Chapter 30

Evidentiary Issues That Are Likely To Arise at Trial

§ 30.01 APPLICABILITY OF THE RULES OF EVIDENCE

In *In re Gault,* 387 U.S. 1 (1967), the Supreme Court condemned the use of hearsay in delinquency trials, observing that "[n]o reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals." *Id.* at 56. The *Gault* opinion referred with approval to juvenile justice standards that "state that testimony should be under oath and that only competent, material and relevant evidence under rules applicable to civil cases should be admitted in evidence." *Id.* at 56-57 (citing the Children's Bureau's Standards for Juvenile and Family Courts).

In a number of States a statute or court rule specifies that juvenile delinquency trials shall be conducted in accordance with the rules of evidence employed in adult court proceedings. Jurisdictions that have adopted uniform rules of evidence to govern adult civil and criminal cases usually apply these rules to juvenile delinquency cases as well. *See, e.g.,* NEB. REV. STAT. § 27-1101(1) (2022); R.I. RULES JUV. PROC. 9(b) (2022); WIS. STAT. ANN. § 938.299(4) (2022); WYO. RULE EVID. 1101(b)(3) (2022) & 1977 Committee Note. In jurisdictions that employ differing rules in civil and criminal cases, some States provide for the use of criminal rules of evidence in delinquency trials (*see, e.g.,* COLO. RULE JUV. PROC. 1 (2022); FLA. STAT. ANN. § 985.35(2) (2022); ILL. COMP. STAT. ANN. ch. 705, § 405/5-605(3)(a) (2022); IOWA CODE ANN. § 232.47(5) (2022); MINN. RULE JUV. DELINQUENCY 13.04 (2022); N.C. GEN. STAT. ANN. § 7B-2408 (2022); TEX. FAM. CODE ANN. § 54.03(d) (2022); W. VA. CODE § 49-4-701(k) (2022)), while others call for the use of civil rules (*see, e.g.,* KAN. STAT. ANN. § 38-2354 (2022); S.D. CODIFIED LAWS § 26-7A-56 (2022)). Still other jurisdictions provide in general terms that evidence in delinquency trials must be competent, relevant, and material, *see, e.g.,* D.C. CODE § 16-2316(b) (2022); NEV. REV. STAT. § 62D.040(4) (2022); N.Y. FAM. CT. ACT § 342.2(1) (2022), without saying whether evidentiary issues should be resolved in accordance with civil or criminal rules of evidence. Finally, in some jurisdictions the juvenile code does not address the question of evidentiary rules at all; the courts by custom follow either the criminal or the civil rules.

This chapter's discussion of evidentiary matters will be limited to a few of the most important problems specific to juvenile delinquency trials. For other evidentiary issues, *see* DAVID P. LEONARD, EDWARD J. IMWINKELRIED, DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, THE NEW WIGMORE: A TREATISE ON EVIDENCE (2d ed. 2009); JACK B. WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE MANUAL : A GUIDE TO THE FEDERAL RULES OF EVIDENCE, BASED ON WEINSTEIN'S EVIDENCE (10th ed. 2015); EDWARD J. IMWINKELRIED, PAUL C. GIANNELLI , FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURTROOM CRIMINAL EVIDENCE (5th ed. 2011); RICHARD O. LEMPERT, SAMUEL R. GROSS, JAMES S. LIEBMAN, JOHN H. BLUME, STEPHAN LANDSMAN & FREDRIC I. LEDERER, A MODERN APPROACH

TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES (4th ed. 2011); KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE, ROBERT P. MOSTELLER, E.F. ROBERTS & ELEANOR SWIFT, MCCORMICK ON EVIDENCE (7th ed. 2013); ANDRE A. MOENSSENS, BETTY LAYNE DESPORTES & STEVEN D. BENJAMIN, SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES (7th ed. 2017); Brandon L. Garrett & Gregory Mitchell, *The Proficiency of Experts*, 166 U. PA. L. REV. 901 (2018).

§ 30.02 PROCEDURAL DEVICES

Ordinarily, evidentiary issues are raised during trial by means of objections, motions to strike testimony, and motions for a mistrial. These procedures are discussed in Chapter 34.

When the evidence in question is extremely prejudicial, the normal processes for objecting to evidence will be inadequate. References to the existence of the evidence and discussions of its admissibility will jaundice the trier of fact. Section 30.02(a) discusses techniques for litigating the admissibility of highly prejudicial evidence out of earshot of the trier in bench and jury trials. Section 30.02(b) discusses stipulations, which can be used to exclude prejudicial evidence and can also be used to obviate the need to seek out and present witnesses on technical or routine matters that the prosecution is prepared to concede. Section 30.02(c) then discusses the option of "stipulated trials," a procedure in which the entire trial is conducted on the basis of prior transcripts, stipulations, or both.

§ 30.02(a) Procedures for Litigating Evidentiary Issues Out of Earshot of the Trier of Fact

§ 30.02(a)(1) Bench Trials

Unlike jury trials, in which the division of responsibilities between judge and jury facilitates a resolution of sensitive evidentiary issues outside the hearing of the trier of fact, bench trials involve a trier who is also the arbiter of evidentiary issues. Even when evidence is excluded, the judge will ordinarily hear it in the course of determining its admissibility. Although all judges profess to ignore excluded evidence in deciding guilt or innocence, inevitably the evidence affects the judge's thinking. The problem is complicated by the unwillingness of most judges to grant a recusal motion after hearing highly prejudicial evidence, see § 20.05 *supra,* and by the risk that a request for recusal may irk the judge, see § 20.07 *supra.*

If counsel knows in advance of a bench trial – from defense investigation, discovery, or prior hearings in the case – that the prosecution intends to offer certain highly prejudicial and objectionable evidence, counsel should consider litigating the admissibility of the evidence before trial by making a motion *in limine* and requesting that the motion be heard by a judge other than the one who will preside over the trial. See § 7.03(c) *supra*. (Of course, this approach should not be used if the judge who would rule on the pretrial motion is highly likely to deny it and if the judge who will preside over the trial would at least attempt to exclude the evidence

from his or her decisionmaking in the event that s/he holds it inadmissible.) When employing this procedure, counsel needs to take into account that the judge who will preside over the trial may resent the implication that s/he would consider prejudicial information s/he has excluded. Accordingly, counsel should stress that the motion *in limine* is being made merely as a precautionary measure to avert the possibility that inadmissible evidence might affect the judge unconsciously at trial. See § 20.07 *supra.* In addition, counsel may wish to point out that the motion procedure conserves judicial resources by obviating any need for a later request for recusal. In framing the motion and in arguing it, counsel will have to avoid revealing the nature of the inadmissible evidence and will need to be alert to object if the prosecutor begins to describe the evidence.

If counsel was unaware of the prejudicial evidence before trial or was otherwise unable to make a pretrial motion *in limine,* s/he might consider the alternative procedure of asking the trial judge to refer counsel's objections to another judge for argument and resolution. This is an uncommon procedure, but it can be proposed to the judge as a highly practical one. Brief recesses of bench trials for many reasons of administrative convenience are commonplace, and counsel can urge that a recess to permit another judge to hear defense objections to particularly prejudicial items of prosecutorial evidence would not delay the trial unduly. Indeed, a special recess may not be necessary: The prosecution can proceed with other evidence, temporarily withholding the challenged item, until the next regularly scheduled recess; and during that recess the parties can arrange – with the trial judge's approval – to present the matter expeditiously to another judge.

Counsel also might consider making use of the anticipatory objection procedure described in § 34.04 *infra* and the *voir dire* procedure described in § 34.05. Although these procedures are particularly well-suited for the jury trial context as mechanisms for averting disclosure of inadmissible evidence to the jury, they may also serve useful functions in a bench trial.

§ 30.02(a)(2) Jury Trials

One of the most difficult – and crucial – aspects of making objections at a jury trial is the need to guard against the jury's hearing objectionable evidence before counsel can secure a ruling from the judge to exclude it. This can happen in any number of ways. Even if counsel objects to the prosecutor's question before the witness starts to answer it, the jury often will be able to deduce what the answer probably would have been. Once counsel objects, the prosecutor may respond in a way that tips off the jury to what the challenged evidence is. If counsel and/or the prosecutor engage in a colloquy with the judge in open court about counsel's objection, much may be revealed to the jury even if both lawyers and the judge are taking pains to avoid disclosing the content of the challenged testimony.

As § 7.03(c) *supra* discussed, counsel can use a pretrial motion *in limine* to secure a ruling from the judge, in advance of trial, that certain evidence the prosecution intends to use at trial is inadmissible and/or that certain arguments the prosecution might be disposed to make in

opening statement or closing argument will not be permitted. A pretrial ruling of this sort ensures that the jury will not hear the impermissible evidence or argument. In the event that the excluded evidence leaks out anyway as a result of something the prosecutor or a prosecution witness says or does, counsel is in a good position to obtain a mistrial. See § 34.11 *infra*.

If counsel has reason to believe (due to defense investigation, the probable-cause hearing, discovery, or a pretrial suppression hearing) that the prosecution will attempt to introduce objectionable evidence through a particular witness, and if counsel has not raised the issue with the judge prior to the commencement of the trial – perhaps because counsel did not know about the issue at that time, or because counsel decided that the considerations canvassed in § 7.03 made a pretrial adjudication of the issue less advantageous to the defense than its adjudication during evidence-taking at trial, or because counsel felt that his or her position on the issue would be strongest after the judge had heard the parties' opening statements and/or certain other prosecution testimony – counsel can guard against the risk of jury exposure to the objectionable evidence by making an anticipatory objection when the witness is first called to the stand or when the prosecutor begins any line of questioning that may lead to the objectionable matter. See § 34.04 *infra*.

If objectionable matters arise at trial that counsel was not able to forestall with one of the foregoing devices – because, for example, counsel had no basis for anticipating that a prosecutor would ask a certain objectionable question or that a witness would respond with an objectionable answer – counsel can use a sidebar conference to ensure that discussions of the admissibility of the potentially prejudicial evidence do not take place within the hearing of the jury. Upon objecting, counsel can request that the court hear the objection at the bench ("at sidebar"). If the design of the courtroom makes it possible for the jurors to hear bench conferences, counsel should ask that the jury be excused during argument and decision of counsel's objection. However, most judges will not tolerate frequent requests to excuse the jury, and counsel must limit these requests to situations in which a revelation of the evidence to which s/he is objecting would bias jurors badly against the respondent or the defense theory of the case. Counsel should, in any event, make the requests at sidebar, not in open court, because the jurors are likely to be irked at the party responsible for making them suffer the inconvenience of traipsing in and out of the courtroom and the boredom of waiting out the resolution of a bench conference. To a somewhat lesser extent, they may be irritated by extended bench conferences even when the jury remains in the courtroom.

When preliminary questions of fact bear upon the admissibility of an item of evidence, the trial judge ordinarily decides those questions, even at a jury trial. During the presentation of testimony on these preliminary factual questions (usually called *voir dire* examination), the jury is often, although not invariably, excused, either on the court's initiative or at the request of counsel for one of the parties. See § 34.05 *infra*. In most situations in which the *voir dire* examination is occasioned by a defense objection to any significant piece of prosecution evidence, counsel should ask (at sidebar) that the jury be excused. This is usually a matter committed to the discretion of the trial judge. However, in jurisdictions where suppression issues

are raised at trial rather than by pretrial motions, see § 22.01 *supra,* the respondent has a constitutional right to demand a hearing out of the presence of the jury on the admissibility of a confession challenged under federal constitutional exclusionary principles, *see Jackson v. Denno,* 378 U.S. 368 (1964); *Sims v. Georgia,* 385 U.S. 538 (1967), and doubtless also upon any defense objection to evidence on the ground that it was obtained by an unconstitutional search and seizure or other violation of constitutional guarantees enforced by an exclusionary rule.

§ 30.02(a)(3) Preparing To Use the Procedures

To make effective use of the procedures described in the preceding two sections, counsel should review his or her case file before trial and identify every item of prosecution evidence to which s/he plans to object. On the basis of the information available to counsel – from discovery, prior hearings, and investigation – counsel should anticipate through which prosecution witnesses, and at what points in the testimony of each, the objectionable items are likely to be elicited. S/he should then plan out a comprehensive strategy of trial objections, deciding which ones to make in the ordinary fashion – by objecting and stating the grounds of objection in open court when the evidence is first offered by the prosecutor – and which ones to raise earlier in a witness's examination or even at the outset of trial, which ones to raise at sidebar, and on which ones to request still more unusual procedures, such as excusing the jury from the courtroom during evidentiary arguments or *voir dire,* or requiring the prosecutor to argue the admissibility of evidence without disclosing its substance in a bench trial.

These decisions must be made on the basis of a comparative assessment of:

(A) the harm that each item of objectionable evidence will do if the trier of fact hears about it;

(B) the likelihood of counsel's winning his or her objection to each item;

(C) the extent to which there is a precedent or compelling logical justification for the use of special procedures to litigate the objections to each item; and

(D) the relative priority of litigating one or another of counsel's potential objections through the use of these special procedures.

A comprehensive strategy is important because of most judges' very limited patience with requests for unusual or time-consuming trial procedures: Counsel cannot expect to have more than a few of these requests granted in any trial, and s/he should save them for the points at which they will do the most good.

§ 30.02(b) Stipulations

Counsel should always keep in mind the possibility of offering to stipulate to matters that

the prosecutor can amply prove.

Stipulations are particularly advisable when there is a risk that the prosecution's proof will incidentally introduce some prejudicial matter. For example, counsel should consider stipulating (1) the fact of death in a homicide case, to avoid gruesome photographs and medical testimony (*see*, *e.g.*,Jessica M. Salerno, *Seeing Red: Disgust Reactions to Gruesome Photographs in Color (but not in Black and White) Increase Convictions*, 23 (No. 3) PSYCHOLOGY, PUBLIC POLICY, AND LAW 336-50 (2017)); (2) the identity of a stolen object, to avoid its identification by a sympathetic theft complainant who has no other testimony pertinent to the case; (3) the authenticity of prosecution exhibits, to avoid chain-of-custody testimony resulting in a parade of police witnesses testifying with crackerjack efficiency that may appear to characterize the entire police investigation; and (4) the qualifications of prosecution experts, if they are impressive.

Stipulations can also be used to improve counsel's position on certain evidentiary objections. For example, when counsel objects to an item of prosecution evidence on the ground that its prejudicial impact substantially outweighs its probative value (see § 30.03 *infra*), counsel can reduce its probative value by announcing that s/he will stipulate the fact which the item is being offered to prove. *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172 (1997); *People v. Walker*, 211 Ill. 2d 317, 328-43, 812 N.E.2d 339, 345-53, 285 Ill. Dec. 519, 525-33 (2004); *State v. Alvarez*, 318 N.J. Super. 137, 150-54, 723 A.2d 91, 97-99 (1999).

Obtaining the prosecutor's stipulation to factual elements in the defense case will enable counsel to save the time and trouble of seeking out, preparing, and examining witnesses on incontestable points. *Cf.* § 30.04(b)(2) concluding paragraph *supra*. For example, if the prosecutor is willing to stipulate to the accuracy and authenticity of defense counsel's transcript of a police radio communications tape, counsel can forgo testimony by the police communications personnel who recorded the tape and by the individual who transcribed it. Counsel does well to seek stipulations to the admissibility of items of defense evidence (*see*, *e.g.*, *Pittman by Hamilton v. County of Madison, Illinois*, 863 F.3d 734 (7th Cir. 2017)) unless, by so doing, s/he is likely to alert the prosecutor to potential objections that the prosecutor is otherwise likely to overlook. When a prosecutor who is cooperative in matters of this kind requests reciprocal stipulations to incontrovertible or unimportant points in the prosecution's case or to the admissibility of unobjectionable items of prosecution evidence, counsel should ordinarily agree, both in order to maintain the prosecutor's cooperation and in order to avoid irritating the judge by appearing to be wasting the court's time in taking testimony on facts that could have been stipulated.

§ 30.02(c) Stipulated Trials

Counsel may, on occasion, wish to waive a full evidentiary trial and to submit the case to the court on an agreed statement of facts or on the police report or on the transcript of the probable-cause hearing or of a pretrial hearing on a motion to suppress. This procedure is called a

"stipulated trial" in some jurisdictions, a "trial on a case-stated basis" in others.

The procedure is useful in cases in which there is no real factual dispute and the only matters in controversy are legal – the interpretation of an unclear rule of law or the application of an established rule to a novel set of facts. Thus, for example, in a case in which both parties agree that the respondent cursed at a police officer who was engaged in his or her official duties but the parties disagree about whether these facts make out the crime of obstruction of governmental administration, counsel might offer to stipulate the facts and argue only the legal issue. The judge will ordinarily appreciate the time and trouble saved and may reflect his or her appreciation at disposition in the event that the respondent is convicted.

In jurisdictions in which a pretrial suppression ruling cannot be reviewed on appeal following the accused's entry of a guilty plea, see §§ 14.10, 22.07 *supra,* the stipulated trial procedure may offer advantages comparable to those of a guilty plea while preserving the respondent's right to appellate review of the suppression ruling. Because the stipulated trial process saves the prosecutor's and the judge's time, the prosecutor will often be amenable to offering sentencing concessions similar to those s/he would make in exchange for a guilty plea (prosecutorial support for a disposition of probation, or whatever), and the judge will tend to be more lenient at disposition. Yet because the stipulated trial is technically a "trial," any errors in the pretrial suppression ruling are preserved for appeal.

There may be additional reasons for the stipulated trial procedure in particular cases. A police report may contain inadmissible matter favorable to the respondent or may reflect the investigating officer's sympathy for the respondent; the transcript of a probable-cause hearing may contain similarly inadmissible defense matter or a fatal defect in the prosecution testimony. When stipulating to trial on a prior transcript, counsel should make clear whether the parties are agreeing that the court may consider everything in the transcript or only the evidence presented there that would be admissible under the evidentiary rules applicable at trial. *Cf. Moore v. United States,* 429 U.S. 20 (1976) (per curiam).

§ 30.03 RELEVANCE; PROBATIVE WEIGHT VERSUS PREJUDICE

The initial inquiry with respect to the admissibility of any piece of evidence is its relevance (that is, pertinency to the issues) and its materiality (that is, the weight of its probative contribution to resolution of the issues).

§ 30.03(a) Relevance Generally

The Federal Rules of Evidence contain the following definition of "relevant evidence," which is echoed in many state statutes and local rules: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action" (FED. RULE EVID. 401).

The application of this rule to a particular item of evidence requires two inquiries:

First, it is necessary to identify what facts (often called "factual propositions") are "of consequence to the determination of the action" (that is, to the decision of the issues framed for trial). This inquiry is technically known as an inquiry into "materiality," and the factual propositions identified are known as "material facts." The process of identifying them begins with an analysis of the pleadings – that is, in a delinquency case, the Petition and the respondent's plea – in the light of the rules of substantive law defining the elements of the offenses charged and the defenses asserted. (If the substantive rules are disputed, the judge will have to resolve the dispute in order to identify the material facts in issue.) The process then takes account of the impact of any pretrial proceedings or earlier trial proceedings upon the issues framed by the pleadings.

Second, it is necessary to inquire whether the particular item of evidence has *probative force* in regard to any material fact – that is, whether it has a *logical tendency to establish or negate the truth of such a fact*. Federal Rule 401(a) sets a relatively low threshold for the amount of probative force which is required to make an item of evidence relevant: "*any tendency* to make a [material] fact more or less probable than it would be without the evidence" (emphasis added). *See*, *e.g.*, *State v. Sparks*, 336 Or. 298, 307, 83 P.3d 304, 310 (2004); *State v. Richardson*, 210 Wis. 2d 694, 707, 563 N.W.2d 899, 904 (Wis. 1997). In answering this question for the purpose of ruling on an objection that a particular item of evidence is irrelevant, the judge is not supposed to consider the *credibility* (that is, the believability) of the item. As a practical matter, this means that any item of "direct evidence" (that is, any statement by a witness that s/he did or observed something that constitutes a material fact) is *per se* relevant. In regard to items of "indirect" or "circumstantial" evidence, the judge must accept the credibility of the item and inquire only whether there is some logically reasonable chain of inference or characterization that connects it with a material factual proposition. The chain needs not be air-tight or conclusive. "'[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."' *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985), quoting Fed. Rule Evid. 401." *McKoy v. North Carolina*, 494 U.S. 433, 439 (1990). *See also United States v. Ray*, 956 F.3d 1154, 1159 (9th Cir. 2020), *aff'd in relevant part*, *United States v. Bacon*, 979 F.3d 766 (9th Cir. 2020) (en banc) (reversing a conviction because the trial judge applied an erroneous standard in excluding medical expert testimony proffered by the defendant in support of an insanity defense: applying Federal Evidence Rule 702, the court holds that the "correct legal standard is for the district court 'to determine the relevance of the psychological evaluation the expert conducted and the medical diagnoses he made, not his ultimate legal conclusion regarding the defendant's mental state.'"); *State v. Naudain*, 368 Or. 140, 142, 144, 151, 487 P.3d 32, 33, 35, 38 (2021) (the trial court erred in sustaining the prosecutor's relevance objection to defense counsel's cross-examination of the murder victim's fiancé about "the victim's racial prejudices and refusal to allow Black people in the home that the couple shared," which defense counsel sought to elicit in order to show that the witness "herself had a racial bias"; because the witness

and the victim "were in the most intimate of relationships" and the witness "did not separate her own views from those of the 'house' when she spoke [to the police] about that [house] rule," the "evidence that defendant sought to introduce" "logically supports an inference" that the witness shared the victim's "racial bias at least to some degree. The evidence does not compel that inference, but it clears the low bar of demonstrating a rational relationship between the partners' views. Thus, the trial court erred in concluding that the evidence of [the victim's] racial attitudes and practices was not relevant to the issue of [the witness's] bias.").

The requirement of relevancy is not applied with mechanistic rigor to every isolated factual detail. Details which in themselves lack a strictly logical connection to any material factual proposition are nonetheless ordinarily held to be relevant as "background" or "context" if they set the scene for some other relevant fact – if they situate a relevant fact in its chronological or causal or narrative setting, make it more intelligible, give it the texture and color and drama of life – provided that they do not run on too long or stray too far afield, and that they do not pose a danger of laying affirmatively improper matter before the jury. *See Old Chief v. United States*, 519 U.S. 172, 186-90 (1997).

§ 30.03(b) Arguments for Applying the Relevance Rule in a Manner that Respects the Special Position and Needs of the Defense in a Delinquency Trial

In delinquency trials – as in adult criminal trials – the accused is often given the benefit of the doubt on close questions whether to admit or to exclude evidence. That is particularly true with regard to the admissibility of evidence proffered by the defense. *See*, *e.g.*, *Wilson v. State*, 971 So.2d 963, 965 (Fla. App. 2008); *State v. Souza*, 708 A.2d 899, 902-03 (R.I. 1998) (dictum): ("we believe that trial justices should generally err on the side of allowing criminal defendants a reasonable opportunity to present their cases and defenses as they see fit to do so"); *cf*. *State v. Dorsey,* 207 La. 928, 964, 22 So.2d 273, 285 (1945) ("It is the duty of the State to concern itself as much in having the innocent acquitted as in securing the conviction of the guilty, and the State is desirous of giving every accused person a fair and reasonable opportunity to make his defense."). Counsel should urge the judge that it would not be fair if the respondent were deprived of the chance to tell his or her story because of a close call on the question of relevance. Counsel can also point out that the judge's exercise of his or her discretion in favor of admissibility would avoid a possible conflict between state evidentiary rules and the federal constitutional right to present defensive evidence (see § 33.04 *infra*). This Sixth and Fourteenth Amendment right has been held to invalidate overly rigid state-law bars to the presentation of an accused's version of the facts. *Chambers v. Mississippi,* 410 U.S. 284 (1973); *Green v. Georgia,* 442 U.S. 95 (1979) (per curiam); *Crane v. Kentucky,* 476 U.S. 683 (1986); *Rock v. Arkansas,* 483 U.S. 44 (1987); *Lunbery v. Hornbeak*, 605 F.3d 754, 760-62 (9th Cir. 2010); *Cudjo v. Ayers*, 698 F.3d 752, 754-55, 762-68 (9th Cir. 2012).

§ 30.03(c) Probative Weight Versus Prejudice

The trial judge has broad discretion to balance the probative weight of proffered evidence

against its possible prejudicial impact. If evidence is very prejudicial, the judge may exclude it although it is probative and otherwise admissible within technical evidentiary rules. *See, e.g., Hamling v. United States,* 418 U.S. 87, 127 (1974); *United States v. Abel,* 469 U.S. 45, 54 (1984); *Old Chief v. United States*, 519 U.S. 172, 180-85 (1997); *Crane v. Kentucky,* 476 U.S. at 689-90 (dictum). Defense counsel should be quick to invoke this discretion against potentially misleading, inflammatory, or emotion-rousing prosecution evidence. *See, e.g., United States v. Hale,* 422 U.S. 171, 173, 180 (1975); *Old Chief v. United States*, *supra*; *United States v. Nolan*, 956 F.3d 71, 83 (2d Cir. 2020); *United States v. Morgan*, 786 F.3d 227, 232-33 (2d Cir. 2015); *United States v. Vallejo*, 237 F.3d 1008, 1017, as amended by 246 F.3d 1150 (9th Cir. 2001) ("Agent Ajioka's testimony concerning the structure and modus operandi of drug trafficking organizations was not relevant to the Government's case against Vallejo. Nor was it needed to assist the jury's understanding of a complex criminal case. Agent Ajioka testified to the different roles played by various members of drug trafficking organizations, and although he did not cast Vallejo in a particular role, the implication of his testimony was that Vallejo had knowledge of how the entire organization operated, and thus knew he was carrying the drugs. To admit this testimony on the issue of knowledge, the only issue in the case, was unfairly prejudicial, and an abuse of discretion under Rule 403."); *State v. Acker*, 2015 ND 278, 871 N.W.2d 603 (N.D. 2015) (reversing an aggravated-assault conviction because the trial judge failed to conduct a proper analysis of the probative/prejudice balance before allowing the prosecution to impeach the defendant with his prior conviction of a sex offense); *State v. Brumbach*, 273 Or. App. 552, 359 P.3d 490 (2015) (reversing a sexual abuse conviction because the trial judge failed to perform a probative/prejudice-balance analysis before allowing the prosecution to present evidence of the defendant's commission of similar sexual offenses against the same child and other children); *cf. Jenkins v. Anderson,* 447 U.S. 231, 240-41 (1980).

The prosecution's ability to invoke the probative/prejudice balance as a ground for excluding defense evidence is limited by the respondent's federal constitutional rights to confrontation (*see Blackston v. Rapelje*, 780 F.3d 340, 357 (6th Cir. 2015), summarized in § 30.04(c) seventh paragraph *infra*) and to present a defense (*see Olden v. Kentucky,* 488 U.S. 227 (1988), summarized in § 39.1 *infra*). "[I]t is clearly established that a trial court violates the Confrontation Clause when it routinely applies Rule 403 balancing to limit cross-examination by the accused on issues central to the defense." *Rhodes v. Dittmann*, 903 F.3d 646, 657 (7th Cir. 2018).

§ 30.04 HEARSAY AND CONFRONTATION

§ 30.04(a) Introduction: The Relationship Between Hearsay and Confrontation Clause Issues

Hearsay is traditionally defined as evidence of "'a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.'" *Lee v. Illinois,* 476 U.S. 530, 543 n.4 (1986) (quoting MCCORMICK ON EVIDENCE § 246, p. 584 (2d ed. [Cleary] 1972)).

The rules of evidence or appellate precedents in every state exclude hearsay generally but provide numerous, varying, and often complex exceptions to the ban.

In addition to these common-law hearsay rules, the Confrontation Clause of the Sixth Amendment, which is applicable to state trials through its incorporation into the Fourteenth Amendment, *see Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965), bans prosecutorial proof of certain out-of-court statements in adult criminal trials. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 329 (2009);. The same confrontational protections are required in juvenile delinquency trials by the juvenile respondent's due process right to a fair trial. *See In re Gault,* 387 U.S. 1, 56-57 (1967).

The restrictions established by the constitutional right are not necessarily coincident with the hearsay doctrine of any particular jurisdiction. *See Crawford v. Washington*, 541 U.S. at 50-51. Evidence admissible within a hearsay exception or loophole may violate the right to confrontation. *Id*. at 51. Conversely, an out-of-court statement that is "a good candidate for exclusion under [a jurisdiction's] hearsay rules" will not invariably be subject to exclusion on federal Confrontation Clause grounds. *Id*.

When objecting to an attempt by a prosecutor to introduce an out-of-court statement, counsel should always clearly state whether the objection is based on the hearsay rule or the Confrontation Clause or both. In the event of a conviction, the failure to specify the grounds for the objection could result in a ruling on appeal that counsel failed to preserve the claim s/he intended to make. *See, e.g.*, *People v. Goldstein*, 6 N.Y.3d 119, 126, 843 N.E.2d 727, 731-32, 810 N.Y.S.2d 100, 104-05 (2005) (declining to reach a hearsay issue because the defense only raised a Confrontation Clause challenge); *People v. Lopez*, 25 A.D.3d 385, 386, 808 N.Y.S.2d 648, 649 (N.Y. App. Div., 1st Dep't 2006) (defense counsel's objection on hearsay grounds was insufficient to preserve a Confrontation Clause claim).

It is particularly important, whenever possible, to base an objection on the Confrontation Clause (in conjunction with a hearsay objection, where applicable). Counsel can thereby preserve a federal claim for postconviction review by the federal courts if it is rejected by the state courts. See §§ 39.02(a), 39.03(b) *infra*. Also, by invoking the Sixth Amendment Confrontation-Clause right, counsel can justify objections to many items of prosecution evidence that have traditionally been admissible under settled local hearsay doctrines. Because the federal caselaw was radically transformed in the wake of the Supreme Court's 2004 *Crawford* decision, and will not shake down in detail for decades (*see*, *e.g.*, the exegetic struggles reflected in *Taylor v. State*, 226 Md. App. 317, 130 A.3d 509 (2016)) – and because most state trial judges will be relatively unfamiliar with the voluminous, convoluted body of post-*Crawford* appellate caselaw – a judge who is not eager to undertake legal research or to risk reversible error may be inclined to give the defense the benefit of the doubt when ruling on Sixth Amendment objections. And, finally, unlike hearsay objections, Confrontation Clause objections invoke a source of law – the constitutional guarantee to criminal defendants and juvenile respondents of a right to confront

their accusers – which applies only to the prosecution's evidence, so they are less likely than hearsay objections to backfire and obstruct the presentation of the defense case.

When raising a Confrontation Clause claim, counsel should explicitly cite the state constitution in addition to the federal Sixth Amendment, so as to preserve a claim that the state constitutional confrontation right is broader than the federal. *Cf. People v. Clay*, 88 A.D.2d 14, 26-27, 926 N.Y.S.2d 598, 608-09 (N.Y. App. Div., 2d Dep't 2011) (rejecting a Confrontation Clause claim on federal constitutional grounds and then declining to consider whether a different result should be reached under the state constitution because "appellant does not argue that the State Constitution is more protective of the right of confrontation than the Federal Constitution"); *State v. Moore*, 334 Or. 328, 49 P.3d 785 (2002) (invoking the Oregon constitution and rejecting the U.S. Supreme Court's pre-*Crawford* Sixth Amendment caselaw in requiring a declarant's unavailability as a condition of admission of excited-utterance testimony); *State v. McGriff*, 76 Hawai'i 148, 156, 871 P.2d 782, 790 (1994) (under the Hawai'i constitution "we have parted ways with the United States Supreme Court which has held [in its *pre-Crawford decisions*] that the sixth amendment confrontation clause does not necessitate a showing of unavailability for evidence falling within certain hearsay exceptions").

§ 30.04(b) Hearsay

The hearsay rule says, generally, that a witness is not permitted to recount a statement made by anyone other than the witness – or, in a stricter version, a statement made by anybody, including the witness (except a statement that the witness has made earlier "while testifying at the current trial or hearing" (*see* FED. RULE EVID. 801(c)(1)) – for the purpose of proving "the truth of the matter asserted in the statement" (FED. RULE EVID. 801(c)(2)). "Statements" include oral and written utterances and communicative gestures. See *id*., RULE 801(a). The aim of the hearsay rule is to forbid the testimonial use of statements that are not made under oath, under the trier's scrutiny and subject to cross examination. For this purpose, "testimonial use" means any use which depends upon crediting the assertions of the "declarant" (*i.e.*, "the person who made the statement" (*id*., RULE 801(b))) as though the declarant were a witness, so that their capacity to prove a relevant fact stands or falls on the declarant's believability. Statements offered *for any other purpose than to prove the truth of the matter stated* are not hearsay.

The hearsay rule is riddled with exceptions. Most of these are tailored to situations in which either (1) the circumstances under which some type of out-of-court statement is made are regarded as furnishing sufficient assurance of reliability so that the risks involved in admitting evidence without the ordinary safeguards of in-court presentation under oath and subject to plenary cross-examination are not exorbitant; or (2) other safeguards are thought to be available as substitutes for the ordinary ones; or (3) exclusion of the particular type of out-of-court statement would deprive the judicial process of a species of needed information for which there is no adequate substitute, and this consideration is thought to outweigh the risks of unreliability; or (4) there are thought to exist *some* assurances of reliability or *some* safeguards against undetectable unreliability (although these are not as effective as in categories (1) and (2) above),

and there is *some* substantial need for the information which a particular type of out-of-court statement is uniquely able to supply (although the need is not as great as in category (3) above), so that, on balance of these considerations, exclusion would be inappropriate. The various hearsay exceptions developed by the common law for these reasons have been codified (and in some instances recast) in Federal Rules of Evidence 803 and 804. In many States, a statute or local rule essentially tracks the Federal Rules in defining the hearsay rule and its exceptions.

§ 30.04(b)(1) Defense Objection to Prosecution Evidence as Hearsay

The purpose and effect of the hearsay exceptions are to admit statements which *are* hearsay, to be used as such. But a hearsay statement is admissible within one of these exceptions only if and after evidence has been presented that establishes to the judge's satisfaction the existence of *each and every factual circumstance defined by the applicable subdivision of the rule as an element of the exception*. In other words, a foundation must be laid for the admission of the statement by convincing the court to find as a fact that all of the conditions required by the terms of the exception have been met. Thus, if the prosecution is seeking to admit an out-of-court statement pursuant to an exception to the hearsay rule, counsel can insist that the prosecution present evidence which establishes such a foundation, and counsel can insist that the trial judge make a factual finding of the existence of all of the foundational elements. *See, e.g.*, *Tyrrell v. Wal-Mart Stores, Inc.*, 97 N.Y.2d 650, 652, 762 N.E.2d 921, 922, 737 N.Y.S.2d 43, 44 (2001) (the trial court's introduction of a hearsay statement as a spontaneous declaration and *res gestae* on the 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"; the 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."); *People v. Cummings*, 31 N.Y.3d 204, 207, 212, 99 N.E.3d 877, 879-80, 883, 75 N.Y.S.3d 484 (2018) (the trial court improperly applied the "excited utterance exception to the hearsay rule" to grant the prosecution's request to admit a 911 call recording in which an "unidentified speaker" in "the background can be faintly heard saying, 'Yo, it was Twanek, man! It was Twanek, man!'"; "Because there is no evidence from which a reasonable inference can be drawn that the declarant personally observed the incident, admission of the statement heard in the background of the 911 call was error."); *see also id*. at 214-16, 99 N.E.3d at 885-86 (Rivera, J., concurring) (raising the question whether the "excited utterance" exception to the hearsay rule "should be rejected whole cloth" "in light of advances in psychology and neuroscience that demonstrate an individual's inability to accurately recall facts when experiencing trauma, and, in turn, to create falsehoods immediately," and discussing caselaw and legal scholarship that support the "cabin[ing], if not outright abandon[ment], [of] the exception").

Counsel wants to be alert for so-called "dual-purpose hearsay." An out-of-court statement may at first blush appear to be offered for a nonhearsay purpose or to come within a hearsay exception, but when its relevance is scrutinized more closely, the use which makes it relevant will be seen to depend upon its truth. *See*, *e.g.*, *Commonwealth v. Fitzpatrick*, 255 A.3d 452, 460,

472-73 (Pa. 2021) (in the prosecution of a husband for the killing of his wife, her note in her day planner, '"If something happens to me – JOE," is inadmissible hearsay: "The statement at issue *sub judice* is not a routine state of mind expression. Rather, it is a compound statement that both demonstrates the speaker's then-existing state of mind and, when offered for the truth of the matter asserted, proves a fact that, if considered on its own, would be inadmissible hearsay. . . . On one hand, the statement reflects Annemarie's state of mind at the time she wrote it. Annemarie clearly was distressed and troubled over the nature of her then-existing relationship with Fitzpatrick, to the point that she appeared to be apprehensive of him. Such feelings and emotions, assuming they are expressed in an out-of-court statement without any other facts or assertions tethered to the statement, generally are admissible under the state of mind hearsay exception. . . . On the other hand, Annemarie's statement also contained a factual assertion: that Fitzpatrick would be the perpetrator if something untoward or violent happened to her. The fact-based aspect of the statement, when offered for the truth of the matter asserted, is inadmissible hearsay."); *cf*. *State v. Jensen*, summarized in § 30.04(c) *infra*. Hearsay-within-hearsay can also raise complicated issues. *See*, *e.g.*, *State v. Guerra*, 497 P.3d 1106 (Idaho 2021) (in a DWI prosecution, a police officer was allowed to testify that medication found in the defendant's purse following her arrest while driving contained a warning label saying "take due caution when operating motor vehicles" (*id*. at 1121); the Idaho Supreme Court describes this testimony as presenting "a classic example of potential hearsay-within-hearsay" (*id*. at 1119), with both levels posing obstacles to admissibility that the prosecution was required to overcome; the court does not reach the question whether the label itself was inadmissible hearsay but concludes that the officer's testimony as to what the label said was inadmissible because this "warning impliedly asserts that the medication in the bottle may impair the user's ability to drive a car or use heavy equipment"; it thus "constitutes an assertion of fact that is capable of being proven true (i.e., the medication may impair the ability to drive)"; so the officer's testimony concerning that warning constituted "an assertion of fact . . . subject to the hearsay rules" and was not admissible either for a nonhearsay purpose or within any hearsay exception).

If the prosecution seeks to overcome a hearsay objection by asserting that a statement is not being offered "for the truth of the matter asserted" and thus is not "hearsay," counsel may be able to counter that the court should find that, notwithstanding the prosecutor's argument, the way in which the prosecution intends to use the statement at trial actually is for the truth. *See, e.g.*, *United States v. Nelson*, 725 F.3d 615, 620 (6th Cir. 2013) (rejecting the government's argument that the content of a 911 call was "offered not for the truth of the matter asserted, but rather to show why the officers acted as they did": "[c]ontrary to the Government's position, the police officers' testimony about the 911 call . . . was effectively offered to prove the truth of the statements made" and was "thereby inadmissible" under Fed. Rule Evid. 802.); *United States v. Jones*, 930 F.3d 366 (5th Cir. 2019), summarized in § 30.04(c) *infra* (reaching the same result under the Confrontation Clause); *People v. Goldstein*, 6 N.Y.3d at 127-28, 843 N.E.2d at 732-33, 810 N.Y.S.2d at 105-06 (although the prosecution claimed that statements at issue "were not offered to prove the[ir] truth," the prosecution "obviously wanted and expected the jury to take the statements as true" and therefore the statements should be deemed as actually being "offered for their truth, and . . . [therefore] hearsay").

Prosecutors will sometimes call a witness they expect to deny knowledge or recollection of relevant facts in order to "impeach" this testimony with a "prior inconsistent statement" (see § 37.4 *infra*) containing incriminating information. Counsel should object to this "impeachment" as subverting the hearsay rule, since the witness has offered no substantive testimony to impeach. See § 31.15 *infra* and particularly *State v. Little Long,* 2021 S.D. 38, 962 N.W.2d 237 (2021), summarized in that section. *Cf. United States v. Rusnak*, 981 F.3d 697 (9th Cir. 2020) (holding that it was a violation of the hearsay rule and plain error – albeit harmless error on the record of the particular case at bar – to allow the prosecutor, in cross-examining a defense witness beyond the scope of her direct-examination testimony, to describe statements that she made in an FBI interview).

If the court finds that the prosecution genuinely is seeking to use the out-of-court statement for a non-truth-showing purpose – or if counsel chooses not to challenge the prosecutor's claimed intention in this regard – counsel can nonetheless argue against the admission of the statement on the grounds that (1) the facts which the prosecution claims are inferable from the making of the statement without regard to its truth are themselves irrelevant (see § 30.03(a) *supra*) or (2) that the probative value of those facts is substantially outweighed by the risk of unfair prejudice to the respondent, including the prejudice that will result if the statement is considered for its truth (see § 30.03(b) *supra*).

Of course, these various arguments should be made only if the defense would benefit from excluding the statement. If it would further the defense's interest to have the statement in evidence, counsel presumably will forgo all such objections, allow the statement to be admitted, and then use it to advance the defense's overall narrative and/or to undermine the prosecution's.

For discussion of the hearsay exception for co-conspirators' statements, see § 30.06(a) *infra*.

§ 30.04(b)(2) Anticipating Prosecution Objections to Defense Evidence as Hearsay

Whenever defense counsel wishes to present evidence of an out-of-court statement, s/he needs to anticipate a hearsay objection. The proffer of any hard-copy or electronic document or the enunciation of any sentence in the testimony of a defense witness that begins "He said" or "She said" may well draw a knee-jerk hearsay objection from the prosecutor or a knee-jerk exclusionary ruling (even without a prosecutorial objection) by the judge. Counsel must plan to get past this hurdle.

If the evidence comes squarely within the scope of a conventional hearsay exception – such as, for example, the business-records exception (*see*, *e.g.*, FED. RULE EVID. 803(6)) – counsel's first and easiest route around the hurdle is to ask the prosecutor to stipulate to its admissibility. Most prosecutors will do so; and, if they do not, counsel can raise the matter at a pretrial conference with some confidence that the judge will be displeased by this wasteful stonewalling. See § 27.10 *supra*. Before going the stipulation route, however, defense counsel

should consider whether s/he would gain some persuasive benefit from going through the motions of laying the foundation for the hearsay exception by the testimony of a witness or witnesses. If, for example, the witness who can be called to establish the elements of the business-records exception comes across as a model of crackerjack efficiency, his or her technical "foundation" testimony may also lend credibility to the contents of the record s/he produces.

If a stipulation is tactically unwise or is unobtainable, counsel must decide whether to attempt to get past the hearsay-objection hurdle by (1) taking the position that the out-of-court statement is not hearsay (because not offered for the truth), or (2) taking the position that the out-of-court statement is admissible within a hearsay exception, or (3) taking both positions. If s/he opts to take both positions, s/he should ordinarily respond to a prosecution objection by arguing position number (1) *first* and then proceeding on to position number (2). (By the time a lawyer has finished making a hearsay-exception argument, it will be obvious to the judge that counsel wants to get some truth-showing benefit from the evidence, and it will then not be easy to persuade the judge that counsel's not-for-the-truth arguments are genuine.) If position number (1) fails, position number (2) may save the day; and if position number (1) succeeds, position number (2) may broaden counsel's right to reason from the evidence in closing argument. (Should counsel prevail only on position number (1), the prosecution will be entitled in a jury trial to a jury instruction that the evidence is not to be considered for its truth.)

To prepare to defend position (1), counsel will need to go through an exhaustive analysis of (a) what ultimate facts are material (see § 30.03(a) third paragraph *supra*), and (b) what logical lines of reasoning could allow those facts to be inferred from the making or existence of the out-of-court statement without regard to its truth. Take this example: Counsel's client, Daniel, is charged with the theft of money which was kept in a jar behind a stack of canned goods on a shelf in the convenience store where Daniel worked the afternoon shift as a counter attendant. The store-owner, who had not had occasion to go to the jar for several days, discovered it missing one morning. Neither the jar nor the money has been recovered. The prosecution's case relies on the theory that Daniel was the only person other than the store-owner who knew that money was hidden in the store, plus the testimony of another employee, Willem, who worked the night shift. Willem will testify for the prosecution that Daniel had complained to Willem about "working seven days a week for piss-poor pay" and then bragged that he, Daniel, had "taught the cheapskate a lesson." Counsel's defense theory is that Willem was the real thief. Counsel wants to call a delivery-truck driver who made periodic evening stops at the store, to testify that, a few days before the theft, Willem told Driver that Daniel had told Willem that "the old man has got a wad of cash stashed somewhere in the store." Counsel's response to the prosecution's hearsay objection is that this conversation is not being offered for the truth but (i) to discredit Willem's testimony for bias, since Willem can escape suspicion himself by putting Daniel in the frame (*cf. Olden v. Kentucky,* 488 U.S. 227 (1988)); (ii) to show that Willem was as likely as Daniel to have stolen the money, since both had equal means and opportunity (*cf. Holmes v. South Carolina*, 547 U.S. 319 (2006); *United States v. Crosby*, 75 F.3d 1343 (9th Cir. 1996)); and (iii) to defeat the prosecution's premise that no one other than the store owner and Daniel knew about

the cache of money in the store – since Willem had not only evinced such knowledge but shared it with a casual acquaintance and was no less likely to have talked about it to other people as well. As these contentions suggest, two of the most commonly available routes around a hearsay objection are "state of mind" arguments: – that the mere making of the statement (without considering whether it is true) furnishes circumstantial evidence of the existence of relevant knowledge, motive, intention or bias on the part of either the out-of-court speaker or those to whom s/he spoke. Another nonhearsay theory that most judges can grasp when made in three words – "goes to credibility" – is that an out-of-court statement impeaches inconsistent testimony of a prosecution witness or bolsters consistent testimony of a defense witness whom the prosecution has accused of fabricating. *See State v. Garcia*, 245 N.J. 412, 246 A.3d 204 (2021) (in a prosecution for aggravated assault arising out of a fight, the trial judge erred in excluding a video of the defendant's family members attempting to tell his side of the story to police and being rebuffed: at trial the police testified that they had canvassed the scene for witnesses; the prosecutor argued that the family witnesses were not to be believed because they had not come forward and told their story to the police, and also that "common sense tells us, police don't ignore witnesses who have material information"; the court finds that the video impeaches the police testimony, permissibly bolsters the defense witnesses' testimony, and demonstrates the impropriety of the prosecutor's argument.).

To prepare to defend position (2) – that an out-of-court statement comes within a hearsay exception – counsel will need to drill a foundation witness to cover systematically all of the factual elements needed to bring the exception into play. To activate the business-records exception, for example, a defense witness will have to testify that: (i) s/he is the custodian of a set of records (ii) kept by a regularly conducted business or other organization, (iii) which maintains such records in the regular course of its activities, and (iv) that the particular record proffered was created and kept pursuant to that regular practice; and (v) was made at or near the time of the event or condition recorded, (vi) by a person with knowledge of the event or condition or from information transmitted by such a person. (Counsel may have to prove some of these elements circumstantially. Where – as is common – the original maker of a record is unavailable or has no recollection of making that particular record, elements (v) and (vi) can be established by having a witness who is familiar with the organization's general record-making and record-filing procedures testify that records of this kind: (A) are made in the first instance contemporaneously with the occurrences recorded, and (B) only by individuals with personal knowledge or a first-hand report of those occurrences, and (C) are inscribed in a particular, conventional form, and (D) are retained in a particular form and location; and that (E) *this* record was retrieved from the usual location of such records and that (F) it displays the characteristic form of those records.) The need to attend to minutiae in foundation-laying means that, if counsel wants to produce an efficient-looking, non-boring performance, witness rehearsal is crucial. See § 10.09(c) *supra*.

§ 30.04(c) The Confrontation Clause

The Supreme Court has emphasized that a primary goal of the Confrontation Clause is

not simply to "ensure reliability of [the prosecution's] evidence" but to "command[ ] . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination" (*Crawford v. Washington*, 541 U.S. 36, 61 (2004)). *See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 145-46 (2006) (dictum). Prior to the *Crawford* decision, Confrontation Clause claims were governed by a standard established in *Ohio v. Roberts*, 448 U.S. 56 (1980), which permitted the admission of prosecution evidence that was not subject to cross-examination if the proffered evidence fell within a "'firmly rooted hearsay exception'" or was shown to bear "'particularized guarantees of trustworthiness'" (*Crawford*, 541 U.S. at 60 (quoting *Roberts*, 448 U.S. at 66)). In *Crawford*, the Court rejected this approach, explaining that "reliability" and "trustworthiness" cannot be the benchmarks of compliance with the Confrontation Clause because "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability'" (541 U.S. at 61). *Crawford*'s new Sixth Amendment touchstone is a purportedly straightforward, bright-line rule barring prosecution evidence of any out-of-court "testimonial statement" unless (1) the declarant is "unavailable to testify" at trial, and (2) the defendant or juvenile respondent has had an adequate "prior opportunity for cross-examination" of the declarant (*id*. at 54; *see also id*. at 58, 59 & n.9, 68).

Although the Supreme Court has not as yet "spell[ed] out a comprehensive definition of [the term] 'testimonial'" (*id*. at 68; see also *id*. at 68 n.10 (acknowledging that "our refusal to articulate a comprehensive definition in this case will cause interim uncertainty")), the Court has made clear that the category of "testimonial statements" is a broad one, encompassing at least the following: testimony in a formal proceeding, such as "at a preliminary hearing, before a grand jury, or at a former trial" (*id*. at 68); affidavits prepared for litigation (*see id*. at 51-52; *see also, e.g.*, *United States v. Duron-Caldera*, 737 F.3d 988, 993-96 (5th Cir. 2013)); the transcript of a guilty-plea allocution by a suspect in the same murder with which the defendant was charged and who had pleaded out to a different charge and was unavailable to testify at the time of the defendant's trial (*Hemphill v. New York*, 142 S. Ct. 681 (2022) (rejecting a contention that the Confrontation Clause allowed the admission of this suspect's allocution because the defendant "opened the door" to it by presenting evidence to support a defense theory which it refuted); forensic analysis reports (such as, for example, a report in a drug sale or possession case that shows that "material seized by the police and connected to the defendant was [a controlled substance]"), at least where "the analysts' [written] statements . . . [were] prepared specifically for use at . . . trial" (*Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 329 (2009)); statements made to the police by a suspect in the course of police interrogation (*Crawford*, 541 U.S. at 52-53, 68-69); and (except in circumstances explained in the second paragraph after this one) statements made to the police by a civilian witness at the scene of a crime, when the police arrive to investigate shortly after the crime was reported (*see Davis v. Washington*, 547 U.S. 813, 829-32 (2006); *Michigan v. Bryant*, 562 U.S. 344, 355-59 (2011) (dictum)). *See also Commonwealth v. Brown*, 646 Pa. 396, 417-18, 185 A.3d 316, 329 (2018) (dictum) ("Pennsylvania law requires the preparation of autopsy reports in all cases of sudden, violent, and suspicious deaths, or deaths by other than natural causes, and in such cases, the autopsy and subsequent report are designed to determine whether the death occurred as the result of a criminal act. . . . Moreover, the law

requires the coroner or medical examiner charged with conducting and reporting the results of such autopsies to consult and advise the local district attorney to the extent practicable. . . . Accordingly, we determine the primary purpose for preparation of an autopsy report under these circumstances is to establish or prove past events potentially relevant to a later criminal prosecution and that any person creating the report would reasonably believe it would be available for use at a later criminal trial. Thus, we conclude the autopsy report in this case was testimonial."); *Lambert v. Warden Greene SCI*, 861 F.3d 459, 470 (3d Cir. 2017) (the prosecution's use against Lambert of statements which Lambert's co-defendant made to his defense psychiatrist prior to trial and which the psychiatrist recounted at trial in the co-defendant's defense case, were "testimonial" for Confrontation Clause purposes even though the statements "were not made with the primary purpose of creating evidence for the prosecution" and were not "made with the intent to accuse"; "in the context of the joint trial, Lambert needs only to show that . . . [the co-defendant's] statements to [the psychiatrist] . . . were made with the primary purpose of substituting for his in-court testimony about the crime"); *State v. Carrion*, 249 N.J. 253, 260, 265 A.3d 115, 119 (2021) ("[D]efendant Jose Carrion contends the trial court erred in admitting information contained in an affidavit from a non-testifying detective of the Firearms Investigation Unit of the Department of Law and Public Safety . . . . The admitted evidence showed that the non-testifying detective's search of the database revealed no permit existed authorizing Carrion to lawfully possess a handgun when one was seized by police from his home. Applying the test from decisions interpreting the federal Confrontation Clause, which we have adopted in our state confrontation jurisprudence, we conclude that, while the raw data contained in the database listing issued firearm permits is not 'testimonial' for purposes of a confrontation-right analysis, statements about the search of that database for information specific to defendant for use in his prosecution is testimonial. Here, the State's reliance on an affidavit by a non-testifying witness to introduce over defendant's objection the results of that search violated defendant's right to confront the witnesses against him."); *State v. Swaney*, 787 N.W.2d 541, 554 (Minn. 2010) (the Confrontation Clause applies not only to out-of-court statements of the nontestifying declarant but also to any "testimony that inescapably implies a nontestifying witness's testimonial hearsay statement"); *United States v. Ackerly*, 981 F.3d 70 (1st Cir. 2020) (upholding on plain-error review an order of a district court granting the defendant a new trial because the prosecution violated her right to confrontation by eliciting from one of her accomplices that another had pleaded guilty; "The government does not gainsay that a guilty plea constitutes a testimonial statement under *Crawford*" (*id*. at 76); before *Crawford*, both the Supreme Court and the First Circuit "interpreted the Confrontation Clause to bar the government from bringing to the attention of the jury, in the form of questions, certain information not admitted into evidence" (*id*. at 77); and nothing in *Crawford* changes that rule); *Taylor v. Cain,* 545 F.3d 327, 331, 335 (5th Cir. 2008) (the Confrontation Clause was violated when a police officer was permitted to testify that he "had a conversation with an individual and during this conversation, learned some information. I took this information that I learned and from that information was able to develop a suspect" and was then asked "And Detective, as per this end of your investigation, what was the name of your suspect?" and answered "First name only was Bruce [the defendant's given name]": "'Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-

examination . . . would eviscerate the constitutional right to confront and cross-examine one's accusers.'"); *United States v. Kizzee*, 877 F.3d 650, 655, 659 (5th Cir. 2017) (the Confrontation Clause was violated when a detective was permitted to testify that he asked a narcotics arrestee whether the defendant had sold the arrestee narcotics on the present occasion and on previous occasions and whether the arrestee had observed additional narcotics at the defendant's residence, and then "Based on your observations the day before that involved the surveillance at Mr. Kizzee's residence, the [police] stop . . . [of the informant which resulted in] the discovery of narcotics, and your subsequent interview of . . . [the arrestee], what did you . . . do?," to which the detective answered: "I was able to obtain a search warrant for . . . [Kizzee's address].": "Testifying officers may provide context for their investigation or explain 'background' facts. . . . Such out-of-court statements are not offered for the truth of the matter asserted therein, but instead for another purpose: to explain the officer's actions. . . . These statements often provide necessary context where a defendant challenges the adequacy of an investigation. But absent such claims, there is a questionable need for presenting out-of-court statements because the additional context is often unnecessary, and such statements can be highly prejudicial. . . . 'The need for this evidence is slight, and the likelihood of misuse great.' . . . Statements exceeding the limited need to explain an officer's actions can violate the Sixth Amendment – where a nontestifying witness specifically links a defendant to the crime, testimony becomes inadmissible hearsay."); *United States v. Hamann*, 33 F.4th 759, 763 (5th Cir. 2022) ("In the last fifteen years, we have vacated at least six convictions and affirmed at least two writs of habeas corpus for kindred reasons. The most recent of those cases was decided just a year before Hamann's trial. There, we reaffirmed what we had said many times: If the government elects to introduce out-of-court statements to attempt to provide context for its investigation, its use must be 'circumspect' and 'limited.' . . . Trial courts must be 'vigilant in preventing . . . abuse' to avoid 'the backdoor introduction of highly inculpatory statements.' . . . We reaffirm those principles today."); *People v. Jones*, 166 A.D.3d 803, 88 N.Y.S.3d 88 (N.Y. App. Div., 2d Dep't 2018) (prosecution witnesses qualified as experts in gang behavior were permitted to testify to conclusions based on their experience in debriefing scores of gang members who had been arrested and were in custody: "[C]ontrary to the People's contention, information derived from the debriefing of arrested S.N.O.W. Gang members constitutes testimonial statements within the meaning of *Crawford*. . . . The more difficult question presented is whether the substance of such statements was impermissibly conveyed to the jury by . . . [the experts] in the guise of expert testimony. We find that it was. ¶ For instance, when Georg, over defense counsel's objection, was asked about the basis for his decision to arrest the defendant and others who had congregated in Montbellier Park on April 1, 2014, on a charge of unlawful assembly, Georg specifically mentioned debriefings he had conducted with unnamed members of the S.N.O.W. Gang. While the Supreme Court promptly sustained an objection precluding Georg from conveying to the jury what the unnamed gang members had told him, the fact remains that the jury was made to understand that the basis for Georg's belief that the defendant was 'preparing to engage . . . in tumultuous and violent conduct'. . . was information obtained from Georg's prior questioning of arrested members of the S.N.O.W. Gang. Nor is there any indication that Georg merely relied on this hearsay information for the purpose of forming an independent opinion based on his own expertise."); *United States v. Charles*, 722 F.3d 1319, 1320-21, 1330-31 (11th Cir. 2013) (the Confrontation Clause was

violated by the admission of a Customs and Border Protection (CBP) officer's "testimony of the interpreter's statements of what [defendant] Charles said where Charles had no opportunity to cross-examine the interpreter" who "translated Charles's Creole language statements into English during the CBP officer's interrogation of Charles").

The 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*, 576 U.S. 237, 246 (2015); *Michigan v. Bryant*, 562 U.S. at 357 n.3), although it has observed that "at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns" and it has therefore "decline[d] to adopt a categorical rule excluding them from the Sixth Amendment's reach" (*Ohio v. Clark*, 576 U.S. at 246). The *Clark* case says "[n]evertheless, [that] such statements are much less likely to be testimonial than statements to law enforcement officers" (*id*.), and it upholds the admission of out-of-court statements of a three-year-old child to his public-school teachers, identifying the defendant as his sexual abuser, on the ground that "neither the child nor his teachers had the primary purpose of assisting in . . . [a criminal] prosecution" (*id*. at 240). "When . . . [the] teachers noticed . . . [the child's] 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 . . . [him] to his guardian at the end of the day, they needed to determine who might be abusing the child." *Id*. at 246. *Compare Ramirez v. Tegels*, 963 F.3d 604, 615 (7th Cir. 2020) ("Once at the hospital, although medical professionals appear to have conducted most of the questioning, Officer Larson was present and involved for at least some of the questioning. Officer Larson offered M.G. a teddy bear, which she used to show him where Mr. Ramirez had touched her. Immediately after the sexual assault examination, hospital staff reported to law enforcement what had happened in the examination room and provided evidence to law enforcement, regardless of whether Officer Larson was in the room. ¶ Hence, at least some of the questioning in the hospital examination room arguably functioned as a substitute for a police interrogation. The conclusion that the State urges us to reach – that statements made 'during the course of receiving medical treatment' are *per se* non-testimonial – would invite law enforcement officers simply to escort victims of any violent crime to a hospital (regardless of whether the victim sought or desired medical treatment), where law enforcement could then work with medical professionals to elicit testimonial statements from the victim in circumvention of the Confrontation Clause's protections.").

Thus far, the Court has definitively classified only one type of statement as falling outside the category of "testimonial" statements: "[s]tatements . . . 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. at 822). *See also id*. ("Statements . . . 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."); *Michigan v. Bryant*, 562 U.S. at 358 ("When, as in *Davis* [*v. Washington*], 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 [Confrontation] Clause"). 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. at 370). "[T]he existence *vel non* of an ongoing emergency" at the time of the police questioning is not "dispositive of the testimonial inquiry"; "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. *Compare Davis*, 547 U.S. at 827-28 (holding that a portion of a civilian witness's statements to a 911 operator during the course of a 911 telephone call was nontestimonial 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"; 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."), *with id*. at 829-30 (holding, in the companion case of *Hammon v. Indiana*, that an in-person statement to the police by the complainant in a domestic disturbance at her home was "testimonial" 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."), *and with State v. Jensen*, 2021 WI 27, 396 Wis. 2d 196, 957 N.W.2d 244 (Wis. 2021) ("Prior to her death, . . . [Jensen's wife] made several statements suggesting that, if she died, the police should investigate Jensen. She wrote a letter and gave it to her neighbor with instructions to give the letter to the police should anything happen to her. She also left two voicemails with Pleasant Prairie Police Officer Ron Kosman two weeks before she died stating that if she were found dead, Jensen should be Kosman's "first suspect." *Id*. at 200, 957 N.W.2d at 246. Prior to *Crawford*, the Wisconsin Supreme Court held these statements "testimonial" and inadmissible because their "primary purpose . . . was not to help the police resolve an active emergency but to 'investigate or aid in prosecution in the event of her death.'" *Id*. at 201, 957 N.W.2d at 247. Revisiting this holding in connection with Jensen's retrial, the Wisconsin Supreme Court finds it consistent with the post-*Crawford* decisions of the United States Supreme Court and therefore binding as the law of the case. *Id*. at 217, 957 N.W.2d at 255.); *cf*. *Commonwealth v. Fitzpatrick*, 255 A.3d 452, 460, 472-73 (Pa. 2021), summarized in § 30.04(b)(1) *supra*. *And see Michigan v. Bryant*, 562 U.S. at 371-78 (a mortally wounded shooting victim's statement to the police, in which the victim identified the shooter and described

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'": "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."); *Ohio v. Clark*, 576 U.S. at 247 (where, as summarized in the preceding paragraph, "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. . . . [The child]'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 . . . [the child]'s answers were primarily aimed at identifying and ending the threat. . . [by] identify[ing] 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 . . . [the defendant's] prosecution. On the contrary, it is clear that the first objective was to protect . . . [the child]."). In cases that lie on the *Davis-Hammon* continuum, counsel seeking to have a statement held "testimonial" should stress the following circumstances when they exist: (1) there was no need for immediate preventive or remedial non-prosecution-related official action at the time of the conversation; (2) the conversation concerned events that constituted a completed criminal episode; (3) the conversation had the tone of an ordinary police-witness interview; (4) it was conducted by or in the presence of, or at the instance of, a law-enforcement officer or prosecutor; and (5) the person being interviewed had some motive to abet prosecution of the perpetrator (for example, s/he was the victim of the crime or stood to gain some benefit from the authorities by cooperating in obtaining a conviction). *See, e.g.*, *McCarley v. Kelly*, 801 F.3d 652, 664-65 (6th Cir. 2015) (out-of-court statements by the murder victim's three-year-old son to a child psychologist, which were made during clinical interviews, were "testimonial" because "they were deliberately elicited in an interrogation-like atmosphere absent an ongoing emergency and used to prove past events in a later criminal prosecution": "Because Dr. Lord was questioning D.P. about the night of his mother's murder and reporting everything D.P. said that might be relevant to the investigation back to Lt. Karabatsos, Dr. Lord was acting more as a police interrogator than a child psychologist engaged in private counseling."; "D.P.'s statements to Dr. Lord occurred long after – ten days, to be precise – any emergency situation had

passed."; "The lieutenant unambiguously stated that his 'main concern' and the 'main reason' for D.P.'s sessions with Dr. Lord 'was to try to get the information' that police personnel could not elicit from D.P. – including the identity of the suspects – so that Lt. Karabatsos 'could use it in [his] investigation.'"); *State v. Tome*, 405 Mont. 292, 306-07, 495 P.3d 54, 63-64 (2021) (holding that the Confrontation Clause was violated in a statutory rape case when the prosecution was permitted to present in its case-in-chief testimony by three witnesses (a sexual assault nurse examiner, an investigating police officer, and a Department of Public Health and Human Services child protection specialist) reciting what the victim – a thirteen-year-old deaf and developmentally delayed girl who was found incompetent to testify – told them, together with the tape of a videorecorded interview of the girl by the DPHHS specialist; the Montana Supreme Court distinguishes *Ohio v. Clark* on the ground that the child's recitations to the witnesses "came 24 to 48 hours after the alleged crime, well after any potential ongoing emergency. The circumstances of each interview support a finding that the primary purpose was to gather evidence for a prosecution, and nothing suggests that the encounters were 'informal and spontaneous' as in *Clark*. . . . [The officer's] intent was to investigate . . . [a] report [by a school psychologist and a school behavioral specialist that the child had told them she was sexually abused]. As a result of . . . [the officer's] investigation, . . . [the SANE nurse] conducted a sexual assault examination of . . . [the girl] at the emergency room to gather evidence for the investigation. . . . [The girl's] forensic interview with [the DPHHS child protection specialist] arose from the necessity to investigate the report and occurred at the DPHHS office with law enforcement observing the interview from a separate room. The objective intent of each party indicates that the primary purpose was to gather evidence for a prosecution. . . . [The officer] was investigating a report of child abuse as a member of law enforcement. . . . [The] SANE nurse . . . gathered evidence of . . . [the girl's] condition for future criminal prosecution. . . . [The DPHHS specialist], as a forensic interviewer, testified that she intended to turn the interview over to law enforcement for placement into evidence. While . . . [the girl] was found not competent to testify, the record indicates that . . . [she] had previously called law enforcement on her parents and therefore possessed at least some awareness of the purpose of law enforcement. . . . [H]er statements were undoubtedly made for the primary purpose of furthering Tome's prosecution."); *State in the Interest of J.A.*, 195 N.J. 324, 329, 347, 348, 949 A.2d 790, 792, 803, 804 (2008) (statements by a witness to a police officer, "describing a robbery committed ten minutes earlier and his pursuit of the robbers," were "testimonial" and admitted in violation of the Confrontation Clause because "a declarant's narrative to a law enforcement officer about a crime, which once completed has ended any 'imminent danger' to the declarant or some other identifiable person, is testimonial"). "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." *Michigan v. Bryant*, 562 U.S. at 367-68. *See, e.g.*, *id*. at 375 (neither the police nor the declarant "had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution'"); *Ohio v. Clark*, 576 U.S. at 240. The Supreme Court has cautioned that 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, 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). *See also id*. at 828-29 ("[i]t could readily be maintained that" portions of the 911 call that followed the portion the Court classified as nontestimonial should be deemed "testimonial" because they followed the point at which "the emergency appears to have ended" and involved "a battery of questions" by the 911 operator). Thus, the Court has recognized that it may sometimes be necessary for judges to use an "*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). Regarding *in limine* procedures and redaction, see §§ 7.03, 27.12(c), 30.02(a), 30.02(b) *supra*.

In *dicta*, the Court has identified some other types of statements that may be non-testimonial for purposes of *Crawford*:

- "Business and public records . . . created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial" may be non-testimonial (*Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009) (dictum)). *See also id*. at 311 n.1; *Crawford*, 541 U.S. at 56. But the Court has made clear that a "business or official record[ ]" *is* "testimonial" if it was "prepared specifically for use at . . . trial" – as is the case, for example, when the prosecution seeks to "prove its case via *ex parte* out-of-court affidavits" of forensic analysts (*Melendez-Diaz v. Massachusetts*, 557 U.S. at 324, 329). *Accord*, *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011) (the Confrontation Clause prevents the prosecution from "introduc[ing] 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"; "[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."); *Martin v. State*, 60 A.3d 1100, 1102-09 (Del. 2013); *State v. Navarette*, 2013-NMSC-003, 294 P.3d 435, 436 (N.M. 2013). *Compare Williams v. Illinois*, 567 U.S. 50 (2012) (affirming a lower court's rejection of a Confrontation Clause challenge to the admission of a testifying expert witness's reference to information in a forensic report prepared by a different, non-testifying expert, but announcing this ruling without attaining a majority on the rationale: 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 "report itself was neither admitted into evidence nor shown to the [judicial] factfinder" in the bench trial (*id*. at 62); 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*.); and the judicial fact-finder could be relied upon to understand that the statement could not be "consider[ed] . . . for its truth" (*id*. at 79); a dissenting opinion by Justice Kagan, joined by Justices Scalia, Ginsburg and Sotomayor, concluded that the challenged statement "went to its truth" and therefore was inadmissible (*see id*. at 126);

Justice Thomas, who concurred in the plurality's judgment, thereby providing a fifth vote for affirming the lower court's ruling, stated that he "share[d] the dissent's view" that the "statements were introduced for their truth" (*id*. at 103, 109); he apparently agreed, also, that testimonial statements introduced for their truth are constitutionally barred at a bench trial (*id*. at 106 n.1), but he nonetheless joined the plurality in affirming the conviction because of his view that unsworn forensic reports like the one at issue in *Williams* "lack[ ] the requisite 'formality and solemnity' to be considered '"testimonial"' for purposes of the Confrontation Clause." (*id*. at 103)), *with United States v. James*, 712 F.3d 79, 94-96, 99, 102 (2d Cir. 2013) (concluding that "[n]o single rationale disposing of the *Williams* case enjoys the support of a majority of the Justices" and therefore it is necessary to view *Williams* as "confined to the particular set of facts presented in that case" and to continue to "rely on Supreme Court precedent before *Williams*"; the court of appeals applies the pre-*Williams* rule to hold that autopsy and toxicology reports that were challenged on Confrontation Clause grounds were not "testimonial" because they were "not prepared primarily to create a record for use at a criminal trial."), *and Garlick v. Lee*, 1 F.4th 122 (2d Cir. 2021) (agreeing with *James* that *Williams* provides no Confrontation Clause instruction and holding that where an "autopsy was performed in aid of an active police investigation" (*id*. at 134), in response to a detective's request (*id*.) and in the presence of two detectives (*id*.), and where "the final, signed autopsy report was delivered to the . . . District Attorney's Office" (*id*.), that report was clearly testimonial and inadmissible), *and Jenkins v. United States*, 75 A.3d 174 (D.C. 2013) (agreeing with the Second Circuit that "the splintered decision in *Williams*, which failed to produce a common view shared by at least five Justices, creates no new rule of law that we can apply in this case" (*id*. at 176) and that it is therefore necessary to continue to follow "pre-*Williams* precedent in the Supreme Court and in our own jurisdiction" (*id*. at 189); the D.C. Court of Appeals applies its pre-*Williams* precedent to hold that the trial court violated the Confrontation Clause by "permitt[ing] the government to present the entirety of its DNA evidence through the testimony of a single expert witness (*id*. at 176) – a "forensic examiner" in the "FBI DNA Analysis Unit" who "does not perform the tests on the biological material himself but, rather, is 'assisted by [b]iologists or technicians who actually perform the hands-on part of the testing' or 'DNA typing' in the laboratory" (*id*. at 190) – "without making available for cross-examination the laboratory analysts who performed the underlying serological and DNA laboratory work" (*id*. at 176), where the "serology and DNA testing was conducted for the primary purpose of establishing some fact relevant to a later criminal prosecution." (*id*. at 191)). *See also United States v. Duron-Caldera*, 737 F.3d at 994 n.4 ("In *Williams*, there is no common denominator between the plurality opinion and Justice Thomas's concurring opinion. Neither of these opinions can be viewed as a logical subset of the other. . . . As *Williams* does not yield a 'narrowest' holding that enjoys the support of five Justices, it does not provide a controlling rule useful to resolving this case."); Edward K. Cheng & Cara C. Mannion, *Unraveling* Williams v. Illinois, 95 N.Y.U. L. REV. 136 (2020); *and see Commonwealth v. Tassone*, 468 Mass. 391, 392, 399-402, 11 N.E.3d 67, 68, 72-75 (2014) (applying the State's "common law of evidence" to hold that "an opinion regarding the results of DNA testing

is admissible only where the defendant has a meaningful opportunity to cross-examine the expert witness about the reliability of the underlying data produced by such testing," and that "[h]ere, the defendant was deprived of a meaningful opportunity for such cross-examination because the analysts who generated the DNA profiles through DNA testing did not testify at trial, and the expert witness who offered the opinion of a match had no affiliation with the laboratory that tested the crime scene sample."). *And see generally* Lauren McLane, *Confronting the Twenty-First-Century Marian Examination*, 82 ALBANY L. REV. 949 (2018-2019).

- "[A] clerk's certificate authenticating an official record – or a copy thereof – for use as evidence" may be non-testimonial, but "a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it . . . [in a case in which the defendant's] guilt depend[s] on the nonexistence of the record for which the clerk searched" is testimonial (*Melendez-Diaz v. Massachusetts*, 557 U.S. at 322-23). *See also United States v. Martinez-Rios*, 595 F.3d 581, 585-86 (5th Cir. 2010); *State v. Kennedy*, 846 N.W.2d 517, 525-27 (Iowa 2014); *People v. Pacer*, 6 N.Y.3d 504, 847 N.E.2d 1149, 814 N.Y.S.2d 575 (2006); *State v. Jasper*, 174 Wash. 2d 96, 100, 114-16, 271 P.3d 876, 879, 886-87 (2012).

- Statements by a co-conspirator made during and in furtherance of the conspiracy may be non-testimonial. *See Crawford*, 541 U.S. at 56; *see also id*. at 58 (discussing *Bourjaily v. United States*, 483 U.S. 171 (1987)). See also § 30.06(a) *infra*.

- Some "dying declarations" may be non-testimonial. *Compare Crawford*, 541 U.S. at 56 n.6 ("many dying declarations may not be testimonial"), *with Michigan v. Bryant*, 562 U.S. at 395-96 (Justice Ginsburg, 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."); *and see State v. Williamson*, 246 N.J. 185, 211, 249 A.3d 478, 492 (2021) ("[w]e . . . choose to follow a majority of states in interpreting footnote six of *Crawford* as allowing dying declarations to be an exception to the Confrontation Clause").

Like the hearsay rule, "[t]he Confrontation Clause prohibits an out-of-court statement only if it is admitted for its truth" (*Woods v. Etherton*, 578 U.S. 113, 117 (2016)). In cases in which the prosecution seeks to evade the protections of the Clause by asserting that a statement is not being offered "for the truth of the matter asserted," the defense often will be able to challenge the validity of that claim. *See, e.g.*, *People v. Hopson*, 3 Cal. 5th 424, 425-26, 433-34, 396 P.3d 1054, 1056, 1061, 219 Cal. Rptr. 3d 717, 719, 725 (2017) (the prosecutor's introduction into evidence of an out-of-court statement, purportedly for a non-truth purpose, violated the Confrontation Clause because "the jury was never informed of the limited nonhearsay purpose for which . . . [the out-of-court statement] was ostensibly admitted, and, critically, the prosecution did not use . . . [the out-of-court statement] for any such limited purpose" and instead used it "for its truth"); *People v. Goldstein*, 6 N.Y.3d 119, 127-28, 843 N.E.2d 727, 732-33, 810

N.Y.S.2d 100, 105-06 (2005) (rejecting the prosecution's argument that the Confrontation Clause did not apply to a prosecution psychiatrist's testimony about hearsay statements underlying her diagnosis which "were not offered to establish their truth" and were offered merely to "help the jury in evaluating . . . [the psychiatrist's] opinion": "Since 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," and therefore the statements must be deemed to have been offered for the truth.). *See also Lambert v. Warden Greene SCI*, 861 F.3d 459, 470 (3d Cir. 2017) ("Because the[ ] [challenged out-of-court] statements were testimonial, we next determine if the prosecution used them for the truth asserted therein . . . . In making this determination, we are not to accept the prosecution's 'not-for-truth' rationale at face value, but instead must determine if there is a '"*legitimate*, non hearsay purpose,"' *Williams* [*v. Illinois*], 132 S. Ct. at 2257 (Thomas, J., concurring) . . . (emphasis in text), by 'thoroughly examin[ing] the use of the out-of-court [statements] and the efficacy of a limiting instruction.'"); *United States v. Jones*, 930 F.3d 366, 376-77 (5th Cir. 2019) (finding a Confrontation Clause violation where the prosecutor asked the arresting agent "How did you know that a drug deal had, in fact, occurred?" and the agent responded "So once . . . the other units saw what looked like a drug deal, *I made a phone call to my confidential source, who then made some phone calls himself and got back to me that the deal had happened*": the court rejects the Government's argument "that the informant's statements were not introduced for their truth, but simply to explain the actions of law enforcement officers" and it finds the Sixth Amendment error reversible even though "the district court instructed the jury that testimony regarding the confidential informant 'was admitted only to explain why law enforcement was conducting various surveillance operations,' and could not be used 'as evidence the defendant, or anyone else, actually engaged in a drug transaction.'"); *Orlando v. Nassau Cty. Dist. Attorney's Office*, 915 F.3d 113 (2d Cir. 2019), summarized in § 30.06(b) *infra*; *United States v. Nelson*, 725 F.3d 615, 620 (6th Cir. 2013) (rejecting the government's argument, in the context of a non-constitutional hearsay issue, that the content of a 911 call was "offered not for the truth of the matter asserted, but rather to show why the officers acted as they did": "[c]ontrary to the Government's position, the police officers' testimony about the 911 call . . . was effectively offered to prove the truth of the statements made" and was "thereby inadmissible" under FED. RULE EVID. 802.). Even if the judge accepts the prosecution's characterization of the statement as not being offered for the "truth of the matter asserted," defense counsel may be able to lodge a follow-up objection to the proffered evidence on the ground that the non-truth purpose for which the prosecution is seeking to admit the evidence is irrelevant or that the probative value of the evidence for that purpose is substantially outweighed by the prejudicial risk that the trier will impermissibly credit the evidence for its truth (see §§ 30.03(a), 30.03(c), 30.04(b)(1) third paragraph *supra*).

If the statement the prosecution seeks to admit is a "testimonial" statement by an unavailable witness that is offered "for the truth of the matter," then *Crawford* requires its exclusion unless the defense has had an adequate "prior opportunity for cross-examination" (*Crawford*, 541 U.S. at 68). In cases in which there was a probable-cause hearing and defense counsel cross-examined the now-unavailable prosecution witness at that hearing, the prosecutor may claim that the defense has had the requisite prior opportunity for cross-examination of the

witness. But *Crawford* presupposes an adequate opportunity to "test" the reliability of a witness's account in the "crucible of cross-examination" (*see id*. at 61), and usually probable-cause hearings are too limited in scope and depth to substitute for a full-blown, wide-ranging cross-examination at trial. *See*, *e.g.*, *People v. Fry*, 92 P.3d 970, 972 (Colo. 2004); *State v. Nofoa*, 135 Hawai'i 220, 230-34, 349 P.3d 327, 337-41 (2015); *People v. Torres*, 2012 IL 111302, 962 N.E.2d 919, 932-34, 357 Ill. Dec. 18, 31-33 (2012); *State v. Stuart*, 2005 WI 47, 279 Wis. 2d 659, 672-76, 695 N.W.2d 259, 265-67 (Wis. 2005). *Cf. Lee v. Illinois*, 476 U.S. at 546 n.6 (the 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"); *and see Corona v. State*, 64 So.3d 1232, 1241 (Fla. 2011) (discovery depositions, available to the defense in criminal cases under state rules, "do not meet *Crawford*'s cross-examination requirement" of "afford[ing] [the accused] an adequate opportunity to cross-examine the . . . declarant" because, *inter alia*, such depositions are "'not designed as an opportunity to engage in adversarial testing of the evidence against the defendant,'" and they are admissible at trial solely "'for purposes of impeachment'" and not as "'substantive evidence'"); *Blackston v. Rapelje*, 780 F.3d 340 (6th Cir. 2015) (the defendant's first conviction was vacated and he was retried. "Before the second trial was held, two of the state's key witnesses recanted their testimony. Because those witnesses were later determined to be unavailable at the new trial, the court ordered their earlier testimony read to the jury, while at the same time denying Blackston the right to impeach their testimony with evidence of their subsequent recantations." *Id*. at 344. "The Michigan Supreme Court found, and the state argues, that Simpson and Zantello were confronted adequately at the first trial and that further impeachment based on the recantations would be 'largely cumulative.' . . . ¶ We conclude that the difference between the recantations and the impeachment at the first trial was one of kind, not degree, and that the state court was objectively unreasonable in concluding otherwise." *Id*. at 354-55. "Finally, whether or not the state courts were justified in some 'skeptic[ism]' of Zantello's and Simpson's reliability, it was plainly a misapplication of Rule 403 [the applicable probative/prejudice balance rule (see § 30.03(c) *supra*)] to prevent the jury from hearing the recantations on that basis. The Confrontation Clause . . . applies regardless of whether the judge is swayed personally by the material's substantive persuasiveness. Nor are mere reliability concerns under Rule 403 the sort of 'paramount' state interests that would allow the exclusion of evidence, let alone trump a defendant's confrontation rights." *Id*. at 357.). Pre-court statements made by a prosecution witness who testifies at trial and which come within a hearsay exception that allows them to be considered for their truth are also admissible under the Confrontation Clause if the witness is subject to plenary cross-examination on them. But if a prosecution witness successfully resists cross-examination, the admission of such a pre-court statement violates the defendant's confrontation rights. *See State v. Hutton*, 188 Conn. App. 481, 205 A.3d 637 (2019) (finding a Sixth Amendment violation when the prosecution was allowed to present a videotaped statement given to the police by a turncoat accomplice who was called as a prosecution witness at trial but refused to answer any questions; the court's thorough opinion cites cases from other jurisdictions reaching the same result, whether the putative witness claims

the Fifth Amendment, is contumaciously recalcitrant, or is unresponsive as a result of disability).

The "unavailability" component of the exception to the Sixth Amendment's ban of testimonial statements is helpfully analyzed in *State v. Lebric,* 334 Conn. 492, 223 A.3d 333 (2020) (reversing a conviction on the ground that the trial court violated the defendant's constitutional right to confrontation by admitting the preliminary-hearing transcript of a key prosecution witness on the basis of the prosecution's claim that the witness was unavailable at the time of trial; the Connecticut Supreme Court notes that "under the confrontation clause of the sixth amendment, a witness is not unavailable '"unless the prosecutorial authorities have made a [good faith] effort to obtain his presence at trial"'" (*id*. at 508, 223 A.3d at 345) and it follows the lead of "the United States Circuit Courts of Appeals . . . [which] "have identified four objective criteria" for determining whether the prosecution's efforts are adequate: "'First, the more crucial the witness, the greater the effort required to secure his attendance . . . . Second, the more serious the crime for which the defendant is being tried, the greater the effort the [state] should put forth to produce the witness at trial. . . . Third, where a witness has special reason to favor the prosecution, such as an immunity arrangement in exchange for cooperation, the defendant's interest in confronting the witness is stronger . . . . Fourth, a good measure of [the] reasonableness [of the prosecution's efforts] is to require the [s]tate to make the same sort of effort to locate and secure the witness for trial that it would have made if it did not have the prior testimony available.'" *Id.* at 511-12, 223 A.3d at 347-48.). *See also State v. Tribble*, 193 Vt. 194, 67 A.3d 210 (2012) (reversing a conviction for Confrontation-Clause error when the preservation deposition of a medical examiner was admitted in the prosecution's case-in-chief; "[T]he United States Supreme Court's decisions in *Crawford*, *supra*, and *Melendez–Diaz*, *supra*,] make it clear that, when a witness is available for trial, the Confrontation Clause requires live testimony *at trial*, even when a defendant did have a prior opportunity to cross-examine the witness. In *Melendez–Diaz*, the Court required that the defendant be confronted 'at trial' and held that *both* the prior opportunity to cross-examine *and* unavailability at trial were necessary conditions for escaping the in-trial confrontation requirement." 193 Vt. at 208, 67 A.3d at 218. "[W]e cannot conclude based on the evidence in the record that Dr. Morrow was unavailable. Dr. Morrow indicated that attending the trial in person 'would be immensely inconvenient' for him and his employer, but also undisputedly indicated his willingness to return from New Zealand for the trial and that he would require a business class ticket. The State knew where Dr. Morrow was, and Dr. Morrow was willing to testify at the trial if the State made the necessary arrangements. There is no evidence that Dr. Morrow required the State to invoke any formal process to secure his attendance. The only two impediments to Dr. Morrow's testifying at the trial were inconvenience and cost. We have expressly rejected both of these as factors sufficient to support a finding of unavailability." *Id*. at 213, 67 A.3d at 222); *People v. Sardy*, 318 Mich. App. 558, 899 N.W.2d 107 (2017) (in a sexual abuse case, the 7-year-old victim testified at trial that she was unable to remember the events of the two incidents underlying the sexual abuse charges against her father; she testified only to some foundational and peripheral matters, and the trial court restricted cross examination to those matters; the trial court admitted her preliminary-examination testimony regarding the two incidents on the theory that the child was "unavailable" under Michigan hearsay doctrine and had been cross-examined at the PX; the Court of Appeals,

while acknowledging that the trial court's state hearsay-law ruling was correct, holds that the admission of her PX testimony violated the Confrontation Clause under Crawford because she was "unavailable" for federal Sixth Amendment purposes); *compare United States v. Owens*, 484 U.S. 554 (1988) (a pre-*Crawford* case finding no Confrontation Clause or hearsay violation when the victim of an assault resulting in a severe head injury testified at trial that he could not presently remember his assailant but did remember identifying the defendant as the assailant when questioned by an FBI agent before trial; defense counsel was permitted to cross-examine this witness "to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination . . . .) the very fact that he has a bad memory" (*id*. at 559), and this "'*opportunity* for effective cross-examination'" satisfied the Sixth Amendment (*id*.).).

In announcing a new standard for Confrontation Clause analysis of "testimonial" statements in *Crawford v. Washington*, the Supreme Court did not provide any guidance to the lower courts on how to apply the Confrontation Clause to statements that are classified as "non-testimonial." In the wake of *Crawford*, some lower courts concluded that the Confrontation Clause applies to non-testimonial as well as testimonial statements, and that the proper approach to assessing a Confrontation Clause challenge to admission of a non-testimonial statement is the pre-*Crawford* standard of *Ohio v. Roberts*, 448 U.S. 56 (1980). *See, e.g.*, *Summers v. Dretke*, 431 F.3d 861, 877 (5th Cir. 2005); *United States v. Hinton*, 423 F.3d 355, 358 n.1 (3d Cir. 2005); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004); *State v. Rivera*, 268 Conn. 351, 362-63, 844 A.2d 191, 200-01 (2004). But in *Davis v. Washington*, 547 U.S. 813 (2006), a post-*Crawford* decision, the Supreme Court later indicated that non-testimonial statements do not implicate the Confrontation Clause. *Davis* is a singularly unsatisfactory opinion because (1) it treats *Crawford* as having implicitly resolved that non-testimonial "hearsay . . . is not subject to the Confrontation Clause" (*Davis v. Washington*, 547 U.S. at 821, 823-24), whereas a close reading of the *Crawford* opinion readily reveals that *Crawford* nowhere addressed this issue, saying only 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 – as does *Roberts,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether" (541 U.S. at 68); and (2) the *Davis* Court's only other statement on the subject – a comment that "[a] limitation [of the Confrontation Clause to "testimonial" statements] so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter" (*Davis*, 547 U.S. at 824) – is palpably oblique. (*Compare Crawford*, 541 U.S. at 59 (rejecting a litigant's characterization of a prior decision by stating that the Court would not "authoritatively . . . announce" a significant doctrinal modification "in such an oblique manner").) *Davis* is therefore a prime candidate for rejection by state courts interpreting their state constitutional confrontation guarantees. See § 7.09 *supra*.

The Supreme Court has stated in *dictum* that an accused may "forfeit" the protections of the Confrontation Clause with respect to a witness's out-of-court statement by "obtain[ing] . . . the absence of . . . [the] witness by wrongdoing" (*Davis v. Washington*, 547 U.S. at 833). In making this statement, the Court explained that it was "tak[ing] no position on the standards

necessary to demonstrate such forfeiture" (*id*.). In *Giles v. California*, 554 U.S. 353 (2008), the Court definitively rejected a "theory of forfeiture by wrongdoing accepted by the California Supreme Court," explaining that the lower court's formulation diverged from "founding-era" and subsequent judicial conceptions of the "confrontation right" by failing to require a showing that the defendant not only caused the maker of the out-of-court statement "to be absent" but "engag[ed] in conduct *designed* to prevent the witness from testifying" and with the express "intent[ion] to prevent [the] . . . witness from testifying" (*id*. at 358-59, 368). *See also, e.g.*, *People v. Burns*, 494 Mich. 104, 115-17, 832 N.W.2d 738, 745-46 (2013) (evidence that the defendant "instructed" his infant daughter "'not to tell' anyone [about the alleged abuse] and warned her that if she told, she would 'get in trouble'" did not justify a finding of forfeiture of the Confrontation Clause by wrongdoing because the "defendant's contemporaneous statements to CB are as consistent with the inference that defendant's intention was that the alleged abuse go undiscovered as they are with an inference that defendant specifically intended to prevent CB from testifying"). Many jurisdictions have established standards for determining whether an accused's actions in procuring the absence of a prosecution witness should be deemed to forfeit the protections of the jurisdiction's hearsay rule, but often these standards address only the hearsay rule and do not address the distinct question of what standards and procedures govern a claim of forfeiture under the Sixth Amendment Confrontation Clause. *See, e.g.*, *United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002).

A few lower courts have permitted the introduction of an out-of-court statement, notwithstanding a Confrontation Clause violation, if "the defendant opened the door to the admission of limited testimonial statements as necessary to clarify, rebut, or complete a particular issue, such as questions concerning the adequacy of a police investigation." *People v. Hopson*, 3 Cal. 5th at 440, 396 P.3d at 1065, 219 Cal. Rptr. at 730 (dictum). *See id*. at 440-42, 396 P.3d at 1065-67, 219 Cal. Rptr. 3d at 730-32 (surveying caselaw on the issue). But those courts that have adopted such "an opening the door exception to the confrontation right have recognized it must be a limited one, lest the exception swallow the usual confrontation rule" (*id*. at 439, 396 P.3d at 1065, 219 Cal. Rptr. 3d at 730). *See id*. at 442, 396 P.3d at 1067, 219 Cal. Rptr. 3d at 732 (describing rulings to this effect in other jurisdictions and holding that "[s]imilarly, here, if the [prosecution's] goal [in introducing a confession by a non-testifying co-perpetrator] were simply to correct an incomplete and misleading impression [by the defendant in her testimony] that . . . [the co-perpetrator's] statements to defendant were the only statements that . . . [he] made about the crime, it would have sufficed to confirm that . . . [the co-perpetrator] later gave police a statement, 'without the need to go into the damning details' of what he said."). The validity of any "opening the door" exception to the Confrontation Clause is in doubt in the wake of *Hemphill v. New York*, 142 S. Ct. 681 (2022), where the Court rejected a New York State version of "door-opening" that allowed a trial judge to "admit[ ] unconfronted, testimonial hearsay against Hemphill simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct." *Id*. at 692. The Court stated emphatically that "under the [Confrontation] Clause, . . . it [was not] the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause." *Id*. The *Hemphill* opinion leaves open the

possibility that the "common-law rule of completeness" – which allows "a party '"against whom a part of an utterance has been put in, . . . [to] complement it by putting in the remainder"'" – "might allow the admission of testimonial hearsay against a criminal defendant," at least in some "circumstances." *Id*. at 693. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Request for Comments on Proposed Amendments to Federal Rules and Forms (Aug. 6, 2021), *available at* https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_-_august_2021_0.pdf, at pp.294-95, 299-303 (proposing to expand FED. RULE EVID. 106's rule of completeness for written and recorded statements to also cover oral statements and to state that an adverse party may invoke the rule of completeness "over a hearsay objection"). But even if the door-opening rationale might allow the prosecution to counter with testimonial hearsay in some narrow rule-of-completeness scenario, it is strongly arguable that the rationale can be applied no more broadly than that after *Hemphill*.

Crawford's prohibition against the admission of out-of-court, inculpatory, testimonial statements is not limited to cases in which the prosecution offers the text of the statement *verbatim*. Testimony paraphrasing the statement, describing its contents, characterizing its purport, or otherwise conveying to the trier of fact the incriminating thrust of the statement also violates a respondent's Confrontation Clause rights under *Crawford*. *See, e.g.*, *Ocampo v. Vail*, 649 F.3d 1098, 1108-13 (9th Cir. 2011) and cases cited ("Our conclusion is that before *Crawford* it was clearly established that testimony from which one could determine the critical content of the out-of-court statement was sufficient to trigger Confrontation Clause concerns, and that, far from undermining that standard, *Crawford* established principles with which that aspect of the pre-*Crawford* Confrontation Clause jurisprudence are fully consistent." *Id*. at 1108. "[I]t would be an unreasonable application of the core Confrontation Clause principle underlying *Crawford* to allow police officers to testify to the substance of an unavailable witness's testimonial statements as long as they do so descriptively rather than verbatim or in detail." *Id*. at 1109.); *State v. Swaney*, 787 N.W.2d 541, 554 (Minn. 2010) (the Confrontation Clause applies not only to out-of-court statements of the nontestifying declarant but also to any "testimony that inescapably implies a nontestifying witness's testimonial hearsay statement").

Whether the right to confrontation applies to criminal proceedings other than trial is an issue on which the courts are divided. *Compare Vasquez Diaz v. Commonwealth*, 487 Mass. 336, 346, 167 N.E.3d 822, 835 (2021) ("[t]oday, we join a minority of States that have held that there is a right to confrontation at a hearing on a motion to suppress."), *with State v. Zamzow*, 2017 WI 29, 374 Wis. 2d 220, 237, 892 N.W.2d 637, 646 (Wis. 2017) ("[w]e agree with those jurisdictions . . . concluding that the Confrontation Clause does not apply during suppression hearings"); *and see In re C.B.*, 865 S.E.2d 68, 76-77 & nn.11, 13 (W. Va. 2021) (dictum) (holding that the Confrontation Clause was violated at a juvenile transfer hearing by allowing a state police officer to testify to statements made to him by a nurse and a doctor regarding the nature and causes of injuries to an infant in a child abuse/neglect case).

§ 30.05 COMPETENCY OF WITNESSES

Delinquency cases often arise out of altercations between children. The complainant or witnesses to the offense may be so young that their competency to testify comes into question. "A number of States . . . mandate by statute that a trial judge assess a child's competency to testify on the basis of specified requirements. These usually include a determination that the child is capable of expression, is capable of understanding the duty to tell the truth, and is capable of receiving just impressions of the facts about which he or she is called to testify." *Kentucky v. Stincer,* 482 U.S. 730, 742 n.12 (1987) (citing to representative statutes). "Some States explicitly allow children to testify without requiring a prior competency qualification, while others simply provide that all persons, including children, are deemed competent unless otherwise limited by statute." *Id.*

Most jurisdictions that provide for competency inquiries follow the general rule that "'[t]here is no precise age which determines the question of competency [and that] . . . [t]his depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.'" *Id.* at 741 n.11 (quoting *Wheeler v. United States,* 159 U.S. 523, 524 (1895)). Some States, however, specify that children below a certain age are presumptively incompetent. *See, e.g.,* N.Y. FAM. CT. ACT § 343.1(2) (2022) ("[a] witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath"); *People v. Carrington*, 18 Misc.3d 1147(A), 859 N.Y.S.2d 897, 2008 WL 650055, at *8 (N.Y. Cty. Court, Westchester Cty. 2008) (granting the defendant's motion to dismiss the indictment because the court finds, "[b]ased upon an *in-camera* review of the grand jury minutes, the child's videotaped testimony, court file, motion papers and case law, . . . that the prosecutor improperly allowed the seven (7) year old child [witness] to testify as if under oath" and "there is no other corroborating evidence, on this record, that was presented to the Grand Jury").

The inquiry into competency usually takes the form of a *voir dire,* conducted when the child witness takes the stand (in some jurisdictions after the child has been administered the oath, in other jurisdictions as a prerequisite for the administration of the oath). If the child is a witness whom the prosecution seeks to present at trial, the qualifying questions are asked by either the prosecutor or the judge, and defense counsel is afforded the opportunity to cross-examine; if the child is a defense witness, either defense counsel or the judge will ask the qualifying questions, and the prosecutor will be allowed to cross-examine. "Children often are asked their names, where they go to school, how old they are, whether they know who the judge is, whether they know what a lie is, and whether they know what happens when one tells a lie." *Kentucky v. Stincer,* 482 U.S. at 741. *See also Harris v. Thompson*, 698 F.3d 609, 640-43 (7th Cir. 2012) (recognizing that in cases in which the defense plans to present a child witness who will be subject to a competency inquiry, defense counsel's preparation for the competency hearing should include at least the following: "[i]nterviewing . . . [the child witness] in advance . . . to familiarize . . . [the child] with the types of questions he would be asked" at the hearing; "anticipat[ing] the State's approach in challenging competency"; and "developing a rapport with an understandably nervous and reticent child").

In a jury trial, when defense counsel plans to challenge the competency of a child witness called by the prosecution, counsel should request that the *vor dire* on competency be held out of the presence of the jury. This request should be made at a pretrial conference or at the outset of the trial, before the jurors are brought in. See §§ 27.10, 29.02. Jurors will not take well to watching a defense attorney interrogate a child and succeed in excluding his or her testimony.

In cross-examining a child witness on *voir dire* for the purpose of showing that the witness is not competent to testify, counsel should consider exploring the following lines of cross-examination: (a) whether the child has told lies to his or her parent or other relatives or friends without the other individual ever finding out that s/he told a lie (this question can serve as a lead-in to the ultimate inquiry whether the child understands that lying is wrong; if the ultimate question is asked without a run-up, it is likely to get a canned affirmative answer); (b) if the child is very young, whether s/he believes that certain cartoon characters s/he watches on television are "real"; (c) what grade level s/he is in at school, whether s/he is in special education, and what types of grades s/he receives (for the purpose of arguing that the witness's educational deficits impair his or her competency to testify to a greater extent than his or her age alone would); and (d) whether the child has been coached by the prosecutor on what to say in the competency inquiry. *See, e.g.*, *In re J.M.*, 2006-Ohio-1203, 2006 WL 649627, at *5 (Ohio App. March 16, 2006) (the trial court abused its discretion by deeming the 12-year-old complainant to be competent to testify, based on routine *voir dire* questions and without thoroughly "delving . . . into the key issue of competency," despite "indications that [the witness] was in special education classes, that she had and continued to have imaginary friends, that she had at least one past diagnosis of schizophrenia, and that her ability to recollect even routine information such as the day, month, and year was severely limited"); *cf. Perry v. Commonwealth*, 390 S.W.3d 122, 127-28 (Ky. 2013) (the trial court violated "due process and fundamental fairness" by denying the defense's motion for "an independent psychological evaluation" of the child complainant, which "raised the issue of [the child complainant's] competency to testify in light of possible mental problems and effects of the psychotropic drugs he was taking" and "argued that [the child complainant] did not know the difference between truth and a lie").

§ 30.06 CO-RESPONDENTS', CO-CONSPIRATORS', AND OTHER ACCOMPLICES' STATEMENTS

§ 30.06(a) Admissibility of Co-conspirators' Declarations

Section 30.04(c) *supra* explained the general operation of the hearsay rule and its exceptions. A hearsay exception that is frequently invoked in criminal trials and sometimes in delinquency trials is a particularized version of the rule admitting out-of-court declarations of a party's agent against the party. For purposes of this rule, co-conspirators are treated as mutual agents, and declarations made by one conspirator in furtherance of the conspiracy are admissible against others. *See*, *e.g.*, *United States v. Alcorta*, 853 F.3d 1123, 1137 (10th Cir. 2017) ("Before admitting statements into evidence under the coconspirator exception to the hearsay rule, the district court must determine by a preponderance of the evidence that (1) a conspiracy existed,

(2) the declarant and the defendant were both members of the conspiracy, and (3) the statements were made in the course of and in furtherance of the conspiracy. . . . ¶ The trial court must state on the record its findings on the elements of the coconspirator exception."). In most jurisdictions the principle is applied to admit these hearsay declarations once a *prima facie* showing of conspiracy is made, whether or not conspiracy has been formally charged against the defendant or respondent. As noted in § 30.04(c) fifth paragraph *supra*, the Supreme Court has not yet resolved the question of whether statements by a co-conspirator made during and in furtherance of the conspiracy are non-testimonial and thus outside the ambit of Confrontation Clause protections. *See Crawford v. Washington*, 541 U.S. 36, 56 (2004); *see also id*. at 58 (discussing *Bourjaily v. United States*, 483 U.S. 171 (1987)).

When dealing with a prosecutor's invocation of the special rules for co-conspirators' declarations, counsel should keep in mind that:

(1) A condition of the admissibility of a co-conspirator's declaration is that a *prima facie* showing of conspiracy has been made. It is not sufficient that the declarant and respondent are each charged as principals to the same offense. Conspiratorial agreement must appear. *E.g.*, *People v. Bac Tran*, 80 N.Y.2d 170, 603 N.E.2d 950, 589 N.Y.S.2d 845 (1992); *Jenkins v. United States*, 80 A.3d 978 (D.C. 2013).

(2) The co-conspirator's declarations are admissible only if made within the duration of the conspiracy. Arrest of a conspirator is ordinarily viewed as terminating the conspiracy, or at least the arrested conspirator's part in it, for this purpose. The frequently heard prosecutorial contention that a criminal conspiracy implies a subsidiary conspiracy to conceal the crime and that the latter endures the dissolution of the former upon completion of the criminal exercise or apprehension of the conspirator has been rejected in federal criminal trials by the Supreme Court. *Krulewitch v. United States*, 336 U.S. 440 (1949). Although the Court refused in *Dutton v. Evans*, 400 U.S. 74 (1970), to constitutionalize the *Krulewitch* rule as an inflexible canon of Sixth Amendment Confrontation law, the *Dutton* decision is badly muddled by multiple opinions and multiple grounds, leaving open the strong possibility that at least some of the more extreme extensions of the states' "co-conspirator" doctrines will be held unconstitutional. A *dictum* in *Bourjaily v. United States*, *supra*, glosses *Dutton* as permitting post-arrest co-conspirators' declarations only upon a showing of particularized "indicia of reliability." *See Bourjaily*, 483 U.S. at 183 (characterizing *Dutton* as holding that a "reliability inquiry [is] required where [the state] evidentiary rule deviates from [the] common-law approach, admitting co-conspirators' hearsay statements made after termination of [the] conspiracy"). And the reasoning of *United States v. Inadi*, 475 U.S. 387 (1986), plainly implies that the co-conspirator's unavailability at the time of trial must be shown as well. A state obviously cannot be free to treat the suppositious "concealment phase" of a conspiracy as continuing through the time of trial (although its logic goes that far), since this would nullify the holdings of *Bruton v. United States*, 391 U.S. 123 (1968), and *Roberts v. Russell*, 392 U.S. 293 (1968), and of *Lee v. Illinois*, 476 U.S. 530 (1986) (discussed in § 18.10(a) *supra*, and in § 30.06(b) *infra*). It remains to be seen where the constitutional line will be drawn between *Dutton* and *Bruton*. *Crawford*'s reinvention of Sixth

Amendment Confrontation jurisprudence is a wild card in this calculus. See § 30.04(c) *supra*. In the meantime the very uncertainty of that line provides a persuasive argument that the state courts should adopt the safe and readily administrable *Krulewitch* rule – that all postarrest declarations of a conspirator are inadmissible against co-conspirators – as a matter of state law. *See, e.g.*, *State v. Rivenbark*, 311 Md. 147, 152-60, 533 A.2d 271, 273-77 (1987); *State v. Britt*, 293 Neb. 381, 399-400, 881 N.W.2d 818, 833 (2016) ("The federal courts and the overwhelming majority of state courts reject any argument that postcrime concealment is implicitly encompassed by the underlying conspiracy. The majority rule is that the agreement or understanding that forms the conspiracy does include an implied agreement that the conspirators will try to avoid apprehension after the crime has been committed. Therefore, absent an 'express original agreement among the conspirators to continue to act in concert in order to cover up' or an independent 'coverup conspiracy,' assertions are not excluded from the hearsay rule when made after the central aim of the conspiracy has ended and while the conspirators were acting in concert to conceal their prior criminal activity.").

Even if made during the conspiracy, a declaration is inadmissible unless made to further the aims of the conspiracy. The rule of thumb, used by a number of trial judges, that admits any statement of a conspirator before dissolution of the conspiracy is erroneous. Co-conspirators' statements are admissible only "when made in the course *and* in furtherance of the conspiracy," *Bourjaily v. United States*, 483 U.S. at 183 (emphasis added). *See*, *e.g.*, *State v. Anders*, 331 S.C. 474, 503 S.E.2d 443 (1998).

§ 30.06(b) Admissibility of Co-respondents' Declarations at a Joint Trial

Section 18.10(a) *supra* describes the *Bruton* doctrine, which governs adult criminal cases in which the prosecution offers evidence of a co-defendant's out-of-court statements implicating the defendant. As explained there, in any trial in which the co-defendant will not testify, *Bruton* effectuates the defendant's Sixth Amendment right to confront and cross-examine the co-defendant as a declarant by requiring either severance of the co-defendant's trial or redaction of the statements to eliminate any reference to the defendant. *e.g.*, *Orlando v. Nassau Cty. Dist. Attorney's Office*, 915 F.3d 113 (2d Cir. 2019) (reversing a conviction for *Bruton* error where officers who had simultaneously interrogated the defendant and an accomplice testified that the defendant changed his initial statement when confronted with conflicting statements of the accomplice; despite a jury instruction that the contents of the accomplice's statements were not being admitted for their truth but only to provide context for the defendant's change of story, their admission violated the defendant's Sixth Amendment right to confrontation: "Although the non-testifying witness in *Bruton* was a codefendant in a joint trial, *Bruton* applies equally to the testimonial and incriminating statements of non-testifying accomplices tried separately." *Id*. at 122.); *Freeman v. Capozza*, 517 F. Supp. 3d 407, 409-10 (E.D. Pa. 2021) (in a prosecution for kidnapping, murder and related offenses allegedly committed by four confederates – Freeman, Collier, Miller and Teel – *Bruton* was violated by the admission of Miller's confession at a joint trial of Miller, Collier and Freeman; "[T]he references to Teel's name (which were not redacted since he pled guilty), combined with the fact that Miller's statements referred to himself in first

person, precluded the possibility that Teel or Miller were 'the first guy' or 'the second guy' in Miller's statements [as redacted in an apparent effort to satisfy *Bruton*]. Because there were only two other defendants on trial, a juror '"need only lift [their] eyes to [Collier and Freeman], sitting at counsel table" to determine that [they were] "the other guy[s]"' involved in the crimes."); *Wynn v. United States*, 241 A.3d 277, 285 (D.C. 2020)
("[H]ere, the government blatantly linked appellant to 'the other guy' [in the codefendant's redacted confession] by prefacing the redacted interview with testimony that . . . [the codefendant] knew . . . [the defendant]. This is precisely the type of extrinsic evidence of a defendant's identity that runs afoul of *Bruton*. The government . . . [argues] that, by the time the government elicited . . . [a detective's] testimony preceding the introduction of the redacted interview, the jury had already heard testimony that . . . [the codefendant] and . . . [the defendant] were acquaintances. But that argument undercuts the government's position. If the jury had already heard about . . . [the codefendant's] familiarity with . . . [the defendant], then eliciting the same testimony, without more, was seemingly a non sequitur that served no apparent purpose other than to impermissibly link . . . [the defendant] to the person referenced in the redacted interview. . . . At bottom, by eliciting testimony that 'blatantly link[ed]' . . . [the defendant] to the unnamed individual referenced in . . . [the codefendant's] redacted interview just before that interview was read to the jury, the government violated . . . [the defendant's] Sixth Amendment confrontation right.").

As § 18.10(a) further explains, some state courts have held that the *Bruton* rule does not apply in juvenile delinquency bench trials. Such rulings typically are based on the rationale that a judicial trier of fact is capable of applying the co-respondent's confession solely to the determination of the co-respondent's guilt. But *Lee v. Illinois*, 476 U.S. 530 (1986), provides a basis for challenging that premise and urging that *Bruton* should extend to bench trials. See, again, section 18.10(a).

If the judge at a joint bench trial does permit the introduction of a co-respondent's statement implicating the respondent, it is clear that any "use [of the] hearsay evidence as substantive evidence against the [respondent]" (*Lee v. Illinois*, 476 U.S. at 542) would violate the respondent's constitutional right to confrontation. *Id.* at 542-46. *See, e.g., In re Appeal No. 977 from Circuit Court of Baltimore County,* 22 Md. App. 511, 323 A.2d 663 (1974); *In the Matter of Quinton A.,* 49 N.Y.2d 328, 338-39, 402 N.E.2d 126, 131-32, 425 N.Y.S.2d 788, 793-94 (1980); *W.B. v. State,* 356 So.2d 884 (Fla. App. 1978). As the Court explained in *Lee v. Illinois,* in ruling that the use of a co-defendant's statement to convict the defendant in a bench trial violated this Sixth Amendment right, "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." 476 U.S. at 545. *See also Lilly v. Virginia*, 527 U.S. 116, 127-28, 131-34 (1999) (plurality opinion). Moreover, since the portions of the co-respondent's statement implicating the respondent cannot be used as substantive evidence against the respondent and have little probative value in establishing the co-respondent's guilt, counsel can argue that these "presumptively unreliable . . . passages" (*Lee v. Illinois*, 476 U.S. at 545) should be excluded

from evidence altogether. Counsel can argue that, notwithstanding the judge's capacity to disregard this evidence in deciding the respondent's guilt, such redaction is a reasonable prophylactic measure to prevent even the possibility of prejudice to the respondent. See §§ 30.02(a)(1), 30.03 *supra;* see also § 20.05 *supra.*

(If the prosecution seeks to introduce an out-of-court statement by an accomplice who is *not* being tried jointly with the respondent and who is not testifying at trial, the statement will ordinarily be barred by both local hearsay rules and the Confrontation Clause (see §§ 30.04(b), 30.04(c) *supra*) unless it comes within the exception for co-conspirators' statements made during and in furtherance of the conspiracy (see § 30.06(a) *supra*).)

In cases in which an accomplice testifies for the prosecution, there are no hearsay or confrontation problems because the accomplice is available for cross-examination by the respondent's attorney. There are, however, state-law doctrines prohibiting conviction of a respondent solely on the basis of the uncorroborated testimony of an accomplice. See § 35.04 subdivision (ii) *infra.* In a case in which a co-defendant pleads guilty during the trial and then is called to the witness stand by the prosecution to testify against the defendant, counsel should request that the judge impose whatever limitations on the testimony are needed to exclude information the former co-defendant may have learned as a result of joint defense planning, and counsel also should seek whatever jury instructions are needed to guard against prejudice from the former co-defendant's guilty plea and change of status. *See United States v. Barret*, 848 F.3d 524, 533-34 (2d Cir. 2017).)

§ 30.07 ADMISSIBILITY OF EVIDENCE OF CONVICTIONS, OTHER CRIMES, OR [BAD] ACTS BY THE RESPONDENT OR A WITNESS FOR THE PROSECUTION OR DEFENSE

§ 30.07(a) Proof of Character, Propensity, Other Crimes or [Bad] Acts of the Respondent in the Prosecution's Case-in-Chief

Immemorial Anglo-American common-law practice forbids the prosecution to present evidence of a criminal defendant's or juvenile respondent's character, reputation, or predisposition as the basis for an inference that s/he committed the offense for which s/he is presently being tried. That prohibition continues in virtually all jurisdictions today. FED. RULE EVID. 404(a)(1) illustrates its prevalent formulation: "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."

A parallel, pervasive prohibition has long forbidden proof of a respondent's prior convictions or of his or her commission of criminal or other "bad" acts distinct from the present charge for the purpose of demonstrating the likelihood that s/he committed the present charge. The latter rule is often described as having "exceptions" – as allowing, for example, proof of the respondent's identity as the perpetrator of the presently-charged offense by evidence that s/he

committed criminal acts with a similar, signature *modus operandi* on other occasions. This conceptualization of the subject in terms of "exceptions" to a general rule prohibiting "other crime/other [bad]-act" evidence generally is good news for the defense if counsel can get the judge to buy it. But a more accurate analysis of the doctrine in most jurisdictions is that the rule prohibits prosecution evidence of a respondent's other crimes and bad behavior *only when that evidence is offered for the sole purpose of showing that the respondent is predisposed by character to commit a crime like the present one*; and that the point of the "exceptions" is that such evidence is admissible for any other purpose for which it is relevant (subject to limitations described in the following paragraphs). FED. RULE EVID. 404(b) (2022) illustrates the usual shape of this evidentiary restriction:

> "[Rule 404](b) Crimes, Wrongs, or Other Acts.
>
> "(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> "(2) Permitted Uses . . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

See also Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 HOFSTRA L. REV. 851 (2017). The reason why we have bracketed the word "bad" in the preceding section titles and text is that, although that adjective or one of its synonyms was traditionally included in the statement of the common-law precept and is often thought by judges to be one of the precept's doctrinal elements, contemporary evidence rules like Rule 404(b)(1) explicitly refer to any "other act" – bad, good, or indifferent: – anything, in other words, that is not encompassed in the scenario comprising the present criminal charge, its setting, or its background. Two additional changes in the traditional treatment of this subject were introduced by federal and state legislation and rules revisions beginning in the 1990's and are now widespread: *First*, a genuine exception to the prohibition of other-crime evidence to show propensity or predisposition was created for designated sex crimes (particularly sexual offenses against children). *See*, *e.g.*, FED. RULE EVID. 413(a), 414(a) (2022); *United States v. Hruby*, 19 F.4th 963 (6th Cir. 2021). *Second*, in cases in which other-crime-and-[bad]-act evidence is made admissible, the prosecution is often required to serve pretrial notice of such evidence on the defense (routinely or in response to a defense request). *See*, *e.g.*, FED. RULE EVID. 404(b)(2), 413(b), 414(b) (2022). The precise terms of these changes vary from State to State, as do the procedures which have evolved to permit defendants and juvenile respondents to enforce the applicable restrictions on the prosecution's use of "other crime/other [bad]-act" evidence. Particularly where pretrial notice of such evidence is required, courts are increasingly coming to entertain defense motions *in limine* seeking to exclude or limit such evidence. See §§ 7.03, 30.02(a)(1), 30.03(a)(2) *supra*. Local practice must be consulted.

The courts are usually fairly vigilant to enforce whatever restrictions local law imposes on the use of "other crime/other [bad]-act" evidence – and to exclude altogether proof of bad character traits through evidence of reputation or proof of criminal propensity through diagnostic or anecdotal evidence – because all jurisdictions recognize the historicity and fundamental principle of the rule "disallow[ing] resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt" (*Michelson v. United States,* 335 U.S. 469 (1948)). *See*, *e.g.*, *Old Chief v. United States*, 519 U.S. 172, 180-82 (1997); *United States v. Brizuela*, 962 F.3d 784, 793 (4th Cir. 2020) ("[s]uch 'propensity evidence is excluded because it might "overpersuade" a jury and cause them to "prejudge one with a bad general record"'"); *United States v. Wells*, 879 F.3d 900, 914, 917 (9th Cir. 2017) (the admission of the testimony of a forensic psychologist tendered as an expert in "'targeted, intended workplace multiple-homicide violence'" as the basis for "invit[ing] the jury to find a 'fit' between . . . [the expert's] criminal profile [testimony purporting to describe "the personality and other psychological characteristics of those who commit these types of crimes"] and the lay witnesses' testimony concerning . . . [the defendant's] own character traits" was reversible error; this testimony constituted forbidden bad-character evidence under Federal Evidence Rule 404(a)(1); the court reviews the state and federal caselaw rigorously limiting the admissibility of criminal-profile evidence to circumstances in which it is not used to show propensity); *Jackson v. State*, 166 So.3d 195, 198-99 (Fla. App. 2015); *Amey v. State*, 331 Ga. App. 244, 248-54, 770 S.E.2d 321, 326-29 (2015); *People v. Ullah*, 216 Mich. App. 669, 550 N.W.2d 568 (1995); *State v. Hembree*, 368 N.C. 2, 13-14, 770 S.E.2d 77, 85 (2015); *State v. Jones*, 450 S.W.3d 866, 890-91 (Tenn. 2014); *Rojas v. People*, 2022 CO 8, 504 P.3d 296, 300-01 (Colo. 2022) ("Today, we discard a troublesome relic from Colorado's common law of evidence: the res gestae doctrine. ¶ . . . Although it has morphed over time, the res gestae doctrine these days is often used as a shortcut for admitting character evidence about criminal defendants. While we seek to ensure that defendants are tried for the crimes with which they've been charged and not for seeming to have a propensity to engage in criminal conduct, . . . res gestae evidence – septic though it sometimes may be – has been admitted because it is 'linked in time and circumstances to the charged crime' or 'is necessary to complete the story of the crime for the jury.' . . . In short, we have treated res gestae evidence, in various ways, as intrinsic to the charged offenses and therefore not subject to the rules limiting the admissibility of extrinsic, uncharged misconduct evidence. But because res gestae is so ill-defined, such uncharged misconduct evidence too often dodges the rules and slips into cases without the requisite scrutiny. ¶ . . . It is time for us to bury res gestae. This court's adoption of the Colorado Rules of Evidence more than four decades ago should have rendered the res gestae doctrine obsolete. . . . [U]ncharged misconduct evidence that meets certain requirements can be admitted to show, for example, that a defendant had the motive, opportunity, or intent to commit the charged offense. CRE 404(b). By continuing to rely on res gestae as a standalone basis for admissibility and allowing the vagueness of res gestae to persist next to these more analytically demanding rules of relevancy, we have created a breeding ground for confusion, inconsistency, and unfairness. ¶ . . . Therefore, we join other jurisdictions that have abandoned this always-nebulous and long-superfluous doctrine."); *United States v. Charley*, 1 F.4th 637, 640 (9th Cir. 2021) (in the prosecution of a woman for assaulting her boyfriend, the defendant claimed self-defense and testified that the boyfriend had assaulted her

on three previous occasions; in rebuttal, the prosecution was permitted to present evidence that the defendant had behaved violently toward members of her family – not her boyfriend – when she was drunk on two occasions 24 and 36 months prior to the charged offense, and the trial judge instructed the jury that this evidence could be considered only for whatever bearing it might have upon the defendant's intent, motive and identity; the Court of Appeals reverses the conviction for error in allowing this rebuttal evidence: "Rule 404 of the Federal Rules of Evidence prohibits evidence about a defendant's character trait to prove that the defendant committed the charged crime when he acted in accordance with that character trait. The rule is rooted in the 'basic premise of our criminal justice system' that '[o]ur law punishes people for what they do, not who they are.' *Buck v. Davis*, 137 S. Ct. 759, 778 . . . (2017) (Roberts, C.J.). Courts, as gatekeepers of evidence, are tasked with ensuring that a jury convicts a defendant based only on his alleged conduct and mental state underlying the charged crime, not based on his generalized disposition or tendency to act in a particular way – however offensive his behavior may have been in the past."); *State v. Thomas*, 2017-Ohio-8011, 152 Ohio St. 3d 15, 26, 92 N.E.3d 821, 831 (2017) (plurality opinion) ("the trial court committed plain error in admitting evidence that Thomas owned other knives unrelated to the murder. This evidence painted Thomas as someone with bad character and allowed the jury to convict him on the basis that he acted in conformity with it, violating Evid.R. 404(B)."); *State v. Vazquez*, 198 Wash. 2d 239, 494 P.3d 424 (2021) (reversing a conviction because trial counsel was ineffective, largely in failing to object to other-crimes evidence including the prosecutor's eliciting from the defendant on cross-examination that she had a substantial prior felony record; the Washington Supreme Court holds, *inter alia*, that the defendant did not open the door to this evidence by testifying on direct that when the police approached the meth house in which she and other persons lived, she hid from them because she had an outstanding arrest record for failing to check in with her probation supervision officer); *cf. State v. Plain*, 898 N.W.2d 801, 822, 826-27 (Iowa 2017) (the prosecution introduced a redacted recording of a 911 call made during the criminal incident containing statements that the defendant "was wearing a GPS monitoring device and was not afraid to go 'back to prison'"; defense counsel, who had listened to the tape before trial but failed to object to these statements, listened again that evening, noted the statements and moved for a mistrial the next day; the Iowa Supreme Court holds the evidence inadmissible but finds that under the circumstances a curative instruction that in "the 911 recording, there may have been references to a GPS monitoring device and/or time spent in prison . . . [and t]he jury is to disregard any [such] statement[s]" was a sufficient corrective to obviate the need for a mistrial.); *and see McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993) (holding that admission of propensity evidence in a state murder trial violated federal constitutional Due Process: "[T]he evidence in this case is emotionally charged. The prosecution used evidence of the Gerber knife, which could not possibly have been used to commit the murder, to help paint a picture of a young man with a fascination with knives and with a commando lifestyle. The prosecutor raised the issue on cross-examination of why McKinney had purchased a knife with a black blade, asking him whether it was because such knives are favored by commandos because they do not reflect light. The jury was offered the image of a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body. This evidence, as discussed above, was not

relevant to the questions before the jury. It served only to prey on the emotions of the jury, to lead them to mistrust McKinney, and to believe more easily that he was the type of son who would kill his mother in her sleep without much apparent motive."); *Commonwealth v. Carter*, 488 Mass. 191, 205-06, 172 N.E.3d 367, 382 (2021) (in a prosecution for a murder committed with a nine millimeter handgun, it was error to admit evidence that the defendant had been arrested during the preceding year for possession in his home of a handgun of that caliber: "'the prejudicial impact on the jury is likely to outweigh the "tenuous relevancy of evidence of a person's general acquaintance with weapons."'"; "Furthermore, while the prior arrest evidence may have established Carter's familiarity with the kind of firearm used in . . . the murder [at issue], it ultimately was used for an improper purpose when the prosecutor urged the jury during closing argument to conclude, based on the prior arrest, that it was Carter's larger responsibility to 'hav[e] access to those guns' and his 'role' to supply gang members with firearms. Carter's arrest for unlawful possession of a firearm, without more, does not reasonably support such an inference."; also, evidence of gang affiliation was erroneously admitted in the absence of any showing that the murder was connected with gang activity (*id*. at 206-07, 172 N.E.3d at 382-83)); *Kipp v. Davis*, 971 F.3d 939 (9th Cir. 2020) (holding that, in a state rape-murder trial, the admission of evidence of the defendant's commission of an unrelated, unadjudicated rape-murder clearly violated federal constitutional Due Process: the prosecution's contention that the evidence was admissible to show identity and intent is rejected because the two murders were factually dissimilar.); *cf. Towles v. State*, 168 So.3d 133 (Ala. 2014) (under Alabama's evidence rule that tracks Federal Evidence Rule 404(b), the Alabama Supreme Court holds that in a prosecution for beating the defendant's younger son to death, evidence that the defendant repeatedly beat his older son was admissible for the purpose of showing motive, but the court reverses the defendant's conviction because the trial judge's instructions to the jury allowed consideration of the older boy's testimony to be used to prove not only motive but intent). And even when the "other crimes" evidence falls within one of the technically admissible categories, it is still subject to exclusion in the discretion of the trial judge if its prejudicial impact outweighs its probative value (see § 30.03(c) *supra*). *E.g.*, *United States v. Scott*, 677 F.3d 72, 74, 81, 82, 84 (2d Cir. 2012) (the trial court abused its discretion and committed reversible error by permitting the prosecution to introduce "testimony from two police detectives that they were familiar with . . . [the defendant] and had spoken to him on numerous occasions prior to his arrest in the instant case": identity was not "an issue *in dispute*," especially where it was conceded by defense counsel in opening statement, and "what little probative value this testimony may have had was substantially outweighed by the risk of unfair prejudice" in that the jury would likely "assume that the defendant's lengthy and numerous contacts with the police were . . . related to his bad character and criminal propensity."); *Minch v. Commonwealth*, 630 S.W.3d 660, 667 (Ky. 2021) (reversing convictions for sexual exploitation of a minor, sexual abuse of a minor, and possession of depictions of sexual performances by a minor: "The Commonwealth informed the jury in its opening statement that Minch had on his computer 5,000 unindicted images and videos depicting child pornography . . . . [One detective] testified about the unindicted images and relayed that, during Minch's arrest, he found hundreds of images of infants and toddlers like those for which Minch was indicted. . . . [Another detective] testified about the unindicted images and labelled them pornographic. He stated that 925 images of child sex-abuse material

were found on Minch's phone and that 4,622 pornographic images and 1,005 pornographic videos were also found on Minch's computer during the investigation. The Commonwealth asked Bell to repeat those numbers for the jury. ¶ We conclude the trial court erred when it allowed the Commonwealth to introduce the number of unindicted images because those images were not relevant to anything at issue with respect to the possession charges and their risk of prejudicial harm substantially outweighed their probative value such that they could not have been introduced to prove Minch's exploitation charges."); *State v. Tarver*, 2021 WL 5356303, at *11 (N.J. Super. 2021) ("We conclude the trial court mistakenly applied its discretion in admitting a voluminous amount of evidence of uncharged claims related to defendant giving alcohol and marijuana to an underaged Darren and engaging in sexual misconduct outside our state. As the court found, such evidence helped the State demonstrate defendant's plan and intent to groom Darren, as well as the 'progression' of their inappropriate relationship. But it was not needed 'to provide necessary background information' about the relationship . . . . The evidence presented to support the charged sex abuse against Darren in New Jersey served the same purpose. Thus, the admission of the additional alleged uncharged bad acts evidence that occurred outside New Jersey or involved minors other than Darren was not necessary. Such evidence was inherently inflammatory as it had the probable capacity to divert the jurors' minds from a reasonable and fair evaluation of whether defendant was guilty of the charged offenses. Indeed, there was more than enough probative admissible evidence available to the State, e.g., the text messages between Darren and defendant and Darren's testimony about the abuse that occurred in New Jersey, to prove the charged offenses."); *State v. Brumbach*, 273 Or. App. 552, 359 P.3d 490 (2015), summarized in § 30.03(c) *supra*; *Randolph v. State*, 136 Nev. 659, 477 P.3d 342 (2020); *State v. Everett*, 296 Kan. 1039, 297 P.3d 292 (2013); *People v. Robinson,* 68 N.Y.2d 541, 549, 503 N.E.2d 485, 490, 510 N.Y.S.2d 837, 842 (1986) ("[p]rejudice involves both the nature of the crime, for the more heinous the uncharged crime, the more likely that jurors will be swayed by it, and the difficulty faced by the defendant in seeking to rebut the inference which the uncharged crime evidence brings into play"); *Campbell v. United States,* 450 A.2d 428, 430 (D.C. 1982).

If defense counsel elects to present character witnesses, this will ordinarily be deemed to open the door to the prosecution's proof of bad character in rebuttal. See § 33.17 subdivision (4)(a) *infra;* see also §§ 30.07(b), 33.06 subdivision (J), 33.09(a) *infra. See, e.g.*, N.Y. FAM. CT. ACT § 344.1(2). But any attempt by the prosecutor to introduce "other crime/other [bad]-act" evidence in the prosecution's case-in-chief should be resisted under the principles of the preceding paragraph. Counsel can cite the very strong language found in a number of judicial opinions to the effect that the exclusion of such evidence is "one of the most fundamental notions known to our law" (*United States v. Beno,* 324 F.2d 582, 587 (2d Cir. 1963); *see, e.g., Ali v. United States,* 520 A.2d 306, 309-10 (D.C. 1987)), arising "out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence" (*Lovely v. United States,* 169 F.2d 386, 389 (4th Cir. 1948); *see State v. Melcher*, 140 N.H. 823, 830, 678 A.2d 146, 151 (1996)). *And see Michelson v. United States,* 335 U.S. at 475-76 ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The

overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."); *State v. McCarthy*, 156 Vt. 148, 155, 589 A.2d 869, 873 (1991) ("Evidence of uncharged crime creates a 'grave danger of prejudice,' . . . such that it is 'the most prejudicial evidence imaginable against an accused"); *McKinney v. Rees*, 993 F.2d at 1381 ("The rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence [*i.e.*, one of the "'rules [that] are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property'" (quoting *Brinegar v. United States*, 338 U.S. 160, 174 (1949)]. It has persisted since at least 1684 to the present, and is now established not only in the California and federal evidence rules, but in the evidence rules of thirty-seven other states and in the common-law precedents of the remaining twelve states and the District of Columbia."). Counsel also can draw upon caselaw which, in some jurisdictions, requires that the prosecution prove any admissible "other crimes" by a specified quantum of evidence. *See, e.g., Ali v. United States,* 520 A.2d at 310 n.4 (in order to use "other crimes" evidence, the prosecution must present, at a pretrial hearing, clear and convincing evidence that the accused committed the other crime); TENN. RULE EVID. 404(b)(3) (same quantum).

Defense counsel who is representing a respondent with a record of prior arrests or convictions must be constantly on guard throughout the trial to avoid the accidental exposure of that record to the trier of fact. Numerous documents that may be offered as prosecution exhibits for other purposes – *e.g.*, comparison fingerprint cards; photographs of the respondent at the time of arrest – may contain notations of the respondent's record. Counsel should inspect each exhibit carefully and take the time to read it as soon as it is marked for identification, before it is discussed or displayed in open court. S/he should be sure to look at the back of every exhibit. If matter relating to inadmissible arrests or convictions appears on an otherwise admissible exhibit, counsel should suggest some means of reproducing the exhibit without the prejudicial matter. In a jury trial, these suggestions should be made at the bench, outside the earshot of the jury; and, if extended discussion of the suggestion is likely, counsel should request that admission of the exhibit be postponed until the matter can be taken up *in camera* during a lunch break or other normal recess in the trial. (Protracted sidebar discussions of an exhibit while the jury is present in the courtroom with nothing to do but speculate about what's going on will often lead some jurors to guess that the defense is hiding something from them.) In a bench trial, counsel should first attempt to arrange a sanitized reproduction of the exhibit by agreement with the prosecutor before the exhibit is shown to the judge. If the prosecutor does not agree to this, counsel should then ask the court to order the exclusion and excision of the inadmissible matter without inspecting it, so as to avoid possible prejudice. In jurisdictions in which the court file (which judges often peruse during the trial) normally contains papers showing the respondent's prior record or is marked in some manner to cross-reference the respondent's other cases, counsel should examine the file carefully before trial and, if necessary, ask that the judge in a bench trial refrain from viewing the file in order to avoid exposure to inadmissible evidence.

§ 30.07(b) Proof of the Respondent's Prior Convictions or Prior [Bad] Acts for

Impeachment or in Rebuttal

In adult criminal trials the standard rule is that a defendant who testifies may be impeached with certain prior convictions. Ordinarily, any conviction of a felony or *crimen falsi* can be used for this purpose, but some jurisdictions disallow convictions that are more than a specified number of years old or allow these "stale" convictions only under designated circumstances (for example, when the nature of the crime makes them particularly probative of lack of credibility). Some jurisdictions also allow adult criminal defendants to be impeached with "prior [bad] acts" that did not result in a criminal conviction if (1) these acts are probative of the veracity of the defendant and (2) their probative value outweighs their prejudice to the defendant. The proper method of impeachment is usually for the prosecutor to ask the defendant on cross-examination whether s/he was convicted of a specified crime or whether s/he did a specified [bad] act on a specified date. If s/he denies the conviction or act or says that s/he does not remember, the prosecutor can subsequently introduce a certified judgment of conviction in rebuttal but, in most jurisdictions, cannot introduce independent evidence of [bad] acts that were not reduced to conviction. It is not a condition of this kind of cross-examination that the prosecutor be able to prove the prior conviction or prior [bad] act by competent evidence apart from the defendant's answers on cross. Rather, the prosecutor is permitted to ask the questions whenever s/he can satisfy the judge that s/he has a good-faith basis for believing that the defendant suffered the convictions or committed the acts. *But see People v. Cantave*, 21 N.Y.3d 374, 377, 380, 993 N.E.2d 1257, 1260, 1262, 971 N.Y.S.2d 237, 239, 241 (2013) (the Fifth Amendment prohibition against a prosecutor's questioning a testifying defendant about a *pending* criminal charge for the purpose of impeaching credibility also bars the prosecution from cross-examining a testifying defendant who has "a conviction pending appeal" about "the underlying facts of that conviction" until "direct appeal has been exhausted").

In most States, a juvenile delinquency adjudication cannot be used to impeach either a defendant in a criminal trial or a juvenile respondent in a delinquency trial. This result is dictated in some States by statutes prohibiting the use of a juvenile adjudication in any subsequent proceeding (*see, e.g., Moore v. State,* 333 So.2d 165 (Ala. Crim. App. 1976)); in other States it is produced by statutes or caselaw excluding juvenile adjudications from the category of "convictions" that are admissible for impeachment (*see, e.g.,* FED. RULE EVID. 609(d)(2); *People v. Massie,* 137 Ill. App. 3d 723, 484 N.E.2d 1213, 92 Ill. Dec. 358 (1985)*; People v. Peele,* 12 N.Y.2d 890, 188 N.E.2d 265, 237 N.Y.S.2d 999 (1963); *State in the Interest of K.P.,* 167 N.J. Super. 290, 400 A.2d 840 (1979); *State v. Matthews,* 6 Wash. App. 201, 492 P.2d 1076 (1971)); and in still other States, it is a reflection of a general evidentiary rule of confidentiality of juvenile adjudications.

Some jurisdictions, however, deem juvenile adjudications to be admissible for impeachment just as adult convictions are (*see, e.g., State v. Mallory,* 270 S.C. 519, 242 S.E.2d 693 (1978)), at least when the proceeding in which they are offered into evidence is a delinquency trial closed to the public (*In the Matter of the Welfare of C.D.L.,* 306 N.W.2d 819 (Minn. 1981); *but see In the Matter of the Welfare of S.S.E.*, 629 N.W.2d 456, 459-60 (Minn.

App. 2001)). In addition, even in jurisdictions that generally prohibit the use of juvenile adjudications, they may be used in certain circumstances. Some jurisdictions view the accused's presentation of good-character evidence (see §§ 33.17-33.20 *infra*) as opening the door to the prosecution's questioning of the character witnesses about the accused's otherwise inadmissible prior adjudications of delinquency, insofar as these are pertinent to the character trait that the accused has put in issue. *See, e.g., Wilburn v. State,* 289 Ark. 224, 711 S.W.2d 760 (1986); N.Y. FAM. CT. ACT § 344.1(2) (2013). And in some jurisdictions that allow impeachment with "prior bad acts," the prior bad acts underlying juvenile adjudications may be admissible for impeachment even though the adjudications themselves are not. *See, e.g., People v. Greer,* 42 N.Y.2d 170, 176, 366 N.E.2d 273, 277, 397 N.Y.S.2d 613, 617 (1977).

Prior *arrests* cannot be used to impeach the accused in either a criminal or juvenile delinquency trial. Unlike convictions, arrests do not tend to show guilt, and they are not admissible for any purpose that requires reasoning from the arrest to guilt of the offense for which the arrest was made. *People v. Cook,* 37 N.Y.2d 591, 596, 338 N.E.2d 619, 621, 376 N.Y.S.2d 110, 113-14 (1975) ("Impeachment of a witness by evidence or inquiry as to prior arrests or charges is clearly improper. The mere fact that a person has been previously charged or accused has no probative value. There is absolutely no logical connection between a prior unproven charge and that witness' [sic] credibility."). *See*, *e.g.*, *People v. Anderson*, 20 Cal. 3d 647, 574 P.2d 1235, 143 Cal.Rptr. 88 (1978); *People v. Brown*, 61 Ill. App. 3d 180, 377 N.E.2d 1201, 18 Ill. Dec. 565 (1978); *Commonwealth v. Levene*, 492 Pa. 287, 290-91, 424 A.2d 865, 866 (1980); *Powell v. State*, 673 S.W.2d 403 (Tex. App. 1984). However, if the accused on direct examination volunteers that s/he has never been arrested – or testifies that s/he "has never been in trouble with the law," or makes similar claims – this testimony may open the door to impeachment by prior arrests (*e.g.*, *State v. Thomas*, 878 S.W.2d 76 (Mo. App. 1994); see § 33.09(a) *infra*), to the extent (but only to the extent) that they controvert these protestations (*see Modeste v. State*, 760 So.2d 1078 (Fla. App. 2000); *People v. Brown*, 61 Ill. App. 3d at 184, 377 N.E.2d at 1203-04, 18 Ill. Dec. at 567-68; *West v. State*, 169 S.W.3d 275, 278-79 (Tex. App. 2005) (dictum)).

§ 30.07(c) Defense Impeachment of Prosecution Witnesses with Prior Convictions or Prior [Bad] Acts

State evidentiary rules and the confrontation clauses of the state and federal constitutions give the respondent a right to impeach a prosecution witness with the witness's adult convictions pertinent to lack of veracity:

> "'Our cases construing the [confrontation] clause [of the Sixth Amendment] hold that a primary interest secured by it is the right of cross-examination.' . . . Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' [sic] story to test the witness' [sic] perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.,* discredit, the witness. One way of discrediting the witness is to

> introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury [or the judge in a bench trial] a basis to infer that the witness' [sic] character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony." (*Davis v. Alaska,* 415 U.S. 308, 315-16 (1974).)

See also, e.g., *Slovik v. Yates*, 556 F.3d 747, 752-54 (9th Cir. 2009); *Vasquez v. Jones*, 496 F.3d 564, 570-74 (6th Cir. 2007).

Juvenile adjudications of a prosecution witness (whether that witness is presently an adult or still a juvenile) are ordinarily barred from impeachment use by the sorts of exclusionary provisions described in § 30.07(b) *supra.* But these provisions must give way to the accused's constitutional rights to confrontation in certain cases. In *Davis v. Alaska, supra*, the Supreme Court held that the defense was entitled to use a juvenile witness's prior adjudication, for which he was on probation at the time he implicated the defendant, to cross-examine on the subject of bias – specifically, to show that the witness's probationary status gave him reason to make a false identification in order to avoid antagonizing the authorities and jeopardizing the continuation of his probation. The Court explained that "[t]he State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness" (415 U.S. at 320). "Whatever temporary embarrassment might result to [the witness] . . . or his family by disclosure of his juvenile record . . . is outweighed by [the accused's] . . . right to probe into the influence of possible bias in the testimony of a crucial identification witness." *Id.* at 319. *See also, e.g.*, *In re Douglas L.*, 625 A.2d 1357 (R.I. 1993).

The *Davis* decision was explicitly limited to the use of juvenile adjudications that showed bias. However, several lower courts have applied *Davis*'s logic to permit impeachment of prosecution witnesses with prior juvenile adjudications that reflect adversely on the witness's general credibility. *See, e.g., Tabron v. United States,* 444 A.2d 942, 943 (D.C. 1982) (if impeachment of a witness's general credibility is "'likely to be material to the outcome' of the trial"); *State v. Deffenbaugh,* 217 Kan. 469, 472-74, 536 P.2d 1030, 1034 (1975) (if the juvenile adjudication is for an offense involving dishonesty or false statement); *State v. Hillard,* 421 So.2d 220 (La. 1982) (if the court determines, on a case-by-case basis, that the accused's right to confrontation outweighs the state's policy of confidentiality).

FED. RULE EVID. 608(b) and parallel provisions in States that have followed the lead of the Federal Rules permit a cross-examiner to inquire into "specific instances of a witness's conduct . . . if they are probative of the [witness's] character for . . . untruthfulness," but forbid extrinsic evidence of such incidents. A useful compendium of the commonplace rules in these regards is found in *Fields v. State*, 432 Md. 650, 673-74, 69 A.3d 1104, 1117-18 (2013):

> "'The Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him or her.' . . . In exercising that right, a

> defendant may cross-examine a witness in order to impeach his or her credibility. . . .The common law rules regarding impeachment of a witness by resort to his or her prior bad acts, now codified in Maryland Rule 5–608(b), . . . [are as follows: A]lthough 'mere accusations of crime or misconduct may not be used to impeach,' we have allowed, given a proper showing, cross-examination of a witness regarding 'prior bad acts which are relevant to an assessment of the witness' credibility.' . . . To be sure, 'if the bad acts are not conclusively demonstrated by a conviction, the trial judge must exercise greater care in determining the proper scope of cross-examination.'. . . Nevertheless, such inquiry is allowed 'when the trial judge is satisfied that there is a reasonable basis for the question, that the primary purpose of the inquiry is not to harass or embarrass the witness, and that there is little likelihood of obscuring the issue on trial.' . . . In such instances, though, 'the cross-examiner is bound by the witness' answer and, upon the witness' denial, may not introduce extrinsic evidence to contradict the witness or prove the discrediting act.' . . . That said, the trial judge must be alert to the possibility of prejudice outweighing the probative value of the inquiry. . . . Indeed, 'when impeachment is the aim, the relevant inquiry is not whether the witness has been accused of misconduct by some other person, but whether the witness actually committed the prior bad act. A hearsay accusation of guilt has little logical relevance to the witness' credibility.'"

See also, *e.g.*, *Allen v. Commonwealth*, 395 S.W.3d 451 (Ky. 2013); *Wilkerson v. State*, 953 A.2d 352 (Del. 2008); *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982). Counsel can argue that the federal and state constitutional rights to confrontation also entitle the defense to cross-examine a prosecution witness with respect to any prior [bad] acts (whether committed as an adult or juvenile) that tend to show the witness's general untrustworthiness. *See, e.g., People v. Smith*, 27 N.Y.3d 652, 659, 666, 669, 57 N.E.3d 53, 57, 62, 64, 36 N.Y.S.3d 861, 865, 870, 872 (2016) (the trial judges in cases that were joined on appeal abused their discretion by precluding defense counsel from using the State's "prior bad acts" rule to (in one case) "question Detective Sanchez regarding a lawsuit in which he and the rest of the narcotics field team involved in this case were sued in federal court for civil rights violations" in an unrelated civil suit alleging false arrest, excessive force, and fabrication of evidence, and (in another case) to cross-examine "Detective Rivera about . . . prior false arrests based upon the specific allegations of . . . [an unrelated] federal lawsuit"; "law enforcement witnesses should be treated in the same manner as any other prosecution witness for purposes of cross-examination."); *People v. Batista,* 113 A.D.2d 890, 493 N.Y.S.2d 608 (N.Y. App. Div., 2d Dep't 1985) (the trial court erred in precluding the defense from impeaching a prosecution witness with his illegal gambling activities and failure to carry a green card). *See also United States v. Woodard*, 699 F.3d 1188, 1192, 1195-97 (10th Cir. 2012) (the trial court violated the defendant's right to confrontation by preventing defense counsel from questioning a state motor transportation division inspector about "a prior determination made by a different federal district judge [at a suppression hearing] that the MTD inspector was not credible"); *United States v. White*, 692 F.3d 235, 248-51 (2d Cir. 2012) (the trial court improperly prevented defense counsel from cross-examining a police officer about his testimony at a suppression hearing in an unrelated case that resulted in the judge's "unequivocally discredit[ing] . . . [the officer's] testimony"); *Hill v. State*, 54 Ark. App.

380, 382-83, 927 S.W.2d 820, 822 (1996) (the trial court erred in disallowing cross-examination of an undercover detective – the prosecution's key witness to a drug sale – concerning two incidents in which he "had filed a false police report and had given a false statement regarding his police vehicle being stolen"; "these instances of misconduct are related to the witness's veracity, and were thus probative of his capacity for truthfulness"). When a prosecution witness's behavior demonstrates a willingness to falsify evidence in a judicial proceeding, defense counsel is not limited to exploring it on cross-examination but may also prove it extrinsically. *See Coates v. United States*, 113 A.3d 564 (D.C. 2015) (reversing a conviction for error in excluding defense "evidence implying . . . [that an] informant [who was the mainstay of the prosecution's case] had corruptly fabricated a murder confession by an innocent man in another case in order to curry favor with the government" (*id.* at 566): "[e]xtrinsic evidence showing [such fabrication]. . . was admissible . . . because it was probative not merely of . . . [the informer's] lack of veracity, but of his corruption – his 'willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony' or otherwise 'to thwart the ascertainment of truth in a judicial proceeding' (*id*. at 572). And certainly the defense can impeach with any prior [bad] acts or pending charges that tend to show bias on the part of a witness. *See, e.g., Delaware v. Van Arsdall,* 475 U.S. 673 (1986) (the trial court's refusal to permit cross-examination of a prosecution witness about the terms of an agreement under which a drunk driving charge against him was dismissed in exchange for his promise to speak to the prosecutor about the crime for which the defendant was on trial violated the defendant's Sixth Amendment right to confrontation); *Brinson v. Walker*, 547 F.3d 387, 390, 394-95 (2d Cir. 2008) (the trial judge violated the Confrontation Clause by preventing defense counsel from cross-examining the complainant "on whether he was fired from his job at . . . [a restaurant] for refusing to serve black patrons," information which defense counsel sought to elicit to support a defense theory that the complainant's "accusation [that he had been robbed by the defendant] was a deliberate lie, motivated by . . . [the complainant's] racial hatred of black people"); *Bentley v. State*, 930 A.2d 866, 869, 871-72, 874-75 (Del. 2007) (the trial court violated the defendant's rights to confrontation and to a fair trial by upholding a prosecution witness's assertion of her Fifth Amendment privilege and precluding defense counsel from cross-examining the witness, who had pending drug charges, about the witness's prior drug use, which defense counsel sought to elicit to "cast into doubt . . . [the witness's] ability to perceive or remember" and to "establish bias or motive for the changes in her testimony"; the state could have avoided "[t]he substantial danger of prejudice from the preclusion of cross examination . . . [by seeking] use immunity for [the witness's] testimony."); *Longus v. United States*, 52 A.3d 836, 851-54 (D.C. 2012) (the trial court improperly prevented defense counsel from cross-examining a police detective about two theories of potential bias: questioning to show that the detective "was under investigation by the U.S. Attorney for witness coaching," which "provided a motive for the detective to want to curry favor with the government"; and questioning "to show his 'corruption' through evidence that Detective Brown had . . . engaged in witness tampering in the . . . [other] case"); *Washington v. United States,* 461 A.2d 1037, 1038 (D.C. 1983) (even in the absence of a testimonial arrangement between the witness and the prosecutor, a pending charge against the witness may be used to show bias in the form of the witness's "harbor[ing] a hope of better treatment if he testified as he did"); *State v. Clark*, 364 S.W.3d 540, 544-45 (Mo. 2012) (defense counsel was

entitled to cross-examine a prosecution witness about having pled guilty to unrelated charges and his hope that "he would reap a benefit" from testifying for the state even though there was no plea agreement to that effect; the witness's "belief that his testimony would have a favorable effect on future sentencing may have been mistaken or speculative, but what is important is what he believed."); *cf. Davis v. Alaska,* 415 U.S. at 319-20.

For additional discussion of these forms of impeachment, see § 37.11 *infra*.

§ 30.07(d) Defense Evidence of Prior Convictions or Prior [Bad] Acts of the Complainant or Other Participants in the Criminal Episode

The defense can prove any convictions or [bad] acts of any person that are otherwise relevant to the respondent's theory of the case, such as a complainant's prior assaults in a case in which the respondent asserts self-defense and seeks to use the complainant's violent history to show that s/he was the aggressor or to show the reasonableness of the respondent's fear. *See, e.g., McBride v. United States,* 441 A.2d 644 (D.C. 1982); *see also People v. Petty*, 7 N.Y.3d 277, 285, 852 N.E.2d 1155, 1161, 819 N.Y.S.2d 684, 689-90 (2006) (in a self-defense case, the defendant can introduce "evidence of a deceased victim's prior threats against defendant . . . to prove that the victim was the initial aggressor, whether or not such threats . . . [were] communicated to defendant," because "such threats may indicate an intent to act upon them, thereby creating a probability that the deceased victim has in fact acted upon them as the initial aggressor"). *Cf. United States v. Zephier*, 989 F.3d 629, 637 (8th Cir. 2021) (after the prosecution was permitted to present expert testimony that the rape complainant exhibited typical symptoms of a rape victim, the defendant was entitled to show that she had been raped by someone else on a previous occasion: "By keeping Zephier from exploring even 'the basic factual details' of A.Z.'s prior sexual assault, the jury could 'have been led . . . to the conclusion' that her difficulties were caused by Zephier's alleged criminal conduct, and his alone.").

§ 30.07(e) Prosecutorial Impeachment of Defense Witnesses with Prior Convictions or Prior [Bad] Acts

The same principles that permit the defense to impeach prosecution witnesses with prior adult convictions and [bad] acts (see § 30.07(c)) entitle the prosecution to impeach defense witnesses with prior adult convictions and, in some jurisdictions, with prior [bad] acts. *But see State v. Scott*, 229 N.J. 469, 163 A.3d 325 (2017) (prosecution evidence that the defendant's mother, testifying as a defense witness, had lied to police on two previous occasions to assist her son in evading prosecution was inadmissible to impeach her; the court rejects the state's argument that this evidence went to "bias"; it holds, instead, that the evidence constituted an impermissible means of proving character for untruthfulness and that it was substantially more prejudicial than probative).

As § 30.07(b) *supra* explains, the vast majority of jurisdictions prohibit prosecutorial impeachment of an accused with prior juvenile adjudications. Some courts have, however, relied

upon the rationale of *Davis v. Alaska* to permit the prosecution to impeach other defense witnesses with their prior juvenile adjudications. *See People v. Puente,* 98 Ill. App. 3d 936, 424 N.E.2d 775, 54 Ill. Dec. 25 (1981) (superseded by statute, *see In re K.D.*, 279 Ill App. 3d 1020, 1024, 666 N.E.2d 29, 32, 216 Ill. Dec. 861, 864 (1996)); *State v. Wilkins,* 215 Kan. 145, 523 P.2d 728 (1974). This extrapolation from *Davis* is inconsistent with *Davis*'s holding and logic: *Davis* was predicated upon the accused's Sixth Amendment right to confrontation, and the prosecution has no constitutional right to confrontation. *See, e.g., State v. Thomas,* 536 S.W.2d 529, 531 (Mo. App. 1976); *Commonwealth v. Slaughter,* 482 Pa. 538, 552, 394 A.2d 453, 460 (1978). Accordingly, the interests in confidentiality that Alaska advanced in *Davis* as a basis for excluding juvenile adjudications should ordinarily preclude the prosecution from impeaching a defense witness with prior juvenile adjudications. *See Davis v. Alaska,* 415 U.S. at 319 ("The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.").