

**FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
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**CONFRONTATION CLAUSE ANALYSIS
AFTER *CRAWFORD V. WASHINGTON***

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**HEARSAY AND THE 6TH AMENDMENT
AFTER CRAWFORD v. WASHINGTON**

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- C. Thus, for “testimonial” hearsay, the rule in *Ohio v. Roberts* that focuses on the “reliability” of the hearsay is no longer valid.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 162, 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 under *Chapman*. (*United States v. Nielsen* (2004), 371 F.3d 574, 581, citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680-681. See also, *People v. Ledesma* (2006) 39 Cal.4th 641. [*Crawford* error was harmless beyond a reasonable doubt primarily because numerous witnesses had testified the defendant admitted the robbery; *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) 37 Cal.4th 428f, 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:

- A. “*Crawford* cannot reasonably be understood as barring such evidence where the declarant was available for that purpose at trial, and the defendant could have cross-examined him.” (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn.19.) Thus, lack of unavailability alone will not support a *Crawford* challenge to hearsay evidence in California.
- B. 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*].)
- C. “[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. 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]; *People v. Whitney* (2005) 129 Cal.App.4th 1287 [assuming *Crawford* applied to SVP proceeding (but see *Angulo, ante*), introduction of the defendant’s admissions to doctor did not violate the 6th Amendment because the doctor testified].)
- D. Proper invocation of the witness’ 5th Amendment privilege renders him unavailable for *Crawford*’s purposes. (*People v. Seijas* (2005) 36 Cal.4th 291.) 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 make 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.)

V. Adequacy of prior cross examination:

- A. Even after *Crawford*, the California Supreme Court may continue 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.)
- B. Preliminary hearing cross-examination may be sufficient to permit use of prior testimony. (*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]. See also, See, *People v. Ochoa* (2004) 121 Cal.App.4th 1551, *review granted* behind both *Black* and *Cage*.)
- C. In an UNPUBLISHED opinion, one appellate panel has held that recalcitrance of the declarant/witness does not unconstitutionally undermine the opportunity for cross-examination. (*People v. Duy Tran* (2006) 2006 Cal.App.Unpub.LEXIS 8833 [4DCA/3, relying on *Delaware v. Fensterer* (1985) 474 U.S. 15 [6th A. does not guarantee cooperative witness or successful cross-examination]. Accord, *People v. Butler* (2005) 127 Cal.App.4th 49, *review denied* [a witness who denies that he made a prior hearsay statement is still available for cross examination, and thus the statement can come in]; *People v. Harless* (2004) 125 Cal.App.4th 70, *remanded after decision in Black* [impeached by a prior inconsistent statement which witness maintained she could not recall was adequate opportunity for effective cross-examination about the hearsay statement].)
- D. *Harless* is arguably bound by its facts (the witness did attempt to explain away her statement), and the Ninth Circuit has held that restrictions on cross-examination can render use of a prior statement a violation of Sixth Amendment confrontation rights under *Crawford*. (*United States v.*

Wilmore (9th Cir. 2004) 381 F.3d 868. 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.

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. Developing a definition for “testimonial” hearsay

In *Crawford*, the Court chose to “leave for another day any effort to spell out a comprehensive definition of ‘testimonial’ .” (*Crawford, supra*, at p. 68.) However, the opinion contains the following premises that provide some indication of what the Court considers to be “testimonial hearsay.”

- A. “‘Testimony,’ . . . is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’” (*Crawford, supra*, at p. 51.)
- B. At its absolute narrowest, “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].)
- C. The Court also noted three “formulations” of the “core class of ‘testimonial’ statements” (*Crawford, supra*, at pp. 51-52. See also *Davis v. Washington* and *Hammond v. Indiana* (2006) 547 U.S. ___, 2006 DAR 7615 [endorsing the 3rd “formulation” at least as it applies to statements to law enforcement outside of a formal interrogation setting].)
 - 1. “‘*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”;
 - 2. “‘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)”;

3. “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.”

VIII. Prior testimony:

- A. 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].)
- B. Conditional Examinations: In *People v. Jurado* (2006) 38 Cal.4th 72, the court held that evidence from a conditional examination taken prior to the victim’s death was admissible even after *Crawford*, because the declarant testified under oath and the defendant had an opportunity to cross-examine.

IX. Statements made to police officers

A. Formal interrogation is not necessary.

1. The USSC rejected the formality requirement in its joint opinion in *Davis v. Washington* and *Hammond v. Indiana* (2006) 547 U.S. ___, 2006 DAR 7615. There, the court held that a conversation during a 9-1-1 call or at the scene between an officer and a witness may contain testimonial hearsay if it is part of the investigation, rather than effort to render aid in an emergency.
2. Historically, justices of the peace were not magistrates as we understand the office. Rather they performed investigative functions that we currently associate with the police. (*Crawford*, *supra*, at p. 53.)
3. The larger point of *Crawford* 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. This was endorsed in *Hammon/Davis*,

supra. (See also, *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*.

B. Statements made at crime scenes

1. *Hammon v. Indiana*, sub nom *Davis v. Washington* (2006) 547 U.S. ___, 2006 DAR 7615 [statements made by the victim during a crime scene interview that focused on investigation, not rendering of emergency aid were testimonial hearsay]. Most of the DCA decisions in California anticipated *Hammon/Davis*. (See, e.g., *People v. Price* (2004) 120 Cal.App.4th. 224 [victim's statement to police at the scene was testimonial]; *People v. Sisavath* (2004) 118 Cal.App. 4th 1396, *review denied* [statement alleged child victim made to a police officer responding to the scene was “testimonial,” because the “statement was ‘knowingly given in response to structured police questioning’]; *In re Fernando* (2006) 137 Cal.App.4th 148, *review granted* behind *Cage* [statements by robbery victim describing crime and identifying defendant in response to police questioning after the defendant had been arrested constituted testimonial hearsay]; *People v. Adams* (2004) 120 Cal.App.4th 1065, *review granted* (S127373) [forty-five minute interview of the complainant at the hospital was testimonial]; *People v. Ochoa* (2004) 121 Cal.App.4th 1551, *review granted* behind both *Black* and *Cage* [insistence on formality is inconsistent with core message of *Crawford*]; *People v. Kilday* (2004) 123 Cal.App.4th 406, *review granted* (S129567) behind *Cage* [distinguishing two statements by victim to responding officers at the scene based on whether they were directed to addressing emergency assistance or investigation of crime].)
2. Other jurisdictions also anticipated *Hammon/Davis*. (See also, *State v. West* (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*; *Spencer v. State* (Tex. App. 2005) 162 S.W.3d 877, 881 [“excited utterances can be made both spontaneously and in

response to questioning.”]; *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”]; *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”]; *United States v. Nielsen* (9th Cir. 2004) 371 F.3d 574 [defendant’s girlfriend’s statement in response to police questioning during a search were testimonial hearsay].)

3. However, some California decisions did not anticipate *Hammon/Davis*. (See, *People v. Cage* (2004) 120 Cal.App.4th 770, review granted October 13, 2004 (S127344), argued January 9, 2007 [to constitute interrogation for 6th A. purposes, the statement must be made in a relatively formal proceeding that contemplates a trial]; *People v. Corella* (2004) 122 Cal.App.4th 461. [statements to responding officer were not result of interrogation because “under *Crawford* a police interrogation requires a relatively formal investigation where a trial is contemplated”].)
4. In a rather unusual scenario, in *People v. Morgan* (2005) 125 Cal.App.4th 935, the court 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 who pretended to be an associate of the defendant suspected of selling drugs) 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.

C. 9-1-1 calls

1. *Davis v. Washington* (2006) 547 U.S. ___, 2006 DAR 7615 held that statements made by the victim during a 9-1-1 call immediately after an assault, while the victim was distraught and requesting aid in an emergency were not testimonial hearsay. (See also, *People v. Sanchez* (2006) 138 Cal.App.4th 1085 [witnesses reporting traffic accident to 9-1-1 operator “to arrange assistance” for people injured in a traffic accident, and “to assist authorities in apprehending the driver who appeared to the callers to have caused

. . . the accident, thereby preventing any additional harm to other persons and potentially assisting those already harmed in the reported accident in a future effort to obtain compensation for their injuries and losses”], *review granted behind Cage*;

2. Other rationales prior to *Hammon/Davis* included *People v. Corella, supra*, 122 Cal.App.4th at p. 468 [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”]; *People v. Caudillo* (2004) 122 Cal.App.4th 1417, as modified 2004 Cal. App. LEXIS 1849, *review granted* (S129212) [anonymous non-victim’s statement to 9-1-1 operator reporting “men with guns” and providing a description of the car from which shots were fired by an to the 9-1-1 operator was “non-testimonial,” 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”]; *People v. Moscat* (2004) 777 N.Y.S. 2d 875 [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”].)
3. Even after *Hammon/Davis*, where the 9-1-1 call is not to report an emergency, but rather to provide investigative information after the crime has been committed, the statement may be testimonial under *Crawford*. (*People v. Cortes* (2004) 781 N.Y.S. 2d 401 [statement by a third party witness to 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”]; *State v. West* (Ill.App. 2005) 355 Ill.App.3d 28 [823 N.E.2d 82] [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. See also, *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, because “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”].)

- B. However, where the government arranges the conversation between the declarant and the other individual, the hearsay may be testimonial. (See, *People v. Wahlert* (2005) 130 Cal.App.4th 709, *review granted* [statements to co-defendant made during conversation set up by police as a “pretext call” to get evidence against defendant were testimonial, but error harmless beyond a reasonable doubt]; *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. Further, where the private communication is particularly accusatory, it may also be testimonial. (See, *Crawford, supra*, at pp. 11-52 [two of the three “formulations” of “testimonial” hearsay that Justice Scalia provided focus on the intent of the declarant]; *Ibid.* [prime example of testimonial hearsay was Lord Cobham’s private letter implicating Sir Walter Raleigh].) Modernly, accusatory statements may be made to a rape or domestic violence counselor, a private attorney, a doctor or any other private person. The impact of the use of such statements does not justify such a broad exemption from the 6th A. (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]; *People v. Cervantes* (2004) 118 Cal.App. 4th 162, *review denied*. [assuming statements to private persons could qualify as “testimonial” under 3rd “formulation,” but here, statement made by a co-defendant to a neighbor in the process of seeking medical help was not testimonial]; *People v. Sisavath, supra*, 118 Cal.App.4th at p. 1402 [rejecting the Attorney General’s argument that the child’s videotaped statement could not be “testimonial” because it was not given to a government employee; endorsed use of 3rd “formulation”]. Compare, *People v. Rincon* (2005) 129 Cal.App.4th 738, *review denied* [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]; *People v. Cage, supra*, 120 Cal.App.4th 770, *review granted* [statement made by the victim to a doctor at the emergency room was not testimonial, because the doctor was neither a police officer nor an agent of the police].)

XI. Statements which are not hearsay, or not admitted to prove the truth do not violate the 6th A.

- A. “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 [*Street* co-defendant’s confession was offered as a prior inconsistent statement in rebuttal to defendant’s testimony].)

- B. 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. (*People v. Combs* (2004) 34 Cal. 4th 821, 842 [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])
- C. Expert testimony based on hearsay and the hearsay itself regarding the defendant’s gang status is admissible to substantiate an expert opinion. (*People v. Thomas* (2005) 130 Cal.App.4th 1202 [the hearsay upon which the expert relied was not admitted for its truth]. See also, *People v. Hallquist* (2005) 133 Cal.App.4th 291 [a post-*Crawford* case without any mention of *Crawford* arriving at the same conclusion].)

XII. Hearsay exceptions

A. Confessions and Admissions

- 1. Presumably, the fact a statement constitutes a “confession” does not remove it from 6th A. protection. One *Crawford* formulation includes “‘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).”
- 2. However, California decisions have rejected 6th A. challenges to admissions of such statements. (See, *People v. Roldan* (2005) 35 Cal.4th 646, 711, fn. 25 [defendant’s adoptive admissions are not “testimonial”]; *People v. Castille* (2005) 129 Cal.App.4th 863 [same]; *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].)

- B. **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.)

C. “Spontaneous Statements”

1. In *People v. Ledesma* (2006) 39 Cal.4th 641, the Supreme Court assumed “spontaneous statement” testimony violated the defendant’s 6th A. right under *Crawford* and *Davis*, but found the error harmless beyond a reasonable doubt primarily because numerous witnesses had testified the defendant admitted the crime.
2. However, one Court of Appeal decision has rejected a 6th A. challenge based on a determination the statement was “spontaneous.” (*People v. Rincon* (2005) 129 Cal.App.4th 738, *review denied* [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.’”]. *Contra, Spencer v. State* (Tex. App. 2005) 162 S.W.3d 877, 881 [“excited utterances can be made both spontaneously and in response to questioning.”]; *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”].)

D. Documentary evidence, business and official records

1. Without addressing the question, *Crawford* noted that “most of the hearsay exceptions [historically used to permit use of hearsay at trial] covered statements that by their nature were not testimonial--for example, business records.” (*Crawford, supra*, 541 U.S. at p. 56.) The concurrence elevated this passing comment: “the Court’s analysis of ‘testimony’ excludes at least some hearsay exceptions, such as business records and official records.” (*Id.*, at p. 76, conc. opinion of Rehnquist, J.)
2. “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.” (*People v. Mitchell* (2005) 131 Cal.App.4th 1210, *review denied* [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" and thus, not "testimonial hearsay;" 2 statements on the tape that incriminated the defendant were "testimonial hearsay" and harmless under *Chapman*.)

3. In *People v. Johnson* (2004) 121 Cal.App.4th 1409, the First District reasoned that an Alameda County Crime Laboratory report containing an expert determination of the narcotic quality of the substance possessed by defendant was not "testimonial." However, this portion of the opinion may be dicta, given the broader holding in the case that the Sixth Amendment simply did not apply to probation revocation hearings.
4. In cases where the 6th A. did apply, various pieces of documentary evidence prepared for purposes other than to prosecute the defendant have been found to be not testimonial. (*People v. Saffold* (2005) 127 Cal.App.4th 979 [a proof of service executed by a deputy sheriff serving a restraining order on the defendant in a prosecution for 7 counts of violating the restraining order]; *People v. Taulton* (2005) 129 Cal.App.4th 1218 [a Penal Code section "969b packet;" foreseeability is not the standard, the purpose for which the document was prepared is], disagreeing with *People v. Cervantes* (2004) 118 Cal.App.4th 162; accord, *United States v. Weiland* (9th Cir. 2005) 420 F.3d 1062 ["Penitentiary packet" was a public record under *Crawford*]; *People v. Brown* (A112649) 2006 Cal.App.Unpub.LEXIS 8589 [same]; *United States v. Bahena-Cardenas* (9th Cir. 2005) 411 F.3d 1067 [a warrant of deportation held in the defendant's INS file]; *United States v. Cervantes-Flores* (9th Cir. 2005) 421 F.3d 825 [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; even though the certificate was prepared for litigation, the underlying document which the certificate attested did not exist was not].
5. Though neither a business nor an official record, a murder victim's diary was held to be not testimonial after petitioner conceded the point under *Crawford*'s 3rd "formulation." (*Parle v. Runnels* (9th Cir. 2004) 387 F.3d 1030.)

E. Dying Declarations and "Forfeiture by Misconduct"

1. Dying declarations are probably exempt from *Crawford*'s analysis

under the rationale that 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. "Although many dying declarations may be testimonial, there is authority for admitting even those that clearly are." However, the Court ultimately reserved the issue, noting "[i]f this exception must be accepted on historical grounds, it is *sui generis*." (*Crawford, supra*, p. 56, f.n.6. See also, *People v. Monterroso* (2004) 34 Cal.4th 743 [without decided whether the statement was "testimonial" under *Crawford*, dying declarations do not violate the confrontation clause, because of the exception's historical pedigree]; accord, *People v. Mayo* (2006) 140 Cal.App.4th 535, 554.)

2. Alternatively, they may be 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).
 - a. Without providing an analysis of what constitutes sufficient conduct to invoke it, Justice Scalia adopted the concept of "forfeiture by wrongdoing" as a separate and distinct exception to the Confrontation Clause: "[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 [distinguishing the exception from those based on the reliability analysis of *Roberts*]. See, *People v. Ledesma* (2006) 39 Cal.4th 641 [declining to address the doctrine, because admission of the hearsay testimony was harmless beyond a reasonable doubt anyway]; *People v. Giles, supra*, 123 Cal.App.4th 475, review granted (S129852) and *People v. Jiles* (2004) 122 Cal. App 4th 504, review granted behind *Giles* (S128638) [two issues on review: (1) whether the forfeiture doctrine applies on the facts of these cases; and (2) whether the doctrine applies when the alleged "wrongdoing" is the same as the offense for which defendant was on trial. Note, in *Jiles*, the statements were admitted under Evid. Code § 1370]. *Giles* was argued in December.)
 - b. "Forfeiture by wrongdoing" by its very terms, can apply any time it can be shown that the defendant had a hand in the declarant's unavailability. However, 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 whom this statement is offered.” Under *Crawford*, the meaning and scope of the confrontation clause is not to be determined by states’ hearsay laws.

- c. Issues that may be left unaddressed in *Giles*:
- (1) 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. (See, *United States v. Houlihan* (1st Cir. 1996) 96 F.3d 1271, 1280 [holding that it does]. See also, Evid. Code §1350 [stating such a requirement]; Fed. Rule of Evid. 804(b)(6) [same].)
 - (2) 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.
 - (3) what is the scope of the doctrine’s application?
 - (a) 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.
 - (b) Notably, 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.*)

XIII. 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. Navarro* (2006) 138 Cal.App.4th 146 [following *Martinez*]; *People v. Gomez* (2004) 117 Cal.App.4th 531 [*Harvey/Madden* hearsay did not implicate the 6th Amendment].)

D. SVP Commitments: There currently appears to be no 6th A. right to confrontation and cross examination in SVP commitment proceedings. (*People v. Angulo* (2005) 129 Cal.App.4th 303 [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]; *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. *People v. Taulton, supra*, 129 Cal.App.4th 1218 [a Penal Code section “969b packet” is not testimonial hearsay]; *United States v. Weiland, supra*, 420 F.3d 1062 [“Penitentiary packet” was a public record under *Crawford*]; *People v. Gonzales* (2005) 131 Cal.App.4th 767, *review denied* [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. Evidence Code section 402 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*. Accord, *In re S.C.* (2006) 138 Cal.App.4th 396.)

H. Civil summary judgment: *Crawford* does not apply (*Kulshretha v. First Union Commercial Corp.* (2004) 33 Cal. 4th 601.)

XIV. 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.)

B. In *People v. Combs, supra*, 34 Cal.4th at p. 842, the California Supreme Court reserved judgment on the question whether *Crawford* applied retroactively to final judgments 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. Most federal circuits have concluded that *Crawford* announced 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. Assuming *Crawford* did announce a new rule, one must argue that it 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, dis. 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*. *Bockting* was granted certiorari sub nom *Whorton v. Bockting* (2006) 126 S.Ct. 2017; 164 L.Ed.2d 778. Argument was held in this case on October

31, 2006.

- F. A second bar to retroactivity in federal court may be the independent non-retroactivity rule imposed by AEDPA in § 2254 (d) (1).