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Constitutional Law -- The Confrontation Clause and the New "Primary Purpose Test" in Domestic Violence Cases; Davis v Washington, 126 S. Ct. 2266 (2006)

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CONSTITUTIONAL LAW—The Confrontation Clause and the New "Primary Purpose Test" in Domestic Violence Cases; *Davis v. Washington*, 126 S. Ct. 2266 (2006).

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INTRODUCTION

On February 1, 2001, Michelle McCottry dialed 911 and then quickly hung up.[1] Since hang-ups often indicate grave danger, the 911 operator immediately returned the call.[2] A hysterical and sobbing McCottry answered and told the operator, "He's here jumpin' on me again."[3] The operator ask McCottry who the attacker was, the relationship she had with the attacker, and if alcohol was involved.[4] McCottry identified her attacker as Adrian Davis and told the operator he had beaten her with his fists and had just left.[5] She also informed the operator she had a protective order against him.[6] When law enforcement officers arrived at the scene, Davis was no longer at the house, and McCottry was frantically gathering belongings so she and her children could leave.[7] McCottry had "fresh injuries on her forearm and her face."[8]

The State arrested Davis and charged him with felony violation of a domestic no-contact order.[9] McCottry originally assisted the prosecutor's office, but at the time of trial, they were unable to locate her.[10] Instead, the two police officers who responded to the scene were the only State witnesses.[11] They testified about McCottry's recent injuries but said they did not know what caused them.[12] While McCottry herself did not testify, the trial court allowed her 911 conversation to be admitted under the excited utterance hearsay exception.[13] Davis objected and

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[1] State v. Davis, 111 P.3d 844, 846 (Wash. 2005).

[2] *Id.* at 846, 850.

[3] *Id.* at 846 (quoting Ex. 2 (911 audiotape)).

[4] *Davis*, 111 P.3d at 846.

[5] *Id.*

[6] *Id.* at 846-47.

[7] *Id.* at 847.

[8] *Id.*

[9] *Davis*, 111 P.3d at 847; WASH. REV. CODE § 26.50.110(1), (4) (1984) (McCottry had a no-contact order against Davis in which "[a]ny assault . . . is a violation of an order.").

[10] *Davis*, 111 P.3d at 847.

[11] *Id.*

[12] *Id.*

[13] *Id.* (The court denied a proposed jury instruction on McCottry's absence.); WASH. R. EVID. 803 (a)(2); FED. R. EVID. 803(2) (The Washington state rule of evidence and the federal rule of

claimed entering the 911 call as evidence violated his Sixth Amendment right to confront the witness against him, but the trial court admitted the 911 tape, and the jury convicted Davis of felony violation of a domestic no-contact order.[14]

Ultimately, the U.S. Supreme Court granted certiorari to consider Davis' Sixth Amendment objection and decide when evidence taken by law enforcement should be admitted at trial without a prior opportunity for cross-examination.[15] The Court previously differentiated between testimonial and non-testimonial statements in applying the Sixth Amendment and determined that the Sixth Amendment does not apply to non-testimonial statements.[16] Furthermore, the Court took the opportunity in this case to clarify what makes a statement testimonial as opposed to non-testimonial.[17] The Court upheld Davis' conviction, ruling the evidence was admissible because the statement was non-testimonial.[18]

The U.S. Supreme Court combined the *Davis* case with *Hammon v. Indiana*, which presented a similar issue, but had distinguishable facts.[19] In *Hammon*, the police responded to a "domestic disturbance" at the home of Hershel and Amy Hammon.[20] When the police arrived, Amy was on the front porch and, although she appeared to be fearful, she told the officers "everything was okay."[21] She let the officers enter the home where they found an overturned heater.[22] The officers spoke to Hershel who said he and Amy had an argument, but it was not physical.[23] One officer talked with Amy in the living room, while the other officer made Hershel stay in the kitchen.[24] The officer talking to Amy did not see any physical injuries, although Amy said she was in some pain.[25] Amy filled out an affidavit stating: "Broke our furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter."[26]

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evidence are the same and state: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.").

[14] *Davis*, 111 P.3d at 847.

[15] Davis v. Washington, 126 S. Ct. 547 (2005); Davis v. Washington, 126 S. Ct. 2266, 2270 (2006).

[16] Crawford v. Washington, 541 U.S. 36, 68 (2004).

[17] *Davis*, 126 S. Ct. at 2273-74.

[18] *Id.* at 2277, 2280.

[19] *Id.* at 2266.

[20] Hammon v. State, 829 N.E.2d 444, 446-47 (Ind. 2005).

[21] *Id.* at 446-47.

[22] *Id.* at 447.

[23] *Id.*

[24] *Id.*; Davis v. Washington, 126 S. Ct. 2266, 2272 (2006).

[25] Hammon v. State, 809 N.E.2d 945, 948 (Ind. Ct. App. 2004).

[26] *Davis*, 126 S. Ct. at 2272.

"The State charged Hershel with domestic battery and with violating his probation."[27] Although Amy did not testify at trial, the court entered her affidavit as evidence under the present sense impression hearsay exception.[28] The responding police officer testified to Amy's oral statements, which the court admitted into evidence under the excited utterance hearsay exception.[29] Hershel objected, arguing that his Sixth Amendment confrontation right had been violated.[30] At a bench trial, the court convicted Hershel on both charges.[31] The Indiana Court of Appeals and the Indiana Supreme Court affirmed the conviction holding that Amy's oral statement to the police officer was an "excited utterance" and, therefore, not testimonial.[32] The Indiana Supreme Court also held Amy's affidavit to be testimonial.[33] Admitting the affidavit as evidence, however, was harmless error because the trial was to the bench.[34]

On certiorari, the U.S. Supreme Court held that Amy's oral statement to the police officer and affidavit were testimonial, and the lower court violated Hershel's right to cross-examine the witness against him.[35] The Court reversed his conviction.[36]

The U.S. Supreme Court resolved both cases, consolidated in *Davis v. Washington*.[37] It used the case to address troubling issues related to the Sixth Amendment's Confrontation Clause that remained after its 2004 decision in

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[27] *Id.*; IND. CODE § 35-42-2-1.3 (2000) ("A person who knowingly or intentionally touches an individual who (1) is or was a spouse of the other person . . . in a rude, insolvent, or angry manner that results in bodily injury . . . .").

[28] *Davis*, 126 S. Ct. at 2272; IND. R. EVID. 803 (1) (1994) ("Present sense impression. A statement describing or explaining a material event, condition or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter.").

[29] *Davis*, 126 S. Ct. at 2272; IND. R. EVID. 803(2) (1994) ("Excited utterances. A statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition.").

[30] *Davis*, 126 S. Ct. at 2272.

[31] *Id.* at 2273.

[32] Hammon v. Indiana, 809 N.E.2d 945, 950, 952 (Ind. Ct. App. 2004); Hammon v. State, 829 N.E.2d 444, 449, 456-58 (Ind. 2005).

[33] *Hammon*, 829 N.E.2d at 458. "The Court of Appeals did not decide whether the affidavit was properly admitted, reasoning that the issue was academic because the affidavit was cumulative of Mooney's testimony and therefore harmless, if error at all." *Id.* at 448; *Hammon*, 809 N.E.2d at 948 n.1.

[34] *Id.* at 459.

[35] Davis v. Washington, 126 S. Ct. 552 (2005), *cert. granted*; Davis v. Washington, 126 S. Ct. 2266, 2278-80 (2006).

[36] *Davis*, 126 S. Ct. at 2280.

[37] Davis v. Washington, 126 S. Ct. 552 (2005), *cert. granted*; Davis v. Washington, 126 S. Ct. 2266, 2270 (2006).

Crawford v. Washington.[38] In *Crawford*, the Court held the Confrontation Clause prohibits the use of "testimonial" statements that are not (or have not been) subject to cross-examination.[39] The Court did not, however, give a precise definition of "testimonial."[40] In *Davis*, the Court took a step in clarifying what sort of statements are testimonial by specifically addressing police interrogations.[41] It found that not all interrogations made by police would qualify as testimonial.[42] Instead, a court must objectively consider the reason and circumstances under which the statement was given to determine whether it is testimonial.[43] If the statement serves to request help in an ongoing emergency, as in McCottry's 911 call, then the statement is non-testimonial.[44] But if the statement is part of an investigation of possible past crimes, it would be considered testimonial regardless of the level of formality used in securing the statement.[45] Thus, after *Davis*, the courts will have to determine the primary purpose of the police interrogation before it can rule on whether the statement will be admissible as evidence under the Confrontation Clause.[46]

This note first discusses the background of the Confrontation Clause and how Confrontation Clause analysis evolved from a close relationship with hearsay rules to a complete separation from hearsay analysis in *Crawford*. The note will next discuss the "primary purpose test" articulated in *Davis* in determining which statements taken by police at the scene will be admissible as evidence and which will not. It will then review some issues with the test that will need further clarification by the Court, and it will also discuss the alternative "formality test" proposed by the dissent. Since both cases involved in *Davis* are rooted in domestic violence, the note will examine the dramatic effect the current doctrine will have on domestic violence cases, including difficulty in prosecuting the cases.[47] Finally, the note will explore how the forfeiture doctrine could remedy some of the problems in domestic violence cases where the victim does not testify as a result of the defendant's threats and intimidation.

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[38] Davis v. Washington, 126 S. Ct. 2266, 2273 (2006); Crawford v. Washington, 541 U.S. 36 (2004).

[39] *Crawford*, 541 U.S. at 68.

[40] *Id.* ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.").

[41] *Davis*, 126 S. Ct. at 2270.

[42] *Id.* at 2273-74.

[43] *Id.* at 2273-74, 2277.

[44] *Id.* at 2273-74, 2276-77.

[45] *Id.* at 2276.

[46] *Id.* at 2273-74.

[47] Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions after* Crawford, 20 CRIM. JUST. 24, 25 (2005). Reports from news agencies shortly after *Crawford* indicated prosecutors were forced to drop nearly fifty percent of domestic violence prosecutions since an estimated eighty percent of victims refused to cooperate. *Id.*

BACKGROUND

The right of the accused to confront the witnesses against him is one that has existed since the Roman era, but has evolved considerably over time.[48] England's early civil law system, for example, allowed judges to examine witnesses before trials in private without the defendant present and later admit the out-of-court examinations into the trial as evidence.[49] This practice later moved to the opposite extreme and prevented out-of-court statements from being admitted at all.[50] The American colonies also had questionable confrontation practices.[51] When the U.S. Constitution was ratified in 1789 without a provision to allow the accused to confront a witness against him, part of the ratification agreement included an understanding that a Bill of Rights would be added.[52] In 1791, the first Congress

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[48] Coy v. Iowa, 487 U.S. 1012, 1015 (1988). The Roman judicial system was adversarial, much like the United States, and the primary means of proving a case was through witness testimony. Frank R. Herrmann, S.J., & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 484 (1994). Although different social classes were sometimes afforded different treatment, one of the basic rights afforded all defendants was a right to confront a witness against them. *Id.* at 485. According to Roman Governor Festus, "[i]t is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." *Id.* at 482 (quoting *Acts of the Apostles* 25:16).

[49] *Crawford*, 541 U.S. at 43-44.

[50] *Id.* at 44-45. A change in England's civil law court system in the late 1600s generally excluding hearsay was due in part to the 1603 trial of Sir Walter Raleigh, one of England's great explorers and a hero, who was charged with treason for conspiring with Spain to overthrow King James. *Id.* at 44. Raleigh's alleged co-conspirator, Lord Cobham, testified in front of a "Privy Council" and later wrote a letter that implicated Raleigh in an effort for Cobham to try to save himself. *Id.* at 44; Alan Raphael, *When Can a Witness's Statements Be Admitted Into Evidence Without the Witness First Taking the Stand*, 6 PREVIEW 292 (2006). At Raleigh's trial, the court admitted Cobham's prior testimony and letter without Cobham's direct testimony. *Crawford*, 541 U.S. at 44. Raleigh protested that he did not have the opportunity to confront Cobham and that, although Cobham had lied in his prior testimony and letter, he would not lie to Raleigh's face. *Id.* Raleigh was convicted of treason and sentenced to death. *Id.*; Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388-89 (1959). After this tragedy, English statutes and judicial decisions reformed the laws, granting the "right of confrontation." *Crawford*, 541 U.S. at 44; Pollitt, 8 J. PUB. L. at 388. The English law was changed to require face-to-face testimony. Raphael, 6 PREVIEW at 292. The Court of the King's Bench later went so far as to rule that if a witness was not available for cross-examination, his testimony would not be admitted as evidence, even if the witness were dead. *Crawford*, 541 U.S. at 44 (citing King v. Paine, 5 Mod. 163 (1696)).

[51] *Crawford*, 541 U.S. at 47-48 (relating how in the eighteenth century, the Virginia Council objected to the Governor hearing testimony privately without giving the accused access to the witnesses); Pollitt, *supra* note 50, at 396-97 (noting that before the Revolution, colonial courts heard cases involving violations of the Stamp Act in which the courts questioned and disposed of witnesses in private judicial proceedings); *Crawford*, 541 U.S. at 44 (noting that many states adopted the right of confrontation in their state constitutions, although the federal constitution did not originally have this right); *Id.* (quoting R. Lee, *Letter IV by the Federal Farmer* (Oct. 15, 1787)) (relating criticism by a colonist that the proposed U.S. Constitution did not secure the right to cross-examine witnesses in front of the fact-finders).

[52] *Crawford*, 541 U.S. at 49; Pollitt, *supra* note 50, at 399-400.

kept its promise and passed the Bill of Rights which included the Confrontation Clause in the Sixth Amendment.[53] The Sixth Amendment reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[54]

Pre-Roberts *Era*

One of the first cases interpreting the Confrontation Clause, *Mattox v. United States*, was heard in 1895.[55] Two witnesses testified at an earlier trial concerning the same crime but died before the second.[56] In affirming the murder conviction, the Court held that allowing the reporter to read the deceased testimony from the earlier trial was proper.[57] The Court reasoned that the Confrontation Clause prevented evidence from entering a trial when the defendant was not allowed to cross-examine the witness, but since the defendant cross-examined the witnesses in the earlier trial, there was no constitutional violation.[58] The Court also acknowledged that face-to-face confrontation allowed the fact-finders to deter-

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[53] *Crawford*, 541 U.S. at 49, 53-54; Pollitt, *supra* note 50, at 399-400 (stating that the basic purpose of the Sixth Amendment was to ensure the state could not take certain rights from a person faced with criminal charges).

[54] U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 49-50 (2004) (relating that many early courts interpreted the Confrontation Clause to mean the accused should have the opportunity to confront a witness through cross-examination) (citing Johnston v. State, 10 Tenn. 58, 59 (1821)) (holding that prior opportunity to cross-examine and proof of death allows a deceased witness's testimony to be admitted as evidence); State v. Hill, 20 S.C.L. 607, 608-10 (S.C. 1835) (holding that a police administered deposition is not admissible if witness dies after deposition); Commonwealth v. Richards, 35 Mass. 434, 437 (1837) (noting that the exact words of a deceased witness's previous testimony must be used); Bostick v. State, 22 Tenn. 344, 345-46 (1842) (holding that opting not to cross-examine a witness but later introducing the deposition as evidence allows witness's deposition to be entered as rebutting testimony); Kendrick v. State, 29 Tenn. 479, 485-88 (1850) (holding that the defendant's prior opportunity to confront and cross-examine deceased witness allows evidence to be admitted); United States v. Macomb, 26 F. Cas. 1132, 1133 (C.C. Ill. 1851) (No. 15,702) (holding that testimony of a deceased witness allowed because defendant cross-examined the witness at initial hearing); State v. Houser, 26 Mo. 431, 435-36 (1858) (holding that absent defendant's wrongdoing prior depositions cannot be entered into evidence).

[55] Mattox v. United States, 156 U.S. 237 (1895); Laird Kirpatrick, Crawford: *A Look Backward, A Look Forward*, 20 CRIM. JUST. 6, 7 (2005).

> The Court stated that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. at 243. To grant the defendant's claim "would be carrying his constitutional protection to an unwarrantable extent" and "the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."

Mattox, 156 U.S. at 243; Kirkpatrick, 20 CRIM. JUST. at 7.

[56] *Mattox*, 156 U. S. at 240 (in the first trial the defendant was convicted but on appeal the case was reversed and remanded for a new trial).

[57] *Id.* at 242-44.

[58] *Id.* at 244.

mine the witness's credibility.[59] Since *Mattox*, the Court has required a showing that the witness is unavailable to testify before entering a previous statement into evidence.[60]

In 1965, following a period without Confrontation Clause disputes, the U.S. Supreme Court heard two Confrontation Clause cases in which it enforced the accused's fundamental right to have the opportunity to cross-examine a witness.[61] In *Pointer v. Texas*, the Court held the defendant's confrontation right was violated because he was not allowed to cross-examine the witness.[62] The Court held the right to a fair trial, through confrontation and cross-examination, was a fundamental right protected by the Constitution and was applicable to the states through the Fourteenth Amendment.[63] In the second case, *Douglas v. Alabama*, the Court held that Douglas' confrontation right was violated since the prosecutor read a statement from a person Douglas had no opportunity to cross-examine, and the jury could infer that since the witness would not testify, the statement was true.[64]

In 1968, the U.S. Supreme Court heard the cases of *Bruton v. United States* and *Barber v. Page*.[65] In *Bruton*, the Court ruled that Bruton's Sixth Amendment rights were violated since Bruton was not allowed to cross-examine the co-defendant in a joint trial.[66] The Court reasoned the jurors could not follow a jury instruction to disregard the co-defendant's incriminating statement, and the instruction alone was not enough to satisfy Bruton's confrontation right.[67] The Court compared the Sixth Amendment and the traditional hearsay rules.[68] The Confrontation

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[59] *Id.*

[60] Kirpatrick, *supra* note 55, at 7.

[61] Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

[62] *Pointer*, 380 U.S. at 401, 403, 405. The case involved a robbery victim who testified at a preliminary hearing in which the defendant was not represented by counsel. *Id.* at 401. The defendant made no attempt to cross-examine the witness. *Id.* At trial, the court allowed the transcript to be read rather than requiring the witness to testify. *Id.*

[63] *Pointer*, 380 U.S. at 403; U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); Adamson v. California, 332 U.S. 46, 70-72 (1947) (Black, J., dissenting) (majority chose to selectively incorporate the "Bill of Rights" instead of Justice Black's total incorporation approach.).

[64] *Douglas*, 380 U.S. at 416-19. The prosecutor read a police statement previously given by the accomplice because the accomplice had exercised his Fifth Amendment right to avoid self-incrimination during his testimony. *Id.* at 416.

[65] Bruton v. United States, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968).

[66] *Bruton*, 391 U.S. at 137. The co-defendant did not testify in a joint trial but the prosecution read a statement that implicated both Bruton and his co-defendant. *Id.*

[67] *Id.*

[68] *Id.* at 129.

Clause and hearsay rules "stem from the same roots," but the two are not the same.[69] Evidence may meet the rules of hearsay but not meet the Confrontation Clause.[70]

In *Barber*, the Court held that since the defendant did not have an opportunity to confront the witness through cross-examination in front of the jury, the defendant's confrontation right was violated.[71] This case made the requirement of the unavailability of a witness more stringent.[72] If a witness is in jail, he is not unavailable, and the prosecution must make a good-faith effort to produce the witness at trial.[73] If a witness is available for trial, a defendant has a right to confront the witness through cross-examination, which allows the jury to determine the witness's credibility.[74] Also, the right to cross-examine a witness is not waived just because the defendant's counsel does not cross-examine the witness at a preliminary hearing.[75]

The Court further explored the differences between availability of testimony and the importance of the testimony in the 1970 case of *California v. Green*.[76] The Court faced a situation where the defendant had an opportunity to cross-examine a witness, but the witness was evasive and kept changing his story.[77] The Court

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[69] Dutton v. Evans, 400 U.S. 74, 86 (1970).

[70] *Id.*

[71] Barber v. Page, 390 U.S. 719, 720-22, 725-26 (1968). A key witness was incarcerated less than three hundred miles away from the trial, and the State made no effort to have the witness testify. *Id.* at 720. Instead the court admitted evidence from a preliminary hearing in which the defense counsel chose not to cross-examine the witness. *Id.*

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

Id. at 725.

[72] *Id.* at 723-25.

[73] *Id.*

[74] Barber v. Page, 390 U.S. 719, 725-26 (1968).

[75] *Id.* at 725.

[76] California v. Green, 399 U.S. 149 (1970).

[77] *Green*, 399 U.S. at 151-52. This case involved a minor, named Porter, who was caught selling marijuana. *Id.* at 151. After being arrested for selling marijuana to an undercover police officer, Porter reported that Green had contacted him and asks him if he wanted to sell some "stuff" which Green personally delivered to Porter. *Id.* A week later at the preliminary hearing, Porter stated that Green was the supplier but he had not personally delivered the marijuana to Porter. *Id.* At trial two months later, Porter was uncertain how he had obtained the marijuana because he was on LSD. *Id.* at 152. When the prosecutor examined Porter at trial, he read Porter's preliminary hearing statements. *Id.* Porter evasively answered the prosecutor's questions, as well as the defendant's cross-examination, by claiming that although the preliminary hearing statements refreshed his memory,

found the defendant's right to confront the witness had been met.[78] It explained that, while "hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law."[79] Even though the reading of the minor witness's previous statements may have been questionable under the hearsay rules, it did not mean the Confrontation Clause had been violated.[80] If a witness was available but could not remember what happened, no Confrontation Clause violation exists, even if there had been a hearsay violation.[81]

Also in 1970, the Court heard *Dutton v. Evans* where the Court held the defendant's confrontation right was not violated since he had the opportunity to cross-examine each witness.[82] The Court also found the statement had an "indicia of reliability" because the statement was made spontaneously and against the co-conspirator's own interests.[83] The confrontation right does not bar all hearsay evidence at trial.[84] The Confrontation Clause was added to ensure the accused has the right to show the jury that the witness's statement is not true through confrontation.[85]

Next, the Court decided *Mancusi v. Stubbs* in which a witness had testified and been cross-examined at the first trial and then left the country permanently.[86] The Court combined requirements from previous cases by holding that the testimony from the first trial could be used in the second trial upon a showing of the witness's unavailability, the testimony's reliability, and an opportunity for the defendant to cross-examine.[87] The Court admitted the previous testimony because the jury still had the opportunity to assess the statement's credibility.[88]

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he still was not sure of the details of what had happened since he was taking drugs at the time of the incident. *Id.*

[78] *Green*, 399 U.S. at 155.

[79] *Id.*

[80] *Id.* at 156.

[81] *Id.* at 158. This case shows how the Court viewed hearsay and confrontation rights as two separate doctrines. *Id.* at 155-56.

[82] Dutton v. Evans, 400 U.S. 74, 78 (1970). While in prison, Evans's co-conspirator, Williams, commented to a fellow inmate that Williams would not be in prison if it were not for Evans. *Id.* at 77. The fellow inmate testified at Evans' trial and was cross-examined by Evans' counsel. *Id.*

[83] *Id.* at 88-89. The Court started using the "indicia of reliability" to show trustworthiness of a statement. *Id.*

[84] *Id.* at 80.

[85] *Id.* at 89.

[86] Mancusi v. Stubbs, 408 U.S. 204, 208-09 (1972).

[87] *Id.* at 213, 216.

[88] *Id.* at 216.

In 1975, Congress implemented the Federal Rules of Evidence which codified traditional hearsay rules and exceptions.[89] In doing so, Congress wanted to ensure evidence was used in a way to ascertain the truth.[90] However, even if a statement satisfied the Federal Rules of Evidence, the testimony was still not admissible unless the Confrontation Clause requirements were met.[91] At this point, the Confrontation Clause required that the witness be unavailable and the defendant had an opportunity to cross-examine.[92]

The Roberts *Era*

In 1980, the U.S. Supreme Court decided the landmark case of *Ohio v. Roberts*, which changed previously-held notions about the Sixth Amendment.[93] The Court held, as it had in the past, that entering preliminary hearing testimony at trial did not violate the defendant's Sixth Amendment confrontation rights since the defendant's counsel was allowed to question the witness at the preliminary hearing, and the witness was unavailable for trial.[94]

The Court found the Confrontation Clause restricts admissible hearsay in two ways.[95] The first requirement to allow hearsay was called the "rule of necessity," established in *Mancusi* and *Barber*.[96] That is, if the defendant had a prior opportunity to cross-examine the witness, then the prosecution must show that the witness is unavailable in order to admit the prior testimony as evidence.[97] The second requirement, a major change, came when the Court held that once a witness is shown to be unavailable, the prosecutor must prove the statement is trustworthy or reliable, which will allow the fact-finder to determine the state-

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[89] *See* FED. R. EVID. 102; FED. R. EVID. 801-807. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* at 801(c). H.R. rep. no. 94-355, at 1095 (1975) (This bill "[w]ill put into the Federal Rules of Evidence the prevailing Federal practice. . . . It will simply provide that out-of-court identifications are admissible if they meet constitutional requirements.").

[90] FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

[91] Dutton v. Evans, 400 U.S. 74, 80 (1970).

[92] Mancusi v. Stubbs, 408 U.S. 204, 208-13 (1972).

[93] Ohio v. Roberts, 448 U.S. 56, 65-66 (1980). *Roberts* involved a witness in a forgery case who had become unavailable after testifying and being cross-examined at a preliminary hearing. *Id.* at 58-59. The witness, Anita, was the victim's daughter. *Id.* at 58. Despite the prosecution's five subpoenas, the state was unable to locate Anita for trial. *Id.* at 59.

[94] *Id.* at 70, 75.

[95] *Id.* at 65.

[96] Mancusi v. Stubbs, 408 U.S. 204, 212-13 (1972); Barber v. Page, 390 U.S. 719, 722 (1968).

[97] *Roberts*, 448 U.S. at 65.

ment's credibility.[98] The prosecutor can prove reliability by showing the evidence falls into "certain hearsay exceptions [that] rest upon such solid foundations that admission of virtually any evidence within them comports the 'substance of the constitutional protection.'"[99] The Court agreed with *Dutton* and *Green* that both the Confrontation Clause and hearsay rules protect the same rights.[100] Since some hearsay rules are so firmly established, meeting the hearsay rule also means the constitutional confrontation standard is met.[101]

After *Roberts*, the Court's decisions continued to weaken the test of unavailability and reliability.[102] For example, in *United States v. Inadi*, the Court held that co-conspirators' recorded statements provided a weaker form of evidence than live testimony.[103] Still, the tape-recorded phone calls could be admitted into evidence.[104] The Court held that the Confrontation Clause did not require proof that the co-conspirator was unavailable for trial as long as the statements met the requirements under the Federal Rules of Evidence regarding hearsay.[105] In effect, this case demonstrated the Court's direction that in order for evidence to be admitted, it only needed to meet the hearsay requirements and not additional Confrontation Clause requirements.[106]

Similarly in *Bourjaily v. United States*, the trial court admitted a co-conspirator's taped telephone statements.[107] Since the requirements under the Confrontation Clause and the Federal Rules of Evidence were identical, the Court held that if the statements met the Federal Rules' requirements, there was no need to determine the reliability requirement under the Confrontation Clause.[108]

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[98] *Id.* at 65-66.

[99] *Id.* at 66 (quoting Mattox v. United States 156 U.S. 237, 244 (1895)).

[100] *Roberts*, 448 U.S. at 66 (quoting California v. Green, 399 U.S. 149, 155 (1970); Dutton v. Evans, 400 U.S. 74, 86 (1970)).

[101] *Roberts*, 448 U.S. at 66 (quoting *Mattox*, 156 U.S. at 244) ("[C]ertain hearsay exceptions rest on such solid foundations that admission of virtually any evidence within them comports with the 'substance of constitutional protection.'"). The dissent pointed out that although the statement may have been shown to be reliable, the state must first meet the "threshold requirement" of the witness's unavailability. *Id.* at 78-79 (Brennan, J., dissenting). The state is required to show that it is impossible for the witness to testify at trial which the dissenters did not agree was met. *Id.* at 79-80 (Brennan, J., dissenting).

[102] Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 757 (2005).

[103] *Id.*; United States v. Inadi, 475 U.S. 387, 394-95 (1986).

[104] *Inadi*, 475 U.S. at 390, 400.

[105] *Id.* at 394-95 (holding the statement must be made in the course and furtherance of the conspiracy as required by the hearsay rule); FED. R. EVID. 801(d)(2)(E).

[106] *Inadi*, 475 U.S. at 394-95.

[107] Bourjaily v. United States, 483 U.S. 171, 174 (1987).

[108] *Id.* at 181-82.

During the *Roberts* era, the Court only disallowed two types of testimony as not within "firmly rooted" hearsay exceptions.[109] The first type of testimony came from accomplices' confessions.[110] The Court found these statements unreliable because they were often made to implicate the other person while trying to save the declarant.[111] The second type of testimony came in child abuse cases.[112] Although prosecutors used different methods to try to allow the defendant the right to confront the witness while still trying to protect the young victim, the Court found that some methods violated the Confrontation Clause.[113] In *Coy v. Iowa*, for example, the Court held the defendant's Sixth Amendment rights were violated because a screen placed between the witness and the defendant prevented him from confronting the witness face-to-face.[114] In *Maryland v. Craig*, the Court departed from previous rulings by holding that although face-to-face confrontation is preferred, it is not an absolute Sixth Amendment right.[115] Due to the trauma caused to the child witness, the Court held that it was permissible under the Sixth Amendment to allow the child to testify by one-way, closed-circuit television upon the showing by the state of the trauma that would be caused to the witness by interaction with the defendant.[116] Then in *Idaho v. Wright*, the Court found the statements made by the two-year-old to a doctor did not have sufficient indicia of reliability and therefore the defendant's Sixth Amendment right to confront the witness was violated.[117] *Wright* helped solidify the "indicia of reliability" requirement and also demonstrated that the Sixth Amendment is only violated if a hearsay exception is not met.[118]

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[109] *See* Lininger, *supra* note 102, at 758.

[110] *Id.*

[111] Lilly v. Virginia, 527 U.S. 116, 130-31 (1999). Three men committed several robberies, then carjacked a car and killed the driver. *Id.* at 120. One man told the police that he had been involved in the robberies but one of the other men had carjacked the car and killed the driver. *Id.* at 120-22. The trial court allowed the statement but the U.S. Supreme Court held the statements were not reliable. *Id.* at 121-22, 130-31.

[112] *See* Lininger, *supra* note 102, at 758.

[113] *See* Coy v. Iowa, 487 U.S. 1012, 1020 (1988); Maryland v. Craig, 497 U.S. 836, 840-42, 855, 860 (1990); Idaho v. Wright, 497 U.S. 805, 826-27 (1990).

[114] Coy v. Iowa, 487 U.S. 1012, 1017-18 (1988). The Court reasoned that the defendant has a right of face-to-face confrontation in addition to the right to cross-examine. *Id.* at 1020-22.

[115] Maryland v. Craig, 497 U.S. 836, 857-58 (1990). The Court remanded the case and held if there was no showing of possible trauma to the victim, it would violate the defendant's Confrontation rights to allow the witness to testify by closed-circuit television. *Id.* at 860.

[116] *Id.* at 840-42.

[117] Idaho v. Wright, 497 U.S. 805, 822, 827 (1990). Two sisters, one 5½ and one 2½, told their father's girlfriend that their mother's boyfriend had sexually assaulted them with the help of their mother. *Id.* at 808-09. After being reported to police, the girls were examined and interviewed by a doctor, but he did not properly record the interview. *Id.* at 809-11. At trial, the judge determined that the then three-year-old could not testify, so the doctor testified about the substance of the interview. *Id.* at 809, 816, 818. Both the mother and the boyfriend were convicted of two counts of lewd conduct with a minor. *Id.* at 812.

[118] *See* Lininger, *supra* note 102, at 758.

The Crawford *Era*

In 2004, the U.S. Supreme Court reinvented the Confrontation Clause when it decided *Crawford v. Washington*.[119] *Crawford* overruled the guidelines set forth in *Ohio v. Roberts* concerning testimonial statements.[120] The Court in *Crawford* found the Confrontation Clause required an opportunity to cross-examine, regardless of the showing of the statement's reliability.[121] The *Crawford* ruling

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[119] Crawford v. Washington, 541 U.S. 36, 61 (2004). In *Crawford*, Kenneth Lee allegedly attempted to rape Sylvia Crawford, so her husband, Michael Crawford, went to Lee's house to confront him. *Id.* at 38. Michael ended up stabbing Lee, and the police eventually arrested Michael for attempted murder. *Id.* While in police custody, the police read both Michael and Sylvia their *Miranda* warnings and then interrogated the couple separately. *Id.*; Miranda v. Arizona, 384 U.S. 436, 479 (1966). Michael and Sylvia's statements were generally consistent, although Sylvia contradicted Michael by saying that Lee did not reach for a weapon. *Crawford*, 541 U.S. at 38-40. As evidence at Michael's trial, the prosecutor entered Sylvia's tape-recorded statement to the police under the State's "hearsay exception against penal interest." *Id.* at 40; WASH. R. EVID. 804(b)(3) (identical to Federal Rule of Evidence 804(b)(3)). Washington State marital privilege law barred Sylvia from testifying, though it allowed a spouse's out-of-court statement to be admitted under a hearsay exception. *Crawford*, 541 U.S. at 40; State v. Burden, 841 P.2d 758, 760 (1992); WASH. REV. CODE § 5.60.060(1) (1994) ("A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage."). Michael refused to waive the privilege to allow his wife to testify and counsel to cross-examine her. *Crawford*, 541 U.S. at 40. The trial court admitted the statement into evidence despite Michael's Confrontation Clause objections, and the jury convicted Michael of assault. *Id.* at 40-41. The Washington Court of Appeals reversed the conviction because, in applying a "nine-factor test," it felt Sylvia's statement was not reliable since it contradicted a prior verbal statement, the statement resulted from specific police questioning, and "she admitted she had shut her eyes during the stabbing." *Id.* at 41; State v. Crawford, 54 P.3d 656, 661 n.3 (2002); State v. Rice, 844 P.2d 416, 425 (1993). The nine factors were:

> (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

State v. Crawford, 54 P.3d 656, 661 n.3. The Washington Supreme Court reversed even though it found the statement did not fall under the hearsay exception. Washington v. Crawford, 54 P. 3d 656, 664 (Wash. 2002). Unlike the court of appeals, the Washington Supreme Court held Sylvia's statement was, in fact, reliable. *Id.* The U.S. Supreme Court, however, granted certiorari and reversed the Washington Supreme Court's decision. Crawford v. Washington, 540 U.S. 964 (2003); *Crawford*, 541 U.S. at 69.

[120] *Id.* at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts* . . . .").

[121] *Id.* at 68-69. Before *Crawford*, if a statement qualified under the hearsay exception, it met the confrontation requirement. Idaho v. Wright, 497 U.S. 805, 813-14 (1990).

required separate confrontation and hearsay analyses.[122] Evidence that previously would have been admitted without concern was now inadmissible.[123]

The Court held that playing the recorded statement at trial violated the defendant's Sixth Amendment right to be confronted by the witness against him because the statement was testimonial, and the defendant did not have an opportunity to cross-examine the witness.[124] In order to meet Confrontation Clause requirements, the statement must be testimonial, the witness must be unavailable, and the defendant must have had a prior opportunity to cross-examine the witness.[125]

In the opinion written by Justice Scalia, the Court explained that the history of the Sixth Amendment supported its ruling.[126] The Confrontation Clause was written to prevent the use of "ex parte examinations of evidence against the accused."[127] The Court found the Sixth Amendment protects a defendant against witnesses who "bear testimony."[128] Although the Court did not specifically define the term "testimonial," it did give examples, stating that "[a]ffidavits, depositions, prior testimony, or confessions" are testimonial.[129] The Court also found that "[s]tatements taken by police officers in the course of interrogations are also testimonial, under even a narrow standard."[130]

Crawford illustrated some key changes in Confrontation Clause jurisprudence.[131] The Court held that hearsay and confrontation rights are two distinct issues.[132] Also, by holding that only testimonial statements invoke confrontation issues, it created separate rules for testimonial and non-testimonial statements.[133] For a testimonial statement to be admitted, the witness must be unavailable and the defendant must have had a prior opportunity to cross-examine the witness.[134]

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[122] Lininger, *supra* note 102, at 765.

[123] *Id.* at 768.

[124] *Crawford*, 541 U.S. at 68.

[125] *Id.* at 53-54.

[126] *Id.* at 50.

[127] *Id.*

[128] *Id.* at 51. The Court used an 1828 edition of Webster's *An American Dictionary of the English Language* in defining testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.*

[129] *Crawford*, 541 U.S. at 52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

[130] *Crawford*, 541 U.S. at 52.

[131] *Id.* at 53.

[132] *Id.* at 53; Ohio v. Roberts, 448 U.S. 56, 66 (1980) (holding that some hearsay rules were so established that meeting the hearsay requirement also meets the confrontation requirement).

[133] *Crawford*, 541 U.S at 59, 68.

[134] *Id.* at 59.

For a non-testimonial statement, states are allowed some flexibility, as shown in *Roberts*.[135] The key in many cases could be in the definition of the statement as testimonial or non-testimonial.[136] Although the Court gave a few examples of what could be a testimonial statement, it became clear that more clarification was needed.[137]

After *Crawford*, Wyoming courts responded much like other state courts.[138] The Wyoming case against Michael Sarr demonstrates the different approaches used before and after *Crawford*.[139] The State charged Sarr with seven counts of aggravated assault and battery in February of 2001 for alleged attacks against Ann Wing.[140] The charges were supported in part by Wing's two tape-recorded statements to police and the police search of the home for evidence.[141] Wing died shortly after making the statements.[142] After being convicted of five counts of assault and battery, Sarr appealed to the Wyoming Supreme Court, which decided the case in March of 2003.[143] The court found the State secured the convictions based solely on Wing's police interviews.[144] The evidence conformed with the Wyoming Rule of Evidence 804(b)(6), but this rule was not a "firmly rooted" hearsay exception.[145] In considering the totality of the circumstances, the Wyoming Supreme Court decided that the statement was trustworthy, therefore, the trial court properly admitted the statement.[146] Sarr appealed to the U.S.

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[135] *Crawford*, 541 U.S. at 68; *Roberts*, 448 U.S. at 66 (holding that requirements of unavailability and "indicia of reliability" must be shown for a statement to be admitted as evidence).

[136] Richard D. Friedman, *Crawford Surprises: Mostly Unpleasant*, 20 CRIM. JUST. 36, 36-37 (2005).

[137] *Id.* at 36; *see Crawford*, 541 U.S. at 51.

[138] *See* Sarr v. Wyoming, 113 P.3d 1051 (Wyo. 2005) [hereinafter *Sarr II*]; Vigil v. Wyoming, 98 P.3d 172 (Wyo. 2004) (reversing conviction when co-conspirator's previous statement to police admitted into evidence without any opportunity for defendant to cross-examine); Wyoming v. Sarr, 65 P.3d 711 (Wyo. 2003) [hereinafter *Sarr I*]; Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v. Washington, 79 S. CAL. L. REV. 213, 216-18 (2005).

[139] *Sarr II*, 113 P.3d at 1051.

[140] *Sarr I*, 65 P.3d at 714-15.

[141] *Id.* at 714. Sarr and Wing's intimate relationship allegedly included abusive acts such as making her stand in the corner, hitting her with a "coup stick," throwing things at her, throwing her to the ground, striking her with a vehicle, repeatedly bashing her head against the dining room table, striking her with a pistol belt full of shells, threatening to kill her with a firearm, and kicking her in the head while wearing heavy winter boots. *Id.* at 714-15.

[142] *Id.* at 715 (noting that Wing drowned in the bathtub and the death was unrelated to the charges against Sarr).

[143] *Id.* at 713, 715.

[144] *Id.* at 715.

[145] *Sarr I*, 65 P.3d at 715-17; WYO. R. EVID. 804(b)(6).

[146] *Id.* at 716, 718. The Wyoming Supreme Court did find one count lacked sufficient evidence of injury. *Id.* at 719.

Supreme Court, which remanded the case to be considered in light of *Crawford*.[147] In June 2005, the Wyoming Supreme Court reconsidered the same facts and reversed two of the convictions it had previously upheld.[148] The court found that Wing's statements were testimonial and Sarr had not been given the opportunity to cross-examine the witness as *Crawford* required.[149]

PRINCIPAL CASE

While *Crawford* held the confrontation requirement applied to testimonial statements, *Davis* addressed the testimonial nature of police interrogation.[150] *Crawford* stated police interrogations were subject to the Confrontation Clause because the statements given to police would be testimonial.[151] The issue presented to the Court allowed it to determine when a statement made to law enforcement personnel would be testimonial and thus "subject to the requirements of the Sixth Amendment's Confrontation Clause."[152] The Court refined this by differentiating between testimonial and non-testimonial statements in police interrogations.[153]

Davis clarified the testimonial nature of the two most common types of police interrogations: 911 calls and questioning at the scene of a crime.[154] The first case involved a 911 call made to police by Michelle McCottry.[155] The second case involved a police interrogation at the scene of a domestic dispute located in Hershel and Amy Hammon's home.[156]

The Court began by reiterating that the Confrontation Clause gives a person a right to confront the witness against him.[157] The basis of the confrontation right depends on the declarant being a witness.[158] Only a person who makes a testimonial statement is a witness.[159]

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[147] Wyoming v. Sarr, 125 S. Ct. 297 (2004).

[148] *Sarr II*, 113 P.3d at 1052.

[149] *Id.* at 1053. The court was not asked to determine the testimonial nature of the statement. *Id.* at 1053.

[150] Crawford v. Washington, 541 U.S. 36, 51 (2004); Davis v. Washington, 126 S. Ct. 2266 (2006).

[151] *Crawford*, 541 U.S. at 52.

[152] *Davis*, 126 S. Ct. at 2270.

[153] *Id.* at 2273-74.

[154] State v. Davis, 111 P.3d 844, 846 (Wash. 2005); Hammon v. State, 829 N.E.2d 444, 446 (Ind. 2005).

[155] *Davis*, 111 P.3d at 846; *See supra* notes 1-18 and accompanying text.

[156] Hammon v. State, 829 N.E.2d 444, 446 (Ind. 2005); *See supra* notes 18-36 and accompanying text.

[157] Davis v. Washington, 126 S. Ct. 2266, 2273 (2006).

[158] *Id.*

[159] *Id.*

The Court held that if a statement is made in an attempt to receive help from the police in an emergency, it is non-testimonial.[160] It stated that a non-testimonial statement is one "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[161] Therefore, the declarant in an emergency encounter with police is not considered a witness within the meaning of the Sixth Amendment Confrontation Clause.[162] The Court unanimously found that McCottry's statement identifying Davis as her attacker was asking for help in an "ongoing emergency," because she described the "events as they were actually happening, rather than 'describ[ing] past events.'"[163]

A statement is testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[164] Since the Confrontation Clause applies only to declarants who bear testimony, the testimonial nature of the statement causes the declarant to become a witness within the meaning of the Confrontation Clause.[165]

The Court was focusing on police interrogations and began by categorizing police interrogations to include interrogations that take place at the scene of an incident as well as 911 calls.[166] In *Crawford*, the Court found that police interrogations were testimonial.[167] But in *Davis*, the Court differentiated the testimonial nature of statements that resulted in different types of situations where police interrogations occur.[168] The initial interrogation during a 911 call is generally to determine what the situation is and what type of police assistance will be needed.[169] The purpose of the 911 operator's interrogation is not to determine past events, therefore, it will generally be non-testimonial.[170]

The Court also found an interrogation may begin as non-testimonial and progress into a testimonial statement once the emergency has ended.[171] The

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[160] *Id.* at 2273, 2277.

[161] *Id.* at 2273.

[162] *Davis*, 126 S. Ct. at 2273.

[163] *Id.*

[164] *Id.* at 2273-74 (quoting Lilly v. Virginia, 527 U.S. 116, 137 (1999)).

[165] *Id.* at 2273.

[166] *Id.* at 2274 n.2.

[167] Crawford v. Washington, 541 U.S. 36, 52 (2004).

[168] *Davis*, 126 S. Ct. at 2273-74.

[169] *Id.* at 2276, 2279.

[170] *Id.* at 2279.

[171] *Id.* at 2277. The Court explained:

> This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme

Court applied this standard by comparing McCottry and Sylvia Crawford's interrogations.[172] Sylvia's interrogation happened in the police station where she gave answers that were recorded by an attending police officer.[173] In contrast, the 911 operator interrogated McCottry while she remained in the place of the attack.[174] She frantically answered questions in a place where she was unsafe, unprotected, and in immediate danger.[175] She described the events as they were occurring instead of having occurred in the past.[176] The Court found she was not testifying as a witness would under direct examination.[177] Instead, McCottry was seeking aid from police.[178] So admitting her statement did not violate Davis's confrontation rights.[179]

In reversing and remanding Hershel's conviction by an eight-to-one vote, the Court reasoned that Amy's affidavit was testimonial, and a prior opportunity to cross-examine must be afforded Hershel in order to satisfy the Confrontation Clause requirements.[180] The testimonial nature of Amy's statement derived from the fact she was describing past events as opposed to an ongoing emergency.[181] The Court, as it did in *Davis*, compared the interrogations of Amy Hammon and Sylvia Crawford and found the interrogations to be similar.[182] The primary purpose of both interrogations was to prove past conduct.[183] Both interrogations took place after the event or emergency had ended, while they were separated from their husbands, and in the presence of police.[184] The Court did acknowledge

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> Court put it, "evolve into testimonial statements," once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*.

Id.

[172] *Id.* at 2276-77.

[173] Davis v. Washington, 126 S. Ct. 2266, 2276 (2006).

[174] *Id.* at 2276.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Davis*, 126 S. Ct. at 2276-77 (2006).

[179] *Id.* at 2277-78.

[180] *Id.* at 2278.

[181] *Id.*

[182] *Id.*

[183] *Davis*, 126 S. Ct. at 2278.

[184] *Id.*

the difference in formality between the two situations.[185] Sylvia's interrogation took place in the police station after she had been read her *Miranda* rights, but Amy's interrogation took place in her living room with no *Miranda* warning.[186] The Court found the level of formality may strengthen the testimonial claim regarding a statement, but the formality is not required.[187]

While concurring with the majority in upholding the *Davis* conviction, Justice Thomas dissented with respect to the reversal of the conviction in the *Hammon* case.[188] He agreed with the majority that the history of the Confrontation Clause supports the definition of a witness and that only a witness can bear testimony.[189] To be considered as a witness, however, a level of formality should be required.[190] In *Crawford*, the police read the *Miranda* warnings and then took Sylvia's statements while she was in police custody.[191] That level of formality alerted the witness to the importance of her statements.[192]

Justice Thomas also claimed the articulated primary purpose test "yields no predictable results to police officers and prosecutors attempting to comply with the law."[193] The primary purpose of law enforcement is not always singular or clear.[194] A law enforcement officer generally has the purposes of responding to the emergency and gathering evidence.[195] Rather than the police in the field, the courts will be charged with determining the officer's actual purpose.[196]

Thus, Justice Thomas advocated that neither the 911 call in *Davis* nor the affidavit in *Hammon* would be testimonial under the correct approach.[197] Thomas reasoned that the lack of formality and the inconsistency with the purpose of the Confrontation Clause furthered the conclusion that did not apply to either interrogation.[198] He argued that the new standards are "neither workable nor a targeted attempt to reach the abuses forbidden by the Clause."[199] The standard is over-

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[185] *Id.*

[186] *Id.* at 2278; Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[187] *Davis*, 126 S. Ct. at 2278.

[188] *Id.* at 2285 (Thomas, J., dissenting).

[189] *Id.* at 2282 (Thomas, J., dissenting).

[190] *Id.* at 2282-83 (Thomas, J., dissenting).

[191] *Id.* at 2282 (Thomas, J., dissenting); Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[192] *Davis*, 126 S. Ct. at 2282-83 (Thomas, J., dissenting).

[193] *Id.* at 2283 (Thomas, J., dissenting).

[194] *Id.* (Thomas, J., dissenting).

[195] *Id.* (Thomas, J., dissenting).

[196] *Id.* at 2284 (Thomas, J., dissenting).

[197] *Davis*, 126 S. Ct. at 2284 (Thomas, J., dissenting).

[198] *Id.* at 2284 (Thomas, J., dissenting).

[199] *Id.* at 2285 (Thomas, J., dissenting).

inclusive since the Confrontation Clause was never meant to cover informal police interrogations whether it occurred on the phone or at the scene.[200] Furthermore, he argued that the majority's apprehension that the right will be evaded if it only applies to formal statements can be remedied by the court controlling the use of evidence that is entered by the prosecution as a way of "circumventing the literal right of confrontation."[201]

The Court rejected the "formality test" proposed by Justice Thomas although he argued it might clarify when testimony is actually taken.[202] Justice Thomas argued the history of the Confrontation Clause and the past cases do not support the majority's ruling.[203] The "formality test" would require a formalized statement "[s]uch as affidavits, depositions, prior testimony, or confessions" in order to qualify for protection under the Confrontation Clause.[204] Statements to police that are not formalized with *Miranda* warnings or in a formal setting would not qualify.[205] Since the statements were not formalized by *Miranda* warnings in either case, the statements would not qualify as testimony or invoke the Confrontation Clause. They simply lack the formal nature required for testimony that lets witnesses know they are giving testimony.[206]

ANALYSIS

In *Davis*, the Court considered two different tests for determining whether a statement made by a declarant during police interrogations was testimonial or non-testimonial: The "primary purpose test," accepted by the majority, and the "formality test," proposed by Justice Thomas in his dissent.[207] Both tests have strengths and weaknesses and will shape domestic violence cases in different ways. Due to the many domestic violence cases, prosecutors, attorneys, and courts need an effective way to handle these cases. Confrontation becomes an important issue in domestic violence cases. If a victim's statement to police requires the victim to later testify, many domestic violence offenses will be difficult to prosecute if the victim refuses to cooperate.

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[200] *Id.* at 2283 (Thomas, J., dissenting).

[201] *Id.* at 2283 (Thomas, J., dissenting).

[202] *Davis*, 126 S. Ct. at 2282-84 (Thomas, J., dissenting).

[203] *Id.* at 2281 (Thomas, J., dissenting).

[204] *Id.* at 2282 (Thomas, J. dissenting); White v. Illinois, 502 U.S. 346, 365 (1992).

[205] *Davis*, 126 S. Ct. at 2282-83 (Thomas, J. dissenting); Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[206] *Davis*, 126 S. Ct. at 2282 (Thomas, J., dissenting).

[207] *Id.* at 2273-74; *see also id.* at 2282-83 (Thomas, J., dissenting).

Comparing the Primary Purpose Test with the Formality Test

The majority of the Court adopted the "primary purpose test" to determine if statements made during police interrogations should be considered testimonial or non-testimonial.[208] This objective test requires a court to determine whether the police interrogator's primary purpose was made to collect evidence of a past criminal act to be used later for prosecution or to aid in an emergency.[209] To determine if a statement is testimonial, a court may consider facts indicating formality in the gathering of the statement, the surrounding circumstances of safety or emergency, and the method of recording the statement.[210]

A strength the "primary purpose test" affords is a definition of what is and is not testimonial.[211] Although *Crawford* previously differentiated between testimonial and non-testimonial statements, it articulated only a broad guideline.[212] The "primary purpose test" provides a more detailed analysis to be applied and allows for an objective determination by the court of the circumstances surrounding the statement.[213] The Court's use of objective tests is favorable because it avoids the problem of courts having to try to figure out individuals' thoughts.[214]

The disadvantage of the "primary purpose test" is that it may lead to further uncertainty in its effective resolution of the confrontation issues.[215] The *Davis* Court adopted a standard defining "testimonial" that may lead to unpredictability.[216] For example, unpredictability may arise in defining when the emergency

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[208] *Id.* at 2273-74; Michael H. Graham, *The* Davis *Narrowing of* Crawford*: Is the Primary Purpose Test of* Davis *Jurisprudentially "Sound," "Workable," and "Predictable?"*, 42 NO. 5 CRIM. L. BULL. 4 (2006).

[209] *Davis*, 126 S. Ct. at 2273-74, 2277.

[210] *See id.* at 2276-77.

[211] *Id.* at 2273-74.

[212] Crawford v. Washington, 541 U.S. 36, 59, 68 (2004).

[213] *Davis*, 126 S. Ct. at 2273-74; Andrew C. Fine, *Refining* Crawford: *The Confrontation Clause After* Davis v. Washington *and* Hammon v. Indiana, 105 MICH. L. REV. FIRST IMPRESSIONS 11, 12 (2006), *at* http://www.michiganlawreview.org/firstimpressions/vol105/fine.pdf (last visited March 1, 2007).

[214] *See* Whren v. United States, 517 U.S. 806, 812-13 (1996). A plainclothes police officer arrested the defendant after stopping the vehicle for a minor traffic violation and then discovering drugs in the car. *Id.* at 808-09. The issue in the case hinged on whether the police officer's subjective thoughts should be considered. *Id.* at 808. The Court found that the lower court was correct in looking at what a reasonable officer in the situation would have done. *Id.* at 813, 819.

[215] *Davis*, 126 S. Ct. at 2284 (Thomas, J., dissenting).

[216] Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach But Not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16, 18 (2006) *at* http://www.michiganlawreview.org/firstimpressions/vol105/giffin.pdf (last visited March 1, 2007); *Davis*, 126 S. Ct. 2283 (Thomas, J., dissenting). The *Crawford* Court criticized *Roberts* for creating precisely the same unpredictability. Lininger, *supra* note 102, at 763-64; Griffin, 105 MICH. L. REV. FIRST IMPRESSIONS at 18.

has ended, given that a statement's timing might affect its primary purpose.[217] An interrogation that starts as a non-testimonial request for assistance can "evolve into [a] testimonial statement" once the emergency assistance is rendered or the emergency has ended.[218] The fine line can mean the difference between key evidence being admitted or not.[219] For example, when McCottry told the 911 operator Davis had left the house, the statement changed from non-testimonial to testimonial because the emergency had ended.[220]

Although McCottry's case seemed obvious, difficulty may arise in deciding when the emergency ended in other situations since part of the interrogation could be testimonial and part could be non-testimonial.[221] If the emergency ends when an alleged abuser leaves the scene, the point when the caller informs the 911 operator that the alleged abuser has left the scene may affect the testimonial nature of the statement.[222] In *Hammon*, the immediate emergency was over when the police arrived, but an argument could be made as to when the emergency really ends in domestic dispute situations.[223] A judge could make a determination about the level of violence and the possibility that, although the initial incident may have ended, there is still an emergency.[224] Leaving such decisions to an individual judge may lead to inconsistencies in applying the standard.[225]

Another source of uncertainty may arise since the new test requires courts to objectively determine, from the circumstances, law enforcement's primary motive for the interrogation.[226] Although the test appears to be logical, it is a legal fiction.[227] An officer usually has many motives including ensuring the safety of the caller, protecting the officer's own safety, gathering evidence, and determining if

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[217] *Davis*, 126 S. Ct. at 2284 (Thomas, J., dissenting).

[218] *Id.* at 2277 (citing *Hammon*, 829 N.E. 2d at 457).

[219] *See Davis*, 126 S. Ct. at 2277.

[220] *Davis*, 126 S. Ct. at 2277.

[221] Joan S. Meier, Davis/Hammon, *Domestic Violence, and The Supreme Court: The Case for Cautious Optimism*, 105 MICH. L. REV. FIRST IMPRESSIONS 22, 26 (2006), *at* http://www.michiganlawreview.org/firstimpressions/vol105/meier.pdf (last visited March 1, 2007); Fine, *supra* note 213, at 12.

[222] *Davis*, 126 S. Ct. at 2277. Because the objective view of the police interrogator is what is important, if the reasonable 911 operator believes there is an emergency then the statement would be non-testimonial. *Id.*; Geetanjli Malhorta, Note, *Resolving the Ambiguity behind the Bright-Line Rule: The Effect of* Crawford v. Washington *on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U. ILL. L. REV. 205, 214 (2006).

[223] Meier, *supra* note 221, at 26.

[224] *Id.*

[225] *Id.*

[226] *Davis*, 126 S. Ct. at 2273-74; Fine, *supra* note 213, at 12.

[227] Fine, *supra* note 213, at 12-13; *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting); Meier, *supra* note 221, at 25.

criminal activity has occurred.[228] Since the police officer may have more than one purpose, the primary one may be difficult to determine, leading to unpredictable rulings by the courts.[229] This unpredictability could cause difficulty for prosecutors in determining charges to bring, and for law enforcement officers in knowing how to respond and record the events through statements.[230]

Further uncertainty may arise from the requirement that the courts consider the police officer's motivations without considering the speaker's motivation or reasonable expectations.[231] Consideration of the police officer's motivation will lead to different results than consideration of the speaker's motivation.[232] A speaker in a domestic violence situation may have the primary purpose of obtaining protection with little thought given to future prosecution.[233] But prosecution may be the police officer's primary motivation.[234] If the purpose of the Confrontation Clause is to prevent governmental abuses, as the majority found, the intent of the person giving the statement should be considered instead of the police officer's intent.[235] In a footnote to the majority opinion, the Court recognized that the intent of the person giving the statement should be considered: it is the "[d]eclarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."[236] But the "primary purpose test" does not consider the declarant's intent in making the statement.[237] This inconsistency caused confusion in a ruling by the West Virginia Supreme Court shortly after *Davis*.[238] The court held that it should "focus more upon the witness' statement, and less upon any interrogator's questions."[239]

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[228] *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting); Fine, *supra* note 213, at 12-13; Meier, *supra* note 221, at 25.

[229] *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting); Griffin, *supra* note 216, at 18.

[230] *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting).

[231] Fine, *supra* note 213, at 12.

[232] *Id.*; *see also* Meier, *supra* note 221, at 25.

[233] Meier, *supra* note 221, at 25.

[234] *Id.*

[235] Griffin, *supra* note 216, at 21 ("The goal of confrontation, according to *Crawford*'s reasoning and *Davis*'s purposive test, is to expose any governmental coercion or manipulation.") The Court did "clarify that the confrontation clause focuses solely upon conduct by governmental officials." Graham, *supra* note 208.

[236] *Davis*, 126 S. Ct. at 2274, n.1.

[237] Fine, *supra* note 213, at 12; Tom Lininger, Davis *and* Hammon: *A Step Forward, or a Step Back?*, 105 MICH. L. REV. FIRST IMPRESSIONS 28, 29 (2006), *at* http://www.michiganlawreview.org/firstimpressions/vol105/lininger.pdf (last visited March 1, 2007).

[238] State v. Mechling, 633 S.E.2d 311, 321-22 (W. Va. 2006).

[239] *Id.* at 321-22.

> We believe that the Court's holdings in *Crawford* and in *Davis* regarding the meaning of "testimonial statements" may therefore be distilled down into the following three points. First, a testimonial statement is, generally, a statement

As a practical matter, *Davis* might encourage police manipulation by officers cautiously reporting the situation.[240] The emergency requirement might also lead to officers questioning the victim while the emergency is ongoing and before they ensure the victim is safe.[241]

The "primary purpose test" is a compromise between the right of the defendant to confront the witness, even regarding informal statements, and the ability to admit statements, without confrontation, that are clearly given in the heat of the emergency.[242] Justice Thomas claimed that by allowing informal statements, the test "shift[s] the ability to control whether a violation occurred from the police and prosecutor to the judge, whose determination as to the 'primary purpose' of a particular interrogation would be unpredictable and not necessarily tethered to the actual purpose for which the police performed the interrogation."[243]

The alternative test the Court considered and rejected was the "formality test." In his dissent, Justice Thomas advocated for a test that would not consider the primary purpose of the interrogation but would instead consider the level of formality under which the statement was obtained.[244] Formality in the police interrogation would alert the declarant to the fact that he or she is giving testimony.[245] This test provides a more definite guideline as to when a statement is testimonial.[246] It requires that formality exists, such as the statement is taken in a formal setting like a police station, and a warning is given that the statement is being considered as evidence of a past crime.[247]

> that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Second, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency. And third, a court assessing whether a witness's out-of-court statement is "testimonial" should focus more upon the witness's statement, and less upon any interrogator's questions.

Id.

[240] Fine, *supra* note 213, at 13.

[241] *Id.*

[242] Griffin, *supra* note 216, at 16-17.

[243] *Davis*, 126 S. Ct. at 2282-83 (Thomas, J., dissenting).

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.*

The major disadvantage of the "formality test" is that the Confrontation Clause could be circumvented by a police officer simply not formalizing a statement.[248] An informal statement would be considered non-testimonial and would not require that the defendant have a right to cross-examine the witness.[249] The majority found that as police procedures for gathering information become more informal, those informal statements should be covered by the Confrontation Clause.[250] The majority of the Court found that some formality is required for making a statement testimonial, but the Court did not describe what levels of formality would be considered appropriate.[251] Although the "formality test" is a bright-line rule, the *Davis* Court clearly adopted the "primary purpose test."[252]

Domestic Violence Cases

Domestic violence cases, as illustrated in *Davis*, present unique issues surrounding the revived Confrontation Clause.[253] Domestic violence victims often request help from law enforcement and initially cooperate with prosecutors only to later withdraw prior statements and try to get the charges dropped.[254] Due to the private nature in which domestic violence occurs, the new rules may prohibit many domestic violence cases from being successfully prosecuted without the victim's statement.[255] The victim's reasons for failing to testify may be persuasion or threats of retaliation from the abuser.[256] Also, the victim could lose financial support provided by the abuser if the abuser is detained or incarcerated as a result of a successful prosecution.[257] The victim may also be fearful of children being taken by the state or hurt by the abuser.[258] Domestic violence centers on a pattern

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[248] *Davis*, 126 S. Ct. at 2276. The Court explained that it "do[es] not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition." *Id.*

[249] *Id.* at 2282-83 (Thomas, J., dissenting).

[250] *Id.* at 2278 n. 5 ("We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th century forebears did not, examining police officers . . . .").

[251] Richard D. Friedman, *We Really (For the Most Part) Mean It!*, 105 MICH. L. REV. FIRST IMPRESSIONS 1, 4 (2006), *at* http://www.michiganlawreview.org/firstimpressions/vol105/friedman.pdf (last visited March 1, 2007).

[252] *Davis*, 126 S. Ct. at 2273-74.

[253] Patrice Wade DiPietro, *Domestic Dispute Cases Prompt Closer Look at Confrontation Clause*, 8 NO. 17 LAW. J. 3, 9 (2006); *see* David G. Savage, *Confronting 911 Evidence: High Court Ponders Whether Statements are "Testimonial," Requiring Confrontation*, 92 A.B.A.J. 12 (2006).

[254] Raeder, *supra* note 47, at 24.

[255] *Id.*

[256] Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 458-59 (2006).

[257] *Id.* at 458.

[258] *Id.* at 443 n.14.

of control that is often used to influence the victim.[259] Unlike other criminal charges, the abuser has access to the victim, even after the court issues a no-contact order.[260] The abuser can use this access to control and persuade the victim not to testify.[261]

The dynamics of domestic violence illustrates practical problems prosecutors will encounter in this post-*Crawford* era.[262] In the past, domestic violence prosecutions often utilized statements of absent victims under the "excited utterances" exception of the Federal Rules of Evidence and identical state rules.[263] Now, the Court's new requirements have added an additional burden over the hearsay requirements of "excited utterances" which will greatly impair domestic violence prosecutions.[264] Reports from news agencies shortly after *Crawford* indicated prosecutors were forced to drop nearly fifty percent of domestic violence prosecutions since an estimated eighty percent of victims refused to cooperate.[265] Prosecutors were forced to decide on a case-by-case basis if charges could be successfully brought on other evidence if the witness did not testify, or how the credibility of a victim might be damaged if the victim testified to something different than was first reported.[266]

The Court's rationale in *Crawford* and *Davis* was a historically based notion that a defendant had the right to confront adverse witnesses.[267] But there are

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[259] *Id.* at 459.

> The battering relationship is not about conflict between two people; rather, it is about one person exercising power and control over the other. Battering is a pattern of verbal and physical abuse, but the batterer's behavior can take many forms. Common manifestations of that behavior include imposing economic or financial restrictions, enforcing physical and emotional isolation, repeatedly invading the victim's privacy, supervising the victim's behavior, terminating support from family or friends, threatening violence toward the victim, threatening suicide, getting the victim addicted to drugs or alcohol, and physically or sexually assaulting the victim. The purpose of the abusive behavior is to subjugate the victim and establish the batterer's superiority.

Id. (quoting Andrew King-Ries, Crawford v. Washington*: The End of Victimless Prosecution*, 28 SEATTLE U. L. REV. 301, 304 (2005)).

[260] Lininger, *supra* note 102, at 769-70.

[261] *Id.*

[262] *Id.*

[263] Raeder, *supra* note 47, at 24; FED. R. EVID. 803(2). Washington court allowed McCottry's statement under the Washington Rules of Evidence. WASH. R. EVID. 803(a)(2). The Indiana court allowed Amy's statement under the Indiana Rules of Evidence. IND. R. EVID. 803(2).

[264] Lininger, *supra* note 102, at 773-82.

[265] Raeder, *supra* note 47, at 25.

[266] *Id.* at 24-25.

[267] Myrna Raeder, Crawford *and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Remember the Ladies and the Children:* Crawford's *Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 311-12 (2005); Crawford v. Washington, 541 U.S. 36, 43-45 (2004).

problems with adopting policies and practices from 1791 without adapting them to the realities of modern life.[268] The Court retreated to a time when women were not allowed to participate in creating policy and rules.[269] A woman was no longer considered a separate legal person when she married, but rather an extension of her husband.[270] Furthermore, women were not considered equal to men.[271] Also, in 1791, the husband's responsibilities included chastising his wife if he believed she had misbehaved.[272] It is unlikely the founding fathers could have imagined a world that did not tolerate domestic violence.[273] They were unlikely to imagine a world where "911 protocols are routine, as are pro- or mandatory-arrest policies, no-drop prosecutions, criminal contempt convictions for violation of protective orders, expansive hearsay exceptions and in some states reporting requirements for medical personnel."[274]

There have also been many advances since 1791, including the organization of police forces, and medical, forensic, and technological advances (videotape, two-way television, telephone, e-mail, audiotape, typewriters, and computerized recordings).[275] These advances have helped make evidence easily accessible and accepted in the courtroom and should be considered in deciding issues related to Confrontation Clause issues.[276]

Although the "primary purpose test" was a step forward in defining what is testimonial, it raises concern in domestic violence cases.[277] The police officers' motivation in domestic violence situations is often to keep the victim safe, which might not fall neatly into the category of emergency or evidence-building.[278] Keeping a victim of domestic violence safe might involve intervention and assistance long after the initial incident is over.[279] Collecting evidence for prosecution of the abuser might aid in protecting the victim from further harm.[280] *Davis* affects police by requiring a police officer to consider the situation in light of what a court

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[268] Raeder, *supra* note 267, at 311.

[269] *Id.* at 311-12.

[270] Virginia H. Murray, *Part Three: "Traditional" Legal Perspective: A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U.L. REV. 433, 440 (1998).

[271] *Id.* at 435-36.

[272] Raeder, *supra* note 267, at 311-12.

[273] *Id.* at 312.

[274] *Id.* at 312, 326-29.

[275] *Id.* at 311-12.

[276] *See id.* at 313.

[277] Meier, *supra* note 221, at 23.

[278] *Id.* at 25.

[279] *Id.* at 26.

[280] *Id.*

will later consider to be the primary motivation for the police officer's actions.[281] The police officer might ask questions that relate to the victim's safety but could also be used to assess criminal activity.[282] The setting, timing, and framing of the question might change the testimonial nature of the statement given by the alleged victim.[283] The police interrogation in *Hammon* occurred after the police arrived at the Hammon home.[284] Amy told police officers she was fine.[285] One police officer questioned Amy in a separate room while the other police officer remained with Hershel in the kitchen to ensure Amy's safety.[286] Yet, the Court found this statement testimonial because it was taken after the emergency had ended.[287] This illustrates that how and when the police officer takes a statement might affect the testimonial nature and admissibility of the statement, since danger can exist even after the initial incident is over.[288] If the police had not separated them and still had to restrain Hershel, a court would have to determine if the emergency had ended.[289]

The good news in domestic violence cases is, although the Supreme Court found the emergency had ended when the police arrived in the *Hammon* case, the lower courts have latitude to determine when the emergency has ended.[290] A court can base its decision on the facts of the particular case.[291] If it finds danger still existed in a domestic violence case, then the emergency had not ended and any statements made would be non-testimonial.[292]

Although *Davis* has made it more difficult to prosecute abusers, domestic violence cases cannot be ignored because there are simply too many cases.[293] Alternative

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[281] *See* Davis v. Washington, 126 S. Ct. 2266, 2273-74 (2006); Linger, *supra* note 102, at 778-81.

[282] Raeder, *supra* note 267, at 312-13; *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting); Meier, *supra* note 221, at 26.

[283] Meier, *supra* note 221, at 26.

[284] Hammon v. State, 829 N.E.2d 444, 446-47 (Ind. 2005); Meier, *supra* note 221, at 26.

[285] *Hammon*, 829 N.E.2d at 447; *Davis*, 126 S. Ct. at 2272.

[286] *Hammon*, 829 N.E.2d at 446; Meier, *supra* note 221, at 26.

[287] *Davis*, 126 S. Ct. at 2278.

[288] Meier, *supra* note 221, at 26

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] Raeder, *supra* note 47, at 27. This article supports the volume of cases with the fact that "nearly 590,000 nonfatal acts of domestic violence were estimated to have been committed against women in 2001, and approximately 1,250 women were killed by an intimate partner in 2000." Meier, *supra* note 221, at 23 ("[Domestic violence] cases now constitute up to half of calls to police and form 20 to 50% of criminal dockets, and may well constitute a majority of the case where confrontation rights are at issue.").

ways of handling domestic violence cases have been advocated.[294] Since issues arise with the right to cross-examine a witness, the first solution requires officers to question victims in such a way that their statements are non-testimonial and the person is not a witness.[295] One strategy might be active interrogations before the emergency has ended.[296] Emergency operators are currently trained to ask as many questions as possible about the nature of the emergency.[297] If this is done before the emergency has ended, then the statements are non-testimonial.[298]

The second solution involves legislative reform.[299] The key issue in domestic violence cases centers around the right to cross-examine the witness, but *Crawford* does not require the cross-examination take place at trial.[300] The more time that passes from the assault to trial, the more likely the victim will change or withdraw the accusations.[301] The legislative reforms would require more frequent opportunities to cross-examine the victim.[302] These opportunities might include non-waivable preliminary hearings, special hearings held very shortly after the incident, or depositions.[303] Another strategy is to pass laws that would detain the abuser and provide a quicker trial in order to eliminate witness intimidation.[304]

Forfeiture Doctrine

Unlike other cases where the prosecutor has some control over the witness, in domestic violence cases, the defendant has the control over the victim.[305] The *Davis* Court acknowledged that domestic violence cases are "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial."[306]

The Court suggested the forfeiture doctrine might be a solution to evidence being excluded in domestic violence cases.[307] In these cases, the defendant often

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[294] Lininger, *supra* note 102, at 783-818.

[295] *Id.* at 776; *Davis*, 126 S. Ct. at 2273-74.

[296] Fine, *supra* note 213, at 12-13.

[297] Lininger, *supra* note 102, at 776.

[298] *Id.*; *Davis*, 126 S. Ct. 2273-74.

[299] Lininger, *supra* note 102, at 783-84.

[300] *Id.* at 784.

[301] *Id.* at 786.

[302] *Id.* at 784-86.

[303] *Id.* at 787-97.

[304] Lininger, *supra* note 102, at 815-16.

[305] *Id.*

[306] Griffin, *supra* note 216, at 19; Davis v. Washington, 126 S. Ct. 2266, 2280 (2006).

[307] *Davis*, 126 S. Ct. at 2279-80. Forfeiture means the defendant waives the Sixth Amendment right if responsible for taking actions that caused the victim's absence or inability to testify. *Id.* at 2279-80.

makes the witness unavailable for trial using threats or intimidation.[308] Therefore, forfeiture could allow a victim's statements to be entered into evidence where they would not otherwise be admissible.[309]

Unfortunately, the Court only briefly mentioned forfeiture.[310] Worse, it did not define Confrontation Clause forfeiture other than to say that if the defendant acts in a way that coerces the victim to silence, confrontational protections will be waived.[311] For support, the Court only cited the 1879 case of *Reynolds v. United States*.[312] In *Reynolds*, the Court held that the State must prove a witness's testimony was unavailable because of the defendant's conduct.[313] The burden then shifts to the defendant to show no involvement.[314] If forfeiture is proven, then the witness's testimony can be admitted into evidence if the evidence is "competent."[315] The *Reynolds* Court did not, however, define "competent."[316] The facts indicated "competent" evidence included prior testimony subject to cross-examination.[317] The Court did not clarify whether it intended modern forfeiture to encompass the same elements as *Reynolds*.[318] These elements would not help domestic violence prosecutions since the prior cross-examination requirement would still need to be met.[319]

In addition to the common-law forfeiture rule for the Confrontation Clause, there is also a hearsay forfeiture doctrine codified into Federal Rule of Evidence ("FRE") 804(b)(6). FRE 804(b)(6) states that forfeiture by wrongdoing provides

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[308] *Id.* at 2280; Meier, *supra* note 221, at 24-25; Raeder, *supra* note 267, at 361-62 (noting that studies indicate a "high percentage of physical and economic threats" were made to victims who cooperated with the police).

[309] Meier, *supra* note 221, at 24. Forfeiture could be particularly significant in Wyoming since it currently ranks second in the U.S. in the number of women being killed by a person she knew. VIOLENCE POLICY CENTER, WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2004 HOMICIDE DATA 21 (2006), *at* http://www.vpc.org/press/0609wmmw.htm (last visited on March 8, 2007) (reporting that 2.39 women per 100,000 were killed in Wyoming in 2004; a total of six women were killed in Wyoming).

[310] *Davis*, 126 S. Ct. at 2280.

[311] *Id.* ("[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.").

[312] *Id.*; Reynolds v. United States, 98 U.S. 145 (1878).

[313] *Reynolds*, 98 U.S. at 158; King-Ries, *supra* note 256, at 451.

[314] *Reynolds*, 98 U.S. at 158; King-Ries, *supra* note 256, at 451.

[315] *Reynolds*, 98 U.S. at 158; King-Ries, *supra* note 256, at 451.

[316] *Reynolds*, 98 U.S. at 160-61; King-Ries, *supra* note 256, at 451.

[317] *Reynolds*, 98 U.S. 145; King-Ries, *supra* note 256, at 451.

[318] Davis v. Washington, 126 S. Ct. 2266, 2280 (2006) ("We take no position on the standards necessary to demonstrate such forfeiture.").

[319] *See* Lininger, *supra* note 102, at 783.

an exception under the hearsay rules.[320] A statement can be admitted into evidence under hearsay rules if the proponent proves the other party secured the witness' unavailability.[321] In drafting the rule, the Rules Committee intended to codify the widely-recognized principle and create a formalized response to actions challenging the criminal justice system.[322] The Court did not decide whether this stringent requirement of witness unavailability applied, although some suggest that FRE 804(b)(6) will affect the forfeiture guidelines.[323]

In addition to what the elements and standard of proof will be, many practical questions remain.[324] If the threat or intimidation occurred before the arrest, the court may or may not consider the threat.[325] A court will have to decide whether to measure threats and intimidation by a subjective or objective test.[326] A court must also decide what conduct by the defendant would invoke the forfeiture doctrine.[327] History of abuse, a particular incident or statement, or an abnormal threat that has been a warning in the past may all influence a court's decision.[328] In addition, a court will be faced with situations where it will have to decide the facts when the victim is unable to testify.[329] Even if the prosecutor proves forfeiture, the court may still have to determine the scope of admissible hearsay.[330]

CONCLUSION

The U.S. Supreme Court in *Davis v. Washington* took the opportunity to clarify what constitutes a "testimonial" statement under *Crawford* by classifying statements gathered in police interrogations as testimonial or non-testimonial. The "primary purpose test" adopted by the Court requires classification of a statement to the police according to the main purpose for which the statement was collected: emergency assistance or an investigation of possible past crimes. Although the test is a step forward in defining what is testimonial, it is a step backward in

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[320] FED. R. EVID. 804(b)(6) ("The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.").

[321] *Id.* The elements are generally thought to include proving the unavailability of the expected witness, intent of the defendant to prevent the testimony, and the defendant's act caused the witness's unavailability. King-Ries, *supra* note 256, at 454-55.

[322] FED. R. EVID. 804(b)(6) advisory committee's note; King-Ries, *supra* note 256, at 452.

[323] King-Ries, *supra* note 256, at 450.

[324] Meier, *supra* note 221, at 24-25.

[325] *Id.* at 24.

[326] *Id.*; Friedman, *supra* note 251, at 5; Lininger, *supra* note 237, at 31.

[327] Meier, *supra* note 221, at 24.

[328] *Id.*

[329] *Id.* at 26.

[330] *Id.* at 24, 26.

domestic violence prosecutions where statements by victims after an emergency has ended would be subject to the full protection of the Confrontation Clause. In domestic violence cases where victims frequently recant or fail to appear at trial, prosecutors will now face the task of trying to prove cases without the benefit of police testimony. Even if the victim continues to cooperate, the prosecutor will have to require the victim to testify against the accused despite concerns for the victim's safety.

Domestic violence is prevalent in our society and without an effective way for courts and prosecutors to deal with the problems, it is likely the violence will continue and may become worse. In fact, domestic violence prosecutions reportedly have been drastically curtailed since *Crawford*.[331] If a perpetrator of domestic violence knows that the charges will be dropped if the victim recants or changes her story, it is likely that more pressure will be put on the victim to do just that. The Court suggests the forfeiture doctrine to be the saving grace in domestic violence cases, but did not lay out clear guidelines. There are likely to be similar evidentiary problems in proving threats and intimidation procured the witness's unavailability without using the witness's statements. Additional guidelines will have to be developed to determine if the forfeiture doctrine could be helpful to a prosecutor who needs the statements of an intimidated or threatened victim to continue the case. Intervention by advocates, the prosecutor, and police may produce evidence other than just the victim's statements to show threats and intimidation of the victim. Although enlightening regarding the term "testimonial," *Davis v. Washington* dims the prospect of successful domestic violence prosecutions.

[331] Raeder, *supra* note 47, at 25.