

Crawford Interpreted: 2004-2005

[In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court adopted yet another interpretation of the meaning of the Confrontation Clause of the Sixth Amendment as applied to the use of hearsay evidence. In the annual supplement to 30A Wright & Graham, Federal Practice and Procedure Evidence, § 5172.2, (available on Westlaw by entering "FPP § 5172.2.") I viewed this "fresh start" with scepticism in light of the Court's previous failed attempts to find an path between gutting the Confrontation Clause and making it a constitutional version of the hearsay rule. In an essay forthcoming in the Ohio State Journal of Criminal Law called "Confrontation Stories: Sir Walter Raleigh on the Mayflower" available at <http://repositories.cdlib.org/uclalaw/plltwps/5-10>) I criticized the Court's use of history and suggested that history could support the Courts two-track right of confrontation.

This article revisits these two questions in light of the decisions of state and lower federal courts interpreting Crawford. Adapted from the forthcoming 2006 annual supplement to § 5172.2 of volume 30A of Federal Practice and Procedure: Evidence , the article contains cross-references to that section and begins with footnote 85 of that section. Readers should be aware, however, that the Supreme Court is considering petitions for certiorari to review two of the cases discussed here so some of what is said here may be obsolete in a few months.]

While the writers got the first crack¹ at interpreting the Supreme Court's decision in Crawford v. Washington,² the state and lower federal courts have now issued a number of opinions teasing meaning from Justice Scalia's elliptic prose.³ We examine those opinions below, beginning with the scope of Crawford; e.g., is the hearsay challenged under the Confrontation Clause "testimonial"? This naturally leads to the consequences of finding the hearsay "testimonial"; e.g., when can it be introduced without violating the right of confrontation. We then consider how, if at all, the Sixth Amendment applies to "nontestimonial" hearsay. Finally, we take up a number of procedural matters such as retroactivity and the standard of review.

I. "Testimonial statements"

Courts all agree that the threshold inquiry in applying Crawford is whether the proffered hearsay qualifies as a "testimonial statement."⁴ Some of opinions decide this question with little analysis---often because the statement at issue fits neatly an example provided by Justice Scalia's Crawford opinion.⁵ Opinions that consider the question at greater length fall into two overlapping categories. Some apply the language and policy of the Crawford opinion to the hearsay at issue in broad terms that leave room for future maneuver.⁶ Others, perhaps taking a cue from Justice Scalia's hope for a "bright line" rule, try to devise categories into which trial courts can fit facts in future cases.⁷ We follow this bifurcation in our own analysis to enable readers to understand

the cases without suggesting that the courts consistent follow one of the other archetype.

The “Rule of Thumb” Analysis---Generally

Justice Scalia’s opinion suggests two quite different ways of defining “testimonial.”⁸ The first---what we shall call the “official inducement” strand---looks at the statement from the point of view of the government official and looks to the form of the statement to see if those who solicited it had some accusatorial purpose in mind.⁹ The second---we shall call it the “declarant’s objective intent”---considers whether the statement was made “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”¹⁰ Though courts tend to emphasize one or the other of these strands, each complements the other; that is, when a statement is made at the inducement of government officials, the declarant can “reasonably believe” they intend it for use at trial.¹¹ Indeed, some courts believe the two share a “common nucleus” and so can be reduced to a single test.¹² For example, one court says that Crawford turns on “the purpose for which the [extrajudicial] statement was obtained or given.”¹³

The case that tests the relationship between the two strands arises when the government uses an undercover informant to induce the declarant to make incriminating statements.¹⁴ One court held the statements “non-testimonial” on the strength of the suggestion in Crawford that Bourjaily v. U.S. was still good law.¹⁵ Sometimes the decision might be defended on the ground that the statements were not “accusations” even though the court relied on some other rationale.¹⁶

---the “official inducement” strand

Most of the opinions finding statements “testimonial” under this strand concern statements well within the Supreme Court’s “core class” of testimonial statements.¹⁷ For example, after being read her Miranda rights, a shoplifting arrestee makes a written statement naming defendant as her accomplice.¹⁸ Similarly, when a police officer questions the victim of a brutal assault in the hospital, such “structured police questioning” was “testimonial.”¹⁹ The better reasoned opinions augment the comparison with the policy of Crawford; e.g., holding that identifications of the defendant from police mugbooks not only resembles the sorts of procedure mentioned in Justice Scalia’s opinion but are also exactly the kind of accusatorial hearsay that cross-examination was meant to test.²⁰

Many opinions holding statements not “testimonial” do so by pointing out that they do not fit any of the examples used by Justice Scalia to capture the “core” concept of Crawford.²¹ Some courts try to reduce the Supreme Court’s varied expressions to a simpler statement; e.g., that “testimonial hearsay” must have “an official or formal quality.”²² But the better reasoned opinions make the structure of the interrogation simply an indicium that the interrogator intends²³ to elicit “testimonial” hearsay. Another

formal indicium is the identity of the recipient; statements to police officers and other state agents will more likely be found “testimonial” than statements to friends, family members, or co-workers.²⁴

Many courts have seized on a phrase in Justice Scalia’s opinion to make “structured police questioning” something of a shibboleth in determining whether the response of the declarant is “testimonial.”²⁵ For example, where the police ask a turncoat accomplice to make a recorded phonecall to elicit incriminating statements from the defendant, statements of the accomplice are “testimonial.”²⁶ But other courts, even those that rely on some formal indicia, note that Justice Scalia also said that “interrogation” in *Crawford* should be read in a “colloquial, rather than any technical, legal sense.”²⁷ One court tried to squeeze some rules of thumb from the conflicting cases on police interrogations.²⁸ Perhaps the least defensible of such formal tests is whether the person performing the interrogation was a “government employee.”²⁹

For many courts, the formal indicia simply provide evidence of the purpose or intent of the interrogator.³⁰ Some courts hold that the “testimonial” nature of the statement turns on both the intent of the declarant and of the interrogator.³¹ But one court has said that the intent of the declarant cannot turn a “nontestimonial” interrogation into a “testimonial” one.³²

Many courts make this strand turn on the resemblance between the interrogation at hand and those that the Court’s opinion cited as the historical source of the Sixth Amendment right; for example, the declarant’s response is not “testimonial” if the interrogator did not behave like *Torquemada*.³³ Departures from the historical examples may be justified if the interrogation would nonetheless have led the witness to reasonably believe her accusation would be used to prosecute the accused.³⁴

---the “declarant’s objective intent” strand

Courts frequently find statements not “testimonial” 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.”³⁵ Though “witness” might refer either to the person who testifies in court, most courts assume that the word refers to the declarant.³⁶ Some courts suppose that this follows automatically if the statement was made with no “official inducement.”³⁷ But a few courts seem to assume the declarant’s intent only comes into play in deciding whether statements made during a police interrogation are “testimonial.”³⁸ Some courts have rejected this strand entirely.³⁹ But another court favors it over the “official inducement” strand because the latter can be used to evade *Crawford* by using informal methods to elicit statements.⁴⁰

A few courts think that the statement is “testimonial hearsay” if this strand is met, regardless of whether the statement was induced by official action.⁴¹ Others use this strand in conjunction with police inducement to convert the inquiry into the declarant’s state of mind; that is, what was the “purpose or expectation” of the declarant?⁴² But the

“purpose” rationale runs aground in the case where a chemist prepares a lab report stating that the substance submitted for analysis is some forbidden substance; although most people would not think of this as an “accusation”, the chemist clearly expects that the report will be used in a subsequent criminal proceeding.⁴³

Justice Scalia’s opinion does not clearly answer the question “admissible against who”? That is, does the accuser have to understand that the statement would be “available for use at a later trial” of the person accused or is enough that the accuser supposes it can be used against someone?⁴⁴

In the overwhelming majority of the cases in which courts have found that an objective witness would reasonably believe “that the statement would be available for use at a later time”, the statement meets ordinary notions of an “accusation”:

- a wife keeps a diary of her dialing doings that includes accounts of the deterioration of her relationship with her husband just before he killed her.⁴⁵
- a wife tells police officers responding to a domestic disturbance 911 call that her husband hit her.⁴⁶
- the police arrive at the scene of a shooting and witnesses tell them the defendant was the shooter.⁴⁷
- declarant identifies suspects from photographs of crime from bank surveillance camera.⁴⁸
- though using nonleading questions in relaxed manner, interviewer told seven-year-old child-abuse victim that she was a police officer and, after questioning him on the difference between truth and lies, told him he must tell the truth.⁴⁹

Similarly, most of the statements found “nontestimonial” do not resemble what ordinary people would call an “accusation”:⁵⁰

- the defendant writes out a “script” for his girlfriend to use in providing him a false alibi.
- members of drug conspiracy carry on their business over telephone not knowing that the phones are tapped and one of their number is a government informer.⁵¹
- bystander reports to police answering call about drive-by shooting that he thinks “he was shot in the right foot” but does not identify the shooter or describe the shooting.⁵²
- a companion of seller tells proposed buyer of weapon that it was used in a recent murder but without identifying the seller as the shooter.⁵³

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

- a prisoner in the presence of guards admits to relatives that he was the driver of the getaway car.⁵⁴
- immediately after being rescued by officers from knife-wielding assailant who held her hostage, the victim tells officers what defendant did to her.⁵⁵
- declarant calls 911 to report that her boyfriend threatened her and her sister with a handgun.⁵⁶

In some cases, courts write schizophrenic opinions; e.g., holding that a statement is a “declaration against interest” for purpose of a hearsay objection but not “testimonial” under Crawford because the declarant could not foresee that the statement might be used against him.⁵⁷

The declarant’s intent strand becomes problematic when accusations come from persons with limited intellectual capacity, such as children or adults who have diminished mental abilities.⁵⁸ Since such witnesses are highly subject to leading by interrogators, most courts have been reluctant to place them beyond the scope of Crawford. Some courts suggest that in such cases, courts apply an objective test that disregards the immaturity or incompetence of the witness.⁵⁹ But other courts have held Crawford inapplicable because the child could not have understood that his accusation was “testimonial.”⁶⁰

Courts ignore this strand when faced with affidavits introduced to prove an element of the charged crime.⁶¹

The Categorical Approach---Generally

The cases do not divide as neatly as our organization might suggest.⁶² The same opinion can blend “rule of thumb” and “categorical” treatment of Crawford issues. Moreover, an opinion that analyzes a confrontation issue in terms of Justice Scalia’s broad categories may be treated in subsequent opinions as creating a category of “nontestimonial” or “testimonial” hearsay. Nonetheless, we think dividing the cases this way has its uses.⁶³

---affidavits

Since the Crawford opinion mentions them as within the “core” of “testimonial hearsay”, most courts have held that affidavits presumptively satisfy the definition of testimonial.⁶⁴ But a witness can provide an affidavit that does not amount to an “accusation.”⁶⁵

---informer accusations

Since “faceless informers” have long been a staple of confrontation history⁶⁶, one would suppose that statements by informers accusing the defendant would fall easily within the Crawford definition of “testimonial.” But some courts have struggled to reach this conclusion.⁶⁷

---investigatory interrogations

A number of courts have exempted police interrogations from Crawford on the grounds that the officers were not seeking evidence for use at trial but were only trying to find out what happened.⁶⁸ For example, when the declarant approaches police officers near a wrecked car and asks them what happened to the car and the fate of its occupants, the inquiries were not “testimonial” where the officers did not know she was the girlfriend of the driver even though they suspected the car had been used in a robbery.⁶⁹ Some opinions view the police intent as determinative; that is, the statements are not “testimonial” if the officers just wanted to “assess the situation and secure the scene.”⁷⁰ But other courts look to the intent of the declarant and hold the statement “testimonial” if it was an accusation of crime.⁷¹

Some opinions rely on formal criteria; e.g., “unstructured interaction between officer and witness” does not amount to the “formal police inquiry” labeled “testimonial” in Crawford.⁷² For example, where immediately after police rescue her from a knife-wielding assailant, the victim tells them what defendant did to her before they arrived on the scene.⁷³ In some of these cases, the opinions seem naive if one looks at the intent of the officer rather than the formal criteria; e.g., when a police officer executing a search warrant answers the defendant’s phone and pretends to be a drug dealer to elicit an offer to buy from the caller.⁷⁴ This case seems far simpler if one asks: “was the declarant making an accusation?”⁷⁵

--- “mechanical hearsay”

One court has held Crawford applies to “mechanical hearsay”---that is, a “statement” made by a machine by some purely mechanical process that does not rest on some hearsay statement of a human being.⁷⁶

---plea allocutions

When another person accuses the defendant of a crime in a proceeding under Criminal Rule 11 to determine whether to accept that person’s guilty plea, some courts find this per se “testimonial hearsay.”⁷⁷ Since plea allocutions are made in court and under oath, courts find it “obvious” that the person is “bearing witness against himself” so as to make the hearsay “testimonial” when used to convict someone else.⁷⁸

--- “private” conversations

Some courts hold that hearsay statements are not “testimonial” if made in “private” conversations.⁷⁹ But perhaps sensing that a hearsay statement can be an “accusation” even when not made to a public official⁸⁰, some courts define “private” to mean “between confidants.”⁸¹ For example, one court held a statement made by a murder victim to his cousin and roommate within the walls of their apartment not “testimonial” even though it accused the defendant of assault with a deadly weapon.⁸² But other opinions stretch the concept of “private”; e.g., finding that remarks to visiting relatives in the presence of jail guards were not “testimonial.”⁸³

---Rule 801(d)(2)(e) “straight” admissions

The hearsay rule admits statements made by a party to the action; for example, the defendant’s confession comes in on this ground⁸⁴. Though Supreme Court has said little on this issue, most courts hold that the defendant has no right to confront himself.⁸⁵ But in an unpublished opinion the Ninth Circuit held that straight admissions were not “firmly rooted” so that when a statement of the defendant appears in the otherwise admissible hearsay statement of another party it must satisfy Roberts other route to admissibility.⁸⁶ We think this was wrong under Roberts and do not expect it will be found good law after Crawford.⁸⁷ Distinguish the admissibility of one defendant’s admission in a joint trial; such statements remain under the Bruton doctrine.⁸⁸

Adoptive admissions can fare differently, at least in cases where the police set a turncoat accomplice to try to get the defendant to adopt the turncoat’s statements about the crime.⁸⁹

---Rule 801(d)(2)(E) statements to coconspirators

One sort of “private conversation” that courts have rushed to declare not “testimonial” are statements made to a fellow conspirator.⁹⁰ When the declarant makes the statement in furtherance of the conspiracy with which the defendant is charged, the statement is “legally operative conduct” and not “hearsay” so it is not within the scope of the right of confrontation for that reason.⁹¹ As some courts have noted, under the classic notion of conspiracies as clandestine, coconspirator statements by their very nature will not be “testimonial” under either strand of Crawford.⁹² Often the statements of co-conspirators will not amount to an “accusation.”⁹³

But even where the nature of the conspiracy requires public utterance---e.g., fraud or narcotics sales---the statement will be introduced into evidence to prove an element of the crime; that is, it comes in as “legally operative conduct” and thus fall outside of Crawford as not being introduced “for the truth of the matter asserted therein.”⁹⁴ For example, in a conspiracy to obstruct justice where the defendant induced a co-conspirator to testify falsely at a civil deposition so that the statement appeared to be

“testimonial” under Crawford, the court found it obvious that the prosecution did not introduce the false testimony to prove its truth.⁹⁵

---911 calls

Since the writers did this, courts have some excuse for adopting a categorical approach

to statements made to the police by declarants who call the 911 emergency number.⁹⁶ Some courts hold that 911 calls that meet the requirements for the excited utterance exception to the hearsay rule are per se “nontestimonial.”⁹⁷ Other courts hold 911 calls cannot be testimonial because they do not produce “structured police questioning.”⁹⁸ Others argue 911 calls are “nontestimonial” because the caller wants to summon help, not accuse someone of crime.⁹⁹ Some courts “back-reason” from the 911 cases to on-the-scene accusations of crime.¹⁰⁰

One court thought the fact that 911 calls are “cloaked in anonymity” by state argued for putting them beyond Crawford scrutiny.¹⁰¹ To us, this clashes with the Supreme Court’s condemnation of the use of anonymous accusers during the McCarthyite witchhunts.¹⁰²

The better-reasoned cases reject this category and apply the general Crawford criteria to determine whether or not a statement made in a 911 call are “testimonial.”¹⁰³

---Rule 803(3) excited utterances

Exited utterances frequently figure in 911 calls but some courts also use an excited utterance rationale in holding accusations of child abuse not “testimonial.”¹⁰⁴ Some courts hold that excited utterances are per se “nontestimonial”, apparently on the ground that they lack the structure of the kinds of utterances described as “testimonial” in Crawford.¹⁰⁵ But other courts state that an excited utterance may or may not be testimonial, depending on the circumstances under which it was uttered.¹⁰⁶ For example, the statement is “testimonial” where the police take a crime victim down to the station and interrogate him on the record.¹⁰⁷

Some courts rationalize this doctrine on the ground that the person making an excited utterance could not contemplate its possible use at evidence at trial.¹⁰⁸ However, in some of the excited utterance cases the statement at issue might better be put outside Crawford as not amounting to an “accusation”; e.g., when the murder victim shouts a warning to his family when a man who had threatened to kill him arrives on the scene.¹⁰⁹

---Rule 803(4) statements for medical diagnosis

Some courts have held that when an accusation is made to a physician, it is not “testimonial” because the declarant is seeking treatment, not punishment of the

offender.¹¹⁰ But in the most common use of this category---prosecutions for child abuse---the declarant likely sees the doctor as an authority figure and thus an appropriate recipient of accusations of crime.¹¹¹ Moreover, few cases consider whether state law requires the physician to report cases of suspected child abuse to the police---a fact that muddies the purpose of the physician in interrogating the child.¹¹²

---child abuse prosecutions

In a footnote in *Crawford*, Justice Scalia suggested that the Court's decision in *White v. Illinois* might be "arguably in tension" with the *Crawford* holding.¹¹³ Since *White* involved a police interrogation of a child abuse victim, lower courts have tried to read this as some hint of whether the court might admit an exception for child abuse.¹¹⁴ One court flatly rejected this reading where the only difference between the instant case and *White* was that the questioning was done by a social worker, rather than a police officer.¹¹⁵ Many other courts have held questioning of child abuse victims to be "testimonial" without considering *White*.¹¹⁶

But a significant number of courts have held interrogations by a physician are not "testimonial" because the purpose of the questioning is the health of the child, not filling the prisons.¹¹⁷

---Rule 803(6) business records

In describing the history of the right of confrontation, Justice Scalia wrote that most of the hearsay exceptions at common law "covered statements that by their nature were not testimonial---for example, business records. . ." ¹¹⁸ Some courts read this as meaning that business records are per se "nontestimonial."¹¹⁹

---Rule 803(8) official records

Courts have struggled to save this exception and state statutes that allowed the use of affidavits in place of testimony of government laboratory employees in drug and drunk driving cases.¹²⁰ One court has held such affidavits admissible under an exception to the common law confrontation right for documentary evidence.¹²¹ Another holds them "non-testimonial" because lab work is "not investigative or prosecutorial" but "routine, non-adversarial, and made to ensure an accurate measurement."¹²² But the most direct route to a holding that they are "nontestimonial" runs through the official records exception.¹²³ Courts do this by extending the dictum in Justice Scalia's opinion about business records¹²⁴ to make official records per se outside the scope of *Crawford*.¹²⁵ But these courts fail to note that business "records" prepared for purposes of litigation (as the affidavits obviously are) do not fall within the exception.¹²⁶

Some of the cases could be equally rationalized on the ground that the person who makes out the affidavit is not an "accuser"; e.g., the process server who fills out a proof of service for a restraining order later used in a prosecution for violating the order to

prove service.¹²⁷ Similarly, a lab report stating that a substance submitted for analysis is cocaine does not resemble a traditional “accusation” of crime.¹²⁸ Nonetheless, a few courts have held similar affidavits “testimonial” under Crawford.¹²⁹

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

Perhaps because Lilly said that “declarations against interest” defined “too large a class for meaningful Confrontation Clause analysis”,¹³⁰ courts have shown little inclination to treat them categorically under Crawford.¹³¹

II. Admissibility of “Testimonial Statements”

Assuming a hearsay statement is “testimonial”, Crawford suggests that it can only be admitted if two conditions are satisfied: (a) the declarant is unavailable; and, (b) the defendant had a prior opportunity to cross-examine the declarant.¹³² But as we shall show, Crawford itself weakens this “bright line.”¹³³ Justice Scalia’s opinion hints that Sixth Amendment allows what one court called “a small class of exceptions.”¹³⁴

---declarant “unavailable” but previously cross-examined

Justice Scalia’s opinion suggests that the Sixth Amendment does not bar the use of a “testimonial statement” of “a witness who did not appear at trial” if “he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.”¹³⁵ The lower courts have wrestled with both of these requirements.

Some courts assumed that “unavailable” incorporates the hearsay standard in Rule 804(b)(a) rather than the more stringent standard of *Barber v. Page* and its progeny¹³⁶; e.g., the defendant claims he does not remember the perception that was the subject of his “testimonial hearsay.”¹³⁷ Courts might find some support for the view that forgetfulness makes the witness “unavailable” from the Supreme Court’s decision in *U.S. v. Owens*.¹³⁸

A few courts have taken a more stringent view than the Supreme Court on what is required to satisfy the requirement of past cross-examination; for example, rejecting the Court’s holding in *Green* that the preliminary hearing provides an adequate “opportunity” for cross-examination.¹³⁹ Similarly, one court reads Crawford as rejecting “cross-examination by proxy” that is permitted by some state versions of the former testimony exception to the hearsay rule.¹⁴⁰

---declarant available but not called

Some prosecutors have argued that Crawford is satisfied if the declarant was available and could have been called by the defense for cross-examination.¹⁴¹ Courts have rightly rejected this argument on the ground that it is the state’s, not the defense, burden to provide confrontation.¹⁴²

---defendant testified at trial

Courts regard it an a fortiori case for admissibility under Crawford where the declarant takes the stand at trial and so is subject to cross-examination regarding the “testimonial” statement.¹⁴³ Though we doubt this ploy falls within the policy of Evidence Rule 703, some courts nonetheless permit prosecutors to do this.¹⁴⁴

---hearsay offered for non-testimonial purpose

Prior to Crawford, the Supreme Court held that out-of-court statements did not violate the Confrontation Clause if they were not offered “for the truth of the matter asserted therein”---or as law students put it, if used for a “non-FOTOMAT” purpose.¹⁴⁵ Courts continue to apply this doctrine to admit “testimonial” hearsay.¹⁴⁶ However, unless courts insist on strict compliance with the requirements of Rule 105 for multiple admissibility¹⁴⁷, non-FOTOMAT could become a route to evasion of the Sixth Amendment.¹⁴⁸ For example, several courts have allowed prosecutors to bring hearsay accusations before the jury on the bogus theory of proving “why officers took the actions they did”---a fact without any relevance to the prosecution’s case.¹⁴⁹ Some courts have properly seen that the use of “testimonial hearsay” on this theory raises a Bruton problem.¹⁵⁰

A more difficult problem arises from the practice of some crime labs of sending their cleverest witness rather than the person who actually performed the test to give an expert opinion based upon the hearsay of the person who did the lab work.¹⁵¹ Though one may doubt that this ploy conforms to either the letter, the spirit, or policy of Rule 703, some courts allow prosecutors to get away with it.¹⁵² Some courts have held that the expert opinion of an absent expert is not hearsay when offered as the basis for the opinion of a testifying expert and thus satisfies Crawford on this ground.¹⁵³

Two methods of evading the hearsay rule that may prosecutors may use to exploit the present exception to Crawford are circumstantial evidence of hearsay and variants of the infamous “I-am-the-Pope” hypothetical.¹⁵⁴ The only court to encounter these evasions rightly concluded that both the statement “I want to buy some crack” and testimony that people attempted to buy crack from plain clothes officers while they were executing a search warrant did not fall outside Crawford as “not hearsay.”¹⁵⁵ If the court had not so held, then prosecutor’s could not prove that an eye-witness told police that “defendant killed Cock Robin” but they could have the officer testify that eye-witness “accused the defendant” of the ornithological atrocity.

---declarant testifies at trial

Another pre-Crawford case held that the introduction of hearsay did not offend the Confrontation Clause if the declarant appeared as a witness at trial.¹⁵⁶ Since Crawford suggests that past cross-examination satisfies the Sixth Amendment where the witness

is unavailable, courts holding that present cross-examination suffices to admit “testimonial hearsay” seem to be on sound ground.¹⁵⁷ But where the declarant appears as a witness and refuses to answer any questions about the “testimonial” statement, courts have taken divergent positions on whether this suffices to satisfy Crawford.¹⁵⁸ Justice Scalia bears some of the blame because he use the phrase “when the declarant appears for cross-examination at trial” to describe this exception.¹⁵⁹

Indiana takes the hard-nose position that Crawford is satisfied unless the defendant asks the trial judge to cite the declarant-witness for contempt---a rule that seems at odds with the notion that the prosecution, not the defense, must satisfy the Sixth Amendment if wants to use hearsay accusations.¹⁶⁰

This exception does not apply to cases of multiple hearsay; that is, where the declarant’s “testimonial” statement includes the “testimonial” statement of some third person.¹⁶¹

---defendant forfeits confrontation rights

The Supreme Court’s Crawford opinion suggests that the defendant can forfeit his right to confrontation so as to allow the admission of “testimonial hearsay.”¹⁶² Unhappily, some courts have confused “forfeiture” with procedural psuedo-waiver; e.g., holding that the defendant “forfeits” his Crawford rights by failing to ask the court to cite a recalcitrant declarant for contempt when she refuses to answer any questions about “testimonial hearsay.”¹⁶³ But the better reasoned decisions hold that it is the state’s burden to provide confrontation; the defendant does not forfeit his right of confrontation by not calling the declarant as a witness after the prosecution introduces “testimonial hearsay.”¹⁶⁴

True “forfeiture” requires the prosecution to prove that wrongdoing by the defendant caused the witness to be unavailable.¹⁶⁵ This requires something more than suspicions that defendant’s friends or criminal associates murdered or intimidated the declarant.¹⁶⁶ Nor is it enough that the declarant died while the defendant was at large after failing to show up for trial.¹⁶⁷

---dying declarations

As a few courts have noted in dicta¹⁶⁸ , Justice Scalia suggested the possibility that one traditional hearsay exception may have been known to the Founders and could conceivably be available after Crawford even though “testimonial”; namely, dying declarations.¹⁶⁹ The lower courts were quick to seize this possibility.¹⁷⁰ Some bolster the Supreme Court’s slippery dictum by noting Justice Scalia’s dubious claim that the Sixth Amendment adopted a supposed common law right of confrontation.¹⁷¹

III. “Non-testimonial” Hearsay Post-Crawford

Since Justice Scalia was coy about the impact of Roberts on the pre-existing caselaw, lower courts have been understandably puzzled about the status of “nontestimonial” hearsay under the Confrontation Clause.¹⁷² Many courts say that Crawford “overruled” or “abrogated” Roberts but ambiguity abounds.¹⁷³ Such language might mean that Roberts no longer applies to all statements or that it no longer applies to “testimonial” statements.¹⁷⁴ Most courts read Crawford to mean that Roberts remains viable; that is, that “nontestimonial” statements must still satisfy the Roberts test.¹⁷⁵ But a significant minority believe that Roberts is no longer good law.¹⁷⁶

IV. Post-Crawford Procedure

Most courts seem to assume that pre-Crawford confrontation procedures that arise from the Constitution rather than the Evidence or Criminal Rules remain viable after Crawford; e.g., the restrictions on the use of hearsay in joint trials required by the Court’s Bruton decision must still be followed.¹⁷⁷

Retroactivity of Crawford

Crawford applies retroactively in federal courts on direct appeal of cases tried before the decision.¹⁷⁸ When Crawford is raised in federal courts in a habeas corpus proceeding arising from a state conviction, the Clinton habeas corpus statute bars retroactive application.¹⁷⁹ Federal courts have also held Crawford non-retroactive on constitutional grounds.¹⁸⁰ Only one federal court seems to have found Crawford retroactive on habeas corpus.¹⁸¹

Most state courts hold that Crawford applies in cases pending on direct appeal at the time the Supreme Court announced its new confrontation doctrine.¹⁸² Some base these rulings on federal constitutional law.¹⁸³ However, the defendant cannot invoke Crawford to argue that counsel was incompetent for failure to object on confrontation grounds to a statement that was admissible under pre-Crawford precedents.¹⁸⁴

Raising Crawford issues

---proper objection

In order to preserve Crawford claims for appeal, the defendant must make a proper objection at trial.¹⁸⁵ Most courts assume this means the objection must comply with Evidence Rule 103.¹⁸⁶ Usually courts hold a hearsay objection does not suffice unless it is coupled with a claim that admission of the hearsay violates the Sixth Amendment.¹⁸⁷ Some courts hold review was barred when defendant failed to make a confrontation objection that would have been futile at the time because Crawford had not yet been decided.¹⁸⁸ They justify this in reliance on Justice Scalia’s attempt to portray Crawford as simply a reformulation of the Court’s prior caselaw.¹⁸⁹ But another court held that in such cases the defendant is entitled to a “modified plain error review” in which the government bears the burden of showing that the error was not harmless.¹⁹⁰

---seek contempt order

Perhaps the least defensible of the post-Crawford procedural hurdles courts have erected is the Indiana rule that where the declarant appears at trial and refuses to answer the prosecution's questions about a "testimonial" statement, the defense must ask the trial court to hold the witness in contempt or forfeit the right to raise a Crawford objection to the prosecution's use of "testimonial hearsay" from the obstreperous witness.¹⁹¹

Standard of review of Crawford rulings

Some courts apply the familiar abuse of discretion standard to Crawford rulings, usually on the assumption that a confrontation objection is simply another evidentiary claim.¹⁹² But the better view would seem to be that of the federal courts holding that claims of Crawford error are reviewed de novo.¹⁹³ Some states use the higher standard.¹⁹⁴

---harmless error

Most of the early decisions hold that Crawford errors are not "structural."¹⁹⁵ Hence, they are subject to the Chapman standard for harmless error. Most often courts save the conviction by finding Crawford error harmless¹⁹⁶. But in a few cases, courts have reversed for Crawford error.¹⁹⁷

Waiver of confrontation rights

Though nothing in Crawford suggests it affects the pre-existing caselaw, prosecutors desperate to preserve convictions have advanced clever waiver arguments; e.g., that the defendant waives his right to confront testimonial declarants by failing to call them as witnesses.¹⁹⁸ The suggestion that the Sixth Amendment places the burden on the defendant to call witnesses for confrontation has properly been rejected.¹⁹⁹

Courts generally throw around the word loosely so the "waiver" cases need to be used cautiously.²⁰⁰

Scope of Crawford

Most courts hold that Crawford only applies to proceedings governed by the Sixth Amendment and not to the due process right of confrontation in some administrative proceedings.²⁰¹ But Crawford does apply to misdemeanor prosecutions.²⁰² Perhaps because of the Supreme Court's extension of jury trial to sentencing, some courts have assumed that Crawford applies to sentencing hearings following conviction.²⁰³

Several courts have assumed, without deciding, that Crawford applies to hearsay used to prove an uncharged crime relevant to prove some element of the charged

crime.²⁰⁴ A Texas court has held that Crawford does not apply to a pretrial hearing to suppress evidence.²⁰⁵

1

85. Writers

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; 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; King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 2005, 28 *Seattle U.L.Rev.* 301; Mendez, *Crawford v. Washington: A Critique*, 2004, 57 *Stan.L.Rev.* 569; Mosteller, *Crawford v. Washington: Encouraging and Ensuring The Confrontation of Witnesses*, 2005, 39 *U.Rich.L.Rev.* 511; 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.

Student works

Comment, *Child Sex Abuse Victims: How Will Their Stories Be Heard After Crawford?*, 2005, 27 *Campbell L.Rev.* 279; Comment, "Utter Exc itement" About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford, 2005, 36 *St. Mary's L.J.* 717; Note, *Constitutional Law---Sixth Amendment---Testimonial Statements Inadmissible Under Confrontation Clause Absent Showing of Unavailability and Prior Opportunity for Cross-Examination*, 2005, 72 *Tenn.L.Rev.* 671; Note, *Examining the Repercussions of Crawford: The Uncertain Future of Hearsay Evidence in Missouri*, 2005, 70 *Mo.L.Rev.* 561; Note, *Confrontation Clause Forbids Admission of Testimonial Out-of-court Statements Without Prior Opportunity to Cross-examine*, 2005, 40 *Harv.C.R.-C.L.L.L.Rev.* 223.

2

86. Crawford decision

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

3

87. Lower court opinions

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").

See also

Text at notecall 55, above.

Duelling dictionaries

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").

4

88. "Testimonial statement"

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).

People v. Sisavath, 2004, 13 Cal.Rptr.3d 753, 757, 118 Cal.App.4th 1396 ("the important question"); *Hammon v. State*, Ind.2005, 829 N.E.2d 444, 449; *State v. Wright*, Minn.App. 2004, 686 N.W.2d 295, 301 (confrontation analysis "turns on" distinction); *State v. Hembergt*, 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. 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; *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; *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").

See also

Crawford only applies if the statement is "hearsay", a matter generally supposed to be determined by the law of evidence, not the Sixth Amendment. 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").

5

89. Little analysis

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”; *People v. Fry*, Colo.2004, 92 P.3d 970, 974 (testimony at preliminary hearing); *Clark v. State*, Miss. 2004, 891 So.2d 136, 140 (custodial statement of accomplice); *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).

6

90. Broad terms

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

7

91. Categorical approach

See, e.g., *State v. Staten*, S.C.App.2005, 610 S.E.2d 823, 831 (collecting cases from other states using this approach).

See also

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

8

92. Two ways

Some opinions note 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. Wright*, Minn.App. 2004, 686 N.W.2d 295, 301; *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. As the inspection of footnote 93 will reveal, we have combined the first two because they seem to us to be two ways of saying the same thing.

Some courts have attributed the two approaches to the academics cited in Justice Scalia’s opinion--- 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. 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. But we decided that without an intellectual blood test, it would be unfair to attribute paternity to these authors by referring to the two strands as “the Amar approach” and “the Friedman approach.”

See also

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”).

9

93. “Official inducement”

Justice Scalia defines the “core class” of “testimonial” statements in various ways. He speaks of “*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” and “extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” 124 S.Ct. at 1364, 541 U.S. at 51.

But later after declining to provide a “comprehensive definition” of “testimonial”, Justice Scalia opines that “at a minimum” it includes “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* at 1374, 541 U.S. at 51-52.

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”); *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”).

But see

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

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).

10

94. “Available for use”

Id. at 1364, 541 U.S. at 52.

11

95. Complementary

State v. Staten, S.C.App.2005, 610 S.E.2d 823, 829-830 (treating these as “the Crawford two-pronged analysis”).

12

96. “Common nucleus”

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”).

Compare

State v. Manuel, 2005, 697 N.W.2d 811, 821, ___ Wis.2d ___ (assuming that official inducement and witness purpose strands share a “common nucleus”).

13

97. Turns on purpose

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. Mason, 2005, 110 P.3d 245, 249, ___ 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).

14

98. Informer induces

See, e.g., 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.

15

99. Bourjaily good law

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.

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.

16

100. Not “accusations”

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).

101. “Core class”

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

See also

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. Bruno, C.A.2d, 2004, 383 F.3d 65, 78 (grand jury testimony only evidence that defendant had attempted to obstruct justice);

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); 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”); 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. 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”).

18

102. Shoplifting arrestee

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

19

103. Victim in hospital

Wall v. State, Tex.App.2004, 143 S.W.3d 846, 851 (rejecting contrary view in Cassidy v. State, Tex.App. 2004, 149 S.W.3d 712 as based on “technical” reading of “interrogated”).

See also

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”);

20

104. Photo identifications

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

21

105. Do not fit

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); State v. Staten, S.C.App.2005, 610 S.E.2d 823, 836; 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).

22

106. “Official or formal”

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); 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. 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

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

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).

23

107. Indicium of intent

Hammon v. State, Ind.2005, 829 N.E.2d 444, 453.

24

108. Recipient indicium

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”); 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); 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”); 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”); 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); Evans v. Luebbers, 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).

People v. Butler, 2005, 25 Cal.Rptr.2d 154, 161, 127 Cal.App.4th 49 (statements made spontaneously to co-workers not “testimonial”); People v. Garrison, Colo.App. 2004, 109 P.3d 1009, 1011 (statement to boss); 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”); 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”); Hammon v. State, Ind.2005, 829 N.E.2d 444, 454 (collecting cases); 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. 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. 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. Brigman, 2005, 615 S.E.2d 21, 24-26, ___ N.C.App. ___ (statement to foster parent about child abuse by biological parents 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); 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. Chio, 2004, 98 P.3d 1144, 1146, 195 Or.App. 581 (tape-recording of phonecall co-defendant made to friend from jail not “testimonial”); State v. Davis, 2005, 613 S.E.2d 760, 779, 364 S.C. 364 (to prospective buyer of murder weapon); 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”); Woods v. State, Tex.Crim. 2004, 152 S.W.3d 105, 114 (“casual remarks made spontaneously to acquaintances” 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).

See also

State v. Davis, 2005, 613 S.E.2d 760, 777, 364 S.C. 364 (collecting cases from around the country using this doctrine).

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. 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); 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”).

26

110. Turncoat accomplice

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

27

111. “Colloquial sense”

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).

28

112. Rules of thumb

- “(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.

See also

Ruth v. State, Tex.App. 2005, 167 S.W.3d 560, 568 (reasserting these).

29

113. “Government employee”

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.

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”).

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’s door claiming to have been raped, then relaying her response to 911 operators questions did not convert caller into a governmental agent); 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”).

30

114. Purpose or intent

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).

31

115. 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).

32

116. Cannot turn

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

33

117. Like Torquemada

People v. Vigil, Colo.App. 2004, 104 P.3d 258, 262 (requiring “(1) solemn or formal statements, (2) made for the purpose of proving or establishing facts in judicial proceedings, (3) made to government actor”).

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).

34

118. Used to prosecute

People v. Vigil, Colo.App. 2004, 104 P.3d 258, 262 (though seven-year-old child was questioned with nonleading, open-ended questions in a relaxed atmosphere, interrogator told child she was a police officer, probed whether the child knew the difference between truth-telling and lying, and told him he needed to tell the truth).

35

119. “Objective witness”

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

One reason courts may differ on the application of this formula is different visions of just what the declarant must foresee. That the defendant will go to trial rather than plead guilty? That the declarant will not be called as a witness at trial? That some hearsay exception will apply to admit the declarant’s statement? Courts may be thinking of these questions when they tweak the verbiage. See, e.g., Gamble v. State, Ind.App. 2005, 831 N.E.2d 178, 182 (statement made “for purposes of preserving it for potential future use in legal proceedings”). One familiar with the history of the Confrontation Clause might suppose it enough that the declarant or her proxy could understand that the statement would trigger official action against the perpetrator; e.g., a pupil who complains to the principal that her teacher has groped her may not be thinking of prosecution but would seem to expect that the principal will take some action against the teacher in response to the statement. Compare Lopez v. State, Fla.App. 2004, 888 So.2d 693, 699-700 (declarant who identifies a person as the perpetrator “to a police officer at the scene of the crime surely knows the statement is a form of accusation that will be used against the suspect”).

But see

State v. Warsame, Minn.App. 2005, 701 N.W.2d 305, 311 (trial judge excluded evidence on the ground that witness could foresee that her statement would be “used prosecutorially” as the basis for further investigation or consideration by the prosecutor in determining whether or not to file charges; appellate court rejects this on ground witness must foresee that the statement “would be available for later use at trial”).

See also

Hammon v. State, Ind.2005, 829 N.E.2d 444, 455-456 (collecting cases using this indicium); 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).

36

120. Refers to declarant

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).

But see

Gamble v. State, Ind.App. 2005, 831 N.E.2d 178, 182 (applies to both the declarant and the questioner).

37

121. No “inducement”

State v. Staten, S.C.App.2005, 610 S.E.2d 823, 836.

38

122. Only police interrogations

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

39

123. Rejected strand

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); 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”).

But see

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”).

40

124. Used to evade

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

41

125. Regardless if induced

State v. Hill, 2005, 827 N.E.2d 351, 358-359, 160 Ohio App.3d 324.

42

126. Declarant's "purpose"

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); 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. Hembertt, 2005, 696 N.W.2d 473, 482, 269 Neb. 840; 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); 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).

43

127. Chemist expects

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).

44

128. Against someone

For example, in a case where the appellate court did not see the problem, a prisoner admitted to visiting relatives in the presence of guards that he was the driver of a getaway car. We suppose that an objective witness could have anticipated that the statement might be used against the prisoner. But in the case, the statement was used in a prosecution of the prisoner's girl friend for perjury in testifying that the prisoner could not have been the driver because he was with her somewhere else at the time. The court was probably right when it said the prisoner could not "reasonably believe" that it would be used against his girl friend--though what an objective witness might think is more problematic. People v. Shepherd, 2004, 689 N.W.2d 721, 729, 263 Mich.App. 665.

See also

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. *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”).

45

129. Diary

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

46

130. Husband hit her.

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

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. 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”).

47

131. Defendant the shooter

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

See also

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).

48

132. Identifies suspects

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

49

133. Must tell the truth

People v. Vigil, Colo.App. 2004, 104 P.3d 258, 262

50

134. Do not resemble accusation

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

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).

51

135. 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”).

52

136. “Shot in the foot”

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

53

137. Without identifying shooter

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

54

138. Prisoner admits

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

55

139. Tells 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).

56

140. Calls 911

State v. Wright, Minn.App. 2004, 686 N.W.2d 295, 302 (on grounds statement was an excited utterance).

57

141. 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”).

58

142. Limited capacity

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

People v. Vigil, Colo.App. 2004, 104 P.3d 258, 262-263 (seeing no problem in applying standard to seven-year-old child); 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).

59

143. Objective test

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. 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); 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).

60

144. Not have understood

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).

61

145. Affidavits prove element

See, e.g., *U.S. v. Rueda-Rivera*, C.A.5th, 2005, 396 F.3d 678, 680 (affidavit of clerk that the defendant had never received permission to re-enter U.S.).

See also

These cases are discussed below, text at notecall XX.

62

146. Divide neatly

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.

63

147. Uses

The overlap means that busy lawyers will probably find relevant caselaw regardless of which direction they choose to begin their research.

64

148. Affidavits

Hammon v. State, Ind.2005, 829 N.E.2d 444, 458 (even though affidavit merely repeats an accusation that the court held was not “testimonial.”

65

149. Not an “accusation”

For a discussion of why confrontation might be better limited to “accusations” than to “testimonial hearsay”, see the text above at notecall 34.

66

150. “Faceless informers”

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

67

151. Courts struggled

U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 676-678; *State v. Parks*, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (collecting cases that show varying definitions of “interrogation”).

See also

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 911 calls “testimonial”).

68

152. Investigatory interrogations

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); State v. Warsame, Minn.App. 2005, 701 N.W.2d 305, 308 (collecting cases and deciding that Wright, below, reflects the majority rule); State v. Wright, Minn.App. 2004, 686 N.W.2d 295, 300 (dictum; relies on Hammon); Hammon v. State, Ind.2005, 829 N.E.2d 444, 458 (officers responding to report of wifebeating where only trying to secure the scene and determine whether anything requiring police action had occurred); Rogers v. State, Ind.App. 2004, 814 N.E.2d 695, 701-702; 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); 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).

See also

State v. Davis, 2005, 613 S.E.2d 760, 772, 364 S.C. 364 (large collection of cases pro and con on this issue).

But see

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”); 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).

69¹⁵³

153. Used in robbery

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).

70

154. “Secure the scene”

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).

See also

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”; the old “res gestae” doctrine without the Latin tag).

71

155. “Testimonial” accusation

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

72

156. “Unstructured interaction”

People v. Corella, 2004, 18 Cal.Rptr.3d 770,776, 122 Cal.App.4th 461.

73

157. Rescued from assailant

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

74

158. Elicit an offer

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

75

159. “Making accusation?”

Ironically, the court in Morgan had just determined that the caller’s statements were not “hearsay” because they did not explicitly assert that the defendant was a drug dealer. People v. Morgan, 2005, 23 Cal.Rptr.2d 224, 232, 125 Cal.App.4th 935.

See also

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); 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).

76

160. “Mechanical hearsay”

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).

77

161. Allocutions per se

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.

78

162. "Obvious"

People v. Shepherd, 2004, 689 N.W.2d 721, 726, 263 Mich.App. 665.

79

163. "Private" conversations

U.S. v. Hendricks, C.A.3d, 2005, 395 F.3d 173, 181 (collecting cases); 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).

"[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.

See also

Hammon v. State, Ind.2005, 829 N.E.2d 444, 454 (collecting cases).

80

164. Private "accusation"

For example, a child sees both parents and policemen as authority figures so when a minor wants to accuse someone of a crime, she is more likely to tell a parent than to seek out a policeman. See text at notecall 60, above.

On the doctrinal justification for using “accusation” rather than “testimonial” to capture what the Crawford opinion aims at, see text at notecall 34.

81

165. “Between confidants”

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

82

166. Cousin and 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).

83

167. Jail guards

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

84

168. Defendant’s confession

Since the defendant cannot be a “witness against” himself unless he waives his Fifth Amendment privilege against self-incrimination, one can argue that under the “holistic Sixth Amendment” he needs no additional protection from the Confrontation Clause. 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”).

85

169. Confront himself

State v. Konohia, Haw.App.2005, 107 P.3d 1190, 1199 n.11, 107 Haw. 517; State v. Robinson, 2005, 109 P.3d 185, 189, 33 Kans.App. 773.

86

170. Satisfy Roberts

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

87

171. Not good law

We would not even bring this up had it had not surfaced in a post-Crawford published opinion. See U.S. v. Gibson, C.A.6th, 2005, 409 F.3d 325, 338. We suspect this another of those “Stanford clerk opinions” that infuriate appellate lawyers on the Left Coast.

88

172. 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.

89

173. Turncoat’s statements

State v. Hernandez, Fla.App. 2004, 875 So.2d 1271, 1273 (holding statements “testimonial”). While the defendant has no right to confront himself, he does have a right to confront the accomplice who tees up accusations for his adoption. 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).

90

174. Fellow conspirator

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); State v. Staten, S.C.App.2005, 610 S.E.2d 823, 834 (collecting cases); Wiggins v. State, Tex.App. 2004, 152 S.W.2d 656, 659 (relying on Saget).

91

175. Not “hearsay”

Since conspiracy is a crime committed by words, the statements of coconspirators are not introduced “for the truth of the matter asserted.” See below, text at notecall XX. Hence, only courts that stretch the exemption in Rule 801(d)(2)(E) to cover statements not in furtherance of the conspiracy have need for the present claim that the statement is “nontestimonial.” 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).

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).

But see

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”).

92

176. Nature not “testimonial”

U.S. v. Holmes, C.A.5th, 2005, 406 F.3d 337, 348 n. 16 (collecting authorities).

93

177. 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).

94

178. Not FOTOMAT

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

95

179. Deposition testimony’

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

96

180. 911 calls

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); 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. Mackey, 2004, 785 N.Y.S.2d 870, 872, 5 Misc.3d 709 (collecting cases); State v. Staten, S.C.App.2005, 610 S.E.2d 823, 832 (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”); 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).

On the use of 911 as a meaningful category by the writers, see text at notecall 41, above.

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).

97

181. Per se “nontestimonial”

U.S. v. Brun, C.A.8th, 2005, 416 F.3d 703, 707 (where qualifies as an excited utterance); State v. Byrd, 2005, 828 N.E.2d 133, 136, 160 Ohio App.3d 538.

But see

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

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”).

98

182. Not “structured questioning”

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).

But see

State v. Wright, Minn.App. 2004, 686 N.W.2d 295, 303 (hinting that if the defendant could prove that the 911 operator followed a pattern of questioning designed to produce evidence for trial, calls might be found “testimonial”); 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).

99

183. Summon help

State v. Wright, Minn.App. 2004, 686 N.W.2d 295, 302 (collecting cases).

100

184. “Back reason”

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"); 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");

101

185. "Cloaked in anonymity"

State v. Wright, Minn.App. 2004, 686 N.W.2d 295, 302.

102

186. 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.

103

187. Reject category

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").

104

188. Excited utterances

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

105

189. Per se "nontestimonial"

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).

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; 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); State v. Byrd, 2005, 828 N.E.2d 133, 136, 160 Ohio App.3d 538 (when applied to 911 calls); Ruth v. State, Tex.App. 2005, 167 S.W.3d 560, 568 (“spontaneous statements” to police); 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).

But see

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”); 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); 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. 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); Spencer v. State, Tex.App. 2005, 162 S.W.3d 877, 880 (flatly rejecting this view; but collecting cases from other jurisdictions adopting it).

106

190. Depending on circumstances

State v. Parks, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (explaining this view); 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); State v. Hembertt, 2005, 696 N.W.2d 473, 480, 269 Neb. 840; 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).

107

191. Interrogate at station

State v. Aguilar, App. 2005, 107 P.3d 377, 379, 210 Ariz. 377 (dictum; excited utterance elicited by police query might be “testimonial”); Samarron v. State, Tex.App. 2004, 150 S.W.3d 701, 706-707 (noting that statement was not “spontaneous” which might suggest it was not within the hearsay exception as well).

Compare

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”).

108

192. Could not contemplate

State v. Aguilar, App. 2005, 107 P.3d 377, 379, 210 Ariz. 377.

But see

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”).

109

193. Shouts warning

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).

110

194. Made to physician

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

But see

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”).

111

195. Authority figure

See the analysis of statements made to a parent, above, text at notecall XX. A child’s notion that the physician can help secure punishment of the offender is frequently confirmed by the fact that the parents, a police officer, or both have arranged for her to speak to the physician.

112

196. Requires report

Perhaps courts suppose that only the child’s purpose counts for Crawford purposes.

113

197. “Arguably in tension”

124 S.Ct. at 1368 n. 8, 541 U.S. at 58 n. 8.

114

198. Child abuse exception

White is discussed in § 6470, p. 861 in the Main Volume.

115

199. Social worker

State v. Mack, 2004, 101 P.3d 349, 352-353, 337 Or. 586

116

200. Child abuse “testimonial”

See the cases collected in State v. Mack, 2004, 101 P.3d 349, 352 n. 10, 337 Or. 586.

See also

State v. Bobadilla, Minn.App. 2004, 690 N.W.2d 345, 349 (where child interviewed in presence of detective).

117

201. Physician not “testimonial”

State v. Scacchetti, Minn.App. 2005, 690 N.W.2d 393, 396.

118

202. “Business records”

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

119

203. Per se “nontestimonial”

U.S. v. Chan-Astorga, C.A.9th, 2005, 126 Fed.Appx. 364, 367 (business card and drug ledger not “testimonial”); People v. Taulton, 2005, 29 Cal.Rptr.2d 203, 206, 129 Cal.App.4th 1218 (dictum).

120

204. Crime lab affidavits

See above, text at notecall 72.

See also

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).

Compare

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); 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. 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).

121

205. Common law 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).

122

206. "Ensure accurate measurement"

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); 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"); 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); State v. Dedman, 2004, 102 P.3d 628, 636, 136 N.M. 561 (hence, admissible under the "firmly rooted" exception for government records); 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).

123

207. Official records exception

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. 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).

124

208. Scalia's dictum

124 S.Ct. at 1367, 514 U.S. at 56, quoted in the text above at notecall 202.

125

209. Outside scope

People v. Taulton, 2005, 29 Cal.Rptr.2d 203, 206, 129 Cal.App.4th 1218.

126

210. Not within exception

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).

127

211. 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").

128

212. Substance cocaine

People v. Johnson, 2004, 18 Cal.Rptr.3d 230, 233, 121 Cal.App.4th 1409.

129

213. Affidavits "testimonial"

City of Las Vegas v. Walsh, 2004, 91 P.3d 591, 595, 120 Nev. 392 (affidavit of nurse that blood sample was properly drawn and authenticating sample as one received delivered to police).

130

214. "Too large a class"

See § 6371.1, text at notecall 23, this Supplement.

131

215. Little inclination

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).

132

216. Two conditions

124 S.Ct. at 1365, 541 U.S. at 54.

See also

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).

133

217. Crawford weakens

Ibid. (suggesting that hearsay may also be admissible under any hearsay exceptions recognized at the time the of "the founding.")

134

218. "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.

135

219. "Prior opportunity"

124 S.Ct. at 1365, 541 U.S. at 54.

See also

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); 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).

136

220. Barber standard

Barber is discussed in § 6363, p. 783 in the Main Volume.

But see

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);

Compare

State v. Dedman, 2004, 102 P.3d 628, 637, 136 N.M. 561 (recognizing an exception under Roberts for affidavits submitted by lab technicians because cross-examination

is of little use, the evidence is reliable, and public policy of sparing the state the expense and embarrassment of having technicians produced at trial).

137

221. Does not remember

State v. Williams, La.App.2004, 889 So.2d 1093, 1101.

138

222. Owens decision

The decision is described in § 6369, p. 850. Owens might be distinguished on the grounds that the declarant did appear at trial to the jury could assess the credibility of the claimed lack of memory and that the court assumed that the defendant caused the loss of memory so that the case may involve a subliminal notion of forfeiture of the right.

See also

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).

139

223. Rejecting Green

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).

The Green case is discussed in § 6364 in the Main Volume.

But see

People v. Gonzales, 2005, 32 Cal.Rptr.3d 172, 176, 131 Cal.App.4th 767 (opportunity to cross-examine at preliminary hearing satisfies Crawford); 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. 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).

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).

140

224. Cross by proxy

State v. Hale, 2005, 691 N.W.2d 637, 646-647, 277 Wis.2d 593.

141

225. Defense could have called

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.

142

226. State's burden

Bratton v. State, Tex.App. 2005, 156 S.W.3d 689, 694.

143

227. Declarant takes stand

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); Somervell v. State, Fla.App. 2004, 883 So.2d 836, 837 (child abuse victim who made videotaped accusation to police); People v. Cortes, 2004, 781 N.Y.S.2d 401, 416, 4 Misc.3d 575 (911 caller); 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).

144

228. Policy of Rule 703

See vol. 29, § 6272.

145

229. "Non-FOTOMAT" 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.

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).

See also

Of course, the court never reaches the question of what the statement is being offered to prove if the utterance does not amount to a “statement.” Courts generally assume this question is to be decided under the law of evidence, not the Sixth Amendment. But results that make sense in terms of the law of evidence make less sense under Crawford confrontation. For example, one court held that a question asked of arresting officers---”how did you guys find us so fast?”----was an “assertion” under the Evidence Rules. U.S. v. Summers, C.A.10th, 2005, 414 F.3d 1287, 1298-1299. But since the question does not comport with most notions of an “accusation”, one may question the court’s determination that it was “testimonial.” Id. at 1300-1303.

146

230. Continue to apply

U.S. v. Pugh, C.A.6th, 2005, 405 F.3d 390, 400 (dictum; statement not relevant for non-FOTOMAT purpose); 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); 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. Trala, C.A.3d, 2004, 386 F.3d 536, 544 (false exculpatory statements admissible under Street after Crawford).

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); State v. Doe, 2004, 103 P.3d 967, 972, 140 Ida. 873 (offered as basis for expert’s opinion that child had been sexually abused); 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).

147

231. Compliance with 105

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).

But see

Some courts fail to see the difficult Bruton problem that arises when court admits accusations of child abuse by child and mother to provide a basis for an expert opinion that the child had been sexually abused. See, e.g., State v. Doe, 2004, 103 P.3d 967, 973, 140 Ida. 873.

148

232. Evasion

U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 676 (circumstantial evidence of hearsay accusation admissible as “background”).

But see

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. Neilsen, C.A.9th,

2004, 371 F.3d 574, 581 n. 1 (admitting 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).

149

233. Bogus theory

U.S. v. Cromer, C.A.6th, 2004, 389 F.3d 662, 676 (collecting cases).

It is true that a statement offered to prove its affect on the person who heard it is not hearsay because it is not offered to prove the truth of what the statement asserts. But the effect of the statement on the hearer must be relevant or this theory fails. An informer's statement can legitimately be offered to prove probable cause to arrest on a motion to suppress. But at trial, why the police investigated or arrested the defendant has no relevance to the defendant's guilt. U.S. v. Solomon, C.A.10th, 2005, 399 F.3d 1231, 1237 (rejecting bogus theory where no issue of probable cause).

150

234. Bruton problem

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).

151

235. Cleverest witness

Not only is the person who has expertise in testifying rather than the underlying science less likely to be flustered on cross-examination but when pressed can simply disclaim any knowledge other than "what it says in the report."

152

236. Rule 703

See vol. 29, § 6272.

153

237. Satisfies Crawford

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”); U.S. v. Casiano, C.A.2d 2005, 135 Fed.Appx. 791, 794 (Crawford not violated by expert opinion based on uncontroverted hearsay, at least where those statements are not introduced at trial); 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); State v. Delaney, 2005, 613 S.E.2d 699, 701, ___ N.C.App. ___ (relying on Jones, below); State v. Walker, 2005, 613 S.E.2d 330, 333, ___ N.C.App. ___; State v. Jones, N.C.App. 2004, 2004 WL 1964890.

154

238. Two methods

Circumstantial evidence of hearsay arises when a party wants to offer evidence whose only relevance is to permit the jury to infer that someone made a statement; e.g., a police officer testifies that she arrived on the scene of a bar fight, interviewed the witnesses, and then arrested the defendant. The only relevance of this to defendant’s guilt runs through an inference that the witnesses told the police that the defendant struck the victim.

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.

See also

U.S. v. Casiano, C.A.2d 2005, 135 Fed.Appx. 791, 794 (police “expert” testifies how charged narcotics conspiracy 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”).

155

239. Attempted to buy

State v. Roach, 2005, 613 S.E.2d 791, 794, 342 S.C. 422 (but holding “nontestimonial” because the declarant clearly did not expect the statement to be used in court).

156

240. Declarant appeared

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.

157

241. Present satisfies

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); People v. Butler, 2005, 25 Cal.Rptr.2d 154, 161, 127 Cal.App.4th 49 (proper to introduce recanted statements in police reports where declarant’s 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); 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); 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); Fowler v. State, Ind.2005, 829 N.E.2d 459, 464 (relying on California v. Green, § 6364 in the main volume); 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); 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).

158

242. Refuses to answer

A common scenario in spousal abuse cases. See, e.g., Fowler v. State, Ind.2005, 829 N.E.2d 459, 462-463.

See also

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).

159

243. “Declarant appears”

124 S.Ct. at 1369 n. 9, 541 U.S. at 59 n. 9.

160

244. Indiana hard-nose

Fowler v. State, Ind.2005, 829 N.E.2d 459, 467.

What makes Fowler even more problematic is that the recalcitrant witness was the defendant’s wife and the prosecution was for wifebeating. Even if one does not indulge the supposition that the court is asking the wife to choose between jail or another beating, one may still think the court’s rule is a poor way to deal with the problem of domestic violence.

161

245. Multiple hearsay

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).

162

246. “Forfeit” right

124 S.Ct. at 1370, 541 U.S. at 62.

See also

State v. Mack, 2004, 101 P.3d 349, 352 n. 6, 337 Or. 586 (dictum).

163

247. Psuedo-waiver

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); Fowler v. State, Ind.2005, 829 N.E.2d 459, 470; 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).

See also

“Psuedo-waiver” is explained in vol. 21, § 5033.

But see

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).

164

248. Not calling 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. 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).

165

249. Cause by wrongdoing

“[R]ule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds. . .” 124 S.Ct. at 1370, 541 U.S. at 62 (citing Reynolds v. U.S., discussed in § 6356, p. 217, in the Main Volume).

U.S. v. Garcia-Meza, C.A.6th, 2005, 403 F.3d 366, 369-370 (defendant killed declarant); 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).

See also

The burden of proving forfeiture is on the prosecution. State v. Alvarez-Lopez, 2004, 98 P.3d 699, 704, 136 N.M. 309.

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)

166

250. More than suspicions

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); People v. Moore, Colo.App.

2004, 117 P.3d 1, 5 (suffices that defendant is on trial for murder of declarant); 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).

See also

U.S. v. Garcia-Meza, C.A.6th, 2005, 403 F.3d 366, 369-370 (defendant admits he killed the declarant); 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”); 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);

But see

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).

167

251. Defendant at large

State v. Alvarez-Lopez, 2004, 98 P.3d 699, 704, 136 N.M. 309.

168

252. Dicta

State v. Mack, 2004, 101 P.3d 349, 352 n.8, 337 Or. 586

169

253. Dying declarations

124 S.Ct. at 1367 n.6, 541 U.S. at 55 n.6.

See also

State v. Blackstock, 2004, 598 S.E.2d 412, 420, 165 N.C.App. 50 (Crawford left question open).

Compare

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).

170

254. Courts seize

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.

171

255. Adopted 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.

172

256. Scalia coy

“Where 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 does Roberts, and as would an approach the exempted such statements from Confrontation Clause scrutiny altogether.” 124 S.Ct. at 1374, 541 U.S. at 68.

“Although our analysis in this case casts doubt on that holding [rejecting argument in White that Roberts be repealed and nontestimonial hearsay be left to state law], we need not definitively resolve whether it survives our decision today.” 124 S.Ct. at 1370, 541 U.S. at 61.

173

257. Ambiguity abounds

U.S. v. Pugh, C.A.6th, 2005, 405 F.3d 390, 397 (“limited” Roberts); Ferguson v. Roper, C.A.8th, 2005, 400 F.3d 635, 639 (“overruled, at least in part”); 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”);

State v. Parks, 2005, 116 P.3d 631, 637, 211 Ariz. 19 (“jettisoned” Roberts “reliability analysis”); People v. Monterroso, 2004, 22 Cal.Rptr.3d 1, 19, 34 Cal.4th 743, 101 P.3d 956, 972 (“repudiated Roberts”); People v. Argomaniz-Ramirez, Colo. 2004, 102 P.3d 1015, 1017 (“overruled a portion of” Roberts); State v. Crocker, 2004, 852 A.2d 762, 786, 83 Conn.App. 615 (“overruled” but only as to testimonial statements); Herrera-Vega v. State, Fla.App. 2004, 888 So.2d 66, 68 (Court “receded from” Roberts); State v. Hernandez, Fla.App. 2004, 875 So.2d 1271, 1273 (“overruled” so state Roberts precedents no longer binding); Moody v. State, 2004, 594 S.E.2d 350, 354, 277 Ga. 676 (“renders Roberts irrelevant”); People v. West, 2005, 823 N.E.2d 82, 87, 355 Ill.App. 28, 291 Ill.Dec. 72 (“abandoned reliability framework”); 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. 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); City of Las Vegas v. Walsh, 2004, 91 P.3d 591, 595, 120 Nev. 392 (“overturned”); State v. Lewis, 2004, 603 S.E.2d 559, 556, 166 N.C.App. 596 (“abandoned the rationale” of Roberts); State v. Forrest, 2004,

596 S.E.2d 22, 26, 164 N.C.App. 272 (“overturned”); State v. Page, 2005, 104 P.3d 616, 619, 197 Or.App. 72 (“partially overruled”); 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”); State v. Carrothers, So.Dak. 2005, 692 N.W.2d 544 (“overruled”); 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”); Lee v. Texas, 2004, 143 S.W.3d 565, 570 (“overruled”); Wall v. State, Tex.App.2004, 143 S.W.3d 846, 849 (“overruled”).

Assuming Crawford overrules Roberts, it does not necessarily follow that nontestimonial hearsay falls outside the Confrontation Clause. 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.

But see

People v. Shepherd, 2004, 689 N.W.2d 721, 729, 263 Mich.App. 665 (“Crawford left Roberts intact regarding the admissibility of nontestimonial statements”).

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258. Language might mean

See, e.g., Binder, Hearsay Handbook, 4th ed.2004, § 7:2.

See also

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 position on this question); Fowler v. State, Ind.2005, 829 N.E.2d 459, 464 (only overruled Roberts, California v. Green still good law); 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); State v. Manuel, App.2004, 685 N.W.2d 525, 531, 275 Wis.2d 146 (Court “discarded” Roberts but only for “testimonial statements”).

175

259. Must satisfy Roberts

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”).

State cases

People v. Shepherd, 2004, 689 N.W.2d 721, 729, 263 Mich.App. 665; State v. Vaught, 2004, 682 N.W.2d 284, 292, 268 Neb. 316 (taking agnostic position but finding Roberts satisfied); 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. Staten, S.C.App.2005, 610 S.E.2d 823, 836; State v. Manuel, App.2004, 685 N.W.2d 525, 532, 275 Wis.2d 146 (admitting Crawford is muddy on this but applying it out of “an abundance of caution”); Wiggins v. State, Tex.App. 2004, 152 S.W.2d 656, 660 (collecting similar cases); 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).

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.

176

260. Roberts no good

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); 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); 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. 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 exceptio).

177

261. Bruton followed

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

178

262. Crawford retroactive

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.

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263. Statute bars

Brown v. Uphoff, C.A.10th, 2004, 381 F.3d 1219; *Juarez v. Nelson*, C.A.10th, 2005, 127 Fed.Appx. 401, 403; *Straub v. Kilgore*, C.A.6th, 2004, 100 Fed.Appx. 378, 379.

180

264. Federal courts

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); ; ; ;9 ; *Bockting v. Bayer*, C.A.9th, 2005, 399 F.3d 1010, 1014 (collecting cases but reaching contrary conclusion); *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.

181

265. Only one court

Bockting v. Bayer, C.A.9th, 2005, 399 F.3d 1010, 1012.

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).

But see

Tidwell v. Calderon, C.A.9th, 2005, 134 Fed.Appx. 141, 142 n. 1 (noting Bockting not final as a petition for rehearing is pending).

182

266. State direct appeal

People v. Sisavath, 2004, 13 Cal.Rptr.3d 753, 757, 118 Cal.App.4th 1396; 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. Taylor, La.App. 2005, 905 So.2d 451, 457; State v. Jackson, La.App. 2005, 904 So.2d 907, 914); 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; State v. Hill, 2005, 827 N.E.2d 351, 358, 160 Ohio App. 324 (applying state law); State v. Champion, 2005, 615 S.E.2d 366, 371-372, ___ N.C.App. ___; Marc v. State, Tex.App. 2005, 166 S.W.3d 767, 778 n. 3.

But see

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).

183

267. Federal constitutional

State v. Gomez, Tenn.2005, 163 S.W.3d 632, 642.

184

268. Counsel incompetent

State v. Williams, Iowa 2005, 695 N.W.2d 23, 29.

185

269. Proper objection

U.S. v. Green, C.A.6th, 2005, 125 Fed.Appx. 659, 662 (cannot raise on appeal where defendant stipulated to admissibility at trial); 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); 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); People v. Walker, 2005, 697 N.W.2d 159, 161, 265 Mich.App. 530 (cannot raise confrontation objection for first time on appeal); 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).

186

270. Comply with 103

U.S. v. Delgado, C.A.5th, 2005, 401 F.3d 290, 299 (assuming "running objection" preserves); *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); *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).

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).

187

271. Coupled with Sixth

Vigil v. State, Wyo.2004, 98 P.3d 172, 177.

188

272. Make futile objection

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; *People v. Geno*, 2004, 683 N.W.2d 687, 691-692, 261 Mich.App. 624 (so only plain error review available); *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.

But see

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).

Compare

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).

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273. Simply reformulation

Bunton v. State, Tex.App.2004, 136 S.W.3d 355, 368.

190

274. “Modified plain error”

U.S. v. Bowes, C.A.2d, 2004, 115 Fed.Appx. 503, 505.

See also

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).

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).

191

275. Ask for contempt

Fowler v. State, Ind.2005, 829 N.E.2d 459.

192

276. Abuse of discretion

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. Manfre, C.A.8th, 2004, 368 F.3d 832, 837; U.S. v. Green, C.A.6th, 2005, 125 Fed.Appx. 659, 662; 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; State v. Scacchetti, Minn.App. 2005, 690 N.W.2d 393, 395; State v. Wright, Minn.App. 2004, 686 N.W.2d 295, 300; 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.

Compare

State v. Warsame, Minn.App. 2005, 701 N.W.2d 305, 308 (different standard when state appeals from pretrial ruling excluding the evidence on Crawford grounds).

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277. Reviewed de novo

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. Hendricks, C.A.3d, 2005, 395 F.3d 173,

176; 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. Neilsen, C.A.9th, 2004, 371 F.3d 574, 581.

State cases

People v. Cervantes, 2004, 12 Cal.Rptr.3d 774, 783, 118 Cal.App.4th 162; Johnson v. State, Del. 2005, 878 A.2d 422, 425; State v. Grace, App. 2005, 111 P.3d, 28, 33, 107 Haw. 135 (“independent judgement” review); People v. McPherson, 2004, 687 N.W.2d 370, 375, 263 Mich.App. 124; State v. Warsame, Minn.App. 2005, 701 N.W.2d 305, 308 (whether statement is “testimonial” only); 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; State v. Carrothers, So.Dak. 2005, 692 N.W.2d 544; Wilson v. State, Tex.App. 2004, 151 S.W.3d 694, 697; Wall v. State, Tex.App.2004, 143 S.W.3d 846, 849; Hale v. State, Tex.App. 2004, 139 S.W.3d 418, 421; 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”); 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).

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278. Higher standard

Vigil v. State, Wyo.2004, 98 P.3d 172, 177.

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279. Not “structural”

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).

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280. Error harmless

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. 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. Neilsen, C.A.9th, 2004, 371 F.3d 574, 581-582.

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"); Somervell v. State, Fla.App. 2004, 883 So.2d 836, 839; 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; State v. Jackson, La.App. 2005, 904 So.2d 907, 914; State v. Ash, 2005, 611 S.E.2d 855, 863, ___ N.C.App. ___; State v. Gomez, Tenn.2005, 163 S.W.3d 632, 645; 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, 695; Wall v. State, Tex.App.2004, 143 S.W.3d 846, 851; State v. Hale, 2005, 691 N.W.2d 637, 650, 277 Wis.2d 593.

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281. Courts reversed

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; State v. Parks, 2005, 116 P.3d 631, 637, 211 Ariz. 19; People v. R.A.S., Colo.App. 2005, 111 P.3d 487, 491; People v. West, 2005, 823 N.E.2d 82, 93, 355 Ill.App. 28, 291 Ill.Dec. 72; People v. Shepherd, 2004, 689 N.W.2d 721, 727, 263 Mich.App. 665; State v. Johnson, 2004, 98 P.3d 998, 1002, 136 N.M. 348; State v. Morton, 2004, 601 S.E.2d 873, 876, 166 N.C.App. 477; Jahanian v. State, Tex.App. 2004, 145 S.W.3d 346, 350; Lee v. Texas, 2004, 143 S.W.3d 565, 571; 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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282. Novel waiver

State v. Snowden, 2005, 867 A.2d 314, 332, 385 Md. 64 (objection to testimony about declarant's accusations "waived" right because he did not object to failure to call declarant).

Compare

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);

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283. Defendant must call

State v. Snowden, 2005, 867 A.2d 314, 332, 385 Md. 64.

See also

Lowery v. Collins, C.A.5th, 1993, 988 F.2d 1364, 1369-1370 (pre-Crawford opinion rejects similar claim as "simply wrong").

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284. Used loosely

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, use 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).

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285. Not due process

In re April C., 2005, 31 Cal.Rptr.3d 804, 811, 131 Cal.App.4th 599 (not in dependency proceeding); People v. Angulo, 2005, 30 Cal.Rptr.3d 189, 201, 129 Cal.App.4th 1349 (sexually violent predator proceeding); People v. Johnson, 2004, 18 Cal.Rptr.3d 230, 232, 121 Cal.App.4th 1409 (probation revocation proceeding not “criminal prosecution” within Sixth Amendment); People v. Turley, Colo.App. 2004, 109 P.3d 1025, 1026 (probation revocation proceeding); In re D.R., 2005, 616 S.E.2d 300, 303, ___ N.C.App. ___ (parental termination proceedings); State v. Abd-Rahman, 2005, 111 P.3d 1157, 1161 159 Wash.2d 280 (parole revocation proceeding; collecting similar cases).

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286. Misdemeanors

State v. Ashford, 2004, 864 A.2d 1122, 1127 n. 6, 374 N.J.Super. 332.

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287. Sentencing hearings

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. Martinez-Galvan, C.A.5th, 2005, 135 Fed.Appx. 712, 713; U.S. v. Martinez, C.A.2d 239, 243 (Crawford and Booker neither alone nor in combination alter the prior rule admitting hearsay in sentencing proceeding; collecting cases); 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.

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288. Uncharged crime

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).

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289. Motion to suppress

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).