CRAWFORD AND BEYOND*

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CRAWFORD AND BEYOND

I. INTRODUCTION

The Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), dramatically changed the legal framework for analysis of out-of-court statements. If a statement is "testimonial," it cannot be admitted against a defendant at trial unless the government establishes both that the declarant is unavailable and the defendant had an adequate opportunity to cross-examine the declarant. If the statement is not testimonial, its admissibility is governed by the rules of evidence and the reliability requirements of due process.

In attempting to exclude the government's proffered statements, counsel must be sure to object on at least three separate grounds: 1) the evidence is testimonial and admission violates the Sixth Amendment right to confrontation, 2) the evidence is unreliable and therefore admission violates the Due Process Clause of the Fifth Amendment, and 3) the government has failed to establish that the evidence is admissible under the rules of evidence (hearsay, etc.). This paper addresses the Sixth Amendment implications of Crawford, as well as its applicability to rules of evidence governing prior statements.

II. THE RIGHT TO CONFRONTATION

A. The Sixth Amendment:

The Sixth Amendment Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

B. History: Ohio v. Roberts

In Ohio v. Roberts, 448 U.S. 56, 66 (1980), the Supreme Court held that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" The Court explained that reliability could be inferred if the evidence fell within a "firmly rooted hearsay

exception." In other cases, the evidence must be excluded, "at least absent a showing of particularized guarantees of trustworthiness." Id.

C. Crawford v. Washington

In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court opined that "where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in the development of hearsay law - as does [Ohio v. Roberts], and as would an approach that exempted such statements from the Confrontation Clause altogether." Id. at 68. Where **testimonial** evidence is at issue, however, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. Crawford thus overruled the amorphous Roberts reliability test with respect to testimonial evidence. 541 U.S. at 61; see also Whorton v. Bockting, 127 S.Ct. 1173, 1179, 1183 (2007) (holding that Crawford announced a new rule that would not be applied retroactively in habeas proceedings). Of course, the courts must determine what is testimonial, and, if evidence is testimonial, what constitutes unavailability and an opportunity for cross-examination.

Not all out-of-court statements "implicate 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." Crawford, 541 U.S. at 51. The Court emphasized that the Confrontation Clause guarantee is procedural not substantive. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by the crucible of corss-examination. The Clause reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." Id. at 61.

While courts continued to apply the Roberts framework to non-testimonial evidence after Crawford, see e.g. United States v. Holmes, 406 F.3d 337, 348 (5th Cir.), cert. denied, 546 U.S. 871 (2005); United States v. Saget, 377 F.3d 223, 227 (2d Cir. 2004), cert. denied, 543 U.S. 1079 (2005), the Supreme Court subsequently explained that the "Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability." Bockting, 127 S.Ct. at 1183. However, all is not lost. Non-testimonial evidence is governed by the rules of evidence, especially the rules governing hearsay. The Due Process Clause of the Fifth Amendment may also implicate concerns of reliability.

D. What is Testimonial?

There are some statements that are, without a doubt, "testimonial." At a minimum, the term applies to testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. Crawford, 541 U.S. at 68. A witness's own formal admission of guilt is also testimonial. 541 U.S. at 65; see United States v. McClain, 377 F.3d 219, 221-22 (2d Cir. 2004).

The term testimonial includes *ex parte* statements, that is, extrajudicial statements "formalized in testimonial materials, such as affidavits, depositions, prior testimony or confessions." Crawford, 541 U.S. at 51 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J. concurring)); see also Lilly v. Virginia, 527 U.S. 116, 137 (1999) (plurality opinion) ("when the government is involved in the statements' production and when the statements describe past events, the statements implicate the core concerns of the old ex parte affidavit practice."); Bruton v. United States, 391 U.S. 123, 138 (1968) (Stewart, J. concurring) ("an out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused."). As the Court emphasized, 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." Crawford, 541 U.S. at 51. The Court further warned that "involvement of government officers in the production of testimony with an eye toward trial presents a unique potential for prosecutorial abuse." Id. at 56 n.7. See also United States v. Summers, 414 F.3d 1287, 1298-99 (10th Cir. 2005) (accomplice statement); United States v. Pugh, 405 F.3d 390, 399 (6th Cir. 2005) (incarcerated witness identification); United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005) (child's statement to forensic investigator); Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005) (child statement to investigator), cert. denied, 126 S.Ct. 2017 (2006); United States v. Rodriguez-Marrero, 390 F.3d 1, 16 (1st Cir. 2004) (accomplice confession), cert. denied, 544 U.S. 912 (2005).

On the other hand, the Court identified certain types of hearsay exceptions that "by their nature were not testimonial," for example, business records and statements in furtherance of a conspiracy. 541 U.S. at 56; see also United States v. Inadi, 475 U.S. 387 (1988) (admission of coconspirator statement does not violate confrontation clause). These exceptions themselves serve to distinguish testimonial from non-testimonial evidence. See e.g. United States v. Bridgeforth, 441 F.3d 864, 869 (9th Cir. 2006) (Fed. R. Evid. 801(d)(2)(E) is "identical" to confrontation clause).

In Davis v. Washington, 126 S.Ct. 2266 (2006), the Supreme Court addressed the admissibility of excited utterances made to law enforcement officers in two domestic

violence cases. Elaborating on Crawford, the Court emphasized that only statements that are testimonial cause the declarant to be a "witness" within the meaning of the Confrontation Clause. Davis, 126 S.Ct. at 2273. While testimony is typically a "solemn declaration," id. at 2274 (citation omitted), formality is not necessarily required. Id. at 2274-76. Nor must there necessarily be an interrogation or questioning by a law enforcement officer. Id. at 2274-75 n.1 & n.2. The inquiry is whether the interrogation is directed to establishing "facts of a past crime," whether they pertain to the identity of the perpetrator or are designed to provide evidence. Id. at 2276. The Court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. Applying this test, the Court determined that Davis's 911 statements describing an ongoing emergency were not testimonial, while Hammond's statements to police investigating what had happened were.

The Sixth Amendment, like the hearsay rules, comes into play only if a statement is being offered as an assertion. United States v. Gonzalez, 436 F.3d 560, 576 (5th Cir. 2006) (victim's statement offered to prove notice); United States v. Holmes, 406 F.3d 337, 348-50 (5th Cir.) (deposition not offered for truth), cert. denied, 546 U.S. 871 (2005); see generally Fed. R. Evid. 801(c) (definition of hearsay). Further, many of the hearsay exceptions do not allow the admission of statements made in anticipation of litigation. See e.g. Fed. R. Evid. 803(6) (business records); United States v. Williams, 661 F.2d 528, 530 (5th Cir. 1981). A police report cannot be admitted as a government record against a defendant in a criminal case. Fed. R. Evid. 803(8); United States v. Cain, 615 F.2d 380 (5th Cir. 1980); but see United States v. Lopez-Moreno, 420 F.3d 420, 436-37 (5th Cir. 2005) (ICE record not prepared for prosecution was admissible), cert. denied, 126 S.Ct. 1449 (2006). Similarly, under the coconspirator exception, the government must establish that the statement was made during and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E); Bourjaily v. United States, 483 U.S. 171 (1987). Such statements are by definition not made to assist law enforcement.

E. Unavailability

Crawford does not change the law on unavailability, but makes it much more important. The burden of proving unavailability is on the government. Out-of-court testimony is permissible "only if the witness is demonstrably unavailable to testify in person." 541 U.S. at 59.

Federal Rule of Evidenc 804(a) defines "unavailability" to include:

1. A witness exempted by privilege, United States v. Salerno, 505 U.S. 317, 321 (1992); see also Lilly v. Virginia, 527 U.S. 116 (1999)(Fifth Amendment privilege);

2. A witness who persists in refusing to testify after court order;

3. A witness unable to remember;

4. A witness with a physical or mental incapacity, see e.g. State v. C.J., 148 W.2d 672, 685 (2003) (incompetence establishes unavailability); but compare Idaho v. Wright, 497 U.S. 805, 816 (1990) ("assuming without deciding" that incompetence satisfies unavailability); and

5. A witness who is absent and the proponent is unable to produce him by process or other reasonable means. The government must, however, demonstrate that it has made a reasonable effort to produce the witness. See e.g. Motes v. United States, 178 U.S. 458, 470-71 (1900) (government negligence allowing witness to abscond); United States v. Yida, 498 F.3d 945 (9th Cir. 2007)(affirming exclusion of alien's former testimony because government's deportation of witness was not reasonable); United States v. Aguilar-Tamayo, 300 F.3d 562, 566 (5th Cir. 2002) (government must show took steps to obtain foreign witness).

A witness is not considered to be unavailable if his or her failure to appear is due to the procurement or wrongdoing of the proponent to prevent the witness's attendance and testimony. Fed. R. Evid. 804(a)(1). See Crawford, 541 U.S. at 63 (citing Reynolds v.

United States, 98 U.S. 145 (1879)); see e.g. United States v. Johnson, 495 F.3d 951, 970 (8th Cir. 2007) (murdered witness); United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006) (same), cert. denied, 127 S.Ct. 1351 (2007); United States v. Dhinsa, 243 F.3d 635, 651 (2d Cir. 2001).

F. Adequacy of Prior Confrontation

Similarly, the importance of an adequate opportunity for cross-examination has become much more important for testimonial evidence. The Court has previously held that the Confrontation Clause is satisfied if the defendant was represented by counsel, who had an adequate opportunity to cross-examine the witness and had the same or similar motive for doing so. Compare Mancusi v. Stubbs, 408 U.S. 204, 213-16 (1972) (adequate cross examination at prior trial on same charge); California v. Green, 399 U.S. 149, 165-68 (1970) (adequate cross-examination at preliminary hearing), with Pointer v. Texas, 380 U.S. 400, 406-08 (1965) (inadequate opportunity where defendant not represented by counsel at preliminary hearing). Before proceeding in these preliminary matters, defense counsel should carefully outline the limitations on cross-examination, such as a limited time to prepare, absence of pretrial discovery, and limitations on the inquiry in the proceeding.

When a declarant does appear at trial, the Confrontation Clause does not generally bar the admission of prior statements as long as the witness is present to explain or defend them, 541 U.S. at 59 n.9, even if the witness's memory is impaired. United States v. Owens, 484 U.S. 554 (1988). If the witness takes the stand but cannot remember the substance of her prior statements, she can be impeached with her prior statements without offending confrontation rights because she is there, hence subject to cross-examination. People v. Phan, 2004 WL 1175334 (Cal.App. 2004); State v. Gorman, 854 A.2d 1164 (Me. 2004) (witness's selective memory psychiatric problems, and history of delusions did not negate fact she testified at trial and was subject to cross).

III. HEARSAY

A. "Firmly Rooted" Hearsay Exceptions

Roberts permitted introduction of out of court statements only if they bore adequate "indicia of reliability." 448 U.S. at 66. Reliability was inferred if the evidence fell within a "firmly rooted hearsay exception." An understanding of the hearsay rules

is critical in a post-Crawford world where admissibility of non-testimonial evidence is no longer governed by the Sixth Amendment.

B. What is Hearsay?

Hearsay is a statement, other than one made by the declarant testifying at trial, offered to "prove the truth of the matter asserted." Fed. R. Evid. 801(c). A **statement** includes: (1) oral or written assertions, or (2) nonverbal conduct intended by the person to be an assertion. Fed. R. Evid. 801(a).

C. Statements that Are Not Offered to Prove the Truth

Statements that are operative facts or reflecting state of mind of another (like issuing commands, etc.) are not "testimonial" because they are not being admitted for the truth of matter asserted. See e.g. United States v. Madera, 489 F.3d 115 (2d Cir.) (John Gotti's prison statements not offered for truth but for effect on another), cert. denied 2007 WL 2606112 (U.S. Oct. 9, 2007); United States v. Gonzalez, 436 F.3d 560, 576 (5th Cir.) (victim's statement offered to prove notice), cert. denied, 126 S.Ct.2045 (2006); United States v. Price, 418 F.3d 771 (7th Cir. 2005) (police intelligence alert found at conspirator's home to prove counter-surveillance); United States v. Holmes, 406 F.3d 337, 348-50 (5th Cir.) (deposition not offered for truth), cert. denied, 546 U.S. 871 (2005); United States v. Mayhew, 380 F. Supp.2d 961 (S.D. Ohio, 2005) (kidnap victim's letters).

Remember, a statement not offered for the truth must still be relevant. Beware the agent's summary of inadmissible evidence in the guise of establishing the reason for the agent's action. For example, in a blatant effort to establish guilt without confrontation, law enforcement officers in United States v. Silva, 380 F.3d 1018 (7th Cir. 2004), summarized conversations between the informant and his supplier identifying the defendant as the person who would make the delivery. Another officer informed the jury of a positive drug test that he had not personally observed. The prosecutor contended that the statements were admissible to explain the agents' actions. The Seventh Circuit was not fooled:

> Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under

> the sixth amendment and the hearsay rule. . . .Under the prosecution's theory, every time a person says to the police "X committed the crime," the statement (including all corroborating details) would be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one's accusers.

380 F.3d at 1020 (citing Crawford). See also United States v. Fasanelli, 2006 WL 786708 (11th Cir. March 28, 2006) (not offered to explain officer actions where inquiry eliciting hearsay was prosecutor's last question); United States v. Kang, 934 F.2d 621 (5th Cir. 1991) (agent's intent not relevant); United States v. Hernandez, 750 F.2d 1256 (5th Cir. 1985) (same); but see United States v. James, 487 F.3d 518 (7th Cir. 2007) (informant statement offered to rebut claim defendant was set up).

D. Prior Witness Statement

Federal Rule of Evidence 801(d)(1) provides that the prior statement of a witness is not hearsay if she testifies at the proceeding and is subject to cross-examination concerning the statement; and

> -the statement is inconsistent and given under oath subject to penalty of perjury at trial, deposition or other proceeding; or
>
> -consistent and offered to rebut an express or implied charge of recent fabrication or improper influence or motion, if made before the improper influence or motive to fabricate arose, Tome v. United States, 513 U.S. 150 (1995); or
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> - identification of a person after perceiving that person.

Note that in each of these instances, the declarant is available for cross examination concerning the statement.

E. Co-Conspirator Statements

Coconspirator statements are not hearsay. Fed. R. Evid. 801(d)(2)(E). The government must prove that the declarant and defendant are members of the conspiracy

and that the statement was made during and in furtherance of the conspiracy ; Bourjaily v. United States, 483 U.S. 171 (1987). Statements that are "idle chatter" do not further the conspiracy. United States v. Cornett, 195 F.3d 776 (5th Cir. 1999); United States v. McConnell, 988 F.2d 530, 533 (5th Cir. 1993); United States v. Nazemian, 948 F.2d 522, 529-30 (9th Cir. 1991) (statement was purely historical). In determining the admissibility of a coconspirator statement, the court can consider the statement, but the statement itself is "not alone sufficient to establish the existence of the conspiracy and the participation of the declarant and the party against whom the statement is offered." Fed. R. Evid. 801(d)(2); see also Advisory Committee Notes to 1997 Amendment; Bourjaily, 482 U.S. at 184-85 (Stevens, J. concurring); United States v. Lindeman, 85 F.3d 1232, 1238-39 & n.4 (7th Cir. 1996) (citing cases). An informant's statements are not admissible under Rule 801(d)(2)(E) because he cannot be conspirator, although limited use of his statements may be used to provide context. United States v. Rogers, 118 F.3d 466, 477 (6th Cir. 1997) (citing United States v. Howard, 770 F.2d 57, 61 & n.4 (6th Cir. 1985) (en banc)); see also United States v. Darden, 70 F.3d 1507, 1530 (8th Cir. 1995); United States v. Felton, 908 F.2d 186, 188 n.3 (7th Cir. 1990).

Coconspirator statements are not testimonial. United States v. Bridgeforth, 441 F.3d 864, 869 & n1. (9th Cir. 2006); United States v. Allen, 425 F.3d 1231, 1235 (9th Cir. 2005), cert. denied, 547 U.S. 1012 (2006); United States v. Reyes, 362 F.3d 536, 540-41 (8th Cir.), cert. denied, 542 U.S. 945 (2004); United States v. Lee, 374 F.3d 637 (8th Cir. 2004); United States v. Saget, 377 F.3d 223 (2d Cir. 2004), cert. denied, 543 U.S. 1078 (2005); see also Crawford, 541 U.S. at 56.

IV. HEARSAY EXCEPTIONS

A. Present Sense Impression or Spontaneous Declaration.

A "present sense impression" is a statement describing or explaining an event or condition made while perceiving the event or immediately thereafter. Fed. R. Evid. 803(1). See United States v. Cain, 587 F.2d 678, 681 (5th Cir. 1979) (statement made too long after event); see also United States v. Cruz, 765 F.2d 1020 (11th Cir. 1985). There is also an exception for a statement describing the declarant's state of mind, emotion, sensation, or physical condition. Fed. R. Evid. 803(3); see e.g. Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892). The statement must be relevant and the exception does not include a statement of memory or belief. Prather v. Prather, 650 F.2d 88 (5th Cir. 1981); see also United States v. Puglisi, 790 F.2d 240 (2d Cir. 1986).

A witness's statement reflecting his mental state, particularly to private individuals, is not "testimonial," so it is not subject to the requirements of confrontation. Horton v. Allen, 370 F.3d 75, 83-85 (1st Cir. 2004) (codefendant's earlier statement that he needed money and victim would not extend credit for drugs), cert. denied, 543 U.S. 1093 (2005); see also United States v. Danford, 435 F.3d 682, 687-88 (7th Cir. 2005) (witness heard store manager say defendant asked how to disarm alarm); United States v. Baker, 432 F.3d 1189, 1214 (11th Cir. 2005) (parents of murder victim could testify about her pre-crime expressions of fear), cert. denied, 547 U.S. 1085 (2006); Evans v. Leubbers, 371 F.3d 438, 444-45 (8th Cir. 2004) (murder victim's statement that she feared husband would kill her offered to rebut defense theory of suicide), cert. denied, 543 U.S. 1067 (2005) .

B. Excited Utterances

An "excited utterance" is a statement relating to a "startling" event or condition while the declarant was under the stress of excitement caused by the event or condition. Fed. R. Evid. 803(2). As discussed supra, the testimonial character of this evidence is dependent on whether the declarant is seeking assistance for an ongoing emergency or whether she is recounting historical facts. Davis, 126 S.Ct. at 2273-76. Courts have readily admitted 911 calls post-Davis. See e.g. United States v. Cadieux, 2007 WL 2369697 (1st Cir. Aug. 21, 2007); United States v. Thomas, 453 F.3d 838 (7th Cir. 2006); United States v. Clemmons, 461 F.3d 1057 (8th Cir. 2006) (shooting victim's statement).
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C. Statements for Medical Diagnosis/Treatment

A statement made for purposes of medical diagnosis or treatment, describing medical history, symptoms, pain or inception or general character of the cause, is admissible, Fed. R. Evid. 803(4), White v. Illinois, 502 U.S. 346 (1992) (sexual assault victim's statement to doctor), *if* the statement was "reasonably pertinent to diagnosis or treatment." Rock v. Huffco Cas & Oil Co., Inc. 922 F.2d 272 (5th Cir. 1991). Routine medical examinations may be admissible even if a criminal investigation is imminent or pending. United States v. Ellis, 460 F.3d 920, 923 (7th Cir. 2006)(blood test showing defendant's methamphetamine use).

The Eighth Circuit has held that a patient's statement about the identity of her attacker is normally not pertinent to treatment, unless the perpetrator is a family member whose identity is relevant to her continued well being. United States v. Peneaux, 432 F.3d 882, 893 (8th Cir. 2005). The court added in Peneaux that the government must

establish that a very young patient understood the importance of telling the medical provider the truth. Id. Statements *truly* made for medical diagnosis and treatment are not "testimonial." Evans v. Leubbers, 371 F.3d 438, 444 (8th Cir. 2004), cert. denied, 543 U.S. 1067 (2005).

One thoughtful jurist recognized that rape trauma and child molestation exams are orchestrated by the police to get admissible evidence that otherwise would be hearsay. The court acknowledged that the inquiries that police ask medical staff to make were essentially making the doctors police agents. Declaring that a rape victim's hospital rape exam records had the "dual purpose of investigation and treatment," a New York court found that as long as there was a legitimate non-testimonial basis for gathering the information (here, medical treatment), then it would be treated as non-testimonial. Nonetheless, DNA testing of the victim and defendant *was* purely for purposes of prosecution, so it was testimonial and could not be admitted under the hearsay exception. People v. Rogers, 8 A.D.3d 888, 891-92, 780 N.Y.S.2d 393, 396 (2004).

D. "Business Records" Exception

A record of "regularly conducted activity" is admissible, pursuant to Fed. R. Evid. 803(6), of (1) acts, events, conditions, opinions or diagnoses, (2) made at or near the time, United States v. Williams, 661 F.2d 528 (5th Cir. 1981) (3 years too long); (3) by or from information transmitted by a person with knowledge, United States v. Davis, 571 F.2d 1354, 1360 (5th Cir. 1978) (response to ATF questionaire not admissible; (4) if kept in the course of regularly conducted business activity, and (5) it was the regular practice of that business activity to make the record, United States v. Robinson, 700 F.2d 205, 210 (5th Cir. 1983) (excluded); Williams, supra; (6) unless the source of information or the method or circumstance of preparation "indicate a lack of trustworthiness." United States v. Wells, 262 F.3d 455, 459 (5th Cir. 2001)(destroyed drug ledgers insufficiently reliable). The document cannot have been prepared primarily for litigation, Broadcast Music, Inc. v. Xanthas, 855 F.2d 233, 238 (5th Cir. 1988); Williams, 661 F.2d at 530; Pan-Islamic Trade Corp. V. Exxon Corp., 632 F.2d 539 (5th Cir. 1980).

Statements in business records are non-testimonial. United States v. Munoz-Franco, 487 F.3d 25 (1st Cir. 2007) (Bank board minutes); United States v. Gilbertson, 435 F.3d 790, 796 (7th Cir. 2006) (odometer records); United States v. Jamieson, 427 F.3d 394, 411 (6th Cir. 2005) (summary based on business records), cert. denied, 126 S.Ct. 2909 (2006); Johnson v. Renico, 314 F.Supp.2d 700, 705-08 (E.D.Mich. 2004) (regarding statements by defendants in booking records). Because business records are not-testimonial, an affidavit of authenticity is likewise not subject to Sixth Amendment

protections. United States v. Morgan, 2007 WL 3015225 (5th Cir. Oct. 17, 2007). Federal courts have treated autopsy reports as a business record. United States v. Feliz, 467 F.3d 227 (2d Cir. 2006), cert. denied, 127 S.Ct. 1323 (2007); but see Smith v. State, 898 So.2d 907 (Ala.Crim.App. 2004) (not a business record).

E. Public Records

Records, statements and data of public offices and agencies setting forth (A) the activities of the agency, or (B) matters observed pursuant to a duty imposed by law are admissible, **except** "in criminal cases matters [events] observed by police officers and other law enforcement personnel." Fed. R. Evid. 803(8). See e.g. United States v. Cain, 615 F.2d 380 (5th Cir. 1980) (business record exception cannot be used to circumvent the prohibition on introducing police reports against a defendant in a criminal case). The law enforcement prohibition does not apply, however, if the document records "routine, objective observations, made as part of the everyday function of the preparing official or agency." United States v. Lopez-Moreno, 420 F.3d 420, 437 (5th Cir. 2005) (holding that computer printouts of deportations were admissible) (quoting United States v. Quezada, 754 F.2d 1190, 1193 (5th Cir. 1985)), cert. denied, 126 S.Ct. 1449 (2006); see also United States v. Cantellano, 430 F.3d 1142, 1145 (11th Cir. 2005) (warrant of deportation), cert. denied, 126 S.Ct. 1604 (2006). A certificate of the nonexistence of a routine government record is likewise admissible. United States v. Cervantes-Flores, 421 F.3d 825, 831-34 (9th Cir. 2005), cert. denied, 547 U.S. 1114 (2006); see also United States v. Rueda-Rivera, 396 F.3d 678 (5th Cir. 2005); but see United States v. Earle, 488 F.3d 537 (1st Cir. 2007) (questioning admissibility but holding any error harmless), cert. denied, 2007 WL 2605813 (U.S. Oct. 9, 2007). Statements are not necessarily admissible merely because they are contained in a government file. See Lopez-Moreno, 420 F.3d at 435-36 & n.7 (emphasizing that government did not introduce alien witness affidavits and defendant did not object to agent's recitation of oral statements made by the aliens at the time of arrest about their nationality); see also United States v. Taylor, 462 F.3d 1023 (8th Cir. 2006)(report contained double hearsay, not findings or observations of officer). Nor are they admissible if they lack indicia of reliability. United States v. De La Cruz, 469 F.3d 1064 (7th Cir. 2006)(excluding defense evidence).

F. Prior testimony

The federal rules permit introduction of prior testimony of an unavailable witness if the testimony was 1) given at a hearing or deposition, 2) if the party against whom it

was offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1). This rule would appear to satisfy the Sixth Amendment as it requires a showing of both unavailability and adequate opportunity for cross-examination. See United States v. Avants, 367 F.3d 433, 445 (5th Cir. 2004).

G. Dying Declarations

In federal court, the dying declaration exception in criminal cases is limited to homicide prosecutions. The declaration must have been made while the declarant believed that death was imminent, concerning the cause or circumstances of death. Fed. R. Evid. 804(b)(2). See United States v. Shields, 497 F.3d 789 (8th Cir. 2007)(insufficient evidence that complainant who shook head about identity of assailant knew death was imminent). While recognizing that dying declarations, unlike other traditional hearsay exceptions, may be testimonial, the Supreme Court viewed them as *sui generis*. Crawford, 541 U.S. at 55 n.6. The Court left for another day the question whether the Sixth Amendment incorporates an exception for such declarations. Id.

H. Statements against Penal Interest

A statement against penal interest is a statement that is so contrary to the pecuniary or proprietary interest or so far tended to subject the declarant to civil or criminal liability, that a reasonable person would not have made the statement unless he believed it to be true. Fed. R. Evid. 804(b)(3). The Seventh Circuit recently held that the statement must be tantamount to a confession. United States v. Leahy, 464 F.3d 773, 797 (7th Cir. 2006), cert. denied, 2007 WL 1090402 (U.S. Oct. 1, 2007).

Statements against interest made to police are covered by the Sixth Amendment. Lilly v. Virginia, 527 U.S. 116 (1999); see also United States v. Jones, 371 F.3d 363, 368-69 (7th Cir. 2004). Admissions to police executing a search warrant that implicated both the speaking property owner and the guest (later the accused) have been deemed "testimonial" and barred by Crawford. United States v. Nielsen, 371 F.3d 574, 581-82 (9th Cir. 2004). A confession made to a family member or friend, not police, however, was not considered "testimonial" so it did not require confrontation nor fall under Crawford. United States v. Franklin, 415 F.3d 537 (6th Cir. 2005); State v. Rivera, 268 Conn. 351, 844 A.2d 191, 201-02 (2004); People v. Cervantes, 12 Cal.Rptr.3d 774, 779-83 (Cal.App. 2004).

I. Third Party Guilty Pleas

A third party's guilty plea is not "testimonial" when offered for the limited purpose of showing his bias. People v. White, 2004 WL 723258 (Cal.App. April 5, 2004) (unpublished). However, it is "testimonial" when admitted as evidence against the defendant. United States v. McClain, 377 F.3d 219 (2nd Cir. 2004); United States v. Massino, 319 F.Supp.2d 295, 296-301 (E.D.N.Y. 2004).

J. Residual Exception, Fed. R. Evid. 807

In Dorchy v. Jones, 398 F.3d 783 (6th Cir. 2005), a habeas petitioner claimed that admission of the testimony of a witness from a related trial, under the residual hearsay exception, Fed. R. Evid. 807, violated the Sixth Amendment principles annunciated in Crawford. The Sixth Circuit declined to apply Crawford retroactively, 398 F.3d at 788, but held that the government had failed to establish that the testimony was sufficiently reliable under Roberts. Id. at 788-91. The Michigan courts had found particular guarantees of trustworthiness based on four facts: 1) the witness was cross-examined by the confederate's attorney at his trial, 2) the witness's statements were consistent, 3) the witness was an eyewitness, whose testimony was corroborated by others, and 4) the statement was made under oath. The Sixth Circuit made short shrift of the last three factors, noting that corroboration is "irrelevant to a finding of trustworthiness," 398 F.3d at 788 (quoting Idaho v. Wright, 497 U.S. 805, 820 (1990)), and that an oath is insufficient. 398 F.3d at 791. The most important factor was the confederate's opportunity for cross-examination. The court recognized, however, that the confederate did not have a similar motive during his cross-examination, and, in fact, had made an effort to shift blame to Dorchy. Id. at 788-91. Indeed, the court emphasized that statements made by coconspirators, never cross-examined by a defendant's own attorney, "have uniformly been held by the Supreme Court to be insufficiently trustworthy for admission under the Confrontation Clause." Id. at 789 (citing Crawford). But see United States v. Morgan, 385 F.3d 196, 208 (2d Cir. 2004) (codefendant letter to boyfriend).

V. OTHER RULES OF EVIDENCE PERTAINING TO STATEMENTS

A. Prior Inconsistent Statements.

A witness can be impeached at trial with a prior inconsistent statement. Fed. R. Evid. 613. The statement must actually be inconsistent. United States v. Avants, 367 F.3d 433, 447-48 (5th Cir. 2004). In the Sixth Amendment context, it is important to keep in mind that such statements are admitted solely for impeachment, not for the truth. A defendant is entitled to a limiting instruction to this effect. United States v. Sisto, 534 F.2d 616, 623 (5th Cir. 1976); see also United States v. Livingston, 816 F.2d 184, 192 (5th Cir. 1987) (limiting instruction at close of case sufficient where government never contended prior statement was true). The government should not be permitted to call a witness solely to impeach him. United States v. Johnson, 802 F.2d 1459 (D.C. Cir. 1986). There is a particular danger that in such circumstances the jury will ignore the instruction limiting consideration of the statement to impeachment. United States v. Ince, 21 F.3d 576, 578-79 (4th Cir. 1994).

B. Basis of Expert Opinion

An expert may base her opinion on inadmissible evidence reasonably relied upon by experts in the field. Such evidence shall not be disclosed to the jury, however, unless the court determines that the probative value substantially outweighs the prejudicial effect. Fed. R. Evid. 703. Under the Sixth Amendment, such evidence should not be disclosed if it is being submitted for the truth. Compare United States v. Avants, 367 F.3d 433, 447 (5th Cir. 2005) (witness could opine that firearm could have caused wound based on experience and conversations with others); United States v. Zavala, 2005 WL 1705824 (3d Cir. July 22, 2005) (unpublished) (agent could give opinion based on what he had learned over the years); United States v. Stone, 222 F.R.D. 334, 338 (E.D. Tenn. 2004) (IRS agent could give opinion based on information from others because information not submitted as truth), aff'd, 432 F.3d 651, 653 (6th Cir. 2006) (only issue presented on appeal was opinion based on testimony and documents admitted at trial), with United States v. Buonsignore, 2005 WL 1130367 (11th Cir.) (unpublished) (agent could not give value of drugs based on other agent's work), cert. denied, 126 S.Ct. 270 (2005).

C. Sentencing

After Crawford and United States v. Booker, 543 U.S. 220 (2005), courts have continued to decline to apply the confrontation clause to sentencing. See e.g. United States v. Beydoun, 469 F.3d 102, 108 (5th Cir. 2006); United States v. Bustamante, 454 F.3d 1200 (10th Cir. 2006). The Fifth Circuit has even held that the Sixth Amendment

right to confrontation does not apply to a capital sentencing. United States v. Fields, 483 F.3d 313 (5th Cir. 2007); but see United States v. Mills, 446 F.Supp.2d 1115 (C.D.C. Cal. 2006).

VI. CONCLUSION

Crawford makes clear that out-of-court statements that are testimonial are admissible against a criminal defendant only if the declarant is unavailable and the defendant had an adequate opportunity to cross-examine her. Courts must now struggle with determining what statements are testimonial, often looking to the circumstances and motive for the statement. Due process requires that even non-testimonial statements be reliable before they are admitted in a criminal trial. Normally, this requirement can be satisfied by establishing that the statement fits within a "firmly rooted hearsay exception," or that there are other adequate "indicia of reliability." In any of these contexts, however, the defense must diligently insure that the government actually establishes the requisite foundation for admissibility.