

To Be or Not To Be Testimonial? *That Is the Question:*¹ 2004 Developments in the Sixth Amendment

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*Full fathom five thy father lies;
Of his bones are coral made:
Those are pearls that were his eyes:
Nothing of him that doth fade,
Both doth suffer a sea-change
Into something rich and strange.*²

Introduction

With the March 2004 release of the Supreme Court's decision in *Crawford v. Washington*,³ it has been a banner year for the Sixth Amendment's Confrontation Clause.⁴ Not since the Court issued the 1984 decision *Ohio v. Roberts*⁵ has the Court released such a significant case in Confrontation Clause jurisprudence. *Crawford* fundamentally altered the legal landscape of confrontation⁶ and its relationship to hearsay by severing, for all intents and purposes, the relationship between the two. Last year's Sixth Amendment article discussed the opinion and some of the more obvious ramifications.⁷ This year, many state and federal courts have trekked into the uncharted waters of *Crawford* and tried to navigate their way through what was supposed to be a simple analysis, all with varying degrees of success and consistency. Because of the opinion's importance, the practitioner, whether a trial or a defense counsel, must understand *Crawford* and its effects. The necessity of understanding *Crawford* is not limited to the trial practitioner, but also extends to the military judiciary, which will have to make decisions at trial as to whether a statement is or is not affected by *Crawford*. Further, Office of the Staff Judge Advocate's leadership must understand the case because they must determine the best way to advise a convening authority when *Crawford* issues arise in a case. For example, should the trial counsel make and pay for travel arrangements for a civilian witness at an Article 32, Uniform Code of Military Justice, investigation or hope that the key witness answers a subpoena at the time of trial or flies from the United States if the case is tried overseas? Whether *Crawford* is a return to the Framers' original intent⁸ or is a marker to some place rich and strange remains to be seen.⁹ The trip, however, is for anyone involved in military justice.

¹ A variation on a quotation: WILLIAM SHAKESPEARE, *HAMLET*, act III, sc. i.

² WILLIAM SHAKESPEARE, *THE TEMPEST*, act I, sc. ii.

³ 541 U.S. 36 (2004).

⁴ "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

⁵ 448 U.S. 56 (1984) (holding that a hearsay statement from an absent declarant could satisfy the Confrontation Clause if it possessed sufficient guarantees of trustworthiness shown either by the statement's fitting with a firmly rooted exception to the hearsay rule or by the statement's having particularized guarantees of trustworthiness).

⁶ One court commented, "So what's all the fuss about? A paradigm shift in confrontation clause analysis, that's what." *People v. Cage*, 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004), *review granted*, 19 Cal. Rptr. 3d 824 (Cal. 2004).

⁷ See Major Robert Wm. Best, *2003 Developments in the Sixth Amendment: Black Cats on Strolls*, *ARMY LAW.*, July 2004, at 55.

⁸ Justice Scalia, writing for the seven-member majority, noted the following:

[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right . . . to be confronted with the witnesses against him' [citation omitted] is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions *established at the time of the founding*.

Crawford v. Washington, 541 U.S. 36, 54 (2004) (emphasis added).

⁹ Chief Justice Rehnquist (joined by Justice O'Connor) observed that the Court's decision "casts a mantle of uncertainty over future criminal trials in both federal and state courts. . . ." *Id.* at 69 (Rehnquist, C.J., concurring in the judgment).

Back to the Future:¹⁰ *Crawford v. Washington*

The facts of the case are straight forward. On 5 August 1999, several weeks after being informed by his wife Sylvia that Mr. Rubin Richard Lee attempted to rape her, Mr. Michael Crawford, with assistance from Sylvia, located Mr. Lee and confronted him.¹¹ During the confrontation, Michael pulled a knife and stabbed Mr. Lee in the torso.¹² The police arrested Crawford and his wife later the same night.¹³ After law enforcement advised them of their *Miranda* rights,¹⁴ each gave two videotaped statements.¹⁵

The initial statements were generally consistent: the Crawfords went to visit Mr. Lee at his apartment; Michael left briefly to go to the store whereupon Mr. Lee made sexual advances toward Sylvia, which she fought off; Michael returned and heard his wife's yelling; Michael and Mr. Lee started fighting; and Mr. Lee was stabbed.¹⁶ The subsequent statements, however, differed.¹⁷ The second statements indicated that the alleged sexual assault occurred several weeks earlier; that Michael became angry at someone mentioning Mr. Lee while the couple was visiting friends; that he and Sylvia left the gathering to find Mr. Lee; that they knocked on the wrong apartment door, but Mr. Lee answered the door; that they talked for a short while and then Michael stabbed Mr. Lee.¹⁸ Michael indicated in his second statement that Mr. Lee may have had something in his hand when he stabbed him.¹⁹ Sylvia's stated, however, that Mr. Lee may have grabbed for something only *after* Michael stabbed Mr. Lee.²⁰ Thus, Michael claimed that he acted in self-defense, while Sylvia's statement shed substantial doubt on that claim.²¹

At trial, Crawford invoked the Washington state marital privilege to prevent his wife from testifying.²² In view of that invocation, the state moved to admit Sylvia's two statements.²³ With respect to the first statement, the state's argument was that it was not admitted for its truth, but rather to show that the Crawfords lied in their initial statements; therefore, the first statement was not hearsay.²⁴ The second statement was admissible hearsay, the state argued, because Sylvia's statement was

¹⁰ BACK TO THE FUTURE (Universal Studios 1985).

¹¹ *Crawford*, 541 U.S. at 38.

¹² *Id.*

¹³ *See id.*

¹⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that before a custodial interrogation, a subject must be warned that he has a right to remain silent, to be informed that any statement made may be used as evidence against him, and to the presence of an attorney).

¹⁵ *Crawford*, 541 U.S. at 38.

¹⁶ *See id.* at 38-39; *State v. Crawford*, 54 P.3d 656, 658 (Wash. 2002).

¹⁷ *Crawford*, 54 P.3d at 658.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (stating, "[T]he main distinguishing factor in these second statements was the Crawford alluded that Lee *may* have had something in his hand *when* Crawford stabbed Lee, while Sylvia implied that Lee *may* have grabbed for something *after* Crawford stabbed Lee.").

²¹ *Id.* at 662.

²² *See Crawford*, 541 U.S. at 39. The marital privilege does not allow a wife to be examined for or against her husband without his consent. *See id.* There was much ink spilled by the lower courts discussing the issue of waiver of Crawford's confrontation right. *See State v. Crawford*, No. 25307-1-II, 2001 Wash. App. LEXIS 1723, at *3-5 (Wash. Ct. App. 2001); *Crawford*, 54 P.3d at 658-60 (en banc). Ultimately, the state courts decided that Crawford's invocation of the state marital privilege did *not* waive his confrontation right claim. The Washington Supreme Court declared,

To force a defendant to choose the more difficult position of confronting his spouse on the stand, or to assume that he has waived his confrontation right by electing not to call his wife, presents a similarly untenable choice [between selecting one right to the exclusion of the other] and undermines the marital privilege itself. Therefore, we hold that Crawford did not waive his right to confrontation when he invoked the marital privilege.

Crawford, 54 P.3d at 660. Interestingly, the state abandoned the waiver argument before the U.S. Supreme Court; therefore, the Court did not have the occasion to pass on the issue. *Crawford*, 541 U.S. at 42 n.1.

²³ *See Crawford*, 2001 Wash. App. LEXIS 1723 at *7.

²⁴ *See id.* at *7.

one against her penal interest.²⁵ The trial court concluded that because Sylvia led Crawford to Lee's apartment, her statement, on the whole, was indeed admissible as a statement against her penal interest.²⁶ The Washington Court of Appeals agreed that portions of Sylvia's second statement were against her penal interest,²⁷ but, applying a nine-factor test,²⁸ found that the statement "was plainly untrustworthy."²⁹ The court held that under *Lilly v. Virginia*,³⁰ the statement did not fall within a firmly rooted exception to the hearsay rule and that the statement did not possess sufficient particularized guarantees under *Lilly*'s residual trustworthiness test to satisfy the Confrontation Clause; therefore, the statement's admission violated the Sixth Amendment requiring reversal.³¹ The state petitioned the Washington Supreme Court for review, which the court granted, ultimately reversing the lower appellate court's decision.

In its review, the Washington Supreme Court applied a different test than the lower court did. A statement that is not firmly rooted may be admissible for Confrontation Clause purposes, the court declared, if it possesses some indicia of reliability, shown either by applying the nine-factor test to determine "relative reliability" or by analyzing a statement to determine whether it "interlocks" with another statement.³² The court determined that "[b]ecause Sylvia's and Michael's [second statements were] virtually identical, admission of Sylvia's statement satisf[ied] the requirement of reliability under the confrontation clause."³³ The court, therefore, reinstated Crawford's conviction. Crawford then appealed to the U.S. Supreme Court, stating that "[t]his case presents this Court with an opportunity to clarify the operation of the Confrontation Clause and to refasten this critical provision to its historical and textual underpinnings."³⁴ The Supreme Court took up that opportunity and fundamentally altered the then-existing relationship between hearsay and the Confrontation Clause.

After reviewing the facts, the Court began its analysis by reviewing the historical pedigree of the Confrontation Clause, focusing its attention on the abuses of what the Court called the civil-law mode of criminal prosecution.³⁵ The civil-law model of criminal procedure permitted private examination of witnesses and conviction of defendants without an opportunity for cross-examination.³⁶ Describing the encroachment of *ex parte* examination by judicial officers in England as best evidenced by the treason trial of Sir Walter Raleigh,³⁷ the Court believed that the Framers of the Confrontation Clause were strongly motivated to provide a particular procedure to assess reliability: "testing in the crucible of cross-examination."³⁸ Stated another way, reliability is a byproduct of the constitutionally mandated procedure of cross-examination. As a result of the Court's *Ohio v. Roberts* opinion,³⁹ in lieu of confrontation, a defendant could be convicted based on the "reliability" of a

²⁵ *Id.* at *8.

²⁶ *Id.* at *9.

²⁷ *Id.* at *10.

²⁸ *See id.* at *12-17.

²⁹ *Id.* at *19.

³⁰ 527 U.S. 116 (1999) (plurality opinion) (holding that accomplices' confessions are not within a firmly rooted exception to the hearsay rule and thus subject to the "residual trustworthiness test" of the Confrontation Clause).

³¹ *See Crawford*, 2001 Wash. App. LEXIS 1723 at *20-21.

³² *State v. Crawford*, 54 P.3d 656, 661 (Wash. 2002). Such an approach clearly violated the dictates of *Idaho v. Wright*, which held that "the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must . . . be drawn from the totality of the circumstances *that surround the making of the statement* and that render the declarant particularly worthy of belief." 497 U.S. 805, 820 (1990) (emphasis added). Further, the Court observed, "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of *its inherent trustworthiness, not by reference to other evidence at trial.*" *Id.* at 822 (emphasis added).

³³ The court reached its conclusion because neither Crawford's nor Sylvia's statement clearly stated that Mr. Lee had a weapon in his hand when Crawford was defending himself. "And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." *Crawford*, 54 P.3d at 664.

³⁴ Brief for Petitioner at 1, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410).

³⁵ *See Crawford*, 541 U.S. at 50.

³⁶ The Court observed that "English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers." *Id.* at 43.

³⁷ The Court called the political trials of the 16th and 17th centuries, which included the Sir Walter Raleigh trial, the "most notorious instances of civil-law examination." It was after these trials, the Court noted, that "English law developed a right of confrontation that limited these abuses." *Id.* at 44.

³⁸ *Id.* at 61.

³⁹ 448 U.S. 56 (1984).

hearsay statement—reliability being a solely judicial determination.⁴⁰ As Justice Scalia, the majority opinion’s author, noted in the *Crawford* opinion, “The legacy of *Roberts* in other courts vindicates the Framers’ wisdom in rejecting a general reliability exception [to the Confrontation Clause]. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”⁴¹ The Court declared, “The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”⁴² Given *Roberts*’ vice and the goal of the Confrontation Clause, the Court sought to unmoor the two:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of “reliability.” . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.⁴³

To be admissible at trial, the Court held, the proponent of a testimonial hearsay statement must show that the declarant is unavailable and that the accused had a prior opportunity to cross-examine the declarant.⁴⁴ It is this concept of “testimonial hearsay” that has caused the lower courts the most difficulty, because the Court does not provide a comprehensive definition for the key concept of the case.⁴⁵

Eschewing clarity, the Court defined testimonial minimally: “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”⁴⁶ (the lattermost example itself being defined colloquially, rather than legally).⁴⁷ The Court, however, provided hints as to a broader definition of testimonial in its discussion of the “various formulations” of the core class of testimonial statements:

[E]x *parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examination, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that the declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.⁴⁸

The last phrase seems to be the focus of the majority of lower courts in determining whether a statement falling outside the narrow definition is testimonial.

Among the many questions generated by the Court’s opinion, one fundamental question is most unclear: What is the reach of “testimonial hearsay”? Given the Court’s focus on the Framers’ motivations and the civil-law mode of criminal procedure, there is much support for the argument that the range of statements falling within the testimonial parameter is narrow.⁴⁹ On the other hand, given the Court’s observation that “[v]arious formulations of this core class of ‘testimonial’ statements exist,”⁵⁰ there is similar room to argue that “testimonial” covers statements that are outside of the formalized,

⁴⁰ See *supra* note 5 and accompanying text.

⁴¹ *Crawford*, 541 U.S. at 62-63.

⁴² *Id.*

⁴³ *Id.* at 61.

⁴⁴ See *id.* at 53-54.

⁴⁵ The majority acknowledges that its failure to provide a comprehensive definition is problematic: “We acknowledge THE CHIEF JUSTICE’s objection . . . that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty.” *Id.* at 68 n.10.

⁴⁶ *Id.* at 68.

⁴⁷ *Id.* at 53 n.4.

⁴⁸ *Id.* at 51-52 (internal citations omitted) (emphasis added).

⁴⁹ “The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.” *Id.* at 51.

⁵⁰ *Id.*

affidavit-type statements.⁵¹ In any case, the lower courts are grappling not only with the scope of the word “testimonial,”⁵² but also with a key term provided by the Court—“interrogation.” To be sure, the Court has sent the criminal lawyer and trial and appellate judges into the Sea of We Do Not Know.⁵³ All is not lost, however, because the outer limits of the Confrontation Clause will be defined by trial and defense counsel in cases tried throughout the world. Rather than despairing, ambitious, zealous counsel should relish the opportunity to push the boat back into harbor, clarifying for the journeyman Judge Advocate what testimonial really means outside of the minimal definition provided in *Crawford*.

The Certainty of *Crawford*: Statements to Nongovernmental Actors⁵⁴

Undergirding much of the *Crawford* opinion is the majority’s concern about government involvement in statements created with an eye toward prosecution.⁵⁵ This key component of the opinion guides lower courts’ take on *Crawford* with respect to what is *nontestimonial*.⁵⁶ To the extent that a statement does not involve a governmental actor seeking information for later prosecution, state and federal courts have had no difficulty classifying the statements at issue as nontestimonial.⁵⁷ As of the end of 2004, these courts uniformly have treated statements made to family members, friends, co-workers, and strangers as nontestimonial hearsay.⁵⁸ To the *Crawford* Court, such a statement is “a casual remark to an acquaintance” that must be distinguished from a statement made to a government officer.⁵⁹

Lower courts’ treatment of such statements ranges from the conclusory to the authoritative. An example of the former is *People v. Griffin*.⁶⁰ The case involved the trial court’s admission of a murdered sexual abuse victim’s statement to a

⁵¹ See *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004) (noting that “[b]y denominating these types of statements as constituting the ‘core’ of the universe of testimonial statements, the Court left open the possibility that the definition of testimony encompasses a broader range of statements”); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 527 (2005) (observing that the Court offers “tantalizing hints . . . that leave open the door for a broader view . . .”).

⁵² Lower courts, cast adrift by the majority’s refusal to comprehensively define the key distinction, are struggling to classify informal statements, nonofficial statements, medical statements, and 911 phone calls as testimonial or nontestimonial. The focus for courts in that struggle seems to be falling on Justice Scalia’s discussion of the “core” class of testimonial statements. *Crawford*, 541 U.S. at 51.

⁵³ The Chief Justice aptly wrote in his concurrence in the judgment:

The Court grandly declares that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists, is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

Id. at 75-76 (Rehnquist, C.J., concurring in the judgment) (internal citations omitted).

⁵⁴ All the cases discussed in this article involve statements made by unavailable witnesses at trial. The reasons are not important for purposes of this article. Given the Court’s requirement, however, that the prosecution show a declarant’s unavailability, this area of the law is important and likely to see growth. The Court spelled out the current standard for Confrontation Clause purposes in *Roberts*: “The basic litmus of Sixth Amendment unavailability is established: ‘[A] witness is not “unavailable” for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.’” *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (quoting *Barber v. Page*, 390 U.S. 719, 724-725 (1968)) (emphasis in original).

⁵⁵ See *Crawford*, 541 U.S. at 56 n.7 (“Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar.”).

⁵⁶ Once a court determines that the statement at issue is nontestimonial, the issue then becomes whether *Roberts* applies. The Court observed that where nontestimonial evidence is at issue “it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether.” *Id.* at 68. Courts still apply *Roberts* for nontestimonial hearsay. See, e.g., *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 971 (2005); *United States v. McClain*, 377 F.3d 219 (2d Cir. 2004); *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004). The rationale for such decisions was best expressed in *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 938 (2005) (observing the “*Crawford* Court expressly declined to overrule *White [v. Illinois]*, 502 U.S. 346 (1992)], in which the majority of the Court considered and rejected a conception of the Confrontation Clause that would restrict the admission of testimonial statements but place no constitutional limits on the admission of out-of-court nontestimonial statements”). The trial practitioner must, therefore, still be able to articulate why a nontestimonial hearsay statement satisfies the Confrontation Clause and why such a statement is admissible under the hearsay rules.

⁵⁷ See cases cited *infra* note 71.

⁵⁸ See cases cited *infra* note 71.

⁵⁹ *Crawford*, 541 U.S. at 51 (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).

⁶⁰ 93 P.3d 344 (Cal. 2004).

schoolmate that the defendant had been fondling her and that she intended to confront him if he continued.⁶¹ The California Supreme Court observed in a footnote that “*Crawford* [did] not affect the present case, because the out-of-court statement here at issue . . . is not ‘testimonial hearsay’ within the meaning of *Crawford*.”⁶² The court offered nothing else in support of what it apparently thought was an obvious conclusion. On the other end of the spectrum is the case *People v. Compan*.⁶³ The statements at issue in *Compan* were made by a battered wife, who called a friend, stating the defendant was angry and yelling at her.⁶⁴ Fifteen minutes later, she called saying the defendant hurt her.⁶⁵ When her friend came to the house, the “upset and agitated” victim recounted the abuse: the defendant punched and kicked her, threw her against a wall, and pulled her hair.⁶⁶ The court took pains to explain its view of *Crawford*’s definition of testimonial, noting that:

[I]t appears that testimonial statements under *Crawford* will generally be (1) solemn or formal statements (not casual or off-hand remarks), (2) made for the purpose of proving or establishing facts in judicial proceedings (not for business or personal purposes), (3) to a government actor or agent (not someone unassociated with government activity).⁶⁷

The court concluded that the victim’s statements were nontestimonial because they possessed none of the noted characteristics.⁶⁸ Similarly, the Wisconsin Court of Appeals in *State v. Manuel*⁶⁹ hewed its opinion closer to *Crawford*’s language in holding a co-defendant’s statement to his girlfriend implicating the defendant was nontestimonial:

The statement was not made to an agent of the government or to someone engaged in investigating the shooting. The statement thus does not fall within any of the categories of testimonial statements expressly identified in *Crawford* (prior trial, preliminary-hearing and grand-jury testimony, and statements made during police interrogations). Neither does it appear to be the type of statement the Court found had historically been the “primary object” of the framer’s concerns in enacting the Confrontation Clause.⁷⁰

Although the Wisconsin court took its support from *Crawford*’s language rather than using its own construction, a comparison between *Compan* and *Manuel* reveals virtually identical reasoning: a casual statement made for a nongovernmental reason to a nongovernmental agent is not testimonial.⁷¹ In *United States v. Savoca*,⁷² the District Court

⁶¹ *Id.* at 369.

⁶² *Id.* at 372 n.19.

⁶³ 100 P.3d 522 (Colo. Ct. App. 2004), *cert. granted*, 2004 Colo. LEXIS 849 (Colo. Oct. 25, 2004). The Colorado Supreme Court granted review on whether “admission of an extended narration as an ‘excited utterance’ exception to the hearsay rule when such evidence was never tested by cross-examination as required by *Crawford v. Washington* (citation omitted).”

⁶⁴ *Id.* at 535.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 537. *Accord* *People v. T.T.*, 815 N.E.2d 789, 800 (Ill. Ct. App. 2004) (noting that *Crawford* indicates that governmental involvement in some fashion in the creation of a formal statement is necessary to render the statement testimonial in nature”). Similarly, Professor Mosteller points out, “[T]he purpose for which a statement is made is the critical determiner of whether it is testimonial.” Mosteller, *supra* note 51, at 549.

⁶⁸ *Compan*, 100 P.3d at 538.

⁶⁹ 685 N.W.2d 525 (Wis. Ct. App. 2004), *rev. granted*, 689 N.W.2d 55 (Wis. 2004).

⁷⁰ *Manuel*, 685 N.W.2d at 162.

⁷¹ *See also* *People v. Vigil*, 104 P.2d 258 (Colo. Ct. App. 2004), *cert. granted in part, denied in part*, 2004 Colo. LEXIS 1030 (Colo. Dec. 20, 2004) (holding that child sexual abuse victim’s statement to his father and his father’s friend was nontestimonial because the statement was not a solemn or formal statement made to a nongovernmental actor); *Demons v. State*, 595 S.E.2d 76 (Ga. 2004) (holding that decedent’s statements to a co-worker about the source of bruises on his upper arms and chest and about a threat communicated by the defendant “were not remotely similar” to prior testimony at a grand jury hearing, preliminary hearing, or prior trial or to police interrogation); *State v. Rivera*, 844 A.2d 191 (Conn. 2004) (holding that uncle’s statements to his nephew were outside the core category of *ex parte* testimonial statements of concern in *Crawford*); *People v. Rolandis G.*, 817 N.E.2d 183 (Ill. Ct. App. 2004) (holding that the victim’s statement to his mother were “more in the nature of a ‘casual remark to an acquaintance’ that the Court implied would not be testimonial”); *People v. West*, No. 1-02-2358, 2005 Ill. App. LEXIS 62 (Ill. Ct. App. Jan. 5, 2005) (holding that a victim’s statements to a Ms. Jackson were not testimonial because Ms. Jackson was not acting as a governmental officer seeking evidence); and *State v. Blackstock*, 598 S.E.2d 412 (N.C. Ct. App. 2004) (holding that armed robbery victim’s statements to his wife and daughter were not testimonial because the statements were not made under a reasonable belief that they would be used prosecutorially (victim made statement when health was improving, but he died later)). There are several federal cases that also use the same reasoning. *See, e.g.*, *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004) (holding that that co-accused’s statements made to witness regarding what co-accused said to the witness on the day of murders were not testimonial because the statements were not *ex parte* testimony or its equivalent; were not contained in formalized documents; were not made during custodial confession; and were made to a private person and not under circumstances that would lead an objective witness to believe that the statements would be available for use a later trial); *Evans v. Luebbers*, 371 F.3d 438

provided a succinct summary of what it considered testimonial hearsay, stating, “All the examples provided [in *Crawford*’s minimal definition] contain an ‘official’ element. While statements may or may not have been sworn, each example was made to an authority figure in an authoritarian environment. *This element of officiality appears to be the hallmark of a ‘testimonial statement.’*”⁷³ Whether this conclusion is supportable in light of the Confrontation Clause’s text is an open matter, but practically speaking, the courts’ focus follows from *Crawford*.

The Court made very clear in *Crawford* that the Confrontation Clause is not solely concerned with those who actually testify in court: “[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony”⁷⁴ Similarly, why is the Court’s construction of the Confrontation Clause concerned only with those witnesses who are official? In answering this question, the Court looked to the history of the Confrontation Clause, concluding that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”⁷⁵ To suggest, however, that the Confrontation Clause is only concerned with official statements is not supported in the text of the Confrontation Clause.⁷⁶ The Court’s attempt to restrict the reach of the Confrontation Clause and the lower courts’ implementing interpretations of *Crawford* misconstrues the Confrontation Clause’s plain text. Nowhere is the word “official” or “governmental” used as an adjective before the word “witness.” If the Court is going to interpret the Confrontation Clause expansively to include out-of-court declarants as “witnesses” within the ambit of the Confrontation Clause, why would it, at the same time, restrict the type of witnesses who qualify as “witnesses” under the Confrontation Clause? The Court should not read a *qualifier* for the word “witness,” notwithstanding the motivation of the Framers at the time they drafted the Confrontation Clause. Indeed, if confrontation is the goal and if the Confrontation Clause is to prescribe a *procedure*,⁷⁷ on what grounds can the Court graft a qualifier onto the word “witness”? Where in the plain text is the qualifier “official” or “governmental”? Why should it be significant as a matter of *procedural* constitutional law⁷⁸ that a witness be somehow tied to an official purpose? Cannot a private declarant bear witness to a friend, a family member, or a co-worker against an accused in the form of an accusatory statement that *should be* subject to cross-examination?⁷⁹ These are points that arguably can be made by a defense counsel in support of an expansive understanding of confrontation. Because the Court has unmoored confrontation jurisprudence from hearsay law, it should matter little the status or even purpose of the listener. What should matter is bringing witnesses in the courtroom for confrontation—as the text of the Confrontation Clause clearly states.

(8th Cir. 2004) (holding that later-murdered victim’s (who was Evans’ estranged wife) numerous out-of-court statements that she was scared of Evans, that she was verbally and physically abused by Evans, that she intended to divorce Evans, and that she obtained a protective order against Evans made to ten different witnesses were not testimonial because the statements did not fit within the expressed definitions of testimonial set out by the *Crawford* court); *United States v. Lee*, 374 F.3d 637 (8th Cir. 2004) (holding that statements made by co-defendant to his mother were nontestimonial because they were casual conversations that did not implicate the core concerns of the Confrontation Clause).

⁷² 335 F. Supp. 2d 385 (S.D.N.Y. 2004) (noting that statements at issue were nontestimonial because they were made by the co-defendant to his then live-in girlfriend, not to a government official).

⁷³ *Id.* at 392-93 (emphasis added).

⁷⁴ *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

⁷⁵ *Id.* There are others, however, who suggest that the Court’s view of the history supporting its interpretation is wrong. *See, e.g., People v. Cortes*, 781 N.Y.S.2d 401, 409 (2004) (noting that “history does not support the proposition that hearsay subject to confrontation is limited to deposition, affidavits and other formal documents”).

⁷⁶ Mosteller, *supra* note 51, at 575 (noting that “the Confrontation Clause has no requirement of government involvement”).

⁷⁷ “To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford*, 541 U.S. at 61.

⁷⁸ *See supra* note 38 and accompanying text.

⁷⁹ An argument can be made that hearsay law and the Clause are inextricably intertwined notwithstanding the Court’s attempt to divorce them. *See, e.g., People v. Cortes*, 781 N.Y.S.2d 401, 407 (noting that the history of the hearsay rule and the confrontation rule are “inexorably intertwined”). To require cross-examination of declarants who make inherently reliable statements, the argument goes, is an exercise in futility because there is nothing new to be gained. Therefore, to the extent that a hearsay statement involves the power of the State, but at the same time is inherently reliable, there is no *need* for confrontation in the courtroom. This idea was crystallized in *Idaho v. Wright*, 497 U.S. 805 (1990), where the Court stated that “if the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial.” *Id.* at 820. And, for that matter, the Confrontation Clause did not bar that statement’s admissibility either. Indeed, for twenty-four years, *Roberts* stood for that proposition. Discussion with Major Christopher W. Behan, Professor, Criminal Law Department, US Army Judge Advocate General’s Legal Center and School (on file with the author).

Crawford and Statements to Social Workers and other Medical Professionals

As discussed, lower courts have focused on the status of the listener, the circumstances under which the statement is given, and the purpose the statement is taken. In the medical field, these lines can get blurry, but the results in 2004 have been uniform. The extent of government agents' involvement, insofar as those agents are concerned with building a case against an accused, seems to be determinative of whether a resulting statement is testimonial. The cases *T.P. v. State*,⁸⁰ *People v. Sisavath*,⁸¹ *People v. Rolandis G.*,⁸² *Snowden v. Maryland*,⁸³ *State v. Courtney*,⁸⁴ *State v. Bobadilla*,⁸⁵ and *State v. Mack*⁸⁶ all involved interviews by social or child advocacy workers at the request of or on referral from law enforcement. In each case, the reviewing court concluded that the resulting statements were testimonial. Decisive in each of these cases was the courts' uniform conclusion that the interview was conducted "for the purpose of developing the case"⁸⁷ against the defendants. Even in the one case that did not involve a referral or direct involvement by law enforcement, *People v. T.T.*,⁸⁸ the court determined that because the interviewer took a formal statement with an eye toward prosecution, the hearsay statement was testimonial.⁸⁹ The lesson for counsel is, therefore, clear: be able to articulate that an interview's purpose was or was not to develop a case against an accused. If the referral's purpose was *not* to develop a case against the accused, the argument can be made that, although there was government involvement in the creation of the statement, the primary *purpose* was other than prosecution of the accused and; therefore, any subsequent statement is not testimonial.

At least one court did not find the employment status of the social or advocacy worker necessarily determinative of a statement's testimonial character.⁹⁰ *People v. Sisaveth*⁹¹ involved a child's statement to a nongovernmental employee; yet the court still found the statement at issue to be testimonial⁹² because "there is no serious question but that Victim 2's statement was 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"⁹³ Noting the *Crawford* Court's reference to "an objective witness," the *Sisaveth* court squarely addressed the vexing question of just who the objective witness is supposed to be:

Conceivably, the Supreme Court's reference to an "objective witness" should be taken to mean an objective witness in the same category of persons as the actual witness – here an objective four-year-old. But we do not think so. It is more likely that the Supreme Court meant simply that if a statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial.⁹⁴

⁸⁰ No. CR-03-0574, 2004 Ala. Crim App. LEXIS 236 (Ala. Crim. App. Oct. 29, 2004).

⁸¹ 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004).

⁸² 817 N.E.2d 183 (Ill. Ct. App. 2004).

⁸³ 846 A.2d 36 (Md. Ct. Spec. App. 2004), *aff'd*, 2005 Md. LEXIS 35 (Md. Feb. 7, 2005).

⁸⁴ 682 N.W.2d 185 (Minn. Ct. App. 2004), *review granted*, 2004 Minn. LEXIS 575 (Minn. Sept. 29, 2004).

⁸⁵ 690 N.W.2d 345 (Minn. Ct. App. 2004).

⁸⁶ 101 P.3d 349 (Ore. 2004).

⁸⁷ *Courtney*, 682 N.W.2d at 196.

⁸⁸ 815 N.E.2d 789 (Ill. Ct. App. 2004).

⁸⁹ *Id.* at 802.

⁹⁰ This point is of interest because at most installations, social workers are either government employees or government contract employees. If the key is employment status, every statement to every child and adolescent therapist or family advocacy worker would be testimonial.

⁹¹ 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004). *Compare id.*, with *People v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (noting in *dicta* that after referral by Children's Protective Services statement of child that she had an "owie" to the executive director of Children's Assessment Center (a nongovernment employee) was nontestimonial because was not in the nature of *ex parte* in-court testimony or its equivalent).

⁹² The court specifically rejected the People's arguments, *inter alia*, that the statement at issue was not testimonial because the interviewer was not a government employee and because the Multidisciplinary Interview Center was a neutral site where the interview might have been for a therapeutic purpose. The court noted that because the interview took place after prosecution was initiated, attended by the prosecutor, and was conducted by a forensically trained interviewer, "[i] does not matter what the government's actual intent was in setting up the interview, where the interview took place or who employed the interviewer." *Sisaveth*, 13 Cal. Rptr. 3d at 758.

⁹³ *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004)).

⁹⁴ *Sisaveth*, 13 Cal. Rptr. 3d at 758 n.3.

The seemingly clear lines regarding social workers get less distinct in cases involving medical personnel.

Whether a statement made to medical personnel is testimonial is a complex area, which raises numerous questions in light of *Crawford*. For example, if a child sexual abuse or assault victim is referred to a medical doctor for an examination by law enforcement, does this alone make any subsequent statement testimonial? If a medical examination occurs before a referral, is it not foreseeable to an objective witness that any statement may be available for use at a later trial, particularly when there is a duty to report suspected abuse? Does it matter that the doctor or nurse is not asking questions about what happened and who did what for a forensic purpose, but only to assess the healthcare needs of the declarant? Finally, is the declarant's subjective intent in making the statement relevant?

Some of the answers to these questions were provided in *People v. Cage*.⁹⁵ Cage allegedly assaulted her 15-year-old son, John, by cutting his face with a piece of a broken glass table.⁹⁶ After being taken to the hospital by a sheriff's deputy, an emergency room doctor, Dr. Russell, asked John what happened.⁹⁷ John replied that his mother cut him while his grandmother held him.⁹⁸ In assessing the situation, the court observed that "Dr. Russell was not a police officer or even an agent of the police. He was not performing any function remotely resembling that of a Tudor, Stuart, or Hanoverian justice of the peace."⁹⁹ The court also noted that *Crawford* emphasized the significance of government involvement in the creation of the statement,¹⁰⁰ which in this case, did not occur except insofar as the deputy brought the victim to the hospital for medical treatment. In response to the defendant's argument that John did not distinguish between the deputy's questions¹⁰¹ and the doctor's, the court noted that *Crawford* did not adopt any of the formulations of the "core class" of testimonial hearsay statements; rather, the court stated that the *Crawford* Court "merely noted that they 'exist,' that they 'share a common nucleus,' and that certain indisputably testimonial hearsay statements also fall within that nucleus."¹⁰² For counsel looking to narrow the scope of *Crawford*, the *Cage* court offered this important point:

[E]ven under the [*Crawford* Court's] proposed formulations, the declarant's subjective understanding is irrelevant. They state an objective, "reasonable person" test. No reasonable person in John's shoes would have expected his statements to Dr. Russell to be used prosecutorially, at defendant's trial. This is true even if he thought the doctor might relay his statements to the police. After all, *anyone* who obtains information relevant to a criminal investigation might (and certainly should) pass it along to the police.¹⁰³

Thus, *Cage* supports an argument that even if the declarant expects his statement to be passed onto police, that expectation will not decide the issue: What would an objective, reasonable person expect? As part of that determination, these questions must be answered: What is the purpose of the *listener*? On whom *should* be focus be? On the objective, reasonable declarant or the listener? The next case sheds some light on this issue.

The primary point in *Cage*—the participation of government officials in the creation of the statement—is repeated in other cases involving similar statements. For example, in *People v. Vigil*,¹⁰⁴ the court addressed whether a doctor's interview with the child-victim at the request of law enforcement was testimonial. A police officer investigating the alleged abuse asked a doctor, who was a member of a child protection team providing consultations at hospitals in cases of suspected child abuse, to conduct a "forensic sexual abuse examination."¹⁰⁵ Noting that before performing the examination, the doctor spoke

⁹⁵ 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004), *rev. granted*, 19 Cal. Rptr. 3d 824 (Cal. 2004).

⁹⁶ *Cage*, 15 Cal. Rptr. 3d at 848-49.

⁹⁷ *Id.* at 849.

⁹⁸ *Id.*

⁹⁹ *Id.* at 854.

¹⁰⁰ "*Crawford* repeatedly emphasized the significance of government involvement in a testimonial hearsay statement." *Id.*

¹⁰¹ Before being treated, the deputy sheriff investigating the case asked the victim what happened. The court determined that the responses were not testimonial. *Id.* at 855-57.

¹⁰² *Id.* at 855.

¹⁰³ *Id.* The Oregon Supreme Court made a similar point with respect to the declarant's intent, but also placed emphasis on methodology of government involvement: "The primary focus in *Crawford* was on the method by which government officials elicited out-of-court statements for use in criminal trials, not on the declarant's intent or purpose in making the statement." *State v. Mack*, 101 P.3d 349 (Ore. 2004).

¹⁰⁴ 104 P.2d 258 (Colo. Ct. App. 2004), *cert. granted in part, denied in part*, 2004 Colo. LEXIS 1030 (Colo. Dec. 20, 2004).

¹⁰⁵ *Vigil*, 104 P.2d at 256.

to the police officer about the case, the court found that “[t]he statements were made under circumstances that would lead an objective witness reasonably to believe that they would be used prosecutorially. Although the doctor himself was not a government officer or employee, he was not a person ‘unassociated with government activity.’”¹⁰⁶ Unlike the court in *Cage*, however, the *Vigil* court seemed to place the objective witness spotlight on the *listener* of the statement: “The doctor elicited the statements after consultation with the police, and he necessarily understood that information he obtained would be used be used in a subsequent prosecution for child abuse.”¹⁰⁷ In the world of confrontation, is this the correct focus?

Focusing on the *listener* makes sense if governmental involvement is the defining characteristic of a testimonial statement, because the intent of the declarant (objective or subjective) is of no interest. This focus also makes sense if the Confrontation Clause’s limit is to formalized, affidavit, *ex parte*-type statements and police interrogations, because even if the declarant does not want the information to be used, the government was still involved with an eye toward prosecution. If the Confrontation Clause’s concern, however, is on those who bear “witness,” then it should not matter what the *listener* expects, wants, or does, because that person only becomes a witness at trial if declarant’s unavailability makes him one.¹⁰⁸ The true “witness” is the declarant and the listener is merely the transmitter of the witness’ hearsay statement against the accused. If the Confrontation Clause is to have its textual meaning, the focus should be on the declarant, who is viewed objectively to determine whether he would reasonably believe that the statement being made is likely to be available for use at a later trial—as any accusatory statement is. If this declarant-centered focus is correct, then logically it makes no difference whether the government is involved in the creation of the statement. What matters is whether the declarant reasonably could expect a statement that accuses someone of a crime to be available for use at a later prosecution. Therefore, the *Vigil* court mistook the meaning of “witness” and placed the focus on the wrong person.

Likewise, focusing on a medical examination purpose places the emphasis on the wrong question and the wrong person.¹⁰⁹ *Cage* and *Vigil* placed emphasis on the purpose of the examination and whether the subsequent statement had the trappings of the *Crawford* Court’s description of testimonial statements.¹¹⁰ Similarly, in *State v. Vaught*,¹¹¹ the Nebraska court decided the case based upon the purpose of the exam and the statement’s dissimilarity to testimonial statements listed in *Crawford*. *Vaught* involved the admission of a statement made by a victim of child sexual abuse to a doctor.¹¹² The 4-year-old victim identified the perpetrator in response to a doctor’s question about happened.¹¹³ The court held that the victim’s statement was not testimonial because “the victim’s identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment,” which statement did not fit within any of the *Crawford* Court’s core class of testimonial statements.¹¹⁴ In support of its conclusion, the court observed that the evidence showed the only purpose of the examination was to obtain medical treatment: “[T]here was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination.”¹¹⁵ Was the 4-year-old’s statement made for the purpose of medical treatment or was it merely an unknowing response to a specific question? It is doubtful that the victim in the case understood the significance of the question or its answer. Why should it matter that the government did not cause the statement to be made? Isn’t the effect the same—identifying the perpetrator? One court opinion, discussed in the next paragraph, notes that a governmental referral of a victim to a medical doctor makes no difference as to whether a subsequent statement is testimonial.¹¹⁶ Further, this same court made a critical distinction between a statement made for treatment and one that *identifies* a perpetrator.¹¹⁷

¹⁰⁶ *Id.* at 256 (quoting, *People v. Compan*, 100 P.3d 522 (Colo. Ct. App. 2004), *cert. granted*, 2004 Colo. LEXIS 849 (Colo. Oct. 25, 2004)).

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ This point assumes that the statement at issue is offered for its truth and not some other evidentiary purpose.

¹⁰⁹ These questions still have to get answered, however, as an *evidentiary* matter: What rule of evidence will be used to get the evidence into the courtroom? Perhaps the courts have not been able to divorce hearsay law and the Clause just yet.

¹¹⁰ See *People v. Cage*, 15 Cal. Rptr. 3d 846, 854-855 (Cal. Ct. App. 2004); *Vigil*, 104 P.3d at 265-66.

¹¹¹ 682 N.W.2d 284 (Neb. 2004).

¹¹² *Id.* at 286.

¹¹³ *Id.*

¹¹⁴ *Id.* at 291.

¹¹⁵ *Id.*

¹¹⁶ *People v. T.T.*, 815 N.E.2d 789, 803 (Ill. Ct. App. 2004).

¹¹⁷ See *id.* at 804.

People v. T.T. involved a sexual assault of a 7-year-old girl by a 14-year-old boy.¹¹⁸ A worker for the Department of Children and Family Services (DCFS) referred the victim to the emergency room five months after the alleged assault.¹¹⁹ Doctor Lorand explained to G.F. (the victim) that she would conduct a physical examination and asked G.F. what, if anything, happened to her.¹²⁰ G.F. indicated that the defendant was the person who hurt her in her private parts or buttocks area.¹²¹ The court held that “a victim’s statements to medical personnel regarding ‘descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof,’ are not testimonial in nature where such statements do not accuse or identify the perpetrator of the assault.”¹²² The court rejected the defendant’s attempt to characterize the entire statement as testimonial because “[s]uch an analysis overlooks the crucial ‘witness against’ phrase of the confrontation clause and casts too wide a net in categorizing nonaccusatory statements by sexual assault victims to medical personnel as implicating the confrontation clause’s core concerns regarding government production of *ex parte* evidence against a criminal defendant.”¹²³ Aside from making an appropriate distinction and giving meaning to the text of the Confrontation Clause, of particular interest to military practitioners is the court’s comment that it did “not find controlling the fact that G.F.’s medical exam was the result of a referral from DCFS.”¹²⁴ The court, therefore, seems to suggest, at least with respect to medical statements, that government involvement is not determinative—it is the accusatory character of the statement that carries the day.¹²⁵ To be sure, the court took an important step in pushing the Confrontation Clause toward its plain meaning, but the court still used the *Crawford* Court’s vocabulary of “core concerns” of the Confrontation Clause.¹²⁶

What should trial and defense counsel take from these medical statement cases? First, look for government involvement in the creation of the statement. Second, determine the purpose of the statement with focus on the objective witness. Third, parse the statement into its components. To the extent that law enforcement remained on the sideline, trial counsel should be able to argue that any statement is not testimonial. If the purpose was to develop a case against the accused, defense counsel should be able to argue that any statement is testimonial. If the purpose was truly for medical purposes, however, the trial counsel has ample support for a nontestimonial finding by a military judge. At the same time, the defense counsel can point to *People v. T.T.* to support an argument that an accusatory statement made by a declarant should be considered testimonial, particularly when an objective declarant would expect the statement to be available for later use at trial. The purpose of the Confrontation Clause would be better served if judges would make a clean break in their minds between the constitutional question and the evidentiary issue in this area. To the extent that a child, teenager, or an adult accuses someone of some act against him, that person should be required to come into a courtroom, take an oath, be observable by the finders of fact, be subject to cross-examination¹²⁷ and tell the panel the accused did what he told a doctor, nurse, social worker, or therapist he did. Such a requirement has the beauty of not only complying with the Confrontation Clause, but also being very easy to implement.

The 911 Phone Call Debate: Are They Testimonial?

911 OPERATOR #24: “WHAT’S YOUR EMERGENCY?”

A: “HE JUST HIT ME WITH A BAT!”

Q: “WHO? CAN YOU DESCRIBE WHO HIT YOU?”

A: “MIKE SMITH, WHITE GUY, BLUE JEANS, RED SHIRT, YELLOW CAP, 6’1”, 200 LBS.! HELP ME!!”

¹¹⁸ *Id.* at 792-93.

¹¹⁹ *Id.* at 794.

¹²⁰ *Id.*

¹²¹ *Id.* at 794-95.

¹²² *Id.* at 804 (quoting 725 Illinois Compiled Statutes Annotated 5/115-10 (West 2000)) (emphasis added).

¹²³ *Id.*

¹²⁴ *Id.* at 803.

¹²⁵ *See id.* at 804.

¹²⁶ *See id.*

¹²⁷ As the Supreme Court has noted, there are four elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 846 (1990) Sometimes, however, the physical presence element may be laid aside if necessary to further an important public policy and the reliability of the evidence can otherwise be assured. *Id.*; MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611(d)(3) (2002) (permitting remote testimony of child witnesses upon a finding of necessity by the judge).

Q: "WHERE ARE YOU?"
A: "2483 EARNHARDT WAY."
[PHONE LINE GOES DEAD.]

It is common knowledge today that if there is an emergency, one should dial 911 for assistance.¹²⁸ If someone makes a 911 phone call, he presumably understands that some agent of the government is on the other end of the line and that help in the form of emergency medical personnel or law enforcement will respond to a request for assistance. It is also common knowledge that 911 operators are trained to get as much information about the situation as possible, to include a description, if not the actual identity, of the alleged perpetrator. An issue facing the courts is whether 911 phone calls are testimonial hearsay. The courts are split on this issue, and some courts make a *T.T.*-like distinction between the identity of the perpetrator and other information. In this area, the various undercurrents in *Crawford* come together creating not clarity, but confusion.

One of the first cases to address *Crawford* after the Court released its opinion on March 8, 2004, was *People v. Moscat*.¹²⁹ The case involved a 911 phone call by the complainant in a domestic violence prosecution against Moscat, who moved *in limine* to exclude the recording of the call.¹³⁰ The court, one dedicated solely to trying cases of alleged domestic violence, discussed the case in the context of "victimless prosecutions," in which prosecutors try to prove domestic violence cases without a victim because the victim usually does not appear at trial due to fear, economic or emotional dependence on the defendant, or reluctance to break up their families.¹³¹ As the court pointed out, prosecutors commonly use victims' hearsay statements to doctors as statements made for medical diagnosis or treatment and statements to responding police officers as excited utterances.¹³² The court also noted that "the most common form of such evidence is a call for help made by a woman to 911."¹³³

Against this backdrop, the court determined that "[a] 911 call for help is essentially different in nature than the 'testimonial' materials that *Crawford* tells us the Confrontation Clause was designed to exclude."¹³⁴ In support of this conclusion, the court pointed to two key facts that underline the difference between a *Crawford* testimonial statement and a 911 phone call: the call is not initiated by the police and the call is not generated by a desire of the prosecution or police to seek evidence against someone.¹³⁵ Rather, a 911 call is generated by "the urgent desire of a citizen to be rescued from immediate peril."¹³⁶ Noting that "[a] testimonial statement is produced when the government summons a citizen to be a witness," the court found the typical 911 call is not testimonial because the relationship between the caller and the government is inverted.¹³⁷ That the victim is "trying to save her own life" without consciously "bearing witness" was sufficient for the court to determine that the phone call "is simply *not* the equivalent to a formal pretrial examination by a Justice of the Peace in Reformation England."¹³⁸ *People v. Cortes*¹³⁹ was the responding salvo in the 911 phone call arena. *Cortes* involved a slightly different phone call—a call to report a crime rather than to request assistance or a "cry for help."¹⁴⁰

¹²⁸ See *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Gen. Term 2004).

¹²⁹ 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

¹³⁰ *Id.*

¹³¹ *Id.* at 878.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 879. In fact, the court noted that the phone call can be considered part of the crime itself. *Id.* at 880.

¹³⁵ *Id.* at 879.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 880.

¹³⁹ 781 N.Y.S.2d 401 (N.Y. Gen. Term 2004).

¹⁴⁰ *Id.* at 402.

Cortes involved two 911 phone calls regarding a shooting in the Bronx.¹⁴¹ The caller responded to several questions about the event, gave a description of the shooter and the shooter's direction of flight.¹⁴² The court reviewed the history of the Confrontation Clause, coming to a different conclusion than the Supreme Court did.¹⁴³ The judge found that historical research concluded that the decision to include the right of confrontation had more to do with the "the adversarial system in the American courts made part of the Federal and State bill of rights to protect against [the] government" than with the English experience and the common law.¹⁴⁴ This conclusion is important because it allowed the judge in this case to cast over the limits the *Crawford* Court imposed on the scope of the Confrontation Clause.¹⁴⁵ The judge proposed an objective test more in line with what he called the "highly prized" right of confrontation: "[W]hether the pretrial statement of a person . . . admitted through the testimony of another person, on tape or in writing, was made primarily for . . . [a] purpose [other than investigation or prosecution of a crime]. If so, it need not be confronted."¹⁴⁶ Applying the test to the facts, the court concluded that a 911 phone call made to report a crime and supply information about the circumstances and the people involved is testimonial, requiring an opportunity for cross-examination.¹⁴⁷ The court noted that an objective witness "knows that when he or she reports a crime the statement will be used in an investigation and at proceedings relating to a prosecution."¹⁴⁸ The court did not attempt to distinguish between a call for help and a call to report a crime.¹⁴⁹ One may surmise that given the care with which the court drafted its opinion, the phrase "report a crime" was chosen purposefully and any discussion beyond the facts of the case is unwarranted. Thus, although *Cortes* is an immensely important case, a cry for help-type 911 phone call is untouched by *Cortes*.¹⁵⁰ This case, however, is not the last word on the matter in New York.

*People v. Dobbin*¹⁵¹ presented a strong argument in favor of the testimonial nature of a 911 phone call that can be described as a report of a crime. The court reasoned that a 911 phone call reporting a crime is testimonial because: (1) the call contains "a solemn declaration" officially reporting a crime to a government agency;¹⁵² (2) an objective witness would reasonably believe that after reporting a crime to police, he would be called to testify, and the information supplied would be available for use at a later trial;¹⁵³ (3) the 911 phone call has many features that are the functional equivalent of a police interrogation; both report a crime to police, both initiate police and/or prosecutorial action, both are accusatory, and both feature structured police questioning;¹⁵⁴ and (4) the hearsay nature of the statement—the "very fact that a hearsay exception is necessary for admissibility shows that the statement is testimonial, since hearsay exceptions, when applied to statements, only apply to those that are testimonial; that is, those that contain a 'declaration or affirmation made for the purpose of

¹⁴¹ *Id.* at 402-04.

¹⁴² *Id.* at 404.

¹⁴³ *See id.* at 407-15

¹⁴⁴ *Id.* at 409-10.

¹⁴⁵ *Supra* note 75 and accompanying text.

¹⁴⁶ *Cortes*, 781 N.Y.S.2d at 414.

¹⁴⁷ *Id.* at 415.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 402.

¹⁵⁰ In a later case, *People v. Isaac*, No. 23398/02, 2004 N.Y. Misc. LEXIS 814 (N.Y. Dist. Ct. June 16, 2004), the court had the benefit of both *Moscat* and *Cortes* and chose the reasoning of *Moscat* as the better-reasoned. The judge observed:

This Court agrees that at the least, the "excited utterances" identified by Judge Greenberg in *Moscat* fall outside the reach of *Crawford* not because they fall within a hearsay exception, but because the characteristics which bring them within this particular hearsay exception negate the characteristics which would be required to make them "testimonial."

Id. at **9.

¹⁵¹ No. 7284/95, 2004 N.Y. Misc. LEXIS 2848 (N.Y. Sup. Ct. Dec. 22, 2004).

¹⁵² *Id.* at **7-8.

¹⁵³ *Id.* at **9.

¹⁵⁴ *Id.* at **10-11.

establishing or proving some fact.”¹⁵⁵ While this last point is not very persuasive, the case is instructive for counsel seeking to keep a 911 phone call that reports a crime out of court if the declarant is not available to testify.¹⁵⁶

Two other cases support the conclusion that a 911 call reporting a crime is testimonial: *People v. West*¹⁵⁷ and *State v. Powers*.¹⁵⁸ *West* applies similar reasoning to *People v. T.T.*:¹⁵⁹ a 911 phone call must be parsed into its testimonial—that is, accusatory—and nontestimonial components. The key inquiries are whether the 911 phone call was “(1) volunteered for the purpose of initiating police action or criminal prosecution; or (2) provided in response to an interrogation, the purpose of which was to gather evidence for use in a criminal prosecution.”¹⁶⁰ If the answer to either question is yes, the phone call is testimonial.¹⁶¹ Similarly, the court in *Powers* rejected a bright-line rule admitting 911 phone calls as excited utterances, finding instead “that the trial court, on a case-by-case basis, can best assess the proposed admission of a 911 recording as testimonial or nontestimonial and whether the statement originates from interrogation.”¹⁶²

On the other side of the equation are *State v. Wright*¹⁶³ and *People v. Caudillo*.¹⁶⁴ *Wright* held that the victim’s 911 phone call made “moments after the criminal offense and under the stress of the event” was not testimonial.¹⁶⁵ The court based its conclusion on the idea that “[s]tatements in a 911 call by a victim struggling for self-control and survival moments after an assault simply do not qualify as knowing responses to structured questioning in an investigative environment in which the declarant reasonably expects that the responses will be used in later judicial proceedings.”¹⁶⁶ There can be little doubt that a victim’s statement calling for help is *qualitatively* different from the statements that concerned the *Crawford* Court. An issue for defense counsel, however, is whether a victim’s statement is functionally different from the 911 phone call described in the next case.

The court in *Caudillo* dealt with an anonymous bystander’s 911 phone call reporting “men with guns,” while also providing a license plate number and a description of the two vehicles involved.¹⁶⁷ In holding that the call was *not* testimonial, the court compared the *Crawford* Court’s formulations of the core class of testimonial statements, finding that the phone call was not *ex parte* in-court testimony or its functional equivalent, not an extrajudicial statement in formalized materials, and not made under circumstances an objective witness would reasonably believe would make it available for later use at trial.¹⁶⁸ The court found the following: the 911 call was placed to provide “assistance to any victims and apprehending the gunman to prevent any further violence”; the call’s purpose “was to advise the police of the situation so that they could take appropriate action to protect the community”; and “the caller was simply requesting help from the police by describing what she saw without thinking about whether her statements would be used at a later date.”¹⁶⁹ The focus on the subjective expectation of the caller is not the correct focus for determining whether a statement is testimonial. While such an argument

¹⁵⁵ *Id.* at **12-15 (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

¹⁵⁶ Another possible avenue of approach for counsel is the forfeiture by wrongdoing doctrine. The greater weight of available authority applies the doctrine to the same conduct for which the defendant is on trial. *See, e.g.*, *State v. Meeks*, 88 P.3d 789, 795 (Kan. 2004) (holding that the defendant forfeited his confrontation rights and hearsay objections because he killed the declarant); *People v. Giles*, 19 Cal. Rptr. 3d 843 (Cal. Ct. App. 2004), *rev. granted*, 102 P.3d 930 (Cal. 2004). The Court accepted the doctrine of forfeiture by wrongdoing; thus the doctrine survives *Crawford*. *Crawford*, 541 U.S. at 61-62.

¹⁵⁷ No. 1-02-2358, 2005 Ill. App. LEXIS 62 (Ill. Ct. App. Jan. 5, 2005). Although the opinion is dated 2005, the court’s original opinion was dated 22 December 2004, thus the opinion is appropriate in a discussion of 2004 new developments.

¹⁵⁸ 99 P.3d 1262 (Wash. Ct. App. 2004).

¹⁵⁹ 815 N.E.2d 789 (Ill. Ct. App. 2004).

¹⁶⁰ *West*, 2005 Ill. App. LEXIS 62 at *22.

¹⁶¹ *Id.* at *23.

¹⁶² *Powers*, 99 P.3d at 1266.

¹⁶³ 686 N.W.2d 295 (Minn. Ct. App. 2004). The Minnesota Supreme Court granted review on the *Crawford* issue.

¹⁶⁴ 19 Cal. Rptr. 3d 574 (Cal. Ct. App. 2004), *rev. granted*, 23 Cal. Rptr. 3d 294 (Cal. 2005).

¹⁶⁵ *Wright*, 686 N.W.2d at 302.

¹⁶⁶ *Id.*

¹⁶⁷ *Caudillo*, 19 Cal. Rptr. 3d at 576. The occupants of the two vehicles were members of different street gangs. *Id.*

¹⁶⁸ *Id.* at 1439-40.

¹⁶⁹ *Id.* at 1440.

inures to the benefit of the government, the language from *Crawford* clearly indicates that any test regarding the declarant is objective.¹⁷⁰ Notwithstanding *Caudillo*'s incorrect focus on the subjective expectation of the caller, there are greater issues to be answered.

Why is there a distinction between a cry for help by a victim and a report of a crime by a bystander? To be sure, the intents of the declarants are different, but the practical effect is the same: the information is used by the government to assist in the prosecution of a case, and if the case is prosecuted, both are witnesses against the accused. What is the constitutional difference between a victim's and a bystander's statements with respect to the protection afforded by the Confrontation Clause? Why should the result be different? As a practical matter, the language of *Crawford* gives ample support for the difference and trial and defense counsel have precedent to argue the merits of their respective positions before a military judge.

Trial counsel argue that a victim's call made while under the stress of the event is not testimonial because the call is placed to summon immediate assistance, not to initiate prosecution. *Wright, Caudillo, West, Powers, and Moscat* all offer varying degrees of support for that proposition. The other cases, *Cortes* and *Dobbin*, are distinguishable on the facts. For the defense counsel, *West, Powers, Cortes, and Dobbins* also offer support that 911 phone calls are not automatically admissible—the Confrontation Clause cannot be swept easily away by the emotion of the events that gave rise to the phone call. These 911 phone call cases point to the difficulty courts are having in the absence of a comprehensive definition of testimonial. To be sure, the real-life drama played on 911 tapes makes it challenging to analyze the issues logically. Nonetheless, the law is the dictate of reason,¹⁷¹ not emotion. An accused's right to confront witnesses should not be eliminated because emotion leads justice.

What Should Be Simple Is Not: The Meaning of Interrogation

It should be simple to determine what amounts to interrogation: “In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.”¹⁷² Alas, for the trial practitioner, the Court muddied the waters: the Court used the term “interrogation” in its colloquial sense, rather than in any legal sense.¹⁷³ The Court seemed to believe what constitutes an interrogation is so self-evident—even in a colloquial sense—that it spent no time explaining what the term *might* encompass. Like its definition of testimonial, the Court left more questions than answers in this key area of its opinion. Whatever else can be said about the *Crawford* opinion, the issue of Sylvia's statement given during a police interrogation was *the* issue of the case; everything else the Court addressed served as background for the question before it.¹⁷⁴ Other testimonial issues can be distinguished as dicta because *Crawford* is not on point for those issues. *Crawford* supplies a general approach for answering the question of what is testimonial hearsay, but the opinion certainly is not the definitive answer, as the cases discussed above amply demonstrate. Nonetheless, regarding issues for which *Crawford* is on point, there is no agreement about what constitutes an “interrogation.”

The primary area of disagreement mirrors the dispute regarding 911 phone calls: if a statement to a police officer is an excited utterance, the majority of courts are finding such a statement to be nontestimonial.¹⁷⁵ The conclusion is premised on the lack of resemblance to the formalized, structured police questioning endemic to the civil-law mode of criminal procedure. Further, if police officers arrive at a scene having no firm understanding that a crime has been committed, of the identity of the perpetrator, or other preliminary information, appellate courts have found statements made during that initial period on the scene to be nontestimonial.¹⁷⁶ Courts have also found statements made during preliminary field investigations before a scene is secured to be nontestimonial.¹⁷⁷ When a witness is at the police station and subjected to formalized, structured

¹⁷⁰ See *supra* text accompanying note 48.

¹⁷¹ *Lex est dictamen rationis*. BLACK'S LAW DICTIONARY 910 (6th ed. 1990).

¹⁷² *Crawford, v. Washington*, 541 U.S. 36, 53 (2004).

¹⁷³ *Id.* at 53 n.4.

¹⁷⁴ “We granted certiorari to determine whether the State's use of Sylvia's statement [given during police interrogation] violated the *Confrontation Clause*.” *Id.* at 42.

¹⁷⁵ See *infra* text accompanying notes 179-215.

¹⁷⁶ See *infra* text accompanying notes 232-269.

¹⁷⁷ See *infra* text accompanying notes 248-269.

police questioning, the courts have had little difficulty finding “interrogation.”¹⁷⁸ Because these latter cases are straightforward, this article will not analyze them. Instead, this article will address the more difficult questions presented when police officers arrive at scene or question a victim at a hospital.

The cases in this area can be broken down into two areas. First are those cases involving police officers arriving on a scene and encountering a putative victim. The case holdings dealing with this fact pattern are as dispersed as those dealing with the fringe areas (outside the minimum definition) of testimonial hearsay. Second are those cases dealing with police officers interviewing putative victims at places other than the scene, for example at a hospital. Not surprisingly, the holdings in those cases are inconsistent as well. The lesson for counsel from these cases is that the decision by the trial judge often will be made based on counsel’s advocacy. Counsel on both sides of the issue can borrow language from the *Crawford* opinion and case law from lower courts to serve as support. These cases show the *Crawford* Court understood that hearsay law and confrontation should be divorced, but the terms of the divorce need some simplification and clarification.

Indiana courts first addressed the issue of interrogation after *Crawford*. *Hammon v. State*¹⁷⁹ and *Fowler v. State*¹⁸⁰ were decided on the same day, 9 August 2004, and each involved domestic abuse victims who made statements to responding police officers. In *Hammon*, a police officer arrived at a private residence and spoke with A.H., whom the officer thought was “timid and frightened.”¹⁸¹ The police officer entered the residence to find the living room in disarray with broken items littering the floor.¹⁸² After the defendant, Hammon, claimed that the argument was not physical, the officer separated A.H. and Hammon.¹⁸³ A.H. told the officer that the defendant threw her into glass from a broken heater and punched her twice in the chest.¹⁸⁴ At trial, A.H. did not testify, but the officer testified to A.H.’s statements.¹⁸⁵ The trial court admitted A.H.’s statement as an excited utterance,¹⁸⁶ a conclusion the appellate court affirmed.¹⁸⁷ The court then reviewed *Crawford*’s effect on the case, holding that A.H.’s statement was not testimonial.¹⁸⁸ The court noted that “the common denominator underlying the *Crawford*’s court’s discussion of what constitutes a ‘testimonial’ statement is the official and formal quality of such a statement.”¹⁸⁹ In deciding whether the statement was the product of interrogation, the court stated, “[P]olice ‘interrogation’ is not the same as, and is much narrower than police ‘questioning.’”¹⁹⁰ Given the narrow interpretation of “interrogation” as a premise, the court held:

[W]hen police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter *in order to determine what happened*, statements giving in response thereto are not “testimonial.” Whatever else police “interrogation” might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it occurred.¹⁹¹

¹⁷⁸ See, e.g., *People v. Pirwani*, 14 Cal. Rptr. 3d 673 (Cal. Ct. App. 2004) (holding that a victim’s videotaped statement to police was testimonial); *People v. Vigil*, 104 P.2d 258 (Colo. Ct. App. 2004), cert. granted in part, denied in part, 2004 Colo. LEXIS 1030 (Colo. Dec. 20, 2004) (holding that victim’s videotaped statement to law enforcement was testimonial); *United States v. Simpson*, 60 M.J. 674 (Army Ct. Crim. App. 2004) (holding that a co-accused sworn statement given to agents of the U.S. Army Criminal Investigation Command (CID) at the CID office was testimonial). The *Simpson* case is the first case from a military court to discuss *Crawford*. The Court of Appeals for the Armed Forces (CAAF) has several cases pending before it having *Crawford* issues: *United States v. Taylor*, 60 M.J. 349 (2004); *United States v. Rhodes*, 60 M.J. 378 (2004); *United States v. Scheurer*, 60 M.J. 117 (2004).

¹⁷⁹ 809 N.E.2d 945 (Ind. Ct. App. 2004), transfer granted, 2004 Ind. LEXIS 1031 (Ind. Dec. 9, 2004).

¹⁸⁰ 809 N.E.2d 960 (Ind. Ct. App. 2004), transfer granted, 2004 Ind. LEXIS 1030 (Ind. Dec. 9, 2004).

¹⁸¹ *Hammon*, 809 N.E.2d at 947.

¹⁸² *Id.*

¹⁸³ *Id.* at 948.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 950.

¹⁸⁸ *Id.* at 952.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (emphasis added).

The court also went further, noting that “the very concept of an ‘excited utterance’ is such that it is difficult to perceive how such a statement could ever be ‘testimonial.’”¹⁹² Given the Supreme Court’s emphasis on formality, the inquisitorial nature of criminal procedure, and the involvement of government agents with an eye toward prosecution in *Crawford*, the court’s decision in *Hammon* should come as no surprise. Is this conclusion, however, supportable? The officer was dispatched in response to a request,¹⁹³ so he knew that a problem was afoot. Given that he entered the home and saw the telltale signs of a domestic disturbance, coupled with his observations of the victim,¹⁹⁴ one cannot seriously argue that the officer did not know A.H. was likely a victim of an assault. Therefore, how can one persuasively maintain that what followed was not interrogation, at least in a colloquial sense? As the court noted, officers arriving on the scene ask questions “in order to determine what happened.”¹⁹⁵ Isn’t that also what a trial is for? What is the functional difference between A.H.’s statement at the scene of the crime and Sylvia Crawford’s statement to police officers at the stationhouse? If the distinction is the presence of structured police questioning, and that excited utterances by definition are not testimonial, then the exceptions swallow the rule. Nonetheless, those distinctions—the presence or absence of structured police questioning and the excited nature of the statement—are ones that other courts have grasped tightly to justify their decisions. For example, the other case decided by the Indiana Court of Appeals on the same day as *Hammon* presented very similar facts and an identical holding.

The officers in *Fowler* were dispatched in response to a 911 phone call.¹⁹⁶ On arrival, Officer Decker met Fowler and his wife, A.R.¹⁹⁷ Officer Decker observed that A.R. had a bloody nose and had blood on her shirt and pants.¹⁹⁸ After being on the scene for ten minutes, Officer Decker asked A.R. what happened.¹⁹⁹ Moaning and crying, A.R. told the officer that Fowler punched her in the face several times.²⁰⁰ Quoting extensively from the decision in *Hammon*,²⁰¹ the court in *Fowler* held that A.R.’s excited utterance was not testimonial, declaring that her statement did not “remotely” resemble “an inquiry before King James I’s Privy Council,” nor did it resemble the “classic ‘police interrogation’” referred to in *Crawford*.²⁰² As with the statement in *Hammon*, the responding officer had a clear understanding that a crime occurred, that the wife was the victim, and that the husband was very likely the guilty party.²⁰³ The accused’s right of confrontation was brushed aside in favor of presenting the hearsay statement by the police officer because the wife refused to testify as to the assault.²⁰⁴ Other courts faced with similar fact patterns have arrived at similar conclusions.

For example, in *State v. Forrest*,²⁰⁵ the court dealt with a statement from a kidnapping victim made immediately after being rescued by police officers. Law enforcement agents were sent to the home of Cynthia Moore, the defendant’s aunt.²⁰⁶ According to the court, the police had reason to believe that Forrest was armed with a knife and gun.²⁰⁷ During the police’s hour-long observation, they saw Forrest come out of the home a number of times with a knife to Moore’s body and throat.²⁰⁸

¹⁹² *Id.*

¹⁹³ *Id.* at 947.

¹⁹⁴ *Id.* at 948.

¹⁹⁵ *Id.* at 952.

¹⁹⁶ 809 N.E.2d 960, 961 (Ind. Ct. App. 2004).

¹⁹⁷ *Id.* at 961.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 962-64.

²⁰² *Id.* at 964.

²⁰³ *See id.* at 961.

²⁰⁴ A.R. stated during her examination, “I don’t want to testify no more!” *Id.* at 961 (quoting the trial transcript, Tr. p. 7). Because the court did not discuss waiver, one may surmise that there was no waiver of the opportunity to cross-examine A.R. *See, e.g.*, *United States v. Bridges*, 55 M.J. 60 (2001); *United States v. McGrath*, 39 M.J. 158 (C.M.A. 1994).

²⁰⁵ 596 S.E.2d 22 (N.C. Ct. App. 2004), *rev. denied*, 2004 N.C. LEXIS 1207 (N.C. Dec. 2, 2004).

²⁰⁶ *Id.* at 23.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 23-24.

After Forrest walked down the street with a knife to Moore's throat, police moved in to disarm Forrest, arrest him, and free Moore.²⁰⁹ After being freed, Moore, while bleeding, shaking, crying and in a state of nervousness, told a detective what Moore had done to her while in the house.²¹⁰ The court looked to the *Moscat* decision and applied its rationale to the facts before it, concluding that Moore's statement was not testimonial.²¹¹ The court observed, "Just as with a 911 call, a spontaneous statement made to police immediately after a rescue can be considered 'part of the criminal incident itself, rather than as part of the prosecution that follows.'"²¹² The court also noted that Moore "was not providing a formal statement, deposition, or affidavit, was not aware that she was bearing witness, and was not aware that her utterances might impact further legal proceedings."²¹³ The court's focus on what the victim was aware of, apparently not applying the objective test, is misplaced and is not supported by *Crawford*.²¹⁴ What is more puzzling is why the court downplayed the facts known to the officers when they arrived at the scene and after they saw the accused's actions. There is no doubt they knew there was a crime and they knew who was responsible. That Moore spontaneously made accusatory statements makes no constitutional difference as to whether she was bearing witness against Forrest.

In *People v. Mackey*,²¹⁵ the court addressed the statements of an assault victim who approached officers in a van, and in response to the question, "What is wrong?," told them that her boyfriend punched her in the face and pushed her down.²¹⁶ The importance of this case is the test the court articulated to determine whether a statement is testimonial:

A fact-specific analysis of the particular nature and circumstances of the statements is applied to determine whether the statements are testimonial. The analysis takes into consideration the extent of formalized setting in which the statements were made, if and how the statements were recorded, the declarant's primary purpose in making the statements, whether an objective declarant would believe those statements would be used to initiate prosecutorial action and later at trial, and specifically with cases involving statements to law enforcement, the existence of any structured questioning and whether the declarant initiated the contact.²¹⁷

The court concluded that the victim initiated contact with police to seek immediate protection, not to initiate prosecutorial action.²¹⁸ Further, the statement was not in response to structured police questioning and was informal.²¹⁹ Analysis of the test reveals a number of issues. Is a request for assistance a broad concept that includes telling the police the identity of the perpetrator? Need police officers wait for someone to say something to them, not record the conversation in any formalized way, and ask only open-ended questions to avoid the strictures of the Confrontation Clause? Should the prosecution be allowed to show that the subjective intent of the declarant was not to initiate prosecution in order to avoid the "testimonial" moniker on an accusatory statement? If the statement is excited, along with everything else noted, does that automatically mean that the statement is nontestimonial? The Florida Court of Appeals answered this last question negatively in *Lopez v. State*.²²⁰

²⁰⁹ *Id.* at 24.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 27 (quoting *People v. Moscat*, 777 N.Y.S.2d 875, 880 (N.Y. Crim. Ct. 2004)).

²¹³ *Id.* (citation omitted).

²¹⁴ *See supra* text accompanying note 48.

²¹⁵ 785 N.Y.S.2d 870 (N.Y. Crim. Ct. 2004).

²¹⁶ *Id.* at 871.

²¹⁷ *Id.* at 873-74.

²¹⁸ *Id.* at 874.

²¹⁹ *Id.* The Maine Supreme Court came to a similar conclusion in *State v. Barnes*, No. 854 A.2d 208 (Me. 2004). There, the court held that the defendant's mother's 1998 statement to police officer (mother killed by defendant in 1999) that defendant had assaulted her and repeatedly threatened to kill her were not testimonial because police did not seek her out, the statements were made under stress of assault, and not made in response to tactically structured police questioning. The 9th Circuit also reached the conclusion that statements made to an investigating officer are not testimonial. *Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004). The court held that murdered victim's statements that she believed a prowler at her home to be the defendant to police officers responding to 911 call were not testimonial because the victim was not being interrogated by police officers who were at victim's home to assist her.

²²⁰ 888 So. 2d 693 (Fla. Ct. App. 2004).

Police officers were dispatched to an apartment complex to investigate a report of kidnapping and assault.²²¹ A police officer met the victim, who was nervous and appeared to be upset, in the parking lot.²²² Officer Gaston asked the victim what happened, and the victim stated that a man abducted him at gunpoint in the victim's car.²²³ The victim then pointed to Lopez and shortly thereafter told the officer that the weapon was in the victim's car.²²⁴ The court doubted that the conversation could be called an interrogation,²²⁵ but the court concluded that the conversation was testimonial.²²⁶ The victim, the court determined, "knew that he was making a formal report of the incident and that his report would be used against the defendant."²²⁷ Importantly, the court noted the following:

[W]hether a statement falls within the third category of testimonial statements [that is, statements made under circumstances that would lead an objective witness to reasonably believe that the statements would be available for use at a later trial] identified in *Crawford* depends on the purpose for which the statement is made, *not on the emotional state of the declarant.*²²⁸

This observation should be heartening to defense counsel seeking to have an excited utterance to a police officer classified as a testimonial statement. Indeed, as the court pointed out, "the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made."²²⁹ One can easily imagine numerous situations where an excited victim or witness makes a report in response to a question from a police officer that is not necessarily reliable²³⁰ and should be subject to cross-examination.

Another case in which the court focused on the lack of formality and purpose of the statement is *People v. Cage*.²³¹ Recall that this case involved John, who was slashed in the face with a piece of glass by his mother. After John arrived at the hospital, Deputy Mullin asked him what happened.²³² John told the deputy about the argument he had with his mother, that his grandmother held him, that his mother grabbed a piece of glass from the broken coffee table, and that his mother cut him.²³³ The court could not "believe that the [f]ramers would have seen a 'striking resemblance' between Deputy Mullin's interview with John at the hospital and a justice of the peace's pretrial examination."²³⁴ Incredibly, the court believed that Deputy Mullin had not determined whether a crime had been committed and, if so, by whom.²³⁵ The conversation was, rather, just an open-ended request for John "to tell his story."²³⁶ The lack of a known crime and the lack of suspect, coupled with an open-ended invitation, was apparently sufficient to have an accusatory statement deemed nontestimonial. That

²²¹ *Id.* at 695.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 697.

²²⁶ *Id.* at 700.

²²⁷ *Id.*

²²⁸ *Id.* at 699 (emphasis added).

²²⁹ *Id.* at 699-700.

²³⁰ "[U]nder *Crawford*, reliability has no bearing on the question of whether a statement was testimonial." *Id.* at 699.

²³¹ 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004), *review granted*, 19 Cal. Rptr. 3d 824 (Cal. 2004).

²³² *Id.* at 849.

²³³ *Id.*

²³⁴ *Id.* at 856.

²³⁵ *Id.* Although Deputy Mullin testified that he had no reason to think a crime had been committed, his testimony and the court's belief of his testimony are at least facially questionable given the information Mullin knew after he went to the site of the assault—the defendant picking up pieces of glass and a coffee table missing its top. He also spoke to the defendant, her mother, and her daughter. *Id.* at 849. An hour after going to the house, he was dispatched to look for an injured person, finding John with a large cut on the side of his face. *Id.*

²³⁶ *Id.* at 856-57.

conclusion rests on a thin reed indeed, one that nevertheless finds support in two other cases, *Cassidy v. State*²³⁷ and *People v. Kilday*.²³⁸

The Texas court in *Cassidy* evaluated an assault victim's statement to an investigating officer while the victim was in the hospital.²³⁹ Austin Police Officer Benfer was dispatched to a convenience store, where an employee had been stabbed.²⁴⁰ On arriving, he saw medical personnel working on the clerk, Shoukat.²⁴¹ He also observed a large amount of blood behind the counter and elsewhere in the store.²⁴² About an hour after the assault, Officer Benfer interviewed Shoukat, who through an interpreter gave the officer a description of the assailant matching a description provided by two other witnesses.²⁴³ Shoukat also told Officer Benfer that a man entered the store, asked to cash a check, and when Shoukat refused, the man stabbed him.²⁴⁴ The court, in a conclusory fashion, held that Benfer's interview of Shoukat was not an interrogation; therefore, the statement was not testimonial.²⁴⁵ This case is at least distinguishable from *Cage* because Officer Benfer knew that there was a crime, although he was not sure who committed it. Nonetheless, a police officer's knowledge of a crime did not seem to matter to the Texas court; the characterization of the statement as an excited utterance (a characterization not disputed by *Cassidy*)²⁴⁶ seemed to carry the day.

Kilday is the last case to discuss a lack of certainty in the analysis of whether a statement testimonial. The manager of a hotel testified that he observed burns on the legs of the victim, Patricia Kiernan, who previously told the manager that she wore a bandage because of a work injury.²⁴⁷ He asked to see the injury and, after seeing it, concluded that it could not have been an accident.²⁴⁸ He asked the victim what happened and she reluctantly told him that her live-in boyfriend intentionally burned her with an iron; the manager then called the police.²⁴⁹ Two police officers, Officers Cirina and Federico, arrived and met Kiernan, who was upset, frightened, and reluctant to speak to the officers.²⁵⁰ Officer Federico observed that Kiernan had several injuries.²⁵¹ The victim told Officer Cirina that her boyfriend cut her arm and burned her leg with an iron.²⁵² She also told him that that night before, her boyfriend pulled her hair and threw her into walls.²⁵³ She told Officer Federico that Kilday cut her wrist and arm with a piece of glass, held her down and burned her leg with an iron, pushed her into the street during a fight the night before, and pulled her hair and threw her against a wall that morning.²⁵⁴ Because Kiernan was

²³⁷ 149 S.W.3d 712 (Tex. App. 2004).

²³⁸ 20 Cal. Rptr. 3d 161 (Cal. Ct. App. 2004), review granted, 2005 Cal. LEXIS 565 (Cal. Jan. 19, 2005).

²³⁹ *Cassidy*, 149 S.W.3d at 714.

²⁴⁰ *Id.* at 713.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 714.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 716. There is one Texas case that came to a similar conclusion, *Wilson v. State*, 151 S.W.3d 694 (Tex. Ct. App. 2004). In *Wilson*, police officers at the scene of a just-ended police chase spoke to the defendant's girlfriend, who came up to them, asking what happened to the car and the passengers in the car. She told police that the car had been stolen, that she was the girlfriend of the driver of the car, and that his initials were A.D. The court held that the statements were not testimonial because the girlfriend initiated contact, her statements were made in the course of inquiring about the car and its passengers, and she was not responding to structured police questioning.

²⁴⁶ *Id.* at 714.

²⁴⁷ *People v. Kilday*, 20 Cal. Rptr. 3d 161, 164 (2004).

²⁴⁸ *Id.* at 165.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* ("a bruise on her right shoulder and arm, a cut on her left wrist and arm, and a bump on the back of her head").

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

reluctant to speak to the officers, Cirina summoned a female detective to the scene to talk to her.²⁵⁵ The officers briefed the detective after she arrived and told her that they needed a more detailed statement.²⁵⁶ Kiernan relayed much of the same information to the detective as she relayed to the officers (the second statement).²⁵⁷ After her boyfriend returned to the hotel, officers arrested him.²⁵⁸ The detective then conducted a tape-recorded interview with the victim (the third statement).²⁵⁹ During that statement, Kiernan detailed a longer history of abuse at the hands of her boyfriend.²⁶⁰

The court declared that statements obtained through police questioning at or near the scene of a crime are testimonial if the officer is acting “in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution.”²⁶¹ Applying its premise, the court found that Kiernan’s second and third statements were testimonial.²⁶² The court spent more time on the second statement, noting that the police had secured the scene when the detective arrived and exigent matters were resolved.²⁶³ Thus, by the time the detective arrived, “the overarching purpose of the interaction [with Kiernan] was obtaining a detailed statement” for prosecutorial purposes.²⁶⁴ The first statement, however, posed more of a problem.

The court stated that Officers Cirina and Federico initially encountered an unsecured and uncertain situation.²⁶⁵ For reasons deriving from its premise, the court noted that there was nothing in the record to suggest “the officers were aware of the nature of the crime at issue or the identity of the alleged assailant.”²⁶⁶ Because the officers “were still principally in the process of accomplishing the preliminary tasks of securing and assessing the scene, we conclude that the statement elicited is not testimonial.”²⁶⁷ The court wisely made it clear, however, that it was not adopting a blanket rule that “all statements obtained from victims or witnesses by police officers responding to emergency calls are necessarily nontestimonial,”²⁶⁸ but the court made it difficult for future defendants in California to argue that such statements are testimonial.

There are several cases on the other side of the fence from *Kilday*, *Cassidy*, *Cage*, *Mackey*, and *Forrest*. In *People v. Victors*,²⁶⁹ the court adopted a very simple test to determine whether police questioning at the scene of a crime is testimonial: “[T]estimonial evidence encompasses out-of-court statements that are offered to establish or disprove an element of the offense charged or a matter of fact.”²⁷⁰ This case involved statements made by a domestic violence victim to an officer responding to a report of domestic battery.²⁷¹ He first talked to witnesses who heard an argument between the defendant and the victim, and then he talked to the victim, whom he described as crying, upset, and frightful.²⁷² Just like the cases above, the police officer responded to a call for assistance and conducted an investigation into the possible commission of a crime.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *See id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *See id.* at 165-66.

²⁶¹ *Id.* at 170.

²⁶² *Id.* at 171-72.

²⁶³ *Id.* at 171.

²⁶⁴ *Id.* The court found that the detective was aware of the general nature of the crime and the likely perpetrator. *Id.*

²⁶⁵ *Id.* at 172.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 174.

²⁶⁸ *Id.* at 173.

²⁶⁹ 819 N.E.2d 311 (Ill. Ct. App. 2004).

²⁷⁰ *Id.* at 320.

²⁷¹ *Id.* at 314.

²⁷² *Id.*

This time, however, the court found the statements were testimonial.²⁷³ Although the prosecution argued that the victim's statement was an excited utterance,²⁷⁴ the court disagreed.

*State v. Wall*²⁷⁵ is factually similar to *Victors* and virtually identical to *Cassidy*. A police officer interviewed a victim of an assault while the victim was hospitalized as a result of the assault.²⁷⁶ The victim answered questions and identified Wall as the assailant.²⁷⁷ The court noted the holding in *Cassidy*, yet it made an opposite finding: the statement of the victim was testimonial because the interview was structured police questioning.²⁷⁸ The trial court's conclusion that the statement was an excited utterance,²⁷⁹ did not figure into the court's analysis. This court's holding is not without company from other courts: *People v. Sisavath*,²⁸⁰ *People v. Adams*,²⁸¹ *People v. T.T.*,²⁸² *People v. Rolandis G.*,²⁸³ and *People v. West*²⁸⁴ all stand for similar propositions.

What is the trial practitioner to take from all these cases and their varied conclusions? The trend, perhaps wrongly so, is preliminary statements—primarily excited utterances—that are obtained by police assessing the situation in response to a report of a crime are nontestimonial. To the extent the interviews are more formalized, the police have a better idea what the situation is and who is involved, and the more calm the interviewee, the more likely courts are to find the statements testimonial. Whether there is a constitutional difference between a preliminary investigation and a later investigation is a dubious distinction at best. What can be clearly deduced from the fallout with regard to a core term from *Crawford*—interrogation—is that the Court needs to provide greater clarity as to its terms. The Court does trial practitioners no favors when it uses an important term and then casts the bar adrift to find its own way. Perhaps the Court's refusal to define interrogation means that the Court does not know what the term means in the varied practices of the states.

What *Crawford* Does not Implicate

Crawford only extends to testimonial hearsay.²⁸⁵ If the proponent has a nonhearsay purpose for introducing the statement, *Crawford* does not apply.²⁸⁶ Also, *Crawford* is no impediment to the admissibility of statements if the declarant

²⁷³ *Id.* at 320.

²⁷⁴ *Id.* at 319.

²⁷⁵ 143 S.W.2d 846 (Tex. Ct. App. 2004).

²⁷⁶ *Id.* at 848.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 851.

²⁷⁹ *Id.* at 848.

²⁸⁰ 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004) (holding that a child sexual abuse victim's statement to a police officer responding to call was testimonial because it was knowingly given in response to structured police questioning).

²⁸¹ 16 Cal. Rptr. 3d 237 (Cal. Ct. App. 2004), *rev. granted*, 19 Cal. Rptr. 3d 824 (Cal. 2004) (holding that a calm assault victim's statements to sheriff deputy at the scene of an assault as well as during an interview approximately forty-five minutes later at the hospital were testimonial hearsay).

²⁸² 815 N.E.2d 789 (Ill. Ct. App. 2004) (holding that a sexual abuse victim's statements to the police detective at the scene clearly fell within the definition of testimonial).

²⁸³ 817 N.E.2d 183 (Ill. Ct. App. 2004) (holding that the victim's statement to police officer responding to and investigating a report of sexual assault was testimonial because it was the result of formal and systemic questioning).

²⁸⁴ No. 1-02-2358, 2005 Ill. App. LEXIS 62 (Ill. Ct. App. Jan. 5, 2005) (holding that the victim's statements to the police officers taken at the hospital when the defendant was already in custody and the officers had some knowledge of his involvement were testimonial). This case also has a nontestimonial statement by the victim. The court also held that the victim's statement to a police officer at a third party's house were not testimonial because the statement was obtained in response to the officer's preliminary task of attending to the victim's medical needs shortly after the commission of the crime.

²⁸⁵ *See Crawford v. Washington*, 541 U.S. 36, 68 (2004).

²⁸⁶ "The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9. *See, e.g., People v. Lanier*, 687 N.W.2d 370 (Mich. Ct. App. 2004) (approving use of a testimonial statement of dead declarant who implicated the defendant because the statement was not offered for its truth, but to impeach the defendant's testimony that the declarant was the shooter).

testifies at trial.²⁸⁷ Finally, the Confrontation Clause does not bar admission of business records,²⁸⁸ statements of co-conspirators,²⁸⁹ and (probably) dying declarations.²⁹⁰ To some extent, *Crawford* is naturally clearer about what is outside its scope than what is inside.

What Does It All Mean?

There can be absolutely no doubt that *Crawford* fundamentally alters the way criminal cases are tried. Under *Roberts*, if the victim or primary witness did not appear at trial for whatever reason, the prosecution could still go forward if the victim's or witness's statement possessed the requisite "indicia of reliability."²⁹¹ No more. Now counsel must determine whether a statement is testimonial, a daunting task. As has been argued above, to the extent that a statement is accusatory, the declarant's statement should be considered testimonial. Most courts, however, have taken a different approach, looking at government involvement in the creation of the statement, the statement's purpose, whether the statement is an excited utterance, and to whom the statement was made.

Crawford may spell doom for the admission of statements gathered with government involvement, for the purpose of building a case against the accused, or made to a government agent (as opposed to a friend or family member). The statement may still be admissible if the proponent of the testimonial statement can show unavailability and a prior opportunity for cross-examination. Caution must be exercised, however, because the meanings of unavailability and "opportunity for cross-examination,"²⁹² have long languished under *Roberts*. Counsel should expect renewed emphasis in these two areas if military judges declare a lot of hearsay statements testimonial.

In everyday practice, given the new paradigm, counsel must re-evaluate how to handle the Article 32 investigation and the use of depositions,²⁹³ and must also ensure that all statements by a victim or witness are disclosed to defense.²⁹⁴ How much of the case should be tried at the hearing? Should the government seek to depose important witnesses? What if the victim refuses to come to the hearing? What if the defense is aware one statement, but not another (and neither is the trial counsel)?

Because the way ahead is so unclear and the waters are uncharted, counsel will find a rare opportunity to influence the future direction of courts-martial practice. Because the way ahead is not certain, counsel must keep up with the rapidly developing case law in this area if they are to marshal the latest interpretation in support of their arguments. Every week, at least twenty opinions are released that make a citation to *Crawford*. Armed with the newest cases and making the best argument, counsel may have *the* case on the desk at this very moment that will clear the air and show that the end of the journey is indeed a place rich and strange: an occupied witness box where under *Roberts* there wasn't one.

²⁸⁷ *Crawford*, 541 U.S. at 59 ("The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.").

²⁸⁸ *Id.* at 56. Whether records created solely for litigation are testimonial is open question. Compare, *City of Las Vegas v. Walsh*, 91 P.3d 591 (Nev. 2004) (holding that a healthcare professional's affidavit prepared solely for the prosecution's later use at trial was testimonial), and *People v. Rogers*, 780 N.Y.S.2d 393 (N.Y. App. Div. 2004) (holding that a report of blood test results (admitted as a business record) of alleged rape victim incapable of consent because of intoxication was testimonial because the test requested by and prepared for law enforcement for the purpose of prosecution), with *State v. Dedman*, 102 P.3d 628 (N.M. 2004) (holding that a blood alcohol report, generated by the Scientific Laboratory Division of the Department of Health, was not investigative or prosecutorial, and although prepared for trial, the "process is routine, non-adversarial, and made to ensure an accurate measurement").

²⁸⁹ *Crawford*, 541 U.S. at 56.

²⁹⁰ *Id.* at 56 n.6.

²⁹¹ See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

²⁹² The meaning of the "opportunity for cross-examination" has been long dominated by the case *United States v. Owens*, 484 U.S. 554 (1988), which held that the Confrontation Clause was not violated by admission of the victim's out-of-court identification of the defendant from a photo line-up even though he was unable, because of a memory loss, to testify concerning the basis for the identification.

²⁹³ See generally MCM, *supra* note 127, R.C.M. 702.

²⁹⁴ See, e.g., *People v. Ochoa*, 18 Cal. Rptr. 3d 635 (Cal. Ct. App. 2004), *review granted*, 101 P.3d 575 (Cal. 2004) (approving the People's concession that *Crawford* "would preclude the admission of testimonial statements that were not disclosed or identified at the preliminary hearing").