for further consideration in light of *Melendez-Diaz*. But the Court denied certiorari in *Cosme*. Go figure.

State v. Crager, 116 Ohio St.3d 369, 879 N.E.2d 745, 2007-Ohio-6840 (Ohio Dec 27, 2007), on remand, 2008 Ohio 3223, 2008 Ohio App. LEXIS 2743 (Ohio App. 2008), vacated and remanded, 129 S. Ct. 2856, 174 L. Ed. 2d 598 (2009), new trial ordered, 123 Ohio St. 3d 1210, 914 N.E.2d 1055 (Ohio App. 2009) –

People v. Barba, 2007 WL 4125230 (Cal. App. 2 Dist. Nov 21, 2007) (unpub), cert. granted, summarily vacated and remanded, 557 U.S. 930 (June 29, 2009), 2010 Cal. LEXIS 4428 (Cal., May 12, 2010) (denying petition without prejudice), cert. granted, summarily vacated and remanded (again!), 131 S. Ct. 3088, 180 L. Ed. 2d 911 (June 28, 2011), 2012 Cal. LEXIS 3385 (Cal., Apr. 11, 2012) (denying petition without prejudice), cert. granted, summarily vacated and remanded (third time!), 133 S. Ct. 609, 184 L. Ed. 2d 390 (Nov. 13, 2012) –

State v. Lewis, 235 S.W.3d 136 (Tenn. 2007) – "Because Dr. Melton did not actually perform the DNA analysis on the hat found at the scene, the Defendant challenges the admissibility of her testimony. ... Here, the data gathered by Dr. Nelson was not admitted into evidence. The jury did not hear her 'testimony.' Dr. Melton's expert opinion was an evaluation of the data. She did not communicate any out-of-court statement made by Dr. Nelson. In consequence, it is our view that the trial court did not err by admitting the testimony."

People v. Horton, 2007 WL 2446482 (Mich. App. Aug. 28, 2007) (unpub), leave to appeal denied, 485 Mich. 880, 772 N.W.2d 46 (Mich. Sept. 23, 2009) – "Serologists Paul Donald, Michelle Marfori, and Rodney Wolfarth all performed laboratory tests related to this case,[FN2] but only Donald testified at trial. Some of Donald's testimony was based solely on the written reports and findings of Marfori and Wolfarth. In particular, Donald testified that Wolfarth found evidence of human blood in several samples taken from defendant's apartment and in a sample taken from a blue blanket discovered by the police. Donald then testified that Marfori tested the samples and that she concluded that the victim's blood matched certain of the samples taken from defendant's apartment. Lastly, Donald testified that Wolfarth compared the victim's blood to the blood collected from the blue blanket, and that Wolfarth concluded that the samples matched. ... [W]e conclude that Donald's testimony concerning Marfori's and Wolfarth's out-of-court findings and laboratory reports constituted hearsay that was admitted in violation of the rules of evidence and in violation of defendant's right to confront the witnesses against him."

Veney v. U.S., 929 A.2d 448 (D.C. Aug 02, 2007), merits discussion deleted on motion for rehearing, 936 A.2d 809 (D.C. Nov 16, 2007)

DNA / Serology: Expert Bases Opinion on Another's Work

(category added Dec. 2012)

(see also the two preceding categories; and part 6, "Foundation / Preliminary Questions of Fact / Chain of Custody")

State ex rel. Montgomery v. Karp, 236 Ariz. 120, 336 P.3d 753, 755-58 (Ct. App. 2014) – pretrial appeal – "The police drew Voris's blood, and a Scottsdale Police Department Crime Lab criminalist, Lynette Kogler, analyzed the blood using a gas chromatograph... ¶ 3 Before trial, the State moved to admit expert testimony of another criminalist, Jennifer Valdez, a technical leader in the Scottsdale Police Department Crime Lab. ... ¶ 13 Therefore, an expert may testify to otherwise inadmissible evidence, including the substance of a non-testifying expert's analysis, if such evidence forms the basis of the expert's opinion and is reasonably relied upon by experts in the field. ... [¶ 15] [B]ecause the notes and reports are used for the sole purpose of explaining the basis on which Valdez's opinion rests, they fall outside the scope of the Confrontation Clause. More importantly, the State is not offering the documents into evidence; it is offering Valdez's independent, expert opinion. At trial, Voris will have the opportunity to fully cross-examine her, thereby satisfying the Confrontation Clause."

People v. Banks, 59 Cal.4th 1113, 176 Cal.Rptr.3d 185, 331 P.3d 1206 (Cal. 2014) – "an expert witness's reliance on statements or reports by other individuals that 'merely record objective facts' do not implicate the confrontation clause because '[s]uch observations are not testimonial in nature.'"

State v. Mark, __ So.3d __, 2013-1110 (La. App. 4 Cir. 7/30/14) – "In the present case, the then unknown male DNA profile (later found to match Mr. Mark's DNA profile) was developed by ReliaGene in March 2005 from vaginal swabs taken from E.W. in 1994. Mr. Mark was not a suspect in the case at that time. He did not become a suspect until 2011, when a computer-generated hit in the CODIS database matched the DNA profile developed by ReliaGene with his known DNA profile that had been obtained after his arrest. [¶] Under *Williams* and *Bolden*, any evidence introduced as to that CODIS match, whether it was the testimony of Ms. Montgomery or the actual computer-generated copy of the match, did not violate Mr. Mark's rights under the Confrontation Clause. Pursuant to *Williams*, no one from ReliaGene had to testify concerning its development of the DNA profile from the vaginal swabs taken from E.W. It was sufficient that Ms. Delatte, with the LSPCL, testified that a DNA profile of Mr. Mark, developed by the LSPCL from the reference buccal swabs obtained from him after his 2011 arrest in the instant case, matched the male DNA profile developed by ReliaGene in 2005. According to *Williams*, Mr. Mark was not denied any confrontation rights by the failure of any other technician from ReliaGene or the LSPCL to testify.

Paredes v. State, __ S.W.3d __, 2014 WL 3672965 (Tex. App.--Hous. [14th Dist.] 2014) – "Finally and most significantly, unlike in *Burch* and *Bullcoming*, Freeman was not a surrogate witness serving as a mere conduit for another analyst's opinions. Instead, Freeman was the analyst who actually developed the opinions she testified to during appellant's trial. Freeman also

had personal knowledge of the procedures and equipment used by Identigene. [cite] In addition, Freeman testified at length and was cross-examined regarding how she developed her independent opinions regarding the DNA found in the t-shirt stain and collar scrapings. Therefore, we conclude *Burch* does not support a holding that admitting Freeman's testimony violated the Confrontation Clause."

People v. Sanders, 118 A.D.3d 1029, 987 N.Y.S.2d 461 (N.Y. App. Div. 2d Dept. 2014) –

"The court also properly admitted the New York City Office of Chief Medical Examiner's files containing DNA profiles and objective information regarding the testing procedures. These files contained DNA profiles prepared prior to receiving the defendant's DNA and did not, standing alone, link the defendant to the crime [cites]. The People's expert conducted the critical analysis linking the defendant's DNA to the DNA found at the crime scene [cite]. The People were not required to present the testimony of each analyst who contributed to the process and who developed the reports [cite]."

People v. Payne, 115 A.D.3d 439, 981 N.Y.S.2d 521 (N.Y. App. Div. 1st Dept. 2014) –

"Defendant's right of confrontation was not violated by testimony by the People's expert DNA analyst that referred to data gathered by nontestifying technicians [cites]."

State v. Lafleur, 134 So. 3d 167 (La. App. 3d Cir. 2014) – "No error under the Confrontation Clause occurs when a DNA expert testifies that in his or her opinion the DNA profile developed from a sample taken from defendant matches the DNA profile developed by other, non-testifying technicians from biological samples taken from the victim of a sexual assault if: the tests on the victim's samples were conducted before the defendant was identified as the assailant or targeted as a suspect, [cite], ... the tests are conducted by an accredited laboratory, ... and the report of the test results itself is not introduced as a certified declaration of fact by the accredited laboratory."

State v. Griep, 353 Wis.2d 252, 845 N.W.2d 24 (Wis. App. 2014) – "¶ 1 This operating a motor vehicle while intoxicated case raises a recurring and unsettled question of law: under *Crawford* ... may the State submit evidence of a driver's blood alcohol level at trial when the analyst who did the actual testing is unavailable to testify? ... ¶ 22 ... Under the reasoning of *Barton*, the availability of a well qualified expert, testifying as to his independent conclusion about the ethanol testing of Griep's blood as evidenced by a report from another state lab analyst, was sufficient to protect Griep's right to confrontation."

State v. Lui, 179 Wash.2d 457, 315 P.3d 493 (Wash. 2014), cert. denied, 2014 WL 1354998 (June 23, 2014) – "[¶53] our test allows expert witnesses to rely upon technical data prepared by others when reaching their own conclusions, without requiring each laboratory technician to take the witness stand. The test does nothing more. ... [¶ 56] If DNA evidence is used in trial, someone must be subject to cross-examination. The 'someone' required by the confrontation clause is the person who has made the final comparison that is used against the defendant."

State v. Oliphant, 127 So. 3d 91, 102-06 (La. App. 3d Cir. 2013) – " This issue arises because the actual Crime Lab employee who performed the DNA analysis was on maternity leave at the time of trial, and Mr. Wojtkiewicz testified concerning the results of that testing based on his review of her notes and the tests and procedures applied in the analysis. ... We find no error in the trial court's ruling allowing Mr. Wojtkiewicz to testify concerning his interpretation of Ms.

Raley's analysis. Therefore, we find no merit in the defendant's argument that his trial counsel was ineffective in failing to object to Mr. Wojtkiewicz's testimony."

Jenkins v. U.S., 75 A.3d 174, 176-210 (D.C. App. 2013) – "By referring to the findings of other laboratory analysts—those who tested for the presence of biological material in the crime scene evidence and those who extracted and amplified the DNA—and doing so without a limiting instruction that would have directed the jury not to consider the analysts' findings as substantive evidence, we think it is clear that under the law in this jurisdiction Dr. Baechtel relayed hearsay. ... Because the tests were conducted 'expressly for use in criminal prosecutions as a substitute for live testimony against the accused,' the stated results of those tests are testimonial." [NOTE: DNA technicians conduct tests "expressly" to provide a substitute for live testimony? This opinion is as short on analysis as it is careless in its language, but seems to hold that the entire team of technicians must troop into court.]

State v. Medicine Eagle, 835 N.W.2d 886, 888-92 (S.D. 2013) – "we conclude that Medicine Eagle's Confrontation Clause rights were not violated by the State's introduction of testimony from Leal regarding the 2008 and 2011 Y–STR testing. Leal participated in various steps of both the 2008 and 2011 testing and even wrote the original report regarding the results of the 2011 Y–STR testing. Also, Leal independently reviewed, analyzed, and compared the data obtained during the 2008 Y–STR testing. She then came to her own independent conclusions about whether Medicine Eagle could be excluded as a contributor to the samples. In addition, the 2008 and 2011 Y–STR testing reports were not introduced *899 at trial through Leal. Instead, only the chart Leal created, which contained a summary of her conclusions and statistical calculations for each sample, was admitted into evidence. Further, Leal only testified about her own conclusions and statistical calculations."

Cooper v. State, 73 A.3d 1108, 1110-24 (Md. 2013), cert. pet. filed (11/11/13) – "The Shields report, as it appears in the record, is a two page document indicating, among other things, when the report was created, what items were tested, what procedures were used to develop the results, and the DNA results developed from the testing. Nowhere on either page of the report, however, is there an indication that the results are sworn to or certified or that any person attests to the accuracy of the results. Although Bode [the lab – Shields was the analyst] developed the results at the request of the Baltimore City Police Department, the Shields report is not the result of any formalized police interrogation. Therefore, applying Justice Thomas's reasoning we conclude that the Shields report lacks the formality to be testimonial. Because a violation of the Confrontation Clause requires that the offered statement or evidence be both testimonial and introduced for its truth, we conclude that the introduction of the Shields report at trial did not violate Cooper's right of confrontation."

Derr v. State, 73 A.3d 254, 258-73 (Md. 2013), cert. pet. filed (Nov. 20, 2013) – "Because we determine that none of the challenged forensic test results are sufficiently formalized within the meaning of the [*Williams*] plurality and Justice Thomas's concurring opinions, we further conclude that none are testimonial. And, because none of the test results are testimonial, the introduction of the results does not implicate Derr's right of confrontation."

People v. Nelson, 994 N.E.2d 597, 599-605 (Ill. App. 1st Dist. 2013), reh'g denied (Aug. 13, 2013) – "¶ 72 ... We also conclude defendant failed to show the admission of Quartaro's

testimony violated his sixth amendment right to confront the witnesses against him, because the confrontation clause did not require the State to produce other Cellmark technicians to testify regarding the preliminary steps in the DNA analysis prepared by Quartaro."

State v. Deadwiller, 834 N.W.2d 362, 364-84 (Wis. 2013) – "Thus, Witucki was not merely a conduit for Orchid's DNA profiles, but he independently concluded that Deadwiller was a match to Orchid's DNA profiles. [cite] Therefore, Witucki's testimony was sufficient to protect Deadwiller's right to confrontation."

People v. Kendrick, 2013 IL App (1st) 090120-B, 990 N.E.2d 776, 371 Ill. Dec. 588 (Ill. App. Ct. 1st Dist. 2013) – "The supreme court did not address in Leach the issue presently before us, i.e., whether expert opinion testimony based on a DNA report prepared by someone else violates the confrontation clause. Rather, this issue was squarely addressed by the United States Supreme Court in *Williams v. Illinois*, and a majority of the Court agreed in that case 'that an expert may testify regarding the DNA analysis in a report prepared by another analyst without violating the confrontation clause.'"

People v. Barba, 215 Cal. App. 4th 712, 155 Cal. Rptr. 3d 707 (Cal. App. 2d Dist. 2013), cert. denied (Nov. 12, 2013) – "As for the practical considerations that motivated the plurality in *Williams*, we agree that it makes no sense to exclude evidence of DNA reports if the technicians who conducted the tests do not testify. So long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence about the DNA tests themselves is admissible."

Commonwealth v. Greineder, 464 Mass. 580, 984 N.E.2d 804 (Mass. 2013) – "Of great significance for our present purposes is that *Williams* focused on the admissibility of evidence of the basis of the expert's independent opinion, and not the admissibility of the expert opinion itself. ... The expert witness's testimony in *Williams* that implicated the DNA test results of a nontestifying analyst 'would have been . . . improper under long-standing Massachusetts law.' ... Thus, our rules of evidence and the protections they afford [*593] are not inconsistent with *Williams*.¹⁴ *Williams* does not interpret the confrontation clause to exclude an expert's independent opinion testimony, even if based on facts or data not in evidence and prepared by a nontestifying analyst. ... Expert opinion testimony, even that which relies for its basis on the DNA test results of a nontestifying analyst not admitted in evidence, does not violate a criminal defendant's right to confront witnesses against him under either the Sixth Amendment or art. 12 of the Massachusetts Declaration of Rights."

People v. Steppe, 213 Cal. App. 4th 1116, 152 Cal. Rptr. 3d 827 (Cal. App. 4th Dist. 2013) – "As to ... the technical reviewer's reference during her testimony to the conclusion reached by the clothing/door analyst, we note, [*1127] first, that the people analyst testified, without objection from defendant, that no report issued forth from the lab unless it had been checked by a reviewer and its conclusions concurred in by that reviewer. Thus, when the reviewer testified as to her conclusions, the jury necessarily knew that the clothing/door analyst had reached the same conclusions. Moreover, as a general matter, as both *Williams* and *Lopez* concluded, such lab reports, containing these conclusions, lack the degree of formality and solemnity to be considered testimonial for purposes of the confrontation clause. Finally, neither *Bullcoming* nor *Melendez-Diaz* required [**836] the trial court here to sustain defendant's objection. [¶] We agree with the People that the technical reviewer's brief reference to the clothing/door analyst's

reports and her reliance on the raw data [fn 13] was proper under California authority as well because such items are reasonably relied on by experts in the field of DNA analysis in forming their opinions."

People v Rios, 102 A.D.3d 473, 473-476 (N.Y. App. Div. 1st Dep't 2013) – "As an alternative holding, we reject defendant's Confrontation Clause claim on the merits. A fair reading of the analyst's testimony establishes that she made her own independent comparison between defendant's DNA profile and the DNA recovered from semen stains on the victim's underwear. The record does not support defendant's assertion that the witness merely reported on or agreed with a comparison made by others in her office. Thus, the witness did not merely provide surrogate testimony that failed to satisfy the Confrontation Clause (compare *Bullcoming*...) ... [A]s noted, the reports of the nontestifying analysts never reached the jury. The witness testified about the other analysts's tests only to explain the basis for her own opinion, which was the only statement offered for the truth of the matter asserted [cite]."

Commonwealth v. Tassone, 982 N.E.2d 534, 537 n.3 (Mass. App. Ct. 2013), rev'd by Commonwealth v. Tassone, 468 Mass. 391, 11 N.E.3d 67 (Mass. 2014) –

Crosby v. State, 735 S.E.2d 588, 2012 Fulton County D. Rep. 4112 (Ga. Ct. App. 2012) – "here, rather than being a mere conduit for the GBI technician and the Utah lab's findings, the GBI forensic biologist reviewed the data and testing procedures to determine the accuracy of those findings. Thus, the GBI biologist's testimony regarding these findings was not inadmissible hearsay.¹⁴ Furthermore, because the GBI biologist personally conducted much of the testing herself (reviewing and analyzing all of the testing procedures and data forming the basis of her opinion testimony at trial), she—unlike the expert in *Bullcoming*—was not acting as a mere surrogate for the GBI technician or the Utah lab.¹⁵ Rather, she had a 'substantial personal connection to the scientific [tests] at issue.'¹⁶ Accordingly, the GBI forensic biologist's testimony did not violate Crosby's Sixth Amendment Confrontation Clause right."

State v. Bolden, __ So.3d __, 2012 La. LEXIS 2894, 1-8 (La. Oct. 26, 2012) – "We therefore read *Williams* no more broadly than the particular circumstances that led to the convergence of the votes of five Justices to uphold the judgment of the Illinois appellate courts affirming the defendant's conviction and that are substantially similar to those in the present case. No error under the Confrontation Clause occurs when a DNA expert testifies that in his or her opinion the DNA profile developed from a sample taken from defendant matches the DNA profile developed by other, non-testifying technicians from biological samples taken from the victim of a sexual assault if: the tests on the victim's samples were conducted before the defendant was identified as the assailant or targeted as a suspect, [cites]; the tests are conducted by an accredited laboratory [cites]; and the report of the test results itself is not introduced as a certified declaration of fact by the accredited laboratory."

People v. Negron, __ N.E.3d __, 2012 IL App (1st) 101194; 2012 Ill. App. LEXIS 1073 (Ill. App. Ct. 1st Dist. 2012), modified upon denial of rehearing (Jan. 31, 2013) – " [¶ 64] Given the Supreme Court's narrow majority holding in *Williams* allowing an expert to testify regarding such reports and holding that such testimony is not a confrontation clause violation, we hold that Pineda's testimony concerning the DNA report as the basis for her opinion that defendant's DNA matched the tissue sample in this case did not violate the confrontation clause."

People v Vargas, 99 A.D.3d 481, 952 N.Y.S.2d 41 (N.Y. App. Div. 1st Dep't 2012) – "Defendant's right of confrontation was not violated by testimony by the People's expert DNA analyst that made reference to data gathered by nontestifying technicians [cite]. *Williams* ... provides further support for the proposition that the DNA evidence in this case did not violate the Confrontation Clause."

State v. Lopez, 45 A.3d 1 (R.I. 2012) – "the fact that Quartaro used data produced from the work of other analysts to form his final, independent conclusions did not bestow upon defendant the constitutional right to confront each and every one of those subordinate analysts."

Commonwealth v. McGrail, 80 Mass. App. Ct. 339, 952 N.E.2d 969 (Mass. App. Ct. 2011) – "At trial, Cunningham expressed his own expert opinion based on an independent analysis of the data presented to him. This opinion was independently admissible evidence. Although relying on the analysis conducted by another, he was 'not merely act[ing] as a conduit for the opinions of others.'"

Derr v. State, 422 Md. 211, 29 A.3d 533 (Md. 2011), vacated by Maryland v. Derr, 133 S.Ct. 63 (2013), superseded on remand 73 A.3d 254, 258-73 (Md. 2013) – before being vacated and superseded, this opinion was rejected in **United States v. Summers, 666 F.3d 192, 195-205 (4th Cir. Md. 2011)**, leading to different confrontation clauses in Maryland's state and federal courts – also criticized in **State v. Lopez, 45 A.3d 1, 2-20 (R.I. 2012)**

Commonwealth v. Bizanowicz, 459 Mass. 400, 945 N.E.2d 356 (Mass. 2011) – "Here, Hagan testified that he had reviewed Sendlenski's report, and that it was the type of report on which chemists are accustomed to rely. Had Sendlenski testified, his findings would have been independently admissible. However, Hagan did not rely on Sendlenski's findings in presenting his own opinion. Rather, Hagan recited the results of Sendlenski's tests and presented to the jury Sendlenski's underlying factual findings. ... The testimony introduced factual findings through the hearsay notes of a nontestifying expert, and should not have been admitted."

Commonwealth v. Taskey, 78 Mass. App. Ct. 787, 941 N.E.2d 713 (Mass. App. Ct. 2011) – "Before the decision in *Crawford v. Washington, supra*, issued in 2004, Massachusetts evidentiary doctrine permitted an expert witness to offer an opinion based upon inadmissible hearsay information... In Massachusetts and in multiple other jurisdictions 15 this evidentiary principle has proceeded compatibly with the confrontation doctrine of the *Crawford* and *Melendez-Diaz* decisions."

People v. Johnson, 406 Ill. App. 3d 114, 940 N.E.2d 264, 346 Ill. Dec. 264, 265-272 (Ill. App. Ct. 1st Dist. 2010), GVR'd for reconsideration in light of *Williams* (Jan. 30, 2012) – "The Cellmark report was not offered to prove the truth of its contents, but was used as part of the bases for two experts' opinions. Accordingly, we find no *Crawford* violation in this case, and thus, no error."

State v. Hurt, 702 S.E.2d 82, 100 (N.C. Ct. App. 2010), stay granted (N.C. Nov. 30, 2010) – "the admissibility of Barker and Freeman's testimony will not be governed by the *Melendez-Diaz* if the reports upon which they relied merely provided a basis for their independent expert opinions but were offered neither as proof of the matter asserted nor prima facie evidence that the items linking Defendant to the crime contained blood or saliva that matched his DNA profile."

We conclude, however, that the reports in the instant case were not limited to this permissible function. ... the reports were clearly being utilized by the testifying experts as a vehicle through which they impermissibly offered the statements of other expert analysts for the truth of the matter asserted, implicating the Confrontation Clause."

Commonwealth v. Greineder, 458 Mass. 207, 936 N.E.2d 372 (Mass. 2010) – "The defendant argues that his right to confront witnesses pursuant to the Sixth Amendment to the United States Constitution was violated when Dr. Robin Cotton, forensic laboratory director of Cellmark Diagnostics, was allowed to testify as to details of DNA test results obtained by staff analyst Wendy Magee and reviewed by Dr. Jennifer Reynolds or Dr. Lewis Maddox, none of whom testified at trial, and express a statistical opinion based on those test results. ... Opinion testimony may, as here, be based on hearsay and not offend the Sixth Amendment."

State v. Elkins, 44 Kan. App. 2d 974, 242 P.3d 1223 (Kan. Ct. App. 2010) – "We conclude that the right of confrontation does not extend to the person who entered Elkins' DNA profile in the CODIS database."

United States v. Pablo, 625 F.3d 1285, 1288-1295 (10th Cir. N.M. 2010). GVR'd for reconsideration in light of Williams, 133 S. Ct. 56, 183 L. Ed. 2d 699 (2012), decision adhered to on remand, 696 F.3d 1280 (10th Cir. 2012) – on remand the court found that any error was not "plain," observing: "We add that the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4-1-4 divide of opinions in *Williams*."

Aguilar v. Commonwealth, 699 S.E.2d 215 (Va. 2010), cert. denied, 131 S. Ct. 3089 (June 28, 2011) – "[T]he Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself." [cites] Likewise, the Sixth Amendment does not require that every person who had some role in performing a forensic analysis, or whose work upon which the ultimate conclusions depend, testify at trial."

Commonwealth v. Barbosa, 457 Mass. 773, 933 N.E.2d 93 (Mass. 2010) – "the defendant's right of confrontation was not violated by the admission of [testifying expert] Lynch's opinion, because he had a fair opportunity to confront Lynch as to the reasonable basis for that opinion. [cite] The defendant's right of confrontation, however, was violated by Lynch's testimony as to what they had found, which informed the jury that [non-testifying expert] Delatore also shared that opinion, when Delatore's opinion was testimonial hearsay and Delatore was not subject to cross-examination. ... The risk that a jury may infer facts not in evidence from an opinion that is admissible in evidence is not a reason to declare the latter inadmissible unless the unfair prejudice arising from the facts inferred substantially outweighs the probative weight of the [*789] opinion." – "The defendant also contends that, where the analyst who conducts [*790] the DNA tests does not testify, the defendant is disadvantaged because he cannot cross-examine the testing analyst regarding the possibility of mislabeling or mishandling of the DNA, or outright manipulation of data or fraud. This practical limitation on the scope of cross-examination exists whenever any expert relies on the results of tests, experiments, or observations conducted by another."

People v. Williams, 238 Ill. 2d 125, 939 N.E.2d 268, 345 Ill. Dec. 425 (Ill. July 15, 2010), aff'd, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) –

Marshall v. State, 2010 OK CR 8, 232 P.3d 467 (Okla. Crim. App. 2010) – Wilson, a DNA expert, testified to conclusions and opinions of another expert – confrontation clause violation found – but: "n3 Implicit in the testimony of any expert witness is the ability to form an independent opinion based on the evidence and materials reviewed. If Mr. Wilson had formed and testified to his own independent opinion the issue would be moot."

State v. Dilboy, 999 A.2d 1092, 160 N.H. 135, 139-142 (N.H. 2010), cert. granted, summarily vacated and remanded, Dilboy v. New Hampshire, 131 S. Ct. 3089, 180 L. Ed. 2d 911 (U.S. 2011) (June 28, 2011), affirmed on remand, State v. Dilboy, 163 N.H. 760, 48 A.3d 983 (N.H. 2012) – on remand in 2012 the court found that the evidence was insufficient to establish a confrontation clause violation without resort to speculation

Vann v. State, 229 P.3d 197, 199-211 (Alaska Ct. App. 2010) – "Although Cheryl Duda's associate, Jessica Cohen, processed two of the samples (by running them through a machine that analyzes the genetic profile contained in DNA), Duda testified that (1) she herself interpreted the data read-outs produced by the machine from Cohen's two samples, and (2) the conclusions that Duda reached about the significance of the test results were her own. Thus, Duda was the "real" witness with respect to all five of the samples -- much as a doctor would be the "real" witness regarding a diagnosis of illness, or a pathologist would be the "real" witness regarding a conclusion as to cause of death, even though the doctor or pathologist relied in substantial measure [*200] on the results of testing conducted by laboratory technicians. Accordingly, Vann's right of confrontation under the Sixth Amendment was satisfied when he was afforded the opportunity to cross-examine Duda." [NOTE: Very long opinion, collecting many cases.]

State v. Lopez, 186 Ohio App. 3d 328, 2010 Ohio 732, 927 N.E.2d 1147 (Ohio Ct. App., Butler County 2010) – "[¶61] nothing in the Supreme Court's decision in Melendez-Diaz, speaks specifically to the admissibility of a second analyst's testimony or whether the Sixth Amendment requires testimony from the analyst who performed the original test. ... Like these other courts, we find Melendez-Diaz distinguishable in that the state did not read a report into the record or offer an affidavit in lieu of live testimony. Instead, the state called Worst to testify regarding the procedures, process, logistics, and results of the DNA testing offered as evidence against Lopez."

United States v. Boyd, 686 F. Supp. 2d 382, 383-386 (S.D.N.Y. 2010), aff'd, 401 Fed.Appx. 565 (2d Cir. 2010) – "Only the final stage of the DNA testing involved the type of analytical judgment for which a certificate would be an inadequate substitute for in-court testimony under the Sixth Amendment. But this was precisely where the Government provided live testimony in the form of the expert who performed this step. ... The Court here holds only that where the defendant had ample opportunity to confront the Government witness who undertook the final, critical stage of the DNA analysis, and where that witness was personally familiar with each of the prior steps, testified that the analysis included safeguards to verify that errors would not result in a false positive, and demonstrated that the prior steps were essentially mechanical in nature, the Confrontation Clause is satisfied."

People v Dail, 2010 NY Slip Op 532, 69 A.D.3d 873, 894 N.Y.S.2d 78 (N.Y. App. Div. 2d Dep't 2010) – "the critical determination linking the defendant to the crimes was made by the forensic geneticist who testified, based upon her analysis of data in the lab reports, that the defendant's DNA was present on items recovered from the burglarized residences. Accordingly, the lab reports were not testimonial in nature, and their admission through the forensic geneticist's testimony did not violate the defendant's right to confrontation..."

State v. Bullcoming, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1 (N.M. 2010), rev'd, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) –

People v. Johnson, 394 Ill. App. 3d 1027, 915 N.E.2d 845, 333 Ill. Dec. 774 (Ill.App. 1 Dist. Sep 18, 2009), vacated and remanded, 237 Ill. 2d 574, 934 N.E.2d 1005 (Ill. 2010), on reconsideration, 406 Ill. App. 3d 114, 940 N.E.2d 264, 346 Ill. Dec. 264 (Ill. App. Ct. 1st Dist. 2010), vacated and remanded, 2013 Ill. LEXIS 96 (Ill. Jan. 30, 2013) –

State v. Lui, 153 Wn. App. 304, 221 P.3d 948 (Wash. Ct. App. 2009), aff'd, State v. Lui, 179 Wash.2d 457, 315 P.3d 493 (Wash. 2014), cert. denied, 2014 WL 1354998 (June 23, 2014) – "Sione Lui appeals his jury trial conviction for second degree murder in the strangulation death of his fiancée, Elaina Boussiacos. He argues that his Sixth Amendment right to confront the witnesses against him was violated when the State's medical examiner and DNA (deoxyribonucleic acid) expert testified based partially on forensic evidence developed by others. ... We hold that no Sixth Amendment confrontation clause violation occurred here because Lui had a full opportunity to test the basis and reliability of the experts' opinions and conclusions. And because Melendez-Diaz does not preclude a qualified expert from offering an opinion in reliance upon another expert's work product, we affirm Lui's conviction." – "Here, in contrast [to M-D], the autopsy and DNA reports were not offered in lieu of live testimony. Indeed, the reports themselves were not admitted into evidence at all. ... [E]xpert witnesses are not required to have personal, firsthand knowledge of the evidence on which they rely."

State v. Mobley, 684 S.E.2d 508, 510-513 (N.C. Ct. App. 2009) – "In this case, the testifying expert, Aby Moeykens, testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data. Defendant has not challenged the propriety of the methods used by the crime lab, therefore, Ms. Moeykens was justified in relying on those procedures in her analysis. Her first step in forming her opinion was to review the original data and controls of the underlying reports from the buccal swab and the vaginal swab. ... in this case, the underlying report, which would be testimonial on its own, is used as a basis for the opinion of an expert who independently reviewed and confirmed the results, and is therefore not offered for the proof of the matter asserted under North Carolina case law. Therefore, we hold Ms. Moeykens's testimony does not violate the Confrontation Clause even in light of *Melendez-Diaz*. These assignments of error are overruled."

People v Brown, 2009 NY Slip Op 8475, 13 N.Y.3d 332; 918 N.E.2d 927; 890 N.Y.S.2d 415 (N.Y. 2009) – "The main issue raised on appeal is whether defendant's Sixth Amendment right to confrontation was violated by the introduction of a DNA report processed by a subcontractor laboratory to the Office of the Chief Medical Examiner (OCME) through the testimony of a forensic biologist from OCME. Because the report is "nontestimonial," we hold that its admission did not constitute a Crawford violation ... Here, unlike *Melendez-Diaz*, the People

called the forensic biologist who conducted the actual analysis at issue, linking defendant's DNA to the profile found in the victim's rape kit. She testified that she had personally examined the Bode file; she interpreted the profile of the data represented in the machine-generated graphs; and she made the critical determination linking defendant to this crime. She also stated that she was familiar with the procedures and protocols used by Bode, and defendant could have challenged such claim on cross-examination. The Bode report, furthermore, was not "testimonial" under such circumstances because it consisted of merely machine-generated graphs, charts and numerical data. There were no conclusions, interpretations or comparisons apparent in the report since the technicians' use of the typing machine would not have entailed any such subjective analysis. These technicians would not have been able to offer [***932] any testimony other than how they performed certain procedures."

England v. State, 302 Ga. App. 12, 689 S.E.2d 833, 2009 FCDR 4009 (Ga. Ct. App. 2009) – "At trial, the GBI toxicologist testified that he analyzed one sample of England's blood for alcohol content, using a headspace gas chromatograph and that a lab technician performed the exact same procedure on a second replicate sample of England's blood. The toxicologist testified that the reason for this second test was to ensure accuracy... England argues that because the lab technician did not testify, he was deprived of his right to confrontation and cross-examination as to her actions. However, the testimony of the lab technician in this matter was not required to protect England's constitutional right of confrontation. The toxicologist testified that in analyzing blood samples for blood-alcohol content, the lab technician 'just takes a specimen of the blood, places it in a glass vial and seals it up.' He also testified that it is his responsibility to program the chromatograph for both blood samples and to analyze the data to create the final report. Indeed, the toxicologist further testified that the lab technician never looks at the data, does not approve the data, and does not approve the controls."

Drug Analysis Results

Melendez-Diaz holds that drug analysis results are testimonial, at least when they take the form of affidavits. Justice Sotomayor's concurrence in *Bullcoming* provides the (current) key test for determining whether a lab test result is testimonial. *Williams* establishes the negative principle that Rule 703 doesn't mean the statement isn't offered for the truth (since only four justices said it did).

State v. Michaels, 219 N.J. 1, 95 A.3d 648, 650-82 (N.J. 2014) – "Laboratory results of gas chromatography/mass spectrometry tests performed on defendant's blood sample, which was drawn at a hospital the evening of her motor vehicle accident, revealed the presence of cocaine, alprazolam (an active ingredient of Xanax), and benzoethylene (a cocaine metabolite). ... We recognize that the forensic report in issue is "testimonial" and that it is the type of document subject to the Confrontation Clause."

People v. Wolz, 112 A.D.3d 1150, 976 N.Y.S.2d 723 (N.Y. App. Div. 3d Dept. 2013) – "Clifford Brant, the State Police forensic scientist who performed the chemical analysis and prepared the report, testified at trial, but his supervisor, Margaret Lafond—who cosigned the

report—did not testify." – not a confrontation clause problem - – [NOTE: The confrontation clause regulates in-court testimony. It doesn't dictate the prosecution's witness list.]

Commonwealth v. Lezynski, 993 N.E.2d 333, 334-38 (Mass. 2013) – "We agree with the Appeals Court that the admission of Dr. Behonick's testimony on direct examination reciting the results of the toxicology analysis performed by the Pennsylvania laboratory as to the concentration of fentanyl in the tested sample of Beaulier's blood was error of constitutional dimension, a point on which the defendant and the Commonwealth also agree."

Commonwealth v. Milburn, 72 A.3d 617 (Pa. Super. 2013) – expert testified that drug analysis proceeds in two steps – first, "a color test known as a SCOTT test" – if that is positive, gas chromatography/mass spectrometry testing follows – the expert conducted the latter but not the former test, but by virtue of performing the latter tests indirectly conveyed the results of the former – "The type of testimony offered by Mr. Vargase has been ruled by five Supreme Court justices to fall outside of the parameters of the Confrontation Clause because it is not "testimonial" in nature, as envisioned by *Crawford*."

United States v. Kim, __ M.J. __, 2013 CCA LEXIS 85, 1-8 (A.F.C.C.A. Feb. 7, 2013) – "the appellant argues that his Sixth Amendment¹ right to confrontation was violated when the military judge admitted testimonial hearsay in the form of two drug testing reports into evidence for the members' consideration. ... we find that admission of the certifications on the respective cover memoranda, the [lab certifying official]'s certifications and handwritten annotations on the two specimen custody documents (DD Form 2624), and Dr. Jain's testimony concerning these specific documents violated the Confrontation Clause."

United States v. Montelongo, __ M.J. __, 2012 CCA LEXIS 489, 21-25 (A.F.C.C.A. Dec. 14, 2012) – "We find that the LCO's [Lab Certifying Official] certification on the DD Form 2624 that 'the laboratory results indicated on this form were correctly determined by proper laboratory procedures, and they are correctly annotated' is testimonial hearsay. [cite] Additionally, we find that the rescreen and GC/MS reviews, as well Dr. HN's reference to them, constituted testimonial hearsay. Analysts doing a rescreen and confirmation test on a specimen identified as presumptively positive 'must reasonably understand themselves to be assisting in the production of evidence.'"

State v. Whittington, 728 S.E.2d 385, 387 (N.C. Ct. App. 2012), rev'd, 753 S.E.2d 320 (2014)

State v. Moncayo, 2012 NMCA 66, 284 P.3d 423 (N.M. Ct. App. 2012) – "The State acknowledges that because the laboratory report was admitted, 'it appears there may have been a violation of [D]efendant's right of confrontation.' We agree."

State v. Burrow, 721 S.E.2d 356, 357-363 (N.C. Ct. App. 2012) – " Detective Munday was not qualified as an expert regarding the analysis, and he did not participate in the analysis in any way. He testified that he sent the pills to SBI for analysis and received the results in the report. The court admitted the report into evidence without any objection from Defendant. Detective Munday then read directly from the report, stating, 'It says, results of examination Item 1, oxycodone-Schedule II; weight 10.7 grams[,] and the report was published to the jury. Because Detective Munday merely summarized inadmissible testimonial evidence and had no

independent expert opinion to offer, we hold it was error to allow Detective Munday to testify concerning the composition of the confiscated substance at issue in this case."

Whittle v. Commonwealth, 352 S.W.3d 898, 900-906 (Ky. 2011) – "Gary Boley was the chemist at the state crime lab who authored the report identifying the white powder in the bag that Appellant had tossed onto the sidewalk as cocaine. However, due to illness, Boley failed to appear in court and the director of the lab, Terry Comstock, testified in his stead. Comstock read from and discussed the report, which was then admitted into evidence." – a violation under *Bullcoming*

United States v. Moore, 651 F.3d 30 (D.C. Cir. 2011) – "the forensic chemists who authored the DEA reports made several representations, for example, that they were trained DEA chemists who followed certain procedures regarding the marking of containers and the inspection of seals, and that the chemical reagents and/or analytical instruments used were free from contamination and operating properly. The record in this court submitted by the parties does not indicate appellants had an opportunity to cross-examine the forensic chemists about their representations." – testimonial

State v. Simmons, 67 So. 3d 525, 526-535 (La.App. 4 Cir. 2011), rev'd State v. Simmons, 78 So. 3d 743, 742-748 (La. 2012) –

Commonwealth v. MacDonald, 459 Mass. 148, 945 N.E.2d 260 (Mass. 2011) – visual ID of marijuana – "Here, the Commonwealth had such a [drug] certificate, but did not seek to introduce it in evidence, representing to the judge that the analyst who had conducted the tests no longer worked for the Massachusetts crime laboratory and no other analyst was available on the day of the trial. [¶]The defendant argues that, in light of *Melendez-Diaz*, we should hold that, where the Commonwealth does not call an analyst to testify concerning the chemical composition of a drug, it may 'rely solely on that expert testimony to establish chemical composition and, instead, should be required to provide corroborating evidence.' Otherwise, he argues, the Commonwealth can use expert testimony to 'avoid the confrontation requirement' articulated in *Melendez-Diaz*.... We are not persuaded that *Melendez-Diaz* requires the result the defendant claims, as it explicitly rejected the idea that only an analyst's testimony would be sufficient to prove the chemical composition of a substance."

State v. Garnett, 706 S.E.2d 280, 284-286 (N.C. Ct. App. 2011) – "On appeal, Defendant first contends that the trial court erred in permitting the State's expert witness to testify as to the identity and weight of the "leafy green plant substance" seized where the expert's testimony was based upon the analysis performed by a non-testifying forensic analyst. ... While this testimony was admitted in violation of Defendant's rights under the Confrontation Clause, we nevertheless conclude this error was not prejudicial in light of the additional evidence of Defendant's guilt."

State v. Jones, 703 S.E.2d 772, 773-775 (N.C. Ct. App. 2010) – "Defendant challenges the admission of the chemical analysis report that was prepared by Anne Charlesworth and testified about by Officer Tucker at trial on the basis that his Sixth Amendment Confrontation Clause rights were violated. The report summarized testing done by Ms. Charlesworth and concluded that the substance found in defendant's jacket was cocaine. Ms. Charlesworth did not testify at trial.... It is clear that Ms. Charlesworth's report was testimonial in nature. See *Melendez-Diaz-Diaz*..."

State v. Williams, 702 S.E.2d 233, 234-238 (N.C. Ct. App. 2010), stay granted, 2010 N.C. LEXIS 1063 (N.C., Dec. 20, 2010) – "it is clear that the report detailing the tests done by Johnson and then 'peer reviewed' and testified about by Charlesworth is testimonial. See *Melendez-Diaz*..."

United States v. Blazier, 69 M.J. 218, 220-227 (C.A.A.F. 2010) – "Each report included (1) a cover memorandum summarizing the tests the urine samples were subjected to and the results of those tests, and (2) attached records, the vast majority of which were printouts of the machine-generated data from the drug tests and machine calibrations, along with a specimen custody document, intralaboratory chain of custody documents for each of the laboratory tests conducted, presumptive positive reports, and occasional handwritten annotations. ... [W]e are satisfied that the signed, certified cover memoranda -- prepared at the request of the Government for use at trial, and which summarized the entirety of the laboratory analyses in the manner that most directly 'bore witness' against Appellant -- are testimonial under current Supreme Court precedent."

Cypress v. Commonwealth, 699 S.E.2d 206 (Va. 2010) – combined with *Briscoe v. Commonwealth* – cocaine cases – "we initially decide an issue that we did not reach in *Magruder*: whether the certificates of analysis that were admitted into evidence in the defendants' trials were 'testimonial.' We conclude that they were."

State v. Craven, 696 S.E.2d 750, 753-755 (N.C. Ct. App. 2010) – "We see no meaningful difference in the testimony Special Agent Schell gave in *Brewington* [below] and in the case before us. Defendant's constitutional right to confront witnesses against him was violated by admission of the forensic analyses and Special Agent Schell's related testimony about the substances obtained on 3 and 6 March 2008."

State v. Brewington, 693 S.E.2d 182 (N.C. App. 2010), temporary stay allowed (N.C. 2010) -- "the transcript of the trial shows that the testimonial document prepared by Agent Gregory was admitted into evidence against defendant for the substantive purpose of showing that the contraband seized was cocaine. This end was achieved through the testimony of Special Agent Schell. Under *Melendez-Diaz* and *Locklear*, we are bound to conclude that this testimony was admitted in violation of defendant's right under the Confrontation Clause of the Sixth Amendment."

State v. Brennan, 692 S.E.2d 427, 430-431 (N.C. Ct. App. 2010), stayed, 364 N.C. 242, 698 S.E.2d 72 (May 21, 2010) – "Agent Icard did no independent research to confirm Agent Knott's results; in fact, she saw the substance for the first time in open court when she testified to what -- in her expert opinion -- it was. Such expertise is manifestly no more reliable than lay opinion based on a visual inspection of suspected powder cocaine, such as has been deemed inadmissible. [NOTE: Oh, come on!] ... Insofar as Agent Icard testified to Agent Knott's results, the testimony violated Defendant's constitutional rights as interpreted in *Melendez-Diaz* and *Locklear*."

State v. Witherspoon, 694 S.E.2d 521 (N.C. Ct. App. May 18, 2010) – "although the Confrontation Clause prohibits the State from introducing the results of scientific testing

conducted by one expert through another expert's testimony, an expert may testify as to his or her own opinion based on the results of testing conducted by another expert."

State v. Aragon, 2010-NMSC-008, 225 P.3d 1280, 1284-85 (N.M. 2010) – lab report testimonial

State v. Davidson, 32 So. 3d 290, 297 (La.App. 2 Cir. 2010) – "Davidson argues that the lab report should not have been admitted into evidence. The report contained the analysis results and weight of the cocaine. ... The report in this case is clearly testimonial..."

Post-Melendez-Diaz Massachusetts cases:

Commonwealth v. Ramsey, 466 Mass. 489, 995 N.E.2d 1110, 1111-12 (Mass. 2013)
Commonwealth v. Marte, 84 Mass.App.Ct. 136, 993 N.E.2d 1201, 1204 (Mass. App. Ct. 2013)
Commonwealth v. Davis, 83 Mass. App. Ct. 484, 985 N.E.2d 1216 (Mass. App. Ct. 2013)
Commonwealth v. Montoya, 464 Mass. 566, 984 N.E.2d 793 (Mass. 2013)
Commonwealth v. Mendes, 463 Mass. 353, 974 N.E.2d 606 (Mass. 2012)
Commonwealth v. Myers, 82 Mass. App. Ct. 172, 971 N.E.2d 815 (Mass. App. Ct. 2012)
Commonwealth v. Escalera, 462 Mass. 636, 650, 970 N.E.2d 319 (Mass. 2012)
Commonwealth v. King, 461 Mass. 354, 960 N.E.2d 894 (Mass. 2012)
Commonwealth v. Billings, 461 Mass. 362, 960 N.E.2d 900 (Mass. 2012)
Commonwealth v. Barbosa, 461 Mass. 431, 961 N.E.2d 560 (Mass. 2012) –
Commonwealth v. Munoz, 461 Mass. 126, 958 N.E.2d 1167 (Mass. 2011) (unlike most of the cases listed here, this one contains an extended discussion), GVR'd by **Munoz v. Massachusetts, 133 S. Ct. 102, 184 L. Ed. 2d 4 (2012)** –
Commonwealth v. Nelson, 460 Mass. 564, 573-574, 953 N.E.2d 164 (Mass. 2011)
Commonwealth v. Lima, 80 Mass. App. Ct. 114, 123, 951 N.E.2d 952 (Mass. App. Ct. 2011)
Commonwealth v. Ramsey, 79 Mass. App. Ct. 724, 949 N.E.2d 927 (Mass. App. Ct. 2011)
Commonwealth v. Hopkins, 79 Mass. App. Ct. 412, 946 N.E.2d 153 (Mass. App. Ct. 2011)
Commonwealth v. Westbrook, 79 Mass. App. Ct. 417, 947 N.E.2d 51 (Mass. App. Ct. 2011)
Commonwealth v. Hanson, 79 Mass. App. Ct. 233, 945 N.E.2d 409 (Mass. App. Ct. 2011)
Commonwealth v. McCollum, 79 Mass. App. Ct. 239, 945 N.E.2d 937 (Mass. App. Ct. 2011)
Commonwealth v. Escalera, 79 Mass. App. Ct. 262, 945 N.E.2d 415 (Mass. App. Ct. 2011), review granted (June 8, 2011)
Commonwealth v. Casali, 459 Mass. 139, 943 N.E.2d 936 (Mass. 2011)
Commonwealth v. Walorz, 79 Mass. App. Ct. 132, 944 N.E.2d 1061 (Mass. App. Ct. 2011)
Commonwealth v. Mendes, 78 Mass. App. Ct. 474, 940 N.E.2d 467 (Mass. App. Ct. 2010)
Commonwealth v. Fernandez, 458 Mass. 137, 934 N.E.2d 810 (Mass. 2010)
Commonwealth v. Bookman, 77 Mass. App. Ct. 546, 932 N.E.2d 824 (Mass. App. Ct. 2010)
Commonwealth v. Pixley, 77 Mass. App. Ct. 624, 632-633, 933 N.E.2d 645 (Mass. App. Ct. 2010)
Commonwealth v. DeMatos, 77 Mass. App. Ct. 727, 729-730, 933 N.E.2d 992 (Mass. App. Ct. 2010), review denied (2010)
Commonwealth v. Barbosa, 77 Mass. App. Ct. 340, 931 N.E.2d 60 (Mass. App. Ct. 2010), rev'd **Commonwealth v. Barbosa, 461 Mass. 431, 961 N.E.2d 560 (Mass. 2012)** —
Commonwealth v. King, 77 Mass. App. Ct. 189, 928 N.E.2d 1014 (Mass. App. Ct. 2010), rev'd **Commonwealth v. King, 461 Mass. 354, 960 N.E.2d 894 (Mass. 2012)**
Commonwealth v. Rivas, 77 Mass. App. Ct. 210, 211-212, 929 N.E.2d 328 (Mass. App. Ct. 2010)

Commonwealth v. Hernandez, 77 Mass. App. Ct. 259, 929 N.E.2d 992 (Mass. App. Ct. 2010)
Commonwealth v. Sullivan, 76 Mass. App. Ct. 864, 872-873 (Mass. App. Ct. 2010)
Commonwealth v. Jones, 77 Mass. App. Ct. 53, 928 N.E.2d 374 (Mass. App. Ct. 2010)
Commonwealth v. Villatoro, 76 Mass. App. Ct. 645, 651-654, 925 N.E.2d 45 (Mass. App. Ct. 2010)
Commonwealth v. Morales, 76 Mass. App. Ct. 663, 664, 925 N.E.2d 551 (Mass. App. Ct. 2010) (on remand from SCOTUS)
Commonwealth v. Fluellen, 456 Mass. 517, 518, 924 N.E.2d 713 (Mass. 2010)
Commonwealth v. Rodriguez, 456 Mass. 578, 590-592 (Mass. 2010)
Commonwealth v. Perez, 76 Mass. App. Ct. 439, 922 N.E.2d 855 (Mass. App. Ct. 2010)
Commonwealth v. Muniz, 456 Mass. 166, 921 N.E.2d 981 (Mass. 2010)
Commonwealth v. Vasquez, 456 Mass. 350, 923 N.E.2d 524 (Mass. 2010)
Commonwealth v. Charles, 456 Mass. 378, 923 N.E.2d 519 (Mass. 2010)
Commonwealth v. Madera, 76 Mass. App. Ct. 154, 920 N.E.2d 312 (Mass. App. Ct. 2010)
Commonwealth v. Morales, 76 Mass. App. Ct. 663, 925 N.E.2d 551 (Mass. App. Ct. 2010)
Commonwealth v. Rivera, 76 Mass. App. Ct. 67, 918 N.E.2d 871 (Mass. App. Ct. 2009)
Commonwealth v. DePina, 75 Mass. App. Ct. 842, 917 N.E.2d 781 (Mass. App. Ct. 2009)
Commonwealth v. Harris, 75 Mass. App. Ct. 696, 916 N.E.2d 396 (Mass. App. Ct. 2009)
Commonwealth v. Vasquez, 75 Mass. App. Ct. 446, 914 N.E.2d 944 (Mass. App. Ct. 2009)

United States v. Rose, 587 F.3d 695, 698-701 (5th Cir. Tex. 2009) – "We agree that the SWIFS [Southwest Institute of Forensic Sciences] lab report, like the certificates of analysis in *Melendez-Diaz*, is a testimonial statement for purposes of the Confrontation Clause."

State v. Laturner, 289 Kan. 727, 728-753 (Kan. 2009) – "the KBI laboratory analyst's certificate was testimonial, giving rise to Laturner's rights under the Confrontation Clause."

Commonwealth v. Rodriguez, 75 Mass. App. Ct. 235, 913 N.E.2d 880 (Mass. App. Ct. Sept. 25, 2009) – "At trial, over the defendant's objections, five certificates of analysis from the State crime laboratory were introduced by the Commonwealth and admitted in evidence. fn4 The certificates stated that the substances seized by police and connected to the defendant were cocaine of specific weights and marijuana. The admission of this evidence without testimony from the analyst was constitutional error, as it violated the defendant's rights under the confrontation clause of the Sixth Amendment to the United States Constitution."

State v. Galindo, 683 S.E.2d 785, 787-789 (N.C. Ct. App. 2009) – "The evidence in this case -- Aldridge's expert testimony based 'solely' on the absent analyst's lab report -- is indistinguishable from the opinion testimony held to be unconstitutional in *Locklear*. Similarly, as the State failed to show that the lab analyst who actually weighed the cocaine was unavailable to testify or that defendant had a prior opportunity to cross-examine the analyst regarding the specific report at issue in this case, defendant's right to confront an adverse witness was violated. The trial court thus erred in overruling defendant's objections."

People v. Ruttenschmidt (Olga), 220 P.3d 239 (Cal. 2009), supplemental briefing ordered (July 13, 2011) – "The petition for review by appellant Golay is granted. [¶] The issues to be

briefed and argued are limited to the following: (1) Was defendant denied her right of confrontation under the Sixth Amendment when a supervising criminalist testified to the result of drug tests and the report prepared by another criminalist? (2) How does the decision of the United States Supreme Court in *Melendez-Diaz* ... affect this court's decision in *People v. Geier* ...?"

Digsby v. United States, 981 A.2d 598, 604 (D.C. 2009) – "The government correctly concedes that the trial court erred by admitting the DEA chemist's lab reports without the testimony of the DEA chemist."

California cases applying *Geier* to drug analysis results:

Geier is a DNA case but in the listed cases the Courts of Appeal extended its rationale to drug cases. The validity of *Geier* itself is currently under review in the California Supreme Court.

People v. Gordon, 2009 WL 522875 (Cal. App. 3 Dist. Mar 03, 2009) (unpub)

People v. Paulson, 2009 WL 250088 (Cal. App. 5 Dist. Feb 03, 2009) (unpub)

People v. Velazquez, 2009 WL 153877 (Cal. App. 4 Dist. Jan 23, 2009) (unpub)

People v. Briones, 2008 WL 5394926 (Cal. App. 2 Dist. Dec 30, 2008) (unpub)

People v. Fromuth, 2008 WL 2807232 (Cal. App. 2 Dist. Jul 22, 2008) (unpub)

People v. Moline, 2007 WL 4296583 (Cal. App. 4 Dist. Dec 10, 2007) (unpub)

In re D.H., 2007 WL 2955950 (Cal. App. 1 Dist. Oct 11, 2007) (unpub)

McMurrar v. State, __ N.E.2d __, 2009 WL 1330806 (Ind. App. May 12, 2009) – "Here, Patricia Bowen, a forensic scientist with the Indianapolis-Marion County Forensic Services Agency, performed the laboratory testing on some residue found on the paraphernalia for the purpose of showing that the substance was cocaine ... However, instead of Bowen, the State called Brenda Keller (Keller), the quality assurance manager with the Indianapolis-Marion County Forensic Services Agency. Keller's testimony was limited to the contents of the report and the conclusions drawn therein; she was merely a sponsoring witness of the exhibit and did not perform the tests herself. The State did not allege, let alone prove, that Bowen was unavailable to testify. Pursuant to *Jackson*, we conclude that Keller's testimony does not satisfy McMurrar's right of confrontation under *Crawford*..."

U.S. v. Siepker, 2008 WL 5273088 (N.D. Iowa Dec 18, 2008) (unpub) (§ 2255) – "The law enforcement officers' testimony about the lab reports also does not raise a Sixth Amendment confrontation clause issue, because the lab reports were admissible "business records," not "testimonial" hearsay. ... Laboratory reports may, nevertheless, be admitted without the testimony of the person who actually prepared the report, even if that person is not shown to be unavailable. [cite] Here, the prosecution argues that the lab reports were properly "self-authenticated" by the attached written declaration of a qualified person, as permitted by Rule 902(11), and the court agrees."

State v. Schultz, 2008 WL 5147589 (Wash. App. Div. 2 Dec 09, 2008) (unpub) – "Presently, the state of the law is unresolved as to whether a forensic lab report is testimonial evidence. Washington courts have not directly addressed whether a lab report is testimonial." – but accepting state's concession that it was "under the particular circumstances of this case"

State v. Radford, 196 P.3d 23, 26, 223 Or.App. 406 (Or. App. Oct 29, 2008) – "Because defendant agreed to be tried on stipulated facts, the laboratory reports themselves were never actually admitted as evidence. The error in ruling that the reports were admissible was therefore harmless."

State v. Judy, 2008 WL 4695982, 2008-Ohio-5551 (Ohio App. 4 Dist. Oct 21, 2008) (unpub) – cocaine – "BCI & I lab reports are nontestimonial"

People v. Mays, 2008 WL 4323733 (Cal. App. 2 Dist. Sep 23, 2008) (unpub) – cocaine – drug analyses non-testimonial

People v. Manzano, 2008 WL 4182437 (Cal. App. 2 Dist. Sep 12, 2008) (unpub) – marijuana – drug analyses non-testimonial

Commonwealth v. Darosa, 2008 WL 4130897 (Mass. App.Ct. Sep 09, 2008) (unpub) – drug certificates are not testimonial in nature

State v. Hendon, 194 P.3d 149, 151, 222 Or.App. 97 (Or.App. Sep 03, 2008) – Under Oregon Constitution, report identifying meth testimonial, following *State v. Birchfield*, 342 Or. 624, 157 P.3d 216 (Or. 2007)

Jackson v. State, 891 N.E.2d 657 (Ind. App. Aug 12, 2008) – cocaine – "We agree with those states that find lab reports and similar materials, when prepared for criminal trials, to be testimonial statements and that their admission without the preparer's testimony runs afoul of *Crawford* and the Confrontation Clause."

Dunn v. State, 665 S.E.2d 377, 08 FCDR 2545 (Ga. App. Jul 10, 2008) – meth – "Because 'the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made,' [cite] the trial court did not err in allowing the expert witness to testify based on the data contained in the technician's report." [NOTE: Although the case contains numerous citations to cases discussing the nature of drug analyses, the actual holding appears to have been based on expert witness rule.]

State v. Christy, 2008 WL 2623968 (Wash. App. Div. 3 Jul 03, 2008) (unpub) – Discussing at length whether drug analysis report was testimonial and then not deciding the issue because the drug in question was marijuana, it was identified as such by other witnesses, and any error was harmless – i.e., drug report not even necessary, really

State v. Johnson, 982 So.2d 672 (Fla. May 01, 2008) – "We agree with those states that find lab reports and similar materials, when prepared for criminal trials, to be testimonial statements and that their admission without the preparer's testimony runs afoul of *Crawford* and the Confrontation Clause."

State v. Moore, 2008 WL 2058533, 2008-Ohio-2359 (Ohio App. 8 Dist. May 15, 2008) (unpub), reversed and remanded, **Moore v. Ohio, 130 S. Ct. 1685, 176 L. Ed. 2d 176 (U.S. 2010)**, conviction aff'd on other grounds on remand, **2010 Ohio 1569 (Ohio Ct. App., Cuyahoga County Apr. 8, 2010)** –

State v. O'Connor, 2008 WL 2102356, 2008-Ohio-2415 (Ohio App. 12 Dist. May 19, 2008) (unpub) – "{¶ 29} This court has recently held that a drug analysis report completed by the BCI does not constitute "testimonial" evidence under *Crawford* and, therefore, the defendant's Confrontation Clause rights under *Crawford* were not violated by the report's admission into evidence. *State v. Malott* ..."

State v. Malott, 2008 WL 1932428, 2008-Ohio-2114 (Ohio App. 12 Dist. May 05, 2008) (unpub) – "we find that the drug analysis report in this case was a business record and nontestimonial under *Crawford*."

State v. Willis, 219 Or.App. 268, 182 P.3d 891 (Or. App. Apr 16, 2008) – Under Oregon Constitution, report identifying marijuana testimonial, following *State v. Birchfield*, 342 Or. 624, 157 P.3d 216 (Or. 2007)

State v. Smith, 2008 WL 366791 (Wash. App. Div. 2 Feb 12, 2008) (unpub) – meth case – dizzy opinion – analyst Kee testified all her work is peer-reviewed – "She then testified that the peer reviewer 'agreed with the findings in my final report.' ... In this case, it cannot be disputed that the peer reviewer's opinion that Kee's conclusions were probably testimonial. After all, Kee conducted her forensic tests on the evidence at the request of the State in preparation for trial. It follows that the peer review process was also conducted in preparation for litigation and thus testimonial. Therefore, we must determine whether Kee's statement was hearsay" – a backwards analysis that implies non-hearsay can be testimonial hearsay, which is nonsense – and note that no out-of-court statement was actually offered into evidence – if Kee had stopped after saying her work was peer-reviewed, wouldn't that have implied the peer reviewer's conclusion just as surely?

Commonwealth v. Bly, 2008 WL 649039, 71 Mass. App. Ct. 1112 (Mass. App. Ct. Mar 11, 2008) (unpub) – "We agree with the Commonwealth that the defendant's claim that the admission of the drug analysis certificate violated his right to confront the witnesses is without merit. Drug certificates are not created in a judicial setting or in the course of police interrogation and are more akin to business or public records, which are nontestimonial. The Massachusetts Legislature has permitted certificates of scientific analysis recording a primary fact, rather than an opinion, to be admitted in criminal trials as prima facie evidence, even if no witness from the laboratory that prepared the certificate testifies."

U.S. v. Harcrow, 66 M.J. 154 (U.S. Armed Forces Mar 13, 2008) – laboratory reports identifying cocaine and heroin "were testimonial evidence" – key factors: "Here the laboratory analysis was conducted at the behest of the sheriff's office after arresting Harcrow for suspected drug use. The laboratory reports pertain to items seized from Harcrow's home at the time of the arrest and the reports expressly identify Harcrow as a 'suspect.'" – distinguishing *Magyari*, involving random urine tests, because this one wasn't random – the second concurrence (a dissent but for the majority's finding of harmless error) cites a long list of cases addressing the issue

State v. Fulk, 2007 WL 4488315, 2007-Ohio-6975 (Ohio App. 3 Dist. Dec 26, 2007) (unpub); **State v. Pasqualone, 2007 WL 4376223, 2007-Ohio-6725, 6725+ (Ohio App. 11 Dist. Dec 14, 2007)** (unpub), rev'd, **State v. Pasqualone, __ N.E.2d. __, 2009 WL 250473, 2009-Ohio-315 (Ohio Feb 04, 2009)**; **State v. Reuschling, 2007 WL 4376219, 2007-Ohio-6726 (Ohio App. 11**

Dist. Dec 14, 2007) (unpub), **motion for delayed appeal denied, 117 Ohio St.3d 1474, 884 N.E.2d 1107, 2008-Ohio-1841 (Ohio Apr 23, 2008)** – these three cases all hold that drug analysis reports are testimonial, but they may possibly no longer be good law after **State v. Crager, 116 Ohio St.3d 369, 879 N.E.2d 745, 2007-Ohio-6840 (Ohio Dec 27, 2007), vacated and remanded, 129 S. Ct. 2856, 174 L. Ed. 2d 598 (2009), reversed and remanded, 116 Ohio St. 3d 369, 2007 Ohio 6840, 879 N.E.2d 745 (2007)** – (the Supreme Court's decision in *Pasqualone* was based on waiver and did not reach the testimonial issue)

State v. Cannady, 2007 WL 4393778 (N.C.App. Dec 18, 2007) (unpub) – marijuana case – "We are bound by this Court's decisions in *Delaney* and *Walker* and conclude that the SBI report prepared by Agent Gregory was properly admissible for non-testimonial purposes, both because it was corroborative and because it helped form the basis of an expert's [*i.e.*, another, testifying analyst] opinion."

Hinojos-Mendoza v. People, 169 P.3d 662 (Colo. Sep 10, 2007), cert. denied, No. 07-9369 (June 29, 2009) – cocaine case – "The Colorado Supreme Court reverses the court of appeals' holding that the laboratory report identifying cocaine found in Hinojos-Mendoza's vehicle is nontestimonial hearsay. ... The Court holds that laboratory reports are testimonial statements subject to the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). Lab reports are prepared in preparation for prosecution of a crime, and thus belong to the core class of testimonial statements made under circumstances 'which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' *Crawford*, 541 U.S. at 52. " – [NOTE: The Colorado Supreme Court is referring to itself, rather in the style of a professional athlete talking about himself in the third person.] – "Turning to the specific lab report at issue in this case, we hold that it is testimonial. The lab report was prepared at the direction of the police and a copy of the report was transmitted to the district attorney's office. There can be no serious dispute that the sole purpose of the report was to analyze the substance found in Hinojos-Mendoza's vehicle in anticipation of criminal prosecution. The report states "offense: 3530–cocaine–sell" and lists Hinojos-Mendoza as the suspect. [FN4] Moreover, the report was introduced at trial to establish the elements of the offense with which Hinojos-Mendoza was charged. [FN5] Under such circumstances, the lab report is testimonial in nature. *Crawford*, 541 U.S. at 52" –

U.S. v. Williamson, 65 M.J. 706 (Army Ct. Crim. App. Jul 25, 2007) – "The question we must decide is whether the forensic laboratory report produced by the USACIL [identifying substance as marijuana] constitutes testimonial hearsay ... [A]lthough we find generating the USACIL forensic report akin to an 'objective cataloging of unambiguous factual matters[,] *Rankin*, 64 M.J. at 352, *i.e.*, the identity and amount of a controlled substance, [fn] we also find the laboratory technician's 'statements' responded to a law enforcement inquiry, and the 'primary purpose for making, or eliciting, the [report]' was to produce evidence 'with an eye toward trial,' *i.e.*, the report was produced months after appellant's arrest, and after the government preferred the charge alleging narcotics possession with intent to distribute. *Id.* Accordingly, we hold the laboratory report was testimonial and its admission into evidence at the court-martial erroneous."

U.S. v. Harcrow, 2006 WL 4572853 (Navy-Marine Corps. Ct. Crim. App. Oct 30, 2006) (unpub), **aff'd, 66 M.J. 154 (U.S. Armed Forces Mar 13, 2008)**

People v. Williams, 183 P.3d 577 (Colo. App. Jun 14, 2007), cert. denied, 2008 WL 2174008 (Colo. May 27, 2008) – cocaine case – agreeing with prior opinion that "a laboratory report detailing the testing and weighing of cocaine was not 'testimonial' within the meaning of that term as used in the constitutional confrontation analysis of *Crawford*" – [NOTE: This case relied on *People v. Hinojos-Mendoza*, 140 P.3d 30 (Colo.App.2005), which was reversed in part and affirmed in part by the Colorado Supreme Court, 169 P.3d 662 (Colo. Sep 10, 2007), *cert. petition filed* (Feb 04, 2008).]

People v. Hunter, 2007 WL 1644036, *3 (Cal. App. 4 Dist. 2007) (unpub) – cocaine case – "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." (quoting *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1412.)

People v. Boet, 2007 WL 1366073, *1 (Cal. App. 2 Dist. 2007) – methamphetamine case – "Laboratory reports do not contain witness statements, but only show recorded results of well-recognized scientific tests. Thus, they are not testimonial within the meaning of *Crawford*. (See *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1412-1413[stating in dicta that lab reports are not testimonial]; *Commonwealth v. Verde* (2005) 444 Mass. 279, 827 N.E.2d 701, 705-706 [finding lab report that gave weight of cocaine to be non-testimonial because the chemical analysis done using a well-recognized scientific test and was neither discretionary nor based on opinion].)"

State v. March, 216 S.W.3d 663 (Mo. 2007) – cocaine case – "Under the definitions of 'testimony' and 'testimonial' in *Crawford*, as well as the 'primary purpose' test in *Davis*, it is clear that the laboratory report in this case constituted a 'core' testimonial statement subject to the requirements of the Confrontation Clause. The laboratory report was prepared at the request of law enforcement for March's prosecution. It was offered to prove an element of the charged crime- *i.e.*, that the substance March possessed was cocaine base. The report was a sworn and formal statement offered in lieu of testimony by the declarant. Use of sworn *ex parte* affidavits to secure criminal convictions was the principal evil at which the Confrontation Clause was directed. *Crawford*, 541 U.S. at 50. A laboratory report, like this one, that was prepared solely for prosecution to prove an element of the crime charged is 'testimonial' because it bears all the characteristics of an *ex parte* affidavit. [¶] When a laboratory report is created for the purpose of prosecuting a criminal defendant, like this one was, it is testimonial." – holding criticized with discussion in **State v. Cramer, 116 Ohio St.3d 369, ¶ 68, 879 N.E.2d 745, 2007-Ohio-6840 (Ohio Dec 27, 2007) vacated and remanded, 129 S. Ct. 2856, 174 L. Ed. 2d 598 (2009), reversed and remanded, 116 Ohio St. 3d 369, 2007 Ohio 6840, 879 N.E.2d 745 (2007)** –

People v. Hutchins, 147 Cal.App.4th 992, 55 Cal.Rptr.3d 105 (Cal. App. 2 Dist. 2007) – cocaine charge in rape case – "The laboratory report "does not 'bear testimony,' or function as the equivalent of in-court testimony." [cites] Further, "even if *Crawford* applies to the admission of routine documentary evidence, [appellant] had a full opportunity to cross-examine [analyst's supervisor] on the foundational showing made for the document. In our view, this meets the requirements of *Crawford*."" [NOTE: this is from officially unpublished portion of opinion]

People v. Salinas, 146 Cal.App.4th 958, 53 Cal.Rptr.3d 302 (Cal. App. 5 Dist. 2007) – methamphetamine case – "the laboratory report is not testimonial"

People v. Hunter 2007 WL 80976, *3 (Cal.App. 4 Dist.,2007) (unpub) – cocaine case – "Here, the laboratory report was not testimonial evidence; therefore, its admission into evidence did not violate the Sixth Amendment." (following *People v. Johnson* 121 Cal.App.4th 1409, 1412 (2004))

State v. Dibbern, 2006 Ore. App. LEXIS 1892 (Or. Ct. App. 2006) – meth case – "The trial court admitted two laboratory reports prepared by an employee of the state police forensics laboratory that established that the substance found in defendant's home was methamphetamine. Defendant argued that the admission of the reports denied him the right to confront the author of the reports in violation of the Sixth Amendment to the United States Constitution. The court concluded that Confrontation Clause concerns were satisfied by the availability of a procedure, under Or. Rev. Stat. § 475.235, that allowed a defendant to subpoena the author of the reports and to require the state to call the subpoenaed witness in order to introduce the reports into evidence. Defendant's inability to confront the author of the reports flowed from his failure to avail himself of that procedure."

Thomas v. United States, 914 A.2d 1 (D.C. 2006) – cocaine case – "Although we do not hold D.C. Code § 48-905.06 unconstitutional in light of *Crawford*, we are obliged to re-interpret the statute so as to preserve its constitutionality. As we now construe § 48-905.06, it still authorizes the government to introduce a chemist's report without calling the chemist in its case-in-chief, but only so long as the record shows a valid waiver by the defendant of his confrontation right. Absent a valid waiver, which usually must be express but under some circumstances may be inferable from a defendant's failure to request the government to produce the author of the report, the defendant enjoys a Sixth Amendment right to be confronted with the chemist in person."

Following *Thomas*:

Digsby v. United States, 981 A.2d 598 (D.C. Oct. 1 2009)

Smith v. U.S., 966 A.2d 367 (D.C. Feb 26, 2009)

Washington v. U.S., 965 A.2d 35 (D.C. Feb 19, 2009)

Millard v. U.S., 967 A.2d 155 (D.C. Mar 12, 2009)

Fields v. U.S., 952 A.2d 859 (D.C. Apr 10, 2008)

Ottis v. U.S., 952 A.2d 156 (D.C. Apr 24, 2008) (on reh'g – prior opinion withdrawn)

Callahan v. U.S., 937 A.2d 141 (D.C. Dec 13, 2007)

United States v. Wahila, 2006 CCA LEXIS 320 (A.F.C.C.A. 2006) – cocaine case – "The airman, at trial, did not object to the admission of a laboratory report, which reflected that a urine sample tested positive for a metabolite of cocaine. The government did not call any of the 17 laboratory technicians whose names appeared on the report and chain of custody documents and who tested the urine, reviewed the results, or prepared the report admitted at trial. The airman asserted that the admission of the positive drug urinalysis report, without the testimony by all of the laboratory technicians who contributed to that report, was a violation of the Confrontation Clause of U.S. Const. amend. VI. He alleged that the report contained testimonial hearsay. The court held that data entries made by laboratory technicians testing urine samples submitted as part of a random urinalysis inspection program were not testimonial hearsay and, thus, such reports were properly admissible. The court held that the airman's laboratory report qualified as a business record, a "firmly rooted hearsay exception," and was, thus, properly admitted as evidence at trial."

State v. Miller, 208 Ore. App. 424, 144 P.3d 1052 (Ore. Ct. App. 2006), opinion adhered to on reconsideration, 210 Or.App. 176, 149 P.3d 1251 (Or. App. Dec 27, 2006) – meth case involving two lab reports, one urinalysis of defendant and one for residue on a pipe – "the lab reports here are not the sort of 'business records' referred to in the *Crawford* dictum. [cite] The trial court properly concluded that the lab reports constituted 'testimonial' evidence." – but state demand statute is constitutional

State v. Wells, 208 Ore. App. 480 (Ore. Ct. App. 2006), vacated, 343 Or. 159, 164 P.3d 1160 (Or. Jul 24, 2007), on remand to 215 Or.App. 488, 169 P.3d 1278 (Or.App. Oct 17, 2007) – meth case – conviction initially affirmed, but on remand court held: "The facts of this case do not differ in any significant way from those in *State v. Marroquin*, 215 Or.App. 330, 168 P.3d 1246 (2007), in which we reversed and remanded convictions due to the erroneous admission of laboratory reports in violation of Article I, section 11, of the Oregon Constitution. Accordingly, we do the same in this case."

State v. Caulfield, 722 N.W.2d 304 (Minn. 2006) – cocaine case – "The BCA lab report bears characteristics of each of the three generic descriptions offered by the Supreme Court in *Crawford*. The lab analyst submitting the report attested to her findings. The report functioned as the equivalent of testimony on the identification of the substance seized from Caulfield. The report was prepared at the request of the Rochester police for the prosecution of Caulfield, and was offered at trial specifically to prove an element of the crimes with which he was charged. The report conforms to the types of statements about which the Court in *Crawford* expressed concern – affidavits and similar documents admitted in lieu of present testimony at trial. [cite] [¶] We have said the critical determinative factor in assessing whether a statement is testimonial is whether it was prepared for litigation. ... The BCA report was clearly prepared for litigation. ... We conclude that the BCA lab report admitted at trial against Caulfield was testimonial evidence under *Crawford*."

Following *Caulfield*:

State v. Mata-Woodruff, 2008 WL 2415273 (Minn. App. Jun 17, 2008) (unpub)

State v. Gonzalez Mejia, 2008 WL 2065886 (Minn. App. May 13, 2008) (unpub)

State v. Willis, 2008 WL 2020365 (Minn. App. May 13, 2008) (unpub)

State v. Yusuf, 2008 WL 942542 (Minn. App. Apr 08, 2008) (unpub)

State v. Ellis, 2008 WL 660565 (Minn. App. Mar 11, 2008) (unpub)

Martin v. State, 2006 Fla. App. LEXIS 14434 (Fla. Dist. Ct. App. 1st Dist. 2006) – marijuana and cocaine case – 2-1 decision that drug analysis reports from Florida Department of Law Enforcement are business records, but testimonial

State v. March, 2006 Mo. App. LEXIS 998 (Mo. Ct. App. 2006) – A drug analysis report is a non-testimonial business record.

People v. Walters, 2006 Colo. App. LEXIS 1096 (Colo. Ct. App. 2006) – "criminal investigations laboratory report regarding the results of tests of suspected drugs was not testimonial and, therefore, could be admitted without cross-examination of the laboratory technician."

Pruitt v. State, 2006 Ala. Crim. App. LEXIS 121 (Ala. Crim. App. 2006) – “The State's reliance on the certificate of analysis did not violate defendant's Confrontation Clause rights. Certificates of analysis prepared by the Alabama Department of Forensic Sciences were business records grounded in inherently trustworthy and reliable scientific testing. The holding in Perkins was extended to encompass certificates of analysis provided by the Department. The certificate of analysis was non-testimonial hearsay and was admissible under the business record exception. *** a certificate of analysis is not based on speculation, opinion, or guesswork, but instead is founded in scientific testing to determine the physical and chemical composition of the substance and the amount or quantity of the substance.”

United States v. Rahamin, 168 Fed. Appx. 512 (3d. Cir. Pa. 2006) – “the DEA laboratory report appears to be a testimonial statement since it was offered to prove the weight and substance of the 20,000 confiscated pills. Agents Pritts, a DEA special agent with no apparent laboratory background, was the witness through which this evidence was offered. Because of this, Rahamin claims that he had no opportunity to question the methodology of the lab analysis. Given that no evidence of unavailability or prior questioning by the defense was ever introduced, the introduction of the DEA lab report appears to be a violation of Rahamin's Confrontation Clause rights. Under plain error analysis, an error occurred.”

Peters v. State, 919 So. 2d 624 (Fla. Dist. Ct. App. 1st Dist. Jan. 24, 2006) – “Appellant argues that the admission of a business record of an independent laboratory at a community control revocation hearing violated his constitutional right to confrontation as set forth in *Crawford*. We reject that contention because *Crawford* did not abrogate the rule enunciated by this court in *Davis v. State*, 562 So. 2d 431 (Fla. 1st DCA 1990), that written laboratory reports from independent labs setting forth the results of drug tests are admissible in community supervision revocation proceedings.”

Johnson v. State, 929 So.2d 4 (Fla. Dist. Ct. App. 2nd Dist. 2005) - “despite *Crawford*'s suggestion that all business records are nontestimonial, we hold that an FDLE lab report prepared pursuant to police investigation and admitted to establish an element of a crime is testimonial hearsay even if it is admitted as a business record. *** Similarly, even if an FDLE lab report is admitted as a business record, its purpose is clearly to establish an element of the crime at trial. This is particularly so because presumptive tests conducted by a field officer alone are not sufficient to establish a prima facie case; FDLE reports are often vital to the State's prosecution.”

Commonwealth v. Crapps, 64 Mass. App. Ct. 915, 2005 Mass. App. LEXIS 924 (Mass. App. Ct. 2005) – Drug analysis certificates are non-testimonial.

State v. Cunningham, 903 So. 2d 1110 (La. 2005) – “The statutes in question allowed a certificate of analysis to be accepted by the trial court as prima facie proof of the substance tested without live testimony of the person performing the analysis. The court reversed, holding that the statutes did not infringe upon defendant's constitutional right to confrontation because defendant merely had to subpoena the person who performed the examination or analysis of the evidence. Once a defendant requests the subpoena, the certificate of analysis has no evidentiary value and the State must call the relevant witnesses to prove its case. Because the good-faith certification of La. Rev. Stat. Ann. ?? 15:501(B)(2) was imposed only on defendant and not the State, it was not construed as an unconstitutional violation of the confrontation clause. Consequently, the burden

to demonstrate good faith was featherweight so as not to adversely impact defendant's right to confrontation, and defendant, who did not avail himself of the opportunity to subpoena the report-preparer, could have satisfied the good-faith requirement by merely indicating a preference for live testimony.”

Commonwealth v. Verde, 444 Mass. 279; 827 N.E.2d 701 (2005), effectively overruled by *Melendez-Diaz* – “This appeal raises the question whether, in light of *Crawford*, the confrontation clause of the Sixth Amendment to the United States Constitution requires that laboratory technicians who analyze drugs seized as part of a criminal investigation authenticate their laboratory findings by appearing at a defendant's trial. Because we conclude that a drug certificate is akin to a business record and the confrontation clause is not implicated by this type of evidence, we answer in the negative and affirm the conviction.”

Following *Verde*:

Commonwealth v. Fernandez, 2009 WL 1270469 (Mass. App. Ct. May 11, 2009) (unpub) –

Commonwealth v. Muniz, 2009 WL 1286444 (Mass.App.Ct. May 12, 2009) (unpub)

Commonwealth v. Dessources, __ N.E.2d __, 2009 WL 1235299 (Mass. App. Ct. May 08, 2009) –

Commonwealth v. Williams, 2009 WL 613793 (Mass. App. Ct. Mar 12, 2009)

Commonwealth v. Trinidad, 2009 WL 586739, 73 Mass.App.Ct. 1126 (Mass. App.Ct. Mar 10, 2009) (unpub) –

Commonwealth v. Blanks, 2009 WL 482557, 73 Mass.App.Ct. 1124 (Mass.App.Ct. Feb 27, 2009) (unpub), remanded for reconsideration in light of M-D, 459 Mass. 1112, 947 N.E.2d 1089 (Mass. 2011)

Com. v. Reeder, __ N.E.2d __, 2009 WL 456577 (Mass. App. Ct. Feb 26, 2009)

Commonwealth v. Oquendo, 2009 WL 426292, 73 Mass.App.Ct. 1123 (Mass. App. Ct. Feb 23, 2009) (unpub)

Commonwealth v. Hamilton, 2009 WL 385379, 73 Mass.App.Ct. 1122 (Mass. App. Ct. Feb 18, 2009), vacated and remanded for reconsideration in light of M-D by *Hamilton v. Massachusetts*, 130 S. Ct. 216; 175 L. Ed. 2d 4 (Oct. 5, 2009) –

Commonwealth v. Abreu, 2009 WL 363446, 73 Mass.App.Ct. 1121 (Mass.App.Ct. Feb 17, 2009) (unpub)

Commonwealth v. Torres, 2009 WL 330931, 73 Mass.App.Ct. 1121 (Mass.App.Ct. Feb 12, 2009) (unpub)

Com. v. Carrasquillo, 2009 WL 168761 (Mass. App. Ct. Jan 27, 2009) (unpub)

Commonwealth v. Carrasquillo, 2009 WL 168761 (Mass. App. Ct. Jan 27, 2009) (unpub)

Commonwealth v. Agard, 2009 WL 102752 (Mass. App. Ct. Jan 16, 2009) (unpub)

Commonwealth v. Cosenza, 2009 WL 77970 (Mass.App.Ct. Jan 14, 2009) (unpub)

Commonwealth v. Chung, 2008 WL 5069814, 73 Mass.App.Ct. 1108 (Mass. App. Ct. Dec 02, 2008)

Commonwealth v. Jackson, 2007 WL 4293069 (Mass. App. Ct. Dec 07, 2007) (unpub)

Commonwealth v. Melendez-Diaz, 2007 WL 2189152 69 Mass.App.Ct. 1114 (Mass. App. Ct. Jul 31, 2007), reversed, 557 U.S. __, __ S.Ct. __ (June 25, 2009)

➤ Sub-Category: Field Tests
(category added Sept. 2012)

Newman v. United States, 49 A.3d 321, 325-326 (D.C. 2012) – "Officer Melby conducted a field test on the green plant material. The purple color reaction indicated to him that the substance was marijuana. Cross-examination revealed that Officer Melby knew very little about the accuracy of the field test or how it worked. ... Defense counsel pressed harder: 'Somebody told you at some point. They said, you put it in there, it turns purple, it's marijuana?' Officer Melby responded, 'That's correct.' [¶] Claiming that his right to confrontation was violated, appellant asserts that he 'should have been permitted to cross-examine the person who told Officer Melby that if he saw purple it was marijuana.' ... Appellant misconstrues the right of confrontation. This is not a case where the government introduced a forensic report without calling the person who prepared it. [cites] Instead, Officer Melby was testifying from personal knowledge about a test that he performed himself. [¶] Appellant's argument is akin to saying that, whenever a DEA chemist testifies about the identity of a controlled substance, the government is required to call the professors who taught him chemistry in college and the supervisors who trained him at the DEA lab." – no violation

Drug Analysis: Testimony by Supervisor or Colleague
(category added Dec. 2012)
(this category and the next substantially overlap)

Hingle v. State, 153 So. 3d 659, 661-65 (Miss. 2014), reh'g denied (Jan. 15, 2015), cert. pet. filed – "¶ 3. Gary Fernandez, a drug analyst with the Mississippi Crime Laboratory, testified that he reviewed the results of a test conducted by Bob Reed, which had concluded that the pills contained morphine. Fernandez testified that, although he had not observed Reed performing the test, he had reviewed Reed's report line-by-line, had reached an independent conclusion that the pills contained morphine, and had signed the report as the technical and administrative reviewer." – Reed did not testify – "Reed's report *662 was not admitted into evidence... *665 ¶ 13. Fernandez's testimony about the report was admissible because Fernandez had intimate knowledge of the testing and he was actively involved in the production of the report because he served as the reviewing analyst. His signature as the reviewing analyst was required for the report to be completed." – no plain error – a 5-4 decision with long dissent

State v. Michaels, 219 N.J. 1, 95 A.3d 648 (N.J. 2014) – "in this matter we join the many courts that have concluded that a defendant's confrontation rights are not violated if a forensic report is admitted at trial and only the supervisor/reviewer testifies and is available for cross-examination, when the supervisor is knowledgeable about the testing process, reviews scientific testing data produced, concludes that the data indicates the presence of drugs, and prepares, certifies, and signs a report setting forth the results of the testing. In examining the testimony and documentary evidence challenged in this matter, we do not find it to be equivalent to the 'surrogate testimony' that the United States Supreme Court found problematic in *Bullcoming*..."

Miller v. State, __ So.3d __, 2014 WL 406552 (Miss. App. 2014), reh'g denied (June 10, 2014) – "¶ 12. The Mississippi Supreme Court has previously addressed this very issue. The court held 'that a supervisor, reviewer, or other analyst involved may testify in place of the

primary analyst where that person was 'actively involved in the production of the report and had intimate knowledge of analyses even though she did not perform the tests firsthand.'"

Ezell v. State, __ So3d __, 2013 WL 4799153 (Miss. App. 2013), reh'g denied (Dec. 3, 2013)

– "Milam stated she currently worked in administration but was certified as an analyst and conducted peer reviews on all the drug cases. It is unclear from the testimony if Milam actually tested the substance herself, but her testimony indicates she signed the report, indicating the substance was tested and found to be cocaine. We cannot find Ezell's Sixth Amendment rights were violated in this instance."

U.S. v. Porter, 72 M.J. 335 (App. Armed Forces 2013) – "At trial, to lay the foundation for the DTR [drug testing report], the Government called Ronald Shippee, Ph.D., ... In light of Dr. Shippee's testimony that he had no supervisory role at AFIP [the lab] and the fact that neither the analysts nor the reviewer who signed pages 54 or 154 of the DTR testified, the defense objected to admission of the DTR on Confrontation Clause grounds. ... At no time during his testimony, however, did Dr. Shippee specifically interpret or rely on the machine-generated *337 data contained in the DTR to independently conclude that Appellee's sample tested positive for THC and BZE. ... [T]he two summary confirmation pages at issue squarely qualify as testimonial statements under the Supreme Court's various formulations."

Burch v. State, 401 S.W.3d 634, 634-642 (Tex. Crim. App. 2013) – "Although Lopez, the testifying witness, was a supervisor who 'reviewed' the original process, we cannot say, on this record, that she had personal knowledge that the tests were done correctly or that the tester did not fabricate the results. She could say only that the original analyst wrote a report claiming to have conformed with the required safeguards. Consequently, cross-examining her did not satisfy the appellant's constitutional rights." – [NOTE: Practically speaking, the holding seems to be that the foundation was inadequate.] – a concurring opinion states: "If the State can produce 'another' who may have developed his or her own separate conclusion based on data supplied through testing (*i.e.*, particular 'testing' is really performed through machinery and analysts develop opinions [*642] from that data), I see no reason why that witness should be denied an opportunity to testify."

State v. Craven, 744 S.E.2d 458, 458-466 (N.C. 2013) – "It is clear from this testimony that Agent Schell did not offer—or even purport to offer—her own independent analysis or opinion on the 3 March and 6 March 2008 samples. Instead, Agent Schell merely parroted Agent Shoopman's and Agent Allcox's conclusions from their lab reports." – held: confrontation clause violation

United States v. Turner, 709 F.3d 1187, 1187-1197 (7th Cir. Wis. 2013), reh'g denied (Apr. 30, 2013), cert. denied (May 27, 2014) – on remand from SCOTUS, which GVR'd prior decision – "At the least, however, the *Williams* decision (which we discuss in more detail below) casts doubt on using expert testimony in place of testimony from an analyst who actually examined and tested evidence bearing on a defendant's guilt, insofar as the expert is asked about matters which lie solely within the testing analyst's knowledge. ... Only two aspects of Block's testimony potentially present a Confrontation Clause problem: Block's testimony that Hanson followed standard procedures in testing the substances that Turner distributed to the undercover officer, and his testimony [*1190] that he reached the same conclusion about the nature of the substances that Hanson did. In both respects, Block necessarily was relying on out-of-court

statements contained in Hanson's notes and report. ... As we explained in our prior decision, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify. ... Nothing in the Supreme Court's *Williams* decision undermines this aspect of our decision. ... Recognizing that the divided nature of the *Williams* decision makes it difficult to predict how the Supreme Court would treat Hanson's report, and in order to give Turner the benefit of the doubt, we shall assume that the nature of the report, particularly insofar as it formally documented Hanson's findings for purposes of the criminal case against Turner, is sufficiently testimonial to trigger the protections of the Confrontation Clause. We shall therefore assume that Block's testimony in fact did violate Turner's confrontation rights to the extent he disclosed that Hanson had determined the tested substances to contain cocaine base, as memorialized in her report." – but harmless

Jenkins v. State, 102 So. 3d 1063 (Miss. Oct. 4, 2012), modified (12/20/12), cert pet filed (3/19/13) – essentially identical to *Grim*, immediately below

Grim v. State, 102 So. 3d 1073 (Miss. Oct. 18, 2012) – "We granted Grim's petition for writ of certiorari to examine whether the trial court erred by allowing a laboratory supervisor, who neither observed nor participated in the testing of the substance, to testify in place of the analyst who had performed the testing. [cites] Finding no error, we affirm. ... ¶ 16. None of these [U.S. Supreme Court] cases stands for the proposition that, in every case, the only person permitted to testify is the primary analyst who performed the test and prepared the report. ... To determine if a witness satisfies the defendant's right to confrontation, we apply a two-part test: First, we ask whether the witness has "intimate knowledge" of the particular report, even if the witness was not the primary analyst or did not perform the analysis firsthand. [cite] Second, we ask whether the witness was "actively involved in the production" of the report at issue. *Id.* We require a witness to be knowledgeable about both the underlying analysis and the report itself to satisfy the protections of the Confrontation Clause. ... Mississippi law requires far more than a 'custodian' or 'someone' who can authenticate the document; we require a witness – an analyst – who not only knows about the analysis performed, but is knowledgeable about the document as well. [cite] As in the case at hand, we do not always require 'the particular analyst who conducted the test' to testify, because we recognize that some tests involve multiple analysts. ... ¶ 22. We hold that a supervisor, reviewer, or other analyst involved may testify in place of the primary analyst where that person was 'actively involved in the production of the report and had intimate knowledge of analyses even though [he or] she did not perform the tests first hand.'"

Whittle v. Commonwealth, 352 S.W.3d 898, 900-906 (Ky. 2011) – "This distinction would carry water if Comstock's testimony about testing was the only evidence admitted, and not the report itself. But the report [prepared by non-testifying analyst] was admitted into evidence. Appellant's opportunity to cross-examine Comstock does not satisfy any potential right to be confronted with the author of the report."

Herrera v. State, 288 Ga. 231, 234, 702 S.E.2d 854, 2010 Fulton County D. Rep. 3509 (Ga. 2010) – "The lab report was admitted in evidence over Herrera's objection that it constituted testimonial hearsay and violated his right of confrontation. [cites] However, in addition to the lab report itself, the lab supervisor, an expert in toxicology, testified that he developed the lab procedures and trained the staff as to how to perform the lab tests; that he supervised the employees who conducted the tests; and that, in his opinion, based on the results of the tests, Herrera tested positive for amphetamine, methamphetamine and cocaine metabolites. [cites] In

view of the lab supervisor's testimony, any error in the admission of the lab report itself was harmless beyond a reasonable doubt."

State v. Witherspoon, 2010 NC App LEXIS 814 (N.C. Ct. App. May 18, 2010) – "although the Confrontation Clause prohibits the State from introducing the results of scientific testing conducted by one expert through another expert's testimony, an expert may testify as to his or her own opinion based on the results of testing conducted by another expert." – following *Mobley*

United States v. Rose, 587 F.3d 695, 698-701 (5th Cir. Tex. 2009) – discussing whether testimony by supervisor satisfies confrontation clause, including citations to numerous cases (n. 4) but ultimately not deciding the issue

Rector v. State, 285 Ga. 714, 681 S.E.2d 157, 2009 Fulton County D. Rep. 2366 (Ga. July 9, 2009) – "The toxicologist who testified had reviewed the work of the doctor who had originally prepared the report and reached the same conclusion that the victim's blood sample tested negative for cocaine. Accordingly, [r]ather than being a mere conduit for [the doctor's] findings, [the toxicologist] reviewed the data and testing procedures to determine the accuracy of [the] report. An expert may base [his] opinions on data gathered by others."

People v. Velazquez, 2009 WL 153877 (Cal. App. 4 Dist. Jan 23, 2009) (unpub) – "whether the reports themselves were or were not admissible hearsay ... the expert is, nonetheless, allowed to render an opinion, and may testify that reports prepared by other experts were a basis for that opinion."

U.S. v. Crockett, 586 F.Supp.2d 877 (E.D. Mich. Nov 14, 2008) – machine printouts weren't statements (see above) – and "allowing a qualified witness to interpret those readouts for the jury would not run afoul of either the rule against hearsay or the Confrontation Clause because the witness would be in court giving testimony and subject to cross-examination"

Jackson v. State, 891 N.E.2d 657 (Ind. App. Aug 12, 2008) – cocaine – "[Supervisor] Ballard's testimony was limited to his opinion that based on his review of [technician] Lang's work, it appeared that she had performed the testing properly. Ballard was merely a sponsoring witness of the exhibit and did not perform any tests himself. ... The cross-examination of Ballard is not equivalent to the cross-examination of Lang. Under the principles enunciated in *Crawford*, Jackson was entitled to confront Lang directly."

State v. Johnson, 982 So.2d 672 (Fla. May 01, 2008) – because lab report was deemed testimonial, it was improperly admitted "via testimony" from supervisor – with no analysis as to whether the supervisor's testimony was admissible on its own merits

State v. Moore, 2008 WL 2058533, 2008-Ohio-2359 (Ohio App. 8 Dist. May 15, 2008) (unpub) reversed and remanded, **Moore v. Ohio, 130 S. Ct. 1685, 176 L. Ed. 2d 176 (U.S. 2010)**, conviction aff'd on other grounds on remand, **2010 Ohio 1569 (Ohio Ct. App., Cuyahoga County Apr. 8, 2010)** –

Blaylock v. State, 259 S.W.3d 202 (Tex. App.-Texarkana May 14, 2008), pet. ref'd (Oct 15, 2008), cert. denied, 557 U.S. 938 (June 29, 2009) – "The parties stipulated that [supervisor] Pridgen was an expert in the field of chemistry. Pridgen ... explained that his testimony was not

based simply on 'reading notes' of the examiner, but by 'looking at the printed results from the instruments.' This testimony demonstrates that Pridgen was applying his expertise to the scientific data in arriving at his opinion. Based on this explanation, we believe that this testimony was the expert opinion of Pridgen based on definitive tests done on the substance and was not merely a recitation of the notes of the chemist who actually did the test. Pridgen was cross-examined by the defense."

U.S. v. Moon, 512 F.3d 359 (7th Cir. Jan 03, 2008), cert. denied, (Oct. 6, 2008)— opinion by Judge Easterbrook – "The principal question on appeal is whether a chemist violated the Confrontation Clause of the Sixth Amendment when testifying that the substance seized from defendants was cocaine. [¶] James DeFrancesco, a chemist employed by the Drug Enforcement Agency, testified that the substance was cocaine. He based this conclusion on the output of two machines: an infrared spectrometer and a gas chromatograph. DeFrancesco did not perform the tests himself; the lab work had been done by Ragnar Olson, a chemist who left federal employment three weeks before trial. Olson had just started at law school and did not want to interrupt his legal education. So DeFrancesco testified, using the instruments' output, a report that Olson had prepared, and Olson's lab notes (which persuaded DeFrancesco that Olson had prepared the samples and run the tests correctly). ... [T]he Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself. ... DeFrancesco was entitled to analyze the data that Olson had obtained. Olson's own conclusions based on the data should have been kept out of evidence ..."

People v. Boet, 2007 WL 1366073, *1 (Cal. App. 2 Dist. 2007) – two counts of selling methamphetamine – two different analysts prepared report, but only one testified – report was nontestimonial but "[e]ven assuming that the report was testimonial, appellant had an opportunity to cross-examine [testifying analyst] Chasteen about the report. Chasteen testified generally about the standard procedures in the laboratory, including the procedure of making notes at the time of analysis and noting if the seal on an evidence envelope was broken when received by the laboratory, Chasteen noted that Lepisto's note stated that the seal was not broken. Chasteen also testified that he reviewed the protocol used by [non-testifying analyst] Lepisto to test the substance to determine if it was a controlled substance and that the protocol was within the range of accepted procedures at the laboratory. Specifically, Lepisto performed the same tests as Chasteen. Appellant was free to cross-examine Chasteen about procedures for preparing reports, how testing was done in the laboratory, and the acceptance of the testing procedures by the scientific community." – thus confrontation clause satisfied

People v. Hutchins, 147 Cal.App.4th 992, 55 Cal.Rptr.3d 105 (Cal.App. 2 Dist. 2007) – "Perez [the supervisor] explained the analysis procedure, the different tests that were run on the sample, and the results of Phillips's report. She testified that she reviewed the laboratory report and that it was the business practice of the sheriff's department to prepare the report as the sample is being analyzed. "If there had been problems with how the report was generated or how the testing was done, or if there were questions about methodology or acceptance of the testing procedures by the scientific community, [appellant] had the chance to explore these areas through the cross-examination of [Perez]. The record reveals that [Perez] was not asked any question that [s]he was unable to answer." – [NOTE: from officially unpublished portion of opinion]

People v. Salinas, 146 Cal.App.4th 958, 53 Cal.Rptr.3d 302 (Cal. App. 5 Dist. 2007) -

"The evidence came in through the testimony of a supervising criminalist who reviewed the report of another laboratory employee, who did not testify. We hold that admission of this evidence does not violate the Crawford decision since the laboratory report is not testimonial; it was not offered as a substitute for live testimony; and the defendant had a full opportunity to cross-examine the supervising criminalist."

People v. Hunter 2007 WL 80976, *3 (Cal.App. 4 Dist. 2007) (unpub) – "it was not reversible error for the trial court to permit testimony from a different criminalist than the one who actually performed the tests."

Drug Analysis: Expert Bases Opinion on Another's Work

(category added Dec. 2012)

(this and the preceding category substantially overlap; *see also* part 6, "Foundation / Preliminary Questions of Fact / Chain of Custody.")

U.S. v. Maxwell, 724 F.3d 724, 725-28 (7th Cir. 2013) – "The analyst from the Wisconsin State Crime Laboratory who originally tested the substance seized from Maxwell retired before trial, so the government offered the testimony of his co-worker instead. The co-worker did not personally analyze the substance herself, but concluded that it contained crack cocaine after reviewing the data generated by the original analyst. ... Maxwell was not deprived of his Sixth Amendment right simply by virtue of the fact that [the second analyst] relied on [the first analyst]'s data in reaching her own conclusions, especially since she never mentioned what conclusions [the first analyst] reached about the substance."

State v. Ortiz-Zape, 743 S.E.2d 156 (N.C. 2013) – "Despite the lack of definitive guidance on the issue before us, a close examination of *Williams v. Illinois* seems to indicate that a qualified expert may provide an independent opinion based on otherwise inadmissible out-of-court statements in certain contexts. ... We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements."

Following *Ortiz-Zape*, with full opinions:

State v. Brewington, 743 S.E.2d 626, 625-639 (N.C. 2013), cert. denied (May 27, 2014)

State v. Brent, 743 S.E.2d 152 (N.C. 2013)

State v. Welch, 115 So. 3d 490 (La.App. 1 Cir. Mar. 22, 2013) – "Considering Dr. Behonick's credentials and the basis for his explanation of the test results, we find no confrontation clause violation in allowing Dr. Behonick, a forensic toxicologist, to testify on the basis of the report by his fellow toxicologist, who did not testify at trial."

State v. Huettl, 2013-NMCA-038, 305 P.3d 956 (N.M. Ct. App. Dec. 27, 2012), cert. granted (03/01/13) – "We further hold that because the evidence shows that Ms. Nardoni's role in the actual testing process appeared to have been limited to simply placing the substance onto the spectrophotometer, and because Mr. Hightower testified only as to his own analysis and interpretation of the data generated by the spectrophotometer, concluding that the evidence contained methamphetamine, Defendant's right to confrontation was not violated. ... [¶] 28] *Williams*, *Bullcoming*, and *Melendez-Diaz* do not support the notion that a defendant has the

right to confront a laboratory analyst who, having participated in some aspect of evidence analysis, nevertheless did not record any certifications, statements, or conclusions that were offered as evidence. ... [¶ 36] [A]n expert who has analyzed the raw data generated by another analyst and who has formed independent conclusions based upon that analysis may testify as to those conclusions."

Commonwealth v. Munoz, 461 Mass. 126, 958 N.E.2d 1167 (Mass. 2011), GVR'd for reconsideration in light of *Williams* by *Munoz v. Massachusetts*, 133 S. Ct. 102, 184 L. Ed. 2d 4 (2012) – "A substitute analyst who offers an independent opinion can, however, be cross-examined meaningfully in at least two ways. [*134] First, such an analyst is subject to cross-examination on the general risk of error in forensic testing, whether introduced through carelessness, incompetence, or fraud. ... [**1175] Second, a substitute analyst, basing an independent opinion on data generated by a prior analyst, can be cross-examined on many of the specific risks that could lead to an erroneous conclusion concerning the identity and weight of a substance at issue in a particular case. ... As a general proposition, ... we discern no reason to conclude either that cross-examination of a substitute analyst offering an independent opinion cannot be meaningful or that the opinion offered cannot fairly be characterized as independent."

United States v. Ramos-González, 664 F.3d 1, 1-7 (1st Cir. P.R. 2011) – "These Supreme Court cases are instructive, but they do not squarely address an issue that must be explored in this case: the extent to which the Sixth Amendment permits an expert witness to disclose the substance of a previously unadmitted forensic lab report that he did not draft. ... Absent further clarification from the Court, the reconciliation of Crawford, Melendez-Diaz, and Bullcoming -- which forbid the introduction of testimonial hearsay as evidence in itself -- with Rule 703, which permits expert reliance on otherwise inadmissible testimonial hearsay, will necessarily involve a case-by-case assessment as to the quality and quantity of the expert's reliance. ... More specifically, the assessment is one of degree. Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. ... Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation."

State v. Williams, 702 S.E.2d 233, 234-238 (N.C. Ct. App. 2010), appeal dismissed (2012) – "we turn to the present case and note that Charlesworth did not conduct any tests on the substance, nor was she present when Johnson did. We think that these facts are decisive and show that Charlesworth could not have provided her own admissible analysis of the relevant underlying substance. [cite] We therefore now hold that Charlesworth's testimony detailing her 'peer review' was merely a summary of the underlying analysis done by Johnson. Therefore admitting this testimony was error." [NOTE: The court finds that the testifying expert didn't analyze the substance. But any expert analyzes the readout from the machine, and there's no necessity to be present when the machine spits it out.]

United States v. Blazier, 69 M.J. 218, 220-227 (C.A.A.F. 2010) – "We further hold that an expert may, consistent with the Confrontation Clause and the rules of evidence, (1) rely on, repeat, or interpret admissible and nonhearsay machine-generated printouts of machine-generated data, [cites], and/or (2) rely on, but not repeat, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert opinion arrived at is the expert's own [cites]." – "That an expert did not personally perform the tests upon which his opinion is

based is explorable on cross-examination, but that goes to the weight, rather than to the admissibility, of that expert's opinion."

State v. Craven, 696 S.E.2d 750, 753-755 (N.C. Ct. App. 2010) – "We see no meaningful difference in the testimony Special Agent Schell gave in Brewington [below] and in the case before us. Defendant's constitutional right to confront witnesses against him was violated by admission of the forensic analyses and Special Agent Schell's related testimony about the substances obtained on 3 and 6 March 2008."

State v. Brewington, 693 S.E.2d 182 (N.C. App. 2010), appeal dismissed (Oct. 4, 2012) – "Here, the question of whether the Sixth Amendment rights of defendant were violated turns on whether Special Agent Schell offered an independent expert opinion as to the chemical composition of the State's evidence or whether she merely summarized the findings of Agent Gregory. If Special Agent Schell simply offered the opinion contained in Agent Gregory's report - the type of report that the Supreme Court held to be "testimonial" in *Melendez-Diaz* and that the North Carolina Supreme Court held to be inadmissible through a testifying expert in *Locklear* - then the defendant's right to confrontation was implicated and violated. If, however, Special Agent Schell offered her own expert opinion based on independent analysis, then her use of the underlying report prepared by Agent Gregory as a source of data facilitating that analysis would not violate defendant's right to confrontation. It is clear from the testimony of Special Agent Schell that she had no part in conducting any testing of the substance, nor did she conduct any independent analysis of the substance. She merely reviewed the reported findings of Agent Gregory, and testified that if Agent Gregory followed procedures, and if Agent Gregory did not make any mistakes, and if Agent Gregory did not deliberately falsify or alter the findings, then Special Agent Schell "would have come to the same conclusion that she did." As the Supreme Court clearly established in *Melendez-Diaz*, it is precisely these "ifs" that need to be explored upon cross-examination to test the reliability of the evidence. [M-D cite] Special Agent Schell could not have answered these questions because she conducted no independent analysis." – sixth amendment violation

State v. Hough, 690 S.E.2d 285, 286-292 (N.C. Ct. App. 2010), appeal dismissed (Oct. 4, 2012) – "Upon review of Alloway's testimony, we conclude that her expert opinion was based on an independent review and confirmation of test results, unlike the situations presented in *Melendez-Diaz*... we do not find that *Melendez-Diaz* abrogates those cases where the analyst who testified asserted his or her own expert opinion." – collecting cases

Carolina v. State, 302 Ga. App. 40, 690 S.E.2d 435 (Ga. Ct. App. 2010) – "*Melendez-Diaz* specifically did not decide the issue presented here -- whether the technician or chemist who actually performed the tests must testify at trial. ... In our view, a critical distinction here, and one also present and noted by the majority in *Dunn*, is that the report or data prepared by the nontestifying technician was not admitted into evidence and the expert who made the determination that the substance was contraband based on her interpretation of the data did testify at trial and was thus subject to cross-examination." – no violation

United States v. Turner, 591 F.3d 928, 930-934 (7th Cir. Wis. 2010), GVR'd for reconsideration in light of Williams, 133 S.Ct. 55, 183 L.Ed.2d 698 (2012), decision adhered to on remand 2013 US App LEXIS 4365 (March 4, 2013) –

Reddick v. State, 298 Ga. App. 155, 679 S.E.2d 380; 2009 Fulton County D. Rep. 1964 (Ga. App. Jun 01, 2009) – "'an expert need not testify to the validity of every step that went into the formulation of his re-sults as a foundation for their admissibility." [FN10] Moreover, "an expert may base his opinion on data collected by others." [FN11] The fact that Reeves may have relied on lab work performed by Moore does not render Reeves's expert opinion inadmissible; instead, it presents a question for the factfinder as to the weight to be given to her testimony."

Haywood v. State, 301 Ga. App. 717, 689 S.E.2d 82, 2009 FCDR 4124 (Ga. Ct. App. 2009) – "Haywood's contention is controlled directly and adversely to him by several recent cases, including Rector v. State, 285 Ga. at 715 (4); Bradberry v. State, 297 Ga. App. 679, 682 (2) (678 SE2d 131) (2009); and Dunn, 292 Ga. App. at 669-672 (1). n3 Indeed, in Reddick v. State, 298 Ga. App. 155, 157 (2) (679 SE2d 380) (2009), the same forensic chemist gave similar expert testimony predicated on data gathered by the same lab technician involved in this case, and we likewise rejected the defendant's contention that his right to confrontation was violated. As such, the drug identification testimony in the instant case did not run afoul of the Sixth Amendment."

Urinalysis Results

Warning: *Melendez-Diaz* / *Bullcoming* / *Williams* may call older cases into question

Carrington v. D.C., 77 A.3d 999, 1001-07 (D.C. App. 2013), cert. denied, 134 S. Ct. 1353 (U.S. 2014) – " Under this court's interpretation of *Williams* in *Young*, the results of appellant's urinalysis clearly constitute testimonial statements."

Marshall v. People, 309 P.3d 943 (Colo. 2013) – "¶ 2 ... we find that admission of the lab report did not violate the Confrontation Clause. While Burbach did not conduct the test of Marshall's urine sample herself, she supervised the testing process, reviewed all the data generated by the test, made the determination that the data accurately determined that Marshall had methamphetamine present in her urine, and certified the test results. She therefore did not provide 'surrogate' testimony of the sort found to be problematic in *Bullcoming*..."

United States v. Tearman, 70 M.J. 640, 640-645 (N-M.C.C.A. 2012), aff'd, 72 M.J. 54, 54-70 (C.A.A.F. 2013) – "Prosecution Exhibit 4 can be distilled into four categories: machine generated annotations; internal chain of custody forms (excluding the DD 2624); review worksheets (one each for the screen, rescreen and confirmation tests); and the DD 2624 ... the DD 2624 is the official Department of Defense specimen custody form used by the NDSL for certifying and reporting urinalysis test results." Held: first three are non-testimonial, but fourth is testimonial

United States v. Byrne, 70 M.J. 611, 612-621 (C.G.C.C.A. 2011) – "we conclude that the cover memorandum in Prosecution Exhibit 4, p. 4, which presented the findings, including the specific cocaine metabolite and the concentration of that metabolite in Appellant's urine, and prepared after the Government's request for a litigation packet, is testimonial [*616] for purposes of the Confrontation Clause of the Sixth Amendment."

United States v. Sweeney, 70 M.J. 296, 297-313 (C.A.A.F. 2011) – "more recent case law demonstrates that the focus has to be on the purpose of the statements in the drug testing report itself, rather than the initial purpose for the urine being collected and sent to the laboratory for

testing. ... Where, as here, an accused's sample tests positive in at least one screening test, analysts must reasonably understand themselves to be assisting in the production of evidence when they perform re-screens and confirmation tests and subsequently make formal certifications¹³ on official forms attesting to the presence of illegal substances, to the proper conducting of the tests, and to other relevant information."

State v. Erwin, 2011 VT 41, 26 A.3d 1 (Vt. 2011) – "Defendant appeals from his conviction, following a jury trial, of obtaining a regulated drug by deceit ... [¶ 26] In the instant case, the laboratory reports were prepared at the instigation of defendant and his hospital employer almost a year before the filing of criminal charges against him. Police had no involvement whatsoever in procuring these tests. ... According to the testimony, the laboratories here were not in the business of producing evidence for use at trial – quite unlike the state police laboratory at issue in *Melendez-Diaz*." – not testimonial, at least under plain error review

United States v. Dunn, __ M.J. __, 2010 CCA LEXIS 169, 26-33 (A.F.C.C.A. Aug. 31, 2010), review granted, 2010 CAAF LEXIS 1058 (C.A.A.F., Dec. 21, 2010) – "The appellant is essentially arguing that the Supreme Court's decision in *Melendez-Diaz* has overruled our superior court's decision in *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006). We disagree. ... [T]he statements Dr. DT testified about did not come from the lab analysts but from non-testimonial data generated by machines. Moreover, Dr. DT is better qualified to explain the science behind the testing and the test results than the analysts who operate the machines that generate the raw data."

State v. Jones, 30 So. 3d 619, 621-623 (Fla. Dist. Ct. App. 2d Dist. 2010) – "Thus, the reason behind a medical test determines whether the written document containing the results of that test is testimonial in nature and triggers a defendant's constitutional right to confrontation. Although Mr. Jones's counsel argued that the urinalyses were ordered for prosecutorial purposes rather than for medical reasons, again he provided no evidence to support his assertion. A trial court may not rely on argument by counsel to make factual determinations. [cites] Without any evidence to support the assertion that the urinalyses were for prosecutorial purposes rather than for medical [*623] reasons, the trial court departed from the essential requirements of law in finding that introduction of the test results would violate *Crawford*."

State v. Jones, 2008 WL 4291467, *1+ (Kan. App. Sep 19, 2008) (unpub) – "The analysis of blood and urine samples is a routine procedure in a hospital lab. There was no testimony that the vials containing H.F.'s blood and urine samples were labeled in a way to identify the donor as a 12-year-old child or to indicate that the donor had been the victim of a sexual assault. Here, the analysis was conducted in the hospital's own lab where samples from the hospital's patients are routinely analyzed. The lab results were found in H.F.'s medical records maintained by the hospital. There was no testimony to indicate that a lab technician receiving the samples for analysis would know that the donor was the victim of a crime as opposed to just another hospital patient needing lab tests. [¶] The facts before us stand in marked contrast to the facts in *Laturner*, 38 Kan.App.2d 193. There, a lab test for methamphetamine was conducted by personnel at the KBI for the explicit purpose of prosecuting the defendant for a drug crime. Unlike here, the KBI lab technician in *Laturner* knew at the time the tests were conducted that her report would be presented in court. [¶] Under the circumstances, there is no evidence indicating that the lab technician would have anticipated that these test results would be used in a criminal prosecution. Accordingly, the test results were not testimonial..."

U.S. v. Harris, 66 M.J. 781 (Navy-Marine Ct.Crim.App. Jul 31, 2008) – " We first acknowledge that in *Magyari*, the lab reports at issue concerned a random urinalysis of multiple individuals at a command, whereas in the case at bar the appellant was singled out by his command and directed to provide the sample. His urine was the only sample sent by his command to the Navy Drug Screening Laboratory, and it was marked "probable cause." Prosecution Exhibit 2. However, while the basis for collecting the samples in these cases differ, those differences do not appear to have altered the method by which the lab technicians tested and reported the results, as compared to those in *Magyari*. The appellant's sample was one among 100, some of which were blind samples provided for quality assurance. The technicians did not associate any sample with a particular person, and they had no expectation that any particular sample would test positive for any particular drug. Finally, as in *Magyari*, the lab technicians testing the appellant's sample had no reason to suspect him of drug use, and no basis upon which to believe that his sample would test positive for methamphetamine." – contrasted with drug analyses – held: results are non-testimonial

State v. Miller, 208 Ore. App. 424, 144 P.3d 1052 (Ore. Ct. App. 2006), opinion adhered to on reconsideration, 210 Or.App. 176, 149 P.3d 1251 (Or. App. Dec 27, 2006) – meth case involving two lab reports, one urinalysis of defendant and one for residue on a pipe – "the lab reports here are not the sort of 'business records' referred to in the *Crawford* dictum. [cite] The trial court properly concluded that the lab reports constituted 'testimonial' evidence." – but state demand statute is constitutional

United States v. Spain, 2006 CCA LEXIS 245 (A.F.C.C.A. 2006) and United States v. Stafford, 2006 CCA LEXIS 212 (A.F.C.C.A. 2006) – A laboratory report from the Air Force Institute for Operational Health that indicated the appellant's urine had tested positive for a metabolite of marijuana was a non-testimonial business record.

In re J.R.L.G., 2006 Tex. App. LEXIS 3344 (Tex. App. 2006) – "On appeal, the juvenile argued that admission of his urinalysis lab results violated his Sixth Amendment confrontation right. The court disagreed, holding that the lab reports were non-testimonial evidence. The Sixth Amendment Confrontation Clause was not implicated, and the trial court did not err in admitting the reports. The lab reports did not contain out-of-court statements providing observations of a declarant. The lab reports merely contained the results of the tests."

United States v. Magyari, 63 M.J. 123 (C.A.A.F. 2006) – "The draftsman argued that his Sixth Amendment right to confront the witnesses against him was violated by use of his positive urinalysis. The court considered whether the data entries in the urinalysis lab report constituted testimonial statements or whether, in the alternative, they represented nontestimonial hearsay. The draftsman contended that the data recorded in the lab reports were statements by the lab technicians and that they fell under the third category of core testimonial evidence, statements which would be used at trial, identified in *Crawford v. Washington*. Based on the facts of the case, the court found that the lab technicians were not engaged in a law enforcement function. Rather, their data entries were simply a routine, objective cataloging of an unambiguous factual matter and were nontestimonial and outside the scope of *Crawford*. The court ruled that the lab report was simply a record of "regularly conducted" activity that qualified as a business record under Mil. R. Evid. 803(6), Manual Courts-Martial, a firmly rooted hearsay exception.

Affirming, the court concluded the statements contained in the lab report were properly admitted as evidence at trial.”

Following *Magyari*:

U.S. v. May, 2009 WL 136682 (Air Force Ct. Crim. App. Jan 22, 2009) (unpub)

U.S. v. Blazier, 2008 WL 4525781 (Air Force Ct. Crim. App. Sep 08, 2008) (unpub)

U.S. v. Watson, 2008 WL 900968 (A.F. Ct. Crim. App. Apr 04, 2008) (unpub)

U.S. v. Harris, 65 M.J. 594 (Naval-Marine Corps Ct. Crim. App. Jan 24, 2007)

State v. Jarrett, 2006 Ohio 882 (Ohio Ct. App. 2006) – “While defendant was on probation for a prior OMVI conviction, he was required to provide urine samples at the request of his probation officer. The results of one such sample indicated the presence of cocaine and marijuana. Defendant was interviewed about the positive test result by a police officer, whereupon defendant admitted using cocaine. After being indicted on the possession charge, defendant entered a guilty plea and he was convicted and sentenced to a term of community control. On appeal, the court found that testimony from a laboratory analyst who did not personally perform the testing was error which violated defendant's confrontation right under U.S. Const. amend. VI and Ohio Const. art. I, § 10. Although defendant had requested the presence of the actual person who completed the tests at his trial, the person who testified at his trial was actually the supervisor of the report maker. As defendant never had an opportunity to cross-examine the maker of the report, under *Crager* the admission of the report and the testimony of the witness as to the conclusions in the report were error.”

United States v. Ryan, 2005 CCA LEXIS 407 (N-M.C.C.A. 2005) – “We are persuaded that a report of laboratory analysis of a urine sample prepared in accordance with standard scientific and technical procedures and admitted as a business record does not comprise the type of "testimonial hearsay" condemned in *Crawford*.”

Autopsy Reports / Death Certificates / Postmortem Toxicology Reports

Warning: *Melendez-Diaz* / *Bullcoming* may call some of the older cases into question.

Sheffield v. United States, 111 A.3d 611, 623 (D.C. 2015) – "neither this court nor the Supreme Court has decided whether autopsy reports are testimonial; Butler therefore cannot show plain error."

Hull v. State, __ So.3d __, 2015 WL 1186662 (Miss. Ct. App. Mar. 17, 2015) – "We cannot say that Andrews's means of injury was shown on the death certificate as 'struck in head' in order to prove a fact at trial. There is no evidence in the record to support this argument." – death certificate was non-testimonial

People v. Hensley, 2014 IL App (1st) 120802, 387 Ill.Dec. 522, 22 N.E.3d 1175, reh'g denied (Dec. 23, 2014), appeal pending (Mar Term 2015) – "[¶ 78] The autopsy report here was not testimonial. Both the admission of the report and Dr. Goldschmidt's expert testimony did not violate defendant's confrontation rights."

People v. Chelley, 121 A.D.3d 1505, 1506-07, 993 N.Y.S.2d 597, 599 (N.Y. App. Div. 2014), leave to appeal denied, (N.Y. Feb. 3, 2015) – "the autopsy report does not constitute testimonial evidence"

State v. Dotson, 450 S.W.3d 1 (Tenn. 2014) cert. denied, 135 S.Ct. 1535 (Mar. 9, 2015) – "We need not decide in this case whether autopsy reports are testimonial or whether a medical examiner may testify about an autopsy report produced by another pathologist who does not testify at trial. Instead we hold only that no clear rule of law was breached in this case by the admission of the autopsy reports or Dr. Funte's testimony about them. [fn 35] Given the uncertainty that has existed in Confrontation Clause jurisprudence since *Crawford*, and in particular the lack of clarity regarding expert reports and testimony, which was actually exacerbated by the splintered decision in *Williams*, we conclude that the defendant has failed to establish that a clear and unequivocal rule of law was breached."

People v. Merritt, 2014 COA 124 __ P.3d __ (Colo. App. 2014) – " Because autopsies may be conducted for a wide variety of reasons, whether an autopsy report is or is not testimonial is highly influenced by attendant circumstances. ¶ 45 The circumstances surrounding the victim's death in this case and the ensuing autopsy suggest that the autopsy report was created primarily for the purpose of gathering evidence to use in the eventual prosecution of a murder suspect. ... ¶ 49 Because it was reasonable for Dr. Lear-Kaul to assume the statements in her autopsy report would be used in a criminal prosecution, the statements were testimonial under *Crawford*." – in other words, case-by-case determination

State v. Pesqueira, 235 Ariz. 470333 P.3d 797 (Ariz. App. 2d Div. 2014) – "¶ 19 Here, however, the autopsy report was not testimonial because it was not offered to establish or prove some fact. [cite] That Hess came to the same conclusion as the author of the autopsy report does not make the report testimonial. Rather, the report, which was not admitted into evidence, was one of three sources Hess relied upon in reaching that conclusion."

State v. Crane, 2014-Ohio-3657, 17 N.E.3d 1252 (Ohio App. 12th Dist. 2014) – "the AIT [Laboratories] toxicology report that was created at the medical examiner's (Dr. Wanger's) request and used by him to determine the cause of Christine's death was nontestimonial for purposes of the Confrontation Clause, and therefore the trial court did not err in admitting it into evidence at trial. ... AIT's primary purpose in creating the toxicology report was to serve the interest of its paying client, Dr. Wanger, and Dr. Wanger's primary purpose in requesting the toxicology report was to determine the cause of Christine's death, which he was statutorily obligated to do."

State v. Harmon, 139 So. 3d 1195 (La. App. 3d Cir. 2014) – "Next, the defendant argues that the report should not have been admitted because it denied him his constitutional right to cross-examine the coroner on the rape findings. We agree with the defendant's argument that La.Code Crim.P. art. 105 does not authorize the use of the coroner's report to establish elements of a rape in that it does deny him his constitutional right to cross-examination. ... The use of the report to establish elements of a rape violated the defendant's right in that respect."

State v. Ortega, 2014-NMSC-017, 327 P.3d 1076 (N.M. 2014) – "{19} Dr. Zumwalt testified that the OMI orders toxicology reports when it feels that drugs or alcohol might be a key factor in a death. The State elicited Dr. Zumwalt's testimony about Victim's toxicology report to prove

that Victim did not die from drug or alcohol use, but rather from gunshot wounds. Because the report was compiled 'to establish or prove past events potentially relevant to later criminal prosecution', *id.*, we conclude the statements concluded therein were testimonial. Furthermore, the statements concerning toxicity were offered for the truth of the matter asserted (that Victim's cause of death was not alcohol or drugs), the State did not argue that Dr. Hwang was unavailable to testify at trial, and Defendant was not afforded an opportunity to cross-examine him. Therefore, pursuant to *Navarette*, we hold that Dr. Zumwalt's testimony regarding the toxicology reports violated Defendant's confrontation rights under the Sixth Amendment."

Hensley v. Roden, 755 F.3d 724, 726-35 (1st Cir. 2014) (habeas) – "Here, contrary to the position Hensley takes on appeal, *Melendez–Díaz* did not say one way or the other whether autopsy reports should be considered testimonial. ... When other courts, post *Melendez–Díaz*, have been confronted with the question of whether autopsy reports are testimonial or not, disparity of treatment has reigned."

State v. Maxwell, 2014-Ohio-1019, 139 Ohio St. 3d 12, 9 N.E.3d 930 (Ohio 2014) – "{¶ 63} ... We hold that an autopsy report that is neither prepared for the primary purpose of accusing a targeted individual nor prepared for the primary purpose of providing evidence in a criminal trial is nontestimonial..."

Malaska v. State, 216 Md.App. 492, 88 A.3d 805, 808-19 (Md. Spec. App. 2014) – "we conclude that the autopsy report was testimonial in nature ... Pending further instruction from the Court, we hold that the formalities required by the statutes, together with the signatures of Doctors Fowler, Weedn and Boggs, render the autopsy report in the instant case sufficiently formalized to be 'testimonial' for purposes of the confrontation clause."

People v. Acevedo, 112 A.D.3d 4549, 76 N.Y.S.2d 82, 83 (N.Y. App. Div. 1st Dept. 2013) – "Defendant's right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner. The report was not testimonial [cite]."

Lee v. State, 418 S.W.3d 892, 893-901 (Tex. App.--Hous. [14th Dist.] 2013), petition for discretionary review refused (Mar. 12, 2014) – "While we need not decide whether autopsy reports will always be testimonial, we agree with the parties that, in this case, an objective medical examiner would reasonably believe that her report would be used in a later prosecution. Because Dr. Florez's report was testimonial, and there is no evidence or argument that the Confrontation Clause prerequisites to its admission were met, the trial court erred in admitting the report." – overruling *Campos v. State*, 256 S.W.3d 757, 763-64 (Tex. App.-Houston [14th Dist.] 2008, pet. ref'd)

People v. Crawford, 377 Ill.Dec. 862, 2 N.E.3d 1143 (Ill. App., 1st Div., 2013) – "¶ 151 In our view, the holding in *Leach* controls this issue. Here, as in *Leach*, Townsend's autopsy report was prepared by Lifschultz, who had retired out of the country by the time of defendant's trial, and Jones, the chief medical examiner, testified as to the contents of the report—which was admitted as evidence at trial—and relied upon that report in formulating her opinion as to Townsend's manner of death. ... [T]he primary purpose for the preparation of the autopsy report in this case was to determine the cause of death, and not to accuse a targeted individual of criminal conduct

nor to provide evidence at a criminal trial. Since the evidence does not meet the tests set forth in *Williams* and *Davis*, it does not trigger the protections of *Crawford*."

State v. Medina, 306 P.3d 48, 62-64 (Ariz. 2013) – "¶ 51 Medina contends that admitting the victim's autopsy report without the opportunity to cross-examine the report's author and allowing another medical examiner to testify using facts from the report violated the Sixth Amendment's Confrontation Clause. ... we reject his arguments because we find the report is not testimonial."

State v. Blevins, 744 S.E.2d 245, 253-255 (W. Va. 2013) – in *Frazier*, "this Court concluded, and the State conceded, that an autopsy report is a testimonial statement..."

Euceda v. United States, 66 A.3d 994 (D.C. 2013) – "We cannot say that any error here was plain, as neither this court nor the Supreme Court has decided whether autopsy reports constitute the kind of 'testimonial' statement subject to the Confrontation Clause."

Commonwealth v. Carr, 464 Mass. 855, 986 N.E.2d 380 (Mass. 2013) – "We need not decide whether the certificate was testimonial per se since it is clear that the statement made by the medical examiner contained in the death certificate was testimonial in fact."

State v. Francis, 111 So. 3d 529, 534-535 (La.App. 3 Cir. 2013) – "The autopsy report in this case is likewise different from the documents intended to fall within the scope of the Confrontation Clause. The autopsy report had no bearing on the guilt *vel non* of Defendant. It simply identified the cause of death."

People v. Brewer, 987 N.E.2d 938, 370 Ill. Dec. 172 (Ill. App. Ct. 1st Dist. 2013) – "[¶ 43] Applying the holding in *Leach*, we find the autopsy report was not testimonial and its admission into evidence did not implicate Brewer's confrontation clause rights. The purpose of the autopsy was to determine how McEwen died, not who was responsible. Nothing in the autopsy report linked Brewer to the shooting and it is only when the autopsy findings are viewed in light of Brewer's own statement to the police and other evidence at trial is there a connection established between Brewer and the crime."

United States v. Mallay, 712 F.3d 79, 99-111 (2d Cir. N.Y. 2013) – "Even after *Crawford*, however, this court reaffirmed its settled holding that autopsy reports could be admitted as business records without violating the Confrontation Clause. ... We conclude that even if these cases [*i.e.*, *Melendez-Diaz* and *Bullcoming*] cast doubt on any categorical designation of certain forensic reports as admissible in all cases, the autopsy reports in this case are nevertheless not testimonial -- and therefore do not implicate the Confrontation Clause -- because they were not created 'for the purpose of establishing or proving some fact at trial.' ... we see nothing to indicate that the toxicology report was completed primarily to generate evidence for use at a subsequent criminal trial. We conclude that the toxicology report was non-testimonial..." – [NOTE: Judge Eaton disagrees that the autopsy report was non-testimonial but concludes its admission was not plain error due to "the unsettled state of the law."]

State v. Navarette, 2013-NMSC-003, 294 P.3d 435 (N.M. 2013), cert. denied – "Because an autopsy conducted in the context of a death caused by this type of injury will automatically trigger a duty by medical examiners to report their findings to the district attorney, see § 24-11-8, we conclude that autopsy reports regarding individuals who suffered a violent death are

testimonial. ... [I]t does not matter that the autopsy report does not target a specific person or that the autopsy report does not produce inherently inculpatory evidence." - **declined to follow by State v. Sauerbry, 447 S.W.3d 780 n. 1 (Mo. Ct. App. 2014)**

Naquin v. State, __ So.3d __, 2012 Ala. Crim. App. LEXIS 116 (Ala. Crim. App. Dec. 14, 2012) – in dicta: "We note that this Court has found an autopsy report to be nontestimonial and thus admissible as a business record with no Confrontation Clause implications. *Thompson v. State* [Ms. CR-05-0073, February 17, 2012] __ So. 3d __, 2012 Ala. Crim. App. LEXIS 10 (Ala. Crim. App. 2012); *Perkins v. State*, 897 So. 2d 457 (Ala. Crim. App. 2004) (not a violation of the Confrontation Clause to admit an autopsy report without the medical examiner's testimony). This Court has also found that the admission of an autopsy report without testimony from the forensic examiner who conducted the autopsy to be a violation of the Confrontation Clause. *Smith v. State*, 898 So. 2d 907 (Ala. Crim. App. 2004)."

State v. Frazier, 735 S.E.2d 727, 728-735 (W. Va. 2012) – "[*732] It is clear that... an autopsy report prepared in a homicide case has the primary purpose of establishing or proving past events (facts) potentially relevant to a later criminal prosecution, and is therefore a testimonial statement." [NOTE: "In a homicide case" – does that imply the report is *not* testimonial if the cause of death is undetermined?]

State v. Kennedy, 735 S.E.2d 905, 908-927 (W. Va. 2012) – 1996 conviction – "Notably, the State concedes that under current caselaw, the autopsy report was testimonial and therefore its admission was, in fact, error. ... The autopsy report at issue appears to unquestionably qualify as testimonial hearsay. ... [F]or purposes of use in criminal prosecutions, autopsy reports are under all circumstances testimonial."

People v. Leach, 980 N.E.2d 570, 366 Ill. Dec. 477 (Ill. Nov. 29, 2012) – "[¶ 136] This split of opinion and the confusion regarding application of the primary purpose test to reports of forensic testing may eventually be resolved by the United States Supreme Court. In the meantime, while we are not prepared to say that the report of an autopsy conducted by the medical examiner's office can never be testimonial in nature, we conclude that under the objective test set out by the plurality in *Williams*, under the test adopted in *Davis*, and under Justice Thomas's 'formality and solemnity' rule, autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial. Further, an autopsy report prepared in the normal course of business of a medical examiner's office is not rendered testimonial merely because the assistant medical examiner performing the autopsy is aware that police suspect homicide and that a specific individual might be responsible."

State v. Joseph, 283 P.3d 27, 27-30 (Ariz. 2012), cert. denied (2013) – "[¶ 7 To prepare for his testimony, the State's medical expert, Dr. Philip Keen, reviewed Tommar's autopsy report, which Dr. Ruth Kohlmeier had prepared. Dr. Kohlmeier did not testify and the report itself was not admitted into evidence. ... [¶ 10] Even if the autopsy report were itself 'testimonial,' Dr. Keen did not testify to any of Dr. Kohlmeier's conclusions. [cite] He testified instead to opinions he formed after reviewing facts and photographs contained in the report." – no error

Hutcherson v. State, 373 S.W.3d 179, 180-184 (Tex. App. Amarillo 2012) – "While the record reveals that Dr. Natarajan's conclusions were based largely on his discussions with Dr. Fernandez, it also reflects that Dr. Natarajan did not testify as to what Dr. Fernandez concluded

to be the cause of Silva's death. Likewise, the State did not offer the autopsy report prepared by Dr. Fernandez into evidence.ⁿ⁴ As such, Dr. Natarajan's testimony did not violate appellant's confrontation rights because it was not testimonial hearsay. *See Crawford*... Rather, Dr. Natarajan testified about his opinion regarding the cause of Silva's death, and was subject to cross-examination regarding the bases upon which that opinion rested as well as the reliability of the methods utilized to reach his opinion."

Commonwealth v. Phim, 462 Mass. 470, 478-480, 969 N.E.2d 663 (Mass. 2012) – "A medical examiner who did not personally perform an autopsy on the victim may properly testify as to his or her professional opinion concerning the victim's cause of death based on data collected by another medical examiner, so long as that data are independently admissible. ... Consistent with the Sixth Amendment and traditional protections against hearsay, however, a substitute medical examiner may not testify on direct examination to the facts, data, and conclusions stated in an autopsy report. ... Accordingly, the prosecutor should not have elicited testimony on the description of the fatal wound contained in the nontestifying medical examiner's files, or of the victim's weight, height and general physical condition." – [NOTE: Height and weight are testimonial? Recording them makes a person a "witness against" the defendant? Seriously?]

People v. Childs, 491 Mich. 906, 810 N.W.2d 563 (Mich. 2012) – "we ... VACATE that part of the Court of Appeals opinion holding that the autopsy report was not testimonial and, therefore, that its admission did not violate the defendant's Sixth Amendment right to be confronted with the witnesses against him. In particular, we disagree with the Court of Appeals reliance on MRE 803(8) and its determination that the autopsy report was not prepared in anticipation of litigation, *see Bullcoming*..."

People v. Lee, 968 N.E.2d 1204, 1206-1220 (Ill. App. Ct. 1st Dist. 2012) – "we find that Dr. McElligott's testimony regarding the findings of the autopsy reports was not testimonial in nature, that the autopsy reports fell within the business records exception to hearsay, and thus, the defendant's right to confrontation was not implicated under *Crawford*. Moreover, we note that even assuming arguendo that Dr. McElligott's observations and findings at trial were testimonial in nature, the autopsy reports were not admitted for the purpose of proving the truth of [non-testifying pathologist] Dr. Mileusnic's findings because it, along with the toxicology reports, photographs and x-rays, only served as a basis upon which Dr. McElligott formed her own opinion as to the causes of death of the victims. Thus, we find that the defendant's right to confront and cross-examine Dr. Mileusnic was not violated. ... Unlike *Bullcoming*, the autopsies here were not performed and the autopsy reports were not made solely for the primary purpose of aiding a police investigation, and, as it is undisputed that the manner of the victims' deaths was homicide, the exact causes of the victims' deaths had no direct bearing on the essential elements of the crimes at issue, the identity of the perpetrators, or the fact that the perpetrators had broken into the victims' home and set it on fire."

Thompson v. State, __ So.3d __, 2012 Ala. Crim. App. LEXIS 10, 72-79 (Ala. Crim. App. Feb. 17, 2012) – "the autopsies on the three victims had been performed by Dr. John Glenn. McDuffie said that Dr. Glenn no longer worked with the laboratory, that he had taken a medical retirement, and that Dr. Glenn's medical doctor had informed McDuffie that he was not 'capable of testifying.'" – adhering to prior decision that "'Unlike the hearsay in *Crawford v. Washington*, the hearsay at issue in this case is nontestimonial in nature -- an autopsy report on the victim,...'

... In Thompson's case, the admission of the autopsy reports, which were nontestimonial in nature, did not implicate the Confrontation Clause or *Crawford*..."

United States v. Ignasiak, 667 F.3d 1217, 1219-1237 (11th Cir. Fla. 2012) – "we must first determine whether the autopsy reports at issue are testimonial evidence subject to the Confrontation Clause. For the following [*1230] reasons, we conclude that the answer to this question is yes." – very long opinion that includes a perplexing discussion saying that the reports are testimonial because they "are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy." – implying that the declarant's skill has something to do with the sixth amendment

People v. Lewis, 490 Mich. 921, 806 N.W.2d 295 (Mich. 2011), affirming in part and vacating in part People v. Lewis, 287 Mich. App. 356, 788 N.W.2d 461 (Mich. Ct. App. Jan. 12, 2010) – a case that's bounced around the Michigan appellate system for years – "we AFFIRM the result reached by the Court of Appeals, but VACATE that part of the Court of Appeals opinion holding that the autopsy report was not testimonial and, therefore, that its admission did not violate the defendant's Sixth Amendment right to be confronted with the witnesses against him. In particular, we disagree with the Court of Appeals' reliance on MRE 803(8) and its determination that the autopsy report was not prepared in anticipation of litigation, *see Bullcoming* ... Nonetheless, we agree that the admission of the report was not outcome determinative." – In a concurrence, Justice Kelly notes the national split in authority and adds: "by vacating the Court of Appeals Confrontation Clause analysis and affirming on alternate grounds, we are not deciding whether the autopsy report constituted testimonial hearsay evidence."

State v. Jaramillo, 2012-NMCA-029, __ P.3d __ (N.M. Ct. App. 2011), Certiorari Denied, 2012-NMCERT-02 (Feb. 16, 2012) – "Because Dr. Natarajan's [autopsy] report was prepared to document a homicide and intended for use in prosecution of a criminal case, we conclude that the purpose of the autopsy report was to provide prosecutorial evidence. Thus, we hold that the statements contained in the report were testimonial."

Nardi v. Pepe, 662 F.3d 107 (1st Cir. Mass. 2011) (habeas) – "Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez-Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133-34 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2858, 174 L. Ed. 2d 600 (2009), but the law has continued to evolve and no one can be certain just what the Supreme Court would say about that issue today."

Beecham v. State, __ So.3d __, 2011 Miss. App. LEXIS 642 (Miss. Ct. App. Oct. 18, 2011) – DUI causing death – "During the first day of trial, a certified copy of Lovelace's death certificate was introduced without a sponsoring witness, over the defense's objection, to show that the cause of death was 'complications of blunt[-]force injuries to [the] head and chest.' ... hen nearly a third of all traffic fatalities involve driving under the influence, any objective witness preparing a death certificate in a traffic death should reasonably expect a criminal prosecution could ensue. Therefore, we find that the death certificate's statement as to the cause of death was testimonial in nature and subject to the Confrontation Clause."

State v. McMillan, 718 S.E.2d 640, 646-647 (N.C. Ct. App. 2011) – "The Confrontation Clause prohibits the introduction of testimony by an expert witness based solely upon the reports of a non-testifying analyst. *State v. Locklear*, ... However, because Dr. Radisch was actually present for the autopsy of Rosario and testified as to her own independent opinion as to the cause of her death, *Locklear* is not controlling in this case. ... Dr. Radisch was present during the autopsy of Rosario and testified to her own, independent conclusions as to the cause of death. Dr. Radisch was not simply recounting the findings of Dr. Gardner in that doctor's autopsy report."

People v. Dobbey, 957 N.E.2d 142 (Ill. App. Ct. 1st Dist. 2011) – "Multiple divisions of the appellate court have previously held that testimony [*161] by a medical examiner regarding an autopsy report prepared by an individual who no longer works for the medical examiner's office is not testimonial and does not implicate the confrontation clause. [cites] We see no reason to depart from this precedent."

United States v. Moore, 651 F.3d 30, 39-40 (D.C. Cir. 2011) – "Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled "reports." These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are 'circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" – However, "It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial..."

State v. Hartley, 710 S.E.2d 385, 395-397 (N.C. Ct. App. 2011) – "the critical distinction that we must make in order to address defendant's challenge to the admission of [forensic pathologist] Dr. Radisch's testimony is determining whether she merely recited information previously reported by Dr. Barr or whether she testified to her own, independent expert opinion based on information of a type properly utilized in developing an expert opinion."

State v. Dixon, 226 Ariz. 545, 552-553, 250 P.3d 1174 (Ariz. 2011), cert. denied (Oct. 17, 2011) – "¶ 35 Because the State does not argue to the contrary, we assume *arguendo* that the autopsy report itself was testimonial hearsay. ... Our cases teach that a testifying medical examiner may, consistent with the Confrontation Clause, rely on information in autopsy reports prepared by others as long as he forms his own conclusions."

People v Hall, 2011 NY Slip Op 3193, 84 A.D.3d 79, 923 N.Y.S.2d 428 (N.Y. App. Div. 1st Dep't 2011) – "In this appeal from a first degree murder conviction, defendant asserts that under *Melendez-Diaz* [cite], the admission of an unredacted autopsy report violated his rights under the Confrontation Clause. However, under *People v Freycinet* [cite], which is binding upon us, the factual part of the autopsy report is nontestimonial and admissible, and, in this case, *Melendez-Diaz* does not mandate a contrary result. ... Although during her testimony, Dr. Goldfedder made some references to facts contained in the autopsy report, she emphasized [***430] that all of the conclusions she reached were her own."

Commonwealth v. Rogers, 459 Mass. 249, 945 N.E.2d 295 (Mass. 2011) – "The defendant maintains that his Sixth Amendment right to confront witnesses was violated when Dr. Flomenbaum, a medical examiner who did not perform the autopsy of the victim, was permitted to testify as to cause of death. ... We stated further, *see Nardi*, *supra* at 388-391, that a substitute

medical examiner may testify to his or her own opinion concerning the victim's cause of death. A testifying medical examiner, however, may not testify on direct examination to the underlying factual findings contained in an autopsy report prepared by a different medical examiner. ... Dr. Flomenbaum based his testimony primarily on two autopsy photographs, both of which were admitted in evidence at trial n18. Indeed, he referred to them extensively and they were projected [*266] on screen as he testified. ... There was no error in the admission of the above testimony. ... However, Dr. Flomenbaum also testified on direct examination to the length and depth of the stab wound, and that the bleeding came "through the air pipe, not as a result of injury to the lung itself." These underlying factual findings (presumably from the autopsy report) should not have been admitted on direct examination."

Birkhead v. State, 57 So. 3d 1223, 1233-1236 (Miss. 2011) – "Under the circumstances of this case, we conclude that HN19the death certificate is a nontestimonial record of vital statistics, "created for the administration of an entity's [**33] affairs and not for the purpose of establishing or proving some fact at trial[,]" and, therefore, not subject to a Confrontation Clause analysis."

Commonwealth v. Housen, 458 Mass. 702, 709-711, 940 N.E.2d 437 (Mass. 2011) – "The opinion of the testifying medical examiner as to the cause of death was clearly his opinion, and not merely a recitation of the opinion of the medical examiner who performed the autopsy."

Commonwealth v. Tu Trinh, 458 Mass. 776, 789-790, 940 N.E.2d 871 (Mass. Jan. 31, 2011) – "the testifying medical examiner's description of the original medical examiner's findings, as outlined in the autopsy report, was inadmissible testimonial hearsay. [cite] The admission of this testimony does not warrant a new trial because the testifying medical examiner could permissibly and did testify as to his opinion of the cause of the victim's death,..."

Commonwealth v. McCowen, 458 Mass. 461, 480-481, 939 N.E.2d 735 (Mass. 2010) – "The autopsy of the victim was conducted by Dr. James Weiner, but Dr. Weiner was unavailable to testify at trial due to illness; in his place, the prosecution called Dr. Henry Nields, whose knowledge of the case derived solely from his review of the reports, notes, and charts prepared by Dr. Weiner.... The observations, findings, and opinions of Dr. Weiner reflected in his notes and reports were testimonial hearsay, because a reasonable person in his position would anticipate that they would be used against the accused in investigating and prosecuting a crime, and they were offered for the truth of the matters asserted."

People v. Leach, 405 Ill. App. 3d 297, 298-311, 939 N.E.2d 537, 345 Ill. Dec. 694 (Ill. App. Ct. 1st Dist. 2010) – "Although the medical examiner in such cases is mandated to conduct an investigation, including an autopsy if necessary, we do not perceive a law enforcement function, but rather an examination sufficient to establish manner and cause of death." – report is nontestimonial

Cuesta-Rodriguez v. State, 2010 OK CR 23, 241 P.3d 214 (Okla. Crim. App. 2010) – "[*P35] In this case, the circumstances surrounding Fisher's death warranted the suspicion that her death was a criminal homicide. Under these circumstances, therefore, it is reasonable to assume that Dr. Jordan understood that the report containing his findings and opinions would be used in a criminal prosecution. Dr. Jordan's autopsy report was a testimonial statement, and Dr. Jordan was a witness within the meaning of the Confrontation Clause."

State v. Blue, 699 S.E.2d 661, 669-670 (N.C. Ct. App. 2010) – "Dr. Butts' participation in the autopsy is furthered evidenced by the fact that he, along with Dr. Trobbiani, signed the autopsy report. It is evident from his testimony that Dr. Butts was testifying as to his own observations and providing information rationally based on his own perceptions. Indeed, defendant points us to no portion of Dr. Butts' testimony in which he sought to testify as to the declarations or findings of anyone other than himself. [cite] Thus, we hold the trial court did not err in permitting Dr. Butts to testify as to the autopsy findings."

People v. Dendel, 289 Mich. App. 445, 797 N.W.2d 645 (Mich. Ct. App. Aug. 24, 2010), leave to appeal denied (Sept. 21, 2011) – murder theory was insulin overdose – "Dr. Evans testified generally about the relationship between insulin and glucose levels, and the body's response to insulin. He explained the difficulty of testing for the presence of insulin during an autopsy. Dr. Evans then testified that the [postmortem] toxicology results showed that the level of glucose in Burley's system was zero. He opined that the zero glucose level was consistent with Burley having been injected with insulin. ... Dr. Evans stated that about fifteen people from his lab were involved in the testing. ... We hold that, here, the statements are testimonial. ... The medical examiner ... sought from the lab specific information to investigate the possibility of criminal activity. Under these circumstances, any statements made in relation to this investigation took on a testimonial character. Although Dr. Evans testified that toxicological testing is normally performed without any case background and without preconceived notions about what might be found, the testing here was performed in anticipation of a criminal trial, after the medical examiner's original findings had been challenged. ... [T]he statement that Burley died with a glucose level of zero was a testimonial statement." [NOTE: Why does the medical examiner's perspective control, when the medical examiner wasn't the declarant?]

Commonwealth v. Durand, 457 Mass. 574, 575-601, 931 N.E.2d 950 (Mass. 2010) – "We conclude that the testimony concerning the factual contents of the autopsy report prepared by a nontestifying medical examiner violated the defendant's constitutional right of confrontation, see Crawford..." – opinion suggests that, to avoid the confrontation clause problem, the pathologist should illustrate testimony with postmortem photographs – a gorefest PowerPoint – that extra step of making jurors puke would eliminate forbidden reliance on the report's factual findings "even if the substitute examiner's observations happen to correlate exactly with those contained in the autopsy report." – (and would put pressure on the defense to stipulate)

State v. Mitchell, 2010 ME 73, 4 A.3d 478 (Me. 2010) – "in light of Justice Thomas's concurrence in Melendez-Diaz, it appears unlikely that the majority of the Supreme Court intended to include autopsy information underlying expert testimony in the same category as evidence 'prepared specifically for use at . . . trial.'" – no violation when testifying pathologist relied on non-admitted autopsy report prepared by someone else

People v. Antonio, 404 Ill. App. 3d 391, 935 N.E.2d 540, 343 Ill. Dec. 532 (Ill. App. Ct. 1st Dist. Aug. 30, 2010) – "The plain language of this section [725 ILCS 5/115-5.1] is persuasive and convinces us of the correctness of characterizing the reports of postmortem examinations as business records. ... [W]e are unpersuaded by defendant's claim that the Melendez-Diaz opinion "implicitly overruled" our decisions in Leach and Moore. ... Based on the conclusion that the autopsy report was a business record and in view of the relevant body of precedent, we are convinced Crawford is not implicated in the present case." [NOTE: Due to dismemberment of

the body and advanced decomposition, neither the examining pathologist nor the forensic anthropologist was able to provide any evidence about cause or manner of death.]

State v. Snelling, 236 P.3d 409, 413-414 (Ariz. 2010) – "Here, the medical examiner testified that she formed her own opinions after reading the report on Curtis's autopsy. Although she referred to the report's findings, she used this information, as well as the photographs of the victim's body, to reach her own conclusions about Curtis's injuries and the cause of her death. Snelling confronted and cross-examined the medical examiner about her opinions. [cite] Therefore, the medical examiner's testimony was not hearsay and did not violate Snelling's confrontation rights. ... Even if we assume the autopsy report was testimonial, however, it was not admitted into evidence and, thus, no Confrontation Clause violation occurred."

People v. Pitchford, 929 N.E.2d 655, 663-664, 341 Ill. Dec. 1 (Ill. App. Ct. 1st Dist. 2010) – "An autopsy report is significantly different from a lab report of the type at issue in *Melendez-Diaz*, The inapplicability of *Melendez-Diaz* to the facts of the case is clear."

People v. Cortez, 931 N.E.2d 751, 341 Ill. Dec. 854 (Ill. App. Ct. 1st Dist. June 22, 2010) – "Defendant next argues that the trial court's decision to allow the autopsy report to be admitted over defense counsel's objection, without the State producing its author for cross-examination, violated his right to confront the witnesses against him. ... However, defendant overlooks the fact that this court has previously held that autopsy reports are business records and do not implicate *Crawford*. ... we are nevertheless unpersuaded that *Melendez-Diaz* upsets our prior holdings."

Martinez v. State, 311 S.W.3d 104 (Tex. App. Amarillo 2010) – "[forensic pathologist] Frost's autopsy report was a testimonial statement and that Frost was a witness within the meaning of the Confrontation Clause of the Sixth Amendment."

Gobble v. State, __ So.3d __, 2010 Ala. Crim. App. LEXIS 8, 68-70 (Ala. Crim. App. Feb. 5, 2010) – autopsy report is non-testimonial business record – court's analysis is not very clear – n.47 and surrounding text

Commonwealth v. Pena, 455 Mass. 1, 913 N.E.2d 815 (Mass. Sep 24, 2009) – "Dr. Flomenbaum was not foreclosed from forming and testifying to an opinion based on Dr. Cannon's autopsy report."

Wood v. State, 299 S.W.3d 200 (Tex. App. Austin 2009) – "We do not hold that all autopsy reports are categorically testimonial. In this case, however, the circumstances surrounding Wessberg's death warranted the police in the suspicion that his death was a homicide, [*210] and there is evidence that this is exactly what the police did suspect. The homicide detective who was the lead investigator in this case and a police evidence specialist attended the autopsy of Wessberg's body. Under these circumstances, it is reasonable to assume that Colemeyer understood that the report containing her findings and opinions would be used prosecutorially. fn5 See *Melendez-Diaz*, 174 L.Ed.2d at 321. We hold that Colemeyer's autopsy report was a testimonial statement and that Colemeyer was a witness within the meaning of the Confrontation Clause." [NOTE: Would result be different if homicide was not suspected before autopsy?]

Rector v. State, 285 Ga. 714, 681 S.E.2d 157, 2009 FCDR 2366 (Ga. 2009), cert. denied, 130 S. Ct. 807, 175 L. Ed. 2d 567 (2009) – "The toxicologist who testified had reviewed the work of the doctor who had originally prepared the report and reached the same conclusion that the [deceased] victim's blood sample tested negative for cocaine." – no c.c. violation

Commonwealth v. Avila, 454 Mass. 744; 912 N.E.2d 1014 (Mass. Sep 15, 2009) – "Dr. Abraham Philip, the medical ex-aminer who conducted the victim's autopsy in November, 2003, was no longer employed by the Commonwealth at the time of trial. Dr. Flomenbaum, then the chief medical examiner for the Commonwealth, testified at trial in Dr. Philip's stead. ... [W]e conclude that the judge correctly permitted Dr. Flomenbaum to offer his opinions concerning issues related to the autopsy, but erred in allowing Dr. Flomenbaum to testify on direct examination about the findings in Dr. Philip's autopsy report--both because these findings were inadmissible hearsay and because they violated the confrontation clause."

Koenig v. State, 916 N.E.2d 200, 201-202 (Ind. Ct. App. 2009) – "The lab test showing there was methadone in [deceased friend] Harbin's blood should not have been admitted. ... In Jackson v. State, 891 N.E.2d 657, 661 (Ind. Ct. App. 2008), we had already reached the same result the Supreme Court reached in Melendez-Diaz: we held a certificate of analysis used to prove an element of charged crime was a testimonial statement, so its admission into evidence without the testimony of the lab technician who prepared it violated the Sixth Amendment right to confront witnesses."

State v. Martin, 291 S.W.3d 269 (Mo. App. S.D. Jun 26, 2009) – after lengthy discussion, not resolving issue: "the autopsy report was not included in the record on appeal, and we decline to consider whether it might be considered "testimonial" absent an awareness of its contents and the circumstances surrounding its production." – *cf. Walkup*, below

State v. Walkup, 290 S.W.3d 764 (Mo. App. W.D. Jun 16, 2009) – "An autopsy report prepared for the purpose of a criminal prosecution is a testimonial statement." – [NOTE: How about autopsy reports *not* prepared for purpose of a criminal prosecution? And *cf. Martin*, above.] – "[T]he number and measurements of the wounds were factual information, not [non-testifying pathologist] Gill's opinions. [Testifying pathologist] Dudley did not mention a conclusion drawn by Gill or restate an opinion made by Gill, nor did the State attempt to introduce Gill's autopsy report. Rather, Dudley testified as a qualified expert to her own conclusions and opinions based upon her independent analysis of the factual information available to her. [cite] Dudley was entitled to rely upon the factual information contained in the autopsy report and photographs, scene investigation reports, the toxicology report, and body diagrams as support for her opinions because she testified those materials are reasonably relied upon by other experts in the field of forensic pathology."

People v. Leach, __ N.E.2d __, 2009 WL 1211380 (Ill.App. 1 Dist. May 01, 2009), vacated –

People v. Raby, 2009 WL 839109 (Mich. App. Mar 31, 2009), application for leave to appeal granted and remanded, 485 Mich. 994, 775 N.W.2d 144 (Mich. 2009) (unpub) – not plain error to admit autopsy report of non-testifying pathologist – remanded for reconsideration in light of M-D

Edwards v. Artus, 2009 WL 742735 (E.D. N.Y. Mar 20, 2009) (unpub) (habeas) – "the Second Circuit has re-affirmed that, even under *Crawford*, autopsy reports remain admissible as non-testimonial business records."

Birkhead v. State, __ S.2d __, 2009 WL 399551 (Miss. Feb 19, 2009) – "¶ 30. We find that the State is correct in its assertion that the death certificate is admissible as a public record." [NOTE: Oddly, court goes on to state that certificate has "particularized guarantees of trustworthiness."]

State v. Bell, 274 S.W.3d 592 (Mo. App. W.D. Jan 13, 2009) – "An autopsy report, when prepared for the purpose of criminal prosecution, is a 'testimonial statement.' *Davidson*, 242 S.W.3d at 417. As such, an autopsy report, or testimony regarding an autopsy report, can-not be admitted without testimony from the person who conducted the autopsy or prepared the report unless the defendant has had an opportunity for cross-examination. *See id.*"

State v. Johnson, 756 N.W.2d 883 (Minn. App. Oct 14, 2008), review denied (Dec 23, 2008) – Syllabus: "1. An autopsy report is 'testimonial' in nature, and therefore implicates a defendant's right to confrontation under *Crawford*" – even though "The autopsy report introduced as an exhibit did not include the usual conclusions as to the cause and manner of death." [NOTE: If the pathologist dies before trial, can a different pathologist base his/her own conclusions or the report?]

Commonwealth v. Nardi, 452 Mass. 379, 893 N.E.2d 1221 (Mass. Sep 25, 2008) – "With respect to our inquiry into whether statements made by Dr. Weiner in his report were testimonial, [cite], it is readily apparent that they were. Such statements are testimonial in fact, because "a reasonable person in [Dr. Weiner's] position would anticipate his [findings and conclusions] being used against the accused in investigating and prosecuting a crime." (brackets, other than first pair, in original) – [NOTE: What if the cause of death is natural? Is the autopsy report still testimonial, or is it the pathologist's conclusion that makes it testimonial?]

People v. Dendel, 2008 WL 4180292 (Mich. App. Sep 11, 2008) (unpub) **application for leave to appeal granted and remanded 485 Mich. 903, 773 N.W.2d 16 (Mich. 2009)** – "autopsy reports are not testimonial because they are public records prepared pursuant to a duty imposed by law as part of the statutorily defined duties of a medical examiner"

Smith v. McDonough, 2008 WL 2941149 (S.D. Fla. Jul 29, 2008) (unpub) (habeas) – "The courts have therefore held that the admission of both the routine findings recited in an autopsy report as well as the accompanying testimony of a medical examiner as to his opinion about the cause of death based upon the report who neither conducted the autopsy nor prepared the report is proper under *Crawford*. [FN19] [cite] Thus, in this case, the Confrontation Clause did not prevent Dr. Hyma, who was called as a witness to establish that the final gunshot wounds to the head was the cause of death, either from testifying about the facts contained in the autopsy report prepared by Dr. Blaise or from expressing his opinion about the cause of death based upon the autopsy report."

Rogovich v. Schriro, 2008 WL 2757362 (D. Ariz. Jul 14, 2008) (unpub) (habeas) – extensive dicta upholding use of autopsy report under expert witness rule

State v. Robinson, 2008 WL 2700002, 2008-Ohio-3498 (Ohio App. 6 Dist. Jul 11, 2008) (unpub) – FN 2: "autopsy reports and related test findings are not testimonial and do not violate the confrontation clause"

State v. Biggs, 2008 WL 2641325 (Ariz. App. Div. 1 Jan 15, 2008) (unpub) – "¶14 ... Dr. Keen's reliance on the autopsy report prepared by Dr. Zhang and the photographs taken as part of that autopsy, as a basis for his opinions, was permissible under the Confrontation Clause."

People v. Freycinet, 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450, 2008 N.Y. Slip Op. 05776 (N.Y. Jun 26, 2008) – " In *People v. Rawlins* [cite], we considered whether fingerprint comparison reports and the report of a DNA technician were 'testimonial' evidence under *Crawford* ... This case raises a similar question about an autopsy report. Analyzing the question in the way *Rawlins* requires, we conclude that the redacted report at issue here was not testimonial." – redacted to eliminate opinions

Campos v. State, 256 S.W.3d 757 (Tex. App.-Hous. May 27, 2008) – "we conclude the autopsy report at issue contains a sterile recitation of facts and is nontestimonial within the meaning of *Crawford* and *Davis*." – overruled by **Lee v. State, 418 S.W.3d 892, 893-901 (Tex. App.--Hous. [14th Dist.] 2013)**, petition for discretionary review refused (Mar. 12, 2014)

People v. Lewis, 2008 WL 1733718 (Mich.App. Apr 15, 2008), remanded for reconsideration in light of *M-D* by **People v. Lewis, 485 Mich. 878, 772 N.W.2d 47 (Mich. Sept. 23, 2009)** (unpub), aff'd on harmless error grounds, **People v. Lewis, 490 Mich. 921, 806 N.W.2d 295 (Mich. 2011)**–

People v. Dowling, 50 A.D.3d 698, 854 N.Y.S.2d 762, 2008 N.Y. Slip Op. 03021 (N.Y. A.D. 2 Dept. Apr 01, 2008) – "The testimony was properly limited to the non-opinion portion of the autopsy report which was nontestimonial in nature"

State v. Mitchell, 2008 WL 850179, 2008-Ohio-1525 (Ohio App. 7 Dist. Mar 19, 2008) (unpub) – Ohio Supreme Court ruling in *State v. Craig*, 110 Ohio St.3d 306, 319, 2006-Ohio-4571, that autopsy reports are non-testimonial, is still good law

Sharifi v. State, 993 So.2d 907 (Ala. Crim. App. Feb 01, 2008) – reaffirming *Perkins v. State*, 897 So.2d 457 (Ala.Crim.App.2004), which held autopsy reports to be non-testimonial, and citing subsequent cases around the country coming to same conclusion

U.S. v. De La Cruz, 514 F.3d 121 (1st Cir. Feb 01, 2008), cert. denied, No. 07-1602 (June 29, 2009) – "An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*."

People v. Moore, 378 Ill.App.3d 41, 880 N.E.2d 229, 316 Ill.Dec. 751 (Ill.App. 1 Dist. Dec 11, 2007) – "A plain reading of the statute governing the admissibility of the medical examiner's report as evidence leads us to conclude that an autopsy report should be treated as a business

record. In addition, Illinois courts have held that autopsy reports are public records and business records. [cites] Consequently, the autopsy report in the instant case did not implicate *Crawford* and defendant was not denied his sixth Amendment right to confrontation."

State v. Beaner, 974 So.2d 667 (La. App. 2 Cir. Dec 05, 2007) – "The death certificates admitted at trial contain general descriptions of the cause of the death. There is nothing in the certificates that is testimonial in nature or that implicates Beaner. ... [T]he record in the instant matter reveals that, aside from a single sentence (as discussed more fully below), the information contained in the challenged autopsy report/procès verbal was routine, descriptive, nonanalytical, and thus, nontestimonial in nature. ... Such information does not trigger the *Crawford* mandate for cross-examination pursuant to the Confrontation Clause.

State v. Davidson, 242 S.W.3d 409 (Mo. App. E.D. Oct 23, 2007) – "We conclude that the autopsy report in this case qualifies as a 'testimonial statement' under *Crawford*. One medical examiner prepared the autopsy report at the request of law enforcement in anticipation of a murder prosecution, and the report was offered to prove the victim's cause of death. The State sought to use the report and the testimony of another medical examiner in lieu of the testimony of the medical examiner who prepared the report. When an autopsy report is prepared for purposes of criminal prosecution, as this one was, the report is testimonial. *See March*, 216 S.W.3d at 667. The court may not admit the report without the testimony of its preparer unless he or she is unavailable and the defendant had a prior opportunity for cross-examination. *Id.* Those requirements were not met here. Admission of the report and another medical examiner's testimony in lieu of the testimony of the medical examiner who prepared the report violated the defendant's Confrontation Clause rights."

State v. Russell, 966 So.2d 154 (La. App. 2 Cir. Sep 26, 2007) – "The defendant asserts that La. C. Cr. P. art. 105 is unconstitutional to the extent it provides a hearsay exception for the admissibility of coroners' reports and the proces verbal. ... The proof of the death or cause of death by a coroner's report is not proof of guilt or innocence. Generally, such evidence does not implicate the accused. It is rem ipsam evidence. ... Courts in other states have found that coroner's reports are generally nontestimonial under *Crawford*. ... Because La. C. Cr. P. art. 105 is expressly limited to the admission and use of coroner's reports only for nontestimonial purposes, the defendant has not met his burden in challenging the constitutionality of this article."

State v. Bowers, 965 So.2d 959 (La. App. 2 Cir. Sept. 19, 2007) – "Ms. Bowers urges the district court erred in admitting into evidence the autopsy report allegedly written by Dr. McCormick." – held: not testimonial, following *State v. Anderson*, 942 So.2d 625 (La.App. 2 Cir. 2006) – "[The report] primarily describes Maguire's injuries and the condition of his cardiovascular system. It identified the cause of death, acute myocardial ischemia, completely in accord with Art. 105. As in *Anderson*, we find this nontestimonial. There was no denial of confrontation. [¶] Admittedly, the 'narrative of findings' is not completely descriptive: it erroneously states that Maguire was killed 'while chasing a shoplifter.' [He was actually run over by fleeing shoplifter.] However, any error in admitting this testimonial statement was harmless beyond a reasonable doubt ..."

Pierce v. State, 234 S.W.3d 265 (Tex. App.-Waco Aug 15, 2007) – "Dr. Susie Dana, a pathologist, performed the autopsy on Narvaiz and wrote the autopsy report. At the time of trial,

Dr. Dana was no longer employed by the Bexar County medical examiner. Thus, and over Pierce's Confrontation Clause objection, Dr. Randy Frost, a Bexar County deputy medical examiner who was a signatory to Dr. Dana's report, testified about the autopsy findings. ... At least two courts have held that autopsy reports are not testimonial. [Agreeing with them.]"

U.S. v. James, 2007 WL 2702449 (E.D. N.Y. Sep 12, 2007) (unpub) – pretrial order on motion to exclude – "The government sought to introduce the autopsy report, including the toxicology report created by Dr. Leslie Mootoo, the Guyanese "government's forensic pathologist and bacteriologist." (Tr. at 3237). Dr. Mootoo, having died several years ago, was unavailable to testify. ... Although the Supreme Court did not define 'testimonial' in *Crawford*, 'it did offer a number of observations that suggest the contours of that definition.' *United States v. Feliz*, 487 F.3d 227, 232 (2d Cir.2006). The Second Circuit has interpreted these 'contours' and found that autopsy reports were not testimonial in nature. *Id.* at 233. ... Defendants took great pains to describe the close proximity between the medical examiner's office and the Guyanese police station as well as cooperation between the medical examiner and the police. However, the critical inquiry is not the physical proximity of two agencies or their level of cooperation, but rather whether the agency that created the report can be characterized by its duties and purposes as law enforcement. ... There is no indication that Dr. Mootoo was employed by a law enforcement agency or was responsible for enforcing any laws. ... Moreover, Dr. Brijmohan's testimony established that a toxicology report is not separate and distinct from an autopsy report. Rather, in addition to the internal and external examination of the corpse, the toxicology report is an integral part of forensic pathology. ... Accordingly, Dr. Mootoo's toxicology report is admissible under Rule 803(6) and is therefore not subject to the constraints of *Crawford*."

Clarke v. Goord, 2007 WL 2324965 (E.D. N.Y. Aug 10, 2007) (unpub) – "Petitioner argues here that the Appellate Division violated his rights under the Confrontation Clause, as interpreted by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), when it admitted the contents of an autopsy report based on testimony by a medical examiner, albeit not the one who authored the report, without allowing petitioner to cross-examine the report's author. ... [T]he claim is meritless in light of the Second Circuit's decision in *United States v. Feliz*, 467 F.3d 227, 229 (2d Cir.2006), which held that 'autopsy reports are not testimonial within the meaning of *Crawford* and, thus, do not come within the ambit of the Confrontation Clause.'"

People v. Freycinet, 41 A.D.3d 731, 839 N.Y.S.2d 770, 2007 N.Y. Slip Op. 05522 (N.Y. A.D. 2 Dept. 2007), aff'd, 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450, 2008 N.Y. Slip Op. 05776 (N.Y. Jun 26, 2008)

United States v. Feliz, 467 F.3d 227, 71 Fed. R. Evid. Serv. 734 (2nd Cir. 2006) – "Because the autopsy reports are business records as defined in Fed. R. Evid. 803(6), they are nontestimonial. ... We hold that the autopsy reports are equally admissible as public records. For reasons substantially analogous to those outlined above, we find that public records are, indeed, nontestimonial under *Crawford*, 541 U.S. at 36, 124 S.Ct. 1354."

➤ Sub-Category: Autopsy Photographs
(category added June 2012)

Herrera v. State, 367 S.W.3d 762 (Tex. App. Houston 14th Dist. 2012) – "Appellant argues that the autopsy slides were similarly testimonial in nature because Dr. Pustilnik's office used them in preparing the autopsy report, and he therefore had a right to cross-examine Dr. Pustilnik before Dr. Frost testified. An autopsy photograph, however, is not a testimonial statement."

➤ Sub-Category: Pathologist Bases Opinion on Investigator's Report
(category added June 2013)

People v. Mercado, 216 Cal. App. 4th 67, 156 Cal. Rptr. 3d 804 (Cal. App. 2d Dist. 2013) – "Mercado contends [pathologist] Chinwah's testimony 'that, in his opinion, the manner of death was homicide, and that his opinion was based upon a report by the coroner's investigator who interviewed witnesses at the scene, who told the investigator that "this mother was intentionally run over by the operator of the vehicle,"' violated the confrontation clause and requires a reversal of her conviction. We disagree. ... we conclude the extrajudicial statements Chinwah relied on in reaching his 'homicide' determination did not qualify as testimonial because they failed both the formality and the primary purpose tests. That is, we conclude there was no confrontation clause violation under either the *Williams* plurality or Justice Thomas's *Williams* concurrence."

Autopsy / Postmortem Toxicology: Testimony by Supervisor or Colleague

(category added Dec. 2012)
(this and the next category substantially overlap)

State v. McFeeture, 2014-Ohio-5271, ¶¶ 58-92, 24 N.E.3d 724 (Ohio 2014) – "¶ 87} The toxicology reports were completed by the coroner's office as part of the autopsy protocol. The reports were done in the routine business of the coroner's office. They were clearly not testimonial, and fell under the business records exception to the hearsay rule. As such, McFeeture's contention that the toxicologist who prepared the reports was required to testify is without merit."

People v. Merritt, 2014 COA 124, __ P.3d __ (Colo. App. 2014) – "We are further asked to determine whether an expert witness may refer to the absent doctor's testimonial statement in rendering his own opinion as to Welch's cause of death. Under the circumstances present here, he was properly permitted to do so."

Torres v. State, 12 N.E.3d 272 (Ind. App. 2014) – "Torres argues the trial court violated his right to confrontation and committed fundamental error when it permitted Dr. Carter to testify about the results of the victim's autopsy when she did not perform the autopsy. We do not find fundamental error in the admission of Dr. Carter's testimony. Dr. Carter was asked whether she had an occasion to "look at and examine the autopsy of a Darnell Lindsay, autopsy # 12-0024?" (Tr. at 315.) But there is no reference to exactly what was included in that autopsy. Nor was any specific reference made to Dr. Cavanaugh's report. When questioned about the number of times the victim had been shot, Dr. Carter referred to "the investigation" and "the doctor's report," (*id.* at 326), but it is not apparent from her testimony to which documents she was referring. We therefore cannot conclude that the "investigation" or "report" to which she was referring was Dr. Cavanaugh's report, or that her testimony otherwise invoked Torres' right to confront a witness."

– (NOTE: A conclusory dissent grossly misstates the holding of *Bullcoming* and then asserts, without analysis or even seeming awareness of the novelty of the position advocated, that autopsy photographs are testimonial.)

Malaska v. State, 216 Md.App. 492, 88 A.3d 805, 808-19 (Md. Spec. App. 2014) – "The physical dissection of Liller's body was performed by Cassie L. Boggs, M.D., under the supervision of Victor W. Weedn, M.D., J.D., then an assistant medical examiner. ... The report was signed by Doctors Boggs and Weedn as well as by David R. Fowler, M.D., the Chief Medical Examiner. ... the evidence established that both Dr. Weedn and Dr. Boggs were involved in the autopsy of Liller in their respective roles. However, *819 because Dr. Weedn—and only Dr. Weedn—carried the responsibility and authority to make the ultimate determination as to the cause and manner of death, we conclude that he was a proper witness, for confrontation clause purposes, through which to admit the results of the autopsy report including the conclusion that Liller died of a gunshot wound to the back."

Lee v. State, 418 S.W.3d 892, 893-901 (Tex. App.--Hous. [14th Dist.] 2013), petition for discretionary review refused (Mar. 12, 2014) – "Dr. Milton mostly testified to his own interpretation of the autopsy photographs admitted without objection. In *Williams*, at least eight justices saw no Confrontation Clause problem with a testifying expert providing an independent evaluation of evidence that someone else collected. [cites] Texas courts have agreed."

Miller v. State, 313 P.3d 934, 967-74 (Okla. Crim. App. 2013) – "¶ 100 It was clear prior to and throughout the testimony of Dr. Distefano that his testimony regarding the autopsies of Bowles and Thurman consisted almost entirely of presenting *Dr. Anzalone's* findings and conclusions. ... Dr. Distefano noted that he was provided with "the prior testimony of Dr. Anzalone regarding her findings" and that he reviewed this testimony in order to be prepared 'to present to this jury what Dr. Anzalone's findings were regarding the autopsy of Mary Bowles' and 'to also be able to relay what Dr. Anzalone's findings were regarding the cause of death of Jerald Thurman.' ... it is quite clear that it violated Miller's Sixth Amendment right to confront and cross-examine the witnesses against him to allow Dr. Distefano to present the autopsy findings of Dr. Anzalone..."

People v. Edwards, 57 Cal.4th 658, 161 Cal.Rptr.3d 191, 306 P.3d 1049 (Cal. 2013) – original pathologist had retired, a successor testified – "Here, as in *Dungo*, Dr. Fukumoto recounted objective medical observations derived from Dr. Richards's autopsy report and its accompanying photographs, microscopic slides, and X-rays, and expressed opinions based on *707 those observations. Defendant implicitly concedes any confrontation clause challenge to this portion of Dr. Fukumoto's testimony is foreclosed by *Dungo*, and offers no persuasive reason for us to revisit our conclusion in that case. ... This testimony by Dr. Fukumoto did not, however, recount Dr. Richards's *forensic opinions* as to the cause of Deeble's injury or death, but rather his medical observations of objective fact." (italics in original)

Commonwealth v. Reavis, 992 N.E.2d 304, 310-13 (Mass. 2013) – "We have never stated that a substitute medical examiner may not testify to his or her own opinions unless the medical examiner who performed the autopsy is shown to be unavailable ..."

People v. Brewer, 987 N.E.2d 938, 370 Ill. Dec. 172 (Ill. App. Ct. 1st Dist. 2013) – "the trial court did not err in permitting someone other than the medical examiner who performed the

autopsy to testify because as the supreme court stated in *Leach*, 'if the [autopsy] report was properly admitted, the expert witness's testimony cannot have violated the confrontation clause even if it had the effect of offering the report for the truth of the matters asserted therein.'"

State v. Navarette, 2013-NMSC-003, 294 P.3d 435 (N.M. 2013), cert. petition filed – "Because [the testifying pathologist] related testimonial hearsay from [the report of the non-testifying pathologist who performed the autopsy] to the jury, and it was not established that Dr. Dudley was unavailable and Navarette had a prior opportunity to cross-examine Dr. Dudley, Navarette's confrontation rights were violated." – [NOTE: The offending statement was elicited by the defense on cross-examination, a point the opinion does not address.] - **declined to follow by State v. Sauerbry, 447 S.W.3d 780 n. 1 (Mo. Ct. App. 2014)**

State v. Jaramillo, 2012-NMCA-029, 272 P.3d 682 (N.M. Ct. App. 2011), certiorari denied, 2012-NMCERT-02 (Feb. 16, 2012) – "had Dr. Parsons made it clear that he was stating his own independent opinions and that he relied on the facts contained in Dr. Natarajan's report because it contained the types of facts and data upon which medical examiners rely, then Dr. Parsons' testimony may have been admissible. However, Dr. Parsons did not testify to this effect..."

State v. Hartley, 710 S.E.2d 385, 395-397 (N.C. Ct. App. 2011) – "Next, defendant argues that his Sixth Amendment right to confront the witnesses against him was violated at trial when Dr. Deborah Radisch testified to the results of the victims' autopsies performed by Dr. Carl Barr who was not present to testify because he was recovering from surgery. ... expert testimony is permissible when the expert testifies 'not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data.'"

State v. Bell, 274 S.W.3d 592 (Mo. App. W.D. Jan 13, 2009) – "In this case, Dr. Gill conducted the autopsy and prepared the report regarding Mr. Carballo's death. Dr. Dudley, however, as the chief medical examiner of Jackson County, reviewed the evidence and testified as to her conclusions regarding Mr. Carballo's death as well as the conclusions of Dr. Gill. Dr. Dudley's testimony, to the extent she discussed Dr. Gill's opinions, was error and violated Mr. Bell's Confrontation Clause rights. 'Admission of ... another medical examiner's testimony in lieu of the testimony of the medical examiner who prepared the report' violates a defendant's Confrontation Clause rights." [NOTE: Is the distinction between the factual findings and the pathologist's conclusions regarding cause and manner of death? That seems implied.]

Commonwealth v. Nardi, 452 Mass. 379, 893 N.E.2d 1221 (Mass. Sep 25, 2008) – Dr. Weiner performed autopsy but was unavailable, so Dr. McDonough testified – "Nardi argues that admitting Dr. McDonough's opinion regarding the cause of death was tantamount to admitting Dr. Weiner's testimony without the opportunity to cross-examine him. We disagree. Dr. McDonough, a medical examiner with over two decades of experience, testified to his own expert opinion, and did so based on a permissible foundation. He, not Dr. Weiner, was the witness testifying to the cause of death, and Nardi was afforded ample opportunity to cross-examine him. ... The fact that Dr. McDonough's expert opinion on the cause of Barchard's death was based, in large part, on findings made during the course of an autopsy that he did not perform does not infringe on Nardi's right to confrontation concerning this issue." – however, "we agree that Dr. McDonough should not have been permitted to testify to the findings in the

autopsy report on direct examination" – that is, he should not have repeated opinions of other pathologist

Campos v. State, 256 S.W.3d 757, 762-763 (Tex. App. Houston 14th Dist. 2008), overruled by **Lee v. State, 418 S.W.3d 892, 893-901 (Tex. App.--Hous. [14th Dist.] 2013)**, petition for discretionary review refused (Mar. 12, 2014)

U.S. v. De La Cruz, 514 F.3d 121, n. 5 (1st Cir. Feb 01, 2008), cert. denied, No. 07-1602 (June 29, 2009) – "We add that, as a matter of expert opinion testimony, a physician's reliance on reports prepared by other medical professionals is 'plainly justified in light of the custom and practice of the medical profession. Doctors routinely rely on observations reported by other doctors, and it is unrealistic to expect a physician, as a condition precedent to offering opinion testimony ..., to have performed every test, procedure, and examination himself.'"

Costley v. State, 175 Md.App. 90, 926 A.2d 769 (Md. Ct. Spec. App. 2007) – "Because neither of the Assistant Medical Examiners who prepared the report was employed by the Medical Examiner's Office at the time of trial, Dr. David Fowler, the Chief Medical Examiner, testified. As Chief Medical Examiner, Dr. Fowler had reviewed the report and signed the opinion page. ... In short, Dr. Fowler testified to his opinions based on the physical findings in the autopsy report, and defense counsel was able to cross-examine him on how his conclusions were reached. Appellant did not dispute the opinions set forth in the report. There was no error in admitting the report or Dr. Fowler's testimony."

Autopsy / Postmortem Toxicology: Expert Bases Opinion on Another's Work
(category added Dec. 2012)

(this and the preceding category substantially overlap; *see also* part 6, "Foundation / Preliminary Questions of Fact / Chain of Custody")

State v. VanDyke, 2015 WI App 30, ¶¶ 1-28, 361 Wis. 2d 738 (Wis. App. 2015) – "¶ 17 We agree with VanDyke that the laboratory report containing Trittin's blood and urine test results was testimonial." – concluding that "the analyst would reasonably expect that the document, which was requested by the medical examiner to aid in determining Trittin's cause of death, 'would be available for use at a later trial.'" – even though it did not find the manner of death to be homicide!

State v. Sauerbry, 447 S.W.3d 780, 781-89 (Mo. Ct. App. 2014) – "a medical examiner may testify to his or her own opinions as to a victim's cause of death, and the nature and cause of particular injuries the victim suffered, even if the testifying examiner's opinions depend on, and disclose, factual observations made by an absent medical examiner who actually performed the victim's autopsy."

State v. Pesqueira, 235 Ariz. 470, 333 P.3d 797 (Ariz. App. 2d Div. 2014) – "¶ 5 Pesqueira first argues the trial court erred in allowing the state's medical expert, Dr. Gregory Hess, to base his opinion as to the cause of L.C.'s death on the autopsy report generated in Mexico. ... ¶ 16 Our supreme court has 'held that a testifying medical examiner may offer an opinion based on an autopsy performed by a non-testifying expert without violating the Confrontation Clause.' [cites] 'Because the facts underlying an expert's opinion are admissible only to show the basis of that

opinion and not to prove their truth, an expert does not admit hearsay or violate the Confrontation Clause by revealing the substance of a non-testifying expert's opinion.'... ¶ 17 Here, Hess testified that he formed his own opinion after reviewing the autopsy report and photographs, UMC medical records, and the death certificate. Although he discussed the substance of the autopsy report, he explained that he had used that information, along with the other documents, to reach his own conclusions..."

State v. Maxwell, 2014-Ohio-1019, 139 Ohio St. 3d 12, 9 N.E.3d 930 (Ohio 2014) – ""{ ¶ 50} ... the majority of jurisdictions that have examined this issue have concluded that a substitute examiner, on direct examination, may at least testify as to his or her own expert opinions and conclusions regarding the autopsy and the victim's death. ... {¶ 51} The Supreme Court of California, however, expanded the scope of admissible opinion testimony by a substitute examiner. The court allowed the substitute medical examiner to testify regarding his 'independent opinion' as an expert witness as to the cause of the victim's death, when that opinion was based solely on a review of the autopsy report. *People v. Dungo*, [cite]. Because the expert witness did not describe the conclusions reached by the nontestifying examiner, and the expert's descriptions were limited to objective facts, such as the condition of the victim's body at the time of the autopsy, these types of statements were not testimonial in nature. [cite] {¶ 52} We agree."

State v. Mercier, 87 A.3d 700, 701-04 (Me. 2014) – "[¶ 14] In sum, our reasoning in *Mitchell*, bolstered by the Supreme Court's decision in *Williams*, holds true—the admission of the testimony of a medical examiner who relies in part on information obtained as a result of an autopsy or contained in an autopsy report completed by a non-testifying medical examiner is not a violation of the Confrontation Clause."

State v. Heine, 844 N.W.2d 409 (Wis. App. 2014) – "[¶ 12] ... few expert witnesses would be able to testify at all if they had to personally reproduce the experiments and analyses that underlay developments in their field. [cites] Thus, permitting the expert to rely on inadmissible material in accordance with Rule 907.03 does not violate a defendant's right to confrontation. ... [¶ 14] ... Dr. Tranchida's testimony that he regularly relied on toxicology results in forming his final opinion as to cause of death laid the proper foundation for him to have relied on the toxicology report irrespective of whether that report was admissible into evidence or disclosed to the jury." – [NOTE: The latter sentence comes in the course of a harmless error analysis.]

Commonwealth v. Reavis, 992 N.E.2d 304, 310-13 (Mass. 2013) – "A substitute medical examiner who did not perform the autopsy may offer an opinion on the cause of death, based on his review of an autopsy report by the medical examiner who performed the autopsy and his review of the autopsy photographs, as these are documents upon which experts are accustomed to rely, and which are potentially independently admissible through appropriate witnesses."

State v. Barnes, 741 S.E.2d 457 (N.C. Ct. App. 2013) – "defendant argues that the trial court deprived him of his constitutional right of confrontation by allowing Dr. Jordan to testify that he relied on the toxicology report in forming his opinion of the cause of death and to testify as to the results of the report. ... Whether an expert witness's reliance upon laboratory reports prepared by others in formulating an opinion pursuant to Rule 703 of the North Carolina Rules of Evidence constitutes a violation of a criminal defendant's right to confrontation of witnesses against him under the Sixth Amendment of the United States Constitution is an evolving area of law. The caselaw from the United States Supreme Court and our North Carolina Supreme Court is not

fully developed at this time. Based upon the facts of the instant case, we need not, and do not reach this issue."

State v. Kennedy, 735 S.E.2d 905, 908-927 (W. Va. 2012) – "Dr. Sabet unequivocally testified that these were additional opinions he derived from inspection of the ... autopsy photographs... As such, given that Dr. Sabet was available for cross-examination on these original opinions, no Confrontation Clause violation occurred in the admission of this testimony."

People v. Dungo, 55 Cal. 4th 608, 147 Cal. Rptr. 3d 527, 286 P.3d 442, 455-58 (Oct. 15, 2012) (modified on denial of rehearing Dec. 12, 2012) – "At the jury trial, Dr. Lawrence testified that after reviewing Dr. Bolduc's autopsy report and the accompanying autopsy photographs, he concluded that Pina had died from asphyxia caused by strangulation. ... Dr. Lawrence did not describe to the jury Dr. Bolduc's opinion about the cause of Pina's death; instead, he only gave his own independent opinion as a forensic pathologist. ... Neither the autopsy photographs nor Dr. Bolduc's autopsy report was admitted into evidence. ... The issue before us is whether Dr. Lawrence's testimony about these objective facts entitled defendant to confront and cross-examine Dr. Bolduc. ... Dr. Lawrence's description to the jury of objective facts about the condition of victim Pina's body, facts he derived from Dr. Bolduc's autopsy report and its accompanying photographs, did not give defendant a right to confront and cross-examine Dr. Bolduc. The facts that Dr. Lawrence related to the jury were not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's confrontation right, and [***537] criminal investigation was not the primary purpose for recording the facts in question." [NOTE: This is one of three companion cases decided at the same time, and contains two concurrences, both of which are thoughtful and useful.]

Hutcherson v. State, 373 S.W.3d 179, 180-184 (Tex. App. Amarillo 2012) – "Because Dr. Natarajan [*184] did not disclose the testimonial hearsay upon which his expert opinion was based, the jury only heard the direct, in-court testimony of Natarajan, and appellant's confrontation rights were not violated."

State v. Cabezuela, 2011-NMSC-041, 150 N.M. 654, 265 P.3d 705 (N.M. 2011) – "Dr. Barry testified that Dr. Ann Bracey, a forensic pathology fellow, performed Baby Mariana's autopsy. Although Dr. Barry did not perform Baby Mariana's autopsy, she was the supervising pathologist for this autopsy; she went 'through every key feature with Dr. Bracey,' which included the 'microscopic exam, examination of the body and the injuries, examination of all the photographs.' Dr. Barry explained that because of her involvement in the autopsy, both her name and Dr. Bracey's name appeared on the reports, and that in her testimony she would be referring to 'our autopsy report' in order to be as accurate as possible. ... the autopsy report was never entered into evidence... the record supports a conclusion that Dr. Barry had sufficient personal knowledge to testify as to what Dr. Bracey discovered through the autopsy."

Cuesta-Rodriguez v. State, 2010 OK CR 23, 241 P.3d 214 (Okla. Crim. App. 2010) – "while Dr. Gofton's opinions were admissible because he was available for cross-examination about those opinions, Cuesta-Rodriguez was denied the opportunity to confront Dr. Jordan in order to test his competence and the accuracy of his findings contained in the hand-annotated diagrams and the autopsy report whose contents Dr. Gofton disclosed to the jury. The trial court erred by admitting the autopsy diagrams drawn by Dr. Jordan and Dr. Gofton's testimony about what Dr. Jordan said in his autopsy report." – court goes on to suggest second pathologist should write his

own report and testify from it – without clarifying whether the second report can quote the first one

Commonwealth v. Durand, 457 Mass. 574, 575-601, 931 N.E.2d 950 (Mass. 2010) – "A substitute medical examiner may testify as to his or her own opinion concerning the victim's cause of death, n11, even though the testimony is based principally on the autopsy performed by an unavailable pathologist, because the substitute medical examiner's opinion is subject to cross-examination. Nardi, supra at 388-391. However, a testifying medical examiner called by the Commonwealth is not permitted to testify, on direct examination, to the underlying factual findings contained in the autopsy report prepared by a different medical examiner, because such testimony would violate a defendant's confrontation rights. ... We recognize that the distinction drawn in Nardi, which permits a substitute medical examiner to testify on direct examination as to his or her opinion but not to the facts that may underlie that opinion, has sometimes proven difficult to apply during the course of a trial." – [NOTE: This opinion provides helpful suggestions about how the prosecutor can get the testifying pathologist to jump through the necessary hoops.]

Martinez v. State, 311 S.W.3d 104 (Tex. App. Amarillo 2010) – "The Confrontation Clause is not violated merely because an expert bases an opinion on inadmissible testimonial hearsay. ... However, [forensic pathologist] Beaver did disclose to the jury certain testimonial statements contained in the autopsy report [prepared by another pathologist]. Texas Rule of Evidence 705(d) permits an expert to disclose inadmissible facts or data underlying his opinion, but only if the value of the inadmissible evidence disclosed is not outweighed by the danger that the inadmissible evidence will be used for another, impermissible purpose. [cites] In the present case, the facts and data in the autopsy report explained and supported Beaver's opinions only if those facts and that data were deemed true. Thus, under the circumstances of this case, the disclosure of the out-of-court testimonial statements underlying Beaver's opinions, even if offered only for the purpose of explaining and supporting those opinions, constituted the use of testimonial statements to prove the truth of the matters asserted in violation of the Confrontation Clause." – [Note: The lack of logical progression between the propositions set forth in this holding is nearly complete. Obviously the facts and data could support the opinion even if they were false. That would make the opinion fallacious, not unsupported.]

Commonwealth v. Semedo, 456 Mass. 1, 921 N.E.2d 57 (Mass. 2010) – defendant "'objects' to the introduction of testimony of a medical examiner other than the one who performed the autopsy. ... There was no error. See Commonwealth v. Avila, 454 Mass. 744, 759-766, 912 N.E.2d 1014 (2008) (right of confrontation not violated where medical examiner who did not perform autopsy testifies to his own opinion as to cause of death)."

Wood v. State, 299 S.W.3d 200 (Tex. App. Austin 2009), pet. ref'd (2010) – "We agree, however, that the Confrontation Clause is not violated merely because an expert bases an opinion on inadmissible testimonial hearsay. ... But Dolinak did more than merely offer his expert opinions. He also disclosed to the jury the testimonial statements in the autopsy report on which his opinions were based. ... the facts and data in Colemeyer's autopsy report explained and supported Dolinak's opinions only if they were true. Appellant did not request a limiting instruction, but even if the trial court had expressly instructed the jury to consider the testimonial statements in the autopsy report for the limited purpose of explaining and supporting Dolinak's opinions, the jury could not have given effect to that instruction without first determining that the

statements were true. Under the circumstances of this case, the disclosure of the out-of-court testimonial statements underlying Dolinak's opinions, even if only for the ostensible purpose of explaining and supporting those opinions, constituted the use of the testimonial statements to prove the truth of the matters stated in violation of the Confrontation Clause." [NOTE: The author doesn't seem to recognize the latter part of this passage is logically incompatible with the assertion at the beginning, because the latter part is equally true every time an expert, or anyone else, bases an opinion on data. Besides, what does determining whether data is true have to do with the confrontation clause, or for that matter the definition of "testimonial"? This case is a classic example of articulate non-thought.]

Rector v. State, 285 Ga. 714, 681 S.E.2d 157, 2009 FCDR 2366 (Ga. 2009), cert. denied, 130 S. Ct. 807, 175 L. Ed. 2d 567 (2009) – "Rector claims that the trial court erred in allowing the State's toxicologist to testify about a toxicology report relating to the deceased victim that had been prepared by another doctor. The toxicologist who testified had reviewed the work of the doctor who had originally prepared the report and reached the same conclusion that the victim's blood sample tested negative for cocaine. Accordingly, '[r]ather than being a mere conduit for [the doctor's] findings, [the toxicologist] reviewed the data and testing procedures to determine the accuracy of [the] report. An expert may base [his] opinions on data gathered by others."

Commonwealth v. Hensley, 454 Mass. 721, 913 N.E.2d 3398 (Mass. Sep 15, 2009) – "Dr. Flomenbaum also testified on direct examination to many of the specific findings made by Dr. Zane in the autopsy report, and to various conclusions regarding the length (from two to ten minutes) and nature of the "struggle" between the victim and Hensley that resulted in her death, including that abrasions on the victim's neck were likely caused by her fingernails in attempts to pull the ligature off during the strangulation. ... there was no error in admitting the testimony of Dr. Flomenbaum regarding his opinion as to the cause of death. Dr. Flomenbaum appeared as a witness at the trial, opined as an expert on the basis of information on which experts ordinarily and may properly rely, and was subject to cross-examination." – any error in the recitation of specific findings was harmless – denial of habeas corpus affirmed by **Hensley v. Roden, 755 F.3d 724 (1st Cir. 2014)**

Commonwealth v. Avila, 454 Mass. 744, 912 N.E.2d 1014 (Mass. Sep 15, 2009) – "Dr. Abraham Philip, the medical examiner who conducted the victim's autopsy in November, 2003, was no longer employed by the Commonwealth at the time of trial. Dr. Flomenbaum, then the chief medical examiner for the Commonwealth, testified at trial in Dr. Philip's stead. ... [A]s we held in Nardi, the substitute medical examiner, as an expert witness, is not permitted on direct examination to recite or otherwise testify about the underlying factual findings of the unavailable medical examiner as contained in the autopsy report. [FN18] ... The expert witness's testimony must be confined to his or her own opinions and, as to these, the expert is available for cross-examination."

Fingerprint Evidence

Warning: *Melendez-Diaz* / *Bullcoming* may call the older cases into question.

Hamilton v. Lee, __ F.Supp.3d __, 2015 WL 1402316 (E.D.N.Y. Mar. 27, 2015) – "The prints themselves and the notation on the fingerprint card indicating that Detective Dryver took the prints from petitioner on the night of the murder. They were not directly accusatory and are

therefore not “testimonial” under the confrontation clause. They were made primarily to identify defendant in order to process his arrest, not to create evidence for a trial.”

People v. Jackson, 968 N.Y.S.2d 789, 791, 108 A.D.3d 1079 (N.Y. App. Div. 4th Dept. 2013) leave to appeal denied, 2013 WL 6567672 (N.Y. 2013) – “The technician who processed and photographed the fingerprint did not compare the latent print to the fingerprints of defendant or any other suspect. Thus, the technician's findings were not testimonial...”

U.S. v. Williams, 720 F.3d 674, 697-99 (8th Cir. 2013) – “*698 At trial, the government called James Brady, a fingerprint specialist from Omaha, Nebraska, to testify that 'Donald Jarmon's' fingerprints obtained in Arizona in January 2009 matched Williams's fingerprints ... Williams argues that his Confrontation Clause right was violated when the government failed to present for cross-examination the person who took 'Donald Jarmon's' fingerprints in Arizona. ... We do not believe that the Supreme Court's concerns regarding confrontation in *Melendez-Diaz* and *Bullcoming* are present here with respect to the fingerprint cards. Unlike the evidence in those cases, the fingerprint cards were created as part of a routine booking procedure and not in anticipation of litigation, *i.e.*, “for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.” *Melendez-Diaz*...”

People v. Pollard, __ P.3d __, 2013 COA 31M, ¶ 48 (Colo. Ct. App. 2013) – “the notation of a non-testifying criminologist, verifying the fingerprint analysis in a report authored by the criminologist who testified during defendant's habitual offender proceeding, is not 'testimonial' hearsay excludable under Confrontation Clause guarantees. ... Here, the 'verification' was done, not for use as evidence, but for internal administrative purposes...”

People v Doe, 38 Misc. 3d 709 (N.Y. Sup. Ct. 2012) – “The testing at issue here, merely to recover the print from the note, resulted in the discovery of nonaccusatory raw data similar to DNA tests, which has been found not violative of a defendant's Confrontation Clause Rights... n7 This Court disagrees with the analysis and conclusion set forth in *Hernandez*, in which the New York County Supreme Court held that the admission of a latent print report without the testimony of the person who recovered the print violated *Crawford*. ... The report of the criminalist who discovered a fingerprint and who is unavailable to testify at this trial does not implicate defendant in any way because the report of the recovery itself does not link this defendant to the crime.”

Commonwealth v. Burton, 82 Mass. App. Ct. 912, 978 N.E.2d 796 (Mass. App. Ct. 2012) – “The fingerprint records in this case met the criteria for business records and were nontestimonial; thus, their admission in evidence did not violate the defendant's right of confrontation.”

Commonwealth v. Whitaker, 460 Mass. 409, 421-423, 951 N.E.2d 873 (Mass. 2011) – “The judge erred in allowing Trooper Dolan on direct examination to offer hearsay testimony regarding the opinions of two other fingerprint examiners.... Where, as here, the conclusion or opinion of the non-testifying expert is testimonial, because it was conducted as part of the criminal investigation, its admission violates the defendant's right of confrontation, because the opinion is not subject to cross-examination.”

Bond v. State, 925 N.E.2d 773, 776-777 (Ind. Ct. App. 2010) – "The thrust of Bond's argument is that the State's failure to produce the verifying print examiner violated his Sixth Amendment confrontation rights. However, Bond points to no testimonial out-of-court statements which were offered against him and which form the basis of his Sixth Amendment challenge. The State called both forensic technician Frick and latent print examiner Klosinski. Frick testified to the processes she used to develop the prints found on the duct tape and temporary license plate. Klosinski testified to the results of her own fingerprint comparisons. To be sure, Klosinski said that the ACE-V protocol was followed, which means one other examiner analyzed the latent prints. That examiner did not appear in court. But the verifier's results were not introduced at trial, and neither Frick nor Klosinski testified to his results or conclusions. ... In short, the absent examiner's results were never referenced, and we are accordingly left with no predicate for a Sixth Amendment confrontation violation."

State v. Anderson, 386 S.C. 120, 687 S.E.2d 35 (S.C. 2009) – "FN 3. Even assuming that Anderson raised a hearsay challenge, such an argument would be without merit. In Rich, this Court definitively held that police fingerprint cards do not violate the prohibition against hearsay given they fall within the business records exception or the public records exception. [cite]Notably, appellate courts have continued to recognize this principle and have emphasized that fingerprint cards are not "testimonial" and, thus, do not violate the rule in Crawford..."

State v. Martin, __ S.W.3d __, 2009 WL 1815427 (Mo. App. S.D. Jun 26, 2009) – in case where expert who testified was not same expert who prepared report – even if report was testimonial, "the complained-of evidence was cumulative of her own clearly admissible testimony and could not have contributed to Defendant's conviction."

People v. Rawlins, 10 N.Y.3d 136, 884 N.E.2d 1019, 855 N.Y.S.2d 20, 2008 N.Y. Slip Op. 01420+ (N.Y. Feb 19, 2008) cert. denied sub nom. Meekins v. New York, No. 07-10845 (May 09, 2008) – fingerprint reports are testimonial [NOTE: Curiously, the same opinion holds that DNA reports are not testimonial, although as the concurring judge notes, "the distinctions advanced by the majority do not explain why the fingerprint comparison ... was testimonial, but the DNA profile... was not."]

Acevedo v. State, 255 S.W.3d 162 (Tex. App.-San Antonio Jan 30, 2008), petition for discretionary review filed (May 05, 2008) – "The State argues that because autopsy reports have been admissible as nontestimonial statements, the latent print report is similarly nontestimonial. We disagree. Unlike an autopsy report which contains 'matters observed pursuant to a duty imposed by law' and are therefore considered nontestimonial for *Crawford* purposes, the primary purpose of the latent print report was to establish or prove past events potentially relevant to later criminal prosecution. [cites] Thus, although the report does not accuse Acevedo of wrongdoing, it potentially provided factual evidence to support his conviction. We, therefore, conclude the latent print report is testimonial in nature."

People v. Rawlins, 37 A.D.3d 183, 829 N.Y.S.2d 79, 2007 N.Y. Slip Op. 00998 (N.Y. A.D. 1 Dept., 2007), aff'd, 10 N.Y.3d 136, 884 N.E.2d 1019, 855 N.Y.S.2d 20, 2008 N.Y. Slip Op. 01420+ (N.Y. Feb 19, 2008) People v. Rawlins, 10 N.Y.3d 136, 884 N.E.2d 1019, 855 N.Y.S.2d 20, 2008 N.Y. Slip Op. 01420+ (N.Y. Feb 19, 2008) cert. denied sub nom. Meekins v. New York, No. 07-10845 (May 09, 2008) –

Denham v. State, 966 So.2d 894 (Miss. App. Oct 16, 2007) – "On November 15, 2005, the day before the trial, Denham's counsel filed a motion to prohibit the introduction of any evidence of the fingerprint comparisons done in this case. Denham argued that the State only produced one examiner, Paul Wilkerson, when, according to the guidelines set forth in the Scientific Working Group on Friction Ridge Analysis, Study and Testing (SWGFAST), the testimony of two examiners is necessary for a valid identification. Hence, Denham claims that the State's failure to produce the other examiner, Jamie Bush, violated Denham's Sixth Amendment right to confrontation. ... ¶ 13. There was no testimony or evidence from Bush. The jury heard only that Bush performed the initial fingerprint examination at the crime lab. Bush's report was neither admitted into evidence nor were his findings ever presented to the jury. Accordingly, we find no merit to this issue."

People v. Jambor, 273 Mich.App. 477, 729 N.W.2d 569 (Mich. App. 2007) – "the fingerprint cards are admissible under the business records exception to the hearsay rule; therefore, the cards are not testimonial." – emphasizing that "the fingerprint cards prepared by Brien contain no subjective statements", that is, no comparison or other analysis, but just the prints themselves

United States v. Thornton, 209 Fed.Appx. 297, 2006 U.S. App. LEXIS 30372, 2006 WL 3591902 (4th Cir. W.Va. 2006) - Fingerprint cards are non-testimonial business records.

People v. Hernandez, 7 Misc.3d 568, 794 N.Y.S.2d 788, 2005 N.Y. Slip Op. 25007 (N.Y. Sup Ct 2005) - "The only evidence linking the defendant to the crime charged in the second count was the discovery of fingerprints on a television. The officer who lifted the prints, forwarded them for analysis, and completed the report had since retired and moved to Ireland. Defendant argued the latent print report was inadmissible under the business records exception because information in the report was "testimonial" in nature, and that admitting the report into evidence without the ability to cross-examine the report's preparer violated of his rights under the Confrontation Clause. The People argued that the report was not prepared at the prosecution's request, and was made even before the defendant's identity became known. The court found that the parameters of "testimonial," for purposes of Confrontation Clause analysis, included the involvement of government officers in the production of testimony with an eye toward trial. The prints in question were not taken simply for administrative use. They were taken with the ultimate goal of apprehending and successfully prosecuting an accused. The report was testimonial in nature, and was inadmissible in the absence of the officer in question."

State v. Windley, 617 S.E.2d 682 (NC Ct. App. 2005) - Fingerprint cards are not testimonial.

State v. Arita, 900 So. 2d 37 (La App 5 Cir 2005) - Fingerprint results are non-testimonial and, therefore, it was not a violation of *Crawford* that the technician who lifted the fingerprint was unavailable for trial.

Forensic Examiner's Report / Ballistics Certificate

Warning: *Melendez-Diaz* / *Bullcoming* call the older cases into question.

Miller v. State, 313 P.3d 934, 967-74 (Okla. Crim. App. 2013) – "Dennis Fuller, a forensic scientist with the Tulsa Police Department's forensic laboratory, provided this firearms identification testimony at Miller's 2002 trial. Mark Boese, the director of the City of Tulsa's

Forensic Laboratory, presented this evidence at Miller's 2008 retrial. Although Miller describes Boese as a "substitute" witness for Fuller, Boese played a very different role at Miller's retrial than did Dr. Distefano. Most importantly, Boese's testimony was based almost entirely on his own experience and his own *independent* examination of the firearms evidence in the case, rather than simply summarizing for the jury what Fuller had done, observed, and concluded..." – no violation

Martin v. State, 2013 Ark. App. 371, __ SW.3d __ (Ark. Ct. App. 2013) – "Looney was cross-examined on this issue extensively, and the jury was well aware that he had not performed the test firing, that Andrejack had actually performed the test firing, and that Looney had relied on the case-numbering system regularly used by the crime lab to verify that the test cartridges had been fired from that particular gun. The circuit court did not abuse its discretion in allowing Looney's testimony." – [NOTE: The apparent sixth amendment ruling is that the first expert's statements were non-hearsay and therefore not testimonial hearsay.]

Burdette v. State, 110 So. 3d 296, 297-306 (Miss. 2013) – "[¶ 12] [Detective] Williford testified to the results of the Mississippi Crime Laboratory's analysis of some of the casings and projectiles in question. Williford stated that the crime lab's results showed that all seven casings found and four of the bullets found definitely were fired from the gun in question, and the other bullets were consistent with having been fired by the gun in question but could not be definitively included nor excluded. After this testimony, the crime lab report was admitted into evidence without objection. No individual involved with the testing of the bullets or with the crime lab testified at trial. ... [¶ 24] Here, the surrogate testimony was presented by a police officer with no apparent relation to the Mississippi Crime Laboratory or to this particular report. The report undoubtedly was testimonial... The admission of the document without live testimony from an individual involved in the analysis constituted a violation of the Confrontation Clause."

Connors v. State, 92 So. 3d 676, 678-685 (Miss. 2012) – "During Detective Haygood's testimony, the State introduced a report of ballistics tests performed by Carl Fullilove of the Mississippi Crime Laboratory. The Mississippi Crime Laboratory had been asked to determine if the spent shell casings found at the murder scene were fired in the Mossberg 12-gauge shotgun also found at the scene. ... Detective Haygood testified that this [*i.e.*, Fullilove's report] meant that the shells could have been fired in the Mossberg 12-gauge shotgun or in another one. The State did not call Fullilove to testify. ... "Plainly, under *Melendez-Diaz*, the forensic reports at issue were testimonial in nature."

Tollefson v. State, 352 S.W.3d 816, 817-818 (Tex. App. San Antonio 2011) – "Although Pendelton test fired the weapon, Vachon was the analyst who created the report, she was present when Pendelton fired the weapon, and she testified at trial. In *Bullcoming*, the analyst who testified at trial did not prepare the report; a different analyst did. ... Moreover, Pendelton did not make a testimonial statement because he did not create the report. Vachon made the testimonial statement and because she testified and was available for cross-examination, we hold the Confrontation Clause was not violated."

Post-Melendez-Diaz Massachusetts cases:

Commonwealth v. Ramsey, 466 Mass. 489, 995 N.E.2d 1110, 1111-12 (Mass. 2013)
Commonwealth v. Escalera, 462 Mass. 636, 650, 970 N.E.2d 319 (Mass. 2012)

Commonwealth v. Charles, 81 Mass. App. Ct. 901, 959 N.E.2d 994 (Mass. App. Ct. 2012), review granted (March 5, 2012) –
Commonwealth v. Barbosa, 461 Mass. 431, 961 N.E.2d 560 (Mass. 2012)
Commonwealth v. Romero, 80 Mass. App. Ct. 791, 801-803, 956 N.E.2d 1250 (Mass. App. Ct. 2011), review granted (Mass., Feb. 2, 2012)
Commonwealth v. Lima, 80 Mass. App. Ct. 114, 123, 951 N.E.2d 952 (Mass. App. Ct. 2011)
Commonwealth v. Perez, 80 Mass. App. Ct. 271, 279-280, 952 N.E.2d 441 (Mass. App. Ct. 2011)
Commonwealth v. Ramsey, 79 Mass. App. Ct. 724, 949 N.E.2d 927 (Mass. App. Ct. 2011)
Commonwealth v. McCollum, 79 Mass. App. Ct. 239, 945 N.E.2d 937 (Mass. App. Ct. 2011)
Commonwealth v. Escalera, 79 Mass. App. Ct. 262, 945 N.E.2d 415 (Mass. App. Ct. 2011), review granted (June 8, 2011)
Commonwealth v. Barbosa, 77 Mass. App. Ct. 340, 931 N.E.2d 60 (Mass. App. Ct. 2010), rev'd **Commonwealth v. Barbosa**, 461 Mass. 431, 961 N.E.2d 560 (Mass. 2012) —
Commonwealth v. Jones, 77 Mass. App. Ct. 53, 928 N.E.2d 374 (Mass. App. Ct. 2010)
Commonwealth v. Pittman, 76 Mass. App. Ct. 905, 905-906, 923 N.E.2d 1083 (Mass. App. Ct. 2010)
Commonwealth v. Muniz, 456 Mass. 166, 921 N.E.2d 981 (Mass. 2010)
Commonwealth v. Depina, 456 Mass. 238, 922 N.E.2d 778 (Mass. 2010)
Commonwealth v. Loadholt, 456 Mass. 411, 923 N.E.2d 1037 (Mass. 2010)
Commonwealth v. Rivera, 76 Mass. App. Ct. 304, 921 N.E.2d 1008 (Mass. App. Ct. 2010)
Commonwealth v. Morales, 76 Mass. App. Ct. 663, 925 N.E.2d 551 (Mass. App. Ct. 2010)
Commonwealth v. Ware, 76 Mass. App. Ct. 53, 918 N.E.2d 861 (Mass. App. Ct. 2009)
Commonwealth v. Hollister, 75 Mass. App. Ct. 729, 916 N.E.2d 768 (Mass. App. Ct. 2009)
Commonwealth v. Chery, 75 Mass. App. Ct. 909, 915 N.E.2d 284 (Mass. App. Ct. 2009)
Commonwealth v. Mendes, 75 Mass. App. Ct. 390, 914 N.E.2d 348 (Mass. App. Ct. 2009)
Commonwealth v. Brown, 75 Mass. App. Ct. 361, 914 N.E.2d 332 (Mass. App. Ct. 2009)

Pre-Melendez-Diaz Massachusetts cases:

Commonwealth v. Morales, 71 Mass.App.Ct. 587, 884 N.E.2d 546 (Mass. App. April 22, 2008), vacated and remanded, 129 S. Ct. 2858, 174 L. Ed. 2d 599 (2009) –

Following *Morales*:

Commonwealth v. Muniz, 2009 WL 1286444 (Mass.App.Ct. May 12, 2009) (unpub) (citing *Verde* rather than *Morales*)

Commonwealth v. Veillette, 2009 WL 586747, 73 Mass.App.Ct. 1126 (Mass. App. Ct. Mar 10, 2009) (unpub) –

Commonwealth v. Samuel, 2009 WL 499300, 73 Mass.App.Ct. 1124 (Mass.App.Ct. Mar 02, 2009) (unpub)

Commonwealth v. Acevedo, 2009 WL 468660, 73 Mass.App.Ct. 1123 (Mass.App.Ct. Feb 26, 2009) (unpub) (citing *Verde* rather than *Morales*)

Commonwealth v. Figlioli, 2009 WL 330924 (Mass. App. Ct. Feb 12, 2009) (unpub) –

Commonwealth v. Jones, 2009 WL 195904 (Mass. App.Ct. Jan 29, 2009) (unpub) –

Commonwealth v. Jeudi, 2009 WL 36142 (Mass. App. Ct. Jan 08, 2009) (unpub)

Commonwealth v. Damon, 2008 WL 5351827 (Mass. App. Ct. Dec 24, 2008) (unpub)

Commonwealth v. Maglione, 2008 WL 1901419 (Mass. App. May 01, 2008) (unpub)

State v. Moore, 2008 WL 851054 (N.C. App. Apr 01, 2008) (unpub) – "the forensic report--containing the results of the analysis performed on the firearm and the DNA analysis performed

on the latex gloves--does not constitute a testimonial statement admitted in violation of defendant's rights under the Confrontation Clause." – following *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137 (N.C. 2006)

Commonwealth v. Elie, 2008 WL 360952 (Mass. App. Ct. Feb 11, 2008) (unpub) – "A ballistics certificate is a 'record of primary fact' made by a public officer in the performance of his duties that does not violate a defendant's Sixth Amendment or art. 12 rights."

Commonwealth v. Urena, 2007 WL 4234098 (Mass. App. Ct. Dec 03, 2007) (unpub) – "At trial, the Commonwealth sought to introduce a certificate from a qualified ballistics expert to prove that the gun and cartridges seized from the defendant, and for which he lacked a license, were a working firearm and ammunition. ... The ballistics certificate at issue is a 'record of a primary fact' made by a public officer in the performance of his duties that does not violate the defendant's Sixth Amendment rights."

Medical Records

(see also part 5, Medical Diagnosis / Treatment, Business Records; and specific topics in this part.)

Warning: *Melendez-Diaz* / *Bullcoming* may call the older cases into question.

State v. Hurtado, 173 Wn. App. 592, 294 P.3d 838 (Wash. Ct. App. 2013) – "¶2 We hold that the domestic violence victim's statements to medical personnel at the hospital, which were made while a police officer was present and collecting evidence of the alleged crime, were testimonial." – in ¶ 23, the opinion specifically agrees that statement at issue was "a statement [that] is made for diagnosis and treatment purposes" to "medical personnel who are not employed by or working for the State"

State v. Jones, 140 Conn. App. 455, 59 A.3d 320 (Conn. App. Ct. 2013), appeal granted on unrelated issue, 61 A.3d 1099 (Feb. 28, 2013) – "The defendant contends that the statements within the medical records are testimonial in nature, and that their admission violated his fundamental right to confront a witness against him pursuant to the United States constitution. We disagree. ... None of the statements within Rodriguez' medical records were testimonial, nor does Bullcoming change the admissibility of medical records containing nontestimonial hearsay. The [*474] medical records in this case were properly admitted,⁶ and having Tilden read the statements of [Dr.] Nguyen-Tan and the nurses contained within the medical records did not constitute a violation of the defendant's sixth amendment right to confront a witness against him."

State v. Jones, 288 P.3d 140, 142-145 (Kan. 2012) – "At trial, Jones made a hearsay objection to nurse Gannon's testimony that the hospital laboratory results indicated that H.F.'s blood and urine contained alcohol and marijuana. ... Pointedly, the written laboratory report was never admitted into evidence; rather, the State only offered Gannon's testimony as to what was stated in the laboratory report. ... Unfortunately, because Jones did not raise the right of confrontation issue at trial, we have no findings relevant to whether the laboratory results were testimonial in nature. Specifically, we have no findings as to the primary purpose of the hospital technician's laboratory report. That absence precludes us from a proper review on this issue."

People v. Davis, 199 Cal. App. 4th 1254, 1256-1273 (Cal. App. 3d Dist. 2011) (as modified), review granted, depublished (Jan. 11, 2012), review dismissed (May 22, 2013) – "Unlike the documents in *Melendez-Diaz*, the medical documents here are, quite plainly, not affidavits. ... The reports completely lack the solemnity or formality associated with the affidavits utilized in *Melendez-Diaz*. ... Dr. Richardson's testimony indicates that Coleman's medical records were generated in the ordinary course of the hospital's business of treating patients, and further that they were created for medically related, not litigation, purposes. That the reports of Drs. Edington, Loew, and Enlow were created for medically related purposes is made clear by the heavy medical jargon they contain, which indicates they were written for use by other medical professionals, not for evidentiary use by judge or jury. Furthermore, there is no evidence that the reports were made at the behest of the police or the prosecution."

Bowling v. State, 289 Ga. 881, 717 S.E.2d 190, 2011 Fulton County D. Rep. 3198 (Ga. 2011) – "Admitting Bowling's medical records into evidence at trial did not violate the Confrontation Clause. The emergency room physician primarily responsible for Bowling's care testified at trial. Since she was subject to cross-examination, the Supreme Court's decisions in *Crawford* and its progeny have no application to her own statements in the report she prepared after meeting with Bowling. [cite] In any event, none of the medical records are testimonial inasmuch as the circumstances surrounding their creation and the statements and actions of the parties objectively indicate that the records were prepared with a primary purpose of facilitating Bowling's medical care. ... As to the drug and urine screens, Bowling's physician testified that she ordered the tests for medical purposes. Medical records created for treatment purposes are not testimonial."

Sanders v. Commonwealth, 282 Va. 154, 711 S.E.2d 213 (Va. 2011) – child abuse victim had STD – "The laboratory report was for medical treatment purposes as it was created to permit Dr. Clayton to medically diagnose and treat CL for sexually transmitted infections. Because reports created for medical treatment purposes are nontestimonial, Sanders' Sixth Amendment right to confront witnesses against him was not violated."

State v. Moreno-Garcia, 243 Ore. App. 571, 260 P.3d 522 (Or. Ct. App. 2011) – in child abuse case, medical records are testimonial – "the medical information produced by [Dr.] Keltner and recounted by [Dr.] Lorenz was testimonial and inadmissible under *Crawford* and *Davis*." [NOTE that this holding applies to specifically *medical* information. Try to imagine the court reaching the same result in a case involving the medical records of an adult male judge. Can't be done, can it?]

People v. McNeal, 405 Ill. App. 3d 647 (Ill. App. Ct. 1st Dist. Nov. 24, 2010), appeal denied, (Jan. 26, 2011), cert. denied (Oct. 3 2011) – "The triage note was written by a nurse when M.Z. first presented at the hospital for treatment following a sexual assault. The declarant's intent, the triage nurse, was to gather information from M.Z. for further treatment. The note was prepared in the course of M.Z.'s medical treatment. The objective circumstances would not lead a reasonable person to conclude that this statement would be used for prosecution. The nurse made the note to assist other medical personnel in the examination and treatment of M.Z., not in the hopes to aid prosecution. At the time of M.Z.'s treatment, the perpetrator's name was not known. [Treating nurse] Yates testified that she reviewed the triage notes prior to examining M.Z. to assist in the treatment. A reasonable person in the triage nurse's position would not conclude that this initial note would be used against the defendant when the purpose of the note was to assist other

medical personnel in the victim's treatment. Based on these circumstances, we find that the triage note prepared by the nurse was nontestimonial, and thus, no Crawford violation occurred."

State v. Holzknecht, 157 Wn. App. 754, 238 P.3d 1233 (Wash. Ct. App. 2010), review denied (Feb. 2, 2011) – "On December 1, 2007, two-month-old Grace Holzknecht was admitted to Children's Hospital with three leg fractures. Doctors determined the fractures were not caused by accidental trauma. Grace's father was charged with assault.... [¶] 54] Although the United States Supreme Court has not provided a comprehensive definition of 'testimonial,' it has held that medical reports created for treatment purposes are not testimonial."

Commonwealth v. Dyer, 77 Mass. App. Ct. 850, 850-856, __ N.E.2d __ (Mass. App. Ct. 2010) – "Medical records generated for evaluation and treatment purposes do not constitute testimonial evidence triggering a constitutional right of confrontation."

People v. McNeal, __ N.E.2d __, 2010 Ill. App. LEXIS 1055, 1-24 (Ill. App. Ct. 1st Dist. Sept. 30, 2010), modified and rehearing denied, 2010 Ill. App. LEXIS 1271 (Ill. App. Ct. 1st Dist., Nov. 24, 2010) – "Kristin Yates testified that she is employed as a registered nurse and on September 9, 2005, she was working at Evanston Northwestern Hospital. She stated that she treated M.Z. on that date. Prior to M.Z.'s examination, Yates testified that she reviewed the triage note written by another nurse because it was 'medically important for her to treat the patient.'...A reasonable person in the triage nurse's position would not conclude that this initial note would be used against the defendant when the purpose of the note was to assist other medical personnel in the victim's treatment. Based on these circumstances, we find that the triage note prepared by the nurse was nontestimonial."

Patel v. State, __ S.W.3d __, 2009 WL 1425219 (Tex. App.-Fort Worth May 21, 2009) – DWI case – "In his fourth point, Patel argues that he was denied his right to cross-examination regarding the blood test results that were admitted as part of the hospital records. Under *Crawford v. Washington*, however, business records are nontestimonial hearsay. [cite] Because the hospital records here were properly admitted under the business records exception to the hearsay rule, their admission did not violate Patel's con-frontation rights."

People v. Robles, 2009 WL 1364364 (Cal. App. 4 Dist. May 15, 2009) (unpub) – "Dr. Kenneth Cisco, who was the Medical Director of the Unilab facility in Tarzana, California in 2004, testified to the testing procedures performed at this facility and the results of lab tests performed on samples taken from E.C. and Robles. Over defense counsel's objections on grounds of hearsay and inadequate foundation, Cisco testified that Robles' sample contained antibodies to both type I and II herpes simplex virus, and that E.C.'s sample contained antibodies to type II herpes simplex virus." – not testimonial under *Geier*

People v. Sterhan, 2009 WL 638205 (Mich. App. Mar 12, 2009) (unpub) – Muskegon County Mental Health records are business records and non-testimonial

Commonwealth v. Beatty, 2009 WL 510571, 73 Mass.App.Ct. 1125 (Mass.App.Ct. Mar 03, 2009) (unpub) – "nothing suggests the doctor's notations were made in anticipation of litigation. The defendant's medical records were therefore not testimonial in fact, and the confrontation clause was not violated."

State v. Smith, 2009 WL 368332 (N.C. App. Feb 17, 2009) (unpub) – "Although Dr. Abrams referenced the hospital records in his testimony, because these records are business records, they are exempted from the rule against hearsay. *Crawford* acknowledges that business records are not testimonial, posing no per se Confrontation Clause problem."

State v. Wilson, 2009 WL 48141 (Hawai'i App. Jan. 07, 2009) (unpub) – "Since we have concluded that the Japanese x-rays were not hearsay, Wilson's right to confrontation was not implicated."

Briggs v. State, __ So.2d __, 2008 WL 5146547 (Miss. App. Dec 09, 2008) – "As to Briggs's first complaint about Shaw's testimony, he contends in his appellate brief that allowing [Nurse Practitioner] Shaw to recite the findings of the radiologist, who read the CT scan, constituted a violation of his Sixth Amendment right as enunciated in *Crawford*... Shaw's testimony does not fall within the parameters of *Crawford*."

State v. Smith, 2008 WL 4951646, 2008-Ohio-5985 (Ohio App. 8 Dist. Nov 20, 2008) (unpub) – "{¶ 45} The defense stipulated to the admission of the medical records with the exception of the single statement addressed in Assignment of Error IV, where the victim/patient reported being hit by her 'boyfriend.' Defendant contends this constitutes a testimonial out-of-court statement barred by the Confrontation Clause..." – victim/patient's statement not testimonial

State v. Morales, 2008 WL 4183332, 2008-Ohio-4619 (Ohio App. 6 Dist. Sep 12, 2008) (unpub) – "{¶ 24} ... all of the victim's statements [contined in medical records] were made during her hospital stay, to medical professionals, in connection with her ongoing treatment and care. It is our conclusion that the circumstances under which her statements were made were not such that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *See Crawford*" – nontestimonial.

State v. Talley, __ S.W.3d __, 2008 WL 2943525 (Mo. App. S.D. Aug 01, 2008) – "Because the medical records in question were not created in preparation for litigation, they are for that reason not considered 'testimonial' in nature and fall outside the types of evidence prohibited by both *Crawford* ... and *Davis*"

State v. Coulter, 255 S.W.3d 552 (Mo. App. W.D. Jun 24, 2008) – prosecution for workers comp fraud – physical therapist had died before trial but portions of treatment notes read – in dicta, stating: "Here, the primary purpose of [P.T.] Mr. Gillaspie's notes and records was to record information about Coulter's treatment, e.g., her appointment times, the treatment rendered, and her progress in therapy. The records contained information that directly related to her medical condition. They were not made to government agents or as part of a criminal prosecution... Because the main purpose of the notes was to document treatment and therapy issues, and because there was no showing here that Mr. Gillaspie had notice of the likelihood of a criminal prosecution, we are not persuaded that the terse notes should be regarded as a 'testimonial' statement such as the statement in *Crawford*." – but then ruling it doesn't matter anyway because defendant was acquitted on the count supported by the notes

Commonwealth v. Lampron, 2005 Mass. App. LEXIS 1248 (2005) – In this drunk driving case, "the statements in the hospital records were not testimonial in fact and did not violate the Confrontation Clause because the challenged notations appear to have been made within hours or

a day after his admission and were related to evaluating his condition at the time of his admission in order to determine appropriate treatment. The notations were not made in anticipation of their use in the investigation and prosecution of a crime.

Raw Data

(category added August 2014)

State v. Buckland, 313 Conn. 205, 96 A.3d 1163 (Conn. 2014) – "although *Melendez–Diaz* did not address the issue of whether raw data constitutes testimonial evidence subject to the confrontation clause, we agree with other courts which have answered that question in the negative."

Paredes v. State, __ S.W.3d __, 2014 WL 3672965 (Tex. App.--Hous. [14th Dist.] 2014) – "Because the raw DNA data generated by the non-testifying analysts does not meet the requirements of a testimonial statement discussed above, we hold it is non-testimonial. We reach this conclusion for two reasons. First, unlike in *Burch* and *Bullcoming*, the raw DNA data generated by the non-testifying analysts here is not found in a formal report and was not admitted into evidence during appellant's trial. It cannot be said that the 'primary purpose' of this data, which in itself does not establish any relevant fact, was "creating an out-of-court substitute for trial testimony." *Michigan v. Bryant*... Nor does the raw data meet either of the testimonial requirements used by the plurality and Justice Thomas's concurrence in *Williams*... Second, the raw DNA data was used by Freeman, one of the State's testifying expert witnesses, to develop her own opinions that the t-shirt contained the complainant's DNA as well as the DNA of a major contributor. It is Freeman's opinions—not the raw DNA data generated by the non-testifying analysts—that asserted facts relevant to appellant's prosecution, and appellant was able to cross-examine her regarding those opinions."

People v. Fernandez, 115 A.D.3d 977, 982 N.Y.S.2d 174, 176-77 (N.Y. App. Div. 2d Dept. 2014) – "Contrary to the defendant's contentions, his right of confrontation (*see* U.S. Const Sixth Amend) was not violated by the testimony of an assistant director employed by the Office of the Chief Medical Examiner of the City of New York (hereinafter OCME) and the admission into evidence of DNA profile reports generated by lab technicians employed by the OCME. The assistant director conducted the actual analysis and interpretation of the data contained in the reports at issue. ... Consequently, the DNA profile reports *177 were not testimonial, but rather, were merely raw data that, standing alone, did not link the defendant to the crime [cite]."

People v. Pitre, 968 N.Y.S.2d 585, 587, 108 A.D.3d 643 (N.Y. App. Div. 2d Dept. 2013) – "The DNA profiles were not testimonial [cite], but rather, were merely raw data that, standing alone, did not link the defendant to the crime [cite]."

Can a Machine (or Dog) Be a Hearsay Declarant for Purposes of Crawford?

(see also part 2, Meaning of "Statement")

The question in the heading sounds absurd, but courts are asking it – and answering it in different ways.

United States v. Staton, 605 Fed.Appx. 110 (3d Cir. Mar. 26, 2015) – "the Confrontation Clause is only implicated by hearsay statements, and since a 'statement is something uttered by 'a person,' ... nothing said by a machine ... is hearsay.'" [ellipses in original]

State v. Ziegler, 855 N.W.2d 551 (Minn. Ct. App. 2014) – a crash reconstructionist "testified that he reconstructed the accident in this case relying, in part, on data collected from a sensing and diagnostic module (SDM) in Ziegler's vehicle. Sergeant Inglett testified that an SDM is a type of 'event data recorder' that collects and records information such as vehicle speed, engine speed, and brake-switch activation. Sergeant Inglett explained that the SDM is idle until it senses a change in velocity or an impact, at which point it records data from other devices in the vehicle." – phrasing the issue on appeal this way: "Are machine-generated data that do not contain the statements of human witnesses testimonial statements that implicate a defendant's right to confrontation under the Sixth Amendment?" – answer: no – "the Confrontation Clause is concerned with human witnesses" – furthermore, "The people who wrote the computer program that operates the SDM did not make a statement implicating Ziegler in the underlying offense; they simply wrote computer code."

People v. Peyton, 229 Cal. App. 4th 1063, 1075-77, 177 Cal. Rptr. 3d 823, 833-34 (2014), review denied (Nov. 25, 2014) – "Because an ATM machine cannot be cross-examined, the receipt of machine-generated ATM photos into evidence does not violate the Confrontation Clause."

People v. Banks, 59 Cal.4th 1113, 176 Cal.Rptr.3d 185, 331 P.3d 1206 (Cal. 2014) – "the introduction of machine-generated data does not implicate the confrontation clause because 'unlike a person, a machine cannot be cross-examined.'"

People v. Goldsmith, 59 Cal.4th 258, 172 Cal.Rptr.3d 637, 326 P.3d 239 (Cal. 2014) – challenge to red-light cameras, or Automated Traffic Enforcement System (ATES) – "The ATES-generated photographs and video introduced here as substantive evidence of defendant's infraction are not statements of a person ... Therefore, they do not constitute hearsay ... Simply put, '[t]he Evidence Code does not contemplate that a machine can make a statement.' ... our determination that the ATES evidence is not hearsay necessarily requires the rejection of defendant's confrontation claims."

State v. Ortiz-Zape, 743 S.E.2d 156, 156-173 (N.C. 2013) – "consistent with the Confrontation Clause, if 'of a type reasonably relied upon by experts in the particular field,' N.C. R. Evid. 703, raw data generated by a machine may be admitted for the purpose of showing the basis of an expert's opinion."

State v. Brent, 743 S.E.2d 152 (N.C. 2013) – "machine-generated raw data, if of a type reasonably relied upon by experts in the field, may be admitted to show the basis of an expert's opinion."

Young v. United States, 63 A.3d 1033, 1035-1049 (D.C. 2013) – "We emphasize, however, that it is too simplistic to say the DNA profiles and the RMP printout were not hearsay because they were 'nothing more than raw data produced by a machine.' ... In the present case, the DNA profiles and, perhaps, the PopStats printout, do not stand on their own but, instead, have meaning because they amount to a communication by the scientists who produced them—the assertion,

essentially, that the scientists generated these specific results by properly performing certain tests and procedures on particular, uncorrupted evidence and correctly recording the outcomes." – [NOTE: The ability of *Crawford* to cloud judges' mind is astonishing. It's just not true that a machine's printout contains a representation, or even an implied assertion, concerning the way the inputs were generated – by its nature, the printout is absolutely silent on the topic.]

People v. Steppe, 213 Cal. App. 4th 1116, 1118-1127 (Cal. App. 4th Dist. 2013) – "*Lopez* specifically held that a machine printout is not subject to confrontation analysis. Here, it was never established how the raw data was generated, or by whom. Defendant cites no authority that testimony concerning raw data, by an expert subject to cross-examination, violates the confrontation clause."

United States v. Merritt, __ M.J. __, 2012 CCA LEXIS 923, 15-16 (A.F.C.C.A. Dec. 14, 2012) – "[I]t is well-settled that under both the Confrontation Clause and the rules of evidence, machine-generated data and printouts are not statements and thus not hearsay - machines are not declarants - and such data is therefore not testimonial."

State v. Bolden, __ So.3d __, 2012 La. LEXIS 2894, 1-8 (La. Oct. 26, 2012) – after detailed examination of *Williams* – "In addition, as a matter of Louisiana law, the computer printouts of the profiles developed from the victims' samples by the two laboratories using the same software did not constitute statements of a declarant..."

State v. Lopez, 55 Cal. 4th 569, 286 P.3d 469, 147 Cal. Rptr. 3d 559 (Oct. 15, 2012) – "Not yet considered by the United States Supreme Court is whether the prosecution's use at trial of a machine printout violates a defendant's right to confront and cross-examine the machine's operator when, as here, the printout contains no statement from the operator attesting to the validity of the data shown. We agree with those federal appellate courts that have upheld the use of such printouts. [cites] Because, unlike a person, a machine cannot be cross-examined, here the prosecution's introduction into evidence of the machine-generated printouts shown in pages 2 through 6 of nontestifying analyst Peña's laboratory report did not implicate the Sixth Amendment's right to confrontation."

People v. Theis, 963 N.E.2d 378 (Ill. App. Ct. 2d Dist. 2011) – "A taped conversation is not hearsay; rather, it is a 'mechanical eavesdropper with an identity of its own, separate and apart from the voices recorded.'"

United States v. Summers, 666 F.3d 192, 195-205 (4th Cir. Md. 2011) – "The court in *Moon* held, in agreement with our decision in *United States v. Washington*, that pure instrument read-outs are not testimonial. [cites] [¶] Indeed, our *Washington* precedent controls the result in Summers's case. The numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine, are indistinguishable in character from the gas chromatograph data in *Washington* and the chromatograph and spectrometer results in *Moon* and *Turner*. ... The Supreme Court's decisions in *Melendez-Diaz* and in *Bullcoming* do not compel a different result. ... *Bullcoming* is distinguishable because it was patently not, as Justice Sotomayor stressed, a case contesting the Sixth Amendment implications of machine-generated results." – rejecting **Derr v. State, 422 Md. 211, 29 A.3d 533 (Md. 2011)** ("To the extent that *Derr* ascribes testimonial significance to machine-generated results ... we find its reasoning unpersuasive." – [NOTE: While the Supreme Court denied certiorari in *Summers*, it granted cert

in a case that did no more than cite to Summers as controlling authority, remanded it for reconsideration in light of Williams. *United States v. Shanton*, 462 Fed. Appx. 297 (4th Cir. Md., 2012), GVR'd by **Shanton v. United States**, 133 S. Ct. 181, 184 L. Ed. 2d 5 (2012).]

United States v. Wilson, 278 F.R.D. 145, 153 (D. Md. 2011) – dog sniff – "Ahorrio compares Camo [the dog] to a technician who reads results from a machine, but the machine is the more appropriate analogy to the dog. The 'technician' would be the dog's handler."

Commonwealth v. Sally, 20 Pa. D. & C.5th 428, 2011 Phila. Ct. Com. Pl. LEXIS 8, 1-25 (Pa. C.P. 2011) – "courts throughout the country have recognized that machine-generated data and printouts are not hearsay statements because machines are not declarants and their data and printouts are not statements. Therefore, machine-generated data and printouts are not testimonial hearsay."

United States v. Blazier, 69 M.J. 218, 220-227 (C.A.A.F. 2010) – "it is well-settled that under both the Confrontation Clause and the rules of evidence, machine-generated data and printouts are not statements and thus not hearsay -- machines are not declarants -- and such data is therefore not 'testimonial.'"

Cranston v. State, 936 N.E.2d 342 (Ind. Ct. App. 2010) – "A Datamaster evidence ticket is a mechanically-produced readout which cannot constitute 'testimonial hearsay' under Crawford..."

People v. Dinardo, 290 Mich. App. 280; 801 N.W.2d 73 (Mich. Ct. App. Oct. 12, 2010) – "The documents at issue in Melendez-Diaz, Payne, and Lonsby constituted testimonial hearsay precisely because they were all prepared by human analysts who recorded the results of various laboratory tests and set down their own conclusions in written form. Such human analysts were unquestionably "witnesses" within the meaning of the Sixth Amendment. In contrast, the Datamaster ticket at issue in this case was generated entirely by a machine without the input of any human analyst. No human analyst entered data into the Datamaster machine or recorded findings or conclusions on the Datamaster printout. Nor was any expert interpretation required for the Datamaster test results to be understood. ... The machine was the sole source of the test results, which spoke entirely for themselves. We agree with courts from other jurisdictions which have held that a machine is not a 'witness[]' in the constitutional sense, and that data automatically generated by a machine are accordingly nontestimonial in nature."

State v. Bullcoming, 2010-NMSC-007, 226 P.3d 1 (N.M. 2010), rev'd

Young v. State, 2009 WL 1384953 (Ind. App. May 18, 2009) (unpub) – store security officer observed shoplifter through surveillance camera, but video wasn't preserved – " Young turns Crawford on its head and essentially argues that his constitutional rights were violated because he was not allowed to "confront and cross-examine" the videotape--an inanimate object. ... the court has recognized the right to confront and cross-examine the laboratory technician whose statements were memorialized, but no analogous right to confront and cross-examine the technician's equipment has been upheld."

U.S. v. Crockett, 586 F.Supp.2d 877 (E.D. Mich. Nov 14, 2008) – cop stole cocaine from evidence room – chemist who tested substance now deceased – "Other courts have had no trouble concluding that readings from laboratory instruments implicate neither the hearsay rule

nor the Confrontation Clause. [cites] This Court agrees. The instrument readouts and printouts are not 'statements' within the meaning of the Federal Rule of Evidence 801(a), which defines the term to mean 'an oral or written assertion or ... nonverbal conduct of a person.' Fed.R.Evid. 801(a)"

City of Fargo v. Levine, 747 N.W.2d 130, 2008 ND 64 (N.D. Apr 17, 2008) – "[¶ 16] Levine claims the Intoxilyzer should be treated as a witness and examination of the source code should be a prerequisite for admission of the device's "testimony" or test results. This Court has not determined whether reports generated by laboratory equipment are testimonial under *Crawford*. [cite] ... While the machine may not be "cross-examined" directly, the defendant has the opportunity to cross-examine the "director or an employee of the state crime laboratory," who has been designated to speak to the accuracy of the test results."

State v. Chun, 194 N.J. 54, 943 A.2d 114+ (N.J. Mar 17, 2008) – result of breath test "comes, however, not from the mouth of a living witness, but from a machine. Surely the Founding Fathers did not envision the day when a device that cannot itself be cross-examined would be the equivalent of a witness."

U.S. v. Moon, 512 F.3d 359 (7th Cir. Jan 03, 2008), cert. denied, (Oct. 6, 2008) – opinion by Judge Easterbrook – "A physician may order a blood test for a patient and infer from the levels of sugar and insulin that the patient has diabetes. The physician's diagnosis is testimonial, but the lab's raw results are not, because data are not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone. If the readings are 'statements' by a 'witness against' the defendants, then the machine must be the declarant. Yet how could one cross-examine a gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests. That is one reason why Rule 703 provides that the expert's source materials need not be introduced or even admissible in evidence. The vital questions--was the lab work done properly? what do the readings mean?--can be put to the expert on the stand. The background data need not be presented to the jury."

State v. Ruggles, 214 Or.App. 612, 167 P.3d 471 (Or. App. Aug 29, 2007) – "OEC 801 indicates that hearsay is an out-of-court statement, offered for the truth of what it asserts, and made by a declarant--who must, by definition, be a person. OEC 801(2)." (quoting *State v. Weber*, 172 Or.App. 704, 709, 19 P.3d 378 (2001)) – statement by machine is not hearsay

U.S. v. Washington, 498 F.3d 225 (4th Cir. 2007), cert. denied, No. 07-8291 (June 29, 2009) – blood analysis – "[W]e reject the characterization of the raw data generated by the lab's machines as statements of the lab technicians who operated the machines. The raw data generated by the diagnostic machines are the 'statements' of the machines themselves, not their operators. But 'statements' made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause. ... Only a person may be a declarant and make a statement. ... In short, the raw data generated by the machines do not constitute 'statements,' and the machines are not 'declarants.'"

People v. Monsivais, 2007 WL 2391007 (Cal. App. 6 Dist. Aug 23, 2007) (unpub) – convenience store surveillance tape of robbery – "Because '[t]here was a technical issue,' the video was not available for trial." – but officer testified he had viewed the tape and recognized the defendant – "The 7-Eleven videotape was not a 'reconstruction' of the crime but was a

representation of the crime itself. The declarant, the tape, was authenticated by a participant in the robbery and competent secondary evidence of its content was available. It was, therefore, admissible as a hearsay exception as a matter of state law. ... Here, the statement, the tape, was not made in response to an 'interrogation'--there was not and could be no 'focused police questioning.' However, the tape was made to provide a record of an event ongoing when the tape was being recorded, and its primary purpose was to prove or establish the facts of the event it was recording for investigation and for possible use at a trial. (*Cage, supra*, 40 Cal.4th at p. 984.) In that sense the tape was 'testimonial.' ... Admission of secondary evidence of the tape under a recognized state exception to the hearsay rule did not deprive Amparo of his right to cross-examination and confrontation."

Child Abuse / Rape: Expert Bases Opinion on Another's Work

(category added December 2012)

(See also part 6, "Foundation / Preliminary Questions of Fact / Chain of Custody.")

People v. Huynh, 212 Cal. App. 4th 285, 315-321, 151 Cal. Rptr. 3d 170 (Cal. App. 4th Dist. 2012) – "Huynh contends the trial court violated his Sixth Amendment right to confront witnesses by allowing a nurse to testify about Jeremiah's sexual assault examination conducted by another nurse. The contention is without merit. ... At the time of trial, Danella Kawachi, the registered nurse who conducted a [**196] SART examination on Jeremiah on June 8, 2009, was unavailable because [*316] she was awaiting a heart transplant. The trial court, over the objection of Huynh, allowed the prosecution to present the testimony of Claire Nelli, a registered nurse who was Kawachi's supervisor and employer. ... Nelli is the owner of one of the SART facilities in San Diego and personally reviews all reports and photographs taken during examinations in her facility. ... During Nelli's testimony, she reviewed two photographs from the SART examination of Jeremiah's anus and rectum and stated her independent opinion—based on her experiences examining more than 1,000 anuses during the course of 2,000 SART examinations—that the photographs showed significant trauma to the anus. Nelli did not describe to the jury Kawachi's findings and opinions regarding the examination and Jeremiah's injuries. ... Nelli's testimony stating objective facts about the condition of Jeremiah's body—facts she derived from the photographs that Kawachi took during the SART examination—did not give Huynh the right to confront and cross-examine Kawachi."

Naquin v. State, __ So.3d __, 2012 Ala. Crim. App. LEXIS 116 (Ala. Crim. App. Dec. 14, 2012) – "Dr. Kirk testified the victim was examined at the SCAN clinic by Dr. Shriner. Because Dr. Shriner was 87 years old at the time of the trial, retired from the practice of medicine, and in poor health, he was unable to attend the trial. ... [B]ased on *Williams*, Dr. Kirk's testimony presenting her own independent opinion based on her review of the victim's file, which included Dr. Shriner's drawings and SCAN report, was properly admitted over Naquin's Confrontation Clause objection. ... The admission into evidence of Dr. Shriner's SCAN summary report was error. ... [I]t appears that the primary purpose of referring the victim for a second gynecological examination at the SCAN clinic was for a forensic or investigative purpose in preparation for Naquin's prosecution. ... Thus, we conclude that the SCAN report, at the very least, included testimonial statements. Therefore, its admission into evidence without redaction of the testimonial statements or without the defendant having an opportunity to cross-examine Dr. Shriner violated the Confrontation Clause."

Lab Reports and Expert Evidence Generally

Warning: *Melendez-Diaz* / *Bullcoming* / *Williams* may call the oldest cases into question.

People v. Barry, 2015 COA 4, 349 P.3d 1139 (Colo. App. January 29, 2015) – "¶ 75 Forensic lab reports are testimonial hearsay subject to Confrontation Clause requirements."

Molina v. State, 450 S.W.3d 540, 549-51 (Tex. App. 2014) – gunshot residue testing – "After independently analyzing gunshot residue reports prepared by others in his office, Davis testified that no gunshot residue was found on anyone in Vargas's car. ... Because Davis independently analyzed the data and offered his own opinions, testified at length and was cross-examined concerning the basis for his opinions, and was not merely relying on the written analysis of others, this case is distinguishable from *Bullcoming* and *Burch* and does not support a holding that admitting Davis's testimony violated the Confrontation Clause."

People v. Raucci, 109 A.D.3d 109, 968 N.Y.S.2d 211 (N.Y. App. Div. 3d Dep't 2013) – the mad bombing facilities director of Schenectady schools – "Defendant next contends that County Court erred in admitting into evidence a report prepared by an FBI forensic chemistry examiner, who opined as to the composition of six substances — three powder samples and three samples of an epoxy-type resin containing a fuse — that were recovered from, among other places, defendant's office [n. 8]. Specifically, defendant asserts that his right of confrontation was violated because the testifying analyst relied upon raw data compiled by another chemist working in the same lab, the latter of whom was not produced at trial. We do not agree. ... Although the analyst in question indeed based his opinion upon raw data that was generated — in part — by another chemist in the same lab, a review of the record makes clear that, among other things, the testifying analyst drew his own scientific conclusions from such data..."

United States v. Soto, 720 F.3d 51, 52-60 (1st Cir. Mass. 2013) – "Thus, it appears that six justices would find no Sixth Amendment violation when a second analyst retests evidence and testifies at trial about her conclusions about her independent examination. ... We do not interpret *Bullcoming* to mean that the agent who testifies against the defendant cannot know about another agent's prior examination or that agent's results when he conducts his examination."

State v. McLeod, 66 A.3d 1221 (N.H. 2013) – whether fire expert can base opinion on statements by since-deceased witness – "The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem. ... We agree with the proposition that the Confrontation Clause is not violated when an expert testifies regarding his or her independent judgment, even if that judgment is based upon inadmissible testimonial hearsay. ... the question is not whether an expert can explain his opinion in a manner that is independent from testimonial statements; rather, it is whether the expert brings his own independent judgment to bear on the facts before him. ... Thus, the Confrontation Clause does not prohibit them from testifying regarding their opinions, so long as they do not testify as to Walker's statements on direct examination."

State v. Anwar S., 141 Conn. App. 355, 61 A.3d 1129 (Conn. App. Ct. 2013) – tests revealed STD in abuse victim – "Our inquiry turns on the reasonable expectation of the laboratory analysts, who prepared the report, under the circumstances in this case. [cite] That the laboratory report also serves a forensic purpose is insufficient to render it testimonial. In fact, there is no requirement that the laboratory results serve exclusively a medical purpose, but instead *Davis* requires a primarily nonevidentiary purpose. ... The laboratory results submitted into evidence in this case are distinguishable from the aforementioned cases [*i.e.*, *Melendez-Diaz* and *Bullcoming*] in light of law enforcement's limited involvement in facilitating the testing. In the present case, the analysis was requested by Murphy, a medical staff member,ⁿ⁷ [*365] rather than a law enforcement officer.

United States v. Pablo, 696 F.3d 1280 (10th Cir. 2012) – "*Williams* does not appear necessarily to conflict with the 'parroting' precedent cited above, n.11 but it may add further limitations on the admissibility of testimony regarding the results of lab reports in some cases. This is because in *Williams*, five members of the Supreme Court n.12 concluded that the out-of-court statements in the report about which the witness testified were being offered for the truth of the matter asserted, even though the in-court witness perhaps was not merely 'parroting' out-of-court statements in a DNA analysis produced by someone else; but the witness was implicitly assuming the accuracy of those statements in her discussion of DNA matches that could be made based on that the results of that analysis."

State v. Sizemore, 2010 N.C. App. LEXIS 507 (N.C. Ct. App. Mar. 16, 2010) (unpub) – arson – "Where, as here, an 'underlying report' is used, not as proof of the matter asserted in the report, but as a basis for expert testimony, subject to cross-examination, the Confrontation Clause is not violated."

Commonwealth v. Beneche, 458 Mass. 61, 80-82, 933 N.E.2d 951 (Mass. 2010) – "Two criminalists with the Boston police department crime laboratory testified that the hair from the crime scene, along with a sample from Deane, had been sent for DNA testing to a Federal Bureau of Investigation laboratory in another State and that the laboratory had found that the hair found at the scene was "consistent with being the hair from Jessica Deane." This testimony was admitted in violation of the defendant's right to confrontation. See *Melendez-Diaz*..."

State v. Conley, 2010 N.C. App. LEXIS 58 (N.C. Ct. App. Jan. 19, 2010) (unpub) – but cited as authority in *State v. Brewington*, 693 S.E.2d 182 (N.C. Ct. App. May 18, 2010), and *Vann v. State*, 229 P.3d 197, 2010 Alas. App. LEXIS 43 (Alaska Ct. App. 2010) – "The substance of Agent Crawford's testimony supports two conclusions: (1) that the glass samples are consistent with each other, and (2) that the samples are consistent with the type of green glass found in cars. The above testimony demonstrates that these conclusions were not formed through any sort of independent review and analysis on the part of Agent Crawford as required under our holding in *Mobley*; rather, the record shows that Agent Crawford merely summarized Agent Flanagan's findings. Thus, we conclude that the trial court erred in admitting Agent Crawford's testimony under *Mobley* and *Melendez-Diaz*."

State v. Sizemore, 2010 N.C. App. LEXIS 507 (N.C. Ct. App. Mar. 16, 2010) (unpub) – "Special Agent John Bendure, a chemical analyst with the SBI crime laboratory, tested several items found in defendant's apartment for the presence of accelerants. Bendure died prior to defendant's trial and Charles McClelland, Jr., Special Agent-in-Charge of the SBI crime lab,

testified that Bendure's test results indicated the presence of gasoline and residual gasoline on the samples obtained from defendant's apartment. McClelland also gave his expert opinion that, based on all the information in the lab file as well as Bendure's report, each sample tested contained gasoline or residual gasoline. ... McClelland then gave his expert opinion that accelerants were present in the items found in defendant's apartment..." – no violation

State v. Weaver, 898 N.E.2d 1023, 178 Ohio App.3d 504, 2008-Ohio-5022 (Ohio App. 6 Dist. Sep 30, 2008) – Munchausen's Syndrome by Proxy case, mother accused of giving child syrup of ipecac repeatedly – two blood samples and one urine sample revealed ipecac markers – "{¶ 153} In our view, the issues presented under appellant's Assignment of Error No. III are controlled by the Ohio Supreme Court's decision in *State v. Crager*. The MEDTOX laboratory reports are not testimonial for purposes of the right to confront witnesses under *Crawford*..."

State v. Sizemore, 2008 WL 2968921 (N.C. App. Aug 05, 2008) (unpub) – arson – Defendant next argues that the trial court erred in allowing testimony regarding the contents of a report concerning scientific evidence from a State Bureau of Investigation agent different from the one who conducted the tests and compiled the report. ... The agent who testified as to the report testified that the deceased agent had created the report as part of his regular duties with the agency and in the ordinary course of agency business. [cite] [FN2]" – not testimonial

State v. Marroquin, 215 Or.App. 330, 168 P.3d 1246 (Or. App. Oct 03, 2007) – under Oregon Constitution, "admission of the laboratory report, without requiring the state to produce at trial the criminalist who prepared the report or to demonstrate that that person was unavailable, is plain error" – following *State v. Birchfield*, 342 Or. 624, 157 P.3d 216 (Or. 2007)

State v. Laturner, 38 Kan.App.2d 193, 163 P.3d 367 (Kan. App. Jul 27, 2007), review granted (Dec 18, 2007) – partially invaliding, on *Crawford* grounds, K.S.A.2006 Supp. 22-3437, which "permits the admission of a forensic lab report without the testimony of the technician who prepared it" – "The lab report challenged by Laturner is testimonial. ... The forensic scientist who prepared Laturner's lab report was a witness; the statements in her lab report were testimony; and she knew when preparing her report that it would be used by the State at Laturner's trial to prove he committed the crime of possessing methamphetamine." [NOTE: This analysis seems to depend entirely on the assumption that the technician prepared her report after she obtained the positive result, as opposed to documenting her work as she went.]

State v. Weaver, 733 N.W.2d 793 (Minn. App. Jul 03, 2007), review denied (Sep 18, 2007) – "The state has the burden to prove that the laboratory test results are not testimonial. *Caulfield*, 722 N.W.2d at 308. The critical determinative factor in assessing whether a statement is testimonial is whether it was "prepared for litigation." *Id.* at 309. [¶] Here, the laboratory test results were obtained at the request of the medical examiner, Dr. Roe, during an autopsy that occurred in the course of a homicide investigation. The results were specifically relied on by Dr. Roe in reaching her conclusion on the cause of death. And the information was relayed to the jury in lieu of testimony at trial. *See id.* (concluding that BCA laboratory report 'bears characteristics of each of the three generic descriptions' of testimonial evidence offered by *Crawford*). ... Dr. Roe's testimony regarding the laboratory test results was introduced as a basis for her medical opinion that the cause of death was carbon-monoxide poisoning. We therefore conclude that the laboratory test results admitted through the testimony of Dr. Roe were testimonial in nature."

People v. Geier, 41 Cal.4th 555, 161 P.3d 104, 61 Cal.Rptr.3d 580 (Cal. 2007), cert. denied, No. 07-7770 (June 29, 2009) – "An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*."

– "There is no question that the DNA report was requested by a police agency. Even if the employees of Cellmark are not themselves members of law enforcement, they were paid to do work as part of a government investigation; furthermore, it could reasonably have been anticipated that the report might be used at a later criminal trial. [Biologist] Yates's observations, however, constitute a contemporaneous recordation of observable events rather than the documentation of past events. That is, she recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks. "Therefore, when [she] made these observations, [she]--like the declarant reporting an emergency in Davis--[was] 'not acting as [a] witness []; and [was] 'not testifying.' " (*United States v. Ellis, supra*, 460 F.3d at pp. 926-927.)"

People v. Flournoy, 2007 WL 1830806 (Cal. App. 4 Dist. Jun 27, 2007) (unpub) – "[T]he court properly admitted the DNA report prepared by Dutra as it was subject to the business records exception to the hearsay rule. Rogala testified that all criminalists in the crime lab followed the same method--a computer program--to determine population frequencies. Dutra performed the DNA profiling of the sample furnished by Flournoy, and Rogala performed a technical review of his work. Based upon that review, she was satisfied that Dutra followed the proper protocols and procedures. As such, Rogala provided an adequate foundation to render the DNA report subject to the business records exception to the hearsay rule."

Psychiatric Evidence

(category added March 2-14)

People v. Demagall, 114 A.D.3d 189, 978 N.Y.S.2d 416, 424 (N.Y. App. Div. 3d Dept. 2014)

– defense was insanity – state's testifying psychiatrist, Tuckman, recited findings of a second, non-testifying psychiatrist, Al-Tariq – "Defendant failed to preserve his related claim that the admission of Al-Tariq's statements through Tuckman's testimony violated defendant's rights under the Confrontation Clause [cites]. Were this issue before us, we would agree with such claim [cites]."

Piecing Together Bits of *Williams* to Construct a Rule

(category added September 2012)

One of the oddities of *Williams* is that its constitutional command can be complied with only by meeting the standards established by any two of its three opinions, even though none of the justices thinks meeting two different tests is constitutionally required.

Carrington v. D.C., 77 A.3d 999, 1001-07 (D.C. App. 2013), cert. denied, 134 S. Ct. 1353 (U.S. 2014) – " It is logically coherent and faithful to the Justices' expressed views to understand *Williams* as establishing—at a minimum—a sufficient, if not a necessary criterion: a statement is

testimonial at least when it passes the basic evidentiary purpose test plus either the plurality's targeted accusation requirement or Justice Thomas' formality criterion. ... [A]t least five Justices would find that admitting testimonial hearsay for the limited, non-hearsay purpose of evaluating the basis of the expert's opinion does not cure the Confrontation Clause violation."

Derr v. State, 73 A.3d 254, 258-73 (Md. 2013), cert. pet. filed (Nov. 20, 2013) – "requiring that statements be, at a minimum, formalized to be testimonial is the 'position' taken by the five Justices who agreed that the Confrontation Clause was not violated 'on the narrowest grounds.'" [NOTE: Judge McDonald, concurring, points out that this is "the narrowest definition of 'testimonial hearsay'" and not necessarily "the narrowest 'holding.'"]

State v. Deadwiller, 834 N.W.2d 362, 364-84 (Wis. 2013) – "¶ 31 "We need not find a legal opinion which a majority joined, but merely 'a legal standard which, *161 when applied, will necessarily produce results with which a majority of the Court from that case would agree.' " *People v. Dungo*, 55 Cal.4th 608, 147 Cal.Rptr.3d 527, 286 P.3d 442, 455 (2012) (Chin, J., concurring) (citation omitted). Therefore, "we must identify and apply a test which satisfies the requirements of both Justice [Alito's] plurality opinion and Justice [Thomas's] concurrence.""

Commonwealth v. Greineder, 464 Mass. 580, 984 N.E.2d 804 (Mass. 2013) – "Importantly, however, the [*Williams*] dissent concluded: 'There was nothing wrong with [the expert's] testifying that two DNA profiles -- the one shown in the . . . report and the one derived from [the defendant's] blood -- matched each other; that was a straightforward application of [the expert's] expertise. Similarly, [the expert] could have added that if the . . . report resulted from scientifically sound testing of [a DNA sample recovered from the victim], then it would link [the defendant] to the assault. What [the expert] could not do was what she did: indicate that the . . . report was produced in [a particular] way . . . ' *Id.* at 2270 (Kagan, J., dissenting). Thus, no member of the Supreme Court plainly concluded that the expert opinion testimony was improper."

People v. Negron, 984 N.E.2d 491, 2012 IL App (1st) 101194, 368 Ill. Dec. 545 (Ill. App. Ct. 1st Dist. 2012), modified upon denial of rehearing (Jan. 31, 2013) – DNA – "[¶ 61] Thus, it appears that the instant case would satisfy both the *Williams* plurality's primary purpose test and the *Williams* dissent's primary purpose test."

United States v. Shanton, 2013 U.S. App. LEXIS 4447 (4th Cir. Mar. 4, 2013), on remand from SCOTUS, 133 S. Ct. 181, 184 L. Ed. 2d 5 (2012) (unpub) – "If this case were to go before the Supreme Court again, we believe five justices would affirm: Justice Thomas on the ground that the statements at issue were not testimonial and Justice Alito, along with the three justices who joined his plurality opinion, on the ground that the statements were not admitted for the truth of the matter asserted."

United States v. Pablo, 696 F.3d 1280 (10th Cir. 2012) – "[W]e cannot say the district court plainly erred in admitting Ms. Snider's testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission. On the contrary, it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in *Williams*. The four-Justice plurality in *Williams* likely would determine that Ms. Snider's testimony was not offered for the truth of the matter asserted in Ms. Dick's report, but rather was offered for the separate purpose of evaluating Ms.

Snider's credibility as an expert witness per Fed. R. Evid. 703; and therefore that the admission of her testimony did not offend the Confrontation Clause. [cite] Meanwhile, although Justice Thomas likely would conclude that [*1292] the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admissible because the appellate record does not show that the report was certified, sworn to, or otherwise imbued with the requisite 'solemnity' required for the statements therein to be considered "'testimonial" for purposes of the Confrontation Clause.'"

People v. Nunley, 491 Mich. 686, 821 N.W.2d 642 (Mich. 2012) – "We note that our analysis is consistent with the reasoning of both the lead opinion and the dissenting opinion from the United States Supreme Court's recent plurality decision in *Williams*."

State v. Dungo, 55 Cal.4th 608, 286 P.3d 442 (Cal. 2012) (Chin, J., concurring) – "Are we to discern no law of the land from the *Williams* case? I do not believe so. ... [A] majority of the *Williams* court would find no violation of the confrontation clause whenever there was no violation under the plurality *and* under Justice Thomas's reasoning." (italics in original) – [NOTE: Three other justices joined this concurrence.]

Waiver / Forfeiture by Failure to Comply with Demand Statute or Rule

***Melendez-Diaz* states in dicta that demand statutes or rules are constitutional (pdf slip op. at 20-21), so long as they do not require the defense to subpoena the witness (pdf slip op. at 18-19).**

State v. Whittington, 753 S.E.2d 320, 324 (N.C. 2014) – "Accordingly, we conclude that *Melendez-Diaz* had no impact on the continuing vitality of subsection 90-95(g). When the State satisfies the requirements of subdivision 90-95(g)(1) and the defendant fails to file a timely written objection, a valid waiver of the defendant's constitutional right to confront the analyst occurs."

State v. Burrow, 742 S.E.2d 619, 619-622 (N.C. Ct. App. 2013) – "Because notice was given under N.C. Gen. Stat. § 90-95(g) that the State would introduce the SBI report without evidence from the analyst, and because there was no objection by Defendant to the introduction of that report, a new trial is no longer appropriate."

State v. Whittington, 728 S.E.2d 385, 387 (N.C. Ct. App. 2012), rev'd, 753 S.E.2d 320 (2014)

State v. Simmons, 78 So. 3d 743, 742-748 (La. 2012) – "respondent waived his Sixth Amendment right of confrontation by failing to timely request a subpoena for the analyst who performed the test on the rocks of cocaine."

Jones v. State, 2011 Ark. App. 683, 5-7 (Ark. Ct. App. 2011) (unpub) – "Here, appellant admittedly failed to give the required notice requesting the analyst's presence. The analyst's name appeared on the prosecution's witness list, and defense counsel assumed she would testify at trial. On the day of trial, the defense learned that the analyst was on maternity leave and would not be called as a witness by the prosecution. Appellant cites no authority for his argument that he was

excused from the notice requirement because the analyst appeared on the prosecution's witness list."

State v. Schroeder, 164 Wn. App. 164, 165-169, 262 P.3d 1237 (Wash. Ct. App. 2011) –

"'The states are allowed, as part of their procedural rules, to require that the defendant demand the presence of the expert in a timely fashion.' Melendez-Diaz, 124 S. Ct. at 2541. Washington has done so in CrR 6.13(b). Mr. Schroeder never demanded that the analyst testify at trial. For this reason, also, he waived his confrontation rights on this issue."

State v. McElveen, 73 So. 3d 1033, 1096-1100 (La.App. 4 Cir. 2011) – "Louisiana provides a notice-and-procedure statute (La. R. S. 15:499, et seq.); both *Melendez-Diaz* and *Bullcoming* recognize and sanction such state statutes; and the Louisiana Supreme Court has declared Louisiana's notice-and-demand statute, albeit pre-2010, which underwent minor changes in 2010, acceptable. We do not find that the trial court violated the defendant's confrontation rights."

Moore v. Ohio, 2010 Ohio 1569 (Ohio Ct. App., Cuyahoga County Apr. 8, 2010) (on remand from SCOTUS) – R.C. 2925.51(C) is "precisely the type of 'notice and demand' statute addressed in *Melendez-Diaz*."

State v. Steele, 689 S.E.2d 155, 158 (N.C. Ct. App. 2010) – "defendant waived his right to confrontation by failing to timely object to the challenged evidence under the applicable notice statute."

Randolph v. State, 2010 OK CR 2, 231 P.3d 672 (Okla. Crim. App. 2010) – "If counsel truly intended to exercise Appellant's rights to confront and cross-examine the witness, rather than merely intoning a spurious objection to the laboratory report, the statute provided a clear procedure for asserting those rights. Appellant ignored the statutory procedure and waived the right to confrontation."

State v. Nelson, 2009 WL 366056, 2009 N.J. Super. Unpub. LEXIS 193 (N.J. Super.A.D. Feb 17, 2009) – "At the core of this argument is defendant's contention that his non-compliance with the procedural requirements set forth in N.J.S.A. 2C:35-19(c) is not a waiver of his Sixth Amendment right of cross-examination of the chemist, a right defendant essentially alleges he is entitled to invoke at any time, including as he did here, at the time of trial. We reject this contention."

State v. Pasqualone, __ N.E.2d __, 2009 WL 250473, 2009-Ohio-315 (Ohio Feb 04, 2009) – cocaine – "We acknowledge that our decision in *State v. Crager*, ... strongly supports the argument that the report is not testimonial. [FN4] However, based on our resolution of the state's second proposition of law, we do not address this issue. We determine that regardless of whether the report is testimonial, Pasqualone validly waived his right to cross-examine the analyst by failing to exercise the opportunity to demand the analyst's testimony afforded by R.C. 2925.51." – lawyer's waiver is binding on client

Johnson v. State, 2009 WL 102930 (Tex. App.-Amarillo Jan 15, 2009) (unpub) – "By failing to timely file a written objection, Appellant has not preserved his contention for review. [cite] *See also Deener v. State*, 214 S.W.3d 522, 526 (Tex.App.-Dallas 2007, pet. ref'd) (concluding

that by failing to file a timely written objection to a certificate of analysis, the defendant forfeited his con-stitutional right to confront witnesses against him under *Crawford*...)"

Culberson v. State, 2008 WL 1765132 (Tex. App.-Eastland Apr 17, 2008) (unpub) – "Because the right of confrontation is a forfeitable right, Articles 38.41 and 38.42 [governing use of certificates of analysis at trial] are not facially unconstitutional."

Ki-Ho Min v. Com., 2008 WL 762192, *1+ (Va.App. Mar 25, 2008) (unpub) – DWI – "On appeal, appellant contends the trial court erred in admitting a certificate of blood alcohol analysis (BAC). ... In considering the issues he raises, we assume without deciding that the BAC represents testimonial evidence. ... Because appellant did not subpoena the booking tech, he waived his opportunity to cross-examine potential witnesses. The trial court therefore did not violate his constitutional rights when it admitted the BAC in accordance with the terms of Code § 19.2-187."

State v. Urbina, 2008 WL 623944, 2008-Ohio-1013 (Ohio App. 3 Dist. Mar 10, 2008) (unpub) – finding notice of right to subpoena chemist that does not inform the defendant of the consequences of failing to do so is inadequate to prove waiver – but error harmless

Hinojos-Mendoza v. People, 169 P.3d 662 (Colo. Sep 10, 2007),), cert. denied, No. 07-9369 (June 29, 2009)

State v. Campbell, 2006 ND 168, 2006 ND 168 (N.D. 2006), cert. denied, 127 S.Ct. 1150, 166 L.Ed.2d 993 (Jan 22, 2007) - "In these consolidated cases, Thomas Pinks appeals from a judgment of conviction for being in actual physical control of an automobile while under the influence of alcohol or other drugs and possession of marijuana paraphernalia, and Billie Campbell appeals from a judgment of conviction for possession of marijuana and marijuana paraphernalia. Both claim the admission of a state crime laboratory report violated their Sixth Amendment right to confrontation because the report was a testimonial statement under the holding of *Crawford*. Since the resolution of this case makes it unnecessary to decide whether the report is a testimonial statement, we determine the prudent course is not to decide an unnecessary question. Because Pinks and Campbell failed to avail themselves of their opportunity to subpoena the author of the state crime laboratory report, they have waived any potential Confrontation Clause violation."

McKeel v. Commonwealth, 2006 Va. App. LEXIS 575 (Va. Ct. App. 2006) – "Defendant waived her right to confrontation under U.S. Const. amend. VI by failing to avail herself of her statutory right under Va. Code Ann. § 19.2-187.1 to subpoena the operator of the breath test in her trial. Therefore, it was proper to admit the certificate of the blood alcohol analysis without live testimony of the operator where the Commonwealth complied with the requirements of Va. Code Ann. §§ 18.2-268.9 and 19.2-187."

State v. Kemper, 2004 Tenn. Crim. App. LEXIS 845, 2004 WL 2218471 (Tenn Crim App 2004), appeal denied (Jan. 24, 2005) - "Defendant argued that the trial court erroneously admitted the results of his blood alcohol test because the accompanying certificate bore a rubber-stamped signature. The appellate court determined that an accused waived the right of confrontation if the laboratory technician was not subpoenaed, or was not called to the witness stand by either party. Defendant waived any right of confrontation by his failure to subpoena the

Tennessee Bureau of Investigation (TBI) testing scientist, as a witness at trial. Defendant did not contend that the designated representative of the TBI, whose signature appeared on the certificate, was not the officially designated representative and did not insist that his presence was necessary for trial. There was nothing to contradict the implicit adoption of the facsimile by the representative as his signature. The reasonable inference was that his signature, as stamped, was authorized by the Director of the TBI.”

Constitutional Validity of Demand Statute or Rule

***Melendez-Diaz* holds that demand statutes or rules are constitutional (slip op. at 20-21), so long as they do not require the defense to subpoena the witness (slip op. at 18-19).**

City of Reno v. Howard, 318 P.3d 1063 (Nev. 2014) – “we now hold that NRS 50.315(6) impermissibly burdens confrontation rights because, unlike a “simple” notice-and-demand statute that merely requires a defendant's timely objection, *1067 NRS 50.315(6) requires a defendant to establish a substantial and bona fide dispute regarding the facts in the declaration in order to exercise his confrontation rights. A defendant who cannot make this showing will suffer a forced waiver of his confrontation rights despite a timely attempt to invoke them. Because such an additional burden is impermissible according to the U.S. Supreme Court's decision in *Melendez-Diaz*, we conclude that NRS 50.315(6) violates the Confrontation Clause.”

State v. Kinslow, 257 Ore. App. 295, 304 P.3d 801 (Or. Ct. App. 2013) – “We have previously rejected an argument under the Sixth Amendment that ‘the provisions of ORS 475.235(4) and (5) unconstitutionally shift the burden to defendant...’ ... We likewise reject defendant's challenge under the state constitution.”

State v. Simmons, 78 So. 3d 743, 742-748 (La. 2012) – “the court of appeal acknowledged that this Court, *State v. Cunningham*, [cite], the First Circuit, *State v. Beauchamp*, [cite] and the Second Circuit, *State v. Dukes*, [cite], had reached the opposite view of whether the statutory procedure set forth in La.R.S. 15:500-501 raised substantial confrontation issues. The Fourth Circuit declined to follow the reasoning in *Beauchamp* and *Dukes*, and further declined to follow this Court's holding in *Cunningham* because our decision came well before the Supreme Court rendered the opinion in *Melendez-Diaz* ..., which, in the court of appeal's view, invalidated this state's procedure as it existed at the time of respondent's trial. ... The First and Second Circuits reached the correct conclusion that our decision in *Cunningham* is consistent with, and not superseded by, *Melendez-Diaz*.”

State v. Glass, 246 Ore. App. 698, 700-701, 268 P.3d 689 (Or. Ct. App. 2011) – “Defendant argued in the trial court, and asserts on appeal, that the provisions of ORS 475.235(4) and (5) unconstitutionally shift the burden to defendant by requiring defendant, rather than the state, to secure the testimony of a state's witness. That [**691] argument was addressed—and rejected—by the Court in *Melendez-Diaz*.”

State v. Simmons, 67 So. 3d 525, 526-535 (La.App. 4 Cir. 2011), rev'd State v. Simmons, 78 So. 3d 743, 742-748 (La. 2012) –

People v. Martinez, 254 P.3d 1198, 1200-1202 (Colo. Ct. App. 2011) – "Defendant contends that the rationale of *Hinojos-Mendoza* may no longer apply after the decision by the United States Supreme Court in *Melendez-Diaz* [cite], because, according to defendant, the Supreme Court 'seemed to suggest that a statute requiring a defendant to demand his right of confrontation pretrial after notice did not violate the Confrontation Clause, but that actually requiring him to subpoena the adverse witness would.' We disagree with the hypothetical suggestion attributed to the Supreme Court."

Cropper v. People, 251 P.3d 434, 434-442 (Colo. 2011) – "In this case, we review the constitutionality of section 16-3-309(5), C.R.S. (2010), as applied to petitioner, David Lee Cropper. n1 We hold that, based on *Hinojos-Mendoza*... Cropper waived his confrontation rights and, therefore, the statute was constitutional as applied. ... We hold that section 16-3-309(5) is constitutional as it was applied to Cropper."

State v. Dukes, 57 So. 3d 489 (La.App. 2 Cir. 2011) – finding Louisiana's version valid – "Unlike the scenario in *Melendez-Diaz*, however, the state's duty under the Confrontation Clause is not converted into the defendant's privilege under the Compulsory Process Clause. [*496] Under the Massachusetts law, the state's use of the certificate of analysis was not dependent on the defendant's failure to object; the state apparently could use the certificate as prima facie proof of its contents regardless of whether the defendant subpoenaed the analyst. In Louisiana, the mere request for a subpoena by the defendant five days prior to trial rendered the certificate useless to the state as prima facie proof of its contents or of proper custody. La. R.S. 15:501(B)(1). Accordingly, an unavailable or uncooperative analyst becomes the state's problem in meeting its burden of proof and not the defendant's in exercising his right to confrontation."

Cypress v. Commonwealth, 699 S.E.2d 206 (Va. 2010) – "Former Code §§ 19.2-187 and -187.1 are not analogous to the type of permissible "notice-and-demand" statutes discussed in *Melendez-Diaz*. ... Thus, in light of the decision in *Melendez-Diaz*, we now hold that the procedure established in former Code § 19.2-187.1 did not adequately safeguard a criminal defendant's rights under the Confrontation Clause. Accordingly, in both *Cypress*' and *Briscoe*'s trials, the admission into evidence of the certificates of analysis at issue without testimony from the forensic analysts violated the Confrontation Clause."

State v. Beauchamp, 49 So. 3d 5 (La.App. 1 Cir. Sept. 10, 2010) – "Louisiana Revised Statutes 15:501 is precisely the kind of "notice-and-demand" statute that the court in *Melendez-Diaz* recognized to be permissible under the Confrontation Clause."

State v. Murphy, 42 Kan. App. 2d 933 (Kan. Ct. App. 2009) – "Thus, under *Laturner*, the objection, timing, and waiver provisions of K.S.A. 22-3437(3) remain in effect. The defendant here [*942] did not properly object under these provisions to the admission of the lab report within 10 days of receiving the State's notice of intent to proffer and therefore he waived his objection to the admission of the lab report. Under *Laturner*, the district court did not err in overruling the defendant's objection for being untimely raised under K.S.A. 22-3437(3)."

State v. Laturner, 289 Kan. 727, 221 P.3d 525 (Kan. 2009) – " it is combination of the two sentences--one requiring the district judge to rule on the objection and the other stating that the certificate shall be admitted unless it meets the narrowly defined, permissible objection--that imposes too heavy a burden on a defendant's rights and causes us to conclude K.S.A. 22-3437(3)

is unconstitutional when applied in a criminal case. ... In summary, in any case where the right of confrontation arises under the Sixth Amendment to the United States Constitution, we sever the third and fourth sentences of K.S.A. 22-3437(3)..."

Magruder v. Commonwealth, 275 Va. 283, 657 S.E.2d 113 (Va. Feb 29, 2008), cert. pet. filed (Jun 06, 2008) – drug analyses – "Even if we assume the certificates in the cases at bar are testimonial, the decision in *Crawford* did not address the issues before us, i.e., whether a prescribed statutory demand procedure adequately protects a criminal defendant's rights under the Confrontation Clause and whether failure to follow that procedure waives the right to confront a particular witness. ... [I]t is undisputed that a criminal defendant can waive the right to confrontation. [cites] The decision in *Crawford* did not alter that fact. ... 'For certain fundamental rights, the defendant must personally make an informed waiver. [cites] For other rights, however, waiver may be effected by action of counsel. ... Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.' ... Therefore, we hold that the Court of Appeals did not err in affirming the judgments of the circuit courts admitting into evidence the respective certificates of analysis at issue in these appeals." [NOTE: Three justices dissented. Both opinions contain numerous citations.]

McCray v. Com., 2008 WL 168929 (Va. App. Jan 22, 2008) (unpub) – "Prior to trial, the Commonwealth timely filed, and caused to be mailed or delivered, a copy of a certificate of analysis, as required by Code § 19.2-187. [FN1] McCray did not avail himself of the right to compel the attendance at trial of the person who performed the analysis, as granted by Code § 19.2-187.1. ... [Court assumes without deciding the certificate of analysis is testimonial.] ... [T]he defendant in this case gave the Commonwealth no notice of his desire to examine the scientist who prepared the certificate of analysis before the day of trial. He therefore waived his Confrontation Clause rights."

U.S. v. Moon, 512 F.3d 359 (7th Cir. Jan 03, 2008), cert. denied, (Oct. 6, 2008)– opinion by Judge Easterbrook – "*Crawford* ... holds that the Confrontation Clause entitles defendants in criminal cases to block the use of testimonial statements by persons who are not available for cross-examination at trial. Phrasing *Crawford's* rule as an entitlement, rather than an unconditional command to the court, is important. Hearsay usually is weaker than live testimony, and defendants may prefer the hearsay version rather than making an objection that would compel the prosecution to produce a stronger witness. ... A defendant who sincerely wants live testimony should make the demand, so that the declarant can be produced. The lack of a demand for testimony by an available declarant leads to the conclusion that the appellate argument is strategic rather than sincere." [NOTE: This is dicta. On the other hand, the author is a particularly well-known judge.]

State v. Pasqualone, 2007 WL 4376223, *4+, 2007-Ohio-6725, 6725+ (Ohio App. 11 Dist. Dec 14, 2007) (unpub) – "The Third District held that 'a criminal defendant can waive his confrontation rights by failing to demand the testimony of the laboratory technicians under R.C. 2925.51(C).' [cite] Other courts have also held that a defendant can waive his confrontation rights by failing to demand the testimony of the analyst. ... [But] the appropriate question is whether an attorney can waive confrontation rights on behalf of his or her client. For the following reasons, we answer this question in the negative." – defendant must *personally* choose not to call the analyst for waiver to be effective [NOTE: Shortly after this case, and *Reuschling* and *Fulk*, were decided, the Ohio Supreme Court issued its opinion in *State v. Crager*, 116 Ohio

St.3d 369, 879 N.E.2d 745, 2007-Ohio-6840 (Ohio Dec 27, 2007), which may significantly alter the analysis.]

State v. Reuschling, 2007 WL 4376219, 2007-Ohio-6726 (Ohio App. 11 Dist. Dec 14, 2007) (unpub) – "{¶ 13} Pursuant to R.C. 2925.51(C), the accused has the right to demand the testimony of the analyst by serving such demand on the prosecuting attorney within seven days of the accused's or his attorney's receipt of the laboratory report. Reuschling did not demand the analyst's testimony, and the analyst's report identifying the 13.97 grams of methamphetamine was admitted into evidence. ... {¶ 38} In this matter, Reuschling waived his right to confront the laboratory analyst. This occurred as a result of Reuschling's trial strategy. His trial strategy regarding the possession of methamphetamine charge was to admit the substance in his mouth was methamphetamine, but to argue that he was permitted to possess the substance because he was working with law enforcement in an undercover operation. Reuschling personally agreed to this trial strategy." – waiver effective [NOTE: Shortly after this case, and *Pasqualone* and *Fulk*, were decided, the Ohio Supreme Court issued its opinion in *State v. Crager*, 116 Ohio St.3d 369, 879 N.E.2d 745, 2007-Ohio-6840 (Ohio Dec 27, 2007), which may significantly alter the analysis.]

State v. Caulfield, 722 N.W.2d 304 (Minn. 2006) – cocaine case – "any statute purporting to admit testimonial reports without the testimony of the preparer must provide adequate notice to the defendant of the contents of the report and the likely consequences of his failure to request the testimony of the preparer. Otherwise, there is no reasonable basis to conclude that the defendant's failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his confrontation rights. [¶] Because section 634.15 does not require adequate notice to the defendant, we conclude that it violates the Confrontation Clause. And because the record does not show that the state did otherwise provide adequate notice to Caulfield, we conclude that the admission of the BCA lab report against him was error."



Part 16: Miscellaneous: Drunk Driving, Drugs, Vice, Motor Vehicle Offenses, Etc.

Anonymous and Citizen Tips

State v. Enright, 416 N.J. Super. 391, 4 A.3d 1027 (App. Div. Aug. 19, 2010) – "The tip in this case was from an off-duty law enforcement officer who was driving along defendant's route and observed his erratic driving. It was not a statement made during police interrogation to serve a future prosecution. The tip was given to assist the local police in meeting an ongoing emergency, an intoxicated driver on the road. Defendant's right to confrontation was not violated by admission of the off-duty officer's tip."

State v. Turner, 2007 WL 2103025 (Minn. App. Jul 24, 2007) (unpub) – "Turner argues that the deputy's testimony that the 911 caller said that a drunk driver was driving the minivan was inadmissible hearsay pointing directly to Turner's guilt of the offense of driving while impaired. [FN 1: Because, as explained below, we conclude that the statement was not hearsay, it is not testimonial and *Crawford* is not implicated. ...] [¶] 'In criminal cases, evidence that an arresting or investigating officer received a tip for purposes of explaining why the police conducted surveillance is not hearsay.' *Litzau*, 650 N.W.2d at 182. Because the challenged statement in this case was offered to explain why the deputy's attention was focused on Turner's vehicle, the statement is plainly not hearsay."

State v. Carpenter, 2006 Ohio 4296 (Ohio Ct. App. 2006) – An anonymous tip regarding a drug transaction was a non-testimonial statement when testified to by a police officer to show what action he took.

People v. Sanchez, 138 Cal. App. 4th 1085 (Cal. App. 2d Dist. 2006) – "Defendant caused a fatal motor vehicle accident when he was driving at extremely high speed while intoxicated. *** The admission of the 911 tapes and transcripts did not violate defendant's confrontation rights because the calls, which were made to alert authorities of the need to aid the accident victims, were spontaneous statements and were not testimonial in nature."

Waltmon v. State, 2004 Tex. App. LEXIS 7285 (Tex. App. El Paso 2004) – "The fact that the anonymous caller reported Appellant's erratic driving did not amount to a testimonial statement as contemplated by *Crawford*. The tipster's statement was not admitted to show that Appellant was indeed driving while intoxicated but to show how the officers happened to be in the area."

Packaging

State v. Anderson, 220 S.W.3d 454 (Mo. App. 2007) – in concurring opinion: "Several courts have allowed similar packaging to be admitted in meth precursor prosecutions, and one of those also considered a Confrontation Clause challenge. 'It seems clear to us that the author of the label on the non-prescription, over-the-counter medication at issue here, was not a "witness against the accused." Thus, the statements on the labels, though hearsay, would nevertheless fall within *Crawford's* discussion of non-testimonial hearsay.' *Burchfield v. State*, 892 So.2d 191, 202 (Miss.2004). As such, the non-testimonial hearsay was exempt from Confrontation Clause challenge. *Id.* The same reasoning applies here." (Scott, J., concurring; footnotes omitted).

Burchfield v. State, 892 So.2d 191 (Miss. 2004) – statements on Sudafed labels not testimonial

Driving Record / Vehicle Registration / License and License Revocation (see also Public Records)

State v. Velykoretskykh, 268 Or. App. 706, 343 P.3d 272 (2015) – "the notice of suspension in the present case, like the return of service in *Copeland*, was not testimonial. ... the trial court did not err in allowing the state to enter into evidence the notice of suspension."

State v. Soule, 134 Haw. 465, 466-68, 342 P.3d 884, 885-87 (Ct. App. 2015), as corrected (Feb. 18, 2015) – "Windrath, the person who signed the Exhibit 2 letter, certified that Soule did not have a valid driver's license on the 'violation date.' It appears that this certification was based on the absence of records showing that Soule had a driver's licence. ... We conclude that Exhibit 2 was testimonial..."

People v. Smith, 118 A.D.3d 920, 988 N.Y.S.2d 233 (N.Y. App. Div. 2d Dept. 2014) – defendant objected to admission of "his Department of Motor Vehicles driving abstract, which indicated a prior conviction of driving while intoxicated and a license suspension. The abstract was admissible pursuant to the business records exception to the hearsay rule [cites] and did not violate the defendant's constitutional right to confrontation [cites]."

Commonwealth v. Bigley, 85 Mass. App. Ct. 507, 11 N.E.3d 1086 (Mass. App. 2014) – "He argues that the fifth exhibit, a certified copy of his RMV record, was inadmissible in violation of his rights pursuant to the confrontation clause under the rationale of *516 *Commonwealth v. Ellis*, ... However, *Ellis* makes clear that there is no *Melendez-Diaz* error in the admission of RMV records 'kept in the ordinary course of business.' [cite] The fact that the records were requested in anticipation of trial is irrelevant, as they were 'maintained independent of any prosecutorial purpose.'"

Boone v. Commonwealth, 63 Va.App. 383, 758 S.E.2d 72 (Va. App. 2014) – "This Court has previously determined that a DMV transcript is not 'testimonial.' *Jasper*... While our analyses in *Jasper* and *Michels* preceded *Melendez-Diaz*, we conclude that *Melendez-Diaz* does not demand a different *76 result regarding the use of a DMV transcript as evidence at trial. ... The DMV transcript is a printout of information maintained in the DMV database for the purpose of administration of the Motor Vehicle Code... While the printout of the transcript was requested for use at Boone's trial, as we said in *Jasper*, the underlying records certified by a state official were not created in anticipation of litigation. ... therefore, the DMV transcript was not testimonial..."

State v. Kennedy, 846 N.W.2d 517 (Iowa 2014) – "We hold the rulings in *Melendez-Diaz* and *Bullcoming* do not overrule or undermine our decision in *Shipley*. A certified abstract of a driving record is significantly different from a forensic report analyzing drugs or blood alcohol content. ... Accordingly, the certified abstract of Kennedy's driving record, the first two pages of the exhibit, is not testimonial and the admission of these two pages did not violate the Confrontation Clauses..."

State v. Rainey, 327 P.3d 56, 180 Wash.App. 830 (Wash. App. Div. 1 2014) – "¶ 2 Additionally, as conceded by the State, the admission of certified copies of Rainey's driving records at trial violated his Sixth Amendment right to confrontation." – citing *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (Wash. 2012)

State v. Leibel, 838 N.W.2d 286 (Neb. 2013) – "We agree with numerous other courts that hold driving records are not testimonial."

State v. Wixom, 820 N.W.2d 159 (Iowa Ct. App. 2012) – "the driving record and certification were not created in an adversarial setting. They were admissible without live testimony."

State v. Mares, 160 Wn. App. 558, 248 P.3d 140 (Wash. Ct. App. 2011) – driver's license is non-testimonial business record

State v. Woodbury, 2011 ME 25, 13 A.3d 1204 (Me. 2011) – "Contrary to Woodbury's contention and consistent with our recent jurisprudence, the challenged language, essentially stating that Woodbury's license was revoked according to Secretary of State records on the relevant date, does not violate the Confrontation Clause or the United States Supreme Court's decisions in *Crawford* ... and *Melendez-Diaz*..."

Commonwealth v. McMullin, 76 Mass. App. Ct. 904, 923 N.E.2d 1062 (Mass. App. Ct. 2010) – "Admission of court records and records of the Registry of Motor Vehicles in the present case did not violate the defendant's Sixth Amendment right of confrontation."

Commonwealth v. Martinez-Guzman, 76 Mass. App. Ct. 167, 920 N.E.2d 322 (Mass. App. Ct. 2010) – "Unlike the certificates at issue in *Melendez-Diaz*, which are created solely to prove an element of the prosecution's case, RMV records are maintained independently of any prosecutorial purpose and are therefore admissible in evidence as ordinary business records..."

Banther v. State, 977 A.2d 870 (Del. Supr. Jul 29, 2009) – "a police officer is permitted to relate motor vehicle registration information received from registration authorities because public records are recognized as hearsay exceptions under D.R.E. 803(8), and the registration information is not "testimonial" in nature."

State v. Tayman, 960 A.2d 1151, 2008 ME 177 (Me. Dec 04, 2008) – "[¶ 21] We agree with the reasoning of the majority of jurisdictions that have considered this issue and concluded that the introduction of records similar to the Violations Bureau docket entries offered against Tayman are akin to business or public records, and that such documents merely reflect the routine cataloging of administrative events."

State v. Shipley, 757 N.W.2d 228 (Iowa Jul 18, 2008), reh'g denied Nov. 13, 2008 – "we agree with the conclusion in the majority of post-*Crawford* driving record cases that such information is constitutionally admissible. Rather than rely solely on the characterization of a document as a business or public record, we reach this decision by engaging in a more particularized analysis that focuses on the function of the right of cross-examination as discussed in *Crawford*." – concluding the driving record "was thus created under conditions far removed from the inquisitorial investigative function--the primary evil that *Crawford* was designed to avoid."

State v. Track, 2008 WL 2447402 (Ariz. App. Div. 1 Jun 12, 2008) (unpub) – "Although the admin per se affidavits are filled out at the scene of the crime and may subsequently be used in DUI prosecutions, the forwarding of them to MVD to be filed in drivers' MVD records occurs 'regardless of their possible use in a criminal prosecution.' ... We see no substantive difference between a letter from MVD notifying a defendant of his license suspension and an admin per se affidavit served by a police officer notifying a defendant of his license suspension. Therefore, under *King*, the Affidavit was nontestimonial and its admission did not violate the Confrontation Clause."

People v. Espinoza, 195 P.3d 1122 (Colo. App. Apr 03, 2008), as modified on denial of rehearing (May 29, 2008) – driving record "served a routine administrative function and was created before the charged time occurred" – non-testimonial

State v. Dukes, 174 P.3d 914 (Kan. App. Jan 18, 2008) – "The law requires that this data be compiled over time, and merely pulling the data from the computer system because of an upcoming trial does not change its nature. If this were a critical objection, the State could avoid it by automatically printing out the records of all drivers every day; it would then have an exhibit ready to introduce that was not prepared in anticipation of a specific trial. We do not believe that it makes a difference under *Crawford* whether the State seeks to introduce an exhibit of one page containing only Scott Dukes' driving record rather than introducing an exhibit automatically printed each day or month consisting of hundreds of thousands of pages comprising the driving record of all residents of Sedgwick County. Such is the value of computers--we can limit the information we get to what's relevant to us." – held: driving record is not testimonial

State v. Tveit, 2007 WL 2999101 (Wash. App. Div. 2 Oct 16, 2007) (unpub) – Sine Tveit appeals her jury conviction for first degree driving while license suspended (DWLS). She argues that the trial court erred in denying her motion to suppress the certified copy of her driving record [(CCDR)] as hearsay and violated her constitutional right of confrontation. ... Following *Kirkpatrick* and *Kronich*, we hold that admission of Tveit's CCDR, an acknowledged public record, did not violate her right to confrontation."

State v. Bennett, 216 Ariz. 15, 162 P.3d 654 (Ariz. App. Div. 2 2007) – deciding admissibility of record of prior drunk driving convictions – "We held in *King* that prior conviction records are not testimonial because '[c]onvictions are not recorded exclusively in anticipation of future litigation for the purpose of establishing facts contained in those records.' 213 Ariz. 632, ¶ 24, 146 P.3d at 1280. To the extent Bennett suggests that King was wrongly decided, we decline to revisit our holding in that case."

State v. Shipley, 2007 WL 911894 (Iowa App. 2007) (unpub), **overruled by State v. Shipley, 757 N.W.2d 228 (Iowa Jul 18, 2008), reh'g denied Nov. 13, 2008** –

State v. Kirkpatrick, 161 P.3d 990 (Wash. 2007), overruled **State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (Wash. 2012)** – "The present case requires this court to determine whether a DOL certification as to the absence of a driver's license is testimonial for purposes of the Crawford analysis. We hold that neither certification of DOL drivers' records nor certifications as to the absence of such records are testimonial for purposes of Crawford."

State v. Kronich, 161 P.3d 982 (Wash. 2007), overruled **State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (Wash. 2012)** – "The present case requires this court to resolve the question of the testimonial nature of a particular type of extant public record, namely, a DOL certification describing the status of a person's driving privilege. We hold that such a record is not testimonial for purposes of the Crawford analysis. ... [A] certified statement as to the status of a defendant's driving privilege is not an accusatory statement or testimony; it is not testimonial evidence."

State v. Vonderharr, 733 N.W.2d 847 (Minn. App. 2007) – "But the DPS records are significantly different from the laboratory report that was at issue in *Caulfield*. The laboratory report was produced by an analyst at the Bureau of Criminal Apprehension who analyzed a

substance that was seized from the defendant when he was arrested. *Id.* at 307. The report was prepared at the request of the police for the prosecution of the defendant. *Id.* at 309. Unlike the laboratory report, Vonderharr's DPS records were not prepared for the purpose of prosecuting Vonderharr. The records were produced before Vonderharr was charged and even before the incident that lead to him being charged occurred. ... [T]he mere fact that the DPS records can be used in a criminal prosecution does not mean that they were created for that purpose. Consequently, we conclude that ... the DPS records are not testimonial evidence that implicates the Confrontation Clause of the Sixth Amendment."

State v. Matthews, 2007 WL 1810244 (Wash. App. Div. 1 Jun 25, 2007) (unpub) – "[Defendant] contends the trial court erred in admitting a letter from a Department of Licensing employee stating that, on the day of Matthews' arrest, his license was suspended. He concedes that his argument was rejected in *State v. N.M.K.*, 129 Wash.App. 155, 118 P.3d 368 (2005), review granted, 157 Wash.2d 1001, 136 P.3d 758 (2006) and *State v. Kronich*, 131 Wash.App. 537, 128 P.3d 119, review granted in part, 157 Wash.2d 1008, 139 P.3d 349 (2006), but argues that those cases were wrongly decided. We adhere to our decision in *N.M.K.*"

People v. Wolters, 41 A.D.3d 518, 838 N.Y.S.2d 117, 2007 N.Y. Slip Op. 04861 (N.Y. A.D. 2 Dept. 2007) – "The Supreme Court committed reversible error in admitting into evidence the affidavit of a nontestifying official from the Department of Motor Vehicles (*see Crawford v. Washington*, 541 U.S. 36; *People v. Pacer*, 6 NY3d 504; *People v. Capellan*, 6 Misc.3d 809, 812)."

Jaspar v. Commonwealth, 49 Va.App. 749, 644 S.E.2d 406 (Va. App. May 22, 2007) – "Appellant challenges, on Confrontation Clause grounds, the admission into evidence of his DMV driving transcript to prove both that his license had been revoked and that he had notice of that revocation. ... In appellant's case, like in *Michels v. Commonwealth*, 47 Va.App. 461, 466, 624 S.E.2d 675, 678 (2006)], the challenged document was generated as a result of a request by law enforcement personnel for a search of certain public records. Although *Michels* involved a certification of an out-of-state official regarding an absence of certain records whereas appellant's case involved the certification of an in-state official regarding the existence of certain records, we hold these distinctions lack legal significance. In both cases, the person completing the certification was the custodian of the records searched, and the underlying records were not created in anticipation of the litigation in which a summary of their contents was offered into evidence. Thus, here, as in *Michels*, the admission of the challenged document did not violate appellant's Confrontation Clause rights."

State v. Kelsey, 212 Or.App. 145, 157 P.3d 262 (Or. App. 2007) – "In his second assignment of error, he argues that the trial court erred in admitting a Driver and Motor Vehicle Services Division suspension packet containing a copy of his driving record and a document dating from the arrest leading to his suspension notifying him that his driving privileges were to be suspended. According to defendant, admitting the documents violated his right to confront his accusers under the Sixth Amendment of the United States Constitution as construed in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). We recently decided that issue contrary to defendant's position in *State v. Davis*, 211 Or.App. 550, --- P.3d ---- (2007)."

State v. Davis, 211 Or.App. 550, 156 P.3d 93 (Or. App. 2007) – "[W]e conclude that the DMV printout of defendant's driving record is clearly not testimonial. Like Intoxilyzer certificates, and

unlike crime lab reports, Oregon driving records are data compilations. They are not made and maintained for the primary purpose of criminal investigations. The employees are required by statute to keep the records; doing so is a ministerial duty having nothing to do with prosecuting a particular individual for criminal activity. ORS 802.200(9). Indeed, the records are created before any criminal act occurs. No person involved in the creation of the record can be said to have done so as a 'witness' against a defendant, nor could any such person be deemed an 'accuser.' The admission of the printout did not violate defendant's right to confront the witnesses against her." – not deciding whether implied consent form is testimonial, because even if it was, error was harmless

Hardin v. State, 31 Fla. L. Weekly D 2396 (Fla. Dist. Ct. App. 5th Dist. 2006) – “in a prosecution for driving while license revoked as a habitual traffic offender, a certified copy of the defendant's driving record is not testimonial hearsay and thus the record's admission did not implicate the defendant's Sixth Amendment right to confrontation under *Crawford* ...”

People v. Pacer, 2006 NY Slip Op 2291 (2006) – “Defendant was charged with aggravated unlicensed operation of a motor vehicle in the first degree and related offenses. At trial, to prove that defendant knew his driving privileges had been revoked and was thus guilty of an aggravated offense, the prosecution introduced an affidavit prepared by a Department of Motor Vehicles official in 2003 describing the agency's revocation and mailing procedures, and averring that on information and belief they were satisfied. *** The People concede that the affidavit is a sworn document prepared by a government official specifically for use by the prosecution at trial. The People further concede that defendant never had a chance to cross-examine the affiant and that the prosecution produced no evidence that the affiant was unavailable to testify. They argue that the affidavit was admissible as a business record or public record, and thus outside the scope of the Confrontation Clause.” The affidavit was testimonial since it was prepared for prosecution and Defendant had no opportunity to challenge the accuracy of prior notice of revocation (mistake, wrong identity, etc.).

Sproule v. State, 927 So. 2d 46 (Fla. Dist. Ct. App. 4th Dist. 2006) - A certified driving record is a public record and is non-testimonial under *Crawford*.

State v. Kronich, 131 Wn. App. 537, 128 P.3d 119 (Wash. Ct. App. 2006), aff'd, 161 P.3d 982 (Wash. 2007), overruled State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (Wash. 2012) – “Defendant argued that ... a Washington Department of Licensing (DOL) record violated *Crawford v. Washington*. ... The instant court also concluded that defendant was not denied his Sixth Amendment confrontation rights when the trial court allowed admission of a DOL record custodian's certification regarding the status of defendant's driving privileges. The DOL document was properly admitted. To hold otherwise would have required numerous additional witnesses without any apparent gain in the truth-seeking process.”

State v. King, 2006 Ariz. App. LEXIS 147 (Ariz. Ct. App. 2006) – “Defendant argued that the admission of records of his prior convictions without testimony and Motor Vehicle Department (MVD) records of his license suspension violated his rights under the Confrontation Clause of the Sixth Amendment. The court disagreed, holding that the records were non-testimonial under *Crawford* because they were public records that were akin to business records and were prepared and maintained regardless of their possible use in a criminal prosecution.”

People v. Thoma, 128 Cal. App. 4th 676; 27 Cal. Rptr. 3d 309 (Cal App 2nd Dist 2005) - "Defendant argued that his prior conviction of driving under the influence causing "bodily injury" did not constitute a strike within the meaning of California's "Three Strikes" Law, Cal. Penal Code §§ 667(b)-(i), 1170.12. Defendant did not dispute the sentencing court's description of the victim's injuries during sentencing on the prior conviction. The instant court held that defendant's silence in the face of an accusation was a tacit admission of the truth thereof. A reasonable person in defendant's situation would have disputed the sentencing court's description of the victim's injuries if that description had been false. Defendant's silence at the sentencing hearing was admissible under Cal. Evid. Code § 1221 as an adoptive admission of the truth of the sentencing court's description of the victim's injuries."

Proof of Service or Mailing

(see also part 5, "Public Records and Court Filings")

State v. Mecham, 331 P.3d 80 (Wash. App. Div. 1 2014) – "¶ 44 Mecham argues that the certification of mailing on the license revocation order is testimonial hearsay... ¶ 51 Here, the certification of mailing is a sworn statement, made under penalty of perjury. This would lead an objective witness to reasonably believe that the certification would be used at a later trial. And, it is difficult to say that such a sworn statement does not meet the definition of testimony in *Crawford*: a solemn declaration or affirmation made for the purpose of establishing or proving some fact. ... ¶ 53 ... However, the validity of the revocation order is a legal question for the court, not an element of the crime. [cite] The court, not the trier of fact, must make this threshold determination of validity. *Id.* The right to confrontation is a trial right and is not implicated in such pretrial proceedings. [cite] Therefore, the fact of mailing is neither subject to the confrontation clause, nor an essential fact to be proven at a DWLS trial."

State v. Kennedy, 846 N.W.2d 517 (Iowa 2014) – "an affidavit of mailing prepared prior to criminal charges kept in the regular course of business as an administrative record does not violate the Confrontation Clause. On the *527 other hand, ... the Confrontation Clause prohibits the admission of an affidavit of mailing when the affidavit is both prepared after the criminal charges and the affidavit makes a factual representation intended as testimony. ... The affidavits of mailing were prepared after the State filed the complaint against Kennedy. ... The affidavits did not merely authenticate and attest to the existence of a record in the IDOT's possession, but made factual representations the IDOT mailed the notices on particular dates. ... Therefore, the affidavits of mailing and attachments violated the Confrontation Clauses of the United States and Iowa Constitutions and were not admissible."

People v. Maldonado, 981 N.Y.S.2d 241, 244-46 (N.Y. App. Term. 2013) – "It is well settled that a DMV affidavit of regularity/proof of mailing which is used to show that a defendant knew or should have known that his license or driving privileges had been suspended or revoked is testimonial in nature, under the holding of *Crawford*..."

Commonwealth v. Lee, 466 Mass. 1028, 998 N.E.2d 768, 769-71 (Mass. 2013) – "In *Parenteau*, we held that a registry certificate attesting to the mailing of a notice of license suspension, which was created for purposes of trial and therefore not in the ordinary course of registry business, was 'testimonial' for Sixth Amendment confrontation purposes and, as such, was inadmissible without testimony from a witness on behalf of the registry."

People v. Nunley, 491 Mich. 686, 821 N.W.2d 642 (Mich. 2012) – "The issue in this case is whether a Michigan Department of State (DOS)n1 certificate of mailing is testimonial in nature ... We hold that a DOS certificate of mailing is not testimonial because the circumstances under which it is generated would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Instead, the circumstances reflect that the creation of a certificate of mailing, which is necessarily generated before the commission of any crime, is a function of the legislatively authorized administrative role of the DOS independent [*690] from any investigatory or prosecutorial purpose. Therefore, the DOS certificate of mailing may be admitted into evidence absent accompanying witness testimony without violating the Confrontation Clause."

State v. Shivers, 280 P.3d 635, 634-640 (Ariz. Ct. App. 2012) – "A jury convicted Corey Demar Shivers for interfering with judicial proceedings after he violated the terms of an order of protection by contacting the victim in this case. The issue before us is whether the trial court violated Shivers' Sixth Amendment right to confront witnesses by admitting in evidence a written declaration of service of the order without testimony from the law enforcement officer who served Shivers or a showing the officer was unavailable and Shivers had a prior opportunity to cross-examine him. ... we hold the declaration was non-testimonial..."

State v. Maynard, 2012 ME 33, 39 A.3d 70 (Me. 2012) – "A certification from the Secretary of State that the required notification of suspension was sent to a defendant does not violate the Confrontation Clause because the notification of suspension is non-testimonial."

Commonwealth v. Parenteau, 460 Mass. 1, 948 N.E.2d 883 (Mass. 2011) – "We agree with the Commonwealth that the actual notice of the defendant's license revocation, dated May 2, 2007, constitutes a business record of the registry, created and kept in the ordinary course of its affairs. n9. However, there is no evidence of the existence of a contemporaneous business record showing that the notice was mailed on that date. If such a record had been created at the time the notice was mailed and preserved by the registry as part of the administration of its regular business affairs, then it would have been admissible at trial. That would have been the correct procedure for the admission of a business record from the registry. Here, however, the only evidence that the notice was mailed to the defendant is the registry certificate dated July 24, 2009, three months before trial, attesting to that fact. Such certificate was not created as part of the administration of the registry's regular business affairs, but for the purpose of establishing an essential fact at trial. Accordingly, the registry certificate did not constitute a nontestimonial business record."

People v Brown, 2011 NY Slip Op 21115, 31 Misc. 3d 794, 919 N.Y.S.2d 324 (N.Y. City Ct. 2011) – "Where foundational requirements have been met, documents generated and maintained in the ordinary course of business are admissible as a business records exception to the hearsay rule (CPLR 4518). However, where the sole purpose in creating the document was in preparation for litigation, then the document is self serving and not admissible ... The simple recordation of the date and time of mailing, together with the certified mail receipt would be all that is necessary to evidence the Department's compliance with notice provision of that section. The Mailing Record is not that. Although it memorializes the date and time when the Postal Service received the notice, it goes well beyond that. The Mailing Record makes testimonial assertions regarding the procedures employed by the Department to effect mailing and the significance of

Postal ID number attached to each notice. Those declarations would serve no business purpose to the Department, since it must be assumed that its employees would be familiar with its own practices and procedures. The document's significance is that it is meant to inform someone outside the Department about its practices and procedures. Its sole purpose is to provide evidence to satisfy the knowledge element necessary for a conviction on a criminal charge [cite]."

People v Rayford, 2011 NY Slip Op 536, 80 A.D.3d 780, 916 N.Y.S.2d 603 (N.Y. App. Div. 2d Dep't 2011) – "The defendant correctly contends that the admission of a certain document as proof that a "Notice of Suspension" of his driver's license had been mailed to him constituted testimonial hearsay and, thus, violated his right of confrontation..."

State v. Murphy, 2010 ME 28, 991 A.2d 35 (Me. 2010) – "[¶1] Murphy contends that the trial court violated his Sixth Amendment right to confront witnesses against him by admitting in evidence, over his objection, a written certificate from the Secretary of State as prima facie proof that a notice of his suspension had been sent to him--a necessary element for conviction. ... [¶26] As in *Tayman*, the Secretary of State's certificate authenticated and summarized routine motor vehicle records that were not primarily maintained for use as evidence in criminal prosecutions. Further, the certificate was accompanied by an actual record that corroborated the summary contained in the certificate. Under these circumstances, Murphy's rights secured by the Confrontation Clause of the Sixth Amendment were not violated."

following in: **State v. Gilman, 2010 ME 35, 993 A.2d 14 (Me. 2010)**

People v Darrisaw, 2009 NY Slip Op 6992, 66 A.D.3d 1427, 886 N.Y.S.2d 315 (N.Y. App. Div. 4th Dep't 2009) – driving with revoked license – "we conclude that the 'Affidavit of Regularity/Proof of Mailing' (affidavit) prepared by an employee of the Department of Motor Vehicles (DMV) constituted testimonial evidence that did not fall within the business records exception to the hearsay rule"

Radar / Speed Check Card / Laser Unit Testing

People v. Solomon, 958 N.Y.S.2d 287, 287-293 (N.Y. J. Ct. 2013) – speeding case – "Here, similarly, the primary purpose of the test results on the laser unit was to assure its reliability, not to establish elements of the case against defendant, Thus, under *Bullcoming*, the test results and notes reflecting them are not 'testimonial' within the meaning of the *Crawford* ruling and do not require application of the Confrontation Clause."

State v. Fitzwater, 122 Haw. 354, 227 P.3d 520 (Haw. 2010) – "According to the officer, the speedometer in his police vehicle indicated that Fitzwater was traveling 70 miles per hour in an area where the speed limit was 35 miles per hour. The officer further testified that a 'speed check' had been conducted to determine the accuracy of the police vehicle's speedometer about five months before the incident involving Fitzwater. ... admission of a speed check card for which a proper foundation has been established does not violate a defendant's Sixth Amendment rights."

State v. Shitanishi, 2009 WL 1486593 (Hawai'i App. May 28, 2009) (unpub) – "Admission of the contents of the speed check card was not a violation of Shitanishi's right of confrontation. *Crawford*..."

State v. Fitzwater, 2009 WL 1112602 (Hawai'i App. Apr 27, 2009) (unpub), **rev'd for lack of foundation, 122 Haw. 354, 227 P.3d 520 (Haw. 2010)** – "Admission of the speed check card was not a violation of Fitzwater's right of confrontation. *Crawford* [cite] (business records are not testimonial in nature)."

State v. Wiest, 2008 WL 821801, *2, 2008-Ohio-1433, 1433 (Ohio App. 1 Dist. Mar 28, 2008) (unpub) – speeding case (!) – "¶ 13} Finally, Wiest argues that judicial notice was improper because it violated his right, under *Crawford v. Washington*, [FN10] to confront the expert that had established the LTI-2020's reliability. The Supreme Court of Ohio has rejected this claim under similar circumstances, holding that an expert's testimony about a general scientific principle or fact is not testimonial. [FN11] Wiest has not convinced us to deviate from that rule in the case at bar. We overrule the first and third assignments of error."

State v. Jacobson, 273 Neb. 289, 299-300, 728 N.W.2d 613 (Neb. 2007) - "[Officer] conducted accuracy checks on his radar unit (the primary measuring device) using the tuning forks (the testing devices). ... we conclude that the statements in the document certifying the accuracy of the tuning forks were nontestimonial."

Air Bag Control System Report (category added March 2014)

Peterson v. State, 129 So. 3d 451, 452-53 (Fla. 2d Dist. App. 2014) – drunk driving resulting in death – "The State introduced, over Peterson's objection, the air bag control system report from Peterson's vehicle. Peterson argues that the computer-generated air bag control system report was testimonial hearsay... the air bag control system report is not accusatory and does not describe any specific wrongdoing of Peterson. Instead, the report merely establishes the existence or absence of some objective fact, i.e., if and when the brakes were applied in Peterson's car before the accident and the speed the car was traveling. ... Because the air bag control system report is not testimonial, the trial court did not err in admitting the report over a Confrontation Clause objection."

Dashboard Camera (category added June 2011)

Commonwealth v. McKellick, 2011 PA Super 127, 24 A.3d 982 (Pa. Super. Ct. 2011) – "In the instant matter, Appellant acknowledges the videotape had no audio; thus...it falls within the category of the non-testimonial exception carved out by the Supreme Court in *Crawford*..."

Expert Testimony

Roberts v. U.S., 916 A.2d 922 (D.C. 2007) – "[O]ur recent decision in *Thomas v. United States*, No. 03-CF-1125, 2006 D.C.App. LEXIS 655 (D.C. Dec. 28, 2006), leaves no room for dispute that the conclusions of FBI laboratory scientists-the serologist, the PCR/STR technician, and the examiner-admitted as substantive evidence at trial are 'testimonial' under *Crawford*, *supra*, thus subject to the requirements of cross-examination and declarant-unavailability

confirmed by that decision. Just as *Thomas* held that reports setting forth the results of analysis of drugs by DEA chemists are testimonial because they ‘are created expressly for use in criminal prosecutions,’ 2006 D.C.App. LEXIS 655, at *28-29, so the FBI laboratory scientists here were ‘forensic expert[s] employed by a law enforcement agency, ... tasked by the government’ to perform tests providing the basis for ‘critical expert witness testimony ... against appellant at his criminal trial.’ *Id.* at *24. To the extent that their conclusions were used as substantive evidence against appellant at trial, he was therefore entitled to be ‘confronted with’ the conclusions in the manner the Sixth Amendment requires, that is, through the opportunity for cross-examination of the declarant.” – concluding “reliance on the expert witness paradigm does not help the government here” because some test results were offered as substantive evidence rather than merely as basis for opinion, and no limiting instruction was given

People v. Hernandez, 2007 WL 241264, *5 -6 (Cal. App. 2 Dist. 2007) – “[A]n expert’s reliance on hearsay in forming an opinion does not implicate *Crawford*. (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 55-57; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208-1210.)”

United States v. Zavala, 2005 U.S. App. LEXIS 15084 (3rd Cir. Pa. 2005) - “The court held that the testimony of an expert witness that the quantity of drugs involved in the charges against defendant, some three pounds, was consistent with intent to distribute did not violate defendant’s Sixth Amendment rights to confrontation, as established in *Crawford*, because Fed. R. Evid. 703 allowed the expert to base his opinion on facts or data that would otherwise be inadmissible.”

State v. Delaney, 613 S.E.2d 699 (N.C. Ct. App. 2005) – “In a search of defendant’s residence, police discovered drugs under defendant’s bed and in an outbuilding. In the course of the police investigation into defendant’s case, the drugs found at defendant’s residence were sent to a state agency for analysis. An expert testified regarding the results of the analysis, which had been conducted by another analyst. Defendant argued on appeal that the trial court, in violation of his U.S. Const. amend. VI confrontation rights, erroneously allowed the prosecution to introduce hearsay evidence of the chemical analysis performed by a chemist who did not testify. Testimony as to information relied upon by an expert when offered to show the basis for the expert’s opinion was not hearsay as it was not offered as substantive evidence. Expert testimony that relied upon evidence that was not admissible was not a Confrontation Clause violation if the expert was available for cross-examination. Defendant was given the chance to cross-examine the expert as to his opinion and the basis for the opinion.”

United States v. Buonsignore, 131 Fed. Appx. 252 (11th Cir GA 2005) - “Although we conclude that the district court abused its discretion by admitting expert testimony regarding the value of the drugs, the error was harmless and does not warrant reversal. The district court properly admitted the agent’s testimony under Rule 702, as his training and experience qualified him to testify as an expert in drug valuation. The district court evaluated the reliability of the agent’s testimony and methodology he employed to arrive at his testimony. The drug value information helped the jurors better understand evidence at issue. Thus, it was admissible under Rule 702. However, the drug valuation testimony violated the Confrontation Clause. Although Rule 703 allows experts to rely on otherwise inadmissible evidence in formulating their opinions and the agent’s testimony complied with our decision in *Brown*, it is inadmissible under the standard set forth in *Crawford*. The agent’s testimony was based on information obtained from an unidentified individual at the DEA in Washington, D.C. The evidence is testimonial in nature.

The government has not shown that both (1) that individual is unavailable, and (2) Buonsignore had the opportunity to cross-examine that individual. Thus, it was a violation of the Confrontation Clause to admit it.”

Search Consent Forms

State v. Smith, 2005 La. LEXIS 2114 (2005) – “Although a declarant signed a consent form authorizing the warrantless search of a motel room she shared with defendant during police questioning at the station house, that statement, a direct assertion of her state of mind and therefore hearsay, did not constitute testimonial hearsay for purposes of Crawford because no objective person could have reasonably believed that the statement itself, as opposed to any real evidence that might have resulted from an ensuing search, would have been used later at trial against defendant as testimonial evidence bearing on the question of guilt or innocence.”

Destruction or Other Loss of Evidence

Church v. Schriro, 2008 WL 2168998 (D. Ariz. May 22, 2008) (unpub) (habeas) – "Petitioner contends his Sixth Amendment right to confrontation was violated because a police detective testified regarding the contents of a videotape found in Petitioner's residence pursuant to a search warrant, which videotape had, while in police custody, deteriorated to a point where the tape could not be viewed by the bench. Petitioner asserts this made it impossible to refute the detective's testimony that the acts depicted on the videotape constituted sexual exploitation of a minor. Petitioner's counsel vigorously cross-examined the detective with regard to his identification of Petitioner as the person in the videotape and, accordingly, Petitioner's right to confront witnesses was not violated with regard to this witness and this testimony. *See Crawford...*"

U.S. v. Varner, 2008 WL 134197 (4th Cir. Jan 14, 2008) (unpub) – "On appeal, Varner argues that ... (3) the DEA improperly destroyed evidence that was crucial to Varner's defense, violating his constitutional rights to due process and to defend and confront evidence used to convict him. [FN4] ... [n.4] [A]n agent's failure to preserve evidence does not violate the Confrontation Clause unless the defendant can demonstrate bad faith on the part of the agent. *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). Because we find no evidence of bad faith on the part of the DEA agents, Varner's *Crawford* claim must fail."

Data Used to Generate Map (category added August 2014)

State v. Pearson, 180 Wash.App. 576, 321 P.3d 1285 (Wash. App. Div. 3 2014) – "¶ 1 The State appeals the trial court's decision to vacate the jury's special finding that Richard L Pearson delivered a controlled substance-hydrocodone within 1,000 feet of a school bus stop. The court reasoned a school official was required to validate the bus stops. ... ¶ 4 For Mr. Pearson's case, Mr. Martian created a map from its digital information using 1309 North First Street as the center point and depicting a 1,000 foot radius around that center point. ... ¶ 14 Here, Mr. Martian provided a digital map generated by the county with information supplied by a school district official. One of the purposes of the information is to ascertain whether RCW 69.50.435(1)(c) has

been implicated. Thus, the county map is prepared for potential use in a criminal proceeding. This falls within the core class of testimonial statements. Therefore, Mr. Pearson had a right to confront the school district official." – [NOTE the way the court switches subjects: the map was testimonial; therefore, the defendant had the right to confront the person who provided the underlying data – which the court *doesn't* find testimonial.]



Part 17: Ineffective Assistance of Counsel Claims and Habeas Corpus Claims Based on *Crawford*.

This final part is a repository for cases decided on grounds related to *Crawford* but which don't actually decide the sixth amendment issue. This includes claims that counsel was ineffective for not raising a *Crawford* issue. Such claims generally require the court to consider whether raising the issue would have changed the result of the trial. When the court concludes that raising the issue would not have made a difference, the case goes into this category.

This category also includes federal habeas corpus cases considering whether a state court's resolution of a *Crawford* issue was unreasonable. The Supreme Court has said "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (italics in original). When courts engage in a *Crawford* analysis but then dispose of the case merely by declaring that the lawyer or state court acted reasonably, the case is put into this category.

Please note: IAC and habeas cases in which the *Crawford* issue is squarely decided are treated like any other case. Consequently, this category includes only cases in which the prosecution prevailed on the *Crawford*-based claim, leaving the conviction undisturbed.

Clearly Established Federal Law

McCarley v. Kelly, 759 F.3d 535 (6th Cir. 2014) (habeas) – small child witnessed his mother's murder – police officer suggested putting child in therapy to obtain information from him – child went into therapy, therapist reported to officer what child had said – oddly, at trial the therapist was asked to read from reports to officer, rather than simply testifying – held: under clearly-established federal law, the child's statements to his therapist were testimonial, based on an obviously-inadquate and indeed borderline-ludicrous analogy to *Davis* – the court's underlying point seems to be that *the therapist's* statements to the officer were testimonial, which is true but irrelevant, since the therapist testified

Hensley v. Roden, 755 F.3d 724, 726-35 (1st Cir. 2014) (habeas) – "Here, contrary to the position Hensley takes on appeal, *Melendez-Diaz* did not say one way or the other whether autopsy reports should be considered testimonial. ... When other courts, post *Melendez-Diaz*, have been confronted with the question of whether autopsy reports are testimonial or not,

disparity of treatment has reigned. ... As the above cases make clear, even after *Melendez-Diaz* had been around a little longer, it was still uncertain where autopsy reports stood. This strongly undercuts Hensley's claim that the testimonial nature of autopsy reports was clearly established."

Strong v. Roper, 737 F.3d 506, 514-15 (8th Cir. 2013) (habeas) – "When the state supreme court adjudicated Strong's claim in 2004, however, Supreme Court precedent had not established whether an excited utterance made in the presence of a police officer was testimonial."

Dorsey v. Stephens, 720 F.3d 309, 312-13 (5th Cir. 2013) (habeas) – "We have not found, and Dorsey does not cite, any decision of the Supreme Court that clearly establishes the contours of the Confrontation Clause when applied to facts even remotely analogous to a soundless video of a child's responses and actions during an interview with law enforcement officials."

Flournoy v. Small, 681 F.3d 1000 (9th Cir. Cal. 2012) (habeas) – petitioner "contends that the trial court permitted a forensic analyst to testify based on the results of scientific tests performed and reports prepared by other analysts in violation of his Sixth Amendment Confrontation Clause right. This claim fails because there was no clearly established federal law, based on decisions of the United States Supreme Court, that held such testimony to violate the Confrontation Clause in circumstances where the testifying witness participated in and reviewed the crime lab's work, even though [*1002] she did not personally conduct all the testing herself. ... Even today there does not appear to be clearly established federal law that would make the admission of Rogala's testimony unreasonable under the standard set under AEDPA. ... If those areas remained unsolved as of 2011, it is impossible to conclude that the California court's conclusions in this case were contrary to clearly established federal law at the time."

Meras v. Sisto, 676 F.3d 1184, 1186-1193 (9th Cir. Cal. 2012) (habeas) – "Meras argues that forensic lab reports are testimonial because they're produced in anticipation of litigation. But *Crawford* didn't 'clearly establish' such a rule. ... But *Melendez-Diaz* involved a lab report submitted without live testimony, whereas Meras's case has the added complication that the report was introduced through the testimony of the author's supervisor. The Court did not decide until 2011, in *Bullcoming*, that the right to confrontation could be satisfied only by the live testimony of a declarant." [NOTE: This case has a scathing dissent by Judge Bea, pointing out the self-indulgence of the dicta-rama that is Judge Kozinski's opinion for the court.]

Nardi v. Pepe, 662 F.3d 107 (1st Cir. Mass. 2011) (habeas) – "In our view, *Crawford* (as matters stood when the SJC decided Nardi's appeal) did not "clearly establish" that either the autopsy report or [*111] Dr. McDonough's opinion in partial reliance upon it were inadmissible under the Confrontation Clause."

Likely v. Ruane, 642 F.3d 99 (1st Cir. Mass. 2011) (habeas) – "For purposes of this case, the more important point is that during the relevant period [*i.e.*, pre-*Melendez-Diaz*], there was no 'clearly established Federal law, as determined by the Supreme Court of the United States,' [cite], as to whether admission of this evidence without the chemist being a witness violated the Confrontation Clause."

Walker v. Hadi, 611 F.3d 720 (11th Cir. Fla. June 4, 2010) (habeas) – habeas petition filed by petitioner committed as sexually violent predator – "Walker has not cited a single U.S. Supreme Court case requiring the Florida court to exclude testimonial hearsay evidence in a civil

commitment hearing. [cite] Moreover, the state court was under no obligation to widen the scope of *Crawford* to a context not yet decided by the U.S. Supreme Court. [cite] Accordingly, the state court's decision, to the extent that it admitted testimonial hearsay at Walker's civil commitment proceeding, was not contrary to, nor an unreasonable application of, clearly established Federal law."

Likely v. Ruane, 681 F. Supp. 2d 107, 111 (D. Mass. 2010) (habeas) (Judge Saris) – "To be sure, Justice Scalia's language in *Melendez-Diaz* acknowledges no debate, pronouncing that there is 'little doubt' that certificates of analysis are testimonial under *Crawford*, 129 S. Ct. at 2532, and calling the application of *Crawford* 'rather straightforward.' 129 S. Ct. at 2533. Of course, four dissenters disputed those characterizations. *See* 129 S. Ct. 2543 (criticizing the ruling as "sweep[ing] away an accepted rule governing the admission of scientific evidence.") (Kennedy, J. dissenting). Yet even if the result in *Melendez-Diaz* was likely, *Likely* does not prevail because likeliness is not the standard. Rather he must show that *Verde* (and by extension the Appeals Court considering *Likely*'s appeal) was objectively unreasonable. In my view, the decision of the Massachusetts Appeals Court was not contrary to, nor an unreasonable application of the Supreme Court's holding in *Crawford*."

Garcia v. Roden, 672 F. Supp. 2d 198, 207-211 (D. Mass. 2009) (habeas) (Judge Young) – "The initial question, therefore, is whether *Crawford* so clearly foreshadowed *Melendez-Diaz* that the contrary holding of the Massachusetts Supreme Judicial Court in *Commonwealth v. Verde* was an unreasonable application of federal law already clearly established by the Supreme Court in *Crawford*. This Court rules that it was." – [NOTE: Four justices of the Supreme Court were equally unreasonable, then – they dissented in *Melendez-Diaz* – making this case an obviously unreasonable application of the unreasonable application standard. The chronic bad faith of federal habeas judges is rarely so unashamedly on display.]

Meeks v. McKune, 2009 WL 975135 (D. Kan. Apr 09, 2009) (unpub) (habeas) – "Numerous courts subsequent to the *Crawford* decision similarly determined that the forfeiture by wrongdoing doctrine applied regardless of the defendant's motive. ... The Kansas Supreme Court's decision [to that effect] was neither contrary to nor an unreasonable application of clearly established Federal law, and Petitioner is not entitled to relief on this ground."

Klimawicze v. Trancoso, 2009 WL 667228 (7th Cir. Mar 13, 2009) (unpub) – "The Illinois appellate court decided Klimawicze's direct appeal five months after *Crawford* issued, and since then the Supreme Court and the circuit courts have refined *Crawford* considerably. The parties seem to think that these later developments affect Klimawicze's petition, but they are mistaken. This case turns on whether the state court unreasonably applied *Crawford*; everything else is just dross. [cite] Nevertheless, the cases that follow *Crawford* shed some light on the Supreme Court's decision--and further reinforce the conclusion that the state-court decision was not objectively unreasonable." – [NOTE: Light-shedding dross??]

Wiggins v. Jackson, 2009 WL 484668 (W.D. N.C. Feb 25, 2009) (unpub) (habeas) – "Petitioner simply does not establish how the MAR court's opinion was objectively unreasonable in light of *Crawford*. Indeed, after the *Crawford* decision, numerous federal and state courts ruled that 911 calls were not testimonial. ... Indisputably, as *Davis* was filed after this federal habeas petition was filed, it was not clearly established Supreme Court precedent at the time of Petitioner's state collateral proceedings."

Meras v. Sisto, 2009 WL 382641 (E.D. Cal. Feb 13, 2009) (unpub) (habeas) – "The Court's research has not revealed any binding authority on whether a DNA test constitutes a business record within the context of the Confrontation Clause, though it has yielded several persuasive authority that would support such a conclusion."

Pese v. Runnels, 2009 WL 248374 (N.D. Cal. Jan 29, 2009) (unpub) (habeas) – "where, as here, the Supreme Court has never squarely addressed whether a particular type of statement is testimonial, a state court's admission of such statement at trial is not 'contrary to' clearly established Supreme Court precedent or an 'unreasonable application' of *Crawford*"

Samayoa v. Ayers, 2009 WL 62424 (S.D. Cal. Jan 09, 2009) (unpub) (habeas) – "'similar motive' is a state evidentiary requirement, and not a requirement under the Confrontation Clause. The Supreme Court has refrained from conducting any similar motive inquiry in their Sixth Amendment cases, and Petitioner has not directed the Court's attention to any clearly established federal law that supports his position."

Deener v. Quarterman, 2008 WL 4791473 (N.D. Tex. Oct 30, 2008) (unpub) (habeas) – "There simply is no basis for concluding that the state court decision, holding that petitioner forfeited his right of confrontation by failing to file written objections to the certificate of analysis and chain of custody affidavits at least 10 days before trial as required by Texas law, is contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States."

Young v. Symmes, 2008 WL 4748569 (D. Minn. Oct 28, 2008) (habeas) – "the Supreme Court has provided no categorical answer to the question of whether the admission of a dying declaration, or of a private statement made to non-law enforcement in the circumstances presented here, violates the Confrontation Clause."

Wilkinson v. Hofmann, 572 F.Supp.2d 470 (D. Vt. Aug 19, 2008) – "While Tom's statements could possibly be seen as testimonial under *Davis*, *Davis* was not clearly established law when Wilkinson's conviction became final. Therefore, the court must review the decision using *Crawford* but not *Davis*."

Bobadilla v. Carlson, 570 F.Supp.2d 1098 (D. Minn. Jul 16, 2008) (habeas), aff'd, **Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. (Minn.) Aug 06, 2009), cert. denied, 130 S. Ct. 1081; 175 L. Ed. 2d 928 (2010)** – "In *Davis*, the United States Supreme Court shed considerable light on the definition of 'testimonial.' But because *Davis* was decided after the Minnesota Supreme Court reinstated Bobadilla's conviction, *Davis* is not part of the 'clearly established Federal law' in light of which this Court must evaluate the court's decision." [NOTE: Compare Reverse Retroactivity, below.]

Moses v. Payne, 543 F.3d 1090, 08 Cal. Daily Op. Serv. 12,122 (9th Cir. Sep 15, 2008) __ F.3d __, 2009 WL 213070 (9th Cir. Jan. 30, 2009) (amended) (habeas) – (habeas) – " In light of *Musladin*, *Panetti*, and *Van Patten*, we conclude that when a Supreme Court decision does not 'squarely address[] the issue in th[e] case' or establish a legal principle that 'clearly extend[s]' to a new context to the extent required by the Supreme Court in these recent decisions, *Van Patten*, 128 S.Ct. at 746, 745, it cannot be said, under AEDPA, there is 'clearly established' Supreme

Court precedent addressing the issue before us, and so we must defer to the state court's decision. ... The state court applied *Crawford*, the correct legal rule. Because the court did not arrive at a result different from the result reached by the Supreme Court in an indistinguishable case, we conclude that the state appellate court's decision was not 'contrary to' clearly established Supreme Court precedent under 28 U.S.C. § 2254(d)(1). *See Andrade*, 538 U.S. at 73. Nor did the state appellate court's adjudication of Moses's Confrontation Clause claim involve an 'unreasonable application of' *Crawford*... the state appellate court concluded that Jennifer Moses's statements to Dr. Appleton were non-testimonial because they were made for purposes of diagnosis and treatment, rather than to inculcate Moses. We conclude this is not an unreasonable application of the legal principle established by *Crawford*."

Paul v. Ercole, 2008 WL 3861209 (S.D. N.Y. Aug 19, 2008) (unpub) (habeas) – "'Because the United States Supreme [C]ourt [in *Crawford* ...] explicitly declined to decide whether the admission of dying declarations violated the Sixth Amendment, there was no clearly established United State Supreme Court law on this question.'" (brackets in original)

Wilson v. Sirmons, 536 F.3d 1064 (10th Cir. Aug 08, 2008) (habeas) – "we have recently stated that it is 'far from clear' whether the Confrontation Clause even applies at capital sentencing proceedings." – therefore admission of even testimonial hearsay at capital sentencing hearing not grounds for reversal on habeas

Bobadilla v. Carlson, 2008 WL 2788011 (D. Minn. Mar 25, 2008) (unpub) (habeas), magistrate's recommendation rejected and writ of habeas corpus granted, **Bobadilla v. Carlson, 570 F.Supp.2d 1098 (D. Minn. Jul 16, 2008)** (habeas), *aff'd Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. (Minn.) Aug 06, 2009)*, cert. denied, 130 S. Ct. 1081; 175 L. Ed. 2d 928 (2010)

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Delgadillo v. Woodford, 527 F.3d 919 (9th Cir. Jun 03, 2008) (habeas) – petitioner's appeal became final before *Crawford* was decided, but state court retroactively applied *Crawford*, which *Whorton v. Bockting* said was not required but *Danforth* said was permissible – "The state court did not err in electing to apply *Crawford*. Therefore, *Crawford* is the 'clearly established Federal law' for purposes of our AEDPA review."

Duncan v. Bobby, 2008 WL 111229 (N.D. Ohio Jan 08, 2008) (unpub) (habeas) – "Applying the authorities cited above, the state court's admission of the statements of Mr. Futrell made as he lay dying, were not contrary to, nor did they constitute an unreasonable application of, clearly established federal law concerning a criminal defendant's Sixth Amendment right to confront the witnesses against him, particularly in light of the fact that the statements were non-testimonial dying declarations and, therefore, were inherently reliable."

Lingle v. Mitchell, 2007 WL 4287752 (W.D. N.C. Dec 05, 2007) (unpub) (habeas) – "[T]here is no clearly established federal law that the Confrontation Clause applies in sentencing proceedings."

Call v. Branker, 2007 WL 4115934 (4th Cir. Nov 20, 2007) (unpub) (habeas) – "nor would *Crawford* have constituted 'clearly established' law at the time of the resentencing [*i.e.*, before *Crawford* was decided]."

Ellington v. Grams, 2007 WL 3342587 (E.D. Wis. Nov 09, 2007) (unpub) (habeas) – "[I]t is clear that the Wisconsin Court of Appeals' conclusion that admission of Marilyn B.'s medical records did not violate Ellington's rights under the Confrontation Clause is not contrary to, nor does it constitute an unreasonable application of, clearly established federal law."

Torres v. Roberts, 2007 WL 3302437 (10th Cir. Nov 07, 2007) (unpub) (habeas) – "The Kansas Supreme Court rejected Torres's argument that the trial court violated his Sixth Amendment right to confront witnesses when it admitted the statements he made to law enforcement officers. ... We agree that no clear authority exists for the proposition that the Sixth Amendment guarantees a right to 'confront oneself' at trial."

Pizano v. Davis, 2006 WL 4975357 (E.D. Mich. Mar 08, 2006) (unpub) (habeas) – "Because petitioner's trial and direct appeal pre-date the Supreme Court's decision, *Crawford* does not constitute 'clearly established law' upon which habeas relief for petitioner may be predicated."

Ruiz v. Scriber, 2007 WL 2790203 (N.D. Cal. Sep 20, 2007) (unpub) (habeas) – "While the forfeiture-by-wrongdoing doctrine is clearly established federal law, as determined by *Reynolds*, the intent-to-silence requirement is not. ... Here, Ms. Altamirano made statements regarding domestic violence and spousal rape to two officers. Petitioner then murdered her. Under the forfeiture-by-wrongdoing doctrine, it was not a contrary or unreasonable application of clearly established federal law to admit the hearsay statements because petitioner had voluntarily (and wrongfully) kept the witness away, and the evidence was supplied in some lawful way (under the California Evidence Code hearsay exception). Petitioner was not subject to the protections of the Confrontation Clause under these circumstances."

Guilbeau v. Cain, 2007 WL 2478888 (W.D. La. Jul 31, 2007) (unpub) (habeas) – "Therefore, contrary to petitioner's position, what does and does not constitute 'testimonial' hearsay, and more specifically whether out-of-court statements made by a victim-decedent in the context of a purely private conversation are 'testimonial', is not 'clearly established' by the United States Supreme Court."

Davis v. Polk, 2007 WL 2898711 (W.D. N.C. Sep 28, 2007) (unpub) (habeas) – "there is no clearly established federal law that the Confrontation Clause applies in a capital sentencing proceeding. ... Consequently, there is no clearly established federal law that introduction of hearsay evidence at a sentencing proceeding violates a defendant's rights under the Confrontation Clause. Therefore, counsel were not deficient for failing to object to Detective Searcy's testimony on Sixth Amendment grounds."

Beverly v. Buss, 2007 WL 1662771 (N.D. Ind. 2007) (unpub) – "Because the United States Supreme court explicitly declined to decide whether the admission of dying declarations violated the Sixth Amendment, there was no clearly established United State Supreme Court law on this question. Indeed, the court intimated that such an exception could well exist when it cited authority in support of the exception. In light of *Crawford*, this Court cannot say that the State of Indiana unreasonably applied clearly established Federal law."

(This category collects cases in which retroactive application of *Crawford* would benefit the warden.)

Williams v. Wolfenbarger, 2009 WL 94528 (E.D. Mich. Jan 12, 2009) (unpub) (habeas) – "Here, even if the Michigan Court of Appeals erred with respect to its analysis of any statements not constituting testimonial hearsay under *Roberts*, petitioner would not be able to show a constitutional violation as required by § 2254(a), because the introduction of non-testimonial hear-say does not violate the Confrontation Clause. [FN3] FN3. Although this result flows from a plain reading of § 2254, the conclusion is buttressed by the absurdity of a contrary result. For in-stance, suppose that the Court were to conclude that the Michigan Court of Appeals unreasonably applied *Roberts* with respect to a particular non-testimonial statement, and that this finding alone entitled petitioner to habeas relief. The actual relief to which petitioner would be entitled would be a new trial. However, at that new trial, the prosecution would be free to again introduce the non-testimonial statement, because under *Crawford* and *Davis* it is clear that the non-testimonial statement is not barred by the Confrontation Clause."

Doan v. Carter, 548 F.3d 449 (6th Cir.(Ohio) Nov 26, 2008), rehearing and rehearing en banc denied (Feb 19, 2009) – "Notwithstanding the fact that Doan must establish that the state court's decision was contrary to, or a misapplication of *Roberts*, Doan must also establish that the state court's decision was contrary to, or a misapplication of, *Crawford*. ... This Court has previously explained that a showing that a state court misapplied *Roberts* is 'a necessary, but not a sufficient, condition for habeas relief,' because '[t]he goal of the great writ is not to correct the misapplication of overruled precedents.'"

Barlow v. Scribner, 2008 WL 4500030 (C.D. Cal. Oct 05, 2008) (unpub) (habeas) – "*Crawford* nevertheless maybe applied retroactively to deny claims of a petitioner whose conviction became final prior to 2004 when *Crawford* was decided"

Desai v. Booker, 538 F.3d 424 (6th Cir. Aug. 15, 2008) – "Even if Desai could show that he is entitled to a new trial because the state courts misapplied the old *Roberts* test, that would not give him a right to a new trial conducted under the old test. The most he could hope for is a new trial in which the state courts would apply the *Crawford/Davis* regime, meaning of course that Adams' non-testimonial statement could not be kept out under the Confrontation Clause. As relevant to the constitutional claim underlying Desai's habeas petition, then, the new trial would look like the old trial--which is the epitome of a harmless and therefore uncorrectable error on habeas review.

Unreasonable Application of Federal Law

Ross v. DA of Allegheny, 672 F.3d 198, 201-213 (3d Cir. Pa. 2012) (habeas) – "There were ample statements in the record from which the PCRA Court could reasonably have concluded that Erwin would not testify if called to do so. Under AEDPA, it is not the place of a federal court to reweigh the evidence, when the state court's determination is supported by the record."

Peak v. Webb, 673 F.3d 465, 466-487 (6th Cir. Ky. 2012) – "It is not unreasonable to believe, as did at least three justices on the Kentucky Supreme Court, as well as the trial-court [*474] judge, that confrontation only requires that a declarant be made available in the courtroom for a

criminal defendant to call during his own case. It can be argued that this ability is equivalent to cross-examination. The defendant can, for example, employ leading questions in questioning a hostile witness on direct examination just as he could in cross-examination. [cite] More basically, the defendant has had the ability to confront the witness face-to-face, and to question the witness about the testimonial statement while the witness is under oath. [¶] We are not convinced that the opportunity to call a witness, as opposed to the opportunity to immediately cross-examine a witness, satisfies the Confrontation Clause. However, we are convinced that there is a possibility for fairminded disagreement on the issue, and under clear, and increasingly strident,¹² Supreme Court precedent, that is all that is required to affirm."

Vega v. Walsh, 669 F.3d 123 (2d Cir. N.Y. 2012) – "Relying on *Melendez-Diaz* and *Bullcoming*, Vega argues that his rights under the Confrontation Clause of the Sixth Amendment were violated because autopsy reports are testimonial. Specifically, he contends that the medical examiner should not have been permitted to testify from a report about an autopsy she had not performed, where the medical examiner who performed the autopsy was not available for cross-examination. ... We conclude that the Appellate Division's decision was neither contrary to nor an unreasonable application of *Crawford*. Reasonable jurists could disagree (certainly back then) as to whether Reiber's testimony about the autopsy report came within the *Crawford* formulations. *Crawford's* list of testimonial statements was nonexhaustive and its guidance was hardly definitive. Furthermore, although autopsies are often used in criminal prosecutions, they are also prepared for numerous other reasons -- including the determination of cause of death when there is no anticipation of use of the autopsy in any kind of court proceeding. [cite] Given the state of the law in 2005, we conclude that there was nothing unreasonable in the Appellate Division's conclusion that Reiber's testimony was not barred by the Confrontation Clause."

Jones v. Basinger, 635 F.3d 1030 (7th Cir. Ind. 2011) (habeas) – state court ruled evidence was not admitted for truth, 7th Circuit disagreed

Likely v. Ruane, 681 F. Supp. 2d 107, 107-111 (D. Mass. 2010) – "This case turns on whether the Massachusetts Appeals Court's [pre-*Melendez-Diaz*] decision was an 'unreasonable application' of *Crawford*. ... State and federal courts across the country were divided as to whether scientific evidence like the drug certificates at issue were testimonial in the wake of *Crawford*. As the four dissenters in *Melendez-Diaz* noted, thirty-five states and six Federal Courts of Appeals allowed the admission of scientific analysis without the testimony of the analyst who produced it. 129 S. Ct. at 2543 (Kennedy, J., dissenting). ... It would be peculiar to find that a position taken by a majority of courts -- and supported by four Supreme Court justices -- was objectively unreasonable." – though noting that a different federal judge in Massachusetts has held exactly that

Sisneroz v. California, 2009 WL 302280 (E.D. Cal. Feb 06, 2009) (unpub) – state court conclusion that *Crawford* did not apply to civil SVP proceeding was "neither contrary to nor involved an unreasonable application of any controlling United States Supreme Court holding."

Miller v. Stovall, 573 F.Supp.2d 964 (E.D. Mich. Aug 27, 2008) (habeas), aff'd **Miller v. Stovall, 608 F.3d 913, 916-918 (6th Cir. Mich. 2010)** – in a poorly-organized, badly-written and very long opinion, holding that the state court's determination that a suicide note was non-testimonial was an unreasonable application of *Crawford*

Salcedo v. Ollison, 2008 WL 2811486, *9+ (C.D. Cal. Jul 21, 2008) (unpub) (habeas) – not unreasonable of state court to permit jury to receive transcript of 911 call admitted as background – also response to emergency

Powell v. Kirkland, 2008 WL 2774389 (E.D. Cal. Jun 27, 2008) (unpub) (habeas) – state court ruled that gang expert's response to prosecutor's hypothetical question, which was based on absent witness's statement, did not offer the absent witness's statement for truth of the matter asserted – not contrary to *Crawford*

Espinosa v. Horel, 2008 WL 783375 (N.D.Cal. Mar 25, 2008) (unpub) (habeas) – "the Court of Appeal's decision that any [*Crawford*] error by the State Trial Court was harmless beyond a reasonable doubt was not contrary to, or an unreasonable application of, federal law within the meaning of § 2254(d)(1)."

Cochran v. Adams, 2007 WL 2481456 (S.D. Cal. Aug 28, 2007) (unpub) (habeas) – "Although Petitioner argues that calling the victim/accuser as a friendly witness is not the same as having her called by the prosecution, he fails to elaborate on, or offer any legal support for, this assertion. (See Traverse at 25.) Indeed, this Court was unable to locate any Supreme Court precedent that expressly requires a state prosecutor to call the victim of a sexual assault as a witness in order to satisfy the accused's right to confrontation. In the absence of controlling Supreme Court authority, this Court cannot say that the trial court's decision was objectively unreasonable."

Saechao v. Oregon, 2007 WL 2888620 (9th Cir. Oct 02, 2007) (unpub) (habeas) – "Because *Crawford* did not speak to 'whether and when statements made to someone other than law enforcement personnel are 'testimonial,' " *Davis v. Washington*, 126 S.Ct. 2266, 2274 n. 2. (2006), the Oregon Court of Appeals' treatment of the case was not an objectively unreasonable application of federal law, as defined by the Supreme Court."

Smith v. Pennsylvania, 2007 WL 2729902 (E.D. Pa. Aug 20, 2007) (unpub) (habeas) – "Following Smith's arrest, a preliminary hearing was held on July 11, 2002, during which the victim testified. On March 21, 2003, the victim was killed in an unrelated matter. ... In this case, Smith does not argue that he was deprived of the opportunity to conduct any cross-examination of the victim, but rather that he was denied the right to conduct a full and fair cross-examination due to the limitations set forth by the court during his preliminary hearing. ... In this case, Smith had an adequate opportunity for cross-examination of the victim at the preliminary hearing, and the introduction of the victim's preliminary hearing testimony did not violate Smith's rights under the Confrontation Clause. As a result, I find that the state courts' conclusion that there was no violation of the Confrontation Clause is not an unreasonable application of clearly established federal law, as determined by the Supreme Court. See 28 U.S.C. § 2254(d)."

Roelle v. Wilson, 2007 WL 2572254 (N.D.Ohio Sep 04, 2007) (unpub) (habeas) – "[T]he trial court permitted police officers to testify about what they learned from the alleged victim and her family members during the police investigation." – appeals court ruled it wasn't offered for the truth but to explain the investigation – "Under either the 'unreasonable application' of or 'contrary to' test, the Petitioner's challenge to the admission of the officers' testimony at trial does not support the issuance of a writ of habeas corpus..."

Earhart v. Konteh, 2007 WL 2492307 (S.D. Ohio Aug 29, 2007) (unpub) (habeas) – videotaped deposition used to accommodate child victim who was out of state on family vacation at the time of trial – "Neither the Supreme Court nor the Sixth Circuit has explicitly addressed whether a witness is 'unavailable' because she is on a previously scheduled vacation out of town. ... Thus, the Court concludes that the trial judge erred by admitting the deposition testimony of Ms. Trost, and in turn, that the Ohio Court of Appeals' decision upholding that decision was contrary to and an unreasonable application of clearly established federal law." [NOTE: The Supreme Court has not established any law on the subject; the state court's decision was contrary to the law clearly established by the Supreme Court. And in the same paragraph, even!]

Marquez v. Evans, 2007 WL 2406867 (N.D. Cal. Aug 20, 2007) (unpub) (habeas) – admission of a videotapes that "showed testimony by the boys that the petitioner had beaten their mother" was not contrary to federal law, because the boys testified – and the fact that they testified further made any error harmless under the *Brecht v. Abrahamson* standard

Levy v. Uttecht, 2007 WL 2363041 (W.D. Wash. Aug 14, 2007) (unpub) (habeas) – "Petitioner makes no showing that this decision of the Washington Supreme Court was contrary to, or constituted an unreasonable application of, federal law as determined by the United States Supreme Court. Petitioner cites to no authority in either his petition or his traverse which suggests that the right of confrontation applies at suppression hearings. And, in fact, the United States Supreme Court has indicated otherwise."

Haliym v. Mitchell, 492 F.3d 680 (6th Cir. 2007) (habeas) (death penalty case) – "Moreover, Petitioner did cross-examine [7-year-old] Albert, and Albert was generally responsive to that cross-examination. The Ohio Supreme Court's conclusion that Albert was competent to testify is not clearly erroneous. Accordingly, we reject Petitioner's claim that Albert's testimony violated Petitioner's rights under the Confrontation Clause." [NOTE: The "clearly erroneous" language is itself clearly erroneous – it's an incorrect legal standard. *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).]

Durall v. Quinn, 2007 WL 1574121 (W.D. Wash. May 29, 2007) (unpub) – habeas – "At issue in this claim are out-of-court statements which the victim made to friends, co-workers, and family members about her plan to talk to petitioner about a divorce on the night she was murdered. These statements were admitted under an exception to the hearsay rule as statements of future intent. ... [T]he Washington Supreme Court concluded that statements made by the victim to co-workers and relatives about her plan to discuss divorce with petitioner could not be deemed testimonial 'under any reasonable reading of Crawford.' (Dkt. No. 16, Ex. 18 at 3-4.) While petitioner argues vigorously that the statements at issue should be deemed testimonial, petitioner makes no showing that the decision of the Washington Supreme Court was either contrary to, or constituted an unreasonable application of, clearly established federal law. Accordingly, petitioner's federal habeas petition should be denied with respect to his third ground for relief."

Buenos Ruiz v. Fischer, 2007 WL 1395462 (E.D. N.Y. May 10, 2007) (unpub) – (habeas) – "Here, the evidence was admitted to explain how the investigation of the Petitioner progressed and to explain the lapse of time between the commission of the crime and the apprehension of Petitioner. ... The Appellate Division properly found, therefore, that Detective Martinez's testimony did not violate the Confrontation Clause."

Green v. Lafler, 2007 WL 1041200, *11+ (E.D. Mich. Apr 05, 2007) (unpub) (habeas) – "Out-of court statements by Barnes to Borns were "non-testimonial" statements. The statements were informally made by Barnes to his brother Borns, not to a government officer in response to a formal investigation. ... The state court's admission of Borns' testimony relative to Barnes' inculpatory out-of-court statements implicating himself and Green was not contrary to, or an unreasonable application of, clearly established federal law."

Moses v. Payne, 2007 WL 1101494 (W.D. Wash. Apr 10, 2007), aff'd, 543 F.3d 1090, 08 Cal. Daily Op. Serv. 12,122 (9th Cir. Sep 15, 2008) (unpub) (habeas) – "Applying the *Crawford/Davis* test, the Magistrate Judge correctly concluded the decedent's statements to [ER physician] Appleton were non-testimonial. ... Dr. Appleton was not involved in the investigation of the assault and was not working in conjunction with police or governmental officials to develop testimony. Petitioner does not point to anything in the record indicating the deceased had any reason to believe her statements to Dr. Appleton would be used at a trial. Dr. Appleton's testimony is admissible under *Crawford*." – state courts' determination not contrary to clearly established federal law

Edwards v. Minnesota, 2007 WL 1387995, *6+ (D. Minn. May 09, 2007) (unpub) (habeas) – "The trial court applied Minn. R. Evid. 803(3) which provides for admission of an unavailable declarant's hearsay statement of then-existing state of mind. The exception created under Minn. R. Evid. 803(3) is consistent with affording the State flexibility in creating their hearsay jurisprudence. Petitioner has failed to show that Minn. R. Evid. 803(3) violates his rights under the Confrontation Clause or any other Constitutional Provision."

State Habeas

People v. Gallegos, 2007 WL 2482622 (Cal. App. 2 Dist. Sep 05, 2007) (unpub) – state court held that *Crawford* does not apply to hearsay relied upon by expert to form opinion – not grounds for habeas relief

Ineffective Assistance of Counsel

United States v. Palmer, __ F.Supp.3d __, 2015 WL 1423321 (D.D.C. Mar. 30, 2015) (§ 2255), appeal filed – "Given that the evidence in question does not raise Confrontation Clause concerns because it was not admitted into evidence at trial, because it was related by [DNA expert] Suebert solely for the purpose of explaining the assumptions on which her opinion rested, and because defense counsel was presented with the opportunity to cross-examine Suebert at trial, the Court finds that both trial and appellate counsel did not act in an objectively unreasonable manner by failing to raise this challenge." – [NOTE: The material in question appears to have consisted of the testifying witness's own notes and reports, which should raise no confrontation clause concern because the author was on the stand.]

State v. VanDyke, 2015 WI App 30, ¶¶ 1-28, 361 Wis. 2d 738 (Wis. App. 2015) – "¶ 26 We conclude trial counsel's failure to object to the deprivation of a fundamental constitutional right [*i.e.*, a postmortem toxicology report] constituted deficient performance under the ineffective assistance of counsel rubric."

Jones v. Clarke, 7 F.Supp.3d 626 (E.D. Va. 2014) (habeas), vacated in part, 783 F.3d 987 (4th Cir.2015) – "In his petition, Petitioner contends that trial counsel provided ineffective assistance because she ... failed to object to the admission of the certificate [of fingerprint analysis] on the grounds that its admission violated Petitioner's Confrontation Clause rights as established by *Crawford*... Trial counsel's performance was therefore deficient as it fell below an objective standard of reasonableness, and the Court finds no conceivable basis for upholding the Supreme Court of Virginia's conclusion to the contrary, which was an unreasonable application of *Strickland*."

Blair v. State, 402 S.W.3d 131 (Mo. Ct. App. 2013) – "Prior to trial, Appellant's trial counsel ... entered into a stipulation with the State that Dr. Thomas Young could testify regarding the autopsies performed by Dr. Thomas Gill." – on the facts of the case, reasonable tactics

State v. McDougle, 2013 WI App 43, 830 N.W.2d 243 (Wis. Ct. App. 2013) – "[¶ 18] Furthermore, we are not persuaded by McDougle's alternative argument that there is no need to demonstrate trial counsel's prejudice so long as there is a Confrontation Clause violation."

People v Carnevale, 101 A.D.3d 1375, 957 N.Y.S.2d 746 (N.Y. App. Div. 3d Dep't 2012) – "This damaging statement implicating defendant in Carnevale's plan was clearly hearsay offered to prove its truth — i.e., that Carnevale (who did not testify at defendant's trial) and defendant together planned and intended the shootings. However, no hearsay or confrontation clause objections were registered by defense counsel... This is, then, a 'rare case' in which it is possible to reject — from the trial record alone — all legitimate explanations for counsel's failure, among others, to pursue a colorable suppression issue [cite]."

Flournoy v. Small, 681 F.3d 1000 (9th Cir. Cal. 2012) (habeas) – "*Crawford* did not dictate a conclusion that Flournoy's Confrontation Clause rights were violated. The failure to make an objection that would have been overruled was not deficient performance."

Menefield v. State, 363 S.W.3d 591, 592-594 (Tex. Crim. App. 2012) – "The reason that the laboratory report in this case was inadmissible is that Murphy, its author, had not been called to testify.n10 We do not know why counsel failed to raise a Confrontation Clause objection because the record is silent on the matter. Perhaps there was no good reason, and counsel's conduct was deficient. Or perhaps the State could (and with an objection would) have brought Murphy to the courtroom to testify, and counsel realized that cross-examining Murphy would not benefit his client. Neither trial counsel nor the State have been given an opportunity respond to appellant's allegation. Consequently, we conclude that the record fails to show deficient performance."

Grindle v. State, 299 Ga. App. 412; 683 S.E.2d 72; 2009 Fulton County D. Rep. 2740 (Ga. App. Jul 27, 2009) – "Plunkett's custodial statement to the detective was testimonial inasmuch as it was made to a police officer during the course of an investigation, and Grindle did not have an opportunity to cross-examine Plunkett because Plunkett did not testify. There is nothing in the record showing that the statement would have been admissible under any exception to the hearsay rule, [FN2] nor has the State argued that in its brief. Counsel conceded that there was no reasonable strategic reason for not objecting to this testimony. It follows, therefore, that Grindle's

attorney should have objected to the admission of Plunkett's custodial statement to the detective, and that, had he done so, the trial judge would have been required to exclude it."

U.S. v. Irby, 558 F.3d 651 (7th Cir. Mar 11, 2009) – "FN4. ... In this case, had Irby raised and the district court sus-tained a confrontation-clause objection to the hearsay statements, the result could have been the live and potentially more forceful testimony of the CI from the witness stand. Faced with this prospect, it may have been to Irby's advantage to let the statements come into evidence through Officer Batterham." [NOTE: This footnote was dicta, and the precise issue wasn't IAC but whether plain error had been shown, but the point it makes might be useful in IAC cases.]

U.S. v. Solomon, 2009 WL 499419 (N.D. Okla. Feb 27, 2009) (unpub) (§ 2255) – "This Court declines to find deficient performance by counsel whose hearsay objection was overruled and who did not have the benefit of the *Crawford* decision at the time of trial."

Zink v. State, __ S.W.3d __, 2009 WL 454283 (Mo. Feb 24, 2009) – "At the time of Mr. Zink's trial, his counsel's performance was consistent with existing law, and he was not required to predict whether autopsy reports would be found to be testimonial in nature and entitled to the protections of *Crawford*. Trial counsel, therefore, was not ineffective for failing to object to testimony and closing argument concerning the autopsy report."

People v. Chandler, 2009 WL 389726 (Cal. App. 1 Dist. Feb 18, 2009) (unpub) – "Defendant had had the opportunity to cross-examine Chandler, who was now unavailable to testify at trial. Admission of his preliminary examination testimony at trial would therefore not violate defendant's confrontation rights. (*Crawford* ... Presumably knowing this, defendant's trial counsel did not object at trial. That does not establish constitutional incompetence. 'Trial counsel is not required to make futile objections, advance meritless arguments or undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel.'"

People v. Richardson, 2009 WL 279481 (Mich. App. Feb 05, 2009) (unpub) – "Officer Blanding stated that Simmons told him that she permitted defendant to sell drugs from the apartment. Defendant did not object to or move to strike that statement. ... it was objectively unreasonable for defense counsel not to object to the statement and move to have it stricken."

State v. Hudson, 2009 WL 252362, 2009-Ohio-456 (Ohio App. 5 Dist. Feb 02, 2009) (unpub) – "{¶ 122} However, an officer's testimony concerning the reasons for his or her actions during an investiga-tion generally is not considered hearsay, because, rather than to prove the truth of the statement made to the officer, it is offered to show why the officer as the testifying witness acted in a particular manner. ... We find, therefore, that trial counsel was not ineffective in failing to object to Detective George's testimony."

Yisrael v. State, 271 S.W.3d 647 (Mo. App. W.D. Dec 30, 2008) – "Ahijah Yisrael appeals from the judgment of the motion court denying his claim of ineffective assis-tance of appellate counsel for failing to assert a claim under *Crawford* ... in his direct appeal. The State of Missouri cross ap-peals the judgment of the motion court vacating Mr. Yisrael's convictions and sentences based on a viola-tion of Mr. Yisrael's constitutional right to confront and cross-examine the witnesses against him under *Crawford*. Because a published opinion would have no precedential

value, a memorandum has been pro-vided to the parties. The judgment of the motion court is affirmed. Rule 84.16(b)." [NOTE: This is the published opinion in its entirety.]

People v. Myers, 2008 WL 5394419 (Cal. App. 2 Dist. Dec 17, 2008) (unpub) – "there was no valid basis on which to object to the [gang expert] testimony about which defendant now complains, and his contentions of eviden-tiary error and ineffective counsel must be rejected."

Vasquez v. Hedgpeth, 2008 WL 5103197 (C.D. Cal. Dec 01, 2008) (unpub) (habeas) – "The challenged statements were not hearsay because they were not offered for the truth of the matter stated. There was substantial other evidence that Dolow was [petitioner's] gang moniker, and Campos's testimony that he had been told [petitioner] was dangerous was offered to show Campos's state of mind, not to prove that [petitioner] was, in fact, a "dangerous man." Phev's similar testimony was offered as impeachment, to refute his recantation of his pretrial statements. For these reasons, there was no Crawford violation and counsel was not ineffective."

Rudolph v. McNeil, 2008 WL 5095624 (S.D. Fla. Nov 26, 2008) (unpub) (habeas) – "Rudolph's trial proceedings took place in October 2003, before *Crawford* had been decided. The courts have generally held that an attorney's failure to anticipate changes in the law does not render his performance ineffective."

People v. Zavala, 168 Cal.App.4th 772, 85 Cal.Rptr.3d 734 (Cal. App. 5 Dist. Nov 24, 2008), review denied (Feb 25, 2009) – "since the law neither does nor requires idle acts, Zavala's attorney did not render ineffective assistance of counsel by declining to make a futile confrontation clause objection to the admission of those statements."

State v. Rayshad, 670 S.E.2d 849, 8 FCDR 3996 (Ga. App. Dec. 1, 2008) – "Mercer's declarations were given in response to police questioning at the sheriff's office days after the crimes were committed, and the declarations implicated Rayshad. ... Rayshad's counsel's failure to protect his client from them could not have been reasonable trial strategy, but was deficient performance."

Eller v. State, 294 Ga.App. 77, 668 S.E.2d 755 (Ga. App. Oct 16, 2008) – "At the hearing on the motion for new trial, defense counsel articulated a strategy of allowing the officers to testify about the witnesses' statements without objection ..." – not ineffective

Perales v. State, 2008 WL 4531659 (Tex.App.-Fort Worth Oct 09, 2008) (unpub) – "because the detective testified at trial... Perales's trial counsel was not ineffective by failing to object to the admission of the detective's statements on Confrontation Clause grounds."

Taylor v. State, __ S.W.3d __, 2008 WL 3906321 (Mo. Aug 26, 2008) – forensic pathologist testified about autopsy performed by different doctor – "Counsel's failure to raise a hearsay argument with regard to Dr. Adelstein's testimony was not deficient" based on Missouri law prior extant at time of trial

State v. Voss, 2008 WL 2955390, 2008-Ohio-3889 (Ohio App. 12 Dist. Aug 04, 2008) (unpub) – "In *State v. Craig*, ... however, the court held that autopsy reports are admissible as business records even in light of *Crawford*. [cite] Therefore, the failure of Voss' trial counsel to object to the admission of the autopsy reports did not constitute ineffective assistance."

Antunes-Salgado v. State, 987 So.2d 222 (Fla. App. 2 Dist. Jul 30, 2008) – drug case – "Here, Antunes-Salgado's codefendants' post-*Miranda* statements to the police were clearly testimonial and thus clearly inadmissible under *Crawford*. The statements were made in response to a police interrogation, and they were not statements made in furtherance of the conspiracy. Therefore, defense counsel was ineffective for failing to object on this basis as well."

Strong v. State, __ S.W.3d __, 2008 WL 2929675 (Mo. Jul 31, 2008) – "trial counsel cannot be ineffective for failing to anticipate the holding of *Crawford* prior to its issuance"

Mitchell v. Poole, 2008 WL 2795469 (E.D. N.Y. Jul 18, 2008) (unpub) (habeas) – "Although petitioner's trial occurred prior to the decision in *Crawford* ... and thus it would be difficult to find that trial counsel provided ineffective assistance for failing to anticipate that decision, the fact is that the 911 calls at issue had all the earmarks of non-testimonial statements subsequently identified in *Davis* ... The witness to the robbery saw it occurring on her front stoop and called 911 as it was happening or immediately thereafter, describing the particulars of the perpetrator and the location of the robbery in an agitated state. There was thus no valid objection for trial counsel to make."

Echemendia v. McNeil, 2008 WL 2726917 (S.D. Fla. Jul 11, 2008) (unpub) (habeas) – "Since Detective Cabrera's out-of-court statements in this case were made during a former trial where the opportunity for cross examination obviously existed, *Crawford* would not have foreclosed the admission of that testimony, so appellate counsel's failure to make a contrary argument did not amount to constitutionally deficient representation."

Beck v. State, 665 S.E.2d 701, 292 Ga.App. 472, 8 FCDR 2229 (Ga. App. Jun 23, 2008) – trial counsel testified that he deliberately chose not to object on *Crawford* grounds to a poor-quality audio recording because he did not want to back the state into calling the CI to provide live testimony – "As this strategy was not patently unreasonable, the trial court did not err in finding that counsel's actions in this regard fell within the broad range of reasonable professional conduct."

People v. Orona, 2008 WL 2445103 (Cal. App. 4 Dist. Jun 18, 2008) (unpub) – counsel not ineffective for failing to object to gang expert's testimony that defendant was "shot caller" in gang – "We conclude there is no reasonable probability the result would have been different had counsel objected to Edinger's testimony."

Renteria v. Subia, 2008 WL 2413998 (C.D. Cal. Jun 13, 2008) (unpub) (habeas) – 5-year-old was eyewitness to father's murder of mother – "defense counsel consciously refrained from making a *Crawford* objection to Kaylee's Statements because he had an objectively reasonable concern that doing so would result in a pyrrhic victory under the circumstances. If a *Crawford* objection had been made and sustained, the record clearly establishes the People would have proceeded to call Kaylee as a witness. At that point, defense counsel would then be faced with having to cross-examine a 'very cute' five-year old girl about how her father brutally murdered her mother, a situation that was fraught with danger and likely to be more damaging than Kaylee's videotaped statements." – a reasonable tactical decision and "far from" ineffectiveness

Medina v. State, 2008 WL 2247061 (Ind. App. Jun 03, 2008) (unpub) – despite defense counsel falling on her own sword and almost masochistically describing her own incompetence, no showing of ineffectiveness when *Crawford* objection to child's statement would have been meritorious because child testified

Ottis v. U.S., 952 A.2d 156 (D.C. Apr 24, 2008) – defense counsel did not object to introduction of drug test reports, which in D.C. are considered testimonial – but not ineffective because "the government still could have called the chemist to testify based on the reports the chemist prepared. Therefore, appellant would be unable to prove that 'there [was] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"

Maher v. U.S., 2008 WL 1986037 (D. Me. May 07, 2008) (unpub) (§ 2255) – "Given the First Circuit's thoroughgoing plain error analysis, I conclude that Maher cannot make the Strickland prejudice showing apropos the failure to object to this hearsay evidence. ... [I]t is hard to seriously fault defense counsel's failure to press the issue at trial. The First Circuit recognized that the dividing line "between what is true background to explain police conduct (and thus an exception to the hearsay rule and thus an exception to *Crawford*) and what is an attempt to evade *Crawford* and the normal restrictions on hearsay" is often unclear. *Maher*, 454 F.3d at 23."

Byars v. State, 2008 WL 1991737, *6+ (Tex.App.-Hous. (14 Dist.) May 08, 2008) (unpub) – non-capital bifurcated trial – "D.B. testified as a witness for the defense during the punishment phase of trial. Other than the fact that the State chose not to call D.B. to testify during the guilt-innocence phase, appellant does not point to any other evidence demonstrating D.B.'s unavailability, nor does he explain how *Crawford* applies when the declarant testifies during part of the trial. ... Accordingly, counsel was not ineffective for failing to lodge an objection."

Kuecker v. State, 2008 WL 1747692 (Tex.App.-Hous. Apr 17, 2008) (unpub) – "trial counsel's strategy appears to have been to admit the videotape [containing arguably-testimonial statements] and then have appellant explain, through his own testimony, his version of what transpired. [¶] Accordingly, appellant has failed to establish, by a preponderance of the evidence under the first prong of the *Strickland* test ..."

Williams v. U.S., 2008 WL 538941 (9th Cir. Feb 28, 2008) (unpub) (§ 2255) – defendant was tried pre-*Crawford*, but his appeal was post-*Crawford* – "Although we find no error in the conduct of his trial counsel, Williams's attorney on direct appeal rendered ineffective assistance by failing to argue that his client's Confrontation Clause rights were violated by the admission of an unavailable witness's grand jury testimony."

People v. Sprosta, 49 A.D.3d 784, 853 N.Y.S.2d 625 (N.Y. A.D. 2 Dept. Mar 18, 2008) – "the record establishes that defense counsel's express denial of any objection was part of an intentional defense strategy to comment upon the alleged unreliability of the expert's testimony. ... The record before us reveals strategic or legitimate explanations for the alleged instances of ineffective assistance."

State v. Danforth, 2008 WL 596544 (Wis. App. Mar 06, 2008) (unpub) (post-conviction motion) – failure to object to reports of Iowa Department of Human Services investigation not IAC where counsel gave valid reason for decision – the reports contradicted each other

Gomez v. U.S., 2008 WL 341337 (M.D. Fla. Feb 05, 2008) (unpub) (§ 2255) – “Gomez claims his counsel failed to object to the Government's introduction of hearsay testimony at sentencing ... However, *Crawford* does not apply to a proceeding other than trial. ... Gomez's sentence was not enhanced as the result of his prior arrests alone. Thus, Gomez incurred no prejudice as a result of his counsel not opposing the testimony.”

People v. Wise, 2007 WL 4479063 (Cal. App. 1 Dist. Dec 21, 2007) (unpub) – “In this case, there is a highly satisfactory explanation why counsel did not object to the portion of the tape containing the alleged hearsay by Williams. Simply put, it fit into his theory of the case, which was, as he explained to the jury in closing argument, that Lamar Williams was the killer and real villain of the piece ...”

State v. Fulk, 2007 WL 4488315, 2007-Ohio-6975 (Ohio App. 3 Dist. Dec 26, 2007) (unpub) – drug case – “{¶ 35} Upon review of the record, and being mindful of the incomplete record of discovery before this court, we find that Fulk's counsel's apparent failure to demand the testimony of the BCII technician prior to trial or otherwise object to the foundation laid for the introduction of the reports at trial could well have been trial strategy. Defense attorneys commonly do not wish to have a chemist present to testify at trial in order to de-emphasize the nature or amount of the drugs in front of the jury. Similarly, defense counsel may not want to be seen as objecting unnecessarily where the drug analysis is not relevant to the defendant's claim that she was unaware of the drugs or had no possession of them. In any event, we will not presume ineffectiveness or that these strategies were not legitimate solely from a failure to object at trial. Nor can we presume that had defense counsel made a pretrial demand for the testimony of the chemist, the outcome of the trial would have been different. *See Strickland*, 466 U.S. at 688, 694. Accordingly, on this record we cannot find that Fulk's counsel was ineffective for failing to object to the admission of Exhibits 3 and 4.” [NOTE: Shortly after this case, and *Reuschling* and *Pasqualone*, were decided, the Ohio Supreme Court issued its opinion in *State v. Crager*, 116 Ohio St.3d 369, 879 N.E.2d 745, 2007-Ohio-6840 (Ohio Dec 27, 2007), which may significantly alter the analysis.]

People v. Guess, 2007 WL 4462987 (Cal. App. 6 Dist. Dec 21, 2007) – “Defendant argues that he was prejudiced because counsel was unable to explore with Drayshonda her inconsistent statements. He overlooks that counsel make effective use of these interviews in his argument to the jury without having given her an opportunity to explain herself or resolve the inconsistencies. ... Under these circumstances, we conclude that defense counsel was not incompetent. He had a tactical reason for the admission of Drayshonda's police interviews.”

Commonwealth v. Lao, 450 Mass. 215, 877 N.E.2d 557 (Mass. 2007) – “[W]e analyze whether the failure of the defendant's appellate counsel to raise a *Crawford* issue with respect to the tape recording of the 911 call and the statements made by Alicia to Yessenia and to Officer Bonita fell measurably below the conduct that might be expected from an ordinary fallible lawyer.” – answer: yes

Ex parte Huerta, 2007 WL 4139233 (Tex. Crim. App. Nov 21, 2007) (unpub) – “As a matter of law, counsel cannot be held constitutionally deficient for failing to predict future law [*i.e.*, *Crawford*].”

Farmer v. Ryan, 2007 WL 4126308 (E.D. Cal. Nov 20, 2007) (unpub) (habeas) – hearsay declarant testified – "Petitioner's Sixth Amendment right to confront this witness was adequately protected. *See Crawford* ... Therefore, any objection by counsel would have been futile and counsel could not have been ineffective for failing to raise a meritless objection."

People v. Means, 2007 WL 3408469 (Cal. App. 5 Dist. Nov 16, 2007) (unpub) – "In the instant case, trial counsel could have reasonably concluded that statements of bystanders regarding 'Richard,' apartment 103, and the brown Delta were made while police officers sought to meet an ongoing emergency arising from the shooting of Damon Pearson. In other words, he could have reasonably determined the statements were not the product of an interrogation but were uttered about events as they were actually happening and, therefore, were not subject to exclusion under the principles of *Crawford*... Once again, criminal defense counsel is not obligated to make an idle motion."

State v. Pruitt, 2007 WL 3195161 (Wash. App. Div. 2 Oct 31, 2007) (unpub) – "Pruitt first claims that he was denied his right to effective assistance of counsel because his attorney (1) elicited hearsay testimony from Detective Pihl that Beeler had confessed and identified him as an accomplice in the Mr. Sudsy's robbery; [citing *Crawford*] ... The recitation set out above shows that defense counsel elicited this testimony for a non-hearsay purpose and as part of his strategy to discredit the police investigation. As a matter of legitimate trial tactics, this cannot form the basis for a claim that counsel was ineffective."

Padilla Venegas v. Runnels, 2007 WL 2462146 (N.D. Cal. Aug 29, 2007) (unpub) (habeas) – "Because counsel's performance must be evaluated at the time of petitioner's trial, counsel was not required to anticipate *Crawford*."

State v. Jespersen, 2007 WL 2660061 (Cal.App. 4 Dist. Sept. 12, 2007) (unpub) – "Here, although the record sheds no light on why Boyce did not more thoroughly redact the videotapes, did not object timely to their admission, did not specifically object to the hearsay and irrelevant portions of the tapes or the prior testimony of J. and Michelle that were not qualifying consistent or inconsistent statements, and did not object to the television and VCR going into the deliberations room, given the sound legal basis for such objections, the history of this case and the closeness of the credibility issues at stake, we simply cannot find any satisfactory explanation or rational tactical purpose for Boyce's failures. Because the alleged victims' credibility was central to Jespersen's case, we believe that any reasonably competent attorney ... would have made the evidentiary objections and videotape deletions to which Jespersen now raises as error on appeal."

Glass v. State, 227 S.W.3d 463 (Mo. 2007) (post-conviction relief proceeding) – "Glass was tried and convicted before the *Crawford* case was decided. In order to make the *Crawford* objection at trial, counsel would have had to anticipate the Supreme Court's holding in an opinion that had not yet been issued. ... The motion court did not clearly err in finding that trial counsel was not ineffective. Because the court did not clearly err in finding that trial counsel was effective, the court also did not clearly err in rejecting Glass' claim that appellate counsel should have raised the issue on appeal."

Smith v. State, 2007 WL 2066291 (Tex. App.-Austin Jul 18, 2007) (unpub) – "We also conclude that the trial judge would not have committed error in overruling an objection to the

challenged statement on the basis that the statement violated Smith's confrontation rights under the Sixth Amendment of the United States Constitution." – not ineffective to fail to object on *Crawford* grounds to that statement and transcript of 911 call

State v. Hendrickson, 158 P.3d 1257 (Wash. App. Div. 2 2007) – "Hendrickson urges that we reverse his conviction for identity theft of Noe's social security card on the ground of ineffective assistance of counsel. Hendrickson's counsel did not object to hearsay testimony by a criminal investigator that Noe lost his card and that no one had permission to use it. This key testimony is inadmissible hearsay and barred under *Crawford*, competent counsel would have objected, and Hendrickson suffered prejudice. Accordingly, we reverse this conviction." (footnote omitted)

People v. Harmon, 2007 WL 1366776, *3+ (Cal.App. 3 Dist. May 10, 2007) (unpub) – "Laurie Parker conducted the sexual assault examination of the victim at UCDMC. Parker obtained the vaginal and cervical swabs that held the biological samples from which a DNA profile was created and compared with the DNA profile obtained from defendant. Parker did not testify at trial. Instead, her report was admitted into evidence as a business record, and another member of the UCDMC SAFE team, Leslie Schmidt, testified about its contents. [¶] Defendant contends presentation of the examination results, and in particular the DNA evidence, violated his Sixth Amendment right of confrontation. ... We disagree. Defendant's argument assumes that, if counsel had raised a confrontation clause challenge, and the challenge had merit, the DNA evidence would have been excluded. That assumption is unwarranted. The best defendant could have hoped for was that the court would exclude the SAFE report and preclude Leslie Schmidt from testifying about it. In that case, counsel may reasonably have assumed the prosecution then would have procured the testimony of Laurie Parker herself. Although we do not know what Parker would have said, there is no reason to believe she would have testified differently than Schmidt about whether the biological samples on the vaginal and cervical swab were obtained from the victim according to normal SAFE team practices. Parker would have been able to use the report to support her testimony."

U.S. v. Stubbs, 2007 WL 1232139 (W.D. Pa. Apr 26, 2007) (unpub) (§ 2255) – "Defense counsel, in this case, made the initial reference to the out-of-court statement; the evidence was not elicited against Defendant by the prosecution, but instead in support of Defendant, by his own advocate. ... Counsel did not err, under applicable standards, in failing to intercede in Defendant's pending appeal--whether on her own initiative or with respect to Defendant's pro se motions--in order to raise *Crawford*."

