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The Short (?), Happy (?) Life of Crawford v. Washingtonⁱ

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In 2004, a majority of the Supreme Court embraced a version of the position taken by the three concurring justices in *Lilly*.ⁱⁱ In reliance on a modern version of Wigmore's Anglophile history, the Court bifurcated confrontation doctrine; a rigorous version applies to what the majority calls "testimonial" statements while some less robust but still uncertain rule applies to "nontestimonial" hearsay.ⁱⁱⁱ To understand what the lower courts and the writers^{iv} have made of *Crawford*, we must unpack the majority opinion by Justice Scalia.^v

Facts

Crawford v. Washington arose in the prosecution of a husband for assault and attempted murder of a man the defendant claimed had raped his wife.^{vi} The police questioned both husband and wife using leading questions designed to elicit answers that would undermine the husband's claim of self-defense.^{vii} At trial, the wife claimed the marital witness privilege not to testify against her husband; so the prosecution offered in evidence a tape-recording of one of the wife's statements.^{viii} The trial court admitted the tape via a questionable application of the hearsay exception for declarations against interest.^{ix}

The Washington Court of Appeals reversed, applying a precious version of *Roberts* to hold that the use of the wife's statement violated the defendant's right of confrontation.^x The Washington Supreme Court reversed the Court of Appeals using a blunderbuss application of a repudiated version of the *Bruton* doctrine.^{xi} The U.S. Supreme Court granted certiorari and reversed, rejecting the garbled version of *Bruton* relied on by the Washington Supreme Court.^{xii} But instead of applying *Roberts* or the plurality opinion in *Lilly*, the U.S. Supreme Court majority embarked on the entirely new course suggested by the concurring opinions in *Lilly*.^{xiii} Since Justice Scalia relies on both history and policy to justify this new departure, we must detour through these exotic locales before turning to the Court's new interpretation of the Confrontation Clause.^{xiv}

Neo-Wigmorean History

Justice Scalia, after stating the issue, wrote that the text of the Confrontation Clause does not "alone resolve" the validity of the *Roberts* effort to avoid fusion.^{xv} So we must "turn to the historical background of the Clause to understand its meaning."^{xvi} However, Justice Scalia stumbles at the outset by claiming a Roman patrimony for the right of confrontation.^{xvii} But he recovers with quick leap into Wigmorean history: "[t]he founding generation's immediate source. . . was the common law."^{xviii} The opinion invokes two lines of authority for this dubious claim: first, a supposed English reaction to the

inquisitorial practices of justices of the peace, and, second, the trial of Sir Walter Raleigh.^{xix}

Justice Scalia correctly states that the examination before the justices of the peace under the Tudors represented an inquisitorial borrowing from the civil law that was antithetical to the common law tradition.^{xx} But to him, the “most notorious instances” of the use of civil law procedure came in political trials of the upper classes, not the persecution of religious dissenters in church courts.^{xxi} At this point Justice Scalia drags in Sir Walter Raleigh, even quoting his complaint that he was being tried “by the Spanish Inquisition.”^{xxii} According to this Neo-Wigmorean history, the use of the inquisitorial procedure led to “a series of statutory and judicial reforms” that developed an English “right of confrontation.”^{xxiii} Justice Scalia does not bother to explain why this English “right of confrontation” disappeared in the centuries after it supposedly came over to America on the Mayflower.^{xxiv}

On closer inspection, the Neo-Wigmorean claim of a common law right of confrontation evaporates. Even Justice Scalia must know that treason statutes that allowed Roman confrontation do not prove a “common law” right of confrontation.^{xxv} Nor do “strict rules of unavailability” for the use of hearsay or restrictions on the use of one defendant’s confession against another provide much support for an English right of confrontation.^{xxvi} Thus Justice Scalia’s claim for a common law right of confrontation rests on a series of English cases that supposedly held that statements taken at an examination before the justice of the peace could only be used against the defendant if he had been afforded an opportunity to cross-examine the declarant.^{xxvii} But Professor Davies has convincingly shown that most of these cases came too late for the Founders to have been aware of them and that Justice Scalia misread the handful of cases that might have been known to the Founders.^{xxviii}

Things get better---but not much---when Justice Scalia’s Neo-Wigmorean history shifts to this side of the Atlantic.^{xxix} The opinion rehearses the colonists’ response to attempts by the Crown to impose inquisitorial procedures, most notably the use of the vice-admiralty courts to enforce the Stamp Act and the Navigation Acts.^{xxx} Justice Scalia adds a reference to the state constitutions that provided a right of confrontation and quotes objections made during the ratification debates to the failure of the Constitution to provide such a right.^{xxxi} But the majority opinion cherry-picks quotations that foster its belief that the right of confrontation exists independently of other provisions in the Bill of Rights ignores those that show it as part of a “holistic Sixth Amendment” that the Founders thought preserved an adversary “trial by jury.”^{xxxii} Nor does his history support Justice Scalia’s claim that the Sixth Amendment incorporated an English common law right.^{xxxiii} And surprisingly---since it might have provided support for the majority’s two-tier Confrontation Clause---Justice Scalia does not note that some state rights of confrontation as well as Madison’s draft of the Sixth Amendment applied to both “accusers and witnesses.”^{xxxiv}

Finally, Justice Scalia claims that “[e]arly state decisions shed light on the original understanding of the common-law right” supposedly adopted by the Sixth Amendment.^{xxxv} But most of the cited decisions came more than 30 years after the adoption of the Confrontation Clause so they provide weak evidence of the Framers’ intent.^{xxxvi} Of the two cases described in the majority opinion, one provides no support for Justice Scalia’s reading because it comes from South Carolina, a state without a confrontation clause in its constitution, and so was decided on purely evidentiary grounds.^{xxxvii} The other case, “decided a mere three years after the adoption of the Sixth Amendment, according to Justice Scalia, also avails him little.^{xxxviii} The per curiam opinion relies on a state statute, not the state confrontation clause.^{xxxix} And the state confrontation clause did not give the accused a right to cross-examine but only “to confront the accusers and witnesses with other testimony.”^{xl}

Why should anyone care that the Court’s Neo-Wigmorean history garbles the true story?^{xli} First, false history deprives the lower courts of opportunities to use real history to flesh out the meaning of Crawford; e.g., by reading the majority’s core concern as “accusations” and by looking to decisions under other provisions of the Sixth Amendment to tease out the policy of the Confrontation Clause.^{xlii} Second, bad history understates the opposition of the Founders to “mere hearsay”---opposition that lower courts might consider when deciding what Crawford requires when the proffered hearsay is not “testimonial.”^{xliii} Third, the Court’s use of history invites lower courts to evade difficult confrontation questions by superficial comparisons between the present issue and some past abuse; e.g., holding that a 911 call raises no confrontation issue because it does not resemble an examination before a Marian justice of the peace.^{xliv} Finally, and worse yet, lower courts can garble up their own history to distort the meaning of Crawford.^{xlv}

Confrontation policy

The majority opinion jumps directly from confrontation history to the limitations the Sixth Amendment imposes on the use of evidence against the accused; it makes no attempt to state the policy, if any, that led the Founders to adopt the Confrontation Clause.^{xlvi} Indeed, we must tease out the Crawford policy from the interstices of the opinion.^{xlvii} Since we think confrontation policy rather than historical analogies should control the rules laid down in Crawford, we pause here for a word about policy before turning to the doctrines laid down in Crawford.^{xlviii}

The clearest clues to Crawford policy appear in Justice Scalia’s castigation of the Roberts decision---the Court’s last attempt at a comprehensive reformulation of the right of confrontation.^{xlix} The most succinct summation of the Roberts critique states:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that

reliability be assessed in a particular manner: by testing in the crucible of cross-examination.ⁱ

Notice that the confrontation under Crawford becomes not only a procedural guarantee, but an instrumental one.ⁱⁱ As we have seen, history does not support this crabbed reading of the right; people demand and defend confrontation on non-instrumental grounds such as the immorality of making accusations without taking responsibility for them.ⁱⁱⁱ

A second Crawford policy seeks to avoid “fusion”---that is, making confrontation a constitutional version of the hearsay rule.^{liii} As Justice Scalia put it, “we do not think the Framers meant to leave the Sixth Amendment’s protections to the vagaries of the rules of evidence.”^{liiv} Thus, confrontation bars the use of hearsay that the rules of evidence would admit, at least where the hearsay is “testimonial.”^{liv} Thus Crawford strengthens the right of confrontation but at the same time arguably reduces its scope so that it applies only to “testimonial” hearsay.^{lvi}

A third Crawford policy at first seems amorphous; the majority opinion says that the Roberts “reliability” policy “is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”^{lvii} “Predictability” as a constitutional value seems embedded in the “holistic Sixth Amendment”; the right to counsel and to compulsory process for witness becomes weaker if counsel cannot know when the prosecution can use hearsay instead of calling the witnesses.^{lviii} But Justice Scalia’s lengthy catalog of inconsistent lower court opinions, together with their use to admit “testimonial” hearsay, suggests that he has something else in mind.^{lix}

Justice Scalia apparently finds the need for predictability in another feature of the “holistic Sixth Amendment”; namely, the separation of functions among judge, jury, and counsel.^{lx} The thrust of the majority opinion lies in the notion that determining the reliability of evidence is a function assigned by the Sixth Amendment to the jury, not the judge.^{lxi} Justice Scalia notes that “[v]ague standards are manipulable” and that the Framers “were loath to leave too much discretion in judicial hands” because they “knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people.”^{lxii} Hence, the third Crawford policy seeks a bright-line rule that cannot be manipulated by judges.^{lxiii}

One other confrontation policy also springs from the “holistic Sixth Amendment”---restraint on the use of the criminal sanction that has so often been abused by governments past and present.^{lxiv} One can see this in Justice Scalia’s historical account but he only touches on it when he later refers to “politically charged cases.”^{lxv} However, today such abuses bear less on elites like Sir Walter Raleigh and more on ordinary people despised, not for their political beliefs, but because of human frailty that leads them to drug or sexual abuse or the use of violence against family members.^{lxvi} At the turn of the 21st century, Americans seemed to think that the criminal law provided a handy solution for every social problem from rebellious youth to corporate corruption.^{lxvii}

The Sixth Amendment in general and the Confrontation Clause in particular provide a check on the too-easy resort to the criminal sanction by making conviction expensive.^{lxviii} Not surprisingly, the loudest objections to Crawford came from defenders of the failed policy of “solving” the problem of domestic violence by criminalizing it.^{lxix}

The Crawford holding

From its Neo-Wigmorean history, the Crawford majority draws two conclusions about the meaning of the Sixth Amendment.^{lxx} First, since the “principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure”, the right of confrontation only barred hearsay that resembled the “use of ex parte examinations as evidence against the accused.”^{lxxi} The opinion dubbed the “core class” of hearsay subject to the right of confrontation as “testimonial” statements.^{lxxii} Second, the “Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.”^{lxxiii}

The Crawford holding thus raised many questions for the courts that had to apply it:

- what is the meaning of “testimonial”?^{lxxiv} Courts have vacillated between a “rule of thumb” approach^{lxxv} and a “categorical” approach.^{lxxvi} The “rule of thumb” analysis has two strands: “official inducement”, which looks to the way government officials participated in the making of the statement^{lxxvii}; and, “the declarant’s objective intent”, which asks whether the person making the statement foresaw its use against the defendant.^{lxxviii} The “categorical” approach looks either to the examples used in the Court’s opinion in Crawford or to the hearsay exceptions to determine whether or not the statement is “testimonial.”^{lxxix}
- under what circumstances are “testimonial” statements admissible? The Scalia opinion suggests that such statements are admissible only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine.^{lxxx} This leaves open the standards for determining unavailability^{lxxxii} and the adequacy of the prior opportunity for cross-examination.^{lxxxiii} However, the majority suggests that “testimonial” hearsay also comes in if the declarant testifies at trial^{lxxxiii}, or if the statement is admissible for some nonhearsay purpose^{lxxxiv}, or if the defendant has forfeited his right of confrontation by misconduct; e.g., killing the declarant.^{lxxxv} In addition, the Court suggests that hearsay exceptions recognized in 1791 might apply to the right of confrontation as well.^{lxxxvi}
- does the Roberts rule still apply to “nontestimonial” hearsay or is such hearsay free from any confrontation scrutiny?^{lxxxvii}

- what procedural rules apply when adjudicating confrontation issue post-Crawford? The first issue courts faced was whether Crawford applied retroactively to cases no longer on direct appeal.^{lxxxviii} Courts also had to decide how Crawford objections were preserved; for example, did a Roberts objection made prior to the decision in Crawford suffice.^{lxxxix} Another question was the proper standard for appellate review; should courts review the ruling below de novo or for abuse of discretion?^{xc} Was Crawford subject to harmless error?^{xc} Finally, how can Crawford claims be waived?^{xcii}
- what is the scope of Crawford?^{xciii} That is, does the new rule only apply at criminal trials or does it also bar the use of “testimonial” hearsay in sentencing or in civil cases?

We turn now to how lower courts have answered these questions using clues from the Crawford opinion.

“Testimonial”---the Court’s clues

Justice Scalia begins sketching the Court’s new confrontation analysis by rejecting Wigmore’s claim that the Confrontation only applied to witnesses who appear in court to testify against the defendant.^{xciv} Instead, he invokes history and the dictionary to escape fusion; “not all hearsay,” he opines, “implicates the Sixth Amendment core concerns” about the use of civil law procedure.”^{xcv} Ignoring the fact that it once included “accusers”^{xcvi}, Justice Scalia quotes an 1828 dictionary to define “witnesses” as persons who “bear testimony”---the latter term defined as a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”^{xcvii} Ironically, the opinion then refers to the person who makes such a statement to government officers as an “accuser.”

The majority opinion offers two somewhat different definitions of what it calls “testimonial statements.” First it derives part of the “official inducement” strand from Justice Thomas’ concurring opinion in *White v. Illinois*^{xcviii}: “extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”^{xcix} Second, it introduces the “declarant’s intent” strand from an amicus brief^c: “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.”^{ci} Finally, the majority opinion combines these two strands into one:

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.^{cii}

As we shall argue, much of what the Crawford majority tries to capture by these verbal formulae could be described in a single word: “accusation.”^{ciii} This, we think, is the

“common nucleus” that Justice Scalia sees in the differing “formulations” but does not attempt to describe.^{civ}

The majority opinion tries to bring the statements of Crawford’s wife within these formulae by claiming that “[s]tatements taken by police officers in the course of interrogations are. . . testimonial under even a narrow standard.”^{cv} But instead of applying the definitions just quoted, Justice Scalia resorts to historical analogy: “[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England.”^{cv} The problem with this technique, whatever the accuracy of the historical analogy^{cvii}, is it invites lower courts to do likewise.^{cviii}

In several places in the majority opinion, Justice Scalia drops “bits and morsels” that lower courts followed to reach the gingerbread house of narrow Crawford readings.^{cix} For example, in the course of his anti-fusionist prelude, Justice Scalia writes that an “off-hand, overheard remark. . . bears little resemblance to the civil-law abuses the Confrontation Clause targeted.”^{cx} Later in the definition of “testimony” this returns as “a casual remark to an acquaintance.”^{cx} We suppose that Justice Scalia meant these phrases to be read in light of the statements to follow; but some lower courts have used them to hold that an accusation of crime to a family member does not fall within Crawford regardless of whether the declarant knew it might bring harm to the accused--- for example, a child who accuses one parent of child abuse.^{cxii} Surely the majority of the Court did not intend the Crawford rule to admit accusations more likely to be irresponsible than those made to a judge or police officer.^{cxiii}

Similarly, in the passage bringing police interrogations within the scope of Crawford, Justice Scalia drops a footnote stating: “We use the term ‘interrogation’ in its colloquial, rather than any technical legal, sense.”^{cxiv} The footnote notes that the Court need not choose among the many possible definitions of “interrogation” because the Crawford’s wife’s “recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.”^{cxv} To some lower courts, this means that Crawford does not apply if the police questioning is not “structured” or if the declarant’s statement is not recorded.^{cxvi}

Finally, a “thread” runs through the opinion that lower courts have seldom followed--- prosecutorial abuse.^{cxvii} Justice Scalia writes that “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents a unique potential for prosecutorial abuse.”^{cxviii} This echoes the statement in *Lilley* that “when the government is involved in the statements’ production and the when the statements describe past events” this implicates “the core concerns of the old *ex parte* affidavit practice.”^{cxix} One such abuse that lower courts might well attend to in applying Crawford is the use of police or prosecutorial power to shape the circumstances surrounding the statement to make it seem “nontestimonial.”^{cxx}

I. “Testimonial statements”

Courts agree that Crawford analysis begins with the “threshold question” that provides the “lynchpin” in determining whether a hearsay statement falls within Crawford: whether or not the statement is “testimonial.”^{CXXI} But the “threshold question” implies a subsidiary inquiry; that is, is the proffered evidence “hearsay”?^{CXXII} Despite the death of “fusion”, courts assume they should determine whether or not the statement is “hearsay” for this threshold purpose by applying the law of evidence, not the Sixth Amendment.^{CXXIII}

Assuming the statement is “hearsay”, courts sometimes determine that it is “testimonial” with only cursory analysis---usually because the proffered statement fits neatly into one Justice Scalia’s examples of clearly “testimonial” hearsay.^{CXXIV} The more scholarly opinions tend to fall into one of two overlapping categories.^{CXXV} Some courts apply the language and policy of Crawford to provide “rules of thumb” that leave wiggle room for future appellate maneuver.^{CXXVI} Opinions in this category sometimes follow Justice Scalia’s example and borrow dictionary definitions of key terms in his opinion.^{CXXVII} The second category consists of opinions that take their cue from Justice Scalia’s hope for “bright line” rules and try to devise categories into which trial court can fit the facts of the cases before them.^{CXXVIII} Sometimes the categories incorporate hearsay exceptions; e.g., excited utterances are per se “nontestimonial.”^{CXXIX} Other categories describe recurrent fact patterns; e.g. statements made to police officers during field interrogations or to those who answer emergency calls to 911.^{CXXX} Given the number of post-Crawford opinions^{CXXXI}, many could justifiably be placed in either of our two broad categories.^{CXXXII}

Rule of thumb analysis; generally

Justice Scalia’s three “testimonial” formulations contain two quite distinct strands.^{CXXXIII} The first---what we shall call the “official inducement” test---relies on formal criteria by requiring that “testimonial” statements resemble “affidavits, depositions, prior testimony, or confessions.”^{CXXXIV} These items share one characteristic; in each case government officials shape the statement into accusatorial form for evidentiary use at trial.^{CXXXV} The second strand---we call it the “declarant’s objective intent” test---asks whether the declarant intends to officially accuse another person of a crime.^{CXXXVI} This strand can rest on both instrumental and noninstrumental policy grounds; a declarant who understands that she is making an official accusation of crime will more likely speak with care to state the facts accurately and when the intent to accuse is clear, courts can more properly insist that the accusation be made responsibly---that is, under oath in the presence of the accused and subject to both cross-examination and the penalties for perjury.^{CXXXVII}

Note that the Crawford majority never suggested that either of these strands, either alone or combined with the other, should determine the outer limits of “testimonial” hearsay.^{CXXXVIII} Some courts have identified these strands with their principle academic proponents cited in Justice Scalia’s opinion.^{CXXXIX} While what these authors have said may help to determine what the majority meant, without an

intellectual blood test it would be unfair to attribute paternity to them.^{cxl} Moreover, though courts sometimes assume they have to choose between them, the two approaches complement each other more than they compete; that is, when government officials induce an accusation, the declarant can “reasonably believe” they intend it for use at trial.^{cxli} Indeed, some courts believe the two share a “common nucleus” that can be reduced to a single test.^{cxlii} For example, whether a statement qualifies as “testimonial” turns on “the purpose for which the [hearsay] statement was obtained or given.”^{cxliii}

The case that tests the relationship between the “official inducement” and the “declarant’s objective intent” tests arises when the government uses an undercover agent or informer to induce the unwitting declarant to utter incriminating statements.^{cxliv} Some courts hold such statements “nontestimonial” in reliance on the suggestion by the Crawford majority that the decision in *Bourgaily v. United States*, which involved a similar scenario, might survive the decision in *Crawford*.^{cxlv} Courts might find some such cases easier to decide had the Supreme Court chosen “accusation” rather than “testimonial statement” to describe the subject of its more robust Confrontation Clause.^{cxlvi}

Rule of thumb analysis; the “official inducement” test

Most decisions finding statements “testimonial” as the “functional equivalent” of in-court testimony “such as affidavits, depositions, prior testimony, or confessions” fall well within what Justice Scalia called “the core class” of this category.^{cxlvii} For example:

- after being read her Miranda rights, a shoplifting arrestee signs a written statement accusing defendant of acting as her accomplice.^{cxlviii}
- grand jury testimony provides the only evidence that defendant obstructed justice.^{cxlix}
- a captured alien tells the Coast Guard how defendant smuggled him in.^{cl}
- a police officer engages in “structured questioning” of the victim of an assault being treated in the hospital.^{cli}

Other state and federal opinions fall into this pattern.^{clii} When confronted with a statement of a kind not mentioned in *Crawford*---for example, an identification of the defendant as the perpetrator after being shown his picture in a police “mug book”---the better-reasoned opinions analogize from the “core class” using historical and policy arguments to show the “testimonial” nature of the statement.^{cliii}

Court holding statements “nontestimonial” use more varied doctrinal routes to escape from *Crawford*’s stringent regime.^{cliv} The clearest path to finding statements “nontestimonial” simply reverses the scheme we just saw; that is, a statement is

“nontestimonial” if it does not fall within one of the examples Justice Scalia used to capture the “core” of Crawford.^{clv} Some courts try to reduce the Supreme Court’s varied formulations to some simpler test; for example, that “testimonial” hearsay must have an “official or formal quality”.^{clvi} Since most of the examples used in Justice Scalia’s opinion contain statements produced by official interrogation, many courts have seized on the phrase “structured police interrogation” as a shibboleth for excluding less formal statements to the police.^{clvii} Sometimes courts use the phrase to make statements “testimonial” even though they fail the Court’s more sophisticated formulae; for example, when the police instruct a turncoat accomplice to try to elicit incriminating statements from the defendant.^{clviii}

But the better reasoned opinions use the structure of the interrogation only as one indicator that the questioner intended to elicit “testimonial” statements for use at trial.^{clix} Even courts relying on formal criteria sometimes concede that the Crawford opinion said that word “interrogation” should be read in a “colloquial, rather than any technical, legal sense.”^{clx} But this caution has not kept some courts from devising more or less elaborate rules for determining whether a statement is “testimonial” by combining Crawford and the Supreme Court’s prior cases on police interrogations and the Fifth Amendment.^{clxi}

Another formal criterion for “testimonial” hearsay developed by the lower courts looks at the person to whom the statement was made.^{clxii} Some courts insist, perhaps indefensibly, that only “government employees” can receive “testimonial” statements.^{clxiii} Most courts, however, will find the statement “testimonial” if made either to a police officer^{clxiv} or to a nongovernmental employee serving as a conduit to the prosecution;^{clxv} for example, social workers in rape crisis centers.^{clxvi} Conversely, most courts hold statements “nontestimonial” if made to parents^{clxvii} or other family members^{clxviii}, friends^{clxix} or neighbors^{clxx}, fellow workers^{clxxi}, or other persons not acting for the police.^{clxxii}

For some courts, these formal indicia do no more than provide evidence of the purpose or intent of the interrogator to elicit or the declarant to provide “testimonial” statements.^{clxxiii} A few courts think that the “testimonial” nature of the statement turns on the intent of both the declarant and the questioner.^{clxxiv} But one court holds that the intent of the declarant cannot turn a statement “testimonial” if the other formal indicia make it “nontestimonial.”^{clxxv}

A departure from formal criteria appears in the cases that make the issue turn on the degree to which the way the statement was elicited resembles the historical abuses recited in Justice Scalia’s opinion^{clxxvi}; for example, the statement is “testimonial” only if the conduct of the interrogator bears comparison with that of *Torquemada*.^{clxxvii}

Rule of Thumb Analysis---the “declarant’s objective intent” test

Many courts find statements not “testimonial” despite official involvement because the declarant did not speak “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”^{clxxviii} Divergent results from this formula may stem from an ambiguity about just what the “objective witness” must foresee.^{clxxix} Some courts have tweaked the language to account for the many cases that never go to trial; e.g., a “testimonial” statement is made for the purpose of “preserving it for potential future use in legal proceedings.”^{clxxx} But another court rejected the lower court’s view that it was enough that the declarant could foresee that her statement would be “used prosecutorially” for further investigation or in the charging decision.^{clxxxi}

Courts that insist that the witness foresee trial use never explain why the prosecution should be allowed to use an irresponsible accusation simply because the witness does not foresee cross-examination; e.g., the football player who complains to the principal that one of the coaches groped him.^{clxxxii} Surely it should suffice that the declarant “knows the statement is a form of accusation that will be used against the suspect.”^{clxxxiii} Rather than “testimonial”, the Crawford majority might better have applied its more robust version of confrontation to any “behavior properly describable as an “accusation””; that is, when the declarant knew or intended that “the statement would involve the defendant in some sort of official trouble.”^{clxxxiv}

A second ambiguity concerns the identity of the “objective witness”---the Court might have meant the “witness” who testifies to the statement in court, the police officer who “witnessed” the statement, or the declarant as the “witness” who needs to be cross-examined.^{clxxxv} The answer to this question ought to mesh with the policies of the Crawford opinion.^{clxxxvi} Most courts, implicitly relying on Justice Scalia’s view that confrontation is a procedural guarantee, think “witness” refers to the declarant.^{clxxxvii} A few courts, either still wedded to reliability concerns or taking seriously the Crawford majority’s concern about police abuse read the word to refer to the interrogator.^{clxxxviii} Occasionally courts suggest the test applies to both the declarant and her interrogator.^{clxxxix}

A third ambiguity concerns the relationship between this test and the “official inducement” test.^{cxcc} Some courts suppose that in the absence of any official inducement, the declarant could not have reasonably believed that his statement would be used at trial.^{cxcci} A few courts find the statement “testimonial” if this test is met even in the absence of official inducement.^{cxccii} Sometimes courts suppose this test only applies to determine whether statements made during police interrogation are “testimonial”.^{cxcciii} A few courts resolve the ambiguity by rejecting the “objective intent” test outright.^{cxcciv} But other courts favor the test out of fear that the “official inducement” test can be rigged by the police.^{cxccv}

However, most courts do not reject or favor either test but combine them into an inquiry into the purpose of the declarant in making the statement.^{cxccvi} However, even the combined tests run aground in some cases.^{cxccvii} For example, when a police

chemist prepares a lab report stating that the sample submitted to him was some illegal drug, the report was both officially induced and intended for use in prosecuting the person found in possession of the drug.^{cxcviii} Though reasonable people might wonder whether a lab report is any kind of “accusation”, some courts have found them “testimonial” under Crawford.^{cxcix}

Finally, the Crawford statement of the “declarant’s objective intent” test does not tell us who the declarant must suppose the statement will be used against; is an accusation “testimonial” only when used against the accused or does Crawford bar its use against someone else?^{cc} For example, when a prisoner admits to visiting relatives in the presence of guards that he drove the getaway car, he can probably foresee that it might be used against him but not that it could be used to prosecute his girl friend for perjury in testifying that he was with her at the time of the robbery.^{cci} The court found that defendant did not foresee this use, but the case might be more satisfying if the court could simply say that the statement did not “accuse” the girl friend of anything.^{ccii}

In most of the cases where courts have found a statement “testimonial” because an objective witness reasonably believes “that the statement would be available for use at a later time”, the statement also meets ordinary notions of an “accusation”:

- a desperate housewife keeps a diary of her daily doings that includes accounts of her deteriorating marital relationship just before her husband killed her.^{cciii}
- a wife tells police officers responding to a 911 domestic disturbance call that her husband hit her.^{cciv}
- the police arrive at the scene of a shooting; witnesses tell them defendant was the shooter.^{ccv}
- using photographs from bank surveillance camera, declarant identifies robbery suspects.^{ccvi}
- though using nonleading questions in a relaxed manner to elicit accusations of child abuse, the interviewer introduced herself to the seven-year-old declarant as a police officer, questioned him on the difference between truth and lies, then told him he must tell her the truth.^{ccvii}

On the other hand, many statements found “nontestimonial” do not resemble what ordinary people would call an “accusation”:^{ccviii}

- an unidentified police officer radios his colleagues responding to a 911 call that the declarant did not need an ambulance but would get himself to the hospital.^{ccix}

- members of a drug conspiracy carry out their business over a telephone, not knowing one of their number is an informer and the phone is tapped.^{CCX}
- a shady business keeps records of customer complaints of services not received and credit card chargebacks for such services.^{CCXI}
- a bystander reports to police answering call about a drive-by shooting that he thinks he was “shot in right foot”, but does not otherwise describe the shooting or identify the shooter.^{CCXII}
- a companion of the seller of weapon tells a prospective buyer that the weapon was used in a recent murder but without describing it or identifying the seller as the killer.^{CCXIII}

But some opinions finding that an accuser could not reasonably believe that the statement “would be available for later use at trial” defy common sense:^{CCXIV}

- a prisoner admits to visiting relatives in the presence of prison guards that he drove the getaway car in charged crime.^{CCXV}
- declarant calls 911 to report that her boyfriend threatened her and her sister with a handgun.^{CCXVI}
- immediately after being rescued by police officers from knife-wielding assailant, the victim tells the officers what the defendant did to her.^{CCXVII}
- in an interview arranged by police pursuant to a statute requiring reporting of child abuse and conducted by social worker in the presence of the investigating officer neither the social worker nor the child understood they were producing evidence for trial.^{CCXVIII}

As we shall see, the same political impulse that drives some courts to find declarant’s remarkably obtuse about the use of their statements, drives other courts to create categorical exceptions to Crawford.^{CCXIX}

Sometimes courts applying the “objective declarant” test write doctrinally schizophrenic opinions; for example, holding that the declarant could foresee prosecutorial use in order to make the opinion a “declaration” against interest to escape the hearsay rule, then turning around to say that he could not foresee prosecutorial use to escape Crawford.^{CCXX} In an infamous California case, after being assured by his lawyer that everything he said was privileged so no one else would ever hear it, the declarant confessed his part in a conspiracy to commit murder---clearly nontestimonial under the present test, but inadmissible hearsay until the court in an unprecedented holding found it to be a declaration against interest.^{CCXXI}

---the “objective declarant” test and intellectually impaired declarants

Courts differ widely in how they apply this test to declarants with limited intellectual ability; that is, adults with some mental impairment or very young children.^{CCXXII} They have considered the following possibilities:^{CCXXIII}

- mentally impaired persons are incapable of making “testimonial statements; most courts have rejected this possibility.^{CCXXIV}
- a few courts seem to apply a subjective test; that is, did this person understand that her statement could be used testimonially?^{CCXXV}
- a number of courts use an “objective declarant” with the personal characteristics of this one; in other words, would an “objective seven-year-old” understand the uses to which his statements would be put?^{CCXXVI}
- applying an “objective observer” test that ignores the personal characteristics of the instant declarant.^{CCXXVII}
- some courts look to the understanding of the interrogator when the declarant’s ability to judge potential use of statement seems impaired.^{CCXXVIII}

Until the Supreme Court speaks, we cannot say which of these is the proper approach to applying Crawford to declarants of limited understanding.^{CCXXIX}

Categorical analysis---Generally

We begin with a caution to the reader: the cases do not divide as neatly as our analysis might suggest---the same opinion can blend both “rule of thumb” and “categorical” tests to determine if a statement is “testimonial” under Crawford.^{CCXXX} Nonetheless, we believe that an arbitrary organization will prove more serviceable to the reader than no organization at all.^{CCXXXI}

In what we call “categorical analysis”, courts try to find little boxes in which to place the precedents.^{CCXXXII} We group the categories under two headings; the “practical” and the “doctrinal.”^{CCXXXIII} The “practical” categories deal with recurring fact patterns in the real world; for example, calls to 911 operators or “investigatory interrogations” by police officers at the scene of the crime.^{CCXXXIV} The “doctrinal” categories lump cases together based on the hearsay exception used by the trial court to admit the statement; e.g. “excited utterances” or “business records”.^{CCXXXV}

--- “practical” categories; affidavits

Since the Crawford opinion puts affidavits at the “core” of “testimonial” hearsay, we might suppose courts would have few problems with this category.^{CCXXXVI} A person

who swears to an affidavit must surely understand that prosecutors and police officers want hearsay in this form so it can be used in court.^{ccxxxvii} Moreover, nearly a century before Crawford the Supreme Court cast doubt on the use of government reports without allowing the defendant to confront the the declarants.^{ccxxxviii} But despite this, some courts have allowed prosecutors to use affidavits to prove an element of the crime charged.^{ccxxxix} Hence, affidavits provide a useful example of a major problem in Crawford's analysis; to wit, a statement that fits the court's definition of "testimonial" may not be an "accusation" of crime.^{ccxli}

Consider two common but different types of affidavit.^{ccxli} In the first, a police lab technician makes an affidavit swearing that his testing of a breath machine used to show defendant's intoxication in a drunk driving prosecution was working properly at some relevant time.^{ccxlii} In the second, to prove that the defendant was a convicted felon, an element of a firearms offense, the prosecution submits an affidavit swearing that state records of prior convictions are authentic.^{ccxliii} Though the first affidavit accuses the defendant of nothing and the second impliedly accuses him of being a convicted felon, courts have treated both as "nontestimonial" for Crawford purpose.^{ccxliv} On the other hand, some courts have held affidavits "testimonial" even when the confrontation policies embraced in Crawford would not seem to require this; e.g., an affidavit seeking to authenticate business records under Evidence Rule 902(11).^{ccxlv}

Crawford raises particular problems under state statutes enacted in recent decades in order to save money that allow the use of police lab reports or affidavits of police technicians in lieu of live testimony in the prosecution of traffic and drug offenses.^{ccxlvi} Such statutes, as well as nonstatutory attempts to use affidavits and lab reports have generated a confusing caselaw.^{ccxlvii} Most courts ignore crucial distinctions among the affidavits and reports considered in the precedents.^{ccxlviii} Not only do some of these look more like "accusations" than do others^{ccxlix}, but they differ in the degree of danger that crime labs will fob off "junk science" on the courts.^{cccl} Courts also vary in which Crawford method they use to analyze crime lab hearsay.^{cccli}

A handful of courts, perhaps reacting to Justice Scalia's remarks about the hearsay exception for dying declarations, have tried to find historical justification for admitting crime lab evidence.^{cccli} For example, Oregon courts admit affidavits and certificates under a supposed common law exception to the right of confrontation for documentary evidence.^{ccclii} Massachusetts went so far as to claim that its law recognized the official records exception prior to the adoption of the Sixth Amendment in 1791.^{cccliv}

A somewhat larger group of courts tried to use various forms of "rule of thumb" analysis to admit crime lab reports and affidavits.^{ccclv} For example, that the declarant does not intend to create evidence for use at trial, but only to "ensure accurate measurement" or to engage in a "simply routine, objective cataloging of an unambiguous factual matter."^{ccclvi} Others have suggested that, unlike other affidavits, crime lab affidavits and reports are not within the Crawford "core" class of testimonial

statements.^{cclvii} Some courts argue that when the test or report does not target any particular defendant---or as we would say, is not an “accusation”---the declarant does not “bear testimony” and thus is not a “witness against” the defendant.^{cclviii} Other courts, presumably unwittingly, rely on doctrines rejected by the Supreme Court.^{cclix} A few courts suppose that the state can shift the burden of producing the witness to the defendant or that the right can be satisfied through cross-examination of someone other than the declarant.^{cclx}

The problem with these “rule of thumb” cases is that other courts applying the same standards have held lab reports and affidavits to be “testimonial.”^{cclxi} Perhaps for this reason, some courts have tried to distinguish between reports and affidavits that record “facts” from those that include “opinions”---only the latter supposed to be “testimonial.”^{cclxii} Only rarely do courts grasp the true distinction---between those that accuse the defendant of a crime and those that do not.^{cclxiii}

Not surprisingly, given the difficulty of answering the question under the “rule of thumb” tests, most courts have turned to other “categorical tests” to justify treating lab reports and affidavits as not “testimonial.”^{cclxiv} Some courts, seizing on Justice Scalia’s dictum in Crawford that statements that fit within the business records exception are not “testimonial”, try to fit affidavits and lab reports into that category.^{cclxv} But while many courts have used this analysis^{cclxvi}, other courts have questioned it.^{cclxvii} Some courts have doubted that the majority in Crawford really intended that everything kept in some corporate filing cabinet automatically satisfies the Confrontation Clause.^{cclxviii} Moreover, affidavits and many lab reports would not qualify for admission under the hearsay exception because they were prepared, not “in the regular course of business” but specifically for use at trial.^{cclxix} In other words, the same reason lab reports qualify as “testimonial” should disqualify them for admission under the hearsay exception.^{cclxx} But unlike the hearsay rule’s concern for “reliability”, under Crawford courts should worry more depriving the defendant of the opportunity to cross-examine crime lab “junk scientists.”^{cclxxi}

Some courts have tried to bypass the problems with the business records exception by extending the Scalia dictum to the official records exception.^{cclxxii} But this move takes courts from the rock to the whirlpool because Evidence Rule 803(8) does not apply to records of matters “observed by police officers and other law enforcement personnel.”^{cclxxiii} Irony abounds when courts use this route to escape Crawford because Congress added this limiting language to protect the defendant’s right of confrontation.^{cclxxiv}

--- “practical” categories; informer accusations

Given all the rhetoric about “faceless informants” in the history of confrontation, we might expect courts to have an easy time in declaring such accusations “testimonial.”^{cclxxv} But facts have struggled with cases in which anonymous declarants have accused someone of crime.^{cclxxvi} Since courts have not treated informers as a

separate category, we have placed informer cases under the headings that courts used to decide them.¹

--- “practical” categories; investigatory interrogations

Many cases have held statements not “testimonial” despite the official inducement test on the ground that the declarants were responding to what we call “investigatory interrogation.”^{cclxxvii} Courts accepting this category seem to rest it on the policy of avoiding police abuse; that is, if the officers are just trying to find out “what happened”, they cannot shape the statements for prosecutorial purposes.^{cclxxviii} For example, when the declarant approaches police officers at the scene of an accident and asks them what happened to the wrecked car, the declarant’s response to their questions are not “testimonial” even though the officers already suspected the car had been used in a recent robbery because they did not know that the declarant was the girlfriend of the driver of the car.^{cclxxix} This category requires drawing some fine temporal and factual lines to prevent its being used simply as a device to evade Crawford.^{cclxxx}

Some courts have added an emergency justification for exempting statements from Crawford under this heading; that is, at the time of the statement, the officers just wanted to “assess the situation and secure the scene.”^{cclxxx} The possibilities for abuse appear when one court uses the “res gestae” doctrine (albeit without the Latin tag) that courts have used in the past to evade the other crimes and hearsay doctrines.^{cclxxxii} Perhaps to avoid misuse, some courts supplement this category with formal criteria borrowed from the official inducement doctrine; e.g., a statement will be found nontestimonial only when a product of an “unstructured interaction between officer and witness” that does not amount to a “formal police inquiry.”^{cclxxxiii} For example, immediately after the police rescue the declarant from a knife-wielding assailant, she tells them what he did to her before they arrived on the scene.^{cclxxxiv} One court tried to formulate a checklist to allow lower courts to determine when an investigatory interrogation was “testimonial.”^{cclxxxv}

A few courts apply the investigatory interrogation category with some rigor.^{cclxxxvi} But others apply it in formalistic fashion that appears naive in light of the policy of Crawford; finding a statement “nontestimonial” when a police officer executing a search warrant answers the defendant’s phone and seeks to elicit an offer to buy drugs from the caller by posing as a drug dealer.^{cclxxxvii} Some courts have rejected this category entirely;^{cclxxxviii} others apply it only on a case-by-case basis.^{cclxxxix} Other courts find statements that might fall within this category “testimonial” when they resemble an “accusation” by applying the “objective declarant” standard.^{ccxc} Once again, experience with this category suggests courts will often reach the correct result more easily if they ask whether the statement to the police accused the defendant of some crime.^{ccxci}

--- “practical” categories; “mechanical hearsay”

One hearsay issue evidence students find typically professorial (and hence impractical) concerns “mechanical hearsay”---a “statement” produced by a machine without human intervention offered for the truth of what the machine asserts; for example, to prove venue, a witness testified that the navigation system in his car “said” he was in San Bernardino County when fired on by defendant from a passing truck.^{ccxcii} Since the problem of “mechanical hearsay” surfaces so seldom in the cases, one would not expect it to arise so soon under Crawford.^{ccxciii} However, within a year of Crawford one court correctly held that because the printout from a breath machine was not “hearsay”, it could not be “testimonial.”^{ccxciv} But another court produced an opinion that can be read as reaching the opposite conclusion.^{ccxcv} -

--- “practical” categories” ; plea allocutions

When a trial judge accepts a guilty plea from a defendant, Criminal Rule 11 requires that the judge make sufficient inquiry of the defendant to determine that he understands what he has done to violate the law---a procedure often incorrectly referred to as “allocution.”^{ccxcvi} Evidence Rules 410 and 802 provide significant limitations on the use of these Rule 11 statements as evidence so one would not suppose they would constitute a significant confrontation problem.^{ccxcvii} Nonetheless, courts in the Second Circuit allowed the use of allocution statements often enough to earn a place in Justice Scalia’s Hall of Shame for opinions under Roberts allowing the use of “plainly testimonial statements despite the absence of any opportunity to cross-examine.”^{ccxcviii} In the face of this vituperative dictum, the Second Circuit has fallen into line, holding the use of “allocutions” per se violative of Crawford.^{ccxcix} State courts have also found it “obvious” that the person is “bearing witness against himself” so as to make allocution statements “testimonial” when used to convict someone else.^{ccc} Nonetheless, some judges on the Second Circuit still suppose that prosecutors can evade the Crawford dictum by offering the guilty plea rather than the Rule 11 statements.^{ccci}

--- “practical” categories; “private” conversations

One categorical offshoot of the “official inducement” test holds that statements made to friends and family are not “testimonial” hearsay.^{cccii} Not only do such statements not involve any official inducement, the declarant will often not have any objective belief that the statement will be used in a criminal prosecution.^{ccciii} But the policy behind this categorical exclusion cannot easily be discerned; why should an accuser who lacks the guts to go public with his accusation be allowed to remain in the shadows when the government seeks to use a “private” accusation against the accused?^{ccciv} Indeed, some of the cases representing this category involve private statements that did not accuse anyone of a crime.^{cccv} But courts that recognize this exception make no attempt to go beyond Crawford to justify its application to accusations of crime.^{cccvi}

Sensitive to possibilities of abuse, some courts limit this category to communications among “confidants.”^{cccvii} Some of the cases fit this criterion; where a

frightened woman calls her sister for advice about what to do about a man she thinks is lurking outside her house.^{cccviii} This can perhaps reasonably be extended to a roommate, at least where the roommate is related to the declarant.^{cccix} Accusations made to a neighbor seem to stretch the notion of “private” quite a bit.^{cccx} But the concept lose all meaning when applied to statements of declarant to relatives visiting him in jail uttered within earshot of his guards.^{cccxi}

--- “practical” categories; 911 calls

Since some writers think that declarants who call 911 to report a crime deserve special consideration^{cccxi}, courts may justifiably suppose that they should be treated categorically.^{cccxi} But courts who accept categorical treatment, differ widely in both whether the category is “testimonial” and why.^{cccxi} Some courts treat 911 calls as excited utterances and hold them per se nontestimonial under that category.^{cccxi} Other courts relying on precedents under the official inducement test, find 911 calls not “testimonial” because not a product of “structured police questioning.”^{cccxi} Other courts look to the objective declarant test to find calls nontestimonial because the witness wants to summon help, not make an official accusation of crime.^{cccxi} Given this lack of consensus on the proper treatment of 911 calls, courts have found it too easy to use this category as an analogy to decide cases not involving such calls.^{cccxi}

A few courts have used the objective declarant test to find calls “testimonial”, reasoning that anyone who reads newspapers or watches television crime shows knows that police use 911 calls to develop evidence for prosecution.^{cccxi} The better reasoned cases reject categorical treatment of 911 calls in favor of using the general Crawford criteria on a case-by-case basis to determine whether or not the call is “testimonial.”^{cccxi} Courts should be reluctant to hold 911 calls “nontestimonial” where the police promise, provide, or allow the number to be used for anonymous accusations.^{cccxi} The Court’s condemnation of anonymous accusers during the McCarthyite abuses counsels against allowing such evidence as part of the “war on crime”---or drugs or terrorism.^{cccxi}

Categorical analysis--- “doctrinal” categories

The second kind of categorical analysis tries to determine whether a statement is “testimonial” by looking at the hearsay exception used by the trial court to admit the statement.^{cccxi} As we have just seen, courts may use both a doctrinal category and a practical category in admitting a statement; e.g., admitting 911 calls when they fall within the exception for excited utterances.^{cccxi} We treat two instances of such combination analysis separately because we think the courts in these cases actually want to create an exception to the Crawford requirements for cases of domestic violence and sexual abuse of children.^{cccxi}

--- “doctrinal” categories; Rule 801(d)(2) party admissions

In Crawford, Justice Scalia opined that “[most of the hearsay exceptions] covered statements that by their nature were not testimonial---for example, business records or statements in furtherance of a conspiracy.”^{cccxxvi} Rule 801(d)(2) includes party admissions in the same group of hearsay exemptions as co-conspirator statements so one unfamiliar with the differing policies of these admissions might suppose that all of them are automatically nontestimonial under Crawford.^{cccxxvii}

The most commonly used of these exemptions, so-called “straight admissions”, admit the defendant’s own statements on a theory of “estoppel by mouth”; that is, a litigant who shoots off his mouth cannot object to the use of such statements by an opponent on the ground that he did not know what he was talking about.^{cccxxviii} Despite this, under the Roberts regime, one court held that “straight admissions” were not “firmly rooted”---which if true would cast doubt on their use under Crawford.^{cccxxix} This “Left Coast” opinion seems to have led judges to suppose that “straight admissions” raised confrontation problems under Crawford.^{cccxxx} Since the defendant cannot be a “witness against” himself unless he waives the Fifth Amendment privilege against self-incrimination, one can argue that under the theory of the “holistic Sixth Amendment” he needs no additional protection under the Confrontation Clause against attempts to make him a “witness against” himself.^{cccxxxi} Be that as it may, the few courts who have seriously entertained a confrontation challenge to them have held “straight admissions” not “testimonial.”^{cccxxxii}

Some judges have supposed that adoptive admissions under Rule 801(d)(2)(B) should fare similarly under Crawford.^{cccxxxiii} But while the defendant has no right to confront himself, arguably he needs to confront the person who made the statement he supposedly adopted---the true “witness against” him.^{cccxxxiv} Hence, one court held that where the police used a turncoat accomplice to try to get the defendant to adopt the accomplice’s statements, those statements are “testimonial” under Crawford.^{cccxxxv} But in most cases, courts treat “straight” and “adoptive” admissions similarly for Crawford purposes.^{cccxxxvi}

Of course, where one defendant’s “straight” or “adoptive” admissions come in at a joint trial, her codefendant’s have a confrontation objection under the Bruton doctrine.^{cccxxxvii}

As of this writing, no case has considered the status of “authorized” or “vicarious” admissions under Crawford.^{cccxxxviii} This probably stems from the rarity of criminal prosecutions of corporations.^{cccxxxix} When the issue arises, courts will probably hold such statements not “testimonial” by analogy with the other exemptions in Federal Rule 801(d)(2), especially the exemption for statements by coconspirators.^{cccxl}

-----; Rule 801(d)(2)(E) coconspirator statements

One kind of “private conversation” courts eagerly find nontestimonial are those among conspirators.^{cccxli} Courts can find multiple *rationalia* for this result.^{cccxlili} Since

conspiracy is a crime committed by words, statements made in furtherance of the conspiracy are “legally operative conduct”; that is, they are not offered for the truth of the matter asserted (or as law students say, “they are not offered FOTOMAT”), so they are not “hearsay” and beyond Crawford on that ground.^{cccxl} Moreover, many of the crimes popular among conspirators---fraud and sales of contraband such as narcotics and stolen property---have the utterance of words as one of their elements; since such statements are also “legally operative conduct”, they too are not “hearsay”.^{cccxliv}

Hence, it is only where the statement of the co-conspirator was not “in furtherance” of the conspiracy, that courts need to ask whether they were “testimonial.”^{cccxliv} Courts frequently say that because of the secretive nature of conspiracies, the speakers could not anticipate prosecutorial use so by their very nature co-conspirator statements are not “testimonial.”^{cccxlvi} Such statements echo a dictum in Justice Scalia’s opinion for the Crawford majority.^{cccxlvii} Occasionally courts overlook the limitation in the Crawford dictum to statements “in furtherance” of the conspiracy.^{cccxlvi} But the better reasoned opinions have found coconspirator statements not “in furtherance” of the conspiracy to be “testimonial”^{cccxliv} ; for example, where the police induce one conspirator to call the other to try to induce admissions.^{ccccli} But some coconspirator statements that appear “testimonial” may come in for a nontestimonial purpose; for example, false statements given at a civil deposition are obviously not being offered by the prosecution for their truth.^{ccccli} In addition, some coconspirator statements may qualify as nontestimonial where they do not amount to an accusation.^{ccccli}

-----; Rule 803(1) contemporaneous statements

Sometimes courts apply the Crawford dictum to statements falling within the so-called “Houston Oxygen” exception in Rule 803(1).^{ccccli} This exception was originally justified on the ground that since the statement was made in the presence of another witness to the event described, the declarant would be less likely to lie and the other witness could correct any misperceptions or misnarration.^{ccccli} Hence, nothing about Houston Oxygen statements makes them inherently incapable of being accusations of a crime or makes the declarant unable to contemplate their use in the prosecution of the accused.^{ccccli} Unhappily, many courts have expanded the exception well beyond its original justification to make it all but indistinguishable from the exception for excited utterances.^{ccccli}

-----; Rule 803(2) excited utterances

Many courts hold excited utterances per se “nontestimonial.”^{ccccli} Few do this in reliance on Justice Scalia’s Crawford dictum.^{ccccli} Some rely on formal grounds; i.e., an excited utterance lacks the structure of the core concept of “testimony” found in Crawford.^{ccccli} Others argue that if the declarant satisfies the requirement of the exception that she be so excited that she cannot contemplate lying, then a fortiori she cannot contemplate the possible use of the statement to prosecute the accused.^{ccccli}

Some of the per se cases look very much like attempts to create categorical exceptions not found in Crawford; e.g., for 911 calls or for accusations of child abuse.^{ccclxi}

Most of the cases reject the per se approach.^{ccclxii} The majority hold that an excited utterance may or may not be “testimonial” depending on the circumstances of the particular case.^{ccclxiii} For example, even if a statement qualifies under the hearsay exception, it can still be “testimonial” if the excited utterance was induced by police interrogation.^{ccclxiv} On the other hand, where the excited declarant rushes up to a police officer responding to a citizen alert about domestic violence to say that the defendant had assaulted her and was upstairs stabbing her mother, the statement is nontestimonial.^{ccclxv} On the other hand, some excited utterances could better be excluded from confrontation scrutiny on the grounds that they do not amount to an “accusation.”^{ccclxvi} For example, when a murder victim seeing a man who threatened to kill him arrive at his home and shouts to family members to take cover.^{ccclxvii}

-----Rule 803(4) statements to medical personnel

Another doctrinal category that courts use to create a “quasi-exception” to Crawford is the hearsay exception in Rule 803(f) for “statements for purposes of medical diagnosis or treatment.”^{ccclxviii} Courts justify this on many grounds.^{ccclxix} Some say that because to be within the hearsay exception the statement must be made to get treatment, any statements within the privilege cannot have been intended for use at trial.^{ccclxx} Other courts say the statements are not “testimonial” because the declarant could not objectively believe that the statement would be used at a subsequent criminal trial.^{ccclxxi} Finally, some courts rely on the official inducement rationale; that is, because medical personnel are not government employees, there is little danger that they would shape the statements for prosecutorial purposes.^{ccclxxii}

The “90 pound gorilla” courts ignore in all these rationalia are the state statutes that require medical personnel to report cases of suspected child abuse.^{ccclxxiii} Moreover, many courts ignore the rationale of the hearsay objection and of Crawford to hold that what counts is not the patient’s belief that she must be truthful but the doctor’s subjective belief that his only purpose was treatment.^{ccclxxiv} The resulting opinions carry a strong aura of unreality.^{ccclxxv}

The better-reasoned cases reject categorical treatment of statements to medical personnel.^{ccclxxvi} Instead, they apply the Crawford criteria to such statement.^{ccclxxvii} When courts admit only non-accusatorial statements to physicians and nurses they not only comply with Crawford but bring confrontation doctrine more in line with the hearsay exception.^{ccclxxviii}

-----; Rule 803(6) business records

As we previously saw, in Crawford Justice Scalia wrote that most common law hearsay exceptions “covered exceptions that by their nature were not testimonial---for example, business records. . .”^{ccclxxxix} Hence, some courts have supposed that anything found in a file drawer or on a computer hard drive was per se not “testimonial.”^{ccclxxx} But as we have seen, many of those cases dealt with state statutes allowing the prosecution to prove elements of immigration crimes, drunk driving or drug offenses by affidavit.^{ccclxxx} Some of these cases read Justice Scalia as saying that business records constitute an “exception” to the right of confrontation because like dying declarations they predate the adoption of the Sixth Amendment.^{ccclxxxii} In fact, the business records exception was created by statute in the early 20th Century.^{ccclxxxiii} Moreover, the Supreme Court interpreted that statute to exclude records created for use in litigation, a limitation carried over into Rule 803(6).^{ccclxxxiv}

The better-reasoned cases correctly understand Justice to Scalia to mean that most true business records will not be “testimonial” because they do not contain accusations of crime and were not prepared for use in prosecuting criminal cases.^{ccclxxxv} These courts apply the general Crawford criteria to hearsay offered under the business records exception and, where appropriate, find them “testimonial.”^{ccclxxxvi} Of course, often “testimonial” business records will have been improperly admitted as a matter of state hearsay law so the court need not reach the constitutional question.^{ccclxxxvii} On the other hand, applying the Crawford criteria can also lead to the conclusion that a particular business record is not “testimonial.”^{ccclxxxviii}

----; Rule 803(8) official records

Perhaps sensing that affidavits don’t fit well within the business records exception, some courts invoke the official records instead of, or in addition to, the business records rationale.^{ccclxxxix} Some courts make the same historical error here; that is, supposing that the official records exception existed in 1791 so the hearsay exception also creates an exception to the right of confrontation.^{cccxc} Hence, hearsay admitted under the official records exception gets treated as per se beyond the scope of Crawford as nontestimonial.^{cccxc} As was true of the per se approach to business records, courts seem driven by the desire to avoid troubling government bureaucrats by the adversary needs of criminal defendants.^{cccxcii}

Ironically, Congress amended the Advisory Committee’s version of Rule 803(8) to exclude from the hearsay exception “matters observed by police officers and other law enforcement personnel” as well as “factual findings” of authorized investigations in criminal cases.^{cccxciii} This amendment resulted from a concern over “the adversarial nature of the confrontation between the police and the defendant in criminal cases.”^{cccxciv} As other writers have noted, the use of Rule 803(8) to admit “testimonial” hearsay seems a questionable ploy.^{cccxcv} Moreover, many courts hold that prosecutors cannot escape the restrictions in Rule 803(8) by offering government records under the business records exception.^{cccxcvi} Courts would do better to renounce the categorical approach to official records in favor of application of the general Crawford criteria.^{cccxcvii}

As we have previously seen, courts use the business and official records categories almost exclusively to admit crime lab and other affidavits.^{cccxcviii} Many courts will distort the exceptions to justify admission of affidavits.^{cccxcix} Others rely on restrictions in the hearsay exceptions to hold the affidavits inadmissible as “testimonial.”^{cd} As a result, the affidavit cases illustrate nicely why the Supreme Court’s “testimonial” conception fails; namely, it leads courts to exclude affidavits that do not look much like the “accusations” of crime that ought to be the core concern of the Confrontation Clause.^{cdi} For example, a process server who fills out a proof of service for a restraining order could hardly be called defendant’s “accuser” when the affidavit is later introduced in a prosecution for violating the order.^{cdii} The same seems true when a police chemist submits a report or an affidavit stating that she tested a substance submitted to her for analysis and opining that the substance is cocaine.^{cdiii} In some cases, the defense may have good reason for wanting to cross-examine the chemist in light of revelations about the shoddy work of some crime labs.^{cdiv} But this is a problem that might be better handled by stricter enforcement of the hearsay exceptions and the expert opinion rules---or if the issue must be constitutionalized, under the Due Process clause.^{cdv}

-----; Rule 804(b)(3) declarations against interest

Another hearsay exception that courts have stretched out of shape to ensure convictions is the one in Evidence Rule 804(b)(3) for declarations against penal interest; for example, holding that statements made by a defendant to obtain a favorable plea bargain are “against” his interest.^{cdvi} Courts sometimes take schizophrenic views of declarations against interest; for example, holding that the statement was a private one among friends to escape from Crawford and holding it was against the declarant’s interest to avoid hearsay exclusion.^{cdvii} But the court has already addressed this problem in Lilly, writing that “declarations against interest” described “too large a class for meaningful Confrontation Clause analysis.”^{cdviii} Perhaps for this reason, most courts have opted not to treat declarations against interest in categorical fashion under Crawford.^{cdix}

As of this writing, no other hearsay exceptions have been treated categorically for Crawford analysis.^{cdx}

II. Admissibility of “Testimonial” Statements

Once a court determines that a hearsay statement is “testimonial”, Crawford tells us that the statement is only admissible if two conditions are satisfied: first, the declarant is unavailable as a witness, and; second, the defendant had a prior opportunity to cross-examine the declarant.^{cdxi} Though lower courts most often cite this “bright line” rule en route to finding a way around it^{cdxii}, when the two conditions fail they have little problem understanding the rule.^{cdxiii} Though Justice Scalia’s opinion for the Crawford majority speaks of the “admission” of “testimonial” hearsay, presumably

the Sixth Amendment bars other methods of bringing the statement before the trier of fact; for example, by taking judicial notice of the statement.^{cdxiv}

However, the Crawford opinion blurs the “bright line” in an effort to remain loyal to its misguided conclusion that the right of confrontation came over on the Mayflower; Justice Scalia says the Sixth Amendment “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”^{cdxv} This “small class” of exceptions to the right is larger than some courts suppose.^{cdxvi} We should, however, not confuse these “exceptions” to the right of confrontation with those hearsay “exceptions” that Justice Scalia opined that “by their nature were not testimonial.”^{cdxvii} The latter lie beyond the scope of Crawford, governed by Roberts or completely free of Sixth Amendment scrutiny.^{cdxviii}

---present cross; declarant testifies at trial

Since Justice Scalia cites Green with approval^{cdxix}, Crawford does not alter the holding in that case that confrontation does not require contemporaneous cross-examination; that is, present cross-examination about a past hearsay statement satisfies the Sixth Amendment.^{cdxx} The lower courts understand that Crawford allows the admission of “testimonial” hearsay if the declarant takes the stand and is subject to cross-examination about the statement.^{cdxxi} Unhappily, when Justice Scalia alluded to this route to admissibility of “testimonial” hearsay in a footnote, he wrote 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.”^{cdxxii} This phrasing has left the lower courts in some confusion about just what it takes to satisfy the right of confrontation by this method.^{cdxxiii}

To begin with an elemental point, courts have differed on whether the declarant “appears” within the meaning of the Scalia dictum when his visage “appears” on a closed circuit television screen but he is not physically present in the courtroom.^{cdxxiv} Since the right of physical confrontation is a separate feature of the right of confrontation, it seems unlikely that Crawford intended to overrule or undermine the Court’s prior cases on this feature.^{cdxxv}

No case so far has addressed the question of whether the declarant “appears” when the prosecution has her present in the courtroom so the defendant could call her as a witness but does put her on the stand.^{cdxxvi} However, one California opinion holds that the prosecution can satisfy Crawford by putting the declarant on the stand without having her testify about the statement.^{cdxxvii}

Suppose, however, the witness takes the stand and refuses to answer any questions about her prior accusation---a common occurrence in wifebeating cases.^{cdxxviii} One court has held this satisfies Crawford, at least where the defendant does not seek a contempt citation of the declarant-witness.^{cdxxix} But in most cases, the recalcitrant declarant will not openly defy the court but will take refuge in Richard Nixon’s advice for

avoiding perjury; that is, claim a lack of memory.^{cdxxx} Most courts hold Crawford satisfied in such cases.^{cdxxxii} This seems justified in light of the Supreme Court's holding in Owens to the same effect under the Roberts regime.^{cdxxxiii}

Where the declarant testifies and recants the prior accusation, most courts hold this satisfies Crawford even though cross-examination about the recanted accusation may be ineffective.^{cdxxxiv} The witness must have personal knowledge of the subject of the "testimonial" statement.^{cdxxxv} But one court has held Crawford satisfied where the declarant's memory has been hypnotically enhanced.^{cdxxxvi} In short, most courts hold Crawford satisfied by an opportunity for present cross-examination without regard to its effectiveness.^{cdxxxvii} However, past cross-examination does not suffice where the declarant appears at trial.^{cdxxxviii}

---declarant "unavailable": past cross

The Crawford majority also opined that the use of the "testimonial hearsay" of an absent declarant did not offend the Sixth Amendment if the declarant "was unavailable to testify, and the defendant had a prior opportunity for cross-examination."^{cdxxxix} We take up these dual requirements in that order.

----- "unavailable"

We assume that the standard for "unavailability" under Crawford is the one laid down in Barber v. Page^{cdxl}; that is, "a witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial."^{cdxli} Many courts have applied this standard under Crawford.^{cdxlii} But the Barber standard dealt with declarants who were physically "unavailable" so it cannot be applied to declarants who are physically present but have emotional or physical reasons for not testifying; for example, the witness who claims a lack of memory or the privilege against self-incrimination.^{cdxliii} The Barber standard never got developed much beyond the cases of physically absent declarants because for the two decades prior to Crawford, the Court all but abandoned the "unavailability" requirement.^{cdxliv}

In another pre-Crawford case of a physically absent declarant, the Court held that confrontation was excused where the record shows that the state "was powerless to compel his attendance."^{cdxlv} Applied by analogy, this standard might make the witness "unavailable" where she claims a lack of memory, a common occurrence in domestic violence cases.^{cdxlvi} But the state is not "powerless" in the case of a claim of the privilege against self-incrimination; it can always grant the witness immunity.^{cdxlvii} Unwillingness to compel immunity grants to satisfy the right of confrontation may explain why courts do not adopt the "powerless" standard of unavailability for forgetful witnesses.^{cdxlviii}

Instead, when faced with a form of “unavailability” that Barber does not contemplate, most courts adopt the standard of Evidence Rule 804(a) or similar state provisions.^{cdxlviii} But since these requirements were drafted for use with the hearsay rule, they fall far short of the rigorous standards Barber supposes that the Sixth Amendment demands.^{cdxlix} Indeed, one state court reads Crawford as rejecting the kinds of “subjective standards” of unavailability found in these statutes and rules.^{cdl} Hence, until the Supreme Court again addresses the question, we cannot state with any confidence what standard of “unavailability” must be met to admit “testimonial” hearsay under this exception to the right of confrontation.^{cdli}

----- “opportunity to cross-examine”

In a pre-Crawford case, Justice Scalia and the majority of the Court took a rather cavalier view of the right of cross-examination under the Sixth Amendment: “the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”^{cdlii} Since those words were addressed to present cross-examination, we may hope that something more stringent might be required in the case of past cross-examination where the defendant will also be deprived of some of the features that make cross-examination effective; for example, the ability of the jurors to observe the demeanor of the witness as he answers.^{cdliii}

In considering the constitutional adequacy of past cross-examination, we may fruitfully distinguish between those circumstances intrinsic to the examination (the witness refuses to answer or the judge cuts off the cross-examination as “tedious”) and those circumstances extrinsic to the examination (defense counsel was drunk or otherwise incompetent).^{cdliv} As to the first, the lower courts have generally been tolerant of such inhibitions on the effectiveness of cross-examination as lack of memory and inarticulate or evasive responses.^{cdlv}

Courts have been more concerned about the extrinsic features that limit the effectiveness of cross-examination.^{cdlvi} For example, in *California v. Green* the court held the Confrontation Clause satisfied by cross-examination at a prior preliminary hearing.^{cdlvii} Some courts assume *Green* is still good law after Crawford.^{cdlviii} But other courts have held that because of its limited scope, the preliminary hearing does not provide an “opportunity for cross-examination” that suffices under Crawford.^{cdlix} Even when the state has wide open cross-examination at the preliminary hearing, when the hearing takes place shortly after counsel is retained or appointed, she may be ill-prepared for cross-examination.^{cdlx} One court has applied the “holistic Sixth Amendment” as a standard to judge the adequacy of a past hearing to provide meaningful cross-examination.^{cdlxi}

Another problem with the preliminary hearing and other pretrial hearings courts have found to provide an adequate “opportunity for cross-examination” arises when

extrinsic circumstances have changed between the time of hearing and the time of trial.^{cdlxii} Courts all but universally hold that changed circumstances does not alter the adequacy of past cross-examination.^{cdlxiii}

Courts have also divided on the adequacy of the prior hearing where its procedural incidents differ from those that prevail at trial; for example, the defendant is not allowed to be present at the hearing.^{cdlxiv} One court has held Crawford satisfied by examination at a pretrial hearing on the admissibility of the statement even though declarant had to call the witness and could only conduct direct examination.^{cdlxv}

Since defendant has a personal right to confront the witness, cross-examination of the witness by some other defendant does not satisfy Crawford even though such “proxy cross-examination” suffices for the prior testimony exception in some state codes.^{cdlxvi}

---declarant available but not called

Prosecutors have sometimes argued that Crawford is satisfied if the state makes the declarant available so the defendant could call and examine her.^{cdlxvii} Since the Sixth Amendment puts the burden on the state to provide confrontation, not merely to allow the defendant to seek it, courts have rightly rejected this argument.^{cdlxviii} However, one court supposed that Crawford was satisfied if the defendant could have deposed the declarant.^{cdlxix} But another court expressed some doubt about this.^{cdlxx}

--- “testimonial” statement not “hearsay”

In a pre-Crawford case, the Supreme Court held that defendant has no right to confront declarants whose statements are introduced for some non-hearsay purpose.^{cdlxxi} In Crawford, Justice Scalia restated the point this way: “The [Confrontation] Clause. . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”^{cdlxxii} Lower courts generally assume that whether or not the statement is “hearsay” for purposes of the right of confrontation is to be determined under Rule 801(c) or the state hearsay rule.^{cdlxxiii}

Under Rule 801(c), as under the common law, the definition of “hearsay” contains three elements: (1) a “statement”; (2) made “out of court”; and (3) “offered to prove the truth of the matter asserted therein” (or as law students say “offered FOTOMAT”).^{cdlxxiv} Each of these elements contains some degree of uncertainty; for example, some judges and lawyers erroneously suppose that a question is not a “statement” and therefore cannot be “hearsay.”^{cdlxxv} In addition, some courts assume that the hearsay rule only bars direct, not circumstantial evidence, of hearsay; hence, when anonymous declarants identify the defendant as the instigator of a bar fight, the prosecution can evade the hearsay rule by having the police officer testify “I went into the bar and after interviewing the witnesses to the fight, I arrested the defendant.”^{cdlxxvi}

Courts applying Crawford are at this writing batting around .500 in applying these basic hearsay concepts.^{cdlxxvii} Most courts assume that circumstantial evidence of hearsay raises no Crawford problems.^{cdlxxviii} On the other hand, the Tenth Circuit correctly saw that an accomplice's question "how did you guys find us?" was an "assertion" under Rule 801(c), though some might argue with the court's conclusion that it was "testimonial" since it does not resemble an accusation.^{cdlxxix}

Many courts correctly apply the FOTOMAT element of the hearsay rule when applying the Crawford dictum that Street remains good law.^{cdlxxx} This is particularly true of the classical categories of non-FOTOMAT use:

- offered to show the effect of the statement on someone who heard it (EOH)^{cdlxxx} Some opinions that appear wrong or simply obtuse might also fall in this category.^{cdlxxxii}
- "legally operative conduct" (LOC); i.e. the words uttered are an element of the crime or of a defense.^{cdlxxxiii}
- "circumstantial evidence of state of mind" (CE/SM); this require the proponent to introduce both the statement and independent evidence that it is either true or false; for example, to show the defendant knew that the victim kept her housekey under the doormat we need both defendant's statement and independent evidence that she did.^{cdlxxxiv} Some courts erroneously suppose that any statement offered to show the declarant's state of mind is not hearsay; if this were so, the hearsay exception for state of mind would be superfluous.^{cdlxxxv}
- impeachment; e.g., as a prior inconsistent statement.^{cdlxxxvi}
- to show the basis of an expert's opinion; this is a specialized example of EOH but it deserves special consideration because it is frequently misused.^{cdlxxxvii}

Courts must be careful when admitting a statement for a non-hearsay purpose that they do not overlook problems of multiple hearsay; that the statement being offered non-FOTOMAT is proved by another hearsay statement.^{cdlxxxviii} In addition, the fact the non-FOTOMAT statement is offered to prove must be relevant; for example, on a motion to suppress evidence as the product of an illegal search and seizure, the statement of an informer to the officer comes in non-FOTOMAT as EOH.^{cdlxxxix} But since the legality of the arrest is seldom an issue at trial, evidence that the police had probable cause is irrelevant.^{cdxc}

For this reason, Evidence Rule 401, which makes evidence "relevant" when offered to prove undisputed "background facts", threatens to undermine the right of confrontation.^{cdxc} Courts have exploited this to admit evidence on the bogus theory of proving "context", "the course of the investigation" or why the officers acted as they did.^{cdxcii} Sometimes statements admitted under the bogus theory could probably have

been admitted for some legitimate purpose.^{cdxciii} If not, the evidence should be excluded when offered under the bogus theory.^{cdxciv}

-----the “expert testifier”

An even greater threat to the right of confrontation is the practice of some crime labs of sending to court their most polished “testifier”, rather than the expert who actually performed the laboratory work that incriminates the defendant.^{cdxcv} Courts justify this by Evidence Rule 703, though it is doubtful that it conforms with either the letter, spirit, or policy of the Rule.^{cdxcvi} Not only are such “testifiers” more accomplished courtroom performers and more imbued with the pro-prosecution ethos, when pinned down they can always claim that they don’t know anything except “what it says in the report.”^{cdxcvii} In some cases, the expertise of the witness consists of knowing the best way to get testimonial hearsay before the jury.^{cdxcviii} For example, some courts allow a police “expert” to testify that the defendant is a member of a “criminal street gang” based on accusations of membership by anonymous declarants.^{cdxcix}

A surprising number of courts have approved the use of “testifiers” despite Crawford.^d The cases theorize that the unfronted statements are not “hearsay” or not “testimonial” or both.^{di} One court held that hearsay-based expert testimony is proper under Crawford because the defendant can cross-examine the expert who testifies.^{dii} Another opined this was proper where the prosecution did not introduce the hearsay, apparently meaning that if the defendant exercises his right to cross-examine the expert he waives his right to confront the hearsay declarants.^{diii}

The better-reasoned cases reject all of the rationalizations given for allowing an expert witness to smuggle “testimonial” hearsay into the jury room.^{dii} As one court noted, given the recent scandals over bias, incompetence, and corruption in prosecution-oriented laboratories, the need to cross-examine lab technicians who do the work has never been higher.^{dvi}

-----manipulation of hearsay definition

So far prosecutors have seen little need to take advantage of the present route to admissibility by manipulating the definition of hearsay.^{dvi} Since this may change if the Supreme Court cuts off some of other techniques lower courts have approved for bypassing Crawford, it is worth mentioning two of these.^{dvii} The first is circumstantial evidence of hearsay; that is, evidence whose only relevance is to allow the jury to infer that someone made hearsay accusations against the defendant.^{dviii} The second is to invoke the Wigmorean response to the infamous “I-am-the-Pope” hypothetical; e.g., the statement “I want to buy drugs” is not hearsay when offered to prove, not the speaker’s desire for dope but the defendant’s willingness to supply it.^{dix} In the rare cases in which these gambits surfaced, courts have been able and willing to check them.^{dx}

-----instructions and the Bruton problem

Since hearsay offered for a nontestimonial (i.e., non-FOTOMAT) purpose comes in under the doctrine of multiple admissibility, the court must comply with Evidence Rule 105; that is, the jury must be given a limiting instruction and the prosecution cannot use the evidence for its truth.^{dx1} Courts understand their duties under Rule 105 but sometimes take a cavalier attitude toward them.^{dx2} Some of the instructions given provide little help to the jury in understanding just what uses they can make of statements admitted for a nontestimonial purpose.^{dx3} But a court is in a poor position to give a good limiting instruction to the jury if it does not force the prosecutor to provide a clear explanation of just why the statement is relevant as nonhearsay.^{dx4} Instructions are crucial under Crawford because the Supreme Court held in the well-known Bruton decision that where instructions could not protect the defendant against the use of unconfrosted hearsay, the hearsay must be excluded.^{dx5} While Bruton involved the confession of a defendant introduced at a joint trial with a nonconfessing codefendant, some of the statements allowed in under Crawford seem even more difficult to control with a limiting instruction; accusations of child abuse by the child and her mother admitted as the basis for an expert opinion that the child was abused.^{dx6}

---defendant forfeits right of confrontation

In a dictum in Crawford, Justice Scalia wrote that “we accept. . .the rule of forfeiture by wrongdoing [which] extinguishes confrontation claims on essentially equitable grounds.”^{dx7} The citation to Reynolds v. U.S. that follows makes clear that what the majority had in mind was the defendant who obstructs justice to prevent the declarant from appearing, then complaining that he cannot cross-examine her.^{dx8} Many courts have properly applied the forfeiture doctrine.^{dx9} This requires that the prosecution prove that the defendant engaged in some misdeed with the intent of making the declarant unavailable at trial; i.e., it is not enough that defendant jumped bail and the declarant died while he was at large.^{dx10} But some courts take the view that defendant’s intent is irrelevant so long as his wrongdoing had the effect of preventing the declarant’s testimony; for example, the defendant is on trial for murdering the declarant.^{dx11} One may doubt that this is what the Supreme Court intended because these holdings make superflous the Crawford majority’s remarks about the status of the dying declaration exception.^{dx12}

Courts agree that the prosecution has the burden of proof of the preliminary facts but they disagree about how much evidence suffices to prove the defendant’s intent.^{dx13} Some courts say that intent need be proven only by a preponderance of the evidence.^{dx14} New York courts apparently apply a much lower standard, at least in domestic violence cases, holding that the spouse’s recantation of her accusations suffices.^{dx15} Similarly, relying on a jailhouse informant’s testimony that the defendant admitted he killed the declarant to prevent her testimony does not suggest a very high standard of proof.^{dx16} Cases holding the evidence insufficient seem to comport with a preponderance standard.^{dx17} The better cases holding the evidence suffices do not seem to require a higher standard.^{dx18}

-----confused application of “forfeiture”

Unhappily, the Supreme Court has used the term “forfeiture” to describe procedural default that bars appellate review.^{dxxix} As a result, lower courts use the term rather than the pseudo-waiver rationale Wigmore used to characterize the effect of the failure to object at trial.^{dxxx} In some cases, the confusion produces an arguably incorrect decision but it does not damage the right of confrontation.^{dxxxi} But some confused applications all but demolish the right;^{dxxxii} for example, holding that defendant forfeits the right of confrontation by failing to depose or subpoena the absent declarant.^{dxxxiii} The better reasoned cases reject pseudo-waiver of the right of confrontation.^{dxxxiv}

---dying declaration exception?

In a footnote in Crawford, Justice Scalia suggested that the “one deviation” from the majority’s views that history does not justify treating hearsay exceptions as exceptions to the right of confrontation “involves dying declarations.”^{dxxxv} He finds cases in which “testimonial” dying declarations were admitted at the English common law, but says the Court “need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations.”^{dxxxvi} But he adds that “[i]f this exception must be accepted on historical grounds, it is sui generis”---in plain English, “one of a kind.”^{dxxxvii}

While recognizing this possibility in dicta, most courts recognize that the Supreme Court left the question unanswered.^{dxxxviii} As we have just seen, some courts side-stepped the question by holding that if the defendant is charged with murdering the dying declarant, he forfeits the right of confrontation.^{dxxxix} But other courts rushed to answer the question “yes.”^{dxl} Usually courts justify this answer on the questionable ground that the Sixth Amendment was intended to incorporate the common law.^{dxli} However, even states that lacked a confrontation clause in 1791 took a dim view of dying declarations.^{dxlii}

---exceptions for wife-beating and child sexual abuse cases?

Given Justice Scalia’s labelling a possible dying declarations exception as sui generis, only courts who apparently do not understand history or Latin or both have created other confrontation exceptions.^{dxliii} However, in the Mattox case that Justice Scalia cited with approval in Crawford,^{dxliv} Justice Brown wrote that that the right of confrontation “must occasionally give way to considerations of public policy and the necessities of the case.”^{dxlv} Though it is possible to interpret this (as Justice Scalia did) as only approving exceptions that existed at the time the Confrontation Clause was adopted, the opinion contains rhetoric that invites a broader reading.^{dxlvi}

The writers have anguished over the effect of Crawford on two kinds of cases in which “public policy and the necessities of the case” might support an exception; i.e., cases of spousal abuse^{dxlvii} and child molestation.^{dxlviii} The two share some characteristics: i.e., political correctness as academic causes, judicial willingness to bend the law, and extravagant claims about the effect of Crawford on successful prosecution.^{dxlix} However, the two differ in one important characteristic; in one case the confrontation problem stems from inability to confront the accuser, in the other from unwillingness to do so.^{dl} Hence, treating them separately make sense.^{dli}

-----domestic violence exception

In the past, prosecutors treated wifebeating as a family matter, prosecuting the husband only if the wife insisted.^{dlii} But over the last quarter of the 20th Century an alliance of feminists and law-and-order conservatives began pushing to criminalize the problem.^{dliii} The highpoint of this came in 1994 with passage of the federal Violence Against Women Act which provided federal funds to states willing to prosecute spousal abuse more aggressively.^{dliv} Prosecutors taking this course soon ran up against a major problem; many abused women---some estimates run as high as 80%---for reasons that remain disputed were unwilling to testify against their abusers or otherwise assist the prosecutors.^{dlv}

Federal agencies urged prosecutors to get around this problem with what were euphemistically called “evidence-based”, or more candidly, “victimless” prosecution strategies.^{dlvi} Police were encouraged to drop efforts to get the abuser to confess and to forego gathering physical evidence of the crime; instead, they were pushed to gather hearsay from victims in a manner that would make it admissible at trial over objection.^{dlvii} As often happens during law-and-order crusades, the end justified the means; domestic violence became an “epidemic”---some proponents claiming that 50% of American women are victims of domestic violence.^{dlviii} Justifying the admission of hearsay accusations is easier if one assumes---as many victims advocates do--- the truth of the accusation.^{dlxix}

Under the Roberts regime, “evidence-based” prosecutions thrived because the two exceptions most often used to admit hearsay accusations---excited utterances and statements for purposes of medical diagnosis---were “firmly rooted.”^{dlx} Some prosecutors found greater success with an absent accuser than they did with a present, but reluctant, one.^{dlxi} Whether “evidence-based” prosecutions succeeded in reducing the scourge of domestic violence is another matter.^{dlxii} Recent science implies that the impact of the criminal sanction may be limited because violence results from a complicated combination of genes and the social environment.^{dlxiii} Whether punishment of offenders can delegitimize male brutality when courts must contend with a “culture of violence” that lionizes violence in everything from professional football to television drama.^{dlxiv} Contrary to popular belief, wifebeating is not limited to trailer parks but extends to the posh homes of Harvard law grads and ambitious politicians.^{dlxv} At best,

the belief that criminalization can “solve” the problem of domestic violence may distract attention and money from more promising remedies.^{dlxvi}

Successful or not, Crawford posed an immediate threat to the use of hearsay accusations to prosecute cases of domestic violence.^{dlxvii} Some forms of hearsay accusations fell squarely with the Crawford “core” of “testimonial hearsay”; e.g., battery affidavits.^{dlxviii} Other forms would be swept in through the “official inducement test” because of all the “protocols” and other instructions to 911 operators and street officers to try to get an accusation from the victim.^{dlxix} And given the absence of the victim, even the “declarant’s objective intent test” offered little comfort to prosecutors.^{dlxx} Worse yet, Crawford seemed to shift control of the decision to prosecute from deputy district attorneys to the victim.^{dlxxi}

The threat Crawford posed to the use of hearsay accusations to prove domestic violations was promptly squelched by the lower courts manipulating the meaning of “testimonial.”^{dlxxii} The most popular method for containing Crawford was to declare excited utterances per se “nontestimonial.”^{dlxxiii} Since “excited utterances” could apply to the two most popular methods of inducing hearsay accusations—calls to 911 and “investigatory interrogations” for first responders—this created a wide loophole.^{dlxxiv} Courts also expanded the “present sense impression” exception and dubbed accusations admitted under this exception “nontestimonial.”^{dlxxv} The latter action provided another route for the admission of 911 calls.^{dlxxvi}

A case study of the leading case on 911 calls—People v. Moscat—provides an exemplary tale of a judge taking seriously his role as the vindicator of abused women and shrugging off his role as an impartial adjudicator.^{dlxxvii} Only 17 days after Crawford was decided, a judge assigned to a Bronx court specializing in domestic violence cases suggested that defendant’s appointed counsel move to suppress a 911 tape.^{dlxxviii} When counsel did so, without inviting the parties to brief the case or listening to the tape, the judge issued an opinion pronouncing the 911 call “nontestimonial” because it was a “call for help” rather than an accusation.^{dlxxix} When defense counsel finally got to hear the tape, the “call for help” turned out to have been made 8 hours after the crime by an unexcited neighbor who did not claim to have personal knowledge of the charged crime.^{dlxxx} Though requested to do so, the judge declined to amend or withdraw the opinion—which went on to become one of the leading authorities on the admissibility of 911 calls under Crawford.^{dlxxxi}

Given such judicial bias against domestic violence defendants, appellate courts ought to use care in endorsing the use of the forfeiture doctrine that the Supreme Court endorsed in Crawford to deny defendants the right to confront their accusers.^{dlxxxii} Some prosecutors think the doctrine applies in every domestic violence case where the victim declines to testify.^{dlxxxiii} While scholars who urge this way around Crawford probably would not carry forfeiture that far^{dlxxxiv}, courts should be wary of treating forfeiture as an “open-Sesame” to admit hearsay accusations.^{dlxxxv} Abused women refuse to cooperate with prosecutors for many other reasons besides intimidation by the defendant.^{dlxxxvi} Hence, it would be error to presume forfeiture from the mere fact that the victim declines to aid the prosecutor.^{dlxxxvii}

Courts dealing with domestic violence cases in the post-Crawford era would do well to recognize that criminalization of the problem has not been an unalloyed success.^{dlxxxviii} Part of the blame for this rests on the belief that “justice-on-the-cheap” cannot make much of a dent in the incidence of spousal abuse; courts and legislators need to devote more public resources to the task.^{dlxxxix} The writers have offered some suggestions for how we might rethink methods for prosecution of domestic violence to make them compatible with Crawford.^{dxc}

- **drop “one-size-fits-all” approach:** Professor Raeder suggests dividing cases into three groups according to their severity; the most dangerous offenders would get a “full-court press” prosecution and the least dangerous would be diverted to community counselling and surveillance, while the middle group would be prosecuted as misdemeanors but only if the victim agreed to cooperate with the prosecution.^{dxci}
- **“fast track” domestic violence cases:** by advancing spousal abuse on the calendar, they could be brought to plea or trial before the victim changes her mind and the defendant has time to browbeat or persuade her into noncooperation.^{dxcii}
- **shift weapons-use cases to federal courts:** while this would also shift the tax burden to the federal fisc and force Congress to put the money where its mouth is, it would also facilitate “victimless” prosecution and allow more draconian sentences.^{dxciiii}
- **create new offenses that lessen the burden of proof:** states could create a new set of domestic violence crimes with elements that lessen the need for the prosecution to have a willing victim.^{dxciiv}
- **shift the police effort away from the victim and back to the offender:** instead of devoting police efforts to gathering usable hearsay accusations, domestic violence cases should receive the same aggressive strategies used in other dangerous felonies; e.g., gathering of physical evidence, seeking admissions or confessions from the perpetrator, and seeking out witnesses other than the victim.^{dxciv}
- **provide more protection and social services to victims:** if the police provided more protection to victims, this could deter defendants from threatening them to prevent their testimony; similarly, social services could make victims less economically and psychologically dependent on the abuser and his family.^{dxcivi}
- **provide early opportunities for cross-examination of the accuser:** since past cross-examination satisfies the right of confrontation, states could make hearsay accusations admissible with statutory provisions for depositions in criminal cases or making preliminary hearings non-waivable.^{dxciivii}
- **create new hearsay exceptions:** some nontestimonial statements that might aid the prosecution in domestic violence cases are nonetheless excluded by state hearsay rules; e.g., prior inconsistent statements that cannot be used substantively.^{dxciiviii} Hence, states could assist prosecutors by creating new exceptions.^{dxciix}
- **add new curbs on “nontestimonial” hearsay:** given the puny protection Roberts provides against the use of bad but nontestimonial hearsay statements, some courts may be tempted to class such statements as “testimonial” to do justice in the case before them; creating some safeguards against the use of “bad” hearsay would reduce the temptation.^{dxci}

Even without these reforms, imaginative courts have shown that prosecutors can still convict domestic violence without distorting Crawford or creating an exception to the Sixth Amendment right of confrontation.^{dxci}

---child abuse exception

Superficially, child abuse resembles domestic violence in the challenge it poses to those who favor a robust right of confrontation.^{dxcii} While advocates present loose definitions of both, those sometimes employed for “child abuse” make the title

something of a misnomer.^{dciii} As a result, the statistics used to show the incidence of the crime become even more suspect.^{dciv} Whatever the true numbers may be, those we have suggest that physical abuse of children is twice as likely as sexual abuse.^{dcv} Nonetheless, the writers prefer to focus on the “horrendous” sexual abuse of children.^{dcvi} While specialists may justify this on the grounds that physical abuse usually leaves physical evidence, we may suspect that public interest in this crime arises from the peculiarly American combination of prurient interest in sex and naivete about the sexuality of children.^{dcvii}

The lack of a firm definition and reliable statistics combine to make “child sexual abuse” a particularly protean crime.^{dcviii} The phrase covers everyone from baby rapers^{dcix} to senile grandfathers^{dcx} to fumbling teenagers.^{dcxi} Worse yet, states have enacted draconian penalties; in some states child sexual abuse is a capital offense.^{dcxii} Such harsh penalties are not limited to the “Bible belt”; even hedonistic states like California impose life sentences for child sexual abuse.^{dcxiii} Some “progressive” states allow castration of sex offenders.^{dcxiv} Yet despite the severe penalties, recidivism among sexual offenders runs high.^{dcxv} Like domestic violence, child sexual abuse permeates even the highest social strata.^{dcxvi} Hovering over this already dismal picture is the spectre of the McMartin pre-school case in which police and sexual abuse “expert” induced scores of children to falsely accuse teachers of sexual abuse during Satanic rituals.^{dcxvii}

Child sexual abuse cases are difficult to prosecute.^{dcxviii} In addition to the same familial pressures to recant as domestic violence victims, young children may find it difficult to face the accused and to undergo cross-examination because of psychosexual immaturity.^{dcxix} But unlike domestic violence cases where prosecutors prefer “victimless” prosecutors, prosecutors are often unwilling to bring child sexual abuse cases to trial if the victim will not testify.^{dcxx} Yet in some states and in federal courts, young children cannot testify even if willing because the trial judge rules them incompetent as witnesses.^{dcxxi} But in federal courts and many states this wound is self-inflicted; Evidence Rule 601 abolished incompetence of witnesses but state and federal judges have insisted on reading back into the law of evidence what Congress deleted.^{dcxxii} In 1996 Congress passed the Victims’ Protection and Rights Act which attempted to undo what the courts had done but only with respect to child abuse.^{dcxxiii}

Crawford threatened the status quo regarding child sexual abuse prosecutions.^{dcxxiv} As in cases of domestic violence, prosecutors relied heavily on the excited utterance hearsay exception and courts distorted the exception even more--- holding declarants could be still under the stress of excitement weeks or months after the startling event.^{dcxxv} The exception for statements made for medical diagnosis and treatment was even more popular with prosecutors in child abuse cases.^{dcxxvi} Under the Roberts regime, the sprawling growth of this exception had been held “firmly rooted.”^{dcxxvii} But after Crawford the widespread use of mandatory reporting statutes arguably turned medical personnel into police agents and made statements to them “testimonial.”^{dcxxviii} Finally, since Crawford made the reliability of the hearsay irrelevant

to satisfaction of the right of confrontation, it threatened to make unconstitutional the new child abuse hearsay exceptions enacted during the Roberts era.^{dcxxix} State court cases under Crawford did not all support the gloomy predictions.^{dcxxx}

The writers and prosecutors proposed a number of ways to reconcile Crawford with aggressive prosecution of child sexual abuse cases; e.g., more liberal use of the forfeiture doctrine.^{dcxxxi} Others have suggested making child sexual abuse accusations into “excited utterances” and per se “nontestimonial.”^{dcxxxii} Since unlike domestic violence cases, prosecutors of child sexual abuse are reluctant to go to trial without the testimony of the victim^{dcxxxiii}, some have suggested methods for making testifying easier for the child; e.g., better preparation of child witnesses and increased use of closed circuit television when children testify.^{dcxxxiv} Some writers have suggested that because of their lack of maturity, child victims young enough to be held incompetent should be held incapable of making “testimonial” statements.^{dcxxxv}

Few writers have been willing to go head-on with Crawford by urging the Court to create an exception to the right of confrontation for child victims of sexual abuse.^{dcxxxvi} The argument for using the power reserved in Mattox to create a “public policy” exception is stronger here than in the case of domestic violence.^{dcxxxvii} If Crawford means that sexual abuse of young children cannot be prosecuted, the Court has created a target population for predators to prey upon.^{dcxxxviii} For example, when early California law made non-white persons incompetent to testify, thugs specialized in robbing Asian, Black, and Hispanic miners in the gold fields.^{dcxxxix} Creating the exception seems easier once we recognize that one of the functions of the Confrontation Clause is to prescribe the duties of an “accuser”; just as very young children are exempted from other legal obligations, so they can be exempted from the obligations imposed on adult accusers.^{dcxli}

Once courts accept the argument for an exception to the right of confrontation, many questions remain.^{dcxli} First, who should count as a “child” for purposes of the exception?^{dcxlii} We would limit the exception to those young enough to qualify as “incompetent” under the common law disqualification for infancy.^{dcxlili} Older children, with proper preparation, can take on the obligations of an “accuser.”^{dcxliv} Second, the exemption should not mean that young children cannot be heard in court, but only that they cannot “testify”; hearsay statements of the child could be admitted and the child could make an unsworn statement before the jury and be asked questions by the defense.^{dcxlv} Third, the jury should be instructed that the child’s statements (whether in court or out of court), while not “testimony”, are “evidence”---a special kind of “circumstantial evidence”, if you will.^{dcxlvii} The instruction should leave the weight of the child’s statements to the jury but they should be told that they can choose to rely on the statements even when they are contradicted by sworn testimony.^{dcxlvii}

III. “Non-testimonial” Hearsay After Crawford

Justice Scalia played coy in *Crawford* about the effect of the majority's holding on hearsay statements that were not "testimonial"; though he criticized the Roberts decision, he did not overrule it.^{dcxlviii} He said that "[a]lthough our analysis in this case casts doubt on [Roberts], we need not definitively resolve whether it survives our decision today."^{dcxlix} But later in the opinion he wrote that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law---. . . as would an approach the exempted such statements from Confrontation Clause scrutiny altogether."^{dcl}

Despite Justice Scalia's unwillingness to do so, some federal courts decided that *Crawford* "overruled" Roberts---at least with respect to "testimonial" statements.^{dcli} Many more state courts were willing to take the bold approach.^{dclii} Though this left trial judges in a quandry, some federal courts chose to emulate Justice Scalia by using weasel words like "abrogate" to describe the effect of *Crawford* on Roberts.^{dcliii} Some state courts also took the mealy-mouthed method of dealing with the effect of *Crawford*.^{dcliv} But even courts who took the forthright approach to say that Roberts had been overruled were still left with the effect of *Crawford* on the Supreme Court's pre-Roberts confrontation cases.^{dclv}

Faced with this uncertainty, most courts chose to take the safer course^{dclvi}; that is, both state^{dclvii} and federal courts continued to apply Roberts to "non-testimonial" hearsay.^{dclviii} Only a few state courts bit the bullet offered by Justice Scalia to hold that "non-testimonial" hearsay was admissible without regard to the Sixth Amendment.^{dclix} No court seems to have considered whether the state confrontation clause imposed any limits on the use of hearsay.^{dclx} At least one state court, however, that recognized that it was free to disregard Roberts still found it prudent to continue to follow it.^{dclxi}

IV. Post-Crawford Procedure

Most courts assume that *Crawford* does not alter constitutional rules of procedure designed to protect the right of confrontation; for example, the Bruton rule barring the introduction at a joint trial of an unredacted copy of a non-testifying defendant's confession that inculpates a co-defendant.^{dclxii} However, *Crawford* can indirectly affect the application of these rules; for example, by making a co-defendant's statement inadmissible when under Roberts it would have been admissible against the defendant thus making the Bruton rule inapplicable.^{dclxiii} In addition, some writers fear that *Crawford* presages the reversal on *Craig v. Maryland*, where the Court authorized special procedures for dealing with child witnesses unable to face the accused when testifying.^{dclxiv}

---retroactivity of Crawford

Federal courts apply *Crawford* to cases pending on direct appeal even though they were tried prior to *Crawford*.^{dclxv} But where the issue is raised on appeal from a

state conviction that was final prior to Crawford, most courts apply constitutional doctrine to bar retroactive application of Crawford.^{dclxvi} In addition, courts have held that the Clinton habeas corpus statute forbids retroactive application.^{dclxvii} The defendant cannot evade these limits on retroactivity by first moving to vacate the conviction under Criminal Rule 60(b).^{dclxviii} Only the Ninth Circuit has held Crawford fully retroactive.^{dclxix} However, the Supreme Court granted certiorari in one of the Ninth Circuit cases so we may soon have a definitive answer.^{dclxx}

State cases generally follow the federal pattern, often relying on the same caselaw.^{dclxxi} Crawford applies on direct appeal in state courts to cases still pending when Crawford was decided.^{dclxxii} Normally states do not consider Crawford claims on collateral review of cases that were final prior to Crawford.^{dclxxiii} However, some states apply Crawford on collateral review, either as a matter of state law^{dclxxiv} or under unusual circumstances.^{dclxxv} Defendants cannot escape the restrictions on collateral review by claiming trial or appellate counsel was incompetent for failing to anticipate Crawford.^{dclxxvi}

---raising Crawford issues

In order to preserve Crawford error for appeal, the defendant must make a proper objection in both state^{dclxxvii} and federal courts.^{dclxxviii} Washington, however, allows Crawford error to be raised for the first time on appeal because of the “constitutional magnitude” of the issue.^{dclxxix} But elsewhere, absent plain error, the objection must be timely and specific as required by Rule 103 and its state clones.^{dclxxx} For most courts this means the objection must be on confrontation grounds; a hearsay objection will not suffice^{dclxxxi} unless coupled with mumbling that sounds like confrontation to the appellate court.^{dclxxxii}

Some courts use Rule 103 to undermine retroactivity, holding that the defendant must have made a confrontation objection even though that objection would have been futile before Crawford was decided.^{dclxxxiii} When they bother to justify this, courts have relied on Justice Scalia’s attempt in his majority opinion to make Crawford sound consistent with the Court’s prior precedents.^{dclxxxiv} Most courts, however, have been more forgiving.^{dclxxxv} These courts reason that competent counsel need not have predicted that the Supreme Court would overrule Roberts.^{dclxxxvi} However, some courts go no farther than allowing some form of “plain error” review.^{dclxxxvii}

The defendant must comply with other procedural rules for perfecting an appeal.^{dclxxxviii} The least defensible of these is an Indiana holding that where the declarant appears and refuses to answer the prosecutor’s questions about a “testimonial” statement, the defense forfeits the right to raise Crawford error if he does not ask for a contempt citation of the witness.^{dclxxxix} Courts have split on whether the doctrine of “estoppel to object” applies with respect to Crawford claims.^{dcxc}

Rule 104 presumably governs proof of the preliminary facts needed to decide the admissibility of the statement.^{dcxci} This means that the defense must prove the facts that support the exclusion of the evidence; e.g., those facts that show that the statement was “testimonial.”^{dcxcii} The prosecution must prove those facts that render the statement “non-testimonial” or that show that Crawford is otherwise satisfied.^{dcxciii} Some courts have invoked presumptions to allocate the burden of proof on preliminary facts.^{dcxciv} Since Crawford facts are Rule 104(a) preliminary facts to be decided by the judge^{dcxcv}, the Evidence Rules do not apply so the parties can use hearsay to prove or disprove the facts.^{dcxcvi}

Rule 105 applies when a “testimonial” statement is offered for a “non-testimonial” purpose; e.g., when an accusation is offered for some nonhearsay purpose.^{dcxcvii} This means that the defense is entitled on request to a limiting instruction and other measures to prevent the statement from being used by the jury for a “testimonial” purpose.^{dcxcviii} The prosecution cannot introduce an accusation for some non-testimonial purpose, then argue to the jury that it can be used as testimony.^{dcxcix} Though in theory there is a Bruton problem if no instruction can keep the jury from using an accusation testimonially, courts have rejected this in practice.^{dcc}

--- “waiver” of confrontation rights

The defendant can expressly waive her right of confrontation by a knowing and intelligent surrender of the right.^{dcci} Unhappily, courts toss around the word “waiver” like a frisbee, confusing the real thing with other procedural rules.^{dccii} As a result, prosecutors have fooled some courts with spurious “waiver” arguments; e.g., that defendant waives the right of confrontation by failing to call the declarant for cross-examination after a “testimonial” statement is admitted.^{dcciii} Since defendant’s “right” to confront witnesses imposes a “duty” on the state to produce the witnesses, this argument is “simply wrong.”^{dcciv}

--- appellate review; standard

Perhaps on the assumption that a violation of the right of confrontation is just another evidentiary error, some courts review Crawford claims under an “abuse of discretion” standard.^{dccv} But the majority view in federal courts is that a Crawford claim is reviewed de novo.^{dccvi} Many states apply a similar standard^{dccvii}, though sometimes phrasing it as “plenary”^{dccviii} or “independent” review.^{dccix} A few opinions distinguish between review of the facts and the law, reserving the higher standard for the latter.^{dccx} However, the dichotomy fails in the case of so-called “constitutional fact.”^{dccxi} Sometimes courts suggest a different standard applies when the state appeals a Crawford ruling.^{dccxii}

-----harmless error

Virtually all courts hold that Crawford error is not “structural” and so apply the Chapman standard for harmless error.^{dccxiii} Since many, perhaps most, of the cases decided in the first few years were tried prior to the decision in Crawford, many federal opinions save the conviction by finding the error “harmless.”^{dccxiv} A good many state opinions also take the “harmless error” route to affirm the trial court who did no wrong under the pre-Crawford standards.^{dccxv} However, a surprising number of state and federal opinions have reversed convictions for Crawford error.^{dccxvi}

---scope of Crawford

Since the Sixth Amendment only applies in “criminal prosecutions”, Crawford does not apply in most noncriminal proceedings; e.g., civil actions^{dccxvii}, probation and parole revocations^{dccxviii}, civil proceedings to incarcerate “sexually violent predators”^{dccxix}, and juvenile courts.^{dccxx} However, sometimes other rules or the “due process right of confrontation” may bar the use of “testimonial” hearsay in such proceedings.^{dccxxi} But Crawford does apply in criminal prosecutions of misdemeanors.^{dccxxii} Some courts suppose that Crawford applies when the accusation is directed, not at the charged crime, but at another crime offered under Rule 404(b).^{dccxxiii} But courts have held that Crawford does not apply at a pretrial hearing to determine preliminary questions of fact under Rule 104 or to suppress evidence.^{dccxxiv}

Although the Supreme Court held in 1949 that the right of confrontation did not apply in sentencing proceedings^{dccxxv}, some writers have argued that the combination of Crawford and *Blakely v. Washington*^{dccxxvi}, which gave defendant a right to jury trial on facts that must be proved to enhance a sentence, should extend the right of confrontation to sentencing trials.^{dccxxvii} While some courts have conceded the force of the argument, none have adopted it.^{dccxxviii}

Given the secrecy and non-adversarial nature of grand jury proceedings, courts have had little difficulty in holding Crawford does not apply to evidence presented to the grand jury.^{dccxxix}

i

n. 1. Short(?), Happy (?)

With apologies to Earnest Hemmingway and Francis Macomber.

ii

n. 2. Lilly concurrence

See § 5371, this Supplement, text at notecall 45.

iii

n. 3. Discredited history

Wigmore claimed that the confrontation clause was no more than a right to cross-examine adopted from the English common law. As readers of vols. 30 and 30A know, the right of confrontation developed on this side of the Atlantic as part of a “holistic” Sixth Amendment that read the right to trial by jury to embrace an adversary system of criminal justice in response to the efforts of the Crown to impose inquisitorial courts on the colonies.

iv

n. 4. Writers

The professorial writers have had a field day with Crawford. See, e.g., Boyer, *The Trial of Sir Walter Raleigh: The Law of Treason, The Trial of Treason, and The Origins of the Confrontation Clause*, 2005, 74 *Miss.L.J.* 869; Capra, *Amending The Hearsay Exception for Declarations Against Penal Interest in The Wake of Crawford*, 2005, 105 *Colum.L.Rev.* 2409; Chase, *The Five Faces of The Confrontation Clause*, 2003, 40 *Hous.L.Rev.* 1003 (confrontation law on the eve of Crawford); Comparet-Cassani, *Crawford and The Forfeiture By Wrongdoing Exception*, 2005, 42 *San Diego L.Rev.* 1185; Counsellor & Rickett, *The Confrontation Clause After Crawford v. Washington, Smaller Mouth, Bigger Teeth*, 2005, 57 *Baylor L.Rev.* 1; Davies, *What Did The Framers Know, and When Did They Know It?; Fictional Originalism in Crawford v. Washington*, 2005, 71 *Brook.L.Rev.* 105; Dwyer, *Crawford’s “Testimonial Hearsay” Category: A Plain Limit on the Protections of the Confrontation Clause*, 2005, 71 *Brook.L.Rev.* 275; Friedman, *Grappling With The Meaning of “Testimonial”*, 2005, 71 *Brook.L.Rev.* 241; Graham, *Confrontation Stories: Raleigh on The Mayflower*, 2005, 3 *Ohio St.J.Crim.L.* 209; Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington*, 2005, 50 *S.D.L.Rev.* 41; Holland, *Testimonial Statements Under Crawford: What Makes Testimony. . . Testimonial?*, 2005, 71 *Brook.L.Rev.* 281; Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 2005, 71 *Brook.L.Rev.* 219; ;Kirst, *Does Crawford Provide A Stable Foundation for Confrontation Doctrine?*, 2005, 71 *Brook.L.Rev.* 35; Latimer, *Confrontation After Crawford: The Decision’s Impact on How Hearsay is Analyzed Under The Confrontation Clause*, 2006, 36 *Seton Hall L.Rev.* 327; McClain, *Post-Crawford: A Time to Liberalize The Substantive Admissibility of a Testifying Witness’s Prior Consistent Statements*, 2005, 74 *U.M.K.C.L.Rev.* 1; Mendez, *Crawford v. Washington: A Critique*, 2004, 57 *Stan.L.Rev.* 569; Moise, *The Confrontation Clause and Justice Scalia: Everything Old is New Again*, 2004, 16 *SEP.S.C.Law.* 11; Mosteller, *Crawford v. Washington: Encouraging and Ensuring The Confrontation of Witnesses*, 2005, 39 *U.Rich.L.Rev.* 511; Mosteller, *“Testimonial” and The Formalistic*

Definition---The Case for An “Accusatorial” Fix, 2005, 20-SUM Crim.Just. 14; Park, Purpose As A Guide to The Interpretation of the Confrontation Clause, 2005, 71 Brook.L.Rev. 297; Pitler, Introduction to Symposium: Crawford and Beyond, 2005, 71 Brook.L.Rev. 1; Reed, Crawford v. Washington and The Irretrievable Breakdown of a Union: Separating The Confrontation Clause From The Hearsay Rule, 2004, 56 S.C.L.Rev. 185; Ruebner & Scahill, Crawford v. Washington, The Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law, 2005, 36 Loy.U.(Chi.)L.J. 703; Schectman, From “Reliability” to Uncertainty: Difficulties Inherent in Interpreting and Applying the New Crawford Standard, 2005, 71 Brook.L.Rev. 305; Silberlight, Confronting a Testimonial Definition in a Post-Crawford Era, 2005, 29 Am.J.Trial Advoc. 65; Smith, When To Hear Hearsay: A Proposal for a New Rule of Evidence Designed to Protect the Constitutional Right of The Criminally Accused to Confront The Witnesses Against Her, 1999, 32 J.Marsh.L.Rev. 1287; Walther, Pipe-Dreams of Truth and Fairness: Is Crawford v. Washington A Breakthrough for Sixth Amendment Confrontation Rights?, 2006, 9 Buff.Crim.L.Rev. 453

See also

The many works on Crawford in spousal abuse and child abuse prosecutions are collected in notes 547 and 548, below.

v

n. 5. Student Writers

Student writers have also weighed in. See, e.g., Comment, Crawford v. Washington: Implications for The War on Terrorism, 2005, 54 Cath.U.L.Rev. 1077; Comment, Confrontation at Sentencing: The Logical Connection Between Crawford and Blakely, 2005, 49 How.L.J. 179; Comment, Accomplice Confessions and The Confrontation Clause: Crawford v. Washington Confronts Past Issues With a New Rule, 2005, 32 Pepp.L.Rev. 315; Comment, Unspeakable! Crawford v. Washington and Its Effects on Child Victims of Sexual Assault, 35 Sw.U.L.Rev. 137.

Note, Resolving the Ambiguity Behind The Bright-Line Rule: The Effect of Crawford v. Washington on The Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions, 2006 U.Ill.L.Rev. 205; Note, Calling Crawford: Minnesota Declares A 911 Call Non-Testimonial in State v. Wright, 2006, 58 Me.L.Rev. 249; Note, Evidence---Sixth Amendment and The Confrontation Clause---Testimonial Trumps Reliable: The United States Supreme Court Reconsiders Its Approach to The Confrontation Clause, 2005, 27 U.Ark.Little Rock L.Rev. 323; Note, Legal Crossroads: The Hearsay Rule Meets The Sixth Amendment Confrontation Clause in Crawford v. Washington, 2005, 38 Creighton L.Rev. 999; Note, Constitutional Law---Confrontation Clause---Admission of Testimonial Hearsay Contingent Upon Declarant Unavailability and Prior Opportunity for Cross-Examination, 2004, 35 Cumb.L.Rev. 205; Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581; Note,

Sixth Amendment--Witness Confrontation--The Sixth Amendment Guarantees an Accused The Right “to Be Confronted With The Witnesses Against Him” in A Criminal Prosecution, 2004, 118 Harv.L.Rev. 316; Note, Crawford v. Washington: Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity to Cross-Examine, 2005, 40 Harv.Civ.Rts.-Civ.Lib.L.Rev. 223; Note, Testimonial Hearsay as The Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington, 2004, 55 Hast.L.J. 1539; Note, Testimonial or NonTestimonial?: The Admissibility of Forensic Evidence After Crawford v.Washington, 2005-2006, 94 Ky.L.J. 187; Note, Examining The Repurcussions of Crawford: The Uncertain Future of Hearsay Evidence in Missouri, 2005, 70 Mo.L.Rev. 561; Note, State v. Carter: Rejecting Crawford v. Washington’s Third Formulation As A Per Se Definition of Testimonial, 2005 67 Mont.L.Rev. 121; Note, Constitutional Law---Sixth Amendment---Testimonial Statements Inadmissible Under The Confrontation Clause Absent Showing of Unavailability and Prior Opportunity for Cross-Examination, 2005, 72 Tenn.L.Rev. 671; Note, Crawford v. Washington: Reclaiming The Original Meaning of the Confrontation Clause, 2005, 21 Touro L.Rev. 231.

See also

The many works on Crawford in spousal abuse and child abuse prosecutions are collected in notes 547 and 548, below.

vi

n. 6. Crawford facts

2004, 124 S.Ct. 1354, 1357, 541 U.S. 36, 158 L.Ed.2d 177.

vii

n. 7. Leading questions

124 S.Ct. at 1357, 1372-1373, 541 U.S. at 39, 66.

viii

n. 8. Offered tape

124 S.Ct. 1358, 541 U.S. at 40.

Washington follows the majority rule that the marital witness privilege does not bar the use of one spouse’s hearsay against the other. See vol. 25, § 5576, pp. 589-595. A scholar of the much-condemned civil law system finds it “remarkable” that the privilege allows this. Walther, Pipe-Dreams of Truth and Fairness: Is Crawford v. Washington A Breakthrough for Sixth Amendment Confrontation Rights?, 2006, 9 Buff.Crim.L.Rev. 453, 457.

ix

n. 9. Questionable application

While a law student who had just finished an evidence exam might appreciate that a response harmful to her husband’s claim of self-defense might inculpate the wife under some theory of accessory liability, we may doubt that even a lawyer would

grasp this subtlety with the added stress of a police custodial interrogation. A fortiori, no laymen could under the circumstances be said to know that the statement “was so far contrary to her interests that a reasonable person would not have made it unless it was true.” Indeed, Justice Scalia seems to doubt that the statement was against her, or anybody else’s, interest. 124 S.Ct. at 1373, 541 U.S. at 66 (wife’s statement “truly inscrutable”).

x

n. 10. Precious Roberts

The court applied a “nine-part test” that Washington courts had spun off Roberts and its inconsistent progeny. *State v. Crawford*, 2001, 107 Wash.App. 1025.

xi

n. 11. Blunderbuss Bruton

The Supreme Court held that because the wife’s statement “interlocked” with that of the defendant, this give it sufficient reliability to satisfy the Confrontation Clause. *State v. Crawford*, 2002, 54 P.3d 656, 663, 147 Wash.2d 424.

Bruton did not deal with the admissibility of hearsay against the defendant, but rather with what steps must be taken to insulate the defendant from hearsay properly admitted against a co-defendant in a joint trial. See vol. 21A, § 5064.1, p. 284. See also, § 6362, p. 781 in the main volume. The Supreme Court flirted for a while with the “interlocking confessions” doctrine but rejected it in *Cruz v. New York*, 1987, 107 S.Ct. 1714, 481 U.S. 186, 95 L.Ed.2d 162. See vol. 21A, § 5064.3, p. 304.

xii

n. 12. Rejecting garbled

124 S.Ct. at 1368-1369, 541 U.S. at 58-59.

xiii

n. 13. Embarked on new

124 S.Ct. at 1370, 541 U.S. at 60-61.

xiv

n. 14. New interpretation

For a criticism of the majority’s use of history and an illustration of how the history of confrontation developed in these volumes might have enriched the Court’s analysis, see *Graham, Confrontation Stories: Raleigh on The Mayflower*, 2005, 3 Ohio St.J.Crim.L. 209.

xv

n. 15. Text does not “resolve”

124 S.Ct. at 1359, 541 U.S. at 43.

The Petition for Certiorari in *Crawford* raised two issue; first, the viability of the Washington Supreme Court’s “interlocking” confession rationale, and second,

whether the “Court should reevaluate the Confrontation Clause framework established in *Ohio v. Roberts*.” 71 U.S.L.W. 3753, June 10, 2003, U.S., No. 02-9410.

Professor Kirst shows that Justice Scalia faced the same dilemma that Justice Harlan faced in *Green* and Justice Blackmun faced in *Roberts*; that is, how to formulate a general theory of confrontation without running aground on the shoals of fusion of the Clause with the hearsay rule or being sucked into the whirlpool that left the Clause with no application to hearsay. Kirst, *Does Crawford Provide A Stable Foundation for Confrontation Doctrine?*, 2005, 71 *Brook.L.Rev.* 35, 40-48.

xvi

n. 16. “Historical background”

124 S.Ct. at 1359, 541 U.S. at 43.

See also

People v. Fisher, N.Y.City Ct.2005, 9 Misc.3d 1121(A), 2005 WL 2780884 pp. 1-3 (another potted version of the neo-Wigmorean history).

xvii

n. 17. Roman patrimony

“The right to confront one’s accusers is a concept that dates back to Roman times.” *Ibid.*

As we explain in vol. 30, § 6342, p. 199, confrontation under Roman law was a pretrial procedure bearing more resemblance to a modern police line-up than it does to cross-examination at trial.

See also

Comment, *Reading The Text of The Confrontation Clause: “To Be” or Not “to Be”?* 2001, 3 *U.Pa.J.Const.L* 722, 740 (making similar historical claim).

xviii

n. 18. “Source common law”

124 S.Ct. at 1359, 541 U.S. at 43.

xix

n. 19. Dubious claim

As Professor Jonakait points out, Justice Scalia cannot explain why the Confrontation Clause should incorporate some supposed common law right when every other provision in the Sixth Amendment rejects the English common law of the time; e.g., giving the defendant a right to counsel that the English did not recognize for another half-century. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 2005, 71 *Brook.L.Rev.* 219.

See also

Comment, Reading The Text of The Confrontation Clause: “To Be” or Not “to Be”?
2001, 3 U.Pa.J.Const.L 722, 742 (similar Anglophile analysis).

xx

n. 20. Inquisitorial

124 S.Ct. at 1359-1360, 541 U.S. at 43-44.

Perhaps because of his own religious affiliations, Justice Scalia never uses the word “inquisitorial” to describe the civil law procedure nor does he mention the church courts and religious persecution that were probably far more salient in colonial resentments toward the civil law mode of trial.

Compare

To see how a contemporary civil law scholar views Crawford, see Walther, Pipe-Dreams of Truth and Fairness: Is Crawford v. Washington A Breakthrough for Sixth Amendment Confrontation Rights?, 2006, 9 Buff.Crim.L.Rev. 453.

xxi

n. 21. “Notorious instances”

124 S.Ct. at 1359-1360, 541 U.S. at 43-44.

The colonists probably knew and detested these religious persecutions far more than the treason trials that Justice Scalia invokes. See § 6342.1, this supplement.

xxii

n. 22. “Spanish Inquisition”

124 S.Ct. at 1359-1360, 541 U.S. at 43-44.

For a full account of Raleigh’s trial, see vol. 30 § 6342, pp. 258-269.

xxiii

n. 23. English “right”

124 S.Ct. at 1360, 541 U.S. at 44.

xxiv

n. 24. “Right” disappeared

The leading English study of the question finds that the common law never recognized a right of confrontation. See Choo, Hearsay and Confrontation in Criminal Trials, 1996, p. 181.

Apparently what Justice Scalia did is to use English cases on the right of the defense to cross-examine prosecution witnesses---mistakenly supposing this is all the Sixth Amendment intended to give the defendant.

But see

Ironically, the civil law nations of Europe that Justice Scalia condemns do have something like the Sixth Amendment right of confrontation. Walther, Pipe-Dreams of

Truth and Fairness: Is Crawford v. Washington A Breakthrough for Sixth Amendment Confrontation Rights?, 2006, 9 Buff.Crim.L.Rev. 453, 456, 470.

xxv

n. 25. Treason statutes

124 S.Ct. at 1360, 541 U.S. at 44 (“treason statutes required witnesses to confront the accused ‘face to face’ at his arraignment”).

For an analysis of Roman confrontation, see § 6342, pp. 199-200 in the main volume.

xxvi

n. 26. “Strict rules”

124 S.Ct. at 1360, 541 U.S. at 45.

xxvii

n. 27. Opportunity to cross

124 S.Ct. at 1360-1362, 541 U.S. at 45-47.

xxviii

n. 28. Misread cases

Davies, What Did The Framers Know, and When Did They Know It?; Fictional Originalism in Crawford v. Washington, 2005, 71 Brook.L.Rev. 105.

xxix

n. 29. Court’s history

The majority opinion appears to have gotten its history from a brief filed amicus curiae by a group of evidence scholars. See Motion to File and Brief of Amici Curiae Law Professors, Crawford v. Washington, 541 U.S. 36 , 2004, No. 02-9410, 2003 WL 21754958.

xxx

n. 30. Vice-admiralty

124 S.Ct. at 1362, 541 U.S. at 47-48.

For a more complete account of these events, see vol. 30 § 6345, pp. 482-491, 494-506, 514-528.

xxxi

n. 31. Ratification debates

124 S.Ct. at 1362-1363, 541 U.S. at 48-49.

For more on these, see § 5346 in vol. 30.

See also

Comment, Reading The Text of The Confrontation Clause: “To Be” or Not “to Be”? 2001, 3 U.Pa.J.Const.L 722, 744 (repeating conventional claim that history of clause

is murky and providing a murky account of the history of the drafting of the Sixth Amendment).

xxxii

n. 32. “Holistic Sixth”

Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 2005, 71 *Brook.L.Rev.* 219, 229.

See also

Walther, *Pipe-Dreams of Truth and Fairness: Is Crawford v. Washington A Breakthrough for Sixth Amendment Confrontation Rights?*, 2006, 9 *Buff.Crim.L.Rev.* 453, 473 (similar argument from the comparative law perspective).

xxxiii

n. 33. Does not support

Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 2005, 71 *Brook.L.Rev.* 219, 227-228; Kirst, *Does Crawford Provide A Stable Foundation for Confrontation Doctrine?*, 2005, 71 *Brook.L.Rev.* 35, 84.

xxxiv

n. 34. “Accusers and”

Kirst, *Does Crawford Provide A Stable Foundation for Confrontation Doctrine?*, 2005, 71 *Brook.L.Rev.* 35, 80, 85.

xxxv

n. 35. “Early state decisions”

124 S.Ct. at 1363, 541 U.S. at 49.

xxxvi

n. 36. Weak evidence

Davies, *What Did The Framers Know, and When Did They Know It?; Fictional Originalism in Crawford v. Washington*, 2005, 71 *Brook.L.Rev.* 105, 180.

xxxvii

n. 37. No support

The case, *State v. Campbell*, 1844, 1 Rich. 124, 1844 WL 2258, arose in South Carolina---a state that had no confrontation clause in its state constitution. As the quotation in Justice Scalia’s opinion implies, the court was deciding the case as a matter of the law of evidence, not as a matter of constitutional law. Ironically, the second passage quoted does “shed light upon the early understanding” of the right of confrontation, albeit not in the way Justice Scalia intended. The South Carolina court derived the right of confrontation from the provision in the state constitution providing a right to trial by jury. That is, *Campbell* shows what we have called “the holistic Sixth Amendment” in operation---not the narrow right of cross-examination that has mesmerized the Supreme Court in recent years.

xxxviii

n. 38. “Mere three years”

124 S.Ct. at 1363, 541 U.S. at 49.

The case is *State v. Webb*, 1794, 2 N.C.(1 Hayw.) 103, discussed in vol. 30A, § 6355, p. 39, n. 339.

xxxix

n. 39. Not confrontation

Moreover, the passage quoted in the majority opinion is dicta since the statute in question required that the depositions be taken in the presence of the accused, which they were not.

Compare

Another early case with a more expansive view of the right of confrontation, *People v. Atkins*, 1807, 1 Tenn.(Overton) 229, is described in detail in vol. 30A, § 6355, pp. 49-50.

xl

n. 40. “With testimony”

See vol. 30, § 6346, p. 592.

xli

n. 41. Garbles story

The writers have taken divergent positions, some arguing that the the remedy is better history, while others think the Court would be better off abandoning any effort to find the meaning of the Confrontation Clause in history. Compare Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 2005, 71 *Brook.L.Rev.* 219, 229, with Davies, *What Did The Framers Know, and When Did They Know It?*; *Fictional Originalism in Crawford v. Washington*, 2005, 71 *Brook.L.Rev.* 105, 206.

See also

People v. Cortes, 2004, 781 N.Y.S.2d 401, 407-409, 4 Misc.3d 575 (summarizing historical sources showing Crawford history in error).

xlii

n. 42. Tease out

Kirst, *Does Crawford Provide A Stable Foundation for Confrontation Doctrine?*, 2005, 71 *Brook.L.Rev.* 35, 80, 85 (use of “accusers” in early confrontation clauses); Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 2005, 71 *Brook.L.Rev.* 219, 229 (use of other provisions of Sixth Amendment).

xliii

n. 43. “Mere hearsay”

Consider, for instance, the response of Sir Walter Raleigh to the use of hearsay against him. At Raleigh's trial, to satisfy Raleigh's demand for witnesses, the prosecution produced Dyer, a pilot, who testified that while in Lisbon he encountered a gentleman who told him that the King would never be crowned because "Don Raleigh and Don Cobham shall cut his throat" before the coronation. Raleigh responded: "This is the saying of some wild Jesuit or beggerly priest but what proof is it against me?" Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 1972, 8 *Crim.L.Bull.* 99, 100-101.

See also

People v. Cortes, 2004, 781 N.Y.S.2d 401, 408, 4 Misc.3d 575 (noting that the association between hearsay and cross-examination was not made in England until 1789, too late to have affected drafting and adoption of the Confrontation Clause).

xliv

n. 44. J.P.s and 911 calls

See, e.g., *People v. Corella*, 2004, 18 Cal.Rptr.3d 770,776, 122 Cal.App.4th 461 (911 call and police response do not resemble examination by English JP); *People v. Walker*, 2005, 697 N.W.2d 159, 161, 265 Mich.App. 530 (wifebeating complaint to police not like a justice of the peace examination).

See also

State v. Parks, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (since modern police have taken over the functions of the justice of the peace, courts should analogize from those functions rather than from the particular techniques used; i.e., just because magistrates used formal questioning when investigating crime does not mean police must use formal questioning for the responses to be "testimonial" under Crawford); *People v. Cortes*, 2004, 781 N.Y.S.2d 401, 415, 4 Misc.3d 575 (analogizing 911 calls to police as the "modern equivalent made possible by technology" of the examination of witnesses by the Marian Justices of the Peace); *State v. Mack*, 2004, 101 P.3d 349, 351, 337 Or. 586 (since Supreme Court equated police with justice of the peace, the test is whether the questioner resembles a police officer, not whether the declarant intended an accusation).

Compare

U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 674 (holding that declarant's intent determines applicability of Crawford because it would cover Lord Cobham's accusation of Raleigh; but failing to note that Cobham's accusation came in an affidavit so it would also satisfy the official inducement strand); *Shiver v. State*, Fla.App. 2005, 900 So.2d 615, 618 n. 3 (using analogy to Raleigh case in holding affidavit that breath machine was properly calibrated violated right of confrontation).

xlvi

n. 45. Garble own

See, e.g., *State v. Snowden*, 2005, 867 A.2d 314, 327-328, 385 Md. 64 (supposing that torture was used by Lord Jeffries during the “Bloody Assizes” of 1685 and that this motivated the Framers of the Sixth Amendment---both doubtful propositions);

xlvi

n. 46. No policy

Schectman, *From “Reliability” to Uncertainty: Difficulties Inherent in Interpreting and Applying the New Crawford Standard*, 2005, 71 *Brook.L.Rev.* 305.

See also

A more expansive explanation of confrontation policy appears in § 6371.3, this supplement, text at notecall 360.

xlvii

n. 47. Tease out policy

For a different account of confrontation policy, see Park, *Purpose As A Guide to The Interpretation of the Confrontation Clause*, 2005, 71 *Brook.L.Rev.* 297, 298 (purpose of confrontation is to prevent three-fold abuse of state power: (1) using secrecy to prevent defendant from gaining impeaching material about the declarant and the statement; (2) providing a false account of the crime or the evidence; (3) using state power to mold the evidence by torture, intimidation, or exploiting the weakness of the witness).

xlviii

n. 48. Policy not history

Tillers, *Legal History For A Dummy: A Comment on The Role of History in Judicial Interpretation of the Confrontation Clause*, 2005, 71 *Brook.L.Rev.* 235 (making similar point on the grounds most trial judges cannot properly handle history).

xlix

n. 49. Roberts reformulation

See § 6367 in the main volume.

l

n. 50. “Crucible of cross”

124 S.Ct. at 1370, 541 U.S. at 61 (the passage continues: “The Clause thus reflects a judgment, not only about the desirability of reliable evidence. . .but about how reliability can best be determined.”, citing Blackstone and Hale).

li

n. 51. Instrumental

That is, confrontation is a tool for ensuring evidence is reliable. The danger of making confrontation an instrumental value is that courts will use reliability to determine the need for and the adequacy of confrontation. For example, by deciding that the defendant does not need cross-examination where reliability is not important or

otherwise assured as when the declarant's statement is used as the basis for an expert opinion.

See also

A subsidiary instrumental policy embraced by some courts is police and prosecutorial abuse; that is, the reason for including only "testimonial" hearsay under Crawford is because officials have the power to shape the statement to their own purposes. From this, some courts have avoided "bright-line" rules that can easily be manipulated by the police and prosecutors. See, e.g., *U.S. v. Saner*, D.C.Ind.2004, 313 F.Supp.2d 896, 901.

lii

n. 52. Immorality

President Eisenhower provided the most colorful example of this when he compared the anonymous informants used during the McCarthyite purges with the Western gunman who shot people in the back rather than in the face-to-face gunfight valorized in countless books and movies. See § 6360, p. 750, in the main volume.

liii

n. 53. "Fusion"

See § 6369 in the main volume.

liv

n. 54. "Vagaries of evidence."

124 S.Ct. at 1370, 541 U.S. at 61.

lv

n. 55. Bars hearsay

By contrast, under Roberts any hearsay that fit within a "firmly rooted" hearsay exception was also admissible under the Confrontation Clause. See § 6367 in the main volume.

See also

Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating The Confrontation Clause From The Hearsay Rule*, 2004, 56 S.C.L.Rev. 185, 186, 199.

lvi

n. 56. Reduces scope

Counsellor & Rickett, *The Confrontation Clause After Crawford v. Washington, Smaller Mouth, Bigger Teeth*, 2005, 57 Baylor L.Rev. 1.

lvii

n. 57. "Unpredictable"

124 S.Ct. at 1371, 541 U.S. at 63.

lviii

n. 58. Cannot know

The Sixth Amendment right to be informed of “the nature and cause of the accusation” also comes into play. See vol. 30, § 6341, p. 193. This suggests that for hearsay outside the scope of Crawford, notice of intent to use hearsay might substitute for cross-examination.

lix

n. 59. Scalia catalog

124 S.Ct. at 1371-1374, 541 U.S. at 63-68.

lx

n. 60. Separation of functions

See vol. 30, § 6341, p. 188.

lxi

n. 61. Assigned to jury

The assumption that requiring cross-examination empowers the jury to determine reliability seems so fundamental that Justice Scalia apparently sees no need to mention it. But compare his remark that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because the defendant is obviously guilty.” 124 S.Ct. at 1371, 541 U.S. at 62.

lxii

n. 62. “Safeguard rights”

124 S.Ct. at 1373, 541 U.S. at 67.

lxiii

n. 63. Bright-line rule

As we shall see, courts and commentators have not found the line between “testimonial” and “nontestimonial” hearsay all that bright.

lxiv

n. 64. Abuse of sanction

For one take on this that differs in significant particulars from the explanation above, see Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 1992, 76 Minn.L.Rev. 557.

lxv

n. 65. “Politically charged”

124 S.Ct. at 1373, 541 U.S. at 68.

lxvi

n. 66. Despised frailty

Older readers may recall the hysteria over child sexual abuse that one writer has compared to the Salem Witchcraft trials, see Moriarity, Wonders of the Invisible

World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials, 2001, 26 Vt.L.Rev. 43, 48, but which also bears comparison to the anti-Communist hysteria after World War II that also threatened the values of confrontation. See § 6360, p. 714, in the main volume.

lxvii

n. 67. Handy solution

See vol. 21, § 5007, pp. 290-306 (describing the causes and consequences of this).

lxviii

n. 68. Making expensive

Thus, when the law-and-order craze peaked, courts and prosecutors had to collaborate to find shortcuts to handle a caseload that criminalizing legislatures refused to pay for; the epitome of this strategy remains plea bargaining in which the defendant agrees to give up his constitutional rights to avoid the threat of draconian punishment (which legislators proved more willing to provide). Ibid.

lxix

n. 69. Domestic violence

For a collection of the early prophets of gloom from these precincts and an embrace of their cause, see Note, The Price of Silence: The Prosecution of Domestic Violence Cases In Light of Crawford v. Washington, 2005, 79 So.Cal.L.Rev. 213, 217 (claiming that in some states dozens of prosecutions were dismissed daily after Crawford).

lxx

n. 70. Two conclusions

124 S.Ct. at 1368, 541 U.S. at 50 (“history supports two inferences about the meaning of the Sixth Amendment”).

lxxi

n. 71. Use of ex parte

Ibid.

lxxii

n. 72. Dubbed “testimonial”

124 S.Ct. at 1364, 541 U.S. at 51.

See also

124 S.C. at 1365, 541 U.S. at 53 (“even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object”)

lxxiii

n. 73. “Prior opportunity”

124 S.Ct. at 1365, 541 U.A. at 53-54.

lxxiv

n. 74. “Testimonial”

Best, To Be or Not to Be Testimonial? That is The Question: 2004 Developments in The Sixth Amendment, 2005-APR Army Lawyer 65; Dwyer, Crawford’s “Testimonial Hearsay” Category: A Plain Limit on the Protections of the Confrontation Clause, 2005, 71 Brook.L.Rev. 275; Friedman, Grappling With The Meaning of “Testimonial”, 2005, 71 Brook.L.Rev. 241; Holland, Testimonial Statements Under Crawford: What Makes Testimony. . . Testimonial?, 2005, 71 Brook.L.Rev. 281; Note, A Multidimensional Framework for The Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581.

lxxv

n. 75. “Rule of thumb”

See below, text at notecall 133.

lxxvi

n. 76. “Categorical”

See below, text at notecall 230.

lxxvii

n. 77. “Inducement”

See below, text at notecall 147.

lxxviii

n. 78. “Objective intent”

See below, text at notecall 178.

lxxix

n. 79. Exceptions

For example, courts that hold that an affidavit is per se “testimonial” or that excited utterances are per se “nontestimonial.” See below, text at notecalls 236, 357.

lxxx

n. 80. Two conditions

See, above, text at notecall 73.

lxxxi

n. 81. Unavailability

See below, text at notecall 438.

lxxxii

n. 82. Adequacy of cross

See below, text at notecall 419.

lxxxiii

n. 83. Declarant testifies

See below, text at notecall 419.

lxxxiv

n. 84. Nonhearsay use

See below, text at notecall 471.

lxxxv

n. 85. Forfeited

See below, text at notecall 517.

lxxxvi

n. 86. 1791 exceptions

See below, text at notecall 536.

lxxxvii

n. 87. Roberts apply

See below, text at notecall 648.

lxxxviii

n. 88. Retroactivity

See below, text at notecall 665.

lxxxix

n. 89. Objections

See below, text at notecall 677.

xc

n. 90. De novo or discretion

See below, text at notecall 705.

xcii

n. 91. Harmless error

See below, text at notecall 713.

xcii

n. 92. Waived

See below, text at notecall 701.

xciii

n. 93. Scope

See below, text at notecall 717.

xciv

n. 94. Rejecting Wigmore

124 S.Ct. at 1364, 541 U.S. at 50-51.

See also

For Justice Harlan’s brief flirtation with thus ultimate anti-fusionist stance, see § 6364, p. 794, in the main volume.

xcv

n. 95. “Not all hearsay”

124 S.Ct. at 1364, 541 U.S. at 51.

xcvi

n. 96. Included “accusers”

See vol. 30, § 6347, p. 762.

xcvii

n. 97. “Solemn declaration”

124 S.Ct. at 1364, 541 U.S. at 51. As we shall see, lower courts have seized on this language to exclude “exited utterances” and other hearsay that lacks formality from the scope of the Sixth Amendment.

xcviii

n. 98. Thomas concurrence

See § 6370, p. 864, in the main volume.

xcix

n. 99. “Formalized materials”

124 S.Ct. at 1364, 541 U.S. at 51-52.

See also

The Department of Justice in its amicus brief urged this formula: “[I]n court testimony or its functional equivalent i.e., affidavits, depositions, prior testimony, or formal statements to law enforcement officers, including the accomplice confession at issue in this case.”

c

n. 100. Amicus brief

Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3.

ci

n. 101. “Objective witness”

124 S.Ct. at 1364, 541 U.S. at 52.

cii

n. 102. “Prosecutorially”

124 S.Ct. at 1364, 541 U.S. at 51. The Court credits this version to the brief for petitioner Crawford.

ciii

n. 103. “Accusation”

What these formulae try to capture in terms of “formality” might better be expressed in terms of “seriousness.” The material in the official inducement strand---affidavits, custodial examinations, depositions, prior testimony---are indeed formal, but the purpose of that formality is to convey to the speaker the seriousness of the words she is about to utter. But unless the speaker is joking or irresponsible, most understand that accusing another person of crime should not be done lightly.

civ

n. 104. “Common nucleus”

124 S.Ct. at 1364, 541 U.S. at 52.

cv

n. 105. “Narrow standard”

124 S.Ct. at 1364, 541 U.S. at 52.

cvi

n. 106. “Striking resemblance”

124 S.Ct. at 1364, 541 U.S. at 52.

cvii

n. 107. Accuracy

For what it’s worth, we find the analogy persuasive but would add that JPs and police officers both lacked legal training.

cviii

n. 108. Do likewise

See text at notecall 44, above.

cix

n. 109. “Bits and morsels”

Pitler, Introduction: Symposium: Crawford and Beyond, 2005, 71 Brook.L.Rev. 1, 6.

See also

State v. Walker, 2005, 118 P.3d 935, 940, 129 Wash.App. 258 (collecting these).

Jeffrey Fisher, the losing attorney in Crawford, collects “clues” as to the meaning of “testimonial” taken from Crawford and prior Supreme Court opinions in his Crawford v. Washington: Reframing The Right to Confrontation, 2005, p. 2 [available for download at ConfrontationBlog.com]

Compare

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 586 (while Scalia plants significant clues as to meaning, lower courts tend to use these selectively to narrow the scope of the decision). For an example, see People v. Ruiz, L.A.Super.2004, 2004 WL 2383676 p. 4.

cx

n. 110. “Off-hand remark”

124 S.Ct. at 1363, 541 U.S. at 51.

cxi

n. 111. “Casual remark”

124 S.Ct. at 1363, 541 U.S. at 51.

cxii

n. 112. Accuses parent

See below, text at notecall 161.

cxiii

n. 113. Irresponsible

Putting aside children for the moment, women are more likely to bandy accusations lightly over the backroom fence than they are in court and men are more likely to brag about their crimes in the locker room than they are to the police. Why gossip and braggadocio should rank higher in terms of reliability than calculated accusations to officials is not readily apparent.

cxiv

n. 114. “Colloquial sense”

124 S.Ct. at 1365 n. 4, 541 U.S. at 53 n. 4.

cxv

n. 115. “Structured questioning”

124 S.Ct. at 1365 n. 4, 541 U.S. at 53 n. 4.

cxvi

n. 116. Not “structured”

See below, text at notecall 151.

cxvii

n. 117. Abuse “thread”

Pitler, Introduction: Symposium: Crawford and Beyond, 2005, 71 Brook.L.Rev. 1, 7.

cxviii

n. 118. “Unique potential”

124 S.Ct. at 1367 n. 7, 541 U.S. at 58 n. 7.

See also

People v. Ruiz, L.A.Super.2004, 2004 WL 2383676 p. 4 (so statements made to governmental officers more likely to be “testimonial”).

cxix

n. 119. “Affidavit practice”

Lilley v. Virginia, 1999, 119 S.Ct. 1887, 1900, 527 U.S. 116, 137, 144 L.Ed.2d 117.

cxx

n. 120. Make “nontestimonial”

See, e.g., U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 674 (rejecting proposed test because it would encourage this).

cxxi

n. 121. “Threshold”

U.S. v. Holmes, C.A.5th, 2005, 406 F.3d 337, 348 (“will generally be outcome-determinative”); U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 179 (“the lynchpin” of Crawford); U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 672 (“threshold determination”); U.S. v. Saget, C.A.2d 2004, 377 F.3d 223, 227 (“begins” Crawford analysis); U.S. v. Saner, D.C.Ind.2004, 313 F.Supp.2d 896, 899 (because Crawford is limited to such statements).

State cases

Bohsancurt v. Eisenberg, App.2006, 129 P.3d 471, 473, 212 Az. 182 (Crawford first case to require this distinction); People v. Sisavath, 2004, 13 Cal.Rptr.3d 753, 757, 118 Cal.App.4th 1396 (“the important question”); Purvis v. State, Ind.App.2005, 829 N.E.2d 572, 579 (“first issue”); Hammon v. State, Ind.2005, 829 N.E.2d 444, 449; State v. Scacchetti, Minn.2006, 711 N.W.2d 508, 513 (whether admission violates Confrontation Clause “dependent” on whether “testimonial”); State v. Hembertt, 2005, 696 N.W.2d 473, 480, 269 Neb. 840; State v. Vaught, 2004, 682 N.W.2d 284, 291, 268 Neb. 316 (“initial step”); City of Las Vegas v. Walsh, 2004, 91 P.3d 591, 595, 120 Nev. 392 (application of Crawford “necessarily depends” on categorization); State v. Shelly, 2006, 627 S.E.2d 287, 299, ___ N.C.App. ___ (“determinative” question); State v. Blackstock, 2004, 598 S.E.2d 412, 420, 165 N.C.App. 50 (“analysis will usually turn on”); State v. Lewis, 2004, 603 S.E.2d 559, 556, 166 N.C.App. 596; State v. Forrest, 2004, 596 S.E.2d 22, 26, 164 N.C.App. 272; State v. Dedman, 2004, 102 P.3d 628, 636, 136 N.M. 561; People v. Bradley, 2005, 799 N.Y.S.2d 472, 476, 22 App.Div.3d 33 (“operative question”); State v. Cook, Ohio.App.2005, 2005 WL 736671 (“pivotal question”); State v. Mack, 2004, 101 P.3d 349, 351, 337 Or. 586 (“initial and often dispositive” issue); State v. Staten, S.C.App.2005, 610 S.E.2d 823, 829; State v. Maclin, Tenn.2006, 183 S.W.3d 335, 345 (“threshold question”); Key v. State, Tex.App.2005, 173 S.W.3d 72, 74 (“first task”); Ruth v. State, Tex.App. 2005, 167 S.W.3d 560, 568 (“threshold issue”); Woods v. State, Tex.Crim. 2004, 152 S.W.3d 105, 113 (“threshold question”); Wilson v. State, Tex.App. 2004, 151 S.W.3d 694, 697; Wall v. State, Tex.App.2004, 143 S.W.3d 846, 851; State v. Stuart, 2005, 695 N.W.2d 259, 265, 279 Wis.2d 659 (“threshold question”).

cxxii

n. 122. “Hearsay”

Distinguish the question, considered in Part II below, whether “testimonial” hearsay is admissible under Crawford for some nonhearsay purpose. So far as we can tell, it makes little difference whether the court determines that Crawford analysis does not apply because the proffered evidence is not “hearsay” or determines that the statement, while otherwise “testimonial” comes in for a nonhearsay purpose.

cxxiii

n. 123. Evidence law

See, e.g., *U.S. v. Summers*, C.A.10th, 2005, 414 F.3d 1287, 1299-1300 (whether a question that assumes the declarant’s guilt is an “assertion”).

cxxiv

n. 124. Cursory analysis

U.S. v. Santos, C.A.2d, 2006, 449 F.3d 93, 95 (prosecution concedes accomplice confession to police was “testimonial”); *Guidry v. Dretke*, C.A.5th, 2005, 397 F.3d 306, 329-330 (murder-for-hire participant’s statements to girl friend about crime that cast defendant in leading role; state courts had held statements improperly admitted); *U.S. v. Bruno*, C.A.2d, 2004, 383 F.3d 65, 78 (prosecution concedes plea allocutions and grand jury testimony were “testimonial”); *U.S. v. Nielsen*, C.A.9th, 2004, 371 F.3d 574, 581(statement of occupant to officers executing search warrant for apartment); *U.S. v. Jordan*, D.C.Colo.2005, 2005 WL 513501 p. 2 (Bureau of Prisons officer interrogates dying inmate regarding the identity of his killer and the reason for the killing); *Haymon v. New York*, D.C.N.Y.2004, 332 F.Supp.2d 550, 557 (co-defendant’s statements to police interrogators).

State cases

People v. Adams, 2004, 16 Cal.Rptr.3d 237, 244, 120 Cal.App.4th 1065 (officer responding to 911 call; pregnant and bleeding victim accuses defendant of hitting her with glass and kneeling her in the stomach); *People v. Ruiz*, Cal.App.2005, 2005 WL 1670426, p. 4 (police interrogation of domestic violence victim); *People v. Cage*, 2004, 15 Cal.Rptr.3d 846, 854, 120 Cal.App.4th 770 (‘classic station-house interview’; that declarant not in custody does not distinguish from Crawford); *People v. Fry*, Colo.2004, 92 P.3d 970, 974 (testimony at preliminary hearing); *State v. Skakel*, 2006, 888 A.2d 985, 1040, 276 Conn. 633 (testimony at probable cause hearing); *Manuel v. State*, Fla.App.2005, 2005 WL 1130183 (even though excited utterance, statement elicited by direct police interrogation “testimonial”); *Blanton v. State*, Fla.App.2004, 880 So.2d 798, 801 (statement of child to police investigator “testimonial” even though child apparently only authenticated a videotape of the crime); *Watson v. State*, 2004, 604 S.E.2d 804, 810, 278 Ga. 763 (statements to police officers during investigation “testimonial”); *Miller v. State*, 2005, 615 S.E.2d 843, 846, 273 Ga.App. 761 (statements of wife to officer responding to a domestic dispute call accusing husband of multiple assaults and batteries); *D.G.B. v. State*, Ind.App.2005, 833 N.E.2d 519, 528 (statements by child victim recorded on videotape by detective as part of official investigation of sexual abuse charges “testimonial”); *State v. Nguyen*, 2006, 133 P.3d 1259, 1270, ___ Kans.App. ___ (confession of coconspirator); *Jackson v. Commonwealth*, Ky.2006, 187 S.W.3d

300, 304 (custodial statement of accomplice); *State v. Arita*, La.App.2005, 909 So.2d 37, 45 (latent fingerprint not “testimonial” and admissible under official records exception); *Bynum v. State*, Miss.2006, 929 So.2d 312, 314 (custodial statement of co-defendant); *Clark v. State*, Miss. 2004, 891 So.2d 136, 140 (custodial statement of accomplice); *People v. Ryan*, 2005, 790 N.Y.S.2d 723, 726 17 App.Div.3d 1(stationhouse confessions of accomplices); *Benford v. State*, Tex.App.2005, 2005 WL 240611 (statement made during police interrogation and harmless anyway); *Guteirrez v. State*, Tex.App.2004, 150 S.W.3d 827, 830 (videotaped confession of codefendant); *Brooks v. State*, Tex.App.2004, 132 S.W.3d 702, 707 (statement made under police interrogation); *State v. Hale*, 2005, 691 N.W.2d 637, 646, 277 Wis.2d 593 (testimony from former trial); *Vigil v. State*, Wyo.2004, 98 P.3d 172, 179 (statements made by co-defendant during a custodial police interrogation).

cxxv

n. 125. Scholarly opinions

See, e.g., *Stancil v. U.S.*, D.C.App.2005, 866 A.2d 799; *Smith v. State*, Ala.Crim.2004, 898 So.2d 907; *In re Fernando R.*, 2006, 40 Cal.Rptr.3d 61, 63, 138 Cal.App.4th 148; *State v. Wright*, Minn.2005, 701 N.W.2d 802 ; *State v. Mizenko*, 2006, 127 P.3d 458, 330 Mont. 229; *State v. Maclin*, Tenn.2006, 183 S.W.3d 335; *Lagunas v. State*, Tex.App.2005, 187 S.W.3d 503.

cxxvi

n. 126. Wiggle room

See, e.g., *Spencer v. State*, Tex.App. 2005, 162 S.W.3d 877, 879.

A common complaint in these opinions is the Court’s failure to provide an adequate definition of “testimonial.” See, e.g., *U.S. v. Hendricks*, C.A.3d, 2005, 395 F.3d 173, 180 (collecting cases showing how courts “have struggled with the definition”); *State v. Parks*, 2005, 116 P.3d 631, 637, 211 Ariz. 19; *People v. Taulton*, 2005, 29 Cal.Rptr.2d 203, 204-205, 129 Cal.App.4th 1218; *State v. Grace*, App. 2005, 111 P.3d, 28, 37, 107 Haw. 135 (Crawford leaves lower courts “in a bit of a quandry”); *Flores v. State*, 2005, 120 P.3d 1170, 1177, ___ Nev. ___ (because Court provided no clear-cut method for identifying “testimonial” hearsay, courts nationwide have encountered considerable difficulty in determining where the fine line lies).

Compare

Note, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington*, 2006, 94 Geo.L.J. 581, 586 (while Scalia plants significant clues as to meaning, lower courts tend to use these selectively to narrow the scope of the decision).

cxxvii

n. 127. Dictionary definitions

Taking their cue from Justice Scalia’s reliance on Webster’s, see 124 S.Ct. at 1364, 541 U.S. at 51, some lower courts have trotted out competing dictionaries to define terms

in the Court's opinion. See, e.g., *U.S. v. Arnold*, C.A.6th, 2005, 410 F.3d 895, 903 (a more recent edition of Webster and the Oxford English Dictionary; "testimonial" and "testimony"); *Anderson v. State*, Alaska App. 2005, 111 P.3d 350, 353 (American Heritage Dictionary and Merriam-Webster Dictionary of Law definitions of "interrogate"); *Purvis v. State*, Ind.App.2005, 829 N.E.2d 572, 579 n. 3 (Webster's Third International defines "interrogate" both as "to question typically with formality, command, and thoroughness for full information and circumstantial detail" and "to ask questions about"); *Commonwealth v. Gonsalves*, 2005, 833 N.E.2d 549, 554, 445 Mass. 1 (adding definitions from Black's Law Dictionary to the one in Webster's quoted in *Purvis*).

Compare

In re E.H., 2005, 823 N.E.2d 1029, 1036, 355 Ill.App.3d 564, 291 Ill.Dec. 443 (quoting and relying on Wigmore's definition of "testimony"---"any assertion, taken as the basis for an inference to the existence of the matter asserted, is testimony, whether made in court or not"; same definition of "testimonial evidence").

See

2 Wigmore, *Evidence*, Chadbourne rev.1979, § 479, p. 640.

cxxviii

n. 128. Devise categories

See, e.g., *State v. Staten*, S.C.App.2005, 610 S.E.2d 823, 831 (collecting cases from other states using this approach); *State v. Maclin*, Tenn.2006, 183 S.W.3d 335, 346 (similar).

See also

For a much more compendious version, see *State v. Davis*, 2005, 613 S.E.2d 760, 768, 364 S.C. 364.

cxxix

n. 129. Per se "nontestimonial"

The categorical approach mimics the majority opinion in *Crawford*, which noted that business records and declarations of coconspirators were not "testimonial." See 124 S.Ct. at 1367, 541 U.S. at 56.

cxx

n. 130. Calls to 911

Marquardt v. State, 2005, 882 A.2d 900, 915-916, 164 Md.App. 95 (cases in conflict); *State v. Wright*, Minn.2005, 701 N.W.2d 802, 810 (collecting cases); *State v. Byrd*, 2005, 828 N.E.2d 133, 136, 160 Ohio App.3d 538 (nontestimonial if constitutes excited utterance); *State v. Staten*, S.C.App.2005, 610 S.E.2d 823, 832 (collecting cases).

See also

Friedman & McCormick, Dial-In Testimony, 2002, 150 U.Pa.L.Rev. 1171.

For examples of “investigative interrogations” as nontestimonial, see *U.S. v. Brun*, C.A.8th, 2005, 416 F.3d 703; *Leavitt v. Arave*, C.A.9th, 2004, 383 F.3d 809, 830 n. 22.

cxxxix

n. 131. Number of opinions

In *re Fernando R.*, 2006, 40 Cal.Rptr.3d 61, 63, 138 Cal.App.4th 148 (claiming Crawford has already been applied “in thousands of cases” by courts across the country); *Wall v. State*, Tex.Crim.2006, 184 S.W.3d 730, 737 (“courts across the nation have grappled with the meaning of ‘testimonial’”).

Exaggeration of the number of post-Crawford opinions by critics of the decision is fairly common. See, e.g., Baird, *The Confrontation Clause: Why Crawford v. Washington Does Nothing More Than Maintain The Status Quo*, 2005, 47 So.Tex.L.Rev. 305, 322 (claiming more than one thousand opinions on question of whether the evidence is testimonial). A thousand opinions would average out to 20 per state; even the states with the most opinions such as California and Texas barely exceed that number and many states have yet to consider Crawford. We think “hundreds” would be a better estimate of the number of post-Crawford opinions.

cxxxix

n. 132. Broad categories

See, e.g., *Spencer v. State*, Tex.App. 2005, 162 S.W.3d 877, 879.

Compare

State v. Maclin, Tenn.2006, 183 S.W.3d 335, 347 (courts have used either a per se approach or a case-by-case analysis).

cxxxix

n. 133. Two strands

See text at notecalls 99 and 101, above. The third combines these two strands. See text at notecall 102, above.

Note, *Testimonial or NonTestimonial?: The Admissibility of Forensic Evidence After Crawford v. Washington*, 2005-2006, 94 Ky.L.J. 187, 194-196 (sketching differences between two).

See also

Some opinions insist that Crawford provided “three formulations” of the “core” class of “testimonial” hearsay. See, e.g., *People v. West*, 2005, 823 N.E.2d 82, 87, 355 Ill.App. 28, 291 Ill.Dec. 72; *State v. Snowden*, 2005, 867 A.2d 314, 323, 385 Md. 64; *State v. Vaught*, 2004, 682 N.W.2d 284, 291, 268 Neb. 316, *Spencer v. State*, Tex.App. 2005, 162 S.W.3d 877, 879. But as far as we can tell, no decision has ever turned on the way the two formulae described in the test were combined in the third.

But see

People v. Cage, 2004, 15 Cal.Rptr.3d 846, 855, 120 Cal.App.4th 770 (Crawford did not adopt any of the three formulations so its actual holding was narrower than any of them).

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 587 (arguing that both Friedman and Berger's "prosecutorial restraint" models are inadequate, standing alone; so would combine the two to use both the declarant's intent and the prosecution's motivation).

cxxxiv

n. 134. Formal criteria

Or as one version has it, "formalized testimonial materials." See text at notecall 99, above.

Compare

U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 674 (attributing this strand to the writing of Professor Akhil Reed Amar and rejecting it as inviting officials to adopt informal modes in order to evade Crawford).

cxxxv

n. 135. Officials shaped

This test appears to rest on the policy of preventing governmental abuse. See above, text at notecall 64. That abuse consists of biasing the witness to make both the statement and any testimony at trial by the declarant less reliable than it would be if a product of the witness's unaided volition.

See also

State v. Brigman, 2005, 615 S.E.2d 21, 24, ___ N.C.App. ___ (accusations of child abuse elicited by foster parents with whom children had been placed by the state not "testimonial" even though foster parent attempted to record the statements at the behest of the social worker supervising the placement because not "procured by a government officer"); Moore v. State, Tex.App.2005, 169 S.W.3d 467, 471 (noting cases that use this strand); Ruth v. State, Tex.App. 2005, 167 S.W.3d 560, 568 (where interaction initiated by declarant, as in 911 call, not testimonial); State v. Stuart, 2005, 695 N.W.2d 259, 265, 279 Wis.2d 659 (relying on statement above to hold testimony at preliminary hearing is "testimonial").

cxxxvi

n. 136. Accuse of crime

Or more specifically, the statement must be made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." See text at notecall 101, above.

See also

U.S. v. Johnson, C.A.6th, 2005, 430 F.3d 383, 395 (statements elicited by friend of declarant at the behest of the government not “testimonial” because declarant did not know they were being secretly recorded for prosecution); U.S. v. Hinton, C.A.3d, 423 F.3d 355, 359 (adopting this as the standard most likely to ensure compliance with the Confrontation Clause); Moore v. State, Tex.App.2005, 169 S.W.3d 467, 472 (noting some courts say declarant’s subjective intent is relevant to this determination).

But see

State v. Wright, Minn.2005, 701 N.W.2d 802, 810 n. 2 (collecting writers and cases saying this is the broadest test); State v. Mizenko, 2006, 127 P.3d 458, 466, 330 Mont. 229 (rejecting this formulation as too broad).

cxxxvii

n. 137. Make responsibly

See, above, text at notecall 50.

cxxxviii

n. 138. Outer limits

In re Fernando R., 2006, 40 Cal.Rptr.3d 61, 71, 138 Cal.App.4th 148 (collecting cases saying that by quoting the three formulae, majority did not intend to adopt them as the standards for determining when statement is “testimonial”); State v. Bobadilla, Minn.2006, 709 N.W.2d 243, 249 (unclear whether any of the three formulae in Crawford is “authoritative”); Moore v. State, Tex.App.2005, 169 S.W.3d 467, 471 (in determining if statement is “testimonial” courts look to “the formal nature of the interaction, the intent of the declarant, or some combination of the two”).

But see

Hammon v. State, Ind.2005, 829 N.E.2d 444, 451-452 (“core concerns” apparently mark the outer limits of “testimonial hearsay”).

cxxxix

n. 139. Academics cited

See, e.g., U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 673; State v. Davis, 2005, 613 S.E.2d 760, 767, 364 S.C. 364, citing Amar, *The Constitution and Criminal Procedure*, 1997, pp. 125-131 and Friedman, *Confrontation: The Search for Basic Principles*, 1998, 86 *Geo.L.J.* 1011, cited at 124 S.Ct. at 1370, 541 U.S. at 60.

cxl

n. 140. Attribute to writers

U.S. v. Hadley, C.A.6th, 2005, 431 F.3d 484, 499-500 (adopting Friedman formula); U.S. v. Summers, C.A.10th, 2005, 414 F.3d 1287, 1298 (rejecting Amar approach in favor of Friedman’s view because Amar’s approach “emphasizes form over substance”); Flores v. State, 2005, 120 P.3d 1170, 1177, ___ Nev. ___ (finding

these writers instructive but not definitive; none of the three tests suggested by the Crawford majority corresponds with the views of either).

But see

U.S. v. Gilbertson, C.A.7th, 2005, 435 F.3d 790, 795 (source of second Crawford formula was Justice Thomas' concurring opinion in *White v. Illinois*; see § 6370, p. 864, in the main volume).

cxli

n. 141. Complementary

In re Fernando R., 2006, 40 Cal.Rptr.3d 61, 72, 138 Cal.App.4th 148 (in determining whether questioning of victim amounted to an "interrogation", court could consider whether she could have objectively believed her statements would be used to prosecute the perpetrator of street mugging); *Purvis v. State*, Ind.App.2005, 829 N.E.2d 572, 580 (where officer, after being told child was sexually abused, questions the child with repeated question, an objective observer would have no doubt that he was gathering evidence to be used in prosecution); *Bray v. Commonwealth*, Ky.2005, 177 S.W.3d 741, 745 (frightened call to sister to report defendant was stalking her not circumstances that would lead an objective witness to believe the statement would be available for trial); *Commonwealth v. Gonsalves*, 2005, 833 N.E.2d 549, 558, 445 Mass. 1 (statements not "per se testimonial" because they fall within the core class can still be found "testimonial" by applying the "objective declarant" test); *State v. Bobadilla*, Minn.2006, 709 N.W.2d 243, 253 (most officers taking statements within the Crawford "core" would be producing the statement for use at trial); *State v. Mizenko*, 2006, 127 P.3d 458, 462, 330 Mont. 229 (when speaking to government agents, declarant could reasonably expect that the statements would be used at trial); *Medina v. State*, 2006, 131 P.3d 15, 20, ___ Nev. ___ (statement by rape victim to neighbor who came to apartment to see what was wrong with her that "I have been raped" not testimonial because not an affidavit nor made during custodial interrogation nor at prior hearing and declarant could not expect it to be used at trial because made to neighbor before anyone had called the police); *Flores v. State*, 2005, 120 P.3d 1170, 1179, ___ Nev. ___ (when speaking to police officers or persons charged with investigating child abuse, "reasonable person" would suppose an accusation of child abuse would be used to prosecute mother for child abuse even if her five-year-old daughter did not); *State v. Reese*, 2005, 844 N.E.2d 873, 877, 165 Ohio App.3d 21 (statement by mother "some years earlier" about the value of ring defendant is now charged with stealing not "testimonial" because not the kind of formalized statement described in Crawford and mother could not expect that the statement would be used in evidence if the ring were stolen); *State v. Staten*, S.C.App.2005, 610 S.E.2d 823, 829-830 (treating these as "the Crawford two-pronged analysis"); *State v. Mason*, 2005, 126 P.3d 34, 39, ___ Wash.App. ___ (if purpose of declarant is to seek help, unlikely that police induced statement or that declarant expected that it would be used at trial).

cxlii

n. 142. "Common nucleus"

Stancil v. U.S., D.C.App.2005, 866 A.2d 799, 812 (all statements cited in Crawford as “testimonial” involved “a declarant’s knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that . . . responses might be used in future judicial proceedings”); State v. King, App.2006, 132 P.3d 311, 315, ___ Ariz. ___ (common nucleus is “reasonable expectation of the declarant”); State v. Miller, 2006, 896 A.2d 844, 858, 95 Conn.App. 362 (“reasonable expectation of declarant” as the “anchor of more concrete definition”); State v. Snowden, 2005, 867 A.2d 314, 324, 385 Md. 64 (Crawford requires “a formal or official statement made or elicited for the purpose of being introduced at a criminal trial”); People v. Orpin, N.Y.Cty.Ct. 2005, 796 N.Y.S.2d 512, 515, 8 Misc.3d 768 (“that the declarant understand that his or her statement will be used in a criminal investigation or prosecution”); State v. Shafer, 2006, 128 P.3d 87, 91, ___ Wash.2d ___ (common thread of core class of hearsay statements is involvement by a government official).

Compare

U.S. v. Gilbertson, C.A.7th, 2005, 435 F.3d 790, 795 (Crawford applies only to “statements made following government official initiated ex parte examination or interrogation developed in anticipation of or in aid of criminal litigation”; blaming the other Professor Graham for this stingy reading); Walker v. State, Tex.App.2005, 180 S.W.3d 829, 833 (Texas courts look to formality of interaction with police, the purpose and structure of police questioning, and the declarant’s expectations regarding use in a criminal prosecution); Key v. State, Tex.App.2005, 173 S.W.3d 72, 74 (statements described as testimonial in Crawford “all involve a declarant’s knowing responses to structured questioning in an investigative environment or in a courtroom setting where the declarant could reasonably expect his or her responses might be used in a future judicial proceeding”); State v. King, App.2005, 706 N.W.2d 181, 184 n.1, ___ Wis.2d ___ (Wisconsin follows all three of the Crawford formulae); State v. Manuel, 2005, 697 N.W.2d 811, 821, ___ Wis.2d ___ (assuming that official inducement and witness purpose strands share a “common nucleus”).

But see

Moore v. State, Tex.App.2005, 169 S.W.3d 467, 472-473 (since statement qualifies as “testimonial” under either standard, court need not choose between them).

See also

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 591 (arguing the true target of Crawford is the “accusatory witness”; so to be found “testimonial” must “the fact the witness seeks to prove must necessarily encompass the defendant’s relationship to the crime in which he is implicated).

cxliii

n. 143. Turns on purpose

U.S. v. Bordeaux, C.A.8th, 2004, 400 F.3d 548, 556 (if interrogation has a law enforcement purpose, it is “testimonial” even though the interrogator may have had

other purposes in mind as well); *Leavitt v. Arave*, C.A.9th, 2004, 383 F.3d 809, 830 n.22 (calls to police accusing defendant of trying to break into her home not “testimonial” because declarant seeking help, not prosecution); *People v. Taulton*, 2005, 29 Cal.Rptr.2d 203, 206, 129 Cal.App.4th 1218 (holding records of prison not intended as accusations even though they may be used to enhance penalty); *State v. Vaught*, 2004, 682 N.W.2d 284, 291, 268 Neb. 316 (accusation by child of sexual abuse not “testimonial” since made for medical diagnosis).

See also

State v. Bobadilla, Minn.2006, 709 N.W.2d 243, 250 (the declarant’s purpose in speaking to the officers and the officers’ purpose in speaking to the officers are central, all other facts simply prove these; e.g., whether the declarant was a victim or an observer, who initiated the conversation, its location, the declarant’s emotional state, the level of formality or structure of the interchange, and if and how the statements were recorded); *State v. Maclin*, Tenn.2006, 183 S.W.3d 335, 346 (Crawford “involves a formal or official statement made or elicited with the purpose of being introduced at a criminal trial”); *State v. Mason*, 2005, 126 P.3d 34, 39, ___ Wash.App. ___ (central inquiry is purpose of witness because this determines whether he could reasonably believe that his statement would be used at a later trial).

cxliv

n. 144. Informer to induce

See, e.g., *U.S. v. Underwood*, C.A.11th, 2006, 446 F.3d 1340, 1347 (circumstances would not lead declarant to believe statement would be available for use at a later trial); *U.S. v. Johnson*, C.A.6th, 2005, 430 F.3d 383, 395 (not “testimonial” because declarant unaware he was being recorded by the prosecution); *U.S. v. Hendricks*, C.A.3d, 2005, 395 F.3d 173, 182 (conceding contrary argument “is not without some appeal” but rejecting on Bourjaily grounds); *U.S. v. Brisco-Bey*, C.A.3d, 2005, 126 Fed.Appx. 551, 553 (kissing-off Crawford objection without any analysis of the issue); *U.S. v. Saget*, C.A.2d 2004, 377 F.3d 223, 228-229; *State v. Savanh*, 2005, 707 N.W.2d 549, 554, ___ Wis.2d ___ (remark of accomplice not “testimonial” and made in furtherance of conspiracy).

Compare

State v. Shafer, 2006, 128 P.3d 87, 91, ___ Wash.2d ___ (statements to government informer acting as friend of the family not “testimonial”).

But see

People v. Wahlert, 2005, 31 Cal.Rptr.3d 603, 614, ___ Cal.App.4th ___ (police induce one suspect to make “pretext call” to another suspect “to gather evidence and incriminating statements”; “testimonial”); *In re J.K.W.*, Minn.App.2004, 2004 WL 1488850 p. 3 (police officer induced child suspected of making bomb threat and her mother to induce defendant to make incriminating admissions and record them; statements “testimonial”).

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 594 (noting courts dismiss as “nontestimonial” but argues that when these are accusations, relying on declarant’s intent and ignoring prosecutorial inducement provides an incentive for police to use this method of creating hearsay that will slide by Crawford).

cxlv

n. 145. Bourjaily survive

U.S. v. Underwood, C.A.11th, 2006, 446 F.3d 1340, 1347 (relying on Bourjaily argument); U.S. v. Johnson, C.A.6th, 2006, 440 F.3d 832, 842 (since declarant was speaking to fellow criminal who he did not know had become a wired informer, his statements were not “testimonial”); U.S. v. Guishard, C.A.3d, 2006, 163 Fed.Appx. 114, 117 n. 2; U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 183; U.S. v. Saget, C.A.2d 2004, 377 F.3d 223, 229; U.S. Canady, C.A.4th, 2005, 139 Fed.Appx. 499, 501.

See also

The Bourjaily case is discussed in § 6369, p. 847 in the Main Volume. The Crawford discussion of Bourjaily appears at 124 S.Ct. at 1368, 54 U.S. at 58.

But see

People v. Wahlert, 2005, 31 Cal.Rptr.3d 603, 615, ___ Cal.App.4th ___ (rejecting Bourjaily analysis where conspiracy had ended when statements elicited); State v. Adams, 2006, 131 P.3d 556, 562, ___ Kan.App. ___ (holding that informer’s phone call with police listening in to arrange drug deal was testimonial as informer had every reason to believe that his statements to defendant would be used against the latter).

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n.146. Chosen “accusation”

Frequently the statements induced by the informant bear not the slightest resemblance to the “accusations” of crime that so concerned the Founders. See, e.g., U.S. v. Johnson, C.A.3d, 2005, 119 Fed.Appx. 415, 418-419 (recordings of defendant arranging and consummating drug deal orchestrated by informant; court rationalizes on grounds that statements were declarations of co-conspirators).

cxlviii

n. 147. “Core class”

124 S.Ct. at 1364, 541 U.S. at 51.

U.S. v. Mikos, D.C.Ill.2004, 2004 WL 1631675, p. 6 (statements to HHS investigators probing Medicare fraud “testimonial”); U.S. v. Gonzalez-Marichal, D.C.Cal.2004, 317 F.Supp.2d 1200, 1203 (while statements about nationality might not appear like an accusation in the abstract, when coupled with the statement that she paid defendant to smuggle her into U.S. they are “testimonial”); People v. Lee, 2004, 21 Cal.Rptr.3d 309, 313, 124 Cal.App.4th 483 (statements made in the course of police

interrogations); *People v. Kilday*, 2004, 20 Cal.Rptr.3d 161, 171, 123 Cal.App.4th 406 (police questioned witness in his hotel room after arresting defendant and recorded his answers); *People v. Pirwani*, 2004, 14 Cal.Rptr.3d 673, 685, 119 Cal.App.4th 770 (videotaped ex parte interview of person who accused defendant of stealing her gambling winnings); *Brawner v. State*, 2004, 602 S.E.2d 612, 614 n. 2, 278 Ga. 316 (declarant told police several days after the crime that defendant shot the victim several times as the victim lay on the ground pleading for his life); *Purvis v. State*, Ind.App.2005, 829 N.E.2d 572, 580 (where parents had already told officer what child would say and where officer asked repeated same question many times, clear officer engage in interrogation to produce evidence for trial); *Bell v. State*, Miss.App.2006, 928 So.2d 951, 960 (interrogation of two pre-school children about the murder of their mother by their father “testimonial”); *State v. Romero*, App.2006, 133 P.3d 842, 857, 139 N.M. 386 (testimony before grand jury); *People v. Durio*, N.Y.Sup.Ct.2005, 794 N.Y.S.2d 863, 864, 7 Misc.3d 729 (police ask dying man who shot him; answer “testimonial”); *State v. Morgan*, 2004, 604 S.E.2d 886, 901, 359 N.C. 131(statement given by defendant’s nephew several hours after crime to officer in response to “structured police questioning”; “testimonial”); *State v. Saunders*, 2006, 132 P.3d 743, 749, ___ Wash.App. ___ (“structured police interview” seeking to extract information from reluctant witness “testimonial”; dictum).

cxlviii

n. 148. Acting as accomplice

Jahanian v. State, Tex.App. 2004, 145 S.W.3d 346, 350.

See also

U.S. v. Saner, D.C.Ind.2004, 313 F.Supp.2d 896, 901 (Crawford not distinguishable on ground declarant there was in custody); *State v. Bell*, 2004, 603 S.E.2d 93, 116, 359 N.C. 1 (statement of robbery victim at the scene of the crime describing the crime in response to “structured police questioning”; “testimonial”); *Clay v. State*, Tex.App. 2005, 177 S.W.3d 486, 490 (statements of accomplices under police interrogation “testimonial”); *Brawner v. State*, 2004, 602 S.E.2d 612, 614 n. 2, 278 Ga. 316 (declining to limit Crawford to cases where person being interrogated by the police is a suspect in the charged crime);

Compare

State v. Greene, 2005, 874 A.2d 750, 774, 274 Conn. 134 (statement by man who approached police at scene of shooting and announced that he thought he had been shot in the foot was not in custody or interrogated so statement not within the first two Crawford tests); *Purvis v. State*, Ind.App.2005, 829 N.E.2d 572, 579 (“interrogate” can mean anything from custodial interrogation of a suspect to a simple conversation with a police officer); *Commonwealth v. Gonsalves*, 2005, 833 N.E.2d 549, 555, 445 Mass. 1 (defining “interrogation” to mean all “law enforcement questioning related to the investigation or prosecution of a crime”).

cxlix

n. 149. Grand jury testimony

U.S. v. Bruno, C.A.2d, 2004, 383 F.3d 65, 78; State v. Romero, App.2006, 133 P.3d 842, 857, 139 N.M. 386.

See also

U.S. v. Saner, D.C.Ind.2004, 313 F.Supp.2d 896, 901 (Crawford applies where questioning is done by prosecutors rather than police).

cl

n. 150. Smuggled in

U.S. v. McKenzie, C.A.11th, 2005, 160 Fed.Appx. 821, 824.

cli

n. 151. “Questioning” in hospital

Marquardt v. State, 2005, 882 A.2d 900, 919, 164 Md.App. 95 (questioning witness in hospital 30 minutes after assault “testimonial”).

See also

U.S. v. Gonzalez-Marichal, D.C.Cal.2004, 317 F.Supp.2d 1200, 1202 (while in hospital with broken leg, declarant states during custodial interrogation that she is a Mexican national who paid defendant \$1500 to smuggle her into U.S.; “testimonial”); Gay v. State, 2005, 611 S.E.2d 31, 33, 279 Ga. 180 (statements made by father to police investigating the shooting of his daughter at the hospital shortly after the shooting; “testimonial”); People v. Gilmore, 2005, 828 N.E.2d 293, 301, 356 Ill.App.3d 1023 (dying murder victim identifies killer in response to police query); People v. R.F., 2005, 825 N.E.2d 287, 295, 355 Ill.App.3d 992, 292 Ill.Dec. 31 (mother told officer at hospital that child had accused father of child abuse; officer returned next day with sidekick, told child he was there to help her, and asked her to repeat what she said to her mother; “testimonial”); Wall v. State, Tex.Crim.2006, 184 S.W.3d 730, 737 n. 28 (collecting cases on hospital interrogation and rejecting Cassidy view that not “testimonial”); Tyler v. State, Tex.App. 550, 554 (rejecting both Wall and Cassidy in case where officer only asked victim for his name and triggered account of crime); State v. Lewis, 2004, 603 S.E.2d 559, 556, 166 N.C.App. 596 (officer investigating robbery took statement on the scene from injured victim while awaiting arrival of ambulance; held “testimonial”); State v. Walker, 2005, 118 P.3d 935, 940, 129 Wash.App. 258 (police interrogation of victim of jailhouse altercation in hospital two hours after the attack using “structured questioning”; “testimonial”).

But see

Cassidy v. State, Tex.App. 2004, 149 S.W.3d 712 (not “testimonial”).

clii

n. 152. Pattern

U.S. v. Guishard, C.A.3d, 2006, 163 Fed.Appx. 114, 117 (statements made during F.B.I. interrogation); U.S. v. Baker, C.A.11th, 2005, 432 F.3d 1189, 1207 (statements made by “accusers” to law enforcement officers in course of a criminal investigation are “testimonial”); U.S. v. Pugh, C.A.6th, 2005, 405 F.3d 390, 399 (during police

interrogation declarant identifies defendant as the perpetrator of charged crime); U.S. v. Rodriguez-Marrero, C.A.1st, 2004, 390 F.3d 1, 17 (confession of accomplice signed and presented under oath to prosecutor); U.S. v. Rashid, C.A.8th, 2004, 383 F.3d 769, 776 (statements during F.B.I. interrogations); U.S. v. Aleman-Ramos, C.A.6th, 2005, 155 Fed.Appx. 845, 850 n. 2 (statement of nine-year-old boy to police interrogator “testimonial” even if the declarant could not have appreciated the use to which his statements would be put).

People v. R.A.S., Colo.App. 2005, 111 P.3d 487, 490 (taped “forensic interview” of victim at a facility for abused children “testimonial” even under the “narrowest formulation” of Crawford definition); State v. Pierre, 2006, 890 A.2d 474, 495, 277 Conn. 42 (written statement produced during police interrogation “testimonial”); Bell v. State, 2004, 597 S.E.2d 350, 353, 278 Ga. 69 (statement that victim made to police officers investigating her complaints that her husband held a knife to her throat and threatened to kill her); Moody v. State, 2004, 594 S.E.2d 350, 354, 277 Ga. 676 (murder victim’s statements to police accusing defendant of firing shotgun into bedroom where she was sleeping with her paramour); People v. West, 2005, 823 N.E.2d 82, 87, 355 Ill.App. 28, 291 Ill.Dec. 72 (victim questioned by police at hospital after defendant had been arrested for assaulting her; “testimonial”); People v. Victors, 2004, 819 N.E.2d 311, 320, 353 Ill.App.3d 801 (on-scene police interrogation of participants in domestic dispute); In re T.T., 2004, 815 N.E.2d 789, 800 351 Ill.App.3d 976, 287 Ill.Dec. 145 (police interrogation of five-year-old “testimonial”); People v. Bell, 2004, 689 N.W.2d 732, 735, 264 Mich.App. 58 (during custodial interrogation, declarant accused defendant of hiring him to do firebombing; “clearly testimonial” though concurrence disagrees with majority and Justice Scalia); People v. McPherson, 2004, 687 N.W.2d 370, 376, 263 Mich.App. 124 (arrestee after police interrogation gives written statement to police describing commission of crime; “undeniably testimonial” without analysis); State v. Hannon, Minn.2005, 703 N.W.2d 498, 507 (clear that testimony at prior trial is testimonial); State v. Romero, App.2006, 133 P.3d 842, 857, 139 N.M. 386 (stationhouse interrogation); State v. Johnson, 2004, 98 P.3d 998, 1002, 136 N.M. 348 (custodial interview of accomplice “squarely within” Crawford); State v. Ash, 2005, 611 S.E.2d 855, 863, ___ N.C.App. ___ (“undisputed” that playing videotaped deposition of autopsy surgeon in lieu of testimony was “testimonial”); State v. Morton, 2004, 601 S.E.2d 873, 875, 166 N.C.App. 477 (custodial police interrogation); Ruth v. State, Tex.App. 2005, 167 S.W.3d 560, 568 (deriving subsidiary principles from “core” formulations); Bratton v. State, Tex.App. 2005, 156 S.W.3d 689, 693 (state concedes statements during police interrogation were “testimonial”); Samarron v. State, Tex.App. 2004, 150 S.W.3d 701, 706 (victim of assault agrees to go to police headquarters to make statement, sets in cubicle with detective who takes down statement; held “testimonial”); Hale v. State, Tex.App. 2004, 139 S.W.3d 418, 421 (accomplice confession made during custodial police interrogation); State v. Stuart, 2005, 695 N.W.2d 259, 261, 279 Wis.2d 659 (testimony at preliminary hearing); State v. Hale, 2005, 691 N.W.2d 637, 646, 277 Wis.2d 593 (testimony at former trial).

Compare

People v. Garrison, Colo.App. 2004, 109 P.3d 1009, 1011 (statements not within “core class” per se “nontestimonial”).

cliii

n. 153. Historical and policy

State v. Lewis, 2004, 603 S.E.2d 559, 562-563, 166 N.C.App. 596.

See also

State v. King, App.2005, 706 N.W.2d 181, 189, ___ Wis.2d ___ (identification at line-up is “testimonial”).

Many cases involve questioning of suspected abused children by social workers or therapists at private and public institutions funded to treat such children, to remove them from dangerous environments, and to aid prosecution of perpetrators. See, e.g., T.P. v. State, Ala.Crim.2004, 911 So.2d 1117, 1123 (interview conducted by social worker and police investigator of suspected child abuse victim “testimonial”; interview was “investigative tool” for potential prosecution; hence, “testimonial”); People v. Warner, 2004, 14 Cal.Rptr.3d 419, 428, 119 Cal.App.4th 331 (multi-disciplinary interview center founded and funded to interrogate victims of suspected child abuse for civil and criminal proceedings; “testimonial” even though also claims treatment purpose);

cliv

n. 154. Escape regime

On the treatment of “nontestimonial” hearsay post-Crawford, see below, text at notecall 648.

clv

n. 155. Not within “core”

Jensen v. Pliier, C.A.9th, 2006, 439 F.3d 1086, 1089 (former prosecutor and would-be defense lawyer interrogates arrestee who accuses others of conspiring with him to commit charged murder; not “testimonial” as not within examples given by Court); U.S. v. Gonzales, C.A.5th, 2006, 436 F.3d 560, 576 (screaming that arresting officers had hurt declarant); U.S. v. Schlisser, C.A.2d 2006, 168 Fed.Appx. 483, 485 (statements made by grifters and marks during stock swindle); U.S. v. Hadley, C.A.6th, 2005, 431 F.3d 484, 502 (screaming to police that defendant “has a gun” and “he’s going to kill me” does not fall within Crawford core class); People v. Caudillo, 2004, 19 Cal.Rptr.3d 574, 589, 122 Cal.App.4th 1417 (anonymous 911 caller reports men with guns, describes car, and gives license plate number); People v. Cage, 2004, 15 Cal.Rptr.3d 846, 854, 120 Cal.App.4th 770 (asking child who had accused mother of slashing his face with a piece of glass to “tell us the story” not “structured questioning” and not “testimonial”); Compan v. People, Colo.2005, 121 P.2d 876, 880 (calling friend to come and rescue her from abusive spouse, then telling her what had happened does not fit within any of the Crawford categories of “testimonial” statements; so court need not decide which controls); People v. Butler, 2005, 25 Cal.Rptr.2d 154, 161, 127 Cal.App.4th 49 (statements to colleagues “bear

no indicia common to the various testimonial settings” mentioned in Crawford); *People v. Cervantes*, 2004, 12 Cal.Rptr.3d 774, 782, 118 Cal.App.4th 162 (declarant seeking medical treatment from neighbor revealed that injuries suffered in fleeing from gang killing perpetrated by declarant and defendant; does not resemble any of the specific examples cited in Crawford); *People v. Vigil*, Colo.2006, 127 P.3d 916, 928 (statement to father and father’s friend do not resemble the core class described in Crawford); *State v. Wright*, Minn.2005, 701 N.W.2d 802, 814 (statements of victim and sister to officers responding to a 911 call); *Foley v. State*, Miss.2005, 914 So.2d 677, 685 (statements to therapist, social worker, and sexual abuse examiner); *People v. Bradley*, 2005, 799 N.Y.S.2d 472, 475, 22 App.Div.3d 33 (question “what happened” by officer responding to 911 call nothing like the “detailed, particularized, and memorialized questioning” in Crawford); *State v. Shelly*, 2006, 627 S.E.2d 287, 299, ___ N.C.App. ___ (opinion of expert based on tests performed and report of same by absent declarant from state crime lab); *State v. McClanahan*, 2005, 2005 WL 1398835 p. 3 (while officers were heading for location where shots were fired, anonymous informant approached them and volunteered that the shots came from defendant’s apartment; not “testimonial”); *sState v. Staten*, S.C.App.2005, 610 S.E.2d 823, 836; *State v. Walker*, 2005, 118 P.3d 935, 942, 129 Wash.App. 258 (statements to mother after child returned from weekend with grandfather accusing him of sexual abuse; not made in court, in formalized testimonial materials nor in response to police interrogation so not “testimonial”); *State v. Hemphill*, App.2005, 707 N.W.2d 313, 315, ___ Wis.2d ___ (statement of bystander “that’s them” to police answering 911 call about men with a gun does not fit into any of the Crawford categories); *State v. Manuel*, 2005, 697 N.W.2d 811, 822, ___ Wis.2d ___ (statements of accomplice to girl friend about crime shortly after its commission “do not fit” either of the two Scalia formulations).

Compare

In re Fernando R., 2006, 40 Cal.Rptr.3d 61, 72, 138 Cal.App.4th 148 (statement at issue does not fall within any of the categories that Crawford suggests are “nontestimonial”).

clvi

n. 156. “Official or formal”

U.S. v. Danford, C.A.7th, 2005, 435 F.3d 682, 687 (statement by employee to former employee that he had just shown defendant how to disarm the burglary alarm akin to a “casual conversation” rather than the formal statement of concern in Crawford); *U.S. v. Hendricks*, C.A.3d, 2005, 395 F.3d 173, 181 (each of the examples cited in Crawford “entailed a formality to the statement” not present when government informer elicits statements in wiretapped conversations); *U.S. v. Savoca*, D.C.N.Y. 2004, 335 F.Supp.2d 385, 393 (“element of officiality” the “hallmark of testimonial statement”).

Anderson v. State, Alaska App. 2005, 111 P.3d 350, 354 (police responding to 911 call ask injured victim “what happened?”; response “Joe hit me with a pipe” not

“testimonial”); *State v. Green*, 2005, 874 A.2d 750, 774, 274 Conn. 134 (bystander who reported being shot in drive-by shooting not in custody nor interrogated and no record made of his statements; not “testimonial”); *In re T.T.*, 2004, 815 N.E.2d 789, 800 351 Ill.App.3d 976, 287 Ill.Dec. 145 (Crawford requires government involvement to make statement “testimonial”); *Hammon v. State*, Ind.2005, 829 N.E.2d 444, 452. 454 (so “unstructured” interrogations not testimonial; collecting cases); *State v. Burrell*, Minn.2005, 697 N.W.2d 579, 599 (mother comes to police station to inquire about son’s arrest, not treated as suspect or Mirandized, and no record made of her willing answers to questions; dictum probably not “testimonial” but further facts may develop on remand); *State v. Davis*, 2005, 613 S.E.2d 760, 779, 364 S.C. 364 (declarant tells prospective buyer of weapon not to buy it because it was used in a murder); *Walker v. State*, Tex.App.2005, 180 S.W.3d 829, 834 (where police asked declarant in their custody to identify suspects as part of ongoing criminal investigation, questioning was sufficiently formal and structured to qualify as “testimonial”); *Ruth v. State*, Tex.App. 2005, 167 S.W.3d 560, 568 (so 911 call is not); *Lee v. Texas*, 2004, 143 S.W.3d 565, 570 (statements made by driver of car after defendant was arrested that money found in search of trunk were proceeds of drug sales were “testimonial” where recorded on videocamera in patrol car); *State v. Wilkinson*, 2005, 879 A.2d 445, 448 ___ Vt. ___ (exited utterance not in “context of formal interrogation or other structured environment”); *State v. Mason*, 2005, 110 P.3d 245, 247, ___ Wash.App. ___ (whether interaction takes place in formal setting with structured questioning, recorded, part of incident or part of prosecution, whether witness had time for contemplation).

Compare

State v. Greene, 2005, 874 A.2d 750, 774 n. 26, 274 Conn. 134 (rejecting argument that any statement made to police must have the required formality to be “testimonial” under Crawford); *People v. Cortes*, 2004, 781 N.Y.S.2d 401, 406, 4 Misc.3d 575 (surveying police websites to show that 911 calls are answered with a “regularized routine” designed to elicit “testimonial” hearsay).

But see

People v. Wahlert, 2005, 31 Cal.Rptr.3d 603, 617 n. 14, ___ Cal.App.4th ___ (when the government induces one suspect to make a pretext call to another to elicit incriminating admissions, the formality of the questioning and the understanding of the declarant do not apply to determine if “testimonial”); *State v. Parks*, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (whether or not there was a police “interrogation” only one indicium of “testimonial statements”; statements can be testimonial even in the absence of an interrogation as when accuser reasonably believed that her statement will be used in the investigation or prosecution of the accused).

clvii

n. 157. “Structured” shibboleth

U.S. v. Hadley, C.A.6th, 2005, 431 F.3d 484, 502 (screaming to police that defendant “has a gun” and “he’s going to kill me” before they asked any questions not “structured police questioning”); *Stancil v. U.S.*, D.C.App.2005, 866 A.2d 799, 814

(once police separate combatants and begin to question them about the altercation, “structured police questioning” began and statements made were “testimonial”); *State v. Alvarez*, App.2005, 107 P.3d 350, 354, 210 Ariz. 24 (to constitute an “interrogation” within the meaning of Crawford, police questioning must be “structured” or “aimed at producing evidence in anticipation of a potential criminal prosecution”; neither applies when officer does not know a crime has been committed at the time of questioning); *People v. Smith*, 2005, 38 Cal.Rptr.3d 1, 8, 135 Cal.App.4th 914 (or if made in formal proceeding: dictum); *People v. Sisavath*, 2004, 13 Cal.Rptr.3d 753, 757, 118 Cal.App.4th 1396 (police questioning of child abuse victim was “structured” so child’s response was “testimonial”); *State v. Greene*, 2005, 874 A.2d 750, 774 n. 26, 274 Conn. 134 (category of “formalized testimonial materials” does not include all oral statements to the police); *State v. Barnes*, Me. 2004, 854 A.2d 208, 210 (mother runs into police station to complain that her son assaulted her was seeking safety and aid and questions not structured; not “testimonial”); *State v. Warsame*, Minn.App. 2005, 701 N.W.2d 305, 310 (so when witness gives a narrative response to a single question, no “interrogation”); *State v. Hembertt*, 2005, 696 N.W.2d 473, 482, 269 Neb. 840 (to fall within the “police interrogation” category of Crawford “requires some kind of structured police questioning, intended to elicit information for use in a contemplated prosecution”; collecting cases); *People v. Watson*, N.Y.Cty.Ct.2004, 798 N.Y.S.2d 712, 5 Misc.3d 1013 (statement made to police after they arrived on the scene and arrested the defendant that “that is the man who robbed me” not “testimonial”); *Scott v. State*, Tex.App. 2005, 165 S.W.3d 27, 47 (it is the circumstances under which statement is made that determine whether or not it is “testimonial”; content of statement is irrelevant, e.g., whether or not it amounts to an “accusation”).

But see

State v. Parks, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (collecting cases but holding that an “interrogation” can occur “even in the absence of ‘formal’ or ‘structured’ police questioning”); *In re Fernando R.*, 2006, 40 Cal.Rptr.3d 61, 75, 138 Cal.App.4th 148 (rejecting “structured police questioning” as the sine qua non of “police interrogation” under Crawford); *In re Rolandis G.*, 2004, 817 N.E.2d 183, 188, 352 Ill.App.3d 776 (social worker engaged in “formal and systematic questioning” of suspected child abuse victim; “testimonial”); *Commonwealth v. Gonsalves*, 2005, 833 N.E.2d 549, 555, 445 Mass. 1 (limiting “testimonial” statements to formalized accounts would invite the police to evade Crawford by using informal measures to interrogate witnesses).

Compare

U.S. v. Brito, C.A.1st, 2005, 427 F.3d 53, 63 (questions by 911 operator that only seek to clarify or focus the caller’s narrative not an “interrogation” in any meaningful sense of the word); *People v. Caudillo*, 2004, 19 Cal.Rptr.3d 574, 590, 122 Cal.App.4th 1417 (911 call reporting men with guns, describing car, and giving license plate not formal enough to be “testimonial”).

See also

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 606 (arguing that including formulae that unlike Justice Thomas' in White did not include an element for formality suggests that the majority did not want to limit Crawford to formal statements).

clviii

n. 158. Turncoat accomplice

State v. Hernandez, Fla.App. 2004, 875 So.2d 1271, 1273.

See also

For the problems in analyzing such statements under Crawford, see above, text at notecall 144.

Compare

People v. Watson, N.Y.Cty.Ct.2004, 798 N.Y.S.2d 712, 5 Misc.3d 1013 (can have a police "interrogation" even where only two questions were asked where questions called for narrative); Commonwealth v. Dargan, Pa.Super.2006, 897 A.2d 496, 500-501 (an informer's accusation of defendant not "testimonial" because it was a voluntary statement seeking assistance; i.e., a deal that would allow him to escape punishment for his own crimes).

clix

n. 159. Indicator of intent

E.g., Hammon v. State, Ind.2005, 829 N.E.2d 444, 453; State ex rel. J.A., 2006, 897 A.2d 1119, 1125, 385. N.J.Super. 544 (embracing Hammon reasoning).

See also

U.S. v. Bordeaux, C.A.8th, 2004, 400 F.3d 548, 556 (interview of sex abuse victim by "forensic examiner" that was videotaped and a copy sent to the police had sufficient formality to show purpose was to gather evidence for trial as well as for therapy); In re Fernando R., 2006, 40 Cal.Rptr.3d 61, 75, 138 Cal.App.4th 148 (formality of statement and presence of structured police question relevant to whether or not "testimonial" but not a sine qua non); People v. Bradley, 2005, 799 N.Y.S.2d 472, 480, 22 App.Div.3d 33 (rather than looking to the intent of the declarant, "the better approach is to evaluate the objective of the person posing the question"); State v. Siler, 2005, 843 N.E.2d 863, 867-868, 164 Ohio App.3d 680 (structured questioning by interrogator specially trained to elicit statements from 5 children; "testimonial"); State v. Maclin, Tenn.2006, 183 S.W.3d 335, 348 (using Hammon as an example of the case-by-case method used by most courts); Lagunas v. State, Tex.App.2005, 187 S.W.3d 503, 520 (that statements were elicited by police weighs toward a finding that statements were "testimonial" but does not outweigh other considerations to the contrary).

clx

n. 160. “Colloquial sense”

In re Fernando R., 2006, 40 Cal.Rptr.3d 61, 72, 138 Cal.App.4th 148 (but court can consider whether victim-declarant would have thought police were seeking statements for use in prosecution of perpetrator); In re Rolandis G., 2004, 817 N.E.2d 183, 187, 352 Ill.App.3d 776 (so not limited to custodial interrogation of suspects but applies as well to questioning of crime victims); State v. Siler, 2005, 843 N.E.2d 863, 866, 164 Ohio App.3d 680 (“interrogation” includes questioning of both suspects and witnesses); **Lee v. Texas, 2004, 143 S.W.3d 565, 570 (so accusation that money found in car were proceeds of defendant’s drug sales made at roadside after defendant’s arrest by driver of the car were “testimonial” where declarant made statement in patrol car on videorecorder).**

clxi

n. 161. Elaborate rules

- “(1) Testimonial statements are official and formal in nature.
 - “(2) Interaction with the police initiated by a witness or the victim is less likely to result in testimonial statements than if initiated by the police.
 - “(3) Spontaneous statements to the police are not testimonial.
 - “(4) Responses to preliminary questions by police at the scene of a crime while police are assessing and securing the scene are not testimonial.”
- Spencer v. State, Tex.App. 2005, 162 S.W.3d 877, 882.

“In determining whether a statement is testimonial. . .courts must ascertain:

- (1) whether the declarant initiated the statement;
 - (2) the formality of the setting; and,
 - (3) the declarant’s purpose in making the statement.”
- State v. Mason, 2005, 126 P.3d 34, 40, ___ Wash.App. ___.

Courts should use following factors “in deciding whether a particular statement is “testimonial”;

- (1) whether the declarant was a victim or an observer;
- (2) whether the contact was initiated by the declarant or by law enforcement officials;
- (3) the degree of formality. . .in which the statement was made;
- (4) whether the statement was given in response to questioning, whether the questioning was structured, and the scope of such questioning;
- (5) whether the statement was recorded (either in writing or by electronic means);
- (6) the declarant’s purpose in making the statements;
- (7) the officer’s purpose in speaking with declarant; and,
- (8) whether an objective declarant under the circumstances would believe that the statement would be used at trial.”

State v. Maclin, Tenn.2006, 183 S.W.3d 335, 349.

Lagunas v. State, Tex.App.2005, 187 S.W.3d 503, 517 (similar list); Ruth v. State, Tex.App. 2005, 167 S.W.3d 560, 568 (reasserting Spencer criteria, above); State v. Mason, 2005, 126 P.3d 34, 39, ___ Wash.App. ___ (in determining whether declarant-initiated contact statements are “testimonial” courts look to formal factors such as

whether questioning is structured or recorded, whether made as part of the incident or not, and whether the declarant had time for contemplation; collecting cases).

Compare

In re Fernando R., 2006, 40 Cal.Rptr.3d 61, 74, 138 Cal.App.4th 148 (in determining whether statement was the product of a “police interrogation”, court considers the status of the investigation at the time, the nature and extent of the inquiry, and the contents of the statement; i.e., injuries suffered, detailed account of street mugging and its aftermath, an identification of the perpetrator, and an opinion of the value of stolen property); Commonwealth v. Gonsalves, 2005, 833 N.E.2d 549, 555, 445 Mass. 1 (since Crawford says “interrogation” was not meant in any “technical legal sense”, courts should not look to Miranda caselaw for guidance); Mason v. State, Tex.App.2005, 173 S.W.3d 105, 111 (“interrogation” for purposes of Fifth Amendment not interchangeable with meaning for Sixth Amendment purposes).

See also

Moran v. State, Tex.App.2005, 171 S.W.3d 382, 388 (for purposes of Miranda, “interrogation” not limited to questions but applies to any words or action by police they should have known were likely to elicit an incriminating response).

clxii

n. 162. Person to whom made

The Confrontation Clause seeks to make accusers responsible but extrajudicial accusations of crime around the water cooler or over the back fence are beyond its reach. However, when the prosecution seeks to use these irresponsible accusations to prove guilt, one would suppose that the Sixth Amendment should come into play.

But see

People v. Butler, 2005, 25 Cal.Rptr.2d 154, 161, 127 Cal.App.4th 49 (statements made spontaneously to co-workers not “testimonial”); State v. Mizenko, 2006, 127 P.3d 458, 463, 467, 330 Mont. 229 (casual statements to neighbor over back fence not “testimonial”; collects cases)

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 610 (arguing that accusations to friends and physicians should not be “testimonial” where declarant unwilling to take on the role of accuser).

See also

Hammon v. State, Ind.2005, 829 N.E.2d 444, 454 (collecting cases); Lagunas v. State, Tex.App.2005, 187 S.W.3d 503 517 (a “consideration” in determining if statement is “testimonial”); State v. Davis, 2005, 613 S.E.2d 760, 777, 364 S.C. 364 (collecting cases from around the country using this doctrine): State v. Maclin, Tenn.2006, 183 S.W.3d 335, 346-347 nn. 12, 13 (collecting cases adopting recipient approach).

Compare

Flores v. State, Tex.App.2005, 170 S.W.3d 722, 724 (in determining if statement is “testimonial”, courts consider: (1) to whom it was made; (2) was it volunteered or solicited; (3) was it made during casual conversation, formal legal proceeding or investigation; (4) time when made).

clxiii

n. 163. “Government employees”

People v. Ruiz, L.A.Super.2004, 2004 WL 2383676 p. 4 (because of policy of avoiding government abuse, statements are more likely to be “testimonial” if made to a governmental officer); People v. Vigil, Colo.2006, 127 P.3d 916, 928 (where no government officials involved in interrogation, not “testimonial”); People v. R.F., 2005, 825 N.E.2d 287, 294-295, 355 Ill.App.3d 992, 292 Ill.Dec. 31 (Crawford only applies to statements to government officials; majority opinion emphasizes how governmental agents can warp statements); People v. Geno, 2004, 683 N.W.2d 687, 691-692, 261 Mich.App. 624 (holding that where state contracted out child protective services to a private organization, interrogation of child by intake worker was not “testimonial”--- Ironically, the statement made by the child in response to this interrogation was not an “accusation”; i.e., she simply said she had an “owie” without identifying its source); Hobgood v. State, Miss.2006, 926 So.2d 847, 852 (“statement is testimonial when it is given to the police or individuals working in connection with the police for the purpose of prosecuting the accused”).

But see

People v. Sisavath, 2004, 13 Cal.Rptr.3d 753, 757, 118 Cal.App.4th 1396 (interview conducted by “forensic interview specialist” at county facility for children suspected as victims of sex abuse “testimonial”); In re E.H., 2005, 823 N.E.2d 1029, 1036, 355 Ill.App.3d 564, 291 Ill.Dec. 443 (child’s statement to grandmother “testimonial”; rejecting claim Crawford limited to statements to governmental officials on policy grounds); In re Rolandis G., 2004, 817 N.E.2d 183, 188, 352 Ill.App.3d 776 (questioning of suspected sexual abuse victim at “child advocacy center” while detective watched through a two-way mirror; “testimonial”).

Compare

People v. West, 2005, 823 N.E.2d 82, 91, 355 Ill.App. 28, 291 Ill.Dec. 72 (calling 911 to report that victim came to calle’rs door claiming to have been raped, then relaying her response to 911 operators questions did not convert caller into a governmental agent); Commonwealth v. Gonsalves, 2005, 833 N.E.2d 549, 557, 445 Mass. 1 (statements made to nongovernmental questioners or made spontaneously to police are not “per se testimonial” but can be found to be so by apply Crawford principles); State v. Scacchetti, Minn.2006, 711 N.W.2d 508, 514 (if nongovernmental questioner, can still be “testimonial” if questioner acts in concert with or as a conduit to an agent of the governor; holding nurse in government hospital child abuse unit is neither); State v. Romero, App.2006, 133 P.3d 842, 858, 139 N.M. 386 (that nurse who conducted child abuse interrogation was not a government official does not preclude finding that statements were testimonial); State v. Brigman, 2005, 615

S.E.2d 21, 24, ___ N.C.App. ___ (foster parent eliciting and recording statements at behest of supervising social worker not a “government officer”).

clxiv

n. 164. Police officer

U.S. v. Allen, C.A.9th, 2005, 425 F.3d 1231, 1235 (statements by coconspirator to government agent clearly “testimonial”); U.S. v. Arnold, C.A.6th, 2005, 410 F.3d 895, 903 (that statement was made to police suffices to make it “testimonial”, but supporting with other indicia).

Compare

In re Fernando R., 2006, 40 Cal.Rptr.3d 61, 73, 138 Cal.App.4th 148 (but conversely, mere fact that the questioner is a peace officer does not suffice to make it a “police interrogation” for Crawford purposes).

clxv

n. 165. Conduit

State v. Scacchetti, Minn.2006, 711 N.W.2d 508, 514 (if nongovernmental questioner, can still be “testimonial” if questioner acts in concert with or as a conduit to an agent of the governor; holding nurse in government hospital child abuse unit is neither); Hobgood v. State, Miss.2006, 926 So.2d 847, 852 (“statement is testimonial when it is given to the police or individuals working in connection with the police for the purpose of prosecuting the accused”); Foley v. State, Miss.2005, 914 So.2d 677, 685 (implying that if police use civilian professionals to interrogate abused child that statements would be “testimonial”).

But see

Purvis v. State, Ind.App.2005, 829 N.E.2d 572, 579 (fact that parents who inquire about child abuse will report it to the police does not convert their questioning into an official interrogation and the child’s response into “testimonial” hearsay),

clxvi

n. 166. Social worker

In re T.T., 2004, 815 N.E.2d 789, 801, 351 Ill.App.3d 976, 287 Ill.Dec. 145 (statement to social worker investigating report of child sexual abuse “testimonial”); State v. Romero, App.2006, 133 P.3d 842, 857, 139 N.M. 386 (state to sexual assault nurse examiner “testimonial”).

But see

State v. Scacchetti, Minn.2006, 711 N.W.2d 508, 514 (statements by child to nurse practitioner in state hospital unit to assess whether children have been abused not “testimonial” as nurse was not a government employee); State v. Lee, Ohio App.2005, 2005 WL 544837 p. 3 (since no police were present at private rape counselling clinic to which they had sent declarant for a “forensic examination and collection of evidence” not testimonial even though declarant had signed form authorizing the clinic to disclose evidence to police for the purpose of prosecution).

clxvii

n. 167. Parents

U.S. v. Peneaux, C.A.8th, 2005, 432 F.3d 882, 896 (since foster parents of children removed from home on allegations of child abuse are not agents of the state, accusations of abuse made to them are not “testimonial”); U.S. v. Lee, C.A.8th, 2004, 374 F.3d 637, 646 (defendant’s confession of crime to his mother who later became a government informer); People v. Vigil, Colo.2006, 127 P.3d 916, 928 (statements to father and father’s friend not “testimonial” where no government officials involved); Mencos v. State, Fla.App.2005, 909 So.2d 349, 351 (statement made by child to mother in the hearing of police who had responded to mother’s 911 call reporting abuse of child not “testimonial” even though apparently made after police had questioned child and apparently in response to such questioning); Somervell v. State, Fla.App. 2004, 883 So.2d 836, 838 (mother overhears autistic child pretending to talk on phone with police officer at child advocacy center; not “testimonial”); Taylor v. State, Ind.App. 2006, 841 N.E.2d 631, 634 n. 3 (accusation of child abuse to mother not “testimonial”); People v. R.F., 2005, 825 N.E.2d 287, 295, 355 Ill.App.3d 992, 292 Ill.Dec. 31 (statements to mother and grandmother not “testimonial”); In re Rolandis G., 2004, 817 N.E.2d 183, 189, 352 Ill.App.3d 776 (accusation made by child to mother akin to “casual remark to acquaintance” that Crawford says not “testimonial”); State v. Bobadilla, Minn.App. 2004, 690 N.W.2d 345, 349 (child questioned by mother about injury suggestive of child abuse; not “testimonial” as she was concerned about health, not crime); State v. Brigman, 2005, 615 S.E.2d 21, 24-26, ___ N.C.App. ___ (statement to foster parent about child abuse by biological parents not “testimonial”); State v. Shafer, 2006, 128 P.3d 87, 91, ___ Wash.2d ___ (statements of child abuse victim to mother and friend of mother who was a police informer but not acting as such at the time not “testimonial”); State v. Walker, 2005, 118 P.3d 935, 940, 129 Wash.App. 258 (accusation of child abuse by grandfather made to mother who did nothing about it until defendant tried to forcibly rape child; not “testimonial”).

clxviii

n. 168. Family members

U.S. v. Mayhew, D.C. Ohio 2005, 380 F.Supp.2d 961, 972 (reasonable person in declarant’s position would not suppose that letters to her mother complaining of father’s abuse would be introduced in future prosecution of father for murdering her and her mother); U.S. v. Mikos, D.C.Ill.2004, 2004 WL 1631675, p. 6 (statement to sister about efforts by defendant to suborn perjury); Anderson v. State, Ind.App.2005, 833 N.E.2d 119, 123 (statements of child abuse victim to babysitting great-grandmother not “testimonial” even though elicited by questioning after child used sexual phrase); Bray v. Commonwealth, Ky.2005, 177 S.W.3d 741, 745 (frantic call to sister reporting husband was stalking her not “testimonial”); State v. Blackstock, 2004, 598 S.E.2d 412, 420, 165 N.C.App. 50 (statements of murder victim to wife and daughter describing how unknown robbers shot him); State v. Wilkinson, 2005, 879 A.2d 445, 448 ___ Vt. ___ (excited utterance to cousin after defendant threatened to kill declarant not “testimonial”).

clxix

n. 169. Friends

U.S. v. Franklin, C.A.6th, 2005, 415 F.3d 537, 545 (defendant confided in friend that he had participated in robbery of armored truck; not “testimonial”); Ramirez v. Dretke, C.A.5th, 2005, 398 F.3d, 691, 695 n.3 (assassin’s statement to a friend that he had been hired to kill a fireman and description of how he carried out crime not “testimonial”); Evans v. Luebbbers, C.A.8th, 2004, 371 F.3d 438, 445 (murder victim’s statements to friends that defendant had abused her like O.J. Simpson and that she might end up like Nicole Simpson); Gutierrez v. Dorsey, C.A.10th, 2004, 105 Fed.Appx. 229, 231 (defendant’s girl friend blabs to friend about her role in defendant’s robbery; “nontestimonial”); U.S. v. Savoca, D.C.N.Y. 2004, 335 F.Supp.2d 385, 392 (confides details of crime to paramour); U.S. v. Mikos, D.C.Ill.2004, 2004 WL 1631675, p. 6 (tells sister that defendant tried to get her to lie to investigators).

State cases

People v. Smith, 2005, 38 Cal.Rptr.3d 1, 8, 135 Cal.App.4th 914 (statement to live-in girl friend); Compan v. People, Colo.2005, 121 P.2d 876, 881 (telling female friend that husband had abused her would not lead objective witness to believe the evidence would be available for use at trial); State v. Miller, 2006, 896 A.2d 844, 858, 95 Conn.App. 362 (statements to friends in unofficial setting not “testimonial; collecting cases); State v. Pierre, 2006, 890 A.2d 474, 495, 277 Conn. 42 (bragging about crime to a friend); State v. Jones, Del.Super.2004, 2004 WL 2914276, p. 4 (defendant bragged to lover about plans to rob drug dealer; not “testimonial”); State v. Hegggar, La.App.2005, 808 So.2d 1245, 1249 (cell phone statement by murder victim to girl friend that he was talking to the defendant shortly before the murder); State v. Alvarez-Lopez, 2004, 98 P.3d 699, 704, 136 N.M. 309 (Crawford not applicable to “statements made to friends or acquaintances”; dictum); State v. Chio, 2004, 98 P.3d 1144, 1146, 195 Or.App. 581 (tape-recording of phonecall co-defendant made to friend from jail not “testimonial”); Woods v. State, Tex.Crim. 2004, 152 S.W.3d 105, 114 (“casual remarks made spontaneously to acquaintances” not “testimonial”); State v. Ferguson, 2004, 607 S.E.2d 526, 429, 216 W.Va. 420 (minutes after incident, victim makes excited utterance to friends accusing defendant of threatening her with a knife; not “testimonial”); State v. Manuel, App.2004, 685 N.W.2d 525, 532, 275 Wis.2d 146 (admission of accomplice to his girl friend that he and defendant had perpetrated charged crime).

But see

In re J.K.W., Minn.App.2004, 2004 WL 1488850 p. 3 (statements made between two schoolgirls “testimonial” where one had been induced by police to elicit and record statements that would incriminate chum in bomb threat).

clxx

n. 170. Neighbors

Campos v. State, Tex.App.2005, 186 S.W.3d 93, 97 (statements to neighbor seeking help in calling 911 not “testimonial”); People v. Walker, 2005, 697 N.W.2d 159, 161, 265 Mich.App. 530 (statement made to neighbor lady after declarant fled home claiming her husband beat her); Miller v. State, Okla.Crim.2004, 98 P.3d 738, 743-744 (declarant lived in car in backyard of parents of witness to whom he confessed that attempted robbery had escalated into dual murders by defendant).

clxxi

n. 171. Fellow workers

People v. Garrison, Colo.App. 2004, 109 P.3d 1009, 1011 (statement to boss); Demons v. State, 2004, 595 S.E.2d 76, 80, 277 Ga. 724 (statements to co-worker that visible injuries had been inflicted by defendant and he was afraid defendant was going to kill him not “testimonial”); People v. Bauder, 2006, 712 N.W.2d 506, 512, 269 Mich.App. 174 (statements to friends, coworkers, in-laws, and defendant’s relatives not “testimonial”); Rodgers v. State, Tex.App.2005, 162 S.W.3d 698, 714 (statements to family member and co-worker accusing her husband of planning to kill her not “testimonial”).

clxxii

n. 172. Other persons

Jensen v. Pliier, C.A.9th, 2006, 439 F.3d 1086, 1089 (accusations to would-be defense counsel not “testimonial”); U.S. v. Foster, C.A.2d, 2005, 127 Fed.Appx. 537, 539 n.1 (statement to government informant not known as such to the defendant not “testimonial”); People v. Cage, 2004, 15 Cal.Rptr.3d 846, 854, 120 Cal.App.4th 770 (clearly nontestimonial where made to emergency room physician who was not an agent of the police); State v. Ahmed, Minn.App.2006, 708 N.W.2d 574, 580 (statement to passenger in vehicle as defendant was trying to force them off the road was to avoid that vehicle, not provide evidence for trial); Flores v. State, 2005, 120 P.3d 1170, 1179, ___ Nev. ___ (child tells baby-sitter that her mother struck infant brother; not “testimonial”); State v. Lawson, 2005, 619 S.E.2d 410, 413, ___ N.C.App. ___ (statements between victims of crime to each other outside presence of police while in ambulance en route to hospital identifying defendant as perpetrator were “private” so not “testimonial”); State v. Davis, 2005, 613 S.E.2d 760, 779, 364 S.C. 364 (to prospective buyer of murder weapon); State v. Fisher, 2005, 108 P.3d 1262, 1269, 130 Wash.App. 1 (doctor who was not a government employee asked abused child what happened; accusation of defendant not “testimonial”).

clxxiii

n. 173. Purpose or intent

See, e.g., U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 181 (assuming without discussion that intent of declarant, not of police agent who induced statements is determinative); Hammon v. State, Ind.2005, 829 N.E.2d 444, 455; State v. Hembertt, 2005, 696 N.W.2d 473, 478, 269 Neb. 840 (person responding to structured police questioning could reasonably believe her statement would be used against the accused); Flores v. State, 2005, 120 P.3d 1170, 1178, ___ Nev. ___ (given her age,

court doubts that child who said her mother struck a sibling expected that her statement would be used to prosecute mother).

clxxiv

n. 174. Intent of both

Hammon v. State, Ind.2005, 829 N.E.2d 444, 456 (but privileging the intent of the interrogator as determinative if determinable); State v. Scacchetti, Minn.2006, 711 N.W.2d 508, 513 (whether either or both is “acting to produce a statement for trial”); State v. Romero, App.2006, 133 P.3d 842, 859, 139 N.M. 386 (approving Hammon approach).

clxxv

n.175. Cannot turn

Spencer v. State, Tex.App. 2005, 162 S.W.3d 877, 883 n. 4.

clxxvi

n. 176. Historical abuses

U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 674 (holding that declarant’s intent determines applicability of Crawford because it would cover Lord Cobham’s accusation of Raleigh; but failing to note that Cobham’s accusation came in an affidavit so it would also satisfy the official inducement strand); U.S. v. Saner, D.C.Ind.2004, 313 F.Supp.2d 896, 901 (since prosecutors are even more like English justices of the peace than the police, questioning by prosecutors falls within Crawford); People v. Sanchez, 2006, 41 Cal.Rptr.3d 892, 901, 138 Cal.App.4th 1085 (since 911 operators not like Tudor justice of the peace, calls seeking to have drunk driver arrested before he caused any more accidents not “testimonial”); People v. Cage, 2004, 15 Cal.Rptr.3d 846, 854, 120 Cal.App.4th 770 (emergency room physician does not remotely resemble Tudor, Stuart, or Hanoverian justice of the peace); Card v. State, Fla.App.2006, 927 So.2d 200, 203-24 (driving record not “testimonial”; does not resemble an ex parte examination); Shiver v. State, Fla.App. 2005, 900 So.2d 615, 618 n. 3 (using analogy to Raleigh case in holding affidavit that breath machine was properly calibrated violated right of confrontation); People v. Walker, 2005, 697 N.W.2d 159, 164, 265 Mich.App. 530 (complaint of wife to police officers that her husband beat her did not resemble examination by justice of peace so Crawford does not apply); People v. Cortes, 2004, 781 N.Y.S.2d 401, 415, 4 Misc.3d 575 (analogizing 911 calls to police as the “modern equivalent made possible by technology” of the examination of witnesses by the Marian Justices of the Peace); State v. Mack, 2004, 101 P.3d 349, 351, 337 Or. 586 (since Supreme Court equated police with justice of the peace, the test is whether the questioner resembles a police officer, not whether the declarant intended an accusation); State v. Saunders, 2006, 132 P.3d 743, 749, ___ Wash.App. ___ (paramedic and emergency room physician did not resemble police interrogators or 18th Century justices of the peace).

Compare

State v. Parks, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (since modern police have taken over the functions of the justice of the peace, courts should analogize from those functions rather than from the particular techniques used; i.e., just because magistrates used formal questioning when investigating crime does not mean police must use formal questioning for the responses to be “testimonial” under Crawford); Commonwealth v. Gonsalves, 2005, 833 N.E.2d 549, 557, 445 Mass. 1 (courts should not engage in historical analogies but should use history to discern the functions of the right of confrontation).

But see

Luginbyhl v. State, Va.App.2005, 618 S.E.2d 347, 355 (affidavit that officer properly operated breath test machine does not resemble Lord Cobham’s statements because it does not accuse the defendant of anything).

clxxvii

n. 177. Torquemada

Stancil v. U.S., D.C.App.2005, 866 A.2d 799, 801 n. 4 (comparing facts of present case to trial of Sir Walter Raleigh).

Compare

Tyler v. State, Tex.App. 550, 554 (no “interrogation” where officer triggers an account of the crime by simply asking the victim for his name).

clxxviii

n. 178. “Believe available”

124 S.Ct. at 1364, 541 U.S. at 52.

The Court blames this phrase on an amicus brief filed by the National Association of Criminal Defense Lawyers. It was also advanced in a brief filed by Professors of Evidence Law. Note, State v. Carter: Rejecting Crawford v. Washington’s Third Formulation As A Per Se Definition of Testimonial, 2005 67 Mont.L.Rev. 121, 130.

See also

U.S. v. Johnson, C.A.6th, 2005, 430 F.3d 383, 394 (“focus of the testimonial inquiry is on the declarant”); State v. Pierre, 2006, 890 A.2d 474, 495, 277 Conn. 42 (statement by confederate to a friend inculcating himself and defendant in a crime six months before they were arrested for the crime; objective witness would not foresee use to prosecute crime); Hammon v. State, Ind.2005, 829 N.E.2d 444, 455-456 (collecting cases using this indicium); Wall v. State, Tex.Crim.2006, 184 S.W.3d 730, 735 n. 11 (claiming most lower courts have used this broader formula); Salt Lake City v. Williams, Utah App.2005, 128 P.3d 47, 454 (where statement was made to friend calling 911 as assailant was bearing down on them, no reasonable expectation that statement would be used in prosecution); State v. Manuel, 2005, 697 N.W.2d 811, 822, ___ Wis.2d ___ (collecting and analyzing other cases using this strand).

Compare

U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 673 (attributing this strand to Professor Richard Friedman and quoting his “five rules of thumb” for applying it); People v. Cortes, 2004, 781 N.Y.S.2d 401, 414, 4 Misc.3d 575 (also crediting Professor Friedman and showing how properly applied it makes 911 calls to police “testimonial” under Crawford).

clxxxix

n. 179. Might foresee

Since the vast majority of criminal cases do not go to trial, presumably the witness need not factor in the possibility of a plea bargain. A witness familiar with the television version of the Fifth Amendment might suppose that it is enough that the statement would “tend to incriminate” the accused.

clxxx

n. 180. “Legal proceedings”

Gamble v. State, Ind.App. 2005, 831 N.E.2d 178, 182.

clxxxix

n. 181. Reject “prosecutorially”

State v. Warsame, Minn.App. 2005, 701 N.W.2d 305, 311 (insisting that witness must foresee its use “at trial”).

clxxxix

n. 182. Groped him

Surely the player expects some kind of official action against the coach even if he did not consider criminal prosecution.

clxxxix

n. 183. “Used against”

Lopez v. State, Fla.App. 2004, 888 So.2d 693, 699-700 (speaking of a statement to a police officer, not a principal).

clxxxix

n. 184. “Official trouble”

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 599-600.

clxxxix

n. 185. Identity of “witness”

We ignore other possibilities that have not been mentioned in the lower court opinions.

clxxxix

n. 186. Policies

See above, text at notecall 46.

clxxxvii

n. 187. Refers to declarant

U.S. v. Johnson, C.A.6th, 2006, 440 F.3d 832, 843 (declarant is person whose statements are offered against defendant); U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 181 (assuming without discussion that intent of declarant is determinative); Shiver v. State, Fla.App. 2005, 900 So.2d 615, 617 (police officer preparing affidavit showing breath machine was properly operating must have understood that the it would be used in drunk driving prosecution to authenticate the machine); Hammon v. State, Ind.2005, 829 N.E.2d 444, 457; State v. Lasnetski, Minn.App. 2005, 696 N.W.2d 387, 393 (wife relaying husband's side of cell phone conversation to police officer while trying to convince defendant not to commit suicide did not expect her words to be used against husband at trial); In re J.K.W., Minn.App.2004, 2004 WL 1488850 p. 3 (schoolgirl who had been induced by police officer to induce and secretly record incriminating admission by chum would reasonably believe that her statements would be used to prosecute chum);-State v. Savanh, 2005, 707 N.W.2d 549, 555, ___Wis.2d ___ (declarant could not reasonably believe informal telephone conversation with roommate in presence of one who he did not know was a police informant would be available for use at trial).

clxxxviii

n. 188. Interrogator

In re Fernando R., 2006, 40 Cal.Rptr.3d 61, 78 n. 27, 138 Cal.App.4th 148 (noting that some courts think interrogator's purpose controls but rejecting this view); State v. Bobadilla, Minn.2006, 709 N.W.2d 243, 251 (claiming most courts have adopted view the interrogator's purpose is determinative and only a few have made the declarant's purpose dispositive; collecting cases and adopting the supposed majority view); Anderson v. State, Ind.App.2005, 833 N.E.2d 119, 125 (in case of three-year-old child, motive of questioner determines).

clxxxix

n. 189. Applies to both

Gamble v. State, Ind.App. 2005, 831 N.E.2d 178, 182 (applies to both the declarant and the questioner); State v. Romero, App.2006, 133 P.3d 842, 859, 139 N.M. 386 (same; relying on Hammon, note 187, above).

cxc

n. 190. "Official inducement"

See above, text at notecall 147.

cxci

n. 191. No inducement

State v. Pierre, 2006, 890 A.2d 474, 495, 277 Conn. 42 (declarant brags to friend about crime committed by him and defendant not "testimonial" because made on own initiative when he did not foresee use in prosecution); State v. Lawson, 2005, 619 S.E.2d 410, 413, ___ N.C.App. ___ (statement by one crime victim to other

identifying their assailant made outside of the presence of police while they were in ambulance en route to hospital was not one objective witness would think might be used at trial); State v. Staten, S.C.App.2005, 610 S.E.2d 823, 836.

excii

n. 192. Even in absence

Flores v. State, 2005, 120 P.3d 1170, 1179, ___ Nev. ___ (attributing this view to Professor Friedman); State v. Hill, 2005, 827 N.E.2d 351, 358-359, 160 Ohio App.3d 324; State v. Lee, Ohio App.2005, 2005 WL 544837 p. 2 (following Sixth Circuit decisions that adopt Friedman view).

exciii

n. 193. Only interrogation

State v. Snowden, 2005, 867 A.2d 314, 325, 385 Md. 64.

See also

State v. Parks, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (collecting cases that show varying definitions of “interrogation”).

exciv

n. 194. Rejecting test

People v. Taulton, 2005, 29 Cal.Rptr.2d 203, 129 Cal.App.4th 1218 (language dictum; court did not adopt language simply by quoting from brief); People v. Butler, 2005, 25 Cal.Rptr.2d 154, 162, 127 Cal.App.4th 49 (“no language in Crawford supports” argument that statements become “testimonial” because witnesses would believe they could be use for trial because they were included in police reports); In re E.H., 2005, 823 N.E.2d 1029, 1037, 355 Ill.App.3d 564, 291 Ill.Dec. 443 (history shows that the Confrontation Clause means defendant must be confronted with her accuser; right is not contingent on the state of mind of the accuser when making the accusation); In re Rolandis G., 2004, 817 N.E.2d 183, 189, 352 Ill.App.3d 776 (refusing to hold that because child witness incapable of understanding use of statements, they could not be “testimonial”; defendant’s right to confront witness should not turn on state of mind of the accuser); People v. Bradley, 2005, 799 N.Y.S.2d 472, 479, 22 App.Div.3d 33 (Crawford did not intend “to erect so formidable a barrier” to the use of hearsay); People v. Fisher, N.Y.City Ct.2005, 9 Misc.3d 1121(A), 2005 WL 2780884 p. 4 (Crawford court did not endorse test; so court rejects in breath test certification case); State v. Mack, 2004, 101 P.3d 349, 353, 337 Or. 586 (“primary focus in Crawford was on the method by which government officials elicited out-of-court statements for use in criminal trials, not on the declarant’s intent or purpose in making the statement”).

Compare

Note, State v. Carter: Rejecting Crawford v. Washington’s Third Formulation As A Per Se Definition of Testimonial, 2005 67 Mont.L.Rev. 121.

cxcv

n. 195. Test rigged

U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 674.

See also

U.S. v. Summers, C.A.10th, 2005, 414 F.3d 1287, 1302 (making objective expectations of the declarant the sole criterion of “testimonial statements”); State ex rel. J.A., 2006, 897 A.2d 1119, 1125-1127, 385 N.J.Super. 544 (similar); State v. Maclin, Tenn.2006, 183 S.W.3d 335, 348-349 (best approach to Crawford issues is via a case-by-case approach using objective standard to see if the purpose of the declarant was “testimonial”).

But see

Commonwealth v. Gonsalves, 2005, 833 N.E.2d 549, 558, 445 Mass. 1 (“objective declarant” test is approach most consistent with Crawford policy of avoiding official manipulation of procedure).

cxcvi

n. 196. Purpose of declarant

Bohsancurt v. Eisenberg, App.2006, 129 P.3d 471, 479, 212 Az. 182 (while technician who certified that breath machine was operating properly when tested prior to being placed in service knew that his statement might be used in evidence, Crawford does not apply because he did not know it would be used against any particular defendant); State v. King, App.2006, 132 P.3d 311, 317, ___ Ariz. ___ (statement “testimonial” if purpose is to identify a suspect or provide evidence of a crime that has already occurred); In re Fernando R., 2006, 40 Cal.Rptr.3d 61, 78, 138 Cal.App.4th 148 (where police had already determined that declarant had been mugged and arrested the perpetrator and she gave them a detailed account of the commission of the crime, she must have known that her statement was being taken for use at trial); People v. Cervantes, 2004, 12 Cal.Rptr.3d 774, 783, 118 Cal.App.4th 162 (statement by declarant to neighbor while seeking medical treatment of her did not expect her to reveal what he said because she knew he was a gang member and statements concerned a gang killing); Compan v. People, Colo.2005, 121 P.2d 876, 881 (statements to rescuing friend that husband had beaten her would not lead objective witness to suppose statements would be available for later use at trial); People v. Walker, 2005, 697 N.W.2d 159, 163, 265 Mich.App. 530 (statement to neighbor after fleeing home that her husband was beating her was a plea for sanctuary, not an accusation); State v. Ahmed, Minn.App.2006, 708 N.W.2d 574, 581 (purpose in accusing defendant of being driver of car trying to run another vehicle off the road was to avoid that vehicle, not provide evidence for trial); (State v. Hembertt, 2005, 696 N.W.2d 473, 482, 269 Neb. 840; Medina v. State, 2006, 131 P.3d 15, 20, ___ Nev. ___ (victim would understand that statements made to forensic nurse during sexual assault examination was being garnered for use in prosecution as that was the purpose of the examination); State v. Romero, App.2006, 133 P.3d 842, 859, 139 N.M. 386 (assault victim did not consult nurse until three weeks after assault when no condition requiring treatment existed; State v. Blackstock, 2004, 598 S.E.2d 412, 420, 165 N.C.App. 50 (statement by

murder victim to family in hospital while believing he was going to survive and so be available to testify); *King v. State*, Tex.App.2006, 189 S.W.3d 347, 359 (when conspirators discussed how to commit killing, they did not anticipate that statements would be available for use at trial); *Campos v. State*, Tex.App.2005, 186 S.W.3d 93, 97 (when declarant knocked on neighbor's door at 3:00 AM to seek his help in calling 911 she did not reasonably expect that her statements would be used later at trial); *Wall v. State*, Tex.Crim.2006, 184 S.W.3d 730, 745 (man in hospital asked to identify assailant would understand that police were collecting evidence for use in prosecution); *Walker v. State*, Tex.App.2005, 180 S.W.3d 829, 834 (prisoner in custody asked to identify suspects as part of investigation would reasonably suppose her statements would be used in subsequent trial of those she named); *State v. Mason*, 2005, 110 P.3d 245, 247, ___ Wash.App. ___ (declarant's purpose to seek police protection from defendant who had kidnapped and assaulted him).

cxvii

197. Run aground

In many of these cases, courts resort to the categorical approach. See below, text at notecall 230.

cxviii

n. 198. Lab report

People v. Johnson, 2004, 18 Cal.Rptr.3d 230, 232, 121 Cal.App.4th 1409 (straining to find report "nontestimonial").

Compare

U.S. v. Ramirez, C.A.6th, 2005, 133 Fed.Appx. 196, 202 (police officers conducting surveillance who told superior that defendant's car had been seen at a stash house knew statements would be used in investigation of defendant).

cxix

n. 199. Found "testimonial"

Shiver v. State, Fla.App. 2005, 900 So.2d 615, 617 (use of affidavit to authenticate accuracy of breath test machine in drunk driving case violates Crawford); *City of Las Vegas v. Walsh*, 2005, 124 P.3d 203, 207, ___ Nev. ___ (certificate that blood properly drawn from D.U.I. suspect "testimonial").

But see

Napier v. State, Ind.App. 2005, 820 N.E.2d 144, 149 (certificate that breath test machine was properly operating not "testimonial").

See also

Other cases are collected in notes 236 and following, below.

cc

n. 200. Someone else

A similar problem arises when one defendant makes a confession that implicates a co-defendant. The confessor presumably thinks more about its use against him rather than his co-defendant. *People v. Cervantes*, 2004, 12 Cal.Rptr.3d 774, 782, 118 Cal.App.4th 162 (rejecting argument that in telling friend about gang shooting defendant intended her to report it to the police to shift blame to other gang members); *State v. Jackson*, La.App. 2005, 904 So.2d 907, 911 (rejecting argument that use of statement in a joint trial under defunct Bruton exception meant that statement was not “testimonial” under Crawford); *Scott v. State*, Tex.App. 2005, 165 S.W.3d 27, 47 (redacting explicit references to the defendant does not make co-defendant’s confession any less “testimonial”).

cci

n. 201. Prosecute for perjury

People v. Shepherd, 2004, 689 N.W.2d 721, 729, 263 Mich.App. 665.

ccii

n. 202. Did not “accuse”

The court disposed of the present problem by ignoring it.

Compare

People v. Sanchez, 2006, 41 Cal.Rptr.3d 892, 901, 138 Cal.App.4th 1085 (apparently finding 911 calls nontestimonial because those who accused driver of car of causing fatal accident did not know identity of the driver or that he was drunk at the time).

cciii

n. 203. Diary

Parle v. Runnels, C.A.9th, 2004, 387 F.3d 1030, 1037.

Compare

In re E.H., 2005, 823 N.E.2d 1029, 1036, 355 Ill.App.3d 564, 291 Ill.Dec. 443 (statement of child to grandmother about sexual acts committed with babysitter “bore accusatory testimony” against the defendant; hence, “testimonial”); *In re J.K.W.*, Minn.App.2004, 2004 WL 1488850 p. 3 (schoolgirl who at request of police called chum and attempted to elicit and record incriminating admission must objectively believe that her accusations of chum’s role in bomb scare would be used to prosecute chum).

cciv

n. 204. Husband hit her

State v. Byrd, 2005, 828 N.E.2d 133, 137, 160 Ohio App.3d 538.

See also

People v. Thompson, 2004, 812 N.E.2d 516, 521, 349 Ill.App.3d 587 (statements made by wife accusing defendant of abusing her in petition for order of protection against him: “testimonial”); *State v. Romero*, App.2006, 133 P.3d 842, 859, 139 N.M. 386 (accusations made to sexual assault nurse three weeks after assault); *State v.*

Maclin, Tenn.2006, 183 S.W.3d 335, 352 (victim called 911 but danger had subsided by the time they arrived and her detailed description suggests she must have reasonably believed statement would be used for prosecution); Mason v. State, Tex.App.2005, 173 S.W.3d 105, 111 (victim who called 911 to report that boyfriend had slapped, choked, and threatened her spoke to officer responding to call under circumstances that would lead an objective witness to believe that her statements would be used to prosecute him); Moore v. State, Tex.App.2005, 169 S.W.3d 467, 475 (one hour after domestic violence report, police interviewed victim and son on videotape after giving her Miranda warnings; “testimonial”).

But see

People v. Walker, 2005, 697 N.W.2d 159, 161, 265 Mich.App. 530 (complaint to neighbor and police that her husband beat her not “testimonial”; strong dissent); People v. Mackey, 2004, 785 N.Y.S.2d 870, 872, 5 Misc.3d 709 (wife who runs up to police officer on street and accuses her husband of just punching her in the face was seeking protection, not prosecution).

Compare

State v. Wright, Minn.2005, 701 N.W.2d 802, 814 (supposing that most people who call 911 recognize that what they say may be used against perpetrator but rejecting the objective intent test on grounds it is too broad); State v. Lasnetski, Minn.App. 2005, 696 N.W.2d 387, 393 (wife on cell phone with husband in effort to convince him not to convince suicide relays his side of conversation to police officer; not “testimonial”).

ccv

n. 205. The shooter

State v. Hill, 2005, 827 N.E.2d 351, 359, 160 Ohio App.3d 324.

See also

U.S. v. Hinton, C.A.3d, 423 F.3d 355, 361 (while riding in police car in search for assailant, victim pointed out defenant as the perp; testimonial); State v. Grace, App. 2005, 111 P.3d, 28, 38, 107 Haw. 135 (police officer arrives on scene five minutes after 911 call and interviews two pre-pubescent girls who say that defendant hit his wife).

ccvi

n. 206. Identifies suspects

U.S. v. Pugh, C.A.6th, 2005, 405 F.3d 390, 399.

See also

State v. Lackey, 2005, 120 P.3d 332, 343, 280 Kan. 190 (statement of cabbie describing a fare he had picked up shortly after robbery near scene was one an objective witness would think might be used at trial so “testimonial”).

ccvii

n. 207. Must tell truth

People v. Vigil, Colo.App.2004, 104 P.3d 258, 262, reversed on other grounds, Colo.2006, 127 P.3d 916.

See also

People v. Harless, 2004, 22 Cal.Rptr.3d 625, 636, 125 Cal.App.4th 70 (accusation that defendant provided drugs to minors in order to have sex with them made during a sexual abuse examination in course of district attorney's investigation of defendant); Contrearas v. State, Fla.App.2005, 910 So.2d 901, 905 (interview with child protective worker in sheriff's office indistinguishable from ordinary police interrogation and "testimonial"); Anderson v. State, Ind.App.2005, 833 N.E.2d 119, 125 (interview with child sex abuse victim made as part of investigation of the charge; "testimonial"); State v. Henderson, 129 P.3d 646, 653, ___ Kan.App. ___ (collecting and following cases holding interviews with child protective agency in conjunction with police are "testimonial"); Flores v. State, 2005, 120 P.3d 1170, 1179, ___ Nev. ___ (even if five-year-old daughter did not realize that her accusation of child abuse would be used to prosecute her mother, a "reasonable person" would; hence, "testimonial").

ccviii

n. 208. Do not resemble

For a case that could be debated endlessly, see State v. Manuel, 2005, 697 N.W.2d 811, 818, ___ Wis.2d ___ (declarant tells his girl friend shortly after murder, that he was standing by car talking to victim when the defendant "came out of nowhere" and shot the victim). Does the self-exculpatory motive apparent on the face of this statement remove it from the category of "accusation"?

See also

State v. Greene, 2005, 874 A.2d 750, 775, 274 Conn. 134 (neighbor who approaches police at scene of shooting and says he believes one of the shots hit him in the foot but does not know who the shooter was would not have an objective belief that statements would later used at trial); Gamble v. State, Ind.App. 2005, 831 N.E.2d 178, 183 (two 911 callers reported that someone had been shot but neither of them saw the shooter; held nontestimonial on present rationale); Medina v. State, 2006, 131 P.3d 15, 20, ___ Nev. ___ (statement to neighbor that "I have been raped" that did not identify the perpetrator); State v. Johnson, 2006, 131 P.3d 173, 190, 340 Or. 173 (victim could not anticipate that her statement that she was going to defendant's home to play computer games would be used to prosecute him when he then raped and murdered her).

ccix

n. 209. Radios colleagues

State v. Greene, 2005, 874 A.2d 750, 776, 274 Conn. 134.

ccx

n. 210. Phone tapped

U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 181.

See also

State v. Roach, 2005, 613 S.E.2d 791, 794, 342 S.C. 422 (as plain clothes officers are executing a search warrant at defendant's residence, defendant's customers come to the door and attempt to purchase drugs from the officers; not "testimonial").

ccxi

n. 211. Customer records

U.S. v. Goldstein, C.A.2d, 2006, 442 F.3d 777, 785.

ccxii

n. 212. "Shot in the foot"

State v. Green, 2005, 874 A.2d 750, 775, 274 Conn. 134.

See also

U.S. v. Hadley, C.A.6th, 2005, 431 F.3d 484, 502 (screaming to police as they arrived on the scene that defendant "has a gun" and "he's going to kill me" not "calculated reflection on possible use of statements in criminal investigation or prosecution" but an effort to secure police aid in a dangerous situation);

ccxiii

n. 213. Shooter killer

State v. Davis, 2005, 613 S.E.2d 760, 779, 364 S.C. 364.

ccxiv

n. 214. Defy common sense

People v. Caudillo, 2004, 19 Cal.Rptr.3d 574, 590, 122 Cal.App.4th 1417 (911 caller who reported shooting to police so they could take appropriate action to protect the community had no objective reason to believe that words might lead to arrest and prosecution of the shooters); State v. Lee, Ohio App.2005, 2005 WL 544837 p. 2 (declarant who was sent by police to private domestic violence and rape center partly funded by police had no objective reason to believe her statements might be used to prosecute her husband even though she signed a consent form for a "forensic examination and collection of evidence" that authorized the release of "evidence. . .to a law enforcement agency for use only in the investigation and prosecution of this crime");

ccxv

n. 215. Drove getaway car

People v. Shepherd, 2004, 689 N.W.2d 721, 725, 263 Mich.App. 665.

ccxvi

n. 216. Calls 911

State v. Wright, Minn.2005, 701 N.W.2d 802, 811 (on grounds she was too excited to recall all the television portrayals of the use of such calls).

See also

Neal v. State, Tex.App.2006, 186 S.W.3d 690, 693-694 (declarant who calls 911 while still dominated by fear of crime which was still in progress would not objectively believe her statements would later be used to prosecute her assailant); State v. Mason, 2005, 126 P.3d 34, 40, ___ Wash.App. ___ (if a witness makes a statement while seeking protection it is unlikely that she intends to make a formal statement, is aware that she is bearing witness, or expects that her utterance might be used in prosecution of accused).

ccxvii

n. 217. What defendant did

State v. Forrest, 2004, 596 S.E.2d 22, 27, 164 N.C.App. 272 (declarant “was not aware that she was bearing witness and was not aware that her utterances might impact further legal proceedings”; court must suppose that victim never watches television).

ccxviii

n. 218. Child abuse report

State v. Bobadilla, Minn.2006, 709 N.W.2d 243, 254.

See also

State v. Fisher, 2005, 108 P.3d 1262, 1269, 130 Wash.App. 1 (“objective observer” could not reasonably foresee that abused child’s accusation of abuse to emergency room physician would be used to prosecute the accused; apparently objective observer never heard about mandatory reporters of child abuse).

ccxix

n. 219. Categorical exceptions

See below, text at notecalls 230-410.

ccxx

n. 220. Schizophrenic

U.S. v. Savoca, D.C.N.Y. 2004, 335 F.Supp.2d 385, 393 (when accomplice made “declaration against interest” to his girl friend about the details of the charged crime, it was “inconceivable that he thought that his statements would later be available for use at any official proceeding”); Smith v. State, Tex.App.2006, 187 S.W.3d 186, 193 (statement comes in as a declaration against interest because it tend to criminate the declarant but not “testimonial” because only made to beer drinking buddies).

ccxxi

n. 221. Unprecedented

Perhaps to show consistency in its inconsistency, the California appellate court did not publish the opinion despite the defense counsel’s showing that apparently no other court in the United States had ever held a privileged statement to be a declaration against interest and California court rules that mandate the publication of opinions that make new law. Readers can find a documentation of the facts in a habeas

corpus proceeding that arose out of one of the prosecutions. *Jensen v. Pfliler*, C.A.9th, 2006, 439 F.3d 1086, 1090 (finding nothing wrong with state court's holdings that accusation by killer that others conspired with him was not "testimonial" because made to lawyer who assured him that no one else would ever hear it but was admissible against co-conspirators as a declaration against interest).

ccxxii

n. 222. Limited ability

So far we have found no cases applying Crawford to mentally impaired adults. The issue existed but was not discussed in *State v. Castilla*, 2005, 87 P.3d 1211, 1213, 131 Wash.App. 7 (holding accusation by mentally impaired patient not "testimonial" because not intended for use at trial; issue not raised by pro se defendant).

Compare

Lagunas v. State, Tex.App.2005, 187 S.W.3d 503, 519 (that child was only four years old and witnessed what she thought was the murder of her mother a "strong consideration" in deciding that her statement to police officer who inquired about her well-being was not "testimonial"); *State v. Walker*, 2005, 118 P.3d 935, 942, 129 Wash.App. 258 (eleven-year-old child who accused grandfather of sexual abuse could not reasonably believe would be available for trial when made to mother who did nothing about it until grandfather tried to rape child).

ccxxiii

n. 223. Possibilities

Courts can avoid the problem by applying some other test, either the "official inducement" test or one of the categorical tests.

Compare

State v. Henderson, 129 P.3d 646, 652, ___ Kan.App. ___ (collecting and rejecting cases holding per se nontestimonial if declarant incompetent).

See also

In re E.H., 2005, 823 N.E.2d 1029, 1037, 355 Ill.App.3d 564, 291 Ill.Dec. 443 (defendant's right to confront witnesses not contingent on the state of mind of the accuser when making the accusation that leads to prosecution).

ccxxiv

n. 224. Incapable

In re Rolandis G., 2004, 817 N.E.2d 183, 189, 352 Ill.App.3d 776 (rejecting claim that because child abuse victim could not meet the objective witness test, accusations could not be "testimonial"; invoking official inducement strand to trump); *State v. Henderson*, 129 P.3d 646, 652, ___ Kan.App. ___ (rejecting claim that nontestimonial because three-year-old declarant incapable of knowing of prosecutorial use); *State v. Snowden*, 2005, 867 A.2d 314, 328-329, 385 Md. 64 (rejecting argument that children are incapable of making "testimonial assertions").

But see

State v. Scacchetti, Minn.App. 2005, 690 N.W.2d 393, 396; State v. Krasky, Minn.App. 2005, 696 N.W.2d 816, 819-820 (even though nurse interrogated defendant at behest of police, seven-year old child would not have anticipated that statements would be used in prosecution of defendant; relying on Scacchetti over vigorous dissent); State v. Brigman, 2005, 615 S.E.2d 21, 25, ___ N.C.App. ___ (six-year-old incapable of making “testimonial” statement because could not understand that accusations of parental child abuse could be used testimonially).

ccxxv

n. 225. Subjective

State v. Sheppard, 2005, 842 N.E.2d 561, 567, 164 Ohio App.3d 372 (no evidence that six-year-old knew that accusations of sex abuse made after several prior interrogations about the crime would be used in the prosecution of criminal case).

ccxxvi

n. 226. “Objective seven-year-old”

U.S. v. Aleman-Ramos, C.A.6th, 2005, 155 Fed.Appx. 845, 850 n. 2 (supposing the standard is “a reasonable nine-year-old boy”); People v. Vigil, Colo.2006, 127 P.3d 916, 928 (test is whether an objective seven-year-old would not understand that statements to parent accusing someone of child abuse would be used at trial); In re D.L., Ohio App.2005, 2005 WL 1119809, pp. 4, 8 (reasonable three-year-old who had previously accused defendant of child abuse would not understand that questioning by pediatric nurse specializing in child abuse after police were notified of accusation would be seeking information for use at trial; dissent suggests that three-year-old who understood his statements were “testimonial” would be ready for law school); State v. Shafer, 2006, 128 P.3d 87, 92 n. 8, ___ Wash.2d ___ (assuming standard is reasonable three-year-old child).

ccxxvii

n. 227. “Objective observer”

People v. Sisavath, 2004, 13 Cal.Rptr.3d 753, 758 n.3, 118 Cal.App.4th 1396 (Crawford did not mean a four-year old “objective witness” but that “objective observer” would expect that statement would be used in prosecution); State v. Snowden, 2005, 867 A.2d 314, 329, 385 Md. 64 (using an “objective person” rather than “an objective child of [the witnesses’s] age” as the proper standard); State v. Fisher, 2005, 108 P.3d 1262, 1269, 130 Wash.App. 1 (“objective observer” of two-year-old’s accusation of child abuse to treating physician could not reasonably foresee its use to prosecute accused).

But see

State v. Grace, App. 2005, 111 P.3d, 28, 38, 107 Haw. 135 (rejecting Sisavath on ground that the objective witness test can accommodate children simply by ignoring personal characteristics of the witness).

ccxxviii

n. 228. Look to interrogator

Anderson v. State, Ind.App.2005, 833 N.E.2d 119, 125 (making intent of questioner determinative in case of three-year-old victim); State v. Siler, 2005, 843 N.E.2d 863, 865, 164 Ohio App.3d 680 (looking to official inducement test instead); State v. Bobadilla, Minn.2006, 709 N.W.2d 243, 255 (where child is too young to understand purpose, intent of interrogator controls).

ccxxxix

n. 229. Proper approach

A cynic might say that except for the per se incapable approach, all of the others are pretty much alike; that is, given that most judges know little about the way ordinary people view a police interrogation, cases holding how an “objective-three-year-old” thinks about her accusation really reflect the subjective belief of the judges about declarant’s mental state.

Compare

Hobgood v. State, Miss.2006, 926 So.2d 847, 852 (opining that five-year-old made accusations “for the sake of his well-being and not for the purpose of furthering the prosecution” of his assailant).

ccxxx

n. 230. Blend both

See, e.g., U.S. v. Cervantes-Flores, C.A.9th, 2005, 421 F.3d 825, 833-834 (using the rule-of-thumb method to support use of categorical exclusion of business records).

Moreover, some courts have kissed off Crawford complaints in a manner that makes analysis impossible. See, e.g., Endsley v. Aispuro, C.A.9th, 2004, 119 Fed.Appx. 56, 57.

ccxxxix

n. 231. Serviceable

Apparently other writers agree. See, e.g., footnote 169, above.

But see

People v. Lee, 2004, 21 Cal.Rptr.3d 309, 313, 124 Cal.App.4th 483 (rejecting the categorical approach; cites Crawford dictum that “the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts”).

ccxxxii

n. 232. Little boxes

As the reader will soon see, some of the boxes are too big; that is, they combine categories that would work better if kept separate.

ccxxxiii

n. 233. Two headings

As will appear, courts often combine the two; for example, using the “doctrinal” category of “excited utterances” to determine how to deal with a “practical category” such as “911 calls.”

ccxxxiv

n. 234. “Practical”

These cases take their cue from the writers. See e.g., Friedman & McCormack, Dail-In Testimony, 2002, 150 U.Pa.L.Rev. 1171 (whole article on application of the Confrontation Clause to 911 calls).

ccxxxv

n. 235. “Doctrinal”

These cases seem to involve hangover from the now discredited Roberts regime in which statements automatically passed confrontation scrutiny if they fell within a “firmly rooted” hearsay exception. See § 6367 in the main volume.

ccxxxvi

n. 236. Affidavits “core”

124 S.Ct. at 1364, 514 U.S. at 52.

ccxxxvii

n. 237. Used in court

See, e.g., State v. Mizenko, 2006, 127 P.3d 458, 462, 330 Mont. 229 (declarant who makes an affidavit expects that the state will try to use it at trial).

ccxxxviii

n. 238. Doubt on reports

Diaz v. U.S., 1912, 32 S.Ct. 250, 223 U.S. 442, 56 L.Ed. 500, discussed in the main volume in § 6358, p. 486.

ccxxxix

n. 239. Prove element

State v. Mizenko, 2006, 127 P.3d 458, 462, 330 Mont. 229 (declarant who makes an affidavit expects that the state will try to use it at trial).

But see

People v. Fisher, N.Y.City Ct.2005, 9 Misc.3d 1121(A), 2005 WL 2780884 p. 4 (pointing out that the Crawford court did not endorse the “declarant’s objective intent test” and rejecting test).

ccxl

n. 240. Not “accusation”

On the policy of confrontation and “accusations”, see above, text at notecall 103.

Compare

U.S. v. Wittig, D.C.Kan.2005, 2005 WL 1227790 (affidavit under Rule 902(11) to authenticate business records fit within core category of Crawford and preparer must know the affidavit will be used prosecutorially).

ccxli

n. 241. Two types

These are “ideal types”; they do not exhaust the possibilities or imply that the same affidavit cannot partake of both.

ccxlii

n. 242. Breath machine

See, e.g., Luginbyhl v. State, Va.App.2005, 618 S.E.2d 347, 354 (affidavit by officers that breath test machine was properly operated not “testimonial”).

See also

State v. Carter, 2005, 114 P.3d 1001, 1006, 326 Mont. 427 (breath machine certificates not substantive evidence but merely authenticate other admissible evidence); Green v. DeMarco, Sup.Ct.Monroe Cty.2005, 812 N.Y.S.2d 772, 778, 11 Misc.3d 451 (breath test affidavit not “testimonial” because purpose is not solely for use in criminal trial but to make sure machines are properly serviced and replaced; analogized to safety inspections for automobiles).

ccxliii

n. 243. Swearing authentic

U.S. v. Weiland, C.A.9th, 2005, 420 F.3d 1062, 1077 (“routine attestation” of domestic public records of defendant’s prior state convictions not “testimonial”).

ccxliv

n. 244. Both “nontestimonial”

Courts can also err in the other direction. See, e.g., Hammon v. State, Ind.2005, 829 N.E.2d 444, 458 (treating as “testimonial” even though affidavit merely repeats an accusation that the court held was not “testimonial”).

ccxlv

n. 245. Affidavit to authenticate

U.S. v. Wittig, D.C.Kan.2005, 2005 WL 1227790.

See also

In U.S. v. Gilbertson, C.A.7th, 2005, 435 F.3d 790, 794-796 the court had to engage in labored huffing and puffing to admit over Crawford objections affidavits filed by former owners of the car in question recording odometer readings at time of prior sales in a prosecution for felonious diddling with odometers; how much simpler it would have been for the court to simply say that one of these were “accusations” of crime against the defendant).

Compare

Bohsancurt v. Eisenberg, App.2006, 129 P.3d 480, 473, 212 Az. 182 (distinguishing affidavits that accuse a particular defendant from an affidavit that certified that breath machine was operating properly when tested prior to being placed in use that did not target any particular DUI suspect who might be tested on the machine); People v. Pacer, 2005, 796 N.Y.S.2d 787, 788, 21 App.Div.3d 192 (affidavit the defendant had been notified that his driving privileges had been revoked; “testimonial” in prosecution for driving without a license [even though does not look like an “accusation”]); State v. Cook, Ohio.App.2005, 2005 WL 736671 (affidavit that breath machine was operating properly simply foundational evidence; not “testimonial”).

ccxlvi

n. 246. Crime lab affidavits

People v. Hinojoso-Mendoza, Colo.App.2005, 2005 WL 2561391 (rejecting claim state statute admitting crime lab reports unconstitutional on its face under Crawford); Belvin v. State, Fla.App.2006, 922 So.2d 1046, 1048 (policy to lessen states burden in drunk driving prosecutions); Rackoff v. State, 2005, 621 S.E.2d 841, 845 275 Ga.App. 737 (quoting statute and tracing its history); Rollins v. State, 2006, 897 A.2d 821, 831, 392 Md. 455 (collecting cases holding autopsy reports “non-testimonial”); Commonwealth v. Verde, 2005, 827 N.E.2d 701, 704, 444 Mass. 279 (quoting statute and collecting cases from other states).

See also

Note, Testimonial or NonTestimonial?: The Admissibility of Forensic Evidence After Crawford v. Washington, 2005-2006, 94 Ky.L.J. 187 (noting problem).

ccxlvii

n. 247. Confusing caselaw

See, e.g., U.S. v. Welch, C.A.5th, 2005, 151 Fed.Appx. 331, 333 (since lab reports bore adequate indicia of reliability, they do not violate right of confrontation even if inadmissible under hearsay rule; confusing opinion).

ccxlviii

n. 248. Distinctions in precedents

Bohsancurt v. Eisenberg, App.2006, 129 P.3d 471, 473, 212 Az. 182 (collecting cases purporting to show that majority of courts have held nontestimonial).

See also

Giannelli, Expert Testimony and The Confrontation Clause, 1993, 22 Cap.U.L.Rev. 45, 69-70 (under Roberts lower courts had split on whether lab reports could be admitted without calling the declarant).

ccxlix

n. 249. “Accusations”

State v. Carter, 2005, 114 P.3d 1001, 1007, 326 Mont. 427 (breath machine certificates not “testimonial” because they are not accusatory substantive evidence but simply provide authentication of such evidence); Green v. DeMarco, Sup.Ct.Monroe

Cty.2005, 812 N.Y.S.2d 772, 778, 11 Misc.3d 451 (breath machine affidavits not “testimonial” because do not accuse anyone of crime but simply report neutral facts about the operation of the machine); People v. Fisher, N.Y.City Ct.2005, 9 Misc.3d 1121(A), 2005 WL 2780884 p. 7 (breath test machine certification did not accuse defendant of any offense so not testimonial).

Compare

Rembusch v. State, Ind.App.2005, 836 N.E.2d 979, 989 (certificate that breath test machine properly operating admissible under Crawford because prepared in routine manner for administrative purposes) with People v. Brown, 2005, 801 N.Y.S.2d 709, 9 Misc.3d 420 (reports of DNA testing done for trial not “testimonial” since reports simply document work done for bureaucratic purposes; collecting cases).

See also

Note, Testimonial or NonTestimonial?: The Admissibility of Forensic Evidence After Crawford v. Washington, 2005-2006, 94 Ky.L.J. 187, 204 (argument that not “testimonial” is true only for reports prepared as a matter of course in every case, such as hospital reports or official autopsy reports, but cautioning against per se approach as sometimes these may be accusatory).

ccl

n. 250. “Junk science”

Giannelli, Admissibility of Lab Reports: The Right of Confrontation Post-Crawford, 2004, 19-FALL Crim.Just. 26, 20.

ccli

n. 251. Crawford method

That is some courts rely on “rule of thumb analysis” while other rely “categorical” analysis.

cclii

n. 252. Dying declarations

124 S.Ct. at 1367 n.6, 541 U.S. at 55 n.6 (suggesting that because the exception existed at common law, the Founders may have intended it to survive the Sixth Amendment).

ccliii

n. 253. Documentary exception

State v. William, 2005, 110 P.3d 1114, 1115, 199 Or.App. 191 (relying on Cooley’s Gilded Age treatise on constitutional law---see § 6356, pp. 149-150 in the main volume---and Oregon constitutional law rather than the Sixth Amendment).

See also

State v. Norman, 2005, 125 P.3d 15, 17, 19, 203 Or.App. 1 (certificate that breath machine operated properly akin to business records that were not testimonial at common law; relying on prior state and outstate cases and extending William to

Sixth Amendment); *State v. Conway*, 1984, 690 P.2d 1128, 70 Or.App. 721 (pre-Crawford case under state constitution reaching similar conclusion).

ccliv

n. 254. Massachusetts

Commonwealth v. Verde, 2005, 827 N.E.2d 701, 705, 444 Mass. 279.

See also

People v. Kanhai, N.Y.Ct.Ct.2005, 797 N.Y.S.2d 870, 875, 8 Misc.3d 447 (since business records exception existed when Sixth Amendment was adopted, certificates that breath test machine was operating properly raised no constitutional issue).

cclv

n. 255. Use “rule of thumb”

Sometimes this analysis is combined with other arguments described in the text. See, e.g., *Commonwealth v. Verde*, 2005, 827 N.E.2d 701, 704, 444 Mass. 279 (records of blood intoxication tests that record primary fact without judgment or discretion not “testimonial”). Compare text at notecall 244, above.

cclvi

n. 256. “Routine, objective”

U.S. v. Cervantes-Flores, C.A.9th, 2005, 421 F.3d 825, 833 (certificate of nonexistence of a business record per se nontestimonial because “simply a routine, objective, cataloging of an unambiguous factual matter”, quoting *U.S. v. Bahena-Cardenas*, C.A.9th, 2005, 411 F.3d 1067, 1074-1074).

See also

U.S. v. Chavez-Rivera, C.A.9th, 2005, 158 Fed.Appx. 19, 20 (rote application of *Cervantes-Flores*, above); *U.S. v. Olmos-Esparza*, C.A.9th, 2005, 149 Fed.Appx. 596, 598 (certificate of non-existence of record of permission to enter U.S. not “testimonial” even though prepared for use in prosecution because “simply a routine, objective, cataloging of an unambiguous factual matter”).

Compare

This rationale has spread to other documents that do not seem to fit; see *U.S. v. Ballesteros-Selinger*, C.A.9th, 2006, 06 C.D.O.S. 6469 (oral opinion of immigration judge ordering defendant deported as an alien improperly in the U.S. not “testimonial” because merely a “routine, objective, cataloging of an unambiguous factual matter” not intended for use at trial though the opinion itself says it will be transcribed and used should the matter be reopened).

State cases

Rembusch v. State, Ind.App.2005, 836 N.E.2d 979, 989 (certificate that breath test machine properly operating admissible under Crawford because prepared in routine manner for administrative purposes); *Commonwealth v. Walther*, Ky.2006, 189

S.W.3d 570, 575 (breath test machine certificate made for quality control purposes, not for use at trial); *People v. Brown*, 2005, 801 N.Y.S.2d 709, 9 Misc.3d 420 (reports of DNA testing done for trial not “testimonial” since reports simply document work done for bureaucratic purposes; collecting cases); *People v. Fisher*, N.Y.City Ct.2005, 9 Misc.3d 1121(A), 2005 WL 2780884 p. 6 (breath test machine certifications performed routinely and without regard to defendant’s case not “testimonial”; collecting other cases reaching conflicting results); *State v. Forte*, 2006, 629 S.E.2d 137, 143, 360 N.C. 427 (lab report showing DNA on victims matched defendant’s not “testimonial” but “neutral, objective analysis of evidence”).

cclvii

n. 257. Not within “core”

Rembusch v. State, Ind.App.2005, 836 N.E.2d 979, 981 (breath test machine certificate; relies on *Napier*, below); *Napier v. State*, Ind.App. 2005, 827 N.E.2d 565, 568 (certificate that breath machine was properly operating not “testimonial” because not like any of the devices described in *Crawford* as “core”).

cclviii

n. 258. Not “witness”

People v. Johnson, 2004, 18 Cal.Rptr.3d 230, 233, 121 Cal.App.4th 1409 (though maker of lab report expects it to be used in court, it does not “bear testimony” within the meaning of *Crawford*); *Rackoff v. State*, 2005, 621 S.E.2d 841, 845 275 Ga.App. 737 (certificate not aimed at any individual and contained facts, not opinions; machine, not the technician was the “witness against” accused); *State v. Mizenko*, 2006, 127 P.3d 458, 330 Mont. 229 (*Crawford* does not apply to hearsay used as foundation for admissibility of other evidence even when accusatory because not “substantive” so declarant not a “witness against” defendant).

cclix

n. 259. Doctrines rejected

Valentine v. Alameida, C.A.9th, 2005, 143 Fed.Appx. 782, 783 (crime lab reports admissible under business records exception, a firmly rooted exception under *Roberts*; overlooks that records prepared for use in litigation not within the traditional exception); *State v. Dedman*, 2004, 102 P.3d 628, 636, 136 N.M. 561 (hence, admissible under the “firmly rooted” exception for government records). Of course, the *Roberts* “firmly rooted” test was repealed for “testimonial” statements by *Crawford*.

cclx

n. 260. Shift burden

State v. Cunningham, La. 2005, 903 So.2d 1110, 1119 (certificate of analysis opining that substance seized from defendant was marijuana; no violation of *Crawford* where all defendant had to do to have the state produce the chemist at trial was to request this when served with the certificate); *State v. Lyles*, 2005, 615 S.E.2d 890, 893, ___ N.C.App. ___ (since defendant can cross-examine the chemist who testifies, *Crawford* permits him to opine that substance seized from defendant was cocaine based on testing done by another chemist not called at trial).

Compare

People v. Lonsby, 2005, 707 N.W.2d 610, 620 n. 10, 268 Mich.App. 375 (collecting cases pro and con but holding lab notes “testimonial” when smuggled in as basis for testimony of expert who had know personal knowledge of the tests and as a result was immune to any cross-examination about the report).

cclxi

n. 261. Reports “testimonial”

Belvin v. State, Fla.App.2006, 922 So.2d 1046, 1050 (rejecting attempt to distinguish from “testimonial statements” as “a distinction without a difference”); People v. Lonsby, 2005, 707 N.W.2d 610, 619, 268 Mich.App. 375 (crime lab tech could reasonably expect that her lab notes would be used prosecutorially when she ran tests on rape kit and swim suit seeking evidence of defendant’s semen; hence, notes were “testimonial”); People v. Hernandez, 2005, 794 N.Y.S.2d 788, 789, 7 Misc.3d 568 (latent print report describing how print was taken “testimonial”; taken for prosecutorial use); State v. Crager, 2005, 844 N.E.2d 390, 396, 164 Ohio App.3d 816 (lab report comparing DNA “testimonial”; prepared as part of police investigation and reasonable person would suppose it would be used at trial).

Compare

State v. English, 2005, 614 S.E.2d 405, 409, ___ N.C.App. ___ (implying that had defendant not stipulated to its admissibility, crime lab report would have been excluded under Crawford); State v. Forrester, 2005, 125 P.3d 47, 50, 203 Or.App. 151 (not plain error to admit lab report of blood alcohol content in drunk driving case); State v. Allen, 2005, 108 P.3d 651, 652, 198 Or.App. 392 (not plain error to introduce lab report stating substance taken from defendant was cocaine without calling the chemist who ran the tests to testify to conclusions of report).

See also

Jones. v. State, Miss.App. 2003, 881 So.2d 209, 219 (lab report showing results of test of defendant’s urine violates right of confrontation; pre-Crawford opinion).

cclxii

n. 262. “Facts” and “opinions”

Rollins v. State, 2005, 866 A.2d 925, 943, 161 Md.App. 34 (distinguishing between “opinions” and “findings of physical condition” in autopsy report); Commonwealth v. Verde, 2005, 827 N.E.2d 701, 704, 444 Mass. 279 (records of blood intoxication tests that record primary fact without judgment or discretion not “testimonial”); State v. Melton, 2006, 625 S.E.2d 609, 612, ___ N.C.App. ___ (laboratory reports are nontestimonial only when they record objective facts obtained by mechanical process; dictum).

cclxiii

n. 263. Accuse of crime

State v. Carter, 2005, 114 P.3d 1001, 1007, 326 Mont. 427 (affidavit of crime lab that breath analysis machine was operating properly prior to its use on defendant not “testimonial” because not “accusatory”; distinguishing case in which test of defendant’s blood showed him to be under the influence).

Compare

U.S. v. Weiland, C.A.9th, 2005, 420 F.3d 1062, 1077 (certifications needed to make records of conviction self-authenticating not “testimonial”); Bohsancurt v. Eisenberg, App.2006, 129 P.3d 471, 476, 212 Az. 182 (purpose to assure accuracy of breath machine and complying with statute making admissible).

cclxiv

n. 264. “Categorical tests”

The reader should understand by now that this ploy will be equally unavailing.

cclxv

n. 265. Scalia dictum

124 S.Ct. at 1367, 514 U.S. at 56.

cclxvi

n. 266. Courts used

U.S. v. Hagege, C.A.9th, 2006, 437 F.3d 943, 958 (foreign business records admitted under 28 U.S.C.A. § 3505); U.S. v. King, C.A.4th, 2006, 161 Fed.Appx. 296, 297 (unspecified business record); U.S. v. Cervantes-Flores, C.A.9th, 2005, 421 F.3d 825, 832 (certificate of nonexistence of a record “closely resembles” a business record; therefore, nontestimonial); U.S. v. Shepard, C.A.11th, 2005, 154 Fed.Appx. 849, 851; U.S. v. Chan-Astorga, C.A.9th, 2005, 126 Fed.Appx. 364, 367 (business card and drug ledger not “testimonial”); Perkins v. State, Ala.Crim.2004, 897 So.2d 457, 464 (autopsy report admissible as business record and not “testimonial” because reliable); Bohsancurt v. Eisenberg, App.2006, 129 P.3d 471, 473, 212 Az. 182 (certificate that breath machine operating properly admitted and nontestimonial); People v. Taulton, 2005, 29 Cal.Rptr.2d 203, 206, 129 Cal.App.4th 1218 (dictum); Desue v. State, Fla.App.2005, 908 So.2d 1116, 1118; Rackoff v. State, 2005, 621 S.E.2d 841, 845 275 Ga.App. 737; State v. Leonard, La.App.2005, 915 So.2d 829, 833 (coroner’s report on cause of death); Rollins v. State, 2005, 866 A.2d 925, 943, 161 Md.App. 34 (autopsy report not “testimonial” as a business record); State ex rel. L.R., 2006, 890 A.2d 343, 354, 382 N.J.Super. 605 (estimate of damages caused by criminal mischief prepared for juvenile court); State v. Godshalk, 2005, 885 A.2d 969, 973, 381 N.J.Super. 326; People v. Brown, 2005, 801 N.Y.S.2d 709, 9 Misc.3d 420 (report of results of DNA testing done for purposes of trial not “testimonial” under business records exception); State v. Cook, Ohio.App.2005, 2005 WL 736671 (affidavit that breath test machine operated properly; (State v. Norman, 2005, 125 P.3d 15, 17, 19, 203 Or.App. 1 (certificate that breath test machine operated properly); State v. N.M.K., 2005, 118 P.2d 368, 372, 129 Wash.App. 155 (certified letter attesting that no driver’s license had been issued to defendant in prosecution for driving without one).

cclxvii

n. 267. Courts questioned

Smith v. State, Ala.Crim.2004, 898 So.2d 907, 916 (affidavit of autopsy surgeon of the cause of death, an essential element in a murder prosecution, held “testimonial”); People v. Johnson, Fla.App.2005, 929 So.2d 4, 7 (lab report offered as business record to prove that substance was “cocaine” “testimonial” to prove element of charged crime as intended “to bear witness against accused”); City of Las Vegas v. Walsh, 2005, 124 P.3d 203, 207, ___ Nev. ___ (affidavit of nurse that blood properly drawn from D.U.I. suspect “testimonial”); People v. Niene, N.Y.City Ct.2005, 798 N.Y.S.2d 891, 893, 8 Misc.3d 649 (an affidavit is an affidavit; cannot make it nontestimonial by calling it a business or a government record); People v. Orpin, N.Y.City.Ct. 2005, 796 N.Y.S.2d 512, 515, 8 Misc.3d 768 (reading Crawford to require that business records satisfy the same test as other hearsay); People v. Hernandez, 2005, 794 N.Y.S.2d 788, 789, 7 Misc.3d 568 (police officer’s latent print report describing how print was lifted and processed “testimonial” and not admissible under business records exception); State v. Melton, 2006, 625 S.E.2d 609, 612, ___ N.C.App. ___ (recognizing that business records can be “testimonial” but using harmless error to avoid issue); Russeau v. State, Tex.Crim.2005, 171 S.W.3d 871, 880 (incident reports prepared by prison guards for use in disciplinary hearings “testimonial” and inadmissible at punishment phase of capital trial).

See also

People v. Mitchell, 2005, 32 Cal.Rptr.3d 613, 621, 131 Cal.App.4th 1210 (noting split among courts on whether business records are “testimonial”); State v. Benefiel, 2006, 128 P.3d 1251, 1253, ___ Wash.App. ___ (court record of judgment of conviction not “testimonial” because declarant could not reasonably believe it would be used by the prosecutor in a later trial).

cclxviii

n. 268. Courts doubted

People v. Mitchell, 2005, 32 Cal.Rptr.3d 613, 621, 131 Cal.App.4th 1210 (Court could not have meant that all documentary evidence that might qualify under expansive definition of “business record” was automatically nontestimonial).

cclxix

n. 269. For use at trial

Palmer v. Hoffman, 1943, 63 S.Ct. 477, 318 U.S. 109, 87 L.Ed. 645.

See also

Advisory Committee’s Note, F.R.Ev. 803(6) (explaining how Rule incorporates Palmer).

cclxx

n. 270. Qualify as “testimonial”

Note, Testimonial or NonTestimonial?: The Admissibility of Forensic Evidence After Crawford v.Washington, 2005-2006, 94 Ky.L.J. 187, 201-202 (arguing “testimonial”

and pointing out that his comports with prior caselaw under Rules holding that reports prepared for purposes of litigation “lack trustworthiness”).

Compare

State v. Phillips, App.2005, 126 P.3d 546, 551, 138 N.M. 729 (due process right of confrontation applicable in probation revocation proceedings not satisfied where “record custodian” testified to contents of documents in file recording events of which she had no personal knowledge).

cclxxi

n. 271. Cross-examine “junk”

Giannelli, Expert Testimony and The Confrontation Clause, 1993, 22 Cap.U.L.Rev. 45, 79-80.

cclxxii

n. 272. Official records

U.S. v. Torres-Hernandez, C.A.9th, 2006, 447 F.3d 699, 703 n. 5 (certificate of nonexistence of record of permission to enter country properly admitted); U.S. v. Rizo-Hernandez, C.A.9th, 2006, 171 Fed.Appx. 109, 110 (warrant of deportation and certificate of absence of record showing permission to reenter both “non-testimonial”); U.S. v. Cantellano, C.A.11th, 2005, 430 F.3d 1142, 1145 (deportation warrant showing facts of defendant’s departure from U.S. not “testimonial”; collecting similar cases); Bohsancurt v. Eisenberg, App.2006, 129 P.3d 471, 475, 212 Az. 182 (many courts have used this to admit crime lab affidavits); People v. Hinojoso-Mendoza, Colo.App.2005, 2005 WL 2561391 (collecting cases and finding that majority hold that lab reports “nontestimonial” as either business or official records); Commonwealth v. Verde, 2005, 827 N.E.2d 701, 705, 444 Mass. 279 (suggesting dictum applies to both business and official records).

See also

Similar cases are collected below, notecalls 389 and 392.

cclxxiii

n. 273. “Observed by personnel”

Evidence Rule 803(8)(B). Rule 803(8)(C) limits admissibility of records and reports of governmental factfinding to “civil cases.”

See also

Giannelli, Admissibility of Lab Reports: The Right of Confrontation Post-Crawford, 2004, 19-FALL Crim.Just. 26, 27 (doubts admissible under 803(8) because of the exclusions for investigatory and police reports).

cclxxiv

n. 274. Protect right

House Report No. 93-650.

cclxxv

n. 275. “Faceless informers”

See, e.g., § 6360, pp. 740-747, in the Main Volume.

cclxxvi

n. 276. Courts struggled

U.S. v. Savoires, C.A.6th, 2005, 430 F.3d 376, 382 (while informant’s statements were “testimonial”, not a violation of right of confrontation to allow the prosecution to assert privilege to prevent defendant from learning his identity); U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 676-678; People v. Cortes, 2004, 781 N.Y.S.2d 401, 405, 4 Misc.3d 575 (noting that Court did not define “interrogation” and resorting to dictionary definitions to find anonymous 911 calls “testimonial”).

cclxxvii

n. 277. “Investigatory interrogation”

See, e.g., Stencil v. U.S., D.C.App.2005, 866 A.2d 799, 814 (as police enter apartment, little girl holding knife stands between mother and father and shouts at the latter to “stop hurting my mommy”; not “testimonial”); Drayton v. U.S., D.C.Ct.App.2005, 877 A.2d 145, 150 (recognizing doctrine but holding it inapplicable on the facts); U.S. v. Webb, D.C.Super.2004, 2004 WL 2726100. p. 3 (police responding to disturbance call find man and woman standing on opposite sides of car, she crying and bleeding from cuts on lip and over eye; asked “what happened?” victim says man punched her twice in the face because he would not give him money to buy drugs); People v. Kilday, 2004, 20 Cal.Rptr.3d 161, 169, 123 Cal.App.4th 406 (statements made in hotel lobby by frightened witness to officers who knew nothing about the situation); State v. Green, 2005, 874 A.2d 750, 774, 274 Conn. 134 (bystander at drive-by shooting reports to officer securing the scene that he thinks he was hit by bullet); Lopez v. State, Fla.App. 2004, 888 So.2d 693, 698 (collecting cases); People v. West, 2005, 823 N.E.2d 82, 87, 355 Ill.App. 28, 291 Ill.Dec. 72 (officers responding to 911 call elicits accusation of rape and description of rapist; not “testimonial” because questions were “preliminary” and for purpose of attending to victim’s medical needs); People v. Bryant, Mich.App.2004, 2004 WL 1882661 (officers responding to report of shooting find dying victim on ground, asked him what happened, and he accused defendant of shooting him; not “testimonial”); State v. Warsame, Minn.App. 2005, 701 N.W.2d 305, 308 (collecting cases and deciding that Hammon, below, reflects the majority rule); Hammon v. State, Ind.2005, 829 N.E.2d 444, 458 (officers responding to report of wifebeating were only trying to secure the scene and determine whether anything requiring police action had occurred) [the Supreme Court reversed in Davis; see § 6371.3, this supplement]; Rogers v. State, Ind.App. 2004, 814 N.E.2d 695, 701-702; State ex rel. J.A., 2006, 897 A.2d 1119, 1126, 385. N.J.Super. 544 (collecting cases); People v. Bradley, 2005, 799 N.Y.S.2d 472, 477, 22 App.Div.3d 33 (“preliminary, on-scene interviews” distinguishable from those in Crawford); People v. Watson, N.Y.Cty.Ct.2004, 798 N.Y.S.2d 712, 5 Misc.3d 1013 (police arriving on scene arrest fleeing defendant who witnesses then identify as the robber; asking defendant if he had accomplice was part of effort to secure the

scene and not “testimonial”); *People v. Mackey*, 2004, 785 N.Y.S.2d 870, 872, 5 Misc.3d 709 (wife runs up to a police officer and accuses her husband of punching her in the face; collecting cases); *State v. Maclin*, Tenn.2006, 183 S.W.3d 335, 353 (police responding to burglary alarm flagged down by teenagers who when asked “what’s going on?”, described the man who had kicked in the door and entered; not “testimonial” as not “accusatory” or directed specifically at defendant); *Key v. State*, Tex.App.2005, 173 S.W.3d 72, 75 (collecting and claiming that most cases recognize as nontestimonial); *Ruth v. State*, Tex.App. 2005, 167 S.W.3d 560, 569 (dictum); *Marc v. State*, Tex.App. 2005, 166 S.W.3d 767, 779 (because not “structured” and not initiated by police); *Spencer v. State*, Tex.App. 2005, 162 S.W.3d 877, 881 (collecting similar cases from other states); *State v. Ohlson*, 2005, 125 P.3d 990, 995, 131 Wash.App. 71 (“minimal questioning” of frightened victims of vehicular assault did not make “testimonial”).

See also

Mason v. State, Tex.App.2005, 173 S.W.3d 105, 109 (collecting conflicting cases on testimonial nature of statements to police responding to 911 calls).

cclxxviii

n. 278. Police abuse policy

See above, text at notecall 117.

Compare

People v. Cage, 2004, 15 Cal.Rptr.3d 846, 856, 120 Cal.App.4th 770 (since Marian inquisitorial procedure did not begin until the defendant was arrested, interrogation at hospital of child who accused mother of abusing him prior to her arrest not “testimonial”); *State ex rel. J.A.*, 2006, 897 A.2d 1119, 1126, 385 N.J.Super. 544 (investigatory investigations not “testimonial” because declarant not “bearing witness” and does not speak in contemplation of future legal proceedings).

cclxxix

n. 279. Girlfriend of driver

Wilson v. State, Tex.App. 2004, 151 S.W.3d 694, 698 (declarant initiated exchange, her statements were questions---not accusations, and questions were not “tactically structured” but only tried to determine why she was upset and concerned).

cclxxx

n. 280. Fine lines

See, e.g., *Drayton v. U.S.*, D.C.Ct.App.2005, 877 A.2d 145, 150-151 (investigatory phase had ended when police had already heard what happened and resumed questioning after arresting defendant, handcuffing her, and placing her in patrol car; applying *Stancil*, below); *Stancil v. U.S.*, D.C.App.2005, 866 A.2d 799, 814 (marking the divide between securing the scene and the investigation at the point where the officers had separated the parties, calmed them, and began to question them about the incident); *People v. Kilday*, 2004, 20 Cal.Rptr.3d 161, 171-172, 123 Cal.App.4th

406 (statements made an hour after scene secured to officer who was specifically summoned to interrogate the witness); Commonwealth v. Gonsalves, 2005, 833 N.E.2d 549, 556, 445 Mass. 1 (Crawford applies to “investigatory interrogation” but not questions to “secure a volatile scene” or to determine the need for medical care).

cclxxxi

n. 281. “Secure the scene”

Stancil v. U.S., D.C.App.2005, 866 A.2d 799, 812 (statements made to officers during initial stage of encounter while they are securing the scene and before the emergency has passed not “testimonial”); Packer v. State, Ala.Crim.App. 2005, 926 So.2d 1076, 1079 n. 1 (extending from on-scene questioning to interrogation at hospital); State v. Alvarez, App.2005, 107 P.3d 350, 354, 210 Ariz. 24 (statements not “testimonial” where officer finds declarant wandering down the road, barely conscious, with blood all over his head and questioned him about injuries in order to get medical assistance for him); Purvis v. State, Ind.App.2005, 829 N.E.2d 572 (applied to questioning by declarant’s parents after catching him in compromising situation); Commonwealth v. Gonsalves, 2005, 833 N.E.2d 549, 556, 445 Mass. 1 (Crawford does not apply when officers are engaged in “community caretaking function” by securing a “volatile scene” or providing medical care to wounded people; the former can include pursuit of suspects believed to be a danger to others such as fleeing drunk drivers or freeing a hostage or disarming a suspect); State v. Hembertt, 2005, 696 N.W.2d 473, 483, 269 Neb. 840 (collecting cases to support claim that courts “almost uniformly” adopt this view when police respond to an emergency); State ex rel. J.A., 2006, 897 A.2d 1119, 1126, 385 N.J.Super. 544 (endorsing this rationale); State v. Romero, App.2006, 133 P.3d 842, 861, 139 N.M. 386 (victim leaped from car when saw officers, ran to them through gravel, barefoot and crying to tell police that defendant had threatened to kill her; officers put her in patrol car for safety and asked a few questions to enable them to enter the house in search of defendant); People v. Watson, N.Y.Cty.Ct.2004, 798 N.Y.S.2d 712, 5 Misc.3d 1013 (asking arrested armed robbery suspect if he had an accomplice was effort to protect police and bystanders from another man with a gun, not an effort to gather evidence for trial); Lagunas v. State, Tex.App.2005, 187 S.W.3d 503, 518 (officer entered house at mother’s request to see if burglar had harmed children; statements made in response to question “is everything ok?” not “testimonial”); Key v. State, Tex.App.2005, 173 S.W.3d 72, 76 (officer responding to call was securing and assessing the scene, not producing evidence in anticipation of a criminal prosecution).

But see

Commonwealth v. Foley, 833 N.E.2d 130, 133, 445 Mass. 1001 (once scene secured and queries about need for medical services were answered, all subsequent questions elicited “testimonial” hearsay); People v. Watson, N.Y.Cty.Ct.2004, 798 N.Y.S.2d 712, 5 Misc.3d 1013 (once police arrested robber, secured scene, and recovered both the loot and the weapon, asking witnesses to tell them “what happened?” was an effort to gather evidence for trial so statements in response were “testimonial”); Mason v. State, Tex.App.2005, 173 S.W.3d 105, 109 (collecting

and rejecting Texas cases holding not “testimonial” where questioning “simply intended to assess the situation”).

cclxxxii

n. 282. “Res gestae”

State v. Green, 2005, 874 A.2d 750, 775, 274 Conn. 134 (statements can be “seen as part of the criminal incident, rather than as part of the prosecution that follows”).

See also

Vol. 22, § 5239, text at notecall 17 (“res gestae” and Rule 404(b)); 3 M.Graham, Handbook of Federal Evidence, 5th ed.2001, § 803.2, p. 276 (“res gestae” and hearsay).

cclxxxiii

n. 283. “Formal inquiry”

Stancil v. U.S., D.C.App.2005, 866 A.2d 799, 810 (court attempts to steer between requiring formality and making all accusatory statements “testimonial”); U.S. v. Webb, D.C.Super.2004, 2004 WL 2726100. p. 3 (police coming on scene of assault ask “what happened?” and “why?”; not testimonial); People v. Corella, 2004, 18 Cal.Rptr.3d 770,776, 122 Cal.App.4th 461; People v. Cage, 2004, 15 Cal.Rptr.3d 846, 856, 120 Cal.App.4th 770 (Crawford requires statement be made in a “relatively formal proceeding that contemplates a future trial”; “interview” in the hospital with child who at the scene of the crime accused mother of slashing him with glass does not qualify as “testimonial”); People v. Newland, 2004, 775 N.Y.S.2d 330, 6 App.Div.3d 330 (brief interchange that led officer to search for and find relevant evidence not “testimonial”); Mason v. State, Tex.App.2005, 173 S.W.3d 105, 109 (Texas cases suggest formality of questioning only goes to declarant’s objective belief about the use of the statements at trial); Key v. State, Tex.App.2005, 173 S.W.3d 72, 76 (unstructured interaction between officer and witness bears to resemblance to Crawford’s notion of an “interrogation”); Gonzalez v. State, Tex.App.2004, 155 S.W.3d 603, 609 n. 4 (dictum; questioning of murder-robbery victim by officers responding to 911 call lacks the structured formality required to make it “testimonial”); State v. Searcy, App.2005, 709 N.W.2d 497, 512, ___ Wis.2d ___ (cousin shouted to police arresting declarant that they could not do that to her cousin who was staying with her not “testimonial” even though it led police to stolen property; collecting conflicting cases on similar facts).

cclxxxiv

n. 284. Rescue declarant

State v. Forrest, 2004, 596 S.E.2d 22, 26-27, 164 N.C.App. 272.

Compare

People v. Ruiz, L.A.Super.2004, 2004 WL 2383676 p. 9 (officer had dual motives; to rescue declarant but also to prosecute her assailant).

cclxxxv

n. 285. Checklist

In determining whether field interrogations are testimonial, courts consider:

- (1) whether declarant victim or observer;
- (2) the declarant's purpose in speaking;
- (3) whether police or declarant initiated the conversation;
- (4) location of conversation (declarant's home, squad car, police station);
- (5) declarant's emotional state when speaking;
- (6) level of formality and structure of the conversation;
- (7) purpose of officers in speaking;
- (8) if and how the statements were recorded.

State v. Wright, Minn.2005, 701 N.W.2d 802, 812-813.

See also

State v. Scacchetti, Minn.2006, 711 N.W.2d 508, 515-516 (Wright test modified and applied); State v. Ahmed, Minn.App.2006, 708 N.W.2d 574, 582 (Wright test applied).

cclxxxvi

n. 286. Apply with rigor

See, e.g., State v. Parks, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (police arrested defendant immediately on arrival, separated witnesses for questioning, and no apparent security or medical concerns; answers "testimonial"); Pitts v. State, 2005, 612 S.E.2d 1, 5, 272 Ga.App. 182 (police arrive in response to 911 call, find defendant assaulting declarant and arrest him; declarant's account of the assault to officers "testimonial" relying on Georgia cases holding response to police investigative interrogations "testimonial"); People v. Victors, 2004, 819 N.E.2d 311, 320, 353 Ill.App.3d 801 (on-scene police questioning of participants in domestic dispute "testimonial"); Commonwealth v. Foley, 833 N.E.2d 130, 133, 445 Mass. 1001(response to question "where is he?" and to inquiries about need for medical assistance not "testimonial", but responses to subsequent questions were); State v. Allen, 2005, 614 S.E.2d 361, ___ N.C.App. ___ (statements elicited by police questioning 20 minutes after the crime were "testimonial"; distinguishing case holding otherwise on a 911 call).

cclxxxvii

n. 287. Posing as dealer

People v. Morgan, 2005, 23 Cal.Rptr.2d 224, 232, 125 Cal.App.4th 935.

cclxxxviii

n. 288. Reject category

State v. King, App.2006, 132 P.3d 311, 318, ___ Ariz. ___ (rejecting category in favor of "totality of the circumstances" approach); State v. Davis, 2005, 613 S.E.2d 760, 772, 364 S.C. 364 (large collection of cases pro and con on this issue).

cclxxxix

n. 289. Case-by-case

People v. Kilday, 2004, 20 Cal.Rptr.3d 161, 173, 123 Cal.App.4th 406; State v. Wright, Minn.2005, 701 N.W.2d 802, 812 n. 7 (collecting cases adopting categorical rule but opting for case-by-case determination); State v. Romero, App.2006, 133 P.3d 842, 860-861, 139 N.M. 386 (similar but “fact specific” inquiry).

Compare

State v. Henderson, 129 P.3d 646, 650, ___ Kan.App. ___ (rejecting attempt to analogize interrogation of child abuse victim with investigatory interrogations).

ccxc

n. 290. “Accusation testimonial”

State v. P, 2005, 828 N.E.2d 133, 137, 160 Ohio App.3d 538.

See also

State v. King, App.2006, 132 P.3d 311, 318, ___ Ariz. ___ (declarant who accuses defendant of throwing pit bull puppies over the house would expect that the officer would use that statement in the investigation and prosecution of the crime); People v. Ruiz, L.A.Super.2004, 2004 WL 2383676 p. 9 (when declarant accuses defendant of a crime of violence, she must know that as result he would be arrested and prosecuted); Bartee v. State, Fla.App.2006, 922 So.2d 1065, 1070 (statements to police officer responding to a 911 call “well after” assailant left the scene “testimonial” as reasonable person would know they would be in prosecuting the accused); State v. Moses, 2005, 119 P.3d 906, 911, 129 Wash.App. 718 (30 minutes after assault victim asks neighbor to call 911, police arrive 30 minutes later and conduct a structured 40 minutes of questioning during which declarant expressed fear that statements would be used to send defendant to jail; “testimonial”).

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 605 (noting that the Solicitor General conceded that such reports of crime to police from bystanders at the scene were “testimonial”).

But see

People v. Watson, N.Y.Cty.Ct.2004, 798 N.Y.S.2d 712, 5 Misc.3d 1013 (statement by victim that robber acted alone in response to police question not “testimonial” as question was part of effort to secure the scene; doubtful that witness thought statement would be used in a future judicial proceeding [because accusation was implicit, not explicit?]).

ccxci

n. 291. Accused of crime

See, e.g., State v. Green, 2005, 874 A.2d 750, 775, 274 Conn. 134 (declarant tells police he thought he had been shot but does not say who fired shot or why; not “testimonial”); Tyler v. State, Tex.App. 550, 554 (declarant tells police that man who

shot him first demanded his wallet but does not know and cannot name assailant; not “testimonial”).

Ironically, the court that appeared so foolish in applying this category, see text at notecall 288 above, had stumbled over a more direct way when it surmounted the hearsay objection to the statements by opining they were not hearsay because they did not explicitly accuse the defendant of being a drug dealer. *People v. Morgan*, 2005, 23 Cal.Rptr.2d 224, 232, 125 Cal.App.4th 935.

See also

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under *Crawford v. Washington*, 2006, 94 Geo.L.J. 581, 593 (noting split among courts over the use of this category and arguing that when statement is accusatory, it should be “testimonial”).

ccxcii

n. 292. “Mechanical hearsay”

Other examples include the time recorded on telephone answering machine to prove when the call was received or the temperature on the sign on a savings and loan to prove that it was below freezing when the plaintiff slipped on the residue of defendant’s sprinkler system. “Mechanical hearsay” is not “hearsay” because the problem is one of relevance---was the machine operating properly when it spoke, not a problem of perception, recollection, narration, or sincerity on the part of the machine. See Graham, Casenotes Outline: Evidence, Chap. 9-II-F.

ccxciii

n. 293. Arise so soon

Lawyers probably never think to make a hearsay objection to machine produced hearsay because they don’t see the problem---few casebooks mention it---or they fear that they will look ridiculous if they do.

ccxciv

n. 294. Held not “testimonial”

Luginbyhl v. State, Va.App.2005, 618 S.E.2d 347, 351 (breath test machine result not hearsay and therefore not “testimonial”).

ccxcv

n. 295. Opposite conclusion

Napier v. State, Ind.App. 2005, 820 N.E.2d 144, 151 (*Crawford* violated in drunk driving prosecution where only evidence of defendant’s intoxication was the printout of a breath test machine introduced without calling the operator of the machine). The better reading is that the court thought that the only way the printout was relevant was if the operator testified that it was used in the proper manner---the real problem, but not one properly within the realm of *Crawford*.

See also

People v. Fisher, N.Y.City Ct.2005, 9 Misc.3d 1121(A), 2005 WL 2780884 p. 9 (holding with little consideration that breath test machine printout of the results of test on defendant was “testimonial”).

ccxcvi

n. 296. “Allocution”

See Criminal Rule 11(b).

On the proper meaning of the word, see Mellinkoff’s Dictionary of American Legal Usage, 1992, pp. 25-26 (refers to the classic inquiry just prior to sentencing “do you know any reason why sentence should not be imposed?”, an inquiry not limited to guilty pleas.

ccxcvii

n. 297. Limitations on use

Rule 410 limits the use of Rule 11 statements only against the person who entered the plea but the hearsay rule should keep them out when offered against third person. Since the defendant presumably benefits from the plea, the statement can hardly be against his interest much less against the interest of some other defendant who he drags into the account of his wrongdoing.

But see

People v. Hardy, 2005, 824 N.E.2d 953, 956, 4 N.Y.3d 192, 791 N.Y.S.2d 953 (explaining that under pre-Crawford state law, plea allocutions were admissible as declarations against interest).

ccxcviii

n. 298. “Plainly testimonial”

124 S.Ct. at 1372, 541 U.S. at 58-59.

ccxcix

n. 299. Second Circuit

U.S. v. Reifler, C.A.2d, 2006, 446 F.3d 65, 86; U.S. v. Snype, C.A.2d, 2006, 441 F.3d 119, 128; U.S. v. Pearson, C.A.2d, 2006, 165 Fed.Appx. 129, 131 (but not plain error); U.S. v. Caicedo, C.A.2d, 2005, 150 Fed.Appx. 91, 92 (but harmless error); U.S. v. Lewis, C.A.2d, 2005, 144 Fed.Appx. 131, 133; U.S. v. Birkett, C.A.2d, 2005, 138 Fed.Appx. 375, 377; U.S. v. Fruchter, C.A.2d, 2005, 137 Fed.Appx. 390, 392 (prosecutor concedes this); U.S. v. Kiltinivichious, C.A.2d, 2005, 132 Fed.Appx. 901; U.S. v. Hawkins, C.A.2d 2005, 125 Fed.Appx. 364, 367; U.S. v. Foster, C.A.2d, 2005, 127 Fed.Appx. 537, 539; U.S. v. McClain, C.A.2d, 2004, 377 F.3d 219, 221; U.S. v. Santiago, C.A.2d, 2005, 126 Fed.Appx. 21, 23; U.S. v. Bruno, C.A.2d, 2004, 383 F.3d 65, 78; U.S. v. Tusanez, C.A.2d 2004, 116 Fed.Appx. 305, 306; U.S. v. Bowes, 115 Fed.Appx. 503, 504; U.S. v. De la Cruz, C.A.2d , 2005, 114 Fed.Appx. 30, 32.

U.S. v. Massino, D.C.N.Y.2004, 319 F.Supp.2d 295, 298 (guilty plea of third person offered to prove commission of charged crime meets Crawford standards for “testimonial” statements).

See also

The use in the Second Circuit may have crept over from practice in New York state courts where the Evidence Rules are not in effect. *People v. Bradley*, 2005, 799 N.Y.S.2d 472, 477, 22 App.Div.3d 33 (collecting New York cases); *People v. Carrieri*, 2004, 778 N.Y.S.2d 854, 855, 3 Misc.3d 870.

ccc

n. 300. “Obvious”

People v. Shepherd, 2004, 689 N.W.2d 721, 726, 263 Mich.App. 665; *People v. Hardy*, 2005, 824 N.E.2d 953, 956, 4 N.Y.3d 192, 791 N.Y.S.2d 953 (same); *People v. Woods*, 2004, 779 N.Y.S.2d 494, 496, 9 App.Div.3d 293 (because opinion in Crawford specifically identifies as “testimonial”); *People v. A.S. Goldmen, Inc.*, 2004, 779 N.Y.S.2d 489, 491, 9 App.Div.3d 283 (same).

ccci

n. 301. Offering plea

U.S. v. Burns, C.A.2d, 2006, 164 Fed.Appx. 45, 48 n. 2.

But see

People v. Couillard, Colo.App.2005, 131 P.3d 1146, 1152 (applying to judicial notice of a petition to plead guilty of another used as evidence against defendant).

cccii

n. 302. Friends and family

“[S]tatements made to family, friends, and acquaintances without an intention for use at trial have consistently been held not to be testimonial, even if highly incriminating to another.” *Mosteller, Crawford v. Washington: Encouraging and Ensuring The Confrontation of Witnesses*, 2005, 39 U.Rich.L.Rev. 511, 540, quoted in *State v. Staten*, S.C.App.2005, 610 S.E.2d 823, 831.

ccciii

n. 303. Not have belief

State v. Heggart, La.App.2005, 808 So.2d 1245, 1249 (when victim told girl friend over cell phone that he was talking to defendant, he could not expect this to be used in court because he did not know the defendant was about to kill him); *State v. Mizenko*, 2006, 127 P.3d 458, 465, 330 Mont. 229 (bruised and out-of-breath declarant accuses her husband of having beaten her; though seeking assistance, she had no objective reason to believe her statement would be used in court); *State v. Feliciano*, R.I.2006, 2006 WL 1932661, p. 8 (murder victim could not foresee that his statement to a friend identifying one of the gang members who had previously attacked him would be used in prosecution of them for later killing him).

Compare

Smith v. State, Tex.App.2006, 187 S.W.3d 186, 193 (braggadocio among beer-swilling buddies not “testimonial” though admitted as a declaration against interest).

ccciv

n. 304. Policy

One would suppose that a “private” accusation is more likely to be irresponsible than one made in public; hence, if the policy of confrontation is to encourage responsible accusations, this exception seems perverse.

cccv

n. 305. Did not accuse

U.S. v. Hansen, C.A.1st, 2006, 434 F.3d 92, 100 (“casual remarks” among conspirators not in furtherance of conspiracy but which they could not reasonably expect to be used in later trial); Horton v. Allen, C.A.1st, 2004, 370 F.3d 75, 84 (statements made during “private conversation” are “nontestimonial” because declarant has no expectation that the statements would be used in court; the court might also have noted that the statements at issue accused no one of crime but simply provided circumstantial evidence of guilt); State v. Smith, 2005, 881 A.2d 160, 179 n. 11, 275 Conn. 205, 232 n. 11 (statements to mother and friends by murder victim expressing fear of defendant because she thought he might kill her or members of her family not “testimonial” because not within any of the Crawford categories or formulations); People v. Redeaux, 2005, 823 N.E.2d 268, 270, 355 Ill.App.3d 302 (calls between undercover agent and persons arranging drug buy from defendant more like a “casual conversation” than “structured police questioning” where officer did not ask for defendant’s identity or any other facts not germane to making the deal).

But see

People v. Wahlert, 2005, 31 Cal.Rptr.3d 603, 615, ___ Cal.App.4th ___ (where police induce one suspect to make a “pretext call” to elicit admissions from accomplice, this is not the sort of “casual conversation” that Crawford implies is not “testimonial”).

cccvi

n. 306. Courts recognize

U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 181 (collecting cases); Hammon v. State, Ind.2005, 829 N.E.2d 444, 454 (collecting cases).

See also

Other cases appear in note 167 and subsequent notes above.

cccvii

n. 307. “Confidants”

State v. Staten, S.C.App.2005, 610 S.E.2d 823, 831.

cccviii

n. 308. Calls sister

Bray v. Commonwealth, Ky.2005, 177 S.W.3d 741, 745.

cccix

n. 309. Roommate

State v. Staten, S.C.App.2005, 610 S.E.2d 823, 836 (the day before the crime, victim told witness that defendants “pulled a gun” on him).

cccix

n. 310. Neighbor

State v. Mizenko, 2006, 127 P.3d 458, 465, 330 Mont. 229 (shortly after crime, victim tells neighbor that her husband has beaten her; not “testimonial”).

cccxi

n. 311. Jail guards

People v. Shepherd, 2004, 689 N.W.2d 721, 729, 263 Mich.App. 665.

cccxi

n. 312. Writers think

See, e.g., Friedman & McCormack, Dial-In Testimony, 2002, 150 U.Pa.L.Rev. 1171.

See also

Note, Resolving the Ambiguity Behind The Bright-Line Rule: The Effect of Crawford v. Washington on The Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions, 2006 U.Ill.L.Rev. 205; Note, Calling Crawford: Minnesota Declares A 911 Call Non-Testimonial in State v. Wright, 2006, 58 Me.L.Rev. 249.

cccxi

n. 313. Treated categorically

U.S. v. Hadley, C.A.6th, 2005, 431 F.3d 484, 503-505 (collecting state and federal cases); U.S. v. Hinton, C.A.3d, 423 F.3d 355, 357 (purpose of 911 call to seek police help in preventing danger, not to create evidence for trial; ignores that by the time call was placed, the danger had passed so police could only prevent recurrence by arresting defendant); U.S. v. Arnold, C.A.6th, 2005, 410 F.3d 895, 903 (even though one purpose of 911 call may have been to procure assistance, where the witness was the only witness to the crime, she could reasonably anticipate that what she said would be used against the perpetrator); Leavitt v. Arave, C.A.9th, 2004, 383 F.3d 809, 830 n. 22 (declarant called 911 to say that defendant was trying to break into her home; not “testimonial” because seeking help, not prosecution); U.S. v. Todd, C.A.11th, 2005, 157 Fed.Appx. 108, 110 (collecting cases but using harmless error to evade); Packer v. State, Ala.Crim.App. 2005, 926 So.2d 1076, 1079; State v. King, App.2006, 132 P.3d 311, 316, ___ Ariz. ___ (collecting cases); People v. Mitchell, 2005, 32 Cal.Rptr.3d 613, 622, 131 Cal.App.4th 1210 (collecting conflicting cases); People v. Caudillo, 2004, 19 Cal.Rptr.3d 574, 587, 122 Cal.App.4th 1417 (collecting and analyzing New York and California cases); Towbridge v. State, Fla.App.2005, 898 So.2d 1205 (where falls within state version of Rule 803(1) Houston Oxygen exception); Pitts v. State, 2005, 612 S.E.2d 1, 5, 272 Ga.App. 182

(wife called 911 after estranged husband entered home and tore phone from her hand on first try to call to report that he was violating protective order; not “testimonial” because made for purpose of preventing crime, not prosecuting it); *Gamble v. State*, Ind.App. 2005, 831 N.E.2d 178, 182 (refusing to differentiate calls from bystanders from those made by victims; both nontestimonial); *People v. Marino*, 2005, 800 N.Y.S.2d 439, 440, 21 App.Div.3d 430 (perfunctory analysis); *People v. Mackey*, 2004, 785 N.Y.S.2d 870, 872, 5 Misc.3d 709 (collecting cases); *People v. Moscat*, Bronx Co.Crim.Ct. 2004, 777 N.Y.S.2d 875, 3 Misc.3d 739 (not “testimonial”); *State v. Staten*, S.C.App.2005, 610 S.E.2d 823, 832 (collecting cases); *Bray v. Commonwealth*, Ky.2005, 177 S.W.3d 741, 745 (collecting cases on 911 calls for use as analogy to call to sister for help); *State v. Maclin*, Tenn.2006, 183 S.W.3d 335, 346 n. 10 (collecting cases); *Ruth v. State*, Tex.App. 2005, 167 S.W.3d 560, 569 (“typical” 911 call seeking police assistance in domestic disturbance not “testimonial”); *Salt Lake City v. Williams*, Utah App.2005, 128 P.3d 47, 53 (collecting conflicting cases); *State v. Davis*, 2005, 111 P.3d 844, 849, 154 Wash.2d 291, 302 (not “testimonial” when call made for help rather than to report crime); *State v. Moses*, 2005, 119 P.3d 906, 910, 129 Wash.App. 718 (discussing Washington cases); *State v. Mason*, 2005, 110 P.3d 245, 249 n.17, ___ Wash.App. ___ (collecting cases); *State v. Powers*, 2004, 99 P.3d 1262, 1263, 124 Wash.App. 92 (collecting cases but rejecting per se categorization).

cccxiv

n. 314. Courts differ

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under *Crawford v. Washington*, 2006, 94 Geo.L.J. 581, 613.

ccc xv

n. 315. Excited utterances

U.S. v. Brito, C.A.1st, 2005, 427 F.3d 53, 50 (excited utterances made during call); *U.S. v. Brun*, C.A.8th, 2005, 416 F.3d 703, 707 (where qualifies as an excited utterance); *Bartee v. State*, Fla.App.2006, 922 So.2d 1065, 1070 (when introduced as excited utterances or under the Houston Oxygen exception); *Williams v. State*, Fla.App.2005, 909 So.2d 599 (when admitted as an excited utterance); *State v. Byrd*, 2005, 828 N.E.2d 133, 136, 160 Ohio App.3d 538; *People v. Isaac*, N.Y.D.C.2004, 791 N.Y.S.2d 872, 4 Misc.3d 1001(A).

Compare

People v. West, 2005, 823 N.E.2d 82, 91, 355 Ill.App. 28, 291 Ill.Dec. 72 (collecting cases and drawing from them the rule that parts of 911 call relating victim’s name, address, nature of crime, and medical needs are not “testimonial” but those describing vehicle and direction of flight and property stolen are “testimonial”).

See also

For categorical treatment of excited utterances, see blow, text at notecall 357.

ccc xvi

n. 316. Not “structured”

People v. Sanchez, 2006, 41 Cal.Rptr.3d 892, 901, 138 Cal.App.4th 1085 (911 operator did not engage in “structured questioning” when she asked callers for description of car driven by hit-and-run driver and asked if they got the license plate number; not “testimonial” even though callers intended the information they provided be used to arrest the driver and hold him liable for injuries suffered by victims); People v. Corella, 2004, 18 Cal.Rptr.3d 770,776, 122 Cal.App.4th 461 (because initiated by declarant and police operator is determining the appropriate police response, not planning for trial); Marquardt v. State, 2005, 882 A.2d 900, 916, 164 Md.App. 95 (where victim dialed 911 and left the line open while she struggled with defendant, her statements not in response to police questioning or its functional equivalent); People v. Coleman, 2005, 791 N.Y.S.2d 112, 114, 16 App.Div.3d 254 (request for description of attacker not “structured questioning” but only a question asked in an emergency situation to “help the police nab” perpetrators of attack in progress at time of the call); Kearney v. State, Tex.App.2005, 181 S.W.3d 438, 442 (statements to police when police are called shortly after crime not “testimonial” because not initiated by police and not formal or structured).

But see

People v. Dobbin, 2004, 791 N.Y.S.2d 897, 903, 6 Misc.3d 892 (911 call resulted in a police interrogation designed to identify the perpetrator for prosecutorial purposes); People v. Cortes, 2004, 781 N.Y.S.2d 401, 405-406, 4 Misc.3d 575 (collecting descriptions from police websites to show that they ask callers to structure their calls to elicit “testimonial” statements).

cccxvii

n. 317. Summon help

State v. King, App.2006, 132 P.3d 311, 317, ___ Ariz. ___ (calls that are “loud cries for help” are nontestimonial); People v. Sanchez, 2006, 41 Cal.Rptr.3d 892, 901, 138 Cal.App.4th 1085 (purpose of 911 calls made by witnesses to drunk driver’s colliding with other cars was to assist police in arresting the driver to prevent harm to others and to assist injured person in future tort suit; but not “testimonial” because 911 operator not like a Tudor justice of the peace); People v. Caudillo, 2004, 19 Cal.Rptr.3d 574, 587, 122 Cal.App.4th 1417 (purpose of anonymous 911 caller was to make an informal report of shooting to police so they could take appropriate action to protect the community; since caller never said this, not clear how appellate court knows this); Marquardt v. State, 2005, 882 A.2d 900, 915, 164 Md.App. 95 (where victim dialed 911 as defendant dragged her out of truck, struck her several times, and threatened to kill her); Commonwealth v. Jackson, Mass.Super.2005, 2005 WL 2740579, p. 3 (victim called 911 to report man had broken into her home and might still be there; not per se “testimonial” since questions all designed to determine danger to her and to responding officers); State v. Wright, Minn.2005, 701 N.W.2d 802, 810 (collecting cases holding such calls per se “nontestimonial”); State v. Mizenko, 2006, 127 P.3d 458, 463, 330 Mont. 229 (declarant alerting police to immediate danger has less expectation that the state will use statements at trial); People v. Royster, 2005, 795 N.Y.S.2d 560, 561, 18 App.Div.3d 375 (operator only

asked if caller was injured and for her location); *People v. Coleman*, 2005, 791 N.Y.S.2d 112, 114, 16 App.Div.3d 254 (911 caller must have been seeking medical assistance for victims of attack because he told the operator they were both “bleeding real bad”); *People v. Conyers*, 2004, 777 N.Y.S.2d 274, 276, 4 Misc.3d 346 (mother who called 911 in panic and terror wanted to stop assault then in progress, not create evidence for trial); *Neal v. State*, Tex.App.2006, 186 S.W.3d 690, 693 (calls made to summon help while crime is in progress and declarant still in personal danger not normally “testimonial”; collecting Texas cases); *Kearney v. State*, Tex.App.2005, 181 S.W.3d 438, 443; *State v. Saunders*, 2006, 132 P.3d 743, 748, ___ Wash.App. ___ (call reporting that her boy friend had grabbed her by the throat, threw her against wall, and trashed her cell phone was seeking help and protection against him, not trying to aid a future prosecution); *State v. Davis*, 2005, 111 P.3d 844, 849, 154 Wash.2d 291, 302 (and on excited utterance rationale).

But see

State v. King, App.2006, 132 P.3d 311, 317, ___ Ariz. ___ (calls made for the primary purpose of identifying a suspect or providing evidence of a crime that has already occurred usually “testimonial”); *Lagunas v. State*, Tex.App.2005, 187 S.W.3d 503, 517 (that person was making a “plea for assistance” a consideration in determining whether an excited utterance is “testimonial”)

ccc xviii

n. 318. Use as analogy

People v. Ruiz, L.A.Super.2004, 2004 WL 2383676 p. 6 (using 911 cases as analogy to hold statements made to police responding to a 911 call were “testimonial”); *State v. Lasnetski*, Minn.App. 2005, 696 N.W.2d 387, 393 (wife on cellphone with defendant in attempt to prevent him from committing suicide relays his statements to officer; analogized to a 911 call); *State v. Forrest*, 2004, 596 S.E.2d 22, 26-27, 164 N.C.App. 272 (since victim’s excited utterance on being rescued from knife-wielding assailant resembled a 911 call, statement was “non-testimonial”); *Bray v. Commonwealth*, Ky.2005, 177 S.W.3d 741, 745 (wife calling sister to report husband was stalking her at the time of the call analogized to 911 call); *State v. Mason*, 2005, 110 P.3d 245, 247, ___ Wash.App. ___ (statements made by victim to officials while seeking protection from defendant not “testimonial” by analogy to 911 cases).

But see

State v. Allen, 2005, 614 S.E.2d 361, 366, ___ N.C.App. ___ (distinguishing *Forrest* on the facts and holding statement elicited from victims by police questioning 20 minutes after the crime was “testimonial”)

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n. 319. Knows police use

U.S. v. Brito, C.A.1st, 2005, 427 F.3d 53, 60 (since most people understand that 911 calls reporting criminal activity are recorded for use in prosecution, this suggests that they are testimonial under *Crawford*; but distinguishing excited utterances made

during such calls); Commonwealth v. Jackson, Mass.Super.2005, 2005 WL 2740579, p. 3 (person who calls 911 to report presence of intruder in her home seeks “assistance” but must know that police will “assist” her by finding, arresting, and prosecuting the perpetrator); People v. Dobbin, 2004, 791 N.Y.S.2d 897, 903, 6 Misc.3d 892 (person calling 911 must have an objective belief that the statement will lead to the arrest and prosecution of the perpetrator); People v. Cortes, 2004, 781 N.Y.S.2d 401, 405, 4 Misc.3d 575 (television and movies have made public aware that function of 911 number includes gathering “testimonial statements”).

Compare

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 613 (arguing Cortes approach is best because though not apparent, official inducement is clear).

ccccxx

n. 320. Reject categorical

State v. King, App.2006, 132 P.3d 311, 317-318, ___ Ariz. ___ (should be judged on case-by-case basis; some calls may include both “testimonial” and nontestimonial statements so should evaluate each separately);-State v. Wright, Minn.2005, 701 N.W.2d 802, 811 (rejecting categorical rule that all calls are nontestimonial); State v. Mizenko, 2006, 127 P.3d 458, 463, 330 Mont. 229 (whether reasonable declarant would expect 911 call to be used prosecutorially depends on circumstances); People v. Dobbin, 2004, 791 N.Y.S.2d 897, 903, 6 Misc.3d 892 (finding bystanders call reporting a robbery in progress to be “testimonial”); Campos v. State, Tex.App.2005, 186 S.W.3d 93, 97 (two questions and statement to 911 operator that declarant was nervous not “testimonial” under any of the Crawford tests); Kearney v. State, Tex.App.2005, 181 S.W.3d 438, 443; Salt Lake City v. Williams, Utah App.2005, 128 P.3d 47, 53 (must be done on case-by-case basis); State v. Moses, 2005, 119 P.3d 906, 910, 129 Wash.App. 718 (dictum; must look at all circumstances); State v. Davis, 2005, 111 P.3d 844, 849, 154 Wash.2d 291, 302 (where declarant called 911, then hung up and was crying and hysterical when operator called her back, she was seeking help when she said defendant “was here jumping on me again” in violation of protective order so accusation was not “testimonial”) [this decision was affirmed by the U.S. Supreme Court; see § 6371.3, this supplement]; State v. Powers, 2004, 99 P.3d 1262, 1266, 124 Wash.App. 92 (where declarant called 911 to accuse defendant of violating protective order she did so to assist in his apprehension and prosecution, not to seek protection; hence, “testimonial”).

See also

Marquardt v. State, 2005, 882 A.2d 900, 916, 164 Md.App. 95 (declining to decide issue categorically since on facts 911 call clearly nontestimonial).

ccccxi

n. 321. Anonymous accusations

For an example of an anonymous 911 call, see U.S. v. Brito, C.A.1st, 2005, 427 F.3d 53, 55, 56.

Compare

U.S. v. Andrews, C.A.11th, 2005, 135 Fed.Appx. 290, 292 (using harmless error to evade issue where anonymous caller accused defendant of threatening people with a gun).

See also

In some states, the definition of “hearsay” in Rule 801 has been interpreted to bar the admission of statements if the declarant is not known. State v. Marbury, 2004, 2004 WL 758404 ¶ 45.

cccxxii

n. 322. Court’s condemnation

See, e.g., Greene v. McElroy, 1959, 79 S.Ct. 1400, 360 U.S. 474, 3 L.Ed.2d 1377 discussed in § 6360, p. 759, in the Main Volume.

See also

State v. Branch, 2005, 865 A.2d 673, 678, 182 N.J. 338 (“the right of confrontation protect[s] a defendant from the incriminating statements of a faceless accuser who remains in the shadows and avoids the light of court”).

cccxxiii

n. 323. Looking at exception

Courts who do this may still be under the influence of the Roberts decision which made statements pass confrontation muster if they fell under a “firmly rooted” hearsay exception. See § 6367 in the main volume.

cccxxiv

n. 324. Excited 911 calls

See above, text at notecall 316.

cccxxv

n. 325. Create exception

Whether or not the Supreme Court will allow such exceptions may become clear when the Court decides the Davis-Hammon cases which were pending before the Court when these words were written.

cccxxvi

n. 326. “Exceptions not testimonial”

124 S.Ct. at 1367, 541 U.S. at 56 (apparently supposing these were “well established by 1791”).

cccxxvii

n. 327. Differing policies

As we shall see below, text at notecall 342, most co-conspirators statements are “legally operative conduct” and not hearsay at all.

cccxxviii

n. 328. “Estoppel by mouth”

See, e.g., U.S. v. Brown, C.A.11th, 2006, 441 F.3d 1330, 1359 (defendant cannot seriously claim that his own statements should be excluded because he did not have a chance to cross-examine himself); State v. Torres, 121 P.3d 429, 437, 280 Kan. 309 (similar).

But see

State v. Nguyen, 2006, 133 P.3d 1259, 1278, ___ Kans.App. ___ (arguing since the only way he can “cross-examine” himself is by waiving his Fifth Amendment privilege not to testify, this unconstitutionally requires him to waive one right to vindicate another; court rejects argument).

cccxxix

n. 329. Not “firmly rooted”

Gonzalez v. Fairman, C.A.9th, 2002, 49 Fed.Appx. 97, 99.

cccxxx

n. 330. Judges supposed

U.S. v. Gibson, C.A.6th, 2005, 409 F.3d 325, 338.

cccxxxi

n. 331. Needs no protection

State v. Robinson, 2005, 109 P.3d 185, 189, 33 Kans.App. 773.

But see

State v. Torres, 121 P.3d 429, 437, 280 Kan. 309 (arguing that since he can vindicate his Sixth Amendment right only by waiving his Fifth Amendment right not to testify, this violates the doctrine of “unconstitutional conditions” enunciated in Simmons v. U.S., 1968, 88 S.Ct. 967, 390 U.S. 377, 19 L.Ed.2d 1247; court rejects argument on ground that defendant was not “compelled” to make statements he now seeks to exclude).

cccxxxii

n. 332. Not “testimonial”

U.S. v. Brown, C.A.11th, 2006, 441 F.3d 1330, 1359 (party’s own admission offered against him not “testimonial”); Flonnory v. State, Del.2006, 893 A.2d 507, 522 (same); State v. Konohia, Haw.App.2005, 107 P.3d 1190, 1199 n.11, 107 Haw. 517; State v. Torres, 121 P.3d 429, 437, 280 Kan. 309; State v. Adams, 2005, 124 P.3d 19, 31, 280 Kan. 494; State v. Robinson, 2005, 109 P.3d 185, 189, 33 Kans.App. 773.

Compare

U.S. v. Briscoe-Bey, C.A.3d, 2005, 126 Fed.Appx. 551, 553 (apparently assuming that the defendant’s own statements are not “testimonial”).

cccxxxiii

n. 333. Adoptive admissions

U.S. v. Latysheva, C.A.9th, 2006, 162 Fed.Appx. 720, 724 (adoptive admission under Rule 801(d)(2) raises no confrontation issue even when admitted against codefendants); People v. Combs, 2004, 22 Cal.Rptr.3d 61, 79, 34 Cal.4th 821, 101 P.3d 1007 (what defendant says comes in as straight admission, what declarant says comes in to show effect on defendant; hence, not “testimonial”); King v. State, Tex.App.2006, 189 S.W.3d 347, 361 (statement not in furtherance of conspiracy admissible as adoptive admission over Crawford objection);

cccxxxiv

n. 334. True “witness”

Since the defendant does not know that he will need confrontation at the time he goes along with the statements, his “adoption” cannot amount to a “waiver” of the right.

cccxxxv

n. 335. Accomplice “testimonial”

State v. Hernandez, Fla.App. 2004, 875 So.2d 1271, 1273.

cccxxxvi

n. 336. Treat similarly

U.S. v. Jimenez, C.A.1st, 2005, 419 F.3d 34, 44 (where defendant repeats statements of codefendant in his own confession, he adopts the statement, thereby becoming a “witness” himself who he has no right to confront); People v. Jurado, 2006, 41 Cal.Rptr.3d 319, 355, 38 Cal.4th 72, 131 P.3d 400 (treating admissions and adoptive admissions as identical for confrontation purposes).

cccxxxvii

n. 337. Bruton doctrine

U.S. v. Gibson, C.A.6th, 2005, 409 F.3d 325, 337.

See also

The Bruton rule is explained in § 6362, p. 781.

cccxxxviii

n. 338. “Authorized” or “vicarious”

See Evidence Rules 801(d)(2)(C) and (D).

cccxxxix

n. 339. Rarity of prosecutions

It may also reflect uncertainty about the application of the right of confrontation to corporations. Since a corporation cannot stand “face to face” with its accusers, the noninstrumental justifications for the right seem weaker with respect to such artificial “persons.” As a matter of history, one can doubt that the Founders supposed the Sixth Amendment rights extended to corporations.

cccxl

n. 340. Analogy to 801(d)(2)

When we find them, the cases will appear in this note.

cccqli

n. 341. Conspirators nontestimonial

U.S. v. Underwood, C.A.11th, 2006, 446 F.3d 1340, 1347; U.S. v. Faulkner, C.A.10th, 2006, 439 F.3d 1221, 1225 (but unclear if Roberts applies); U.S. v. Hansen, C.A.1st, 2006, 434 F.3d 92, 100; U.S. v. Del Rio, C.A.11th, 2006, 168 Fed.Appx. 923, 929; U.S. v. Martinez, C.A.6th, 2005, 430 F.3d 317, 329 (collecting cases); U.S. v. Jenkins, C.A.7th, 2005, 419 F.3d 614, 618 (assuming that because Evidence Rules admit statements of coconspirators as “nonhearsay”, everything said of wiretaps is per se nontestimonial); U.S. v. Felton, C.A.1st, 2005, 417 F.3d 97, 103 n. 2; U.S. v. Delgado, C.A.5th, 2005, 401 F.3d 290, 299; Ferguson v. Roper, C.A.8th, 2005, 400 F.3d 635, 639; U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 181 (collecting cases); State v. Cunningham, La. 2005, 903 So.2d 1110, 1119; Day v. Duncan, C.A.9th, 2005, 121 Fed.Appx. 211, 213; U.S. v. Johnson, C.A.3d, 2005, 119 Fed.Appx. 415, 417; U.S. v. Saget, C.A.2d 2004, 377 F.3d 223, 228; U.S. v. Lee, C.A.8th, 2004, 374 F.3d 637, 644 (made in furtherance of conspiracy); U.S. v. Manfre, C.A.8th, 2004, 368 F.3d 832, 838 (statements by co-conspirator attempting to conceal conspiracy); People v. Redeaux, 2005, 823 N.E.2d 268, 270, 355 Ill.App.3d 302 (tape of statements defendant and fellow conspirators made in arranging and consumating a drug buy); Jones v. State, Ind.App.2005, 834 N.E.2d 167, 168 (statement of coconspirator threatening victim of charged conspiratorial robbery); State v. Jackson, 2005, 118 P.3d 1238, 1254, 280 Kan. 16 (third person overheard phone conversation in which defendant and another hatched plot to kill); Bush v. State, Miss.2005, 895 So.2d 836, 845-846 (statements of those planning robbery); State v. Staten, S.C.App.2005, 610 S.E.2d 823, 834 (collecting cases); King v. State, Tex.App.2006, 189 S.W.3d 347, 359; Wiggins v. State, Tex.App. 2004, 152 S.W.2d 656, 659 (relying on Saget); State v. Williams, 2006, 128 P.3d 98, 101, ___ Wash.App. ___; State v. Savanh, 2005, 707 N.W.2d 549, 555, ___Wis.2d ___ (statements made in furtherance of conspiracy are “by their nature” nontestimonial).

cccqlii

n. 342. Multiple rationalia

Or as they say in the Academy, “the result is overdetermined.”

cccqliii

n. 343. Not “hearsay”

U.S. v. Faulkner, C.A.10th, 2006, 439 F.3d 1221, 1225-1227 (good explanation of this point).

On the inapplicability of Crawford to statements that are not “hearsay”, see below, text at notecall 471.

See also

U.S. v. Holmes, C.A.5th, 2005, 406 F.3d 337, 349 (recognizing this even where the co-conspirator's statement was made in a civil deposition).

cccxliv

n. 344. Utterance as element

U.S. v. Stewart, C.A.2d, 2006, 433 F.3d 273, 291 (statements made as part of conspiracy to obstruct justice); U.S. v. Holmes, C.A.5th, 2005, 406 F.3d 337, 349.

cccxlv

n. 345. Not "in furtherance"

For one such case, see *Wiggins v. State*, Tex.App. 2004, 152 S.W.2d 656, 659 (applied to statement by coconspirator to a friend after the crime, describing the way the crime was committed).

cccxlvi

n. 346. Nature not "testimonial"

U.S. v. Allen, C.A.9th, 2005, 425 F.3d 1231, 1235 (collecting cases); U.S. v. Martinez, C.A.6th, 2005, 430 F.3d 317, 329 (collecting cases); U.S. v. Holmes, C.A.5th, 2005, 406 F.3d 337, 348 n. 16 (collecting authorities).

cccxlvii

n. 347. Echo dictum

124 S.Ct. 1367, 514 U.S. at 56: "Most of the hearsay exceptions covered statements that by their nature were not testimonial--for example, business records or statements in furtherance of a conspiracy."

cccxlviii

n. 348. Overlook "in furtherance"

Ferguson v. Roper, C.A.8th, 2005, 400 F.3d 635, 639 (whether statement made "in furtherance of conspiracy" irrelevant to question of whether "testimonial").

cccxlx

n. 349. Coconspirator "testimonial"

U.S. v. Logan, C.A.2d, 2005, 419 F.3d 172, 178-179 (where coconspirators gave false alibis under police interrogation they would have expected that the statements might be used in later judicial proceedings); *State v. Cox*, La.App.2004, 876 So.2d 932, 938 (statement by co-conspirator during police interrogation; "testimonial").

cccl

n. 350. Induce admissions

People v. Wahlert, 2005, 31 Cal.Rptr.3d 603, 616, ___ Cal.App.4th ___ (where statements not made during course of conspiracy, Crawford dictum does not apply; hence, statements made by defendant during "pretext call" placed by former

conspirator at the urging of the police to obtain incriminating admission is “testimonial”).

But see

People v. Redeaux, 2005, 823 N.E.2d 268, 270, 355 Ill.App.3d 302 (undercover agent did not ask about defendant’s identity or any other facts not relevant to consummating proposed drug sale; not “testimonial”).

cccli

n. 351. False deposition

U.S. v. Holmes, C.A.5th, 2005, 406 F.3d 337, 349.

ccclii

n. 352. Not “accusation”

See, e.g., U.S. v. Manfre, C.A.8th, 2004, 368 F.3d 832, 837 (arsonist’s half-brother testifies that he heard arsonist making secretive phone calls to defendant, including something about a propane tank and when asked about these calls, arsonist said defendant wanted to keep them secret and lied about their substance); State v. Heggart, La.App.2005, 808 So.2d 1245, 1249 (when victim told girl friend over cell phone that he was talking to defendant, he could not expect this to be used in court because he did not know the defendant was about to kill him).

cccliii

n. 353. Apply to 803(1)

State v. Banks, Ohio App.2004, 2004 WL 2809070 ¶ 18 (court supposes that all common law exceptions, including excited utterances and present sense impressions, are also exceptions to the right of confrontation under Crawford).

cccliv

n. 354. Originally justified

In addition, because the statement was being made as the event was being perceived, misrecollection was unlikely. See, e.g., Houston Oxygen Co. v. Davis, 1942, 161 S.W.2d 474, 139 Tex. 1.

ccclv

n. 355. Use in prosecution

For example, when made in a 911 call. Compare Towbridge v. State, Fla.App.2005, 898 So.2d 1205 (not “testimonial” where falls within state version of Rule 803(1) Houston Oxygen exception).

ccclvi

n. 356. Expanded exception

See vol. 30B, § 7042.

ccclvii

n. 357. Per se “nontestimonial”

U.S. v. Hadley, C.A.6th, 2005, 431 F.3d 484, 503 (collecting cases); U.S. v. Brito, C.A.1st, 2005, 427 F.3d 53, 60 (collecting cases adopting per se approach and rejecting them); U.S. v. Brun, C.A.8th, 2005, 416 F.3d 703, 707; Mungo v. Duncan, C.A.2d, 2004, 393 F.3d 327, 331 (dictum); U.S. v. Rashid, C.A.8th, 2004, 383 F.3d 769, 777 (dictum); U.S. v. Webb, D.C.Super.2004, 2004 WL 2726100. p. 3 (most courts take this position).

State cases

Anderson v. State, Alaska App. 2005, 111 P.3d 350, 354 (“great majority” of cases hold that excited utterance to a police officer in response to “minimal questioning” is not “testimonial”); State v. Aguilar, App. 2005, 107 P.3d 377, 379, 210 Ariz. 377 (collecting cases); People v. Corella, 2004, 18 Cal.Rptr.3d 770,776, 122 Cal.App.4th 461; People v. King, Colo.App.2005, 121 P.3d 234, 239 (collecting cases purporting to show “almost all” courts that have considered the issue have taken this position); Herrera-Vega v. State, Fla.App. 2004, 888 So.2d 66, 68 (citing similar cases); Hammon v. State, Ind.2005, 829 N.E.2d 444, 453 (rejecting this doctrine, but collecting cases pro and con); People v. Marino, 2005, 800 N.Y.S.2d 439, 440, 21 App.Div.3d 430 (without any analysis of issue); People v. Isaac, N.Y.D.C.2004, 791 N.Y.S.2d 872, 4 Misc.3d 1001(A) (in 911 call); State v. Byrd, 2005, 828 N.E.2d 133, 136, 160 Ohio App.3d 538 (when applied to 911 calls); Commonwealth v. Eichele, Pa.Com.Pl.2004, 2004 WL 2002212, 66 Pa.D.& C.4th 460, 467 (statements made on discovering murder victim’s body in guest bedroom occupied by defendant); State v. Maclin, Tenn.2006, 183 S.W.3d 335, 349 (collecting cases espousing this view but arguing this is inconsistent with Justice Scalia’s analysis of White); Davis v. State, Tex.App.2005, 169 S.W.3d 660, 670 (collecting cases adopting per se rule but rejecting it); Key v. State, Tex.App.2005, 173 S.W.3d 72, 76 (rationale of exception inconsistent with Crawford’s notion of “testimony”; collecting cases); Ruth v. State, Tex.App. 2005, 167 S.W.3d 560, 568 (“spontaneous statements” to police); Salt Lake City v. Williams, Utah App.2005, 128 P.3d 47, 52 (when made to friend, not police); State v. Ohlson, 2005, 125 P.3d 990, 995, 131 Wash.App. 71 (relying on Ohrndorf, below); State v. Orndorff, 2004, 95 P.3d 406, 408, 122 Wash.App. 781 (what declarant said about calling 911 shortly after armed assailants left; no statements accusing anyone of anything); State v. Searcy, App.2005, 709 N.W.2d 497, 511, ___ Wis.2d ___ (cousin’s excited utterance at scene of defendant’s arrest that he had been staying with her lack the formal quality of the first two Crawford categories nor could she have anticipated its use for his prosecution even though it enabled officers to find the stolen property).

ccclviii

n. 358. Reliance on dictum

See, e.g., State v. Banks, Ohio App.2004, 2004 WL 2809070 ¶ 21 (supposing common law hearsay exceptions also exceptions to Sixth Amendment).

ccclix

n. 359. Lacks structure

See, e.g., *Key v. State*, Tex.App.2005, 173 S.W.3d 72, 76 (rationale of exception inconsistent with Crawford's notion of "testimony"; collecting cases).

ccclx

n. 360. Cannot contemplate

State v. Aguilar, App. 2005, 107 P.3d 377, 379, 210 Ariz. 377; *State v. Searcy*, App.2005, 709 N.W.2d 497, 512, ___ Wis.2d ___.

But see

Drayton v. U.S., D.C.Ct.App.2005, 877 A.2d 145, 149 (even a startled person must know that an identification of a suspect at the scene of the crime will be used against the suspect); *People v. Ruiz*, L.A.Super.2004, 2004 WL 2383676 p. 9 (passage of time and absence of any evidence that defendant was still agitated over defendant's acts make statements "testimonial"); *Howard v. State*, Fla.App.2005, 902 So.2d 878, 879 (excited accusation to deputy sheriff satisfies third Crawford definition of "testimonial"); *Mason v. State*, Tex.App.2005, 173 S.W.3d 105, 110 (rejecting argument that excited utterer cannot contemplate possible prosecutorial use of utterance); *Davis v. State*, Tex.App.2005, 169 S.W.3d 660, 672 (declarant who tells officers responding to 911 call that defendant tried to kill her must know that this accusation will be used against defendant); *Lopez v. State*, Fla.App. 2004, 888 So.2d 693, 699 (person who accuses defendant of kidnapping him in excited utterance to a police officer "surely knows" that statement will be used against defendant so statement is "testimonial").

ccclxi

n. 361. Child abuse

State v. Staten, S.C.App.2005, 610 S.E.2d 823, 835 (collecting cases).

See also

For the 911 call cases, see footnote 315, above.

ccclxii

n. 362. Reject per se

U.S. v. Arnold, C.A.6th, 2005, 410 F.3d 895, 902 (even if a statement qualifies as an excited utterance, it can still be "testimonial"); *U.S. v. Jordan*, D.C.Colo.2005, 2005 WL 513501 p. 4 (not an exception to Crawford requirements); *State v. Parks*, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (collecting cases and siding with those that reject the per se nontestimonial approach); *In re Fernando R.*, 2006, 40 Cal.Rptr.3d 61, 70, 138 Cal.App.4th 148 (citing California cases adopting per se view and rejecting them); *Lopez v. State*, Fla.App. 2004, 888 So.2d 693, 699 (rejecting per se rule; whether statement was "testimonial" turns on intent of speaker, not his emotional state); *State v. Mizenko*, 2006, 127 P.3d 458, 468, 330 Mont. 229 (rejecting dissent's claim that Crawford makes excited utterances per se "testimonial"); *State v. Allen*, 2005, 614 S.E.2d 361, 366 n. 2, ___ N.C.App. ___ (whether a statement was an excited utterance is not determinative, but in determining that statement was "testimonial" court could consider facts that disqualify the statement for the

exception); *Lagunas v. State*, Tex.App.2005, 187 S.W.3d 503, 520 (excited utterances can be “testimonial”); *Moore v. State*, Tex.App.2005, 169 S.W.3d 467, 473 (similar to *Spencer*, below); *Spencer v. State*, Tex.App. 2005, 162 S.W.3d 877, 880 (flatly rejecting this view; but collecting cases from other jurisdictions adopting it).

But see

Cassidy v. State, Tex.App. 2004, 149 S.W.3d 712, 739 (endorsing view that caselaw on excited utterances is “muddled”).

ccclxiii

n. 363. Depending on circumstances

U.S. v. Brito, C.A.1st, 2005, 427 F.3d 53, 61; *Stancil v. U.S.*, D.C.App.2005, 866 A.2d 799, 809 (after reviewing cases pro and con); *Drayton v. U.S.*, D.C.Ct.App.2005, 877 A.2d 145, 149; *In re Fernando R.*, 2006, 40 Cal.Rptr.3d 61, 76, 138 Cal.App.4th 148 (whether excited utterance is “testimonial” depends on circumstances); *State v. King*, App.2006, 132 P.3d 311, 316, ___ Ariz. ___ (rejecting view that automatically nontestimonial, citing *Parks*, below); *State v. Parks*, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (explaining this view); *Howard v. State*, Fla.App.2005, 902 So.2d 878, 879 (excited accusation of kidnapping to deputy sheriff; “testimonial”); *Lopez v. State*, Fla.App. 2004, 888 So.2d 693, 699 (depends on other indicia of intent of speaker such as recipient; collecting cases); *Demons v. State*, 2004, 595 S.E.2d 76, 80, 277 Ga. 724 (statement of murder victim to friend he had driven to hotel that defendant, who was trying to find him in hotel, was going to kill him; not “testimonial” because declarant could not foresee use in prosecution for his own murder); *Commonwealth v. Gonsalves*, 2005, 833 N.E.2d 549, 559, 445 Mass. 1 (rejecting argument that an excited utterer cannot think of creating evidence for use at trial); *State v. Hembertt*, 2005, 696 N.W.2d 473, 480, 269 Neb. 840; *People v. Watson*, N.Y.Ct.Ct.2004, 798 N.Y.S.2d 712, 5 Misc.3d 1013; *State v. Maclin*, Tenn.2006, 183 S.W.3d 335, 350 (collecting cases adopting this approach and following them); *Commonwealth v. Gray*, Pa.Super.2005, 867 A.2d 560, 576 (nothing inconsistent between a statement being both “excited” and “testimonial”); *Neal v. State*, Tex.App.2006, 186 S.W.3d 690, 693 (relying on *Wall*, below); *Wall v. State*, Tex.Crim.2006, 184 S.W.3d 730, 741 (claiming most Texas cases have adopted this view and endorsing it); *Davis v. State*, Tex.App.2005, 169 S.W.3d 660, 670 (collecting cases taking this view and adopting it); *Moore v. State*, Tex.App.2005, 169 S.W.3d 467, 474 (rejecting per se approach); *Tyler v. State*, Tex.App. 550, 554 (conflicting Texas cases on hospital statements by victims of violent crime distinguished on ground that present case involves no police interrogation); *Wilson v. State*, Tex.App.2004, 151 S.W.3d 694, 698 (not “testimonial” where declarant approached police at scene to inquire about fate of her car who did not engage in “structured” questioning but simply responded to her questions); *State v. Wilkinson*, 2005, 879 A.2d 445, 448 ___ Vt. ___ (excited utterance to cousin with no police present and no structured interrogation not “testimonial”); *State v. Walker*, 2005, 118 P.3d 935, 940, 129 Wash.App. 258 (statements during structured police questioning two hours after attack not

“testimonial”); State v. King, App.2005, 706 N.W.2d 181, 188, ___ Wis.2d ___ (statement of victim to police at hospital 90 minutes after the assault “testimonial” when given in response to structured police questioning despite admissibility as excited utterances under state law).

ccclxiv

n. 364. Induced by police

State v. Aguilar, App. 2005, 107 P.3d 377, 379, 210 Ariz. 377 (dictum; excited utterance elicited by police query might be “testimonial”); Manuel v. State, Fla.App.2005, 2005 WL 1130183 (excited utterance in response to officer’s direct questioning “testimonial”); Samarron v. State, Tex.App. 2004, 150 S.W.3d 701, 706-707 (reversing admission as an excited utterance of stationhouse statement made hours after the crime by witness who spoon-fed each sentence to hunt-and-peck typing officer; statement was not volunteered but was formal, written, and signed).

ccclxv

n. 365. Stabbing mother

Commonwealth v. Gray, Pa.Super.2005, 867 A.2d 560, 577.

But see

Lopez v. State, Fla.App. 2004, 888 So.2d 693, 700 (excited statement to police officer that declarant had been kidnapped at gunpoint and pointing to the perpetrator were “testimonial”).

ccclxvi

n. 366. Not “accusation”

See, e.g., State v. Searcy, App.2005, 709 N.W.2d 497, 512, ___ Wis.2d ___ (shouting to police arresting him that “that’s my cousin---you can’t do that!” and adding that he had been staying with her not “testimonial” even though it led police to stolen property).

ccclxvii

n. 367. Take cover

State v. Aguilar, App. 2005, 107 P.3d 377, 379, 210 Ariz. 377 (shouting assailant’s name and urging family members to hide as he dashed into house to get his gun).

ccclxviii

n. 368. “Medical treatment”

State v. Staten, S.C.App.2005, 610 S.E.2d 823, 833 (collecting cases).

ccclxix

n. 369. Courts justify

U.S. v. Peneaux, C.A.8th, 2005, 432 F.3d 882, 896 (statements made to physician giving medical aid to abused child presumed to be nontestimonial).

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 614 (arguing where doctor or social

worker functions as an agent of the police, statement should be “testimonial” irrespective of intent of declarant).

ccclxx

n. 370. Intent

Hobgood v. State, Miss.2006, 926 So.2d 847, 852 (five-year-old made accusations to seek medical and psychological treatment, not to further prosecution of his assailant); State v. Vaught, 2004, 682 N.W.2d 284, 291-292 268 Neb. 316 (because purpose was medical treatment, not to develop evidence for trial).

ccclxxi

n. 371. Could not believe

Saunders, 2006, 132 P.3d 743, 748, ___ Wash.App. ___ (person making accusations to paramedic and emergency room physician would not think she was creating evidence for trial); State v. Fisher, 2005, 108 P.3d 1262, 1269, 130 Wash.App. 1 (“objective observer” could not reasonably foresee that infant’s accusation of child abuse would be used to prosecute the abuser).

ccclxxii

n. 372. Not government

U.S. v. Peneaux, C.A.8th, 2005, 432 F.3d 882, 896 (because lacked “formality” of interrogation, no “substantial government involvement, nor any “law enforcement purpose”); People v. Vigil, Colo.2006, 127 P.3d 916, 922 (issue is whether doctor’s questioning of child as part of a sexual assault examination is the functional equivalent of a police interrogation; held, it is not because being part of prosecution sexual assault team does not make doctor a government official and part of purpose in questioning to see if medical assistance was required); State v. Scacchetti, Minn.2006, 711 N.W.2d 508, 515 (nurse employed by state hospital unit designed to ferret out cases of child abuse not a government employee so statements to her not “testimonial” even though they would be forwarded to prosecutor for whom nurse would testify if needed); State v. Castilla, 2005, 87 P.3d 1211, 1213, 131 Wash.App. 7 (accusation made by mentally impaired patient to nurse not “testimonial” as not a government official and not given with eye toward trial).

But see

Hobgood v. State, Miss.2006, 926 So.2d 847, 852 (statements might be “testimonial” had the police directed the victim to seek treatment for the purpose of discovering evidence in aid of investigation of child abuse).

ccclxxiii

n. 373. Statutes require

Such statutes mean that the declarant could objectively believe that her accusations would be sent to police for use in prosecution and that treating physicians will interrogate the child to see whether they need to report and to justify their suspicions should they later be criticized or sued for forwarding the accusation to the police.

But see

People v. Cage, 2004, 15 Cal.Rptr.3d 846, 855, 120 Cal.App.4th 770 (fact that physician ought to relay accusation of child abuse to the police does not suffice to make accusation “testimonial” under Crawford since Court did not adopt the tests it described).

See also

State v. Henderson, 129 P.3d 646, 654, ___ Kan.App. ___ (rejecting attempt to analogize interrogation of child by police and child protective services worker to interrogation by treating physician).

Compare

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 611-612 (argues should be nontestimonial because government involvement too attenuated).

ccclxxiv

n. 374. Doctor’s belief

People v. Vigil, Colo.2006, 127 P.3d 916, 923 (what counts is doctor’s subjective purpose; where he testifies that he questioned child to see if the child suffered injuries that needed medical attention, it makes no difference that he consulted with police first and then performed a forensic sexual abuse examination to find evidence that might be used at trial).

ccclxxv

n. 375. Unreality

See, e.g., State v. Sheppard, 2005, 842 N.E.2d 561, 567, 164 Ohio App.3d 372 (statements by child-victim to psychologist to whom she had been sent by “investigative social worker” not “testimonial” where psychologist testified that purpose of interrogation was treatment---testimony that clashes with fact that declarant had already been seen by a nurse-practitioner at hospital for this purpose); In re D.L., Ohio App.2005, 2005 WL 1119809, p. 3 (after hearing accusation of sexual abuse, social worker notified police and sent declarant to pediatric nurse in the child protection program at local clinic who interrogated child to elicit facts that would support an opinion of child abuse; held, not “testimonial” over vigorous dissent); Foley v. State, Miss.2005, 914 So.2d 677, 685 (statements to persons that fall within state version of Rule 803(4) part of “neutral medical evaluation” even though they were investigating suspected sex abuse).

ccclxxvi

n. 376. Reject categorical

People v. Vigil, Colo.2006, 127 P.3d 916, 922 (collecting conflicting cases from other jurisdictions); State v. Romero, App.2006, 133 P.3d 842, 858-850, 139 N.M. 386 (evidence showed victim was not seeking treatment; sexual assault nurse consulted three weeks after crime, no evidence of trauma that required treatment found, and nurse sought to elicit accusations).

ccclxxvii

n. 377. Apply Crawford

State v. Moses, 2005, 119 P.3d 906, 911-912, 129 Wash.App. 718 (while courts hold “testimonial” where prosecutorial purpose is clear, those cases do not apply where the child was taken to emergency room with serious injuries and the ER physician testified that he asked the victim “what happened?” in order to determine appropriate treatment).

ccclxxviii

n. 378. Bring in line

In re T.T., 2004, 815 N.E.2d 789, 803, 351 Ill.App.3d 976, 287 Ill.Dec. 145 (statements of five-year-old child abuse victim describing symptoms and their cause not “testimonial” but identification of defendant as the perpetrator was “testimonial”); People v. West, 2005, 823 N.E.2d 82, 879, 355 Ill.App. 28, 291 Ill.Dec. 72 (distinguishing between cause of symptoms and pain, including nature of the attack, and accusations of rape, including identity of perpetrator; only latter “testimonial”).

See also

Advisory Committee’s Note, F.R.Ev. 803(4)(while exception applies to statements of causation “reasonably pertinent” to treatment, it does not ordinarily apply “to statements as to fault”).

ccclxxix

n. 379. “Nature not testimonial”

See text at footnote 347, above.

ccclxxx

n. 380. Per se not “testimonial”

U.S. v. Hagege, C.A.9th, 2006, 437 F.3d 943, 958 (foreign business records admitted under 28 U.S.C.A. § 3505); U.S. v. King, C.A.4th, 2006, 161 Fed.Appx. 296, 297 (unspecified business record); U.S. v. Cervantes-Flores, C.A.9th, 2005, 421 F.3d 825, 832 (certificate of nonexistence of a record “closely resembles” a business record; therefore, nontestimonial); U.S. v. Shepard, C.A.11th, 2005, 154 Fed.Appx. 849, 851; U.S. v. Chan-Astorga, C.A.9th, 2005, 126 Fed.Appx. 364, 367 (business card and drug ledger not “testimonial”); Perkins v. State, Ala.Crim.2004, 897 So.2d 457, 464 (autopsy report admissible as business record and not “testimonial” because reliable); Bohsancurt v. Eisenberg, App.2006, 129 P.3d 471, 473, 212 Az. 182 (certificate that breath machine operating properly admitted and nontestimonial); People v. Taulton, 2005, 29 Cal.Rptr.2d 203, 206, 129 Cal.App.4th 1218 (dictum); Card v. State, Fla.App.2006, 927 So.2d 200, 202 (collecting cases); Peterson v. State, Fla.App.2005, 911 So.2d, 184, 185 (Department of Corrections records to prove defendant a repeat offender); Desue v. State, Fla.App.2005, 908 So.2d 1116, 1118; Sproule v. State, Fla.App.2006, 927 So.2d 46, 48; Rackoff v. State, 2005, 621 S.E.2d 841, 845 275 Ga.App. 737; State v. Leonard, La.App.2005, 915 So.2d 829, 833 (coroner’s report on cause of death); Rollins v. State, 2006, 897 A.2d 821, 831,

837, 392 Md. 455 (autopsy report not “testimonial” as a business record); State ex rel. L.R., 2006, 890 A.2d 343, 354, 382 N.J.Super. 605 (estimate of damages caused by criminal mischief prepared for juvenile court); Green v. DeMarco, Sup.Ct.Monroe Cty.2005, 812 N.Y.S.2d 772, 778, 11 Misc.3d 451 (breath test certifications not “testimonial” because they do not accuse anyone of a crime or prove an element of the charged crime; collecting other cases reaching similar result on other grounds); People v. Krueger, N.Y.Just.Ct.2005, 804 N.Y.S.2d 908, 911, 9 Misc.3d 950 (certification that breath test machine worked properly); People v. Durio, N.Y.Sup.Ct.2005, 794 N.Y.S.2d 863, 867, 7 Misc.3d 729 (certification that defendant did not have driver’s license);-State v. Godshalk, 2005, 885 A.2d 969, 973, 381 N.J.Super. 326; People v. Brown, 2005, 801 N.Y.S.2d 709, 9 Misc.3d 420 (report of results of DNA testing done for purposes of trial not “testimonial” under business records exception); State v. Forte, 2006, 629 S.E.2d 137, 143, 360 N.C. 427 (lab report that DNA from victim matched defendant’s); State v. Cook, Ohio.App.2005, 2005 WL 736671 (affidavit that breath test machine operated properly; (State v. Norman, 2005, 125 P.3d 15, 17, 19, 203 Or.App. 1 (certificate that breath test machine operated properly); Mitchell v. State, Tex.App.2005, 191 S.W.3d 219, 222 (autopsy report); Eslora v. State, Tex.App.2005, 2005 WL 763233, p. 4 (because lab report showing defendant had herpes did fit within the categories of “testimonial” evidence listed in Crawford it was admissible in child sexual abuse prosecution even though contains multiple hearsay made by a third party not under a business duty); State v. N.M.K., 2005, 118 P.2d 368, 372, 129 Wash.App. 155 (certified letter attesting that no driver’s license had been issued to defendant in prosecution for driving without one).

ccclxxxi

n. 381. Prove by affidavit

See above, text at notecall 246.

ccclxxxii

n. 382. Predate adoption

See, e.g., U.S. v. Cervantes-Flores, C.A.9th, 2005, 421 F.3d 825, 832 (supposing that the business records exception, which was created by statute in the 20th Century, was one of the hearsay exceptions “established at the time of the founding”).

ccclxxxiii

n. 383. Created by statute

See vol. 21, § 5005, p. 147 and following.

ccclxxxiv

n. 384. Created for litigation

Palmer v. Hoffman, 1943, 63 S.Ct. 477, 318 U.S. 109, 87 L.Ed. 645.

See also

Advisory Committee’s Note, F.R.Ev. 803(6) (explaining how Rule incorporates Palmer).

People v. Niene, N.Y.City Ct.2005, 798 N.Y.S.2d 891, 893, 8 Misc.3d 649 (affidavit prepared for use at trial cannot have been made “in the regular course of business” and thus does not qualify as a business record).

But see

Green v. DeMarco, Sup.Ct.Monroe Cty.2005, 812 N.Y.S.2d 772, 780, 11 Misc.3d 451 (New York rejects Palmer so records prepared for purposes of litigation are admissible); People v. Fisher, N.Y.City Ct.2005, 9 Misc.3d 1121(A), 2005 WL 2780884 p. 8 (records of breath test machine certifications have substantial administrative purpose so admissible as business records); People v. Krueger, N.Y.Just.Ct.2005, 804 N.Y.S.2d 908, 911, 9 Misc.3d 950 (even though prepared for litigation, not “testimonial” because not prepared for this specific case).

ccclxxxv

n. 385. Better-reasoned cases

See, e.g., People v. Mitchell, 2005, 32 Cal.Rptr.3d 613, 621, 131 Cal.App.4th 1210 (Court could not have meant that all documentary evidence that might qualify under expansive definition of “business record” was automatically nontestimonial); Card v. State, Fla.App.2006, 927 So.2d 200, 202 (collecting cases); Rollins v. State, 2006, 897 A.2d 821, 834, 392 Md. 455 (even if autopsy report falls within business or official records exceptions, it must still be evaluated using Crawford criteria to see if it is “testimonial”); State v. Crager, 2005, 844 N.E.2d 390, 396-397, 164 Ohio App.3d 816 (collecting and rejecting cases holding business records per se not “testimonial” in favor of case-by-case analysis using Crawford formulations).

ccclxxxvi

n. 386. Find “testimonial”

Smith v. State, Ala.Crim.2004, 898 So.2d 907, 916 (affidavit of autopsy surgeon of the cause of death, an essential element in a murder prosecution, held “testimonial”); People v. Johnson, Fla.App.2005, 929 So.2d 4, 7 (lab report offered as business record to prove that substance was “cocaine” “testimonial” to prove element of charged crime as intended “to bear witness against accused”); City of Las Vegas v. Walsh, 2005, 124 P.3d 203, 207, ___ Nev. ___ (affidavit of nurse that blood properly drawn from D.U.I. suspect “testimonial”); People v. Orpin, N.Y.Cty.Ct. 2005, 796 N.Y.S.2d 512, 515, 8 Misc.3d 768 (reading Crawford to require that business records satisfy the same test as other hearsay); State v. Melton, 2006, 625 S.E.2d 609, 612, ___ N.C.App. ___ (recognizing that business records can be “testimonial” but using harmless error to avoid issue); State v. Crager, 2005, 844 N.E.2d 390, 396, 164 Ohio App.3d 816 (lab report on DNA comparison “testimonial” as objective person would foresee its use at trial); Russeau v. State, Tex.Crim.2005, 171 S.W.3d 871, 880 (incident reports prepared by prison guards for use in disciplinary hearings “testimonial” and inadmissible at punishment phase of capital trial).

Compare

State v. Phillips, App.2005, 126 P.3d 546, 551, 138 N.M. 729 (due process right of confrontation applicable in probation revocation proceedings not satisfied where

“record custodian” testified to contents of documents in file recording events of which she had no personal knowledge).

ccclxxxvii

n. 387. Improperly admitted

See, e.g., *People v. Hernandez*, 2005, 794 N.Y.S.2d 788, 789, 7 Misc.3d 568 (police officer’s latent print report describing how print was lifted and processed “testimonial” and not admissible under business records exception).

ccclxxxviii

n. 388. Particular record

See, e.g., *Card v. State*, Fla.App.2006, 927 So.2d 200, 202 (DMV records not “testimonial” because not an accusation); *State v. Benefiel*, 2006, 128 P.3d 1251, 1253, ___ Wash.App. ___ (court record of judgment of conviction not “testimonial” because declarant could not reasonably believe it would be used by the prosecutor in a later trial).

ccclxxxix

n. 389. Invoke official records

U.S. v. Salazar-Gonzales, C.A.9th, 2006, 445 F.3d 1208, 1210 (INS “certificate of nonexistence of record” admissible to prove defendant lacked permission to enter the country); *Bohsancurt v. Eisenberg*, App.2006, 129 P.3d 471, 475, 212 Az. 182 (many courts have used this to admit crime lab affidavits); *People v. Durio*, N.Y.Sup.Ct.2005, 794 N.Y.S.2d 863, 864, 7 Misc.3d 729 (crime lab independent of prosecutor and autopsy report not prepared at prosecutor’s request so not “testimonial”); *Commonwealth v. Verde*, 2005, 827 N.E.2d 701, 705, 444 Mass. 279 (suggesting dictum applies to both business and official records); *State v. Forte*, 2006, 629 S.E.2d 137, 143, 360 N.C. 427 (lab report showing DNA match not “testimonial” and admissible as official or business record); *Mitchell v. State*, Tex.App.2005, 191 S.W.3d 219, 222 (autopsy report admissible as official or business record); *State v. Kronich*, 2006, 128 P.3d 119, 122, 131 Wash.App. 537 (since official records are analogous to business records that Crawford held not “testimonial”, Department of Licensing certificate of record showing defendant’s driving privileges revoked admissible in prosecution for driving with a suspended license; vigorous dissent).

cccxc

n. 390. Same historical error

Commonwealth v. Verde, 2005, 827 N.E.2d 701, 705, 444 Mass. 279 (claiming that the official records exception was recognized in 1791); *State v. Norman*, 2005, 125 P.3d 15, 17, 19, 203 Or.App. 1 (certificate that breath machine operated properly akin to business records that were not testimonial at common law; relying on prior state and outstate cases and extending William, below, to Sixth Amendment); *State v. William*, 2005, 110 P.3d 1114, 1115, 199 Or.App. 191 (relying on Cooley’s Gilded Age treatise on constitutional law---see § 6356, pp. 149-150 in the main volume---and Oregon constitutional law rather than the Sixth Amendment).

See also

State v. Conway, 1984, 690 P.2d 1128, 70 Or.App. 721 (pre-Crawford case under state constitution reaching similar conclusion).

cccxc

n. 391. Beyond scope

U.S. v. Weiland, C.A.9th, 2005, 420 F.3d 1062, 1077 (public records of defendant's convictions per se nontestimonial); People v. Taulton, 2005, 29 Cal.Rptr.2d 203, 206, 129 Cal.App.4th 1218; People v. Shreck, Colo.App.2004, 107 P.3d 1048, 1060 (records of convictions offered to prove defendant a "habitual offender" not "testimonial" because analogous to business records); State v. Leonard, La.App.2005, 915 So.2d 829, 833 (state statute makes coroner's report only admissible for nontestimonial purpose of proving cause of death); Rollins v. State, 2005, 866 A.2d 925, 943, 161 Md.App. 34 (autopsy report "findings of physical fact" not "testimonial"); State v. Norman, 2005, 125 P.3d 15, 17, 19, 203 Or.App. 1 (claiming official records not "testimonial" at common law); State v. N.M.K., 2005, 118 P.2d 368, 372, 129 Wash.App. 155 (the "functional equivalent" of business records).

cccxcii

n. 392. Avoid troubling bureaucrats

U.S. v. Valdez-Maltos, C.A.5th, 2006, 443 F.3d 910, 911 (deportation warrants admissible as government records; not "testimonial" as simply "mechanically register an unambiguous factual matter"); U.S. v. Cantellano, C.A.11th, 2005, 430 F.3d 1142, 1145 (deportation warrant showing facts of defendant's departure from U.S. not "testimonial"; collecting similar cases); U.S. v. Rueda-Rivera, C.A.5th, 2005, 396 F.3d 678, 680 (affidavit of La Migra the only evidence of element of charged crime; held, "nontestimonial" by analogy to business records in reliance on unpublished opinion); U.S. v. Olmos-Esparza, C.A.9th, 2005, 149 Fed.Appx. 596, 597 (certificate of non-existence of record of permission to enter U.S. not "testimonial" and admissible as a public record even though prepared for use in prosecution); U.S. v. Mendoza-Orellana, C.A.4th, 2005, 133 Fed.Appx. 68, 70 (similar; relying on Rueda-Rivera); People v. Taulton, 2005, 29 Cal.Rptr.2d 203, 206, 129 Cal.App.4th 1218 (admitting prison records to show defendant was a recidivist in penalty enhancement proceedings); People v. Hinojoso-Mendoza, Colo.App.2005, 2005 WL 2561391 (collecting cases and finding that majority hold that lab reports "nontestimonial" as either business or official records); Belvin v. State, Fla.App.2006, 922 So.2d 1046, 1049 (state statute makes blood alcohol test certificates admissible as official records); State v. Godshalk, 2005, 885 A.2d 969, 973, 381 N.J.Super. 326 (breathalyzer test certificate used as foundation for admission of test results); State v. N.M.K., 2005, 118 P.2d 368, 372, 129 Wash.App. 155 (letter certifying that no driver's license had been issued to defendant).

cccxciii

n. 393. Congress amended

See Senate Report No. 93-1277, 93d Cong., Second Session, 1975, p. 17.

cccxciv

n. 394. “Adversarial nature”

Ibid.

cccxcv

n. 395. Questionable

See, e.g., Giannelli, Admissibility of Lab Reports: The Right of Confrontation Post-Crawford, 2004, 19-FALL Crim.Just. 26, 27 (doubts admissible under 803(8) because of the exclusions for investigatory and police reports).

cccxcvi

n. 396. Cannot escape

See vol. 30B, § 7047, p. 453.

See also

Giannelli, Admissibility of Lab Reports: The Right of Confrontation Post-Crawford, 2004, 19-FALL Crim.Just. 26, 28 (citing cases holding that 803(6) cannot be used to escape the restrictions in Rule 803(8)).

cccxcvii

n. 397. General criteria

See, e.g., Belvin v. State, Fla.App.2006, 922 So.2d 1046, 1051 (rejecting claim that official record

Compare

Ford v. State, Tex.App.2005, 179 S.W.3d 203, 208 (disciplinary grievance records based on hearsay by other inmates not “testimonial”).

cccxcviii

n. 398. Admit affidavits

See above, text at notecall 236.

cccxcix

n. 399. Justify admission

U.S. v. Cervantes-Flores, C.A.9th, 2005, 421 F.3d 825, 832-833 (even though prepared for litigation, certificate of nonexistence of a record refers to a class of records that existed prior to litigation; hence, like business records and per se nontestimonial); U.S. v. Lopez-Moreno, C.A.5th, 2005, 420 F.3d 420, 436-437 (computer printout of immigration records of prior deportations admitted as official records not “testimonial”); People v. Hinojoso-Mendoza, Colo.App.2005, 2005 WL 2561391 (lab report stating that substance seized from defendant was cocaine not within this doctrine where no showing it was prepared “at the express direction of the prosecutor for the purposes of litigation”); Sproule v. State, Fla.App.2006, 927 So.2d 46, 47 (defendant’s driving record in prosecution for driving without a license); Desue v. State, Fla.App.2005, 908 So.2d 1116, 1117 (records showing date and

time defendant released from prison but assuming exception would not apply to “an affidavit prepared for a particular case masquerading as a business record”); *State ex rel. L.R.*, 2006, 890 A.2d 343, 354, 382 N.J.Super. 605 (introduction of estimate of damages to car from criminal mischief prepared for juvenile court proceeding does not offend Crawford); *People v. Brown*, 2005, 801 N.Y.S.2d 709, 9 Misc.3d 420 (reports of DNA testing done for trial not “testimonial” as simply “routine entries” done for profiling purposes).

cd

n. 400. Hold “testimonial”

People v. Mitchell, 2005, 32 Cal.Rptr.3d 613, 621, 131 Cal.App.4th 1210 (collecting cases in which courts have held business records prepared for trial were “testimonial”); *People v. Johnson*, Fla.App.2005, 929 So.2d 4, 7 (lab report that substance submitted was cocaine “testimonial” even when offered as a business record to prove an element of charged crime); *People v. Lonsby*, 2005, 707 N.W.2d 610, 619 n. 9, 268 Mich.App. 375 (lab tech’s notes on her testing for defendant’s semen on victim and her clothes not within either business records or official records exceptions because prepared in anticipation of litigation); *People v. Capellan*, 2004, 791 N.Y.S.2d 315, 317, 6 Misc.3d 809 (affidavit certifying authenticity of state records showing no license issued to defendant prepared for purposes of litigation; hence, “testimonial”). *People v. Rogers*, 2004, 780 N.Y.S.2d 393, 396, 8 App.Div.3d 888, 891 (report by private lab of results of drug test performed by state police not admissible as business record because prepared for litigation and thus lack reliability); *People v. Pacer*, 2005, 796 N.Y.S.2d 787, 788, 21 App.Div.3d 192 (affidavit that defendant’s driving privileges had been revoked not a business record when prepared for use in prosecuting defendant for driving without a license); *People v. Orpin*, N.Y.Cty.Ct. 2005, 796 N.Y.S.2d 512, 515, 8 Misc.3d 768 (person preparing breath machine certification must know that the purpose of the certificate is for use at trial; hence, testimonial); *People v. Hernandez*, 2005, 794 N.Y.S.2d 788, 789, 7 Misc.3d 568 (officer’s latent print report not admissible as business record as not taken for administrative use but for use in prosecution and thus “testimonial” even though identity of defendant not then known); *Rousseau v. State*, Tex.Crim.2005, 171 S.W.3d 871, 880 (incident reports prepared by prison guards graphically describing defendant’s crimes “testimonial” and inadmissible at punishment phase of capital trial).

cdi

n. 401. Not “accusations”

State v. Carter, 2005, 114 P.3d 1001, 1007, 326 Mont. 427 (breath machine certificate not substantive accusation but simply foundational for other evidence); *People v. Pacer*, 2005, 796 N.Y.S.2d 787, 788, 21 App.Div.3d 192 (affidavit that defendant had been sent letter that his driving privileges had been revoked “testimonial” in prosecution for driving without a license---[even though does not look like “accusation” of defendant]); *People v. Orpin*, N.Y.Cty.Ct. 2005, 796 N.Y.S.2d 512, 515, 8 Misc.3d 768 (because technician who prepared breath test machine certificate must know that its purpose was to authenticate machine readings at trial);

People v. Capellan, 2004, 791 N.Y.S.2d 315, 317, 6 Misc.3d 809 (affidavit authenticating official records prepared for use at trial; hence, “testimonial”); People v. Rogers, 2004, 780 N.Y.S.2d 393, 396, 8 App.Div.3d 888, 891 (because defendant had right to cross-examine lab technician about techniques used to determine victim’s blood alcohol level from a sample of her blood where intoxication showed her inability to consent and report was requested by State Police for use at trial); People v. Hernandez, 2005, 794 N.Y.S.2d 788, 789, 7 Misc.3d 568 (latent print report to authenticate print identifying defendant is “testimonial” even though not accusatory and not requested by prosecutor); City of Las Vegas v. Walsh, 2005, 124 P.3d 203, 207, ___ Nev. ___ (affidavit of nurse that blood sample was properly drawn and authenticating sample as one received delivered to police).

But see

People v. Hinojoso-Mendoza, Colo.App.2005, 2005 WL 2561391 (collecting above cases and rejecting them as “minority” view).

Compare

Bohsancurt v. Eisenberg, App.2006, 129 P.3d 471, 478, 212 Az. 182 (distinguishing the above cases on ground that they were “against” a particular defendant, unlike certificate that breath machine was operating properly when tested in advance of its use against any particular DUI suspect).

cdii

n. 402. Process server

People v. Safford, 2005, 26 Cal.Rptr.3d 190, 193, 127 Cal.App.4th 979 (deputy who served process and filled out form “not an accuser”).

See also

Bohsancurt v. Eisenberg, App.2006, 129 P.3d 471, 477, 212 Az. 182 (holding certificate that breath machine operating properly not “testimonial” because not “against” any particular defendant but an abstract statement of fact); People v. Shreck, Colo.App.2004, 107 P.3d 1048, 1060-1061 (affidavits of authenticity to prove admissibility of documents showing an element of charged crime not “testimonial”); Rackoff v. State, 2005, 621 S.E.2d 841, 845 275 Ga.App. 737 (machine, not the technician is the “witness against” defendant); Frazier v. State, Miss.App.2005, 907 So.2d 985, 987 (statement authenticating prison records used to adjudicate defendant an habitual offender not “testimonial” because affiant only said the copies were accurate, not that defendant had committed the offenses recorded in the originals); State v. Shelly, 2006, 627 S.E.2d 287, 299, ___ N.C.App. ___ (report of absent chemist of his testing of gunshot residue to eliminate alternative suspect to charged murder thus refuting defense claim).

But see

People v. Capellan, 2004, 791 N.Y.S.2d 315, 317, 6 Misc.3d 809 (affidavit authenticating records prepared for use at trial; hence, “testimonial”).

Compare

Note, A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington, 2006, 94 Geo.L.J. 581, 600 (arguing that Scalia did not intend that his reference to business records include official records, which F.R.E. already exclude; if the report is an accusation, it should be “testimonial”).

cdiii

n. 403. Substance cocaine

People v. Johnson, 2004, 18 Cal.Rptr.3d 230, 233, 121 Cal.App.4th 1409.

See also

U.S. v. Cantellano, C.A.11th, 2005, 430 F.3d 1142, 1145 (because deportation warrants are recorded routinely and not in preparation for criminal trials, they are non-accusatory and thus not “testimonial”); Bohsancurt v. Eisenberg, App.2006, 129 P.3d 471, 477, 212 Az. 182 (abstract certification that breath machine operating properly when tested not “against” any particular defendant who might subsequently be tested with the machine); Commonwealth v. Walther, Ky.2006, 189 S.W.3d 570, 575 (every state but one has held that test records of breath machines not “testimonial” in drunk driving cases; collecting cases); State v. Leonard, La.App.2005, 915 So.2d 829, 833 (because defense conceded cause of death, use of coroner’s report to prove this nontestimonial); People v. Brown, 2005, 801 N.Y.S.2d 709, 9 Misc.3d 420 (reports of DNA testing done for purpose of use at trial not “testimonial” because done by state lab not part of prosecutor’s office); State v. Cook, Ohio.App.2005, 2005 WL 736671 (affidavit that breath machine operating properly not “testimonial” because not prepared in investigative or prosecutorial setting and were business records).

But see

U.S. v. Buonsignore, C.A.11th, 2005, 131 Fed.Appx. 252, 257 (testimony about the value of cocaine that simply repeated what the witness had been told by an absent D.E.A. source violated Crawford); Smith v. State, Ala.Crim.2004, 898 So.2d 907, 917 (allowing the use of an affidavit of the autopsy surgeon to prove the cause of death permitted the prosecution to prove an essential element of the crime of murder without cross-examination of the witness); People v. Capellan, 2004, 791 N.Y.S.2d 315, 317, 6 Misc.3d 809 (affidavit authenticating business record created for use at trial; hence, “testimonial”); People v. Rogers, 2004, 780 N.Y.S.2d 393, 396, 8 App.Div.3d 888, 891 (lab report of results of test on victim’s blood “testimonial” because degree of intoxication went to her ability to consent and test was initiated by state police to gather evidence for trial).

Compare

Commonwealth v. Walther, Ky.2006, 189 S.W.3d 570, 575 (adopting rationale of Lubinbyhl cased, below); Luginbyhl v. State, Va.App.2005, 618 S.E.2d 347, 354 (affidavit by officer stating that he properly operated breath test machine not “testimonial” because it does not accuse the defendant of anything; quoting reference to “accusers” in Crawford opinion and in Virginia Confrontation Clause).

cdiv

n. 404. Good reason to cross

Note, Testimonial or NonTestimonial?: The Admissibility of Forensic Evidence After Crawford v. Washington, 2005-2006, 94 Ky.L.J. 187 (noting problem).

See also

Giannelli, Expert Testimony and The Confrontation Clause, 1993, 22 Cap.U.L.Rev. 45, 69-70 (under Roberts lower courts had split on whether lab reports could be admitted without calling the declarant).

cdv

n. 405. Stricter enforcement

Giannelli, Expert Testimony and The Confrontation Clause, 1993, 22 Cap.U.L.Rev. 45, 79-80 (says the problem is less of hearsay and more of the reliability of the scientific opinions that cannot be cross-examined).

See also

Giannelli, Admissibility of Lab Reports: The Right of Confrontation Post-Crawford, 2004, 19-FALL Crim.Just. 26, 20 (pointing out that courts used the same arguments used to find lab reports not “testimonial” to escape the exclusions in 803(8) for investigatory and police reports).

cdvi

n. 406. Obtain bargain

U.S. v. Reifler, C.A.2d, 2006, 446 F.3d 65, 86 (collecting Second Circuit decisions adopting this New York practice); People v. Hardy, 2005, 824 N.E.2d 953, 956, 4 N.Y.3d 192, 791 N.Y.S.2d 953 (plea allocutions admissible pre-Crawford as “declarations against interest”).

See also

State v. Forbes, 2005, 119 P.3d 144, 138 N.M. 264 (allowing defendant habeas relief where U.S. Supreme Court reversed a state decision that defendant was denied right of confrontation where accomplice confession was used against him as a declaration against interest, a decision that Crawford now concedes was wrong).

cdvii

n. 407. Schizophrenic

See, e.g., Smith v. State, Tex.App.2006, 187 S.W.3d 186, 193 (relying on fact that statement was declaration against interest to admit over hearsay objection, but holding not “testimonial” because only person who heard it were defendant’s beer-drinking buddies).

cdviii

n. 408. “Too large a class”

Lilly v. Virginia, 1999, 119 S.Ct. 1887, 1895, 527 U.S. 116, 125, 144 L.Ed. 2d 117, discussed in § 6371.1, text at notecall 23, this Supplement.

cdix

n. 409. Not categorical

See, e.g., U.S. v. Rodriguez-Marrero, C.A.1st, 2004, 390 F.3d 1, 17 (statement of accomplice given under oath to prosecutor; “testimonial”); Brown v. Uphoff, C.A.10th, 2004, 381 F.3d 1219, 1224 n.4 (declaration against interest of coconspirator implicating defendant “testimonial”); U.S. v. Jones, C.A.7th, 2004, 371 F.3d 363, 369 (same); State v. Duarte, App. 2004, 98 P.3d 1054, 1057, 136 N.M. 404 (treating statements in custodial interrogation as “testimonial” despite fact that trial court admitted them as declarations against interest); State v. Cook, 2006, 135 P.3d 260, 268, 340 Or. 530 (confessions of accomplices to police inculcating defendant; declarations against interest but “testimonial”); Benford v. State, Tex.App.2005, 2005 WL 240611 (finding “testimonial” without considering exception though trial court did).

cdx

n. 410. Other exceptions

U.S. v. Gonzalez-Marichal, D.C.Cal.2004, 317 F.Supp.2d 1200, 1204 n. 2 (statement of family history no longer admissible per Roberts).

cdxi

n. 411. Two conditions

124 S.Ct. at 1365, 541 U.S. at 54.

cdxii

n. 412. Way around

See, e.g., State v. King, App.2005, 706 N.W.2d 181, 184, ___ Wis.2d ___.

cdxiii

n. 413. Little problem

See, e.g., Taylor v. Commonwealth, Ky. 2005, 175 S.W.3d 68, 72 (statement of unavailable coconspirator to police not admissible where defendant had no chance for cross); Clark v. State, Miss. 2004, 891 So.2d 136, 140 (error to admit testimonial hearsay of accomplice who refused to testify at defendant’s trial despite having confessed to the crime).

cdxiv

n. 414. Judicial notice

People v. Couillard, Colo.App.2005, 131 P.3d 1146, 1152 (assuming Crawford applies when court takes judicial notice of testimonial statements; i.e., the plea allocution of an accomplice).

cdxv

n. 415. “Time of founding”

124 S.Ct. at 1365, 541 U.S. at 54.

cdxvi

n. 416. “Small class”

State v. Mack, 2004, 101 P.3d 349, 352 n. 8, 337 Or. 586 (mentioning forfeiture of the right and the dying declarations exception).

See also

State v. Powers, 2004, 99 P.3d 1262, 1263, 124 Wash.App. 92.

cdxvii

n. 417. “By their nature”

124 S.Ct. 1367, 514 U.S. at 56.

cdxviii

n. 418. Beyond scope

See below, text at notecall 717.

cdxix

n. 419. Cites Green

124 S.Ct. at 1367, 541 U.S. at 56.

cdxx

n. 420. Present satisfies

California v. Green, 1970, 90 S.Ct. 1930, 1935, 399 U.S. 149, 158, 26 L.Ed.2d 489, discussed in § 6364 in the main volume.

cdxxi

n. 421. Declarant takes stand

U.S. v. Ricks, C.A.4th, 2006, 166 Fed.Appx. 37, 38 (even though witness answers through interpreter and claims lack of memory regarding accusations); U.S. v. Stepherson, C.A.11th, 2005, 152 Fed.Appx. 904, 907; U.S. v. Foster, C.A.2d, 2005, 127 Fed.Appx. 537, 539 n.1; U.S. v. Green, C.A.6th, 2005, 125 Fed.Appx. 659, 662) (person who made 911 call); People v. Harless, 2004, 22 Cal.Rptr.3d 625, 636, 125 Cal.App.4th 70 (declarant present at trial and subjected to lengthy cross-examination); State v. Miller, Fla.App.2005, 918 So.2d 350, 351 (victim’s prior statement under oath); Somervell v. State, Fla.App. 2004, 883 So.2d 836, 837 (child abuse victim who made videotaped accusation to police); Cooley v. State, 2004, 849 A.2d 1026, 1032, 157 Md.App. 101 (after witness testified that everything he said in the past was a lie and he lacks any personal knowledge of charged crime, state introduces prior inconsistent statement); State v. Tate, Minn.App.2004, 682 N.W.2d 169, 176 n. 1 (witness testified only under compulsion, stated part of her former statements were lies, and denied defendant’s guilt); Gaxiola v. State, 2005, 119 P.3d 1225, 1230, ___ Nev. ___ (accusations child victim made to mother, uncle, and police admissible where child testified at trial subject to cross-examination; rejecting

argument cross had to be at the time of the statements); *People v. Cortes*, 2004, 781 N.Y.S.2d 401, 416, 4 Misc.3d 575 (911 caller); *State v. Sheppard*, 2005, 842 N.E.2d 561, 567, 164 Ohio App.3d 372 (six-year-old sex abuse victim); *State v. Marbury*, Ohio App.2004, 2004 WL 758404 ¶ 39 (911 caller); *Crawford v. State*, Tex.App.2004, 139 S.W.3d 462, 464 (dictum or alternative holding); *State v. Price*, 2005, 110 P.3d 1171, 1174, 127 Wash.App. 193 (four-year old sexual abuse victim takes stand but claims lack of memory of abuse or what she told people about the crime but accuses defendant of crime by nodding in response to a leading question; Crawford satisfied); *State v. James*, App.2005, 703 N.W.2d 727, 732, 285 Wis.2d 783 (admission of videotaped interview with child abuse victims does not offend Crawford if the prosecution promises to produce them at trial for cross-examination; assumes trial court must declare mistrial if witnesses do not submit to cross).

cdxxii

n. 422. “Declarant appears”

124 S.Ct. at 1369 n. 9, 541 U.S. at 59 n. 9.

See also

U.S. v. Owens, 1988, 108 S.Ct. 838, 484 U.S. 554, 558-560, 98 L.Ed.2d 951, discussed in the main volume in § 6369, p. 850.

cdxxiii

n. 423. Confusion

See, e.g., *Flonnory v. State*, Del.2006, 893 A.2d 507, 522 (no Crawford violation where declarant appears for cross-examination at trial); *State v. Miller*, Fla.App.2005, 918 So.2d 350, 351 (Owens satisfied where victim appeared at trial and claimed faulty memory of prior accusation); *Gomez v. State*, Tex.App.2005, 183 S.W.3d 86, 90 (Crawford inapplicable where declarant testifies at trial and was available for cross-examination).

cdxxiv

n. 424. Not present

U.S. v. Kappell, C.A.6th, 2005, 418 F.3d 550, 554 (child accusers “appear” on closed circuit television and are cross-examined; Crawford does not alter holding in *Craig* that this suffices to satisfy Sixth Amendment).

But see

U.S. v. Bordeaux, C.A.8th, 2004, 400 F.3d 548, 556 (appearance on closed circuit television does not satisfy requirement of Crawford that declarant “appear” at trial).

cdxxv

n. 425. Prior cases

See § 6370, pp. 856-858.

But see

However, where the declarant appears in court for direct examination, then retreats to another room for televised cross-examination, this may suggest that the lower court improperly applied the Court's standards for the use of televised testimony; that is, if the declarant can face the defendant while accusing him of crime, how can the trauma of cross-examination in the presence of the defendant be so much more traumatic as to justify not making him face the defendant during cross-examination? U.S. v. Bordeaux, C.A.8th, 2004, 400 F.3d 548, 556 (fact that declarant testified in open court does not satisfy Crawford where defense was only allowed to cross-examine her on closed circuit television).

cdxxvi

n. 426. Declarant present

In some states, if the defendant calls the declarant to the stand, his ability to impeach her may be more limited than if the prosecution had called her as a witness. Perhaps the Sixth Amendment overrides those rules just as it can trump judicially imposed limits on cross-examination.

cdxxvii

n. 427. Putting on stand

People v. Warner, 2004, 14 Cal.Rptr.3d 419, 428, 119 Cal.App.4th 331 (Crawford does not require that the state have the declarant testify about statement; enough that she appears at trial and claims complete lack of memory about the statement).

cdxxviii

n. 428. Refuses to answer

See, e.g., Fowler v. State, Ind.2005, 829 N.E.2d 459, 462-463.

cdxxix

n. 429. Seek contempt

Fowler v. State, Ind.2005, 829 N.E.2d 459, 467.

cdxxx

n. 430. Lack of memory

The White House Transcripts, Gold ed. 1974, Meeting of The President, John Dean, and Robert Haldeman, Oval Office, March 21, 1973, p. 171 (discussing what advice to give administration witnesses who testify before the grand jury):

“Haldeman: You can say you have forgotten too, can't you?”

“Dean: Sure, but you are chancing a very high risk for [a] perjury situation.

“President: But you can say ‘I don't remember.’ You can say ‘I can't recall. I can't give any answer to that that I can recall.’”

cdxxxi

n. 431. Crawford satisfied

Hasan v. Galaza, C.A.9th, 2006, 165 Fed.Appx. 557, 559 (Crawford satisfied even though the witness no longer remembers facts on which opinion is based); People v. Warner, 2004, 14 Cal.Rptr.3d 419, 429, 119 Cal.App.4th 331 (Crawford satisfied where declarant present at trial but claimed complete lack of memory about interrogation or statements it induced); State v. Pierre, 2006, 890 A.2d 474, 495, 277 Conn. 42 (Crawford satisfied where declarant testifies he does not remember facts related in statement, that he never read statement, and signed it only to escape police harassment); Johnson v. State, Del. 2005, 878 A.2d 422, 428 (witness denied any recollection of prior inconsistent statements admitted to impeach her; Crawford satisfied because confrontation only requires an “opportunity” for cross-examination, not “effective” cross-examination); State v. Fields, Haw.App.2005, 2005 WL 1274539, p. 15 (even though victim of defendant’s domestic abuse claims not to remember anything about crime; relying on Owens, below); Clark v. State, Ind.App.2004, 808 N.E.2d 1183, 1189 n. 2 (witness claims lack of recollection so state introduces transcript of his prior accusation); State v. Gorman, Me.2004, 854 A.2d 1164, 1176 (defendant’s mother claims not to remember anything he told her about the charged crime; no confrontation violation to introduce her grand jury testimony that he had confessed crime to her as prior recollection recorded); Cooley v. State, 2004, 849 A.2d 1026, 1032, 157 Md.App. 101 (witness disavowed all prior accusations as based on hearsay and disclaims any personal knowledge of crime; held no violation of Crawford in reliance on Owens, below); State v. Marbury, Ohio App.2004, 2004 WL 758404 ¶ 39 (even though counsel chose not to cross-examine); State v. Carothers, So.Dak.2005, 692 N.W.2d 544, 547 (four-year-old child that trial court declined to declare incompetent; collecting cases); State v. Manuel, App.2004, 685 N.W.2d 525, 532 n. 7, 275 Wis.2d 146 (if what declarant told the police was “testimonial”, it was still admissible where she testified at trial even though she claimed not to remember the statement or its subject matter).

cdxxxii

n. 432. Owens holding

U.S. v. Owens, 1988, 108 S.Ct. 838, 484 U.S. 554, 558-560, 98 L.Ed.2d 951, discussed in the main volume in § 6369, p. 850.

cdxxxiii

n. 433. Witness recants

People v. Butler, 2005, 25 Cal.Rptr.2d 154, 161, 127 Cal.App.4th 49 (proper to introduce recanted statements in police reports where declarants testified at trial); People v. Martinez, 2005, 23 Cal.Rptr.3d 508, 519, 125 Cal.App.4th 1035 (Crawford not violated by introduction of wife’s accusations of spousal abuse to police and at preliminary hearing where she recanted the accusation at trial and submitted to cross-examination about the accusations); State v. Gorman, Me.2004, 854 A.2d 1164, 1176 (Owens justifies admission of defendant’s mother’s grand jury testimony after she claims to have forgotten anything he told her about the charged crime).

cdxxxiv

n. 434. Personal knowledge

Shiver v. State, Fla.App. 2005, 900 So.2d 615, 618 (that officer who used breathtaking machine would testify that machine had been properly calibrated does not satisfy Crawford where officer lacks personal knowledge and would just be repeating the hearsay statements of the person did the calibration).

cdxxxv

n. 435. Hypnotically enhanced

Nolan v. State, 2006, 132 P.3d 564, 571, ___ Nev. ___ (declarant whose memory was hypnotically refreshed was available at trial and could have been cross-examined about testimonial statements to police officer).

cdxxxvi

n. 436. Opportunity suffices

Mensing v. Mahoney, C.A.9th, 2006, 167 Fed.Appx. 657, 658 (rape victim did testify and defendant had an opportunity to cross-examine her); U.S. v. Allen, C.A.9th, 2005, 425 F.3d 1231, 1235 (declarant cross-examined by defendant); U.S. v. Kappell, C.A.6th, 2005, 418 F.3d 550, 554 (child accusers appeared on closed circuit television and were cross-examined by defense); Williamson v. Miller-Stout, C.A.9th, 2005, 135 Fed.Appx. 958, 959 (when declarant appears at trial, Crawford “places no constraints at all on the use of his prior testimonial statements”; quoting majority opinion); In re S.C., 2006, 41 Cal.Rptr.3d 453, 479, 138 Cal.App.4th 395 (parent could cross-examine child whose statements were included in social worker’s report seeking to deprive parent of custody); People v. Argomaniz-Ramirez, Colo. 2004, 102 P.3d 1015, 1017 (Crawford does not invalidate state child hearsay statute allowing use of hearsay accusations where the child testifies at trial); People v. Collins, Colo.App. 2004, 104 P.3d 299, 303 (no Crawford violation where witness testified at trial and tape of excited utterance in 911 call not admitted until end of testimony); Miller v. State, Del.2006, 893 A.2d 937, 953 (no Crawford violation to admit written statement describing crime where declarant testified at trial and was cross-examined); Flonnory v. State, Del.2006, 893 A.2d 507, 521 (testified and subject to cross-examination); State v. Causey, Fla.App.2005, 898 So.2d 1096, 1098 (error to exclude statements of child during sexual abuse investigation without determining whether the child could testify at trial); State v. Konohia, Haw.App.2005, 107 P.3d 1190, 1198-1199, 107 Haw. 517 (person who made 911 call testifies and was subject to cross-examination at trial); Taylor v. State, Ind.App. 2006, 841 N.E.2d 631, 634 n. 3 (child declarant testified at trial and subject to cross-examination); Fowler v. State, Ind.2005, 829 N.E.2d 459, 464 (relying on California v. Green, § 6364 in the main volume); Clark v. State, Ind.App.2004, 808 N.E.2d 1183, 1189 n. 2 (even though state introduced prior inconsistent statement after declarant left stand, defendant could have recalled and cross-examined him); State v. Corbett, 2006, 130 P.3d 1179, 1189, ___ Kan. ___ (Crawford does not apply where declarant testified at trial and was available for cross-examination); State v. Gorman, Me.2004, 854 A.2d 1164, 1176 (even though witness suffered from delusions and was under psychiatric medication at the time she made prior statement); State v. Ahmed, Minn.App.2006, 708 N.W.2d 574, 582 (declarant testified at trial and was available for cross-examination); State v. Cook, Ohio.App.2005, 2005 WL 736671 (crime lab

expert testified at trial subject to cross-examination); *State v. Carrothers*, So.Dak. 2005, 692 N.W.2d 548 n. 5 (collecting many cases similarly relying on Green; accusation of child abuse by four-year-old child); *Campos v. State*, Tex.App.2005, 186 S.W.3d 93, 97 (statements relaying victim's story to 911 operator admissible when declarant testifies at trial); *Hanson v. State*, Tex.App.2005, 180 S.W.3d 726, 731 n. 8 (collecting similar cases).

cdxxxvii

n. 437. Past cross

State v. Weaver, La.App.2005, 917 So.2d 600, 610 (cross-examination at hearing on motion to suppress was insufficient and ineffective to satisfy Crawford).

cdxxxviii

n. 438. "Unavailable" and "prior"

124 S.Ct. at 1365, 541 U.S. at 54.

cdxxxix

n. 439. Barber standard

1968, 88 S.Ct. 1318, 390 U.S. 719, 20 L.Ed. 2d 255, discussed in § 6363 in the main volume.

cdxli

n. 440. "Good faith effort"

Id. at 1322, 390 U.S. at 724-725.

cdxli

n. 441. Courts applied

People v. Johnson, Fla.App.2005, 929 So.2d 4, 8 (witness "available" where witness was willing to come from Virginia to testify but state was too cheap to pay air fare); *State v. Francois*, La.App.2006, 926 So.2d 744, 752 (mere fact that witness has moved out of state does not suffice without showing what efforts were made to get him to return); *State v. Ahmed*, Minn.App.2006, 708 N.W.2d 574, 582 ("diligent, good-faith effort to locate and return a witness" required); *State v. Bell*, 2004, 603 S.E.2d 93, 116, 359 N.C. 1 (in capital sentencing proceeding need only make good faith effort to secure testimony before using hearsay); *State v. King*, App.2005, 706 N.W.2d 181, 187, ___ Wis.2d ___ (declarant not "unavailable" under Barber standard where detectives spoke with her the weekend before trial, she told them she feared testifying, but would call and let them know if she was coming; since she could have been subpoenaed then, subsequent bungled efforts to obtain her testimony do not meet Barber standard).

But see

Williams v. U.S., D.C.App.2005, 881 A.2d 557, 564 (government can use testimony of witness from former trial even though the reason the witness was "unavailable" was that the government had deported him so he was now beyond the subpoena power); *State v. McGowen*, Tenn.Crim.2005, 2005 WL 2008183, pp. 8-10 (state had custody

of witness, let him walk away from county youth ranch, then made a perfunctory effort to find him; held, a “good faith effort”).

cdxlii

n. 442. Claims privilege

See, e.g., *People v. Wahlert*, 2005, 31 Cal.Rptr.3d 603, 613, ___ Cal.App.4th ___ (assertion of privilege against self-incrimination); *State v. Pierre*, 2006, 890 A.2d 474, 502, 277 Conn. 42 (assertion of privilege against self-incrimination); *State v. Estrella*, 2006, 893 A.2d 348, 358, 277 Conn. 458 (declarant’s assertion of privilege against self-incrimination makes him unavailable); *State v. Lewis*, La.App.2005, 917 So.2d 583, 593 (witness who asserts privilege against self-incrimination “unavailable”).

cdxlili

n. 443. Abandoned “unavailability”

See *U.S. v. Inadi*, 1986, 106 S.Ct. 1121, 1126, 475 U.S. 387, 394, 89 L.Ed.2d 390, discussed in the main volume in § 6368, p. 837.

cdxliv

n. 444. “Powerless”

Mancusi v. Stubbs, 1972, 92 S.Ct. 2308, 2311, 408 U.S. 204, 212, 33 L.Ed.2d 293, discussed in § 6363, pp. 786-787, in the main volume.

cdxlv

n. 445. Lack of memory

See, e.g., *State v. Williams*, La.App.2004, 889 So.2d 1093, 1101.

cdxlvi

n. 446. Grant immunity

Compare vol. 23, § 5436 (cases dealing with grants of immunity in the face of privilege claims).

cdxlvii

n. 447. Do not adopt

The cases in footnote 442, above, suggest this is no trivial consideration.

cdxlviii

n. 448. Similar state

People v. Wilson, 2005, 30 Cal.Rptr.3d 513, 539, 36 Cal.4th 309, 114 P.3d 758 (testimony at former trial admissible if Cal.Evid.Code § 1291 is satisfied); *Taylor v. Commonwealth*, Ky. 2005, 175 S.W.3d 68, 72 (assumes that standard of Rule 804(a)(1) applies).

cdxlix

n. 449. Fall far short

See, e.g., *People v. Wilson*, 2005, 30 Cal.Rptr.3d 513, 539, 36 Cal.4th 309, 114 P.3d 758 (assuming need only satisfy state law requirement of “due diligence” so prosecution need not have kept tabs on witness who was in prison at time defendant’s conviction was reversed on appeal but had disappeared a year later when the prosecution got around to trying to serve a subpoena).

cdl

n. 450. “Subjective standards”

Contreas v. State, Fla.App.2005, 910 So.2d 901, 907 (Crawford outlaws subjective standards for “unavailability”; hence, not enough that trial judge found testifying might cause child severe emotional harm).

cdli

n. 451. “Testimonial” standard

When the Court addresses the issue, we will cite the case(s) in this footnote.

cdlii

n. 452. “Defense wish”

U.S. v. Owens, 1988, 108 S.Ct. 838, 842, 484 U.S. 554, 559, 98 L.Ed.2d 951 (quoting *Delaware v. Fensterer*, 1985, 106 S.Ct. 292, 296, 474 U.S. 15, 22, 88 L.ed.2d 15).

cdliii

n. 453. Demeanor

Even if the prior cross-examination was video-recorded, some lawyers and judges believe the jury does not get the full effect of the demeanor.

cdliv

n. 454. Distinguish

We do not claim that the distinction is watertight. Lest the reader think our examples are fanciful, we once observed a judge cut off cross-examination at a preliminary hearing under the California equivalent of Evidence Rule 611(a) on the grounds that it was “tedious.”

cdlv

n. 455. Courts tolerant

U.S. v. Kappell, C.A.6th, 2005, 418 F.3d 550, 555 (fact that child witnesses were inarticulate or unresponsive on cross-examination does not deny right of confrontation; *Owens* says only an “opportunity” to cross-examine need be provided); *U.S. v. Ricks*, C.A.4th, 2006, 166 Fed.Appx. 37, 38 (citing *Owens* for the proposition that all confrontation requires is an “opportunity” for cross-examination, not a right to have the questions on cross answered substantively); *People v. Warner*, 2004, 14 Cal.Rptr.3d 419, 430, 119 Cal.App.4th 331 (Crawford satisfied where declarant denies all knowledge of statement or the interview that induced it); *State v. Skakel*, 2006, 888 A.2d 985, 1040, 276 Conn. 633 (that declarant was on drugs during prior testimony does not make cross-examination per se inadequate; record shows extensive cross on drug addiction, other misconduct, lack of memory,

and prior inconsistent statements); *Nolan v. State*, 2006, 132 P.3d 564, 571, ___ Nev. ___ (witness who had no memory of crime until hypnotically refreshed could be cross-examined about lack of memory; suffices to satisfy Crawford); *State v. Pierre*, 2006, 890 A.2d 474, 495, 277 Conn. 42 (Crawford satisfied where declarant claims to have no recollection of facts underlying his statement); *State v. Pierre*, 2006, 890 A.2d 474, 500, 277 Conn. 42 (collecting cases holding opportunity to cross adequate even where declarant claims lack of memory of events recounted in statement); *State v. Mobley*, 2005, 118 P.3d 413, 418, 129 Wash.App. 378 (Crawford satisfied where ten-year-old diffident declarant appears at trial, testified on direct about substance of hearsay accusations and was cross-examined about lack of recall and ability to elaborate the accusations, citing *Owens*); *State v. Price*, 2005, 110 P.3d 1171, 1174, 127 Wash.App. 193 (Crawford satisfied where witness appears at trial, testifies she cannot remember the event nor the substance of statements she made about the event, but makes accusatorial nod in response to a leading question).

But see

Anderson v. State, Ind.App.2005, 833 N.E.2d 119, 126 (cross-examination of child at a Protected Persons hearing did not satisfy Crawford where child was ruled incompetent to testify because did not understand the obligation of the oath); *Purvis v. State*, Ind.App.2005, 829 N.E.2d 572, 581 (cross-examination at competency hearing does not satisfy Sixth where judge concludes child was incompetent for failure to understand the obligation of the oath).

cdlvi

n. 456. Courts concerned

The courts may intuit that the state has more power over the extrinsic features of cross-examination than over intrinsic limitations; compare, for example, the failure of memory of the witness with statutory or caselaw restrictions on cross-examination at the preliminary hearing.

cdlvii

n. 457. Green held

1970, 90 S.Ct. 1930, 1938, 399 U.S.149, 165, 26 L.Ed.2d 489, discussed in the main volume in § 6346, p. 788.

cdlviii

n. 458. Green still good

People v. Gonzales, 2005, 32 Cal.Rptr.3d 172, 176, 131 Cal.App.4th 767 (opportunity for cross-examination at preliminary hearing that satisfies former testimony statute also satisfies Crawford); *State v. Crocker*, 2004, 852 A.2d 762, 787, 83 Conn.App. 615 (testimony at probable cause hearing satisfied Crawford where no restrictions placed on cross-examination).

cdlix

n. 459. Does not suffice

People v. Fry, Colo.2004, 92 P.3d 970, 977 (because the preliminary hearing is limited to determining probable cause, courts do not allow cross-examination going to credibility); State v. Stuart, 2005, 695 N.W.2d 259, 265-266, 279 Wis.2d 659 (cross-examination at preliminary hearing does not extend to credibility so it does not satisfy Crawford).

cdlx

n. 460. Ill-prepared

People v. Jurado, 2006, 41 Cal.Rptr.3d 319, 354, 38 Cal.4th 72, 131 P.3d 400 (opportunity to cross-examine at conditional examination satisfied Crawford even though counsel at this early stage did not have all the material they might have used to impeach the witness); State v. McGowen, Tenn.Crim.2005, 2005 WL 2008183, pp. 11-12 (since defense had the same motive to cross-examine witness at prelim it would have at trial, Crawford satisfied).

cdlxi

n. 461. “Holistic Sixth”

Blanton v. State, Fla.App.2004, 880 So.2d 798, 801(holistic Sixth; confrontation policy satisfied “when an accused is provided with notice of the charges, a copy of the statement, and a reasonable opportunity to test the veracity of the statement”).

See also

Vol. 30, § 6341, p. 185 and following (explaining the “holistic Sixth Amendment”).

cdlxii

n. 462. Other hearings

People v. Wilson, 2005, 30 Cal.Rptr.3d 513, 539, 36 Cal.4th 309, 114 P.3d 758 (since Crawford said “reliability” has nothing to do with confrontation, past cross adequate even though subsequent developments suggest that witness was a jailhouse informant who set up the defendant in return for sentencing concessions so his testimony was “unreliable”); State v. Estrella, 2006, 893 A.2d 348, 356, 277 Conn. 458 (testimony at probable cause hearing suffices even though letter recanting the testimony was not then available for use in cross); State v. Weaver, La.App.2005, 917 So.2d 600, 612 (cross at motion to suppress adequate despite fact that declarant had become a co-defendant by the time the hearsay was offered at trial); State v. Hannon, Minn.2005, 703 N.W.2d 498, 507 (cross at former trial adequate where though evidence was weaker, it was largely similar and state’s theory remains the same).

See also

Lopez v. State, Fla.App. 2004, 888 So.2d 693, 700-701 (distinguishing between discovery deposition and a deposition to perpetuate testimony; defendant not entitled to be present at former, counsel do not expect testimony will be used at trial so cross-examination usually limited, so opportunity to cross-examine does not satisfy Crawford).

cdlxiii

n. 463. Does not alter

See cases cited in the immediately preceding footnote. Notice that some of the changed circumstances were within the power of the prosecution to alter.

cdlxiv

n. 464. Not present

Contrearas v. State, Fla.App.2005, 910 So.2d 901, 909 (deposition not adequate opportunity for cross-examination where taken without defendant's presence).

cdlxv

n. 465. Direct satisfies

State v. Mohamed, 2006, 130 P.3d 401, 403, ___ Wash.App. ___ (declarant testified at pretrial hearing to determine admissibility of her hearsay statements; held adequate opportunity to confront even though defendant forced to call and examine witness on direct).

cdlxvi

n. 466. "Proxy cross"

State v. Hale, 2005, 691 N.W.2d 637, 646-647, 277 Wis.2d 593.

cdlxvii

n. 467. Makes available

See, e.g., State v. Brigman, 2005, 615 S.E.2d 21, 24, ___ N.C.App. ___; Bratton v. State, Tex.App. 2005, 156 S.W.3d 689, 693-694.

See also

Douglas, Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and The Right to Confront Hearsay, 1999, 67 Geo.Wash.L.Rev. 191, 227-228 (arguing that confrontation right is satisfied if defendant can call declarant for cross-examination).

cdlxviii

n. 468. Courts reject

Belvin v. State, Fla.App.2006, 922 So.2d 1046, 1054 (so no answer to confrontation challenge to use of lab technician's affidavit to say that defendant could have called the affiant as a witness); Contrearas v. State, Fla.App.2005, 910 So.2d 901, 908 (burden on state to introduce deposition that it claims provided adequate cross-examination of declarant); State v. Snowden, 2005, 867 A.2d 314, 33n n. 22, 385 Md. 64 (rejecting similar argument on similar grounds); Bratton v. State, Tex.App. 2005, 156 S.W.3d 689, 694.

But see

Giannelli, Admissibility of Lab Reports: The Right of Confrontation Post-Crawford, 2004, 19-FALL Crim.Just. 26, 31 (collects cases upholding "notice and demand" statutes that allow the state to introduce lab reports if the defense does not demand that a live expert be produced).

cdlxix

n. 469. Could have deposed

Blanton v. State, Fla.App.2004, 880 So.2d 798, 801 n. 3 (while Crawford implicitly requires that opportunity to cross-examine be “meaningful”, that requirement is satisfied by opportunity to take discovery deposition).

cdlxx

n. 470. Doubt

Contrearas v. State, Fla.App.2005, 910 So.2d 901, 908 (cross-examination at deposition might suffice if state offers deposition along with disputed “testimonial” videotape but burden is not on defense to introduce constitutionally necessary evidence of guilt).

cdlxxi

n. 471. Non-hearsay purpose

Tennessee v. Street, 1985, 105 S.Ct. 2078, 471 U.S. 2078, 85 L.Ed.2d 425, discussed in the main volume in § 6368, p. 834.

cdlxxii

n. 472. “Matter asserted”

124 S.Ct. at 1369, n. 9, 541 U.S. at 59 n. 9.

cdlxxiii

n. 473. Hearsay rule

The Supreme Court seems not to have decided the point but for reasons that will appear, we think some constitutional control is required or states can use their hearsay rules to undermine Crawford.

cdlxxiv

n. 474. Three elements

See generally, vol. 30, § 6322, p. 22.

cdlxxv

n. 475. Question not

The “rationale” supporting this view is that a question is not an “assertion” within the meaning of Evidence Rule 801(a). But this makes hearsay policy turn on the form of utterance; there is no reason to suppose that “what is your name?” lacks the hearsay dangers that make “I want to know your name.” unreliable when offered to prove that the declarant does not know the person’s name.

Compare

U.S. v. Lopez-Moreno, C.A.5th, 2005, 420 F.3d 420, 436 (Mexican voter cards offered to prove that passengers were aliens not hearsay because not an “assertion”; perhaps what court means is that only a Mexican national would possess cards

purporting to be authorizations to vote in Mexican elections even if documents were fraudulent, a somewhat less dubious rationale).

See also

Commonwealth v. Eichele, Pa.Com.Pl.2004, 2004 WL 2002212, 66 Pa.D.& C.4th 460, 468 n. 6 (asking defendant to leave is a “verbal act” or command and is not hearsay so raises no Crawford problem).

cdlxxvi

n. 476. Circumstantial

This is not a hypothetical case. When the writer was a neophyte evidence scholar, the late Justice Otto Kaus of the California Supreme Court, then a judge of the Los Angeles Superior Court was faced with just such a case. Though himself an evidence teacher, Judge Kaus could not figure out why his instincts conflicted with the apparent absence of a “statement” in the testimony until he had run the problem by several other evidence scholars.

cdlxxvii

n. 477. Batting .500

Reasonable people could differ in how to classify some of the cases. See, e.g., U.S. v. Del Rio, C.A.11th, 2006, 168 Fed.Appx. 923, 929 (holding no confrontation violation where witness did not recite any specific statements but described conduct that involved out-of-court statements; e.g., how and why the DEA controlled shipment of cocaine). The court could have supposed that either the testimony did not include a “statement” or that the statements were not offered FOTOMAT. But this could also have been an example of circumstantial evidence of hearsay.

cdlxxviii

n. 478. No problems

Mason v. Yarborough, C.A.9th, 2006, 447 F.3d 693, 696 (officer testifies that after seven hour interrogation of accomplice, he arrested him; held no violation of Bruton doctrine because contents of statements never introduced); U.S. v. Magallanez, C.A.10th, 2007, 408 F.3d 672, 679 (agent testifies as an expert that many other witnesses said that defendant was guilty and agent believed them; held not “testimonial” since agent never quoted these anonymous witnesses); U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 676 (circumstantial evidence of hearsay accusation admissible as “background”); Somers v. State, 2004, 846 A.2d 1065, 1070, 156 Md.App. 279 (state calls witness who pled guilty to being defendant’s accomplice who testified he committed the charged robbery with someone else but refuses to answer when asked if that person is in the courtroom; held no violation of Crawford because no hearsay statement was introduced); State v. Medina, 2005, 622 S.E.2d 176, 181, ___ N.C.App. ___ (assumes circumstantial evidence of hearsay not barred by Crawford; officer testifies that after interviewing defendant’s cousin he concluded cousin was “a material witness”); Ford v. State, Tex.App.2005, 179 S.W.3d 203, 208 (assumes not applicable to circumstantial evidence of hearsay);

prosecution introduces search warrant issued in reliance on statements of informer who participated in controlled buy).

But see

Shuffield v. State, Tex.App.2006, 189 S.W.3d 782, 791 (Crawford arguably violated by circumstantial evidence of contents of confession of defendant's brother).

cdlxxix

n. 479. "How did you find?"

U.S. v. Summers, C.A.10th, 2005, 414 F.3d 1287, 1298-1299.

But see

People v. Jurado, 2006, 41 Cal.Rptr.3d 319, 354, 38 Cal.4th 72, 131 P.3d 400 (supposing erroneously that a request---"I want you to get me a gun"---cannot be hearsay even in case where offered for truth of the matter to prove declarant wanted to kill someone).

cdlxxx

n. 480. Remains good

But see

People v. Morgan, 2005, 23 Cal.Rptr.2d 224, 232, 125 Cal.App.4th 935 (doubting that Street is still good law after Crawford).

cdlxxxi

n. 481. Effect on hearer

U.S. v. Goldstein, C.A.2d, 2006, 442 F.3d 777, 785 (apparently to show effect on hearer but unclear from opinion); Furr v. Brady, C.A.1st, 2006, 440 F.3d 34, 39 (to show effect on hearer; that is, it caused defendant to threaten declarant who made accusation to police); U.S. v. Gonzales, C.A.5th, 2006, 436 F.3d 560, 576 (to show effect on hearer; i.e., knowledge of fact related in statement); U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 183 (could be introduced to show effect on hearer; i.e., other parties to wiretapped phone conversation); Dednam v. State, 2005, 2005 WL 23329 p. 5, 360 Ark. 240 (to show that victim had fingered defendant's brother in crime to show motive for murder); People v. Combs, 2004, 22 Cal.Rptr.3d 61, 79, 34 Cal.4th 821, 101 P.3d 1007 (what declarant said admissible to show effect on defendant; i.e., that he indicated his assent and thus adopted them); State v. Konohia, Haw.App.2005, 107 P.3d 1190, 1198-1199, 107 Haw. 517 (offered to show the effect of declarant's statements on the defendant); People v. McPherson, 2004, 687 N.W.2d 370, 375, 263 Mich.App. 124 (statement of coparticipant in crime admitted to show effect in causing defendant to change his story of the crime); Commonwealth v. Whitaker, Pa.Super.2005, 878 A.2d 914, 924 (accomplice's statement that state had brought in a witness to testify against them admissible to show that defendant's request to accomplice not to testify was part of continuing conspiracy to commit and conceal crime); In re Theders, 2005, 123 P.3d 489, 495,

130 Wash.App. 422 (effect on hearer; co-defendant's statement to show defendant's acquiescence in false alibi).

cdlxxxii

n. 482. Wrong or obtuse

U.S. v. Briscoe-Bey, C.A.3d, 2005, 126 Fed.Appx. 551, 553 (to make defendant's side of conversation understandable); U.S. v. Hansen, C.A.1st, 2006, 434 F.3d 92, 100 (to "provide context" for admissions of defendant made in recorded conversation; perhaps the court means admissible to show effect on hearer, but opinion too terse to tell); U.S. v. Wolfson, C.A.2d, 2005, 160 Fed.Appx. 95, 98 (to "provide context" for other statements admitted in evidence); U.S. v. Mayhew, D.C. Ohio 2005, 380 F.Supp.2d 961, 971 (court holds statements not hearsay when offered to prove declarant's state of mind; court overlooks the fact that the statements prove the declarant's state of mind only if they are true, which is why Evidence Rule 803(3) provides an exception for this purpose).

cdlxxxiii

n. 483. LOC

U.S. v. Schlisser, C.A.2d 2006, 168 Fed.Appx. 483, 485 (statements of grifters and marks as legally operative conduct in stock swindle); U.S. v. Stewart, C.A.2d, 2006, 433 F.3d 273, 291 (legally operative conduct; statements made in course of conspiracy to obstruct justice); State v. Adams, 2006, 131 P.3d 556, 562, ___ Kan.App. ___ (legally operative conduct; statements of informant in setting up charged drug deal with defendant); State v. Smith, 2005, 832 N.E.2d 1286, 1291, 162 Ohio App.3d 208 (legally operative conduct, though court says it comes in to provide context for defendant's admissions; statements made by defendant and informer during charged sale of drugs).

See also

Co-conspirator statements as legally operative conduct are discussed above, text at notecall 341.

cdlxxxiv

n. 484. CE/SM

U.S. v. Latysheva, C.A.9th, 2006, 162 Fed.Appx. 720, 724 (to show smuggled aliens all used same false story); U.S. v. Logan, C.A.2d, 2005, 419 F.3d 172, 178 (false alibis of co-defendants to prove existence of conspiracy and defendant's knowledge thereof); U.S. v. Trala, C.A.3d, 2004, 386 F.3d 536, 544 (false exculpatory statements admissible under Street after Crawford to show consciousness of guilt); State v. Newell, Iowa 2006, 710 N.W.2d 6, 23 (false statements by defendant's mother to cover-up his child abuse).

But see

U.S. v. Lore, C.A.3d, 2005, 430 F.3d 190, 209 (supposing proper to offer grand jury testimony on the theory that it was "obviously false").

cdlxxxv

n. 485. Superfluous

State v. Mason, 2005, 126 P.3d 34, 40, ___ Wash.App. ___ (supposing that offering declarant's statements that he was afraid of defendant are not hearsay when offered to prove his state of mind; i.e., that he was afraid of defendant).

cdlxxxvi

n. 486. Impeachment

Adams v. Holland, C.A.6th, 2005, 168 Fed.Appx. 17, 20 (as prior inconsistent statement to impeach).

Unlike statements admitted under the hearsay exemption in Evidence Rule 801(d)(1)(A), these statements cannot be used for the truth of the matter asserted but only to destroy the value of the declarant's testimony or other hearsay statement.

cdlxxxvii

n. 487. Basis of opinion

Bao v. Adams, C.A.9th, 2005, 139 Fed.Appx. 841 (basis for opinion by "gang expert"); State v. Doe, 2004, 103 P.3d 967, 973, 140 Ida. 873 (accusations of child abuse by child and mother to provide a basis for an expert opinion that the child had been sexually abused).

cdlxxxviii

n. 488. Multiple hearsay

State v. Newell, Iowa 2006, 710 N.W.2d 6, 26 (statement by defendant's mother relating defendant's false story about death of infant; court either does not see or chooses to ignore fact that while what defendant said was not hearsay, statements of mother offered to prove that he said it were hearsay).

cdlxxxix

n. 489. Comes in EOH

The oft-repeated statement that "hearsay is admissible to prove probable cause" is technically incorrect; when offered to show what the officer knew at the time of the arrest, the statement is not "hearsay." When we say that an officer "had probable cause", what we mean is that he knew enough to justify an arrest or detention.

cdxc

n. 490. Irrelevant

U.S. v. Solomon, C.A.10th, 2005, 399 F.3d 1231, 1237 (rejecting bogus theory where no issue of probable cause).

cdxcii

n. 491. Prove "background"

See vol. 22, § 5164, note 29. For a case exploiting Rule 401 this way, see U.S. v. Paulino, C.A.2d, 2006, 445 F.3d 211, 217.

cdxciii

n. 492. Bogus theory

U.S. v. Paulino, C.A.2d, 2006, 445 F.3d 211, 216 (OK to admit where jurors instructed to use to “understand the course of events” so they can judge if prosecution witness was credible); U.S. v. Eberhart, C.A.7th, 2006, 434 F.3d 935, 939 (hearsay accusation that defendant was the declarant’s supplier admissible to “explain why the investigation proceeded as it did”); U.S. v. Del Rio, C.A.11th, 2006, 168 Fed.Appx. 923, 929 (admitted to “explain the course of the investigation”); U.S. v. Guishard, C.A.3d, 2006, 163 Fed.Appx. 114, 117 (to show why F.B.I. set up sting operation on defendant); U.S. v. Savoires, C.A.6th, 2005, 430 F.3d 376, 382 (accusation by informer that defendant sold him dope in controlled buy not “testimonial” if used solely as background, but assuming it error for prosecution to use the evidence in argument as evidence of guilt); U.S. v. Jimenez, C.A.1st, 2005, 419 F.3d 34, 44 (confession of codefendant accusing defendant offered to prove “investigatory steps pursued by” government agents and “to provide context” for defendant’s own confession); U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 676 (collecting cases); Dednam v. State, 2005, 2005 WL 23329 p. 5, 360 Ark. 240 (to show why police sought a warrant for defendant’s arrest); People v. Mitchell, 2005, 32 Cal.Rptr.3d 613, 622, 131 Cal.App.4th 1210 (tape of chase recording officers’ statements of defendant’s conduct offered for the immaterial purpose of showing “how the pursuit unfolded” not “testimonial”; in fact, little of it amounted to an accusation of any crime); State v. Adams, 2006, 131 P.3d 556, 562, ___ Kan.App. ___ (dubious but accepts as an alternative ground); State v. Smothers, La.App.2006, 927 So.2d 484, 490 (dragging in discredited “res gestae” notion to avoid having to decide if 911 call was “testimonial”); State v. Addison, La.App.2005, 920 So.2d 884, 892 (informer’s statement not “hearsay” when introduced to “explain the course of the police investigation and the steps leading to defendant’s arrest” though court thinks in present case prosecutor went too far in using this doctrine to smuggle in hearsay accusations); People v. Lewis, 2004, 782 N.Y.S.2d 321, 11 App.Div.3d 954 (statement of officers that co-defendant had inculpated him and other witnesses at the scene of the murder had identified him admissible to show why the defendant confessed); People v. Newland, 2004, 775 N.Y.S.2d 330, 6 App.Div.3d 330 (to complete the narrative and explain why officer searched shopping cart); State v. McClanahan, 2005, 2005 WL 1398835 p. 4 (to show why the police went to defendant’s apartment; alternative ground); State v. Banks, Ohio App.2004, 2004 WL 2809070 ¶ 20 (to show why officers did what they did on the night they arrested defendant); Commonwealth v. Dargan, Pa.Super.2006, 897 A.2d 496, 500 (alternative ground?; reasoning unclear); State v. Mason, 2005, 126 P.3d 34, 41 n. 27, ___ Wash.App. ___ (admitting statements made by declarant during search of defendant’s home to explain why certain items were seized which court says was relevant to prove prior crime, hardly a nonhearsay purpose); State v. Moses, 2005, 119 P.3d 906, 913, 129 Wash.App. 718 (no violation of Crawford when testimonial statements of declarant and her children were introduced to show why social worker called child protective services---a wholly irrelevant fact).

n. 493. Legitimate

See, e.g., *U.S. v. Walter*, C.A.1st, 2006, 434 F.3d 30, 33 (admitted on bogus ground that they “provide context” for defendant’s admissions; actually legally operative conduct as part of charged crime).

cdxciv

n. 494. Excluded

U.S. v. Hadley, C.A.6th, 2005, 431 F.3d 484, 501 n. 13 (collecting cases rejecting bogus why-police-acted-as-they-did rationale); *U.S. v. Solomon*, C.A.10th, 2005, 399 F.3d 1231, 1237 (rejecting bogus theory where no issue of probable cause); *U.S. v. Ramirez*, C.A.6th, 2005, 133 Fed.Appx. 196, 202; (rejecting “background” argument accepted in *Cromer* in case of double hearsay); *U.S. v. Nielsen*, C.A.9th, 2004, 371 F.3d 574, 581 n. 1 (housemate’s statement that only defendant had access to safe where contraband was found “testimonial”; rejecting argument statement was offered non-FOTOMAT to prove why police had to break into safe; why police broke in was irrelevant); *State v. Branch*, 2005, 865 A.2d 673, 678, 182 N.J. 338 (no legitimate need for officer to tell jury why he decided to include the defendant’s photo in a photographic array).

See also

U.S. v. Massino, D.C.N.Y.2004, 319 F.Supp.2d 295, 299 (while guilty plea is a “fact”, when offered to prove that the pleader believed himself guilty of the charged crime, it is hearsay and “testimonial”); *People v. Ryan*, 2005, 790 N.Y.S.2d 723, 726 17 App.Div.3d 1 (rejecting bogus “open-the-door” argument).

cdxcv

n. 495. Expert “testifier”

See, e.g., *Perkins v. State*, Ala.Crim.2004, 897 So.2d 457, 465 n. 4 (collecting Alabama cases approving this ploy); *Mitchell v. State*, Tex.App.2005, 191 S.W.3d 219, 222 (expert can testify based on autopsy report prepared by other expert and admitted as an official record).

cdxcvi

n. 496. Rule 703

Note, *Testimonial Hearsay as The Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington*, 2004, 55 *Hast.L.J.* 1539.

See also

Vol. 29, § 6272 (analyzing the policy of Rule 703).

cdxcvii

n. 497. “Says in report”

Compare, *Giannelli*, *Expert Testimony and The Confrontation Clause*, 1993, 22 *Cap.U.L.Rev.* 45 (devastating critique of Fensterer in which Court allowed junk science to come in when F.B.I. crime lab tech testified that he did not know what

tests he ran and thus could evade cross-examination that would have shown that he relied on a scientifically discredited test).

Compare

State v. Barton, App.2005, 709 N.W.2d 93, 95, ___ Wis.2d ___ (proper for crime lab bureaucrat to opine that fire had been set based on file describing tests performed by subordinate of which the witness lacked personal knowledge; court overlooks resemblance between this and the civil law “trial by dossier”).

cdxcviii

n. 498. Get hearsay in

Note, Testimonial Hearsay as The Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington, 2004, 55 Hast.L.J. 1539, 1556 (discussing cases in which police “experts” give opinions based on testimonial hearsay).

cdxcix

n. 499. “Street gang”

People v. Thomas, 2005, 30 Cal.Rptr.3d 582, 586, 130 Cal.App.4th 1202 (expert testimony that defendant was a member of a “criminal state gang”---an element of the charged crime---based on hearsay from other gang members; collecting similar cases from other states).

d

n. 500. Courts approve

State v. Leonard, La.App.2005, 915 So.2d 829, 833 (no confrontation violation when coroner testified to the cause of death based on autopsy performed by subordinate as the latter was not “a witness against” the defendant); State v. Garner, La.App.2005, 913 So.2d 874, 884 (no Crawford violation when coroner testified to cause of death rather than the deputy coroner who actually performed the autopsy; defendant could cross-examine the coroner about the basis of his opinion); People v. Durio, N.Y.Sup.Ct.2005, 794 N.Y.S.2d 863, 864, 7 Misc.3d 729 (ploy used with apparent approval by court); State v. Shelly, 2006, 627 S.E.2d 287, 299, ___ N.C.App. ___ (Crawford does not bar crime lab expert who had nothing to do with testing to render opinion on and read to the jury from report of chemist who actually performed the test, relying on Delaney, below); State v. Durham, 2006, 625 S.E.2d 831, 834, ___ N.C.App. ___ (Crawford does not invalidate practice of introducing autopsy report of non-testifying pathologist through the testimony of another expert, at least in case where expert actually observed autopsy); State v. Delaney, 2005, 613 S.E.2d 699, 701, 171 N.C.App. 14 (relying on Jones, below); State v. Walker, 2005, 613 S.E.2d 330, 333, 170 N.C.App. 632; State v. Jones, N.C.App. 2004, 2004 WL 1964890; State v. Barton, App.2005, 709 N.W.2d 93, 97, ___ Wis.2d ___ (Crawford does not invalidate Wisconsin practice of allowing crime lab bureaucrats with no personal knowledge to render opinion based on file compiled by subordinates describing results of tests they performed; collecting similar holdings from other states).

di

n. 501. Not “testimonial”

U.S. v. Springer, C.A.11th, 2006, 165 Fed.Appx. 709, 716 (no problem where testimony of expert rests on nontestimonial hearsay); Coble v. Dretke, C.A.5th, 2005, 417 F.3d 508, 516-517 (Crawford does not bar use of expert psychiatric opinions rendered for treatment purposes long before the charged crime by experts who did not appear at trial; opinions not “testimonial”---and the court might have added, not “accusations”); State v. Hocutt, 2006, 628 S.E.2d 832, 839, ___ N.C.App. ___ (testimony about results of DNA analysis by witness who did not perform the analysis nontestimonial, citing North Carolina cases in note 500, above).

dii

n. 502. Can cross expert

State v. Benefiel, 2006, 128 P.3d 1251, 1253, ___ Wash.App. ___ (since defendant could cross-examine his parole officer who testified that he failed to report, it makes no difference that he could not cross-examine the declarant of court records showing duty to report).

diii

n. 503. Waives right

U.S. v. Casiano, C.A.2d 2005, 135 Fed.Appx. 791, 794 (Crawford not violated by expert opinion based on unconfrosted hearsay, at least where those statements are not introduced at trial).

div

n. 504. Reject rationalizations

U.S. v. Buonsignore, C.A.11th, 2005, 131 Fed.Appx. 252, 257 (testimony about the value of cocaine that simply repeated what the witness had been told by an absent D.E.A. source violated Crawford); Rollins v. State, 2005, 866 A.2d 925, 943, 161 Md.App. 34 (where report of autopsy dealt with ultimate issue, “testimonial” and must call person who performed autopsy); People v. Lonsby, 2005, 707 N.W.2d 610, 613, 268 Mich.App. 375 (violation of right of confrontation to allow expert who knew nothing about case prior to day he testified to opine on the basis of lab notes of chemist that semen was found on defendant’s clothing where expert testified in terms of what “we” found even though he did not participate in testing, could only guess why foreign pubic hairs found on victim’s swim suit were not tested, and prosecutor relied on the lab notes as substantive evidence of defendant’s guilt during argument); People v. Brown, 2005, 801 N.Y.S.2d 709, 9 Misc.3d 420 (rejecting argument that report of DNA testing used to support opinion that defendant raped the victim not offered for hearsay purpose); State v. Crager, 2005, 844 N.E.2d 390, 396, 164 Ohio App.3d 816 (violation of Crawford to allow expert without personal knowledge of tests to opine that DNA was defendant’s based on lab report of absent declarant who ran the tests).

dv

n. 505. Need to cross

People v. Orpin, N.Y.Cty.Ct. 2005, 796 N.Y.S.2d 512, 517, 8 Misc.3d 768 (in holding crime lab certificates testimonial, court notes that recent scandals involving crime labs, including the FBI lab, show the need for cross-examination of lab technicians).

dvi

n. 506. Little need

Or perhaps prosecutors lack the wit to do this or defense counsel lacks the wit to detect the manipulation.

dvii

n. 507. May change

As the Court did in Davis v. Washington, 2006, 226 S.Ct. 2266, 541 U.S. ____.

dviii

n. 508. Infer accusations

See, e.g., People v. Newland, 2004, 775 N.Y.S.2d 330, 6 App.Div.3d 330 (police officer arrives on scene of burglary and after speaking to person across the street who did not witness the crime, searched a shopping cart where he found papers bearing defendant's name; sees as an "implied assertion").

dix

n. 509. "I-am-the-Pope"

If a statement "I am the Pope" is offered to prove that the speaker is insane, some people suppose that this is not hearsay because it is not offered to prove that the speaker is the Supreme Pontiff. But as pointed out decades ago, if the person says "I believe I am the Pope", this is hearsay because it is not the statement but the person's belief in its truth that allows us to infer insanity. Only the terminally hypertechical would deny that "I am the Pope" and "I believe I am the Poper" are functionally equivalent; that is, the first is relevant ot insanity only if one supposes the speaker believes the speaker means to assert that he believes the statement is true.

dx

n. 510. Courts check

State v. Branch, 2005, 865 A.2d 673, 678, 182 N.J. 338 (error under Crawford to admit testimony that officer regarded defendant as a suspect because of "information received" because jury could only infer that someone had told the officer that the defendant had committed the crime); State v. Roach, 2005, 613 S.E.2d 791, 794, 342 S.C. 422 (while plain clothes officers were executing a search warrant, declarant came to the door and said "I want to buy some crack"; hearsay, but holding "nontestimonial" because the declarant clearly did not expect the statement to be used in court).

But see

U.S. v. Casiano, C.A.2d 2005, 135 Fed.Appx. 791, 794 (police “expert” testifies how charged narcotics conspiracy worked and how drugs were sold; held not to violate Crawford even though jurors could easily infer that the only way the expert could know the secret workings of the conspirators was because someone who was privy to them had told him and the only justification for the admissibility of the opinion was to provide “background”).

dxii

n. 511. Rule 105

See vol. 21A, §§ 5066, 5067.

See also

People v. Ryan, 2005, 790 N.Y.S.2d 723, 726 17 App.Div.3d 1 (rejecting claim used non-FOTOMAT where prosecution argued to jury that evidence could be used for substantive purposes).

dxiii

n. 512. Understand duties

U.S. v. Walter, C.A.1st, 2006, 434 F.3d 30, 35 (since defendant never requested an instruction limiting statements to non-hearsay purpose, he cannot complain of appeal of trial court’s failure to give one); People v. McPherson, 2004, 687 N.W.2d 370, 377, 263 Mich.App. 124 (noting that prosecutor never used the statement for the truth of the matter asserted).

dxiiii

n. 513. Instructions

See, e.g., Furr v. Brady, C.A.1st, 2006, 440 F.3d 34, 39 n. 3 (supposing instruction adequate that tells jury that they can only use it on particular count but does not tell that they cannot use if for the truth of the matter asserted); U.S. v. Goldstein, C.A.2d, 2006, 442 F.3d 777, 785 (court supposes enough that jurors were told statements were not to be used for the truth without specifying what uses were permissible).

dxv

n. 514. Does not force

U.S. v. Giron-Soria, C.A.9th, 2006, 163 Fed.Appx. 591 (officers’ statements on videotape offered for unspecified purpose); U.S. v. Latysheva, C.A.9th, 2006, 162 Fed.Appx. 720, 724 (admitted to show declarant’s told same false story; relevance of this never explained).

See also

It does not help that the courts can err in applying the doctrine. See, e.g., People v. Jurado, 2006, 41 Cal.Rptr.3d 319, 355, 38 Cal.4th 72, 131 P.3d 400.

dxvi

n. 515. Bruton decision

Bruton v. U.S., 1968, 88 S.Ct. 1620, 391 U.S. 123, 20 L.Ed.2d 476, discussed in § 6362 in the main volume at p. 781.

But see

Furr v. Brady, C.A.1st, 2006, 440 F.3d 34, 37-38 (claiming that Bruton was overruled on this point in Tennessee v. Street, 1985, 105 S.Ct. 2078, 471 U.S. 409, 85 L.Ed.2d 425).

See also

Johnson v. State, Del. 2005, 878 A.2d 422, 425 (Crawford not violated when co-defendant's threats to witnesses were not offered against defendant in their joint trial; no mention of Bruton); Commonwealth v. Brown, Pa.Super. 2004, 853 A.2d 1029, 1034 (co-defendant's confession admitted in joint trial on theory not offered for the truth of the matter against defendant, but in closing argument the prosecutor used it "testimonial" against defendant; held, reversible error).

dxvi

n. 516. Basis for expert

See, e.g., State v. Doe, 2004, 103 P.3d 967, 973, 140 Ida. 873.

dxvii

n. 517. "Essentially equitable"

124 S.Ct. at 1370, 541 U.S. at 62 (explaining why, unlike Roberts exceptions to confrontation, this one has nothing to do with the reliability of the hearsay statement).

See also

People v. Giles, 2004, 19 Cal.Rptr.3d 843, 851, 123 Cal.App.4th 475 (since doctrine is equitable, court should not apply it where this would be unjust to do so; e.g., when the statement to be admitted lacks reliability); Commonwealth v. Edwards, 2005, 830 N.E.2d, 158, 166-168, 444 Mass. 526 (listing jurisdictions that have adopted the doctrine and discussing the policy that supports it).

dxviii

n. 518. Obstructs justice

1878, 8 Otto (98 U.S.) 145, 25 L.Ed. 244 (in a bigamy prosecution in the Utah Territory, the defendant and his relatives prevented the marshal from serving a subpoena on one of his "wives"). The case is discussed in the main volume in § 6356, p. 216.

Compare

People v. Giles, 2004, 19 Cal.Rptr.3d 843, 850-851, 123 Cal.App.4th 475 (must be an intentional act; that defendant drove car in which declarant was accidentally killed would not suffice); Commonwealth v. Edwards, 2005, 830 N.E.2d, 158, 168-169, 444 Mass. 526 (applies not only where defendant murders, threatens, or otherwise intimidates the witness but also where the defendant colludes with the victim; must

be a “wrongful act” but need not be a crime nor must the unavailability of the witness result in the precise way that defendant planned).

dxix

n. 519. Properly applied

U.S. v. Williams, C.A.2d, 2006, 443 F.3d 35, 45 (declarant refused to testify, claiming that defendant’s girl friend and brother had threatened him and his family; dicta, collecting cases); State v. Henderson, 129 P.3d 646, 650, ___ Kan.App. ___ (causal link between defendant and witnesses unavailability must be shown; not enough that victim was child who defendant might suppose would be unwilling to testify against him); Commonwealth v. Edwards, 2005, 830 N.E.2d, 158, 164, 444 Mass. 526 (defendant urged prosecution’s key witness to flee the jurisdiction); People v. Jones, 2006, 714 N.W.2d 362, 367, 270 Mich.App. 208 (defendant’s cousin, a member of defendant’s street gang, threatened to kill witness, other gang members present in court, and gang has history of witness intimidation); State v. Ivy, Tenn.2006, 188 S.W.3d 132, 147 (properly applying dictum to case where evidence showed motive was to prevent declarant from reporting assault to police, a step that would have led to revocation of defendant’s recently granted parole).

See also

State v. King, App.2006, 132 P.3d 311, 319 n. 5, ___ Ariz. ___ (dictum; would apply if declarant became unavailable by defendant’s inducement); State v. Henderson, 129 P.3d 646, 654, ___ Kan.App. ___ (collecting cases applying doctrine); State v. Romero, App.2006, 133 P.3d 842, 851, 139 N.M. 386 (must prove four elements: declarant expected to testify; declarant becomes unavailable; defendant’s misconduct caused the unavailability; and defendant intended to prevent declarant from testifying); State v. Mack, 2004, 101 P.3d 349, 352 n. 6, 337 Or. 586 (dictum).

dxix

n. 520. While at large

State v. Alvarez-Lopez, 2004, 98 P.3d 699, 704, 136 N.M. 309.

See also

Sarr v. State, Wyo. 2005, 113 P.3d 1051, 1053 (state concedes Crawford violation where after making accusation of spousal abuse, declarant drowned in her bathtub).

dxix

n. 521. Murders declarant

U.S. v. Garcia-Meza, C.A.6th, 2005, 403 F.3d 366, 370 (defendant need not cause the witness unavailability for the purpose of preventing her from testifying; it is enough that his acts have this effect as when the defendant murders his wife); U.S. v. Mayhew, D.C. Ohio 2005, 380 F.Supp.2d 961, 966 (collecting cases and writers and summarizing arguments favoring this extension of the exception); People v. Ruiz, Cal.App.2005, 2005 WL 1670426, p. 6; People v. Giles, 2004, 19 Cal.Rptr.3d 843, 847-848, 123 Cal.App.4th 475 (need not decide if prior claims of domestic violence were “testimonial” since defendant forfeited right by murdering declarant; collecting

cases); *People v. Jiles*, 2004, 18 Cal.Rptr.3d 790, 795, 122 Cal.App.4th 504 (assuming this); *People v. Pantoja*, 2004, 18 Cal.Rptr.3d 492, 499 n. 2, 122 Cal.App.4th, 10 n. 2 (noting cases so applying doctrine but declining to pass on the issue); *People v. Moore*, Colo.App. 2004, 117 P.3d 1, 5 (applies when defendant asserts Crawford to exclude wife's excited utterances in prosecution for her murder); *State v. Meeks*, 2004, 88 P.3d 789, 794, 277 Kan. 609 (statement by victim that "Meeks shot me" admissible in murder prosecution on forfeiture theory); *People v. Bauder*, 2006, 712 N.W.2d 506, 514, 269 Mich.App. 174 (not required that defendant intend that murder prevent victim from testifying against him where that is its effect; adopting reasoning of *Garcia-Meza*, above); *State v. Hand*, 2006, 840 N.E.2d 151, 175, 107 Ohio St.3d 378 (defendant murdered declarant); *Gonzalez v. State*, Tex.App.2004, 155 S.W.3d 603, 610 (defendant shot declarant during a robbery and she later died from her wounds).

But see

U.S. v. Mikos, D.C.Ill.2004, 2004 WL 1631675, p. 5 (declining to allow government to invoke exception where defendant charged with murdering witness to prevent her from testifying).

dxxii

n. 522. Make superfluous

As we shall see in the next section, Justice Scalia pondered but did not decide whether, because it existed in 1791, the dying declarations exception to the hearsay rule was also an exception to the right of confrontation. But if the declarant forfeits the right of confrontation in any case where he murders the declarant, the forfeiture doctrine would apply in any case where the prosecution could invoke the dying declarations exception.

See also

U.S. v. Mayhew, D.C. Ohio 2005, 380 F.Supp.2d 961, 965-966 (accepting forfeiture argument after rejecting dying declaration exception as "unreliable").

But see

People v. Ruiz, Cal.App.2005, 2005 WL 1670426, p. 6 (rejecting argument that murder must have been intended to prevent victim from testifying, not to keep her from running off with another man, on the ground this confuses "waiver", which requires a knowing act, with forfeiture, which does not); *Gonzalez v. State*, Tex.App.2004, 155 S.W.3d 603, 610-611 (no reason to limit to cases where defendant murders declarant with intent to prevent her testimony).

dxxiii

n. 523. Burden of proof

People v. Ruiz, Cal.App.2005, 2005 WL 1670426, p. 5 (prosecution must prove); *Commonwealth v. Edwards*, 2005, 830 N.E.2d, 158, 172, 444 Mass. 526 (same); *State v. Alvarez-Lopez*, 2004, 98 P.3d 699, 704, 136 N.M. 309 (burden of proving forfeiture is on the prosecution).

dxxiv

n. 524. Preponderance

U.S. v. Mayhew, D.C. Ohio 2005, 380 F.Supp.2d 961, 968 (applying preponderance standard and finding forfeiture); U.S. v. Mikos, D.C.Ill.2004, 2004 WL 1631675, p. 5 (assuming preponderance standard applies); State v. Meeks, 2004, 88 P.3d 789, 794, 277 Kan. 609 (assuming that standard of proof is preponderance of evidence and that what must be proved is that statement was made, not that defendant killed the declarant to prevent testimony at trial); Commonwealth v. Edwards, 2005, 830 N.E.2d, 158, 174, 444 Mass. 526 (preponderance standard justified); People v. Ruiz, Cal.App.2005, 2005 WL 1670426, p. 5 (relying on federal cases construing hearsay exception).

Compare

People v. Giles, 2004, 19 Cal.Rptr.3d 843, 850, 123 Cal.App.4th 475 (since evidence that defendant murdered declarant satisfied “clear and convincing” standard, court need not decide if mere preponderance would suffice).

dxxv

n. 525. Recantation suffices

People v. Mackey, 2004, 785 N.Y.S.2d 870, 873, 5 Misc.3d 709 (collecting cases apparently holding that wife’s recantation of accusations of marital violence suffices to work forfeiture of right of confrontation).

See also

U.S. v. Garcia-Meza, C.A.6th, 2005, 403 F.3d 366, 369-370 (defendant admits he killed the declarant); People v. Moore, Colo.App. 2004, 117 P.3d 1, 5 (suffices that defendant is on trial for murder of declarant).

dxxvi

n. 526. Jailhouse informant

State v. Hand, 2006, 840 N.E.2d 151, 175, 107 Ohio St.3d 378 (trial court finding that defendant killed declarant to prevent him from testifying based on testimony of jail house informant that defendant had told him this).

dxxvii

n. 527. Insufficient

U.S. v. Arnold, C.A.6th, 2005, 410 F.3d 895, 902 n. 7 (rejecting dissent’s reliance on this ground where all the record showed was that declarant did not appear at trial and testified at a later contempt hearing that she had been under pressure from her mother---defendant’s paramour---but that was not the reason she failed to appear); U.S. v. Rodriguez-Marrero, C.A.1st, 2004, 390 F.3d 1, 17 n. 8 (statement in brief on appeal that defendant was aware declarant would be murdered because he had been told “not to worry” about him does not suffice); U.S. v. Jordan, D.C.Colo.2005, 2005 WL 513501 p. 6 (evidence that defendant murdered the declarant does not prove that he did so to prevent him from testifying where declarant says he was

killed in a dispute over a debt for drugs supplied); U.S. v. Mikos, D.C.III.2004, 2004 WL 1631675, p. 5 (circumstantial evidence that defendant murdered declarant to prevent her from testifying against him); State v. Henderson, 129 P.3d 646, 650, ___ Kan.App. ___ (age alone does not suffice to establish; must show defendant caused three-year-old's unavailability which could not do when judge declared child incompetent to testify); State v. Page, 2005, 104 P.3d 616, 621, 197 Or.App. 72 (evidence that defendant knew each other and vague reference to gang involvement in the charged crime does not suffice); Clark v. State, Miss. 2004, 891 So.2d 136, 138, 140 (assuming not enough that declarant told police he would not testify because he was "afraid for his life").

dxxviii

n. 528. Evidence suffices

Commonwealth v. Edwards, 2005, 830 N.E.2d, 158, 174, 444 Mass. 526 (tape-recordings of phone conversation from jail in which defendant urged key prosecution witness to flee the state to avoid testifying against defendant); People v. Jones, 2006, 714 N.W.2d 362, 367, 270 Mich.App. 208 (defendant's cousin, a member of defendant's street gang, threatened to kill witness, other gang members present in court, and gang has history of witness intimidation); State v. Ivy, Tenn.2006, 188 S.W.3d 132, 147 (evidence at trial showed that defendant murdered victim to prevent her from reporting assault that would have led to parole revocation to police).

dxxix

n. 529. Default that bars

People v. Mitchell, 2005, 32 Cal.Rptr.3d 613, 619, 131 Cal.App.4th 1210 (defendant who failed to object on Crawford grounds two weeks after the case was decided "forfeited" right to raise issue on appeal, citing same usage by U.S. Supreme Court in U.S. v. Olano, 1993, 113 S.Ct. 1770, 507 U.S. 725, 731, 123 L.Ed.2d 508).

dxxx

n. 530. Psuedo-waiver

"Psuedo-waiver" is explained in vol. 21, § 5033.

dxxxi

n. 531. Does not damage

City of Las Vegas v. Walsh, 2005, 124 P.3d 203, 207, ___ Nev. ___ (defendant waives right to object to use of affidavit to authenticate blood sample if he fails to raise a bona fide dispute regarding contents of affidavit); McClenton v. State, Tex.App. 2005, 167 S.W.3d 86, 94 (defendant "opened the door" to testimonial hearsay by asking single question about it); Courson v. State, Tex.App. 2005, 160 S.W.3d 125, 129 (by not objecting when objection would have been futile because Crawford had not been decided, defendant forfeited right of confrontation; what the court really means is that the defendant forfeited his right to raise the issue on appeal).

dxxxii

n. 532. Demolish

Fowler v. State, Ind.2005, 829 N.E.2d 459, 470 (defendant forfeits right of confrontation by not asking trial court to cite recalcitrant witness for contempt for refusing to answer questions about “testimonial” hearsay); State v. Marbury, Ohio App.2004, 2004 WL 758404 ¶ 39 (by declining to cross-examine declarant at trial, defendant waives his right of confrontation so he cannot complain on appeal about the admission of her hearsay statements that she does not recall making).

dxxxiii

n. 533. Failing to subpoena

Blanton v. State, Fla.App.2004, 880 So.2d 798, 801 (Crawford satisfied when defendant could have deposed the declarant); State v. Brigman, 2005, 615 S.E.2d 21, 24, ___ N.C.App. ___ (by failing to call child declarants to the stand, defendant waived right to confront them; alternative rationale); Bratton v. State, Tex.App. 2005, 156 S.W.3d 689, 694.

See also

People v. Angulo, 2005, 30 Cal.Rptr.3d 189, 202, 129 Cal.App.4th 1349 (by pleading guilty, defendant waived right of confrontation so he cannot complain when statements of accusers in that case are later used against him, at least in a sexually violent predator proceeding in which only the due process right of confrontation applies).

dxxxiv

n. 534. Cases reject

U.S. v. Pugh, C.A.6th, 2005, 405 F.3d 390, 400 (Crawford objection not waived when defendant “opened door” to let it in); U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 679 (rightly rejecting the notion that defendant forfeited right of confrontation by “opening the door” by cross-examining officers about the informant to reduce the impact of circumstantial evidence of accusations introduced by prosecutors); People v. R.A.S., Colo.App. 2005, 111 P.3d 487, 490 (defendant does not waive Crawford objection by stipulating that child-victim was not a competent witness); State v. Cox, La.App.2004, 876 So.2d 932, 938 (confrontation not waived by failing to subpoena declarant for trial); People v. Lonsby, 2005, 707 N.W.2d 610, 615, 268 Mich.App. 375 (defendant did not forfeit confrontation right by failing to object to expert testimony when he did not then know that the expert would simply be used as a conduit to bring unopposed hearsay into evidence).

dxxxv

n. 535. “Dying declarations”

124 S.Ct. at 1367 n.6, 541 U.S. at 55 n.6.

dxxxvi

n. 536. “Incorporates”

124 S.Ct. at 1367 n.6, 541 U.S. at 55 n.6.

dxxxvii

n. 537. “Sui generis”

124 S.Ct. at 1367 n.6, 541 U.S. at 55 n.6.

dxxxviii

n. 538. Unanswered

People v. Jiles, 2004, 18 Cal.Rptr.3d 790, 795, 122 Cal.App.4th 504 (Supreme Court left question unanswered but court renders issue moot by holding that murderer forfeits right to confront victim); People v. Durio, N.Y.Sup.Ct.2005, 794 N.Y.S.2d 863, 864, 7 Misc.3d 729 (Supreme Court left unanswered); State v. Blackstock, 2004, 598 S.E.2d 412, 420, 165 N.C.App. 50 (Crawford left question open).

dxxxix

n. 539. Side-stepped

See, e.g., State v. Meeks, 2004, 88 P.3d 789, 792, 277 Kan. 609 (apparently passing over dying declaration route because victim was not under a sense of immediately impending death but rendering dying declarations superfluous by holding that defendant in murder prosecution forfeits right of confrontation by killing victim).

dxl

n. 540. Answer “yes”

People v. Monterroso, 2004, 22 Cal.Rptr.3d 1, 19, 34 Cal.4th 743, 101 P.3d 956, 972; People v. Gilmore, 2005, 828 N.E.2d 293, 302, 356 Ill.App.3d 1023 (after discussing conflicting cases in this note, decides exception should be recognized); State v. Martin, Minn.2005, 695 N.W.2d 578, 585; People v. Durio, N.Y.Sup.Ct.2005, 794 N.Y.S.2d 863, 864, 7 Misc.3d 729 (admitting dying declaration under Mattox necessity exception).

But see

U.S. v. Mayhew, D.C. Ohio 2005, 380 F.Supp.2d 961, 965 n. 5 (rejecting exception on ground that dying declarations are not reliable); U.S. v. Jordan, D.C. Colo.2005, 2005 WL 513501 p. 3 (recognizing that Crawford leaves question open but holds, based on historical underpinnings of the rule, that the Sixth Amendment does not incorporate a dying declarations exception).

dxli

n. 541. Common law

People v. Monterroso, 2004, 22 Cal.Rptr.3d 1, 19, 34 Cal.4th 743, 101 P.3d 956, 972; State v. Martin, Minn.2005, 695 N.W.2d 578, 585.

See also

The grounds for thinking the Founders did not intend to incorporate the common law are set out at length in § 6355 in the main volume, between notecalls 174-288.

dxlii

n. 542. Dim view

People v. Cortes, 2004, 781 N.Y.S.2d 410, 405, 4 Misc.3d 575 (collecting New York decisions showing a suspicion of use of dying declarations in a state that had no constitutional right of confrontation).

dxliii

n. 543. Other exceptions

People v. Kanhai, N.Y.Cty.Ct.2005, 797 N.Y.S.2d 870, 875, 8 Misc.3d 447 (claiming that the business records exception existed at the time of the founding, so it raises no confrontation issue).

dxliv

n. 544. Cited with approval

124 S.Ct. at 1365, 541 U.S. at 54 (reading Mattox to only allow exceptions that existed at the time the Sixth Amendment was adopted).

dxlv

n. 545. “Give way to policy”

Mattox v. U.S., 1895, 15 S.Ct. 337, 340, 156 U.S. 237, 243, 39 L.Ed. 409.

dxlvi

n. 546. Rhetoric

“The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.” 15 S.Ct. at 340, 156 U.S. at 243. The broader reading can also be supported by the historical context in which the case was decided. See § 6357, pp. 297-305.

dxlvii

n. 547. Spousal abuse

Busching, Rethinking Strategies for Prosecuting Domestic Violence in the Wake of Crawford, 2005, 71 Brook.L.Rev. 391; Chase, Is Crawford a “Get Out of Jail Free” Card for Batterers and Abusers? An Argument for A Narrow Definition of “Testimonial”, 2005, 84 Or.L.Rev. 1093; Jaros, The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington, 2005, 42 Am.Crim.L.Rev. 995; Lininger, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747; Lininger, Yes, Virginia, There Is A Confrontation Clause, 2005, 71 Brook.L.Rev. 401; King-Reis, Crawford v. Washington: The End of Victimless Prosecution?, 28 Seattle U.L.Rev. 301; Moody, A Blow to Domestic Violence Victims: Applying the “Testimonial Statements” Test in Crawford v. Washington, 2005, 11 Wm.& Mary J.Women & L. 387;

Comment, “Utter Excitement” About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington, 2005, 36 St.Mary’s L.J. 717.

Note, Resolving The Ambiguity Behind The Bright Line Rule: The Effect of Crawford v. Washington on The Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions, 2006 U.Ill.L.Rev. 205.

dxlviii

n. 548. Child molestation

Chase, Is Crawford A “Get Out of Jail Free” Card for Batterers and Abusers? An Argument for a Narrow Definition of “Testimonial”, 2005, 84 Or.L.Rev. 1093; Mosteller, Crawford’s Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases, 2005, 71 Brook.L.Rev. 411; Raeder, Remember The Ladies and Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311; Stefanuca, Crawford v. Washington: The Admissibility of Statements to Physicians and the Use of Closed Circuit Television in Cases of Child Sexual Abuse, 2005, 5 U.Md.L.J.Race, Religion, Gender & Class 411.

Comment, Child Sex Abuse Victims: How Will Their Stories Be Heard After Crawford v. Washington?, 2005, 27 Campbell L.Rev. 279; Comment, Unspeakable! Crawford v. Washington and Its Effects on Child Victims of Sexual Assault, 35 Sw.U.L.Rev. 137; Comment, Repurcussions of Crawford v. Washington: A Child’s Statement to A Washington State Child Protective Services Worker May Be Inadmissible, 2005, 80 Wash.L.Rev. 219; Comment, Child’s Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution, 2005, 108 W.Va.L.Rev. 501.

Note, Child Abuse Witness Protections Confront Crawford v. Washington, 2005, 39 Ind.L.Rev. 113; Note, The Price of Silence: The Prosecution of Domestic Violence Cases In Light of Crawford v. Washington, 2005, 79 So.Cal.L.Rev. 213, 217; Note, Working Within and Around Utah’s Section 76-5-411 after Crawford v. Washington: Assessing The Admissibility of Out-of-Court Statements of Child Victims of Sexual Abuse, 2005 Utah L.Rev. 1101.

See also

Friedman, The Conundrum of Children, Confrontation, and Hearsay, 2002, 65-WTR Law & Contemp.Probs. 243; Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under The Challenge of Child Sexual Abuse Prosecutions, 1993, 1993 U.Ill.L.Rev. 691.

dxlix

n. 549. Effect of Crawford

Moody, A Blow to Domestic Violence Victims: Applying the “Testimonial Statements” Test in Crawford v. Washington, 2005, 11 Wm.& Mary J.Women & L. 387 (Crawford a “fatal blow”), 395 (“eviscerates” prosecutions); Lininger, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747, 748 (newspaper reports that prosecutors dismissed hundreds of cases after Crawford); Raeder, Remember The Ladies and Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311-312, 386.

But see

Busching, Rethinking Strategies for Prosecuting Domestic Violence in the Wake of Crawford, 2005, 71 Brook.L.Rev. 391, 396 (correctly predicting that lower courts would evade Crawford restrictions); Comment, "Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington, 2005, 36 St. Mary's L.J. 717, 727-728.

dl

n. 550. Unwillingness

As we shall see, other differences exist or flow from this one.

dli

n. 551. Separately

As the articles cited in notes 547 and 548 suggest, most of the writers do this.

dlii

n. 552. Wife insisted

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 326-327.

dliii

n. 553. Criminalize

For another triumph of this alliance, see vol. 23, § 5382, text at notecall 6.

dliiv

n. 554. Federal funds

Comment, "Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington, 2005, 36 St.Mary's L.J. 717, 727.

dlv

n. 555. Unwilling to assist

Lining, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747, 751.

dlvi

n. 556. "Victimless"

Busching, Rethinking Strategies for Prosecuting Domestic Violence in the Wake of Crawford, 2005, 71 Brook.L.Rev. 391, 392.

dlvii

n. 557. Make admissible

King-Reis, Crawford v. Washington: The End of Victimless Prosecution?, 28 Seattle U.L.Rev. 301, 310; Comment, "Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington, 2005, 36 St.Mary's L.J. 717, 730.

dlviii

n. 558. 50% victims

King-Reis, Crawford v. Washington: The End of Victimless Prosecution?, 28 Seattle U.L.Rev. 301, 303.

Compare

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 325-326 (collection of statistics showing lower rates).

Analysis of the statistics suggests that part of the problem is that the counters use differing definitions of the subject matter of their inquiry. Comment, "Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington, 2005, 36 St.Mary's L.J. 717, 726-727 (Texas advocacy group defines "domestic violence" to cover everything from first degree murder to shouting matches and refusing to consort with in-laws).

dlx

n. 559. Assumes truth

King-Reis, Crawford v. Washington: The End of Victimless Prosecution?, 28 Seattle U.L.Rev. 301, 307-308.

dlx

n. 560. "Firmly rooted"

See § 6367, notes 63 and 66, this supplement.

dlxi

n. 561. Greater success

Busching, Rethinking Strategies for Prosecuting Domestic Violence in the Wake of Crawford, 2005, 71 Brook.L.Rev. 391, 396.

dlxii

n. 562. Reducing violence

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 325-326 (citing statistics purporting to show that violence against women halved from 1993 to 2001, but other statistics suggest that having seen the results of criminalization of the problem, many victims simply stopped reporting abuse).

dlxiii

n. 563. Genes and environment

See, e.g., Caspi, et al., Role of Genotype in the Cycle of Violence in Maltreated Children, 297 Science 851 (August 2, 2002); Stokstad, Violent Effects of Abuse Tied to Gene, 297 Science 752 (August 2, 2002) (study of both genetics and social surroundings points to the influence of a particular genotype on aggressive behavior in young adults from a troubled background); Bower, Resilient DNA: Gene May Brighten Future for Abused Kids, 162 Science News, No. 5 (online) (Aug. 3, 2002) (whether abused children turn violent or not appears to be genetically determined).

dlxiv

n. 564. Television drama

Swanbrow, Vicious Videos, Michigan Today, Summer 2006, p. 8 (studies show kids who watch violent television shows and play violent video games are more violent than others).

dlxv

n. 565. Ambitious politicians

Bower, All The Rage: Survey Extends Reach of Explosive-Anger Disorder, 169 Sci.News 356 (June 10, 2006)(6-9 million people suffer an episode of intermittent explosive disorder each year resulting in domestic violence, road rage, and the like); Jackman, Ex-Bush Aide Fatally Shoots Son, Himself, Washington Post, July 15, 2006, p. B01. (Harvard JD commits suicide when police try to serve a domestic violence warrant on him); Follick, Tom Gallagher Opens Up About Messy '79 Divorce, Gainesville Sun, June 20, 2006 (online)(Christian, family values gubernatorial candidate's wife sought restraining order after he broke into house and threatened her mother; trial judge denied to avoid embarrassing husband's political career).

dlxvi

n. 566. Promising remedies

See, e.g., Bower, Violent Developments, 169 Science News 328 (May 27, 2006)(violent behavior caused by complicated relationship between genetic inheritance and social circumstances that affect the parts of the brain that control emotion; many children can be taught to manage anger through the Peaceful Schools Project).

dlxvii

n. 567. Crawford threat

See note 549, above.

dlxviii

n. 568. Affidavits

Linger, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747, 782.

dlxix

n. 569. Get accusation

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 337.

dlxx

n. 570. Victim absent

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 342.

dlxxi

n. 571. Shift to victim

Lininger, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747, 782.

This may explain the exaggerated predictions of the effect of Crawford by prosecutors. See, e.g., Moody, A Blow to Domestic Violence Victims: Applying the “Testimonial Statements” Test in Crawford v. Washington, 2005, 11 Wm.& Mary J.Women & L. 387, 404 (Crawford a “fatal blow” to domestic violence prosecutions, renders prosecutors “powerless”).

dlxxii

n. 572. Manipulating “testimonial”

Chase, Is Crawford a “Get Out of Jail Free” Card for Batterers and Abusers? An Argument for A Narrow Definition of “Testimonial”, 2005, 84 Or.L.Rev. 1093; Comment, Unspeakable! Crawford v. Washington and Its Effects on Child Victims of Sexual Assault, 35 Sw.U.L.Rev. 137; Comment, Child’s Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution, 2005, 108 W.Va.L.Rev. 501, 504 (urging courts to apply narrow definition of the term).

dlxxiii

n. 573. Per se “nontestimonial”

Moody, A Blow to Domestic Violence Victims: Applying the “Testimonial Statements” Test in Crawford v. Washington, 2005, 11 Wm.& Mary J.Women & L. 387, 400; Comment, “Utter Excitement” About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington, 2005, 36 St.Mary’s L.J. 717, 732.

dlxxiv

n. 574. Wide loophole

Lininger, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747,786; Lininger, Yes, Virginia, There Is A Confrontation Clause, 2005, 71 Brook.L.Rev. 401, 403.

dlxxv

n. 575. Expanded “present”

The exception was originally justified on the ground that since the person who testified to the statement was also perceiving the matter described, the declarant was less likely to lie and misperceptions and misstatements could be corrected by the witness. See Morgan, Basic Problems of Evidence, 1961, pp. 340-341. This justification would not allow admission of statements to a 911 operator who could not provide either of the two safeguards; but courts disregarded that limitation in their desire to support prosecution of wife-beaters. King-Reis, Crawford v. Washington: The End of Victimless Prosecution?, 28 Seattle U.L.Rev. 301, 309-310.

dlxxvi

n. 576. Route for 911 calls

Busching, Rethinking Strategies for Prosecuting Domestic Violence in the Wake of Crawford, 2005, 71 Brook.L.Rev. 391, 394; Chase, Is Crawford a “Get Out of Jail

Free” Card for Batterers and Abusers? An Argument for A Narrow Definition of “Testimonial”, 2005, 84 Or.L.Rev. 1093, 1114; Note, Resolving the Ambiguity Behind The Bright-Line Rule: The Effect of Crawford v. Washington on The Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions, 2006 U.Ill.L.Rev. 205; Note, Calling Crawford: Minnesota Declares A 911 Call Non-Testimonial in State v. Wright, 2006, 58 Me.L.Rev. 249.

dlxxvii

n. 577. Moscat case

People v. Moscat, Bronx Co.Crim.Ct. 2004, 777 N.Y.S.2d 875, 3 Misc.3d 739.

dlxxviii

n. 578. Suppress tape

Jaros, The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington, 2005, 42 Am.Crim.L.Rev. 995, 1004.

dlxxix

n. 579. “Call for help”

Since the opinion ran ten pages, the inference that the judge had written the opinion, then gone looking for a case in which it might be used becomes irresistible. Jaros, The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington, 2005, 42 Am.Crim.L.Rev. 995, 1004 n. 55 (reporting the judge’s denial of this).

dlxxx

n. 580. Ignorant tardy neighbor

Jaros, The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington, 2005, 42 Am.Crim.L.Rev. 995, 1005.

dlxxxii

n. 581. Leading authority

Jaros, The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington, 2005, 42 Am.Crim.L.Rev. 995, 1008.

dlxxxiii

n. 582. Forfeiture endorsed

See above, text at notecall 517.

See also

State v. Wright, Minn.2005, 701 N.W.2d 802, 814 (domestic violence cases present “special concerns” after Crawford, but use of forfeiture doctrine will solve many of them).

Chase, Is Crawford a “Get Out of Jail Free” Card for Batterers and Abusers? An Argument for A Narrow Definition of “Testimonial”, 2005, 84 Or.L.Rev. 1093, 1123 (sceptical).

dlxxxiii

n. 583. In every case

Lininger, Yes, Virginia, There Is A Confrontation Clause, 2005, 71 Brook.L.Rev. 401, 407.

dlxxxiv

n. 584. Not that far

Lininger, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747, 807 (urge police officers to ask victim about defendant's attempts to intimidate her to prevent her cooperation).

dlxxxv

n. 585. "Open-Sesame"

Busching, Rethinking Strategies for Prosecuting Domestic Violence in the Wake of Crawford, 2005, 71 Brook.L.Rev. 391, 398 (prosecutors should treat domestic violence defendants like members of the Mafia---willing to do anything to get rid of witnesses).

dlxxxvi

n. 586. Many other reasons

These range from the untruthfulness of the initial accusations through the mistaken notion that somehow they are to blame for the abusers violence to love for the defendant and willingness to accept his promises to reform. Comment, "Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington, 2005, 36 St.Mary's L.J. 717, 728-729.

dlxxxvii

n. 587. Presume forfeiture

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 361 (rejecting presumption approach).

dlxxxviii

n. 588. Not unalloyed success

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 329-331.

dlxxxix

n. 589. Devote resources

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 367.

dx

n. 590. Rethink methods

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 313.

dxci

n. 591. Three tracks

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 369-371.

dxcii

n. 592. "Fast track" cases

Lining, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747, 815.

dxciiii

n. 593. Shift to federal

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 369.

dxciiv

n. 594. New offenses

Lining, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747, 754, 816.

When the writer served a brief stint as a deputy district attorney in a then-rural California county, if the victim declined to testify the abuser was prosecuted instead for disturbing the peace---a less serious crime, to be sure, but one that still permitted probation department surveillance and counselling of the offender.

dxciiv

n. 595. Aggressive police work

Busching, Rethinking Strategies for Prosecuting Domestic Violence in the Wake of Crawford, 2005, 71 Brook.L.Rev. 391, 397.

dxciiv

n. 596. Protection and services

Lining, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747, 754, 813 (protection); Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 373 (services).

dxciiv

n. 597. Early cross

Lining, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747, 753, 787.

But see

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 355-356 (agreeing with proposal but doubting it is the panacea the proponents promise).

dxcviii

n. 598. Prior inconsistent

Busching, Rethinking Strategies for Prosecuting Domestic Violence in the Wake of Crawford, 2005, 71 Brook.L.Rev. 391, 399-400.

dxci

n. 599. New exceptions

Linger, Prosecuting Batterers After Crawford, 2005, 91 Va.L.Rev. 747, 797, 803.

dc

n. 600. Curbs on “nontestimonial”

Linger, Yes, Virginia, There Is A Confrontation Clause, 2005, 71 Brook.L.Rev. 401, 406.

dci

n. 601. Convict without

See, e.g., *People v. Thompson*, 2004, 812 N.E.2d 516, 521, 349 Ill.App.3d 587 (good paradigm case; shows that even with middle class defendant, don't need hearsay from victim to prove case); *Commonwealth v. Gonsalves*, 2005, 833 N.E.2d 549, 559, 445 Mass. 1 (recognizing impact of Crawford on domestic violence cases but using the one at hand to show how successful prosecution can still be done without denying the defendant the right to confront his accuser).

dcii

n. 602. Challenge to confrontation

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 386.

dciii

n. 603. Misnomer

See, e.g., Comment, Child's Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution, 2005, 108 W.Va.L.Rev. 501, 504 n. 10 (“loosely defined” as physical, emotional, or sexual mistreatment of anyone under the age of 18).

dciv

n. 604. Statistics suspect

See, e.g., Comment, Child Sex Abuse Victims: How Will Their Stories Be Heard After Crawford v. Washington?, 2005, 27 Campbell L.Rev. 279, 290 (10% of boys, 25% of girls have been sexually abused).

dcv

n. 605. Twice as likely

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 374.

dcvi

n. 606. “Horrendous”

Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under The Challenge of Child Sexual Abuse Prosecutions, 1993, 1993 U.Ill.L.Rev. 691, 692.

devii

n. 607. Peculiarly American

It was an expatriate Frenchman, Maurice Chevallier, who sang “Thank Heaven For Little Girls” and expatriate Russian, Vladimir Nobakov, who wrote the story of “Lolita”, a pubescent sexpot.

See also

Vol. 23, § 5412A, text at notecall 12 (Supp.2006).

dcviii

n. 608. Protean crime

See, e.g., U.S. v. Bordeaux, C.A.8th, 400 F.3d 548 (D put penis in child's mouth); In re Rolandis G, 2004, 817 N.E.2d 183, 352 Ill.App.3d 776 (D adjudicated a juvenile delinquent for forcing seven-year-old boy to perform oral sex); People v. Fulcher, 2006, 38 Cal.Rptr.3d 702, 136 Cal.App.4th 41 (D took nude photos of and touched daughters genitals, put 7 year-old's penis in his mouth).

dcix

n. 609. Baby rapers

See, e.g., People v. Harless, 2005, 22 Cal.Rptr.3d 625, 125 Cal.App.4th 70 (D gave drugs to and had sex with subteen daughters)

dcx

n. 610. Grandfathers

See, e.g., T.P. v. State, Ala.Crim.2005, 911 So.2d 1117(eight-year-old victim's grandfather touched his buttocks); State v. Squiers, 2006, 896 A.2d 80, ___ Vt. ___ (D tried unsuccessfully to touch his 14-year-old granddaughters breasts and genitals while making sexual overtures).

dcxi

n. 611. Teenagers

See, e.g., Palmer, Court Upholds 10-Year Term in Teen Sex Case, Fulton County Daily Report, June 28, 2006 (online)(18-year old gets mandatory minimum of ten years without possibility of parole for having sex with a 14-year-old girl; Georgia Supreme Court holds sentence constitutional after having reversed similar sentence for a high school football star).

dcxii

n. 612. Capital offense

Blanton v. State, Fla.App.2004, 880 So.2d 798(D charged with capital sexual battery of 11-year-old stepdaughter for making videotape of child in lewd poses while he groped her); Foley v. State, Miss.2005, 914 So.2d 677(D got life sentence, though

charged with a capital offense for penetrating 5-year-old stepdaughter with vibrator and forcing her to perform oral sex on him).

See also

Talley, Oklahoma Governor Approves Executing Molesters, Associated Press, June 9, 2006 (online)(joins four other states that make child molestation a capital crime).

dexiii

n. 613. Hedonistic states

People v. Warner, 2004, 14 Cal.Rptr.3d 419, 119 Cal.App.4th 331(defendant gets life sentence for touching vagina of five-year-old).

See also

Cal. Pen. Code § 667.61(specified sex offenses subject to punishment by incarceration for life).

Compare

People v. Hicks, 1999, 25 Cal.Rptr.2d 469, 6 Cal.4th 784, 863 P.2d 714 (80 year sentence for rape upheld).

dexiv

n. 614. Castration

Rondeaux, Can Castration Be A Solution for Sex Offenders?, Washington Post, July 5, 2006, p. B01(8 states allow castration of sexual offenders either with drugs or surgically despite doubts about whether it works).

dexv

n. 615. Recidivism

See, e.g., U.S. v. Gross, C.A.7th, 2006, 437 F.3d 691 (defendant subjected to serial sex abuse as a child grows up to become a serial sex criminal himself).

See also

Rondeaux, Can Castration Be A Solution for Sex Offenders?, Washington Post, July 5, 2006, p. B01.

But see

Vol. 23, § 5412, text at notecall 134 (statistics show low recidivism rate for rape).

dexvi

n. 616. Highest strata

See, e.g., Booth, Defendant Expected To Take Stand in Sexual Harassment Case, McAllen (Tex.) Monitor, June 21, 2006 (online) (two girls testify they were sexually assaulted by political consultant famous for attack ad accusing President Clinton of giving nuclear secrets to China in exchange for campaign contributions).

dexvii

n. 617. Satanic rituals

Zirpolo, McMartin Pre-Schooler: "I Lied", Los Angeles Times, October 30, 2005 (online)(recounting how when police and child welfare workers pressed him to conform his story with that of other accusers, he made up story of Satanic abuse by altering details of Catholic mass he had attended).

See also

Ex parte Briggs, Tex.Crim.2005, 187 S.W.2d 458 (D wrongfully convicted of causing death of sickly infant who was also victim of medical and emergency room malpractice on basis of Harris County autopsy report claiming homicide later determined to be erroneous).

dexviii

n. 618. Cases difficult

Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under The Challenge of Child Sexual Abuse Prosecutions, 1993, 1993 U.Ill.L.Rev. 691, 695.

dexix

n. 619. Immaturity

Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under The Challenge of Child Sexual Abuse Prosecutions, 1993, 1993 U.Ill.L.Rev. 691, 695.

dexx

n. 620. Prosecutors unwilling

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 374-375.

dexxi

n. 621. Incompetent

Comment, Child's Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution, 2005, 108 W.Va.L.Rev. 501, 503.

dexxii

n. 622. Congress deleted

See vol. 27, §§ 6002 (Rule 601 aimed to abolish incompetency), 6005 (courts ignore Rule 601 and continue to disqualify witnesses on common law grounds of incompetency, including infancy).

dexxiii

n. 623. Only child abuse

See 18 U.S.C.A. § 3509, discussed in volume 27, § 6005, this supplement.

dexxiv

n. 624. Threatened status quo

For a collection of alarmist responses, see Comment, *Child's Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution*, 2005, 108 W.Va.L.Rev. 501, 503 n. 7.

dexxv

n. 625. Distorted utterances

Raeder, *Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 2005, 71 Brook.L.Rev. 311, 376; Comment, *Child's Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution*, 2005, 108 W.Va.L.Rev. 501, 522.

See also

Vol. 30B, § 7043, text at notecall 14 (distortion of exception in cases of child abuse).

dexxvi

n. 626. Medical treatment

Chase, *Is Crawford a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for A Narrow Definition of "Testimonial"*, 2005, 84 Or.L.Rev. 1093, 1121; Raeder, *Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 2005, 71 Brook.L.Rev. 311, 376; Stefanuca, *Crawford v. Washington: The Admissibility of Statements to Physicians and the Use of Closed Circuit Television in Cases of Child Sexual Abuse*, 2005, 5 U.Md.L.J.Race, Religion, Gender & Class 411, 418; Comment, *Child's Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution*, 2005, 108 W.Va.L.Rev. 501, 525.

See also

Vol. 30B, § 7045, text at notecall 5 (use in cases of child sexual abuse "particularly troubling");

In re D.L., Ohio App.2005, 2005 WL 1119809, pp. 4-5 (in holding accusation made to pediatric nurse specializing in child abuse to whom child was sent by social worker who also called the police was not "testimonial" over vigorous dissent, court justifies holding by noting the difficulty prosecutors have in getting convictions and the number of other courts who have similarly distorted the exception).

dexxvii

n. 627. "Firmly rooted"

Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under The Challenge of Child Sexual Abuse Prosecutions*, 1993, 1993 U.Ill.L.Rev. 691, 706.

See also

Vol. 30A, § 6367 n. 66 (this supplement).

dexxviii

n. 628. Made "testimonial"

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 377.

dcxxix

n. 629. New exceptions

Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under The Challenge of Child Sexual Abuse Prosecutions, 1993, 1993 U.Ill.L.Rev. 691, 696; Comment, Repurcussions of Crawford v. Washington: A Child's Statement to A Washington State Child Protective Services Worker May Be Inadmissible, 2005, 80 Wash.L.Rev. 219, 226; Comment, Child's Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution, 2005, 108 W.Va.L.Rev. 501, 528.

dcxxx

n. 630. Support gloomy

See, e.g., State v. Bobadilla, Minn.2006, 709 N.W.2d 243, 253 (majority of cases hold child's statement "testimonial" but most are distinguishable); State v. Snowden, 2005, 867 A.2d 314, 323, 385 Md. 64 (questioning of victim by social worker acting as part of police investigation makes statements "testimonial"); State v. Davis, 2005, 613 S.E.2d 760, 775, 364 S.C. 364 (collecting the conflicting cases on this issue).

dcxxxi

n. 631. Use forfeiture

Friedman, The Conundrum of Children, Confrontation, and Hearsay, 2002, 65-WTR Law & Contemp.Probs. 243, 252; Comment, Child's Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution, 2005, 108 W.Va.L.Rev. 501, 533.

But see

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 388 (skeptical about the effectiveness of this since child often intimidated by mother and other family members, not the defendant).

dcxxxii

n. 632. Per se "nontestimonial"

Comment, Child's Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution, 2005, 108 W.Va.L.Rev. 501, 524.

dcxxxiii

n. 633. Reluctant without

Raeder, Remember The Ladies and Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases, 2005, 71 Brook.L.Rev. 311, 374-375.

dcxxxiv

n. 634. Preparation and CCTV

Mosteller, Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases, 2005, 71 Brook.L.Rev. 411, 414 (preparation); Comment, Child's Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution, 2005, 108 W.Va.L.Rev. 501, 536 (CCTV).

But see

Stefanuca, Crawford v. Washington: The Admissibility of Statements to Physicians and the Use of Closed Circuit Television in Cases of Child Sexual Abuse, 2005, 5 U.Md.L.J.Race, Religion, Gender & Class 411, 426-427 (suggesting that since Justice Scalia dissented in the Supreme Court case approving the use of CCTV with child victims, his hegemony in Crawford means that case is ripe for overruling).

dcxxxv

n. 635. Incapable of "testimonial"

Comment, Child's Play: Avoiding The Pitfalls of Crawford v. Washington in Child Abuse Prosecution, 2005, 108 W.Va.L.Rev. 501, 520-521.

But see

State v. Snowden, 2005, 867 A.2d 314, 328-329, 385 Md. 64 (rejecting the argument).

dcxxxvi

n. 636. Create exception

Comment, Child Sex Abuse Victims: How Will Their Stories Be Heard After Crawford v. Washington?, 2005, 27 Campbell L.Rev. 279, 293.

But see

While we agree with this view, we think the exception should be narrow given the limited success that criminalization alone has had in reducing child sexual abuse. See, e.g., U.S. v. Gross, C.A.7th, 2006, 437 F.3d 691.

dcxxxvii

n. 637. Mattox exception

Mattox v. U.S., 1895, 15 S.Ct. 337, 340, 156 U.S. 237, 243, 39 L.Ed. 409.

Though Justice Scalia in Crawford tried to limit this power to those exceptions recognized at common law, see 124 S.Ct. at 1365, 541 U.S. at 54, the majority of the Court took the contrary view in Maryland v. Craig, 1990, 110 S.Ct. 3157, 497 U.S. 836, 849-850, 111 L.Ed.2d 666, at least with respect to physical confrontation.

dcxxxviii

n. 638. Predators prey

Some cases suggest this dynamic at work; see Purvis v. State, Ind.App.2005, 829 N.E.2d 572 (predatory pedophile seeks out mentally deficient ten-year-old and succeeds despite careful parenting); In re E.H., 2005, 823 N.E.2d 1029, 1035, 355 Ill.App.3d 564, 291 Ill.Dec. 443 (thirteen-year-old girl allowed to babysit five-year-old and two-year-old girls engages them in anal-genital licking); State v. Castilla, 2005,

87 P.3d 1211, 1213, 131 Wash.App. 7 (nurse engages in sex with mentally impaired patient under guise of “treatment”).

dcxxxix

n. 639. Thugs specialized

See, e.g., *People v. Jones*, 1867, 31 Cal. 565, 574, 1867 WL 740 (defendant bragged that Chinese victim could not testify against him; court recognizes problem but reverses trial court’s effort to evade the law to do justice).

dexl

n. 640. Children exempted

See § 6371.3, this supplement, text at notecall 370.

dexli

n. 641. Questions remain

Though the arguments for an exception arose in child sexual abuse cases, it should probably also apply to other crimes against the child. But the arguments do not seem to support an exception for other crimes such as parental drug dealing. See vol. 25, § 5572, text at notecall 575. Whether it should apply to domestic violence to another family member is a closer question. See, e.g., *State v. Courtney*, Minn.2005, 696 N.W.2d 73, 77. On the one hand, the child can suffer harm from seeing one parent beat the other; but on the other hand, pitting the child against the father when the mother refuses to testify against him can also harm the child’s psyche.

dexlii

n. 642. Who “child”

We assume the exception would also apply to adults who have the mental capacity of a child.

Compare

State v. Castilla, 2005, 87 P.3d 1211, 1213, 131 Wash.App. 7 (mentally impaired victim).

dexliii

n. 643. Infancy

See vol. 27, § 6005, text at notecall 63.

dexliv

n. 644. Older accuser

In an ideal world, school age children ought to receive some rudimentary sex education which would not only make them better able to testify but also help them to avoid victimization. One does not have to read very many child abuse cases to conclude that parents do not do a very good job of teaching their children about sex. When children are taught to call a penis a “jolly whacker” and a vagina a “butterfly”, they are ill-prepared to testify or to fend off pedophiles.

dcxlv

n. 645. Unsworn statement

What we have in mind is something like the procedure used in some states when the criminal defendants were still disqualified by interest from testifying in their own behalf. See *Ferguson v. Georgia*, 1961, 81 S.Ct. 756, 757, 365 U.S. 570, 5 L.Ed.2d 783.

See also

Milich, *Georgia Rules of Evidence*, 2d ed.2002, § 12.1, p. 210.

dcxlvii

n. 646. "Circumstantial"

Perhaps this is what Professor Friedman has in mind when he compared the hearsay of a child to the barking of a bloodhound. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 2002, 65-WTR Law & Contemp.Probs. 243, 249-250.

dcxlviii

n. 647. Contradicted by sworn

Compare former Georgia Code § 38-415: "[the criminal defendant's statement to the jury] shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case."

Those members of the jury who have experience dealing with young children will surely be able to evaluate such statements as they do when a child accuses a sibling of being the perpetrator of a battery.

dcxlviii

n. 648. Criticized Roberts

See 124 S.Ct. at 1371, 541 U.S. at 62.

See also

State v. Mizenko, 2006, 127 P.3d 458, 468, 330 Mont. 229 (rather than divine Court's intent, lower courts should wait for Supreme Court to overrule Roberts).

dcxlix

n. 649. "Whether survives"

124 S.Ct. at 1370, 541 U.S. at 61.

dcl

n. 650. "Exempted from scrutiny"

124 S.Ct. at 1374, 541 U.S. at 68.

dcli

n. 651. "Overruled" Roberts

Lave v. Dretke, C.A.5th, 2006, 444 F.3d 333, 335 ("overruled" Roberts as to "testimonial" statements); *U.S. v. Hadley*, C.A.6th, 2005, 431 F.3d 484, 493

(“overruled” as to “testimonial evidence”); U.S. v. Hinton, C.A.3d, 423 F.3d 355, 357 (“partially overruled” Roberts); Ferguson v. Roper, C.A.8th, 2005, 400 F.3d 635, 639 (“overruled, at least in part”); Miller v. State, Okla.Crim.2004, 98 P.3d 738, 743 (“overruled” Roberts as to “testimonial” statements).

dclii

n. 652. State courts bold

People v. Argomaniz-Ramirez, Colo. 2004, 102 P.3d 1015, 1017 (“overruled a portion of” Roberts); State v. Pierre, 2006, 890 A.2d 474, 495, 277 Conn. 42 (“overruled” as to “testimonial statements”); State v. Greene, 2005, 874 A.2d 750, 773, 274 Conn. 134 (Crawford overruled Roberts only as to “testimonial” hearsay); State v. Crocker, 2004, 852 A.2d 762, 786, 83 Conn.App. 615 (“overruled” but only as to testimonial statements); State v. Hernandez, Fla.App. 2004, 875 So.2d 1271, 1273 (“overruled” so state Roberts precedents no longer binding); Hammon v. State, Ind.2005, 829 N.E.2d 444, 449 (“expressly overruled”); People v. Bell, 2004, 689 N.W.2d 732, 735, 264 Mich.App. 58 (“overruled”); People v. McPherson, 2004, 687 N.W.2d 370, 375, 263 Mich.App. 124 (“overruled”); People v. Geno, 2004, 683 N.W.2d 687, 691-692, 261 Mich.App. 624 (“overruled”); State v. Page, 2005, 104 P.3d 616, 619, 197 Or.App. 72 (“partially overruled”); State v. Carrothers, So.Dak. 2005, 692 N.W.2d 544 (“overruled”); State v. Maclin, Tenn.2006, 183 S.W.3d 335, 344 (Roberts overruled as to testimonial statements); Lee v. Texas, 2004, 143 S.W.3d 565, 570 (“overruled”); Wall v. State, Tex.App.2004, 143 S.W.3d 846, 849 (“overruled”).

See also

City of Las Vegas v. Walsh, 2004, 91 P.3d 591, 595, 120 Nev. 392 (“overturned”); State v. Forrest, 2004, 596 S.E.2d 22, 26, 164 N.C.App. 272 (“overturned”).

dcliii

n. 653. Weasel words

Jensen v. Pliier, C.A.9th, 2006, 439 F.3d 1086, 1090 (unclear if Roberts is still good law as to nontestimonial statements); U.S. v. Pugh, C.A.6th, 2005, 405 F.3d 390, 397 (“limited” Roberts); U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 177 (“redefines Sixth Amendment jurisprudence”); U.S. v. Rashid, C.A.8th, 2004, 383 F.3d 769, 775 (“changed confrontation analysis”); U.S. v. Saget, C.A.2d 2004, 377 F.3d 223, 226 (“abrogates” Roberts); Horton v. Allen, C.A.1st, 2004, 370 F.3d 75, 83 (“abrogated in part”).

dcliv

n. 654. States mealy-mouthed

Smith v. State, Ala.Crim.2004, 898 So.2d 907, 913 (“abrogated” Roberts); State v. Parks, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (“jettisoned” Roberts “reliability analysis”); People v. Wahlert, 2005, 31 Cal.Rptr.3d 603, 612, ___ Cal.App.4th ___ (“reshaped confrontation clause analysis”); People v. Monterroso, 2004, 22 Cal.Rptr.3d 1, 19, 34 Cal.4th 743, 101 P.3d 956, 972 (“repudiated Roberts”); Herrera-Vega v. State, Fla.App. 2004, 888 So.2d 66, 68 (Court “receded from” Roberts); Moody v. State, 2004, 594 S.E.2d 350, 354, 277 Ga. 676 (“renders

Roberts irrelevant”); *In re E.H.*, 2005, 823 N.E.2d 1029, 1035, 355 Ill.App.3d 564, 291 Ill.Dec. 443 (“renounced” Roberts rationale); *People v. West*, 2005, 823 N.E.2d 82, 87, 355 Ill.App. 28, 291 Ill.Dec. 72 (“abandoned reliability framework”); *State v. Wright*, Minn.2005, 701 N.W.2d 802, 809 (“abrogate part” of Roberts); *State v. Bobadilla*, Minn.App. 2004, 690 N.W.2d 345, 349 (“rejected” Roberts); *Clark v. State*, Miss. 2004, 891 So.2d 136, 139 (“abrogated”); *State v. Vaught*, 2004, 682 N.W.2d 284, 290, 268 Neb. 316 (“altered” Roberts); *People v. Bradley*, 2005, 799 N.Y.S.2d 472, 475, 22 App.Div.3d 33 (“departed from” Roberts); *State v. Lewis*, 2004, 603 S.E.2d 559, 556, 166 N.C.App. 596 (“abandoned the rationale” of Roberts); *State v. Harris*, R.I. 2005, 871 A.2d 341, 344 n. 10 (“abrogated”); *State v. Davis*, 2005, 613 S.E.2d 760, 765, 364 S.C. 364 (“broke away from Roberts”); *Courson v. State*, Tex.App. 2005, 160 S.W.3d 125, 129 (“abrogated” as to testimonial statements); *Samarron v. State*, Tex.App. 2004, 150 S.W.3d 701, 706 (“abrogated”); *State v. Savanh*, 2005, 707 N.W.2d 549, 554, ___ Wis.2d ___ (“put the brakes on” Roberts); *State v. Hemphill*, App.2005, 707 N.W.2d 313, 315, ___ Wis.2d ___ (“modified” Roberts).

dclv

n. 655. Pre-Roberts cases

See, e.g., *Fowler v. State*, Ind.2005, 829 N.E.2d 459, 464 (only overruled Roberts, California v. Green still good law).

The Court has applied the right to confrontation to hearsay in many other cases. See §§ 6355-6366 in the main volume. Roberts did not purport to overrule those cases, indeed, Justice Blackmun’s opinion relies on those cases to support the theory he espoused in Roberts much as Justice Scalia relied on the pre-existing caselaw in *Crawford*. See § 6367, pp. 824-827. Moreover, the Court continued to rely on those cases after Roberts. Hence, if Roberts is overruled, nontestimonial hearsay might still have to pass muster under the pre-Roberts caselaw.

dclvi

n. 656. Uncertainty and safer

U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 179 n. 7 (noting claim of one writer that *Crawford* presages the demise of Roberts but stating that step “is beyond the province of this court”); *State v. Doe*, 2004, 103 P.3d 967, 972, 140 Ida. 873 (noting that while it is open to dispute whether Roberts was abrogated for “nontestimonial” hearsay, safer course would be to assume that Roberts was still good law in such cases); *Hammon v. State*, Ind.2005, 829 N.E.2d 444, 450 n. 4 (declining to decide whether Roberts is still good law; collecting authorities with differing positions on this question); *State v. Hembertt*, 2005, 696 N.W.2d 473, 484, 269 Neb. 840 (noting uncertainty but declining to decide question where exception invoked was “firmly rooted” and thus satisfied Roberts); *King v. State*, Tex.App.2006, 189 S.W.3d 347, 361 (doubting that Roberts remains viable but applying anyway); *Key v. State*, Tex.App.2005, 173 S.W.3d 72, 77 (*Crawford* made no explicit statement on the fate of Roberts); *State v. Manuel*, App.2004, 685 N.W.2d 525, 531, 275 Wis.2d 146 (Court “discarded” Roberts but only for “testimonial statements”).

dclvii

n. 657. States apply Roberts

People v. Smith, 2005, 38 Cal.Rptr.3d 1, 8, 135 Cal.App.4th 914; People v. Vigil, Colo.2006, 127 P.3d 916, 926; People v. Couillard, Colo.App.2005, 131 P.3d 1146, 1152; People v. King, Colo.App.2005, 121 P.3d 234, 241; Compan v. People, Colo.2005, 121 P.2d 876, 880; People v. Hinojoso-Mendoza, Colo.App.2005, 2005 WL 2561391; State v. Miller, 2006, 896 A.2d 844, 859, 95 Conn.App. 362; State v. Pierre, 2006, 890 A.2d 474, 502, 277 Conn. 42 (nontestimonial statements admissible if they satisfy Roberts); Sproule v. State, Fla.App.2006, 927 So.2d 46, 47; People v. R.F., 2005, 825 N.E.2d 287, 295, 355 Ill.App.3d 992, 292 Ill.Dec. 31; State v. Jackson, 2005, 118 P.3d 1238, 1254, 280 Kan. 16 (co-conspirator statements subject to Roberts analysis); People v. Shepherd, 2004, 689 N.W.2d 721, 729, 263 Mich.App. 665; State v. Ahmed, Minn.App.2006, 708 N.W.2d 574, 580; State v. Mizenko, 2006, 127 P.3d 458, 461, 330 Mont. 229; State v. Vaught, 2004, 682 N.W.2d 284, 292, 268 Neb. 316 (taking agnostic position but finding Roberts satisfied); Flores v. State, 2005, 120 P.3d 1170, 1180, ___ Nev. ___ (assuming Roberts applies to nontestimonial statement on remand); State v. Blackstock, 2004, 598 S.E.2d 412, 423 n. 2, 165 N.C.App. 50 (Roberts still good law for nontestimonial statements); State v. Dedman, 2004, 102 P.3d 628, 636, 136 N.M. 561; State v. Lawson, 2005, 619 S.E.2d 410, 414, ___ N.C.App. ___; State v. Cook, Ohio.App.2005, 2005 WL 736671; State v. Staten, S.C.App.2005, 610 S.E.2d 823, 836; State v. Maclin, Tenn.2006, 183 S.W.3d 335, 351; Ford v. State, Tex.App.2005, 179 S.W.3d 203, 209; Key v. State, Tex.App.2005, 173 S.W.3d 72, 77; Wiggins v. State, Tex.App. 2004, 152 S.W.2d 656, 660 (collecting similar cases); Moore v. State, Tex.App.2005, 169 S.W.3d 467, 470 n.7; Salt Lake City v. Williams, Utah App.2005, 128 P.3d 47, 54; State v. Searcy, App.2005, 709 N.W.2d 497, 510, ___ Wis.2d ___ (following Manuel, below); State v. Hemphill, App.2005, 707 N.W.2d 313, 315, ___ Wis.2d ___ (Roberts applies to nontestimonial statements); State v. King, App.2005, 706 N.W.2d 181, 189, ___ Wis.2d ___ (since Roberts requires declarant be “unavailable”, where she was not court need not decide whether her statements were “testimonial” under Crawford); State v. Manuel, 2005, 697 N.W.2d 811, 818, ___ Wis.2d ___ (stating but declining to follow argument that Roberts can now be ignored; collecting cases taking the same position); State v. Stuart, 2005, 695 N.W.2d 259, 265, 279 Wis.2d 659 (Roberts no longer good law only with respect to “testimonial” statements).

dclviii

n. 658. Federal continued

U.S. v. Johnson, C.A.6th, 2006, 440 F.3d 832, 844; U.S. v. Johnson, C.A.6th, 2005, 430 F.3d 383, 395; U.S. v. Martinez, C.A.6th, 2005, 430 F.3d 317, 329; U.S. v. Hinton, C.A.3d, 423 F.3d 355, 358 n. 1; U.S. v. Weiland, C.A.9th, 2005, 420 F.3d 1062, 1077; U.S. v. Johnson, C.A.3d, 2005, 119 Fed.Appx. 415, 417 (Crawford limited to “testimonial” statements); U.S. v. Gibson, C.A.6th, 2005, 409 F.3d 325, 338 (nontestimonial statements admitted because they have particularized guarantees of trustworthiness); U.S. v. Holmes, C.A.5th, 2005, 406 F.3d 337, 348 (but noting in a

footnote the Court's suggestion that it might eventually free states from Roberts); U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 178-179 (Crawford limited to "testimonial evidence"); U.S. v. Saget, C.A.2d 2004, 377 F.3d 223, 226-227; Horton v. Allen, C.A.1st, 2004, 370 F.3d 75, 84 (Roberts continues to apply to "nontestimonial" hearsay); U.S. v. Savoca, D.C.N.Y. 2004, 335 F.Supp.2d 385, 393 (claiming Crawford court "explicitly upheld the application of Roberts" to "nontestimonial hearsay").

Compare

Roberts does apply when federal courts do habeas review of state cases decided prior to Crawford. See, e.g., Bintz v. Bertrand, C.A.7th, 2005, 403 F.3d 859, 867.

dclix

n. 659. Bit the bullet

U.S. v. Saner, D.C.Ind.2004, 313 F.Supp.2d 896, 900 (if statement not "testimonial", only hearsay rules control admissibility); People v. Morgan, 2005, 23 Cal.Rptr.2d 224, 232, 125 Cal.App.4th 935 (supposing that Tennessee v. Street, which held that hearsay offered for a nonhearsay purpose did not offend Roberts, is no longer good law so states can look to their own hearsay rule to determine admissibility of the evidence); People v. Butler, 2005, 25 Cal.Rptr.2d 154, 161, 127 Cal.App.4th 49 (once court decides statements satisfied Crawford, only question is admissibility under state hearsay rules); Herrera-Vega v. State, Fla.App. 2004, 888 So.2d 66, 68 (so admissibility of "nontestimonial statements" governed solely by state evidence law); Rackoff v. State, 2005, 621 S.E.2d 841, 845 275 Ga.App. 737 (once found "nontestimonial", constitutional inquiry ends); Pitts v. State, 2005, 612 S.E.2d 1, 5, 272 Ga.App. 182 (since nontestimonial 911 calls admissible under state evidence law, Sixth Amendment satisfied); Purvis v. State, Ind.App.2005, 829 N.E.2d 572, 578 (state hearsay rules control if not "testimonial"); Rollins v. State, 2005, 866 A.2d 925, 943, 161 Md.App. 34; Marquardt v. State, 2005, 882 A.2d 900, 915, 164 Md.App. 95 (nontestimonial statements need only conform to state's hearsay rules); Commonwealth v. Gonsalves, 2005, 833 N.E.2d 549, 554, 445 Mass. 1 (nontestimonial hearsay "governed largely" by state hearsay rules); People v. Walker, 2005, 697 N.W.2d 159, 161, 265 Mich.App. 530 (so "nontestimonial" accusations need not meet any requirements except state hearsay rules); State v. Carter, 2005, 114 P.3d 1001, 1007, 326 Mont. 427 (states can apply own confrontation clause to nontestimonial hearsay); State v. Forrest, 2004, 596 S.E.2d 22, 26, 164 N.C.App. 272 (if statements "non-testimonial", need only apply state hearsay rules); Vigil v. State, Wyo.2004, 98 P.3d 172, 177-178, 179 n. 3; Wilson v. State, Tex.App. 2004, 151 S.W.3d 694, 698 (assuming if excited utterances are not "testimonial", the only issue is whether they satisfy the requirements of that exception to the hearsay rule); State v. Mason, 2005, 110 P.3d 245, 247, ____ Wash.App. ____ (nontestimonial statements admissible if they fall within a hearsay exception).

dclx

n. 660. State clause

These are collected and discussed in § 6356 in the main volume, text at notecall 155.

dclxi

n. 661. Prudent to follow

State v. Maclin, Tenn.2006, 183 S.W.3d 335, 345 n. 8 (while states are free to ignore Roberts, the prudential course would be to continue to apply it).

dclxii

n. 662. Bruton rule

U.S. v. Harris, C.A.2d, 2006, 167 Fed.Appx. 856, 859 (assuming Crawford did not affect); U.S. v. Allen, C.A.9th, 2005, 425 F.3d 1231, 1235 n.5 (assuming Bruton still good law but not applicable on facts); U.S. v. Gibson, C.A.6th, 2005, 409 F.3d 325, 337; Johnson v. State, Del. 2005, 878 A.2d 422, 425 (Crawford not violated when co-defendant's threats to witnesses were not offered against defendant in their joint trial; no mention of Bruton); People v. Khan, 2004, 791 N.Y.S.2d 872, 4 Misc.3d 1003(A) (Crawford does not alter Bruton doctrine); Commonwealth v. Whitaker, Pa.Super.2005, 878 A.2d 914, 922 (correctly holding that since Bruton is concerned with evidence not admitted in evidence against defendant and Crawford concerns when evidence is admissible against the defendant, changes in the latter do not change the former).

But see

Mason v. Yarborough, C.A.9th, 2006, 447 F.3d 693, 696 (thinks Crawford makes Bruton inapplicable to circumstantial evidence of a co-defendants confession); Richardson v. Newland, D.C.Cal.2004, 342 F.Supp.2d 900, 923 (supposing that because Crawford would bar use against defendant, it would deny defendant a fair trial to allow the accusation to be used against the declarant who was joined with defendant on a trumped-up charge of being an accessory).

dclxiii

n. 663. Making inadmissible

See, e.g., Jackson v. Commonwealth, Ky.2006, 187 S.W.3d 300, 304.

See also

The Bruton doctrine is analyzed in vol. 1A, § 5064. For a short explanation, see § 6362, text at notecall 31 in the main volume.

dclxiv

n. 664. Craig reversal

Stefanuca, Crawford v. Washington: The Admissibility of Statements to Physicians and the Use of Closed Circuit Television in Cases of Child Sexual Abuse, 2005, 5 U.Md.L.J.Race, Religion, Gender & Class 411.

See also

Maryland v. Craig, 1990, 110 S.Ct. 3157, 497 U.S. 836, 111 L.Ed.2d 666.

But see

State v. Blanchette, 2006, 134 P.3d 19, ___ Kan.App. ___ (Crawford does not alter Craig; while the statement is “testimonial” the child is testifying so Crawford is satisfied); State v. Henriod, Utah 2006, 131 P.3d 232, 237 (Crawford’s rejection of “reliability” as a tool for confrontation analysis does not invalidate every other confrontation doctrine that employs the concept; thus Coy and Craig still control issues of the failure to provide face-to-face cross-examination).

dclxv

n. 665. On direct appeal

See, e.g., U.S. v. Gonzales, C.A.5th, 2006, 436 F.3d 560, 576 (but must have objected at trial); U.S. v. Weiland, C.A.9th, 2005, 420 F.3d 1062, 1076 (on direct review of trial held before Crawford); U.S. v. Summers, C.A.10th, 2005, 414 F.3d 1287, 1298 n.8; U.S. v. Solomon, C.A.10th, 2005, 399 F.3d 1231, 1237 n. 2; U.S. v. Rodriguez-Marrero, C.A.1st, 2004, 390 F.3d 1, 16 n. 7.

dclxvi

n. 666. Constitutional bar

Fulcher v. Motley, C.A.6th, 2006, 444 F.3d 791, 811 (over vigorous dissent); Lave v. Dretke, C.A.5th, 2006, 444 F.3d 333, 336 (same); Espy v. Massac, C.A.11th, 2006, 443 F.3d 1362, 1366-1367 (collecting cases pro and con); Stuart v. Wilson, C.A.6th, 2006, 442 F.3d 506, 516 n. 6; In re Rutherford, C.A.11th, 2006, 437 F.3d 1125, 1128; Bintz v. Bertrand, C.A.7th, 2005, 403 F.3d 859, 867 n. 5 (collecting similar cases); Murillo v. Frank, C.A.7th, 2005, 402 F.3d 786, 789 (collecting other federal cases); Dorchy v. Jones, C.A.6th, 2005, 398 F.3d 783, 788; Ferguson v. Roper, C.A.8th, 2005, 400 F.3d 635, 639 n. 3 (dictum); Bocktin v. Bayer, C.A.9th, 2005, 399 F.3d 1010, 1014 (collecting cases but reaching contrary conclusion); McGonagle v. U.S., C.A.1st, 2005, 137 Fed.Appx. 373, 380 (doubtful applies retroactively on collateral review); Mungo v. Duncan, C.A.2d, 2004, 393 F.3d 327, 332; Brown v. Uphoff, C.A.10th, 2004, 381 F.3d 1219, 1225-1227; Evans v. Luebbbers, C.A.8th, 2004, 371 F.3d 438, 444; Haymon v. New York, D.C.N.Y.2004, 332 F.Supp.2d 550, 557.

See also

People v. Watson, N.Y.Cty.Ct.2004, 798 N.Y.S.2d 712, 5 Misc.3d 1013 (collecting other federal decisions reaching similar conclusions).

dclxvii

n. 667. Clinton habeas

Brown v. Uphoff, C.A.10th, 2004, 381 F.3d 1219; Adams v. Holland, C.A.6th, 2005, 168 Fed.Appx. 17, 20; Juarez v. Nelson, C.A.10th, 2005, 127 Fed.Appx. 401, 403; Straub v. Kilgore, C.A.6th, 2004, 100 Fed.Appx. 378, 379.

dclxviii

n. 668. Not Rule 60(b)

U.S. v. Canedo, C.A.10th, 2006, 169 Fed.Appx. 508 (cannot escape restrictions by use of motion under Criminal Rule 60(b) for motion to vacate judgement).

dclxix

n. 669. Only 9th Circuit

Zamora v. Adams, C.A.9th, 2005, 150 Fed.Appx. 583, 584; Bockting v. Bayer, C.A.9th, 2005, 399 F.3d 1010, 1012; Richardson v. Newland, D.C.Cal.2004, 342 F.Supp.2d 900, 923-925.

See also

Lave v. Dretke, C.A.5th, 2005, 416 F.3d 372, 379 (in light of Bockting, reasonable jurists could debate retroactivity; granting certificate of appealability to decide issue).

dclxx

n. 670. Granted certiorari

Whorton v. Bockting, 2006, 126 S.Ct. 2017, 547 U.S. ____.

dclxxi

n. 671. Same caselaw

T.P. v. State, Ala.Crim.2004, 911 So.2d 1117, 1121 (Griffith); State v. King, App.2006, 132 P.3d 311, 313 n. 2, ____ Ariz. ____ (citing Griffith v. Kentucky); People v. Warner, 2004, 14 Cal.Rptr.3d 419, 428, 119 Cal.App.4th 331(same); Edwards v. People, Colo.2006, 129 P.3d 977, 978 (Crawford not applicable on collateral review applying federal Teague test); Chandler v. Crosby, Fla.2005, 916 So.2d 728, 729 (cannot raise Crawford on state habeas corpus, citing federal precedents); Commonwealth v. Eichele, Pa.Com.Pl.2004, 2004 WL 2002212, 66 Pa.D.& C.4th 460, 464 n. 3 (doubts Crawford applies on collateral review); State v. Gomez, Tenn.2005, 163 S.W.3d 632, 642; In re Theders, 2005, 123 P.3d 489, 493, 130 Wash.App. 422 (Crawford not a “watershed” ruling that applies retroactively); In re Markel, 2005, 111 P.3d 249, 252, 154 Wash.2d 262, 270-271 (does not apply retroactively to cases on collateral review; relying on federal cases).

dclxxii

n. 672. State direct appeal

State v. King, App.2006, 132 P.3d 311, 313 n.2, ____ Ariz. ____; People v. Sisavath, 2004, 13 Cal.Rptr.3d 753, 757, 118 Cal.App.4th 1396; People v. Ruiz, L.A.Super.2004, 2004 WL 2383676 p. 9; Gay v. State, 2005, 611 S.E.2d 31, 33 n.2, 279 Ga. 180; State v. Grace, App. 2005, 111 P.3d, 28, 35 n. 6, 107 Haw. 135; ; In re T.T., 2004, 815 N.E.2d 789, 798, 351 Ill.App.3d 976, 287 Ill.Dec. 145; State v. Nguyen, 2006, 133 P.3d 1259, 1270, ____ Kans.App. ____; State v. Henderson, 129 P.3d 646, 650, ____ Kan.App. ____; People v. Thompson, 2004, 812 N.E.2d 516, 521, 349 Ill.App.3d 587; State v. Taylor, La.App. 2005, 905 So.2d 451, 457; State v. Jackson, La.App. 2005, 904 So.2d 907, 914); State v. Cox, La.App.2004, 876 So.2d 932, 938; People v. Bell, 2004, 689 N.W.2d 732, 735, 264 Mich.App. 58; State v. Scacchetti, Minn.App. 2005, 690 N.W.2d 393, 395; Bynum v. State, Miss.2006, 929 So.2d 312, 314 (Crawford applies to cases pending on direct appeal at the time

Crawford was decided); *Bell v. State*, Miss.App.2006, 928 So.2d 951, 959 (same; applying Supreme Court caselaw); *State v. Carter*, 2005, 114 P.3d 1001, 1004, 326 Mont. 427 (relying on Supreme Court cases); *Flores v. State*, 2005, 120 P.3d 1170, 1177, ___ Nev. ___ (applying Crawford on direct appeal, purportedly by applying federal law); *People v. Pacer*, 2005, 796 N.Y.S.2d 787, 788, 21 App.Div.3d 192; *People v. Ryan*, 2005, 790 N.Y.S.2d 723, 726 n.1 17 App.Div.3d 1 (collecting cases); *People v. Carrieri*, 2004, 778 N.Y.S.2d 854, 855, 3 Misc.3d 870; *People v. Conyers*, 2004, 777 N.Y.S.2d 274, 276, 4 Misc.3d 346; *State v. Morgan*, 2004, 604 S.E.2d 886, 900, 359 N.C. 131; *State v. Hill*, 2005, 827 N.E.2d 351, 358, 160 Ohio App. 324 (applying state law); *In re D.L.*, Ohio App.2005, 2005 WL 1119809, p. 2; *State v. Champion*, 2005, 615 S.E.2d 366, 371-372, ___ N.C.App. ___; *Commonwealth v. Whitaker*, Pa.Super.2005, 878 A.2d 914, 920 n. 3; *Lagunas v. State*, Tex.App.2005, 187 S.W.3d 503, 513 n.10; *Marc v. State*, Tex.App. 2005, 166 S.W.3d 767, 778 n. 3; *Sammaron v. State*, Tex.App.2005, 150 S.W.3d 701, 706 n. 6.

dclxxiii

n. 673. State collateral review

Edwards v. People, Colo.2006, 129 P.3d 977, 978 (Crawford does not apply to cases on collateral review); *Danforth v. State*, Minn.App. 2005, 700 N.W.2d 530, 531 (Crawford does not apply retroactively in state proceeding for post-conviction relief; collecting and relying on federal cases cited above); *People v. Khan*, 2004, 791 N.Y.S.2d 872, 4 Misc.3d 1003(A) (defendant cannot raise Crawford claim on collateral review); *Commonwealth v. Collins*, 2005, 888 A.2d 564, 576 n. 15, ___ Pa. ___ (Crawford not applicable on collateral review of cases tried prior to that decision).

But see

People v. Dobbin, 2004, 791 N.Y.S.2d 897, 905, 6 Misc.3d 892 (Crawford applies on collateral review).

dclxxiv

n. 674. State law

Taylor v. Commonwealth, Ky. 2005, 175 S.W.3d 68, 72 (assuming Crawford applies in state post-conviction proceeding); *People v. Watson*, N.Y.Cty.Ct.2004, 798 N.Y.S.2d 712, 5 Misc.3d 1013 (under New York law, Crawford available on collateral review of conviction).

dclxxv

n. 675. Unusual circumstances

State v. Forbes, 2005, 119 P.3d 144, 138 N.M. 264 (defendant entitled to habeas relief on the unique circumstance that the state court had earlier reversed his conviction on confrontation grounds only to be reversed by U.S. Supreme Court in a decision that Crawford now implies was erroneous).

dclxxvi

n. 676. Counsel incompetent

In re Moore, 2005, 34 Cal.Rptr. 605, 607, 133 Cal.App.4th 68 (defendant cannot collaterally attack conviction on ground counsel was ineffective for failure to raise Crawford before the case was decided); State v. Williams, Iowa 2005, 695 N.W.2d 23, 29 (where statements were admissible under pre-Crawford precedents).

dclxxvii

n. 677. State objections

McCoo v. State, Ala.Crim.2004, 921 So.2d 446, 448 (failure to object on either hearsay or confrontation grounds at trial bars review); People v. Baylor, 2005, 29 Cal.Rptr.3d 864, 872, 130 Cal.App.4th 355 (hearsay objection does not preserve Crawford objection where the statement was also objectionable under Roberts); People v. Hinojoso-Mendoza, Colo.App.2005, 2005 WL 2561391; State v. Crocker, 2004, 852 A.2d 762, 789, 83 Conn.App. 615 (no objection to use of former testimony; cannot raise Crawford on appeal); State v. Nguyen, 2006, 133 P.3d 1259, 1278, ___ Kans.App. ___ (cannot raise Crawford objection to own statements where no objection made in trial court); People v. Walker, 2005, 697 N.W.2d 159, 161, 265 Mich.App. 530 (cannot raise confrontation objection for first time on appeal); People v. Royster, 2005, 795 N.Y.S.2d 560, 561, 18 App.Div.3d 375 (unexplained failure to preserve); People v. Hardy, 2005, 824 N.E.2d 953, 957 n.3, 4 N.Y.3d 192, 791 N.Y.S.2d 953 (must be specific and timely); People v. Marino, 2005, 800 N.Y.S.2d 439, 440, 21 App.Div.3d 430 (failure to object with sufficient specificity barred review of Crawford claim); State v. Jones, 2006, 627 S.E.2d 265, 269, ___ N.C.App. ___ (declining to consider Crawford claim on this ground); State v. Forrester, 2005, 125 P.3d 47, 50, 203 Or.App. 151 (only plain error review where no objection below); State v. William, 2005, 110 P.3d 1114, 1115, 199 Or.App. 191 (hearsay objection does not preserve Crawford objection); State v. Page, 2005, 104 P.3d 616, 619, 197 Or.App. 72 (hearsay objection does not preserve even though several phrases of confrontation jargon---"particularized guarantees of trustworthiness"---were uttered during argument); Commonwealth v. Whitaker, Pa.Super.2005, 878 A.2d 914, 920 n. 3 (pre-Crawford objection on Bruton grounds suffices to preserve claim that Crawford alters Bruton); Crawford v. State, Tex.App.2004, 139 S.W.3d 462, 464 (defendant made no objection at trial so not preserved for appeal); Riner v. Commonwealth, 2004, 601 S.E.2d 555, 573 n. 13, 268 Va. 296 (hearsay objections do not preserve confrontation objection to use of pawn shop records to show defendant pawned murdered wife's rings; strong dissent).

dclxxviii

n. 678. Federal objections

U.S. v. Gonzales, C.A.5th, 2006, 436 F.3d 560, 576; U.S. v. King, C.A.4th, 2006, 161 Fed.Appx. 296, 297 (must object on confrontation grounds or only plain error review); U.S. v. Allen, C.A.9th, 2005, 425 F.3d 1231, 1235 (only plain error Crawford review where defendant failed to object on confrontation grounds below); U.S. v. Lopez-Moreno, C.A.5th, 2005, 420 F.3d 420, 435 (need not review Crawford claim where no objection below); U.S. v. Logan, C.A.2d, 2005, 419 F.3d 172, 177 (only plain error review); U.S. v. Kappell, C.A.6th, 2005, 418 F.3d 550, 554 (same); U.S. v.

Green, C.A.6th, 2005, 125 Fed.Appx. 659, 662 (cannot raise on appeal where defendant stipulated to admissibility at trial).

dclxxix

n. 679. “Magnitude” of issue

State v. Ohlson, 2005, 125 P.3d 990, 994, 131 Wash.App. 71 (because Crawford issue is of “constitutional magnitude”, it may be raised for the first time on appeal).

dclxxx

n. 680. Required by 103

U.S. v. Delgado, C.A.5th, 2005, 401 F.3d 290, 299 (assuming “running objection” preserves); U.S. v. Birkett, C.A.2d, 2005, 138 Fed.Appx. 375, 377 (even though trial court cut off attempt to state objection, barred where did not try again the next day when the evidence was admitted); Stancil v. U.S., D.C.App.2005, 866 A.2d 799, 805 (objection that declarant “should be here today to testify” suffices where record shows trial judge understood this as a confrontation objection); People v. Bauder, 2006, 712 N.W.2d 506, 510, 269 Mich.App. 174; People v. Bones, 2005, 793 N.Y.S.2d 545, 17 App.Div.3d 689 (objection lacked sufficient specificity to preserve Crawford error); State v. Harris, R.I. 2005, 871 A.2d 341, 345 n. 11 (declining to pass on whether a hearsay objection suffices to raise Crawford); State v. Gomez, Tenn.2005, 163 S.W.3d 632, 645 (objection made but withdrawn does not suffice); Walker v. State, Tex.App.2005, 180 S.W.3d 829, 834 (“nontestifying witness, out of court hearsay, and confrontational” suffices to raise Crawford objection); Ruth v. State, Tex.App. 2005, 167 S.W.3d 560, 567 (“well established” that hearsay objection does not preserve confrontation claim even when confrontation objection made to another statement by same declarant and linked to previous hearsay objection); Ray v. State, Tex.App.2004, 176 S.W.3d 544, 551 (objection on federal confrontation grounds does not preserve error under state right of confrontation); State v. Kronich, 2006, 128 P.3d 119, 122, 131 Wash.App. 537 (“lack of foundation” does not preserve hearsay or confrontation error).

See also

The cases cited in notes 677 and 678 above; the requirements of Rule 103 are analyzed in vol.21, §§ 5034-5037.

But see

Drayton v. U.S., D.C.Ct.App.2005, 877 A.2d 145, 149 (assuming objection to lack of foundation for excited utterance suffices).

dclxxxi

n. 681. Hearsay does not

U.S. v. Baker, C.A.11th, 2005, 432 F.3d 1189, 1206 n. 12 (hearsay objection does not preserve Crawford error; collecting cases); U.S. v. Chau, C.A.11th, 2005, 426 F.3d 1318, 1321-1322; U.S. v. Springer, C.A.11th, 2006, 165 Fed.Appx. 709, 715 (same); People v. Vigil, Colo.2006, 127 P.3d 916, 929 (only plain error review available where defendant did not invoke Confrontation Clause at trial); People v. Hinojoso-

Mendoza, Colo.App.2005, 2005 WL 2561391 (collecting conflicting state authorities and holding on facts that hearsay objection does not preserve Crawford error); People v. Wahlert, 2005, 31 Cal.Rptr.3d 603, 612 n. 11, ___ Cal.App.4th ___ (objection that inability to cross-examine declarant denies Sixth and 14th Amendment rights suffices); Mencos v. State, Fla.App.2005, 909 So.2d 349, 351 (hearsay objection alone does not suffice because it does not alert trial judge to need to determine if statement is “testimonial” and other Crawford requisites); People v. Bauder, 2006, 712 N.W.2d 506, 510, 269 Mich.App. 174 (objection on hearsay grounds does not preserve confrontation claim and vice versa); Neal v. State, Tex.App.2006, 186 S.W.3d 690, 692 (hearsay objection does not preserve Crawford error); Campos v. State, Tex.App.2005, 186 S.W.3d 93, 98 (hearsay objection does not suffice to preserve confrontation error); Vigil v. State, Wyo.2004, 98 P.3d 172, 177.

But see

Wall v. State, Tex.App.2004, 143 S.W.3d 846, 849 (assuming hearsay objection suffices to preserve in trial held prior to Crawford).

dclxxxii

n. 682. Mumbling sounds

State v. King, App.2006, 132 P.3d 311, 314, ___ Ariz. ___ (hearsay objection coupled with complaint that declarant could not be cross-examined suffices to preserve); In re Fernando R., 2006, 40 Cal.Rptr.3d 61, 68, 138 Cal.App.4th 148 (hearsay objection suffices in nonjury trial where during argument immediately thereafter the defense complained that it had no opportunity to cross-examine the declarant); Brooks v. State, Tex.App.2004, 132 S.W.3d 702, 705 (same).

dclxxxiii

n. 683. Objection futile

U.S. v. Stewart, C.A.2d, 2006, 433 F.3d 273, 290 (since defendants did not make Crawford objections because case had not yet been decided, claims reviewed only for plain error); U.S. v. Hadley, C.A.6th, 2005, 431 F.3d 484, 498 (so limited to plain error review); U.S. v. Solomon, C.A.10th, 2005, 399 F.3d 1231, 1237; U.S. v. Bowes, C.A.2d, 2004, 115 Fed.Appx. 503, 504; State v. Garner, La.App.2005, 913 So.2d 874, 884 (but reviewing claim anyway); Collins v. State, 2005, 884 A.2d 181, 193, 164 Md.App. 582; People v. Geno, 2004, 683 N.W.2d 687, 691-692, 261 Mich.App. 624 (so only plain error review available); People v. Bryant, Mich.App.2004, 2004 WL 1882661 (same); State v. Torres, App. 2005, 113 P.3d 877, 884, 137 N.M. 607 (pre-Crawford hearsay objection does not suffice); State v. Gomez, Tenn.2005, 163 S.W.3d 632, 645; Oveal v. State, Tex.App. 2005, 164 S.W.3d 735, 739 n. 2 (collecting similar Texas cases); Courson v. State, Tex.App. 2005, 160 S.W.3d 125, 129; Bunton v. State, Tex.App.2004, 136 S.W.3d 355, 368.

dclxxxiv

n. 684. Consistent with prior

See, e.g., *Bunton v. State*, Tex.App.2004, 136 S.W.3d 355, 368 (Crawford simply a reformulation of prior law).

See also

124 S.Ct. at 1367, 541 U.S. at 57 (prior caselaw “largely consistent” with Crawford).

dclxxxv

n. 685. More forgiving

Stancil v. U.S., D.C.App.2005, 866 A.2d 799, 805 (defendant can raise Crawford error on appeal even though not raised below because Crawford had not then been decided); *People v. Wahlert*, 2005, 31 Cal.Rptr.3d 603, 612, ___ Cal.App.4th ___ (objection not required when pertinent law has changed so unforeseeably that it would be unreasonable to expect counsel to anticipate the change); *People v. Thomas*, 2005, 30 Cal.Rptr.3d 582, 586, 130 Cal.App.4th 1202 (failure to make pre-Crawford objection “excusable”); *People v. Safford*, 2005, 26 Cal.Rptr.3d 190, 193, 127 Cal.App.4th 979 (defendant did not waive his confrontation rights by not asserting them in pre-Crawford hearing where objection would have been “unavailing”); *People v. Johnson*, 2004, 18 Cal.Rptr.3d 230, 232 n. 2, 121 Cal.App.4th 1409 (same); *People v. Kilday*, 2004, 20 Cal.Rptr.3d 161, 169, 123 Cal.App.4th 406 (failure to object excused when it would have been futile under then-existing law); *People v. Ruiz*, L.A.Super.2004, 2004 WL 2383676 p. 9 n. 7 (same); *Commonwealth v. Verde*, 2005, 827 N.E.2d 701, 705, 444 Mass. 279 (failure to object at pre-Crawford trial “excusable”); *State v. Romero*, App.2006, 133 P.3d 842, 848, 139 N.M. 386 (courts liberally construe objections made prior to Crawford, collecting cases; where judge understood it as confrontation objection need not anticipate Crawford); *People v. Lonsby*, 2005, 707 N.W.2d 610, 621, 268 Mich.App. 375 (since Crawford applies retroactively to cases pending on appeal, defendant who did not object at trial is entitled to normal review despite failure to preserve issue at trial); *State v. Carter*, 2005, 114 P.3d 1001, 1003, 326 Mont. 427 (reviewing for Crawford error despite absence of confrontation objection where trial held prior to decision in Crawford); *Commonwealth v. Gray*, Pa.Super.2005, 867 A.2d 560, 574 (pre-Crawford objection suffices even though not phrased in terms of confrontation).

But see

People v. Baylor, 2005, 29 Cal.Rptr.3d 864, 872, 130 Cal.App.4th 355 (objection must be made pre-Crawford where the validity of the hearsay exception under Roberts was an open question at the time of trial).

dclxxxvi

n. 686. Predicted overrule

Blanton v. State, Fla.App.2004, 880 So.2d 798, 800 n. 1 (doubting that competent counsel required to predict that Supreme Court would overrule Roberts).

dclxxxvii

n. 687. “Plain error” review

U.S. v. Bowes, C.A.2d, 2004, 115 Fed.Appx. 503, 505 (“modified” plain error with burden on prosecution to show error not harmless); U.S. v. Baker, C.A.11th, 2005, 432 F.3d 1189, 1207 (statement accusing defendant of murder ten years earlier offered to show what “investigation revealed” about drug conspirators; plain error); U.S. v. Bruno, C.A.2d, 2004, 383 F.3d 65, 79 (finding admission of plea allocution and grand jury testimony to be plain error); Commonwealth v. Foley, 833 N.E.2d 130, 132, 445 Mass. 1001 (where confrontation issue not preserved, only plain error review possible); Hobgood v. State, Miss.2006, 926 So.2d 847, 852 (review not barred despite lack of objection at trial where issue raised on appeal implicates “fundamental rights”); State v. Cook, Ohio.App.2005, 2005 WL 736671 (when defendant failed to object on Crawford grounds, court can only review for plain error).

dclxxxviii

n. 688. Other procedural rules

See, e.g., State ex rel. L.R., 2006, 890 A.2d 343, 354, 382 N.J.Super. 605 (issue not preserved where defendant did not file timely appeal from Family Court order finding him delinquent).

dclxxxix

n. 689. Ask for contempt

Fowler v. State, Ind.2005, 829 N.E.2d 459.

dexc

n. 690. “Estoppel to object”

U.S. v. Magallanez, C.A.10th, 2007, 408 F.3d 672, 678 (when defense counsel said documents furnished in discovery did not implicate defendant, he opened the door to prosecution “expert” testimony that many believable witnesses said that defendant was guilty); State v. Morgan, 2004, 604 S.E.2d 886, 900, 359 N.C. 131 (where defense counsel elicits “testimonial” hearsay on cross-examination, he cannot raise issue on appeal); State v. Romero, App.2006, 133 P.3d 842, 849, 139 N.M. 386 (defendant does not “waive” objection to victim’s statements where after objections were overruled, he introduced other statements by victim to impeach).

See also

The doctrine of “estoppel to object” is examined and found wanting in vol. 21, § 5039 and following.

dexci

n. 691. Rule 104 governs

See vol. 21A, § 5053 and following.

dexcii

n. 692. Show “testimonial”

See vol. 21A, § 5053.6, text at notecall 16.

dexciii

n. 693. Crawford satisfied

Mason v. State, Tex.App.2005, 173 S.W.3d 105, 111 (state has burden of proof to show facts that make statement not “testimonial” or that Crawford is otherwise satisfied).

dexciv

n. 694. Presumptions

State v. Mizenko, 2006, 127 P.3d 458, 464, 330 Mont. 229.

dexciv

n. 695. By judge

See vol. 21A, § 5053.4, text at notecall 5.

dexcvi

n. 696. Use hearsay

See Davis v. Washington, 2006, 126 S.Ct. 2266, 2280, 547 U.S. ____, ____ (to prove forfeiture); People v. Ruiz, Cal.App.2005, 2005 WL 1670426, p. 5 (to prove forfeiture); Commonwealth v. Edwards, 2005, 830 N.E.2d, 158, 174, 444 Mass. 526 (same).

See also

Vol. 21A, § 5055.

dexcvi

n. 697. Nonhearsay purpose

See above, text at notecall 471.

dexcvi

n. 698. Measures to prevent

See vol. 21A, §§ 5066 and 5067.

But see

U.S. v. Briscoe-Bey, C.A.3d, 2005, 126 Fed.Appx. 551, 553 (not plain error to admit statements for nontestimonial purpose without giving limiting instruction).

dexcix

n. 699. Used as testimony

U.S. v. Savoires, C.A.6th, 2005, 430 F.3d 376, 382 (assuming “non-testimonial” hearsay violates Crawford if prosecutor uses it in argument for a “testimonial” purpose); Commonwealth v. Brown, Pa.Super. 2004, 853 A.2d 1029, 1034 (co-defendant’s confession admitted in joint trial on theory not offered for the truth of the matter against defendant, but in closing argument the prosecutor used it “testimonial” against defendant; held, reversible error).

dcc

n. 700. Reject in practice

See, e.g., *Furr v. Brady*, C.A.1st, 2006, 440 F.3d 34, 37-38.

dcci

n. 701. Expressly waive

State v. English, 2005, 614 S.E.2d 405, 409, ___ N.C.App. ___ (defendant waived right to confront lab tech when counsel stipulated to admission of report and defendant confirmed waiver on inquiry by the trial judge).

dccii

n. 702. Confusing real thing

See, e.g., *State v. Harris*, R.I. 2005, 871 A.2d 341, 346 (claiming defendant has “waived any right” he had under the Confrontation Clause when prior to Crawford his attorney objected on hearsay grounds and when his objection was overruled, used the statements on cross-examination; what the court means is that defendant is “estopped to object” to any error in admitting the statement---see vol. 21, § 5039).

See also

Vol. 21, § 5033.

dcciii

n. 703. Spurious “waiver”

State v. Snowden, 2005, 867 A.2d 314, 332, 385 Md. 64.

dcciv

n. 704. “Simply wrong”

Lowery v. Collins, C.A.5th, 1993, 988 F.2d 1364, 1369-1370 (pre-Crawford opinion rejects similar claim as “simply wrong”).

dccv

n. 705. “Abuse of discretion”

U.S. v. Baker, C.A.11th, 2005, 432 F.3d 1189, 1202; *U.S. v. Arnold*, C.A.6th, 2005, 410 F.3d 895, 898; *U.S. v. Pugh*, C.A.6th, 2005, 405 F.3d 390, 397; *U.S. v. Macias*, C.A.6th, 2004, 387 F.3d 509, 515 (Bruton error); *U.S. v. Manfre*, C.A.8th, 2004, 368 F.3d 832, 837; *U.S. v. Stepherson*, C.A.11th, 2005, 152 Fed.Appx. 904, 906; *U.S. v. Green*, C.A.6th, 2005, 125 Fed.Appx. 659, 662; *Bartee v. State*, Fla.App.2006, 922 So.2d 1065, 1070; *Gamble v. State*, Ind.App. 2005, 831 N.E.2d 178, 180; *People v. Walker*, 2005, 697 N.W.2d 159, 161, 265 Mich.App. 530; *Bell v. State*, Miss.App.2006, 928 So.2d 951, 958; *Medina v. State*, 2006, 131 P.3d 15, 20, ___ Nev. ___ (trial court will not be reversed on appeal unless decision is “manifestly erroneous”); *State v. Duarte*, App. 2004, 98 P.3d 1054, 1057, 136 N.M. 404; *State v. Byrd*, 2005, 828 N.E.2d 133, 137, 160 Ohio App.3d 538; *State v. Hill*, 2005, 827 N.E.2d 351, 358, 160 Ohio App. 324; *State v. Marbury*, 2004, 2004 WL 758404 ¶ 29; *State v. Banks*, Ohio App.2004, 2004 WL 2809070 ¶ 12; *Commonwealth v. Dargan*, Pa.Super.2006, 897 A.2d 496, 500; *Key v. State*, Tex.App.2005, 173 S.W.3d 72, 73; *Salt Lake City v. Williams*, Utah App.2005, 128 P.3d 47, 49 (holding unclear).

dccvi

n. 706. De novo review

U.S. v. Underwood, C.A.11th, 2006, 446 F.3d 1340, 1345; U.S. v. Johnson, C.A.6th, 2006, 440 F.3d 832, 842; U.S. v. Hagege, C.A.9th, 2006, 437 F.3d 943, 956; U.S. v. Katzopoulous, C.A.6th, 2006, 437 F.3d 569, 573; U.S. v. Del Rio, C.A.11th, 2006, 168 Fed.Appx. 923, 929; U.S. v. Gilbertson, C.A.7th, 2005, 435 F.3d 790, 794; U.S. v. Danford, C.A.7th, 2005, 435 F.3d 682, 687; U.S. v. Walter, C.A.1st, 2006, 434 F.3d 30, 33; U.S. v. Cantellano, C.A.11th, 2005, 430 F.3d 1142, 1144; U.S. v. Johnson, C.A.6th, 2005, 430 F.3d 383, 393; U.S. v. Lore, C.A.3d, 2005, 430 F.3d 190, 208 (“plenary” review); U.S. v. Rondeau, C.A.1st, 2005, 430 F.3d 44, 47; U.S. v. Brito, C.A.1st, 2005, 427 F.3d 53, 59; U.S. v. Cervantes-Flores, C.A.9th, 2005, 421 F.3d 825, 831; U.S. v. Weiland, C.A.9th, 2005, 420 F.3d 1062, 1076; U.S. v. Brun, C.A.8th, 2005, 416 F.3d 703, 706; U.S. v. Summers, C.A.10th, 2005, 414 F.3d 1287, 1298; U.S. v. Gibson, C.A.6th, 2005, 409 F.3d 325, 337; U.S. v. Delgado, C.A.5th, 2005, 401 F.3d 290, 299; U.S. v. Bordeaux, C.A.8th, 2004, 400 F.3d 548, 552; U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 176; U.S. v. McKenzie, C.A.11th, 2005, 160 Fed.Appx. 821, 824; U.S. v. McGuffin, C.A.10th, 2005, 149 Fed.Appx. 714, 718; U.S. v. Trala, C.A.3d, 2004, 386 F.3d 536, 543 (“plenary review”); U.S. v. Saget, C.A.2d, 2004, 377 F.3d 223, 230; U.S. v. Lee, C.A.8th, 2004, 374 F.3d 637, 643; U.S. v. Nielsen, C.A.9th, 2004, 371 F.3d 574, 581.

dccvii

n. 707. States similar

State v. King, App.2006, 132 P.3d 311, 314, ___ Ariz. ___ (de novo); Bohsancurt v. Eisenberg, App.2006, 129 P.3d 471, 473, 212 Az. 182; State v. Alvarez, App.2005, 107 P.3d 350, 354, 210 Ariz. 24 (de novo); People v. Cervantes, 2004, 12 Cal.Rptr.3d 774, 783, 118 Cal.App.4th 162; Flonnory v. State, Del.2006, 893 A.2d 507, 515; Johnson v. State, Del. 2005, 878 A.2d 422, 425; People v. Redeaux, 2005, 823 N.E.2d 268, 270, 355 Ill.App.3d 302; Purvis v. State, Ind.App.2005, 829 N.E.2d 572, 578 (de novo); State v. Newell, Iowa 2006, 710 N.W.2d 6, 23; State v. Adams, 2005, 124 P.3d 19, 31, 280 Kan. 494; State v. Henderson, 129 P.3d 646, 651, ___ Kan.App. ___; People v. Jones, 2006, 714 N.W.2d 362, 366, 270 Mich.App. 208; People v. McPherson, 2004, 687 N.W.2d 370, 375, 263 Mich.App. 124; State v. Ahmed, Minn.App.2006, 708 N.W.2d 574, 580; State v. Mizenko, 2006, 127 P.3d 458, 460, 330 Mont. 229; State v. Hembertt, 2005, 696 N.W.2d 473, 478, 269 Neb. 840; State v. Dedman, 2004, 102 P.3d 628, 634, 136 N.M. 561; In re S.A.2005, 708 N.W.2d 673, 679; State v. Carrothers, So.Dak. 2005, 692 N.W.2d 544; State v. Romero, App.2006, 133 P.3d 842, 848, 139 N.M. 386; State v. Smith, 2005, 832 N.E.2d 1286, 1289, 162 Ohio App.3d 208; State v. Carrothers, So.Dak.2005, 692 N.W.2d 544, 546; Lagunas v. State, Tex.App.2005, 187 S.W.3d 503, 513-514; Campos v. State, Tex.App.2005, 186 S.W.3d 93, 96; Kearney v. State, Tex.App.2005, 181 S.W.3d 438, 441; Brooks v. State, Tex.App.2004, 132 S.W.3d 702, 705; Moore v. State, Tex.App.2005, 169 S.W.3d 467, 474; Wilson v. State, Tex.App. 2004, 151 S.W.3d 694, 697; Wall v. State, Tex.Crim.2006, 184 S.W.3d 730, 742 (because standard is objective, unlike hearsay inquiries, so trial

judge no better situated to decide than appellate courts); *Wilson v. State*, Tex.App.2004, 151 S.W.3d 694, 697; *Hale v. State*, Tex.App. 2004, 139 S.W.3d 418, 421; *State v. Searcy*, App.2005, 709 N.W.2d 497, 510, ___ Wis.2d ___ (de novo); *State v. Manuel*, 2005, 697 N.W.2d 811, 818, ___ Wis.2d ___ (“de novo”); *State v. Stuart*, 2005, 695 N.W.2d 259, 264, 279 Wis.2d 659 (same); *Vigil v. State*, Wyo.2004, 98 P.3d 172, 177.

dccviii

n. 708. “Plenary”

State v. Estrella, 2006, 893 A.2d 348, 356, 277 Conn. 458 (“plenary”); *State v. Pierre*, 2006, 890 A.2d 474, 495, 277 Conn. 42 (review “plenary”); *State v. Blanchette*, 2006, 134 P.3d 19, 27 ___ Kan.App. ___ (“unlimited review”); *State v. Carter*, 2005, 114 P.3d 1001, 1005, 326 Mont. 427 (“plenary”).

dccix

n. 709. “Independent”

People v. Wahlert, 2005, 31 Cal.Rptr.3d 603, 612, ___ Cal.App.4th ___ (“independently review”); *State v. Grace*, App. 2005, 111 P.3d, 28, 33, 107 Haw. 135 (“independent judgement” review); *State v. Hemphill*, App.2005, 707 N.W.2d 313, 315, ___ Wis.2d ___ (reviewed “independently”); *State v. Manuel*, App.2004, 685 N.W.2d 525, 531, 275 Wis.2d 146; *Bratton v. State*, Tex.App. 2005, 156 S.W.3d 689, 693 (“independent review”).

dccx

n. 710. Reserving higher

State v. Warsame, Minn.App. 2005, 701 N.W.2d 305, 308 (de novo review only on whether statement is “testimonial”); *State v. Maclin*, Tenn.2006, 183 S.W.3d 335, 343 (de novo review where no dispute about facts); *State v. Barton*, App.2005, 709 N.W.2d 93, 95, ___ Wis.2d ___ (findings of evidentiary or historical fact upheld unless “clearly erroneous”; independent review limited to constitutional facts).

dccxi

n. 711. “Constitutional fact”

State v. King, App.2005, 706 N.W.2d 181, 186, ___ Wis.2d ___ (“unavailability” for Crawford purposes is a constitutional fact that is reviewed de novo).

dccxii

n. 712. State appeals

State v. Warsame, Minn.App. 2005, 701 N.W.2d 305, 308 (when state appeals from pretrial ruling excluding the evidence on Crawford grounds an appellate court will reverse the district court's determination only if State demonstrates clearly and unequivocally that the district court erred and that, unless reversed, the error will have a critical impact on the outcome of the trial).

dccxiii

n. 713. Chapman standard

U.S. v. McKoy, C.A.4th, 2005, 129 Fed.Appx. 815, 823; People v. Shepherd, 2004, 689 N.W.2d 721, 727, 263 Mich.App. 665; State v. Gomez, Tenn.2005, 163 S.W.3d 632, 647.

Compare

U.S. v. Bruno, C.A.2d, 2004, 383 F.3d 65, 79 (declining to decide issue where Crawford error satisfies standard for nonstructural error).

dcxix

n. 714. Federal “harmless”

U.S. v. Reifler, C.A.2d, 2006, 446 F.3d 65, 87; U.S. v. Snype, C.A.2d, 2006, 441 F.3d 119, 128-129 (evidence of existence of conspiracy that plea allocutions offered to prove so overwhelming that the defendant did not dispute it at trial); U.S. v. Savoires, C.A.6th, 2005, 430 F.3d 376, 382 (where evidence against defendant was “compelling”); U.S. v. Lore, C.A.3d, 2005, 430 F.3d 190, 209 (evidence against defendant “overwhelming”); U.S. v. Summers, C.A.10th, 2005, 414 F.3d 1287, 1298 (where the “testimonial statement” did not amount to an accusation); U.S. v. Burns, C.A.2d, 2006, 164 Fed.Appx. 45, 48 (to avoid deciding if a guilty plea was “testimonial”); U.S. v. McKenzie, C.A.11th, 2005, 160 Fed.Appx. 821, 824; U.S. v. Todd, C.A.11th, 2005, 157 Fed.Appx. 108, 110 (to evade ruling on 911 call); U.S. v. Williams, C.A.11th, 2005, 156 Fed.Appx. 160, 161 (so need not decide if testimonial hearsay can be used as basis for expert opinion); U.S. v. Aleman-Ramos, C.A.6th, 2005, 155 Fed.Appx. 845, 850; U.S. v. Doss, C.A.5th, 2005, 155 Fed.Appx. 770 (to avoid deciding if Crawford applies in proceeding to revoke supervised release); U.S. v. Abdelazz, C.A.11th, 2005, 144 Fed.Appx. 821, 828 (to avoid deciding in hearsay from an anonymous informant violated Crawford); U.S. v. Andrews, C.A.11th, 2005, 135 Fed.Appx. 290, 292 (even though 911 call was the only direct evidence that defendant committed charged crime); U.S. v. Ramirez, C.A.6th, 2005, 133 Fed.Appx. 196, 202-203; U.S. v. Frenchie, C.A.5th, 132 Fed.Appx. 672, 674 (so court need not decide if Crawford applies to probation revocation proceedings); U.S. v. Kiltinivichious, C.A.2d, 2005, 132 Fed.Appx. 901; U.S. v. McKoy, C.A.4th, 2005, 129 Fed.Appx. 815, 823; U.S. v. Jordan, C.A.4th, 2005, 127 Fed.Appx. 646, 648; U.S. v. Hawkins, C.A.2d 2005, 125 Fed.Appx. 364, 367; U.S. v. McClain, C.A.2d, 2004, 377 F.3d 219, 222; U.S. v. Tusanez, C.A.2d 2004, 116 Fed.Appx. 305, 306; U.S. v. Nielsen, C.A.9th, 2004, 371 F.3d 574, 581-582; Haymon v. New York, D.C.N.Y.2004, 332 F.Supp.2d 550, 557 (alternative holding).

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n. 715. State “harmless”

T.P. v. State, Ala.Crim.2004, 911 So.2d 1117, 1124; Smith v. State, Ala.Crim.2004, 898 So.2d 907, 917; People v. Mitchell, 2005, 32 Cal.Rptr.3d 613, 623, 131 Cal.App.4th 1210; People v. Wahlert, 2005, 31 Cal.Rptr.3d 603, 617, ___ Cal.App.4th ___; People v. Houston, 2005, 29 Cal.Rptr.3d 818, 832, 130 Cal.App.4th 279 (so court need not decide if wife’s complaints to police about defendant’s prior acts of violence were “testimonial”); People v. Cage, 2004, 15 Cal.Rptr.3d 846, 857, 120 Cal.App.4th

770; *Blanton v. State*, Fla.App.2004, 880 So.2d 798, 802 (alternative ground for affirmance); *Purvis v. State*, Ind.App.2005, 829 N.E.2d 572, 585); *State v. Addison*, La.App.2005, 920 So.2d 884, 892; *Somervell v. State*, Fla.App. 2004, 883 So.2d 836, 839; *Gay v. State*, 2005, 611 S.E.2d 31, 33, 279 Ga. 180; *Watson v. State*, 2004, 604 S.E.2d 804, 810, 278 Ga. 763 (to avoid deciding if Crawford applies); *Bell v. State*, 2004, 597 S.E.2d 350, 353, 278 Ga. 69; *Moody v. State*, 2004, 594 S.E.2d 350, 354, 277 Ga. 676; *D.G.B. v. State*, Ind.App.2005, 833 N.E.2d 519, 528; *State v. Newell*, Iowa 2006, 710 N.W.2d 6, 25 (to avoid deciding if statements were admissible); *People v. R.F.*, 2005, 825 N.E.2d 287, 296, 355 Ill.App.3d 992, 292 Ill.Dec. 31; *State v. Nguyen*, 2006, 133 P.3d 1259, 1270, ___ Kans.App. ___; *State v. Lackey*, 2005, 120 P.3d 332, 343, 280 Kan. 190; *Taylor v. Commonwealth*, Ky. 2005, 175 S.W.3d 68, 72; *State v. Bonit*, La.App.2006, 928 So.2d 633, 641; *State v. Francois*, La.App.2006, 926 So.2d 744, 752; *State v. Weaver*, La.App.2005, 917 So.2d 600, 614; *State v. Jackson*, La.App. 2005, 904 So.2d 907, 914; *Marquardt v. State*, 2005, 882 A.2d 900, 921, 164 Md.App. 95; *Jihad v. State*, Minn.2006, 714 N.W.2d 445, 448 (to avoid deciding application and retroactivity of Crawford); *Bynum v. State*, Miss.2006, 929 So.2d 312, 314; *State v. Paoni*, 2006, 128 P.3d 1040, 1044, 331 Mont. 86 (to avoid deciding if defendant preserved Crawford error); *State v. Mizenko*, 2006, 127 P.3d 458, 465, 330 Mont. 229 (cumulative evidence); *People v. Niene*, N.Y.City Ct.2005, 798 N.Y.S.2d 891, 894, 8 Misc.3d 649 ; *People v. Watson*, N.Y.Cty.Ct.2004, 798 N.Y.S.2d 712, 5 Misc.3d 1013; *People v. Dobbin*, 2004, 791 N.Y.S.2d 897, 905, 6 Misc.3d 892; *People v. A.S. Goldmen, Inc.*, 2004, 779 N.Y.S.2d 489, 491, 9 App.Div.3d 283; *People v. McBee*, 2004, 778 N.Y.S.2d 287, 8 App.Div.3d 500; *State v. Melton*, 2006, 625 S.E.2d 609, 612, ___ N.C.App. ___ (to avoid remand to decide if lab report was “testimonial”); *State v. Morgan*, 2004, 604 S.E.2d 886, 901, 359 N.C. 131; *State v. Bell*, 2004, 603 S.E.2d 93, 117, 359 N.C. 1; *State v. Ash*, 2005, 611 S.E.2d 855, 863, ___ N.C.App. ___; *State v. Cook*, 2006, 135 P.3d 260, 268, 340 Or. 530; *State v. Gomez*, Tenn.2005, 163 S.W.3d 632, 645; *Wall v. State*, Tex.Crim.2006, 184 S.W.3d 730, 746; *Ruth v. State*, Tex.App. 2005, 167 S.W.3d 560, 569 (alternative rationale); *Bratton v. State*, Tex.App. 2005, 156 S.W.3d 689, *Guteirrez v. State*, Tex.App.2004, 150 S.W.3d 827, 832; *Benford v. State*, Tex.App.2005, 2005 WL 240611; 695; *Ray v. State*, Tex.App.2004, 176 S.W.3d 544, 551; *State v. Mason*, 2005, 126 P.3d 34, 40, ___ Wash.App. ___ (so need not decide if accusation elicited from scared and beaten declarant was testimonial); *State v. Saunders*, 2006, 132 P.3d 743, 749, ___ Wash.App. ___ (to avoid deciding if “testimonial”); *State v. Moses*, 2005, 119 P.3d 906, 913, 129 Wash.App. 718; *State v. Hale*, 2005, 691 N.W.2d 637, 650, 277 Wis.2d 593.

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n. 716. Reversed

U.S. v. Santos, C.A.2d, 2006, 449 F.3d 93, 102; *Zamora v. Adams*, C.A.9th, 2005, 150 Fed.Appx. 583, 585 (where testimonial statements of victim only substantial evidence of guilt); *U.S. v. Pugh*, C.A.6th, 2005, 405 F.3d 390, 401; *U.S. v. Bruno*, C.A.2d, 2004, 383 F.3d 65, 81; *Stancil v. U.S.*, D.C.App.2005, 866 A.2d 799, 816 (where without the disputed statement no evidence to rebut claim of self-defense);

State v. King, App.2006, 132 P.3d 311, 319, ___ Ariz. ___; State v. Parks, 2005, 116 P.3d 631, 637, 211 Ariz. 19; In re Fernando R., 2006, 40 Cal.Rptr.3d 61, 80, 138 Cal.App.4th 148; People v. Kilday, 2004, 20 Cal.Rptr.3d 161, 174, 123 Cal.App.4th 406; **People v. Adams, 2004, 16 Cal.Rptr.3d 237, 244, 120 Cal.App.4th 1065; People v. Pirwani, 2004, 14 Cal.Rptr.3d 673, 688, 119 Cal.App.4th 770; People v. Ruiz, L.A.Super.2004, 2004 WL 2383676 p.10; People v. R.A.S., Colo.App. 2005, 111 P.3d 487, 491; Contrearras v. State, Fla.App.2005, 910 So.2d 901, 909; People v. Johnson, Fla.App.2005, 929 So.2d 4, 8; Miller v. State, 2005, 615 S.E.2d 843, 846, 273 Ga.App. 761; Brawner v. State, 2004, 602 S.E.2d 612, 615, 278 Ga. 316; In re E.H., 2005, 823 N.E.2d 1029, 1038, 355 Ill.App.3d 564, 291 Ill.Dec. 443; People v. West, 2005, 823 N.E.2d 82, 93, 355 Ill.App. 28, 291 Ill.Dec. 72; People v. Thompson, 2004, 812 N.E.2d 516, 522, 349 Ill.App.3d 587; State v. Cox, La.App.2004, 876 So.2d 932, 940; Commonwealth v. Foley, 833 N.E.2d 130, 133, 445 Mass. 1001; People v. Shepherd, 2004, 689 N.W.2d 721, 727, 263 Mich.App. 665; In re J.K.W., Minn.App.2004, 2004 WL 1488850 p. 4; Bell v. State, Miss.App.2006, 928 So.2d 951, 961; State v. Romero, App.2006, 133 P.3d 842, 861, 139 N.M. 386; State v. Johnson, 2004, 98 P.3d 998, 1002, 136 N.M. 348; Flores v. State, 2005, 120 P.3d 1170, 1180, ___ Nev. ___; People v. Hardy, 2005, 824 N.E.2d 953, 958, 4 N.Y.3d 192, 791 N.Y.S.2d 953; People v. Woods, 2004, 779 N.Y.S.2d 494, 496, 9 App.Div.3d 293; State v. Morton, 2004, 601 S.E.2d 873, 876, 166 N.C.App. 477; State v. Siler, 2005, 843 N.E.2d 863, 869, 164 Ohio App.3d 680; State v. Maclin, Tenn.2006, 183 S.W.3d 335, 352; Walker v. State, Tex.App.2005, 180 S.W.3d 829, 835; Clay v. State, Tex.App. 2005, 177 S.W.3d 486, 491); Mason v. State, Tex.App.2005, 173 S.W.3d 105, 112; Sammaron v. State, Tex.App.2005, 150 S.W.3d 701, 708; Jahanian v. State, Tex.App. 2004, 145 S.W.3d 346, 350; Lee v. Texas, 2004, 143 S.W.3d 565, 571; Brooks v. State, Tex.App.2004, 132 S.W.3d 702, 711; State v. Walker, 2005, 118 P.3d 935, 940, 129 Wash.App. 258; State v. Stuart, 2005, 695 N.W.2d 259, 270, 279 Wis.2d 659; Sarr v. State, Wyo. 2005, 113 P.3d 1051, 1053 (after remand from Supreme Court on Crawford grounds).**

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n. 717. Civil cases

Cabinet for Health & Family Services v. A.G.G., Ky.2006, 190 S.W.3d 338, 345 (proceeding to terminate parental rights; collecting pre-Crawford cases).

dcxviii

n. 718. Revocations

U.S v. Kelley, C.A. 7th, 2006, 446 F.3d 688, 590 (probation revocation hearing; Crawford does not change prior decisions holding Confrontation Clause inapplicable, collecting similar holdings); U.S. v. Williams, C.A.2d, 2006, 443 F.3d 35, 45 (despite Morrissey, Crawford does not apply at revocation of supervised release hearing so only entitled to Criminal Rule 32.1(b)(2)(c) limited confrontation); U.S. v. Rondeau, C.A.1st, 2005, 430 F.3d 44, 47 (revocation of supervised release; Crawford not applicable but limited right of confrontation under Criminal Rule 32.1(b)(2)(C)); U.S.

v. Aspinall, C.A.2d, 2004, 389 F.3d 332, 342-343 (nothing in Crawford overturns prior decisions holding Confrontation Clause only applies in criminal trials and not in probation revocation proceedings); U.S. v. Martin, C.A.8th, 2004, 382 F.3d 840, 844 (Crawford not applicable in proceeding to revoke supervised release as Court in Morrissey said should not equate such hearings with a criminal trial); U.S. v. Hall, C.A.9th, 2005, 419 F.3d 980, 985 (revocation of supervised release; Crawford not applicable); U.S. v. Kirby, C.A.6th, 2005, 418 F.3d 621 (probation revocation proceeding; collects conflicting federal decisions); U.S. v. Jones, C.A.4th, 2005, 143 Fed.Appx. 521 (apparently holding Crawford not applicable to revocation of supervised release); U.S. v. Barraza, D.C.Cal.2004, 318 F.Supp.2d 1031, 1032 (Crawford does not apply in release revocation proceeding, which is governed by 14th Amendment due process, not the Sixth Amendment).

Compare

U.S. v. Spence, C.A.11th, 2005, 151 Fed.Appx. 836, 838 (using harmless error to avoid deciding if Crawford applies to proceedings to revoke supervised release).

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n. 719. SVP proceedings

People v. Reynolds, 2006, 42 Cal.Rptr.3d 761, 772, 139 Cal.App.4th 111 (sexually violent predator proceeding); People v. Fulcher, 2006, 38 Cal.Rptr.3d 702, 712, 136 Cal.App.4th 41 (due process right that applies in SVP proceedings is not coextensive with the Sixth Amendment right; it does not even bar multiple hearsay and third stool rumours); People v. Angulo, 2005, 30 Cal.Rptr.3d 189, 202, 129 Cal.App.4th 1349 (Crawford did not alter Court's prior cases holding only due process right of confrontation applies in civil proceedings like those to commit an SVP); Commonwealth v. Given, 2004, 808 N.E.2d 788, 792, 441 Mass. 741 (police report admissible in sexually dangerous person hearing; not barred by Crawford or due process right of confrontation); Commitment of G.G.N., 2004, 855 A.2d 569, 579, 372 N.J.Super. 42 (Crawford not applicable to multiple hearsay statements found in two decades of reports dumped into the record by the state); People v. Dort, 2005, 792 N.Y.S.2d 236, 238 (Crawford not applicable to sex offender registration proceedings).

dccxx

n. 720. Juvenile courts

In re April C., 2005, 31 Cal.Rptr.3d 804, 810, 131 Cal.App.4th 599 (Crawford not applicable in civil cases, including juvenile court dependency hearings; so proper to admit hearsay accusations of sexual abuse under Roberts-era "reliability" hearsay exception); In re C.M., 2004, 815 N.E.2d 49, 51, 351 Ill.App.3d 913 (Crawford does not apply in juvenile court proceedings to make abused child a ward of the court); State ex rel. L.R., 2006, 890 A.2d 343, 354, 382 N.J.Super. 605.

dccxxi

n. 721. "Due process" bars

U.S. v. Taveras, C.A.1st, 2004, 380 F.3d 532, 538 n.8 (since admission of hearsay at revocation hearing violated Criminal Rule 32.1, court did not have to decide if Crawford applies in hearing to revoke supervised release); U.S. v. Jarvis, C.A.9th, 2004, 94 Fed.Appx. 501, 502 (confrontation violation to revoke supervised release on basis of police report without any showing of good cause for not calling adverse witnesses; citing Crawford but relying on Morrisey cases); Commitment of G.G.N., 2004, 855 A.2d 569, 579, 372 N.J.Super. 42 (while due process allows use of hearsay, it is violated where state dumps into record two decades of hospital records containing multiple hearsay of dubious quantity to support hired guns who want defendant kept locked up though every treating expert believes he can safely be released); State v. Phillips, App.2005, 126 P.3d 546, 551, 138 N.M. 729 (due process right of confrontation violated in probation revocation proceeding when custodian of record who lacked personal knowledge of underlying facts testified to contents of documents in file accusing defendant of misconduct in another state).

dccxxii

n. 722. Misdemeanors

State v. Godshalk, 2005, 885 A.2d 969, 972, 381 N.J.Super. 326 (applies to drunk driving prosecution, a nonindictable quasi-criminal prosecution); State v. Ashford, 2004, 864 A.2d 1122, 1127 n. 6, 374 N.J.Super. 332.

dccxxiii

n. 723. Rule 404(b)

Somervell v. State, Fla.App. 2004, 883 So.2d 836, 837; Bell v. State, 2004, 597 S.E.2d 350, 353, 278 Ga. 69; Moody v. State, 2004, 594 S.E.2d 350, 354, 277 Ga. 676 (assuming applies to evidence of other crimes); State v. Barnes, Me. 2004, 854 A.2d 208, 210 (assumes); State v. Courtney, Minn.2005, 696 N.W.2d 73 (issue appears but not decided).

dccxxiv

n. 724. Suppress evidence

U.S. v. Saneaux, D.C.N.Y.2005, 365 F.Supp.2d 493, 498 n. 5 (in determining whether statement is admissible under coconspirators hearsay exception); People v. Felder, Colo.App.2005, 129 P.3d, 1072, 1073 (Crawford only applies at trial, not on pretrial motion to suppress evidence on Fourth Amendment grounds); People v. Robinson, 2005, 802 N.Y.S.2d 868, 9 Misc.3d 676, 678-679 (Crawford does not apply at pretrial suppression hearings); Vanmeter v. State, Tex.App. 2005, 165 S.W.3d 68, 74 (on grounds that confrontation is a trial right and prior law allowed use of hearsay during pretrial hearings).

dccxxv

n. 725. Not in sentencing

Williams v. N.Y., 1949, 69 S.Ct. 1075, 337 U.S. 241, 93 L.Ed. 1337.

dccxxvi

n. 726. Blakely decision

2004, 124 S.Ct. 2531, 542 U.S. 296, 159 L.Ed. 2d 403.

dccxxvii

n. 727. Extend to sentencing

Comment, Confrontation at Sentencing, The Logical Connection Between Crawford and Blakely, 2005, 49 How.L.J. 179.

dccxxviii

n. 728. None adopted

U.S. v. Littlejohn, C.A.9th, 2006, 444 F.3d 1196, 1200 (finding some force to argument but constrained by precedent to follow the majority view that Crawford does not affect Supreme Court cases that right of confrontation does not apply at sentencing); U.S. v. Katzopoulos, C.A.6th, 2006, 437 F.3d 569, 575 (collecting cases holding Crawford not applicable at sentencing as well as those suggesting Crawford and Booker may change this and siding with the former); U.S. v. Garcia, C.A.2d, 2006, 167 Fed.Appx. 259, 261 (relying on Martinez, below); U.S. v. Cantellano, C.A.11th, 2005, 430 F.3d 1142, 1146 (does not apply in non-capital sentencing); U.S. v. Brown, C.A.8th, 2005, 430 F.3d 942, 944 (similar; collects cases); U.S. v. Chau, C.A.11th, 2005, 426 F.3d 1318, 1323 (Crawford does not alter prior law allowing use of hearsay in sentencing; collects cases); U.S. v. Monteiro, C.A.1st, 2005, 417 F.3d 208, 215 (nothing in Booker or Crawford suggests that the latter applies in sentencing); U.S. v. Roche, C.A.7th, 2005, 415 F.3d 614, 618; U.S. v. Luciano, C.A.1st, 2005, 414 F.3d 174, 178 (collecting pre-Crawford cases); U.S. v. McKenzie, C.A.4th, 2006, 164 Fed.Appx. 319, 322; U.S. v. McGuffin, C.A.10th, 2005, 149 Fed.Appx. 714, 718 (Crawford does not bar use of hearsay at sentencing); Sandoval-Huerta v. Castro, C.A.9th, 2005, 140 Fed.Appx. 670, 671; U.S. v. Waite, C.A.10th, 2005, 139 Fed.Appx. 119, 124; U.S. v. Martinez-Galvan, C.A.5th, 2005, 135 Fed.Appx. 712, 713; U.S. v. Martinez, C.A.2d, 2005, 413 F.3d 239, 243 (Crawford and Booker neither alone nor in combination alter the prior rule admitting hearsay in sentencing proceeding; collecting cases); U.S. v. Melendez, D.C.N.Y.2005, 2005 WL 1423268 p. 5 n. 3); People v. Gonzales, 2005, 32 Cal.Rptr.3d 172, 176, 131 Cal.App.4th 767 (hearing to determine “strike” under “three strikes” law); People v. Taulton, 2005, 29 Cal.Rptr.2d 203, 129 Cal.App.4th 1218.

But see

Desue v. State, Fla.App.2005, 908 So.2d 1116, 1117 (assuming Crawford applies at sentencing).

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n. 729. Grand jury

People v. Laumeyer, 2005, 801 N.Y.S.2d 880, 889-890, 10 Misc.3d 184; People v. Pacer, 2005, 799 N.Y.S.2d 881, 882, 9 Misc.3d 545.