The Supreme Court of South Carolina

In the Matter of Victoria T. Roach, Petitioner

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 17, 1996, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to Supreme Court of South Carolina, dated January 7, 2005, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Victoria T. Roach shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 7, 2005

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16

April 11, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

City of North Charleston, R. Keith Summey, Steve Ayer, Gussie Green, Sam Hart, Bobby Jameson, Robert King, Phoebe Miller, Rhonda Jerome, and Dorothy Williams, individually and as the Mayor, and City Council of the City of North Charleston, Plaintiffs-Petitioners,

v.

The County of Charleston, Peggy A. Moseley, in her official capacity as Charleston County Auditor, and D. Michael Huggins, in his official capacity as Charleston County Assessor, Defendants-Respondents.

Town of Kiawah Island, Intervenor.

ORIGINAL JURISDICTION

Opinion No. 25966
Heard March 1, 2005 – Filed April 11, 2005

JUDGMENT FOR PLAINTIFFS

J. Brady Hair and Derk Van Raalte, of North Charleston, for plaintiffs-petitioners.

Joseph Dawson, III, and Bernard E. Ferrara, Jr., of North Charleston; M. Dawes Cook, Jr., Gunnar Nistad, and Wendy Keefer, of Barnwell, Whaley, Patterson & Helms, LLC, of Charleston; and Samuel W. Howell, IV, of Howell & Linkous, LLC, of Charleston, for defendants-respondents.

Gedney M. Howe, III, Alvin Hammer, and Dennis James Rhoad, of Charleston, for intervenor.

M. Elizabeth Crum and Francenia B. Heizer, of McNair Law Firm, of Columbia, for amici curiae South Carolina Chamber of Commerce, South Carolina School Boards Association, Municipal Association of South Carolina, and Richland County.

Scott Thomas Price, of Columbia, for amici curiae South Carolina School Boards Association.

Danny C. Crowe, of Columbia, for amici curiae Municipal Association of South Carolina.

PER CURIAM: This case is before us in our original jurisdiction. Plaintiffs challenge the constitutionality of a tax ordinance enacted by Charleston County (County) pursuant to S.C. Code Ann. § 12-37-223A (Supp. 2004). We find the statute unconstitutional and strike the ordinance as invalid.

BACKGROUND

Section 12-37-233A allows a county to enact a property tax cap as follows:

(A) As authorized by Section 3, Article X of the South Carolina Constitution, the General Assembly hereby authorizes the governing body of a county by ordinance to exempt an amount of fair market value of real property located in the county sufficient to limit to fifteen percent any valuation increase attributable to a countywide appraisal and equalization program conducted pursuant to Section 12-43-217. An exemption allowed by this section does not apply to:

(1) real property valued for property tax purposes by the unit valuation method;

(2) value attributable to property or improvements not previously taxed, such as new construction, and for renovation of existing structures;

(3) property transferred after the most recent countywide equalization program implemented pursuant to Section 12-43-217; provided, however, at the option of the governing body of a county which is in the process of first implementing a countywide equalization program under Section 12-43-217, property transferred on or after January first of the year of implementation of the most recent countywide equalization program.

In November 2000, County first adopted an ordinance allowing a tax cap only for owner-occupied property. We found the ordinance inconsistent with § 12-37-233A because the ordinance created an unauthorized exemption applicable only to owner-occupied property rather than all real property. Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002).

In July 2002, County adopted its current ordinance tracking the language of § 12-37-223A as follows:

Section 1.

> There is hereby implemented in Charleston County the exemption provided in Section 12-37-223[A] of the Code of Laws of South Carolina 1976, as amended, by providing an exemption for real property in an amount of fair market value of real property located in Charleston County sufficient to limit to fifteen percent any valuation increase attributable to the implementation in Charleston County of a countywide appraisal and equalization program conducted pursuant to Section 12-43-217 of the Code of Laws of South Carolina 1976, as amended.
>
> Section 2.
>
> The exceptions from the exemption provided by this Ordinance shall be as provided in Section 12-37-223[A] of the Code of Laws of South Carolina 1976, as amended.

In February 2003, plaintiffs commenced this action challenging the new ordinance as unconstitutional. We appointed Judge A. Victor Rawl as referee. After an evidentiary hearing, Judge Rawl issued his report in favor of plaintiffs.

ISSUE

Does § 12-37-223A violate article X, § 3, of our State Constitution because it is not a general law that is uniform statewide?

ANALYSIS

Section 12-37-223A states that the General Assembly is acting "as authorized by Section 3, Article X of the South Carolina Constitution" in enacting this exemption from property tax. Article X, § 3, lists specific exemptions from property tax such as government property, libraries, and churches, and further provides:

> In addition to the exemptions listed in this section, the General Assembly may provide for exemptions from the

> property tax, by general laws applicable uniformly to property throughout the State and in all political subdivisions.
> . . .

(emphasis added).

Article X, § 3, mandates statewide uniformity in property tax exemptions enacted by the General Assembly. Where our Constitution requires statewide uniformity, a local option law is not valid. Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996). Section 12-37-223A is patently invalid since it enacts an exemption that is not uniform throughout the State. For this reason, we declare § 12-37-223A unconstitutional and hold County's ordinance is therefore invalid.

JUDGMENT FOR PLAINTIFFS.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Herbert
Altonia Addison, Respondent.

Opinion No. 25967
Submitted February 22, 2005 – Filed April 11, 2005

DISBARRED

Henry B. Richardson, Jr., Disciplinary Counsel, and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for the Office of Disciplinary Counsel.

Herbert Altonia Addison, of Hopkins, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction in Rule 7(b), RLDE, Rule 413, SCACR, including disbarment. In addition, respondent agrees to pay restitution to clients, banks, and other persons and entities who have incurred losses as a result of his misconduct. We accept the agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Complainant A owned a mobile home located on a portion of her mother's property. In 1999, Complainant A obtained a refinancing loan. Respondent conducted the loan closing which was to include conveyance of 3/10 of an acre from Complainant A's mother to Complainant A. Respondent incorrectly described the land and conveyed all of Complainant A's mother's land to Complainant A. The error was discovered in November 2000 when Complainant A's mother tried to obtain a home improvement loan.

Respondent acknowledges he failed to take adequate and timely steps to correct the error, including failing to cooperate with Complainant A, her attorney, and the mortgage company. Before the error could be corrected, Complainant A filed for bankruptcy.

Matter II

Respondent was the closing attorney for the sale of Complainant B's property to a buyer on April 6, 2001. Before the closing, Complainant B or her representative received a HUD-1 statement which showed no excess deposit and that Complainant B would received $2,153.62 as net proceeds from the sale.

At closing, however, respondent presented a different HUD-l statement which showed an excess deposit of $5,000.00 and that Complainant B was to pay $2,846.38. Complainant B expressed objection to the HUD-1 statement. Respondent left Complainant B and the mortgage broker alone. Complainant B alleges the mortgage broker represented that the changes were simply to allow the closing to proceed and that Complainant B would still receive the sum stated on the original HUD-1. Complainant B proceeded with the closing based on the mortgage broker's representations but has not received $2,153.62.

Respondent acknowledges executing a revised HUD-1 statement that contained false and/or misleading information, failing to adequately communicate with Complainant B, failing to record the deed after closing, failing to record the original mortgage, failing to secure a title policy, and failing to provide closing documents to the purchaser. Respondent further acknowledges using the name, address, and trust account of another attorney to conduct the closing although respondent was not an associate, employee, or partner of the other attorney and the other attorney was not involved in the closing.

Matter III

In August 1999, respondent represented Complainant C in the purchase of a home. Complainant C was told the only encumbrance on the home was a $32,830.97 Internal Revenue Service (IRS) lien against one of the sellers and that the IRS would settle the lien for $2,600.00. Respondent was to pay $2,600.00 to the IRS from the proceeds of the loan closing. At some point, respondent forwarded a money order for $2,600.00 to the IRS, but did not request a release. The IRS did not process the money order or issue a release, apparently because it was unclear to which matter the money order pertained and the IRS did not know who to contact regarding the matter.

In January 2001, Complainant C refinanced her home with another attorney. The title search performed by Complainant C's refinancing attorney reported four encumbrances of record. One was the IRS lien respondent was to have paid from the proceeds of the August 1999 closing. The other three encumbrances were tax liens of the prior owner which had not been discovered by respondent in 1999 or by another law firm during an April 2000 refinancing. After much inquiry by Complainant C's refinancing attorney, the money order was identified and the lien matter was resolved.

Matter IV

Respondent was a title insurance agent for Atlantic Title Insurance Company (Atlantic) from May 27, 1998 until December 24,

1999 when respondent's agency was terminated due to an unsatisfactory audit. The audit, which involved a review of approximately 350 files, revealed that respondent had collected premiums and issued commitments on a number of files, but failed to issue policies or remit premiums to Atlantic in the amount of $8,653.13.

Respondent delivered a check dated February 28, 2002, to Atlantic in the amount of $8,000.00. The check could not be negotiated due to insufficient funds in the account. Atlantic is still owed $8,653.13.

During investigation of this and other matters, Disciplinary Counsel issued subpoenas for respondent's financial records. Respondent did not fully respond to the subpoenas. Based on Disciplinary Counsel's review of the limited financial records respondent did supply, it was determined that from 1999 to 2000, one of respondent's trust accounts had twenty-seven insufficient and/or NSF checks and another trust account had twenty-two insufficient and/or NSF checks and negative balances on three occasions.

Matter V

On May 2, 2002, a non-lawyer assistant in respondent's office sent a letter bearing her signature to Complainant D, a contractor. The letter demanded that certain repairs be made on respondent's client's home before the warranty expired and threatened legal action if the repairs were not made. On May 3, 2002, Complainant D faxed a response to respondent's office stating that a detailed inspection of the home would be conducted by the vice-president of the company before the end of the week.

On May 9, the non-lawyer assistant sent a second letter to Complainant D. In this letter, the assistant thanked Complainant D for the inspection, but again demanded repairs. On May 14, Complainant D responded with a letter to respondent's office indicating all repairs were completed on May 13, 2002.

By separate letter, Complainant D raised the appearance of the unauthorized practice of law by non-lawyer employees to the Commission on Lawyer Conduct. Respondent did not respond to Disciplinary Counsel's request for information.

Matter VI

In June 2001, respondent conducted a real estate closing for a client. The client was buying a house for herself and her daughter. At closing, respondent listed his former law partner as the settlement agent on closing documents. Respondent's former partner was not the settlement agent and respondent did not have permission to use his name.

Respondent's client passed away in January 2002. In the process of probating her estate, the personal representative, Complainant E, discovered that respondent failed to record the deed or provide his client with the original deed, causing the sellers to remain owners of record. Respondent also retained $389.04 at closing to pay county taxes but did not remit those funds to the county. Complainant E made several attempts to contact respondent, but he did not respond. The deed was recorded on April 9, 2002, but Complainant E has not received the deed and the taxes remain unpaid.

Matter VII

On or about October 13, 1999, respondent conducted a real estate loan closing for Complainant F and withheld $18,791.00 to pay the IRS on behalf of the client. Between October 18, 1999 and June 13, 2001, respondent failed to pay the IRS on behalf of Complainant F. On June 13, 2001, respondent's trust account had a negative balance. Complainant F is still owed $18,791.00.

Matter VIII

Respondent was retained to represent Complainant G in connection with claims against law enforcement agencies who had

arrested and detained Complainant G in 1994 on charges of rape and related charges on which Complainant G was ultimately exonerated. Respondent failed to diligently and competently represent Complainant G, failed to communicate with Complainant G, and failed to take steps to protect Complainant G's interests upon termination of representation.

Matter IX

On or about April 7, 2000, respondent conducted a residential real estate closing for Clients H and I. The property included two lots of land, and any improvements thereon, known as Lots 11 and 12, Block B, on a subdivision of Tracts 1 and 2, Block B, in Haskell Heights, Richland County, South Carolina, more particularly shown on a plat recorded in Richland County Plat Book 362 at page 2427. At the time of the closing, a dwelling was situated on Lot 11 and Lot 12 was vacant. The loan closing instructions provided by the lender and the title commitment for the mortgage required the mortgage to be secured by both lots and any improvements thereon. The property description drafted by respondent for the mortgage and, subsequently, the mortgage respondent recorded, did not include Lot 11 and the dwelling situated on it. Respondent's failure to comply with the closing instructions to include Lot 11 and its improvements in the mortgage was inconsistent with the clients' and lender's instructions and left the lender undersecured.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.15(a) (lawyer shall hold property of clients in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule

4.1 (in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact to a third person); Rule 5.3(a) (a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a non-lawyer employee's conduct is compatible with the professional obligations of the lawyer); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Respondent further admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it is a ground for discipline for lawyer to violate Rules of Professional Conduct). In addition, he admits his misconduct violated Rule 417, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. Respondent is required to pay restitution to presently known and/or subsequently identified clients, banks, and other persons and entities who have incurred losses as a result of respondent's misconduct in connection with this matter. Moreover, respondent is required to reimburse the Lawyers' Fund for Client Protection for any claims paid as a result of his misconduct in connection with this matter. Respondent shall not apply for readmission until all restitution has been paid. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jordan
Delaine White, Respondent.

Opinion No. 25968
Submitted March 4, 2005 – Filed April 11, 2005

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Jordan Delaine White, of Sumter, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to imposition of a public reprimand or definite suspension for a period to be determined by the Court. We accept the agreement and definitely suspend respondent from the practice of law for eighteen months. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

In January 2004, Client A retained respondent to represent her interests in a child custody and divorce matter. During his representation, respondent made lewd, lascivious, and degrading comments to and about Client A when she was alone and when others were with her. During his representation, respondent exhibited immoral and impure behavior towards Client A's fiancé by suggesting things of a sexual nature which shamed and embarrassed the fiancé. Client A pleaded many times for respondent to stop making vulgar comments and to focus on the issues for which he had been hired.

To Client A's great distress, respondent continued a pattern of unethical sexual advances towards Client A. Several times, respondent attempted to touch Client A and offered to "satisfy" her and "put a smile on her face." Respondent frequently urged Client A to come to his office after hours without her fiancé and children.

Additionally, respondent did not adequately represent Client A, misinformed her of her rights, did not respond to her inquiries, and generally placed her legal matters and rights in jeopardy. At the temporary emergency hearing, respondent did not speak up for Client A's interests, thereby contributing to her loss of temporary custody of her children. Respondent breached confidentiality by discussing in detail the facts of the case with his wife, who then shared the details with Client A.

Respondent admits to a pattern and practice of sexually harassing vulnerable female clients, making lewd comments to them, and insisting they come to his office alone at night and on weekends. With at least one married client, respondent called and asked her to come to his office when he knew her husband (who was also respondent's client) was out of town. Respondent commented on how

"fine" she looked. Respondent implied to various female clients that he would trade sexual favors for legal fees.

Matter II

Respondent was retained by Client B, an employee of the United States Air Force, to represent him in a child support matter. Client B travels frequently and was unable to attend the March 3, 2004 hearing. For two months after the hearing, respondent continuously neglected Client B's telephone calls. When respondent did speak with Client B, respondent told Client B that an order had not been signed and that he would contact Client B when it was signed. Several months went by without contact. Thereafter, Client B discovered his pay had been reduced per court order.

After many more telephone calls, respondent told Client B the order had been signed and he had mailed him a copy. Several more days passed and Client B did not receive the order. Client B then telephoned respondent, insisting respondent fax him a copy of the order. Client B received the order by fax on October 12, 2004. The order had been signed on August 18, 2004.

The terms of the order were unfavorable to Client B. Client B had been ordered to provide proof to opposing counsel and the judge of a life insurance policy naming the child as beneficiary. Respondent had the policy in his file but failed to present it at the hearing, giving the impression that Client B was not cooperating with the former child support order. Additionally, respondent did not submit Client B's financial declaration, which caused the child support to be increased when, had the financial statement been produced, additional support might not have been ordered. Client B has had to seek other counsel and recently discovered his rights to reconsideration of and/or appeal from the court order expired before he even received a copy of the order.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter and promptly comply with reasonable requests for information); Rule 1.6 **(**lawyer shall not reveal information relating to representation of a client unless the client consents after consultation); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of his client); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(c) (lawyer shall not engage in conduct involving moral turpitude); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (lawyer shall not violate the oath of office).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for eighteen months. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.[1]

[1] The parties agreed to the appointment of an attorney to protect respondent's clients' interests if the Court suspended respondent for more than sixty (60) days. By separate order, the Court will appoint an attorney to protect respondent's clients' interests.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ben R. Pittman, on behalf of himself and all other shareholders of Grand Strand Entertainment, Inc., Appellant,

v.

Grand Strand Entertainment, Inc., d/b/a Legends In Concert of Myrtle Beach, John Stuart and Legends in Concert, Inc., Defendants,

Of Whom John Stuart is, Respondent.

Appeal from Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 25969
Heard February 3, 2005 – Filed April 11, 2005

AFFIRMED IN RESULT

C. Scott Masel, of Newby Pridgen Sartip & Masel, of Myrtle Beach, for Appellant.

Henrietta U. Golding, of McNair Law Firm, of Myrtle Beach, for Respondent.

CHIEF JUSTICE TOAL: This case was certified for review pursuant to 204(b), SCACR. The underlying litigation began when Appellant Ben R. Pittman (Pittman) brought an action against Grand Strand Entertainment, Inc., d/b/a Legends In Concert of Myrtle Beach, Respondent John Stuart (Stuart), and Legends In Concert, Inc., seeking injunctive relief and damages for misappropriation of corporate opportunity and breach of contract. The parties resolved all claims involving the corporations in arbitration. Following arbitration, however, Pittman pursued claims against Stuart as an individual. Eventually, both Pittman and Stuart moved for summary judgment, and the court granted summary judgment in favor of Stuart. Pittman appeals. We affirm.

FACTUAL / PROCEDURAL BACKGROUND

In 1994, Pittman and Stuart began making plans to open a live musical show, named "Legends in Concert," in Myrtle Beach, South Carolina. Stuart, president and sole shareholder of Legends In Concert, Inc. (Legends), a Nevada corporation, created and produced the show. Pittman, a stockbroker and entrepreneur who had an interest in the entertainment business, offered to raise the capital needed to open the show in Myrtle Beach.[1]

To raise the capital, Pittman formed a corporation named Grand Strand Entertainment, Inc. (Grand Strand). Through a public offering of stock, the corporation would raise money to open and run the show.[2] The corporation was formed in January 1995, with Pittman as its sole incorporator.

On March 26, 1995, Grand Strand and Legends entered into a licensing agreement.[3] The purpose of the agreement was to give Grand Strand

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[1] The show originated in Las Vegas and had successfully opened in other cities.

[2] Pittman explained that he would raise the money through a Small Corporate Offering Registration (SCOR), which is a type of public stock offering.

[3] Pittman also signed the agreement as an individual. Stuart signed only on behalf of his corporation, Legends.

licensing and intellectual property rights to produce the Myrtle Beach show, in exchange for raising capital to fund the show's opening and operation. More specifically, the agreement provided that Grand Strand would "raise between $500,000 and $1,000,000 dollars to develop, stage, open, and operate the show . . . for a minimum of a one year run."

The parties signed the agreement even though it contained deadlines that were to be met *before* the date the agreement was signed. The agreement included, in part, the following terms:

> a) [Legends] shall commence operation in Myrtle Beach by planning, staging rehearsing and opening [the show] through supplying its own lighting, equipment and technical support, personnel, acts, talent and through accepting *preliminary cash receipts* from Grand Strand in the amount of *$200,000 on or before March 30th*, by payment of *$100,000.00 on or before March 10th* and *the balance by March 30th*.
>
> b) Grand Strand will promptly register its SCOR offering and raise sufficient funds to complete capitalization of [the show] *which shall include all pre-production opening costs* and ongoing operating expenses, and in any event, shall not be less than $300,000.00 but is likely to be $1,000,000.00. . . .
>
> c) Grand Strand will register the SCOR offering to finance the Myrtle Beach operation on or before June 1, 1995, in order to fully capitalize [the show] by not later than August 31st, 1995.
>
> d) In the event that Grand Strand fails to perform or does not perform in a timely fashion, Legends shall have the right to continue to operate the Myrtle Beach production as a production of [Legends] . . . .

(Emphases added). The agreement also gave Legends the right to terminate the agreement if Grand Strand materially breached any of the terms.

Just two days after the agreement was signed, the show opened. At this time, Grand Strand had yet to pay Legends any money as outlined in the agreement. Therefore, Legends, not Grand Strand, funded all pre-production costs and was solely responsible for financing the show's opening. But according to Pittman, Stuart told him not to worry about the dates in the licensing agreement; Stuart just wanted Pittman to facilitate the SCOR in order to raise capital. In response to a conversation they apparently had about the missed deadlines, Pittman sent Stuart a fax, dated March 28, 1995, which provided as follows:

> Since you have asked me not to concentrate on the $200,000 since we got the show open without it and the license was so long in the making, I will now go ahead and concentrate on the SCOR offering ASAP per you [sic] request. . . . As you said Sunday about the license agreement when I wanted to make sure the $200,000 was not an issue . . ., this is all a matter of trust and I really do trust you and hope that the same always applies to me.

The SCOR offering never occurred. Grand Strand did, however, issue Stuart 120,000 shares of stock. On April 17, 1995, a week after the stock was issued, Stuart sent a letter to the bank where Grand Strand maintained its accounts, authorizing the bank to honor drafts made by certain Legends personnel in Nevada. Stuart signed the letters as Chief Executive Officer of Grand Strand, even though he was never officially elected or named as a director or the CEO.

Finally, on April 26, 1995, Stuart sent Pittman a letter declaring Grand Strand in breach of the licensing agreement. Accordingly, Stuart terminated the agreement with Grand Strand. The letter also explained that Legends would continue operating the Myrtle Beach show, without the assistance of Grand Strand or Pittman.

In response, Pittman brought a derivative action on behalf of himself and all other shareholders of Grand Strand, seeking injunctive relief and damages for misappropriation of corporate opportunity and breach of contract. The circuit court stayed the action pending the submission of claims against Grand Strand and Legends to arbitration, as required under the

licensing agreement. The court also ruled that Pittman's claims against Stuart, in his individual capacity, were not included in the arbitration agreement and thus could be pursued in an independent legal action following arbitration.

The arbitrator awarded judgment in favor of Legends on the claim for injunctive relief and dismissed all other claims. In addition, the arbitrator awarded Pittman $15,400 for services rendered and costs advanced. Finally, the arbitrator provided that "[t]his Award is in full settlement of all claims (and counterclaims) submitted by either party against the other in this arbitration."

Following arbitration, the circuit court lifted the stay, allowing Pittman to pursue his remaining claims against Stuart in his individual capacity. Stuart subsequently filed a motion for summary judgment based on res judicata and collateral estoppel, claiming that the parties agreed that all claims, including Pittman's claims against Stuart, were to be resolved in arbitration. The court denied Stuart's motion, finding that the parties never made such an agreement.

In the action against Stuart, Pittman alleged that Stuart misappropriated Grand Strand's corporate opportunity in breach of Stuart's fiduciary duty to the corporation. Both parties filed motions for summary judgment. The master-in-equity granted summary judgment in favor of Stuart, and, in doing so, made the following conclusions of law: (1) Grand Strand breached the agreement by failing to raise the necessary funding to open and run the show; and (2) Stuart did not usurp any corporate opportunity in breach of his fiduciary obligations to Grand Strand, or otherwise fail to act in good faith. Pittman filed a motion for reconsideration, which was denied.

Pittman appeals and raises the following issues for review:

I. Did the master-in-equity err in granting summary judgment in favor of Stuart?

II. Did the master-in-equity err in finding that the arbitration award barred Pittman from bringing the same claims against Stuart that Pittman had previously asserted against Legends?

LAW/ANALYSIS

I. SUMMARY JUDGMENT

In reviewing the grant of summary judgment, this Court applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *South Carolina Electric & Gas Co. v. Town of Awendaw*, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004) (quoting *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)). On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party. *Id.*

Pittman argues Stuart owed a fiduciary duty to Grand Strand, and there is an issue of fact as to whether Stuart breached this duty. Because we find that the parties were not in a fiduciary relationship, we disagree.

Whether there is a fiduciary relationship between two people is an equitable issue. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003). A fiduciary relationship exists when one has a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith. *Hotz v. Minyard*, 304 S.C. 225, 230, 403 S.E.2d 634, 637 (1991).

Stuart did not owe a fiduciary duty to Pittman or Grand Strand. However, Pittman argues that Stuart owed a fiduciary duty because he was (1) a majority shareholder; (2) the CEO of Grand Strand; and (3) the Chairman of the Board of Directors. But Pittman did not occupy any of these positions.

First, there is no evidence that Stuart was a majority shareholder of Grand Strand. In fact, the corporate minutes describe *Pittman* as "the sole

shareholder of the corporation." Although Stuart was eventually issued 120,000 shares of stock, there is no indication that by holding this stock, for which Stuart paid nothing, Stuart became a majority shareholder.[4]

Second, Pittman himself testified that there was no resolution or shareholder vote of the shareholders naming Stuart a director or officer. In fact, *Pittman* signed the corporate minutes as "Chairman." Later, in correspondence with Stuart's attorney, Pittman signed a letter as "President of Grand Strand Entertainment, Inc."

Stuart did, however, sign his name as CEO of Grand Strand on two letters that he wrote to the bank, and on a bank agreement. Although Stuart's act of signing his name as CEO may have been inappropriate, it did not transform Stuart into Grand Strand's CEO, with duties attendant to that position. We are unwilling, therefore, to find that Stuart owed duties required by officers of corporation.

At most, Pittman and Stuart, and their respective corporations, were parties to a contract, acting as two separate entities. Pittman breached that contract by not paying the $200,000 by March 30, and by not promptly registering the SCOR offering and providing all the opening costs. If anything, it was Pittman, not Stuart, whose actions were detrimental to Grand Strand.

Because these parties were not in a fiduciary relationship, we affirm the master-in-equity's decision granting summary judgment in favor of Stuart.

II. Claim Preclusion

Pittman argues that the master-in-equity erred in finding that the arbitration award barred Pittman from bringing the same claims against Stuart that Pittman had previously asserted against Legends. We disagree.

Pittman misconstrues the language in the master-in-equity's ruling. In his ruling, the master found the following: "[s]ince Legends in Concert, Inc.

[4] Grand Strand was authorized to issue a total of 1,000,000 shares.

committed no wrongs, the Plaintiff is barred from asserting any such claims against the Defendant Stuart." Pittman argues that this language effectively barred Pittman from pursuing his claims against Stuart *as an individual*. This is incorrect. The master simply reiterated what the law has been throughout this litigation: claims raised against Legends were confined to and disposed of through arbitration; therefore, Pittman was not permitted to turn around and raise those very same claims against Stuart *as an individual*. In other words, any claims Pittman has against Stuart must specifically address wrongs committed by Stuart, not Legends.

Therefore, we find no error.

CONCLUSION

For the foregoing reasons, we affirm the master-in-equity's order granting summary judgment in favor of Stuart.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cheryl Howard Craig, Respondent,

v.

William Rhett Craig, III, Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal from Greenville County
Robert N. Jenkins, Sr., Family Court Judge

Opinion No. 25970
Submitted February 16, 2005 – Filed April 11, 2005

AFFIRMED

T. Preston Reid, of Howard, Howard, Francis, & Reid, of Greenville, for Petitioner.

Jean Perrin Derrick, of Lexington, and Stuart G. Anderson, Jr., of Anderson, Fayssoux, & Chasteen, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: Respondent, Cheryl Howard Craig (Wife), brought the underlying divorce against Petitioner, William Rhett Craig, III

(Husband), seeking custody of the couple's youngest child, division of the marital property, alimony, child support, and attorney's fees.

FACTUAL / PROCEDURAL BACKGROUND

Husband and wife were married in 1974. In January 2000, Husband told Wife that he wanted to end the marriage and that he had engaged in five affairs over the course of their twenty-five-year marriage. Husband denied that he was having an affair and claimed the last affair he had was two-and-a-half years earlier. The couple decided to separate. In August 2000, Wife filed for divorce. After filing for divorce, Wife learned that Husband was engaged in a pre-separation affair. Husband denied this allegation, but before the case went to trial, Husband admitted the extra marital affair in a sworn affidavit submitted to the court. As a result, Wife established pre-separation adultery and was granted a divorce *a vinculo matrimonii*.

The couple has three children. The oldest child was living in the marital home at the time of the divorce. The oldest child suffers from injuries sustained in a childhood bicycle incident, but is able to care for himself financially because of a settlement relating to the injuries he suffered as a child. The second child is a college graduate who, at the time of divorce, also lived in the marital home while searching for employment. The third and youngest child was a junior in high school and lived in the home.

Wife has a master's degree in nursing and has been employed as a critical care nurse. Husband is a doctor and is a partner in a medical group that specializes in internal medicine. The couple has significant marital assets. The total value of the marital estate was determined to be $2,473,430.10. The marital property includes, but is not limited to, a home in Greenville, a significant 401(k) account, and other financial investment accounts.

The family court awarded custody of the youngest child to Wife. In addition, the family court found Wife had a special equity in non-marital

property owned by the husband.[1] The remaining marital assets, including Husband's retirement account, were divided equally. Moreover, the court ordered that, after the graduation of the youngest child from high school, the marital home was to be sold and the proceeds from the sale divided equally. In addition, the family court judge awarded Wife $500 per month in permanent periodic alimony and contribution toward her attorney's fees and costs.

Following the court's ruling, Wife filed a motion to alter or amend the judgment. The judge granted the motion and amended the order to grant Wife transitional monthly alimony of $3,000, until the sale of the marital home, at which time the amount of permanent periodic alimony would be set at $875 per month.

Despite the increase in alimony, Wife appealed and the court of appeals held that the family court erred in requiring the sale of the marital home and awarded Wife the home. *Craig v. Craig*, 358 S.C. 548, 558-59, 595 S.E.2d 837, 843 (Ct. App. 2004). The court of appeals then divided the remaining assets of the total marital estate equally, awarding both parties $1,236,715.05. Because the court awarded Wife the home, the court awarded Husband more of his retirement account to arrive at an even division of the assets and account for his equity in the home. Further, the court awarded Wife permanent periodic alimony of $3,000 per month.

This Court granted Husband's petition for certiorari, and the following issues have been raised for review:

I. Did the court of appeals err in reversing the family court's order to sell the marital home and equally divide the proceeds between Husband and Wife?

II. Did the court of appeals err in increasing the award of permanent periodic alimony to $3,000?

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[1] Husband owns an interest in several other properties that the family court determined to be non-marital property. The court found that Wife had a special equity in the properties because she contributed to their improvement.

LAW / ANALYSIS

I. Marital Residence

Husband contends that the court of appeals erred in reversing the family court's decision to sell the marital home and equally divide the proceeds between Husband and Wife. We disagree.

The division of marital property is within the discretion of the family court judge and the judge's decision will not be disturbed on appeal absent an abuse of discretion. *Morris v. Morris*, 295 S.C. 37, 39, 367 S.E.2d 24, 24 (1988). In order to effect an equitable division of property, the family court may require the sale of marital home. *Donahue v. Donahue*, 299 S.C. 353, 360, 384 S.E.2d 741, 745 (1989). Before ordering marital property be sold, the court should first try to make an "in-kind" distribution of the marital assets. *Id.* However, a family court may grant a spouse title to the marital home as part of the equitable distribution. *Id.* When distributing marital property, the family court should consider all fifteen factors set forth in the Code. S.C. Code Ann. § 20-7-472 (Supp. 2003). The family court considers the desirability to award the family home as part of the equitable distribution and any non-marital assets owned by either party. S.C. Code Ann. § 20-7-472(7) and (10) (Supp. 2003).

In the present case, the court of appeals correctly awarded sole possession of the marital home to Wife. The award of the marital home was part of the equitable distribution of the marital estate, not an award incident to support.

It is well established that family courts are empowered to include in an order for support that a party be provided with necessary shelter. S.C. Code Ann. § 20-7-420(15) (1976). A party who is granted possession of the marital home as an incident to support does not obtain a vested right to stay in the home for his lifetime; rather, changed circumstances may necessitate later modifying the possession. *Whitfield v. Hanks*, 278 S.C. 165, 166, 293 S.E.2d 314, 315 (1982). An award of the marital home incident to support requires a showing that compelling interests exist, such as (1) the need for adequate shelter for minors; (2) the occupying spouse has a special need for

the house because of a handicap or other infirmity; (3) the inability of the occupying spouse to otherwise obtain adequate housing; or (4) other special circumstances exist. *Thompson v. Brunson*, 283 S.C. 221, 226-27, 321 S.E.2d 622, 625 (Ct. App. 1984).

But if the house is awarded to a spouse as part of the equitable distribution of the marital estate, then no showing of special circumstances need be shown. *Donahue*, 299 S.C. at 360, 384 S.E.2d at 745. The marital home is merely a share of the total marital estate. *Id.* The party either gets the house or the value of his share of the equity in the house.

In the present case, the home was ordered to be sold as a part of the equitable distribution of the marital property. As a result, Wife does not need to demonstrate that special circumstances exist. However, the family court erred in making its equitable distribution of the assets.

In distributing the marital property, the family court did not apply the factors outlined in section 20-7-472. The family court failed to consider the desirability to maintain the marital home or consider the nonmarital property owned by Husband.

As to the desirability to maintain the marital home, Wife testified she had lived in the marital home longer than she had lived in any home. Further, Wife testified that she feels safe in the home because it is in a gated neighborhood. In addition, the children, even though emancipated, maintain rooms in the marital home. These factors weigh heavily in favor of awarding Wife the marital home as part of the equitable distribution of the estate.

In awarding the home as part of the distribution of the estate, the family court also overlooked the abundance of property owned by Husband. The record indicates that Husband owns an interest in at least three other properties either with his son or with other family members.

Therefore, we hold that the family court erred in not considering these factors when it apportioned the marital estate. Accordingly, the court of appeals correctly awarded Wife the marital home in the distribution of the estate.

II. Alimony

Husband contends the court of appeals erred by reversing the family court's decision to award permanent periodic alimony and by increasing the amount of the award. We disagree.

An award of alimony rests within the sound discretion of family court and will not be disturbed absent an abuse of discretion. *Dearybury v. Dearybury*, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002). Alimony is a substitute for the support which is normally incident to the marital relationship. *Spence v. Spence*, 260 S.C. 526, 529, 197 S.E.2d 683, 684 (1973). Generally, alimony should place the supported spouse, as nearly as practical, in the same position as enjoyed during the marriage. *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001).

When awarding alimony, the family court considers the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonable anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other relevant factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2003); *Patel v. Patel*, 347 S.C. 281, 290, 555 S.E.2d 386, 391 (2001) (holding that the court is required to consider all relevant factors in determining alimony).

In the present case, the family court abused its discretion by not addressing the standard of living established by the couple during the marriage. Husband and Wife established a very high standard of living for themselves. The couple has a very nice home in a very nice neighborhood. Wife drives a nice car. These are things Wife has grown accustomed to during the marriage. But for the infidelities of Husband, Wife would continue to enjoy the life that she had during the marriage.

Therefore, we hold that the court of appeals correctly awarded Wife an increase in alimony.

CONCLUSION

Based on the reasoning outlined above, we **AFFIRM** the court of appeals.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Jordan
Delaine White, Respondent.

ORDER

The Office of Disciplinary Counsel seeks the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. See In the Matter of White, Op. No. 25968 (S.C. Sup. Ct. filed April 11, 2005) (Shearouse Adv. Sh. No. 16 at page 32). Respondent consents to the appointment of an attorney to protect his clients' interests.

IT IS ORDERED that Richard C. Jones, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Jones shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Jones may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Richard C. Jones, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Richard C. Jones, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Jones' office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ John H. Waller, Jr. J.
FOR THE COURT

Columbia, South Carolina

April 11, 2005

The South Carolina Court of Appeals

The State, Respondent,

v.

Alvin Jermaine Green, Appellant.

The Honorable Howard P. King
Clarendon County
Trial Court Case No. 2002-GS-14-00074

ORDER

By order of the Court, Opinion Number 3941 has been withdrawn and Opinion Number 2005-UP-223 has been substituted therefore.

IT IS SO ORDERED.

Kenneth A. Richstad
CLERK
FOR THE COURT

Columbia, South Carolina
3/31/05

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Christopher F. Davis, **Appellant.**

Appeal From Aiken County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 3970
Heard March 9, 2005 – Filed March 28, 2005

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelanka, Assistant Attorney General Jeffrey A. Jacobs, all of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

ANDERSON, J.: Christopher F. Davis appeals his convictions for murder, armed robbery, and possession of a firearm during the commission of a violent crime. Davis contends that admission of hearsay statements violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. We disagree and affirm.

FACTUAL/PROCEDURAL BACKGROUND

A jury convicted Davis of robbing and murdering Paul Williams (the victim). Davis argues the trial judge erred by allowing Shawn Hicks, a witness at trial, to testify to hearsay statements made by Gregg Hill. Davis claims the statements by declarant Hill were testimonial in nature, and, pursuant to Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), admission of the evidence violated his rights under the Confrontation Clause. The State contends the convictions should be affirmed because the statements were not testimonial and fit within the excited utterance exception to the rule against hearsay.

Hicks was selling drugs near the victim's house on the night of the murder. At Davis's trial, Hicks averred that he heard Davis, the victim, and Reggie Stevens arguing. Hicks then heard a gunshot and observed three individuals running from the victim's backyard. Witnesses, including Hicks, identified Stevens as one of the individuals, but could not identify the other two.

Five to ten minutes after hearing the gunshot, Hicks sold drugs to Stevens and Hill. Approximately fifteen to thirty minutes after the gunshot, Stevens and Hill returned with Davis, who was carrying a shotgun and a bag of coins. Davis purchased drugs from Hicks with the coins and offered to sell Hicks the shotgun. At this time, the hearsay statements at issue were uttered by Hill to Hicks. Hicks testified as follows:

> Q. What, if anything, did anybody say to you to prevent you from buying it [the shotgun]?
> A. Well, he told me not to purchase the shotgun.
> Q. Who told you?

A. Greg Hill.

. . . .

Q. [W]hat did Greg Hill tell you that night . . . ?
A. Chris and Reggie went in the house.
Q. All right. Did he say anything about Paul being shot or anything?
A. Yeah. That's why he told me not to get the shotgun.
Q. Because?
A. Paul had been shot with it.

The trial judge found Hill's declarations admissible as statements made in the furtherance of a conspiracy and admitted the testimony over Davis's objection.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, ___ S.C. ___, 608 S.E.2d 435 (Ct. App. 2004). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. On review, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990); see also State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000) (noting an abuse of discretion is a conclusion with no reasonable factual support). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

LAW/ANALYSIS

I. Confrontation Clause

Among other protections, the Sixth Amendment assures: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The Sixth Amendment was incorporated and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. California v. Green, 399 U.S. 149 (1970); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004). The primary interest secured by the Confrontation Clause is the right to cross-examination. Gillian at 450, 602 S.E.2d at 71 (citing State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Starnes v. State, 307 S.C. 247, 414 S.E.2d 582 (1991)); see also State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994) (observing that specifically included in defendant's Sixth Amendment right to confront a witness is the right to meaningfully cross-examine an adverse witness).

Certain hearsay statements traditionally have been admissible against a defendant even though the declarant was unavailable at trial and even though the defendant did not have a prior opportunity to cross-examine the declarant. Under Ohio v. Roberts, 448 U.S. 56 (1980), abrogated by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), hearsay statements were admissible if they bore "adequate 'indicia of reliability'"—a test that could be met by showing the evidence (1) fell within a firmly rooted hearsay exception, or (2) bore particularized guarantees of trustworthiness. Roberts at 66; State v. Sanders, 356 S.C. 214, 588 S.E.2d 142 (Ct. App. 2003). However, in Crawford, the United States Supreme Court broke away from Roberts and radically changed the Confrontation Clause landscape.

A. Crawford v. Washington

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), Michael Crawford was convicted of assault for stabbing Kenneth Lee, who allegedly tried to rape Crawford's wife, Sylvia. At trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing. Sylvia did not testify at trial due to Washington's marital privilege, which "generally bars a spouse from testifying without the other spouse's consent." Id. at ___, 124 S.Ct. at 1357 (citing Wash. Rev. Code § 5.60.060(1) (1994)). This privilege, however, does not extend to a spouse's out-of-court statements admissible under a hearsay exception. Whether Crawford saw a weapon in Lee's hands was a critical fact for his claim of self-defense. Because Sylvia was unable to testify at trial, Crawford claimed the admission of Sylvia's statement was a violation of his federal constitutional right under the Sixth Amendment to be confronted with the witnesses against him.

Following Roberts, the trial court allowed Sylvia's statement on the ground that it bore guarantees of trustworthiness. The Washington Court of Appeals reversed. The Washington Supreme Court then reinstated the conviction, and the Supreme Court of the United States granted certiorari.

Justice Scalia, writing for the seven-Justice majority, announced a fundamental change in Confrontation Clause jurisprudence:

> 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." . . . To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at ___, 124 S.Ct. at 1373 (emphasis added). Crucial to the Court's decision was its emphasis on testimonial hearsay. "[I]f the Sixth Amendment

is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." Id. at ___, 124 S.Ct. at 1365 (footnote omitted). Thus,

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Id. at ___, 124 S.Ct. at 1374 (footnote omitted).

B. Defining the Line Between Testimonial and Nontestimonial

The holding in Crawford is unequivocal: "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." 541 U.S. at ___, 124 S.Ct. at 1374. However, the Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" Id. (footnote omitted). Therefore, Crawford's reach largely will be determined by the definition courts give to the term "testimonial."

1. Guidance from Crawford

The Crawford Court established that whatever else testimonial covers, "it apples at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations." 541 U.S. at ___, 124 S.Ct. at 1374. Looking to the language of the Sixth Amendment for guidance, the Court deduced that "[t]he text of the Confrontation Clause . . . . applies to 'witnesses' against the accused—in other words, those who bear testimony." Id. (citation omitted). The Court explained:

> "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some

> fact." . . . [A]n 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. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Id.

The Court mentioned three formulations of "this core class of 'testimonial' statements":

> (1) "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially";
>
> (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and
>
> (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]"

Id. at ___, 124 S.Ct. at 1364 (citations omitted).

Additional instruction may be found in the Court's recurring references to what it called the "principal evil at which the Confrontation Clause was directed." Throughout the opinion, the Court interpreted the Clause by referencing its historical purpose of protecting against the "civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." Id. at ___, 124 S.Ct. at 1363.

The continental civil-law tradition "condon[ing] examination in private by judicial officers" stands in historical contradistinction to the English

common-law tradition of "live testimony in court subject to adversarial testing." 541 U.S. at ___, 124 S.Ct. at 1359 (citing 3 W. Blackstone, Commentaries on the Laws of England 373-74 (1768)). Yet, the civil-law practice eventually found its way to England:

> Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face. . . ."
>
> Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century . . . . These . . . statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. . . . [T]hey came to be used as evidence in some cases, . . . resulting in an adoption of continental procedure.

Id. at ___, 124 S.Ct. at 1359-60 (citations omitted).

It was against this backdrop that the Confrontation Clause stage was set. Thus, the Sixth Amendment "must be interpreted" with this focus on preventing the civil-law use of ex parte examinations as evidence against the accused in mind. Id. at ___, 124 S.Ct. at 1363. See id. at ___, 124 S.Ct. at 1364 (noting that while ex parte examinations might sometimes be admissible under modern rules, the Framers certainly would not have condoned them); id. at ___, 124 S.Ct. at 1365 (observing that the current investigatory involvement of police officers in the production of testimonial evidence presents the same risk as the civil-law practices of justices of the peace); id. at ___, 124 S.Ct. at 1374 (finding that testimony at a preliminary hearing, before a grand jury, or at a former trial; and interrogation by police have the "closest kinship to the abuses at which the Confrontation Clause was directed").

In abrogating Roberts, the Court acknowledged suggestions by academics that the Court revise its Confrontation Clause doctrine to reflect more accurately the original understanding of the Clause. See id. at ___, 124

S.Ct. at 1369-70 (citing Akhil Reed Amar, The Constitution and Criminal Procedure 125-131 (1997); Richard Friedman, Confrontation: the Search for Basic Principles, 86 Geo. L. J. 1011 (1998)). The significance of the Court's citations to the scholarship of Professors Amar and Friedman is unclear. However, the differing views of the two professors as to what constitutes testimonial provide an efficacious framework for analyzing the myriad of post-Crawford Confrontation Clause cases.

2. Educatory Writings

Amar suggests the Confrontation Clause "encompasses only those 'witnesses' who testify either by taking the stand in person or via government-prepared affidavits, deposition, videotapes, and the like." A. Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 Geo. L. J. 1045 (1998). Amar's focus is on the text of the Sixth Amendment and particularly on what was the common understanding of being a witness against someone during the Founding Era. Thus, clearly testimonial statements include prior testimony, depositions, and affidavits. Police station confessions and statements come within Amar's understanding of the Clause, although he admits they are a "tad trickier." Id. at 1049. Though confessions and statements are not made under oath, "they typically have other formal indicia of testimony." Id. For example, confessions and statements are purportedly precise renditions of answers to precise questions and are usually attested by the confessor's signature. "Thus, they may be treated as functional depositions/affidavits, and therefore as 'witnessing' under both the Fifth and Sixth Amendments." Id. (footnote omitted). Amar's definition excludes private accusations made out of court by one private person to another.

Friedman offers a "modestly broader definition" of testimonial. See 86 Geo. L. J. at 1043. Under Friedman's approach, "a declarant should be deemed to be acting as a witness when she makes a statement if she anticipates that the statement will be used in the prosecution or investigation of a crime." Id. at 1042. He offers five "rules of thumb":

> A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made

> by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.

Id. at 1042-43.

One writer has illustrated the difference between Amar's and Friedman's approaches as follows:

> A is found dead in her bedroom, and her husband, B, is indicted for her murder. The police discover that A has left behind a diary detailing B's persistent history of domestic violence. The diary's cover page indicates that A authored it "to memorialize my husband's brutality in case something happens to me."

Paul Shechtman, 'Crawford' and the Meaning of Testimonial, 6/23/2004 N.Y.L.J. 4, (col 4.). Assuming the diary is admissible under the jurisdiction's hearsay rules, whether it will pass Confrontation Clause scrutiny depends upon whether the court adopts a definition of testimonial more akin to Amar's or Freidman's. Because the diary is not formalized and generated at the behest of the government, Amar's definition would find it nontestimonial. Freidman's approach, in contrariety, would deem the diary testimonial if the court found that A memorialized B's abuse in anticipation that the diary would be used against B in court in the event of her death.

3. Post-Crawford Decisions

Since Crawford, many courts have addressed whether particular statements are testimonial or nontestimonial. The issue has arisen under various factual circumstances, and statements tend to fall within one of

several categories. For example, multiple courts have faced the question whether hearsay statements made to 911 dispatchers are testimonial under Crawford. These courts have employed divergent tests and rationales to reach varying conclusions. Additional categorical situations include statements made to police during initial field investigations; statements made by children to authorities or parents; and statements made to family, friends, or acquaintances. Considering the significance "testimonial" now plays in Confrontation Clause cases, a review of how other courts have begun to define the term is edifying.

a. Statements Made During 911 Calls

One of the earliest opinions to address the reaches of "testimonial" is People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004). The defendant in Moscat made a motion in limine to exclude the recording of a 911 call made by the complainant. Announcing its "early opportunity" to "work out in practice the meaning and concrete application of the new principles" set forth in Crawford, 777 N.Y.S.2d at 876, the Moscat court held:

> A 911 call for help is essentially different in nature than the "testimonial" materials that Crawford tells us the Confrontation Clause was designed to exclude.
>
> A 911 call is typically initiated not by the police, but by the victim of a crime. It is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather, the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril.
>
> . . . .
>
> Moreover, a 911 call can usually be seen as part of the criminal incident itself, rather than as part of the prosecution that follows. Many 911 calls are made while an assault or homicide is still in progress. Most other 911 calls are made in the immediate aftermath of the crime.

> Typically, a woman who calls 911 for help because she has just been stabbed or shot is not contemplating being a "witness" in future legal proceedings; she is usually trying simply to save her own life.

Moscat, 777 N.Y.S.2d at 879-880. See also People v. Conyers, 777 N.Y.S.2d 274, 277 (N.Y. Sup. Ct. Queens Co. 2004) (citing Moscat and finding 911 calls nontestimonial because it was clear to the court, "having heard the panicked and terrified scream of Ms. Conyers', that her intention in placing the 911 calls was to stop the assault in progress and not to consider the legal ramifications of herself as a witness in a future proceeding[.]").

People v. Corella, 18 Cal.Rptr.3d 770 (Cal. Ct. App. 2004), is an early post-Crawford decision from the Court of Appeal of California. Corella's wife informed a 911 operator that her husband had hit her. Based on Crawford's treatment of "police interrogation" as being analogous "to the official pretrial examination of suspects and witnesses by English justices of the peace before England had a professional police force," the Corella court concluded "a police interrogation requires a relatively formal investigation where a trial is contemplated." Id. at 776. In contrast to the facts of Crawford, Mrs. Corella's statements "were not 'knowingly given in response to structured police questioning,' and bear no indicia common to the official and formal quality of the various statements deemed testimonial by Crawford. Mrs. Corella, not the police, initiated the 911 call to request assistance." Id. Therefore, the statements were found nontestimonial.

Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004), involved the brutal mutilation and murder of Danette Elg. The night before her murder, Elg phoned 911 when she heard someone attempting to break into her house. The police responded and found signs of attempted entry. Elg suspected that Leavitt was the perpetrator. She was killed the following night, and Leavitt was charged with her murder.

Leavitt argued that use at trial of the 911 recording violated his rights under the Confrontation Clause. Among other things, Elg had told the 911 dispatcher "she thought the prowler was Leavitt, because he had tried to talk

himself into her home earlier that day, but she had refused him entry." Id. at 830 (footnote omitted).

After noting that Crawford left open a precise definition of testimonial, the Leavitt court concluded: "Although the question is close, we do not believe that Elg's statements are of the kind with which Crawford was concerned, namely, testimonial statements." Id. at 830 n.22. The court explicated:

> Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate "the principal evil at which the Confrontation Clause was directed . . . ."

Id.

In Pitts v. State, ___ S.E.2d ___, 2005 WL 127049 (Ga. App. 2005), Pitts's wife called 911 and notified the dispatcher that Pitts had broken into her home and that another man was on her porch. She stated that

> Pitts broke into her house and was taking a shower, that he did not live there anymore, that he was running around her house with no clothes on, that he was not supposed to be in the county, that he was violating his probation, that "he's wanted," and that he was involved in a police chase the preceding weekend.

___ S.E.2d at ___, 2005 WL 127049 at *1.

The Pitts court determined that the statements made by Pitts's wife were not testimonial:

> The 911 calls . . . do not come within the ambit of Crawford. Here, the caller's statements were made while the incident was actually in progress. The statements were not made for the purpose of establishing or proving a fact regarding some

> past event, but for the purpose of preventing or stopping a crime as it was actually occurring. The caller was requesting that police come to her home to remove Pitts, who she said had broken into her house. The statements made during the 911 calls were made without premeditation or afterthought.

___ S.E.2d at ___, 2005 WL 127049 at *4.

State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004), found that statements made during a 911 call, moments after a criminal offense, and while still under the stress of the event, are not testimonial under Crawford. The court explained its decision as follows:

> A 911 call is usually made because the caller wants protection from an immediate danger, not because the 911 caller expects the report to be used later at trial with the caller bearing witness—rather, there is a cloak of anonymity surrounding 911 calls that encourages citizens to make emergency calls and not fear repercussion.

Id. at 302 (citation omitted).

People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. Bronx Co. 2004), found hearsay statements made to a 911 operator were testimonial and thus reached a different conclusion than did the courts in Moscat and Conyers. Factually, Cortes involved a 911 call by an unidentified and unavailable witness to a shooting. The court began with the proposition that "[t]he circumstances of some 911 calls, particularly those reporting a crime, are within the definition of interrogation." Id. at 405. Emphasizing that "what is paramount in Crawford is the importance of the confrontation right[,]" id. at 414, the court opined: "A definition of 'testimonial' that takes the Supreme Court and the New York courts at their word when they highly value the confrontation right cannot be limited to formal documents, affidavits or depositions." Id. (footnote omitted).

The court adopted the following test:

> A test . . . in accord with the highly prized protection of the right of confrontation is the objective one of whether the pretrial statement of a person other than the defendant, admitted through the testimony of another person, on tape or in writing, was made primarily for another purpose. If so, it need not be confronted. Under the test, for example, traditional business records, hospital diagnostic information, public records, res gestae, and co-conspirator statements would be admissible at trial without cross-examination. Whether some other statement falls within the test is to be determined by the circumstances in which the statement was made.

Id. at 414-15 (footnote omitted).

Under the objective speaker test, "When a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding; it makes no difference what the caller believes." Id. at 415. Thus, statements made to the 911 dispatcher were deemed testimonial.

Like Cortes, the court in People v. Dobbin, ___ N.Y.S.2d ___, 2004 WL 3048648 (N.Y. Sup. Ct. New York Co. 2004), found hearsay statements to a 911 dispatcher testimonial. The caller in Dobbin phoned 911 to report the robbery of a parking lot attendant which was in progress. An account of the robbery, the location of the robbery, and a description of the perpetrator were given to the operator. The Dobbin court reasoned:

> The 911 call, in this case, contains a solemn declaration for the purpose of establishing the fact that the defendant is committing a robbery. The caller is making a formal out of court statement to a government officer for the purpose of establishing this fact. The caller's statement is not a "casual remark to an acquaintance." The caller was officially reporting a crime to the government agency entrusted with this very serious and

> important function. As such, the 911 call falls within the category of out of court statements which reflect the focus of the Confrontation Clause; the out of court statements of "'witnesses' against the accused in other words, those who 'bear testimony.'"
>
> Second, further guidance as to whether the 911 call's content is a testimonial statement is provided in Crawford when we are given various examples of the type of out of court statements that fit within the class of testimonial statements. The broad categories of "various formulations of this core class of 'testimonial' statements," are "ex parte in-court testimony or its functional equivalent" and out of court "similar pre-trial statements." Among this type of pretrial statements, the Supreme Court lists, "pre-trial statements that declarants would reasonably expect to be used prosecutorially," and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

___ N.Y.S.2d ___, 2004 WL 3048648 at *3 (citations omitted). The court found "[t]he 911 statement fits . . . within the type of statement that was 'made under the circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" ___ N.Y.S.2d ___, 2004 WL 3048648 at *3 (citation omitted).

Additionally, the court found the statement analogous to a statement made during a police interrogation. The statement was "obtained by 'Police Operator 1521.'" ___ N.Y.S.2d ___, 2004 WL 3048648 at *4. Thus, "[g]iven Crawford's broad statement that testimonial statements include the 'functional equivalent' of some of the 'various formulations of the core class of testimonial statements,' it follows that a formal statement to a government officer, who is a police operator officially designated to formally obtain these statements, is the functional equivalent of a formal statement to a police officer." Id. Concomitantly, the court found the statement was testimonial.

In State v. Powers, 99 P.3d 1262 (Wash. Ct. App. 2004), the Washington Court of Appeals weighed in on the testimonial debate by

adopting a case-by-case approach to 911 calls. Powers appealed his conviction for violating a domestic violence protection order on the ground that the trial court erred in admitting a 911 recording. The victim called 911 and informed the dispatcher that Powers was in her home in violation of an order. The police promptly responded, and Powers was apprehended. On appeal, he argued that the caller's statement to the 911 operator fell squarely within the pretrial statements that declarants would reasonably expect to be used prosecutorially.

The court took note of the "dichotomy between a plea for help and testimonial statements in 911 calls," id. at 1265 (citing Richard Friedman & Bridget McCormack, Dial-In Testimony, 150 U. Pa. L. Rev. 1177 (2002)), and announced:

> We reject the State's request for a bright line rule admitting all 911 recordings because a rule would likely result in the vice Crawford seeks to redress: A "capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." 541 U.S. at ___, 124 S.Ct. at 1371. Instead, we hold that the trial court, on a case-by-case basis, can best assess the proposed admission of a 911 recording as testimonial or nontestimonial and whether the statement originates from interrogation.

99 P.3d at 1266.

The record showed that the victim "called 911 to report Power's violation of the existing protective order and described Powers to assist in his apprehension and prosecution, rather than to protect herself or her child from his return." Id. Accordingly, the call was deemed testimonial.

The Illinois Appellate Court, in People v. West, ___ N.E.2d ___, 2005 WL 44003 (Ill. App. Ct. 2005), reviewed Moscat, Cortes, and Powers and found those opinions helpful in formulating the following approach to statements made to 911 operators:

> First, as in Powers, we reject any bright line rule which would hold a 911 call testimonial or not testimonial in nature. Rather, we believe that a court should determine, on a case-by-case basis, whether the statement made to the 911 dispatcher was: (1) volunteered for the purpose of initiating police action or criminal prosecution; or (2) provided in response to an interrogation, the purpose of which was to gather evidence for use in a criminal prosecution. In the first instance, the statement is testimonial in nature because an objective individual would reasonably believe that when he or she reports a crime they are "bearing witness" and that their statement will be available for use at future criminal proceedings. Cortes, 781 N.Y.S.2d at 415-16. In the later case, the statement is testimonial in nature because it is the product of evidence-producing questions, the responses to which, if used to convict a defendant, would implicate the central concerns underlying the confrontation clause. Crawford, 541 U.S. at ___, 124 S.Ct. at 1365. Second, in performing this analysis, a court should examine a caller's statement in the same manner as it would a victim's statement to a treating medical professional. Accordingly, statements which are made "to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation" (Richard Friedman, Bridget McCormack, Dial-In Testimony, 150 U. Pa. L. Rev 1171, 1242 (2002)) are comparable to those made to medical personnel regarding "descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof" (725 ILCS 5/115-13 (West 2002)) and, as such, are not testimonial in nature. However, statements volunteered for the purpose of "invoking police action and the prosecutorial process" (Cortes, 781 N.Y.S.2d at 416), or responses to questions posed for the purpose of collecting information "useful to the criminal justice system," (150 U. Pa. L. Rev. at 1242) are testimonial in nature.

___ N.E.2d at ___, 2005 WL 44003 at *8.

Based on its formulation, the West court found statements made to a 911 operator "concerning the nature of the alleged attack, . . . medical needs, . . . age and location" were nontestimonial, whereas statements which described the victim's vehicle, "the direction in which her assailants fled, and the items of personal property they took" were testimonial. ___ N.E.2d at ___, 2005 WL 44003 at * 9

b. Statements Made During Police Investigations

As with statements to 911 operators, courts have struggled with statements made to police during field investigations. Crawford's holding explicitly finds that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." 541 U.S. at ___, 124 S.Ct. at 1364. The Court used the term "'interrogation' in its colloquial, rather than any technical legal, sense." 541 U.S. at ___, 124 S.Ct. at 1365 n.4 (citation omitted). Therefore, various definitions of "interrogation" are apt to arise, and the Court limited its guidance to holding that "Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." Id. Whether all statements made to police, regardless of the context in which they were made, should be treated as testimonial has been viewed differently by courts.

In Lopez v. State, 888 So.2d 693 (Fla. Dist. Ct. App. 2004), police were dispatched to an apartment complex to investigate a report of kidnapping and assault. Once there, Officer Gaston encountered Ruiz in the parking lot. The officer asked Ruiz what had occurred, and Ruiz replied that the defendant had held him at gunpoint in Ruiz's car and that the gun was still in his vehicle. A jury convicted Lopez for possession of a firearm by a convicted felon. Ruiz was not available for trial, and the defendant appealed his conviction, contending the admission of Ruiz's statement to police violated his rights under the Confrontation Clause.

The Lopez court analyzed Ruiz's statement under each of the three formulations of the core class of testimonial statements given by the Crawford Court. First, although the statement was in response to a question by a police officer, the court found it "doubtful that the questioning could be regarded as an 'interrogation.'" Id. at 698. Second, the statement did not fall

within the second category of out-of-court statements made in "'formalized testimonial materials'" because "it was not made with the kind of formality the Court was referring to in Crawford." Id. "It was not the kind of solemn or deliberate statement a person would make in an affidavit or a deposition." Id. Finally, whether the statement would lead an objective witness reasonably to believe that the statement would be available for use at a later trial was "a more difficult question." Id. Under this third category, the court's focus was on "the purpose for which the statement [wa]s made, not on the emotional state of the declarant." Id. at 699. In contrast to a spontaneous statement made to a friend or family member,

> a startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect. In this situation, the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made.

Id. at 699-700. Therefore, the court concluded that Ruiz's statement was testimonial:

> While it is true that Ruiz was nervous and speaking rapidly, he surely must have expected that the statement he made to Officer Gaston might be used in court against the defendant. . . . Even in his excitement, Ruiz knew that he was making a formal report of the incident and that his report would be used against the defendant.

Id. at 700.

Georgia courts have adopted a broad interpretation of interrogation and have generally found statements made to police are testimonial. In Moody v State, 594 S.E.2d 350 (Ga. 2004), Moody was charged with the murder of Rebecca Norman. The Confrontation Clause issue arose from statements Norman made to police two years before her murder, when Moody had fired a shotgun into her bedroom window. At trial, an officer testified about what Norman told him shortly after Moody shot into the bedroom in which she

was sleeping. The court's discussion of testimonial was limited to the following statement made in a footnote: "the [Crawford] Court stated that the term [testimonial] certainly applies to statements made in a police interrogation, and it appears that the term encompasses the type of field investigation of witnesses at issue here." Id. at 354 n. 6.

The Georgia Supreme Court, in Bell v. State, 597 S.E.2d 350 (Ga. 2004), cited Crawford and Moody to support its conclusion that the trial court erred in admitting "out-of-court statements that the victim had made to police officers during the course of the officers' investigations of complaints made by the victim against Mr. Bell." Id. at 353. See also Brawner v. State, 602 S.E.2d 612, 613 (Ga. 2004) (finding testimonial the statement a witness gave to police several days after shooting claiming the witness observed the appellant shoot the victim several times while the victim lay on the ground saying "Don't kill me."); Jenkins v. State, 604 S.E.2d 789, 795 (Ga. 2004) ("Since Crawford v. Washington, we have interpreted 'testimonial statements' to include those statements made by witnesses to police officers investigating a crime.") (citing Moody, Bell, and Brawner) (footnote omitted); Pitts v. State, ___ S.E.2d ___, ___, 2005 WL 127049 *3 (Ga. App. 2005) ("Since Crawford, our courts have interpreted "testimonial" statements to include those statements made by witnesses to police officers investigating a crime.").

However, a number of courts have concluded statements are not testimonial solely because they are made to police. In People v. Mackey, 785 N.Y.S.2d 870 (N.Y. Crim. Ct. 2004), eight on-duty police officers were patrolling in a marked van when the victim waved to them, requesting assistance. The victim was crying, and her face was red and swollen. One of the officers, Officer Melenciano, "asked her what was wrong and she stated that her boyfriend had punched her in the face and pushed her down and then tried to take her children." Id. at 871.

The Mackey court began by recognizing that

> courts in New York and throughout the country have held that responses to police officers during a preliminary field investigation are not barred as "testimonial" statements under

> Crawford if the statements and the circumstances in which the statements were made lack the requisite formality to constitute a police interrogation. See People v. Newland, 6 A.D.3d 330, 775 N.Y.S.2d 308 (1st Dept. 2004) (concluding that a brief, informal remark to an officer conducting a field investigation which was not made in response to structured police questioning should not be considered a testimonial statement); State v. Forrest, 164 N.C. App. 272, 596 S.E.2d 22 (Court of Appeals of North Carolina, 2004) (holding statements initiated by complaining witness to police immediately after rescue were non-testimonial in nature). But cf. Moody v. State, 277 Ga. 676, 594 S.E.2d 350 (Ga. 2004) (finding statements of deceased victim to a police officer during a field investigation of a previous, separate incident two years prior involving defendant were testimonial and admission of this testimony was error).

Id. at 872-73.

The court engaged in a "fact-specific analysis of the particular nature and circumstances of the statements" that considered

> the extent of a formalized setting in which the statements were made, if and how the statements were recorded, the declarant's primary purpose in making the statements, whether an objective declarant would believe those statements would be used to initiate prosecutorial action and later at trial, and specifically with cases involving statements to law enforcement, the existence of any structured questioning and whether the declarant initiated the contact.

Id. at 873-74. Under the facts of Mackey, the victim's statements were nontestimonial and their admission did not violate the Confrontation Clause.

Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004), involved a conviction for domestic battery. Officer Mooney was dispatched to a residence occupied by Hammon and A.H., the victim. Officer Mooney separated Hammon from A.H., and A.H. told the officer that Hammon had

thrown her down into shattered glass and punched her twice in the chest. A.H. did not testify at trial. Instead, the court allowed Officer Mooney to relate A.H.'s statements to the jury.

The Hammon court held:

> the statement A.H. gave to Officer Mooney was not a "testimonial" statement. It appears to us that the common denominator underlying the Supreme Court's discussion of what constitutes a "testimonial" statement is the official and formal quality of such a statement. A.H.'s oral statement was not given in a formal setting even remotely resembling an inquiry before King James I's Privy Council; it was not given during any type of pre-trial hearing or deposition; it was not contained within a "formalized" document of any kind.

Id. at 952 (footnote omitted).

Further, the court addressed the closer question whether A.H.'s statement was the product of a police interrogation:

> [W]e observe that the Supreme Court chose not to say that any police questioning of a witness would make any statement given in response thereto "testimonial"; rather, it expressly limited its holding to police "interrogation." We conclude this choice of words clearly indicates that police "interrogation" is not the same as, and is much narrower than, police "questioning."

Id.

Thus, the court reached the conclusion that "when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not 'testimonial.'" Id.

Additionally, A.H. completed a battery affidavit that was admitted at trial. The Hammon court noted that the battery affidavit "would probably qualify as a 'testimonial' statement," id. at 952 n.5, but found admission of the affidavit harmless because it was cumulative of Officer Mooney's properly admitted testimony regarding A.H.'s statements. Id. at 948 n.1 (citation omitted). See also Fowler v. State, 809 N.E.2d 960, 968 (Ind. Ct. App. 2004), transfer granted (Dec. 9, 2004) ("An unrehearsed statement made without reflection or deliberation, as required to be an 'excited utterance,' is not 'testimonial' in that such a statement, by definition, has not been made in contemplation of its use in a future trial.") (citations omitted).

In State v. Barnes, 854 A.2d 208 (Me. 2004), Barnes was convicted of murdering his mother. The testimony at trial included that of an officer who asseverated that prior to the murder, Barnes's mother "drove herself to the police station . . . . and said that her son had assaulted her and had threatened to kill her more than once during the day." Id. at 209. The Barnes court found the statements nontestimonial because: (1) the police did not seek out Barnes's mother; (2) her statements were made while she was still under the stress of the attack; and (3) she was not responding to "tactically structured police questioning as in Crawford, but was instead seeking safety and aid." Id. at 211.

In Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004), after concluding that Elg's statements to the 911 dispatcher were nontestimonial, see supra, the Ninth Circuit Court of Appeals turned to Elg's statements made to the police who responded to the 911 call. The court found that Elg

> was in no way being interrogated by [police] but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed . . . .

Id. at 830 n.22 (internal quotation marks and citation omitted).

After determining that statements to the 911 operator were not testimonial, the court in State v. Wright, 686 N.W.2d 295 (Minn. Ct. App.

2004), review granted (Nov. 23, 2004), declined to answer the "closer question" whether statements made to police were testimonial. The Wright court found that any error in admission would be harmless. However, the court did state, in dictum, "We are not convinced that a police response to an incident when the victims are in distress and primarily concerned with ensuring that their assailant has been apprehended satisfies any of the formulations or examples of testimonial hearsay provided by the Supreme Court." Id. at 305.

c. Statements by Children

A third category of cases exploring the definition of testimonial is that of statements by children. This category may be bifurcated into statements made to government personnel and statements made to parents or other persons not employed by the government. The cases often, though not always, arise where the child declarant has been sexually abused. Most courts have found that a child's statement to a government figure is testimonial. However, they do not always follow a consistent rationale.

In Snowden v. State, 846 A.2d 36 (Md. Ct. Spec. App. 2004), shortly after the Supreme Court issued the Crawford opinion, the Court of Special Appeals of Maryland addressed Crawford's applicability to statements by children in the context of child abuse. Snowden was convicted of seven counts of child abuse and related offenses. The convictions arose from alleged sexual contact with three different minor females, two of whom were ten years old and one of whom was eight. The children did not testify at trial; instead, a social worker was allowed to relate their testimony pursuant to a Maryland statute. See id. at 39 (quoting Md. Code Ann., Crim. Proc. § 11-304 (2002)). The social worker based her testimony on one unrecorded interview with each of the children, in which she used non-leading and general questions to elicit details of the abuse.

The Snowden court was persuaded the children's statements, testified to by the social worker, were testimonial:

> As the trial court stated: "The children were interviewed for the expressed purpose of developing their testimony by [the social

> worker], under the relevant Maryland statute that provides for the testimony of certain persons in lieu of a child, in a child sexual abuse case . . . ." In light of Crawford, appellant is entitled to a new trial at which the State will be prohibited from introducing any testimonial hearsay declarations of a person who (1) is available to testify, or (2) made the testimonial hearsay statements on an occasion at which the defendant did not have an opportunity for cross-examination.

Id. at 47 (footnotes omitted).

In People v. Sisavath, 13 Cal.Rptr.3d 753 (Cal. Ct. App. 2004), Sisavath was accused of sexually abusing two children whom the court referred to as Victim 1 and Victim 2. The evidence at trial included two hearsay statements of Victim 2: the first a statement to a police officer and the second a videotaped interview with a "trained interviewer at Fresno County's Multidisciplinary Interview Center (MDIC)." Id. at 756. The trial court admitted both statements, but the California Court of Appeal reversed.

First, the court found it "clear that Victim 2's statement to Officer Vincent was testimonial under Crawford." Id. at 757. This statement was "'knowingly given in response to structured police questioning.' The People concede this." Id.

Second, the court addressed the videotaped interview, which took place after the original complaint had been filed and a preliminary hearing had been held. "The deputy district attorney who prosecuted the case was present in the interview, along with an investigator from the district attorney's office. The interview was conducted by a 'forensic interview specialist.'" Id. Therefore, the court concluded: "Under these circumstances, there is no serious question but that Victim 2's statement was 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 757-58 (internal quotation marks and citation omitted).

Thus, the Sisavath court adopted the third and most expansive Crawford formulation of testimonial, and concluded that the Supreme Court's

reference to "objective witness" meant an "objective observer," not "an objective witness in the same category of persons as the actual witness—here, an objective four-year-old." Id. at 758 n.3.

People v. Vigil, 104 P.3d 258 (Colo. Ct. App. 2004), cert. granted (Dec. 20, 2004), reached a similar result as Sisavath, but with a potentially significant difference in reasoning. The defendant in Vigil was convicted for sexually assaulting a seven-year-old boy. At trial, the State showed portions of a videotaped police interview of the child. The boy did not testify at trial, and the defendant argued that admission of the videotape violated his rights under the Confrontation Clause.

In finding the videotape was testimonial, the Vigil court rejected the People's argument that the statement was not testimonial because "it was not made during the course of a police interrogation and because a seven-year-old child would not reasonably expect his statements to be used prosecutorially." Id. at 262. The court explained that "[a]lthough the interview in this case was conducted in a relaxed atmosphere, with open-ended, nonleading questions, and although no oath was administered at the outset, it nevertheless amounted to interrogation under Crawford." Id. The court noted that the interviewing officer "told [the child] he needed to tell the truth," and when officer asked the child what should happen to the defendant, "the child replied that defendant should go to jail." Id. Therefore, while the Vigil court did not expressly state the objective witness test should consider the age of the actual witness, the court did apply such a test under the facts before it.

In People ex rel. R.A.S., ___ P.3d ___, 2004 WL 1351383 (Colo. Ct. App. 2004), the defendant, a juvenile, allegedly "touched the genitals of a four-year-old boy (the victim) and persuaded the victim to perform oral sex upon him." Id. at ___, 2004 WL 1351383 at * 1. The victim did not testify. Instead, a police investigator, who conducted a videotaped forensic interview of the victim, testified. The videotaped interview was introduced as well.

The court noted that "the statement was taken by an investigating officer in a question and answer format appropriate to a child." Id. at ___, 2004 WL 1351383 at *4. The court then announced its holding: "The

statement was 'testimonial' within even the narrowest formulation of the Court's definition of that term. We thus conclude that the statement was not admissible at trial." Id. (citations omitted).

State v. Courtney, 682 N.W.2d 185 (Minn. Ct. App. 2004), differs from Snowden, Sisavath, Vigil, and R.A.S. in that the child in Courtney was not sexually abused, but was a witness in a domestic assault action. However, the rationale behind finding the minor child's statement testimonial is similar to the child abuse cases.

Courtney was tried and convicted for assaulting the mother of the child declarant. The child made statements during a videotaped interview that on the night in question, she heard things breaking, heard her mother crying, and witnessed Courtney threatening her mother with two guns. The State offered the videotaped interview at trial, and on appeal the court held:

> [The child's] statement is testimonial. A child-protection worker, along with a law enforcement officer, interviewed [the child] for the purpose of developing a case against Courtney. . . . At one point, the interview was stopped by the police officer when he directed the child-protection worker to ask [the child] to draw the guns she saw Courtney allegedly use to threaten [the victim]. The circumstances under which the interview was conducted show it was made in preparation for the case against Courtney.

Id. at 196.

The Michigan Court of Appeals, has found, in dictum, that a child's statements to an interviewer are not testimonial. In People v. Geno, 683 N.W.2d 687 (Mich. Ct. App. 2004), the court found the defendant had not properly preserved and presented a Crawford claim, but that even if he had, the child's statement "did not constitute testimonial evidence under Crawford, and therefore was not barred by the Confrontation Clause." Id. at 692. There, the defendant allegedly sexually assaulted his girlfriend's two-year-old daughter. The contested hearsay statement was uttered during an interview by the Children's Assessment Center. "The interviewer noticed

blood in the child's pull-up underpants and asked the child if she 'had an owie?' The child answered, 'yes, Dale [defendant] hurts me here,' pointing to her vaginal area." Id. at 689.

In ruling the hearsay nontestimonial, the court explicated:

> The child's statement was made to the executive director of the Children's Assessment Center, not to a government employee, and the child's answer to the question whether she had an "owie" was not a statement in the nature of ex parte in-court testimony or its functional equivalent.

Id. at 692 (internal quotation marks and citation omitted).

At least two cases have held a child's statement to a parent is nontestimonial. In Herrera-Vega v. State, 888 So.2d 66 (Fla. Dist. Ct. App. 2004), the court found that testimonial evidence "does not appear to include the spontaneous statements made by D.H. to her mother while being dressed, nor does it include D.H.'s statements to her father." Id. at 69. Similarly, the court in Somervell v. State, 883 So.2d 836 (Fla. Dist. Ct. App. 2004) held: "It seems to us that statements that a mother hears from her autistic child does not fit within the umbra or penumbra of" any of the categories of testimonial set forth by the Crawford Court. Id. at 838.

d. Statements Made to Family, Friends, or Acquaintances

Finally, numerous opinions from around the country have determined that statements made to friends, family, or acquaintances do not constitute testimonial hearsay.

In United States v. Hendricks, 395 F.3d 173 (3rd Cir. 2005), a grand jury indicted Hendricks and several other defendants for conspiracy, narcotics possession and distribution, and money laundering. At issue was the admissibility of surveillance tapes obtained pursuant to a court order under 18 U.S.C. § 2510 et seq. The Hendricks court found the taped statements were not the type of statements Crawford meant to affect:

First and foremost, the recorded conversations here at issue neither fall within nor are analogous to any of the specific examples of testimonial statements mentioned by the Court. Crawford, 541 U.S. at ___, 124 S.Ct. at 1374 (listing "prior testimony [given] at a preliminary hearing, before a grand jury, or at a former trial[,] and . . . police interrogations" as examples of obviously testimonial statements). Second, the recorded conversations do not qualify as "testimonial" under any of the three definitions mentioned by the Court. They are not "ex parte in-court testimony or its functional equivalent," nor are they "extrajudicial statements . . . contained in formalized . . . materials, such as affidavits, depositions, prior testimony, or confessions." 541 U.S. at ___, 124 S.Ct. at 1364 (internal citations and quotations omitted). Each of the examples referred to by the Court or the definitions it considered entails a formality to the statement absent from the recorded statements at issue here. Even considered in perspective of the broad definition offered by the NACDL, the Title III recordings cannot be deemed "testimonial" as the speakers certainly did not make the statements thinking that they "'would be available for use at a later trial.'" Crawford, 541 U.S. at ___, 124 S.Ct. at 1364 (quoting Brief of NACDL). Rather, the very purpose of Title III intercepts is to capture conversations that the participants believe are not being heard by the authorities and will not be available for use in a prosecution.

A witness "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, 541 U.S. at ___, 124 S.Ct. at 1364. The Title III recordings here at issue are much more similar to the latter than the former. Therefore, as recognized by other courts that have addressed similar issues, we find that the surreptitiously monitored conversations and statements contained in the Title III recordings are not "testimonial" for purposes of Crawford.

395 F.3d at 181.

In Ramirez v. Dretke, ___ F.3d ___, 2005 WL 174643 (5th Cir. 2005), Ramirez was convicted of murdering his ex-wife's boyfriend. Ramirez hired Bell to assist him with the murder. Prior to the killing, Bell told Hoogstra that Ramirez had hired Bell to kill a fireman, and after the murder, Bell described the killing to Hoogstra. Both Ramirez and the State maintained that "Bell's out-of-court statements [were] not 'testimonial evidence' as that term is used in Crawford." Id. at *3 n.3. The court agreed, noting there is "nothing in Crawford to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatory context." Id.

Evans was convicted of murdering his estranged wife. At issue in Evans v. Luebbers, 371 F.3d 438 (8th Cir. 2004), were a number of statements the wife made before her death, including that she was afraid of Evans, that "I'll be like another Nicole Simpson," that she was abused by Evans, and that she was planning to divorce him. Id. at 444. The court, with little explanation, found Crawford inapplicable because the hearsay statements of Evans's wife did not fit within "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; [or] to police interrogations." Id. at 445 (internal quotation marks and citation omitted). See also United States v. Manfre, 368 F.3d 832, 838 n.1 (8th Cir. 2004) (finding hearsay statements made to "loved ones or acquaintances . . . are not the kind of memorialized, judicial-process-created evidence of which Crawford speaks.").

In People v. Butler, ___ Cal.Rptr.3d ___, 2005 WL 428210 (2005), a homicide witness made spontaneous statements to co-workers regarding a murder. The court rejected appellant's argument that an objective observer would reasonably foresee that the statements could be used in a prosecution. In the court's view, this argument was contrary to Crawford's focus on "statements given in lieu of oral testimony, such as an affidavit, or given to a government official in a formal statement." Id. at *6.

People v. Cervantes, 12 Cal.Rptr.3d 774 (Cal. Ct. App. 2004), involved a statement made to an acquaintance who rendered medical aid following a

murder. A neighbor of Morales, one of three defendants, was a surgical medical assistant who had known Morales for approximately twelve years. The court found that Morales's statement to his neighbor was not similar to grand jury testimony or a statement taken by an officer during an investigation. The statement was testimonial, "if at all, only under the definition quoted from the amici brief . . . which asserted testimonial statements include those 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 782 (internal quotation marks and citation omitted). The court rejected the argument that Morales made the statement knowing his neighbor would repeat it to police. Instead, the court found:

> . . . Morales sought medical assistance from a friend of long standing who had come to visit his home. Morales's statement appears to have been made without any reasonable expectation it would be used at a later trial. Rather, it seems far more likely Morales expected Ojeda would not repeat anything he told her to the police. Indeed, Ojeda admitted she knew appellants were gang members and indicated she was afraid to testify in this case.

Id. at 783.

In State v. Rivera, 844 A.2d 191 (Conn. 2004), the defendant and Michael Glanville allegedly murdered Audrey Lover and set fire to her house. The Rivera court found that incriminating statements Glanville made to his nephew during a car ride did not fall within any of the formulations of the core class of testimonial statements discussed in Crawford. Id. at 202.

In Demons v. State, 595 S.E.2d 76 (Ga. 2004), the victim confided in Bohr, a coworker, several days before the victim was murdered. Bohr testified that "the victim was distressed and had bruises on his upper arms and chest, that he began crying and told her where the bruises came from, that she had never seen anybody so afraid of anyone else, and that he said that Demons was going to kill him." Id. at 79. The statements were declared nontestimonial because they "were not remotely similar to such prior testimony or police interrogation, as they were made in a conversation with a friend, before the commission of any crime, and without any reasonable

expectation that they would be used at a later trial." Id. at 80 (citation omitted).

People v. Shepherd, 689 N.W.2d 721 (Mich. Ct. App. 2004), found statements the defendant's boyfriend, Bobby Butters, made to relatives visiting him in jail, which jail guards overheard, were "clearly not testimonial." Id. at 729. Butters "was speaking to relatives, not to the guards, and made spontaneous, unprompted comments regarding his role in the fleeing and eluding and assault." Id. Thus, "[e]ven under the broadest definition of testimonial, it is unlikely that Mr. Butters would have reasonably believed that the statements would be available for use at a later trial." Id.

In State v. Blackstock, 598 S.E.2d 412 (N.C. Ct. App. 2004), Weeks was shot while working at a convenience store he owned and operated. He died five days later, but before his death, and while he was in the hospital, Weeks made several statements to his wife and daughter. The trial court allowed these statements over the defendant's objection. The Court of Appeals of North Carolina concluded "the statements made by Weeks to his wife and daughter were essentially nontestimonial in nature." Id. at 420. The statements were "personal conversations that took place over a series of several days, made at a time when Weeks' physical condition was improving." Id. Thus, the court found it unlikely that Weeks made the statements under the reasonable belief that they would be used prosecutorially.

Woods v. State, 152 S.W.3d 105 (Tex. Crim. App. 2004), found incriminating statements made by a co-defendant to acquaintances at a coffee shop were nontestimonial. The statements were "casual remarks . . . made to acquaintances." Id. at 114 (footnote omitted).

In State v. Orndorff, 95 P.3d 406 (Wash. Ct. App. 2004), two masked men forced their way into Nordby's house. Nordby, who was upstairs at the time with Lorina Coble and several others, heard his minor son screaming and went downstairs to investigate. Norby engaged in a struggle with the two men, both of whom were armed. The intruders eventually subdued Nordby, but they fled after a 911 dispatch operator returned Coble's call which had

been aborted. Coble did not testify at trial, but the trial court allowed Nordby to testify that "Coble told him she saw a man with a pistol downstairs, saw both men leave, she tried to call 911, and was panic-stricken." Id. at 408. The court found Coble's statement nontestimonial: "It was not a declaration or affirmation made to establish or prove some fact; it was not prior testimony or a statement given in response to police questioning; and coble had no reason to expect that her statement would be used prosecutorially." Id.

4. Application to the Case Sub Judice

Hill's statements to Hicks were nontestimonial. First, the utterances do not fit within those examples that Crawford says clearly are testimonial—i.e., they were not testimony at a preliminary hearing, before a grand jury, or at a former trial; or statements made to police during an investigation. See Crawford, 541 U.S. at ___, 124 S.Ct. at 1374.

Next, we turn to the trilogy of formulations mentioned by the Crawford opinion. Id. at ___, 124 S.Ct. at 1364. We need not adopt any of the three formulations because, in this case, the hearsay declarations are nontestimonial under each test. Hill's statements were not ex parte in-court testimony or its functional equivalent, and they were not extrajudicial statements contained in formalized materials; to the contrary, Hill's remarks were totally devoid of any formality or governmental involvement. As to the third formulation, we find no evidence that a reasonable speaker in Hill's position would believe the statements made would be available for use at a later trial. Hill's statements were made to warn an acquaintance not to purchase a gun that had just been used in a murder. Furthermore, the statements could incriminate Hill. Therefore, we are unconvinced that Hill, or a person in his position, would have uttered the statements with the reasonable belief they later would be used prosecutorially.

Hill's declarations are much more akin to casual remarks to an acquaintance than formal statements to government officers. See Crawford at ___, 124 S.Ct. at 1364 (observing 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."). Moreover, they bear no

resemblance to the sort of examinations by justices of the peace which the Crawford Court stressed were the real impetus behind the Confrontation Clause. We hold that Hill's statements to Hicks were nontestimonial; therefore, Crawford does not mandate that Davis be afforded the opportunity to test Hill's statement through cross-examination.

However, our analysis does not end here. Under Crawford, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." 541 U.S. at ___, 124 S.Ct. at 1374. Accordingly, we turn to analyze whether Hill's hearsay statements fall under a firmly rooted hearsay exception or else bear particularized guarantees of trustworthiness. Roberts, 448 U.S. at 66.

C. Reliability Under Ohio v. Roberts

1. The Rule Against Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay statements are not admissible unless otherwise provided by the South Carolina Rules of Evidence or by other rules prescribed by the South Carolina Supreme Court or by statute. Rule 802, SCRE.

The trial judge admitted Hill's declarations as statements made in furtherance of a conspiracy, see Rule 801(d)(2)(E), SCRE, and ruled that the utterances were not admissible as present sense impressions. Neither Hill nor Davis was charged with conspiracy and no evidence of a conspiracy exists. On appeal, the State concedes that admitting the declarations as statements by a coconspirator was erroneous. However, the State argues that admission of the statements should be upheld under the excited utterance exception found in Rule 803(2), SCRE. We address this exception pursuant to Rule 220(C), SCACR ("The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal."). See also I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

2. Excited Utterance Exception

Pursuant to Rule 803(2), a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule, regardless whether the declarant is available as a witness. Rule 803(2), SCRE; see also State v. Sims, 348 S.C. 16, 20, 558 S.E.2d 518, 520 (2002) ("An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.").

Both the United States Supreme Court and the South Carolina Supreme Court have declared that excited utterance is a firmly rooted hearsay exception. White v. Illinios, 502 U.S. 346, 355 n.8 ("There can be no doubt that the two exceptions we consider in this case are 'firmly rooted.' The exception for spontaneous declarations is at least two centuries old . . . . It is currently recognized under Federal Rule of Evidence 803(2), and in nearly four-fifths of the States."); State v. Burdette, 335 S.C. 34, 45, 515 S.E.2d 525, 531 (1999) ("We . . . find that the excited utterance exception is firmly rooted in South Carolina law and satisfies the requirements of the Confrontation Clause."); accord State v. Dennis 337 S.C. 275, 523 S.E.2d 173 (1999). Accordingly, we must determine whether Hill's statements qualify under the excited utterance exception to the hearsay rule. If so, they were properly admitted.

Three elements must be met to show a statement is an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of the excitement; and (3) the stress must have been caused by the startling event or condition. Sims, 348 S.C. at 21, 558 S.E.2d at 521. The court must consider the totality of the circumstances in determining whether a statement falls within the excited utterance exception. State v. LaCoste, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001); State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). "The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective

thought, reducing the likelihood of fabrication." LaCoste at 160, 553 S.E.2d at 468 (quoting State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)).

Time is a factor in the excited utterance analysis, and our courts have allowed intervals in excess of an hour, even up to eleven hours, between the startling event and the statement. See State v. Blackburn, 271 S.C. 324, 328, 247 S.E.2d 334, 336 (1978). Courts have disallowed use of the excited utterance exception when an unusually long time period passed before the statement was made and the declarant had time to compose himself or herself or had other opportunities to speak. See State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999) (rejecting use of the exception based on ten-hour interval and two intervening opportunities to speak in which the declarant said nothing); Burroughs, 328 S.C. at 500-01, 492 S.E.2d at 413-14 (finding no excited utterance when there was a ten-hour interval and the declarant said she used the time to compose herself). The Burroughs court noted a useful rule of thumb that when enough time has elapsed between the event and the statement to permit reflective thought, the statement should be excluded. Id. at 500, 492 S.E.2d at 413. Use of the exception has been overturned when the interval cannot be determined from the record. State v. Garcia, 334 S.C. 71, 77, 512 S.E.2d 507, 510 (1999); State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998).

However, the stress of the event—not the time between the event and the statement—is the linchpin of the excited utterance exception. See State v. Quillien, 263 S.C. 87, 97, 207 S.E.2d 814, 817 (1974). "There are no hard and fast rules as to when res gestae ends." State v. Harrison, 298 S.C. 333, 336, 380 S.E.2d 818, 820 (1989), superseded by rule as stated in Hill, 331 S.C. at 99, 501 S.E.2d at 125.[1] Time is one factor to consider; "[o]ther factors useful in determining whether a statement qualifies as an excited

[1] Although Harrison, Blackburn, and Quillien predate the South Carolina Rule of Evidence, their reasoning is still efficacious. Those cases were decided under the res gestae doctrine, and Rules 803(1) & (2) codify res gestae. See State v. Burdette, 335 S.C. 34, 43, 515 S.E.2d 525, 530 (1999); State v. Burroughs, 328 S.C. 489, 498-99, 492 S.E.2d 408, 412-14 (Ct. App. 1997).

utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event." Sims, 348 S.C. at 22, 558 S.E.2d at 521.

Additionally, the statement must be based on firsthand information, such as statements of an actual witness to an event. Hill, 331 S.C. at 99, 501 S.E.2d at 125; LaCoste, 347 S.C. at 161, 553 S.E.2d at 468. Firsthand knowledge may be established by information conveyed in the statement itself. Id. at 161, 553 S.E.2d at 469.

3. Application of Excited Utterance Exception to Hill's Statement

Hill's statement that the shotgun was used to kill Davis relates to a murder, and murder is certainly a startling event. See State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999) (rejecting appellant's argument that the State failed to show a statement was an excited utterance where declarant had just seen his brother shoot an unarmed man, abruptly ending a fistfight). The closer issue is whether Hill was under the stress of the startling event when he made the controverted statements.

Considering the factors of severity of the stress of the event, time between the event and the utterance, and surrounding indicia of stress, we find sufficient evidence that Hill was under the stress of the murder when he made the declarations to Hicks. The statements relate to a highly stressful event. The time between the event and the statements was well within the time frame courts have allowed for excited utterances. See, e.g., Burdette, 335 S.C. 34, 515 S.E.2d 525 (allowing statements made less than one hour after event). Here, Hill encountered Hicks just ten to thirty minutes after Stevens and the two unidentified individuals fled from the murder scene. Furthermore, surrounding circumstances point to a conclusion that the stress of the event had not abated. Both Davis and Stevens bought an unusually large amount of drugs; Davis was willing to exchange an entire bag full of coins for drugs without counting it; and Stevens gave away drugs in an unusually generous gesture.

Furthermore, we find the record strongly supports Hill's statements were based on firsthand information. Hill established that "[s]tatements

which are not based on firsthand information, as where the declarant was not an actual witness to the event, are not admissible under the exited utterance . . . exception to the hearsay rule." 331 S.C. at 99, 501 S.E.2d at 125 (citing 23 C.J.S. Crim. Law § 876 (1989)). In Hill, the defendant shot a police officer in a car wash parking lot. Kenneth Grant arrived at the car wash fifteen minutes after the shooting, and testified in camera that some fifteen to twenty minutes after arriving he heard an unidentifiable person in the crowd say there were two suspects. The supreme court agreed with the trial court that the hearsay was inadmissible. Among other reasons for the ruling, there was "no evidence the unidentified declarant witnessed the shooting." Id. at 100, 501 S.E.2d at 125. Subsequently, LaCoste amplified Hill by holding that firsthand knowledge of unknown declarants may be established by the declaration itself. 347 S.C. at 161, 553 S.E.2d at 469.

Here, there is sufficient evidence that Hill's declarations to Hicks were based on personal knowledge. Unlike State v. Hill, the declarant in this case was known. Immediately before the shooting, Steven and Davis were heard arguing with the victim. Just after the shooting three individuals, one of whom was Stevens, were seen fleeing the scene. Minutes later Hill appeared with Stevens and Davis. We find this evidence supports the inference that Hill was one of the three individuals fleeing the scene; that he was, therefore, present at the murder scene; and that he had firsthand knowledge that the shotgun had been used to kill Williams.

Bolstering this conclusion is a "jailhouse confession," signed by Davis, indicating that Davis shot the victim. When Davis was arrested, he was jailed and placed in a cell directly across from Hicks, who was incarcerated on an unrelated offense. According to Hicks, he and Davis would communicate with each other by placing a letter in a book and sliding the book from cell to cell. Hicks stated that he slid the following letter, which was admitted into evidence, to Davis:

> Hey Chris the night that ya'll came and tried to sell me the shotgun was ya'll coming from Paul's house then what I need to know from you who was the trigger man and I know it wasn't Greg from what he told me that night so it had to be [illegible] you or Reggie cause you had the gun and Greg told me you and

> Reggie the who [sic] went in the house so who pulled the trigger if Reggie did it just write Reggie's name or if you did just sign your name at the bottom and I will help you out by writing that letter just write what you want me to tell them.

The letter is signed "Christopher Davis" and dated "3-15-01." A handwriting expert testified that the signature was Davis's. Hicks acknowledged that he observed Davis sign the letter, and Davis admitting signing a piece of paper for Hicks, although he contended it was blank when he signed it. Davis does not appeal the trial judge's admission of this confession. Therefore, its stands on its own and was independent evidence for the jury's consideration. The confession indicates that Hicks knew from Hill that either Stevens or Davis shot the victim. Thus, the confession, coupled with the strong inference that Hill was present at the crime scene, constitutes sufficient evidence that Hill had personal knowledge of the contents of his declarations.

Based on the totality of the circumstance, we find the record supports (1) Hill's statement was related to a startling event; (2) it was made while Hill was under the stress of the event; (3) the stress resulted from the startling event; and (4) the statement was based on firsthand information. We therefore find Hill's statement admissible under Rule 803(2), a firmly rooted hearsay exception.

II. Harmless Error

Finally, the State contends any error in admission of Hill's hearsay declarations would be harmless. We agree.

"A violation of the defendant's Sixth Amendment right to confront the witness is not per se reversible error if the error was harmless beyond a reasonable doubt." State v. Gillian, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004) (internal quotation marks omitted) (quoting State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002)); see also Delaware v. Van Arsdall, 475 U.S. 673 (1986) (finding Confrontation Clause violations are subject to harmless error analysis); Bockting v. Bayer, ___ F.3d ___, 2005 WL 406284 *8 (9th Cir. 2005) ("Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of

the evidence at trial."); United States v. Nielsen, 371 F.3d 574, 581 (9th Cir. 2004) ("Confrontation Clause violations are subject to harmless error analysis, because the Constitution entitles a criminal defendant to a fair trial, not a perfect one.") (internal quotation marks and citation omitted); Smith v. State, ___ So.2d ___, 2004 WL 921748 (Ala. Crim. App. 2004) (noting Confrontation Clause violations are subject to harmless error analysis); State v. Cotto, 865 A.2d 660 (N.J. 2005) (holding statements which did not fall under excited utterance exception were erroneously admitted but that the error was harmless); State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) ("A violation of the defendant's Sixth Amendment right to confront the witness is not per se reversible error. This Court must determine whether the error was harmless beyond a reasonable doubt.") (internal quotation marks and citation omitted); State v. Portnoy, 718 P.2d 805 (Wash. Ct. App. 1986) (finding Confrontation Clause violations are subject to harmless error analysis); cf. Neder v. United States, 527 U.S. 1 (1999) (noting the erroneous admission of evidence in violation of the Fifth Amendment's guarantee against self-incrimination, and the erroneous exclusion of evidence in violation of the right to confront witnesses guaranteed by the Sixth Amendment are both subject to harmless error analysis).

Courts around the nation have found that Crawford violations are no exception to this rule. United States v. Rodriguez-Marrero, 390 F.3d 1 (1st Cir. 2004) (finding signed confession testimonial under Crawford and engaging in a sua sponte harmless error analysis, but concluding admission of the statements was not harmless); United States v. McClain, 377 F.3d 219 (2nd Cir. 2004) ("It is well established that violations of the Confrontation Clause, if preserved for appellate review, are subject to harmless error review . . . and Crawford does not suggest otherwise.") (citations omitted); United States v. Rashid, 383 F.3d 769 (8th Cir. 2004) (noting statements taken by FBI agent during course of interrogation were testimonial for purposes of Crawford, but admission was harmless error because other evidence of guilt was overwhelming); Stancil v. United States, ___ A.2d ___, ___, 2005 WL 195547 at *13 (D.C. Cir. 2005) (observing that the harmless error analysis applies to Crawford violations but finding the government had not made a sufficient showing the error was harmless); People v. Song, 22 Cal.Rptr.3d 118 (Cal. App. 2004) (employing harmless error analysis to Crawford

violation and finding admission of the testimonial evidence was not harmless error); People v. Edwards, 101 P.3d 1118 (Colo. App. 2004) ("[V]iolations of the rule announced in Crawford constitute errors in the trial process and are subject to either plain or harmless error review."); Bell v. State, 597 S.E.2d 350 (Ga. 2004) (finding statements victim made to police officer were testimonial and inadmissible under Crawford, but that the error was harmless); People v. Patterson, 808 N.E.2d 1159 (2004) (applying harmless error analysis to alleged Crawford violation); Hammon v. State, 809 N.E.2d 945 (Ind. App. 2004) (opining that even if battery affidavit were testimonial and improperly admitted, any error was harmless because its content was cumulative of other evidence); State v. Wright, 686 N.W.2d 295 (Minn. App. 2004) (declining to rule whether a 911 call was testimonial because even if it were, admission of the call would constitute harmless error).

Whether an error is harmless depends on the circumstances of the particular case. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003). No definite rule of law governs this finding. State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004). Rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985).

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. at 63, 584 S.E.2d at 897; Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996); Thompson, 352 S.C. at 562, 575 S.E.2d at 83; State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct.

App. 2003). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); Adams, 354 S.C. at 381, 580 S.E.2d at 795; see also State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (noting that when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside the conviction for insubstantial errors not affecting result).

The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); see also State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996) (instructing that error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (explicating that any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

Hill's statements, as related by Hicks, were (1) Davis and Stevens went into the victim's house, and (2) the shotgun that Davis was trying to sell was used to murder the victim. Considering the other evidence before the jury, we harbor no reasonable doubts that any error in admitting Hill's statement would have been harmless.

Foremost, Davis's confession, the admission of which is not at issue, contains the substance of Hill's statements as testified to by Hicks. The confession establishes that Hicks knew "from what Greg [Hill] told me that night . . . [the trigger man] had to be . . . you or Reggie [Stevens] cause you had the gun and Greg told me you and Reggie the who [sic] went in the house . . . ." Thus, the substance of Hill's declarations were properly before the jury. Consequently, Hicks's testimony as to Hill's hearsay was merely cumulative of other evidence, and its admission—even if erroneous—was harmless.

Additionally, two witnesses, Hicks and his brother, Raymond, heard Davis, Stevens, and the victim arguing just before the gunshot. Following the gunshot, Hicks, Raymond, and a third witness, Calvin Patten, observed three individuals running from the victim's back yard. Hicks and Patten both identified Stevens as one of the fleeing men, and police matched Stevens's shoeprint with one found at the crime scene.

Between ten and thirty minutes after the gunshot, Hill, Stevens, and Davis were seen together. According to Hicks, Davis had the shotgun, and Stevens purchased over $100 worth of crack cocaine, an unusually large purchase for Stevens. Calvin Patten testified that Stevens gave him some drugs in an uncharacteristically generous gesture. Lorenzo White averred that late one night Davis came to his house with the shotgun, wiped it down with Clorox to remove finger prints, and hid the gun somewhere in White's house.

Thus, excluding Hicks's testimony regarding Hill's hearsay statements, the jury heard evidence that several witnesses overheard Stevens, Davis, and Williams arguing; thereafter a gun was fired; Stevens and two other individuals were seen fleeing the crime scene; Stevens's footprint was found at the crime scene; Stevens and Hill emerged and made a large drug purchase; Stevens gave away some crack cocaine in an unusually generous gesture; minutes later, Stevens and Hill returned with Davis, who was trying to sell a shotgun; Davis took the shotgun to a friends house, where he wiped down the gun with Clorox and hid it; Hicks wrote that he knew Davis and Stevens entered the house, and that one of them shot the victim; and Davis confessed to the murder. Under these facts, even were we to conclude Hill's statements were improperly admitted, they were cumulative of statements in the confession, and the other evidence against Davis was so substantial that the hearsay utterances were neither material nor prejudicial. Therefore, any error in admitting the statements would be harmless.

CONCLUSION

Hill's hearsay statements to Hicks were properly admitted. The utterances were nontestimonial; therefore, Crawford v. Washington does not

bar the admission of these statements, even though Hill was unavailable at trial and Davis did not have a prior opportunity to cross-examine him. Hill's statements were admissible under the excited utterance exception, Rule 803(2), SCRE, which is recognized as a firmly rooted hearsay exception. Accordingly, the Confrontation Clause does not require that Davis have the opportunity to cross-examine Hill regarding the nontestimonial excited utterance. Regardless, any error in admitting the statements would have been harmless. Davis's convictions are

AFFIRMED.

BEATTY and SHORT, JJ., concur.