

The Admission of Evidence in Domestic Violence Cases after *Crawford v. Washington*:

A National Survey

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On March 8, 2004, the Supreme Court decided *Crawford v. Washington*,² ruling that the Confrontation Clause barred the admission of “testimonial hearsay” in criminal prosecutions. Prosecutors, defense attorneys, and judges nationwide immediately recognized that the Supreme Court had dramatically altered the landscape of hearsay admissibility. *Crawford* left many issues unanswered and created considerable uncertainty as to how the rules of evidence would be affected. In particular, the Court’s reasoning in *Crawford* has profound implications in the prosecution of domestic violence cases, which frequently rely on the introduction of out-of-court statements.

This Article examines the different ways state and federal courts nationwide have considered, interpreted, and applied *Crawford* in domestic violence cases. In Part I, we briefly review the holding and reasoning of *Crawford*. In Part II, we discuss the evolution of hearsay rules in domestic violence cases leading up to *Crawford*. Assessment of these pre-*Crawford* cases reveals that courts admitted out-of-court statements in domestic violence cases

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² *Crawford v. Washington*, 541 U.S. 36 (2004).

under the excited utterance and medical record hearsay exceptions. In Part III, we evaluate how *Crawford* has altered the application of these exceptions to out-of-court statements. Our review reveals that many courts have continued to allow the introduction of victims' out-of-court statements in a variety of circumstances. In Part IV, we consider the impact of a recent Supreme Court decision, *Davis v. Washington*,³ on these cases. *Davis* further clarified the test to be used in determining which out-of-court statements are admissible in domestic violence prosecutions. Finally, in Part V, we look to the future of this field.

I. *Crawford v. Washington*

The *Crawford* Court, abrogating *Ohio v. Roberts*,⁴ held that the Sixth Amendment Confrontation Clause renders testimonial, out-of-court statements inadmissible -- even if deemed reliable by the trial court -- unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.⁵ The *Crawford* defendant was charged with assault and attempted murder.⁶ The defendant's wife did not testify at trial because of the state marital privilege, which does not allow one spouse to testify against the other spouse without the other spouse's consent.⁷ The prosecution instead sought to introduce

³ *Davis v. Washington*, 126 S. Ct. 2266 (2006).

⁴ *Ohio v. Roberts*, 48 U.S. 56 (1980). Many courts still cite *Roberts* as good law for determining the reliability of non-testimonial hearsay, even in the aftermath of *Crawford*. The statement of a hearsay declarant who is unavailable for trial may be admitted only if it bears adequate indicia of reliability, but reliability can be inferred where the evidence falls within a firmly rooted hearsay exception; in other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. *Id.* at 66; *see also* *White v. Illinois*, 502 U.S. 346, 352 (Justices Scalia and Thomas would completely overrule *Ohio v. Roberts* and hold that the Confrontation Clause places no limits on non-testimonial hearsay.); *United States v. Taylor*, 328 F. Supp. 2d 915, 923 (N.D. Ind. 2004) (Defendant's statement against penal interest also inculcating co-defendant made to an accomplice after the fact is non-testimonial and subject to reliability assessment to ensure its trustworthiness under *Ohio v. Roberts*. The court based its conclusion partially on the fact that at the time of the statement the co-defendant declarant and the accomplice after the fact recipient were confidants, but not without reservation. The court noted, "[i]t is the unfortunate reality of human nature that people for whatever reason or motivations, lie to friends and foe alike."); *Nucci v. Proper*, 95 N.Y. 2d 597, 603 (N.Y. 2001) (Highlighting reliability as lynchpin to hearsay exceptions. Reliability has been defined by the Court of Appeals within the context of hearsay as the "sum of the circumstances surrounding the making of the statement that renders the declarant worthy of belief.").

⁵ *Crawford*, 541 U.S. at 68.

⁶ *Id.* at 40.

⁷ *Id.* In this case, one might argue that Mr. Crawford created his own inability to cross-examine

a recorded statement that the defendant's wife had made to the police as evidence that the stabbing was not in self-defense.⁸ The defendant argued that admitting the evidence would violate his Sixth Amendment right to confront the witnesses against him.⁹ The trial court admitted the statements, and the defendant was convicted of assault.¹⁰ The Supreme Court, in an opinion authored by Justice Scalia, reversed the defendant's conviction.¹¹

The Court rejected the proposition that all out-of-court statements are to be regulated only by the law of evidence, to the exclusion of the Confrontation Clause.¹² Turning to the historical background of the Confrontation Clause, the Court reasoned that the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex-parte* examinations as evidence against the accused."¹³ According to the Court, ceding the admissibility of all out-of-court statements to the rules of evidence would render the Sixth Amendment "powerless to prevent even the most flagrant inquisitorial practices."¹⁴ While the Court acknowledged that the Confrontation Clause is meant to "ensure reliability of evidence," it held that the guarantee is "procedural rather than substantive."¹⁵ That is, where out-of-court statements are testimonial, "indicia of reliability" are insufficient; the only assay of reliability that satisfies constitutional requirements is the one the Constitution specifically mandates: confrontation. As Justice Scalia memorably wrote, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."¹⁶

The Court in *Crawford*, however, did not provide a comprehensive definition of the word "testimonial," nor did it furnish an exhaustive list of what types of out-of-court statements are considered testimonial. The Court held that, at a minimum, "testimonial" out-of-court statements would include prior testimony at a preliminary hearing, prior testimony before a grand jury or at a former trial, and statements made during police interrogations.¹⁷ The Supreme Court left open the possibility that anytime a declarant may believe that she will

his wife by asserting the marital privilege and refusing to allow her to testify.

⁸ *Id.*

⁹ *Crawford*, 541 U.S. at 40.

¹⁰ *Id.* at 41.

¹¹ *Id.* at 69.

¹² *Id.* at 50-51.

¹³ *Id.* at 50.

¹⁴ *Id.* at 51.

¹⁵ *Id.* at 61.

¹⁶ *Id.* at 62.

¹⁷ *Id.* at 68.

be called as a witness at trial or that her statement may be used at trial, the statement given by that declarant may be considered testimonial.¹⁸

However, the Court strongly suggested -- but did not explicitly hold -- that some hearsay does not implicate the core concern of the Sixth Amendment.¹⁹ Where non-testimonial hearsay is at issue (for example, business records or statements made in furtherance of a conspiracy) the states have flexibility in their development of the law of evidence.²⁰ Courts may allow such out-of-court statements, despite the lack of prior cross-examination, without running afoul of the Sixth Amendment.²¹ In a footnote, the Court indicated that dying declarations may be admissible because they were clearly an exception accepted by the Framers of the Constitution.²² Additionally, the Court observed that the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”²³

Crawford, due to its broad impact and vague boundaries, left many questions unanswered. These questions take on increased importance in domestic violence prosecutions because prosecutors have come to rely so heavily on the admission of out-of-court statements by complaining witnesses.

II. The Evolution of Prosecutorial Strategies in Domestic Violence Cases before *Crawford*

The *Crawford* decision came after a decade during which prosecutorial strategies in domestic violence cases had evolved dramatically. Following the passage of the landmark Violence Against Women Act in 1994, with its mandatory arrest and pro-prosecution policies and increased emphasis on training judges and court personnel, prosecutors’ offices around the country developed specialized units to handle the sudden flood of domestic violence cases.²⁴ These units quickly faced the reality that many complaining witnesses did not choose to cooperate with the prosecution of the defendants, and the prosecutors struggled to keep the witnesses engaged despite economic,

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.* at 56.

²¹ *Id.*

²² *Id.* at 56, n.6.

²³ *Id.* at 60.

²⁴ Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM & MARY L. REV. 1505, 1516 (1998); *see also* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARVARD L. REV. 1849 (1996); *see also* 42 U.S.C. §§ 14301-14040 (West 1994).

emotional, and physical barriers.²⁵ Prosecutors increasingly enlisted advocates to offer victims counseling and personal support.²⁶ In addition, prosecutors began stressing the importance of what is often called “victimless” or “evidence-based prosecution.”²⁷ This strategy succeeded by relieving the state’s reliance on the complaining witness’s willingness to testify.²⁸ As one veteran domestic violence prosecutor claims, “For every case that I can prosecute without the victim, I can get 100 more pleas from defendants.”²⁹

Victimless prosecution meant relying on the introduction of the complaining witness’s out-of-court statements to first responders and medical personnel, usually under the well-established hearsay exceptions for excited utterances and business records. A brief survey of these cases reveals the importance of these exceptions to the prosecution of domestic violence offenses.

A. Excited Utterances

Prior to *Crawford*, evolving case law supported the introduction of statements made by domestic violence victims under the excited utterance exception to the hearsay rule. This exception dictates that statements made in the immediate aftermath of a traumatic event have sufficient indicia of reliability because the witness has not had time to fabricate testimony, and thus may be admitted.³⁰ In *United States v. James*,³¹ for example, the district court allowed an officer to testify concerning out-of-court statements made by a complainant because the statements were made directly after the assault and thus satisfied *Roberts*’s adequate indicia of reliability test.³² In *James*, an officer responded to a 911 call and spoke with a woman who said that her husband had just pushed her and slapped her on the back of the head.³³ She was upset and stated that she wished to press charges.³⁴ The officer arrested the defendant and charged him

²⁵ Hanna, *supra* note 24, at 1852.

²⁶ *Id.* at 1863-64.

²⁷ *Id.* at 1865.

²⁸ *Id.*

²⁹ Telephone Interview with Scott Kessler, Assistant District Attorney, Chief of Domestic Violence Bureau, Queens County District Attorney’s Office (Oct. 5, 2005).

³⁰ See, e.g., FED. R. EVID. 803 advisory committee’s note (“[C]ircumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.”).

³¹ *United States v. James*, 164 F. Supp. 2d 718 (D. Md. 2001).

³² *Id.* at 721.

³³ *Id.* at 720.

³⁴ *Id.*

with assault.³⁵ By the time the officer was processing the arrest, however, the purported victim refused to provide a sworn statement and denied that she wished to press charges.³⁶ At defendant's bench trial before a Magistrate Judge, she refused to testify and claimed spousal privilege.³⁷

The prosecution offered the wife's original statements to the responding officer in evidence.³⁸ The trial court ruled that the wife was indeed unavailable, and that her statements were admissible under the excited utterance exception to the hearsay rule.³⁹ The trial court specifically addressed the Confrontation Clause issue and broadly held that "once the court determines that an out of court statement qualifies as an excited utterance, the Confrontation Clause has been satisfied."⁴⁰ The district court upheld the magistrate's finding on appeal.⁴¹

The Florida Court of Appeal similarly relied on the excited utterance exception in *Werley v. State*⁴² to uphold the admission of a 911 recording of a wife who stated to the operator that her husband had beaten her.⁴³ When the officers arrived at the scene, they found the complainant wandering in the street with blood running from her head.⁴⁴ She repeated that her husband had hit her but subsequently recanted these statements and testified for the defense.⁴⁵ The court admitted the wife's statement to 911 as an excited utterance, even though she had waited over an hour to place the call.⁴⁶

In several other state appellate court decisions, courts upheld the admission of "unreflective" statements made in the face of trauma. In *State v. McCombs*,⁴⁷ the Ohio Court of Appeals held that the victim's wife's statements to 911, a neighbor, and a responding patrolman were all admissible as excited utterances.⁴⁸ The court reasoned that the statements fell within the exception because they were the "product of reactive rather than reflective thinking."⁴⁹

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *United States v. James*, 128 F. Supp. 2d 291, 297 (D. Md. 2001).

⁴² *Werley v. State*, 814 So. 2d. 1159 (Fla. Dist. Ct. App. 2002).

⁴³ *Id.* at 1160.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1161

⁴⁷ *State v. McCombs*, 2000 Ohio 1936 (Ohio Ct. App. 2000).

⁴⁸ *Id.* at *3.

⁴⁹ *Id.* at *6-7.

Similarly, in *State v. Maldonado*,⁵⁰ the Ohio Court of Appeals upheld the admission of children's statements to a county social worker made after their father had stabbed their mother.⁵¹ The court concluded that the statements were reliable because they were the "result of their unreflective thoughts following a traumatic event."⁵² Finally, in *State v. Todd*,⁵³ the Kansas Court of Appeals upheld the admission of numerous statements by a woman after her husband beat her with a metal pipe.⁵⁴ The court found that although she was technically available, her statements concerning the assault to her neighbors and to the treating physicians were all admissible as excited utterances.⁵⁵

B. Medical Records

Pre-*Crawford*, courts admitted medical records in domestic violence cases as an exception to the hearsay rule when they found sufficient "indicia of reliability," even when the records included statements that identified the victim's attacker. In *United States v. Haner*,⁵⁶ the United States Court of Appeals for the Armed Forces admitted medical records and all statements therein after finding that the statements were reliable because they were made for the purpose of diagnosis or treatment.⁵⁷ The court concluded that the declarant "believed, by being truthful, she would promote her own well-being."⁵⁸ The declarant had called the police after fleeing her home clad in only a blanket.⁵⁹ She reported to the responding officers that her husband had tied her up and threatened to kill her with a knife.⁶⁰ The following day she was treated by a physician who noted belt marks on her body and a knife scrape that ran across her chest.⁶¹ Additionally, she had tape marks on her wrists and ankles.⁶²

⁵⁰ *State v. Maldonado*, 1997 Ohio App. LEXIS 4853 (Ohio Ct. App. 1997).

⁵¹ *Id.* at *6.

⁵² *Id.* at *7.

⁵³ *State v. Todd*, 24 Kan. App. 2d 796 (Kan. Ct. App. 1998).

⁵⁴ *Id.* at 797.

⁵⁵ *Id.* at 802.

⁵⁶ *United States v. Haner*, 49 M.J. 72 (C.A.A.F. 1998).

⁵⁷ *Id.* at 77.

⁵⁸ *Id.*

⁵⁹ *Id.* at 75.

⁶⁰ *Id.* at 74.

⁶¹ *Id.*

⁶² *Id.*

The wife reported to the physician her account of what had happened.⁶³ Immediately after the physical exam, she gave a statement to a clinical social worker.⁶⁴ Later, she gave a statement to special military investigating officers.⁶⁵ However, she subsequently recanted her statements and claimed that all contact had been consensual.⁶⁶ At trial, the wife testified for the defense, and the prosecution offered all of her out-of-court statements into evidence.⁶⁷ The court admitted the wife's statement to the responding officers under the excited utterance exception to the hearsay rule,⁶⁸ and allowed the statements made both to the physician and to the social worker to be admitted as "statements made for the purposes of medical diagnosis or treatment."⁶⁹ The court also admitted the wife's sworn statement to the investigating military officers under the "residual hearsay" exception, finding that her statement was reliable because she had not been pressured to make the statement and that the events had been "recent, traumatic and still fresh" in her memory when the statements were made.⁷⁰

Courts have reached a similar conclusion by applying a "totality of the circumstances" test to the evaluation of statements made to medical personnel following an alleged attack. In *United States v. Ortiz*,⁷¹ a woman appeared at her neighbor's door, naked and hysterical, begging him to call the security police.⁷² When a security police officer arrived, the woman told the officer that her husband had beaten her.⁷³ She repeated her statement to an investigating officer later that night, and to the treating physician.⁷⁴ Several days later, she spoke to another security officer and gave him a handwritten statement, which she signed, under oath, detailing the beating.⁷⁵ However, she later refused to testify against her husband.⁷⁶ The court admitted not only the out-of-court statements made to the responding officers, but also the medical records identifying her husband as

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 75.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 77.

⁷⁰ *Id.* at 78.

⁷¹ *United States v. Ortiz*, 34 M.J. 831 (U.S. Air Force C.M.R. 1992).

⁷² *Id.* at 833.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

the attacker.⁷⁷ The court held that her statements were directly relevant to the treatment of her injuries and that there was “a valid medical reason to know the identity of the assailant” and therefore the statements fell under the medical treatment exception to the hearsay rule.⁷⁸ Additionally, the court upheld the introduction of the wife’s written statements; the Confrontation Clause issues were not relevant because the statement was deemed trustworthy under the *Idaho v. Wright*⁷⁹ “totality of the circumstances” test.⁸⁰ The court found that the out-of-court written statement was trustworthy because it reiterated the wife’s previous statements and because it was not prepared under interrogation.⁸¹ “It is in the interest of justice to admit out-of-court statements from abused spouses when such statements have the necessary ‘indicia of reliability’ and ‘circumstantial guarantees of trustworthiness’ to justify their admission.”⁸²

III. Application of *Crawford* to Domestic Violence Cases

A review of recent decisions facilitates an assessment of *Crawford*’s impact on domestic violence cases. While some courts have reasoned that *Crawford* should dramatically restrict the introduction of victims’ out-of-court statements in domestic violence cases, many courts have held that such statements are still admissible.

⁷⁷ *Id.* at 834.

⁷⁸ *Id.*

⁷⁹ *Idaho v. Wright*, 497 U.S. 805 (1990).

⁸⁰ *Ortiz*, 34 M.J. at 835; *see also Wright*, 497 U.S. at 820-21 (“We think the ‘particularized guarantees of trustworthiness’ required for admission under the Confrontation Clause must . . . be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. . . . Because evidence possessing ‘particularized guarantees of trustworthiness’ must be at least as reliable as evidence admitted under a firmly rooted hearsay exception . . . we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability.”).

⁸¹ *Ortiz*, 34 M.J. at 835.

⁸² *Id.*

A. Crawford's Impact on Excited Utterance Cases

1. Excited Utterances Not Made to Law Enforcement

Most courts have held that excited utterances made to friends, relatives, or other non-law-enforcement personnel should be considered non-testimonial for Confrontation Clause purposes. In *People v. Compan*,⁸³ the Colorado Court of Appeals admitted excited utterances made by the victim to her friend.⁸⁴ The court found that the victim, while “upset and agitated” shortly after being assaulted, told a friend that her husband had punched and kicked her, thrown her against a wall, and pulled her hair.⁸⁵ The victim’s statements were considered non-testimonial because they were made to a friend and not to law enforcement or a judicial officer.⁸⁶

Courts can apply this reasoning to other hearsay exceptions as well. In *People v. Williams*,⁸⁷ the Michigan Court of Appeals concluded that a murder victim’s statements were not testimonial under Crawford, and thus were admissible under the hearsay exception for statements expressing the declarant’s then-existing state of mind, emotion, sensation, or physical condition.⁸⁸ The out-of-court statements had been made to the victim’s mother, sister, brother, and friend concerning: (i) the victim’s unhappiness with the defendant (her husband) and her feelings of exhaustion with his stalking behavior and threats; (ii) the victim’s feelings of fear for her life; (iii) the victim’s desire to escape from the defendant; (iv) the victim’s eventual happiness at ending her relationship with the defendant; and (v) the victim’s plan to pursue happiness with someone else.⁸⁹ The court reasoned that the statements were not testimonial because they had not been elicited by a governmental official,⁹⁰ were not “*ex parte* in-court testimony or its functional equivalent,”⁹¹ and had not been made with “an eye toward trial.”⁹²

⁸³ *People v. Compan*, 100 P.3d 533 (Colo. Ct. App. 2004).

⁸⁴ *Id.* at 536.

⁸⁵ *Id.* at 535.

⁸⁶ *Id.* at 538.

⁸⁷ *People v. Williams*, No. 246011, 2004 Mich. App. LEXIS 1217 (Mich. Ct. App. May 13, 2004). For another example, see *Evans v. Luebbers*, 371 F.3d 438 (8th Cir. 2004).

⁸⁸ *Williams*, 2004 Mich. App. LEXIS at *7 n.2.

⁸⁹ *Id.* at *3-4.

⁹⁰ *Id.* at *7 n.2.

⁹¹ *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

⁹² *Id.*

2. Excited Utterances Made to Law Enforcement

Courts have used two different approaches in determining whether or not excited utterances made to law enforcement personnel are admissible under *Crawford*. Most courts have adopted a case-by-case analysis approach requiring trial courts to determine whether a statement is testimonial based on the context in which the statement was made. Several courts have held that where a statement is determined to be an excited utterance, it cannot be considered testimonial. While the Supreme Court's decision in *Davis* should cast the *per se* approach in doubt,⁹³ these cases illuminate the challenge courts have faced in balancing the constitutional confrontation requirement with other values, such as admitting reliable, relevant evidence.

a. Case-by-case Analysis

The Criminal Court of the City of New York held in *People v. Mackey*⁹⁴ that a fact-specific analysis of the particular nature and circumstances of the out-of-court statement should be applied to determine whether such a statement is to be considered testimonial:

The analysis takes into consideration 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.⁹⁵

The declarant in *Mackey* had initiated contact with a police officer immediately after the defendant had allegedly punched the declarant, pushed her down, and tried to take her children.⁹⁶ The officer merely asked the declarant what was wrong.⁹⁷ The court held the excited utterances to be non-testimonial because

⁹³ See *Davis v. Washington*, 126 S. Ct. 2266, 2284 n.5 (2006).

⁹⁴ *People v. Mackey*, 785 N.Y.S.2d 870 (N.Y. Crim. Ct. 2004).

⁹⁵ *Id.* at 874.

⁹⁶ *Id.*

⁹⁷ *Id.*

they had not been made in response to structured police questioning, and had not been given in a formal setting or contained in a formalized document.⁹⁸

In *State v. Barnes*,⁹⁹ where a son appealed his conviction for murdering his mother, the Maine Supreme Court upheld admission of his mother's statement, which had been made to a police officer in connection with a prior assault by her son.¹⁰⁰ The decedent had driven to the police station after she had fled from her son's earlier assault.¹⁰¹ She said that her son had assaulted and threatened to kill her more than once that day.¹⁰² The mother, who had a history of heart problems, was clutching her chest; an ambulance was called.¹⁰³ The court held that the statements made by the mother were properly admitted as excited utterances and that they were non-testimonial.¹⁰⁴ The court performed the following analysis:

First, the police did not seek her out. She went to the police station on her own Second, her statements to them were made when she was still under the stress of the alleged assault Third, she was not responding to tactically structured police questioning as in *Crawford*, but was instead seeking safety and aid¹⁰⁵

In sum, police intent, the condition and intent of the declarant, and the formality of the questioning were the key factors for the court.¹⁰⁶

The California Court of Appeal, in *People v. Cage*,¹⁰⁷ ruled that hearsay statements made to a police officer at the hospital were not testimonial because "the interview was not sufficiently analogous to a pretrial examination by a justice of the peace; among other things, the police had not yet focused on a

⁹⁸ *Id.*

⁹⁹ *State v. Barnes*, 854 A.2d 208 (Me. 2004).

¹⁰⁰ *Id.* at 211.

¹⁰¹ *Id.* at 309.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 308.

¹⁰⁵ *Id.* at 312.

¹⁰⁶ *See id.*

¹⁰⁷ *People v. Cage*, 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004), *depublished by* 19 Cal. Rptr. 3d 824 (Cal. 2004). Supplemental briefing was ordered by the California Supreme Court to address the potential effect of *Davis v. Washington*. *People v. Cage*, 2006 Cal. LEXIS 8013 (Cal. June 28, 2006).

crime or a suspect, there was no structured questioning, and the interview was informal and unrecorded.”¹⁰⁸

A videotaped police interview with a victim who was allegedly raped by her boyfriend was inadmissible under *Crawford* in another California case, *People v. Zarazua*.¹⁰⁹ The girlfriend was unavailable to testify at trial,¹¹⁰ and the boyfriend had no prior opportunity to cross-examine her.¹¹¹ The court, quoting *Crawford*, held that “[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.”¹¹²

Similar reasoning may be found in cases involving other hearsay exceptions as well. In a murder case, *Moody v. State*,¹¹³ the Georgia Supreme Court barred as testimonial statements made to police by the victim following an earlier incident, when the defendant had shot into the victim’s bedroom.¹¹⁴ The court noted that *Crawford*, despite the Court’s refusal to comprehensively define “testimonial,” “certainly applies” to statements derived from police interrogation.¹¹⁵ The court therefore concluded that “the term [‘testimonial’] encompasses the type of field investigation of witnesses at issue here.”¹¹⁶

¹⁰⁸ *Id.* at 848; *but see* *People v. Kilday*, 20 Cal. Rptr. 3d 161, 173 (Cal. Ct. App. 2004) (“[A]n interpretation of *Crawford* that makes the presence or absence of indicia of formality determinative is inconsistent with the Supreme Court focus on ‘the production of testimonial evidence,’ which may occur during relatively informal questioning in the field.”) (internal citation omitted) (depublished).

¹⁰⁹ *People v. Zarazua*, No. H025472, 2004 Cal. App. Unpub. LEXIS 3831, at *1-4, 12-14 (Cal. Ct. App. Apr. 20, 2004).

¹¹⁰ *Id.* at *11 n.3.

¹¹¹ *See id.* at *10-11, 13-14.

¹¹² *Id.* at *12.

¹¹³ *Moody v. State*, 594 S.E.2d 350 (Ga. 2004). For another example, see *Bell v. Georgia*, 597 S.E. 2d 350 (Ga. 2004).

¹¹⁴ *Moody*, 594 S.E.2d at 354.

¹¹⁵ *Id.* at 354 n.6.

¹¹⁶ *Id.*

b. Non-Testimonial *Per Se*

While some courts pre-*Davis* rejected the *per se* approach,¹¹⁷ others adopted it, deeming excited utterances to be, by their very nature, non-testimonial.¹¹⁸ In an Indiana case, *Hammon v. State*,¹¹⁹ the appellate court held that excited utterances could not be testimonial in nature because, by definition, they are not spoken for use at trial.¹²⁰ A police officer was permitted under the excited utterance exception to relate the defendant's wife's statements when the victim refused to testify.¹²¹ The Indiana Supreme Court, however, rejected this view and held there was no inherent contradiction in characterizing an excited utterance as testimonial: "[W]e agree with the Court of Appeals in its view that responses to initial inquiries at a crime scene are typically not 'testimonial.' We do not agree, however, that a statement that qualifies as an 'excited utterance' is necessarily nontestimonial."¹²² The United States Supreme Court granted certiorari in *Hammon*,¹²³ and, as we will discuss in Part V, it resolved the case as part of *Davis v. Washington*.

c. 911 Calls

While the Supreme Court in *Davis v. Washington* agreed that a 911 call transcript was admissible as non-testimonial hearsay, it left open the possibility

¹¹⁷ *Hammon v. State*, 829 N.E.2d 444, 453 (Ind. 2005), *rev'd*, *Davis v. Washington*, 126 S. Ct. 2266 (2006); *Stancil v. United States*, 866 A.2d 799, 809 (D.C. Cir. 2005), *rev'd en banc*, 878 A.2d 1186 (D.C. Cir. 2005); *State v. Parks*, 116 P.3d 631, 638 (Ariz. Ct. App. 2005); *People v. Diaz*, 21 A.D.3d 58, 66 (N.Y. App. Div. 2005) (acknowledging that there are circumstances in which an excited utterance can arguably be testimonial, particularly where it was "given in reply to the deliberate questions of a police officer").

¹¹⁸ *Anderson v. State*, 111 P.3d 350, 354-55 (Alaska Ct. App. 2005), *vacated*, 126 S. Ct. 2983 (2006) (remanding for further consideration in light of *Davis v. Washington*); *State v. Quintero*, No. M2003-02311-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 383, at *32-33 (Tenn. Crim. App. April 22, 2005); *see also* *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (holding "it is difficult to identify any circumstances under which a . . . spontaneous statement would be 'testimonial'").

¹¹⁹ *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), *vacated*, 829 N.E.2d 444 (Ind. 2005).

¹²⁰ *Hammon*, 809 N.E.2d at 952; *accord* *People v. Isaac*, 791 N.Y.S.2d 872 (N.Y. Dist. Ct. 2004); *United States v. Brown*, 322 F. Supp.2d 101 (D. Mass. 2004) (stating "[i]t is doubtful that even in a trial setting *Crawford* would apply to spontaneous utterances . . ."); *see also* *People v. Lockett*, No. A099945, 2004 Cal. App. Unpub. LEXIS 6326 (Cal. Ct. App. July 6, 2004)).

¹²¹ *Hammon*, 809 N.E.2d at 952.

¹²² *Hammon*, 829 N.E.2d at 453.

¹²³ *Hammon v. Indiana*, 126 S. Ct. 552 (2005).

that 911 calls may be testimonial under certain circumstances.¹²⁴ Courts ruling in domestic violence cases before *Davis* tended to look to the intent of the declarant to determine whether a statement was testimonial.¹²⁵

In *People v. Moscat*,¹²⁶ the New York state court held that the nature of a 911 call is “fundamentally different” from a testimonial statement because a 911 caller expresses “the urgent desire of a citizen to be rescued from immediate peril” rather than the police’s desire to seek evidence against a particular suspect.¹²⁷ The court found that a 911 caller, especially in domestic violence cases, “is not contemplating being a ‘witness’ in future legal proceedings; she is usually trying simply to save her own life” because of injury already inflicted or because of the prospect of imminent injury.¹²⁸ On the other hand, the Washington Court of Appeals in *Washington v. Powers*¹²⁹ found statements made

¹²⁴ See *infra* Part V.

¹²⁵ In cases outside of the domestic violence context, courts have ruled that 911 calls may be testimonial if the operator asks investigation-related questions. Thus, the New York Supreme Court, Bronx County, in *People v. Cortes*, 4 Misc. 3d 575 (N.Y. Sup. Ct. 2004), held that a 911 call constituted interrogation by the operator when questions were asked about the suspect’s “location, description, and direction of movement,” because such information was “necessary for the police to conduct their investigation.” *Id.* at 579. Other cases reveal that courts may also come to *both* conclusions, excluding some portions of a 911 call and admitting others. In *People v. West*, 823 N.E.2d 82 (Ill. App. Ct. 2004), an Illinois case, those parts of a 911 call in which a victim described the vehicle from which she had been abducted, “the direction in which her assailants fled, and the items of personal property they took” were held to be testimonial because they were “comparable to those obtained through official questioning for the purpose of producing evidence in anticipation of a potential criminal proceeding.” *Id.* at 91-92. However, the victim’s statements to the dispatcher “concerning the nature of the alleged attack, [her] medical needs, and her age and location [were] not testimonial in nature” because they were made “immediately after [the victim] was brutally assaulted and in a state of shock for the purpose of requesting medical and police assistance.” *Id.* at 91.

¹²⁶ *People v. Moscat*, 3 Misc. 3d 739 (N.Y. Crim. Ct. 2004). For a law review article arguing, through the lens of *Moscat*, that trial judges in domestic violence cases are construing *Crawford* too narrowly, see David Jaros, *The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington*, 42 AM. CRIM. L. REV. 995 (Summer 2005).

¹²⁷ *Moscat*, 3 Misc. 3d at 745; see also *State v. Forrest*, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004) (quoting the passage from *Moscat*).

¹²⁸ *Moscat*, 3 Misc. 3d at 746. In the words of the Criminal Court of the City of New York, Bronx County, “The 911 call -- usually, a hurried and panicked conversation between an injured victim and a police telephone operator -- is simply *not* equivalent to a formal pretrial examination by a justice of the peace in Reformation England. If anything, it is the electronically augmented equivalent of a loud cry for help. The Confrontation Clause was not directed at such a cry.” *Id.* (emphasis in original).

¹²⁹ *State v. Powers*, 99 P.3d 1262 (Wash. Ct. App. 2004).

in a 911 call to be testimonial because the complainant called to report a violation of an existing protective order rather than to request help.¹³⁰ The statement was not “part of the criminal incident itself”¹³¹ or a request for help or protection; instead, it was a call made “to report [the defendant’s] violation of the existing protective order” and to describe the defendant so as “to assist in his apprehension and prosecution.”¹³²

B. Medical Records

The admissibility of statements included in medical records in domestic violence cases continues to center around a determination of whether those statements were made for the purpose of receiving medical treatment. In *State v. Vaught*,¹³³ the Nebraska Supreme Court ruled that a statement given to a doctor by a child victim of sexual abuse who had identified the perpetrator of the assault was admissible under *Crawford* because it was given for the purposes of promoting diagnosis and treatment, and was therefore not testimonial.¹³⁴

¹³⁰ Powers, 99 P.3d at 1266.

¹³¹ *Id.* (quoting *People v. Moscat*, 3 Misc. 3d 739, 746 (N.Y. Crim. Ct. 2004)).

¹³² *Id.* For an example of intent analysis outside the domestic violence realm, see *People v. Coleman*, 16 A.D.3d 254 (N.Y. App. Div. 2005). The court in *Coleman* held a 911 call from a “distracted, unidentified” caller was properly admissible under either the excited utterance or present sense impression exceptions to the hearsay rule. *Id.* at 254. Given the emphasis in *Crawford* on formality of questioning and procedures resembling depositions and affidavits, the court did not accept the argument that “virtually any report of criminal activity, knowingly made to the authorities, should be viewed as testimonial . . .” *Id.* at 254-55. The court found that -- to the extent that a declarant’s motivation matters in finding a statement testimonial -- in this case the “primary motivation was to call for urgent assistance, and not to phone in an anonymous accusation.” *Id.* at 255. In examining the 911 operator’s conduct, the court found the operator was not following a protocol to obtain information, and, setting aside requests for the caller to repeat information he had already volunteered, the only “significant” question the operator asked was for a description of the assailant. *Id.* The court decided “this question did not render the response testimonial, because it fell within a category that has been described as ‘questions delivered in emergency circumstances to help the police nab . . . assailants.’” *Id.* (citing *Mungo v. Duncan*, 393 F.3d 327, 336 n.9 (2d Cir. 2004)).

¹³³ *State v. Vaught*, 682 N.W.2d 284 (Neb. 2004).

¹³⁴ *Id.* at 288. The physician’s testimony that the victim told him that defendant had “put his finger in her pee-pee” was admissible; also, “there were valid medical treatment purposes for learning the identity of the perpetrator and . . . such purposes were pertinent to diagnosis and treatment.” *Id.* at 289; see also *People v. Caccese*, 211 A.D. 2d 976 (N.Y. App. Div. 1996). The Court of Appeals of Ohio in *State v. Stahl*, No. 22261, 2005 Ohio App. LEXIS 1134 (Ohio Ct. App. Mar. 16, 2005), a rape case, offers another justification in cases in which the victim has already spoken to the police. The court held that, since the victim had already made a testimonial statement to police, it was reasonable that she would perceive the role of the nurse differently. *Id.*

Similarly, in New York, the identity of a perpetrator of domestic violence is admissible as part of hospital records necessary for diagnosis and treatment.¹³⁵ An Illinois state court in *In re T.T.*¹³⁶ found that the child's statements to doctors "describing the cause of symptoms or pain or the general character of the assault" were not testimonial, but the child's statement identifying the defendant as the attacker was testimonial.¹³⁷

IV. *Davis v. Washington*: Implications for Prosecution of Domestic Violence Cases

The continuing role of the excited utterance exception to the hearsay rule has recently been examined by the Supreme Court. In *Davis v. Washington*,¹³⁸ which reviewed *Hammon v. State*¹³⁹ as well as *State v. Davis*,¹⁴⁰ the Supreme Court was asked to further define what circumstances render out-of-court statements "testimonial."¹⁴¹ While *Davis* clarified some questions, it left open considerable room for debate over admissibility of out-of-court statements in domestic violence prosecutions.

A. *Hammon v. State* and *State v. Davis*

Hammon raises the issue of whether statements made to police officers at the scene of a crime should be considered testimonial.¹⁴² The police responded to a domestic disturbance call and found Mrs. Hammon seated on the porch of her home.¹⁴³ She was extremely upset, but denied that there was any problem

at *16-17.

¹³⁵ *People v. James*, 19 A.D. 3d 616, 617 (N.Y. App. Div. 2005) (Court properly admitted decedent's hospital records pertaining to a prior assault at the hands of defendant during defendant's murder trial: "the statements made by the decedent . . . , and as testified to at trial by the nurse who treated the decedent, were germane to the decedent's then medical diagnosis and treatment."); *see also* *People v. Cage*, 15 Cal. Rptr. 3d 846, 854-55 (Cal. Ct. App. 2004) (Domestic abuse victim's statement to doctor identifying his mother and grandmother as perpetrators of assault was non-testimonial because solicited for purposes of treatment.), *depublished* by 19 Cal. Rptr. 3d 824 (Cal. 2004).

¹³⁶ *In re T.T.*, 351 Ill. App. 3d 976 (Ill. App. Ct. 2004).

¹³⁷ *Id.* at 992.

¹³⁸ *Davis v. Washington*, 126 S. Ct. 2266 (2006).

¹³⁹ *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005).

¹⁴⁰ *State v. Davis*, 111 P.3d 844 (Wash. 2005).

¹⁴¹ *Davis*, 126 S. Ct. at 2270.

¹⁴² *Hammon*, 829 N.E.2d at 448.

¹⁴³ *Id.* at 446.

when asked by the police.¹⁴⁴ After the police received permission to enter her home, they found broken glass and evidence of a fight in the living room.¹⁴⁵ Mr. Hammon told the officers that he had a dispute with his wife, but that it did not get physical.¹⁴⁶ After the other officer spoke with Mrs. Hammon again, she reported that her husband had thrown her down on the floor with the broken glass and assaulted her, including “shov[ing] her head into the broken glass of the heater.”¹⁴⁷ She eventually signed an affidavit describing the assault.¹⁴⁸ Mrs. Hammon refused to testify at trial, but both her statement and the affidavit were admitted into evidence.¹⁴⁹ On appeal, the Supreme Court of Indiana concluded that the oral statement was not testimonial, and that the improper admission of the testimonial written affidavit amounted to harmless error.¹⁵⁰

Davis concerns whether statements made to a 911 operator are “testimonial.”¹⁵¹ The Supreme Court of Washington upheld the admissibility of a transcript of a 911 call during which, in response to the operator’s questions, the victim said that her boyfriend had beat her.¹⁵² The court found that *Crawford* did not bar the admission of the victim’s identification of the defendant as her assailant because that statement was non-testimonial.¹⁵³ The 911 operator was not acting primarily as a law enforcement official, but rather was gathering information only for the purpose of coordinating an appropriate response to the situation.¹⁵⁴

B. How to Determine Whether a Statement is Testimonial: Proposed Standards for *Davis*

The briefs submitted to the Supreme Court by the parties, as well as nearly a dozen amicus briefs, proposed dramatically different tests for determining whether a statement should be barred as testimonial hearsay. These proposed tests reflect the development of the decisions in the cases outlined above.

¹⁴⁴ *Id.* at 447.

¹⁴⁵ *Id.* at 455.

¹⁴⁶ *Id.* at 447.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 447.

¹⁵⁰ *Id.* at 448.

¹⁵¹ *State v. Davis*, 111 P.3d 844, 846 (Wash. 2005).

¹⁵² *Id.*

¹⁵³ *Id.* at 851.

¹⁵⁴ *Id.* at 849-51.

(1) Reasonable person test: Under this suggested standard, courts would bar out-of-court statements made under circumstances which a “reasonable person” would understand to support the arrest or prosecution of an individual named in that statement.¹⁵⁵ Thus, Mrs. Hammon’s statement to the law enforcement official responding to her home would be barred because a reasonable person would expect this statement to support a criminal justice response.¹⁵⁶ Similarly, the 911 transcript in *Hammon* would be considered inadmissible hearsay.¹⁵⁷ The brief submitted on behalf of Mr. Hammon advocated a similar standard.¹⁵⁸

(2) Resemblance test: The State of Indiana supported a “resemblance” test which would ask courts to consider whether an out-of-court statement was made in circumstances similar to those specifically addressed by the Confrontation Clause, i.e., statements made in a formal setting under “tactically structured” interrogation.¹⁵⁹ Statements given under these circumstances would be considered testimonial and inadmissible unless the witness was available for cross-examination.¹⁶⁰ Statements given outside of this context would be considered under the traditional hearsay exception doctrines which look to indicia of reliability.¹⁶¹ The State’s brief argued that *Crawford*’s holding was limited to a specific type of hearsay and did not mean to sweep so broadly.¹⁶²

(3) Subjective Test/Interrogator: Under this test, a court would consider the subjective intent of the interrogator in soliciting the statements in determining whether or not the statements should be considered testimonial.¹⁶³ Thus, if the 911 operator intended to collect information in support of an arrest or prosecution and asked detailed questions to that end, resulting statements would be barred. In contrast, if the interrogator’s primary function were to respond to

¹⁵⁵ Brief of Amici Curiae American Civil Liberties Union, the ACLU of Washington, and the Indiana Civil Liberties Union at 5, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (Nos. 05-5224, 05-5705).

¹⁵⁶ *Id.* The Court could, of course, choose to adopt this standard but find, on the contrary, that “reasonable people” do not have this expectation when they call the police in an emergency situation.

¹⁵⁷ *Id.*

¹⁵⁸ Brief of Respondent at 9, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (No. 05-5705).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Brief of Respondent at 24, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (No. 05-5224).

an emergency, resulting statements would be admissible.¹⁶⁴ This test creates an “immediate safety” exception to the hearsay rule.¹⁶⁵

(4) Subjective Test/Declarant: This test assesses the motivation of the declarant (rather than the interrogator) to determine admissibility.¹⁶⁶ If the victim is seeking assistance and does not intend, at the time of the statement, to provide evidence in support of prosecution, the statement should not be considered testimonial. Admissibility should then be determined in accordance with traditional exceptions to the hearsay rule, such as the excited utterance exception. This test was instrumental to the determination by the Washington Supreme Court to admit the 911 statement.¹⁶⁷

(5) Bright Line Tests: Alternatively, several amici urged the Court to adopt a bright line test, either admitting all excited utterances as *per se* non-testimonial¹⁶⁸ or excluding any statement made outside the courtroom used in support of prosecution.¹⁶⁹

C. The Supreme Court’s Holding in *Davis v. Washington*

The Supreme Court in *Davis* determined that courts must review out-of-court statements to determine their “primary purpose” in considering whether or not they are deemed testimonial hearsay and therefore inadmissible.¹⁷⁰ The Court held that:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to

¹⁶⁴ *Id.* at 7.

¹⁶⁵ Brief of Respondent at 10, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (No. 05-5705).

¹⁶⁶ Reply Brief of Petitioner at 16-17, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (05-5224).

¹⁶⁷ *State v. Davis*, 111 P.3d 844 (Wash. 2005).

¹⁶⁸ Brief of Illinois, Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Kansas, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming in support of Respondents at 17, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (Nos. 05-5224, 05-5705).

¹⁶⁹ Brief of the National Association of Criminal Defense Lawyers, the Washington Association of Criminal Defense Lawyers and the Public Defender Service for the District of Columbia in support of Petitioner at 5, *Davis v. Washington*, 126 S. Ct. 2266 (2005) (No. 05-5224).

¹⁷⁰ *Davis v. Washington*, 126 S. Ct. 2266, 2269 (2006).

meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹⁷¹

In applying this test to the two cases at hand, the Court held that Michelle McCottry's statement to the 911 operator was in response to an emergency and was not intended to provide support for an investigation, and was therefore non-testimonial.¹⁷² The statement was properly admitted.¹⁷³ In contrast, the Court held that Amy Hammon's statement to the responding officer at her home was in support of the officer's investigation and was not made during an on-going emergency.¹⁷⁴ The Court held that this statement was testimonial.¹⁷⁵

D. Remaining Questions

Despite this recent opinion, significant questions concerning the applicability of *Crawford* will remain. In particular, *Davis* did not specifically address statements made to non-law-enforcement personnel.¹⁷⁶ Statements made to friends, neighbors, or others may still be admissible under traditional excited utterance exceptions. Additionally, statements made to advocates or other non-law-enforcement personnel, who may work in conjunction with law enforcement, may also be considered outside of the scope of these decisions.

Determining whether a statement's primary -- as opposed to secondary -- purpose is to support an investigation may also prove difficult to determine. In *Davis*, for example, it is possible that the Court would have reached a different conclusion with respect to Amy Hammon's statement had the state court more clearly articulated the emergency aspects of the police response. Justice Scalia notes in the majority decision that *Davis* should not be read to bar all statements to responding officers.¹⁷⁷ Indeed, he writes that the "exigencies" of domestic disputes "may often mean that 'initial inquires' produce nontestimonial

¹⁷¹ *Id.* at 2273.

¹⁷² *Id.* at 2285.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 2276.

¹⁷⁵ *Id.* at 2278.

¹⁷⁶ See *State v. Mechling*, 633 S.E.2d 311, 324 n.10 (W. Va. 2006) (applying the "primary purpose" test to determine the admissibility of a statement to a neighbor).

¹⁷⁷ *Davis*, 126 S. Ct. at 2279.

statements.”¹⁷⁸

Finally, as outlined in the next section, forfeiture may take on increasing importance as a result of the Supreme Court’s decision in *Davis*.¹⁷⁹

E. Implications for Domestic Violence Prosecutions: Forfeiture

Domestic violence prosecution cases are unique in that the defendant and complaining witness are often connected by a history of intimacy, children, economic necessity, and other issues. As a result, the defendant’s conduct may more easily affect the availability of the complaining witness. Therefore, exceptions to the exclusion of testimonial hearsay where the witness is unavailable take on added relevance.

Under *Crawford*, testimony cannot be admitted unless the witness is “unavailable” and there was a prior opportunity for cross-examination.¹⁸⁰ However, if a defendant caused the declarant’s unavailability, the *Crawford* Court recognized that the doctrine of forfeiture may allow such evidence in even if the defendant had no prior opportunity for cross-examination.¹⁸¹ According to the Court, “[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”¹⁸² Although relatively few courts have relied on this exception in admitting domestic violence testimony, forfeiture may now become an important tool in admitting testimonial evidence in domestic violence cases.

In *State v. Fields*,¹⁸³ for example, the Minnesota Supreme Court, relying on *Crawford*, held that “if a witness is unavailable because of the defendant’s own wrongful procurement, ‘he is in no condition to assert that his constitutional rights have been violated.’”¹⁸⁴ The defendant in *Fields* made threatening phone calls to various witnesses while incarcerated.¹⁸⁵ One threatened witness refused to continue his testimony at trial, fearing “reprisals.”¹⁸⁶ After hearing evidence

¹⁷⁸ *Id.* (emphasis in original).

¹⁷⁹ Indeed, the Court specifically suggested that the Indiana courts consider whether or not a determination of forfeiture was appropriate in the *Hammon* case. *Davis*, 126 S. Ct. at 2270.

¹⁸⁰ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

¹⁸¹ *Id.* at 62.

¹⁸² *Id.*

¹⁸³ *State v. Fields*, 679 N.W.2d 341 (Minn. 2004).

¹⁸⁴ *Id.* at 347 (quoting *Reynolds v. United States*, 98 U.S. 145, 158 (1878)).

¹⁸⁵ *Id.* at 345.

¹⁸⁶ *Id.*

of the threats, the trial court admitted the witness's grand jury testimony.¹⁸⁷ The Supreme Court of Minnesota affirmed, stating that "the district court's findings that [the defendant] engaged in wrongful conduct, that he intended to procure the unavailability of [the witness] and that the intentional wrongful conduct actually did procure the unavailability of [the witness]" were supported by the record.¹⁸⁸

V. Conclusion

Crawford placed stringent requirements on the admission of hearsay in ways that appeared to be detrimental to domestic violence prosecutions. However, prosecutors have developed new strategies to allow in hearsay evidence where vulnerable complaining witnesses decline to testify at trial. Certain differences in approach are readily observed at this early date and the definition of "testimonial" continues to be unsettled. While the Supreme Court decision in *Davis* resolved some of these issues, the battle over whether or not -- and under what circumstances -- prosecutors will be able to use "evidence-based" strategies in domestic violence cases, will continue.¹⁸⁹ New questions will arise about both the breadth of the application of *Davis* as well as the facts necessary to support a "primary-purpose" determination. Litigation strategies may now focus additional attention on the forfeiture doctrine, and community response professionals may adapt their procedures to clarify when they are

¹⁸⁷ *Id.* at 345-46.

¹⁸⁸ *Id.* at 347. In a rather unusual application of the forfeiture doctrine, outside of the domestic violence context, the Kansas Supreme Court in *State v. Meeks*, 88 P.3d 789 (Kan. 2004), found that a murder defendant forfeited his right of confrontation and waived any hearsay objections with respect to a victim's statement to a police officer, in the presence of four witnesses, that the defendant had shot him. *Id.* at 794-95. The court found by a preponderance of the evidence that the defendant had shot the declarant and caused his death, the crime for which defendant was charged. *Id.* at 794; *see also* *State v. Sheppard*, 484 A.2d 1330, 1346 (N.J. Super. Ct. Law Div. 1984) (Defendant "forfeited his confrontation right by a pattern of conduct that resulted in [the declarant's] fear which we find to be reasonable under the circumstances. The record is replete with [the defendant's] threats and attempts to intimidate against [the declarant] and others. [The defendant] had physically abused [the declarant] and threatened to kill her if she did not do what she was told."). Forfeiture generally applies when the defendant's acts *intend* to silence the victim from testifying. *See, e.g.,* *People v. Maher*, 89 N.Y.2d 456, 462 (N.Y. 1997) (There was "not a scintilla of evidence that the defendant's acts against the absent witness were motivated, even in part, by a desire to prevent the victim from testifying against him in court." The application of the forfeiture rule should not require the trial court to "decide the ultimate question for the jury in the same case, i.e., whether the defendant caused the victim's death.").

¹⁸⁹ The author is ethically proscribed from articulating an opinion on how he may rule on any issue that may come before him as a sitting judge.

responding to emergencies as opposed to collecting evidence. Intimate partner and domestic violence cases will continue to present unique issues that directly challenge courts to consider the implications of the *Crawford* ruling.