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What Happened: Confronting Confrontation in the Wake of Bullcoming, Bryant, and Crawford.

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ARTICLE

"WHAT HAPPENED?": CONFRONTING CONFRONTATION IN THE WAKE OF *BULLCOMING*, *BRYANT*, AND *CRAWFORD*

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"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."
—The Constitution of the United States, Sixth Amendment

I. INTRODUCTION

Seven years ago, the United States Supreme Court purportedly returned to the Founding Fathers' intent regarding the Sixth Amendment right of confrontation.[1] *Crawford v. Washington*[2] and its progeny demonstrate the difficulty of delineating both the core and the perimeter of the Confrontation Clause.[3] Courts continue to outline the practical limitations of applying both the rationale and the holding of *Crawford*. Late in its 2010–2011 term, the Court issued two decisions further altering the contours of Confrontation Clause jurisprudence in *Michigan v. Bryant*[4] and *Bullcoming v. New Mexico*.[5]

Most February days in Michigan are cold enough to sustain

1. *See* Crawford v. Washington, 541 U.S. 36, 50, 53–54 (2004) (noting that the Confrontation Clause was originally intended to guard against the "use of ex parte examinations as evidence" and against offered testimony of unavailable witnesses); *see also* U.S. CONST. amend. VI (providing that an accused has a right to confront adverse witnesses). The Sixth Amendment was made binding on the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406 (1965).

2. Crawford v. Washington, 541 U.S. 36 (2004).

3. U.S. CONST. amend. VI; *see, e.g.*, Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717 (2011) (refusing to allow the introduction of a blood alcohol laboratory analysis without the live testimony of the laboratory technician); Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011) (determining that the primary purpose of an interrogation by authorities is to consider the surrounding circumstances in their entirety); Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2542 (2009) (holding that "[ex parte] out-of-court affidavits" of forensic analysis did not satisfy the Sixth Amendment's guarantee to confront witnesses); Davis v. Washington, 547 U.S. 810, 822 (2006) (holding that statements made to authorities responding to an ongoing emergency are nontestimonial, and thus the Confrontation Clause does not apply); Blakely v. Washington, 542 U.S. 296, 313 (2004) (explaining that the facts used to determine a defendant's sentence must be the facts used by the fact-finder at trial); *Crawford*, 541 U.S. at 51–52 (indicating that there are various formulations to the core class of testimonial statements); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); Ohio v. Roberts, 448 U.S. 56, 66 (1980) (stating that the prior testimony of an unavailable witness "must bear some . . . 'indicia of reliability'" (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972))), *abrogated by Crawford*, 541 U.S. 36.

4. Michigan v. Bryant, 131 S. Ct. 1143 (2011).

5. Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).

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thick ice on open water, preventing large holes from forming. Metaphorically, this proposition was not so true on February 28, 2011, the day the Supreme Court issued its opinion in *Bryant*.[6] In 2004, *Crawford* abrogated *Ohio v. Roberts*,[7] forcing trial lawyers to re-evaluate the use of various types of hearsay formerly admitted upon a finding of adequate "indicia of reliability."[8] But with the issuance of *Bryant*, the old *Roberts* "indicia of reliability" test has now been replaced with the new "primary purpose" test to identify certain testimonial statements.[9] By significantly altering the contours of Confrontation Clause jurisprudence, the Court's opinion has left many wondering "what happened" to the Court's former directives on the matter.[10] Only time will tell how capable the *Bryant* analysis is in further altering the course of the Confrontation Clause inquiry. While the ramifications of *Bryant* are yet to be fully seen and are beyond the scope of this Article, the potential size of the "hole in the ice" created in its wake may

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6. *Bryant*, 131 S. Ct. at 1143.

7. Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36. *Roberts* stood for the proposition that "the confrontation right does not bar admission of statements of an unavailable witness if the statements bea[r] adequate indicia of reliability." *Bryant*, 131 S. Ct. at 1152 (alteration in original) (quoting *Roberts*, 448 U.S. at 66) (internal quotation marks omitted). If evidence fell "within a firmly rooted hearsay exception[,]" it was thus "reliable" notwithstanding the restrictions imposed by the Confrontation Clause. *Roberts*, 448 U.S. at 66. If the evidence did not fall within such an exception but bore "particularized guarantees of trustworthiness[,]" the evidence was still deemed reliable. *Id.*

8. *See* Gary M. Bishop, *Testimonial Statements, Excited Utterances and the Confrontation Clause: Formulating a Precise Rule After* Crawford *and* Davis, 54 CLEV. ST. L. REV. 559, 561, 564–65 (2006) (exploring the impact of *Crawford* and *Davis* on "testimonial" statements, and noting that the *Crawford* Court, in overruling *Roberts*, recognized that prior standards articulated by the Court "fail[ed] to protect criminal defendants against typical Confrontation Clause violations" (citing *Crawford*, 541 U.S. at 60)).

9. *Bryant*, 131 S. Ct. at 1156 (pointing out that the factual context of the underlying case required the Court "to provide additional clarification with regard to what *Davis* meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency'" (quoting *Davis*, 547 U.S. at 826)).

10. *Id.* at 1168 (Scalia, J., dissenting) ("In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in shambles."); *see* Craig M. Bradley, *Further Confusion Over Confrontation*, TRIAL, June 2011, at 52, 52 (asserting that with the issuance of *Bryant*, the Supreme Court "dug itself deeper into the hole of confusion created by its earlier decisions concerning the Confrontation Clause").

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cause one to ask, What just happened?[11]

Although it remains the prosecution's burden to establish by a preponderance of the evidence that the circumstances of a statement reveal its nontestimonial nature, defense counsel need not idly rest. Many prosecutors may be content to put on a bare bones prima facie case. Enlightened and prepared defense counsel might consider ways to use "the list" delineated in *Bryant* in an aggressive manner—attempting to pile on reasons why a statement made in response to an interrogation is, in fact, testimonial.[12] On appeal with de novo review of the question of law, less is better for the prosecution. Accordingly, reliance on any pre-*Bryant* case should be closely scrutinized for the "thickness of the ice" lest one unwittingly fall into the frigid waters and float beyond the lands of adequate indicia of reliability, and further down into the potentially deeper and swifter primary purpose waters.[13]

This Article revisits the *Crawford* issues as they have manifested in courts throughout the country and identifies the roles that *Bryant*, *Davis v. Washington*,[14] *Melendez-Diaz v. Massachusetts*,[15] and *Bullcoming* are playing in the analysis as it currently exists and continues to develop. The primary focus of this Article is on issues arising at trial as courts attempt to implement the Supreme Court's standards with regard to a defendant's right to confrontation. It concludes with a limited emphasis on other appellate issues and with an eye to Texas's twist on confrontation and related issues.

11. Shortly after February 28, 2011—the day *Bryant* was issued—a Westlaw search of opinions from all states that contained both the phrases "*Crawford v. Washington*" and "What happened?" resulted in nearly 1,400 cases in which the results might be affected by *Bryant*'s rationale.

12. *See Bryant*, 131 S. Ct. at 1156 (providing a non-exhaustive list of relevant circumstantial considerations).

13. *Cf. id.* at 1174 (Scalia, J., dissenting) ("The Court announces that in future cases it will look to 'standard rules of hearsay, designed to identify some statements as reliable,' when deciding whether a statement is testimonial. *Ohio v. Roberts* said something remarkably similar: An out-of-court statement is admissible if it 'falls within a firmly rooted hearsay exception' or otherwise 'bears adequate indicia of reliability.'" (citations omitted) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. 36)).

14. Davis v. Washington, 547 U.S. 813 (2006).

15. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).

A. Michigan v. Bryant

Detroit police responded to an emergency call, arrived at "a gas station parking lot," and found Covington in great pain with a gunshot to his abdomen.[16] Several different officers asked "what had happened, who had shot him, and where the shooting had occurred."[17] Covington identified the defendant, Bryant, as the shooter and described how, when, and where the shooting occurred.[18] Emergency medical personnel began treating Covington within ten minutes, and the police responded with backup to Bryant's house.[19] There, police found evidence of the shooting as well as Covington's wallet and identification.[20]

Covington died within hours, and Bryant was subsequently convicted of murder and firearm offenses under the law as it existed before *Crawford*.[21] As a new landmark in Confrontation Clause jurisprudence, *Crawford* abrogated the adequate indicia of reliability test of *Roberts*, which was often criticized for its inadequate protection of defendants' confrontation rights.[22] In its place, *Crawford* annunciated a new rule: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually describes: confrontation."[23] By its own admission, however, the Court left for another day a more precise examination of what

16. *Bryant*, 131 S. Ct. at 1150.

17. *Id.* (internal quotation marks omitted).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* Indeed, the Supreme Court concluded "that the 'primary purpose' of the questioning was to establish the facts of an event that had *already* occurred." *Id. Crawford* however, previously rejected the unpredictable nature of the indicia of reliability test from *Roberts*. Crawford v. Washington, 541 U.S. 36, 63 (2004). Thus, it would appear that under *Bryant* a judicial reversion to a more amorphous standard has occurred.

22. *Crawford*, 541 U.S. at 62–63. Specifically, the Court commented that "[m]embers of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause." *Id.* at 60 (citing Lilly v. Virginia, 527 U.S. 116, 140–43 (1999) (Breyer, J., concurring); White v. Illinois, 502 U.S. 346, 366 (1992) (Thomas, J., concurring); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 125–31 (1998); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998)).

23. *Id.* at 68–69.

constitutes "testimonial" statements for purposes of the Confrontation Clause.[24]

Later in 2006, after *Davis*, the Michigan Supreme Court reversed Bryant's convictions, and held that the primary purpose of the police questioning "was to establish the facts of an event that had *already* occurred . . . [and] was not to enable police assistance to meet an ongoing emergency."[25] Thus, in accord with both *Crawford* and *Davis*, the court concluded that the interrogation contained testimonial hearsay admissible only upon confrontation of the declarant—Covington.[26] But the United States Supreme Court disagreed and vacated the judgment and remanded for further proceedings.[27]

In *Bryant*, the Supreme Court implemented a process to determine whether the hearsay at issue was testimonial by objectively ascertaining the primary purpose of the objected-to hearsay.[28] Justice Sotomayor, writing for the majority, recognized that the facts necessitated "further explanation of the 'ongoing

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24. *Id.*

25. People v. Bryant, 768 N.W.2d 65, 71 (Mich. 2009), *vacated*, 131 S. Ct. 1143 (2011). The Supreme Court of Michigan noted:

> The crime had been completed about 30 minutes earlier and six blocks from where the police questioned the victim. The police asked the victim what had happened in the past, not what was currently happening. That is, the "primary purpose" of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator.

Id.

Davis was decided jointly with *Hammon v. Indiana*. Davis v. Washington, 546 U.S. 975, 975 (2005); Hammon v. Indiana, 546 U.S. 976, 976 (2005). Both cases involved the applicability of the Confrontation Clause in the context of domestic disputes. Davis v. Washington, 547 U.S. 813, 817–21 (2006). *Davis* presented the Court with an opportunity to provide the bench and bar guidance on the meaning of "testimonial"—guidance it expressly avoided setting forth in *Crawford*. *Crawford*, 541 U.S. at 68 (leaving "for another day any effort to spell out a comprehensive definition of 'testimonial'"); *see Davis*, 547 U.S. at 822 (defining nontestimonial statements as "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"; whereas testimonial statements are made "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").

26. *Bryant*, 768 N.W.2d at 71.

27. Michigan v. Bryant, 131 S. Ct. 1143, 1167 (2011), *vacating* 768 N.W.2d 65 (Mich. 2009).

28. *Id.* at 1156.

emergency' circumstance addressed in *Davis*," which unlike *Bryant*, arose in the context of a domestic dispute.[29] Justice Sotomayor pointed out 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.'"[30] The new framework delineated by *Bryant* requires an objective evaluation of "the circumstances in which the encounter occurs and the statements and actions of the parties."[31] Justice Sotomayor explained that, regarding police-directed interrogations, *Davis* and *Crawford* required confrontation only for those "interrogations solely directed at establishing the facts of a past crime."[32] The Court pointed out that the police questioning of Covington "occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion."[33] Furthermore, neither the police nor Covington himself knew the location of the shooter.[34] These key facts, the Court explained, distinguished *Bryant* "from *Crawford*'s formal station-house interrogation."[35] The Court concluded:

> The questions [the police] asked—"what had happened, who had shot [Covington], and where the shooting occurred"—were the exact type of questions necessary to allow the police to "assess the situation, the threat to their own safety, and possible danger to the potential victim" and to the public, including to allow them to ascertain "whether they would be encountering a violent felon[.]" In other words, [the police at the scene] solicited the information necessary to enable them "to meet an ongoing emergency."[36]

Thus, according to the majority, Covington's statements to the police regarding the identity and description of his assailant were

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29. *Id.* at 1156–57 ("As our recent Confrontation Clause cases have explained, the existence of an 'ongoing emergency' at the time of an encounter between an individual and the police is among the most important circumstances informing the 'primary purpose' of an interrogation." (citing *Davis*, 547 U.S. at 828–30)).

30. *Id.* at 1157 (quoting *Davis*, 547 U.S. at 822).

31. *Id.* at 1156.

32. *Id.* at 1153 (quoting *Davis*, 547 U.S. at 826).

33. *Id.* at 1160.

34. *Id.* at 1164 ("At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown . . . .").

35. *Id.* at 1148.

36. *Id.* at 1166 (footnote omitted) (citations and internal quotation marks omitted).

not testimonial hearsay.[37]

Although the Court conceded that the Michigan Supreme Court correctly employed its Confrontation Clause analysis by beginning its determination with a review of "the circumstances in which Covington interacted with the police[,]" it pointed out that "the court construed *Davis* to have decided more than it did and thus employed an unduly narrow understanding of 'ongoing emergency' that *Davis* does not require."[38] Justice Sotomayor recognized that *Davis* was concerned only with "the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat" to the declarant.[39] Further, the existence of an alleged emergency and the parties' perceptions of whether that emergency is ongoing are among the most important of considerations in determining whether the declarant's statement was made during the course of an ongoing emergency.[40] The Court concluded that nowhere in Covington's responses to police questioning was there an indication that he thought "there was no emergency or that a prior emergency had ended."[41] Furthermore, consideration of "the informality of the situation and interrogation" indicates "that the interrogators' primary purpose was simply to address what they considered to be an ongoing emergency."[42] Together, the circumstances of the encounter between the police and Covington, and the statements and actions made by each of them, demonstrated objectively to the Court that the statements were not testimonial.[43] Vacating and remanding, the majority held that the Confrontation Clause did not bar Covington's statements from admission into evidence at Bryant's trial.[44]

Justice Thomas, concurring only in the judgment, reasserted criticisms of any judicial attempts to ascertain the primary purpose of either an interrogator or a declarant "'as an exercise in fiction'

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37. *Id.* at 1166–67.
38. *Id.* at 1158 (citing People v. Bryant, 768 N.W.2d 65, 71 (Mich. 2009), *vacated*, 131 S. Ct. 1143 (2011)).
39. *Id.*
40. *Id.* at 1162.
41. *Id.* at 1163.
42. *Id.* at 1166.
43. *Id.* at 1166–67.
44. *Id.* at 1167.

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that . . . 'yields no predictable results'" because such a test creates uncertainty for both law enforcement and the lower courts.[45] Justice Thomas argued that Covington's statements, given as "he bled from a fatal gunshot wound[,]" were not testimonial because the questioning by police lacked sufficient formality and solemnity compared to the historical abuses that inspired the Confrontation Clause.[46]

Justice Scalia vehemently dissented, concluding that Covington's statement was testimonial,[47] and further lamented that rather than "clarifying the law, the Court ma[de] itself the obfuscator of last resort."[48] Further rebuffing the majority, and in open opposition to its focus on the statements and actions of both the declarant *and* the police, Justice Scalia declared in protest that, at bottom, "[t]he declarant's intent is what counts."[49] The intent of the interrogator is relevant only insofar as it informs "whether [the] declarant intends to make a solemn statement, and envisions its use at a criminal trial."[50] Finally, looking to the purpose of Covington's statements, he opined that *Bryant* "is an absurdly easy case."[51]

Justice Scalia contended that for purposes of the Confrontation Clause, testimonial means more than merely taken for use at trial.[52] Justice Scalia opined that the declarant's intent and

45. *Id.* (Thomas, J., concurring) (quoting Davis v. Washington, 547 U.S. 813, 839, 838 (2006) (Thomas, J., concurring in judgment and dissenting in part)).

46. *Id.* ("The police questioning was not 'a formalized dialogue,' did not result in 'formalized testimonial materials' such as a deposition or affidavit, and bore no 'indicia of solemnity.'" (quoting *Davis*, 547 U.S. at 840)).

47. *Id.* at 1171–72 (Scalia, J., dissenting).

48. *Id.* at 1168.

49. *Id.*

50. *Id.* at 1169.

51. *Id.* at 1171. Justice Scalia also maintained that the case was an easy one, even including the perspective of the police in an evaluation of the primary purpose of the declarant's statement:

> None—absolutely none—of their actions indicated that they perceived an imminent threat. . . . To the contrary, all five testified that they questioned Covington *before conducting any investigation at the scene.* Would this have made any sense if they feared the presence of a shooter? Most tellingly, none of the officers started his interrogation by asking what would have been the obvious first question if any hint of such a fear existed: Where is the shooter?

Id. at 1172–73.

52. *See id.* at 1168–69 (focusing on the declarant's intent to make a solemn statement coupled with the understanding that it could be used as prosecutorial evidence).

understanding that a statement "may be used to invoke the coercive machinery of the State against the accused" is what distinguishes a testimonial statement from "a narrative told to a friend over dinner."[53] The reliability of the statement made by the declarant "tells us *nothing* about whether a statement is testimonial."[54] Covington's statements, he concluded, were not made to meet an "ongoing emergency[,]" unlike the declarant's statements in *Davis*.[55] They were testimonial, and absent confrontation, should have been barred from admission into evidence.[56]

An emotional aspect of Justice Scalia's dissent is his implication that the test utilized by the *Bryant* majority encourages, or at least facilitates, result-oriented judging. He explained that under the majority's manipulable standard, "a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial" if the defendant "'deserves' to go to jail."[57] In this same vein, he accused the Court of creating a "revisionist narrative," where careful arrangement of facts can create faux emergencies.[58]

Justice Ginsberg agreed with Justice Scalia's dissent, but also wrote separately.[59] In her brief opinion, she recalled "a well-established exception to the confrontation requirement: . . . dying declarations."[60] Justice Ginsberg declared that she "would take up the question whether the exception for dying declaration survives our recent Confrontation Clause decisions"; the prosecution, however, abandoned the issue, so it was not properly before the Court.[61] That issue too, it seems, is for another day.

Ultimately, the majority held that it is the primary purpose of

53. *Id.* (citing Richard Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241, 259 (2005)).

54. *Id.* at 1175. ("Testimonial and nontestimonial statements alike come in varying degrees of reliability.").

55. *Id.* at 1172.

56. *See id.* at 1174 (indicating that Covington's statements in the present case were made with the purpose of establishing guilt).

57. *Id.* at 1170.

58. *See id.* at 1174 ("[T]oday's decision is not only a gross distortion of the facts. It is a gross distortion of the law . . . .").

59. *Id.* at 1176 (Ginsberg, J., dissenting).

60. *Id.* at 1177.

61. *Id.*

the interrogation in any context, old or new, that must be determined by objectively evaluating all the circumstances, both emergent and non-emergent.[62] According to the majority, it is the then-apparent perspective of a reasonable person that is relevant to a later review of the primary purpose of an interrogation.[63] The reasoning of such an inquiry hinges necessarily on the understanding that perspective governs both the declarant's and the interrogator's purpose at the time the statement is made.[64] In addition to analyzing the circumstances that initially led to the interrogation, the majority emphasized that a court need not place undue focus on whether a situation is ongoing.[65] Rather, the focus should be whether any party to the interrogation reasonably believed an emergency posed a continuing threat to either the victim, to the first responders, or to the public.[66] The proverbial hole in the Michigan ice is now established.

Attempting to provide further guidance on the primary purpose inquiry, the *Bryant* Court also indicated that a trial court's objective evaluation should consider varied, non-exclusive matters, such as: (1) "the type of weapon employed";[67] (2) the medical condition of a declarant;[68] (3) the severity of injuries to a victim;[69] (4) whether the cause of the event is motivated by private or public concerns;[70] (5) the location of the alleged actor;[71] (6) proximity to place of the event;[72] (7) proximity in time from

62. *See id.* at 1156 (majority opinion) ("To determine whether the 'primary purpose' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' . . . which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." (quoting Davis v. Washington, 547 U.S. 813, 822 (2006))).

63. *Id.*

64. *See id.* ("[T]he relevant inquiry is not of the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.").

65. *See id.* at 1157 n.8, 1160, 1165 (noting that although it is an important factor, the actual existence of an ongoing emergency is only one of many factors to be considered in determining the interrogation's primary purpose).

66. *Id.* at 1159.

67. *Id.* at 1158.

68. *Id.* at 1159.

69. *Id.* at 1159, 1161.

70. *Id.* at 1159.

71. *Id.* at 1164.

72. *Id.* at 1156.

the event;[73] (8) when conversations evolve into testimonial statements;[74] (9) the informality of the encounter;[75] (10) the nature of what is asked and answered;[76] (11) the identity of the interrogator;[77] and (12) the content and tenor of the interrogator's questions.[78] Applying this non-exclusive list of factors to the case at hand, the Court held that "Covington's identification and description of the shooter and the location of the shooting were not testimonial hearsay"; thus, the statements were not barred from admission at trial by the Confrontation Clause.[79] According to the Court, when a hearsay statement "is not procured with a primary purpose of creating an out-of-court substitute for trial testimony[,] . . . the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause."[80] As a point of emphasis, Justice Sotomayor referenced *Davis* for the proposition that the text of the Sixth Amendment is a limitation that clearly reflects "not merely its 'core,' but its perimeter."[81] The potential nontestimonial combinations of the majority's seemingly endless list are exponential in number—arguably broader than any application of the old *Roberts* adequate indicia of reliability test.[82] It seems that this hole in the Michigan ice is likely to expand into a crevasse.

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73. *Id.*
74. *Id.* at 1159.
75. *Id.* at 1160.
76. *Id.*
77. *Id.* at 1162.
78. *Id.*
79. *Id.* at 1167.
80. *Id.* at 1155.
81. *Id.* at 1155–56, n.5 (quoting Davis v. Washington, 547 U.S. 813, 823–24 (2006)) (internal quotation marks omitted).
82. *Compare id.* at 1162–68 (considering a broad and non-exclusive list of factors to be objectively evaluated in "primary purpose" analysis), *with* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (recognizing "adequate indicia of reliability" present in either hearsay exceptions or other "particular guarantees of trustworthiness"), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

II. BEFORE *BRYANT*: OTHER CASES CONFRONTING CONFRONTATION

A. Crawford v. Washington

Before *Bryant*, *Crawford* carried the day for Confrontation Clause jurisprudence. In the underlying case, the State of Washington tried defendant Michael Crawford for assault with a deadly weapon and attempted murder for allegedly stabbing Kenneth Lee.[83] Crawford raised the issue of self-defense and invoked the Washington marital privilege, thereby precluding his wife from testifying against him.[84] Undeterred, the prosecution introduced into evidence, over objection, a tape-recorded statement of Crawford's wife previously given to investigators.[85] On appeal, an intermediate appellate court reversed the conviction, deeming the statement lacked sufficient trustworthiness.[86] But the Washington Supreme Court reinstated the conviction, concluding that the statement was sufficiently trustworthy.[87]

Writing for the majority, Justice Scalia initially laid out the essential portions of the Confrontation Clause as the foundation for the opinion.[88] Looking to the writings of Blackstone, Justice Scalia noted that although historical antecedents of "this bedrock procedural guarantee" originated in Roman times, the Founding Fathers looked to the common law tradition "of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers."[89] After a nearly

83. *Crawford*, 541 U.S. at 38.

84. *Id.* at 40.

85. *Id.* at 40–41.

86. *See id.* at 41 (summarizing that the Washington Court of Appeals evaluated the "guarantees of trustworthiness" under a nine-factor test).

87. *Id.* ("The Washington Supreme Court . . . unanimously conclude[d] that, although Sylvia's statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness . . . .").

88. *Id.* at 42. Specifically, Justice Scalia noted that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.* (quoting U.S. CONST. amend. VI) (internal quotation marks omitted). He further recounted "that this bedrock procedural guarantee applies to both federal and state prosecutions." *Id.* (citing Pointer v. Texas, 380 U.S. 400, 406 (1965)).

89. *Id.* at 43 (citing Coy v. Iowa, 487 U.S. 1012, 1015 (1988); *Pointer*, 380 U.S. at 406; 3 WILLIAM BLACKSTONE, COMMENTARIES *373–74; Frank R. Hermann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*,

exhaustive examination of Confrontation Clause jurisprudence, Justice Scalia next framed the two criteria that must comply with the Framers' design of ensuring sufficient reliability and thus authorizing the admission of testimonial hearsay: (1) appearance by the witness at trial unless "unavailable"; and (2) if unavailable, a prior opportunity to cross-examine.[90]

Ultimately, Justice Scalia demonstrated the ways in which the *Roberts* standard was flawed—not in its goal, but in its judicially crafted surrogate to the process designed and intended by the Framers of the Confrontation Clause.[91] Explaining that the admission of evidence solely upon such manipulable and vague standards was "fundamentally at odds with the right of confrontation" envisioned by the Framers, Scalia concluded that "the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable."[92] *Crawford* conceded it could resolve the case on the facts under *Roberts*'s "reliability factors" and reach the same result—the declarant's statement should not have been admitted because its introduction violated the Confrontation Clause.[93] But, maintaining that the "Framers . . . would not have been content to indulge" the assumption of reliability, even when found in utmost good faith, the Court was compelled to end what it viewed as an "open-ended balancing test" doing "violence" to the Founders' categorical constitutional guarantees.[94] The Court recognized *Crawford* as an opportunity to correct its past missteps and accordingly, to overrule *Roberts*.[95] The crux of the *Crawford* opinion is summarily illuminated in a single, final sentence—

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34 VA. J. INT'L L. 481 (1994)).

90. *See id.* at 57–58 (reviewing leading decisions on Confrontation Clause issues and noting their conformity to the principle that "testimony is admissible only if the defendant had an adequate opportunity to cross-examine[,]" and excluding such testimony when the witness's unavailability was not properly established (citing Mancusi v. Stubbs, 408 U.S. 204, 213–16 (1972); California v. Green, 399 U.S. 149, 165–68 (1970); Barber v. Page, 390 U.S. 719, 722–25 (1968); *Pointer*, 380 U.S. at 406–08; Moses v. United States, 178 U.S. 458, 470–71 (1900))).

91. *See id.* at 61 (doubting that the Framers intended to hinge the Sixth Amendment protections on "rules of evidence, much less [on] amorphous notions of 'reliability'").

92. *Id.* at 61, 68 & n.10.

93. *Id.* at 67.

94. *Id.* at 67–68.

95. *See id.* at 67 ("[T]his [is] one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion.").

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"[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[96] Confrontation, at some point in time, is the primary and unavoidable "crucible" through which testimonial statements must pass before being admitted against the accused.[97] Secondary to that requirement is the mandate that absent unavailability and a prior opportunity for cross-examination, the declarant of testimonial evidence must be "present at trial to defend or explain it."[98]

While Justice Scalia purposefully deferred comprehensively analyzing the term testimonial, he did refer to *Webster's* definition of "testimony" and other "[v]arious formulations" of a definition for the term.[99] Certain types of hearsay fit into the category of testimonial depending on the breadth of the definition. For example, ex parte testimony at a preliminary hearing is reasonably expected to be testimonial;[100] "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard";[101] and "under any conceivable definition," statements "knowingly given in response to structured police questioning" qualify as testimonial.[102] The Court further explained that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[103]

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96. *Id.* at 68–69.

97. *Id.* at 61. Professor Alfredo Garcia maintains that, together, "[t]he right to confrontation and to compulsory process are two sides of the same coin: They represent the crux of the adversarial system of adjudication." ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 71 (1992) (citing Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 568, 625 (1978)). "[T]he denial of effective confrontation[,]" Garcia continues, "especially at trial, abridges significantly a defendant's rights under the Sixth Amendment and thereby casts doubt on the fairness of the proceeding." *Id.*

98. *Crawford*, 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).

99. *Id.* at 51.

100. *Id.* (citing Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21939940 at *23).

101. *Id.* at 52.

102. *Id.* at 53 n.4.

103. *Id.* at 68.

B. Davis v. Washington

Near the end of the 2006 term, the Court issued a joint opinion in *Davis* hinting to litigators that some things cannot be changed.[104] The critical issue at hand was the meaning of the term testimonial as it applies to the Confrontation Clause.[105] Whether a statement is testimonial bears directly on the applicability of the Confrontation Clause and the attendant right it confers.[106] The text of the Sixth Amendment right to confrontation evinces the Framers' focus on testimonial hearsay; the clause applies only "to 'witnesses' against the accused—in other words, those who 'bear testimony.'"[107] Justice Scalia indicated that testimonial hearsay simply is what it is; while the facts of any given case govern the determination of the issue, what is and what is not testimonial does not change.[108] That is, as the Court explained in *Davis*, "[w]e have recognized that the operative phrase in the Clause, 'witnesses against him,' could be interpreted narrowly, to reach only those witnesses who actually testify at trial, or more broadly, to reach many or all of those whose out-of-court statements are offered at trial."[109] Neither form, formality, timing, nor audience alone dictates whether hearsay is or is not testimonial; rather, it is a matter of substance that dictates that

104. Davis v. Washington, 547 U.S. 813, 813 (2006).

105. *Id.* at 823 ("We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay . . . .").

106. *See Crawford*, 541 U.S. at 53–54 (noting that the Framers intended to exclude "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant . . . had a prior opportunity for cross-examination" (footnote omitted)).

107. *Davis*, 547 U.S. at 823–24 (citing 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). *But see* THOMAS J. GARDNER & TERRY M. ANDERSON, CRIMINAL EVIDENCE: PROCEDURE AND CASES 176 n.1 (7th ed. 2010) (pointing out that some scholars have argued that "witness," as it appears in the Clause, "was originally intended to refer only to out-of-court-statements directed solely at inculpating the defendant, such as affidavits, depositions, and confessions"). In *White v. Illinois*, Justice Thomas protested that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized, testimonial materials . . . ." 502 U.S. 346, 365 (1992) (Thomas, J., concurring). The majority in *White* rejected this point, however, and concluded that such a narrow interpretation of the Sixth Amendment "is foreclosed by our prior cases." *Id.* at 352 (majority opinion).

108. *Davis*, 547 U.S. at 832 n.6 (2006).

109. *Id.* at 835 (Thomas, J., concurring in part and dissenting in part) (citing *Crawford*, 541 U.S. at 42–43; *White*, 502 U.S. at 359–63 (Thomas, J., concurring)).

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testimonial statements are what they are.[110]

One's constitutional right to confront a declarant centers on a single determination: Is the challenged statement testimonial?[111] In *Davis*, Justice Scalia stated, "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."[112] Regarding statements to law enforcement, the Supreme Court attempted to simplify the issue by comparing and distinguishing the facts in *Davis* and *Hammon*.[113] The Court placed emphasis on the primary purpose of any form of interrogation by any member of law enforcement.[114] While the Court continued to caution against any strict classification of certain types of statements, it is now clear that fact situations are to be reviewed objectively.[115] The *Davis*/*Hammon* dichotomy ultimately rested in the distinction between law enforcement's needs at the moment of any such "interrogation."[116] How would the statement aid the declarant and the interviewer? Did the information assist in stopping an ongoing emergency? Or, on the opposite end of the spectrum, did the information gained merely "establish or prove past

110. *See* Craig M. Bradley, *Further Confusion Over Confrontation*, TRIAL, June 2011, at 52, 54 (explaining that the necessity of cross-examination lies at the crux of Confrontation Clause cases and that although such an approach requires analysis on a case-by-case basis, "it at least asks the right question without relying on the often irrational hearsay law as the Court did in *Ohio v. Roberts*" (citing Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36)).

111. *See Davis*, 547 U.S. at 821 (noting that the phrase "testimonial statements" is critical to the resolution of both *Davis* and *Hammon*). Specifically, the Court clarified that "[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id.* at 821 (citing *Crawford*, 541 U.S. at 51).

112. *Id.*

113. *See id.* at 817–21 (recalling that in *Davis*, the statements in question were part of a 911 conversation in the midst of a dispute, and in *Hammon* the statement in question was made in the aftermath of a domestic disturbance).

114. *Id.* at 822.

115. *Id.* at 821; *see* Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011) (determining that the surrounding circumstances are to be evaluated objectively in deciding whether a statement is testimonial or not).

116. *Compare Davis*, 547 U.S. at 828 (concluding that the interrogation in *Davis* was to meet an ongoing emergency), *with id.* at 829 (determining that the interrogation in *Hammon* was not made to address and respond to an ongoing emergency).

events?"[117] "Without attempting to produce an exhaustive classification," the Supreme Court set out the following:

> 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. 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.[118]

The facts of *Davis* and *Hammon* provided a framework to determine whether such statements obtained through police interrogation were testimonial. In light of *Bryant* however, that framework is now morphed. In *Davis*, a non-testifying domestic violence victim's conversation with a 911 operator was admitted as evidence over Davis's Confrontation Clause objection.[119] Davis fled the scene while the victim was on the telephone; police responded first to check the area for Davis, and then spoke with the frantic victim while documenting her injuries.[120] In *Hammon*, police officers responded and spoke with a reported domestic violence victim on her front porch, where she denied that anything was wrong, and she gave the officers permission to enter her home.[121] Finding the victim's husband inside, along with evidence of a disturbance, the officers separated the two before obtaining details from the victim in an affidavit.[122] At trial, the victim failed to appear, but the court allowed the officer's recitation of the victim's allegations.[123] As *Davis* noted in 2006 and *Bryant* emphasized in 2011, the "limitation so clearly reflected" in the Confrontation Clause marks not only the "core" of the provision, "but its perimeter."[124] In order for the Confrontation Clause to

117. *Id.* at 822.
118. *Id.*
119. *Id.* at 826–27.
120. *Id.* at 817–18.
121. *Id.* at 819.
122. *Id.* at 819–20.
123. *Id.* at 820–21.
124. *Id.* at 824; *see* Michigan v. Bryant, 131 S. Ct. 1143, 1155–56 (2011) (recalling Justice Scalia's remarks in *Davis* in support of the proposition that when "no such primary purpose exists, the admissibility of a statement is the concern of . . . rules of evidence, not

be properly invoked, the challenged hearsay must "clearly involve testimony" defined as "a solemn declaration . . . made for the purpose of establishing or proving some fact" and made by a witness against the accused.[125]

But such a solemn declaration need not be sworn or given in a formal setting to be testimonial. Rather, it is the context in which it is made and the substance of the statement—not its form—that is determinative.[126] *Davis* presented the question of whether "objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements."[127] Because the victim "was speaking about events *as they were actually happening*, rather than 'describ[ing] past events,'"[128] the *Davis* declarant "was not acting as a *witness*; she was not *testifying*."[129]

Conversely, the declarant's statements in *Hammon* occurred under circumstances inappreciably different than those the Court found to be interrogational in *Crawford*.[130] That is, no emergency was in progress because the police officer that arrived on the domestic disturbance scene did not hear arguments or crashing and did not witness anyone throwing or breaking any objects.[131] Additionally, as an interesting observation in light of *Bryant*, the officer did not ask, "what is happening," as law enforcement had in *Davis*; rather, he asked, "What happened?"[132] Furthermore, although *Davis* noted that one must look primarily at the

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the Confrontation Clause" (citing *Davis*, 547 U.S. at 823–24 (2006))).

125. *Davis*, 547 U.S. at 824 (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)).

126. *See id.* at 825–29 (explaining that the Confrontation Clause's scope is not limited to only formal statements; indeed, even nontestimonial statements may "evolve into testimonial statements" (quoting Hammon v. Indiana, 829 N.E.2d 444, 457 (Ind. 2006), *rev'd and remanded sub nom. Davis*, 547 U.S. at 828)).

127. *Id.* at 826.

128. *Id.* at 827 (alteration in original) (quoting Lilly v. Virginia, 527 U.S. 116, 137 (1999)).

129. *Id.* at 828.

130. *See id.* at 829 (determining that as between *Hammon* and *Crawford*, the facts "were not much different").

131. *Id.* at 829–30.

132. *Id.* at 830; *see* Michigan v. Bryant, 131 S. Ct. 1143, 1154 (2011) (describing the factual context of *Hammon*, where the Court concluded that the statements made were testimonial because the declarant made them after an apparent emergency had ended). The police dispatched to the scene in *Bryant* also asked "What happened?[,]" but the Court concluded in that case that the emergency was ongoing. *Bryant*, 131 S. Ct. at 1165.

declarant's statements, and explained that one *should not focus upon the interrogator's questions*,[133] the 2011 version of the primary purpose test commands that a court include consideration of the content and tenor of the interrogator's questions in determining whether the declarant's statements are indeed testimonial.[134]

Davis was obviously not the end of the story. *Bryant*, at minimum, significantly broadens the primary purpose test to determine what is or is not testimonial hearsay by refocusing the determination on both the declarant's and the interrogator's motives and statements.[135] Arguably, the new test may create a standard that is even more manipulable and more at odds with the Sixth Amendment than the old *Roberts* adequate indicia of reliability test. In the poignant words of Justice Scalia, "[*Bryant*] is a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned."[136] Again, one might be compelled to ask, What just happened?

C. Bullcoming v. New Mexico *and* Melendez-Diaz v. Massachusetts

The often complex task of determining whether statements are

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133. *Davis*, 547 U.S. at 822 n.1 ("[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.").

134. *Bryant*, 131 S. Ct. at 1161. Specifically, *Bryant* instructed:

> The combined approach [of looking to both the statements of the interrogator and the declarant] also ameliorates problems that could arise from looking solely to one participant. Predominant among these is the problem of mixed motives on the part of both interrogators and declarants. Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession.

Id. (citing *Davis*, 547 U.S. at 839 (Thomas, J., concurring in part and dissenting in part); New York v. Quarles, 467 U.S. 649, 656 (1984)). The majority responded to the dissent's criticism of this approach by clarifying that "[a]t trial, the declarant's statements, not the interrogator's questions, will be introduced to 'establis[h] the truth of the matter asserted.'" *Id.* at 1162 (quoting Crawford v. Washington 541 U.S. 36, 60 n.9 (2004)).

135. *See id.* at 1161 (countering the dissent's criticism that *Bryant* gives excessive weight to police intentions by noting that consideration of all relevant factors improves the primary purpose inquiry).

136. *Id.* at 1174 (Scalia, J., dissenting).

testimonial is further exacerbated by modern advances in technology unanticipated by the Framers. Two recent cases, *Bullcoming v. New Mexico* and *Melendez-Diaz v. Massachusetts*, attempt to cast much-needed light on whether certified lab results measuring blood alcohol concentration[137] and levels of cocaine,[138] respectively, constitute testimonial statements when admitted at trial over an objection pursuant to the Confrontation Clause.[139]

On June 23, 2011, the Supreme Court issued its opinion in *Bullcoming*.[140] After being involved in an automobile collision and failing field sobriety tests, Bullcoming was arrested and charged with an intoxicated driving offense.[141] Bullcoming refused a breath test, so "the police obtained a warrant authorizing a blood-alcohol analysis."[142] The blood test recorded Bullcoming's blood-alcohol concentration to be over the legal limit.[143] At trial, the lab analyst did not testify, but after a supervising analyst testified about lab procedures, protocols, and standards, the testing analyst's computer-generated test results were admitted.[144] On appeal the New Mexico Supreme Court held that "admission of the report did not violate the Confrontation Clause."[145]

The United States Supreme Court granted certiorari to decide whether the Confrontation Clause permits prosecutors "to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification."[146] Writing for the five-to-four majority, Justice Ginsburg noted that such "surrogate" testimony in support of admission of an analyst's report was

137. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710 (2011).
138. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531 (2009).
139. *Bullcoming*, 131 S. Ct. at 2710; *Melendez-Diaz*, 129 S. Ct. at 2530–31.
140. *Bullcoming*, 131 S. Ct. at 2705.
141. *Id.* at 2710.
142. *Id.*
143. *Id.*
144. *Id.* at 2712.
145. *Id.*
146. *Id.* at 2713.

insufficient to meet the exacting standard of the Confrontation Clause.[147]

Introduction of an actual report or its contents into evidence requires that the analyst who wrote the report "must be made available for confrontation even if [the analyst has] 'the scientific acumen of [Madame] Curie and the veracity of Mother Teresa.'"[148] But it is important to note that the question of whether an expert may provide an independent opinion based upon the otherwise inadmissible test results of a non-testifying analyst remains unanswered.[149] Unanswered questions aside, the Confrontation Clause "does not tolerate" ad hoc court determinations that surrogate confrontation will provide "a fair enough opportunity for cross-examination."[150]

Justice Sotomayor concurred in the judgment, but wrote separately to emphasize what she viewed to be the limited nature of the Court's holding.[151] While she agreed that the certificate at issue was testimonial because of its inherent formality and evidentiary purpose, she aimed to restrict the contexts in which the majority's analysis would assumedly control.[152] She did so by pointing out: (1) *Bullcoming* is "not a case in which the State suggested an alternate purpose, much less an alternate *primary* purpose, for the . . . report";[153] (2) it is "not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue";[154] (3) it 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";[155] and (4) it is

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147. *Id.*

148. *Id.* at 2715 (quoting Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2537 n.6 (2009)).

149. *See id.* at 2722–23 (Sotomayor, J., concurring in part) (outlining the extent of the limitations of the majority's holding).

150. *Id.* at 2716 (majority opinion).

151. *Id.* at 2719 (Sotomayor, J., concurring in part).

152. *Id.* at 2721–22.

153. *Id.* at 2722.

154. *Id.*

155. *Id.* (citing FED. R. EVID. 703). Just five days after issuance of *Bullcoming*, the Court granted a writ of certiorari filed in *Williams v. Illinois*, 131 S. Ct. 3090, 3090 (2011). That case addresses the third question Justice Sotomayor explicitly remarked was not at issue in *Bullcoming*: whether a state rule of evidence allowing an expert witness to testify

"not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph."[156]

The outcome of *Bullcoming* hardly came as a surprise in light of the similarities it bore with the issue addressed in *Melendez-Diaz*.[157] There, certified lab results indicating the weight and identity of cocaine were admitted into evidence over the Confrontation Clause objection of Melendez-Diaz.[158] The Court concluded that "certificates of analysis" are "incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact[,]'" and are therefore testimonial.[159] Quoting *Crawford*, Justice Scalia reasserted that any statements "declarants would reasonably expect to be used prosecutorially[,]" or "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[,]" are "within the 'core class of testimonial statements'" subject to the Confrontation Clause unless "waived" at the election of the accused.[160] The Court pointed out that "under Massachusetts law, the *sole purpose* of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance."[161] Recognizing that the analysts are witnesses for purposes of the Confrontation Clause, the Court concluded that absent testimony from the analysts at trial, or in lieu of their unavailability, an opportunity for the defendant to conduct cross-examination, the affidavits could not be introduced in trial as

about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause. Brief for Petitioner at 2–3, Williams v. Illinois, No. 10-8505 (filed Aug. 31, 2011), 2011 WL 3894397 at *2–3.

156. *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring in part).

157. *Compare* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2539–40 (2009) (concluding that under the Confrontation Clause, certificates of analysis were not properly admissible due to the fact that their purpose was for use at trial), *with Bullcoming*, 131 S. Ct. at 2721 (concluding that the report "has a primary purpose of creating an out-of-court substitute for trial testimony . . . which renders it testimonial" (quoting Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011))).

158. *Melendez-Diaz*, 129 S. Ct. at 2530–31.

159. *Id.* at 2532 (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)).

160. *Id.* at 2531–32, 2534 n.3 (quoting *Crawford*, 541 U.S. at 51–52) (internal quotation marks omitted).

161. *Id.* at 2532 (quoting MASS. GEN. LAWS ch. 111, § 13 (2004)) (internal quotation marks omitted).

evidence.[162] In so doing, the Court rejected the contrary cases relying on the discredited *Roberts* theory that erroneously focused on indicia of reliability instead of the framework delineated in *Crawford*.[163]

III. TURNING AWAY FROM THE SUPREME COURT: WHAT'S HAPPENED IN THE FIFTY STATES?

A. *Criminal Prosecutions*

Beyond their specific factual settings, the *Crawford* and *Bryant* Courts left open certain other issues relevant to the Confrontation Clause.[164] Not surprisingly, the Court frequently draws heavily upon the specific wording of the Confrontation Clause, which applies, in all criminal prosecutions.[165] The breadth of this language, and consequently the reach of an individual's confrontation rights in trials not traditionally considered criminal in nature, has recently been tested in courts. For example, in *In re N.D.C.*,[166] the Supreme Court of Missouri held that due to the potential for deprivation of liberties, the protections afforded by the Sixth Amendment are applicable to juvenile delinquency hearings.[167] But, *Crawford* has been found inapplicable to numerous post-, quasi-, and non-criminal prosecution scenarios.[168]

162. *Id.* (citing *Crawford*, 541 U.S. at 54).

163. *Id.* at 2533.

164. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1162 (2011) (refusing to "sacrifice accuracy for simplicity" and asserting that "all relevant information, including the statements and actions of interrogators[,]" should be considered in primary purpose assessments); *Crawford*, 541 U.S. at 51–52 (expressing that there are "various formulations of th[e] core class of 'testimonial' statements" while not exhaustively analyzing those possibilities).

165. U.S. CONST. amend. VI; *e.g.*, *Crawford*, 541 U.S. at 42 (quoting the Sixth Amendment and recognizing it as a "bedrock procedural guarantee" (citing Pointer v. Texas, 380 U.S. 400, 406 (1965))).

166. *In re* N.D.C., 229 S.W.3d 602 (Mo. 2007) (per curiam).

167. *Id.* at 605; *see also In re* Rolandis G., 902 N.E.2d 600, 611 (Ill. 2008) (applying the Confrontation Clause to a juvenile proceeding).

168. *See, e.g.*, *In re* J.D.C., 159 P.3d 974, 982 (Kan. 2007) (declining to extend the right of confrontation to a proceeding regarding the care of a child); State v. Denney, 156 P.3d 1275, 1281 (Kan. 2007) (maintaining that the right to confrontation is inapplicable to post-trial DNA review); Browning v. State, 188 P.3d 60, 74 (Nev. 2008) (en banc) (per curiam) (holding that the right of confrontation is inapplicable to the capital penalty phase of trial); Wortham v. State, 188 P.3d 201, 205 (Okla. Crim. App. 2008) (maintaining that probation revocation is not a criminal prosecution); Doe v. Sex Offender Registry Bd., No.

It must also be noted that the United States Supreme Court has held that an accused maintains a Sixth Amendment right to a jury trial, unless waived, as to certain factual determinations relevant to sentencing.[169]

B. *Comments to Non-Law Enforcement: Testimonial?*

The holdings of several state supreme courts have given rise to a presumption in favor of admissibility with regard to statements made to non-law enforcement.[170] In *Bell v. State*,[171] the Georgia Supreme Court differentiated between statements given to law enforcement and relatives or friends.[172] Although *Bell* did not expressly discuss a presumption, the discussion centered upon the distinction between the testimonial nature of a murder victim's statements to police versus the nontestimonial nature of the

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04-02169 F, 2004 WL 2747604, at *3 (Mass. Super. Ct. 2004) (concluding the Confrontation Clause is inapplicable to sex offender commitment); State v. Rhinehart, 153 P.3d 830, 834–35 (Utah Ct. App. 2006) (determining that the right of confrontation is not applicable to preliminary hearings); Gilman v. Commonwealth, 657 S.E.2d 474, 476 (Va. 2008) (en banc) (holding that criminal contempt is not a criminal prosecution). *But see* McNac v. State, 215 S.W.3d 420, 421 (Tex. Crim. App. 2007) (holding, without discussion or analysis, that the right to confrontation applies in the punishment phase of trial); Russeau v. State, 171 S.W.3d 871, 880–81 (Tex. Crim. App. 2005) (ruling that the guarantees of the Confrontation Clause applied to "incident reports" admitted into evidence only during the punishment phase of trial).

169. *See* Blakely v. Washington, 542 U.S. 296, 305 (2004) (maintaining that a judge acquires authority to impose enhanced sentences "only upon finding some additional fact," not from the jury verdict alone); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that any fact, except prior convictions, which may enhance "the penalty for a crime beyond the prescribed statutory maximum, must be submitted to the jury, and proved beyond a reasonable doubt"). *Blakely* expanded the *Apprendi* holding to *any facts* that the law makes essential to the punishment decision. *Blakely*, 542 U.S. at 305. Since both the right to a trial by jury and the right to confront one's accuser are found in the Sixth Amendment, it would seem reasonable that one would have the right to confront a declarant of testimonial hearsay about information relevant to fact findings that are to be submitted to a jury.

170. *See, e.g.*, State v. Ladner, 644 S.E.2d 684, 689 (S.C. 2007) (concluding that a child victim's statements to a relative were nontestimonial); Woods v. State, 152 S.W.3d 105, 114 (Tex. Crim. App. 2004) (holding that casual remarks to friend are nontestimonial); State v. Athan, 158 P.3d 27, 41 (Wash. 2007) (en banc) (maintaining that a murder victim's statements of her impressions before she died were nontestimonial); *see also* Bell v. State, 597 S.E.2d 350, 353 (Ga. 2004) (recognizing, implicitly, a distinction between statements made to family members and statements made to law enforcement officials).

171. Bell v. State, 597 S.E.2d 350 (Ga. 2004).

172. *Id.* at 353.

victim's statements to her best friend and relatives.[173]

A poignant fact scenario regarding statements to friends and lovers came out of Kansas.[174] In *State v. Davis*,[175] a codefendant, Dickerson, was at the home of a witness who testified "over the defendant's hearsay objection[,] that while she was engaged in sexual intercourse with Dickerson, he received a call on his cell phone."[176] The witness "stated Dickerson told her that the call was from his cousin, the defendant[,]" whom she overheard through the phone stating that he "had this [guy] in the house and he wanted to kill him."[177] The objection specifically related to the part of the hearsay statement by Dickerson identifying the caller: "It is my cousin Breland."[178] The statement, however, was nontestimonial, which the defendant conceded.[179] A Washington, D.C. court held that conversations between an accused's fellow inmates and girlfriends, made while incarcerated, were of such a nontestimonial character that they fell clearly beyond both the core and the perimeter of the Confrontation Clause.[180] Casual conversation, at least between inmates, is simply not within the Supreme Court's definition of testimonial statements.[181]

Similarly, hearsay excepted under the medical diagnosis provisions can also fall beyond the definitional purview of testimonial statements.[182] Victims often make spontaneous statements to medical personnel and answer questions that result in potentially relevant statements. These statements may or may not be testimonial, and trial courts must serve as gatekeepers to redact those that are testimonial unless otherwise admissible.

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173. *Id.*; *see Ladner*, 644 S.E.2d at 689 (concluding that a child's statements to a relative were nontestimonial); *Woods*, 152 S.W.3d at 114 (holding that casual remarks to friends are nontestimonial).

174. State v. Davis, 158 P.3d 317, 320 (Kan. 2006).

175. State v. Davis, 158 P.3d 317 (Kan. 2006).

176. *Id.* at 320.

177. *Id.*

178. *Id.* at 320–21.

179. *Id.* at 323.

180. *See* Coleman v. United States, 948 A.2d 534, 544, 545 (D.C. 2008) (holding that incarceration prevented a common law marriage, thereby precluding spousal privilege, and that conversation with inmates was explicitly nontestimonial).

181. *Id.* at 545 (citing Crawford v. Washington 541 U.S. 36, 51 (2004)).

182. *E.g.*, Taylor v. State, 268 S.W.3d 571, 587 (Tex. Crim. App. 2008) (determining that the key to admissibility is the declarant's appreciation of the need for an accurate diagnosis and treatment—not the witness's medical credentials).

C. *Accomplice Statements to Law Enforcement*

Under the *Crawford* standard, out-of-court accomplice statements to police, if offered to prove the truth of the matter asserted, are testimonial, and thus inadmissible unless the declarant either testifies or, if unavailable at trial, the accused previously had an adequate opportunity to confront the declarant.[183] The same should be equally true for a coconspirator's post-crime statement given either to the police or a prosecutor.[184] Even if the content of an accomplice's testimonial statement to law enforcement is not, in and of itself, admitted before the jury, the mere reference to such a statement as being consistent with that of the defendant arguably violates the Confrontation Clause.[185] Codefendant or coconspirator statements to police should not be confused with any statement by an accomplice made to someone who is not associated with law enforcement.[186] Much like victim statements to family or friends, codefendant statements to non-law enforcement personnel are also nontestimonial.[187]

D. *Child-Victim Statements*

Statements obtained from child victims for the express or designed purpose of developing their testimony have been deemed, on an objective basis, to be solemn declarations by numerous jurisdictions, and thus testimonial.[188] It follows that

183. *Crawford*, 541 U.S. at 68.

184. *See* United States v. Saner, 313 F. Supp. 2d 896, 902 (S.D. Ind. 2004) (indicating that a coconspirator's statement to a Department of Justice official merited the protections of the Confrontation Clause).

185. Shuffield v. State, 189 S.W.3d 782, 791 (Tex. Crim. App. 2006). *But see* Del Carmen Hernandez v. State, 273 S.W.3d 685, 688–89 (Tex. Crim. App. 2008) (maintaining that an accomplice's statement was correctly admitted only for impeachment and with proper limiting instructions).

186. *See* People v. Taylor, 759 N.W.2d 361, 368 (Mich. 2008) (per curiam) (concluding that a codefendant's statement to a non-law enforcement witness describing a kidnapping and shooting was nontestimonial).

187. State v. Short, 958 So. 2d 93, 97 (La. Ct. App. 2007).

188. *See* Wright v. State, 673 S.E.2d 249, 253 (Ga. 2009) (concluding that a child's reflective response to an officer that "Daddy did it" was testimonial); *In re* Rolandis G., 902 N.E.2d 600, 613 (Ill. 2008) (affirming that a child advocate interviewer acted as a police representative, and therefore the child's statement was testimonial); *In re* S.R., 920 A.2d 1262, 1267 (Pa. Super. Ct. 2007) (determining that the four-year-old victim's statement made to a forensic interviewer under direction of the police was testimonial),

courts have found no error in the admission of child statements, testimonial or not, to investigators, social workers, and the like as long as the witness is "available" to testify.[189] However, the concept of being in "direct" confrontation of child-witness accusers remains open for further review. The Supreme Court granted certiorari on March 7, 2011, in *Allshouse v. Pennsylvania*,[190] to respond to the question of "[w]hether a child's statements in an interview with a child protection agency worker investigating suspicions of past abuse are 'testimonial' evidence subject to the demands of the Confrontation Clause under *Crawford v. Washington*."[191] In that case, the defendant, Allshouse, was charged with numerous counts of assaultive and child endangerment offenses after a caseworker investigated and reported a child's allegations of abuse.[192] At a pretrial hearing, the child witness did not testify, but based upon other witnesses' testimony, the court found the child's statements reliable and found the child unavailable due to the potential for her to suffer emotional trauma.[193] Pursuant to state statute, the trial court admitted the child's out-of-court statements over Allshouse's confrontation objection, ruling that "a child in her position would

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perm. app. granted, 941 A.2d 671 (per curiam). *But see* State v. Bobadilla, 709 N.W.2d 243, 257 (Minn. 2006) (concluding that a statement was nontestimonial because neither the involved social worker nor the victim "were acting to a substantial degree, . . . to produce a statement for trial"); State v. Coder, 968 A.2d 1175, 1186 (N.J. 2009) (holding that a child's statement to his mother, who did not act as a government proxy to collect evidence of crime, was nontestimonial); State v. Buda, 949 A.2d 761, 778–80 (N.J. 2008) (determining that the paramount responsibility of a Division of Youth and Family Services worker was to ensure the safety of a child victim and "to protect prospectively a child in need[,]" and that the statement of the child victim was thereby nontestimonial).

189. *See* State v. Perry, 275 S.W.3d 237, 243–44 (Mo. 2009) (concluding that if the child declarant testifies, the Confrontation Clause places no constraint on admissibility of videotaped pretrial statements, and state rules of evidence are controlling); Penny v. State, 960 So. 2d 533, 537 (Miss. Ct. App. 2006) (holding that the defendant was not denied a right to confrontation when the trial court allowed a child victim's previously taped statement into evidence); Folks v. State, 207 P.3d 379, 382–83 (Okla. Crim. App. 2008) (maintaining that because the child-declarant testified, the forensic interview DVD was admissible).

190. Allshouse v. Pennsylvania, 131 S. Ct. 1597 (2011).

191. Petition for Writ of Certiorari at i, *Allshouse*, 131 S. Ct. 1597 (No. 09-1396), 2010 WL 1973599 at *i.

192. Commonwealth v. Allshouse, 985 A.2d 847, 850–51 (Pa. 2009), *vacated*, 131 S. Ct. 1597 (2011).

193. *Id.*

not have been able to 'make the determination that [the statements] would be available for use later at trial.'"[194] In light of *Bryant*, the Supreme Court remanded the case back to the Pennsylvania courts to further wrestle with the issue.[195]

When addressing these issues in future trials, litigants must now, in accordance with *Bryant*, ascertain the primary purpose of the questioning by objectively evaluating "the circumstances in which the encounter occurs and the statements and actions of the parties."[196] Such a review may require a review of the protocols established by the particular facility—for example, a crisis center, women's shelter, children's advocacy center, or a hospital—where the victim divulged the details sought to be admitted into evidence. The most critical issues will likely continue to be: the purpose of the declarant's presence at the facility; the extent to which medical or psychological treatment was obtained; the intent and purpose of the interviewer; and the training and experience of the interviewer.[197]

As a final note, in cases involving child declarants, some courts have held that a defendant's failure to utilize statutorily-crafted mechanisms designed to safeguard one's right to confrontation constitutes relinquishment of the right.[198]

E. *Nontestimonial "Stuff"*

In *Crawford*, Justice Scalia offered several types of evidence that he deemed "nontestimonial."[199] Specifically, he cited evidence admitted under "hearsay exceptions [that cover] statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."[200] By definition, a statement made in furtherance of a conspiracy

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194. Petition for Writ of Certiorari at 6, *Allshouse*, 131 S. Ct. 1597 (No. 09-1396), 2010 WL 1973599 at *6.

195. *Allshouse*, 131 S. Ct. at 1598.

196. Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011).

197. *Cf. id.* at 1148 (summarizing how various factors and circumstances distinguish the facts of *Bryant* from the more formal questioning in *Crawford*).

198. *E.g.*, Rangel v. State, 199 S.W.3d 523, 537 (Tex. App.—Fort Worth 2006) (addressing the testimonial character of statements given by a child in a Child Protective Services interview), *pet. dism'd*, 250 S.W.3d 96 (Tex. Crim. App. 2008) (per curiam).

199. Crawford v. Washington, 541 U.S. 36, 56 (2004).

200. *Id.*

does not constitute hearsay while a business record does.[201] States are left to devise applicable rules for the admission of both nonhearsay and nontestimonial hearsay evidence.

1. Business Records

The fact that true business records are generally nontestimonial does not end the inquiry. "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but 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."[202] *Melendez-Diaz* is instructive on this point.[203] There, the prosecution, pursuant to state law, submitted "certificates of analysis" as part of the proof that the accused illegally possessed cocaine.[204] Over Melendez-Diaz's confrontation objection, the trial court admitted the certificates as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . ."[205] Reiterating the definition of testimony, *Melendez-Diaz* held that the certificates were "incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[206] It did not matter that state law denoted the form of the statements as certificates rather than affidavits because the Court regarded the certificates as "functionally identical" to in-court testimony, except for the opportunity to confront or cross-examine the declarant.[207] The certificates did not qualify as business records admissible without confrontation because the information contained therein was "calculated for use essentially in the court, not in the business [of the laboratory.]"[208] Specifically, the Court illustrated that

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201. *See* FED. R. EVID. 801(d)(2)(E) (exempting statements of coconspirators made "during the course and in furtherance of the conspiracy"); *id.* R. 803(6) (excepting business records from the exclusion of hearsay).

202. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2539–40 (2009).

203. *Id.* at 2529.

204. *Id.* at 2531.

205. *Id.* (quoting MASS. GEN. LAWS ch. 111, § 13 (2004)).

206. *Id.* at 2532 (citations omitted) (internal quotation marks omitted).

207. *Id.* (quoting Davis v. Washington, 547 U.S. 813, 830 (2006)).

208. *Id.* at 2538 (quoting Palmer v. Hoffman, 318 U.S. 109, 114 (1943)) (internal quotation marks omitted).

"medical reports created for treatment purposes" are a type of business record admissible absent confrontation.[209] Combining this rationale with those of *Bryant*, *Crawford*, and *Davis*, the magnifying glass of any future analysis regarding business, public, or official records must continue to focus upon the purpose for which the declarant made the statement.[210]

If the record is prepared essentially for use in court, it is not a true business record, and even if it might otherwise qualify for admission under a state law, an accused party is entitled to subject the declarant of statements in such records to cross-examination.[211] All evidentiary matters that the prosecution chooses to introduce—even if merely collateral, establishing a chain of custody, laying a predicate, or establishing any other condition of admissibility—"must (if the defendant objects) be introduced live" unless they are submitted in "documents prepared in the regular course of [business]."[212] In light of *Melendez-Diaz* and *Bullcoming*, one must carefully scrutinize cases cited, due to the varied breadth of applications, before relying thereon for support.[213] Also in play in *Melendez-Diaz* was

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209. *Id.* at 2533 n.2.

210. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2715, 2717 (2011) (remarking on the similarities in fact and reasoning between the present case and *Melendez-Diaz*); Michigan v. Bryant, 131 S. Ct. 1143, 1155, 1156 (2011) (reasserting Confrontation Clause progeny since *Crawford*, and requiring that the "the circumstances in which the encounter occurs and the statements and actions of the parties" be evaluated objectively to determine the primary purpose of the statement in question); *see also* Taylor v. State, 268 S.W.3d 571, 587 (Tex. Crim. App. 2008) (requiring the trial court to trust the defendant's statement in spite of the selfish motivations associated with seeking medical treatment before defendant's statements may gain admittance).

211. *See Melendez-Diaz*, 129 S. Ct. at 2538 ("Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at trial." (citations omitted)).

212. *Id.* at 2532 n.1.

213. *Compare* Abyo v. State, 166 P.3d 55, 56 (Alaska Ct. App. 2007) (determining that documents verifying the calibration of a breath test machine are nontestimonial), State v. Jacobson, 728 N.W.2d 613, 622 (Neb. 2007) (en banc) (reasoning that because the document was prepared as a matter of routine duties, statements "certifying the accuracy of . . . tuning forks were nontestimonial"), State v. Fischer, 726 N.W.2d 176, 182 (Neb. 2007) (en banc) (holding that certifications verifying that a blood alcohol content simulator solution was properly concentrated are nontestimonial), State v. Sweet, 949 A.2d 809, 816–17 (N.J. 2008) (holding that ampoule testing and operational inspection certificates for a breath test machine are nontestimonial due to the business records hearsay exception), *and* State v. Chun, 943 A.2d 114, 166–67 (N.J. 2008) (concluding that

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the failure of the Massachusetts statute to provide a mechanism for an accused to object to the report.[214] Justice Scalia expressly authorized states to adopt and implement procedural rules to govern the time within which an accused must levy an objection, such as those found in "notice-and-demand" statutes.[215] For instance, Ohio has a law requiring defendants, upon proper and timely notice, to demand that the prosecution produce the analyst as a witness at trial.[216]

However, other notice-type statutes may run afoul of either or both of the Sixth Amendment's Confrontation and Compulsory Process Clauses.[217] If the procedure requires the accused to subpoena and secure the witness's attendance, the statute becomes susceptible to a potent argument that forcing a defendant to call witnesses impermissibly shifts the burden of proof.[218] As to statements contained in "Public Records and Reports," trial courts must similarly look to the purpose for which the information was recorded. Formerly, clerks of a court or other public office were permitted the narrow authority to certify the accuracy of a copy of

foundational documents indicating a breath test device is in working order and a report generated by a device calculating blood alcohol concentration are nontestimonial), *with* City of Las Vegas v. Walsh, 124 P.3d 203, 208–09 (Nev. 2005) (en banc) (summarizing that a nurse's affidavit regarding procedures in drawing blood was testimonial, but that statutory mechanisms to contest the affidavit adequately protected the right to confront and the failure to invoke such a mechanism constituted waiver of the right).

214. *Melendez-Diaz*, 129 S. Ct. at 2535.

215. *Id.* at 2541 (encouraging "notice-and-demand statutes" and asserting that they do not shift any burden, but merely govern time frames for raising Confrontation Clause objections). By way of example, Justice Scalia cited Ohio, Texas, and Georgia statutes. *Id.* (citing GA. CODE ANN. § 35-3-154.1 (West 2006); OHIO REV. CODE ANN. § 2925.51(C) (West 2006); TEX. CODE CRIM. PROC. ANN. art. 38.41 (West 2005)).

216. *See* State v. Pasqualone, 903 N.E.2d 270, 279–80 (Ohio 2009) (determining that the accused's failure to timely demand the lab technician's testimony after notice of the report constituted waiver of the right to confront the witness); *see also* Coleman v. People, 169 P.3d 659, 661 (Colo. 2007) (noting that while subject to a voluntariness inquiry in cases of mistake or lack of actual notice, the failure to notify the state pursuant to statute of defendant's desire to confront a lab technician waived the right).

217. *Melendez-Diaz*, 129 S. Ct. at 2557 (Kennedy, J., dissenting) (citing Pamela Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 481–85 (2006)).

218. *See* State v. Birchfield, 157 P.3d 216, 220 (Or. 2007) (holding an Oregon notice-and-demand statute unconstitutional because it imposed not merely a notice requirement, but also a subpoena requirement); *see also* Callaham v. United States, 937 A.2d 141, 144–45 (D.C. 2007) (concluding that a statute providing notice to allow the accused to subpoena the author of a laboratory report cannot trump the requirements of the Confrontation Clause).

an official or authentic public record.[219] Justice Scalia's use of past tense verbs may hint that even the mere authentication of public records requires live testimony.[220] Similarly, Justice Scalia indicates that a clerk's testimony regarding the absence of a particular public record will likely necessitate live testimony.[221]

2. Furtherance of Conspiracy

Recall that a statement made in furtherance of a conspiracy does not constitute hearsay.[222] Thus, admissibility of such a statement is not dependent upon any analysis regarding the testimonial character of the statement.[223] Consequently, a review of admissibility is governed only by evidentiary rules on hearsay.

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219. *Melendez-Diaz*, 129 S. Ct. at 2538–39 (quoting State v. Wilson, 75 So. 95, 97 (La. 1917)).

220. *See id.* ("He *was* permitted to 'certify to the correctness of a copy . . . .'" (emphasis added)).

221. *Id.* at 2539. *Compare* Rockwell v. State, 176 P.3d 14, 26 (Alaska Ct. App. 2008) (holding that passport stamps and an immigration card not maintained for the purpose of criminal prosecution are nontestimonial), Jackson v. United States, 924 A.2d 1016, 1022 (D.C. 2007) (ruling that entries on a docket sheet were not intended for future litigation and were thus nontestimonial in a prosecution for the violation of the Bail Reform Act), State v. Shipley, 757 N.W.2d 228, 237–38 (Iowa 2008) (maintaining that driving records are nontestimonial public records developed prior to prosecution), State v. Tayman, 960 A.2d 1151, 1157 (Me. 2008) (ruling that a certified record of suspension of a driver's license is nontestimonial), State v. Tscheu, 758 N.W.2d 849, 865 (Minn. 2008) (determining that a motor vehicle transfer record not prepared for prosecution was nontestimonial, but testimony by the officer confirming the date of sale through a prior owner was testimonial), Birkhead v. State, 57 So. 3d 1223, 1236 (Miss. 2011) (holding that the noted time of death on a death certificate was nontestimonial because it was created for reasons other than "proving some fact at trial" (quoting *Melendez-Diaz*, 123 S. Ct. at 2539–40)), State v. Raines, 653 S.E.2d 126, 137 (N.C. 2007) (deeming detention center incident reports not prepared for use in criminal trial to be nontestimonial), Segundo v. State, 270 S.W.3d 79, 106–07 (Tex. Crim. App. 2008) (concluding that parole recordation certificates with boilerplate language regarding violations were nontestimonial), *and* State v. Kirkpatrick, 161 P.3d 990, 995 (Wash. 2007) (en banc) (declaring that a certification of absence of a driver's license is nontestimonial), *with* Commonwealth. v. Nardi, 893 N.E.2d 1221, 1233 (Mass. 2008) (ruling that findings and conclusions in an autopsy report, whether or not public record, were inadmissible, but further concluding that an expert witness may base his opinion as to the cause of death on such conclusions).

222. FED. R. EVID. 801(d)(2)(E); TEX. R. EVID. 801(e)(2)(E).

223. *See* Arroyo v. State, 239 S.W.3d 282, 292 n. 8 (Tex. App.—Tyler 2007, pet. ref'd) (concluding that a true coconspirator statement made in furtherance of the conspiracy—an admission by a party-opponent—is not hearsay based upon principles of agency under Texas Rule of Evidence 801(e)(2)(E)).

3. Admissions

The rationale for the introduction of admissions follows the same rationale underlying coconspirator statements made in the furtherance of the conspiracy—admissions are excluded, by definition, from the hearsay rule.[224] In other words, an admission attributed to a defendant may be testimonial, but it is not testimonial hearsay by a witness against the accused. A defendant cannot object to evidence of his own "admissions" written in a letter to a friend.[225] Likewise, the failure of an accused, after waiving his right to remain silent, to deny his own inculpatory statements made to a third-party results in an adoptive admission to which the third-party may testify as nontestimonial.[226]

F. *Unavailability*

Crawford's focus on the adversarial process of confrontation as the ultimate determinant of reliability affords much less attention to "unavailability."[227] Justice Scalia simply stated without elaboration, "[c]ourts . . . developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person."[228] Furthermore, little Supreme Court precedent exists to establish applicable parameters for the definition of unavailability. One Supreme Court case inherently demonstrates a willingness to allow Congress to define unavailability in the rules of evidence.[229] Accordingly, the present

224. FED. R. EVID. 801(d)(2); TEX. R. EVID. 801(e)(2).

225. People v. Crespi, 155 P.3d 570, 575 (Colo. App. 2006).

226. *See* People v. Combs, 101 P.3d 1007, 1021–22 (Cal. 2004) (reasoning that the statement was an "adoptive admission"). On a finer note, despite the *Combs* court's discussion of the matter, one's failure to deny an inculpatory statement, as an adoptive admission, is by definition not hearsay—thus, any discussion or conclusion that it is also nontestimonial is essentially superfluous. *See generally* FED. R. EVID. 801(d)(2) (excepting admissions from hearsay evidentiary restrictions); TEX. R. EVID. 801(d)(2)(E) (excluding statements made by a party's coconspirator "during the course and in furtherance of the conspiracy" from the definition of hearsay).

227. *See* Crawford v. Washington, 541 U.S. 36, 54 (2004) (discussing the common law's disfavor of allowing the admission of prior testimony at trial unless the witness was unavailable to testify, but failing to articulate what makes a witness "unavailable").

228. *Id.* at 45 (citing Lord Morley's Case, (1666) 6 How. St. Tr. 769, 770–771 (H.L.)).

229. *See* United States v. Owens, 484 U.S. 554, 563–64 (1988) (remarking that the respondent's argument was one of mere semantics and declining to find a substantive inconsistency in the Federal Rules of Evidence governing hearsay).

Court appears content to allow Congress and other rule-making bodies to establish the parameters used in defining unavailability. Nevertheless, the application of those rules merits an examination of some key points from *Crawford*. First, the rules should be "relatively strict," and second, the unavailability must be demonstrable.[230]

Recalling that the mere exercise of a privilege was the situation that made the declarant in *Crawford* unavailable, unavailability is surely not limited to a physical absence.[231] The Florida definition of unavailability, for example, includes a declarant's inability to testify due to "then-existing physical or mental illness or infirmity."[232] A finding that testimony by a child witness will cause substantial emotional or mental harm or that another witness is unavailable may, at least in Florida, receive deference on appeal, absent an abuse of discretion.[233]

Several cases touch upon the burden of proof required by the proponent of testimonial hearsay, the admissibility of which turns, in part, upon the unavailability of the declarant.[234] The Massachusetts Supreme Court noted that the proponent need not exhaust all leads or possibilities to secure attendance by a witness previously examined; rather, it must only exercise reasonable due diligence.[235] The Supreme Court has also indicated that it matters not who bears responsibility for a witness's unavailability, provided that an opportunity to confront presented itself prior to the unavailability.[236] Similarly, the prosecution does not have an affirmative duty to prevent a witness from disappearing.[237]

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230. *Crawford*, 541 U.S. at 45 (citing *Lord Morley's Case*, 6 How. St. Tr. at 770–71).

231. *See id.* at 40 (recognizing that the petitioner's wife did not testify due to the jurisdiction's marital privilege rules).

232. State v. Contreras, 979 So. 2d 896, 906 (Fla. 2008) (quoting FLA. STAT. ANN. § 90.804 (West 2007)) (internal quotation marks omitted).

233. *Id.* at 907.

234. *See, e.g.*, State v. Ramirez, 936 A.2d 1254, 1263–64 (R.I. 2007) (recognizing that efforts to locate a witness are to be judged by their nature, and that the prosecution should use good faith in its search efforts).

235. Commonwealth v. Robinson, 888 N.E.2d 926, 931 (Mass. 2008).

236. Giles v. California, 554 U.S. 353, 371 (2008).

237. *See Ramirez*, 936 A.2d at 1263–64 (declining to find bad faith on the part of the prosecution for its reasonable efforts to search for the witness under the circumstances). *Ramirez* continued stating that the prosecution need not offer immunity to a witness who pleads the right to remain silent before the witness may be deemed unavailable. *Id.*

Likewise, the prosecution need not offer immunity to a witness who pleads the right to remain silent before the witness may be deemed unavailable.[238]

G. *Opportunity to Confront the Witness at Trial*

A classic set of facts relevant to one's opportunity to confront is illuminated in the Wyoming case of *Bush v. State*.[239] Bush murdered his wife in 1990.[240] The statements of his five-year-old child made in counseling were admitted against him in the 2007 trial, when the then-adult child testified she could not remember anything that happened in 1990.[241] The challenged statements implicated Bush as having "hurt Mommy[,]" having "killed [her] Mommy[,]" and having threatened to kill the child if she said anything.[242] However, because the adult child appeared for trial, was placed under oath, and testified, "Bush was confronted with the witness and had the opportunity to cross-examine her[,] and the Sixth Amendment was satisfied."[243]

In *Penny v. State*,[244] the prosecution's child witness was passed to the defense after only perfunctory questions asked on direct examination.[245] Later, the prosecution proffered an out-of-court videotaped recording of the child through the interviewer's testimony.[246] On appeal, the court of appeals held that the defense had an adequate opportunity to confront the child and that the trial court properly admitted the taped recording.[247] Similarly, in *State v. Holliday*,[248] the Minnesota Supreme Court noted that subjecting oneself to cross-examination requires (1) appearance, (2) the ability to take an oath, and (3) answers given to questions.[249]

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238. *Id.* at 1265.
239. Bush v. State, 193 P.3d 203 (Wyo. 2008).
240. *Id.* at 206.
241. *Id.* at 206–08.
242. *Id.* at 208.
243. *Id.* at 211; *see also* Woodall v. State, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011) (ruling that memory loss does not render a witness absent).
244. Penny v. State, 960 So. 2d 533 (Miss. Ct. App. 2006).
245. *Id.* at 536.
246. *Id.*
247. *Id.* at 538.
248. State v. Holliday, 745 N.W.2d 556 (Minn. 2008).
249. *Id.* at 567 (citing State v. Pierre, 809 A.2d 474, 502 (Conn. 2006)); *see also*

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Justice Scalia stated that an "adequate" opportunity to confront the witness is sufficient.[250] As the Supreme Court plainly stated in *United States v. Owens*,[251] the right of confrontation does not go so far as to guarantee either effective or successful cross-examination.[252] Rather, "[i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness'[s] bias, his lack of care and attentiveness, his poor eyesight, and . . . the very fact that he has a bad memory."[253] In this vein, allowing the broadcast of a child victim's live testimony from a room outside the courtroom, as well as pre-recording a child's testimony, may suffice to afford an accused with his opportunity to confront if certain safeguards and requirements are met.[254] Likewise, limiting cross-examination of an unavailable child witness through the pretrial videotaping of answers to interrogatories submitted by defense counsel, but posed to the child witness by the same forensic examiner who initially interviewed the child at an advocacy center, was held by the Seventh Court of Appeals to be within the discretion of the trial court.[255] The Texas Court of Criminal Appeals, however, recently reversed this ruling, holding instead that limitations on cross-examination of even a vulnerable child victim violates the Confrontation Clause.[256]

Coronado v. State[257] involved a charge of sexual assault against a child.[258] The prosecution conducted a series of interviews with

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State v. Legere, 958 A.2d 969, 978 (N.H. 2008) (holding that an opportunity to confront is satisfied as long as the witness testifies and is made available for cross-examination, even if the witness feigns memory problems (quoting State v. Delgado, 628 A.2d 263, 264 (1993))).

250. Crawford v. Washington, 541 U.S. 36, 57 (2004).

251. United States v. Owens, 484 U.S. 554 (1988).

252. *Id.* at 559.

253. *Id.*

254. *See* State v. Arroyo, 935 A.2d 975, 992–93 (Conn. 2007) (involving the use of a one-way mirror in the courtroom).

255. Coronado v. State, 310 S.W.3d 156, 165 (Tex. App.—Amarillo 2010), *rev'd*, No. PD-0644, 2011 WL 4436474 (Tex. Crim. App. Sept. 14, 2011).

256. Coronado v. State, No. PD-0644-10, 2011 WL 4436474, at *1–2 (Tex. Crim. App. Sept. 14, 2011).

257. Coronado v. State, No. PD-0644-10, 2011 WL 4436474 (Tex. Crim. App. Sept. 14, 2011).

258. *Id.* at *1.

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the child victim, during which the child implicated Coronado.[259] At trial, the child's therapist testified "that she believed that testifying in front of [Coronado] or testifying via closed circuit television would be harmful" to the child victim.[260] The trial court ruled that the child was thus unavailable.[261] Defense counsel, however, was allowed to "submit written interrogatories to the forensic interviewer[,]" who would then pose the questions to the child in a second recorded interview.[262] Over Coronado's objections, the two taped interviews were admitted.[263] Coronado was convicted and sentenced to life in prison.[264]

On appeal, Coronado argued that he had been denied his right to confront the witness.[265] The court of appeals agreed that the child victim's statements were testimonial, but held that cross-examination through written questions satisfied Coronado's right to confront his accuser.[266] The Texas Court of Criminal Appeals reversed, holding that the written interrogatory procedure the trial court used did not pass constitutional muster.[267] The Court declared that "[a] prior opportunity to cross-examine means an opportunity for full personal[,] adversarial cross-examination, including attacks on credibility[,]"[268] and "[e]x parte submission of written interrogatories does not qualify as cross-examination."[269] At bottom, the court explained, "[c]ross-examination means personal, live, adversarial questioning in a formal setting. It cannot have one meaning for some witnesses and another meaning for others."[270]

Another interesting scenario was addressed in June 2008 by the

259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at *2.
264. *Id.*
265. *Id.*
266. *Id.* at *1 (citing *Coronado*, 310 S.W.3d at 165).
267. *Id.* at *8 ("We are unable to find any post-*Crawford* precedent from any jurisdiction that states, or even suggests, that a list of written interrogatories, posed by a forensic examiner to a child in an [ex parte] interview, is a constitutional substitute for live cross-examination and confrontation.").
268. *Id.* at *5.
269. *Id.* at *7.
270. *Id.* at *8.

Massachusetts Supreme Judicial Court.[271] Before the grand jury, a non-accomplice witness testified that while giving the accused a ride from the scene of a shooting, the accused stated that he had shot someone.[272] Before trial, the witness recanted his uncontested grand jury testimony, stating that he could not recall the accused saying that he shot someone.[273] After an in camera hearing, the judge ruled that the witness's lack of memory was a recent fabrication and allowed the prosecutor to read the grand jury transcript to the jury as a prior inconsistent statement.[274] The accused was allowed to cross-examine the witness without limitation.[275] On appeal, the witness was found to be available for cross-examination and confrontation in accordance with *Crawford*.[276]

Clearly, it appears that the timing of the opportunity is of lesser importance than the subject matter.[277] In *Crawford*, Justice Scalia reiterated that the Confrontation Clause does not restrict the use of testimonial hearsay of a declarant who, at some time, makes an appearance at the actual trial and is available for cross-examination.[278] But the Georgia Supreme Court has held that an appearance must also provide some indicia of meaningfulness.[279] An accomplice witness who shuts down on direct examination regarding the prosecution's reason for calling the witness and refuses questions on cross-examination does not provide an opportunity for effective cross-examination.[280] In such cases,

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271. Commonwealth v. Figueroa, 887 N.E.2d 1040, 1042, 1046 (Mass. 2008).

272. *Id.*

273. *Id.* at 1046.

274. *Id.*

275. *Id.* at 1047.

276. *Id.* at 1048.

277. *Compare* Crawford v. Washington, 541 U.S. 36, 59 (2004) (establishing that witness statements may be admitted if the defendant had a sufficient chance to confront the witness), *with* Soto v. State, 677 S.E.2d 95, 100 (Ga. 2009) (holding that the inability to confront a witness was harmless error when overwhelming evidence existed to support a conviction).

278. *Crawford*, 541 U.S. at 59 n.9 (citing California v. Green, 399 U.S. 149, 162 (1970)).

279. *See Soto*, 677 S.E.2d at 99 (explaining that the inability to confront a declarant is not reversible error since the declarant's statements merely highlighted existing evidence of guilt).

280. *See id.* (stating that the declarant's refusal to answer questions during trial violated the defendant's right under the Confrontation Clause).

prior testimonial statements of the witness are inadmissible.[281] The New Jersey Supreme Court's opinion in *State v. Nyhammer*[282] applied a comparative rationale. There, the court noted that if, in fact, the witness had been "completely silent or unresponsive[,]" the decision to admit the testimony might have turned on an effective denial of the right to confrontation.[283] However, the issue at hand was whether the accused had a meaningful opportunity to confront a child witness who was unable to detail the material acts of alleged sexual abuse on direct examination.[284] Defense counsel questioned the child witness about a number of general subjects but chose not to cross-examine the child about the core of the accusations.[285] Accordingly, the accused had the opportunity to cross-examine the child, but his unexplained decision to "forgo critical cross-examination" did not mean that he was denied the opportunity to do so.[286] If the prosecution has reason to believe its witness will not be available at trial, it has the additional burden to perpetuate testimony, through deposition or otherwise, while providing the accused an adequate opportunity to confront the witness.[287] The mere existence of a state statute allowing either party to depose a witness is not a substitute for the constitutional right to confront the accuser.[288]

281. *E.g.*, *id.* (concluding that the admission of declarant's prior statements where the declarant refused to answer questions during trial was a violation of defendant's constitutional right).

282. State v. Nyhammer, 963 A.2d 316 (N.J. 2009).

283. *See id.* at 334 (differentiating between a declarant who refused to testify from an attorney who failed to cross-examine an unresponsive declarant (citing Douglas v. Alabama, 380 U.S. 415, 419–20 (1965))).

284. *Id.* at 333.

285. *Id.* at 334.

286. *Id.*

287. Blanton v. State, 978 So. 2d 149, 155 n.6 (Fla. 2008) (quoting FLA. R. CRIM. P. 3.190(j)(1) (2007) (amended 2009)).

288. *Cf. id.* at 155 (explaining why a discovery deposition does not meet the standards of *Crawford* to the extent it supplies an opportunity to cross-examine the declarant). The court explained:

> First, [the deposition rule] was not designed as an opportunity to engage in adversarial testing of the evidence against the defendant, nor is the rule customarily used for the purpose of cross-examination. Instead, the rule is used to learn what the testimony will be and [to] attempt to limit it or to uncover other evidence and witnesses. A defendant cannot be "expected to conduct an adequate cross-examination as to matters of which he first gained knowledge at the taking of the

It is important to remember Justice Scalia's emphasis upon the process guaranteed by the Constitution. The intent of the Sixth Amendment was to test the reliability of out-of-court testimonial statements in one manner alone—"the crucible of cross-examination."[289] Consequently, any procedure or mechanism placing a burden upon the accused to either subpoena, call, produce, or otherwise sponsor direct examination of a witness who may purportedly provide evidence beneficial to the prosecution is an impermissible shifting of the burden of proof.[290]

H. *Prior Opportunity to Confront if Witness is Unavailable*

When a trial court finds a witness to be truly unavailable and the issue at hand is the sufficiency of a prior opportunity to confront the declarant, any prior opportunity may suffice, including any type of state or federal preliminary hearing on evidence admissibility.[291] Such rulings are upheld as long as the motive to explore the issue at the prior hearing was material and pertinent to the matter asserted in the out-of-court testimonial statement when offered at trial.[292] In *Martinez v. State*,[293] for example, the Texas Court of Criminal Appeals affirmed a death sentence on the

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> deposition." This is especially true if the defendant is "unaware that this deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent's statements." Second, a discovery deposition is not intended as an opportunity to perpetuate testimony for use at trial, is not admissible as substantive evidence at trial, and is only admissible for purposes of impeachment. Third, the defendant is not entitled to be present during a discovery deposition pursuant to [the deposition rule]. Thus, the exercise of the right to take a discovery deposition . . . does not serve as the functional substitute for in-court confrontation of the witness.

Id. (citations omitted).

289. Crawford v. Washington, 541 U.S. 36, 61 (2004).

290. *See* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2534, 2540 (2009) (emphasizing that the Confrontation Clause imposes a burden on the prosecution and not the defendant).

291. *E.g.*, Martinez v. State, 327 S.W.3d 727, 739–40 (Tex. Crim. App. 2010) (approving the admission of testimony by a witness who had died between trials), *cert. denied*, 131 S. Ct. 2966 (2011).

292. *See* United States v. Salerno, 505 U.S. 317, 321–22 (1992) (upholding a strict interpretation of the "similar motive" requirement required by the former testimony hearsay exception).

293. Martinez v. State, 327 S.W.3d 727 (Tex. Crim. App. 2010), *cert. denied*, 131 S. Ct. 2966 (2011).

re-trial of the initial punishment phase.[294] In the original 1989 trial, Johnny DeAnda testified, but he died before the 2009 retrial.[295] As a result, the defendant argued that the absence of a proper cross-examination denied the jury an opportunity to consider mitigating evidence.[296] Later, at the 2009 trial, the defendant argued that DeAnda's prior testimony should not be read into the record because the defendant allegedly did not have the same depth and breadth of focus on mitigating evidence to provide a similar motive for cross-examination at that time.[297] The court disagreed, stating that because the parties, the issues, and the underlying purpose of the mitigating jury instructions "were the same in both 1989 and 2009[,]" defense counsel in both trials retained a similar motive to confront the witness.[298] Further, the accused's current dissatisfaction with the depth of the prior cross-examination does not in and of itself affect motive.[299]

In *State v. Noah*,[300] the Supreme Court of Kansas held that a victim who broke down on the witness stand and was unable to continue testifying in a preliminary hearing did not provide an adequate opportunity for cross-examination necessary to justify admission of the prior testimony when the victim was unavailable at trial.[301] In *Hanson v. State*,[302] the court upheld admission of the prior testimony of an unavailable witness even though the accused argued new impeachment evidence against the declarant that had come to light subsequent to the first trial.[303]

294. *Id.* at 740.
295. *Id.* at 737.
296. *Id.* at 737–38.
297. *Id.*
298. *Id.* at 739.
299. *Id.* (citing Coffin v. State, 855 S.W.2d 140, 149 (Tex. Crim. App. 1994)).
300. State v. Noah, 162 P.3d 799 (Kan. 2007).
301. *Id.* at 804–06; *see also* Martin v. State, 668 S.E.2d 685, 689–90 (Ga. 2008) (concluding that the issues at a second trial were substantially the same as prior testimony during an earlier punishment hearing wherein aggravating factors were explored, and the trial court imposed no limits on prior cross-examination); State v. Nelis, 733 N.W.2d 619, 628 (Wis. 2007) (maintaining that prior inconsistent statements of a prior witness were properly admitted even though the record was not clear regarding the witness's availability for recall).
302. Hanson v. State, 206 P.3d 1020 (Okla. Crim. App. 2009).
303. *Id.* at 1026.

I. *Dying Declarations*

The Supreme Court noted in *Crawford* that the only historically founded exceptions to the Sixth Amendment are dying declarations.[304] In *Giles v. California*,[305] the Supreme Court reaffirmed that, at the time the Sixth Amendment was drafted, dying declarations were admitted at common law even though un-confronted.[306] Accordingly, a statement made with an awareness that the declarant is on the brink of death is admissible regardless of the lack of confrontation.[307]

The California Supreme Court provided a thorough post-*Crawford* analysis of the dying declaration exception in *People v. Monterroso*.[308] As long as a statement, testimonial or not, is made by a person with personal knowledge "under a sense of immediately impending death[,]" its admission does not violate *Crawford*.[309] The degree and extent of the sense of death can be established, in part or in whole, by the content of the statement, the declarant's demeanor, and the severity of the injuries.[310] Quoting authorities dating back to 1722, the court concluded that admission of properly founded dying declarations posed no conflict to the Sixth Amendment.[311]

In *Bryant*, Justice Ginsberg expressly declared in her dissent that she would address the viability of the exception under more recent Confrontation Clause decisions, suggesting the possibility that the reasoning in *Giles* may have weathered under the *Crawford/Davis/Bryant* framework.[312]

304. *See* Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004) (noting that a dying declaration is the only admissible un-confronted testimonial statement under the Confrontation Clause).

305. Giles v. California, 554 U.S. 353 (2008).

306. *See id.* at 362–64 (recalling historic cases that supported the admission of dying declarations as an exemption to the Confrontation Clause).

307. *Id.* at 359.

308. People v. Monterroso, 101 P.3d 956 (Cal. 2004).

309. *Id.* at 971 (quoting CAL. EVID. CODE § 1242 (Deering 2004)).

310. *E.g.*, *id.* (recognizing various manifestations of a declarant's belief in his impending death (quoting People v. Tahl, 423 P.2d 246, 248 (Cal. 1967))).

311. *Id.* at 972 (quoting King v. Reason, (1772) 16 How. St. Tr. 1, 24–25 (K.B.)).

312. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1177 (2011) (Ginsberg, J., dissenting) (expressing the intent to address the dying declaration exception framed against recent Confrontation Clause decisions).

J. *Forfeiture*

In a number of respects, forfeiture of one's right of confrontation continues to be as ripe for debate as any of the issues discussed herein. In *Crawford*, Justice Scalia referenced *Reynolds v. United States*[313] to emphasize that a defendant's wrongful procurement of a witness's absence from trial extinguished, or forfeited, the defendant's right of confrontation.[314] *Giles* refined the "narrow" rule of forfeiture by requiring evidence that the accused, directly or indirectly, employed an intent or design to prevent a witness from testifying.[315]

As a collateral consequence of *Giles*, courts were forced to determine whether the statements at issue in *Bryant* were testimonial. Had the *Giles* result been different, Confrontation Clause jurisprudence could be free of the *Bryant* construct and rationale. In other words, those accused of murder could not complain about the lack of confrontation regarding statements made by the victim without resorting to either *Bryant* or the dying declaration analysis.

As to the level of proof necessary to show forfeiture in the federal system, *United States v. Zlatogur*[316] analyzed the Federal Rules of Evidence and explained why the standard was not clear and convincing evidence.[317] The advisory committee noted that the Rules of Evidence adopted the preponderance standard in 1997 to discourage wrongful procurement of a witness's unavailability.[318] Wrongful procurement of a witness's absence forfeits not only the right of confrontation, but may also forfeit the right to levy hearsay objections as well.[319] The Texas Court of

313. Reynolds v. United States, 98 U.S. 145 (1878).

314. Crawford v. Washington, 541 U.S. 36, 62 (2004) (citing *Reynolds*, 98 U.S. at 158–59).

315. *See* Giles v. California, 554 U.S. 353, 360–61, 373 (2008) (outlining the scope of the forfeiture exception to the defendant's right to confrontation).

316. United States v. Zlatogur, 271 F.3d 1025 (11th Cir. 2001) (per curiam).

317. *See id.* at 1028–29 (rejecting a clear and convincing standard in favor of a preponderance of the evidence standard).

318. *Id.* at 1028 (quoting FED. R. EVID. 804(b)(6) advisory committee note).

319. *See* Proffit v. State, 191 P.3d 963, 967 (Wyo. 2008) (ruling that a finding of forfeiture trumps any application of state hearsay or other evidentiary rules); *cf.* Commonwealth v. Edwards, 830 N.E.2d 158, 175 (Mass. 2005) (refusing to remand on a forfeiture issue when the prosecution did not allege sufficient facts on that issue).

Criminal Appeals has noted that the United States Supreme Court's reaffirmation of the equitably grounded principle would permit appellate courts to infer from the record any required intent or design to procure the declarant's absence "even when [a] trial court has not made such a finding explicit."[320]

The breadth of possible situations that could authorize and justify a finding that a defendant forfeited his right of confrontation is extremely wide. If testimonial statements of a murder victim are admissible under the rubric of forfeiture, the same logic would tend to justify admission of testimonial statements of a child sexual assault victim who was threatened with personal harm, harm to family or friends, or other coercive threats and tactics by the actor intending to quell report of the crime. In family or domestic violence situations, might the same also be true if it is adequately shown that through threats of reprisal or even promises of money or reconciliation, the victim becomes unavailable? The Supreme Court definitively answered this question in the affirmative in *Giles*: "Acts of domestic violence often are *intended* to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions."[321] The Court went further to announce, at least in domestic violence situations, that it deemed evidence of extraneous bad acts highly relevant to demonstrate intent to isolate or "dissuade the victim from resorting to outside help."[322]

Any error by the trial court in a finding of forfeiture, as well as other *Crawford* issues, is reviewed under the harmless error standard.[323] Also, it should be noted that the proponent's affirmative burden to establish forfeiture is distinguishable from a failure to preserve error during trial.[324] In other words, it may not necessarily be incumbent upon the prosecution to demonstrate an intentional waiver of the right to confront during trial. Failure to

320. Gonzalez v. State, 195 S.W.3d 114, 125 n.47 (Tex. Crim. App. 2006).

321. Giles v. California, 554 U.S. 353, 377 (2008) (emphasis added).

322. *Id.*

323. *See* Chapman v. California, 386 U.S. 18, 24 (1967) (declaring that the burden is on the beneficiaries of a constitutional error to demonstrate that the error did not contribute to the verdict).

324. *See* Bunton v. State, 136 S.W.3d 355, 365 (Tex. App.—Austin 2004, pet. ref'd) (refusing to consider matters not objected to at trial).

adequately object can, in most jurisdictions, constitute waiver of constitutional rights, including the right to confront witnesses.[325]

K. *Not for the Truth of the Matter Asserted*

Justice Scalia pointed out that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[326] This exception is subject to extensive abuses on a couple of fronts. First, one must ascertain what issue may be proven other than the truth of the matter asserted.[327] Second, one must determine whether the issue is a matter of consequence; in other words, Is the issue contested?[328] If the answer to the second question is no, the relevance of any detail in any testimonial statement diminishes and the prejudicial effect, even in the face of a limiting instruction, inversely increases.[329] Thus, at most, a witness should be limited to conveying how or why the information in the hearsay testimony tends "to make the existence of [a specific] fact that is of consequence . . . more or less probable" without relating the otherwise inadmissible details of the hearsay.[330] Even if the answer to the second question above is yes, any details of the testimonial statement should not be admitted if the relevance of the proffered testimonial hearsay diminishes in proportion to the

325. *See id.* at 368 (reinforcing the rule that even constitutional rights may be waived if not objected to at trial). *But see* State v. Smith, 960 A.2d 993, 1010 (Conn. 2008) (concluding that waiver requires deliberate action, and is not presumed on a silent record (citing State v. Jones, 916 A.2d 17, 31 (Conn. 2007))); Stringer v. State (*Stringer I*), 241 S.W.3d 52, 56 (Tex. Crim. App. 2007) (maintaining that although the right to confront an accuser can be waived, courts indulge presumptions against waiver of fundamental rights, and thus, a waiver cannot be presumed on a silent record (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969))).

326. Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).

327. *E.g.*, Taylor v. State, 268 S.W.3d 571, 591 (Tex. Crim. App. 2008) (requiring that the record reflect the vital nature of the truth-telling, and that a child-declarant is aware of such vitality, for the admission of hearsay statements under the medical exception).

328. *See* Vinson v. State, 252 S.W.3d 336, 337 (Tex. Crim. App. 2008) (relaying that the victim's statement to police that her injuries were caused by her boyfriend was not contested, and thus required no additional consideration by the court).

329. *See* Langham v. State, 305 S.W.3d 568, 584–85 (Tex. Crim. App. 2010) (Hervey, J., dissenting) (arguing that the admission of evidence from a confidential source provided more than background information and was testimonial in nature; even if limiting instructions had been imposed, the defendant's constitutional rights were violated).

330. TEX. R. EVID. 401.

truth of the testimony. Further, the efficacy of a cautionary limiting instruction in such a case is, at best, questionable.[331] If, on the other hand, the relevance of the testimonial hearsay can be established regardless of its truth or falsity, the evidence may fit within an exception.[332] Nonetheless, a strongly worded limiting instruction should be provided simultaneously with the admission of the testimony and within the court's written charge to the jury. For instance, in *Bryant*, admission of the police officers' testimony regarding the details relayed to them by Covington might have been justified only if issue was raised as to whether, why, or how the police ascertained the location of the shooting, as long as the relevance of the testimony did not depend upon its truth.[333] If at issue, and if the police acted upon Covington's words and subsequently found evidence of the shooting along with Covington's wallet and identification at a location otherwise unknown to the police, the relevance of Covington's testimonial hearsay exists regardless of its truth or falsity.

On this note, in *Brunson v. State*,[334] the Arkansas Supreme Court ruled that the trial court's admission of ex parte orders to show "that [the victim] had obtained protective orders against [the defendant], and to show the volatility of [the] relationship . . . near the time of the murders[,]" was appropriate because the relevance of the evidence did not depend upon the truth of the matters asserted within the orders.[335] Likewise, the Texas Court of Criminal Appeals similarly held that admission of redacted, yet clearly testimonial, statements to police with limiting instructions that evidence could only be considered to impeach a defense witness did not implicate the Sixth Amendment.[336] Also, the

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331. *See* Walter v. State, 267 S.W.3d 883, 898–99 (Tex. Crim. App. 2008) (permitting the admission of a statement that inculpates the witness yet excluding the portion of the statement that shifts the blame to defendant).

332. *Cf. Langham*, 305 S.W.3d at 576 ("When the relevance of an out-of-court statement derives solely from the fact that it was made, and not from the content of the assertion it contains, there is no constitutional imperative that the accused be permitted to confront the declarant.").

333. *Cf.* Michigan v. Bryant, 131 S. Ct. 1143, 1173 (2011) (Scalia, J., dissenting) (criticizing *Bryant* as an "expansive exception to the Confrontation Clause").

334. Brunson v. State, 245 S.W.3d 132 (Ark. 2006).

335. *Id.* at 140.

336. Hernandez v. State, 273 S.W.3d 685, 688–89 (Tex. Crim. App. 2008) (citing Tennessee v. Street, 471 U.S. 409, 413 (1985)).

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Court of Criminal Appeals of Tennessee has upheld admission of a video from a child advocacy center's interview of a child victim merely "as a prior consistent statement to rehabilitate the victim's credibility."[337] The trial court instructed the jury that the video was only for assessing the victim's credibility and not for the truth of the matter asserted.[338] Since the child victim had testified and could have been recalled, no error was presented.[339]

In *United States v. Stone*,[340] the Eastern District of Tennessee assumed that the out-of-court statements testified to by an expert as part of the basis for her opinion were testimonial.[341] The court approved the admission of such testimonial statements, regardless of the absence of any prior opportunity to cross-examine the declarants, and found that the statements were useful to the finder of fact as essential "for evaluating the merit of the opinions."[342] But it is the obligation of the trial court to "ensure that the expert witness is truly testifying as an expert and not merely serving as a conduit through which hearsay is brought before the jury."[343] The court expounded that a trial court "must ensure that the witness is giving expert opinion and not merely the opinion of an expert."[344]

Such as the case may be, in *State v. Smith*,[345] the Arizona Supreme Court held that reliance upon the report of another examiner as the basis of the testifying expert's opinion did not violate *Crawford*.[346] But note that the Supreme Court recently

337. State v. Neese, No. M2005-00752-CCA-R3-CD, 2006 WL 3831387, at *4 (Tenn. Crim. App. Dec. 15, 2006).

338. *Id.*

339. *Id.*

340. United States v. Stone, 222 F.R.D. 334 (E.D. Tenn. 2004), *aff'd*, 432 F.3d 651 (6th Cir. 2005).

341. *Id.* at 339.

342. *Id.*

343. *Id.* at 341 (citing United States v. Lundy, 809 F.2d 392, 395 (7th Cir. 1987)).

344. *Id. But see* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2719–22 (2011) (Sotomayor, J., concurring) (outlining the limits of the majority's holding and specifically enumerating three scenarios, including one similar to *State v. Smith*, 159 P.3d 531, 539–40 (Ariz. 2007), not covered by the majority's opinion).

345. State v. Smith, 159 P.3d 531 (Ariz. 2007).

346. *Id.* at 539–40; *see also* State v. Lewis, 235 S.W.3d 136, 151 (Tenn. 2007) (ruling that the admission of a forensic scientist's expert testimony about data gathered by a lab technician was not error because it was a proper basis of the expert opinion); Szymanski v. State, 166 P.3d 879, 885–86 (Wyo. 2007) (holding that the testimony, offered not for its truth or its implication purposes but only as the basis of expert opinion, did not violate the Confrontation Clause).

granted certiorari in *Williams v. Illinois*.[347] Soon it will be determined whether the analysis employed in cases such as *Smith* stands as valid to the extent it holds such reliance constitutional, absent opportunity for cross-examination.[348]

L. *Optional Completeness*

Another issue worthy of note is the interplay of the rule of optional completeness and an accused's right to confront his accuser. When a defendant opens a door, be it in voir dire, in an opening statement, or in the admission of evidence, he waives the right to preclude the admission—on a constitutional basis—of other facts that may clarify and explain the defense's position.[349] In *People v. Ko*,[350] the accused made opening statements and offered part of a testimonial statement into evidence.[351] The New York court held that it was only proper to allow admission of the remainder of the statement for the prosecution's rebuttal.[352]

In a case from South Dakota, the introduction of portions of a statement by the defendant enabled the prosecution to complete the picture by eliciting testimony regarding the remainder of the statement.[353] To the extent, and only to that extent, that a defendant opens such a door, the prosecution may respond. Neither constitutional nor statutory shields were intended to be

347. Williams v. Illinois, 131 S. Ct. 3090 (2011).

348. *Smith*, 153 P.3d at 539–40. In *Williams*, the Supreme Court granted certiorari to decide whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant had no opportunity to confront the actual analysts, violates the Confrontation Clause. Brief for Petitioner at 2–3, Williams v. Illinois, No. 10-8505 (filed Aug. 31, 2011), 2011 WL 3894397 at *i. Interestingly, this was one of the issues Justice Sotomayor pointed out in her *Bullcoming* concurrence as not decided by the majority's holding in that case. *Bullcoming*, 131 S. Ct. at 2719–22 (Sotomayor, J., concurring).

349. People v. Ko, 789 N.Y.S.2d 43, 45 (App. Div. 2005).

350. People v. Ko, 789 N.Y.S.2d 43 (App. Div. 2005).

351. *Id.* at 44.

352. *Id.* at 45; *see also* Wells v. State, 319 S.W.3d 82, 94 (Tex. App.—San Antonio 2010, pet. ref'd) (concluding that the defendant opened the door for the prosecution to correct a false impression).

353. State v. Selalla, 744 N.W.2d 802, 817–18 (S.D. 2008); *see also* State v. Roberts, 951 A.2d 803, 813–14 (Me. 2008) (holding that the admission of evidence for "the interest of completeness" means it was not admitted for the truth of the matter asserted, and thus does not violate the Confrontation Clause); State v. Dewitz, 212 P.3d 1040, 1055 (Mont. 2009) (ruling that an accused's prior admission of a statement opened the door to the prosecution's questions on the same evidence).

converted into swords to be used in a manner to thwart justice without the risk of reprisal by the prosecution.[354]

IV. WHAT'S HAPPENED REGARDING APPELLATE ISSUES IN TEXAS AND ELSEWHERE?

A. *Preservation of Error*

The Sixth Amendment right to confront the declarant of testimonial statements must be timely asserted.[355] Accordingly, an objection sufficient to preserve the constitutional issue must be more than a mere hearsay objection.[356] Similarly, the Texas Court of Criminal Appeals dismissed a prior grant of discretionary review in *Rangel v. State*,[357] by concluding that it "refuse[d] to examine the propriety of a trial judge's ruling based upon evidence that the trial judge had no opportunity to consider when he made his ruling."[358] Although the *Crawford* issue had been raised early in the trial, and the judge had made a general ruling, the evidence subject to the appellate attack was not admitted until much later in the trial.[359] At that time, the judge was not asked to make a more specific ruling.[360] Thus, the court held, in effect, that the issue was not properly preserved for review.[361]

B. *Waiver*

A majority of courts indulge every presumption against a conclusion that an accused has waived a fundamental

354. *See generally* Harris v. New York, 401 U.S. 222, 226 (1971) (maintaining that informing the defendant of his Fifth Amendment rights does not provide a license to the defendant to offer perjured testimony without expectation that the prosecution will rebut with prior inconsistent statements).

355. *E.g.*, Deener v. State, 214 S.W.3d 522, 528 (Tex. App.—Dallas 2006, pet. ref'd) (determining that the defendant's failure to timely object to testimonial evidence waived the right to confrontation).

356. Reyna v. State, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005) (ruling that to properly preserve error an objection must specifically address the Confrontation Clause).

357. Rangel v. State, 250 S.W.3d 96 (Tex. Crim. App. 2008) (per curiam).

358. *Id.* at 98.

359. *Id.* at 97–98.

360. *Id.* at 98 ("The issue was never consensually re-litigated by the parties at a later time." (citing Rachal v. State, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996))).

361. *Id.*

constitutional right, including the right of confrontation.[362] Accordingly, the Texas Court of Criminal Appeals has concluded that a valid waiver of the right to confront and cross-examine witnesses requires that the record reflect the right is knowingly, voluntarily, and intelligently relinquished.[363]

C. *De Novo Review*

In *Wall v. State*,[364] the Texas Court of Criminal Appeals held that a determination of "whether a statement is testimonial" must be based upon the "standard of an objectively reasonable declarant standing in the shoes of the actual declarant."[365] Review of the issue is de novo because such a ruling, as a matter of law, "does not depend upon demeanor, credibility, or other criteria peculiar to personal observation."[366]

Practitioners should be aware, however, that appellate attorneys must make all cogent arguments when presenting cases at the first level of appeal.[367] This is to ensure that any higher appellate court may likewise consider any and all such cogent arguments that a statement was either nontestimonial or otherwise admissible.[368]

D. *Invited Error*

In the realm of induced error, "a party cannot take advantage of an error that it invited or caused."[369] In *Woodall v. State*,[370] the

362. *E.g.*, Stringer v. State (*Stringer I*), 241 S.W.3d 52, 56 (Tex. Crim. App. 2007) (invoking the United States Supreme Court's language to announce that waiver is not presumed from a silent record (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))).

363. *Id.* at 59; *see also* Brookhart v. Janis, 384 U.S. 1, 3–4 (1966) (explaining that an effective waiver of constitutional rights requires "intentional relinquishment or abandonment of a known right or privilege" (quoting *Johnson*, 304 U.S. at 464)); Reyna v. State, 478 S.W.2d 481, 482 (Tex. Crim. App. 1972) (concluding that the record sufficiently established that the defendant waived his confrontation rights).

364. Wall v. State, 184 S.W.3d 730 (Tex. Crim. App. 2006).

365. *Id.* at 742–43 (citing Crawford v. Washington, 541 U.S. 36, 52 (2004)).

366. *Id.* at 743 (citing Lilly v. Virginia, 527 U.S. 116, 136–37 (1999)).

367. *See* De la Paz v. State, 273 S.W.3d 671, 680 n.7 (Tex. Crim. App. 2008) (declining to consider an argument not presented to the court of appeals).

368. *See id.* at 680 (applying the "first raised on appeal" analysis to a Confrontation Clause waiver).

369. Woodall v. State, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011) (citing Prystash v. State, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999)).

370. Woodall v. State, 336 S.W.3d 634 (Tex. Crim. App. 2011).

Texas Court of Criminal Appeals held that the accused invited the error, if any, by declining the trial court's offer to attach a subpoenaed witness.[371] Thus, the accused was estopped from attempting to take advantage of the error.[372]

E. *Harmless Error*

Any error in the admission of testimonial statements is subject to harmless error analysis.[373] The party benefiting from the erroneous admission bears the burden of establishing that the verdict would have been the same even without the challenged testimony or evidence.[374]

In *Clay v. State*,[375] the Texas Court of Criminal Appeals reiterated the factors specifically pertinent to a harmless error analysis.[376] This method is preferable to merely looking for overwhelming evidence of guilt.[377] Ultimately, the reviewing court must be able to declare that it is beyond a reasonable doubt that any *Crawford* error did not contribute to the conviction.[378]

The factors utilized in determining whether erroneously admitted testimonial statements contributed to a conviction are: "(1) the importance of the hearsay statements to the State's case; (2) whether the hearsay evidence was cumulative of the other evidence; (3) the presence or absence of evidence corroborating or contradicting the hearsay testimony on material points; and (4) the overall strength of the prosecution's case."[379] Courts have long held that, generally speaking, instructions to disregard are presumed to ameliorate any taint.[380] The Supreme Court of

371. *Id.* at 646.

372. *Id.*

373. *Cf.* Clay v. State, 240 S.W.3d 895, 903 n.9 (Tex. Crim. App. 2007) ("A violation of the Confrontation Clause is subject to harmless error analysis." (citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986))).

374. *Id.* at 904 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

375. Clay v. State, 240 S.W.3d 895 (Tex. Crim. App. 2007).

376. *Id.* at 904.

377. *See id.* at 903 (recalling that the prosecution advocated for a harmless error test based upon the overwhelming evidence against the defendant).

378. *Id.* at 905; *accord* Scott v. State, 227 S.W.3d 670, 690–91 (Tex. Crim. App. 2007) ("[T]he reviewing court must be able to declare itself satisfied, to a level of confidence beyond a reasonable doubt, 'that the error did not contribute to the conviction' before it can affirm it." (quoting Davis v. State, 203 S.W.3d 845, 852 (Tex. Crim. App. 2006))).

379. *Davis*, 203 S.W.3d at 852.

380. *E.g.*, Bloom v. People, 185 P.3d 797, 805 (Colo. 2008) (presuming that

Colorado has now specifically applied this rule to an alleged *Crawford* violation.[381] Thus, in that state, the potential for any reversible error is diminished on that ground.

F. *Ineffective Assistance of Counsel*

Prosecutors should vigilantly stay abreast of developments in these lines of cases. An unwitting failure to ensure that an accused is afforded any constitutional right is grounds for ineffective assistance of counsel.[382] The Massachusetts Supreme Judicial Court held in a collateral proceeding that appellate counsel was ineffective for failing to raise the issue on direct appeal.[383] There, the defendant's jury trial was held in 2002, and appellate counsel filed briefs thirty-six days after the *Crawford* opinion was issued.[384]

V. WHAT'S HAPPENED RECENTLY IN TEXAS?

A. *Strategic Applications*

The Texas Court of Criminal Appeals has issued few significant opinions on the Sixth Amendment beyond *Martinez*, regarding the adequate opportunity to confront an available witness. In a footnote of *Coble v. State*,[385] the Court of Criminal Appeals reiterated that a Confrontation Clause analysis is applicable only to hearsay evidence.[386]

Additionally, the Court of Criminal Appeals reversed an appellate court's decision regarding the admission of certain grand jury testimony.[387] A witness testified during the defense's case-in-

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instructions to the jury to disregard are followed).

381. *Id.*

382. State *ex rel.* Humphries v. McBride, 647 S.E.2d 798, 808 (W. Va. 2007) (per curiam) (holding that failure to object to testimonial statements constitutes ineffective assistance of counsel).

383. Commonwealth v. Lao, 877 N.E.2d 557, 562–63 (Mass. 2007). *But see* Taylor v. State, 262 S.W.3d 231, 253–54 (Mo. 2008) (denying ineffective assistance relief on the ground that appellate counsel should have raised a *Crawford* objection).

384. *See id.* at 559 n.3 (noting that *Crawford* was decided on March 8, 2004, and this appeal was filed April 13, 2004).

385. Coble v. State, 330 S.W.3d 253 (Tex. Crim. App. 2010), *cert. denied*, 131 S. Ct. 3030 (2011).

386. *Id.* at 290 & n.105.

387. Woodall v. State, 336 S.W.3d 634, 639 (Tex. Crim. App. 2011).

chief, but she claimed significant memory loss regarding dancing at a club and testifying before the grand jury.[388] The trial court instructed the witness that she remained subject to the subpoena. After the defense rested, the prosecution re-called the witness, and she did not appear.[389] The accused objected to the prosecution's proposal to read the witness's grand jury testimony as a past recollection recorded.[390] Although the trial court offered to obtain a writ of attachment to secure the witness's presence, the accused declined.[391] Subsequently, the trial court overruled the objections, and the grand jury transcript was read to the jury.[392] The court of appeals concluded that the witness was "absent" due to her memory loss, and the prosecution was therefore impermissibly allowed to introduce testimonial hearsay about which she could not be cross-examined due to memory loss.[393] The Court of Criminal Appeals disagreed, stating "that memory loss does not render a witness 'absent' for Confrontation Clause purposes."[394] Furthermore, by declining the trial court's offer to attach the witness, the defendant induced the alleged error that was raised on appeal.[395]

In *Wells v. State*,[396] the defendant created an impression that a certain individual had not identified the defendant as the shooter.[397] Such an impression was false, and the prosecution attempted to correct this impression *with* testimony from another detective, yet was thwarted by a *Crawford* objection.[398] The court of appeals determined that the defendant's false impression "opened the door" for "the admission of evidence that may otherwise violate the Confrontation Clause."[399]

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388. *Id.* at 637.
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.* at 638.
393. *Id.*
394. *Id.* at 644. The scope of the statement is narrow though. If the witness is present and testifying, then memory loss will not render him or her absent. *Id.*
395. *Id.* at 646.
396. Wells v. State, 319 S.W.3d 82 (Tex. App.—San Antonio 2010, pet. ref'd).
397. *Id.* at 93.
398. *Id.*
399. *Id.* at 94 (citing Goodman v. State, 302 S.W.3d 462, 473 (Tex. App.—Texarkana 2009, pet. ref'd)).

Finally, in 2010, the Fourteenth Court of Appeals reversed a conviction in *Kelly v. State*.[400] At trial, law enforcement and Texas Department of Family Protective Services witnesses were allowed, over repeated objections, to testify about what they "learned," "gained," "heard," were "told," or were "informed of" concerning allegations of sexual abuse and exploitation of several children.[401] Absent confrontation, the court of appeals easily determined that admission of such testimony was a harmful back-door violation of the right of confrontation.[402]

B. *The Texas Spin on the Meaning of "Testimonial" and Other Fine Points of Interest from the Court of Criminal Appeals*

In *Stringer v. State* (*Stringer II*),[403] the Texas Court of Criminal Appeals held, in effect, that the punishment phase of a non-capital case, in which sentencing is completed by the judge, is not a "criminal prosecution" for purposes of the Sixth Amendment.[404] Thus, *Crawford* does not apply.[405] Citing authority out of the United States Courts of Appeals for the Fifth and Seventh Circuits, the court indicated that in such cases the relevant constitutional provision is the Due Process Clause rather than the Confrontation Clause.[406]

In *Langham v. State*,[407] the Court of Criminal Appeals addressed the scenario of testimony offered for one purpose, but capitalized on for other purposes, including truth of the matter asserted.[408] Although the intermediate court found the hearsay to be nontestimonial, the Court of Criminal Appeals disagreed, specifically concluding that the Supreme Court directs its "primary purpose" inquiry at the objective of "first in importance" rather

400. Kelly v. State, 321 S.W.3d 583, 605 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

401. *Id.* at 603.

402. *See id.* at 604 (emphasizing that the prosecution bore the burden of establishing the admissibility of the statements under *Crawford* and that it had failed to do so).

403. Stringer v. State (*Stringer II*), 309 S.W.3d 42 (Tex. Crim. App. 2010).

404. *Id.* at 47.

405. *Id.*

406. *Id.* (quoting United States v. Fields, 483 F.3d 313, 327–28 (5th Cir. 2007) (citation omitted)).

407. Langham v. State, 305 S.W.3d 568 (Tex. Crim. App. 2010).

408. *Id.* at 574.

than merely "first in time."[409]

Even if the confidential informant did not personally anticipate that the information would be used in a prosecution, a second-tier analysis reveals that an objective witness might reasonably believe that the statement "would be available for use at a later trial."[410] Thus, as directed by *Crawford* and *Davis*, the Court of Criminal Appeals's conclusion is correct in this vein as well. Significantly, the court concluded that under the circumstances, the trial court also erred in admitting testimonial hearsay under the auspices that its relevance was founded in something other than the truth of the matter asserted.[411] "When the relevance of an out-of-court statement derives solely from the fact that it was made, and *not from the content of the assertion it contains*, there is no constitutional imperative that the accused be permitted to confront the declarant."[412] Later, the court added:

> Typically, so-called "background" evidence is admissible, not because it has particularly compelling probative value with respect to the elements of the alleged offense, but simply because it provides the jury with perspective, so that the jury is equipped to evaluate, in proper context, *other* evidence that more directly relates to elemental facts.[413]

But in this case, the officer's testimony about the informant's statements with respect to Langham's involvement in the criminal activities afoot "provided far greater detail than was reasonably necessary to explain why the police decided to investigate the residence."[414] Finding error, the court remanded the case for a more thorough harm analysis, stating that "the reviewing court must ask itself whether there is a reasonable possibility that the *Crawford* error moved the jury from a state of non-persuasion to one of persuasion on a particular issue."[415]

409. *Id.* at 579.

410. *See id.* at 577 & n.30 (providing a lengthy discussion of the applicable standard and the hazards in admitting hearsay evidence on the basis of "background information").

411. *See id.* at 580–81 (recognizing the harm committed by the prosecution actually using statements for purposes other than those for which they were originally offered).

412. *Id.* at 576 (emphasis added).

413. *Id.* at 580.

414. *Id.*

415. *Id.* at 582 (quoting Scott v. State, 227 S.W.3d 670, 690–91 (Tex. Crim. App. 2007)) (internal quotation marks omitted).

In October 2009, the Court of Criminal Appeals upheld a trial court's admission of a victim's 911 call as a dying declaration.[416] The opinion provides an extremely thorough rendition of the law applicable to such an analysis, ultimately concluding that the trial court did not abuse its discretion by admitting the 911 call as a dying declaration even though the victim survived for two days after being shot in the head with a .44-caliber magnum pistol.[417]

VII. CONCLUSION

The United States Supreme Court's opinion in *Davis* clearly directed criminal trial lawyers and judges to allow substance to control over form.[418] In determining the quintessential issue of what is testimonial, Justice Scalia focused the debate on the declarant's purpose in making the statement.[419] But what has happened, as a practical matter, is that one must now counter such directives with *Bryant* and objectively consider all relevant factors to determine the primary purpose of the interrogation.[420] Included in this evaluation must be the context of the interrogation and the interrogator's purpose in eliciting the declarant's response.

Time may test the viability of Justice Scalia's prediction that the *Bryant* majority's analysis lends to result-oriented and unpredictable results. Indeed, an analysis that focuses, however objectively, on the intentions of the interrogator in evoking a declarant's incriminating statement will change the ways in which

416. Gardner v. State, 306 S.W.3d 274, 288–89 (Tex. Crim. App. 2009), *cert. denied*, 131 S. Ct. 103 (2010).

417. *See id.* at 288–92 & nn.19–34 (summarizing concerns regarding exceptions made for dying declarations and concluding that evidence must demonstrate "that the declarant must have realized that he was at death's door at the time that he spoke").

418. *See* Davis v. Washington, 547 U.S. 813, 822 (2006) ("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. 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.").

419. *Id.*

420. Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011) ("An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.'").

the trial courts examine the scope of the clause. For now, at least, while *Bryant* squarely places the basic determination of whether hearsay is testimonial on the primary purpose of the statement, Justice Scalia's emphasis in *Crawford* remains instructive.[421] That is, the protections of the Confrontation Clause are implicated by any statements that "declarants would reasonably expect to be used prosecutorially" or "were made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial" unless waived at the election of the accused.[422]

The parameters of an accused's confrontation rights have shifted over time. From *Roberts*'s indicia of reliability threshold,[423] to *Bryant*'s primary purpose test,[424] the bench and bar have been forced to navigate uncharted waters with oftentimes highly fact specific, and sometimes vague, guidance. But at the heart of the inquiry is the understanding that the right afforded by the Sixth Amendment lies at the very crux of an adversarial system built, in part, to combat historical evils of a criminal law system that once used ex parte examinations as evidence against an accused.[425] Confrontation is the bottom line. If a statement is testimonial, the Court has stressed that the Constitution demands confrontation.[426] Confrontation, in turn, forces the witness's testimony to be subjected to scrutiny by adversarial examination—the "greatest legal engine ever invented for the discovery of truth."[427]

421. *Id.*; *see* Crawford v. Washington, 541 U.S. 36, 51–52 (2004) (establishing the "core class" of testimonial statements and the various formulations thereof).

422. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531, 2534 n.3 (2011) (quoting *Crawford*, 541 U.S. at 51–52) (internal quotation marks omitted).

423. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. 36.

424. *Bryant*, 131 S. Ct. at 1156.

425. *See id.* at 1152 (reaffirming the principal evils that the Confrontation Clause is directed at preventing (quoting *Crawford*, 541 U.S. at 50)).

426. *Crawford*, 541 U.S. at 69.

427. California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 WIGMORE, EVIDENCE § 1367).

APPENDIX A:

CASES CONSTRUING *CRAWFORD* AND *DAVIS*

Alabama:

Ex parte Brown, 11 So. 3d 933 (Ala. 2008). Due to the fact that the defense did not object to testimony during trial, objection could not be raised on appeal, and the court reviewed the case for plain error. The two-part plain error standard requires that the claimed error "must . . . seriously affect a defendant's 'substantial rights[,]'" and "must also have an unfair prejudicial impact on the jury's deliberations."

Floyd v. State, No. CR-05-0935, 2008 WL 3989540 (Ala. Crim. App. Sept. 28, 2007). Appellant claimed that the trial court admitted a "gruesome, cumulative, and more prejudicial than probative" crime scene videotape. However, appellant did not object to the evidence at trial and, consequently, did not properly preserve error. In such a case, claims on appeal are reviewed under the plain error standard.

Alaska:

Rockwell v. State, 176 P.3d 14 (Alaska Ct. App. 2008). Due to the fact that the primary purpose of immigration cards and passport stamps is not for criminal investigations, they are nontestimonial and admissible. Therefore, cross-examination of a foreign customs official who stamped the accused's passport was not required.

Abyo v. State, 166 P.3d 55 (Alaska Ct. App. 2007). No Confrontation Clause violation occurred when documentation that verified the breathalyzer calibration was admitted as evidence. Despite the inability to cross-examine the author, the calibration document was deemed nontestimonial.

Anderson v. State, 163 P.3d 1000 (Alaska Ct. App. 2007). Applying *Crawford* and *Davis*, the court held that a victim's

statements to police were admissible under a hearsay exception because they were in response to an officer's questions regarding the nature and extent of injuries and were, therefore, non-testimonial.

Arizona:

State v. Armstrong, 189 P.3d 378 (Ariz. 2008). During the aggravation phase in a death penalty case, the admission of a coconspirator's testimony transcript was harmless error because the prosecution had other evidence sufficient to support the aggravating circumstances.

State v. Smith, 159 P.3d 531 (Ariz. 2007). The medical examiner who testified at trial did not present inadmissible evidence by referencing the statements of a previous medical examiner who did not testify. The testifying medical examiner reviewed the case, made his own conclusions, and used the prior medical examiner's reports and testimony merely as underlying data and a basis for his own opinions.

Arkansas:

Seely v. State, 282 S.W.3d 778 (Ark. 2008). Statements by young witnesses made to government officials are presumptively testimonial, while statements made to laypersons are presumptively nontestimonial. Although a medical provider is required to report incidences of child abuse, the primary purpose of questioning the child victim was to define "the scope of . . . medical examination" and was, therefore, nontestimonial.

Beasley v. State, 258 S.W.3d 728 (Ark. 2007). Defendant had an opportunity to cross-examine the witness at a bond hearing. However, when the witness could not be located for actual trial, the court ruled that reading the witness's prior testimony would violate the Confrontation Clause. The court found that the motive for developing testimony at the bond hearing was too dissimilar when compared with cross-examination at trial. At the bond hearing, the defendant's purpose was to gain bond, while at trial his goal was to obtain an acquittal.

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Brunson v. State, 245 S.W.3d 132 (Ark. 2006). Ex parte protective orders were admissible without violating the Confrontation Clause because they were entered to corroborate other witnesses' testimony and not for the truth of the operative claims asserted.

Dednam v. State, 200 S.W.3d 875 (Ark. 2005). A detective's testimony about the victim's statements was deemed admissible when the testimony was used to show the connection between the parties and to "establish the basis for [the detective's] actions in obtaining an arrest warrant . . . and not [for] the truth of whether" the defendant committed the crime.

California:

People v. Concepcion, 193 P.3d 1172 (Cal. 2008). The defendant's right to confront witnesses may be waived if he is not present at trial. The defendant's escape before the trial began, but after the jury had been selected, was properly concluded to be a voluntary waiver and not forfeiture.

People v. Williams, 181 P.3d 1035 (Cal. 2008). A witness's prior testimony from a pretrial hearing was admissible after he refused to testify at trial because the defendant had an opportunity to fully cross-examine that witness at the hearing. The prosecution was not required to immunize a witness in order to secure that witness's testimony at trial.

People v. Cage, 155 P.3d 205 (Cal. 2007). Questions by the victim's surgeon that elicited the identity of the perpetrator were nontestimonial because the primary purpose was "not to obtain . . . the identity of the perpetrator . . . but to deal with a contemporaneous medical situation that required immediate information about what had caused the victim's wound."

People v. Giles, 152 P.3d 433 (Cal. 2007), *vacated*, 554 U.S. 353 (2008). The reason for the crime was immaterial, as the defendant forfeited his confrontation right by his own wrongdoing. Therefore, testimonial statements made by the victim to police

officers were properly admitted, even though cross-examination was not conducted.

People v. Combs, 101 P.3d 1007 (Cal. 2004). A codefendant's statements during a videotaped crime reenactment, in which the defendant also participated, were admissible as nontestimonial, adoptive admissions. There was no violation of the Confrontation Clause because the statements "were admitted to supply meaning to the defendant's conduct or silence in the face of . . . [the codefendant's] accusatory statements."

People v. Monterroso, 101 P.3d 956 (Cal. 2004). The defendant's appeal argued that comments made by the trial court in preparation for and during the penalty phase were improper. However, his point of error was deemed forfeited when a timely objection was not made at trial.

Colorado:

Bloom v. People, 185 P.3d 797 (Colo. 2008). Curative instructions to the jury to disregard the reference to a codefendant's polygraph test were determined to be proper. There is a presumption that juries follow the instructions they receive from the trial judge.

Pena v. People, 173 P.3d 1107 (Colo. 2007). A finding of forfeiture does not preclude a trial court from also considering hearsay objections when these objections are properly made.

Vasquez v. People, 173 P.3d 1099 (Colo. 2007). Forfeiture requires a finding of "intent on the part of the defendant to prevent the witness from testifying at trial." The trial court's finding of forfeiture was upheld after the defendant murdered his wife to prevent her from testifying.

Coleman v. People, 169 P.3d 659 (Colo. 2007). The defendant alleged that his rights were violated when a forensic laboratory report was admitted and he was not given the opportunity to cross-examine the technician who prepared the report. Although the defendant had a right to cross-examine the technician, he waived

that right by not making a timely request for the technician to testify at trial.

People v. Moreno, 160 P.3d 242 (Colo. 2007). The prosecution failed to prove forfeiture by wrongdoing absent a showing that the defendant intended to prevent a witness from testifying against him.

Arteaga-Lansaw v. People, 159 P.3d 107 (Colo. 2007). A deceased victim's statements to the police detective were testimonial and should not have been admitted at trial. However, the victim's almost identical utterance to three others who testified was nontestimonial and admissible. Therefore, admitting the testimonial statements at trial was held to be harmless error.

People v. Argomaniz-Ramirez, 102 P.3d 1015 (Colo. 2004). Admission of a child's prior videotaped statement to police is permitted when the child will also testify at trial. The defendant had the opportunity to cross-examine the child witness at trial, and there was no Sixth Amendment violation in admitting the videotaped testimonial statements.

People v. Crespi, 155 P.3d 570 (Colo. App. 2006). The defendant's written letter to a codefendant was admissible against the defendant. There can be no Confrontation Clause violation "when the defendant is the declarant[]" because the defendant has the "opportunity to explain or deny the letter's contents."

Connecticut:

State v. Madigosky, 966 A.2d 730 (Conn. 2009). The defendant's mother was ill, and the trial court admitted her statement to police that her son had told her he committed the crime. After the prosecution acquiesced that the statement was improperly admitted, the court of appeals found that this was harmless error after "ample evidence of the defendant's remorse . . . properly was admitted."

State v. Smith, 960 A.2d 993 (Conn. 2008). The defendant did not waive his claim that an informant's statements recorded during

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their conversation violated his right to confrontation, because there can be no waiver of a fundamental right in a silent record. However, the defendant expressly consented to admission of the recordings.

State v. Holness, 958 A.2d 754 (Conn. 2008). A witness denied making a written statement to police the night of the crime in question, but confirmed it was his signature and initials on the written statement. Police detectives testified that the witness had made the written statement at the police station on the night in question. Although the witness did not recall making the written statement, he was not functionally unavailable and defense counsel had ample opportunity to cross-examine him.

State v. Simpson, 945 A.2d 449 (Conn. 2008). The witness did not remember making a videotaped statement. However, the defendant was able to cross-examine her and raised issues with regards to the witness's memory and perception. Even though the witness did not recall her statement, she was not functionally unavailable.

State v. Slater, 939 A.2d 1105 (Conn. 2008). A rape victim's statements to two strangers at the scene and to an emergency room physician and a nurse were nontestimonial and, therefore, admissible. Both the spontaneous utterance exception and the medical treatment exception to the hearsay rule applied, respectively.

State v. Arroyo, 935 A.2d 975 (Conn. 2007). A child's statements to a forensic investigator were nontestimonial, even though tapes were given to authorities and police detectives were present behind one-way mirrors at some of the interviews. The forensic investigator's primary purpose was to determine the child's medical needs.

State v. Randolph, 933 A.2d 1158 (Conn. 2007). At the defendant's probable cause hearing, the prosecution introduced the victim's postmortem report without the author's testimony. Although this violated the defendant's confrontation right, the

error was harmless because "ample evidence existed to support the trial court's probable cause determination."

State v. Camacho, 924 A.2d 99 (Conn. 2007). The trial court properly admitted dual inculpatory statements by a coconspirator. The court properly concluded that the statements "had been made in furtherance of an ongoing conspiracy[,]" which is an exception to hearsay.

State v. Aaron, 865 A.2d 1135 (Conn. 2005). A child victim, who spontaneously reported sexual abuse when she was two-and-a-half years old, was unable to recall the event at trial a decade later. The court permitted the victim's mother to relate the child's statements, declaring them nontestimonial under the residual hearsay exception.

Delaware:

Jones v. State, 940 A.2d 1 (Del. 2007). A coconspirator's hearsay statements made to his girlfriend in furtherance of the conspiracy were nontestimonial.

Jenkins v. State, 862 A.2d 386 (Del. 2004). The probationer had no constitutional right to confront witnesses at a probation violation hearing. The officer's testimony at the hearing concerning the probationer's confession, without the probationer's presence, also did not violate the probationer's confrontation right.

District of Columbia:

Roberson v. United States, 961 A.2d 1092 (D.C. 2008). A forfeiture of the right to confrontation cannot be overturned unless it is proved to be clearly erroneous.

Blunt v. United States, 959 A.2d 721 (D.C. 2008). A witness's fabricated claim of an inability to recall events in question did not deprive the defendant of his right to confrontation.

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Coleman v. United States, 948 A.2d 534 (D.C. 2008). Statements made in the course of a casual conversation are nontestimonial, and thus admissible at trial.

Callaham v. United States, 937 A.2d 141 (D.C. 2007). Despite the prosecution's notice to the accused that it may subpoena the author of a lab report, it was impermissible under the Confrontation Clause for the trial court to allow the lab report without giving the defendant an opportunity to cross-examine the author.

Reyes v. United States, 933 A.2d 785 (D.C. 2007). If a witness appears at trial for cross-examination, Confrontation Clause requirements will be met despite the witness being unable to remember previous identifications or statements that are the subject of the cross-examination. The Confrontation Clause does not constrain the use of prior statements made by the witness.

Gatlin v. United States, 925 A.2d 594 (D.C. 2007). The preponderance of the evidence standard governs in cases where the prosecution seeks to admit grand jury testimony based on claims that the defendant is responsible for the witness being unable to testify at trial. This standard was applied in a forfeiture by wrongdoing claim after it was established that coconspirator liability was also involved in intimidating a witness.

Jackson v. United States, 924 A.2d 1016 (D.C. 2007). Certified copies of court docket entries pertaining to future litigation were deemed nontestimonial for Confrontation Clause purposes and were thus admissible at trial.

Young v. United States, 863 A.2d 804 (D.C. 2004). The right of confrontation in criminal trials does not apply in probation hearings, where all that is required is minimum due process rights.

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Florida:

Peters v. State, 984 So. 2d 1227 (Fla. 2008). Probation revocation proceedings are not equivalent to a criminal prosecution. Thus, Confrontation Clause rights do not apply.

Russell v. State, 982 So. 2d 642 (Fla. 2008). The United States Supreme Court's decision in *Crawford*, addressing the use of testimonial hearsay, was decided only in the context of criminal proceedings. Rights derived from *Crawford* do not apply in probation revocation proceedings.

State v. Contreras, 979 So. 2d 896 (Fla. 2008). The unavailability of a child witness for cross-examination violated the defendant's right to confrontation, despite the defendant's ability to depose the child. Such a finding of unavailability should be upheld unless it is shown that there was an abuse of discretion.

Blanton v. State, 978 So. 2d 149 (Fla. 2008). The burden is on the prosecution to perpetuate testimony in order to provide the defendant with an opportunity to cross-examine a witness if there is reason to believe that the prosecution's witness will be unavailable for trial. This burden is not relieved by the availability of a deposition of a child witness or by a rule permitting a defendant to perpetuate testimony.

Franklin v. State, 965 So. 2d 79 (Fla. 2007). Statements made by the victim to his friend immediately after being shot were nontestimonial and were thus admissible at trial. Also, statements made to the responding officer were nontestimonial when the victim contacted the officer immediately after being shot, was in considerable pain, had difficulty breathing, and the statements were made before medical personnel arrived on the scene.

Williams v. State, 967 So. 2d 735 (Fla. 2007) (per curiam). The defendant's objections to the admissibility of the victim's out-of-court statements failed to specifically allege a violation of Confrontation Clause privileges and, therefore, were not preserved for appellate review.

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Peede v. State, 955 So. 2d 480 (Fla. 2007) (per curiam). The court held that *Crawford* does not apply retroactively to defendants convicted prior to the decision.

Gonzalez v. State, 965 So. 2d 273 (Fla. Dist. Ct. App. 2007). A record of a pawn shop transaction, indicating that the defendant sold a stolen weed whacker, was deemed nontestimonial as these forms are kept primarily for record-keeping purposes and not to bear witness against the customer.

Georgia:

Soto v. State, 677 S.E.2d 95 (Ga. 2009). The defendant's confrontation rights were violated when he was not given opportunity to cross-examine a codefendant, after the codefendant refused to answer any more questions. The codefendant exonerated the defendant, but his admitted prior statement conflicted with the exoneration testimony, and the defendant did not have the opportunity to ask the codefendant about the statement.

Wright v. State, 673 S.E.2d 249 (Ga. 2009). The reflective response of the five-year-old victim that "Daddy did it[,]" made to a military police officer after the incident had ended, was testimonial, so its admission violated the Confrontation Clause.

Martin v. State, 668 S.E.2d 685 (Ga. 2008). Issues at a second trial were substantially similar to the issues addressed by testimony of the defendant's girlfriend at a previous trial concerning aggravating circumstances. These statements were admissible under the prior testimony exception, when the trial court, in the earlier hearing, imposed no limitations on cross-examination.

Thomas v. State, 668 S.E.2d 711 (Ga. 2008). The victim's statements identifying the assailant to neighbors as part of a 911 call, while the emergency was ongoing and the assailant was still at large, were nontestimonial and not subject to the Confrontation Clause. The court further held that the victim's prompt identification of the assailant and his vehicle to paramedics and the

responding officer were admissible as spontaneous utterances under the exception of *res gestae*.

Smith v. State, 667 S.E.2d 65 (Ga. 2008). Statements made by the victim to friends about the violent nature of the relationship between the defendant and the victim were nontestimonial when they occurred before the commission of the crime.

Fair v. State, 664 S.E.2d 227 (Ga. 2008). *Crawford* applies only to criminal trials and not pretrial hearings.

Hester v. State, 659 S.E.2d 600 (Ga. 2008). Nontestimonial statements made during an ongoing emergency can evolve into testimonial statements once the purpose of the conversation—to stifle the ongoing emergency—has been achieved. If this is the case, the statements must be excluded absent confrontation.

Lindsey v. State, 651 S.E.2d 66 (Ga. 2007). Comments made by the victim to the prosecutor concerning extraneous hostilities with the defendant were testimonial and, thus, not admissible.

Turner v. State, 641 S.E.2d 527 (Ga. 2007). The victim's statements to his police officer friends, made prior to his death, were nontestimonial and admissible under both *Crawford* and the necessity exception.

Porter v. State, 606 S.E.2d 240 (Ga. 2004). Statements made by a witness in response to police inquiries during a pretrial investigation were testimonial in nature because the witness refused to testify at the trial and, thus, was not available. However, admission of this testimony at trial was judged to be harmless error because the evidence against the defendant was overwhelming.

Watson v. State, 604 S.E.2d 804 (Ga. 2004). The deceased victim's statements to close, personal friends were admissible under the exception of necessity.

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Bell v. State, 597 S.E.2d 350 (Ga. 2004). Out-of-court statements by the victim to police during investigations into incidents between the defendant and the victim are testimonial. However, statements made by the victim to friends and relatives are nontestimonial and, therefore, admissible at trial.

Demons v. State, 595 S.E.2d 76 (Ga. 2004). Statements made by the victim to a coworker concerning prior difficulties with the accused and before the commission of any crime were nontestimonial.

Moody v. State, 594 S.E.2d 350 (Ga. 2004). A police officer's testimony about statements made by the victim shortly after being shot were testimonial in nature and, therefore, inadmissible. However, the admission of these statements at trial was judged to be harmless error, as their admission posed no reasonable possibility of contributing to the defendant's conviction at trial.

Hawai'i

State v. Fields, 168 P.3d 955 (Haw. 2007). Admission of the victim's out-of-court statements did not violate the Confrontation Clause when the defendant had an adequate opportunity to cross-examine the victim at trial, despite the victim claiming memory loss at trial.

Idaho:

State v. Hooper, 176 P.3d 911 (Idaho 2007). A six-year-old victim's videotaped statements were testimonial for purposes of *Crawford* and *Davis*, and their admission was not harmless error.

Illinois:

In re Rolandis G., 902 N.E.2d 600 (Ill. 2008). The child victim's statements made to a child advocate were testimonial and their admission during a juvenile delinquency hearing violated the Confrontation Clause. The court held that the child advocate acted as a police representative.

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People v. Melchor, 871 N.E.2d 32 (Ill. 2007). Procedurally, the appellate court must first consider potential state law evidentiary rules. Only if the trial court's state law evidentiary ruling was either not erroneous, or was erroneous but harmless, should it consider constitutional *Crawford* issues.

People v. Stechly, 870 N.E.2d 333 (Ill. 2007). The statements of a child victim were deemed testimonial, as they were made in response to questions designed to assist an investigation. A finding of forfeiture of the right to confrontation by wrongdoing requires that the prosecution prove the defendant intended to cause the witness's absence at trial.

People v. Sutton, 874 N.E.2d 212 (Ill. App. Ct. 2007). Although post-hypnotic statements are inadmissible, hypnotic treatment does not render the witness legally incompetent and unavailable for cross-examination on matters occurring before the treatment.

Indiana:

Reyes v. State, 868 N.E.2d 438 (Ind. 2007). The admission of toxicology reports by affidavit was not a violation of the Confrontation Clause. A substantial trustworthiness test, rather than a typical confrontation right analysis, is the applicable standard for determining the reliability of evidence in probation revocation hearings.

Iowa:

State v. Harper, 770 N.W.2d 316 (Iowa 2009). Admission of the victim's statements, which exhibited little resemblance to testimony made to the hospital staff that tied defendant to the crime, did not violate the Confrontation Clause.

State v. Schaer, 757 N.W.2d 630 (Iowa 2008). The prosecution satisfied its burden of showing by a preponderance of the evidence that statements made by the victim to her stepsister and medical providers were nontestimonial.

State v. Shipley, 757 N.W.2d 228 (Iowa 2008). A certified copy of the defendant's driving record abstract was nontestimonial and, therefore, admissible under the Confrontation Clause.

State v. Bentley, 739 N.W.2d 296 (Iowa 2007). Videotaped statements by a child were testimonial when the statements were made to a counselor at a child protection center and concerned alleged sexual abuse of the child because the defendant had no opportunity for cross-examination.

State v. Wells, 738 N.W.2d 214 (Iowa 2007). Any error in the admission of the child victim's statements through the sexual assault nurse examiner was harmless in light of DNA evidence establishing the defendant's guilt.

Kansas:

State v. Ransom, 207 P.3d 208 (Kan. 2009). Four factors are to be considered in determining when evidence is testimonial: (1) Whether an objective witness would reasonably believe the statement would be available for later use in the prosecution; (2) whether the statement was made to a law enforcement officer or a government official; (3) whether the interview's primary purpose was to discern the proof of facts that would be used later; and (4) the formality of the statement.

State v. Jones, 197 P.3d 815 (Kan. 2008). Based on the record and reasonable inferences therefrom, a murder victim's statements to paramedics satisfied the elements of the dying declaration exception.

State v. Anderson, 197 P.3d 409 (Kan. 2008). Whether a violation of confrontation rights was harmless is determined by various facts, including importance of the witness's testimony to the prosecution's case, whether such testimony was cumulative, presence or absence of corroborating or contradicting evidence, and the strength of the prosecution's overall case.

State v. Vasquez, 194 P.3d 563 (Kan. 2008). Statements made by the defendant's wife to a police officer on the day the wife was murdered were nontestimonial and, therefore, admissible under the totality of the circumstances test.

State v. Brown, 173 P.3d 612 (Kan. 2007). Statements made among bystanders within close proximity of the shooting were nontestimonial and did not violate the Confrontation Clause.

State v. Araujo, 169 P.3d 1123 (Kan. 2007). The Confrontation Clause does not apply to testimonial statements used for purposes other than to establish the truth of the matter stated.

State v. Noah, 162 P.3d 799 (Kan. 2007). A victim who became emotional on the stand and was unable to continue in a preliminary hearing did not provide the defendant an adequate opportunity to cross-examine, and, thus, admission of the victim's statements at trial when the victim was unavailable violated the Confrontation Clause.

State v. Henderson, 160 P.3d 776 (Kan. 2007). A child's videotaped statement was testimonial because its primary purpose was to establish past events for a later prosecution. Further, incompetence of a young victim is, in and of itself, insufficient to warrant the application of forfeiture by wrongdoing.

In re J.D.C., 159 P.3d 974 (Kan. 2007). Since confrontation rights are limited to criminal prosecutions, they do not apply in a proceeding to adjudicate a child as one in need of care.

State v. Stano, 159 P.3d 931 (Kan. 2007). Admission of written testimony and statements made by a witness during a preliminary hearing did not violate the defendant's right to confrontation. The interests and motivations in confronting the witness at the preliminary hearing were sufficiently similar to provide the defendant an adequate opportunity to cross-examine.

State v. Denney, 156 P.3d 1275 (Kan. 2007). The defendant had no right in a posttrial DNA review to confront the person who conducted DNA testing or to be present at the hearing.

State v. Davis, 158 P.3d 317 (Kan. 2006). The witness's statements made in good faith and with no accusatory intent were inherently trustworthy and, accordingly, admission thereof did not violate the Confrontation Clause.

Kentucky:

Hartsfield v. Commonwealth, 277 S.W.3d 239 (Ky. 2009). Statements made by the deceased victim to the sexual assault nurse examiner, who was acting in cooperation with or for police to supplement an investigation, were testimonial.

Chestnut v. Commonwealth, 250 S.W.3d 288 (Ky. 2008). The Confrontation Clause does not bar an officer's testimonial statement used for purposes other than establishing the truth of the matter asserted.

Turner v. Commonwealth, 248 S.W.3d 543 (Ky. 2008). If offered for the sole reasons of placing defendant's admission into context, recorded statements are nontestimonial. However, statements offered to ascertain truth would violate the Confrontation Clause.

Monroe v. Commonwealth, 244 S.W.3d 69 (Ky. 2008). The improper admission of hearsay evidence, justified as co-conspirator's statements made in contemplation of assisting the conspiracy, was not a harmless error.

Rankins v. Commonwealth, 237 S.W.3d 128 (Ky. 2007). An alleged assault victim's response to a police officer who asked "what happened" was testimonial after the victim began telling the details of the assault.

Louisiana:

State v. A.M., 994 So. 2d 1277 (La. 2008). A right to present one's defense does not encompass a right to have an expert testify about the credibility of a witness.

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State v. Short, 958 So. 2d 93 (La. Ct. App. 2007). The codefendant's out-of-court statements to non-law enforcement witnesses were nontestimonial and did not trigger application of the Confrontation Clause.

State v. Price, 952 So. 2d 112 (La. Ct. App. 2006) (en banc). Discussion between friends immediately before the crime was nontestimonial.

Maine:

State v. Rickett, 967 A.2d 671 (Me. 2009). Out of three 911 calls, only the first two were made during an ongoing emergency and were nontestimonial. Correspondingly, the first two calls were admissible and the third was properly redacted.

State v. Tayman, 960 A.2d 1151 (Me. 2008). The certified record of a suspended driver's license was held to be non-testimonial in light of *Crawford* and *Davis*. The court commented that such records are considered regular administrative documents with no real legal assertions or accusations.

State v. Mangos, 957 A.2d 89 (Me. 2008). A forensic chemist's statement in a report about how the chemist obtained DNA evidence was testimonial when the chemist did not testify on cross-examination.

State v. Roberts, 951 A.2d 803 (Me. 2008). An affidavit of protection from abuse was deemed admissible because it was used for optional completeness, not to demonstrate the truth of matters asserted.

Maryland:

Myer v. State, 943 A.2d 615 (Md. 2008). The court declined to discuss constitutional issues when the evidentiary issues could have been decided on non-constitutional grounds of state law.

State v. Snowden, 867 A.2d 314 (Md. 2005). A social worker's testimony that gave details regarding the sexual abuse of a child victim was deemed inadmissible because the purpose of the social worker's interview with the child was to further develop testimony.

Massachusetts:

Commonwealth v. Nardi, 893 N.E.2d 1221 (Mass. 2008). The court held that: (1) an expert witness may opine based upon the record of another but may not give findings and conclusions of a non-testifying expert; (2) an autopsy report is not a public record and is testimonial; and (3) without the author's testimony, admission of an autopsy report is a violation of the defendant's confrontation right.

Commonwealth v. Nesbitt, 892 N.E.2d 299 (Mass. 2008). A sense of impending death may be inferred for purposes of applying the dying declaration doctrine. Statements made under this doctrine do not violate one's confrontation right.

Commonwealth v. Robinson, 888 N.E.2d 926 (Mass. 2008). The prosecution need not exhaust all resources trying to locate the victim to ensure attendance at trial, but instead, need only make a good-faith effort

Commonwealth v. Figueroa, 887 N.E.2d 1040 (Mass. 2008). Because the witness testified at trial, it was permissible for the trial court to read grand jury testimony to the jury after the witness gave inconsistent statements and declared his inability to recall certain things.

Commonwealth v. Lao, 877 N.E.2d 557 (Mass. 2007). In a pre-*Crawford* trial with a post-*Crawford* appeal, appellate counsel's assistance was deemed ineffective due to a failure to challenge the admissibility of hearsay evidence.

Commonwealth v. Burton, 876 N.E.2d 411 (Mass. 2007). Coconspirator statements were admissible because the crime was still continuing at the time of the conversation and were made in furtherance of the conspiracy.

Commonwealth v. Edwards, 830 N.E.2d 158 (Mass. 2005). Forfeiture of the confrontation right by wrongdoing also applies to objections to hearsay.

Commonwealth v. Sena, 809 N.E.2d 505 (Mass. 2004). A prior recorded statement was held to be admissible because counsel executed due diligence to locate and produce the witness.

Doe v. Sex Offender Registry Bd., No. 04-02169 F, 2004 WL 2747604 (Mass. Super. Ct. Nov. 22, 2004). Confrontation rights are not applicable in civil sex offender commitment proceedings.

Michigan:

People v. Bryant, 768 N.W.2d 65 (Mich. 2009), *rev'd*, 131 S. Ct. 1143 (2011). The victim's statements to police about an incident that occurred a half-hour prior were testimonial. Thus, their admission violated the defendant's confrontation rights. The court emphasized that the primary purpose of the questioning was to ascertain what had already happened.

People v. Taylor, 759 N.W.2d 361 (Mich. 2008). The co-defendant's out-of-court statements to non-law enforcement witnesses that the defendant had shot victim once in each leg were nontestimonial.

Minnesota:

State v. Tscheu, 758 N.W.2d 849 (Minn. 2008). A motor vehicle transfer record, indicating the date of transfer of a vehicle matching the description of a car observed on the murder victim's property, was not prepared for prosecution, and was thus nontestimonial. While confirmation of the vehicle's sale by a police officer was testimonial in nature, the statement did not affect substantial rights that required reversal.

State v. Holliday, 745 N.W.2d 556 (Minn. 2008). The Confrontation Clause is not violated by admission of a witness's prior out-of-court statements into evidence if that witness appears for cross-examination. The Confrontation Clause was thus

satisfied when the witness appeared at trial, took an oath to speak the truth, and answered questions posed during cross-examination.

State v. Krasky, 736 N.W.2d 636 (Minn. 2007). In an effort to assess and protect a child, law enforcement acquiesced to questioning by medical professionals. This alone did not render those professionals proxies for the police. The statements were nontestimonial for Confrontation Clause purposes.

State v. Warsame, 735 N.W.2d 684 (Minn. 2007). Analyzed objectively, the initial statements made by the victim of a domestic assault were not made with prosecution in mind and were thus nontestimonial. Police interrogated the victim to respond to her ongoing medical emergency, and "[f]or Confrontation Clause purposes, it is the primary purpose of the interrogation that is dispositive."

State v. Wright, 726 N.W.2d 464 (Minn. 2007). A minor's statements made to 911 operators during an emergency were nontestimonial, yet statements made to police officers after the emergency passed were deemed testimonial. The 911 calls were not intended to establish events relevant to later prosecution, while the questioning by police, occurring after defendant was in custody, was aimed at prosecution.

State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006). The young child's statement at issue was deemed nontestimonial because neither the child nor the social worker acted "to a substantial degree" to provide a trial statement.

State v. Fields, 679 N.W.2d 341 (Minn. 2004). The defendant's post-arrest phone calls to threaten the witness after his grand jury appearance, but before trial, were properly held to be a forfeiture by wrongdoing.

State v. Ali, 679 N.W.2d 359 (Minn. Ct. App. 2004). A certification document admitted only to corroborate tests performed by a police officer was nontestimonial, thus distinguishing it from business records offered to prove an essential element of a crime, which are testimonial.

Mississippi:

Birkhead v. State, 57 So. 3d 1223 (Miss. 2011) (en banc). A death certificate containing the time of death is a vital statistic. Vital statistics are nontestimonial if used in regular administration and not to establish facts for trial. Thus, the Confrontation Clause is not implicated by their admission.

Neal v. State, 15 So. 3d 388 (Miss. 2009) (en banc). Statements made by the victim's son, presented through testimony of the neighbor to whom they were made, were deemed nontestimonial. The statements were not made with a mind to prosecution, and thus they fall outside the category of testimonial hearsay subject to the Confrontation Clause. A crucial factor here was that the child and the neighbor were unaware of the murder when the statements were made.

Smith v. State, 986 So. 2d 290 (Miss. 2008). A codefendant's admitted out-of-court statement, which implicated another defendant, violated the Confrontation Clause. Cautionary instructions to the jury cannot cure such a violation. However, on the facts of the case, the error was harmless.

Bishop v. State, 982 So. 2d 371 (Miss. 2008). The child victim's statements to her therapist and to her mother were deemed nontestimonial and were admitted. Statements to the mother were spontaneous, and statements to the therapist were made for the purpose of treatment.

Burchfield v. State, 892 So. 2d 191 (Miss. 2004) (en banc). Over-the-counter medicine labels that listed active ingredients were found to be nontestimonial hearsay, and were admissible despite a Confrontation Clause challenge. Admissibility hinged on a finding that the trustworthiness of the source guaranteed its reliability. Unopened medications purchased directly by a defendant satisfy this standard.

Penny v. State, 960 So. 2d 533 (Miss. Ct. App. 2006). A child victim's videotaped statement of sexual abuse, given to a social worker at the suggestion of the assistant district attorney, was

testimonial. However, the defendant had an adequate opportunity to confront the victim during cross-examination so the Confrontation Clause was not violated.

Missouri:

State v. Perry, 275 S.W.3d 237 (Mo. 2009). The statute allowing admission of pretrial videotaped statements by a child victim does not implicate the Confrontation Clause when the witness is available for cross-examination. Further, the Confrontation Clause does not prohibit states from creating additional requirements for admission of statements.

State v. McLaughlin, 265 S.W.3d 257 (Mo. 2008). Forfeiture by wrongdoing provides an exception to the Confrontation Clause, but the defendant must engage in the wrongdoing with the intent of preventing the witness from testifying. When, as in this case, an abusive relationship ends in murder, evidence may demonstrate that the murderer expressed the intent to prevent the victim from reporting the abuse, thus rendering previous statements admissible under the doctrine of forfeiture.

Taylor v. State, 262 S.W.3d 231 (Mo. 2008). The doctor's testimony regarding an autopsy performed by another doctor was admitted at trial. Though *Crawford* was handed down prior to appellate counsel filing a reply brief as part of direct appeal, appellate counsel's performance was not deemed deficient for failing to raise a hearsay argument.

In re N.D.C., 229 S.W.3d 602 (Mo. 2007) (per curiam). The child victim's statements to her mother were not testimonial, and were properly admitted at a juvenile delinquency proceeding. Due to the risk of deprivation of a liberty, Sixth Amendment protections apply in both juvenile delinquency and criminal proceedings.

State v. Kemp, 212 S.W.3d 135 (Mo. 2007). Statements made by the defendant's girlfriend, audible on a 911 call, were non-testimonial and correctly admitted as excited utterances.

State v. Aaron, 218 S.W.3d 501 (Mo. Ct. App. 2007). Cross-examination of a witness at a preliminary hearing, though brief and resulting in only four pages of testimony, was sufficient to satisfy the Confrontation Clause. This held true despite the defendant being represented by different counsel at trial.

Montana:

State v. Russette, 198 P.3d 791 (Mont. 2008). The defendant's motion in limine to prevent the admission of an anonymous tip and his passing reference to the right of confrontation during trial was deemed insufficient to preserve the issue for appeal.

Nebraska:

State v. Jacobson, 728 N.W.2d 613 (Neb. 2007) (en banc). Documents certifying a radar unit's accuracy were admitted at trial. The documents were prepared six months before the radar was used to determine the defendant's speed, and were without reference to any particular defendant. As such, the "statements were too attenuated from the prosecution . . . to be testimonial."

State v. Fischer, 726 N.W.2d 176 (Neb. 2007) (en banc). A certificate verifying a blood alcohol concentration simulator solution, which was used to calibrate the testing device, was not testimonial in nature. Such certification is required regardless of whether the statements will be used in a criminal prosecution.

Nevada:

Hernandez v. State, 188 P.3d 1126 (Nev. 2008). Unavailability of a witness requires a showing of due diligence and a good faith effort to secure the witness's attendance. The prosecution's failure to issue a subpoena, and minimal efforts to contact the witness, were deemed insufficient to claim witness unavailability.

Browning v. State, 188 P.3d 60 (Nev. 2008) (en banc) (per curiam). *Crawford* does not apply during the capital penalty phase.

City of Las Vegas v. Walsh, 124 P.3d 203 (Nev. 2005) (en banc). Affidavits by the nurse who drew blood samples for chemical analysis were deemed testimonial. The governing statute provided a mechanism for the defendant to challenge the affidavit, thus preserving an opportunity to confront. Because defense counsel possesses authority to waive the right to confrontation, failure to properly raise an issue within the statutory mechanism constitutes waiver.

New Hampshire:

State v. Ata, 969 A.2d 419 (N.H. 2009). The defendant's accomplice could not recall the details of the crimes in a burglary trial due to drug use. This did not equate to unavailability for the purpose of the Confrontation Clause. Regardless of the degree of memory impairment, physical availability for cross-examination at trial removes any obstacles under the Confrontation Clause.

State v. Legere, 958 A.2d 969 (N.H. 2008). An eyewitness to a murder, who by the time of trial had no memory of the shooting, gave statements to police shortly after the crime occurred. The opportunity to confront was satisfied by the witness's availability for cross-examination at trial.

State v. Munoz, 949 A.2d 155 (N.H. 2008). An anonymous tip leading to identification of the accused, which was admitted at trial, did not offend the Confrontation Clause. The statement was used only to shed light on the police investigation. If a conversation is relevant, whether or not the contents are true, the hearsay rule will not exclude the testimony.

State v. Ayer, 917 A.2d 214 (N.H. 2006). Questions posed by police to the defendant's wife were focused on resolving an ongoing emergency. Therefore, they were nontestimonial in nature. Though a conversation may evolve into a testimonial statement, the wife of the accused made the relevant statements prior to resolution of the emergency.

New Jersey:

State v. Coder, 968 A.2d 1175 (N.J. 2009). Out-of-court statements made by a three-year-old girl to her mother were considered relevant and hearsay for purposes of the Confrontation Clause. However, the statements were admissible under the "tender years" exception and considered nontestimonial. Therefore, they did not violate the defendant's Sixth Amendment right to confrontation.

State v. Byrd, 967 A.2d 285 (N.J. 2009). Admission of hearsay evidence under the "forfeiture by wrongdoing" doctrine does not conflict with the Sixth Amendment right to confrontation. However, a lower court's in camera interview of a witness to determine the doctrine's applicability did violate a defendant's right to confrontation.

State v. Sweet, 949 A.2d 809 (N.J. 2008). Operational certificates for breath testing and ampoule testing are considered nontestimonial for purposes of the Confrontation Clause. Further, they are admissible under the business records exception to the hearsay rule.

State ex rel. J.A., 949 A.2d 790 (N.J. 2008). A witness's statements given to police concerning a robbery that had taken place ten minutes prior were considered testimonial for the purpose of the Confrontation Clause. Though the statements were made for the purpose of gathering information, the record failed to reflect an ongoing emergency.

State v. Buda, 949 A.2d 761 (N.J. 2008). Statements made to the mother and the special response team members by a three-year-old boy, several hours after the incident, were permissible under the excited utterance exception and not considered testimonial for purposes of the Confrontation Clause.

State v. Chun, 943 A.2d 114 (N.J. 2008). Various scientific standards used to determine blood alcohol levels are admissible. Agreement by the scientific community as to the most effective form of testing is not necessary. Evidence that a breath-measuring

device is in working order and a report generated by that machine are considered nontestimonial and therefore, do not violate the Confrontation Clause.

State v. Branch, 865 A.2d 673 (N.J. 2005). Testimony from a detective that the defendant's picture was included in a photographic lineup "based on the information received" was in violation of the Confrontation Clause. Admission of these statements was plain error.

New Mexico:

State v. Zamarripa, 199 P.3d 846 (N.M. 2008). When the prosecution agreed to extend limited immunity to a codefendant, it deprived the defendant of the right to fully confront and cross-examine the witness.

State v. Romero, 156 P.3d 694 (N.M. 2007). Statements given to a sexual assault nurse examiner were interpreted to be clearly accusatory against the defendant and were thus testimonial in nature.

New York:

People v. Rawlins, 884 N.E.2d 1019 (N.Y. 2008). Latent fingerprint reports created by law enforcement are considered testimonial in nature. However, not allowing the defendant to cross-examine the officer in charge of the reports was considered harmless error.

People v. Nieves-Andino, 872 N.E.2d 1188 (N.Y. 2007). Statements made to the first responding police officer by a shooting victim were not considered testimonial. The questioning attempted to provide the victim with emergency medical care and was not for the purpose of gathering information to build a case.

People v. Watson, 827 N.Y.S.2d 822 (App. Div. 2007). A full statement about the details of a crime is testimonial, and introduction of such evidence is in violation of a defendant's Sixth

Amendment rights. However, nontestimonial statements may determine the termination of the state of emergency.

People v. Ko, 789 N.Y.S.2d 43 (App. Div. 2005). The defendant preserved a Confrontation Clause argument and, on appeal, the evidence submitted at trial was considered testimonial. However, the court concluded that the defendant opened the door to submit the evidence and found no basis for reversal.

People v. Nunez, 776 N.Y.S.2d 551 (App. Div. 2004). The introduction of evidence that law enforcement officials took certain investigatory steps to complete the narrative of events did not violate the Confrontation Clause, and was not introduced for the truth of the matter asserted.

North Carolina:

State v. Raines, 653 S.E.2d 126 (N.C. 2007). Detention center reports are likened to business records. However, as the rules of evidence are not controlling in capital penalty sentencing proceedings, they do not need to meet the evidentiary standards set forth in the business records exception.

State v. Lewis, 648 S.E.2d 824 (N.C. 2007). Statements made when the declarant was in no threat of danger and when the police officer sought to discover more information concerning the crime were considered testimonial. Due to the testimonial nature of the evidence and its introduction at trial, the lower court's error was harmful.

State v. Morgan, 604 S.E.2d 886 (N.C. 2004). Testimonial evidence admitted in violation of the Confrontation Clause is still subject to a harmful error analysis. When there is an overwhelming amount of evidence against the defendant, the admission of such testimonial evidence may be harmless.

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North Dakota:

State v. Keener, 755 N.W.2d 462 (N.D. 2008). The defendant failed to object to a witness's testimony on Confrontation Clause grounds. Such failure is reviewed under plain error analysis.

City of Fargo v. Levine, 747 N.W.2d 130 (N.D. 2008). Source codes used in the software of a breathalyzer machine could not be treated as a witness and, as such, the defendant had no right to confrontation against it. Therefore, the defendant was not entitled to review the code himself.

State v. Muhle, 737 N.W.2d 647 (N.D. 2007). The age of a witness may lead to difficulty on cross-examination; however, it does not, in and of itself, preclude the defendant's right to effective cross-examination.

Oklahoma:

Hanson v. State, 206 P.3d 1020 (Okla. Crim. App. 2009). The trial court allowed hearsay evidence although new impeachment evidence existed against the declarant. The defendant had cross-examined the witnesses during his trial and had exposed weaknesses in their testimonies, thus the new impeachment evidence was of little value for Confrontation Clause purposes.

Hampton v. State, 203 P.3d 179 (Okla. Crim. App. 2009). In order to admit hearsay evidence in a revocation hearing, the court must make an evaluation of its trustworthiness. The court found that the trustworthiness of the hearsay evidence was sufficient and admitted it into evidence.

Folks v. State, 207 P.3d 379 (Okla. Crim. App. 2008). A child witness testified at trial. As such, a DVD recording of the child interview came under a statutory exception to the hearsay rule and was thus admissible.

Wortham v. State, 188 P.3d 201 (Okla. Crim. App. 2008). Probation revocation hearings did not give rise to Sixth Amendment confrontation protections.

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Thompson v. State, 169 P.3d 1198 (Okla. Crim. App. 2007). Witnesses who had been involved in gang activity feared reprisal and were therefore considered unable to testify. However, the court ruled that the defendant's Sixth Amendment confrontation rights were not violated because counsel had an opportunity to question both witnesses during a preliminary hearing.

Andrew v. State, 164 P.3d 176 (Okla. Crim. App. 2007). Admission of statements given to police officers concerning a witness's belief that the defendant had committed the crime was harmless. The court reasoned that because of the overwhelming evidence against the defendant, a jury would have reasonably reached the same conclusion.

Primeaux v. State, 88 P.3d 893 (Okla. Crim. App. 2004). When the prosecution has exercised due diligence in locating a witness, yet is unsuccessful, prior testimony of the witness is allowable if the defendant was able to confront and cross-examine the witness at that time.

Ohio:

State v. Pasqualone, 903 N.E.2d 270 (Ohio 2009). The defendant challenged a ruling on his Sixth Amendment right to confrontation when he was not allowed to cross-examine a laboratory technician who determined that a substance found in his possession was cocaine. By assuming the report filed by the technician was testimonial in nature, the defendant waived his right to cross-examination after failing to request his testimony within the statutory period.

State v. Muttart, 875 N.E.2d 944 (Ohio 2007). A child's outcry-type statements to her mother and others were admissible hearsay as they "were made for the purpose of medical diagnosis and treatment."

Oregon:

State v. Camarena, 176 P.3d 380 (Or. 2008). A victim's statements during an emergency 911 call, claiming that her boyfriend had just hit her, were considered nontestimonial in nature. Responses given to questioning aimed at establishing facts for subsequent criminal proceedings were classified as testimonial, yet any evidence introduced at trial was considered harmless.

State v. McDonnell, 176 P.3d 1236 (Or. 2007). Defendants must object to prior testimony before the prosecution is required to demonstrate the declarant's unavailability.

State v. Birchfield, 157 P.3d 216 (Or. 2007). Admitting a laboratory report without requiring the prosecution to produce the analyst who generated the report, or demonstrating his unavailability, was a violation of the right to confrontation under the Oregon Constitution.

State v. Mack, 101 P.3d 349 (Or. 2004). Statements made to a caseworker fell within a core class of testimonial statements identified in *Crawford*. Further, they were identical to statements gained by law enforcement officials.

Pennsylvania:

Commonwealth v. Baumhammers, 960 A.2d 59 (Pa. 2008). In affirming a capital murder conviction, the court reasoned that a failure to object to admission of a psychiatrist's interviews with various declarants regarding an insanity plea did not preserve error for appeal.

Commonwealth v. King, 959 A.2d 405 (Pa. 2008). The defendant killed an informant in retaliation for collaborating with the authorities. At trial, the defendant argued against the admissibility of evidence regarding out-of-court statements predating the murder. The court held that forfeiture by wrongdoing waived any confrontation issues.

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Commonwealth v. Carter, 932 A.2d 1261 (Pa. 2007). In an effort to exclude incriminating evidence of his possession charge, the defendant argued that the admission of the lab report violated the Confrontation Clause. The court rejected the argument, holding that crime lab reports are not governed by the Confrontation Clause and that they are admissible under the business record hearsay exception. In doing so, the court noted that *Crawford* did not retroactively apply.

In re S.R., 920 A.2d 1262 (Pa. Super. Ct. 2007). A child could testify about her mother's statements, and have those statements admitted into evidence under the state's "tender years" hearsay rule. Meanwhile, the mother's statements were not admissible as evidence.

Rhode Island:

State v. Bergevine, 942 A.2d 974 (R.I. 2008). The court admitted a parent's statement to a 911 operator asking for assistance. The parent had just witnessed the defendant abusing his daughter. The parent's statements were not subject to confrontation analysis, as they were not testimonial and otherwise admissible under the excited utterance exception to hearsay.

State v. DeJesus, 947 A.2d 873 (R.I. 2008). Defendant made incriminating statements to a cell mate. The cell mate later testified as to these statements and the court rejected the defendant's Confrontation Clause argument, observing that the statements did not constitute hearsay because they were not offered to prove the truth of the matter asserted.

State v. Ramirez, 936 A.2d 1254 (R.I. 2007). The court rejected the defendant's assertion of error regarding the admission of a forensic detective's investigation leading up to the defendant's conviction. Applying a good-faith standard to prove unavailability, the evidence did not violate the defendant's right to confrontation.

State v. Pompey, 934 A.2d 210 (R.I. 2007). The court held that the defendant's girlfriend's utterances regarding allegations of battery were admissible under the excited utterance exception to hearsay. Therefore, the Confrontation Clause was inapplicable to probation revocation proceedings.

South Carolina:

State v. Stokes, 673 S.E.2d 434 (S.C. 2009). The Confrontation Clause only aims to provide an opportunity for cross-examination. When counsel opts not to cross-examine the witness, the Confrontation Clause is not implicated.

State v. Ladner, 644 S.E.2d 684 (S.C. 2007). A two-year-old's statements to her caretaker supported a criminal sexual conduct charge against the defendant. The court held confrontation inapplicable because the child's statements constituted excited utterances subject to the well-defined hearsay exception.

South Dakota:

State v. Selalla, 744 N.W.2d 802 (S.D. 2008). At trial, the defendant introduced favorable hearsay evidence that led to incriminating hearsay evidence. The defendant argued for exclusion of the damaging evidence based upon the Confrontation Clause, while also arguing for the admission of exculpatory hearsay evidence based upon the rule of optional completeness. The court rejected the arguments, noting that the Confrontation Clause could not be used as both a sword and a shield.

State v. Tiegen, 744 N.W.2d 578 (S.D. 2008). Even where statements are improperly admitted into evidence, harmful error must still be shown to merit reversal.

State v. Carothers, 692 N.W.2d 544 (S.D. 2005). In a kidnapping and pedophilia prosecution, the defendant's Confrontation Clause argument was rejected because the victim was available to testify at trial and was subject to cross-examination. The court went on to note that the timing of the confrontation is immaterial.

Tennessee:

State v. Banks, 271 S.W.3d 90 (Tenn. 2008). A victim's statements to an officer at the scene were admitted at trial. Rejecting the defendant's confrontation objection, the court held that the statements at issue were admissible under the excited utterance exception to hearsay and, thus, not subject to the Confrontation Clause.

State v. Cannon, 254 S.W.3d 287 (Tenn. 2008). In determining the testimonial nature of a witness's statement, the court held that testimonial statements were subject to harmless error analysis.

State v. Lewis, 235 S.W.3d 136 (Tenn. 2007). The court admitted into evidence the victim's call to 911 and a third-party statement identifying the defendant. The court overruled the defendant's Confrontation Clause objection, and held that the victim's final call was admissible under the dying declaration exception to hearsay. The court also concluded that the third-party statement was nontestimonial.

State v. Sorrell, No. W2006-02766-CCA-R3-CD, 2009 WL 1025873 (Tenn. Crim. App. Aug. 8, 2009). At trial, the defendant contested the introduction of a tape recording containing a conversation between the defendant and a third-party. The defendant argued that the evidence was inadmissible hearsay. The court reasoned that the evidence was introduced to prove his knowledge of the victim, not his culpability. Thus, as it was not offered to prove the truth of the matter asserted, the evidence was not hearsay. Any specific confrontation issue was waived by a failure to object.

State v. Bateman, No. W2007-00571-CCA-R3-CV, 2008 WL 4756675 (Tenn. Crim. App. Oct. 28, 2008). Under Tennessee precedent, the dying declaration exception applies to both testimonial and nontestimonial statements.

State v. Milan, No. W2006-02606-CCA-MR3-CD, 2008 WL 4378172 (Tenn. Crim. App. Sept. 26, 2008). The defendant's girlfriend brought charges against him. Before trial the defendant

killed her. The court held that a letter from the girlfriend was correctly admitted at trial under the forfeiture by wrongdoing exception, thus precluding defendant's assertion of a Confrontation Clause violation.

State v. Neese, No. M2005-00752-CCA-R3-CD, 2006 WL 3831387 (Tenn. Crim. App. Dec. 15, 2006). Video footage of an interview between a minor and a social worker was not hearsay because was it was not offered to prove the truth of the matter asserted, but rather to bolster the victim's credibility. Because of a prior opportunity to cross-examine, the declarant was not unavailable for cross-examination.

Texas:

Del Carmen Hernandez v. State, 273 S.W.3d 685 (Tex. Crim. App. 2008). At trial, the defendant asserted his Fifth Amendment rights and was thus unavailable. The defendant told a prison mate that a codefendant was attempting to help the victim. The court determined that these were admissible extrajudicial statements, and, consequently, not subject to *Crawford* analysis.

De La Paz v. State, 273 S.W.3d 671 (Tex. Crim. App. 2008). At trial, the defendant objected to the introduction of handwritten notes on hearsay grounds. The court held that the prosecution bore the burden of proof to establish the notes' admissibility under *Crawford*, and that it failed to meet that burden. The court also rejected the prosecution's argument that the defendant failed to preserve the error.

Segundo v. State, 270 S.W.3d 79 (Tex. Crim. App. 2008). Written certificates from the Texas Board of Pardons and Paroles containing statements regarding the trustworthiness of the defendant were held nontestimonial because the language on the forms consisted of pre-printed, boilerplate text. The documents were admissible under the business and public records exceptions to the hearsay rule.

Taylor v. State, 268 S.W.3d 571 (Tex. Crim. App. 2008). A witness is not required to have medical qualifications before testifying on a victim's out-of-court statements under the medical diagnosis and treatment hearsay exception. The victim's statements, however, must find their genesis in the purpose of medical diagnosis or treatment, and the proponent must prove that it was reasonable that the witness would have depended on the victim's information for a proper medical evaluation.

Clay v. State, 240 S.W.3d 895 (Tex. Crim. App. 2007). The trial court admitted the statements of two individuals involved in a robbery. On appeal, the defendant claimed the trial court abused its discretion in admitting testimonial hearsay evidence. The appellate court explained that the error was harmless because, excluding the contested statements, the evidence was sufficient. Thus, the admitted evidence was merely cumulative.

Stringer v. State (*Stringer I*), 241 S.W.3d 52 (Tex. Crim. App. 2007), *abrogated by* 309 S.W.3d 42 (Tex. Crim. App. 2010). The court found that a written waiver of the right to confrontation and cross-examination under the Texas Code of Criminal Procedure did not apply to the punishment phase of trial because the article's text lacked express language expanding the scope beyond the guilt phase.

Rubio v. State, 241 S.W.3d 1 (Tex. Crim. App. 2007). The written and videotaped statements from the defendant's wife, who was also a codefendant, were erroneously admitted at trial. This testimony was the only evidence refuting defendant's plea of insanity. Due to the wife's absence at trial, the court concluded that the defendant was deprived of an opportunity to cross-examine the witness. Because the statements were found to have contributed to the guilty verdict, the erroneous admission constituted harmful error.

McNac v. State, 215 S.W.3d 420 (Tex. Crim. App. 2007). The court determined the admission of out-of-court statements made by the defendant's wife to police officers, regarding his prior assaults against her, did not affect the guilt phase of trial because they were admitted to assess sentencing. After performing a harm

analysis, the court concluded beyond a reasonable doubt that the admitted statements were harmless to the defendant.

Davis v. State, 203 S.W.3d 845 (Tex. Crim. App. 2006). The court listed four factors for consideration when conducting harmful error analysis on a *Crawford* violation: (1) "[T]he importance of the hearsay statements to the [prosecution]"; (2) the cumulative nature of the hearsay evidence; (3) the presence of other evidence to contradict or corroborate the hearsay evidence; and (4) "the overall strength of the prosecution's case."

Ex parte Keith, 202 S.W.3d 767 (Tex. Crim. App. 2006). The *Crawford* analysis is not necessarily designed to improve the truth-finding ability of a trial court. Additionally, it does not apply retroactively.

Gonzalez v. State, 195 S.W.3d 114 (Tex. Crim. App. 2006). A defendant may forfeit his right to confrontation by killing the victim, thereby making the victim unavailable. Nonetheless, in instances such as these, defendants have a right to confront the dying declarations of the victim.

Wall v. State, 184 S.W.3d 730 (Tex. Crim. App. 2006). When determining whether an out-of-court utterance is testimonial, the court must consider whether an objectively reasonable declarant would believe that he or she was making a testimonial statement. A witness, who was aware that an officer conducting an investigation was questioning him, was found to have been aware that his statements could be used against him in prosecution and, therefore, they were testimonial.

Renya v. State, 168 S.W.3d 173 (Tex. Crim. App. 2005). Defense counsel raised the argument that testimony from the victim-witness should be admissible for the limited purpose of credibility yet cited neither the rules of evidence nor the United States Constitution in the objection. The court held that the defendant's objection could have sounded under either theory, but without a specified legal basis, it was not "sufficiently specific to preserve error" under the Confrontation Clause.

Russeau v. State, 171 S.W.3d 871 (Tex. Crim. App. 2005). Written incident and disciplinary reports from the defendant's time in jail were improperly admitted into evidence during the sentencing phase of trial because the prosecution failed to satisfy the unavailability requirements and the defendant was unable to cross-examine the writers of the reports. Due to the influential and damaging effect of these reports on the jury, the court found harmful error in their admittance at trial.

Woods v. State, 152 S.W.3d 105 (Tex. Crim. App. 2004). Although testimonial statements have not been defined by the United States Supreme Court, they occur "at a minimum[,] . . . at a preliminary hearing, before a grand jury, or at a former trial." Casual remarks do not fit into these categories, making them nontestimonial.

Arroyo v. State, 239 S.W.3d 282 (Tex. App.—Tyler 2007, pet. ref'd). At trial, testimony of a friend of the defendant, who was present at the time of the crime, was admitted. The statements at issue were determined to be made pursuant to a conspiracy to rob the victim. Further, the court rejected the assertion that every violation of the rules of evidence is also a violation of the Confrontation Clause.

Deener v. State, 214 S.W.3d 522 (Tex. App.—Dallas 2006, pet. ref'd). Faced with the question of whether a chain of affidavits was constitutional under *Crawford*, the court held that the procedural rules at issue were implemented only upon request, thus the defendant had forfeited his right to confrontation. The statute was held constitutional.

Garcia v. State, 212 S.W.3d 877 (Tex. App.—Austin 2006, no pet.). The defendant's conviction for domestic violence in violation of a protective order was based upon his daughter's statements to law enforcement. The daughter's statements were not testimonial and, thus, not subject to confrontation.

Rangel v. State, 199 S.W.3d 523 (Tex. App.—Fort Worth 2006), *pet. dism'd*, 250 S.W.3d 96 (Tex. Crim. App. 2008). A videotaped statement of a six-year-old girl's account of sexual assault by the

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defendant, was found to be testimonial but not in violation of the Confrontation Clause. Since the defendant had the chance to confront the minor witness, even though she was statutorily "unavailable" for trial, the Confrontation Clause was not violated, and the defendant waived his right to raise a constitutional challenge.

Utah:

State v. Rhinehart, 153 P.3d 830 (Utah Ct. App. 2006). The Confrontation Clause does not apply to preliminary hearings because cross-examination is "not essential for the probable cause determination that is the focus of the preliminary hearing."

Vermont:

State v. Shea, 965 A.2d 504 (Vt. 2008). Emergency responders, reacting to protect themselves and others, are not conducting criminal investigations. Thus, information disclosed during the ongoing emergency, including the name of the defendant, constitutes nontestimonial language. Only when the scene becomes stabilized, and the police begin to question the complainant from a relative position of safety, do the statements made become testimonial in nature.

State v. Jackson, 956 A.2d 1126 (Vt. 2008). The court held that admitting hearsay from a victim was harmless because it was cumulative of another witness's testimony, and the testimony was not essential to prove the elements of the offense.

Virginia:

Magruder v. Commonwealth, 657 S.E.2d 113 (Va. 2008) (en banc), *vacated and remanded sub nom.* Briscoe v. Virginia, 130 S. Ct. 1316 (2010). The right to cross-examine may, "in appropriate cases[,]" bow to accommodate other legitimate interests of the criminal trial process, including statutes providing a mechanism for the accused to secure the presence of a lab witness if the accused does not stipulate to the lab report.

Gilman v. Commonwealth, 657 S.E.2d 474 (Va. 2008) (en banc). The Sixth Amendment right to confrontation is inapplicable in a contempt proceeding because "criminal contempt proceedings are not 'criminal prosecutions.'"

Washington:

State v. Koslowski, 209 P.3d 479 (Wash. 2009) (en banc). The appellate court decided, based upon a record created prior to *Crawford* and *Davis*, that witness statements to a police officer in a non-emergency setting were testimonial.

State v. Benn, 165 P.3d 1232 (Wash. 2007) (en banc). The defendant's decision not to cross-examine a witness when he had the opportunity cured any possible confrontation defects in his second trial, where that witness was dead and his testimony was admitted.

State v. Mason, 162 P.3d 396 (Wash. 2007) (en banc). The defendant forfeited his right to exclude evidence based on the Sixth Amendment's Confrontation Clause under the doctrine of forfeiture by wrongdoing—his act of killing the victim-witness rendered her unavailable to testify. Forfeiture by wrongdoing requires clear, cogent, and convincing evidence. The defendant's confession to the murder satisfied this standard.

State v. Kirkpatrick, 161 P.3d 990 (Wash. 2007) (en banc). The business records exception permitted the certification of driver's records from the Department of Licensing as nontestimonial, despite the fact that the documents were prepared specifically for the purposes of trial.

State v. Athan, 158 P.3d 27 (Wash. 2007) (en banc). Witness testimony of the victim's impressions of the defendant prior to her death was admitted under the mental state exception to hearsay. The court concluded that such statements were nontestimonial, thus not subject to *Crawford* analysis.

West Virginia:

State v. Reed, 674 S.E.2d 18 (W. Va. 2009) (per curiam). An objection must be timely, so as not to preclude the prosecution from exercising options with respect to the challenged evidence. Failure to raise a timely objection may waive the defendant's right to confrontation.

Damron v. Haines, 672 S.E.2d 271 (W. Va. 2008) (per curiam). Admission of a police report placing the defendant at the scene of a crime was not harmful error because the jury's determination was strictly limited to probable cause, not the truth of the matter asserted. A limiting instruction prevented the jury from using the evidence for true identification, because of the unavailability of the eyewitness. The defendant was acquitted of wrongdoing stemming from that particular incident.

State ex rel. Humphries v. McBride, 647 S.E.2d 798 (W. Va. 2007) (per curiam). Failure to object to offered testimonial statements was held to constitute ineffective assistance of counsel.

Wisconsin:

State v. Doss, 754 N.W.2d 150 (Wis. 2008). Bank records prepared for trial for authentication purposes will only qualify under the business records exception. These documents are not considered testimonial and their admission does not violate the constitutional right of confrontation under the Sixth Amendment.

State v. Nelis, 733 N.W.2d 619 (Wis. 2007). Prior extrajudicial and inconsistent statements were deemed admissible over objection. The defendant's objection under *Crawford* was held insufficient to preserve any error for appeal because the defendant failed to object under the applicable state statute.

State v. Hale, 691 N.W.2d 637 (Wis. 2005). Admission at trial of the previous testimony of a missing witness violated the defendant's right to confrontation because the defendant lacked a prior opportunity to cross-examine the witness. The error was

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deemed harmless, however, because other evidence presented at trial was sufficient to sustain the conviction.

Wyoming:

Bush v. State, 193 P.3d 203 (Wyo. 2008). A witness who was too ill to appear was sworn and testified from a live-feed video. Subject to the crucible of cross-examination, the court held that the constitutional right to confront was satisfied.

Proffit v. State, 191 P.3d 963 (Wyo. 2008). Upon a finding that a defendant committed wrongdoing for the purpose of preventing a witness from testifying, the defendant forfeits any right under evidentiary rules to prevent admittance of that witness's testimony.

Szymanski v. State, 166 P.3d 879 (Wyo. 2007). Statements made to the fire inspector during the course of his inspection, by an individual unavailable at trial, were admissible as a basis of an expert's opinion. Such a finding did not violate the Sixth Amendment rights of the defendant.

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APPENDIX B:

TEXAS CASE ADDENDUM

I. THRESHOLD QUESTIONS

A. *Criminal Proceeding*

1. Pretrial Hearing:

Graves v. State, 307 S.W.3d 483 (Tex. App.—Texarkana 2010, pet. ref'd). The Confrontation Clause does not apply during pretrial hearings.

Shedden v. State, 268 S.W.3d 717 (Tex. App.—Corpus Christi 2008, pet. ref'd). *Crawford* indicates no intent to require the identification and confrontation of a confidential informant at a pretrial *Franks* hearing.

Vanmeter v. State, 165 S.W.3d 68 (Tex. App.—Dallas 2005, pet. ref'd). The Confrontation Clause does not prevent statements from being admitted during pretrial hearings in order to determine suppression motions.

2. Juvenile Disposition Hearing:

In re M.P., 220 S.W.3d 99 (Tex. App.—Waco 2007, pet. denied). The court held that although the Confrontation Clause protections do not apply to the disposition phase in a juvenile delinquency proceeding, the due process right to confrontation under the Fourteenth Amendment does apply.

3. Non-capital Sentencing by Judge:

Stringer v. State (*Stringer II*), 309 S.W.3d 42 (Tex. Crim. App. 2010). Use of a pre-sentence investigation report in a sentencing hearing will be afforded other constitutional due process protections, but not the right to confrontation.

4. Probation Revocation Hearing:

Mauro v. State, 235 S.W.3d 374 (Tex. App.—Eastland 2007, pet. ref'd). A hearing to determine revocation of deferred adjudication

is not considered a stage of criminal prosecution. Therefore, the prosecution may utilize alternatives to live testimony without violating the accused's Sixth Amendment right to confrontation.

Diaz v. State, 172 S.W.3d 668 (Tex. App.—San Antonio 2005, no pet.). Community supervision revocation hearings, like other revocation hearings, are not a stage of the criminal prosecution. As such, *Crawford* does not apply.

5. Civil Commitment Hearing:

In re Commitment of Polk, 187 S.W.3d 550 (Tex. App.—Beaumont 2006, no pet.). A proceeding to civilly commit an individual as a sexually violent predator is not a criminal prosecution as defined in *Crawford*, and does not give rise to any Confrontation Clause rights.

B. *Retroactivity*

Ex parte Lave, 257 S.W.3d 235 (Tex. Crim. App. 2008). Federal law does not require state courts to apply *Crawford* to cases that were final when that case was decided. In reviewing an application for habeas corpus, the court may, but need not, retroactively apply *Crawford* to cases that were final at the time *Crawford* was decided.

Ex parte Keith, 202 S.W.3d 767 (Tex. Crim. App. 2006). Rejecting the notion that *Crawford* applies retroactively to cases finalized prior to that decision, the court held *Crawford* inapplicable in a collateral review of a conviction entered prior to *Crawford's* issuance.

C. *Burden of Proof*

Davis v. State, 268 S.W.3d 683 (Tex. App.—Fort Worth 2008, pet. ref'd). In the context of the right to confrontation, the proponent of the evidence must overcome an objection by a preponderance of the evidence just like with other issues of admissibility. Whether the statement admitted was testimonial is a question of law reviewed de novo.

D. *Non-Hearsay*

1. Coconspirator Statements:

Guevara v. State, 297 S.W.3d 350 (Tex. App.—San Antonio 2009, pet. ref'd). A statement made in the course of a conspiracy and a subsequent statement of conspiracy to hinder apprehension made by the coconspirator to a friend are nontestimonial in nature, and thus not a violation of the Confrontation Clause.

Arroyo v. State, 239 S.W.3d 282 (Tex. App.—Tyler 2007, pet. ref'd). A true coconspirator statement made in furtherance of the conspiracy is as an admission by a party opponent under the Texas Rules of Evidence. Since it is not hearsay, any *Crawford* analysis is superfluous.

2. Prior Inconsistent Statements:

Hernandez v. State, 273 S.W.3d 685 (Tex. Crim. App. 2008). In a capital murder trial, the admission of a testimonial prior inconsistent statement did not violate *Crawford* when the statement was not offered for the truth of the matter asserted.

Miles v. State, 259 S.W.3d 240 (Tex. App.—Texarkana 2008, pet. ref'd). The use of an out-of-court statement to refresh a witness's memory, or as a prior inconsistent statement, is permitted by *Crawford* if the declarant testifies at trial before the use and is subject to cross-examination.

3. Not for the Truth of the Matter—Generally:

Langham v. State, 305 S.W.3d 568 (Tex. Crim. App. 2010). If the relevance of a piece of evidence depends upon any degree of truth, such evidence should not be admitted absent an exemption or exception. Under these circumstances, *Crawford* is not violated because the testifying witness is the one who stands against the accused, and not the out-of-court declarant; therefore, the witness is available for cross-examination.

4. Information Acted Upon:

Chase v. State, No. 03-06-00747-CR, 2009 WL 722253 (Tex. App.—Austin Mar. 19, 2009, no pet.) (mem. op., not designated for publication). A 911 call reporting reckless driving was not

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witness testimony of drug possession. Rather, the caller merely provided information upon which police responded to meet an ongoing emergency. Thus, it was not testimonial.

5. Information to Evaluate the Merit of Expert Opinion:

Blaylock v. State, 259 S.W.3d 202 (Tex. App.—Texarkana 2008, pet. ref'd). Any expert with knowledge of the relevant scientific process may give an opinion as to the content of a substance, such as cocaine, after reviewing results of chemical testing even if the testimonial declarant was unavailable to testify.

E. *Nontestimonial Hearsay*

1. Excepted Hearsay: Excited Utterance:

Lagunas v. State, 187 S.W.3d 503 (Tex. App.—Austin 2005, pet. ref'd). If an excited utterance is nontestimonial, *Ohio v. Roberts* may remain instructive or controlling with regard to admissibility instead of *Crawford*.

2. Excepted Hearsay: Statements Against Penal Interests:

Walter v. State, 267 S.W.3d 883 (Tex. Crim. App. 2008). Only statements that are directly against the interest of the declarant may be admitted under Texas Rule of Evidence 803(24). Self-exculpatory statements may not be admitted since it is expected that a perpetrator would shift the blame. The court identified three general categories for statements against penal interest: (1) self-inculpating statements; (2) joint inculpation; and (3) those statements that shift the blame by limiting the declarant's own culpability.

Woods v. State, 152 S.W.3d 105 (Tex. Crim. App. 2004). Factors to consider in applying Texas Rule of Evidence 803(24) include: "(1) whether the guilt of the declarant is inconsistent with guilt of the defendant; (2) whether the declarant was so situated that he might have committed the crime; (3) the timing of the declaration; (4) the spontaneity of the declaration; (5) the relationship between the declarant and the party to whom the statement was made; and (6) the existence of independent corroborative facts."

3. Excepted Hearsay: Statement for Medical Diagnosis:

Taylor v. State, 268 S.W.3d 571 (Tex. Crim. App. 2008). The key to admissibility of statements made to medical professionals is the declarant's appreciation of the need for an accurate diagnosis and treatment, not the witness's medical qualifications. Statements assigning fault are not considered a basis for treatment and are not admissible under this inquiry.

Berkley v. State, 298 S.W.3d 712 (Tex. App.—San Antonio 2009, pet. ref'd). When a statement is made in the course of obtaining medical treatment and diagnosis, the trial court does not abuse its discretion by admitting the medical report when the record indicates the primary purpose was to render medical treatment.

Goodman v. State, 302 S.W.3d 462 (Tex. App.—Texarkana 2009, pet. ref'd). A blood sample drawn for the purpose of medical care rather than for prosecution purposes is considered nontestimonial.

F. Crawford *is a Rule of Procedure*

Lagunas v. State, 187 S.W.3d 503 (Tex. App.—Austin 2005, pet. ref'd). The Confrontation Clause's primary concern is "testimonial hearsay" and that the reliability of the statement used by a party is only constitutionally satisfied through confrontation by the opposing party. The admissibility of a reliable statement in complying with a hearsay rule may nonetheless violate the Confrontation Clause.

G. *Appearance of Declarant at Trial*

Land v. State, 291 S.W.3d 23 (Tex. App.—Texarkana 2009, pet. ref'd). If the declarant of a challenged videotaped statement testifies at trial, the Confrontation Clause presents no restriction on admissibility of such evidence.

H. *Declarant "Unavailability"*

Reed v. State, 312 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). A proponent of prior testimony from an unavailable witness must show a good-faith effort to secure his presence. Good-faith effort includes: exhaustive communication among the declarant's friends and family who were unable to provide concrete information on declarant's location; telephone calls to numbers that the declarant constantly changed; a search of property and vehicle records; and a directive that the county inform the prosecutor in case of declarant's arrest.

II. *CRAWFORD* APPLICATION

A. *Testimonial vs. Nontestimonial*

Langham v. State, 305 S.W.3d 568 (Tex. Crim. App. 2010). The primary purpose of the testimonial statement focuses on "first in importance" and not "first in time." The officer's testimonial statements did not fall under the permissible "background" exception and, thus, were not admissible into evidence.

Vinson v. State, 252 S.W.3d 336 (Tex. Crim. App. 2008). Factors to consider in determining whether a statement was testimonial include: whether the emergency was ongoing; whether the interrogation relates to events occurring presently or in the past; whether the questioning was to assist in resolving a crime or in memorializing it; whether the questioning was away from the accused; and whether the event was recounted systematically.

Kelly v. State, 321 S.W.3d 583 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The masking of hearsay as prior consistent statements is a back-door violation of the Confrontation Clause where the prior consistent statements were not made by the declarant to the witness, and the statements were not made prior to a biased influence.

Clark v. State, 282 S.W.3d 924 (Tex. App.—Beaumont 2009, pet ref'd). The victim's identification of appellant to the officer after the shooting is considered nontestimonial because its primary purpose was to assist police in the emergency situation.

Miles v. State, 259 S.W.3d 240 (Tex. App.—Texarkana 2008, pet. ref'd). The standard utilized to determine whether a statement is testimonial is that of an objectively reasonable declarant standing in the shoes of the actual declarant, considering timing, purpose, and setting of the challenged statement.

Rodriguez v. State, 274 S.W.3d 760 (Tex. App.—San Antonio 2008, no pet.). Excited utterances by a domestic violence victim to the first responder were both nontestimonial in part and testimonial in part, respective to the officer's need to quell the emergency relative to individual statements.

Curry v. State, 228 S.W.3d 292 (Tex. App.—Waco 2007, pet. ref'd). The recorded audio of a conversation between an informant and the accused in the course of a drug transaction is nontestimonial because the statement was made as the event in question was happening.

Garcia v. State, 246 S.W.3d 121 (Tex. App.—San Antonio 2007, pet. ref'd). A murder victim's statements to friends, coworkers, and her divorce attorney relating her fear of the defendant were nontestimonial.

Mims v. State, 238 S.W.3d 867 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The murder victim's statement to a friend that the defendant was chasing the victim was nontestimonial.

Garcia v. State, 212 S.W.3d 877 (Tex. App.—Austin 2006, no pet.). A mother's statements to a first responder concerning an ongoing emergency, the kidnapping of her child, were deemed nontestimonial.

B. Crawford *Exception: Business Records and Public Records*

Smith v. State, 297 S.W.3d 260 (Tex. Crim. App. 2009), *cert. denied*, 130 S. Ct. 1699 (2010). Disciplinary reports and hearing records contain mostly sterile and routine recitations of facts, which generally are nontestimonial. However, factual descriptions of specific observations are testimonial.

Segundo v. State, 270 S.W.3d 79 (Tex. Crim. App. 2008). Objective, ministerial, and otherwise boilerplate language in parole documents are nontestimonial business or public records.

Russeau v. State, 171 S.W.3d 871 (Tex. Crim. App. 2005). Disciplinary records kept by a jail that document historical details of a specific event are testimonial and should be redacted from otherwise admissible business or public records.

Grey v. State, 299 S.W.3d 902 (Tex. App.—Austin 2009, pet. ref'd). The social and criminal history of the defendant, recorded upon admittance into prison, was not written in anticipation of prosecutorial use and was, therefore, not testimonial.

Wells v. State, 241 S.W.3d 172 (Tex. App.—Eastland 2007, pet. ref'd). Child Protective Services business records containing third-party descriptions of criminal conduct allegedly committed by the defendant are inadmissible as testimonial hearsay.

1. DNA Lab Reports:

Cuadros-Fernandez v. State, 316 S.W.3d 645 (Tex. App.—Dallas 2009, no pet.). Admission of DNA lab reports as part of forensic evidence team's business records was an error, as they were prepared by a third-party with knowledge that they would be used for prosecutorial purposes.

2. Autopsy Reports:

Martinez v. State, 311 S.W.3d 104 (Tex. App.—Amarillo 2010, pet. ref'd). If an expert can properly develop his or her own opinion, a witness may testify to it, but the report of a non-testifying expert is not admissible.

Wood v. State, 299 S.W.3d 200 (Tex. App.—Austin 2009, pet. ref'd). Admission of fact findings by a non-testifying expert as mere support for the testifying expert's opinion is error because the jury necessarily must assume the truth of such findings.

Campos v. State, 256 S.W.3d 757 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). Admissibility of an autopsy report does not depend upon the inclusion of detailed or graphic observation.

Rather, it depends on the extent to which the records are either sterile recitations of fact or a subjective narration of events relevant to the guilt of the defendant.

3. Latent Fingerprint Report:

Acevedo v. State, 255 S.W.3d 162 (Tex. App.—San Antonio 2008, pet. ref'd). A latent fingerprint report is testimonial because it has the potential to provide factual evidence in support of a conviction.

4. Substance Abuse Consultation Report:

Sullivan v. State, 248 S.W.3d 746 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Notes recorded by a substance abuse counselor did not fall under any category of testimonial statements under *Crawford* and were thus nontestimonial business records admissible under the Confrontation Clause.

C. *Dying Declarations*

Gardner v. State, 306 S.W.3d 274 (Tex. Crim. App. 2009), *cert. denied*, 131 S. Ct. 103 (2010). A dying declaration is considered nontestimonial and admissible under the Texas Rules of Evidence.

D. *Forfeiture by Wrongdoing*

Gonzalez v. State, 195 S.W.3d 114 (Tex. Crim. App. 2006). By killing his victim, in part to prevent the victim from testifying against him, the defendant forfeited his Confrontation Clause objection to statements made to the police by his victim.

Davis v. State, 268 S.W.3d 683 (Tex. App.—Fort Worth 2008, pet. ref'd). The proponent of evidence must show by a preponderance of the evidence that the defendant killed with the intent to prevent his victim from testifying for the forfeiture by wrongdoing exception to apply.

E. *Preservation of Error—Procedural Default*

Reyna v. State, 168 S.W.3d 173 (Tex. Crim. App. 2005). A mere objection to hearsay is insufficient to specifically preserve error on the grounds of an alleged Confrontation Clause violation.

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Toliver v. State, 279 S.W.3d 391 (Tex. App.—Texarkana 2009, pet ref'd), *cert. denied*, 130 S. Ct. 3417 (2010). Timely and specific objections and rulings are required to preserve error on an alleged *Crawford* error. Additionally, failure to continuously object each time the purportedly inadmissible evidence is offered results in the complaint not being preserved for appeal.

Blaylock v. State, 259 S.W.3d 202 (Tex. App.—Texarkana 2008, pet. ref'd). "[Q]uestions regarding the admissibility of evidence are rendered moot" and harmless if the same evidence is later admitted without objection.

F. *Waiver*

1. Presumption Against Waiver:

Stringer v. State (*Stringer I*), 241 S.W.3d 52 (Tex. Crim. App. 2007). While the right to confrontation may be waived, courts must make every reasonable presumption against waiver as a fundamental right. Thus, courts will not presume waiver of confrontation from a silent record or absent some other explicit waiver.

2. Statutory Waiver:

Deener v. State, 214 S.W.3d 522 (Tex. App.—Dallas 2006, pet. ref'd). Failure to file a timely, written objection to the use of testimonial evidence—in this case, certificates and affidavits—constituted forfeiture of the defendant's right to confrontation under section 38 of the Texas Code of Criminal Procedure.

Rangel v. State, 199 S.W.3d 523 (Tex. App.—Fort Worth 2006), *pet. dism'd*, 250 S.W.3d 96 (Tex. Crim. App. 2008). Defendant's failure to utilize statutorily-crafted measures designed to allow confrontation of a witness who was unavailable for traditional cross-examination constituted a waiver of that right.

3. Cross-examination of Objected-to Testimony:

Rodriguez v. State, 274 S.W.3d 760 (Tex. App.—San Antonio 2008, no pet.). A defendant does not waive his confrontation objections by cross-examining evidence or testimony for the

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purpose of rebutting or explaining the evidence that was improperly admitted over objection.

G. *Harmless Error Analysis*

Clay v. State, 240 S.W.3d 895 (Tex. Crim. App. 2007). The entire record is to be reviewed for harm, when determining whether the error contributed to the verdict beyond a reasonable doubt.

H. *Appellate Review*

1. Standard of Review:

Wall v. State, 184 S.W.3d 730 (Tex. Crim. App. 2006). While issues of fact and credibility determinations by the trial court should receive due deference, constitutional rulings on the testimonial nature of hearsay evidence are reviewed de novo.

Rangel v. State, 199 S.W.3d 523 (Tex. App.—Fort Worth 2006), *pet. dism'd*, 250 S.W.3d 96 (Tex. Crim. App. 2008). A trial court's determination of unavailability, based upon historical facts and credibility, is subject to review under an abuse of discretion standard.

III. MISCELLANEOUS

A. *Value or Weight of the Evidence*

Saldana v. State, 287 S.W.3d 43 (Tex. App.—Corpus Christi 2008, pet. ref'd). A victim's statement at trial, in conflict with a prior statement, has no bearing on that statement's probative value. Neither *Crawford*, nor its progeny, has any bearing upon the substantive value to be given to admissible hearsay, testimonial or not.

B. *Variance*

Rodriguez v. State, 274 S.W.3d 760 (Tex. App.—San Antonio 2008, no pet.). Although evidence was erroneously admitted under *Crawford*, it was not rendered insufficient, because a hypothetically correct jury charge need only contain the essential elements of the offense and need not include allegations that may give rise to immaterial variances.

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