

HEARSAY AND CONFRONTATION

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HEARSAY AND CONFRONTATION

I. INTRODUCTION.

In a landmark case issued on March 8, 2004, the U.S. Supreme Court held in *Crawford v. Washington*, 541 U.S. ___, 124 S.Ct. 1354, ___ L.Ed.2d ___ (2004), that a witness's out-of-court testimonial statement is inadmissible at trial unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine.

This article summarizes the post-*Crawford* decisions by federal and state courts, including Texas, with an emphasis on answering questions left unaddressed by the Supreme Court, i.e., what is "testimonial" evidence? what, if any, harm analysis applies? is *Crawford* retroactive on habeas?

This article also summarizes the most recent decisions of the Texas Court of Criminal Appeals dealing with hearsay rules and statutes.

II. CRAWFORD V. WASHINGTON

A. The Facts and Holding

Michael D. Crawford stabbed Kenneth Lee in the torso during a fight in Lee's apartment. At his trial for assault, Crawford claimed that he stabbed Lee in self-defense after Lee grabbed for something, and he invoked the state marital privilege to prevent his wife Sylvia, who witnessed the incident, from testifying at trial. Instead, the State sought to introduce a taped statement Sylvia gave to a detective in which she said, among other things, that she didn't see a weapon in "Kenny's" hands. This statement was not hearsay, according to the State, because it was a statement against penal interest -- Sylvia admitted in the statement that she had led Michael to Kenny's apartment -- and the statement did not violate the Confrontation Clause of the Sixth Amendment, the trial court ruled, because it was reliable, bearing "particularized guarantees of trustworthiness" as required by *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) -- Sylvia's statement otherwise corroborated her husband's story, she was questioned by a "neutral" law enforcement officer, etc.

Wrong, said the U.S. Supreme Court. Michael had no opportunity to cross-examine Sylvia and so the admission of her statement violated the Sixth Amendment. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford v. Washington*, 124 S.Ct. at 1374.

In other words, the out-of-court testimonial statement of a witness is not admissible at trial unless the

witness is unavailable and the defendant has had the opportunity to cross-examine the witness.

In Crawford's case, the judgment of the Washington Supreme Court was reversed and the case remanded for "further proceedings not inconsistent with this opinion." *Id.*

B. The Reasoning

In reaching its decision in *Crawford*, the Court turned to the historical background of the Confrontation Clause, including the 1603 trial of Sir Walter Raleigh, English common law, and early American state decisions, to find that the Clause applies to out-of-court statements by witnesses against an accused, not just in-court statements, and that witnesses means those who bear testimony. *Id.* at 1364. The Court did not set out a definition of testimony but specifically included prior testimony at a preliminary hearing, interrogations by law enforcement officers, accomplices' confessions and testimony before a grand jury or at a former trial. *Id.* at 1364, 1365, 1367, 1374.

In addition, the Court said, the historical record shows that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination. *Id.* at 1365.

After analyzing its own prior cases, which it characterized as generally faithful to the original meaning of the Confrontation Clause, the Court examined *Ohio v. Roberts* and found it both too broad -- applying the same analysis whether or not the out-of-court statement had been subjected to cross-examination -- and too narrow -- admitting *ex parte* statements upon a mere finding of reliability. *Id.* at 1369.

Where nontestimonial hearsay is at issue, the states are allowed flexibility in developing hearsay law, as in the *Roberts* approach or even one "that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* at 1374. "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.*

C. What's In and What's Out

The Rule:

A witness's out-of-court testimonial statement is admissible against a defendant in a criminal trial only if the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness.

What is Not Admissible:

- grand jury testimony (*Crawford* at 1374)
- prior testimony at a preliminary hearing (1364)
- statements taken by police officers in the course of interrogation (1364), including accomplices' confessions (1367)
- prior trial testimony (1367, 1374)

What is Admissible:

- business records (described as nontestimonial, *Crawford* at 1367)
- statements in furtherance of a conspiracy (also nontestimonial, 1367)
- prior testimonial statements when declarant appears for cross-examination at trial (1369 n.9)
- testimonial statements not introduced to prove the truth of the matter asserted (1369 n.9)
- exceptions established at the time of the founding (1365), which is the year 1791 (1368 n.8), probably including dying declarations (1367 n.6), and possibly including spontaneous declarations made immediately upon hurt received and before declarant had time to devise or contrive (1368 n.8)
- statements affected by rule of forfeiture by wrongdoing, which extinguishes confrontation claims on essentially equitable grounds (1371); Court notes but expresses no opinion on issue of *Crawford*'s invocation of marital privilege as a possible waiver of confrontation rights because State did not raise issue again after losing in intermediate state court (1359 n.1)

III. QUESTIONS

Crawford v. Washington is a landmark case that leaves many questions unaddressed, in a couple of cases (what is "testimonial"? what is "interrogation?") deliberately.

Among the many questions left to the states and lower courts are the following:

- A. Does *Crawford* apply to statements offered by the defendant as well as to those offered by the State?

- B. How is a *Crawford* trial complaint preserved for appellate review?
- C. What test should a court should use to determine if an out-of-court statement is testimonial? *Crawford* refers to three possible formulations:
1. material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;
 2. extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and
 3. statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.
- D. What statements are "testimonial"?
- E. Are nontestimonial statements still evaluated under *Ohio v. Roberts*?
- F. Is *Crawford* error subject to a harm analysis, and, if so, which one?
- G. Is *Crawford* retroactive on habeas?

IV. ANSWERS SO FAR

The published decisions issued by federal and state courts since March generally involve questions directly answered by *Crawford*, with a few exceptions:

A. Does *Crawford* apply to statements offered by the defendant as well as to those offered by the State?

No. Sixth Amendment confrontation rights are personal to the defendant. See *United States v. Hite*, 364 F.3d 874, 883 n.12 (7th Cir. 2004) (*Crawford* does not apply because witness was not unavailable and the statement was offered by the defendant); *Al-Amin v. State*, ___ S.E.2d ___ (Ga. May 24, 2004) at 13 n.12 (same).

Note: *Crawford* does not apply to civil commitment proceedings or parole revocations. See *United States v. Barraza*, ___ F.Supp.2d ___ (S.D.Cal. May 17, 2004) (*Crawford* inapplicable to supervised release revocation proceedings because right to confrontation in a revocation proceeding is a due process right, not a Sixth Amendment right); *Commonwealth v. Given*, 808

N.E.2d 788, 794 n.9 (Mass. May 20, 2004) (*Crawford* not implicated because Confrontation Clause does not apply to civil commitment proceedings).

B. How is a *Crawford* trial complaint preserved for appellate review?

A *Crawford* complaint, like any other confrontation claim, must be raised at trial in order to be raised on appeal. See *Bunton v. State*, ___ S.W.3d ___ (Tex. App. -- Austin May 13, 2004) at 11 (because defendant did not object on confrontation grounds at trial, only hearsay, no possible *Crawford* error was preserved for appeal); *Stoddard v. State*, ___ A.2d ___ (Md.App. June 4, 2004) at 19 (defendant waived confrontation complaint by making no objection at trial).

The wording of a *Crawford* complaint is also like that of any other confrontation claim, generally involving some form of the word “confront,” although one intermediate Texas court has held that an objection based on “opportunity to cross-examine” is sufficient. See *Brooks v. State*, ___ S.W.3d ___ (Tex. App. -- Dallas, Apr. 28, 2004) (“doesn’t afford me an opportunity to cross-examine” sufficient to preserve *Crawford* error).

C. What test should a court use to determine if an out-of-court statement is testimonial?

Is “testimonial” limited to formal documents specifically prepared for trial, such as affidavits, depositions, prior testimony, and confessions, or does it include statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial?

Some courts have limited the definition of “testimonial” statements to formal documents. See *United States v. Manfre*, ___ F.3d ___ (8th Cir. May 11, 2004) at 3 n.1 (formal statements to government officers, affidavits, depositions, prior testimony, confessions, and other “memorialized, judicial process-created evidence”); *People v. Compan*, ___ P.3d ___ (Colo.App. May 20, 2004 at 4 (solemn or formal statements made for the purpose of proving or establishing facts in judicial proceedings to a government actor or agent).

Other courts are including within the definition of “testimonial” statements those statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. See, for example, *State v. Rivera*, 844 A.2d 191, 202 (Conn. 2004) (statement not made under circumstances which would lead an objective witness to reasonably believe the statement

would be available for use later at trial); *People v. Cervantes*, ___ Cal.Rptr.3d ___ (Cal.App.2d Apr. 29, 2004) (witness’s statement was testimonial, if at all, under definition of testimonial as statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial).

This latter definition of “testimonial” statements is an objective test -- what an objective witness would reasonably believe -- which seems to allow the judge (and, later, the reviewing court) to take into account both the intent of the person making the statement and the circumstances surrounding the making of the statement.

It does not appear that any courts are using a purely subjective test, one based solely on the intent of the person making the statement.

D. What statements are “testimonial”?

1. 911 Calls

1. *People v. Caruso*, ___ N.Y.S.2d ___ (N.Y.A.D. Apr. 29, 2004) at 3 (victim’s 911 call identifying defendant as person who shot him evaluated as dying declaration).
2. *People v. Moscat*, ___ N.Y.S.2d ___ (N.Y.Crim.Ct. Mar. 25, 2004) at 6 (911 call nontestimonial because initiated by victim, was part of criminal incident itself, and was attempt to save life).
3. *People v. Cortes*, No. 658/02 (N.Y.Sup. May 26, 2004) (anonymous 911 call about a man running with a gun and shooting a victim held inadmissible as the product of “interrogation” because 911 information collection follows established procedures and rules, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding, and a reasonable caller knows that when he or she reports a crime the statement will be used in an investigation and at proceedings related to a prosecution).

2. Statements to Friends, Relatives, Others

1. *United States v. Manfre*, ___ F.3d ___ (8th Cir. May 11, 2004) at 3 n.1 (*Crawford* does not apply to coconspirator’s statements to brother and fiancé).
2. *Demons v. State*, ___ S.E.2d ___ (Ga. Mar. 29, 2004) (victim’s statements to two witnesses before murder nontestimonial).

3. *People v. Cervantes*, ___ Cal.Rptr.3d ___ (Cal.App.2d Apr. 29, 2004) (codefendant's statement to neighbor while seeking medical treatment nontestimonial).
 4. *People v. Compan*, ___ P.3d ___ (Colo.App. May 20, 2004) at 4 (victim's statements to friend nontestimonial).
3. Statements to Police or Prosecutors
1. *United States v. Gia Le*, ___ F.Supp.2d ___ (E.D.Va. Apr. 23, 2004) at 6 (in joint trial, codefendants' statements admissible if properly redacted to omit any reference to defendant and used only against codefendants making the statements).
 2. *United States v. Saner*, ___ F.Supp.2d ___ (S.D.Ind. Apr. 9, 2004) (coconspirator's statement to prosecutor inadmissible under *Crawford*).
 3. *Johnson v. Renico*, ___ F.Supp.2d ___ (E.D.Mich. Apr. 21, 2004) (defendant's statements to police during booking admissible as business records and are therefore nontestimonial).
 4. *Bell v. State*, ___ S.E.2d ___ (Ga. May 24, 2004) at 2 (victim's complaints to police about defendant inadmissible at defendant's later trial for murder of victim).
 5. *Moody v. State*, 594 S.E.2d 350, 354 (Ga. 2004) (victim's identification of defendant to police inadmissible under *Crawford*).
 6. *Cassidy v. State*, ___ S.W.3d ___ (Tex. App. -- Austin May 20, 2004) (victim's identification of defendant to police within one hour of stabbing was excited utterance and admissible because interview did not constitute "interrogation" as used in *Crawford*).
 7. *Hale v. State*, ___ S.W.3d ___ (Tex. App. -- Fort Worth Mar. 25, 2004) (accomplice's statement to police testimonial and therefore inadmissible).
 8. *Brooks v. State*, ___ S.W.3d ___ (Tex. App. -- Dallas Apr. 28, 2004) at 5 (same).
 9. *State v. Forrest*, ___ S.E.2d ___ (N.C.App. May 18, 2004) at 6 (victim's statements made immediately after being rescued by police nontestimonial).
 10. *People v. Newland*, 775 N.Y.S.2d 308 (N.Y.A.D. 2004) (brief, informal remark by witness to officer conducting a field investigation nontestimonial).
4. Police Testimony about Investigation
1. *People v. Gomez*, 12 Cal.Rptr.3d 398, 406 (Cal.App.4th 2004) (*Crawford* not implicated by admission of officers' testimony as to probable cause).
 2. *People v. Nunez*, ___ N.Y.S.2d ___ (N.Y.A.D. May 6, 2004) (Confrontation Clause does not bar limited evidence that police took certain investigatory steps admissible for purpose other than establishing truth of matter asserted).
 3. *People v. Newland*, 775 N.Y.S.2d 308 (N.Y.A.D. 2004) (no *Crawford* violation where brief, informal remark by witness to officer used by officer to explain why he looked in shopping cart).
5. Child Abuse
1. *Snowden v. State*, 846 A.2d 36, 47 (Md.App. 2004) (children's statements to social worker employed by county testimonial and therefore inadmissible because interviews conducted with expressed purpose of developing children's testimony).
 2. *People v. Geno*, ___ N.W.2d ___ (Mich.App. Apr. 27, 2004) (child's statement was nontestimonial where made to non-government employee who was in the bathroom with the child, noticed blood on the child's pull-up, and asked her if she had "an owie").
 3. *People v. Sisavath*, ___ Cal.Rptr.3d ___ (Cal.App.5th May 27, 2004) at 4 (child's statements at facility specially designed and staffed for interviewing children suspected of being victims of abuse was testimonial where interview took place after prosecution had been initiated, prosecutor was present at interview, and interview was conducted by a person trained in forensic interviewing).
6. Depositions
1. *Liggins v. Graves*, ___ F.Supp.2d ___ (S.D.Iowa Mar. 24, 2004) at 7 (deposition testimony admissible where mentally infirm witness now unavailable and defendant had opportunity to cross-examine at deposition).

7. Grand Jury

1. *People v. Patterson*, ___ N.E.2d ___ (Ill.App.4th May 4, 2004) at 5 (grand jury testimony testimonial and therefore inadmissible under *Crawford*).

8. Plea Proceedings

1. *United States v. Massino*, ___ F.Supp.2d ___ (E.D.N.Y. June 1, 2004) at 3 (codefendant's guilty pleas are testimonial).
2. *People v. Carrieri*, No. ___ (N.Y.Sup. Apr. 15, 2004) (codefendant's redacted plea allocutions are testimonial and therefore inadmissible under *Crawford*).

9. Coconspirator Statements

1. *United States v. Robinson*, ___ F.3d ___ (5th Cir. Apr. 14, 2004) at 9 n.20 (statement made during course of conspiracy is nontestimonial).
2. *United States v. Manfre*, ___ F.3d ___ (8th Cir. May 11, 2004) at 3 n.1 (*Crawford* does not apply to coconspirator's statements to brother and fiancé).
3. *United States v. Reyes*, 362 F.3d 536, 540 n.4 (8th Cir. 2004) (coconspirator statements are nontestimonial).
4. *Llaca v. Duncan*, ___ F.Supp.2d ___ (S.D.N.Y. May 4, 2004) at 23 n.6 (same).
5. *State v. Rivera*, 844 A.2d 191, 202 (Conn. 2004) (same).
6. *United States v. Saner*, ___ F.Supp.2d ___ (S.D. Ind. Apr. 9, 2004) (coconspirator's statement to prosecutor inadmissible under *Crawford*).

10. Dying Declarations

1. *People v. Caruso*, ___ N.Y.S.2d ___ (N.Y.A.D. Apr. 29, 2004) at 3 n.4 (U.S. Supreme Court "has left open the issue of the effect" of *Crawford* on dying declarations).

11. Business Records, Including Autopsy Reports

1. *Johnson v. Renico*, ___ F.Supp.2d ___ (E.D.Mich. Apr. 21, 2004) at 5 (defendant's statements to police during booking admissible as business records and are therefore nontestimonial).

2. *Perkins v. State*, ___ So.2d ___ (Ala.Crim.App. Apr. 30, 2004) at 6 (autopsy report nontestimonial business record).
3. *Smith v. State*, ___ So.2d ___ (Ala.Crim.App. Apr. 30, 2004) at 8 (autopsy report normally admissible as nontestimonial business record but error where cause of death was crucial element in case and defendant had no opportunity to cross-examine the pathologist).

12. Prior Testimony

1. *United States v. Mitchell*, ___ F.3d ___ (3rd Cir. Apr. 29, 2004) (*Crawford* not implicated where government experts testified and were cross-examined at *Daubert* hearing).
2. *United States v. Avants*, ___ F.3d ___ (5th Cir. Apr. 19, 2004) (no *Crawford* violation where witness testified and was cross-examined at preliminary hearing).
3. *Cooper v. McGrath*, ___ F.Supp.2d ___ (N.D.Cal. Apr. 14, 2004) (same).
4. *Commonwealth v. Sena*, ___ N.E.2d ___ (Mass. May 28, 2004 at 7-8 (no *Crawford* violation where witness unavailable and defendant had opportunity to cross-examine at prior trial).
5. *Primeaux v. State*, ___ F.3d ___ (Okla.Crim.App. Apr. 6, 2004) (witness's testimony from preliminary hearing could be read at trial where witness unavailable and defendant had prior opportunity to cross-examine).
6. *People v. Seijcas*, 9 Cal.Rptr.3d 826 (Cal.App. 2004) (where witness present at trial, State could not substitute witness' recorded statement from preliminary hearing)

13. Witness Available at Trial

1. *Clark v. State*, ___ N.E.2d ___ (Ind. May 19, 2004) (witness's prior testimonial statements admissible where witness available for cross-examination at trial).
2. *Cooley v. State*, ___ A.2d ___ (Md.App. May 27, 2004) at 3 (same).
3. *Somers v. State*, ___ A.2d ___ (Md.App. Apr. 13, 2004) at 8 n.1 (same).
4. *People v. Seijcas*, 9 Cal.Rptr.3d 826 (Cal.App. Mar. 24, 2004) (where witness present at trial, State could not substitute

witness's recorded statement from preliminary hearing).

14. Forfeiture by Wrongdoing

1. *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004) (witness's statements to police and grand jury admissible where defendant's wrongful conduct caused witness's unavailability).
2. *State v. Meeks*, ___ P.3d ___ (Kan. Apr. 23, 2004) (victim's identification of defendant to officer admissible at trial where defendant forfeited his right of confrontation by shooting victim).

E. Are nontestimonial statements still evaluated under *Ohio v. Roberts*?

Although the matter was left up to the states, most courts reviewing confrontation claims dealing with nontestimonial statements have continued to use the reliability test set out in *Ohio v. Roberts*, i.e., the evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." See *Horton v. Allen*, ___ F.3d ___ (1st Cir. May 26, 2004) at 7 (applying *Roberts* to nontestimonial private conversation); *Johnson v. Renico*, ___ F.Supp.2d ___ (E.D. Mich. Apr. 21, 2004) at 4 (applying *Roberts* to admission of defendant's booking information as business records); *State v. Rivera*, 844 A.2d 191, 202 (Conn. 2004) (applying *Roberts* to witness's statement to family member); *People v. Compan*, ___ P.3d ___ (Colo.App. May 20, 2004) at 4-5 (applying *Roberts* to nontestimonial evidence); *People v. Cervantes*, ___ Cal.Rptr.3d ___ (Cal.App.2d Apr. 29, 2004) (applying state version of *Roberts* to nontestimonial statement).

F. Is *Crawford* error subject to a harm analysis, and, if so, which one?

Crawford error is subject to a harm analysis, the test for constitutional error. See *Perkins v. State*, ___ So.2d ___ (Ala.Crim.App. Apr. 30, 2004) at 6 (if admission of autopsy report was error, harmless because sufficient other evidence to find defendant guilty); *Smith v. State*, ___ So.2d ___ (Ala.Crim.App. Apr. 30, 2004) (admission of crucial autopsy report error but harmless where jury found defendant guilty of lesser included offense not based on evidence in autopsy); *Moody v. State*, 594 S.E.2d 350, 354 (Ga. 2004) (error in admitting victim's prior statement to police in which she said defendant had fired a shot into her bedroom was

harmless because another victim of the same shooting testified and defendant had pled guilty to shooting); *Hale v. State*, ___ S.W.3d ___ (Tex. App. -- Fort Worth June 9, 2004) at 2-3 (admission of accomplice's statement harmful under Tex.R.App.P. 44.2(a) using factors listed in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)); *Cassidy v. State*, ___ S.W.3d ___ (Tex. App. -- Austin May 20, 2004) (even if admission of victim's identification of defendant was error, error was harmless in light of other identification of defendant as assailant); *Brooks v. State*, ___ S.W.3d ___ (Tex. App. -- Dallas Apr. 28, 2004) at 5-7 (admission of codefendant's statement harmful under Tex.R.App.P. 44.2(a)); *State v. Pullen*, 594 S.E.2d 248, 254 (N.C.App. 2004) (admission of testimonial statement harmless where sufficient other evidence showed all three defendants were together at time and place of robbery); *People v. Patterson*, ___ N.E.2d ___ (Ill.App.4th May 4, 2004) at 5 (admission of grand jury testimony harmless where other evidence supplied same information).

G. Is *Crawford* retroactive on habeas?

Generally, a new constitutional rule does not apply on collateral review unless the new rule: (1) places certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe, or (2) permits the retroactive application of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. 288, 310-33, 109 S.Ct. 1060, 1075-76, 103 L.Ed.2d 334 (1989). The rule in *Crawford* does not divest the government of any criminal law-making authority and, at least so far, has not been declared a watershed rule. See *Murillo v. Frank*, ___ F.Supp.2d ___ (E.D. Wisc. Apr. 6, 2004) at 4 (*Crawford* is "new rule" which does not apply on habeas); *Dorchy v. Jones*, ___ F.Supp.2d ___ (E.D.Mich. May 26, 2004) at 6 (same); *Johnson v. Renico*, ___ F.Supp.2d ___ (E.D.Mich. Apr. 21, 2004) at 4 (*Crawford* not retroactive on habeas).

V. RECENT HEARSAY CASES

From June 1, 2003, to June 7, 2004, the Texas Court of Criminal Appeals issued the following published cases dealing with hearsay statutes and rules:

A. Preservation

Moff v. State, 131 S.W.3d 485, 488 (Tex. Crim. App. 2004) (defendant's "hearsay" and "no predicate" objections at trial were insufficient to preserve appellate claim that witness's testimony as to purchase price of property was "no evidence" of value because witness

was not the owner of the property, was not an expert, and did not testify as to depreciated value; defendant did not, however waive his complaint about the sufficiency of the evidence to prove value because no trial objection is necessary to preserve a claim of insufficient evidence).

B. Preservation & 801(e)(2)(B)

Paredes v. State, 129 S.W.3d 530, 534-35 (Tex. Crim. App. 2004) (witness's testimony as to statements made by co-defendant implicating defendant in murders not hearsay because made in defendant's presence and defendant manifested his agreement with the statements; defendant's "hearsay" objection at trial failed to preserve error on Confrontation Clause grounds)

C. 803(4) & 803(6)

Garcia v. State, 126 S.W.3d 921, 926-27 (Tex. Crim. App. 2004) (business records of Bexar County Battered Women's Shelter were admissible but statements in records from defendant's wife that defendant had physically and psychologically abused her were not covered by business records exception; statements were also not covered by medical diagnosis exception where wife was not specifically seeking medical treatment when she made the statements).

D. 803(24)

Simpson v. State, 119 S.W.3d 262, 269-71 (Tex. Crim. App. 2003) (witnesses's statements that defendant's wife told them that "they" went to the river where defendant and an accomplice threw the victim in did not implicate wife sufficiently as to qualify her statements as statements against penal interest, but error harmless in light of other strong evidence of defendant's participation in offense).

E. 804(b)(3)

Valle v. State, 109 S.W.3d 500, 505-07 (Tex. Crim. App. 2003) (videotaped statements of defendant's mother about her own medical problems, defendant's difficulties in TYC, and abuse of defendant by his stepfather were inadmissible as statement of personal or family history because statements did not concern information such as birth, adoption, marriage, etc.; exclusion was not a violation of due process because defendant was not prevented from presenting substance of his mitigating evidence to jury).