2022 TENNESSEE JUDICIAL ACADEMY

The Hearsay Rule and Exceptions
Constitutional Right to Confrontation

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Objectives:

The Hearsay Rule and Its Exceptions:

After this session you will be able to:

1. Understand and apply the definition of hearsay;
2. Apply the distinction between statements that are hearsay and statements that are not hearsay;
3. Determine which out-of-court statements are hearsay and which are not;
4. Differentiate between statements that are hearsay, statements that are not hearsay, and statements that are excluded from the hearsay rule under FRE 801(d);
5. Understand the underlying bases for exceptions to the hearsay rule;
6. Identify the key hearsay exceptions and their elements;
7. Determine Rule 804 unavailability; and
8. Recognize Rule 805 hearsay within hearsay.

Constitutional Right to Confrontation

After this session you will be able to:

1. Appreciate the significance of the constitutional right to confrontation and its relationship to cross-examination;
2. Recite and apply the rule of *Crawford v. Washington*;
3. Distinguish between testimonial and non-testimonial statements;
4. Apply the *Crawford* rule to oral and written testimonial statements;
5. Understand when the right to confrontation is satisfied or waived; and
6. Identify emerging, unsettled confrontation issues.

The Hearsay Rule and its Exceptions

I. INTRODUCTION

Just as understanding evidence begins with a general framework, the starting point for understanding the hearsay rule, its exemptions and exceptions, begins with understanding the general definition of hearsay.

HEARSAY IS A STATEMENT
THAT DECLARANT DOES NOT MAKE WHILE TESTIFYING
AT THE CURRENT TRIAL OR HEARING, AND
THAT A PARTY OFFERS IN EVIDENCE TO PROVE THE TRUTH OF THE MATTER ASSERTED IN THE STATEMENT

For the judge's purposes, the terms within the definition must also be defined. Therefore:

HEARSAY IS A STATEMENT WHICH INCLUDES
ORAL AND WRITTEN ASSERTIONS
AND NONVERBAL CONDUCT INTENDED AS AN ASSERTION
NOT MADE BY ONE TESTIFYING AT TRIAL OR HEARING
OFFERED IN EVIDENCE
TO PROVE THE TRUTH OF THE MATTER ASSERTED

II. DEFINITIONS

Simply put, hearsay is an out-of-court statement offered in court to prove the truth of that asserted in the statement.

A. Hearsay is a statement. Statements include:

1. Oral assertions
2. Written assertions
3. Nonverbal conduct intended as an assertion

B. Declarant is a person making the statement

III. ADMISSIBILITY

Hearsay is not admissible except as provided by rule or statute.

THRESHOLD INQUIRY: In ruling on hearsay objections, use this simple four-prong inquiry:

1. **Is the evidence an out-of-court statement, as defined by the rule?**
2. **Is the statement offered to prove the truth of the matter asserted within the statement?**

If both questions are answered "yes," the statement is not admissible unless one of the following questions can also be answered "yes"

3. **Is the statement excluded from operation of the hearsay rule?**
4. **Does the statement fall under an exception to the hearsay rule?**

IV. BASIS FOR HEARSAY EXCLUSION AND EXCEPTIONS

A. Basis for Exclusion of Hearsay Statements – Hearsay Dangers

Because the reliability of evidence is affected by the perception, memory, sincerity, and language of a witness, our rules of evidence have traditionally favored live witness testimony in the presence of the fact finder. The four traditional conditions require that a witness testify under oath, while present in court, in the presence of the factfinder, and subject to cross-examination. The general exclusion of hearsay evidence preserves these safeguards of reliable evidence.

Thus, the four "hearsay dangers" are insincerity, faulty perception, deficiencies in memory, and errors in narration. The rule excluding hearsay serves to guard against these dangers. Exclusion is based upon the belief that these factors will be best preserved if testimony is required to be under oath, in the presence of the fact-finder, and subject to cross-examination.

B. Statements that are not Hearsay

The general rule excluding the admission of hearsay statements does not apply to statements that do not fit within the hearsay definition. Therefore, statements that are either (1) not out-of-court statements, (2) not offered in court, or (3) not offered to prove the truth of the matter asserted in the statement are not excluded by the hearsay rule.

The most common type of statement that does not fit within the definition of hearsay are statements that are not offered to prove the truth of the matter asserted in the statement. Examples of statements not offered to prove the truth of the matter asserted are statements offered to prove that something was said, as opposed to *what* was said; statements offered to prove the effect the statement had on the listener, rather than to prove the truth of what was said;

and statements that have independent legal significance, such as offers and acceptances. Some other frequent examples of these statements are statements offered to prove the speaker's state of mind, statements that are implied assertions, and statements offered to prove another party's course of action.

To determine whether a statement is offered for the truth of the matter is asserts, the inquiry is whether the statement's probative force depends upon its being true. Generally, if the statement has probative value, regardless of its truth, the statement is not hearsay and is not excluded by the hearsay rule. But if the statement has some probative value regardless of its truth, but has far greater probative value if the statement is true, the judge must consider whether the probative value of the non-truth content is substantially outweighed by the danger of unfair prejudice under Rule 403. Tenn. R. Evid. 403. If the judge admits the evidence, the opponent is entitled to have the judge instruct the jury as to the limited purpose for which the jury may use the evidence. Tenn. R. Evid. 105.

When a proponent argues that an out-of-court statement is not offered for the truth of the matter asserted and is, therefore, not hearsay, the judge must inquire as to the purpose for the introduction. The judge must then determine whether the claimed purpose is legitimate and relevant. Statements that are not offered to prove the truth of the matter are only admissible if they are offered to establish some fact of consequence.

C. Hearsay Exceptions

The Tennessee Rules of Evidence provide for the admission of many hearsay statements under exceptions to the hearsay rule. The hearsay exceptions have developed over time based largely on judicial experience. The exceptions vary in number and type, but all share as a common characteristic the absence of one or more of the hearsay dangers. For example, statements made for purposes of medical diagnosis and treatment fall under a hearsay exception because of the assumption that the declarant will be motivated to be sincere when seeking medical help.

Statements admissible under a hearsay exception are of two types. In the first, the availability of the declarant is immaterial. Arguably, the statement is reliable by its very nature, thus removing any need for an inquiry into whether the statement is necessary. The second type of hearsay admissible under an exception requires that the unavailability of the declarant be established. The creation of these exceptions has resulted from the need for the evidence.

For both categories of hearsay exceptions, the proponent of the evidence must establish the admissibility of the statement by offering evidence sufficient for the court to find the existence of the elements of a hearsay exception. For statements offered as Rule 804 exceptions, the proponent must also establish the unavailability of the declarant. Elements of the exceptions, as well as unavailability, are generally factual matters that must be proved, not assertions that counsel may merely make.

V. EFFECT OF ADMISSION OF STATEMENTS AS EXCEPTIONS

When it is determined that a statement is an exception to the hearsay rule, the statement is admitted for its full evidentiary, substantive value. But statements that satisfy a hearsay exception are not *per se* admissible; the statements may still be inadmissible under some other applicable rule of evidence.

STATEMENTS THAT ARE EXEMPTED FROM THE HEARSAY RULE OR THAT FALL UNDER A HEARSAY EXCEPTION ARE NOT EXCLUDED FROM EVIDENCE BASED ON A HEARSAY OBJECTION,

BUT

THE STATEMENT MAY STILL BE EXCLUDED BASED ON OTHER APPLICABLE RULES OF EVIDENCE.

VI. ADMISSION OF STATEMENTS THAT ARE NOT HEASAY: CHECKLIST

The following list contains examples of statements that are not offered for their truth:

1. Verbal Acts – Words that have independent legal significance regardless of their truth

2. Statements offered for their Effect on the Listener – Statements that are offered for the purpose of showing the probable effect on a person who heard the statement

3. Implied Assertions – Statements that state one thing but impliedly assert something else

4. Non-Assertive Conduct – Conduct that is not intended as an assertion by the declarant

5. Statements Revealing Awareness or Knowledge – Statements that are offered to prove that the speaker is aware or has knowledge of something

6. Silence or Nondisclosure – Silence or inaction that is **not** intended to assert

7. Statements offered to Impeach – Statements offered to show that the declarant has made an inconsistent statement at another time

VII. ADMISSION OF STATEMENTS THAT ARE HEARSAY EXCEPTIONS: CHECKLIST

A. Rule 803 Exceptions, Availability of Declarant Immaterial

Tennessee recognizes twenty-one hearsay exceptions for which the availability of the declarant is immaterial. They are:

1. Prior Statement of identification by witness – 803(1.1)
2. Admission by party opponent – 803(1.2)
3. Excited utterance – 803(2)
4. Then-existing mental, emotional, physical condition – 803(3)
5. Statements made for medical diagnosis and treatment – 803(4)
6. Recorded recollection – 803(5)
7. Records of regularly conducted activity – 803(6)
8. Public records – 803(8)
9. Record of vital statistics – 803(9)
10. Marriage, baptismal, and similar certificates – 803(12)
11. Family records – 803 (13)
12. Records of documents affecting an interest in property – 803 (14)
13. Statements in ancient documents affecting an interest in property – 803 (16)
14. Market reports and commercial publications – 803(17)
15. Reputation concerning personal or family history – 803(19)
16. Reputation concerning ancient boundaries – 803(20)
17. Reputation as to character – 803(21)
18. Judgment of previous conviction – 803(22)
19. Judgments as to personal or family history or boundaries – 803(23)
20. Children's statements – 803(25)
21. Prior inconsistent statements of testifying witness – 803(26)

These exceptions are more easily remembered if grouped into five categories:

TRUTH-PRODUCING (1 – 4)
RECORDS AND TREATISES (5 - 18)
REPUTATION (19 - 21)
JUDGMENTS (22 - 23)
OTHER – 803(25), (26)

In determining whether an exception exists under Rule 803, the trial judge need only determine:

(a) the elements of the exception

(b) whether the proponent has established the elements

In determining whether the evidence should be admitted, the trial judge must also determine whether the evidence meets other admissibility requirements.

Once the judge determines the evidence is an exception to the hearsay rule and meets other admissibility requirements, the evidence stands as substantive proof of the fact or absence of the fact it purports to establish.

B. Select Rule 803 Exceptions

1. Admission by Party Opponent – Tenn. R. Evid. 803(1.2) –

A statement offered against a party that is the party's own statement; a statement in which a party has manifested an adoption or belief in its truth; a statement by a person authorized by the party to make the statement concerning the subject; a statement by an agent or servant concerning a matter within the scope of the agency and made during the existence of the relationship or qualifying as against the declarant's interest; a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy; or a statement by a person in private of estate with the party.

FOUNDATION:

Statement <u>offered against a party</u> and

. made by the party individually or in a representative capacity or adopted or authorized by the party

. or made by the party's agent or co-conspirator (with certain limitations) or a person in privity of estate with the party

NOTE: For this exception, the content of the statement does not have to be against interest; the statement only has to be offered against a party.

2. Excited Utterance – Tenn. R. Evid. 803(2) –

A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

FOUNDATION:

Statement relating to
. a startling event or condition
. produces a statement relating to the startling event or condition
. which is made while under the stress or excitement caused by the startling event or condition

3. Then Existing Mental, Emotional, Physical Condition – Tenn. R. Evid. 803(3)

A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

FOUNDATION:
Statement about
. then existing
. state of mind, emotion, sensation, physical condition
. but not of memory or belief (with limited exception)

4. Statement for Purposes of Medical Diagnosis and Treatment – Tenn. R. Evid. 803(4) –

A statement made for purposes of medical diagnosis and treatment describing medical history, past or present symptoms, pain, or sensations; or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis and treatment.

FOUNDATION:
Statement
. made for the purpose of medical diagnosis and treatment
. and describing medical history, symptoms, pain, cause
. and reasonably pertinent to medical diagnosis and treatment

5. Recorded Recollection – Tenn. R. Evid. 803(5) –

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

FOUNDATION:

Record

. concerning a matter about which a witness once had knowledge
. but cannot now recall well enough to testify fully and accurate
. that was made or adopted by witness while memory was fresh
. and that accurately reflects the witness' knowledge

Recorded Recollection, a hearsay exception under Rule 803(5), and Refreshing Recollection, a procedure for helping a witness to remember under Rule 612, are entirely different.

The former allows the use of a record to prove its content providing a foundation can be laid under the exception. Even if the hearsay exception applies, the writing is read into evidence but may only be received as an exhibit if offered by the adverse party.

The latter allows the use of anything to revive the memory of a forgetful witness whose testimony becomes the evidence.

6. Records of Regularly Conducted Activity & Absence – Tenn. R. Evid. 803(6)

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with Rule 902(11) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

FOUNDATION:

. record of act, event, condition, opinion, diagnosis
. made at or near time of act, event, condition, opinion, diagnosis
. made by or from information transmitted by a person with knowledge
. who had a business duty to record and transmit the information
. and record, etc., was kept in the course of regularly conducted business activity
. and regular practice of business to keep (i.e., relied upon)
. and testified to by custodian or qualified witness or by certificate under 902(11)
. UNLESS SOURCE OR METHOD OR CIRCUMSTANCES INDICATE LACK OF TRUSTWORTHINESS

7. Public Records and Reports– Tenn. R. Evid. 803(8) –

Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of the office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel.

FOUNDATION:

. records, reports, statements, data compilations
. of public office or agencies
. setting forth activities of office or agency
. or matters observed pursuant to legal duty
UNLESS SOURCE OR METHOD OR CIRCUMSTANCES INDICATE LACK OF TRUSTWORTHINESS
And EXCLUDING MATTERS OBSERVED BY LAW ENFORCEMENT

8. Other Records Exceptions –

The other Rule 803 records exceptions generally embrace within the title the elements that must be present before the exception applies. For example, Rule 803(9) creates an exception for records of vital statistics, Rule 803(12) for marriage, baptismal, and similar certificates, Rule 803 (14) for documents pertaining to property, and Rule 803(13) for family records. If asked to admit evidence based on one of these exceptions, the judge should review the specifics of the rule to assure the proponent has established the requisite elements.

9. Reliable Writing Exceptions –

Three of the Rule 803 exceptions allow the admission of information in reliable writings. Rule 803(16) allows the admission of statements in documents in existence for more than thirty years. Rule 803(17) provides an exception, for example, for market quotations, lists, directories, and other published compilations generally used by the public or by persons in particular occupations.

10. Judgment of Previous Conviction – Tenn. R. Evid. 803(22) –

Evidence of a final judgment adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

FOUNDATION:

Judgment of conviction if

. conviction of crime punishable by death or imprisonment for more than one year
. after trial or guilty plea
. offered to prove any fact essential to sustain judgment

The hearsay exception under Rule 803(22) removes the hearsay objection, but like all hearsay exceptions, it does not create a rule of absolute admissibility. Rules 401-404 and Rule 609 impact whether the judgment of conviction is admissible.

11. Reputation Exceptions –

One's reputation is generally what others say or believe about the person. Likewise, a family reputation or the reputation about a boundary or custom is that which people have believed or said about it. Thus, all reputation evidence is by definition hearsay. The Tennessee Rules of Evidence create hearsay exceptions for three specific kinds of reputation evidence: (1) reputation concerning personal and family history, Tenn. R. Evid. 803(19); (2) reputation concerning boundaries and general history, Tenn. R. Evid. 803(20); and (3) reputation about character, Tenn. R. Evid. 803(21). The hearsay exceptions remove an objection to the evidence based on hearsay, but do not assure admissibility. The rules regarding admissibility of evidence regarding personal reputation are greatly affected by the rules of relevance. Tenn. R. Evid. 401 - 405, 608 - 609.

Reputation evidence concerning personal or family history, boundaries, general history, or character is not hearsay, but all reputation evidence is not necessarily admissible. Counsel is likely to raise other objections to relevance, fairness, and method of proof.

12. Children's Statements – 803(25)

Provided that the circumstances indicate trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(12), issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21), or issues concerning termination of parental rights pursuant to Tenn. Code Ann. § 37-1-147 and Tenn. Code Ann. § 36-1-113, and statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse offered in a civil trial relating to custody, shared parenting, or visitation. Declarants of age thirteen or older at the time of the hearing must testify unless unavailable as defined by Rule 804(a); otherwise this exception is inapplicable to their extrajudicial statements.

FOUNDATION:

Circumstances surrounding statement indicates trustworthiness
. statement concerns abuse or neglect
. statement is made by child alleged to be victim of physical, sexual, or psychological abuse or neglect
. statement is offered in certain specified proceedings
. If declarant is 13 or older, declarant must testify or be unavailable under Rule 804(a)

Judge must first conduct a jury-out hearing to determine by a preponderance whether the prior statement was made under circumstances indicating trustworthiness.

13. Prior Inconsistent Statement of Testifying Witness – 803(26)

Statement otherwise admissible under Rule 613(b) if all of the following conditions are satisfied:

(A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.

(B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.

(C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

FOUNDATION:

Declarant testifies at trial and is subject to cross-examination
. statement is audio, video, written and signed, or under oath
. statement is inconsistent
. declarant is first given the opportunity to explain or deny as provided by with Rule 613(b)

Judge must first conduct a jury-out hearing to determine by a preponderance whether the prior statement was made under circumstances indicating trustworthiness.

C. Exceptions Under Rule 804, Unavailability of Declarant Required

1. Unavailability Requirement

Procedure – Before a judge can find an 804 exception to the hearsay rule, the judge must determine or the parties must stipulate that the declarant is unavailable. This determination is a "preliminary question concerning the . . . admissibility of evidence" under Rule 104. As such, it is a decision for the trial judge which may be made without confinement to the rules of evidence.

2. Definition of Unavailability

A declarant is unavailable for Rule 804 purposes if the witness is exempted from testimony, refuses to testify, lacks the ability to testify, or is beyond the reach of process. Specifically, Rule 804(a) defines unavailability of a declarant as including situations in which declarant (1) is exempted by ruling of the court on the grounds of privilege from testifying concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or (3) demonstrates a lack of memory of the subject matter of the declarant's statement; or (4) is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity; (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process; or
(6) for depositions in civil actions only, is at a greater distance than 100 miles from the place of trial or hearing.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying. Tenn. R. 804(a).

Summary of Unavailability

Declarant is

Dead
Insane
Too ill or infirm to testify
Exempt from testifying
Refuses and cannot be compelled to testify
Claims lack of memory
Absent from hearing and unable to procure attendance by process or reasonable means

Most of the unavailability conditions require fact finding by the court based upon evidence proffered by the proponent of the evidence. The burden is upon the proponent to establish first, the unavailability of the declarant, and second, the application of a hearsay exception.

3. Exceptions Under Rule 804

a. Former Testimony – Tenn. R. Evid. 804(b)(1) –

Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had both an opportunity and a similar motive to

develop the testimony by direct, cross, or redirect examination.

FOUNDATION:

. Unavailable declarant
. Former TESTIMONY (i.e., under oath or affirmation)
. Offered against party with opportunity and similar motive to develop at prior proceeding

The non-hearsay use of former testimony is not governed by Rule 804(b)(1); thus, if the proponent offers the former testimony to impeach the witness, refresh the witness's recollection, or for some purpose other than proving its truth, Rule 804(b)(1) does not apply.

b. Statement under Belief of Impending Death – Tenn. R Evid. 804(b)(2) –

In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death.

FOUNDATION:

. declarant is unavailable
. statement concerns the cause of circumstances of impending death
. statement made while declarant believes death is imminent
. homicide case or civil case

c. Statement Against Interest – Tenn. R. Evid. 804(b)(3) –

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

FOUNDATION:

. declarant is unavailable
. statement is against pecuniary, proprietary, penal, liability interest
. reasonable person would not have made statement unless true

VIII. DECLARANT'S CREDIBILITY

Tennessee Rule of Evidence 806 allows the credibility of a declarant to be attacked when a hearsay statement or some non-hearsay admissions (under Tenn. R. Evid.

801(d)(2)(C),(D), or (E)), are admitted. The declarant's credibility "may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness." Tenn. R. Evid. 806. A declarant's prior statements are not subject to the requirement that declarant be given an opportunity to explain them. Further, if a party against whom a hearsay statement has been offered calls the declarant as a witness, the party may cross-examine the declarant. Tenn. R. Evid. 806.

IX. HEARSAY WITHIN HEARSAY

If hearsay occurs within hearsay, each statement must satisfy the elements of an exception to be admissible under Rule 805 of the Tennessee Rules of Evidence. Thus, "[h]earsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules or otherwise by law." Tenn. R. Evid. 805.

Constitutional Right to Confrontation

I. The Rule in *Crawford*

A. *Crawford v. Washington*, 541 U.S. 36 (2004)

The Sixth Amendment guarantees an accused the right to "be confronted with the witnesses against him." Before 2004, in a series of cases, one of the most notable of which was *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court had analyzed confrontation claims congruently with hearsay rules, holding that statements that fell within a "firmly rooted" hearsay exception did not violate the Confrontation Clause and were therefore admissible. Statements that did not fall within a firmly rooted hearsay exception, such as those offered under a residual exception or those that did not fit within the intent of the hearsay exception, were admissible only if the statements bore particularized guarantees of trustworthiness.

The first step in evaluating a confrontation claim is whether the evidence which the government offers is "testimonial." This analysis flows from the Court's focus on the word "witness" in the Sixth Amendment and its reference to a witness as one who "bear[s] testimony" which is a "solemn declaration or affirmation made for the purpose of establishing some fact." The rule established in *Crawford* is that the government may not introduce a testimonial statement over objection unless the declarant is present subject to cross-examination or the declarant is unavailable and defendant had a prior opportunity to cross-examine. The *Crawford* rule does not apply to statements that are not offered for the truth of the matter asserted..[1] When the declarant appears at trial for cross-examination, the Confrontation Clause is not implicated. Statements that are not testimonial are admissible based upon either the *Roberts* test or other state-determined guidelines.[2]

In *Crawford*, the Court did not explicitly define "testimonial,[3]" but offered numerous examples and comments about what might be included in the definition. For example, the majority opinion noted that:

> [v]arious formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior

[1] The majority left open whether other hearsay might also violate the Confrontation Clause with this statement: "In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." 541 U.S. at 52.

[2] The majority said: "Where 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.

[3] The majority said: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." Id.

> testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . ." These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition--for example, ex parte testimony at a preliminary hearing.
>
> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations[4] bear a striking resemblance to examinations by justices of the peace in England. The statements are not sworn testimony, but the absence of oath was not dispositive.

On one specific kind of statement, the dying declaration, the Court offered this advice:

> The existence of that exception as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is sui generis.[5]

B. Post-*Crawford* Oral Testimonial Statements in *Davis, Hammond, Bryant,* and *Clark*

Although the Court did not give a comprehensive definition of testimonial statements in *Crawford*, the Court returned to that issue in the companion cases of *Davis v. Washington* and *Hammond v. Indiana*, 547 U.S. 813 (2006). There the Court explained that

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

Additionally, the Court outlined factors that courts could consider in making the testimonial inquiry: 1) whether the statement describes past events or events as they are happening, 2)

[4] The Court noted that it was using the term "interrogation" in its "colloquial," not technical, legal sense.
[5] 541 U.S. at n.6 (citations omitted).

whether the purpose of the statement is to assist in investigation of a crime or, on the other hand, provide information relevant to some other purpose, 3) the level of formality of the exchange in which the statement is made. The Court also noted that statements could begin as non-testimonial and "evolve" into testimonial statements.

In two subsequent decisions, the Court has expanded on the *Crawford* formulation. In *Michigan v. Bryant*, 562 U.S. 344 (2011), the Court applied the *Davis* primary purpose test to a case involving the wounded victim's identification and description of his shooter. The Court held that the victim's statements were not testimonial because the primary purpose of the police interrogation was "to enable police assistance to meet an ongoing emergency." In so holding, the Court looked at a laundry list of factors, including the reliability of the statement, the motivation of the interrogators and the speaker, the formality of the interrogation setting, and the verb tenses used in the statement. The Court emphasized that the primary purpose test is objective and must consider the perspectives of both the speaker and the interrogator. Thus, to determine the primary purpose, courts should look at the purpose that reasonable actors would have in eliciting or giving the statement, rather than the actual motives of the parties. Although the crime had ended in this case, the emergency was ongoing because of the continuing public danger, "an assessment that could depend on the weapon used in the crime, the likelihood that the assailant will strike again, the medical condition of the victim, and other case-specific circumstances."

Justice Scalia dissented vigorously from the majority holding in *Bryant*, challenging that they had created a sweeping exception to the Confrontation Clause for all violent crimes. Justice Scalia would have structured the inquiry to look only to the speaker's purpose and would consider whether the statement resembles testimony, which he defines as a "solemn declaration of past events."

A few years later, the Court addressed an oral statement made, not to police officers, but to schoolteachers. In *Ohio v. Clark*, 576 U.S. 237 (2015), the Supreme Court allowed preschool teachers to repeat a child's statements identifying defendant as his abuser. The Court held that the child's statements were not testimonial because they were not made with the primary purpose of creating evidence for the prosecution of defendant but occurred in the context of an ongoing emergency involving suspected child abuse. The questions that the teachers asked were aimed at addressing the emergency and ending it, not at producing evidence for later use at trial. Additionally, the conversation was informal and spontaneous, lacking the formality that is essential to testimonial statements. The Court also noted that the fact that the statements were made to teachers, rather than law enforcement officers, was significant because the teachers were not individuals principally charged with uncovering and prosecuting criminal behavior and, thus, were significantly less likely to be testimonial.

B. Written Testimonial Statements in *Melendez-Diaz, Bullcoming,* and *Williams*

In three decisions since *Crawford*, the Court has addressed the issue of whether certain written statements offered at trial are testimonial statements. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) the Court applied the testimonial statements analysis to chemical drug test reports. When the state offered the report without the testimony of the lab technician who prepared it, the defendant objected on confrontation grounds. The Supreme Court agreed that the

lab report prepared for use in a criminal trial was testimonial and subject to the demands of the Sixth Amendment. Lab reports fall into the category of "affidavits" and as such are within the "core class of testimonial statements." The Court held that certificates of analysis constituted testimonial evidence because they were prepared for the purpose of a later criminal trial. In the case, the Court quoted from *Crawford* its non-exclusive class of statements which are testimonial in nature:

> Various formulations of this core class of testimonial statements exist: ex parte in-court testimony or its functional equivalent that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to

The State raised a host of arguments that were rejected, including that the reports were excluded from confrontation due to their nature, that requiring the presence of the technicians would backlog the courts, and that the defense could challenge the validity of the report by other means, including hiring its own expert or subpoenaing the state's expert. As to the latter argument, the Court famously said that "[c]onverting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness-no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not only the defendant to bring those adverse witnesses into courts. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses."

The Court left open the possibility that a state could mandate *when* the confrontation right was executed using a notice-demand statute. "The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections."

As states scurried to react to the confrontation requirement, some became creative, utilizing one witness to testify as a surrogate for the actual witness who conducted the test. In a case against Defendant Bullcoming, the New Mexico Supreme Court applied the *Melendez-Diaz* precedent to a slightly different set of facts. The State of New Mexico introduced a blood alcohol test in Bullcoming's trial but offered it along with the testimony of an analyst who did not perform the test. The New Mexico Supreme Court agreed that the report was testimonial but upheld its admission because of the surrogate expert. The United States Supreme Court rejected this analysis and held that the Confrontation Clause "does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certificate." *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). Thus, for a testimonial statement to be introduced, the witness who made the statement must testify unless the witness is unavailable, and the defendant has had a prior opportunity to cross-examine.

The year following *Bullcoming*, the Court addressed the application of the cases to oral testimony from experts based on written reports by other experts. *Williams v. Illinois*, 132 S.Ct. 2221 (2012). This decision has produced much confusion about the application of the

confrontation right to reports not conducted by experts relied upon and referred to by experts who testify at trial. The Court was asked to determine whether a forensic analyst could testify based partially on a DNA profile performed by someone else. Four justices held that the DNA profile was not testimonial, primarily because it did not accuse a targeted individual of a crime, but also because it was even hearsay, since it was not offered for the truth of the matter asserted. Justice Thomas, who agreed with the four that the DNA profile was admissible, balked at this conclusion, noting that "[t]here is no meaningful distinction between disclosing an out-of-court statement so that a factfinder may evaluate the expert's opinion and disclosing that statement for its truth." But Thomas' rationale turned on his characterization of the report has not having the formalities associated with testimonial statements.

> *Williams* has raised more questions than it has answered. It appears that formal forensic testimonial reports will continue to be inadmissible absent the testimony of their authors. These include reports analyzing drug, blood alcohol, fingerprints, and ballistics and reports that are incriminating on their face. Reports that target a known suspect are more likely to be deemed testimonial. Alternatively, preliminary reports that are a part of internal work product and general testing not intended to target an identified individual likely will not be considered testimonial.

C. Waiver of the Right to Confrontation in *Giles*

In both *Crawford* and *Davis*, amici (and some justices) expressed concern that the rule of *Crawford* and *Davis* would be particularly problematic in domestic violence cases in which victims often are intimidated or threatened by their abusers in order to keep them from testifying. The majority responded to these concerns about the rule by noting that the confrontation right could be "extinguished" on "equitable grounds" when the defendant makes the witness unavailable for the purpose of preventing the witness from testifying. Under these circumstances, the defendant forfeits the right to confrontation. Justice Scalia, writing for the majority in *Davis*, responded that "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." *Davis*, 547 U.S. at 833.

Two years after *Davis*, a California case gave the Court the opportunity to address the forfeiture issue in more than an advisory fashion. Defendant Giles was tried for the murder of his ex-girlfriend. Claiming self-defense, Giles introduced evidence of the victim's prior violent history and of threats she had made against him. In response, the prosecution called a police officer to testify that the victim had claimed that Giles had assaulted and threatened to kill her. Giles objected to the evidence on confrontation grounds, but the prosecution claimed that he had forfeited his right to confrontation by wrongdoing, i.e., by killing the victim.

The Supreme Court endorsed the availability of the forfeiture exception but said it did not apply under the circumstances of the case. Rather, the forfeiture by wrongdoing exception applies only to situations in which the defendant causes the witness' absence with the intention of preventing the witness from testifying at trial. The prosecution bears the burden of proving

that the witness' absence was procured for the purpose of preventing the witness from testifying In a later case, *Giles v. California*, 554 U.S. 353 (2008), the Court clarified that the forfeiture by wrongdoing rule operated only when the prosecution can prove by a preponderance of the evidence that the defendant secured the witness' unavailability for the purpose of preventing the witness' testimony.

D. No Retroactivity under *Whorton*

In a Nevada habeas proceeding, the Ninth Circuit Court of Appeals held that the decision in *Crawford*, though a new rule, announced a "watershed rule of criminal procedure fundamental to our criminal regime" and "seriously implicating the accuracy of the verdict," and thus, applied *Crawford* retroactively. The United States Supreme Court granted certiorari to review the Ninth Circuit's determination that *Crawford* applied retroactively.

The Court, unanimously, determined that it did not. First, the Court concluded that clearly *Crawford* announced a new rule. It was not dictated by prior precedent, but was flatly inconsistent with the prior precedent. Although the Court had stretched in *Crawford* and proclaimed that "the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause," it had acknowledged that the "rationale" had not. Therefore, in *Whorton* the Court concluded that *Crawford* "was not dictated by the governing precedent" and was a new rule. *Whorton v. Bockting*, 549 U.S. 406 (2007).

The Court secondly concluded that *Crawford's* rule was purely procedural and not substantive. Thus, it could only be applied retroactive on collateral review if it is a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Demonstrating the unlikelihood that such a beast (a new rule implicating fundamental fairness) would ever be found, the Court easily concluded that neither of the two tests essential to a finding of the watershed rule exception existed. The decision in *Crawford* was not necessary to prevent an "impermissibly large risk" of inaccurate convictions; nor did it alter understanding of "bedrock procedural elements essential to the fairness of a proceeding." The upshot of *Whorton* is that *Crawford* will not be applied retroactively to judgments under review.

E. Confrontation and Opening the Door

This term, in *Hemphill v. New York*, ___ U.S. ___, 142 S. Ct. 681 (2022), the Court held, in an 8-1 opinion written by Justice Sotomayor, Justice Thomas, dissenting, that a trial judge's admission of unconfronted testimonial hearsay evidence based on the theory that the evidence was necessary to correct a misleading impression caused by defendant's opening the door violated defendant's right to confrontation under the Sixth Amendment. The trial court was incorrect in considering the reliability of defendant's theory of the case; similarly, the trial court did not have the authority to determine that the hearsay evidence was reasonably necessary to correct what it inappropriately considered a misleading impression. The Court reiterated: "The Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court."

F. Confrontation Clause Analysis

1. Is a hearsay statement offered against defendant at trial?

   If the statement is not hearsay (i.e., offered for its truth), the Confrontation Clause does not apply.

2. Is the hearsay declarant subject to cross-examination at trial?

   If the declarant is subject to cross-examination, the right to confrontation is satisfied.

3. Is the hearsay statement testimonial?

   If the statement is not testimonial, the Confrontation Clause does not apply.

   To determine if testimonial, consider factors set out in *Crawford*, *Davis*, *Bryant*, *Clark* and *Williams* – nature of statement, primary purpose, degree of formality, to whom the statement is made

4. Has the State established that the declarant is unavailable?

5. Has the State also established that the accused had a prior opportunity to cross-examine the declarant?

6. Has the defendant waived or forfeited the right to confrontation?

II. Analytical Framework for *Crawford*

A. Simple Framework

1. Is a hearsay statement offered against a defendant at trial?

   If the statement is not hearsay (i.e., offered for its truth), the Confrontation Clause does not apply.

2. Is the declarant subject to cross-examination at trial?

   If the declarant is subject to cross-examination, the right to confrontation is satisfied.

3. Is the statement testimonial?

If the statement is not testimonial, the Confrontation Clause does not apply.

To determine if statement is testimonial, consider factors set out in *Crawford*, *Davis*, *Bryant*, and *Williams* – nature of statement, primary purpose, degree of formality,

4. Has the State established unavailability?

5. Has the State also established a prior opportunity to cross-examine?

6. Has the defendant waived or forfeited the right to confrontation?

B. More Detailed Regarding Steps 3-6 in Simple Framework

3. Is the statement testimonial?

"We leave for another day any effort to spell out a comprehensive definition of "testimonial."

"Without attempting to produce an exhaustive classification of all conceivable statements as either testimonial or nontestimonial . . . ."

"An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."

See e.g., *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004) (private comment was not testimonial); *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004)(admission of sworn, signed confession of codefendant violated confrontation right).

a. Is the statement hearsay or (is the statement) not offered for the truth?

The "Confrontation Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

See e.g., *United States v. Ahern*, 2005 WL 1074279 (D. N.H. 2005) (no error because witness did not present testimony or evidence at trial); *United States v. Coplan*, 2004 WL 603412 (D.N.H. 2004)(reference to codefendant's statement did not constitute error).

b. Is it the kind of "core testimonial" statements that the Confrontation Clause was intended to cover?

The Court talked about a "class" of testimonial statements that included affidavits, prior unconfronted testimony, similar pretrial statements expected to be used prosecutorially,

such as depositions, confessions, prior testimony, and affidavits.

The Court talked about dying declarations as *sui generis*—"the existence of that exception as a general rule of criminal hearsay law cannot be disputed. . . . Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is clearly *sui generis*.

c. Is the statement a result of an interrogation? If not, is the statement testimonial, nonetheless?

It is not clear to what extent *Crawford* applies to statements other than those produced by interrogation. In *Davis*, the Court declined guidance, stating "[w]ithout attempting to produce an exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation -- as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

d. Is the statement an evolving testimonial statement?

In *Davis*, the Court acknowledged that statements could change over time. "This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, 'evolve into testimonial statements,' once that purpose has been achieved."

4. If the statement is testimonial, is the declarant[6] "unavailable?"

In neither *Crawford*, nor *Davis*, nor *Hammon* was there an issue of unavailability. Now that the Confrontation Clause has been untethered from the hearsay rules, is it fair to assume that those rules still define "unavailability?" At common-law, unavailability was much more limited. While the United States Supreme Court pre-*Crawford* suggested that a good-faith test was to be applied, is that still the standard for unavailability after Crawford?

The Court said in *Crawford* "we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (citing California v. Green, 399 U.S. 149 (1970)).

[6] Creativity, perhaps, but without merit, the court said, to defendant's argument that he, as the out-of-court declarant was unavailable, and that he had not had a prior opportunity to cross-examine his own prior out-of-court statements. *United States v. Lopez*, 380 F.3d 538 (1st Cir. 2004).

5. If the statement is testimonial and the declarant is unavailable, was there a prior "opportunity" to cross-examine?

Crawford, in dicta, indicates that the somewhat skewed analysis of the *opportunity* to cross-examine, adopted before *Crawford* is still applicable.

Crawford said: "Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness's prior trial testimony. (citing *Mattox v. United States*, 156 U.S. 237 (1895)). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: 'The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.'"

6. Did defendant waive or "forfeit" confrontation rights by wrongdoing?

"When defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not have to acquiesce . . . . We reiterate what we said in *Crawford:* that the rule of 'forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds.'"

See e.g., United States v. Rodriguez-Marrero, 390 F.3d 1 (1st Cir. 2004) (forfeiture of right by death of witness discussed, but not found)

7. Does the right to confrontation apply to sentencings, revocations, or other non-guilt-phase criminal proceedings?

See e.g., United States v. Taveras, 380 F.3d 532 (1st Cir. 2004) (application to revocation hearing not determined); *United States v. Luciano*, 414 F.3d 174 (1st Cir. 2005)(challenge to sentence based on enhancing facts that defendant did not have opportunity to confront);

8. To what extent does the right to confrontation apply to cases remanded or reversed on appeal or in state and federal habeas proceedings?

See e.g., Horton v. Allen, 370 F.3d 75 (1st Cir. 2004) (bypass issue because find nontestimonial); *McConagle v. United States*, 137 Fed. Appx. 373 (1st Cir. 2005)

9. Is the defendant entitled to greater protection under state constitutional rights?

10. Does Tennessee continue to apply *Ohio v. Roberts* to nontestimonial hearsay?

Crawford gave states the option when it said: "Where nontestimonial hearsay is at issue,

it is wholly consistent with the Framer's 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." *Davis* made it very clear that the Constitution imposed no additional requirements for the admission of nontestimonial hearsay. "A limitation [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." Yet, the Tennessee Supreme Court seems to require that courts continue to apply the *Roberts* test to nontestimonial statements: "When hearsay evidence is nontestimonial and otherwise admissible under the rules of evidence, a separate analysis under the *Roberts* test for reliability is unnecessary under either the federal Confrontation Clause or the equivalent provision of the state constitution." *State v. Lewis*, 235 S.W.3d 136 (Tenn. 2007).