THE PROSECUTORS' RESOURCE

Crawford and its Progeny

ÆQUITAS

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BOOKMARKS[1]

Overview

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

There are many barriers to victims' participation in the prosecution of their abusers. When prosecuting a domestic violence case with a non-participating victim (one who either is not in court, or who is in court but is "unavailable" by reason of refusal to testify, exercise of a privilege, illness, or incompetency) the prosecutor must anticipate a challenge under ***Crawford v. Washington***[2] to the introduction of the victim's out-of-court statements. ***Crawford*** and its progeny are landmark cases that address the admissibility of out-of-court statements based upon an accused's Sixth Amendment right to confrontation. ***Crawford*** analysis applies with equal force to the State's introduction of out-of-court statements by non-victim witnesses, and it therefore has implications for the admissibility of forensic evidence, generally requiring the in-court testimony of the analyst who actually performed any examinations or testing procedures. [3]

It is important to remember that ***Crawford*** and its progeny address *only* the constitutional issue of whether admission of an out-of-court statement by a non-testifying witness violates the Sixth Amendment's Confrontation Clause. These cases do not control whether a statement is barred by rules against hearsay, or

[1] To navigate back to "Bookmarks" click on the section heading.
[2] Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).
[3] *See* Melendez–Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); Williams v. Illinois, 132 S.Ct. 2221 (2012).

whether the statement is admissible as an exception to the hearsay rule. Those evidence rules may vary from one jurisdiction to another, and must be satisfied regardless of how the statement is analyzed under ***Crawford***. In addition, nearly all state constitutions have their own confrontation clauses. Only Idaho and Nevada lack a confrontation guarantee in their state constitutions. More than half of the state confrontation clauses speak of the right to confront (or be confronted by) witnesses; others speak of the right to "meet the witnesses face to face." Regardless of the language used, the overwhelming majority of states have not interpreted their own state's constitutional guarantee of confrontation as providing any protections beyond that afforded by the Sixth Amendment. The courts of at least ten states have explicitly stated that they interpret their state confrontation guarantee as coextensive with the Sixth Amendment,[4] while the courts of at least two states have explicitly stated that the state constitutional confrontation clause will be independently interpreted, leaving open the possibility that the state constitution might bar some forms of evidence admissible under the Sixth Amendment.[5]

It should further be noted, at the outset, that ***where a witness actually testifies at trial and is subject to cross-examination, there is no confrontation problem***. The prosecutor only needs to satisfy the applicable hearsay rules for the witness's out-of-court statement to be admissible. Confrontation (and ***Crawford*** analysis) is only a concern where the State seeks to introduce the out-of-court statement of a witness who is not testifying and subject to cross-examination. If such a statement is considered to be "testimonial" (as that term is defined in ***Crawford*** and its progeny) the State must prove that the witness is "unavailable" (as that term is defined in the case law) and must show that the defendant had a prior opportunity to cross-examine the witness.

Because only the defendant in a criminal trial has a right of confrontation, ***Crawford*** has no applicability to evidence presented by the defense; out-of-court statements presented by a defendant are subject to ordinary hearsay analysis. ***Crawford*** also has no applicability where the State seeks to introduce the defendant's own out-of-court statement. Such statements are admissions by a party opponent and are neither hearsay nor subject to any right of confrontation. Nor does ***Crawford*** apply to statements that are not admitted for the truth of the matter asserted; again, such statements are neither hearsay nor subject to confrontation.[6] Although ***Crawford*** may be applicable during the penalty phase of a capital case,[7] it is not applicable to ordinary sentencing proceedings, nor in such proceedings as probation or parole violation hearings, nor civil proceedings such as hearings to terminate parental rights.

In this Resource, the focus will be on interpretations of the Sixth Amendment's Confrontation Clause under ***Crawford***. The prosecutor must be aware, however, of the simultaneous need to satisfy state evidence rules concerning hearsay.

Where the ***Crawford*** rule would otherwise bar admission of an out-of-court statement by an unavailable witness, there are some avenues of relief where state law permits: application of the doctrine of forfeiture by wrongdoing where it is the defendant's own actions that have caused the victim or other witness to be

[4] *See* Hinojos-Mendoza v. People, 169 P.3d 662, 665-66 (Colo. 2007); People v. Gilmore, 828 N.E.2d 293, 302-03 (Ill. App. Ct. 2005); State v. Schaer, 757 N.W.2d 630, 633 n.1 (Iowa 2008); State v. Blanchette, 134 P.3d 19, 29-30 (Kan. Ct. App. 2006); Marquardt v. State, 882 A.2d 900, 915 (Md. Ct. Spec. App. 2005); Com. v. DeOliveira, 849 N.E.2d 218, 221 n.1 (Mass. 2006); State v. Holliday, 745 N.W.2d 556, 566 (Minn. 2008); State v. Kent, 918 A.2d 626, 640-42 (N.J. Super. Ct. App. Div. 2007); Com. v. Mollett, 5 A.3d 291, 307-08 & n.5 (Pa. Super. Ct. 2010), *app. denied*, 14 A.3d 826 (2011); State v. Lewis, 235 S.W.3d 136, 144-45 (Tenn. 2007).

[5] *See* State v. Campbell, 705 P.2d 694, 703 (Or. 1985); State v. Pugh, 225 P.3d 892, 896-902 (Wash. 2009).

[6] Caution is advised where the evidence sought to be admitted is a test result relied upon as the basis for an expert's opinion under FED. R. EVID. 703 or its equivalent. Even if the rules of evidence consider such evidence not to be admitted for its truth, the Confrontation Clause may still prohibit its admission. *See* Williams v. Illinois, 132 S.Ct. 2221 (2012) (plurality).

[7] The United States Supreme Court has not addressed this issue, and the lower courts have come to different conclusions. *Compare* State v. Bell, 603 S.E.2d 93, 115-16 (N.C. 2004) (holding *Crawford* applicable during sentencing phase of capital trial) *with* People v. Banks, 934 N.E.2d 435, 459-463 (Ill. 2010) (holding *Crawford* not applicable during sentencing phase of capital trial).

unavailable, and "notice and demand" statutes requiring timely objection to admission of forensic reports. The strategy of seeking an early opportunity for cross-examination (such as a preliminary hearing) may preserve the victim's testimony in the event she later becomes unavailable to testify at trial.

This Resource will first place ***Crawford*** in its historical context, and explain how the rules governing application of the Confrontation Clause have changed as a result. Next, it will present a framework for analyzing admissibility of out-of-court statements under the ***Crawford*** rules, using a flowchart and detailed outline. Finally, it will provide a list of resources, sample questions, and strategy suggestions to assist the prosecutor in satisfying the confrontation requirements under the Sixth Amendment.

Historical Context and how *Crawford* Changed the Landscape

To properly understand ***Crawford*** and the cases that followed, it is important to place them in historical context. Prior to the ***Crawford*** decision in 2004, the standard for admissibility of out-of-court statements under the Confrontation Clause was the standard set forth in ***Ohio v. Roberts***.[8] In ***Roberts***, the Supreme Court held that the out-of-court statement of an absent witness could be admitted without offending the Sixth Amendment only where the witness was "unavailable" and

> only if [the out-of-court statement] bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[9]

Thus, under the ***Roberts*** rule, confrontation analysis depended mainly upon whether the statement fell within a "firmly rooted hearsay exception" or whether the State could show "particularized guarantees of trustworthiness." Under this scheme, admissibility of a statement without an opportunity to confront the witness depended upon whether the statement could be deemed sufficiently reliable.

In ***Crawford,*** the Supreme Court overruled ***Roberts*** and defined a new standard for the admissibility of the out-of-court statements of unavailable witnesses. ***Crawford*** was an attempted murder case in which the defendant's wife (who was not the victim, but rather was a witness to the stabbing) was questioned by the police shortly after the crime, inculpating her husband in that statement. The wife was unavailable for trial due to the spousal privilege, but the trial court permitted the State to introduce her prior statement, finding that it was sufficiently reliable to satisfy any confrontation concerns. The Washington Supreme Court upheld the trial court's decision on appeal.[10] The United States Supreme Court reversed, overruling the ***Roberts*** "reliability" standard and announcing a new test for the right to confrontation—a test that classified out-of-court statements as either "testimonial" and therefore subject to the right of confrontation, or "nontestimonial" and therefore not subject to confrontation. In the case of statements classed as testimonial, such evidence would be admissible only where the witness is unavailable for trial and where there has been a prior opportunity for confrontation.[11]

For several years after ***Crawford*** was decided, there continued to be some doubt in the lower courts as to whether the ***Roberts*** rule still controlled admissibility for statements classified as nontestimonial; however,

[8] Ohio v. Roberts, 448 U.S. 56 (1980).
[9] *Id*. at 66.
[10] State v. Crawford, 54 P.3d 656 (Wash. 2002).
[11] *Crawford*, 541 U.S. 36.

the subsequent Supreme Court decisions in ***Davis v. Washington***[12] and ***Whorton v. Bockting***[13] clarified that the ***Roberts*** rule was overruled even with respect to nontestimonial statements. Nontestimonial statements are, thus, completely outside the scope of the Sixth Amendment's Confrontation Clause, and are analyzed under a jurisdiction's ordinary hearsay rules. There is no longer a need to show, with respect to nontestimonial statements, that the hearsay exception is "firmly rooted" or that a statement bears "particularized guarantees of trustworthiness."[14]

Testimonial statements include those in which "state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial."[15] As other cases have made clear, however, the degree of "formality" of the statement is not controlling; more important are the involvement of state actors and an objective expectation on the part of the declarant that the statements would be used in subsequent prosecution. Other types of statements classified as testimonial include affidavits or certifications, lab reports prepared for evidentiary purposes, testimony at court proceedings, plea allocutions, and the like. Nontestimonial statements, in contrast, are out-of-court statements that are generally less formal and are not intended to establish past events for a future prosecution. A statement made to a police officer is nontestimonial where the primary purpose of the statement is to aid police to meet an ongoing emergency rather than to establish past events. For example, statements to a 911 dispatcher or to police at the scene of a crime in progress would be nontestimonial because the primary purpose of the statements is to address the ongoing emergency. In some emergency situations, what begins as a nontestimonial statement may, as the circumstances of the encounter between the witness and questioner evolve, become testimonial. In such cases, the testimonial portion may later have to be redacted before the statement is admitted at trial.

If the declarant/witness is available to testify at trial, the State's failure to call him or her to testify will preclude the State from introducing testimonial hearsay statements of that witness. If the declarant is unavailable to testify at trial, testimonial hearsay is, generally, admissible under ***Crawford*** only when there has been a prior opportunity for cross-examination.

If the defendant *caused* the declarant to be unavailable, however, with the intention of preventing the declarant from testifying at a present or future hearing, then testimonial hearsay may be admissible under a theory of forfeiture by wrongdoing, the defendant having forfeited his confrontation right by his actions. In several jurisdictions, there is an explicit evidence rule permitting the admission of hearsay by reason of forfeiture by wrongdoing; in others, such evidence may be admissible under an equitable theory of forfeiture. In addition, a defendant may waive his right to confrontation by stipulating to the admissibility of a statement or by failing to assert the right where state law requires him to do so for purposes of challenging the admission of lab reports. Another seemingly settled exception to the ***Crawford*** rule is the dying declaration, which is generally not subject to confrontation analysis.

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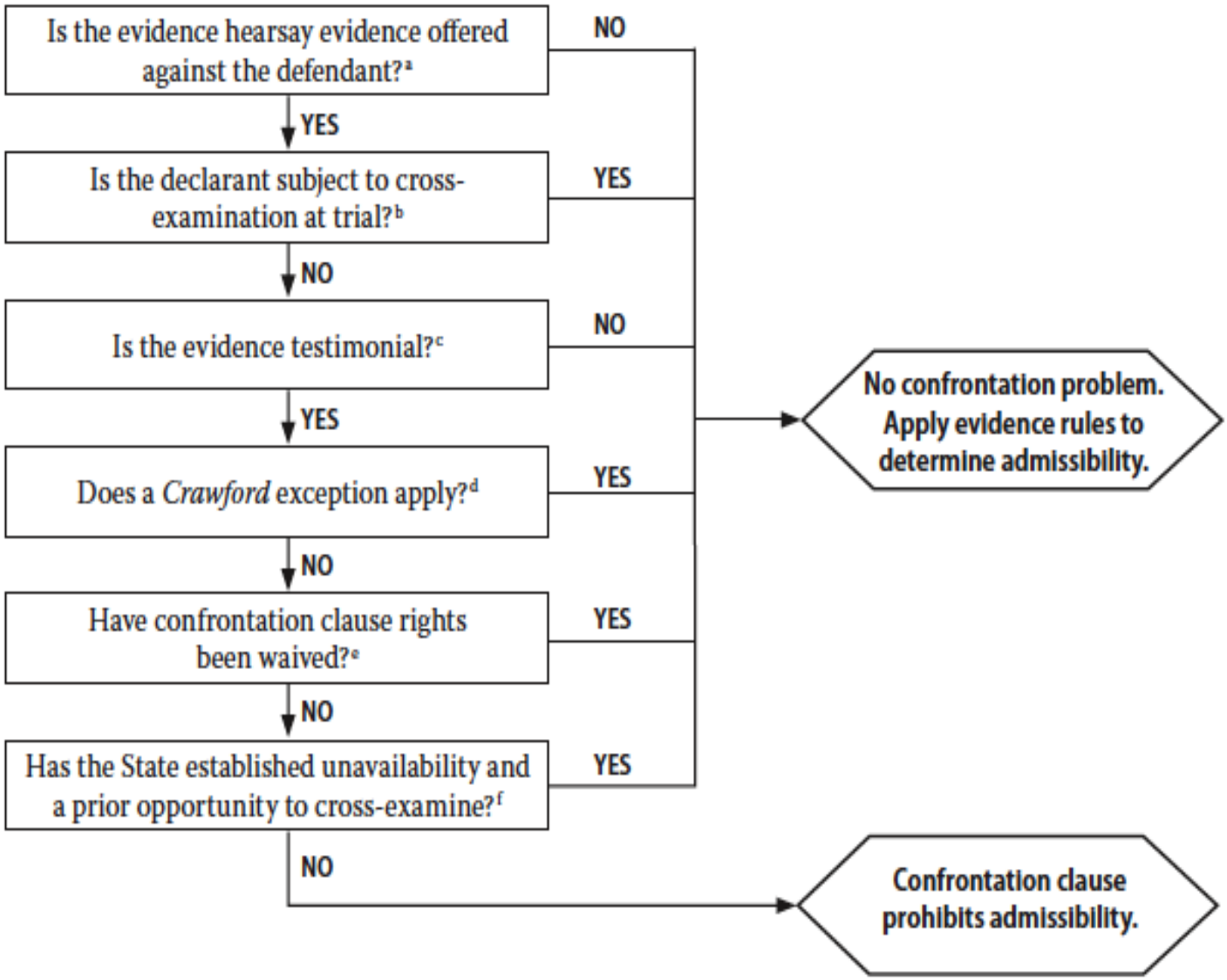
[12] Davis v. Washington, 547 U.S. 813 (2006).
[13] Whorton v. Bockting, 549 U.S. 406 (2007).
[14] Any lingering uncertainty about the continued applicability of *Roberts* to nontestimonial statements was put to rest in *Bockting,* which held that *Crawford* does not apply retroactively to cases no longer on direct appeal: "Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability." 549 U.S. at 420. It has been suggested, however, that the Due Process Clause may preclude the admission of nontestimonial hearsay that is unreliable. *See* Lynn McLain, *"I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker – and the Role of the Due Process Clause as to Nontestimonial Hearsay*, 32 CARDOZO L. REV. 373 (2010); *cf.* Chambers v. Mississippi, 409 U.S. 95 (1972) (state court's exclusion, under state hearsay rules, of reliable exculpatory evidence violated defendant's right to due process).
[15] Michigan v. Bryant, 562 U.S.1143, 1155 (2011).

Analyzing Admissibility Under *Crawford*

Determining the admissibility of a statement under ***Crawford*** involves examination of several factors, including (1) whether the statement is hearsay offered against the defendant, (2) whether the witness is testifying and subject to cross-examination at trial, (3) the testimonial/nontestimonial character of the statement, (4) whether the statement falls within an exception to the Crawford rule (forfeiture by wrongdoing or dying declaration), (5) whether the defendant has waived his right to confrontation, and (6) whether the State can establish the unavailability of the witness and that the defendant had a prior opportunity for cross-examination. Determinations of those factors will determine whether the statement will be admissible at trial without offending the Sixth Amendment Confrontation Clause.

On the following page is a flow chart to assist in analyzing admissibility of a statement under ***Crawford***. A discussion of each of the factors follows.

Crawford Analysis Chart *



* This Crawford Analysis Chart is from Professor Jessica Smith's excellent article, "Understanding the New Confrontation Clause Analysis: *Crawford*, *Davis*, and *Melendez-Diaz*," Administration of Justice Bulletin, No. 2010/02, April 2010, page 6. It is reprinted with permission of the School of Government, copyright 2010. This copyrighted material may not be reproduced in whole or in part without the express written permission of the School of Government, CB# 3330 UNC Chapel Hill, Chapel Hill, North Carolina 27599-3330; telephone: 919-966-4119; fax 919-962-2707; Web address: www.sog.unc.edu.

[a] See pages 7-8, *infra*.

[b] See pages 8-10, *infra*.

[c] See pages 10-13, *infra*.

[d] See pages 14-17, *infra*. (Includes "dying declarations" and forfeiture by wrongdoing.)

[e] See page 17, *infra.* (Includes "notice and demand" provisions, stipulations, and "opening the door.")

[f] See pages 17-22, *infra.*

1) Is the evidence hearsay offered against the defendant?

The following types of evidence never implicate Confrontation Clause issues:

- Evidence offered by the defendant. ***Giles v. California***[16] (recognizing that a defendant could elicit evidence of a statement that would be barred if offered by the State).
- Evidence of the defendant's own statements (including adoptive admissions). ***United States v. Allen***;[17] ***United States v. Lafferty***.[18]
- Evidence that is not offered for the truth of the matter asserted. ***Crawford***.[19] Thus, a statement offered for some other purpose, such as its effect on the hearer, is not subject to confrontation.
    - Where a defendant testified at trial that he had confessed to the crime only because the police had ordered him to give a statement matching that of his accomplice (who had already confessed), there was no violation of the Confrontation Clause when the prosecution was permitted to read the accomplice's statement on rebuttal, to show that the statements were very different. The trial court instructed the jury that the accomplice's confession was not to be considered for the truth of its contents, but rather only to weigh the credibility of defendant's testimony. ***Tennessee v. Street***.[20]
    - A tape recording of a conversation between the defendant and an informant was admissible because the defendant's own statements were statements of a party opponent and, thus, were not hearsay. The statements of the informant on the tape were not offered for their truth, but rather to put the defendant's statements into context; those statements, too, were admissible as being neither testimonial nor hearsay. ***United States v. Tolliver.***[21]
    - ***Caution: "Basis for expert's opinion."*** Traditionally, under Fed. R. Evid. 703 or its equivalent, an expert may rely upon inadmissible evidence in forming his or her expert opinion, and may testify to that opinion and the basis for it so long as the evidence is not offered for the truth of the matter asserted. Often, such evidence includes reports of examinations by other individuals, such as lab technicians who actually performed testing procedures on DNA or other evidence, the results of which have been transmitted to the expert who prepares a report and testifies at trial. In ***Williams v. Illinois***,[22] the United States Supreme Court considered the testimony of an expert who had compared the DNA profile developed from a sample provided by the defendant with a DNA profile developed from a sample taken from a rape victim, where no expert had testified concerning the analysis of the sample taken from the victim. The testifying expert who had performed the comparison referred to the sample taken from the victim during the defendant's bench trial. Although the Court affirmed defendant's conviction, only four justices agreed that the testimony concerning the sample taken from the victim was *not* offered for its truth, and placed great emphasis on the fact that this was a bench trial, where the factfinder was unlikely to be confused about the purpose for which the testimony was offered. Prosecutors must use ***extreme caution*** in attempting to admit evidence on this basis. Given the lack of a majority opinion in ***Williams***, and the widely divergent views in the concurring opinion of Justice Thomas and the strong dissent of the other four justices, it is ***questionable*** whether testimony of this kind can be safely admitted on

[16] Giles v. California, 128 S.Ct. 2678, 2692 n. 7 (2008).
[17] United States v. Allen, 10 F.3d 405, 413 (7th Cir. 1993).
[18] United States v. Lafferty, 387 F.Supp.2d 500, 509-511 (W.D. Pa. 2005).
[19] *Crawford*, 541 U.S. at 59 n.9.
[20] Tennessee v. Street, 471 U.S. 409 (1985).
[21] Unites States v. Tolliver, 454 F.3d 660, 665 (7th Cir. 2006).
[22] *Williams,* 132 S.Ct. 2221.

the theory that it is not offered for its truth without offending the Confrontation Clause. See the discussion of ***Melendez-Diaz v. Massachusetts***[23] and ***Bullcoming v. New Mexico***,[24] at page 11, *infra*, for discussion of the admissibility of scientific evidence in general under ***Crawford***.

- Reminder: where evidence is not being offered for the truth of the matter asserted, a limiting instruction is necessary.

2) Is the witness/declarant subject to cross-examination at trial?

Where a witness actually testifies and is subject to cross-examination at trial, there is no confrontation issue with respect to admission of that witness's prior statement. "The Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." ***California v. Green.***[25] "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." ***Crawford.***[26]

The primary issues that arise under this factor involve some sort of alleged limitation on the ability of the defendant to conduct cross-examination of a prosecution witness. The witness might invoke a privilege or refuse to testify, despite an order to do so. The witness might not be physically in the defendant's presence, testifying by teleconference or by closed-circuit television. The witness might testify to a loss of memory concerning either the statement or the underlying events (or both). The witness might suffer from some other physical or mental infirmity that makes it difficult to communicate. The witness might be evasive or refuse to acknowledge the prior statements.

- **Witness present in court but not called to testify**. The confrontation requirement is not satisfied where the State merely produces the witness in court but does not call him or her to the stand. "[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." ***Melendez-Diaz v. Massachusetts.***[27] Moreover, such a witness would not be "unavailable" so as to permit a prior statement to be admitted, even where there has been a prior opportunity to cross-examine the witness. See the discussion of "unavailability" at pages 17-21, *infra*.
- **Refusal to testify (under assertion of privilege or otherwise).** A witness who refuses to testify, or who asserts a privilege (even where that privilege is not legitimate, provided the witness refuses to testify in spite of an order to do so), is not subject to cross-examination. The Confrontation Clause is violated if the trial court admits the out-of-court statement of a witness who is non-responsive on the stand under an assertion of a privilege unless there was a prior opportunity to cross-examine the witness. ***Crawford;***[28] ***Douglas v. Alabama.***[29] Even if the assertion of privilege is not legitimate, and therefore the witness is "made legally available for both direct and cross-examination," adequate opportunity for confrontation cannot be established unless the witness actually testifies and submits to cross-examination. ***United States v. Torrez-Ortega***;[30] ***Douglas.***[31]

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[23] *Melendez-Diaz*, 129 S.Ct. 2527.
[24] *Bullcoming*, 131 S.Ct. 2705.
[25] California v. Green, 399 U.S. 149, 158 (1970).
[26] *Crawford,* 541 U.S. at 59 n.9.
[27] *Melendez-Diaz,* 129 S.Ct. at 2540.
[28] *Crawford*, 541 U.S. 36.
[29] Douglas v. Alabama, 380 U. S. 415 (1965).
[30] United States v. Torrez-Ortega, 184 F.3d 1128, 1132-34 (10th Cir. 1999).
[31] Douglas v. Alabama, 380 U. S. 415 (1965).

- **Testimony via closed-circuit television.** Confrontation via closed-circuit television pursuant to the rule set forth in ***Maryland v. Craig***[32] apparently continues to be acceptable for purposes of ***Crawford*** analysis. ***United States v. Kappell.***[33] Note that the circumstances permitting such alternative modes of testimony are strictly circumscribed, and the trial court must make explicit findings of necessity under the test set forth in ***Craig***. ***United States v. Yates***.[34]
- **Loss of memory.** The Confrontation Clause is not violated where the witness suffers memory loss and, therefore, is not able to provide sufficient information on cross-examination. ***United States v. Owens.***[35] In ***Owens***, admission of the witness's out-of-court identification of the accused was upheld even though the witness was unable to explain the basis for the identification because of the memory loss. "The Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " ***Owens;***[36] ***Kappell.***[37]
- **Uncooperative/evasive witness.** Because the Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish," ***Owens;***[38] ***Kappell,***[39] cross-examination of an evasive or reluctant witness nevertheless satisfies the requirements of the Confrontation Clause. Thus, the prior statements of such a witness are admissible if they fall within the limitations of the hearsay rules.
- **Witness with physical or mental impairment not rendering witness incompetent to testify.** In ***Vasquez v. Kirkland***,[40] a *habeas corpus* challenge to the defendant's murder conviction, the primary witness was deaf, unable to speak, and used no sign language. In order for her to testify, two interpreters were needed, one of whom had to communicate with the witness by a combination of writing, facial expressions, gestures, and use of photographs. The Ninth Circuit rejected defendant's claim that he was deprived of his right to confront the witness because of her physical limitations. Although ***Vasquez*** did not involve a challenge to admission of the witness's prior statements, it seems clear that the adequacy of the opportunity to cross-examine would permit such statements to be admitted if otherwise admissible under the hearsay rules.
- **Incompetent witness.** If a witness is incompetent to testify, there obviously is no opportunity for cross-examination.

3) Is the evidence testimonial?

Crawford distinguished between two types of out-of-court statements: "testimonial" statements, which require the opportunity for confrontation under the Sixth Amendment, and "nontestimonial" statements, which do not require opportunity for confrontation to be admissible at trial. Although ***Crawford*** refrained from offering a comprehensive definition of the two categories, a series of subsequent cases have shaped the contours of the definition.

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[32] Maryland v. Craig, 497 U.S. 836 (1990).
[33] United States v. Kappell, 418 F.3d 550 (6th Cir. 2005).
[34] United States v. Yates, 438 F.3d 1307, 1312-18 (11th Cir. 2006).
[35] U.S. v. Owens, 484 U.S. 554 (1988).
[36] U.S. v. Owens, 484 U.S. 554, 559 (1988) (emphasis in original).
[37] United States v. Kappell, 418 F.3d 550, 555 (6th Cir. 2005).
[38] U.S. v. Owens, 484 U.S. 554, 559 (1988) (emphasis in original).
[39] United States v. Kappell, 418 F.3d 550, 555 (6th Cir. 2005).
[40] Vasquez v. Kirkland, 572 F.3d 1029 (9th Cir. 2009), *cert. denied* 130 S.Ct. 1086 (2010).

- In ***Crawford***, the Court explained the significance of "[t]he involvement of government officers in the production of testimonial evidence."[41] The fact that "[a]n 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,"[42] is the primary basis for the distinction between the two categories. ***Crawford v. Washington.***[43]

- "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the [interrogation's] primary purpose . . . is to enable police assistance to meet an ongoing emergency." ***Davis v. Washington***.[44] In ***Davis***, the Court held that in a victim's statements to a 911 operator, the victim was "speaking about events as they were actually happening, rather than 'describ[ing] past events,'" there was an ongoing emergency, the "elicited statements were necessary to be able to resolve the present emergency," and the statements were not formal. ***Davis.***[45] The Court therefore concluded that those statements were nontestimonial and, hence, admissible.

- When no ongoing emergency exists, statements made to the police describing past events would be considered testimonial. Statements "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.***[46] Thus, in the companion case consolidated for decision with ***Davis***, ***Hammon v. Indiana***, statements that the victim made to the police after their arrival at her home, when the domestic incident that prompted the police response had ended and where the police were questioning the victim and the defendant in separate rooms, were considered to be testimonial and, hence, inadmissible because the defendant had no opportunity to cross-examine the victim, who had refused to testify at trial.[47]

- The ***Davis*** "primary purpose test" is an objective test in which the court evaluates the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred, rather than a subjective test of the actual intention of the parties involved. Factors that will be considered in the evaluation include: location (crime scene versus police station); time (during an ongoing emergency versus afterwards); existence of a necessity to "end a threatening situation"; threat to the public; involvement of a weapon; a victim's medical condition; the need for first responders to judge the existence and magnitude of a continuing threat to the victim and the public by questioning the victim; informality of the encounter (versus formality).

- In ***Michigan v. Bryant***,[48] police had found the victim in the street with a mortal gunshot wound. The officers, who arrived at the scene before the medical services, questioned the victim about what happened. In response, the victim identified the shooter and told the officers he was shot outside the assailant's home. The victim died from the injuries a few hours later. The trial court had permitted the prosecution to introduce the victim's statements at trial. Applying the "primary purpose" test, the Supreme Court found that the circumstances of the case indicated the police questioning was intended to address an ongoing emergency and threat to the safety of the public and the police, especially since a weapon was involved. Hence, the Court held that the statement was nontestimonial, and was properly admitted at trial.

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[41] *Crawford*, 541 U.S. at 53.
[42] *Id.*
[43] *Id.*
[44] *Davis*, 547 U.S. at 822.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] Michigan v. Bryant, 131 S.Ct. 1143 (2011).

- Scientific reports and certificates are treated as the equivalent of affidavits, which fall within the "core class of testimonial statements" covered by the Confrontation Clause. Their testimonial nature also stems from the fact that the certificates were prepared "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. Massachusetts.***[49]

- The "core class of testimonial statements" covered by the Confrontation Clause includes: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ***Melendez-Diaz v. Massachusetts.***[50] In ***Bullcoming v. New Mexico***, the Supreme Court held that testimony of a different analyst from the same lab, who had no personal involvement in the analysis of the sample resulting in the lab report that was proffered at trial, did not satisfy the requirements of the confrontation clause.[51]

- In a case involving fraudulent use of credit cards, hearsay statements from declarants in the bank and credit industry were determined to be nontestimonial because the declarants did not reasonably contemplate their use at a criminal trial. Additionally, the court noted that the statements were not offered for their truth, and that the jury was so instructed. ***United States v. Goldstein.***[52]

- Statements made by a non-testifying accomplice to a jailhouse informant (wired by the police) were admissible as nontestimonial statements because the declarant was engaged in what he believed was casual conversation with an acquaintance and, applying the hearsay rules, as a declaration against the penal interest of the declarant. ***United States v. Smalls.***[53]

- Statements to medical professionals, social workers, and the like are often difficult to analyze in terms of whether or not they are testimonial. The determination may turn in large part upon whether such professionals are affiliated with law enforcement, or upon the actual involvement of law enforcement in requesting, directing, or observing the examination or interview. To the extent statements are made in connection with an evidence-gathering protocol, such a SANE[54] examination, they are likely to be considered to be testimonial. Likewise, a forensic interview of a child victim made at the request of the police, or observed or recorded by an investigator, will likely be considered to be testimonial. On the other hand, statements to a physician, nurse, therapist or EMT that are made for purposes of receiving medical treatment would be considered nontestimonial. The problem, of course, is that these purposes often overlap, and determining which purpose is "primary" is highly fact-sensitive. The prosecutor should check the relevant jurisdiction's case law for precedent that may indicate whether or not statements made in a particular context will be considered to be testimonial. Testimony by a medical professional that certain types of questioning are necessary to diagnose and treat any injuries, and that such diagnosis and treatment is his or her primary mission, may help to establish that the primary purpose of the questioning was not to preserve testimony for trial, but rather to provide appropriate medical treatment, thereby permitting the statements to be admitted as

[49] *Melendez-Diaz*, 129 S.Ct. at 2532.
[50] *Id.*
[51] *Bullcoming*, 131 S.Ct. 2705.
[52] United States v. Goldstein, 442 F.3d 777 (2d Cir. 2006).
[53] United States v. Smalls, 605 F.3d 765 (10th Cir. 2010).
[54] Sexual Assault Nurse Examiner.

nontestimonial statements.[55] In at least one jurisdiction, Kansas, the state Supreme Court has permitted those portions of a statement made to a SANE that are pertinent to medical treatment to be admitted as nontestimonial, excluding as testimonial only those portions that appeared to be elicited primarily for the purpose of evidence collection and preservation. See ***State v. Miller***.[56]

- The following chart includes some examples of testimonial and nontestimonial statements identified in federal case law. **NOTE**: This is **not** an exhaustive list.

Testimonial	Nontestimonial
• *Ex parte* in-court testimony[57] • Testimony at a preliminary hearing[58] • Testimony before a grand jury[59] • Prior testimony at a former trial[60] • Statements taken by police officers in the course of interrogations[61] • Affidavits (including scientific reports and certificates)[62] • Depositions[63] • Confessions of co-defendants[64] • Custodial examinations[65] • Pretrial statements that declarants would reasonably expect to be used prosecutorially or would be available for use at a later trial[66] • Extrajudicial statements contained in formalized testimonial materials[67] • Certification of non-existence of official records[68]	• Informal statements made with no reasonable expectations the statement will be used in trial[69] • Recording of 911 calls or records of police questioning which took place while an emergency was in progress and with the primary purpose of meeting the emergency situation[70] • Statements made and documents generally prepared without the reasonable contemplation of their use at a criminal trial (many business records fall within this category)[71] • A tape recording of a conversation between an informant and a non-testifying accomplice.[72]

[55] For a collection of cases from numerous jurisdictions with respect to how statements made to social workers or medical professionals have been analyzed in the child abuse context, see Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses,* 2008/07 ADMIN. OF JUSTICE BULL. (2008), *available at,* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0807.pdf. Much of the reasoning in such cases should be applicable in the context of crimes involving adult victims.
[56] State v. Miller, 264 P.3d 461, 488 (Kan. 2011). ("We conclude the SANE was acting as an agent of law enforcement when performing the role of collecting evidence and completing the [police] evidence kit. Any inquiries made solely for the purpose of recording answers on a [police] form would produce testimonial statements in most circumstances. However, inquiries made for the sole purpose of medical treatment, or even for a dual purpose that includes treatment, may produce nontestimonial statements, depending on other circumstances.")
[57] Melend*ez-Diaz*, 129 S.Ct. at 2531.
[58] *Crawford v.*, 541 U.S. at 52, 69.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Melend*ez-Diaz*, 129 S.Ct. at 2531.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] White v. Illinois, 502 U. S. 346, 365 (1992). *See also Melendez-Diaz*, 129 S.Ct. at 2531.
[68] *Melendez-Diaz,* 129 S.Ct. at 2539 n.9.
[69] *Crawford*, 541 U.S. 36 (2004), *See also* United States v. Smalls, 605 F.3d 765 (10th Cir. 2010).
[70] *Davis*, 547 U.S. at 822-27; *see also* Michigan v. Bryant, 131 S.Ct. 1143 (2011).

4) Is the evidence testimonial? Does the statement come within an exception to *Crawford*?

- Dying declarations have generally been recognized as an exception to ***Crawford***.[73] Although the United States Supreme Court has not yet explicitly ruled on the issue, the ***Crawford*** decision acknowledged in dicta that despite the testimonial character of many such statements, the historical admissibility of the dying declaration might qualify it as a *sui generis* exception to the rule of confrontation. [74]
- Forfeiture by wrongdoing—an important and useful tool in domestic violence and human trafficking cases
  - Origin and requirements:
    - The United States Supreme Court expressed the basis for the doctrine in an 1878 decision: "[I]f a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. … [I]f he voluntarily keeps the witnesses away, he cannot insist on his privilege [to confront the witnesses]. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." ***Reynolds v. United States***.[75]
    - Fed. R. Evid. 804(b)(6) – A statement is admissible against a party if the unavailability of the declarant is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying.
    - The doctrine of forfeiture by wrongdoing requires the court to find that the defendant acted, at least in part, with the intent to silence the witness, to make the declarant unavailable, or to deprive the criminal justice system of evidence.[76] ***Giles v. California***[77] and relevant lower-court decisions suggest that it is not necessary for the prosecution to show that the defendant's *sole* intent was to prevent the witness from testifying.[78]
    - ***Crawford v. Washington*** does not impact the applicability of forfeiture by wrongdoing doctrine. In ***Crawford*****,** the Court emphasized that "[t]he ***Roberts*** test . . . is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (*which we accept*) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability."[79] Forfeiture by wrongdoing can thus be

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[71] United States v. Goldstein, 442 F.3d 777, 785 (2d Cir. 2006).
[72] *Smalls*, 605 F.3d 765.
[73] *E.g.*, People v. Monterroso, 101 P.3d 956, 971-72 (Cal. 2004); Com. v. Nesbitt, 892 N.E.2d 299, 310-12 (Mass. 2008).
[74] *Crawford*, 541 U.S. at 56 n.6.
[75] Reynolds v. United States, 98 U.S. 145 (1878).
[76] *Giles* 128 S.Ct. at 2688 n.2 (2008) (The Court noted with approval Ohio's Evid.R. 804(B)(6), which explicitly incorporates this purpose requirement).
[77] *Giles*, 128 S.Ct. 2678.
[78] Several courts have held that the State need not establish that the defendant's *sole* motivation was to eliminate the declarant as a potential witness; it need only demonstrate that the defendant 'was motivated in part by a desire to silence the witness.' State v. Hand, 840 N.E.2d 151,172 (Ohio 2006); *see, e.g.*, United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996); United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001). Acts intended to dissuade the victim from cooperating with law enforcement, as well as those intended to dissuade her from testifying in court, may result in finding of forfeiture. People v. Banos, 100 Cal.Rptr.3d 476, 492-93 (Cal. Ct. App. 2009). The existence of other possible motives did not preclude application of the doctrine of forfeiture. *Id.*
[79] *Crawford*, 541 U.S. at 62 (2004) (emphasis added). The "*Roberts* test" refers to the holding in *Ohio v. Roberts*, 448 U.S. 56 (1980), which allowed the admission of an unavailable witness's statement against a criminal defendant if the statement had "adequate indicia of reliability." According

considered an exception to ***Crawford's*** (and the Sixth Amendment's) confrontation requirement.

- In ***Davis v. Washington***,[80] the Supreme Court reinforced its acceptance of forfeiture by wrongdoing, stating, "We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.' . . . That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."[81]
- Section 804(b)(6) of the Federal Rules of Evidence codifies forfeiture by wrongdoing as an exception to the rule against hearsay. Several states have adopted some version of Fed. R. Evid. 804(b)(6), while many other states have adopted the doctrine on the basis of equitable forfeiture principles.[82] In 804(b)(6) jurisdictions, once forfeiture has been established, the declarant's statements are admissible. In equitable jurisdictions, even if forfeiture is established, the declarant's statements may still have to satisfy an exception to the rule against hearsay.

- Forfeiture by Wrongdoing in Domestic Violence Cases:
  - According to ***Giles v. California***, in domestic violence cases the intent to silence the witness can be inferred from an ongoing pattern of abuse.[83] The Court observed that "[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution – rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."[84]
  - Justice Souter's partially concurring opinion in ***Giles*** added that "the element of intention [to prevent the witness from testifying] would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process."[85]
- Burden of Proof
  - Preponderance of the evidence is the standard in the majority of states. While the United States Supreme Court has not explicitly ruled on the standard of proof for forfeiture, in the context of determining the admissibility of co-conspirator statements at a pretrial hearing pursuant to Fed. R. Evid. 104, the Court held that the standard for making preliminary determinations on the admissibility of evidence is preponderance of the evidence.[86] In ***Davis***,

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to the *Roberts* Court, the Confrontation Clause would be satisfied when the evidence fell within a "firmly rooted hearsay exception" or had "particularized guarantees of trustworthiness." *Crawford* overruled *Roberts* and struck down the test announced in that case.

[80] *Davis*, 547 U.S. 813.

[81] *Id*. at 833.

[82] In "equitable jurisdictions," there is no codified statute or rule implementing forfeiture by wrongdoing. Rather, the courts have, as a matter of common law, applied the principle to arrive at the equitable result of precluding a defendant from asserting his right of confrontation where he has intentionally caused the absence of the witness from trial. *See, e.g.*, People v. Geraci, 649 N.E.2d 817 (N.Y. 1995).

[83] *Giles*, 128 S.Ct. 2678.

[84] *Id*. at 2693.

[85] *Giles*, 128 S.Ct. at 2695 (Souter, J., concurring in part).

[86] Bourjaily v. United States, 483 U.S. 171 (1987).

the Court noted that the majority of federal and state courts had applied the preponderance standard in determining whether forfeiture had occurred.[87] Moreover, in its decision in ***Giles***,[88] despite its disapproval of California's failure to consider the defendant's intent to silence the witness, the Court did not criticize the California Supreme Court's application of the preponderance standard. As the Court of Appeals for the District of Columbia observed, imposing a higher "burden of proof on the government might encourage behavior which strikes at the heart of the justice system itself." ***Devonshire v. United States***.[89]

- Clear and convincing evidence is the standard in Maryland, New York, Washington, and perhaps California.[90] The applicable standard in California is not entirely clear, as the "clear and convincing evidence" standard expressed in the evidence rule is contradicted by the holdings of the California Supreme Court.[91]
- Check your state statutes and case law to be certain which standard applies in your jurisdiction.

- Evidentiary hearing
  - An evidentiary hearing may be held, outside the presence of the jury, at which the prosecution is given the opportunity to prove by the applicable standard of proof that the defendant intentionally procured the unavailability of a witness or a victim.[92]
  - This hearing is generally governed by Fed. R. Evid. 104 or its equivalent,[93] which is the rule that controls determinations of "preliminary questions," such as admissibility of evidence. Under that rule, such hearings must be conducted out of the hearing of the jury. Pursuant to Fed. R. Evid. 104(a), the evidence rules (except for claims of privilege) do not apply. Thus, hearsay (including the statements sought to be admitted) is admissible in such a preliminary hearing.[94]
  - Advance notice requirement – When the prosecution seeks to admit hearsay evidence under the forfeiture by wrongdoing doctrine, the rules generally require advance written notice.[95] Even if not explicitly required by the provisions of the applicable rule, the prosecutor should provide to each adverse party notice of an intention to introduce such statement(s), in a manner sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

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[87] *Davis*, 547 U.S. at 833.
[88] *Giles,* 128 S.Ct. 2678.
[89] Devonshire v. United States, 691 A.2d 165 (D.C. 1997) (quoting United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982)).
[90] MD. CODE ANN., CTS. & JUD. PROC. §10-901 (West 2011); People v. Geraci, 85 N.Y.2d 359, 649, N.E.2d 817 (N.Y. 1995); State v. Mason, 160 Wash. 2d 910 (2007).
[91] Section 1350 of the California Evidence Code, which codifies forfeiture by wrongdoing for certain serious felony cases where the witness's unavailability is the result of homicide or kidnapping, explicitly requires a clear and convincing standard of proof. Nevertheless, the California Supreme Court has, without resolving the apparent conflict, repeatedly stated that the standard of proof for forfeiture by wrongdoing is a preponderance of the evidence. *See* People v. Giles, 152 P.3d 433, 436 n.8 (Cal. 2007), *vacated*, 128 S.Ct. 2678 (2008); People v. Zambrano, 163 P.3d 4, 50 n.21 (Cal. 2007). *See also* People v. Banos, 178 Cal.App.4th 483, 492 n.12 (Cal. Ct. App. 2009) (declining to resolve apparent conflict, but observing that preponderance of the evidence appears to be the standard under California law), *cert. denied*, 130 S.Ct. 3289 (2010).
[92] *See, e.g.*, United States v. Dhinsa, 243 F.3d 635, 653-54 (2d Cir. 2001).
[93] Some states, such as New Jersey, may have additional requirements for the conduct of the preliminary hearing on forfeiture. In State v. Byrd, 967 A.2d 285 (N.J. 2009), the New Jersey Supreme Court set out specific requirements for the preliminary hearing on forfeiture by wrongdoing in addition to what is explicitly required under N.J.R. EVID. 104. *Byrd*, 967 A.2d at 303-04.
[94] *Davis*, 547 U.S. at 833.
[95] *E.g.*, OHIO. R. EVID. 804(b)(6).

5) Is the evidence testimonial? Have Confrontation Clause rights been waived?

A defendant may waive his right to confrontation by stipulating to the admissibility of a testimonial statement by an absent witness;[96] through operation of "notice and demand" statutes that exist in many jurisdictions;[97] or by "opening the door" to otherwise inadmissible testimony by making a strategic decision to introduce evidence that the prosecution, in fairness, must be able to rebut.[98]

Whether the defendant must explicitly waive the confrontation right on the record in the case of a stipulation has not been settled by the United States Supreme Court. Where the stipulation is entered into by defense counsel, over the defendant's objection, the waiver has been held invalid.[99] On the other hand, where the waiver results from a strategic decision and where defendant does not affirmatively object, counsel's waiver of the right may be upheld absent a showing of ineffective assistance of counsel.[100]

Notice and demand statutes generally provide that the State must give timely notice of intent to offer certain types of forensic evidence reports, and that the defendant must make a timely objection to such reports in order to preserve his right to confront at trial the witnesses who authored such reports. The constitutionality of such statutes was recognized in ***Melendez-Diaz***.[101]

6) Is the evidence testimonial? Has the State established the unavailability of the witness and a prior opportunity to cross-examine the witness?

Assuming that all of the foregoing factors indicate that the ***Crawford*** confrontation requirements are applicable, before the State may introduce the testimonial statement of a non-testifying witness, it must establish (1) that the witness is "unavailable," and (2) that the defendant had a prior opportunity to cross-examine the witness. Both criteria must be satisfied before the statement will be admissible.

- The witness must be "unavailable" to testify at trial.
  - "Unavailability" for confrontation purposes should not be confused with the definition of "unavailable" in Fed. R. Evid. 804(a). After ***Crawford***, the hearsay rules have no applicability to confrontation analysis, although hearsay rules must also be satisfied for the statement to be admissible, regardless of whether or not the statement is testimonial. Note, however, that a witness who testifies to a loss of memory is subject to cross-examination such that there is no confrontation problem, ***Owens,***[102] and yet is "unavailable" for purposes of the hearsay rules permitting the admission of a prior statement, Fed. R. Evid. 804(a)(3); 804(b).
  - A witness who is deceased is obviously unavailable to testify.
  - Most cases construing the "unavailability" requirement focus on the efforts made by the State to produce the witness in court. The State must demonstrate that it has made reasonable, good-faith

[96] United States v. Stephens, 609 F.2d 230 (5th Cir. 1980).
[97] *E.g.*, GA. CODE ANN. § 35–3–154.1 (2006).
[98] United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010).
[99] United States v. Williams, 632 F.3d 12 (4th Cir. 2011).
[100] United States v. Cooper, 243 F.3d 411, 418 (7th Cir. 2001).
[101] *Melendez-Diaz*, 129 S.Ct. at 2540-42.
[102] United States v. Owens, 484 U.S. 554 (1988).

efforts to secure the attendance of the witness. ***Ohio v. Roberts***;[103] ***Barber v. Page***;[104] ***Hardy v. Cross***.[105]

- Circumstances where a witness will be deemed unavailable:
  - Death.
  - Assertion of privilege. Even where the privilege is not legitimate, a witness's refusal to testify under assertion of a privilege despite an order to do so renders him or her unavailable for purposes of ***Crawford***. In most cases, the witness should take the stand, out of the presence of the jury, for the purpose of asserting the privilege, and if the court finds the privilege to be invalid, the court should order the witness to testify in order to establish that he or she will refuse to testify in spite of the threat of contempt.[106]
  - Refusal to testify despite an order to do so.[107]
  - Mental or physical infirmity so severe as to render the witness incompetent or unable to testify.
    - Where a victim is likely to be severely traumatized by testifying, the court should make findings, based upon the testimony of an expert, of the probable harm to the victim before making the determination that the victim is "unavailable" to testify.[108] The testimony of a child victim's parent, or other lay witnesses, concerning the mental status of a witness will be insufficient to establish that grave harm will result from testifying.[109]
    - Where a witness is expected to recover from a physical or mental disability within a reasonable time, taking into account the importance of the witness's testimony, a delay in the proceedings may be required rather than a ruling that dispenses with live testimony. ***United States v. Faison***.[110] The court should consider "the importance of the absent witness for the case; the nature and extent of cross-examination in the earlier testimony; the nature of the illness; the expected time of recovery; the reliability of the evidence of the probable duration of the illness; and any special circumstances counselling against delay."[111] In ***Faison***, the court noted that the witness's testimony was critical to the case, making live testimony essential if a reasonable continuance would make that possible. In ***Younger v. State***,[112] on the other hand, the Delaware Supreme Court held that where the witness's testimony was merely rebuttal testimony, there was no need to delay the trial so that the temporarily incapacitated witness could testify in court. The Court upheld the trial court's decision admitting his prior testimony from a suppression hearing, at which the witness had been subject to cross-examination.

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[103] Ohio v. Roberts, 448 U.S. 56 (1980).
[104] Barber v. Page, 390 U.S. 719 (1968).
[105] Hardy v. Cross, 132 S.Ct. 490 (2011).
[106] United States v. Zappola, 646 F.2d 48, 54 (2d Cir. 1981).
[107] *Id*.
[108] *See* State v. Contreras, 979 So.2d 896, 905-08 (Fla. 2008) (child victim who expert opined was substantially likely to "suffer severe emotional or mental harm if required to participate in the case"); *Warren v. United States*, 436 A.2d 821, 828-830 (D.C. Ct. App. 1981) (adult victim who "would undergo far greater mental anguish than normally accompanies court appearances of the victims of rapes (and presumably other such crimes as kidnapping, terrorism, and hijacking) and that her appearance in court ... would be likely to lead to severe psychosis, even possible suicide." (quoting trial court opinion; omission in original)).
[109] People v. Stritzinger, 668 P.2d 738, 746-48 (Cal. 1983).
[110] United States v. Faison, 679 F.2d 292 (3d Cir. 1982).
[111] *Id.* at 297.
[112] Younger v. State, 496 A.2d 546 (Del. 2007).

- The witness cannot be produced in court despite reasonable, good faith efforts to do so.
    - The State must present evidence of the efforts it has made to produce the witness before that witness will be deemed "unavailable." E.g., ***Ohio v. Roberts***;[113] ***Barber v. Page***;[114] ***Hardy v. Cross***.[115] Those efforts include use of subpoena or other process (such as a writ for a witness who is in custody), including use of interstate witness subpoenas for witnesses located out of state.[116] The State's offer of travel and lodging expenses to secure the witness's attendance, while probably necessary, may not be sufficient. ***United States v. Yida.***[117] The prosecutor must be prepared to present evidence of the efforts it has made to secure the witness's attendance before the court rules on the witness's unavailability for confrontation purposes. While obviously futile efforts are not required, ***Roberts,***[118] the State cannot simply conclude that efforts would be futile—there must be a good reason for failing to pursue particular means of securing the witness's testimony. '[T]he possibility of a refusal is not the equivalent of asking and receiving a rebuff.' ***Barber*** (holding that the State's failure to attempt to secure the attendance of a witness in federal custody meant that the witness was not "unavailable" for trial).[119] On the other hand, "the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." ***Hardy***.[120]
    - The State must show that its efforts to produce the witness were both reasonable and made in good faith. Even where the prosecution acts in good faith, its actions to procure the witness's attendance must be reasonable under the circumstances. ***Yida.***[121] "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." ***Roberts***.[122] Even extensive efforts to locate and produce a witness may fail to satisfy the unavailability requirement, however, if the effort is not made until the eve of trial. ***United States v. Tirado-Tirado.***[123]
    - There is also be an affirmative obligation on the part of the State to refrain from taking any action that may contribute to the witness's subsequent unavailability. In ***United States v. Yida***,[124] the Government's main witness, who was being held as a material witness but was also pending deportation as a result of his own guilty plea, testified at a first conspiracy trial that ended in a mistrial. Before the second trial could commence, the witness sought to be released from custody due to health problems. He asked to be deported to return to his home country of Israel pending retrial, assuring prosecutors he would return to testify. The Government agreed, securing his promise to return and deporting him to Israel as he had requested. When the witness refused to return to the U.S. at the time of the second trial, in spite of entreaties by prosecutors and by his own

[113] *Roberts*, 448 U.S. at 74-75 (overruled on other grounds by *Crawford* 541, U.S. at 53 (2004). Although *Crawford* overruled *Roberts* with respect to the standard for the right of confrontation, *Roberts* remains good law with respect to the need for the State to make reasonable, good-faith efforts to produce the witness before a prior statement may be admitted due to unavailability of the witness).
[114] Barber v. Page, 390 U.S. 719, 724 (1968).
[115] Hardy v. Cross, 132 S.Ct. 490 (2011).
[116] *Barber*, 390 U.S. at 723-724 & n.4; State v. Roman, 590 A.2d 686, 688-89 (N.J. Super. Ct. App. Div. 1991).
[117] United States v. Yida, 498 F.3d 945, 960 (9th Cir. 2008).
[118] *Roberts*, 448 U.S. at 74.
[119] *Barber*, 390 U.S. at 724 (1968) (quoting Barber v. Page, 381 F.2d 479, 481 (10th Cir. 1966) (Aldrich, J., dissenting)).
[120] *Hardy*, 132 S.Ct. at 495.
[121] *Yida*, 498 F.3d 945.
[122] *Roberts*, 448 U.S. at 74 (1980) (quoting California v. Green, 399 U.S. at 189 n. 22 (concurring opinion, citing Barber v. Page, 390 U.S. 719, 724 (1968))).
[123] United States v. Tirado-Tirado, 563 F.3d 117 (5th Cir. 2009)
[124] *Yida*, 498 F.3d 945.

attorneys and in spite of the Government's promise to pay any travel-related expenses, the Government was precluded at the retrial from introducing the witness's testimony from the first trial. Although there was no way to force the witness to return to this country, the District Court held that the decision to deport him was unreasonable under the circumstances and that he was, therefore, not an "unavailable" witness.[125] The Ninth Circuit agreed, finding no indication of bad faith, but nevertheless concluding the Government had acted unreasonably. The court observed that even if the witness's health problems weighed in favor of his release from custody, such release could have been accompanied by such precautions as retaining the witness's passport or placing him on reporting status pending the retrial. The court was also troubled by the fact that the prosecution did not consult with the trial court and with defense counsel for guidance before making the unilateral decision to deport the witness. The court observed that the trial court might have permitted a video deposition of the witness if deportation were determined to be appropriate, and suggested that such consultation with the court and defense counsel might have tipped the scales in favor of a finding of reasonableness even if the witness ultimately failed to return.[126]

- The principle in ***Yida***[127] should be limited to situations where the State is actually involved in some act or decision that unreasonably contributes to the witness's unavailability. It should not be read to require the holding of civilian witnesses, not involved in criminal activity, as material witnesses—an undesirable strategy when dealing with victims of violence. Rather, such witnesses should be personally served with subpoenas well in advance of court dates; contact information, including contact information for family and friends, should be obtained; and any necessary travel and lodging provisions should be offered. All efforts by investigators to locate and produce the witness in court should be carefully documented so the State can demonstrate that it made reasonable, good-faith efforts to produce the witness.
- A state prosecutor is unlikely to be in the position to prevent a witness's deportation if the federal government decides to deport the witness prior to trial; however, it is necessary for the State to show that it nevertheless made reasonable, good-faith efforts to arrange for the witness to be available for trial, such as requesting a delay in deportation or making arrangements with the federal government for the witness's temporary return to the United States if possible.[128] Even with respect to federal prosecutions, a deported witness may be deemed to be "unavailable" where the Government takes significant steps to produce the witness for trial. See ***United States v. Allie*** (finding unavailability established where the Government's efforts including "giving the witnesses the option of remaining in the United States with work permits, telling the witnesses about the payment of witness fees and travel cost reimbursement, giving the witnesses a subpoena and a letter to facilitate their reentry into the United States, calling the witnesses in Mexico, getting the witnesses' repeated assurances that they would return, apprising the border inspectors of the witnesses' expected arrival

[125] Id. at 949.
[126] *Id.* 957-961 (9th Cir. 2008).
[127] *Id.*
[128] *See* Morgan v. Com., 650 S.E.2d 541 (Va. Ct. App. 2007) (finding reasonable good-faith effort made where prosecutors had twice issued subpoenas to the witness that were honored, prosecutors maintained close contact with witness throughout pretrial proceedings, and the Commonwealth had advised federal immigration authorities of her status as a witness and the crucial need for her testimony); *cf.* State v. Larraco 93 P.3d 725, 734 (Kan. Ct. App. 2004) (finding State made insufficient efforts to produce deported witness where State was aware of pending deportation proceedings but failed to take "additional action to assure [the witness's] presence at trial, such as making travel arrangements or consulting with the INS about the necessary considerations for facilitating [the witness's] return from Mexico to testify at Larraco's trial").

and issuing checks to be given to the witnesses upon their reentry in to the United States").[129] Prosecutors should be aware that victims of domestic violence may be able to petition for their own "green card" pursuant to the Violence Against Women Act, and victims of domestic violence or human trafficking may be eligible for a "U Visa" for nonimmigrants, which can later be converted to permanent resident status ("green card"). The rules for eligibility and application are complex, and the victim should be referred to an immigration resource that can provide assistance with the application process.

- The defendant must have had a prior opportunity to cross-examine the unavailable witness.
  - Where the State seeks to introduce testimony of an "unavailable" witness that was taken at a prior court proceeding, the defendant's prior opportunity to cross-examine must have been *adequate* in order to satisfy the requirements of the Confrontation Clause. In ***Pointer v. Texas,***[130] the Court held that the Confrontation Clause was violated when the trial court admitted a transcript of the preliminary hearing testimony of the complaining witness, who had since moved to another state, because the defendant, who was unrepresented at the preliminary hearing, had not cross-examined the witness at that hearing. The mere fact the defendant could, in theory, have asked the witness questions at the hearing did not mean that he had an adequate opportunity to do so under these circumstances.
  - The opportunity to cross-examine is inadequate when the statement was given at prior trial where defendant was not a party and thus had no opportunity to cross-examine. See ***Kirby v. United States*.**[131]
  - The accused's opportunity to examine a witness at a preliminary hearing suffices for purposes of the Confrontation Clause. ***California v. Green*.**[132]
  - Cross-examination in a prior trial on the same charges is considered an adequate opportunity to cross-examine. ***Mancusi v. Stubbs*.**[133]
  - Cross-examination at a deposition taken for the purpose of preserving testimony is adequate for purposes of confronting a witness who is unavailable for trial.[134]
  - In ***Ohio v. Roberts,***[135] the defense called the witness in a preliminary hearing and questioned her on direct examination. Defense counsel did not ask to have the witness declared hostile, and did not request permission to cross-examine her. Nevertheless, this prior opportunity for cross-examination was adequate. The Court observed that "[c]ounsel's questioning clearly partook of cross-examination as a matter of *form*. His presentation was replete with leading questions, the principal tool and hallmark of cross-examination. In addition, counsel's questioning comported with the principal *purpose* of cross-examination: to challenge 'whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed.' "[136]

[129] United States v. Allie, 978 F.2d 1401, 1407-08 (5th Cir. 1992)
[130] Pointer v. Texas, 380 U.S. 400, 403 (1961).
[131] Kirby v. United States, 174 U.S. 47, 54–57 (1899).
[132] California v. Green, 399 U.S. 149 (1970).
[133] Mancusi v. Stubbs, 408 U.S. 204, 213–16 (1972). *See also* Mattox v. United States, 156 U.S. 237 (1895).
[134] *See Yida*, 498 F.3d at 958-60.
[135] *Roberts*, 448 U.S. 56.
[136] *Id.* at 70-71 (emphasis in original, citation omitted).

Trial Strategies for *Crawford* Challenges

When preparing a case, the prosecutor should:

- Work collaboratively with police and community advocates to provide support services to victims. This practice will serve two purposes: (1) it will promote victim safety, and (2) it will help victims to stay involved in the prosecution of the case and increase the likelihood they will be available to testify against their abusers.
- Train police officers to document all of the circumstances surrounding a domestic violence incident thoroughly so that prosecutors can accurately determine whether victim and witness statements are testimonial or nontestimonial.
- Review police reports and speak to investigating officers to determine whether victim and witness statements are testimonial or nontestimonial.
- Determine whether a ***Crawford*** challenge is well founded. The existence of any of the following three factors can serve as a basis for the objection to be immediately overruled:
    - The proceeding is not a criminal trial. ***Crawford*** implicates the Sixth Amendment right to confrontation in criminal cases only, so any ***Crawford*** objection should be overruled in civil cases, sentencing proceedings, and probation revocation hearings.[137]
    - The declarant is present and testifying. If the declarant is present in court and testifying, the declarant is available for cross-examination, and, therefore, the ***Crawford*** objection should be overruled.[138]
    - The objection is to the defendant's own statement. Where defendant's statements constitute admissions by a party-opponent, they are not hearsay under Fed. R. Evid. 801(d)(2)(A). "[S]ince the prohibition annunciated in *Crawford* only applies to hearsay, that prohibition does not cover [defentant's own] statements." ***United States v. Tolliver.***[139] In ***Tolliver***, the statement in question was a recorded statement of a conversation between the defendant and an informant. The court held that the defendant's own statements were party admissions, and that the statements of the informant were not offered for their truth, but rather merely to place the defendant's statements in context.
- Interview the victim and witnesses for any evidence of intimidation of the victim or witnesses by the defendant for a possible forfeiture by wrongdoing motion.
- If a Sexual Assault Nurse Examiner (SANE) or a Forensic Nurse Examiner (FNE) provided care for a victim, determine the treatment philosophy of that SANE/FNE. If the primary purpose of the examination is to provide treatment and care of the patient as opposed to evidence collection, then the medical report and statements by the patient should be nontestimonial and admissible under the hearsay exception for statements made for purposes of medical diagnosis or treatment. Where a dual purpose is served by the examination, it may be possible to argue that those statements made specifically for medical purposes should be admissible as nontestimonial, redacting any testimonial statements made for purposes of future prosecution. Such a redaction would be analogous to the

[137] *Crawford*, 541 U.S. 36.
[138] *Id.*
[139] United States v. Tolliver, 454 F.3d 660, 665 (7th Cir. 2006).

redaction of testimonial portions of a 911 call or other statement to law enforcement in an evolving emergency situation. See ***State v. Miller***.[140]

- Consider calling the victim (or any other witnesses you fear may later become unavailable) as witnesses at a preliminary hearing in which defendant has an opportunity to cross-examine. This may preserve the testimony in a form that can be admitted if the witness later becomes unavailable for trial. Alternatively, if your court rules permit, consider requesting a pretrial deposition (preferably videotaped) to preserve the testimony of a witness who is likely to become unavailable for trial (e.g., where the witness faces deportation proceedings or is gravely ill).
- If statements are testimonial and there was no prior opportunity to cross-examine the witness, you must have the witness present to testify, unless the defendant has acted so as to forfeit his right to confrontation. (See Forfeiture by Wrongdoing.)
- Exercise due diligence in procuring your witnesses for trial, and be prepared to justify your efforts to produce that witness as reasonable, good-faith efforts. Instruct investigators to document all such efforts in detail.

Trial Strategies for Forfeiture by Wrongdoing

- Consult with victims and work to protect them from intimidation with appropriate bail/bond conditions, moving to revoke bond when appropriate.
- Educate victims about intimidation and manipulation by their abusers so they will preserve evidence of intimidation and manipulation and promptly report any such incidents to law enforcement.
- Where the inducement for the victim not to testify is in the form of seemingly loving or apparently innocuous acts, consider presenting expert testimony to explain how these acts are intended to, and do, influence victims not to cooperate in the prosecution of their abusers. Such testimony need not (and probably should not) focus on common domestic violence victim behaviors or "battered woman's syndrome", but rather should explain how batterers seeking to control or manipulate their victims use such tactics to dissuade victims from cooperating with law enforcement. Such testimony may be helpful in assisting the court to understand how a tearful apology or promise to change can be considered "wrongdoing."
- Interview the victim and all witnesses (including family and friends of the victim) about any intimidation or manipulation by the defendant or by someone acting on his behalf (such as the defendant's family members or friends).
- Prosecute defendants for forfeiture crimes such as witness tampering/intimidation/retaliation, obstruction of justice, and suborning perjury.
- Train police officers to thoroughly investigate and document all the circumstances surrounding a domestic violence incident, including the history of the relationship between the victim and defendant, which may demonstrate a pattern of abuse designed to prevent the victim from reaching out for help or from cooperating with law enforcement.
- As with ***Crawford*** challenges in general, exercise due diligence in procuring witnesses for trial, and be prepared to justify your efforts to produce those witness as reasonable, good-faith efforts. Instruct investigators to document in detail all such efforts. Failure to do so may result in failure to establish "unavailability" and preclusion of statements even where forfeiture conduct has occurred.

[140] State v. Miller, 264 P.3d 461, 488 (Kan. 2011).

- In your trial notebook, maintain a section for evidence of forfeiture by wrongdoing for each witness potentially vulnerable to intimidation or manipulation so you will be prepared to proceed with a forfeiture hearing if the witness fails to appear due to the defendant's actions. You may wish to consider requiring their appearance in court the first day of trial, regardless of when you intend to call them to testify. If your victim or witness fails to appear, make a motion for a hearing immediately prior to trial so you will know the status of your evidence before the jury is sworn or the first witness is sworn in a bench trial.
- If you become aware of the witness's unavailability after the trial begins, request a hearing outside the presence of the jury to establish forfeiture by wrongdoing.
- Be prepared to argue an *ad hoc* forfeiture motion in cases where witnesses appear but improperly refuse to testify on the stand (including any improper assertions of privilege) due to the defendant's intimidation or inducement. In such cases, request that the court order the witness to testify; failure to issue such an order may result in a finding that the witness was not necessarily unavailable.

Forfeiture Hearing Checklist[141]

- **Proffer to court that witness is unavailable** (not present, refuses to testify, claiming a privilege, etc.). May need to call witnesses to establish declarant's unavailability.
- If witness not present, **proffer due diligence** in trying to obtain the witness's presence in court. May need to call witnesses to establish due diligence. Explain all efforts made to locate the witness and to secure his or her presence in court, including an explanation of why certain efforts may not have been pursued.
- Remind court that the **standard of proof** is preponderance (or clear and convincing where applicable).
- Remind court that **hearsay is admissible**, including the statements you are seeking to have admitted.
- **Call witnesses.** These might include investigators, patrol officers, 911 dispatcher, family members, friends, co-workers, advocates (where the victim has waived confidentiality/privilege if applicable, or has otherwise given the advocate permission to testify).
- **Question witnesses as to:**
  1. First hand knowledge—what they have personally observed (instances of abuse, intimidation or control)
  2. Statements by victim
  3. Statements by defendant
  4. Statements by others
  5. Any other sources of information (e.g., pictures, journal entries, letters, voicemail messages, postings on social networking websites, etc.)
- **Question witnesses, where appropriate, about:**
  1. History of relationship (abuse/control/isolation/manipulation/intimidation)

[141] Be certain you satisfy any unique requirements for forfeiture hearings that may be applicable in your jurisdiction (*e.g.*, New Jersey requirements set forth in State v. Byrd, 967 A.2d 285, 303-04 (N.J. 2009).

2. Current incident of abuse (injuries/property damage/cause of fight)
3. Defendant's behavior since arrest (contact with victim via phone, in person, through third parties, other electronic means, threats by defendant, promises to change by defendant, professions of love by defendant)
4. Protective Orders/No-Contact Orders (violations, even where victim acquiesces)
5. Defendant's criminal history of abuse/intimidation (arrests, convictions, dropped charges).
6. Where charges were dropped previously, any actions by defendant that caused the victim to drop the charges on those occasions.

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SAMPLES

Predicate Questions for Admission of Out-of-Court Statements

- Statements to a 911 Call-Taker
- Statements to a Law Enforcement Officer on the Scene
- Statements to a Forensic Nurse Examiner for Purposes of Medical Diagnosis/Treatment

Statements to a 911 Call-Taker

Duties and Responsibilities

1. Please state your name.
2. Where are you currently employed?
3. And what do you do there? [Position]
4. How long have you worked in this current position?
5. Would you please explain to the jury your duties and responsibilities as a 911 call-taker?
    a. Did you receive any special training to qualify for your current position? What, if any?
    b. Do you receive any continuing education or training related to your position? What, if any?

Purpose of Initial Information – Providing Assistance

6. When you first answer a call, do you have a standard question you ask the caller? What is it?
7. Why do you ask the question in this way?
8. After your initial question, is there specific information you try to obtain?
9. What information?

    ID of caller - Why?

    Location of call – Why?

    ID of suspect – Why?

    Location of suspect – Why?

    Description of suspect – Why?

    Weapons – Why?

    Need for medical assistance – Why?

    NOTE: Proceed through any additional preliminary information/questions and establish the purpose of obtaining the information.

10. After you have obtained this information, what do you do next?
11. Is there a set protocol you follow when obtaining information during a 911 call?
    a. What is it?
    b. Who sets this protocol?
    c. What is the purpose of it?

    NOTE: Be aware that a 911 call may initially be in connection with an ongoing emergency (nontestimonial) but may evolve into a series of questions designed to elicit information relating to past events or charging determinations (testimonial). Information that does not relate to the provision of assistance, which is the basis of the ongoing emergency exception, must be redacted from the recording prior to admission.

12. Are there occasions when you remain on the phone with the caller until police arrive at the scene? Why would you do this?
13. I am handing what has been marked for identification as State's Exhibit # _____. Do you recognize it? What is it?
14. Have you had an opportunity to review this recording?
15. Did you recognize any of the voices on this recording? Which ones?
16. Is this recording a fair and accurate depiction of the 911 call you received from a person who identified himself or herself as ____ on (DATE)?
17. When you first answered this call, can you describe the caller's demeanor? (It is critical to provide a detailed description of the caller's demeanor.)

    NOTE: At this point move for the admission of the (redacted if necessary) 911 recording as 1) nontestimonial under the ongoing emergency doctrine, and 2) admissible under a specific hearsay exception (most commonly excited utterance or then existing mental, emotional or physical condition). Remember that if the victim has testified (even for the defense), there is no confrontation issue, so no redaction for testimonial statements should be necessary.

Statements to a Law Enforcement Officer on the Scene

1. Please introduce yourself to the jury.
2. Where are you employed?
3. What is your position at ___?
4. How long have you been employed as a police officer?
5. Would you please explain your duties and responsibilities in your current position?
6. Officer, were you on duty on (DATE OF OFFENSE) at approximately (TIME OF DISPATCH)?
7. At that time did you receive a dispatch to (LOCATION)?
8. What was the nature of the dispatch?
9. How far away from the location were you at that time?
10. And how long did it take you to arrive at the scene of the call?
11. When you arrived, where did you park in relation to the scene? Why?
12. Please describe the location you responded to?
13. When you arrived at the location, what, if anything, did you hear?
14. Did you observe anything unusual from the outside of the building?
15. What did you do after arriving at the scene?
16. With whom did you first speak when you arrived at the scene?
17. Where did you speak with this person?
18. Did you see or speak with anyone else who was present at this location?
19. (Depending on whether defendant was on the scene, ask:)
    a. (If not on scene, ask any applicable questions that may establish ongoing emergency due to dangerous assailant's being at large)
    b. (If defendant on scene, have officer ID defendant, then ask about what the defendant was doing and his demeanor).
20. Can you describe the condition of the inside of the residence? (It is critical to provide a detailed description. Particularly note details such as broken door lock/security chain, items thrown around room, phone ripped from wall, blood, etc.)
21. How much time passed between the time you were dispatched and the time you first had an opportunity to speak with (the victim)?
22. Would you describe (the victim's) physical condition when you were speaking with her?
23. Did (the victim) have any visible physical injuries when you were speaking with her?
    a. If yes, did the injuries appear to be recent?)
24. Did (the victim) appear to be in any pain while you were speaking with her? (Note such details as holding an injured arm, limping, raspy voice, etc.)
25. Did she show or tell you about any injuries or pain she was experiencing at the time?

26. Would you please describe (the victim's) demeanor when you were talking with her? (It is critical to provide a detailed, accurate description of the victim's demeanor.)
27. At this time and in this condition, did the victim make any spontaneous statements to you about what had happened?
28. Did the victim make any statements to you in response to questions by you?
31. Please describe the circumstances surrounding [the victim's] statement to you?

    NOTE: It is critical to provide a detailed, accurate description of the circumstances under which any statements were made, including asking whether there were witnesses present or within earshot. Was the victim in the police station at the time? Was the statement recorded?

32. Was the victim's statement sworn?
33. Was the victim told that her statements could or would be used in the arrest or prosecution of the suspect?

    NOTE: At this point move for the admission of the victim's statement as nontestimonial under the ongoing emergency doctrine, and 2) admissible under a specific hearsay exception (most commonly excited utterance or then existing mental, emotional or physical condition).

Statements to a Forensic Nurse Examiner for Purposes of Medical Diagnosis/Treatment

1. Please state your name for the jury?
2. How are you employed?
3. Who is your employer? How long?
4. How long have you been employed as a nurse?
5. What is your field of practice?
6. In addition to that field of practice, do you have any specialized training?
7. In what?
8. What does a Forensic Nurse Examiner do?
9. Describe the process of seeing patients who present after a domestic violence incident?
10. You indicated that you take a patient history; describe why that is medically necessary.
11. In the medical field, is obtaining a patient history unique to domestic violence patients?
12. Will you treat a patient who complains of assault regardless of whether or not they wish to cooperate with the police?

    NOTE: In some states, health care providers may be mandated to report DV so it might be better to phrase it as "cooperate with police" rather than "report it to the police" in those jurisdictions.
13. Do you obtain details of the assault from the patient? Why?
14. How do details of the assault impact the medical evaluation of the patient?
15. Do details of the assault impact the way a patient is discharged from your care? How so?

    NOTE: In regards to discussing emergent signs and symptoms with patients or needed follow up based on the mechanisms of injury like strangulation.
16. What is a discharge plan?
17. What information do you need to create a discharge plan?
18. Are discharge plans unique to domestic violence patients? Please explain. (Note that this may provide a basis for admitting the victim's statement about the identity of her abuser in a domestic violence case as a statement for purposes of obtaining medical treatment)
19. Do you create a medical record of your encounter with domestic violence patients?
20. I want to call your attention to (DATE).
21. Did you come into contact with (the victim) on that date?
22. Where did you first encounter (the victim) on that day?
23. What time was it?
24. What was the purpose of the encounter?
25. Did you obtain any information from (the victim) prior to treatment?
26. Did you obtain a medical history from (the victim)?

27. Did you obtain an account of the assault from (the victim)?
28. Did you provide medical treatment to (the victim)?
29. Can you please describe the specific steps you took in examining (the victim) in this case?
30. Would you describe (the victim's) physical condition (overall physical appearance)?
31. Did (the victim) have any visible injuries?
32. Did (the victim) describe any pain?

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