SUPREME COURT UPDATE ON CRIMINAL PROCEDURE

by Professor Jeffrey Fisher

Digital Privacy in the Post-*Riley* World

by Jeffrey L. Fisher and Teresa Reed (Stanford Law School '15)

I. Fourth Amendment Issues

A. GPS Tracking

1. **Physical attachment / trespass**: "We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search." *United States v. Jones*, 132 S. Ct. 945, 949 (2012). Thus, in applying *Jones*, lower courts assess the threshold question whether a defendant has Fourth Amendment standing to challenge the placement of a GPS device on the vehicle in question. If so, then the physical attachment of the device constitutes a search. On the other hand, "a defendant who does not have either a lawful ownership interest, or a possessory interest in a searched automobile at the time of the search does not possess a legitimate expectation of privacy that the Fourth Amendment will protect." *United States v. Houseal*, 2014 WL 626765, at *6 n.11 (W.D. Ky. Feb. 18, 2014) (cataloguing cases).
2. **No trespass:** Where no physical trespass occurred, courts look to Justice Alito's concurrence in *Jones*, which (together with Justice Sotomayor's concurrence) spoke for five Justices to find that GPS tracking constitutes a search based solely upon the reasonable expectation of privacy test articulated in *Katz v. United States*, 389 U.S. 347 (1967). "The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated." *Jones*, 132 S. Ct. at 964 (Alito, J., concurring).
    a. **Long-term tracking:** "[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Id.* (Alito, J., concurring); *see also id.* at 955 (Sotomayor, J., concurring) (same).
    b. **Short-term tracking:** "[R]elatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable . . . We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark." *Id.* at 964 (Alito, J., concurring)*; see also id.* at 955 (Sotomayor, J., concurring) ("In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention").
        i. In general, lower courts reason that monitoring periods of one week or less are allowed by Justice Alito's approval of "[r]elatively short-term monitoring." *See United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012) (three days); *United States v. Devora*, 2015 WL 1621396, at *4 (W.D. Tex. Apr. 9, 2015) ("a matter of hours"); *United States v. Ruibal*,

2014 WL 357298 (W.D. Mich. Jan. 31, 2014) (two days); *United States v. Luna-Santillanes*, 2012 WL 1019601 (E.D. Mich. Mar. 26, 2012) (one day); *People v. Barnes*, 216 Cal. App. 4th 1508, (2013) (one evening); *People v. Hall*, 2013 WL 3776340, at *5 (Cal. Ct. App. July 17, 2013) ("nearly negligible one-week use of GPS monitoring," supplemented by live surveillance).

ii. For cases noting that longer time periods implicated the concerns in *Jones*, see *United States v. White*, 2014 WL 6682645, at *5 (E.D. Mich. 2014) ("[T]he length [30 days] and breadth of the tracking here extends well beyond what any reasonable person might anticipate"); *United States v. Powell*, 943 F. Supp. 2d 759 (E.D. Mich. 2013) (same, for a monitoring period of seven months); *United States v. Lopez*, 895 F. Supp. 2d 592, 601 (D. Del. 2012) (tracking for seventeen days within a four-month period was "not so distinguishable from the timeframe detailed in *Jones* as to render [defendant's] monitoring decidedly 'short-term'").

iii. Departing from this approach, the Florida Supreme Court ruled in *Tracey v. State* that the warrantless use of cell site location information to track an individual during the course of a single day's car trip violated the Fourth Amendment. 152 So. 3d 504, 525 (2014). The court refused to tether its reasoning to the temporal length of the monitoring, which in its view was "not a workable analysis." *Id.* at 520. Rather, the court emphasized that an earlier case allowing police monitoring, *United States v. Knotts*, 460 U.S. 276 (1983), was not applicable because when *Knotts* was decided, "high tech tracking such as now occurs was not within the purview of public awareness or general availability." 152 So.3d at 525.

B. Cell Phones and Other Digital Devices

1. Without a warrant

a. Incident to arrest: *Riley v. California*, 134 S. Ct. 2473 (2014), held that the search-incident-to-arrest doctrine does not allow warrantless searches of the digital contents of cell phones incident to arrest. The Supreme Court recognized that "[c]ellphones differ in both a quantitative and qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 2489. *Riley*, therefore, suggests that "digital is different" in the Fourth Amendment context – that is, that older cases developed in the context of physical objects should not control the Fourth Amendment's application to electronic information.

i. Cell phones and other computers: In differentiating cell phones from physical objects, *Riley* did not explicitly establish what other electronic devices might fall within its

scope. However, courts have little trouble extending *Riley*'s reasoning to other computers. *See, e.g.*, *People v. Michael E.*, 230 Cal. App. 4th 261, 277 (2014) ("[A]s the Supreme Court observed, cell phones 'are in fact minicomputers,' and the search of a computer hard drive implicates at least the same privacy concerns as those implicated by the search of a cell phone . . . ." (citing *Riley*, 134 S. Ct. at 2489)).

ii. **Cameras:** Courts disagree about whether *Riley* applies to digital cameras. *See Am. News & Info Servs., Inc. v. Gore*, 2014 WL 4681936, at *10 (S.D. Cal. Sept. 18, 2014) (video cameras "fall somewhere between the physical search of a cigarette package found in a pocket [in *United States v. Robinson*, 414 U.S. 218 (1973)] . . . and the data search of a cell phone under *Riley*"). *Compare United States v. Whiteside*, 2014 WL 4928951, at *2 (S.D.N.Y. Oct. 1, 2014) (*Riley*'s "rationale appears to be equally applicable to searching the content of digital cameras given their storage capacity and labeling (time/date/location capabilities)"), *with United States v. Miller*, 2014 WL 3671062, at *3 (E.D. Mich. July 23, 2014) ("[T]he search of Defendant's camera does not raise the same privacy concerns as a cell phone.").

iii. **GPS device:** One state appellate court applied *Riley* to the contents of a GPS device found on an arrestee's person. *State v. Clyburn*, 2015 WL 1528909, at *5 (N.C. Ct. App. Apr. 7, 2015) ("The type of data that may be found on a GPS device was specifically mentioned by the *Riley* Court in distinguishing the digital data that can be stored on a cell phone from the type of data that is typically stored in physical records found on one's person.").

iv. **Key fob:** Defendants have also argued that police use of garage openers or key fobs may require a warrant after *Riley*, though no court has yet agreed. *See United States v. Williams*, 773 F.3d 98, 104 (D.C. Cir. 2014) (defendant waived argument); *United States v. Correa*, 2015 WL 300463, at *1 (N.D. Ill. Jan. 21, 2015).

b. **Exigent circumstances:** *Riley* noted that, "case-specific exceptions may still justify a warrantless search of a particular phone." 134 S. Ct. at 2494. The exigent circumstances exception, for example, could cover "the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury." *Id.*

i. **Encryption:** Dismissing the government's argument that remote wiping or data encryption justified routine searches of cell phones incident to arrest, the *Riley* Court

nevertheless observed that if "the potential loss of evidence" truly constitutes a " 'now or never' situation . . . [police] may be able to rely on exigent circumstances to search the phone immediately." 134 S. Ct. at 2488 (quoting *Missouri v. McNeely*, 133 S. Ct. 1552, 1562 (2013)). Lower courts read this suggestion narrowly, finding that speculative concerns about data preservation do not ordinarily implicate the exigent circumstances exception. *See United States v. Camou*, 773 F.3d 932 (9th Cir. 2014); *United States v. Alonso-Castaneda*, 2015 WL 1711989, at *7 (D. Ariz. Apr. 15, 2015) (scope of search went beyond what was permissible "to prevent the loss of call data"); *Carter v. State*, 2015 WL 1905914 (Tex. App. Apr. 27, 2015); *State v. Lacey*, 2015 WL 359249, at *2 (Iowa Ct. App. Jan. 28, 2015) (no "specific, articulable facts" to support the government's contention that a second suspect could have destroyed digital evidence while a warrant was obtained); *Oliver v. State*, 2015 WL 1933389, at *4 (Tex. App. Jan. 22, 2015) ("Appellant had no opportunity to delete data himself once the phone was seized.").

ii. **Probationer / parolee search exception:** Lower courts agree that the exceptions articulated in *United States v. Knights*, 543 U.S. 112 (2001), and *Samson v. California*, 547 U.S. 843 (2006), allowing searches of probationers and parolees without probable cause, continue to apply to cell phones after *Riley*. *See United States v. Dahl*, 2014 WL 6792676, at *5 (E.D. Pa. Dec. 3, 2014); *United States v. Martinez*, 2014 WL 3956677 (N.D. Cal. Aug. 12, 2014); *State v. Gonzalez*, 2015 WL 1913109 (N.D. Apr. 28, 2015); *People v. Purdie*, 2014 WL 4261692 (Cal. Ct. App. Aug. 29, 2014).

iii. **Other exceptions:** One lower court allowed the warrantless search of a cell phone under *Riley*'s express recognition of the exception "to pursue a fleeing suspect." *State v. Samalia*, 344 P.3d 722, 726 (Wash. Ct. App. 2015) (also finding that the state's exception to the warrant requirement for voluntarily abandoned property applied to the phone).

c. Border searches: Border searches are historically "reasonable simply by virtue of the fact that they occur at the border." *United States v. Ramsey*, 431 U.S. 606, 616 (1977). Pre-*Riley*, the Ninth Circuit excluded computers from this rule, requiring reasonable suspicion for the examination of a hard drive at the border. *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc).

i. Some lower courts have rejected the argument that *Riley* affected the border search exception, even as they followed *Cotterman* by requiring reasonable suspicion for digital searches at the border. *See United States v. Blue*, 2015 WL 1519159, at *2 (N.D. Ga. Apr. 1, 2015) (upholding search of computer based on reasonable suspicion, but finding "no authority" for the proposition that *Riley* changed border search law); *United States v. Saboonchi*, 48 F. Supp. 3d 815 (D. Md. 2014) (declining to reconsider prior decision, which upheld search of digital devices based on reasonable suspicion, in light of *Riley*).

ii. In contrast, the D.C. District Court has relied in part on *Riley* to suppress evidence from a laptop search at the border. The court found that, after *Riley*, "the analysis of whether the search of [the] laptop was reasonable under the Fourth Amendment does not simply end with the invocation of . . . the well-recognized border exception." *United States v. Kim*, 2015 WL 2148070, at *19 (D.D.C. May 8, 2015). Rather, "[a]pplying the *Riley* framework, the national security concerns that underlie the enforcement of export control regulations at the border must be balanced against the degree to which Kim's privacy was invaded in this instance." *Id.* at *20.

2. **With a warrant / particularity requirement:** In the briefs in *Riley*, the United States asserted that the Fourth Amendment's particularity requirement did not mean that cell phone warrants would specify which files, dates, attachments, or links could be searched. U.S. Br. 24. The *Riley* Court did not address these arguments directly, but did observe that government protocols to avoid overbroad cell phone searches were "[p]robably a good idea" – though not sufficient to eliminate possible Fourth Amendment violations in the execution of warrantless searches. 134 S. Ct. at 2491.

   a. Post-*Riley*, some lower courts have rigorously applied the Fourth Amendment's particularity requirement to cell phone warrants. *See, e.g.*, *United States v. Russian*, 2015 WL 1863333 (D. Kan. Apr. 23, 2015) (court could not conclude that warrant simply authorizing seizure of cell phones was sufficiently particular); *United States v. Winn*, 2015 WL 553286 (S.D. Ill. Feb. 9, 2015) (warrant that failed to specify the categories, characteristics, and time frame of the data for which the police had probable cause was overbroad); *State v. Henderson*, 854 N.W.2d 616, 634 (Neb. 2014) (warrant allowing search of "[a]ny and all" content did not meet particularity requirement). In particular, the District Court of Kansas has applied the particularity requirement by demanding search protocols in cell phone warrants that (1) avoid "the overseizure of data and indefinite storage of data that [the

government] lacks probable cause to seize" and (2) provide a "meaningful description of the scope of the search [the government] is requesting to be authorized." *In re Nextel Cellular Telephone*, 2014 WL 2898262 (D. Kan. June 26, 2014), at *10-13; *see also In re Cellular Telephones*, 2014 WL 7793690 (D. Kan. Dec. 30, 2014); *In re Search of Premises Known as Three Cellphones & One Micro-SD Card*, 2014 WL 3845157 (D. Kan. Aug. 4, 2014).

b. Other courts have not been so eager to mandate specific limits in warrants for digital content.

i. The Sixth Circuit recently approved a warrant that authorized "the search for any records of communication, indicia of use, ownership, or possession, including electronic calendars, address books, e-mails, and chat logs," because "[a]t the time of the seizure . . . the officers could not have known where this information was located in the phone or in what format." *United States v. Bass*, 2015 WL 1727290, at *4 (6th Cir. Apr. 15, 2015); *see also Hedgepath v. Com*, 441 S.W.3d 119, 130 (Ky. 2014) (warrant specifying "cell phones" was sufficiently particular). For a lengthier discussion, see *United States v. Garcia-Alvarez*, 2015 WL 777411, at *2-5 (S.D. Cal. Feb. 24, 2015) (rejecting defendant's arguments that warrant was insufficiently particular because it was not limited to recent data and did not specify a methodology).

ii. Some courts anticipate that *Riley* forecasts future elaboration of protocols or particularity for digital data, but nevertheless read the opinion itself quite narrowly. *See, e.g.*, *United States v. Leora*, 2014 WL 5859072, at *71 (D.N.M. Oct. 20, 2014) ("Although [*Riley*] may indicate the Supreme Court's willingness to provide greater Fourth Amendment protections in the ESI [electronically stored information] context in the future, the Court finds it difficult to conclude that such increased protections are either necessary or required under current Supreme Court precedent."); *United States v. Lustyik*, 2014 WL 4802911, at *16 (S.D.N.Y. Sept. 29, 2014) (rejecting defendants' demand for search protocols, but observing that "the threats to privacy posed by digital searches . . . may eventually make digital search protocols a Fourth Amendment necessity.").

C. Cell Site Location Information: Cell phone service providers maintain records of calls made or received by a customer and of the particular cell tower that carried the call to or from the customer. Courts thus must grapple with whether police can invoke § 2703(d) of the Stored Communication Act to obtain that cell

site location information from third-party service providers upon a mere showing of "reasonable grounds," without a warrant based upon probable cause.

1. Pre-*Riley*, many lower courts found that cell phone users had no reasonable expectation of privacy in cell site records and allowed the government to access those records without a warrant. *See In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600, 613 (5th Cir. 2013) ("Cell phone users, therefore, understand that their service providers record their location information when they use their phones at least to the same extent that landline users in *Smith* [*v. Maryland*, 442 U.S. 735 (1979)] understood that the phone company recorded the numbers they dialed."); *United States v. Moreno-Nevarez*, 2013 WL 5631017 (S.D. Cal. Oct. 2, 2013); *United States v. Graham*, 846 F. Supp. 2d 384, 404 (D. Md. 2012) (pending on appeal in the Fourth Circuit); *see also United States v. Thousand*, 558 Fed. Appx. 666, 670 (7th Cir. 2014) ("We have not found any federal appellate decision accepting [defendant]'s premise that obtaining cell-site data from telecommunications companies . . . raises a concern under the Fourth Amendment.").

- **a.** For courts holding the opposite, see *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, 2012 WL 3260215 (S.D. Tex. July 30, 2012); *In the Application of the United States for an Order Authorizing the Release of Historical Cell-Site Information*, 809 F. Supp. 2d 113 (E.D.N.Y. 2011); *Commonwealth v. Augustine*, 4 N.E.3d 846 (Mass. 2014).
- **b.** For an intermediate approach, see *In re Application of U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records*, 620 F.3d 304, 320 (3d Cir. 2010) (magistrates can properly grant court orders to obtain cell tower information on a showing less than probable cause, but also have the power "to be used sparingly" to require the government to show probable cause).

2. In the post-*Riley* era, courts are split over whether the Fourth Amendment protects cell site information. *Compare United States v. Graham*, 796 F.3d 322 (4th Cir. 2015); *Commonwealth v. Estabrook*, ___ N.E.2d ___, 2015 WL 5662710 (Mass. 2015); *United States v. Cooper*, 2015 WL 881578, at *6 (N.D. Cal. Mar. 2, 2015) (finding that, post-*Riley*, *Smith* cannot be applied to cell site data because "the pen registers employed in 1979 bear little resemblance to their modern day counterparts"), *with United States v. Davis*, 785 F.3d 498, at n.19 (11th Cir. May 5, 2015) (en banc) (dismissing defendant's argument that *Riley* applies to cell tower data because "[i]t is not helpful to lump together doctrinally unrelated cases that happen to involve similar modern technology"); *United States v. Guerrero*, 768 F.3d 351, 360 (5th Cir. 2014) (*Riley* did not disrupt the Fifth Circuit's precedent holding that cell site location data is not protected by the Fourth Amendment, although it may "one day lead the Court to treat historical cell site data

in the possession of a cellphone provider differently from a pen register in the possession of a pay phone operator"); *United States v. Epstein*, 2015 WL 1646838 (D.N.J. Apr. 14, 2015) (holding that "*Riley* did not address the constitutionality of utilizing § 2703(d) to obtain historical cell site location data from *third-party* cell phone providers," and cataloguing cases that agree); *United States v. Dorsey*, 2015 WL 847395 (C.D. Cal. Feb. 23, 2015) (district courts in the Ninth Circuit have "universally decided that historical cell site information may be obtained pursuant to a § 2703(d) order without a showing of probable cause"); *United States v. Shah*, 2015 WL 72118 (E.D.N.C. Jan. 6, 2015); *United States v. Rogers*, 2014 WL 5152543 (N.D. Ill. Oct. 9, 2014); *United States v. Giddins*, 2014 WL 4955472 (D. Md. Sept. 30, 2014); *Ford v. State*, 444 S.W.3d 171 (Ct. App. Tex. 2014); *State v. Perry*, ___ S.E.2d ___, 2015 WL 5331908 (N.C. App. 2015) (same). The federal government is seeking en banc review on the issue in *Graham.*

II. Fifth Amendment/Passwords

A. Written Password: Both the State and the United States argued in *Riley* that police officers need to search smart phones promptly, especially if found unlocked, because a password could kick in and permanently block access. U.S. Br. 11; Resp. Br. 34-35. Petitioner responded that this argument would only hold true if – among other things – law enforcement could not compel arrestees to disclose their passwords. Reply Br. 14 & n.8.

1. Lower courts have applied the "foregone conclusion" doctrine and find no Fifth Amendment protection for passwords "[w]here the existence and location of the [information that would be compelled is already] known to the government." *In re Boucher*, 2009 WL 424718 (D. Vt. Feb. 19, 2009) (citing *Fisher v. United States*, 425 U.S. 391, 411 (1976)); *see also United States v. Gavegnano*, 305 Fed. Appx. 954, 956 (4th Cir. 2009) ("Any self-incriminating testimony that he may have provided by revealing the password was already a 'foregone conclusion' because the Government independently proved that Gavegnano was the sole user and possessor of the computer."); *United States v. Fricosu*, 841 F. Supp. 2d 1232 (D. Colo. 2012); *Com v. Gelfgatt*, 11 N.E.3d 605 (Mass. 2014) (compelling defendant to enter encryption key does not violate Fifth Amendment); *Order Granting Ex Parte Request for Reconsideration of the United States's Application Under the All Writs Act* at 3, No. 13-M-449 (E.D. Wis. May 21, 2013).

a. For cases holding that the Fifth Amendment does apply to password disclosure or decryption, see *In re Grand Jury Subpoena Duces Tecum*, 670 F.3d 1335, 1349 (11th Cir. 2012) ("[T]he explicit and implicit factual communications associated with the decryption and production are not foregone conclusions."), and *United States v. Kirschner*, 823 F. Supp. 2d 665, 669 (E.D. Mich. 2010) ("[T]he government is . . . seeking testimony from the

Defendant, requiring him to divulge through his mental processes his password.")

2. Consensus has not emerged on this issue. *See, e.g.*, *United States v. Bondo*, 2015 WL 1518987, at *6 (A.F. Ct. Crim. App. Mar 18, 2015) ("We leave as unresolved whether a properly issued warrant may compel a suspect to produce a password.").
    a. **All Writs Act** - In one instance, a district court applied the All Writs Act to order a cell phone manufacturer to unlock the cell phone, disregarding the Fifth Amendment issue entirely. *In re XXX, Inc.*, 2014 WL 5510865 (S.D.N.Y. Oct. 31, 2014). In another, a district court raised serious questions about the applicability of the Act. *See In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court* (E.D.N.Y. Oct. 9, 2015), available at https://ia801501.us.archive.org/27/items/gov.uscourts.nyed.376325/gov.uscourts.nyed.376325.2.0.pdf. The EFF has also issued a position paper arguing that the Act does not apply here. *See* Andrew Crocker, *Sifting Fact from Fiction with All Writs and Encryption: No Backdoors*, Dec. 4, 2014.
    b. **Voluntary disclosure:** In other cases, officers have obtained cell passwords merely by asking for them. *See, e.g.*, *United States v. Furman*, 2015 WL 1061956, at *2 (D. Minn. Mar. 11, 2015) ("Defendant initially refused the request, but ultimately provided the password . . . ."); *United States v. Graham*, 2014 WL 2922388 (N.D. Ga. June 27, 2014); *Riley*, Reply Br. at 14 (listing cases).

B. Fingerprints: Smart phone owners today can elect to use a fingerprint scan instead of a traditional password to unlock their phones. This prompts the question whether the Fifth Amendment applies to biometric authentication of digital devices.

1. Under current precedents, the Fifth Amendment does not protect biometric information – a fingerprint, voiceprint, or facial recognition – as testimonial. *See* John Larkin, *Compelled Production of Encrypted Data*, 14 Vand. J. Ent. & Tech. L. 253, 278 n.128 (2012) (citing Supreme Court cases disavowing Fifth Amendment protection for handwriting, voice exemplars, and blood tests); *see also Virginia v. Baust*, 2014 WL 6709960, at *3 (Va. Cir. Ct. Oct. 28, 2014) ("The fingerprint, like a key, does not require the witness to divulge anything through his mental processes.").
2. Some scholars argue that the Fifth Amendment doctrine must evolve to cover biometric identification or its constitutional protection will be unduly eroded. *See, e.g.*, Erin M. Sales, *The "Biometric Revolution": An Erosion of the Fifth Amendment Privilege to Be Free From Self-Incrimination*, 69 U. Miami L. Rev. 193, 231 (2014); Vivek Mohan & John Villasenor, *Decrypting the Fifth Amendment: The Limits of Self-Incrimination in the Digital Era*, U. Penn. J. of Const. L. (2012).

III. Exclusionary Rule

A. Officers' Actions Consistent with Then-Binding Precedent

1. **Within same court system:** The Court in *Davis v. United States* held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." 131 S. Ct. 2419, 2423 (2011). Defendants seeking to suppress digital evidence, even in the wake of recent case law that renders police action unconstitutional, must therefore overcome the argument that *Davis*'s good-faith exception applies.
2. **Within same jurisdiction but state court precedent:** Courts disagree as to whether the relevant "appellate precedent" under *Davis* must come from the same court system. One California district court applied *Davis* based on precedent from the California Supreme Court, despite observing that "[i]t might be a different question if [the precedent] were not so squarely on-point, if the decision had been issued by an intermediate state court of appeal, or if there were contradictory authority in the Ninth Circuit that made the question . . . unsettled in California [at the time of police action]." *United States v. Garcia*, 2014 WL 4543163, at *6 (N.D. Cal. Sept. 12, 2014). The court also acknowledged that a leading treatise "suggest[s] that for *Davis* to apply, the precedent must be binding 'in the jurisdiction of ultimate prosecution.'" *Id.* (*quoting* W. LaFave, 1 Search & Seizure § 1.3(h)). *But see United States v. Eisenhour*, 2014 WL 4206884, at *3 (D. Nev. Aug. 25, 2014) (declining to apply the good-faith exception after *Riley* because "[n]o Ninth Circuit case explicitly rules that digital data on a cell phone can be searched incident to arrest").

B. General Supreme Court Precedent: Courts splinter over whether older Supreme Court cases not directly on-point can trigger the good-faith exception, or whether *Davis*' *on-point* precedent rule is the only way to trigger the exception. For a helpful discussion, see *United States v. Aguiar*, 737 F.3d 251, 260-261 (2d Cir. 2013). *See also United States v. Robinson*, 903 F. Supp. 2d 766, 784 (E.D. Miss. 2012) (reading *Davis* as expressly limited to "binding" as opposed to "generally accepted" authority, and to precedent that "specifically *authorizes* a particular police practice" (quoting *Davis*, 131 S. Ct. at 2429)); Petition for Certiorari, *Stephens v. United States*, 764 F.3d 327 (4th Cir. 2014) (No. 14-1313), 2015 WL 2062483 (reviewing varied conceptions of *Davis* in lower court opinions treating GPS tracking). In tackling this issue, courts often overlook that this Court held in *United States v. Johnson*, 457 U.S. 537, 561 (1982), that suppression is the appropriate remedy when officer make a mistake absent a third-party directive concerning an "unsettled" issue of law. Applying the exclusionary rule in these circumstances, the Court explained, provides "an incentive to err on the side of constitutional behavior." *Id.*; *see also Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring) ("when police decide to conduct a search or seizure in the absence of case law (or other authority)" exclusion has a deterrent role to play).

1. **GPS tracking:** *United States v. Knotts*, 460 U.S. 276 (1983), rejected a Fourth Amendment challenge to police use of a beeper to monitor the

defendant on public roads. *See also United States v. Karo*, 468 U.S. 705 (1984) (approving *Knotts*, though finding that beeper monitoring in a private residence violates the Fourth Amendment). Courts are split over whether *Knotts* and *Karo* justify application of the good-faith exception to pre-*Jones* GPS tracking. For courts holding that *Davis* applies, see *United States v. Katzin*, 769 F.3d 163 (3d Cir. 2014) (en banc); *United States v. Stephens*, 764 F.3d 327 (4th Cir. 2014); *United States v. Brown*, 744 F.3d 474 (7th Cir. 2014); *United States v. Aguiar*, 737 F.3d 251 (2d Cir. 2013); *United States v. Sparks*, 711 F.3d 58 (1st Cir. 2013). For courts holding the opposite, see *State v. Adams*, 763 S.E.2d 341 (S.C. 2014); *State v. Hohn*, 321 P.3d 799 (Kan. App. 2014); *State v. Mitchell*, 323 P.3d 69 (Ariz. App. 2014); *People v. LeFlore*, 996 N.E.2d 768 (Ill. App. 2013).

2. **Cell phone and computer data:** Similarly, courts are beginning to grapple with whether cell phone searches conducted before *Riley* are covered by the good-faith exception in light of *United States v. Robinson*, 414 U.S. 218 (1973), which established the broad search incident to arrest exception for physical objects. *Compare United States v. Caldwell*, 2015 WL 179583 (E.D. Tenn. Jan. 14, 2015) (*Robinson* and progeny, "in combination with the decisions of most courts to have addressed the issue of a cell phone search incident to arrest at that time . . . render the actions of Officer Patterson objectively reasonable"); *People v. Gonzales*, 2015 WL 1543511 (Cal. Ct. App. Jan. 14, 2015) (good-faith reliance on *Robinson* justifies applying *Davis* to a cell phone search conducted before binding state precedent was decided), *with United States v. Garcia*, 2014 WL 4543163, at *6 (N.D. Cal. Sept. 12, 2014) ("The purposes of, and expectations surrounding, a cigarette pack and a cell phone are so different that it cannot reasonably be said that a case permitting the search of one object 'specifically authorized' the search of the other, particularly given that cell phones were not even a glint in the eye of the courts in 1973.").
3. **Cell site location information:** Courts analyzing whether *Davis* applies to police access to cell site data might rely on *Smith v. Maryland*, which held that the installation of a pen register was not a search because callers voluntarily exposed the numbers they dialed to the third-party telephone company, 442 U.S. 742 (1979). *See United States v. Davis*, 2015 WL 2058977 (11th Cir. May 5, 2015); *People v. Moorer*, 959 N.Y.S.2d 868 (N.Y. Co. Ct. 2013) (reviewing *Karo*, *Knotts*, *Smith*, and *Jones* to determine that "the unsettled state of federal decisional law in this area" made pinging defendant's cell phone to obtain its location reasonable under *Davis*). More often, where officers acted in accordance with the Stored Communications Act, courts do not address *Davis* but instead apply the good-faith exception under *Illinois v. Krull*, which held that the exclusionary rule does not apply when officers obtain evidence in "objectively reasonable reliance on statute," 480 U.S. 340 (1987). *See, e.g.*, *United States v. McCullough*, 523 Fed. Appx. 82

(2d Cir. 2013); *United States v. Epstein*, 2015 WL 1646838 (D.N.J. Apr. 14, 2015); *United States v. Dorsey*, (C.D. Cal. Feb. 23, 2015); *United States v. Giddins*, 2014 WL 4955472 (D. Md. 2014); *United States v. Ashburn*, 2014 WL 7403851 (E.D.N.Y. 2014); *United States v. Caraballo*, 963 F. Supp. 2d 341 (D. Vt. 2013); *United States v. Booker*, 2013 WL 2903562 (N.D. Ga. June 13, 2013); *United States v. Muniz*, 2013 WL 391161 (S.D. Tex. Jan. 29, 2013).

Crawford v. Washington: Reframing the Right to Confrontation

By Jeffrey L. Fisher[*]

[*] Professor at Stanford Law School and lead counsel for the petitioners in the U.S. Supreme Court in *Crawford v. Washington*, *Davis v. Washington*, *Melendez-Diaz v. Massachusetts*, *Bullcoming v. New Mexico*, and for the respondent in *Ohio v. Clark*. This outline incorporates post-*Crawford* decisions through November 11, 2015. In areas generating controversy, I have tried to include all relevant published decisions from federal courts and state courts of last resort, as well as state intermediate court decisions insofar as I am aware of them. In other areas, I often provide only a few representative cases.

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I. OVERVIEW AND THE GENERAL RULE

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 sufficiently 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 are testimonial. It then addresses various scenarios in which testimonial statements might be admissible, notwithstanding *Crawford*'s general exclusionary rule.

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 v. Massachusettes,* 557 U.S. 305 (2009) (quoting *Crawford,* 541 U.S. at 52).

b. "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,* 557 U.S. at 310 (Thomas, J., concurring).

c. "To rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to a later criminal prosecution." *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6 (2011) (plurality) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)); *see also Michigan v. Bryant*, 562 U.S. 344 (2011) ("[T]he touchstone of the testimonial inquiry . . . is whether the 'primary purpose' of the interrogation" was to enable the police to resolve an ongoing emergency or to establish past events potentially relevant to a later criminal prosecution.").

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,* 547 U.S. at 827.

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.").

f. "[T]he most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011).

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. "Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach." But "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Ohio v. Clark*, 135 S. Ct. 2173, 2181-82 (2015).

c. "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,* 547 U.S. at 822 n.1; *see also Melendez-Diaz,* 557 U.S. at 316 ("a person who volunteers his testimony" is not "any less a 'witness against' the defendant" than one who responds to interrogation").

d. "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,* 547 U.S. at 828. 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,* 557 U.S. at 310(certificates that are "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination'" are testimonial).

e. "Formality" is a "factor" in the testimonial calculus. "[F]ormality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Bryant*, 562 U.S. at 366. But "the absence of an oath is not dispositive in determining if a statement is testimonial." *Bullcoming,* 131 S. Ct. at 2717.

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,* 557 U.S. at 313; *see also United States v. Duron-Caldera*, 737 F.3d 988 (5th Cir. 2013) (confirming that this remains the law despite suggestions to the contrary in four-Justice plurality opinion in *Williams*).

g. A declarant need not have "observe[d] the crime" or "any action related to it" to make testimonial statements. A record of contemporaneous observations of the crime scene or other evidence, made after the fact, is testimonial. *Melendez-Diaz,* 557 U.S. at 316.

h. A declarant need not apply "interpretation" or "independent judgment" to external observations in order to make testimonial statements. *Bullcoming*, 131 S. Ct. at 2717.

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

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 Bullcoming*, 131 S. Ct. at 2715 ("This Court settled in *Crawford* that the obvious reliability of a testimonial statement does not dispense with the Confrontation Clause."). 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." 557 U.S. at 324. The Court further noted that 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 analysts always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa." *Id.* at 319 n.6.

To be sure, the Court later noted in *Bryant* that in determining whether a statement was procured "with a primary purpose of creating an out-of-court substitute for trial testimony, . . . standard rules of hearsay, designed to identify some statements as reliable, will be relevant." 562 U.S. at 358-59. The Court further stated that "[i]mplicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination. This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition . . . are considered to be reliable because the declarant, in the excitement, presumably cannot form a falsehood. . . . An ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency." *Id.* at 361-62 (internal citations omitted).

It is difficult to know exactly what to make of this passage. But it should not be overread. The Court acknowledges earlier in the opinion that *Crawford* "overrule[d]" the *Roberts* framework, and nothing in the passage mentions – much less purports to qualify or back away from – the statements in *Crawford* and *Melendez-Diaz* that render the rules of evidence and reliability irrelevant to the testimonial inquiry. So if the passage does not reintroduce reliability into confrontation law, then what does it do? It seems to mean, as the Court explains in a footnote attached to the end of it and as Justice Sotomayor added in her concurrence in *Bullcoming*, that when a statement satisfies a hearsay exception, it is likely to be nontestimonial because many hearsay exceptions "rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution." *Bryant,* 562 U.S. at 362 n.9; *see also Bullcoming*, 131 S. Ct. at 2720 (Sotomayor, J., concurring in part) ("The hearsay rule's recognition of the certificates' evidentiary purpose thus confirmed our decision that the certificates were testimonial under the primary purpose analysis required by the Confrontation Clause."). That is, some of the same things that hearsay law takes to indicate reliability also can indicate that a statement is nontestimonial. But there is no *causal* connection between the two – merely an overlap. The fact that a statement is reliable does not make it nontestimonial, for "[t]he rules of evidence, not the Confrontation Clause, are designed primarily to police reliability." *Bullcoming*, 131 S. Ct. at 2720 n.1 (Sotomayor, J., concurring in part).

B. Applications to Specific Kinds of Statements

The Court in *Crawford* 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 . . . ." *Crawford*, 541 U.S. at 68. The prior testimony need not have occurred in the same case and may be from a civil case or a foreign case. *See Simmons v. State,* 234 S.W.3d 321 (Ark. App. 2006) (deposition taken in anticipation of civil trial testimonial); *United States v. Causevic*, 636 F.3d 998 (8th Cir. 2011) (foreign case).

2. **Allocutions, guilty pleas, and other formal statements admitting guilt:** These are testimonial. *See Crawford,* 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); *State v. Tollardo*, 275 P.3d 110 (N.M. 2012) (guilty plea); *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.** *Crawford,* 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." *Id.* 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 in the vicinity of the 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 (2d 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,* 554 U.S. 353, 358 (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 as *sui generis*); *State v. Martin,* 695 N.W.2d 578 (Minn. 2005) (same); *Harkins v. State,* 143 P.3d 706 (Nev. 2006) (same); *State v. Beauchamp*, 796 N.W.2d 780 (Wisc. 2011) (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) (photographic identification); *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*, 548 U.S. 924 (2006); *Benford v. State,* 2005 WL 240611 (Tex. App. Feb. 3, 2005) (unpublished) (photographic lineup); *People v. Nesbitt*, 910 N.Y.S.2d 471 (2010); *Mungo v. Duncan,* 393 F.3d 327, 336 n.9 (2d 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*." 547 U.S. at 822 (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 822 n.1. In the *Davis* opinion, the Court ruled that statements a woman made in *Hammon v. Indiana* in response to responding officers' "initial inquiries" that "recounted . . . how potentially criminal past events began and progressed" were testimonial. *Id.* at 838. Several years later, the Court held in *Michigan v. Bryant*, 562 U.S. 344 (2011), that statements that police obtained from a shooting victim a few minutes after the shooting, in which he identified his assailant were nontestimonial. The Court followed a two-step process in reaching this conclusion, asking (a) whether an ongoing emergency existed and (b) if so, whether the primary purpose of the statements was to resolve the emergency. *See id.* at 1165 (explaining the two steps). Each step involves multi-factor inquiries that are outlined below.

   a. **"Ongoing emergency."** The *Bryant* Court instructed that the question whether an "ongoing emergency" exists is a "highly context-dependent inquiry." 562 U.S.363. Factors that the Court specifically referenced were:

i. **Whether any threat is "neutralized" or "continuing."** *Id.* at 363. In *Hammon*, the threat was neutralized, because it "involved domestic violence" and the police were in control of the suspect. In *Bryant*, there was a continuing threat because it involved "an armed shooter, whose motive for and location after the shooting, were unknown." *Id.* at 346, 374; *People v. Burney*, 963 N.E.2d 430 (Ill. App. 2011).

ii. **Whether a "threat[] to public safety" exists.** In *Hammon*, no such threat existed because it involved a "purely private dispute." *Id.* at 372. *Bryant*, in contrast, involved a broader "zone of potential victims," "encompass[ing] a threat potentially to the police and the public." *Id.* at 363-64, 373. Yet this factor does not "suggest[] that an emergency is ongoing in every place or even just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose." *Id.* at 365.

iii. **The "type of weapon employed."** *Id.* at 364. "Hershel Hammon was armed only with his fists when he attacked his wife, so removing Amy to a separate room was sufficient to end the emergency." *Id.* at 364. A gun is different.

iv. **The "medical condition" of the victim.** *Id.* at 364-65.

b. **Primary purpose:** The *Bryant* Court explained that the primary purpose test is an "objective" test "requires a combined inquiry that accounts for both the declarant and the interrogator" (to the extent there is one). 562 U.S. at 367. Courts "should determine the 'primary purpose of the interrogation' by *objectively* evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." *Id.* at 370 (emphasis added). Several factors inform this inquiry. Among them:

i. **Whether the declarant is seriously injured:** "The medical condition of the victim is important to the primary purpose inquiry to the extent it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." *Id.* at 364-65; *see also Sanders v. State*, 77 So.3d 484 (Miss. 2012) (burn victim's statements to responding officers not testimonial).

ii. **The formality of the statements:** The degree of "[]formality in an encounter between a victim and the police" informs the primary purpose of an interrogation. *Id.* at 366, 377; *see also Bullcoming*, 131 S. Ct. at 2721 (Sotomayor, J., concurring in part) ("formality suggests that the statement is intended for use at trial"). In *Hammon*, the interaction between the declarant and the officer was formal because the officers had "actively separated" her from the suspect and her statements "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." *Davis*, 547 U.S. at 830. By contrast, in *Bryant*, the circumstances were relatively informal because "the questioning . . . occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion." 562 U.S. at 366.

iii. **Level of police knowledge at the time statements are obtained:** In *Bryant*, the police "did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred." 562 U.S. at 356. By contrast, where officers already have a sense of what happened and believe that it was criminal, it is more likely that statements are being obtained and given primarily for prosecutorial use.

iv. **Whether officer was the first responder:** Officers who arrive and ask questions after others have already initially responded are more likely to be aimed at procuring evidence than quelling an emergency. *See, e.g., State v. Alers*, ___ A.3d ___, 2015 WL 2431796 (Vt. 2015).

9. **911 calls:** The same general test – coined in *Davis* and elucidated in *Bryant* – 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*, 547 U.S. at 822 (emphasis added). For representative applications of this test, see *Commonwealth v. Simon*, 456 Mass. 280 (Mass. 2010) (parts of call right after shooting nontestimonial but parts unnecessary to enable response testimonial); *Commonwealth v. Beatrice*, 951 N.E.2d 26 (Mass. 2011) (call reporting completed domestic disturbance testimonial because accused had no weapon and posed no threat to general public).

   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. *Compare Wilder v. Commonwealth*, 687 S.E.2d 542 (Va. App. 2010) (call reporting larceny in progress testimonial), *with United States v. Proctor,* 505 F.3d 366 (5th Cir. 2007) (call reporting felon in possession not testimonial); *United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012) (same regarding ongoing drug dealing in the street); *Key v. State,* 657 S.E.2d 273 (Ga. App. 2008) (call reporting drunk driver not testimonial); *Langley v. State*, 28 A.3d 646 (Md. 2011) (call reporting just-completed murder/robbery not testimonial). But the same test should probably control: whether the caller's primary purpose is to enable the police to resolve an "ongoing emergency" or to report factual assertions for use in a criminal investigation or prosecution.

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. **Statements relating to domestic violence protection orders:** Accusations to police officers or courts in order to obtain such orders are testimonial, even if they pre-date the current litigation. *See Crawford v. Commonwealth*, 704 S.E.2d 107 (Va. 2011) (affidavit); *People v. Thompson,* 812 N.E.2d 516 (Ill. App. Ct. 2004) (oral accusations); *Miller v. State*, 717 S.E.2d 179 (Ga. 2011) (petition seeking protective order); *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). But courts have held that statements memorializing returns of service of such orders are not testimonial. *Gaines v. State*, 999 N.E.2d 999 (Ind. App. 2013) (collecting cases).

12. **Child hearsay statements describing abuse:** "Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system." *Ohio v. Clark*, 135 S. Ct. 2173, 2182 (2015) (involving three-year-old child).[1]

    a. **To law enforcement officers –** Every court to address the issue has held that child 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., In re N.C.*, 105 A.3d 1199 (Penn. 2014); *State v. McCoy*, 459 S.W.3d 1(Tenn. 2014); *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).

    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. Henderson*, 160 P.3d 776 (Kan. 2007); *State v. Mack,* 101 P.3d 349 (Or. 2004); *State v. Norby,* 180 P.3d 752 (Or. App. 2008); *In re S.P.,* 215 P.3d 847 (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.2d 896 (Fla. 2008); *T.P. v. State,* 911 So.2d 1117 (Ala. Crim. App. 2004); *D.G. v. State,* 76 So.3d 852 (Ala. Crim. App. 2011) (same); *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); *Styron v. State*, 34 So.2d 724 (Ala. Crim. App. 2009); *but see State v. Arnold*, 933 N.E.2d 775 (Ohio 2010) (holding that some statements to social worker after the police were involved were testimonial but others were nontestimonial because they were made for purposes of medical treatment). But a significant minority treats such statements as nontestimonial when the police are not yet directly involved. *See United States v. De Leon*, 678 F.3d 317 (4th Cir. 2012); *Commonwealth v. Allshouse*, 36 A.3d 163 (Pa. 2012); *State v.*

[1] When out-of-court statements by children are nontestimonial, that does not necessarily mean the prosecution may introduce such statements without putting the child on the stand or providing any other opportunity for the defense to question the child. In that circumstance, there is a substantial argument that the Due Process Clause requires the prosecution to provide the defense some sort of opportunity to question the child, if only through a child interview specialist in a therapeutic setting. *See* Richard D. Friedman & Stephen J. Ceci, *The Child as Quasi-Witness*, 82 U. Chi. L. Rev. 89 (2015).

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).

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 McCarley v. Kelly*, 801 F.3d 652 (6th Cir. 2015) (three-year old's statement to child psychologist); *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), *after reconsideration*, 159 P.3d 329 (Or. App. 2007). *But see Madden v. State*, 97 So.3d 1217 (Miss. App. 2011) (statements nontestimonial even though police referred child to private organization after forensic interview). 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,* 213 P.3d 476 (Nev. 2009) (same).

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

f. To school employees – A statement elicited by preschool teachers "to determine who might be abusing the child . . . to protect the victim from further attacks" are not testimonial because their primary purpose is responding to an ongoing emergency. *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015). Before *Clark*, one court held that a report of abuse to a social worker at a school was testimonial. *People v. Stechly,* 870 N.E.2d 333 (Ill. 2007). Another held that a statement given to a school security officer following a fight was testimonial. *In the Matter of M.H.V-P.*, 341 S.W.3d 553 (Tex. App. 2011).

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); *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 expressly for use in criminal prosecutions. 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.B.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. Vega*, 236 P.3d 632 (Nev. 2010) (statement to nurse at child advocacy center); *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. Bennington*, 264 P.3d 461 (Kan. 2011). *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.

        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. *Medina v. State,* 143 P.3d 471 (Nev. 2006); *Commonwealth v. Jones*, 37 N.E.3d 589 (Mass. 2015); *Hatley v. State,* 722 S.E.2d 67 (Ga. 2012); *James v. Commonwealth,* 360 S.W.3d 189 (Ky. 2012); *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007); *People v. Vargas*, 178 Cal. App. 4th 647 (2009); *Naquin v. State*, 156 So.3d 984 (Ala. Crim. App. 2012); *Herrera v. State*, 424 S.W.3d 52 (Tex. App. 2014). *But see State v. Miller,* 264 P.3d 461 (Kan. 2011) (statements to SANE nurse regarding medical condition not testimonial;

State did not introduce statements identifying perpetrator); *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). 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,* 143 P.3d at 473; *see generally United States v. Gardinier,* 65 M.J. 60 (C.A.A.F. 2007); Sexual Assault Nurse Examiner Programs, http://www.ncjrs.gov/App/Publications/ alphaList.aspx?alpha=S (describing protocols for SANE's).

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,*770 N.W.2d 316 (Iowa 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.,* 209 P.3d 845 (Or. App. 2009); *People v. Duhs*, 947 N.E.2d 617 (N.Y. App. 2011). *But see Duhs v. Capra*, 83 F. Supp. 3d 433(E.D.N.Y. 2015) (Weinstein, J.) (child statement to treating physician testimonial); *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. *Crawford*, 541 U.S. at 51. Indeed, most statements to friends, family, or acquaintances in the course of everyday affairs are not 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). But the Court has reserved the question whether statements to "private citizens" can *ever* be testimonial. *Bryant*, 562 U.S. at 357 n.3. And it seems clear that at least some such statements should be – for instance, a person's statement to his brother that he asks (or obviously expects) the brother to relay to the police. Indeed, *Davis* discussed

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"); *State v. Alvarez-Abrego*, 233 P.3d 889 (Wash. App. 2010). Yet some courts have held that accusatory statements made to friends with at least a reasonable expectation of their being passed onto law enforcement were nontestimonial, even though the statements were not "casual" in any sense. *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); *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); *United States v. Lopez-Medina*, 620 F.3d 826 (10th Cir. 2010); *Langham v. State*, 305 S.W.3d 568 (Tex. Crim. 2010). Statements by an undercover informant to defendant or other nongovernmental personnel, during a conversation the informant knows the government is recording, is testimonial but implicates the Confrontation Clause only if used to prove the truth of the matter it asserts; if the statements are repeated for the jury only to put others' statements in context, then the right to confrontation is not impinged. *United States v. Hendricks,* 395 F.3d 173 (3d 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) (unpublished).

17. **Statements *to* confidential informants or undercover officers:** A statement to such a person in the course of allegedly criminal activity is at least generally not testimonial. *See Crawford,* 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 (2d 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. *See, e.g., United States v. Smalls,* 605 F.3d 765 (10th Cir. 2010) (Kelly, J., dissenting) (arguing that statements made to undercover informant placed in jail cell to elicit confession through "trickery" should have been considered testimonial). 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). The same is true with respect to statements made to "gang experts," regardless whether they are made before any particular investigation. *United States v. Cazares*, 788 F.3d 956(9th Cir. 2015); *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008).

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); *Jensen v. Clements*, 800 F.3d 892(7th Cir. 2015) (same); *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); *State v. Hull*, 788 N.W.2d 81 (Minn. 2010) (similar statement to a friend testimonial); *but see 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 drug lab reports, ballistics reports, and other certified and otherwise forensic reports made for the primary purpose of producing evidence for litigation are testimonial when they are (i) formalized *or* (ii) they "accus[e] a targeted individual" of crime. *See Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009) (drug lab report and forensic reports generally); *Williams v. Illinois*, 132 S. Ct. 2221, 2260 (2012) (Thomas, J., concurring in the judgment) (insisting on formality); *id.* at 2243 (plurality opinion of Alito, J.) (insisting on targeted individual); *see also Young v. United States*, 63 A.3d 1033 (D.C. 2013) (synthesizing Supreme Court precedent to derive this test); *State v. Norton*, 117 A.3d 1055, 1072-73 (Md. 2015) (same). Uncertified and otherwise informal forensic reports that do not accuse any targeted individual are also testimonial if crafted "to evade the formalized process." *Williams*, 132 S. Ct. at 2260 n.5 (Thomas, J., concurring in the judgment) (casting deciding vote to hold that informal DNA profile, used by another analyst to declare a DNA match, was not testimonial).[2] Applying this rule, the California Supreme Court has held that information on a blood alcohol report tying the sample to the defendant is not sufficiently formal to be testimonial, though that seems a highly questionable holding since the BAC report that

[2] Justice Thomas' opinion in *Williams* establishes the law because, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks and citation omitted). Justice Thomas' opinion is narrower than the four-Justice plurality's because the plurality would have held that the forensic report at issue was properly transmitted to the jury even if the report had been testimonial, whereas Justice Thomas concluded that the report was properly admitted only because it was nontestimonial.

the Supreme Court deemed testimonial in *Bullcoming* contained the same kind of information. *People v. Lopez*, 286 F.3d 469 (Cal. 2012).

21. **Autopsy reports**. It seems clear that the rules governing forensic reports dictate that autopsies concluding that a homicide occured are testimonial. *See State v. Navarette*, 294 P.3d 435 (N.M. 2013) (testimonial); *Miller v. State*, 313 P.3d 934 (Ok. Crim. 2013); *State v. Lui*, 315 P.3d 493 (Wash. 2014); *State v. Kennedy*, 735 S.E.2d 905 (W. Va. 2012); *Commonwealth v. Carr*, 986 N.E.2d 380 (Mass. 2013); *Lee v. State*, 418 S.W.3d 892 (Tex. App. 2013); *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011) (same prior to *Williams*); *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012) (same). But a few courts have held that autopsy reports, or portions thereof, are sometimes not testimonial. *See People v. Leach*, 980 N.W.2d 570 (Ill. 2012) (whole report nontestimonial); *State v. Maxwell*, 9 N.E.3d 930 (Ohio 2014) (same); *State v. Medina*, 306 P.3d 48 (Ariz. 2014) (same); *Malaska v.* State, 88 A.3d 805 (Md. App. 2014); *People v. Dungo*, 286 P.3d 442 (Cal. 2012) (objective statements in report not testimonial).

22. **Machine-generated printouts:** The Supreme Court has not decided, *see Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring in part), and lower court judges have split over, whether or to what extent machine-generated print-outs are testimonial. Insofar as such printouts are, in essence, the machine talking, they are nontestimonial because machines cannot be witnesses. But insofar as they (or portions thereof, such as a defendant's name or a sample number on a page with a graph) are the product of human manipulation and intervention, they are testimonial. For a discussion and debate of this issue in the context of forensic print-outs, compare the majority and dissenting opinions in *United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007).

23. **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, e.g., Commonwealth v. Walther,* 189 S.W.3d 570 (Ky. 2006) (not testimonial because not created for use in any particular investigation). *Melendez-Diaz* states that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial statements." 557 U.S. at 311 n.1; *see also Matthies v. State,* 85 S.3d 838 (Miss. 2012) (holding 5-4 that calibration records are nontestimonial); *State v. Ducasse*, 8 A.3d 1252 (Me. 2010) (specification on blood collection tubes that their material will not disturb integrity of samples nontestimonial).

24. **Medical records**: Customary medical reports "created for treatment purposes" are nontestimonial. *Melendez-Diaz,* 557 U.S. at 312 n.2 (citing two cases involving blood tests performed for the purpose of administering medical treatment); *see also 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).

25. **Law enforcement records**

a. **Police reports:** These are testimonial because they are created for an investigatory/prosecutorial purpose. *State v. Kuropchak*, ___ A.3d ___, 2015 WL 192144 (N.J. 2015); *State v. Lahai*, 18 A.3d 630 (Conn. App. 2011); *see also Melendez-Diaz*, 557 U.S. at 322 (assuming same).

b. **Bench warrants:** Courts hold that these are nontestimonial because they are issued for law enforcement purposes unconnected to trial. *State v. Carter*, 241 P.3d 1205 (Or. App. 2010); *Jackson v. United States*, 924 A.2d 1016 (D.C. 2007).

c. **Immigration-related records.** Reports of deportation are nontestimonial. *See, e.g., 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). But one court has held that an affidavit taken during an immigration investigation into potential document fraud is testimonial. *United States v. Duron-Caldera*, 737 F.3d 988 (5th Cir. 2013).

d. **Booking records:** Booking cards, fingerprint cards, and the like are not testimonial because they are made for the primary purpose of identification and administrative processing, not prosecution. *United States v. Williams*, 720 F.3d 674, (8th Cir. 2013); *Fowler v. State*, 929 N.E.2d 875 (Ind. App. 2010); *Hamilton v. Lee*, 94 F.Supp.3d 460 (E.D.N.Y. 2015) (Weinstein, J.).

26. **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); *but see United States v. Morrow*, ___ F. Supp. 3d ___, 2015 WL 1955462 (D.D.C. 2015) (holding opposite).

b. **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,* 446 F. Supp. 2d 1115 (C.D. Cal. 2006) (same if the incident is sufficiently serious to trigger independent punishment), *with State v. Raines,* 653 S.E.2d 126 (N.C. 2007) (nontestimonial). One court has held that public school disciplinary records are testimonial. *In re D.K.*, 924 N.E.2d 270 (Ohio App. 2009).

c. **Pseudoephedrine purchase logs:** A divided Fifth Circuit has held that logs that federal law requires pharmacies to keep to facilitate any investigation of drug purchases law enforcement may later initiate are nontestimonial. *United States v. Towns*, 718 F.3d 404 (5th Cir. 2013); *accord United States v. Mashek*, 606 F.3d 922 (8th Cir. 2010).

d. **Reports generated to aid law enforcement agencies** – If a business generates reports designed to detect criminal activity and turns them over to trigger criminal investigations, the reports are testimonial. *See United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012) (reports from internet service provider concerning suspected child pornography activity testimonial). Similarly, if an individual fills in a form upon being told notified of an

ongoing criminal investigation, the report is testimonial. *United States v. Esparza*, 791 F.3d 1067 (9th Cir. 2015).

27. **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,* 557 U.S. at 321-322. 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,* 557 U.S. at 323; *see also Tabaka v. District of Columbia,* 976 A.2d 173 (D.C. 2009) (nonexistence of driving permit); *United States v. Martinez-Rios*, 595 F.3d 581 (5th Cir. 2010) (nonexistence of record permitting reentry into United States); *United States v. Orozco-Acosta*, 607 F.3d 1156 (9th Cir. 2010) (same); *United States v. Norwood*, 595 F.3d 1025 (9th Cir. 2010) (nonexistence of employment records); *Washington v. State*, 18 So.3d 1221 (Fla. App. 2009) (nonexistence of contracting license); *State v. Jasper*, 271 P.3d 876 (Wash. 2012) (nonexistence of reinstatement of driving privileges or registration of business). Federal Rule of Evidence 803(10)(B) now implicitly acknowledges that such reports are testimonial, providing a notice-and-demand procedure for introducing them.

    b. **Certifications/affidavits describing or summarizing records:** A clerk's certification "interpret[ing]," or describing the "substance or effect" of a public record is testimonial. *Melendez-Diaz,* 557 U.S. at 322; *see also United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011) (letter from court clerk summarizing record of conviction); *Commonwealth v. Parenteau*, 948 N.E.2d 883 (Mass. 2011) (certificate attesting to fact that a notice of revocation of driving privileges had been mailed); *People v. Pacer,* 847 N.E.2d 1149 (N.Y. 2006) (affidavit of DMV records manager concerning defendant's driving record); *State v. Jasper*, 271 P.3d 876 (Wash. 2012); *State v. Alvarez-Amador*, 232 P.3d 989 (Or. App. 2010) (certification regarding social security number); *State v. Darrisaw*, 886 N.Y.S. 2d 315 (2009) (affidavit of regularity / proof of mailing of suspension of driver's license); *United States v. Bustamante,* 687 F.3d 1190 (9th Cir. 2012) (affidavit testifying to contents of birth records testimonial, even though purported to be merely a "copy"); *United States v. Talar*, 74 M.J. 821 (Army Crim. Ct. App. 2015) (information on records custodian's affidavit that went beyond mere certification of correctness). *But see State v. Woodbury*, 13 A.3d 1204 (Me. 2011) & *State v. Murphy*, 991 A.2d 35 (Me. 2010) (treating this passage of *Melendez-Diaz* as dicta and holding that certificates summarizing the substance of state records are not 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,* 557 U.S. at 322; *see also United States v. Anekwu*, 695 F.3d 967 (9th Cir. 2012) (same with respect to foreign public records). It is unclear whether this rule

applies to authentications of *private* business records as well, for there is no similar historical pedigree for the rule in that context. But courts thus far have held that the rule applies equally to certifications regarding business records. *See United States v. Yeley-Davis*, 632 F.3d 673 (10th Cir. 2011); *United States v. Jackson*, 636 F.3d 687 (5th Cir. 2011); *United States v. Ellis*, 460 F.3d 920, 927 (7th Cir. 2006); *United States v. Weiland*, 420 F.3d 1062 (9th Cir. 2005).

d. Certifications/affidavits of mailing: Certifications of mailing are nontestimonial when created contemporaneously with the mailing for administrative reasons. *People v. Nunley*, 821 N.W.2d 642 (Mich. 2012). But such certifications are testimonial when created after criminal charges have been filed in order to help the prosecution prove its case. *State v. Kennedy*, 846 N.W.2d 517 (Iowa 2014); *Commonwealth v. Parenteau*, 948 N.E.2d 883 (Mass. 2011).

28. 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,* 557 U.S. at 311 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,* 557 U.S. at 326 n.11; *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011) (same regarding chain-of-custody document regarding urinalysis); *State v. Herauf*, 819 N.W.2d 546 (N.D. 2012) (same regarding blood draw); *State v. Sorensen*, 814 N.W.2d 848 (Neb. 2012) (same). *But see United States v. Johnson*, 688 F.3d 494 (8th Cir. 2012) (misreading footnote 1 of *Melendez-Diaz* to apply only when defendant seeks to challenge chain-of-custody instead of merely putting prosecution to its proof).

29. Interpreter's translations of testimonial statements: Courts are divided over whether real-time translations of testimonial statements from an interpreter, such as during a police interview, are themselves testimonial. *Compare United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013) (testimonial), *with United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012) (divided opinion; nontestimonial); *United States v. Shibin*, 722 F.2d 233 (4th Cir. 2013) (nontestimonial).

C. Nontestimonial Statements

Davis holds that the Confrontation Clause does not apply 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. *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

The Confrontation Clause allows the prosecution to introduce testimonial evidence only if one of the following circumstances is present:

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 (or really does 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); *California v. Green,* 399 U.S. 149 (1970) (same with respect to witness claimed memory loss at trial); *see also State v. Cameron M.,* 55 A.3d 272 (Conn. 2012) (same in context of child witness); *Cooley v. State,* 867 A.2d 1065 (Md. 2005) (testimonial statement admissible where witness recanted on the stand). At least one state, however, has rejected *Owens* on state constitutional law grounds and held that a adequate opportunity to cross does not exist when the witness cannot remember giving the testimonial statement or the events in question. *Goforth v. State*, 70 So.3d 174 (Miss. 2011).

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. *People v. Learn*, 899 N.E.2d 1076 (Ill. App. 2009). 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,* 557 U.S. at 324-325 ("[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. Toohey*, 816 N.W.2d 120 (S.D. 2012); *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 who takes the stand but refuses to answer any substantive questions, 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). But if the defendant asks for the witness to be held in contempt and the witness still refuses to answer, then the defendant lacks on adequate opportunity for cross. *State v. Johnson-Howell,* 881 P.2d 1288, 1300 (Kan. 1994). 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); *see also Laredo v. State*, 194 S.W.3d 637 (Tex. App. 2006) (same outcome under state law when witness refused to answer questions about incident).

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. *See Melendez-Diaz*, 557 U.S. at 324 ("[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defense to bring those adverse witnesses into court."). Accordingly, several courts have held that 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 several others – even some after *Melendez-Diaz*, which was decided in 2009 – have held that the defendant's ability to recall the witness for a new round of cross-examination satisfies the Confrontation Clause. *State v. Tompkins*, 859 N.W.2d 631 (Iowa 2015); *State v. Anderson*, 776 S.E.2d 76 (S.C. 2015); *State v. Stokes,* 673 S.E.2d 434 (S.C. 2009); *State v. Nelis,* 733 N.W.2d 619 (Wisc. 2007); *People v. Cowan*, 236 P.3d 1074 (Cal. 2010); *State v. Hoch*, 18 A.3d 562 (Vt. 2011); *McKnight v. State*, 656 S.E.2d 830 (Ga. 2008); *State v. Davis*, 951 A.2d 31 (Conn. App. 2008); *State v. Richards*, 47 So.3d 598 (La. App. 2010); *State v. Pollock*, 284 P.3d 1222 (Or. App. 2012) (same when witness "adopted" out-of-court statements while on stand but prosecution did not introduce them until witness was done testifying). *See generally* Christopher B. Mueller, *Cross Examination Earlier or Later: When is it Enough to Satisfy* Crawford*,* 19 Regent L. Rev. 319 (2006-07).

7. **Witness testifies based on another person's testimonial statements.** The prosecution cannot introduce one person's testimonial statements through the in-court testimony of

another. It does not matter whether the in-court witness is arguably an effective substitute for the out-of-court witness. "The [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716 (2011). Thus, when the State in *Bullcoming* "elected to introduce Caylor's certification, Caylor became a witness Bullcoming had a right to confront." *Id.*[3] At the same time, the Confrontation Clause does not require the prosecution to produce someone involved in a forensic analysis or other event if the prosecution does not introduce that person's statements and the in-court witness testifies entirely based on his or her own personal observations and conclusions. *Smith v. State*, 28 So.3d 838 (Fla. 2009); *Commonwealth v. Barbosa*, 933 N.E. 2d 93 (Mass. 2010); *State v. Gomez*, 244 P.3d 1163 (Ariz. 2010); *State v. Ortiz-Zape*, 743 S.E.2d 156 (N.C. 2013). In between these two poles, "[t]he relevant question is whether the way the prosecutor solicited the [witness's in-court] testimony made the source and content of the [out of court testimonial statement] clear. . . . If the substance of the prohibited testimony is evident even though it was not introduced in its prohibited form," the Confrontation Clause is violated. *Ryan v. Miller*, 303 F.3d 231, 249-50 (2d Cir. 2002); *see also United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011) (same result even if testifying witness performed a contemporaneous review of the nontestifying analyst's report); *United States v. Garcia*, 752 F.3d 382 (4th Cir. 2014).

a. Police officer testimony. Courts have little difficulty applying this rule in the context of police officers testifying in a manner such that jury could have inferred the substance of a nontestifying witness's testimonial statements in a police interview. *State v. Swaney*, 787 N.W.2d 481 (Minn. 2010); *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011) (same); *Wheeler v. State*, 36 A.3d 310 (Del. 2012); *Hutchins v. Wainwright,* 715 F.2d 512, 516 (11th Cir. 1983); *Farve v. Henderson,* 464 F.2d 359 (5th Cir. 1972) (same). In fact, one federal court of appeals has found this rule sufficiently clearly established to warrant habeas relief. *Ocampo v. Vail*, 649 F.3d 1098 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 62 (2012).

b. Forensic testimony. This rule applies the same way in the context of forensic evidence. In *Williams v. Illinois*, 132 S. Ct. 2221 (2012), a forensic analyst gave DNA testimony based in part on someone else's lab report that was not introduced into evidence. Even though the testifying witness did not repeat the lab report verbatim, five Justices (Justice Thomas plus the four dissenting Justices) assumed that such in-court testimony implicates the Confrontation Clause if the lab report is testimonial. Nevertheless, litigation continues in this area, and courts have struggled over certain issues:

i. Testifying expert offers "independent opinion": The Confrontation Clause prohibits an in-court witness from transmitting the substance of a nontestifying witness's testimonial statements even if the expert also offers an "independent opinion" based on the other analyst's work. *United States v. Soto*, 720 F.3d 51 (1st Cir. 2013); *State v. McLeod*, 66 A.3d 1221 (N.H. 2013); *Commonwealth v. Reavis*,

[3] Some states have essentially the same rule as a matter of state evidence law. *See, e.g.*, *State v. Thompson*, 318 P.3d 1221 (Utah App. 2014).

992 N.E.2d 304 (Mass. 2013); *State v. Kennedy*, 735 S.E.2d 905 (W. Va. 2012); *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012); *contra State v. Brewington*, 743 S.E.2d 626 (N.C. 2013) (ignoring in-court witness's disclosure of testimonial statements because the witness offered "independent opinion"); *State v. Lui*, 315 P.3d 493 (Wash. 2014) (testifying expert may transmit any "non-inculpatory" statement from nontestifying analyst). Of course, a testifying expert may offer an "independent opinion" without transmitting any nontestifying witness's testimonial statements – provided the opinion comports with otherwise applicable evidence-law requirements.

ii. Testifying expert signed report: If the testifying expert was the only person who signed the report, he may testify to its contents even if he did not do the testing himself (though, of course, he may not transmit any testimonial statements from the nontestifying analyst). *See Marshall v. People*, 309 P.3d 943 (Colo. 2013); *Commonwealth v. Yohe*, 79 A.3d 520 (Pa. 2013); *State v. Lopez*, 45 A.3d 1 (R.I. 2012); *Ware v. State*, ___ So. 3d ___, 2014 WL 210106 (Ala. 2014); *United States v. Summers*, 666 F.3d 192 (4th Cir. 2011); *but see Martin v. State*, 60 A.3d 1100 (De. 2013) (holding the actual analyst must testify). But the prosecution may not introduce a testimonial lab report with multiple signatures though only one signatory without redacting the other author's signature. *Compare Burch v. State*, 401 S.W.3d 634 (Tex. Crim. 2013) (confrontation violation) *with Jenkins v. State*, 102 So.3d 1063 (Miss. 2012) (no violation).

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,* 557 U.S. at 313-14 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). Thus, any waiver must be clear, and an attorney cannot stipulate to the admission of an out-of-court testimonial statement over the defendant's objection. *United States v. Williams*, 632 F.3d 129 (4th Cir. 2011) (collecting cases); *State v. Tribble*, 67 A.3d 210 (Vt. 2012) (same).

1. **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. 557 U.S. at 326 & 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). *See also Cropper v. People*, 251 P.3d 434 (Colo. 2011) (providing lab report is sufficient notice when statute is clear on its face).

2. **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. Courts have held, however, 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. City of Reno v. Howard*, 318 P.3d 1063 (Nev. 2014); *State v. Cunningham,* 903 So.2d 1110 (La. 2005) & *State v. Simmons*, 78 So.2d 743 (La. 2012); *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. 557 U.S. 327 n.12. Two state supreme courts upheld such prerequisites prior to *Melendez-Diaz*. *See City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005); *State v. Crow,* 974 P.2d 100, 111 (Kan. 1999). But one of those courts has since reversed itself. *State v. Laturner,* 163 P.3d 367, 218 P.3d 23 (Kan. 2009).

3. **Requiring defendant to subpoena witness –** A defendant's ability to subpoena a witness "is no substitute for the right of confrontation." *Melendez-Diaz,* 557 U.S. at 327. "[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. But see Rodriguez v. State*, 245 P.3d 818 (Wyo. 2010) (no violation when defendant actually called witness whose testimonial statements the prosecution had offered to the stand). 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 supra* subsection 1.

C. Unavailablity and a Prior Opportunity for Cross-Examination – Testimonial statements are admissible if the witness is "unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 54.

1. **Unavailability:** "[T]he prosecution bears the burden of establishing" that a witness is unavailable. *Ohio v. Roberts,* 448 U.S. 56, 75 (1980). *Crawford* does not appear to change what constitutes unavailability under *Roberts* or any other pre-*Crawford* case, 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). Reasonableness depends, in part, on the importance of the witness; the more important, the more strenuous the government's efforts must be. *See, e.g., Brooks v. United States*, 39 A.3d 873 (D.C. 2012) (citing cases). 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). For example, it is not enough for the prosecution to issue a subpoena to a witness whom it knows may not respond; the prosecution must actively seek the witness's participation. *State v. Cox*, 779 N.W.2d 844 (Minn. 2010); *State v. Sharp*, 327 S.W.3d 704 (Tenn. Crim. App. 2010). 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)); *see also Rawlins v. People*, 61 V.I. 493 (2014) (witness not unavailable because extradition process was possible).

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 a 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); *People v. Roldan*, 205 Cal.App.4th 969 (2012). When the federal government deports a witness without a state knowing it or being able to stop it,

then the witness is unavailable. *See People v. Herrera*, 232 P.3d 710 (Cal. 2010) (state unaware of deportation); *Morgan v. Commonwealth,* 650 S.E.2d 541 (Va. App. 2007) (state tried to stop deportation).

v. **Witness is outside jurisdiction and would be inconvenient to return** – If the government knows where the witness is and it would be merely inconvenient to bring him back for trial, the witness is not unavailable. *See, e.g., State v. Tribble*, 67 A.3d 210 (Vt. 2012) (forensic analyst now working in New Zealand not unavailable).

vi. **Witness refuses to testify on pain of contempt** – One court has held that a witness who is threatened with, and accepts, being held in contempt of court for refusal to testify, is unavailable. *State v. Lehr*, 254 P.3d 379 (Ariz. 2011). But a witness is not unavailable if the court has not ordered him to testify. *State v. Kitt*, 823 N.W.2d 175 (Neb. 2012).

vii. **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). For a more recent case considering the issue at length, see *Commonwealth v. Housewright*, 25 N.E.3d 273 (Mass. 2015) ("[A] witness is unavailable if there is an unacceptable risk that the witness's health would be jeopardized by testifying in court on the scheduled date and either (1) a continuance would not reduce the risk to an acceptable level, or (2) a continuance would make the risk acceptable but would not serve the interests of justice.").

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); *State v. Jones*, 984 N.E.2d 948 (Ohio 2012) (same).

d. Defendant procures witness's absence – If the defendant causes a witness's unavailability, the witness is unavailable. But forfeiture may apply. 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,* 213 P.3d 476 (Nev. 2009) (adequate opportunity at preliminary hearing); *State v. Skakel,* 888 A.2d 985 (Conn. 2006) (adequate opportunity at probable cause hearing); *Commonwealth v. Hurley*, 455 Mass. 53 (Mass. 2009) (adequate opportunity at pretrial detention hearing); *State v. Douglas,* 800 P.3d 288, 293 (Or. 1990) (adequate opportunity at bond hearing); *United States v. Doyle,* 621 F. Supp. 2d 337 (W.D. Va. 2009) (same); *Petit v. State*, 92 So.3d 906 (Fla. App. 2012) (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)' *Petit v. State*, 92 So.3d 906 (Fla.App. 2012) (adequate opportunity at bond 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. Pre-indictment depositions. In light of *Crawford*, one district court has allowed the government to conduct a pre-indictment deposition in order to preserve testimony of a

gravely ill witness for trial. *In re Grand Jury Proceedings*, 697 F. Supp. 2d 262 (D.R.I. 2010).

d. 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).

e. 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 of 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); *People v. Torres*, 962 N.E.2d 919 (Ill. 2012). *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,* 206 P.3d 1020 (Ok. Crim. 2009); *State v. Estrella,* 893 A.2d 348, 358-60 (Conn. 2006).

f. 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 or from reporting a crime to law enforcement, 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 (2d 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. Banos*, 178 Cal. App. 4th 483 (2010) (dissuading witness from reporting crime). 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,* 554 U.S. 353 (2008); *see State v. Hale,* 691 N.W.2d 637, 653 (Wis. Jan. 2005) (Prosser, J., concurring) (collecting citations to various jurisdictions following preponderance standard); *United States v. Johnson*, 767 F.3d 814 (9th Cir. 2014). 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*, 554 U.S. 353 (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. Although intent must be shown, it is enough that preventing testimony was a "substantial" purpose; it need not be the person's *primary* purpose. *United States v. Jackson*, 706 F.3d 264 (4th Cir. 2013); *State v. Supanchick*, 263 P.3d 378 (Or. App. 2011). 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 376-77.

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. *Commonwealth v. Edwards,* 830 N.E.2d 158 (Mass. 2005); *see also Commonwealth v. Szerlong*, 933 N.E.2d 633 (Mass. 2010) (marrying witness in order to claim spousal privilege constituted forfeiture).

c. Coconspirator causes unavailability. When a coconspirator's misconduct causes a witness' unavailability, 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); *accord United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012).

d. Purpose of silencing witness in another case. Forfeiture occurs whenever the defendant purposefully silences a witness, even if it is meant to silence the witness in someone else's case. *See, e.g., Ward v. United States*, 55 A.3d 840 (D.C. 2012) (collecting cases).

e. Threats/promises unconnected to investigation or prosecution. Two courts have held that simply telling an alleged victim of abuse "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); *People v. Burns*, 832 N.W.2d 738 (Mich. 2013).

f. Defendant absconds. When a defendant absconds and a witness becomes unavailable in the meantime, courts have refused to find forfeiture, reasoning that the defendants' wrongdoing did not cause the witnesses' unavailability. *See State v. Alvarez-Lopez,* 98 P.3d 699 (N.M. 2004); *State v. Weaver,* 733 N.W.2d 793 (Minn. App. 2007).

g. Domestic violence. Various recurring forms of domestic violence may constitute forfeiture, insofar as they are intended to intimidate and threaten the victim from seeking help from law enforcement. *See People v. Smith*, 907 N.Y.S.2d 860 (2010) (multiple calls in violation of protection order).

h. Retaliation for previous testimony. One court has held that killing a person in retaliation for previous testimony does not constitute forfeiture because it does not relate to future testimony. *United States v. Henderson*, 626 F.3d 326 (6th Cir. 2010).

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); *State v. Hull*, 788 N.W.2d 81 (Minn. 2010) (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 (S.D. 2008) (same); *State v. Childress*, 2006 WL 3804418 (Tenn. Crim. App. Dec. 27, 2006) (unpublished) (same); *State v. Brooks*, 264 P.3d 40 (Haw. App. 2012). Two courts have taken things a step further, holding that the defendant opens the door by introducing evidence besides the testimonial statement itself that makes it "reasonably necessary" for the prosecution to introduce the statement to prevent the defendant from misleading the jury. *People v. Reid*, 971 A.2d 353 (N.Y. 2012); *United States v. Cruz-Diaz*, 550 F.3d 169 (1st Cir. 2008); *but see United States v. Holmes*, 620 F.3d 836 (8th Cir. 2010) (prosecution could introduce gist of a testimonial statement under these circumstances but finding violation because accusatory specifics were unnecessary). If the prosecution is allowed to introduce a testimonial statement because the defendant opened the door, one court has held that the trial court 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 Purportedly 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,* 564 F.3d 1280 (11th Cir. 2009) (same), *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 have generated 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. Adams*, 628 F.3d 407 (7th Cir. 2010) (same); *United States v. Hearn,* 500 F.3d 479 (6th Cir. 2007) (same); *State v. Johnson,* 771 N.W. 2d (S.D. 2009) (same); *United States v. Holmes*, 620 F.3d 836 (8th Cir. 2010) (same); *United States v. Cabrera-Rivera*, 583 F.3d 26 (1st Cir. 2009) (same); *Blount v. State*, 22 N.E.2d 559 (Ind. 2014) (same); *People v. Garcia*, 25 N.Y.3d 77 (N.Y. 2015); *but see State v. Johnson*, 95 A.3d 621 (Me. 2014) (allowing testimonial statements to be admitted to explain police investigation); *Green v. State*, 430 S.W.3d 729 (Ark. 2013) (same); *Szymanski v. State,* 166 P.3d 879 (Wyo. 2007) (allowing incriminating statements to be admitted for dubious nonhearsay purpose); *United States v. Ibarra-Diaz*, ___ F.3d ___, 2015 WL 6847828 (10th Cir. 2015) (same). 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); *State v. Broadway*, 753 So.2d 801 (La. 1999); *compare United States v. Banks*, 645 F.3d 971 (8th Cir. 2011) (allowing introduction of testimonial statements to explain investigation only because it was truly at issue); *United States v. Shores*, 700 F.3d 366 (8th Cir. 2012) (same). And even when the government does have a legitimate need to present such evidence, that need can often be accommodated by redacting the statement and/or 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 (3d Cir. 2006); *State v. McLaughlin*, 14 A.3d 720 (N.J. 2011); *State v. Braxter*, 568 A.2d 311, 315 (R.I. 1990); *State v. Adams,* 131 P.3d 556 (Kan. App. 2006) (prosecutors may not "elicit[] unnecessary and damning details to establish the motivation for police investigation"), *rev'd on other grounds,* 153 P.3d 512 (Kan. 2007).[4]

[4] Jurisdictions may also impose nonconstitutional limitations on the prosecution's ability to introduce testimonial statements for nonhearsay purposes. *See, e.g., United States v. Adams,* 722 F.3d 788 (6th Cir. 2013) (Rule 403 barred nonhearsay use of documents); *United States v. Evans,* 216 F.3d 80,

One federal court of appeals views these principles as so well settled that their violation warrants habeas relief on this basis. *Jones v. Basinger*, 685 F.3d 1030 (7th Cir. 2011).

2. **Statements recited by officers while conducting interrogations.** A few courts have held that testimonial statements embedded within questions during interrogations do not implicate the Confrontation Clause because they are introduced only to illustrate the "interrogation technique" of reciting others' statements to elicit responses from the person being interrogated. *See Allen v. State*, 296 S.E.3d 785 (Ga. 2015); *Swain v. State*, 459 S.W.3d 283 (Ark. 2015).

3. **Statements offered as support for the opinion of prosecutorial expert witnesses.** In *Williams v. Illinois*, 132 S. Ct. 2221 (2012), a majority of Justices on the Supreme Court – Justice Thomas, concurring in the judgment, and the four dissenters – held that a prosecution violates the Confrontation Clause when one of its expert witnesses discloses testimonial statements made by a nontestifying person (for example, in interviews or in forensic lab reports). It does not matter whether the testimonial statements that are introduced or repeated by the expert are purportedly not introduced for the truth of the matter asserted. As Justice Thomas put it, "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth." 132 S. Ct. at 2257.[5] For courts recognizing this holding, see *State v. McLeod*, 66 A.3d 1221 (N.H. 2013); *State v. Navarette*, 294 P.3d 495 (N.M. 2013); *Martin v. State*, 60 A.3d 1100 (De. 2013); *State v. Kennedy*, 735 S.E.2d 905 (W. Va. 2012); *Carrington v. Dist. of Columbia*, 77 A.3d 999 (1005); *but see State v. Mercier*, 87 P.3d 800 (Me. 2014).

   This rule applies not only to forensic evidence but also to gang expert testimony. *See United States v. Cazares*, 788 F.3d 956 (9th Cir. 2015); *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008). The California Court of Appeal, however, has struggled mightily with this issue. *See People v. Archuleta*, 170 Cal.Rptr.3d 361 (2014), *review granted and opinion superseded by, People v. Archuleta*, 326 P.3d 253 (Cal. 2014) (discussing

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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 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)).

[5] When five Justices agree on a proposition of law, it makes law that is binding on the lower courts even when some of those Justices were in dissent as to the Court's ultimate judgment. *See, e.g., Nat'l Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012) (noting that the five votes constituted a holding even though four of those votes were cast by dissenting Justices); *Alexander v. Choate,* 469 U.S. 287, 293 & nn. 8-9 (1985); *Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582 (1983). Accordingly, shortly after deciding *Williams*, the Court vacated and remanded a case in which an appellate court had held that the Confrontation Clause had not been violated by the introduction of testimonial statements to support an expert's opinion because those statements had not been introduced for their truth. *See Mercado v. California*, 133 S. Ct. 65 (2012) (No. 11-7979), *vacating and remanding People v. Mercado*, 2011 WL 2936791 (Cal. App. 2011).

disagreements among different districts on the issue); *People v. Perez*, 2015 WL 5772186 (Cal. Ct. App. Sept. 30, 2015) (unpublished opinion). And the California Supreme Court currently has the issue under review. *See People v. Sanchez*, 167 Cal. Rptr. 3d 9 (2014), *review granted* (May 14, 2014).

This is not to say that the Confrontation Clause prevents a prosecution expert witness from relying on nontestifying witnesses' testimonial statements in forming an opinion that the expert witness transmits to the jury. So long as the expert does not disclose any testimonial evidence on direct examination, *Crawford* does not stand in the say of such testimony. It then is up to the defense whether to challenge the expert's opinion (either its admissibility or persuasiveness) for lack of foundation or to bring out the testimonial basis evidence on cross-examination. *See, e.g., McLeod*, 66 A.3d at 1229.

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 remaining evidence. *Id.*; *accord Fields v. United States,* 952A.2d 859 (D.C. 2008); *Duvall v. United States,* 975A.2d 839 (D.C. 2009).