

CRAWFORD, THE HEARSAY RULE AND THE FUTURE

**AMY WILSON
CATHY COCHRAN**
Texas Court of Criminal Appeals

State Bar of Texas
31ST ANNUAL ADVANCED CRIMINAL LAW COURSE
July 18-21, 2005
Corpus Christi

CHAPTER 27

CATHY COCHRAN

Texas Court of Criminal Appeals

P.O. Box 12308, Capitol Station

Austin, Texas, 78711

cathy.cochran@cca.courts.state.tx.us

BIOGRAPHICAL INFORMATION

EDUCATION

B.A. in English with Honors, Stanford University

J.D. summa cum laude, University of Houston Law Center

PROFESSIONAL ACTIVITIES

Judge, Texas Court of Criminal Appeals (2001-)

Of Counsel, Rusty Hardin & Associates (1996-2001)

Director, Criminal Justice, Governor's Policy Office (1995)

Of Counsel, Hardin, Beers, Hagstette & Davidson (1991-1996)

Visiting Professor of Law, University of Houston Law Center (1989-1990)

Adjunct Professor of Law, University of Houston Law Center (1986-1992)

Assistant District Attorney, Fort Bend County, Texas (1990)

Assistant District Attorney, Harris County, Texas (1984-1989)

Board Certified in Criminal Law

Member, Administration of Rules of Evidence Committee

Member, State Bar College

Liaison, Board of Directors, Center for the Judiciary

LAW RELATED PUBLICATIONS

Editor, **The Texas Rules of Evidence Handbook** (2d, 3rd, 4th & 5th editions)

Criminal Procedure, 26 **Texas Tech L. Rev.** 553 (1995).

A Practical Guide to the Admissibility of Novel Expert Evidence in Criminal Trials

Under Federal Rule 702, 22 **St. Mary's L.J.** 181 (1991).

The "New Federalism": Judicial Legislation by the Texas Court of Criminal Appeals?, 68 **Tex.L.Rev.** 1481 (1990).

The Relevancy Revolution in Criminal Law: A Practical Tour Through the Texas Rules of Criminal Evidence, 20 **St. Mary's L.J.** 737 (1989).

Criminal Justice and the State's Right to Due Process, 30 **S.Tex.L.J.** 201 (1988).

Criminal Justice and the State's Right to Appeal, 51 **Tex. Bar J.** 242 (1988).

Summary of Changes Effected by the Texas Rules of Criminal Evidence, 20 **Hous.L.Rev.** 53 (1987 Supp.).

The Burger Court Limits on Habeas Corpus, 20 **Hous.L.Rev.** 1417 (1983).

Author/Speaker for the State Bar of Texas Advanced Criminal Law Course 1991-2002

AMY WILSON

Texas Court of Criminal Appeals
P.O. Box 12308, Capitol Station
Austin, Texas 78711
amy.wilson@cca.courts.state.tx.us

EDUCATION

J.D. University of Texas School of Law 1999
B.A. University of Texas at Austin 1988

LICENSES

Fifth Circuit Court of Appeals
State of Texas
Texas Eastern District Court
Texas Southern District Court
Texas Western District Court

WORK HISTORY

Research Attorney	Texas Court of Criminal Appeals	2001-Present
Assistant Attorney General	Texas Attorney General's Office	2000-2001
Staff Attorney	Dallas County Criminal District Courts	1999-2000
Appellate Law Clerk	Travis County District Attorney's Office	1997-1999
Research Assistant	University of Texas School of Law	1998
Intern	Texas Court of Criminal Appeals	1997
Editor	PrepMaster Review Inc.	1989-1996

PUBLICATIONS

Co-author–Novel Research Techniques, Issues & Innovative Briefing
The University of Texas Conference on Criminal Appeals, May 2002
Co-author–Undergraduate and Graduate School Entrance Exam Prep Textbooks
PrepMaster Review, Inc.; Lighthouse Review, Inc.

HOBBIES

Soccer
Trail and Marathon Running
Mountain Biking
Adventure Racing

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	CRAWFORD AND BEYOND—THE INTERSECTION OF THE HEARSAY RULE AND THE CONFRONTATION CLAUSE IN CRIMINAL CASES.	1
A.	The <i>Crawford</i> Decision.	1
1.	<u>The background facts.</u>	1
2.	<u>The historical basis for the Confrontation Clause and the hearsay rule.</u>	1
3.	<u>The doctrinal result in <i>Crawford</i>.</u>	2
4.	<u>The practical result in <i>Crawford</i>.</u>	2
B.	What is “testimonial”?	2
C.	Testimonial or Non-Testimonial?	3
1.	<u>Clearly Testimonial Statements.</u>	4
a.	Prior Testimony.	4
b.	Police Interrogation Statements	5
c.	An accuser’s formal statement	7
2.	<u>Clearly non-testimonial statements.</u>	8
a.	Dying Declarations.	8
b.	Street corner conversations.	9
c.	Formal or informal reports to non-law enforcement personnel.	9
d.	Excited utterances, when made to someone other than law enforcement.	10
e.	Present state of mind statements made to non-law enforcement.	10
f.	Co-conspirator Statements.	11
g.	Statements not offered for the truth of their contents.	11
h.	Information that experts have relied on to form an opinion.	12
3.	<u>Less clear areas-- The middle ground.</u>	12
a.	Reports to doctors.	12
b.	911 Calls.	14
c.	Reports to police, but not to one who is at that time engaged in the competitive enterprise of detecting crime, investigating crime, or gathering evidence for prosecuting a suspect.	16
d.	Business records and reports.	19
D.	Opportunity to Cross-Examine.	20
1.	<u>If the prosecution calls the declarant to the witness stand at trial, the Confrontation Clause is satisfied.</u>	20
2.	<u>If the State shows that the witness is now unavailable, but defendant had a prior opportunity to cross-examine, the Confrontation Clause is satisfied.</u>	21
3.	<u>Witness has no memory of the testimonial statement.</u>	21
4.	<u>Witness “freezes” on the witness stand.</u>	22
E.	Forfeiture or Waiver of Right to Confront Witness.	22
1.	<u>Forfeiture by wrongdoing.</u>	22
2.	<u>Waiver.</u>	23
F.	Proceedings In Which <i>Crawford</i> Applies.	23
1.	<u>Proof of guilt in a criminal trial.</u>	23
2.	<u>Not probation or parole revocation proceedings.</u>	24
3.	<u>Civil commitment or termination of rights proceedings.</u>	24
4.	<u>Other proceedings.</u>	25
G.	Retroactivity	25
1.	<u>The rule applies to cases on direct appeal</u>	25
2.	<u>Not retroactive on collateral review.</u>	25

3. State cases discussing retroactivity. 26

H. Harmless error 27

III. A FUNCTIONAL APPROACH TO THE ADMISSION AND EXCLUSION OF BUSINESS RECORDS. 27

A. Step One: Was the record compiled by a “law enforcement officer?” 27

B. Step Two: If the record was compiled by a “law enforcement officer,” what was his role at the time he compiled the record? 28

C. Step Three– If the public officer or agency report records information other than the “observations of police officers or other law enforcement personnel,” then the document may be admissible under either 803(8) or 803(6). 29

1. Rationales for the exception: 29

2. Types of records covered by Rule 803(8): 29

 a. Records setting forth the activities of the office or agency: 29

 b. Factual reports required by law (mechanical factual records) 29

 c. Records resulting from authorized investigations (may be subjective, conclusory, and may contain statements by outsiders to the agency) 30

3. What are the distinctions between public records offered under Rule 803(8) and business records offered under 803(6)? 30

D. Step Four– Is the document admissible under Rule 803(6)? 30

1. Overview of the foundation requirements: 30

 1. Documents made “in the regular course of business” 30

 2. It must be part of the business purpose to make this record. 30

 3. Made by someone with a business duty to report and personal knowledge of the events. 31

 4. Was record made at or near time of events recorded? 32

 5. Sponsored by record custodian or another qualified witness 32

E. Step Five– Is there “hearsay within the hearsay” of an otherwise admissible public record or business record? 32

 1. Did that person have personal knowledge and a business duty to report to the recording person? 32

 2. If outsider provided any information, that information is hearsay and must be redacted from the document unless it meets some other hearsay exception. 32

 3. Rule 805 32

 4. Defendant’s statements in business or public record. 33

IV. THE FUTURE OF THE HEARSAY RULE 33

RUBE GOLDBERG ANALYSIS OF BUSINESS RECORDS 35

CRAWFORD, THE HEARSAY RULE AND THE FUTURE

I. INTRODUCTION

This outline addresses only three aspects of the hearsay rule. First, it examines the intersection of the hearsay rule and the Confrontation Clause after the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). Second, it provides a functional analysis of the admissibility of documents in criminal cases under the Business Records (803(6)) and Public Records (803(8)) exceptions to the hearsay rule in a post-*Crawford* world. Third, it poses some questions for trial judges and attorneys to consider about the future of the hearsay rule in a post-*Crawford* world.

II. CRAWFORD AND BEYOND—THE INTERSECTION OF THE HEARSAY RULE AND THE CONFRONTATION CLAUSE IN CRIMINAL CASES.

A. The *Crawford* Decision.

In criminal proceedings, the hearsay rule is not the only potential bar to the admission of out-of-court statements. The Confrontation Clause contained within the Sixth Amendment to the United States Constitution acts as the primary brake against the admission of out-of-court statements offered against an accused. In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court dramatically changed its interpretation of the Confrontation Clause as it applies to the admissibility of out-of-court statements. It held that admission of an out-of-court testimonial statement made by a non-testifying witness to law enforcement officials is barred by the Confrontation Clause—even if the trial judge had found it to bear particularized guarantees of trustworthiness—unless the defendant had a prior opportunity to cross-examine the witness and that witness is unavailable to testify at trial. *Id.* at 68-69.

1. The background facts.

In *Crawford*, the defendant was charged with assault, but he claimed self-defense. The police interrogated both Crawford and his wife, Sylvia. Sylvia's tape-recorded statement, though generally consistent with Crawford's own statements, undermined his claim of self-defense. Sylvia did not testify at trial because her husband invoked the state marital privilege. The prosecutor then offered her tape-recorded statement to police as a statement against her penal interest. Crawford objected on Confrontation Clause grounds, but

the trial court found the statement trustworthy and admissible under *Ohio v. Roberts*, 448 U.S. 56 (1980).

2. The historical basis for the Confrontation Clause and the hearsay rule.

Both the Confrontation Clause and the rule against hearsay trace their origins to the Trial of Sir Walter Raleigh in 1603 in which Raleigh was charged with plotting to put Arabella Stuart on the English throne. *See Raleigh's Case*, 2 How. St. Tr. 1, 15-16, 24 (1603). At trial, the prosecution relied primarily upon the written confession of Lord Cobham, an alleged co-conspirator who had been tortured but was still alive and languishing in the Tower of London. Raleigh claimed that Lord Cobham had recanted his confession and protested its use. He told Lord Coke, the prosecutor:

But is it strange to see how you press me still with my Lord Cobham, and yet will not produce him; ... [H]e is in the house hard by, and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this confession of his, it shall convict me and ease you of further proof.

Lord Coke declined to produce Lord Cobham. Instead, he called Mr. Dyer, a river boat pilot, who testified that, while he was in Lisbon, he had overheard an unnamed Portuguese gentleman say “Young king [James] shall never be crowned for Lord Cobham and Don Raleigh will cut his throat before he come to be crowned.” Raleigh protested that this evidence was mere rumor-mongering by “some wild Jesuit or beggarly priest; but what proof is it against me?” Nonetheless, Raleigh was convicted of treason on the basis of these two pieces of evidence and was later executed. The public was outraged and from this trial both the Confrontation Clause and the rule against hearsay evolved.

The use of Lord Cobham's out-of-court, *ex parte* confession is precisely the type of “testimonial” document that Justice Scalia decried in *Crawford* as violative of the Confrontation Clause as it existed at the time the Bill of Rights was enacted. Although historians tell us that Lord Cobham had been tortured, it is also thought that his confession was accurate and reliable. But, torture or no, Englishmen (and Americans) do not rely upon an *ex parte* “inquisitorial” system of justice as employed by the then-hated Spanish or French systems of justice. The English relied upon an “adversarial” system of justice in which zealous cross-examination of the opposing side's witnesses was thought a better way to achieve an accurate result in the full light of public

scrutiny. The rights to confront and cross-examine witnesses is the cornerstone of the modern American adversary system which relies heavily upon public access to and scrutiny of the evidence and witnesses.

The use of Dyer's testimony about the out-of-court statements by the unnamed Portuguese gentleman invokes not only the Confrontation Clause but is at the heart of the rationale for the rule against hearsay. On its face, this testimony smacks of unreliability and rumor-mongering. The hearsay rule is directed primarily toward the reliability and accuracy of evidence, while the Confrontation Clause is directed primarily toward protecting the adversarial system of justice. Together, the two doctrines help ensure that the out-of-court statements offered against a criminal defendant are both reliable and subject to testing through the crucible of confrontation and cross-examination.

3. The doctrinal result in Crawford.

After examining the historical origins of the clause, the Supreme Court, in an opinion authored by Justice Scalia, repudiated its *Roberts* framework of "open-ended balancing tests" in favor of a "categorical" rule that requires "unavailability and a prior opportunity for cross-examination" with regard to "core testimonial statements that the Confrontation Clause plainly meant to exclude." 541 U.S. at 63, 67-68. The Court declined to "spell out a comprehensive definition of 'testimonial,'" *id.* at 68, but it did not leave lower courts entirely without guidance, as it stated that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50.

4. The practical result in Crawford.

Under *Crawford*, there are three basic questions to consider under the Confrontation Clause concerning the admission of an out-of-court statement against a criminal defendant:

- (1) Is the statement "testimonial"? If so,
- (2) Does (or did) the defendant have an adequate opportunity to confront and cross-examine the declarant?
- (3) Did the defendant waive the right to confrontation by failing to object or by forfeiting his right to confrontation by wrongdoing (e.g., his misconduct by murder, bribery, intimidation, coercion is the reason the witness is not present to testify)?

B. What is "testimonial"?

Justice Scalia set out three potential tests for determining whether a particular statement comes within that "core class of 'testimonial' statements" that would make Sir Walter Raleigh turn over in his grave:

- (1) Petitioner's definition: "ex parte in-court testimony or its functional equivalent—that is material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.* at 52 (quoting Brief for Petitioner);
- (2) Prior Supreme Court definition: "extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Id.* (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)); and
- (3) Amici curiae definition: 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." *Id.* (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae*).

Although the Supreme Court left open the exact contours of what constitutes a "testimonial" statement, a practical rule-of-thumb is that if the out-of-court statement was made casually or without reflection as to any potential legal consequences, but rather by one simply "living his life" and speaking while doing so, the statement would normally be non-testimonial. *See id.* at 51 ("[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"); Conversely, a "structured" investigative police interview, even in a casual setting such as a hospital, will normally result in a testimonial statement. *See, e.g., Wall v. State*, 143 S.W.3d 846, 851 (Tex. App. – Corpus Christi 2004, pet. granted) (assault victim's statement given to police officer at hospital during investigation of crime was "testimonial" under *Crawford*; harmless error to admit it when victim did not testify at trial); *Lee v. State*, 143 S.W.3d 565, 570-71 (Tex. App. – Dallas 2004, pet. filed) (officer's roadside questioning of co-defendant asking if money was obtained from the illegal sale of drugs was interrogation; resultant statement was testimonial and inadmissible under *Crawford*); compare *Wilson v. State*,

151 S.W.3d 694, 698 (Tex. App. – Fort Worth 2004, pet. ref'd) (traffic accident victim's statements to responding police officer not testimonial under *Crawford* because declarant approached officer at the scene where her car had been wrecked, she appeared nervous and visibly upset and was inquiring about her car and its missing occupants).

- (4) Evidence scholars are ecstatic. Much of the reasoning and some of the language contained in Justice Scalia's *Crawford* opinion comes from the amicus brief filed in *Crawford* on behalf of nine law school professors. They began their discussion advocating a "testimonial" approach to the hearsay-Confrontation Clause intersection by stating: By granting certiorari in this case, the court has created an opportunity to replace an unsatisfactory conception of the Confrontation Clause with one that is historically well grounded, textually faithful, intuitively appealing, and straightforward in its application.

Brief Amicus Curiae of Law Professors, *Crawford v. Washington*, LEXSEE 2002 U.S. Briefs 9410 *2 (2002). One of the more illuminating sentences in this Brief is the following: "When the prosecution offers an ordinary hearsay statement, *made without any anticipation of evidentiary use*, it will often be better, taking into account considerations of truth, determination and cost, to admit the statement rather than to exclude it." *Id.* at *12-13 (emphasis added). This sentence is important in two ways: (1) if the statement is made with the anticipation of its later use as evidence in a criminal proceeding, the Confrontation Clause requires that the defendant have an opportunity to confront and cross-examine the declarant— either at trial or, if the witness is unavailable, at some time prior to trial; and (2) if the hearsay statement was made without any anticipation of its later use as evidence, the costs and benefits of the truthseeking mission of a criminal trial tip toward its admission regardless of whether the declarant is now available or not. In other words, to what extent should the hearsay rules themselves be simplified, streamlined, and tilted toward the admission of out-of-court statements which were not made in anticipation of their use as evidence? The professors note that "[b]y decoupling the Confrontation Clause from the minutiae of the hearsay rules, the testimonial approach would allow each jurisdiction to make its own determination as to

what non-testimonial hearsay should be admitted in criminal cases." *Id.* at *13.

The professors reasoned that insisting upon confrontation as the required method for giving "testimony," serves several important instrumental goals:

- (1) "Confrontation guarantees openness of procedure"; the world at large may see that our system does not depend upon back room torture, intimidation or coercion of witnesses;
- (2) "Confrontation provides a chance for the defendant, personally or through counsel, to dispute and explore the weaknesses in the witness's testimony"; Perhaps what the witness said out of court was only half his story, perhaps he suffered from testimonial defects— sight, hearing, memory, credibility—at the time of the event or at the time he spoke; cross-examination is our mode of uncovering those potential problems;
- (3) "Confrontation discourages falsehood as well as assists in its detection"; testifying under oath, in public, in front of the defendant, subject to cross-examination makes a false accusation more difficult than it would be otherwise;
- (4) "If, as is usually the case, the confrontation occurs at trial or in a videotaped proceeding, the trier of fact has an opportunity to assess the demeanor of the witness";
- (5) "Confrontation eliminates the need for intermediaries, and along with it any doubt about what the witness's testimony is."

Id. at *14-16.

C. Testimonial or Non-Testimonial?

Chief Justice Rehnquist complained, in his concurring opinion to *Crawford*, that the Supreme Court failed to give the lower courts and advocates a clear and explicit definition of "testimonial" statements that are covered by the *Crawford* rule. *See Crawford*, 541 U.S. at 75-76 (Rehnquist, C.J., joined by O'Connor, J., concurring). He lamented that "the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists ...is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner." *Id.* He may be right, but his view did not prevail.

Nonetheless, lower federal and state courts across the country have been busy. Scores of opinions analyzing *Crawford* and its application to the various hearsay exceptions and factual scenarios of individual cases are issued every week. Texas courts and practitioners can glean two main threads from a survey of the cases issued in the past year:

1. In most instances, the categorization of a statement as “testimonial” or “non-testimonial” does not depend upon the specific hearsay exemption or exception, but rather upon the specific circumstances under which the out-of-court statement was made;
2. The emerging trend is toward categorizing out-of-court statements as “testimonial” under a broader umbrella of Confrontation Clause coverage rather than a narrow definition of “testimonial.”

One might usefully look at the world of “testimonial versus non-testimonial” statements across a broad spectrum with the obviously testimonial statements at one end, the obviously non-testimonial statements at the other end, and the “well, it all depends on the circumstances” statements somewhere in the middle of the spectrum. Always ask “Would a reasonable person, in the declarant’s shoes, think that he was speaking for legal purposes? That his words might be used by someone in a trial someday?” This is the test set out in the law school professors’ Brief. (Stating that “[o]ne practical possibility is an objective test that would ask: Would a reasonable person in the declarant’s position anticipate that the statement would likely be used for evidentiary purposes?”). *Id.* at * 20. They also suggested some “rules of thumb”:

A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made directly to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one’s ordinary business, made before the criminal act

has occurred or with no recognition that it relates to criminal activity.

Id. at *21.

1. Clearly Testimonial Statements.

Under *Crawford* itself, “[w]hatever else the term covers, the term “testimonial” applies at a minimum to

- 1) prior testimony at a preliminary hearing, before a grand jury, or at a former trial;
- 2) police interrogations;” and
- 3) “[a]n accuser who makes a formal statement to government officers.”

“These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.” *Crawford*, 541 U.S. at 68. “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Id.* at 51.

These statements, then, are at one end of the “testimonial v. non-testimonial” spectrum.

a. Prior Testimony.

If the out-of-court declarant does not take the witness stand and is subject to cross-examination in the present trial, his prior testimony is not admissible if the defendant did not have a prior opportunity to confront and cross-examine the witness.

No opportunity to cross-examine. *United States v. Wilmore*, 381 F.3d 868, 871-73 (9th Cir. 2004) (finding a *Crawford* violation in admission of prior grand jury testimony after witness asserted her privilege against self-incrimination as to statements to the grand jury: “It is undisputed that Ms. John’s grand jury testimony was ‘testimonial,’ and that Wilmore did not have the opportunity to cross-examine Ms. John at the grand jury hearing. Furthermore, we find that Ms. John’s assertion of her Fifth Amendment privilege, coupled with the district court’s restriction on cross-examination, made Ms. John ‘unavailable’ with regard to her grand jury testimony This left Wilmore with no opportunity to ‘confront’ Ms. John about why she testified the way she did before the grand jury or about whether that testimony was true”).

Insufficient opportunity to cross-examine. *People v. Fry*, 92 P.3d 970, 973-81 (Colo. 2004) (reversing murder conviction under *Crawford* because of admission of defendant’s uncle’s preliminary hearing testimony that defendant telephoned him and stated that “Darla [Fischer] was in the hospital and that he had put

her there”; opportunity for cross-examination in Colorado’s preliminary hearings, in which “the right to cross-examination may be curtailed by the judge in all but the most unusual circumstances,” not adequate under *Crawford*).

Accomplice’s cross-examination does not satisfy *Crawford*. *State v. Hale*, 691 N.W.2d 637 (Wis. 2005)(error under *Crawford* to admit former testimony because accomplice’s opportunity to cross-examine declarant during his trial two months before defendant’s did not satisfy defendant’s right to confront witness, even though evidence did fit state hearsay exception for former testimony and accomplice had “similar motive” to cross-examine declarant).

Accomplice’s plea allocutions are testimonial. The Supreme Court specifically included plea allocutions among the “core testimonial statements that the Confrontation Clause plainly meant to exclude.” *Crawford*, 541 U.S. at 63. See *United States v. McClain*, 377 F.3d 219, 220-22 (2d Cir. 2004) (In prosecution for money laundering, wire fraud, and conspiracy, admission of three co-conspirators’ guilty plea allocutions violated defendants’ Confrontation Clause rights under *Crawford*; “the admission of the co-conspirators’ guilty plea allocutions against Martins and Guastella violated the Confrontation Clause because the statements were testimonial and the appellants did not have the prior opportunity to cross-examine the declarants”); *People v. Carrieri*, 778 N.Y.S.2d 854, 854-55, 3 Misc. 3d 870, 871-872 (N.Y. Misc. 2004) (denying motion by government to admit co-defendant’s plea allocation unless he testified; “the plea minutes may not be used against defendant Carrieri at trial even though they may well be an exception to the hearsay rule as a Declaration against Penal Interest”); *People v. Shepherd*, 263 Mich. App. 665, 671 (Mich. Ct. App. 2004) (“The trial court’s admission of the transcript of Mr. Butters’s guilty plea was clearly improper. Mr. Butters’s testimony made under oath in court is an obvious example of testimonial evidence--Mr. Butters bore testimony against himself implicating defendant in his crime of subornation of perjury. Defendant was absent from that proceeding and was given no opportunity for cross-examination. Furthermore, the transcript was presented to prove the truth of the matter asserted--that defendant gave false testimony pursuant to Mr. Butters’s solicitation of these particular statements. As such, its admission violated defendant’s Sixth Amendment right to confront the witnesses against her”).

Plea allocutions are not admissible even for rehabilitation purposes. *United States v. Massino*,

319 F. Supp. 2d 295, 299-301 (E.D.N.Y. 2004) (denying government’s motion in limine requesting admission of co-defendants’ guilty pleas to rehabilitate cooperating witness’s testimony; “even if guilty pleas are not inherently ‘testimonial’ within the meaning of the Sixth Amendment, the guilty pleas are clearly testimonial in this case. The defendant is alleged to be the boss of the Bonanno crime family, whose members and associates, in turn, are alleged to have committed a variety of crimes ranging from arson to extortion to murder. The defendant is alleged to have been aware of or approved of all of this conduct either personally or through captains and soldiers who served as his agents. Further, the defendant is alleged to have received proceeds of the profits from much if not all of this criminal conduct. Each of the other thirty co-defendants charged in this indictment pleaded guilty to at least one of the charges against him. Given the fact that the defendant is alleged to be the boss of a complex and vast RICO enterprise, there can be no question that even the mere fact that his thirty co-defendants pleaded guilty provides substantial confessional evidence that, at the very least, the co-defendants participated in criminal aspects of this enterprise. In this case, the allegation that the defendant was the boss of an organized crime family is so inherently intertwined with the illegal conduct of its members and associates that the mere admission of guilt of one of these members and associates provides crucial testimonial evidence against the defendant within the meaning of *Crawford* and the Sixth Amendment”).

Not even redacted plea allocutions are permitted under *Crawford*. *People v. Woods*, 779 N.Y.S.2d 494, 496 (N.Y. App. Div. 2004) (reversible error; “In his plea allocation, Rivers admitted, in summary, that after defendant punched the complainant, Rivers held a knife to him while Hopkins took cash and keys from his pocket. Rivers having invoked his Fifth Amendment right not to testify, his allocation, with defendant’s and Hopkins’s names changed to “A” and “B,” was read to the jury, over the objections of defense counsel”).

b. Police Interrogation Statements

When the police are engaged in the competitive enterprise of detecting crime, investigating crime, gathering evidence for criminal prosecution, they may conduct custodial or non-custodial interrogations. Statements obtained during such interrogations are testimonial “as a matter of law.” *Brooks v. State*, 132 S.W.3d 702, 707 (Tex. App.-Dallas 2004, pet. ref’d)(the written statement of Samuel Hunter, a non-testifying co-defendant “was testimonial as a matter of law ...

Appellant had no opportunity to cross-examine Hunter either before or during trial. Thus, admission of the statement as evidence against appellant violated the Sixth Amendment”); *People v. Ryan*, 790 N.Y.S.2d 723 (N.Y. App. Div. 2005)(statements admitted during government’s redirect examination of the interrogating officer, recounting the commission of the crime, from planning through fruition, by defendant and cohorts violated of defendant’s Sixth Amendment rights under *Crawford*);

Redaction of an accomplice’s confession does not satisfy *Crawford*. *Scott v. State*, ___ S.W.3d ___, 2005 Tex. App. LEXIS 2168, *45-51 (Tex. App.–Austin, March 24, 2005) (harmless *Crawford* error to admit, over objection, accomplice Springsteen’s testimonial statement given during police interrogation; rejecting State’s argument that because Springsteen’s custodial statement had been redacted to omit any reference to Scott, it was not “accusatory” and its introduction in evidence did not make Springsteen a witness against Scott within the meaning of the Sixth Amendment); *Hale v. State*, 139 S.W.3d 418, 421-22 and n. 1 (Tex. App.–Fort Worth 2004 n.p.h.) (reversing conviction because of admission of written statement of unavailable accomplice, which was made during police interrogation, although that statement had been redacted; “The redacted statement simply replaces Hale’s name with generic pronouns such as ‘he’ or ‘him,’ but does not delete references to conduct attributed to Hale”); *United States v. Jones*, 371 F.3d 363, 369 (7th Cir. 2004) (admission of a redacted version of co-conspirator’s confession implicating defendant in illegal resale of firearms was error under *Crawford* because defendant had never had the opportunity to cross-examine the co-conspirator, who had become a fugitive).

State’s burden to show prior cross-examination. It is the State’s burden to show that the defendant had a prior opportunity to confront and cross-examine the out-of-court declarant before a non-testifying accomplice’s custodial statement is admissible under *Crawford*. *Bratton v. State*, 156 S.W.3d 689, 693-94 (Tex. App.–Dallas 2005, n.p.h.)(*Crawford* error to admit the written statements of two nontestifying accomplices; rejecting State’s argument that *Crawford* does not apply because the accomplices were “available, present, and could have been confronted” by defendant; “as the party seeking to admit [accomplices’] statements, it was the State’s burden to show their statements were admissible, that is, that [accomplices] were unavailable and that Bratton had been afforded a prior opportunity to cross-examine them ... By the State’s own admission

though, [accomplices] were available to testify, and nothing in the record suggests, nor does the State contend, that Bratton was afforded a prior opportunity to cross-examine them. As such, the statements were inadmissible, and the trial court erred in not excluding them”).

Both formal and informal interrogation. The interrogation need not be conducted in a formal setting to make the out-of-court statement a “testimonial” one. *Lee v. State*, 143 S.W.3d 565, 569-71 (Tex. App.–Dallas 2004, pet. filed) (“the out-of-court statement of Pham [that the cash in the purple bag was from the sale of ecstasy], made in response to the questions of the officer during the roadside stop after appellant had been arrested, is ... testimonial. Its admission violated appellant’s Sixth Amendment right of confrontation.”); rejecting State’s argument that the setting lacked the formality of the testimonial statements described in *Crawford*: “the officers’ questioning was recorded on the audio-video equipment of the patrol car. Although the statement in question was not audible on the recording, that does not alter the formality of the setting that was intended to record testimony for the prosecution of the case being investigated”); *United States v. Saner*, 313 F. Supp. 2d 896, 901-02 (S.D. Ind. 2004) (statements made in response to questioning at co-defendant’s home by DOJ prosecutor were testimonial, and inadmissible at joint trial where co-defendant would not testify; “The most obvious distinguishing factor between the circumstances in *Crawford* and the present circumstances is that [co-defendant] was not in custody when he made the statements to the prosecutor. However, this does not appear to be a meaningful distinction under *Crawford*. When the Court concluded that interrogation by law enforcement officers constituted testimonial hearsay, it was careful to note that it was using the term ‘interrogation’ in the colloquial sense, not in the narrow, legal sense”).

Rule applies even during a joint trial. *United States v. Rashid*, 383 F.3d 769, 775-776 (8th Cir. 2004) (in joint trial for bank fraud, admission of Nahia’s statements violated co-defendant Rashid’s Confrontation Clause rights: “Nahia’s statements were statements taken by FBI agents in the course of interrogations and thus testimonial for purposes of *Crawford*. Nahia was a non-testifying co-defendant and thus was not available as a witness, but Rashid did not have a prior opportunity to cross-examine her”).

Rule does not apply to joint confessions or adoptive admissions. *Globe v. State*, 877 So. 2d 663, 672-73 (Fla. 2004) (“Globe was present during Busby’s

statement and had a chance to contradict what Busby said. A review of the transcript in this case makes it clear that Busby's statements were adopted by Globe. Instead of contradicting Busby's statements, Globe verbally affirmed what Busby said and added significant details to Busby's statement. The statements were properly admitted as adoptive admissions As we previously noted, statements admitted as adoptive admissions do not implicate the Confrontation Clause”).

c. An accuser's formal statement

Statements made at a police station. *Samarron v. State*, 150 S.W.3d 701, 706-708 (Tex. App.— San Antonio 2004, pet. ref'd) (*Crawford* error to admit statement made by non-testifying witness where statement was made not at scene of murder, but at police station and in response to questioning: “Detective Louis Martinez testified that upon arriving at the scene, Officer Mike Lopez told him that Garcia had witnessed the murder. Because Garcia agreed to go to the police station to give a statement, Detective Martinez did not question Garcia at the scene. At the police station, while Detective Martinez and Garcia sat in a cubicle, Detective Martinez questioned Garcia about what he had witnessed:

Q: Now, sir, these answers—this statement was a result of you questioning [Garcia]; was it not?

A: I asked him what happened, yes.

Q: It was not a spontaneous answer that he gave you, it wasn't a spontaneous statement—it wasn't something that he told you without you having to question him?

A: I asked him what happened, what next and then what and then what.

Q: So you kept having to ask him, “and then what and then what?” It wasn't something that he was—

A: Because I'm typing. I can't type as fast as he talks.

Q: So he didn't even write this statement, is that what you're saying?

A: Correct.

Here the witness did not spontaneously tell Detective Martinez what had happened at the scene. Instead, after being questioned by Detective Martinez, he gave a formal, signed, written statement to the police. . . . Here, Samarron did not have an opportunity to cross-examine him before trial. Therefore, Samarron's rights under the Confrontation Clause were violated”

A formal, seemingly neutral, statement may be testimonial. *United States v. Gonzalez-Marichal*, 317 F. Supp. 2d 1200, 1202-03 (D. Cal. 2004) (rejecting Government's reasoning that statements about nationality are not testimonial statements under *Crawford*; “One of the elements that must be proved by the Government beyond a reasonable doubt is that Defendant transported an illegal alien within the United States. Thus, a custodial statement regarding alienage is material and goes to the heart of the Government's case against [Defendant] because it proves an element of the offense. While a custodial statement of nationality may be neutral and non-incriminating in the abstract, as applied to [Defendant's] case, the nationality of the material witness may well determine whether [Defendant] is incarcerated or released from custody”).

A victim's statements to a law enforcement investigator. *People v. Pirwani*, 14 Cal. Rptr. 3d 673, 676 (Cal. Ct. App. 2004) (admission of videotaped statement made by dependent adult to police and a Justice Department Medi-Cal Fraud and Elder Abuse Bureau investigator, two days before she died, in which she disclosed that she had entrusted the management of her finances to defendant, violated *Crawford*).

Formal statements by children may be testimonial. *Bockting v. Bayer*, 399 F.3d 1010, 1012 (9th Cir. 2005) (defendant's sexual abuse conviction reversed when complainant, defendant's six-year old stepdaughter did not testify at trial, but statements from police interview were admitted); *People v. Sisavath*, 118 Cal. App. 4th 1396, 1401-1403, 13 Cal. Rptr. 3d 753, 756-758 (5th Dist. 2004) (child's statements in the MDIC interview in this case were testimonial because an objective observer would reasonably expect the statement to be available for use in a prosecution: “[the child's] interview took place after a prosecution was initiated, was attended by the prosecutor and the prosecutor's investigator, and was conducted by a person trained in forensic interviewing”); *State v. Snowden*, 867 A.2d 314, 320-21 (Md. 2005) (statements made by child abuse victims to a social worker, though previously admissible under specific “tender years” exception to hearsay rule, are testimonial under *Crawford* and inadmissible under Confrontation Clause if child does not testify); *People v. Vigil*, 104 P.3d 258, 263 (Colo. Ct. App. 2004) (videotaped statement given by the child to the police officer was “testimonial” under *Crawford* even though seven-year-old child would not reasonably expect his statements to be used prosecutorially); *People in Interest of R.A.S.*, ___ P.3d ___, 2004 Colo. App. LEXIS 1032 (Colo. App. No. 03CA1209, June 17, 2004)

(child victim's statements "taken by an investigating officer in a question and answer format appropriate to a child" were testimonial under *Crawford*); *State v. Courtney*, 682 N.W.2d 185, 196-97 (Minn. Ct. App. 2004) (circumstances of interview show it was made in preparation for the case against defendant; the child was interviewed for the purpose of developing the case against defendant, and "at one point, the interview was stopped by the police officer when he directed the child-protection worker to ask [child] to draw the guns she saw [defendant] use to threaten" another); *People v. R.F.*, 825 N.E.2d 287, 295 (Ill. App. Ct. 2005) ("A.F.'s statement to Officer Weddington was testimonial under *Crawford* and should not have been admitted in the absence of cross-examination"); *People v. Sisavath*, 118 Cal. App. 4th 1396, 1401-03, 13 Cal. Rptr. 3d 753, 756-58 (5th Dist. 2004) (statements that a four-year-old sexual abuse victim made to a police officer were clearly "testimonial" under *Crawford*, as were statements made to a "forensic interview specialist" with a prosecutor present.).

Some courts have held that formal or semi-formal statements made by children to non-governmental officials investigating child abuse are not necessarily testimonial. *See People v. Geno*, 683 N.W.2d 687, 261 Mich. App. 624, 631 (Mich. Ct. App. 2004) ("we conclude that the child's statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. The child's statement was made to the executive director of the Children's Assessment Center, not to a government employee, and the child's answer to the question whether she had an "owie" was not a statement in the nature of "ex parte in-court testimony or its functional equivalent").

The law school professors, in their *Crawford* amicus Brief noted that "statements by young children will present some of the closest issues under the testimonial approach." *Id.* at *22. Statements by very young children to their friends, family, physicians, or caregivers "may be considered non-testimonial in some circumstances even though statements by adults in similar circumstances would likely be considered testimonial." *Id.* at *22 n.12. The professors analogize these unreflective, out-of-the-mouths-of-babes-type statements as similar to a dog barking rather than a purposeful accusation. However, a statement made in response to questioning by "a police officer or physician to whom the child has been referred because of suspicions of abuse is more likely to be testimonial than

is a spontaneous statement by the child before abuse has been suspected." *Id.*

2. Clearly non-testimonial statements.

Most courts, in most cases, have held that—at least in the abstract—statements made in the following situations do not fall in the "testimonial" scenario: (1) dying declarations; (2) street corner conversations to friends, foes, or even police; (3) formal or semi-formal reports made to someone other than law enforcement; (4) excited utterances made to someone other than police officers; (5) conspirator statements; (6) statements that are not offered for the truth of their contents; (7) hearsay information that an expert has relied on.

a. Dying Declarations.

Dying declarations, otherwise admissible under Rule 804(b)(2), would appear to be unaffected by *Crawford* for three reasons: (1) the Supreme Court seemed to suggest as much in footnote 6 of *Crawford*; (2) these statements are generally not made in response to any structured questioning; and (3) the declarant, in extremis would usually not have any expectation that his dying words would later be used at a trial. *State v. Nix*, 2004 Ohio 5502, p.5 (Ohio Ct. App. 2004, mot. denied) ("According to Thomas, Villas, fearing that his wound was mortal, told her, "Ursula, if I don't make it, please tell my momma Damien shot me"); *Walton v. State*, 603 S.E.2d 263, 265, 278 Ga. 432, 434-35 (Ga. 2004) (noting that *Crawford* court "acknowledged that admission of a dying declaration was an exception to the general rule that a prior opportunity to cross-examine was a necessary condition for admissibility of testimonial statements); *People v. Durio*, 2005 NY Slip Op 25085, 3-4 (N.Y. Misc. 2005) (noting that, by citing *Maddox v. U.S.*, 156 U.S. 237, 243 (1895), which specifically referred to a victim's dying declaration as an example of hearsay evidence that was admissible despite being contrary to the literal meaning of the Confrontation Clause, the *Crawford* Court recognized that a defendant's right of confrontation is not absolute, that dying declarations are clearly an aberration, and that their admissibility must be considered in the context of the overwhelming interest of public policy; holding that victim's dying declaration, although made in response to police questioning about who had shot him, and therefore testimonial in nature, was properly admitted at trial).

Dying declarations were traditionally only admissible in homicide prosecutions and only when the declarant named the defendant as his killer. Thus, part of the rationale for this common-law exception may have been

a theory of “forfeiture by wrongdoing.” That is, “the victim would be available to testify had you not killed him.”

Some cases have held that, despite footnote 6 in *Crawford*, dying declarations do meet the criteria for “testimonial” statements and are not admissible despite their hoary pedigree. *United States v. Jordan*, 2005 U.S. Dist. LEXIS 3289 (D. Colo. 2005) (granting defendant’s motion in limine to suppress the stabbing victim’s statements made during the approximately seven hours between the time of the stabbing and his death, to Bureau of Prisons agent, in which he identified defendant as attacker and related its motive; statements were “patently testimonial” and finding “no rationale in *Crawford* or otherwise under which dying declarations should be treated differently than any other testimonial statement”).

b. Street corner conversations.

These are truly unreflective, non-litigation-oriented statements. *Woods v. State*, 152 S.W.3d 105, 112, 114 (Tex. Crim. App. 2004) (co-defendant’s statements to two other men—that “he had a job to do” for defendant that night and that he did not want to do it, that he and defendant had used victim’s credit card to make an online purchase of tickets; and that they had attempted to make a third person appear responsible for the murders by buying the tickets in his name and having them sent to his house—did not fall within the categories of testimonial evidence described in *Crawford* because they were casual remarks made spontaneously to acquaintances); *Horton v. Allen*, 370 F.3d 75, 83-84 (1st Cir. 2004) (accomplice’s statements made on the day of the murders—that he needed money and that victim had refused to give him drugs on credit—did not qualify as testimonial and were properly admitted under the state of mind exception; they were made during a private conversation with a friend and not under circumstances in which an objective person would “reasonably believe that the statement would be available for use at a later trial”); *Ramirez v. Dretke*, 398 F.3d 691, 695 (5th Cir. 2005) (accomplice’s out-of-court statements that defendant had hired him to kill a fireman and his subsequent description of the murder to a friend were not “testimonial evidence” under *Crawford*; “There is nothing in *Crawford* to suggest that ‘testimonial evidence’ includes spontaneous out-of-court statements made outside any arguably judicial or investigatory context”); *United States v. Morgan*, 385 F.3d 196, 208-09 n.8 (2d Cir. 2004) (co-defendant’s letter written in her hotel room to boyfriend which indicated that both women were expecting a suspiciously large payment for their

willingness to go to Europe as couriers was non-testimonial and not subject to the rule in *Crawford*); *United States v. Manfre*, 368 F.3d 832, 838 n. 1 (8th Cir. 2004) (*Crawford* has no effect on accomplice’s “I’m not gonna tell” street corner statements “made to loved ones or acquaintances and are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks”); *State v. Rivera*, 844 A.2d 191, 197, 202, 268 Conn. 351, 357, 365 n. 13 (2004) (accomplice’s statement to his nephew that he and defendant had broken into a woman’s house looking for items to steal, and that when were discovered by the woman, the defendant choked her and used an oil lamp to burn the house in an attempt to destroy any evidence, did not fall within the core category of ex parte testimonial statements that concerned the Court in *Crawford*); *People v. Shepherd*, 263 Mich. App. 665, 675-76 (Mich. Ct. App. 2004) (statements overheard by jail guards were “clearly not testimonial” as accomplice “was speaking to relatives, not to the guards, and made spontaneous, unprompted comments regarding his role in the fleeing and eluding and assault. Even under the broadest definition of testimonial, it is unlikely that [accomplice] would have reasonably believed that the statements would be available for use at a later trial”; admissible as statements against penal interest); *State v. Dunivant*, 2005 Ohio 1497 (Ohio Ct. App. 2005) (recitation of street-corner dispute and peaceful attempts to reconcile not testimonial; “Floyd’s statements to Strain, made for the purpose of mediating a drug-deal induced debt, were unequivocally extra-judicial and do not fall within any of the three tendered formulations that would make them testimonial”).

c. Formal or informal reports to non-law enforcement personnel.

State v. Blackstock, 598 S.E.2d 412, 419-20 (N.C. App. 2004, rev. denied) (the fact that victim’s statements were made during personal conversations with his wife and daughter as he recovered from assault “mitigates against the possibility that he understood he was ‘bearing witness’” against defendant; nontestimonial under *Crawford*); *State v. Manuel*, 685 N.W.2d 525, 532 (Wis. App. 2004, review granted) (declarant’s out-of-court statement to his girlfriend—that defendant had shot the victim—was not testimonial in nature because it was not “made to an agent of the government or to someone engaged in investigating the shooting”); *People v. Griffin*, 33 Cal. 4th 536, 577, 579 n.19 (Cal. 2004) (murder victim’s statements to friend at school that defendant “was touching her places where she knew that

it was wrong to be touched,” and that “when she goes home from school and if ... [defendant] was going to touch her places ... that she knew ... wasn't right, ... she was going to tell him to quit,” and that “if he wasn't, ... she was going to ... tell him that she was going to tell her mother” not testimonial hearsay within the meaning of *Crawford*); **People v. Compan**, 100 P.3d 533, 535, 538 (Colo. Ct. App. May 20, 2004, writ granted) (victim's statement to friend that defendant had punched and kicked her, thrown her against a wall, and pulled her hair, were not testimonial under *Crawford*); **Demons v. State**, 595 S.E.2d 76, 80, 277 Ga. 724, 725 (Ga. 2004)(deceased victim's statement to close co-worker that defendant was responsible for the bruises on his upper arms and chest, and that defendant “was going to kill him” not “testimonial”); **Somervell v. State**, 883 So. 2d 836, 838 (Fla. Dist. Ct. App. 2004) (statements that a mother overheard from her autistic child who was pretending to talk on the phone to the defendant did not fit within the “umbra or penumbra of any of *Crawford*'s testimonial categories”); **State v. Aaron L.**, 272 Conn. 798, 814 (Conn. 2005) (two-and-one-half year-old victim's spontaneous statement to his mother, “I'm not going to tell you that I touch daddy's pee-pee,” made more than seven years before the defendant's arrest, did “not fall within the core category of ex parte testimonial statements that the court was concerned with in *Crawford*”).

At least one court has held that a child's accusatory statement, even when made to a relative, may be “testimonial” in the sense used by the *Crawford* Court. **People v. E.H. (In re E.H.)**, 823 N.E.2d 1029, 1037 (Ill. App. Ct. 2005)(non-testifying child victim's out-of-court statements to her grandmother not admissible under *Crawford*: “we are certain that, in this case, B.R's statement to her grandmother falls within the purview of the ruling of *Crawford* and is governed by the protections of the confrontation clause.... Here, the declarant, B.R..., bore accusatory testimony against E.H. which was offered to prove the truth of the matter asserted, specifically, that E.H. sexually assaulted her. ...We believe it is the nature of the testimony rather than the official or unofficial nature of the person testifying that determines the applicability of *Crawford* and the confrontation clause”).

d. Excited utterances, when made to someone other than law enforcement.

Generally speaking, excited utterances are nontestimonial in nature and they, too, would not be barred under *Crawford* if they are otherwise admissible under Rule 803(2).

While crime was still in progress. **State v. Orndorff**, 95 P.3d 406, 408 (Wash. Ct. App. 2004) (excited utterance made by one victim of home burglary—that she saw a man with a pistol downstairs, saw both men leave, tried to call 911, and was panic-stricken—which was made to second victim, was not testimonial because it was “a spontaneous declaration made in response to the stressful incident she was experiencing”);

Excited report to boss. **People v. Garrison**, 109 P.3d 1009, 1012-13 (Colo. Ct. App. 2004)(victim's statements to training manager—on February 21 that an old friend of his was calling and threatening to kill him, and on March 8 that the guy that was calling him a couple of weeks earlier was “coming here from California to kill me”—were not testimonial hearsay; the statements were not made to the police, and there was no indication that the manager was acting as a police agent; the February 21 statements were made when victim was “extremely excited and mad” and the March 8 statements were a “continuation of the February 21 statements”);

Frantic call to sister. **People v. Rivera**, 8 A.D.3d 53, 53 (N.Y. App. Div. 2004, appeal denied) (“The court properly admitted the victim's girlfriend's telephoned statement to the victim's sister, identifying defendant as the assailant, under the excited utterance exception to the hearsay rule. This declaration, made within minutes of the stabbing by a crying, screaming declarant, was clearly made under the continuing stress and excitement caused by the startling event, and was not made under the impetus of studied reflection”; although not preserved, *Crawford* Confrontation claim rejected as statement was not testimonial); **State v. Aguilar**, 107 P.3d 377, 379 (Ariz. Ct. App. 2005) (“Excited utterances heard and testified to by lay witnesses are not *Crawford*-style testimonial statements. Consequently, we find the excited utterances in this case [Hector Sr. yelling “Dopey, Dopey, Dopey,” shortly before he was slain] were properly admitted”).

e. Present state of mind statements made to non-law enforcement.

Horton v. Allen, 370 F.3d 75, 84 (1st Cir. 2004) (statements made on the day of murder recounting that defendant's accomplice had told a witness that he needed money and that victim had refused to give him drugs on credit admissible under state-of-mind exception); **United States v. Johnson**, 354 F. Supp. 2d 939, 960 (N.D. Iowa 2005) (murder victim's informational “off-the-cuff” statements to witness

regarding his intention to meet defendant on night that he disappeared non-testimonial and admissible under “state of mind” exception); *State v. Maring*, 2005 Minn. App. LEXIS 423, *7-8 (Minn. Ct. App. 2005) (statements made during phone call from truck driver to witness-driver Olson--to talk about the way the semi between them was being driven--were not testimonial; “there is nothing in the record to remotely suggest that the dump-truck driver had any reason to anticipate that his statements to Olsen would later be used in a criminal prosecution of the semi driver”).

f. Co-conspirator Statements.

It seems clear that *Crawford* does not apply to co-conspirator statements admissible under Rule 801(e)(2)(E) as those are not testimonial statements made to law enforcement. *See Crawford*, 541 U.S. at 74 (Rehnquist, C.J., concurring) (discussing the rationale supporting admission of co-conspirator statements regardless of their hearsay nature; “[b]ecause the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission actually furthers the Confrontation Clause’s very mission which is to advance the accuracy of the truth-determining process in criminal trials”) (internal quotations and citations omitted); *Wiggins v. State*, 152 S.W.3d 656, 660 (Tex. App. – Texarkana 2004, n.p.h.) (stating that co-conspirator statements are nontestimonial under *Crawford* but applying *Roberts* reliability analysis as well in rejecting Confrontation Clause objection); *United States v. Delgado*, 401 F.3d 290, 299 (5th Cir. 2005) (“Michael Martinez testified as to statements given by fellow [Texas Mexican Mafia] members regarding the sale of drugs, the collection and safekeeping of “the dime” from TMM members, the collection of drug debts owed to TMM members, the commission of crimes to collect debts, and the covering-up of crimes. *Crawford* is not applicable to those statements [by co-conspirators] because they are not testimonial hearsay statements”); *United States v. Lee*, 374 F.3d 637, 643 (8th Cir. 2004); *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004) (statements made by a co-conspirator to confidential informant not “testimonial” under *Crawford*; declarant made statements to one he thought was an ally or friend and speaker had no motive to shift blame or diminish responsibility); *United States v. Reyes*, 362 F.3d 536, 540-41 (8th Cir. 2004); *Shelton v. State*, 2005 Ga. LEXIS 232 (Ga. 2005) (*Crawford* not applicable insofar as statements made by co-conspirators are non-testimonial); *Bush v. State*, 895 So. 2d 836 (Miss.

2005) (*Crawford* not applicable to statements of co-conspirators made in furtherance of a conspiracy); *People v. Cook*, 815 N.E.2d 879, 892-93 (Ill. App. 2004) (*Crawford* does not affect the admissibility of co-conspirator statements); *People v. Redeaux*, 823 N.E.2d 268, 272 (Ill. App. Ct. 2005)(coconspirator statements not testimonial); *United States v. Hendricks*, 395 F.3d 173, 181-82 (3rd Cir. 2005)(statements and recordings between deceased confidential informant and co-conspirators non-testimonial and admissible under *Crawford*).

g. Statements not offered for the truth of their contents.

The Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Crawford*, 124 S. Ct. at 1369 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

In these situations, it is not the content of the statement that has evidentiary significance, it is the mere fact of its making that is probative. Thus, it would seem irrelevant whether a reasonable person in the declarant’s position would have thought that the content of his statements would be available for later prosecutorial use. These statements have traditionally been admissible as not covered by the hearsay rule at all. *United States v. Holmes*, 406 F.3d 337, 347-50 (5th Cir. 2005) (“statements made by a co-conspirator during the course and in furtherance of a conspiracy are by their nature generally nontestimonial ... but the challenged evidence here ... is not the run-of-the-mill co-conspirator’s statement made unwittingly to a confidential government informant, or made casually to a partner-in-crime; rather, we have a co-conspirator’s statement that is derived from a formalized testimonial source--recorded and sworn civil deposition testimony.... Whether this evidence is “testimonial” as *Crawford* used that term is uncertain. This case does not, however, require resolution of whether Gonzalez’s civil deposition qualifies as testimonial evidence triggering the right of confrontation. Even assuming arguendo that her deposition is testimonial under *Crawford*, there was no constitutional error, because the government did not offer her testimony to prove the truth of the matter asserted”); *People v. Newland*, 6 A.D.3d 330, 330-31, 775 N.Y.S.2d 308, 308-310 (2004, appeal denied) (finding court “properly admitted a police officer’s brief testimony that, while canvassing for possible witnesses to a burglary, he spoke to a person across the street from the site of the burglary, who was not a witness to the crime, and that, as a result

of an unspecified conversation with this person, he searched a shopping cart left directly outside the burglarized premises and found papers bearing defendant's name"; holding first that "a brief, informal remark to an officer conducting a field investigation, not made in response to 'structured police questioning' ... should not be considered testimonial" and second, even if it were, "we would find no constitutional violation, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"); *Dednam v. State*, 2005 Ark. LEXIS 8, 14-15 (Ark. 2005) ("While Otis's statements to Detective Keel may have been testimonial in nature, they were admitted to demonstrate the basis of Detective Keel's actions in seeking an arrest warrant for Baker, whom Dednam subsequently visited in jail the night of Otis's murder, and further to establish motive, and not to prove that Dednam actually robbed Otis. Because the statements were not admitted for the truth of the matter asserted, cross-examination was not required to test their veracity. Hence, the statements are not barred by the Confrontation Clause"); *Thong Le v. State*, 2005 Miss. LEXIS 151, 66-67 (Miss. 2005) (*Crawford* not violated where the trial court gave a limiting instruction to the jury which explained that deceased co-defendant's statement to law enforcement was not to be considered in determining defendant's guilt or innocence, but was only to be considered for limited purposes of determining the credibility of co-defendant's other out-of-court statements offered into evidence by the defendant).

h. Information that experts have relied on to form an opinion.

Some courts have held that *Crawford* does not bar a testifying expert witness from reviewing or relying upon out-of-court hearsay statements in forming his opinion (although it may be invoked to prohibit the expert from repeating all of the out-of-court statements to the jury). However, if the hearsay data is itself unreliable, even the expert's opinion may be inadmissible. See *United States v. Stone*, 222 F.R.D. 334, 339 (E.D. Tenn. 2004) (*Crawford* does not prevent IRS expert from considering the substance of witness interview statements in forming expert opinion because "the purpose of the out-of-court statements would not be for hearsay purposes but rather would be for evaluating the merit of the opinions [the expert] offered on direct examination"); *People v. Goldstein*, 14 A.3d 32, 37-39 (N.Y. App. 2004) (rejecting defense argument that forensic psychiatrist's testimony that incorporated hearsay statements from

various sources, e.g., psychiatric records, witnesses to the incident in question and to past incidents involving defendant, that the psychiatrist consulted in producing her evaluation of defendant, denied him his right to confront these "witnesses"; *Crawford* does not preclude the expert witness from relying upon such data as "background" information supporting her own opinion and she is present in court to be cross-examined on that opinion).

In *Howard v. Walker*, 406 F.3d 114, 123-27 (2d Cir. 2005), however, the Second Circuit held that it was error under both *Bruton* and *Crawford* for the medical examiner to base her opinion that the burglary victim "probably" died of a heart attack because of the defendant and co-defendant's ransacking of her house. Her opinion was based largely upon the custodial interrogation confession made by the non-testifying co-defendant, but this type of statement is notoriously unreliable and inadmissible under *Bruton*. "This court declines to determine whether admission of expert testimony based on a *Bruton*-infected statement violates a defendant's confrontation rights in every case." In this case, however, the defendant was denied his right to cross-examine the medical examiner or to rebut her testimony by presenting his own expert witness unless she was then able to divulge the contents of the co-defendant's written statement to the jury. Because these denials constituted harmful constitutional errors, the court did not decide whether the admission of the medical examiner's testimony, based on presumptively unreliable statements, was by itself a violation of the defendant's Confrontation Clause rights.

3. Less clear areas-- The middle ground.

In some situations-- such as reports to doctors, 911 calls, and citizen-initiated reports to police--the "testimonial" or "non-testimonial" categorization is especially dependent upon the specific circumstances under which the declarant spoke. There are few "bright lines" here. As with Rule 403, a trial judge's individualistic, idiosyncratic decision either way is likely to be upheld on review. The general approach, however, is to ask whether a reasonable person, in the declarant's position, would be thinking, at the moment of speaking, whether this statement would likely be used as evidence in some future judicial proceeding.

a. Reports to doctors.

In the context of a regular medical check-up or emergency room treatment, a child's report to a doctor for medical purposes is generally not one that a reasonable person would think likely to lead to its use in

a future prosecution. *State v. Vaught*, 682 N.W.2d 284, 268 Neb. 316, 325-26 (Neb. 2004) (child's statement to doctor identifying defendant as person who "put his finger in her pee-pee" was not testimonial; "In the present case, the victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment. There was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination"); *State v. Scacchetti*, 690 N.W.2d 393, 397 (Minn. Ct. App. 2005) (three year old "R.J.'s out-of-court statements to a nurse practitioner, made in a hospital while the nurse examined R.J. for purposes of medical diagnosis, were not testimonial and therefore their admission did not violate Scacchetti's right to confrontation even though R.J. did not testify at trial and Scacchetti did not have a prior opportunity to cross examine her").

Even a statement made to a nurse during a post assault exam--one purpose of which is to provide expert care to the victim, another purpose of which is to collect physical evidence including clothing, DNA samples for the rape kit, and photos using ultraviolet light--is not necessarily a statement made "in circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *State v. Stahl*, 2005 Ohio 1137 (Ohio Ct. App. 2005)(statement victim gave to nurse after giving a stationhouse statement to police for the purpose of pressing charges and prosecuting the rape was not testimonial; "We find it entirely reasonable that the victim under this scenario, could have viewed these two people, and these two entities of police and hospital, as having separate and very distinct roles; the police officer to enforce retribution on the wrongdoer and the nurse to provide aid and comfort").

Nor is a statement made in the course of seeking medical assistance from a friend and neighbor, explaining how the injuries came about, one made in a situation in which the declarant would have a reasonable expectation that it would be used at a later trial. *People v. Cervantes*, Cal. App. 4th 162, 165, 173-74 (Cal. Ct. App. 2004, rev. denied) (rejecting argument that statement accomplice made to his surgical medical assistant neighbor, that he received cuts needing treatment "jumping fences" after he and other gang members shot two men he thought had made advances towards his girlfriend, was testimonial under *Crawford*; "we do not find this view of the evidence reasonable. Rather, we subscribe to the view that [Accomplice] sought medical

assistance from a friend [Ojeda] of long standing who had come to visit his home. [His] statement appears to have been made without any reasonable expectation it would be used at a later trial. Rather, it seems far more likely [accomplice] expected Ojeda would not repeat anything he told her to the police").

Occasionally, a court may find that some portions of a statement made for medical purposes testimonial and other portions not. This is a typical analysis for hearsay statements, but query whether, in the context of a single conversation, the declarant might be thinking about the legal consequences of the statement in one breath but not in the next. *In re T.T.*, 815 N.E.2d 789, 800-05, 351 Ill. App. 3d 976, 994 (Ill. App. Ct. 2004) ("To the extent that G.F.'s statements responded to Dr. Lorand's questions regarding the nature of the alleged attack, the physical exam, and complaints of pain or injury, such statements remain governed by the medical treatment hearsay exception statute. However, G.F.'s accusatory statements identifying respondent as the perpetrator do implicate the core concerns protected by the confrontation clause. When the content of G.F.'s statement concerned fault or identity, then such testimonial statements are only admissible through Dr. Lorand if G.F. testifies at trial and is subject to cross examination").

Statements made to a social worker may or may not be testimonial depending on the context. If such statements are made either after the police have become involved, or in anticipation that the police will become involved, they are more likely to be categorized as testimonial. *People v. Pirwani*, 119 Cal. App. 4th 770, 774, 790 (Cal. Ct. App. 2004) (Confrontation Clause violation in admission of a statement dependant-adult victim made to her social worker's supervisor the day after she spoke to the police for the first time; "Given the two-day lapse between [victim's] initial telephone call to [social worker] and the hearsay statement--a period that apparently was punctuated by a visit to the police station--[victim] patently had the chance to return to a calmer mental state. Here ... there was an adult declarant--albeit one with 'mental problems'--who had two days in which to gather her thoughts, reflect on them, and regain her composure"); compare *State v. Mason*, 110 P.3d 245, ___ (Wash. Ct. App. 2005) (statements made to victim advocate during "safety planning" not testimonial; "Every statement Webb testified to involved Santoso's profound fear and his pleas for help. Santoso was seeking protection, not bearing witness to a crime. And because Webb was acting as a victim's advocate charged with helping Santoso find safety, Santoso had

little reason to expect that his statements to her would ultimately be used to prosecute Mason”).

b. 911 Calls.

Similarly, 911 calls have sometimes been held to be non-testimonial under the *Crawford* framework because they resemble an “electronically augmented equivalent of a loud cry for help ... made while an assault or homicide is still in progress” or “in the immediate aftermath of the crime.” *People v. Caudillo*, 19 Cal. Rptr.3d 574, 588 (Cal. App. 2004, review granted) (quoting *People v. Moscat*, 3 Misc.3d 739, 746, 777 N.Y.S.2d 875 (2004)). In *Moscat*, the court explained that the domestic violence victim’s 911 call was not testimonial because: (1) the call was initiated by the victim, not police; (2) the call was made not to provide evidence, but to be rescued from imminent peril; (3) the call could be seen as part of the criminal event itself because it was made while the assault was still in progress; and (4) because there was no time for the caller-victim to contemplate her words; “she is usually trying simply to save her own life.” 777 N.Y.S.2d at 878; see also *Leavitt v. Arave*, 371 F.3d 663, 683 (9th Cir. 2004) (murder victim’s 911 call to police night before her death admissible under *Crawford* because victim was seeking help from police to end a frightening intrusion into her home; statements naming defendant as probable prowler admissible as excited utterances); *State v. Wright*, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004) (“statements made during the 911 call, moments after the criminal offense and under the stress of that event, are not “testimonial” under *Crawford*”); *People v. Conyers*, 777 N.Y.S.2d 274, 276-77 (N.Y. Sup. 2004) (two 911 calls were made by defendant’s mother “as she reacted to the life-threatening crisis unfolding before her eyes”; voices of victim and defendant while assault was occurring audible in background; concluding that statements were nontestimonial under *Crawford* because caller’s “intention in placing the 911 calls was to stop the assault in progress and not to consider the legal ramifications of herself as a witness in a future proceeding”); *People v. Corella*, 122 Cal. App. 4th 461, 469, 18 Cal. Rptr. 3d 770 (Cal. Ct. App. 2004) (concluding that 911 statements were not equivalent to a police interrogation “because they were not ‘knowingly given in response to structured police questioning’ and bear no indicia common to the official and formal quality of the various statements deemed testimonial by *Crawford*”; noting that “[n]ot only is a victim making a 911 call in need of assistance, the 911 operator is determining the appropriate response, not conducting a police

interrogation in contemplation of a future prosecution”); *Towbridge v. State*, 898 So.2d 1205, 1206 (Fla. Dist. Ct. App. 2005) (*Crawford* is inapplicable to admission of 911 tape--which was admitted as a spontaneous statement); *State v. Byrd*, 2005 Ohio 1902 (Ohio Ct. App. 2005)(911 emergency call made by a domestic assault victim is not testimonial in nature and, provided it meets the excited utterance exception to the hearsay rule, it may be admissible against the defendant without violating the Sixth Amendment Confrontation Rights of the accused).

Other courts have found that a 911 call was testimonial in nature because it was made to report a crime and supply information about its commission; thus its purpose is for “investigation, prosecution, and potential use at a judicial proceeding.” *People v. Cortes*, 781 N.Y.S.2d 401, 415 (2004) (stating that the 911 call “was for the purpose of invoking police action and the prosecutorial process”). In *Cortes*, the 911 caller reporting an attempted murder was never identified and he yelled, “He’s killing him, he’s shooting him again,” and then hung up with the comment, “I gotta hang up because people, people are gonna think I’m out calling the cops.” *Id.* at 404. See also *State v. Powers*, 124 Wn. App. 92, 100-02 (Wash. Ct. App. 2004) (concluding that where the record shows “that T.P. called 911 to report Power’s violation of the existing protective order and described Powers to assist in his apprehension and prosecution, rather than to protect herself or her child from his return,” T.P.’s statements were “testimonial” and were erroneously admitted at trial when she became unavailable.). In *People v. Dobbin*, 791 N.Y.S.2d 897 (N.Y. Misc. 2004, appeal denied), the court found the following 911 tape testimonial:

OPERATOR: POLICE OPERATOR 1521 WHERE'S YOUR EMERGENCY PLEASE?

CALLER: HI . . . YES . . . A ROBBERY . . . A ROBBERY IN PROGRESS HERE ON 27TH STREET AND EIGHTH AVENUE.

OPERATOR: WHAT'S BEING ROBBED?

CALLER: A CAR . . . A CAR ATTENDANT HAS JUST BEEN ROBBED BY A GUY

OPERATOR: A WHAT?

CALLER: A CAR ATTENDANT . . . ONE OF THOSE [INAUDIBLE] CAR PARKS

OPERATOR: A CAR ATTENDANT?

CALLER: YEAH . . . IT HAPPENED ALREADY . . . THE GUY IS GONE ALREADY

OPERATOR: WHAT?

CALLER: JUST GOT ROBBED

OPERATOR: YOU WERE ROBBED?

CALLER: NO . . . NOT ME . . . I'VE SEEN IT AND I'M CALLING TO REPORT IT.

OPERATOR: BUT, WHAT WAS ROBBED?

CALLER: A CAR ATTENDANT . . . FROM ONE OF THE CAR PARKS

OPERATOR: OH, A PERSON IN A GARAGE

CALLER: YEAH . . . IT HAPPENED ALREADY

OPERATOR: AND SOMEONE ROBBED HIM?

CALLER: YEAH . . . THE GUY IS GONE ALREADY NOW

OPERATOR: ROBBED HIM OF WHAT?

CALLER: HIS WALLET . . . [INAUDIBLE] BEAT HIM

OPERATOR: WHAT IS THE ADDRESS?

CALLER: 249 WEST 29TH STREET

OPERATOR: AND WHAT HAPPENED?

CALLER: ALRIGHT . . . THE GUY WALKED UP TO HIM IN THE BOOTH AND PROCEEDED TO BEAT HIM AND TAKE HIS WALLET . . . AND JUST WENT AT HIM . . . RIGHT HERE . . . I WAS JUST GETTING A CALL HERE ON MY MESSAGES . . . SO AS I SEEN IT I JUST CALL YOU GUYS UP

OPERATOR: THE PERP . . . WAS HE BLACK WHITE OR HISPANIC?

CALLER: IT'S A BLACK GUY AND THE GUY WHO GOT ROBBED WAS [INAUDIBLE]

OPERATOR: WHAT WAS THE MAN . . . THE BLACK MAN WEARING?

CALLER: HE HAD ON A BLUE LIKE A POLO TOP . . . BLUE AND WHITE . . . RED STRIPES ON IT . . . AND JEANS . . . HE'S LIKE ABOUT 5' 6

OPERATOR: WHAT COLOR JEANS?

CALLER: BLUE JEANS . . . HE HAD ON WHITE TENNIS SHOES LIKE

OPERATOR: DO YOU KNOW THE NAME OF THE GARAGE?

CALLER: IT'S A PARK CALLED PARK HERE MADISON SQUARE GARDEN

OPERATOR: WHAT IS YOUR LAST NAME?

CALLER: [LAUGHTER] . . . MY LAST NAME IS BYER . . . B-Y-E-R . . . FIRST NAME IS . . . [INAUDIBLE]

OPERATOR: DO YOU HAVE A TELEPHONE THERE?

CALLER: I AM ON A PAY PHONE

OPERATOR: DOES IT HAVE A NUMBER?

CALLER: NO

OPERATOR: OKAY . . . POLICE WILL BE THERE . . . DOES THE MAN NEED AN AMBULANCE?

CALLER: NO . . . HE JUST WENT BACK INTO HIS BOOTH . . . LOOKS LIKE HE'S CRYING

OPERATOR: OKAY . . . THEY WILL BE THERE
CALLER: ALRIGHT

Id. at 899. The court stated:

The 911 call, in this case, contains a solemn declaration for the purpose of establishing the fact that the defendant is committing a robbery. The caller is making a formal out of court statement to a government officer for the purpose of establishing this fact. The caller's statement is not a 'casual remark to an acquaintance.' The caller was officially reporting a crime to the government agency entrusted with this very serious and important function. As such, the 911 call falls within the category of out of court statements which reflect the focus of the Confrontation Clause; the out of court statements of "'witnesses' against the accused in other words, those who 'bear testimony.'

Id. at 900.

This dichotomy between a 911 call for help and one for providing information to police was explored in a pre-*Crawford* law review article. Richard Friedman, *Dial-In Testimony*, 150 U. PA.L.REV. 1171, 1242-43 (2002) (noting that a 911 caller's statements may "serve either or both of two primary objectives—to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous situation, and to provide information to aid investigation and possible prosecution related to that situation").

Some courts have "split the baby" on 911 calls, holding that part of the call was "testimonial" and part was not. Again, however, it is curious to think that a caller might be in a "litigation-oriented" state of mind during part of a statement and a "non-litigation-oriented" state of mind during another part of the same statement. *People v. West*, 823 N.E.2d 82, 91-92 (Ill. App. Ct. 2005) (finding "that those statements made to the 911 dispatcher concerning the nature of the alleged attack, M.M.'s medical needs, and her age and location are not testimonial in nature, and were properly admitted at trial. . . . However, those statements made by M.M. which described her vehicle, the direction in which her assailants fled, and the items of personal property they took are testimonial in nature. These statements were made in response to questions posed by the dispatcher for the stated purpose of involving the police. As such, M.M.'s responses are comparable to those obtained

through official questioning for the purpose of producing evidence in anticipation of a potential criminal proceeding, and their use at trial to secure the defendant's conviction implicates the central concerns underlying the confrontation clause”).

- c. Reports to police, but not to one who is at that time engaged in the competitive enterprise of detecting crime, investigating crime, or gathering evidence for prosecuting a suspect.

Many cases have been decided concerning this situation in the past twelve months. The decisions are almost equally divided into the “testimonial” and “non-testimonial” camps. One of the most succinct discussions of the rationale for the “non-testimonial” camp is contained in *Stancil v. United States*, 866 A.2d 799, 812 (D.C. 2005) (“police who respond to emergency calls for help and ask preliminary questions to ascertain whether the victim, other civilians, or the police themselves are in danger, are not obtaining information for the purpose of making a case against a suspect”; statements made to officers at this initial stage of the encounter - one might fairly call it “securing the scene”—are not testimonial; “in contrast, where police officers engage in structured questioning of victims or witnesses to a crime after the emergency has passed ... the resulting statements are more like the ‘formal statements to government officers’ of concern in *Crawford*”); see also *Key v. State*, ___ S.W.3d ___, 2005 Tex. App. LEXIS 1573, 12-13 (Tex. App.—Tyler 2005, n.p.h.) (victim’s statement to officer—that she had been restrained by defendant since seven o’clock that morning, had just run from the house and defendant had grabbed her and pulled her to the ground, causing several injuries, and that she feared defendant—was not testimonial; “the underlying rationale of an excited utterance supports a determination that [the statement] is not testimonial in nature. Such a declaration from one who has recently endured physical abuse, and with no time for reflection or deliberation, is likely to be truthful. It is consistent with the definition of an excited utterance to conclude that it is not a statement that has been made in contemplation of its use in a future trial. [Victim] was very distraught, upset, crying, and fearful. [Officer] believed she was in danger. Further, [victim] was not the one who called the police and she did not initiate contact with [officer]”); *Cassidy v. State*, 149 S.W.3d 712, 715 (Tex. App.—Austin 2004, pet. ref’d) (officer’s interview of assault victim at the hospital on the afternoon of the assault was not “interrogation” as that term is used in *Crawford*); *Wilson v. State*, 151 S.W.3d 694, 696-98 (Tex. App.—Fort Worth 2004, pet. ref’d)(declarant’s

statements to officers at scene where her car had been wrecked and abandoned—that the car had been stolen, that she was the girlfriend of the driver of the car, and that his initials were A.D.—were not testimonial where she approached the police at the scene and her statements were made in the course of her inquiring about her car and the occupants that were missing from the car and not in response to interrogation); *Davis v. State*, 2005 Tex. App. LEXIS 712 (Tex. App.—Fort Worth 2005, n.p.h.)(not designated for publication) (declarant’s statements to officer that defendant had come to her residence earlier that morning and told her that he “had killed a woman and she was inside his apartment” were not testimonial; declarant “voluntarily called police after discovering [victim’s] body. She further voluntarily informed [officer] of the statements that [defendant] made to her”); *People v. King*, 2005 Colo. App. LEXIS 111 (Colo. Ct. App. 2005) (victim’s statements to officer were excited utterances; “P.T. was hysterical at different times throughout the two-hour period that she made statements to Officer Christian. There was also testimony that during the two hours, P.T. continually lapsed into French while she was speaking and that she repeatedly asked whether she was going to die. Furthermore, Officer Christian testified that P.T. was bleeding badly and that P.T. was continually being examined and treated for her injuries during the time she was with her”); *State v. Alvarez*, 107 P.3d 350 (Ariz. Ct. App.2005) (“Although S. made his statement [that three men had “jumped him” and had taken his car] in response to [officer’s] questions, the exchange could not have constituted a ‘police interrogation.’ S. did not call the police as a result of the crime that had been committed. Rather, [officer] found S. staggering down a road. When [officer] found S., [he] did not know that a crime had even been committed; [Officer] simply questioned S. about his injuries to obtain medical assistance for him. [Officer’s] questioning was neither structured nor conducted for the purpose of “producing evidence in anticipation of a potential criminal prosecution”); *State v. Barnes*, 854 A.2d 208, 210-12 (Me. 2004) (concluding that statements made by defendant’s mother to police officers when she reported a prior assault by her son were not part of a structured police interrogation and thus not “testimonial” under *Crawford*; noting that police did not seek out the declarant, her statements were made while still under the stress of excitement from the assault, police questions were posed to determine why she was distressed, and declarant was seeking safety and aid, not responding to tactically structured police questioning); *People v.*

Mackey, 5 Misc. 3d 709, 714, 785 N.Y.S.2d 870, 874 (N.Y. Misc. 2004) (assault victim's statements to flagged-down officer not testimonial; "[victim] was crying, her face was red and swollen, her speech was shaky, she seemed nervous, and she had a baby in a stroller who was crying and another child standing beside her. Officer Melenciano asked her what was wrong and she stated that her boyfriend had punched her in the face and pushed her down and then tried to take her children. [Victim] pointed to the left side of her cheek, which was red and swollen, and said that her boyfriend had punched her there"); *State v. Anderson*, 2005 Tenn. Crim. App. LEXIS 62 (Tenn. Crim. App. 2005) (statements made all "at once" by juveniles--that a "large black man with a bald head just kicked in the door of a business across the street" and was "still inside"--to an officer that the juveniles had flagged down were not testimonial; "Because an excited utterance is a reactionary event of the senses made without reflection or deliberation, it cannot be testimonial in that such a statement has not been made in contemplation of its use in a future trial"); *State v. Maclin*, 2005 Tenn. Crim. App. LEXIS 108 (Tenn. Crim. App. 2005)(victim summoned police to her home, fearing for her safety, and she talked to them upon their arrival; "This was not a formal statement or a police interrogation, and the statements made to the police by the victim were not testimonial in nature. Therefore, according to *Crawford*, the test set forth in *Roberts* applies to our determination of whether the victim's testimonial statements were properly admitted").

Some courts have held that excited statements made to law enforcement officers are never testimonial if they are truly excited utterances. *Hammon v. State*, 809 N.E.2d 945, 948, 952 (Ind. Ct. App. 2004) (statements made by victim that defendant had physically attacked her by throwing her down into the glass from a shattered heater and that he punched her twice in the chest were not testimonial; "when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not 'testimonial'"; noting also "that the very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial'"); *State v. Cannaday*, 2005 Ohio 1513 (Ohio Ct. App. 2005) (victim's statement to responding officer--that she got in a fight with her husband over seeing one of her ex-boyfriends and that he hit her in the face--was admissible as an excited utterance; defendant's reliance upon *Crawford* "misplaced"); *Fowler v. State*, 809 N.E.2d

960, 961, 964-965 (Ind. Ct. App. 2004) (officer's questioning of A.R. at the scene of the incident ten minutes after his arrival does not qualify as classic police interrogation under *Crawford*; "the very nature of A.R.'s 'excited utterance' [that Fowler had punched her several times in the face] to [officer] places it outside the realm of 'testimonial' statements"); *Rogers v. State*, 814 N.E.2d 695, 701 (Ind. Ct. App. 2004) (officer's questioning of victim at bar shortly after assault occurred did not qualify as "police interrogation" and victim's statements that defendant approached him in the bar area, threw him on the ground, and caused him to lose consciousness were not "testimonial"); *State v. Forrest*, 596 S.E.2d 22, 27, 164 N.C. App. 272, 280 (N.C. Ct. App. 2004)("[victim's] statements concerning her kidnaping and violent assault were made immediately after her rescue by police with no time for reflection or thought on [victim's] part ... Although [detective] was at the scene specifically to respond to [victim] and later asked some questions, [he] did not question [her] until after she "abruptly started talking"; not a "police interrogation" under *Crawford*"); *State v. Veessenmeyer*, 2005 Minn. App. LEXIS 287 (Minn. Ct. App. 2005) ("a witness who calls 911 and seeks the assistance of police would be less likely to engage in an 'excited utterance' than one, such as [declarant] here, upon whose premises the officers arrived with little or no advance announcement or expectation"; officers had entered house after suspect ran from them and kicked in the front door of house he had been driving away from when officers spotted him); *Commonwealth v. Gray*, 2005 PA Super 22, p.2, p.36 (Pa. Super. Ct. 2005) (young pregnant woman's statement that she had been assaulted, that her mother had just been stabbed upstairs by her mother's boyfriend, and that defendant was still upstairs with her mother were not testimonial; noting that courts uniformly "permit the introduction of excited utterances which are volunteered by the declarant and which are made to obtain the assistance of police"); *People v. Walker*, 2005 Mich. App. LEXIS 788, 8-9 (Mich. Ct. App. 2005) (complainant's statements to police officers and her written statement dictated to her neighbor not testimonial; admissible as excited utterances because there were made while the victim was hysterical in spite of two hour interval between the assault and her escape; dissent would find testimonial because complainant told her neighbor about the alleged assault after securing her neighbor's cooperation in contacting the police, and so intended to "bear testimony against the accused"); *Anderson v. State*, 2005 Alas. App. LEXIS 40 (Alaska Ct. App. 2005) (victim's statement to officer

that “Joe” had hit him with a pipe was not testimonial, though made in response to officer’s on-the-scene question, “What happened?”; “In determining the colloquial definition of interrogation, it seems logical for us to turn to the dictionary. The American Heritage Dictionary of the English Language defines interrogate as ‘to examine by questioning formally or officially.’ The Merriam-Webster Dictionary of Law provides the definition of ‘to question formally and systematically.’ From these definitions, we conclude that [officer] did not interrogate [victim] when she asked him, ‘What happened?’ The questioning does not seem to fall within the category of formal, official, and systematic questioning”).

On the other hand, courts have held that reports to police officers are “testimonial” if made in a context flavored foremost by investigation of crime. *Wall v. State*, 143 S.W.3d 846, 851 (Tex. App. – Corpus Christi 2004, pet. granted) (assault victim’s statement to police officer at hospital during investigation of crime was “testimonial” under *Crawford*); *United States v. Solomon*, 399 F.3d 1231, 1237 (10th Cir. 2005) (statements made by driver during conversation “to determine whether she was involved, how she knew [passenger-defendant], if she was involved with drugs, and to cut her loose if she wasn’t, to get rid of her and her traffic violation so I could deal with [defendant],” were testimonial; officer initiated conversation after he located a firearm and a piece of crack cocaine on defendant; rejecting State’s argument that the statements were offered, not for their truth, but for the limited purpose of explaining why officer searched car); *Lopez v. State*, 888 So.2d 693, 700 (Fla. Dist. Ct. App. 2004) (declarant’s statement [identifying defendant as the person who had the revolver] to officer that had been dispatched investigate a report of a kidnaping and assault was testimonial; “While it is true that Ruiz was nervous and speaking rapidly, he surely must have expected that the statement he made to [officer] might be used in court against the defendant. He knew that [officer] was a policeman who was on the scene in an official capacity to investigate a reported crime. Even in his excitement, Ruiz knew that he was making a formal report of the incident and that his report would be used against the defendant”); *United States v. Nielsen*, 371 F.3d 574, 578, 581 (9th Cir. 2004) (declarant’s statement [that Nielsen had access to the floor safe where the methamphetamine was found]—which was made in response to agent’s questioning during the course of the search—was testimonial); *Moody v. State*, 594 S.E.2d 350, 354, 277 Ga. 676, 678-79 (Ga. 2004) (statement

murder victim Norman made to officer two years before her death, after Moody had fired a sawed-off shotgun into the bedroom she shared with her boyfriend, was testimonial); *Bell v. State*, 278 Ga. 69, 72 (Ga. 2004) (statements that the murder victim had made to police officers during the course of the officers’ investigations of prior complaints made by her against defendant were testimonial); *Brawner v. State*, 602 S.E.2d 612, 613-14, 278 Ga. 316, 317-18 (Ga. 2004) (declarant’s written statement that he had seen defendant shoot the victim several times while the victim lay on the ground saying “Don’t kill me,” which was given to detective several days after the shooting, was testimonial); *People v. Thompson*, 812 N.E.2d 516, 521-22 (Ill. Ct. App. 2004) (declarant’s written statements made in the course of obtaining a protective order are testimonial); *Manuel v. State*, 2005 Fla. App. LEXIS 31, 3-4 (Fla. Dist. Ct. App. 2005) (*Crawford* error to admit the victim’s excited utterance statement to police officer as to how the victim was injured because it was made in response to the officer’s direct questioning); *Gay v. State*, 611 S.E.2d 31, 33 (Ga. 2005) (*Crawford* error to allow agent to testify to statements made by victim’s stepfather at hospital where victim was being treated shortly after murder); *Pitts v. State*, 2005 Ga. App. LEXIS 50, 10-11 (Ga. Ct. App. 2005) (“We hold that the statements the victim made to deputies after they arrived on the scene and arrested Pitts are testimonial since the statements resulted from police questioning during the investigation of a crime. At the time these statements were made, Pitts had already been handcuffed, taken outside, and placed in a patrol car. The victim made statements to government officials which a person would reasonably believe would be available for use at a later trial”); *State v. Grace*, 2005 Haw. App. LEXIS 118, 7-9 (Haw. Ct. App. 2005) (*Crawford* error to allow officer to testify to what declarants had said they saw as excited utterances; the girls’ statements were “testimonial” under *Crawford* because they were statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”); *State v. Byrd*, 2005 Ohio 1902 (Ohio Ct. App. 2005) (officer’s testimony that victim admitted to him that she struck defendant several times and bit his hand before he bit her violated *Crawford*; victim made the statements during an interview by officer after he arrived at the crime scene); *State v. Hill*, 2005 Ohio 1501 (Ohio Ct. App. 2005) (victim’s out-of-court statements that “David” shot her, made to responding officer who interviewed the victims. was testimonial, because it was “made under

circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”).

d. Business records and reports.

Traditional business records—the kind that are kept by the shopkeeper in the ordinary course of business and are not compiled for any law enforcement purposes or for potential litigation—are not testimonial and the Supreme Court in *Crawford* explicitly noted that, at the time of the Bill of Rights, “[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.” 541 U.S. at 56.

The ordinary business record, though it may contain hearsay-within-hearsay (see Part III *infra*), is at the far end of the non-testimonial spectrum. However, business records are also kept by government agencies, law enforcement, and adjuncts of government agencies. Some of these business records—or at least certain entries within those business records—may be testimonial under *Crawford*.

- **not testimonial—autopsy reports.** *Denoso v. State*, 156 S.W.3d 166, 182 (Tex. App.—Corpus Christi 2005, pet. filed) (“Based on our review, the autopsy report in this case does not fall within the categories of testimonial evidence described in *Crawford*. It is not prior testimony at a preliminary hearing, before a grand jury, or at a former trial. . . . It is not a statement given in response to police interrogations”; *Perkins v. State*, 897 So.2d 457, 462-65 (Ala. Crim. App. 2004) (“the hearsay at issue in this case [an autopsy report on the victim] is nontestimonial in nature”).
- **not testimonial—breath test certificate.** *Napier v. State*, 820 N.E.2d 144, 145, 149 (Ind. Ct. App. 2005)(breath test instrument certification documents are not testimonial under *Crawford*; “Even though the inspector of the machine and the Director of Toxicology who executed the certification of inspection did not testify at trial, the information contained in the certificates does not pertain to the issue of guilt. Rather, that information simply goes to inspection and certification matters”); *State v. Cook*, 2005 Ohio 1550, P20 (Ohio Ct. App. 2005) (records relating to the checks done on the breath test machine and the qualifications of the officer performing the test are non-testimonial; “First, they bear no similarities to the types of evidence the Supreme Court labeled as testimonial Second, . . . the records are business records, which, at least according to dicta in *Crawford*, are not testimonial”); *State v. Carter*, 2005 MT 87, p. 38-40 (Mont. 2005) (certification reports are nontestimonial in nature because they are foundational, not substantive or accusatory; “the nontestimonial pieces of evidence at issue here, the weekly and yearly certification reports for the Intoxilizer 5000, do not implicate Carter’s constitutional right of confrontation”).
- **not testimonial—immigration file.** *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005) (“The [immigration file] admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford*. We decline to extend *Crawford* to reach such a document”).
- **not testimonial—foreign marriage records.** *United States v. Tirouda*, 2005 U.S. App. LEXIS 364 (9th Cir. 2005) (not designated for publication).
- **not testimonial—pen packets.** *Frazier v. State*, 2005 Miss. App. LEXIS 158 (Miss. Ct. App. 2005)(self-authenticating pen-packets, otherwise admissible, not barred by *Crawford*; “The record reflects that the statements at issue here - the pen packs - are not in the "core class" of testimonial statements suggested in *Crawford* the “author” of the pen-packs - the custodian of records for the Alabama Department of Corrections - was not a witness against Frazier. No one from the State of Alabama testified that Frazier was a habitual offender. If anything, the certificate on the pen packs indicates that the custodian of records swore that the documents were true and correct copies, not that Frazier actually committed any act”).
- **not testimonial—labels on bottles.** *Burchfield v. State*, 892 So. 2d 191, 202 (Miss. 2004) (admission of label on a box of over-the-counter medicine listing active ingredients not barred by *Crawford*; “the author of the label on the non-prescription, over-the-counter medication at issue here, was not a ‘witness against the accused.’ Thus, the statements on the labels, though hearsay, would nevertheless fall within *Crawford*’s discussion of non-testimonial hearsay”).
- **non-testimonial—proof of service.** *People v. Saffold*, 127 Cal. App. 4th 979, 982-84 (Cal. App. 2005) (rejecting claim that hearsay evidence of

proof of service in domestic relations order violated *Crawford*; “The trial court properly admitted evidence of the proof of service because it is not a testimonial statement within the holding of *Crawford*. ... Here Deputy Allain was not an accuser making a statement to government officers; he did not give testimony against David by serving the restraining order and completing the proof of service. Allain, an employee of the Civil Division of the Sheriff’s Department, served David in the routine performance of his duties”).

Some courts have held that certain types of business records are testimonial under *Crawford*, especially those created with an eye toward use in a criminal proceeding.

- **testimonial–testing initiated by the prosecution.** *People v. Rogers*, 8 A.D.3d 888, 891-892 (N.Y. App. Div. 2004) (where blood test was initiated by the prosecution and generated by the desire to discover evidence against defendant, admission of results without the ability to cross-examine the report’s preparer was a violation of Confrontation Clause).
- **testimonial–affidavit prepared for trial.** *Las Vegas v. Walsh*, 91 P.3d 591, 595-596 (Nev. 2004) (health professional’s affidavit “offered to prove certain facts concerning use of certain devices or withdrawal or holding of evidence related to determining presence of alcohol” can only be admitted if the health care professional is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the health care professional regarding those statements).
- **testimonial–breath test.** *Shiver v. State*, 2005 Fla. App. LEXIS 2931, *6 (Fla. Dist. Ct. App. 2005) (admission of breath test results, over *Crawford* objection, error; “Because Appellant was unable to challenge the accuracy of the instrument by the constitutionally mandated method of cross-examination of the person who performed the maintenance, introduction of the breath test affidavit violated Appellant’s right to confront witnesses”; confrontation of trooper did not cure the Confrontation Clause violation because “[t]he trooper was simply attesting to someone else’s assertion that the breathalyzer had been timely and properly maintained before being used on Appellant”).
- **testimonial–latent print report.** *People v. Hernandez*, 7 Misc. 3d 568 (N.Y. Misc. 2005)

(concluding latent fingerprint report is testimonial in nature, and inadmissible unless officer who discovered prints and wrote report, and who is now retired and living in Ireland, testifies at trial).

D. Opportunity to Cross-Examine.

1. If the prosecution calls the declarant to the witness stand at trial, the Confrontation Clause is satisfied.

In *Crawford*, the Supreme Court observed that “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” *Crawford*, 541 U.S. at 59 n.9. It is the “literal right to ‘confront’ the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause.” *California v. Green*, 399 U.S. 149, 157 (1970). Thus, once the declarant personally appears at the trial, takes the oath, and is subject to cross-examination, his out-of-court statements, if otherwise admissible under the hearsay rule, are not affected by the rule in *Crawford*. *See Crawford v. State*, 139 S.W.3d 462, 464-65 (Tex. App. – Dallas 2004, pet. ref’d) (stating that *Crawford* holding “applies only when the extrajudicial testimonial statements of a witness *who does not testify at trial* are sought to be admitted”; here defendant had the opportunity to cross-examine the testifying complainant about the out-of-court statements made) (emphasis in original)(Substituted opinion, with same language, at *Crawford v. State*, 2004 Tex. App. LEXIS 6472 (Tex. App. Dallas July 21, 2004)); *see also Carter v. State*, 150 S.W.3d 230, 241(Tex. App. – Texarkana 2004, n.p.h.) (“there is no violation of the Confrontation Clause under *Crawford* when a witness actually testifies at trial”); *Mumphrey v. State*, 155 S.W.3d 651, 657 n. 1 (Tex. App.–Texarkana 2005, pet. filed) (“Reedy testified at trial. Therefore, the concerns raised ... *Crawford* ... are not relevant in this case”); *United States v. Wipf*, 397 F.3d 677, 682 (8th Cir. 2005) (“In this case, both J.D. and G.A.S. testified at trial and were available for cross-examination. Wipf has shown no violation of the Confrontation Clause with respect to Dr. Zitzow’s testimony”). Note that in *Wipf*, a psychologist could testify to the children’s out-of-court statements because the children testified and were available for cross-examination concerning those prior statements. Presumably, the defendant knew about the making of those statements at the time the two boys testified.

2. If the State shows that the witness is now unavailable, but defendant had a prior opportunity to cross-examine, the Confrontation Clause is satisfied.

Historically, the Confrontation Clause has “preferred” live testimony under oath at the trial itself. However, if the defendant has had a prior opportunity to cross-examine the out-of-court declarant under oath and the prosecution shows that the witness is presently unavailable—through no fault of the government—then the Confrontation Clause will “permit” that prior opportunity to suffice. It is the State’s obligation to demonstrate that the declarant is “unavailable.” Although the Supreme Court did not explicitly state, in *Crawford*, what it meant by the term “unavailable,” it is a fair assumption that the definition of unavailability set out in FED. R. EVID. 804(a) and TEX. R. EVID. 804(a) would apply.

- **at a preliminary hearing.** *People v. Price*, 120 Cal. App. 4th 224, 239 (Cal. Ct. App. 2004) (no *Crawford* violation because “not only did Steven have the opportunity to cross-examine Jamilah at the preliminary hearing about the statement she gave to Officer Martinez, but he vigorously exercised that opportunity and later presented that preliminary hearing testimony to the jury in support of his defense”); *State v. Crocker*, 852 A.2d 762, 784-87, 83 Conn. App. 615, 650 (Conn. Ct. App. 2004) (concluding that cross-examination—with no restrictions—at probable cause hearing of witness not involved in the attorney’s conflict of interest—was substantively adequate and constitutionally sufficient).
- **at prior trial.** *State v. Clark*, 598 S.E.2d 213, 219, 165 N.C. App. 279, 287-88 (N.C. Ct. App. 2004, rev. denied) (“Moore’s prior testimony [that defendant was robber], which was given at an earlier trial where defendant was present and cross-examined the witness, satisfies the cross-examination requirement under *Crawford*”; conversely, “Although Moore’s affidavit and statements may have corroborated her prior testimony, without a limiting instruction to the jury not to consider the evidence for the truth of the matter asserted, *i.e.*, whether defendant was ... assailant, the admission of this evidence without affording defendant an opportunity to cross-examine Moore is error”);
- **opportunity to depose.** *Blanton v. State*, 880 So. 2d 798, 799-01 (Fla. Dist. Ct. App. 2004, rev. denied) (admission of 11 year-old victim’s statement to a police investigator that the photographs and video depicted her and defendant

did not violate *Crawford*, where appellant’s counsel deposed the child after she gave the statement).

But a limited right of cross-examination does not satisfy the Confrontation Clause. For example, cross-examination of a witness at a motion to suppress hearing concerning an arrest would not be a sufficient opportunity to cross-examine concerning testimonial statements unrelated to the arrest or other matters litigated at the motion hearing. See *People v. Fry*, 92 P.3d 970, 973-81 (Colo. 2004) (because the rights of the defendant are curtailed at preliminary hearings—evidentiary and procedural rules are relaxed, and the rights to cross-examine witnesses and to introduce evidence are limited to the question of probable cause—the Confrontation Clause “precludes the admission of the transcript of a preliminary hearing at a subsequent trial when the witness whose testimony is sought has become unavailable”).

In some instances, a two-way video teleconference might not be a sufficient opportunity to confront and cross-examine the now-unavailable witness. See *United States v. Yates*, 391 F.3d 1182, 1183-1184 (11th Cir. 2004) *rehearing en banc granted*, 2005 U.S. App. LEXIS 5065 (11th Cir. 2005) (in prosecution for offenses in connection with defendants’ involvement in an internet pharmacy, admission of testimony from Australia, by two-way video teleconference, violated defendants’ Sixth Amendment rights under *Crawford*). Similarly, one court has held that the use of a closed circuit television for taking the child complainant’s testimony was not a sufficient opportunity for confrontation and cross-examination to permit the government to introduce her “testimonial” statement to a “forensic interviewer.” *United States v. Bordeaux*, 400 F.3d 548, 554, 557 (8th Cir. 2005) (admission of statement that child made during forensic interview violated confrontation rights under *Crawford* because the child was “legally absent from trial”—“a two-way closed-circuit television is not constitutionally equivalent to a face-to-face confrontation”).

3. Witness has no memory of the testimonial statement.

Even if a witness cannot remember his prior out-of-court statements, and thus cannot be effectively cross-examined upon their accuracy, the Confrontation Clause is nonetheless satisfied if the accused has the opportunity to cross-examine the witness. See *State v. Gorman*, 854 A.2d 1164, 1177-78 (Me. 2004), *cert denied*, 125 S.Ct. 1663 (2005) (rejecting defendant’s contention that witness (his mother) was effectively unavailable because

of her lack of memory of statements she made to grand jury and because she was under influence of psychiatric medications and had a history of delusional thought; concluding that “the Confrontation Clause was satisfied when [defendant] was given the opportunity to examine and cross-examine his mother before the jury regarding what she did and did not recall and the reasons for her failure of recollection”; no Confrontation Clause violation in admission of mother’s grand jury testimony); *Clark v. State*, 808 N.E.2d 1183, 1189-90 n. 2 (Ind. 2004) (no *Crawford* violation where witness—who previously testified that he was at the apartments with defendant and others when defendant got into an argument with victim and told everyone to go inside, and shortly after that, witness heard shots—testified at trial that he did not remember being at the scene and did not recall whether anyone else was there; “*Crawford* ... does not affect this case because [witness] testified at trial”; *Crawford* “does not alter the rule that ‘when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements’”); *Mercer v. United States*, 864 A.2d 110, 114 (2004) (no *Crawford* error to admit the grand jury testimony of a witness who had testified at the previous trial and who appeared as a witness at the second trial, but, because of a head injury and a series of strokes, was unable to recall in any meaningful way the events of the day of the shooting, her testimony before the grand jury, or her testimony in the first trial; nothing in *Crawford* limits *United States v. Owens*, 484 U.S. 554, 563 (1988), where Supreme Court held that a witness’s memory failure does not present Confrontation Clause problem); *State v. Yanez*, 2005 Minn. App. LEXIS 412 (Minn. Ct. App. 2005) (“Here, L.P. appeared at trial and was cross-examined. We conclude that despite her memory lapses, L.P. was available and the admission of her out-of-court statements did not deny Yanez his right to confrontation. Therefore, we need not address whether L.P.’s statements to the witnesses were testimonial.”).

4. Witness “freezes” on the witness stand.

Again, the witness is on the witness stand, subject to confrontation and cross-examination. The fact that the witness cannot testify coherently is exactly the type of confrontation and cross-examination that proves the opponent’s point. See *People v. Sharp*, 825 N.E.2d 706, 710-13 (Ill. App. Ct. 2005) (“Despite J.E.’s apparent unwillingness or inability to testify on direct examination about what defendant did to her in the room, this record demonstrates that J.E. ‘appeared’ for cross-examination

at trial within the meaning of *Crawford*” because she was present for cross-examination and answered defense counsel’s questions).

E. Forfeiture or Waiver of Right to Confront Witness.

1. Forfeiture by wrongdoing.

If the witness cannot appear at trial because the defendant has prevented that witness’s appearance by a wrongful act—murder, bribery, intimidation, etc.—the defendant forfeits his right to insist upon face-to-face confrontation. The State must prove that the witness did not appear because of the defendant’s wrongful act. *Gonzalez v. State*, 155 S.W.3d 603, 610 (Tex. App.—San Antonio 2004, pet. struck) (“we need not resolve whether Maria’s statements to the police were testimonial because Gonzalez forfeited his right of confrontation under the doctrine of forfeiture by wrongdoing. ... In light of this doctrine, we hold that Gonzalez is precluded from objecting to the introduction of Maria’s statements on Confrontation Clause grounds because it was his own criminal conduct (in this case, murder) that rendered Maria unavailable for cross-examination”); *People v. Moore*, 2004 Colo. App. LEXIS 1354 (Colo. Ct. App. 2004) (300-pound defendant who sat on his wife’s chest until she died of asphyxiation forfeited his right to claim a confrontation violation in connection with the admission of her out-of-court statement implicating him in a prior instance of domestic violence); *State v. Meeks*, 277 Kan. 609, 611, 614 (Kan. 2004) (defendant forfeited his right to confront victim about his statement that “Meeks shot me” by killing the victim); *United States v. Johnson*, 354 F. Supp. 2d 939, 966 (D. Iowa 2005) (granting government’s motion to admit out of court statements by deceased victims pursuant either to the “state of mind” exception or the “forfeiture by wrongdoing” exception or both; noting that defendant’s contention that the “forfeiture by wrongdoing” exception cannot “trump” the confrontation clause is plainly contrary to *Crawford*”).

If the government cannot prove the connection between the witness’s failure to appear and the defendant’s wrongdoing, the forfeiture rule does not apply. *United States v. Hendricks*, 2004 U.S. Dist. LEXIS 8854, 4-5 (D.V.I. 2004) (court refused to allow government to introduce statements of confidential agent on a theory of forfeiture by wrongdoing; although agent was murdered after his identity had been revealed to defendants during discovery, the “Government was unable to establish a conclusive link between this matter and the murder”).

At least one court has held that the government must show that the defendant's wrongdoing was for the specific purpose of preventing the witness from testifying at trial. *United States v. Jordan*, 2005 U.S. Dist. LEXIS 3289 (D. Colo. 2005) (although forfeiture by wrongdoing doctrine survives *Crawford*, it does not apply here; doctrine applies to actions whose purpose is to prevent the testimony; here, the only showing of motive or intent is the government's proffer of victim's statement that "It was over drug debts. Jordan owes about two-thousand dollars for drugs"). This may be too narrow a view of the doctrine, as it would automatically exclude all dying declarations under the common law except those in which the defendant's purported motive for the murder was to prevent the witness from testifying against him about some other matter unrelated to the homicide for which the defendant was then on trial.

2. Waiver.

As always, a party waives any potential Confrontation Clause error by failing to object on this specific basis. *Oveal v. State*, 2005 Tex. App. LEXIS 1837 n.2 (Tex. App.—Dallas 2005, n.p.h.) ("Although *Crawford* clarified the law with respect to the Confrontation Clause and the admissibility of out-of-court testimonial statements, the federal constitutional right to confront one's accuser's is neither new nor novel. Accordingly, by failing to object on Confrontation Clause grounds, appellant failed to preserve this issue for review"); *United States v. Rashid*, 383 F.3d 769, 775-776 (8th Cir. 2004) (Although admission of accomplice's testimonial statements—taken by FBI agents in the course of interrogations—violated defendant's Confrontation Clause rights, he failed to preserve this error for appellate review; finding no plain error because accomplice's statements did not expressly or impliedly incriminate defendant and other evidence of his guilt was overwhelming).

A defendant waives any Confrontation Clause objection by using the declarant's statement himself. *State v. Harris*, 871 A.2d 341, 345-46 & n.11 (R.I. 2005) ("Having chosen to use [declarant's] statement in his cross-examination of both [officers], defendant waived any right that he arguably may have had under the Confrontation Clause with respect to that statement").

However, the defendant has no obligation to call the out-of-court declarant even if that declarant is available and thus he does not waive his right to confront the declarant by failing to call that witness. *Bratton v. State*, 156 S.W.3d 689, 694 (Tex. App.—Dallas 2005, n.p.h.) (rejecting State's argument that because defendant chose

not to call Curl or Ward, he cannot complain he was denied his right to confront them; "we find nothing in *Crawford* or elsewhere suggesting that a defendant waives his right to confront a witness whose testimonial statement was admitted into evidence by failing to call him as a witness at trial. . . . In fact, as the party seeking to admit Curl's and Ward's statements, it was the State's burden to show their statements were admissible, that is, that Curl and Ward were unavailable and that Bratton had been afforded a prior opportunity to cross-examine them"); *State v. Cox*, 876 So. 2d 932, 938-39 (La. Ct. App. 2004) (rejecting State's contention that defendant waived his right to object to the introduction of the Sykes statement because the court had offered him the right to subpoena Sykes as a witness; "This begs the issue. Calling Sykes as a witness, in and of itself, would hardly render the statement admissible. Defendant should not be required to call Mrs. Sykes as a witness simply to facilitate the State's introduction of evidence against the Defendant. Moreover, there could be a whole host of reasons why Defendant would not want to call Mrs. Sykes as a witness. Simply stated, if the State needed to have Mrs. Sykes' testimony to enable the State to introduce the statement into evidence, the State could have called Mrs. Sykes as a witness").

The right to confront the person who has made an out-of-court statement is not waived by stipulating to that witness's incompetence or unavailability. *People ex rel. R.A.S.*, 2004 Colo. App. LEXIS 1032 (Colo. Ct. App. 2004) ("The People argue that the juvenile waived his confrontation claim by stipulating that the victim was incompetent to testify as a witness. We do not agree. The stipulation merely established the unavailability of the witness; it was consistent with that stipulation for the juvenile to assert, as he did in the trial court, that the hearsay statement otherwise violated his right of confrontation").

F. Proceedings In Which *Crawford* Applies.

1. Proof of guilt in a criminal trial.

The Confrontation Clause applies, most literally, at the guilt phase of a criminal trial. It does not literally apply to the sentencing phase in federal criminal proceedings. *United States v. Leatch*, 111 Fed. Appx. 770 (5th Cir. 2004) ("Nothing in *Crawford* indicates that its holding is applicable to sentencing proceedings"); *United States v. Gray*, 362 F. Supp. 714, 724-25 (D. Va. 2005) (*Crawford* does not apply at sentencing in the post-*Booker* sentencing regime—under which constitutional procedural protections at sentencing are weakened; nevertheless, strongly encouraging the use of

witness testimony and cross-examination to resolve factual disputes at sentencing).

2. Not probation or parole revocation proceedings.

Several courts have held that the *Crawford* rule does not apply to probation revocation proceedings because those are not “criminal proceedings” to which the Sixth Amendment applies. *Smart v. State*, 153 S.W.3d 118, 121 (Tex. App.—Beaumont 2004, pet. ref’d) (“Nothing in *Crawford* suggests that the Confrontation Clause, which applies to criminal trials, alters the standard set forth in *Morrissey* for the admissibility of evidence in a revocation proceeding”); *United States v. Barraza*, 318 F. Supp.2d 1031, 1035 (S.D. Cal. 2004) (concluding that *Crawford* does not apply to supervised release revocation proceeding); *People v. Johnson*, 121 Cal. App. 4th 1409, 1411, 18 Cal. Rptr.3d 230, 232 (2004, rev. denied). Instead, a probationer’s limited right to confront witnesses at a revocation hearing stems from the Due Process Clause of the Fourteenth Amendment. *Johnson*, 121 Cal. App. 4th at 1411, 18 Cal. Rptr.3d at 232 (citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973)). In *Johnson*, the court upheld the admission (at a probation revocation proceeding) of a laboratory report analyzing rock cocaine as “routine documentary evidence.” *Id.* 121 Cal. App. 4th at 1413, 18 Cal. Rptr.3d at 233. The court reasoned that “the witness’s demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material. ... Unlike the confrontation clause, due process demands that evidence be reliable in substance not that its reliability be evaluated in ‘a particular manner.’” *Id.* See also *Commonwealth v. Given*, 808 N.E.2d 788, 794 n.9 (Mass. 2004) (stating “that the focus on reliability may not accommodate a simple, predictable, bright-line rule does not alter the fact that reliability, not cross-examination, is the ‘due process touchstone’”); *United States v. Martin*, 382 F.3d 840 (8th Cir. 2004) (holding that the Sixth Amendment right to confrontation did not exist in parole revocation hearings); *United States v. Taveras*, 380 F.3d 532 (1st Cir. 2004); *United States v. Aspinall* 389 F.3d 332 (2nd Cir. 2004) (*Crawford* does not apply to parole revocation hearings because by its text, the Sixth Amendment is limited to “criminal prosecutions” *United States v. Barraza*, 318 F. Supp.2d 1031, 1035 (S.D. Cal. 2004) (“the conditional right to confrontation in a revocation proceeding recognized by *Morrissey* and *Scarpelli* is a due process,

not a Sixth Amendment, right. Because *Crawford* is a Sixth Amendment Confrontation Clause case, it is clear that *Crawford* is not controlling authority regarding the right to confrontation in a revocation proceeding”); *State v. Michael*, 891 So. 2d 109, 115 (La. Ct. App. 2005) (permissible, in revocation proceeding, to consider victim’s hospital statement that defendant stabbed her); *People v. Brown*, 2005 NY Slip Op 50146U (N.Y. Misc. 2005) (“a violation of probation is not a criminal prosecution,” therefore county’s public safety lab report admissible).

Not all courts agree. *United States v. Jarvis*, 94 Fed. Appx. 501, 502 (9th Cir. 2004) (“Due process mandates that at revocation proceedings, the releasee must be afforded the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation; Jarvis’s confrontation rights under *Crawford* violated where the only evidence of supervised release violations was a hearsay statement, a police report, not admitted into evidence); *Ash v. Reilly*, 354 F. Supp. 2d 1, 7, 10 (D.D.C. 2004) (“this Court holds that a criminal defendant in a parole revocation hearing is entitled to confrontation and that the contours of that right are dictated by the Supreme Court’s recent formulation in *Crawford*”; holding that because Ash’s parole was revoked solely based on the hearsay testimony of a police officer and a police report, which was also based exclusively on hearsay evidence, Ash’s constitutional due process right to confrontation of adverse witnesses was violated).

3. Civil commitment or termination of rights proceedings.

A few courts have held that *Crawford* does not apply in proceedings for the civil commitment of sex offenders. *In re Commitment of G.G.N.*, 372 N.J. Super. 42, 57, 855 A.2d 569, 579 (2004) (“We have found no case in any jurisdiction that has extended *Crawford* to a civil commitment proceeding where the burden of proof is less than beyond a reasonable doubt”); *Commonwealth v. Given*, 441 Mass. 741, 741-742, 747 (Mass. 2004) (*Crawford* does not change rule that in commitment trial of a person accused of being sexually dangerous, the Commonwealth is entitled to introduce in evidence police reports relating to that person’s prior sexual offenses; “The *Crawford* case has no direct bearing on this case, because, as we have made clear, the confrontation clause does not apply to civil commitment proceedings”).

4. Other proceedings.

Some courts have held that the rule in *Crawford* does not apply to state sentencing proceedings. *People v. Vensor*, 2005 Colo. App. LEXIS 106 (Colo. Ct. App. 2005) (“*Crawford* involves the constitutional right to confront witnesses at trial, not at sentencing. The heightened due process standards required at trial do not apply at sentencing”; *Crawford* does not affect admission of testimony concerning other families whose children claimed to have been molested by defendant).

Crawford does not apply to suppression hearings where the issue is not guilt or innocence, but the manner in which evidence was obtained. *State v. Massie*, 2005 Ohio 1678 (Ohio Ct. App. 2005) (rejecting argument that there is *Crawford* problem with two hearsay reports—the first from an unidentified informant to the dispatcher and the second from the dispatcher to the troopers—admitted at the suppression hearing; holding *Crawford* applies to situations occurring at trial and does not affect the rule in *United States v. Raddatz*, 447 U.S. 667, 679 (1980) that a court may consider hearsay testimony at a suppression hearing).

G. Retroactivity

1. The rule applies to cases on direct appeal

Assuming that the issue was preserved, the reasoning and result in *Crawford* applies to all cases that were in trial or on direct appeal at the time the *Crawford* decision was announced. *United States v. Avants*, 367 F.3d 433, 445 (5th Cir. 2004) (applying *Crawford* test in appeal from a 2003 conviction for a 1966, racially motivated murder, even though *Crawford* was delivered after oral argument for the appeal; holding no violation to admit 1966 preliminary hearing testimony because “[t]he qualities that made Jones’s testimony admissible under 804(b)(1) make it meet *Crawford*’s Confrontation Clause test: unavailability and prior opportunity for cross-examination”); *State v. Cox*, 876 So. 2d 932, 938 (La. Ct. App. 2004) (following other cases holding *Crawford*’s analysis applicable even though Supreme Court’s decision was rendered after case was tried and decided: “Even though the decision in *Crawford* is very recent, other courts have already considered its application to cases which had been tried before *Crawford* was decided”); *State v. Herrmann*, 679 N.W.2d 503, 2004 SD 53 (S.D. 2004); *State v. Pullen*, 594 S.E.2d 248 (N.C.App. 2004); *Cooper v. McGrath*, 314 F. Supp. 2d 967, 2004 U.S. Dist. LEXIS 6620 (N.D.Cal. 2004) *Moody v. State*, 277 Ga. 676, 594 S.E.2d 350 (Ga. 2004); *People v. Ryan*, 790 N.Y.S.2d 723 n. 1 (N.Y. App. Div. 2005) (“Although *Crawford*

was decided during the pendency of the instant appeal, we conclude that, to the extent that *Crawford* enunciated ‘a new rule for the conduct of criminal prosecutions,’ it applies ‘retroactively to all cases, state or federal, pending on direct review or not yet final’”); *United States v. Solomon*, 399 F.3d 1231, 1237 n. 2 (10th Cir. 2005) (“*Crawford* applies to our analysis because Solomon’s case is on direct review”); *but see Bynum v. State*, 2005 Miss. App. LEXIS 267, P23 (Miss. Ct. App. 2005) (“Based on the benign character of the co-defendant’s statement in this case, and the assuredly disruptive impact that the retroactive application of *Crawford* would undoubtedly create in the form of innumerable appeals, we conclude that *Crawford* should not be applied retroactively in this appeal”).

2. Not retroactive on collateral review.

For cases which became final before *Crawford*, the general rule has been that *Crawford* does not apply retroactively to writs of habeas corpus regardless of whether the writs were filed before or after *Crawford*. *Wheeler v. Dretke*, 2004 U.S. Dist. LEXIS 12809 (D. Tex. 2004) (“*Crawford* does not change the resolution of this case. First, the Supreme Court did not suggest that its holding would apply retroactively. ... Also, the *Crawford* holding does not appear to fall within either of the two exceptions to that non-retroactivity doctrine. ... Furthermore, even if a confrontation clause violation is found, a petitioner is not entitled to habeas relief unless he proves that the error ‘had a substantial and injurious effect or influence in determining the jury’s verdict.’ ... The particular test is whether the petitioner ‘has successfully established ... grave doubt as to whether the assumed wrongfully admitted hearsay testimony influenced the conviction.’”); *Murillo v. Frank*, 402 F.3d 786, 789-90 (7th Cir. 2005) (agreeing that although *Crawford* changed the law, it was an ordinary development in criminal procedure that, like almost all other such changes, applies prospectively); *Mungo v. Duncan*, 393 F.3d 327, 336 (2d Cir. 2004) (“In short, the advent of the *Crawford* rule brings about substantial changes in the protection given by the Confrontation Clause to an accused from receipt of uncross-examined statements. In some instances those changes will likely improve the accuracy of the factfinding process; in others they will likely impair the accuracy of the factfinding process. Because *Teague*’s test of a watershed rule requires improvement in the accuracy of the trial process overall, we conclude that *Crawford* is not a watershed rule. We thus conclude that *Crawford*

should not be applied retroactively on collateral review”); *Evans v. Luebbbers*, 371 F.3d 438, 444-45 (8th Cir. 2004) (“We doubt *Crawford*'s application to the case at hand for at least two reasons. First, the *Crawford* Court did not suggest that this doctrine would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions to *Teague v. Lane*'s non-retroactivity doctrine”); *Ferguson v. Roper*, 400 F.3d 635, 639 n.3 (8th Cir. 2005) (noting, without deciding, that *Crawford* does not appear to fall within the narrow exceptions to non-retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989)); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005) (“*Teague* ... prohibits Dorchy from availing himself of the new rule articulated in *Crawford*. The question before us is therefore whether the analysis by the Michigan Court of Appeals was contrary to, or involved an unreasonable application of *Roberts*.”); *Brown v. Uphoff*, 381 F.3d 1219, 1224-27 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 940 (2005) (“*Roberts* and its progeny did not dictate the result in *Crawford* and we conclude that it announces a new rule of constitutional law,” but *Crawford* did not set forth a “watershed rule” of criminal procedure: “It is true that in *Crawford* the Court referred to the protections of the Confrontation Clause as a ‘bedrock procedural guarantee,’ *Crawford* does not ‘alter[] our understanding of what constitutes basic due process,’ ... but merely sets out new standards for the admission of certain kinds of hearsay. Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial It would, therefore, be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process”); *Juarez v. Nelson*, 2005 U.S. App. LEXIS 5135 (10th Cir. 2005) (stating that it must apply the Supreme Court law existing at the time the state court reached its decision when analyzing the right to federal habeas relief; “we may not consider *Crawford* under the standard of review we must follow in § 2254(d)”); *Bintz v. Bertrand*, 2005 U.S. App. LEXIS 5612 (7th Cir. 2005) (*Crawford* does not rise to the level of a watershed rule; “[w]hile important, it does not introduce any fundamentally new concepts to address the fairness or accuracy of a trial; instead it calls for a complete implementation of a protection that already exists -- the Confrontation Clause. Further, it is unclear that *Crawford*'s modification to the hearsay rules will markedly improve the accuracy of convictions.... *Crawford* is not a guarantee of accuracy, but an extension of the full constitutional protections of the Sixth Amendment. While the two concepts overlap, they are

not synonymous. *Crawford*, therefore, is not a watershed change for purposes of the second Teague exception and does not apply retroactively”).

A few federal courts have gone the other way and held that *Crawford* does apply retroactively to collateral proceedings. *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005). The three judges in *Bockting* each wrote separate opinions. Judge Noonan concluded that *Crawford* applies on collateral review because it did not change the law. Judge McKeown concluded that *Crawford* did change the law, and changed it so dramatically that it established a “watershed rule” that applies retroactively. Judge Wallace agreed with Judge McKeown that *Crawford* changed the law but disagreed with her understanding of *Crawford*'s fundamentality. He saw it as an ordinary development in criminal procedure that like almost all other such changes applies prospectively.

3. State cases discussing retroactivity.

Most state cases have followed the majority of federal cases and held that *Crawford* should not apply retroactively to state habeas corpus proceedings. *People v. Vasquez*, 2005 NY Slip Op 25065, 25 (N.Y. Misc. 2005) (“*Crawford* announced a new procedural rule that does not apply retroactively to cases already final on direct review”); *People v. Edwards*, 101 P.3d 1118, 1124 (Colo. Ct. App. 2004, *cert. granted*) (*Crawford* does not establish a watershed rule under the second *Teague* exception. Therefore, it does not apply retroactively to cases on collateral review where, as here, the defendant's conviction became final before *Crawford* was announced”) *People v. Soto*, 2005 WL 1134862 (N.Y. Misc. 2004) (“*Crawford* is not applicable on collateral review”).

Again, some courts have gone the other way, although generally in unpublished opinions. *People v. Watson*, 2004 NY Slip Op 51364U, 10 (N.Y. Misc. 2004) (“this court finds that it should, and it must, apply the Supreme Court's decision in *Crawford v. Washington* retroactively to defendant's case”; nevertheless denying post-conviction relief)(not designated for publication); *People v. Encarnacion*, 2005 NY Slip Op 50203U, 8, 13-14 (N.Y. Misc. 2005) (“this Court concludes that *Crawford* significantly improves the accuracy of the trial process and that a *Crawford* violation seriously diminishes the risk that an innocent person will be convicted. In every case with a *Crawford* violation, presumptively unreliable hearsay will have been admitted as direct evidence of guilt and considered by the fact-finder. Indeed, most of those cases inevitably will have involved hearsay that was

admitted based upon nothing more than a judicial determination of reliability . . . In any event, regardless of how the evidence was admitted under Roberts, the introduction of presumptively unreliable hearsay into a trial creates a significant risk that an innocent person will be found guilty. Accordingly, *Crawford* is central to an accurate determination of guilt or innocence and, thus, applies retroactively on post-judgment review.’; “When this Court conducted defendant’s trial eight years ago, the two declarations against penal interest were admitted into evidence in compliance with the then existing law and properly considered by the jury that found her guilty. Seven years after the jury returned that verdict, the Supreme Court altered the constitutional rule governing the admissibility of those statements, and the law requires that the new rule be applied retroactively to defendant’s case on post-judgment review. Unlike in other cases that have ruled *Crawford* applies retroactively on post-judgment review, in this case, the erroneously admitted evidence potentially affected the outcome of the trial. Under these circumstances, defendant is entitled to have another jury decide her guilt on the charge of felony murder in the second degree’”(not designated for publication); *People v. Dobbin*, 2004 NY Slip Op 24534, 9 (N.Y. Misc. 2004) (treating *Crawford* as a “bedrock” rule; “the *Crawford* rule must be applied retroactively on collateral review to the non-testifying 911 witness’ testimonial statement”).

H. Harmless error

Out-of-court statements admitted in violation of the Confrontation Clause as explained in *Crawford* are nonetheless subject to a harmless error analysis under *Chapman v. California*. 386 U.S. 18, 24 (1967); see *Ray v. State*, ___ S.W.3d ___, ___ 2004 Tex. App. LEXIS 11696 (Tex. App. – Houston [1st Dist.] 2004, n.p.h.)(finding that the error under *Crawford* in admitting codefendant Vargas’s statement, which constituted direct proof that Vargas hit the victim with a “piece of metal,” harmless because the statement was cumulative of appellant’s own trial testimony); *Gutierrez v. State*, 150 S.W.3d 827, 831-832 (Tex. App. – Houston [14th Dist.] 2004, n.p.h.) (admission of accomplice’s videotaped statement to police was error under *Crawford*, but harmless in light of appellant’s videotaped confession admitting his participation in the drug-stealing scheme, the testimony of investigating officers who observed the drug transaction between appellant and accomplice, a tape recorded conversation in which appellant agreed to sell stolen drugs to accomplice, the audiotape of the drug transaction, and the stolen drugs that were confiscated from appellant’s car); *Hale v. State*, 139 S.W.3d 418,

421-22 (Tex. App.– Fort Worth 2004, n.p.h.) (admission of codefendant’s written statement made to police during custodial interrogation violated defendant’s Confrontation Clause rights and, because defendant entered guilty pleas after the trial court denied his pretrial motions to exclude codefendant’s testimonial statement, error not harmless). Other cases finding *Crawford* error harmless under *Chapman* analysis include: *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004) ; *United States v. McClain*, 377 F.3d 219 (2nd Cir. 2004); *United States v. Rashid*, 383 F.3d 769 (8th Cir. 2004); *Stancil v. United States*, 866 A.2d 799, 802 (D.C. Cir. 2005); *People v. Song*, 124 Cal. App. 4th 973, 22 Cal.Rptr. 3d 118 (Cal. App. 2004); *People v. Edwards*, 101 P.3d 1118 (Colo. App. 2004); *Bell v. State*, 278 Ga. 69, 597 S.E.2d 350 (Ga. 2004); *People v. Patterson*, 347 Ill. App. 3d 1044, 808 N.E.2d 1159, 283 Ill. Dec. 871 (2004) *Hammon v. State*, 809 N.E.2d 945 (Ind. App. 2004) and *State v. Wright*, 686 N.W.2d 295 (Minn. App. 2004).

III. A FUNCTIONAL APPROACH TO THE ADMISSION AND EXCLUSION OF BUSINESS RECORDS.

A. Step One: Was the record compiled by a “law enforcement officer?”

1. If YES, go to Step Two and consult Rule 803(8)(B) (public record). If the document is not admissible under 803(8)(B), it cannot be admitted as a business record under 803(6) (at least unless the report writer testifies).

The business records exception cannot be used as a “back door” to introduce evidence that is inadmissible under Rule 803(8)(B). See Cole v. State, 839 S.W.2d 798, 806 (Tex. Crim. App. 1990); Air Land Forwarders, Inc. v. United States, 172 F.3d 1338, 1345 (Fed. Cir. 1999); United States v. Brown, 9 F.3d 907, 911 (11th Cir. 1993); United States v. Blackburn, 992 F.2d 666, 671 (7th Cir. 1993) (“If a document prohibited under Rule 803 (B) or (C) can come into evidence under Rule 803(6), then the 803(8) restrictions are rendered nugatory.”)

2. If NO, but it was compiled by a public official or entity, go to Step Three. It may be admitted/excluded under Rule 803(8) as a public record *or* as a routine business record under Rule 803(6). You may take your pick.

3. If NO, and it was kept by any person or entity other than a public officer or agency, go to Step Four. It must be admitted/excluded under Rule 803(6) as a business record.

B. Step Two: If the record was compiled by a “law enforcement officer,” what was his role at the time he compiled the record?

1. Was he in the business of detecting a possible crime? Investigating a possible crime? Apprehending a suspect? Compiling evidence to support criminal charges? Subjectively evaluating evidence collected?

Rule 803(8)(B) does not allow the admission of law enforcement reports that consist of “subjective observations, summaries, opinions and conclusions.” United States v. Orellana-Blanco, 294 F.3d 1143, 1150 (9th Cir. 2002).

1. If YES, the document is inadmissible under Rule 803(8)(B) if it records “matters observed by police officers or other law enforcement personnel.”
2. Was he in the business of recording routine, objective, factual, ministerial information unrelated to crime fighting, crime investigation, evidence collection, evidence evaluation, or any specific litigation?
3. If the document is a routine, factual report, go to Step Three.

Examples of routine, objective, factual, ministerial law enforcement reports:

- *U.S. Marshall's return of service, United States v. Trabajadores, 576 F.2d 388 (1st Cir. 1978);*
- *INS warrant of deportation, United States v. Quezada, 754 F.2d 1190 (5th Cir. 1985);*
- *pen packet, United States v. Vidaure, 861 F.2d 1337 (5th Cir. 1988);*
- *an INS immigration application, United States v. Dominguez, 835 F.2d 694 (7th Cir. 1987);*
- *a computer record of cars reported stolen, United States v. Enterline, 894 F.2d 287 (8th Cir. 1990);*
- *note on a fingerprint card as to where the print was lifted, United States v. Gilbert, 774 F.2d 962 (9th Cir. 1985);*

- *computer records listing the license plates on cars crossing the border, United States v. Orozco, 590 F.2d 789, 793-94 (9th Cir. 1979);*
- *a deportation warrant, United States v. Hernandez-Rojas, 617 F.2d 533 (9th Cir. 1980);*
- *Graph made from a DEA statistical report purportedly showing the average retail price and purity of illicit cocaine in the U.S., United States v. Hardin, 710 F.2d 1231, 1237 (7th Cir. 1983);*
- *Blood alcohol report compiled by personnel of the state's [New Mexico] Department of Health, State v. Dedman, 102 P.3d 628, 634-37 (N.M. 2004) (lengthy, post-Crawford, discussion of Confrontation & Rules 803(8)(B); these reports are non-testimonial and admissible).*

Examples of reports that are NOT routine, objective, factual ministerial reports:

- *DPS lab reports of chemical analysis of controlled substance, Cole v. State, 839 S.W.2d 798 (Tex. Crim. App.1990);*
- *letters and reports in parole officer's file regarding defendant and prepared with a view toward revoking parole, Porter v. State, 578 S.W.2d 742, 746-47 (Tex. Crim. App. 1979);*
- *evidence envelope summarizing State's case against defendant, Battee v. State, 543 S.W.2d 91, 92 (Tex. Crim. App. 1976) (op. on reh'g);*

At the fringe examples:

- *An INS report of an interview with a legal alien which was made to determine whether to issue him a green card; the report was signed by the alien but he did not speak much English; report was later admitted into evidence in prosecution for making false statement on an immigration document (i.e., statements made during that interview). The Ninth Circuit held that this was an adversarial, non-routine, litigation-oriented report, inadmissible under rule 803(8)(B) and therefore inadmissible under 803(6). U.S. v. Orellana-Blanco, 294 F.3d 1143 (9th Cir. 2002);*
- *Jail records which included “a medical screening evaluation, a classification profile, a receiving form,” and various inmate disciplinary reports. Kennedy v. State, ___ S.W.3d ___ 2005 Tex. App. LEXIS 897 * 10-12 (Tex. App. – Fort Worth 2005). The majority held that all of the materials “recorded*

routine, objective observations, made as part of the everyday function of classifying, housing, and managing inmates.” The dissent argued that disciplinary reports, which included allegations of crimes and acts of misconduct, were “reports of crimes and acts of misconduct reported to or observed by law enforcement personnel. They also reflect law enforcement personnel’s rulings regarding culpability and the punishment imposed by law enforcement personnel. ... The purpose of the disciplinary reports was to take disciplinary action against Appellant in an adversarial proceeding.”

Query: Is the specific document (or portion of the document) more like a booking sheet or more like an offense report?

See also, *United States v. Tuck Chong*, 98 F. Supp. 2d 1110, 1125 (D. Haw. 1999) (admitting prison disciplinary reports under 803(6) as long as the report is “based upon the reporting officer’s personal observations”).

2. Rationale for the distinction between “adversarial, crime-fighting, evidence-gathering” reports and routine, objective, non-litigation reports:

“In the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter (here, appellant’s departure from the country), such records are, like other public documents, inherently reliable.” *Cole v. State*, 839 S.W.2d 798, 804 (Tex. Crim. App. 1980) (citing *Smith v. Ithaca*, 612 F.2d 215, 222 (5th Cir. 1980)).

3. Rule 803(8)(B) applies not only to law enforcement reports offered by the State, but it might also apply when offered by the defendant in a criminal case. See *United States v. Insaugarat*, 378 F.3d 456, 465 (5th Cir. 2004) (“The plain language of the rule does not distinguish between a defendant’s and a

prosecutor’s use of a police report”); compare 5 Weinstein’s Federal Evid. § 803.10(5) at 803-102 (2003) (most courts have concluded that 803(8)(B) only applies against the prosecution not against defendant).

- C. **Step Three– If the public officer or agency report records information other than the “observations of police officers or other law enforcement personnel,” then the document may be admissible under either 803(8) or 803(6).**

Most governmental recordkeeping meets the test for admission under Rule 803(8), except for those excluded under 803(8)(B).

1. Rationales for the exception:
 - a. public records are inherently reliable because public officials are presumed to perform their duties in accordance with the law;
 - b. public officers lack a motive to make or keep false records;
 - c. public inspection of these records will ensure that any inaccuracies will be noticed and corrected;
 - d. government offices would be unable to perform their duties adequately if they were frequently required to appear in court and testify to the information contained within those records.

See *Perry v. State*, 957 S.W.2d 894, 897 (Tex. App. – Texarkana 1997, pet. ref’d).

2. Types of records covered by Rule 803(8):
 - a. Records setting forth the activities of the office or agency:
Examples:

Police agency handbooks
U.S. Department of Justice statistical reports on its activities
Licenses issued (or revoked)
Booking forms
Driver’s Licenses, suspensions
 - b. Factual reports required by law (mechanical factual records)
Examples:

Police agency reports on race of detainees;
U.S. Dept. of Justice statistical reports on crime
Individual pen packet materials
Building inspector statistical reports

Public hospital statistical reports

- c. Records resulting from authorized investigations (may be subjective, conclusory, and may contain statements by outsiders to the agency)

Examples:

Medical Examiner Reports– See *Denoso v. State*, 156 S.W.3d 166, 181-82 (Tex. App. – Corpus Christi 2005, n.p.h.) (Forensic pathologist was not “other law enforcement personnel”; report non-testimonial under *Crawford*);

Child Protective Services Reports

Lab reports by non-law enforcement state agency– see *Caw v. State*, 851 S.W.2d 322, 324 (Tex. App. – El Paso 1993, pet. ref’d);

The Warren Report;

The 9/11 Commission Report

3. What are the distinctions between public records offered under Rule 803(8) and business records offered under 803(6)?

Public records admissible under Rule 803(8) do not need to be:

Regularly made

Made at or near the time of the event recorded

These records may include information from outsiders to the public agency (e.g. information supplied by drivers filling out a driver’s license application; information supplied by parents or neighbors in a CPS report)

- However, hearsay statements contained within a public record or report are not automatically admissible merely because they happen to be included within the public report. See *Kratz v. Exxon*, 890 S.W.2d 899, 905-06 (Tex. App. – El Paso 1994, no writ); *Levelland ISD v. Contreras*, 865 S.W.2d 474, 476 (Tex. App. – Amarillo 1993, writ denied).

D. Step Four– Is the document admissible under Rule 803(6)?

1. Overview of the foundation requirements:

- (1) regularly made and kept in course of a regularly conducted business;
- (2) source of information is one who has a business duty to report and has personal knowledge of the events;

- (3) record was made close in time to the event recorded;
- (4) record is sponsored by custodian or other qualified witness.

1. Documents made “in the regular course of business”

“Business”

Includes persons or entities that keep records in a business-like manner. Expense account records routinely kept would qualify, but personal shopping lists, diaries, and personal bank accounting records do not.

Examples of “business-like” records:

drug supplier’s ledger of drug sales, *United States v. Foster*, 711 F.2d 871, 882 (9th Cir. 1983);

personal diary regularly recording tip income, *Keogh v. C.I.R.*, 713 F.2d 496, 499-500 (9th Cir. 1983);

personal diary regularly recording contractor’s bribes paid, *United States v. Hedman*, 630 F.2d 1184, 1197 (7th Cir. 1980);

individual’s inventory of firearms he owned, *United States v. Huber*, 772 F.2d 585, 590-91 & n.4 (9th Cir. 1985);

- Sunday School Bible class attendance records, *Leach v. State*, 80 Tex. Crim. 376, 379-80, 189 S.W. 733, 734-35 (1916);

2. It must be part of the business purpose to make this record.

If the record was made for litigation or personal purposes, it is not made as part of the business purpose.

Examples:

Inter-office memo in accounting firm’s files was not made as part of the regular business routine, *United States v. Freidin*, 849 F.2d 716, 720 (2d Cir. 1988);

Report by lens crafter at FBI’s request and made with knowledge that it would be used in criminal investigation not made as part of regular business practice, *United States v. Blackburn*, 992 F.2d 666, 670 (7th Cir. 1993); Faxed letter from South African business concerning origin of particular pump not made

as part of regular business practice because made in response to prosecutor's request, *Hardy v. State*, 71 S.W.3d 535, 537 (Tex. App. – Amarillo 2002, no pet.); doctor's letter to prosecutor summarizing treatment given child abuse victim was written in anticipation of litigation, not part of routine medical services, *Sessums v. State*, 129 S.W.3d 242, 249 (Tex. App. – Texarkana 2004, pet. ref'd).

Seminal case: The business of a railroad is the transportation of people and goods, not the making of accident reports. *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943).

3. Made by someone with a business duty to report and personal knowledge of the events.

- personal knowledge– the recorder of the information must be the source of the information. He cannot be recording what another person told him.
- business duty– does the person who supplies the information have a “business duty” to report? “Volunteers” or outsiders to the business normally cannot supply the information. The proponent must demonstrate that ALL sources of information and conclusions within the report show that each participant in producing the record was acting in the course of a regularly conducted business OR the proponent can satisfy some other hearsay exception concerning that source. *Muzzelman v. National Rail Passenger Corp.*, 839 F.Supp. 1094, 1098-99 (D. Del. 1993).

Examples:

- Tapes of 911 calls to police not admissible even though they are kept as a regular record by police because officer receiving call had no personal knowledge of event, *Stapleton v. State*, 868 S.W.2d 781, 784 (Tex. Crim. App. 1993); *United States v. Pazzint*, 703 F.2d 420, 424 (9th Cir. 1983) (but hearsay declarant's statement might independently qualify as excited utterance); Statements in police report by third parties under no business duty to report are inadmissible, *United States v. Snyder*, 787 F.2d 1429, 1433-34 (10th Cir. 1986); Account by eyewitness to accident contained in accident report not admissible because bystander

had no business duty to report accurately to police officer, *Logan v. Grady*, 482 S.W.2d 313, 317 (Tex. Civ. App. – Fort Worth 1972, no writ); Statements made by a patient in relating his medical history were not made by someone with a business duty to be accurate, *Cook v. Hoppin*, 783 F.2d 684, 689-90 (7th Cir. 1986) (these statements might be admissible if they meet the requirements of 803(4), statements for purposes of medical diagnosis).

Exception:

“If the business entity has adequate verification or other assurances of accuracy of the information provided by the outside person, [Rule 803(6)] may still apply.” *United States v. McIntyre*, 997 F.2d 687, 700 (10th Cir. 1993).

Examples:

Prison record custodian's testimony that every visitor was required to produce identification and officer was required to verify that identification was sufficient to show logbook was kept under a duty of accuracy, *United States v. Reyes*, 157 F.3d 949, 953 (2d Cir. 1998); Motel guest registration cards admissible because the information supplied by guests was required to be verified by desk clerk, *United States v. McIntyre*, 997 F.2d 687, 700 (10th Cir. 1993); *United States v. Pearson*, 508 F.2d 595, 597 (5th Cir. 1975); Pawn shop receipt admissible because employee testified that he personally took items from defendant, verified his identity and also verified serial numbers on VCR & TV, *Kuczaj v. State*, 848 S.W.2d 284, 288-89 (Tex. App. – Fort Worth 1993, no pet.).

Exception:

If the recording business incorporates the business records of a second business into its own records and routinely relies upon them, [Rule 803(6)] may apply.

“certificate of origin” supplied by General Motors to local car dealer and offered as car dealer's business record admissible because both GM and local car dealer routinely rely on these documents to prove

the VIN number of their cars, *Harris v. State*, 846 S.W.2d 960, 963 (Tex. App. – Houston [1st Dist.] 1993, pet. ref'd); *United States v. Childs*, 5 F.3d 1328, 1334 (9th Cir. 1993);

Letters from third-party insurer concerning cost of settling claims on company A's equipment were incorporated into business records of company A and relied upon in its business dealings, *Bell v. State*, 2004 Tex. App. LEXIS 5936 at * 4-9 (Tex. App. – Houston [1st dist.] 2004, pet. ref'd).

4. Was record made at or near time of events recorded?

There is no litmus test for how timely is timely, but the question is whether the business routinely makes these records at this time as part of its regular business. If the record was made after litigation has begun or in anticipation of litigation, it normally is not timely.

Example-- untimely:

accident report made after lawsuit was initiated, *Gilmour v. Strescon Indus., Inc.*, 66 FRD 146 (E.D. Pa. 1975).

5. Sponsored by record custodian or another qualified witness

- a. A "qualified witness" is anyone who is familiar with the manner in which the record was prepared.
- b. Sponsoring witness need not have been a part of the business activity at the time the record was made. See *Hayden v. State*, 753 S.W.2d 461, 463 (Tex. App. – Beaumont 1988, no pet.) (witness was supervising chemist who was not supervisor when lab test was conducted but he could testify to routine lab procedures); *Armijo v. State*, 751 S.W.2d 950, 952-53 (Tex. App. – Amarillo 1988, no pet.).

E. Step Five– Is there "hearsay within the hearsay" of an otherwise admissible public record or business record?

1. Did that person have personal knowledge and a business duty to report to the recording person?

If so, the public records or business records exception by itself will admit both levels.

Examples:

medical record compiled by nurse who treated patient contains notation "Dr. Kildare said patient was to receive 100 milligrams of codeine"; both nurse and doctor have a business duty, both had

personal information; see, e.g., *Williams v. State*, 2004 Tex. App. LEXIS 10561 (Tex. App. – Houston [1st Dist.] 2004, n.p.h.);

lab analysis report compiled by FDA agent A who analyzed substance and containing notation, "Agent B weighed substance and concluded that it weighed 6.3 grams."

CPS report written by caseworker A who took over from Caseworker B who reported that she saw bruises on Little Johnny on a given date.

2. If outsider provided any information, that information is hearsay and must be redacted from the document unless it meets some other hearsay exception.

Examples:

Consumer complaints about unintended acceleration in ZX cars received by both Nissan and NHTSA [a public agency] were inadmissible hearsay contained within business or public records, *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 140 (Tex. 2004);

Statement by capital murder victim to employee of Battered Women's Shelter about how defendant had physically abused her was inadmissible hearsay contained in business shelter's otherwise admissible business records, *Garcia v. State*, 126 S.W.3d 921, 925-27 (Tex. Crim. App. 2004);

Statements made by child in videotaped interview to Children's Advocacy Center were inadmissible hearsay when offered by defendant; although videotape itself met requirements of a business record, child had no business duty to be accurate in her report, *Cheek v. State*, 119 S.W.3d 475, 478-80 (Tex. App. – El Paso 2003, no pet.);

3. Rule 805

"Additional levels of hearsay within a business record are admissible if all statements within those levels of hearsay conform to the requirements of a distinct exception to the hearsay rule or indeed are defined as not hearsay by Rule 801." 5 Joseph M. McLaughlin, Weinstein's Federal Evidence § 803.08(07) at 803-74-75 (2005).

- a. First question: are those statements "testimonial" under *Crawford*? If so, they are inadmissible under the Confrontation Clause.
- b. Second question: are all non-testimonial statements independently admissible under a separate hearsay exception?

Examples:

Even though information on service pass identifying pictured person as a concentration camp guard may have come from sources other than the clerk who prepared the pass, it was admissible because it independently qualified under the hearsay exceptions for ancient documents and public records, *United States v. Demjanjuk*, 367 F.3d 623, 632 (6th Cir. 2004);

Officer's written report, containing hearsay statements by defendant and defense witness, was admissible because the report qualified as past recollection recorded and (1) defendant's assertions were admissions by party opponent; and (2) witness's statements were prior consistent statements admissible under 801(d)(1)(B), *United States v. Green*, 258 F.3d 683, 689-90 (7th Cir. 2001);

Although police notes were admissible as a business record, information within those notes from informants who were not themselves part of "the business of police" was inadmissible hearsay-within-hearsay), *United States v. Patrick*, 248 F.3d 11, 21-22 (1st Cir. 2001); *United States v. De Peri*, 778 F.2d 963, 976-77 (3d Cir. 1985).

4. Defendant's statements in business or public record.

A defendant's own statements are not hearsay and those statements are admissible when offered by the State if the business record writer was the person who heard the defendant speak. But if someone else told the report writer what the defendant said, the statement is not admissible unless the listener testifies. *United States v. Dotson*, 821 F.2d 1034, 1035 (5th Cir. 1987) (police report containing statement by police sergeant relating admission by defendant's agent inadmissible; although admission itself was within a hearsay exemption as a statement by a party opponent's agent, the statement by the sergeant was hearsay not within any exception).

Defendant— speaks to business record report writer — both levels okay.

Defendant— speaks to person in the business who has a duty to report— that person speaks to report writer—must have listener on the witness stand.

IV. THE FUTURE OF THE HEARSAY RULE

If the primary danger of admitting out-of-court statements into evidence at a criminal trial is that the declarants cannot be confronted and their statements cannot be tested by cross-examination, as *Crawford*

seems to state, then once the declarant takes the witness stand and is subject to confrontation and cross-examination, why exclude *any* of his prior out-of-court statements?

The hearsay rule currently excludes even a witness's prior statements as substantive use unless they meet the stringent requirements set out in Rule 801(e)(1). But, as most evidence scholars have long argued, "[w]hen the declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements." Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV.L.REV. 177, 192-96 (1948). As Professor Morgan noted:

The declarant as a witness is now under oath and now purports to remember and narrate accurately. The adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable in whole or in part.

Id.

The counter-argument—which eventually prevailed in the enactment of the Federal (and Texas) Rules of Evidence—was made by Justice Stone of the Minnesota Supreme Court:

The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.

State v. Saporen, 205 Minn. 358, 285 N.W. 898, 901 (1939). But when the declarant has changed his story from that given at a previous time, his testimony has not "hardened and become unyielding to the blows of truth," it has, in fact, melted like Texas asphalt in August. Further, isn't the opportunity for reconsideration and for baneful influence by others even more likely to color the later testimony than the prior statement which was made

before the witness knew he would be testifying in court? If the jury is likely to hear these prior statements to impeach or rehabilitate the declarant-witness, how likely is it that the jury will put those statements aside as nonsubstantive evidence?

As *Crawford* holds, the value of cross-examination is in challenging a witness's testimony. The cross-examination interest is in no way defeated when the witness himself has recanted his earlier statement and now testifies favorably to the cross-examiner. Certainly he can be called upon to explain his earlier statement, which he is now rejecting. As Dean Wigmore stated:

There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the hearsay rule has been already satisfied.

III A J. WIGMORE, EVIDENCE § 1018, at 996 (Chadbourn rev. 1970). Under *Crawford*, has not the whole purpose of the Confrontation Clause been satisfied as well?

The Second Circuit has argued that

[T]he orthodox rule defies the dictate of common sense that "The fresher the memory, the fuller and more accurate it is. Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy (but) the greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to each of these influences." McCormick, Evidence 75-76 (1954).

United States v. De Sisto, 329 F.2d 929, 933 (2d Cir. 1964).

In the future, will the views of the evidence scholars once again prevail as they did in *Crawford*? Will those same scholars assist in paring down the current technicalities of the hearsay rule to simplify and restructure it? Will the hearsay rule become essentially a codification of *Crawford*, excluding "testimonial" statements by non-testifying declarants, admitting non-testimonial statements by non-testifying declarants, and,

once a declarant takes the witness stand, admitting any and all prior statements made by that witness for whatever probative value the trier of fact wishes to give it?

Only time will tell.

Rube Goldberg Analysis of Business Records

Law Enforcement

Non-Law Enforcement

