8.02 Admissibility Limited by Confrontation Clause (*Crawford*)[1]

(1) Confrontation rule in a criminal prosecution. A "testimonial statement" of a person who does not testify at trial is not admissible against a defendant for the truth of the statement, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination, or the defendant engaged or acquiesced in wrongdoing that was intended to and did procure the unavailability of the witness.

(2) Testimonial statement, in general.

A hearsay statement is testimonial when it consists of:

(a) prior testimony at a preliminary hearing, before a grand jury, or at a former trial;

(b) an out-of-court statement in which

(i) state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial; or

(ii) absent a formal interrogation, the circumstances demonstrate that the "primary purpose" of an exchange was to procure an out-of-court statement to prove criminal conduct or past events potentially relevant to a later criminal prosecution, or otherwise substitute for trial testimony.

(3) Statement to police.

A statement made to the police is not testimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. The

statement to the police is testimonial when the circumstances objectively indicate that there is no ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution. A statement obtained by the police in a formal station house interrogation for that stated purpose is thus testimonial.

(4) Statement to a court.

A defendant's guilty plea allocution that implicates a codefendant is a testimonial statement and may not therefore be admitted at the trial of the codefendant in the absence of an opportunity for the codefendant to cross-examine the defendant.

(5) Statement made for the safety or treatment of a person.

> **(a) A statement of a student made in response to an inquiry of an educator is not testimonial when the primary purpose of the inquiry was to provide for the safety of the child.**
>
> **(b) A statement of a patient made in response to an inquiry by a physician is not testimonial when the primary purpose of the inquiry was to diagnose the patient's condition and administer medical treatment.**

(6) Forensic Report.

> **(a) A forensic report is a testimonial statement when the primary purpose of the report is to provide evidence at trial that explicitly links the defendant to a crime. A testimonial forensic report includes one that identifies an item connected to the defendant as an illegal drug, or delineates the blood-alcohol content of a**

defendant's blood, or identifies the defendant through a fingerprint analysis or through a DNA analysis of incriminating evidence.

(b) A testimonial forensic report entitles a defendant to be confronted, as defined in subdivision one, with either the person who made the forensic report or with a person who is a trained analyst who supervised, witnessed or observed the testing, even without having personally conducted it.

(c) Nontestimonial reports include:

(i) an autopsy report prepared by a medical examiner and describing only the observations and measurements of the deceased that does not link the commission of a crime to a particular person;

(ii) documents pertaining to the routine inspection, maintenance, and calibration of a breathalyzer machine; and

(iii) a report setting forth raw data of a DNA profile generated from an item in the contents of a rape kit before the defendant was a suspect in the crime.

(7) "Opening the door evidence." Unconfronted testimonial hearsay is not admissible in response to evidence introduced by a defendant in a criminal case that is misleading even though the misleading evidence would be subject to correction by the unconfronted testimonial hearsay.

Note

Subdivision (1). The Confrontation Clause of the US Constitution Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy

the right . . . to be confronted with the witnesses against him." That Clause applies to the states through the Fourteenth Amendment of the US Constitution (*Pointer v Texas*, 380 US 400, 406 [1965]), and therefore limits the admissibility of "testimonial" hearsay statements that may otherwise be admissible under state law.

The parameters of "confrontation" are defined in subdivision (1) in accord with *Crawford v Washington* (541 US 36, 42 [2004]) and *Giles v California* (554 US 353, 367 [2008]).

In *Crawford*, the Supreme Court held that

> "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination" (*Crawford v Washington*, 541 US at 68).

*Crawfor*d, however, does not extend to a testimonial statement admitted "for purposes other than establishing the truth of the matter asserted" (*Crawford v Washington*, 541 US at 59 n 9; *Williams v Illinois*, 567 US 50, 57-58 [2012] [plurality op], and at 125-126 [dissenting op]; *People v Garcia*, 25 NY3d 77, 86 [2015]; *People v Reynoso*, 2 NY3d 820, 821 [2004]).

Nor does *Crawford* apply to the admission of testimonial statements at a sentencing proceeding (*People v Leon*, 10 NY3d 122, 125-126 [2008]), or in a grand jury proceeding.

Last, a defendant may forfeit the right of confrontation where the defendant engaged or acquiesced in wrongdoing that was intended to and did procure the witness's unavailability (*Giles*; *see also* Guide to NY Evid rule 8.19, Forfeiture by Wrongdoing, http://www.courts.state.ny.us/judges/evidence/8-HEARSAY/8.19_ FORFEITURE%20BY%20WRONGDOING.pdf; Fed Rules Evid rule 804 [b] [6]; *see also People v Geraci*, 85 NY2d 359, 366 [1995] ["out-of-court statements, including Grand Jury testimony, may be admitted as direct evidence where the witness is unavailable to testify at trial and the proof establishes that the witness's unavailability was procured by misconduct on the part of the defendant"]).

Subdivision (2) (a) is derived from *Crawford's* declaration that "[w]hatever else the term [testimonial evidence] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial" (*Crawford*, 541 US at 68).

Subdivision (2) (b) (i) is derived from *Crawford* (541 US at 68), which itself directly held inadmissible a witness's statement obtained by formal station house interrogation (541 US at 68); and *Michigan v Bryant* (562 US 344, 358

[2011]), which declared that "the most important instances in which the [Confrontation] Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." (*See People v Goldstein*, 6 NY3d 119, 129 [2005] ["(T)he statements made to (the expert) by her interviewees were testimonial. . . . (The interviewees) knew they were responding to questions from an agent of the State engaged in trial preparation. None of them was making 'a casual remark to an acquaintance'; all of them should reasonably have expected their statements 'to be used prosecutorially' or to 'be available for use at a later trial.'. . . Responses to questions asked in interviews that were part of the prosecution's trial preparation are 'formal' in much the same sense as 'depositions' and other materials that the Supreme Court identified as testimonial"].)

Subdivision (2) (b) (ii). The rule that, absent a formal investigation, a statement is testimonial when the "primary purpose" of questioning was to prove criminal conduct or past events relevant to a criminal prosecution is derived from *Davis v Washington* (547 US 813, 822 [2006] [statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"]; *see Michigan v Bryant*, 562 US 344, 358, 366, 370 [2011] ["although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent" (citation and internal quotation marks omitted)]; *People v John*, 27 NY3d 294, 307 [2016] [deeming the primary purpose test essential to determining whether particular evidence is testimonial hearsay requiring the declarant to be a live witness at trial]).

That a statement is testimonial when its primary purpose is to create a substitute for trial testimony is derived from *Bryant* (562 US at 358 ["When . . . the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute"]; *accord Ohio v Clark*, 576 US 237, 238 [2015]; *People v John*, 27 NY3d at 307 [a "statement will be treated as testimonial only if it was procured with a primary purpose of creating an out-of-court substitute for trial testimony (*People v Pealer*, 20 NY3d 447, 453 [2013], quoting *Michigan v Bryant*" (internal quotation marks omitted)]; *see People v Pacer*, 6 NY3d 504, 512 [2006]; *Pealer* at 453 [an affidavit of an employee of the Department of Motor Vehicles attesting to the revocation of an accused's license in a prosecution was testimonial because it "had an accusatory purpose in that it provided proof of an element of the crime and resembled testimonial hearsay"]).

Subdivision (3) is derived from *Davis v Washington* (547 US at 822) which decided two cases. In the first case, a 911 caller's statements relating to an ongoing assault, including the identification of her assailant, were not testimonial, given that the "primary purpose" of the statements was to obtain help (*People v Nieves-Andino*, 9 NY3d 12, 17 [2007]; *People v Bradley*, 8 NY3d 124, 127 [2006]). In the second case, the police, responding to a "domestic disturbance" call, found no ongoing emergency, and thus statements in response to their questions as to what happened were testimonial. (*See Michigan v Bryant*, 562 US at 349 [where the police found a mortally wounded person lying on the ground in a parking lot of a gas station, the victim's statement identifying his assailant, in response to police questions, was admissible because the " 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency' "].)

Subdivision (4) is derived from *People v Hardy* (4 NY3d 192 [2005]) and *People v Douglas* (4 NY3d 777 [2005]).

Subdivision (5) (a) is derived from *Ohio v Clark* (576 US at 249-250 ["(M)andatory reporting (obligations) . . . cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution. It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution"]).

Subdivision (5) (b) is derived from *People v Duhs* (16 NY3d 405, 408-409 [2011] [a child's responses to a medical doctor questioning the child for purposes of treatment was not testimonial]).

Subdivision (6) (a) is derived from *Melendez-Diaz v Massachusetts* (557 US 305 [2009] [drug analysis]); *Bullcoming v New Mexico* (564 US 647 [2011] [blood-alcohol content]); *People v Rawlins* (10 NY3d 136, 157 [2008] [fingerprint report]); *People v John* (27 NY3d at 307-308 [DNA report that linked the defendant to possession of the weapon he was charged with possessing]); and *People v Austin* (30 NY3d 98, 104 [2017] [buccal swab was obtained and the resulting profile was compared with the DNA profile generated from the burglaries "with the primary (truly, the sole) purpose of proving a particular fact in a criminal proceeding—that defendant . . . committed the crime for which he was charged"]).

Subdivision (6) (b) is derived from *Bullcoming* (564 US at 651 [holding that a surrogate analyst who was familiar with the laboratory's testing procedures, but "had neither participated in nor observed the test," did not satisfy the Confrontation Clause requirement]); and *People v Hao Lin* (28 NY3d 701, 705 [2017]) from which the language of subdivision (6) (b) is taken. In *Hao Lin*, a retired officer performed the "breath test" and the officer who testified observed him "perform all of the steps on the checklist and saw the breathalyzer machine print out the results. Based upon his personal observations, Mercado—as a trained and certified operator who was present for the entire testing protocol—was a

suitable witness to testify about the testing procedure and results in defendant's test. Inasmuch as Mercado testified as to his own observations, not as a surrogate for Harriman, there was no Confrontation Clause violation." (*Id*. at 707; *see People v John*, 27 NY3d at 314 ["(T)he claim of a need for a horde of analysts is overstated and a single analyst, particularly the one who performed, witnessed or supervised the generation of the critical numerical DNA profile, would satisfy the dictates of *Crawford* and *Bullcoming*"].)

Subdivision (6) (c) (i) is derived from *People v Freycinet* (11 NY3d 38, 42 [2008] [an autopsy report]). Caveat: Contrary to *Freycinet*, the United States Court of Appeals for the Second Circuit has held that an autopsy report was a testimonial document, regardless of whether it linked the defendant to a crime. (*Garlick v Lee*, 1 F4th 122 [2d Cir 2021], *cert denied* 595 US —, 142 S Ct 1189 [2022].)

Subdivision (6) (c) (ii) and (iii) are derived from *People v Pealer* (20 NY3d at 455-456 [with respect to a breathalyzer machine, the Court noted that "*Melendez-Diaz* recognized the possibility that records 'prepared in the regular course of equipment maintenance'—precursors to an actual breathalyzer test of a suspect—'may well qualify as nontestimonial records' (557 US at 311 n 1). It may reasonably be inferred that the primary motivation for examining the breathalyzer was to advise the . . . Police Department that its machine was adequately calibrated and operating properly"]); *People v Meekins* (10 NY3d 136, 159-160 [2008] [decided with *Rawlins*]); and *People v Brown* (13 NY3d 332, 340 [2009] [a DNA raw data profile before the defendant was a suspect]). In *People v John*, however, the Court cautioned that "our focus in both of those cases [*Meekins* and *Brown*] was that extrajudicial facts were shepherded into evidence by a testifying expert whose subsequent independent analysis of that raw data provided the assurance that the DNA profile generated was accurate. Our sharpest focus was on the final stage of the DNA typing results, to wit, the generated DNA profile" (27 NY3d at 310; *see People v Austin*, 30 NY3d at 104).

Subdivision (7) is derived from *Hemphill v New York* (595 US —, 142 S Ct 681 [2022]). Contrary to the principle set forth in *People v Reid* (19 NY3d 382 [2012]) that was applied in *People v Hemphill* (173 AD3d 471 [1st Dept 2019], *affd* 35 NY3d 1035 [2020]), the Supreme Court held that the "opening the door to evidence" principle must not permit the introduction of evidence in violation of the Sixth Amendment's Confrontation Clause. In *Hemphill*, the defense to a murder indictment rested upon a claimed third party's culpability; in accord with New York's then "opening the door to evidence" principle, the trial court allowed the introduction of the third party's guilty plea when the third party was unavailable to testify. The parties did not dispute that the third party's guilty plea was "testimonial" hearsay, and the Supreme Court then held its admission to be in violation of the Confrontation Clause. Thus, even if it may be argued that "unconfronted, testimonial hearsay" would respond to a party's misleading impression on an issue, it is not admissible: "[The Confrontation Clause] admits no exception for cases in which the trial judge believes unconfronted testimonial

hearsay might be reasonably necessary to correct a misleading impression. Courts may not overlook its command, no matter how noble the motive" (595 US at —, 142 S Ct at 693).

The Supreme Court, however, made a point of stating that "the Court does not decide today the validity of the common-law rule of completeness as applied to testimonial hearsay. Under that rule, a party against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder. The parties agree that the rule of completeness does not apply to the facts of this case, as Morris' plea allocution was not part of any statement that Hemphill introduced. Whether and under what circumstances that rule might allow the admission of testimonial hearsay against a criminal defendant presents different issues that are not before this Court" (595 US at —, 142 S Ct at 693 [internal quotation marks and citations omitted]; *see* Guide to NY Evid rule 4.03).

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[1] In June 2022, this rule was amended to add subdivision (7) with a corresponding Note to incorporate the rule of *Hemphill v New York* (595 US —, 142 S Ct 681 [2022]), and to modify subdivision (6) and the Note thereto to account for the decision of the United States Court of Appeals for the Second Circuit in *Garlick v Lee* (1 F4th 122 [2d Cir 2021], *cert denied* 595 US —, 142 S Ct 1189 [2022]), holding, contrary to the Court of Appeals, that an autopsy report was a testimonial document, regardless of whether it linked the defendant to a crime.