

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

**Randy Hertz
N.Y.U. School of Law
245 Sullivan Street
New York, N.Y. 10012-1301
(212) 998-6434
randy.hertz@nyu.edu**

April 23, 2010

- 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*, and *Melendez-Diaz v. Massachusetts*), 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*, 128 S. Ct. 2678, 2683, 2684 (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: “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009) (quoting *Crawford*, 541 U.S. at 52).
- 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 Proposed 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 proceedings and preserve the ability to argue to the Appellate Division or

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).

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.

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) (Court of Appeals, in holding that prosecution expert's testimony about hearsay statements underlying her diagnosis violated Confrontation Clause, rejects prosecution's argument that statements "were not offered to establish their truth" but merely to "help the jury in evaluating [the psychiatrist's] opinion"; Court of Appeals explains 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).

- (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.” An assertion of this sort should be questioned on the basis of *People v. Resek*, 3 N.Y.3d 385, 787 N.Y.S.2d 683 (2004), which (in the context of “other crimes” evidence) reined in the pre-existing practice of liberally allowing the introduction of otherwise inadmissible evidence on the ground that it is needed to “complete the narrative” and which recognized that this practice is a “delicate business” and that “there is the danger” that such evidence “may improperly divert the jury from the case at hand or introduce more prejudice than evidentiary value.” *See id.* at 389, 787 N.Y.S.2d at 684-85.

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) Note: Although a hearsay objection apparently will still lie even 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 id.*
 - (ii) 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”). *Cf. People v. Ahib Paul*, 25 A.D.3d 165, 803 N.Y.S.2d 66, 70 (1st Dept. 2005) (“we leave to another day the question of whether testimonial dying declarations are subject to an absolute exception to the application of the Confrontation Clause, a possibility suggested in *Crawford*”). *But 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.”).

- (c) The middle category: Types of statements that may or may not be “testimonial” depending upon the circumstances:
 - (i) 911 calls and in-person statements by a witness at the scene of a crime:
 - (A) The assessment of whether a “statement[] made to law enforcement personnel during a 911 call or at a crime scene [is] ‘testimonial’ and thus subject to the requirements of the Sixth Amendment’s Confrontation Clause” is governed by the following standard announced by the U.S. Supreme Court in *Davis v. Washington*, 547 U.S. 813, 822 (2006): “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.”
 - (B) Applying this standard in *Davis*, 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.” *Id.* at 827-28.

- (C) Applying the general standard in the 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.
- (D) In *People v. Bradley*, 8 N.Y.3d 124, 830 N.Y.S.2d 1 (2006), the New York Court of Appeals applied the foregoing standard to a case with “facts ... between those in *Davis* and *Hammon*” and concluded that a non-testifying complainant’s on-the-scene “excited utterance” to a police officer was nontestimonial and could be admitted through the officer’s testimony because the statement was ““made in the course of police interrogation under circumstances objectively indicating that the primary purpose of

the interrogation [was] to enable police assistance to meet an ongoing emergency”: The police officer, who went to the complainant’s apartment in response to a 911 call, “was met there by [the complainant],” who was visibly shaken, had blood on her face and clothing, was bleeding profusely from one hand, and walked with a noticeable limp,” and the officer ““asked her what happened,”” which prompted the “excited utterance,” introduced into evidence at trial, that the complainant’s ““boyfriend threw her through a glass door.””; in finding this statement to be nontestimonial, the Court of Appeals emphasizes that the officer “was met by an emotionally upset woman smeared with blood” and thus his “first concern could only be for her safety”; that the “officer’s evident reason for asking the question was to deal with an emergency” and “to find out what had caused the injuries so that he could decide what, if any, action was necessary to prevent further harm”; that the question he asked “was a normal and appropriate way to begin that task”; and that “[a]ny responsible officer in ... [such a] situation would seek to assure [the complainant’s] safety first, and investigate the crime second.” See also *People v. Nieves-Andino*, 9 N.Y.3d 12, 840 N.Y.S.2d 882 (2007) (applying *People v. Bradley* to reject a Confrontation Clause challenge to the admission of a victim’s statement to police officers as they arrived on the scene and found the victim “bleeding and grimacing with pain” from gunshots: even though the assailant had apparently fled, “[g]iven the speed and sequence of events, the officer could not have been certain that the assailant posed no further danger to [victim] or to the onlookers and ... [the police officer’s] brief solicitation of pedigree information and information about the attacker’s identity was part of [the officer’s] reasonable efforts to assess what had happened to cause [the victim’s] injuries and whether there was any continuing danger to the others in the vicinity”; “In other words, the primary purpose of his inquiry was to find out the nature of the attack, ‘so that [the officer] could decide what, if

any, action was necessary to prevent further harm” in what the “officer ... reasonably assumed ... was an ongoing emergency” and “[i]t follows that [the victim’s] responses to [the officer’s] inquiries were nontestimonial ... and that their admission did not implicate defendant’s right to confrontation”).

- (E) Even when a 911 call or in-person conversation with the police “begins as an interrogation to determine the need for emergency assistance” and is therefore initially nontestimonial under *Crawford*, the exchange with the police can “‘evolve into testimonial statements,’ ... once that purpose [of dealing with the emergency] has been achieved.” *Davis v. Washington*, 547 U.S. at 828. In *Davis*, the Court observed that “[i]t could readily be maintained that” portions of the 911 call that followed the portion at issue in the case were “testimonial” under *Crawford* because they followed the point at which “the emergency appears to have ended” and involved “a battery of questions” by the 911 operator. *Id.* at 828-29. If the prosecution seeks to introduce a statement that contains both testimonial and nontestimonial portions, the trial judge should use the “*in limine* procedure ... to redact or exclude the portions of any statement that have become testimonial, as [judges] do, for example, with unduly prejudicial portions of otherwise admissible evidence.” *Id.* at 829.
- (F) Although the standard announced in *Davis v. Washington* is framed in terms of statements elicited by police “interrogation,” the Court made clear in *Davis* that this phrasing (which was selected for the cases before the Court, which both involved statements elicited by police interrogation) “is not to imply ... that statements made in the absence of any interrogation are necessarily nontestimonial.” The Court explained that the Confrontation Clause, as construed in *Crawford*, applies equally to statements that witnesses “volunteer[]” or that they make in response to “open-ended questions” by a police officer. *Id.* at 822 n.1.

- (ii) “Business records” proffered by the prosecution in a criminal case or by the Presentment Agency in a delinquency case:
 - (A) 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*, 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.” 129 S. Ct. at 2539-40. *See also id.* at 2538 (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 2539 (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).

- (B) In the New York Court of Appeals’ pre-*Melendez-Diaz* applications of *Crawford* to business records, when it appeared that the U.S. Supreme Court was broadly deeming business records to be non-testimonial, the Court of Appeals explained that the New York courts must apply the Confrontation Clause more strictly to business records, and particularly police reports, because New York’s “business records” exception to the hearsay rule is broader than the Federal Rule of Evidence 803 and thus gives rise to the risk of Confrontation Clause problems under “either our Federal or State Constitutions, and most especially in certain types of police business records.” *People v. Rawlins*, 10 N.Y.3d 136, 149-50, 855 N.Y.S.2d 20, 28-29 (2008).
- (C) The U.S. Supreme Court addressed the applicability of the Confrontation Clause to forensic reports in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) and the New York Court of Appeals did so, prior to *Melendez-Diaz*, 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). But the rule governing these situations is unclear for the following reasons:
 - (I) In *Melendez-Diaz*, the U.S. Supreme Court held that the trial judge violated the Confrontation Clause by “admitt[ing] into evidence [drug examiners’] affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine” even though the forensic experts of those reports were not called to the witness stand by the prosecution and thus available for cross-examination by the defense (129 S. Ct. at 2530). But the scope and applicability of this holding are unclear because the reports were sworn affidavits and thus there

was “little doubt that the documents at issue in this case fall within the ‘core of testimonial statements’ ... described [in *Crawford*, which] ... mentions affidavits twice” (*Melendez-Diaz*, 129 S. Ct. at 2532), particularly given that “the *sole purpose* of the affidavits was to provide [the prosecution with] ‘prima facie evidence’” against the accused at trial (*id.*). See also *id.* at 2543 (Thomas, J., concurring) (“I join the Court’s opinion in this case because the documents at issue in this case ‘are quite plainly affidavits,’ ... [and] [as such, they ‘fall within the core class of testimonial statements’ governed by the Confrontation Clause.”).

- (II) In its pre-*Melendez-Diaz* opinions 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 adopted a multi-pronged approach to assessing whether forensic reports are “testimonial” for Confrontation Clause purposes. The status of the *Rawlins-Freycinet* rule is uncertain because (A) its rationale appears to be inconsistent in various ways with the U.S. Supreme Court’s reasoning in the subsequently-issued decision in *Melendez-Diaz*, but (B) the Court of Appeals in a post-*Melendez-Diaz* decision — *People v. Brown*, 13 N.Y.3d 332, 339-40, 890 N.Y.S.2d 415, 419 (2009) — treated the *Rawlins-Freycinet* rule as still in effect and explained that the rule requires consideration of, *inter alia*, “(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.”

- (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 the prosecution establishes either of the following:
- (a) that the declarant is 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) (“Because preliminary hearings in Colorado do not present an adequate opportunity for cross-examination, we find that the trial court erred in admitting preliminary hearing testimony”: “previous testimony is admissible [under *Crawford*] only if the witness is unavailable and the defendant had an adequate prior opportunity for cross-examination”).
 - (b) that 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*, 128 S. Ct. 2678, 2683, 2684 (2008). Under the longstanding “*Sirois* rule” in New York, the prosecution must show at a pretrial *Sirois* hearing, “by ‘clear and convincing evidence’ that the witness is ‘unavailable’ to testify at trial and that the defendant, through his or her misconduct, intentionally made the witness unavailable.” *People v. Byrd*, 51 A.D.3d 267, 273, 855 N.Y.S.2d 505, 510 (1st Dept. 2008). *See also, e.g., People v. Steward*, 54 A.D.3d 880, 864 N.Y.S.2d 488 (2d Dept. 2008); *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.).