Crawford v. Washington: Reframing the Right to Confrontation

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I. OVERVIEW

The Sixth Amendment's Confrontation Clause sets forth the basic condition required for prosecution testimony: "The accused shall enjoy the right . . . to be confronted with the witnesses against him." This means, generally speaking, that the prosecution must present its witnesses in court, under oath, face-to-face with the defendant, and make them available for cross examination. And in order to protect the integrity of this confrontation requirement, the Clause must preclude the introduction of certain out-of-court statements. Specifically, "[w]here ***testimonial*** [hearsay] is at issue," the Sixth Amendment forbids the prosecution from introducing it unless the declarant testifies at trial or the right to confrontation is otherwise honored. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (emphasis added). This outline concerns the scope of that exclusionary rule. It first addresses what kinds of evidence is testimonial. It then addresses various scenarios in which testimonial statements might be admissible.

II. "TESTIMONIAL" EVIDENCE

A. General Considerations

1. Potential definitions of testimonial

a. An assertion "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz,* 129 S. Ct. at ____ (quoting *Crawford,* 541 U.S. at 52).

b. "[I]n-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony . . . , or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford,* 541 U.S. at 51 (quoting Brief for Petitioner at 23); *see also id.* at 52 (substituting "for use at a later trial" for "prosecutorially") (quoting NACDL *Amicus* Br. at 3).

c. "Extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *White v. Illinois,* 502 U.S. 346, 365 (1992) (Thomas, J. concurring in part and concurring in the judgment), *quoted in Crawford,* 541 U.S. at 52 and *Melendez-Diaz,* 129 S. Ct. ____ (Thomas, J., concurring).

2. Confrontation Clause's historical roots and purposes

a. "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. . . . The Sixth Amendment must be interpreted with this focus in mind." *Crawford,* 541 U.S. at 50.

b. "*Involvement of government officers in the production of testimony with an eye toward trial* presents unique potential for prosecutorial abuse – a fact borne out time and again throughout history." *Crawford,* 541 U.S. at 56 n.7 (emphasis added).

c. "[W]hen the government is involved in the statements' production and when the statements describe past events," the statements "implicate the core concerns of the old *ex*

parte affidavit practice." *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion) (emphasis added), *quoted in part in Davis,* 126 S. Ct. at 2276.

d. "Historically, the inclusion of the Confrontation Clause in the Bill of Rights reflected the Framers' conviction that the defendant must not be denied the opportunity to challenge *his accusers* in a direct encounter before the trier of fact." *Ohio v. Roberts,* 448 U.S. 56, 78 (Brennan, J., dissenting) (emphasis added).

e. "*[A]n out-of-court accusation* is universally conceded to be constitutionally inadmissible against the accused . . . ." *Bruton v. United States,* 391 U.S. 123, 138 (1968) (Stewart, J., concurring) (emphasis added); *accord California v. Green,* 399 U.S. 149, 179 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, *trials by anonymous accusers, and absentee witnesses*.") (emphasis added); *Lee v. Illinois,* 476 U.S. 530, 540 (1986) ("The Confrontation Clause . . . ensur[es] that convictions will not be based on the charges of unseen and unknown – and hence unchallengeable – individuals.").

3. Defining qualities of testimonial statements

a. "*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." *Crawford,* 541 U.S. at 51 (emphasis added).

b. "The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers from detailed interrogation. . . . [I]t is in the final analysis the declarant's statements, not [any] interrogator's questions, that the Confrontation Clause requires us to evaluate." *Davis,* 126 S. Ct. at 2274 n.1; *see also Melendez-Diaz,* 129 S. Ct. at ____ ("a person who volunteers his testimony" is not "any less a 'witness against' the defendant" than one who responds to interrogation").

c. "What [the declarant to the 911 operator in *Davis*] said was not 'a weaker substitute for live testimony' at trial." When "the *ex parte* actors and the evidentiary products of the *ex parte* communication align[] perfectly with their courtroom analogues," statements are testimonial. But "[n]o 'witness' goes into court to proclaim an emergency and seek help." *Davis,* 126 S. Ct. at 2277. Statements that "deliberately recount[], in response to police questioning, how potentially criminal events began and progressed" are testimonial "because they do precisely *what a witness does* on direct examination." *Id.* at 2278; *see also Melendez-Diaz,* 129 S. Ct. at ____ (certificates that are "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination'" are testimonial).

d. "We do not dispute that formality is indeed essential to testimonial utterance. . . . It imports sufficient formality, in our view, that lies to [police] officers are criminal offenses." *Davis,* 126 S. Ct. at 2278 n.5.

e. "We can safely assume that the [declarants] were aware of the affidavits' evidentiary purpose." *Melendez-Diaz,* 129 S. Ct. at ____.

f. A statement need not "directly accuse [the defendant] of wrongdoing" to be testimonial. The Confrontation Clause applies to all testimony offered by the prosecution. *Melendez-Diaz,* 129 S. Ct. at ____.

g. A declarant need not have "observe[d] the crime" or "any action related to it" to make testimonial statements. A record of a contemporaneous observations of the crime scene or other evidence, made after the fact, is testimonial. *Melendez-Diaz,* 129 S. Ct. at ____.

h. It is irrelevant whether testimony recounting historical events is "prone to distortion or manipulation" or is "the resul[t] of neutral, scientific testing." Forensic lab reports would be testimonial even if "all analysis always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa." *Melendez-Diaz,* 129 S. Ct. at ____.

4. Relevance of hearsay law (or "firmly rooted" hearsay exceptions)

None! The central holding of *Crawford* is that the Confrontation Clause is a rule of criminal procedure, not of evidence. Accordingly, the constitutional admissibility of statements that declarants would reasonably expect to be used for evidentiary purposes no longer turns in any way on "the vagaries of the rules of evidence, much less [on] some amorphous notions of 'reliability.'" 541 U.S. at 61; *see also United States v. Cromer,* 389 F.3d 662, 679 (6th Cir. 2004) ("If there is one theme that emerges from *Crawford,* it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admissibility of hearsay statements."). In other words, the constitutional considerations requiring testimonial statements to be subject to cross-examination in criminal cases "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." *Crawford,* 541 U.S. at 56 n.7.

In *Melendez-Diaz*, the Court elaborated on this principle, while responding to the Commonwealth's argument that forensic laboratory reports were admissible as business or official records: "Business and public records are generally admissible [in criminal cases] absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for use at petitioner's trial – were testimony against the petitioner, and the analysts were subject to confrontation under the Sixth Amendment." 129 S. Ct. at ____.

B. Applications to Specific Kinds of Statements

The Court describes the first three categories below as "paradigmatic" and "core" testimonial statements, 541 U.S. at 52, 63, suggesting that other types of statements are also testimonial. In

other words, the confrontation right does not apply only to abuses at time of the Founding; it also applies to other types of statements that the Framers would have considered barred. *Id.* at 52 n.3.

1. **Prior testimony:** "Whatever else the term covers, it applies at a minimum to **prior testimony** at a preliminary hearing, before a grand jury, or at a former trial . . . ." 541 U.S. at 68. The prior testimony need not have occurred in the same case and may be from a civil case. *See Simmons v. State,* 234 S.W.3d 321 (Ark. App. 2006) (deposition taken in anticipation of civil trial testimonial).

2. **Allocutions, guilty pleas, and other formal statements admitting guilt:** These are testimonial. *See* 541 U.S. at 64, *abrogating United States Aguilar,* 295 F.3d 1018, 1021-23 (9th Cir. 2003), and similar holdings in other circuits allowing the admission of allocutions. *See also Kirby v. United States,* 174 U.S. 47, 53-60 (1899) (guilty pleas); *United States v. McClain,* 377 F.3d 219, 222 (2nd Cir. 2004) (allocution); *United States v. Massino,* 319 F. Supp. 2d 295 (E.D.N.Y. 2004) (guilty pleas).

3. **"Letters"** to police or other governmental officials accusing someone of wrongdoing are testimonial. 541 U.S. at 44 (noting that an accusatory "letter" was used against Sir Walter Raleigh); *see also* 1 James Stephen, A History of the Criminal Law in England 326 (1883) (common law confrontation right applied to "depositions, confessions of accomplices, *letters*, and the like") (emphasis added), *quoted in California v. Green,* 399 U.S. 149, 156-57 (1970); *State v. Jensen,* 727 N.W.2d 518 (Wis. 2007) (letter directed to police testimonial).

4. **Police stationhouse interrogations:** *Crawford* expressly renders such statements testimonial. 541 U.S. at 68. "We use the term 'interrogation' in its colloquial, rather than any technical legal, sense." 541 U.S. at 53 n.4. "[S]tructured police questioning" qualifies as an interrogation "under any conceivable definition." *Id.*

5. **Statements during police interviews in the field but not at scene of a crime:** Statements during police interviews are testimonial, regardless of whether they are characterized as "interrogations" or not. *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005); *People v. West,* 823 N.E.2d 82, 91-92 (Ill. App. Ct. 2005) (same); *Gay v. State,* 611 S.E.2d 31 (Ga. 2005) (witness' statements to police at hospital shortly after event testimonial); *Wall v. State,* 184 S.W.3d 730 (Tex. Crim. App. 2006) (victim's statements to police at hospital shortly after assault testimonial); *People v. Cage,* 155 P.3d 205 (Cal. 2007) (same); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008) (same); *Marquardt v. State,* 882 A.2d 900 (Md. Ct. Spec. App. 2005) (same); *State v. Walker,* 118 P.3d 935 (Wash. App. 2005) (same); *State v. Moses,* 119 P.3d 906 (Wash. App. 2005) (victim's statements to responding officers at friend's house 70 minutes after event testimonial and witnesses' statements in interview with social worker at hospital testimonial); *United States v. Logan,* 419 F.3d 172 (2nd Cir. 2005) (statement in police interview regarding alibi testimonial even though it constituted a statement in furtherance of conspiracy); *United States v. Saner,* 313 F. Supp. 2d 896 (S.D. Ind. 2004) (statements in response to prosecutor's questions during field interview testimonial).

6. **Dying declarations:** The Court has noted that dying declarations were admitted at common law even when testimonial and unconfronted. *Giles v. California,* 128 S. Ct. 2678, 2682 (2008). "If this exception must be accepted on historical grounds, it is *sui generis.*" *Crawford*, 541 U.S. at 56 n.6; *see also People v. Monterroso,* 101 P.3d 956 (Cal. 2004) (treating dying declaration as *sui generis*); *State v. Martin,* 695 N.W.2d 578 (Minn. 2005) (same); *Harkins v. State,* 143 P.3d 706 (Nev. 2006) (same); *People v. Durio,* 794 N.Y.S.2d 863 (N.Y. Sup. Ct. 2005) (same). *But see United States v. Jordan,* 2005 WL 513501 (D. Colo. March 3, 2005) (dying declarations are testimonial and inadmissible).

7. **Identifications at lineups or showups:** Such statements are testimonial because they are made expressly to further a criminal investigation. *See United States v. Pugh,* 405 F.3d 390, 399 (6th Cir. 2005) (identifying defendant in a picture of the crime scene); *accord State v. Lewis,* 603 S.E.2d 559, 562-63 (N.C. App. 2004) (photographic lineup), *rev'd on other grounds*, 619 S.E.2d 830 (N.C. 2005), *vacated on other grounds*, 126 S. Ct. 2983 (2006); *Benford v. State,* 2005 WL 240611 (Tex. App. Feb. 3, 2005) (unpublished) (photographic lineup); *Mungo v. Duncan,* 393 F.3d 327, 336 n.9 (2nd Cir. 2004) (showup); *State v. King,* 706 N.W.2d 181 (Wis. App. 2005) (lineup).

8. **Statements to officers responding to scene of a suspected crime:** In *Davis,* the Court held that such "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an *ongoing emergency*. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to *establish or prove past events potentially relevant to later criminal prosecution*." 126 S. Ct. at 2273-74 (emphasis added). An interrogation, however, is not required to make such statements testimonial; "The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers from detailed interrogation. . . . [I]t is in the final analysis the declarant's statements, not [any] interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* at 2274 n.1. In the *Davis* opinion, the Court ruled that statements a woman made in response to responding officers' "initial inquiries" that "recounted . . . how potentially criminal past events began and progressed" were testimonial. *Id.* at 2278-79. Though the Court mentioned several factors in reaching this decision, the key seems to be that the event the declarant described, and the attendant immediate threat, was over. After *Davis* was issued, the Court granted, vacated, and remanded (GVR'ed)[1] several cases holding that statements describing completed events to responding officers were nontestimonial; it denied certiorari in cases either holding that such statements were testimonial or holding that statements describing an ongoing event or inside the temporal boundaries of an ongoing emergency were nontestimonial. *See* Roger W. Kirst,

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[1] The Court GVR's a case only when an intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater,* 516 U.S. 163, 167 (1996).

Confrontation Rules After Davis v. Washington, 15 J.L. & Pol'y 635 (2007) (collecting and sorting GVR's). Some lower court decisions issued since *Davis* was decided have adhered to this temporal distinction. *See State v. Mechling,* 633 S.E.2d 311 (W. Va. 2006) (statements after defendant had left scene testimonial because they described what happened); *Cuyuch v. State,* 667 S.E.2d 85 (Ga. 2008) (same); *Wright v. State,* 673 S.E.2d 249 (Ga. 2009) (same because statement was "reflective of past events"); *State v. Lucas,* 965 A.2d 75 (Md. 2009) (same); *State v. Parks,* 142 P.3d 720 (Ariz. App. 2006) (same); *Davis v. State,* 203 S.W.3d 845 (Tex. Crim. App. 2006) (same); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008) (same); *People v. Walker,* 728 N.W.2d 902 (Mich. App. 2006) (same); *Commonwealth v. Burgess,* 879 N.E.2d 63 (Mass. App. Ct. 2008); *State v. Siler,* 876 N.E.2d 534 (Ohio 2007) (child declarant); *Vinson v. State,* 252 S.W.3d 336 (Tex. Crim. App. Jan 16, 2008) (victim's statement to responding officers after defendant restrained testimonial); *Raile v. People,* 148 P.3d 126 (Colo. 2006) (same); *State v. Shea,* 965 A.2d 504 (Vt. 2009) (quick initial statement nontestimonial but statements in response to further questions testimonial). *But see People v. Bradley,* 862 N.E.2d 79 (N.Y. 2006) (statement to responding officer nontestimonial because scene not secured yet); *Rodriguez v. State,* 274 S.W.3d 760 (Tex. App. 2008). Other decisions seemingly have stretched the notion of an "ongoing emergency" beyond the Court's description of the concept. Two areas in particular have become loci of dispute:

a. **Presence of physical injury:** Courts are divided over whether the declarant's need for medical attention creates an ongoing emergency that renders her statements nontestimonial. *Compare United States v. Clemmons,* 461 F.3d 1057 (8th Cir. 2006) (declarant's initial statement saying who shot him nontestimonial); *Head v. State*, 912 A.2d 1, (Md. Ct. Spec. App. 2006) (same); *State v. Alvarez,* 143 P.3d 668 (Ariz. App. 2006) (severely injured declarant's statement to officer describing what happened not testimonial); *Hester v. State,* 659 S.E.2d 600 (Ga. 2008) (same); *State v. Warsame,* 735 N.W.2d 684 (Minn. 2007) (same); *Anderson v. State,* 163 P.3d 1000 (Alaska App. 2007) (same), *with People v. Bryant,* ___ N.W.2d ___, 2009 WL 1677569 (Mich. June 10, 2009) (statement testimonial even though declarant severely injured; medical emergency is irrelevant to whether an "ongoing emergency" under *Davis* exists); *State v. Kirby,* 908 A.2d 506 (Conn. 2006) (testimonial even though declarant severely injured); *State v. Brown,* 961 A.2d 481 (Conn. App. 2009) (same); *State v. Lewis,* 648 S.E.2d 824 (N.C. 2007) (same); *State v. Lewis,* 235 S.W.3d 136 (Tenn. 2007) (same); *Rankins v. Commonwealth,* 237 S.W.3d 128 (Ky. 2007) (same); *State v. Miles,* 145 P.3d 242 (Or. App. 2006) (same); *Commonwealth v. Gonzalez,* 863 N.E.2d 958 (Mass. App. Ct. 2007) (same); *People v. Trevizo,* 181 P.3d375, (Colo. App. 2008) (same); *Hayward v. State,* ___ So.3d ___, 2009 WL 2612524 (Fla. 2009) (same); *State v. Jones,* 197 P.3d 815 (Kan. 2008) (same but statement nevertheless admissible as dying declaration).

b. **Suspect still at large**: Notwithstanding the Supreme Court's statement in *Davis* that the emergency ended when Mr. Davis fled the scene, courts have divided over whether a dangerous suspect's being at large constitutes an ongoing emergency that renders statements nontestimonial. *Compare State v. Ayer,* 917 A.2d 214 (N.H. 2006) (ongoing emergency); *United States v. Arnold,* 486 F.3d 177 (6th Cir. 2007) (en banc) (same); *State v. Warsame,* 735 N.W.2d 684 (Minn. 2007) (same); *People v. Nieves-Andino,* 872 N.E.2d 1188 (N.Y. 2007) (same); *State v. Ohlson,* 168 P.3d 1273 (Wash. 2007) (same);

State v. Romero, 187 P.3d 56 (Cal. 2008) (same) *with State v. Kirby,* 908 A.2d 506 (Conn. 2006) (statements testimonial even though suspect still at large; "accepting the state's arguments on this point would render meaningless the distinction drawn by the United States Supreme Court, as they would render virtually any telephone report of a past violent crime in which a suspect was still at large, no matter the timing of the call, into the report of a "public safety emergency."); *People v. Bryant,* ___ N.W.2d ___, 2009 WL 1677569 (Mich. June 10, 2009) (same); *State v. Koslowski,* ___ P.3d ___, 2009 WL 1709639 (Wash. June 18, 2000) (same); *State v. Lewis,* 648 S.E.2d 824 (N.C. 2007) (same); *Rankins v. Commonwealth,* 237 S.W.3d 128 (Ky. 2007) (same); *People v. Trevizo,* 181 P.3d 375, (Colo. App. 2008) (same); *Hayward v. State,* ___ So.3d ___, 2009 WL 2612524 (Fla. 2009) (same); *State ex rel. J.A.,* 949 A.2d 790 (N.J. 2008) (same but reserving question whether the suspect's having a gun would make ongoing emergency persist); *People v. Sutton,* ___ N.E.2d ___, 2009 WL 1012020 (Ill. Apr. 16, 2009) (same regarding statements to officers in ambulance, but initial statements at the scene before it was secure were nontestimonial). For a thoughtful student note on the issue, see Scott G. Stewart, *The Right to Confrontation, Ongoing Emergencies, and the Violent-Perpetrator-at-Large Problem,* 61 Stan. L. Lev. 751 (2008).

I also have written about this topic, explaining ways in which I think some lower courts are taking unduly expansionist views of the ongoing emergency idea. *See* Jeffrey L. Fisher, *What Happened – and What is Happening – to the Confrontation Clause,* 15 J.L. & Pol'y 587 (2007).

9. **911 calls:** The same general test applies here as in the responding officer context: such "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an *ongoing emergency*. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to *establish or prove past events potentially relevant to later criminal prosecution*." *Davis*, 126 S. Ct. at 2273-74 (emphasis added). An interrogation, however, is not required to make such statements testimonial; "The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers from detailed interrogation. . . . [I]t is in the final analysis the declarant's statements, not [any] interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* at 2274 n.1. In *Davis,* the Court held that statements to the 911 operator "speaking about events *as they were actually happening*" were nontestimonial, but that "[i]t could readily be maintained" that statements later in the call, once the alleged assailant drove away from the premises, "were testimonial." *Id.* at 2276-77 (emphasis in original). After *Davis* was issued, the Court GVR'ed a case that had held that a 911 call reporting a completed criminal event was not testimonial. *Cross v. Commonwealth,* 2005 WL 1703573 (Ky. App. 2005), *vacated*, 549 U.S. 801 (2006). The Court also denied certiorari in another case holding that statements in a 911 call describing ongoing events are not testimonial but those "impart[ing] a factual account of past criminal activity" are testimonial. *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005). Many lower court opinions following *Davis* have followed this dichotomy. *Compare United States v. Thomas,* 453 F.3d 838 (7th Cir. 2006) (report of ongoing event nontestimonial); *Jackson*

v. State, 931 So. 2d 1062 (Fla. App. 2006) (same); *Cook v. State,* 199 S.W.3d 495 (Tex.App. 2006) (same) *with State v. Kirby,* 908 A.2d 506 (Conn. 2006) (severely injured declarant's call made "for the purpose of reporting a past criminal act, rather than to avert a presently occurring one" testimonial); *Commonwealth v. Lao,* 877 N.E.2d 557 (Mass. 2007) (call made well after event testimonial); *Hunt v. State,* ___ P.3d ___, 2009 WL 2195422 (Ok. Crim. July 24, 2009) (call two and one-half hours after assault). *But see State v. Kemp,* 212 S.W.3d 135 (Mo. 2007) (911 call nontestimonial even though event was over because victim had fled to neighbors' house to escape armed and dangerous boyfriend); *State v. Camarena,* 176 P.3d 380 (Or. 2008) (the beginning of a call made immediately event was complete and defendant had left was not testimonial); *Smith v. United States,* 947 A.2d1131 (D.C. 2008)) (911 call reporting completed event testimonial because suspect still at large); *People v. Walker,* 728 N.W.2d 902 (Mich. App. 2006) (same); *Harkins v. State,* 143 P.3d 706 (Nev. 2006) (severely injured declarant's call saying who shot him was not testimonial); *State v. Williams*, 150 P.3d 111 (Wash. App. 2007) (call "shortly after" assault not testimonial because caller was afraid person would come back and was seeking help); *Santacruz v. State,* 237 S.W.3d 822 (Tex. App. 2007) (statements in call made 10-15 minutes after event nontestimonial). One particularly tricky problem arises when a third party calls to report ongoing criminal activity in which the caller is not in any way involved. *See United States v. Proctor,* 505 F.3d 366 (5th Cir. 2007) (call reporting felon in possession not testimonial); *Key v. State,* 657 S.E.2d 273 (Ga. App. 2008) (call reporting drunk driver not testimonial).

10. **Statements of elderly or dependent adult victims to law enforcement officials** under Cal. Evid. Code § 1380; 11 Del. Code § 3516; Or. Rev. Stat. § 40.460(18)(b); and 725 Ill. Comp. Stat. 5/115-10.3. These are, by definition, testimonial. *See People v. Pirwani,* 14 Cal. Rptr. 3d 673 (Cal. App. 2004) (holding that California law is invalid on its face).

11. **Domestic violence accusations to obtain protection orders.** Such accusations to police officers or courts are testimonial, even if they pre-date the current litigation. *See People v. Thompson,* 812 N.E.2d 516 (Ill. App. Ct. 2004); *People v. Pantoja,* 18 Cal. Rptr. 3d 492 (Cal. App. 2004); *cf. State v. Carpenter,* 882 A.2d 604 (Conn. 2005) (statements to state investigator to aid in making recommendations to probate court testimonial).

12. **Child hearsay statements describing abuse:**

a. **To law enforcement officers –** Every court to address the issue has held that statements made during interviews with law enforcement officers are testimonial. *See, e.g., Flores v. State,* 120 P.3d 1170 (Nev. 2005); *People v. Vigil,* 127 P.3d 916 (Colo. 2006); *Hobgood v. State,* 926 So.2d 847 (Miss. 2006).

b. **To state-employed child interview specialists –** Courts unanimously have held that statements made during interviews done specifically to investigate and gather evidence for a criminal prosecution are testimonial. *See, e.g., United States v. Bordeaux,* 400 F.3d 548 (8th Cir. 2005) (child statements to "forensic interviewer" testimonial); *People v. Warner,* 14 Cal. Rptr. 3d 419 (Cal. App. 2004); *L.J.K. v. State,* 942 So.2d 854 (Ala. Crim. App. 2005); *In re S.R.,* 920 A.2d 1262 (Pa. Super. 2007).

c. **To state social workers or child protective services workers during "risk assessment interviews" –** Most courts have held that such statements are testimonial, regardless of whether the law enforcement personnel are involved in the interview or the interview is conducted at the behest of law enforcement. *See State v. Mack,* 101 P.3d 349 (Or. 2004); *State v. Norby,* 180 P.3d 752 (Or. App. 2008); *In re S.P.,* ___ P.3d ___, 2009 WL 2461773 (Or. 2009); *State v. Snowden,* 867 A.2d 314 (Md. 2005); *Flores v. State,* 120 P.3d 1170 (Nev. 2005); *State v. Contreras,* 979 So.2d896(Fla. 2008); *T.P. v. State,* 911 So.2d 1117 (Ala. Crim. App. 2004); *Anderson v. State,* 833 N.E.2d 119 (Ind. App. 2005); *Rangel v. State,* 199 S.W.3d 523 (Tex. App. 2006); *Wells v. State,* 241 S.W.3d 172 (Tex. App. 2007); *State v. Hopkins,* 154 P.3d 250 (Wash. App. 2007). But a significant minority treats such statements as nontestimonial when the police are not yet directly involved. *See State v. Bobadilla,* 709 N.W.2d 243 (Minn. 2006); *State v. Muttart,* 875 N.E.2d 944 (Ohio 2007); *Seely v. State,* 373 Ark. 141 (Ark. 2008); *State v. Buda,* 949 A.2d 761 (N.J. 2008); *Commonwealth v. Allshouse*, 924 A.2d 1215 (Pa. Super. 2007), *appeal granted,* 959 A.2d 903 (Pa. 2008). And the Ohio Court of Appeals, in a decision now being reviewed by the Ohio Supreme Court has held that such statements are nontestimonial even when the police are involved. *State v. Arnold,* 2008 WL 2698885 (Ohio App.), *appeal allowed,* 898 N.E.2d 967 (Ohio 2008).

d. **To private therapists or victims' services personnel –** When such private personnel interview child victims in coordination with law enforcement, courts have held that resulting statements are testimonial. *See State v. Blue,* 717 N.W.2d 558 (N.D. 2006) (statements to private forensic interviewer working "in concert with or as an agent of" the police are testimonial); *State v. Justus,* 205 S.W.3d 872 (Mo. 2006); *In re Rolandis G.,* 902 N.E.2d 600 (Ill. 2008); *State v. Bentley,* 739 N.W.2d 296 (Iowa 2007); *People v. Sharp*, 155 P.3d 577 (Colo. App. 2006); *State v. Pitt*, 147 P.3d 940 (Or. App. 2006), *opinion adhered to on reconsideration by* 159 P.3d 329 (Or. App. 2007). When the police are not directly involved, courts are divided over whether statements to such private personnel are testimonial. *Compare People v. Sisavath,* 13 Cal. Rptr. 3d 753 (Cal. App. 2004) (child's statement to child interview specialist at private victim assessment center was testimonial); *Williams v. State,* 970 So.2d 727 (Miss. App. 2007) (same; interview arranged by CPS), *with State v. Sheppard,* 842 N.E.2d 561 (Ohio App. 2005) (statement to private clinical counselor in mental health interview not testimonial); *People v. Geno,* 683 N.W.2d 687 (Mich. App. 2004) (statement to director of Children's Assessment Center not testimonial); *Lollis v. State,* 232 S.W.3d 803 (Tex. App. 2007); *Bishop v. State,* 982 So.2d 371, (Miss. 2008) (statements to private therapist after police investigation underway but not in coordination with that investigation not testimonial); *Chavez v. State,* ___ P.3d ___, 2009 WL 2341517 (Nev. July 30, 2009) (same).

e. **To medical providers –** Courts are divided over whether children's statements, just like adults' statements, to medical examiners are testimonial. *See infra* at II.D.14.

f. **To school employees -** One court has held that a report of abuse to a social worker at a public school is testimonial. *People v. Stechly,* 870 N.E.2d 333 (Ill. 2007). A report of criminal conduct to a teacher (especially those with reporting requirements) may be testimonial on the ground that it accuses someone of wrongdoing and seeks an official response, but the two courts have addressed the issue thus far have given the issue

relatively short shrift. *See State v. Hosty,* 944 So.2d 255 (Fla. 2006) (divided opinion holding that statement to teacher was not testimonial); *State v. Hunneman*, 2006 WL 3833897 (Ohio App. Dec. 28, 2006) (not testimonial).

g. **To family members –** Courts unanimously have held that child statements given to family members before the police are involved are non-testimonial. *See, e.g., Hobgood v. State,* 926 So. 2d 847 (Miss. 2006) (statements to police testimonial but not statements to relatives before police were involved); *In re Rolandis G.,* 817 N.E.2d 183, 186 (Ill. App. Ct. 2004) (statement to mother not testimonial where "[t]here is no indication that [mother] suspected he had been the victim of a crime and that she was attempting to elicit evidence for a future prosecution"); *People v. R.F.,* 825 N.E.2d 287 (Ill. App. Ct. 2005) (divided decision holding that child's accusation to mother and grandmother not testimonial; emphasizes need for government involvement); *State v. Walker,* 118 P.3d 935 (Wash. App. 2005) (statement to mom not testimonial); *State v. Shafer,* 128 P.3d 87 (Wash. 2006) (same regarding statements to mom and family friend). Courts have not yet grappled with situations in which family members have elicited statements from children after the police are involved for use in a criminal prosecution. But it is not hard to imagine such a scenario and why it would raise serious questions. *Cf. State v. Brigman,* 615 S.E.2d 21 (N.C. App. 2005) (foster mother's taped interview with child not testimonial).

13. **Statements to private investigators or to private victims' services organizations:** If the setting was like an interview in that a reasonable declarant would reasonably have expected his statements to be used for evidentiary purposes, then it is testimonial even without governmental involvement, at least under the "reasonable declarant" definition of testimonial. *See* Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. Rev. 1011, 1038-43 (1998). For cases dealing with children's statements to such organizations, see *supra* at II.D.12(d).

14. **Statements to medical providers:** Courts have generally distinguished between statements made after the police are involved and ones made before any authorities are aware of potentially criminal conduct.

a. **Police already involved:** If the police already are involved so that the examination is, in a sense, part of the investigation, then statements to a doctor or nurse are testimonial. *See State v. Hooper,* 176 P.3d 911 (Idaho 2007) (statement to nurse in forensic interview testimonial); *Hartsfield v. Commonwealth,* 277 S.W.3d 239 (Ky. 2009) (same); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008) (same); *State v. Romero,* 156 P.3d 694 (N.M. 2007) (statements to nurse accusing defendant of criminal acts testimonial); *Hernandez v. State,* 946 So.2d 1270 (Fla. App. 2007); *People v. Spicer,* 884 N.E.2d 675, (Ill. App. 2008); *State v. Miller,* ___ P.3d ___, 2009 WL 1562966 (Ks. App. June 5, 2009). *But see State v. Stahl,* 855 N.E.2d 834 (Ohio 2006) (4-3 opinion holding rape victim's statement to nurse collecting rape kit in coordination with police not testimonial); *State v. Krasky,* 736 N.W.2d 636 (Minn. 2007) (child statements to nurse in conjunction with police investigation not testimonial); *Griner v. State,* 899 A.2d 189 (Md. App. 2006) (child statements to nurse after police arranged for him to be admitted to pediatric ward not testimonial).

b. **Police not yet directly involved:** If the police are not yet involved, this presents a closer question. As an initial matter, some states exclude statements identifying an alleged perpetrator as falling outside the medical treatment hearsay exception. *See Taylor v. State,* 268 S.W.3d 571 (Tex. Crim. 2008); *Commonwealth v. DeOliveira,* 849 N.E.2d 218 (Mass. 2006). But even if state law renders accusatory statements that are unnecessary for the medical treatment – such as identifying "who did this" – generally admissible, they should be considered testimonial. *See State v. Kirby,* 908 A.2d 506 (Conn. 2006) (statements to emergency medical technician were not testimonial because they were germane to medical treatment and "did not identify assailant").

   i. **SANE nurses and similar medical/forensic examiners:** Statements to sexual assault nurse examiners (SANE's) and similar interviewers are testimonial even if the police are not yet involved. As the Nevada Supreme Court put it, "SANE nurses . . . are trained to conduct sexual assault examinations. A particular duty of a SANE nurse is to gather evidence for possible criminal prosecution in cases of alleged sexual assault. SANE nurses do not provide medical treatment. They only examine the individual to get vital signs and a history from the victim." *Medina v. State,* 143 P.3d 471 (Nev. 2006); *accord People v. Stechly*, 870 N.E.2d 333 (Ill. 2007); *State v. Ortega,* 175 P.3d 929 (N.M. 2007); *United States v. Gardinier,* 65 M.J. 60 (C.A.A.F. 2007); *see generally* Sexual Assault Nurse Examiner Programs, http://www.ncjrs.gov/App/Publications/alphaList.aspx?alpha=S (describing protocols for SANE's). *But see State v. Scacchetti,* 711 N.W.2d 508 (Minn. 2006) (statements made during nurse's examination at hospital unit designed to examine for signs of child abuse not testimonial); *State v. Lee,* 855 N.E.2d 834 (Ohio. App. 2005) (same regarding statements made to forensic nurse), *aff'd without opinion,* 856 N.E.2d 921 (Ohio 2006) (4-3 vote).

   ii. **Treating paramedics, doctors and nurses:** Such interviewers, like SANE nurses, are typically required by state law to report suspicions of abuse and other criminal activity to the police. At the same time, such interviewers often need to gather information (at least concerning the origin of injuries, if not who did it), in order to deliver medical treatment. Most courts have ignored the former consideration in favor of the latter, holding that statements produced in this setting are nontestimonial. *See People v. Cage,* 155 P.3d 205 (Cal. 2007) (statements to ER doctor); *State v. Harper,* ___ N.W.2d ___, 2009 WL 277087 (Iowa Feb. 6, 2009) (ER doctor); *People v. Vigil,* 127 P.3d 916 (Colo. 2006) (child's statements to examining physician); *State v. Brigman,* 632 S.E.2d 498 (N.C. App. 2006) (examining physician); *Hobgood v. State,* 926 So.2d 847 (Miss. 2006) (statement to pediatrician nontestimonial; if police had been involved when examination took place, "then it might be possible for the statements to implicate the Confrontation Clause"); *United States v. Peneaux,* 432 F.3d 882 (8th Cir. 2005) (treating physician); *State v. Vaught,* 682 N.W. 2d 284 (Neb. 2004) (statement to ER doctor identifying perpetrator); *State v. Moses,* 119 P.3d 906 (Wash. App. 2005) (ER doctor); *Foley v. State,* 914 So. 2d 677 (Miss. 2005) (examining physician); *State v. Fisher,* 108 P.3d 1262 (Wash. App. 2005) (statement to treating pediatrician); *Clark v. State,* 199 P.3d 1203 (Alaska App. 2009) (ER doctor and nurse); *State v. K.S.,* ___ P.3d ___, 2009 WL 1674927 (Or. App. June 10, 2009). *But see State v.*

Jones, 197 P.3d 815 (Kan. 2008) (statement to paramedic testimonial but admissible because dying declaration).

15. **Statements to friends/family/acquaintances:** A "casual remark to an acquaintance," even if it inculpates the defendant, is not testimonial. 541 U.S. at 51. Indeed, most statements to friends, family, or acquaintances in the course of everyday affairs are not be made with any anticipation of evidentiary use and thus are not testimonial. *See, e.g., State v. Manuel,* 697 N.W.2d 811 ¶¶ 43-53 (Wis. 2005) (collecting cases). Some courts before *Davis* held that accusatory statements made to friends were testimonial, even though the statements were not "casual" in any sense, without seriously considering whether this distinction matters. *See, e.g., Compan v. People,* 121 P.3d 876 (Colo. 2005) (description to friend of sexual assault); *United States v. Jordan,* 399 F. Supp. 2d 706 (E.D. Va. 2005). But *Davis* suggested such holdings may not be correct, discussing approvingly an old English case in which the court excluded the statement a young rape victim made to her mother upon returning home from an assault. *See Davis,* 547 U.S. at 828 (discussing *King v. Brasier,* 1 Leach 199, 168 Eng. Rep. 202 (1779)); *see also State v. Mechling,* 633 S.E.2d 311 (W. Va. 2006) (interpreting the Court's discussion of *Brasier* "to imply that statements made to someone other than law enforcement personnel may also be properly characterized as testimonial"). *But see Medina v. State,* 143 P.3d 471 (Nev. 2006) (statement to neighbor describing rape that happened the day before not testimonial).

16. **Statements *of* confidential informants:** When a confidential informant gives information to a police officer for use in a criminal investigation, those statements are testimonial. *United States v. Cromer,* 389 F.3d 662 (6th Cir. 2004); *United States v. Anderson,* 450 F.3d 294 (7th Cir. 2006); *State v. Adams,* 131 P.3d 556 (Kan. App. 2006), *rev'd on other grounds,* 153 P.3d 512 (Kan. 2007). Statements by an undercover informant to defendant or other nongovernmental personnel, during a conversation the informant knows the government is recording, is testimonial if used to prove crime but not if used only to put others' statements in context. *United States v. Hendricks,* 395 F.3d 173 (3rd Cir. 2005); *State v. Smith,* 960 A.2d 993 (Conn. 2008); *In re Welfare of J.K.W.,* 2004 WL 1488850 (Minn. App. July 6, 2004).

17. **Statements *to* confidential informants or undercover officers:** A statement to such a person in the course of allegedly criminal activity is probably not testimonial. *See* 541 U.S. at 58 ("And *Bourjaily v. United States,* 483 U.S. 171, 181-84 (1987), admitted statements made unwittingly to [an FBI] informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement."); *United States v. Saget,* 377 F.3d 223 (2nd Cir. 2004) (statement to undercover informant not testimonial); *People v. Morgan,* 23 Cal. Rptr. 3d 224 (Cal. App. 2005) (statement unknowingly made to police officer not testimonial). But if the government really is trying to produce testimony rather than capture evidence of ongoing crime, the statements could be testimonial, especially if governmental involvement becomes a clearer touchstone in future cases for the testimonial inquiry. In other words, if one can argue that the government is really trying to circumvent the "testimonial" rule in order to insulate a witness's narrative from a confrontation challenge, the declarant's statements may be

testimonial even without the declarant's knowledge that his statements might be used for evidentiary purposes.

18. **Statements made to prosecution's expert witnesses:** Such statements are testimonial when made in the course of the expert's investigation or assessment, even if the expert is not a state employee, because "[t]he Confrontation Clause would offer too little protection if it could be avoided by assigning the job of interviewing witnesses to an independent contractor rather than an employee." *People v. Goldstein,* 810 N.Y.S.2d 100 (N.Y. 2005); *In re Cesar L.,* 2006 WL 1633474 (Cal.App. 2006)) (unpublished) (same).

19. **Statements regarding potential future crimes:** A statement bearing testimonial features does not lose that status simply because the crime it predicts or assumes will happen has not yet occurred. *See State v. Jensen,* 727 N.W.2d 518 (Wis. 2007) (letter given to friend to give to police "if anything ever happen[ed]" to declarant was testimonial); *State v. Sanchez,* 177 P.3d 444 (Mont. 2008) (note given to friend describing husband's threat that he would kill her if he found out she was cheating was testimonial); *Turner v. State,* 641 S.E.2d 527 (Ga. 2007) (statements to co-workers saying if declarant ever got killed it would be his wife were not testimonial).

20. **Forensic Reports:** Human assertions in autopsies, drug lab reports, and other forensic reports made for the purpose of producing evidence for litigation are testimonial. *Melendez-Diaz v. Massachusetts,* 129 S. Ct. ____, ____ (2009). Other assertions related to forensic evidence are also testimonial to the extent that they are formal assertions made primarily for evidentiary purposes.

21. **Equipment maintenance certifications:** Before *Melendez-Diaz,* one court held that a certification that a breathalyzer is working properly is testimonial, while all others have held that it was not. *Compare Shiver v. State,* 900 So.2d 615 (Fla. App. 2005) (testimonial) *with Commonwealth v. Walther,* 189 S.W.3d 570 (Ky. 2006) (not testimonial because not created for use in any particular investigation); *Rackoff v. State,* 637 S.E.2d 706 (Ga. 2006); *State v. Sweet,* 949 A.2d 809 (N.J. 2008), *cert. denied,* 129 S. Ct. ____ (2009); *see also Luginbyhl v. Commonwealth,* 628 S.E.2d 74 (Va. App. 2006) (reserving issue over dissent arguing that such certificates are testimonial). *Melendez-Diaz* states that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial statements." 129 S. Ct. at ____ n.1.

22. **Medical records**: Customary medical reports "created for treatment purposes" are nontestimonial. *Melendez-Diaz,* 129 S. Ct. at ____ n.2 (citing two cases involving blood tests performed for the purpose of administering medical treatment); *see also Commonwealth v. Lampron,* 839 N.E.2d 870 (Mass. App. Ct. 2005) (typical hospital records noting drug use not testimonial); *State v. Melton,* 625 S.E.2d 609 (N.C. App. 2006) (lab report confirming defendant tested positive for herpes); *United States v. Magyari,* 63 M.J. 123 (C.A.A.F. 2006) (holding before *Melendez-Diaz* that report of random, administrative urinalysis report is nontestimonial but that "the same types of records . . . prepared at the behest of law enforcement in anticipation of prosecution" may be testimonial).

23. **Other reports:** Other types of reports yielding litigation include:

a. **Certification of jurisdictional element of crime:** *United States v. Sandles,* 469 F.3d 508 (6th Cir. 2006) (FDIC official's affidavit to establish that bank was insured by FDIC was testimonial).

b. **Prison disciplinary records:** Courts are divided over whether records from a detention center introduced at the sentencing phase of a capital trial to prove an aggravating factor are testimonial. *Compare Russeau v. State,* 171 S.W.3d 871 (Tex. Crim. 2005) (testimonial); *United States v. Mills,* 466 F. Supp. 2d 1115 (C.D. Cal. 2006) (same), *with State v. Raines,* 653 S.E.2d 126 (N.C. 2007) (nontestimonial); *State v. Owens,* 664 S.E.2d 80 (S.C. 2008) (same).

c. **Reports of deportation:** *United States v. Torres-Villalobos,* 487 F.3d 607 (8th Cir. 2007) (noting unanimous view of five federal circuits to address the issue holding that reports of deportation, produced at time of deportation and later used at prosecutions for illegal reentry, are not testimonial).

24. **Certifications concerning business or public records:** Although records generated without an eye toward litigation are nontestimonial, certifications respecting such records that are created for "the purpose of establishing or proving some fact at trial" are testimonial. It does not matter whether local hearsay law characterizes such certifications also as "business records" or "public records." *Melendez-Diaz,* 129 S. Ct. at ____. Specific types of certifications include:

a. **Certifications of nonexistence of records (CNR's):** A "clerk's certificate attesting to the fact that the clerk [] searched for a particular record and failed to find it" is testimonial, at least when it "serve[s] as substantive evidence against the defendant whose guilt depend[s] on the nonexistence of the record for which the clerk searched." *Melendez-Diaz,* 129 S. Ct. at ____; *see also Tabaka v. District of Columbia,* ___ A.2d ___, 2009 WL 2044053 (D.C. July 16, 2009) (nonexistence of driving permit).

b. **Affidavits or certifications describing or summarizing records:** A clerk's certification "interpret[ing]," or describing the "substance or effect" or a public record is testimonial. *Melendez-Diaz,* 129 S. Ct. at ____; *see also People v. Pacer,* 847 N.E.2d 1149 (N.Y. 2006) (affidavit of DMV records manager concerning defendant's driving record testimonial).

c. **Certifications of authenticity:** A clerk's certification that does nothing more than attest to "the correctness of a copy of [an official] record kept in his office" is not testimonial. *Melendez-Diaz,* 129 S. Ct. at ____. It is unclear whether this rule applies to authentications of private business records as well.

25. **Chain-of-custody affidavits:** "It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence," but to the extent the prosecution offers such evidence, it must do so via "live" witnesses. *Melendez-Diaz,* 129 S. Ct. at ____ n.1. *See also City of Las Vegas v. Walsh,* 124 P.3d 203 (Nev. 2005) (nurse's chain-

of-custody affidavit concerning method of conducting and preserving blood alcohol test is testimonial), *cited with approval in Melendez-Diaz,* 129 S. Ct. at ____ n.11.

C. **Nontestimonial Statements:** *Davis* makes it clear that the Confrontation Clause no longer applies to nontestimonial evidence. 547 U.S. at 824. That is not to say, however, that the Due Process Clause does not still require hearsay evidence to have some level of reliability – as it was doing before the *Roberts* framework took hold. *See California v. Green,* 399 U.S. 149, 163 n.15 (1970) ("[W]e may agree that considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking."); *Manson v. Braithwaite,* 432 U.S. 98, 106 (1977) (Due Process Clause forbids testimony that lacks "sufficient aspects of reliability" to be evaluated by the jury"); *United States v. Shoupe,* 548 F.2d 636, 643-44 (6th Cir. 1977) (holding that disavowed, unsworn, and uncorroborated hearsay statement was insufficiently reliable to satisfy due process). And at least one state has decided as a matter of state constitutional law to continue applying the *Roberts* framework to nontestimonial statements. *See State v. Fields,* 169 P.3d 955 (Haw. 2007).

III. ADMISSIBILITY OF TESTIMONIAL EVIDENCE

A. **Witness Takes the Stand**: Generally speaking, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of prior testimonial statements. . . . The Clause does not bar the admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford*, 541 U.S. at 59 n.9. Issues sometimes arise with respect to a defendant's actual ability to cross-examine the witness or state statutes imposing prerequisites for doing so.

1. **Witness claims memory loss.** A defendant has an adequate opportunity to cross-examine even if the witness claims to have memory problems. *United States v. Owens,* 484 U.S. 554 (1988) (no confrontation violation even though head injury impaired witness's memory after he gave testimonial statement, so cross-examination was of limited utility); *California v. Green,* 399 U.S. 149 (1970) (same with respect to witness claimed memory loss at trial); *see also Cooley v. State,* 867 A.2d 1065 (Md. 2005) (testimonial statement admissible where witness recanted on the stand); *State v. Real,* 150 P.3d 805 (Ariz. App.2007) (police officer may read his report into evidence when he has no memory of events).

2. **Witness invokes privilege.** If the witness is forced to take the stand but refuses on privilege grounds to answer any questions on direct at all, this does *not* constitute an opportunity for cross examination. *See Douglas v. Alabama,* 380 U.S. 415 (1965).

3. **Witness does not give substantive testimony on direct examination.** Even if the prosecution puts a witness on the stand, it may not introduce her prior testimonial statements if it does not at least first ask the witness to relay the substance of the statements in court. The Confrontation Clause "requires the State to elicit damaging testimony from the witness so the defendant may cross examine if he so chooses." *State v. Rohrich,* 939 P.3d 697 (Wash. 1997); *see also Melendez-Diaz,* 129 S. Ct. at ____ ("[T]he Confrontation Clause imposes a burden on the prosecution to present its

witnesses.”). When the prosecution asks the witness to relay her damaging testimony and the witness is nonresponsive, courts have held that the prior statement is then admissible. *See State v. Nyhammer,* 963 A.2d 316 (N.J. 2009); *State v. Perry,* 275 S.W.3d 237 (Mo. 2009); *State v. Kennedy,* 957 So.2d 757 (La. 2007), *rev'd on other grounds,* 128 S. Ct. 2641 (2008).

4. **Witness refuses or is unable to answer questions on cross.** Some courts have held that the defendant has an adequate opportunity to examine a recalcitrant witness unless and until the witness is held in contempt. *State v. Fowler,* 829 N.E.2d 459 (Ind. 2005) (rejecting confrontation claim because defendant did not ask trial judge to make witness answer questions on pain of contempt); *State v. Johnson-Howell,* 881 P.2d 1288, 1300 (Kan. 1994) (confrontation rights violated because witness held in contempt). Another decision holds that a defendant lacks an adequate opportunity for cross-examination if the witness breaks down in the middle of the cross and does not continue. *State v. Noah,* 162 P.3d 799 (Kan. 2007). Still another holds that if a “child is so young that she cannot be cross-examined at all . . . the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Confrontation Clause.” *United States v. War Bonnett,* 933 F.2d 1471, 1474 (8th Cir. 1991).

5. **Defendant needs interpreter to understand witness.** One court has held that if the witness has trouble understanding English and, thus, cannot effectively understand and answer questions, the failure to provide an interpreter to aid in cross examination violates the Confrontation Clause. *Miller v. State,* 177 S.W.3d 1 (Tex. App. 2004).

6. **Witness is no longer on the stand.** The prosecution must offer a witness's prior testimonial statements while the witness is testifying on direct examination. The prosecution cannot introduce such statements after the witness has been excused, leaving it to the defendant to recall the witness for cross-examination. *See Felix v. State,* 849 P.2d 220, 247 (Nev. 1993) (“As a practical matter, if a child is excused before her hearsay statements are proffered, the defense has no opportunity to cross-examine the child on those statements. . . . Arguably, the defense could have recalled Susan and other children for cross-examination. However, we conclude that placing that burden on the defense is unfair.”); *State v. Daniels,* 682 P.2d 173, 178-79 (Mont. 1984) (where declarant is excused as a witness prior to the offering of the declarant's out-of-court statement, declarant was “not subject to cross-examination concerning the statement” and therefore out-of-court statement was inadmissible); *State v. Rohrich,* 939 P.2d 697 (Wash. 1997) (same). *But see State v. Stokes,* 673 S.E.2d 434 (S.C. 2009) (finding no confrontation violation when testimonial statement was introduced after witness left stand); *State v. Nelis,* 733 N.W.2d 619 (Wisc. 2007) (same). *See generally* Christopher B. Mueller, *Cross Examination Earlier or Later: When is it Enough to Satisfy* Crawford*,* 19 Regent L. Rev. 319 (2006-07).

B. **Waivers and Stipulations:** “The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.” *Melendez-Diaz,* 129 S. Ct. at ____ n.3. The right, just like any other right, also can be relinquished by a stipulation allowing the prosecution to introduce testimonial hearsay as a substitute for live testimony. However,

"for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege." *Brookhart v. Janis,* 384 U.S.1, 4 (1966) (quotation omitted).

1. **Requiring defendant to subpoena witness –** A defendant's ability to subpoena a witness "is no substitute for the right of confrontation." *Melendez-Diaz,* 129 S. Ct. at ____. "[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Id.* Some states avoid transgressing this constitutional rule by construing statutory subpoena requirements as nothing more than the requiring that defendants give notice that they want the prosecution to call the witness in their case-in-chief. *See, e.g., State v. Cunningham,* 903 So.2d 1110 (La. 2005); *State v. Simbara,* 811 A.2d 448 (N.J. 2002); *People v. Monica-Simental,* 73 P.3d 15 (Colo. 2003). *See also Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (finding constitutional violation but construing statute this way to avoid future violations); *State v. Birchfield,* 157 P.3d 216 (Or. 2007) (applying state constitutional law to reduce subpoena requirement to mere notice requirement). On such "simple notice and demand" requirements, *see* immediately *infra.*

2. **Simple "notice and demand" statutes -** Many states have statutes that "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance at trial." The Court in *Melendez-Diaz* held that such statutes are constitutional. 129 S. Ct. at ____ & n.12; *see also Hinojos-Mendoza v. People,* 169 P.3d 662, 670 (Colo. 2007). Still, such statutes or notices must adequately warn that failing to request live testimony would waive their constitutional rights. *State v. Caulfield,* 722 N.W.2d 304 (Minn. 2006) (inadequate warning); *State v. Smith,* 2006 WL 846342 (Ohio App. 2006) (same).

3. **Notice and demand statutes requiring pretrial showings or affirmations from defendant –** A handful of states require defendants to make a pretrial showing that they have a "good faith" reason to demand that a prosecution introduce live testimony from a forensic examiner instead of submitting a report, or to affirm under oath an intent to cross-examine the analyst. Two state supreme courts have upheld such prerequisites. *See City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005); *State v. Crow,* 974 P.2d 100, 111 (Kan. 1999); *but see State v. Laturner,* 163 P.3d 367 (Ks. App.), *review granted* (Ks. 2007) (finding that *Crow* is no longer good law after *Crawford*). Other courts have held that such statutes cannot constitutionally require defendants to offer any specific reason for desiring confrontation or to make any substantive showing that there are grounds to cross-examine. *State v. Cunningham,* 903 So.2d 1110 (La. 2005); *State v. Miller,* 790 A.2d 144 (N.J. 2002); *Miller v. State,* 472 S.E.2d 74 (Ga. 1996); *State v. Christensen,* 607 A.2d 952 (N.H.1992). The reasoning of *Melendez-Diaz* strongly suggests that the latter courts are correct, but the Court stopped short of expressly resolving the issue. 129 S. Ct. at ____ n.12.

C. Unavailablity and a Prior Opportunity for Cross-Examination

1. Unavailability.

"[T]he prosecution bears the burden of establishing" that a witness is unavailable. *Ohio v. Roberts,* 448 U.S. 56, 75 (1980).[2] *Crawford* does not appear to change what constitutes unavailability, but it makes this area of law much more important. Potential causes of unavailability include:

a. Physical Unavailability

i. **Death –** When a witness has died, he is unavailable. *See Mattox v. United States,* 156 U.S. 237 (1895).

ii. **Government cannot locate witness at the time of trial** – A witness is unavailable if a witness has unexpectedly gone missing and the prosecution cannot find the witness, "despite good faith efforts undertaken prior to trial to locate and present that witness." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980). "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Id.* (quotation omitted). If the government has not undertaken reasonable attempts to produce the witness, then the witness is not unavailable. *See, e.g., Barber v. Page,* 390 U.S. 719, 722-25 (1969); *Hernandez v. State,* 188 P.3d 1126 (Nev. 2008) (insufficient effort on State's part when simply accepted claim at time of trial of "family emergency" and did not investigate in any way); *State v. King,* 706 N.W.2d 181 (Wis. App. 2005) (insufficient effort when contacted witness several times, learned of her reluctance to appear, and failed to issue subpoena). Similarly, if the prosecution is unable to produce the witness at the time of trial in part because it failed to take reasonable steps in advance to ensure that it would be able to do so, the witness is not unavailable. *Compare Motes v. United States,* 178 U.S. 458, 470-71 (1900) (witness not unavailable when governmental negligence allowed witness it was holding in custody to abscond), *with People v. Bunyard,* 200 P.3d 879 (Cal. 2009) (witness was unavailable when prosecution released him on own recognizance and he promised to reappear and did not pose a flight risk).

iii. **Witness is beyond the court's jurisdiction –** A witness is unavailable if a witness is permanently or at least indefinitely beyond the court's jurisdiction and "the state [i]s powerless to compel his attendance . . . either through its own process or through established procedures." *Mancusi v. Stubbs*, 408 U.S. 204, 208 (1972). But if the prosecution knows were the witness is, and "procedures exist[] whereby the witness could be brought to the trial, and the witness [is] not in a position to frustrate efforts to secure his production," a witness outside the jurisdiction is not unavailable. *Roberts,* 448 U.S. at 77 (discussing holding in *Barber v. Page,* 390 U.S. 719 (1969)).

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[2] The unavailability analysis in *Roberts* appears to remain good law.

iv. **Witness has been deported –** As with missing witnesses, the government has a duty to take reasonable steps to prevent jurisdictional absence from inhibiting its witnesses' giving live testimony. Courts, therefore, have ruled that when a witness cannot testify at trial because the government deported him, the witness is not "unavailable" for confrontation purposes unless the government took steps prior to the deportation to secure the witness's presence at trial. *United States v. Yida,* 498 F.3d 945 (9th Cir. 2007); *United States v. Tirado-Tirado,* 563 F.3d 117 (5th Cir. 2009); *see also Morgan v. Commonwealth,* 650 S.E.2d 541 (Va. App. 2007) (witness deemed unavailable because state tried to stop deportation).

v. **Illness –** The Supreme Court has never addressed this issue. Although there was "considerable contrariety of opinion" on the subject at common law, the modern trend is that a witness is unavailable if what appears to be a permanent illness prevents a witness from appearing in court. *Spencer v. State*, 112 N.W. 462, 463 (Wis. 1907).

b. Mental infirmity

i. **Incompetency -** Lower courts have held that when a witness (usually a young child) is incompetent to testify, she is unavailable. *See, e.g., State v. C.J.,* 63 P.3d 765, 771 (Wash. 2003) (incompetence establishes unavailability). The Supreme Court, however, has never resolved this issue. *Idaho v. Wright,* 497 U.S. 805, 816 (1990) ("assuming without deciding" that incompetence satisfies unavailability test).

ii. **Inability to remember (feigned or actual) –** A witness who takes the stand but claims, truthfully or not, that he cannot remember the events at issue is not unavailable. *United States v. Owens,* 484 U.S. 554 (1988) (head injury impaired witness's memory after he gave testimonial statement); *California v. Green,* 399 U.S. 149 (1970) (claimed memory loss at trial).

c. Invocation of privilege - When a valid privilege, such as the Fifth Amendment or marital privilege, stands in the way of witness taking the stand at trial, lower courts have held that the witness is unavailable. The Supreme Court has never resolved the issue. *See Lilly v. Virginia,* 527 U.S. 116, 124 (1999) (plurality opinion) (Fifth Amendment) (assuming Fifth Amendment invocation establishes unavailability); *State v. Crawford,* 54 P.3d 656 (Wash. 2002) (marital privilege establishes unavailability).

d. Defendant procures witness's absence – If the defendant causes a witness's unavailability, the witness is unavailable. For a discussion of the forfeiture doctrine, see *infra* section III.D.1.

2. **Prior opportunity for cross-examination:** If the defendant was represented by counsel who had an adequate opportunity to cross-examine the witness and the same or similar motive for doing so, this satisfies the Confrontation Clause for statements given at that time. *See Mancusi v. Stubbs,* 408 U.S. 204, 213-16 (1972) (adequate cross because statement given at prior trial on same charges). Issues generating litigation include:

a. **Pretrial hearings:** If a jurisdiction allows the defense at the hearing at issue to examine the witness to substantially the same extent (and on the same material) as would be the case at trial, then this is an adequate opportunity for cross. *Compare Roberts,* 488 U.S. at 70-73 (adequate opportunity where statement was given at preliminary hearing where defendant was represented by counsel); *California v. Green,* 399 U.S. 149, 165-68 (1970) (same). The critical question, therefore, is not exactly what type of hearing is at issue but rather the extent of cross examination that was possible and allowed. *Compare Chavez v. State,* ___ P.3d ___, 2009 WL 2341517 (Nev. July 30, 2009) (adequate opportunity at preliminary hearing); *State v. Skakel,* 888 A.2d 985 (Conn. 2006) (adequate opportunity at probable cause hearing); *State v. Douglas,* 800 P.3d 288, 293 (Or. 1990) (adequate opportunity at bond hearing); *United States v. Doyle,* ___ F. Supp. 2d ___, 2009 WL 1529821 (W.D. Va. June 2, 2009) (same); *Barnes v. State,* 349 S.E.2d 387, 388 (Ga. 1986) (adequate opportunity at committal hearing); *United States v. Poland,* 659 F.2d 884, 896 (9th Cir. 1981) (adequate opportunity at suppression hearing), *Williams v. State,* 447 S.E.2d 676 (Ga. App. 1994) (same); *Coffin v. State,* 850 S.W.2d 608 (Tex. App. 1993) (adequate opportunity at adult certification hearing), *with Pointer v. Texas,* 380 U.S. 400, 406-08 (1965) (inadequate opportunity when statement given in preliminary hearing where defendant was not represented by counsel); *Dickson v. State,* 636 S.E.2d 721 (Ga. App. 2006) (inadequate opportunity at bond hearing); *People v. Brown,* 870 N.E.2d 1033 (Ill. App. 2007) (same); *People v. Vera,* 395 N.W.2d 339 (Mich. App. 1986); *State v. Weaver,* 917 So. 2d 600 (La. App. 2005) (inadequate opportunity at pretrial suppression hearing); *and People v. Fry,* 92 P.3d 970 (Colo. 2004) (inadequate opportunity at all preliminary hearings because state law requires such hearings to be truncated); *State v. Stuart,* 695 N.W.2d 259 (Wis. 2005) (same because state law precludes challenges to witnesses' credibility at such hearings).

b. **Discovery depositions.** Courts are divided over whether a discovery deposition provides an adequate opportunity for cross. *Compare State v. Contreras,* 979 So.2d 896 (Fla. 2008) (not adequate), *with Howard v. State,* 853 N.E.2d 461 (Ind. 2006) (adequate).

c. **Civil cases.** One court has held that an adequate opportunity for cross-examination existed in deposition in civil case because defendant was represented by same attorney and criminal charges already had been filed with respect to same facts. *Simmons v. State,* 234 S.W.3d 321 (Ark. App. 2006).

d. **Later arising evidence.** A defendant's prior opportunity to cross is not adequate if new evidence later arises that would have been important for purposes cross-examining the witness. *Compare Commonwealth v. Bazemore,* 614 A.2d 684 (Pa. 1992) (prior opportunity not adequate because defendant unaware at preliminary hearing of witness's prior inconsistent statement to police and that district attorney was contemplating filing charges against witness); *People v. McCambry,* 578 N.E.2d 1224 (Ill. App. Ct. 1991) (not adequate because defendant was unaware the lineup in which the witness had identified him was suggestive); *People v. Reed,* 414 N.Y.S.2d 89 (N.Y. Sup. Ct. 1979) (not adequate because defendant was unaware of witness's chronic alcoholism). *But see People v. Jurado,* 131 P.3d 400 (Cal. 2006) (adequate because no prosecutorial wrongdoing). The Confrontation Clause is not implicated if the later arising evidence is not important in light of the first cross-examination. *Hanson v. State,* ___ P.3d ___, 2009

WL 975425 (Ok. Crim. Apr. 13, 2009); *State v. Estrella,* 893 A.2d 348, 358-60 (Conn. 2006).

e. **Counsel for someone else cross-examined.** If a party other than the defendant cross-examined the witness at a prior hearing, that does not satisfy the Confrontation Clause. *State v. Hale,* 691 N.W.2d 637 (Wis. 2005); *Kirby v. United States,* 174 U.S. 47, 54-57 (1899) (inadequate opportunity when statement was given at prior trial where defendant was not a party and thus had no opportunity to cross-examine).

D. Equitable Loss of the Right.

There are two types of circumstances in which the prosecution may be able to introduce testimonial statements of unavailable witnesses even if the defendant did not have a prior opportunity to cross-examine them.

1. **"Forfeiture by wrongdoing."** When defendants wrongfully prevent witnesses from testifying, this "extinguishes confrontation claims on essentially equitable grounds." *Crawford*, 541 U.S. at 62 (citing *Reynolds v. United States,* 98 U.S. 145, 158-59 (1879)); *accord Davis,* 126 S. Ct. at 2279-80. For some classic examples of forfeiture, see *United States v. Dhinsa,* 243 F.3d 635, 651 (2nd Cir. 2001) ("threats, actual violence, or murder" forfeit confrontation right); *State v. Hand,* 840 N.E.2d 151 (Ohio 2006), (forfeiture because defendant killed witness to prevent testimony); *People v. Jones,* 714 N.W.2d 362 (Mich. App. 2006) (threats delivered through third party establishes forfeiture); *State v. Ivy,* 188 S.W.3d 132 (Tenn. 2006) (killing witness to prevent her from testifying against defendant in assault prosecution establishes forfeiture in later murder prosecution); *People v. Ware,* 2005 WL 563216 (Mich. App. 2005) (unpublished) (good explanation of law in post-*Crawford* opinion). In some jurisdictions, wrongdoing must be proved by clear and convincing evidence. *See, e.g., People v. Geraci,* 649 N.E.2d 817 (N.Y. 1995). In most, however, a preponderance of the evidence suffices – though even there "a trial court cannot make a forfeiture finding based solely on the unavailable witness's unconfronted testimony; there must be independent corroborative evidence that supports the forfeiture finding." *People v. Giles*, 152 P.3d 433 (Cal. 2007), *rev'd on other grounds,* 128 S. Ct. 2678 (2008); *see State v. Hale,* 691 N.W.2d 637, 653 (Wis. Jan. 2005) (Prosser, J., concurring) (collecting citations to different jurisdictions). Nor may a trial court conduct a forfeiture hearing in an *ex parte* setting. *State v. Byrd,* 967 A.2d 285 (N.J. 2009). Some specific issues that have generated litigation:

a. **Alleged wrongdoing that causes unavailability but is not specifically aimed at preventing testimony.** The Supreme Court held in *Giles v. California*, 128 S. Ct. 2679 (2008), that conduct that causes a witnesses' unavailability but was not designed, or intended, to prevent a witness from testifying does not forfeit the right to confrontation. Acts of domestic violence that are meant to isolate the victim and to prevent her from seeking aid from law enforcement and the judicial process satisfy this intent requirement. *Id.* at 2692-93.

b. **Collusion with witness.** When a defendant colludes with a witness to procure his/her unavailability, one court has held this is sufficient to trigger forfeiture. *See Commonwealth v. Edwards,* 830 N.E.2d 158 (Mass. 2005).

c. **Coconspirator causes unavailability**. When a coconspirator's misconduct causes a witness' unavailability, one court has held that the defendant forfeits his right to confrontation when the misconduct "was within the scope of the conspiracy and reasonably foreseeable to the defendant." *United States v. Carson,* 455 F.3d 336, 364 (D.C. Cir. 2006).

d. **Threats/promises unconnected to investigation or prosecution:** The Illinois Supreme Court has held that simply making an alleged victim of abuse "swear not to tell anyone what happened" does not forfeit the confrontation right because the promise is not extracted in contemplation of a future trial." *In re Rolandis G.,* 902 N.E.2d 600 (Ill. 2008).

e. **Defendant absconds.** When a defendant absconds and a witness becomes unavailable the meantime, courts have held that defendants do *not* forfeit their confrontation rights, because their wrongdoing did not cause the witnesses' unavailability. *See State v. Alvarez-Lopez,* 98 P.3d 699 (N.M. 2004); *People v. Melchor*, 841 N.E.2d 420 (Ill. App. Ct. 2005), *appeal allowed* (Ill. Mar. 29, 2006); *State v. Weaver,* 733 N.W.2d 793 (Minn. App. 2007).

2. **"Opening the door."** Courts have divided over whether a defendant "opens the door," on equitable grounds similar to forfeiture, to the prosecution's introducing an incriminating testimonial statement when a defendant introduces part of that statement or another of the declarant's prior statements. *Compare United States v. Cromer,* 389 F.3d 662 (6th Cir. 2004) (testimonial statement still inadmissible against defendant); *People v. Ryan,* 790 N.Y.S.2d 723 (N.Y. Sup. Ct. App. Div. 2005) (same) *with State v. Prasertphong,* 114 P.3d 828 (Ariz. 2005) ("rule of completeness" allows prosecution to introduce remainder of testimonial statement); *State v. Selalla,* 744 N.W.2d 802 (Jan. 2, 2008) (same); *People v. Ko,* 789 N.Y.S.2d 43 (N.Y. Sup. Ct. App. Div. 2005) (same); *State v. Childress*, 2006 WL 3804418 (Tenn. Crim. App. Dec. 27, 2006) (same). One court has held that the trial court in these circumstances should give a limiting instruction telling the jury to analyze the prosecution's offering only for purpose of credibility. *Le v. State,* 913 So.2d 913 (Miss. 2005).

E. Testimonial Statements Offered For a Nonhearsay Purpose

Generally speaking, introducing testimonial statements for a nonhearsay purpose does not raise a confrontation problem. "The [Confrontation Clause] does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *See Tennessee v. Street,* 471 U.S. 409, 414 (1985)." *Crawford,* 541 U.S. at 59 n.9. But when testimonial statements directly incriminate the defendant such that there is a substantial risk that they jury will disregard limiting instructions, *Street* still requires the

prosecution to show that the prosecution has a genuine need to introduce the evidence for its nonhearsay purpose and that the statement cannot be redacted or rephrased (as is done pursuant to *Bruton*) to blunt the risk of improper use while still accommodating the prosecution's legitimate need. *Compare United States v. Cruz-Diaz,* 550 F.2d 169 (1st Cir. 2008) (statement admissible because it satisfied these requirements); *United States v. Jiminez,* ___ F.3d ___, 2009 WL 921437 (11th Cir. Apr. 7, 2009), *with United States v. Mayfield,* 189 F.3d 895 (9th Cir. 1999) (statement inadmissible because statement was too prejudicial even with limiting instruction); *White v. Cohen,* 635 F.2d 761 (9th Cir. 1981) (same). I have written about this issue: Jeffrey L. Fisher, *The Truth About the "Not for Truth" Exception to* Crawford, 32 The Champion 18 (Jan/Feb 2008). Two particular purported nonhearsay uses of testimonial statements are generating litigation:

1. **Statements purportedly offered to explain police's investigation.** The Supreme Court and some lower courts have emphasized that police officers may not repeat direct accusations of criminal conduct in order to describe their investigation unless doing so is – just as in *Street* – truly necessary and the statement is redacted as much as possible to safeguard confrontation interests. *See Shepard v. United States,* 290 U.S. 96, 103-04 (1933) (holding that the government could not introduce out-of-court accusation for nonhearsay purpose because the jury would not reasonably have been able to avoid considering it for the truth of the matter asserted; "[t]he reverberating clang of those accusatory words would drown out all weaker sounds"); *United States v. Silva,* 380 F.3d 1018, 1020 (7th Cir. 2004) (reversing conviction because of prejudicial effect of inculpatory hearsay supposedly offered for nonsubstantive purposes; "Under the prosecution's theory, every time a person says to the police 'X committed the crime,' the statement (including all corroborating details) would be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one's accusers."); *United States v. Hearn,* 500 F.3d 479 (6th Cir. 2007) (same); *State v. Johnson,* ___ N.W.2d ___, 2009 WL 2319235 (N.D. July 29, 2009) (same); *but see Szymanski v. State,* 166 P.3d 879 (Wyo. 2007) (allowing incriminating statements to be admitted for dubious nonhearsay purpose). It is "most unusual," upon close inspection, that the government has a genuine need to explain the course of its investigation. *See, e.g., Brown v. State*, 549 S.E.2d 107, 111 (Ga. 2001); *see also State v. Broadway*, 753 So.2d 801 (La. 1999). And even when the government does have a legitimate need to present such evidence, that need can often be accommodated by allowing an officer to testify that he acted "upon information received" or words that effect. *United States v. Maher,* 454 F.3d 13, 23 (1st Cir. 2006); *United States v. Price*, 458 F.3d 202, 208 (3rd Cir. 2006); *State v. Vandeweaghe*, 827 A.2d 1028, 1035 (N.J. 2003); *State v. Braxter*, 568 A.2d 311, 315 (R.I. 1990); *State v. Adams,* 131 P.3d 556 (Kan. App. 2006), *rev'd on other grounds,* 153 P.3d 512 (Kan. 2007) (prosecutors may not "elicit[] unnecessary and damning details to establish the motivation for police investigation").[3]

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[3] Jurisdictions may also impose nonconstitutional limitations on the prosecution's ability to introduce testimonial statements for nonhearsay purposes. *See, e.g., United States v. Evans,* 216 F.3d 80, 85 (D.C. Cir. 2000); *State v. Smothers,* 927 So.2d 484 (La. App. 2006) (refusing on state law grounds to allow officer to describe content of 911 call that triggered his investigatory

2. **Testimonial statements repeated by prosecutorial expert witnesses or forensic lab supervisors.** When a prosecutorial expert witness repeats testimonial statements made by another person (for example, in interviews or in forensic lab reports), such statements are typically offered for the truth of the matter asserted and therefore violate the Confrontation Clause. *See People v. Goldstein,* 6 N.Y.3d 119 (N.Y. 2005) (psychological testimony); *United States v. Mejia,* 545 F.3d 179 (2d Cir. 2008) ("gang expert" testimony); *Roberts v. United States,* 916 A.2d 922 (D.C. 2007) (forensic testimony); *State v. Johnson,* 982 So. 2d 682 (Fla. 2008) (same); *State v. Mangos,* 957 A.2d 89 (Me. 2008) (same); *McMurrar v. State,* ___ N.E.2d ___, 2009 WL 1330806 (Ind. App. 2009) (same); *People v. Payne,* ___ N.W.2d ___, 2009 WL 2253287 (Mich. App. July 28, 2009); *State v. Bell,* 274 S.W.3d 592 (Mo. App. 2009) (repeating results of autopsy performed by another); *Commonwealth v. Avila,* ___ N.E.2d ___, 2009 WL 2915662 (Mass. Sept. 15, 2009) (same). *But see State v. Delaney,* 613 S.E.2d 699 (N.C. 2005) (allowing expert to testify as to results of forensic analysis performed by a different scientist); *State v. Tucker,* 160 P.3d 177 (Ariz. 2007) (same); *People v. Leach,* ___ N.E.2d ___, 2009 WL 1211380 (Ill. App. 2009) (same); *People v. Thomas,* 130 Cal. App. 4th 1202 (2005) (same regarding gang expert testimony).[4] As *Melendez-Diaz* makes clear, the Confrontation Clause gives the defendant the right to cross-examine the actual "analyst" who performed the test. 129 S. Ct. at ____. But when a testifying expert offers his or her own opinions based only on raw data produced by a machine and does not repeat the another person's conclusions based on that data, this does not run afoul of the Clause because unadorned machine output is not testimonial. *Commonwealth v. Nardi,* 893 N.E.2d 1121 (Mass. 2008); *Bradbury v. State*, ___ S.E.2d ___, 2009 WL 1176389 (Ga. 2009); *People v. Jones,* 871 N.E.2d 823 (Ill. App. 2007).

IV. HARMLESS ERROR

If a trial court erroneously admitted a testimonial statement at trial, that error is subject to "harmless error" analysis. *See, e.g., Lilly v. Virginia,* 527 U.S. 116, 139-40 (1999) (confrontation error subject to harmless error analysis); *Delaware v. Van Arsdell,* 475 U.S. 673 (1986) (same). In conducting the harmless-error inquiry, an appellate court should reverse if it is possible that the jury relied on the testimonial statement in reaching its verdict. *United States v. Alvarado-Valdez,* 521 F.3d 337, 342 (5th Cir. 2008). An appellate court may not simply ignore the testimonial statement and ask whether the jury clearly would have convicted based on the

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actions because "[m]arginally relevant nonhearsay evidence should not be used as a vehicle to permit the introduction of highly relevant and highly prejudicial hearsay evidence which consists of the substance of an out-of-court assertion that was not made under oath and was not subject to cross-examination at trial") (quoting *McCormick on Evidence* § 249 (3d ed. 1984)).

[4] California courts are currently deeply divided on this issue. *Compare People v. Dungo,* 176 Cal. App. 4th 1388 (Cal. App. 2009) (introduction of forensic examiner's findings through supervisor's testimony violates Confrontation Clause); *People v. Lopez,* 177 Cal. App. 4th 202 (Cal. App. 2009) (same), *with People v. Rutterschmidt,* 176 Cal. App. 4th 1047 (Cal. App. 2009) (no violation); *People v. Guteierrez,* 2009 WL 2872406 (Cal. App. Sept. 9, 2009) (same).

remaining evidence. *Id.*; *accord Fields v. United States,* 952A.2d 859 (D.C. 2008); *Duvall v. United States,* ___ A.2d ___, 2009 WL 2043963 (D.C. July 16, 2009).