

Litigating Confrontation Issues – Ten Years of *Crawford*

Craig W. Albee & Shelley Fite
Federal Defender Services of Wisconsin, Inc.
Winning Strategies Seminar – Santa Fe, New Mexico
May 7, 2015

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. Amend. VI

“Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” Crawford v. Washington, 541 U.S. 36, 68 (2004).

I. What is “testimonial”?

- A. The term “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford*, 541 U.S. at 68.
- B. Justice Scalia declined to further define the term: “We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Id.*
- C. Three proposed definitions of testimonial statements noted in *Crawford*:
 - 1. “[E]x parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.* at 51 (internal quotation marks omitted).
 - 2. “[E]xtrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *Id.* at 51-52 (internal quotation marks omitted).
 - 3. “[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 52 (internal quotation marks omitted).

- D. *Crawford* emphasized that an “accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Id.* at 51.

II. Categories of out-of-court statements not changed by *Crawford*

- A. Several categories of statements do not implicate the Confrontation Clause:
1. Statements not offered for the truth of the matter asserted. *Crawford*, 541 U.S. at 59 n.9.
 2. Statements made by declarants who do testify. *Id.*
 - a. See *State v. Tompkins*, 859 N.W.2d 631, 640 (Iowa 2015) (finding no confrontation bar to the state asking an officer to describe the victim’s prior statement where the victim had testified – even though the state didn’t ask about her prior statement); *but see* Clifford S. Fishman and Ann T. McKenna, 4 JONES ON EVIDENCE § 25A:49.50 (7th ed) (arguing against such a result).
 - b. See also *Cookson v. Schwartz*, 556 F.3d 647, 651 (7th Cir. 2009) (discussing the Sixth Amendment implications of witnesses who profess no memory of their prior statement or who are otherwise unable to testify about their prior statement).
 - c. *But see In re N.C.* 105 A.2d 1199 (Pa. 2014) (finding Confrontation Clause violation where recorded forensic interview admitted, but when four-year-old witness took stand she refused to speak).
 3. Statements made by unavailable declarants when the defendant had an adequate opportunity to cross-examine at a prior hearing. *Crawford*, 541 U.S. at 54-55.
 4. Statements presented by the defense. See *Giles v. California*, 554 U.S. 353, 375 n.7 (2008).
 - a. Some courts apparently still need to be reminded of this. *State v. Smith-Parker*, 340 P.3d 485, 505 (Kan. 2014) (“The . . . Confrontation Clause ruling was based on a faulty premise – that the State has a right of confrontation equal to that of a defendant. This is not the case.”)

5. Statements made by the defendant.
6. Statements in furtherance of a conspiracy. *Crawford*, 541 U.S. at 55.

III. United States Supreme Court cases after *Crawford*.

A. 911 calls and other reports to police

1. *Davis v. Washington/Hammon v. Indiana*, 547 U.S. 813 (2006)
 - a. Statements to police 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 a criminal prosecution.” *Davis*, 547 U.S. at 822 (emphasis added).
 - b. Statements to police are not testimonial “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.” *Id.* (emphasis added).
 - c. In *Hammon*, statements by an alleged victim to police describing a completed domestic assault were found testimonial. *Id.* at 829-32.
 - d. In *Davis*, statements to 911 operator about events as they were actually happening, in order to get aid, were nontestimonial. *Id.* at 826-29.
 - e. **Note:** A single conversation or report to police may contain both testimonial and nontestimonial statements. For example, a 911 call that begins as reporting ongoing emergency and evolves into questioning to establish past events. *Id.* at 829.
2. *Michigan v. Bryant*, 562 U.S. 344, 131 S. Ct. 1143 (2011)
 - a. *Bryant* held that statements to police by a wounded victim identifying his shooter were not testimonial because it was for the primary purpose of enabling the police to respond to an ongoing emergency rather than to prove past events. The

“ongoing emergency” was not the threat to the victim, but to the police and the public at large. 131 S. Ct. at 1165-67.

- b. To determine whether the *primary purpose* of a police interrogation was responding to an ongoing emergency or proving past events, the court considers how all of the participants reasonably would have understood their statements and actions and the surrounding circumstances. *Bryant*, 131 S. Ct. at 1162.
- c. **Note:** Although *Bryant* and other cases refer to police “interrogation,” the Court has said that “a person who volunteers his testimony” to police is no less a witness against the defendant than one who is responding to interrogation. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 316 (2009) (internal citation and quotation marks omitted).
- d. The Court indicated that the informality of the police-victim interaction was relevant to the analysis. *Id.* at 1160.
- e. Justice Scalia’s dissent: “Today’s tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution.” *Id.* at 1168 (Scalia, J., dissenting).

B. Lab reports

- 1. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).
 - a. The Supreme Court held that certificates reporting results of forensic analysis identifying substance as cocaine were testimonial. 557 U.S. at 328-29.
 - b. “Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. . . . But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.” *Id.* at 321.

c. **Note:** To the extent there was any question, the Court assumed that a police report (offered for the truth of the matter asserted) would be testimonial. *Id.* at 316.

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

The state court admitted a forensic lab report certifying defendant's BAC through an analyst who neither participated in nor observed the testing. The Court held that a surrogate/supervisor may not stand in for the author of the report. *Id.* at 2716.

3. *Williams v. Illinois*, __ U.S. __, 132 S. Ct. 2221 (2012).

a. Complicated 4-1-4 decision that has created significant confusion regarding whether an expert's test results that are relied upon by another expert, but "not admitted for their truth," are testimonial. See *United States v. James*, 712 F.3d 79, 91 (2d Cir. 2013) (discussing the case); *State v. Dotson*, 450 S.W.3d 1, 68-70 (Tenn. 2014) ("The *Marks* rule [that lower courts should apply the narrowest ground for the ruling when the Supreme Court does not produce a single majority opinion] ceases to function as it was intended where *Williams* is concerned because the two opinions that resulted in the judgment share no common denominator rationale.")

b. The plurality upheld the use of a state crime lab employee's testimony that the defendant's DNA sample matched a swab taken from the victim, although she wasn't involved in the collection or testing of the swab. See *Williams*, 132 S. Ct. at 2228.

c. Justice Kagan's dissent highlights why the case has generated confusion: "In the pages that follow, I call Justice Alito's opinion 'the plurality,' because that is the conventional term for it. But in all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication." *Id.* at 2265 (Kagan, J., dissenting)

d. Five justices—Thomas, Kagan, Scalia, Ginsburg and Sotomayor—concluded that the test results were admitted for their truth because they had no other relevance. *Williams*, 132

S. Ct. at 2256 (Thomas, J., concurring); *id.* at 2268-69 (Kagan, J., dissenting).

- e. **Important:** A majority of the court rejected the plurality view that a testimonial statement must have “the primary purpose of accusing a targeted individual of engaging in criminal conduct. *See also United States v. Duron-Caldera*, 737 F.3d 988, 994-95 (5th Cir. 2013).

C. Forfeiture by wrongdoing/Dying Declarations

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

1. Only hearsay exceptions firmly established at the founding overcome the rule against testimonial hearsay in the absence of unavailability and a prior opportunity for cross-examination, and forfeiture by wrongdoing is such an exception. *Id.* at 358-61.
2. To prove forfeiture, it’s not enough for the prosecution to show that defendant caused the witness’s absence from trial. Rather, it must be shown that defendant caused the defendant’s absence with the intent to prevent the witness from testifying at trial. *Id.* at 359.
3. The standard of proof is theoretically an open question, as the majority opinion didn’t address it, but it did not disapprove of the state court’s use of the preponderance standard. *See id.* at 379 (Souter, J., concurring) (noting the lower court’s use of the preponderance standard); *see also Davis*, 547 U.S. at 833 (noting the widespread use of the preponderance standard in forfeiture determinations); *United States v. Johnson*, 767 F.3d 815, 822-23 (9th Cir. 2014) (finding that the preponderance standard applied).
4. Lower courts have found that the dying declarations hearsay exception was also firmly established at the time of the founding. Marc McAllister, *Evading Confrontation: From One Amorphous Standard to Another*, 35 SEATTLE U. L. REV. 473, 517-18 (2012).

D. Retroactivity

Crawford is not retroactive. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

E. Unavailability

1. “[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.” *Melendez-Diaz*, 557 U.S. at 324.
2. Whether the prosecution has done enough to produce a witness is a question of reasonableness. *Hardy v. Cross*, ___ U.S. ___, 132 S. Ct. 490, 494 (2011).

IV. Pending in SCOTUS: *Ohio v. Clark*, 135 S. Ct. 43 (2014)

A. Certiorari granted on two questions:

1. Does an individual’s obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?
2. Do a child’s out-of-court statements to a teacher in response to the teacher’s concerns about potential child abuse qualify as “testimonial” statements subject to the Confrontation Clause?

B. State is seeking reversal of an Ohio Supreme Court decision holding that “[w]hen teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator,” under the mandatory-reporting law, “any statements obtained are testimonial for purposes of the Confrontation Clause.” *State v. Clark*, 999 N.E.2d 592, 597 (Ohio 2013).

C. SCOTUSBlog noted that, at argument, the justices seemed perplexed by the challenge of applying the concept of “testimonial” to a three-year-old boy and his teacher. What would they reasonably be thinking about the implications of their conversation? Should this be analyzed as a due process, rather than a confrontation, question? See www.scotusblog.com/2015/03/argument-analysis-it-was-all-about-a-child-at-risk/.

V. Significant conflicts & emerging issues

A. Autopsy Reports

1. While autopsy reports would seem to clearly be testimonial, the courts are split on the issue. *Hensley v. Roden*, 755 F.3d 724, 733-34 (1st Cir. 2014) (describing the split in authority and citing cases); See also

Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports – A “Testimonial,”* 74 La. L. Rev. 117 (2013).

2. This may come down to whether the autopsy report was prepared pursuant to a neutral obligation to determine the cause of death or for the purpose of furthering law enforcement goals. *Compare, e.g., United States v. James*, 712 F.3d 79, 99 (2d Cir. 2013) (particular autopsy report “not testimonial because it was not prepared primarily to create a record for use at a criminal trial”), *with United States v. Ignasiak*, 667 F.3d 1217, 1231 (11th Cir. 2012) (testimonial).
3. Thus, many courts are making this determination on a case-by-case basis – depending on law enforcement’s interest in the body at the time of the autopsy and the nature of death. *See, e.g., Wood v. State*, 299 S.W.3d 200, 209-10 (Tex. Ct. App. 2009) (holding that although not all autopsy reports are testimonial, given the suspect nature of the victim’s death, the subject report was testimonial). *But see Duron-Caldera*, 737 F.3d at 994-95 (noting that a majority of justices in *Williams* rejected the plurality view that a testimonial statement must have “the primary purpose of accusing a targeted individual of engaging in criminal conduct”).

B. Other official reports and forms

1. **Warrants of deportation.** Several courts have found warrants of deportation (admitted in illegal reentry cases) nontestimonial because they are intended to maintain records of noncitizens – not prosecute them. *See, e.g., United States v. Lorenzo-Lucas*, 775 F.3d 1008 (8th Cir. 2014); *United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005); *United States v. Bahena-Cardenas*, 411 F.3d 1067 (9th Cir. 2005).
2. **Machine recertifications.** Machine recertification forms showing that law enforcement’s BAC testing machines were in good working order have been found to be nontestimonial. *State v. Maga*, 96 A.3d 934 (N.H. 2014); *State v. Hawley*, 149 So. 3d 1211 (La. 2014).
3. **Official notifications.** Records showing that defendants received official notifications have been found to be testimonial when prepared after criminal charges related to the notices were filed but nontestimonial when prepared contemporaneously, before charges were filed. *See State v. Kennedy*, 846 N.W.2d 517 (La. 2014) (certain records related to the defendant’s notification of revocation of driver’s

license were testimonial, others not, depending on when produced); *see also People v. Nunley*, 821 N.W.2d 642 (Mich. 2012); *Commonwealth v. Parenteau*, 948 N.E.2d 883 (Mass. 2011).

4. **Compilations prepared for litigation.** *See United States v. Maga*, 475 Fed. Appx. 538, 541-42 (6th Cir. 2012) (finding that the IRS Form 4340 – which documents in lay terms the information contained in a taxpayer’s IRS record once there is suspicion of a tax violation – was testimonial although the underlying data was not. But the court ultimately concluded that the witness who testified about the Form 4340 satisfied the requirements of the Confrontation Clause).

C. Machine-generated data

1. Prior to *Melendez-Diaz*, *Bullcoming* and *Williams*, the Second Circuit found that evidence generated by a machine is not governed by the Confrontation Clause. *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007).
2. This concept has persisted, but it’s not settled. *See, e.g., State v. Buckland*, 96 A.3d 1163 (Conn. 2014); *see also* Brian Sites, *Rise of the Machines: Machine-Generated Data and the Confrontation Clause*, 16 COLUM. SCI. & TECH. L. REV. 36 (2014).

D. Electronic service provider reports in child porn cases

1. *See United States v. Cameron*, 699 F.3d 621, 641-48 (1st Cir. 2012) (although much of the data maintained by an email provider in the normal course of business is not testimonial, documents related to the company’s collection and analysis of data for the purpose of identifying users who are accessing child pornography and providing that information to law enforcement is testimonial)
2. *Cameron* raises an interesting question about when data regarding child pornography is testimonial and, if so, who is the appropriate witness for cross-examination. *See* Merrit Baer, *Who is the Witness to an Internet Crime: The Confrontation Clause, Digital Forensics, and Child Pornography*, 30 SANTA CLARA HIGH TECH. L.J. 31 (2013).
3. **Note:** *Cameron* also found NCMEC Cyber Tipline Reports testimonial. 699 F.3d at 649-52.

E. Statements to SANE nurses and similar professionals

1. As with autopsy reports, courts are split on whether conversations with SANE nurses—or social workers or others acting in a similar capacity—were primarily for medical treatment or criminal investigation. *See Miller v. Mitchell*, Case No. 12-3245-SAC, 2014 WL 642875 at *9 (D. Kansas Nov. 18, 2014) (collecting cases).
2. Statements to SANE nurses logically should be testimonial as they are trained by medical and legal actors both to treat sexual assault victims for trauma *and to collect evidence for prosecution*. *See* <http://www.forensicnurses.org/?page=aboutsane>.
3. The outcome may depend on the specific facts at hand. *Compare United States v. Squire*, 72 M.J. 285, 288-89 (C.A.A.F. 2013) (finding that a sexual assault victim’s statement to a doctor was not testimonial although the doctor was a mandatory reporter) *with United States v. Gardinier*, 65 M.J. 60, 65-66 (C.A.A.F. 2007) (finding that a victim’s statement made to a SANE nurse during a medical examination arranged by the sheriff’s department was testimonial).
4. And a witness’s statements may include testimonial and non-testimonial components. *See State v. Koederitz*, __ So. 3d __, 2015 WL 1212257 (La. March 17, 2015) (holding that an assault victim’s initial statements with medical personnel were not testimonial because made in the context of getting treatment but statements made in a follow-up visit—when the emergency was over and the doctor sought information about her assailant and knew he had a duty to report the information to law enforcement—were testimonial.).
5. *See also McCarley v. Kelly*, 759 F.3d 535 (6th Cir. 2014) (certiorari petition pending) (holding that it was so clear that a child’s statement to a psychologist was testimonial that the state court decision finding otherwise was unreasonable—where law enforcement asked the psychologist to speak to the child for the purpose of getting information relevant to a murder investigation).

F. Statements to other private citizens

1. Courts usually find that statements made to individuals with no relationship to law enforcement are not testimonial.

2. But lower courts have found that such statements – if intended to be delivered to law enforcement or used in a prosecution – can be testimonial. *State v. Sanchez*, 177 P.3d 444, 450-52 (Mont. 2008) (finding testimonial the following note: “To whom it concerns: [the defendant] told me if I ever was caught [sic] with another man while I was dating him, that he would kill me. [The defendant] told me he had friends in Mexico that had medicine that would kill me and our doctors wouldn’t know what it was till it was to [sic] late and I would be dead. So if I unexspetly [sic] become sick and on the edge of death, and perhaps I die no [sic] you will have some answers.”)
3. In *State v. Jensen*, 727 N.W.2d 518, 527-28 (Wis. 2007), the court found that statements by the decedent to her neighbors and her child’s teacher that she feared her husband would kill her were not testimonial. However, the court also stated that governmental involvement was not a necessary precondition to a finding that a statement was testimonial and stated that the test was whether a reasonable person in the decedent’s position would objectively foresee that his statement might be used in the investigation or prosecution of a crime.
4. Justice Scalia’s views on the matter are food for thought:
 - a. He has said that he is “agnostic about whether and when statements to nonstate actors are testimonial.” *Bryant*, 131 S. Ct. at 1169 n.1 (Scalia, J., dissenting).
 - b. But in *Giles*, in dictum, he suggested that such statements would not be testimonial. *Giles*, 128 S. Ct. at 2692-93.
 - c. Then again, in *Bryant*, he favorably cited a 1779 case that “held inadmissible a mother’s account of her young daughters statements ‘immediately on her coming home’ after being sexually assaulted.” 131 S. Ct. at 1173 (Scalia, J., dissenting).

G. Statements of interpreters

Most courts have found that an interpreter’s statements – translating what a defendant or other witness said – is not testimonial because the interpreter is merely a “language conduit,” see, e.g., *United States v. Shibin*, 722 F.3d 233, 248 (4th Cir. 2013), but the Eleventh Circuit disagreed in *United States v. Charles*, 722 F.3d 1319, 1323-24 (11th Cir. 2013).

H. Remote testimony

1. In *Maryland v. Craig*, the Court found that the Confrontation Clause did not bar the use of remote testimony upon a finding of necessity – there, a finding that the child victims would suffer emotional distress if made to see the defendant – and adequate opportunity for cross. 497 U.S. 836 (1990). Query whether *Crawford* changes this.
2. Although no court has found that *Crawford* overruled *Craig*, most haven't squarely rejected that argument,¹ and *Crawford* provides an opportunity to challenge remote testimony:
 - a. Much of *Craig*'s reasoning is incompatible with *Crawford*. See *Craig*, 497 U.S. at 848 (“[A] literal reading of the Confrontation Clause would ‘abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.’ . . . Thus, in certain narrow circumstances, ‘competing interests, if closely examined, may warrant dispensing with confrontation at trial.’”) (quoting *Roberts*, 448 U.S. at 63-64).
 - b. *Crawford* focused on the historical right to confrontation, and Scalia's dissent in *Craig* noted that the decision was contrary to the founders' understanding of “confrontation.” *Craig*, 497 U.S. at 864-65 (Scalia, J., dissenting).
 - c. Federal courts have recognized: “The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation.” *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006); see also *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) (“It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”).
 - d. See Richard D. Friedman, *Remote Testimony*, THE CONFRONTATION BLOG, <http://confrontationright.blogspot.com/2015/03/remote-testimony.html>

¹ But see *United States v. Pack*, 65 M.J. 381 (C.A.A.F. 2007).

I. Due process right?

1. Where the Confrontation Clause has never applied—like at sentencing and revocation hearings—the Due Process Clause protects defendants from unreliable hearsay. *See, e.g., United States v. Moslavac*, 779 F.3d 661, 663-64 (7th Cir. 2015).
2. Now that the Confrontation Clause doesn't apply to nontestimonial hearsay, should the courts recognize a due process right to exclude unreliable, nontestimonial hearsay at trial? *See Lynn McLain "I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker – and the Role of the Due Process Clause as to Nontestimonial Hearsay*, 32 CARDOZO L. REV. 373 (2010).
3. Fundamental Unfairness:
 - a. Statements of child victim (or others) who are deemed incompetent to testify, if the statement in *Ohio v. Clark* (currently pending in the Supreme Court) is deemed nontestimonial. *See Thinking past Clark: Make that Due Process demand now! (And what to demand.)*, THE CONFRONTATION BLOG, <http://confrontationright.blogspot.com/2015/03/thinking-past-clark-make-that-due.html> (March 3, 2015).
 - b. Professor Friedman suggests that defendants should argue that “[i]t would be fundamentally unfair, and a violation of the Due Process Clause. . . if the child’s statement were offered against my client at trial without us having any right to examine the child at all.” *Id.* He then proposes as a possible remedy of having a defense psychologist conduct a forensic interview in lieu of cross-examination.
 - c. **Note:** At the *Ohio v. Clark* oral argument, some justices expressed interest in this line of argument.

VI. Litigating Confrontation Clause and hearsay issues

A. Break the statement down.

1. Identify each discrete assertion subject to potential challenge, and determine whether each is arguably testimonial. Note that the same statement may contain testimonial and nontestimonial components. (For example, a statement to a SANE nurse may be testimonial in part (who caused injury) and nontestimonial in part (nature of injury to be treated).)
2. Be alert to conclusory statements that are based (or likely based) on others' out-of-court statements. *See United States v. Majia*, 545 F.3d 179 (2d Cir. 2008) (holding that an officer testifying as an expert on gang culture cannot "simply transmit . . . hearsay to the jury"); *But see United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1124 (10th Cir. 2014) (finding that the agent's testimony about the defendant's illegal immigration status was based on his "own observations").
3. Regarding each assertion, determine whether the government will deny presenting it for the truth of the matter asserted and, if so, whether there is a basis for challenging that claim (see below).
4. As to each statement, determine whether the witness is unavailable and was previously subject to cross-examination or whether any other exception might apply (*e.g.* forfeiture by wrongdoing).

B. Pan for gold.

1. If you have an interesting confrontation issue, reread significant cases. They are not models of clarity, and close scrutiny is likely to reveal some helpful nuggets for your case.
2. There is a great deal of conflict among jurisdictions on confrontation issues – look outside your jurisdiction for helpful cases.
3. Don't be afraid to make novel arguments – this is a rapidly moving area of law. For example, statements made to private citizens are generally not testimonial. But you may be able to argue that a particular statement made in a particular case was made with the understanding that it would be used in a criminal investigation or prosecution. *See Bullcoming*, 131 S. Ct. at 2714 n.6 (indicating that the

Confrontation Clause applies to statements made to establish or prove past events for a later criminal prosecution); *See also Sanchez*, 177 P.3d at 450-52 (finding that a victim's note from the grave was testimonial); *Jensen*, 727 N.W.2d at 527-28 (same).

C. Plan your objection.

1. First, you must decide whether objecting actually benefits the defense. *See United States v. Webster*, 775 F.3d 897, 902-03 (7th Cir. 2015) (of the defendant's decision not to challenge surrogate testimony that the substance at issue was marijuana: "Hearsay usually is weaker than live testimony, and defendants may prefer the hearsay version rather than making an objection that would compel the prosecution to produce a stronger witness.") (citation omitted).
2. Second, you must decide when to raise the issue (pretrial motions, in limine, during trial) to use it to your best advantage.

D. Preserve the issue.

1. Object under both hearsay rules and the Confrontation Clause.
2. To support an argument that a statement is testimonial, make a clear record of any law enforcement involvement in the making of the statement and the testimonial intent of the declarant.
 - a. For professional witnesses who are not government agents (e.g., SANE, social workers, doctors, teachers) be prepared to show that their job requires them to acquire evidence for possible prosecution or that they are mandatory reporters. Also, consider whether the witness or his organization are government supported.
3. Renew objections at trial. Two federal circuits have held that a pretrial severance motion did not preserve a *Bruton* challenge to a non-testifying defendant's statements where no objection was made at the outset of testimony. *See United States v. Jobe*, 101 F.3d 1046, 1068 (5th Cir. 1996); *United States v. Turner*, 474 F.3d 1265, 1276 (11th Cir. 2007); *but see United States v. Nash*, 482 F.3d 1209, 1218 n.7 (10th Cir. 2007) (motion for severance preserved *Bruton* issue).

- E. If a witness testified at a pretrial hearing, make a record of restrictions on cross-examination that deprived you of a full opportunity to cross.**
1. Better yet – at the pretrial hearing, make a contemporaneous record of restrictions on cross.
 2. Explain to the court how there were limitations on the “scope or nature” of your cross examination at the earlier hearing, *California v. Green*, 399 U.S. 149, 166 (1970), and, ideally, explain some “new and significantly material line of cross-examination that was not . . . touched upon” in the earlier hearing, *Mancusi v. Stubbs*, 408 U.S. 204 (1972).
- F. Fight harmless error.**
1. Courts are eager to avoid reversal by finding harmless error.
 2. Make a contemporaneous record of how lack of confrontation damages the defense.
- G. Challenge the adequacy of the government’s effort to procure the declarant’s attendance.**
1. If the government caused the witness’s unavailability, argue that forfeiture is a two-way street. See *United States v. Yida*, 498 F.3d 945 (9th Cir. 2008) (because government permitted deportation of witness between first trial and retrial, government prohibited from using testimony at first trial although subject to cross-examination).
 2. While not a confrontation issue, if a *defense* witness is unavailable because of the government’s actions, seek to admit hearsay statements of the witness on the ground that the government caused the witness’s absence.
- H. Take advantage of any forfeiture-by-wrongdoing hearing.**
1. A forfeiture hearing provides an opportunity to examine important witnesses before trial. See *Jensen v. Schwochert*, No. 11-C-0803, 2013 WL 6708767, at *12 (E.D. Wis. Dec. 18, 2013) (referring to the “ten-day forfeiture hearing” as a “prolonged evidentiary battle”).

2. It's not like a preliminary hearing; to determine whether the government has proven forfeiture by a preponderance of the evidence requires court to make credibility determination.
3. Be aware that the government may seek to preserve testimony of reluctant witnesses at the forfeiture hearing—complain about any restrictions on cross.

I. Don't accept the government's claim that a statement is not offered for the truth of the matter asserted.

1. Statements relied on by expert

Recall that a majority of justices in *Williams* rejected the state's contention that the statement at issue was not presented for the truth of the matter asserted. Five justices agreed with the proposition that where an expert relies on evidence to reach a conclusion, it is relevant only because of its truth, since "the statement's utility is . . . dependent on its truth." *Williams*, 132 S. Ct. at 2268-69 (Kagan, J., dissenting); *id.* at 2256 (Thomas, J., concurring) ("statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose").

2. Statements relied on by law enforcement

a. As "context" for an officer's investigation

See United States v. Walker, 673 F.3d 649, 657-58 (7th Cir. 2012) ("[A]n informant's out-of-court statements . . . are admissible as nonhearsay when offered to make a defendant's recorded statements intelligible for the jury (that is, for context) or when brief and essential to bridge gaps in the trial testimony that might significantly confuse or mislead jurors. But these limited nonhearsay uses do not open the door for law enforcement officers to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination.") (internal citations omitted);

Jones v. Basinger, 635 F.3d 1030 (7th Cir. 2011) (finding, in a habeas case, that a state court's determination that damning evidence against the defendant was not offered for its truth

was clearly erroneous and discussing the limits of hearsay ostensibly elicited to explain the course of the investigation).

b. As the conduit for inadmissible hearsay

See United States v. Mejia, 545 F.3d 179, 197-98 (2d Cir. 2008) (finding that an officer who testified as an expert on gang culture “did not analyze his source materials so much as repeat their contents” and thereby served as a conduit for hearsay from “custodial interrogations, newspaper articles, police reports, and tape recordings”).

J. Where the Confrontation Clause doesn’t apply, you can still put up a fight – under the hearsay rules and as a matter of due process.

1. Nontestimonial hearsay nonetheless inadmissible

See United States v. Morales, 720 F.3d 1194, 1201-02 (9th Cir. 2013) (holding that field encounter forms on which noncitizens admitted that they were in the country illegally were not testimonial because they were not prepared for the purpose of prosecution [a holding that hopefully does not settle the matter], but they were nevertheless inadmissible hearsay in the prosecution of the person who transported the noncitizens);

See United States v. Baker, 432 F.3d 2005, 1204-31 (11th Cir. 2005) (although the court refused to consider confrontation claims raised for the first time on appeal, it reversed based on inadmissible hearsay);

2. Hearsay inadmissible at revocation hearing as a matter of due process

United States v. Moslavac, 779 F.3d 661, 663-64 (7th Cir. 2015) (although the Confrontation Clause does not apply at revocation hearings, the district court was required to “balance the defendant’s constitutional interest in confrontation and cross-examination against the government’s stated reasons for denying them”).