

Crawford v. Washington: Reframing The Right To Confrontation

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The Essential Holding: “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in the development of hearsay law – as does [*Ohio v. Roberts*, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from the Confrontation Clause altogether. Where *testimonial* evidence is at issue, however, the Sixth Amendment demands what the common law required: *unavailability* and a *prior opportunity for cross-examination*.” 124 S. Ct. at 1374 (emphasis added). This outline tracks the three italicized concepts.

I. “TESTIMONIAL”

Crawford announces a paradigm shift with respect to “testimonial evidence.” While the opinion also “casts doubt on” whether the *Roberts* framework should apply to nontestimonial evidence, 124 S. Ct. at 1370, it declines to overrule that part of *Roberts*, thus leaving lower courts bound (for now) to follow it. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 238 (1997) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”) (quotation omitted); *United States v. Hendricks*, ___ F.3d ___, 2005 WL 81899, at *5 n.7 (3rd Cir. Jan. 14, 2005) (lower courts power to overrule other part of *Roberts*); *State v. Rivera*, 844 A.2d 191, 202 (Conn. 2004) (“because this statement was nontestimonial in nature, application of the *Roberts* test remains appropriate”); *State v. Blackstock*, 598 S.E.2d 412 (N.C. App. 2004) (holding that nontestimonial statement still barred by *Roberts*).

A. Potential Definitions of “Testimonial”

1. “[I]n-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony . . . , or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” 124 S. Ct. at 1364 (quoting Brief for Petitioner at 23); see also *id.* (substituting “for use at a later trial” for “prosecutorially”) (quoting NACDL *Amicus Br.* at 3).
2. “Extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J. concurring in part and concurring in the judgment), *quoted in* 124 S. Ct. at 1364.

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3. “[I]n court testimony or its functional equivalent – *i.e.*, affidavits, depositions, prior testimony, or formal statements to law enforcement officers, including the accomplice confession at issue in this case.” Brief for United States as *Amicus Curiae* in *Crawford* at 9. (The federal government’s position in the case was that the Confrontation Clause applies only to testimonial statements, but that courts can still admit such statements under *Roberts*’ reliability principles.)

B. Clues in the Court’s Opinion(s)

1. “[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. . . . The Sixth Amendment must be interpreted with this focus in mind.” 124 S. Ct. at 1363.
2. “*An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.*” 124 S. Ct. at 1364 (emphasis added).
3. “*Involvement of government officers in the production of testimony with an eye toward trial presents a unique potential for prosecutorial abuse.*” 124 S. Ct. at 1367 n.7 (emphasis added).
4. “*Sylvia’s recorded statement, given in response to structured police questioning, qualifies under any conceivable definition.*” 124 S. Ct. at 1365 n.4 (emphasis added).
4. “[*W*]hen the government is involved in the statements’ production and when the statements describe past events,” the statements “implicate the core concerns of the old *ex parte* affidavit practice.” *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion) (emphasis added).
5. “[*A*]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.” *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) (emphasis added); accord *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) (“[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, *trials by anonymous accusers, and absentee witnesses.*”) (emphasis added).

C. Relevance of Hearsay Law (Or “Firmly Rooted” Hearsay Exceptions) – None!

The central holding of *Crawford* is that the Confrontation Clause is a rule of procedure, not of evidence. Accordingly, the constitutional admissibility of statements that declarants would reasonably expect to be used for evidentiary purposes no longer turns in any way on “the vagaries of the rules of evidence, much less [on] some amorphous notions of ‘reliability.’” 124 S. Ct. at 1370; see also *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004) (“If there is one

theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admissibility of hearsay statements.”). “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Id.* at 1374.

In *Crawford* itself, the U.S. Supreme Court accepted (as it had to) the Washington Supreme Court’s holding that the declarant’s out-of-court statement was “against penal interest” under state hearsay law. 124 S. Ct. at 1358; *see also State v. Crawford*, 147 Wn.2d 424, 435-37 (2002). Yet the U.S. Supreme Court held that this indicium of reliability was irrelevant with respect to whether the statement’s admission violated the Confrontation Clause. 124 S. Ct. at 1370, 1374. The Court also indicated that the same analysis would apply for testimonial statements that qualified as “spontaneous declarations.” *Id.* at 1368 n.8. The Court explained that the constitutional considerations requiring testimonial statements to be subject to cross-examination in criminal cases “do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.” *Id.* at 1367 n.7; *see also United States v. Gonzalez-Marichal*, 317 F. Supp. 2d 1200, (S.D. Cal. 2004) (irrelevant whether testimonial statement falls within hearsay exception for personal and family history); *State v. Cox*, 876 So. 2d 932 (La. App. 2004) (same with regard to co-conspirator statements); *Lopez v. State*, 888 So.2d 693 (Fla. App. 2004) (excited utterances).

The Court’s further notation that “to the extent that a hearsay exception for spontaneous declarations existed at all [in 1791], it required that the statements be made ‘immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive anything for her own advantage,’” 124 S. Ct. at 1368 n.8, was only by way of saying that to the extent that hearsay rules even existed as such at the time of the Founding, they respected the confrontation right’s restrictions on testimonial statements. In other words, the scope of hearsay exceptions in criminal cases in 1791 gives us clues as to how broadly the Framers’ conception of “testimonial” evidence was. *See* 124 S. Ct. at 1367.

D. Applications to Specific Kinds of Statements – The Court describes the first three categories as “paradigmatic” and “core” testimonial statements, 124 S. Ct. at 1364, 1371, suggesting that other types of statements are also testimonial. In other words, the confrontation right does not apply only to abuses at time of the Founding; it also applies to modern types of statements that the Framers would have barred. *Id.* at 1365 n.3

1. “Whatever else the term covers, it applies at a minimum to **prior testimony** at a preliminary hearing, before a grand jury, or at a former trial . . .” 124 S.Ct. at 1374

2. “. . . and to **police interrogations.**” 124 S. Ct. at 1374. “We use the term ‘interrogation’ in its colloquial, rather than any technical legal, sense.” 124 S. Ct. at 1365 n.4. “[S]tructured police questioning” qualifies as an interrogation “under any conceivable definition.” *Id.*; *see also id.* at 1371 (characterizing statement in *State v. Bintz*, 650 N.W.2d 913 (Wis. App. 2002), as testimonial even though statement was given during a noncustodial interview at a police station); *United States v. Saner*, 313 F. Supp. 2d 896 (S.D. Ind. 2004) (prosecutor’s noncustodial interview of witness is testimonial). As for a comprehensive definition of “interrogation,” one possibility is Black’s Law Dictionary 825 (7th ed. 1999), which defines “investigatory interrogation” as “[r]outine, nonaccusatory questioning by police of a person who is not in custody.”
3. **Allocutions, guilty pleas, and other formal statements admitting guilt -** These are testimonial. *See* 124 S. Ct. at 1372, *abrogating United States Aguilar*, 295 F.3d 1018, 1021-23 (9th Cir. 2003), and similar holdings in other circuits allowing the admission of allocutions. *See also Kirby v. United States*, 174 U.S. 47, 53-60 (1899) (guilty pleas); *United States v. McClain*, 377 F.3d 219, 222 (2d Cir. 2004) (allocution); *United States v. Massino*, 319 F. Supp. 2d 295 (E.D.N.Y. 2004) (guilty pleas).
4. **“Letters”** to police or other governmental officials accusing someone of wrongdoing are testimonial. 124 S. Ct. at 1360 (noting that an accusatory “letter” was used against Sir Walter Raleigh); *see also* 1 James Stephen, A History of the Criminal Law in England 326 (1883) (common law confrontation right applied to “depositions, confessions of accomplices, letters, and the like”) (emphasis added), *quoted in California v. Green*, 399 U.S. 149, 156-57 (1970) (Harlan, J., concurring).
5. **Coroner reports, drug chemist reports, etc.** A pre-*Roberts* Supreme Court opinion stated that an autopsy report could not be used against the accused without entitling the defendant “to meet the witness [who authored the report] face to face.” *United States v. Diaz*, 223 U.S. 442, 450 (1912). Autopsies and similar documents should be testimonial because they are statements made for the purpose of producing evidence for litigation. *See City of Las Vegas v. Walsh*, 91 P.3d 591 (Nev. 2004) (nurse’s chain-of-custody affidavit concerning method of conducting and preserving blood alcohol test is testimonial); *People v. Rogers*, 780 N.Y.S.2d 393 (N.Y. App. 2004) (report of blood test is testimonial); *People v. Capellan*, 2004 N.Y. Slip Op. 24513, 2004 WL 2921882 (N.Y. Crim. Dec. 9, 2004) (affidavit of DMV records manager concerning defendant’s driving record testimonial); *but see People v. Schreck*, ___ P.3d ___, 2004 WL 2137067 (Colo. App. Sept. 23, 2004) (chain-of-custody document regarding DNA sample not testimonial); *Napier v. State*, ___ N.E.2d ___, 2005 WL 22858 (Ind. App. Jan. 6, 2005) (toxicologist certificate not testimonial because ruling to the contrary would be

“impractical”). Certain immigration reports may be testimonial for the same reasons.

6. **Statements of elderly or dependent adult “victims” to “law enforcement officials”** under Cal. Evid. Code § 1380; 11 Del. Code § 3516; Or. Rev. Stat. § 40.460(18)(b); and 725 Ill. Comp. Stat. 5/115-10.3. These are, by definition, testimonial. *See People v. Pirwani*, 14 Cal. Rptr. 3d 673 (Cal. App. 2004) (holding that California law is invalid on its face).
7. **Domestic violence accusations under Or. Rev. Stat. § 40.460 and similar statutes.** These are testimonial almost by definition, for they condition admissibility on the statement accusing someone of criminal behavior; being made within 24 hours of alleged event; and being either “recorded, either electronically or in writing” or “made to a peace officer . . . corrections officer, youth corrections officer, parole [or] probation officer, emergency medical technician or firefighter.” *See also People v. Thompson*, 812 N.E.2d 516 (Ill. App. 2004) (wife’s statements in application for a protection order testimonial); *People v. Pantoja*, 18 Cal. Rptr. 3d 492 (Cal. App. 2004) (declaration in support of protection order testimonial).
8. **Child hearsay statements under Wash. Rev. Code § 9A.44.120 and similar statutes** – When a child makes an accusation of abuse to a governmental agent in an interview, the statements are testimonial, in that they are obtained in *ex parte* examinations conducted as part of a criminal investigation. *See State v. Mack*, 101 P.3d 349 (Or. 2004) (three-year old’s statements to social worker during police-directed interview testimonial); *Snowden v. State*, 846 A.2d 36 (Md. App. 2004) (statements obtained under Maryland’s child interview statute are testimonial), *cert. granted*, 851 A.2d 596 (Md. 2004); *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. App. 2004) (child’s statement to child interview specialist at private victim assessment center was testimonial); *State v. Warner*, 14 Cal. Rptr. 3d 419 (2004) (child’s statements to child interview specialist and police officer testimonial); *State v. Courtney*, 682 N.W.2d 185 (Minn. App. 2004) (statements in interview with child protective services worker testimonial), *review granted* (Minn. 2004); *Blanton v. State*, 880 So.2d 798 (Fla. App. 2004) (child’s statement to police investigator testimonial), *review denied* (Fla. 2004); *People v. Vigil*, 2004 WL 1352647 (Colo. App. June 17, 2004) (child’s statements to police officer and to a physician who was a member of a child protection team and a frequent prosecution witness in child abuse cases were testimonial, but prior statements to father and father’s friend were not), *cert. granted*, 2004 WL 2926003 (Colo. Dec. 20, 2004); *In re T.T.*, 815 N.E.2d 789 (Ill. App. 2004) (child statements to police, state social worker, and examining physician testimonial); *In re Rolandis G.*, 817 N.E.2d 183 (Ill. App. 2004) (child statements to police officer and private child abuse investigator testimonial); *T.P. v. State*, ___ So.2d ___, 2004 WL 2418045 (Ala. App.

Oct. 29, 2004) (child's statements to police officer and social worker testimonial). If statements are given to a non-governmental addressee before the police are involved, the question gets harder and depends on the facts and circumstances surrounding the statement. *See* 124 S. Ct. 1368 n.8 (stating that the child's statements to the investigating officer in *White v. Illinois*, 502 U.S. 326 (1992), were testimonial but not mentioning the child's statements to parent and others); *Rolandis G.*, 817 N.E.2d at 186 (statement to mother not testimonial where "[t]here is no indication that [mother] suspected he had been the victim of a crime and that she was attempting to elicit evidence for a future prosecution"). Child statements to medical examiners are addressed *infra* at I.D.13.

9. **Statements of confidential informants.** When a confidential informant gives information to a police officer for use in a criminal investigation, those statements are testimonial; any "formality" in the statements is irrelevant. *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004). Statements by an undercover informant during a conversation the informant knows the government is recording is testimonial if used to prove crime but not if used only to put others' statements in context. *United States v. Hendricks*, ___ F.3d ___, 2005 WL 81899 (3rd Cir. Jan. 14, 2005); *In the Matter of Welfare of J.K.W.*, 2004 WL 1488850 (Minn. App. July 6, 2004) (unpublished).
10. **Witness statements to officers responding to a crime.** Since these statements generally are given to governmental officers for evidentiary purposes, they ordinarily are testimonial. *See* 124 S. Ct. 1368 n.8 (statement in *White v. Illinois*, 502 U.S. 346 (1992), "to an investigating police officer" was testimonial); *supra* at I.D.2 (defining police "interrogation"). It does not matter whether the statements qualify as "excited utterances" or satisfy any other hearsay exception. *See supra* at I.C. The United States Solicitor General, in fact, has agreed that "statements made to officers at the scene by a disinterested bystander who directly observed the commission of a crime and promptly reported it to the police" are testimonial. Brief for the United States as *Amicus Curiae* in *Crawford* at 26. And the Supreme Court has vacated and remanded one decision involving "excited utterances" to a police officer responding to the scene of a crime for further consideration in light of *Crawford*. *Siler v. Ohio*, 125 S. Ct. 671 (2004), *GVR'ing State v. Siler*, 2003 WL 22429053 (Ohio App. 2003). Early lower court decisions, however, have divided on this issue. *Compare United States v. Neilsen*, 371 F.3d 574 (9th Cir. 2004) (statement to an officer during execution of search warrant testimonial); *Moody v. State*, 594 S.E.2d 350 (Ga. 2004) (victim's statement to investigating officer "at the scene" "shortly after" event testimonial); *Pitts v. State*, ___ S.E.2d ___, 2005 WL 127049 (Ga. App. Jan. 24, 2005) (same); *Wall v. State*, 143 S.W.3d 846 (Tex. App. 2004) (victim's statements to police at hospital shortly after assault testimonial); *Heard v. Commonwealth*, 2004 WL 1367163 (Ky. App. June 18, 2004)

(unpublished) (agitated victim's statements to responding police officer were testimonial even though they qualified as excited utterances), *review granted* (Ky. 2004); *State v. Bell*, 603 S.E.2d 93 (N.C. 2004) (statement to investigating officer testimonial because it "was made to further Officer Conerly's investigation of the crime")¹; *Lee v. State*, 143 S.W.3d 565 (Tex. App. 2004) (statement to police in patrol car at scene of incident testimonial); *Lopez v. State*, 888 So.2d 693 (Fla. App. 2004) (statement to responding officer testimonial even though it was excited utterance); *People v. Victors*, 819 N.E.2d 311 (Ill. App. 2004) (victim's statement to responding officer testimonial) with *Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004) (alleged victim statement to officer responding to 911 call not testimonial); *Fowler v. State*, 809 N.E.2d 960 (Ind. App. 2004) ("[W]hen police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not 'testimonial.'"), *transfer granted* (Ind. Dec. 10, 2004); *United States v. Webb*, 2004 WL 2726100 (D.C. Super. 2004) (same); *Cassidy v. State*, 149 S.W.3d 712 (Tex. App. 2004) (alleged victim's statement to police right after event not testimonial); *Wilson v. State*, ___ S.W.3d ___, 2004 WL 2484835 (Tex. App. Nov. 4, 2004) (statement to responding officer not testimonial).² For a very good

¹ See also *State v. Morgan*, 604 S.E.2d 886 (N.C. 2004) (witness's "excited utterances" in police interview a few hours after event testimonial). The North Carolina Court of Appeals issued some opinions on this issue prior to the issuance of *Bell* and *Morgan*. See *State v. Clark*, 598 S.E.2d 213 (N.C. App. 2004) (statements made to officer "during his initial investigation" at the scene of crime were testimonial); *State v. Lewis*, 603 S.E.2d 559 (N.C. App. 2004) (victim's statement to responding officer testimonial because "taken in the course of police investigation"), *pet'n for review granted* (N.C. Dec. 2, 2004); *State v. Forrest*, 596 S.E.2d 22 (N.C. App. 2004) (holding, over a dissent, that such a statement was not testimonial because given right after event). Neither *Bell* nor *Morgan* mentions any of these cases.

² California courts have issued numerous conflicting opinions on the issue of statements to responding/investigative officers; the California Supreme Court granted review on October 13, 2004 in two cases to address the topic. See *People v. Adams*, 16 Cal. App. 3d 237 (Cal. App. 2004) (statement to responding officer testimonial), *review granted* (Cal. 2004) & *People v. Cage*, 15 Cal. Rptr.3d 846 (Cal. App. 2004) (statements to responding officer and ER doctor not testimonial), *review granted* (Cal. 2004). For a nonexhaustive sample of other California decisions on this issue, compare *People v. Ruiz*, 2004 WL 2383676 (Cal. App. Oct. 26, 2004) (unpublished) (statement to responding officer testimonial and noting that police officers are trained to obtain statements for potential use in litigation when responding in potential domestic violence situations); *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. App. 2004) (alleged victim statement to "responding officer" testimonial) with *People v. Kilday*, 20 Cal. Rptr. 3d 161 (Cal. App. 2004) (statements to initially responding officers not testimonial but statements to "investigative" officers who arrived shortly thereafter testimonial), *review granted* (Cal. 2005); *People v. Corella*, 18 Cal. Rptr. 3d 770 (Cal. App. 2004) (statements to responding officers not

discussion of this issue in an article prior to the *Roberts* era that advocated a rule similar to the testimonial approach, see Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 Tex. L. Rev. 151, 194-95 (1978) (distinguishing nontestimonial spontaneous declaration to robber in midst of robbery from a testimonial spontaneous declaration to a police officer immediately after robbery).

11. **911 calls** – A call to report a crime (especially when followed by questions and answers with an operator) is testimonial, but a call that asks for help may not be. See Friedman & McCormack, *Dial-In Testimony*, 150 Pa. L. Rev. 1171, 1240-42 (2002). But even in the latter situation, statements made in a call in the heat of the moment that say more than “come help me” should still be considered testimonial. *Id.*; *State v. Powers*, 99 P.3d 1262 (Wash. App. 2004) (911 call to report domestic violence was testimonial); *People v. Cortes*, 2004 N.Y. Slip Op. 24185, 2004 WL 1258018 (N.Y. Sup. Ct. 2004) (holding that 911 call was testimonial); but see *People v. Moscat*, 777 N.Y.S. 2d 875, 2004 N.Y. Slip Op. 24090 (N.Y. City Crim. Ct. 2004) (suggesting that all 911 calls that include requests for help are nontestimonial in their entirety); *State v. Wright*, 686 N.W.2d 295 (Minn. App. 2004) (911 call “moments after the criminal offense and under the stress of the event” nontestimonial; concurrence emphasizes holding is narrow and that other 911 calls will be testimonial), *review granted* (Minn. 2004); *People v. Corella*, 18 Cal. Rptr. 3d 770 (Cal. App. 2004) (statements in 911 call nontestimonial); *People v. Caudillo*, 19 Cal. Rptr. 3d 574 (Cal. App. Oct. 7, 2004) (statements in 911 call immediately after event nontestimonial), *review granted* (Cal. 2005); *State v. Banks*, 2004 WL 2809070 (Ohio App. Dec. 7, 2004) (holding statements in a 911 call nontestimonial because *Crawford* does not apply to excited utterances). If statements in a 911 call explicitly accuse a particular person of wrongdoing, it may also be worth citing the “accusatory” language mentioned *supra* at I.B.5 to bolster the argument. A case involving a 911 call is currently pending in the Washington Supreme Court and was argued on Sept. 13, 2004. See *State v. Davis*, 116 Wn. App. 81 (2003), *review granted*, 149 Wn.2d 1032 (2003) (supplemental briefing ordered in light of *Crawford*).
12. **Statements to private investigators or to private victim’s services organizations** – If the setting was like an interview in that a reasonable declarant would have expected his statements to be used for evidentiary purposes, then it is testimonial even without governmental involvement, at least under the “reasonable declarant” definition of testimonial. See *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. App. 2004) (child’s statement to child interview specialist at private victim assessment center was testimonial); Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. Rev. 1011, 1038-43 (1998); but see *People v. Geno*,

testimonial).

261 Mich. App. 624 (2004) (statement to director of Children's Assessment Center not testimonial because addressee was "not . . . a government employee").

13. **Statements to doctors** – If the police already are involved so that the examination is, in a sense, part of the investigation, then statements to the doctor are testimonial. *People v. Vigil*, 2004 WL 1352647 (Colo. App. June 17, 2004), *cert. granted*, 2004 WL 2926003 (Colo. Dec. 20, 2004); *People v. Harless*, 125 Cal. App. 4th 70 (2004) (statement to doctor "in the course of the district attorney's investigation of child abuse" testimonial); *cf. Idaho v. Wright*, 497 U.S. 805 (1990) (holding, prior to *Crawford*, that Confrontation Clause barred admission of victim's statement to doctor performing examination in coordination with police investigation). If, however, the police are not yet involved, this presents a closer question. But accusatory statements that are unnecessary for the medical treatment – such as identifying "who did this" – are probably still testimonial, especially when laws impose reporting requirements on doctors. *In re T.T.*, 815 N.E.2d 789 (Ill. App. 2004) (statements "identifying respondent as perpetrator" were testimonial, but statements describing physical condition were not). Some early decisions in this area have not dealt with the subtleties of this issue. *See State v. Vaught*, 682 N.W. 2d 284 (Neb. 2004) (holding that statement to doctor identifying perpetrator was not testimonial simply because "there was [no] indication of government involvement in the initiation or course of the examination"); *People v. Cage*, 15 Cal. Rptr.3d 846 (Cal. App. 2004) (same), *review granted* (Cal. 2004); *State v. Scacchetti*, ___ N.W.2d ___, 2005 WL 14473 (Minn. App. Jan. 4, 2005) (same in nurse's examination).
14. **Statements to friends/family/acquaintance** – A "casual remark to an acquaintance," even if it inculcates the defendant, is not testimonial. 124 S. Ct. at 1364. Indeed, most statements to friends, family, or acquaintances in the course of everyday affairs are not made for evidentiary purposes and thus are not testimonial. *See, e.g., State v. Ferguson*, ___ S.E.2d ___, 2004 WL 2756807 (W. Va. Dec. 3, 2004). But an extended narrative to such a person might be testimonial if it is made in anticipation of litigation. *See Compan v. People*, 2004 WL 2376474 (Colo. Oct. 25, 2004), *granting review of* 100 P.3d 533 (Colo. App. 2004), which holds an extended narrative to a friend is not testimonial.
15. **Statements to undercover officers or informants** – A statement to such a person in the course of allegedly criminal activity is probably not testimonial. *See* 124 S. Ct. at 1368 ("And *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987), admitted statements made unwittingly to an FBI informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement."); *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004) (statement to undercover informant not testimonial); *People v. Morgan*, 2005 WL 56947 (Cal. App. Jan. 12, 2005)

(statement unknowingly made to police officer not testimonial). But if the government really is trying to produce testimony rather than capture evidence of ongoing crime, the statements could be testimonial, especially if governmental involvement becomes a clearer touchstone in future cases for the testimonial inquiry. In other words, if one can argue that the government is really trying to circumvent the “testimonial” rule in order to insulate a witness’s narrative from a confrontation challenge, the declarant’s statements may be testimonial even without the declarant’s knowledge that his statements could be used for evidentiary purposes.

16. **Dying declarations** – “If this exception must be accepted on historical grounds, it is *sui generis*.” 124 S. Ct. 1367 n.6; *see also People v. Monterroso*, 101 P.3d 956 (Cal. 2004) (treating dying declaration as *sui generis* exception to testimonial rule). Dying declarations that obviously are accusations for purposes of future prosecutions might also be viewed as admissible under the forfeiture doctrine, rather than as exception to realm of testimonial statements. *See infra* at III.C; *McDaniel v. State*, 16 Miss. 401 (1847) (“It would be a perversion of [the Constitution’s] meaning to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the production of the witness by causing his death.”); *State v. Meeks*, 88 P.3d 789 (Kan. 2004) (same); *People v. Jiles*, 122 Cal. App. 4th 504 (Cal. App. 2004) (same).

II. **“UNAVAILABILITY”** - *Crawford* does not appear to change this law, but it makes it much more important.

- A. **“Unavailable.”** *See* 124 S. Ct. at 1360 (“only if the witness is demonstrably unavailable to testify in person”). The burden of proof is on the government.
 1. A witness who is physically unavailable – one who has died, who the government cannot locate with “good faith” efforts, etc. – is “unavailable.” *Barber v. Page*, 390 U.S. 719, 724-25 (1968).
 2. When a valid privilege, such a Fifth Amendment or marital privilege, stands in the way of witness taking the stand at trial, the witness is probably unavailable. *See Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (plurality opinion) (Fifth Amendment) (assuming Fifth Amendment invocation establishes unavailability); *State v. Crawford*, 147 Wn.2d 424 (2002) (marital privilege).
 3. Perhaps when a witness (usually a young child) is incompetent to testify, she is unavailable as well. *See, e.g., State v. C.J.*, 148 Wn.2d 672, 685 (2003) (incompetence establishes unavailability); *but compare Idaho v. Wright*, 497 U.S. 805, 816 (1990) (“assuming without deciding” that incompetence satisfies unavailability test).

B. Available to Government (so failure to produce violates the Confrontation Clause)

1. Lack of good faith effort or proof of unavailability. *See, e.g., Barber v. Page*, 390 U.S. 719, 722-25 (1969); *People v. Miranda*, 2004 WL 1386237, at *7 (Cal. App. June 22, 2004) (unpublished opinion); *People v. Chokr*, 2004 WL 1932644 (Cal. App. Aug. 31, 2004) (unpublished opinion) (insufficient effort on State's part when it knew witness had disappeared and did not issue subpoena or look for witness until eve of trial).
2. Governmental negligence allowed witness to abscond. *See, e.g., Motes v. United States*, 178 U.S. 458, 470-71 (1900).
3. Witness is able to come to court and testify but is simply unwilling to do so.

III. "OPPORTUNITY FOR CROSS-EXAMINATION" - *Crawford* may not change this law (depending on what additional historical research might turn up), but it certainly makes it much more important.

- A. Alleged opportunity prior to trial at issue.** If the defendant was represented by counsel who had an adequate opportunity to cross-examine the witness and the same or similar motive for doing so, this satisfies the Confrontation Clause for statements given at that time. *Compare Mancusi v. Stubbs*, 408 U.S. 204, 213-16 (1972) (adequate cross because statement given at prior trial on same charges); *California v. Green*, 399 U.S. 149, 165-68 (1970) (adequate opportunity where statement was given at preliminary hearing where defendant was represented by counsel); *United States v. Avants*, 367 F.3d 433, 443 (5th Cir. 2004) (same, although improperly resting decision on "firmly rooted" language), *with Pointer v. Texas*, 380 U.S. 400, 406-08 (1965) (inadequate opportunity when statement given in preliminary hearing where defendant was not represented by counsel); *Kirby v. United States*, 174 U.S. 47, 54-57 (1899) (inadequate opportunity when statement was given at prior trial where defendant was not a party and thus had no opportunity to cross-examine); *and People v. Fry*, 92 P.3d 970 (Colo. 2004) (inadequate opportunity at all preliminary hearings because state law requires such hearings to be truncated). If a party other than the defendant cross-examined the witness at a prior trial, that does not satisfy the Confrontation Clause. *State v. Hale*, ___, N.W.2d ___, 2005 WL 147123 (Wis. Jan. 15, 2005). There is currently a conflict in Florida over whether taking a "discovery deposition," which is allowed there as a matter of course, is an adequate opportunity for cross. *Compare Lopez v. State*, 888 So.2d 693 (Fla. App. 2004) (not adequate), *with Blanton v. State*, 880 So.2d 798 (Fla. App. 2004) (adequate), *review denied* (Fla. 2004).
- B. Alleged opportunity at trial at issue.** "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the

use of prior testimonial statements. . . . The Clause does not bar the admission of a statement so long as the declarant is present at trial to defend or explain it.” 124 S. Ct. at 1369 n.9. This is so even if the witness cannot, or claims not be able to, remember her prior testimonial statement. *United States v. Owens*, 484 U.S. 554 (1988) (no confrontation violation even though head injury impaired witness’s memory after he gave testimonial statement, so cross-examination was of limited utility); *California v. Green*, 399 U.S. 149 (1970) (same with respect to witness claimed memory loss at trial); *see also People v. Martinez*, 810 N.E.2d 199 (Ill. Ct. App. 2004) (testimonial statement admissible because witness took the stand); *Cooley v. State*, 849 A.2d 1026 (Md. App. 2004) (same where witness recanted on the stand), *cert. granted*, 857 A.2d 1129 (Md. 2004). If, however, the witness is forced to take the stand but refuses on privilege grounds to answer any questions at all, this does *not* suffice to make his prior testimonial statements admissible. *See Douglas v. Alabama*, 380 U.S. 415 (1965). And one court has held that if the witness has trouble understanding English and, thus, cannot effectively understand and answer questions, the failure to provide an interpreter to aid in cross examination violates the Confrontation Clause. *Miller v. State*, ___ S.W.3d ___, 2004 WL 2538286 (Tex. App. Nov. 10, 2004).

- C. **“Forfeiture by wrongdoing”** – When defendants wrongfully prevent witnesses from testifying, this “extinguishes confrontation claims on essentially equitable grounds.” 124 S. Ct. at 1370 (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879)); *see also United States v. Dhinsa*, 243 F.3d 635, 651 (2d Cir. 2001) (“threats, actual violence, or murder” forfeit confrontation right). In some jurisdictions, wrongdoing must be proved by clear and convincing evidence; in others a preponderance suffices. *See State v. Hale*, ___, N.W.2d ___, 2005 WL 147123, at ¶ 96 (Wis. Jan. 15, 2005) (Prosser, J., concurring) (collecting citations to different jurisdictions). Federal Rule of Evidence 804(b)(6) codifies the forfeiture rule for federal cases, and requires that the wrongdoing be “intended to . . . procure the unavailability of the declarant as a witness.” Post-*Crawford* decisions, however, are divided over whether, in the absence of such an evidentiary rule, the wrongdoing at issue, at least in homicide cases, must be “specifically intended to prevent the witness from testifying.” *People v. Giles*, 19 Cal. Rptr. 3d 843 (Cal. App. 2004) (homicide case; wrongdoing must be an “intentional criminal act” but not specifically aimed at preventing testimony), *review granted* (Cal 2004); *People v. Moore*, ___ P.3d ___, 2004 WL 1690247 (Colo. App. July 29, 2004) (same); *Gonzalez v. State*, ___ S.W.3d ___, 2004 WL 2873811 (Tex. App. Dec. 15, 2004) (same); *compare United States v. Houlihan*, 2 F.3d 1271, 1278 (1st Cir. 1996) (must show wrongdoing “undertaken with the intention of preventing the potential witness from testifying at a future trial”); *Francis v. Duncan*, 2004 WL 1878796, at *17 (S.D.N.Y. Aug. 23, 2004) (must show defendant’s “motive . . . to prevent a witness from testifying”).