Cases interpreting Crawford -v- Washington

Allie Phillips
Senior Attorney
American Prosecutor’s Research Institute
National Center for Prosecution of Child Abuse
National Child Protection Training Center
99 Canal Center Plaza, Suite 510
Alexandria, VA 22314
703.518.4385
allie.phillips@ndaa-apri.org

This material is not to be disseminated or utilized, except to other prosecutors or allied professionals, without express written permission from the American Prosecutors Research Institute. It is not to be posted on public websites. Please contact the author for permission.

Cases cited in this outline were found through LexisNexis beginning with the Crawford decision on March 8, 2004 through the publishing of this outline on October 14, 2005. There are 1575 cases citing Crawford to date. However, not all post-Crawford cases are listed in this outline, but all cases citing major propositions are listed. This outline is updated monthly and new cases are highlighted in red.

To receive an email copy and continuing monthly updates of this outline, please email the author at the email address above.

“But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”

-- Justice Benjamin N. Cardozo
Snyder v Massachusetts, 291 US 97 (1934)
TABLE OF CONTENTS

CRAWFORD VS WASHINGTON .................................................................................................................. - 4 -

RETROACTIVITY ......................................................................................................................................... - 4 -
PRESERVATION OF CONFRONTATION ISSUES ......................................................................................... - 5 -

WHAT ARE TESTIMONIAL STATEMENTS? .............................................................................................. - 6 -

POLICE OFFICERS/GOVERNMENT AGENTS .................................................................................................. - 6 -
AFFIDAVITS/DEPOSITIONS .......................................................................................................................... - 8 -
IN-COURT TESTIMONY .................................................................................................................................. - 9 -
GRAND JURY TESTIMONY ............................................................................................................................ - 10 -
Plea ALLOCATIONS/CO-DEFENDANT CONFESSIONS/PRE-TEXT CALLS ..................................................... - 10 -
STATEMENTS OF CONFIDENTIAL INFORMANTS ....................................................................................... - 12 -
OBJECTIVE REASONABLE PERSON STANDARD .......................................................................................... - 12 -

TWO WAYS TO ANALYZE CRAWFORD ..................................................................................................... - 13 -

NOT TESTIMONIAL ......................................................................................................................................... - 13 -
OPPORTUNITY TO CROSS-EXAMINE ........................................................................................................... - 15 -
PRIOR OPPORTUNITY TO CROSS-EXAMINE (SEE ALSO FORMER TESTIMONY EXCEPTION) ...................... - 15 -
UNAVAILABILITY OF WITNESS .................................................................................................................... - 18 -
WITNESS TESTIFIES: LOSS OF MEMORY/FREEZES ON THE STAND/REFUSES TO ANSWER (ALSO SEE SECTION UNDER CHILD ABUSE) .............................................................................................................. - 19 -

CRAWFORD IS GENERALLY NOT APPLICABLE IN THESE SITUATIONS (PLEASE CONSULT YOUR STATE LAW ON 6TH AMENDMENT APPLICATION TO THESE PROCEEDINGS): .......... - 20 -

WITNESS TESTIFIES (TOO MANY CASES TO LIST) ..................................................................................... - 21 -
Preliminary HEARINGS .................................................................................................................................. - 21 -
CIVIL PROCEEDINGS/DEPENDENCY PROCEEDINGS .................................................................................. - 22 -
PROBATION REVOCATION HEARINGS ......................................................................................................... - 23 -
PAROLE REVOCATION HEARINGS – SPLIT OF AUTHORITY ......................................................................... - 24 -
SENTENCING HEARINGS .............................................................................................................................. - 24 -
RESTITUTION HEARINGS ............................................................................................................................... - 25 -
PRE-TRIAL SUPPRESSION HEARINGS .......................................................................................................... - 25 -
NON-HEARSAY STATEMENTS/STATEMENTS NOT FOR THE TRUTH OF MATTER ASSERTED ..................... - 25 -
STATEMENTS MADE BY DEFENDANT ......................................................................................................... - 27 -
WITNESS TESTIMONY OFFERED BY DEFENDANT ..................................................................................... - 27 -
EXCULpatory HEARST STATEMENTS ............................................................................................................. - 28 -
CLOSED-CIRCUIT TV TESTIMONY ................................................................................................................ - 29 -
EXPERT WITNESS OPINIONS (SEE ALSO UNDER DRUNK DRIVING/SUBSTANCE ABUSE CASES) ............... - 29 -

FIRMLY-ROOTED HEARSAY EXCEPTIONS NOT IMPACTED BY CRAWFORD YET .......... - 30 -

PRIOR STATEMENT OF WITNESS ................................................................................................................. - 30 -
STATEMENT/ADMISSION BY PARTY OPPONENT ........................................................................................ - 31 -
Co-CONSPIRATOR STATEMENTS IN FURTHERANCE OF CONSPIRACY ........................................................... - 32 -
PRESENT SENSE IMPRESSIONS ................................................................................................................... - 33 -
EXCITED UTTERANCES & 911 TAPES .......................................................................................................... - 34 -
STATE OF MIND ............................................................................................................................................... - 47 -
MEDICAL DIAGNOSIS/TREATMENT ............................................................................................................. - 49 -
RECORDED RECOLLECTION ....................................................................................................................... - 52 -
BUSINESS RECORDS ....................................................................................................................................... - 52 -
FORMER TESTIMONY (SEE ALSO PRIOR OPPORTUNITY TO CROSS EXAMINE) .................................................. - 54 -
DYING DECLARATIONS .................................................................................................................................... - 54 -
STATEMENTS AGAINST PENAL INTERESTS ................................................................................................. - 55 -

FORFEITURE OF CONFRONTATION RIGHT .............................................................................................. - 57 -
Crawford vs Washington

- U.S. Supreme Court decision on 3-8-04
- Appeals to the Washington Court of Appeals and Washington Supreme Court addressed the reliability and trustworthiness of admitting Mrs. Crawford’s taped statements to police (pursuant to Evidence rule 804(b)(3))
- U.S. Supreme Court only addressed Confrontation Clause issue rather than reliability issues
- The New Rule: “Testimonial” statements no longer admissible unless witness takes the stand and is subject to cross-examination
  - Testimonial not defined
  - Government agent and objective reasonable person standard used
- May impact some firmly rooted hearsay exceptions
- Retroactive for pending cases

Retroactivity

The new rule announced in Crawford does not apply retroactively on collateral attack. Crawford only applies to new cases or cases that were pending on direct review/appeal when Crawford was issued. See these cases for support:

- Bintz v. Bertrand, 403 F.3d 859 (7th Cir. Wis 2005)
- Dorchy v. Jones, 398 F.3d 783 (6th Cir MI 2005)
- Murillo v. Frank, 316 F. Supp. 2d 744 (E.D. Wis. 2004)
Elias v. LaMarque, 2005 U.S. Dist. LEXIS 21267 (N.D. Cal. 2005) – “Although petitioner's conviction became final almost five months before Crawford was decided, the Ninth Circuit has held that Crawford applies retroactively to collateral attacks on state court decisions. See Bockting v. Bayer, 399 F.3d 1010, 1015-1016 (9th Cir. 2005). Consequently, petitioner's claim must be reviewed de novo under Crawford.”

Zamora v. Adams, 2005 U.S. App. LEXIS 20128 (9th Cir. Cal. 2005) - Followed Bockting v Bayer and allowed relief on a habeas petition for Crawford violations after state appeals had been exhausted.

Bartelho v. United States, 2005 U.S. Dist. LEXIS 6046 (D. Me. 2005) – “The question of whether Crawford applies retroactively to cases on collateral review is an interesting one. Compare Mungo v. Duncan, 393 F.3d 327, 335-36 (2d Cir. 2004) (no) with Bockting v. Bayer, 399 F.3d 1010, 1014, 2005 WL 406284, *1-2 (9th Cir. 2005) (yes). However, it is clear that in order to legitimately raise Crawford in a second or successive § 2255 motion, Crawford must first be "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(2)(A).”

Bockting v. Bayer, 2005 U.S. App. LEXIS 9973 (9th Cir Nev 2005 – amended opinion) – The statements of a six year old child victim were admitted at trial without her testimony. The defendant was convicted and the defendant appealed to the Nevada Supreme Court, which dismissed his claims. The United States Supreme Court later vacated the Nevada Supreme Court's decision, remanding for consideration in light of Idaho v. Wright. In 1993, the Nevada Supreme Court affirmed the conviction. The defendant filed a second petition for post-conviction relief, which the state district court denied in 1994. Three years later, the Nevada Supreme Court again dismissed the appeal. The defendant then sought relief in federal court. He timely filed a habeas petition in 1998, which he amended in 2000. The district court denied the petition, and Bockting filed the present appeal. The court held that Crawford was retroactive as it announced a new rule.

Preservation of Confrontation Issues
If a defendant fails to object and preserve a confrontation issue at trial, he cannot then later complain of a Crawford violation. A general objection will not suffice on appeal.

What are testimonial statements?
- Testimony is a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Not casual remarks.
- The *Crawford* test:
  1. Government agent (was the government involved in creating the testimony?)
     - Statements to police officers or government agents
       - Custodial examinations
       - Interrogations (did not define)
     - Affidavits or depositions
     - In court testimony
       - At preliminary hearing
       - At trial
     - Testimony before grand jury
     - Plea allocutions, confessions and pretext calls of Co-Defendants
     - Statements of Confidential Informants
  2. Objective reasonable person standard (could the declarant reasonably expect the statement to later be used in court?)

**Police Officers/Government Agents**

*Mason v. State, 2005 Tex. App. LEXIS 5032 (Tex. App. 2005)* - “The appellate court found that the complainant's out-of-court oral statements [to a police officer responding to a 911 call] resulted from an "interrogation" within the meaning of the Sixth Amendment. Thus, the statements were testimonial. Moreover, even if the complainant's out-of-court oral statements were not in response to "interrogation," they were testimonial because they were statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

*People v. King, 2005 Colo. App. LEXIS 111 (Colo Ct of Ap 2005)* - “where, as here, a victim makes an excited utterance to a police officer, in a noncustodial setting and without indicia of formality, the statement is nontestimonial interrogation under *Crawford*.”

*People v. Lee, 124 Cal. App. 4th 483 (Cal App 2d Dist 2004)* – Tape recorded statements were taken of two eyewitnesses to the crime by police officers. Both witnesses were available for trial but did not appear or testify. Admitting the statements at trial violated *Crawford* because the officers were governmental agents.

*Richardson v. Newland, 342 F. Supp. 2d 900 (ED Cal 2004)* - Statements given to police officers by individuals who do not appear at trial are testimonial statements and require the witness to appear at trial and be subject to confrontation in order to admit the statement.

*United States v. Manfre, 368 F.3d 832 (8th Cir Ark 2004)* – "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."
Hiibel v. Sixth Judicial Dist. Court, 124 S.Ct. 2451 (2004) - “police questioning during a Terry stop qualifies as an interrogation, and it follows that responses to such questions are testimonial in nature.”

State v. Barnes, 2005 ME 105, 854 A.2d 208 (2004) – “Defendant argued that the admission of his mother's statements to a police officer following an earlier alleged assault constituted a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. Specifically, the issue was whether the statements were "testimonial" in nature. The state supreme court concluded that the admission of the statements did not violate the Confrontation Clause for several reasons. First, the police did not seek the mother out. She went to the police station on her own. Second, her statements were made when she was still under the stress of the alleged assault. Third, she was not responding to tactically structured police questioning, but was instead seeking safety and aid. The police were not questioning her regarding known criminal activity. Thus, the interaction between defendant's mother and the officer was not structured police interrogation triggering the cross-examination requirement of the Confrontation Clause. Nor did the victim's words in any other way constitute a "testimonial" statement. Therefore, it was not obvious error for the trial court to admit the officer's testimony.”

United States v. Saner, 313 F. Supp. 2d 896, 2004-1 Trade Cas. (CCH) P74362 (S.D. Ind. 2004) - “In response to the prosecutor's questioning, Vogel [who was not in custody] made ex parte statements incriminating himself and Saner, which a paralegal transcribed. The prosecution now seeks to use the statements at trial against both Defendants. In other words, Vogel will "bear testimony" against Saner at his criminal trial, and Saner did not have the prior opportunity to confront him. Vogel's responses to the prosecutor's questions were testimonial statements, and admission of the statements against Saner would violate his Confrontation Clause rights under the Sixth Amendment.”

United States v. Mikos, 2004 U.S. Dist. LEXIS 13650 (N.D. Ill. 2004) – Statements made to governmental agents, such as US Health & Human Services agents, are testimonial and must be subject to cross-examination.

State v. Lewis, 2004 N.C. App. LEXIS 1958 (NC Ct App 2004) - An elderly victim died of unrelated causes to the crime prior to trial and the prosecutor introduced the victim’s photo line up identification of the defendant and other statements made to police officers at trial. The conviction was reversed on appeal because the victim’s identification of the defendant and statements made to police officers were testimonial in nature and violated the right to cross-examine.

People v. Bryant, 2004 Mich. App. LEXIS 2244 - “The police officers who responded to the shooting found Covington laying on the ground, bleeding from the chest and stomach areas. He was moaning, in obvious physical pain, winded, and had a difficult time speaking. They asked him what happened and Covington responded that he had been shot by Rick at Rick's house, through the door, and he gave the location of Rick's house and a physical description of Rick. Covington was taken from the scene by ambulance and died at the hospital. The one question asked by the police - "what happened?" - does not constitute an
interrogation and there is no evidence of interrogation. Further, the statements were not any type of "ex parte in-court testimony or its functional equivalent."

**Affidavits/Depositions**

**People v. Pacer, 769 NYS 2d 787 (N.Y. App. Div. 4th Dept. 2005)** – An affidavit of regularity/proof of mailing sworn to by an employee of the New York State Department of Motor Vehicles was deemed testimonial. It was not established at trial that the employee was unavailable to testify, nor was it established that defendant previously had the opportunity to cross-examine her. The appeals court found that the affidavit did not qualify as a business record from a regularly conducted business activity because it related to the mailing of a driver's license revocation order in 1987, sworn to in 2003.

**Hammon v. State, 829 NE2d 444 (Ind. 2005)** – “The victim, defendant's wife, did not testify at trial, but had described defendant's violent conduct to arriving police officers. She memorialized the same account by affidavit. The trial court admitted her statements as excited utterances. Noting that after the decision in *Crawford*, admissibility under a hearsay exception did not end its inquiry, the court looked to whether the victim's statements were testimonial, in which case they should have been excluded as violative of the Confrontation Clause. The court held that the victim's purpose in making the statements could be considered, but that the officers' motivation in questioning was more important. Under that analysis, clearly, the initial statements were not gathered for future use at trial, but simply to find out what was going on. The affidavit was testimonial, as it was taken to preserve the victim's account.”

**United States v. Wittig, 2005 U.S. Dist. LEXIS 10067 (D Kan 2005)** - “This Court believes that witness affidavits in the form of [FRE] Rule 902(11) certifications fit within the Supreme Court's definition of testimonial statements.”

**United States v. Moffie, 2005 U.S. Dist. LEXIS 9462 (ND Ohio 2005)** – Defendants were indicted for bank fraud in 2004; however, in a prior recovery asset civil suit, one defendant testified at a deposition in 1999 concerning facts that are relevant to the indictment and was represented by counsel at that deposition. The prosecutor wanted to admit the civil suit deposition during the criminal trial, pursuant to 801(d)(2)(A), admission by a party-opponent. The court found significant precedent throughout the Circuits that prior civil deposition testimony is admissible as a party-admission in a subsequent criminal case. Thus, no *Crawford* issue to admit the deposition against that defendant; however, redactions would have to be made as to other defendants referenced in the deposition because that would violate *Crawford* and *Bruton* unless the defendant took the witness stand.

**State v. Ash, 611 SE2d 855 (NC Ct App 2005)** - Before admitting a videotaped deposition of a witness that was subject to cross-examination at the deposition, the court must first make a finding of unavailability. That finding did not occur in this case and, therefore, admission of the videotaped deposition (which was testimonial) was error.
Liggins v. Graves, 2004 U.S. Dist. LEXIS 4889 (S.D. Iowa 2004) – Depositions are testimonial statements. A witness who testifies at a deposition and has the opportunity to be cross-examined at the deposition (whether the cross examination occurs or not) satisfies Crawford in allowing that deposition transcript to be introduced at trial if the witness is unavailable.

Howard v. State, 816 N.E.2d 948 (Ind. 2004) - A pre-trial deposition of a witness, that permitted cross-examination by the defense, can be properly admitted at trial if the witness is unavailable.

In-Court Testimony
State v. Newell, 2005 Ohio 2848 (Ohio Ct. App. 2005) - “The appellate court held that admission of the victim's preliminary hearing testimony did not violate defendant's right to confrontation because he did cross-examine the victim at the preliminary hearing.”

State v. Hale, 2005 WI 7 (Wisc Sup Ct 2005) – “Defendant asserted that he was entitled to a new trial because the trial court improperly allowed into evidence the former testimony of an unavailable witness who had testified at the separate trial of defendant's codefendant. The court agreed with defendant that the testimony in question should not have been admitted into evidence. The evidence, which was testimonial in nature and was given by a witness who was not available to testify at defendant's trial, violated defendant's right to confrontation under U.S. Const. amend. VI and Wis. Const. art. I, § 7 because defendant did not have a prior opportunity to cross-examine the witness.”


People v. Ochoa, 121 Cal. App. 4th 1551; 18 Cal. Rptr. 3d 365 (Cal App 4th Dist 2004) - The victim of a rape testified at preliminary hearing and was subject to cross-examination. The victim was unavailable for trial and the prosecutor admitted statements that the victim to police officers investigating the case. The defendant objected because not all the statements made to police were cross-examined during the preliminary hearing. The court ruled that defense counsel’s failure to cross-examine the victim regarding all statements did not bar the police officers from providing that testimony at trial. No Crawford violation.

Primeaux v. State, 88 P.2d 893 (Okla. Crim. App. 2004) - “when a defendant is provided an opportunity to cross examine the witness and avails himself of that opportunity at a prior hearing, the confrontation clause is satisfied and a transcript of the prior hearing is admissible.”

People v. Rossbach, 2004 Mich. App. LEXIS 1350 (2004) - “Prior testimonial evidence is admissible if the witness is unavailable and the defendant had an opportunity to cross-examine the witness. Our review of the record indicates that Rossbach had a full opportunity to cross-examine the witness at the preliminary hearing regarding his interactions with
Rossbach. Accordingly, the trial court did not violate Rossbach's Sixth Amendment right to confront the witness by admitting the testimony.”

Grand Jury Testimony

People v. Patterson, 808 N.E.2d 1159(2004) - If witness testifies at grand jury and is not subject to cross examination, the grand jury testimony cannot be admitted at trial unless the witness testifies at trial and is subject to cross examination regarding testimony given before the grand jury.

Plea Allocutions/Co-Defendant Confessions/Pre-Text Calls
Plea allocations and confessions to police of non-testifying co-defendants are testimonial and may not be admitted at trial unless the co-defendant testifies. See the cases below for support:
United States v. Molina, 407 F.3d 511 (1st Cir. PR 2005)

Co-defendant confessions given to a police officers are testimonial and require the co-defendant to testify (or have been previously subject to cross examination) in order to admit the confession against another defendant. See these cases for support:

Commonwealth v. Whitaker, 2005 PA Super 241 (Pa. Super. Ct. 2005) - “Defendant was tried with a co-defendant. The co-defendant's confession was admitted in evidence against the co-defendant only, and it had been redacted to change references to defendant to references to the "other guy." The court held that the term used did not unduly suggest that defendant was the person referred to and that the jury had been cautioned not to use it for any purpose except to determine the co-defendant's innocence or guilt. The decision in Crawford v. Washington did not make use of the redacted confession any less permissible because
Crawford was directed to the introduction of another's statements against a defendant, not their introduction against someone else.”

**People v. Wahlert, 2005 Cal. App. LEXIS 998 (Cal. App. 4th Dist. 2005)** - When police have a co-defendant in custody call another defendant to get the defendant to confess or admit to the crime, playing this pretext tape at trial violates *Crawford* if the co-defendant does not take the witness and is subject to cross examination. Because the police were involved in producing the testimony, it clearly implicates *Crawford*.

**United States v. Jordan, 357 F. Supp. 2d 889 (ED VA 2005)** - In this murder case, the victim was abducted and set on fire. Before dying 10 days later, the victim told police that four unknown black males set him on fire. Three weeks later, Brown went to the police department and confessed to her part in the murder and implicated Jordan. Brown’s statements were recorded. While incarcerated in jail, Brown testified before the grand jury consistent with her statements to the police. While in jail, Brown committed suicide. In a motion in limine, Defendant moved to exclude statements made by Brown to the police and before the grand jury (neither of which were subject to cross examination). The parties agreed that the grand jury testimony was testimonial and therefore barred at trial pursuant to *Crawford*. In relation to the statements to the police, the court stated that Brown went to the police on her own volition and spent most of her interview giving a statement with little questioning from the police, thus not falling within the technical definition of interrogation. The government argued that Brown’s discussion of the murder was a casual conversation of which the court agreed. However, the court noted that when one detective initially commented "If you're needed in court, are you willing to testify in court?”, that implicated the reasonable expectation prong that the statement might later be used in court. Thus, the statements Brown made to the police were testimonial and could not be admitted at the guilty phase of trial.

**United States v. Rivera, 363 F.Supp. 2d 814 (ED Va 2005)** – “redacted post-arrest statements made by two of the co-defendants would not violate the other co-defendants' right to confrontation during the trial because the redacted statements did not directly implicate the co-defendants since the universe of gang members and possible participants in the murder of the witness was quite broad.” No Crawford violation.

**State v. Pullen, 594 S.E.2d 248 (N.C. Ct. App. 2004)** - Co-Def confession: “Because Little's statements were made to police officers in the course of an interrogation, those statements constitute testimonial evidence under *Crawford*. They would only be admissible if Little was unavailable at trial and if defendant had a prior opportunity for cross-examination. The parties do not dispute that Little was "unavailable" given that his attorney notified both parties that Little would invoke his Fifth Amendment rights if called to testify. Since, however, defendant had no prior opportunity to cross-examine Little as to his statements, Little's confession could not be admitted at defendant's trial without violating the Confrontation Clause.”
United States v. Cuong Gia Le, 316 F. Supp. 2d 330 (E.D. Va. 2004) – Where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand. *Crawford* and *Bruton* must be used together. A witness can testify regarding one Defendant confessing (without that Defendant taking the stand) and a limiting instruction can be given that the testimony is to be attributed to one Defendant and not the other. But when co-Defendant’s are tried together, *Bruton* and *Crawford* require the Co-Defendant to take the stand in order to get a confession in against the non-testifying Co-Defendant.

Commonwealth v. Brown, 853 A2d 1029; 2004 PA Super 213 (PA. Super. Ct. 2004) – Conviction vacated because redacted confession of co-Defendant that labeled this Defendant “the other guy” was properly admitted, but in closing argument the prosecutor directly named the Defendant in a manner that related to the information contained in the Co-Defendant statement and, therefore, identified “the other guy” to the jury.

Roy v Coplan, 2004 DNH 56 (D.N.H. 2004) – A statement from a non-testifying co-conspirator cannot be introduced at trial against other Defendants unless that co-conspirator testifies and is subject to cross-examination.

**Statements of Confidential Informants**

United States v. Cromer, 389 F.3d 662 (6th Cir. Mich. 2004) - “statements of a confidential informant are testimonial in nature and therefore may not be offered by the government to establish the guilt of an accused absent an opportunity for the accused to cross-examine the informant.”

**Objective reasonable person standard**

US v. Pugh, 405 F.3d 390 (6th Cir. Ohio 2005) - “the ‘Court emphasized that, '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.’ *Cromer*, 389 F.3d at 672. Thus, we determined that the proper inquiry in deciding whether a statement is testimonial for evidentiary purposes is "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime."
### Two Ways to Analyze Crawford

<table>
<thead>
<tr>
<th>Is the statement testimonial?</th>
<th>Is my witness available?</th>
</tr>
</thead>
<tbody>
<tr>
<td>If no, then no Crawford analysis is conducted</td>
<td>If yes, then no Crawford analysis is conducted</td>
</tr>
<tr>
<td>If yes, then these must occur:</td>
<td>If no, then is the statement testimonial?</td>
</tr>
<tr>
<td>Witness must testify (then other admissible hearsay may be introduced), or</td>
<td>If not testimonial, then no Crawford analysis is conducted (Rules of Evidence and reliability test applied as usual)</td>
</tr>
<tr>
<td>Witness be unavailable AND have been subject to cross-examination at a prior time</td>
<td>If testimonial, then these must occur:</td>
</tr>
<tr>
<td>Note: Reliability or trustworthiness of the prior statement is not an issue under Crawford (Reliability is a factor under Rules of Evidence)</td>
<td>Can demonstrate that witness is legally unavailable AND was subject to cross-examination at a prior hearing</td>
</tr>
<tr>
<td>Note: Reliability or trustworthiness of the prior statement is not an issue under Crawford</td>
<td></td>
</tr>
</tbody>
</table>

#### Not Testimonial

**United States v. Scheurer, 2005 CAAF LEXIS 1104 (2005)** – Incriminatory statements made by defendant's wife to a co-worker of defendant were non-testimonial.


**State v. Peterson, 2005 N.C. App. LEXIS 1754 (NC Ct. App. 2005)** - Statements by a police officer to explain subsequent action taken are not hearsay and non-testimonial under Crawford.


**United States v. Jimenez, 2005 U.S. App. LEXIS 17366 (1st Cir. Mass. 2005)** - “"The [Confrontation] Clause [...] does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 59 n.9. The challenged statements were properly admissible, not for their truth, but to provide context to (1) Jimenez's
admissions in his written confession, and (2) the investigatory steps pursued by Burns and Ortiz. United States v. McDowell, 918 F.2d 1004, 1007 (1st Cir. 1990) ("[A] defendant, having made admissions, [cannot] keep from the jury other segments of the discussion reasonably required to place those admissions into context.").”

State v. Keodara, 2005 Wash. App. LEXIS 1703 (Wash. Ct. App. 2005) - “As officers responded to a burglary report, they observed defendant and two other men fleeing. A police officer deployed his canine to track the suspects and located them hiding in a tree. Defendant argued that the admission of the officer's testimony violated his right to confrontation because he repeatedly testified about what his canine "told" him during the search. He further contended that Wash. Rev. Code § 43.43.754 and the sentence requirement that he provide a biological sample for DNA identification violated his Fourth Amendment right against unreasonable searches and his privacy rights. The appellate court held that the officer's description of his interaction with his canine clearly relayed no testimonial hearsay by a declarant who would have reasonably expected his or her statement to be used in a criminal prosecution, and that the proper foundation for testimony regarding use of a tracking dog was laid and the officer did no more than testify to what was proper given that foundation.”

**Moral of the Story:** Canine’s are not declarants capable of providing testimonial evidence!

People v. Taulton, 129 Cal App 4th 1218; 29 Cal Rptr 3d 203 (Cal App 4th Dist 2005) - Records of prior convictions are not testimonial and therefore are not subject to Crawford's confrontation requirement.


State v. Arita, 900 So. 2d 37 (La App 5 Cir 2005) - Fingerprint results are non-testimonial and, therefore, it was not a violation of Crawford that the technician who lifted the fingerprint was unavailable for trial.


Tao Li v. Phillips, 358 F. Supp. 2d 135 (EDNY 2005) – statements offered not for the truth of matter asserted are not testimonial and do not violate Crawford.

U.S. v Brown, 322 F. Supp 2d 101 (1st Cir. D. Mass 2004) - There is no right to "confront" witnesses upon whom police rely in obtaining probable cause.
Opportunity to Cross-Examine

People v. Carter, 36 Cal. 4th 1114 (2005) - Defendant was charged with murdering three women. The ex-boyfriend of one victim testified at preliminary hearing and died before trial. Defendant objected to introducing the transcript of testimony at trial on the grounds that he did not have a sufficient opportunity to cross examine. The court denied the appeal on those grounds stating that the defendant is allowed “an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer.”

State v. Griffin, 2005 Wash. App. LEXIS 1875 (Wash. Ct. App. 2005) - “A defendant who voluntarily chooses as a tactical defense matter not to pursue a certain avenue of questioning of a witness may not later assert that his right of confrontation was denied to him.” No Crawford violation for failure to cross examine on an issue when the witness testified at trial.

United States v. Kappell, 2005 FED App. 0333P (6th Cir. Mich. 2005) – The two child victims testified at trial pursuant to closed-circuit television. The defendant complained of a confrontation violation because during cross-examination, the children were inarticulate or unresponsive at times and should have been declared unavailable (thus precluding testimony of a psychotherapist and two physicians regarding statements made by the children). Defendant claimed there was no effective cross-examination. The Court rejected this arguments since the U.S. Supreme Court has held that “the Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’

Prior Opportunity to Cross-Examine (see also Former Testimony Exception)

State v. Hannon, 2005 Minn. LEXIS 485 (2005) – On retrial, defendant objected to the introduction of a transcript of a witness who testified at the first trial and died before the 2nd trial. The court rejected this argument on appeal and held the transcript did not violate Crawford since the witness was unavailable and had been previously subject to cross examination. “We further note that Crawford only requires that the defendant have a prior opportunity to cross-examine the witness. The opportunity need not actually be seized. While there may be a case where a prior opportunity was not adequate due to substantial circumstantial differences between the two proceedings, this is not that case.”

State v. Hacheney, 2005 Wash. App. LEXIS 1940 (Wash. Ct. App. 2005) - If the prosecutor meets the proof to show unavailability of a witness, then any prior testimony (which allowed the opportunity for cross examination) may be admissible at trial and this does not violate Crawford.

State v. Stuart, 2005 WI 47 (2005) - Defendant’s brother testified at preliminary hearing, but asserted the 5th Amendment at trial and did not testify. The transcript of the prior hearing was admitted at trial over objection. On appeal, the court ruled that the defendant did not have sufficient opportunity to cross-examine the brother. “In Wisconsin, a defendant has a statutory right at a preliminary hearing to cross-examine witnesses against him. Wis. Stat. § 970.03(5). n8 However, the scope of that cross-examination is limited to issues of plausibility, not credibility. State ex rel. Huser v. Rasmussen, 84 Wis. 2d 600, 614, 267
N.W.2d 285 (1978). This is because the preliminary hearing ‘is intended to be a summary proceeding to determine essential or basic facts’ relating to probable cause, not a ‘full evidentiary trial on the issue of guilt beyond a reasonable doubt.’” Because of Wisconsin’s rules on the scope of cross-examination at preliminary hearings, admitting the transcript violated *Crawford*.

**Anaya v. Huskey, 2005 U.S. Dist. LEXIS 6104 (ND Cal 2005)** – “Petitioner was convicted of continual sexual abuse of a child under the age of fourteen, his daughter, in violation of Cal. Penal Code § 288.5(a). The daughter gave incriminating testimony at a preliminary hearing, but refused to testify at trial, and allegedly recanted. The court did not actively compel her presence, and defendant did not object to her absence or the use of her preliminary hearing testimony at trial. In his petition, he argued that the trial court violated his Sixth Amendment rights when it permitted the preliminary hearing testimony to be read to the jury. *** The court found the prior testimony admissible on prior inconsistent or unavailable witness grounds.”

**State v. Manuel, 2005 Wash. App. LEXIS 369 (2005)** – “Based on separate incidents involving a different victim at each location, the State charged defendant with one count of indecent liberties and one count of second degree rape. The roommate of the alleged rape victim testified as a witness for the State. The jury convicted defendant on the indecent liberties charge, but was unable to reach a verdict on the rape charge. A second trial on the rape charge was held, and the prosecutor informed defense counsel that the State would seek to introduce the videotaped testimony of the roommate at trial; the roommate was in Europe. Defendant argued that the trial court violated his constitutional right to confront and cross-examine the roommate by admitting her testimony from the prior trial despite the State's failure to establish the unavailability of the roommate. The appellate court ruled that the State made reasonable efforts to obtain the roommate's presence for the second trial by letter and subpoena before discovering that she had left the country shortly before trial began. The State sent a letter to the roommate's last known address informing her of the second trial, and sent a subpoena requiring her appearance at trial.” No *Crawford* violation.

**United States v. Williams, 116 Fed. Appx. 890 (9th Cir. Nev. 2004)** – “When defendant learned about a prosecution witness's deposition the day before it was to be held, he did not express a desire to attend. On appeal, defendant claimed he was denied his rights under the Sixth Amendment's Confrontation Clause when the witness was deposed without defendant being present and the government used the videotaped deposition at trial. The court held that, although more than one day's notice of the deposition was preferable, the district court was acting in response to the witness's motion that required the district court to order the witness's deposition and release. The district court did not clearly err in finding that defendant waived his right to be present at the deposition when he failed to appear because it was unlikely that defendant would have appeared had the deposition been delayed, there was an unsuccessful attempt to teleconference with him, and defense counsel attended the deposition. The use of the deposition at trial did not violate the Confrontation Clause because the witness was unavailable for trial and defendant, through defense counsel, had an adequate opportunity to cross-examine the witness at the deposition.” No *Crawford* violation.
United States v. Garcia, 117 Fed. Appx. 162 (2nd Cir NY 2004) – Defendant was convicted and granted a new trial. At the second trial, a key witness who previously testified was unable to be found. The transcript of the prior testimony was admitted into evidence in the second trial. This is not a Crawford violation because the defense had an opportunity to cross-examine the witness at the prior trial and this satisfies the Confrontation Clause.

State v. Stiernagle, 2004 Minn. App. LEXIS 776 (Minn. Ct. of Ap. 2004) – Defense counsel was limited in his cross-examination of a breath test expert. The Court held that this was not a Crawford violation since the Confrontation Clause requires an opportunity to cross examine and the trial judge is permitted to limit the scope of testimony within his discretion.

United States v. Ricks, 96 Fed. Appx. 96 (PA 2004) - When defense counsel has an opportunity to cross-examine a witness a hearing, but does not object when the Judge cuts short the hearing, there is no Crawford violation.

Jones v. Albaugh, 2004 U.S. Dist. LEXIS 4529 (S.D.N.Y. 2004) - The Court explained that a testimonial statement by a witness is not barred by the Sixth Amendment, from use at a criminal trial, if the witness is unavailable at the time of trial and if the defendant has had a prior opportunity to cross-examine the witness. The Confrontation Clause requires that, where prior testimony is admitted at a later proceeding, the party against whom the testimony is admitted must have had an opportunity to cross-examine the witness at the earlier proceeding sufficient to endow the testimony as a whole with some indicia of reliability; the trier of fact must have a satisfactory basis for evaluating the truth of the prior statement.

State v. Young, 87 P.3d 308 (Kansas 2004) – A witness was unavailable for trial but testified at preliminary hearing. The Defendant was represented by counsel at his preliminary hearing and had an opportunity to cross-examine the witness. Although the Defendant claims that the witnesses statements at the preliminary hearing were inconsistent with statements he made at the crime scene, any inconsistency could have been addressed on cross-examination during the preliminary hearing. The Defendant’s counsel did not cross-examination the witness at preliminary examination, but was afforded that opportunity. The Defendant’s counsel’s failure to cross-examine the witness does not equate to a Confrontation Clause violation and does not bar the preliminary hearing testimony from admission at trial due to unavailability of the witness.

State v. Sherman, 2004 Wash. App. LEXIS 1131 (Wash. Ct. App. 2004) - Defendant represented himself in his first trial and was convicted. In a retrial, Defendant had counsel but a main witness against the defendant was unavailable. The prosecutor admitted the testimony of the unavailable witness from the first trial. Defendant argued a Crawford violation because Defendant represented himself and did not fully develop cross-examination against the witness at the trial. The court held that a defendant must simply be afforded the opportunity to cross-examination and the court will not look to the quality of the cross-examination.

People v. Fry, 92 P.3d 970 (Colo. Sup. Ct. 2004) - A witness testified at preliminary hearing and the defense attorney did not cross-examine the witness. Before trial, the witness died. The prosecutor admitted the deceased’s witnesses hearing testimony at trial. The Colorado Supreme Court applied Crawford and overturned the conviction on the basis that preliminary hearings in Colorado do not provide an adequate opportunity to cross-examine witnesses. Therefore, Crawford was violation because the prior testimony was not subject to cross-examination. {NOTE: This case is in opposition to other cases addressing this issue and can be cited as relating strictly to Colorado procedures on preliminary hearings.}

United States v. Wilmore, 381 F.3d 868 (9th Cir Nev 2004) - The wife of the Defendant testified at grand jury (without cross examination) regarding her husband’s robbery of an abortion clinic. Before trial, she informed the prosecutor she would disavow her grand jury testimony. At trial, the wife testified to a limited extent and when asked about whether her husband had a gun, she disavowed her prior testimony about a gun. The prosecutor impeached her with her grand jury testimony. At that point, the wife invoked her 5th Amendment privilege due to potential perjury charges. The defense attorney was limited by the court in its cross-examination and was not allowed to ask any questions that would require the wife to invoke the 5th in front of the jury. The court reversed the conviction because the defendant was not afforded an opportunity to cross-examine the wife regarding her grand jury testimony and why her testimony had changed at trial.

People v. Thompson, 349 Ill. App. 3d 587; 812 NE2d 516 (Ill. App. Ct. 2004) - Victim did not testify at trial and there was no determination as to unavailability. Defendant testified and during cross-examination was impeached with a protective order previously obtained by the victim that contained statements of prior abuse. Defendant was convicted for aggravated battery. Use of the prior protective order containing statements by the victim of prior abuse violated Crawford because the victim was not subjected to cross-examination of those statements.

Unavailability of Witness

United States v. Hite, 364 F.3d 874 (7th Cir 2004) – Prosecutors still must follow the federal rule of good faith in trying to find a witness in order to successfully argue that the witness is unavailable.

Witness Testifies: Loss of Memory/Freezes on the Stand/Refuses to Answer (also see section under child abuse)

**Fowler v. State, 829 NE2d 459 (2005)** – “Defendant argued that his wife's statements to police were inadmissible hearsay and that they were the only evidence supporting his conviction. The supreme court found that the statements were properly admitted as an excited utterance because they were made only 15 minutes after the officer was dispatched and the wife was still under the stress of the event. Defendant also argued that the officer's testimony reporting his wife's statements violated the Confrontation Clause. Defendant contended that he did not have an opportunity to cross-examine his wife because she refused to answer questions from defense counsel on cross-examination. The supreme court held that defendant forfeited his rights to confrontation by failing to request an order directing his wife to respond. By choosing to allow his wife to leave the witness stand without challenging her refusal to answer questions and then choosing not to recall her to the stand after the admission of the officer's testimony, defendant's right to further confrontation was forfeited.”

**State v. Fields, 2005 Haw. App. LEXIS 222 (Haw. Ct. App. 2005)** – “If the witness physically appears at the trial and testifies, does the witness's lack of memory at the trial about the pre-trial testimonial statement authorize conclusions that the witness "did not appear at trial[,]" was "unavailable[,]" and that the defendant did not have a prior opportunity for cross-examination? In light of the precedent of United States v. Owens, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988), quoted in relevant part as follows, the answer is no.” Thus, admitting prior statements of the witness does not violate **Crawford**.

**Randolph v. State, 2005 Del. LEXIS 243 (2005)** - “Defendant, who was 13 years old at the time, was charged with rape and unlawful sexual contact involving his five-year-old sister. During the trial, the victim was unable to implicate defendant and provided nonsensical responses to the questions. However, her mother and the mother's boyfriend testified about incriminating admissions made by defendant. In addition, a child advocacy interviewer and a sexual assault nurse testified about the victim's statements to them. The state supreme court held that defendant was aware that he had a lawyer and that his lawyer was there to help him. Consequently, the family court properly determined, pursuant to Del. Code Ann. tit. 11, § 404(a) (2005), that defendant was competent to stand trial. The mere fact that the victim had difficulty answering questions and provided nonsensical responses on direct examination did not make her unavailable for confrontation clause purposes.”

**Johnson v. State, 2005 Del. LEXIS 240 (2005)** - When a witness testifies and is subject to cross examination, the fact that the witness has lack of memory (whether believable or not) does not violate **Crawford** because the defense attorney may cross examine the witness on the lack of memory. **Crawford** does not require an effective cross examination, just the opportunity for cross examination.

**People v. Bueno, 829 NE2d 402 (Ill App Ct 2005)** - “The witness (who admitted having lent the gun used in a drive-by shooting) originally implicated as the shooter a person who was incarcerated at the time. When the witness was being questioned about another matter, he gave a second statement to police, and this led to defendant's arrest. The witness appeared at defendant's trial, but resisted answering questions about the second statement, and the
defense did not raise the matter on cross-examination. The appellate court held that there were no Confrontation Clause issues regarding substantive admissibility of the second statement, because the witness was there at trial, and could have been cross-examined on the subject.” No *Crawford* violation.

**People v. Rolandis G. (In re Rolandis G.), 352 Ill. App. 3d 776, 817 N.E.2d 183 (Ill App Ct 2004)** - “Once a child witness is unable to proceed with his or her testimony, whether that point occurred prior to taking the stand or subsequently, he or she is properly considered unavailable. *** From the standpoint of the defendant's ability to cross-examine the witness, it makes no difference whether he becomes "unavailable" before or after he takes the witness stand.”

**People v. Martinez, 810 N.E. 2d. 199 (2004)** - Witness could not recall a written statement she made after witnessing a crime. Prior inconsistent statement hearsay exception (FRE 801(d)(1)) allowed admission of the written statement as a result of witnesses lapse in memory. No *Crawford* violation since witness was available for cross examination. “Our Supreme Court consistently has held that judicial opinions announcing new constitutional rules applicable to criminal cases are retroactive to all cases - such as this one - pending on direct review at the time the new constitutional rule is declared.” This case can be cited for under PA Rule 803.1 inconsistent statement by witness arguments.

**People v. Phan, 2004 Cal. App. Unpub. LEXIS 5047 (Cal. 2004)** – Child victim testified at trial concerning statements she made to police officers regarding sexual assault. At trial, child victim had poor recollection regarding police interviews. In a *Crawford* analysis, the court found *Crawford* was satisfied because the victim testified and was subject to cross-examination. The fact that the victim had poor memory and was not able to be cross-examined fully did not require reversal. *Crawford* requirements were satisfied.

*Crawford* is generally not applicable in these situations (please consult your state law on 6th Amendment application to these proceedings):

- Does not impact cases where witness testifies – this is an absolute rule
- Does not impact proceedings where the 6th Amendment does not apply
  - Unresolved issue as to Preliminary hearings?
- Does not impact civil proceedings (including civil child neglect)
- Does not impact probation revocation proceedings
  - However, split of authority involving parole revocation hearings
- Does not impact sentencing hearings
  - Juvenile disposition hearings
- Does not impact restitution hearings
- Does not impact pre-trial suppression hearings
  - Some in-camera hearings implicate *Crawford*
- Does not impact non-hearsay statements
- Does not impact hearsay statements that are non-testimonial (see section further in this outline)
  - This involves many firmly rooted hearsay exceptions
Co-conspirator statements per 801(d)(2)(E) (See cases under Hearsay Exceptions)
- Does not impact statements made by the Defendant (no right to cross examine self)
- Does not impact hearsay statements offered by the Defendant (waives 6th Amendment)
- Not applicable to exculpatory hearsay statements
- Does not impact Closed-Circuit TV testimony (in compliance with Maryland v Craig)
- Does not impact expert witness opinions

**Witness Testifies (too many cases to list)**
When a witness appears, testifies and has the opportunity to be cross-examined, the court may later admit admissible hearsay statements

*De La Cruz v. State,* 2005 Tex. App. LEXIS 5850 (Texas App Houston 14th Dist. 2005)
*State v. Lewis,* 616 S.E.2d 1 (NC Ct. App 2005 – child victim)
*Williamson v. Miller-Stout,* 135 Fed. Appx. 958 (9th Cir. Wash. 2005)

*Moreno v. State,* 2005 Tex. App. LEXIS 4091 (Texas App 2005) – When the victim testified at trial, all prior hearsay and testimonial statements would be admissible since confrontation under *Crawford* was satisfied.

*People v. Argomaniz-Ramirez,* 102 P.3d 1015 (2004) – “prior recorded statements made by children to law enforcement officials may be introduced into evidence when the children testify at trial.”

**Preliminary Hearings**
Each state has differing rules on whether the Sixth Amendment right to confront applies at preliminary hearings. This impacts whether *Crawford* applies at these hearings.

*State v. Mackin,* 695 NW2d 904; 2005 WI App 88 (2005) – “Three years after the burglary, in a telephone conversation with a police detective, an accomplice implicated himself and defendants in the crime. At the preliminary examination, the State called the accomplice as a witness, but he exercised his Fifth Amendment right and refused to testify. The trial court found that the accomplice was unavailable and allowed the detective to testify to the accomplice's statements implicating all three defendants and bound the matter over for trial. A new trial judge reversed, holding that the accomplice's statement was self-serving as he sought to mitigate the impact of his crime by implicating others and that the statement lacked particular guarantees of trustworthiness. The appellate court held that the confrontation clause did not apply to preliminary examinations, and that the only right to
confront witnesses at a preliminary examination was the statutory right to question witnesses who actually testified. The appellate court further held that the trial court should have considered each part of the accomplice's statement to determine whether a reasonable person in his position would have made the statement unless he believed it to be true.”

**Civil Proceedings/Dependency Proceedings**


**State v. Frazier (In re P.F.), 2005 OK CIV APP 50 (Ok. Ct. App. 2005)** - Mother and father were accused of abuse/failure to protect of their child in a deprivation of child action. A forensic interview was conducted of the child. The child did not testify at trial, but the interviewer testified and the videotaped interview was played. The court found that the forensic interview was testimonial, but did not assess whether the child reasonably expected that the statement would later be used in court. The court also did not address the applicability of the 6th Amendment to this proceeding but made a brief reference to it being a quasi-criminal proceeding.

**In re D.R., 616 S.E.2d 300 (NC Ct. App. 2005)** - “The parents argued that the trial court erred by admitting statements made by the child through the testimony of social workers, a foster parent, and psychologists. The appellate court held that the Sixth Amendment was not applicable to this matter as it was a civil action.” No *Crawford* violation.

**A.G.G. v. Commonwealth, 2005 Ky. App. LEXIS 163 (Ky. Ct. App. 2005)** - “The children had been placed in foster care based on neglect. Once in foster care, the elder child, a six-year-old, began acting in a sexually aggressive manner. Both a therapist and a physician were allowed to testify at trial about statements the boy made concerning sexual abuse by family members. Citing the United States Supreme Court decision in *Crawford*, the court vacated the judgments. *** The court held that “In termination of parental rights proceedings, fundamental fairness includes the right to confrontation. *G.E.Y. v. Cabinet for Human Resources, 701 S.W.2d 713 (Ky.App. 1985).*” The court held that statements of the 6 year old child victim, which describe and accuse various persons of abuse, fell into the category of statements made under circumstances which, from an objective perspective, would be reasonably believed to be available for use at a later trial.

**In re April C., 131 Cal. App. 4th 599; 31 Cal. Rptr. 3d 804 (Cal. App. 2nd Dist. 2005)** – “The dependency petition alleged that the boyfriend sexually abused one of the children. The juvenile court received reports containing the child's statements of abuse, and the parties stipulated that the child was not competent to testify. The juvenile court denied a motion to strike the child's hearsay statements. The court, in affirming, held that evidence admitted pursuant to Cal. Welf. & Inst. Code § 355, subjected to the judicial test of reliability, protected the due process rights of a parent accused of sexual abuse in a dependency proceeding. Thus, the requirement of fundamental fairness in the Due Process Clause of the Fourteenth Amendment did not compel the striking of the child's statements from the reports. The child's statements, together with the corroborating evidence of sexual abuse, constituted substantial evidence in support of the jurisdictional findings and disposition order. The court
stated that the distinction between testimonial and nontestimonial hearsay was not applicable because the Sixth Amendment right to confrontation did not apply to parties in civil proceedings, including dependency proceedings.”

**Erickson v. Dep’t of Labor & Indus., 2005 Wash. App. LEXIS 1206 (Wash Ct App 2005)** - Crawford is not applicable in civil cases.

**People v. Angulo, 129 Cal App 4th 1349; 30 Cal Rptr 3d 483 (Cal App 4th Dist 2005)** - Defendant was petitioned as a sexually violent predator and in a civil hearing was committed. Defendant claimed that an expert witnesses’ reliance on police reports (and admission of the police reports) violated Crawford. The court found that Crawford was a criminal case based on the 6th Amendment and did not apply in this civil hearing.

**In re Children of L.D., 2005 Minn. App. LEXIS 222 (2005)** - Civil child abuse/neglect termination proceedings are civil in nature, and not quasi-criminal, thus not affording the Sixth Amendment protections as outlined in Crawford.

**People v. Dort, 18 AD 3d 23; 792 NYS2d 112 (NY App Div 3d Dept 2005)** - Sex Offender Risk Assessment Hearings are not criminal in nature and therefore the protections of the Sixth Amendment right to confront witnesses are not applicable as announced in Crawford.


**People v. Maxwell (In re C.M.), 815 N.E. 2d 49 (Ill App Ct 2004)** - Crawford or right to confrontation do not apply in civil proceedings under the Juvenile Act.

**In re Civil Commitment of G.G.N., 372 NJ Super 562; 854 A2d 936 (NJ Super Ct App Div 2004)** - Civil commitment proceedings under the Sexually Violent Predators Act does not invoke the 6th Amendment and, therefore, Crawford does not apply.

**Probation Revocation Hearings**
There is no 6th Amendment right to confront in probation revocation proceedings or supervised release revocation proceedings. Therefore, Crawford does not apply in these hearings.

**United States v. Hall, 419 F.3d 980 (9th Cir. Cal. 2005)**
**United States v. Kirby, 418 F.3d 621 (6th Cir. Tenn. 2005)**
**Young v. United States, 863 A.2d 804 (2004)**
**United States v. Barazza, 318 F. Supp. 2d 1031(SD Cal 2004)**
**United States v. Aspinall, 389 F.3d 332 (2d Cir. N.Y. 2004).**
United States v. Zayas, 2005 U.S. App. LEXIS 17566 (11th Cir. Fla. 2005) – The court held that at this probation supervised release revocation hearing, the defendant was entitled to some due process and Sixth Amendment protections and the defendant was entitled to confront the police officer who issued a report regarding a new crime.

Parole Revocation Hearings – Split of Authority
Ash v. Reilly, 354 F.Supp. 2d 1 (DC Cir 2004) - This Court held that a defendant has the right of confrontation in a federal parole revocation hearing. “The federal courts are split with regard to whether Crawford v. Washington is binding precedent for parole revocation hearings. See United States v. Jarvis, 94 Fed. Appx. 501 (9th Cir. 2004)(holding that the right to confrontation and thus Crawford v. Washington, applied to parole revocation hearings); United States v. Martin, 382 F.3d 840 (8th Cir. 2004)(holding that the Sixth Amendment right to confrontation did not exist in parole revocation hearings); See also United States v. Taveras, 380 F.3d 532 (1st Cir. 2004); See also United States v. Barazza, 318 F. Supp. 2d 1031 (S.D.Cal. 2004). Most recently, the 2nd Circuit held that Crawford v. Washington does not apply to parole revocation hearings because by its text, the Sixth Amendment is limited to "criminal prosecutions." United States v. Aspinall, 2004 U.S. App. LEXIS 23954, 2004 WL 2601081 (2nd Cir. 2004). That Court also cited to Morrissey for the proposition that "revocation of parole is not part of a criminal prosecution."

Sentencing Hearings
The Sixth Amendment does not apply to sentencing hearings. Therefore, Crawford does not apply to sentencing. See these cases for support:
United States v. Monteiro, 417 F.3d 218 (1st Cir. Mass. 2005)
United States v. Martinez, 413 F.3d 239 (2nd Cir NY 2005)
State v. Abd-Rahmaan, 154 Wn. 2d 280; 111 P3d 1157 (2005)

United States v. Bodkins, 2005 U.S. Dist. LEXIS 8747 (WD VA 2005) - “if the defendants are convicted of one or more death eligible offenses, the subsequent sentencing proceeding will be bifurcated into an eligibility phase followed by a selection phase. Thus, as the Jordan court noted, any testimonial hearsay evidence offered during the eligibility phase would have to meet the requirements of Crawford before it could be presented to the jury. Those same
requirements would not apply to hearsay evidence, testimonial or non-testimonial, offered during the selection phase.”

**State v. Berry, 2005 Mo. App. LEXIS 631 (Mo Ct App 2005)** - When a sentencing phase is held before a jury, the traditional rules of hearsay apply and, therefore, the Sixth Amendment applies at this proceeding. Thus, only non-testimonial hearsay may be admitted without the witness testifying.

**C.C. v. State, 826 NE2d 106 (Ind. Ct App 2005)** - Sixth Amendment rights, as outlined in Crawford, were not violated by the introduction of hearsay at the disposition hearing because the rule against hearsay does not apply in juvenile disposition hearings

**Restitution Hearings**

**State v. Webster, 2005 Wash. App. LEXIS 1316 (Wash. Ct. App. 2005)** - *Crawford* does not apply to restitution hearings as there is no 6th Amendment right in those proceedings.

**Pre-trial Suppression Hearings**

**People v. Martinez, 2005 Cal. App. LEXIS 1350 (Cal. App. 4th Dist. 2005)** – Defendant objected to an in-camera hearing by the Judge concerning whether to reveal the identity of a confidential informant listed in a search warrant for controlled substances. The Judge denied the defendant’s request and allowed the search warrant to remain sealed. On appeal, the court found no Sixth Amendment or *Crawford* violation since those protections did not attach to a suppression hearing.

**LaPointe v. State, 2005 Tex. App. LEXIS 3153 (Texas App Austin 2005)** - An in-camera hearing to determine whether to admit the sexual history of the victim in this sexual assault trial implicates the Sixth Amendment and requires the presence of the defendant and permits cross-examination.

**State v. Massie, 2005 Ohio 1678 (Ohio Ct App 2005)** - Hearsay is allowed in pre-trial suppression hearings; therefore, *Crawford* does not bar the admission of even testimonial hearsay at this proceeding.


**Non-Hearsay Statements/Statements Not for the Truth of Matter Asserted**

**State v. Rogers, 2005 Ohio 4958 (Ohio Ct. App. 2005)** - An officer can testify to information told him by a witness at the crime scene regarding the whereabouts of a weapon because this shows what action the officer took and is not for the truth.

**People v. Davis, 2005 Cal. LEXIS 7963 (2005)** – Hearsay statements offered not for the truth of the matter asserted do not violate *Crawford*. 
State v. McClanahan, 2005 Ohio 2975 (Ohio Ct. App. 2005) – “Further, the trial court did not violate defendant's constitutional right to confront witnesses against him. The unidentified declarant's statement at the scene of the shooting was not "testimonial" as it was not introduced to prove that defendant had repeatedly fired guns in his backyard. The evidence was offered to explain why the police officers directed their investigation toward defendant's residence.”

People v. Morgan, 125 Cal. App. 4th 935; 23 Cal. Rptr 3d 224 (Cal App 3rd Dist 2005) – “While officers were executing a search warrant to search for evidence of sale of methamphetamine, an officer answered the phone and heard the caller ask to buy drugs. The trial court admitted this statement into evidence. *** The court found no violation of the Confrontation Clause in admitting the caller's statements, which were not testimonial even though they were made to a police officer. The officer's minimal responses to the caller was not the involvement of government officers in the production of testimony with an eye toward trial that presented unique potential for prosecutorial abuse.”

Dednam v. State, 2005 Ark. LEXIS 8 (2005) – “The State argued that defendant's motive for killing the victim was to silence him for the benefit of defendant's cousin, who had allegedly robbed the victim some months earlier. Defendant claimed that the admission of a detective's testimony about statements made by the victim implicating defendant's cousin in the robbery violated defendant's Sixth Amendment right to confront and cross-examine a witness against him as well as his due process rights under the United States and Arkansas Constitutions. However, the Sixth Amendment demanded unavailability and a prior opportunity for cross-examination where testimonial evidence was at issue, and where a statement was admitted for a legitimate, non-hearsay purposes, the non-hearsay aspect raised no confrontation-clause concerns. Because the victim's statements to the detective were presented to establish the basis for the detective's actions in obtaining an arrest warrant for defendant's cousin rather than the truth of the victim's statements, they did not constitute hearsay under Ark. R. Evid. 801(c) (2004), cross-examination was not required to test their veracity, and they were not barred by the Confrontation Clause.”

People v. Newland, 775 N.Y.S.2d 308 (2004) - Officer can testify to speaking with a bystander which then resulted in officer taking action that resulted in the location of evidence. This hearsay statement was not admitted for truth, but to show what action the officer took. “We conclude that a brief, informal remark to an officer conducting a field investigation, not made in response to "structured police questioning" should not be considered testimonial, since it "bears little resemblance to the civil-law abuses the Confrontation Clause targeted".”

People v. Ruis, 11 AD 3d 212; 782 NYS 2d 257 (NY App Div 2d Dept 2004) - “Here, the investigating officer was permitted to testify that after speaking with an eyewitness who did not testify at trial and obtaining from the eyewitness a photograph of the defendant, the officer investigated further and the defendant subsequently was apprehended in Costa Rica. This testimony was properly admitted for the purpose of explaining the sequence of events leading to the defendant's apprehension” No Crawford violation.
United States v. Trala, 386 F.3d 536 (3rd Cir DE 2004) – Hearsay statements, not offered for the truth of matter asserted, do not violate Crawford.

United States v. Eberhart, 388 F.3d 1043 (7th Cir Ill 2004) – Hearsay statements, not offered for the truth of matter asserted, but rather to prove why an investigation occurred, does not violate Crawford.

Parle v. Runnels, 387 F.3d 1030 (9th Cir Cal 2004) - The Defendant murdered his wife and the wife’s diary was admitted into evidence to show the nature of their violent relationship. The diary was admitting into evidence pursuant to California Evidence Code 1370, a hearsay exception that examines the reliability and trustworthiness of the statement. The Court found the diary to be non-testimonial because it was not written in anticipation of litigation.

**Statements Made by Defendant**

Benjamin v. State, 2005 Ala. Crim. App. LEXIS 199 (Ala. Crim. App. 2005) - Defendant robbed and murdered the victim and then admitted the crimes to a friend. The district attorney had the friend wear a wire and go back to the defendant who again confessed. The friend did not testify at trial, but the officer in charge of the wire authenticated the tape recording. The court held this was non-testimonial because the friend was not an adverse witness implicating the defendant and the defendant had no idea the statements would be used against him in court.

People v. Thoma, 128 Cal. App 4th 676; 27 Cal. Rptr 3d 309 (Cal App 2nd Dist 2005) - Defendant was convicted of drunk driving. When defendant did not dispute the sentencing court’s description of the victim’s injuries, this became a tacit admission and therefore an adoptive admission of the defendant. As such, the admission was non-testimonial.

People v. Roldan, 35 Cal. 4th 646; 27 Cal. Rptr. 3d 360; 110 P3d 289 (2005) – When a defendant adopts another person’s statement as his own, this adoptive admission becomes the defendant’s own statements and are non-testimonial.

State v. Robinson, 33 Kan. App. 2d 773; 109 P. 3d 185 (Kan Ct App 2005) - The Confrontation Clause does not apply when addressing admitting a defendant’s confession at trial. A Defendant does not have a constitutional right to confront himself.

**Witness Testimony Offered by Defendant**

Tinker v. State, 2005 Ala. Crim. App. LEXIS 148 (Ala. Crim. App. 2005) – When defendant cross examined a police investigator regarding statements made by a co-conspirator who testified and invoked the Fifth Amendment, he cannot then later complain that the State’s rebuttal introduction of the co-conspirators entire statement to the investigator violates the Sixth Amendment and Crawford.

State v. Smith, 2005 Wisc. App. LEXIS 516 (Wisc. Ct. App. 2005) – “At trial, the defense sought to introduce testimony from a co-actor, who stated that when he was in jail, an accomplice told him that he had shot one of the victims. The prosecutor unsuccessfully opposed the admission of the testimony, but later introduced evidence on rebuttal that the co-
actor had made prior inconsistent statements to police denying that he was the shooter. On appeal, defendant argued that the trial court erred by permitting the State to introduce out-of-court statements of a co-actor for the purpose of rebutting out-of-court statements introduced by the defense. The appellate court held that a defendant who introduced testimony from an unavailable declarant could not later claim that he was harmed by his inability to cross-examine that declarant when prior inconsistent statements were introduced to impeach an out-of-court statement introduced by the defendant.”

**State v. Prasertphong, 114 P.3d 828 (Ariz. 2005)** – When a Defendant offers in to evidence portions of a non-testifying co-defendant’s statement to police that exculpates the Defendant, then the Defendant forfeits the right to complain about admission of the entire statement and the right to confront that statement.

**State v. Harris, 871 A.2d 341 (RI 2005)** - “Defendant argued that the admission of a witness's oral statement to police violated the Confrontation Clause. The supreme court concluded that defendant waived any right he had with respect to the statement because, although he initially objected to use of the statement, he later failed to object to the hearsay statement at issue and actually introduced the statement himself on more than one occasion for impeachment purposes.” No *Crawford* violation.

**State v. Dunivant, 2005 Ohio 1497 (2005)** – When Defendant calls a witness to the stand and produces hearsay testimony from that witness, the prosecutor is permitted to cross examine on that hearsay evidence without the need to call the declarant to the stand. This does not violate *Crawford* because the Defendant created the issue.

**Commonwealth v. Gonzalez, 443 Mass. 799; 824 NE2d 843 (2005)** - Defendant called his girlfriend to the witness stand and she contradicted much of her prior grand jury testimony (which was not subject to cross examination). Because the Defendant offered this testimony, he cannot allege a *Crawford* violation.

**United States v. Hite, 364 F.3d 874 (7th Cir. 2004)** – Defendant offered unreliable hearsay at trial which does not implicate *Crawford* because defendant proffered the testimony and waived confrontation of the declarant.

**People v. McMillian, 2004 Mich. App. LEXIS 1156 (2004 unpub dec)** - “defendant argues that his right to confront witnesses was violated when Officer Barbre testified that defendant's friend, Hasan Warlick, stated that the gun belonged to defendant. However, it was defense counsel's questioning of Officer Barbre that led to the complained of testimony. A party waives review of the admission of evidence that he introduced, or that was made relevant by his own placement of a matter in issue.”

**Exculpatory Hearsay Statements**

**United States v. Simpson, 116 Fed. Appx. 736 (6th Cir. Tenn 2004)** - *Crawford* and the Confrontation Clause only apply to statements offered *against* the Defendant. Exculpatory statements for the Defendant do not invoke *Crawford*
Closed-Circuit TV Testimony
United States v. Yates, 18 Fla. L. Weekly Fed. C 50 (11th Cir. Ala. 2004) – This case involved two adult victims of identity fraud who lived in Australia and were outside the subpoena power of the prosecutor’s office. The victim testified via live two-way video teleconferencing. The appeals court overturned the conviction and held that the testimony violated Crawford and the Confrontation Clause, and distinguished the testimony from Maryland v Craig in that face-to-face testimony was required from the victims/accusers and that no public policy outweighed this (whereas in Maryland v Craig the public policy of avoiding trauma to the child allowed for CCTV testimony).

Expert Witness Opinions (see also under Drunk Driving/Substance Abuse cases)
State v. Bethea, 617 S.E.2d 687 (N.C. Ct. App. 2005) - An expert witness may rely on the findings of another expert in rendering an opinion at trial.

State v. Jacobs, 2005 N.C. App. LEXIS 1856 (NC Ct. App. 2005) - An expert witness may rely on other out-of-court information, including information from another expert, when testifying in court. This does not violate Crawford.

People v. Thomas, 130 Cal. App. 4th 709 (Cal. App. 4th Dist. 2005) – “there was no Sixth Amendment violation based on the gang expert's reliance on hearsay matters, as the conversations with other gang members were mentioned only as a basis for the gang expert's opinion that defendant was a gang member.”

United States v. Stone, 222 F.R.D. 334 (ED Tenn 2004) - An expert witness may rely on statements from non-testifying witnesses in testifying to an opinion in court and this does not violate Crawford. NOTE: See United States v. Buonsignore, 2005 U.S. App. LEXIS 8898 (11th Cir GA 2005) at the end of this outline for a contradictory result.

State v. Bethea, 617 S.E.2d 687 (NC Ct. App. 2005) - An expert witness may rely on other out-of-court information, including information from another expert, when testifying in court. This does not violate Crawford.

State v. Rogers, 615 S.E.2d 435 (NC Ct. App. 2005) – “Expert witnesses are generally allowed to rely on otherwise inadmissible evidence to formulate their opinions without running afoul of the Confrontation Clause. *** The testimony concerning Special Agent Earle's involvement simply explained to the jury how the CODIS data came to the attention of Special Agent Budzynski. It was not offered to establish the CODIS match. Special Agent Budzynski testified that he conducted his own independent analysis of the data, concluded that the two DNA profiles matched, and presented the results of his analysis to the jury.”

State v. Watts, 616 S.E.2d 290 (NC Ct. App. 2005) - “Defendant argued that a witness tendered as an expert in forensic DNA analysis was not qualified to testify on population statistics. The appellate court disagreed, noting that a population-statistical analysis is part of DNA analysis, and that North Carolina case law supported the admission of such testimony by forensic DNA analysis experts. The fact that the expert relied on the results of an analysis
conducted by an absent colleague did not violate defendant's Sixth Amendment right to confrontation.”

People v. Brown, 2005 NY Slip Op 25303 (NY Sup. Ct. 2005) – “The charges against defendant arose out of an incident in 1993 and were based on DNA evidence that was developed in 2002 and 2004. The prosecution's expert had reviewed the records technicians prepared regarding both the 2002 testing of a swab that had been taken from the victim and held since 1993 and the 2004 swab taken from defendant at some later date. The expert did not perform the actual DNA testing herself. Defendant argued that the testing constituted "testimonial" evidence and that under Crawford, his Sixth Amendment rights were violated because he was not given the opportunity to confront the technicians who performed the actual testing. The court disagreed. The notes and records prepared by the technicians were not made for investigative or prosecutorial purposes but, rather, were made for the routine purpose of ensuring the accuracy of the testing done in the laboratory and as a foundation for formulating a DNA profile. As such, they were not "testimonial" in nature, and there was no Sixth Amendment right of confrontation as to the technicians. There were no constitutional grounds for reversal of the judgment.”

Ellis v. Phillips, 2005 U.S. Dist. LEXIS 13910 (SDNY 2005) – “The Confrontation Clause was not violated by allowing one expert to testify as to DNA test results when the expert who conducted the tests was unavailable due to cancer under the business record exception to the hearsay rule.”

Firmly-rooted Hearsay Exceptions not impacted by Crawford yet
A majority of decisions support these exceptions as non-testimonial and not impacted by Crawford.
- FRE 801(d)(1) Prior Statement of Witness
- FRE 801(d)(2)(a) Statement/Admission by Party-Opponent
- FRE 801(d)(2)(e) – Co-Conspirators Statements Made in Furtherance of Conspiracy
- FRE 803(1) Present Sense Impression exception
- FRE 803(2) Excited Utterances exception/911 Tapes
- FRE 803(3) State of mind exception
- FRE 803(4) Medical Treatment/Diagnosis exception
- FRE 803(5) Recorded Recollection
- FRE 803(6) Business Records Exception
- FRE 804(b)(1) Former testimony exception
- FRE 804(b)(2) Dying Declarations
- FRE 804(b)(3) Statements against penal interests

Prior Statement of Witness
Yancy v. State, 2005 Ark. App. LEXIS 421 (Ark. Ct. App. 2005) – The victim testified at trial, recanted her statement to police which was given under oath, and was impeached with the prior statement given. This did not violate Crawford because the victim was present and subject to cross examination at trial. Crawford does not apply to prior statements so long as the witness testifies and is subject to cross examination.
Statement/Admission by Party Opponent

**United States v. Moffie, 2005 U.S. Dist. LEXIS 9462 (ND Ohio 2005)** – Defendants were indicted for bank fraud in 2004; however, in a prior recovery asset civil suit, one defendant testified at a deposition in 1999 concerning facts that are relevant to the indictment and was represented by counsel at that deposition. The prosecutor wanted to admit the civil suit deposition during the criminal trial, pursuant to 801(d)(2)(A), admission by a party-opponent. The court found significant precedent throughout the Circuits that prior civil deposition testimony is admissible as a party-admission in a subsequent criminal case. Thus, no *Crawford* issue to admit the deposition against that defendant; however, redactions would have to be made as to other defendants referenced in the deposition because that would violate *Crawford* and *Bruton* unless the defendant took the witness stand.

**United States v. Gibson, 2005 FED App. 0230P (6th Cir. KY 2005)** – Admissions by party opponents are non-testimonial and do not implicate *Crawford*.

**State v. Robinson, 33 Kan. App. 2d 773; 109 P.3d 185 (Kan Ct App 2005)** - The Confrontation Clause does not apply when addressing admitting a defendant’s confession at trial. A Defendant does not have a constitutional right to confront himself.

**People v. Thoma, 125 Cal. App. 4th 1471 (Cal Ap 2d 2005)** - “The admission of appellant's adoptive admission did not violate his confrontation rights under *Crawford*. [B]y reason of the adoptive admissions rule, once the defendant has expressly or impliedly adopted the statements of another, the statements become his own admissions, and are admissible on that basis as a well-recognized exception to the hearsay rule. Being deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant. Accordingly, no confrontation right is impinged when those statements are admitted as adoptive admissions without providing for cross-examination of the declarant.”

**State v. Rivera, 268 Conn. 351, 844 A.2d 191 (2004)** – Defendant confessing a murder to a family member prior to arrest is non-testimonial and *Crawford* analysis does not apply. Reliability test from *Ohio v Roberts* applies in this situation.

**United States v. Morgan, 385 F.3d 196 (2d Cir NY 2004)** - Handwritten letter by a defendant to her boyfriend was not testimonial as she likely did not expect it to be found by the police or used against her at trial. The letter was not testimonial.

**People v. Cervantes, 118 Cal. App. 4th 162; 12 Ca. Prtr. 3d 774 (Cal. App. 2d Dist. 2004)** – The Defendant’s confession was made to a witness to explain injuries he received during the murder and to receive medical help, and with reasonable expectation it would not be repeated due to the fact that witness was afraid of Defendant and his gang. This statement was non-testimonial and no *Crawford* analysis was required.

**Globe v. State, 29 Fla. L. Weekly S 119, 29 Fla. L. Weekly S 345 (2004)** - Co-defendant admissions by acquiescence or silence do not implicate the Confrontation Clause or *Crawford*.
In re J. K.W., 2004 Minn. App. LEXIS 783 (Minn. Ct. of Ap. 2004) - Police asked a co-defendant to call the defendant and see if defendant would admit to being involved in phoning in a bomb threat. The Court of Appeals ruled that since co-defendant didn’t testify, the transcript of the phone call could not come in to evidence since the Co-defendant was not subject to cross examination. {NOTE: This Court did not state how the initial transcript was permitted into court, but it appears that this is a statement by party opponent hearsay exception.}

People v. Hayes, 2004 Mich. App. LEXIS 2500 (Mich Ct App 2004) – Statements made by a defendant in jail to another inmate are not testimonial so long as the inmate is not acting as a governmental agent.

People v. Cervantes, 118 Cal. App. 4th 162, 12 Cal. Rptr. 3d 774 (Cal. App. 2d Dist. 2004) – Three Defendants killed one victim and paralyzed another victim. One Defendant confessed the crime to a witness from whom he sought medical aid from for injuries he suffered during the murder. The witness went to police. The 3 Defendants were in a gang and the witness afraid to testify regarding the statement. The witness did testify regarding the one Defendant’s confession in a trial involving the other two Defendants. The Court held that the witness could testify to the statement because the state of the confessing Defendant was a statement against penal interest (FRE 801(d)(2)(a)) and there was no Confrontation clause violation against the two non-confessing Defendants because the statement to the witness was not testimonial. The confession was made to the witness to explain his injuries and to receive medical help, and with reasonable expectation it would not be repeated due to the fact that witness was afraid of Defendant and his gang. Therefore, no Crawford analysis was required.

Co-Conspirator Statements In Furtherance of Conspiracy
Admitting statements and tape recordings of co-conspirators made in the furtherance of the conspiracy is not hearsay and does not violate Crawford. These statements and recordings do not violate the confrontation clause and the statements may be admitted without any testimony from the co-conspirators.

United States v. Wilson, 2005 U.S. App. LEXIS 18941 (9th Cir. Mont. 2005)
Bush v. State, 895 So.2d 836 (Miss. 2005)
United States v. Delgado, 401 F.3d 290 (5th Cir TX 2005)
United States v. Hendricks, 395 F.3d 173 (3rd Cir. VI 2005)
United States v. Robinson, 367 F.3d 278 (5th Cir Tex. 2004)
United States v. Reyes, 362 F.3d 535 (6th Cir 2004)

Present Sense Impressions
Bray v. Commonwealth, 2005 Ky. LEXIS 288 (2005) – The victim, who was subsequently murdered, called her sister and said she was scared because the defendant was down the street sitting in his car. The victim was describing the situation as it was occurring and how she feared for her life. The sister was permitted to testify to these statements as present sense impressions and they were deemed non-testimonial.

State v. Heggar, 2005 La. App. LEXIS 1967 (La. App. 2 Cir. 2005) - At trial, the prosecution presented testimony of defendant's former girlfriend regarding the content of her conversations with the victim (her new boyfriend) immediately prior to his murder. On appeal, the court found that admitting the present sense impressions were non-testimonial and did not violate Crawford. “The victim's statement to the girlfriend described the arrival of defendant as it happened; likewise, the victim's later statement to the girlfriend immediately prior to the shooting that he and defendant were talking was a description of the event as it happened and also qualified under the present sense exception to the hearsay rule.”

Crawford v. State, 2005 Tex. App. LEXIS 4789 (Tex. App. 2005) - The victim of a fatal shooting was a drug dealer who was doing business with the defendant. Before leaving to meet with the defendant, the victim told his girlfriend that “I'm fixing to go meet Sterling”; (2) "If I don't call you back in thirty minutes, call me"; and (3) "I am where I told you I was goin' to be." The first and second statements were non-testimonial as state of mind statements and properly admitted. The last statement was non-testimonial as a present sense impression and properly admitted. No Crawford violations.

People v. Dobbin, 2004 NY Slip Op 24534 (NY Sup Ct 2004) – A witness to a robbery called 911 to report the crime and gave his last name. The court found the call to be testimonial thus requiring the caller to testify at trial. The court found that the caller was making an official report of a crime to a governmental agency; that a reasonable person would expect that the call to the 911 police operator would be later used in a trial; that the mere act of reporting a crime would lead a reasonable person to understand he has become involved in a police investigation and that the statement could be used in prosecution; and last, although the statements by the caller were present sense impressions, the statements were accusatory in nature and therefore testimonial

United States v. Griggs, 65 Fed. R. Evid. Serv. (CBC) 1109; 2004 U.S. Dist. LEXIS 23695 (SDNY 2004) – “The government seeks to introduce testimony by a police officer, summoned to the scene from the police precinct across the street, who heard the statement "Gun! Gun! He's got a gun!" and observed the declarant gesture at the defendant to identify the person to whom his statement had referred. The government has indicated that this witness has not been found by government investigators. The government seeks to introduce this testimony pursuant to the hearsay exceptions for either excited utterances or present sense impressions. Although the Crawford court did not provide a definition for what constitutes a "testimonial" statement, the Second Circuit has subsequently stated that a declarant's statements are testimonial if they are "knowing responses to structured
questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings.” Therefore, these statements fall within both hearsay exceptions and are not testimonial.

State v. Meeks, 88 P.3d 789 (Kan. 2004) - Statement by shooting victim to police officer “Meeks shot me” and prosecutor admitted statement of now dead victim under present sense impression hearsay exception. “In the instant case, Officer Hall was arguably conducting an interrogation when he asked Green if he knew who shot him, thus making the response testimonial. Moreover, Meeks was not given the opportunity to confront Green through cross-examination because Green died before testifying at trial. We need not determine whether the response was testimonial or not, however, because we hold that Meeks forfeited his right to confrontation by killing the witness, Green.” Therefore, this was admissible hearsay as a present sense impression.

Excited Utterances & 911 Tapes

Compan v. People, 2005 Colo. LEXIS 873 (2005) – The victim, wife of the defendant, did not appear at trial to testify. Statements made by the victim to a friend while still under the stress from the assault were properly admitted as they were non-testimonial.

Lagunas v. State, 2005 Tex. App. LEXIS 6957 (Tex. App. 2005) – Defendant was charged with kidnapping and burglary. On appeal, “Defendant argued that the admission of a child witness's hearsay statements violated his right to confrontation. The court of appeals disagreed. The child's age and her emotional state were factors strongly suggesting that her statements to the officer were non-testimonial. Considering the context, the statements amounted to a small child's expressions of fear arising from her mother's absence. When an officer located the child, he asked her name and told her that he was a police officer. He then noticed that she was "terrified" and crying. The officer's exchange with the child was unlike the sort of formalized or structured interrogation that has been held to give rise to testimonial hearsay. To the contrary, it was closer in nature to a preliminary question in which the officer sought to clarify the child's spontaneous statement that her mother was dead. There was not time to formulate careful, structured questioning. Significantly, after calming the child, the officer asked her no further questions regarding the circumstances of her mother's disappearance.”

State v. Warsame, 701 N.W.2d 305 (Minn. 2005) – “When the officer arrived near the scene, he encountered the victim in the street. She stated that "my boyfriend just beat me up." The trial court held the latter initial statement was admissible, apparently, as an excited-utterance. However, as the officer checked the victim's head injury, he asked her some form of open-ended question as to what happened; at that point, the victim went into great detail about defendant striking her with a cooking pot, and his chasing her with a knife while threatening to kill her. Thus, the issue was whether the district court erred in ruling that the latter statements were testimonial and therefore inadmissible. The appellate court noted that a majority of post-Crawford cases involving initial police-victim interactions at the scene held that the situations did not involve interrogation and that resulting statements were not testimonial. Further, in the instant case, the district court clearly erred in finding the victim had 15 to 20 minutes "to reflect" before making her statements. The appellate court held the
questioning was not clearly done to obtain evidence that could be used at trial. Thus, the subject statements were nontestimonial.”

**Commonwealth v. Foley, 445 Mass. 1001 (2005)** - “The police arrived at a home and encountered the adult victim and four children, crouched on a bed. The victim was crying, and the children looked horrified. One of the children pointed to a bedroom. The officer found defendant and took him into custody. The officer than interviewed the victim who identified defendant as her assailant and gave extensive details about the attack. At trial, the adult victim invoked her marital privilege. The officer was allowed to testify to her statements. The appellate court held that the initial responses did not involve interrogation as the purpose behind the questioning involved a community caretaking function. However, statements made in response to questioning after the scene was secure and the victim declined medical attention were made in response to investigatory interrogation. Their admission violated the Sixth Amendment.”

**Marquardt v. State, 2005 Md. App. LEXIS 188 (Md. Ct. Spec. App. 2005)** - A 911 call from a victim of domestic violence, made as the assault was in progress, was not testimonial under Crawford. The victim was requesting help, not formalizing a statement concerning a crime.

**State v. Primo, 2005 Ohio 3903 (Ohio Ct. App. 2005)** - “Defendant, a nurse's assistant at a nursing care facility, touched the breast of an elderly female patient. Defendant argued that the trial court erred when it admitted the victim's statements as excited utterances. The appellate court held that the victim's statements were excited utterances, pursuant to Ohio R. Evid. 803(2), as the statements related to the startling event while the victim was still under the stress caused by the event. The victim made the statements to a nurse's assistant and two nursing supervisors when they entered her room and inquired about her well-being. The victim began crying and indicated that a black man had pinched or grabbed her breast. The statements in question were not testimonial in nature, and the admission of the statements by the trial court did not violate defendant's right to confrontation.”

**People v. Bradley, 2005 N.Y. App. Div. LEXIS 8142 (NY App. Div. 1st Dept. 2005)** - “A police officer responded to a 911 call and defendant's girlfriend, who was bleeding profusely, indicated that defendant had thrown her through a glass door. Defendant was arrested. At trial, the girlfriend's bloody clothing was introduced, as were medical records of her treatment, photographs of the apartment, and protective orders against defendant. The chief evidence was the victim's out-of-court statement to the police officer, which was admitted as an excited utterance. Defendant denied causing the injuries, but he was convicted by a jury. On appeal, the court held that the statement of the victim was not testimonial within the contemplation of Crawford, and as such, defendant's constitutional rights to confrontation and due process were not violated. The answer came as a result of a general, non-specific question by the police, which was not interrogatory in nature, such that the statement was not deemed testimonial.”
Gamble v. State, 831 N.E.2d 178 (Ind. Ct. App. 2005) – “The evidence indicated that defendant shot the victim with a shotgun after a dispute over money arose. After the shooting, two people called 911 to report the incident. Defendant argued that the trial court erred in admitting the 911 calls into evidence because the calls were testimonial in nature and the admission thus violated his Sixth Amendment right to confront the witnesses. The appellate court could not say that 911 operators were principally motivated by a desire to preserve statements for future investigations or prosecution. Furthermore, it was the principal motive of the callers to alert emergency medical personnel that someone had been shot. Under these circumstances, the court held that the callers' statements were not testimonial and the admission of the tapes did not violate defendant's Sixth Amendment right to confrontation.”

State v. Parks, 2005 Ariz. App. LEXIS 90 (Ariz. Ct. App. 2005) – “The trial court found Cory had witnessed a startling event, and that his statements to Manor about the shooting were made under the stress of that event and were spontaneous. The trial court did not abuse its discretion in finding Cory's statements to Manor were excited utterances. Nevertheless, as we discuss below, Cory's statements had testimonial significance, and were made during the course of a police interrogation.” After the officer determined that the declarant had witnessed the shooting, he was separated from others. The officer was operating in an “investigative mode and was attempting to ensure that their recollections would remain their own and have more prosecutorial force. These circumstances demonstrate that at the time Manor began to question Cory, the purpose of his questioning was to obtain information regarding a potential crime. Further, although emotional and upset, Cory appeared to have appreciated that what he had witnessed would have significance to a future criminal prosecution.”

United States v. Brun, 2005 U.S. App. LEXIS 15747 (8th Cir. Minn. 2005) - “Police received two 911 calls. In the first call, the victim's nephew requested assistance because defendant and the victim were arguing. Twenty minutes later, the victim called 911, stating that defendant was drunk and fired a rifle into the bathroom. When police arrived, they spoke to the victim and her nephew and later completed a report. At trial, the victim testified inconsistently with her 911 statement. Her nephew was unavailable. Both 911 statements and the victim's statements in the police report were admitted into evidence as exited utterances. On appeal, the court affirmed. Although the nephew did not testify, admission of his 911 statements did not violate defendant's confrontation clause rights. His 911 statements were exited utterances, and they were admissible despite his unavailability because they fell within an established hearsay exception. Similarly, the victim's 911 statements were properly admitted as exited utterances. Additionally, the victim's statements to the police who responded to the 911 call were exited utterances. The victim was visibly distraught, and her spontaneous statements were not made in response to suggestive questioning by the police.”

Tyler v. State, 2005 Tex. App. LEXIS 4742(Tex. App. 2005) – Statements made to police officers by a gun shot victim immediately before going in to surgery were exited utterances and non-testimonial.
State v. Davis, 154 Wn. 2d 291; 111 P.3d 844 (Wash. 2005) - “The woman who had filed the no-contact order against defendant called 911 but hung up. The 911 operator called her back, at which time the woman stated that defendant was "jumpin' on" her. She told the operator that defendant had used his fists to beat her. On appeal, the court was asked to determine whether the admission of the 911 call violated defendant's Sixth Amendment right to confrontation. The court held that emergency 911 calls had to be assessed on a case-by-case basis and that the statements made in the calls were to be individually evaluated for admissibility in light of the confrontation clause. The court held that overwhelming untainted evidence supported defendant's conviction and that any error in admitting "testimonial" statements without cross-examination was harmless beyond a reasonable doubt. The court noted that the woman called 911 because of an immediate danger. There was no evidence she sought to "bear witness" in contemplation of legal proceedings. The court determined that the information essential to the prosecution of defendant was the woman's initial identification of defendant as her assailant was nontestimonial and properly admitted.”

People v. Royster, 18 AD 3d 375; 795 NYS 2d 560 (NY App Div 1st Dept 2005) - The complainant's 911 call was properly admitted at trial as an excited utterance and the tape was non-testimonial because the 911 operator did not ask the caller anything except her location and whether she was injured.

State v. Hembertt, 269 Neb. 840 (2005) - The victim did not testify at trial, but her excited utterances were held to be non-testimonial and admissible at trial. “The record clearly established the element of spontaneity necessary for the victim's statements to be an excited utterance. According to the police officer's testimony, the victim said that the assault had occurred moments prior to the officers' arrival and her statement was volunteered. Assuming the officer's testimony to be correct, there had not been time for the exciting influence to have been dissipated. Given the officer's testimony, the trial court did not err in concluding that foundation for the excited utterance exception to the hearsay rule had been established. Defendant's claim that the statements were made in response to police questioning was contradicted by the record. When asked, the officer specifically testified that the victim's statements were made before any questions were asked. Asking the victim whether there were weapons in the house did not undermine the conclusion that she was still speaking under the stress of nervous excitement and shock produced by the act.”

People v. Rincon, 129 Cal. App. 4th 738; 28 Cal. Rptr 3d 844 (Cal App 2nd Dist 2005) – “Defendant argued that the attempted murder victim's statements to a prosecution witness were wrongly admitted and that their use at trial violated his Sixth Amendment right of confrontation. The court held that the out-of-court statements made by the attempted murder victim to a prosecution witness were admissible as spontaneous statements under Cal. Evid. Code § 1240. The victim's statements lacked any degree of legal or procedural formality. Rather, the victim, who was shot in the ankle during a gun battle, spoke to the witness, a civilian and former gang member, at the witness's home in the immediate aftermath of the shooting. The victim could not reasonably have anticipated that the witness would relate the statements to law enforcement or that the statements would somehow be used in court. Substantial evidence supported a finding that the victim spoke immediately upon the hurt received, while under the stress of excitement caused by the shooting, and before he had time
to devise or contrive any thing for his own advantage. Thus, the victim's out-of-court statements were not testimonial, and their use against defendant at trial did not violate the Sixth Amendment.”

**Massey v. Lamarque, 2005 U.S. App. LEXIS 8990 (9th Cir Cal 2005)** - Spontaneous statements on a 911 tape were non-testimonial and did not require the declarant to testify.

**State v. Mason, 127 Wn. App. 554; 110 P.3d 245 (Wash Ct App 2005)** - “Defendant claimed the trial court violated his right to confrontation under U.S. Const. amend. VI and Wash. Const. art. I, § 22, by permitting witnesses to testify about statements the victim made to four police officers and a victim's advocate before he disappeared. The statements described a prior attack by defendant, as well as the victim's profound fear of defendant after the incident. Because defendant's trial was held before Crawford v. Washington, the trial court admitted the victim's statements as excited utterances. Under the Crawford rule, if the statements were "testimonial," they were inadmissible if defendant never had the opportunity to cross-examine the victim. The court found that the victim's statements were not "testimonial" because they were offered while the victim was seeking protection and not for the purpose of bearing witness against defendant. Also the statements were initiated by the victim and not by government officials.”

**State v. Wilkinson, 2005 VT 46 (2005)** – “Defendant was accused of pointing a gun at and threatening to kill the victim, his stepson. The victim told defendant's cousin that defendant had pulled a gun on him, that he was frightened, and that he thought defendant was going to kill him. The victim had been convicted of perjury and was therefore incompetent to testify under Vt. Stat. Ann. tit. 13, § 2907. The trial court admitted the victim's statement to the cousin as an excited utterance under Vt. R. Evid. 803(2). Defendant argued that his confrontation rights were violated because the statement was "testimonial" within the meaning of Crawford. The appellate court disagreed. The statement was not "testimonial" because it was not given to police and was not made during course of the police investigation; the victim was excitedly expressing his fear to a friend.”

**Spencer v. State, 162 SW3d 877 (Tex App Houston 14th Dist 2005)** - “Defendant's girlfriend did not testify at trial, but the trial court allowed the two officers who responded to the girlfriend's 911 call to testify that she told them that defendant had hit her. The trial court admitted the girlfriend's initial statements to the officers under the excited utterance exception to the hearsay rule. Defendant claimed the ruling deprived him of his right to confront witnesses against him under the Sixth and Fourteenth Amendments to the United States Constitution. The court held that the girlfriend's statements to the officers were not "testimonial," under the Crawford test for analyzing confrontation claims because the girlfriend initiated the contact by summoning the police for help, and the officers' preliminary question at the scene was designed to ensure the safety of those on the scene and did not amount to interrogation. The court noted that even if the girlfriend's statements were made in response to questioning, preliminary questions when police arrive at a crime scene to assess and secure the scene did not constitute interrogation because they bore no indicia of the formal, structured questions necessary for statements to be testimonial.”

State v. Byrd, 2005 Ohio 1902 (Ohio Ct App 2005) - The 911 tape containing excited utterances of the non-testify victim was deemed non-testimonial and properly admitted at trial.

Towbridge v. State, 89 So. 2d 1205 (Fla Dist Ct Ap 3rd Dist 2005) - *Crawford* does not apply to spontaneous statements.

Anderson v. State, 2111 P.3d 350 (Alaska Ct Ap 2005) - “The police responded to a report of an assault, and when they arrived, they found the victim. When the officer asked the victim what had happened, the victim answered that defendant had hit him with a pipe. At defendant's trial, the victim did not testify, but his out-of-court statement was presented to the jury through the hearsay testimony of the officer. The trial court ruled that the victim's statement was admissible as an excited utterance. The trial court's decision was affirmed on appeal, however, the case was remanded to the appellate court to review the case in light of the U.S. Supreme Court decision in *Crawford*. The issue in the instant case was whether the victim's response to the officer's question, "What happened?" qualified as "testimonial" hearsay under *Crawford*. The appellate court ruled that the victim's response was not "testimonial" for purposes of the Confrontation Clause. An excited utterance by a crime victim to a police officer, made in response to minimal questioning, was not testimonial. The appellate court followed the emerging majority view on the admissibility of excited responses to brief on-the-scene questioning by police officers.”

State v. Staten, 364 SC 7; 610 SE2d 823 (2005) – “Defendant was found to be involved in the shooting death of a college student. On appeal, the court found that defendant's right to confront a witness under the Sixth Amendment, applicable to the states through the Fourteenth Amendment, and under S.C. Const. art. I, § 14 was not violated by the testimony of the victim's roommate that the victim had told the roommate that defendant had earlier pulled a gun on him, as the statement was nontestimonial in that it was not made for later use at trial and it fell under the excited utterance hearsay exception of S.C. R. Evid. 803(2).” (NOTE: An article written by the author of this outline was cited as authority in this decision.)

People v. Coleman, 16 AD 3d 254; 791 NYS 2d 112 (NY App Div 1st Dept 2005) – “The trial court properly admitted the "911" tape. The "911" operator requested and obtained a description of the assailant but otherwise only asked the caller to repeat information he had already volunteered. The "911" tape evidence satisfied both the excited utterance and present sense impression exceptions to the hearsay rule. The "911" tape was not "testimonial" under the U.S. Supreme Court's *Crawford* v. Washington Confrontation Clause decision. The information conveyed by the "911" caller was for the purpose of urgently seeking police intervention for badly bleeding victims, did not result from structured questioning pursuant to a protocol, and requested only a description of the attacker and information already volunteered. The primary reason for the "911" call was for urgent assistance and was not to phone in an anonymous accusation. In *Crawford*, the focus of the right to confront
testimonial statements was primarily directed at evidence bearing a resemblance to depositions and affidavits, even if unsworn. Crawford did not support the proposition that virtually every report of criminal activity, knowingly made to the authorities, was to be viewed as testimonial.”

United States v. Jordan, 2005 U.S. Dist. LEXIS 3289 (D. Colo. 2005) - “The victim was stabbed with a sharpened piece of metal in the main recreation yard of a federal penitentiary. Defendant was also an inmate there, and he was charged with second-degree murder, assault with intent to murder, assault with a dangerous weapon, and assault resulting in serious bodily injury. He moved to prevent plaintiff United States from using evidence of what had been characterized as the victim's dying declarations. The court noted that at three different points, the victim was questioned, and he identified defendant as the perpetrator. The United States wanted to use those statements under the dying declaration hearsay exception, the excitable utterance hearsay exception, and the Forfeiture by Wrongdoing Doctrine hearsay exception. The court rejected all three arguments, finding that admission of a testimonial dying declaration after Crawford went against the sweeping prohibitions set forth in that case. The court also rejected the excited utterance argument, and found that the Forfeiture by Wrongdoing doctrine did not apply in the action.”

State v. Alvarez, 107 P.3d 350 (Ariz Ct App 2005) - “Defendant said his two companions pulled a man out of his rental car and beat him; defendant and the companions drove off in the car. Before dying of his injuries, the victim told police he had been assaulted by three men who stole his car. Defendant and two other men were seen in rental car. Blood was found on defendant's shoe, on the companion's clothes, and on concrete blocks found at the murder scene. The appellate court held that, as the evidence had been sufficient to convict defendant of the crimes, the trial court properly denied his motion for a judgment of acquittal. Instructions concerning reasonable doubt and the elements of felony murder were proper. As the victim had been staggering, bleeding, slipping in and out of consciousness, and asking for medical help, the trial court properly found that he had been under the stress of a startling event; his statement was thus admissible under Ariz. R. Evid. 803(2) as an excited utterance. Since police did not know a crime had been committed when they questioned the victim, his statement was non-testimonial hearsay outside the scope of Crawford and its admission did not violate defendant's Sixth Amendment confrontation rights.”

Key v. State, 2005 Tex. App. LEXIS 1573 (2005) - “When Tyler Police Officer Kevin Mobley answered a disturbance call one night, he found Appellant and Rachel Bailey sitting outside on the ground, arguing. Bailey told Officer Mobley that she had been restrained by Appellant since seven o'clock that morning. She had just run from the house and Appellant had grabbed her and pulled her to the ground, causing several injuries. She had bruises on her arms, consistent with fingers grabbing and pressure being applied to the arms with a hand. She had several injuries about her body, arms, and legs. Bailey indicated that she feared Appellant. Appellant was arrested and charged with assaulting Bailey. Officer Mobley and Officer Chris Calloway, who assisted that night, testified at the trial. Bailey did not testify.” Victim’s statements found to be non-testimonial and did not violate Crawford.
State v. Anderson, 2005 Tenn. Crim. App. LEXIS 62 (Tenn Crim App 2005) - “Defendant argued that the trial court erred by allowing hearsay statements of eyewitnesses to be introduced through the testimony of a police officer as an excited utterance, thereby violating his right to confront witnesses against him. The appellate court determined that it was clear from the officer's testimony that the juveniles had just witnessed the break-in and were excited to report what they had witnessed. The juveniles' statements described the startling event that they had personally observed. The statements were made in reaction to the exciting event that they had just observed. The brief passage of time between the event and the statements weighed in favor of a finding that the statements were made under the stress or excitement of witnessing a break-in. The statements were not made at a preliminary hearing, grand jury, or former trial. Because an excited utterance was a reactionary event of the senses made without reflection or deliberation, it could not be testimonial in that such a statement had not been made in contemplation of its use in a future trial. Therefore, their admission presented no violation of defendant's Sixth Amendment Confrontation Clause rights.”

Commonwealth v. Gray, 2005 PA Super 22 (PA Super Ct 2005) - “an unsolicited excited utterance to police that is made to obtain assistance during the commission of a crime would not constitute a statement made in contemplation of prosecution. In such a situation, the declarant is not subject to police interrogation and is not influenced by reason or deliberation. The declarant volunteers this information in effort to remedy a perceived emergency, not to create a record against another for use in a future prosecution.” No Crawford violation.

State v. Wright, 2005 Minn. App. LEXIS 95 (Minn Ct of Ap 2005) - “Defendant argued, inter alia, that the trial court erred by admitting the hearsay statements of an unavailable witness who lived near the shooting. The court of appeals disagreed. The witness took the initiative to make the 911 call and he volunteered his statements to the officer at the scene. There was no indication that the witness was subjected to structured questioning by the officer, nor was there any indication that he should have reasonably expected his statements to be used at defendant's trial more than one year later. At the time the witness made the statements, he had not been notified that a crime had been committed, so it would have been objectively unreasonable to believe that his statements would be used at a later trial. Therefore, the statements were not testimonial. The State presented a strong case, so much so that defendant did not appeal on sufficiency of the evidence grounds. The combination of the relatively light importance attached to the witness's testimony, the corroborative evidence surrounding the incident, and the strength of the State's case showed that admittance of the hearsay statements, if done in error, was harmless beyond a reasonable doubt.”

People v. King, 2005 Colo. App. LEXIS 111 (Colo Ct of Ap 2005) - “where, as here, a victim makes an excited utterance to a police officer, in a noncustodial setting and without indicia of formality, the statement is nontestimonial interrogation under Crawford.”

Ariz. v. Aguilar, 107 P.3d 377 (Ariz Ct of Ap 2005) - “In this opinion, we apply the Court's revised approach in order to determine whether a particular type of hearsay-excepted out-of-court statement, the excited utterance, is testimonial. Because we find that an excited utterance heard and testified to by a lay witness does not fit within Crawford's definition of
testimonial, as we understand that term, we find no error in the trial court's admission of certain excited utterances that inculpated Defendant.”

**People v. West, 2004 Ill. App. LEXIS 1536 (Ill App Ct 2004)** – “The victim was kidnapped, robbed and raped, but was murdered prior to trial. Immediately after the crimes, the victim ran to a house and the police were called. Although statements made by the victim to police officers when being questioned at the hospital were deemed testimonial and excluded on appeal pursuant to Crawford, the appeals court upheld the admission of statements made by the victim to an officer who arrived at the house when the victim was calling for medical help. The court held that “the questions posed by the officer were preliminary in nature and for the purpose of attending to [the victim’s] medical concerns, not for the purpose of producing evidence in anticipation of a potential criminal prosecution.” As to statements made to the 911 operator, the court held “we find that those statements made to the 911 dispatcher concerning the nature of the alleged attack, [the victim’s] medical needs, and her age and location are not testimonial in nature, and were properly admitted at trial. These statements were given immediately after [the victim] was brutally assaulted and in a state of shock for the purpose of requesting medical and police assistance. Further, the dispatcher's questions concerning what was wrong, whether [the victim] was in need of an ambulance, what her age was, and where she was located were posed in order to gather information about the situation and to secure medical attention for her, not to produce evidence in anticipation of a potential criminal prosecution. However, those statements made by [the victim] which described her vehicle, the direction in which her assailants fled, and the items of personal property they took are testimonial in nature. These statements were made in response to questions posed by the dispatcher for the stated purpose of involving the police. As such, [the victim’s] responses are comparable to those obtained through official questioning for the purpose of producing evidence in anticipation of a potential criminal proceeding, and their use at trial to secure the defendant's conviction implicates the central concerns underlying the confrontation clause. Accordingly, we find that the portion of [the victim’s] statement to the dispatcher which described her vehicle, the direction in which her assailants fled, and the items of personal property they took are testimonial in nature, and their admission at trial violated the defendant's right of confrontation.”

**United States v. Griggs, 2004 U.S. Dist. LEXIS 23695 (SDNY 2004)** – “The government seeks to introduce testimony by a police officer, summoned to the scene from the police precinct across the street, who heard the statement "Gun! Gun! He's got a gun!" and observed the declarant gesture at the defendant to identify the person to whom his statement had referred. The government has indicated that this witness has not been found by government investigators. The government seeks to introduce this testimony pursuant to the hearsay exceptions for either excited utterances or present sense impressions. Although the Crawford court did not provide a definition for what constitutes a "testimonial" statement, the Second Circuit has subsequently stated that a declarant's statements are testimonial if they are "knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings." Therefore, these statements fall within both hearsay exceptions and are not testimonial.
Wilson v. State, 151 S.W.3d 694 (Tex App Ft Worth 2004) – “A few days after the robbery, a police officer saw a car that matched the description given by the victim. Defendant, the driver, matched the physical description given by the victim. The officer told defendant to exit the car, but defendant took off instead. The car eventually came to a stop, and defendant and two others took off running through a field. Defendant's girlfriend approached the officers and told police defendant's initials and gave them his wallet. The court held that the girlfriend's statements were nontestimonial and that Crawford did not apply. She initiated the interaction with the officers, her statements were made in the course of her inquiring about her car and the missing occupants, and she was not responding to tactically structured police questioning. The trial court properly admitted the statements [as excited utterances]. The officers testified that the girlfriend seemed upset and nervous and looked like she was about to cry. A reasonable person could conclude that she made the statements while under stress, fear, or excitement from seeing her car wrecked, abandoned, and surrounded by police officers, knowing that she had lent the car to her boyfriend.”

State v. Nelson, 2004 Ohio 6153 (2004) – Admission of a 911 tape having the victim as caller on the tape was nontestimonial and did not violate Crawford when the victim was unavailable for trial.

State v. Powers, 99 P.3d 1262 (2004) – “The court held that the trial court, on a case-by-case basis, could best assess the proposed admission of a 911 recording as testimonial or nontestimonial and whether the statement originated from interrogation. Despite the seriousness of defendant's alleged conduct, the victim's call was not part of the criminal incident itself or a request for help entitling the State to prove their case without affording defendant the opportunity to cross-examine the victim, a right case law protected. The record showed that the victim called 911 to report defendant's violation of the order and described him to assist in his apprehension, rather than to protect herself from his return. Thus, her statements were testimonial and were erroneously admitted at trial when she became unavailable. Because the 911 tape was the only evidence establishing the corpus delicti, without it, defendant's statements to police were inadmissible.”

People v. Victors, 819 N.E.2d 311, 353 Ill. App. 3d 801 (Ill App Ct 2004) – The victim of an assault made out-of-court statements to a police officer at the scene. Before making these statements, the victim had previously spoken with another officer for about 5 minutes. At trial, the victim did not testify and the court admitted the statements to the officer as excited utterances. On appeal, the court found the statements were not excited utterances due to the intervening interview by the first office and, therefore, declared the statements to the 2nd officer to be testimonial and required the victim to testify at trial.

Lopez v. State, 888 So.2d 693 (Fla Dist Ct App 1st Div 2004) - Police officers were dispatched and located the victim of an alleged carjacking. The officer asked the victim what happened and the victim, nervous and upset, told the officer he was abducted at gunpoint and then pointed to the defendant who was standing nearby. A short time later, the victim told the officer that the gun was still located in his car. The victim could not be located for trial and the prosecutor admitted the statements as excited utterances. On appeal, the court affirmed that the statements were excited utterances but that there cannot be a blanket rule
that all excited utterances are “automatically excluded from the class of testimonial statements.” The court found “these statements were not made to a person in authority for the purpose of accusing someone, or in the words of the Supreme Court, to "bear testimony" against someone. In contrast, a startled person who identifies a suspect in a statement made 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. These principles lead us to conclude that the statement at issue was a testimonial statement. While it is true that Ruiz was nervous and speaking rapidly, he surely must have expected that the statement he made to Officer Gaston might be used in court against the defendant. He knew that Gaston was a policeman who was on the scene in an official capacity to investigate a reported crime. Even in his excitement, Ruiz knew that he was making a formal report of the incident and that his report would be used against the defendant.”

Rogers v. State, 814 N.E.2d 695 (Ind Ct App 2004) - At the scene, a police officer took a statement from the victim. The victim was injured (cut on the forehead that was bleeding), visibly upset and shaking all over and did not appear to be aware of what was going on around him. The victim did give a statement to the officer identifying his assailant and demeanor. The court found the statement by the victim to be excited utterances and not testimonial. The very concept of an excited utterance (a declaration from one who has recently suffered an overpowering experience is likely to be truthful) is such that it is difficult to perceive how such a statement could ever be "testimonial.

State v. Orndorff, 95 P.3d 406 (Wash. 2004) – “Defendants entered the victim's home and threatened two children with guns while looking for the victim. They further struck the victim with a rifle, causing profuse bleeding. *** Coble's excited utterance fits into none of these categories. It was not a declaration or affirmation made to establish or prove some fact; it was not prior testimony or a statement given in response to police questioning; and Coble had no reason to expect that her statement would be used prosecutorially. Rather, Coble's statement was a spontaneous declaration made in response to the stressful incident she was experiencing. We hold that Coble's excited utterance was not testimonial …”

State v. Barnes, 2004 Me. 105, 854 A.2d 208 (2004) – “Defendant argued that the admission of his mother's statements to a police officer following an earlier alleged assault constituted a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. Specifically, the issue was whether the statements were "testimonial" in nature. The state supreme court concluded that the admission of the statements did not violate the Confrontation Clause for several reasons. First, the police did not seek the mother out. She went to the police station on her own. Second, her statements were made when she was still under the stress of the alleged assault. Third, she was not responding to tactically structured police questioning, but was instead seeking safety and aid. The police were not questioning her regarding known criminal activity. Thus, the interaction between defendant's mother and the officer was not structured police interrogation triggering the cross-examination requirement of the Confrontation Clause. Nor did the victim's words in any other way constitute a "testimonial" statement. Therefore, it was not obvious error for the trial court to admit the officer's testimony.”
People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Sup. Ct. 2004) - “the Court denies the motion because the 911 call here is not "testimonial" in nature as the term "testimonial" is used in *Crawford.* “It is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather, the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril.” “The 911 call -- usually, a hurried and panicked conversation between an injured victim and a police telephone operator -- is simply *not* equivalent to a formal pretrial examination by a Justice of the Peace in Reformation England. If anything, it is the electronically augmented equivalent of a loud cry for help.” “Moreover, a 911 call can usually be seen as part of the criminal incident itself, rather than as part of the prosecution that follows. Many 911 calls are made while an assault or homicide is still in progress. Most other 911 calls are made in the *immediate* aftermath of the crime. Indeed, the reason why a 911 call can qualify as an "excited utterance" exempt from the rules of evidence barring hearsay is that very little time has passed between the exciting event itself and the call for help; the 911 call qualifies as an excited utterance precisely because there has been no opportunity for the caller to reflect and falsify her (or his) account of events.” (NOTE: On 11-26-04, the underlying facts regarding the 911 caller and the time of call came in to question as not being accurate in this opinion. The 911 caller was a neighbor, not the victim, and the call was made 9 hours after the alleged crime. The Judge writing the opinion is standing behind his reasoning, but attorneys should be aware that the facts outlined in the decision are not wholly accurate.)

People v. Cortes, 2004 N.Y. Misc. LEXIS 663 (2004) - 911 tape is testimonial and the caller must be present at trial in order to admit the tape. “The first emergency call on the 911 tape was made by a male observer who could not be located by the prosecution and was therefore unavailable for cross-examination at trial. *** The 911 operator asked questions about the shooter's location, description, and direction of movement, all necessary for the police to conduct their investigation. *** The tape shows that the caller supplied information to the 911 operator in response to the operator's questions and that he also gave relevant information before the question was asked. *** The circumstances of some 911 calls, particularly those reporting a crime, are within the definition of interrogation. *** The police department collects information about crimes through callers to 911 who either are aware of the needed information because they have been told by public communications or because they are specifically asked by operators. The method for taking the calls falls within the definition of interrogation. *** The admission of 911 calls in New York is premised on the theory of spontaneous declaration, excited utterance or present sense impression. 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 for investigation, prosecution, and potential use at a judicial proceeding; it makes no difference what the caller believes.”

People v. Caudillo, 2004 Cal. App. LEXIS 1691 (Cal App 6th Dist 2004) - “the caller made the call immediately after witnessing the shooting. The caller could still see the Lincoln nearby. Although she had left the scene by the end of the call, she indicated that she was still afraid by stating that she did not want to give her cell phone number and did not want to "drive back by." She was clearly excited and stressed by the incident.” *** “First, the 911 call was not " *ex parte* in-court testimony or its functional equivalent--that is, material such
as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." The 911 call was initiated by a witness to a shooting. The declarant was speaking to a dispatcher who was attempting to obtain information to assist the police in responding appropriately, by providing assistance to any victims and apprehending the gunman to prevent any further violence. The call in this case stands in stark contrast to the statement in *Crawford*, which was made during a formal police interrogation after both the defendant and the declarant had been arrested. Here, the call occurred before any arrests were even made. Second, the 911 call cannot be described as an "'extrajudicial statement[] ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" The 911 call was an informal report of a recent shooting; its purpose was to advise the police of the situation so that they could take appropriate action to protect the community. Finally, the 911 call was not "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" This was a classic 911 call, made immediately after a crime was committed. The caller was simply requesting help from the police by describing what she saw without thinking about whether her statements would be used at a later trial. In conclusion, we do not believe that a 911 call such as the one admitted in this case was within the contemplation of the *Crawford* court when it concluded that the Confrontation Clause of the Sixth Amendment bars introduction of "testimonial" statements. The call here was initiated by a citizen witness to a crime; it was not initiated by the government or an agent of the government. The details provided by the caller were elicited in order to facilitate appropriate police response, not to provide evidence to be used at a later trial. Under the circumstances in this case, we believe that the admission of the 911 call did not violate the Confrontation Clause.

**State v. Wright, 686 N.W.2d 295 (Minn Ct App 2004)** - 911 tape of frantic victims requesting help was held non-testimonial and an excited utterance.

**State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004)** - spontaneous statements by victim made after being rescued from a kidnapping and made to non-questioning police officer were excited utterances and non-testimonial. No *Crawford* analysis needed.

**People v. Rivera, 778 N.Y.S.2d 28 (N.Y. App. Div. 1st Dept 2004)** – Excited utterance hearsay exception is not testimonial. “The court properly admitted the victim's girlfriend's telephoned statement to the victim's sister, identifying defendant as the assailant, under the excited utterance exception to the hearsay rule. This declaration, made within minutes of the stabbing by a crying, screaming declarant, was clearly made under the continuing stress and excitement caused by the startling event, and was not made under the impetus of studied reflection”

**Leavitt v. Arave, 371 F.2d 663 (9th Cir. Idaho 2004)** – The victim was brutally murdered by an intruder in her home. The night before the murder, she frantically called 911 regarding a prowler trying to enter her home and she named the defendant as the prowler. “Among other things, she said that she thought the prowler was Leavitt, because he had tried to talk himself into her home earlier that day, but she had refused him entry. Leavitt claims that the admission of the hearsay testimony violated his rights” *** “The Idaho courts relied upon
the state's residual exception, which is not firmly rooted, but the evidence could properly
have come in under the excited utterance exception, which is. See Wright, 497 U.S. at 817,
820, 110 S. Ct. at 3147, 3149. We have considered the circumstances and have no doubt that
the victim was speaking while under the baleful influence of an exceedingly stressful event --
the attempt by an intruder to break into her home. Nor do we doubt that she lacked the time
or the incentive to reflect upon and confabulate a story. Thus, the evidence properly came in
as an excited utterance. There was no violation of Leavitt's constitutional rights.” *** ”We
do not think that Elg's statements to the police she called to her home fall within the compass
of these examples. Elg, not the police, initiated their interaction. She was in no way being
interrogated by them but instead sought their help in ending a frightening intrusion into her
home. Thus, we do not believe that the admission of her hearsay statements against Leavitt
implicate "the principal evil at which the Confrontation Clause was directed[.]“

People v. Corella, 122 Cal. App. 4th 461 (Cal App 2d Dist 2004) – Defendant assaulted his
wife and she called 911 and reported the assault. She also repeated the accusation to police
and medical personnel. At preliminary hearing, the victim recanted her accusation and
admitted to giving a false statement. The victim did not testify at trial and her statements to
the police were admitted. The conviction was upheld on appeal as not violating Crawford
because the victim initiated the 911 call, not the police. Moreover, the victim provided
spontaneous statements describing the assault and this did not rise to level of interrogation.
Preliminary questions by a police office at the scene is not an interrogation. Although the
spontaneous statement were admitted at trial, these statements were made without reflection
or deliberation and could not have been made in contemplation of testimonial use at trial.

State of Mind
State v. Smith, 275 Conn. 205 (2005) – Admitting statements by the deceased victim that
she feared the defendant were properly admitted as state of mind hearsay statements and did
not violate Crawford.

victim had expressed fear of defendant, her former handyman, after an earlier burglary, and
she did not want to discuss the alleged later rape with police at all. She did make many
statements to medical professionals, immediately after the incident and after her return to her
winter home, and to her children. Except for a few statements to a nurse who had a role in
gathering forensic evidence, the court held that most of the statements were nontestimonial in
nature under a Sixth Amendment analysis, so that they would be admissible if they fell
within a deeply rooted hearsay exception under Del. R. Evid. 803 and bore indicia of
reliability. Many of the statements were clearly admissible as made for purposes of obtaining
medical treatment, and others were excited utterances. Statements of the victim's then-
existing state of mind with regard to fears of returning to the house were admissible, but
other statements that would have related to the history of the victim's fears of defendant were
not. Finally, since there was plenty of other evidence as to the victim's medical condition, the
court declined to admit her medical treatment records as business records.”
Hodges v. Commonwealth, 613 S.E.2d 834 (Va. Ct. App. 2005) - Statements made by the deceased victim regarding meeting with the defendant prior to being killed were non-testimonial state of mind statements and properly admitted at trial.

Crawford v. State, 2005 Tex. App. LEXIS 4789 (Tex. App. 2005) - The victim of a fatal shooting was a drug dealer who was doing business with the defendant. Before leaving to meet with the defendant, the victim told his girlfriend that “I'm fixing to go meet Sterling”; (2) "If I don't call you back in thirty minutes, call me"; and (3) "I am where I told you I was goin' to be." The first and second statements were non-testimonial as state of mind statements and properly admitted. The last statement was non-testimonial as a present sense impression and properly admitted. No Crawford violations.

McKinney v. Bruce, 125 Fed. Appx. 983 (10th Cir Kan 2005) - A victim’s statements made to his uncle about who he was leaving to go see and immediately prior to his murder were admitted as state of mind statements and were held to be non-testimonial under Crawford.

State v. Jones, 2004 Del. Super. LEXIS 407 (2004) – The defendant’s girlfriend, who did was unavailable to testify at trial, informed police that a co-conspirator to the murder, who worked as a drug dealer for one of the victims, planned to rob the victim because the victim would not pay the co-conspirator. The girlfriend said that the co-conspirator intended to shoot the victim so that the victim could not identify the robbers. The court admitted the statements of the co-conspirator's intent to commit murder as the co-conspirator's existing state of mind. The court held these statements were non-testimonial because they were made to an acquaintance and not to an arm of the government.

United States v. Dorman, 108 Fed. Appx. 228 (6th Cir. Ky 2004) – A witness testified as to a 803(3) hearsay statement regarding state of mind and future intent. The court held this was non-testimonial and no Crawford analysis was needed under the rules of evidence.

People v. Becerra, 2004 Cal. App. Unpub. LEXIS 2692 and 3702 (2004) – When child stated to her mom “my head hurts” and child dies as a result of injuries, that statement is non-testimonial state of mind hearsay exception and can be admitted at trial without Crawford analysis.

People v. Williams, 2004 Mich. App. LEXIS 1217 (2004 unpub dec) - deceased victim’s statements of fear for her life from Defendant to her mom and brother were admissible as state of mind exceptions and non-testimonial and not subject to Crawford analysis.

Horton v. Allen, 370 F.3d 75 (1st Cir. Mass 2004) – State of mind statements made by co-conspirator to a witness are not testimonial and not subject to Crawford analysis since the statement was made without the expectation of being used at trial.

Stoddard v. State, 157 Md. App. 247, 850 A.2d 406 (Md. Ct. Spec. App 2004) - This case could be deemed an 803(3) state of mind case, but the court did not analysis it under that rule, but rather under Rule 801. “An eighteen-month-old child's fearful question to her
mother, "Is Erik going to get me?" is clearly not hearsay under Maryland Rule 5-801 and Federal Rule of Evidence 801. It might once have been deemed an implied assertion under Wright v. Tatham. It does not qualify as hearsay today. Applying the analytic tools developed to measure conduct and utterances against the new rules, it is, as hearsay, twice bereft. A little girl's fearful question to her mother was not intended by her to be a communicative assertion of any fact. It was, pure and simple, a frightened request for information. "Am I safe?" It was not assertive. For that reason alone, it was not hearsay."

Evans v. Luebbers, 371 F.3d 438 (8th Cir. MO 2004) - Defendant was convicted of murdering his wife. Statements made by the deceased victim to others were admitted into evidence under the state of mind hearsay exception. "The trial court admitted statements suggesting that Sheilah Evans was scared of the petitioner (e.g., "I'll be like another Nicole Simpson." Trial Tr. at 486; "This might be another O.J. Simpson case." Trial Tr. at 341), that Sheilah Evans was verbally and physically abused by the petitioner, that Sheilah Evans intended to divorce the petitioner, and that Sheilah Evans obtained a protective order against the petitioner.” The Court found that Crawford did not apply in this case because the deceased victim’s statements were non-testimonial and fell within the hearsay exception for state of mind.

Medical Diagnosis/Treatment
State v. Molina, 2005 Wash. App. LEXIS 2058 (Wash. Ct. App. 2005) - “Defendant argued that testimony admitted at trial regarding out of court statements and a question by the victim were inadmissible hearsay that also violated his Sixth Amendment right to confrontation. The appellate court found that the doctor asked how the victim got the wound. She responded that her ex-boyfriend stabbed her. The victim's response was necessary to ascertain the nature of the wound inflicted and to provide her with appropriate medical treatment. The statement was reasonably pertinent to diagnosis and treatment of her injuries. Her statements were admissible under the statement for medical treatment exception of Wash. R. Evid. 803(a)(4) because a doctor or social worker may recommend counseling or escape from the dangerous domestic environment as part of a treatment plan.”

State v. Johnson, 2005 Del. Super. LEXIS 253 (Del. Super. Ct. 2005) - “The elderly victim had expressed fear of defendant, her former handyman, after an earlier burglary, and she did not want to discuss the alleged later rape with police at all. She did make many statements to medical professionals, immediately after the incident and after her return to her winter home, and to her children. Except for a few statements to a nurse who had a role in gathering forensic evidence, the court held that most of the statements were non-testimonial in nature under a Sixth Amendment analysis, so that they would be admissible if they fell within a deeply rooted hearsay exception under Del. R. Evid. 803 and bore indicia of reliability. Many of the statements were clearly admissible as made for purposes of obtaining medical treatment, and others were excited utterances. Statements of the victim's then-existing state of mind with regard to fears of returning to the house were admissible, but other statements that would have related to the history of the victim's fears of defendant were not. Finally, since there was plenty of other evidence as to the victim's medical condition, the court declined to admit her medical treatment records as business records.”
State v. Bartholomew, 2005 Wash. App. LEXIS 832 (Wash Ct App 2005) – “The victim did not testify at defendant's trial for kidnapping and attempted murder. The superior court admitted the victim's hearsay statements through two witnesses who found her on the side of the road. The victim told them that defendant had beaten her up. Her statements were admissible as excited utterances under Wash. R. Evid. 803(a)(2). Her hearsay statements to medical personnel two days after the offense, in which she identified defendant as the assailant, were testimonial in nature. *** [The victim] should have reasonably known that her statements would lead to the identity and prosecution of her assailants. She spoke with Lindall and Dr. Slack two days after the offense, when the initial shock would have faded. Police officers were present when Lindall treated [the victim] in the hotel room. Additionally, [the victim] filled out a police report and spoke with a police officer while in the hospital. Although there are some circumstances in which statements made to medical personnel are not testimonial, this is not such a case.”

State v. Lee, 2005 Ohio 996 (2005) – “While being examined by the sexual assault nurse, the wife detailed that her husband had strangled her and beaten her with a belt, and then retrieved a knife from the kitchen and demanded that she have sex with him. The appellate court held that because the wife's statements to the sexual assault nurse were non-testimonial, the trial court erred in excluding them. A reasonable person under the circumstances would have had no reason to believe that her statements made to the examining nurse would later be used at trial. The nurse indicated that a detailed description of the events was crucial to a successful examination, giving her the knowledge necessary to conduct a thorough examination. She then testified as to the specifics of the victim's case. The record indicated that the victim first went to the police and was then sent for treatment. However, no officers accompanied her, nor were any officers present during her examination. Further, despite defendant's repeated assertions that the medical consent form included statements made by the victim, the plain language of the consent form referenced categories of physical evidence.”

State v. Stahl, 2005 Ohio 1137 (2005) – “The victim, an adult female, went to the police station and claimed that she had been raped. She was questioned by a police officer for the purpose of filing charges. The officer then drove the woman to a trauma unit of a hospital for purposes of a medical examination. The woman informed the examining nurse that her boyfriend's boss had raped her when she went to the office to ask him for her boyfriend's job back. Defendant was charged with rape and kidnapping, but prior to trial, the victim died. Thereafter, the trial court granted defendant's motion to prohibit the State from introducing statements made by the victim to the nurse, based on defendant's Sixth Amendment right to confront his accuser. On appeal by the State, the court held that the trial court erred as the statements to the nurse were non-testimonial under a Crawford analysis. The victim's statements to the police officer were not admissible as they were made for the purpose of filing the police report. However, the statements to the nurse were for the purpose of medical diagnosis and treatment and were admissible under Ohio R. Evid. 803(4).”

People v. Vigil, 104 P.3d 258 (Colo 2004) – “We conclude that, under the particular circumstances present here, the child's statements to the doctor were testimonial under Crawford. The statements were made under circumstances that would lead an objective
witness reasonably to believe that they would be used prosecutorially. Although the doctor himself was not a government officer or employee, he was not a person "unassociated with government activity." People v. Compan, supra, ___ P.3d at ___ 2004 Colo. App. LEXIS 865 at *9. The doctor elicited the statements after consultation with the police, and he necessarily understood that information he obtained would be used in a subsequent prosecution for child abuse. Thus, on retrial, the doctor may not testify regarding the child's statements to him if the child does not testify at trial. We note, however, that this conclusion does not require the exclusion of testimony by the doctor regarding his observations and physical findings."

People v. West, 2004 Ill. App. LEXIS 1536 (Ill App Ct 2004) – Statements made by a victim to an ER nurse and doctor of the cause of her symptoms and pain were held to be non-testimonial and properly admitted; but statements concerning identity of the assailants were deemed testimonial.

State v. Vaught, 268 Neb. 316 (Neb. Sup. Ct. 2004) - This case involved a 4-yr old victim of sexual abuse who informed a physician during a medical examine about the identity of the defendant. “We believe on the facts of this case that the victim's statement to the doctor was not a "testimonial" statement under Crawford. As discussed above, the victim's identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment. In the present case, the victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment. There was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination. {NOTE: It does not appear that the victim testified at any hearing in this case.}

People v. Cage, 120 Cal. App. 4th 770 (2004) - “During a fight between defendant and her 15-year-old son John F., John sustained a long and nasty cut down his neck. John made three successive hearsay statements--to a police officer at the hospital, to a doctor at the hospital, and to the same police officer at the police station--each to the effect that defendant had picked up a piece of glass and deliberately slashed him with it.” The court held “The statement to the police officer at the police station was clearly testimonial. The statement to the doctor at the hospital was just as clearly nontestimonial. We will hold that the statement to the 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. Cervantes, 118 Cal. App. 4th 162, 12 Cal. Rptr. 3d 774 (Cal. App. 2d Dist. 2004) – Three Defendants killed one victim and paralyzed another victim. One Defendant confessed the crime to a witness from whom he sought medical aid from for injuries he suffered during the murder. The witness went to police. The 3 Defendants were in a gang and the witness afraid to testify regarding the statement. The witness did testify regarding the one Defendant’s confession in a trial involving the other two Defendants. The Court held that the witness could testify to the statement because the state of the confessing Defendant was a statement against penal interest (FRE 801(d)(2)(a)) and there was no Confrontation
clause violation against the two non-confessing Defendants because the statement to the witness was not testimonial. The confession was made to the witness to explain his injuries and to receive medical help, and with reasonable expectation it would not be repeated due to the fact that witness was afraid of Defendant and his gang. Therefore, no Crawford analysis was required.

**Recorded Recollection**  
Gov't of the V.I. v. George, 2004 V.I. LEXIS 25 (V.I. Terr. Ct. 2005) - Recorded recollection documents are non-testimonial and since the witnesses testified at trial and there was the opportunity to cross-examine, there was no confrontation violation.

City of Kirkland v. Nakandakari-Arana, 2005 Wash. App. LEXIS 1587 (Wash. Ct. App. 2005) – When the witness testifies and is impeached or has memory refreshed with a prior recorded statement, this does not violate Crawford because the witness is available for cross-examination. “The victim alleged that defendant had assaulted her. A police officer interviewed her and wrote up a narrative statement on her behalf, in which she identified defendant as her assailant and gave a detailed account of the assault. When the victim could not identify defendant at trial, the prosecutor offered defendant's written statement into evidence. The trial court found that the victim's written statement to police violated defendant's right to confront witnesses and the City appealed. The appellate court noted that when a declarant appeared for cross-examination at trial, the Confrontation Clause placed no constraints at all on the use of her prior testimonial statements. The appellate court held that because the victim testified and was cross-examined, there was no confrontation clause violation.”

**Business Records**  


Desue v. State, 30 Fla. L. Weekly D 1775 (Fla. Dist. Ct. App. 1st Dist. 2005) - Department of Corrections release records of the defendant were non-testimonial business records.

Ellis v. Phillips, 2005 U.S. Dist. LEXIS 13910 (SDNY 2005) – “The Confrontation Clause was not violated by allowing one expert to testify as to DNA test results when the expert who conducted the tests was unavailable due to cancer under the business record exception to the hearsay rule.”


Eslora v. State, 2005 Tex. App. LEXIS 2564 (2005) – Medical records are business records and are non-testimonial and do not require testimony from the preparing witness.

Rollins v. State, 161 Md. App. 34, 866 A.2d 926 (Md Ct Spec App 2005) - “Defendant argued the trial court erred in overruling his objection to the autopsy report prepared by one doctor and testified to by the medical examiner, because the document was hearsay, and its introduction violated his rights to confrontation. The opinions/conclusions in the autopsy report fell within the business records exception of the hearsay rule and was non-testimonial hearsay.”

People v. Hernandez, 2005 NY Slip Op 25007 (NY Sup Ct 2005) - “The only evidence linking the defendant to the crime charged in the second count was the discovery of fingerprints on a television. The officer who lifted the prints, forwarded them for analysis, and completed the report had since retired and moved to Ireland. Defendant argued the latent print report was inadmissible under the business records exception because information in the report was "testimonial" in nature, and that admitting the report into evidence without the ability to cross-examine the report's preparer violated of his rights under the Confrontation Clause. The People argued that the report was not prepared at the prosecution's request, and was made even before the defendant's identity became known. The court found that the parameters of "testimonial," for purposes of Confrontation Clause analysis, included the involvement of government officers in the production of testimony with an eye toward trial. The prints in question were not taken simply for administrative use. They were taken with the ultimate goal of apprehending and successfully prosecuting an accused. The report was testimonial in nature, and was inadmissible in the absence of the officer in question.”

United States v. Rueda-Rivera, 396 F.3d 678 (5th Cir. Tex 2005) – Defendant was charged with re-entering the United States illegally. At trial, the prosecution introduced a Certificate of Nonexistence of Record (“CNR”) as a business record. On appeal, the Court found Crawford did not apply to the record because it was not testimonial and did not require the testimony of the author of the record.


Smith v. State, 2004 Ala. Crim. App. LEXIS 93 (Ala Crim App 2004) - Autopsy reports are business records and not testimonial so Crawford analysis does not apply. It is harmless error if prosecutor does not call the medical examiner to the stand who performed the autopsy but rather calls another medical examiner in the office. “By use of certified copies of business documents and official records under special statutes providing for such, it could be conceivable that the State could prove some offenses without the necessity of calling any witnesses at all, except for the guarantees of our state and federal constitutions. The right of a defendant to be confronted by witnesses against him, includes the right of cross examination.”
United States v. Gutierrez-Gonzales, 111 Fed. Appx. 732 (5th Cir TX 2004) - Because the items in Gonzales' immigration file are nontestimonial, the Confrontation Clause does not bar their admission. Moreover, the Supreme Court noted that business records are "statements that by their nature are not testimonial" and therefore do not [*6] run afoul of Crawford.

People v. Shreck, 107 P.3d 1048 (Colo Ct App 2004) - Court records showing a defendant’s prior criminal convictions are business records and not subject to Crawford.

Former Testimony (see also Prior Opportunity to Cross Examine)
State v. McGowen, 2005 Tenn. Crim. App. LEXIS 913 (Tenn. Crim. App. 2005) - There is no Crawford violation when admitting the preliminary hearing transcript of an unavailable witness who was subject to cross examination.

State v. Newell, 2005 Ohio 2848 (Ohio Ct. App. 2005) - “The appellate court held that admission of the victim's preliminary hearing testimony did not violate defendant's right to confrontation because he did cross-examine the victim at the preliminary hearing.”

United States v. Avants, 367 F.3d 433 (5th Cir. Mass. 2004) –1966 murder that was tried in state court in 1996 (acquittal) and then tried in federal court in 1999. The main witness in the 1966 state trial died prior to the 1999 federal trial, but his 1966 trial testimony was proper to admit at 1999 trial. This met the Crawford test of unavailability and prior opportunity to cross-examine the witness.

Dying Declarations
State v. Jones, 2005 Minn. App. Unpub. LEXIS 142 (2005) – The dying declaration of the victim was properly admitted at trial and Crawford has not abrogated Minnesota’s dying declaration law.

State v. Martin, 695 N.W.2d 578 (Minn 2005) – “Defendant was convicted of premeditated first-degree murder, first-degree murder while committing a burglary, second-degree assault, and two counts of kidnapping. On appeal, the court found that the trial court did not abuse its discretion in admitting the victim's statement identifying defendant as his assailant under the dying declaration exception to the hearsay rule, Minn. R. Evid. 804(b)(2), because the victim was shot in the chest and stabbed in the neck, was struggling to breathe, and lost consciousness and died less than an hour after making the statement. Admitting the statement as a dying declaration did not violate defendant's right to confrontation because an exception for dying declarations existed at common law and was not repudiated by the Sixth Amendment.”

People v. Gilmore, 356 Ill. App. 3d 1023; 828 N.E.2d 293 (Ill App Ct 2005) – “Defendant, the victim, and the victim's roommate fought after defendant allegedly sexually assaulted the roommate's girlfriend. Defendant reportedly lost the confrontation, and the victim and roommate then returned to their residence. Early the next morning, the roommate heard a gunshot and found the victim lying on the floor. Defendant was taken to the hospital. Defendant told the doctor he was not doing well. The doctor told the victim he was in "rough shape." Two detectives were allowed to briefly question the victim, who told them that the
person he had fought with the previous evening was the shooter. The victim also described
the shooter. At trial, the victim's statements to police were admitted under the dying
declaration exception to the hearsay rule. After defendant was convicted of murder and
sentenced, the trial court summarily denied his pro se posttrial motion challenging the
effectiveness of his counsel. On appeal, the appellate court found that admission of the dying
declarations did not violate the state or federal Confrontation Clause and was proper.”

stabbed with a sharpened piece of metal in the main recreation yard of a federal penitentiary.
Defendant was also an inmate there, and he was charged with second-degree murder, assault
with intent to murder, assault with a dangerous weapon, and assault resulting in serious
bodily injury. He moved to prevent plaintiff United States from using evidence of what had
been characterized as the victim's dying declarations. The court noted that at three different
points, the victim was questioned, and he identified defendant as the perpetrator. The United
States wanted to use those statements under the dying declaration hearsay exception, the
excitable utterance hearsay exception, and the Forfeiture by Wrongdoing Doctrine hearsay
exception. The court rejected all three arguments, finding that admission of a testimonial
dying declaration after Crawford went against the sweeping prohibitions set forth in that
case. The court also rejected the excited utterance argument, and found that the Forfeiture by
Wrongdoing doctrine did not apply in the action.”

**Commonwealth v. Salaam, 65 Va. Cir. 405 (2004)** - Defendant shot the victim and a
witness attending to the victim testified that prior to dying the victim identified the defendant
as the shooter. Admission of the dying declaration did not violate *Crawford*.

**People v. Monterroso, 34 Cal. 4th 743; 22 Cal. Rptr. 3d 1; 101 P.3d 956 (2004)** – Dying
declarations are non-testimonial do not fall under *Crawford*.


**Statements Against Penal Interests**

**United States v. Ciarcia, 2005 U.S. Dist. LEXIS 7174 (D. Conn. 2005)** - “When the
witness refused to testify at trial in defendant's case despite the court's order to do so, he
became an unavailable witness within the meaning of Fed. R. Evid. 804(a)(2). Because the
United States Court of Appeals for the Second Circuit had not yet determined whether
statements against penal interest fell within a firmly rooted hearsay exception, the statements
had to bear adequate guarantees of trustworthiness to be admissible under the Confrontation
Clause. The court held that all of the statements at issue bore adequate guarantees of
trustworthiness where the statements were made to friends or confidants in private, non-
coercive settings and did not involve the witness's knowing response to structured
questioning in an investigative environment or a courtroom setting where the witness would
reasonably expect that his responses might be used in future judicial proceedings. The court
found that a reasonable person would have perceived the statements being offered by the
government as being against his penal interest because the statements either implicated the
witness in a money laundering scheme or the shooting of another person.”

- 55 -
**Gutierrez v. State, 150 S.W.3d 827 (Tex App Houston 14th Div 2004)** – A non-testifying Co-Defendant gave a videotaped confession to the police regarding the involvement of the defendant in stealing drugs. At trial, the videotape was played. Although statements against penal interests generally do not violate *Crawford*, this videotaped statement did violate *Crawford* because the statement was given to the police.

**People v. Deshazo, 469 Mich. 1036 (2004)** - “a non-testifying co-defendant told the witness that defendants hired him to kill the victim, is admissible as a statement against penal interest under MRE 804(b)(3). The co-defendant's statement bears adequate indicia of reliability, in that it was voluntarily given to a friend or confederate, and was uttered spontaneously without prompting or inquiry. The statement was not made to law enforcement officers.” This is a non-testimonial statement and not subject to *Crawford* analysis.

**People v. Carrieri, 3 Misc. 3d 870, 778 N.Y.S.2d 854 (2004)**- “based upon the analysis of *Crawford* and the facts of the instant matter, this court holds that the proposed use by the People of the plea minutes of the co-defendants is testimonial in nature. Therefore, the use of the minutes as proposed by the People, without the co-defendants being called as witnesses, would be violative of the Confrontation Clause. Accordingly, the plea minutes may not be used against defendant Carrieri at trial even though they may well be an exception to the hearsay rule as a Declaration against Penal Interest.”

**US v. Jones, 371 F.3d 363 (7th Cir. Ind. 2004)** - The *Bruton* line of cases deals with situations in which the confession of one defendant is offered at a joint trial where the statement is redacted to omit any explicit reference to the co-defendant and the jury is instructed to consider the statement only against the declarant. *Id.* Here, Rock, the declarant, was not present at the trial, so his confession was obviously intended to be used against Jones. Jones never had an opportunity to cross-examine Rock and thus, under *Crawford*, no part of Rock’s confession should have been allowed into evidence.

**Gutierrez v. Dorsey, 105 Fed. Appx. 229 (10th Cir. N.M. 2004)** - A witness testified that her good friend, who was the girlfriend of the defendant, told her that she had been with the defendant, had planned the robbery, and had driven to the service station where the robbery took place with the defendant and others and that the defendant had a knife. The trial court admitted that testimony under New Mexico Rule of Evidence 11-804(B)(4) (hearsay exception for statements against interest) and there was no Crawford violation since the statement was non-testimonial.

**United States v. Vogel, 2004-1 Trade Cas. (CCH) P74,362 (USDC Indiana)** – Where co-defendant makes a statement implicating other co-defendants and invokes 5th Amendment at trial and does not testify, *Crawford* bars admission of the statement under FRE 804(b)(3) (statement against interest) because this violates the right to confront by the other co-defendants.
Forfeiture of Confrontation Right

- Per Crawford, confrontation right may be extinguished on equitable grounds
- Relied on Reynolds v US (forfeiture by wrongdoing exception)
- Defendant induced unavailability of witness
  - Killing Witness
  - Missing witness
  - Traumatized witness
  - Threats to victim, witness, family, pets
  - Telling a child to “not tell”
  - Procuring others to secure witnesses unavailability
  - Intent issue still in dispute
  - Need not be wrongful
    - Gifts, money

When a defendant’s crime causes the victim to be unavailable (due to trauma, injuries, or fear), it is proper to argue that the defendant forfeited the right to confront the witness at trial due to wrongdoing. Moreover, when the defendant threatens the victim to not disclose the crime or identity of defendant, threatens family members, causes the victim to flee the area, or procures the victim to keep quiet through the use of money, gifts or other tactics, a successful argument can also be made regarding forfeiture of the right to confront.

Post Traumatic Stress Disorder, Acute Stress Disorder or Traumatic Stress Disorder from the crime may be an argument to avoid the victim (especially a child) from having to testify. In child abuse cases, this may allow for the admission of a forensic video interview without the child having to testify.

Standard of Proof not ruled on by US Supreme Court. A majority of federal circuits use the preponderance of evidence standard, but some states have applied the clear and convincing standard.

United States v. Montague, 2005 U.S. App. LEXIS 14593 (10th Cir. Utah 2005) – “During the investigation of a domestic violence complaint filed by defendant's wife, police officers seized three firearms after the wife indicated that there were two firearms in the house and one in defendant's truck. Although the wife testified before the grand jury that the firearms belonged to defendant, she refused to testify at defendant's trial and invoked her marital privilege. On appeal, defendant argued that the district court violated his Sixth Amendment right to confront witnesses by admitting at trial the grand jury testimony of his wife. The court held that the district court did not clearly err in finding that defendant procured his wife's unavailability. The evidence showed that after defendant was arrested, he repeatedly communicated with his wife in violation of a no-contact court order. Therefore, the testimony was properly admitted under Fed. R. Evid. 804(b)(6).”

United States v. Mayhew, 2005 U.S. Dist. LEXIS 15935 (S.D. Ohio 2005) - Defendant shot and killed his ex-girlfriend and her fiancée and kidnapped their daughter. Defendant was approached by a police officer while on the run and killed the officer. During an chase which resulted in a roadblock of the defendant, the defendant shot his daughter and shot himself. While en route to the hospital, the daughter told a police officer of the shootings
and the kidnapping, all of which was tape recorded by the officer. The daughter later died. Admitting the tape recorded statement at trial was appropriate since the defendant forfeited his right to confront his daughter since he killed her. “Equitable considerations demand that a defendant forfeits his Confrontation Clause rights if the court determines by a preponderance of the evidence that the declarant is unable to testify because the defendant intentionally murdered her, regardless of whether the defendant is standing trial for the identical crime that caused the declarant's unavailability”

**People v. Melchor, 2005 Ill. App. LEXIS 626 (Ill. Ct. App. 2005)** - “According to defendant, he fled immediately after a fatal shooting and hid for many years because he feared gang-related reprisals, even though the shooting itself was not gang-related. By the time he was brought to trial, the only eyewitness had died. That witness had testified at a co-defendant's trial, so that testimony was read into the record. The court held that since defendant had never had a chance to cross-examine the dead witness, admission of the testimony violated his confrontation rights, and that his flight had not caused him to forfeit those rights. This was the most significant evidence of defendant's guilt, so its improper admission could not be harmless, and his conviction was reversed.”

**United States v. Gray, 405 F.3d 227 (4th Cir MD 2005)** - This case has a good background and analysis of the forfeiture by wrongdoing principal. “Although out-of-court statements ordinarily may not be admitted to prove the truth of the matters asserted, the doctrine of forfeiture by wrongdoing allows such statements to be admitted where the defendant's own misconduct rendered the declarant unavailable as a witness at trial. The Supreme Court applied this doctrine in *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1878), stating that "the Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." *Id.* at 158. By 1996, every circuit to address the issue had recognized this doctrine. *See United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996); *United States v. Mastrangelo*, 693 F.2d 269, 273-74 (2d Cir. 1982); *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982); *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. 1982); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979); *United States v. Carlson*, 547 F.2d 1346, 1357 (8th Cir. 1976). *** We conclude that Rule 804(b)(6) applies whenever the defendant's wrongdoing was intended to, and did, render the declarant unavailable as a witness against the defendant, without regard to the nature of the charges at the trial in which the declarant's statements are offered.”

**United States v. Gray, 405 F.3d 227 (4th Cir. MD 2005)** - “Although out-of-court statements ordinarily may not be admitted to prove the truth of the matters asserted, the doctrine of forfeiture by wrongdoing allows such statements to be admitted where the defendant's own misconduct rendered the declarant unavailable as a witness at trial. The U.S. Supreme Court has stated that the U.S. Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by the accused's own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.”
United States v. Jordan, 2005 U.S. Dist. LEXIS 3289 (D. Colo. 2005) - “The victim was stabbed with a sharpened piece of metal in the main recreation yard of a federal penitentiary. Defendant was also an inmate there, and he was charged with second-degree murder, assault with intent to murder, assault with a dangerous weapon, and assault resulting in serious bodily injury. He moved to prevent plaintiff United States from using evidence of what had been characterized as the victim's dying declarations. The court noted that at three different points, the victim was questioned, and he identified defendant as the perpetrator. The United States wanted to use those statements under the dying declaration hearsay exception, the excited utterance hearsay exception, and the Forfeiture by Wrongdoing Doctrine hearsay exception. The court rejected all three arguments, finding that admission of a testimonial dying declaration after Crawford went against the sweeping prohibitions set forth in that case. The court also rejected the excited utterance argument, and found that the Forfeiture by Wrongdoing doctrine did not apply in the action.”

United States v. Garcia-Meza, 2005 FED App. 0159P (6th Cir. Mich 2005) - Defendant admitted to killing his wife. At trial, the prosecutor admitted excited utterances from the deceased wife through the testimony of police officers. Defendant was convicted and on appeal argued that admitting the excited utterances violated Crawford and that forfeiture should not be applied because he did not intend to prevent her from testifying when killing her. The Court held that the defendant made his wife unavailable to testify as a result of killing her and, therefore, forfeited the right to argue a Sixth Amendment violation. The court further held that the Defendant need not specifically intend to prevent the witness from testifying because forfeiture is applied based on equitable grounds and does not contain a specific intent provision.

Commonwealth v. Salaam, 65 Va. Cir. 405 (2004) - Defendant shot the victim and a witness attending to the victim testified that prior to dying the victim identified the defendant as the shooter. Admission of the dying declaration did not violate Crawford. The Defendant also forfeited his right to confront the victim due to the wrongdoing in killing the victim.

People v. Moore, 2004 Colo. App. LEXIS 1354 (Colo. Ct. Ap. 2004) – Defendant stabbed his wife and while she was in the ambulance and in an excited state of mind, she informed a police officer that her husband stabbed her. The victim ultimately died from the stabbing. The court ruled that the defendant’s wrongdoing in killing his wife forfeited his right to cross-examine her regarding her excited utterance to the police officer and the statement was allowed into evidence.

State v. Meeks, 277 Kan. 609 (2004)- “In the instant case, Officer Hall was arguably conducting an interrogation when he asked Green if he knew who shot him, thus making the response testimonial. Moreover, Meeks was not given the opportunity to confront Green through cross-examination because Green died before testifying at trial. We need not determine whether the response was testimonial or not, however, because we hold that Meeks forfeited his right to confrontation by killing the witness, Green.”
Francis v. Duncan, 2004 U.S. Dist. LEXIS 16670 (SDNY 2004) - Defendant telephoned death threats to his robbery victim that caused her to not testify at trial. The court ruled that the Defendant forfeited his right to confront the victim and the victim’s grand jury testimony was admissible at trial, as was her statements regarding fear of dying.

People v Jiles, 122 Cal. App. 4th 504; 18 Cal. Rptr. 3d 790 (Cal Ct App 4th Dist Div 2, 2004) – Defendant admitted to stabbing his wife and ultimately resulted in her death. At the scene, the victim identified the defendant as her assailant. On appeal, the court did not address whether a dying declaration would be a non-testimonial statement for purposes of Crawford but instead focused on the forfeiture provision to confirm proper admission at trial of the statement.

People v. Giles, 123 Cal. App. 4th 475 (Cal App 2d 2004) - Statements of the deceased victim, told to a police officer in a previous altercation, were admitted during the murder trial. The court found that the defendant forfeited his right to cross examine the victim regarding the statements previously made due to his admitted wrongdoing in killing the victim. The court applied a clear and convincing standard.

New Jersey v Sheppard, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984) – Prosecutor can use acts during the commission of the crime to show procurement by Defendant to induce unavailability of victim or witness. If victim or witness refuses to testify, cannot remember, becomes non-responsive during questioning, this argument should be made to show that Defendant forfeited Confrontation right due to wrong doing.

Child Abuse Cases after Crawford
- Is a Forensic Interview testimonial? Courts are deciding yes based primarily on the status of the interviewer (governmental agent) but are failing to acknowledge whether a child could reasonably understand that the interview will be later used in court.
- Factors to consider regarding child statements
  - Are young children (below the age of 10) likely to comprehend that a forensic interview may be used at trial (i.e., reasonable person standard)?
  - Reasonable child standard?
  - Remember that the status of interviewers (i.e., police officers or state CPS workers) will be considered by the court
  - Is it fair and equitable to apply Crawford when the defendant’s conduct made the child unavailable for trial?
  - Is it fair and equitable to apply Crawford when the court has found the child to be incompetent to testify at trial and prohibits the child from testifying?
  - Truth/lie questions in a forensic interview relate to an oath for purposes of testifying in court and should be discouraged from use during an interview
  - First disclosure (or Tender Years) statements may be testimonial depending on the nature of the disclosure (i.e., unexpected disclosure to a caregiver –vs- disclosure during a forensic interview)
Spontaneous statements by children to caregivers are non-testimonial so far

Court Procedures regarding child testimony

- Child has poor memory or freezes on the witness stand
- Child testified at preliminary hearing but unavailable for trial
- Testimony by closed-circuit television per Maryland v Craig does not violate Crawford.

Forensic interviews are not primarily for the purpose of criminal prosecution. A trained forensic interviewer will interview a child to see if any abuse/neglect occurred, to determine who the assailant is, to determine whether the child needs medical treatment or psychological treatment, to give information to CPS regarding removal of the child from the home and safety issues regarding the home. In the “Child First Doctrine,” the child always comes first in a forensic interview (not getting evidence, not getting a disclosure, and not getting a prosecutable case) and adhering to this doctrine will provide another strong argument that forensic interviews are not testimonial. Moreover, young children will not objectively understand that their statement could potentially be later used in a court proceeding. Most children do not understand what court is and, therefore, cannot understand that statements made in a forensic interview could be used in court.

Be sure to educate forensic interviewers regarding the problems with incorporating a truth/lie protocol during the interview, as well as to never ask a child what they want to have happen to the assailant (this question brings to the attention of the child that court action may occur as a result of their forensic interview). If a truth/lie component is used during a forensic interview of a child, this may provide defense counsel with sufficient argument that the forensic interview was actually conducted for purposes of litigation or prosecution. Each jurisdiction should decide how to handle a truth/lie component in a forensic interview.

If a state Tender Years statute allows for the admission of certain child hearsay statements without the child having to take the stand, that portion of the statute may be in violation of Crawford if the statement to admit at trial is considered testimonial. However, if the Tender Years statute also allows for the admission of these child hearsay statements if the child testifies, then the statute satisfies Crawford.

When children testifies via closed-circuit television (pursuant to analysis under the state’s statute), a Crawford analysis is not required because the child is present in court for purposes of cross-examination and confrontation by the defendant.

Forensic Interviews

Contreras v. State, 2005 Fla. App. LEXIS 14431 (Fla. Dist. Ct. App. 4th Dist. 2005) –“The coordinator of a child protection team, working with a county sheriff, took a videotaped statement of defendant's daughter regarding allegations of sexual molestation. In substance, the daughter stated that defendant committed acts of sexual activity with her on one night. The trial judge found that the daughter was unavailable to testify at trial because of an expert's opinion that the daughter would suffer severe emotional and psychological harm if she testified in person. The trial judge then allowed the use of the ex parte statement at trial.
Defendant argued that the State's principal evidence of the crime, the video statement of the victim, failed to satisfy the requirements of the Confrontation Clause of the United States Constitution. On appeal, the court found that defendant's Sixth Amendment right to confrontation was denied by the admission of the videotaped statement. Further, the trial court's finding that the daughter was unavailable to testify was incorrect as the daughter was 13 years old at the time of the trial, and thus she no longer qualified for unavailability under Fla. Stat. ch. 90.803(23) (2001). Finally, the error was not harmless.”

**D.G.B. v. State, 2005 Ind. App. LEXIS 1584 (Ind. Ct. App. 2005)** - Juvenile defendant was charged with molesting a 6 year old victim. At trial, the forensic interview of the victim was introduced at the victim did not testify due to trauma. On appeal the court determined that the forensic interview was testimonial since the interview was conducted by a police officer attempting to gather evidence of a crime.

**In re D.L., 2005 Ohio 2320 (Ohio Ct Ap 2005)** - Defendant was found delinquent for engaging in sexual conduct with his 3-year-old cousin. The victim was found incompetent to testify at trial. The social worker who interviewed the child testified that victim gave great detail similar to the disclosure to her mother. The victim was taken to the hospital and given a physical exam. The exam revealed nothing. However, the pediatric nurse practitioner concluded that abuse was probable, based on the victim's description of events. The victim's statements to the practitioner were held non-testimonial and properly admitted under the medical history hearsay exception despite the ruling that the victim was not competent to testify. There was no evidence to show that the nurse practitioner was working on behalf of, or in conjunction with, investigating police officers for the purpose of developing the case against the defendant. The nurse took statements from the victim to evaluate how likely it was that she had been abused and to determine what laboratory tests and medical treatment might be needed. The nurse further considered information from the victim's medical history to aid her in making her assessment and conducted a physical evaluation of the victim. There was no evidence that the victim was interviewed for the express purpose of developing her testimony for use at trial. The court went on to say “Our review of the record shows no circumstances to indicate the victim, or a reasonable child of her age, would have believed her statements were for anything other than for medical treatment.” The court further held, “because an incompetency ruling is a declaration that the witness is incapable of understanding an oath, or liable to give an incoherent statement as to the subject and cannot properly communicate to the jury, it does not make for a conclusion that all out-of-court statements are per se inadmissible when a witness is declared incompetent. This may be particularly true in the case of young children. Simply because a child is deemed incompetent for purposes of testifying does not make the child's statements per se inadmissible.”

**State v. Krasky, 696 N.W.2d 816 (Minn Ct Ap 2005)** - Statements made by the 7-year-old victim in this case to a nurse practitioner conducting an interview and examination were held to be non-testimonial. “Here, T.L.K. was examined and interviewed at MCRC by a nurse practitioner using what appears to be the same procedure described in Scacchetti. The nurse practitioner conducted a thorough medical examination, including an STD test, and recommended that T.L.K. see a psychotherapist to help her cope with the abuse that she has suffered. The examination was also videotaped, presumably for review by the MCRC.
Here, although the MCRC examination may have been arranged by Detective Manuel and a child-protection worker, there is no indication that T.L.K. thought that her statements might be used in a later trial. T.L.K. was driven to MCRC by her foster mother, and she was shielded from the police presence throughout the MCRC examination. The record is clear that Detective Manuel did not interrupt or direct any portion of the interview or examination. The length of time between the alleged abuse and the examination also suggests that T.L.K. was not aware of any prosecutorial purpose of the examination and did not "reasonably believe that her disclosures would be available for use at a later trial." Scacchetti, 690 N.W.2d at 396. Although T.L.K. was not in need of immediate medical attention when the examination took place, the record shows that a nurse practitioner performed tests and asked questions so that she could provide a medical diagnosis. Although the examination was arranged by Detective Manuel, we further find that the examination was conducted, at least in part, for the purpose of medical diagnosis and that the administering nurse practitioner followed her medical protocol without interference or assistance from Detective Manuel. We conclude that T.L.K.'s statements at MCRC were not testimonial, and we reverse the district court's order suppressing those statements.”

**People v. R.F., 355 Ill. App. 3d 992; 825 N.E.2d 287 (Ill Ct of Ap 2005)** – Statements made by the 3 year old victim to her mom and grandmother about the defendant pinching and kissing her vaginal area were properly admitted and were non-testimonial statements. The statements were made to family members and not government personnel. The child did not testify at trial due to her age and fear. However, statements made by the child to a police investigator who interviewed the child were deemed testimonial because the officer “was acting in an investigative capacity for the purpose of producing evidence in anticipation of a criminal prosecution.”

**State v. Mack, 337 Ore. 586 (2004)** – “A social worker interviewed the victim's three-year-old brother who was in the house when the victim died. The interviews were videotaped. Defendant argued that under the Confrontation Clause of the Sixth Amendment, the statements were testimonial and thus inadmissible. The court affirmed, holding that under Crawford, a United States Supreme Court case that was decided five days after the State filed its motion in limine to determine admissibility, the child's statements to the social worker fell within the core class of testimonial evidence that Crawford identified. There could be little doubt that if the police officers had conducted the interviews, the resulting statements would be testimonial. The social worker was serving as a proxy for the police. She took over the first interview when the interviewing officer was unable to establish a dialogue with the child and she continued in that role in the second interview and elicited statements from the child so that police officers could videotape them for use in a criminal proceeding. Under Crawford, admitting the child's statements to the social worker would violate the Confrontation Clause.”

**People v. Argomaniz-Ramirez, 102 P.3d 1015 (2004)** – “prior recorded statements made by children to law enforcement officials may be introduced into evidence when the children testify at trial.”
Somervell v. State, 29 Fla. L. Weekly D 1739 (Fla. Dist. Ct. App. 5th Dist 2004) – A videotaped forensic interview, conducted by a police officer, of the 8 year old victim was properly admitted at trial after the child victim had already testified. This did not violate the confrontation clause and a Crawford hearing was not necessary.

United States v. Bordeaux, 400 F.3d 548 (8th Cir. SD 2005) - The court held that defendant's Sixth Amendment rights were violated by the admission of a statement that the victim made out of court to a "forensic interviewer." The victim's statements were testimonial because the purpose of the interview was to collect information about the alleged sexual abuse for law enforcement. "The formality of the questioning and the government involvement in it are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a "forensic" interview, meaning that it "pertained to, [was] connected with, or [was to be] used in courts of law." Oxford English Dictionary Online Edition (taken from second print ed. 1989). That [the child's] statements may have also had a medical purpose does not change the fact that they were testimonial, because Crawford does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial."

State v. Snowden, 867 A.2d 314 (Md Sup Ct 2005) – This case involved 2 child victims of sexual abuse (ages 8 and 10). The children did not testify at trial, but the CPS worker who interviewed the children testified to the statements made during the interview. “As soon as the police investigation of the girls' allegations got under way, they were interviewed, in accordance with Maryland practice, by a state social worker at a child protective facility. The statements elicited by the social worker were introduced at trial after the trial court determined that the girls were unavailable to testify because of potential trauma. Defense counsel expressed state and federal constitutional objections at that time, and those objections preserved the issue for appeal. While appeal to the intermediate court was pending, the nation's highest court clarified the extent of confrontation rights in the Crawford decision, holding that an unavailable declarant's testimonial statements, that is, statements that a declarant objectively would know were likely to be used in a prosecution, could not be used at trial unless there had been a prior opportunity to cross-examine the declarant. Although the girls were young, there was no reason to think that they were not well aware that the statements were being taken because of the police investigation their accusations had launched, so the statements were testimonial, not therapeutic, in their basic nature.” The court imposed an objective ordinary person standard on these child victims, pointed out that the interviews were conducted at a county-owned facility, and that the purpose of the CPS worker conducting the interview was to gather evidence for prosecution. “We find that where an objective person in the position of the declarant would be aware that the statement-taker is an agent of the government, governmental involvement is a relevant, and indeed weighty, factor in determining whether any statements made would be deemed testimonial in nature. *** Although we recognize that there may be situations where a child may be so young or immature that he or she would be unable to understand the testimonial nature of his or her statements, we are unwilling to conclude that, as a matter of law, young children's
statements cannot possess the same testimonial nature as those of other, more clearly competent declarants.”

Starr v. State, 269 Ga. App. 466, 604 S.E.2d 297 (GA Ct App 2004) - One videotaped statement from the child victim was admitted at trial. Although the child did not testify, the child was in court and available for cross examination. The defense did not object to the admission of the videotaped statements. The court found no confrontation violation.

Reasonable Child Standard/Children’s State of Mind
United States v. Coulter, 2005 CCA LEXIS 299 (N-M.C.C.A. 2005) – Two year old child spontaneously disclosed that she had been touched by defendant. These statements held non-testimonial because the statements to her parents were not the type of testimonial statements outlined in Crawford. “At the same time, the circumstances under which this two-year-old declarant made her statements would not lead an objective witness to reasonably believe that the statements would be available for use at a later trial. Two-year-old [victim] could no more appreciate the possible future uses of her statements than she could understand the significance of what she was communicating.”

In re D.L., 2005 Ohio 2320 (Ohio Ct Ap 2005) – Three year old victim: “Our review of the record shows no circumstances to indicate the victim, or a reasonable child of her age, would have believed her statements were for anything other than for medical treatment.”

State v. Krasky, 696 N.W.2d 816 (Minn Ct Ap 2005) - Statements made by the 7-year-old victim in this case to a nurse practitioner conducting an interview and examination were held to be non-testimonial. “Here, although the MCRC examination may have been arranged by Detective Manuel and a child-protection worker, there is no indication that T.L.K. thought that her statements might be used in a later trial.”

Lagunas v. State, 2005 Tex. App. LEXIS 6957 (Tex. App. 2005) – Defendant was charged with kidnapping and burglary. On appeal, “Defendant argued that the admission of a child witness's hearsay statements violated his right to confrontation. The court of appeals disagreed. The child's age and her emotional state were factors strongly suggesting that her statements to the officer were non-testimonial. Considering the context, the statements amounted to a small child's expressions of fear arising from her mother's absence. When an officer located the child, he asked her name and told her that he was a police officer. He then noticed that she was "terrified" and crying. The officer's exchange with the child was unlike the sort of formalized or structured interrogation that has been held to give rise to testimonial hearsay. To the contrary, it was closer in nature to a preliminary question in which the officer sought to clarify the child's spontaneous statement that her mother was dead. There was not time to formulate careful, structured questioning. Significantly, after calming the child, the officer asked her no further questions regarding the circumstances of her mother's disappearance.”

In re D.L., 2005 Ohio 2320 (Ohio Ct Ap 2005) - “Our review of the record shows no circumstances to indicate the victim, or a reasonable child of her age, would have believed her statements were for anything other than for medical treatment.”
State v. Dezee, 2005 Wash. App. LEXIS 104 (Wash Ct App 2005) - Nothing in the record supports the conclusion that [the child], a nine year old, reasonably believed the statements to her mother could or would be available for use in a trial.

Status of Forensic Interviewer
State v. Courtney, 696 N.W.2d 73 (Minn. Sup. Ct. 2005 – updated opinion) – In this domestic violence case, the victim gave a tape recorded statement to police and her 6-yr old daughter gave a videotaped interview of what she witnessed. At trial, the victim testified for the defendant and recanted her statement. The prosecutor introduced the audio and video tapes pursuant to the residual/catchall hearsay exception. The Court of Appeals held that the statement was testimonial, however, there was no Crawford violation since the victim was present for cross examination. However, the videotaped statement of the daughter was declared to be testimonial and a violation of Crawford since she was not subject to cross examination. The Court went on to say that because the CPS worker along with a police officer interviewed the child for purposes of developing a case against the defendant, that the statement was testimonial. The Supreme Court, however, reversed the conviction and in relation to the child’s videotaped statement, the Court did not decide whether the statement was testimonial because admission of the child’s interview was harmless error.

People v. Geno, 261 Mich. App. 624 (2004) – “Defendant's conviction arises out of the sexual assault of the two-year-old daughter of defendant's girlfriend. When the victim's father picked the victim up from the home of her mother and defendant, he noticed that she was acting uncomfortable and did not want her father to change her. Once he did, her father noticed irritation and bruising around the child's vaginal area as well as blood in the child's pull-up. Her father contacted Children's Protective Services, which arranged to have an assessment and interview of the child by 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. Defendant was questioned by a City of Muskegon police detective and explained that some weeks earlier, he had changed the child and may have hurt her. He denied, however, touching her in a sexual way. During subsequent police interviews, defendant admitted that he was molested as a child, that he was sexually attracted to children, and that he had sexually fantasized about the victim. He also explained that while wiping the victim in the course of changing her, he may have accidentally inserted his finger into the victim's vagina. Defendant later wrote and signed a statement in which he admitted that his finger "penetrated her vaginal lips slightly" and that he "was slightly aroused because my finger accidentally touched her vagina". However, we conclude that the child's statement did not constitute testimonial evidence under Crawford, and therefore was not barred by the Confrontation Clause. The child's statement was made to the executive director of the Children's Assessment Center, not to a government employee, and the child's answer to the question of whether she had an "owie" was not a statement in the nature of "ex parte in-court testimony or its functional equivalent".
People v. Vigil, 104 P.3d 258 (2004) - “Defendant was convicted of having sexually assaulted the seven-year-old son of a co-worker in the co-worker's home. The child's father testified at trial that, when he went to check on his son, he pushed open the door to the child's room and saw defendant leaning over the child. Both were partially undressed. Defendant fled. The child, who appeared frightened and confused, told his father that defendant "stuck his wienie in his butt and his butt hurt." He also told his father's friend, who was visiting in the home, that his "butt hurt." *** “A police officer interviewed the child about the incident, and portions of the videotaped interview were shown to the jury at trial. The child, who had been ruled incompetent, did not testify.” *** “We conclude that the videotaped statement given by the child to the police officer in this case was "testimonial" under the Crawford formulations of that concept. In so concluding, we reject the People's argument that the statement could not be considered testimonial because it was not made during the course of police interrogation and because a seven-year-old child would not reasonably expect his statements to be used prosecutorially.” *** “The police officer who conducted the interview had had extensive training in the particular interrogation techniques required for interviewing children. At the outset of the interview, she told the child she was a police officer, and, after ascertaining that the child knew the difference between being truthful and lying, she told him he needed to tell the truth. Thus, the absence of an oath, which in any event is not a requirement under Crawford for police interrogations, did not preclude the child's statements from being testimonial.” *** “Nor can the statements be characterized as non-testimonial on the basis that a seven-year-old child would not reasonably expect them to be used prosecutorially. During the interview, the police officer asked the child what should happen to defendant, and the child replied that defendant should go to jail. The officer then told the child that he would need to talk to "a friend" of hers who worked for the district attorney and who was going to try to put defendant "in jail for a long long time." This discussion, together with the interviewer's emphasis at the outset regarding the need to be truthful, would indicate to an objective person in the child's position that the statements were intended for use at a later proceeding that would lead to punishment of defendant.” Note: This case has been appealed to the Colorado Supreme Court.

Incompetent Child Witness
Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2005) - The 10-year-old victim testified at a hearing under the Protected Persons Statute to determine his competency to testify. The defendant was allowed to cross-examine the child at the hearing. The child was found incompetent to testify and did not testify at trial. The court admitted excited utterances of the child to his mother and her boyfriend, and statements to a police officer. On appeal, the court found that although the child had been subject to some cross examination at the PPS hearing, "M.B.'s testimony at the hearing did not constitute cross-examination for Crawford purposes, because the trial court determined that M.B. was unable to understand the nature and obligation of an oath. Since M.B. was incompetent to testify, Purvis's cross-examination of M.B. at the hearing did not satisfy the requirements of Crawford because Purvis lacked an opportunity for "full, adequate, and effective cross-examination." The court went on to hold that "a witness unable to appreciate the obligation to testify truthfully cannot be effectively cross-examined for Crawford purposes."
State v. Bobadilla, 690 N.W.2d 345 (Minn. 2004) - The 3 year old victim disclosed penetration by the defendant to his mother. At a forensic interview with a CPS worker and police officer, the child also disclosed penetration. At a competency hearing, the 3 year old was declared incompetent to testify. The prosecutor admitted all the child’s statements, including the videotaped forensic interview. On appeal, the court declared the forensic interview to be testimonial and not admissible. “child-protection worker interviewed [the child] in the presence of Detective Akerson. She asked [the child] whether anyone had hurt him, who hurt him, and how he was hurt. These circumstances clearly indicate that the interview was conducted for purpose of developing a case against Bobadilla, and therefore, the answers elicited were testimonial in nature.” However, the child’s statement to his mother was not testimonial because the mother questioned the child about the redness around his anus out of concern for his health, not because she expected to develop a case against Bobadilla. (**NOTE: This case has been appealed to the Minnesota Supreme Court and APRI filed an Amicus Brief in support in April).  

People ex rel. R.A.S., 111 P.3d 487 (2004) - This case involved a juvenile defendant who molested a 4 year old child. The child disclosed to his mother and then during a forensic interview with a trained police officer. At trial, the child was to go through a competency hearing, but the hearing was not held. Instead, the child’s statements to his mother and during the forensic interview were admitted at trial. The forensic interview was videotaped and the video was played at trial. The court did not make a conclusion about the child’s unavailability since the prosecutor and defense attorney agreed that the child did not meet the competency requirements. On appeal, the court found that the statements by the child to the forensic interviewer were testimonial. Although the juvenile defendant stipulated that the child was incompetent to testify, the defendant did not waive his confrontation rights. The court found that the defendant merely waived unavailability of the child, not the right to confront. The hearsay statements to the mother were not addressed on appeal. Case was reversed in light of Crawford.  

Statements Pursuant to First Disclosure/Tender Years Statutes  
Mont. v. Spencer, 2005 ML 430 (Mont. 2005) – A 3 yr old disclosure of sexual abuse to a counselor and mother are non-testimonial under Crawford.  

Commonwealth v. King, 2005 Mass. LEXIS 541 (2005) - Defendant was convicted of raping his 4 year old daughter. The child testified at trial and statements she made to her mother and a police officer were also admitted under the “fresh complaint” rule. Defendant argued that the fresh complaint rule violates Crawford. The court modified the rule and announced the “first complaint rule.” The court held that since the child testified and was subject to cross-examination, the first complaint statements were properly admitted.  

Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2005) – The 10-year-old victim disclosed abuse by the defendant to his mother and her boyfriend. The victim did not testify at trial due to being found incompetent and the trial admitted these statements as excited utterances. On appeal, the court found that the statements made to the mother and boyfriend were non-testimonial as the victim was being asked what happened and whether the child had been harmed. “M.B.’s statements to Gray and Shawn were not elicited for the purpose of
preparing to prosecute anyone but rather to gain information about what happened, find out if M.B. was harmed, and remedy any harm that had befallen him.” The victim’s statements to a police officer, however, were deemed testimonial. “We do not hold that every statement by a crime victim to a police officer is testimonial. We hold only that M.B.’s statements to Officer Cuthbertson were testimonial under the specific circumstances of this case, where Shawn had briefed the officer on the facts before he questioned M.B. and where he repeated his questioning to M.B. multiple times for the purpose of obtaining evidence to be used to prosecute Purvis.”

**People v. Cannon, 2005 Ill. App. LEXIS 622 (Ill. Ct. App. 2005)** - “On appeal, defendant argued that 725 Ill. Comp. Stat. Ann. 5/115-10 (2002), which allowed for the introduction of the victim's statements to third persons at his trial, was unconstitutional on its face and that the wrongfully admitted statements resulted in his conviction. The appellate court concluded that 725 Ill. Comp. Stat. Ann. 5/115-10(b)(1) and (b)(2)(A) interacted to specifically provide that a victim's hearsay statements should be admitted only when there were sufficient safeguards of reliability surrounding the statements and the victim actually testified at trial. Thus, in requiring the appearance of the victim at trial, the statutory procedure was wholly consistent with the holding of Crawford and, in and of itself, suffered no constitutional impediment. The appellate court found 725 Ill. Comp. Stat. Ann. 5/115-10(b)(2)(A) to be severable from any other allegedly unconstitutional provisions in 725 Ill. Comp. Stat. Ann. 5/115-10.”

**State v. Carothers, 2005 SD 16 (2005)** - In a pre-trial hearing brought by the prosecution regarding admissibility of the 4-year-old child’s statements, the trial court wrongly ruled that Crawford required cross-examination at the moment that the statements were originally made (rather than requiring cross-examination at trial). In overruling this opinion, the South Dakota Supreme Court held: “Section 19-16-38 authorized the admission of a child's prior statement of sexual abuse, and, pursuant to that section, the State announced that it would be introducing in evidence, at defendant's trial on child sexual abuse charges, statements made by the four-year-old child to a social worker. The trial court decided that in line with the recent reworking of the test for admissibility of out-of-court statements in the Crawford decision, admission of the statements would violate defendant's Sixth Amendment rights. The court held, in agreement with many courts of other jurisdictions that had considered the issue, that defendant's confrontation rights would have been violated only if the child had not been available to testify at trial, where she would face cross-examination. Since the State planned to call her as a witness, her prior statements could also be offered in evidence. It was premature to rule on whether, because of her young age at the time of the events in question and fading memory, the child would eventually be found unavailable to testify as a matter of law, in which case her earlier statements would be excluded.”

**T.P. v. State, 2004 Ala. Crim. App. LEXIS 236 (Ala Crim App 2004)** - This case addressed Alabama’s Tender Years statute which provides for hearsay statements of children under age 12 to be admitted at trial if the child testifies or if the child is found to be unavailable. The statute does not address previous cross-examination by the child. In this case, the child did not testify at trial or any other hearing and the statements admitted at trial were the result of an interview conducted by DHR social worker and a police investigator as
part of a criminal investigation. The court found that because the interview was intended to be used as an investigative tool for a potential criminal prosecution, the interview is similar to a police interrogation and, thus, falls within the definition of "testimonial."

**Spontaneous Statements**

*United States v. Coulter, 2005 CCA LEXIS 299 (N-M.C.C.A. 2005)* – Two year old child spontaneously disclosed that she had been touched by defendant. These statements held non-testimonial because the statements to her parents were not the type of testimonial statements outlined in Crawford. “At the same time, the circumstances under which this two-year-old declarant made her statements would not lead an objective witness to reasonably believe that the statements would be available for use at a later trial. Two-year-old [victim] could no more appreciate the possible future uses of her statements than she could understand the significance of what she was communicating.”

*People v. E.H. (In re E.H.), 823 N.E.2d 1029 (Ill Ct of Ap 2005)* – Juvenile defendant (age 13 at the time of the incident) was adjudicated and made a ward of the court for criminal sexual abuse against 2 minor child (ages 2 and 5 at the time of the abuse). Both children made spontaneous disclosures to their grandmother that the abuse happened when the defendant was babysitting them. The grandmother did not make a report for one year. The older victim testified at trial (then age 7), but the younger victim did not. The court held that the younger victim’s statements to the grandmother were testimonial in violation of *Crawford*. “In this case, the declarant, did not appear for cross-examination at trial and was not present at trial to defend or explain her accusations against the defendant. [The child] made an out-of-court statement to her grandmother, which was offered to prove the matter asserted, and the grandmother testified to that out-of-court statement in court. The admission of the accuser's out-of-court testimony by permitting another witness, the grandmother, to testify for the accuser, is exactly what the Framers of the Constitution were endeavoring to prohibit with the sixth amendment. Therefore, [the defendant] had a constitutional right to confront her accuser.” The court found that the statements by the child victim were “accusatory statements" requiring the protections of the confrontation clause. “We believe it is the nature of the testimony rather than the official or unofficial nature of the person testifying that determines the applicability of *Crawford* and the confrontation clause.”

*People v. R.F., 355 Ill. App. 3d 992; 825 N.E.2d 287 (Ill Ct of Ap 2005)* – Statements made by the 3 year old victim to her mom and grandmother about the defendant pinching and kissing her vaginal area were properly admitted and were non-testimonial statements. The statements were made to family members and not government personnel. The child did not testify at trial due to fear and anxiety. However, statements made by the child to a police investigator who interviewed the child were deemed testimonial because the officer “was acting in an investigative capacity for the purpose of producing evidence in anticipation of a criminal prosecution.”

*State v. Aaron L., 272 Conn. 798, 865 A.2d 1135 (2005)* – “The victim, who was two and one-half years old at the time, made the statement spontaneously and to a close family member more than seven years before the defendant was arrested. In light of these circumstances, the victim's communication to her mother clearly does not fall within the core
category of ex parte testimonial statements that the court was concerned with in *Crawford*. See ("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"). Accordingly, because the victim's statement was nontestimonial in nature, application of the *Roberts* test remains appropriate.”

**State v. Dezee, 2005 Wash. App. LEXIS 104 (Wash Ct App 2005)** - The child’s “statements were spontaneous. They were made initially to her mother while riding in the car to a class. The statements to her mother appear to have been made for the personal purposes of expressing her repugnance at the act and trying to enlist her mother's help in coping with its effects. The record does not indicate [the child] asked her parents to take any action against Dezee. The record does not indicate that in the months between her disclosure to her mother and her mother's report to the police [the child] expressed any thought or concern about police involvement or a legal proceeding. Nothing in the record supports the conclusion that [the child], a nine year old, reasonably believed the statements to her mother could or would be available for use in a trial. We conclude that [the child's] statements to her mother were not testimonial within the analysis contained in *Crawford* and were therefore properly admitted.”

**State v. Doe (In re Doe), 140 Idaho 873; 103 P.3d 967 (2004)** – The 4 year old victim was digitally penetrated by her 14 year old uncle at a campground. Twenty minutes later, the victim was heard by the defendant’s mother crying and blurted out "he put his finger in her bum and that it hurt really bad." A few second later, a still hysterical child repeated the same statement to her mother and grandmother and pointed at her vaginal area to show where he had put his finger. After an evidentiary hearing under the Juvenile Corrections Act, the defendant was placed on probation with a suspended commitment. The magistrate considered the statements of the child victim without the child testifying. On appeal, the court found that this did not violate *Crawford* because the statements were excited utterances, made without prompting or questioning within minutes of the injury. The court considered the youthful age of the child in finding the statements were non-testimonial.

**Herrera-Vega v. State, 29 Fla. L. Weekly D 2361 (Fla Dist Ct App 5th Dist 2004)** - A 3-year old child spontaneously told her mother, as she was putting on the child's underpants, that the defendant had placed his tongue in her "private parts." The child reluctantly repeated the story to her father minutes later. The father confronted the defendant who admitted to touching the child sexually with both his penis and tongue. The police were called and the defendant confessed to multiple sexual contacts with the child. The child refused to repeat to anyone else what she had told her parents about the incident. She was therefore found to be "unavailable" as a witness for trial and no attempt was made to call her to testify. The prosecutor offered offered two forms of evidence that Vega had sexually abused the child: the hearsay testimony from the victim's parents and Vega's confession. On appeal, the court found the child’s statements to both parents to be non-testimonial because testimonial evidence does not appear to include spontaneous statements made by a child to her mother while being dressed or to her father.
Other Hearsay Statements

State v. James, 2005 Wisc. App. LEXIS 610 (Wisc. Ct. App. 2005) – “The action arose when the State, pursuant to Wis. Stat. § 908.08 (2003-04), sought to introduce the videotaped statements of two child witnesses in a sexual assault trial in lieu of full-blown live direct examination and to subsequently make the children available for questioning at the defendant's request. The trial court sustained defendant's objection to this mode of testimonial presentation, observing that in its past experience, child witnesses sometimes refused to submit to cross-examination, thereby necessitating a mistrial in order to avert a violation of defendant's Sixth Amendment right. Invoking Wis. Stat. §§ 904.03, 906.11 and 908.08(3) (2003-04), the trial court required any live testimony to occur first.” Having the witnesses testifies prior to admitting other out-of-court statements satisfies Crawford.

People v. Cookson, 215 Ill. 2d 194; 830 N.E.2d 484 (2005) – The victim was seven years old when she was turned over to the police department and taken into protective custody. The child disclosed sexual abuse to the DCFS worker, to a police officer who conducted the forensic interview, and her foster parents among others. The child testified at trial and, therefore, all other admissible hearsay statements may be admitted at trial and this satisfies Crawford and the confrontation clause.

State v. Fisher, 108 P.3d 1262 (2005) – “The victim, a 29-month-old child, told a family practice physician that defendant hit him in his forehead and defendant was subsequently convicted of second-degree child assault. On appeal the court affirmed, stating that there was no indication of a purpose to prepare testimony for trial and no government involvement. Nor was the statement given under circumstances in which its use in a prosecution was reasonably foreseeable by an objective observer. Further, the statement was made in the context where a declarant knew that his comments related to medical treatment and thus, the victim's statement was properly admitted under Wash. R. Evid. 803(a)(4).”

State v. Causey, 30 Fla. L. Weekly D 820 (Fla Dist Ct App 5th Dist 2005) - “Defendant was charged with committing the crime of sexual battery upon a person less than 12 years of age by a person older than 18 years of age. The State filed a notice of its intent to use child hearsay testimony at the defendant's trial pursuant to Fla. Stat. ch. 90.803(23)(b) (2001). Specifically, the State indicated its intent to offer statements made by the alleged child victim to her mother, a friend, a member of the Child Protection Team, and two doctors. The trial court ruled that any testimonial statements made by the alleged child victim in the course of investigation, or which met the definition set forth in § 90.803(22), and which were not otherwise admissible were barred by Crawford v. Washington unless defendant or counsel were allowed to be present and cross-examine such statements. The State argued that Crawford did not require defendant or his counsel to be present at the time the witness's statement was made or to be given an opportunity to cross-examine the witness at that time. The court agreed, finding that the ruling in Crawford merely required that a defendant have an opportunity at some time prior to trial to cross-examine the witness.”

United States v. Wipf, 397 F.3d 677 (8th Cir Minn 2005) – “Defendant worked as a custodian and gym teacher at a mission school on the Red Lake Indian Reservation. A former student reported to the police that he had been molested by defendant. The police
investigated the allegation and defendant was arrested in a hotel room sharing a bed with young boys. A search warrant was executed at defendants home where they found child pornography including a videotape of defendant sexually assaulting a young boy. The appellate court found that there was no Confrontation Clause violation with respect to the testimony of the psychologist about his interviews with two of the victims and the trial testimony of the victims mirrored the testimony of the psychologist. The testimony of the boy discovered through the videotape should not have been excluded under the "fruit of the poisonous tree" doctrine because the boy testified willingly and gave the same account of his relationship with defendant as what he had told the psychologist. The officer's statement that he wanted to tell defendant of the situation and to explain the charges against him, after defendant had requested an attorney, did not amount to a custodial interrogation.”

State v. Harr, 2004 Ohio 5771 (2004) – “The victim was a seven-year-old girl. At trial, the victim was unable to testify as she sobbed uncontrollably. The trial court allowed her mother to testify as to what the victim said when the mother questioned her about the incident. The appellate court held that the trial court abused its discretion in admitting the hearsay testimony of the mother. The victim's statements to her mother were given nearly two weeks after the "startling event" and after the child was confronted by her mother for disobeying her order not to enter a stranger's apartment, and only after she interrogated the child with leading questions. Thus, the trial court abused its discretion in finding that victim's statements to her mother were admissible as excited utterances.”

State v. McClanahan, 2004 Wash. App. LEXIS 597 (2004) - “The trial court determined that [the child] was competent to testify at trial, and after reviewing and reflecting on necessary legal factors, determined the child hearsay statements made to her teacher, her mother and the child interview specialist bore sufficient indicia of reliability to be admissible at trial. Other statements [the child] made were admitted as statements to medical professionals. Under the facts of this case there is no Crawford confrontation issue regarding the admission of the child hearsay statement because the declarant was a witness at trial and McClanahan was afforded the opportunity to cross-examine.”

State v. Vaught, 268 Neb. 316 (Neb. Sup. Ct. 2004) - This case involved a 4-yr old victim of sexual abuse who informed a physician during a medical examine about the identity of the defendant. “We believe on the facts of this case that the victim's statement to the doctor was not a "testimonial" statement under Crawford. As discussed above, the victim's identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment. In the present case, the victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment. There was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination. {NOTE: It does not appear that the victim testified at any hearing in this case.}
Poor Memory/Child Freezes on the Stand/Limited Cross-Examination

State v. Painter, 2005 N.C. App. LEXIS 2000 (N.C. Ct. App. 2005) - Seven year old victim testified at trial but had some memory problems. Subsequently, statements made by the child to a social worker and treating physician were admitted at trial. Defendant objected on Crawford grounds in that he was not able to conduct a thorough cross-examination due to memory problems with the child. The court disagreed and held that the child satisfied Crawford and the Sixth Amendment by testifying and being subject to cross-examination.

In re K.R.O., 2005 Minn. App. Unpub. LEXIS 362 (2005) - Defendant, a juvenile, adjudicated on a sexual assault against a 5 year old victim, argued that although the victim testified, she was not competent to testify (in spite of the court’s ruling that she was competent) and this prevented the defense from an effective cross-examination. As such, admitting the victim’s forensic interview after her testimony violated Crawford. The Court disagreed and held that although the defense had a limited cross-examination, the child was competent and did testify and, therefore, admitting the forensic interview was proper under Crawford.

United States v. Kappell, 2005 FED App. 0333P (6th Cir. Mich. 2005) – The two child victims testified at trial pursuant to closed-circuit television. The defendant complained of a confrontation violation because during cross-examination, the children were inarticulate or unresponsive at times and should have been declared unavailable (thus precluding testimony of a psychotherapist and two physicians regarding statements made by the children). Defendant claimed there was no effective cross-examination. The Court rejected this arguments since the U.S. Supreme Court has held that “the Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”

State v. McKinney, 2005 SD 73 (2005) – The child victim testified at trial but “"did not know" or "could not remember" certain facts. Statements the child made during a forensic interview were also introduced. Defendant appealed regarding the statements to the forensic interviewer and complained that “his cross-examination was not "full and effective" because on approximately twenty occasions J.H. answered his questions indicating that she "did not know" or "could not remember" certain facts. A detailed review of J.H.'s testimony reflects that these answers were in response to five types of questions.” The court found that the child was available and was subject to cross examination and, therefore, all admissible hearsay could be admitted regardless of its testimonial nature.

Randolph v. State, 2005 Del. LEXIS 243 (2005) - “Defendant, who was 13 years old at the time, was charged with rape and unlawful sexual contact involving his five-year-old sister. During the trial, the victim was unable to implicate defendant and provided nonsensical responses to the questions. However, her mother and the mother's boyfriend testified about incriminating admissions made by defendant. In addition, a child advocacy interviewer and a sexual assault nurse testified about the victim's statements to them. The state supreme court held that defendant was aware that he had a lawyer and that his lawyer was there to help him. Consequently, the family court properly determined, pursuant to Del. Code Ann. tit. 11, § 404(a) (2005), that defendant was competent to stand trial. The mere fact that the victim had
difficulty answering questions and provided nonsensical responses on direct examination did not make her unavailable for confrontation clause purposes.”

**State v. Price, 127 Wn. App. 193; 110 P.3d 1171 (Wash Ct App 2005)** - Defendant was convicted of molesting two children. The first child took the stand and testified, but testified that she had forgotten when asked about the sexual contact and the statements she made to her mother and a detective. There was no *Crawford* violation in admitting the hearsay statements through the mother and the detective because the defendant had the opportunity to fully cross-examine her about her out-of-court statements or the underlying events.

**State v. Yanez, 2005 Minn. App. LEXIS 412 (Minn Ct App 2005)** - This case involved a 9 year old victim who had memory lapses while testifying at trial. “Defendant argued that the victim was unavailable for meaningful cross-examination and that admitting her out-of-court statements violated his constitutional right to confront an adverse witness because she testified to a lack of memory of the subject matter of her prior statement and was never subject to full and effective cross-examination. ***The appellate court held that despite her memory lapses, the victim was available and the admission of her out-of-court statements did not deny defendant his right to confrontation.”

**Bockting v. Bayer, 399 F.3d 1010 (9th Cir Nev 2005)** – The six year old child of the defendant spontaneously disclosed sexual abuse to her mother by the defendant. The victim took the witness stand at preliminary hearing, but after a truth-lie inquiry, froze on the witness stand and could not answer any questions concerning the charges. The court declared the child unavailable and admitted the testimony of the mother and the detective who interviewed the child. At trial, the judge found the victim to be unavailable and admitted the same testimony. The Ninth Circuit Court of Appeals held that *Crawford* applies retroactively to this case and remanded for further consideration of whether the child had sufficiently testified and satisfied the criteria of *Crawford*.

**People v. Harless, 125 Cal. App. 4th 70, 22 Cal. Rptr. 3d 625 (Cal App 6th Dist 2004)** – A child victim was present at trial but suffered some memory loss regarding the molestation by the defendant. The child could not remember what she had said or to whom she had said it. The prosecutor admitting the child’s prior inconsistent statement describing the molestation. The Court held that in spite of some memory loss, the child was available for trial and subject to cross-examination. Therefore, there was no *Crawford* violation when her prior inconsistent statement was admitted.

**People v. Phan, 2004 Cal. App. Unpub. LEXIS 5047 (Cal. 2004)** – Child victim testified at trial concerning statements she made to police officers regarding sexual assault. At trial, child victim had poor recollection regarding police interviews. In a *Crawford* analysis, the court found *Crawford* was satisfied because the victim testified and was subject to cross-examination. The fact that the victim had poor memory and was not able to be cross-examined fully did not require reversal. *Crawford* requirements were satisfied.
People v. Warner, 199 Cal. App. 4th 331 (Cal. App. 3d Dist. 2004) - In this case, the victim was 3 years old (4 years old at the time of trial). In a forensic interview, the victim said the touching by her dad happened lots of times. The victim’s mother telephoned defendant (her husband) in a phone sting and he admitted to touching the child. In an interrogation with the detective, the defendant admitted to 3 touchings. At trial, the child didn’t recall the forensic interview and only admitted to one touching on the witness stand. The prosecutor moved to admit the defendant’s statement and argued there was sufficient corpus to admit the statement of the defendant. The court found that since the victim testified at trial and was subject to cross-examination, in spite of her lack of memory, the defendant’s statement could come in as there was sufficient corpus established. No Crawford violation.

People v. T.T. (In re T.T.), 351 Ill. App. 3d 976, 815 N.E.2d 789 (Il App Ct 2004) - “Respondent was accused of having sexual relations with a seven-year-old girl. During the trial, the alleged victim, who was then nine-years-old, responded to general questions, identified respondent in court, and explained how she was at respondent's home. However, when the questions became more specific about the alleged assault, she stopped answering questions. Respondent contended that the trial court erred in finding that the alleged victim was unavailable to testify, erred in admitting testimonial statements that she gave to a police detective, an Illinois Department of Children and Family Services (DCFS) investigator, and an examining physician, and erred by denying respondent an opportunity to cross-examine her. On appeal, the court found that the trial court properly determined that the alleged victim was unavailable. Further, the alleged victim's statements to the police detective and the DCFS investigator were testimonial, and her statement to the examining physician identifying respondent as the perpetrator was testimonial. Because respondent had no opportunity to cross-examine the alleged victim at trial, the testimonial statements were not admissible.”

Child testified at preliminary hearing but unavailable for trial
Anaya v. Huskey, 2005 U.S. Dist. LEXIS 6104 (ND Cal 2005) – “Petitioner was convicted of continual sexual abuse of a child under the age of fourteen, his daughter, in violation of Cal. Penal Code § 288.5(a). The daughter gave incriminating testimony at a preliminary hearing, but refused to testify at trial, and allegedly recanted. The court did not actively compel her presence, and defendant did not object to her absence or the use of her preliminary hearing testimony at trial. In his petition, he argued that the trial court violated his Sixth Amendment rights when it permitted the preliminary hearing testimony to be read to the jury. *** The court found the prior testimony admissible on prior inconsistent or unavailable witness grounds.”

Testifying Via Closed-Circuit or Two-Way TV
United States v. Bordeaux, 400 F.3d 548 (8th Cir. SD 2005) – Defendant was tried for sexual abuse on a minor child (age unknown). Although the victim initially took the witness stand at trial, she was too afraid to testify. During an in chambers review, the Judge ruled that the child could testify via two-way closed circuit television under. After conviction and on appeal, the court held that the testimony via two-way closed circuit TV denied defendant his Sixth Amendment right to confront the victim because the district court found that the
victim's fear of defendant was only one reason why she could not testify in open court; it did
not find that the victim's fear was the dominant reason. The case was remanded for a new
trial where additional facts may be established to satisfy Maryland v Craig.

Domestic Violence Cases after Crawford

- Excited Utterances are not testimonial (so far)
- 911 Tapes – split decisions
  - Courts are looking to the nature of why the caller is calling
    - Requesting help or seeking immediate protection – non-
      testimonial
    - Reporting a crime after the fact - testimonial
- Impeachment due to recantation

Excited Utterances/911 Calls

State v. Warsame, 701 N.W.2d 305 (Minn. 2005) – “When the officer arrived near the
scene, he encountered the victim in the street. She stated that "my boyfriend just beat me up." The trial court held the latter initial statement was admissible, apparently, as an excited-
utterance. However, as the officer checked the victim's head injury, he asked her some form
of open-ended question as to what happened; at that point, the victim went into great detail
about defendant striking her with a cooking pot, and his chasing her with a knife while
threatening to kill her. Thus, the issue was whether the district court erred in ruling that the
latter statements were testimonial and therefore inadmissible. The appellate court noted that a
majority of post-Crawford cases involving initial police-victim interactions at the scene held
that the situations did not involve interrogation and that resulting statements were not
testimonial. Further, in the instant case, the district court clearly erred in finding the victim
had 15 to 20 minutes "to reflect" before making her statements. The appellate court held the
questioning was not clearly done to obtain evidence that could be used at trial. Thus, the
subject statements were nontestimonial.”

from a victim of domestic violence, made as the assault was in progress, was not testimonial
under Crawford. The victim was requesting help, not formalizing a statement concerning a
crime.

Spencer v. State, 162 S.W.3d 877 (Texas App Houston 14th Dist 2005) - “Defendant's
girlfriend did not testify at trial, but the trial court allowed the two officers who responded to
the girlfriend's 911 call to testify that she told them that defendant had hit her. The trial court
admitted the girlfriend's initial statements to the officers under the excited utterance
exception to the hearsay rule. Defendant claimed the ruling deprived him of his right to
confront witnesses against him under the Sixth and Fourteenth Amendments to the United
States Constitution. The court held that the girlfriend's statements to the officers were not
"testimonial," under the Crawford test for analyzing confrontation claims because the
girlfriend initiated the contact by summoning the police for help, and the officers' preliminary question at the scene was designed to ensure the safety of those on the scene and
did not amount to interrogation. The court noted that even if the girlfriend's statements were
made in response to questioning, preliminary questions when police arrive at a crime scene to
assess and secure the scene did not constitute interrogation because they bore no indicia of the formal, structured questions necessary for statements to be testimonial.”

**Pitts v. State, 272 Ga. App. 182; 612 S.E.2d 1 (GA Ct of Ap 2005)** - The defendant was charged with domestic violence involving his wife. The victim asserted marital privilege and did not testify at trial. “We hold that the statements the victim made to deputies after they arrived on the scene and arrested Pitts are testimonial since the statements resulted from police questioning during the investigation of a crime. At the time these statements were made, Pitts had already been handcuffed, taken outside, and placed in a patrol car. The victim made statements to government officials which a person would reasonably believe would be available for use at a later trial. Therefore, under *Crawford*, we are constrained to hold that the admission of these statements at trial infringed upon Pitts' constitutional right to confront the witness against him since he had not had a prior opportunity to cross-examine the declarant about the contents of the hearsay statements. *** The 911 calls, however, do not come within the ambit of *Crawford*. Here, the caller's statements were made while the incident was actually in progress. The statements were not made for the purpose of establishing or proving a fact regarding some past event, but for the purpose of preventing or stopping a crime as it was actually occurring. The caller was requesting that police come to her home to remove Pitts, who she said had broken into her house. The statements made during the 911 calls were made without premeditation or afterthought. Accordingly, the 911 tape was not testimonial. ”

**State v. Powers, 99 P.3d 1262 (2004)** – “The court held that the trial court, on a case-by-case basis, could best assess the proposed admission of a 911 recording as testimonial or nontestimonial and whether the statement originated from interrogation. Despite the seriousness of defendant's alleged conduct, the victim's call was not part of the criminal incident itself or a request for help entitling the State to prove their case without affording defendant the opportunity to cross-examine the victim, a right case law protected. The record showed that the victim called 911 to report defendant's violation of the order and described him to assist in his apprehension, rather than to protect herself from his return. Thus, her statements were testimonial and were erroneously admitted at trial when she became unavailable. Because the 911 tape was the only evidence establishing the corpus delicti, without it, defendant's statements to police were inadmissible.”

**State v. Barnes, 2004 ME 105, 854 A.2d 208 (2004)** – “Defendant argued that the admission of his mother's statements to a police officer following an earlier alleged assault constituted a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. Specifically, the issue was whether the statements were "testimonial" in nature. The state supreme court concluded that the admission of the statements did not violate the Confrontation Clause for several reasons. First, the police did not seek the mother out. She went to the police station on her own. Second, her statements were made when she was still under the stress of the alleged assault. Third, she was not responding to tactically structured police questioning, but was instead seeking safety and aid. The police were not questioning her regarding known criminal activity. Thus, the interaction between defendant's mother and the officer was not structured police interrogation triggering the cross-examination requirement of the Confrontation Clause. Nor did the victim's words in any
other way constitute a "testimonial" statement. Therefore, it was not obvious error for the
trial court to admit the officer's testimony."

People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Sup. Ct. 2004) and People v. Cortes, 2004
N.Y. Misc. LEXIS 663 (2004) – See previous section regarding Excited Utterances in
relation to 911 calls

unavailable for trial and due diligence had been exercised in attempting to serve her with a
subpoena. Victim had also invoked her Fifth Amendment privilege not to testify at the
preliminary hearing against her husband. The trial court ruled that the recording of the
victim's conversation with the 911 operator on the night of the assault was admissible, that
the victim's statements to the police were admissible under Evidence Code section 1370, and
that statements made by the victim to her neighbor and others were admissible under
Evidence Code section 1240. “At trial, the neighbor testified that when his wife brought the
victim to their apartment she was bleeding around her face and very upset. She told him that
her boyfriend had beaten her. The neighbor called the police and the victim told the
dispatcher that her boyfriend, Keith Hunter, had beaten her. She called two more people from
his phone and told each of them that Hunter had beaten her. The responding officer also
testified that the victim had told him that her live-in boyfriend, Keith Hunter, had beaten her.
Despite the finding of unavailability, the victim ultimately testified at trial when called by the
defense. Although this court requested supplemental briefing on the applicability of
Crawford after reviewing the briefs submitted by both parties and the record we agree that
Crawford has no application to this case. The victim whose hearsay statements were received
in evidence did in fact testify. She stated that she had lied to the police and that in reality she
was injured in a fight with another woman.”

People v. Corella, 122 Cal. App. 4th 461 (Cal App 2d Dist 2004) – Defendant assaulted his
wife and she called 911 and reported the assault. She also repeated the accusation to police
and medical personnel. At preliminary hearing, the victim recanted her accusation and
admitted to giving a false statement. The victim did not testify at trial and her statements to
the police were admitted. The conviction was upheld on appeal as not violating Crawford
because the victim initiated the 911 call, not the police. Moreover, the victim provided
spontaneous statements describing the assault and this did not rise to level of interrogation.
Preliminary questions by a police office at the scene is not an interrogation. Although the
spontaneous statement were admitted at trial, these statements were made without reflection
or deliberation and could not have been made in contemplation of testimonial use at trial.

People v. Victors, 353 Ill. App. 3d 801, 819 N.E.2d 311 (Ill App Ct 2004) – The victim of
an assault made out-of-court statements to a police officer at the scene. Before making these
statements, the victim had previously spoken with another officer for about 5 minutes. At
trial, the victim did not testify and the court admitted the statements to the officer as excited
utterances. On appeal, the court found the statements were not excited utterances due to the
intervening interview by the first officer and, therefore, declared the statements to the 2nd
officer to be testimonial and required the victim to testify at trial.
**Service of Restraining Orders**

*People v. Saffold, 2005 Daily Journal DAR 3473 (Cal App 2nd Dist 2005)* - “The trial court admitted evidence of the proof of service of the temporary restraining order upon defendant in jail. The charges against him arose from his violation of that order. Defendant argued that the admission of the proof of service and related documents violated his Sixth Amendment constitutional right to confront witnesses because the deputy did not testify at trial and identify him as the person that he served. Thus, he argued, the State did not establish his actual knowledge of the order. In affirming, the court found that the trial court properly admitted evidence of the proof of service because it was not a "testimonial" statement within Crawford, which concerned pretrial statements given to government officers in a preliminary hearing, grand jury, a former trial, or police interrogations, among other settings. The deputy was not an accuser making a statement to government officers; he did not give testimony against defendant by serving the restraining order and completing the proof of service. He served defendant in the routine performance of his duties, and his testimony would have served primarily to authenticate the proof of service.”

**Impeachment due to Recantation**

*State v. Courtney, 682 N.W.2d 185 (Minn. Ct. of Ap. 2004)* – In this domestic violence case, the victim gave a tape recorded statement to police and her 6-yr old daughter gave a videotaped interview of what she witnessed. At trial, the victim testified for the defendant and recanted her statement. The prosecutor introduced the audio and video tapes pursuant to the residual/catchall hearsay exception. The Court of Appeals held that there was no Crawford violation since the victim was present for cross examination. However, the videotaped statement of the daughter was a violation of Crawford since she was not subject to cross examination. *(NOTE: This case is on appeal to the Minnesota Supreme Court)*

**Elder Abuse after Crawford**

- Statements to Police or Protective Services
- Statements to Medical Professionals
- Statements to Family

**Statements to Police or Protective Services**

*State v. Lewis, 166 N.C. App. 596; 603 S.E.2d 559 (NC Ct App 2004)* - An elderly victim died of unrelated causes to the crime prior to trial and the prosecutor introduced the victim’s photo line up identification of the defendant and other statements made to police officers at trial. The conviction was reversed on appeal because the victim’s identification of the defendant and statements made to police officers were testimonial in nature and violated the right to cross-examine.

*People v Pirwani, 119 Cal. App. 4th 770, 14 Cal. Rptr. 3d 673 (Cal App 6th Dist 2004)* - Defendant was a caretaker for victim, a dependent adult. Victim came into a large sum of money in August 1999, which was gone by February 2001. Threatened with eviction from her care facility for nonpayment of rent, she disclosed that she had entrusted the management of her finances to defendant. Shortly thereafter, victim died. Defendant was convicted of stealing victim’s money. Defendant contends that her constitutional rights were violated at trial by the admission of two hearsay statements by victim: (1) a videotaped statement made
by victim to police two days before she died, admitted into evidence pursuant to Evidence Code section 1380; and (2) a statement victim made to her social worker's supervisor the day after she spoke to the police for the first time, admitted as a spontaneous declaration pursuant to Evidence Code section 1240. The Attorney General conceded that Crawford rendered Evidence Code section 1380 unconstitutional, and that victim’s videotaped statement to police was therefore erroneously admitted. The Court agreed and also concluded that victim’s statement to her social worker's supervisor should not have been admitted as a spontaneous declaration. Case reversed.

**Statements to Medical Professionals**

**State v. Primo, 2005 Ohio 3903 (Ohio Ct. App. 2005)** - “Defendant, a nurse's assistant at a nursing care facility, touched the breast of an elderly female patient. Defendant argued that the trial court erred when it admitted the victim's statements as excited utterances. The appellate court held that the victim's statements were excited utterances, pursuant to Ohio R. Evid. 803(2), as the statements related to the startling event while the victim was still under the stress caused by the event. The victim made the statements to a nurse's assistant and two nursing supervisors when they entered her room and inquired about her well-being. The victim began crying and indicated that a black man had pinched or grabbed her breast. The statements in question were not testimonial in nature, and the admission of the statements by the trial court did not violate defendant's right to confrontation.”

**State v. Johnson, 2005 Del. Super. LEXIS 253 (Del. Super. Ct. 2005)** - “The elderly victim had expressed fear of defendant, her former handyman, after an earlier burglary, and she did not want to discuss the alleged later rape with police at all. She did make many statements to medical professionals, immediately after the incident and after her return to her winter home, and to her children. Except for a few statements to a nurse who had a role in gathering forensic evidence, the court held that most of the statements were nontestimonial in nature under a Sixth Amendment analysis, so that they would be admissible if they fell within a deeply rooted hearsay exception under Del. R. Evid. 803 and bore indicia of reliability. Many of the statements were clearly admissible as made for purposes of obtaining medical treatment, and others were excited utterances. Statements of the victim's then-existing state of mind with regard to fears of returning to the house were admissible, but other statements that would have related to the history of the victim's fears of defendant were not. Finally, since there was plenty of other evidence as to the victim's medical condition, the court declined to admit her medical treatment records as business records.”

**Drunk Driving and Substance Abuse cases After Crawford**

- Anonymous Tips are not testimonial
- Breath Analysis Certification Reports – mixed opinions
- Blood Alcohol and Drug Analysis Results are not testimonial
- Prior Convictions
- Surveillance
- Search Consent Forms
- Informants
**Anonymous Tips**

**Waltmon v. State, 2004 Tex. App. LEXIS 7285 (Tex. App. El Paso 2004)** - “The fact that the anonymous caller reported Appellant's erratic driving did not amount to a testimonial statement as contemplated by *Crawford*. The tipster's statement was not admitted to show that Appellant was indeed driving while intoxicated but to show how the officers happened to be in the area.”

**Breath Analysis Instrument Certification Reports**


**People v. Kanhai, 8 Misc. 3d 447; 797 N.Y.S.2d 870 (NY City Crim Ct 2005)** - “The prosecution offered into evidence, as business records, five exhibits containing statements of individuals who were not called to testify at trial. Three of the exhibits were certified copies of field unit inspection reports of tests conducted by a New York City Police Department (NYPD) technician on the intoxilyzer machine which was used to conduct the breath analysis of defendant. One exhibit was a certified copy of a record of the analysis of the simulator solution lot test conducted by the New York State Police Laboratory and used in the breath alcohol test of defendant. One exhibit was a certified copy of the calibration test conducted by an NYPD technician on the intoxilyzer machine used in the case. Defendant objected to the introduction of the exhibits, and any testimony concerning them, on the ground that their admission violated his Sixth Amendment right of confrontation. The court found that the records were not testimonial in nature, were properly certified, and met all the requirements of business records pursuant to N.Y. C.P.L.R. 4518 and were admissible into evidence against defendant as was all testimony concerning the documents.”

**People v Orpin, 796 N.Y.S.2d 512 (NYJ Ct 2005)** – At trial, the prosecution offered into evidence (1) the record of inspection, maintenance, and calibration prepared by the New York Division of Criminal Justice Services for the Datamaster used in this case and (2) a certification of analysis of the 0.10% Breath Alcohol Simulator Solution prepared by the New York State Police Forensic Investigation Center for reference solution lot number 04040. The court noted that although these are business records and generally non-testimonial under *Crawford*, these type of documents were prepared in anticipation of prosecution and the preparers of the reports would have known this. Therefore, these two documents were held to be testimonial requiring the testimony of the preparers of each report.

**Napier v. State, 827 N.E.2d 565 (Ind Ct App 2005)** – The court affirmed its original position that “certificates of inspection and compliance are not testimonial in nature and, thus, do not fall within the rule announced in *Crawford*. Id. In our view, a defendant's inability to cross-examine information that is contained in the certificates is not the same type
of evidence that concerned the Crawford court.” The court further held that operator certifications are ministerial in nature and therefore non-testimonial and “there is no requirement that live testimony must be offered as to instrument or operator certification.”

**State v. William, 199 Ore. App. 191; 110 P.3d 1114 (Or Ct App 2005)** - Documentary evidence of the accuracy of an Intoxilyzer is non-testimonial and does not require the testimony of the technician who prepared the documents. Public and official records have constituted an exception to the confrontation rights guarantee and their admission does not violate Crawford.

**State v. Carter, 2005 MT 87 (2005)** – “the nontestimonial pieces of evidence at issue here, the weekly and yearly certification reports for the Intoxilizer 5000, do not implicate Carter's constitutional right of confrontation. Therefore Carter is not entitled to a new trial.”

**Shiver v. State, 30 Fla. L. Weekly D 653 (Fla. Dist. Ct. App. 1st Dist. 2005)** - “The state trooper who arrested defendant testified at trial that he administered two breath tests, which determined defendant's blood alcohol level. The State of Florida, over objection and relying on Fla. Stat. ch. 316.1934(5) (2002), offered into evidence an affidavit that was prepared by the trooper of the results of defendant's breath test. The affidavit was also relied upon by the State, pursuant to Fla. Stat. ch. 316.1934(5)(e), to establish the date of performance of the most recent required maintenance of the test instrument by another trooper. Defense counsel argued that the State failed to prove the instrument was properly calibrated, and the admission of the affidavit violated defendant's due process rights. On appeal, the court found that parts of the affidavit constituted testimonial hearsay evidence regarding when the statutorily required maintenance of the instrument was performed. Because defendant was unable to challenge the accuracy of the instrument by the constitutionally mandated method of cross-examination of the person who performed the maintenance, introduction of the affidavit violated defendant's right to confront witnesses, and was not harmless error.”

**Blood Alcohol and Drug Analysis Results**


**Luginbyhl v. Commonwealth, 2005 Va. App. LEXIS 329 (VA. Ct. App. 2005)** – “Defendant was charged with and convicted of driving while intoxicated pursuant to Va. Code Ann. § 18.2-266. On appeal, he contended his conviction should be reversed because the trial court erred in admitting into evidence a certificate of blood alcohol analysis based on the result, contained in a certificate of analysis, obtained from a breath test. Specifically, he argued that admission of the document violated his rights under the Confrontation Clause of the Sixth Amendment. The appellate court found the result of his breath test contained in the certificate of analysis was not hearsay evidence and, therefore, that its admission into evidence did not implicate his Sixth Amendment right to confrontation. The appellate court further held that statements contained in the breath test certificate relating to the machine's good working order and the administering officer's qualifications did not constitute testimonial hearsay and did not require the Commonwealth to prove, pursuant to Crawford,
that the administering officer was unavailable and that defendant had a prior opportunity to examine him.


**People v. Hinojas-Mendoza, 2005 Colo. App. LEXIS 1206 (Colo. Ct. App. 2005)** – “At the time of his trial, he had the right to confront the technician who prepared the laboratory report. He failed to exercise that right by giving pretrial notice under Colo. Rev. Stat. § 16-3-309(5) (2004). Thus, the statements in the laboratory report were rightfully not excluded.”

**State v. Cunningham, 903 So. 2d 1110 (2005)** – “The statutes in question allowed a certificate of analysis to be accepted by the trial court as prima facie proof of the substance tested without live testimony of the person performing the analysis. The court reversed, holding that the statutes did not infringe upon defendant's constitutional right to confrontation because defendant merely had to subpoena the person who performed the examination or analysis of the evidence. Once a defendant requests the subpoena, the certificate of analysis has no evidentiary value and the State must call the relevant witnesses to prove its case. Because the good-faith certification of La. Rev. Stat. Ann. ?? 15:501(B)(2) was imposed only on defendant and not the State, it was not construed as an unconstitutional violation of the confrontation clause. Consequently, the burden to demonstrate good faith was featherweight so as not to adversely impact defendant's right to confrontation, and defendant, who did not avail himself of the opportunity to subpoena the report-preparer, could have satisfied the good-faith requirement by merely indicating a preference for live testimony.”

**Belvin v. State, 30 Fla. L. Weekly D 1421 (Fla. Dist. Ct. App. 4th. Dist. 2005)** – “The state maintains that, because sections 316.1934(5) and 90.803(8) expressly state that breath test affidavits are public records and reports, they are not testimonial. But the statutory listing of breath test affidavits under the public records and reports exception to the hearsay rule does not control whether they are testimonial under Crawford. As mentioned above, these affidavits are prepared for use at a criminal prosecution. They are pretrial statements expected to be admitted into evidence at trial. As such, they fit under Crawford's definition of testimonial evidence and are subject to the requirements articulated in Crawford.”

**Commonwealth v. Verde, 444 Mass. 279; 827 N.E.2d 701 (2005)** – “This appeal raises the question whether, in light of Crawford, the confrontation clause of the Sixth Amendment to the United States Constitution requires that laboratory technicians who analyze drugs seized as part of a criminal investigation authenticate their laboratory findings by appearing at a defendant's trial. Because we conclude that a drug certificate is akin to a business record and the confrontation clause is not implicated by this type of evidence, we answer in the negative and affirm the conviction.”
State v. Dedman, 2004 NMSC 37 (2004) - Blood alcohol reports are not testimonial. “A blood alcohol report is generated by SLD personnel (Scientific Laboratory Division of the Department of Health), not law enforcement, and the report is not investigative or prosecutorial. Although the report is prepared for trial, the process is routine, non-adversarial, and made to ensure an accurate measurement. While a government officer prepared the report, she is not producing testimony for trial. Finally, a blood alcohol report is very different from the other examples of testimonial hearsay evidence: "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations."

State v. Kemper, 2004 Tenn. Crim. App. LEXIS 845 (Tenn Crim App 2004) - “Defendant argued that the trial court erroneously admitted the results of his blood alcohol test because the accompanying certificate bore a rubber-stamped signature. The appellate court determined that an accused waived the right of confrontation if the laboratory technician was not subpoenaed, or was not called to the witness stand by either party. Defendant waived any right of confrontation by his failure to subpoena the Tennessee Bureau of Investigation (TBI) testing scientist, as a witness at trial. Defendant did not contend that the designated representative of the TBI, whose signature appeared on the certificate, was not the officially designated representative and did not insist that his presence was necessary for trial. There was nothing to contradict the implicit adoption of the facsimile by the representative as his signature. The reasonable inference was that his signature, as stamped, was authorized by the Director of the TBI."

State v. Stiernagle, 2004 Minn. App. LEXIS 776 (Minn. Ct. of Ap. 2004) – Defense counsel was limited in his cross-examination of a breath test expert. The Court held that this was not a Crawford violation since the Confrontation Clause requires an opportunity to cross examine and the trial judge is permitted to limit the scope of testimony within his discretion.

Prior Convictions
People v. Thoma, 128 Cal. App. 4th 676; 27 Cal. Rptr. 3d 309 (Cal App 2nd Dist 2005) - “Defendant argued that his prior conviction of driving under the influence causing "bodily injury" did not constitute a strike within the meaning of California's "Three Strikes" Law, Cal. Penal Code §§ 667(b)-(i), 1170.12. Defendant did not dispute the sentencing court's description of the victim's injuries during sentencing on the prior conviction. The instant court held that defendant's silence in the face of an accusation was a tacit admission of the truth thereof. A reasonable person in defendant's situation would have disputed the sentencing court's description of the victim's injuries if that description had been false. Defendant's silence at the sentencing hearing was admissible under Cal. Evid. Code § 1221 as an adoptive admission of the truth of the sentencing court's description of the victim's injuries.’’

Surveillance
United States v. Ramirez, 2005 FED App. 0388P (6th Cir. Tenn 2005) – One surveillance agent may not testify at trial to what another surveillance agent saw that goes to the fact of whether the defendant was present at a drug house. Crawford and the 6th Amendment require that the observing agent testify to what was seen in order to prove that fact.
Expert Testimony
United States v. Zavala, 2005 U.S. App. LEXIS 15084 (3rd Cir. Pa. 2005) - “The court held that the testimony of an expert witness that the quantity of drugs involved in the charges against defendant, some three pounds, was consistent with intent to distribute did not violate defendant's Sixth Amendment rights to confrontation, as established in Crawford, because Fed. R. Evid. 703 allowed the expert to base his opinion on facts or data that would otherwise be inadmissible.”

State v. Delaney, 613 S.E.2d 699 (N.C. Ct. App. 2005) – “In a search of defendant's residence, police discovered drugs under defendant's bed and in an outbuilding. In the course of the police investigation into defendant's case, the drugs found at defendant's residence were sent to a state agency for analysis. An expert testified regarding the results of the analysis, which had been conducted by another analyst. Defendant argued on appeal that the trial court, in violation of his U.S. Const. amend. VI confrontation rights, erroneously allowed the prosecution to introduce hearsay evidence of the chemical analysis performed by a chemist who did not testify. Testimony as to information relied upon by an expert when offered to show the basis for the expert's opinion was not hearsay as it was not offered as substantive evidence. Expert testimony that relied upon evidence that was not admissible was not a Confrontation Clause violation if the expert was available for cross-examination. Defendant was given the chance to cross-examine the expert as to his opinion and the basis for the opinion.”

United States v. Buonsignore, 131 Fed. Appx. 252 (11th Cir GA 2005) - “Although we conclude that the district court abused its discretion by admitting expert testimony regarding the value of the drugs, the error was harmless and does not warrant reversal. The district court properly admitted the agent's testimony under Rule 702, as his training and experience qualified him to testify as an expert in drug valuation. The district court evaluated the reliability of the agent's testimony and methodology he employed to arrive at his testimony. The drug value information helped the jurors better understand evidence at issue. Thus, it was admissible under Rule 702. However, the drug valuation testimony violated the Confrontation Clause. Although Rule 703 allows experts to rely on otherwise inadmissible evidence in formulating their opinions and the agent's testimony complied with our decision in Brown, it is inadmissible under the standard set forth in Crawford. The agent's testimony was based on information obtained from an unidentified individual at the DEA in Washington, D.C. The evidence is testimonial in nature. The government has not shown that both (1) that individual is unavailable, and (2) Buonsignore had the opportunity to cross-examine that individual. Thus, it was a violation of the Confrontation Clause to admit it.”

Search Consent Forms
State v. Smith, 2005 La. LEXIS 2114 (2005) – “Although a declarant signed a consent form authorizing the warrantless search of a motel room she shared with defendant during police questioning at the station house, that statement, a direct assertion of her state of mind and therefore hearsay, did not constitute testimonial hearsay for purposes of Crawford because no objective person could have reasonably believed that the statement itself, as opposed to any real evidence that might have resulted from an ensuing search, would have been used later at trial against defendant as testimonial evidence bearing on the question of guilt or innocence.”
Informants
United States v. Canady, 2005 U.S. App. LEXIS 14175 (4th Cir. N.C. 2005) - There was no violation to admit statements of the defendant’s co-conspirator made to a confidential informant that the defendant was a part of the drug trafficking conspiracy. These statements were not testimonial since the co-conspirator clearly did not realize that his statements to the informant were going to be used against him at trial.

Juvenile Delinquency Cases
- Check with your state regarding 6th Amendment applicability
- Crawford not applicable to disposition hearings


In re D.G.G., 2005 Tex. App. LEXIS 6200 (Texas App. 2005) - Although the court did not provide an analysis of the applicability of the 6th Amendment to delinquency proceedings, the court conducted a Crawford analysis and held: “The juvenile argued that the court erred in admitting hearsay identification testimony in violation of his Sixth Amendment right to confrontation by admitting hearsay statements by the officer that his neighbor identified the juvenile as being in the trunk of the officer's car. The appellate court held that the neighbor's statement did not fall in the "testimonial" category and was exempt from Confrontation Clause scrutiny. The fact that the officer was a police officer did not, without more, make the conversation between him and his neighbor akin to a police interrogation. Nothing indicated who initiated the conversations, the circumstances surrounding them, or any other information showing that the neighbor's statement was made in response to question from an officer acting under color of police authority. Finally, the statement was not made in a formalized setting analogous to any of the situations described in Crawford as producing testimonial statements.”

C.C. v. State, 826 NE2d 106 (Ind. Ct App 2005) - Sixth Amendment rights, as outlined in Crawford, were not violated by the introduction of hearsay at the disposition hearing because the rule against hearsay does not apply in juvenile disposition hearings

What is the Moral of the Story?
- Put your victims/witnesses on the stand
  - At preliminary hearing
  - At trial
- If witness unavailable, argue that hearsay statements are NOT testimonial
  - No Crawford analysis needed
  - Traditional hearsay analysis performed
- Prosecutors need to argue child development research in regard the children not understanding that forensic interviews may be used in court
- Insure that investigators follow up regarding unavailable witnesses and possible forfeiture evidence
- Keep your victim safe and provide support to avoid recant or unavailability
- Use good facts to help make good law