

**Using *Crawford v. Washington*: A Sequence of Steps
for Defenders in Responding to a Prosecutor's Attempt to
Introduce an Individual's Out-of-Court Statement**

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- I. Introduction to *Crawford v. Washington*, 541 U.S. 36 (2004)
- A. Until the issuance of the *Crawford* decision in 2004, Confrontation Clause claims were governed by *Ohio v. Roberts*, 448 U.S. 56 (1980), which held that when a witness is unavailable, the prosecution may be able to present hearsay testimony without running afoul of the Confrontation Clause if the statement is adequately trustworthy and reliable, and which used the following as the markers of “reliability”: (1) whether the proffered evidence falls within a “firmly rooted hearsay exception”; or (b) whether the proffered evidence is shown to have “particularized guarantees of trustworthiness.”
- B. In *Crawford* and its follow-up cases (*Davis v. Washington*, *Giles v. California*, *Melendez-Diaz v. Massachusetts*, *Michigan v. Bryant*, and *Bullcoming v. New Mexico*, and *Williams v. Illinois*), the U.S. Supreme Court abrogated the *Ohio v. Roberts* test and held that hereafter the governing rule is that the prosecution cannot introduce into evidence at trial a “testimonial statement” of a witness whom the prosecution will not call to the witness stand unless either (1) the accused previously had an adequate opportunity to cross-examine the now-unavailable maker of the out-of-court statement (*see Crawford*, 541 U.S. at 680); or (2) the accused can be deemed to have forfeited the protections of the Confrontation Clause by “caus[ing] ... [the maker of the out-of-court statement] to be absent” from court by “engag[ing] in conduct *designed* to prevent the witness from testifying” and with the express “intent[ion] to prevent [the] witness from testifying” (*Giles v. California*, 554 U.S. 353, 359, 361 (2008)). The Supreme Court and the lower courts have used varying language to define the concept of a “testimonial” statement (*see, e.g., Crawford*, 541 U.S. at 52: “[v]arious formulations of this core class of testimonial statements exist”), but the formulation that encompasses and best explains all of the rulings of the Supreme Court thus far is the following one: “To rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.’” *Bullcoming v. New Mexico*, 564 U.S. 647, 659 n.6 (2011) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).
- C. The range of implications of *Crawford* is potentially very broad and may include unexpected areas. For example, in *People v. Goldstein*, 6 N.Y.3d 119, 810 N.Y.S.2d 100 (2005), the New York Court of Appeals held that the defendant’s Confrontation Clause rights under *Crawford v. Washington* were violated by the prosecution’s presentation of a forensic psychiatrist who, in testifying at trial to refute the defense of mental disease or defect, “recounted [hearsay] statements made to her by people who were not available for cross-examination.” *Id.* at 122, 810 N.Y.S.2d at 101. Although the expert’s opinion was admissible because the hearsay information was “of a kind accepted in the profession as reliable in forming a professional opinion” (*id.* at 124, 810 N.Y.S.2d at 124), the Court of

Appeals concluded that the hearsay statements underlying the opinion were inadmissible under *Crawford* and the Confrontation Clause because the authors of the statements were not available for cross-examination. The prosecution argued that the statements were not subject to *Crawford*'s Confrontation Clause analysis because they "were not evidence in themselves, but were admitted only to help the jury in evaluating [the psychiatrist's] opinion, and thus were not offered to establish their truth," but the Court of Appeals rejected this argument, concluding that "[s]ince the prosecution's goal was to buttress [the psychiatrist's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true." *Id.* at 128, 810 N.Y.S.2d at 105.

- II. A Sequence of Steps for Defenders in Responding to a Prosecutor's Attempt to Introduce an Individual's Out-of-Court Statement at Trial¹
 - A. First Step: If a prosecutor seeks to introduce an out-of-court statement at trial or if the defense anticipates that the prosecutor will attempt to do so, the defense should consider challenging the introduction of this statement on the following grounds, either at trial or prior to trial in a motion *in limine*:
 - (1) On state law hearsay grounds and also on constitutional (Confrontation Clause) grounds. Even if the hearsay objection seems very strong, the Confrontation Clause claim should be added when available in order to federalize the issue and thereby preserve the ability to raise a constitutional claim on appeal and perhaps later in federal habeas corpus proceedings. *See, e.g., People v. Lopez*, 25 A.D.3d 385, 808 N.Y.S.2d 648 (1st Dept. 2006) (defense counsel's objection on hearsay grounds was insufficient to preserve Confrontation Clause claim).
 - (2) On both federal and state constitutional grounds, so as to preserve both the federal constitutional claim for appeal and federal habeas corpus

¹ This memorandum's discussion is limited to prosecutorial attempts to use an out-of-court statement at trial. At a suppression hearing, hearsay objections ordinarily would not lie because of the C.P.L. provision authorizing the admission of hearsay at a suppression hearing. *See* C.P.L. § 710.60(4). *But cf. United States v. Matlock*, 415 U.S. 164, 176-77 (1974) (indicating that hearsay objections may be available even in the suppression context if there are sufficient questions about the reliability of the out-of-court statement). It appears that *Crawford* does not extend to a pretrial suppression hearing. *See People v. Brink*, 31 A.D.3d 1139, 1140, 818 N.Y.S.2d 374, 374-75 (4th Dept. 2006); *People v. Robinson*, 9 Misc.3d 676, 802 N.Y.S.2d 868 (County Ct., Suffolk Co. 2005). The Court of Appeals has not yet addressed the applicability of *Crawford* to a pretrial hearing, although the Court of Appeals has held that "*Crawford* does not apply at sentencing proceedings." *People v. Leon*, 10 N.Y.3d 122, 126, 855 N.Y.S.2d 38, 40 (2008).

proceedings and preserve the ability to argue to the Appellate Division or the Court of Appeals that the state constitution's Confrontation Clause (N.Y. Const. art. I, § 6) should be construed more broadly than its federal constitutional counterpart. *See, e.g., People v. Clay*, 88 A.D.2d 14, 926 N.Y.S.2d 598 (2d Dept. 2011) (rejecting Confrontation Clause claim on federal constitutional grounds and then declining to consider whether different result should be reached under state constitution because "appellant does not argue that the State Constitution is more protective of the right of confrontation than the Federal Constitution").

B. (Possible) Next Step: Dealing with a prosecutorial rejoinder that the out-of-court statement is not being offered for the "truth of the matter":

- (1) Legal effect of a prosecutorial assertion that an out-of-court statement is not being offered for the truth of the matter: This assertion, if valid, will overcome both a hearsay objection and a Confrontation Clause objection:
 - (a) By definition, a statement that is not offered for the "truth of the matter" is not "hearsay."
 - (b) Both the U.S. Supreme Court and the New York Court of Appeals have stated that an out-of-court statement that is not offered for the "truth of the matter" does not implicate Confrontation Clause rights under *Crawford*. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("The Clause ... does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."); *People v. Reynoso*, 2 N.Y.3d 820, 821, 781 N.Y.S.2d 284, 284 (2004) ("The prosecution's eliciting of "a statement that a non-testifying codefendant had made to a detective" did not violate the Confrontation Clause because the "statement was admitted not to establish the truth of the matter asserted, but rather to show the detective's state of mind.").
- (2) Possible defense rejoinders:
 - (a) Although the prosecution *claims* that the statement is not being offered for the "truth of the matter," the prosecution actually "want[s] and expect[s] the jury [or judge in a bench trial] to take the statement[] as true" and therefore the statement should be deemed as actually being "offered for the[] truth, and . . . [therefore as] hearsay." *People v. Goldstein*, 6 N.Y.3d 119, 127-28, 810 N.Y.S.2d 100, 105-06 (2005).

- (i) In *Goldstein*, in which the Court of Appeals held that a prosecution expert's testimony about hearsay statements underlying her diagnosis violated the Confrontation Clause, the Court rejected the prosecution's argument that the statements "were not offered to establish their truth" but merely to "help the jury in evaluating [the psychiatrist's] opinion." *Id.* at 127-128, 810 N.Y.S.2d at 105-06. The Court of Appeals explained that "[s]ince the prosecution's goal was to buttress [the psychiatrist's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true," the statements must be deemed to have been offered for the truth. *Id.*
 - (ii) The same principle emerges from caselaw holding that a witness's recounting of an out-of-court statement violated the hearsay rule and/or the Confrontation Clause despite the prosecutor's assertion that the statement was not offered for its truth. *See, e.g., People v. Meadow*, 140 A.D.3d 1596, 33 N.Y.S.3d 597, 599, 600 (4th Dept. 2016) (although "the People contend" that the witnesses' testimony that the victim "told them that defendant had beaten her in the past and threatened to kill her" "are not hearsay because they were not offered for the truth of the matters asserted therein," the Appellate Division "reject[s] that contention" and finds that they were intended for the truth and used by the prosecution in that manner; even if they were relevant under *Molineux*, they were nonetheless inadmissible hearsay); *People v. Berry*, 49 A.D.3d 888, 889, 854 N.Y.S.2d 507, 509-10 (2d Dept. 2008) (the prosecutor's eliciting of inferential hearsay from a detective – who testified that he obtained a personal address book from a witness during a police station interview, photocopied a page from the book, and then put out a "wanted card" for the defendant, thus implying that the witness identified the defendant as the perpetrator – violated the Confrontation Clause).
- (b) If there is no basis for questioning the prosecution's representation that the statement is not being offered for the truth or if such an objection is rejected by the court, then the defense should respond by questioning the non-truth purpose for which the statement is actually being offered and then, if appropriate, arguing that the purpose identified by the prosecution is insufficiently relevant or is

more prejudicial than probative. Any attempt on a prosecutor's part to introduce a statement for some purpose other than the truth at a criminal trial should presumptively raise a question about what the purpose is and why that purpose is relevant to the trial and not more prejudicial than probative.

- (i) In some cases, the prosecution may attempt to substantiate a claim of “not for the truth” by asserting that the statement is needed in order to “complete the narrative.” The “federal Confrontation Clause ‘does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted’ . . . [and], subject to the exercise of a court’s discretion, otherwise inadmissible evidence that ‘provide[s] background information as to how and why the police pursued and confronted [a] defendant’ . . . may be admitted to help a jury understand a case in context ‘if the evidence’s probative value in explaining the [pursuit] outweighs any undue prejudice to the defendant,’ and if the evidence is accompanied by a “proper limiting instruction[.]”’” *People v. Garcia*, 25 N.Y.3d 77, 7 N.Y.S.3d 246 (2015). In *Garcia*, in which the Court of Appeals granted review in two “otherwise unrelated criminal appeals” to consider “whether the introduction of purported ‘background and narrative’ evidence [at trial in these two cases] through the testimony of police detectives violated defendants’ right to confrontation,” the Court of Appeals (1) held in *People v. Garcia* that a detective’s recounting of a statement by the victim’s sister that there had been “‘a problem’” between the defendant and victim was testimonial and violated the Confrontation Clause because it “arguably gave a motive for the shooting, exceeded that which was necessary to explain the police pursuit of the defendant,” and was not “tempered by “‘a proper limiting instruction[.]’””; and (2) held in *People v. DeJesus* that no Confrontation Clause violation occurred when a detective, “when asked whether there came a time on June 9, 2006 when the police began to look for a specific suspect in relation to the death of Montez, . . . merely agreed that the police ‘beg[a]n specifically looking for [defendant]’ at 4:00 p.m. that afternoon without having ‘spoken to [the eyewitness],’” and the Court of Appeals rejected defense counsel’s claim that this testimony constituted “an inferential breach of defendant’s

confrontation rights” in the sense that it implicitly conveyed that someone must have “‘told [the detective] to look for [defendant]’” before the police spoke to the eyewitness. *See also People v. Resek*, 3 N.Y.3d 385, 389, 787 N.Y.S.2d 683, 684-85 (2004) (admission of otherwise inadmissible evidence for the sake of completing the narrative is a “delicate business” because “there is the danger” that such evidence “may improperly divert the jury from the case at hand or introduce more prejudice than evidentiary value”); *People v. Maier*, 77 A.D.3d 681, 682-83, 908 N.Y.S.2d 711, 712-13 (2d Dept. 2010) (judge in drug possession trial erred in allowing prosecution to introduce evidence of other drugs and paraphernalia that were not the subject of charges for the purpose of “‘complet[ing] the narrative’ or to explain the police officer’s conduct”; even if the evidence had been “probative of an issue other than the defendant’s criminal propensity to commit the crime charged, such limited probative value would have been outweighed by the prejudicial impact of the testimony”).

C. Next Step: Arguments that the statement should be barred on hearsay grounds

- (1) If the prosecution doesn’t claim that the statement is non-hearsay on the ground that it is not being offered “for the truth of the matter asserted” or if the prosecution makes such a claim and the claim is rejected by the court, then the defense should seek to prevent the introduction of the statement on any applicable hearsay and Confrontation Clause grounds. It will often be easier to start with the hearsay arguments, especially if they’re strong and straightforward, since a court that is inclined to bar the statement may feel on firmer ground in doing so on the more familiar ground of hearsay. *See, e.g., People v. Isaac*, 4 Misc.3d 1001(A), 791 N.Y.S.2d 872 (Dist. Ct., Nassau Co. 2004) (2004 WL 1389219) (after initially engaging in a lengthy *Crawford* Confrontation Clause analysis and rejecting the defense’s *Crawford* claim, the trial judge rules for the defense on the much simpler and more straightforward hearsay ground).
- (2) A hearsay objection apparently will lie even if the declarant who made the out-of-court statement testifies at the trial and is subject to cross-examination:
 - (a) Prior to 2001, it was unclear whether New York State follows the Federal rules’ approach of defining hearsay as “a statement, other than one made by the declarant *while testifying at the trial or*

hearing, offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid. 801 (emphasis added). *Compare* 57 NY JUR.2D, Evidence and Witnesses § 268, at 527 (1986) (suggesting that hearsay rule should not exclude a witness’s own prior statements because “the utterer of the quoted statement which is the source of the hearsay testimony” is present to be cross-examined) *with* PRINCE, RICHARDSON ON EVIDENCE § 8-102, at 498 (11th ed., Farrell 1995) (adopting the federal approach of treating out-of-court statements offered for their truth as hearsay without regard to whether the “statement [was] made by a [testifying] witness”) *and with* *People v. Edwards*, 47 N.Y.2d 493, 496, 419 N.Y.S.2d 45, 47 (1979) (approvingly citing the foregoing section of RICHARDSON ON EVIDENCE).

- (b) In *Nucci v. Proper*, 95 N.Y.2d 597, 721 N.Y.S.2d 593 (2001), the Court of Appeals signaled that it favors the stricter, federal approach. The Court of Appeals held that a witness’s recounting of another individual’s out-of-court statement was hearsay and should not have been admitted even though the latter individual was herself a witness at trial and therefore “availab[le] for cross-examination.” *Id.* at 604, 721 N.Y.S.2d at 597. In reaching this conclusion, the Court of Appeals disavowed the trial court’s broad reading of an earlier Court of Appeals decision, *Letendre v. Hartford Accident & Indemnity Co.*, 21 N.Y.2d 518, 289 N.Y.S.2d 183 (1968), as rendering the hearsay rule inapplicable when the declarant testifies at trial and is available for cross-examination. Significantly, the New York lower court caselaw and treatises that have favored the less stringent, non-federal rule have supported this approach by interpreting *Letendre* in precisely the manner that has now been rejected by the Court of Appeals in *Nucci*. Finally, the Court of Appeals noted in *Nucci* that New York does not generally follow other states’ approach of “permitting the admission of prior, unsworn oral statements where the declarant is available and subject to cross-examination.” *Nucci*, 95 N.Y.2d at 604 n.2, 721 N.Y.S.2d at 597 n.2. Although the facts of *Nucci* involved a witness’s recounting of *another witness’s* out-of-court statement rather than the witness’s own out-of-court statement, the Court of Appeals’ comments and its circumscribing of *Letendre* suggest that the Court of Appeals favors the federal approach.
- (c) In many instances, a witness’s in-court recitation of his or her own out-of-court statement also constitutes a “prior consistent statement,” which would be inadmissible under the general

prohibition against “prior consistent statements” unless either (I) the cross-examiner has attacked the witness’s statement as fabricated and the prior statement was made before the claimed motive to falsify arose (*see, e.g., People v. McLean*, 69 N.Y.2d 426, 428, 515 N.Y.S.2d 428, 429-30 (1987); *People v. Rosario*, 68 A.D.3d 600, 601, 892 N.Y.S.2d 338, 339-40 (1st Dept. 2009)); or (II) the statement is admissible under another hearsay exception (*see People v. Buie*, 86 N.Y.2d 501, 509-13, 634 N.Y.S.2d 415, 420-22 (1995)).

(d) *Note:* If the declarant testifies at trial and is subject to cross-examination, a Confrontation Clause claim apparently is not available in such a scenario. *See Crawford*, 541 U.S. at 59 n.9 (“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.”).

(3) In arguing that a statement should be barred on hearsay grounds, the defense should, where appropriate, invoke hearsay caselaw that makes it clear that the proponent of the hearsay evidence (which, in this situation, would be the prosecution) bears the burden of establishing the elements of the asserted exception to the hearsay prohibition. *See, e.g., Tyrrell v. Wal-Mart Stores, Inc.*, 97 N.Y.2d 650, 737 N.Y.S.2d 43 (2001) (trial court’s introduction of a hearsay statement as a spontaneous declaration and *res gestae* on ground that “there was ‘no evidence to suggest that the statement was anything other than a spontaneous declaration’” had the effect of “improperly shift[ing] the burden of establishing the exception to the hearsay rule”; trial court should have required the proponent of the hearsay to “show that at the time of the statement the declarant was under the stress of excitement caused by an external event sufficient to still her reflective faculties and had no opportunity for deliberation”).

D. Next Step: Confrontation Clause argument under *Crawford v. Washington* (if the court rejects the hearsay objection):

(1) Determining whether an out-of-court statement is “testimonial” and therefore subject to *Crawford*’s rule that “testimonial statements” cannot be introduced into evidence by the prosecution unless the witness is unavailable and the accused has had “a prior opportunity for cross-examination”:

- (a) What's clearly "testimonial" under *Crawford*:
- (i) Testimony in a prior formal proceeding (e.g., a Grand Jury proceeding, Preliminary Hearing, or former trial). *See Crawford*, 541 U.S. at 68 ("Whatever else the term ["testimonial"] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial").
 - (ii) Statements to the police during interrogation of an individual who's suspected as an accomplice or co-perpetrator. This is the scenario of *Crawford* itself. *See also, e.g., People v. Ryan*, 17 A.D.3d 1, 790 N.Y.S.2d 723 (3d Dept. 2005) (introduction, at trial, of statements made to law enforcement officers by the defendant's accomplices, violated the Confrontation Clause).
 - (iii) Guilty plea allocution by a co-perpetrator. *See People v. Hardy*, 4 N.Y.3d 192, 791 N.Y.S.2d 513 (2005) (introduction, at trial, of a non-testifying co-defendant's plea allocution violated the Confrontation Clause as interpreted in *Crawford*).
 - (iv) Affidavits prepared for litigation. *See Crawford*, 541 U.S. at 51-52.
- (b) What's probably (or possibly) not "testimonial" under *Crawford*:
- (i) Statement by a co-conspirator made during and in furtherance of the conspiracy. *See Crawford*, 541 U.S. at 56.
 - (ii) "[S]tatements to physicians in the course of receiving treatment." *Giles v. California*, 554 U.S. 353, 376 (2008) (*dicta*). *See, e.g., People v. Duhs*, 16 N.Y.3d 405, 922 N.Y.S.2d 843 (2011) (child victim's statement to pediatrician during medical examination of child's injuries was not "testimonial" because "the primary purpose of the pediatrician's inquiry was to determine the mechanism of injury so she could render a diagnosis and administer medical treatment").
 - (iii) Maybe "dying declarations." *See Crawford*, 541 U.S. at 56

n.6 (“many dying declarations may not be testimonial” and “authority for admitting even those that are”); *Michigan v. Bryant*, 562 U.S. 344, 395-96 (2011) (Ginsburg, J., dissenting) (“Were the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions.”); *People v. Clay*, 88 A.D.2d 14, 926 N.Y.S.2d 598 (2d Dept. 2011) (holding that “dying declarations,” even when testimonial, are an exception to the Confrontation Clause of the U.S. Constitution; court reserves the question whether a different result should apply under the state constitution, which was not before the court because “appellant does not argue that the State Constitution is more protective of the right of confrontation than the Federal Constitution”). *Cf. People v. Falletto*, 202 N.Y. 494, 499-500, 96 N.E. 355, 357 (1911) (“Dying declarations are dangerous, because made with no fear of prosecution for perjury and without the test of cross-examination, which is the best method known to bring out the full and exact truth. The fear of punishment after death is not now regarded as so strong a safeguard against falsehood as it was when the rule admitting such declarations was first laid down. Such evidence is the mere statement of what was said by a person, not under oath, usually made when the body is in pain, the mind agitated, and the memory shaken by the certainty of impending death. A clear, full, and exact statement of the facts cannot be expected under such circumstances, especially if the declaration is made in response to suggestive questions, or those calling for the answer of ‘Yes’ or ‘No.’ Experience shows that dying declarations are not always true.”).

- (iv) Business records in certain circumstances: In *Crawford*, the U.S. Supreme Court indicated in *dicta* that “business records ‘by their nature [are] not testimonial.’” *Crawford*, 541 U.S. at 56. Subsequently, in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court narrowed this broad formulation and stated that business records are “generally” non-testimonial if they were “created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial,” but that records and reports *are* testimonial if they were “prepared specifically for use at ... trial.” *Id.* at 324. *See also id.* at 322

(even though “at common law the results of a coroner’s inquest were admissible without an opportunity for confrontation,” “coroner’s reports ... were not accorded any special status in American practice”); *id.* at 323 (even if “a clerk’s certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it” might “qualify as an official record” in that “it was prepared by a public officer in the regular course of his official duties,” the record is nonetheless “testimonial” and “the clerk [i]s nonetheless subject to confrontation” if the record was created for the purpose of providing “substantive evidence against the defendant whose guilt depended on the nonexistence of the record”); *People v. Pacer*, 6 N.Y.3d 504, 814 N.Y.S.2d 575 (2006) (rejecting the prosecution’s argument that an “affidavit prepared by a Department of Motor Vehicles official ... describing the agency’s revocation and mailing procedures, and averring that on information and belief they were satisfied” could be introduced at trial on a charge of “aggravated unlicensed operation of a motor vehicle in the first degree” as “a business record or public record, and thus outside the scope of the Confrontation Clause”; introduction of this affidavit by a government official who was “not a ‘neutral’ officer” on “an essential element of the crime” violated the Confrontation Clause).

- (c) The U.S. Supreme Court has “repeatedly reserved” the question “whether statements to persons other than law enforcement officers are subject to the Confrontation Clause,” *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015); *Michigan v. Bryant*, 562 U.S. at 357 n.3, although the Court has observed that “at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns” and therefore the Court has thus far “decline[d] to adopt a categorical rule excluding them from the Sixth Amendment’s reach.” *Ohio v. Clark*, 135 S. Ct. at 2181. *See also id.* at 2183 (Scalia, concurring in the judgment) (agreeing with the majority’s decision to reserve the question “whether a more permissive Confrontation Clause test – one less likely to hold the statements testimonial – should apply to interrogations by private actors”).
- (d) Criteria for assessing whether a 911 call or an in-person statement by a witness at the scene of a crime is “testimonial” for purposes of

the Confrontation Clause:

- (i) A “statement[] made to law enforcement personnel during a 911 call or at a crime scene” is “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.” *Davis v. Washington*, 547 U.S. 813, 817, 822 (2006).
- (ii) The judicial assessment of the “primary purpose of the interrogation” should be made by “objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs.” *Michigan v. Bryant*, 562 U.S. 344, 370 (2011). “[T]he existence *vel non* of an ongoing emergency” at the time of the police questioning is not “dispositive of the testimonial inquiry” – since “whether an ongoing emergency exists is simply one factor” (*id.* at 366) – but it is “among the most important circumstances informing the ‘primary purpose’ of an interrogation” (*id.* at 361) because “statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation” (*id.* at 370). “[T]he existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.” *Id.* at 370-71. “In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation. . . . Th[is] combined approach [of “account[ing] for both the declarant and the interrogator”] . . . ameliorates problems that could arise from looking solely to one participant. Predominant among these is the problem of mixed motives on the part of both interrogators and declarants.” *Id.* at 367-68.
- (iii) Applying this standard in *Davis v. Washington*, the Court held that a portion of a 911 call was nontestimonial and was not subject to *Crawford*’s rule because “the circumstances of [the complainant’s] interrogation [by the 911 operator] objectively indicate [that the interrogation’s] primary purpose was to enable police assistance to meet an ongoing

emergency,” in that the complainant “was speaking about events *as they were actually happening*, rather than ‘describ[ing] past events,’” “any reasonable listener would recognize that [the complainant] ... was facing an ongoing emergency,” the complainant’s “call was plainly a call for help against bona fide physical threat,” “the nature of what was asked and answered ... viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn ... what had happened in the past” (even with respect to “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 the complainant’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.” 547 U.S. at 827-28.

- (iv) Applying the standard in *Davis*’s companion case of *Hammon v. Indiana*, the U.S. Supreme Court concluded that an in-person statement to the police by the complainant in a domestic disturbance at her home (when the police went there in response to a report of the disturbance) was “testimonial” under *Crawford* and that its introduction at trial violated the Confrontation Clause because “[t]here was no emergency in progress,” the officer “was not seeking to determine (as in [the companion case,] *Davis*) ‘what is happening,’ but rather ‘what happened,’” and the statement “recounted, in response to police questioning, how potentially criminal past events began and progressed.” *Id.* at 829-30.
- (v) Applying the standard in the subsequent case of *Michigan v. Bryant*, 562 U.S. 344 (2011), the Court held that a mortally wounded shooting victim’s statement to the police, in which the victim identified and described the shooter and the location of the shooting, was not “testimonial” because “the circumstances of the encounter [between the victim and the police] as well as the statements and actions of [the victim] and the police objectively indicate that the ‘primary purpose of the interrogation’” was “‘to enable police assistance to meet an ongoing emergency.’” *id.* at 377-78 (quoting *Davis*, 547

U.S. at 822). The Court emphasized that “there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]”; the victim’s “encounter with the police and all of the statements he made during that interaction occurred within the first few minutes of the police officers’ arrival and well before they secured the scene of the shooting – the shooter’s last known location”; the victim was “lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen” and “[h]is answers to the police officers’ questions were punctuated with questions about when emergency medical services would arrive,” and thus it cannot be said that “a person in [his] situation would have had a ‘primary purpose’ ‘to establish or prove past events potentially relevant to later criminal prosecution’”; the questions asked by the officers were “the exact type of questions necessary to . . . solicit[] the information necessary to enable them ‘to meet an ongoing emergency’”; and “[n]othing in [the victim’s] responses indicated to the police that, contrary to their expectation upon responding to a call reporting a shooting, there was no emergency or that a prior emergency had ended.” *Id.* at 372-78.

- (vi) Applying the standard in the subsequent case of *Ohio v. Clark*, 135 S. Ct. 2173 (2015), the Court held that a 3-year-old child’s responses to his preschool teacher’s questions about the source of his injuries were not “testimonial” because “L.P.’s statements occurred in the context of an ongoing emergency involving suspected child abuse”: “When L.P.’s teachers noticed his injuries, they rightly became worried that the 3-year-old was the victim of serious violence. Because the teachers needed to know whether it was safe to release L.P. to his guardian at the end of the day, they needed to determine who might be abusing the child. . . . Thus, the immediate concern was to protect a vulnerable child who needed help. . . . As in [*Michigan v. Bryant*], the emergency in this case was ongoing, and the circumstances were not entirely clear. L.P.’s teachers were not sure who had abused him or how best to secure his safety. Nor were they sure whether any other children might be at risk. As a result, their questions and L.P.’s answers

were primarily aimed at identifying and ending the threat. . . . The teachers' questions were meant to identify the abuser in order to protect the victim from future attacks. . . . There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect L.P." *Id.* at 2181. The Court explained that "neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution" (*id.* at 2177), observing that "it is extremely unlikely that a 3-year-old child in L.P.'s position would intend his statements to be a substitute for trial testimony," and commenting more generally that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause" because "[f]ew preschool students understand the details of our criminal justice system." *Id.* at 2182.

- (e) Criteria for assessing whether a forensic laboratory report is "testimonial" for purposes of the Confrontation Clause:
 - (i) In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court held that "certificate[s] of analysis" of a controlled substance, prepared by Massachusetts Department of Health laboratory drug examiners and attesting that "material seized by the police and connected to the defendant was cocaine," were "testimonial" for Sixth Amendment purposes and therefore, "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that [the accused] had a prior opportunity to cross-examine them," the admission of the certificates violated the Confrontation Clause under *Crawford v. Washington*. *Id.* at 307, 311.
 - (ii) In a follow-up to *Melendez-Diaz*, the Court considered in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), 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." *Id.* at 652. The Court held that "surrogate testimony of that order does not meet the constitutional requirement." *Id.* The Court

explained that “[t]he accused’s right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.” *Id. Accord, People v. John*, 27 N.Y.3d 294, 33 N.Y.S.3d 88 (2016) (the “defendant’s Sixth Amendment right to confront the witnesses against him was violated when the People introduced DNA reports into evidence, asserting that defendant’s DNA profile was found on the gun that was the subject of the charged possessory weapon offense, without producing a single witness who conducted, witnessed or supervised the laboratory’s generation of the DNA profile from the gun or defendant’s exemplar”; It does not suffice for the prosecution to present merely “a testifying analyst functioning as a conduit for the conclusions of others”: “[A]n analyst who witnessed, performed or supervised the generation of defendant’s DNA profile, or who used his or her independent analysis on the raw data ... must be available to testify.”). *Compare People v. Lin*, 28 N.Y.3d 701, 705-06, 49 N.Y.S.3d 353 (2017) (“a trained analyst” can provide the requisite prosecutorial testimony about a forensic test even if s/he was not “the primary analyst” who “personally conducted it,” as long as s/he “supervised, witnessed or observed the testing” – thus being “able to testify [and to be cross-examined] not only about the typical testing protocol, but also about ‘the particular test and testing process’ used in that defendant’s case” – and as long as “none of the nontestifying officer’s hearsay statements were admitted against defendant”) *with People v. Austin*, 30 N.Y.3d 98, 64 N.Y.S.3d 650 (2017) (the “defendant’s Sixth Amendment right to confrontation was violated by the introduction of DNA evidence through the testimony of a witness who had not performed, witnessed or supervised the generation of the DNA profiles.”).

- (iii) In *Williams v. Illinois*, 132 S. Ct. 2221 (2012), the Court considered the application of *Melendez-Diaz* and *Bullcoming* to a bench trial in which a testifying expert relied on the findings of a DNA report for her analysis but the “report itself was neither admitted into evidence nor shown to the [judicial] factfinder” and the testifying expert “did not quote or read from the report” or “identify it as the

source of any of the opinions she expressed.” *Id.* at 2230. In this trial for rape, the prosecution presented three forensic experts: a state forensic scientist who testified that he identified semen on a vaginal swab taken from the victim and then preserved it for further testing; a state forensic scientist who testified to developing a DNA profile of the defendant from a blood sample taken from him; and, to provide the final links, a forensic expert (Sandra Lambatos) who testified that the defendant’s DNA profile matched the DNA profile that an outside laboratory (Cellmark) derived from the semen on the vaginal swab. The defense objected on Confrontation Clause grounds to Lambatos’ testimony that Cellmark’s DNA profile came from the semen on the vaginal swabs – a fact that Lambatos did not personally know (since “she did not conduct or observe any of the testing on the vaginal swabs”) and that she drew from the Cellmark report – but the Illinois Supreme Court ruled that there was no Confrontation Clause violation because Lambatos referenced the report merely for the limited purpose of explaining the basis for her expert opinion and thus the statement was not admitted for the truth of the matter. The U.S. Supreme Court affirmed but in a fragmented set of opinions that complicate and confuse the state of Confrontation Clause rules on forensic reports. A plurality opinion, authored by Justice Alito, and joined by Chief Justice Roberts and Justices Kennedy and Breyer, concluded that there was no Confrontation Clause violation because the out-of-court statement about the source of the Cellmark DNA profile was not admitted for the truth of the matter and this was a bench trial and thus, unlike in a jury trial, the trier of fact could be relied upon to understand that the expert’s “statement regarding the source of the Cellmark report” could not be “consider[ed] ... for its truth.” *Id.* at 2240. A dissenting opinion, authored by Justice Kagan, and joined by Justices Scalia, Ginsburg and Sotomayor, concluded that “Lambatos’s statement about Cellmark’s report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause’s requirements.” *Id.* at 2268. Justice Thomas, who concurred in the plurality’s judgment, thereby providing the fifth vote for affirming the lower court’s ruling, stated explicitly that he “shares the dissent’s view” that “Cellmark’s statements

were introduced for their truth,” *id.* at 2255, 2259, and that this classification is not vitiated by the fact that this was a bench trial, *id.* at 2259 n.1, but Justice Thomas nonetheless joined the plurality in affirming the conviction because of his idiosyncratic view that forensic reports like the Cellmark report at issue in this case “lack[] the requisite ‘formality and solemnity’ to be considered “‘testimonial’” for purposes of the Confrontation Clause.” *Id.* at 2255. Thus, as Justice Kagan observed in her dissent, Justice Thomas’s opinion provides a fifth vote for the dissent’s view that the challenged testimony in this case must be regarded as having come in for the truth of the matter, a classification that would result in a Confrontation Clause bar under the Sixth Amendment standards applied by all members of the Court other than Justice Thomas. *See id.* at 2268.

- (A) Employing reasoning similar to Justice Kagan’s, the New York Court of Appeals held in *People v. Goldstein*, 6 N.Y.3d 119, 810 N.Y.S.2d 100 (2005), that the defendant’s Confrontation Clause rights were violated by the prosecution’s presentation of a forensic psychiatrist who, in testifying at trial to refute the defense of mental disease or defect, “recounted [hearsay] statements made to her by people who were not available for cross-examination.” *Id.* at 122, 810 N.Y.S.2d at 101. Although the prosecution argued that the statements were not subject to *Crawford*’s Confrontation Clause analysis because they “were not evidence in themselves, but were admitted only to help the jury in evaluating [the psychiatrist’s] opinion, and thus were not offered to establish their truth,” the Court of Appeals rejected this argument, concluding that “[s]ince the prosecution’s goal was to buttress [the psychiatrist’s] opinion, the prosecution obviously wanted and expected the jury to take the statements as true.” *Id.* at 128, 810 N.Y.S.2d at 105.
- (iv) As Justice Kagan observed in her dissenting opinion in *Williams v. Illinois*, the various *Williams* opinions leave “significant confusion in their wake. What comes out of four [plurality opinion] Justices’ desire to limit *Melendez-*

Diaz and *Bullcoming* in whatever way possible, combined with one Justice’s one-justice view of those holdings, is – to be frank – who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority.” 132 S. Ct. at 2277.

- (v) The New York Court of Appeals has adopted its own “analytical framework” for analyzing whether a forensic report is “testimonial” for Confrontation Clause purposes, thereby requiring that any challenged report satisfy both the federal constitutional standard and also New York’s “analytical framework.” See *People v. Pealer*, 20 N.Y.3d 447, 962 N.Y.S.2d 592 (2013). In *People v. Rawlins*, 10 N.Y.3d 136, 855 N.Y.S.2d 20 (2008) and *People v. Freycinet*, 11 N.Y.3d 38, 862 N.Y.S.2d 450 (2008), the Court of Appeals held that the classification of a forensic report as “testimonial” for Confrontation Clause purposes turns upon the following factors: “(1) whether the agency that produced the record is independent of law enforcement; (2) whether it reflects objective facts at the time of their recording; (3) whether the report has been biased in favor of law enforcement; and (4) whether the report accuses the defendant by directly linking him or her to the crime.” *People v. Brown*, 13 N.Y.3d 332, 339-40, 890 N.Y.S.2d 415, 419 (2009) (describing the *Rawlins-Freycinet* rule). See also *People v. John*, 27 N.Y.3d 294, 33 N.Y.S.3d 88 (2016) (“We have considered two factors of particular importance in deciding whether a statement is testimonial – “first, whether the statement was prepared in a manner resembling ex parte examination and second, whether the statement accuses defendant of criminal wrongdoing.” Furthermore, the “purpose of making or generating the statement, and the declarant’s motive for doing so,” also “inform these two interrelated touchstones.””).

- (2) What happens if the scenario is covered by *Crawford*? If the statement was “testimonial,” then it is inadmissible against the defendant, even if it satisfies a hearsay exception, unless one of the following rules applies:

- (a) Prior adequate opportunity to cross-examine: A testimonial

statement is admissible, notwithstanding the denial of an opportunity for defense counsel to cross-examine the declarant at trial, if the declarant is currently unavailable and the accused previously had an adequate opportunity to confront/cross-examine the declarant. *See Crawford*, 541 U.S. at 68 (“Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination”).

- (i) If the accused’s prior opportunity for cross-examination of the declarant was at a hearing where the opportunity for cross-examination was curtailed – as is typically the case at a Preliminary Hearing or a Family Court probable cause hearing – the *Crawford* guarantee of confrontation is not satisfied. *See, e.g., People v. Fry*, 92 P.3d 970, 972 (Colo. 2004); *People v. Torres*, 962 N.E.2d 919, 932-34, 357 Ill. Dec. 18, 31-33 (Ill. 2012); *State v. Stuart*, 279 Wis. 2d 659, 672-76, 695 N.W.2d 259, 265-67 (2005). *See also Lee v. Illinois*, 476 U.S. 530, 546 n.6 (1986) (state’s argument that the accused “was afforded an opportunity to cross-examine [the author of the out-of-court statement] . . . during the suppression hearing” and that this opportunity satisfied the Confrontation Clause is rejected by the Court because the limited nature of the inquiry at a suppression hearing precluded an “opportunity for cross-examination sufficient to satisfy the demands of the Confrontation Clause”).
- (b) Forfeiture of Confrontation Clause rights by wrongdoing: If the accused can be deemed to have forfeited the protections of the Confrontation Clause by “caus[ing] . . . [the maker of the out-of-court statement] to be absent” from court by “engag[ing] in conduct *designed* to prevent the witness from testifying” and with the express “intent[ion] to prevent [the] witness from testifying.” *Giles v. California*, 554 U.S. 353, 359, 361 (2008).
 - (i) Under the longstanding “*Sirois* rule” in New York, the prosecution must prove, at a pretrial *Sirois* hearing, “by clear and convincing evidence that the defendant engaged in misconduct aimed at least in part at preventing the witness from testifying and that those misdeeds were a significant cause of the witness’s decision not to testify.” *People v. Smart*, 23 N.Y.3d 213, 989 N.Y.S.2d 631 (2014). *See, e.g., In re Duane F.*, 309 A.D.3d 265, 274-78, 764

N.Y.S.2d 434, 440-43 (1st Dept. 2003); *In re Jonathan D.*, 22 Misc.3d 1126(A), 2009 WL 455355, 2009 N.Y. Slip Op. 50298(U) (N.Y. Family Court, Bronx Co. 2009) (Merchan, J.). *Cf. People v. Dubarry*, 25 N.Y.3d 161, 8 N.Y.S.3d 624 (2015) (prosecution failed to satisfy its burden at the *Sirois* hearing: even if the evidence adequately established that the defendant was the source of the threat, “the additional inference that the communication was necessarily intended and structured to procure the witness’s unavailability [was] based on nothing more than pure speculation”).

- (ii) The defendant has a right to be present at *Sirois* hearing, including during witness’s testimony about alleged threats or other forms of intimidation by defendant. *People v. McCune*, 98 A.D.3d 631, 949 N.Y.S.2d 747 (2d Dept. 2012). *See also People v. Williams*, 125 A.D.3d 697, 2 N.Y.S.3d 612 (2d Dept. 2015) (trial court violated defendant’s right to be present at material stages of a trial by excluding defendant from *Sirois* hearing and arranging for defendant instead to hear a live audio transmission from a holding cell: defendant is “entitled to confront the witness against him at that hearing and also to be present so that he [can] advise counsel of any errors or falsities in the witness’ testimony which could have an impact on guilt or innocence”).
- (c) “Opening the door”: In *People v. Reid*, 19 N.Y.3d 382, 948 N.Y.S.2d 223 (2012), the Court of Appeals held that the doctrine of “opening the door” applies to the *Crawford* doctrine and accordingly a “defendant can open the door to the admission of testimony that would otherwise be inadmissible under the Confrontation Clause of the United States Constitution.” The Court of Appeals explained that this result is necessary to “avoid unfairness and to preserve the truthseeking goals of our courts” because, “[i]f evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant’s actions at trial, then a defendant could attempt to delude a jury ‘by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context’” – “secure [in the] knowledge that the concealed parts would not be admissible, under the Confrontation Clause.” The determination whether a defendant “opened the door” “must be

decided on a case-by-case basis” by means of the following “twofold” inquiry: “whether and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression.” Applying this rule to the present case, the Court of Appeals concludes that the testimonial statement in question – a confession by a non-testifying co-perpetrator (who had initially been a co-defendant but whose trial was severed from the defendant’s under *Bruton v. United States* because of the confession) – was partially admissible because defense counsel “elicit[ed] from witnesses that the police had information that [another individual named] McFarland was involved in the shooting, ... suggesting that more than one source indicated that McFarland was at the scene, and ... persistently presenting the argument that the police investigation was incompetent,” and defense counsel thereby “opened the door to the admission of the testimonial evidence, from his nontestifying codefendant, that the police had information that McFarland was not at the shooting.” Under these circumstances, the Court of Appeals holds, the otherwise inadmissible statement “was reasonably necessary to correct defense counsel’s misleading questioning and argument” and to “prevent the jury from reaching the false conclusion that McFarland had been present at the murder.”