

ANNUAL REPORT

OF THE

COMMITTEE ON CRIMINAL

LAW AND PROBATION ADMINISTRATION

TO THE ILLINOIS JUDICIAL CONFERENCE

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Hon. Michael P. Toomin
Hon. Walter Williams

October 2008

I. STATEMENT ON COMMITTEE CONTINUATION

The purpose of the Criminal Law and Probation Administration Committee ("Committee") of the Illinois Judicial Conference is to review and make recommendations on matters affecting the administration of criminal law and monitor, evaluate and provide recommendations on issues affecting the probation system. The Committee is further charged to review, analyze and examine new issues arising out of legislation and case law that impact criminal law and procedures and probation resources and operations. The Committee also is charged with reviewing and commenting on changes to Illinois Supreme Court Rules that affect the administration of criminal law and/or the probation system.

Since the Committee's inception, a number of critical issues related to criminal law and probation administration have been addressed. Over the years this Committee has been instrumental in sponsoring amendments to Supreme Court Rules 604(d), 605(a), and 605(b). The Committee also has made recommendations for the enacting of new rules, specifically Rule 402A. The Committee has prepared and presented to the Conference a report entitled *The Efficacy and Trends of Speciality Courts*, a detailed inventory on Illinois Problem Solving Courts, and a pre-sentence investigation report format incorporating the principles of Evidence Based Practices (EBP). The Committee also prepared and presented to the Conference a one page EBP bench guide similar to the one created for probation officers, supervisors, and managers.

This year, the Committee continued to examine a myriad of issues concerning the feasibility of a criminal alternative dispute resolution program in Illinois. The Committee also researched and reviewed materials that addressed the charge of improving the efficiency of accepting guilty pleas. At the request of the Supreme Court Rules Committee, the Committee reviewed and commented on proposed Supreme Court Rule 404 concerning admonishments to foreign nationals of their right to inform their respective consulate of their detention. Finally, at the request of the Court, the Committee drafted and presented proposed Supreme Court Rule 430 concerning the use of restraints upon criminal defendants inside the courtroom.

The Committee is dedicated to serving the Court in meeting the assigned projects and priorities, and producing quality information and products. The Committee is requesting to continue addressing matters affecting criminal law and procedure and the administration of probation services.

II. SUMMARY OF COMMITTEE ACTIVITIES

Conference Year 2007 Continued Projects/Priorities:

Project: ***Consider criminal alternative dispute resolution and report on the utility of such a program in Illinois.***

The subcommittee formed in 2007 to examine this charge continued to collect data from other states for review and comment by the full Committee. The Committee also received information and materials from Ms. Sally Wolf, Statewide Coordinator for the Illinois Balanced and

Restorative Justice Project, on different types of programs in Illinois which could be considered as potential models for determining the viability of a criminal alternative dispute resolution program. Based on the research and data presented by the subcommittee, along with the statutory constraints, case law, and rules concerning criminal law and procedure in Illinois, the Committee has reached a tentative consensus that if a criminal alternative dispute resolution program is to be feasible, it should be a mediation type program and limited to misdemeanors only.

The full Committee, however, believes that more time is needed to study if a criminal dispute resolution program would be viable in Illinois, and to clarify the details of such a program, which can then be presented to the Court for its consideration.

Conference Year 2008 Projects/Priorities:

Project 1: Forward the Pre-Sentence Investigation Report to the Administrative Office and its Probation Division for consideration as a component of the Court's existing Standards of Probation Practices.

As directed, the Committee forwarded its Pre-Sentence Investigation Report to the Administrative Office for consideration.

Project 2: Study and consider the feasibility for improving court efficiency in the acceptance of guilty pleas.

The Committee examined multiple different types of written guilty pleas used in other states whereby the accused and their lawyer acknowledge various waivers and stipulations in writing. After examining the documents and discussing this issue, the Committee believes that while the use

of a written form acknowledging the various waivers and stipulations of a guilty plea has some potential benefits in that such a written guilty plea could reduce claims of ineffective assistance of counsel, a statewide mandate for the use of a particular written guilty plea form is not necessary. The Committee believes that a statewide mandate is not necessary since admonishments are mandated by rule and caselaw and also must be placed on the record. However, the Committee submits that each judge should have the option of using a written guilty plea form and suggests that a sample written form be included in judicial education materials for new judges.

Project 3: Study, examine and report on Supreme Court Rules as they relate to criminal procedure and court processes.

Proposed Rule 404 was submitted to the Committee by the Supreme Court Rules Committee in 2007 for consideration and comment. Proposed Rule 404 would direct Illinois judges in felony proceedings to inform a foreign national at their initial appearance that they have the right to inform their consulate of their arrest or detention. At that time, the Committee decided to defer discussion pending the decision by the United States Supreme Court in the case of *Medellin v.*

Texas since the issues being addressed in that case would assist the Committee in commenting on the proposed rule. On March 25, 2008, the United States Supreme Court issued its decision in *Medellin v. Texas*, 128 S.Ct. 1346 (2008). Based on the *Medellin* decision, the Committee advised the Supreme Court Rules Committee that there appeared to be no problem with the language of Proposed Rule 404 so long as it was abundantly clear that the proposed rule applied only to felony cases and that the responsibility to notify the consulate fell to either the defendant or the defendant's attorney and not the trial court judge. The Committee also suggested to the Rules Committee that it give consideration to either drafting another paragraph to proposed Rule 404 or draft another proposed rule that incorporates the statutory mandate of warning a nonresident alien that their guilty plea could lead to deportation proceedings being initiated against them. (See 725 ILCS 5/113-8). A copy of Proposed Rule 404 is attached hereto as Appendix A.

Pursuant to the holding in the case of *People v Boose*, 66 Ill.2d 261 (1977) and its progeny, the Committee discussed the need for a rule concerning the use of restraints in criminal cases. After discussion, the Committee drafted and presented for consideration by the Court proposed Rule 430 which, if adopted, will provide guidance to trial court judges on when restraints are to be used and what findings need to be made prior to the application of restraints. A copy of proposed Rule 430 is attached hereto as Appendix B.

Project 4: Continue to monitor the impact of Crawford v. Washington and it's progeny on the Illinois Courts.

The Committee has continued to discuss and monitor the impact of the U.S. Supreme Court's ruling in the case of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed2d 177 (2004) and its progeny on the Illinois courts. An updated outline prepared by Judge Daniel B. Shanes that discusses the impact of *Crawford* and its progeny was presented to the Committee for information purposes and is attached hereto as Appendix C.

Project 5: Undertake any such other projects or initiatives that are consistent with the Committee charge.

The Committee continues to support revisions of the Illinois criminal statutes to simplify and clarify existing law, to provide trial courts with a range of effective sentencing options, and to provide trial judges with the discretion essential to a fair and effective system of criminal justice. The Hon. Michael P. Toomin is a member of the Criminal Law, Edit, Alignment, and Reform (CLEAR) Commission. Judge Toomin has informed the Committee on the status of the CLEAR Commission report in the General Assembly which has been given the designation of Senate Bill 100. The Committee will continue to monitor the status of this important initiative. Judge Toomin also informed the Committee that the CLEAR Commission began an examination of the sentencing statutes for the purpose of proposing edits, alignment and reforms similar to those proposed for the criminal code currently under consideration by the General Assembly.

III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

While the Committee has made significant progress addressing its charges, much of the Committee's work is ongoing and developing. The Committee is requesting to continue its work in determining the viability of a criminal alternative dispute resolution program in Illinois and if a program is deemed viable, to develop strategies for the effective implementation of such a program.

The Committee also would like to continue reviewing and making recommendations on matters affecting the administration of criminal law and the probation system. The Committee also would like to continue to study, examine and report on proposed Supreme Court Rules as they relate to criminal procedure and court process. Finally, the Committee requests to continue to monitor the effect of *Crawford v. Washington* and its progeny on the Illinois Courts.

For Conference Year 2009, the Committee requests to address one or more of the following projects: (1) explore the need for a first offender diversion program for those convicted of certain Class 4 or Class 3 felonies; (2) explore the use of a "Shock Incarceration" to the Illinois Department of Corrections for certain offenders as part of the terms and conditions of probation; and/or (3) explore the possibility of requiring a risk assessment/evaluation in all domestic violence cases prior to sentencing.

IV. RECOMMENDATIONS

The Committee is making no recommendations to the Conference at this time.

2008 REPORT

2008 REPORT

APPENDIX A

2008 REPORT

PROPOSED ILLINOIS SUPREME COURT RULE 404**Rule 404. Consular Notification for Foreign Nationals**

At the initial appearance, the circuit court must advise a criminal defendant in open court that any foreign national who is arrested or detained has the right to have notice of that fact given to the consular representatives of the country of his or her nationality and the right to communicate with his or her consular representatives. The court must make a written record that such notice was given.

Committee Comment

Rule 404 is intended to ensure that the United States c'omplies with its treaty obligations under Article 36 of the Vienna Convention on Consular Relations which requires that, if requested by a foreign national, the authorities of the receiving State shall, without delay, inform the consular post of the sending State that a national of that State has been arrested or detained. The United States is a party to the Vienna Convention on Consular Relations and, thus, the Convention is part of the supreme law of the United States by virtue of the Supremacy Clause (Article VI) of the U.S. Constitution. Because Article 36 of the Vienna Convention requires that consular notification be given without delay, notice should be given by the arresting or detaining officer in the first instance. The notice to be given by the iudge is not intended to be a substitute for notice by the officer, but is intended instead to ensure that such notice is given and that a written record of notification is kept. The written record may consist of a check box on a form. By requiring that some form of written record be kept, the rule will prevent disputes regarding Article 36 compliance. The rule is written in such a manner that an Illinois circuit court judge could provide the notice to all criminal defendants charged with a felony appearing before the judge, either individually or in a group, without having to ascertain the nationality of each defendant. The Committee takes no position on the appropriate remedy for violation of the consular notification rule, which is a matter of federal treaty law.

2008 REPORT

APPENDIX B

2008 REPORT

Rule 430. Trial of Incarcerated Defendant

An accused shall not be placed in restraints in the presence of the jury unless there is a manifest need for restraints to protect the security of the court or the proceedings. Persons charged with a criminal offense are presumed innocent until otherwise proven guilty and are entitled to defend themselves as free persons before the jury. Any deviation from this right shall be based on evidence or the stipulations of counsel on a case by case basis specifically considered by the trial court for there to be found a need for the shackling of a defendant. The trial judge shall, prior to allowing the defendant to appear before the jury restrained by shackles of any kind whether or not hidden by skirting, conduct a separate hearing on the record to investigate the need for such restraints. At such hearing, the trial court shall consider:

- 1) The seriousness of the present charge against the defendant;
- 2) Defendant's temperament and character known to the trial court either by observation or by the testimony of witnesses;
- 3) The defendant's age and physical attributes;
- 4) The defendant's past criminal record and, more particularly, whether such record contains crimes of violence;
- 5) The defendant's past escapes, attempted escapes, or evidence of any present plan to escape;
- 6) Evidence of any threats made by defendant to harm others, cause a disturbance, or to be self-destructive;
- 7) Evidence of any risk of mob violence or of attempted revenge by others;
- 8) Evidence of any possibility of any attempt to rescue the defendant by others;

- 9) The size and mood of the audience;
- 10) The physical security of the courtroom, including the number of entrances and exits and the number of guards necessary to provide security.

APPENDIX C

2008 REPORT

Lake County Bar Association
Criminal Law Committee Annual Seminar
October 2007

CRAWFORD AND CONFRONTATION

Hon. Daniel B. Shanes
Associate Judge
19th Judicial Circuit
State of Illinois

Discussion notes and outline

In 2004, the United States Supreme Court rewrote its understanding of the Sixth Amendment Confrontation Clause in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), jettisoning a quarter-century of “reliability” jurisprudence in favor of a new testimonial/non-testimonial analysis. Two years later, in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Supreme Court revisited its new confrontation jurisprudence, fleshing out its vision of testimonial hearsay. Even still, while the High Court erected this new paradigm, it left a variety of questions unanswered. Courts of review in Illinois and across the county have addressed several of these issues.

This outline primarily focuses on Supreme Court and Illinois case law development. Out-of-state cases are noted when particularly significant or in the absence of Illinois authority.

2008 REPORT

I. Preliminary Issues

A. Confrontation Clause only applies in criminal prosecutions: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” (Emphasis added.)

1. Juvenile child protection (abuse/neglect) proceedings are civil; Confrontation Clause does not apply.
 - In re C.M., 351 Ill.App.3d 913, 815 N.E.2d 49 (4th Dist. 2004)
2. Confrontation Clause does apply in juvenile delinquency cases; for example:
 - In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted on other grounds 224 Ill.2d 575, 871 N.E.2d 56 (2007)
 - In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (1st Dist. 2004), vacated and remanded on other grounds 224 Ill.2d 575, 866 N.E.2d 1174 (2007), identical opinion upon remand, ___ Ill.App.3d ___, 2007 Ill. App. Lexis 993 (1st Dist. 2007) (petition for rehearing pending)
3. Sexually Dangerous/Violent Persons commitment cases do not implicate the Confrontation Clause.
 - Commonwealth v. Given, 441 Mass. 741, 808 N.E.2d 788 (2004)
 - In re Commitment of Frankovitch, 121 P.3d 1240 (Ariz. App. Ct. 2005)
 - People v. Angulo, 129 Cal.App.4th 1349 (2005) (with experts)
4. Unfitness discharge hearings are not criminal prosecutions; Confrontation Clause does not apply.
 - People v. Waid, 221 Ill.2d 464, 851 N.E.2d 1210 (2006)
5. Confrontation rights apply at trial, not pre-trial suppression hearings.
 - Vanmeter v. State, 165 S.W.3d 68 (Tex. App. Ct. 2005)
 - State v. Smith, 906 So.2d 391 (La. Sup. Ct. 2005)
 - United States v. Miramonted, 365 F.3d 902 (10th Cir. 2004)
 - United States v. Brown, 322 F.Supp.2d 101 (Mass. 2004)

2008 REPORT

- See United States v. Raddatz, 447 U.S. 667, 679, 100 S.Ct. 2406 (1980) (“interests at stake in a suppression hearing are of a lesser magnitude than those at a criminal trial itself.”)

6. Confrontation Clause does not apply at sentencing hearings.

- United States v. Luciano, 414 F.3d 174 (1st Cir. 2005) (non-capital sentencing hearing)
- United States v. Martinez, 413 F.3d 239 (2nd Cir. 2005) (non-capital sentencing hearing)

In addition, the Illinois Supreme Court has implied that Crawford does not affect the admissibility of evidence at the second stage of a capital sentencing hearing. People v. Mertz, 218 Ill.2d 1, 57, 842 N.E.2d 618, 648-49 (2005) (discussing Crawford and reaffirming that the “only requirement for the admissibility of evidence at this stage of a capital sentencing hearing is that the evidence be relevant and reliable.”). See also Thomas v. State, 148 P.3d 727 (Nev. Sup. Ct. 2006) (rejecting claim that Crawford applies to eligibility and selection phases of capital sentencing hearing).

7. Probation violation hearings are civil; Confrontation Clause does not apply.

- People v. Johnson, 121 Cal.App.4th 1409 (2004)
- People v. Turley, 109 P.3d 1025 (Colo. App. Ct. 2004)
- See People v. Lindsey, 199 Ill.2d 460, 771 N.E.2d 399 (2002) (probation revocation hearings civil in nature)

B. Confrontation Clause only applies to out-of-court statements offered for their truth; in other words, hearsay. Non-hearsay evidence--statements not offered for the truth of the matter asserted--do not raise a constitutional issue.

1. Evidence of co-defendant’s statement offered to rebut defendant’s claim of coercion in his statement not admitted for truth of matter asserted.

- Crawford explicitly reaffirms Tennessee v. Street, 471 U.S. 409, 105 S.Ct. 2078 (1985)
- People v. Reynoso, 2 N.Y.3d 820, 814 N.E.2d 456 (N.Y. 2004)
- United States v. Eberhart, 388 F.3d 1043 (7th Cir. 2004)

2008 REPORT

2. Evidence offered to explain course of investigation or conduct of officers is not offered for truth of the matter asserted and does not raise confrontation issues.

- State v. Banks, 2004 Ohio 6522 (Ohio App. Ct. 2004)
- See also People v. Suastegui, 374 Ill.App.3d 635, 871 N.E.2d 145 (1st Dist. 2007) (officer's testimony that declarant's statement corroborated person's statement is not testimonial because shows officer's course of conduct of how investigation proceeded)

3. Expert witnesses can testify about testimonial evidence considered in forming an opinion; evidence not offered for truth of matter asserted.

- People v. Jones, 374 Ill.App.3d 566, 871 N.E.2d 823 (1st Dist. 2007) (gunshot residue testimony; expert may testify about findings and conclusions of nontestifying expert considered in forming opinions)
- State v. Bunn, 619 S.E.2d 918 (N.C. App. Ct. 2005) (drug chemistry) (good discussion)
- State v. Arita, 900 So.2d 37 (La. App. Ct. 2005) (fingerprints)
- State v. Watts, 616 S.E.2d 290 (N.C. App. Ct. 2005) (DNA)
- People v. Thomas, 130 Cal.App.4th 1202 (2005) (gang expert)
- State v. Delany, 613 S.E.2d 699 (N.C. App. Ct. 2005) (drug chemistry)
- State v. Keodara, 2005 Wash. App. Lexis 1703 (Wash. App. Ct. 2005) (canine handler) (unpublished)

- C. Confrontation Clause is satisfied when the declarant is available for cross-examination (regardless of whether the defendant chooses to exercise that right).
Period.

- People v. Cookson, 215 Ill.2d 194, 830 N.E.2d 484 (2005)
- People v. Bakr, 373 Ill.App.3d 981, 869 N.E.2d 1010 (1st Dist. 2007)
- People v. Sharp, 355 Ill.App.3d 786, 825 N.E.2d 706 (4th Dist. 2005) (containing an excellent discussion of what constitutes "available for cross-examination")
- People v. Monroe, 366 Ill.App.3d 1080, 852 N.E.2d 888 (2nd Dist. 2006)
- People v. Desantiago, 365 Ill.App.3d 855, 850 N.E.2d 866 (1st Dist. 2006)
- People v. Miller, 363 Ill.App.3d 67, 842 N.E.2d 290 (1st Dist. 2005)
- People v. Johnson, 363 Ill.App.3d 1060, 845 N.E.2d 645 (2nd Dist. 2005)
- People v. Reed, 361 Ill.App.3d 995, 838 N.E.2d 328 (4th Dist. 2005)
- People v. Cannon, 358 Ill.App.3d 313, 832 N.E.2d 312 (1st Dist. 2005)
- People v. Miles, 351 Ill.App.3d 857, 815 N.E.2d 37 (4th Dist. 2004)

2008 REPORT

- People v. Klimawicze, 352 Ill.App.3d 13, 815 N.E.2d 760 (1st Dist. 2004)
- People v. Thompson, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004)
- People v. Martinez, 348 Ill.App.3d 521, 810 N.E.2d 199 (1st Dist. 2004)

D. Confrontation Clause only applies against the State.

- “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” (Emphasis added.)
- Note that when the defendant opens the door by offering portions of an (otherwise) testimonial statement, the State can cross-examine (pursuant to the “completeness doctrine”) on other relevant portions of that statement for impeachment.

E. Crawford does not affect the admissibility of a defendant’s statement by the State.

- People v. Thompson, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004)

F. Forfeiture by wrongdoing: a defendant forfeits a confrontation claim as a result of his wrongful conduct vis-a-vis the declarant. When the defendant causes the declarant’s unavailability at trial, he forfeits the right to confrontation.

In Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Court explicitly reaffirmed what it noted in Crawford: “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds. That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” Davis, 126 S.Ct. at 2280 (internal quotations and citations omitted.).

Although Davis declined to establish the standards necessary to demonstrate such forfeiture, the Court observed that hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered at such a hearing, and that most courts hold that the State’s burden of proof is by a preponderance of the evidence. Davis, 126 S.Ct. at 2280.

In People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333 (2007), the Illinois Supreme Court grappled with this issue, filing a series of splintered opinions, none of which obtained the approval of a majority of the court. At a minimum, however, Stechly does confirm that the forfeiture-by-wrongdoing doctrine retains vitality in Illinois. Although in separate opinions, a majority of the court agreed that hearsay (including the declarant’s statement) is admissible at a forfeiture hearing, with a plurality concluding that the State must prove the defendant intended to procure the declarant’s absence from trial to establish forfeiture.

2008 REPORT

See also:

- People v. Hampton, 363 Ill.App.3d 293, 842 N.E.2d 1124 (1st Dist. 2006), aff'd and remanded 225 Ill.2d 238, 867 N.E.2d 957 (2007) (remanding for forfeiture hearing; referring to Stechly)
- People v. Melchor, __ Ill.App.3d __, 2007 Ill. App. Lexis 1051 (1st Dist. Sept. 28, 2007), upon remand by 226 Ill.2d 24, 871 N.E.2d 32 (2007), vacating 362 Ill.App.3d 335, 841 N.E.2d 420 (1st Dist. 2005) (noting forfeiture by wrongdoing and concluding that defendant's skipping bail and failing to appear for several years, although wrongful, was not aimed at intentionally procuring witness's absence from trial)

II. Crawford's core holding.

When a declarant does not testify at trial, the Confrontation Clause prohibits admitting the declarant's testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine. It is admitting testimonial evidence absent unavailability and an opportunity for cross-examination that violates the Confrontation Clause.

Note that "unavailability" and "opportunity for cross-examination" are terms of art with their own bodies of case law. An issue frequently arises when the declarant denies at trial making the out-of-court statement or testifies that she simply does not remember doing so. In these circumstances, defendants commonly complain that they are unable to cross-examine (i.e. confront) the witness regarding that statement. This often arises with domestic violence victims and child or elderly witnesses. A strong line of precedent exists regarding the constitutional sufficiency for the "opportunity of cross-examination" under such circumstances. See:

- United States v. Owens, 484 U.S. 554, 108 S.Ct. 838 (1988)
- People v. Lewis, 223 Ill.2d 393, 860 N.E.2d 299 (2006) (citing Owens, holding that "witness is subject to cross-examination when he or she is placed on the witness stand, under oath, and responds willingly to questions", even if beyond the scope of direct examination)
- People v. Bakr, 373 Ill.App.3d 981, 869 N.E.2d 1010 (1st Dist. 2007) (holding that two declarants "physically appeared at trial" and "no confrontation clause problems exist simply because a declarant's alleged memory problems precluded the declarant from being cross-examined to the extent that defense counsel would have liked.")

2008 REPORT

- People v. Watkins, 368 Ill.App.3d 927, 859 N.E.2d 265 (1st Dist. 2006) (sufficient opportunity for cross-examination when witness claimed could not recall events)
- People v. Sharp, 355 Ill.App.3d 786, 825 N.E.2d 706 (4th Dist. 2005) (excellent discussion including Crawford)
- People v. Flores, 128 Ill.2d 66, 538 N.E.2d 481 (1989)
- People v. Bueno, 358 Ill.App.3d 143, 829 N.E.2d 402 (2nd Dist. 2005)
- People v. Miller, 363 Ill.App.3d 67, 842 N.E.2d 290 (1st Dist. 2005)
- People v. Monroe, 366 Ill.App.3d 1080, 852 N.E.2d 888 (2nd Dist. 2006)
- People v. Desantiago, 365 Ill.App.3d 855, 850 N.E.2d 866 (1st Dist. 2006)
- People v. Learn, 371 Ill.App.3d 701, 863 N.E.2d 1173 (2nd Dist. 2007) (holding that, under the facts of that case, the child witness was not available for cross-examination)

In addition, the Crawford Court suggested (if not held) that the Confrontation Clause only applies to testimonial evidence. Crawford, 124 S.Ct. at 1364. However, many courts held that the Roberts v. Ohio, 448 U.S. 56, 100 S.Ct. 2531 (1980), sufficient-indicia-of-reliability framework continued to apply to non-testimonial hearsay. E.g., People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2nd Dist. 2006).

In Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Court reiterated that “other [non-testimonial] hearsay . . . is not subject to the Confrontation Clause.” See also Davis, 126 S.Ct. at 2274 (construing Crawford’s statement, that the text of the Confrontation Clause reflects its focus on testimonial evidence, marks out not only the Clause’s core but also its perimeter). Nonetheless, some courts continued to conclude that Roberts applied to non-testimonial evidence.

In Whorton v. Bockting, ___ U.S. ___, 127 S.Ct. 1173, 1182 (2007), the Court emphatically stated that “Crawford overruled Roberts because Roberts was inconsistent with the original understanding of the Confrontation Clause.” Accordingly, Crawford’s result was the “elimination of Confrontation Clause protection against the admission of unreliable out-of-court non[-]testimonial statements.” Thus, under Crawford, “the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.” Whorton, 127 S.Ct. at 1182-83.

As a result, it is now settled that the Confrontation Clause does not affect the admissibility of non-testimonial hearsay, and no reliability-type analysis is required in determining the admissibility of such hearsay.

III. Testimonial Evidence and Bearing “Witness”

In both Crawford and Davis, the Court discusses the trial of Sir Walter Raleigh in analyzing testimonial evidence. In that case, government investigators (then called magistrates and justices of the peace) took witness statements for use in prosecution in lieu of in-court testimony. It is this practice of “trial by affidavit” with which the Confrontation Clause is concerned. All of the Court's examples of testimonial statements share the characteristic of State actors formally questioning witnesses for subsequent use in court.

Crawford decreed that the Confrontation Clause applies to testimonial evidence, but failed to explicitly define what it meant by the term “testimonial”. Without providing a precise definition of testimonial evidence, Crawford teaches that it is the trial use of a certain type of hearsay--testimonial--that implicates the Confrontation Clause. In doing so, the Court sheds some light on those types of hearsay that constitute testimonial evidence. At the same time, it clearly identifies various types of hearsay that are not testimonial.

At a minimum, Crawford holds that testimonial evidence includes prior testimony and statements made during certain police interrogations. Testimony can come from a variety of settings, including past trials, hearings, grand jury proceedings, plea allocutions, depositions, and affidavits. In each of these, the declarant is placed under oath and provides testimony.

In Crawford, the Court noted that by its own terms the Confrontation Clause applies to “witnesses” against the accused. The Court construed the term “witnesses” as those who bear testimony. Based upon this, the Court concluded that “testimony” in a constitutional sense--in other words, testimonial evidence--requires a certain formality in the statement. “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.” Crawford, 124 S.Ct. at 1364. It is that “specific type of out-of-court statement” that triggers constitutional scrutiny. Id.

In Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Court emphasized this formality in defining testimonial hearsay statements. While the Davis Court framed the issue before it as determining “which police interrogations produce testimony” (Davis, 126 S.Ct. at 2273), the Court provides much greater insight into what constitutes testimonial hearsay in other contexts as well.

To determine whether a statement made during police interrogation (as that term is used for confrontation purposes) constitutes testimonial evidence, the Davis Court established a “primary purpose” test:

2008 REPORT

“Statements are non[-]testimonial 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.” Davis, 126 S.Ct. at 2273-74.

In other words, Davis looks to the “why” and the “when” of the statement. Is the statement obtained to address a current situation--for use in the “now”? Or, is the statement obtained to determine what happened in the past for use in the future? Statements obtained to deal with ongoing situations--for use in the “now”--are not testimonial, while statements taken to memorialize past events for use in later proceedings are testimonial.

The Davis Court’s recitation of the facts in the two consolidated cases before it (Davis v. Washington and Hammon v. Indiana) reflect that dichotomy of purpose. In Davis, the statements were made during a 911 call in which a domestic-violence victim called the police for help. In that situation, the statements dealt with an ongoing emergency; the were for use by police to address an immediate situation. In Hammon, conversely, the statements were made during police investigation into the past commission of possible criminal conduct. The statements were made during structured questioning, under formal enough conditions (in a separate room where the police kept the declarant apart from the suspect), and culminated in the declarant completing an affidavit memorializing her statement. Rather than to help resolve a flaring emergency, these statements were part of a typical investigation into the past commission of a possible crime.

In Crawford, the Court began laying the framework for understanding whether an out-of-court statement constituted “testimony” in a constitutional sense. Attendant to that is the level of formality and the government’s involvement in the procurement of that evidence. Clearly, a declarant’s sworn statements, made during a court proceeding, deposition, or in an affidavit include a significant degree of formality as well as governmental involvement (if simply by placing the declarant under oath). Such statements are plainly testimonial.

In Davis, the Court refined its analysis regarding unsworn out-of-court statements, describing what constitutes “testimony” triggering the Confrontation Clause. The Court concluded that testimonial hearsay evidence is produced where the primary purpose in making the statement is to provide out-of-court testimony in lieu of the declarant testifying at trial. Thus, when “the ex parte actors and the evidentiary products of the ex parte communication align[] perfectly with their courtroom analogues,” the statement is testimonial. Davis, 126 S.Ct. at 2277. Conversely, when the declarant is not acting as a “witness”, that is, when the statement is not a solemn declaration or affirmation made for

2008 REPORT

the purpose of establishing some fact directed at proving the facts of a past crime to convict the perpetrator, the statement is not testimonial. Davis, 126 S.Ct. at 2276. As the Court observed, “[n]o ‘witness’ goes into court to proclaim an emergency and seek help.” Davis, 126 S.Ct. at 2277 (internal quotation marks in original).

In addition, the Court in Crawford held that statements covered by most hearsay exceptions by their nature are not testimonial. Crawford, 124 S.Ct. at 1367. The Court specifically mentioned business records, co-conspirator statements, most dying declarations, pedigree and family history evidence, reputation evidence, and past recollections recorded testimony. Such statements do not share the characteristics of testimonial hearsay; by their very definitions, their primary purpose is not to establish facts for a later criminal prosecution, and they are typically not made to the police. In other words, they bear little resemblance to the evidence used to prosecute Sir Walter Raleigh. Declarants making statements that fall within most hearsay exceptions simply are not acting as “witnesses” within the meaning of the Confrontation Clause.

This analysis comports with the Supreme Court’s characterization of the statements in Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775 (1987), and Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210 (1970), as “clearly non-testimonial.” Davis, 126 S.Ct. at 2275.

In Bourjaily, the trial court admitted a co-conspirator’s statement to an undercover government agent pursuant to the co-conspirator exception to the hearsay rule. Included in that ruling was that the statements were made in furtherance of the conspiracy (rather than, for example, post-arrest during structured police questioning). On review, the Supreme Court held that admitting those statements did not offend the Confrontation Clause. In Crawford and Davis, the Court reaffirmed that conclusion, declaring without discussion that those statements were not testimonial.

In Dutton, the trial court admitted statements from a co-defendant implicating the defendant to another prisoner while they were all in jail. The Supreme Court affirmed admitting those statements as co-conspirator statements (despite the fact that the defendant and the others were already in custody for those offenses). As in Bourjaily, the Court in Crawford and Davis summarily declared those statements were clearly not testimonial.

This is consistent with the Supreme Court’s construction of testimonial hearsay evidence. The statements in Bourjaily and Dutton were not solemn declarations. Nor were they for the purpose of providing evidence to convict. Indeed, they were quite the opposite. In Bourjaily, a co-conspirator was making statements to the government agent to further a criminal conspiracy. In Dutton, no government agent was even involved, and the declarant certainly did not make the statement as a formal declaration or to provide evidence to convict another at trial. In sum, neither statement’s primary purpose was to assist the government in investigating a possible crime. As Davis teaches, neither

2008 REPORT

declarant was acting as a “witness” or “testifying”. Simply put, neither statement bore any resemblance to the evidence admitted against Sir Walter Raleigh. As a result, Crawford and Davis easily deemed these statements non-testimonial.

This teaching informs the analysis involving statements in other contexts. In both Crawford and Davis, the Court made clear that the Confrontation Clause is aimed at a particular practice: the trial use of formalized, ex parte statements to government officials investigating an offense. The Crawford Court held that it is governmental involvement in that statement which bears “the closest kinship to the abuses at which the Confrontation Clause was directed.” Crawford, 124 S.Ct. at 1374. Indeed, it is governmental involvement that often (but not necessarily) creates the formal and solemn environment that leads to testimonial evidence. Without governmental involvement, much of the concern of the Confrontation Clause is absent.

The Supreme Court has held that the Sixth Amendment (home of the Confrontation Clause) “becomes applicable only when the government’s role shifts from investigation to accusation.” Moran v. Burbine, 475 U.S. 412, 430, 106 S.Ct. 1135, 1146 (1986) (holding that the Sixth Amendment right to counsel only attaches after the initiation of adversarial judicial proceedings). This is consistent with the Crawford Court’s repeated concern regarding the involvement of government agents:

- It is “police interrogation [that] bear a striking resemblance to examinations by justices of the peace in England.” Crawford, 124 S.Ct. at 1364.
- The Confrontation Clause is concerned about the “[i]nvolvement of government officers in the production of testimony with an eye toward trial” Crawford, 124 S.Ct. at 1367, n.7.
- The “involvement of government officers in the production of testimonial evidence presents the same risk [of violating the Confrontation Clause], whether the officers are police or justices of the peace.” Crawford, 124 S.Ct. at 1365.

The closer a factual situation comes to Sir Walter Raleigh’s case, the more likely it will be testimonial.

A. Testimonial Evidence: Testimony and Certain Police Interrogations

1. Testimony

- a. Grand Jury testimony is testimonial. People v. Patterson, 347 Ill.App.3d 1044, 808 N.E.2d 1159 (4th Dist. 2004), aff’d 217 Ill.2d

2008 REPORT

407, 841 N.E.2d 889 (2005); People v. Howell, 358 Ill.App.3d 512, 831 N.E.2d 681 (3rd Dist. 2005) (no discussion).

- b. Sworn statements--testimony--in petition for order of protection its testimonial. People v. Thompson, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004).
- c. Co-defendant guilty plea testimonial. People v. Duff, 374 Ill.App.3d 599, 872 N.E.2d 46 (1st Dist. 2007).
- d. Also includes preliminary hearing, trial, plea allocution, depositions, affidavits.

2. Police Interrogation

In Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Supreme Court adopted a "primary purpose test" for determining whether a statement made to a police officer constitutes testimonial evidence. The Court explains that statements

"are non[-]testimonial 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." Davis, 126 S.Ct. at 2273-74.

See above for further discussion of testimonial statements.

Prior to Davis, the Illinois Appellate Court addressed this issue in several opinions:

- a. People v. Bueno, 358 Ill.App.3d 143, 829 N.E.2d 402 (2nd Dist. 2005) (court states that custodial, post-Miranda statement to police "undoubtedly" testimonial).
- b. People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2nd Dist. 2006) (statement to police is testimonial if the officer is acting in investigative capacity to produce evidence for criminal prosecution)

2008 REPORT

- c. People v. Gilmore, 356 Ill.App.3d 1023, 828 N.E.2d 293 (2nd Dist. 2005) (court assumes without analysis that statements made in response to police questioning during investigation of a crime are testimonial).
 - Note that the defendant in Gilmore did not challenge various statements made to medical personnel during treatment or to a friend admitted as excited utterances.
 - d. People v. McMillin, 352 Ill.App.3d 336, 816 N.E.2d 10 (5th Dist. 2004) (court assumes without analysis that statement to police during questioning is testimonial).
- B. Illinois courts' construction of "testimonial" prior to Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006).
1. Testimonial evidence is typically procured by a governmental agent.
 - a. In People v. R.F., 355 Ill.App.3d 992, 1000, 825 N.E.2d 287, 295 (1st Dist. 2005), the court squarely held that "Crawford only applies to statements made to governmental officials; Crawford does not apply to statements made to nongovernmental personnel, such as family members or physicians." In reaching this conclusion, the court thoroughly examined Crawford's analysis, noting that "Crawford repeatedly emphasized the significance of governmental involvement in determining whether a hearsay statement is testimonial." R.F., 355 Ill.App.3d at 999-1000, 825 N.E.2d at 294.
 - b. In In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (1st Dist. 2004), vacated 224 Ill.2d 575, 866 N.E.2d 1174 (2007), upon remand __ Ill.App.3d __, 2007 Ill. App. Lexis 993 (1st Dist. 2007) (identical opinion on remand; petition for rehearing pending), the court states, but then ignores, that "governmental involvement in some fashion in the creation of a formal statement is necessary to render the statement testimonial in nature."
 - c. Note In re E.H., 355 Ill.App.3d 564, 823 N.E.2d 1029 (1st Dist. 2005) (governmental involvement necessary). The Illinois Supreme Court subsequently vacated that decision. In re E.H., 224 Ill.2d 172, 863 N.E.2d 231 (2006).

2008 REPORT

2. Testimonial involves formal, structured questioning by trained investigators used to gain information about a crime. People v. Redeaux, 255 Ill.App.3d 302, 823 N.E.2d 268 (2nd Dist. 2005).
 3. Testimonial involves “formal and systematic questioning” (but maybe not necessarily government agent). In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted 224 Ill.2d 575, 871 N.E.2d 56 (2007).
 4. Testimonial involves “specific, purposeful questions”; officers engaged in “investigative, evidence-producing actions”. People v. West, 355 Ill.App.3d 28, 823 N.E.2d 82 (1st Dist. 2005).
 5. Other jurisdictions have reached similar conclusions. For example:
 - State v. Lewis, 619 S.E.2d 830 (N.C. Sup. Ct. 2005) (“structured police questioning is a key consideration in determining whether a statement is or is not testimonial”)
 - People v. Fisher, 9 Misc.3d 1121A (N.Y. Crim. Ct., 2005) (testimonial involves “those situations in which government officials in a solemn and formal setting produce evidence against an identified individual regarding a particular offense”)
 - Tyler v. State, 167 S.W.3d 550 (Tex. App. Ct. 2005) (testimonial statements involve a declarant’s knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant could reasonably expect that his responses could be used in future judicial proceedings)
 - United States v. Manfre, 368 F.3d 832 (8th Cir. 2004) (testimonial refers to memorialized, judicial-process evidence)
 - State v. Nelson, 2005 N.C. App. Lexis 707 (N.C. App. Ct. 2005) (statements to private security guard not testimonial)
- C. Illinois courts’ construction of “testimonial” since Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006)

In People v. Kim, 368 Ill.App.3d 717, 859 N.E.2d 92 (2nd Dist. 2006), the Appellate Court held that a Breathalyzer certification affidavit did not constitute testimonial hearsay evidence. In doing so, the court wrote that “testimonial” contemplates evidence that is compiled during the investigation of a particular crime pertaining to a particular suspect. Conversely, the court held, documents establishing the existence or absence of an objective fact, rather than detailing the criminal wrongdoing of a defendant, are not testimonial.

2008 REPORT

Although the court did not discuss Davis in its opinion, its discussion is largely consistent with the Davis Court's analysis.

In People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333 (2007), the Illinois Supreme Court addressed whether various statements of a child victim constituted testimonial hearsay. However, a majority of the court was unable to agree upon a single analysis. Various opinions filed in Stechly discussed the statement's solemnity, the intent of the declarant versus the listener, the intent to establish a particular fact, and the presence or absence of police involvement. Because a majority of the court could not agree upon an analysis, it is difficult to discern specific guidance from the conflicting opinions. Indeed, even the plurality repeatedly "felt compelled . . . to note the limited extend of our holding", noting that it was based upon the "circumstances of this case." Stechly, 225 Ill.2d at 302, 870 N.E.2d at 366.

IV. Typical factual contexts: Some testimonial, some not

A. "Formal" statement to police

The classic situation of the police interview, in which a detective interviews an individual at the police station to memorialize her statement for future court purposes, is the essence of testimonial evidence. "Police interrogations bear a striking resemblance to examinations by justices of the peace in England." Crawford, 124 S.Ct. at 1364. The primary purpose of such a statement is clearly to establish past events potentially relevant to a later criminal prosecution. Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 2273-74 (2006).

Similarly, the typical detective interview of a child sexual-assault victim as part of the criminal investigation also constitutes testimonial evidence. It is irrelevant whether this interview takes place at a police station or Children's Advocacy Center.

Both these interviews involve a governmental agent formally interviewing a witness, often with structured questioning. In light of the Davis primary purpose test, this clearly constitutes testimonial evidence.

Examples of Illinois cases:

- People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (1st Dist. 2006)
- People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005)
- People v. West, 355 Ill.App.3d 28, 823 N.E.2d 82 (1st Dist. 2005)

2008 REPORT

- People v. Feazell, __ Ill.App.3d __, 2007 Ill. App. Lexis 1145 (1st Dist. Oct. 31, 2007) (simply stating co-defendant custodial statements clearly testimonial)
- In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted 224 Ill.2d 575, 871 N.E.2d 56 (2007)

B. DCFS interview of child victim

Like a police interview of a child victim, the DCFS interview is often a formal, structured (although hopefully open-ended) questioning of the child-witness. As a result, it often will constitute interrogation for Crawford (even if not Miranda) purposes. However, the issue exists whether, in a particular context, questioning by a DCFS worker constitutes sufficient governmental involvement (assuming some level of governmental involvement is necessary) to render a statement testimonial.

Illinois' first analysis of this issue was in In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (1st Dist. 2004), vacated 224 Ill.2d 575, 866 N.E.2d 1174 (2007), identical opinion upon remand, __ Ill.App.3d __, 2007 Ill. App. Lexis 993 (1st Dist. 2007) (petition for rehearing pending), in which the court held that where the DCFS investigator "works at the behest of and in tandem with the State's Attorney with the intent and purpose of assisting in the prosecutorial effort, DCFS functions as an agent of the prosecution." This makes sense and is in harmony with Crawford's understanding of the Confrontation Clause. Accordingly, the T.T. court was clear that not all statements made to DCFS will necessarily be testimonial, but where the DCFS investigator acts in a prosecutorial capacity, she essentially functions as a State agent for Confrontation Clause purposes.

The Second District Appellate Court followed this portion of T.T.'s analysis in In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted 224 Ill.2d 575, 871 N.E.2d 56 (2007), holding that a child victim's statements to both a police officer and DCFS investigator constituted testimonial evidence because the statements "were the result of formal and systematic questioning."

Note that in a case in which a DCFS worker is not working at the behest of the prosecution, an argument exists that a particular statement would not be testimonial. There are cases from other jurisdictions decided prior to Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), specifically supporting that position.

2008 REPORT

The United States Supreme Court's decision in Davis strengthens this analysis. For example, when a DCFS investigator conducts interviews for child welfare purposes and to assist in formulating a safety plan, those statements may not be made for the primary purpose of establishing a past fact for future criminal prosecution. See Davis, 126 S.Ct. at 2276. As a result, such statements may not be testimonial hearsay.

In People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333 (2007), the court addressed whether various statements of a child victim constituted testimonial hearsay. Although a majority of the court was unable to agree upon a single analysis, the plurality opinion notes that statements to social workers, medical personnel, or other mandated reporters may or may not be testimonial based upon the circumstances of the particular case.

C. Statements to family/friends (non-governmental officials)

This commonly arises when child victims or witnesses make statements to family members or friends about an offense; for example, the child-outcry statement to her parent.

Crawford itself suggests such statements are not testimonial, as they bear little resemblance to ex parte statements to government agents gathering evidence against an accused (see above discussion).

Davis further suggests (although the Court declined to specifically decide) that such statements are not testimonial. The Davis Court's construction of the statements admitted in Dutton v. Evans, 400 U.S. 74, 87-89, 91 S.Ct. 210 (1970), as "clearly non-testimonial" (Davis, 126 S.Ct. at 2275) only makes sense when it is understood in light of the Davis primary purpose test; in the absence of governmental involvement in the statement, the statement cannot objectively be viewed as having the requisite formality and being made to establish a past fact to support a future prosecution.

See above for further discussion of testimonial evidence.

In Illinois, People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005), provides the clearest holding that Crawford applies only to statements made to government officials; in other words, a statement made to a non-governmental official is not testimonial.

1. Child victim statement to mother and grandmother clearly not testimonial. People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005).

2008 REPORT

2. Adult victim statement to concerned citizen/good Samaritan not testimonial; citizen not government agent. People v. West, 355 Ill.App.3d 28, 823 N.E.2d 82 (1st Dist. 2005) (although court differently--and wrongly--analyzes issue in other contexts).

Some cases decided prior to Davis have held that a statement to a non-government agent can be testimonial hearsay, focusing on the content of the statement and finding an “accusatory” portion to be testimonial. The fault with this analysis is that it ignores Crawford’s focus on the purpose and scope of the Confrontation Clause (discussed above). In addition, Davis teaches that a statement’s testimonial nature is determined not by its content but rather by the circumstances in which it was made.

In People v. Cumbee, 366 Ill.App.3d 476, 851 N.E.2d 934 (2nd Dist. 2006), decided several days after Davis, the victim called her neighbor “very upset and crying hysterically.” The neighbor told her to come over, and the victim arrived 30 seconds later. Still crying hysterically and with visible injuries, the victim told the neighbor how the defendant attacked her. The trial court admitted these statements as excited utterances.

On appeal, without any reference to Davis, the Cumbee court followed the analysis of In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (1st Dist. 2004), vacated 224 Ill.2d 575, 866 N.E.2d 1174 (2007), identical opinion upon remand ___ Ill.App.3d ___, 2007 Ill. App. Lexis 993 (1st Dist. 2007) (petition for rehearing pending), and concluded that the portion of the declarant’s statement identifying the defendant were testimonial hearsay. This analysis is incompatible with Davis. (Even upon remand, the appellate court in T.T. failed to address, or even cite, the Supreme Court’s opinion in Davis.)

The Davis Court held that a victim’s answers to a governmental agent’s questions were not testimonial because a “911 call . . . is [designed] to describe current circumstances requiring police assistance.” Davis, 126 S.Ct. at 2276. Davis teaches it is the statement’s purpose that determines its testimonial nature. When the primary purpose of a police interrogation is to prove past events for later criminal prosecutions, the statement is testimonial hearsay. Conversely, when the statement is for immediate use to resolve an emergency, it is not testimonial hearsay.

In Cumbee, the victim’s statements to her neighbor were to seek help “to resolve the present emergency”. See Davis, 126 S.Ct. at 2276. In addition, she was neither responding to an “interrogation” nor speaking to a governmental agent. This factual scenario is even farther afield from the Raleigh trial than that in Davis. As the Davis Court observed, the victim “simply was not acting as a

2008 REPORT

witness; she was not testifying. . . . No ‘witness’ goes into court to proclaim an emergency and seek help.” Davis, 126 S.Ct. at 2277 (emphasis and internal quotations in original).

In light of United States Supreme Court’s opinion in Davis, and particularly noting that the appellate court in T.T. failed to discuss or even cite Davis, it is doubtful the analysis in T.T. and Cumbee will be followed by reviewing courts in the future. In addition, T.T. is currently pending a petition for rehearing, providing the appellate court an opportunity to alter its analysis in light of Davis.

See above for further discussion of testimonial evidence.

See also below for further discussion regarding content of the statement.

D. Police officer at scene and 911 calls

Scenarios in which a police officer responds to a call for assistance and a person places a 911 call are precisely the scenarios addressed by the Court in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006).

Police typically question individuals for one of two reasons, either to (1) gather information to assist in an emergency situation, or (2) establish the facts of a past crime for future prosecution. The Davis Court held that statements made during the former are not testimonial, while statements made during the latter are testimonial. Thus, when an officer is attending to the “community caretaking” function of addressing an emergency concern, rather than acting in an investigative capacity for the purpose of producing evidence for a criminal prosecution, the statement is not testimonial hearsay.

The Davis Court first considered a declarant’s answers to a 911 dispatcher. In doing so, the Court noted that, at a minimum, the initial questioning in a 911 call is ordinarily not designed primarily to prove a past fact, but rather to describe current circumstances requiring police assistance. Factors the Court considered included (1) the declarant was speaking about events as they were happening, rather than describing past events, (2) the declarant was facing an ongoing emergency, (3) the nature of the questioning was objectively such to assist in resolving the emergency rather than simply learn what had happened in the past, and (4) the level of formality of the questioning. Davis, 126 S.Ct. at 2276-77.

As a result, the Court concluded that the primary purpose of questioning under these circumstances is qualitatively different than the testimonial hearsay evidence subject to the Confrontation Clause. Declarants in such circumstances simply are

2008 REPORT

not “witnesses” as that term is used in the constitutional text. Davis, 126 S.Ct. at 2277.

On-scene questioning is guided by the same principles. The factual context in Hammon v. Indiana (the consolidated companion case with Davis) demonstrated that unlike the emergency 911 call, the on-scene questioning was “part of an investigation into possibly criminal past conduct.” The Court observed that at the time of the questioning (1) there was no emergency in progress, (2) the officer separated the victim-declarant from the suspect, (3) the statement deliberately recounted--in response to police questioning--potentially criminal past conduct, and (4) the statement took place some time after the events described were over. Based upon this, the Court concluded that the primary purpose of that questioning was to investigate a possible crime rather than address an ongoing emergency situation. As a result, those statements were testimonial hearsay. Davis, 126 S.Ct. at 2278.

While the Davis Court reached that factual conclusion based upon the evidence before it, the Court was clear that “officers called to investigate need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim. Such exigencies may often mean that initial inquiries produce non[-]testimonial statements.” Davis, 126 S.Ct. at 2279 (internal quotations and citations omitted) (emphasis in original). As a result, Davis’s legal holding remains intact: questioning--be it during a 911 telephone call or in person on-scene--is not testimonial if its primary purpose is to address an ongoing emergency situation.

- Note that non-testimonial statements may evolve into testimonial hearsay evidence. For example, questioning after an emergency ends may produce testimonial statements. Trial courts through orders in limine should exclude testimonial portions of such statements. Davis, 126 S.Ct. at 2277.

Even prior to Davis, some Illinois courts utilized this type of analysis, and those cases remain good law.

1. Adult victim’s statements to responding police officer are not testimonial; the “questions posed by the officer were preliminary in nature and for the purpose of attending to [the victim’s] medical concerns, not for the purpose of producing evidence in anticipation of a potential criminal prosecution.” People v. West, 355 Ill.App.3d 28, 823 N.E.2d 82 (1st Dist. 2005).
2. Child victim’s statement to officer “acting in an investigative capacity for the purposes of producing evidence in anticipation of a criminal

2008 REPORT

prosecution" (citing West) is testimonial. People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005).

3. Note also United States v. Thomas, 453 F.3d 838 (7th Cir. 2006) (following Davis, holding that an anonymous 911 caller's statements were not testimonial).

E. Statements to medical personnel for diagnosis or treatment

Determining whether statements made in the course of a medical examination was initially the subject of some controversy, although it was completely unnecessary. Regardless, the issue should now be settled in light of the Supreme Court's decision in Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006).

Statements to medical personnel do not involve police officers acting in an investigative capacity to produce evidence in anticipation of a criminal prosecution. Instead, such statements are primarily for the purpose of attending to the patient's medical concerns. As a result, these statements bear no relationship to the practices at which the Confrontation Clause was directed, and they cannot be testimonial. People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005).

In addition, medical personnel are not transformed into government agents simply because the medical examination is conducted for forensic purposes, even if it was the result of a DCFS referral. In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (1st Dist. 2004), vacated 224 Ill.2d 575, 866 N.E.2d 1174 (2007), identical opinion upon remand __ Ill.App.3d __, 2007 Ill. App. Lexis 993 (1st Dist. 2007) (petition for rehearing pending).

In T.T., the court ultimately concluded that the portions of a patient's statement identifying the offender were testimonial. In doing so, the court examined the content of the statement and segmented it into testimonial and non-testimonial portions. Prior to Davis, some panels of the Appellate Court followed this analysis. People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2nd Dist. 2006); People v. Cumbee, 366 Ill.App.3d 476, 851 N.E.2d 934 (2nd Dist. 2006).

Contrary to T.T., however, Davis teaches that a statement's testimonial nature is determined not by its content but rather by the circumstances in which it was made. In Davis, the Court considered the admissibility of a victim's statements to a 911 operator. During the call, the 911 operator asked the victim to identify her assailant, and she did. Rather than engage in any content-based dissection of the statement, the Court examined the circumstances in which the statement was

2008 REPORT

made to determine whether it was testimonial. This analysis is inconsistent with T.T.'s content-based parsing, and necessarily rejects it.

The Davis Court concluded that the fact the declarant identified the offender did not render the statement testimonial. Indeed, the Court went further and held that the statement--with the identification of the defendant--was not testimonial even with the 911 operator's specific efforts to identify the assailant. Davis, 126 S.Ct. at 2276. In reaching that conclusion, the Court reasoned that the identity of the assailant is pertinent to the police because they "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Davis, 126 S.Ct. at 2279 (internal quotations omitted).

This comports with precedent from the Illinois Supreme Court regarding statements made in the course of medical treatment. In People v. Falaster, 173 Ill.2d 220, 670 N.E.2d 624 (1996), the victim was taken for a forensic medical examination. The trial court admitted the victim's statement to the nurse identifying the defendant her abuser. On appeal, the supreme court held that a victim's identification of her assailant may be considered by medical professionals in forming their diagnosis and treatment plan, and is therefore admissible.

The supreme court's analysis in Falaster is consistent with the Davis Court's conclusion that police consider the identity of a possible assailant in order to assess the situation and possible danger. Although Falaster did not address the constitutional issue, pursuant to Davis, statements of identification do not automatically obtain special status.

In light of United States Supreme Court's opinion in Davis, and particularly noting that the appellate court in T.T. failed to discuss or even cite Davis, it is doubtful the analysis in T.T. and its progeny will be followed by reviewing courts in the future. In addition, T.T. is currently pending a petition for rehearing, providing the appellate court an opportunity to alter its analysis in light of Davis.

Also note People v. Gilmore, 356 Ill.App.3d 1023, 828 N.E.2d 293 (2nd Dist. 2005), in which the defendant did not challenge various statements made to medical personnel during treatment or to a friend admitted as excited utterances.

V. Non-testimonial hearsay evidence.

The Crawford Confrontation Clause is aimed at a particular practice: the trial use of a witness's ex parte statements to government officials as evidence against the defendant. The Crawford Court notes that statements covered by most hearsay exceptions by their

2008 REPORT

nature are not testimonial. Crawford, 124 S.Ct. at 1367. Such statements do not share the characteristics of testimonial evidence; in other words, they bear little resemblance to the evidence used to prosecute Sir Walter Raleigh. Accordingly, evidence that lacks the characteristics of State actors formally questioning witnesses to produce evidence in anticipation of a criminal prosecution are not testimonial. See above for additional discussion of testimonial evidence.

Note that the Confrontation Clause does not apply to non-testimonial hearsay. The Roberts v. Ohio, 448 U.S. 56, 100 S.Ct. 2531 (1980), sufficient-indicia-of-reliability framework does not survive Crawford in any context, and the admission of even unreliable yet non-testimonial out-of-court statements does not trigger the Confrontation Clause. Whorton v. Bockting, __ U.S. __, 127 S.Ct. 1173 (2007). (See above for further discussion.)

In stating that evidence covered by most hearsay exceptions is not testimonial, the Crawford Court specifically mentions business records, co-conspirator statements, most dying declarations, pedigree and family history evidence, reputation evidence, and past recollections recorded testimony.

A. Co-conspirator statements.

1. The Crawford Court specifically identifies co-conspirator statements as not testimonial. Crawford, 124 S.Ct. at 1367.
2. The Illinois Appellate Court has followed suit. For example:
 - a. In People v. Redeaux, 355 Ill.App.3d 302, 823 N.E.2d 268 (2nd Dist. 2005), the court notes that by their very nature, the purpose of co-conspirator statements are to advance the conspiracy, not assist law enforcement in defeating it.
 - b. In People v. Cook, 352 Ill.App.3d 108, 815 N.E.2d 879 (1st Dist. 2004), the court similarly holds that co-conspirator statements do not constitute testimonial evidence.

B. Dying declarations.

- People v. Gilmore, 356 Ill.App.3d 1023, 828 N.E.2d 293 (2nd Dist. 2005) (Crawford permits admitting dying declarations regardless whether testimonial)

2008 REPORT

C. Breathalyzer certification not testimonial

- People v. Kim, 368 Ill.App.3d 717, 859 N.E.2d 92 (2nd Dist. 2006)
(Although court avoids characterizing Breathalyzer certification affidavit as business record or public document, court concludes that it is not testimonial)

D. Although Illinois courts of review have not yet addressed evidence covered by other common-law hearsay exceptions, courts from other jurisdictions have. For example (these are only selected examples; many more exist):

1. Excited utterance not testimonial:

- Anderson v. State, 111 P.3d 350 (Alaska App. Ct. 2005)
(collecting cases)
- United States v. Luciano, 414 F.3d 174 (1st Cir. 2005)
- Rogers v. State, 814 N.E.2d 695 (Ind. App. Ct. 2004)
- State v. Banks, 2004 Ohio 6522 (Ohio App. Ct. 2004)
- State v. Wright, 701 N.W.2d 802 (Minn. Sup. Ct. 2005)
- State v. Barnes, 2004 Me. 105, 854 A.2d 208 (2004)
- People v. Corella, 122 Cal.App.4th 461 (2004)
- Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004)
- State v. Orndorff, 122 Wn. App. 781, 95 P.3d 406 (2004)

2. Business records not testimonial:

- United States v. Rueda-Rivera, 396 F.3d 678 (5th Cir. 2005) (INS records)
- People v. Kanhai, 797 N.Y.S.2d 870 (N.Y. Crim. Ct. 2005)
(Breathalyzer records)
- People v. Fisher, 9 Misc.3d 1121A (N.Y. Crim. Ct., 2005)
(Breathalyzer records)
- Napier v. State, 827 N.E.2d 565 (Ind. App. Ct. 2005) (Breathalyzer certificates)
- Riner v. Commonwealth, 268 Va. 296, 601 S.E.2d 555 (2004)
- Johnson v. Renico, 314 F.Supp.2d 700 (U.S. Dist. Ct. E.D. Mich. 2004)
- Perkins v. State, 897 So.2d 457 (Ala. App. Ct. 2004)
- Smith v. State, 898 So.2d 907 (Ala. App. Ct. 2004)

3. Other jurisdictions have also held statements admitted to other hearsay exceptions to be not testimonial, including present sense impression, state of mind, past recollection recorded, public records, statement against penal

2008 REPORT

interest, and of course prior testimony (which requires the prior opportunity for cross-examination).

VI. Illinois statutory hearsay exceptions

A. Section 115-10: Certain child-victim hearsay statements

The first statutory hearsay exception attacked after Crawford was section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10), which allows the introduction of a child victim's hearsay statements under certain circumstances. However, Crawford only bars the testimonial statement of a non-testifying declarant. Because section 115-10 applies in other contexts, it is not facially invalid, but instead may be unconstitutionally applied in particular circumstances.

In People v. Cookson, 215 Ill.2d 194, 830 N.E.2d 484 (2005), the Illinois Supreme Court explicitly reaffirmed that the Confrontation Clause is not implicated by the admission of a hearsay statement when the declarant testifies. In Cookson, the victim testified, and the trial court also admitted the child's hearsay statements pursuant to section 115-10(b)(2)(A). On appeal, the supreme court squarely held that because of the "statutory requirement that the child be available to testify . . . [the statute] does not run afoul of Crawford." Cookson, 215 Ill.2d at 204. As a result, the Illinois Supreme Court held that portion of section 115-10 constitutional.

1. When the child-declarant testifies, the Confrontation Clause is satisfied regardless of the nature of the out-of-court statement. Under these circumstances, section 115-10 is constitutional.
 - a. People v. Cookson, 215 Ill.2d 194, 830 N.E.2d 484 (2005) (see discussion above).
 - b. In People v. Cannon, 358 Ill.App.3d 313, 832 N.E.2d 312 (1st Dist. 2005), the court found section 115-10(b)(2)(A) constitutional because the child-declarant testified. The court also held that section 115-10(b)(2)(A) would be "severable from any other allegedly unconstitutional provisions of section 115-10."
 - c. In People v. Reed, 361 Ill.App.3d 995, 838 N.E.2d 328 (4th Dist. 2005), the court (citing Cookson) found section 115-10(b)(2)(A) constitutional because the child-declarant testified. The court, following Cannon, also held that section 115-10(b)(2)(A) would be severable from section 115-10(b)(2)(B). In doing so, the court

2008 REPORT

specifically rejected the Appellate Court's earlier opinion in E.H. (see below).

- d. In People v. Johnson, 363 Ill.App.3d 1060, 845 N.E.2d 645 (2nd Dist. 2005), the court (citing Sharp) held that when a victim is subject to cross-examination, admitting a prior statement pursuant to section 115-10 is a constitutional "nonevent" and does not violate Crawford. In doing so, the court specifically rejected the Appellate Court's earlier opinion in E.H. (see below).
- e. In People v. Sharp, 355 Ill.App.3d 786, 825 N.E.2d 706 (4th Dist. 2005), the court held that admitting statements pursuant to section 115-10 was proper where the declarant testified and was available for cross-examination; see also Justice Turner's concurrence specifically explaining why section 115-10 is facially constitutional.
- f. In People v. Monroe, 366 Ill.App.3d 1080, 852 N.E.2d 888 (2nd Dist. 2006), the victims testified but denied making the out-of-court section 115-10 statements. The Appellate Court held (following Sharp and other cases) that because the victims testified--regardless of the substance of their testimony--admitting the out-of-court statements is a constitutional nonevent.
- g. In In re E.H., 355 Ill.App.3d 564, 823 N.E.2d 1029 (1st Dist. 2005), a divided panel of the appellate court flatly stated that section 115-10 is unconstitutional. However, the Illinois Supreme Court vacated the appellate court's decision in In re E.H., 224 Ill.2d 172, 863 N.E.2d 231 (2006). Upon remand, the appellate court did not reach the constitutional issue. In re E.H., ___ Ill.App.3d ___, 2007 Ill. App. Lexis 724 (1st Dist. June 29, 2007).

In addition, several other panels of the Appellate Court have specifically rejected the appellate court's initial opinion in E.H. People v. Johnson, 363 Ill.App.3d 1060, 845 N.E.2d 645 (2nd Dist. 2005); People v. Reed, 361 Ill.App.3d 995, 838 N.E.2d 328 (4th Dist. 2005).

2. When the child-declarant does not testify, Crawford applies only to a statement that constitutes testimonial hearsay. If the statement is not testimonial, Crawford does not affect its admission, and section 115-10 is not unconstitutionally applied in those circumstances.

2008 REPORT

- a. Whorton v. Bockting, ___ U.S. ___, 127 S.Ct. 1173 (2007) (Confrontation Clause only applies to testimonial hearsay; Roberts overruled by Crawford).
 - b. People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005) (declarant does not testify, section 115-10 permits admitting non-testimonial statement).
 - c. In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted 224 Ill.2d 575, 871 N.E.2d 56 (2007) (declarant does not testify, non-testimonial statement properly admitted under section 115-10).
 - d. Note that the statutory requirements in section 115-10 must still be met to admit non-testimonial statements.
3. If the child-declarant does not testify, a defendant's confrontation rights will typically be violated if testimonial hearsay is admitted against him at trial. To the extent section 115-10 permits this, it would be unconstitutional as applied in those circumstances.
- a. In re Rolandis G., 352 Ill.App.3d 776, 817 N.E.2d 183 (2nd Dist. 2004), appeal granted 224 Ill.2d 575, 871 N.E.2d 56 (2007).
 - b. Based upon the circumstances surrounding the child-declarant's failure to testify, consider whether the forfeiture-by-wrongdoing doctrine may permit admitting the out-of-court statements. See above discussion.

B. Section 115-10.1: Prior inconsistent statements

Section 115-10.1 of the Code of Criminal Procedure (725 ILCS 5/115-10.1) pertains to impeaching a witness with a prior inconsistent statement, which obviously requires the declarant to testify. Because the Confrontation Clause is not implicated when the declarant testifies, section 115-10.1 does not present any constitutional issues. People v. Martinez, 348 Ill.App.3d 521, 810 N.E.2d 199 (1st Dist. 2004); People v. Bakr, 373 Ill.App.3d 981, 869 N.E.2d 1010 (1st Dist. 2007). (Note discussion and cases cited above as well.)

In many ways, the issue becomes whether the defendant had a sufficient opportunity to cross-examine the declarant. Rather than Crawford, this is an issue more truly controlled by the United States Supreme Court's decision in United

2008 REPORT

States v. Owens, 484 U.S. 554, 108 S.Ct. 838 (1988), and its progeny. See the discussion and cases cited above.

- C. Section 115-10.2 of the Code of Criminal Procedure (725 ILCS 5/115-10.2) permits the admission of a prior statement under certain circumstances when the declarant refuses to testify. It requires the declarant to be “unavailable” to testify, but defines that term in a specific way. Because an unavailable witness is typically not subject to cross-examination, section 115-10.2 was considered an early casualty of Crawford. That obituary was premature.

Note that the legislature recently amended section 115-10.2 to require that the statement was made under oath and subject to cross-examination. P.A. 94-53 (eff. June 17, 2005). While this limits the scope of statements covered by section 115-10.2, it likely ensures that it would not violate Crawford in those circumstances.

In addition, because “unavailable” is a term of art defined differently for purposes of the Confrontation Clause and section 115-10.2, a declarant can be simultaneously subject to cross-examination and statutorily unavailable. Applied in that context, section 115-10.2 is constitutional. People v. Bueno, 358 Ill.App.3d 143, 829 N.E.2d 402 (2nd Dist. 2005).

In Bueno, the State called Sergio Ruiz to testify. Sergio had earlier made several custodial, post-Miranda statements to police about the offense. During direct examination, Sergio decided he was done testifying and refused to answer further questions from the State. The defense asked Sergio some questions on cross-examination (but not about his custodial statements), he answered, and was then excused. The trial court subsequently admitted Sergio’s custodial statements to the police pursuant to section 115-10.2.

On appeal, the Second District Appellate Court nimbly concluded that Sergio was simultaneously unavailable but subject to cross-examination. The Second District agreed with the Fourth District in People v. Sharp, 355 Ill.App.3d 786, 825 N.E.2d 706 (4th Dist. 2005), and concluded that Sergio answered the defense’s questions during cross-examination. As a result, the court held that Sergio was available and “appeared” for confrontation-Crawford purposes. Accordingly, admitting Sergio’s custodial statements did not raise any constitutional issues.

Parenthetically, the court quickly noted that Sergio’s statements to the police would constitute testimonial hearsay. However, because the court held that Sergio was available for cross-examination, it is irrelevant whether the statements would be testimonial; that analysis only takes place when the declarant does not appear for cross-examination.

2008 REPORT

The court then turned to the hearsay-evidentiary analysis. Section 115-10.2 defines “unavailable” as when the declarant refuses to testify about his prior statements despite being ordered to do so. Because Sergio did exactly that, the court held that he was unavailable as required by section 115-10.2--despite earlier holding that he appeared at trial and was subject to cross-examination. Accordingly, the court concluded that Sergio’s statements to the police were properly admitted pursuant to section 115-10.2 (having met the other statutory requirements as well).

Note also that in People v. Brown, 363 Ill.App.3d 838, 842 N.E.2d 1141 (1st Dist. 2006), the court similarly held that the former version of section 115-10.2 was not facially unconstitutional.

- D. Section 115-10.2a of the Code of Criminal Procedure (725 ILCS 5/115-10.2a) permits the admission of a prior statement under certain circumstances in domestic violence cases when the declarant is “unavailable” to testify, and defines that term in a specific way.

First, because section 115-10.2a could apply to a non-testimonial statement, it is not facially unconstitutional. (See above discussion.)

In addition, because “unavailable” is a term of art defined differently for purposes of the Confrontation Clause and section 115-10.2a, a declarant can be simultaneously subject to cross-examination and statutorily unavailable. Applied in that context, section 115-10.2 is constitutional. See People v. Bueno, 358 Ill.App.3d 143, 829 N.E.2d 402 (2nd Dist. 2005), and discussion for section 115-10.2 above.

However, section 115-10.2a does not require a prior opportunity for cross-examination. To the extent section 115-10.2a would allow admitting a testimonial statement absent an opportunity for confrontation, it may be unconstitutionally applied.

- E. Section 115-10.3 of the Code of Criminal Procedure (725 ILCS 5/115-10.3) creates a hearsay exception regarding elder adults, and essentially mirrors section 115-10. As a result, the analysis for section 115-10 applies here as well.
- F. Section 115-10.4 of the Code of Criminal Procedure (725 ILCS 5/115-10.4), which permits the admission of a prior statement under certain circumstances when the declarant is deceased, requires that the statement have been made under

2008 REPORT

oath in a court-type proceeding. As a result, any such statement would likely be testimonial. In an effort to ensure the statute's constitutionality, the legislature amended it to require that the statement was subject to cross-examination. P.A. 94-53 (eff. June 17, 2005).

- Note People v. Melchor, 362 Ill.App.3d 335, 841 N.E.2d 420 (1st Dist. 2005) (non-cross-examined prior testimonial statement unconstitutionally admitted), vacated 226 Ill.2d 24, 871 N.E.2d 32 (2007), opinion upon remand __ Ill.App.3d __, 2007 Ill. App. Lexis 1051 (1st Dist. Sept. 28, 2007) (decided on statutory basis; no constitutional discussion).

G. Section 115-12: Statements of identification

Section 115-12 of the Code of Criminal Procedure (725 ILCS 5/115-12) pertains to the admissibility of out-of-court statements of identification. Section 115-12 requires that the declarant testify regarding the statement, and as a result, does not present any constitutional issues. People v. Miller, 363 Ill.App.3d 67, 842 N.E.2d 290 (1st Dist. 2005).

Note also People v. Lewis, 223 Ill.2d 393, 860 N.E.2d 299 (2006) (construing section 115-12 and holding that “witness is subject to cross-examination when he or she is placed on the witness stand, under oath, and responds willingly to questions”, even if issue is beyond the scope of direct examination).

H. Section 115-13: Statements to medical personnel

1. When the patient-declarant testifies, the Confrontation Clause is satisfied, and section 115-13 of the Code of Criminal Procedure (725 ILCS 5/115-13) is not unconstitutional in these circumstances. (See discussions above.)
2. Even when the patient-declarant does not testify, a statement admissible pursuant to section 115-13 should not be testimonial. (See above discussion regarding testimonial evidence.) Crawford does not apply to non-testimonial hearsay; as a result, section 115-13 remains unaffected.

2008 REPORT

VII. Appellate and Post-Conviction Issues

A. Crawford confrontation violations are subject to a harmless error analysis; if the error is harmless beyond a reasonable doubt the violation does not warrant reversal. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967) (harmless error analysis).

- People v. Patterson, 217 Ill.2d 407, 841 N.E.2d 889 (2005)
- People v. Duff, 374 Ill.App.3d 599, 872 N.E.2d 46 (1st Dist. 2007)
- People v. Sullivan, 366 Ill.App.3d 770, 853 N.E.2d 754 (1st Dist. 2006)
- People v. Cumbee, 366 Ill.App.3d 476, 851 N.E.2d 934 (2nd Dist. 2006)
- People v. Purcell, 364 Ill.App.3d 283, 846 N.E.2d 203 (2nd Dist. 2006)
- People v. Brown, 363 Ill.App.3d 838, 842 N.E.2d 1141 (1st Dist. 2006)
- People v. R.F., 355 Ill.App.3d 992, 825 N.E.2d 287 (1st Dist. 2005)
- People v. Cannon, 358 Ill.App.3d 313, 832 N.E.2d 312 (1st Dist. 2005)
- People v. West, 355 Ill.App.3d 28, 823 N.E.2d 82 (1st Dist. 2005)
- People v. Thompson, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004)

B. Error subject to procedural default, forfeiture, and waiver

- People v. Jones, 374 Ill.App.3d 566, 871 N.E.2d 823 (1st Dist. 2007) (alleged error waived by failure to object at trial and raise in post-trial motion)
- People v. Suastegui, 374 Ill.App.3d 635, 871 N.E.2d 145 (1st Dist. 2007) (alleged error waived by failure to object at trial)
- People v. Feazell, __ Ill.App.3d __, 2007 Ill. App. Lexis 1145 (1st Dist. Oct. 31, 2007) (alleged error not preserved by failure to raise in post-trial motion)
- People v. Howell, 358 Ill.App.3d 512, 831 N.E.2d 681 (3rd Dist. 2005) (alleged error not preserved by failure to raise in post-trial motion)

Note that an issue not properly preserved for appeal may still be reviewed under the plain-error doctrine. For example, in People v. Feazell, __ Ill.App.3d __, 2007 Ill. App. Lexis 1145 (1st Dist. Oct. 31, 2007), the appellate court concluded that under the circumstances of that case, admitting the co-defendant's custodial—and obviously testimonial—statements against the defendant constituted plain error.

Note also People v. McMillin, 352 Ill.App.3d 336, 816 N.E.2d 10 (5th Dist. 2004), in which the court considered an ineffective assistance of counsel claim and stated that no reasonably effective defense attorney would fail to object to damaging testimonial evidence (as well as failing to object to prosecutors making up evidence and engaging in other egregious misconduct). Contra State v.

2008 REPORT

Williams, 695 N.W.2d 23 (Iowa Sup. Ct. 2005) (rejecting ineffective assistance argument when defense failed to make a confrontation objection prior to Crawford).

See also:

- State v. Paoni, 331 Mont. 86, 128 P.3d 1040 (Mont. Sup. Ct. 2006) (confrontation issue waived; defendant failed to timely object)
- Patterson v. State, 280 Ga. 132, 625 S.E.2d 395 (Go. Sup. Ct. 2006).
- United States v. Luciano, 414 F.3d 174 (1st Cir. 2005) (defendant failed to object, reviewed only for plain error)
- Muhammad v. Commonwealth, 269 Va. 451, 619 S.E.2d 16 (Va. Sup. Ct. 2005)
- State v. Lee, 687 N.W.2d 237 (N.D. Sup. Ct. 2004) (defendant failed to object, waived issue)
- Parson v. Commonwealth, 144 S.W.3d 775 (Ky. Sup. Ct. 2004) (defendant waived right to confront declarant)
- Commonwealth v. Negron, 441 Mass. 685, 808 N.E.2d 294 (2004) (error waived)

C. No retroactive application

Because a Crawford violation is subject to harmless-error analysis, it should not be applicable retroactively beyond cases on direct appeal. The United States Supreme Court recently agreed in Whorton v. Beckting, __ U.S. __, 127 S.Ct. 1173 (2007), in which a unanimous Court definitively held that Crawford is not retroactive to cases already final on direct review.

This comports with the Illinois Supreme Court's Apprendi analysis, as follows:

“Retroactivity is an all-or-nothing proposition. [Citation.] An error which does not seriously affect the fairness, integrity or public reputation of judicial proceedings in one or more cases cannot be such a bedrock procedural element essential to the fairness of a proceeding as to fall within the second Teague [v. Lane], 489 U.S. 288 (1989) exception, requiring retroactive application in all cases.” People v. DeLaPaz, 204 Ill.2d 426, 438, 791 N.E.2d 489, 496 (2003).