

FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
January 21, 2006

**UPDATE ON
CRAWFORD v. WASHINGTON
DEVELOPMENTS**

CRAWFORD v. WASHINGTON
AN UPDATED OUTLINE
January 2006

Table of Contents

I. The Crawford holding	1
II. Standards of review and prejudice	1
III. Waiver or forfeiture on appeal	2
IV. Unavailability	2
V. Adequacy of prior cross examination	2
VI. Related errors	2
VII. What is considered “testimonial” hearsay?	2
VIII. Prior testimony	3
IX. Statements to police officers	3
X. Statements to non-governmental individuals	8
XI. What documents may be “testimonial?”	11
XII. Statements which are not hearsay, or not admitted to prove the truth .	12
XIII. Hearsay exceptions	13
XIV. No Sixth Amendment issue when the declarant testifies	18
XV. Crawford not applicable in proceedings in which the Sixth Amendment does not apply	19
XVI. Retroactivity	22

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Barber v. Page</i> (1968) 390 U.S. 719	20
<i>Bockting v. Bayer</i> (9th Cir. 2005) 399 F.3d 1010 [as amended 408 F.3d 1127]	22, 23
<i>Bockting v. Bayer</i> (9th Cir. 2005) 418 F.3d 1055 [dis. opn.]	23
<i>Brown v. Uphoff</i> (10th Cir. 2004) 381 F.3d 1219	22
<i>Bruton v. United States</i> (1968) 391 U.S. 123	19
<i>California v. Green</i> (1970) 399 U.S. 149	18
<i>Carty v. Nelson</i> (9th Cir. 2005) 2005 U.S.App. LEXIS 27407	21
<i>Corey v. United States</i> (D. Maine 2005) 2005 U.S.Dist. LEXIS 19845	22
<i>Crawford v. Washington</i> (2004) 541 U.S. 36	<i>passim</i>
<i>Davis v. Alaska</i> (1974) 415 U.S. 308	18
<i>Delaware v. Van Arsdall</i> (1986) 475 U.S. 673	2, 18
<i>Dorchy v. Jones</i> (6th Cir. 2005) 398 F.3d 783	22
<i>Gagnon v. Scarpelli</i> (1973) 411 U.S. 778	19
<i>Griffith v. Kentucky</i> (1987) 479 U.S. 314	22
<i>Lave v. Dretke</i> (5th Cir. 2005)	

416 F.3d 372	22
<i>Morrissey v. Brewer</i> (1972) 408 U.S. 471	19
<i>Mungo v. Duncan</i> (2nd Cir. 2004) 393 F.3d 327	22
<i>Murillo v. Frank</i> (7th Cir. 2005) 402 F.3d 786	22
<i>Nelson v. O'Neil</i> (1971) 402 U.S. 622	19
<i>Ohio v. Roberts</i> (1980) 448 U.S. 56	1
<i>Parle v. Runnels</i> (9th Cir. 2004) 387 F.3d 1030	12
<i>Pennsylvania v. Ritchie</i> (1987) 480 U.S. 39	20
<i>Shepard v. United States</i> (2005) 544 U.S. _____ [161 L.Ed.2d 205, 125 S.Ct.1254, 2005 U.S. LEXIS 2205] ..	21
<i>Smith v. Illinois</i> (1968) 390 U.S. 129	18
<i>Teague v. Lane</i> (1989) 489 U.S. 288	22, 23
<i>Tennessee v. Street</i> (1985) 471 U.S. 409	12
<i>United States v. Allen</i> (9th Cir. 2005) 425 F.3d 1231	14
<i>United States v. Bahena-Cardenas</i> (9th Cir. 2005) 411 F.3d 1067	11
<i>United States v. Cervantes-Flores</i> (9th Cir. 2005) 421 F.3d 825	12
<i>United States v. Cromer</i> (6th Cir. 2004) 389 F.3d 662	4

<i>United States v. Delgado</i> (5th Cir. 2005) 401 F.3d 290	14
<i>United States v. Hall</i> (9th Cir. 2005) 419 F.3d 980	20
<i>United States v. Houlihan</i> (1st Cir. 1996) 96 F.3d 1271	17
<i>United States v. Nielsen</i> (9th Cir. 2004) 371 F.3d 574	2, 7
<i>United States v. Rashid</i> (8th Cir. 2004) 383 F.3d 769	14
<i>United States v. Rondeau</i> (1st Cir. 2005) 2005 U.S.App. LEXIS 25224	20
<i>United States v. Weiland</i> (9th Cir. 2005) 420 F.3d 1062	1, 12
<i>United States v. Wilmore</i> (9th Cir. 2004) 381 F.3d 868	2, 18
<i>White v. Illinois</i> (1992) 502 U.S. 346 [112 S.Ct. 736, 116 L.Ed.2d 848]	3

STATE CASES

<i>Commonwealth v. Given</i> (2004) 441 Mass. 741 [808 N.E.2d 788]	21
<i>Commonwealth v. Gonsalves</i> (Mass. 2005) 445 Mass.1 [833 N.E.2d 549]	7
<i>Davis v. Washington</i> (Wash. 2005) 154 Wn.2d 291 [111 P.3d 844, cert granted (05-5224)]	8
<i>Hammon v. State</i> (Ind. 2005) 829 N.E.2d 444 [cert. granted, <i>Hammon v. Indiana</i> (05-5705)]	4, 7
<i>In re April C.</i> (2005) 131 Cal.App.4th 599[rev. denied]	22

<i>In re Moore</i> (2005) 133 Cal.App.4th 68	22
<i>In re Sakarias</i> (2005) 35 Cal.4th 140	22
<i>Kulshretha v. First Union Commercial Corp.</i> (2004) 33 Cal.4th 601	22
<i>People v. Adams</i> (2004) 120 Cal.App.4th 1065 [rev. granted (S127373)]	5
<i>People v. Angulo</i> (2005) 129 Cal.App.4th 303	19, 21
<i>People v. Aranda</i> (1965) 63 Cal.2d 518	19
<i>People v. Arreola</i> (1994) 74 Cal.4th 1144	20
<i>People v. Avila</i> (2005) 131 Cal.App.4th 163	2
<i>People v. Baylor</i> (2005) 130 Cal.App.4th 355 [rev. granted Sept. 21, 2005]	2
<i>People v. Boyd</i> (1990) 222 Cal.App.3d 541	19
<i>People v. Butler</i> (2005) 127 Cal.App.4th 49 [rev. denied]	11, 18
<i>People v. Cage</i> (2004) 120 Cal.App.4th 770 [rev. granted Oct. 13, 2004 (S127344)]	5, 11, 22
<i>People v. Carter</i> (2005) 36 Cal.4th 1114	2
<i>People v. Castille</i> (2005) 129 Cal.App.4th 863	13
<i>People v. Caudillo</i> (2004) 122 Cal.App.4th 1417 [modified 2004 Cal.App. LEXIS 1849, rev. granted (S1292120)]	7, 8

<i>People v. Cervantes</i> (2004) 118 Cal.App.4th 162 [rev. denied]	1, 9, 10, 12
<i>People v. Combs</i> (2004) 34 Cal.4th 821	13, 22
<i>People v. Corella</i> (2004) 122 Cal.App.4th 461	6-8
<i>People v. Cortes</i> (2004) 781 N.Y.S.2d 401	8
<i>People v. Giles</i> (2004) 123 Cal.App.4th 475 [rev. granted (\$129852)]	16
<i>People v. Gomez</i> (2004) 117 Cal.App.4th 531	21
<i>People v. Gonzales</i> (2005) 131 Cal.App.4th 767 [rev. denied]	21
<i>People v. Greenberger</i> (1997) 58 Cal.App.4th 298	1
<i>People v. Hallquist</i> (2005) 133 Cal.App.4th 291	13
<i>People v. Harless</i> (2004) 125 Cal.App.4th 70 [rev. granted (\$131011)]	18
<i>People v. Houston</i> (2005) 130 Cal.App.4th 279	2
<i>People v. Jiles</i> (2004) 122 Cal.App.4th 504 [rev. granted (\$128638)]	16
<i>People v. Johnson</i> (2004) 121 Cal.App.4th 1409	11, 20
<i>People v. Kilday</i> (2004) 123 Cal.App.4th 406 [rev. granted (\$129567)]	5, 6
<i>People v. Lee</i> (2004) 124 Cal.App.4th 483 [rev. granted (\$130570)]	5
<i>People v. Maki</i> (1985) 39 Cal.3d 707	20

<i>People v. Martinez</i> (2005) 125 Cal.App.4th 1035 [rev. denied]	18
<i>People v. Martinez</i> (2005) 132 Cal.App.4th 233	20
<i>People v. Mitchell</i> (2005) 131 Cal.App.4th 1210 [rev. denied]	2, 13
<i>People v. Monterroso</i> (2004) 34 Cal.4th 743	15
<i>People v. Morgan</i> (2005) 125 Cal.App.4th 935	6
<i>People v. Morrison</i> (2004) 34 Cal.4th 698	18
<i>People v. Moscat</i> (2004) 777 N.Y.S.2d 875	8
<i>People v. Ochoa</i> (2004) 121 Cal.App.4th 1551 [rev. granted]	5
<i>People v. Partida</i> (2005) ___ 2005 DAR 13463	2
<i>People v. Perez</i> (2000) 82 Cal.App.4th 760	18
<i>People v. Pirwani</i> (2004) 119 Cal.App.4th 770 [rev. granted (S130570)]	4, 5
<i>People v. Price</i> (2004) 120 Cal.App.4th 224	5, 11
<i>People v. Rincon</i> (2005) 129 Cal.App.4th 738 [rev. denied]	10, 14
<i>People v. Roldan</i> (2005) 35 Cal.4th 646	13
<i>People v. Saffold</i> (2005) 127 Cal.App.4th 979	12

<i>People v. Seijas</i> (2005) 36 Cal.4th 291	2
<i>People v. Sisavath</i> (2004) 118 Cal.App.4th 1396 [rev. denied]	6, 7, 10
<i>People v. Smith</i> (2003) 30 Cal.4th 581	21
<i>People v. Song</i> (2004) 124 Cal.App.4th 973	19
<i>People v. Taulton</i> (2005) 129 Cal.App.4th 1218	12
<i>People v. Thoma</i> (2005) 128 Cal.App.4th 676 [rev. granted (S134243)]	13
<i>People v. Thomas</i> (2005) 130 Cal.App.4th 1202	13
<i>People v. Wahlert</i> (2005) 130 Cal.App.4th 709 [rev. granted]	10
<i>People v. Whitney</i> (2005) 129 Cal.App.4th 1287	21
<i>People v. Wilson</i> (2005) 36 Cal.4th 309	3
<i>People v. Winson</i> (1981) 29 Cal.3d 711	20
<i>Stancil v. United States</i> (D.C. App. 2005) 866 A.2d 799	7
<i>Spencer v. State</i> (Tex. App. 2005) 162 S.W.3d 877	7
<i>State v. West</i> (Ill.App. 2005) 355 Ill.App.3d 28 [823 N.E.2d 82]	5, 8
<i>Whitman v. Superior Court</i> (1991) 54 Cal.3d 1063	20

<i>Zuliani v. State</i> (Tex. App. 2003) 97 S.W.3d 589	7
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FEDERAL STATUTES

United States Constitution

Fifth Amendment	2, 10
Sixth Amendment	<i>passim</i>

Federal Rules of Evidence

§ 804(b)(6)	17
-------------------	----

AEDPA

§ 2254(d)(1)	23
--------------------	----

STATE STATUTES

Evidence Code

§ 1220	13
§ 1240	14, 18
§ 1350	16, 17
§ 1370	16
§ 1380	5

OTHER AUTHORITIES

Prof. Richard Friedman, <i>Confrontation: The Search for Basic Principles</i> , 86 Geo.L.J. 1011	4
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CRAWFORD v. WASHINGTON
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January 2006

I. The *Crawford* holding

- A. In its holding in *Crawford v. Washington* (2004) 541 U.S. 36, the U.S. Supreme Court abandoned 24 years of Sixth Amendment precedent dating back to its earlier holding in *Ohio v. Roberts* (1980) 448 U.S. 56.
- B. *Crawford* holds that whenever the state offers hearsay evidence against the accused that is “testimonial” in nature, the Sixth Amendment Confrontation Clause requires a showing of
 - 1. unavailability; and
 - 2. a prior opportunity for cross examination (*Crawford, supra*, at pp. 68-69.)
- C. Thus, for “testimonial” hearsay, the rule in *Ohio v. Roberts* that focuses on the “reliability” of the hearsay is no longer valid.

II. Standards of review and prejudice

- A. Pre-*Crawford*, whether a hearsay statement was trustworthy was reviewed for abuse of discretion. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 335.)
- B. Post-*Crawford*, the court independently reviews the totality of the circumstances surrounding the statement to determine whether hearsay is “testimonial.” (*People v. Cervantes* (2004) 118 Cal.App.4th at p. 175, review denied [finding the statements non-testimonial]; *United States v. Weiland* (9th Cir. 2005) 420 F.3d 1062, 1076, fn.12 [indicating the same standard would apply to whether there was an adequate opportunity to cross-examine, and finding public documents not testimonial].)
- C. Because testimonial hearsay implicates the confrontation clause, erroneous admission of such evidence is reviewed for harmless error

¹This outline was built on the work of Professor Robert Calhoun, Golden Gate Law School, who gave a presentation on the impact of *Crawford* at the January 2005 seminar. This update was prepared by Alan Siraco, Staff Attorney at the First District Appellate Project with the assistance of law student Jason Stalinsky.

under *Chapman*. (*United States v. Nielsen*, (9th Cir. 2004) 371 F.3d 574, at p. 581, citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680-681. See also, *People v. Mitchell*, (2005) 131 Cal.App.4th 1210 [admission of otherwise testimonial hearsay in 9-1-1 call was harmless under *Chapman*]; *People v. Houston* (2005) 130 Cal.App.4th 279 [same].)

III. Waiver or forfeiture on appeal

- A. In *People v. Partida* (2005) ___ 2005 DAR 13463, the California Supreme Court has held that though the specific basis for objection must be stated, and review is limited to that basis, a due process argument is preserved for appeal regardless of whether due process was invoked in the trial court.
- B. *People v. Baylor* (2005) 130 Cal.App.4th 355 [objection on HS grounds did not preserve a *Crawford* claim; hearsay declarant was available for cross-examination anyway], review granted September 21, 2005 behind *Partida*.

IV. Unavailability: Proper invocation of the witness' 5th Amendment privilege renders him unavailable for *Crawford's* purposes. (*People v. Seijas* (2005) 36 Cal. 4th 291.) Waiting until the day before trial to look for a witness is not sufficient to show due diligence to establish unavailability. (*People v. Avila* (2005) 131 Cal.App.4th 163 [no mention of *Crawford*].)

V. Adequacy of prior cross examination: Even after *Crawford*, the California Supreme Court continues to weigh the effectiveness of prior cross-examination to determine if it was good enough to render the prior testimony reliable. (*People v. Carter* (2005) 36 Cal.4th 1114.)

VI. Related errors: Once testimonial hearsay is admitted, it may be a separate 6th Amendment violation to limit cross-examination about it. (*United States v. Wilmore* (9th Cir. 2004) 381 F.3d 868 [district court restricted defendant's cross-examination of a government witness about her grand jury testimony after she invoked the Fifth at trial and the government introduced her grand jury testimony as a prior inconsistent statement].)

VII. What is considered "testimonial" hearsay?

Unfortunately, the Court chose to "leave for another day any effort to spell out a comprehensive definition of 'testimonial'." (*Crawford, supra*, at p. 68.)

- A. However, the Court gives hints to its meaning:
 - 1. "'Testimony,' . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some

fact.” (*Crawford, supra*, at p. 51.)

2. The court also provided three possible “formulations” of the “core class of ‘testimonial’ statements” without expressly endorsing any:
 - a. “‘*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,’ Brief for Petitioner 23”;
 - b. “‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’ *White v. Illinois*, 502 U.S. 346, 365, 112 S. Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)”;
 - c. “‘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,’ Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3.”

(*Crawford, supra*, at pp. 51-52.)

3. Finally, the court provided an irreducible minimum pertinent to the facts before it: “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; and to police interrogations.” (*Crawford, supra*, at p. 68 [tape recorded statement of defendant’s wife, obtained during her interrogation as a suspect, was “testimonial” hearsay and, thus, subject to *Crawford*’s stringent standard].)

VIII. Prior testimony: Testimony at a first trial by a witness unavailable at a subsequent trial after reversal and remand is testimonial hearsay. (*People v. Wilson* (2005) 36 Cal.4th 309 [sufficient opportunity to cross-examine at the first trial].)

IX. Statements made to police officers

- A. Is formal interrogation necessary?

1. Many California cases have sought to limit “testimonial” to statements that were the product of police “interrogation,” eschewing the option of analyzing the evidence through the filter of *Crawford*’s objective witness intent formulation.
2. There are two problems with this approach:
 - a. First, it overlooks the historical fact, significant to Justice Scalia, that justices of the peace formerly were not magistrates as we understand the office and that they performed investigative functions that we currently associate with the police. (*Crawford, supra*, at p. 53.)
 - b. Secondly, and more important, treating formality as a prerequisite for categorizing a statement as “testimonial” misses the larger point of *Crawford* which is that statements made to the authorities by persons who should reasonably expect that the statement would be used against the accused in investigating and prosecuting a crime are precisely the sort of accusatory statement the Confrontation Clause was designed to address, regardless of the formality of the setting.
3. An approach appreciating the latter problem has been taken by several federal circuits. (See, e.g., *United States v. Cromer* (6th Cir. 2004) 389 F.3d 662, 673-674 [discussing agreement among several other federal circuits and focusing on whether the declarant has made an accusatory statement], quoting Prof. Richard Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011 (1998) [“A statement made knowingly to the authorities that describes criminal activity is almost always “testimonial”].) Note: Prof. Friedman’s article was cited approvingly in *Crawford, supra*, at p. 61, and Prof. Friedman co-authored one of the more influential amicus briefs submitted in *Crawford*.
4. A similar approach has also been taken by the Supreme Court of Illinois. (*Hammon v. State* (Ind. 2005) 829 N.E.2d 444 [discussing approaches of several jurisdictions and concluding that testimonial is a statement given or taken substantially for the purpose of use at trial], *cert. granted, Hammon v. Indiana* (05-5705).)

B. Formal interrogation cases

- a. *People v. Pirwani* (2004) 119 Cal.App.4th 770 [videotaped

statement made by a crime victim to police and admitted under Evidence Code section 1380 is “testimonial”], *review granted* (S130570), behind *People v. Cage* (S127344).

- b. *People v. Lee* (2004) 124 Cal.App.4th 483 [taped interview of two witnesses by the police is “testimonial”], *review granted* (S130570) , behind *Cage* (S127344).

C. Statement to police not the result of formal interrogation

1. Statements made at crime scenes

- a. *People v. Cage* (2004) 120 Cal.App.4th 770, *review granted* October 13, 2004 (S127344). The Fourth District, Division Two held that “police questioning is not necessarily police interrogation.” To constitute interrogation the statement must be made in a relatively formal proceeding that contemplates a trial. It even suggests the statement must be memorialized somehow.
- b. *People v. Adams* (2004) 120 Cal.App.4th 1065, *review granted* (S127373) . The Third District held that a forty-five minute interview of the complainant at the hospital was testimonial. This case was taken by the Supreme Court at the same time as *Cage* and presents the same issue. (See also, *State v. West* (Ill.App. 2005) 355 Ill.App.3d 28 [823 N.E.2d 82] [distinguishing interview at the hospital to obtain evidence from questions at the scene to administer medical assistance], following *Kilday*.)
- c. *People v. Ochoa* (2004) 121 Cal.App.4th 1551, *review granted* behind both *Black* and *Cage*. The Fourth District, Division One held that insistence on formality is inconsistent with core message of *Crawford*. However, it also held that preliminary hearing cross-examination is sufficient to permit use of prior testimony. (See also, *People v. Price* (2004) 120 Cal.App.4th. 224 [victim's statement to police at the scene was testimonial, but the defendant had and "vigorously" used his opportunity to cross-examine at the preliminary hearing].)
- d. *People v. Kilday* (2004) 123 Cal.App.4th 406, *review granted* (S129567) behind *Cage*. The First District held the victim’s first statement about how she was beaten, cut and thrown into the street made to officers responding to the scene was not testimonial because the victim was

“frightened and upset, [and] the area was uncertain.” (*Id.*, at p. 421.) However, the second statement of the victim, taken a bit later at the scene by a different officer was taken by police in an “investigative capacity to produce evidence” (*Id.*, at p. 420) and, thus, was found to be taken in response interrogation. The First District specifically rejects *Corella*’s suggestion that formality is necessary. Instead, *Kilday* holds that “we believe that an interpretation of *Crawford* that makes the presence or absence of indicia, of formality determinative is inconsistent with the Supreme Court focus on “the production of testimonial evidence ... which may occur during relatively informal questioning in the field.” (*Id.*, at p. 422).

- e. *People v. Morgan* (2005) 125 Cal.App.4th 935. The Third District held that statements, including implied assertions requesting drugs made by a caller to a house where a search warrant was being executed (and which were intercepted by a police officer) were not “testimonial,” because “the informal statement made in an unstructured setting does not resemble the police interrogation in *Crawford* ... [and] the officer’s minimal response to the caller is not the ‘involvement of government officers in the production of testimony with an eye toward trial [that] presents unique potential for prosecutorial abuse.’” (*Id.* at p. 947.) However, the police officer here pretended to be an associate of the defendant and went on to elicit what amount of drugs was needed as well as to invite the caller to come over (which had the effect of confirming the intent to buy) in order to ascertain evidence of the defendant’s drug sale activity, so it is difficult to see why the police officer’s actions don’t amount to “interrogation” under *Crawford*.
- f. *People v. Corella* (2004) 122 Cal.App.4th 461. Mostly a 911 call case, but it also deals with follow-up statements made to a responding police officers. The Second District held these statements were not in response to interrogation because “under *Crawford* a police interrogation requires a relatively formal investigation where a trial is contemplated.” (*Id.*, at p. 468.)
- g. *People v. Sisavath* (2004) 118 Cal.App. 4th 1396, *review denied*. Although principally about a videotaped statement

made to a private child abuse center, the Fifth District held, without much analysis, that a statement the alleged child victim made to a police officer who responded to a complaint by the mother to be “testimonial,” because the “statement was ‘knowingly given in response to structured police questioning.’” (*Id.*, at p. 1402.)

- h. Consistent with the *Cromer* and *Hammon* approach, *United States v. Nielsen* (9th Cir. 2004) 371 F.3d 574 held that the defendant’s girlfriend’s statement in response to police questioning during a search and in defendant’s absence, that only defendant had access to a safe in which drugs were found was testimonial hearsay.
 - i. In *Spencer v. State* (Tex. App. 2005) 162 S.W.3d 877, 881, the court reasoned, “excited utterances can be made both spontaneously and in response to questioning. . . . Accordingly, we decline to join those courts that have established a bright-line rule that excited utterances can never be testimonial.” (Citing *Zuliani v. State* (Tex. App. 2003) 97 S.W.3d 589, 596 and *Stancil v. United States* (D.C. App. 2005) 866 A.2d 799, 809 [“Some excited utterances are testimonial, and others are not, depending on the circumstances”]. See also, *Hammon v. State, supra*, 829 N.E.2d at p. 449 [“no matter how ‘firmly rooted’ the excited utterance exception may be” the court rejects the notion that “an ‘excited utterance’ is necessarily nontestimonial”], *cert. granted.*)
 - j. *Commonwealth v. Gonsalves* (Mass. 2005) 445 Mass.1 [833 N.E.2d 549], held that statements made in response to police questioning at the scene “are per se testimonial, except” where necessary to “secure a volatile scene” or obtain “medical care.”
2. 9-1-1 calls
- a. *People v. Corella, supra*, 122 Cal.App.4th at p. 468. The defendant’s wife’s statement to the 9-1-1 operator that her husband hit her was found to be non-testimonial because it was not “knowingly given in response to structured police questioning.”
 - b. *People v. Caudillo* (2004) 122 Cal.App.4th 1417, as modified 2004 Cal. App. LEXIS 1849, *review granted*

(S129212). The Sixth District held that statements reporting “men with guns” and providing a description of the car from which shots were fired by an anonymous non-victim to the 9-1-1 operator were “non-testimonial,” despite the fact that call was made for the specific purpose of providing the police with the information necessary to apprehend the shooters, because it was not “made under circumstances that would lead an objective witness reasonably to believe the statement would be available for later use at trial.” (*Id.*, at p. 1440).

- c. *People v. Moscat* (2004) 777 N.Y.S. 2d 875. In analysis consistent with *Corella, supra*, and *Caudillo, supra*, the court held that a statement made to a 9-1-1 operator is not testimonial, because a “testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call it is the citizen who summons the government to her aid.”
- d. *People v. Cortes* (2004) 781 N.Y.S. 2d 401. The court held that statement by a third party witness to a shooting to a 9-1-1 operator was testimonial, because “[w]hen a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for the investigation, prosecution and potential use at a judicial proceeding; it makes no difference what the caller believes.” (*Id.*, at p. 415.)
- e. *Davis v. Washington* (Wash. 2005) 154 Wn.2d 291 [111 P.3d 844], *cert. granted* (05-5224): held that a 9-1-1 call must be analyzed on a case-by-case basis. Any given call may have some testimonial (identifying the perpetrator of a crime) and some non-testimonial (requesting aid) statements. Erroneous admission of the whole statement in this case was harmless under *Chapman*.
- f. *State v. West* (Ill.App. 2005) 355 Ill.App.3d 28 [823 N.E.2d 82], similarly rejected a bright line rule, and concluded that a 9-1-1 call reporting a crime constituted “bearing witness” and later statements in response to questions were also testimonial.

X. Statements to non-governmental individuals

- A. “[A] person who makes a casual remark to an acquaintance” is not making

a “testimonial” statement. (*Crawford, supra*, at p. 51.)

1. None of Justice Scalia’s core examples of testimonial statements involve statements to private persons; and
2. Justice Scalia’s history lesson, with its focus on the civil law mode of criminal procedure and particularly its use of *ex parte* examinations as evidence against the accused, could be viewed as being exclusively concerned with government involvement in the creation of the hearsay.

B. However, *Crawford* provides indications that some statements to non-governmental individuals may be “testimonial.”

1. Two of the three “formulations” of “testimonial” hearsay that Justice Scalia provides focus on the intent of the declarant (i.e., whether a “declarant” or “an objective witness” would “reasonably [...] believe that the statement would be available for use at a later trial.”) (*Crawford, supra*, at pp. 11-52.) Such a test would certainly cover some statements made to private persons.
2. The full implications of such a limitation on the meaning of the term “testimonial” would make a mockery of the *Crawford* holding. Using Justice Scalia’s prime example, that would mean Sir Walter Raleigh could still have been convicted on *ex parte* affidavits so long as they were given to private persons regardless of how accusatory they were. Modernly, videotaped statements by the victim or a witness, taken by a rape counselor, domestic violence counselor, private attorney, or any other private person, would all be exempt from the sweep of *Crawford*.

C. Some California cases decline to adopt this private person limitation:

1. *People v. Cervantes* (2004) 118 Cal.App. 4th 162, *review denied*. Though the court found the statement to be “non-testimonial,” it assumed statements to private persons could qualify as “testimonial” and found the third “formulation” to be determinative on whether they actually are. The court found that the statement made by a co-defendant to a neighbor in the process of seeking medical help was not “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” It focused on getting medical care rather than making an accusation, and thus, the statement was “non-testimonial” not because it was made to a private person, but for other reasons.

2. *People v. Sisavath, supra*, 118 Cal.App.4th at p. 1402. The Fifth District specifically rejected the Attorney General’s argument that the child’s videotaped statement could not be “testimonial” because it was not given to a government employee. The Court reasoned instead that the pertinent question is “whether an objective observer would reasonably expect the statement to be available for use in a prosecution,” and held the statement was “testimonial”. Note, however, that in this case, the interview during which the statements were made to private parties was attended by the prosecutor and the prosecutor’s investigator.
3. Defendant's statements to co-defendant made during conversation set up by police as a “pretext call” to get evidence against defendant were inadmissible under *Crawford*. The defendant who does not testify is presumptively unavailable due to the 5th Amendment. (*People v. Wahlert* (2005) 130 Cal.App.4th 709 [error harmless beyond a reasonable doubt], *review granted*.)
4. Note that *Sisavath* and *Cervantes* each defines the use of *Crawford*’s “Third Formulation” differently. *Cervantes* sticks close to the language of *Crawford* and asks whether “a reasonable person in [the declarant’s] position would reasonably believe the statement would be used at trial.” (*Cervantes, supra*, at p. 174.) *Sisavath* rejects that approach, observing “It is more likely that the Supreme Court meant simply that if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial.” (*Sisavath, supra*, at p. 1402). This distinction between what would be thought by a reasonable declarant as opposed to a reasonable observer was not determinative in either of these cases. However, when the declarant is a child, some very old person or someone else who arguably has no awareness of the possible trial usage of their statements, the distinction could be critical.

D. However, several California cases have declined to find statements to private persons to be “testimonial”:

1. *People v. Rincon* (2005) 129 Cal.App.4th 738, *review denied*. The Second District held an out-of-court statement made by a shooting victim to his former gang member friend was not “testimonial” because he could not reasonably have expected the friend to relate the statement to the police for use in a prosecution.

2. *People v. Butler* (2005) 127 Cal.App.4th 49, *review denied* expressed a hard line against any statement not made in the course of police interrogation. Here, the statements were made by school staff to other staff identifying the defendant or at least incriminating him in a shooting, and they were made in the course of school staff trying to investigate the shooting. A separate school staffer called 9-1-1 and reported the statements, some of which were third level hearsay. The defendant on appeal argued the statements related were “testimonial” under *Crawford*’s so-called “third formulation” as described in *Sisavath*. The Court reasoned, “We find no language in *Crawford* that supports these arguments. Rather, appellant’s position is contrary to the language we have quoted from *Crawford* in which the Supreme Court focused on statements given in lieu of oral testimony, such as an affidavit, or given to a government official in a formal statement.”
3. *People v. Cage, supra*, 120 Cal.App.4th 770, *review granted*. The Fourth District, Division Two adopted the Attorney General’s argument for a statement made by the victim to a doctor at the emergency room, emphasizing that the doctor was neither a police officer nor an agent of the police. (But see, *People v. Price* (2004) 120 Cal.App.4th. 224 [distinguishing statements made to doctor to obtain diagnosis and treatment from those identifying her assailant].)

XI. What documents may be “testimonial?”

1. In *People v. Johnson* (2004) 121 Cal.App.4th 1409, in addition to holding that *Crawford* did not apply to a probation revocation hearing (discussed below), the First District reasoned that a lab report was not “testimonial.” This portion of the opinion was dicta, given the broader holding in the case that the Sixth Amendment simply did not apply. However, the lab report contained an expert determination of the narcotic quality of the substance possessed by defendant. It was prepared by the Alameda County Crime Laboratory. Surely, such a report was “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” (*Crawford, supra* at pp. 51-52.)
2. A warrant of deportation held in the defendant’s INS file was admissible to prove defendant left the country even after *Crawford* because it was not prepared for the purpose of litigation; it was not testimonial. (*United States v. Bahena-Cardenas* (9th Cir. 2005) 411 F.3d 1067.)

3. A certificate of nonexistence of record, submitted by the government to prove that defendant had not received the Attorney General's consent to reenter the United States in prosecution for being found in the U.S. after deportation, was not testimonial. Even though the certificate was prepared for litigation, the underlying document which the certificate attested did not exist was not. (*United States v. Cervantes-Flores* (9th Cir. 2005) 421 F.3d 825.)
4. Relying on a conservatorship case and two California statutes, the Second District held in *People v. Saffold* (2005) 127 Cal.App.4th 979 that a proof of service executed by a deputy sheriff serving a restraining order on the defendant was not testimonial in a prosecution for 7 counts of violating the restraining order.
5. A Penal Code section "969b packet" was not "testimonial" because the documents were not obtained for the purpose of potentially using them in a criminal trial or determining if a criminal charge should issue (*People v. Taulton* (2005) 129 Cal.App.4th 1218, disagreeing with *People v. Cervantes* (2004) 118 Cal.App.4th 162. Foreseeability is not the standard, the purpose for which the document was prepared is. (See also, *United States v. Weiland* (9th Cir. 2005) 420 F.3d 1062 ["Penitentiary packet" was a public record under *Crawford*].)
6. A murder victim's diary was not testimonial. (*Parle v. Runnels* (9th Cir. 2004) 387 F.3d 1030.)

XII. Statements which are not hearsay, or not admitted to prove the truth

1. "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 (1985)..." (*Crawford, supra*, at p. 59, fn. 9.) In *Street*, the co-defendant's confession was offered in rebuttal to show that he had not said what defendant testified he had said. Thus, it was not offered for its truth but, rather, to demonstrate a discrepancy, impeaching the defendant's credibility.
2. The California Supreme Court has accordingly held that a co-defendant's statements made during a videotaped re-enactment of the crime (done jointly by defendant and co-defendant) do not raise Confrontation Clause issues because they were not offered for a hearsay purpose. In the court's view, the defendant adopted

his co-defendant's statements and they were not offered for their truth but, rather, to supply meaning to defendant's conduct or silence in the face of them. (*People v. Combs* (2004) 34 Cal. 4th 821, 842.)

2. In *People v. Thomas* (2005) 130 Cal.App.4th 1202, the court held that reliance on hearsay regarding the defendant's gang status was permissible to substantiate an expert opinion because it is not "testimonial." (See also, *People v. Hallquist* (2005) 133 Cal.App.4th 291 [a post-*Crawford* case without any mention of *Crawford* held that information on a label was hearsay, because the expert relied upon its truth in forming his opinion; however, since such reliance is proper, there was no error in admitting the testimony].)

XIII. Hearsay exceptions

1. It is a staple of evidence law that the very theory underlying the use of a party's statements against him (under the party admissions exception) is the belief that a party can hardly complain about a lack of an opportunity to cross-examine himself (Calif. Ev. Code § 1220 (comment)). Nothing in *Crawford* suggests an intent to go beyond this hoary principle and allow the defendant a new basis for excluding his own statements. (*People v. Roldan* (2005) 35 Cal.4th 646, 711, fn. 25. See also, *People v. Castille* (2005) 129 Cal.App.4th 863 [defendant's silence in face of co-defendant's statements during joint interview]; *People v. Thoma* (2005) 128 Cal.App.4th 676, *review granted* (S134243) [issue: whether defendant's silence during a court hearing can be deemed an adoptive admission].)
2. *People v. Mitchell* (2005) 131 Cal.App.4th 1210, *review denied*: Second District held: "Classification as a 'business record,' however, does not alone determine whether this type of evidence is admissible as nontestimonial under *Crawford*. In *Crawford*, the Supreme Court noted business records were one example of hearsay statements 'that by their nature were not testimonial.' By this the court could not have meant all documentary evidence which could broadly qualify in some context as a business record should automatically be considered nontestimonial. Thus, the questions before a court are more properly whether the business record in question nevertheless contains testimonial evidence and whether the record is admissible in compliance with *Crawford's* requirements." Here, the court reasoned that a dispatch log tape was a business record, relevant to the officer's actions and state of

mind, and “immaterial to any contested matter in the trial.” Thus, it was not made inadmissible under the 6th A. by *Crawford*. Admission of the 2 statements on the tape that incriminated the defendant appellant was harmless under *Chapman*.

3. *People v. Rincon* (2005) 129 Cal.App.4th 738, *review denied*. The Second District held an out-of-court statement made by a shooting victim immediately after the shooting to his former gang member friend was not “testimonial hearsay” because it qualified as a “spontaneous statement” under Evidence Code section 1240, which *Crawford* “strongly implied” was excepted from Sixth Amendment protection, citing *Crawford*, supra, 541 U.S. at p. 58, fn. 8 [a statement made “‘immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.’”].)
4. “Co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford*’s holding. See [*Crawford*] at 56 (describing ‘statements in furtherance of a conspiracy’ as ‘statements that by their nature [are] not testimonial’)” (*United States v. Allen* (9th Cir. 2005) 425 F.3d 1231, quoting *Crawford* and citing *United States v. Delgado* (5th Cir. 2005) 401 F.3d 290, 299 and *United States v. Rashid* (8th Cir. 2004) 383 F.3d 769, 777.)

B. Dying Declarations and “Forfeiture by Misconduct”

1. Dying declarations are probably exempt from *Crawford*’s analysis under either of two different rationales:
 - a. they represent an historic exception to the confrontation clause that is incorporated as part of *Crawford*’s effort to capture the historic meaning of the Sixth Amendment; or
 - b. they are admissible under Justice Scalia’s equitable theory of “forfeiture by misconduct” (i.e. if you prevented the witness from testifying you can’t be heard to complain of an inability to cross-examine the witness).
2. Dying Declarations as an Exception to the Confrontation Clause
 - a. Justice Scalia cites historians for the proposition that dying declarations were the only recognized criminal hearsay exception at common law. Therefore, he concludes, “Although many dying declarations may be testimonial, there is authority for admitting even those that clearly are.”

However, he ultimately reserves the issue, concluding “We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.” (*Crawford, supra*, p. 56, f.n.6.)

- b. The California Supreme Court seized upon this suggestion to hold in *People v. Monterroso* (2004) 34 Cal.4th 743, a death penalty case, that dying declarations do not violate the confrontation clause. Doing its own historical analysis, the court concluded that dying declarations were a recognized exception at common law and *Crawford* teaches that the Confrontation Clause must be read as it existed at that time.
 - c. Note: *Monterroso* holds out a thin reed in footnote 5: “We do not decide whether [the declarant’s] statement was testimonial within the meaning of *Crawford*, nor whether the statement was admissible on other grounds.” It is possible that this could lead to an argument that dying declarations that are clearly testimonial could yet be excluded.
3. Forfeiture by Misconduct
- a. Justice Scalia also adopted the concept of “forfeiture by wrongdoing” as a separate and distinct exception to the Confrontation Clause, but then declined to give us any insight into what its contour might be. Distinguishing exceptions based on the reliability analysis of *Roberts* (which he disavowed), Justice Scalia tells us “[T]he 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.” (*Crawford, supra* at p. 62.)
 - b. “Forfeiture by wrongdoing” is potentially a very powerful doctrine and could extend well beyond dying declarations. By its very terms, it can apply any time it can be shown that the defendant had a hand in the declarant’s unavailability.
 - c. Note: this equitably created exception to the Confrontation

Clause must carefully be distinguished from the hearsay exception of Evidence Code section 1350, which creates a hearsay exception in serious felony cases for hearsay statements made by unavailable witnesses when “[t]here is clear and convincing evidence that the declarant’s unavailability was knowingly caused by, aided by, or solicited by the party against when this statement is offered.” If *Crawford* stands for anything, it is that the meaning of the Confrontation Clause is not to be determined by states’ hearsay laws.

- d. The California Supreme Court has not previously addressed the applicability of such as exception to the Confrontation Clause but has just taken the issue in a grant of review to two similarly named cases: *People v. Giles* (2004) 123 Cal.App.4th 475, review granted (S129852) and *People v. Jiles* (2004) 122 Cal. App 4th 504, review granted (S128638). The order granting review listed two issues: whether the forfeiture doctrine applies on the facts of these cases and whether the doctrine applies when the alleged “wrongdoing” is the same as the offense for which defendant was on trial. In *Giles*, the Fourth District, Division Two, upheld the admission of a dying declaration pursuant to the forfeiture doctrine. In *Jiles*, the Second District applied the forfeiture doctrine to statements of the victim made a few weeks before being shot and killed that were admitted under Evid. Code § 1370.
- e. Forfeiture doctrine raises a host of thorny issues.
 - (1) The most obvious problem is the one noted for briefing by the California Supreme Court: should the doctrine apply when the alleged “wrongdoing” is the same as the offense for which the defendant is on trial. This would require the trial court to determine, as a predicate for admissibility, that the defendant is guilty of the crime for which he is charged. *Giles* reasoned that courts are not precluded from determining preliminary facts necessary for an evidentiary ruling merely because they coincide with an ultimate fact in the case.
 - (2) A second issue is whether application of the doctrine should require proof that defendant’s acts of wrongdoing were committed with the specific

intent of preventing testimony about that crime. A fairly recent federal opinion specifically imposes such a requirement as part of the equitable underpinnings of the doctrine. (*U.S. v. Houlihan* (1st Cir. 1996) 96 F.3d 1271, 1280.) Although hearsay rules do not govern confrontation issues any more, it is worth noting that both the California and Federal hearsay exceptions in this area (Evid. Code §1350; Fed. Rule of Evid. 804(b)(6)) both require proof of such intent. *Giles* declined to impose such a requirement although it did require proof that defendant did commit an intentional criminal act.

- (3) Another issue is what burden of proof should control the judge's decision. The Court of Appeal's decision in *Giles* and the California hearsay exception require clear and convincing proof.
- (4) Lastly, and perhaps most importantly, there is the question of what would be the sweep of such a doctrine if it is adopted as an exception to the confrontation clause. The Nov.-Dec. 2004 issue of *Prosecutor* magazine argues that the doctrine be applied in all domestic violence cases where the spouse victim refuses to testify. It is not hard to see expansion of this approach to include all child abuse cases where the victim recants or refuses to testify.
- (5) Against the expansion of the doctrine to negate the effect of *Crawford*, it should be noted that in *Crawford*, itself, the defendant kept his wife from testifying by invoking Washington's marital privilege. The state argued that the defendant had waived the protections of the confrontation clause, an argument that could easily be recast in forfeiture terms. The state court rejected this argument reasoning that "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice." (*Crawford, supra*, at p. 42, f.n. 1). The state did not pursue this issue on appeal, and the Supreme Court specifically noted it was expressing no opinion on this matter. (*Ibid.*)

XIV. No Sixth Amendment Issue When the Declarant Testifies

- A. In the same footnote exempting non-hearsay purpose of extrajudicial statements, the Court also said, “[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See, *California v. Green*, 399 U.S. 149 (1970).” (*Crawford, supra*, at p. 59, fn. 9.) Thus, whether or not the hearsay statement is testimonial, the Confrontation Clause is satisfied if the declarant is present in court, testifies, and is subject to cross-examination. (*People v. Martinez* (2005) 125 Cal.App.4th 1035, *review denied*. See also, *People v. Morrison* (2004) 34 Cal.4th 698, 720 [noting in passing that the introduction of a witness’s prior identification of defendant (admitted as a spontaneous declaration under Evid. Code § 1240) raised no 6th Amendment issue because the witness testified at trial and was subject to cross-examination about the statement].)
- B. In *People v. Harless* (2004) 125 Cal.App.4th 70, the Sixth District applied this principle to a situation where the witness was impeached by a prior inconsistent statement which she maintained she could not recall. The court found the witness was subjected to effective cross-examination about the hearsay statement. Despite her partial failure of memory, she tried to explain her statements and the jury had a chance to assess her demeanor. *Review granted* (S131011) behind *Black and Towne*.
- C. Although there is pre-*Crawford* case law holding that a significant failure to recollect does not necessarily deprive the defendant of the cross-examination guaranteed by the Sixth Amendment (*California v. Green, supra*; *People v. Perez* (2000) 82 Cal. App. 4th 760, 762), one could question whether *Crawford* is satisfied when the witness claims a total failure of memory. *Harless* is arguably bound by its facts (the witness did attempt to explain away her statement), and a recent Ninth Circuit case (*U.S. v. Wilmore* (9th Cir. 2004) 381 F.3d 868) held that restrictions on cross-examination can render use of a prior statement a violation of Sixth Amendment confrontation rights under *Crawford*. (See also, *Smith v. Illinois* (1968) 390 U.S. 129; *Davis v. Alaska* (1974) 415 U.S. 308; and *Delaware v. Van Arsdall* (1986) 475 U.S. 673.) All three of these cases stand for the proposition that evidence rules that significantly undermine the effectiveness of cross-examination offend the Sixth Amendment, even though the witness has been questioned in open court.
- D. *People v. Butler* (2005) 127 Cal.App.4th 49, *review denied*. The Second

District held that a witness who denies that he made a prior hearsay statement is still available for cross examination, and thus the statement can come in.

- E. In *People v. Angulo* (2005) 129 Cal.App.4th 303, the Fourth District held that in an SVP proceeding, the defendant had an opportunity to cross examine an expert regarding a report in the criminal proceedings (in Arkansas), and he could have deposed the expert under the Civil Discovery Act.
- F. This thread of *Crawford* intersects with another line of Sixth Amendment case law – the *Bruton-Aranda* line of cases. (*Bruton v. U.S.* (1968) 391 U.S. 123; *People v. Aranda* (1965) 63 Cal. 2d 518.) The *Bruton-Aranda* rule makes inadmissible against the other defendants the out-of-court statement of a non-testifying co-defendant in a joint trial of two or more defendants. However, the rule provides further that the Sixth Amendment is not applicable in such a situation if the co-defendant who made the confession testifies and is subject to cross-examination. This is true whether the co-defendant admits or denies the confession. (*Nelson v. O’Neil* (1971) 402 U.S. 622; *People v. Boyd* (1990) 222 Cal.App.3d 541). *Crawford* appears to be consistent with *Bruton-Aranda* – both in terms of what it prohibits and what it permits. Whether the admission of a co-defendant’s statement is viewed as violating *Bruton-Aranda* or *Crawford*, a limiting instruction will not cure the error. (*People v. Song* (2004) 124 Cal.App.4th 973, 982-983.)

XV. Crawford is not applicable in proceedings in which the Sixth Amendment does not apply.

- A. Probation Revocation Hearings
 - 1. Traditionally, probation revocation hearings are not viewed as being part of a criminal prosecution. Thus, the full range of Sixth Amendment protections do not apply at a revocation proceeding. (*Morrissey v. Brewer* (1972) 408 U.S. 471; *Gagnon v. Scarpelli* (1973) 411 U.S. 778.)
 - 2. However, the loss of liberty at such a proceeding is a serious deprivation requiring that the probationer be accorded due process (*Gagnon, supra* at p. 781.) This due process guarantee requires that the defendant generally be given the right “to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation.)” (*Id.* at p. 786.) Thus, a defendant at a probation revocation hearing has a right to confrontation, albeit one not as complete as the one guaranteed at

trial by the Sixth Amendment.

- a. In pre-*Crawford* cases, the California Supreme Court’s discussion of the values protected by due process bears a striking resemblance to those values articulated in *Crawford* as being at the heart of the historic meaning of the Sixth Amendment. (See e.g., *People v. Winson* (1981) 29 Cal. 3d 711, 713-714; *People v. Arreola* (1994) 74 Cal. 4th 1144, 1148.) In *Winson*, the court observed that the need for confrontation is particularly important where the evidence is testimonial because of the opportunity for observation of the witness’s demeanor. (29 Cal.3d at p. 717 [the state may not introduce a transcript of a witness’s preliminary hearing testimony at a revocation hearing without a showing of unavailability or other good cause]. But see, *People v. Maki* (1985) 39 Cal. 3d 707 [upholding the admissibility at a probation revocation hearing of documentary hearsay evidence – a car rental invoice and a hotel receipt].)
- b. However, post-*Crawford*, in *People v. Johnson* (2004) 121 Cal.App.4th 1409, the First District has held *Crawford* simply has no application to a probation revocation hearing because the Sixth Amendment does not control such hearings. Thus, it found no error in the admission of a laboratory report showing the defendant to have possessed rock cocaine. Accord, *United States v. Hall* (9th Cir. 2005) 419 F.3d 980; *United States v. Rondeau* (1st Cir. 2005) 2005 U.S.App.LEXIS 25224 [citing agreement among several circuits].)

B. Preliminary Hearings

1. Much of the hearsay used at preliminary hearings is certainly “testimonial” within the meaning of *Crawford*. Though the Supreme Court has frequently described the confrontation clause as a “trial right” (*Barber v. Page* (1968) 390 U.S. 719; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39), it has never explicitly held the Sixth Amendment does not apply to preliminary hearings. The Court came close to so holding in *Barber*. Since it was not essential to the outcome, the suggestion was dicta.
2. The California Supreme Court has expressly held that the Sixth Amendment confrontation clause does not apply to the preliminary hearing. (*Whitman v. Superior Court* (1991) 54 Cal. 3d 1063.)

- C. Suppression Motions: *People v. Martinez* (2005) 132 Cal.App.4th 233, 242: The Fourth District held that *Crawford* does not apply to suppression motions, because, unlike a trial in which the truth is sought, through a suppression motion, “the accused seeks to avoid the truth.” (See also, *People v. Gomez* (2004) 117 Cal.App.4th 531 [*Harvey/Madden* hearsay did not implicate the 6th Amendment].)
- D. SVP Commitments
1. *People v. Angulo* (2005) 129 Cal.App.4th 303: The Fourth District held that there is no 6th Amendment right in SVP proceedings, observing that *Commonwealth v. Given* (2004) 441 Mass. 741 [808 N.E.2d 788] has held that *Crawford* did not apply to Massachusetts’ sex offender civil commitment proceedings.
 2. *People v. Whitney* (2005) 129 Cal.App.4th 1287: The Fifth District, assuming *Crawford* applied, held that introduction of the defendant’s admissions did not violate the 6th Amendment. The doctors who prepared the reports testified.
 3. *Carty v. Nelson* (9th Cir. 2005) 2005 U.S.App.LEXIS 27407 [there is no 6th right in special civil proceeding and documentary evidence did not violate 14th A., though *Crawford* not mentioned].
- E. Sentencing – proof of prior convictions
1. *Blakely/Apprendi* rule says the 6th A. applies to any element other than a prior conviction.
 2. *Shepard v. United States* (2005) 544 U.S. ___ [161 L.Ed.2d 205, 125 S.Ct.1254, 1257, 2005 U.S. LEXIS 2205] says, without mentioning *Crawford*, that the nature of the prior may only be proven by reference to charging documents.
 3. In *People v. Gonzales* (2005) 131 Cal.App.4th 767, *review denied*, the Fourth District held that neither *Crawford* nor *Shepard* barred the use of preliminary hearing testimony to prove a prior conviction, because under *Reed* no witness could testify and the defendant had an opportunity to cross examine at the preliminary hearing.
- F. Hearing on a preliminary fact: *People v. Smith* (2003) 30 Cal.4th 581, another pre-*Crawford* case, examining the admissibility of preliminary hearing testimony of an unavailable witness under a standard similar to

that stated by *Crawford* as applicable to confrontation challenges, held that hearsay could be used to establish unavailability without implicating the 6th Amendment, because it was reasonable for the prosecutor to rely on the statement in exercising due diligence.

- G. Juvenile Cases: *Crawford* does not apply in juvenile dependency cases. (*In re April C.* (2005) 131 Cal.App.4th 599, *review denied.*)
- H. Civil summary judgment: *Crawford* does not apply (*Kulshretha v. First Union Commercial Corp.* (2004) 33 Cal. 4th 601.)

XVI. Retroactivity

- A. *Crawford* is certainly applicable to all cases, state or federal, pending on direct review or not yet final on the date of its decision. (*Griffith v. Kentucky* (1987) 479 U.S. 314.) The real question is whether it can be applied retroactively to cases with final judgments.
- B. In *People v. Combs*, *supra*, 34 Cal.4th at p. 842, the California Supreme Court reserved judgment on this issue while quoting Justice Rehnquist's characterization of *Crawford* as setting forth a "new rule." (*Crawford*, *supra*, at p. 69, concur. opinion of Rehnquist, J.) Further, in *In re Sakarias* (2005) 35 Cal.4th 140, 155, fn.2, without analysis, the Court simply observed that the *Crawford* rule had not been announced at the time of the petitioner's trial and it applied *Roberts*. The Fourth District, Division One has held that *Crawford* falls within *Teague v. Lane* (1989) 489 U.S. 288 [a new rule that "breaks new ground or imposes a new obligation on the States or the Federal Government" is not, with certain exceptions, retroactively applicable], and it is not retroactive. (*In re Moore* (2005) 133 Cal.App.4th 68, 77.)
- C. It is difficult to argue that a rule that has been described as creating "a paradigm shift in confrontation clause analysis" (*People v. Cage*, *supra*, 120 Cal.App.4th 770, *review granted*) is not a new rule under *Teague*. Indeed, most federal circuits have concluded that it did announce a new rule. (See, *Bockting v. Bayer* (9th Cir. 2005) 399 F.3d 1010, 1014-21, as amended 408 F.3d 1127; *Brown v. Uphoff* (10th Cir. 2004) 381 F.3d 1219, 1227; *Mungo v. Duncan* (2nd Cir. 2004) 393 F.3d 327, 336; *Dorchy v. Jones* (6th Cir. 2005) 398 F.3d 783, 788; *Murillo v. Frank* (7th Cir. 2005) 402 F.3d 786, 789-791. See also, *Lave v. Dretke* (5th Cir. 2005) 416 F.3d 372, granting a COA on this point]; *Corey v. U.S.* (D. Maine 2005) 2005 U.S. Dist. LEXIS 19845, following *Murillo*.)
- D. However, Justice Scalia did go out of his way to argue at length that "Our case law has been largely consistent" with the principles driving the

Crawford decision. (*Crawford, supra* at p. 57.) In fact, all of Section IV of the opinion is dedicated to the argument that *Roberts* was the departure not *Crawford*. In *Bockting, supra*, one Ninth Circuit judge concurred in a holding that *Crawford* is retroactive, reasoning that it is not a new rule and need not be put through the “*Summerlin* strainer.” (See, *Bockting v. Bayer, supra*, 399 F.3d at pp. 1022-1023, concur. opinion of Noonan, J.)

- E. An alternative is arguing that *Crawford* establishes a “watershed” rule of criminal procedure, thereby coming within one of the two exceptions to *Teague*’s non-retroactivity rule (*Teague, supra*, 489 U.S. at p. 311). (See, *Bockting v. Bayer, supra*, 399 F.3d at pp. 1014-1021, concur. opinion of McKeown, J.) However, in dissenting from the denial of a motion for rehearing en banc in *Bockting*, and joined by 8 members of the bench, Judge O’Scannlain concluded, “*Bockting* conflicts with the decision of every other circuit to have considered the retroactivity of *Crawford*; . . . it conflicts with our own decision in *Hiracheta* [*v. Attorney General*, an unpublished Memorandum opinion at 105 Fed. Appx. 937]; and, . . . it was wrongly decided.” (*Bockting v. Bayer* (9th Cir. 2005) 418 F.3d 1055, 1061, diss. opinion of O’Scannlain, J.) Most federal circuits finding that *Crawford* announced a new rule have not found it to be a “watershed” rule under *Teague*.
- F. A second bar to retroactivity in federal court may be the independent non-retroactivity rule imposed by AEDPA in § 2254 (d) (1).