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Testimonial Statements, Excited Utterances and the Confrontation Clause: Formulating a Precise Rule after Crawford and Davis

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TESTIMONIAL STATEMENTS, EXCITED UTTERANCES AND
THE CONFRONTATION CLAUSE: FORMULATING A PRECISE
RULE AFTER *CRAWFORD* AND *DAVIS*

GARY M. BISHOP*

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I. INTRODUCTION

In *Crawford v. Washington*,¹ the United States Supreme Court held that the Sixth Amendment’s Confrontation Clause² prohibits the admission of testimonial

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

statements by a witness who is absent from trial unless the declarant is unavailable and the defendant has had an opportunity to cross-examine the statements.³ Thus, the Court imposed an absolute bar on the admission of testimonial statements in the absence of a prior opportunity by the defendant to cross-examine those statements.⁴ Justice Scalia authored the opinion in which 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.”⁵

In establishing cross-examination as the prerequisite for the admission of testimonial evidence, the Court in *Crawford* did not conclusively define the term “testimonial.” Rather, it set forth various descriptions and examples of testimonial statements without explicitly adopting a definition.⁶ Therefore, a determination of whether a defendant is entitled to cross-examine a statement now requires a determination of whether that statement is testimonial.

This Article will analyze whether the post-*Crawford* decisions have been consistent in their treatment of statements that qualify as excited utterances⁷ in light of the Confrontation Clause principles and various definitions of testimonial in *Crawford*. Part II of this Article will provide a discussion of the *Crawford* decision itself and an analysis of *Crawford*'s treatment of earlier cases in this area.⁸ Part III of this Article will provide a discussion and analysis of court decisions that have applied *Crawford* in the context of excited utterances.⁹ It will do this by examining the factors that these courts have considered and emphasized in their analysis of whether an excited utterance qualifies as a testimonial statement, which would implicate the Confrontation Clause protections set forth in *Crawford*. Part IV of this Article will discuss *Crawford*'s impact on the admission of excited utterances by analyzing the various factors from the cases under the different formulations of “testimonial” set forth in *Crawford*.¹⁰ Part IV will then propose a composite definition of “testimonial” that will take into account the three definitions from *Crawford* and the application of those definitions in the cases. Part V of this Article

²U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

³*Crawford*, 541 U.S. at 59.

⁴*Id.* at 61.

⁵*Id.* at 50.

⁶*Id.* at 51-52.

⁷Under the Federal Rules of Evidence, an “excited utterance” is “not excluded by the hearsay rule, even though the declarant is available as a witness.” FED. R. EVID. 803(2). The Rule defines an excited utterance as a “statement relating to a startling event or condition made while the declarant [is] under the stress or excitement caused by the event or condition.” *Id.* The underlying rationale for the admission of excited utterances under Rule 803(2) is that a person who is still under the stress of an exciting event or experience is unlikely to possess the reflective capacity that is needed to manufacture a lie. *See, e.g., United States v. Taveras*, 380 F.3d 532, 537 (1st Cir. 2004).

⁸*See infra* notes 13-77 and accompanying text.

⁹*See infra* notes 78-340 and accompanying text.

¹⁰*See infra* notes 341-81 and accompanying text.

concludes that the intended positive impact of the *Crawford* decision will be realized only if courts refrain from applying its protections to situations that the Supreme Court neither intended nor contemplated.¹¹

II. RATIONALE OF *CRAWFORD V. WASHINGTON* AND TREATMENT OF PRECEDENT

A. “Testimonial” Statements under *Crawford*.

Under *Crawford*, the threshold issue on a particular statement’s admissibility against a defendant is whether the statement is testimonial. The Court in *Crawford* declined to adopt a comprehensive definition of “testimonial,”¹² but stated that the term clearly “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”¹³ Quoting from the Petitioner’s brief, the Court stated that the core class of testimonial statements comes in various forms: “‘*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 [such as a deposition], or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.’”¹⁴

Another description of testimonial statements set forth by the Court in *Crawford* are those “‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’”¹⁵ In general, the definition of testimonial would include “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.”¹⁶ A statement need not be sworn in order to be classified as testimonial.¹⁷

¹¹See *infra* notes 384-85 and accompanying text.

¹²See generally Ariana J. Torchin, Note, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington*, 94 GEO. L.J. 581 (2006) (proposing a framework for deciding whether a statement is testimonial by considering the degree of formality of the statement, the intent of the declarant and the law enforcement officer to whom the statement was made, and the extent of government involvement in the production of the statement).

¹³*Crawford v. Washington*, 541 U.S. 36, 68 (2004). The Court in *Crawford* left no uncertainty in the area of police interrogations when declaring that “[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.” *Id.* at 52. The Court further clarified the meaning of testimonial statements in the context of police interrogations in *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006) (holding that a statement is nontestimonial when purpose of interrogation is to enable police to meet an ongoing emergency and testimonial when purpose of interrogation is to establish prior events that may be relevant to a subsequent criminal prosecution). See *infra* notes 225-340 and accompanying text for an analysis and discussion of both kinds of statements.

¹⁴*Crawford*, 541 U.S. at 51 (quoting Brief of Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21939940).

¹⁵*Id.* at 51-52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

¹⁶*Id.* at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL

In its discussion of testimonial statements, the Court in *Crawford* was particularly concerned about any statements given to officers or government agents because “[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.”¹⁸ The involvement of government representatives is an important factor in the determination of whether evidence qualifies as “testimonial” under *Crawford*:

Involvement of government officers in the production of testimony with any eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.¹⁹

The Court in *Crawford* limited its decision to testimonial hearsay, stating that “[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.”²⁰ With respect to testimonial evidence, however, the Sixth Amendment requires both unavailability of the declarant and a prior opportunity for cross-examination.²¹

The Court’s decision in *Crawford* overruled its prior decision in *Ohio v. Roberts*.²² In that case, the Supreme Court held that the Sixth Amendment’s Confrontation Clause does not bar admission of the statement of an unavailable witness against a criminal defendant if the statement bears “adequate indicia of reliability.”²³ This test requires the evidence either to fall within a “firmly rooted hearsay exception,” or to bear “particularized guarantees of trustworthiness.”²⁴

Chief Justice Rehnquist wrote a concurring opinion in *Crawford v. Washington*, which was joined by Justice O’Connor. The Chief Justice did not agree with the majority’s decision to overrule *Ohio v. Roberts*,²⁵ or with the distinction made by the majority between testimonial and nontestimonial statements.²⁶ Chief Justice

21754961). In evaluating the various formulations of testimonial statements, the Court stated that all “share a common nucleus and then define the [Confrontation] Clause’s coverage at various levels of abstraction around it.” *Id.*

¹⁷*See id.*; see also W. Jeremy Counsellor & Shannon Rickett, *The Confrontation Clause After Crawford v. Washington: Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 17-19 (2005).

¹⁸*Crawford*, 541 U.S. at 51.

¹⁹*Id.* at 56 n.7.

²⁰*Id.* at 68.

²¹*Id.*

²²*Ohio v. Roberts*, 448 U.S. 56 (1980).

²³*Id.* at 66.

²⁴*Id.*; see also Richard D. Friedman, *Confrontation: The Search For Basic Principles*, 86 GEO. L.J. 1011, 1017-22 (1998) (arguing that the *Roberts* framework failed to reflect some of the enduring principles of the Confrontation Clause).

²⁵*Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring).

²⁶*Id.* at 69-73.

Rehnquist also took issue with the broad definition of testimonial statements adopted by the majority:

[A]ny classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today.²⁷

Rehnquist would have reached the same result as the majority without overruling *Ohio v. Roberts*. He reasoned that the statement at issue in *Crawford* was not admissible based on *Idaho v. Wright*,²⁸ which held that corroboration of an out-of-court statement's truthfulness by other evidence at trial was an insufficient basis to admit the statement.²⁹

Prior to *Crawford*, the United States Supreme Court had never distinguished between testimonial and nontestimonial evidence for purposes of the Confrontation Clause.³⁰ Chief Justice Rehnquist expressed concern in his concurring opinion that the majority's failure to clarify exactly what kind of evidence qualifies as "testimonial" would result in confusion in the lower courts.³¹

B. Facts and Procedural History of Crawford

The defendant in *Crawford* stabbed a man who allegedly tried to rape his wife, Sylvia.³² At the defendant's trial for assault and attempted murder, the prosecution played for the jury Sylvia's tape-recorded statement to the police describing the confrontation between the defendant and the victim.³³ The defendant claimed self-defense.³⁴ Because of the state marital privilege barring a spouse from testifying without the other spouse's consent, Sylvia did not testify at the trial.³⁵ Therefore, the defendant had no opportunity to cross-examine Sylvia's statement.³⁶

Sylvia's tape-recorded statement was admitted under the hearsay exception for statements against penal interest based on her admission that she had led the

²⁷*Id.* at 71.

²⁸*Idaho v. Wright*, 497 U.S. 805 (1990).

²⁹*Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring); see also Amber Allred Furbee, Note, *Legal Crossroads: The Hearsay Rule Meets the Sixth Amendment Confrontation Clause in Crawford v. Washington*, 38 CREIGHTON L. REV. 999, 1050-59 (2005) (stating that application of standards enunciated in *Roberts* and *Wright* would have produced the same result reached by the majority in *Crawford*).

³⁰See *Crawford*, 541 U.S. at 72 (Rehnquist, C.J., concurring); see also *State v. Rivera*, 844 A.2d 191, 202 n.13 (2004) (stating that the *Crawford* Court's distinction between testimonial and nontestimonial hearsay is a novel one under the Confrontation Clause).

³¹*Crawford*, 541 U.S. at 75 (Rehnquist, C.J., concurring).

³²*Id.* at 38 (majority opinion).

³³*Id.*

³⁴*Id.* at 40.

³⁵*Id.*

³⁶*Id.* at 38.

defendant to the victim's apartment and thus had facilitated the assault.³⁷ The prosecution sought to use Sylvia's tape-recorded statement as evidence that the stabbing was not in self-defense.³⁸ The defendant claimed that admission of Sylvia's statement violated his federal constitutional right to be confronted with the witnesses against him under the Sixth Amendment.³⁹ The trial court admitted the statement based on *Ohio v. Roberts*,⁴⁰ ruling that the statement was trustworthy under the *Roberts* standard, and offered several reasons to support that determination.⁴¹

The jury convicted the defendant of assault, and the Washington Court of Appeals reversed.⁴² The Court of Appeals held that Sylvia's statement did not bear particularized guarantees of trustworthiness and offered several reasons in support of its conclusion.⁴³ The Washington Supreme Court reinstated the defendant's conviction, concluding that the statement bore guarantees of trustworthiness.⁴⁴ Specifically, the Washington Supreme Court relied on the similarities between the defendant's confession and Sylvia's statement in reaching the conclusion that the statement was trustworthy.⁴⁵

The United States Supreme Court granted certiorari to determine whether the prosecution's use of Sylvia's statement violated the Confrontation Clause, and the Court reversed the judgment of the Washington Supreme Court.⁴⁶

C. Crawford's Treatment of Sixth Amendment Precedent

The Court in *Crawford* used the case as an opportunity to reconsider the standard articulated in *Ohio v. Roberts*⁴⁷ for the admissibility of an unavailable witness's out

³⁷*Id.* at 40.

³⁸*Id.*

³⁹*Id.*

⁴⁰*Ohio v. Roberts*, 448 U.S. 56 (1980).

⁴¹*Crawford*, 541 U.S. at 40. See *supra* notes 22-24 and accompanying text and *infra* notes 47-62 and accompanying text for a discussion of *Roberts*.

⁴²*Id.* at 41. The Court of Appeals of Washington reversed the conviction in an unpublished opinion. *State v. Crawford*, No. 25307-1-II, 2001 WL 850119 (Wash. Ct. App. July 30, 2001).

⁴³*Crawford*, 541 U.S. at 41.

⁴⁴See *id.*; *State v. Crawford*, 54 P.3d 656 (Wash. 2002).

⁴⁵See *Crawford*, 54 P.3d at 663-64; *Crawford*, 541 U.S. at 41-42. The Washington Supreme Court rejected the prosecution's argument that Sylvia's statement did not have to bear guarantees of trustworthiness because the defendant waived his confrontation rights by invoking the marital privilege. *Crawford*, 54 P.3d at 660. The court declined to force the defendant to choose between the marital privilege and confronting his spouse. *Id.* The prosecution did not challenge that holding in the United States Supreme Court. *Crawford*, 541 U.S. at 42 n.1.

⁴⁶*Crawford*, 541 U.S. at 42, 68-69.

⁴⁷*Ohio v. Roberts*, 448 U.S. 56 (1980).

of court statement.⁴⁸ The Court stated that the test in *Ohio v. Roberts* fails to protect criminal defendants against typical Confrontation Clause violations.⁴⁹

In *Roberts*, the defendant was charged with forgery of checks and possession of stolen credit cards.⁵⁰ At the preliminary hearing on the matter, the defendant's lawyer called a witness who testified that she knew the defendant and that she had allowed the defendant to use her apartment for several days while she was away.⁵¹ The defendant's attorney tried to obtain an admission from the witness that she had given the checks and credit cards to the defendant without telling him that he did not have permission to use them.⁵² The witness denied that she had done so.⁵³

When the witness became unavailable for the trial, the prosecution sought to admit the transcript of her testimony at the preliminary hearing.⁵⁴ The trial court admitted the transcript into evidence, and the defendant was convicted.⁵⁵ The Ohio Court of Appeals reversed the conviction, ruling that the prosecution had failed to make a good faith effort to secure the witness's attendance.⁵⁶ The Supreme Court of Ohio affirmed on other grounds, holding that the witness was unavailable and that the transcript was inadmissible at the defendant's trial.⁵⁷ The rationale was that even though the defendant had the opportunity to cross-examine the witness at the preliminary hearing, this was not the equivalent of constitutional confrontation at trial.⁵⁸

In its analysis of whether the prior testimony of the witness at the preliminary hearing bore "adequate indicia of reliability," the United States Supreme Court in *Roberts* declined to specify the level of questioning that would be sufficient to satisfy the Confrontation Clause's requirement of cross-examination.⁵⁹ The Court held, however, that the defendant's attorney had tested the witness's testimony "with the equivalent of significant cross-examination."⁶⁰ Therefore, the Supreme Court relied on the defendant's prior opportunity to cross-examine the witness in its analysis of

⁴⁸*Crawford*, 541 U.S. at 42.

⁴⁹*Id.* at 60.

⁵⁰*Roberts*, 448 U.S. at 58.

⁵¹*Id.* The witness was the daughter of the couple from whom the defendant had allegedly stolen the credit cards and the checks. *Id.*

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.* at 59.

⁵⁵*Id.* at 60.

⁵⁶*Id.*

⁵⁷*Id.* at 61.

⁵⁸*Id.*

⁵⁹*Id.* at 68-70.

⁶⁰*Id.* at 70. The *Roberts* Court stated that the defense attorney's questioning of the witness at the preliminary hearing "clearly partook of cross-examination as a matter of form," *id.*, and that it "comported with the principal *purpose* of cross-examination:" challenging the declarant's veracity, perception, memory and intended meaning. *Id.* at 71.

whether the transcript was sufficiently reliable.⁶¹ The Court in *Crawford* disagreed with the rationale of *Roberts* but not the result.⁶²

The *Crawford* opinion contains an extensive history of the Sixth Amendment's Confrontation Clause and the development of a criminal defendant's right to confront his or her accusers.⁶³ The Court concluded that when dealing with testimonial statements, the framers of the Constitution did not mean to "leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"⁶⁴ The Confrontation Clause is concerned with more than reliability of evidence.⁶⁵ It is concerned with the manner in which the reliability of evidence is tested, and the required test is cross-examination.⁶⁶

The Court in *Crawford* cited to one of its earlier decisions, *Dutton v. Evans*,⁶⁷ to illustrate the limitations on the definition of testimonial statements.⁶⁸ In *Dutton*, a statement made to someone other than a law enforcement officer or agent of the government was admissible against a defendant at his murder trial by the person to whom the statement was made.⁶⁹ Shaw's testimony about what Williams had told

⁶¹*Id.* at 73; see also *California v. Green*, 399 U.S. 149, 151, 158-59 (1970) (Confrontation Clause not violated by admission at trial of witness's prior testimony from a preliminary hearing—testimony that was given under oath and subject to cross examination—when witness was testifying at trial and subject to full and effective cross-examination); *Mattox v. United States*, 156 U.S. 237, 240-44 (1895) (Confrontation Clause not violated by admission at trial of a transcribed copy of testimony of two witnesses from a previous trial, when witnesses had died in the interim and were fully examined and cross-examined when they testified in former trial); Thomas Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 753, 784-87 (2005) (arguing that one of the ways to facilitate domestic violence prosecutions after *Crawford* is to create more opportunities for cross-examination of victims in preliminary hearings, depositions, and other pretrial proceedings).

⁶²*Crawford*, 541 U.S. at 58 (stating that *Roberts* "hew[ed] closely to the traditional line" in its outcome because of its emphasis on the defendant's earlier opportunity to cross-examine the witness).

⁶³*Id.* at 43-50. The decision sets forth the story of the trial of Sir Walter Raleigh to illustrate the inherent unfairness in a system that does not permit the accused to confront the witnesses against him. *Id.* at 44-45. See Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 570-71 (1992); Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763, 765-66 (2000).

⁶⁴*Crawford*, 541 U.S. at 61.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*Dutton v. Evans*, 400 U.S. 74 (1970).

⁶⁸*Crawford*, 541 U.S. at 57.

⁶⁹*Dutton*, 400 U.S. at 77, 87-88. In *Dutton*, a prosecution witness named Shaw testified that he and Williams, who was an accomplice of the defendant Evans in the alleged murder, had been fellow prisoners during the time that Williams was arraigned on the murder charge. *Id.* at 77. Shaw testified that when Williams returned to the penitentiary after the arraignment, Shaw asked him how he had made out. *Id.* Shaw testified that Williams had responded, "If it hadn't been for [the defendant] Alex Evans, we wouldn't be in this now." *Id.* The statement

him was admitted on the basis of a Georgia statutory hearsay exception. The statute provided that if a conspiracy had been proved, any statement made by a conspirator “during the pendency of the criminal project” was admissible against any other conspirator.⁷⁰ The hearsay exception applied by Georgia allowed the introduction of out-of-court statements made both during the course of the conspiracy and the concealment of the conspiracy.⁷¹ The absence of a prior opportunity to cross-examine the statement in *Dutton* was not a bar to its admission because the statement was not testimonial.⁷²

The focus on government officers and agents in the determination of whether statements qualify as testimonial casts some doubt on the holding in *White v. Illinois*.⁷³ The Court in *Crawford* acknowledged that its holding was not entirely consistent with the holding of *White*.⁷⁴ In *White*, statements of a child victim to an investigating police officer were admitted as spontaneous declarations.⁷⁵ The *Crawford* Court acknowledged that its analysis was “in tension” with the holding in *White*,⁷⁶ but it declined to state specifically whether *White* survived the decision in *Crawford*.⁷⁷

was admitted over the objection of defense counsel, and Shaw was cross-examined at length. *Id.* at 77-78.

⁷⁰*Dutton*, 400 U.S. at 78.

⁷¹*Id.* at 81.

⁷²*Crawford*, 541 U.S. at 57. *But see In re E.H.*, 823 N.E.2d 1029, 1037 (Ill. App. Ct. 2005) (holding that grandmother’s testimony about child’s statements to her regarding sexual abuse implicated the Confrontation Clause even though the statements were not made to a government official), *petition for appeal allowed*, 833 N.E.2d 2 (Ill. 2005). *See infra* note 328 for a discussion of *In re E.H.*

⁷³*White v. Illinois*, 502 U.S. 346 (1992).

⁷⁴*Crawford*, 541 U.S. at 58 n.8.

⁷⁵*White*, 502 U.S. at 349-51.

⁷⁶*Crawford*, 541 U.S. at 58 n.8.

⁷⁷The Court later characterized the holding in *White* as the “one arguable exception” to the Confrontation Clause’s requirements of unavailability of the witness and prior cross-examination in cases involving testimonial hearsay. *Davis v. Washington*, 126 S. Ct. 2266, 2275 (2006). In a concurring opinion in *White*, Justice Thomas noted that the Confrontation Clause jurisprudence to that point had implicitly assumed that all hearsay declarants were “witnesses against” a defendant within the meaning of the Confrontation Clause. *White*, 502 U.S. at 359 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas argued that neither the history nor the text of the Confrontation Clause supported this assumption, *id.* at 358, and suggested the following interpretation of the Confrontation Clause: “The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *Id.* at 365. Justice Thomas reiterated this position in subsequent decisions. *See Davis*, 126 S. Ct. at 2280-83 (Thomas, J., concurring in the judgment in part and dissenting in part); *Lilly v. Virginia*, 527 U.S. 116, 143-44 (1999) (Thomas, J., concurring in part and concurring in judgment); *see also* Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045 (1998) (arguing that the

III. IMPACT ON EXCITED UTTERANCE EXCEPTION

Federal and state courts have reached different conclusions on the admissibility of excited utterances under *Crawford* based on their consideration of various factors and the importance placed upon each one.⁷⁸ A number of courts have concluded that excited utterances, even when made to a police officer in response to some degree of questioning, are not testimonial.⁷⁹ Other courts have taken the opposite viewpoint, reasoning that an excited utterance may be testimonial if the questioning by law enforcement officers is for investigatory and fact-gathering purposes in anticipation of a future prosecution.⁸⁰ Structured and detailed questioning is more likely to result in responses that implicate *Crawford*, even if the responses qualify as excited utterances under state evidentiary rules.⁸¹

Confrontation Clause “encompasses only those ‘witnesses’ who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like”).

⁷⁸One view is that “[o]n paper, *Crawford* is a thorough originalist resolution of a constitutional question. In application, however, the Court’s analysis raises substantial questions and leaves them unanswered. Equally as significant as the Court’s holding, then, is what it failed to resolve—and indeed explicitly declined to address.” See *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 316, 321 (2004); see also Lininger, *supra* note 61, at 777-81. Professor Lininger explains that the *Crawford* decision has caused lower courts to be inconsistent in their application of various factors in cases involving domestic violence prosecutions, and also suggests several reforms that would enable prosecutors to convict batterers within the parameters set out in *Crawford*. *Id.*

The purpose of this Article is to provide an in-depth discussion of the various factors that the courts have utilized and the context in which the factors arise in order to determine more accurately whether an excited utterance is admissible against a defendant under *Crawford*.

⁷⁹See, e.g., *United States v. Brun*, 416 F.3d 703, 707-08 (8th Cir. 2005) (finding victim’s statements to police officer not testimonial where police interaction with victim was unstructured and questioning not suggestive).

⁸⁰See, e.g., *Drayton v. United States*, 877 A.2d 145, 150-51 (D.C. 2005) (finding that when police questioned the victim, they were aware of the nature of the crime and the participants’ identities).

⁸¹See, e.g., *Siler v. Ohio*, 543 U.S. 1019 (2004) (vacating *State v. Siler*, No. 02COA028, 2003 WL 22429053 (Ohio Ct. App. Oct. 24, 2003)). Even though approximately eight hours had passed between the estimated time of the victim’s death and the statement of the victim’s child to the officers, the child’s statement was admitted as an excited utterance because a child may be under the stress and excitement of events related to a crime for a longer period than an adult. *Siler*, 2003 WL 22429053, at *6. In addition, the child gave his statement to the officers in the course of two interviews. *Id.* The first interview lasted between thirty and forty-five minutes, and the second interview lasted for one hour. *Id.*

On remand, the Ohio Court of Appeals held that the police had obtained the child’s statements through “a structured police interrogation” and that the statements were, therefore, testimonial. *State v. Siler*, 843 N.E.2d 863, 866 (Ohio Ct. App. 2005), *appeal allowed*, 847 N.E.2d 5 (Ohio 2006).

In light of *Crawford*, the Supreme Court has remanded for further consideration, three cases in which statements made to the police were admitted against defendants at trial based on hearsay exceptions other than the excited utterance. See *Goff v. Ohio*, 541 U.S. 1083 (2004) (admitting the statement of defendant’s wife made to police at trial as a statement against penal interest when the wife was unavailable for trial). On remand, the Ohio Court of Appeals held that statements made by Mr. Goff’s wife to the police while they were

Courts that agree on the result in these cases still differ on their rationales. Some court decisions that have held excited utterances to be nontestimonial focus on the fact that the declarant initiated the contact with police and gave the statement without first being approached. Others emphasize that even if the declarant provided the statement in response to questioning, the questioning must be sufficiently structured and controlled to bring the statement within the *Crawford* rule. Still others examine the declarant's motivation in providing the statement and conclude that it is nontestimonial if given to obtain aid or to reduce the level of danger and not to aid law enforcement in a future prosecution.⁸²

The Supreme Court has confirmed that courts must distinguish between statements that are made to address an ongoing emergency (nontestimonial) and statements that are made to provide information that can be used in a later prosecution (testimonial).⁸³ Although the Court's decision in *Davis* somewhat clarified *Crawford*'s reach, the line between these two kinds of statements can be difficult to draw.⁸⁴ A combination of these factors in any one case only exacerbates the difficulty.⁸⁵

interrogating her were not admissible against Mr. Goff at his trial. *State v. Goff*, No. 21320, 2005 WL 236377, at *2 (Ohio Ct. App. Feb. 2, 2005).

See also *Prasertphong v. Arizona*, 75 P.3d 675 (Ariz. 2003), *vacated*, 541 U.S. 1039 (2004) (admitting statements made to police by an individual involved in the crime for which the defendant was prosecuted as statements against penal interest); *People v. Castille*, 133 Cal. Rptr. 2d 489 (Cal. Ct. App. 2003), *vacated*, *Shields v. California*, 541 U.S. 930 (2004) (admitting statements made by co-defendants to police in a joint interview against each defendant as adoptive admissions and statements of a party—two firmly rooted hearsay exceptions). On remand, the California Court of Appeals affirmed the convictions, holding that an adoptive admission elicited during a joint police interrogation does not implicate the Sixth Amendment or *Crawford*. *See People v. Castille*, 29 Cal. Rptr. 3d 71, 81-85 (Cal. Ct. App. 2005).

Lastly, the United States Court of Appeals for the Second Circuit remanded a case to the district court to consider whether the use of guilty plea allocutions of alleged co-conspirators against a defendant to prove the charged conspiracy violates *Crawford*. *United States v. Pandey*, No. 03-1553, 2004 WL 960023, at *1-2 (2d Cir. May 5, 2004).

⁸²*See State v. Wright*, 701 N.W.2d 802, 812-13 (Minn. 2005) (listing eight factors or considerations to guide courts when determining whether a particular statement is testimonial), *cert. granted*, 126 S. Ct. 2979 (2006) (judgment vacated and case remanded to the Supreme Court of Minnesota for further consideration in light of *Davis*).

⁸³*Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

⁸⁴*Id.* at 2283 (Thomas, J., concurring in the judgment in part and dissenting in part) (stating that the modified standard in *Davis* “yields no predictable results to police officers and prosecutors attempting to comply with the law”).

⁸⁵*See generally* John F. Yetter, *Wrestling With Crawford v. Washington and the New Constitutional Law of Confrontation*, 78 FLA. BAR. J. 26, 29 (2004) (“One can imagine, for instance, excited utterances subdivided into ‘really excited utterances’ that are nontestimonial statements, standard ‘excited utterances’ that could go either way, and ‘mildly excited utterances’ that would be admissible under the hearsay exception but excluded because they contain ‘testimonial’ statements.”).

A. *Contact Initiated by Declarant*

A number of court decisions issued after *Crawford* have held excited utterances to be nontestimonial when the declarant makes the statement after initiating contact with law enforcement authorities. Because the declarant initiates the interaction in these cases, the statement is not taken “in the course of [a police] interrogation,”⁸⁶ and, therefore, is not testimonial. Even though the statement might still qualify as “a formal statement to government officers,”⁸⁷ the absence of interrogation or formal questioning is regarded as more significant.⁸⁸

An example of this scenario is *Leavitt v. Arave*.⁸⁹ In *Leavitt*, the United States Court of Appeals for the Ninth Circuit held that the trial court properly admitted an excited utterance made by the victim to the police, reasoning that the statement was not “testimonial” under *Crawford*.⁹⁰ In *Leavitt*, the victim had been frightened on the night before her death by a prowler at her home.⁹¹ She called the police and told them that she thought the prowler was the defendant because he had tried to talk himself into her home earlier that day.⁹² The Ninth Circuit rejected the defendant’s argument that admission of the hearsay testimony violated his rights under the Sixth Amendment’s Confrontation Clause.⁹³ The court acknowledged that the question was close but “[did] not believe that [the victim’s] statements [were] of the kind with which *Crawford* was concerned, namely, testimonial statements.”⁹⁴ The court went on to explain the distinction between the victim’s statements and the statements in *Crawford*:

⁸⁶*Crawford v. Washington*, 541 U.S. 36, 52 (2004).

⁸⁷*Id.* at 51. It is worth noting that subsequent to its decision in *Crawford*, the Supreme Court stated in dicta that statements made in the absence of interrogation could also qualify as testimonial. *Davis*, 126 S. Ct. at 2274 n.1. The Supreme Court dealt only with statements produced as the result of interrogations because those were the only statements involved in *Davis* and its companion case, *Hammon v. Indiana*. See *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), *aff’d*, 829 N.E.2d 444 (Ind. 2005), *rev’d sub nom. Davis v. Washington*, 126 S. Ct. 2266 (2006).

⁸⁸See Dickinson, *supra* note 63, at 806-09. Mr. Dickinson describes the difference between these kinds of statements as follows:

The difference is subtle, yet defensible. The key is to look at the circumstances surrounding the giving of the out-of-court statement to the government. For instance, if a witness walks up to a police officer and announces, “I saw Jim shoot Lisa,” that type of situation in no way resembles the sorts of abuses concerning the framers. This wholly unsolicited statement does not resemble the prosecutorial abuses common in the trial by affidavit scenario because the statement was not elicited by the government for purposes of trial.

Id. at 807 n.364.

⁸⁹*Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004), *cert. denied*, 545 U.S. 1105 (2005).

⁹⁰*Id.* at 683.

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.* at 683 n.22.

We do not think that [the victim's] statements to the police she called to her home fall within the compass of [the examples of the types of statements that qualify as testimonial in the *Crawford* decision. The victim], 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 [the defendant] implicate "the principal evil at which the *Confrontation Clause* was directed[:] . . . the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."⁹⁵

During the defendant's murder trial in *State v. Barnes*,⁹⁶ the court used similar reasoning in admitting statements made by the defendant's mother to a police officer, following a prior assault.⁹⁷ The officer testified that in March 1998 the defendant's mother drove herself to the police station, entered the station crying and sobbing and stated that her son had assaulted her and threatened to kill her.⁹⁸ The court admitted the testimony as an excited utterance.⁹⁹

The Supreme Judicial Court of Maine concluded that the victim's statements to the police were not testimonial under *Crawford*.¹⁰⁰ The court based its conclusion on the fact that the victim had gone to the police station on her own, not because the police had sought her out or requested her presence.¹⁰¹ In addition, the victim was still under the stress of the event when she made the statements, and any questions posed by the police were for the purpose of determining why she was distressed.¹⁰² There was an absence of structured police questioning, and the police had no reason to believe that any wrongdoing had occurred until the victim made her statements.¹⁰³

In *State v. Anderson*,¹⁰⁴ a group of juveniles flagged down a police officer who was attempting to locate the source of an activated burglar alarm.¹⁰⁵ The officer stopped and asked the group what was going on, and the juveniles told him that a "large black man with a bald head just kicked in the door of a business across the

⁹⁵*Id.* at 684 n.22 (fourth alteration in original) (quoting *Crawford v. Washington*, 541 U.S. 36, 50 (2004)).

⁹⁶*State v. Barnes*, 854 A.2d 208 (Me. 2004).

⁹⁷*Id.* at 209.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.* at 211.

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.* The court's reasoning in *Barnes* touches upon some of the other factors that are discussed *infra*.

¹⁰⁴*State v. Anderson*, No. E2004-00694-CCA-R3-CD, 2005 WL 171441 (Tenn. Crim. App. Jan. 27, 2005), *aff'd*, 183 S.W.3d 335 (Tenn. 2006), *cert. denied*, 127 S. Ct. 47 (2006).

¹⁰⁵*Id.* at *1.

street” and that he was “still inside.”¹⁰⁶ The officer drove to the business, discovered the door open and found the defendant inside.¹⁰⁷

The court in *Anderson* held that the statements were admissible as excited utterances and did not fit into any of the core testimonial categories as set forth in *Crawford*.¹⁰⁸ The court went on to explain that “the essential characteristics that cause the juveniles’ statements to fall within the ambit of the excited utterance exception conflict with the characteristics that would make them testimonial.”¹⁰⁹

A shortcoming in the *Anderson* court’s analysis is that it links the evidentiary issue too closely with the Confrontation Clause issue.¹¹⁰ A rationale that would be more consistent with *Crawford* would hold that the juveniles’ excited utterances were not testimonial because of their actions in initiating contact with the police.¹¹¹ In affirming the admission of the statements on appeal, the Tennessee Supreme Court emphasized that the police were in a “preliminary investigational mode” when they spoke to the witnesses.¹¹² They were trying to determine exactly what was happening and were not gathering evidence for a future prosecution.¹¹³

These cases illustrate one factor to be used by lower courts in their application of *Crawford*. When the declarant initiates the contact with governmental authorities and makes a statement, the statement falls outside of the definition of “testimonial” in *Crawford*. In such cases, the law of evidence determines admissibility of the

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸*Id.* at *3-4.

¹⁰⁹*Id.* at *4.

¹¹⁰*See* *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (“Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”).

¹¹¹*See, e.g.,* *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (holding that the victim’s statements to the 911 operator were not testimonial because the victim initiated the 911 call to request assistance); *People v. Mackey*, 785 N.Y.S.2d 870, 871-74 (2004) (holding that the statements of the domestic assault victim, who approached a police officer seated in the passenger seat of a van that was stopped in traffic at a red light, were not testimonial because the victim initiated contact with the police officer immediately after the incident in order to seek immediate protection); *People v. Watson*, No. 7715/90, 2004 WL 2567124, at *2 (N.Y. Sup. Ct. Nov. 8, 2004) (holding that the restaurant employee’s statement to police that the defendant “just robbed me. He just robbed us in Burger King.” immediately following a robbery of the restaurant was not testimonial because the employee, who was injured in the robbery, initiated the exchange and did not make the statement in response to any police questioning); *State v. Forrest*, 596 S.E.2d 22, 24-27 (N.C. Ct. App. 2004) (holding that statements of the victim were not testimonial because the victim, not the police, initiated the statements immediately after the rescue from the criminal incident without the police asking any questions), *aff’d*, 611 S.E.2d 833 (N.C. 2005), *cert. granted*, 126 S. Ct. 2977 (2006) (judgment vacated and case remanded to the Supreme Court of North Carolina for further consideration in light of *Davis*), *dismissed as moot*, 636 S.E.2d 565 (N.C. 2006) (dismissing in light of defendant’s death).

¹¹²*State v. Maclin*, 183 S.W.3d 335, 353 (Tenn. 2006).

¹¹³*Id.*

statement. The focus in these cases is on the declarant's timing in the making of the excited utterance, and it is irrelevant that the statement is made to a law enforcement officer or government official.

B. Location of Interaction Between the Declarant and the Law Enforcement Agents and Extent of Structure and Formality of Questioning

Another factor that courts have considered in their application of *Crawford* is whether questioning of the declarant by law enforcement agents is structured and formal.¹¹⁴ In most cases dealing with this factor, the location of the questioning is a consideration in the court's analysis. If the questions are informal and unstructured, the courts are more inclined to characterize any statements procured from such questions as nontestimonial. This situation arises if the questioning takes place at the scene of the incident itself or at a location other than the police station, such as a hospital.

Other courts have placed more emphasis on whether the questioning is structured and formal and less emphasis on the location.¹¹⁵ In these cases, the courts seem concerned with the fact that a governmental authority is procuring information through direct questions, even if the questions are few in number and asked at the scene of the incident.¹¹⁶ The courts have held that statements generated under such circumstances, even if admissible as excited utterances, may implicate the Confrontation Clause under *Crawford*.¹¹⁷

In *People v. Cage*,¹¹⁸ the California Court of Appeals had to evaluate three different hearsay statements from the victim, who had sustained a cut on his neck during a fight with the defendant (his mother). The victim stated that his mother had slashed him with a piece of glass. He made this statement to a police officer at the

¹¹⁴This factor is derived from the language in the *Crawford* decision where the Court discussed testimonial statements coming in the form of "custodial examinations" and a declarant "mak[ing] a formal statement to government officers." *Crawford*, 541 U.S. at 51.

¹¹⁵See *infra* notes 123-32 and accompanying text.

¹¹⁶See *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 552 (Mass. 2005) ("[S]tatements made in response to questioning by law enforcement agents are per se testimonial, except when the questioning is meant to secure a volatile scene or to establish the need for or provide medical care."), *cert. denied*, 126 S. Ct. 2982 (2006); *Watson*, 2004 WL 2567124, at *15 (whether questioning constitutes interrogation is not determined by the number of questions asked by a police officer or law enforcement agent); see also *Commonwealth v. Williams*, 836 N.E.2d 335, 338-39 (Mass. App. Ct. 2005) (applying the "per se" rule announced in *Gonsalves*).

¹¹⁷See *United States v. Brito*, 427 F.3d 53, 60 (1st Cir. 2005) (discussing view that the excited nature of the utterance is secondary to the declarant's objectively reasonable expectations of whether the statement would be used prosecutorially), *cert. denied*, 126 S. Ct. 2983 (2006); *Dickinson*, *supra* note 63, at 811 (arguing against the "unwarranted and unduly restrictive" distinction "between statements made in formalized testimonial settings versus informal investigative settings").

¹¹⁸*People v. Cage*, 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004), *petition for review granted*, 99 P.3d 2 (Cal. 2004). The California Supreme Court has ordered supplemental briefing in the matter so that the parties can address the effect of *Davis* on the issues presented in *Cage*. *People v. Cage*, No. S127344, 2006 Cal. LEXIS 8013 (Cal. June 28, 2006).

hospital, to a doctor at the hospital, and to the same police officer at the police station.¹¹⁹ The trial court admitted the statements under the California Evidence Code as both spontaneous statements and a victim's report of a physical injury.¹²⁰

The court in *Cage* held that the statement to the doctor at the hospital was clearly nontestimonial and that the statement to the police officer at the police station was clearly testimonial.¹²¹ On the statement to the police officer at the hospital, the court held that the statement was 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 crime or a suspect, there was no structured questioning, and the interview was informal and unrecorded."¹²²

The lack of formality and structure in the manner of questioning, in addition to the fact that it took place at a hospital and not in a courtroom or station house, persuaded the court in *Cage* that the interview was not an interrogation.¹²³ Therefore, the statement was admissible as a spontaneous or excited utterance and was not testimonial under *Crawford*.¹²⁴

In contrast to the holding in *Cage*, the court in *Wall v. State*¹²⁵ held that a police interview of a witness at a hospital was structured questioning.¹²⁶ In *Wall*, one of the victims of an assault provided a statement to the police detailing how the defendant had made several racial epithets and then attacked his victims with a wooden board.¹²⁷ When the victim was unavailable to testify at trial, a deputy testified as to what the victim had told him in response to the deputy's questioning at the hospital.¹²⁸ The trial court admitted the victim's statements as excited utterances, and the defendant challenged the admission of the statements as a violation of his right to confront the witnesses against him.¹²⁹

The issue on appeal was "whether a non-testifying witness's statement made to a police officer during investigation of a crime and incriminating the defendant, is

¹¹⁹*Cage*, 15 Cal. Rptr. 3d at 848.

¹²⁰*Id.* at 850.

¹²¹*Id.* at 848. The victim's statement to the police officer at the police station was a recorded station-house interview identical to the one at issue in *Crawford*, and the statement to the doctor was not made to the police or an agent of the police. *Id.* at 854-55.

¹²²*Id.* at 848; *see also* *Cassidy v. State*, 149 S.W.3d 712, 714-16 (Tex. App. 2004) (holding that victim's statement to police officer at hospital was admissible as an excited utterance and victim's interview by police officer was not an interrogation as defined in *Crawford*), *cert. denied*, 544 U.S. 925 (2005).

¹²³*Cage*, 15 Cal. Rptr. 3d at 856-57.

¹²⁴*Id.* at 857.

¹²⁵*Wall v. State*, 143 S.W.3d 846 (Tex. App. 2004), *aff'd*, 184 S.W.3d 730 (Tex. Crim. App. 2006).

¹²⁶*Id.* at 851.

¹²⁷*Id.* at 848.

¹²⁸*Id.*

¹²⁹*Id.*

admissible against the defendant.”¹³⁰ In reliance on the standard for interrogation from *Crawford* as a statement “knowingly given in response to structured police questioning,” the court in *Wall* held that an interview of a witness at a hospital is “structured police questioning” and, therefore, an interrogation under *Crawford*.¹³¹ The victim’s statement was held to be “testimonial” under the standard in *Crawford*.¹³²

It is difficult to distinguish *Cage* and *Wall* from each other on their facts. Perhaps one difference is that in *Cage*, the law enforcement agent was still trying to determine whether a crime had been committed at the time he conducted the interview.¹³³ The court in *Cage* stated that the deputy engaged in no structured questioning but simply extended “an open-ended invitation for [the victim] to tell his story.”¹³⁴ In *Wall*, however, the deputy’s questioning of the victim was more specifically related to the investigation of a crime.¹³⁵ The cases clearly illustrate the difficulty that courts have encountered in the application of *Crawford* in this context.

That application, however, may become somewhat less difficult in light of the Supreme Court’s decision in *Davis v. Washington*.¹³⁶ In *Davis*, the Court distinguished between interrogations that occur during an ongoing emergency and interrogations that occur when the emergency has ceased.¹³⁷ Thus, even if the interview in *Cage* was informal and unrecorded, the fact that the police were asking questions some time after the incident in an effort to establish past events would seem to make the victim’s statement to the police testimonial under *Davis*. The

¹³⁰*Id.* at 849.

¹³¹*Id.* at 851.

¹³²*Id.* Applying the standard of an “objectively reasonable declarant standing in the shoes of the actual declarant[.]” the Texas Court of Criminal Appeals held that a reasonable person would have realized that the officers were investigating a criminal occurrence and were gathering evidence for a prosecution. *Wall v. State*, 184 S.W.3d 730, 742-45 (Tex. Crim. App. 2006). The Court of Criminal Appeals, therefore, agreed with the Court of Appeals that admission of the statement violated the defendant’s rights under the Confrontation Clause. *Id.* at 745. The Court of Criminal Appeals also agreed with the Court of Appeals that the erroneous admission of the statement was harmless beyond a reasonable doubt because it did not contribute to the defendant’s conviction. *Id.* at 745-46. The Court of Criminal Appeals remanded the case back to the Court of Appeals for consideration of whether the confrontation violation was harmful during the punishment stage of the proceeding. *Id.* at 746-47.

The holding of the Texas Court of Appeals in *Wall* is also in stark contrast to its holding in *Cassidy*. See *Cassidy v. State*, 149 S.W.3d 712, 714-16 (Tex. App. 2004) (holding that victim’s statement to police officer at hospital was admissible as an excited utterance and that victim’s interview by police officer was not an interrogation as defined in *Crawford*), *cert. denied*, 544 U.S. 925 (2005); see also *Tyler v. State*, 167 S.W.3d 550, 553-54 (Tex. App. 2005) (pointing out apparent conflict between *Wall* and *Cassidy*).

¹³³*People v. Cage*, 15 Cal. Rptr. 3d 846, 856 (Cal. Ct. App. 2004), *petition for review granted*, 99 P.3d 2 (Cal. 2004).

¹³⁴*Id.* at 856-57.

¹³⁵*Wall*, 143 S.W.3d at 848, 851.

¹³⁶*Davis v. Washington*, 126 S. Ct. 2266 (2006).

¹³⁷*Id.* at 2273-74.

Supreme Court of California will reconsider the result in *Cage* in light of the United States Supreme Court's decision in *Davis*.¹³⁸

A statement would seem to qualify as testimonial under *Davis* if it is made in response to any police questioning that occurs after the threatening incident is no longer in progress,¹³⁹ even if the questioning takes place at the scene of the incident itself and elicits a statement that qualifies as an excited utterance under state evidentiary law. The Supreme Court deemphasized the requirement that the questioning be formal and structured in its decision in *Davis*,¹⁴⁰ which was a point of emphasis for several courts in the immediate aftermath of *Crawford*.

For example, in *United States v. Webb*,¹⁴¹ the police officer conducted the questioning right at the scene. In *Webb*, the court held that statements made in response to investigatory questioning at the scene of a criminal event soon after the occurrence of the criminal event were not made in response to police interrogation as contemplated by *Crawford*.¹⁴² In *Webb*, a police officer arrived on the scene of an assault and asked the victim, "What happened?"¹⁴³ The victim responded, "[the defendant] punched me with a closed fist two times in the face."¹⁴⁴ When the police officer asked her why, the victim responded that she had refused to give the defendant money for drugs and that the two had gotten into an argument as a result.¹⁴⁵

The court in *Webb* reasoned that the police officer's main concern in asking the questions was to investigate the situation and to ascertain what had happened.¹⁴⁶ In addition, "[t]he situation did not resemble a formal police investigation at a police station."¹⁴⁷ Therefore, the victim's statements were admitted as excited utterances.¹⁴⁸

¹³⁸People v. Cage, No. S127344, 2006 Cal. LEXIS 8013 (Cal. June 28, 2006) (ordering the parties to submit supplemental briefs addressing the effect of *Davis* on the issues presented in the case).

¹³⁹See *Davis*, 126 S. Ct. at 2278-79.

¹⁴⁰The Court in *Davis* did not entirely reject the notion that the degree of formality of the statement is an important consideration in the determination of whether the statement is testimonial. *Id.* at 2278 n.5. The Court did, however, characterize the distinction between "formal" and "informal" statements as "vague." *Id.*

¹⁴¹United States v. Webb, No. DV-339-04, 2004 WL 2726100 (D.C. Super. Ct. Nov. 9, 2004).

¹⁴²*Id.* at *3.

¹⁴³*Id.* at *1.

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶*Id.* at *3.

¹⁴⁷*Id.* at *4.

¹⁴⁸*Id.* at *4-5; see also *Anderson v. State*, 111 P.3d 350, 351, 353-54 (Alaska Ct. App. 2005) (holding that injured man's response to police officer's question, "What happened?", was not testimonial under *Crawford* because it was not given in response to interrogation), *cert. granted*, 126 S. Ct. 2983 (2006) (vacating judgment and remanding case to the Court of Appeals of Alaska for further consideration in light of *Davis*).

In two cases decided by the Indiana Court of Appeals, statements by a domestic violence victim to a police officer were held to be nontestimonial because of the informal nature of the questioning. In *Fowler v. State*,¹⁴⁹ the court held that a domestic assault victim's statement to a police officer, who asked the victim what had happened ten minutes after arriving at the residence in response to a 911 call, was not a testimonial statement and was therefore admissible under *Crawford*.¹⁵⁰ The victim responded that her husband, the defendant, "had punched her several times in the face."¹⁵¹ Despite the lapse of time between the police officer's arrival and the victim's statement, the court in *Fowler* concluded that the victim's statement was an excited utterance.¹⁵²

On the issue of admissibility of the statement under *Crawford*, the court in *Fowler* held "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.'"¹⁵³ The court emphasized that the investigation was still in a preliminary stage and that the police were asking questions at the scene of the incident shortly after it occurred.¹⁵⁴

In a concurring opinion in *Fowler*, Judge Crone took the position that *Crawford* did not apply to the facts of the case.¹⁵⁵ Judge Crone stated that although the domestic assault victim in the case had been uncooperative, she testified at trial and was therefore subject to cross-examination regarding the statements that she made to the police at the scene.¹⁵⁶ Judge Crone concluded his concurring opinion with the following statement: "The fallout from Justice Scalia's 'clarification' of the Confrontation Clause in *Crawford* will reverberate through the evidentiary landscape for some time to come and will create countless dilemmas for trial and appellate courts" ¹⁵⁷

¹⁴⁹*Fowler v. State*, 809 N.E.2d 960 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 459 (Ind. 2005), *cert. denied*, 126 S. Ct. 2862 (2006).

¹⁵⁰*Id.* at 961, 964.

¹⁵¹*Id.* at 961.

¹⁵²*Id.* at 962.

¹⁵³*Id.* at 964.

¹⁵⁴*Id.* On appeal, the Indiana Supreme Court "assume[d] without deciding that [the victim's] account [of the assault to the police] was testimonial." *Fowler v. State*, 829 N.E.2d 459, 464 (Ind. 2005), *cert. denied*, 126 S. Ct. 2862 (2006). Nevertheless, the court concluded that the statement was properly admitted and affirmed the defendant's conviction on the ground that the victim had appeared at trial and was subject to cross-examination. *Id.* at 464-66. Under the standard announced in *Davis*, the Indiana Supreme Court was correct that the victim's account was testimonial because the "primary purpose" of the police questioning was to establish the prior criminal incident, which was no longer ongoing at that point. *See Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

¹⁵⁵*Fowler*, 809 N.E.2d at 965 (Crone, J., concurring).

¹⁵⁶*Id.* at 966. The Indiana Supreme Court agreed with Justice Crone's position that the victim's appearance at trial satisfied the Confrontation Clause. *See Fowler*, 829 N.E.2d at 464-65.

¹⁵⁷*Fowler*, 809 N.E.2d at 966 (Crone, J., concurring).

Similarly, in *Hammon v. State*,¹⁵⁸ which the Supreme Court reversed as the companion case to *Davis v. Washington*,¹⁵⁹ the court held that statements made by a domestic violence victim to an investigating officer were not testimonial under *Crawford*.¹⁶⁰ The victim's statements were admissible as excited utterances because the victim made the statements to the police after a startling event that had recently taken place.¹⁶¹ Even though the victim gave her statement in direct response to police questioning, it was not an interrogation as defined in *Crawford*.¹⁶² Using some of the language from *Fowler*, the court in *Hammon* reasoned as follows:

We thus hold 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." Whatever else police "interrogation" might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred. Such interaction with witnesses on the scene does not fit within a lay conception of police "interrogation," bolstered by television, as encompassing an "interview" in a room at the stationhouse. It also does not bear the hallmarks of an improper "inquisitorial practice."¹⁶³

The courts in *Webb*, *Fowler* and *Hammon* separated the police activity into two distinct stages: the initial determination of what actually occurred, and if the occurrence constituted a crime, the investigation of the crime itself. These courts reasoned that any answers to police questioning during the former stage were nontestimonial statements because the Court in *Crawford* emphasized the importance of "formal statement[s] to government officers"¹⁶⁴ and described the "striking resemblance [between police interrogations and] examinations by justices of the

¹⁵⁸*Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* *Davis v. Washington*, 126 S. Ct. 2266 (2006).

¹⁵⁹*Davis*, 126 S. Ct. at 2278-80.

¹⁶⁰*Hammon*, 809 N.E.2d at 952.

¹⁶¹*Id.* at 948-49.

¹⁶²*Id.* at 952.

¹⁶³*Id.*; *see also* *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (holding that preliminary questions asked at the crime scene shortly after the crime occurred constituted an "unstructured interaction" between the officer and the witness and not an interrogation); *State v. Hembertt*, 696 N.W.2d 473, 483 (Neb. 2005) (holding that police who ask preliminary questions to ascertain the level of danger when responding to emergency calls are not gathering information to make a case against a suspect), *cert. denied*, 126 S. Ct. 2977 (2006). The Indiana Supreme Court in *Hammon* agreed with the Court of Appeals that responses to initial inquiries at a crime scene typically would not qualify as testimonial statements. *Hammon v. State*, 829 N.E.2d 444, 453 (Ind. 2005), *rev'd sub nom.* *Davis v. Washington*, 126 S. Ct. 2266 (2006). The Indiana Supreme Court declined to adopt the view, however, that excited utterances are per se nontestimonial. *Id.*

¹⁶⁴*Crawford v. Washington*, 541 U.S. 36, 51 (2004).

peace in England[,]” in the 16th and 17th centuries.¹⁶⁵ If the police ask questions during the former stage, any answers to those questions constitute statements that are not testimonial. When the police possess little or no information about a particular occurrence, it follows that they will not be able to ask questions that are formal and structured as contemplated by *Crawford*.¹⁶⁶ Responses to the more detailed questions asked during the investigatory stage, however, produce testimonial statements that are subject to the rule of *Crawford*.

Under *Davis v. Washington*, police questioning at either stage will produce testimonial statements so long as the criminal incident is not ongoing and the “primary purpose” of the questioning is to establish the prior incident in a way that could be used in a subsequent criminal prosecution.¹⁶⁷ The degree of formality is still a consideration in the determination of whether a statement is testimonial,¹⁶⁸ but the Court in *Davis* seemed to break from the rationale of *Crawford* when it stated that “[i]t imports sufficient formality, in our view, that lies to [police] officers are criminal offenses.”¹⁶⁹

An illustration of this two stage procedure that appears to be consistent with the distinction made in *Davis* (between statements to meet an emergency—which are nontestimonial—and statements to establish a past event—which are testimonial) is evidenced in *Stancil v. United States*.¹⁷⁰ In *Stancil*, the evidence against the defendant consisted solely of the testimony of a police officer who appeared at the home of the defendant and his wife in response to a 911 call. The police officer testified to certain statements that the defendant’s wife had made to him shortly after the police arrived on the scene.¹⁷¹ The trial judge allowed the statements to be admitted as excited utterances.¹⁷² On appeal, the defendant argued that the statements were testimonial under *Crawford* and should have been excluded because he had not cross-examined them.¹⁷³

¹⁶⁵*Id.* at 52.

¹⁶⁶*See also* *People v. Bryant*, No. 247039, 2004 WL 1882661 (Mich. Ct. App. Aug. 24, 2004) (finding that victim’s excited utterance was not testimonial because victim was seriously injured when police found him and that the question of “What happened?” did not constitute an interrogation when victim responded that a person named Rick had shot him), *remanded*, 722 N.W.2d 797 (Mich. 2006) (remanding to court of appeals for reconsideration in light of *Davis* in lieu of granting leave to appeal).

¹⁶⁷*Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

¹⁶⁸*Id.* at 2278 n.5.

¹⁶⁹*Id.* As Justice Thomas pointed out in his dissent, the possibility of criminal proceedings being brought against a person who makes a false oral statement to a police officer “may render honesty in casual conversations with police officers important. It does not, however, render those conversations solemn or formal in the ordinary meanings of those terms.” *Id.* at 2283 n.3 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹⁷⁰*Stancil v. United States*, 866 A.2d 799 (D.C. 2005), *reh’g en banc granted*, 878 A.2d 1186 (D.C. 2005).

¹⁷¹*Id.* at 801.

¹⁷²*Id.* at 801-02.

¹⁷³*Id.* at 802.

The court in *Stancil* remanded the case for additional findings on whether the defendant's rights under the Confrontation Clause were violated.¹⁷⁴ The court reasoned that the activities of the police at the apartment during the investigation of the 911 call were divided into two distinct stages.¹⁷⁵ Statements by the defendant's wife to the police during the first stage, before the police had restored order and began asking questions, were not testimonial and could be admitted as evidence under the excited utterance exception.¹⁷⁶ Statements made by the defendant's wife to the police after the police had secured the scene, statements that were in response to questions that the police asked her, took on a "testimonial character" and would ordinarily be inadmissible under the Confrontation Clause.¹⁷⁷ The court in *Stancil* stated that the types of statements cited by the Court in *Crawford* as testimonial "all involve a declarant's knowing responses to structured questioning in an investigative environment."¹⁷⁸ The "investigative environment, however, could be a home or a hotel room under the right circumstances."¹⁷⁹

In *People v. Watson*,¹⁸⁰ the court had to determine whether a series of statements were testimonial under *Crawford* when made by an employee of a Burger King Restaurant immediately following a robbery of the restaurant.¹⁸¹ Immediately after the police captured the suspects, the employee, who was bleeding profusely from an injury suffered during the robbery, stated to the police that the defendant "just robbed me. He just robbed us in Burger King."¹⁸² The police officer then asked the employee whether any other perpetrators were involved in the robbery, and the employee responded that the defendant had acted alone.¹⁸³ Finally, when the police officer asked the employee to describe what happened, the employee described the defendant's actions in entering the Burger King Restaurant, revealing a gun and demanding money from the safe.¹⁸⁴

The employee made his second statement in response to a police question about whether any other perpetrators were involved in the robbery, but it was not a structured question that was asked in anticipation of trial.¹⁸⁵ Rather, the police wanted to secure the area where the robbery had occurred and determine whether they should search for other robbers in the vicinity.¹⁸⁶ Therefore, this statement was

¹⁷⁴*Id.* at 815.

¹⁷⁵*Id.* at 814.

¹⁷⁶*Id.* at 815.

¹⁷⁷*Id.* at 813, 815.

¹⁷⁸*Id.* at 812.

¹⁷⁹*Id.* at 812 n.25.

¹⁸⁰*People v. Watson*, No. 7715/90, 2004 WL 2567124 (N.Y. Sup. Ct. Nov. 8, 2004).

¹⁸¹*Id.* at *1-2, *13-15.

¹⁸²*Id.* at *2.

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵*Id.* at *14.

¹⁸⁶*Id.*

not testimonial and could be introduced at the defendant's trial without violating *Crawford*.¹⁸⁷

The employee's final statement, however, was made in response to structured questioning by the police.¹⁸⁸ When the police asked the employee what had happened, they had already placed the defendant in custody and were trying to obtain information to further their investigation and eventual prosecution of the defendant.¹⁸⁹ Given the circumstances that existed at the time of the questioning, the employee should have been aware that the information would be used at future judicial proceedings.¹⁹⁰ Therefore, the court in *Watson* concluded that the employee's third statement was testimonial in nature and could not be introduced against the defendant at trial because it was not subject to cross-examination.¹⁹¹ The court rejected the argument that no interrogation had taken place because the police had asked only two questions:

Interrogation, even as that term is used in the colloquial sense, is not determined by the number of questions asked. When a police officer or any other law enforcement agent questions a potential witness for the purpose of gathering information to aid in a suspect's prosecution, and the witness is aware of the purpose of the officer's questions, structured questioning amounting to an interrogation has occurred. That the officer obtained all of the pertinent information from a single question is of no moment.¹⁹²

The court in *Watson* permitted the police to determine what actually occurred without excluding the statements made by the employee in the course of that process. Once the police determined what had happened at the restaurant, however, the court characterized as "interrogation" any questions that followed. Law enforcement agents, therefore, are capable of producing both testimonial and nontestimonial statements within a short period of time from the same witness. Moreover, it is not always possible to draw a precise line of demarcation between the police officers' act of responding to an emergency and the act of gathering evidence for the subsequent prosecution.¹⁹³

¹⁸⁷*Id.*

¹⁸⁸*Id.* at *15.

¹⁸⁹*Id.*

¹⁹⁰*Id.* at *15.

¹⁹¹*Id.*

¹⁹²*Id.* This analysis illustrates how the above-stated factors work together in adjudicating the issue of whether a particular statement is testimonial. The *Watson* court's conclusion that the police were engaging in structured questioning, an interrogation, followed directly from its conclusion that the police were gathering evidence for a future prosecution. See *infra* notes 292-340 and accompanying text for a discussion of statements to be used as evidence in a future prosecution.

¹⁹³*Davis v. Washington*, 126 S. Ct. 2266, 2283 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part).

In *People v. Victors*,¹⁹⁴ the defendant was charged with domestic battery. A couple in an adjoining room, the Doerrs, heard “slapping-type” and “thumping” noises coming from the room in which the defendant and the victim were staying.¹⁹⁵ The Doerrs also heard the defendant speak in a loud, angry voice and call the victim an offensive name.¹⁹⁶ When the Doerrs heard the victim tell the defendant to stop, Mr. Doerr called the police and spoke to them upon their arrival.¹⁹⁷

One of the officers on the scene spoke to the victim.¹⁹⁸ The victim informed the officer that she and the defendant had an argument, and the argument escalated into the defendant pushing her, pulling her hair, punching her and choking her.¹⁹⁹ At trial, the State sought to have the officer testify about what the victim had told him because the victim did not testify.²⁰⁰ The trial court admitted the victim’s statements as excited utterances.²⁰¹

The court in *Victors* rejected the claim that the victim’s statements to the police officers constituted excited utterances and held that the admission of the police officer’s testimony regarding the victim’s statements to him violated the rule announced in *Crawford*.²⁰² The court reasoned that the victim made the statements to the police in response to their questions while they were investigating a possible crime.²⁰³ Because the police officer’s testimony was offered to establish an element of the crime with which the defendant had been charged, it constituted testimonial evidence under *Crawford*.²⁰⁴ The *Victors* case is another example of the distinction between the initial determination by the police of what actually occurred and police investigation of the crime itself. By distinguishing between the initial police response to the incident and the subsequent police investigation of the incident, the court in *Victors* correctly anticipated the Supreme Court’s ruling in *Davis*.

In a concurring opinion, Justice O’Malley disagreed with the majority’s conclusion that the victim’s statements were not excited utterances.²⁰⁵ On whether

¹⁹⁴*People v. Victors*, 819 N.E.2d 311 (Ill. App. Ct. 2004), *appeal denied*, 830 N.E.2d 8 (Ill. 2005).

¹⁹⁵*Id.* at 314.

¹⁹⁶*Id.*

¹⁹⁷*Id.*

¹⁹⁸*Id.*

¹⁹⁹*Id.* at 314.

²⁰⁰*Id.*

²⁰¹*Id.* at 315.

²⁰²*Id.* at 320. In ruling that the statements were not excited utterances, the court in *Victors* did not specify the evidentiary rule that would provide for the admission of the statements. *See infra* note 205.

²⁰³*Victors*, 819 N.E.2d at 320.

²⁰⁴*Id.* at 320-21.

²⁰⁵*Id.* at 321 (O’Malley, J., concurring). Justice O’Malley also took issue with the majority’s decision to reach the federal Confrontation Clause issue under *Crawford* when it had already decided that the statement was excluded on evidentiary grounds under Illinois state law. *Id.* at 323.

the victim's statements were testimonial under *Crawford*, Justice O'Malley stated the following:

With the ink hardly dry on *Crawford*'s Copernican shift in federal constitutional law, a panel of the Illinois Appellate Court plummets undaunted, but for no good reason, into the murky waters left in *Crawford*'s wake. In its zeal, the majority stretches the definition of "testimonial" to unprecedented girth in Illinois.²⁰⁶

Because the victim gave her statement to the police in an informal setting without any structured questioning and only minutes after the incident had occurred, reasoned Justice O'Malley, the victim's statement was not testimonial under *Crawford*.²⁰⁷ It is another example of the uncertainty involved in trying to identify the precise point in time when the police have ceased to respond to the incident and have begun to gather evidence.

In *Samarron v. State*,²⁰⁸ the declarant was standing among a group of men who were approached by a second group of men. A man in the second group stabbed Mr. Villatoro, who was in the declarant's group, and another man from the second group hit Mr. Villatoro over the head with a hammer.²⁰⁹ Mr. Villatoro died from his injuries, and the declarant gave a statement to the police one hour after the incident.²¹⁰ Based on the declarant's statement, the police were able to identify the defendant as the man who had stabbed Mr. Villatoro.²¹¹ The declarant did not testify at trial, and his statement was admitted as an excited utterance.²¹²

The court in *Samarron* held that the admission of the declarant's statement violated the Confrontation Clause of the Sixth Amendment because the statement was testimonial.²¹³ The declarant had not spontaneously provided his statement to

²⁰⁶*Id.* at 323.

²⁰⁷*Id.* at 324. In Justice O'Malley's view, the police were still trying to determine exactly what had happened when they spoke to the victim. *Id.* When asked how he conducted the questioning of the victim, the police officer testified, "I asked her basically . . . what was happening." *Id.*; see also *State v. Alvarez*, 107 P.3d 350, 355 (Ariz. Ct. App. 2005) (holding that victim's excited utterance to police, which was obtained in response to questioning, was not testimonial because police did not know that a crime had been committed when they spoke to victim and were still trying to ascertain what had happened), *petition for review granted in part*, No. CR-05-0104-PR, 2005 Ariz. LEXIS 127 (Ariz. 2005), and *remanded by* No. CR-05-0104-PR, 2006 Ariz. LEXIS 96 (Ariz. 2006), *vacated in part and aff'd*, 143 P.3d 668 (Ariz. Ct. App. 2006). On remand from the Arizona Supreme Court for reconsideration in light of *Davis*, the Arizona Court of Appeals affirmed, holding that the victim gave his statement to the police during an ongoing emergency in order to obtain medical assistance for his serious injuries, and that the officer's purpose in asking the victim "what happened?" was to assist the victim and to meet the emergency. *Alvarez*, 143 P.3d at 674.

²⁰⁸*Samarron v. State*, 150 S.W.3d 701 (Tex. Ct. App. 2004).

²⁰⁹*Id.* at 702.

²¹⁰*Id.* at 703.

²¹¹*Id.*

²¹²*Id.*

²¹³*Id.* at 706.

the police.²¹⁴ It was a formal, signed, written statement given in response to questions from the police.²¹⁵ The admission of the statement violated the defendant's right to confront the witnesses against him because he had no opportunity to cross examine it.²¹⁶ Because the statement was in writing, it was the "functional equivalent" of "ex parte in-court testimony" discussed in *Crawford*.²¹⁷

Under *Crawford*, informal questioning and gathering of information from witnesses and victims at the scene of a crime produced nontestimonial statements that could be used against a defendant at a subsequent prosecution without violating the defendant's Confrontation Clause rights. Under *Davis*, the emphasis is more on the timing of the questioning than on the formality of it. Therefore, police questioning of witnesses and victims at the scene of an incident that takes place after the police have neutralized any danger at the scene will produce testimonial statements.²¹⁸ Informal, unstructured questioning designed to ascertain what happened or to address an ongoing incident does not constitute an interrogation as defined in *Crawford*,²¹⁹ and this analysis is still valid after *Davis*. When the questioning becomes more structured and organized, with the information gathered from it to be used in a future prosecution, such use violates the defendant's Confrontation Clause rights unless he or she has the opportunity to cross-examine the statements. The questioning is likely to become more structured and organized when the police determine that a crime has been committed and are seeking to learn the identity of the perpetrator or the manner of its commission.

Although some cases place significance on the location of the questioning, with a hospital deemed to be a less formal atmosphere than a police station,²²⁰ the court in *Stancil v. United States*²²¹ stated that a home or hotel room could constitute an "investigative environment" under the right circumstances. In addition, the court in *People v. Watson*²²² concluded that even two questions can constitute structured questioning if law enforcement personnel have placed the suspect in custody prior to

²¹⁴*Id.* at 707.

²¹⁵*Id.*

²¹⁶*Id.*

²¹⁷*Crawford v. Washington*, 541 U.S. 36, 51 (2004).

²¹⁸*Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

²¹⁹*See Commonwealth v. Gonsalves*, 833 N.E.2d 549, 562-63 (Mass. 2005) (Sosman, J., concurring in part) ("'[P]olice interrogation' does not encompass the basic, immediate, on-scene questioning of persons present in an attempt to get the gist of what is happening or has just happened, i.e., to ascertain why police were called to the scene and what steps need to be taken in response."), *cert. denied*, 126 S. Ct. 2982 (2006).

²²⁰*See Cassidy v. State*, 149 S.W.3d 712, 716 (Tex. Ct. App. 2004), *cert. denied*, 544 U.S. 925 (2005); *People v. Cage*, 15 Cal. Rptr. 3d 846, 848 (Cal. Ct. App. 2004), *petition for review granted*, 99 P.3d 2 (Cal. 2004).

²²¹*Stancil v. United States*, 866 A.2d 799, 812 n.25 (D.C. 2005), *reh'g en banc granted*, 878 A.2d 1186 (D.C. 2005).

²²²*People v. Watson*, No. 7715/90, 2004 WL 2567124, at *15 (N.Y. Sup. Ct. Nov. 8, 2004).

asking the questions. When the witness's statement is written²²³ or recorded,²²⁴ it is likely that such a statement will meet the standard for testimonial material under *Crawford* because the statement is very similar to in-court testimony.

C. Purpose of the Statement

In the analysis of whether the rule announced in *Crawford* applies to a particular statement, courts have also examined the declarant's purpose for making the statement. In some cases, the declarant's primary motivation is to obtain protection from danger or to be rescued from a dangerous situation.²²⁵ In such cases, courts have usually held the statement to be nontestimonial.²²⁶ If, on the other hand, the declarant makes the statement to provide information for a possible future legal proceeding, the courts have held such statements to be testimonial.²²⁷ It can be a difficult task for courts to distinguish between these different kinds of statements.²²⁸ As is the case with all of the factors, the outcome of these cases is often determined by which factor is most prevalent in a given situation.

Emergency 911 calls have been placed in both categories. A nontestimonial plea for help and protection²²⁹ may become a testimonial report of a crime that can be used at a future judicial proceeding if the caller makes a specific accusation.²³⁰ The caller may make such an accusation voluntarily or in response to questions from the 911 operator.²³¹

The Supreme Court subsequently confirmed the validity of the distinction between statements that are made to obtain protection and statements that are made to provide incriminating evidence for Confrontation Clause analysis.²³² The Court in

²²³See *Samarron v. State*, 150 S.W.3d 701, 706-07 (Tex. Ct. App. 2004).

²²⁴A recorded statement may not qualify as an excited utterance in most circumstances because it is likely that such a statement would be obtained at a point when the declarant is no longer under the stress of the exciting event. If the statement was admissible as an excited utterance, however, the degree of formality and structure involved in procuring the statement would qualify it as testimonial under *Crawford*.

²²⁵The declarants in these cases are usually the victims of the crimes.

²²⁶See *United States v. Brito*, 427 F.3d 53, 62 (1st Cir. 2005) ("Ordinarily, statements made to police while the declarant or others are still in personal danger cannot be said to have been made with consideration of their legal ramifications . . . [T]herefore, . . . such statements will not normally be deemed testimonial."), *cert. denied*, 126 S. Ct. 2983 (2006).

²²⁷*Crawford v. Washington*, 541 U.S. 36, 51 (2004) (explaining that "'pretrial statements that declarants would reasonably expect to be used prosecutorially'" are part of the core class of testimonial statements (quoting Brief of Petitioner, *supra* note 14, at 23)).

²²⁸*White v. Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring in part and concurring in the judgment) ("Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties.").

²²⁹See *infra* notes 237-65 and accompanying text.

²³⁰See *infra* notes 307-15 and accompanying text.

²³¹See *infra* notes 329-38 and accompanying text.

²³²See *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

Davis stated that if the purpose of the police interrogation is to respond to an emergency, statements made in the course of the interrogation are nontestimonial.²³³ Conversely, if the purpose of the police interrogation is to establish the occurrence of an event in anticipation of a future prosecution, statements made in the course of the interrogation are testimonial.²³⁴ The Court in *Davis* described the distinction in terms of the interrogation and not the statements themselves because interrogation had produced the statements in the cases before them.²³⁵ The Court made clear that “even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”²³⁶

Thus, courts that made the distinction between these two kinds of statements in the immediate aftermath of *Crawford* correctly anticipated the Court’s clarification of *Crawford* in *Davis*. An examination of these cases illustrates that even with the *Davis* decision as a guide, the distinction is not always a clear one.

1. Statements to Obtain Aid or to Reduce the Level of Danger

In *People v. Moscat*,²³⁷ the prosecution sought to introduce as evidence at trial a recording of a 911 call.²³⁸ The court allowed the recording to be admitted as evidence because it was not “testimonial” as that term is explained in *Crawford*.²³⁹

The *Moscat* court pointed out that 911 calls are among the most common form of evidence in domestic violence cases.²⁴⁰ The court explained that, prior to *Crawford*, it was fairly clear that the admission of 911 calls as excited utterances was not a violation of the Sixth Amendment’s Confrontation Clause.²⁴¹ The *Moscat* court then concluded that “[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.”²⁴² The victim usually generates these calls out of desire to be rescued and protected from danger.²⁴³ In addition, the 911 call is not the equivalent of a formal pretrial examination but rather the “electronically augmented equivalent of a

²³³*Id.* at 2273.

²³⁴*Id.* at 2273-74.

²³⁵*Id.* at 2274 n.1.

²³⁶*Id.*

²³⁷*People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

²³⁸*Id.* at 875.

²³⁹*Id.* at 876.

²⁴⁰*Id.* at 878.

²⁴¹*Id.*

²⁴²*Id.* at 879.

²⁴³*Id.*

loud cry for help.”²⁴⁴ Lastly, the 911 call is part of the criminal incident itself and not part of the prosecution that follows.²⁴⁵

In *People v. Conyers*,²⁴⁶ the prosecution sought to introduce two 911 calls made within minutes of each other by a third party who had witnessed the defendant’s alleged assault of the victim.²⁴⁷ In the first call, the witness screamed for police assistance to stop a fight between her son and son-in-law.²⁴⁸ In the second call, the witness screamed for an ambulance.²⁴⁹ The prosecution sought to introduce both calls as excited utterances.²⁵⁰

The *Conyers* court concluded that neither call was testimonial.²⁵¹ The court reasoned that the witness made the calls as she was reacting to the serious situation that was happening right in front of her.²⁵² Her intention in making the call was to stop the assault that was in progress and not to consider the legal consequences of being a witness in a subsequent criminal prosecution.²⁵³ Because the statements were not testimonial, their introduction at the defendant’s trial did not violate his Sixth Amendment confrontation rights under *Crawford*.²⁵⁴

²⁴⁴*Id.* at 880.

²⁴⁵*Id.*; see also *Commonwealth v. Galicia*, 857 N.E.2d 463 (Mass. 2006) (applying *Davis* and holding that domestic assault victim’s statements to 911 dispatcher were admissible because the purpose of the statements was to enable the police to respond to an ongoing emergency). But see Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1193-1200 (2002) (arguing that participants in the violence that results in 911 calls are aware that statements made in such calls are likely to result in arrest and prosecution and to be used as evidence against the defendant at trial). See generally 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 (2005) (discussing discrepancies between the actual circumstances of the 911 call in *Moscat* and the facts recited in the decision); Lininger, *supra* note 61, at 774, n.136 (pointing out that the *Moscat* court incorrectly recited several of the facts in the case and that the prosecution eventually declined to pursue the case because of problems with the evidence).

²⁴⁶*People v. Conyers*, 777 N.Y.S.2d 274 (N.Y. Sup. Ct. 2004), *aff’d*, 824 N.Y.S.2d 301 (N.Y. App. Div. 2006).

²⁴⁷*Id.* at 275.

²⁴⁸*Id.*

²⁴⁹*Id.*

²⁵⁰*Id.*

²⁵¹*Id.* at 277.

²⁵²*Id.* at 276-77.

²⁵³*Id.* at 277.

²⁵⁴*Id.* On appeal, the Appellate Division of the New York Supreme Court agreed that the 911 calls were not testimonial in light of *Davis* because “the objective circumstances indicate[d] that the primary purpose of the police questioning during the call was to enable assistance during an ongoing emergency, rather than to establish some past fact.” *People v. Conyers*, 824 N.Y.S.2d 301, 302 (N.Y. App. Div. 2006) (citing *Davis v. Washington*, 126 S. Ct. 2266, 2276-77 (2006)); see also *People v. Coleman*, 791 N.Y.S.2d 112, 113-14 (N.Y. App. Div. 2005) (determining that a brief description of an attack in progress in a 911 call was not

Similarly, the issue before the United States Court of Appeals for the First Circuit in *United States v. Brito*²⁵⁵ was whether and under what circumstances an excited utterance in a 911 call should be considered testimonial.²⁵⁶ In *Brito*, an anonymous 911 caller engaged in a dialogue with the 911 operator, stating that she had heard a gunshot, describing the suspect's appearance and location and telling the operator that the suspect had a handgun.²⁵⁷ During the trial, the prosecution sought to introduce the tape of the 911 call as evidence.²⁵⁸ Except for the caller's description of the pistol, the court admitted the 911 tape as an excited utterance.²⁵⁹

On appeal, the defendant asserted that admission of the redacted version of the 911 tape violated his Sixth Amendment right to confront the speaker.²⁶⁰ The defendant's first argument was that an objectively reasonable caller would have understood that the statements given during the call would be available for use at a subsequent prosecution.²⁶¹ Second, the defendant contended that the statements given after the questions posed by the 911 operator were the product of police interrogation.²⁶²

After reviewing the three formulations of testimonial statements in *Crawford* and the court decisions interpreting those formulations, the *Brito* court held that the 911 caller's primary motivation was to neutralize the imminent danger that she faced from the suspect and to obtain a prompt response from law enforcement.²⁶³ For that reason, the caller lacked the "capacity to appreciate the potential long-range use of her words," making the call nontestimonial and admissible as an excited utterance.²⁶⁴ The questions from the 911 operator served to clarify and focus the caller's statement and were not interrogation.²⁶⁵

Victims also make statements with the primary purpose of escaping danger and directing law enforcement agents to the scene of the incident. In *State v. Maclin*,²⁶⁶ two police officers arrived at the victim's home as a result of a 911 hangup call.²⁶⁷

testimonial because the caller's purpose was to obtain police intervention), *leave to appeal denied*, 836 N.E.2d 1157 (N.Y. 2005).

²⁵⁵*United States v. Brito*, 427 F.3d 53 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 2983 (2006).

²⁵⁶*Id.* at 55-56.

²⁵⁷*Id.* at 56.

²⁵⁸*Id.* at 57.

²⁵⁹*Id.* at 57-58.

²⁶⁰*Id.* at 58.

²⁶¹*Id.* at 59.

²⁶²*Id.*

²⁶³*Id.* at 59-62.

²⁶⁴*Id.* at 63.

²⁶⁵*Id.*

²⁶⁶*State v. Maclin*, No. W2003-03123-CCA-R3-DC, 2005 WL 313977 (Tenn. Crim. App. Feb. 9, 2005), *rev'd*, 183 S.W.3d 335 (Tenn. 2006).

²⁶⁷*Id.* at *2.

Upon entering the house, the officers saw the defendant and the victim, who had swelling and bruises on her face.²⁶⁸ The victim told one of the officers that she and the defendant had gotten into an argument on the way home from work and that the defendant had pulled out a gun, pointed it at her head and threatened to kill her if she did not shut up.²⁶⁹ The defendant also threatened to kill the victim's children.²⁷⁰ The victim explained to the officer that the defendant had hit her in the face with his hands.²⁷¹

The *Maclin* court concluded that the victim's statements to the police officer were nontestimonial under *Crawford*.²⁷² The victim, who feared for her safety, summoned the police to her home and spoke to the police when they arrived there.²⁷³ The police did not obtain the statement through interrogation.²⁷⁴ Therefore, the police officer's testimony about those statements did not violate the defendant's Confrontation Clause rights under the Sixth Amendment.²⁷⁵

On appeal, the Tennessee Supreme Court reversed and held that the victim's statements to the police were testimonial.²⁷⁶ The *Maclin* court anticipated the United States Supreme Court's rationale in *Davis v. Washington*,²⁷⁷ reasoning that the arrival of the police neutralized any immediate danger faced by the victim.²⁷⁸ In addition, because the victim gave such an extraordinarily detailed statement to the police, she should have reasonably expected that the statement would be used prosecutorially.²⁷⁹ Even though the Tennessee Supreme Court agreed with the Tennessee Court of

²⁶⁸*Id.*

²⁶⁹*Id.*

²⁷⁰*Id.*

²⁷¹*Id.*

²⁷²*Id.* at *16-17.

²⁷³*Id.* at *17. In this way, the victim also initiated the contact or interaction with the police. See *supra* notes 86-111 and accompanying text.

²⁷⁴*Maclin*, 2005 WL 313977, at *17.

²⁷⁵*Id.*; see also *United States v. Griggs*, No. 04 CR. 425(RWS), 2004 WL 2676474 (S.D.N.Y. Nov. 23, 2004) (permitting police officer to testify at trial that, upon arriving on the scene, he heard the statement, "Gun! Gun! He's got a gun!," and then saw the declarant gesture at the defendant because the statement was not testimonial under *Crawford*).

²⁷⁶*State v. Maclin*, 183 S.W.3d 335, 352 (Tenn. 2006).

²⁷⁷The United States Supreme Court decided *Davis* five months after the Tennessee Supreme Court's decision in *Maclin*.

²⁷⁸*Maclin*, 183 S.W.3d at 352.

²⁷⁹*Id.* The Court reached this conclusion by applying the third definition of testimonial from *Crawford v. Washington*, 541 U.S. 36, 52 (2004). It is interesting to note that the police in *Maclin* were dispatched to the residence of the victim and the defendant based on a 911 hang-up call. *Maclin*, 183 S.W.3d at 339. Assuming that the victim made the call, if she had stayed on the line and described the defendant's attack on her as it was happening, her statement would have been nontestimonial and, therefore, admissible under the standard established in *Davis* five months later. See *Davis v. Washington*, 126 S. Ct. 2266, 2273-74, 2276-77 (2006).

Criminal Appeals that the officers' general questioning at the scene did not constitute police interrogation, the Tennessee Supreme Court reached the opposite conclusion on whether the victim's statement was testimonial.²⁸⁰ The different results reached by the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court in *Maclin* clearly illustrate the difficulty that courts face in trying to characterize police conduct as either responding to an emergency or gathering evidence for a future prosecution.²⁸¹

In *Key v. State*,²⁸² a police officer who answered a disturbance call found the defendant and the victim outside on the ground in an argument.²⁸³ The victim told the officer that the defendant had restrained her since seven o'clock that morning, that she had just run from the house and that the defendant had grabbed her and pulled her to the ground.²⁸⁴

The *Key* court concluded that, by responding to the disturbance, the police officer was not producing evidence for a potential criminal prosecution (which is one of the situations discussed in *Crawford*).²⁸⁵ Rather, the officer was securing the scene and assessing the situation.²⁸⁶ The court held that the underlying rationale of the excited utterance exception supported the conclusion that the victim's statements were not testimonial.²⁸⁷

The cases reveal a willingness on the part of the courts to analyze these quickly developing situations at each stage in order to determine whether any statements implicate the *Crawford* doctrine. In *Moscat*,²⁸⁸ *Conyers*²⁸⁹ and *Brito*,²⁹⁰ the courts agreed that the admission of statements made during 911 calls did not violate the

²⁸⁰*Maclin*, 183 S.W.3d at 352.

²⁸¹See *Davis*, 126 S. Ct. at 2283 (Thomas, J., concurring in the judgment in part and dissenting in part) (stating that most police responses to reports of crimes "are *both* to respond to the emergency *and* to gather evidence") (emphasis in original).

²⁸²*Key v. State*, 173 S.W.3d 72 (Tex. Ct. App. 2005).

²⁸³*Id.* at 73.

²⁸⁴*Id.*

²⁸⁵*Id.* at 76.

²⁸⁶*Id.*; see also *Stancil v. United States*, 866 A.2d 799, 814-15 (D.C. 2005) (holding that statements made by the victim to the police when the police first arrived at the scene of a domestic disturbance were not testimonial because order had not yet been restored), *reh'g en banc granted*, 878 A.2d 1186 (D.C. 2005). But see *Commonwealth v. Young*, No. 0313 CR 5855 (Mass. Dist. Ct. Lynn May 7, 2004) (holding that victim's statement to police officer upon his arrival at the scene that her husband had hit her in the face and chest, which qualified as an excited utterance, was inadmissible at trial because of the defendant's inability to cross-examine the statement).

²⁸⁷*Key*, 173 S.W.3d at 76-77.

²⁸⁸*People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

²⁸⁹*People v. Conyers*, 777 N.Y.S.2d 274 (N.Y. Sup. Ct. 2004), *aff'd*, 824 N.Y.S.2d 301 (N.Y. App. Div. 2006).

²⁹⁰*United States v. Brito*, 427 F.3d 53 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 2983 (2006).

defendant's rights under the Confrontation Clause.²⁹¹ The courts are reluctant, if not completely unwilling, to exclude a statement made for the purpose of obtaining aid or neutralizing a dangerous situation. Courts that admit such statements now do so with assurance that they are correctly applying the rule laid out in *Crawford*, and clarified in *Davis*. When the statements are made at the scene to law enforcement authorities, the analysis necessarily turns to the level of questioning by the authorities.

2. Statement as Evidence for Possible Future Prosecution or Other Legal Proceeding²⁹²

If a declarant makes a statement to law enforcement agents in order to provide evidence against an accused for a possible future prosecution, the statement is testimonial.²⁹³ It is difficult to distinguish many of these statements from those that are made for the purpose of obtaining aid. As previously illustrated, many statements share characteristics that are common to both situations, and the distinguishing factor is often the manner of questioning by law enforcement agents. The court's characterization of the statement will often depend upon which factor is most conspicuous in the particular fact pattern.

An example of the difficulty in this area is *Davis v. State*,²⁹⁴ a case in which the defendant was charged with aggravated assault with a deadly weapon. When a neighbor heard screams coming from the house where the victim and the defendant lived together, she called 911 for police assistance.²⁹⁵ When the police arrived at the house, the victim ran across the street to the neighbor's yard.²⁹⁶ At trial, the neighbor testified that the victim told her, "[h]e tried to kill me."²⁹⁷

²⁹¹The rationale in these decisions conflicts with the thesis of Professor Friedman and Professor McCormack regarding the awareness level of 911 callers. See Friedman & McCormack, *supra* note 245; see also *People v. Cortes*, 781 N.Y.S.2d 401, 415 (2004) (stating that purpose of a 911 call is to supply information for potential use at a subsequent prosecution); *State v. Powers*, 99 P.3d 1262, 1265-66 (Wash. Ct. App. 2004) (stating that purpose of victim's 911 call was to report defendant's violation of a protective order, which provided evidence for his prosecution). *Cortes* is discussed *infra* at notes 329-38 and accompanying text, and *Powers* is discussed *infra* at notes 307-15 and accompanying text.

²⁹²This factor is derived primarily from the third definition of "testimonial" in *Crawford*: "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." *Crawford v. Washington*, 541 U.S. 36, 52 (2004) (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, *supra* note 16, at 3).

²⁹³*United States v. Arnold*, 410 F.3d 895, 902-03 (6th Cir. 2005) (finding that excited utterances were testimonial statements where victim could reasonably expect that her statements would be used to prosecute the defendant), *vacated on other grounds*, 434 F.3d 396 (6th Cir. 2005), *reh'g en banc granted*, No. 04-5384, 2006 U.S. App. LEXIS 4995 (6th Cir. Feb. 27, 2006).

²⁹⁴*Davis v. State*, 169 S.W.3d 660 (Tex. Ct. App. 2005), *aff'd*, 203 S.W.3d 845 (Tex. Crim. App. 2006).

²⁹⁵*Id.* at 663.

²⁹⁶*Id.*

²⁹⁷*Id.*

One of the officers who responded to the 911 call testified that he followed the victim to the front porch of the neighbor's house.²⁹⁸ The victim was crying, trembling and frightened, and she bore signs of injury on her body.²⁹⁹ The police officer testified as to what the victim had told him on the neighbor's porch, which included the details of the defendant's assault on her.³⁰⁰

The defendant argued that the admission of the police officer's testimony about what the victim had told him violated the defendant's rights under the Confrontation Clause of the Sixth Amendment.³⁰¹ In its analysis of whether the victim's statement to the police officer was testimonial under *Crawford*, the *Davis* court stated that "[a] statement is more likely to be testimonial if the person who heard, recorded, and produced the out-of-court statement at trial is a government officer."³⁰² The court noted that simply because a statement qualifies as an excited utterance does not necessarily mean that "it is *ipso facto* nontestimonial hearsay outside the scope of the Confrontation Clause and admissible into evidence. Each case must be examined on its facts to determine if the evidence is testimonial and controlled by *Crawford*."³⁰³ The victim's statements to the police simultaneously served two objectives. The first was to obtain assistance, and the second was to provide information for a possible future prosecution.³⁰⁴

The *Davis* court conceded the difficulty in drawing the line between testimonial and nontestimonial hearsay under *Crawford*.³⁰⁵ Ultimately, the court did not make the determination and concluded that even if the victim's statements were testimonial, the admission of the testimony constituted error that did not contribute to the conviction.³⁰⁶ The scenario in *Davis* precluded the court from characterizing the statement as either primarily a call for assistance—which would be a nontestimonial statement—or primarily the provision of information for a possible future prosecution—which would be a testimonial statement.

²⁹⁸*Id.* at 664.

²⁹⁹*Id.*

³⁰⁰*Id.*

³⁰¹*Id.* at 665.

³⁰²*Id.* at 667.

³⁰³*Id.* at 671.

³⁰⁴*Id.* at 672.

³⁰⁵*Id.*

³⁰⁶*Id.* at 672-73. The Texas Court of Criminal Appeals affirmed the defendant's conviction in *Davis*. *Davis v. State*, 203 S.W.3d 845, 856 (Tex. Crim. App. 2006). The Court first held that the victim's statements to the police were testimonial because they were "made in circumstances objectively indicating that the emergency was over and that the investigation had begun." *Id.* at 849 (citing *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006)). The statements were, therefore, erroneously admitted under *Crawford*. The Court also held, however, that any error caused by the admission of the statements was harmless beyond a reasonable doubt because of the volume of evidence at trial demonstrating that the defendant had attempted to strangle the victim. *Id.* at 849-56.

In *State v. Powers*,³⁰⁷ the victim made a 911 call to the police to report that the defendant had been in her home, which was a violation of the no-contact order against the defendant. In his appeal of the jury's guilty verdict, the defendant argued that the trial court's admission of the 911 tape of the victim's call violated his rights under the Confrontation Clause of the Sixth Amendment.³⁰⁸

The defendant argued that the victim's call was testimonial as defined by the Court in *Crawford* because it constituted a pretrial statement that the victim would reasonably expect to be used in the subsequent prosecution.³⁰⁹ The defendant characterized the 911 operator as an "immediate conduit to the police" and argued that the victim was aware of this connection when she made the call.³¹⁰ Also, because the victim was aware of the no-contact order, as she was named in it and spoke of it on the telephone, she would have been aware that her 911 call would result in the defendant's arrest.³¹¹

Based on its examination of the transcript of the 911 call, the *Powers* court concluded that the victim's call was for the purpose of reporting a crime and not to get help or protection.³¹² Because the victim called 911 to report the defendant's violation of the protective order and provided a description of him so that the authorities could apprehend and prosecute him, she did not call for protection and, therefore, her statements were testimonial under *Crawford*.³¹³ The court rejected the State's argument and refused to adopt a bright line rule that would admit all 911 recordings into evidence.³¹⁴ Thus, the victim's awareness of the protective order allowed the court to conclude that the statement was primarily to provide evidence for a prosecution.³¹⁵

³⁰⁷*State v. Powers*, 99 P.3d 1262 (Wash. Ct. App. 2004).

³⁰⁸*Id.* at 1263.

³⁰⁹*Id.* at 1263-64.

³¹⁰*Id.* at 1264; *see also* *Davis v. Washington*, 126 S. Ct. 2266, 2274 n.2 (2006) (explaining that 911 operators act as agents of law enforcement when they conduct interrogations of 911 callers).

³¹¹*Powers*, 99 P.3d at 1264.

³¹²*Id.* at 1265.

³¹³*Id.* at 1266; *see also* *Friedman & McCormack*, *supra* note 245.

³¹⁴*Powers*, 99 P.3d at 1266.

³¹⁵*See also* *People v. Ruiz*, No. B169642, 2004 WL 2383676 (Cal. Ct. App. 2004) (holding that the victim's statement to the police about the defendant threatening to kill her with a handgun was testimonial). The victim's statement in *Ruiz* was not an excited utterance, but the case illustrates the difficulty of dealing with dual-purpose statements. *Id.* at *9. Even though the victim was seeking aid and protection from the police, the court concluded that the victim was aware that her complaint to the police would result in the defendant's arrest and prosecution because the conduct of which she complained was obviously illegal and highly dangerous. *Id.* at *9.

Similarly, a victim's statements to police that were made contemporaneously with the defendant's arrival on the scene were held to be both excited utterances and testimonial statements because the victim was the only witness to the incident and could reasonably expect that her statements would be used to prosecute the defendant. *United States v. Arnold*,

In *Lopez v. State*,³¹⁶ the court utilized a different rationale but reached the same conclusion as the court in *Powers*. In *Lopez*, the police were investigating a reported kidnapping and assault when they encountered the alleged victim standing in the parking lot of an apartment complex. The victim told the police that a man had abducted him in his own car at gunpoint, and he pointed to the defendant, who was standing a short distance away in the parking lot.³¹⁷ The victim also told the police that the gun used in the abduction was in his car.³¹⁸ The officers searched the car and found a loaded gun under the front passenger seat.³¹⁹ When the officers questioned the defendant, he admitted that the gun belonged to him and that he had hidden it in the victim's car when he saw the police officers.³²⁰

The defendant's position on appeal was that the trial court's admission of the victim's statements about the gun violated his right under the Sixth Amendment to confront the witnesses against him.³²¹ The *Lopez* court agreed with the trial judge that the victim's statement qualified as an excited utterance, but the court also stated that this determination did not necessarily mean that the statement was properly admitted into evidence.³²² The court then analyzed whether the statement made by the victim to the police was testimonial under *Crawford*.³²³ The court concluded that the statement was not made as a result of an interrogation, nor was it made in any formalized testimonial materials, such as affidavits or depositions.³²⁴ The court held that the statement was testimonial under *Crawford* because the victim made the statement with the reasonable expectation that it would be used as evidence in a subsequent court proceeding.³²⁵

It was significant that the victim made his statement in direct response to a police officer's question and that he accused the defendant of a crime in the statement.³²⁶ In its analysis, the *Lopez* court placed importance on the declarant's purpose in making the statement: "[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."³²⁷ The court contrasted such a

410 F.3d 895, 902-03 (6th Cir. 2005), *vacated on other grounds*, 434 F.3d 396 (6th Cir. 2005), *reh'g en banc granted*, No. 04-5384, 2006 U.S. App. LEXIS 4995 (6th Cir. Feb. 27, 2006).

³¹⁶*Lopez v. State*, 888 So. 2d 693 (Fla. Dist. Ct. App. 2004).

³¹⁷*Id.* at 695.

³¹⁸*Id.*

³¹⁹*Id.*

³²⁰*Id.*

³²¹*Id.* at 695-96.

³²²*Id.* at 697.

³²³*Id.* at 698.

³²⁴*Id.*

³²⁵*Id.* at 698-700.

³²⁶*Id.* at 699.

³²⁷*See id.*; *see also* *People v. Watson*, No. 7715/90, 2004 WL 2567124 (N.Y. Sup. Ct. Nov. 8, 2004) (stating that no categorical rule excludes excited utterances from the *Crawford*

statement to a spontaneous declaration made to friend or family member and reasoned that such a statement would unlikely be regarded as testimonial.³²⁸

analysis and each excited utterance must be analyzed on its own terms to determine whether *Crawford* applies). *But see* *Fowler v. State*, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004) (finding excited utterance not testimonial because it was unrehearsed, made without reflection or deliberation, and, therefore, not made in anticipation of its future use at trial), *aff'd*, 829 N.E.2d 459 (Ind. 2005), *cert. denied*, 126 S. Ct. 2862 (2006); *Hammon v. State*, 809 N.E.2d 945, 952-53 (Ind. Ct. App. 2004) (reaching same conclusion as court in *Fowler*), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* *Davis v. Washington*, 126 S. Ct. 2266 (2006).

³²⁸*Lopez*, 888 So. 2d at 699. The *Lopez* court's analysis on this point is consistent with the statement in *Crawford* 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." *Crawford v. Washington*, 541 U.S. 36, 51 (2004); *see also* *State v. Aguilar*, 107 P.3d 377, 379 (Ariz. Ct. App. 2005) ("The only manner by which *Crawford* might be implicated is if the excited utterance is made in response to a police officer's query."); *People v. Compan*, 100 P.3d 533, 538 (Colo. Ct. App. 2004) (finding domestic violence victim's statements to a friend about the defendant's conduct not testimonial because they were not made to a law enforcement or judicial officer), *aff'd*, 121 P.3d 876 (Colo. 2005); *Demons v. State*, 595 S.E.2d 76, 80-81 (Ga. 2004) (finding murder victim's excited utterance to a friend two weeks before the murder not testimonial under *Crawford*); *State v. Staten*, 610 S.E.2d 823, 827, 836 (S.C. Ct. App. 2005) (holding statement of murder victim made during a private conversation with his roommate that defendant had "pulled a . . . gun" on him not testimonial under *Crawford*), *cert. granted*, 2006 S.C. LEXIS 93 (S.C. Mar. 9, 2006); *State v. Orndorff*, 95 P.3d 406, 408 (Wash. Ct. App. 2004) (finding statement of Ms. Coble to Mr. Nordby, who was not a law enforcement agent, that Ms. Coble had seen a man with a pistol, tried to call 911, and was panic-stricken, not testimonial under *Crawford*), *review denied*, 113 P.3d 482 (Wash. 2005); *Dickinson*, *supra* note 63, at 809 (finding no Confrontation Clause concerns with an out-of-court statement if the government did not assist in the production of such statement); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 518 (2005) (stating that one of the unresolved issues in *Crawford* is "whether statements must be elicited by questions from a government agent to be testimonial or whether questioning by private individuals or interrogators working for private groups can also qualify").

The status of the statement's recipient as a government agent or private individual is also an important factor in cases dealing with hearsay exceptions other than excited utterances. *See* *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 755-58 (Cal. Ct. App. 2004) (finding statement of child sex abuse victim to a trained interviewer at a videotaped interview at which the deputy district attorney and an investigator from the district attorney's office were present to be made under circumstances that would lead an objective observer to believe that the statement would be accessible at a subsequent prosecution and, therefore, testimonial under *Crawford*); *People v. Vigil*, 104 P.3d 258, 265 (Colo. Ct. App. 2004) (finding statement of child sex abuse victim to examining doctor, who was a member of child protection team and who spoke with the police before performing the examination, to be made under circumstances that would lead an objective witness reasonably to believe that the statement would be used prosecutorially and, therefore, testimonial under *Crawford*), *aff'd in part, rev'd in part*, 127 P.3d 916 (Colo. 2006); *In re E.H.*, 823 N.E.2d 1029, 1031-32, 1034-37 (Ill. App. Ct. 2005) (finding statement of child sex abuse victim to grandmother testimonial under *Crawford* because the nature of the testimony, and not the official or unofficial nature of the person testifying, determines *Crawford*'s applicability), *petition for appeal allowed*, 833 N.E.2d 2 (Ill. 2005).

In dissent, Justice Quinn stated that because the statements were not made to a governmental actor, the statements could not be considered testimonial under *Crawford*. *Id.* at 1041 (Quinn, J., dissenting). In Justice Quinn's view, even though *Crawford* did not

In *People v. Cortes*,³²⁹ the defendant was charged with various crimes in connection with the shooting of the victim. At trial, the prosecution sought to introduce two separate 911 calls made by two different individuals who reported seeing the shooting.³³⁰ The trial court excluded one of the tapes because the statement on it was obtained through interrogation and was, therefore, testimonial.³³¹ The court admitted a redacted version of the other tape because the declarant was present at trial and subject to cross-examination.³³²

On the excluded tape, the record revealed that the 911 operator had asked the caller a series of questions about the shooter's location, description and direction of movement.³³³ The court reasoned that the circumstances of some 911 calls, specifically those calls that report a crime, come within the definition of interrogation.³³⁴ Because the procedures for 911 calls were established and had rules and recognized patterns for the collection of information, they constituted formal statements as that term is used in *Crawford*.³³⁵

The *Cortes* court read *Crawford* as requiring a "reexamination of the basis for treating spontaneous declarations as admissible hearsay, including statements in a 911 call reporting a crime."³³⁶ In concluding that 911 calls to report a crime are testimonial, the court reasoned as follows:

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.

. . . .

The 911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the [pretrial] depositions taken by magistrates or [justices of the peace] under the Marian committal [act of 1555, which required preliminary examinations of prosecution witnesses to determine if the evidence was sufficient to hold the accused for trial]. Like the victims and witnesses before the King's courts an objective reasonable person knows that when he or she reports a crime the

completely define "testimonial," the *Crawford* Court's formulation of the core class of testimonial statements would exclude the child's statement to her grandmother. *Id.*

³²⁹*People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004).

³³⁰*Id.* at 402.

³³¹*Id.* at 402-03.

³³²*Id.*

³³³*Id.* at 404.

³³⁴*Id.* at 404-05.

³³⁵*Id.* at 406.

³³⁶*Id.* at 415.

statement will be used in an investigation and at proceedings relating to a prosecution.³³⁷

The *Cortes* court put forth a “testimonial per se” rule with respect to 911 calls. The court stated that such calls are testimonial regardless of the caller’s beliefs.³³⁸ There is debate as to whose perspective must be considered, the caller or the listener, in the determination of whether any statement, including a 911 call, is testimonial.³³⁹ A bright line rule is somewhat easier for courts to apply because it allows them to avoid making distinctions that are, at times, difficult to decipher. Ease of application, however, is no justification for excluding statements made by a victim in a 911 call who sought rescue or protection.³⁴⁰

The *Watson* case illustrates that law enforcement agents can procure both testimonial and nontestimonial statements within a short period of time. The analysis becomes more complicated when the court determines that a single statement serves more than one purpose. In *Davis*, the court excluded a dual-purpose statement.

Whether law enforcement agents obtained the statement at issue is significant but not always determinative. In *Lopez*, the court placed great importance on the fact that the victim made the statement to the police. In *Powers*, the court relied on the victim’s awareness of the protective order to conclude that the victim’s statement was primarily to provide evidence for a prosecution. It is unclear whether the result would have been the same in the absence of such awareness.

IV. TOWARDS A MORE PRECISE STANDARD

In order to assess the *Crawford* decision’s impact on the admissibility of excited utterances, the various factors discussed in Part III must be analyzed according to the three definitions of “testimonial” set forth in the opinion. The goal will be to produce a clear delineation of those excited utterances that are admissible even after *Crawford* and those that would result in a Confrontation Clause violation if admitted. This Article will then propose a composite definition that will take into account the three definitions from *Crawford* and the application of those definitions in the cases. Lastly, the Article will offer a slightly revised version of the composite definition that will take into account the Supreme Court’s decision in *Davis v. Washington*.

³³⁷*Id.* at 415; *see also* Friedman & McCormack, *supra* note 245, at 1193-1200.

³³⁸*Cortes*, 781 N.Y.S.2d at 415.

³³⁹*See* *White v. Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring in part and concurring in the judgment) (stating that the flaw in the definition of “testimonial” put forth by the United States in its amicus curiae brief, a definition that included the notion of statements “made in contemplation of legal proceedings,” was that it was unclear “whether the declarant or the listener (or both) must be contemplating legal proceedings”); *Mosteller*, *supra* note 328, at 572 (discussing issues related to whose perspective matters in determining whether a statement is testimonial).

³⁴⁰*See* *United States v. Brito*, 427 F.3d 53, 62 (1st Cir. 2005) (cautioning “against the use of an ‘all or nothing’ approach to the admission or exclusion of 911 calls”), *cert. denied*, 126 S. Ct. 2983 (2006); *People v. West*, 823 N.E.2d 82, 91 (Ill. App. Ct. 2005) (declining to adopt a bright line rule on whether 911 calls are testimonial or nontestimonial); *People v. Conyers*, 777 N.Y.S.2d 274, 276-77 (N.Y. Sup. Ct. 2004) (admitting 911 call where caller’s intention in placing the call was to stop an assault), *aff’d*, 824 N.Y.S.2d 301 (N.Y. App. Div. 2006).

The differences between the two definitions indicate that the *Crawford* decision did indeed cause a degree of “interim uncertainty.”³⁴¹

A. *First Definition: In-Court Testimony or its Functional Equivalent*

The Court in *Crawford* described the “core class of ‘testimonial’ statements” as “‘*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 [such as a deposition], or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.’”³⁴² The first part of this definition would not apply to excited utterances at all because statements in affidavits, depositions or custodial examinations would not typically qualify as excited utterances. Declarants who provide statements in these formats usually provide them at some interval after any startling event or condition.

The last portion of the *Crawford* definition, however, includes statements that a declarant would reasonably expect to be used prosecutorially. This might include an extremely broad class of statements, but the qualifier—“similar pretrial statements”—requires the statements to be similar to the statements set forth in affidavits, depositions or custodial examinations. These statements, in turn, are defined as the “functional equivalent” of *ex parte* in-court testimony. Therefore, in order to qualify as a “testimonial statement” under the first definition in *Crawford*, it is insufficient for the declarant to reasonably expect the statement to be used prosecutorially. Even if the declarant possesses this expectation, the statement must still be “similar” to a statement that is the “functional equivalent” of in-court testimony. Stated another way, the statement must be only two steps removed from in-court testimony.

Therefore, statements made to law enforcement agents where the declarant initiates the contact³⁴³ are not “testimonial statements” under this definition, and the cases that have addressed this scenario have reached the same conclusion. To conclude that the statement is not testimonial simply because it is an excited utterance, as some of the cases do, does not take the analysis sufficiently far.³⁴⁴ The

³⁴¹*Crawford v. Washington*, 541 U.S. 36, 68 n.10 (2004).

³⁴²*Id.* at 51 (quoting Brief of Petitioner, *supra* note 14, at 23).

³⁴³*See supra* notes 86-111 and accompanying text.

³⁴⁴The Court in *Crawford* sought to separate the protections provided by the Sixth Amendment from evidentiary rules regarding admissibility. *See Crawford*, 541 U.S. at 61; *see also* Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 7 (2004) (describing *Crawford* as confirmation that rule against hearsay and the Confrontation Clause are separate legal authorities); Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 185-86 (2004) (describing *Crawford* decision as a divorce between the Confrontation Clause and the hearsay rule). *But see* Commonwealth v. Gonsalves, 833 N.E.2d 549, 572-73 (Mass. 2005) (Sosman, J., concurring in part) (stating that prerequisites for excited utterance exception are incompatible with characteristics that make a statement testimonial), *cert. denied*, 126 S. Ct. 2982 (2006); State v. Anderson, No. E2004-00694-CCA-R3-CD, 2005 WL 171441, at *4 (Tenn. Crim. App. Jan. 27, 2005) (stating that the essential characteristics that cause a statement to be an excited utterance render the statement nontestimonial), *aff'd*, 183 S.W.3d 335 (Tenn. 2006), *cert. denied*, 127 S. Ct. 47 (2006).

more accurate formulation is that the statement is not testimonial because an excited utterance made by the declarant through the initiation of contact with law enforcement agents does not bear any similarity to pretrial statements such as affidavits, custodial examinations or testimony.

Similarly, if the declarant's purpose in making the statement is to obtain aid or to be protected from a dangerous situation, the statement is not testimonial under this definition.³⁴⁵ The courts have declined to characterize a statement as testimonial when the sole purpose of the statement is to obtain protection or to be rescued. Even if the declarant is partially motivated by the desire to provide evidence for a future prosecution, such statements still fail to satisfy this definition of testimonial because the statements are neither the functional equivalent of in-court testimony nor are they similar to statements that qualify as the functional equivalent of in-court testimony. In addition, excluding these statements from the class of statements that qualify as "testimonial" allows the police to perform one of their essential functions: aiding those in danger and providing protection to them.

In many situations, statements that are produced as a result of questioning by law enforcement agents still qualify as excited utterances.³⁴⁶ Under *Crawford*, however, those statements are not admissible against a defendant at trial if they qualify as testimonial.³⁴⁷ The courts' analysis in these instances is whether the questioning was structured or formal. The precise focus in these instances is whether the questioning is sufficiently analogous to a "police interrogation" such that the resulting statement is testimonial.³⁴⁸

The cases do not use the concept of "structured questioning" with any degree of consistency, which makes it difficult to draw solid conclusions about its meaning. It is clear that the questioning does not constitute a "custodial examination" or "police interrogation" if the police are asking questions in the very early stage of the investigation in order to assess the situation and determine exactly what happened.³⁴⁹

³⁴⁵See *supra* notes 114-224 and accompanying text. This view is consistent with the Supreme Court's decision in *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006) (declaring that a statement is nontestimonial when made in the context of an ongoing emergency).

³⁴⁶See *People v. Cage*, 15 Cal. Rptr. 3d 846, 848-50 (Cal. Ct. App.), *petition for review granted*, 99 P.3d 2 (Cal. 2004); *Wall v. State*, 143 S.W.3d 846, 848 (Tex. App. 2004), *aff'd*, 184 S.W.3d 730 (Tex. Crim. App. 2006).

³⁴⁷*E.g.*, *Wall*, 143 S.W.3d at 849-51.

³⁴⁸*Crawford* was unequivocal in its assertion that statements procured by the police during an interrogation are testimonial. *Crawford*, 541 U.S. at 52, 68. Even though the Court in *Crawford* declined to adopt a comprehensive definition of testimonial, it stated that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* (emphasis added).

Of course, with the Supreme Court's decision in *Davis*, the courts must now discern the "primary purpose of the interrogation." *Davis*, 126 S. Ct. at 2273-74. It is not entirely clear whether this will facilitate compliance with the rule. *Id.* at 2283 (Thomas, J., concurring in the judgment in part and dissenting in part) (arguing that the standard in *Davis* "yields no predictable results to police officers and prosecutors attempting to comply with the law").

³⁴⁹*Cassidy v. State*, 149 S.W.3d 712, 714-716 (Tex. App. 2004), *cert. denied*, 544 U.S. 925 (2005); *Cage*, 15 Cal. Rptr. 3d at 855-57; *Fowler v. State*, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 459 (Ind. 2005), *cert. denied*, 126 S. Ct. 2862 (2006); *Hammon v. State*, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd*

When the police investigation has progressed to the point where it has begun to focus on a suspect, and the questions seek incriminating evidence about that particular suspect, the questioning is sufficiently structured to be a custodial examination or interrogation.³⁵⁰

Even if the investigation has begun to focus on a suspect about whom the police are asking questions, statements given in response to such questions hardly seem to qualify as the functional equivalent of in-court testimony. The statement at issue in *Crawford* was a formal, tape-recorded statement given at the police station some time after the incident itself.³⁵¹ The statement was procured through police interrogation and bore a similarity to in-court testimony in a way that a statement given at the scene of the incident, or even at the hospital following the incident, does not.

The courts that have applied *Crawford* are in agreement that when a declarant makes a statement for the purpose of producing evidence against an accused for use in a possible future prosecution, the statement is testimonial.³⁵² The difficulty lies in moving from this abstract principle to its practical application.³⁵³ Part of the difficulty is that any statement provided to law enforcement agents who are investigating a criminal incident could presumably be used in a future prosecution if the perpetrator is apprehended and brought to trial. The *Crawford* definition focuses on whether the declarant reasonably expects the statement to be used in a future prosecution. The proposed composite definition will alleviate some of the uncertainty in this standard.

If the statement constitutes a formal accusation of a criminal act, the statement is testimonial because the declarant can reasonably expect that it will be used in a subsequent prosecution.³⁵⁴ Because such formal accusations would likely qualify as pretrial statements that bear a close similarity to in-court testimony, the statements

sub nom. *Davis v. Washington*, 126 S. Ct. 2266 (2006); *United States v. Webb*, No. DV-339-04, 2004 WL 2726100 (D.C. Super. Ct. Nov. 9, 2004).

³⁵⁰*Wall*, 143 S.W.3d at 851. There is little dispute about the difficulty of distinguishing between testimonial and nontestimonial hearsay under *Crawford*. See *Davis v. State*, 169 S.W.3d 660, 672 (Tex. App. 2005), *aff'd*, 203 S.W.3d 845 (Tex. Crim. App. 2006).

³⁵¹*Crawford*, 541 U.S. at 38-39. In addition, the defendant's wife had received *Miranda* warnings prior to giving the statement. *Id.* at 38. Professor Friedman characterized the fact pattern in *Crawford* as one involving "station house testimony." Friedman, *supra* note 344, at 6. Moreover, the Washington Court of Appeals noted that Sylvia Crawford made the majority of her statement in response to questions from the police. *State v. Crawford*, No. 25307-1-II, 2001 WL 850119, at *3 (Wash. Ct. App. July 30, 2001). Because the questioning of Sylvia Crawford clearly qualified as "police interrogation," the Court in *Crawford* never had to address the less obvious forms of such police activity. *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 564 n.2 (Mass. 2005) (Sosman, J., concurring in part), *cert. denied*, 126 S. Ct. 2982 (2006).

³⁵²See *supra* notes 292-340 and accompanying text.

³⁵³See *White v. Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring in part and concurring in the judgment) ("Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties.").

³⁵⁴*Lopez v. State*, 888 So. 2d 693, 698-99 (Fla. Dist. Ct. App. 2004).

are testimonial according to the first definition in *Crawford*. If the declarant has some special knowledge about the criminal history of the alleged perpetrator,³⁵⁵ or accuses the alleged perpetrator of a particularly serious or violent crime,³⁵⁶ the statement is more likely to be characterized as testimonial. As the cases illustrate, the focus on the declarant's subjective expectations in making the statement may lead to results that are not entirely consistent with the specific holding of *Crawford*.³⁵⁷

B. Second Definition: Extrajudicial Statements in Formalized Testimonial Materials

The *Crawford* Court took the second definition of testimonial statement directly from Justice Thomas's concurring opinion in *White v. Illinois*.³⁵⁸ The Court defined these materials as "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."³⁵⁹ This definition is strikingly similar to the first part of the initial definition set forth in *Crawford*. The emphasis is on the formalized nature of the materials. Therefore, the analysis of the factors under the first part of the initial definition would also apply here. In addition, statements in the formalized materials described in the second definition are unlikely to qualify as excited utterances.

C. Third Definition: Reasonable Belief that Statement Will be Used at Trial

The final, and perhaps most general, definition of testimonial from *Crawford* would include "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."³⁶⁰ This definition is similar to the last portion of the first definition from *Crawford*, which talks about "pretrial statements that declarants would reasonably expect to be used" in a future prosecution.³⁶¹ The difference is that the first definition talks about the declarant's expectation of the use of the statement at trial. The third definition states the standard in terms of an "objective witness." It goes beyond the beliefs and expectations of the particular declarant and establishes an objective standard.³⁶²

³⁵⁵State v. Powers, 99 P.3d 1262, 1264-66 (Wash. Ct. App. 2004).

³⁵⁶People v. Ruiz, No. B169642, 2004 WL 2383676 (Cal. Ct. App. 2004).

³⁵⁷This inconsistency may explain why the Court in *Davis* articulated an objective standard for evaluating the circumstances surrounding the police interrogation and the resulting statements. See *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

³⁵⁸*White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment).

³⁵⁹*Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (quoting *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment)).

³⁶⁰*Id.* at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, *supra* note 16, at 3).

³⁶¹*Id.* at 51 (quoting Brief of Petitioner, *supra* note 14, at 23). The Court in *Davis* took the objective standard one step further, stating it in terms of the circumstances involved in the police interrogation and the resulting statements and not in terms of the declarant. See *Davis*, 126 S. Ct. at 2273-74.

³⁶²See *United States v. Hinton*, 423 F.3d 355, 359-60 (3d Cir. 2005) (reiterating that the objective standard contemplates a reasonable person in the declarant's position); *Wall v. State*,

Moreover, this third definition is primarily responsible for the inconsistent results in the cases. One of the important factors in the application of this definition is the status of the person to whom the statement was made.³⁶³ It also provides the lower courts applying *Crawford* with a level of discretion that perhaps the Supreme Court did not contemplate when it decided *Crawford*.³⁶⁴

Statements made to law enforcement agents for the purpose of obtaining aid or protection are not testimonial under this definition. Under this objective standard, such statements would not be available for use at a later trial because their purpose is to neutralize a dangerous situation. Statements made at the police station or in a similar investigative environment, especially when made in response to structured police questioning, are testimonial. Such statements are testimonial even if they qualify as excited utterances under state evidentiary law because an objective witness would expect the statements to be available for later use at trial. Even though this standard is phrased in terms of an “objective witness,” a particular declarant’s knowledge that a statement will be used in a future prosecution is a factor to consider in the determination of whether the statement is testimonial.³⁶⁵

D. Composite Definition

A final, composite definition of testimonial, which would be based on the formulations in the *Crawford* decision and refined through an examination of the cases dealing with excited utterances, would read as follows:

Testimonial evidence means

- (a) *Ex parte* in-court testimony, including prior testimony during a court proceeding such as a preliminary hearing, grand jury proceeding, motion hearing or trial;
- (b) statements set forth in sworn affidavits;
- (c) statements set forth in depositions;
- (d) statements that constitute formal confessions; or

184 S.W.3d 730, 742-43 (Tex. Crim. App. 2006) (“[T]he legal ruling of whether a statement is testimonial under *Crawford* is determined by the standard of an objectively reasonable declarant standing in the shoes of the actual declarant.”).

³⁶³See *Lopez v. State*, 888 So. 2d 693, 699-700 (Fla. Dist. Ct. App. 2004) (holding that a statement to a friend or family member is not made for the purpose of accusing someone in the same way as a statement to a person of authority).

³⁶⁴See *United States v. Brito*, 427 F.3d 53, 67 (1st Cir. 2005) (Howard, J., concurring in part and concurring in judgment) (“Many courts have resolved [the] uncertainty [created by *Crawford*] by seizing on the most general formulation [of testimonial, which is the third definition], and applying it, without sufficient attention to *Crawford*’s textual and historical rationale.”), *cert. denied*, 126 S. Ct. 2983 (2006); *People v. Cage*, 15 Cal. Rptr. 3d 846, 855 (Cal. Ct. App.) (holding narrowly that despite three different definitions set out in *Crawford*, statements made in response to police interrogation are testimonial), *petition for review granted*, 99 P.3d 2 (Cal. 2004).

³⁶⁵See *People v. Watson*, No. 7715/90, 2004 WL 2567124, at *15 (N.Y. Sup. Ct. Nov. 8, 2004) (finding that interrogation occurs where declarant is aware that law enforcement agent’s purpose in asking questions is to gather information to aid in suspect’s prosecution).

(e) other pretrial statements that are substantially similar to those items listed in subsections (a)-(d) that:

(i) are provided in response to questions from law enforcement agents when the agents have thoroughly assessed a situation or incident and have begun to focus their investigation on a particular suspect or suspects;

(ii) are provided in response to questions from law enforcement agents when such questions are detailed, structured, formal and logically organized in a way that seeks specific, incriminating evidence about a suspect or suspects;

(iii) are provided in response to questions from someone other than a law enforcement agent when the questioning is conducted in the presence of a law enforcement agent, at the behest and direction of a law enforcement agent, or by a person directly associated with the government's investigation, and has the characteristics of the questions in subsection (e)(ii); or

(iv) formally accuse a suspect of a specific crime when the declarant has some particular knowledge of the suspect or the nature of the crime.

Subsection (e) of this definition incorporates the concept of "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." It sets forth the general standard with a level of specificity that will make the standard more readily applicable to new fact situations involving excited utterances. As illustrated by the cases, the general standard is unpredictable and difficult to apply. The Court in *Crawford* abandoned the *Roberts* test for the same reason. Subsection (e) attempts to specify the "circumstances" that would cause a statement to qualify as testimonial, and most of the situations in subsection (e) are a variation of police interrogation.³⁶⁶

An analysis of whether a particular manner of questioning by law enforcement agents constitutes a custodial examination or interrogation must begin with the *Crawford* case itself. Sylvia Crawford's statement to the police was not an excited utterance, but it is the appropriate starting point for a determination of the limitations on questioning by law enforcement agents. The manner in which Sylvia Crawford provided her statement to the police was completely different from a situation in which the declarant makes a statement at the scene of an incident to law enforcement agents, even if that statement is made in response to some degree of questioning.³⁶⁷

³⁶⁶See Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 321-22 (2005) ("At a minimum, . . . the Confrontation Clause appears to apply to statements knowingly made to police in response to police-initiated questions seeking incriminating information.").

³⁶⁷See Robert William Best, *To be or Not to be Testimonial? That is the Question: 2004 Developments in the Sixth Amendment*, ARMY LAW., Apr. 2005, at 65, 79. ("Whatever else can be said about the *Crawford* opinion, the issue of Sylvia's statement given during a police interrogation was the issue of the case; everything else the Court addressed served as background for the question before it.").

It is more likely that an excited utterance will implicate *Crawford* under one of the situations in subsection (e) of the definition. A statement that meets the standard in subsection (e) of the definition must still be “substantially similar” to the formalized materials listed in subsections (a)-(d) in order to qualify as a testimonial statement. Establishing a direct link between the statement in subsection (e) and the specific examples of formalized materials in subsections (a)-(d) will provide courts with more guidance in their application of the *Crawford* decision.³⁶⁸

Moreover, this connection finds support in the *Crawford* decision. After setting out the various formulations of testimonial statements, the Court stated that “[t]hese formulations all share a common nucleus and then define the [Confrontation] Clause’s coverage at various levels of abstraction around it.”³⁶⁹ Perhaps the “common nucleus” was that the statement must contain a degree of formality or structure similar to those listed by the Court, and the belief in its availability for use at a later trial was simply a “level of abstraction around” this requirement. The formulation in subsection (e) of the composite definition transforms the abstract notion of “belief in availability for use at a later trial” into readily identifiable and specific examples. An excited utterance that fails to satisfy one of the formulations in subsection (e) is unlikely to qualify as a testimonial statement. Thus, its admissibility at trial would be determined according to state evidentiary law.

Prior to the Supreme Court’s decision in *Davis*, lower courts tested the parameters of the third definition from *Crawford*. In such cases, courts examined the level of accuracy and precision in the declarant’s accusation and the seriousness of the crime. A victim who simply points out the perpetrator to the police upon their arrival on the scene (That’s the man who hit me) cannot be said to have met the standard in subsection (e) of the definition. It is most likely that the victim is either initiating the contact, seeking protection or both. In addition, a victim or witness who provides information to the police in response to general, informal questions (What’s going on here? or What happened?) is not providing testimonial evidence in accordance with subsection (e).³⁷⁰ The focus under this definition must be on the statement’s nature and purpose and not on the declarant’s emotional state.³⁷¹

Similarly, a declarant who provides a statement to the police in response to formal and direct questioning is more likely to produce a statement that meets the standard in subsection (e). The circumstances surrounding such a statement would lead an objective witness reasonably to believe that the statement would be available for use at a subsequent criminal prosecution. This is the point at which state evidentiary law and the Confrontation Clause part ways. The statement may qualify

³⁶⁸See *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 570-71 (Mass. 2005) (Sosman, J., concurring in part) (emphasizing the importance of articulating a definition of “testimonial” that harmonizes all three formulations from *Crawford*), *cert. denied*, 126 S. Ct. 2982 (2006).

³⁶⁹*Crawford v. Washington*, 541 U.S. 36, 52 (2004).

³⁷⁰See, e.g., *Anderson v. State*, 111 P.3d 350, 351, 353-54 (Alaska Ct. App. 2005), *cert. granted*, 126 S. Ct. 2983 (2006) (vacating judgment and remanding case to the Court of Appeals of Alaska for further consideration in light of *Davis*); *United States v. Webb*, No. DV-339-04, 2004 WL 2726100, at *3-5 (D.C. Super. Ct. Nov. 9, 2004). See also *supra* note 88.

³⁷¹*Lopez v. State*, 888 So. 2d 693, 699 (Fla. Dist. Ct. App. 2004).

as an excited utterance, but as a testimonial statement, it can be admitted at trial only if the defendant has had an opportunity to cross-examine the statement.³⁷²

It is clear that the *Crawford* decision presents new challenges in the area of domestic violence crimes because the prosecution of such cases relies heavily on statements made at the scene to law enforcement authorities and in 911 calls.³⁷³ Placing the emphasis on the statement itself and not on whether the person to whom it was made is a government agent has the potential to expand the class of statements that will be inadmissible under *Crawford*.

One of the unresolved issues in *Crawford* is “whether statements must be elicited by questions from a government agent to be testimonial or whether questioning by private individuals or interrogators working for private groups can also qualify.”³⁷⁴ Under the appropriate circumstances, a statement made to a private citizen would lead an objective witness reasonably to believe that the statement would be available for use at a subsequent criminal prosecution.³⁷⁵ The standard in subsection (e)(iii) of the definition contemplates such circumstances and attempts to bring some clarity to this point. On the other hand, the absence of government officials from the interaction negates the potential for abuse that concerned the Court in *Crawford*.³⁷⁶

It is important to be cognizant of two other aspects of the *Crawford* decision in this context. The first is the statement in the majority opinion 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.”³⁷⁷ On the other hand, the cases illustrate that accusers sometimes make formal statements to acquaintances³⁷⁸ and casual remarks to government officers.³⁷⁹ The lower courts

³⁷²See, e.g., *State v. Siler*, 843 N.E.2d 863, 868 (Ohio Ct. App. 2005) (finding statement both an admissible excited utterance under Ohio law and an inadmissible testimonial statement under *Crawford*), *appeal allowed*, 847 N.E.2d 5 (Ohio 2006).

³⁷³See *Jaros*, *supra* note 245, at 1000-03; *King-Ries*, *supra* note 366, at 305, 318; *Linger*, *supra* note 61, at 768-83, 816; *Donna D. Bloom*, Comment, “Utter Excitement” *About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington*, 36 ST. MARY’S L.J. 717 (2005); *Celeste E. Byrom*, Note, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases after Crawford v. Washington*, 24 REV. LITIG. 409 (2005).

Both of the cases before the Supreme Court in *Davis* were domestic violence cases. *Davis v. Washington*, 126 S. Ct. 2266, 2279-80 (2006). The respondents in those cases, the states of Washington and Indiana, argued that such cases “require[] greater flexibility in the use of testimonial evidence.” *Id.* at 2279. The Court acknowledged that victims of domestic violence are particularly susceptible to intimidation or coercion and that they often decline to testify at trial. *Id.* at 2279-80. The constitutional guarantees, however, must still be the primary concern. *Id.* at 2280.

³⁷⁴*Mosteller*, *supra* note 328, at 518. The issue remains unresolved. See *Davis*, 126 S. Ct. at 2274 n.2 (“[O]ur holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’”).

³⁷⁵See *supra* note 328.

³⁷⁶*Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004).

³⁷⁷*Id.* at 51.

³⁷⁸See *In re E.H.*, 823 N.E.2d 1029, 1031-32, 1034-37 (Ill. App. Ct. 2005), *petition for appeal allowed*, 833 N.E.2d 2 (Ill. 2005).

need guidance on whether the admission of such statements against defendants violates their rights under the Confrontation Clause.³⁸⁰ Subsection (e) of the composite definition provides this guidance.

The second aspect of the decision is the concern expressed by Chief Justice Rehnquist in his concurring opinion that “any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary.”³⁸¹ Certainly sworn affidavits and depositions are part of the core class of testimonial statements. A classification of other statements as testimonial, including certain excited utterances, need not be arbitrary. If the basis of that classification is an objective belief in that statement’s availability for use at a later trial, the statement must be in a format that is substantially similar to a sworn affidavit or deposition and must meet one of the standards set forth in subsection (e) of the proposed composite definition. In this way, the appropriate balance will be struck between an accused’s rights under the Confrontation Clause and the government’s ability to prosecute its cases.

Application of the proposed composite definition would be consistent with *Crawford*. The definition must be slightly altered, however, in light of the *Davis* decision. The most significant difference after *Davis* is that the statements described in subsection (e) of the definition need not be “substantially similar” to the statements listed in subsections (a)-(d). As illustrated by *Hammon v. Indiana*, the companion case to *Davis v. Washington*, the statement can qualify as testimonial

³⁷⁹See *United States v. Webb*, No. DV-339-04, 2004 WL 2726100, at *1-3 (D.C. Super. Ct. Nov. 9, 2004); *Fowler v. State*, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004), *aff’d*, 829 N.E.2d 459 (Ind. 2005), *cert. denied*, 126 S. Ct. 2862 (2006).

³⁸⁰See *Friedman*, *supra* note 344, at 9 (stating that participation by government officials is not the essence of what makes a statement testimonial).

³⁸¹*Crawford*, 541 U.S. at 71 (Rehnquist, C.J., concurring). This view is reflected in three United States Circuit Court decisions issued after *Crawford* involving hearsay exceptions other than excited utterances in which the courts held that statements, which did not involve police or government agents, were not testimonial. See *Evans v. Luebbers*, 371 F.3d 438, 444-45 (8th Cir. 2004) (finding victim’s statements to numerous witnesses prior to the victim’s murder by her husband not to fit the definition of “testimonial” under *Crawford*), *cert. denied*, 543 U.S. 1067 (2005); *Horton v. Allen*, 370 F.3d 75, 83-84 (1st Cir. 2004) (declining to find as testimonial statements to a third party witness, made by person who had accompanied accused on the day of murder, that accused needed money and that victim had refused to give him drugs on credit), *cert. denied*, 543 U.S. 1093 (2005); *United States v. Manfre*, 368 F.3d 832, 837-38, 838 n.1 (8th Cir. 2004) (testimony of victim’s half brother regarding victim’s statements to him implicating the defendant properly admitted because statements were “not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks”).

One case that admitted a testimonial statement was *People v. Ko*, 789 N.Y.S.2d 43 (N.Y. App. Div. 2005), *cert. denied*, 126 S. Ct. 1051 (2006). At trial, a detective who had investigated the murder testified to statements made by the defendant’s girlfriend about bloody clothing found at the murder scene. *Id.* at 44. Even though the statements were testimonial, they were not barred by *Crawford* because the defendant opened the door to the admission of the entire statement concerning clothing found at the murder scene. *Id.* at 44-45. The court was concerned that “[a] contrary holding would allow a defendant to mislead the jury by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context.” *Id.* at 45.

even if it is made at the scene of the incident itself, as long as it is made after the incident is over³⁸² “at some remove in time from the danger.”³⁸³ Subsections (e)(ii) and (e)(iv) of the definition remain unchanged because they more clearly qualify as testimonial statements after *Davis*. Subsection (e)(iii) remains unchanged and unresolved, but it seems that the Supreme Court is moving in the direction of classifying such statements as testimonial.

V. CONCLUSION

Crawford established a new standard for the admission of testimonial statements by a witness who is not present at trial. It overruled the standard in *Ohio v. Roberts*, which examined whether the statement bore adequate indicia of reliability, because the standard in *Roberts* provided inadequate protection for defendants’ rights under the Confrontation Clause.

An understanding of *Crawford*’s effect on the admissibility of excited utterances requires an understanding of which statements the *Crawford* Court meant to include in its definition of “testimonial statement.” Rather than focusing exclusively on whether the recipient of the statement is a government officer or private citizen, the analysis must focus on whether the statement meets one of the standards set forth in subsection (e) of the proposed composite definition. Even if the statement satisfies one of the standards, however, the statement must bear an appreciable similarity to formalized materials such as affidavits and depositions. This analysis is consistent with the Supreme Court’s statement in *Crawford* that all formulations of testimonial statements “share a common nucleus.”³⁸⁴

If the declarant initiates contact with law enforcement agents to seek aid or protection, the statement is not testimonial. If there is some degree of formal or structured questioning to procure the statement, then it is testimonial even if it qualifies as an excited utterance. If the questioning meets the standard, the questioner need not necessarily be a law enforcement agent. The questioning need only be conducted at the behest or in the presence of a law enforcement agent.

In *Davis v. Washington*, the Supreme Court clarified its decision in *Crawford v. Washington*. The degree of formality or structure in the questioning is no longer the primary consideration in determining whether the responses to those questions constitute testimonial statements. Rather, the focus seems to be on the timing of the questioning and whether it takes place at a point removed in time from the threatening situation that gave rise to it.

Both federal and states courts will continue to develop and interpret the Supreme Court’s rulings in *Crawford* and *Davis*. It remains to be seen whether the “primary purpose”³⁸⁵ test from *Davis* will produce consistent results, or results that require further clarification.

³⁸²*Davis v. Washington*, 126 S. Ct. 2266, 2278-79 (2006).

³⁸³*Id.* at 2279.

³⁸⁴*Crawford*, 541 U.S. at 52.

³⁸⁵*Davis*, 126 S. Ct. at 2273-74.