**FIRST DISTRICT APPELLATE PROJECT**
**TRAINING SEMINAR**
**January 20, 2012**

# *Bullcoming* and Beyond*

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*Some of this material is derived from *"Crawford* After *Melendez-Diaz* – The Gift that Keeps on Giving?" by Richard Braucher, presented at the 2010 FDAP Seminar.

"*In all criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (U.S. Const., 6th Amend., emphasis added)

**HOW WE GOT HERE**

A. Testimonial

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

The Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54.) Note, "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. See *California v. Green*, 399 U.S. 149, 162 . . . . " (*Id.* at p. 59, fn. 9; cf. *People v. Cowan* (2010) 50 Cal.4th 401, 463 [hearsay after witness had testified not a confrontation violation when the witness was subject to recall]; see also *Whorton v. Bockting* (2007) 549 U.S. 406, 419-420 [holding that the *Crawford* decision does not apply retroactively in federal habeas proceedings].)

The purpose of the Confrontation Clause is to bar the admission of testimonial statements not subject to cross-examination. "English common law has long differed from continental civil law in regard to the manner in which witnesses give *testimony* in criminal trials. The common-law tradition is one of live *testimony* in court subject to adversarial testing, while the civil law condones examinations in private by judicial officers." (*Id.* at p. 43, emphasis added.) Without the Sixth Amendment, " '[w]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the Inquisition.' " (*Id.*, at pp. 49-50, emphasis deleted.) "Where *testimonial* statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' " (*Id.*, at p. 61, emphasis added.) "Where *testimonial* statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Id.*, at pp. 68-69, emphasis added.)

"[T]he principal evil at which the Confrontation Clause was directed was . . . its use of *ex parte* examinations as evidence against the accused. It was these practices that . . . English law's assertion of a right to confrontation meant to prohibit; and that the founding-

era rhetoric decried. The Sixth Amendment must be interpreted with this in mind. [¶] . . . [¶] This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. . . . [¶] The text of the Confrontation Clause . . . applies to 'witnesses' against the accused—in other words, those who 'bear *testimony*.' [Citation.] '*Testimony*,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' [Citation.] 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. [Citation.] 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." (*Id.* at pp. 50-51, emphasis added.)

Affidavits or statements " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Id.* at p. 52.)

"Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations 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." (*Id.* at p. 52.) The court used "the term 'interrogation' in its colloquial, rather than any technical sense. Cf. *Rhode Island v. Innis,* 446 U.S. 21, 300-301 [parallel cites. omitted] (1980). . . . [The witness's] recorded statements, knowingly given in response to structured police questioning, qualifies under any conceivable definition." (*Id.* at p. 53, fn. 4.)

"Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." (*Id.* at p. 55, fn. 7.)

"The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street* [(1985)] 471 U.S. 409, 414 . . . . " (*Id.* at p. 59, fn. 9.)

2. *Davis v. Washington* (2006) 547 U.S. 813

The Confrontation Clause does not apply to statements that are not testimonial.

(*Davis v. Washington* (2006) 547 U.S. 813, 823 ["the Confrontation Clause applies only to testimonial hearsay"]; see *People v. Loy* (2011) 52 Cal.4th 46, 66-67 [statement to a friend not testimonial]; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 156-157 [statements of codefendant's lies were not admitted for the truth of the matters asserted but to show consciousness of guilt].)

In *Bruton v. United States* (1968) 391 U.S. 123 the Supreme Court had held the admission of statements of a non-testifying co-defendant can violate the right to confrontation. Courts recently have narrowed that rule and have been holding statements to civilians pose no confrontation problem because they are not testimonial. (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 137 & fn. 14; *People v. Arceo* (2011) 195 Cal.App.4th 556, 574-575.) The prosecution can avoid *Bruton* problems by having the police interview codefendants together and the statements of one can be the adoptive admission of the other. (*People v. Jennings* (2010) 50 Cal.4th 616, 664.)

B. The Emergency Exception

1. *Davis v. Washington* (2006) 547 U.S. 813

The Court held statement to 911 operator describing a current emergency is not testimonial. (*Id.* at pp. 826-827.) The Court recognized that 911 operators are not law enforcement officers, but concluded they are police agents. (*Id.* at p. 832, fn. 2.) On the other hand, when police officers arrived at the crime scene in order to find out from the victim what had happened, the victim's statements were testimonial because they relayed historical events and not information concerning a current emergency. (*Id.* at pp. 829-832.)

A test: "Without 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." (*Id.* at p. 822, emphasis added; *Michigan v. Bryant* (2011) 562 U.S. __ [131 S.Ct. 1143, 1154]; *People v. Cage* (2007) 40 Cal.4th 955, 982.)

2. *People v. Cage* (2007) 40 Cal.4th 955

The defendant was convicted of aggravated assault on his 15 year-old son who did not testify. (*Id.* at p. 970.) A sheriff's deputy asked the victim at the hospital about what

happened, and the treating physician asked the same question. (*Id.* at pp. 971-972.)

The state supreme court relied on the test set forth in *Davis*. (*Id.* at p. 982.) "We derive several basic principles from *Davis*. First, as noted above, the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken primarily for the purpose ascribed to testimony – to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Id.* at p. 984, fns. omitted.)

The victim's statements through the officer were testimonial. (*Id.* at pp. 984-986.) But the same information relayed through the doctor were not testimonial. (*Id.* at pp. 986-987.)

A few months later, the California Supreme Court provided a more succinct test. "A statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use a later trial. Conversely, a statement is that does not meet all three criteria is not testimonial." (*People v. Geier* (2007) 41 Cal.4th 555, 605.) Testimonial statements includes not just those to police officers but also those with a special relationship with law enforcement. (*Ibid.*) A declarant's mere awareness that statements might be used at trial is not enough. (*Ibid.*)

In another capital case, the court held that the victim's statement he was attacked by the defendant moments before as admissible under *Crawford.* (*People v. Thomas* (2011) 51 Cal.4th 449, 495-497; see also *People v. Gann* (2011) 193 Cal.App.4th 994, 1008-1009 [codefendant's statements to police at the crime scene falsely stating that victim was killed in an apparent burglary attempt was not testimonial]; *People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466-1467 [statement by gunshot victim near death in ambulance was not testimonial]; *People v. Johnson* (2010) 189 Cal.App.4th 1216, 1225-1226 [911 call immediately after shooting when caller did not feel safe was not testimonial]; *People v.*

*Banos* (2009) 178 Cal.App.4th 483, 491, 494-496 [statement to 911 operator after the emergency to obtain an emergency restraining order was not testimonial]; *id.* at pp. 492, 497 [nor were statements to police about same]; but *id.* at pp. 492, 497-498 [statements to police days later were for investigation and thus testimonial].)

But some statements to medical professionals can be testimonial. (See, e.g., *People v. Vargas* (2009) 178 Cal.App.4th 647, 660-663 [sex assault forensic medical exam].) Similarly, the victim's statements to trained multidisciplinary interviewer after charges were brought was found to be testimonial, though the interviewer was not a government employee. (*People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1402-1403.)

3. *Michigan v. Bryant* (2011) 562 U.S. [131 S.Ct. 1143]

The Court repeated the test announced in *Davis*. (*Id.* at p. 1154.) In determining the "primary purpose" of the interrogation, the Court specified the test is objective; the parties' subjective intent is irrelevant. (*Id.* at p. 1156.) The Court said "we objectively evaluate the circumstances in which the encounter occurs, and the statements, actions of the parties." (*Id.* at p. 1156). "The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight." (*Id.* at p. 1157, fn. 8.)

4. *People v. Blacksher* (2011) 52 Cal.4th 769

A capital case which discussed in depth the *Bryant* case. (See *id.* at p. 811-816.) It was noted the United States Supreme "[C]ourt specifically reserved whether statements made to someone other than a law enforcement officer might be testimonial [citation], the only cases the high court has considered to date have involved statements by or to a government agent. (Cf. *People v. Cage* (2007) 40 Cal.4th 965, in which statements made by a victim to a police officer were held to be testimonial while substantially similar statements given to a physician were not testimonial.)" (*Id.* at p. 813, fn. omitted.) Eye witness's statements to the police immediately after the shooting describing the defendant were not testimonial when it was not clear where the gunman was. (*Id.* at pp. 816-817.) Statements by the eye witness, while in the back of a police car, to family members an hour later were not testimonial, though police officers and mental health officials were present. (*Id.* at p. 818.)

C. Forfeiture by Wrongdoing and Dying Declarations

In *People v. Giles* (2007) 40 Cal.4th 833, the defendant killed his girlfriend. The prosecution admitted evidence of his prior domestic violence with the same victim. Some

of the evidence included her statements concerning the domestic violence. The state supreme court held he forfeited the right to confront her about the prior domestic violence because he killed her. The United States Supreme Court vacated the decision. Forfeiture by wrongdoing applies only if "the defendant engaged in conduct *designed* to prevent the witness from testifying." (*Giles v. California* (2008) 554 U.S. 353, 359-360.)

The United States Supreme Court did state a dying declaration does not violate the Confrontation Clause when the declarant is on the brink of death and aware he or she was dying. (*Giles, supra,* 554 U.S. at pp. 358-359; see also *People v. D'Arcy* (2010) 48 Cal.4th 257, 289-290.)

D. Lab Results and Expert Testimony

1. *People v. Geier* (2007) 41 Cal.4th 555

In a death penalty case, the court permitted the testimony of a prosecution expert of a DNA match. (*Id.* at pp. 605-607.) While the testifying witness looked at the lab results to conclude there was a match, she did not do the DNA testing or generate the lab results. (*Id.* at pp. 593-594.) Dr. Yates at the Cellmark company conducted the tests and recorded the results. (*Id.* at p. 594.) "Yates's observations, however, constitute a contemporaneous recordation of observable events rather than the documentation of past events. That is, she recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks. 'Therefore, when [she] made these observations, [she] – like the declarant reporting an emergency in *Davis* – [was] 'not acting as [a] witness[];' and [was] 'not testifying' " (*Id.* at pp. 605-606.)

2. *Melendez-Diaz v. Massachusetts* (2009) 556 U.S. [129 S.Ct. 2527]

The prosecution introduced a certificate of a drug analysis, which was a sworn statement of a chemical analysis performed by a state laboratory upon police request. Business and public records "are generally admissible absent confrontation . . . because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial." (*Id.* at p. 2539.) Nonetheless, the Court held "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." (*Id*., at p. 2532.) Therefore, "[a]bsent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." (*Ibid*.; see also *Bullcoming v. New Mexico* (2011) 564 U.S. __ [131 S.Ct. 2705, 2716-2717].) Permitting the defendant to subpoena and question the declarant does not solve a confrontation clause violation. (*Id.* at pp. 2538-

2540.)

The purpose of the confrontation clause is to avoid trial by affidavit. (*Id.* at p. 2532.) "There is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements' " described in *Crawford*. (*Id.* at p. 2532, citing *Crawford*, 541 U.S. at pp. 51-52.) "The fact in question is that the substance found . . . was, as the prosecution claimed, cocaine – the precise testimony the analysts would be expected to provide if called at trial. The 'certificates' are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination" (*Id.* at p. 2532.) "[N]ot only were the affidavits ' "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," ' but under Massachusetts law the sole purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance." (*Id.* at p. 2532.)

**WHERE WE ARE NOW**

3. *Bullcoming v. New Mexico* (2011) 564 U.S. [131 S.Ct. 2705]

Lab results cannot be presented by someone who did not perform the test, though he or she knew of the procedures used. (*Id.* at pp. 2713-2716.) It did not matter that this time the lab results were not sworn affidavits. (*Id.* at p. 2717.) "A document created solely for an 'evidentiary purpose, . . . made in aid of a police investigation, ranks as testimonial." (*Ibid.*)

Ginsburg delivered the opinion of the Court, joined by Scalia. Sotomayor, Kagan, and Thomas joined for most of the opinion but not Part IV. In Part IV, which does not have precedential value, Ginsburg stated the following: "The State and its amici urge that unbending application of the Confrontation Clause to forensic evidence would impose an undue burden on the prosecution. This argument, also advanced in the dissent, [citation], largely repeats a refrain rehearsed and rejected in *Melendez-Diaz. See* 557 U.S., at ___-___, 129 S. Ct. 2527, 2540, 174 L. Ed. 2d 314, 330. The constitutional requirement, we reiterate, 'may not [be] disregard[ed] . . . at our convenience,' *id*., at ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314, and the predictions of dire consequences, we again observe, are dubious, see id., at ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314." (*Id.* at p. 2717-2718.) "New Mexico advocates retesting as an effective means to preserve a defendant's confrontation right 'when the [out-of-court] statement is raw data or a mere transcription of raw data onto a public record.' . . . The prosecution, however, bears the burden of proof." (*Id.* at p. 2718.)

In Sotomayor's concurring opinion, she wrote "this case does *not* present" the admission of records necessary for medical treatment; this case did not present a person

testifying as a supervisor, reviewer, or someone else with some personal knowledge of the test performed; "this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence;" and "this was not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph." (*Id.* at p. 2722.)

## WHERE WE ARE GOING

4. *People v. Williams* (2010) 238 Ill.2d 125, 939 N.E.2d 268, cert. granted sub nom. *Williams v. Illinois* June 28, 2011, No. 10-8505.

Question presented: "Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause."

A DNA sample was shipped to a Cellmark laboratory in Maryland for analysis. (*People v. Williams*, *supra*, 939 N.E.2d at p. 271.) The results were generated, at least in part, by a computer. (*Ibid.*) Cellmark's report was not introduced into evidence. (*Id.* at p. 272.) An Illinois State Police forensic analyst reviewed the results from Cellmark and testified it was her opinion there was a DNA match. (*Id.* at pp. 271, 272.) The defendant argued the Cellmark report was effectively admitted into evidence for the truth of the matter asserted because without it the witness could not have provided her opinion that his DNA matched the profile deduced by Cellmark. (*Id.* at p. 278.) The Illinois Supreme Court disagreed, stating an expert can give an opinion based on information not introduced into evidence. (*Id.* at p. 279.) The court also rejected the defendant's argument that the expert's witness should have been excluded under state evidentiary rules because there was no evidence she relied on a reliable basis. (*Id.* at pp. 274-277.)

5. *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886.

The defendant strangled the victim but claimed her death was not deliberate and thus his crime was voluntary manslaughter. The pathologist testified about his opinions on the cause of death. He relied on the autopsy report by another. The autopsy doctor was not called as a witness because he had been fired, he had resigned in his previous job "under a cloud" and district attorneys in several counties would not call him to testify. Questions presented: (1) Was defendant denied his right of confrontation under the Sixth Amendment when [one testifies about lab results or other forensic reports]? (2) How does the decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314, affect this court's decision in *People v. Geier* (2007) 41

Cal.4th 555? (3) What is the significance, if any, of the recent decision of the United States Supreme Court in *Bullcoming v. New Mexico* (June 23, 2011, No. 09-10876) 564 U.S. __.

6. Relevant California Law on Expert Testimony

California follows the rule that information concerning the basis of an expert's opinion is not admitted for the truth of the matter asserted and does not violate the Confrontation Clause, even after *Crawford*. (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427 [evidence of what gang members told the officer did not violate the Confrontation Clause].)

Courts have permitted expert opinions without introducing substantive evidence to support the basis of an expert opinion. This is logically flawed. "To be sure, under current California law, the jury is neither expected nor required to disregard hearsay basis evidence for its truth in evaluating expert opinion testimony. (Evid. Code, §§ 801, 802.) CALCRIM No. 332, the current standard-form jury instruction on expert opinion testimony, instructs the jury that it 'must decide whether information on which the expert relied was true and accurate,' and it may 'disregard any opinion' that it finds 'unbelievable, unreasonable, or unsupported by the evidence.' (See Pen. Code, § 1127b [sua sponte instructions required on expert testimony].) As is often said, 'any expert's opinion is only as good as truthfulness of the information on which it is based.' (*People v. Ramirez, supra*, 153 Cal.App.4th at p. 1427.)" (*People v. Archuleta* (Dec. 29, 2011, E049095) __ Cal.App.4th __ [slip opn. at p. 34].) A "witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact. (*Korsak v. Atlas Hotels, Inc,* [(1992)] 2 Cal.App.4th [1516,] at pp. 1524-1525, citing *Whitfield v. Roth* (1974) 10 Cal.3d 874, 893-896.)" (*Ibid.*) "[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510; accord *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741-743 [a doctor's medical opinion based on records which were not admitted were worthless].)

Nonetheless, California law permits a gang expert to render an opinion based on hearsay information without presenting facts in evidence to support the opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 612-613; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1124-1125.) For criticism of this rule, see *Hill, supra,* at pp. 1129-1130; *People v. Archuleta* (Dec. 29, 2011, E049095) __ Cal.App.4th __ ; *United States v. Mejia* (2d Cir. 2008) 545 F.3d 179, 187-188, 198-199 [gang opinion based on hearsay violated Confrontation Clause]; *People v. Goldstein* (N.Y. 2005) 6 N.Y.3d 119, 128 ["The distinction between a statement offered for the truth and one offered to shed light on an expert's opinion is not meaningful."]. The court in *Archuleta* observed that statements from gang members to

police officers are testimonial. (*Id.* at p. _ [slip opn. at p. 26].) The court suggested that even if the evidence does not violate the Confrontation Clause, it might be inadmissible under Evidence Code section 352. (*Id.* at p. __ [slip opn. at pp. 34-37, 42-44, citing *People v. Coleman* (1985) 38 Cal.3d 69, 91-93.)

E. Developments in the Business and Government Records Exception

Business records generally are not testimonial. (See *Crawford v. Washington* (2004) 541 U.S. 36, 56.) But the confrontation clause does not permit the admission of records if the regularly conducted business activity is the production of evidence for use at trial. (*Melendez-Diaz v. Massachusetts* (2009) 556 U.S. __ [129 S.Ct. 2527, 2538]; *Palmer v. Hoffman* (1943) 318 U.S. 109, 114 [accident report by railroad company inadmissible as a business record]; *Kirby v. United States* (1899) 174 U.S. 47, 55-61 [in prosecution of possession of stolen property, proof that the property was stolen was established by records of the convictions of the thieves]; see *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225 [some public records are testimonial, such as crime reports]; *People v. Pantoja* (2004) 122 Cal.App.4th 1, 9-10 [a person's declaration in an application for protective order was testimonial].)

A certificate of nonexistence of a record is a business record but might violate *Crawford*. (See *United States v. Orosco-Acosta* (9th Cir. 2010) 607 F.3d 1156, 1161-1162; *United States v. Martinez-Rios* (5th Cir. 2010) 595 F.3d 581, 586; *Tabaka v. District of Columbia* (D.C. Ct.App. 2009) 976 A.2d 173, 175; *State v. Alvarez-Amador* (Or.App. 2010) 232 P.3d 989, 994.)

California courts have held that court documents to prove a prior conviction are not testimonial. (*People v. Perez* (2011) 195 Cal.App.4th 801, 804; *People v. Larson* (2011) 194 Cal.App.4th 832, 836-838; *People v. Moreno* (2011) 192 Cal.App.4th 692, 711.) A Rap sheet is not testimonial. (*People v. Morris* (2006) 166 Cal.App.4th 363, 367-373.) Judicial findings were not testimonial because they were not made in anticipation of litigation. (See *United States v. Sine* (9th Cir. 2007) 493 F.3d 1021, 1035, fn. 11.)