Crawford v. Washington – Statement of Facts

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federal constitutional right to be "confronted with the witnesses against him it does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.' " must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or "justified reprisal"; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a "neutral" law enforcement officer. The prosecution played the tape for the jury and relied on it in closing, arguing that it was "damning evidence" that "completely refutes [petitioner's] claim of self-defense." The jury convicted petitioner of assault.

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." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. As noted above, *Roberts* says that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability-*i.e.,* falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it.

The right to confront one's accusers is a concept that dates back to Roman times. The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.

Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.* the witnesses against him, brought before him face to face."

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face ...." The judges refused, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.

One of Raleigh's trial judges later lamented that " 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.' Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused "face to face" at his arraignment. Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person.

First, 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. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being.". Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused-in other words, those who "bear testimony. "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 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. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: " *ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition-for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, yet Raleigh's trial has long been thought a paradigmatic confrontation violation[.]

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.

The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right ... to be confronted with the witnesses against him," is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.

Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.

The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's statements were self-inculpatory. It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does *Roberts,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

Davis v. Washington - Introduction

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36 (2004), we held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Our opinion in *Crawford* set forth "[v]arious formulations" of the core class of " 'testimonial' " statements, but found it unnecessary to endorse any of them, because "some statements qualify under any definition," Among those, we said, were " [s]tatements taken by police officers in the course of interrogations." The questioning that generated the deponent's statement in *Crawford*-which was made and recorded while she was in police custody, after having been given *Miranda* warnings as a possible suspect herself-"qualifies under any conceivable definition" of an " 'interrogation,' "We therefore did not define that term, except to say that "[w]e use [it] ... in its colloquial, rather than any technical legal, sense," and that "one can imagine various definitions ..., and we need not select among them in this case." The character of the statements in the present cases is not as clear, and these cases require us to determine more precisely which police interrogations produce testimony.

Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or non-testimonial, it suffices to decide the present cases to hold as follows: Statements are non-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. 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.

The question before us in *Davis,* then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford* that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford,* " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis [h] or prov [e]" some past fact, but to describe current circumstances requiring police assistance.

The difference between the interrogation in *Davis* and the one in *Crawford* is apparent on the face of things. In *Davis,* McCottry was speaking about events *as they were actually happening,* rather than "describ [ing] past events,". Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in *Davis,* again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness;* she was not *testifying*.

Determining the testimonial or non-testimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task, since they were not much different from the statements we found to be testimonial in *Crawford.* It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct-as, indeed, the testifying officer expressly acknowledged. There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime-which is, of course, precisely what the officer *should* have done.

It is true that the *Crawford* interrogation was more formal. It followed a *Miranda* warning, was tape-recorded, and took place at the station house, see While these features certainly strengthened the statements' testimonial aspect-made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events-none was essential to the point. It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigat[ion]." What we called the "striking resemblance" of the *Crawford* statement to civil-law *ex parte* examinations, is shared by Amy's statement here. Both declarants were actively separated from the defendant-officers forcibly prevented Hershel from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.

Forfeiture by Wrongdoing

Respondents in both cases, joined by a number of their *amici,* contend that the nature of the offenses charged in these two cases-domestic violence-requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford:* that "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds." That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard, see, *e.g.,* State courts tend to follow the same practice. Moreover, if a hearing on forfeiture is required, *Edwards,* for instance, observed that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the "reliability" of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence. *Crawford,* in overruling *Roberts,* did not destroy the ability of courts to protect the integrity of their proceedings.

However, while the *Crawford* ban against testimonial out-of-court hearsay statements by an unavailable witness may apply in DWI cases, the Supreme Court specifically excluded business records from the scope of that ban

Defendant does not challenge the admissibility of Cross' inspection certificates on any basis other than the *Crawford* decision. The inspection certificates are in the form approved by the New Jersey Supreme[.] They are not within the "testimonial evidence" category of *Crawford,* because they are business records (and official records) of the New Jersey State Police, and thus are admissible under *N.J.R.E.* 803(c)(6) and (8

Therefore, we consider first whether the foundational documents at issue are hearsay statements and, if so, whether they qualify under an appropriate exception to the hearsay rule. If those foundational documents are admissible under the hearsay rule, we then address whether they are testimonial and thus run afoul of the Confrontation Clause's guarantee.

1. **Is the Statement hearsay? (y/n)**

2. **Does the hearsay Statement fall within one of the recognized exceptions to the hearsay rule? (y/n)**

3. **Is the statement testimonial within the meaning of *Crawford?* (y/n)**

4. **Was the declarant subject to previous cross-examination? (y/n)**

If the answer to each of the first three question is yes and the last one no, the Statement is inadmissible under *Crawford*.

We reaffirm that "[t]he fact that [foundational documents] may be used to demonstrate that a device, which was used to conduct the breath tests for a particular defendant, was in good working order does not transform them into evidence of an element of the offense nor make them testimonial in the constitutional sense." *Chun, supra,* 194 *N.J.* at 144, 943 *A.*2d 114. We discern no meaningful distinction between the foundational documents required for the admission of Breathalyzer® blood alcohol test results and those we recently approved in *Chun* in respect of Alcotest® blood alcohol test results. Like *Chun,* "we perceive both in the Constitution itself and in *Crawford,* ample room for admissibility of these foundational documents consistent with protecting defendants' rights." *Ibid.*

State v. Chun, 194 N.J. 54 (2008)

[The] certificates "qualify as business records in the traditional sense" because "[f]or purposes of the hearsay exception, we can describe all of these documents as being records of tests of the device, ... or of the chemical composition of the solutions used to either perform the control tests or calibrate the machine." Both the ampoule testing certificates and the breath testing instrument inspection certificates at issue (1) are made in the regular course of business, (2) are prepared reasonably contemporaneously with the events they describe, and (3) no credible challenge has been presented to their trustworthiness as "nothing in this record ... suggests that any of these foundational documents is subject to manipulation by the preparer." Therefore, "we do not regard them as being anything other than business records that are ordinarily reliable."

"[t]he fact that [foundational documents] may be used to demonstrate that a device, which was used to conduct the breath tests for a particular defendant, was in good working order does not transform them into evidence of an element of the offense nor make them testimonial in the constitutional sense."

State v. Berezansky, 386 N.J.Super. 84 (App. Div. 2006)

We reject the State's reliance upon the business record or government record exceptions to the hearsay rule to permit the admission of this lab certificate. The rationale for those exceptions is that such a document is likely to be reliable because it was prepared and preserved in the ordinary course of the operation of a business or governmental entity, and not created primarily as evidence for trial. The certificate at issue is not a record prepared or maintained in the ordinary course of government business; it was prepared specifically in order to prove an element of the crime and offered in lieu of producing the qualified individual who actually performed the test.

State v. Renshaw, 390 N.J.Super. 456 (App. Div. 2007)

In the instant case, the preparation of the Uniform Certification for Bodily Specimens Taken in a Medically Acceptable Manner could not qualify for admission under the business record exception to the hearsay rule, because it was not prepared in the ordinary course of business. Instead, the certification was prepared solely to be used "in any proceeding as evidence of the statements contained" within such record. *N.J.S.A.* 2A:62A-11. As we observed in *Berezansky,* the business records exception will not apply if the document was prepared specifically for the purposes of litigation.

Having found that the certification is testimonial in nature, and in light of our conclusions about what *Berezansky* and *Simbara* require, we see no principled basis to afford a defendant challenging the admissibility of a certification concerning the procedures used to draw his blood any fewer rights than a defendant challenging a technician's report on blood alcohol content or a report on the presence of a controlled dangerous substance. *N.J.S.A.* 2A:62A-11, the statute at issue here, is thus free of any constitutional difficulties only in those circumstances when a defendant consents to the admission of the nurse's certificate and agrees to waive the opportunity for cross-examination; however, when an objection is raised, the existence of the statute is not a justification for the State's failure to produce the witness.

We recognize that hospital nurses, phlebotomists and other medical personnel are not police officers. Nonetheless, their close interaction with law enforcement officers, in extracting blood from DWI suspects and in certifying as to "the manner and circumstances under which the sample was taken," readily places them within the ambit of the "testimonial" boundaries of *Crawford.*

We do so with a full awareness that our case law precedents are not mere theoretical abstractions, but rather serve as guideposts that have real-world impacts in courtrooms for lawyers, clients, and witnesses in everyday settings.

The upshot of classifying declarant's out-of-court statement as testimonial under *Crawford* is that the declarant must appear in court for cross-examination by defense counsel in order for the State to make use of his or her statement for its truth. That is no minor consequence. Laboratory technicians such as Joseph Messana and hospital workers such as Roger Gallant would need to divert from their regular functions, in testing substances and treating sick people, and travel to courthouses to vouch for the contents of their certified reports. These burdens are especially palpable

for hospital workers such as Gallant, a person who does not earn his livelihood as a civil servant but rather as a medical provider who serendipitously had a brief professional encounter in the emergency room with a police officer and an apparently-inebriated motorist.

We take judicial notice that the municipal courts where DWI trials are conducted in this State frequently operate in the evenings. The courts are scattered among over 500 municipalities, sometimes being located at considerable distances from the nearest hospital where drunk drivers may be brought to have their blood drawn. These practical realities trigger significant concerns about the burdens we anticipate will be imposed upon nurses, phlebotomists and other hospital workers by virtue of holding that their presence at DWI trials is constitutionally essential. We also take judicial notice of the general shortage of nurses, which appears to be more severe in our state than it is nationally.

We therefore do not wish the administration of the confrontation rights of defendants charged with DWI violations to impose undue logistical or personal burdens upon the law enforcement personnel and third-party witnesses who are summoned to testify concerning the contents of their hearsay declarations. To the extent feasible, the time chemists spend away from their laboratories

and nurses spend away from their patients should be minimized. Toward that end, we discourage the pro forma insistence that such persons appear at DWI trials to vouch for the contents of their reports, if there are no bona fide subject matters in dispute on which defense counsel intends to cross-examine them.

That being stated, we deem it appropriate prospectively to require, as a condition of our treatment of lab reports and blood sample certificates as "testimonial" documents, that defense counsel provide reasonable advance notice to prosecutors that they wish to cross-examine the authors of those documents at trial. In the absence of such reasonable notice, a defendant shall be deemed to have waived his or her right to confrontation.

Apart from notice-demand requirements, we also believe it worthwhile for the Legislature or the relevant Supreme Court Committees to explore means of abating the time and travel burdens upon nurses, chemists and other third-party witnesses who now will be constitutionally required to travel to municipal court for DWI trials. For instance, such bodies might explore the feasibility of remote video conferences at trials or *de bene esse* videotaped depositions, so that such witnesses need not physically appear in municipal courts late at night. Another possibility that can be considered is whether the scheduling or venues of DWI trials might be altered to minimize logistical burdens on medical providers and laboratory personnel, including the creation of special daytime court calendars to accommodate such witnesses.

State v. Buda, ____ N.J. ____ (2008)

While driving with his mother, N.M., then age three, without any questioning or instigation blurted out "Daddy beat me." Because N.M. did not testify at trial and was not subject to cross-examination at some earlier time, the admissibility of that hearsay statement-one we already have determined to qualify for admission as an excited utterance under *N.J.R.E.* 803(c)(2)-depends on whether the statement was testimonial. We conclude that it was non-testimonial for the following reasons.

Because spontaneous statements do not bear the indicia of "a formal statement to government officers" but instead are akin to "a casual remark to an acquaintance[,]"we conclude, much as the Appellate Division did, that N.M.'s July 2002 spontaneous and unprompted hearsay statement to his mother that "Daddy beat me" is non-testimonial.

When she responded to the hospital, the DYFS worker was responding to a life-threatening emergency no different in kind than the function being performed by the 911 operator in *Davis;* she was seeking information from a victim to determine how best to remove the very real threat of continued bodily harm and even death from this three-year-old child. In reaching these conclusions, we are mindful that the primary obligation of a DYFS worker is not to collect evidence of past events to secure the prosecution of an offender, but to protect prospectively a child in need.

State v. Burr, 392 N.J.Super. 538 (App. Div. 2007)

The so-called "tender years" exception to the hearsay rule provides that "[a] statement by a child under the age of twelve relating to sexual misconduct with or against that child is admissible" at trial if (a) the proponent of the hearsay statement provides sufficient notice of the intent to offer the statement at trial, (b) the court finds, pursuant to a pretrial hearing, that the statement is trustworthy, and (c) the child testifies at the trial, or the child is unavailable as a witness and corroborating proof of the sexual abuse is offered. *N.J.R.E.* 803(c)(27)

Most importantly for present purposes, *Crawford* clearly stated, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.... The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.".

As we have noted, *N.J.R.E.* 803(c)(27) provides for admissibility in two circumstances, first when the child "testifies at trial," and second, when the child is unavailable as a witness but there is corroborating proof of the sexual abuse. In this case, the second part of the rule does not apply because there is no claim that A.A. was unavailable; in fact, she was available. As a result, we express no view on whether the "unavailable" prong of the tender years exception survives *Crawford,* although we entertain considerable doubt that it does.

In this case, the child testified, which fell within the first prong of 803(c)(27), and she was available for and was in fact subjected to cross-examination, thereby satisfying *Crawford.*

State v. Nyhammer, 396 N.J.Super. 72 (App. Div. 2007)

It is clear that A.N.'s videotaped statement was testimonial. It was prepared by law enforcement officers with a view towards use at trial against defendant. For that reason, "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." Their purpose is to establish the identity or collect evidence against the perpetrator of a crime.

The prejudice to defendant is compounded here by A.N.'s direct and cross-examination testimony, which was unresponsive to substantive questions regarding the charges. For that reason, the videotaped statement and Officer Cooper's retelling of A.N.'s statement to her, constitute the main evidence against defendant. The other substantive evidence is the confession, which we have already concluded should have been excluded.

The opportunity to cross-examine must be "full, substantial and meaningful in view of the realities of the situation." Mere presence is not enough to render a witness available for cross-examination. Limitations on cross-examination, such as assertions of privilege, effectively make the witness unavailable. Thus, in the Court found that a witness who persisted in refusing to testify by invoking an invalid Fifth-Amendment privilege, was not sufficiently available for cross-examination to satisfy the requirements **89* **of the Confrontation Clause.**

Crawford **holds that admission of a hearsay statement is viewed differently when the declarant testifies at trial (holding that "[t]he [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."). Although a defendant is not guaranteed "cross-examination that is effective in whatever way, and to whatever extent," the opportunity for cross-examination must be more than a mere sham.**

The witness to the robbery of Juana Chavez provided information to Officer Semmel approximately ten minutes after the completion of that crime. The declarant followed Chavez's assailants immediately after witnessing the robbery and cut short his pursuit at Public School 30. When he met with Officer Semmel several minutes later, he related information about a past event-the robbery and flight of the robbers. That the witness may have volunteered the information or responded to open-ended questions does not change the calculus of whether his statements were testimonial.

Our reading of *Davis* leads us to conclude that a declarant's narrative to a law enforcement officer about a crime, which once completed has ended any "imminent danger" to the declarant or some other identifiable person, is testimonial.

The State argues that the defendants forfeited their Sixth Amendment right of confrontation by threatening Bush with physical harm should he testify against them. Defendants challenge that proposition, contending the ex parte interview of Bush *in camera,* again deprived them of their Sixth Amendment right of confrontation. We agree. 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 However, we do not rest our decision in this matter on that determination alone.

Although *N.J.R.E.* 102 provides that "[t]he adoption of these rules shall not bar the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined," we are satisfied that given the significant and far-reaching implications of this proposed hearsay exception, such a change in the Rules of Evidence should be accomplished by our Supreme Court in accordance with the procedure prescribed in *N.J.S.A.* 2A:84A-38 and -39, rather than by judicial opinion.