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Successful Confrontation Clause Cases after *Crawford v. Washington*, 541 U.S 37 (2004)

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The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas*, 380 U. S. 400, 406 (1965). In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court held that the Confrontation Clause does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.'" *Id*., at 66. To meet that test, evidence had to either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Id.*

The Supreme Court revisited *Ohio v. Roberts* in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Supreme Court held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination" in order for the evidence to be admitted. *Id*., at 68. The Supreme Court left for another day a comprehensive definition of "testimonial," but did find, *inter alia*, that statements made during police interrogation were testimonial in nature.

For federal habeas practitioners it is important to remember that *Crawford* is <u>not</u> retroactive to cases already final on direct review at the time *Crawford* was decided, i.e., March 8, 2004. *Whorton v. Bockting*, 549 U.S. 406 (2007).

The following are summaries of state and federal cases addressing the Confrontation Clause decided after *Crawford v. Washington*, 541 U.S. 36 (2004). The summaries include every Supreme Court case since *Crawford* and the state and federal cases granting relief on Confrontation Clause grounds through January 1, 2012.

Most of the cases address several important issues, but they are sorted by the topic of greatest significance to the case. An asterisk (*) precedes the capital cases.

Where available, there is a link to a publicly available version of the case.

Table of Contents

U.S. Supreme Court Cases

Williams v. Illinois, __ U.S. __, 132 S. Ct. 2221 (2012)
At a bench trial for aggravated sexual assault, aggravated robbery, and aggravated kidnapping, the court admitted expert testimony based in part on a DNA profile produced from semen found on vaginal swabs taken from the victim. At trial, no one who conducted the actual DNA testing on the vaginal swabs testified, but the evidence showed that a group called Cellmark developed a DNA profile based on the semen. The report from Cellmark was not admitted as evidence.

The defendant was convicted and appealed. The state appellate courts affirmed his conviction and sentence. He then petitioned for a writ of certiorari in the United States Supreme Court.

The Supreme Court granted certiorari to determine whether the Confrontation Clause bars "an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify."

The Court held that the expert's testimony did not violate the Confrontation Clause. It explained that it was permissible for the expert to rely on 1) the Cellmark report and 2) the assumption that the DNA profile she was comparing it to was developed from the semen in the vaginal swabs. The Court noted the assumption was similar to the historical practice of offering hypothetical questions to an expert and consistent with the contemporary practice of asking hypothetical questions of experts without phrasing the questions as such. The Court distinguished this case from one before a jury, where an instruction on hypothetical questions would be required.

The Court also held that even if the Cellmark report itself had been admitted, there would be no Confrontation Clause violation. It differentiated the report from accusatory statements and evidence intended to link a particular person to a crime. The latter are generally testimonial. The report, by contrast, was made when no suspect had been identified. Its primary purpose was to "catch a dangerous rapist," not to obtain evidence for use against the defendant. Affirmed.

Hardy v. Cross, 565 U.S. __, 132 S. Ct. 490 (2011) (per curiam)
At trial for kidnapping and sexual assault, the victim testified and was cross-examined by the defendant's attorney. The jury found the defendant not guilty of kidnapping, but was hung on the sexual assault charge. The victim had informed the prosecutor that after the trial, she was willing to testify at the retrial. The state had stayed in "constant contact" with the victim and the victim and her mother had given "every indication" that she would testify.

Nonetheless, ten days prior to the retrial, the state learned that the victim had run away from home and had not returned. The state made extensive efforts, enumerated by the Court to secure the victim's attendance. These efforts included "constant personal visits to the home of [the

victim]," "personal visits to the home of [the victim's] father," and inquires at numerous local agencies and organizations where the victim might be found. The state did not, however, inquire as to the victim's whereabouts from her boyfriend, inquire of her cosmetology school, or issue a subpoena to the victim.

On appeal, the Illinois state appellate court found that the state had made "superhuman" efforts to locate the victim and had, therefore, established her unavailability to testify. The defendant filed a petition for writ of habeas corpus, which was denied. The Seventh Circuit reversed the denial, finding that the Illinois court had unreasonably applied clearly established law.

The Supreme Court reversed. It held that the state court had "identified the correct Sixth Amendment standard and applied it in a reasonable manner," regardless of whether it "went too far in characterizing the prosecution's efforts as superhuman." It explained that the state court was not unreasonable, despite the state's lack of inquiries or subpoena. The Court noted that there was no indication that the additional inquiries were likely to be fruitful. It also explained that the lack of subpoena was not problematic because in the prior trial, the victim had testified at the original trial despite her expressed fear.

The Court clarified that the reasonableness standard for determining whether the state had acted diligently to find an unavailable witness does not require, in every case, the state to issue a subpoena to a witness. A subpoena may not be required where a "witness is so fearful of an assailant that she is willing to risk his acquittal by failing to testify at trial."

Bullcoming v. New Mexico, __ U.S. __, 131 S. Ct. 2705 (2011)

At trial for driving under the influence, the court admitted a blood alcohol content (BAC) lab report through the testimony of a scientist who was familiar with the lab's procedures and testing, but who did not conduct the testing that was ultimately used to convict the defendant.

The New Mexico Supreme Court affirmed, holding that while the results of the lab tests were testimonial, the testimony of the scientist was sufficient to meet the demands of the Confrontation Clause.

The Supreme Court granted certiorari to answer whether the "Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." It held that the Confrontation Clause bars admission in such circumstances.

The Court emphasized that the testing in question involved several steps and that "human error can occur at each step." It rejected the state's factual claim that obtaining an accurate

measurement "merely entails 'look[ing] at the [gas chromotograph] machine and record[ing]' the results." (alterations in original). The court described the "human actions" of the "past events" as "meet for cross-examination" including that the lab received the defendant's blood sample was intact with the seal unbroken, that the technician ensured the sample and the report numbers matched, and that the technician performed a "particular test, adhering to a precise protocol."

While the Court distinguished the situation here from where a mere scrivener records a read out, the Court made clear that "the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar."

The Court also made clear that the report, contrary to New Mexico's contention, was testimonial hearsay because it was "[a] document created solely for an evidentiary purpose, made in aid of a police investigation." (internal quotation and citation omitted). Thus, it took a broader view than the dissent, which sought to characterize the Confrontation Clause as only barring "the government from replicating trial procedures outside of public view."

The Court, as it had in *Melendez-Diaz v. Massachusetts*, 557 U.S. __, 129 S. Ct. 2527 (2009), spoke approvingly of "notice and demand" statutes which require defendants to notify the state if they intend to exercise their Confrontation Clause rights. Such statutes, the Court explained, will alleviate the state's concerns about the cost of having analysts testify.

Michigan v. Bryant, __U.S. ___, 131 S. Ct. 1143 (2011)

At trial, the court admitted the statement of the deceased homicide victim made in response to police questioning identifying the defendant as being involved in his being shot. Neither the defendant nor any other suspect was present at the scene. The police ceased questioning the defendant when the paramedics arrived five or ten minutes after the police arrived. The defendant died in the hospital.

The Michigan Supreme Court reversed, holding that the statements were testimonial hearsay. The Supreme Court granted certiorari to "confront for the first time circumstances in which the 'ongoing emergency' discussed in *Davis* extends beyond an initial victim to a potential threat to the responding police and the public at large."

The Court reversed the Michigan Supreme Court and held that based on its "objective[] evaluat[ion of] the circumstances in which the encounter occur[ed] and the statements and actions of the parties," the statement was made in the course of an ongoing emergency. The Court explained that such an inquiry was relevant to whether the statements were made with the purpose of providing past events to be used in criminal investigation and prosecution.

The Court first reviewed the circumstances of the encounter and determined that the factors suggested that the statements were made during an ongoing emergency and were, therefore, not excluded by the Confrontation Clause. First, the Court examined the scope of potential victims, contrasting the "narrower zone of potential victims" in domestic violence cases with the present case where assisting a single victim may not "neutralize" the threat to the police and the public. The Court noted that a "private dispute" is unlikely to produce an ongoing emergency for the public at large.

The Court examined they "type of weapon employed" to determine the "duration and scope of the emergency." It contrasted the weapon used in *Davis v. Washington*, 547 U.S. 813 (2006), the defendant's fist, with the weapon used here, a gun. The former, it reasoned, could be rendered useless by merely removing the suspect from the proximity of the victim. This reasoning is flawed, however, because it does not account for whether the police or another victim might be victimized by a suspect's fists. The Court explained that the emergency did not continue for the entire year prior to the defendant's arrest in California, but explained that because the statements occurred "within a few blocks and a few minutes of the location" where the police found the victim, they occurred during the emergency.

The Court also took into account the victim's "medical state" to determine whether the statements were made to address an ongoing emergency because it may "shed light on the ability of the victim to have any purpose at all in responding to police questions."

Significantly, the Court clarified that the "existence *vel non* of an ongoing emergency is [not] dispositive of the testimonial inquiry." Rather it is one factor among many to determine the "primary purpose" of an interrogation. If the primary purpose is investigatory, then the interrogation produces testimonial statements.

The Court next examined the statements made by both the police and the victim. The Court emphasized that based on what the police had been told, they "did not know why, where, or when the shooting had occurred." It explained that the types of questions the police asked, "what had happened, who had shot him, and where the shooting occurred, were the exact questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public." (internal quotations and citations omitted).

This case will often be factually distinguishable, as there is often evidence of a relationship between the victim and suspect that makes the ongoing emergency come to an end once the two are separated.

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)

The trial court admitted into evidence "certificates of analysis" reporting the results of forensic analysis, which showed that material seized by the police and connected to the defendant was cocaine. The certificates were sworn before a notary public, as required by state law. The Court reversed the Massachusetts appellate courts and ruled that the analysts were "witnesses" and that the statements were "testimonial" and inadmissible under the Confrontation Clause. Despite the state's label of "certificates," the Court held that the affidavits "fell within the 'core class of testimonial statements'" described in *Crawford* because the statements 1) were given under oath before a notary, 2) addressed the subject matter at issue in trial, and 3) were written, per state law, for the "*sole purpose*" of litigation. The Court contrasted the affidavits with "medical reports created for treatment purposes," which would not be barred by the Confrontation Clause.

The Court rejected the respondent's proposed exceptions for "neutral scientific testing," "[non-]conventional witnesses" who make contemporaneous observations, and non-accusers. The Court cited the National Academy of Sciences' report on forensic science to refute the dissent's suggestion that forensic reports are uniquely "neutral" and "scientific." "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well."

Rejecting the respondent's argument that the prosecution need not call witnesses who are not "accusatory," the Court contrasted the requirements of the Confrontation Clause with the Compulsory Process Clause, "The prosecution *must* produce the former; the defendant *may* call the latter." The Court allowed that "States may adopt procedural rules governing the exercise of [Confrontation Clause] objections," but did not address the minimum constitutional requirements for valid "notice and demand" statutes that provide for waiver absent a request that the prosecution call a witness, other than to say that the "simplest form" of the statutes is constitutional. The Court also rejected the respondent's suggestion that the certificates are business records, "[T]he affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless" because the certificates, like police reports, are "calculated for use in court, not in business." The majority failed to address the dissent's question of which members of the testing team must testify, an important issue going forward.

Giles v. California, 554 U.S. 353 (2008)

The trial court admitted into evidence the murder victim's statements made to police officers about the defendant regarding a domestic-violence dispute occurring several weeks prior to when the victim was killed by defendant, who claimed self defense at his murder trial. The Court held that the state courts erred in holding that forfeiture applied to situations where the defendant procured the witness's absence for reasons other than "prevent[ing] a witness from testifying." Examining "founding-era exception[s]," as defined by case law from the founding era, the Court found that while forfeiture by wrongdoing is an exception to the right of confrontation, the state court misstated the rule.

According to the Court, a defendant forfeits his right to confront witnesses "if the defendant has in mind the particular purpose of making the witness unavailable" when committing the wrongdoing. It adopted a "purpose-based" definition of the forfeiture rule and noted that the "purpose of the rule was removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them." In rejecting a murder victim exception, the Court explained that the "notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury." The Court referred to, but did not address, the "historic" dying declaration exception to the hearsay rule. Judgment of the California Supreme Court is vacated and the case is remanded.

Whorton v. Bockting, 549 U.S. 406 (2007)
The Supreme Court ruled that *Crawford v. Washington*, 541 U.S. 36 (2004) did not announce a "watershed rule" of criminal procedure that would be applied retroactively on collateral review.

Davis v. Washington, 547 U.S. 813 (2006)
The Court considered two consolidated cases to "determine more precisely which police interrogations produce testimony." In the first case, *Davis*, the trial court admitted into evidence recordings of statements the non-testifying complainant made to a 911 operator about the defendant's assault, which took place moments before the call. The defendant was present during the first part of the call, but fled while the complainant continued to be questioned. In the second case, *Hammond*, the trial court admitted into evidence police officer testimony of statements the non-testifying complainant made to police officers during their investigation. The complainant also made a written statement offered under oath.

The Court reiterated the holding of *Crawford*, testimonial hearsay is generally inadmissible under the Confrontation Clause, and offered a formulation of which statements qualify as such, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." In *Davis*, the Court held that the initial statements made in response to the 911 operator's questions were not testimonial hearsay. The Court explained that "police interrogation" produces testimonial statements, but that when the statements are made to address an "ongoing emergency," the statements are not being offered to "establish or prove some past fact, but to describe current circumstances requiring police assistance" (internal quotation and alteration omitted). The complainant's initial statements to the 911 operator were not testimonial because they were to address the ongoing emergency. In dicta, the Court suggested that the

statements made later in the call, after the defendant had left, may be testimonial. The Court assumed for the sake of the opinion that the 911 operator was an agent of the police and declined to address whether statements made to persons other than law enforcement might be testimonial.

Classifying the *Hammond* complainant's statements presented "a much easier task" for the Court, and it found that the statements were testimonial. It rejected the Indiana Supreme Court's ruling that excited utterances, as the trial court had found the complainant's to be, were categorically non-testimonial. Even though the defendant was in the next room and had to be restrained from intervening during the interrogation, there was no "ongoing emergency." The Court emphasized the complainant's use of the past tense, the location of the defendant in a separate room, and the temporal separation of the statement from the events described. Because the statements "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation," the fact that they were made as part of the police officers' initial inquiry was "immaterial."

Crawford v. Washington, 541 U.S. 36 (2004)

The trial court admitted into evidence a recording of a statement the non-testifying wife of the defendant made to police officers during an interrogation about an incident in which the defendant stabbed a man who allegedly tried to rape her. The statement was made while in custody and after *Miranda* warnings had been issued. The wife was rendered unavailable by defendant's invocation of the state spousal privilege. Nonetheless, the trial court ruled that her recorded statement bore sufficient indicia of reliability and was admissible as a statement against penal interest. Thus, the recording was admitted, but the witness did not testify. The recording contradicted the defendant's theory of self-defense.

The Court granted certiorari to "determine whether the State's use of [the wife's] statement violated the Confrontation Clause." Relying on old English and early American cases to examine the meaning of the clause, the Court determined that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused" and that "not all hearsay implicates Sixth Amendment concerns," particularly "offhand remarks" or other "nontestimonial" *ex parte* statements. It ruled that "[t]estimonial statements of witnesses absent from trial [may only be] admitted where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [them]." The Court overturned the rule set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980).

The Court declined to provide a "comprehensive definition of 'testimonial,'" but agreed that several definitions shared a "common nucleus": "*ex parte* testimony or its functional equivalent," "extra-judicial statements . . . contained in formalized testimonial materials," and "statements that were made under circumstances that would lead an objective witness reasonably

to believe that the statement would be available for later use at trial." Statements taken by police officers during interrogations are, under the Court's formulation, testimonial. The Court listed business records and statements in furtherance of a conspiracy as non-testimonial.

Turning to the facts, because the recording offered at trial was made to the police during an interrogation, the Court held it was testimonial. And because the defendant had not had an opportunity to confront the witness, the Court held that the Confrontation Clause rendered the wife's statement inadmissible.

Testimonial Hearsay

Non-Law Enforcement Interrogator

U.S. Court of Appeals Cases

Gov't of the Virgin Islands v. Vicars, No. 08-3960, 2009 WL 2414378 (3d Cir. Aug. 7, 2009) (unreported)
At a trial for aggravated attempted sexual assault, the court admitted a doctor's report conducted at the request of police officers "for the evaluation for alleged sexual molestation/abuse" and "for the purpose of providing medical evidence and documentation." The report contained graphic details of vaginal bruising. There were objections to the report, but the "nature of Vicars's objections, the Government's shifting bases for admissibility, and the trial court's tentative and conflicting rulings on the matter were unclear, if not altogether confusing."

On direct appeal, the Court of Appeals found plain error and ruled that the report was testimonial because it was prepared "under circumstances that would lead an objective witness reasonably to believe that it would be used prosecutorially," noting the reason it was drafted. The error was not harmless because the report was the only evidence of penetration.

Federal District Court Cases

Johnson v. Oregon Board of Parole and Post-Prison Supervision, No. CV. 09-701-MA, 2011 WL 1655421 (D. Or. May 2, 2011)
At trial for sexual penetration of a minor, the court admitted statement the complainant made to Child Abuse Response and Evaluation Services (CARES) health care workers. The complainant did not testify. After the defendant's case on direct appeal had been decided, but before it became final, the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004).

The defendant petitioned for a writ of habeas corpus alleging that the state's decision was contrary to *Crawford*. The District Court granted the petition, holding that, based on state court

case law, statements to CARES workers were testimonial hearsay. Note that *Greene v. Fisher*, __ U.S. __, 132 S. Ct. 38 (2011) would foreclose relief for similarly situated petitioners.

State Court Cases

Miller v. State, 717 S.E.2d 179 (Ga. 2011)
Statements made in verified petitions for domestic violence protective injunctions are testimonial hearsay because the statements were made for potential use in a criminal case. Thus, allowing the judge who received the petitions read them to the jury violated the defendant's right to confront the non-testifying complainant who verified the petitions.

State v. Beecham, No. 2009-KA-00251-COA, 2011 WL 5027239 (Miss. 2011) (unreported)
A statement of cause of death on a death certificate is testimonial hearsay and inadmissible absent the opportunity to cross-examine the person making the finding. Thus, the trial court's admission of the cause of death in a driving under the influence causing death case was prejudicial error where the cause of death listed brunt-force trauma from an automobile as the cause. The court concluded, but did not discuss, that the person making the determination would have reasonably expected the cause of death determination to be used in litigation. Reversed.

State v. Bennington, 264 P.3d 440 (Kan. 2011)
The statements of the complainant victim's statements to a sexual assault nurse examiner (SANE) were testimonial hearsay because the SANE was answering questions prepared by the Kansas Bureau of Investigation and mandated by Kansas law. The interaction also took place in the presence of a law enforcement officer. Moreover, the questions pertained to past events, not the present condition of the victim. Thus, they were more likely to have been taken for investigative, rather than medical or emergent, purposes. Reversed.

State v. Clark, No. 96207, 2011 WL 6780456 (Ohio Dec. 22, 2011)
At trial for child abuse, the court admitted the statements the complaining child made to his teachers, a social worker, and the police. The child was held incompetent to testify and was never cross-examined by the defendant.

The appellate court reversed. It held that the admitted portions of the child's statements to the social worker and the police were collected for investigative, rather than medical, purposes and, citing Ohio precedent, found them testimonial. The court also concluded that the statements to the teachers were testimonial hearsay. It emphasized the teachers' role as a mandatory reporter and the teachers' testimony about their concern at the time of the questioning that criminal activity was taking place.

Green v. State, 22 A.3d 941 (Md. Ct. Spec. App. 2011)

The complainant's statements made to a sexual assault forensic examiner (SAFE) nurse were testimonial hearsay, and their admission violated the defendant's right to confrontation. The appellate court emphasized several critical points: when the victim made the statements, she had already been treated by other medical personnel; a police officer specifically sought out a SAFE nurse to conduct the examination for the purpose of collecting evidence; and the statutory description of SAFE nurses refers to a investigative function.

D.G. v. State, 76 So.3d 852 (Ala. Crim. App. 2011)
At a delinquency adjudication, the court admitted and reviewed a DVD of a forensic examiner from the Alabama Child Advocacy Center interviewing the complaining witness, who did not testify.

The Court of Criminal Appeals reversed. It held that because the statements were made to "verify past incidents in order to aid in a criminal investigation," they were testimonial hearsay and should not have been admitted. Reversed.

State v. Gurule, 256 P.3d 992 (N.M. Ct. App. 2011) *cert. granted State v. Gurule*, 266 P.3d 633 (N.M. June 8, 2011) (table)
A couple was charged with possession of child pornography. After law enforcement had executed a search warrant for pornographic material, but before trial, the co-defendant wife informed her son that she had caught defendant husband viewing child pornography on the computer. The co-defendant wife did not testify, but the son would have testified to the statement.

The New Mexico Court of Appeals held that the statement made to the son was testimonial hearsay. It noted that making the statement when she did, after a search warrant had been executed, made it objectively reasonable for her to believe that the statement she made to her son would be used in a criminal investigation or prosecution. Suppression order affirmed.

Kelly v. State, 321 S.W.3d 583 (Tex. App. 2010)
At trial, the court admitted testimony from a social worker that she was "informed" that the complainants had reported and were subjected to various forms of sexual assault. Several of the social worker's sources testified, but the social worker had conducted interviews of additional nontestifying witnesses and presented information that was not presented by any other witness.

The appellate court held that the information presented violated the Confrontation Clause because the information could have been based only on what the nontestifying witnesses told her. The erroneous admissions were non-harmless because they were the unique source of the information. Reversed.

State v. Arnold, 933 N.E.2d 775 (Ohio 2010)

At trial for sexual assault of a child, the court admitted a child advocate's testimony about what the complainant told her. The appellate court held that the interview resulted in both testimonial and nontestimonial statements and that the nontestimonial statements were admissible. It held that the interview had a dual purpose: medical and forensic. Thus the statements that "likely were not necessary for medical diagnosis or treatment" were testimonial and inadmissible. Reversed.

State v. Carper, 41 So.3d 605 (La. Ct. App. 2010)
At trial for sexual assault of a child, the court admitted the videotaped interview, conducted by a social worker, of the nontestifying complainant who had never been subjected to cross-examination. The appellate court reversed, holding that the statements were testimonial and their admission violated the Confrontation Clause. The error was not harmless because the interviews were "the linchpin of the prosecutor's case." Reversed.

Laymon v. Commonwealth, No. 2008-CA-001626-DG, 2010 WL 668656 (Ky. Ct. App. Feb. 26, 2010) (unreported)
At trial, the court admitted the testimony of the complainant's mother, the mother's boyfriend, and a deputy sheriff about what the complainant told each of them. Even though the mother and boyfriend were not members of the prosecution team, the appellate court reversed, holding that the statements were testimonial because they were not made during an ongoing emergency and were in "an effort to facilitate criminal prosecution." Reversed.

In re D.K., 924 N.E.2d 370 (Ohio Ct. App. 2009)
At a juvenile's trial for habitual disobedience, a principal testified to the content of unadmitted school records authored by a nontestifying witness. The appellate court ruled that school disciplinary reports are testimonial evidence because they are "accusatory, and at a minimum, were created for use in further disciplinary proceedings." The court noted that it "might reasonably be expected that such documents would be used in" juvenile court proceedings. Because the records were the only evidence of a necessary element of the crime charged, the admission was prejudicial. Reversed.

People v. Vargas, 100 Cal. Rptr. 3d 578 (Cal. Ct. App. 2009)
The complainant's statements during a sexual assault examination were inadmissible testimonial hearsay for four reasons: (1) the examiner acted "in an agency relationship with law enforcement, telling the complainant the results of the exam would be "released to law enforcement," (2) the statements were "out-of-court analogs" to testimony because they were made in response to a "rigorous, statutorily mandated format designed to have [the complainant] describe the specific sexual acts," (3) the exam described "past acts," not an ongoing emergency, and (4) even though the questions were relevant to medical treatment, the "*primary* purpose of questioning [the complainant] was . . . gathering evidence . . . for possible use in court." Reversed.

State ex rel. Juvenile Dep't of Multnomah County v. S.P., 215 P.3d 847 (Or. 2009)
Statements the complainant child made to Child Abuse Response Services were testimonial hearsay. Although the statements were made to medical personnel, those personnel were acting at the behest of the police. Thus, the interview was for the "dual purpose" of medical evaluation and police investigation. The statements recounted what the abuser did, who did it, and how many times he did it. They were also made in a "formal setting" and in response to "structured questioning," both suggesting they were testimonial statements.

Hartsfield v. Commonwealth, 277 S.W.3d 239 (Ky. 2009)
At trial for sexual assault, the court admitted the nontestifying complainant's statements to a Sexual Assault Nurse Examiner (SANE Nurse).

The Kentucky Supreme Court reversed. It held that the SANE Nurse's interview of the complainant was the functional equivalent of a police interview and produced testimonial hearsay. The court emphasized the SANE Nurse's cooperation with the police, her role as an investigator, as defined by state statute, and the structured nature of the inquiry.

Harris v. Commonwealth, No. 2007-CA-001152-MR, 2009 WL 350615 (Ky. Ct. App. Nov 18, 2009) (unreported)
At trial, the court admitted the nontestifying complainant's statements made to a social worker during the course of the social worker's investigation into the abuse of the child.

The appellate court reversed. With little explanation, it held that statements made during the course of a social worker's investigation of abuse were testimonial hearsay.

Commonwealth v. Depina, 899 N.E.2d 117 (Mass. Ct. App. 2009) (table decision)
The identification of the defendant by the nontestifying complainant was testimonial hearsay because statements about who caused the injury, although made to a firefighter, would reasonably be assumed to be used for the investigation and prosecution of a crime. It is somewhat noteworthy because the statement was not made to an agent of the prosecution. Because the statements were made in the safety of the firestation, away from the scene of the crime, they were not to resolve an ongoing emergency. Reversed.

In re: T.T., 892 N.E.2d 1163 (Ill. App. Ct. 2008)
Statements made to the investigating police officer were testimonial where the statements were in response to specific, rather than open-ended questions; the witness "knew why she was there" at the police station being interviewed, and after the interview the prosecution filed its indictment.

Notwithstanding the "neutral location" of the witness's home, the open-ended questions, the absence of police, the occurrence of the interview prior to filing charges, and the declarant's young age, her statements made to a social worker were also testimonial where the statements were made in an interview that focused on whether the person might "bear witness" against the

defendant. Likewise, statements about the identity of the perpetrator made to a doctor were testimonial because the identity of the perpetrator is not necessary for medical treatment. Reversed.

State v. Cannon, 254 S.W.3d 287 (Tenn. 2008)
Statements made to a sexual assault nurse examiner were, in this case, testimonial. The court noted that the nurse was trained by law enforcement agencies and described her interview of the complainant as an "interrogation" because the interview was structured and the complainant had already received treatment for her injuries when the nurse spoke with her. Because other errors required reversal, the court did not determine whether the erroneous admission of the testimonial statements was harmless. Reversed.

State ex rel. Juvenile Dep't of Multnomah County v. S.P., 178 P.3d 318 (Or. Ct. App. 2008)
At a juvenile delinquency proceeding, the court admitted statements the complainant made during an interview with a team consisting of medical and law enforcement personnel at a child advocacy center. Even though the statements were made in response to questions that medical personnel would have asked for the purposes of a medical exam, the appellate court held that the statements made during the interview were testimonial because, in light of the following factors, one purpose of the examination was to provide information relevant to a prosecution, not simply provide medical treatment: (1) the purpose of the child advocacy center receives the majority of its referrals from law enforcement in an attempt to limit the number of interviews required in a child abuse investigation, (2) the personnel at the center receive training that goes beyond typical medical training, (3) the child's parents do not receive the full evaluation that is given to law enforcement, and most importantly (4) law enforcement involvement in the center is "pervasive." The court distinguished a pediatrician, subject to mandatory reporting of abuse, who does not routinely seek and obtain information with the "conscious concurrent purpose of preserving that information to assist possible future prosecutions." Reversed.

State v. Hooper, 176 P.3d 911 (Idaho 2007)
While the defendant's direct appeal was pending, *Crawford* and *Davis* were decided. Applying the new rules stated therein, the Idaho Supreme Court held that a child victim's statements to a forensic nurse examiner at a STAR center were testimonial hearsay. Employing a totality of the circumstances test, the court noted that the interview was to establish past facts, the examiner did not ask questions about the complainant's treatment, a medical assessment had already been completed, and the lack of an ongoing emergency. It also noted statements the officers made to the defendant, asking him if there was anything he wanted to explain in light of there having been an interview. Reversed.

Rankins v. Common wealth, 237 S.W.3d 128 (Ky. 2007)
Prior to trial for assault, the prosecution moved to admit statements made by the victim to the officers responding the 911 call and to hospital personnel. The victim was not available to testify. The trial court did not admit the evidence because it was hearsay and rejected the

prosecution's argument that they were excited utterances and dismissed the case. The intermediate appellate court reversed, holding that the statements were, in fact, excited utterances. The state Supreme Court held that the statements were testimonial hearsay because they relayed "what happened," not what "is happening." It held that because the statements were testimonial hearsay, they were inadmissible "regardless of whether they fall under the 'excited utterance,' or any other hearsay exception." Reversed.

State v. Henderson, 160 P.3d 776 (Kan. 2007)
At trial, the court admitted the videotaped joint interrogation of a nontestifying three-year-old child by a sheriff deputy and a member of the Social and Rehabilitation Services. During the interrogation, the child stated that the defendant raped and sexually molested her.

The Kansas Supreme Court, relying on *Davis*, clarified the rule in *Crawford*. To determine whether a statement is testimonial, it examines the totality of the circumstances, including whether the person making the statement would reasonably believe that the statement would be used in a prosecution. It explicitly rejected the American Prosecutors Research Institute's proposal suggesting that where a child does not understand the significance of court proceedings, those statements are nontestimonial. It held instead that the witness's awareness that the statement made be used to prosecute is one factor among others to determine whether the "primary purpose of the interview" is to obtain information to be used in a prosecution. The court concluded that the interrogation in question was for that purpose and that it should have been excluded. The court emphasized the formality of the interview, the involvement of the sheriff's department, and the emphasis on the defendant throughout the interview. It rejected the state's argument that there was an ongoing emergency, noting that the child was recounting past events and was calm. The court also found the error was not harmless and reversed.

People v. Stechly, 870 N.E.2d 333 (Ill. 2007)
At trial, the court admitted, over the defendant's "reliability" and "trustworthiness" objection statements of a nontestifying witness made to "mandated reporters" in interviews conducted to gather information to be passed on to prosecuting authorities. The defendant had allegedly instructed the complainant not to inform her mother about the incident.

In a lengthy and detailed opinion, the Illinois Supreme Court held that the statements were testimonial and reversed. The court held that the defendant's objection, couched in the language of *Roberts v. Ohio* was sufficient to preserve the Confrontation Clause issue because *Crawford* was decided after the trial. It also held that *Crawford* would be applied retroactively to cases pending on appeal because the rule in *Crawford* was a new rule of criminal procedure.

The state argued that the defendant had forfeited any Confrontation Clause argument based on his instruction to the complainant not to tell her mother about the incident. The court held that the forfeiture by wrongdoing doctrine included an intent element requiring the state to show by a preponderance of the evidence that the defendant committed a wrongdoing with the intent to

prevent the witness from testifying. The court held that the defendant's alleged instructions to the complainant warranted an evidentiary hearing on remand.

The court turned to the merits of the defendant's Confrontation Clause claim. Noting that the right of confrontation arose in a time period that used private prosecution for criminal cases, the court rejected the state's effort to limit "testimonial" statements to those made to government personnel. It also held that in the context of private interrogation, the question is whether the declarant intends for the statement to be used against the defendant; the questioner's intent, in that circumstance, is irrelevant. This issue was addressed by *Michigan v. Bryant*, discussed *supra*.

The court also held that the age of the declarant is a relevant "objective circumstance" to be considered to determine whether a declarant intended a statement to be used prosecutorially. It held that the younger a child is, the less likely they are to understand how their statement will be used, and, thus, they are less likely to make a testimonial statement. The court did not address whether this would make the child incompetent to offer evidence.

The mandated reporters were acting on the behalf of the prosecution for the purpose of gathering information relevant to prosecution and, therefore, statements made to them were testimonial hearsay. "Mandated reporters" are persons with a legal obligation to report to authorities any cause to believe a child has been abused or neglected and to "testify fully in any judicial proceeding resulting from such report." The court emphasized that their status "merely . . . supports" the conclusion that they were acting for "no other purpose than to obtain information to pass on to authorities" and was not determinative.

In re S.R., 920 A.2d 1262 (Pa. Super. Ct. 2007)
At trial for indecent assault, over a defense objection, the court admitted statements made by the unavailable complainant to a "forensic specialist." The specialist interviewed the complainant in a manner similar to "direct examination in court" and after conferring with the police, who observed the examination through a one-way mirror.

The appellate court held that the purpose of the specialist's interview was to obtain information to assist in the prosecution of the defendant and, thus, produced testimonial statements.
Reversed.

State v. Romero, 156 P.3d 694 (N.M. 2007)
At trial, the court admitted the testimony of a Sexual Assault Examiner, recounting the nontestifying complainant's statements describing in detail the defendant's sexual assault on her. On appeal, the state argued that the statements were made for the purposes of medical treatment, not for prosecuting the defendant.

The state supreme court disagreed and reversed the trial court. It held that the statements were recounting past facts, provided for the purposes of prosecution the defendant, not to address an

ongoing emergency. The court emphasized that the complainant met with the examiner at the prompting of a police officer and the statements introduced specifically identified the defendant and accused him of sexual assault.

People v. Mileski, No. 248038, 2007 WL 28288 (Mich. Ct. App. Jan. 4, 2007) (unreported)
At trial, the court admitted the testimony of three witnesses, each of whom offered the statements of the nontestifying complainant. The first was the complainant's neighbor, who testified that the complainant made statements to her describing the alleged sexual assault in broad terms immediately after her flight from the scene. The second witness was the reporting officer who reported a more detailed description of the alleged incident that the complainant provided while still "shaking and trembling" after the alleged incident. The third witness was a "nurse specializing in sexual assault examinations" who testified in the most detail about the allegations.

The court of appeals held that the latter two witnesses recounted testimonial hearsay. "[E]ven if [the] remarks qualified as excited utterances or some other form of excepted hearsay," they were not admissible under the Confrontation Clause because the complainant was no longer trying to address an emergency. She was providing information to "create a record to be used against the defendant."

Hernandez v. State, 946 So.2d 1270 (Fla. Dist. Ct. App. 2007)
At trial, the court admitted, over defense objection, the testimony of a nurse employed as part of a Child Protection Team (CPT), who recounted statements of the nontestifying complainant and her nontestifying parents. The nurse interviewed the complainant after obtaining basic information from the investigating officer and testified that she regularly testified about the sexual assault examinations of children she performs in her capacity as a member of the CPT. She testified as to the complainant's version of the events and that, based on a physical examination, the complainant may have suffered sexual abuse. She also testified that the complainant's parents told her the date on which the incident occurred.

The appellate court held that because the nurse was acting as an agent of the police when she interviewed the complainant, the complainant's statements to her were testimonial hearsay. The court emphasized the statutorily defined role of the CPT nurse, including her duty to testify, to assist in cases, and to provide forensic interviews. It also emphasized the involvement of law enforcement in arranging the interview, the nurse's use of a checklist of types of abuse that "were . . . calculated to produce a list of specific acts of sexual abuse that a prosecutor might use to prepare one more charges," and the absence of any ongoing emergency at the time the statements were made.

People v. Sharp, 155 P.3d 577 (Colo. App. 2006)
At trial, the complainant child was called to testify, but was unable to proceed and was not subjected to cross-examination. Instead, a videotaped interview by a "private forensic examiner" was admitted, without objection, as evidence. During the defendant's first appeal, he succeeded

on a sentencing issue. After remand, but before his second appeal, *Crawford* was decided. The appellate court applied *Crawford* to the unobjected to evidence.

The appellate court applied a two-part test to determine whether the interview was the functional equivalent of a police interrogation, and thus produced testimonial hearsay: 1) whether and to what extent government official were involved in producing the statements and 2) whether their purpose was to develop testimony for trial. Because the police arranged and "to a certain extent, directed" the interview, and because the purpose of the interview was to obtain statements to be presented at trial, the court held that the interview was the functional equivalent of police questioning and that the complainant's statements were testimonial, even though the officer was not present during the interview and even though the complainant said she did not know why she was being interviewed.

State v. Justus, 205 S.W.3d 872 (Mo. 2006)
Prior to trial for sexual abuse of a minor, the defense moved to exclude two statements by the nontestifying complainant child. The statements were made to forensic interviewers, and the second interview was videotaped. The trial court admitted both statements, including the interview, after finding the statements admissible under *Roberts*, *Crawford*, and a state evidentiary rule allowing child complainant statements under certain circumstances in child abuse cases. The trial court also admitted the complainant's hearsay statements made to her mother and grandmother. The statements covered much of the same material, and the appellate court ruled these statements were nontestimonial and admissible.

The Missouri Supreme Court ruled the statements to the forensic examiner were testimonial hearsay. Noting that this case was the first "requiring this Court to apply *Crawford* and *Davis* to child victim hearsay admitted under [state evidentiary code] section 491.075," the court ruled the statements made to both the forensic interviewers were testimonial. Even though one interviewer did not work for the state, the court found the statements made in response to her questioning testimonial because she was "acting as a government agent" when she interviewed the complainant. The court also noted the "formal setting in a question and answer format" of both interviews. They had taken place in examination rooms and as part of the police investigation. Despite the other testimony, admitting the statement was not harmless beyond a reasonable doubt because of the "experience and training" of the forensic interviewers and because the erroneously admitted videotaped interview, which directly implicated the defendant.

People v. Walker, 728 N.W.2d 902 (Mich. Ct. App. 2006)
At trial, the court admitted three sets of statements made by the nontestifying complainant; each were admitted as excited utterances and without a Confrontation Clause objection. The first was a statement made during the complainant's neighbor's 911 call. The complainant had run to the neighbor's house in seek of help. During the 911 call the neighbor conveyed the complainant's account of where the alleged assault took place, whether others in that location were at risk, and

a description of her injuries. The appellate court ruled that these statements were made to meet an ongoing emergency and were not testimonial.

The second set of statements were made in the form a written statement, made at the direction of and with the help of the complainant's neighbor. The third set were statements to the police, who had responded to the scene. The appellate court ruled that both the second and third sets of statements were testimonial hearsay. The court noted that "portions of these statements could be viewed as necessary for the police to assess the present emergency . . . 'the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime." The majority found that the unpreserved error was not harmless. The dissent would have held that, based on *Crawford*, a hearsay objection preserved Confrontation Clause errors as a matter of federal law.

State v. Pitt, 147 P.3d 940 (Or. Ct. App. 2006)
At trial, the court admitted video of statements by the nontestifying children complainants. The statements were made during the course of interviews at the Lane County Child Advocacy Center, which provides physical exams, conducts interviews, and makes referrals for treatment. The interviews are "forensic" and the center helps "coordinate interview participation among law enforcement, child protection services and prosecutors." The complainants were referred to the center by the police.

The appellate court found that admission of the video was plain error. In finding that the statements were testimonial hearsay, the court emphasized the interviewer's testimony that the "whole idea" of the center is obtaining statements that can be used in the course of a prosecution. The court also found that the "error sufficiently grave to warrant the exercise of . . . discretion to correct it" because all of the evidence against the defendant "derived from statements of the two girls, whose credibility was the linchpin of the case."

State v. Hooper, No. 31025, 2006 WL 2328233 (Ohio Ct. App. Aug. 11, 2006) (unreported)
The trial court admitted videotaped statements of the complainant child-witness, who the judge had found unavailable. The statements were made in response to structured interview questions asked by a nurse who worked at a Sexual Trauma Abuse Response Center. The interview was arranged by the police and took place at the Center several hours after the incident.

The appellate court held that it was error to admit the video and the statements. Finding the statements testimonial, the court emphasized that were made several hours after the alleged events, outside the presence of the alleged perpetrator, in a safe environment, and during a formal, structured interview. It noted that the nurse initiated the interview with questions about whether the complainant understood the difference between the truth and a lie and asked other questions similar to those one would expect during a direct examination. The court also found that the non-governmental interviewer acted as the functional equivalent of a police interrogator.

The court rejected the state's argument that because of the age of the complainant, six years old, she would not understand that her statements would be subject to later use at trial. Applying

Davis, the court held that it is the circumstances of the interview, not the expectations of the declarant, that are controlling. This position may need to be distinguished somewhat from *Michigan v. Bryant*, discussed *supra*.

Flores v. State, 120 P.3d 1170 (Nev. 2005)
At trial for murder by child abuse, the court admitted the statements of the defendant's nontestifying child. The statements were made to a Las Vegas Police Department investigator, a Child Protective Services investigator, and the child's foster mother. The statements were the "only direct poof in support of the State's theory of murder by child abuse." The defendant provided the police with a statement that was corroborated by the evidence at the scene. The child's statements indicated that the victim wet her pants, the defendant hit her, took her to the shower and hit her again, and that she slipped and hit her head after being hit the second time. After the second strike, the defendant gave the victim "some medicine," and the victim never woke up.

The appellate court reversed. It adopted a case-by-case, "reasonable person" test to determine whether "an objective witness [would] believe that the statement would be available for use at a later trial," and was thus testimonial hearsay. It found that the statements to Child Protective Services and to the Police Department investigator were testimonial because "both were either police operatives or were tasked with reporting instances of child abuse for prosecution." The statement to the foster mother was not testimonial because it was made "spontaneously at home while [the foster mother] was caring for the child."

People v. Herring, No. A104624, 2005 WL 958220 (Cal. Ct. App. April 27, 2005) (unreported)
At trial for sexual assault, attempted murder, assault, and murder, the trial court admitted the testimony of a sexual assault nurse who had interviewed the victim at the hospital. The purpose of the interview was "evidence collection."

The appellate court reversed. It held that the statements made to the nurse were testimonial hearsay because of the purpose of the interview. The court noted the nurse's use of a form created by the police, that the examination took place after police referral, and the lack of any ongoing medical or legal emergency at the time of the interview.

State v. Snowden, 867 A.2d 314 (Md. 2005)
At trial for child abuse, the court admitted the statements the nontestifying complainant children made to a social worker. The complainants informed the social worker that they knew why they were being interviewed, and the trial court admitted the statements under Maryland's "tender years" statute allowing a child's statement to a medical or social work professional upon a showing of "specific guarantees of trustworthiness.

The appellate court, in light of *Crawford v. Washington*, 541 U.S. 36 (2004), reversed. The court explained that the test for determining whether a statement is testimonial is "whether the statements were made under circumstances that would lead an objective declarant reasonably to

believe that the statement would be available for use at a later trial." Finding that the statements "in every way the functional equivalent of formal police questioning," the court emphasized that the interview was conducted at the behest of the police, the statements were made after the complainants had talked to the police, and that the complainants understood that their statements would be used against the defendant. It also noted the purpose of the interviewer's job: "as interviewer and ultimate witness for the prosecution."

People v. West, 823 N.E.2d 82 (Ill. App. Ct. 2005)
At trial for sexual assault, the court admitted the complainant's statements to medical personnel regarding the identity and fault of her attacker.

The appellate court reversed holding that the statements were testimonial hearsay. It contrasted statements about identity and fault from statements concerning the cause of the symptoms and pain.

In re Welfare of J.K.W., No. J80350751, 2004 WL 1488850 (Minn. Ct. App. July 6, 2004) (unreported)
At trial for aiding and abetting terroristic bomb threats, the court admitted a recording made by one of the defendant's friends. The recording was made at the suggestions of the investigating police officer and contained statements by the defendant and her friend.

The appellate court reversed, holding that because the police officer suggested that the recording be made, the statements were made under circumstances in which a reasonable person would believe that they would be used in a criminal prosecution.

State v. Sisavath, 12 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004)
At trial for sexual abuse of a minor, the court admitted the videotaped statement of the minor after finding that she was incompetent to testify. The interview was conducted by a forensic examiner and the County's "Multidisciplinary Interview Center," (MDIC) designed for the interview of children suspected of being victims of abuse. While the defendant's appeal was pending, the Supreme Court decided *Crawford*.

The appellate court reversed. It held that admission of the videotaped statement of the minor violated the defendant's Confrontation Clause rights. It rejected the state's argument that the statements were not testimonial because the interviewer was not a government employee, the center constituted a neutral location, and the interview might have a therapeutic purpose. It held that the question is "whether an objective observer would reasonably expect the statement to be *available for use* in a prosecution." Because the interview was conducted by a person trained in forensic training, was attended by the prosecutor, and took place after the prosecution was initiated, it was "eminently reasonable" that the interview would be available for use at trial.

People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004)

At trial, the judge excluded the 911 tape of a nontestifying witness and authored a lengthy opinion explaining why statements made during 911 calls are not admissible under *Crawford*. This decision abrogated by *Davis*, discussed *supra*.

Ongoing Emergencies

State Court Cases

State v. Samuela, 158 Wash. App. 1011 (Wash. Ct. App. 2010)
At trial for domestic violence, the court admitted a recording of the 911 call placed by the nontestifying complaining witness. The first part of the call addressed whether the caller was in immediate danger. At the end of this part the caller explains that the alleged perpetrator rode away on his bike. The remainder of the call focused on the identity of the alleged perpetrator and the details of the allegations. The trial court held the entire call was nontestimonial.

The appellate court reversed. It held that once the 911 operator learned that the caller was not in danger and that the alleged perpetrator had ridden away, any emergency had subsided and the call became an interrogation, producing testimonial statements.

State ex rel. A.M., Jr., No. FJ-20-2041-08, 2010 WL 5487497 (N.J. Super. Ct. App. Div. Oct. 25, 2010) (unreported)
At a delinquency hearing related to a robbery, the court admitted the nontestifying complainant's statements identifying the defendant as the perpetrator. The statements were made to the investigating police officer at the scene of offense. The victim was bleeding profusely and made the statement, according to the trial and appellate court, without deliberation or reflection.

The appellate court reversed, holding that even though the statement was an excited utterance, it was testimonial hearsay because it was the product of police interrogation and was not to quell an ongoing emergency, as the defendant had already been arrested.

State v. Basil, 998 A.2d 472 (N.J. 2010)
At trial for possession of a shotgun, the court admitted testimony from officers about a statement a nontestifying witness made to them. They testified that the witness/declarant returned to the scene of the arrest and informed them that the defendant was the one with the shotgun and that he had pointed it at her. The appellate court held that the statement was not made pursuant to an "ongoing emergency," emphasizing that the witness returned to the scene, that the defendant was no longer armed and had been detained, and that the identification was after the fact, not contemporaneous with the crime. Reversed.

People v. Wisdom, No. 289232, 2010 WL 2134287 (Mich. Ct. App. May 27, 2010) (unreported)
At trial for failing to properly register as a habitual sex offender, the court admitted the statement of the defendant's nontestifying co-habitating girlfriend. Her statement was to a testifying police

officer and suggested that the defendant had moved. The appellate court held that the statement was testimonial because it described past events. It rejected the state's argument that because the defendant was still allegedly committing the crime (not registering his move), there was an ongoing emergency. Reversed.

Garfield Heights v. Winbush, 931 N.E.2d 1148 (Ohio Ct. App. 2010)
At trial for fleeing and alluding the police in a vehicle, the court admitted the statement of a nontestifying witness made to a police officer. The statement identified the defendant as the person she had loaned her car. The appellate court held that the statements were testimonial because the ongoing emergency, the defendant's alleged flight, was over and the statements were the product of police questioning. The admission was not harmless because the prosecution's case largely rested on the witness's hearsay testimony, and her credibility was the "pivotal issue in the case." Reversed.

Wilder v. Commonwealth, 687 S.E.2d 542 (Va. Ct. App. 2010)
A nontestifying witness's 911 call reporting an ongoing felony was testimonial, was not a report of an ongoing emergency, and was inadmissible for two reasons: (1) the witness was not in danger while reporting the incident and (2) the call was intended to provide a narrative, rather than address an emergency because the witness was not frantic and attempted to call the company being broken into prior to calling 911. Reversed.

People v. Lloyd, No. 277172, 2009 WL 4827440 (Mich. Ct. App. Dec. 15, 2009) (unreported)
The 911 call identifying the defendant as the perpetrator and admitted at trial was testimonial for several reasons: (1) the caller used the past tense to provide information helpful for the police investigation, not to describe an ongoing emergency, (2) the statement was made two hours after the incident, and (3) the caller primarily focused on identifying the perpetrator. The appellate court declined to rule on whether an identification during an ongoing emergency would be testimonial. It also rejected the argument that the defendant being at large constituted an emergency. Reversed.

State v. Beacham, No. 04-12-2830, 2009 WL 2146392 (N.J. Super. Ct. App. Div. July 21, 2009) (unreported)
At trial for murder, the court admitted a nontestifying witness's statement to the investigating police officer. The witness, as soon as the officer arrived, said that two men shot his friend and fled through the back window. Later, also at the scene, he described the burglary he and his friend had interrupted. The appellate court held that the later statements, also made to the police, were testimonial hearsay. It held that they were inadmissible, even though they were excited utterances, because they primary purpose was to aid in the investigation. Unlike the first statement, they were made after the emergency was under control. The court, prior to analyzing the Confrontation Clause claim, concluded that the conviction had to be reversed and, therefore, did not discuss harmlessness. Reversed.

State v. Koslowski, 209 P.3d 479 (Wash. 2009)
The state failed to meet its burden to prove that a nontestifying witness's statements to the police, who were responding to a 911 call, were nontestimonial for several reasons: 1) the statements recounted past events—her description of the crime—instead of contemporaneous observations, and 2) despite the witness being "distraught" and the perpetrators being armed and at large, there was no indication that an emergency existed; there was no apparent risk of the perpetrators' return. *Crawford* was decided while the appeal was pending, so the trial record included information relevant to *Roberts*, but not *Crawford*. Therefore, the burden of proving that the statements were nontestimonial being on the state was an important factor in the case. Reversed.

State v. Lucas, 965 A.2d 75 (Md. 2009)
At trial for a domestic violence offense, the court admitted statements the nontestifying complainant made to the responding officer. The statements were made while the complainant was visibly upset, but in the absence of the defendant and in response to the officer's inquiry about what happened and where she got her injuries.

The Maryland Supreme Court affirmed the Court of Appeals' reversal of the conviction. It held that the statements were testimonial hearsay because any emergency had subsided when the police arrived (the defendant was secure and with another police officer; no call for medical help was placed) and because the officer explained that his questions and the complainant's responses were part of his investigation.

Tubbs v. State, No. CACR 08-580, 2008 WL 5423897 (Ark. Ct. App. Dec. 31, 2008) (unreported)
The nontestifying complainant's statement to the reporting officer that the defendant had been hitting and kicking her all day and would not allow her to use the phone or leave the motel room was testimonial evidence because the statements described past events and were not conveyed during an ongoing emergency since the defendant was asleep. The error was not harmless because without the statements, "the remaining evidence fails to support" the charged offense. Reversed.

Cuyuch v. State, 667 S.E.2d 85 (Ga. 2008)
The nontestifying complainant's statement at the scene identifying the defendant as the perpetrator was testimonial hearsay because it was "clear" that the primary purpose of the identification was for future prosecution, even though other statements made at the scene, such as describing how the defendant stabbed him, were made to address the ongoing medical emergency. Even though both statements were made in the course of the same interview, the court distinguished the purpose of making the separate statements.

The court also found that a nontestifying witness's statement about who committed a crime and where the weapon was, made at the scene of the crime with the unarrested suspect present and

with the victim's status unknown was testimonial because the statements described past events and provided evidence against the suspect. They were not part of an attempt to resolve an ongoing emergency because it was unclear whether the declarant was trying to obtain aid for the victim and because the suspect was sitting calmly watching television. Reversed.

In re: J.A., 949 A.2d 790 (N.J. 2008)
Statements made to a police officer a mere ten minutes after a crime was completed and shortly after the declarant stopped following the alleged perpetrators are testimonial statements because the statement relayed past events in response to a police officer's questions. Neither the officer's open-ended questions nor the witness's volunteering the information "change[s] the calculus" of whether the statements were testimonial. The court rejected the state's argument that the suspect being at large, where s/he poses no threat to the victim, makes the statements part of resolving an ongoing emergency. Reversed.

Allen v. Commonwealth, No. 2006-SC-000407-MR, 2008 WL 2484952 (Ky. June 19, 2008) (unreported)
911 calls made after the victim died were not in response to an ongoing emergency where the calls were made by parties who knew of the death and were relaying past events and theories of culpability. The Confrontation Clause violation, cumulative with an evidentiary violation, was not harmless beyond a reasonable doubt. Reversed.

Vinson v. State, 252 S.W.3d 336 (Tex. Crim. App. 2008)
Responding to a 911 call, a police officer took the statement from the complainant who identified the perpetrator by name and gave a detailed description of the incident. The perpetrator was present in the room for part of the interview, but was eventually placed in the officer's patrol car. At trial, the complainant's statements were admitted via the testimony of the officer and over a defense objection.

The appellate court held that the statements made outside the presence of the perpetrator were testimonial and not in response to an ongoing emergency. Because the defendant was no longer present and no other emergency existed—even though the victim was bleeding during the interview—the statements were testimonial hearsay. Remanded for determination of harm.

State v. Lopez, 974 So.2d 340 (Fla. 2008)
An excited utterance, where not made during the course of an ongoing emergency, is testimonial hearsay where it is made in response to police interrogation, even where the perpetrator is merely twenty-five yards away, the interrogation is not as formal as the interrogation in *Hammon*, and the assailant's gun is at the scene, but not on the assailant's person.

State v. Weaver, 733 N.W.2d 793 (Minn. Ct. App. 2007)
At trial for felony murder, over a defense objection, the court admitted the testimony of an assistant medical examiner who testified to the lab results on the carbon monoxide level in the victim's blood and that the victim died of carbon monoxide poisoning. The person who

conducted the lab tests could not be found or identified based on the report. The defendant admitted setting fire to the home, but claimed that his wife had died when, in the course of an argument, he pushed her, she tripped and hit her head and died soon thereafter. He claimed to have then panicked and set fire to the house. He fled the state after his indictment. He was found four years later. The assistant medical examiner, in addition to testifying about the carbon monoxide levels, testified that the victim did not die from a head injury. The defense called an expert that said it was impossible to determine whether there was a single cause of death. The defense argued the death was manslaughter.

The appellate court ruled that the lab report was testimonial hearsay because it was prepared at the request of the medical examiner during an autopsy that was part of a homicide investigation. The court rejected the state's argument that the defendant had waived his confrontation right by leaving the state. It noted that to waive the right, it must be a known right. Because he had no reason to know that the medical examiner would lose track of who conducted the testing and other related information, he did not waive the right. The court also declined to extend the forfeiture by wrongdoing doctrine to this situation because there was no evidence he intended to make the state lose track of its witness. The error was not harmless beyond a reasonable doubt because of the lab results were discussed at great length in rebutting the defense's case for manslaughter. Reversed.

Zapata v. State, 232 S.W.3d 254 (Tex. App. 2007)
At trial, the only witness was a responding officer who testified to the complainant's statements made outside her home and in response to her questions. The officer testified to the complainant's account of an assault. On cross-examination, the officer testified that her intent during the interrogation was to gather evidence for prosecution. The defendant was inside the house during the interrogation.

The appellate court held that the statements were testimonial because they recounted past events. It also held that there was no ongoing emergency, although the defendant was present, because there was no evidence that there was an ongoing conflict and the complainant was able to make an emergency call, leave the residence, and wait for assistance away from the defendant. The error was not harmless because the officer provided the only testimony of the complaint's statements. Reversed.

Mason v. State, 225 S.W.3d 902 (Tex. App. 2007)
At trial, the court admitted the testimony of an officer responding to a 911 call. The officer testified that the nontestifying complainant told him that the defendant slapped and choked her and threatened to kill her. The officer took her statement outside the residence while the defendant was in the bedroom.

The appellate court reversed and held that the statements were testimonial hearsay because the statement was in response to an officer's questions and described past events. The court rejected

the state's argument that because the complainant's statements were excited utterances, made under the stress of a startling event, they could not be testimonial. The court noted that the test for whether statements are testimonial is objective, in contrast to the excited utterance definition under Texas state law. Reversed.

State v. Tyler, 155 P.3d 1002 (Wash. Ct. App. 2007)
At trial, the court admitted statements from a nontestifying witness. The police had approached her while she and the defendant were walking down the street and appeared to be fighting. Shortly after the police got involved, the two separated, an officer noted she was a "prospective witness," and took a statement from her. Only one officer was on the scene, and periodically throughout her whispered statement the witness said that if the defendant heard what she was saying, he would kill her. As the defendant was being placed in the police car, he shouted to the witness that she would have to show up at court for the state to convict him.

The appellate court held that the statements of the witness were testimonial and were taken for the primary purpose establishing past facts, not addressing an ongoing emergency. While the initial contact may have been to address an "initial exigency," the exigency terminated "as soon as law enforcement separated [the witness and the defendant]." It also noted that the officers characterized the witness as a "prospective witness" and that the police described the encounter as an "investigation."

The appellate court declined to apply the doctrine of forfeiture by wrongdoing because the state raised it for the first time on appeal. Citing *Crawford* and *Davis*, it noted that the doctrine "has its roots in principles of equity, not the constitution."

State v. Greene, No. 04-06-0740, 2007 WL 1223906 (N. J. Super. Ct. App. Div. April 27, 2007) (unreported)
At trial, the court admitted the statement of a nontestifying 911 dispatcher. The statement included a description of the robber and a description of a robbery, as described to the dispatcher.

The appellate court held that because the dispatch relayed past events after the suspect had left the premises, rather than an ongoing account of a robbery, the statements were testimonial hearsay, and that it was error to admit them at trial. The court noted that although the trial court had initially admitted them to describe the "information received" by the police and to explain why the police acted as they did, the prosecution exceeded the scope of the purpose for which they were admitted by noting during closing arguments the consistency between another witness's testimony and the wrongfully admitted statements. Reversed.

Commonwealth v. Williams, 836 N.E.2d 335 (Mass. App. Ct. 2005)
The trial court admitted the statements of the nontestifying complainant that she made to the responding investigators. The statements were made while the defendant was on another floor of the house and provided a detailed account of the alleged assault and battery.

The appellate court reversed. It held that the statements, made in the course of a police interview, were "per se testimonial" unless "the questioning was of an 'emergency' nature." Because, at the time of the questioning, the defendant was "in the control of another officer and not present at the scene," the questioning was not designed to respond to an emergency and produced testimonial hearsay.

Drayton v. United States, 877 A.2d 145 (D.C. 2005)
At trial, the court admitted statements of the defendant's son, the complainant. The statements were admitted over a defense objection and as an excited utterance. The complainant's statement was taken by the responding police officers after the defendant had been placed in the patrol car and after she had discussed "what was going on" with the officers.

The appellate court reversed. It discussed controlling caselaw holding that excited utterances are not per se nontestimonial (*Stancil v. United States*, 866 A.2d 799 (D.C. 2005). It adopted the California rule announced in *People v. Kilday*, 20 Cal.Rptr.3d 161 (Cal. Ct. App. 2004) that statements made to police officers are not per se testimonial. It held that the statements here were testimonial because any emergency had subsided by the time the statements were made. The officers had secured the scene by placing the defendant in the police car and had determined who the participants in the alleged altercation were by interviewing the defendant.

People v. Rivas, No. B171183, 2005 WL 32845 (Cal. Ct. App. Jan. 7, 2005) (unreported)
At trial for attempted willful, deliberate and premeditated murder the trial court admitted the testimony of an investigating officer recounting the unavailable victim's statement to him, made while she was at the hospital. The victim told the officer that the defendant yelled that he was going to kill her while he was stabbing her. Prior to the appellate court's decision, the Unite States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004).

The appellate court reversed. It noted that the defendant did not make a Confrontation Clause objection to the hearsay testimony, but that even if he had done so, the statement would have been admissible under *Ohio v. Roberts*, 448 U.S. 56 (1980). Thus, it reviewed the error. It found that the victim's statement was testimonial hearsay because the officers were acting "in an investigative capacity," not responding to an emergency.

People v. Wang, No. B164939, 2004 WL 2955856 (Cal. Ct. App. Dec. 22, 2004)
At trial, the court admitted statements the non-testifying complainant made to the investigating officer. The statement was made while the complainant was in the hospital and in response to the investigating officers who were "wearing their uniforms and carrying their service revolvers." The interview addressed the complainant's "relationship with the defendant and the abuse defendant had inflicted upon her."

The appellate court reversed, holding that the statements were testimonial hearsay because they were made to the officers while the officers were "operating in their investigative capacity."

State v. Mack, 101 P.3d 349 (Or. 2004) (en banc)
Prior to trial, the court ruled that statements made by a three-year-old during an interview with a Department of Human Services caseworker were testimonial hearsay. The interviewer was initially participating in the interview to "answer questions about his needs" and for the police to "use her expertise interviewing children to facilitate the officers' interview." However, as the interview progressed, the officers failed to "establish kind of a dialogue or rapport," and the caseworker assumed "the primary role in questioning" the witness about the crime.

The state appealed to the Court of Appeals and the Oregon Supreme Court. Both upheld the trial court's ruling. The Oregon Supreme Court ruled that it need not "go beyond the reasoning in *Crawford* to decide this case." Because the caseworker was "serving as a proxy for the police," the statements the witness made to her were "within the core class of testimonial evidence that *Crawford* identified."

Issues Related to Experts

U.S. Court of Appeals Cases

United States v. Dollar, 69 M.J. 411 (C.A.A.F. 2011) (per curiam)
At trial for wrongful use of cocaine, the court admitted drug testing reports during the testimony of the government's expert witness who "frequently" relied on the reports during his testimony. The author of the reports did not testify.

The appellate court held that the admission was error because the expert acted as a "surrogate" witness for the author of the reports.

United States v. Cavitt, 69 M.J. 413 (C.A.A.F. 2011) (per curiam)
At trial for use of marijuana, the court admitted the testimony of an expert who relied upon—and relayed the information contained in—a urinalysis indicating the defendant had used marijuana. The court also admitted "a cover memorandum stating the tests performed and the results thereof, a specimen custody document, a confirmation intervention log, a blind quality control memorandum, chain of custody documents, and machine-generated printouts of machine-generated data."

On appeal the court found that introduction of the documents was in error because the author of the documents did not testify.

United States v. Trotman, 406 Fed. App'x 799 (4th Cir. 2011) (unpublished)
At trial for possession of a controlled substance and possession with intent to distribute, the court admitted testimony from a chemist who had not actually tested the substances in question, but who had reviewed the reports of the person who had. The testifying chemist also observed the substance in question, but not the testing itself.

The appellate court reversed, holding that because the reports were prepared in order to prove that the substances in question were a controlled substance, they were testimonial hearsay.

United States v. Moore, 651 F.3d 30 (D.C. Cir. 2011)
At trial for murder and possession of drugs, the court admitted autopsy reports and the reports of DEA agents. A medical examiner reported that he participated, but only tangentially, in the autopsies that led to the reports, signed by another examiner. The reports were admitted. The DEA agents' reports included information about the weight and identity of controlled substances.

The appellate court reversed. It held that the autopsy reports were testimonial hearsay. It explained that the autopsies were conducted with law enforcement present and that the reports included conclusions of members of law enforcement. Thus, it was reasonable to assume that the reports would be used for trial. The admission of the reports, however, was harmless because the cause of death was well established. The court found that the DEA reports were testimonial because they were indistinguishable from those in *Bullcoming v. New Mexico*, __ U.S. __, 131 S. Ct. 2705 (2011). The court remanded to determine prejudice.

United States v. Ramos-Gonzalez, 664 F.3d 1 (1st Cir. 2011)
At trial for possession of cocaine, the government presented the testimony of a forensic analyst who did not conduct and was not present for the testing of the substance in question. The trial court admitted the analyst's conclusion that the substance was cocaine because of the analyst's "familiarity with official procedure."

The appellate court reversed. It first held that the defense's objection that the analyst had "no personal knowledge" of the testing preserved the Confrontation Clause objection. It then held that in light of *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) the testimony was wrongly admitted. It noted that the government was "hard-pressed to paint [the] testimony as anything other than a recitation" of the testing analyst's report. It contrasted this situation with the one where an expert relies on inadmissible testimonial hearsay to form the expert's own opinion.

United States v. Blazier, 69 M.J. 218 (C.A.A.F. 2010)
At trial, the court admitted laboratory certificates that include printouts from drug testing machines as well as a narrative describing the tests and the results. The technician who authored the report did not testify, but a more experienced person did, repeating the information contained in the reports.

The appellate court reversed. It distinguished between an expert's reliance on inadmissible testimonial hearsay and the same expert's repetition of that hearsay to the fact finder. The Confrontation Clause, it held, prohibits the latter. More specifically, the testifying expert's

repetition of the narrative information in the certificates violated the defendant's right to confront the witnesses against him.

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008)
At a federal narcotics trial, a police officer testified as an expert about how a criminal gang conducted its activity. Over the *Crawford* objection of trial counsel, the officer testified that through the course of custodial interrogations he had learned that the gang used its treasury funds to purchase narcotics, used interstate telephone calls to coordinate activities, and taxed non-member drug dealers. The officer based his testimony on interrogations from prior cases, interrogations related to defendant's case, and other sources. He could not, however, distinguish among his sources.

On direct appeal, the Court of Appeals was "at a loss" as to how the officer applied his expertise in conveying the custodial statements to the jury. It held the custodial statements were testimonial and noted that "at least one fact [was learned] . . . *during the course of this very investigation*" and was a repetition of hearsay statements in "the guise of an expert opinion" and in violation of *Crawford*. The court further held the statements were not harmless beyond a reasonable doubt because they were material to numerous issues in the case as demonstrated by the trial judge requiring the jury to make special finding with regards to them. Vacated and remanded.

State Court Cases

Commonwealth v. Zani, 958 N.E.2d 1182 (Mass. 2011) (table decision)
At trial for possession of cocaine, the court admitted certificates of drug analysis without any witness testifying in support.

The appellate court reviewed for harmless error. The commonwealth argued that the defendant's post-arrest statements identifying the substance as "an eightball," together with the prosecution's expert identifying the substance based on a visual inspection rendered the admission harmless. The appellate court rejected these claims, analogizing this case to other recent decisions with a finding that the error was not harmless, without discussing the facts of this case.

People v. Goodreau, 936 N.Y.S.2d 510 (N.Y. Dec. 22, 2011)
At trial for DWI, the court admitted blood test results even though the person who conducted the blood tests did not testify. The blood was drawn at the defendant's request.

The appellate court reversed. It held that the person conducting the testing should have testified, emphasizing the defense's inability to conduct a meaningful cross-examination about the adherence—or lack thereof—to protocol. The court also found that it was of no moment that the

blood was drawn at the defendant's request, as it was the police who controlled the testing and it was the prosecution that presented the evidence.

Commonwealth v. Lopez, 957 N.E.2d 1131 (Mass. App. Ct. 2011)
At a bench trial for possession of cocaine, the trial court erred by admitting four laboratory certificates identifying the substance possessed by the defendant as cocaine. The state conceded error, but contested harm. The appellate court held that the error was not harmless even though there was some other evidence of the identity of the substance because the trial judge would not have had any need to look beyond the certificates which listed the weight and identity with "seeming exactitude." Reversed.

Whittle v. Commonwealth, 352 S.W.3d 898 (Ky. 2011)
At trial for drug trafficking, the court admitted a report from the state crime laboratory, but the author of the report did not testify. Instead, the director of the laboratory testified, at times reading from the report.

The Kentucky Supreme Court reversed. It held that admitting the report violated the defendant's right to confrontation. It noted that if the director had merely testified about the laboratory's procedures and tests, there would be no violation. But because the report was admitted without the author testifying, the court found error.

State v. Poole, 716 S.E.2d 268 (N.C. Ct. App. 2011)
At trial for possession of a controlled substance, the court admitted the report of a non-testifying analyst and the testimony of an analyst which was based exclusively on the report of the non-testifying analyst.

The North Carolina Court of Appeals reversed. It held that the report was testimonial hearsay and should not have been admitted. It also determined that admitting the testimony of the other analyst was error. It determined that the analyst was not offering an "independent opinion" but was "merely summarizing another non-testifying expert's report" because the analyst conducted no independent testing and did not witness the testing conducted by the non-testifying analyst. Thus, the testimony violated the Confrontation Clause.

Commonwealth v. Darosa, 952 N.E.2d 992 (Mass. App. Ct. Sept. 14, 2011) (table decision)
Admission of drug certificates identifying the weight and quantity of drugs, without testimony from the analyst testing the drugs, violated the defendant's right to confrontation.

Commonwealth v. Mejias, 952 N.E.2d 991 (Mass. App. Ct. Sept. 13, 2011) (table decision)
At trial for possession of over 28 grams but less than 100 grams of cocaine, the court admitted certificates of analysis identifying a substance as cocaine and noting the weight as 35 grams. The analyst did not testify. While the defendant's appeal was pending, the United States Supreme Court decided *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). Nonetheless,

appellate counsel did not raise a Confrontation Clause claim based on the decision. On collateral review, the Massachusetts Court of appeals found that appellate counsel was ineffective for failing to raise a claim. Because the weight of the substance was an element of the offense and because of the small amount more than the threshold for the statute, the error was not harmless.

State v. Jaramillo, 272 P.3d 682 (N.M. Ct. App. 2011)
At trial for child abuse resulting in death, the court admitted portions of the medical examiner's report. The author of the report had retired prior to trial and demanded a fee greater than the state was willing to pay. In the retired examiner's place, the court admitted the report of the examiner and the testimony of new examiner, who took no part in the autopsy. The report concluded, among other things, that the victim's death was caused by closed head injuries and was "consistent with homicide."

The appellate court reversed, holding that the report was testimonial hearsay. Because the report was prepared with the "intention of the medical examiner to establish the case and manner of . . . death," it was a testimonial statement. Reversed.

State v. Williams, 719 S.E.2d 255 (N.C. Ct. App. Nov. 15, 2011) (unreported)
At trial for possession of heroin and for habitual felon status determination, the trial court committed plain error by failing to exclude a laboratory certificate that recounted the quantity and identity of the substances obtained from the defendant. The court noted that the requirement of having proof of the identity beyond that of the expertise of the arresting officers was supported by this case because the arresting officer had misidentified some of the substances.

State v. Bolden, __ So.3d __, 2011 WL 4578596 (La. App. 2011)
At trial for two rapes, the defendant was linked to the crimes via his DNA profile. He had provided his DNA in an unrelated case, and when a lab compared its database to a national database, the defendant's profile was a likely match to the DNA in the two rape cases. Persons no longer working at the laboratory and who did not testify tested the DNA testing related to the two rapes. A third profile was generated after the defendant was charged for the two rapes. That profile was admitted at trial along with the DNA testing associated with the rapes.

The appellate court reversed and held that not being afforded an opportunity to cross examine the analysts who tested the evidence from the rapes violated the defendant's Confrontation Clause rights. It explained that absent such an opportunity, there was no way to ensure that the testing was conducted properly.

People v. Fackleman, 802 N.W.2d 552 (Mich. 2011)
At trial for home invasion, felonious assault, and felony-firearm, the defendant entered a defense of insanity. Shorty after the incident, the defendant was arrested and taken to the psychiatric wing of the hospital. Two days into his stay there, the treating psychiatrist drafted a report

outlining the facts that served the basis of his opinion as well as his opinion that the defendant was not psychotic at the time of trial. The treating psychiatrist did not testify at trial. The defense introduced the testimony of a psychiatrist who concluded he was psychotic at the time of trial. During his direct testimony, he explained that he relied, in part, on the report of the treating psychiatrist, but that he differed with his opinion. On cross-examination, the prosecutor read from the report, including the portion relaying the treating psychiatrist's opinion.

On appeal, the State Supreme Court held that trial counsel was ineffective for failing to raise a Confrontation Clause objection to the admission of the report. It explained that the report was testimonial hearsay. The circumstances under which the psychiatrist drafted the report, it is objectively likely that he expected the statement to be used as evidence in a prosecution. It also noted that statements of psychiatrists "deserve special consideration" because of the likelihood they will be used in cases turning on mental health evidence.

Commonwealth v. Banks, 950 N.E.2d 907 (Mass. App. Ct. July 26, 2011) (table decision)
Admission of ballistic certificates violated the defendant's right to confront the author of the certificates at a trial for possession of a firearm. The error was not harmless because the certificates were the only evidence that the firearm was operational.

State v. Ortiz-Zape, 714 S.E.2d 275 (N.C. Ct. App. 2011)
At trial for possession of marijuana, the court admitted the expert testimony of a criminalist who conducted a "peer review" of the testing analysis prepared by another criminalist. The review consisted of her "review[ing] the drug chemistry worksheet or lab notes that the analyst wrote her notes on and the data that came from the instrument that was in the case file and then [she] also reviewed the data that was still on the instrument and made sure that was all there too."

The appellate court reversed. It held that the peer review was more like reiterating the conclusions of the non-testifying criminalist and did not offer an independent assessment or opinion. The court noted that the criminalist did not observe the testing or conduct any independent testing of her own.

State v. Brent, 718 S.E.2d 736 (N.C. Ct. App. June 21, 2011) (table decision)
At trial for felony possession of cocaine, the court admitted the testimony of a criminalist who conducted "peer review" of the testing analysis prepared by another criminalist. Nothing about the testifying review actually tested the reliability of the data underlying her opinion.

The appellate court reversed. It held that the testifying criminalist had not conducted an independent review. It emphasized that she had not taken "any action to verify the results" on which she based her testimony. Thus, her testimony was more akin to "mere summarization" of the non-testifying criminalist's conclusions and violated the defendant's right to confrontation.

Johnson v. State, Nos. 05-09-00494-CR, 05-09-00495-CR, 2011 WL 135897 (Tex. App. Jan. 18, 2011)
At trial for possession of cocaine with intent to distribute, the trial court infringed on the defendant's Confrontation Clause rights by admitting laboratory certificates detailing the identity and weight of the substance in question. The author of the certificates and analyst who conducted the testing did not testify. The testimony of another analyst was inadequate to protect the defendant's right to confrontation because that analyst merely "parroted" the conclusions of the testing analyst. The testifying analyst did not exercise any independent judgment in coming to her opinion. Reversed.

State v. Styx, 944 N.E.2d 722 (Ohio Ct. App. 2010)
At trial for driving under the influence, the court admitted a blood test result over the defendant's objection without requiring the phlebotomist who drew the blood or the toxicologist who tested to testify.

The appellate court reversed. It held that both were required to testify. It explained that the testimony of the arresting officer did not provide an adequate foundation or opportunity for cross-examination because he did not know the procedure the phlebotomist employed. The supervisor of the toxicology lab's testimony was not adequate because she did not actually conduct any testing or have any "first-hand knowledge of the blood draw, its testing, or its results."

State v. Williams, 702 S.E.2d 233 (N.C. Ct. App. 2010)
At trial for possession of cocaine, the court admitted the testimony of a laboratory analyst about her "peer review" of another analyst's tests. The other analyst did not testify, but her reports were admitted as the basis of the testifying analyst's testimony. The testifying analyst testified that based on the tests and the data produced from the testing that the substance tested was cocaine.

The appellate court reversed. It held that because the analyst did not observe or conduct any of the testing, she "could not have provided her own admissible analysis of the relevant underlying substance."

State v. Brennan, 692 S.E.2d 427 (N.C. Ct. App. 2010)
At trial, the court admitted the expert testimony of a forensic chemist. She testified that, based on her review of a nontestifying chemist's report, that the substance in question was cocaine. The appellate court held that because the testifying witness was "merely reporting the results of other experts," her testimony was in violation of the Confrontation Clause. It noted that she did "no independent research" and had never seen the substance in question. The error was not harmless because the defendant's admission to smoking cocaine earlier in the day and request to

discard the cigarette box containing the substance require inferences that would "inevitably corrode a defendant's Sixth Amendment right to confront his accusers." Reversed.

People v. Davis, No. A120428, 2010 WL 3555825 (Cal. Ct. App. Sept. 14, 2010) (unreported)
The trial court admitted autopsy reports and DNA reports and notes authored by individuals not subject cross-examination. It also allowed an expert to rely on those reports in his testimony.

The appellate court reversed. It held that autopsy reports are testimonial and their authors must be made available to testify because their authors can have "no doubt" that the report might be used a criminal trial "for the purpose of establishing facts necessary to obtain a conviction." Similarly, notes and reports from DNA testing are testimonial for purposes of the Confrontation Clause. With little explanation, the court held that having an expert other than the one generating the statements rely on them is insufficient where the authors of the reports have not been subject to cross-examination.

People v. Lopez-Garcia, No. B215308, 2010 WL 3529775 (Cal. Ct. App. Sept. 13, 2010) (unreported)
The trial court admitted DNA testimony by someone other than the person who conducted the DNA testing. The court also admitted the reports authored by nontestifying witnesses. The appellate court reversed. DNA analysis is testimonial because it summarizes the "results of a scientific procedure performed for the purpose of determining the identity of a criminal suspect" and it "describes a past fact related to criminal activity." The court contrasted a "contemporaneous recordation of observable events," noting the report was prepared nearly a month after the testing was complete. The admission was prejudicial because it was the only evidence other than the testimony of the victim that linked the defendant to the crime.

Commonwealth v. Barton-Martin, 5 A.3d 363 (Pa. Super. Ct. 2010)
At trial for driving under the influence, the court admitted the blood-alcohol test result without requiring the lab technician who conducted the testing to testify. The appellate court held that the admission violated the Confrontation Clause. It dismissed the state's argument that the defense being able to call the lab technician to testify as irrelevant, quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. __, 129 S. Ct. 2527 (2009): "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."

Commonwealth v. Bookman, 932 N.E.2d 824 (Mass. App. Ct. 2010)
At trial for drug related offenses, the court admitted certificates that identified a substance found on the defendant as cocaine. Simply citing two recent state court cases, the appellate court held that the admission violated the Confrontation Clause. Reviewing for whether the evidence was harmless beyond a reasonable doubt, the court concluded, as in the cited cases, that their admission was not. Reversed.

Commonwealth v. Durand, 931 N.E.2d 950 (Mass. 2010)
At trial for murder, the factual contents of an autopsy report prepared by a nontestifying medical examiner were admitted over the defendant's objection. The appellate court held the admission was in error because the testifying pathology expert testified not only to his opinion about the cause of death, but also the underlying facts found only in the hearsay statements contained in the autopsy report. Because the cause of death was "very much a disputed issue," the court held that the error was not harmless. Reversed.

State v. Williams, 698 S.E.2d 556 (N.C. Ct. App. 2010) (table decision)
At trial for possession of marijuana, the court admitted a State Bureau of Investigation lab report. An officer testified, relying on the report, that the substance tested was marijuana. Without discussion, the appellate court held the admission was erroneous. It also held the error was not harmless beyond a reasonable doubt because it was the "only competent evidence identifying the substance as marijuana."

State v. Davis, 698 S.E.2d 556 (N.C. Ct. App. Aug. 3, 2010) (table decision)
At trial, the court admitted the expert testimony of a forensic pathologist who relied on a nontestifying pathologist's report for his testimony. The appellate court held that because he relied on the report but did not conduct any "independent testing designed to confirm the conclusions" therein, its admission violated the Confrontation Clause. The testifying pathologist testified as to the other pathologist's opinion that the death was a homicide. The error was not harmless because the defense theory was that the death was accidental, and the defendant did not get to cross-examine the person who concluded that it was not. Reversed.

Commonwealth v. Hieu Minh Nguyen, 930 N.E.2d 754 (Mass. App. Ct. 2010) (table decision)
At trial, the court admitted drug certificates from a crime lab. No one from the lab testified at trial. The appellate court found a Confrontation Clause violation and prejudice in "light of the other evidence with respect to the nature of [the alleged substances]." Reversed.

State v. Craven, 696 S.E.2d 750 (N.C. Ct. App. 2010)
At trial for drug possession, the court admitted testimony from an officer who had not tested the drugs. She testified that she had reviewed the data collected by the analyzing officer and that if the officer did not falsify the reports and if the officer followed proper procedure, then the testifying officer also would have reached the same conclusions.

The appellate court held that the testimony violated the Confrontation Clause because "it is precisely these 'ifs' that need to be explored on cross-examination." The error was not harmless even though the state presented testimony of a cooperating drug dealer who testified the material was cocaine: "scientific testing by an expert forensic analyst would be much more influential than lay opinion testimony from an admitted drug user." Reversed.

Polk v. State, 233 P.3d 357 (Nev. 2010)

At trial for murder, the court admitted one expert's testimony restating the conclusion of another. The testifying expert had tested three of four pieces of evidence presented at trial. The nontestifying expert was the only expert to test the fourth. The appellate court held that the admission violated the Confrontation Clause because the first expert was not available for cross-examination about the conclusion reached. It deemed the question of prejudice waived because the state failed to raise it in its briefing. Reversed.

State v. Brewington, 693 S.E.2d 182 (N.C. Ct. App. 2010)
At trial for possession of cocaine, the court admitted the state's expert forensic chemist's testimony that the substance in issue was cocaine even though the expert had not conducted the analysis of the substance. The appellate court held that if the witness had "offered her own expert opinion based on independent analysis," then no violation would have occurred. But because the witness "simply offered the opinion contained in [the] report," her testimony was inadmissible. Her testimony was a simple reiteration of the conclusions because she conducted no "independent of analysis of *the substance*." Analyzing whether the report followed proper procedures was not enough. Reversed.

State v. McDaniel, 230 P.3d 245 (Wash. Ct. App. 2010)
At trial, the court admitted the expert testimony of a police officer about gang activity. Based on his investigation, he testified to the defendants' gang nicknames, thus corroborating their involvement in the crime. The appellate court held that for one defendant, the testimony was admissible because the officer clearly relied upon nontestimonial information, including photographs. For the other, the source was interviews, and the state failed to establish that the interviews were nontestimonial. Thus, the expert's testimony regarding the second defendant violated the Confrontation Clause. Because the identification linked the defendant to telephone calls discussing the crime, the error was not harmless.

People v. Defroe, No. D056479, 2010 WL 1532341 (Cal. Ct. App. April 19, 2010) (unreported)
At trial, the court admitted certificates of analysis and testimony about the analysis of a substance that the evidence showed was cocaine. The analyst who completed the testing and authored the reports did not testify. The appellate court held that the admissions were in error because the certificates were, "on their face," prepared for the purpose of proving a fact and, thus, testimonial hearsay. Because the testifying witness "merely conveyed the results," the defendant was deprived of his right to confrontation. Reversed.

People v. Annunciation, No. D054988, 2009 WL 4931884 (Cal. Ct. App. Dec. 22, 2009) (unreported)
At trial for murder, the court admitted the autopsy report relied upon by the testifying pathologist in formulating his testimony, but authored by a different pathologist. The appellate court held that the report was testimonial because it included conclusions about how the injuries suggested the defendant's alleged state of mind at the time of the crime. The court held that prior state precedent had been overruled by *Melendez-Diaz*, specifically noting that whether such reports

were routine, reliable, or created contemporaneous to the testing were all irrelevant to the Confrontation Clause inquiry. The error was not harmless beyond a reasonable doubt because the pathologist's testimony, conveying the inadmissible report, was the "primary evidence that enabled the prosecution to argue" the necessary mental state. Reversed.

State v. Laturner, 218 P.3d 23 (Kan. 2009)
The Kansas Supreme Court ruled that drug analysis certificates, as authorized by state statute, are testimonial hearsay because the statute requires the certifying analyst to swear, under penalty of perjury, that the document is true and correct. The court also held the state's notice-and-demand statute unconstitutional because it provided that a certificate will be admitted unless "it appears from the notice of objection . . . that the grounds for that objection that the conclusions of the certificate . . . will be contested at trial." The court explained that the statute did not permit a defendant to "explore weaknesses in the reliability of a witness' testimony," and that the only justification for the statutory requirement—that "a confrontation right only arose if the hearsay evidence did not have particularized guarantees of trustworthiness—is no longer valid."

People v. Dungo, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009) *review granted People v. Dungo*, 220 P.3d 240 (Cal. 2009)
At trial for homicide, a pathologist was permitted to testify, relying on another pathologist's report, about how long the defendant choked the victim, which was relevant to whether the crime was murder or voluntary manslaughter. The report itself was not admitted, but the testifying pathologist disclosed portions of its contents to the jury. The appellate court held that the report was testimonial because its purpose is to "determine the circumstances, manner, and cause of death[, which] . . . is certainly part of a law enforcement investigation.'" Because the report was testimonial, testimony "relaying the contents" of the report violated the defendant's confrontation right. The court noted that the state was explicitly avoiding putting the other pathologist on the stand because he had been fired and discredited. Reversed.

McMurrar v. State, 905 N.E.2d 527 (Ind. Ct. App. 2009)
At trial for possession of drug paraphernalia, the court admitted a drug analysis certificate related to the testing of the alleged paraphernalia found on the defendant at the time of his arrest. Because the testing was done "for the purpose of showing the substance was cocaine and to prove an element of the charge, *i.e.*, that [the defendant] intended to introduce the cocaine into his body," the appellate court that the report was testimonial hearsay. Since the author of the report did not testify and was not shown to be unavailable, having the quality assurance manager of the laboratory testify to "the contents of the report and the conclusions drawn therein," was an abuse of discretion. The court did not discuss prejudice. Reversed.

State v. Mangos, 957 A.2d 89 (Me. 2008)
A forensic scientist's conclusion about the likelihood that DNA found on clothing matched the defendant's DNA is testimonial because it was made "in furtherance of a police investigation." Even though there were two eyewitnesses who made positive identifications, the erroneous

admission of that evidence was not harmless because the scientist was the only person who could provide the evidence linking the clothing to the tested swabs and who could testify about whether the proper scientific methods were used in creating the tested swabs that resulted in "powerful DNA evidence" connecting the defendant to the crime. Reversed.

People v. Levy, 873 N.Y.S.2d 236 (N.Y. Dist. Ct. 2008) (table decision)
At trial for driving while under the influence of drugs, urine test results conducted as part of the investigation were testimonial hearsay because they are "accusatory—since positive urine tests—combined with the testimony regarding the defendant's operation of her vehicle, would result in the defendant being found guilty." Motion to dismiss granted.

Jackson v. State, 891 N.E.2d 657 (Ind. Ct. App. 2008) abrogated on harmlessness ruling by *Roundtree v. State*, 928 N.E.2d 902 (Ind. Ct. App. 2010) (holding *Chapman* applies to *Crawford* violations)
As a matter of first impression, the appellate court ruled that laboratory certificates are testimonial hearsay because they are prepared for the purpose of litigation. Having the laboratory supervisor testify is not sufficient unless that person prepared the certificate. *Crawford* violations, based on the court's reading of *Crawford* and *Giles*, are not subject to harmlessness review. Reversed.

State v. Mata-Woodruff, No. A07-0117, 2008 WL 2415273 (Minn. Ct. App. June 17, 2008) (unreported)
A Bureau of Criminal Apprehension laboratory report stating that a substance was methamphetamine was testimonial. Admission of the reports without supporting testimony from the analyst who prepared it is plain error where the admission was directly contrary to binding precedent and was relied on by the prosecution, making it the focus of its opening and closing arguments. Reversed.

State v. Willis, No. A06-2443, 2008 WL 2020365 (Minn. Ct. App. May 13, 2008) (unreported)
Admission of Bureau of Criminal Apprehension reports identifying the chemical make-up and weight of various substances was plain error because reports in a nearly identical situation had been found to be testimonial in a recent state Supreme Court decision. The admission was not harmless because the trial court explicitly relied on the reports when finding the defendant guilty of the charges. Reversed.

State v. Johnson, 982 So.2d 672 (Fla. 2008)
Florida Department of Law Enforcement reports about the nature of controlled substances, i.e. whether they are illegal drugs, are testimonial because they are the "functional equivalent of an affidavit" and are "prepared for litigation and written to prove critical elements of the prosecution's case." The court distinguished law enforcement records from other business records based on their function. The court also held that the author of the report was not

"unavailable" because she was willing to fly from Virginia to Florida to testify the next day. Reversed.

State v. Belvin, 986 So.2d 516 (Fla. 2008)
Breath test affidavits containing information about the procedure used to measure the blood alcohol content, the time the sample was analyzed, the results of the test, the type and status of any permit issued by the Florida Department of Law Enforcement and held by the test administrator, and the date of the most recent maintenance on the testing instrument are testimonial statements for several reasons. First, they are "acting as a witness" against the defendant by providing "a critical element" to the DUI prosecution. Next, they are not created during an ongoing emergency or contemporaneously with the crime. Third, they are created at the request of a prosecuting agency. Finally, they are highly formalized and created for use at trial. The court distinguished blood tests and other test results taken for medical purposes, emphasizing that tests by law enforcement are done for the purpose of prosecution and are, thus, testimonial. Reversed.

People v. Horton, No. 268264, 2007 WL 2446482 (Mich. Ct. App. Aug. 28, 2007) (unreported)
At trial for murder, the court admitted the testimony of a serology and DNA expert who, in addition to testifying about the tests he conducted himself, testified about the tests of two nontestifying experts, based on their reports. The other two experts concluded that blood found in the defendant's apartment was human blood matching the victim's blood. The defendant objected on grounds of personal knowledge, but not hearsay or confrontation.

Reviewing for plain error, the court held that because one would "reasonably expect [the reports] would be used in a *prosecutorial* manner and at trial," the court ruled they were testimonial. Their erroneous admission affected the defendant's substantial rights because, even though other evidence was consistent with the prosecution's theory of the case, none was "nearly as strong" as the improper testimony since the evidence alone "persuasively established that the victim's blood was in the defendant's apartment." Reversed.

State v. Lewis, 648 S.E.2d 824 (N.C. 2007)
At trial for assault with a deadly weapon, over defense objection, the court admitted the testimony of the investigating officer, who recounted the statement of the nontestifying complainant and the testimony of another officer about a nontestifying witness who identified the defendant as the assailant. While his appeal was pending, *Crawford* was decided. The court of appeals reversed, and the state Supreme Court reversed the court of appeals. The Supreme Court granted certiorari, vacated the decision, and remanded in light of *Davis*.

The North Carolina Supreme Court then held that the statements were testimonial hearsay. The complainant's statement was testimonial hearsay because she faced no immediate threat; the interview was to determined what happened, rather than what was happening; and occurred "some time after" the events actually occurred. The identification was also testimonial, but the

court did not provide an analysis because it had held as much previously. The court briefly discussed forfeiture by wrongdoing, but acknowledged that it "has not been raised in this case." The court found admitting the statements was not harmless beyond a reasonable doubt, but it did not conduct an analysis. Court of Appeals grant of new trial affirmed.

State v. Moss, 160 P.3d 1143 (Ariz. Ct. App. 2007) *ordered depublished by* 173 P.3d 1021 (Ariz. 2007)

Prior to trial on charges for reckless endangerment based on the defendant's alleged operation of a vehicle under the influence of drugs, the court granted the defendant's motion to exclude expert testimony about toxicology test results of the defendant's blood, which was taken at the time of his arrest, and dismissed the charges. The state had sought to introduce the testimony of the director of the laboratory in lieu of the criminalists who actually tested the blood. The laboratory had closed, and the state was unable to locate the criminalists. The state appealed. It argued that it was merely offering the expert to opine on the defendant's intoxication at the time of his arrest, not to testify as to the opinions reached by the nontestifying criminalists. According to the state, the actual results, i.e. the opinions reached by the prior experts, were being offered as the basis for the testifying expert's opinion.

Affirming, the appellate court rejected the state's arguments, explaining that that the criminalists had prepared their report and reached their conclusions about the defendant's blood for the purpose of prosecuting the defendant and was testimonial hearsay for this reason. Moreover, the jury was likely to consider the testimony about the nontestifying criminalists results for the truth, and, thus, should be considered testimonial hearsay.

State v. March, 216 S.W.3d 663 (Mo. 2007) (en banc)

At trial for trafficking a controlled substance, over a defense objection, the court admitted the testimony of the custodian of a laboratory analysis of a substance found on the defendant's cohabitant at the time of his arrest. The author of the report was not called to testify because he had moved out of state.

The appellate court ruled that the laboratory report was testimonial hearsay because it had been prepared for the purposes of presentation in a prosecution. It declined to apply the business records exception to the report, noting that most of the other states that had done so had applied pre-*Crawford* reasoning. Reversed.

State v. Renshaw, 915 A.2d 1081 (N.J. Super. Ct. App. Div. 2007)

At trial, the court admitted a "Uniform Certification for Bodily Specimens Taken in a Medically Accepted Manner" over the defense objection that the author of the certification was not called to testify. The certification contained an attestation that the blood drawn from the defendant at the time of his arrest was done in a medically accepted manner. In its case, the defense presented expert testimony about potential errors related to the drawing of blood that could interfere with the blood test results which were also admitted at trial.

The appellate court held that the certification was testimonial hearsay because it was prepared "solely to be used 'in any proceeding as evidence of the statements contained' within [the certification]." In light of the defense expert's testimony, the availability of the officer who observed the blood drawn did not sufficiently mitigate the prejudice of not being able to confront the author of the certification because the officer was not competent to testify as to whether the blood was, in fact, drawn in a medically acceptable manner that would avoid the potential errors highlighted by the defense.

State v. Sickman, No. A05-2478, 2006 WL 3593042 (Minn. Ct. App. Dec. 12, 2006) (unreported)

At trial, the court admitted, over the defendant's objection, a certificate authored by the nontestifying person who drew the defendant's blood at the time of his arrest. The certificate stated that the blood draw complied with the relevant statutory requirements for proper blood draws.

The appellate court found that the certificate was testimonial because it, like blood test results and affidavits related to maintenance of brethalyzer machines, was prepared under the reasonable expectation that it would be presented prosecutorially at trial. It rejected the state's argument that the certificate merely corroborated the blood test results and was therefore nontestimonial. The court also applied prior state precedent and held unconstitutional the state notice and demand statute requiring the defendant to notify the prosecution that s/he wants the prosecution to call the person who drew the blood at least ten days prior to trial or waive their presence. The statute did not give the defendant adequate notice of the content of the person's testimony.

Sobata v. State, 933 So.2d 1277 (Fla. Dist. Ct. App. 2006)

Applying prior precedent with little discussion, the appellate court held that the admission of blood test results at a trial for driving under the influence was in error where the toxicologist completing the testing and authoring the report did not testify. Reversed.

Granville v. Graziano, 858 N.E.2d 879 (Ohio Mun. Ct. 2006)

Prior to trial for operating a vehicle under the influence of alcohol (OVI), the defendant moved to suppress the results from a breath test. In Ohio, if test results are admitted in an OVI suppression hearing, they are admissible at trial. The court noted that OVI suppression hearings "often dispose of the entire case."

The court held that because of the significance of the OVI suppression hearing, the Confrontation Clause applied to evidence presented there. It went on to hold that the statements certifying the reliability and testing of the testing device and related to the training and experience of the test administrator. Because the statements are prerequisites for admitting the results of the test, the court held that the statements were made in preparation for litigation and were, therefore, testimonial.

Johnson v. State, 929 So.2d 4 (Fla. Dist. Ct. App. 2005)

At trial for possession of controlled substances, the court admitted the Florida Department of Law Enforcement lab report concluding that substances seized from the defendant were cocaine and marijuana. The author of the report and the person who conducted the tests was out of state and the prosecution did not call her to testify. The prosecution also introduced the testimony of the arresting officers who conducted "presumptive field tests" on the substances and concluded they were cocaine and marijuana. It also introduced testimony of one officer who, based on his training experience, recognized one of the substances as marijuana.

The appellate court reversed, holding that the report was testimonial hearsay. It explained, "The problem comes into play in a case in which an FDLE lab report is admitted as a business record is that, technically, an FDLE lab report is a record kept in the regular course of business but, by its nature, it is intended to bear witness against an accused." The court held that because its purpose is to establish an element of the crime, it is testimonial hearsay. Because the presumptive field test alone was insufficient to convict the defendant, the error was not harmless with regards to the cocaine charge.

People v. Lonsby, 707 N.W.2d 610 (Mich. Ct. App. 2005)

At trial for sexual abuse of the defendant's twelve-year-old granddaughter, the court admitted the testimony of a member of the state crime lab serologist, who relayed the contents of the notes and report of another lab technician, who did not testify. The granddaughter, the defendant's wife, and the defendant also testified. The granddaughter claimed that after she complied with the defendant's request to touch his penis, he ejaculated onto his swimming trunks. The defendant testified that any of his bodily fluid on the trunks would have been urine and that he had changed out of the trunks after his wife noticed a wet spot on them. The defendant's wife testified that she had purchased the trunks at a garage sale but had not washed them after the purchase. The technician's notes said that the initial test on the trunks suggested the presence of semen, but that result was not included in the final report because there was not a sufficient sample to confirm its presence via retesting. While the defendant's appeal was pending, the Supreme Court decided *Crawford*.

The appellate court reversed. Noting a split of authority on the issue, it found that the notes and report made at the crime lab were testimonial hearsay. The court noted that the testing took place "with the ultimate goal of uncovering evidence for use in a criminal prosecution" and that the crime lab is "an arm of law enforcement and the scientists' written analyses are regularly prepared for and introduced in court." The court emphasized that the notes were the only source of the finding that semen was present and that the prosecution witness misleadingly used the first person plural to discuss the testing and findings.

Statements to Law Enforcement

U.S. Court of Appeals Cases

United States v. Meises, 645 F.3d 5 (1st Cir. 2011)

At trial for conspiracy to purchase cocaine, the court admitted the testimony of a law enforcement agent that, after interviewing an absent alleged co-conspirator, the targets of the investigation changed to focus on the defendant. The statement of the alleged co-conspirator was not admitted. One defendant argued that the statement was hearsay and noted that the declarant was not "here." The other defendant noted that the statement was prejudicial.

On appeal, the Court of Appeals reversed. It held that the objection noting the absence of the declarant preserved the Confrontation Clause issue for both defendants. It held that the statement about changing the target of the investigation was testimonial hearsay because it plainly communicated the statement of the declarant: the defendant was involved. "[A]ny other conclusion would permit the government to evade the limitations of the Sixth Amendment . . . by weaving an unavailable declarant's statements into another witness's testimony by implication." Reversed and remanded.

United States v. Sandles, 469 F.3d 508 (6th Cir. 2006)

At a federal bank robbery trial, the government had to prove that the bank was FDIC insured. The trial court admitted three pieces of evidence related to this element: (1) a statement of an employee that it was insured, (2) that employee's statement that the bank had stickers indicating it was insured, and (3) an affidavit from the Assistant Executive Secretary of the FDIC stating that she had searched the FDIC records and uncovered nothing indicating the insured status had ended.

On direct appeal, the Court of Appeals reversed. It held, conducting plain error review, that the affidavit was testimonial hearsay and inadmissible under the Confrontation Clause. The government did not mention the affidavit until closing argument, but the court held it was not harmless error because the only piece of admissible evidence to prove the bank was FDIC insured—the statement about the stickers—was legally insufficient to convict. Reversed and remanded.

United States v. Rodriquez-Marrero, 390 F.3d 1 (1st Cir. 2004)

At trial, two former prosecutors, including a current sitting judge, testified to the sworn statements made by the non-testifying cooperating witness. The cooperating witness was later killed, and the trial court admitted the statements under the forfeiture by wrongdoing doctrine. The defendant was convicted of a drug conspiracy and aiding and abetting murder.

On appeal, the government made only passing reference to the doctrine and, instead, argued that the statements were admissible hearsay because they were against penal interest. Applying *Crawford*, the Court of Appeals dismissed the penal interest argument and ruled that the

statements were testimonial hearsay. It also ruled that the government waived its forfeiture by wrongdoing argument by only making passing reference to it. It found that the government had also waived any harmlessness argument, but *sua sponte* explained that the statements were not harmless because, while the statements corroborated other evidence, their detail was "powerful" and having them come from a judge, who was identified as such to the jury, made finding them harmless "unrealistic." Affirmed in part, vacated in part, and remanded.

State Cases

State v. May, __ N.E.2d __, 2011 WL 6778136 (Ohio Dec. 16, 2011)
At trial for operating a vehicle under the influence of alcohol, the court admitted the testimony of the investigating officer relaying the statements of witnesses who informed him that the defendant had consumed two beers at the scene after the accident. This testimony contradicted the defendant's account, which was that he had consumed four or five beers after the accident and only after the accident.

The appellate court reversed. It held that the witnesses' statement were testimonial hearsay. Although the officer was responding to the scene of an accident, the statements were not taken until after the officer had spoken with EMS and had taken a statement from the defendant. The court found that it was clear that the statements were taken as part of an investigation.

State v. Worley, No. 94590, 2011 WL 2377067 (Ohio Ct. App. June 9, 2011) (unreported)
At trial for attempted murder, the court admitted statements made to the investigating officer. The statements were made days after the crime and during officers investigation of the crime.

The appellate court held that because the statements were made to law enforcement after the emergency had subsided, they were testimonial hearsay outside of any exception. The court did not consider whether the error was harmless. Reversed.

Corbin v. State, 74 So.3d 333 (Miss. 2011)
At trial for murder, the court admitted the statement the victim made to a police interrogator while hospitalized and six months before he died. The defendant never had an opportunity to cross-examine the victim.

The Mississippi Supreme Court reversed. Reviewing for plain error, it held that the statement to the interrogator was testimonial hearsay. Because the statement was made to the investigating officer during the course of his investigation, it was at the "core" of the statements implicating the Confrontation Clause.

Morris v. State, 13 A.3d 1206 (Md. 2011)

At trial for attempted robbery, the state's theory was that the defendant was the pre-ordained getaway driver for the co-defendant. After his arrest, the co-defendant made the following contradictory statements to the police: 1) he entered a car a few blocks from the scene of the incident, and 2) he entered a white sedan at the scene. Prior to trial, the co-defendant entered a plea agreement where he would not challenge the state's evidence in exchange for a reduced sentence, should he be convicted. The defendant and co-defendant were tried jointly. The defendant maintained he innocently picked up the co-defendant as he had many times before.

The appellate court held that because of the plea agreement, the co-defendant was not truly tried jointly and *Crawford*,[1] not *Bruton*,[2] applied. Thus, the question was whether the defendant's statements to law enforcement were testimonial hearsay. Because they were offered to law enforcement, they were. In considering whether the admission was harmless, the court emphasized that the latter statement, that the co-defendant entered the car at the scene, undermined the defendant's claim of innocence and was, therefore, not harmless error.

Commonwealth v. Taliba, 929 N.E.2d 1001 (Mass. App. Ct. 2010)
Admission of a police officer's testimony that a nontestifying informant saw the defendant conduct a drug transaction violated the Confrontation Clause because the officer had no knowledge of the transaction other than the informant's statements to him. Reversed.

Odom v. Commonwealth, No. 2008-SC-000272-MR, 2010 WL 1005958 (Ky. Mar. 18, 2010) (unreported)
Prior to trial, the prosecutor's office obtained and transcribed a statement from the nontestifying complainant about an alleged assault and witness intimidation. The public defender's office obtained and transcribed a statement from the same complainant about the alleged assault. At trial, the defendant represented himself in part and asked the prosecution interviewer about the statement. The court warned him not to continue the line of questioning for risk of having the statement introduced into evidence. He changed lines of questioning and eventually turned to the statement to the public defender about assault. On the prosecution's motion, the court admitted the first statement.

The appellate court found error. It declined to rule on whether "*Crawford* applies to the rule of completeness," but ruled that introduction of the statement about intimidation violated his Confrontation Clause rights because it was "clearly testimonial" based on its relaying past events and not being response to an ongoing emergency. Reversed.

Stanley v. Commonwealth, No. 2007-CA-002211-MR, 2010 WL 323123 (Ky. Ct. App. Jan. 29, 2010) (unreported)

[1] *Crawford v. Washington*, 541 U.S. 36 (2004).
[2] *Bruton v. United States*, 391 U.S. 123 (1968).

At trial the court admitted the investigating detective's testimony recounting statements the victim made to him the day after the alleged robbery.

The appellate court reversed and held that the statements were testimonial because they relayed, in the past tense, "what happened," were for the "primary purpose to establish criminal liability," and were "the day after the robbery" concluded. The admission was a "manifest injustice" that had "a substantial rights of the defendant" because there was no other inculpating evidence.

People v. Ortiz, No. B199037, 2010 WL 312492 (Cal. Ct. App. Jan. 28, 2010) (unreported)
The trial court admitted the tape recorded statement of an interview of an unindicted coconspirator. The appellate court held that the recorded statement was testimonial because it was custodial, "narrative," and did not further the purposes of the conspiracy since it thwarted the conspiracy. Reversed.

State v. Mooney, No. 09CA002, 2009 WL 3691309 (Ohio Ct. App. Nov. 3, 2009) (unreported)
At trial for possession of marijuana, the court admitted, over the pro se defendant's objection, an officer's testimony about whether the voice the nontestifying informant heard on a wire transfer was the defendant's voice. Reversed.

Battle v. State, 19 So.3d 1045 (Fla. Dist. Ct. App. 2009)
At trial for burglary, the trial court erroneously admitted the testimony of a detective about the nontestifying complainants' statements to him. The statements were about the amount and denomination of the money stolen, which served as the prosecution's basis for identifying the defendant as the perpetrator. The appellate court held that the statements were testimonial because they were made in response to police questioning and while the defendant was in police custody and, thus, not in an attempt to respond to an ongoing emergency. Reversed.

Coleman v. Commonwealth, No. 200S-SC-000072-MR, 2009 WL 3526657 (Ky. Oct. 29, 2009) (unreported)
At trial, court allowed a police officer to testify that the witnesses he interviewed all gave a consistent account of the crime that differed from the defendant's account. The interviewed witnesses were not cross-examined and were not unavailable to testify. The appellate court held that the statements, made to the police officer in the course of his investigation, were "squarely within the category of 'testimonial'" statements. It rejected the argument that simply because the witnesses were "available" to the defense by virtue of being under prosecution subpoena, the prosecution had met its Sixth Amendment obligations: "If anything, the ready availability of the witnesses in this cases multiplies the error, because the failure to call them demonstrates a clear attempt to shift the burden to the defense." The admission was not harmless beyond a reasonable doubt. Reversed.

State v. Anwell, No. 2008-P-0111, 2009 WL 2915764 (Ohio Ct. App. Sept. 11, 2009) (unreported)

The nontestifying complainant's statements to the investigating officer were "clearly testimonial," and admitting them violated the defendant's right to confrontation. Even if the statements were an excited utterance, which the court held they were not, they would be testimonial hearsay because they were the product of police questioning and led to the defendant's trial and conviction. Reversed.

Verdree v. State, 683 S.E.2d 632 (Ga. Ct. App. 2009)
The trial court ruled that the codefendant's statements made during custodial interrogation were not testimonial up until the point he admitted to the crime because they were in furtherance of a conspiracy.

The appellate court reversed and held they were testimonial statements because it was made "during the course of an investigation," not during the perpetuation of a conspiracy. The error was prejudicial because it was the only "undisputed evidence which conclusively placed" the defendant at the scene of the crime.

State v. Cibelli, No. 06-01-00106, 2009 WL 1635250 (N.J. Super. Ct. App. Div. June 12, 2009) (unreported)
A nontestifying secretary's statement to an investigating officer that, based on her search of the business's records, the victim had not been at the business on the day of the crime was a testimonial statement because it was made to an officer during the course of his investigation. The objected to error was not harmless beyond a reasonable doubt because the prosecution emphasized the statement in his closing argument, contrasting the nontestifying witness's statement with the defendant's version of events. Reversed.

State v. Brown, 961 A.2d 481 (Conn. App. Ct. 2009)
At trial, the state presented evidence that the complainant related to a shooting ran to a nearby health care facility. At the facility, he was placed in an ambulance, where he was joined by an officer "to obtain a dying declaration." The statement identified the defendant as the shooter and indicated the shooting was in the course of an argument, but the complainant "became evasive as to what the argument was about." The victim survived, but refused to testify at trial.

The appellate court ruled that the statements to the officer were testimonial because the victim "should have been under the reasonable expectation that his statement would later be used" in a prosecution of the assailant. Further, there was no ongoing emergency because the victim was "under no present threat." Even though the U.S. Supreme Court has repeatedly suggested that dying declarations may be a historic exception to the Confrontation Clause, the court did not explicitly address whether the statement was admissible as such. Reversed.

Toledo v. Sailes, 904 N.E.2d 543 (Ohio Ct. App. 2008)
The nontestifying complainant's statements made at the scene to investigating officers were testimonial because they were made after the scene had been secured and were for the primary purpose to clarifying her version of past events. Reversed.

State v. Phillips, No. 05-12-1249, 2008 WL 4964006 (N.J. Super. Ct. App. Div. Nov. 24, 2008) (unreported)
Raising the confrontation issue sua sponte, the appellate court found that a police officer's testimony about what the codefendants said when they saw the defendant, i.e. the defendant "set us up," violated the Confrontation Clause because it was an out-of-court statement used against the defendant, who had no opportunity to cross-examine the codefendants. The error was "clearly capable of producing an unjust result" because the prosecution used the statement to link the defendant to the codefendants and their gang activities. Reversed.

State v. Rufus, No. 90578, 2008 WL 4681392 (Ohio Ct. App. Oct. 23, 2008)
At a bench trial, the court admitted, over defense objection, the investigating officer's testimony about what an eight-year-old witness told him about the crime. The appellate court ruled that the statement was testimonial because it was obtained after the defendant and alleged victim were either in custody or being treated by emergency services personnel and because the statement was related to an interview primarily about whom the primary aggressor was. The error was not harmless beyond a reasonable doubt, in part, because the trial judge explicitly stated that he found the statement corroborated the alleged victim's story. Reversed.

In re: A.J.W., 666 S.E.2d 889 (N.C. Ct. App. 2008) (table decision)
The trial court admitted statements made to investigating police officers of two nontestifying witnesses. The trial court noted, but declined to follow, *Crawford*. The appellate court found "fundamental error" and that the statements identifying the defendant as the perpetrator as "unquestionably testimonial." Dismissed as to one defendant, new trial granted as to other.

Sanon v. State, 978 So.2d 275 (Fla. Dist. Ct. App. 2008)
A statement the defendant's son made to officers was testimonial because the statement described action twenty minutes prior to the statement, the officers approached the son rather than the other way around, and there was no ongoing emergency when the statement was made. The statement described his father throwing the family dog off a balcony and was admitted over the defendant's objection at a trial for animal cruelty. Reversed.

Commonwealth v. Williams, No. CP-06-CR-1324-2005, 5 Pa. D. & C. 5th 129, 2008 WL 4768868 (Pa. Ct. Com. Pl. Jan. 16, 2008) (unreported)
At trial for attempted murder, the court admitted the victim's statements made to police officers while she was being treated at the hospital. The trial and appellate courts found that the statements were excited utterances, but were testimonial hearsay because they were "the result of formal police questioning." The court affirmed the grant of habeas corpus relief without analyzing harm.

Lee v. State, 270 S.W. 496 (Ark. Ct. App. 2008)
Over trial counsel's objection, the investigating officer repeatedly testified as to what a then deceased witnessed had told him during the course of his investigation of an alleged credit card

fraud. The witness was the owner of the business's credit card and said that he had feared that the defendant employee would unlawfully try to use the card, so he deactivated it. He also testified that the witness said the defendant should have, but did not, return the credit card.

The appellate court reversed. It held that because the statements established past facts, they were testimonial. They were offered for the truth, and not to establish why the officer arrested the defendant, because of how the prosecution used the statements—to demonstrate that the defendant did not have permission to use the card—and because there was not an instruction limiting their use. They were not used in rebuttal or for some other purpose. Reversed.

People v. Chavez, No. B188195, 2007 WL 4201292 (Cal. Ct. App. Nov. 29, 2007) (unreported)
At trial for attempted murder, the court admitted the testimony of the investigating officer which recounted statements of two nontestifying witnesses. Trial counsel did not make objections on Confrontation Clause grounds, but because the appellate court found no "tactical reason for counsel having failed to make them," it considered the constitutional question after resolving evidentiary rulings against Chavez. It held both witnesses' statements testimonial. The first statement was testimonial because even though it was made immediately after the officer's arrival at the scene of the crime with the suspect at large, the danger had passed, the officer described the interaction as an interrogation, and the "comprehensive statement" described past facts. The statement of the second witness, the victim, was testimonial because, even though it may have been an excited utterance, of the length of the interrogation—thirty to forty minutes—and because it was in response to police interrogation. Reversed.

Toledo v. Loggins, No. L-06-1355, 2007 WL 3227385 (Ohio Ct. App. Nov. 2, 2007) (unreported)
At a bench trial for assault, admission of the complainant's statement to the police, who responded to a 911 call over two hours after it was made, was error because the statements were testimonial, and the complainant did not testify. The statements were testimonial because they were made well after any emergency had subsided and because the complainant and the defendant were separated at the time the statement was made. The court did not discuss prejudice or harmlessness. Reversed.

State v. Siler, 876 N.E.2d 534 (Ohio 2007)
To determine whether a child declarant's statement is testimonial, courts should apply the "primary-purpose test" announced in *Davis*: "[Statements] are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

The Ohio Supreme Court rejected the argument that, because of their diminished capacity for reflection, the statements of children should, applying the objective witness test announced in *Crawford*, always be nontestimonial. Applying the test to this case, the court held that

statements made during the interrogation of a three-year old declarant resulted in testimonial statements where the interview was conducted by a specially trained police officer whose primary purpose was to investigate a possible crime. Judgment of the appellate court affirmed.

Gifford v. State, 652 S.E.2d 610 (Ga. Ct. App. 2007)
At a trial for armed robbery, the investigating officer testified about statements made by the victim, a gas station attendant. Prior to trial, the victim died of natural causes. The appellate court ruled that because the victim's statements were made to the officer during the course of his investigation, they were testimonial hearsay. Their admission at trial was not harmless beyond a reasonable doubt, even though fingerprints placed the defendant at the scene, because the testimonial hearsay provided the only direct evidence that the store in question had been robbed. Reversed.

Lindsey v. State, 651 S.E.2d 66 (Ga. 2007)
At trial, the court admitted the testimony of an Assistant District Attorney (ADA) regarding a statement made to him in the course of his investigation of the case. The ADA testified that the witness told him that "by coming to testify [on his behalf], we were saving him three bullets." The statement was introduced as evidence of hostilities between the witness and the defendant. The state supreme court ruled that the statements were testimonial because they were made to a government officer investigating a crime. The court did not examine prejudice or harmlessness. Reversed.

State v. Veal, 139 Wash. App. 1023, 2007 WL 1748102 (Wash. Ct. App. 2007)
Prior to trial, the court ruled that if the defendant testified that the nontestifying complainant said that the truck belonged to the complainant and that he had bought it from her, then the state could introduce the complainant's account of the defendant stealing the truck from her, which she gave to a police officer at the scene of the arrest.

The appellate court held that the statements were testimonial because they were made to the officer after the "startling event ceased." The error was not harmless because the statements would have been the only evidence countering the defendant's proffered account of the events. [Note that the defendant never actually testified and the testimony was never actually introduced.] Reversed.

State v. Rodriguez, No. A05-1583, 2006 WL 2806671 (Minn. Ct. App. Oct. 3, 2006) (unreported)
At trial, the court admitted the testimony of a police officer recounting the statements of a nontestifying confidential informant. The informant did not respond to subpoenas and was deemed unavailable to testify by the trial court.

The appellate court found plain error and reversed. It was "particularly troubled" because the informant's statements provided the only evidence identifying the defendant as a participant in the alleged crime.

State v. Parks, 142 P.3d 720 (Ariz. Ct. App. 2006)
At trial for manslaughter, the court admitted the statements the defendant's nontestifying son made to the investigating officer indicating that the defendant was the perpetrator. The statements were made after the officer became aware that both the defendant's son and brother were witnesses and after he had separated the two witnesses.

The appellate court held, on remand from the Arizona Supreme Court that the statements were testimonial hearsay because the purpose of the officer's questioning was "to obtain information regarding a potential crime." It emphasized that the officer's "individual and sequential interview with [the son and uncle] reflected the police officer was operating in an investigative mode."

State v. Melching, 633 S.E.2d 311 (W. Va. 2006)
At trial for domestic battery, the court admitted the testimony of the responding police officer and the neighbor responding to the scene of the alleged incident. Both testified to statements the nontestifying complainant made to them over a defense objection.

The appellate court ruled that the statements to the police, who arrived fifteen minutes after the alleged incident and after the defendant had left the scene, were testimonial hearsay. It declined to rule on the statements to the neighbor so that the lower court could develop a record regarding whether the neighbor was responding to an ongoing emergency. The court discussed at length the adverse effects of requiring survivors of domestic violence to appear in court, but noted that forfeiture by wrongdoing may be an available legal remedy if the prosecution can show the defendant continued to intimidate the complainant. The court remanded for the court below to determine whether such a finding could be properly raised in this case.

State v. Berezansky, 899 A.2d 306 (N.J. Super. Ct. App. Div. 2006)
At trial for driving under the influence, the court admitted blood test results over a defense objection and without requiring the person conducting the blood test or preparing the report to testify. Prior to trial, the defense had requested the notes from the testing and access to any portion of the remaining blood sample, pursuant to a state statute. His requests were ignored.

The appellate court ruled, as a matter of first impression, that admission of the results violated the defendant's Confrontation Clause rights, "In order to use that evidence and not run afoul of the Confrontation Clause, the State must obtain defendant's consent, or failing that, must justify its admission at a hearing." It emphasized that it is the government's burden to prove admissibility, and that even in the face of a state statute requiring a defendant to give notice of an intention to challenge the evidence, such a statute is "to notify the State of his refusal to stipulate to the lab report and to assert that the lab results . . . will be contested at trial." The court analogized the blood test results to tests of controlled substances, previously held to be testimonial hearsay.

Bell v. State, 928 So.2d 951 (Miss. Ct. App. 2006)

At trial for murder, the court admitted the testimony of police officers recounting the statements of the defendant's daughters who were eyewitnesses to their mother's alleged murder. The daughters did not testify at trial.

While the defendant's appeal was pending, the U.S. Supreme Court decided *Crawford*. The appellate court held that *Crawford* applies retroactively to cases pending on appeal. It also held that the daughters' statements, made to police officers in the course of their investigation, were "no doubt" testimonial. It also held that because there was no other eyewitness testimony to incident, the erroneous admission was not harmless.

State v. Kirby, 908 A.2d 506 (Conn. 2006)
The trial court admitted the statements of the deceased complainant made to three people: a police dispatcher who received the complaint, the officer who initially responded to the scene, and the emergency technician who treated the complainant. The complainant told the dispatcher the defendant surprised her when she got home and assaulted and abducted her. The responding officer testified to the detailed account of the incident that the complainant told him.

The appellate court held that the statements to the dispatcher and investigating officer were inadmissible testimonial hearsay. The statements to the dispatcher were testimonial because they were not made during an ongoing emergency or in the presence of a "bona fide physical threat." The court noted that although the statements may have been made in part to obtain medical assistance, viewed on a whole, they were for the primary purpose of investigating and apprehending a suspect from a prior crime. It noted that the call largely consisted of her account of the completed crime. The statements to the responding officer were testimonial because the officer was investigating the completed crime.

The statements to the emergency technician, however, were nontestimonial because they were made for the purpose of obtaining medical assistance, particularly in light of the absence of any identification of the suspect.

The court declined to address harmlessness and prejudice because the state failed to raise it.
Reversed.

State v. King, 132 P.3d 311 (Ariz. Ct. App. 2006)
At trial for cruelty to animals, the court admitted a tape of the 911 call during which the informant identified the defendant by name, provided a description of him, and provided his date of birth. The informant stated that the defendant had left her house in the previous five minutes. The court also admitted statements the informant made to the responding police officer who she spoke with at her house. Both statements were admitted as excited utterances. The informant did not testify at trial. On appeal, the state argued that excited utterances could not be considered testimonial because declarants making them necessarily have no reasonable expectation about their use at trial.

The appellate court reversed. It held that excited utterances must be examined on a case-by-case basis to determine whether statements are testimonial, with the "primary factor" being whether "a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the prosecution of a crime." Not having the guidance of *Davis*, the court decided to remand to the trial court to determine whether the 911 statements were made with such an expectation. For the statements to the police, the court held that regardless of whether the statements were made in response to questions, a person in the declarant's position would expect that the statements would be in a prosecution. It emphasized that she made the statements when the police officer came to investigate the case and declined to require the statements be made in response to formal or structured questioning.

State v. Maclin, 183 S.W.3d 335 (Tenn. 2006)
The state supreme court consolidated two cases on appeal to determine the application of the Confrontation Clause to excited utterances.

The Tennessee Supreme Court held that whether a statement is testimonial must be determined objectively, by examining whether the circumstances under which the statement was made "would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." The court also compiled a non-exhaustive list of factors to be considered when deciding whether a statement is testimonial: (1) whether the declarant was a victim or observer, (2) whether contact was initiated by the declarant or law enforcement, (3) the degree of formality of the surrounding circumstances, (4) whether the statement was in response to questioning, whether the questioning was structured, and the scope of the questioning, (5) whether the statement was recorded, (6) the declarant's purpose in making the statement, (7) the officer's purpose in speaking with the declarant, and (8) whether an objective declarant under the circumstances would believe that the statements would be used at trial.

The court rejected both the defendant's and the government's request for per se rules in favor of a totality of the circumstances approach. The defendant requested a per se rule that statements made to police officers were testimonial hearsay. The government requested a per se rule that excited utterances were not. The court also ruled that the analysis under *Ohio v. Roberts* still applied to nontestimonial hearsay.

Turning to the facts of the consolidated cases, the court found that the nontestifying domestic violence complainant had made a testimonial statement. The court noted that she initiated contact with the police and that when the police arrived she provided a detailed account of the alleged events. By contrast, the court found that the bystander's statement, made after flagging down the police officer, that a "large black man with a bald head" had just kicked down a door, was not testimonial hearsay. It also held the latter statement was an excited utterance, a firmly established exception to the hearsay rule.

State v. Siler, 843 N.E.2d 863 (Ohio Ct. App. 2005)

At trial for the murder of the defendant's former spouse, the court admitted the testimony of the investigating detective, who relayed the statements of the defendant's son, who did not testify. The son provided the detective with a firsthand account of the defendant's alleged murder of his mother.

The appellate court reversed. It held that the statements, although excited utterances under Ohio law, were testimonial hearsay. The court emphasized that the statements were made in response to the investigating detective's structured questioning, during which he engaged in techniques specifically tailored to interviewing child witnesses. Because the remaining evidence was circumstantial and not "overwhelming," the court held the error was not harmless beyond a reasonable doubt.

Walker v. State, 180 S.W.3d 829 (Tex. App. 2005)
At trial for robbery, over a defense objection, the court admitted the investigating officer's testimony recounting an identification of the defendant by a nontestifying witness. The witness was found with the credit cards from the robbery. The investigating officer showed a photo spread to the witness, and she identified the defendant as a possible suspect (the court's opinion is unclear as to what the witness said that made the defendant a suspect).

On appeal, the court held that the identification statement was testimonial hearsay because it occurred while the witness was in custody and was the product of formal police questioning in the form of a photo array. Reversed.

Commonwealth v. Gonsalves, 833 N.E.2d 549 (Mass. 2005)
Prior to trial, the prosecution moved to admit the statements of the unavailable, but uncross-examined, complainant. She had made statements to the police who responded to the scene. When the police arrived, the defendant was not present, the complainant had "no obvious injuries," but she was "crying and hysterical, ranting, loud, hyperventilating, and pacing around the room." In response to police questioning, the complainant described the defendant's physical attack on her.

The state supreme court held that statements to investigating police officers are, absent an emergency, per se testimonial. Testimonial statements include those obtained as part of "preliminary fact gathering" because "[t]here can be no doubt that interrogation involving preliminary fact gathering is part of a criminal investigation. A criminal investigation may begin as soon as an officer turns her head."

By contrast, statements made while to an officer during the officer's "community care taking" and "government peacekeeping" are nontestimonial. These exceptions apply to situations where "there is an objectively reasonable basis for believing that the safety of an individual or the public has been jeopardized."

Turning to the facts of the case, the court concluded that the complaint's statements were testimonial hearsay because nothing in the record indicated that the police were addressing an emergency when she made the statements to them. The record, however, was not yet complete, and the court remanded, allowing the prosecution to expand the record, should it so desire.

State v. Parks, 116 P.3d 631 (Ariz. Ct. App. 2005)
At trial for murder, the court admitted the statements of the defendant's late son, who had spoken to the responding officers and given a videotaped interview. The trial court admitted the statements at the scene as an excited utterance.

The appellate court reversed. It held, "Whether an excited utterance will be testimonial [hearsay] depends on the circumstances when the statement was made." It explained that, under state law, a statement can be made under an emotional state that "still[s] reflection," but nonetheless be made with a reasonable appreciation or expectation that the statement will have an impact on "whether an arrest is made, charges are brought or guilt is attributed." Applying this to the facts, the court found that the son's statements at the scene of the crime were testimonial. They were made after the scene was secure, and "although emotional and upset, [the son] appeared to have appreciated what he had witnessed would have significance to a future criminal prosecution. When the sheriff's deputies arrived at the scene, they heard [the son] and his sister yelling their 'dad was just defending himself.'"

State v. Walker, 118 P.3d 935 (Wash. Ct. App. 2005) (consolidated case)
In consolidated cases, the court held that statements made in response to police inquiries were testimonial, but that statements made by an eleven-year-old in response to her "concerned mother['s questions]" were not testimonial hearsay. In the first case, the complainant gave a statement to the investigating officer who visited him at the hospital several hours after the incident. The officer testified to the statements despite the witness's failure to testify, and the trial court admitted the statements as excited utterances. In the second case, the complainant's mother "sensed something was wrong," and asked the complainant if something had happened and if the complainant's grandfather had tried to touch her. The complainant said yes in response to both questions. The mother testified to the statements at trial, and the complainant refused to answer the prosecution's questions about the alleged molestation.

In the first case, the court of appeals held that despite the statement correctly being characterized as an excited utterance, it was testimonial because it was the product of structured police questioning. In the second case, the court rejected the argument that the statements were testimonial because the mother's purpose in asking her daughter the questions was to gather evidence against the defendant. It noted that the mother testified she had no intention of contacting the authorities because she thought the family could work it out. She only reported the incident after the defendant had broken into her home and further injured the complainant. Because "nothing in the record" suggests the mother initiated the conversation "for the purposes

of gathering information with which to prosecute" the defendant, the statements by the complainant to her mother are not testimonial.

Commonwealth v. Foley, 833 N.E.2d 130 (Mass. 2005)
At trial for assault and battery and assault and battery with a dangerous weapon, the court admitted the nontestifying complaint's statements made to the police officer immediately upon arriving on the scene and in response to extended questioning. The initial questions were regarding the location of the defendant and whether the complainant required medical attention. The remaining questions outlined the details of the allegations. The other evidence of the assault and battery was the complainant's documented physical condition and the defendant's statements that he choked her.

The appellate court, reviewing for a miscarriage of justice, held that the statements made during extended questioning were testimonial per se because they were made in response to investigative interrogation. The initial questions were not because they were made while the police engaged in "community caretaking," ensuring the scene was secure and ensuring the complainant did not require medical attention. The error was not harmless for the assault with a dangerous weapon charge because the statements were the only evidence of the weapon used. In light of the physical evidence and the defendant's statement, the error was harmless with regards to the simple assault and battery charge. Reversed.

Commonwealth v. Rodriguez, 833 N.E.2d 134 (Mass. 2005)
At trial for assault and battery of his son, the court admitted statements made by the defendant's nontestifying son and daughter. The statements were made to the officers responding to a 911 call and while the defendant was being interviewed by two other officers outside his house, where his children were being interviewed. The officers testified about the statements, recounting the details of the alleged incident.

The appellate court reversed. It held that the statements were "per se testimonial" because the statements were made in response to police interrogation. The police were not securing the scene, and nothing in the record indicated that the children were in need of immediate medical attention. The error was not harmless beyond a reasonable doubt because the hearsay statements were the only explanation of the events that transpired.

Moore v. State, 169 S.W.3d 467 (Tex. App. 2005)
At trial for domestic violence, the court admitted the videotaped statement of the nontestifying complainant, taken shortly after the police arrived at the scene, as an excited utterance.

The appellate court reversed. It held that although the statement may have been an excited utterance, it was testimonial hearsay and that excited utterances are not necessarily nontestimonial. The court also declined to adopt either a "formality" of the interview or "declarant intent" inquiry as the only means of determining whether a statement is testimonial. The statement in question was testimonial because taping the interview made the statement

formal and the complainant's professed understanding of her *Miranda* rights, as she indicated on the video, demonstrated that she knew the statements could be used in a prosecution.

In re T.W., No. B175355, 2005 WL 1761964 (Cal. Ct. App. July 27, 2005) (unreported)
At a hearing to determine whether she should be a ward of the court based on the defendant driving her mother's car without permission and other vehicle code violations, the court admitted the defendant's mother's statement to the investigating officer. The defendant's mother said that the defendant did not have permission to use her car. She did not testify at the hearing.

The appellate court reversed. It held that the statement to the officer was the sort of "formal statement to government officers" that the *Crawford* court had in mind when it listed several forms of testimonial hearsay. It admonished the state for its "selective quotations from *Crawford*" and its failure to address the above quoted language. Because the mother's statement was the only evidence of the lack of consent, the court found that the error was not harmless.

State v. Byrd, No. 20580, 828 N.E.2d 133 (Ohio Ct. App. 2005)
At trial for simple assault, the court admitted the testimony of an officer who had taken a statement from the nontestifying complainant.

The appellate court reversed, holding that a statement given in an interview and to a police officer is the sort of statement a reasonable person would expect to be used in an investigation or prosecution. The court did not address harmlessness, but it did note that the state's case consisted entirely of hearsay statements of the complainant.

State v. Farris, No. 84795, 2005 WL 852409 (Ohio Ct. App. April 14, 2005) (unreported)
At trial for burglary, the court admitted the testimony of a detective who recounted a non-testifying, alleged accomplice's statements implicating the defendant.

The appellate court reversed and held that the accomplice's statement, taken while in custody and in connection with an investigation of the accomplice, was testimonial hearsay and should not have been admitted.

State v. Grace, 111 P.3d 28 (Haw. Ct. App. 2005)
At trial for abuse of family or a household member, the court admitted the statements of the nontestifying daughters of the defendants. The statements were made to the investigating police officer when he reported to the scene of the alleged incident.

The appellate court reversed. It noted that it was in "a bit of quandary" because of the *Crawford* court's "objective witness" formulation to determine whether it was reasonable to assume the statement would be used in an investigation or prosecution (and was, thus, testimonial). The court followed California precedent holding that "objective witness" referred to a witness in circumstances similar to the one in question and did not include subjective characteristics such as

the person's age. It held the statements here were testimonial and were an "easy case" because they were made to law enforcement officials.

State v. Page, 104 P.3d 616 (Or. Ct. App. 2005)
In an appeal largely addressing whether the confrontation issue was preserved and, since it was not, whether it amounted plain error, the court ruled that the alleged accomplice's statements to a police interrogator were inadmissible testimonial hearsay because they were made in the court of police interrogation and because the defendant had not had the opportunity to cross-examine the alleged accomplice.

People v. Victors, 819 N.E.2d 311 (Ill. App. Ct. 2004)
At trial for domestic battery, the court admitted the testimony of the investigation officer, recounting the statements the complainant made to him after he finished interviewing the defendant.

The appellate court reversed. It held that *Crawford* proscribed the admission of "testimonial evidence," including "out-of-court statements that are offered to establish or disprove an element of the offense charged or a matter of fact." This definition appears considerably broader than other cases defining *Crawford*'s contours. It focuses on why it is offered at trial, rather than why it was made in the first instance. The statements at issue were testimonial because "[t]he State offered this testimony to establish an element of the offense."

Jenkins v. State, 604 S.E.2d 789 (Ga. 2004)
Prior to trial, the defendant sought to exclude statements of the defendant's deceased uncle, made to the police during their investigation. The trial court ruled them admissible under the "necessity" hearsay exception.

The appellate court reversed. It held that the statements were testimonial because they were taken by the police during their investigation. It noted that *Crawford* "limits the viability of the necessity exception to the hearsay rule."

People v. Bell, 689 N.W.2d 732 (Mich. Ct. App. 2004)
At trial for felony murder and solicitation of arson, the court admitted a statement the alleged coperpetrator made to the police during custodial interrogation. The coperpetrator did not testify.

Applying *Crawford* retrospectively, the appellate court reversed. It held that because the statement was made during the course of a police interrogation, it was "clearly testimonial." Its admission was not harmless because it provided the only evidence of solicitation, the prosecution's theory of culpability for both crimes.

People v. Ruiz, B169642, 2004 WL 2383676 (Cal. Ct. App. Oct. 26, 2004)

At trial for possession of a firearm and ammunition, the court admitted the nontestifying complainant's statement to the (testifying) reporting officer. The statement was taken while the defendant was not at the scene.

The appellate court reversed, holding that the statement was testimonial hearsay because it was made to an officer in the course of his investigation. The court noted the officer's training experience in taking statements from victims of domestic violence as evidence that the officer had taken the statement with the intention of developing facts for the investigation and trial.

Lee v. State, 143 S.W.3d 565 (Tex. Ct. App. 2004)
At trial, the court admitted the statement of the nontestifying codefendant. The codefendant had given the statement to the police at a roadside stop, after the defendant, who was with him, had been arrested.

On appeal, the state argued that because the codefendant "was not in custody, at the "jailhouse," or "sitting down to give a statement after being given *Miranda* warnings" that his statement was not testimonial. The court declined to "adopt such a narrow view" of testimonial hearsay and ruled that statements made in response to a police officer's question about whether the $190,000 found in the car was obtained from the sale of drugs constituted testimonial hearsay. Because without the statement there was only "weak circumstantial evidence" to link the money to the defendant, the error was not harmless beyond a reasonable doubt. Reversed.

State v. Morton, 601 S.E.2d 873 (N.C. Ct. App. 2004)
At trial for possession of stolen property, the court admitted the statement of a nontestifying witness. The witness, after being read his *Miranda* rights, stated that he had sold the defendant stolen goods and that the defendant knew they were stolen at the time of the sale.

The appellate court reversed. It held that because the statements were made in the course of a custodial interrogation after *Miranda* warnings had been given, they were testimonial. The evidence was not harmless beyond a reasonable doubt because the witness offered the only evidence that the defendant knew the property was stolen, an element of the crime.

People v. Pirwani, 14 Cal. Rptr. 3d 673 (Cal. Ct. App. 2007)
At trial for abuse of a dependent adult, the court admitted a statement pursuant to California Evidence Code section 1380, allowing admission an unavailable declarant upon "a showing of particularized guarantees of trustworthiness" and where the statement is "memorialized in a videotape recording made by a law enforcement official."

The California Supreme Court held reversed, holding that section 1380 is unconstitutional on its face. It explained that because the statement must be made to law enforcement officers it would always memorialize a "testimonial" statement within the meaning of *Crawford*.

In re: R.E.L., 111 P.3d 487 (Colo. App. 2004)

At a juvenile delinquency hearing for sexual assault on a child, the court admitted statements the complainant made to a police officer during a "forensic interview."

The appellate court reversed. It held that the answers to the questions, in a "question and answer format appropriate to a child," were testimonial hearsay, "within even the narrowest formulation of the Court's definition of that term." It also rejected the state's argument that the defendant had waived his Confrontation Clause argument by stipulating that the child was incompetent to testify. It explained that the stipulation "merely established the unavailability of the witness."

State v. Allen, No. 82556, 2004 WL 1353169 (Ohio Ct. App. June 17, 2004) (unreported)
At trial for murder, the court admitted the written statement of the alleged coperpetrator, who had been declared unavailable after invoking his right to remain silent. The coperpetrator wrote out the statement during police interrogation, and the statement inculpated the declarant and the defendant. While the defendant's appeal was pending, the Supreme Court decided *Crawford*.

The appellate court held that because the statement was, under *Crawford*, clearly testimonial because it was made to the police during custodial interrogation. The court explained that the statement would have been admissible under *Roberts* because it was self-inculpatory without trying to shift blame, but that under *Crawford*, it was nonetheless inadmissible. Reversed.

State v. Cox, 876 So.2d 932 (La. Ct. App. 2004)
At trial, the court admitted a nontestifying coconspirator's statement made to the police during an interrogation under the coconspirator exception to the hearsay rule.

The appellate court reversed. It held that the statement was not admissible under the coconspirator exception, and even if it was, the statement made during police interrogation was testimonial hearsay and inadmissible under the Confrontation Clause. It explained that the Confrontation Clause extended to all testimonial statements, even those in furtherance of a conspiracy.

People v. Jones, No. 246617, 2004 WL 1292056 (Mich. Ct. App. June 24, 2004) (unreported)
At trial, the court admitted the inculpatory statements of the defendant's two nontestifying codefendants. The statements were made during police questioning and implicated the defendant and the codefendants.

The appellate court reversed, holding that statements taken during the course of police questioning are testimonial hearsay and inadmissible under the Confrontation Clause, even if they are admissible as statements against penal interest.

Davis v. United States, 848 A.2d 596 (D.C. 2004)
At trial for perjury, the court admitted the confession of the defendant's nontestifying coperpetrator of a murder. The defendant had testified that, contrary to his confession and pretrial statements, someone other than the coperpetrator committed the crime.

On appeal, the court held that admitting the confession of the coperpetrator violated the defendant's Confrontation Clause rights because the confession was taken during police interrogation. Reversed.

State v. Cutlip, No. 03CA0118-M, 2004 WL 895980 (Ohio Ct. App. April 28, 2004) (unreported)
At trial, the court admitted the statements of the defendant's two alleged accomplices, taken during custodial police interrogation. The accomplices did not testify.

The appellate court reversed, holding that because the statements were taken during police interrogation, they were testimonial hearsay. Because they were the only evidence that the defendant was the third person involved in the robbery, the admission was not harmless.

Brooks v. State, 132 S.W.3d 702 (Tex. App. 2004)
At trial, the court admitted the nontestifying alleged accomplice's custodial statement implicating the defendant.

The appellate court reversed. It held that because the statement was made during a police interrogation it was "testimonial as a matter of law." The error was not harmless beyond a reasonable doubt because it provided the only proof that the defendant had the intent to commit the crime and actively participated in it, two elements the prosecution was required to prove for its accomplice theory.

Other Testimonial Hearsay

U.S. Court of Appeals Cases

United States v. Jackson, 636 F.3d 687 (5th Cir. 2011)
At trial for conspiring to possess with intent to distribute cocaine, the government introduced notebooks allegedly kept by a non-testifying co-conspirator. The notebooks, according to the government's expert, were used to keep a contemporaneous record of drug sells and buys.

The appellate court reversed. It held that the government had failed to meet its burden to prove that the notebooks were not testimonial hearsay. The court explained that the government failed to authenticate the notebooks and failed to establish that the contents in them were not made under circumstances that an objectively reasonable person would expect to lead to trial testimony. The court emphasized that it was the government's burden to prove the notebooks were admissible.

United States v. Smith, 640 F.3d 358 (D.C. Cir. 2011)
At trial for being a felon in possession of a firearm and drug trafficking, the court admitted a letter from a court clerk stating that the clerk had reviewed court files that the defendant had

been convicted of certain felonies. Copies of the files were not presented, and the clerk did not testify.

The appellate court reversed. It distinguished this case from cases in which a clerk authenticated court files. The latter do not violate the Confrontation Clause because they are not prepared for the purpose of providing evidence of the conviction. The letter here, by contrast, was created for that purpose.

United States v. Causevic, 636 F.3d 998 (8th Cir. 2011)
At trial for making a materially false statement about whether the defendant had ever committed a crime, the court admitted a judgment to prove that the defendant had committed the crime related to the judgment.

The appellate court reversed. It held that since *Kirby v. United States,* 174 U.S. 47 (1899), the Supreme Court has, on Confrontation Clause grounds, barred the use of a conviction to show anything other than the fact that a conviction occurred. In *Kirby* the Court did not permit the use of a conviction for robbery to show that the goods possessed by the defendant had been stolen, and the court here held that the conviction for murder could not be used to show that a murder had been committed.

Gov't of Virgin Islands v. Gumbs, No. 10-3342, 426 Fed. App'x 90 (3d Cir. May 4, 2011) (unpublished)
At trial for possession of a firearm during the course of a violent felony, the government introduced a certificate of no record found indicating that the defendant did not possess a license to possess a firearm. The person preparing the certificate did not testify.

The appellate court found that, in light of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the trial court abused its discretion in admitting the certificate. The court explained that the lack of license was an essential element to the charge and that the defendant's guilt depends on the accuracy of the certificate. The court did not discuss the significance of the certificate being authored for the purpose of litigation.

Ocampo v. Vail, 649 F.3d 1098 (9th Cir. 2011)
At trial for first-degree murder, the major issue was whether the defendant was present at the shooting. The trial court admitted the statements of two police officers relaying what they learned during the course of their investigation. The first police officer testified that a non-testifying witness had eliminated other suspects, but not the defendant (even though the witness knew the defendant and had been presented with a photo of him). The second police officer testified that he had corroborated a testifying witness's account through a non-testifying witness. The account placed the witness at the scene and identified the defendant as the shooter.

The state appellate court held that because the officers "did not testify to the substance" of the out of court statements and because they only provided an "outline" the statements did not violate the Confrontation Clause. The federal district court dismissed the petition for writ of habeas corpus. The Court of Appeals reversed holding that "whatever the locution used, out-of-court statements admitted at trial are 'statements' for the purpose of the Confrontation Clause." Because the officers testified to the information from the non-testifying witness's statements to them, their testimony violated the Confrontation Clause.

State Court Cases

Commonwealth v. Guzman, 954 N.E.2d 590 (Mass. App. Ct. Oct. 4, 2011) (table decision); ***Commonwealth v. Parenteau***, 948 N.E.2d 883 (Mass. 2011)
At trial for driving with a suspended or revoked license for operating under the influence of alcohol, the court admitted a certificate from the Registry of Motor Vehicles indicating that notice of the revocation had been sent to the defendant.

Citing Massachusetts Supreme Court precedent, the court reversed. It explained that the certificate did not simply attest to whether a record existed, "made a factual representation based on those records," and was, therefore, testimonial hearsay.

Diggs v. United States, 28 A.3d 585 (D.C. 2011)
A certificate of no license to carry a pistol is a testimonial document. Admitting it without requiring the testimony of its preparer violated the defendant's Confrontation Clause rights.

Timms v. United States, 25 A.3d 29 (D.C. 2011)
Admitting certificates of no record found at a trial for unlicensed possession of a firearm and possession of unregistered ammunition violated the defendant's right to confront the author of the certificates where the author did not testify. Reversed.

Commonwealth v. Williams, 946 N.E.2d 716 (Mass. App. Ct. 2011)
At trial for possession of cocaine, admitting a certificate of analysis identifying the substance in question and providing its weight violated the defendant's Confrontation Clause rights where no "authenticating witness" testified. Reversed.

Campos-Alvarez v. United States, 16 A.3d 954 (D.C. 2011)
At trial for carrying a pistol with a license and for possession an unregistered firearm, the court admitted certificates of no record found related to the defendant and items in question.

The appellate court reversed. It held that the certificates were testimonial hearsay, citing prior precedent, *Tabaka v. District of Columbia*, 976 A.2d 173 (D.C. 2009).

Commonwealth v. Abrue, 11 A.3d 484 (Pa. Super. Ct. 2010)
At trial for resisting arrest, the court admitted the testimony of a police officer who arrived at the scene and interviewed a nontestifying officer. The testifying officer recounted, over a defense objection, what the nontestifying officer told him about the initiation of the encounter. The defendant also testified and claimed that he acted in self-defense.

The appellate court reversed. It held that neither party had established whether the statement was testimonial or nontestimonial, but that because the state bore the burden of establishing the statement's admissibility, the admission violated the defendant's confrontation rights.

Cuadros-Fernandez v. State, 316 S.W.3d 645 (Tex. App. 2009)
DNA analysis certificates are testimonial hearsay, even where they do not contain an affidavit, because they are "made under circumstances which would lead an objective witness reasonable to believe that the statement would be available for use at a later trial." The court reached that conclusion for several reasons: (1) the analyst's notes submitted with the certificate stating that the report was requested by the police, (2) the results were reported to the police and to the district attorney, and (3) the notes indicate the analyst knew the investigation concerned a homicide. The certificates were the "functionally identical to live, in-court testimony doing 'precisely what a witness does on direct examination'" because it was the only evidence of the DNA results. Reversed.

Grant v. Commonwealth, 682 S.E.2d 84 (Va. Ct. App. 2009)
The trial court admitted a blood analysis certificate at trial for driving under the influence. The certificate contained an "attestation clause" certifying the results. The appellate court held that the attestation clause, but the not the actual results, in a blood alcohol analysis certificate is testimonial hearsay. The results were not hearsay because they were generated by a machine, not a person. The attestation, however, is testimonial because it was prepared "to prove facts essential to the prosecution . . . that the breath test was administered by a licensed operator in accordance with [state law.]" The person who administered the test testified, but the person who created the certificate did not. Reversed.

People v. Darrisaw, 886 N.Y.S.2d 315 (N.Y. App. Div. 2009)
In a very short decision, the appellate court held that an "Affidavit of Regularity/Proof of Mailing" prepared by the Department of Motor Vehicles was testimonial evidence because it "served as 'a direct accusation of an essential element of the crime.'" Reversed.

Tabaka v. District of Columbia, 976 A.2d 173 (D.C. 2009)
A certificate from the Department of Motor Vehicles that the clerk had searched for, but had not found, evidence of a driver's permit is testimonial because it is created "for the sole purpose of providing evidence against a defendant." Its admission, over defense objection, at a trial for operating a motor vehicle without a permit was not harmless beyond a reasonable doubt because it was the sole proof of the defendant's non-licensure. Reversed.

In re Welfare of M.L.B., No. A08-1109, 2009 WL 1851763 (Minn. Ct. App. June 30, 2009) (unreported)
At trial for doing more than five hundred dollars worth of damage to property, the repair estimate related to the alleged damage was testimonial hearsay because it was created for the purpose of proving an essential element of the offense and the author of the estimate did not testify. The court did not explicitly analyze harm. Reversed.

State v. Jorgensen, 754 N.W.2d 77 (Wis. 2008)
The transcript from a prior proceeding during which the prosecutor and the trial judge commented on the defendant's intoxication was testimonial hearsay. The trial judge, in the transcript, states that the defendant was having a difficult time following instructions because of intoxication and that the defendant violated his bond provision, the allegation for which he was on trial. The prosecution said that the defendant, during the proceeding, smelled of alcohol, was having a hard time communicating with his lawyer, had a pending intoxication charge, and violated his bond provision. In the present case, the prosecution's statement in closing argument that the defendant was a "chronic alcoholic" and "smelled of alcohol" on the day in question was also testimonial hearsay. Reversed.

People v. Wolters, 41 A.D.3d 518 (N.Y. App. Div. 2007)
An affidavit that the defendant was unlicensed at the time of the alleged offense, attested to by a Department of Motor Vehicles official, who did not testify, constituted testimonial hearsay in a trial for unlawfully operating or driving a motor vehicle without a license. The error was not harmless beyond a reasonable doubt because without the affidavit, the evidence offered was insufficient as a matter of law. Reversed.

State v. White, 920 A.2d 1216 (N.H. 2007)
At trial, the defense cross-examined a complainant about a prior case in which she had been the complainant and the jury had acquitted the other defendant despite her testimony. The trial court, in this case, allowed the state to introduce testimony of the other case's investigating officer, who testified that the other defendant had initially confessed but had later recanted. The trial court, over a defense objection, admitted the evidence to counter the "misleading advantage" obtained by the defense's cross-examination of the complainant about the prior case and her recantation.

The appellate court reversed, holding that the defendant had not opened the door to the testimony and thereby waived any Confrontation Clause objection. It held that because the state was able to, on redirect examination, have the complainant explain that while she initially thought that the jury must have disbelieved her testimony in the prior case, she now realized the acquittal merely meant the state had "failed to meet its burden in some way." Since the state was able to correct any misimpression, the defendant did not open the door to the testimony of confession and recantation. The appellate court then held that the confession and recantation to the police officer, obtained during interrogation was testimonial hearsay because "they were given under

circumstances[, an interrogation,] objectively indicating that the primary purpose of the interrogation was to establish past events potentially relevant to later criminal prosecution." [Note: The holding is largely unremarkable, but it may be noteworthy that the interrogation's primary purpose was for the later criminal prosecution of *a different individual*.]

Williams v. State, 947 So.2d 694 (Fla. Dist. Ct. App. 2007)
At trial, over a defense objection, the court admitted the testimony of the investigating officer recounting the statements of his fellow officer, relaying contemporaneous observations of the alleged incident. The codefendant successfully appealed his conviction, gaining relief on the ground that admitting the fellow officer's statements violated the Confrontation Clause. The defendant lost the same issue on appeal.

The defendant filed a motion for rehearing realleging the Confrontation Clause violation. The appellate court treated it as a petition for habeas corpus and granted relief. It held that the statements of the nontestifying fellow officer to the testifying officer were testimonial, even though they were contemporaneous observations of the alleged incident. It explained that the fellow officer had an objectively reasonable expectation that the statements (which were being taped) would be used in the prosecution of a crime and were therefore testimonial hearsay.

Hillard v. State, 950 So.2d 224 (Miss. Ct. App. 2007)
At trial for robbery and conspiracy to commit robbery, the court allowed, over a defense objection, the prosecutor to read a transcript of the alleged accomplice's testimony at his separate trial. The accomplice refused to testify at the defendant's trial.

The appellate court held that the testimony was "assuredly" testimonial hearsay and admitted in violation of the defendant's confrontation rights. The error was prejudicial because it provided the only evidence of the defendant's actions after the robbery and the only evidence of the agreement to commit a crime. Reversed.

State v. Bird, 148 P.3d 1058 (Wash. Ct. App. 2006)
At trial, the court admitted the testimony of a police officer, who conveyed the statements of a nontestifying witness to the alleged incident. The officer testified that the witness made statements during an interview and the witness was "talking 'kind of fast' and he was 'talking louder than normal speak'" during the interview.

The appellate court ruled that although the witness "was still under the influence of a startling event" during the interviews (qualifying the statements as excited utterances), they were testimonial hearsay because there was no ongoing emergency when the interview took place.

Shennet v. State, 937 So.2d 287 (Fla. Dist. Ct. 2006)
Over a defense objection, the trial court admitted the recordings of a surveillance officer who made statements as he observed the alleged crime. The officer did not testify at trial.

The appellate court held that the statements were testimonial hearsay. It applied the "objective test" outlined in *Crawford*, whether the reasonable expectation of an objective declarant was that the statement would be used in investigation or prosecution of a crime. In holding the officer's contemporaneous observations were such statements, it emphasized that he "was aware that he was in the midst of a surveillance investigation," and that he "knew" his observations would "have their place" in a criminal prosecution."

Martin v. State, 936 So.2d 1190 (Fla. Dist. Ct. App. 2006)
At trial for possession of controlled substances, the court admitted, over a defense objection, a Florida Department of Law Enforcement report finding that substances from the defendant were "contraband." The author of the report did not testify.

The appellate court, over a dissent, reversed. It held that the report was "obviously prepared for litigation purposes." It noted that the report was prepared by law enforcement, was prepared on the occasion of the defendant's arrest, and was offered by the prosecution. Thus, it rejected the argument that it was a business record prepared by a neutral scientific agency and the dissent's argument that it was not testimonial because it could prove the defendant's innocence. It compared the report to "breath test affidavits," something Florida courts had previously held testimonial.

Williams v. State, 933 So.2d 1283 (Fla. Dist. Ct. App. 2006)
At trial for driving under the influence, the court admitted a breath test affidavit conveying the results of the test. The author of the affidavit did not testify. The appellate court applied its prior precedent regarding a lab report and held that the affidavit was testimonial hearsay, it was not admissible as a business record, and its admission violated the defendant's Confrontation Clause rights. Reversed.

Belvin v. State, 922 So.2d 1046 (Fla. Dist. Ct. App. 2006)
At trial for driving under the influence, the court admitted the affidavit of the nontestifying technician who administered the breath test. Under state law, the defendant had the right to subpoena her as an adverse witness or depose her, via counsel, in a pre-trial "discovery deposition." He did neither.

In this often cited decision, the appellate court reversed. It held that the affidavit was testimonial hearsay because it was prepared for use at trial and, thus, contained statements that an objective witness would reasonably believe would be used at trial. It rejected the state's arguments that the "simple observations" of the technician are not testimonial and emphasized the role of the affidavit in a DUI trial. It also declined to create an exception for all state public records. It held that simply because the affidavit was available as a public record did not mean that the statements contained in it were nontestimonial.

The court also held that the opportunity to cross-examine the technician during the pre-trial discovery deposition was not adequate to protect the defendant's right to confrontation. It held

that the defendant's absence from the deposition, along with the unavailability of cross-examination during the deposition rendered it inadequate.

People v. Pacer, 847 N.E.2d 1149 (N.Y. 2006)
At trial for an aggravated driving offense, the court admitted an affidavit from a nontestifying Department of Motor Vehicles official stating that based on "information and belief" the department's mailing procedures had been followed with regards to sending notice to the defendant that his license had been suspended sixteen years prior to the incident in question. An element of the crime alleged was "knowing" or having "reason to know" that his license had been suspended.

The appellate court reversed. It distinguished federal precedents holding that affidavits about the absence of a record were nontestimonial. Unlike those cases, this case involved an affidavit about the substance of an action taken, not the presence or absence of an otherwise admissible record. It also distinguished cases involving contemporaneous recordings of immigration movements, explaining that the affidavit here was prepared for the purposes of litigation, not for immigration records. Reversed.

People v. White, 24 A.D.3d 801 (N.Y. App. Div. 2005); ***People v. Cioffi***, 24. A.D.3d 793 (N.Y. App. Div. 2005); ***People v. F&S Auto Parts, Inc.***, 24 A.D.3d 795 (N.Y. App. Div. 2005) (consolidated appeal)
At trial for conspiracy, the court admitted the plea allocutions of fifteen coconspirators. Although the defense failed to preserve the issue by specifically objecting on Confrontation Clause grounds, the appellate court reached the issue in the interest of justice. Without explanation, the appellate court held that they were testimonial. It also held that in light of the prosecution's characterization of the allocutions in its *in limine* motions as "essential," "the most compelling evidence of the existence of a conspiracy," and as "the core to the case," the court held that their admission was not harmless. Reversed.

State v. Iverson, No 85593, 2005 WL 3073792 (Ohio Ct. App. Nov. 17, 2005) (unreported)
At trial for possession of a concealed weapon, the only evidence presented was the testimony of a local police officer. The officer testified to what the arresting officer told him (after refreshing his recollection using the arresting officer's report): the weapon in question was located on the back seat of a car, wrapped in a red skull cap, and next to the defendant. The arresting officer was on a tour of duty in "the Middle East" at the time of trial. There was no defense objection to the testimony.

The appellate court found "plain error" because the error was "determinative to the outcome." Specifically, the report written by the arresting officer constituted testimonial hearsay because the arresting officer, in drafting the report and reporting to his fellow officer had the reasonable expectation that the statements would be used to prosecute the defendant. The error was not harmless because it was the only inculpatory evidence presented. Reversed.

Willingham v. State, 622 S.E.2d 343 (Ga. 2005)
At trial for murder and robbery, the state introduced the statement and testimony of a deceased witness who had testified at the alleged coperpetrator's earlier trial. The statement placed the defendant at the scene of the murder and had accompanied the coperpetrator, knowing he intended to rob the victim. The statement and testimony were admitted pursuant to a state statute permitting the presentation of testimony of "a witness since deceased . . . which was given under oath on a former trial upon substantially the same issue and between substantially the same parties."

The appellate court reversed. It held that the trial court misapplied the "substantially same parties" element of the statute and also held that the statements were inadmissible testimonial hearsay. It explained that the statement was made during the course of an interrogation and that the testimony was during a former trial. It considered both types of statements testimonial hearsay. The state failed to meet its burden of proving harmlessness, despite the defendant's recanted confession, because the witness's testimony and statements went to a "core issue" and other evidence was not overwhelming.

Shiver v. State, 900 So.2d 615 (Fla. Dist. Ct. App. 2005)
On appeal from a DUI decision and in one of the early decisions addressing the issue, the appellate court held that a "breath test affidavit" is testimonial hearsay because it "contained statements one would reasonable expect to be used prosecutorially." It noted, "In fact, the only reason the affidavit was prepared for admission at trial." The only reason to admit maintenance information about the breath test instrument was to meet the statutory requirement for the admission of the results.

Napier v. State, 820 N.E.2d 144 (Ind. Ct. App. 2005)
At trial for driving under the influence, the court admitted certification documents regarding the inspection of the breath test machine and a printout from the machine indicating that the defendant had a blood-alcohol content above the legal limit.

The appellate court reversed. It held that the certification documents regarding the inspection were *not* testimonial hearsay because they do not pertain to guilt; they merely relate to whether the breath test results are admissible. The court noted that having "a toxicologist in every court on a daily basis offering testimony about his inspection" is "obviously impractical." By contrast, the breath test results were testimonial hearsay because the result "pertains to the issue of guilt or innocence."

People v. Woods, 9 A.D.3d 293 (N.Y. App. Div. 2004)
At trial for assault in the third degree, the court admitted the codefendant's plea allocution, admitting to robbery and identifying the defendant as the person who punched the complainant.

The appellate court reversed, reviewing "as a matter of discretion in the interest of justice," and held that the plea allocution was testimonial hearsay. It further held that the admission was not

harmless, noting the prosecutor's emphasis on it and the complainant's confusion about which defendant had punched her.

People v. Rogers, 8 A.D.3d 888 (N.Y. App. Div. 2004)
At trial for DUI, the court admitted a lab test result generated by a third party contractor for the police. The report showed the defendant's blood alcohol content. The appellate court reversed. It held that the results were testimonial hearsay because the testing was requested by the police in preparation for the case against the defendant.

****State v. Jasper***, 245 P.3d 228 (Wash. App. Div. 2010) *rev granted* 170 Wash.2d 1026 (Wash. App. Div. Feb. 1, 2011)
At trial for driving while license suspended or revoked, the court admitted an affidavit of the nontestifying Department of Licensing (DOL) records custodian. The affidavit described the custodian's unsuccessful search for the defendant's record of having a license.

The appellate court reversed. It held that the affidavit was testimonial for several reasons: it was prepared for the defendant's prosecution and did not exist separately from the context of the prosecution; it is also not a record kept in the ordinary administration of the DOL's business. The court rejected the state's argument that the affidavit merely established the authenticity of the driving record attached to it. It also found that allowing confrontation of the affiant would not have been an "empty formalism" because of contradictions between the records attached to the affidavit with the prosecution's theory of the case.

Offered for the Truth of the Matter Asserted

U.S. Court of Appeals Cases

Jones v. Basinger, 635 F.3d 1030 (7th Cir. 2011)
At trial for murder, two of the investigating officers testified about the lengthy statement of a non-testifying informant accusing the defendant of the alleged crime. The informant had relayed the confession of his brother to the police. Thus the evidence was double hearsay. The trial court admitted the testimony to explain the "course of investigation," i.e. why the police investigated the defendant, not for it's truth. The trial court, however, only offered "meager instructions" to limit the jury's consideration of the informant evidence from some of one of the two officer's testimony.

Reviewing a denial of an application for writ of habeas corpus, the Court of Appeals held that the state courts had made an unreasonable application of clearly established law requiring a new trial. It explained that the evidence was offered for its truth for several reasons. First, the prosecution's stated reason for introducing the evidence was to "show that other independent evidence" linked the defendant to the crime. Second, the prosecution had offered reasons that

the informant was credible, a showing that would be unnecessary if the evidence was only offered to explain the investigation. Third, for "course of investigation" purposes, "only a small amount of information is legitimately needed in all but the rarest cases."

United States v. Cabrera-Rivera, 583 F.3d 26 (1st Cir. 2009)
The trial court admitted into evidence confessions and statements made by defendant's non-testifying alleged accomplices during an FBI interrogation.

The Court of Appeals first held that the objection to the statements had been preserved because trial counsel had made a *Bruton* objection that could only be interpreted as a *Crawford* objection because "a literal *Bruton* objection would have made no sense" since no other defendants were on trial.

As to the merits, the court held the statements were "testimonial out-of-court statements . . . used for the truth of the matters asserted," not to "provide context" for the discovery of admissible evidence, as the prosecution had argued. The court noted the accomplice confessions were described as "co-defendant" statements, suggesting that the defendant had conspired with them, and that the government was using the statements for their truth, as demonstrated by its closing argument. In its closing argument, the prosecution argued that it brought the evidence to "prove this case beyond a reasonable doubt" and that the statements corroborated admissible evidence. The court also emphasized that some of the information in the admitted evidence provided no context to the investigation and could only have been used for its truth. Vacated and remanded.

United States v. Hearn, 500 F.3d 479 (6th Cir. 2007)
At trial for possession of a controlled substance, the court admitted two officers' testimony that confidential informants told them the defendant possessed and intended to sell a large quantity of ecstasy at an upcoming rave. The prosecution proffered that it was offering the testimony to explain why the officers stopped the defendant when they did: he was on his way to the rave. During closing argument, the prosecution repeatedly referred to the confidential informants' statements when addressing elements of the offense, not merely as an explanation for the officers' actions.

The Court of Appeals found that the manner in which the unavailable informants' statement was introduced and used required the defendant to have the opportunity to cross-examine the informants. It emphasized the prosecution's closing argument that used the officers' testimony to establish that the defendant was "going to take these [pills] with him [to the rave]" (first alteration in original). It also noted that the prosecution asked "broad, open-ended questions [of the officers] . . . instead of attempting to make sure, through narrow questioning or otherwise, that the officers did not testify as to the details of the confidential informants' allegations." The

error was not harmless because "no other evidence so directly demonstrated [the defendant's] possession of the drugs with intent to sell." Reversed and remanded.

United States v. Pugh, 405 F.3d 390 (6th Cir. 2005)
At trial for bank robbery, the court admitted the statement of an absent declarant that one of the persons pictured in the bank security footage was the defendant. The Court of Appeals ruled that the identification was testimonial, emphasizing that it took place in the context of a police interrogation and that "a reasonable person would assume that a statement positively identifying a suspect" would be used in either investigation or prosecution of an offense. The court held that the statement was offered for the truth of the matter asserted, not to explain why the officer attempted to transport the declarant from jail to the police station, because it could not "conceive of any other reason that the positive identification of the defendants would be introduced," other than to prove the defendants were those pictured. The error was not harmless because the only other evidence placing the defendants at the scene of the crime was "contested." Reversed in part, affirmed in part, vacated in part, and remanded.

United States v. Cromer, 389 F.3d 662 (6th Cir. 2004)
At trial, the District Court admitted a police officer's statement that a confidential informant had told him that the defendant was one of the people associated with illegal activities at the residence in question. It also admitted the officer's testimony about the confidential informant's physical description of a participant in drug activity. The defendant met the description.

The Court of Appeals found plain error. It emphasized that the statement "went to the very heart of the prosecutor's case," whether the defendant took part in the illegal activities known to take place at the residence in question. It described the state's effort to characterize the identification as putting the investigation in context and not being used for the truth as a "sham" because the contested question in the case was whether the defendant was involved in the illegal activities at the residence and because there was no dispute as to the subjects of the government's investigation.

Regarding the description, the court further held that the trial court "may well have been correct" to admit it under evidence law based on the defendant's "opening the door" to presentation of this information by raising it on multiple occasions during cross-examination of the government's witnesses. The court held "the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements . . . . A foolish strategic decision [such as cross-examining the witnesses about the description] does not rise to the level of [forfeiture by wrongdoing] and so will not cause the defendant to forfeit his rights under the Confrontation Clause." Reversed and remanded.

State Cases

State v. Stathum, No. 06-08-1930, 2011 WL 1345019 (N.J. Super. Ct. App. Div. Apr. 11, 2011)
At trial for drug distribution, the investigating officer testified that he had narrowed his investigation based on information received from a confidential informant. He also testified what a confidential informant does and, critically, that the defendant had made previous purchases from the informant. The trial court admitted the statements to explain the course of the officer's investigation.

The appellate court reversed. It held that the details the officer supplied, including that the defendant had made purchases unrelated to the present charges, were unnecessary to explain the course of the officer's investigation. Rather, the information was offered for the truth of the matter asserted.

Gardner v. United States, 999 A.2d 55 (D.C. 2010)
At trial, the court admitted a DNA report and an expert's opinion about DNA testing. The DNA at issue was found on the victim's clothing, but the defendant claimed that the clothing had been contaminated during its collection. The analyst conducting the testing did not testify.

The appellate court reversed. It held that the report and expert opinion violated the Confrontation Clause because the reports were the basis for the expert's conclusions and, therefore admitted for the truth of the matter asserted. The court declined to address whether a report could be admitted to corroborate an expert's opinion because this case did not present such a scenario.

Langham v. State, 305 S.W.3d 568 (Tex. Crim. App. 2010)
At trial, the investigating detective testified, over defense objection, about statements a nontestifying confidential informant made to him. The statements relayed information about drug use at the house where the defendant was arrested.

The appellate court held that the statements were offered for the truth of the matter asserted, not as "background" information about how the detective obtained a warrant. It emphasized that the "primary" purpose of gathering the information was to obtain a conviction, even if the "first in time" (an alternate dictionary definition of primary) purpose was to obtain a warrant. Thus, the statements were offered for their truth and in violation of the Confrontation Clause. The court remanded for a harmlessness determination because the lower court applied a sufficiency of the evidence standard instead of a harmless beyond a reasonable doubt standard. Reversed and remanded with instructions.

Commonwealth v. Stone, 291 S.W.3d 696 (Ky. 2009)
Admission of a codefendant's statement that at the time of the alleged stabbing the victim was "backing up" and "backing away" was testimonial because it is a statement that was taken by

police officers in the course of their interrogation. The court analyzed the statement under *Crawford*, not *Bruton*, because the statement was offered against the defendant, rather than offered against the codefendant with an unintended impact on the defendant. The court rejected the argument that the defendant opened the door to the testimony by introducing his own statement that the victim was the aggressor. The court explained that opening the door allows the opposing party to respond to the subject matter, but the opposing party is still subject to the rules of evidence and the Confrontation Clause.

State v. Johnson, 771 N.W.2d 360 (S.D. 2009)
A nontestifying confidential informant's statement that the informant could buy marijuana from the defendant was testimonial hearsay offered for the truth of the matter asserted. The state argued that it was offered to explain why the officer approached the defendant in the first place.

The appellate court described the argument establishing a "fine line," but in light of the prosecution's closing argument, it rejected the argument. In closing, the prosecution argued, "[H]ow do we know [the defendant] sold the drugs? [The informant] told the Detective, I'm going to buy marijuana from [him]."

****Hunt v. State***, 218 P.3d 516 (Okla. Crim. App. 2009)
At trial for malice murder, the court admitted a 911 tape of the victim made during a call a few hours prior to the murder. The state claimed that the statements were admitted to show the victim's state of mind, and the trial court gave a related instruction.

The appellate court held that some portions of the tape were offered for the truth of the matter asserted. Specifically, the court held that the victim's claims that the defendant had attacked her several hours prior to the incident were testimonial (the court did not explicitly state it was for the truth of the matter asserted, but it contrasted these statements with the "state of mind" statements). Because the defendant claimed self-defense and because the inadmissible statements had gone unchallenged, the error was not harmless beyond a reasonable doubt. Reversed.

People v. Ricks, No. 283053, 2009 WL 1607537 (Mich. Ct. App. June 9, 2009) (unreported)
The investigating officer's testimony that he identified the defendant based on the nontestifying informant's giving him the defendant's name and workplace was offered for the truth of the matter asserted, not to explain the investigating officer's actions. Because the other two witnesses identifying the defendant were being held at gunpoint when they saw the perpetrator, "their identification testimony was somewhat suspect," and the erroneously admitted identification error was not harmless beyond a reasonable doubt. Reversed.

Sanabria v. State, 974 A.2d 107 (Del. 2009)
At trial for burglary, a nontestifying 911 dispatcher's statements about what the alarm company had told her was offered for the truth of the matter asserted, not to explain the investigating officer's actions. The dispatcher stated that the alarm company had informed her the motion

detector in the foyer of a house had gone off. "Absent a limiting instruction, the statement . . . could have been considered by the jury for the truth of the matter asserted." The error was not harmless because it was the only evidence that the defendant had entered the house. Reversed.

State v. Maltepes, No. 1 CA-CR 07-0177, 2008 WL 3878510 (Ariz. Ct. App. Aug. 19, 2008) (unreported)
Admission of the investigating officer's statements about his presence at the scene of the crime, including statements about a prior incident that was his reason for being there when the present incident occurred, were offered for the truth of the matter asserted prior investigation "[b]ecause this testimony went far beyond what was necessary to avoid misleading the jury as to why the police were investigating [the defendant] and included testimonial hearsay used by the prosecutor during closing argument" for the truth of the matter asserted. Explaining the reason for police activity or presence should be done by stating it is based "upon information received" is preferable. Reversed.

People v. Feazell, 898 N.E.2d 1077 (Ill. App. Ct. 2007)
At trial for murder and armed robbery, the court, over the defendant's objection, admitted an investigation officer's testimony about his interrogation of the defendant. His testimony included descriptions of the statements by the coperpetrator which he confronted the defendant with.

The appellate court ruled that, contrary to the state's argument, the statements were offered for their truth, and not to describe the "progression of the investigation" or to show the effect on the listener. It explained that while explaining the steps of the investigation is acceptable, putting the substance of the out-of-court declarant's statement before the jury goes beyond the bounds permitted by the police investigation exception. It also explained that the state's failure to show how the defendant's cooperation, behavior, or actions changed after being confronted with the statements belied its contention that the statements were offered to show the effect on the listener. Reversed.

People v. McEaddy, 41 A.Dd 877 (N.Y. App. Div. 2007)
At trial, the court admitted statements of two detectives to the effect that after a surveillance video of a robbery was aired on local television, several callers contacted the police identifying the defendant as the perpetrator.

The appellate court held that the statements were offered for their truth, and not to explain why the police conducted their investigation as they did, because the latter issue was not contested at trial. It held the error was not harmless beyond a reasonable doubt because the identity of the robber was the sole issue at trial. Even though the defendant had made an incriminating statement, the court noted the statement was of questionable valuable because the detectives offered contradictory testimony about the circumstances of the statement. Reversed.

State v. Freeman, No. 04-09-1268, 2007 WL 560297 (N.J. Super. Ct. App. Div. Feb. 27, 2007) (unreported)

At trial for receiving stolen property, a car, the court admitted over the defense's objection the complainant witness's testimony that he reported the car stolen after talking with his wife and stepdaughter. Neither the wife nor stepdaughter testified. The complainant's stepdaughter owned the car. In his rebuttal argument, the prosecution highlighted the complainant's testimony about his conversation with his daughter, arguing that the complainant knew that the defendant lacked permission to use the car based on the complainant's conversation with his wife and stepdaughter.

The appellate court reversed, holding that the "inescapable inference" of the testimony was that the defendant did not have his aunt or cousin's permission to drive the car. It noted that the reason the state suggested for offering the testimony, to demonstrate the prudence of the complainant prior to reporting the car stolen, raised an impermissible inference: the defendant did not have permission to use the car. Reversed.

People v. Irizzary, Nos. 03-02-011-I, 03-03-0275-I, 03-09-0826-I, 2007 WL 1574308 (N.J. Super. Ct. App. Div. June 1, 2007) (unreported)
At trial for possession of a controlled substance and possession of a controlled substance with intent to distribute, the court admitted the investigating detective's statement that he suspected the object discarded by the defendant was a controlled substance based on "information received."

The appellate court held that it was not submitted to permissibly explain the reason for an officer's action because it was, in fact, introduced to explain why the officer suspected the defendant possessed drugs: he had outside the record knowledge indicating as much. The court considered the error cumulatively with other errors in the case and reversed.

State v. Johnson, 138 Wash. App. 1041 (Wash. Ct. App. 2007)
At trial for promoting prostitution, the court admitted statements of a nontestifying sex worker who had recently been arrested. She provided a description of the defendant and his car. The state argued that the statements were offered to explain why the police followed and arrested the defendant, not for their truth.

The appellate court reversed, holding that the statements were offered for their truth because the statements were "far more detailed than would be required to explain why the deputies arrested" the defendant. The court suggested that the officer could have explained that he simply "received information consistent" with the defendant, without providing the prostitute's more detailed description. It also noted the prosecutor's use of the statement in opening and closing argument was for the truth of the statement, not to explain police conduct.

State v. Hoover, 220 S.W. 3d 395 (Mo. Ct. App. 2007)
At trial, over defense counsel's objection, during the prosecution's opening statement he referred to statements a police officer made to the defendant during his interrogation. The police officer had told the defendant that his son was confessing and implicating him. His son did not testify at

trial, but the police officer repeated the statements in his testimony. The prosecution was careful to explain in his opening statement that he was not alleging his son actually confessed, but that the he was simply recounting what the officer said to give context to the defendant's reaction.

The appellate court held that the statements were inadmissible hearsay (the court relied both on evidence code decisions and constitutional decisions in its holding) for two reasons. First, while it is permissible to admit some hearsay evidence to explain police behavior, it is not acceptable to do the same to explain a defendant's reaction to the statements. The court next noted the importance of not allowing the prosecution to offer prefatory reasons for introducing hearsay evidence, such as providing background information, when its true intent is to offer hearsay statements for their truth, as it had done here.

State v. Carlson, 132 Wash. App. 1058 (Wash. Ct. App. May 10, 2006)
At trial for the murder of the defendant's daughter-in-law, the court admitted the statements of the defendant's nontestifying son, the codefendant. The state argued that the statements were admitted to impeach the defendant by showing that they had a carefully constructed alibi and, in the alternative, were not testimonial because they were made in the furtherance of a conspiracy.

The appellate court rejected both arguments and reversed. It held that the statements were offered for the truth because "where one witness is used to impeach another, the veracity of the conflicting stories is necessarily at issue and therefore constitutes hearsay." It also held that the statements were not in the furtherance of a conspiracy because inculpatory statements, like admission of a motive to kill the victim during an extended police interview, could not be in the furtherance of a conspiracy. It rejected the state's argument that documentation of the daughter-in-law's poor parenting and the codefendant's purchase of a gun were sufficient proof of the conspiracy.

People v. Goldstein, 810 N.S.2d 100 (N.Y. 2005)
At trial for murder, the court admitted the testimony of a forensic psychiatrist recounting the statements of nontestifying witnesses. The witnesses recounted prior bad acts of the defendant. The prosecution argued, based on the testimony of the psychiatrist, that the statements were regularly relied on by a minority, but growing, number of psychiatrists whose purpose was to "get to the truth," which involves interviews of people with firsthand knowledge. The statements made to the psychiatrist corroborated the prosecution's theory that the crime was the product of the defendant's anti-social personality disorder and undermined the defense's insanity theory based on the defendant's schizophrenia.

The New York Court of Appeals, New York's court of last resort, reversed. It held that the statements were testimonial because they were made to an agent of the prosecution in the course of her investigation. It noted that it would be "strange" if the witnesses did not know they were answering questions posed by an agent of the prosecution. It also held that the statements were hearsay, offered for the truth of the matter asserted. It rejected the state's argument that the

statements were merely offered to help the jury evaluate the psychiatrist's opinion. The court explained, "We do not see how the jury could use the statements of the interviewees to evaluate [the psychiatrist's] opinion without accepting as a premise either that the statements were true or that they were false." It held that the difference between a statement offered for its truth and to offer support for the expert's opinion "is not meaningful in this case."

People v. Ryan, 17 A.D.3d 1 (N.Y. App. Div. 2005)
At trial for assault, burglary, and unauthorized use of a vehicle, the defense elicited testimony from the investigating officer about whether the nontestifying alleged accomplices made any mention of a weapon, an attempt to impugn the quality of the police investigation, which had proceeded on a theory that there was a gun involved. The trial court then allowed the introduction of the officer's account of the accomplices' full confessions.

The appellate court reversed. It held that, contrary to the state's argument, the statements were offered for their truth, not to provide a full account of the issue only partially explored on cross-examination. The court emphasized that the state's questions made no attempt to clarify possible misconceptions about the statements and that the prosecution used the statements substantively—to argue for guilt—in its closing argument.

Availability for Cross-Examination

Good Faith Efforts to Obtain Presence of Witness

U.S. Court of Appeals Cases

United States v. Tirado-Tirado, 563 F.3d 117 (5th Cir. 2009)
At a trial for inducing an alien to illegally immigrate, the court admitted the deposition testimony of the illegally immigrating alien. The Court of Appeals ruled that because the government failed to make a "good faith" effort to make the alien available for cross-examination at trial, it had failed to demonstrate that the witness was not "unavailable" for purposes of *Crawford* and ruled the admission improper. The government failed to take "any concrete steps" to assure the witness's availability. Vacated and remanded.

Earhart v. Konteh, 589 F.3d 337 (6th Cir. 2009)
At a trial for rape of a child under thirteen and for gross sexual imposition on a child under the age of thirteen, the court admitted the videotaped deposition of the alleged victim. The victim did not testify because she was on vacation.

The Court of Appeals held that being on vacation, absent the government demonstrating that it had made a "good-faith effort to obtain" her presence, including the use of compulsory process, did not make the victim "unavailable" for purposes of the Confrontation Clause. The erroneous

admission was not harmless beyond a reasonable doubt because the victim provided "undoubtedly the most convincing evidence," and the other witnesses provide conflicting testimony. Affirmed in part, reversed and remanded in part.

Fischetti v. Johnson, 384 F.3d 140 (3d Cir. 2004)
At a retrial for burglary, the trial court admitted testimony of burglary victims who testified at the original trial. Some of the witnesses testified at the retrial, but some did not. The defendant was representing himself.

The Court of Appeals held that it was error not to hold a preliminary hearing to first determine whether the non-testifying witness was unavailable and that it was constitutionally deficient performance of appellate counsel for failing to seek review of the same. It held that the trial court's erroneous—but not "clearly erroneous" under AEDPA—denial of replacement counsel constituted cause for overcoming a state court default. Reversed and remanded for determining whether the non-testifying witness was unavailable.

State Court Cases

Meraz v. State, No. 52005, 2011 WL 379037 (Nev. Feb. 3, 2011) (unreported)
At trial for murder, the court admitted a transcript of the surviving victim's testimony at the defendant's prior trial. Before trial, the prosecution had noted its belief that the surviving victim was in Mexico.

The Nevada Supreme Court reversed. It held that the trial court's failure to find the witness unavailable required reversal. Moreover, the prosecution's "mere belief" that the witness is in Mexico is inadequate to support a finding of a good faith effort to obtain the witness's presence.

People v. Painia, No. B215733, 2010 WL 2473268 (Cal. Ct. App. June 21, 2010)
At trial, the court admitted the preliminary hearing testimony of a nontestifying witness. The prosecutor offered evidence of an instruction for a detective to be sent to the witness's home and an attempt to call her on the phone. A bench warrant had also been issued for the witness, but the prosecution offered no evidence that service had been attempted.

The appellate court ruled that the trial court erred when it held that the witness was unavailable without first having a hearing to determine whether the prosecutor used due diligence to locate and present the witness. Reversed.

State v. Smith, No. 22926, 2010 WL 703377 (Ohio Ct. App. Feb. 26, 2010) (unreported)
Prior to trial, the complainant witness was served with a subpoena via mail. The prosecution visited the witness's address, and the witness's sister told the prosecution that the witness was home, but that she would not answer the door. The week before trial the prosecution again visited the witness's address, and she said that she would not come to court for fear of too much

stress. The trial court found that the witness was unavailable and admitted a prior statement she made.

The appellate court held that the state failed to "demonstrate that it had exerted reasonable efforts" to ensure the witness's appearance. Reversed.

State v. Sharp, No. W2008-01656-CCA-R3-CD, 2010 WL 623589 (Tenn. Ct. App. Feb. 22, 2010) (unreported)
At a retrial, the state introduced testimony of a witness from a prior trial. The state, over the course of six to eight months, had failed to obtain the witness's presence. The trial judge ruled that the witness was unavailable because the state had tried to telephone her and because she had moved out of the state.

The appellate court ruled that the trial court abused its discretion in admitting the testimony because the state did not present "any independent evidence" of the witness's unavailability. It noted that the state "should have realized early on" that mere telephone calls would not suffice for the witness in question. Reversed.

People v. Garrett, No. 279546, 2009 WL 2605406 (Mich. Ct. App. Aug. 25, 2009) (unreported)
At trial, the court admitted the preliminary hearing testimony of the defendant's former wife. Prior to presenting the evidence, the prosecution requested to put on evidence of its due diligence in locating the witness, but the trial court denied the request, mistakenly believing the defendant was married to the witness such that the spousal privilege applied.

The appellate court held it was plain error to not permit the state to prove that the witness was unavailable and that because the witness was not shown to be unavailable, admission of her testimony violated the Confrontation Clause. Reversed.

Womack v. State, No. 05-07-00142-CR, 2008 WL 3917807 (Tex. App. Aug. 27, 2008) (unreported)
Prior to trial a witness was called in the preliminary hearing who said she did not wish to testify. Neither the prosecution nor the defense requested the court to order her to testify. Because the prosecution bears the burden of proving unavailability, her testimonial statements were not admissible at trial. The statements were testimonial because, although made in the presence of the alleged assailant, they were made after any emergency had been resolved. Reversed.

Hernandez v. State, 188 P.3d 1126 (Nev. 2008)
Prior to trial, the prosecution obtained an oral promise from a witness to attend trial. Immediately prior to trial, however, the prosecution spoke with a minor child who was a member of the witness's family who informed the prosecutor that the witness had an unspecified emergency wand was unable to attend trial. Nonetheless, the trial court admitted the nontestifying witness's statements to law enforcement.

The appellate court reversed. It held that the prosecution failed to "communicate with an adult" in the witness's household, failed to establish that an emergency actually existed, and failed to inform the trial court of how long the emergency would prevent the witness from attending. The error was not harmless beyond a reasonable doubt. Although other evidence established that the defendant was at the scene of the crime (an eyewitness identifying him as the shooter and his fingerprints on a pay phone), the absent witness's testimony was "not entirely duplicative" because no other witness spoke to or personally interacted with the defendant on the day of the shooting, thus making the absent witness's testimony more reliable in the eyes of the jury.

People v. Smith, No. E041765, 2008 WL 2010374 (Cal. Ct. App. May 12, 2008)
At trial, the court admitted the statements of a witness the prosecution had attempted to subpoena, but had failed to locate.

The appellate court reversed. It held that the prosecution failed to exercise due diligence to locate a missing witness where the witness had not been "particularly cooperative" in the past and the prosecution did not make an effort to locate the witness to serve a subpoena on her until three days prior to trial. Even then, the only effort made was to check the "Cal photo, the DMV, and local arrest records." This effort was inadequate because there was no evidence to show that the witness owned a car, and even if she did, it was unlikely that she would have already notified the relevant authorities of her change in address. The court noted that the prosecution should have at least attempted to contact the neighbor and known associates of the witness. Reversed.

Callaham v. United States, 937 A.2d 141 (D.C. 2007)
At trial for a drug offense, the court admitted the DEA chemist's report identifying a substance as cocaine. The chemist did not testify.

The appellate court, reviewing for plain error, reversed. It held the report was testimonial hearsay because the same court had previously so ruled. It also held that the defendant's right to subpoena the witness at trial failed to satisfy the requirement that the defendant be afforded an opportunity to cross-examine the witness because *Crawford*'s "unqualified insistence on the declarant's unavailability as a precondition to admitting testimonial hearsay forecloses the argument."

People v. Roberts, No. E040045, 2007 WL 1586322 (Cal. Ct. App. June 4, 2007) (unreported)
At trial, the court found the complainant unavailable. The complainant had testified at the preliminary hearing, and the court admitted the testimony, finding the witness unavailable because she had moved to Mexico.

The appellate court found that the prosecution failed to meet its burden to show it exercised good faith or due diligence in attempting to locate the witness. It rejected the trial court's factual finding that the witness had failed to appear because she did, in fact, appear in response to a subpoena. It went on to hold that merely telephoning a witness and reaching her husband, who says she is unavailable, is insufficient for "good faith" or "due diligence." It noted that although

the witness was in Mexico, the United States and Mexico have agreements about procuring the attendance of witnesses in criminal matters. The prosecution's failure to attempt to take advantage those options rendered its efforts insufficient. Reversed.

State v. Workman, 869 N.E.2d 713 (Ohio Ct. App. 2007)
At the preliminary hearing, the complainant testified about the alleged incident. At trial, the state did not present the complainant and, instead, offered a transcript from the preliminary hearing. Over a defense objection, the trial court admitted the testimony because it found the complainant unavailable. The prosecution stated it had issued a subpoena for the complainant to be present and, during an interview, requested she attend the hearing.

The appellate court held that the prosecution had failed to meet its burden to establish reasonable efforts in good faith to obtain her presence at trial. The court noted that the prosecution had merely subpoenaed her, and only a few days before her testimony. It failed to undertake other reasonable measures such as making inquiries of the complainant's family and employer, sending out a nationwide police bulletin, and making inquiries at area jails and morgues. The court specifically held that "the issuance of a subpoena alone does not constitute a sufficient effort when other reasonable methods are also available." Because the state did not demonstrate the complainant was unavailable, her testimony should not have been admitted.

People v. Colton, No. C047536, 2005 WL 1556917 (Cal. Ct. App. July 5, 2005) (unreported)
At trial for voluntary manslaughter and robbery, the court admitted the preliminary hearing testimony of a witness who did not appear to testify at trial. The testimony provided the only evidence that the defendant was present at the shooting perpetrated by the principal. Eyewitness victims testified that the defendant had been present at the house where the crime occurred earlier in the day and that she knew one of the victims had money in his pocket, but they did not testify that she was present during the robbery and homicide. The same victims testified that the principal shot the other victims but did not demand any money.

The appellate court reversed. It held that the prosecution had failed to meet its burden to show that the witness was unavailable, "Given the critical importance of [the witness's] testimony and her questionable credibility, the burden on the prosecution to show that she was unavailable was great. It is against his backdrop that we must evaluate the prosecution's efforts." It held that the prosecution's efforts did not amount to the required "due diligence." The prosecution obtained three continuances and a bench warrant and made at least five trips to the witness's house. It did not, however, talk with other people in the neighborhood about where the witness was. The defense investigator was able to locate the witness within forty-five minutes of arriving at her house by talking with neighbors, who informed him the witness was staying nearby. Because the prosecution failed to show the witness was unavailable, her testimony should not have been admitted. Reversed.

State v. Harris, 129 Wash. App. 1045 (Wash. Ct. App. Oct. 10, 2005)

At retrial for first degree assault with a firearm, the court admitted the statements of the complainant, which were taken during a "structured, two to three hour interview" with the police. While the defendant's appeal was pending the Supreme Court decided *Crawford* and *Davis*.

The appellate court reversed. It explained that *Davis* held that statements must be analyzed on a case-by-case basis and that an excited utterance was not, per se, nontestimonial. It held that while some of the statements in the lengthy interview may have been made for the purpose of eliciting help, "many" were not and that "an objective purpose would understand [the statements] would be used for the purpose of criminal prosecution." Although the defendant had cross-examined her in the first trial, there was no showing of unavailability to testify in the second.

People v. Candelario, No. B170934, 2005 WL 488561 (Cal. Ct. App. Mar. 3, 2005) (unreported)
At trial for assault with a firearm, criminal threats, possession of a firearm, and removal of the identification of a firearm, the court admitted the complainant's preliminary hearing testimony. The prosecution claimed the complainant was unavailable because he was in "Korea," but no evidence was offered to prove the complainant's location.

The appellate court reversed, holding that the prosecution failed to exercise due diligence in obtaining the complainant's attendance. The prosecution had introduced the testimony of an investigator who "checked two apparently reversed versions of [the complainant's] name in one database, made a brief visit to his apartment and, after the trial court expressed doubts, telephoned and spoke to a person of unknown function at [the complainant's] former job." Because the prosecution did not show due diligence, the complainant's testimony should not have been admitted.

People v. Rodriguez, No. B168304, 2004 WL 2397261 (Cal. Ct. App. Oct. 26, 2004)
At the preliminary hearing, the parties each acknowledged that one of the alleged coperpetrators was going to be deported. He had twice given statements to the police and had implicated the defendant in murdering the victim, but he gave conflicting accounts of the homicide. By trial, the witness had been deported, and the trial court determined that, based on the prosecution's efforts to locate him, he was unavailable. The prosecution, after the preliminary hearing had contacted addresses he was believed to have lived prior to deportation, called directory assistance in a town in Mexico where he erroneously believed to be from, and contacted the Mexican consulate. Having found the prosecution's efforts reasonable, the trial court ruled the witness unavailable and admitted the preliminary hearing testimony and the statements to the police.

The appellate court reversed. It held that the prosecution's failure to "use reasonable means to prevent a present witness from becoming absent was "per se unreasonable." The court outlined measures the prosecution could have filed to take prior to the witness's departure, including requesting a "material witness" immigration hold on the witness.

Forfeiture by Wrongdoing

State Court Cases

State v. Cabbell, 24 A.3d 758 (N.J. 2011)
The forfeiture by wrongdoing exception to the right to confront witnesses only applies to unavailable witnesses. Where there was no finding of unavailability, and ample evidence that the witness was available, the exception to did not apply.

Zanders v. United States, 999 A.2d 149 (D.C. 2010)
At trial for murder, the court admitted a statement taken from the victim. Six weeks prior to his death, the defendant was in an altercation with the victim, and the victim was taken to the hospital with stab wounds. While at the hospital, the victim was interrogated by a police officer, and made a statement incriminating the defendant. Six weeks later the defendant allegedly killed the victim.

The appellate court held that the statements were testimonial and not subject to the forfeiture by wrongdoing doctrine because "the government presented no evidence that appellant's purpose in murdering [the victim] was to prevent him from testifying about the stabbing." The error was not harmless because there was a dispute about who started the fight, and the statement placed the blame on the defendant. The assault with a deadly weapon charge was reversed.

State v. Cox, 779 N.W.2d 844 (Minn. 2010)
Prior to trial and at an evidentiary hearing, a witness expressed some hesitation about testifying at trial. She said that she did not want to testify and that she thought that the defendant's mother and brother had threatened her. She said that she did not want to testify, but that she did not know what she would do if the judge ordered her to testify. The trial court found her unavailable admitted her grand jury testimony in lieu of having her testify.

The appellate court reversed, holding that the witness was not "unavailable" for purposes of forfeiture by wrongdoing. Because the witness responded to the pre-trial subpoena and because the state failed to call her at trial, the state failed to establish by a preponderance of evidence that the witness was unavailable.

People v. Younger, No. A110031, 2010 WL 338962 (Cal. Ct. App. Jan. 29, 2010) (unreported)
At trial for murder, several testimonial statements of the victim were presented.

The appellate court reversed. Because the state "presented no evidence that appellant murdered [the victim] with the intention of preventing her from testifying at ongoing criminal proceedings," the appellate court ruled that the defendant's claim was "not barred" by the forfeiture by wrongdoing doctrine. Two of the statements were made to a doctor. Both were testimonial because the doctor was conducting an interview to gather evidence, not to "help him

determine the correct mode of treatment for her." The court noted that the doctor "neither administered or [sic] prescribed any medical treatment." Reversed.

People v. Faz, No. E043111, 2008 WL 4294946 (Cal. Ct. App. Sept. 22, 2008) (unreported)
The prosecution's unsworn statements were insufficient to meet its "burden to present . . . competent evidence showing reasonable diligence . . . to secure the [witness's] attendance at trial." The prosecution also failed to demonstrate that the defendant forfeited his right to confront the witness under the forfeiture by wrongdoing doctrine because the prosecution offered no competent evidence to support that conclusion, only offering its own statements about the reasons for the victim's absence. "[T]he unsworn statement of a prosecutor is not evidence." Remanded for a hearing on forfeiture and unavailability.

People v. Moreno, 160 P.3d 242 (Colo. 2007)
At trial, the court admitted a videotaped interview of the complainant eight-year-old, who accused the defendant of molesting her. The police conducted the interview twice, the second time in a facility with video cameras. While the defendant's appeal was pending, *Crawford* was decided. On appeal, the state argued that because the defendant's traumatization of the victim rendered her unavailable to testify (for fear of retraumatization), he forfeited his right to cross-examine her.

The Colorado Supreme court disagreed and reversed the trial court. It held that, while there may be a "murder exception," generally "apart from any design or attempt by the defendant to subvert [the truth-seeking] process," the defendant will not have forfeited his right to confront witnesses against him. It emphasized the Court's language in *Davis* suggesting that the Federal Rules of Evidence (FRE) codified *Reynolds v. United States*, which was the "Court's only significant on the doctrine of forfeiture by wrongdoing." Because FRE 804(b)(6) requires that the defendant to have procured the witness's unavailability for the purpose of keeping them from testifying. The Colorado court also relied on language in the *Davis* Court's addressing the forfeiture rule's purpose: to prevent defendants from undermining the judicial process by "procuring or coercing silence from witnesses and victims." The Colorado court distinguished the cases from jurisdictions that did not require a showing of intent to prevent the witness from testifying by noting that those cases all involved a murder. It did not rule on whether a murder victim's statements would be admissible under the doctrine. Note that the Supreme Court had not yet decided *California v. Giles* when this case was decided. Judgment of the Court of Appeals affirmed.

State v. Byrd, 923 A.2d 242 (N.J. Super. Ct. App. Div. 2007)
Prior to trial, the court conducted an ex parte interview of a witness in camera and determined that the witness did not wish to testify because he had been threatened by the defendants.

Without more, the appellate court held that the "ex parte procedure employed here was at variance with the full evidentiary hearings conducted outside the presence of the jury in

forfeiture-by-wrongdoing cases." It then cited several federal cases involving forfeiture-by-wrongdoing claims but provided no further explanation. The court did not discuss harmlessness. It did, however, explicitly decline to adopt a state law based forfeiture by wrongdoing doctrine and held that the statement should not have been admitted under current state law. Reversed.

State v. Wright, 726 N.W.2d 464 (Minn. 2007)
At trial, the court admitted the testimony of the investigating officer recounting the nontestifying complainant witnesses' statements to the officers at the scene of the alleged incident. The statements were taken after the defendant had been taken into custody.

The appellate court held that the statements "squarely" fell within the areas proscribed by the Confrontation Clause. Turning to harmlessness, the court noted that the statements were "highly persuasive [and] . . . they featured prominently in closing argument.

The appellate court granted the state's request for a remand on the issue of forfeiture by wrongdoing. It held that because the trial court had merely held a hearing on unavailability, the record lacked any findings on forfeiture, and the state was entitled to present evidence to establish, by a preponderance of the evidence, that the defendant engaged in wrongful conduct with the intent to make the complainants unavailable and that wrongful conduct actually caused their unavailability.

State v. Waddell, 134 P.3d 36 (Kan. Ct. App. 2006)
At trial for rape, aggravated indecent liberties, aggravated criminal sodomy, aggravated indecent solicitation of a child, and criminal threat, the court admitted the video of statements the complainant child made to a "special investigator." The special investigator was employed by Social and Rehabilitation Services. The interview took place at a Child Advocacy Center and was designed to elicit information that would be forwarded to law enforcement. At trial, evidence showed that the defendant had threatened to kill the complainant "if she told."

The appellate court reversed. It held that the statements were clearly testimonial in light of the purpose of the interview. It adopted a "reasonable person" standard to determine whether the complainant had a reasonable expectation that the statements would be used to prosecute the defendant. It rejected the state's proffered "reasonable child" standard, reasoning that "to allow the prosecution to utilize statements by a young child made in an environment and under circumstances in which the investigators clearly contemplated use of the statements at a later trial would create an exception that we are not prepared to recognize."

The court also held that the state had failed to make a showing of forfeiture by wrongdoing. It held that for cases other than murder, the "causative factor has consistently been some act independent of the crime charged. It suggested that the wrongdoing needed to occur after the crime charged, something the state had not shown here. It also emphasized that at the "availability hearing" the complainant had testified that she was "not afraid that anyone in the room" would do anything to her.

State v. Romero, 133 P.3d 842 (N.M. Ct. App. 2006)
At trial for domestic violence related crimes, the court admitted numerous statements by the victim, who was later murdered by the defendant, a crime for which he was tried separately. The murder took place during a fight between the victim and the defendant. The evidence at the murder trial indicated that the defendant and victim fought, made up, fought again, and went to sleep. When the defendant woke up, he found the victim dead.

On appeal from the domestic violence crimes, the state maintained that the victim's statements should be admitted based on the forfeiture by wrongdoing doctrine. The appellate court held that despite its disagreement with the rule, the doctrine required the state to prove, even in cases where the defendant had murdered the declarant, that the defendant committed the wrong with the intent to keep the declarant from testifying. It also held that, while it is permissible in some instances to infer such an intent, the facts here did not warrant such an inference. Because nothing presented at the defendant's murder trial indicated such an intent, the court declined to find one. Instead, it remanded for the trial court to determine whether the defendant had such an intent. If he did, the court ruled that his convictions should not be reversed. Remanded.

People v. Hampton, 842 N.E.2d 1124 (Ill. App. Ct. 2005) *vacated in part on other grounds by* 867 N.E.2d 957 (Ill. 2007)
At trial, the court, over a defense objection, admitted the handwritten statement of the alleged coperpetrator, who was tried separately. The state had called the coperpetrator to testify, but he refused, claiming a Fifth Amendment privilege. The trial court held him in contempt when he continued to refuse to testify despite a court order to do so.

On appeal, the state conceded that the handwritten statement was testimonial hearsay, but it contended that the defendant had forfeited his right to confront the witness by his wrongdoing. Specifically, the state alleged that the defendant authored a letter to the coperpetrator requesting him not to testify. The appellate court held that "any conduct by an accused intended to render a witness against him unavailable to testify is wrongful and may result in forfeiture of the accused's privilege to be confronted by that witness." It held that because the trial court had not addressed the contested issue of the authorship of the letter, it would remand for it to do so.

State v. Alvarez-Lopez, 98 P.3d 699 (N.M. 2004)
After being indicted for robbery, the defendant absconded and was a fugitive. Seven years later, facing charges in federal court, the defendant informed the court of the pending charges against him in state court. In the intervening seven years, the principal witness against him, the alleged coperpetrator, had served his sentence and was deported to Mexico. At trial, the court admitted the coperpetrator's statement made to the police after being read his *Miranda* rights.

The appellate court reversed. It rejected the state's argument that the defendant forfeited his Confrontation Clause rights by absconding for seven years. Adopting the Federal Rule of Evidence 804(b)(6) to determine whether a defendant has forfeited his Confrontation Clause

rights, the court reviewed whether (1) the declarant was to be a witness, (2) the declarant became unavailable, (3) the defendant's misconduct caused the unavailability, and (4) the defendant intended by his misconduct to prevent the declarant from testifying. The appellate court held that because the defendant did not cause the deportation and because nothing in the record indicated that the defendant intended to keep the coperpetrator from testifying, the defendant had not forfeited his Confrontation Clause rights.

Other Availability Issues

State Court Cases

Corona v. State, 64 So.3d 1232 (Fla. 2011)
Citing two prior state precedents, the Florida Supreme Court held that the pre-trial discovery depositions were an inadequate opportunity for cross-examination. The depositions are designed to uncover evidence and potential witnesses, not for impeachment of the witness. Thus, they are not an adequate substitute for cross-examining the witness. Here, because the defendant's only prior opportunity to cross-examine the witness was at a discovery deposition, the admission of that witness's testimony violated the Confrontation Clause.

State v. Cabbell, 24 A.3d 758 (N.J. 2011)
The opportunity to cross-examine a witness is not satisfied by cross-examination during a hearing outside the presence of the jury which is conducted to determine the reliability of the witness's testimony, particularly where the witness is otherwise available and where the defense was not informed in advance of the hearing that the hearing would be the only opportunity to cross-examine the witness.

State v. Sine, 167 P.3d 485 (Or. Ct. App. 2007)
At trial, over the defendant's objection, the court admitted the defendant's wife's "petition to plead guilty" which inculpated the defendant as a coconspirator. She asserted the spousal privilege at trial. The trial court admitted her statement even though it conceded that it was testimonial, reasoning that the state having subpoenaed the wife to testify had made her available for cross-examination.

On appeal, the state conceded error, and the appellate court explained that subpoenaing someone is not sufficient to make them available where they assert a privilege not to testify because the privilege makes the unavailable for cross-examination. Reversed.

Wilson v. State, No. 05-06-00788, 2007 WL 2193347 (Tex. App. Aug. 1, 2007) (unreported)
At trial for robbery, the court admitted the nontestifying codefendant's written confession. The codefendant claimed that the defendant approached the codefendant and suggested the robbery and specifically asked the codefendant to be the driver. When the prosecution moved to admit

the statement, the defense objected, and a hearing was held outside the presence of the jury. The prosecution indicated it had subpoenaed the codefendant and had offered him testimonial immunity. During the hearing, the codefendant testified that he understood that he could be compelled to testify, and the defense did not cross-examine him. Despite finding the codefendant available, the court admitted the confession. The codefendant never testified in front of the jury.

The appellate court ruled that it was the prosecution's burden to demonstrate the confession was admissible, and without calling the codefendant it was not. The court suggested, without explicitly stating, that it was improper for the prosecution to have argued in front of the jury that if the defendant wanted to cross-examine the codefendant, he was available to do so. In finding prejudice, the court noted that that the prosecution argued in its closing that the statement should be used to resolve any doubts about the evidence. Reversed.

In re State ex rel. A.E.L., No. FJ-03-2345-04D, 2007 WL 1555329 (N.J. Super. Ct. App. Div. May 30, 2007) (unreported)

At trial for sexual assault, the complainant testified that he had seen someone's penis, but was unable or unwilling to testify about who he had seen. The defense did not cross-examine the complainant. After the complainant's testimony, the state sought to introduce a videotaped interview of the complainant, during which the complainant identified the defendant as the perpetrator. The defense objected to its admission and, in the alternative, asked to cross-examine the complainant about the interview. The trial court refused, ruling that any cross-examination would not be productive, and defense counsel agreed.

The appellate court reversed, holding that although the defense had the opportunity to cross-examine the witness, it was not sufficient because the court did not make the witness available for cross-examination after introduction of the videotaped interview. It noted, but explicitly did not rely on, a state opinion discussing in dicta the situation where a child victim is unable or unwilling to respond to questions and is thus not available for cross-examination. Instead, the appellate court held that the judge erred by declaring the child unavailable without giving the defense an opportunity to ask questions. Reversed.

Howard v. State, 853 N.E.2d 461 (Ind. 2006)

At trial for child sexual abuse, the court admitted the deposition testimony of the complainant. The complainant took the stand, but began crying and eventually said she could not testify. The trial court found her unavailable.

The appellate court reversed. Although its discussion of whether the statements were admissible was largely couched in terms of the Confrontation Clause, the court analyzed whether the complainant was unavailable under the state's "protected person statute." It used that analysis to find the state's showing of unavailability inadequate for Confrontation Clause purposes. The lack of testimony by a medical or mental health professional about the nature and extent of her

condition rendering her unavailable and absence of a finding that the complainant was unable to participate for medical reasons or otherwise incompetent to testify rendered the state's showing of unavailability inadequate. Reversed.

Improperly Limited Cross-Examination

Witness Refusal or Inability to Testify

Federal District Court Cases

United States v. Smallwood, No. 5:08-CR-38, 2010 WL 4168823 (W.D. Ky. Oct. 12, 2010)
Prior to trial, the trial court held that tool mark testimony, claiming that particular cuts could be made by a particular knife, was inadmissible. The purported expert claimed to be unable to review photos offered by the defense to discuss the identification because the photos were of low quality.

The court excluded the testimony, reasoning, in part, that the expert's testimony could not meaningfully be cross-examined.

State Court Cases

Deloatch v. State, 673 S.E.2d 576 (Ga. Ct. App. 2009)
At trial for armed robbery, the prosecutor examined the alleged codefendant about statements he made to the police regarding prior robberies undertaken in a manner similar to the one in question. The statements inculpated the defendant in those robberies and were used to show a common modus operandi. The codefendant refused to answer any questions from any party, pleading a Fifth Amendment privilege in response to each question.

The appellate court reversed. It held that allowing the prosecutor to read the statements into the record, while not technically testimony, violated the defendant's confrontation rights because he was not given an opportunity to examine the codefendant about them.

State v. Zamarripa, 199 P.3d 846 (N.M. 2008)
At trial, a witness who had previously given a statement was given limited immunity from prosecution related to his testimony. He would not be prosecuted based on the statements he made confirming that he had made the statement to the police, but the immunity did not reach testimony about the subject of the statements. The witness claimed a Fifth Amendment privilege as to the latter statements.

The appellate court reversed. Because the witness was never available to the defense for cross-examination about the substance of the statements, the cross-examination was impermissibly restrictive. The error was not harmless because of the emphasis the state placed on it in closing

argument, because it was the only non-self-serving testimony that undermined the defendant's claim of self-defense, and because there was otherwise "very little direct evidence" that the crime was gang related, the state's theory of the case. Reversed.

State v. Mitchell, 662 S.E.2d 493 (S.C. Ct. App. 2008)
Where a witness merely took the stand, was subject to some direct examination, and then refused to testify further, the defendant did not have an opportunity to cross-examine the witness such that the introduction of the witness's statement violated the Confrontation Clause. Reversed.

Milton v. State, 993 So.2d 1047 (Fla. Dist. Ct. App. 2008)
The trial court, over a defense objection, allowed the prosecution to ask leading questions of the previously convicted codefendant despite his refusal to testify. The prosecution asked a series of leading questions, each suggesting that the codefendant had offered statements inculpating the defendant, and the codefendant witness refused to answer them. The defense asked only one question, whether the codefendant would continue to refuse to answer questions. He answered in the affirmative.

The appellate court noted that the prosecution had notice, based on the preliminary hearing, that the witness would not testify, making the error more egregious. Reversed.

State v. Blue, 717 N.W.2d 558 (N.D. 2006)
The trial court admitted the videotaped statement of the child complainant over a defense objection. The complainant made the statements to a forensic interviewer, who, upon completion of the interview, provided a police officer with a copy of the interview. The interview took place at a Child Advocacy Center and the investigating officer watched the interview watched the interview in another room. Prior to trial, the court held an evidentiary hearing on whether the complainant was competent to testify. During the hearing the complainant sat on her mother's lap, and the defense asked no questions. At its conclusion, the court determined the complainant was unavailable.

The appellate court held that the forensic interviewer was the "functional equivalent" of a police interview and, thus, produced a testimonial statement. It also held that, contrary to the state's argument, the defense had not had an opportunity to cross-examine the complainant. It held that a witness's "mere appearance at a preliminary hearing is not an adequate opportunity for cross-examination for purposes under the Confrontation Clause." It emphasized that if the complainant had testified at trial, the videotaped statement may have been admissible. Reversed.

State v. Sanlin, No. W2004-00841-CCA-R3-CD, 2005 WL 1105227 (Tenn. Ct. App. May 6, 2005) (unreported)
At trial for aggravated robbery and aggravated kidnapping, the trial court admitted testimony that the nontestifying codefendant had pled guilty. The codefendant was called to testify by the

prosecution, even though the prosecution knew that the codefendant intended to make a claim of privilege.

The appellate court reversed. It held that the guilty plea was testimonial hearsay and should not have been admitted. The court found a violation of due process and the right to confrontation. Due process was violated because "the prosecutor consciously attempt[ed] to influence the jury by building its case out of inferences arising from the use of testimonial privilege." The defense's lack of opportunity to cross-examine the codefendant violated the defendant's right to confrontation. The court assessed the following factors: "(1) the prosecutor's intent in calling the witness; (2) the number of questions which elicit an assertion of the privilege; (3) whether either side attempted to draw adverse inferences, in closing argument or at any time during trial, from the witness' refusal to testify; (4) whether inferences relate to central issues or collateral matters; (5) whether the inferences constitute the only evidence bearing upon the issue or are cumulative of other evidence; and (6) whether the trial court provided curative instructions." The court primarily relied upon the prosecutor's knowledge of the codefendant's lack of cooperation and his emphasis on the allocution in closing argument to find prejudice.

State v. Armstrong, Nos. 2001-T-120, 2002-T-0071, 2004 WL 2376467 (Ohio Ct. App. Oct. 22, 2004) (unreported)

At trial, the prosecutor called a previously cooperating witness to testify. The witness had also previously confessed, implicating the defendant. At trial, the witness claimed a lack of memory, and the prosecutor attempted to refresh the witness's recollection in front of the jury by read portions of his confession to him. The witness never acknowledged making the confession, but did not invoke Fifth Amendment privilege.

The appellate court reversed. It held that because the witness never specifically "affirmed the statement as his," the defendant had been precluded from cross-examining him on the statement. Even though the prosecutor's statements are not evidence, the court, citing *Douglas v. Alabama*, 380 U.S. 415 (1965), held that allowing the prosecutor to introduce the statements in that manner freed the jury to infer their truth. It emphasized that the key in *Douglas* was the inability to cross-examine, and that it was irrelevant whether the inability was based on a purported lack of memory, as here, or on an invocation of the Fifth Amendment, as in *Douglas.*

People v. Campos, No. B166705, 2004 WL 2223055 (Cal. Ct. App. Oct. 5, 2004) (unreported)

At trial for first degree murder, the court admitted the prior testimony of a non-testifying alleged accomplice who had testified in a separate trial against other alleged accomplices. At the defendant's preliminary hearing and trial the alleged accomplice declined to answer any questions.

The appellate court reversed, rejecting the state's contention that the alleged accomplice's mere presence was sufficient to make him available for cross-examination. The court disagreed, noting that the defendant had "no meaningful opportunity" to cross-examine the accomplice.

The admission was not harmless because the accomplice's testimony "fit the other pieces of evidence into a coherent whole."

Miller v. State, 177 S.W.3d 1 (Tex. App. 2004)
At trial, the complainant testified as the state's primary witness. Even though the complainant spoke English well enough to identify the defendant as the perpetrator—but only in response to the state's leading questions—the complainant's inability to understand basic questions put to him by the defense rendered him unavailable for meaningful cross-examination. Reversed.

Court Imposed Limitations

U.S. Court of Appeals Cases

Tuite v. Martel, No. 09-56267, 2011 WL 6042371 (9th Cir. Dec. 6, 2011)
At trial for murder, the court did not permit the defense to cross-examine the state's expert about a letter he wrote criticizing the defense expert. The defense expert worked for the law enforcement investigating the case, but had concluded that the crime scene reflected a crime committed by someone familiar with the location. The state's theory was that the crime was an attack by a stranger. The letter accused the defense expert of obstructing justice.

On appeal, the court held that the limitation was in error because it would have undermined the credibility of the state's expert by demonstrating his bias in favor of the prosecution.

Brinson v. Walker, 547 F.3d 387 (2d Cir. 2008)
At a trial for robbery, the court did not permit the African-American defendant to cross-examine the complainant about his racial bias towards African-American people. The defendant intended to cross-examine him about being fired for using racial epithets. The trial court held that because the statements were both subsequent to the incident, they were irrelevant to the witness bias at the time of the incident. The defendant was convicted and appealed. The appellate court affirmed and held that the statements, while relevant, were mere evidence of general ill will, not evidence of ill will towards the defendant. The defendant petitioned for habeas corpus, and the Court of Appeals affirmed the Federal District Court's grant of relief.

It held that the state courts' decisions unreasonably applied the principle that a defendant may cross-examine a witness about "a prototypical form of bias," such as racial bias, and noted that the witness's bias was "an extreme form of bias." It held that the error was not harmless because the witness was the only source of evidence against the defendant and that the little corroborating evidence was consistent with the defendant's theory of the case. Affirmed.

Barbe v. McBride, 521 F.3d 443 (4th Cir. 2008)

At trial for sexual abuse of a minor, the court relied on the state court's *per se* bar in its rape shield law to prohibiting the defendant from cross-examining the state's psychological expert about the minor victim's prior accusations of sexual assault, undermining the defendant's ability to argue that it was the prior incidents of sexual assault that created the victim's "psychological profile" as an adult who had been abused as a child.

The Court of Appeals held that the state court's failure to "determine, on a case-by-case basis, whether application of the rule is arbitrary or disproportionate to the State's legitimate interests" (internal quotations omitted) was an unreasonable application of federal law. The exclusion in this case was not harmless error because it was "the only way to rebut the inference created by the expert's testimony."

Burbank v. Cain, 535 F.3d 350 (5th Cir. 2008)
At trial, the court did not permit the defense to cross-examine the state's "principal witness" about "whether she had reached a plea agreement" on her pending criminal charges. The trial court did permit the defense to establish that she had pending charges of an unspecified nature and that her case had been continued twenty-two times. The Court of Appeals found the error not to be harmless beyond a reasonable doubt because the witness was the only evidence linking the defendant to the crime and because the plea agreement was directly related to the witness's testimony in the pending case. It did not explicitly address whether admitting the statement was error because it agreed with the state court finding of error and only disagreed as to harmlessness. Affirmed.

Hargrave v. McKee, No. 05-1536, 2007 WL 2818339 (6th Cir. Sept. 27, 2007) (unreported)
At trial for carjacking, the court prohibited defense counsel from cross-examining a witness about her psychiatric condition and whether she was using any medication. The trial court limited the cross on these subjects to whether the witness had been diagnosed with schizophrenia.

The Court of Appeals ruled that the proposed areas of cross-examination addressed the witness's "perceptions of the events at issue," including "ongoing delusions in many ways similar to the allegations" for which the defendant was being prosecuted, and were areas of cross-examination protected by the Confrontation Clause. They were not "with regard to general credibility," as claimed by the prosecution. The error was not harmless because the witness's testimony provided the only evidence of two elements of the crime. The Court of Appeals also found that the state had waived the harmless argument by failing to address it in its briefing. Reversed and remanded.

Vasquez v. Jones, 496 F.3d 564 (6th Cir. 2007)

At trial for homicide, the court admitted a preliminary hearing transcript of a witness who subsequently became unavailable. The court, however, did not permit defense counsel to present evidence of the witness's prior criminal record at the trial concluding that defense counsel's motive to cross-examine the witness at the preliminary hearing was "close enough" for trial, and thus the failure to cross-examine the witness about the priors at the preliminary hearing barred admission at trial.

The Court of Appeals held that the state court's "failure to recognize that the trial court's exclusion of Vasquez's impeachment evidence" was an unreasonable application of Supreme Court precedent. The error had a "substantial and injurious effect" because of the importance of the witness's testimony, as demonstrated by the prosecutor's argument, the jury's request to review the transcript, and that the witness was a "tiebreaker" between defense and prosecution witnesses on whether the defendant shot a gun. The court also noted that it would have been "unrealistic" for defense counsel to be prepared to question the witness about his criminal history at the preliminary hearing. Reversed and remanded.

United States v. Jimenez, 464 F.3d 555 (5th Cir. 2006)
At trial for narcotics trafficking, the district court prohibited the defense from cross-examining a police officer about his exact location during his observation of the defendant's house during the alleged offense.

The Court of Appeals held that prohibiting such examination violated the Confrontation Clause because the officer was the only witness to the defendant's distribution, and the government did not otherwise offer evidence—such as photographs of the transactions or witness statements about receiving the drugs—that the transactions took place. Hence, the proposed cross-examination was the only way to test the reliability of the testimony. Looking "primarily at the specific testimony omitted, rather than the weight of the evidence notwithstanding the omitted testimony," the court found that the error was not harmless because the credibility of the witness was "not just the Government's smoking gun; it was the Government's *only* gun." Vacated and remanded.

United States v. Vega Molina, 407 F.3d 511 (1st Cir. 2005)
At trial, the district court did not permit the defendant to cross-examine a co-conspirator about her motives for cooperating with the authorities. Specifically, the trial court prohibited the defendant from cross-examining her about her motive for joining the conspiracy, another defendant's prior acts of violence against her, and statements by the other defendant to the effect that he and the witness had conspired to frame the defendant.

The Court of Appeal found each limitation erroneous. It found the latter "serious," especially in light of the defendant's main theory of defense: he was framed. The court held that the

government's failure to argue that the error was harmless waived the argument, but noted that "there is every reason to doubt whether the outcome . . . would have been the same."

White v. Coplan, 399 F.3d 18 (1st Cir. 2005)
At trial for sexual assault, the trial court did not permit the defendant to cross-examine the only two witnesses with firsthand knowledge of the alleged assaults, the alleged victims, about their prior allegations of sexual assault. He proffered evidence that their prior allegations were false, including an acquittal and a confession that they had lied about prior allegations. At closing, the prosecutor emphasized that his case was built on the theory that "the kids are telling the truth" and that the defense's case is that "[t]he kids are lying." The trial court limited the cross-examination because it held that the defendant could not establish, as state law required, that the prior accusations were "demonstrably false." The New Hampshire Supreme Court affirmed and held that while the defendant had established a "reasonable probability" of their falsity, he had not met the "demonstrably false" standard. The state court also rejected the defendant's claim that the rule violated the Confrontation Clause. On habeas corpus, the Federal District Court denied relief, and the Court of Appeals reversed.

The Court of Appeals held that the state court's limit on cross-examination was an unreasonable application of clearly established law. It noted the similarity between the past accusations to the assault alleged and the state court finding that there was a "reasonable probability" allegations were false. Because the only realistic way the petitioner could defend himself was by impeaching witnesses, he had a right to do so. However, the court limited its ruling, noting that the "demonstrably false" standard was not in all cases "infirm." Vacated and remanded.

Howard v. Walker, 406 F.3d 114 (2d Cir. 2005)
The trial court ruled that if the defense cross-examined the state's expert on the basis of his opinion, then the statements the expert relied upon, including a non-testifying co-conspirator's statement, could be admitted at trial. The defendant was convicted and lost on appeal and in state court. The latter ruled that the expert would have reached his decision with or without the co-conspirator's statement and that any error was therefore harmless. The Federal District Court denied his petition, and he appealed.

Because the conviction became final before *Crawford*, the Court of Appeals applied pre-*Crawford* case law. It ruled that the co-conspirator's statement was inadmissible and that the state court's determination was an unreasonable determination of the facts because the expert could not have reached the same conclusion without the statements. Thus, the Court of Appeals ruled that the state court unconstitutionally required petitioner to choose between cross-examining the expert and having constitutionally inadmissible evidence presented against him. Reversed and remanded.

Kittleson v. Dretke, 426 F.3d 306 (5th Cir. 2005)
At trial for indecency with a child by contact, the court did not permit the defense to cross-examine two witnesses, the complainant and the reporting officer, about the recantation of a second complainant. The trial court also barred him from cross-examining the complainant about her past accusations of sexual abuse. Nonetheless, the jury did hear evidence there was a second complainant when the reporting officer testified that he arranged for child protective services interviews for both complainants.

The Court of Appeals ruled that the claim of Confrontation Clause error was fairly presented in state court because of the defendant's citation to the Sixth and Fourteenth Amendments and to case law he described as finding a violation of the "confrontation clause right from denial of cross-examination." The Court of Appeals found the limits on cross-examination a violation of the defendant's rights because "[e]xcluding the evidence of Jana's recanted testimony left [defendant] unable to fully cross examine . . . the two critical prosecution witnesses, and . . . the jury was left with the impression that [the second victim] also accused" the defendant. It noted that "[t]his case turned entirely on the [victim's] word against [the defendant's]," and, thus, found that the error had a "substantial and injurious effect on the jury's verdict."

Federal District Court

Corby v. Artus, 783 F. Supp. 2d 547 (S.D. N.Y. 2011)
At trial for murder, the defense sought to cross-examine the primary prosecution witness against him about her motive to lie. She owned the room where the murder took place, was allegedly present at the murder, and allegedly rented the room to the defendant. The defendant sought to cross-examine her about her initial denial of having any information about the murder, that the investigating detective informed the witness that the defendant had implicated her in the murder and only after learning she had been implicated did she provide crucial details about the murder.

The federal district court granted the petition for writ of habeas corpus on the basis of a Confrontation Clause violation. It explained that the Supreme Court has made clear that "the ability to explore varieties of bias, and not merely the existence of reasons for bias in general, is essential to the proper exercise of the right to confront witnesses." Here, excluding cross-examination of the "retaliation-based bias, and/or bias stemming from a desire to shift blame" was an unreasonable application of clearly established federal law.

State Court Cases

Downing v. State, 259 P.3d 365 (Wyo. 2011)
At trial for unlawful delivery of a controlled substance, the court prohibited the defense from cross-examining the confidential informant about prior purchases he made as part of a defense

theory that the informant had conned the police and framed the defendant. The limitation was improper because it prevented the defense from impeaching the witness and prevented the defense from presenting its theory of the case.

Guam v. Ojeda, CRA-10-011, 2011 WL 6937376 (Guam Dec. 23, 2011) (unreported)
At trial for criminal sexual conduct, the prosecution presented the evidence of a medical professional who talked at length about an injury to the complainant child's hymen. She explained that the injury was consistent with penetration. Nonetheless, the trial court barred the defense from cross-examining the complainant about allegations she had made against another man, who the defense maintained was the source of the complainant's injuries.

The appellate court held that the restriction violated the defendant's confrontation rights. It explained that ordinarily the "victim's virginity, or lack thereof, has no relevance" in such a case, the prosecution made it an issue, and barring the defense from inquiring about the other allegations was prejudicial error.

State v. Howland, 808 N.W.2d 742 (Wis. Dec. 14, 2011) (unreported)
At trial for sexual assault of a child, the trial court erred by failing to allow the defendant to cross-examine the complainant's mother about her pending charges of physical abuse of the complainant. Regardless of any promises made by the State, because any witness with pending charges is "both 'subject to the coercive power of the [S]tate' and 'the object of its leniency.'" (alteration in original). Because the prosecution repeatedly argued that the complainant's mother had nothing to gain by testifying, the error was not harmless.

Blackman v. State, No. 53468, 2011 WL 6143427 (Nev. Dec. 7, 2011) (unreported)
At trial for pandering of a child and related offenses, the court erred by failing to admit evidence of a "crucial" witness's juvenile delinquency status. The state's interest in the confidentiality of those records was outweighed by the defendant's right to confrontation because the records were offered to "expose bias and show facts that might color the witness's testimony." The court found error without specifying whether the trial court or the trial attorney was at fault. Reversed.

Blades v. United States, 25 A.3d 39 (D.C. 2011)
At trial for murder, only one witness was called. The witness testified that he was on "very good terms" with the defendant and that he had "no grudges" against him. Nonetheless, the trial court did not permit the defense to cross-examine the witness about an incident during which the defendant was fleeing from a shooter and the shooter shot the witness's stepson. The defendant had refused to testify against the shooter.

The appellate court reversed. It held that the trial court unduly limited the defendant's ability to cross-examine the witness about his bias towards the defendant. It explained that where the

government's case rests on the testimony of one witness, the trial court should be "particularly prepared" to permit cross-examination of that witness.

State v. Salas, 253 P.3d 798 (Kan. Ct. App. 2011)
The trial court's prohibiting the defendant from cross-examining the alleged accomplice-come-informant about both the plea agreement he obtained in exchange for his testimony and other pending charges against him violated the defendant's right to confront the alleged accomplice. The appellate court noted that trial courts should give particular latitude in the cross-examination of accomplices given their interest in minimizing their own culpability.

State v. Folk, 256 P.3d 735 (Idaho 2011)
At trial for sexual abuse of a child, the court permitted the complainant child to testify via closed circuit television. The court also required the defendant, who was representing himself, to write out the questions he wished to ask the child on cross-examination for a stand-in attorney to read to the child. The court had found that based on nightmares, both limitations were necessary.

The appellate court reversed. It found that the record was inadequate to find such limitations necessary. It noted that there was evidence of one nightmare, not nightmares. Thus, the only factual basis for the finding was flawed and insufficient. The court also noted that cross-examination is a "fluid" exercise, particularly with children. Thus, requiring the defendant to write out his questions unduly limited his ability to reword questions and to dynamically respond to the witness.

People v. Abelo, 79 A.D.3d 668 (N.Y. App. Div. 2010)
At trial for driving with a suspended license, the court admitted a notice of suspension without the testimony of anyone familiar with the mailing practices of the Department of Motor Vehicles at the time the suspension took place. Whether it was mailed was relevant to whether the defendant knew or had reason to know that his license was suspended.

The appellate court reversed, holding that where no one testified regarding the practices of the DMV at the time of the suspension, the defendant was deprived of his right to confront the witnesses against him because the notice was testimonial evidence.

State v. Herring, 19 A.3d 81 (Vt. 2010)
At trial for sexual assault the complainant testified that the defendant forced her to repeatedly wash her mouth out with Alka-Seltzer after he forced her to have oral sex. At trial she testified this took place at his home. The defendant sought to introduce her prior inconsistent statement claiming the incident took place in a hotel in a different county. The trial court excluded the evidence because it ruled the evidence was unduly prejudicial to the *defendant*.

The appellate court reversed. It held that the credibility of the complainant was central to the prosecution's case even though other evidence suggested he was guilty, including the defendant's brothers testimony about an alleged confession he made to them. The complainant's credibility was central because the brothers had not reported the confession in their initial interaction with the police.

People v. Durden, Nos. A121901, A126649, 2010 WL 2982816 (Cal. Ct. App. July 30, 2010) (unreported)
At trial, the court prohibited defense counsel from cross-examining the investigating officer about where he was located when he observed the defendant's alleged crime. The appellate court ruled that the prohibition violated the defendant's right to confrontation because of the importance of the officer's testimony and because of the jury's questions which suggested they had doubts about the officer's ability to adequately observe the defendant.

State v. Calvin N., 998 A.2d 810 (Conn. App. Ct. 2010)
At trial, the court prohibited defense counsel from cross-examining the complainant about a letter in which she acknowledged she fabricated the allegations about the defendant. The state claimed the letter was written by the complainant's mother, who was facing charges related to the letter.

Finding plain error, the appellate court held that the trial court's sole reliance on the state's representation that the complainant's mother authored the letter was an abuse of discretion. It also foreclosed a "significant means of attacking the complainant's version of events" and was "central to the defendant's theory of defense." Although the alleged motives for fabricating the charges were covered during cross-examination, not being able to cross-examine the witness on her admission that she fabricated the charges was not harmless. Reversed.

Cousins v. Commonwealth, 693 S.E.2d 283 (Va. Ct. App. 2010)
At a murder trial, the court prohibited the defense from cross-examining a witness about whether the witness and the alleged victim were both in a gang. At the preliminary hearing the witness had denied either were in a gang.

The appellate court found prejudicial error because being "members of the same street gang was relevant to the issue of [the witness's] bias and that whether [the witness] was biased was material to appellant's theory of the case[, self-defense]." It noted that the defendant had proffered evidence of two officers who knew the witness and victim were in the same gang. Reversed.

State v. T.T., 157 Wash. App. 1011 (Wash. Ct. App. 2010)
At trial the court admitted incriminating statements of the testifying child complainant that he had previously made to his foster mother and an investigating officer. At trial, the state asked the complainant about the underlying offense, but not the statements. The alleged sexual contact

was described in the statements, but not the testimony. The statements were introduced by the foster mother and the officer.

The appellate court held that for the defendant to have had an adequate opportunity for cross-examination, the state had "to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses." Asking the complainant about the alleged crime, but not the statements made to the officer and the foster mother, was insufficient to allow the defendant an opportunity to cross-examine the complainant and violated the Confrontation Clause.

State v. Nam, No. 36468-9-II, 2010 WL 1687732 (Wash. Ct. App. April 27, 2010) (unreported)
The trial court prevented the defendant from cross-examining the victim and the state's "chief witness" about whether she wanted to be sure that the defendant went to jail.

The appellate court had previously reversed a conviction for the trial court's same limitation. The appellate court again reversed, holding that the trial court violated the defendant's Confrontation Clause rights. The trial court's requirement of an offer of proof regarding the area of cross-examination "would severely restrict legitimate cross-examination." The error was not harmless because without the witness's testimony the evidence at trial would not have been sufficient for conviction. Reversed.

State v. Stinson, 227 P.3d 11 (Kan. Ct. App. 2010)
The trial court prohibited the defense from cross-examining the state's witness about his prior inconsistent statements. In the prior statements, the witness said he was in a close and not in the room where the incident occurred.

The appellate court found that the limitation violated the Confrontation Clause and was an abuse of discretion because it would be "extremely unlikely" that the witness saw the incident from the closet. The trial court's prohibition had a "likelihood of changing the verdict" because, even though some inconsistencies were pointed out at trial, the jury's repeated questions implicating the witness's credibility "might have been enough to tip the balance." Reversed.

Williams v. State, No. 12-07-00428-CR, 2009 WL 4377196 (Tex. App. Dec. 2, 2009) (unreported)
The trial court prohibited the defense from cross-examining the detective who interviewed the detective about the detective's prior inconsistent statements. The detective testified that he did not think the defendant acted in defense of a third person and that he did not believe the defendant's claim of self-defense. Previously, during the detective's interview of the defendant, the detective stated that the believed the defendant's defense of others and self-defense account.

The appellate court held that the limitation was an abuse of discretion because the statements were contradictory and kept information from the jury that would have allowed it to "more completely assess [the detective's] credibility." Reversed.

State v. Marovich, No. A08-1617, 2009 WL 3426508 (Minn. Ct. App. Oct. 27, 2009) (unreported)
At trial for allegedly selling a controlled substance to a confidential informant (CI), the court prohibited the defense from inquiring about the CI's ongoing drug use after the incident and the CI's drug use around the time of the incident.

The appellate court held that the prohibition "compromised the fairness of the proceedings" for three reasons: (1) it prevented the defense from presenting evidence that the CI was cooperating to avoid punishment for his criminal conduct and to continue his paid position as a CI, (2) it undermined the defense's ability to counter the state's claim that the CI had rehabilitated himself and was, therefore, a reliable witness, and (3) it prevented the defense from attacking the CI's memory. The error was not harmless because the CI had a "powerful motive" to testify favorably. Reversed.

Mendenhall v. State, 18 So.3d 915 (Miss. Ct. App. 2009)
The trial court prohibited defense counsel from cross-examining the witness who identified the defendant as the perpetrator about a statement the witness made to his doctor admitting that he had been drinking on the night of the crime. He was cross-examined about whether he had been drinking, but he denied it.

The appellate court ruled that the limitation was an abuse of discretion because the credibility of the testimony as to the identification "bore directly on the truthfulness of his testimony regarding a material fact in issue." Reversed.

Howard v. United States, 978 A.2d 1202 (D.C. 2009)
The trial court prohibited cross-examination of the arresting police officers about their knowledge of a civil law suit filed by the defendant against the police department. The judge, during the preliminary hearing, had previously found that the officer applying for a search warrant did not know about the suit.

The appellate court held that the limit kept the defendant from exposing a "prototypical form of bias" and that the trial court erred in relying on his prior credibility hearing to use his prior credibility determination to keep credibility information from the jury. The defendant had " a well-reasoned suspicion" of bias based on the arresting officer's involvement in the incident underlying the civil suit. Reversed.

Ryan v. State, No. 04-08-00594-CR, 2009 WL 2045211 (Tex. App. July 15, 2009) (unreported)
At trial for assault of the defendant's common-law wife, the court prohibited cross-examination of the defendant's wife about an ongoing custody dispute between the defendant and the witness.

The appellate court held that the trial court abused its discretion because questions about the custody proceedings would be relevant to the witness's "motivation to exaggerate her testimony at trial." The error was not harmless beyond a reasonable doubt because the limit the witness

was the only witness to the offense, and her motive to lie or exaggerate to gain custody of their children was the "critical issue for the defense."

Hibbs v. State, 683 S.E.2d 329 (Ga. Ct. App. 2009)
The trial court abused its discretion and violated the Defendant's Confrontation Clause rights by preventing the defendant from cross-examining the witness about his juvenile case or whether he was in custody at the time the police interviewed him. The error was not harmless beyond a reasonable doubt because the prosecution's case relied primarily on the witness's credibility.

State v. Clark, 974 A.2d 558 (R.I. 2009)
The trial court prohibited the defense from cross-examining the complaining witness about a civil suit filed against the defendant's employer for the actions that led to the prosecution.

The appellate court reversed. Even though the suit had settled prior to the criminal trial, at the time the witness gave the statement, he had a "financial interest that could motivate him to set forth a foundation of facts propitious to his claim." Because he gave a statement to the police in his attorney's office and was permitted to edit the transcript of it, allegedly to harmonize it with other witness statements, the limitation was reversible error. As an aside, the court admonished the prosecution about its use of "broad-based *in limine* motions [that] . . . impact the constitutional safeguards guaranteed to criminal defendants." It also encouraged the trial courts to conduct voir dire "or otherwise carefully review the challenged evidence and cautiously exercise her or his discretion."

Commonwealth v. Ortiz, 900 N.E.2d 913 (Mass. App. Ct. 2009) (table decision)
At trial for attempted murder, the court prevented the defense from asking the prosecution's key witness questions about whether he had sold drugs to the victim on the day of the shooting. The questions were based on a report of a confidential informant that the prosecution disclosed on the day of the trial and the defense proffered were relevant to whether the witness had a motive to falsely identify the defendant. An independent witness testified that the shooter was ten inches taller and heavier than the defendant.

The appellate court reversed. It held that the disclosed report and the independent witness provided an adequate factual basis for conducting the cross-examination addressing the witness's motive for bias.

Obiazor v. United States, 964 A.2d 147 (D.C. 2009)
At trial for sexual assault of a minor, the defendant sought to cross-examine the complainant about a prior allegation of assault five years before this alleged incident. The prior allegation involved the complainant's grandmother's ex-boyfriend and a hickey between her shoulder and collarbone, the same injury allegedly caused by the defendant. The defendant explained that after the prior allegation, the complainant's grandmother was particularly protective of and affectionate to her.

The appellate court reversed. It held that the defense's proffered reason for cross-examining the complainant on the subject was adequate to warrant putting the evidence before the jury. In addition to noting the similarity of the injuries in question, the court also noted that in the complainant's statement to the police about this incident, she mentioned the prior allegation and rejected the state's claim that the events were dissimilar and remote in time.

State v. Chisolm, No. 05-01-0086, 2008 WL 4998507 (N.J. Super. Ct. App. Div. Nov. 26, 2008) (unreported)
At trial, the court prohibited the defense from cross-examining the state's key witness about his "community service for life" (CSL) prevented an adequate cross-examination, even where the witness had technically answered truthfully when he said he was not on parole.

The appellate court reversed. It held that the difference between CSL and parole is a "distinction without a difference," and the "numerous conditions" of the status resulted in the state having a "considerable 'hold'" over the witness that the defense should have been able to cross-examine him about. Reversed.

Vires v. Commonwealth, No. 2006-SC-000072-MR, 2008 WL 4692362 (Ky. Oct. 23, 2008) (unreported)
Prior to trial, a witness had been subjected to a deposition. At trial, the court limited examination of the witness to the questions asked during the deposition.

The appellate court reached the constitutional question, holding that the limitation violated the Confrontation Clause, even though it also reversed on state law grounds. It held that the defense should have been able to explore other areas with the witness. In dicta, the appellate court noted that the hearsay testimony of another witness, a medical professional, was testimonial hearsay because "identification" testimony is almost never offered for diagnosis or treatment. Reversed.

Brown v. United States, 952 A.2d 942 (D.C. 2008)
At trial, the court prohibited counsel from inquiring why a witness was uncomfortable and scared of an observer in the courtroom.

The appellate court reversed. It held the limitation was unreasonable because the witness was related to the defendant and the observer had previously threatened her and told her "on numerous occasions" that he was frustrated he had not been able to find and kill the defendant. Trial counsel was permitted to ask about the gestures the observer made in the court room, but not allowing counsel to ask why those gestures made the witness nervous violated the defendant's right because he was unable to put her discomfort into context. Reversed.

Kinney v. People, 187 P.3d 548 (Colo. 2008)
At trial, the court prohibited counsel from cross-examining a witness about her expectations regarding a pending criminal trespass case.

The Colorado Supreme Court reversed. It held that the limitation was unreasonable because a pending criminal charge is one of the factors that "might have influenced" the witness. It noted that the witness had two prior arrest warrants for a different charge dropped in exchange for her potential cooperation in the case against the defendant. The court explained that a defendant need not show more than a nexus between the proposed area of cross-examination and an influence on her testimony; there is no requirement to show an actual offer or promise of leniency. Reversed.

State v. Stephen F., 188 P.3d 84 (N.M. 2008)
At trial for rape, the court prohibited counsel from cross-examining the complainant about a prior sexual encounter.

The New Mexico Supreme Court reversed, notwithstanding a rape shield statute to the contrary. It held that prohibiting the defendant from cross-examining the complainant about the prior encounter violated the Confrontation Clause where the defendant's defense was consent and he sought to introduce the prior sexual encounter (and related parental discipline) to show that she fabricated the allegation against him to avoid further parental discipline. The appellate court explained that although there were differences in the two encounters, the differences were irrelevant because it was the fear of punishment that the defendant sought to demonstrate. The witness's immediate disclosure of the encounter, likewise, did not diminish the prior encounter's importance because the motive of fear was "central" to the defendant's case. Allowing the defendant to cross-examine the witness and her family about their religious convictions was not sufficient because it was the prior encounter that provided the witness with a motive to fabricate the current allegation. Reversed.

State v. Jackson, 177 P.3d 419 (Kan. Ct. App. 2008)
At trial for sexual assault of a minor, it was an abuse of discretion to limit the cross-examination of the complainant about her victimization by other persons during the same time period under circumstances where the prosecution argued that the defendant's abuse of the complainant had been the cause of the deterioration of her behavior. The appellate court explained that the defendant was entitled to cross-examine the complainant on the subject because it provided an alternative explanation for the deterioration of her behavior. The appellate court so held despite the applicability of the state's rape shield law. Reversed.

State v. Tiernan, 941 A.2d 129 (R.I. 2008)
The trial court prohibited the defense from cross-examining the complainant about whether he intended to file a civil suit for damages and not whether the victim had an incentive to exaggerate his injury or provide testimony that would bolster his claim for civil damages.

The appellate court reversed, explaining that the trial court had "cut off [the inquiry] at the threshold," and approvingly quoted the D.C. Circuit: "[a] general rule has evolved to the effect that the trial court should allow cross-examination and the airing of evidence with respect to a

witness's pending, or even contemplated, suit against the defendant." The court also held that per se reversal was required.

Wilson v. State, 950 A.2d 634 (Del. Super. Ct. 2008)
The trial court prohibited the defense from cross-examining the alleged coconspirator about the sentence recommendation based on his plea agreement.

The appellate court reversed because the limitation did not "preserve the witness's constitutional immunity from self-incrimination, prevent attempts to harass, humiliate or annoy him, or where the information sought might endanger the witness' personal safety."

State v. Sotomayor, No. 00-08-1621-I, 2007 WL 3239142 (N.J. Super. Ct. App. Div. Nov. 5, 2007) (unreported)
The trial court prohibited the defense from cross-examining the complainant about dismissed criminal charges unless the defendant could show that the charges were dismissed "as a result of her testifying in this case."

Reversing, the appellate court explained that "the issue here is not whether the dismissal of the charges . . . was part of a deal, or even whether the prosecutor's office believed there was sufficient evidence to prosecute her. Rather, the issue is what [the witness] was thinking when she testified for the State." Because the charges may have affected her cooperation, the defendant should have been permitted to inquire into this potential bias.

State v. Fernando R., 930 A.2d 78 (Conn. App. Ct. 2007)
The trial court prevented the defendant from cross-examining the victim's mother about her prior inconsistent statements and her decision to contribute $4000 towards the defendant's bail.

The appellate court reversed. At trial for sexual assault of a minor, the victim's mother testified that she took her daughter to the hospital after her daughter told her the defendant assaulted her. The defendant sought to, and was prevented from, cross-examining her about statements she made to family members claiming that her daughter told her she had touched herself, causing the injury to her hymen. The defendant's theory was that based on a prior investigation into the mother by Child Protective Services, she fabricated the story about the defendant to protect herself.

The defendant also sought to cross-examine her about her contribution to his bail which would further corroborate his theory that the daughter had initially told her mother that she hurt herself and that the mother credited the initial story. The court noted that both matters addressed her credibility and motive and should not have been excluded. Addressing harm, the court noted that even though a police officer and physician testified about the injury, the mother's close relationship with the victim made her testimony particularly important and the limitations on addressing her credibility potentially harmful. Reversed.

Bentley v. State, 930 A.2d 866 (Del. 2007)
At trial for murder, the court admitted the testimony of the defendant's ex-girlfriend, who, on direct examination, testified that the defendant was the shooter. On cross-examination, the ex-girlfriend admitted that she had earlier identified the other person at the scene, Buddy, as the shooter. Ultimately, she admitted that she could not see who did the shooting, but that the defendant had the gun. Buddy testified that the defendant was the shooter. Defense counsel sought to cross-examine the ex-girlfriend about her relationship with the defendant's uncle, on the theory that the new relationship gave her a motive to identify the defendant as the shooter: with the defendant in jail, they could continue their relationship without him around.

The witness invoked her Fifth Amendment privilege because she and the uncle were being investigated in a drug conspiracy involving the uncle. The trial court did not require her to answer the questions. In closing arguments, the prosecution argued that the ex-girlfriend changed her story because her relationship with the defendant was over and she no longer had a motive to protect him.

The Delaware Supreme Court held that the limitation violated the defendant's rights because the ex-girlfriend's new relationship could have explained her motive to change her story. It also emphasized that the prosecution was able to offer an explanation for the change (and did so), while the defendant was denied such an opportunity. Thus, it held that the violation "created a substantial danger of prejudice to his right to a fair trial." Reversed.

In re State ex rel. A.E.L., No. FJ-03-2345-04-D, 2007 WL 1555329 (N.J. Super. Ct. App. Div. May 30, 2007) (unreported)
At a trial court adjudication of delinquency for several sexual offenses, the court admitted videotaped statements of the alleged child victim. The statements were made to police officers, and the child had not been subjected to cross-examination prior to trial. At trial, the child testified, but claimed to have no memory of the episode. Defense counsel did not cross-examine the alleged victim, and the trial court held that the alleged victim had no memory of the episode. The trial court barred defense counsel from recalling the child for further cross-examination. Nonetheless, the trial court admitted the videotaped statements.

The appellate court reversed and held that trial court improperly barred defense counsel from cross-examining the child. The limitation prevented the defendant from having an opportunity to cross-examine the child, so the video was improperly admitted.

People v. Owens, 183 P.3d 568 (Colo. App. 2007)
The defendant was charged with unlawful sexual contact based on an encounter with the purported victim that was interrupted by the victim's friend, with whom she had a sexual relationship. The trial court denied the defendant's request to cross-examine the victim or otherwise present information about the victim's relationship with the friend, based on the state's rape shield law.

On appeal, the defendant argued that the relationship was important because it explained her motive to lie about the consensual nature of the encounter. The appellate court agreed and found that the "romantic and sexual relationship with the friend was relevant and highly probative of the victim's motive to lie." Thus, the court found that exclusion violated the defendant's right to confront witnesses. Reversed.

People v. Tucker, No. C049338, 2007 WL 1181015 (Cal. Ct. App. April 23, 2007) (unreported)
The trial court declined to conduct an in camera review of the juvenile dependency file of the defendant's stepson, a key witness linking the defendant to the crime.

Thus, as the appellate court ruled, the trial court precluded the defendant from exposing the witness's bias against her because the files contained evidence that the witness had lied about her in the past. The appellate court so ruled despite a statutory provision limiting access to the files. Reversed.

People v. Diaz, No. D047420, 2007 WL 1041472 (Cal. Ct. App. April 9, 2007) (unreported)
At a preliminary hearing, an acquaintance of the defendant testified about the alleged robbery. When the defense attempted to cross-examine her about her drug use around the time of the incident, the trial court disallowed it, seeking to protect the witness's right to be free from self-incrimination. The trial court also noted that based on her demeanor and body language, her credibility was "minimal at best." At trial, the prosecution was unable to locate the witness and sought to introduce the preliminary hearing transcript pursuant to a state evidentiary rule. The court admitted the testimony over defense counsel's objection and denied defense counsel's request to introduce the credibility finding from the preliminary hearing.

The appellate court held that admitting the preliminary hearing testimony violated the defendant's right to confrontation because defense counsel was not permitted to cross-examine the witness about her drug use and because the negative credibility finding, based on factors not discernible from the admitted transcript, was not also admitted. Reversed.

Holan v. State, No. A-8802, 2007 WL 706741 (Alaska Ct. App. Mar. 7, 2007) (unreported)
At trial for sexual abuse of a minor, the court precluded the defense from cross-examining the complainant minor about the reasons she had been grounded for a year by her mother and stepfather, the defendant, at the time of the alleged incident. The complainant had been grounded because of her drug use and for sneaking out at night, potentially to have sex with an older man. The complainant's mother would have testified to both, including to her and the defendant's efforts to notify the prosecutor's office of potential statutory rape. The trial court reasoned that allowing the jury to hear evidence that she was grounded was sufficient and there was no need to go into the specifics about why.

The appellate court reversed, holding that the reasons were important. The court noted that parents "frequently ground teenagers," and without an explanation of the reasons why, the defendant needed to establish why the grounding was unusual, so the jury could understand what

would motivate the complainant to make false accusations. The reasons could have been the basis for explaining how "the tension level in the family had reached a point where it was more credible that [the complainant] would make a false accusation." Without the jury knowing the reasons for the grounding, the appellate court also found that it may have reasoned that the defendant had grounded the complainant to make her more vulnerable to sexual abuse.

Davis v. State, 970 So.2d 164 (Miss. Ct. App. 2006)
At trial for murder, the defendant testified that he witnessed, but was not part of, the shooting of the victim. The state offered two witnesses against him, one who claimed he saw the defendant shoot the victim, and another who claimed he saw the defendant reach under his shirt and then heard a gunshot. The second witness's testimony directly contradicted his statement to the police in which he claimed not to be present at the shooting. At trial, the prosecutor asked the second witness if she had promised him leniency in exchange for his testimony and he replied that she did not. The trial judge did not permit defense counsel to cross-examine the second witness about his expectations regarding the prosecutor's office and its ability to provide leniency on his pending drug charges.

The appellate court held that the limitation prevented defense counsel from explaining to the jury why the second witness might change his story: to ingratiate himself to the prosecutor's office. It also noted that the prosecution took advantage of this "handicap" by telling the jury in her closing that the second witness was the defendant's friend and had no reason to lie. Reversed.

People v. Robinson, 859 N.E.2d 232 (Ill. App. Ct. 2006)
At the defendant's DUI trial, the court limited defense counsel's cross-examination of the arresting officer. The officer had testified before a grand jury, implying that he had seen the defendant driving and that even if he had not, simply being in the vehicle while intoxicated constituted drunk driving, "Technically . . . it is even an offense of drunk driving if you are asleep behind the wheel, in the back seat of the car, keys in the front and engine off on private property. But he was parked on the pavement. He had just finished driving." The officer had not witnessed the defendant driving.

The appellate court ruled that the defendant should have been able to confront the officer with his misleading statement that the defendant "had just finished driving" because the statement impeached the officer's testimony that he did not see the defendant drive and supported the defendant's theory that "aggressiveness and exaggeration by [the] Officer . . . were the reasons for the erroneous arrest." The court noted that asking the officer to explain his prior, inconsistent testimony provided the necessary foundation for impeaching the officer, even though he never specifically read the exact question and answer from the grand jury testimony. The court did not address harmlessness. Reversed.

State v. Gregrory, 893 A.2d 912 (Conn. App. Ct. 2006)

At trial for sexual assault, the defendant sought to cross-examine the complainant about their sexual history prior to the incident in question. He sought to ask her about role playing, during which he played the part of burglar and rapist, and she played the part of the homeowner/victim. On the night of the incident in question, the evidence showed that the defendant and the complainant had an argument, at the end of which, he pinned the complainant to the bed, stripped off her clothes, pried apart her legs, and vaginally penetrated her. The trial court denied the defendant's request related to the cross-examination, noting that the trial was about the incident, not prior sexual activity. It did permit defense counsel to elicit her testimony about the couple's use of "leg locking" as a sexual position.

The appellate court reversed. It held that that the excluded cross-examination about their prior sexual conduct could have showed that the complainant had consented and that the defendant was merely playing his usual role. It held that the error "had [some] tendency to influence the judgment of the jury," and was, therefore not harmless for three reasons: (1) no other evidence was presented about their role playing, (2) the complainant's testimony was crucial because it was the only evidence against the defendant, heightening the importance of the excluded cross-examination, and (3) the excluded cross-examination effectively precluded cross-examination on consent, an element of the charged offense.

People v. Flowers, No. No. B179285, 2006 WL 598185 (Cal. Ct. App. March 13, 2006) (unreported)
At trial for second degree murder, the court prohibited the defense from cross-examining a witness about his probation status, both at the time of his testimony and at the time of the statement he gave the police. The defense theory at trial was that he was present at the scene and had fought with the victim, but that he did not shoot the victim. The witness provided the only evidence, in the form of the defendant's alleged confession, that the defendant was the shooter. The witness was initially brought in for questioning, the police considered him a suspect. After his statement, they changed his status to a witness.

The appellate court reversed. It held that while a witness's probationary status may not be relevant to their motive to lie in all cases, it was relevant in this case. Even though the witness acknowledged that it was "best for him to make a statement," the jury did not have the reason the witness might have felt pressured to make a statement that wrongly inculpated the defendant: his concerns about his probation being revoked. It further held that the trial court's insistence that the defense demonstrate that the witness had been threatened with revocation was in error. It held that naming someone else as the shooter was [an] immediate and pressing" need for the witness, and had the jury known about his probation status, it would have had a "significantly different impression" of his credibility. Reversed.

People v. Valdez, No. G035070, 2006 WL 805786 (Cal. Ct. App. March 27, 2006) (unreported)
At trial for three counts of lewd acts against a child, the court precluded the defendant from cross-examining the complainant child about the number of times she met with the child

advocate therapist and whether the interviews were suggestive. The complainant had testified that the therapist had told her what had happened, and the complainant's version of events had changed significantly from the time of her first interview with the therapist.

The appellate court held that the exclusion was error and that the jury would have had a "significantly different impression" of the complainant's credibility had the cross-examination been permitted. It held that the state "psychotherapist privilege" had to fall to the defendant's right to confront witnesses. The court noted that children are particularly vulnerable to suggestibility. Rejecting the state's argument that the defense should have sought discovery of the notes from the additional therapy sessions if it was interested in cross-examining the witness about them, the court noted that the defense likely would not have been able to obtain them in discovery. Reversed.

State v. Yang, 712 N.W.2d 400 (Wis. Ct. App. 2006)
At trial for first-degree sexual assault, the defendant's theory was that his ex-wife convinced his daughters to lie about the alleged assaults in an effort to obtain custody of them. He alleged that she had told him that because he remarried, he was "going to be in trouble." During cross-examination of the ex-wife, the defense asked whether the alleged threat had taken place. After the ex-wife denied having the conversation, the trial court sustained the prosecution's objections to inquiring into whether she had made the alleged threat. The trial court reasoned (1) the threat was irrelevant absent a showing that the ill will was "transferred" from the wife to the children, (2) the defendant had successfully excluded evidence of his physical and verbal abuse of his wife, and the testimony might open the door to that evidence, and (3) being able to ask the question, despite her denial about the conversation ever happening, was tantamount to allowing defense counsel to testify. The defendant testified but did not address the threat. The jury acquitted him of assaulting one daughter, but not the other.

The appellate court held the defendant's right to confrontation was "unduly truncated" because the ex-wife's and children's credibility, as emphasized by the prosecutor, was important to the case. The prosecutor even asked the jurors to ask themselves whether anyone had a motive to lie. The court rejected each of the trial court's reasons, finding that whether the ill will "transferred" was a question for the jury and explaining that as long as counsel had a good faith basis for asking the questions, he was entitled to do so. The court also noted that the defendant may not have testified about the threat because he believed the judge's ruling foreclosed the possibility. The court also emphasized that the ex-wife's repeated requests from the interpreter suggest that the trial judge prematurely ended the defense's inquiry. It was possible that the ex-wife simply did not understand the questions. Reversed.

State v. Strowder, No. 85792, 2006 WL 242510 (Ohio Ct. App. 2006)
The trial court prevented the defense from cross-examining one of the alleged coperpetrators, who had made a deal with the prosecution, about the actual penalty he would have faced, absent a deal with the prosecution. Instead, the defense was limited to cross-examining the witness

about what he believed he faced. Absent a plea deal, he faced over twenty counts and up to over one hundred years of prison. He testified that he believed he had faced ten or eleven counts.

The appellate court held that the limitation was error. The defense should have been able to cross-examine the witness about "his *actual* understanding of what sentence he was facing." While the court's formulation is somewhat confusing, presumably it meant that the defense should have been able to ask the defendant about the actual potential sentence, not just his beliefs about the potential sentence. Reversed.

State v. Jones, 713 N.W.2d 247 (Iowa Ct. App. 2006)
At trial for rape, the defense sought to cross-examine the complainant about her financial interest in wrongfully accusing the defendant of rape. She had previously made three allegedly false accusations, and the trial court prevented the defense from presenting evidence of those accusations, citing the state's Rape Shield law. The defense specifically sought to cross-examine the complainant about statements she made to the person she was living with that she would be able to use the restitution money to pay him money she owed. The defense theory was that the encounter was consensual.

The appellate court reversed. It held that the financial incentive was relevant to show that the complainant fabricated the lack of consent.

State v. Novak, 707 N.W.2d 580 (Wis. Ct. App. Nov. 2, 2005) (table decision)
At trial for obstructing an officer, the court barred the defendant from cross-examining one of the state's witnesses about a prior tape recorded statement that the prosecution conceded was inconsistent to her testimony offered at trial. The witness testified that on the way home from a high school football game, she and the defendant's daughter told the defendant that they intended to "toilet paper" the neighbor's yard. She also testified that she and the defendant's daughter told the defendant about having done so the next morning. The police had questioned the defendant about the incident, and she said she had no knowledge of their intentions or actions. During cross-examination of the witness, trial counsel attempted to ask the witness about a tape recorded statement she gave to the defendant's daughter during math class. The trial court barred the cross-examination, despite the prosecution's concession that the prior statement was inconsistent with her testimony. Because of authentication issues, defense counsel did not request to play the tape during the cross-examination.

The appellate court reversed. It held that the limit on cross-examination denied the defendant her "fundamental constitutional rights to present evidence and confront [the witness] by meaningful cross-examination." The court rejected the state's argument that that because the recording may have been made as part of the defendant's daughter's harassment to the witness, allowing the cross-examination would require the jury to hear matters collateral to the litigation, finding that the existence of a prior inconsistent statement on such a key issue to be "hardly collateral," and that the question of harassment was related to the weight of the prior statements, not the

admissibility. The court also held that the defense need not prove that the tape was admissible before cross-examining the witness about it.

Bordelon v. State, 908 So.2d 543 (Fla. Dist. Ct. App. 2005)
At trial for providing the police with a false identity while under arrest or lawfully detained, the trial court limited the defense attorney's cross-examination of the officer who allegedly received a false identification. On direct examination, the officer did not address whether the defendant had been detained. On cross-examination, the officer testified that the defendant was free to go throughout the encounter. Thus, his testimony provided exonerating evidence. On redirect, the prosecution led the officer to testify that, in fact, the defendant had been detained. On recross, however, the trial court prohibited defense counsel from revisiting whether the defendant was free to go throughout the encounter.

The appellate court reversed. It held that to prohibit recross-examination on the "newly elicited [material] from the defendant's chief accuser on redirect, that went to a central issue in a criminal trial" and violated the Confrontation Clause.

State v. Stuart, 695 N.W.2d 259 (Wis. 2005)
At trial for first-degree murder, the court admitted the preliminary hearing testimony of the defendant's brother. At the preliminary hearing, the brother had testified that the defendant confessed to killing the victim. At trial, the brother refused to testify. *Crawford v. Washington*, 541 U.S. 36 (2001), was decided while the defendant's direct appeal was pending.

The Wisconsin Supreme Court reversed. It held that because the preliminary hearing (per state statute) did not permit exploring the credibility or trustworthiness of the witness, the hearing did not satisfy the Confrontation Clause's requirement for cross-examination. At the preliminary hearing, the defendant had attempted to, but was not permitted, to cross-examine the brother about whether the charges pending against him might have influenced his testimony. The error was not harmless despite four other witnesses' testimony about the defendant having confessed to them because of those witnesses' long criminal history, the lack of physical evidence, and the consistency of the other evidence in the case with the defendant's theory of the case.

People v. Sampel, 16 A.2d 1023 (N.Y. App. Div. 2005)
At trial for criminal contempt, the trial court did not permit the defendant to present a witness to testify that the complainant told the witness she had the defendant arrested in order to obtain the defendant's vehicle.

The appellate court reversed, holding, "The denial of the opportunity to contradict answers given by a witness to show bias, interest or hostility" deprived the defendant of his confrontation rights.

State v. Sabog, 117 P.3d 834 (Haw. Ct. App. 2005)

At trial for assault and kidnapping, the court did not permit the defendant to cross-examine the complainant about her drug use and pending criminal charges.

The appellate court reversed, holding that the former was admissible as relevant to the witness's ability to perceive and recall events. The latter was admissible as relevant evidence of bias. The exclusion of the cross-examination on the topics violated the defendant's right to confront the witness.

People v. Golden, 140 P.3d 1 (Colo. App. 2005)
At trial for sexual assault, the defendant was not permitted to cross-examine the complainant about an alleged sexual relationship with one of her roommates. The defendant was the complainant's landlord, and he sought to introduce evidence of a prior admission to involvement in a romantic relationship to demonstrate her motive to lie about the assault.

The appellate court reversed. It held that evidence of the romantic relationship was relevant to the complainant's motive to lie as a prototypical form of bias. The error was not harmless beyond a reasonable doubt because the complainant's testimony was "critical" to the prosecution's case for a lack of consent.

Blunt v. United States, 863 A.2d 828 (D.C. 2004)
At trial for robbery, the defendant sought to cross-examine the state's witness about charges pending in Maryland. The charges had been designated as "Stet" which means they were not being actively pursued, but could be brought at a later date. The trial judge prohibited the cross-examination, ruling that the charges were not offenses that could be used for impeachment. The trial court did not address whether the status of the charges could have provided the witness with bias.

The appellate court reversed. It held that even though the charges were not themselves impeachable, their pending status did provide a potential source of bias for the witness. It rejected the state's argument that because the U.S. Attorney in D.C. had no influence over the case in Maryland, even the source of bias was irrelevant. Instead, the court held that it was the witness's subjective expectation that provided the potential source of bias. Note the potential relationship to *Brady* and witness expectations.

State v. Marcos, 102 P.3d 360 (Haw. 2004)
At trial, the court prohibited any inquiry into the complaining witness's motive to fabricate an injury that corroborated her earlier-alleged abuse. The motive in question was the paternity suit the defendant brought.

The Hawaii Supreme Court ruled that the suit should have been revealed because it was a "fact from which the jurors could appropriately draw inferences relating to the complainant's motive or bias." Thus, the trial court erred when it prohibited "*all* inquiry into the alleged motive or bias for faking injury." Reversed.

Miller v. State, 98 P.3d 738 (Okla. Crim. App. 2004)
At trial the court admitted the confession that the nontestifying codefendant made to his friend. When the friend testified about the confession, the defendant sought to cross-examine him about whether when he was first interrogated by the police the police called him a liar, but the trial court sustained the state's hearsay objection to the question.

The appellate court reversed. It held that whether the police called him a liar was admissible to show whether the friend had a motive to fabricate a story that would satisfy them, making it admissible for a purpose other than for the truth of the matter asserted. The court concluded that not allowing the question violated the defendant's right to confrontation, compounding the other Confrontation Clause error discussed *infra*.

Almond v. Commonwealth, No. 0273-03-2, 2004 WL 1607701 (Va. Ct App. July 20, 2004) (unreported)
At trial, the defendant's theory was that the child complainant fabricated the charges against him in concert with her mother, both of whom were motivated by his refusal to terminate his parental rights. The trial court, however, refused to permit him to ask the complainant whether her mother told her that he had refused.

The appellate court reversed. It held that the answer to the question would not have been offered for the truth, but to explain the complainant's motive. The trial court's restriction on the defendant's right to expose that motive violated his right to confront the complainant.

Other Limitations on Cross-Examination

U.S. Court of Appeals Cases

United States v. Kohring, 637 F.3d 895 (9th Cir. 2010)
In a decision reversing on a *Brady* claim, the court found prejudice based, inter alia, on the defense's inability to cross-examine the star witness on the material in question, thus undermining his Confrontation Clause rights. The undisclosed information about the witness's criminal history would have cast doubt on his credibility.

Federal District Court Cases

United States v. Csolkovits, 794 F. Supp. 2d 764 (E.D. Mich. 2011)
Prior to trial for tax evasion, the government sought to avoid paying for the cost of having the defendant, under the Mutual Assistance Treaty, have counsel in the Bahamas for depositions noticed by the government. The government proposed having the defendant list questions for the magistrate to ask during the deposition.

The court held that the government would be required to pay for local Bahamian counsel to represent the defendant during the depositions. It explained that limiting the defense to submitting questions would be inadequate for confronting the witnesses.

State Court Cases

Coronado v. State, 351 S.W.3d 315 (Tex. Crim. App. 2011)
The trial court's restriction, pursuant to statute, of the defendant to only asking the complaining witness questions via interrogatories, which were asked by a third party and answered on videotape at a remote location, violated the defendant's right to face his accuser.

State v. Arnold, 939 N.E.2d 218 (Ohio Ct. App. 2010)
Prior to trial, the state violated its state-law-imposed duty to disclose the identity and address of a particular witness without providing a justification for doing so. Because of the failure, the only time defense counsel was able to interview the witness was immediately prior to her testimony.

The appellate court reversed. It held that the state's failure to disclose the contact information of the witness prevented defense counsel from having an adequate opportunity to cross examine the witness.

State v. Contreras, 979 So.2d 896 (Fla. 2008)
The pre-trial discovery deposition of a witness who did not testify at trial was not sufficient to satisfy the defendant's right to confront that witness for several reasons. First, the defendant was not present and was not entitled to be present at the deposition. Thus, the deposition was not the "equivalent of cross examination as envisioned by *Crawford*." Second, discovery depositions are intended for the discovery of information, not to replace the opportunity to confront the witness at trial. Because counsel would have different goals in a discovery deposition as opposed to cross-examination at trial (or at a deposition designed to replace trial testimony), the deposition was not an adequate substitute for cross-examination. Reversed.

State v. Lopez, 974 So.2d 340 (Fla. 2008)
The Florida Supreme Court ruled that pre-trial depositions taken pursuant to Florida Rule of Criminal Procedure 3.220 do not provide a sufficient opportunity to cross-examine witnesses for the purposes of the Confrontation Clause. It noted that 3.220 depositions only permit the defendant to attend pursuant to a stipulation by both parties, thus violating the requirement of a face-to-face, in-person confrontation. It also noted that goal of 3.220 hearings is not adversarial in the same way in which in-court testimony is because they are frequently "taken for the purpose of uncovering evidence or revealing other witnesses" and, therefore, is not the "equivalent of significant cross-examination."

State v. Noah, 162 P.3d 799 (Kan. 2007)

At a preliminary hearing related to a sexual abuse charge, the complainant witness testified, but broke down during cross-examination. After two recesses and a psychological evaluation of the complainant, the trial court determined that the witness was unavailable to testify. At trial, the court admitted the transcript of the preliminary hearing.

The appellate court held that the cross-examination at the preliminary hearing was not sufficient because defense counsel had not had an opportunity to engage in cross-examination aimed at exposing facts from which the jury could have drawn inferences about the witness's reliability. The court did not explain its reasoning, but it appears that it was the inability to ask her about the facts of the crime, rather than the different purpose of a preliminary hearing, that led it to hold the cross-examination insufficient. It noted that it was irrelevant whether the limitation was because of the witness's emotional state or some other reason; the cross-examination was not sufficient. It also noted that while defense counsel's questions in the hearing were "confusing and unclear," they did not "rise to the level of intentionally attempting to disqualify [the witness] as a competent witness." Court of Appeals affirmed.

People v. Lewis, No. H027950, 2007 WL 646151 (Cal. Ct. App. Mar. 5, 2007) (unreported)
At trial, the court admitted the preliminary hearing testimony of a nontestifying witness. The appellate court noted that the "sole question is whether [the witness's] exposure to questioning at the preliminary hearing afforded defendant the 'opportunity for cross-examination' required by the confrontation clause." It held that it did not.

Even though the appellate court noted that it was "critical" that the witness offered only exculpatory information at the preliminary hearing, the court's reasoning should apply to other witnesses who only testify at preliminary hearings (at least in California). It noted that the purpose of a preliminary hearing is merely for the magistrate to "examine the case" for "sufficient cause to believe the defendant was guilty." It contrasted such a hearing with a deposition or "some sort of proto-trial," and explained that even though the defendant was entitled to present evidence at a preliminary hearing, the magistrate is not a trier of fact and the defendant's motivation at such a hearing is merely to persuade the magistrate that any reasonable suspicion presented by the prosecution is "too insubstantial to justify holding defendant for trial." It also explained that since defendants are no longer permitted to use preliminary hearings to conduct discovery, that motive for conducting cross-examination no longer exists. Moreover, the defense (and prosecution) inability to be fully prepared to confront a witness because of the early stage at which a preliminary hearing takes place makes it an insufficient substitute for cross-examination at trial. Reversed.

People v. Gardner, No. D047412, 2006 WL 3032497 (Cal. Ct. App. 2006) (unreported)
At a joint trial for possessing stolen property, the trial court, over the defendant's objection, admitted the statement of the *testifying* codefendant indicating that she knew the items in question were stolen. The defendant, when objecting, requested that if the court was going to admit the statements, it should also give an instruction limiting their application to the testifying

codefendant. When the codefendant testified, the court neglected to give the requested instruction, and the defense failed to request it at that time. The defense did, however, request the instruction again when the court instructed the jury at the close of the evidence. The court declined because it had not given the instruction previously.

The appellate court ruled that the trial court erred by failing to give the requested instruction. The appellate court did not clarify at which instance the trial court erred, either at the time of the testimony or at the close of the evidence. Even though the codefendant testified, the appellate court reasoned that because the codefendant denied making the statements in question, she rendered herself effectively unavailable for "full" cross-examination. Because the court concluded the statements were not cumulative of other evidence, it held the failure to instruct the jury was not harmless beyond a reasonable doubt.

Dickson v. State, 636 S.E.2d 721 (Ga. Ct. App. 2006)
Over a defense objection, the trial court admitted a nontestifying declarant's recorded statement. The declarant had previously testified at a bond hearing and died prior to trial. The trial court thus found that the declarant was unavailable and that the defendant had been given a prior opportunity to cross-examine him. The statement provided a first-hand account of the alleged offenses.

The appellate court reversed. It held that for a prior opportunity cross-examine witnesses to satisfy the requirements of the Confrontation Clause, "the prior hearing must have addressed 'substantially the same issues' as those presented at trial." Because the bond hearing addressed whether the defendant posed a flight risk, not murder and assault, the appellate court held that the statements should not have been admitted.

People v. Yanez, No. E034761, 2005 WL 2995493 (Cal. Ct. App. Nov. 9, 2005) (unreported)
At trial, the court admitted the testimony of investigating officers recounting what the complainant witness said to them. The trial court had held that the witness was unavailable.

The appellate court held that the lack of prior opportunity to cross-examine the witness rendered the testimonial statements inadmissible. It rejected the state's argument that the defense interview of the witness, held two days prior to trial, was an adequate substitute for cross-examination. Reversed.

Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005)
At trial for child molestation, the court admitted the statements of the complainant three-year-old. She had told her grandmother that the defendant "let me suck his dick." She was then interviewed by several members of law enforcement and relayed details of the defendant's alleged molestation. Prior to trial, the complainant was called to testify at a competency hearing. At the hearing, she was "[un]able to broach the subject of [her] statements, as she would not even answer questions regarding the color of a chair or her dress."

The appellate court reversed. It held that the statements made to law enforcement were testimonial hearsay. It also held that although the pre-trial hearing satisfied a state statute's requirement for cross-examination, it did not meet the Confrontation Clause's requirements because the witness was "incapable of understanding the nature and obligation of an oath and was therefore unavailable as a witness for trial." For cross-examination to be sufficient, "a witness unable to appreciate the obligation to testify truthfully cannot be effectively cross-examined for *Crawford* purposes." Reversed.

People v. Osio, No. H026953, 2005 WL 1231402 (Cal. Ct. App. May 25, 2005) (unreported)
At trial for aggravated sexual assault of a child, the court admitted statements the nontestifying complainant made, both in a recorded interview with a law enforcement officer and during the preliminary hearing. The recorded statement was not offered at the preliminary hearing. Trial counsel stipulated to the admission of the testimony, but *Crawford v. Washington*, 541 U.S. 36 (2001) was decided subsequent to trial.

The appellate court reversed, holding that the preliminary hearing did not "in the strictest sense" provide the defendant an opportunity to cross-examine the complainant about the statements in the recording because the statements were not offered in the hearing. It also held that the preliminary hearing was inadequate because the preliminary hearing testimony only recounted one incident, whereas seven incidents were at issue at trial. It rejected the state's forfeiture argument regarding the stipulation because *Crawford* had not been decided at the time of trial and the statements were likely admissible under then-existing precedent.

People v. Fry, 92 P.3d 970 (Colo. 2004) (en banc)
At trial for second-degree murder the court admitted the preliminary hearing testimony of the victim's boyfriend. The boyfriend died before trial and did not testify.

The Colorado Supreme Court reaffirmed its decision holding that preliminary hearings in Colorado do provide an adequate opportunity for cross-examination. It noted that preliminary hearings are limited to determining whether there is probable cause and whether exists to believe that a crime occurred. It also noted that the rules of evidence are relaxed at such hearings and that the judge may not make credibility findings about a witness in such a hearing. Because the witness was not subject to cross-examination, its admission violated the defendant's Confrontation Clause rights.

Improperly Admitted Co-Defendant Statements (*Bruton*[3] Error)

U.S. Court of Appeals Cases

Adamson v. Cathel, 633 F.3d 248 (3d Cir. 2011)

[3] *Bruton v. United States*, 391 U.S. 123 (1968)

At trial for armed robbery, the prosecution impeached the defendant's testimony by presenting the testimony of his alleged accomplices. The accomplices did not testify at trial, and their confessions inculpated the defendant. There was no limiting instruction given to the jury regarding the confessions.

On direct appeal, the courts relied on *Tennessee v. Street*, 471 U.S. 409 (1985) to conclude that introducing an accomplice confession was permissible if only used to impeach the defendant's credibility, not for the truth of the confession. In *Street*, there was a limiting instruction regarding the confessions. In federal court, on appeal from denial of a writ for habeas corpus, the court reversed and ruled that the lack of a limiting instruction made the introduction of the confessions error: "[A] jury's understanding of the distinction between substantive and impeachment uses of inculpatory evidence cannot be taken for granted. An appropriate limiting instruction is necessary."

Pabon v. Mahoney, 654 F.3d 385 (3d Cir. 2011)
At trial for murder, the state offered the statement of a co-defendant. The co-defendant's statement was heavily redacted and was admitted as follows, "I know I didn't shoot the girl who got killed. Another should be arrested for this. He paid it off. He even gave me the Grand National for helping." The defendant appealed and, having lost, sought habeas relief, which was denied. A certificate of appealability was also denied.

On appeal from the denial, the Court of Appeals reversed. It held that whether the statement violated the defendant's Confrontation Clause rights was "debatable" and that the case had to be remanded for him to "develop" that claim.

Vazquez v. Wilson, 550 F.3d 270 (3d Cir. 2008)
At trial for murder, the trial court admitted a non-testifying co-defendant's statement after substituting "the other guy" for the defendant's name in approximately twenty different places. The statement said "the other guy" was the shooter. The defendant testified to the contrary, but the gun had his fingerprints on it. The trial court instructed the jury not to consider the statement as evidence against the defendant.

The defendant sought habeas corpus relief, and the Court of Appeals held that the redaction and jury instruction to not consider the statement for purposes of establishing that the defendant was the shooter were inadequate. It held whether considering the statement on its face or in the context of other information presented at trial, it was error to admit it because it was "facially obvious" to whom "the other guy" referred. The error was not harmless because the statement was the only evidence at trial suggesting the defendant was the shooter. The defendant's fingerprints being on the gun was consistent with his non-shooter theory of the case that he had disposed of, but not shot, the gun.

United States v. Vega Molina, 407 F.3d 511 (1st Cir. 2005)
In a joint trial, a police officer who took one non-testifying co-defendant's confession testified about the confession. The trial court did not permit the officer to name the other defendants in his testimony. Instead, he used "other individuals" or "another person" to refer to the other defendants. During closing argument, the prosecutor asked the jury to infer that the "other person" in the redaction was one of the defendants. The defendant offered a contemporaneous objection, but did not ask for an instruction.

The Court of Appeals, reviewing *de novo*, found that the trial court should have sustained the objection and that, in light of the prosecutor's improper argument, the case law "unambiguously requires the trial court to instruct the jury that an out-of-court confession may not be considered evidence against the declarant's co-defendants." The court held that the government's failure to argue that the error was harmless waived the argument, but noted that "there is every reason to doubt whether the outcome . . . would have been the same."

United States v. Macias, 387 F.3d 509 (6th Cir. 2004)
At trial, the court played grand jury testimony of a testifying police officer misquoting a non-testifying co-defendant. The officer had testified that the co-defendant implicated the defendant.

The Court of Appeals held that the Federal District Court abused its discretion in failing to declare a mistrial based on the admission. It held that it was of no moment that the statement was introduced by the co-defendant, rather than the state. Either way, the defendant had no opportunity to cross-examine the witness about it. It also held that the error was not harmless, noting that the government's case was otherwise entirely circumstantial. Reversed.

Federal District Court Cases

United States v. West, 790 F. Supp. 2d 687 (N.D. Ill. 2011)
Prior to trial for fraud, corruption, and bribery, two of the co-defendants—a corporation and an individual—moved to exclude the redacted statement of a third co-defendant or to have separate trials. The redacted statement replaced references to the co-defendants with "the company" and "an individual."

The trial court ruled that if the government intended to introduce the statement, the defendants would have to be tried separately. It explained that it did not consider the statements in isolation and that a juror exposed to the statements would easily understand the substitutions to refer to the co-defendants.

United States v. Shahin, No. CR-10-01165-01-PHX-NVW, 2011 WL 1936244 (May 20, 2011)

Before trial, one co-defendant moved to exclude his co-defendant's statement or, in the alternative, sever the trial.

The trial court granted the motion for several reasons. First, the parties had only provided the court with a "highly general and abstract" version of the purported testimony, making it difficult to determine whether redaction of the statement was a viable option. Second, the court noted that a third alleged perpetrator would be testifying and that a redacted statement, together with the third perpetrator implicating two people, would make it impossible not to infer that the redacted statement referred to the defendant. The trial court allowed the government to decide between exclusion of the statement and severance.

State Court Cases

People v. Smith, No. G041645, 2011 WL 2555791 (Cal. Ct. App. June 28, 2011) (unreported)
At trial for murder, there was a question as to whether it was the defendant or the co-defendant's younger brother who accompanied the co-defendant as he chased and shot the victim. The trial court admitted the statement of the co-defendant that established it was not the co-defendant's brother. Thus, by elimination, the defendant must have joined in the chase. The co-defendant did not testify. The trial court instructed the jury not to consider the statement against the defendant.

The appellate court reversed. It held that the co-defendant's statement, even though it did not name the defendant, violated the Confrontation Clause because of the inevitable inference that the defendant was the chaser and perpetrator.

Watkins v. Commonwealth, Nos. 2008-SC-000798-MR, 2008-SC-000823-MR, 2011 WL 1641764 (Ky. 2011)
At trial for wanton murder of their child, the court admitted the pre-trial statements of the wife. The statement, among other things, alleged that the husband was alone with the child when she was fatally injured, yet failed to act. The wife did not testify at trial, the court did not redact the statement and did not offer a limiting instruction.

The Kentucky Supreme Court reversed. It held that because the statements supported the state's theory of liability, they were inculpatory and should not have been admitted.

State v. Johnson, 703 S.E.2d 217 (S.C. 2010)
At trial for murder, the court admitted the investigating officer's testimony that he initiated an investigation of the defendant based on nontestifying codefendant's confession implicating the defendant. The confession was also introduced, but it had been redacted to omit any reference to the defendant.

The appellate court reversed. It held that officer's testimony made it clear who was identified in the otherwise appropriately redacted statement and rendered the redaction ineffectual. Because the codefendant did not testify, there was Confrontation Clause error.

People v. Ruiz, No. B209622, 2010 WL 1463149 (Cal. Ct. App. April 14, 2010)
At trial, the court admitted a codefendant's redacted statement. Nonetheless, the statement referred to "them" and used the descriptions of the defendants frequently repeated at trial.

The appellate court held that the redacted statement violated the Confrontation Clause because "even without mentioning defendants' names, it implicated them." The error was not harmless because the credibility of the other witnesses had been attacked, the defendants had repudiated their confessions, and the prosecutor admitted that without the statement implicating them, it would be hard for the jury to convict. Reversed.

State v. Duran, No. 05-01299, 2010 WL 1329410 (N.J. Super. Ct. App. Div. April 1, 2010) (unreported)
Prior to trial, the codefendants each moved to sever. One defendant also moved to introduce evidence of the others' membership in a gang to explain why the witness would accuse the defendant, instead of the gang member, of committing the assault. The trial court denied the motions.

The appellate court held that the trial court abused its discretion in denying the motion to sever because two codefendants' theories were mutually exclusive: each claimed the other committed the crime. Moreover, not permitting one defendant to introduce the gang affiliation of the other prevented prejudice towards the gang affiliated defendant, but kept information that the jury should have had in evaluating the witness's testimony. Reversed.

Commonwealth v. Bacigalupo, 918 N.E.2d 51 (Mass. 2009)
At trial, the court permitted, over defense objections, a witness to repeatedly testify that the nontestifying codefendant told her that he and a "friend" committed the crime. The trial court instructed the jury to only consider the witness's statement against the codefendant and instructed the witness to only testify to the codefendant's actions.

The appellate court held that the testimony suggested that the defendant was the "friend" and in violation of the Confrontation Clause because no one else was on trial, because of the judge's emphasis—both through the jury instruction and the admonition to the witness—and because of the victim's testimony identifying the defendant as the perpetrator. The error was not harmless beyond a reasonable doubt because, although the victim testified, the victim was only offered the information four years after the crime and only after being offered a plea deal. Reversed.

State v. Lavadores, 214 P.3d 86 (Or. Ct. App. 2009)
The redaction of the nontestifying codefendant's statement, as admitted at trial, was ineffective for two reasons: (1) the statement "unquestionably implicated" the defendant by referring to

three people, the codefendant, a person the codefendant said was along for the ride, and a third person and (2) naming every individual except the defendant, whose name was replaced "others" and "they," clearly identified the defendant. The error was not harmless because it provided the only evidence contradicting the defendant's account of the incident. Reversed.

People v. Pinto, 56 A.D.3d 956 (N.Y. App. Div. 2008)
At a joint trial, the court admitted the nontestifying codefendant's statement with neutral pronouns substituted for the defendant's name. The statement referred to the actions "we" took and how the codefendant followed "him." The prosecution told the jury only two people were involved in the crime, and the police officer who introduced the statement also testified that he had reviewed videotape of the crime to see if he could identify the defendant.

Noting the above, the appellate court found it "inconceivable that the jury could have considered [the] account . . . as describing anyone other than the defendant and, thus the statement was insufficiently redacted." Reversed.

People v. Cruz, 45 A.D.3d 1462 (N.Y. App. Div. 2007) (memorandum decision)
At a joint trial for robbery, a nontestifying codefendant's statements were admitted. He stated, "If I tell you where we put the clothes and the backpack, do you think they will drop the charges?" "That's where we threw [the stolen items," and, "Did you check the backseat? . . . If they're not there, maybe my girlfriend took them. Can you talk to her."

The appellate court noted that the defendant had objected to their admission, asked for severance, and asked for a redaction at the first trial. The objections and requests were denied, but the trial ended in mistrial. At the second trial, they were unobjected to. Reviewing the claim "in the interest of justice," the appellate court held that their admission violated *Bruton* because, although using neutral pronouns, raised the possibility of referring to the defendant because a victim identified multiple robbers and identified them by name, thus implicating the defendant as "you" and "we." Reversed.

State v. Ennis, 158 P.3d 510 (Or. Ct. App. 2007)
The defendant was tried along with two codefendants, one of whom testified. The nontestifying codefendant offered a confession to the police implicating the defendant. A redacted version of that statement was offered at trial over the defendant's objection and, in the alternative, a request for severance. The redacted statement included the defendant's name in the first few sentences that were otherwise irrelevant to the case and identified him as a friend of the codefendants. The remainder of the statement referred used passive voice and a personal pronoun to obscure the reference to the defendant, but nonetheless made it clear that the statement was referring to an individual who is otherwise unnamed (there are other named individuals in the statement, and it is clear that the statement is not referring to them). The trial court instructed the jury to only consider the confession as evidence against the person making it.

The appellate court held that the admission of the statement was error. It held that the statement, on its face, allowed the jury to infer who the person obscured by personal pronouns and passive voice were. The error was not harmless beyond a reasonable doubt, despite the instruction, because the defendant and the testifying codefendant gave a consistent account of the events that, excluding the statement, was only contradicted by a highly impeachable witness. Reversed.

***Commonwealth v. Markman**, 916 A.2d 586 (Pa. 2007)
At her capital trial, the court admitted a redacted recording of the nontestifying codefendant's statement to the police. Even though the statement was inculpatory for the codefendant, it placed much of the blame for the crime on the defendant. The court ordered that the statement have any mention of the defendant redacted prior to playing it for the jury. In place of the defendant's name, someone, in an obviously different voice, recorded over any mention of her with phrases such as "the other person." At two points in the tape, the state failed to redact the tape at all, and the recording explicitly used the defendant's name. The trial court informed the jury that the tape had been altered and instructed them not to draw any inference based on the alteration.

The appellate court ruled that the admission of the tape violated the defendant's right to confront the witnesses against her because the redactions, "by their nature alerted the jury to the alteration, and they did 'not likely fool anyone' as to whose name had been removed." Because the taped statements provided the only evidence contradicting the defendant's versions of the events, the error was not harmless. Reversed.

Stone v. Commonwealth, No. 2005-CA-001007-MR, 2007 WL 29373 (Ky. Ct. App. 2007) (unreported)
At a joint trial, the court admitted a redacted version of the defendant's statement to the police. The statement claimed that the victim had charged him immediately after a codefendant hit the victim with a beer bottle. The court then also admitted over a defense objection the testimony of a police officer who recounted a nontestifying codefendant's statement claiming the victim backed away immediately after being struck by the beer bottle.

Because the statement directly contradicted the defendant's statement and because it undermined his claim of self-defense, the appellate court ruled that it was improperly admitted, even though it made no mention of the defendant and no mention of the defendant stabbing the victim. The court explained that soliciting the officer's testimony nullified the effect of redacting the codefendant's statement.

State v. Alston, 900 A.2d 1212 (R.I. 2006)
Prior to trial, the court granted the defendant's motion to sever his trial from his alleged coperpetrator. At trial, over a defense objection, the investigating detective read the coperpetrator's confession—a product of police interrogation—to the jury. The statement did not specifically identify the defendant, use plural personal pronouns in reference to an unnamed coperpetrator, or otherwise identify the defendant. However, immediately following the

detective's reading of the statement, the prosecution, again over a defense objection, asked the detective what he did next. The detective indicated that he obtained an arrest warrant for the defendant.

The Rhode Island Supreme Court reversed. It held, "once a *Bruton*-based decision to sever trials is made, then it is presumptively prejudicial to allow into evidence a confession made by the person whose case has been severed." In the context of finding error, the court did not discuss the detective's answers subsequent to the reading of the statement. Despite its presumption, the court went on to find that the error was not harmless beyond a reasonable doubt. It noted the subsequent statements by the detective about obtaining the defendant's arrest warrant; "[i]n effect the jury was told that [the] statement was the basis for defendant's arrest." Reversed.

People v. Crawford, No. G034152, 2006 WL 1125259 (Cal. Ct. App. April 28, 2006)
At a murder trial with three codefendants, the redacted confessions of two of the nontestifying codefendants were admitted over each of the relevant defendants' objections. The statements did not mention any of the other codefendants by name, but referred to them as "homies" or as "my homies." Other evidence at trial established that between three and five people were in a car when a shootout occurred with shots coming from the car. The confessions provided the details of what occurred in the car and established that the codefendants initiated, rather than responded to, the shooting.

The appellate court reversed. It rejected the prosecution's formulation, that unless the statements themselves, without reference to other evidence at trial, identified the codefendants, they were admissible. Instead, the appellate court considered the "contextual implication" of the statements in light of all the evidence presented at trial. In light of the small number of people in the truck, the court held that it was inescapable that the jury knew whom that "homies" referred to the codefendants. The error was not harmless because the confessions undermined the defendants' claims of self-defense.

People v. Kyser, 26 A.D.3d 839 (N.Y. App. Div. 2006)
At trial for possession of a controlled substance, the defendant moved for a separate trial from his codefendant on two grounds: (1) that an out-of-court statement by the nontestifying codefendant would implicate him and (2) that he and the codefendant blamed each other for possession of the cocaine. The trial court denied the motion.

The appellate court reversed and ruled that both grounds were sufficient for requiring severance. It held that the "core of each defense was in irreconcilable conflict with the other" and required severance to prevent "the conflict alone" from leading the jury to infer guilt. The appellate court also reversed on the unpreserved "*Crawford* violation," that the codefendant's statement was testimonial hearsay.

State v. Johnson, 111 P.3d 784 (Or. Ct. App. 2005)

Prior to trial, the defendant moved to sever his trial from his nontestifying codefendant, whose confession implicating the defendant was going to be admitted at trial. The trial court denied the motion and allowed the prosecution to introduce a redacted form of the confession replacing the references to the defendant with "the other person" and "the acquaintance." At the close of the state's case, the defendant moved for a mistrial, which was denied.

The appellate court reversed, holding that it was not an abuse of discretion to let the joint trial go forward but that it was error not to declare a mistrial. Because the redaction failed to "eliminate any reference to defendant's existence" the court held that the court should have declared a mistrial. The court noted various aspects of the confession that were incriminating towards the defendant, rather than the codefendant.

Jefferson v. State, 198 S.W.3d 527 (Ark. 2004)
At trial for attempted murder and robbery, the court admitted the redacted statement of the codefendant. Although the statement had been redacted and edited to read "he" and "they" any time the defendant was mentioned, it was clear that the prosecution's theory was that three people participated in the crime, two of whom were identified in the statement.

The appellate court reversed. It held, apparently as a matter of first impression, that the "non-testifying codefendant's statement is [not] admissible when the defendant's name has been replaced with a pronoun." Because the statement made it clear that someone other than the persons named in the statement participated in the crime, the redaction was inadequate.

Ineffective Assistance of Trial Counsel for Confrontation Error

U.S. Court of Appeals Cases

Sussman v. Jenkins, 636 F.3d 329 (7th Cir. 2011)
At trial for sexual abuse of a minor, the defendant sought to introduce evidence that the complainant had previously leveled false accusations against the complainant's father in an attempt to get his attention shortly after the father abandoned him. The trial court excluded the evidence because trial counsel failed to comply with a pre-trial notice requirement under state law. The alleged abuse by the defendant allegedly occurred shortly after the defendant stopped seeing the complainant.

Reviewing the federal district court's grant of habeas corpus relief, the appellate court held that trial counsel's failure to comply with the statutory requirement was prejudicially ineffective, affecting the petitioner's right to confrontation. It explained that the evidence was not a general attack on the complainant's credibility, but was a suggestion that the complainant is prone to tell a particular kind of lie in response to a certain set of circumstances.

Federal District Court Cases

Banks v. Warden, Louisiana State Penitentiary, No. 1:09-CV-2101, 1:09-CV-02106, 2011 WL 5157764 (W.D. La. Mar. 3, 2011) (unreported)
At the joint trial for armed robbery and attempted armed robbery, the statements of each of the three co-defendants was introduced against all three co-defendants, none of whom testified. The statements inculpated the other co-defendants.

Two of the co-defendants, proceeding pro se, petitioned for a writ of habeas corpus. The federal district court granted relief, explaining that it was prejudicially ineffective for trial counsel to fail to object to the introduction of the statements.

State Court Cases

Cabrera v. State, 694 S.E.2d 720 (Ga. Ct. App. 2010)
At trial, the alleged coperpetrator was called to testify. He had taken a plea the previous week. However, he refused to answer questions. Nonetheless, the prosecutor asked a series of leading questions about the details of the alleged crime. The trial court instructed the jury that counsel's questions were not evidence.

The appellate court held that defense counsel's failure to object to the questions on the basis of the Confrontation Clause. The court could not presume that the jury followed the trial court's instruction because of the "numerous questions inculpating" the defendant. Reversed.

State v. Gray, No. CA2009-12-294, 2009 WL 2929231 (Ohio Ct. App. Sept. 14, 2009) (unreported)
At trial for burglary, the prosecution, without objection, presented the investigating officer's testimony about the nontestifying complainant's statements to him. The statements indicated that the defendant did not have permission to be in the complainant's house and that something was stolen.

The appellate court held that the trial court abused its discretion in not granting a new trial for ineffective assistance because the investigating officer's testimony relayed statements that were "clearly testimonial" and because the state's case was built on the statements. It rejected the trial court's finding that the failure to object was trial strategy because trial counsel said he "should have objected based on hearsay" and that the failure "was not a trial strategy." Reversed.

Grindle v. State, 683 S.E.2d 72 (Ga. Ct. App. 2009)
A nontestifying accomplice's statement to the police during a custodial interrogation was testimonial hearsay. Because, at a post-conviction hearing, counsel conceded there was no reasonable strategic reason for not objecting to the testimony, counsel's failure to do so was deficient. Counsel further testified that his primary strategy was to establish that the defendant

was not present at the crime, the very subject of the inadmissible statement. Because the remaining evidence was circumstantial, there is a reasonable likelihood that the outcome would have been different.

Rayshad v. State, 670 S.E.2d 849 (Ga. Ct. App. 2008)
Trial counsel's introduction of an alleged coconspirator's statement to the police implicating the defendant was deficient performance because the statements were "unquestionably" hearsay that "trampled" on his right to confrontation.

Likewise, trial counsel's failure to object to the out of court statements by another alleged coconspirator alleging that the idea of the crime originated with the defendant was also deficient performance because there was "no question" that the statements constituted inadmissible hearsay and "trampled" the defendant's right to confrontation.

The errors were prejudicial because, as indicated by two jury notes, the defendant's credibility was something the jury struggled with, and the inadmissible evidence greatly impeached it. Reversed.

People v. Robles, Nos. D051344, D051421 2008 WL 4963291 (Cal. Ct. App. Nov. 21, 2008) (unreported)
At trial, the court admitted a statement nontestifying codefendants' statements identifying the defendant as "Sammy," which one of the perpetrators said during the robbery.

Even though there was fingerprint evidence linking the defendant to the outside of the house, the appellate court held that the error was not harmless because the jury likely relied on it to identify the defendant as a perpetrator. The appellate court also held that trial counsel was ineffective for failing to object to the introduction of the statements, especially since he objected to the consolidation of the codefendants' trials because of the statements. It found cumulative prejudice from the *Bruton* error and the ineffectiveness. Reversed.

Atunes-Salgado v. State, 987 So.2d 222 (Fla. Dist. Ct. App. 2008)
Trial counsel was ineffective for conceding to the admission of nontestifying codefendants' statements made during police interrogation because the statements were plainly testimonial hearsay.

Because the statements provided the only evidence of the "agreement" element of the only charge, conspiracy, the ineffective assistance was "patently prejudicial." The court noted that there could be no tactical reason for the concessions. Trial counsel never challenged their admission, and trial counsel admitted to not having researched their admissibility. Trial counsel also admitted that the statements were "critical" to the prosecution's case. Reversed.

State v. Hendrickson, 158 P.3d 1257 (Wash. Ct. App. 2007) (opinion published in part; Confrontation Clause analysis included in published portion)

At trial for possession of stolen financial information, the court admitted the testimony of a Social Security Administrator recounting statements made to him by a nontestifying alleged victim. The alleged victim stated that the defendant did not have permission to possess his social security card. Trial counsel did not object.

The appellate court ruled that because the statement was testimonial hearsay and the only evidence that the defendant did not have a valid reason to possess the card, there was no tactical reason for defense counsel's failure to object. It held that there was a reasonable probability that without the evidence, the defendant would have been acquitted and reversed.

State ex. rel Humphries v. McBride, 647 S.E.2d 798 (W. Va. 2007)
At trial, defense counsel elicited damaging hearsay testimony implicating the defendant's right to confront witnesses. The court did not discuss the details of the statements, but noted that they contradicted key elements of the defense theory and, although the statements were made by coconspirators, they were made after the end of the conspiracy and for self-serving purposes. Without discussing waiver, the court also found that the statements independently violated the defendant's right to confront witnesses, even though they were elicited by his own counsel. Reversed.

Commonwealth v. Brazie, 847 N.E.2d 1100 (Mass. App. Ct. 2006)
At trial court for the rape of each of his two daughters, the defendant's younger daughter testified that "two things" happened between she and her father. She then became emotionally upset and was unable to continue testifying. Defense counsel did not cross-examine her, and counsel did not move to strike her testimony. The prosecution withdrew the portion of the indictment related to her rape. During jury deliberations, the jury asked if they could consider her testimony, and the trial judge instructed them that they could. The other daughter testified that there had been one sexual assault, which was inconsistent with her grand jury testimony that there was more than one. There was also evidence that her new boyfriend had assaulted them.

The appellate court held that trial counsel's failure to move to strike the testimony and failure to object to the judge's supplemental jury instruction "falls measurably below that which might be expected from an ordinary fallible lawyer." It found the failure was prejudicial because of the jury's interest in the testimony, the lack of physical evidence of assault, and the inconsistencies in the other daughter's testimony.

State v. Garrot, 127 Wash. App. 1037 (Wash. Ct. App. 2005)
At trial for burglary and trafficking in stolen property, trial counsel asked the investigating detective whether there was anything that the detective forgot to include in his report from an interview with a pawnshop clerk. The detective responded that he forgot to include the clerk's identification of the defendant as the person who pawned the stolen property.

The appellate court reversed, finding in ineffective assistance of counsel for eliciting testimony that violated the defendant's right to confront the pawnshop clerk. The court opined, "This may

be the finest illustration we have ever seen of why trial counsel should never ask a question without knowing the answer in advance."

People v. Moore, 824 N.E.2d 1162 (Ill. App. Ct. 2005)
At trial for burglary, trial counsel elicited testimony from the complainant that relayed hearsay statements from the crowd that had gathered near the scene of the alleged burglary. The statements provided the only explanation for why the defendant was not found with the goods that were allegedly stolen.

The appellate court reversed, holding that trial counsel provided prejudicially deficient assistance by eliciting the testimony about what members of the crowd said. The deficiency also violated the defendant's confrontation rights because the members of the crowd did not testify and "was hearsay offered for the truth of the matter asserted."

Cipriano v. State, 883 So.2d 363 (Fla. Dist. Ct. App. 2004)
At trial for solicitation of first-degree murder, the only evidence that the defendant solicited the murder was from one witness. Trial counsel did not impeach the witness with his probationary status, and the prosecution did not disclose that the witness was given immunity in exchange for his testimony.

The appellate court reversed for the pro se petitioner. It held that the petitioner had alleged facts sufficient to warrant a hearing on trial counsel's ineffectiveness for failing to impeach the witness to vindicate his Confrontation Clause rights and the state's *Brady* violation further infringing on those rights.

People v. McMillin, 816 N.E.2d 10 (Ill. App. Ct. 2004)
Trial counsel failed to object to testimonial hearsay directly undermining the defendant's "no driving" DUI defense.

The appellate court, citing *Crawford*, held that no sound strategy could support such a decision. Reversed.

Ineffective Assistance of Appellate Counsel for Confrontation Error

U.S. Court of Appeals Cases

Nonni v. Brunelle, No. 01-2771, 2005 WL 1324578 (2d Cir. June 3, 2005) (unreported)
Without objection, the trial court admitted the petitioner's confession to one crime as well as his co-defendant's confession implicating the petitioner in the second crime. While petitioner's appeal was pending, the U.S. Supreme Court ruled that even where the co-defendant's confession was not admitted only against the co-defendant and the jury was instructed to ignore

it with regards to the defendant, its presentation violates the Confrontation Clause.[4] Appellate counsel did not raise the issue. After exhausting the claim in state court, petitioner brought a petition for writ of habeas corpus in federal court claiming ineffective assistance of appellate counsel.

The Federal District Court denied the petition, and the Court of Appeals reversed, holding that the state court's ruling was an unreasonable application of clearly established law. It noted that the state court could have reviewed the unpreserved error in the interests of justice and was likely to do so in light of the recent change in the law. It held that the admission was prejudicial because the only evidence linking petitioner to the second crime was the co-defendant's confession.

Fischetti v. Johnson, 384 F.3d 140 (3d Cir. 2004)
At a retrial for burglary, the trial court admitted testimony of burglary victims who testified at the original trial. Some of the witnesses testified at the retrial, but some did not. The defendant was representing himself.

The Court of Appeals held that it was error not to hold a preliminary hearing to first determine whether the non-testifying witness was unavailable and that it was constitutionally deficient performance of appellate counsel for failing to seek review of the same. It held that the trial court's erroneous—but not "clearly erroneous" under AEDPA—denial of replacement counsel constituted cause for overcoming a state court default. Reversed and remanded for determining whether the non-testifying witness was unavailable.

State Cases

Commonwealth v. Lao, 877 N.E.2d 557 (Mass. 2007)
At trial for murder, the court admitted the excited utterances of the defendant's wife, who had told both a 911 operator and the police about the defendant's prior attempt to murder her. *Crawford* was decided while the defendant's appeal was pending.

Applying Massachusetts's standard for ineffective assistance of counsel, the state court of last resort found that appellate counsel was ineffective for having failed to raise a *Crawford* claim regarding the statements.

The court rejected the state's argument that the *Crawford* court's failure to comprehensively define "testimonial" relieved appellate counsel of his burden. To the contrary, the court noted that even though the "exact contours of what constituted a 'testimonial' statement . . . remained somewhat unclear," each of the challenged statements should be excluded under *Crawford*. Because the case against the defendant was entirely circumstantial and because the statements

[4] *Cruz v. New York*, 481 U.S. 186 (1987).

were the only evidence of his motive, admitting the statements created a substantial risk of a miscarriage of justice. Reversed, new trial granted.

Price v. State, 172 P.3d 1236 (Mont. 2007)
The Montana Supreme Court, applying *Strickland*, held that appellate counsel's failure to raise a challenge to the defendant's absence from numerous in-chambers trial proceedings without a valid waiver of his presence. The proceedings addressed a "broad range" of issues, including jury selection, presentation of witnesses and testimony, exclusion of evidence, and removal of certain jurors. For eight of the conferences, trial counsel purported to waive the defendant's right to be present. For three no waiver was even attempted. There was no on the record appraisal of the defendant's right to be present, as advised by the trial court and as required under Montana state law.

The failure to raise the issue on appeal was prejudicial because, without addressing whether the absences were in error, the failure to raise them undermined the court's confidence in the appeal. Denial of postconviction relief reversed, new appeal ordered.

Non-Harmless Error

Harm Found Based on Prosecution Arguments

U.S. Court of Appeals Cases

United States v. Savala, 70 M.J. 70 (C.A.A.F. 2011)
At trial for rape, the defense argued that the complainant's delay in reporting the incident undermined her credibility. The prosecution countered that her prior experience as a rape victim made her reluctant to report. The trial court did not permit the defense to cross-examine the complainant about whether the complainant had fabricated the prior charges to protect her reputation.

The Military Court of Criminal Appeals ruled that the cross-examination was unduly limited, but that any error was harmless. The Court of Appeals of the Armed Forces reversed. It held that the limited cross-examination was prejudicial error. It emphasized the damage that had been done to the complainant's credibility: she was drinking on the night of the incident, she had a hazy memory, she was engaged to someone else whom she had promised she would stop drinking, and she had lied in her security papers. The court also emphasized that the prosecution's use of the prior allegation to bolster her credibility highlighted the importance of being able to attack the truthfulness of that allegation.

Jensen v. Romanowski, 590 F.3d 373 (6th Cir. 2009)

At trial for criminal sexual conduct, the court admitted the testimony of the investigating officer from a prior conviction for criminal sexual conduct. The officer testified to statements the complainants made to him during his investigation of the earlier case. After an unsuccessful direct appeal, the defendant filed a petition for writ of habeas corpus. The state conceded error, but argued that it was harmless.

The Court of Appeals affirmed the district court's grant of the writ, ruling that the error was not harmless. The court noted that the prosecutor referred to the inadmissible testimony "multiple times throughout voir dire, his opening statement and his closing arguments, relying on details provided only in the erroneously admitted evidence to argue that Jensen had a common scheme or design to have sexual encounters with young girls." The court also noted that, despite the state's protestations, the hearsay statement must have been important to the case because it offered the statement under the residual hearsay exception, which requires the evidence to be the "most probative evidence available." Affirmed.

State Court Cases

Commonwealth v. Andrews, 928 N.E.2d 1040 (Mass App. Ct. 2010) (table decision)
Admission of a drug analysis certificate without subjecting the analyst to cross-examination was not harmless error. The preserved error was not harmless even though two officers testified that they "believed" the substance to be crack cocaine, that the package seized and tested was one of many similar packages, and the defendant told the undercover officers that the substance was "real" or "good." In finding harm, the court noted that the prosecutor relied on the certificate in closing argument. Reversed.

Commonwealth v. Benton, 922 N.E.2d 863 (Mass. Ct. App. 2010) (table decision)
As conceded by the state, admitting drug certificates at trial for distribution of a controlled substance violated the Confrontation Clause. The error required reversal because the certificates were the "strongest evidence" that the substance was cocaine and because the prosecution relied on the certificates in its closing argument. The error required reversal under both the "substantial risk of a miscarriage of justice" standard and the "harmless beyond a reasonable doubt" standard. Reversed.

Commonwealth v. Melendez-Diaz, 921 N.E.2d 108 (Mass. App. Ct. 2010) *on remand from sub nom. Massachusetts v. Melendez-Diaz*, 557 U.S. __, 129 S.Ct. 2527 (2009)
Admission of drug certificates was not "harmless beyond a reasonable doubt" because both the judge and the prosecutor noted the certificates as proof that the substance in question was cocaine. It rejected the argument that the defense failure to make alive issue of the identity mitigated the prejudice because in light of the trial judge's ruling, "the defense was hardly in a position to argue that the substances were not cocaine." Reversed.

People v. Fairweather, 69 A.D.3d 876 (N.Y. App. Div. 2010)

Reviewing an unpreserved error in the "interest of justice," the appellate court held a detective's testimony that the defendant became a suspect after the detective interviewed the complainant was "improper, since it implied that the complainant identified the defendant as the perpetrator." The error was not harmless beyond a reasonable doubt in light of the prosecution's broken promise to the jury that the complainant would testify and identify the defendant. Reversed.

Commonwealth v. Rivera, 918 N.E.2d 871 (Mass. App. Ct. 2009)
Admission of drug certificates, stating the drugs' identity and weight, was not harmless beyond a reasonable doubt because, although the informant ordered specific quantities of specific drugs, the certificates were the only evidence of "independent analysis" of the drug. The court rejected the argument that the sale price of the drugs was indicative that they were what the informant asked for because of the possibility of them being counterfeit drugs. The court also noted that the prosecutor argued, referring to the certificates, that it would be "easy" for the jury to determine the weights. Reversed.

Commonwealth v. Chery, 915 N.E.2d 284 (Mass. App. Ct. 2009)
Admission of ballistics analysis certificates, over the objection of trial counsel, reporting that a firearm was operable for purposes of the firearm offense and that ammunition was designed for use in a firearm for the ammunition offense was not harmless beyond a reasonable doubt. Admission of the firearm itself did not mitigate the prejudice because it was the "only evidence from which the jury could have found the gun operable beyond a reasonable doubt." Admission of the gun itself is insufficient as a matter of law and, *a fortiori*, not harmless. The prosecutor's argument that "the ammunition is real . . . [based on] testing" made the second certificate non-harmless. Reversed.

In re Welfare of B.J.D., No. A08-1761, 2009 WL 2498121 (Minn. Ct. App. Aug. 18, 2009) (unreported)
The state conceded a *Bruton* error but claimed it was harmless beyond a reasonable doubt. The appellate court held that it could not conclude that verdict was "surely unattributable to the error" because (1) the trial court's findings demonstrate that the evidence was highly persuasive, specifically citing the evidence in finding that the key culpable act occurred, (2) the state referred to the evidence in closing argument to bolster another witness's credibility, and (3) the evidence was not overwhelming. Reversed.

People v. Berry, 49 A.D.3d 888 (N.Y. App. Div. 2008)
At trial, a detective testified that after interviewing an individual, he copied a page of that individual's address book and put out a warrant for the defendant's arrest.

The appellate court held that it was clear that the detective was implying that the nontestifying individual identified the defendant as the perpetrator in the course of an interrogation; it amounted to a testimonial statement. Its erroneous admission was not harmless because the only other evidence linking the defendant to the crime was a line-up conducted two years after the

crime. Moreover, the prosecution's emphasis of the inadmissible hearsay made it more likely that it affected the jury's verdict. Reversed.

Seaton v. State, 272 S.W.3d 854 (Ark. Ct. App. 2008)
Over trial counsel's objection, the defendant's statements to his sister, on the night of the incident, that he was going to kill the victim and then, later, that he had killed the victim, were admitted. The defendant claimed self-defense. Because the sister conveyed her statements to the police in the course of their investigation, they were testimonial hearsay. Apparently the state made a necessity argument for its admission, claiming that the sister's statement was "more probative on [mental state] than any other that the State could procure." The appellate court used this argument to hold that the erroneous admission was not harmless beyond a reasonable doubt. Reversed.

State v. Miles, 145 P.3d 242 (Or. Ct. App. 2006)
At trial, the court admitted, via the testimony of the reporting officer, the concededly testimonial hearsay of the defendant's girlfriend. In her statements, she claimed the defendant pushed and hit her. He testified at trial that the pushes came during mutual combat and that he did not punch her.

Finding that the erroneous admission of the statements was not harmless beyond a reasonable doubt, the court emphasized the state's sole reliance on the statements in making its case. On appeal the state had argued that because the jury found the defendant not guilty of fourth-degree assault, but guilty of harassment, it could prove harmlessness. That is, assault requires a showing of physical injury, whereas harassment merely requires proof of offensive contact. The state reasoned that the jury could have found the defendant guilty of harassment merely based on his own testimony. Rejecting this argument, the court emphasized the difference between the sufficiency of the evidence and whether the erroneously admitted evidence likely contributed to the verdict. In light of the prosecution's argument, the court reasoned it did.

People v. Picard, 32 A.D.3d 317 (N.Y. App. Div. 2006)
At trial for a shooting homicide, the court admitted, over one codefendant's objection, the statement of a nontestifying, alleged accomplice, claiming that one defendant asked him to bring him a gun, that he brought him a gun, both codefendants were present when he brought it, and one codefendant was very angry. The state conceded error, but argued it was harmless. It also argued that one of the codefendant's failure to object waived the issue as to that codefendant.

The appellate court reversed in part. It held that the non-objecting defendant had waived the issue and declined to reach it in the interest of justice. As to the objecting codefendant, it reversed. It held that the erroneous admission was not harmless beyond a reasonable doubt because the other evidence against the defendants consisted largely of another alleged accomplice's "largely uncorroborated" testimony, because the prosecution described the

inadmissible statement as "strong" during his closing argument, and because the jury requested a read-back of the inadmissible statement.

State v. Goff, No. 21320, 2005 WL 236377 (Ohio Ct. App. Feb. 2, 2005)
At trial for rape and sexual battery the court admitted the statements the defendant's nontestifying wife made during police interrogation. The charges arose from allegations that the defendant inseminated his stepdaughter against her wishes. The defendant's wife had stated that the complainant was "very reluctant and did not want to go through with it."

The appellate court—after a grant, vacate, and remand from the U.S. Supreme Court—reversed, holding that the statements were testimonial because they were made during police interrogation. They were not harmless beyond a reasonable doubt because the prosecution emphasized that they established the use of force element of the alleged crimes.

People v. Hardy, 824 N.E.2d 953 (N.Y. 2005)
At trial for attempted murder, robbery, and assault, the court admitted the alleged accomplice's plea allocution explaining that the accomplice and another person committed the crime in question. The parties agreed the admission was error, but disputed harm.

The appellate court reversed finding that the error was not harmless beyond a reasonable doubt. The court emphasized that, while other circumstantial evidence tied the defendant to the crime, the prosecution downplayed the credibility of one of its own witnesses while emphasizing the significance of the allocution. The appellate court downplayed the significance of the trial court's instruction to only consider the allocution as proof that two people acted in concert, noting the jury's "repeated requests" to have the allocution read back.

Harm Found Despite Limiting Instruction Offered

U.S. Court of Appeals Cases

United States v. Riggi, 541 F.3d 94 (2d Cir. 2008)
At trial, the court admitted the plea allocutions of eight non-testifying co-conspirators to corroborate cooperating witnesses' testimony as to the existence of the charged conspiracies. Trial counsel objected to their admission on "trustworthiness" grounds, but did not mention the Confrontation Clause.

The Court of Appeals reviewed for plain error, deeming the constitutional error unpreserved. The government conceded error, and the Court of Appeals found the error plain after determining the error "affected substantial rights" and was not harmless. The court emphasized the large number of the allocutions, overlapping nature of the conspiracies "such that evidence of one tended to support the existence of another," the manner in which they undermined the defense theory, and their detail. The court further held that the limiting instructions offered at

trial were likely inadequate because the jury convicted on every count supported by an allocution and acquitted the two unsupported by allocutions. Vacated and remanded.

United States v. Hardwick, 523 F.3d 94 (2d Cir. 2008)
At a trial for murder for hire, the court admitted the plea allocution of the defendant's alleged co-conspirator. The allocution made it clear that the defendant engaged in a *quid pro quo* with the trigger person. Trial counsel made a general objection to the allocution and asked for a limiting instruction. The court gave the limiting instruction, but overruled the objection. During deliberations, the jury asked for and received a readback of the allocution. The Court of Appeals ruled that because the general objection did not mention the Confrontation Clause, the Sixth Amendment, or any Confrontation Clause case law, the error was unpreserved and only reviewable for plain error. The government conceded error, but argued it was not plain and that it was harmless.

The Court of Appeals ruled that the error was plain and was not harmless. It emphasized the jury's request for the readback of the allocution and noted that it was "extremely doubtful" that the jury considered any other evidence as proof of the conspiracy.

United States v. Becker, 502 F.3d 122 (2d Cir. 2007)
At a trial for securities fraud, the court admitted transcripts of eleven plea allocutions by former brokers from the same office as the defendant, which described the brokers' intentional participation in a fraudulent scheme. The allocutions described fraudulent practices in detail and as "well known" in the office. The trial court instructed the jury to only consider the statements for "proof that a conspiracy existed as charged, but not to show that any defendant here was a member of that conspiracy." After conviction, the defendant appealed. The state appellate court rejected his claims, and he did not seek certiorari in the U.S. Supreme Court, which was due ten days after *Crawford* was decided. The defendant petitioned for habeas corpus and was granted relief. The government appealed the harmless error finding and lack of procedural bar.

The Court of Appeals ruled that petitioner's conviction was not final when *Crawford* was decided and that retroactivity was no bar to relief. It found the limiting instruction inadequate to prevent the jury from using the allocutions for an impermissible purpose—to prove the defendant was a conspirator—because of the "sheer number" of allocutions, their "repetitive nature," and because they were "unusually far-reaching and detailed . . . touch[ing] directly on issues that were central to Becker's defense." Vacated and remanded.

State Court Cases

People v. Filyaw, 409 Ill. App.3d 302 (Ill. Ct. App. Apr. 20, 2011) (unreported)

At trial, the court admitted the written statement of an unindicted co-perpetrator. The co-perpetrator testified, but the statement contained hearsay statements of the co-defendant. During jury instructions, the court instructed the jurors not to consider statements made by one defendant against other defendants. There was no instruction given contemporaneously with the statement. The state conceded *Bruton* error, but contested harm.

The Appellate Court of Illinois reversed. It held that the "generic" instruction given was inadequate to cure any harm. It also emphasized that the jury requested, and received, a copy of the statement during deliberations, that the statement was admitted substantively (rather than for impeachment), and that the prosecutor emphasized the statement during closing arguments.

State v. Patterson, 935 N.E.2d 439 (Ohio Ct. App. 2010)
At trial, the court accidentally submitted an exhibit to the jury. The exhibit included a statement from a nontestifying witness claiming that she overheard the defendant laughing about killing someone while driving recklessly. The trial court instructed the jury to disregard the statement and that the statement was unreliable. It also conducted a voir dire of each juror about whether they could disregard the statement.

The appellate court reversed and held that the Confrontation Clause violation was not harmless. It noted that the jury asked the judge whether it should have seen the statement, admitted to having read and discussed the statement, and gave, initially, equivocal answers about whether they could disregard the statement (e.g. "I think so."). It also noted that the jury asked a question about the mens rea for one of the charges. It was recklessness, just like the behavior described in the statement. Reversed.

Generally

U.S. Court of Appeals

Merolillo v. Yates, 663 F.3d 444 (9th Cir. 2011)
At trial for first degree murder, three experts testified about whether the defendant contributed to the victim's death from a ruptured dissecting aortic aneurysm. The issue was whether the head trauma caused by the defendant contributed to the aneurysm. One of the state's experts testified at the preliminary hearing but was not called to testify at trial. At trial, the state cross-examined the defense expert about their disagreement with the non-testifying expert's conclusions. The non-testifying expert was the only expert who concluded that the victim's death was a result of the head trauma caused by the defendant (the other state expert concluded that torso trauma also contributed to the death). The state appellate court found error, but held that it was harmless.

On review of a denial of petition for writ of habeas corpus, the Court of Appeals reversed. Applying the "substantial and injurious effect" standard, the court held that the error was not

harmless because the evidence went to causation, "the heart of the case." The court also noted the testimony was not cumulative and that the jury, via a question, had focused on the issue of causation.

United States v. Alvarado-Valdez, 521 F.3d 337 (5th Cir. 2008)
At trial, a police officer testified to what a cooperating witness, who fled the country prior to trial, told him about the defendant's involvement in a conspiracy to sell cocaine. On appeal, the parties agreed a violation of the Confrontation Clause occurred and was preserved, but they disputed whether the error was harmless.

The Court of Appeals held that inquiring as to whether there is "no reasonable possibility that the tainted evidence might have contributed to the jury's verdict" was the proper inquiry, rather than "the overall strength of the prosecution's case," because this case involves evidence presented (like video depositions), rather than evidence excluded (like limiting a cross-examination). In finding that the government could not meet its burden to prove harmlessness, the court explained, "There is no way to determine whether the jury would have convicted [the defendant] purely [on the basis of admissible] testimony or any of the other evidence. That would require retrying the case on appeal, at best, or engaging in pure speculation, at worst." The prosecutor's reliance on the inadmissible testimony in closing argument to prove the conspiracy, "and by implication, [the defendant's] participation in it," made the error non-harmless.

United States v. Rodriquez-Martinez, 480 F.3d 303 (5th Cir. 2007)
At trial for possession of cocaine, the court admitted the hearsay testimony of an officer about information a confidential informant provided designating the defendant as the source of drugs found in a van. The government conceded the error, but contended any error was harmless. The Court of Appeals disagreed and ruled that since the "informant's out-of-court statement was the only evidence that definitely identified [the defendant] as the drug source," the admission was not harmless. The court also noted that the defendant had given a "logically possible and not implausible account" of the other limited evidence against him, suggesting it pointed to an alleged accomplice.

United States v. King, No. 05-0081-CR, 2006 WL 760150 (2d Cir. Mar. 24, 2006) (unreported)
At trial, the court admitted the plea allocution of a co-conspirator. On appeal, the government conceded error, but argued any error was harmless beyond a reasonable doubt. The Court of Appeals, without explanation, ruled the error was not harmless and vacated the related convictions.

United States v. Santos, 449 F.3d 93 (2d Cir. 2006)
At trial for conspiracy to rob, DEA agents testified that a co-perpetrator admitted to being involved in a conspiracy to rob participants in a drug deal. The trial court ruled that defendants'

names could not be mentioned in the testimony and instructed the jury it could only consider the statement to determine whether a conspiracy existed, not whether the defendants participated in it. On appeal, the government conceded there was preserved *Crawford* error, but argued any error was harmless. Noting the instruction, the court limited its harmlessness inquiry to whether it affected the jury's determination of the existence of a conspiracy. The court did not find the error harmless because the government's case related to the conspiracy was weak.

***Guidry v. Dretke**, 397 F.3d 306 (5th Cir. 2005)
At trial for murder for hire, the court admitted testimony of the defendant's alleged co-conspirator's non-testifying girlfriend implicating the defendant as the gunman in the scheme and establishing that the defendant was to receive compensation for the murder. The state conceded error, but contested harm. The state appellate court found error, but no harm.

The Federal District Court granted the defendant's writ of habeas corpus and the Court of Appeals affirmed, holding that the error was not harmless beyond a reasonable doubt. It noted that the murder-for-hire statute required proof of remuneration or the promise thereof and that the inadmissible evidence was the only proof of remuneration.

***Madrigal v. Bagley**, 413 F.3d 548 (6th Cir. 2005)
At trial for murder, the trial court admitted an alleged accomplice's statements he made to the police. The accomplice claimed he was the getaway driver and that the defendant robbed and killed the victims. The accomplice was unavailable to testify, invoking his Fifth Amendment privilege. The prosecution read the seventy-nine page statement into the record. The state conceded error, but argued it was harmless.

The Court of Appeals affirmed the district court's holding that the state court's decision was an unreasonable application of clearly established law for several reasons. The statements were the only evidence definitively linking the defendant to the scene. No physical evidence linked him, and the eyewitnesses failed to provide key characteristics of the defendant, including facial hair. The court also emphasized the prosecution's emphasis of the statements in its closing argument.

***United States v. Bruno**, 383 F.3d 65 (2d Cir. 2004)
The trial court's admission of a plea allocution of one non-testifying declarant and the grand jury testimony of a different non-testifying declarant was plain error. The government conceded error, but contested harm.

The Court of Appeals found that the error was not harmless because the inadmissible evidence was the only evidence offered to prove elements of several charged crimes. The court declined to decide whether Confrontation Clause errors are structural.

Scott v. Gundy, No. 03-1168, 2004 WL 1303235 (6th Cir. June 9, 2004)
At trial, the court admitted the statement of the non-testifying co-defendant implicating the defendant in the crime. The defendant had previously moved to sever and had moved to exclude the statement. The trial court denied the motion, stating that because the co-defendant intended to testify, it would not be a problem. As the defendant's counsel had predicted, the co-defendant did not testify. No action was taken to correct the admission. On federal review, the state conceded error.

The Court of Appeals affirmed the Federal District Court's grant of habeas relief. It held that the confession was not harmless with regards to premeditation because the other evidence of premeditation, while perhaps sufficient to convict, required "considerable faith in the State's case" because of the "chain of inferences" required to find premeditation on the other evidence. Affirmed.

Federal District Court Cases

Babcock v. Metrish, No. 07-12913, 2009 WL 4884969 (E.D. Mich. Dec. 11, 2009) (unreported)
At trial for being a felon in possession of a firearm, the court admitted the transcript of a deposition into evidence. The deposition was of a police officer to whom the defendant had told that he had his girlfriend purchase a rifle that he later removed from her residence. The officer was on vacation at the time of trial. The state conceded that the officer was not "unavailable" for Confrontation Clause purposes, but contested harm.

The Federal District Court found that the error was not harmless. The court emphasized that the other evidence was less than overwhelming, the hearsay testimony was the only source of the defendant's "particular[ly] probative" confession, and a jury note focused on the improperly admitted evidence. Petition for habeas corpus granted.

State Court Cases

Commonwealth v. Ramsey, 949 N.E.2d 927 (Mass. App. Ct. 2011)
At trial for possession of cocaine, admitting lab certificates identifying the substance as cocaine was not harmless, even where the defense conceded the possession. The appellate court explained that it was not permitted to consider defense admissions in determining harmless error. Because without the admission, there was no other evidence of the identity of the substance, the admission was not harmless.

Commonwealth v. Reese, 933 N.E.2d 181 (Mass. App. Ct. 2010) (table decision)

At trial for unlawful possession of a firearm and unlawful possession of ammunition, the court admitted two ballistics certificates: one certified the gun recovered from the defendant was a working firearm, and the other certified that the rounds found inside the gun were ammunition.

Without discussion, the appellate court held that both were testimonial hearsay. Even though the error may not have been preserved, the court reviewed the error under the harmless by a reasonable doubt standard. It held the error was non-harmless as to the firearm charge because the certificate provided the only evidence that the gun was operable. The ballistics certificate's admission was harmless because other evidence established that there was ammunition found inside the gun. Reversed in part, affirmed in part.

Commonwealth v. Barbosa, 931 N.E.2d 60 (Mass. App. Ct. 2010)
At trial for possession of marijuana, the court admitted lab certificates reporting that the substance obtained from the defendant was marijuana. A police officer also testified that based on the smell of the substance, it was marijuana.

The appellate court reversed. Without discussion, it held the admission violated the Confrontation Clause. The error was not harmless beyond a reasonable doubt because the only other evidence of what the substance was came from the police officer who did not "at any time express an opinion based on any objective criteria, such as training or expertise." Reversed.

Commonwealth v. Tlasek, 930 N.E.2d 174 (Mass. App. Ct. 2010) (table decision)
At trial, the state introduced laboratory certificates that certain substances were cocaine, but the laboratory analyst did not testify. The state conceded error, but contested harm.

The appellate court held that the erroneous admission, "on the totality of the record before us, weighing the properly admitted and improperly admitted evidence together" was not harmless beyond a reasonable doubt. It was non-harmless even though the defendant did not contest (but did not stipulate) that the substance was cocaine and even though officers identified the substance as such. The court noted that the officers did not provide the basis for their conclusion and that the prosecution relied on the certificates, not the testimony, in closing argument. Reversed.

Commonwealth v. Hernandez, 929 N.E.2d 992 (Mass. App. Ct. 2010)
Admission of drug certificates written by nontestifying analysts was error, as conceded by the state.

The appellate court found that the error was non-harmless because, although officers testified that they believed the substance to be drugs, "they were not asked to apply [their] expertise to identify the nature of the substance" and offered "unsupported statements" of what they believed the substances to be. Reversed.

Commonwealth v. Rodriguez, 929 N.E.2d 359 (Mass. App. Ct. 2010) (table decision)

Admission of drug certificates of nontestifying analysts violated the Confrontation Clause. Although an "experienced officer" testified that the substance was cocaine, this "circumstantial indicia of drug involvement" was insufficient to "render harmless" the certificate. Reversed.

Commonwealth v. Rivas, 77 N.E.2d 328 (Mass. App. Ct. 2010)
Admission of drug certificates produced by nontestifying analysts violated the Confrontation Clause. Even though three officers testified about what they "believed" the substances to be, none were experts qualified to identify the nature of the substances, none articulated how their expertise allowed them to identify the substances, and no field tests were performed. Reversed.

Commonwealth v. Ocasio, No. 06-1099, 2010 WL 2754260 (Mass. Supp. June 29, 2010) (unreported)
The trial court admitted drug certificates produced by nontestifying analysts.

The appellate court found that the admission of the certificates violated the Confrontation Clause. The error was non-harmless even though officers testified that, based on their training and experience, several factors suggested the substance was cocaine: (1) its location behind a glove compartment, (2) its texture, (3) the defendant's assumption that the substance was cocaine, and (4) the uses of a masking agent on the substance. The court held, "Where the Commonwealth did not conduct field tests or present evidence of the effect the drug had on the defendant and the defendant did not testify [or stipulate] to the nature of the substance, the admission of the drug [is] not harmless beyond a reasonable doubt." Reversed.

Commonwealth v. Ortiz, 927 N.E.2d 1040 (Mass. App. Ct. 2010) (table decision)
Admission of drug analysis certificates without subjecting the analyst to cross-examination was not harmless error. The appellate court noted that the testimony of a single officer that the substance was cocaine did not render the error harmless because the officer did not conduct field testing on the substance or otherwise explain the basis for his conclusion. Reversed.

Commonwealth v. Anderson, 927 N.E.2d 531 (Mass. App. Ct. 2010) (table decision)
At trial for possession of a firearm and for possession of a controlled substance, the court admitted a ballistics certificate stating the weapon seized from the defendant could fire and a certificate stating that the substance seized was cocaine.

The appellate court held that both were non-harmless error. Admitting the ballistics certificate was not harmless because the state was required to prove that the weapon was capable of firing, and the mere presence of bullets in the weapon was insufficient for conviction. The drug certificate was not harmless because the only evidence that the substance was cocaine came from an officer who testified as to his belief without stating that he had any experience or training in narcotics analysis or had done field testing. Reversed.

Commonwealth v. Anziani, 927 N.E.2d 530 (Mass. App. Ct. 2010) (table decision)

At trial for possessing a controlled substance, the court admitted a laboratory certificate stating that the substance tested (and obtained from the defendant) was heroine. The testing laboratory technician and author of the report did not testify.

The appellate court held that the admission of the certificate violated the Confrontation Clause and was not harmless. It noted that there was no other significant evidence of the "weight and composition" of the substance, two elements of the charge. It rejected the state's argument that the defendant's failure to make the weight and composition "a live issue" rendered the error harmless. Reversed.

State v. Farrar, No. 93060, 2010 WL 2202929 (Ohio Ct. App. June 3, 2010) (unreported)
At trial for possession of a controlled substance, the defendant, pursuant to a state procedure, sought to access the author of a laboratory report for cross-examination. His request was denied, but the lab technician submitted an affidavit, and a different technician testified.

The appellate court held that the lack of access to the testing technician violated the Confrontation Clause. It rejected the state's argument that because the statute prohibits an "offer to sell" a controlled substance, the material sold is irrelevant. Reversed.

In re Delilah C., No. 2 CA-JV 2010-0016, 2010 WL 2197755 (Ariz. Ct. App. June 2, 2010) (unreported)
At trial for possession of drug paraphernalia, the arresting officer testified about his interview of a nontestifying witness. The witness said that the defendant used the dresser where the drug paraphernalia was found. The state did not contest whether the testimony violated the Confrontation Clause.

The appellate court held that the error was prejudicial because the statement was the only evidence of the defendant's "dominion and control" over the dresser and, thus, the only evidence of possessing the paraphernalia. Reversed.

Commonwealth v. Santos, 926 N.E.2d 1200 (Mass. App. Ct. 2010) (table decision)
Admission of drug certificates in trial for possession of a controlled substance violated the Confrontation Clause where the authors of the certificates and lab technicians did not testify. The error was not harmless because none of the testifying witnesses "had any expertise or training in chemical analysis or were qualified as experts to proffer an opinion that the substance was in fact cocaine." Reversed.

Commonwealth v. Tillman, 925 N.E.2d 866 (Mass. App. Ct. 2010) (table decision)
At trial for unlicensed possession of a firearm, a ballistics certificate was admitted stating that the gun was operational. Besides the loaded gun itself, no other evidence was offered to prove the offense. The appellate court reversed, holding that the error was not harmless even though the gun was admitted, it was loaded, and the defendant did not argue that the gun did not meet the statutory definition. Reversed.

State v. Rambert, 693 S.E.2d 282 (N.C. Ct. App. 2010) (table decision)
At trial, the court admitted the expert testimony of a forensic chemist. She testified about the conclusions reached by a nontestifying chemist, finding that a substance is cocaine.

The appellate court reversed, holding the Confrontation Clause violation was plain error and was not harmless. It noted that no admissible testimony established the chemical composition of the substance. The only admissible testimony on the subject was an officer's conclusion that the substance was "consistent with" cocaine.

Commonwealth v. Morales, 925 N.E.2d 551 (Mass. App. Ct. 2010)
Admission of a certificate that a white powder was heroin violated the Confrontation Clause. The error was not harmless because, while other evidence corroborated an intent to distribute, the certificate was the only evidence of the composition of the substance. Similarly, admission of a ballistics certificate stating that a gun was operable was a non-harmless violation. Even though the gun was loaded, there was no evidence presented that the gun was fired, and the defendant did not concede that it was operable. Thus, the error was not harmless. Reversed.

Commonwealth v. Fluellen, 924 N.E.2d 713 (Mass. 2010)
At trial, certificates of analysis were submitted that the substance the defendant was arrested with was cocaine. The defense focused on whether the defendant was a user or distributor of cocaine, not whether the substance was cocaine. Besides the certificates, the prosecution introduced the defendant's statements and interactions with an undercover officer.

The appellate court ruled that while "the jury *could have* inferred the identity of the substance based on the fact that the defendant conveyed to the undercover officer through his words in conduct . . . the certificates made that inference inescapable." Reversed.

Commonwealth v. Reed, 924 N.E.2d 334 (Mass. App. Ct. 2010) (table decision)
At trial for unlicensed possession of a firearm and ammunition, the court admitted ballistics certificates stating that the firearm found on the defendant was operable and that the bullets were ammunition. The state conceded Confrontation Clause error, but contested harm.

The appellate court held that both admissions were not harmless. The firearm certificate was not harmless because, other than the gun being loaded, there was no evidence presented that the gun was operable. The court noted that "[w]ith a certificate in front of them . . . the jury had little reason to endeavor to weigh the other evidence." The ammunition certificate was not harmless because, although the bullets were found in the gun, the jury was "not in a position to evaluate whether this other evidence demonstrated that the bullets met the statutory definition . . . because the judge did not provide the definition to the jury in his instructions. Reversed.

Commonwealth v. Charles, 923 N.E.2d 519 (Mass. 2010)
At trial for possession of controlled substances, the court admitted certificates that the substances possessed by the defendant were marijuana and cocaine. Even though the trial court did not

instruct the jury as such, a state pattern instruction provided that the certificates were prima facie evidence of the identity of the substances. The state conceded error but contested harm.

The appellate court held that the error was not harmless beyond a reasonable doubt because the certificates were the most powerful evidence of the chemical makeup of the substances. The arresting officers' testimony did not render the error harmless because they were not qualified as experts, did not articulate how their expertise permitted them to identify the substances, and gave conclusory testimony. The court rejected the state's argument that the defendant "tacitly stipulated" the identity of the substances by failing to make it a "live issue" at trial. Reversed.

Commonwealth v. Vasquez, 923 N.E.2d 524 (Mass. 2010)
At trial, without objection, the court admitted certificates that certain substances were, as charged, cocaine.

The appellate court held that the failure to object did not require the court to apply its standard reserved for unpreserved error for two reasons: (1) the objection would have been futile under then existing precedent (which was overruled by *Melendez-Diaz* while appeal was pending) and (2) the "'substantial nature' of the rights involved."

The error was not harmless beyond a reasonable doubt because admissible evidence was not so "'overwhelming' as to 'nullify any effect'" of the certificates. The arresting officers' testimony did not so qualify because it was based on their expertise in monitoring drug trafficking, not testing substances to identify it as such. The evidence of drug trafficking was not relevant to the identity of the substance, so it did not mitigate the harm. Finally, the court rejected the state's argument that the defendant's failure to contest the identity of the substances rendered the error harmless. Reversed.

Commonwealth v. Perez, 922 N.E.2d 855 (Mass. App. Ct. 2010)
At trial, the court admitted drug certificates specifying that the seized substances were of a certain weight and were cocaine.

The appellate court held that the admission violated the Confrontation Clause and created a "substantial risk of a miscarriage of justice." There was a substantial risk for several reasons: (1) none of the other evidence was based on "objective criteria" and was limited to officers' conclusory observations, (2) there was no independent evidence of the weight of the substances, and (3) the prosecution relied on the certificates in closing arguments. Reversed.

Commonwealth v. Whitehead, 922 N.E.2d 181 (Mass. App. Ct. 2010) (table decision)
At trial for possession of cocaine, the court admitted drug certificates identifying the substance in question and stating its weight. The testing analyst did not testify.

The appellate court held that the admission violated the Confrontation Clause and created a "substantial risk of a miscarriage of justice." It created such a risk because, regarding the

identity, there was no expert opinion offered, there were no field tests, and the only circumstantial evidence of its identity was the arresting officer's statement that he "believed" it was rock cocaine. Reversed.

Commonwealth v. Muniz, 921 N.E.2d 981 (Mass. 2010)
At trial, over the defense objection, the court admitted ballistics certificates stating that the gun seized from the defendant was operable—an element of possession of a firearm.

The appellate court held that it was constrained by a binding state court opinion, but noted that *Melendez-Diaz* was pending and permitted the defendant to raise the issue in postconviction. In postconviction the state conceded error, but contested harm. The postconviction court held that admission of the firearm certificate was not harmless beyond a reasonable doubt for several reasons: the jury was instructed that the certificate was prima facie evidence that the gun was operable, there was no other evidence that the gun's firing mechanism was operable, and the certificates offered "compelling evidence" of that it was operable. Other evidence presented, such as the gun being loaded and the defendant threatening to shoot it, may have been sufficient for conviction, but the court distinguished the sufficiency review from harmless review. Reversed.

Commonwealth v. Farmer, 922 N.E.2d 180 (Mass. App. Ct. 2010) (table decision)
The state conceded that the ballistics test indicating a gun was operable was admitted in error at trial for unlawful possession of a firearm, which requires the state to prove the firearm is operable.

The appellate court found that the admission created a substantial risk of a miscarriage of justice because there was no other evidence that the gun was operable at the time of the offense. It rejected the state's argument that the inference of the gun being operable, as suggested by the presence of a magazine full of bullets, was sufficient to overcome any prejudice. Reversed.

Commonwealth v. Rivera, 921 N.E.2d 1008 (Mass. App. Ct. 2010)
At trial for unlawful possession of a firearm, the state submitted a ballistics certificate stating that the firearm in question was operable. The gun was also admitted into evidence. The defense did not object to either admission.

Without discussing whether there was a Confrontation Clause violation, the appellate court held that the admissions required reversal because they created a "substantial risk of a miscarriage of justice." It created such a risk because the state's evidence "begins and ends" with the ballistics certificate. The admission of the gun did not mitigate the prejudice because "the mechanisms of guns are not so universally familiar that jurors, simply by looking at one, can tell whether it works." It also rejected the argument that the defendant's failure to contest the issue mitigated the prejudice. Reversed.

Commonwealth v. Kirkland, 922 N.E.2d 179 (Mass. App. Ct. 2010) (table decision)

Admission of drug certificates was not harmless beyond a reasonable doubt in a trial for possession of a controlled substance with intent to distribute where "there was little or no evidence apart from the certificates concerning the identity of the drugs." The appellate court rejected the argument that a stipulation that the substances found in the defendant's pocket were packaged for sale amounted to a stipulation that they were cocaine or otherwise relieved the state from proving its case. Reversed.

Graham v. State, No. CACR 09-903, 2010 WL 1006440 (Ark. Ct. App. Feb. 17, 2010) (unreported)
At a hearing to revoke the defendant's suspended sentence, the court admitted, over the defendant's objection, testimony from an officer that a confidential informant told him that the defendant "delivered cocaine." The court revoked the defendant's suspended sentence.

The appellate court held that the court abused its discretion in admitting the statement and the error was not harmless. It was not harmless because it provided the only direct proof that the defendant supplied the cocaine and because the state's case was not strong. The trial court had noted that if "the burden of proof [were] something other than a preponderance of the evidence, I think the State would fall short." Reversed.

Commonwealth v. Joyner, 921 N.E.2d 565 (Mass. App. Ct. 2010) (table decision)
Admission of drug certificates identifying a substance as cocaine was not harmless beyond a reasonable doubt. The defendant's general objection was sufficient to preserve the issue for review. The court rejected the state's argument that because the identity of the substance was not a "live issue," the error was harmless. Even though the evidence showed that the undercover officer asked for "rock cocaine," the court noted that there was no circumstantial evidence that the substance given to the police officer was cocaine. Reversed.

Commonwealth v. Barrett, 921 N.E.2d 565 (Mass. App. Ct. 2010) (table decision)
There was a "reasonable probability that [admission of drug certificates identifying substances as cocaine and marijuana] contributed to the conviction" for possession of those substances because the certificates were a "central part" of the state's evidence. The only other evidence of the identity of the substances was a police officer's testimony that substances were packaged for sale of the respective drug. Reversed.

Commonwealth v. Pimentel, 921 N.E.2d 113 (Mass. App. Ct. 2010)
Admission of drug certificates over the objection of defense counsel was not harmless beyond a reasonable doubt because the other evidence—a police officer's testimony about packaging of heroin, its street value, and the circumstances of the cooperating witness's arrangements with the defendant to order and buy quantities of heroin—were "at most . . . circumstantial evidence of drug distribution and not evidence of either the weight or the nature of the drug." Reversed.

Commonwealth v. Sutherland, 920 N.E.2d 326 (Mass App. Ct. 2010) (table decision)

The trial court admitted, over defense objection, drug analysis certificates. The defense objected, stating that the evidence was hearsay and that without the presence of the analyst, the state could not lay the proper foundation for the evidence. The appellate court held that the error was preserved and was not harmless beyond a reasonable doubt. It was not harmless as conceded by the state and as determined by the appellate court's careful review of the record. Reversed.

Commonwealth v. Lebron, 920 N.E.2d 326 (Mass. App. Ct. 2010) (table decision)
Admission of drug certificates created a substantial risk of a miscarriage of justice because the only other evidence of the identity of the drugs was an officer's testimony about what he "believed" the substance to be. Reversed.

People v. Schwarz, No. C059021, 2010 WL 193603 (Cal. Ct. App. Jan. 21, 2010) (unreported)
Admission of drug certificates were not harmless beyond a reasonable doubt because it is much more likely that the jury credited the certificates than the officer's statement that, based on his training and experience, the substance "appeared to be" methamphetamine. Reversed.

Commonwealth v. Wright, 918 N.E.2d 882 (Mass. App. Ct. Dec. 24, 2009) (table decision)
Admission of a drug certificate created a substantial risk of a miscarriage of justice because it was the only evidence of "the true nature of the heroin, an essential element of the charged offense." The appellate court rejected the argument that the arresting officers' testimony their prior experience with similarly packaged substances being drugs was sufficient to mitigate the prejudice. Reversed.

Commonwealth v. Phippen, 918 N.E.2d 480 (Mass. App. Ct. 2009) (table decision)
Admission, over defense counsel objection, of drug analysis certificates was not harmless beyond a reasonable doubt because the only other evidence of the identity of the substances was the arresting officers' claim that the substances "appeared" to be a particular drug, sufficient evidence for conviction, but not under *Chapman* harmless error. The appellate court distinguished cases where the defendant admits to the identity of the substance and where officers testify based on "taste, smell, or other characteristics" of the substance. Reversed.

Commonwealth v. Sanders, 918 N.E.2d 98 (Mass. App. Ct. 2009) (table decision)
Admission of a drug analysis certificate, over defense objection limited to the weight of the drugs, was not harmless beyond a reasonable doubt because the certificates were the only direct evidence of weight of the substance. The court declined to rule whether a jury was competent to determine, on its own, the weight of drugs admitted into evidence because it found with that with the certificate in front of them, there was likely no need to independently assess the certificate. The court found that the identity of the substance did not create a substantial likelihood of a miscarriage of justice because the defendant conceded its identity. Reversed.

Commonwealth v. Reyes, 918 N.E.2d 97 (Mass. App. Ct. 2009) (table decision)
At trial for unlawful possession of a firearm and unlawful possession of ammunition, admission of ballistics analysis certificates, over defense objection, was not harmless beyond a reasonable

doubt. Evidence that the gun was loaded was not sufficient to show that the gun was operable, an element of the offense. The admission of the loaded gun was insufficient to mitigate the certificate regarding the ammunition charge because it is likely that the jury relied on the certificate. Reversed.

Commonwealth v. Mells, 918 N.E.2d 97 (Mass. App. Ct. 2009) (table decision)
Admission of drug analysis certificate required reversal, despite a failure to object at trial, because *Melendez-Diaz* was decided while the defendant's appeal was pending and because the certificate was the only evidence that the substance in question was cocaine.

Commonwealth v. DePina, 917 N.E.2d 781 (Mass. App. Ct. 2009)
Admission of drug analysis certificates, over a defense objection, was not harmless beyond a reasonable doubt because they provided the only evidence of the weight of the substance, an element of the crime. It was also not harmless beyond a reasonable doubt regarding the identity of the substance because it provided the "strongest evidence" of the identity, despite circumstantial evidence of the identity. Reversed.

Commonwealth v. Camacho, 916 N.E.2d 774 (Mass. App. Ct. 2009) (table decision)
At trial for distribution of cocaine, as conceded by the state, admission of a drug analysis certificate over the defendant's objection both was a Confrontation Clause violation and was not harmless beyond a reasonable doubt. Reversed.

Commonwealth v. Morales, 916 N.E.2d 774 (Mass. App. Ct. 2009) (table decision)
At trial for trafficking in cocaine in excess of a specific weight, admission of a drug analysis certificate was not harmless beyond a reasonable doubt. It was not harmless because of the prosecution's emphasis on the evidence in closing argument and because, without it, the evidence would have been insufficient to convict the defendant. Retroactively applying *Crawford*, the court rejected the argument that the defendant must show that the cross-examination that could have occurred, had the analyst testified, would have made a difference to the outcome of the case. Reversed.

Commonwealth v. Hollister, 916 N.E.2d 768 (Mass. App. Ct. 2009)
Admission, over defense counsel's objection, of a ballistics analysis certificate at trial for possession of a firearm, was not harmless beyond a reasonable doubt because, "although the fact that the gun had ammunition in it was relevant to the question of whether the gun was operable, it was not of such strength to conclude that the admission" was harmless. Reversed.

Commonwealth v. Keller, 916 N.E.2d 724 (Mass. App. Ct. 2009) (table decision)
Admission of a drug analysis certificate at a trial for trafficking cocaine created a substantial risk of a miscarriage of justice because the certificate was "heavily, if not exclusively" relied on by the prosecution to prove the weight of the substance. The only other evidence was an officer's "guess." The court also found it unlikely that jury would have been able to do more than hazard a guess without the certificate. Reversed.

Tello v. State, No. 07-08-0314-CR, 2009 WL 3518006 (Tex. App. Oct. 30, 2009) (unreported)
As the state conceded, admission of investigating officer's testimony about statements witnesses made to him about the defendant's prior crimes violated state evidentiary law and the Confrontation Clause. The appellate court found cumulative error, considering the constitutional and non-constitutional error together. Reversed.

Commonwealth v. Nassor, 916 N.E.2d 422 (Mass. App. Ct. 2009) (table decision)
Admission of drug analysis certificates over the defendant's objection were not harmless beyond a reasonable doubt because the certificates were the "only evidence" that the substances were particular drugs and weighed a particular amount. The defendant had testified that he knew the substance found in his left jacket pocket was cocaine, and the arresting officers had testified that they "believed" some of the powder found was cocaine. Reversed.

Commonwealth v. Baxter, 915 N.E.2d 591 (Mass. App. Ct. 2009) (table decision)
Admission, over defense counsel objection, of drug analysis certificates identifying substances as drugs was not harmless for five reasons: (1) the defense theory was that because the state did not produce testimony of the analyst, it had failed to prove its case, (2) the prosecution introduced the evidence, (3) there were no curative instructions, (4) no evidence linked the certificates to the substances found on the defendant, and (5) the only other testimony that identified the statements was an officer's statement that he "believed" the substance to be a drug, without the trial judge finding that the officer's experience allowed him to give an expert opinion. Reversed.

State v. McNew, No. 22902, 2009 WL 3353592 (Ohio Ct. App. Oct. 16, 2009) (unreported)
Admission of an officer's statement that, based on his interview of the complainant, that he "determined that there were elements of a child rape in talking to her," was plain error and there was no "reasonable probability that [the statement did] not affect[] the outcome" because the credibility of the victim was the linchpin to the case, and she did not testify. Reversed.

State v. Kelley, 217 P.3d 56 (Kan. Ct. App. 2009)
Admission of the nontestifying witness's statements was not harmless beyond a reasonable doubt. The witness reported the statements of her daughter implicating the defendant. The daughter later recanted and testified for the defense. The error was not harmless because the physical evidence of the alleged rape was limited, the alleged victim recanted her allegation, and the hearsay testimony was significant. Reversed.

Commonwealth v. Brown, 914 N.E.2d 332 (Mass. App. Ct. 2009)
At trial for unlawful possession of an operable firearm, admission of a ballistics analysis certificate, over the objection of trial counsel, was not harmless beyond a reasonable doubt because there was "no other competent evidence" that the gun was operable. The only other evidence was the gun itself, the testimony of the arresting officer that he "cleared" the weapon to make rue there was no live ammunition, and the testimony of the defense psychiatrist that the defendant told him he had removed the bullets before putting the gun in his pants. Reversed.

Digsby v. United States, 981 A.2d 598 (D.C. 2009)
At trial for possession of a controlled substance (heroin and marijuana), the court admitted drug analysis certificates without introducing the analyst's testimony. An intent to distribute can be inferred from expert testimony and from the quantity of drugs. The state conceded error, but contested harm.

The appellate court found that the error was not harmless with regards to the heroin conviction because of the "prominent use" of the certificates regarding the heroin charge. The defendant had admitted to possessing "dope," but the appellate court noted that it is a "generic term that could signify other substances." Reversed.

Commonwealth v. Rodriguez, 913 N.E.2d 880 (Mass. App. Ct. 2009)
At trial for trafficking cocaine of more than 108 grams of a controlled substance, admission of drug analysis certificates including the weight of the drugs was not harmless beyond a reasonable doubt. Even though the defendant admitted to possessing drugs, without the certificates, the conviction would require "too much guess work on too close a question" where the defendant allegedly possessed 136 grams of cocaine. Reversed.

Duvall v. United States, 975 A.2d 839 (D.C. 2009)
At trial for possession of a controlled substance, admission of drug analysis certificates was not harmless beyond a reasonable doubt, even though several the government claimed that four factors suggested otherwise: (1) trial testimony included evidence that the arresting officer conducted a field test of that substance, (2) the officer smelled an odor that, based on his training and experience was marijuana, (3) a field test of the substance confirmed the presence of THC in it, and (4) the defendant admitted at trial that the substance recovered was marijuana. The error was not harmless because the prosecutor in her closing argument and the judge in his fact finding both referred to the certificates. Because the defendant's alleged "admission" was in the context of denying knowledge of the presence of the substance, the court did not consider it an admission for purposes of harmless error. Reversed.

State v. Haggblom, 208 P.3d 1033 (Or. Ct. App. 2009)
Admission of a nontestifying domestic violence complainant's recorded statement to the police was not harmless beyond a reasonable doubt because it was the only evidence that connected her injuries to the actions of the defendant. Reversed.

State v. Paolone, 209 P.3d 324 (Or. Ct. App. 2009)
Admission of the nontestifying codefendant's statement that he made to an officer before trial that detailed the defendant's actions during the crime was not harmless error because the other evidence permitted both guilty and innocent inferences and the statement provided the strongest direct evidence in support of the state's theory. Reversed.

Millard v. United States, 967 A.2d 155 (D.C. 2009)

Admission of a *drug* analysis certificate (DEA-7 report) was not harmless beyond a reasonable doubt for both the drug charges and the *weapons* charges. It was not harmless as to the weapons charges because the prosecution, in rebuttal, argued that it was unlikely that the defendant "just happened to be on Jasper Road with [drugs] in his pocket and a gun was lying there," thus drawing the connection between the drugs and the weapon. Moreover, the evidence of gun possession was otherwise weak. Reversed.

Williams v. United States, 966 A.2d 844 (D.C. 2009)
Admission of a drug analysis certificate (DEA-7 report) was plain error and not harmless beyond a reasonable doubt as to the charge of conviction, distributing cocaine, but it was harmless with regards to the lesser included offense of attempting to distribute cocaine. It was harmless on the latter charge because it did not require the substance to be cocaine; the defendants merely had to attempt to sell cocaine. The court rejected the defendants' arguments that they may have been cooperating to sell fake cocaine because the evidence suggested that the defendants, in fact, operated independently of each other. Reversed in part.

Smith v. United States, 966 A.2d 367 (D.C. 2009)
Admission of a drug analysis certificate (DEA-7 report) was, as conceded, not harmless beyond a reasonable doubt, as to the charge of conviction, possession of cocaine. It was also not harmless beyond a reasonable doubt to the lesser included offense, attempted possession of cocaine for three reasons: (1) the bag with the substance was found near the defendant's weapon, but it was partially buried, suggesting it may have been placed there another time, (2) the jury could have inferred intent to possess from the fact that the substance found was cocaine (as demonstrated by the certificate, and (3) the defense credibly challenged the government witnesses' claim that the defendant admitted the substance was his by stating "that's for personal use." Reversed.

State v. Caraballo, No. 05-07-1360-I, 2009 WL 21509 (N.J. Super. Ct. App. Div. Jan. 6, 2009) (unreported)
At trial for rape, admission of an unredacted codefendant's statement indicating that the encounter was not consensual was not harmless beyond a reasonable doubt because the codefendant was the only witness to the encounter and because the trial judge, sitting as trier of fact, noted that he could not have found the defendant guilty beyond a reasonable doubt without the statement. Reversed.

Dealba v. State, No. 47122, 2009 WL 1424473 (Nev. 2009)
The failure to give an instruction limiting the use of a nontestifying codefendant's redacted statement was not harmless beyond a reasonable doubt because the jury could have improperly used the statement against the defendant and in light of the weak evidence—the only eyewitness could not initially identify the defendant and he described the defendant as a black male even though he was Hispanic—they probably did rely on the statement. Reversed.

State v. Schultz, No. 37438-2-II, 2008 WL 5137589 (Wash. Ct. App. Dec. 9, 2008) (unreported)

As conceded by the state, at trial for possession of methamphetamine, it was not harmless to admit a lab report stating that the substance seized from the defendant was methamphetamine. Reversed.

Vinson v. State, 266 S.W.3d 65 (Tex. App. 2008)
At trial for assault and for interfering with the victim's attempt to obtain help (via 911), it was harmful error to admit testimonial hearsay describing the details of the assault and the means of interference, even though other evidence demonstrated that the victim was assaulted and her call for help was interrupted. The inadmissible evidence was the only evidence of the "means and manner" of the offense. Reversed.

State v. Alne, 184 P.3d 1164 (Or. Ct. App. 2008)
At trial, a physician recounted the complainant's detailed report of a sexual assault. Even though other witnesses testified to similar statements, the court found that in light of the "physician's 'unique training and experience in child abuse assessment [the jury] would likely have given the statements greater weight.'" The court also noted the lack of significant evidence corroborating the complainant's version of the events. Reversed.

State v. Yusuf, No. A06-2060, 2008 WL 942542 (Minn. Ct. App. April 8, 2008) (unreported)
Admission of a certificate of analysis stating the weight of a substance without having the author of the certificate testify was not harmless error where the certificate provided the only scientifically reliable measure of the weight of the substance, an element of the crime charged. The investigating officer's testimony about having weighed the substance while in its bag was insufficiently reliable as was the same officer's estimate of the weight of the substance. Reversed.

Clarke v. State, 976 So.2d 1184 (Fla. Dist. Ct. App. 2008)
An investigating officer's inadmissible testimony about the testimonial statements (as conceded on appeal by the government) of eyewitnesses was not harmless error because, although the officer merely testified as to whether the eyewitnesses' accounts were consistent with the testimony of the victim, the inadmissible statements were the only evidence other than that of the victim that contradicted the defendant's version of the events. Reversed.

State v. Norby, 180 P.3d 752 (Or. Ct. App. 2008)
Admission of a nontestifying complainant child's statements to a physician in a child sexual abuse treatment center was not harmless beyond a reasonable doubt even though several witnesses, including the complainant's mother and grandmother, corroborated the statements. The court emphasized that the physician was a neutral professional specializing in forensic pediatrics and, thus, her testimony "likely had a qualitatively different effect on [the jury's] verdict . . . even if A's statements to [the physician] had been identical to A's statements to the other witnesses." The court also noted that the likelihood that the jury further credited the physician because she used the statements as a basis for her diagnosis. Reversed.

State v. Ellis, No. A06-2088, 2008 WL 660565 (Minn. Ct. App. March 11, 2008) (unreported)
Admission of Minnesota Bureau of Criminal Apprehension crime lab reports was plain error where the author of the reports did not testify. The error affected the fairness and integrity of the judicial process and warranted relief because the reports were the only evidence of the identity or weight of the allegedly controlled substances. Reversed.

Davis v. State, 657 S.E. 609 (Ga. Ct. App. 2008)
As conceded by the state, it was not harmless error to admit the identification statement of the victim, who later died, against the defendant at trial where without the statement the evidence was insufficient to convict the defendant. Reversed.

Fields v. United States, 952 A.2d 859 (D.C. 2008)
In an appeal from conviction of possession of a controlled substance, the government conceded that the admission of a drug analysis report concluding that a substance found next to the defendant was marijuana was not harmless error with regards to possession of marijuana, but it argued that it was harmless beyond a reasonable doubt with regard to an attempted possession charge.

The appellate court disagreed and reversed because the prosecution's case was about the same issue either way: whether the defendant possessed what the government contended was marijuana. The court noted the lack of circumstantial evidence of the defendant's attempt to possess marijuana. Thus the identity of the substance, along with its proximity to the defendant, were the only facts supporting an attempted possession charge. Reversed.

Rubio v. State, 241 S.W.3d 1 (Tex. Crim. App. 2007)
At trial for killing and dismembering his children, the defendant pleaded not guilty by reason of insanity. The defendant gave a videotaped statement detailing his strangling, stabbing, and decapitating his children with the help of their mother. The defendant said he believed the children had been possessed with evil spirits. Their mother gave three statements to the police, each of which was admitted during the innocence/guilt phase, where she invoked her Fifth Amendment rights and was, therefore, unavailable.

Her first statement largely corroborated the defendant's theory of the case, but added some details. Her second statement repudiated her first, and she claimed they killed the children because of financial difficulties and because it would be better for the children to die than to suffer. In a third statement, she said they killed the children because of their financial problems and because they did not want the children to suffer. In the third statement, however, she was ambiguous as to whether the children would suffer because of financial problems or because the children were possessed with evil spirits. She also said that the defendant knew what they had done.

While the defendant's appeal was pending, the Supreme Court decided *Crawford*. The Texas Court of Criminal Appeals found that the erroneous admission was not harmless beyond a reasonable doubt. It noted that as an accomplice, her statements were likely to be given weight. Moreover, she was in the best position to provide information about the defendant's mental state, the only issue at the guilt phase. It also noted her incentive to cooperate, her state of mind (based on having participated in grisly acts), and her suggestibility as a high school drop out and participant in special education courses. The court dismissed the state's argument that the evidence she provided was cumulative and corroborated by the physical evidence because only her chronology of the crime was corroborated. Her explanation that the defendant knew what he had done was wrong and that they killed the children for financial reasons was not cumulative or corroborated by other evidence. It is noteworthy that the court provided a detailed social history of the defendant, including facts about how his mother taught him to prostitute himself and about how he huffed spray paint, even though it was a guilt phase issue and ruling. Reversed.

State v. Lopez, 168 P.3d 743 (N.M. 2007); ***State v. Walters***, 168 P.3d 1068 (N.M. 2007) (codefendant appeal with similar ruling)

At trial for sexual penetration of a child, intentional child abuse resulting in death, and conspiracy to commit child abuse, the trial court admitted the statements of the nontestifying codefendants. The codefendants gave statements corroborating the evidence offered in the defendant's own confession. They did not provide much information about the sexual abuse.

Because the codefendants' statements were cumulative of the defendant's confession and because they offered little information about the sexual abuse, the appellate court ruled that the "per se" error of admitting them was harmless. It ruled, however, that the admission was not harmless as to the conspiracy charge because the only evidence of the conspiracy was the statement of the defendant and codefendants that the defendant and his father (a codefendant) both committed acts constituting child abuse. It was important evidence of the conspiracy because two must act in concert, and without any other direct evidence of an agreement to do so, the defendant's own statement, providing only circumstantial evidence of a conspiracy by describing them acting in the same manner, was the only evidence of an agreement to do so. Reversed in part.

Scott v. State, 227 S.W.3d 670 (Tex. Crim. App. 2007)

At trial for murder, the prosecution admitted the defendant's confession, taken after several days of interrogation. It also admitted, over the defense's objection, the nontestifying codefendant's confession. Other suspects had been exonerated after falsely confessing. The primary defense at trial was that the defendant falsely confessed and had simply parroted the details of the crime he had heard from friends, newspaper accounts, and from the interrogating officers. The prosecution, in closing argument emphasized that, unlike the other suspects' (false) confessions, the person the defendant identified in his confession, also confessed and had no alibi. The intermediate appellate court held that the codefendant's statement was wrongly admitted in

violation of the Confrontation Clause, but that the violation was harmless beyond a reasonable doubt.

Reversing, the Court of Criminal Appeals held that it was not harmless beyond a reasonable doubt. It examined several factors: (1) the importance of the statement to the prosecution's case, (2) whether the statement was cumulative of other evidence, the presence of corroborating or contradicting evidence, (3) the overall strength of the state's case, and (4) what emphasis the prosecution put on the wrongly admitted evidence. After an in-depth examination of whether the defendant might have falsely confessed, including a note that the police tactic of "revivification" through visualization had been discredited, the court concluded the wrongful admission had not been harmless, largely because the evidence corroborating the defendant's confession had been contested and because of the prosecution's emphasis on the wrongfully admitted codefendant's confession. The dissent took issue with the majority's analysis of the false confession.

State v. Pitt, 159 P.3d 329 (Or. Ct. App. 2007)
At trial, the court admitted videotaped statements of nontestifying complainants. It also admitted testimony of the doctor, psychologist, and forensic child interviewer who interviewed them. Each of the latter testified that the complainants had told them that the defendant touched their genitals.

The appellate court found plain error with regard to the videotaped statements and did not rule on the admissibility of the other statements because it found that admitting the videotaped statements was not harmless beyond a reasonable doubt. Disagreeing with the state, it held that it was not required to first determine whether the other statements were admissible because of its ruling on harmlessness. It noted that whether an error is harmless is a question of federal law. Reversed.

Heard v. Commonwealth, 217 S.W.3d 240 (Ky. 2007)
At trial, the court admitted the nontestifying complainant's statements to the investigating officer. The complainant stated that the defendant had called and asked if her grandmother was gone, showed up a few minutes later and threatened to kick in the door, kicked in the door, hit her in the head with a gun, and pointed a gun at her and said he would have shot her had the gun not been broken. The intermediate appellate court held that the statements were erroneously admitted testimonial hearsay, but found the admission harmless.

The Kentucky Supreme Court reversed, finding that the erroneous admission was not harmless beyond a reasonable doubt. Even though the statements were largely cumulative of other evidence, the court noted that the statements from the victim herself were "the most damning." It also noted that the only evidence of an element of one of the offenses came from the complainant. Reversed.

People v. Thomas, No. A104336, 2006 WL 3775882 (Cal. Ct. App. Dec. 26, 2006) (unreported)

At trial for false imprisonment and inflicting corporal injury on a cohabitant, the court admitted the testimony of the investigating officer, who recounted the statement of the nontestifying complainant. The complainant said that she lived with the defendant and recounted a physical altercation with him. The state conceded that the statement to the officer, with the exception of the identification of the defendant, was testimonial hearsay. The court of appeals held that the entire statement was testimonial.

It also held that with regard to inflicting injury on a cohabitant, the error was not harmless. It explained that the only evidence of cohabitation came from the complainant. It also explained that the admission was harmless beyond a reasonable doubt with regards to the other charge because independent witnesses testified to their firsthand knowledge of the altercation. The court did not discuss whether it was confident that the complainant's statements had no effect on the jury, as *Chapman* requires. It also remanded the case for a determination of whether the defendant had forfeited his Confrontation Clause claim based on his wrongdoing. The state pointed to evidence that the defendant had made threatening statements to the defendant.

State v. Parker, 144 P.3d 831 (Mont. 2006)
At trial for assault, the court admitted a tape with the recorded statements of the complainants who were the defendant's spouse and four children, all of whom testified at trial, but recanted their recorded statements. In their recantation, they each claimed a houseguest, Kratz, coerced them into making the statements and was the real perpetrator. Unbeknownst to the court and to the defendant, the tape included a statement by Kratz. Kratz did not testify at trial, and the trial court never ruled that her statements on the tape were admissible. At the close of the evidence, the court ordered that the tape and tape player be delivered to the jury room for use during deliberations.

Reviewing *de novo*, the appellate court held that presenting the unadmitted statement to the jury was trial, rather than structural, error that prejudiced the defendant. The court explained that the presentation of unadmitted evidence to the jury was "amenable to qualitative assessment by a reviewing court for prejudicial impact," and, thus, was trial error. Rejecting the state's argument that the defendant had not proved the jury had heard the tape and therefore did not establish prejudice, the court emphasized that it was the state's burden to prove harmlessness. It then applied the "cumulative effect" test examining "other admissible evidence that proved the same facts as the tainted evidence" and concluded that Kratz's statement, although duplicative of the recorded statements of the defendant's family members, was unique in that it was the only uncontradicted statement put before the jury.

State v. Babb, No. 86294, 2006 WL 1174405 (Ohio Ct. App. May 4, 2006) (unreported)
At a trial for robbery, the court admitted the testimony of an investigating detective about statements an eyewitness to the alleged incident made to him. The statements implicated the defendant, describing how the defendant had a gun, exited the vehicle he was in with the witness,

robbed the alleged victim, and returned to the car. Trial counsel did not object. The state conceded error, but contested harm.

The appellate court reversed. It did not address whether the issue was preserved, but the dissent noted it was not. The majority held that the other evidence was not "so overwhelming, and the prejudicial effect of the [subject statement] is so significant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." (alteration in original). The court emphasized that the other witnesses provided conflicting information about the color of the defendant's eyes and darkness of his lips. It also noted that, unlike the declarant, the other witnesses did not observe what happened after the defendant got out of the car.

Springsteen v. State, No. AP-74223, 2006 WL 1412244 (Tex. Crim. App. May 24, 2006) (unreported)

At trial for murder, the court admitted the written confession of the alleged coperpetrator. The confession did not identify the defendant, but it corroborated "non-public" facts contained in the defendant's videotaped confession, which was also admitted at trial. The defendant testified at trial and repudiated his confession. He also introduced the confessions of two other alleged coperpetrators that contained "non-public" facts about the incident who the police later determined had falsely confessed. The defendant was sentenced to death.

The appellate court reversed the guilt and penalty phases. It held that the confession was clearly testimonial hearsay, and that the state had not proven beyond a reasonable doubt that the confession did not affect the jury's decision. It emphasized the lack of "physical or forensic" evidence linking the defendant to the case, the lack of any witness link him to the crime, and the prosecution's emphasis on the erroneously admitted confession to undermine the defendant's repudiation and to corroborate its theory of the case. The court also emphasized that the defendant's repudiation may "have been given more than the usual weight" in light of the other false confessions.

State v. Davis, 930 So.2d 1099 (La. Ct. App. 2006)

At trial, the state introduced, over defense objection, a district attorney's testimony about what the alleged coperpetrator said during his plea allocution. The allocution directly implicated the defendant in the crime. The coperpetrator had agreed to testify against the defendant in exchange for a less severe sentence. But when he was called to testify, he refused to answer questions unless he was appointed counsel. When the court refused to appoint him counsel, he refused to testify. The trial court admitted the allocution because the defendant had been subject to cross-examination by the district attorney in his own case.

The state conceded error, but contested harm. The appellate court considered "the importance of the evidence to the State's case, whether the testimony was cumulative, the presence or absence of additional corroboration of the evidence, the extent of cross-examination permitted and the overall strength of the State's case." It emphasized that the erroneously admitted evidence was

the "only direct evidence" linking the defendant to the crime, even though circumstantial evidence also did.

Jackson v. Commonwealth, 187 S.W. 300 (Ky. 2006)
Prior to trial, the codefendants moved to redact the inculptatory statements they each made to the police during interrogation. In the alternative, they requested separate trials. Applying *Ohio v. Roberts*, the trial court found the statements reliable and rejected both requests. The defendants pled guilty, but reserved their right to challenge the court's ruling on appeal.

Prior to completion of their appeal, the Supreme Court decided *Crawford*. Relying on *Crawford*, the Kentucky Supreme Court held that the trial court erred in refusing to either redact the statements or grant the motion for separate trials. It rejected the state's invitation to hold the error harmless in light of evidence the state would have presented at trial. It explained that to do so would be "entirely too speculative" and would "misconceive [the] purpose" of harmless error review, "to ensure that fair trials are not overturned on technicalities." It explained that absent an actual trial, the standard of review is abuse of discretion. In light of the change in standard post-*Crawford*, the court found such an abuse. Reversed.

People v. Brown, 842 N.E.2d 1141 (Ill. App. Ct. 2005)
At trial for robbery and murder, the court admitted the statements of nontestifying alleged coconspirators. They had testified in separate trials, and one had provided a written statement, but both refused to testify in the defendant's trial. The statements were introduced via the testimony of three assistant state attorneys and pursuant to a state evidentiary rule related to prior testimony specifically allowed by the appellate court during an interlocutory appeal by the state. The statements provided "detailed" accounts of the crimes. Other evidence at trial included one surviving victim's eyewitness testimony, a codefendant's girlfriend's account of the defendant's confession, and the defendant's friend's account of the defendant's planning of the crime. In light of *Crawford*, decided while the case was pending, the state conceded error related to the prior statements, but contest harm.

The appellate court found that the erroneously admitted statements were not harmless beyond a reasonable doubt. The court noted that there was significant other evidence, but explained that the detailed accounts and the corroboration it provided suggested that the admission of the statements was not harmless beyond a reasonable doubt. Reversed.

People v. Wardell, No. H027777, 2005 WL 3436700 (Cal. Ct. App. Dec. 15, 2005) (unreported)
At trial for a bank robbery, the court admitted the statement of the nontestifying accomplice, claiming that he was the getaway driver. The primary defense theory was that the defendant was the driver, not the person robbing the bank. The defense did not object.

The state conceded error, but contested harm. Because *Crawford* was decided after trial, the appellate court decided to address the unpreserved issue. The court held that the admission was not harmless beyond a reasonable doubt. The court was unpersuaded by the state's argument

that the jury in the defendant's case did not rely on the statement because the jury was not instructed on an accomplice theory and because the jury found that the defendant personally used a firearm. Thus, it likely relied on the accomplice's statement to find that the defendant was the principal. It also rejected the argument that the statements were unimportant in light of other evidence. It noted that the defendant matched the descriptions of the principal and at the time of his arrest was wearing clothing identical to that described by eyewitness, but noted that the accomplice also matched the general descriptions and speculated that the defendant and accomplice may have swapped clothes in an effort to frustrate police efforts to find them. It acknowledged, "While these are not the strongest or most reasonable conclusions from the evidence, that does not mean that this jury did not discount them in reliance on [the accomplice's] statement that he was the driver." Reversed.

People v. Murillo, No. B174164, 2005 WL 1819361 (Cal. Ct. App. Aug. 3, 2005) (unreported)
At a joint trial, the court admitted, over a defense objection, the codefendant's confession which included details of the defendant's acts which would suggest he was a willing participant in the crime alleged. For example, the statement explained that the defendant suggested a parking spot for the getaway car and that it was the defendant who suggested waiting for the victim. The defendant's theory was that he acted under duress.

The state conceded that the admission was error, but it contested harmlessness. The appellate court found that the wrongfully admitted confession was not harmless beyond a reasonable doubt because the statement undermined the defense theory and because the only other evidence against the defendant was weak and to be viewed with caution. Absent the confession, only two facts undermined the defense theory of duress. First, a different alleged coperpetrator (who had made a deal with the prosecution in exchange for his testimony) contradicted the defendant. Second, two eyewitnesses testified that they saw the defendant laughing and smiling during the incident. The court held the admission was not harmless because the primary evidence, other than the wrongfully admitted confession, was from the coperpetrator, whose testimony the jury was instructed to review with caution. It noted that the eyewitnesses were damaging to his case, but that their testimony about demeanor was not enough to overcome the beyond a reasonable doubt standard. Reversed.

Sarr v. State, 113 P.3d 1051 (Wyo. 2005)
On remand from the U.S. Supreme court for reconsideration in light of *Crawford*, the court agreed with the stipulation of the parties: the recorded statements of the unavailable victim were testimonial. Because the evidence was the "most compelling evidence of . . . guilt," it found that the error was not harmless beyond a reasonable doubt. Reversed.

Miller v. State, 615 S.E.2d 843 (Ga. Ct. App. 2005)
At trial for terrorist threats, assault, and battery, the court admitted the nontestifying complainant's statements to the police. The defense attorney introduced the complainant's statements to him that indicated that the defendant had hit her. The defendant testified that the

he hit the complainant, but denied threatening her and claimed to have blacked out from intoxication.

The appellate court reversed the terrorist threats conviction because the statements were admitted in violation of his right to confrontation. They were not harmless because they were the "only real evidence" of the defendant's guilt of this offense. By contrast, his own admission and the evidence his defense attorney presented rendered the admission harmless as to the assault and battery convictions.

Vigil v. State, 98 P.3d 172 (Wyo. 2004)
At trial, after the alleged coperpetrator invoked his Fifth Amendment rights, the court admitted statements that the alleged coperpetrator made during a custodial interview.

The appellate court reversed. It held that the statements were "clearly" testimonial in light of *Crawford* and that they were admitted without the defendant having cross-examined the witness.

Turning to whether the error was harmless, the court noted that the "interests" protected by the Confrontation Clause and implicated in this case suggest the error was not harmless. It listed the preference for face-to-face confrontation, cross-examination of witnesses, testimony under oath, and allowing the fact finder to view the witness's demeanor. Each of these interests would likely be implicated in most Confrontation Clause cases. The court also noted that the case boiled down to a credibility contest between the waffling testimony of the complainant and the witness against the testimony of the defendant.

People v. Ruiz, No. C042579, 2004 WL 1965783 (Cal. Ct. App. Sept. 3, 2004) (unreported)
At trial for first-degree murder, one of the alleged accomplices testified in exchange for immunity. Another alleged accomplice had moved out of the country, but had given a statement to the police, which the prosecution introduced. On appeal the state conceded *Crawford* error, but it argued harmlessness because the eyewitness accomplice provided substantial evidence of guilt.

The appellate court reversed, holding that although the evidence was substantial, it was not overwhelming. It noted that the immunized eyewitness had changed his story several times and had specifically asked the police who had committed the crime before offering his version of the events. It also noted that the jury requested a read back of the inadmissible testimony before reaching its decision.

Brawner v. State, 602 S.E.2d 612 (Ga. 2004)
At trial for first-degree murder, the court admitted a statement a nontestifying eyewitness gave to the police. The statement described the shooting and "went to the core issue of the case, appellant's guilt or innocence."

The appellate court reversed. It held that although the eyewitness's statement was corroborated by two additional eyewitnesses, their testimony conflicted as to whether the victim was standing or laying down when shot and their credibility was called into question on cross examination. One corroborating witness did not report the crime until six months later, while he was incarcerated. The other corroborating witness was related to one of the perpetrators, had a drinking problem, was drunk the night of the shooting, and had been convicted of several felonies.

Samarron v. State, 150 S.W.3d 701 (Tex. App. 2004)
At trial for first degree murder, the court admitted the statement of an eyewitness establishing that the defendant was the perpetrator and corroborating another eyewitness's testimony. On appeal, the courts affirmed. After *Crawford* was decided the Texas Court of Criminal Appeals allowed for an out of time Petition for Discretionary Review and remanded the case to the Court of Appeals.

The Court of Appeals reversed the judgment of the trial court. It held that the statement of the eyewitness, made at the police station, was testimonial hearsay. It held that the statement's admission was not harmless beyond a reasonable doubt to admit the evidence. The court noted that there was an effective cross-examination of the other eyewitness, who only was able to identify the defendant four weeks after the incident. She was unable to do so one hour after the murder. Because of the importance of the identification, the court found that the error was not harmless.

Morten v. United States, 856 A.2d 595 (D.C. 2004)
At a multi-defendant trial for first-degree murder and conspiracy to commit the murder, the court admitted some nontestifying codefendants' statements against each of the codefendants.

The state conceded error, and the appellate court reversed. It explained that the error was not harmless as to any of the charges because, even though they largely addressed the existence of a conspiracy, "their presence and effect was interwoven in the fabric" of the trial.

Even though a member of the street gang that the codefendants belonged to testified about the events in question, the court held that the admission of the codefendants' statements to the police was not harmless beyond a reasonable doubt because the gang member witness was not "an unblemished witness." The court noted his pending plea agreement that included dismissing a capital charge in exchange for his testimony. Although the codefendants' statements largely addressed the existence of a conspiracy, the statements provided proof of motive for the murder and were, thus, not harmless as to both convictions.

Jahanian v. State, 145 S.W.3d 346 (Tex. App. 2004)
At trial for engaging in organized criminal activity by conspiring with others to commit theft of property, the court admitted the custodial, handwritten statement of a nontestifying alleged coperpetrator.

The appellate court reversed. It held that because the statement was custodial, it was testimonial hearsay. The admission was not harmless beyond a reasonable doubt because it provided the only evidence of an agreement to commit a crime.

State v. Johnson, 98 P.3d 998 (N.M. 2004)
At trial for felony murder, robbery, conspiracy to commit robbery, being a felon in possession of a firearm, and tapering with evidence, the court admitted the defendant's friend's custodial statement that provided the only evidence of the defendant wielding a firearm or participated in the crimes. The defendant testified that immediately prior to the crime occurring, his alleged accomplice had proposed committing the crime, but that the defendant had declined and thought he had convinced the accomplice not to commit the crime.

The appellate court reversed. It emphasized that the alleged accomplice's testimony provided the only direct evidence of his inculpatory acts and the prosecutor's argument emphasizing the statements. Moreover, it noted that the defendant offered his own plausible version of the events that was not at odds with other testimony presented.

People v. Thompson, 812 N.E.2d 516 (Ill. App. Ct. 2004)
At trial for several domestic violence offenses, the court admitted the nontestifying complainant's affidavit she submitted in an application for a protective order. The application recounted the same events at issue in the trial and identified the defendant as the perpetrator. The other evidence of trial consisted of police accounts of the defendant's inculpatory statements and of the physical condition of the complainant and the scene of the crime. The defendant testified and denied making the inculpatory statements.

The appellate court reversed. It held that the admission of the complainant's testimonial hearsay was not harmless because it provided the only undisputed evidence that the defendant was the perpetrator. It noted that the defendant claimed the officers fabricated his statements to them.

Hale v. State, 139 S.W.3d 418 (Tex. App. 2004)
Prior to trial, the court ruled that the nontestifying accomplice's written statement to the police was admissible against the defendant. After the ruling, the defendant pled guilty.

The appellate court reversed, holding that the statement was testimonial hearsay. Moreover, it was not persuaded beyond a reasonable doubt that the result would have been different because of the timing of the guilty plea: after the judge's ruling on the admissibility of the statement.

Commonwealth v. Montina, 934 N.E.2d 875 (Mass. App. Ct. 2010)
At trial for possession of marijuana, the court admitted laboratory certificates identifying the substances in question as marijuana. The laboratory technician did not testify, but the arresting officers testified about their general backgrounds in drug recognition and testimony identifying the substances.

The appellate court reversed. It held that the admission was not harmless beyond a reasonable doubt because the officers failed to identify how their training helped them identify the substances and because their identification testimony was conclusory and only offered to provide a foundation for admission of the certificates.

Miscellaneous

U.S. Court of Appeals Cases

United States v. Williams, 632 F.3d 129 (4th Cir. 2011)
Prior to trial for possession of a controlled substance the government introduced a stipulation that the defendant refused to sign. Despite the defendant's on-the-record refusal, the trial court accepted the defense attorney's stipulation and allowed the stipulation to be read to the jury.

The appellate court held that entering the stipulation was an abuse of discretion. It noted that it was "inclined" to require defendant's make a clear waiver of their "Sixth Amendment right," but declined to reach the issue because the defendant had made a clear objection to the stipulation.

United States v. Jones, 393 F.3d 107 (2d Cir. 2004)
Where the court finds Confrontation Clause error, the inadmissible evidence cannot be considered to determine whether sufficient evidence exists to convict the defendant. Reversed and remanded with an order to enter a judgment of acquittal.

Ramjit v. Moore, No. 06-3784, 2007 WL 1958628 (6th Cir. July 2, 2007) (unreported)
Without discussion, the Court of Appeals affirmed the Federal District Court's grant of habeas corpus relief. It had held that the trial court violated the defendant's Confrontation Clause rights when it admitted an alleged accomplice's out-of-court statements without affording him the opportunity to cross-examine him. It further held that the state had waived the harmlessness issue by failing to object to the magistrate's report and recommendation on this point and that, in any event, the error was not harmless.

State Court Cases

Commonwealth v. Gentle, 952 N.E.2d 426 (Mass. App. Ct. 2011)
At trial for drug trafficking, the court admitted laboratory certificates regarding the identity and amount of the substance in question. During trial, the defendant fled, and was not captured for some time. He was eventually sentenced, and appealed. While his appeal was pending, the United States Supreme Court decided *Melendez-Diaz v. Massachusetts*, 557 U.S.305 (2009). The state argued that had the defendant not fled, his appeal would have been decided prior to

Melendez-Diaz, and he would not be entitled to relief. Thus, he should not be able to take advantage of the case on appeal.

The Massachusetts Court of Appeals rejected this argument and granted relief. It explained that it knew of no such exception to the rule in *Griffith v. Kentucky*, 479 U.S. 314 (1987). It described the state's suggestion that a defendant would flee in hopes of a favorable change in the law as "implausible." Because the state otherwise conceded error, the court reversed.

State v. Rainsong, 807 N.W.2d 283 (Iowa 2011)
Prior to trial, the court ruled that a "deposition" of one of the state's witnesses was not admissible. The state had noticed the deposition, but had not obtained a court order authorizing the deposition. Thus, under the state procedure, the defendant had no obligation to attend the deposition. Thus, the appellate court ruled that the defendant had not waived his right to confront the witness and that the trial court did not err by excluding the deposition.

Smith v. United States, 26 A.3d 248 (D.C. Ct. App. 2011)
At trial, the defendant sought to admit a detective's statement as an excited utterance. The defendant made a showing that satisfied the requirements for the statement to be admitted as an excited utterance. The trial court, however, did not admit the statement because it determined doing so would violate the defendant's Confrontation Clause rights.

The appellate court reversed. It held that the Confrontation Clause protects defendants, not the government, and the clause should not be used to prevent defendants from offering evidence themselves.

State v. Simmons, 67 So.3d 525 (La. Ct. App. 2011)
At trial for possession of cocaine, the state gave notice of its intent to rely on a drug analysis certificate. Under Louisiana law, the notice was adequate to require the defendant, should he wish to cross-examine the analyst who conducted the testing, to subpoena the analyst. The defendant failed to do so.

Nonetheless, the Louisiana Court of Appeals reversed. It held that *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) made clear that a defendant could not be required to call a witness to enjoy the rights guaranteed by the Confrontation Clause. Thus, despite the state's compliance with the notice and demand statute, the court held that admitting the certificates was error.

People v. Chastain, No. D058089, 2011 WL 141203 (Cal. Ct. App. Jan. 13, 2011)
At a joint trial for first degree murder, the defendant sought to present the testimony of the defense investigator. The defendant had previously called a witness to testify to his own culpability for the murder in question. The defendant, however, invoked his Fifth Amendment privileges. The trial court did not permit the defendant to present the investigator's testimony, in

part, because it determined that the statement would violate the co-defendant's right to confront the witness.

The appellate court reversed. It held that the statement did not inculpate the co-defendant and, therefore, was not being offered against him. Since the statement was not being offered against him, the Confrontation Clause should not have barred admission of the statement.

Lockwood v. State, Nos. 50864, 52615, 2010 WL 3529416 (Nev. Sept. 3, 2010) (unreported)
At trial for sexual abuse of a child under sixteen, the trial court denied a motion for a new trial based on the foreperson's review of numerous articles on whether a victim could, despite abuse, have an intact hymen. The foreperson shared her research with the other members of the jury.

The appellate court held that the trial court abused its discretion because the exposure to the extrinsic evidence violated the Confrontation Clause, concerned "directly whether it was possible that the victim was assaulted," and "bolstered the credibility of both the victim and the State's expert." Reversed.

State v. Casson, 2 So.3d 1246 (La. Ct. App. 2009)
The defendant entered a plea after an affirmation by defense counsel in response to the following question: "[D]id you advise the defendant of his constitutional rights of trial by jury, right to counsel, privilege against self incrimination, right to plead not guilty, the progressive nature of the offense if applicable and the maximum fines and penalties that could be imposed upon a conviction?"

The appellate court held that this exchange was inadequate to inform the defendant of his right to confront the witnesses against him and reversed the conviction.

People v. Ojito, No. D049765, 2008 WL 3824295 (Cal. Ct. App. Aug. 18, 2008) (unreported)
The defendant's description of a declarant as a "rat" after hearing her incriminating statements does not constitute an adoptive admission such that the statement can be offered against the defendant without running afoul of the Confrontation Clause. This opinion includes strong language condemning the police practice of having a defendant review a statement, then when they do not deny its contents, having the prosecution offer the statement as an adoptive admission. Reversed.

De La Paz v. State, 273 S.W.3d 671 (Tex. Crim. App. 2008)
Once a defendant objects to the admission of evidence on the grounds that its admission violates the Confrontation Clause, it is the prosecution's burden to prove that the statements are admissible. Admitting the objected to statements despite such a failure is error. Remanded for "a harm analysis."

State v. Almanza, 160 P.3d 932 (N.M. Ct. App. 2007)

On February 25, defense counsel informed the prosecution that the defendant no longer wished to accept the plea agreement the prosecution had offered and wished to go to trial, as previously scheduled, on March 1. In light of the agreement, the prosecution had not subpoenaed a chemist from the state crime lab and did not have time to do so prior to March 1. At a hearing on February 28, the trial court granted the prosecution's request, over the defendant's objection, that the chemist testify telephonically. The defense had offered to request a "six-month rule extension," delaying the start date of the trial so the prosecution could subpoena the witness. Nonetheless, the trial court ruled that the defendant had waived his right to confront the chemist face-to-face.

The appellate court disagreed, holding that starting the trial on March 1 and denying the defendant's right neither furthered an "important public policy" nor was "a required necessity." The court grounded its ruling in a series of federal decisions outlining situations in which it would be inconvenient for a witness to testify and where the trial court had erroneously, based on the inconvenience, allowed the witness to testify remotely. Reversed.

State v. Caulfield, 722 N.W.2d 304 (Minn. 2006)

At trial for possession of a controlled substance with intent to sell, the court admitted, over the defendant's objection, the Bureau of Criminal Apprehension's laboratory report identifying the substance seized from the defendant as cocaine. The author of the report did not testify at trial, but the report was admitted pursuant to a statute allowed a defendant to request the preparer of the report to testify, but required the defendant to make the request at least ten days prior to trial. At trial and on appeal, the state argued that the defendant's failure to invoke the statute constituted his waiver of any Confrontation Clause challenge to it.

The Minnesota Supreme Court reversed. It held that the report was testimonial and that the statute infringed upon the defendant's Confrontation Rights. It held,

> "[A]lthough there may be legitimate public policy reasons to advance the time to assert confrontation rights to a reasonable time before trial, such a shift cannot be constitutionally accomplished without adequate notice to the defendant that his failure to request the testimony of the analyst will result in the waiver of his confrontation rights, especially when the report is offered to prove an element of the offense. . . . At a minimum, any statute purporting to admit testimonial reports without the testimony of the preparer must provide adequate notice to the defendant of the contents of the report and the likely consequences of his failure to request the testimony of the preparer. Otherwise, there is no reasonable basis to conclude that the defendant's failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his confrontation rights."

The court also held that harmless error analysis applies to violations of the Confrontation Clause, and that the admission of the reports in this case was not harmless beyond a reasonable doubt. It applied a five-factor test, examining "the manner in which the evidence was presented, whether [the evidence] was highly persuasive, whether it was used in closing argument, . . . whether it was effectively countered by the defendant," and "overwhelming evidence of guilt." Turning to the first factor, the court noted that in light of the "logical flow" of the presentation of evidence, the testimony was "presented in a way designed to secure the verdict. Next, it held that the evidence was "highly persuasive," even though it was "somewhat debatable" that it was cumulative of the field testing testified to by other officers. Third, the court noted the state's reliance on the report in its opening and closing statements. Fourth, it explained that the defense's lack of effective refutation of the evidence only made the erroneous admission more prejudicial.

State v. Lebron, No. 03-06-00714, 2006 WL 2844404 (N.J. Super. Ct. App. Div. Oct. 6, 2006) (unreported)

At trial, the prosecution cross-examined the defendant about statements the defendant's mother, who did not testify, allegedly made to the police. The statements concerned what time the defendant came home and served to undermine his alibi defense.

The appellate court held that the prosecution "fell afoul of *Crawford*'s prohibition on the use of such hearsay statements" because the defendant's mother was not unavailable and had not been subject to cross-examination. It also noted that the prosecution "compounded this prejudicial error" when it referred to the statements during closing argument.

In re Joseph D., No. D047019, 2006 WL 2942806 (Cal. Ct. App. Oct. 16, 2006) (unreported)

Over a defense objection, the juvenile trial court admitted the testimony of the investigating officer who detailed the defendant's alleged confession in Spanish. The defendant claimed officer did not speak Spanish well, and the officer explained that the confession was translated by a nontestifying interpreter. The defendant testified and disputed the accuracy of the confession, blaming translation issues. The defendant sought to cross-examine the interpreter or exclude the confession, but the trial court denied both motions.

The appellate court applied the "language conduit" rule announced in *Correra v. Superior Court*, 40 P.3d 739 (Cal. 2002). The rule requires a case-by-case determination of whether "the translated statement fairly may be considered to be that of the original speaker." It is the government's burden to establish the admissibility under the test. The court held that it had not in this case because the interpreter worked for the prosecuting agency and because the prosecution had provided no evidence of the abilities or qualifications of the interviewing officer and interpreter. Because the trial court explicitly relied on the interpreted statements in discrediting the defendant's testimony, the court found that the erroneous admission was not harmless.

State v. Gipson, 942 So.2d 1184 (La. Ct. App. 2006)
Prior to accepting the defendant's plea, the court told the defendant "the DA must prove his case beyond a reasonable doubt," and that the defendant's attorney "would examine the DA's witnesses." The trial court did not inform the defendant he had the right to confront his accusers.

The appellate court held that the exclusion of the latter information rendered his waiver of Confrontation Clause Rights ineffective.

Howard v. United States, 929 A.2d 839 (D.C. 2006)
Before trial, the prosecution notified the defense of its intent to present a chemist's report regarding the identity of a substance found on the defendant's person. Pursuant to the local statute, the prosecution also provided the defendant with the chain of custody and the analysis. Two days prior to trial, the defense moved *in limine* to exclude the report, as violating his right to confront the chemist. The trial court denied the motion.

The appellate court held that the motion was sufficient to preserve the Confrontation Clause issue and that in light of the objection, the report could not be admitted, despite compliance with the local notice and demand statute. The court contrasted the defendant's objection with the defendant in a case decided shortly before his; there the defendant only raised the Confrontation Clause issue on appeal. Reversed.

State v. Smith, No. 1-05-39, 2006 WL 846342 (Ohio Ct. App. April 3, 2006) (unreported)
At trial for cocaine trafficking, the court admitted, over a defense objection, laboratory reports identifying the substance purchased from the defendant as cocaine. The reports were notarized and outlined the testing procedures used and the qualifications of the person conducting testing. Prior to trial the reports had been provided to the defendant pursuant to Ohio's notice and demand statute. Under the statute, a defendant must demand that the prosecution call the technician as a witness within seven days of receiving the reports. A failure to do so allows the reports to be admitted as prima facie evidence of the identity of the substance at issue without requiring the state to call the technician.

The appellate court held that the notice and demand statute's requirements did not adequately inform defendants of the consequences of not demanding that the prosecution call the technician. It held that—in addition to providing the defendant with the substance of the report, the testing procedures used, and the qualifications of the technician—the prosecution was required to inform the defendant the consequences of failing to demand the prosecution call the technician: the report being admitted as prima facie evidence. Because the prosecution in this case did not meet that requirement, the court held that the defendant had not knowingly and intelligently waived his right to confront the technician. Reversed.

People v. Roberts, No. C046932, 2005 WL 2814047 (Cal. Ct. App. Oct. 27, 2005) (unreported)
At a probation hearing the primary issue was whether the defendant had been forthcoming during treatment about his drug use. The trial court found that, based on his therapist's testimony in

reliance on two third-party polygraph tests, simply that the defendant had been terminated from his program. The court made no findings about the defendant's truthfulness or actual performance on the tests.

The appellate court reversed, ruling that the appellate court's capitulation to the therapist, who had not actually conducted the polygraph tests, violated the petitioner's *due process* right to confront the witness against him. It held that absent a showing of the polygraph examiner's unavailability or good cause for not calling the examiner, the probationer was entitled to confront the examiner. The court noted that the polygraph evidence was the only evidence that defendant had lied about his drug use and that it was the only evidence of his failure to comply with the treatment program.

State v. Phillips, 126 P.3d 546 (N.M. Ct. App. 2005)
At a probation hearing, the court permitted, over a defense objection, the probation officer to read a file into the record conveying the sole basis for finding that the defendant committed a probation violation in another state.

The court of appeals reversed, holding that absent a showing of good cause for the witness's absence, his *due process* right to confront the witnesses against him was violated. The court noted that it had "previously expressed our concern over the 'mere submission' of documents to support a finding of a violation of probation." Reversed.

People v. Willard, No. V174995, 2005 WL 1655842 (Cal. Ct. App. July 15, 2005) (unreported)
At a probation revocation hearing, the court admitted an arrest report authored by a nontestifying officer. The report provided the sole basis for two finding that the defendant violated two terms of his probation: spending time with other drug users and using drugs.

The appellate court reversed, holding that the report was testimonial hearsay. It held that absent a finding of unavailability or other good cause for the officer's absence, the report should not have been admitted. Reversed.

State v. Forbes, 119 P.3d 144 (N.M. 2005)
On appeal, in 1985, the New Mexico Supreme Court reversed the defendant's conviction because he had not had an opportunity to cross-examine the alleged accomplice whose statement was used against him at trial. The U.S. Supreme Court then vacated the decision and remanded in light of *Lee v. Illinois*, 476 U.S. 30 (1986), holding that a co-perpetrator's statement should be reviewed under the *Roberts* reliability test. In light of *Lee*, the New Mexico Supreme Court held that the state had met its burden to show that the accomplice's statement bore sufficient indicia of reliability and was admissible even though the defendant had not had an opportunity to cross-examine him.

After *Crawford* was decided, the defendant filed a petition for writ of habeas corpus in state court. The New Mexico Supreme Court held that the writ should be granted because, under the

"unique facts and procedural posture of [the defendant's] case," because when the court initially decided his case, the result eventually dictated by *Crawford*, was dictated by state court precedent. Because, prior to *Lee*, the New Mexico Supreme Court had held that the defendant had a right to confront the alleged accomplice, regardless of the reliability of the accomplice's statement, the court granted the defendant a new trial.

People v. Hinds, No. 250668, 2005 WL 657469 (Mich. Ct. App. Mar. 22, 2005)
The trial court erred when it permitted the complainant four-year-old to testify behind a screen even though there was "no discernable reason" for doing so. The appellate court noted that there was "no finding that the complainant was psychologically unable to testify or felt threatened."

Garcia v. State, 161 S.W.3d 28 (Tex. App. 2004)
At trial, the complainant was the only one of seven witnesses who testified in Spanish. The defendant only spoke Spanish. The trial was not translated, but a bilingual speaker sat next to the defendant throughout the trial. The Texas Court of Criminal Appeals held that not having the entire proceedings translated for the defendant violated his right to confront witnesses. It remanded to the Court of Appeals to review for harmless error.

The Court of Appeals held that because if "the damaging potential of [a] cross-examination had been fully realized" six of the seven witnesses would have had their testimony undermined, the error was not harmless beyond a reasonable doubt. It explained that it was "inevitable that [not understanding the other witnesses] hampered his attorney's ability to effectively cross-examine the State's witnesses."

Romero v. State, 136 S.W.3d 680 (Tex. App. 2004)
At trial, the complainant witness testified while wearing a disguise leaving visible his ears, the tops of his cheeks, and the bridge of his nose. The witness had refused to enter the courtroom, even after being fined $500, without being allowed to testify while wearing dark sunglasses, a baseball cap, and a jacket with an upturned collar.

The appellate court reversed, holding that allowing the witness to testify with the disguise on violated the defendant's right to face-to-face confrontation of the witnesses against him. It explained that the jury, the prosecution, the defense, and the judge were unable to view the witness's demeanor, that the state presented no particular safety issue, and the trial court failed to make a case-specific finding of necessity.

Post-*Crawford* Cases Applying *Ohio v. Roberts*[5]

U.S. Court of Appeals Cases

[5] *Ohio v. Roberts*, 448 U.S. 1980.

Jones v. Cain, 600 F.3d 527 (5th Cir. 2010)
At a preliminary hearing, a witness testified about his identification of the defendant in a photo lineup. Previously, the witness had given recorded statements to the police about the details of the crime during their investigation of him, but these statements were not disclosed before trial. He was not examined about them during the hearing. After the hearing, the witness died. At trial, the court admitted a transcript of the recorded statements, ruling they were admissible to bolster the credibility of the non-testifying witness. The Federal District Court granted habeas relief, and the state appealed.

The Court of Appeals ruled that the district court had an "independent duty" to determine whether a state's evidentiary laws violate the constitution. Applying the pre-*Crawford* standard, it held that the statements were hearsay. It held their inconsistencies made them "lack particular guarantees of trustworthiness," and that the statements did not fit into a "firmly rooted hearsay exception" because the prior consistent statement exception required the statements to have been made before the motive to lie occurred. Since the statements were made after the non-testifying witness likely realized he was a suspect, they did not fit this exception.

Fratta v. Quarterman, 536 F.3d 485 (5th Cir. 2008)
At a murder-for-hire trial, custodial statements of two of the separately tried, non-testifying perpetrators were admitted against the defendant. The statement of one of the two perpetrators to his girlfriend was also admitted. The statements did not name the defendant, but they made clear that someone had hired the perpetrators to commit the murder. The state conceded error on the admission of the custodial statements. It argued, however, that the statement to the girlfriend was not in error and that any error in admitting the three statements was harmless. The Federal District Court granted the habeas petition, and the warden appealed.

Applying the pre-*Crawford* rule, the Court of Appeals held that the state courts clearly erred by relying on corroborating evidence to find the custodial statements "reliable." The statements were unreliable because they minimized the culpability of those making them and were internally inconsistent. Turning to the statement to the girlfriend, the Court of Appeals held that the state court was unreasonable in extending *Bruton*, which addresses co-defendant statements in joint trials, to apply to single-defendant trial. It then held that the statements did not fit into the "firmly rooted" co-conspirator exception to the hearsay rule because the statements were not "in furtherance" of the conspiracy. They were unreliable because they minimized the culpability of the person making the statement and were not spontaneous. The admissions were not harmless because they supplied the only proof of remuneration. Affirmed.

Taylor v. Cain, 545 F.3d 327 (5th Cir. 2008)
The Federal District Court granted habeas corpus relief, holding that non-testifying confidential informant's statements identifying the defendant as "the perpetrator" were erroneously admitted.

The Court of Appeals ruled that making "the type of arguments that support a Confrontation Clause claim" and merely citing a state case "connecting the error . . . to an accused's federal Confrontation Clause rights" fairly presents the error and, thus, exhausts it.

Applying the pre-*Crawford* standard, the court found that admitting non-testifying witness's statements inculpating the defendant were testimonial hearsay offered for their truth. The statements were not harmless because the state's case otherwise primarily relied on a single eyewitness who merely placed the defendant at the scene, and his testimony was "markedly indefinite." Affirmed.

Stallings v. Bobby, 464 F.3d 576 (6th Cir. 2006)
At a state court trial for drug possession, the court admitted the hearsay statement of the defendant's acquaintance to a police officer. The acquaintance had been arrested along with the defendant and told the police officer where, in addition to the firearm and fake drugs found in the car at the time of the arrest, the defendant kept firearms and cocaine. At trial, the acquaintance disavowed his accusations and claimed a Fifth Amendment privilege. The trial judge, having declared the acquaintance unavailable, admitted the testimony of an officer who related the acquaintance's accusations.

Applying the pre-*Crawford* standard, the Court of Appeals affirmed the Federal District Court's grant of habeas corpus relief and held that the statement lacked "adequate 'indicia of reliability'" because "an accomplice's statements that shift or spread the blame to a criminal defendant" lack reliability. The error was not harmless for several reasons: (1) its importance to the case, as demonstrated by the emphasis in the prosecutor's closing argument; (2) the only other source of most of the information provided was from an unreliable witness, as demonstrated by her prior criminal history, shifting story, and involvement in the crime; and (3) the inadmissible testimony was the only evidence linking the defendant to the cocaine. Reversed and remanded.

Fulcher v. Motley, 444 F.3d 791 (6th Cir. 2006)
At trial for murder, the court admitted a recording of a police station interview of the defendant's wife, who was his girlfriend at the time of the interview. Before trial, the two married, and his wife was, therefore, unavailable because of a state marital privilege. In the interview, the defendant's wife said that the defendant asked her to wash some bloody sweatpants that he said were soiled during a fight with a friend. She also said that the defendant's alleged accomplice asked her to dispose of a key that she did not think belonged to the defendant, the accomplice, or her. Other evidence at trial included inmate informant testimony from four inmates.

Applying the pre-*Crawford* standard, the Court of Appeals ruled that the defendant had preserved his error for review, and that because "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule," the state court

made an unreasonable application of clearly established law, as established by *Douglas*, *Bruton*, and *Lee*, and as announced in *Lilly*.[6] It held the error was not harmless, noting that the state's case was entirely circumstantial and that during deliberations the jury asked to hear the interview again.

Gaston v. Brigano, No. 05-4367, 208 Fed. Appx. 376 (6th Cir. Dec. 7, 2006) (unreported)
At trial for attempted rape of a minor, a tape recording of the non-testifying minor complainant's statements were admitted over objection. The state courts held that the admissions did not violate state evidentiary rules.

Reviewing *de novo* and applying the pre-*Crawford* standard, the Court of Appeals affirmed the grant of habeas corpus relief. The court ruled that the statements were unreliable for two reasons: they were neither spontaneous, as the state trial court had found, nor consistent. They were not spontaneous because they occurred in response to interrogation and numerous leading questions. They were inconsistent because key facts were contradicted in later statements, including whether the defendant had ever hurt her. The error was not harmless because the inadmissible testimony was the only evidence of rape. Affirmed.

Dorchy v. Jones, 398 F.3d 783 (6th Cir. 2005)
At a murder trial, the court admitted two hearsay statements that the defendant shot the victim in the head and that the shots were not in response to a provocation. The first statement was made at an alleged co-perpetrator's trial. The other statement was made during the course of police interrogation. The defendant claimed self-defense. One witness could not be located; the other claimed a Fifth Amendment privilege.

The Court of Appeals affirmed the district court's grant of habeas corpus relief. Applying the pre-*Crawford* standard, it held that the prior testimony was not reliable, noting that the co-perpetrator's motivation to cross-examine the witness were different because of their opposing theories of the case. The court found harm because the state had relied on its residual hearsay exception to admit the testimony. The residual exception requires the proffered evidence to be "more probative on the point for which it is offered" than any other evidence. The court held that, *a foritori*, the statement had a "substantial and injurious effect or influence" on the verdict. The state conceded error on the second statement. The Court of Appeals held that it was not harmless because, once the other inadmissible testimony is excluded, the statement is the only eyewitness account of the shooting.

Federal District Court Cases
Gumm v. Mitchell, No. 1:98-cv-838, 2011 WL 1237572 (S.D. Ohio Mar. 29, 2011)

[6] *Lilly v. Virginia*, 527 U.S. 116 (1999); *Lee v. Illinois*, 476 U.S. 530 (1986); *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965).

During the guilt phase of a capital trial, the state introduced, over the defense's objection, medical records on which the defense expert relied for the basis of his testimony. The records contained hearsay statements of people interviewed by the doctor and included information that the defendant "lied, became rowdy when he drank, was cruel to animals, solicited oral sex from someone, tried to rape his sister's friend, and burned a boy with a hot spoon."

After *Atkins*,[7] the defendant was resentenced to life without possibility of parole. This petition for habeas corpus followed. The district court held that *Roberts v. Ohio*, 448 U.S. 56 (1980) barred admission unless the persons who made statements were unavailable and the statements were trustworthy. Because the prosecution did not demonstrate that the declarants were unavailable, the statements were inadmissible. Note that the Ohio appellate court ruled on the petitioner's case prior to *Crawford*[8] and that the statements may not qualify as testimonial under the *Crawford* rule.

Daly v. Burt, 613 F. Supp. 2d 916 (E.D. Mich. March 25, 2009)
At trial for conspiracy to commit armed robbery, a police officer testified to the confessions of the non-testifying co-defendants. They had given the officer information about planning the conspiracy that contradicted the defendant's version of the events, as presented in his trial testimony. Because *Crawford* was decided "between Petitioner's conviction and his subsequent appeals," the Federal District Court found that "there is some uncertainty what legal standard should apply," *Roberts* or *Crawford*.

Applying both standards, the court found the state appellate courts unreasonably applied each standard. The court held that the statements were testimonial because they were made "during police interrogation." Without analysis, the court also adopted the magistrate's finding that the error was not harmless.

State Court Cases

State v. Hosty, 944 So.2d 255 (Fla. 2006)
Prior to trial, the state sought to introduce two statements made by a mentally disabled adult. One was made to her teacher and the other to a police officer. Both reported sexual abuse committed by the defendant.

Florida has a statutory hearsay exception for abused children and elderly or mentally disabled adults, allowing their hearsay statements to be introduced under certain circumstances. On the defendant's motion, the trial court declared the statutory exception unconstitutional, as applied to mentally disabled adults. The Florida Supreme Court had previously held it unconstitutional as

[7] *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding persons with intellectual disability, previously known as mental retardation, categorically ineligible for the death penalty).
[8] *Crawford v. Washington*, 541 U.S. 36 (2004).

applied to elderly adults because it violated the Confrontation Clause, but it had also held that the statute was constitutional with regards to children. Both prior decisions were pre-*Crawford*. The intermediate appellate court affirmed the trial court's finding.

The Florida Supreme Court reversed. It held that the statute was unconstitutional to the extent that it applied to testimonial hearsay from mentally disabled adults. It explained that the statements the state sought to offer that the complainant made to the police were testimonial hearsay and, although permitted under the statute, were unconstitutional in light of *Crawford*.

The court went on to analyze what it deemed the nontestimonial statements, those made to the teacher, under *Roberts*. It held that nontestimonial hearsay is still analyzed under the rules announced in *Roberts*. It held that the mentally disabled adult exception to the hearsay rule is not firmly rooted, but that the statement bore sufficient indicia of reliability for admission. It held that, in addition to the statutory factors, the trial court should consider the following ten factors regarding the reliability of statements by mentally disabled adults: (1) the spontaneity of the statement, (2) how the statement was elicited, (3) the mental state of the declarant at the time of the statement, (4) how the declarant described the act, (5) whether the declarant used terminology unexpected of a similarly situated mentally disabled adult; (6) the motive or lack thereof to fabricate the statement; (7) the ability of the declarant to distinguish between reality and fantasy; (8) the vagueness of the accusations; (9) the possibility of any improper influence on the declarant; and (10) any contradictions in the accusation.

State v. McKenzie, No. 87610, 2006 WL 3095671 (Ohio Ct. App. Nov. 2, 2006) (unreported)
Prior to trial, the defendant moved to exclude two statements of the nontestifying complainant. The first statement was made as the complainant came running out of her house. She shouted to a police officer who happened by that the defendant was the perpetrator. The officer placed the defendant in his police car and interviewed the complainant. The second statement was made during a police interview and provided a detailed account of abuse. Ruling prior to the Supreme Court's decision in *Davis*, the trial court granted the defendant's motion to exclude both statements.

The appellate court reversed in part. It held that the Court's decision in *Davis* made it clear that the first statement was not testimonial hearsay and that the second statement was. Regarding the second, it emphasized that the emergency had ended when the defendant was placed in the police car and that the officer's questions were asked with the purpose of eliciting evidence against the defendant.

With regards to the first statement, the one it determined was nontestimonial, the court went on to analyze under the *Roberts* rule. It adopted the Seventh Circuit's ruling in *United States v. Thomas*, limiting *Crawford* to testimonial hearsay and applying the *Roberts* rule to nontestimonial hearsay. It held that the nontestimonial statements qualified as excited utterances and, thus, fit into a firmly established exception to the hearsay doctrine.

Mitchell v. State, 120 P.3d 1196 (Okla. Crim. App. 2005)

At trial for murder and counts of child physical and sexual abuse, the court admitted the hearsay testimony of three witnesses. The first witness was the girlfriend of the defendant's son and the brother of the victim. He testified that he did not recall seeing the defendant pick up the child victim by the ankles and throw her on the ground. A police investigator then testified to the first witness's statement that he made during an interview at the hospital, several hours after the witness and the victim arrived at the hospital. The investigator testified that the first witness said that the defendant slammed the victim on the ground several times. The trial court ruled that the statement was admissible under the "exceptional circumstances" exception to the hearsay rule.

The second witness was the sister of the defendant's girlfriend and the victim's aunt. She testified that when she arrived at the hospital and saw her sister, her sister's eyes were red, and that her sister said, "He beat my daughter." No other witness testified to the sister's demeanor, but a detective testified in the preliminary hearing that the girlfriend was laughing when he first encountered her at the hospital. The trial court admitted the statement as an excited utterance.

The third witness was the daughter of the defendant's girlfriend and the victim's sister. She told her aunt that the defendant did not want to take the victim to the hospital. The aunt told the victim's father about the statement. Neither the third witness nor the aunt testified. The victim's father, nonetheless, testified to what the defendant allegedly told the victim's sister. The appellate court did not explain the basis upon which the trial court admitted this testimony.

The court of appeals reversed. It found that each of the witnesses' statements violated the defendant's Confrontation Clause rights. It explained that in *Crawford* the Supreme Court "noted nontestimonial hearsay might still be admissible against an accused in a criminal trial if the declarant were unavailable and the statement bore an adequate indicia of reliability." The court held that the first statement was not an excited utterance because it was made in response to police questioning. Thus, no firmly rooted exception to the hearsay rule made it admissible. The court also noted that the "circumstantial guarantees of trustworthiness" were lacking. It limited its inquiry to "those [circumstances] which existed at the time the statement was made, not those that can be added using hindsight." The court specifically declined to rule whether the statement was testimonial because the witness "testified and denied saying Appellant picked [the victim] up . . . and he was subject to cross-examination." Nonetheless, the court found the statement violated the Confrontation Clause.

The second statement violated the defendant's confrontation rights because the declarant "pled 'the Fifth' and she was not subject to cross-examination." The court also noted that it was not an excited utterance because, despite its relationship to seeing her daughter's condition, the startling event had taken place many hours prior to the statement.

The court did not explain its conclusion regarding the third statement, but found that "[t]his double hearsay was inadmissible and [the defendant] was again denied his right of confrontation when it was admitted."

The court, considering cumulated error, found that the state failed to meet its duty to show that the admissions were harmless beyond a reasonable doubt even though the effect of two of the three errors was "slight."

Miller v. State, 98 P.3d 738 (Okla. Crim. App. 2004)
At trial, the court admitted the nontestifying codefendant's confession to the codefendant's friend. The confession to the friend implicated the defendant as the coperpetrator, but other confessions by the codefendant did not. The defendant testified that he was innocent of the crimes charged. The trial court had previously rejected the defendant's motion to sever, and it overruled the defendant's motion to exclude the inculpatory confession. The jury sentenced the defendant to death.

The appellate court reversed. It held that although the confession was not testimonial, and therefore beyond the scope of *Crawford*, it was inadmissible under the Confrontation Clause because "inherently trustworthy and reliable," the test under *Ohio v. Roberts*. It rejected the state's arguments that the statement against interest and residual hearsay exceptions were firmly rooted. The court also reviewed *Roberts*-type reliability factors and rejected the state's arguments that the statements were reliable.

Cases Applying Confrontation Rights in Sentencing Proceedings

State Court Cases

Vankirk v. State, __ S.W.3d __, 2011 Ark. 428 (Ark. 2011)
At a sentencing hearing related to a rape conviction, the court admitted a videotape of the victim being interviewed by an investigator from the state. The victim did not testify, and the hearing was before a jury.

The Arkansas Supreme Court reversed. It held, as a matter of first impression, that the Confrontation Clause applies at sentencing. The court explained that the sentencing hearing was "in essence, a trial in and of itself," and that the procedure used by Arkansas court, where a jury receives evidence to determine the appropriate punishment, implicates the Sixth Amendment right to confrontation. The court noted that it had previously held that the Sixth Amendment right to counsel and the rules of evidence apply to sentencing proceedings.

State v. Hurt, 702 S.E.2d 82 (N.C. Ct. App. 2010)

At the sentencing portion of a trial, the court admitted expert testimony conveying the statements contained in nontestifying experts' reports.

The appellate court reversed, holding that where the expert testimony does not "testify to his own expert opinion based upon the tests performed by other experts, [or] . . . testify to any review of the conclusions" the testimony is testimonial hearsay.

Addressing, for the first time since *Blakely*, whether the confrontation clause applies to sentencing hearings where juries find factors that increase the maximum potential sentence, the appellate court held that it does: "Where . . . the sentencing fact to be proved is covered by *Blakely*, such that it must be found beyond a reasonable doubt before a judge may impose a sentence above that allowed by the presumptive range, *Crawford* applies."

Woodall v. State, No. 08-07-00015-CR, 2009 WL 2872837 (Tex. App. Sept. 9, 2009) (unreported)
The trial court admitted the uncross-examined grand jury testimony of one of the victims. The witness was called to testify, but claimed a total memory loss because of an automobile accident that occurred after the grand jury testimony. The appellate court held that the witness was not made available for cross-examination for purposes of the Confrontation Clause because the defendant did not have the opportunity to cross-examine her about the subject of her testimony. The admission of the statements was harmless as to guilt, but not as to the punishment because, while the evidence of guilt was overwhelming, the prosecutor sought sentence enhancements, highlighting the inadmissible grand jury testimony.

Stringer v. State, 241 S.W.3d 52 (Tex. Crim. App. 2007)
Construing a state law, the Court of Criminal Appeals held that a waiver of one's Confrontation Clause rights at the guilt phase of a trial, does not encompass a waiver of the right to confront and confront witnesses in the sentencing phase.

People v. Williams, No. H029942, 2007 WL 2153577 (Cal. Ct. App. July 27, 2007) (unreported)
The defendant received a bifurcated trial, one on the crime and one to determine the existence of any prior convictions. During the second phase, the defendant objected to the admission of a preliminary hearing transcript and probation report to prove the existence of a prior conviction. The transcript contained a police officer's recounting of statements made by witnesses to the crime. On appeal, the state conceded both the transcript and probation report were testimonial hearsay, but contested harm.

Based on a recent state law decision, the appellate court rejected the state's argument that the trial court could consider the defendant's statements contained in the probation report to establish the substance of a prior conviction. It also rejected the state's argument that the defendant made an adoptive admission of the facts of the prior conviction by failing to correct the prosecutor's account of the basis for the conviction during his explanation to the court for

why he was not seeking a harsher sentence. The prosecutor was minimizing the gravity of the offense, and the appellate court reasoned that the defendant, therefore, had no incentive to correct the record. Reversed and remanded for resentencing or retrial.

Wall v. State, 184 S.W.3d 730 (Tex. Crim. App. 2006)
At trial, the court admitted the testimony of the investigating officer, who recounted statements made to him by the nontestifying victims of an alleged assault. Several other eyewitnesses testified, including an additional victim, but only the nontestifying victim's statements included racially inflammatory language allegedly used by the defendant.

The appellate court held that the statements, although possibly excited utterances, were testimonial hearsay. It emphasized that they were made to a uniformed officer in response to questioning and during the same transaction during which the victim was able to pose for pictures taken by the officer.

The court also held that the statements were harmless in the guilt phase of the assault trial, but that they may have been prejudicial in determining the appropriate sentence. Implicit in the court's ruling is that the Confrontation Clause applies at sentencing. Reversed.

Russeau v. State, 171 S.W.3d 871 (Tex. Crim. App. 2005)
At the punishment phase of the defendant's capital trial, the court admitted reports "which appeared to have been written by corrections officers and which purported to document in the most detailed and graphic of terms, numerous and repeated disciplinary offenses on the part of appellant while he was incarcerated. It further appeared that, in writing the statements, the officers relied on their own observations or, in several instances, the observations of others." The reports recounted threats of physical harm, refusing to work, breaking out of his cell, masturbating in front of jailers and inmates, fighting with inmates, and possessing weapons. The reports were read aloud to the jury.

The Texas Court of Criminal Appeals reversed. It held that the admission of the reports, *at capital sentencing*, violated the Confrontation Clause. "[T]he statements in the reports amounted to unsworn, *ex parte* affidavits of government employees and were the very type of evidence the Clause was intended to prohibit." The court emphasized the "highly damaging nature" of the reports and the prosecution's reference to them in closing argument in finding that the error was not harmless beyond a reasonable doubt.

Unfortunately, the court did not address that it was applying the Confrontation Clause to the sentencing phase of a trial.