

EXCEPTIONS TO THE HEARSAY RULE AND RECENT CASE LAW RE CRAWFORD v. WASHINGTON

Prepared by Hon. John M. Leventhal

I. Exceptions to Hearsay Rule:

A. Present Sense Impression:

- People v. Vasquez, 88 NY2d 561 (1996)
- People v. Brown, 80 NY2d 729 (1993)
- People v. Buie, 86 NY2d 501(1995)
- "Admissibility of 911 Tapes in Criminal Proceedings" by Mulray, NYLJ 2/2/96 p.1, col.1

B. Excited Utterance:

- People v. Vasquez, 88 NY2d 561 (1996)
- People v. Brown, 70 NY2d 513 (1987)
- People v. Flores, NYLJ, 8-3-01, p. 26, col. 4 [Witness caller's statement that "Her father hit her mother with a piece of wood" is inadmissible as opinion evidence of lay witness drawing an inference from the facts which is within the province of the jury where the witness did not observe the event. (See also, People v. Sullivan, 117 AD2d 476) Statement is additionally inadmissible as witness had not only an opportunity to reflect, but did in fact reflect. (But see, People v. Simpson, 238 AD2d 611)]

● "Using Excited Utterances To Prosecute Domestic Violence in New York: The Door Opens Wide Or Just A Crack?" by Holland, 8 Cardozo Women's L.J. 171 (2002)

C. Medical Records:

- People v. Anonymous, 192 Misc.2d 570 (Sup. Ct. Bronx Co. 2002) [In a prosecution alleging that defendant assaulted his daughter and two sons, and raped the daughter, hospital records showing the extent of the children's injuries and naming defendant as the person who purportedly inflicted the injuries are admissible. The business records exception of the hearsay rule permits the introduction of such evidence provided that the information sought to be admitted is relevant to the diagnosis and treatment of the patients. In cases involving child abuse, the identity of the perpetrator plays a central role in the treatment of the victim where the abuser is someone the child knows or trusts, who seriously abuses the victim over an extended period of time, grave psychological consequences are visited on the abused child in addition to the physical injury inflicted. Moreover, where the agent of the harm is a member of the child's household, sending the child back to the home would undoubtedly endanger the child, who is unable to protect him or herself. Therefore, information that the abuser is a member of the victim's household would be necessary to effective treatment.]

● In accord, People v. Swinger, 180 Misc. 2d 344 (Crim. Court NY Co. 1998) [A misdemeanor charging defendant with two counts of assault in the third degree should not be dismissed because the complainant, defendant's wife, has recanted her prior statements to the police and now refuses to testify where the allegations are otherwise supported by non-hearsay evidence. The complainant's statements to the hospital doctor that she had been assaulted

by defendant are admissible under the “business records” exception to the hearsay rule, because the statements were made for the purposes of complainant’s treatment. Identifying a patient as a domestic violence victim is relevant to a patient’s diagnosis and treatment, and the forms that complainant filled out were prepared in the ordinary course of business. Complainant’s statement to the responding police officer are admissible under the “excited utterance” exception to the hearsay rule as there is sufficient evidence in the record to conclude that the statement was made spontaneously, under the stress of a startling event, with no time for complainant to have fabricated the incident.]; but see, People v. Harrison, 176 AD2d 1199 (4th Dept 1991) [Testimony by emergency room physician about victim’s statements concerning rape constituted improper bolstering]; People v. Barnes 144 AD2d 995 (4th Dept 1988) [Admitting narrative of assault given to the emergency room physician was improper.]

● “Using Medical Hearsay Evidence to Prosecute Family Child Abuse,” by Holland, New York Law Journal, p. 4, col 4(3-26-2003)

● Note bene: The Supreme Court ruled almost 100 years ago that public records are not covered by the hearsay rule, are admissible and not violative of the right to confrontation, and have been admissible from a time prior to the adoption of the Constitution (Heike v. United States, 192 F. 83 (2nd Cir. 1911), aff’d, 227 U.S. 131.

D. Forfeiture of Right to Object to Hearsay:

● People v. Geraci, 85 NY2d359, 366 (1995) and People v. Cotto, 92 NY2d 68, 76(1998) [Defendant may forfeit the right of confrontation as well as the right to assert an evidentiary objection against the admission of a witness’ out-of-court declarations due to a defendant’s misconduct.]; cf. Cotto v. Herbert, 331 F2d 217 (2d Cir.2003) [The Second Circuit Court of Appeals granted petitioner’s writ of *habeas corpus* as 1)there was no Supreme Court precedent extending forfeiture of confrontation rights to complete preclusion of cross-examination of a prosecution witness who actually testifies at trial, when juxtaposed against the clearly established right to cross-examine adverse witnesses for bias and motive to lie; 2)lack of any reason why a complete ban of cross-examination was necessary and appropriate; and 3)the centrality of cross-examination to the truth seeking process]; see also, Steele v. Taylor, 684 F2d 1193(6th Cir. 1982), cert denied 460 US 1053; compare above cases with Matter of Holtzman v. Hellenbrand, 92 AD2d 405(2d Dept. 1983); United States v. Mastrangelo, 693 F2d 269, 273(2d Cir. 1982), cert denied 467 US 1204; United States v. Thevis, 665 F2d 616(5th Cir. 1982), cert denied sub nom. Evans v. United States,456 US 1008 [Where principle is characterized as “waiver by misconduct.”]

● People v. Lamont White, 4 AD3d 225 (1st Dept. 2004) [Court rejected defendant’s claim that his right of confrontation was violated when the court received the victim’s grand jury testimony in evidence even though the victim declared her willingness to testify at trial. Defendant did not challenge the trial court’s finding that he procured the victim’s recantation by misconduct. The court agreed with the proposition that “[a] witness who is so fearful that he [or she] will not testify *or will testify falsely*, ‘is just as unavailable as a witness who is dead or cannot be found.’” To deem a testifying, but recanting witness “available” for Confrontation Clause purposes, would provide witness tamperers with an incentive to induce witnesses to recant rather than to refrain from testifying at all.]

● People v. Santiago, 2003 WL 21507176 (Sup. Ct. NY Co.) [Court admitted complainant's grand jury and other out-of-court statements, ruling complainant unavailable to testify. There had been a history of charges of physical and emotional abuse as well as several prior assault complaints which had been dismissed for failure to prosecute. Defendant called complainant over 100 times during pendency of case and complainant had visited defendant 10 times in jail.]

E. See Generally:

● Nucci v. Proper, 95 NY2d 597, 603(2001) [Highlighting reliability as lynchpin to hearsay exceptions (civil case). Reliability has been defined by the Court of Appeals within the context of hearsay as the sum of the circumstances surrounding the making of the statement that renders the declarant worthy of belief.”]

● Ohio v. Roberts, 448 U.S. 56 (1980) [Many courts cite Ohio v. Roberts as still good law for reliability of non-testimonial hearsay even in the aftermath of Crawford v. Washington: For purpose of rule that the statement of a hearsay declarant who is unavailable for trial may be admitted only if it bears adequate indicia or reliability, reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception; in other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness; see White v. Illinois, 502 U.S. 346 [Justices Scalia and Thomas would completely overrule Ohio v. Roberts and hold that the Confrontation Clause places no limits on non-testimonial hearsay.]; see also, United States v. Taylor, 328 F. Supp.2d 915 (N.D. Ind. 2004) [Defendant's statement against penal interest also inculcating co-defendant made to an accomplice after the fact is non-testimonial and subject to reliability assessment to ensure its trustworthiness under Ohio v. Roberts. The court based its conclusion partially based on the fact that at time of the statement the co-defendant declarant and the accomplice after the fact recipient were confidants, but not without reservation. The court noted,”[i]t is the unfortunate reality of human nature that people for whatever reason or motivations, lie to friends and foe alike.”]

● People v. James, 93 NY2d 620, 642 citing Idaho v. Wright, 497 US 805,821 ; Dutton v. Evans, 400 US 74, 89; United States v. Matthews, 20 F3d 538, 546; United States v. Barone, 114 F3d 1284, 1302 cert denied 522 US 1021; Earnest v. Dorsey, 87 F3d 1123, 1133-1134 cert denied 519 US 1016; United States v. York, 933 F2d 1343, 1362-1363 cert denied 502 US 916 [Relevant non-inclusive factors are “spontaneity, repetition, the mental state of the declarant, absence of motion to fabricate,...unlikelihood of faulty recollection and the degree to which the statement was against the declarant's...interest...the status or relationship to the declarant of the person to whom the statement was made...whether it was made in response to questioning and whether the statements reflect an attempt to shift blame or curry favor.”]

● “Who Needs An Evidence Code?: The New York Court of Appeals Radical Re- Evaluation Of Hearsay,” by Zeidman, 21 Cardozo L. Rev.211 (Oct. 1999).

II. Note bene:

● Crawford v. Washington, 124 S. Ct. 1354 (2004) [The defendant was convicted of assault and attempted murder. At trial, the State was permitted to introduce a recorded statement that defendant's wife had made to the police as evidence that the stabbing was not in self defense. Defendant's wife did not testify at trial because of Washington's marital privilege which generally

bars a spouse from testifying without the other spouse's consent. The Supreme Court in an opinion authored by Justice Scalia reversed defendant's conviction. The Supreme Court held that an out-of-court statement by a witness that is testimonial is barred under the Confrontation Clause of the Sixth Amendment unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness regardless of whether such statement is deemed reliable by the court, abrogating Ohio v Roberts, 448 U.S. 56 (1980). The Supreme Court rejected the proposition that out-of-court statements are to be regulated only by the law of evidence rather than the Confrontation Clause unless they were in existence when the Sixth Amendment was adopted in 1791. To permit the rules of evidence to control the admission of out-of-court statements would render the Sixth Amendment powerless to prevent even the most flagrant inquisitorial practices. The primary concern of the Sixth Amendment is with testimonial hearsay. The Confrontation Clause applies to witnesses against an accused, that is, those who bear testimony. The constitutional as well as the common law right of confrontation, reflects an especially acute concern with a specific type of out-of-court statement. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. The Court declined to provide a comprehensive definition of the word "testimonial," nor did it furnish an exhaustive list of what types of out-of-court statements are considered testimonial. The Court did hold, that at a minimum, testimonial out-of-court statements applies to prior testimony at a preliminary hearing, plea allocutions showing the existence of a conspiracy, testimony before a grand jury, or at a former trial, and to police interrogatories. Testimonial statements may be sworn or unsworn. The Supreme Court left open the possibility that anytime a declarant may believe that she will be called as a witness at trial or that her statement may be used at trial, the statement given by that declarant may be testimonial. Yet, the Court held that not all hearsay implicates the Sixth Amendment core concern of testing the reliability of a non-available witness's prior statement by means of cross-examination. Where non-testimonial hearsay is at issue, for example business records or statements made in furtherance of a conspiracy, the states have flexibility in their development of the hearsay law of evidence to allow such out-of-court statements despite the lack of prior cross-examination without running afoul of the Sixth Amendment. The Court in a footnote indicated that dying declarations may not be testimonial in nature. The Court also observed, "[t]he [Confrontation] Clause...does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." One must look how state and federal courts interpret and apply Crawford v. Washington. Of interest is a discussion of what the various courts have held what is, and what is not, testimonial. This determination is crucial for the following reason: If a hearsay statement is testimonial and sought to be introduced for the truth of the matter asserted, then it may only be admitted 1) if the declarant were to testify at trial, or 2) if the declarant is unavailable to testify, but the defendant was afforded a prior opportunity to cross-examine declarant about the particular statement.

III. Cases interpreting and applying Crawford v. Washington:

A. Statements deemed non-testimonial:

1. Co-conspirator's statements:

● United States v. Reyes, 362 F3d 536, 541 (8th Cir. 2004) [In a footnote, the court rejected defendant's argument that his Sixth Amendment right of confrontation was violated when the trial court admitted statements of a co-conspirator made in the course of the conspiracy and in the furtherance of the conspiracy. The court reaffirmed that statements of a co-conspirator in furtherance of the conspiracy are non-testimonial. The court also noted that Crawford did not provide additional protection for non-testimonial statements and questioned whether the Confrontation Clause protects non-testimonial statements at all.]

● People v. Deshazo, 679 N.W.2d 69 (Mich. 2004) [The expected testimony, that a non-testifying co-defendant told the witness that defendants hired him to kill the victim, is a statement against penal interest and deemed reliable as it was voluntarily given to a friend or confederate. The hearsay in question was not testimonial.]

2. Statement made to civilian(non-law enforcement agent):

a. Declaration against penal interest:

● Connecticut v. Rivera, 844 A.2d 191, 200 (Conn. 2004) [Defendant claimed that he was deprived of his confrontation rights under the Sixth Amendment by allowing a witness to testify about a statement made by another person who was not a trial witness as a declaration against penal interest. The trial court's admission of the statement was upheld on appeal. The statement at issue did not fall within any of the formulations of the core class of testimonial statements discussed by the Supreme Court in Crawford. The statement was not a confession resulting from custodial examination. Unlike a statement to the police, this statement was made in confidence on the declarant's own initiative almost eighteen months prior to the defendant's arrest and more than four years before the declarant's arrest. Under these circumstances, an objective witness would not reasonably believe that the statement would be available for use at a later trial.]

b. Excited utterance/res gestae exception:

● Demons v. Georgia, 595 S.E.2d 76, 80 (Ga. 2004) [Excited utterance exception to rule against hearsay comes under Georgia's "res gestae" exception. Also, victim's hearsay statements to co-worker prior to murder, identifying defendant as source of bruises on his arms and indicating belief that defendant was going to kill him, were not remotely similar to prior testimony or police interrogation, as they were made in a conversation with a friend, before the commission of any crime, and without any reasonable expectation that they would be used at a later trial. Both of these hearsay statements were not testimonial. Therefore, they are not proscribed by the Crawford ruling.]

● People v. Compan, 2004 WL 1123526 (Colo. Ct of Appeals) [Wife did not testify at husband's assault trial. Wife's friend testified about victim's statements while "upset and agitated" shortly after the assault to the effect that defendant had punched and kicked her, thrown her against a wall and pulled her hair. Victim's statements qualified as an excited utterance under the Colorado Rules of Evidence. The appellate court held that the victim's statements were not testimonial as they were made to her friend, not to a law enforcement or judicial officer.]; See also, United States v. Dorman, 2004 WL 1661993 (6th Cir. Ky.)

● McKinney v. Bruce, 2004 WL 1730326 (D. Kansas)[Homicide victim's statements that the defendant wanted to talk to him and that he was leaving to go see what defendant wanted were properly admitted under Kansas statute allowing admission of

declarant's existing state of mind and statement of intent, plan and motive. Court ruled that his statements were non-testimonial.]

● People v. Rivera, 8 A.D. 3d 53 (N.Y. App. Div. 1st Dept. 2004)

[The victim's girlfriend's telephoned statement to the victim's sister, identifying defendant as the assailant, was properly admitted under the excited utterance exception to the hearsay rule. The declaration, made within minutes of the stabbing by a crying, screaming declarant, was clearly made under the continuing stress and excitement caused by the startling event, and was not made under the impetus of studied reflection. Defendant's constitutional claim under the Confrontation Clause of the Sixth Amendment was unpreserved. The court held that if it were to review such a claim it would be denied as the declaration was not a testimonial statement.]

c. Recent perception:

● Wisconsin v. Manuel, 685 N.W.2d 525 (Wis. App. 2004) [Defendant was convicted, *inter alia*, of attempted first degree intentional homicide. Defendant shot a driver when he reached around "Stamps" who was talking to the driver. Stamps had told his girlfriend at the night of the shooting that "he was with the guy that shot" the driver, and that Stamps had taken her and his son to a hotel for two days. Stamps refused to testify at defendant's trial, invoking his Fifth Amendment privilege. The trial court allowed Stamps' girlfriend to testify, finding Stamps unavailable and the statement admissible as a statement of recent perception, an exception to the hearsay rule under Wisconsin statute. Stamps' girlfriend, however, testified that she was unable to recall either what Stamps had told her about the shooting or what she had told the police regarding Stamps' statement to her. A detective, who had questioned Stamps' girlfriend at the time of Stamps' arrest, was allowed to testify that Stamps told the girlfriend within hours of the shooting that he was talking with the victim through the car window, when the defendant "came out of nowhere" and shot the victim. The appellate court concluded that Stamps' statement to his girlfriend was not testimonial in nature. The statement was not made to an agent of the government or to someone engaged in investigating the shooting. The girlfriend's responses to the detective's questioning, although not hearsay pursuant to Wisconsin statute, might nonetheless be considered an out-of-court "testimonial statement. Its introduction does not appear to violate the Confrontation Clause because the girlfriend testified at trial and was subject to defendant's cross-examination regarding her statements to the detective.]

● Michigan v. Williams, 2004 WL 1079808_(Ct of Appeals of Mich.)

[The murder victim's statements made to her mother, sister, brother and friend concerning her (1) unhappiness with defendant(husband) and feelings of exhaustion with his stalking behavior and threats, (2) feelings of fear for her life, (3) desire to escape from defendant, (4) eventual happiness at ending her relationship with defendant, and (5) plan to pursue happiness with someone else are recognized as qualified hearsay exceptions under the Michigan Rules of Evidence (statement of declarant's then existing state of mind, emotions, sensation, or physical condition [such as intent, plan, motive, design, mental feeling, pain, and bodily health]). The appellate court noted that the challenged statements were not testimonial in nature and are not barred by the Confrontation Clause. The statements were not elicited by government officials, were not any type of "ex parte in court testimony or its functional equivalent" and were not given with an eye toward trial.]

d. Child's Statements:

● People v. Becerra, 2004 WL 823429 (Cal. Ct of Appeal, 4th Dist.)

[Child's statement to her mother that her "head hurt" was non-testimonial hearsay and is not within ambit of Crawford v. Washington. Mother's testimony that child called defendant "Head" is not hearsay at all.]

● People v. Geno, 261 Mich. App. 624 (Mich. Ct. App. 2004)

[Defendant was convicted of sexual assault of the two-year-old daughter of defendant's girlfriend. When the molestation was reported to Children's Protective Services, an assessment and interview of the child was held at the Children's Assessment Center. At the interview, the victim asked the interviewer to accompany her to the bathroom. The interviewer noticed blood in the child's pull-up and asked the child if she "had an owie?" The child answered, "yes, Dale [defendant] hurts me here," pointing to her vaginal area." The appellate court held that the child's statement to the interviewer was properly admitted as it "did not constitute testimonial evidence under Crawford, and therefore was not barred by the Confrontation Clause. The child's statement was made to executive director of the Children's Assessment Center, not to a government employee, and the child's answer to the question of whether she had an 'owie' was not a statement in the nature of 'ex parte in-court testimony or its functional equivalent.']

3. Statement made to law enforcement agent for reasons other than testimony:

a. 911 calls as excited utterances:

● People v. Moscat, 3 Misc.3d 739 (Criminal Ct. Bx. Co. 2004) [911

call has its genesis in the urgent desire of a citizen to be rescued from immediate peril, not by the police or prosecution's desire to seek evidence against a particular suspect. 911 calls may be seen as part of the criminal incident itself rather than part of the prosecution that follows. A 911 caller, especially in DV cases, is seeking help simply to save her own life because of injury already inflicted or because of the prospect of imminent injury. Thus, a 911 call is not testimonial in nature under Crawford, and may be received in evidence provided that it meets the requirements of an "excited utterance" or other exception to the hearsay rule. See also, see also, State v. Forrest 596 S.E.2d 22 (N.C. App. 2004) [citing Moscat]. .]

● People v. Conyers, 4 Misc. 3d 346 (Sup. Ct. Queens Co. 2004) [Two

911 calls introduced into evidence at trial as excited utterances were generated by defendant's mother, who was also the mother-in-law of the victim as she reacted to the life threatening crisis unfolding before her eyes. The voices of the victim and the defendant are audible on the tape as the assault was in progress. It was clear to the trial court having heard the panicked and terrified screams of the declarant that her intention in placing the 911 calls was to stop the assault in progress and not to consider the legal ramifications of herself as witness in a future proceeding. Note: This may also been admitted as a present sense impression.]

b. excited utterances made to police officers:

● Fowler v. Indiana, 809 N.E.2d 960 (Ind. Ct. App.) [Police officer

responded to a 911 domestic disturbance call. The officer arrived five minutes after receiving the dispatch observing blood on the wife's nose and what appeared to be blood on her shirt and pants. Ten minutes after arriving at the scene, the officer asked the wife what had happened. The wife, moaning and crying, told the officer and his partner that the defendant, her husband, had punched her several times in the face. At trial, the wife was called to testify. She identified pictures of her taken on the date of the incident. Yet, she refused to testify that the defendant battered her, exclaiming "I don't want to testify no more!" The police officer was allowed, over objection, to

recount the wife's statements that the defendant had battered her under the excited utterance exception. The court recognized that police questioning can be interrogation constituting a testimonial statement. The court, nonetheless, held that "when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter to determine what has happened, statements given in response are not testimonial. Whatever else police interrogation may be, we do not believe that word applies to preliminary investigatory questions asked at the scene of the crime shortly after it has occurred. Such interaction with witnesses on the scene does not fit within a lay conception of police interrogation, bolstered by television, as encompassing an interview in a room at the station house. It also does not bear the hallmarks of an improper inquisitorial practice." One judge, concurring in the result, opined that the trial judge's ruling should be affirmed simply because the witness, although characterized as uncooperative, testified at trial and could have been recalled for cross-examination regarding the statements the wife made at the scene.]

● Hammon v. Indiana, 809 N.E.2d. 945 (Ind. Ct. App. 2004) in accord with Fowler and decided the same day. [In a domestic violence battery case, the trial judge admitted statements made by the victim to the arresting officer. The defendant was convicted after a bench trial. The appellate court held that the statements to the police officer were properly admitted into evidence as an excited utterance. The court noted that even though the victim gave her statement in response to questioning by the officer, the Supreme Court (in Crawford) chose not to say that any police *questioning* of a witness would make any statement in response thereto testimonial: rather it expressly limited its holding to police interrogation." The court noted that "the very concept of an excited utterance is such that it is difficult to perceive how a statement could ever be testimonial...An unrehearsed statement made without time for reflection or deliberation, as required to be an excited utterance, is not testimonial in that such a statement, by definition, has not been made in contemplation of its use in a future trial."] See also, People v. Lockett, 2004 WL 1490529 (Cal. Ct. App.); but Cf. People v. Kilday 20 Cal. Rptr. 3d 162 (Cal. App. 1 Dist. 2004) [stating that, "an interpretation of Crawford that makes the presence or absence of indicia of formality determinative is inconsistent with the Supreme Court focus on "the production of testimonial evidence"(Crawford, at p. 1365), which may occur during relatively informal questioning in the field." See also, People v. Corella 122 Cal. App. 4th 461 (Cal. Ct. App. 2nd Dist. 2004), State v. Wright, 686 N.W.2d 295 (Minn. App. 2004).]

● State v. Barnes, 854 A.2d 208 (Me. 2004) [Mother's statements made to police officer regarding prior assault by son was admissible at son's trial for the murder of his mother. The decedent/mother had driven to the police station after fleeing from her son's earlier assault. She was sobbing and crying and continued crying despite efforts to calm her. Defendant's mother said that her son had assaulted her and had threatened to kill her more than once during the day. The mother who had a history of heart problems was clutching her chest and an ambulance was called. Maine's Supreme Court held that the statements made were properly admitted as an excited utterance and were not testimonial in nature. The court considered the following factors: "First, the police did not seek her out. She went to the police station on her own, not at the demand or request of the police. Second, her statements to them were made when she was still under the stress of the alleged assault. Any questions posed to her by the police were presented in the context of determining why she was distressed. Third, she was not responding to

tactically structured police questioning as in Crawford, but was instead seeking safety and aid. The police were not questioning her regarding known criminal activity and did not have reason, until her own statements were made, to believe that a person or persons had been involved in any specific wrongdoing. Considering all of these facts in their context, we conclude that interaction between (defendant's) mother and the officer was not structured police interrogation triggering the cross-examination requirement of the Confrontation Clause as interpreted by the Court in Crawford. Nor did the victim's words in any other way constitute a "testimonial" statement."

● In accord, Leavitt v. Arave, 371 F.3d 663, 668 n.22 (9th Cir. 2004) [In the context of a *habeas corpus* proceeding, one appeals court has similarly upheld a decedent's prior statement to police whom she had summoned after a break in. The court noted that the victim "was in no way being interrogated by the police but instead sought their help in ending a frightening intrusion into her home."]

● People v. Brown, 322 F.Supp.2d 101 in accord with Fowler, ["It is doubtful that even in a trial setting Crawford would apply to spontaneous utterances.]; in accord People v. Issac, 2004 WL 1389219 (District Court Nassau Co.); see also People v. Lockett 2004 WL 1490529.

c. Police Interviews:

● People v. Cage, 15 Cal. Rptr.3d 846 (Cal. Ct. App. 2004). [Ruling that police interview is not necessarily testimonial, holding that a hearsay statement made to a police officer at the hospital was not testimonial because "the interview was not sufficiently analogous to a pretrial examination by a justice of the peace; among other things, the police had not yet focused on a crime or a suspect, there was no structured questioning, and the interview was informal and unrecorded."]

● People v. Bryant, 2004 WL 1882661 (Mich. App) [A victim of a shooting who was in obvious pain, winded and had a difficult time speaking when the police found him, made a statement in response to a question by the police that was properly admitted at defendant's trial. The victim who later died of his injuries answered the police's only question: "What happened?" The victim's response that the defendant shot him at the defendant's house through a door, with the victim giving a physical description of defendant and the location of the house where he was shot was deemed non-testimonial. The victim did not see the defendant, but recognized his voice. Defendant argued that it was error for the trial court to admit the victim's statements as excited utterances. The court ruled that the sole question asked by the police did not constitute an interrogation and there was no evidence of interrogation. The statements were not any type of "*ex parte* in-court testimony or its functional equivalent."]

● People v. Jimenez, 2004 WL 1832719 (Cal. App. 2 Dist.) [Finding that a victim's statements constituted an excited utterance, rejected the defendant's contention that the statement was the product of police interrogation. The statement was made within a five to eight minute period after the crime during which the police were merely ascertaining whether a crime had in fact been committed and whether they had probable cause to arrest the suspects apprehended. The victim's statements were not the result of interrogation since there was no formal questioning or obtaining a formal statement by the officers. The victim did most of the talking without any need for being questioned. See also People v. Mackey 2004 WL 2348205 (N.Y. Crim. Ct.) [Stating a test to determine whether statements made to police were

testimonial, court must take into consideration the formality of the setting in which the statements were made, if and how the statements were recorded, the declarant's primary purpose in making the statements, whether an objective declarant would believe those statements would be used to initiate prosecutorial action, whether there was structured questioning, and whether the declarant initiated the contact.]

● People v. Kilday 20 Cal. Rptr. 3d 161 (Cal. App. 1 Dist. 2004)[Court articulated its own factors for determining whether statements made to police are testimonial. The court ruled that this determination required a “case-specific, fact-based inquiry ...” that must “ ... center around whether the officer involved was acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution.” In order to determine whether the officers were securing the scene or looking for evidence, the court considered whether the statements of the victim were the product of structured questioning, whether the officers were still responding to the exigency of the circumstances regarding the declarant's safety or medical concerns when declarant made the statements, and whether the officers were yet aware of the crimes and the identity of the assailant.] See also People v. Ford 2004 WL 2538477 (Cal. App. 1 Dist.) [Also asserting that determination of whether statements made to police are testimonial “will depend on the facts and circumstance of the particular case.” At the time statements were made, officer did not know nature of the crime, the identity of assailant, whether assailant was dangerous, or whether victim's injuries required immediate medical attention. Additionally, statements were not the product of structured questioning and were not recorded. Court therefore ruled statements victim/mother made to police that father of her child had inflicted her injuries were non-testimonial, as officer was not acting in investigative capacity, but was rather eliciting basic facts about nature and causes of injury.]

d. Statement to Confidential Informant:

● United States v. Saget, 377 F. 3d 233 (2nd Cir. N.Y. 2004) [Circuit Court of Appeals ruling that co-conspirator's statements made to an informant were not testimonial where the co-conspirator did not know that he was speaking to an informant and could not have reasonably expected that his statements would be used at trial.] but Cf., Ohio v. Nix, 2004 WL 2315035 at *18 [citing the Saget opinion as being “a very broad view of Crawford,” that interprets Crawford as suggesting that “the determinative factor of “whether a declarant bears testimony is the declarant's expectation that his or her statements may later be used at trial.” The court in Nix, although not dealing with a co-conspirator's statement, ruled that such a broad definition “would render “testimonial” anything said to a police officer involved in investigating a crime.”]

4. Statements made for purposes of obtaining medical treatment:

● Washington v. Castilla, 87 P.3d 1211, 1214(Wash. App. Div.2004) [State declined to call complainant, who suffered from significant developmental delays and schizophrenia, as a witness at rape trial of her nursing assistant because the complainant's mental condition had deteriorated to the point where she would not be found competent to testify. Certain of the complainant's statements to nurse who performed sexual assault exam were admitted under hearsay exception for statements made for purposes of obtaining medical treatment. The statements did not go to any disputed issue as defendant conceded that he had intercourse with complainant, but denied that it occurred in a treatment session. “Further, these statements were not

testimonial in nature. They were not elicited by a governmental official and were not given with an eye toward a trial. As such, they do not raise the same concerns under the Sixth Amendment as does testimonial hearsay.”]

● People v. Cervantes, 12 Cal. Rptr.3d 774, 781, (Cal.App. Dist. 2 2004) [Statement made by co-defendant to neighbor, a surgical medical assistant, regarding the underlying incident was properly admitted at murder trial against non-declarant co-defendants. Declarant-codefendant-accomplice did not testify at trial. The appellate court found that the statement was not testimonial. The statement was made when declarant sought medical assistance for cuts and bruises from a friend of long standing who had come to visit his home. The statement appeared to have been made without any reasonable expectation it would be used at a later trial. The court found it far more likely that the declarant thought that the neighbor would not repeat anything he told her to the police. The neighbor admitted that she knew appellants were gang members and indicated that she was afraid to testify in the case.]

● Nebraska v. Vaught, 268 Neb. 316 (Neb. 2004) [A statement given to a doctor by a child who was a victim of sexual abuse, and who identified the perpetrator of the assault, was admissible under *Crawford*, because it was given for the purposes of promoting diagnosis and treatment and was therefore not testimonial in nature.]

5. Impeachment of Good Character

● Washington v. Mc Clanahan, 120 Wash. App. 1065 (Ct of Appeals of Wash. 2004) [Impeachment of defendant’s good character was not testimonial in nature. Defendant was accused of sexually abusing his daughter when she was in the second grade. Defendant testified on his own behalf saying he would not hurt any little child, let alone his own daughter. The prosecutor asked defendant whether he had ever had sex with another named girl when she was thirteen. The named girl declined to testify at defendant’s trial. The Court held that there was good faith basis for the asking of the question and that there was no Confrontation Clause violation.]

6. Statement admitted against co-defendant but not against appellant:

● People v. Landers, 2004 WL 1089500 (Mich Ct. Of Appeals) [The admission of the grand jury testimony of a person who did not testify at trial did not violate defendant’s Sixth Amendment guarantee “to be confronted with the witnesses against *him*.” The trial jury was specifically instructed that the testimony from the prior federal proceeding was not to be used against defendant, but only against a particular co-defendant.]

● United States v. Gia Le, 316 F.Supp.2d 330 (E.D. Va. 2004) [Statement of a non-testifying co-defendant may be redacted to remedy any potential Sixth Amendment violation to defendant’s right of confrontation, and thus render unnecessary either severance or exclusion of these statements. Court discusses instances of when redaction with substitution is improper and other examples where it would not be “facially incriminatory” or “directly accusatory.”]; in accord, People v. Khan, 2004 WL 1463027 (Sup. Ct. Queens Co.) [Defendant argued that his 1991 murder conviction should be vacated because his right to confrontation, pursuant to *Crawford*, was violated. Court found *Crawford* was inapplicable because co-defendant’s statements were not testimonial evidence against defendant, as they only incriminated co-defendants and not the defendant.]

7. Expert Opinions:

● Howard v. Walker, 2004 WL 1638197 (W.D.N.Y.) [An expert doctor was permitted to review non-testimonial statements in forming an expert opinion regarding the victim's cause of death. The court ruled that "while the ramifications of Crawford have yet to be fully developed, this Court declines to extend Crawford to preventing an expert in a criminal case from ever reviewing non-testimonial statements in forming an expert opinion." (quotation at *10). See also, People v. Miller 2004 WL 2534367 (Mich. App.) [Mother convicted of murder of eleven-week-old daughter claimed that witness doctor's reliance on the report of non-witness pathologists violated her right to confrontation. Court found that a report completed by one pathologist at the request of another for the investigative purpose of determining victim's cause of death is not testimonial. Court defined testimonial evidence as "in the nature of testimony" and stated that evidence is testimonial when it is "elicited from a witness in contrast to documentary evidence or real evidence." The court concluded that an autopsy report documenting doctor's medical observations clearly did not meet this definition of testimonial evidence.]

8. Business records:

● Johnson v. Renico, 314 F.Supp.2d 700 (E.D. Mich. 2004)
[Petitioner and another's statements to the police during their respective bookings were admitted into evidence pursuant to the business record exception. By their nature, these statements were not testimonial and their admission would not violate the holding in Crawford v. Washington. Note: These statements are clearly non-testimonial, but may not constitute a business record under New York state law. See, Johnson v. Lutz, 253 NY 124.]

● People v. Rogers, 8 AD3d 888 (1st Dept. 2004) [The court sanctioned the admission of the victim's hospital records. "Although statements made by the victim to the medical personnel were hearsay, such records are admissible under the business records exception, as long as they are germane to the patient's subsequent medical treatment and diagnosis." In contrast, a report giving the results of test for the victim's blood was improperly admitted as a business record. The report here was requested by and prepared for law enforcement for the purpose of prosecution. Although the report was generated by a private lab that conducted the tests and such tests by outside labs are regularly relied upon by the State Police because they do not perform such testing themselves, papers or reports from other entities do not qualify as business records merely because they are regularly filed with the State Police's records. Documents prepared for litigation lack the indicia of reliability necessary to invoke the business records exception to the hearsay rule.]

● Perkins v. Alabama, 2004 WL 923506 (Ala. Crim. App.) [Autopsy report was prepared by medical examiner who had retired. Court held that autopsy report was business record. Other personnel from Alabama's Department of Forensic Sciences gave testimony at trial as to conclusions and opinions based on retired medical examiner's report. The retiring doctor's report was non-testimonial and the admission of other personnel's statements were not violative of Confrontation Clause.]

● U.S. v. Gaines, 2004 WL 1543163 (6th Cir.) [Lab tests were performed to determine that material discovered in defendant's residence was crack cocaine. Examiner who performed the tests was unavailable for trial due to a death in her family. Another examiner's testimony regarding the labs tests did not deny defendant's right to confrontation

because defendant had opportunity to cross-examine the testifying examiner and “that is all the Confrontation Clause requires.”]

● Barela v. Texas, 2004 WL 2192604 (Tex. App. -El Paso,)

[Defendant appealed from a conviction of aggravated robbery, claiming that Sixth Amendment rights were violated when trial court admitted, during the punishment phase, copies of the indictment, the stipulated guilty plea, the change of plea order, the order that defendant failed to appear for sentencing and judgment, and the bench warrant for his arrest for failure to appear. Court found exhibits to be non-testimonial, and ruled that because the documents fell within the public records expression, all documents were admissible.]

9. Sex Offender Risk Assessment Proceeding

● People v. Brown, 2004 WL 1949042 (County Ct. Warren Co.) [The

victim’s statements made to a probation officer in preparation of the defendant’s pre-sentence investigation report were not testimonial. These statements were not made to a police officer in preparation for a criminal trial or in support of a conviction. The statements were made after the defendant’s trial and conviction. Neither the victim nor the probation officer had any incentive to exaggerate the allegations to secure a conviction. The court did not hold that a SORA hearing triggers Confrontation Clause protection. The court acknowledged that a SORA hearing may be merely a ministerial classification and not a trial; its purpose may be administrative and ministerial and not punitive (see, People v. Clark, 261 AD2d 87). The court nonetheless applied the rule in Crawford because it involved a fundamental constitutional right. Courts generally first determine whether the right attaches at all.]

● United States v. Gutierrez-Gonzales, 2004 WL 2294569 (5th Cir.)

[In a defendant’s appeal from conviction for being a previously deported alien found in the United States without permission of the Attorney General after having been earlier convicted of an aggravated felony and removed from the country, defendant claimed that the introduction of his immigration file into evidence violated his right to confrontation. The court found the items to be non-testimonial and ruled that because business records are non-testimonial by nature, they therefore do not “run afoul of Crawford.”]

B. Statements deemed testimonial:

1. Statement or guilty plea of co-defendant/accomplice:

● Hale v. Texas, 139 S.W. 3d 418 (Ct of Appeals of Tex, Ft. Worth)

[Written inculpatory statement of co-defendant/accomplice taken by police officers in the course of their investigation are “testimonial” for purpose of Confrontation Clause analysis. Such statement is inadmissible in prosecution against defendant, where accomplice swore by affidavit that he would assert his right not to testify at defendant’s trial and defendant had no prior opportunity to cross-examine accomplice concerning the statement.]

● United States v. Massino, 319 F. Supp. 2d 295 (E.D.N.Y. 2004)

[Guilty pleas of co-defendants in RICO trial are testimonial statements, inadmissible against the defendant unless there is an opportunity to confront/cross-examine co-defendants.] See also, Ohio v. Allen, 2004 WL 1353169 (Ohio Ct. App.); United States v. McClain, 377 F.3d 219 (2nd Cir. N.Y. 2004) [Ruling that guilty plea allocutions of co-conspirator’s were testimonial, but upholding conviction because admission was harmless error in light of overwhelming evidence.]

● People v. Woods, 9 A.D. 3d 293 (N.Y. App. Div. 2004) [Where co-defendant invoked his Fifth Amendment right not to testify, co-defendant's plea allocutions identifying his accomplices as "A and B" and admitting guilt to the crime of robbery in the first degree, was improperly admitted at defendant's trial.]

2. Co-Conspirator's Statement

● United States v. Saner, 313 F. Supp.2d 896 (S.D. Ind.2004)
[Statement by competitor in criminal anti-trust trial of bookseller alleged to have conspired with defendant to fix prices made to Justice Department Attorney tending to show existence of conspiracy is inadmissible when competitor is unavailable to testify at trial due to invocation of his Fifth Amendment right against self incrimination. Although competitor was not in custody at time of statements, the term interrogation as used in the colloquial sense in Crawford, not in the narrow technical legal sense as in Miranda v. Arizona. The involvement of the prosecutor in the procuring of the *ex parte* statement from the competitor "with an eye toward trial" presents the risk of prosecutorial abuse that the Supreme Court highlighted in Crawford. Such statements must also be testimonial.]

3. 911 calls reporting crimes to police officers/law enforcement personnel:

● People v. Cortes, 4 Misc.3d 575 (Sup. Ct. Bx. Co. 2004)
[Unidentified male observer of purported perpetrator of shooting and attempted murder could not be located by prosecution for trial. The 911 operator asked the caller about the shooter's location, description, and direction of movement, all necessary for the police to conduct their investigation. The court held this call came within the definition of interrogation. Also, 911 statements are formal as the operator follows established procedures, rules, and patterns for information collection. Callers reporting crimes to 911 are likely to know the use to which the information will be put. 911 calls reporting crimes when done for the purpose of invoking police action and the prosecutorial process are subject to Confrontation Clause scrutiny. The court held when a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is investigation, prosecution and potential use at a judicial proceeding. The court concluded that the call is testimonial. Ponder: Can one consider statements which are observations made at the time a crime is being committed (or before its completion) tantamount to police interrogation or investigation? Is it material that the statement was given by a witness rather than a victim?]

● People v. Issac, 2004 WL 1389219 (District Ct Nassau Co.)
[Similarly rejected admission of a 911 call when the call did not constitute an excited utterance.]

● Washington v. Powers, 2004 WL 2436343 (Wash. App. Div. 2) [Useful analysis of dichotomy of plea for help versus testimonial statements. Court rejects bright line test and instead suggests a case by case assessment. The court found the statements made in the 911 call to be testimonial as the complainant called to report a violation of an existing protective order, rather than a request for help. The statement was not part of the criminal incident itself.]

4. Excited Utterances made to Law Enforcement:

● Lopez v. Florida, 2004 WL 2600408 (Fla App. 1 Dist. 2004) [A statement which is an excited utterance may still be testimonial when it was made in response to a police question asking what had happened at the scene of the crime. Court differentiates between excited utterances made to civilians and those made to a person in authority for the purpose of

accusing someone which may constitute “bearing testimony” (even though it is not the result of interrogation).. “A startled person who identifies a suspect in a statement to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect. In this situation, the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made.”

5. Child’s statements:

- Snowden v. Maryland, 846 A.2d 36, 44 (Md. App. 2004)

[Statements of children given by social worker at trial were testimonial. The children were interviewed for the expressed purpose of developing their testimony under the relevant Maryland statute that provides for the testimony of certain persons in lieu of a child, in a child sexual abuse case. Appellant is entitled to new trial where the state will be prohibited from introducing any testimonial hearsay declaration of a person who is unavailable to testify and where the defendant did not have an opportunity to cross-examine the unavailable declarant.]

- In Re T.T., 815 N.E.2d 789 (Ill. App. 1st Dist. 2004) [Similarly, an Illinois statute permitting the admission of an out of court statement made by a child victim who is unable to testify in a sexual abuse case held to be violative of defendant’s confrontation right under Crawford].

- People v. Vigil, 2004 WL 1352647 (Colo. Ct of Appeals)

[Defendant was convicted of sexually assaulting a seven-year-old son of a co-worker. A police officer interviewed the child about the incident, and portions of the videotaped interview were shown to the jury. The child, who had been ruled incompetent, did not testify. The conviction was reversed. The defendant’s constitutional right to confront witnesses was violated.]

- People v. Warner, 14 Cal. Rptr. 3d 419 (Cal. Ct. App. 2004)[Three-year-old girl told mother that her stepfather touched her vagina. The mother called Child Protective Services who had the minor interviewed by a multi-disciplinary interviewer center (MDIC) specialist. The interview was admitted at trial. The appellate court found the interview to be a testimonial statement. Although the MDIC interview was not intended solely as an investigative tool for criminal prosecutions (interview is designed to reduce trauma to the child and to ensure that children in need of services are identified and referred appropriately), that is one of its purposes. A detective observed the interview and it was reasonably expected that the interview would be used prosecutorially at trial. The MDIC interview is similar to police interrogation.]

6. Girlfriend as complainant:

- People v. Zarazua, 2004 WL 837914 (Cal. App. 6 Dist.)

[Videotaped interview taken by police of victim who was allegedly raped by her boyfriend was inadmissible under Crawford v. Washinton when the girlfriend was unavailable to testify at trial and defendant had no prior opportunity to cross-examine girlfriend. “[A]n accuser who makes a formal statement to government officials bears testimony in a sense that a person who makes a casual statement to an acquaintance does not.” Citing Crawford.]

- Moody v. Georgia, 594 S.E.2d 350, 354 (Ga. 2004) [A police officer testified at defendant’s murder trial about what the decedent/girlfriend had told him on a prior occasion after defendant shot into the decedent’s bedroom where she was sleeping. This statement was admitted at defendant’s murder trial under Georgia’s necessity exception to the bar of hearsay testimony. As defendant had no prior opportunity to cross-examine as to the prior

incident, such statement ran afoul of the Supreme Court's ruling in Crawford v. Washington. The court implicitly found that the prior statement to the police officer was testimonial. Conviction was upheld, however, as the admission of such statement was harmless error. There was no reasonable possibility that statement contributed to defendant's conviction. As to harmless error analysis, see also, People v. McBee, 778 N.Y.S.2d 287 (N.Y. App. Div. 2004).]

● Bell v. Georgia, 597 S.E. 2d 350 (Ga. 2004) [Supreme Court of Georgia held that the trial court erred when it admitted out-of-court statements that victim/decedent/wife made to police officers during the course of the officers' investigations of complaints made by the victim against her estranged husband. These out-of-court statements are considered to be testimonial in nature, and were inadmissible since the victim was unavailable to testify at trial and the defendant did not have a prior opportunity to cross-examine the victim about these statements. However, given the strength of the evidence presented at trial, the error was harmless. Note the contrast in the court's ruling: The court upheld the trial court's admission of statements, pursuant to Georgia's necessity exception to the hearsay rule, made to two relatives and to a witness who was the victim's best friend for a decade.]

7. Affidavits:

● Las Vegas v. Walsh, 91 P.3d 591 (Nev. 2004) [An affidavit by a health care professional who withdraws a sample of blood from another for analysis by an expert was admissible pursuant to Nevada statute to prove certain facts at trial such as the occupation of declarant, identity of person from whom the declarant withdrew the sample, chain of custody as to declarant's possession of sample, and identity of person to whom declarant delivered sample. The Supreme Court of Nevada held that a nurse's affidavit pursuant to the statute is testimonial and can only be admitted if the nurse is unavailable to testify and the defendant had a prior opportunity to cross-examine the nurse regarding the statements in the affidavit.]

8. Statements about Alienage/Nationality:

● United States v. Gonzalez-Marichal, 317 F. Supp. 2d 1200 (S.D. Cal. 2004) [Defendant had been charged in a two count indictment with transportation of illegal aliens in violation of federal law. One of the elements that must be proven beyond a reasonable doubt is that the defendant transported an illegal alien within the U.S. A custodial statement by the alleged illegal alien regarding her alienage is material and goes to the heart of the government's case because it proves an element of the offense. While a custodial statement of nationality may be neutral and non-incriminating in the abstract, as applied to the defendant's case, the nationality of the material witness may well determine whether the defendant is incarcerated or released from custody. The District Court rejected the government's reasoning that statements about nationality are not core testimonial statements for Confrontation Clause purposes. For defendant, an untested testimonial statement as to nationality is no less incriminating than a statement that defendant transported a person within the U. S.]

9. Statement to Confidential Informant:

● United States v. Hendricks, 2004 WL 1125146 (D. Virgin Islands) [A recording may provide a sufficient indicia of reliability in terms of the actual words spoken by a witness or defendant. Yet, they do not necessarily provide a reliable context. The District Court rejected the government's contention that recordings are more akin to a photograph, gun, or other real evidence. If recorded statements, even consensual ones as here between defendant and the

governmental informant, are entered into evidence against a defendant who does not have the opportunity to cross-examine the declarant as to what those statements meant, in what context those statements were made, to whom those statements were directed, and what was going on at the time the statements were made, then the defendant's rights to confront has been extinguished. Note: This Court is the first court in the Third Circuit to so hold. The First, Fifth and Eleventh Circuits have held that Title III tape recordings are real evidence and therefore not testimonial.]

10. Reports:

● People v. Rogers, 8 AD3d 888 (1st Dept. 2004) [The court sanctioned the admission of the victim's hospital records. "Although statements made by the victim to the medical personnel were hearsay, such records are admissible under the business records exception, as long as they are germane to the patient's subsequent medical treatment and diagnosis." In contrast, a report giving the results of test for the victim's blood was improperly admitted as a business record. The report here was requested by and prepared for law enforcement for the purpose of prosecution. Although the report was generated by a private lab that conducted the tests and such tests by outside labs are regularly relied upon by the State Police because they do not perform such testing themselves, papers or reports from other entities do not qualify as business records merely because they are regularly filed with the State Police's records. Documents prepared for litigation lack the indicia of reliability necessary to invoke the business records exception to the hearsay rule.]

C. Other Relevant Issues:

1. Implication of Defendant's Rights Under the Confrontation Clause

● Roy v. Coplan, 2004 WL 603412(D. N. H.) [Defendant in a murder case maintained that his Sixth Amendment right to confront witnesses was denied when his trial counsel and the prosecutor referred to a statement of a non-testifying accomplice. The accomplice who was charged with helping the defendant bury the decedent, but not tried with him, invoked his Fifth Amendment privilege. The statement was never read to the jury. The District Court held that a defendant's rights under the Confrontation Clause are implicated when an accomplice's confession, which is used at trial, is directly and powerfully incriminating. To the extent any inferences might have been drawn from the statements made about the accomplice's admissions, any such inferences were not sufficiently incriminating of defendant to raise a Confrontation Clause issue.]

● People v. Brown, 322 F. Supp. 2d 101 (D. Mass. 2004) [Right of confrontation applies only to trials, not to hearings and is therefore inapplicable to probable cause hearings.]

● In re CM v. Maxwell, 815 N.E.2d 49 (Ill. App. 4 Dist. 2004) [Holding that the *Crawford* holding is inapplicable to an abuse/neglect proceeding under Illinois' Juvenile Court Act as it is a civil proceeding not subject to the Sixth Amendment right to confront witnesses.]

● United States v. Barraza, 318 F.Supp.2d 1031 (S.D. Cal. 2004) [Defendant was charged with violation of conditions of his unsupervised release. Hearsay testimony by defendant's wife was offered by the government to show violation. Confrontation Clause had no application to use of testimonial statements of unavailable witness in revocation proceeding.]

● People v. Johnson, 18 Cal. Rptr. 3d 230 (Cal. App. 1 Dist. 2004) [Held that Crawford does not apply to probation revocation hearings because “Crawford’s holding is based squarely on the Sixth Amendment right to confront witnesses,” and the proceedings are not “‘criminal prosecutions’ to which the Sixth Amendment applies.” The court does state, however, that Sixth Amendment cases may provide helpful examples to determine the right of confrontation held by probationers under the due process clause.]

● United States v. Jarvis, 2004 WL 603466 (9th Cir.) [At revocation of supervised release proceedings, the releasee must be afforded the right to confront and to cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation.]

● United States v. Holder, 2004 WL 2091776 (5th Cir. Tex 2004) [There is no right to confrontation at a sentencing proceeding. Nothing in Crawford indicates that its holding is applicable to sentencing proceedings.]

2. Statement Sought to be Admitted for Reasons Other Than Its Truth

a. Background evidence to complete the narrative:

● People v. Newland, 6 AD3d 330, 775 NYS2d 308 (1st Dept. 2004) [A police officer testified briefly that while canvassing for possible witnesses to a burglary, he spoke to a person who was not a witness to the crime. As a result of the conversation, the officer searched a shopping cart left outside the burglarized premises and found papers bearing the defendant’s name. Even assuming that this testimony conveyed an implicit assertion by a non-testifying declarant, it was not received for its truth but as background evidence to complete the narrative of events and to explain why the officer looked into the cart. Furthermore, this evidence did not violate defendant’s right of confrontation. The principal evil at which the Confrontation Clause was directed was the civil law mode of criminal procedure and particularly its use of ex parte examinations as evidence against the accused. The Confrontation Clause was not directed at hearsay in general, but at testimonial statements which include, *inter alia*, “interrogations by law enforcement officers.” The court concluded that a brief informal remark to an officer conducting a field investigation, was not in response to ‘structured questioning,’ should not be considered testimonial since it “bears little resemblance to the civil-law abuses the Confrontation Clause targeted.” The court further held that even if the challenged evidence were a testimonial statement, it would find no Constitutional violation since the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” The evidence was relevant for purposes other than establishing its truth, and there was no danger that the jury, which was made aware that the declarant did not witness the burglary, would treat this evidence as an accusation of a non-testifying witness.] In accord, People v. Nunez, 776 N.Y.S.2d 551 (1st Dept. 2004) .

b. Statements of victim’s Intent, Plans and State of Mind

● People v. Reynoso, 2 N.Y. 3d 820 (N.Y. 2004) [The People were allowed to elicit a statement that a non-testifying declarant had made to a detective. The statement was admitted not to establish the truth of the matter asserted, but rather to show the detective’s state of mind.]

c. Expert Testimony:

● United States v. Stone, 2004 WL 1533903 (E.D. Tenn.) [Court

ruled that an Internal Revenue Service Officer could testify during a tax fraud trial, and rely upon statements made to her by employees of the company where the defendants worked. The employees would not be testifying, but were not unavailable. The court ruled that the IRS officer could use the statements in formulating her expert opinion, even if the statements were testimonial under Crawford, and even if the company's attorney did not have an opportunity to cross-examine the employees, due to the fact that the statements "would not be used to establish the truth of the matters the employees asserted."]

d. Prompt Outcry:

- People v. Romero, 2004 WL 1802044 (N.Y. Crim Ct. Bronx Co.)

[Doctrine of "prompt outcry" (or "fresh complaint") permits the prosecution in a sex crime case to show that the victim promptly reported the crime to another person. Such testimony is admitted not in order to directly prove that the sex crime was in fact committed; rather, the evidence is admitted for the limited purpose of evaluating the victim's credibility. In New York, testimony may only be admitted when declarant/victim testifies at trial. Therefore, there is no Confrontation Clause issue.]

3. Unavailability of Declarant

a. Declarant deemed available:

- People v. Sejas, 9 Cal Rptr.3d 826, 830 (Cal. App. 2d Dist.2004)

[Trial court erroneously permitted witness to invoke privilege against self incrimination when witness had no reasonable fear of prosecution for "lying to the police." Cross-examination at a prior hearing does not satisfy the confrontation requirement where the witness is available. Rather, the *sine qua non* to the use of former testimony is the unavailability of the declarant.]"

b. Declarant testifies at trial is available:

- People v. Martin, 2004 WL 605440 (Cal App.) [In a sexual abuse trial, a videotaped interview of a child was admitted. The child-declarant was available for cross-examination at trial. Thus the Confrontation Clause places no restraints on the use of the child's prior testimonial statements.]

- Washington v. Mc Clanahan, 120 Wash. App. 1065 (Wash. Ct. App. 2004) [A child who is competent to testify and who testifies concerning the act of abuse, but whose memory may be imperfect as to the out of court declaration, is not "unavailable" as a witness for the purpose of the Confrontation Clause. Thus, the child's hearsay statements made to her mother, teacher, and the child's interview specialist were properly admitted, and child was subject to cross-examination concerning her out of court declaration.]

- Illinois v. Martinez, 810 N.E. 2d 199 (Ill. App. Ct. 2004) [A trial witness readily admitted that she could not remember all of the details of the incident to the extent she could on the night she was questioned by the police. Although she implicated the defendant both at trial and in her statement, the trial court found that her genuine lack of recollection on germane matters bolstered her credibility. The witness' limited recall rendered her in court testimony inconsistent with her written statement. Inconsistent statements under Illinois case law are not limited to contradictions, but also include evasive answers, silence, or changes in position. The appellate court held that the trial court did not err in admitting the witness's written statement as admissible hearsay under Illinois law where her in-court testimony was inconsistent with her prior statement and where defendant was given the opportunity to challenge the witness' credibility

through cross-examination. The written statement was clearly testimonial. Finding the statement admissible, the appellate court quoted Crawford: “[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. It is therefore irrelevant that the reliability of some of out of court statements ‘cannot be replicated, even if the declarant testifies to the same matters in court’. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.”(citations omitted)(Query: What about rule against impeaching one’s own witness {with very limited exceptions}?)

● Cooley v. Maryland, 849 A.2d 1026 (Md. Ct. Spec. App. 2004)

[Witness at murder trial testified that defendant did not commit the crime. The Confrontation Clause does not prohibit the jury from convicting defendant on the basis of the witness’ prior written and/or recorded statement in which the witness stated that the defendant did commit the crime. The decision in Crawford v. Washington has no effect upon the admissibility of the witness’ out of court statement because Crawford did not overrule the unbroken line of cases holding that the Confrontation Clause does not operate to exclude pretrial statements made by a witness who actually testifies at trial.]

● United States v. Wilmore, 381 F.3d 868 (9th Cir. Nev. 2004) [Trial court restricted defense counsel’s cross-examination of witness as to her grand jury testimony. The grand jury testimony was admitted to impeach the witness’ trial testimony. The witness invoked her Fifth Amendment right in response to whether she lied before the grand jury. The appeals court ruled that the witness was in fact unavailable as to her grand jury testimony and the defendant was not afforded an opportunity to cross-examine her.]

● Maine v. Gorman, 854 A.2d 1164 (Me. 2004) [The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. Mother testified during grand jury proceedings that her defendant son had confessed a murder to her. The audiotape of grand jury proceedings was admitted pursuant to the recorded recollection exception to the hearsay rule. Court ruled that this was not a violation of defendant’s Sixth Amendment right. The mother’s lack of memory of the confession and history of delusional thoughts did not make her constitutionally unavailable, as she was still available for cross-examination at trial.]

4. Opportunity to Confront/Cross-Examine Declarant:

● Clark v. Indiana, 808 N.E.2d 1183 (Ind. 2004) [Admission of testimonial out of court statement at trial was not error where declarant was witness at trial and defendant had opportunity to cross-examine witness even though he chose not to do so. The Supreme Court in Crawford “specifically noted that its holding does not alter the rule that ‘when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.’”]

● Liggins v. Graves, 2004 WL 729111(S. D. Iowa) [In a *habeas corpus* proceeding, the U. S. District Court upheld the Iowa Supreme Court’s ruling that allowed the deposition of a person unavailable to testify by reason of mental infirmity. Although defendant did not cross-examine potential witness/declarant at deposition, defendant was present at deposition and his counsel both had the opportunity and motive to cross-examine declarant at deposition.]

● Washington v. Sherman, 121 Wash. App. 1062 (Wash. Ct. App. 2004) [*Pro se* defendant was convicted at first trial of first degree assault. Appellate court reversed the conviction and ordered a new trial because the defendant's waiver of his right to counsel was not a valid one. At the first trial, defendant cross-examined a witness for the prosecution who was unavailable at the retrial. Defendant was once again convicted. On appeal, defendant contended that his right to confrontation was violated by the admission of the witness' first trial testimony. The appellate court affirmed the defendant's conviction finding that the trial court did not abuse its discretion in allowing the witness' first trial testimony to be introduced at the second trial. "The confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is necessarily effective in whatever way, and to whatever extent, the defense might wish." Citing Mancusi v. Stubbs, 408 U.S. 204 (1972), the Washington appellate court held that "the introduction of former testimony was proper because there was adequate opportunity to cross-examine the witness at the first trial, there was no evidence that the cross-examination in the first trial was constitutionally deficient, and there was no indication that counsel in the second trial would have touched on any new material line of questioning not addressed at the first trial."]

● People v. Fry, 92 P.3d 970 (Colo. 2004) [Preliminary hearings in Colorado do not provide enough opportunity for cross-examination to satisfy the Confrontation Clause requirements under Crawford.]

● People v. Price, 15 Cal. Rptr. 3d 229 (Cal. Ct. App. 2004) [Defendant had enough opportunity to cross-examine the victim at the preliminary hearing for the hearsay testimony to be properly admitted at trial.]

● United States v. Wilmore, 381 F.3d 868 (9th Cir. Nev. 2004) [Court's limitation on cross-examination effectively made wife an unavailable witness as to her grand jury testimony.]

5. Forfeiture of Right to Confrontation:

● Minnesota v. Fields, 679 N.W.2d 341 (Minn. 2004) [Defendant, while in jail, made threatening phone calls to various witnesses. One witness who was threatened testified briefly at trial, but refused to continue, stating that he feared reprisals. After hearing evidence that was highly suggestive of threats and intimidating overtures directed toward the witness by the defendant, the trial court concluded that the witness' grand jury testimony which was clearly hearsay was admissible under Minnesota statute. The Supreme Court of Minnesota held that "if a witness is unavailable because of the defendant's own wrongful procurement, 'he is in no condition to assert that his constitutional rights have been violated.' Crawford recognized that the rule of forfeiture is still valid. '[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims essentially on equitable grounds; it does not purport to be an alternative means of determining reliability.'" The trial court's findings that the defendant engaged in wrongful conduct, that he intended to procure the unavailability of the witness and that the intentional wrongful conduct actually did procure the unavailability of the witness was supported by the record.]

● Kansas v. Meeks, 88 P.3d 789 (Kan. 2004) [Found that a murder defendant forfeited his right of confrontation and waived any hearsay objections with respect to statement of victim police officer in presence of four others that defendant had shot him]

6. Retroactivity:

● People v. Carrieri, 3 Misc.3d 870 (Sup. Ct. Queens Co. 2004) [A decision of the Supreme Court is given retroactive effect in criminal cases when it affects the fact or truth finding process itself, i.e., the determination of guilt or innocence and as such is constitutional in nature. Plea allocutions of co-defendants as declarations against penal interest are inadmissible under Crawford v. Washington as they are testimonial in nature and defendant had no opportunity to cross-examine co-defendants.]

● See generally, Griffith v. Kentucky, 479 U.S. 314,338 (1987) [Supreme Court held that “a new rule is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.”]

● Teague v. Lane, 489 U.S. 288, 109 (1989) [General rule that new constitutional rules of criminal procedure enumerated in a Supreme Court decision are not applied retroactively to cases that have become final.]; See also, New York v. Eastman, 85 N.Y.2d 265 (Court of Appeals of New York, 1995).

● People v. Khan, 2004 WL 1463027 (Sup. Ct. Queens Co). [Teague v. Lane is to be applied on a case by case basis.] but cf. People v. Watson.

● Wheeler v. Dretke, 2004 WL 1532178 (N.D. Tex); State v. Edwards, 2004 WL 1575250 (Colo. Ct. App.). [Crawford holding does not fall within either of the two exceptions to the Teague v. Lane retroactivity doctrine: “(1) if the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe; or (2) if the new rule is a “watershed” rule without which alters the “understanding of the bedrock procedural elements” essential to the fairness of a proceeding.] See also Garcia v. United States 2004 WL 1752588 (N.D.N.Y).

● People v. Watson, 2004 WL 2567124 (Sup. Ct New York Co. 2004) [Determining that Crawford does apply retroactively on collateral review, under the Teague v. Lane analysis. Under Teague, a watershed rule of criminal procedure which is implicit in the concept of ordered liberty must be applied retroactively. The court found the Sixth Amendment’s Confrontational Clause to be a “bedrock procedural guarantee,” despite the fact that lower federal courts have rejected Crawford’s retroactivity on collateral review based on their determination that the rule is not considered a watershed rule because subject to harmless error analysis. Court also stated that it was bound to apply New York Court of Appeals case, Eastman which did find a new rule which alters the Sixth Amendment right to confront witnesses to be a bedrock element on criminal procedure, even if violation of rule is subject to harmless error analysis. The court therefore applied, Crawford, but found that because even without admission of the statement subsequently deemed testimonial, defendant’s guilt would have been establish beyond a reasonable doubt and therefore denied defendant a new trial.]