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Is *Crawford* a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of "Testimonial"

It is difficult to overstate the impact of *Crawford v. Washington*[1] on domestic violence and familial abuse prosecutions. Not infrequently, the victims in such cases become unavailable by the time of trial. This has forced prosecutors to depend, at least in part, on the use of hearsay statements made by victims during or shortly after the alleged crime.[2] Frequently, such statements are made during 911 calls for assistance[3] or in spontaneous utterances to law enforcement officers or other persons.[4] While many of these statements fit neatly into well-recognized exceptions to the hearsay rule—such as the exceptions for excited utterances[5] or statements made for the purpose of obtaining

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1 541 U.S. 36 (2004).

2 *See, e.g.*, United States v. Arnold, 410 F.3d 895, 897-98 (6th Cir. 2005); People v. Corella, 18 Cal. Rptr. 3d 770, 773 (Cal. Ct. App. 2004); Hammon v. State, 829 N.E.2d 444, 446-47 (Ind. 2005); Spencer v. State, 162 S.W.3d 877, 878 (Tex. Ct. App. 2005).

3 *See, e.g.,* Fowler v. State, 829 N.E.2d 459, 462 (Ind. 2005); People v. Moscat, 777 N.Y.S.2d 875, 879 (N.Y. Crim. Ct. 2004); State v. Powers, 99 P.3d 1262, 1263 (Wash. Ct. App. 2004).

4 *See, e.g.*, Boctking v. Bayer, 399 F.3d 1019 (9th Cir. 2005) (trial court admitted graphic description by young sexual abuse victim contained in statements made to the victim's mother); People v. Griffin, 33 Cal. 4th 536, 579 (Cal. 2004) (upholding admission of statement by victim made to a friend); Demons v. State, 595 S.E.2d 76, 79-80 (Ga. 2004) (statements by victim to co-worker); *Hammon*, 829 N.E.2d at 458 (statement to the police officers at the crime scene held to not be testimonial).

5 *See* FED. R. EVID. 803(2). *See, e.g.*, Leavitt v. Arave, 383 F.3d 809, 830 n.22 (9th Cir. 2004); *Fowler*, 829 N.E.2d at 463; People v. Diaz, 798 N.Y.S.2d 21 (N.Y. App. Div. 2005).

medical diagnosis or treatment[6]—prior to the *Crawford* decision, a number of states had addressed the hearsay issues common to domestic violence and child abuse cases by enacting new exceptions to the hearsay rule.[7]

Prior to *Crawford*, the admissibility of hearsay statements in the face of the Confrontation Clause had depended upon finding that the hearsay statement was reliable.[8] Reliability was presumed if the hearsay statement was admissible under a firmly rooted exception to the hearsay rule.[9] If not, then reliability had to be established by showing that the statement was made under circumstances providing particularized guarantees of trustworthiness.[10] *Crawford* has now revised the effect of the Confrontation

[6] *See* FED. R. EVID. 803(4). *See, e.g.*, Petersen v. United States, 352 F. Supp. 2d 1016, 1027 (D.S.D. 2004); People v. Compan, 100 P.3d 533 (Colo. Ct. App. 2004); State v. Robinson, 669 N.W.2d 790 (Minn. Ct. App. 2005).

[7] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1416 (2004); CAL. EVID. CODE §§ 1360, 1370, 1380 (West Supp. 2005); FLA. STAT. § 90-803(23), (24) (2005); OR. REV. STAT. § 40.460 (2003); OREGON EVID. CODE 803(26); MISS. R. EVID. 803(25). The California statute, for example, provides as follows:

> (a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:
> (1) The statement purports to narrate, describe or explain the infliction or threat of physical injury upon the declarant.
> (2) The declarant is unavailable as a witness pursuant to Section 240.
> (3) The statement was made at or near the time of the infliction or threat of physical injury. . . .
> (4) The statement was made under circumstances that would indicate its trustworthiness.
> (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.
> (b) For purposes of paragraph 4 of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:
> (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested;
> (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
> (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

CAL. EVID CODE § 1370 (West Supp. 2005).

[8] Ohio v. Roberts, 448 U.S. 56, 65-66 (1980).

[9] *Id.* at 66.

[10] For an excellent review of Supreme Court Confrontation Clause jurisprudence prior to the *Crawford* decision, see Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 775-60 (2005). *See also* Carol A. Chase, *The Fives Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1036-61 (2003); W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After* Crawford v. Washington: *Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 5-6, 10-12 (2005); Richard D.

Clause on the admissibility of hearsay evidence so that admissibility now depends upon whether the hearsay statement is "testimonial."[11] If testimonial hearsay evidence is at issue, the Confrontation Clause excludes the evidence unless it is shown that the maker of the statement is unavailable and that the defendant had a prior opportunity for cross-examination.[12] According to the *Crawford* majority, it is consistent with the Framers' design to exempt *nontestimonial* hearsay "from Confrontation Clause scrutiny altogether."[13]

The *Crawford* decision declined to spell out a comprehensive definition of what hearsay is "testimonial," stating that it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, at a former trial, or to statements made during police interrogations.[14] Some scholars have urged the adoption of a broad definition of the types of statements that are testimonial, which would include almost all out-of-court statements by a victim, such as those made during 911 calls and verbal statements to responding officers.[15] Such a broad definition will place many prosecutors of familial abuse and domestic violence cases—where the victim is often unavailable—in a situation where they are unable to proceed, even when the underlying circumstances provide compelling indicia that the victim's hearsay statements are reliable. The harsh reality under *Crawford* is that batterers and abusers may potentially escape prosecution for their crimes.

This Article argues in Part I that a narrow definition of "testimonial statements" is more consistent with the purpose of the Confrontation Clause. In essence, for Confrontation Clause pur-

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Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 446-50 (2004); Christ Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in* Crawford v. Washington, 50 S.D. L. REV. 41, 41-47 (2005).

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

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *See, e.g.*, Lininger, *supra* note 10, at 773-81, 818-19 (suggesting that labeling most statements by victims to police officers as nontestimonial is not true to the *Crawford* Court's interpretation of the Confrontation Clause); Friedman, *supra* note 10, at 457-62; Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH L. REV. 511, 594 (2005) (viewing a broad construction of what is testimonial as encouraging the prosecutor to call child witnesses to testify). These authors address the concern over the loss of victim's statements by focusing on procedures that might increase opportunities for confrontation.

poses a statement should be found to be testimonial *only if* there is government involvement in creating the statement with an eye toward admitting the statement at a trial. This definition is consistent with the Framers' objectives in requiring confrontation.[16] It also more accurately captures the intended role of the Confrontation Clause, which is to specify the method by which the reliability of a certain class of evidence—testimony and testimonial evidence—will be tested.[17] *Crawford* relieves the Confrontation Clause of shouldering the burden of assuring the reliability of all hearsay evidence, as had been the practice under the *Ohio v. Roberts*[18] line of cases from which *Crawford* departs.[19] Reliability of evidence is, of course, an appropriate concern in determining whether to admit evidence in a criminal case, but general concerns about the reliability of evidence are more appropriately within the purview of the Due Process Clause and the evidence codes, as is discussed in Part II. In Part III, this Article explores the application of this framework to types of hearsay evidence that are often available in domestic violence and familial abuse cases. Finally, in Part IV, this Article considers the doctrine of forfeiture as a means of admitting even "testimonial" hearsay and briefly notes ways in which the reliability of hearsay evidence can be tested even without confrontation.

I

AN OUT-OF-COURT STATEMENT IS ONLY TESTIMONIAL IF THE GOVERNMENT PROCURED THE STATEMENT FOR THE PURPOSE OF USING IT AS TRIAL TESTIMONY

Neither *Crawford*, nor the policy reasons cited by *Crawford*, nor the plain language of the Confrontation Clause support a broad definition of "testimonial statements" that would include all statements by any declarant who might anticipate their use in a criminal prosecution. Rather, an essential component of any testimonial statement is government involvement in creating a statement that the government expects to offer in lieu of live trial testimony. A critical reading of *Crawford* clearly affirms this proposition, as does the plain language of the Confrontation Clause.

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[16] *See infra* Part I.A.
[17] *See infra* Part II, notes 78-79 and accompanying text.
[18] 448 U.S. 56 (1980).
[19] *See infra* Part II, notes 78-79 and accompanying text.

A. The Policies Underlying Crawford *Support a Conclusion that Government Involvement is an Essential Component of Testimonial Statements*

In an effort to determine the scope of the Confrontation Clause, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him,"[20] the *Crawford* Court examined the historical backdrop against which the Clause was drafted. The opinion focused upon the continental form of civil law ex parte pretrial examinations, which had found their way into evidence in English common law criminal prosecutions.[21] During the colonial period this controversial practice made its way to the Colonies.[22] Under this practice, ex parte examinations were typically conducted by justices of the peace and the results of those examinations were read at trial.[23] *Crawford* cited the trial of Sir Walter Raleigh[24] as an example of these abusive practices. At that trial, Raleigh's alleged accomplice, Lord Cobham, had been examined by the Privy Council and his examination had been admitted at trial under protest by Raleigh, who unsuccessfully pressed to have his accuser testify.[25] As a further illustration of the type of abuses against which the Confrontation Clause was intended to protect, the *Crawford* majority cited the Massachusetts ratifying convention, at which one participant objected to the Federal Constitution's omission of a right of confrontation, worrying that, as drafted, Congress would possess powers enabling it to establish court procedures similar to those used in the Spanish Inquisition.[26]

Significantly, the *Crawford* Court declared that the "principal evil" at which the Confrontation Clause was aimed was this civil

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[20] U.S. CONST. amend. VI.

[21] Crawford v. Washington, 541 U.S. 36, 42-50 (2004).

[22] *Id.* at 47-50.

[23] *Id.* at 44.

[24] *Id.* Although the historical origins of the Confrontation Clause are somewhat murky, and there is nothing to indicate that the trial of Raleigh was actually discussed by the Framers, *see* Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 n.4 (1972), there is little question that this notorious trial exemplifies the dangers against which the Confrontation Clause seeks to protect.

[25] *See* Raleigh's Case, The Trial of Sir Walter Raleigh, Knt. At Winchester, for High Treason, 2 HOW. ST. TRL 1, 15-16 (1603).

[26] *Crawford*, 541 U.S. at 48-49 (citing 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 110-11 (Jonathan Elliot 2d ed. 1863)).

law practice of using ex parte pretrial examinations against an accused in criminal proceedings.[27] The Court noted that "not all hearsay implicates the Sixth Amendment's core concerns."[28] "An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted."[29]

The significance of this passage should not be understated. Here, the Court clearly recognized that the focus of the Confrontation Clause is narrower than the general reliability of hearsay evidence. Rather, the focus is on the abusive government practice of engaging in ex parte examinations for the purpose of creating testimonial evidence to be used at trial. As Justice Scalia, writing for the majority, noted: "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."[30]

The history underlying the adoption of the Confrontation Clause, and the purpose that the Framers intended it to serve, clearly reveal that involvement of government officials in the creation of witness statements for use at trial is an essential component of a "testimonial statement" as defined in *Crawford.*

B. The Crawford *Opinion Expressly Refers to Government Involvement in Characterizing a Statement as Testimonial*

Although the Court expressly declined to define categorically the types of out-of-court statements that may be considered testimonial,[31] the opinion repeatedly supports a determination that government involvement in the creation of the statement is an essential component of this definition. It is clear that the term "testimonial" must be determined by the type of abuse to which the Confrontation Clause is directed—ex parte pretrial examinations. In noting that the term "testimonial" applies at a minimum to prior testimony at preliminary hearings, before a grand jury, and at a former trial, as well as to statements made during

[27] *Id.* at 50.
[28] *Id.* at 51.
[29] *Id.*
[30] *Id.* at 56 n.7.
[31] *Id.* at 68.

police interrogations, the Court emphasized that these practices have "the closest kinship to the abuses at which the Confrontation Clause was directed."[32]

Further, the Court was careful to distinguish between statements made to government officers as opposed to remarks made to others. As previously discussed, *Crawford* notes that "[a]n off-hand, overheard remark" may be excluded as inadmissible hearsay, but its admission does not run afoul of the Sixth Amendment because it "bears little resemblance to the civil-law abuses the Confrontation Clause targeted."[33] The opinion also distinguishes between a formal statement made by an accuser to the government, which the opinion characterizes as a statement by one who "bears testimony," and a statement in the form of a casual remark made by a person to an acquaintance, which is not testimonial.[34]

Twice in the *Crawford* opinion there is language that appears to shift its focus from the government action used in obtaining the statements to the perception of the witness making the statements. In citing various proposed formulations of statements that may be determined to be "testimonial," the Court refers to "material such as affidavits, custodial examinations, prior testimony . . . or similar pretrial statements *that the declarants would reasonably expect to be used prosecutorially*."[35] In addition, quoting from an amicus brief filed by the National Association of Criminal Defense Lawyers, the Court lists as another possible formulation, "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."[36] This language has caused some writers to conclude that government involvement in creating the hearsay statement is not always necessary.[37] Indeed, one scholar has posited a situation in which a witness, on her own, shoved a written statement under the courthouse door asserting that the accused did in fact commit the crime.[38] He concludes, "that would plainly be testimonial even though no government official played a role in preparing the

[32] *Id.*
[33] *Id.* at 51.
[34] *Id.*
[35] *Id.* (emphasis added).
[36] *Id.* at 52.
[37] *See, e.g.*, Friedman, *supra* note 10, at 457-48; Mosteller, *supra* note 15, at 573.
[38] Friedman, *supra* note 10 at 458.

statement."[39] Yet, this statement propounded by the witness acting on her own is not even distantly related to the ex parte pretrial examinations targeted by the Confrontation Clause. It is true that the statement would likely fail the reliability safeguards inherent in the hearsay exceptions, and therefore would be inadmissible under the hearsay rules, but *Crawford* takes great care to disentangle the Confrontation Clause from issues of the mere reliability of hearsay.[40]

But then why does the Court even refer to two possible formulations that consider, at least in part, the perceptions of the person making the statement—more specifically, whether the maker of the statement would reasonably believe that the statement would be used at a trial? There are at least two possible explanations short of leaping to the conclusion that all accusatory statements are testimonial. One explanation is that the Court implicitly recognized that, while government involvement is a *necessary* component in the creation of a testimonial statement, it is not *sufficient* to deem a statement testimonial. Rather, a statement to a government official is only testimonial if it is made under circumstances that would cause a reasonable witness to believe that the statement would be available for later use at a trial. This would clearly be the case where the police are interrogating a suspect in custody following the advisement of the *Miranda* rights.[41] It may also be the case in a formal police interrogation where a witness is asked to sign a written statement or to verify the accuracy of a recorded statement. It would likely *not* be the case—in the absence of circumstances indicating otherwise—where a crime victim calls 911 and pleads for assistance. In the

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[39] *Id.*

[40] *See* Crawford v. Washington, 541 U.S. 36, 51 (2004) (noting that a hearsay statement may be excluded under the hearsay rules even though "it bears little resemblance to the civil-law abuses the Confrontation Clause targeted."). Friedman also cites as support a notation in the *Crawford* opinion that one of the statements involved in the Raleigh case was a letter. Friedman, *supra* note 10, at 458. This is far removed from an indication that the Framers were even cognizant of that obscure fact, or that the Framers would have considered that such a letter, which would almost certainly have been inadmissible under then-current practices, involved the type of practice at which the Confrontation Clause was directed. The Confrontation Clause is not a general guarantor of reliability but rather provides a procedure by which a narrow class of out-of-court statements—testimonial statements—can be tested. *Crawford,* 541 U.S. at 61.

[41] A key component of the *Miranda* warnings is the advice that "anything [you] say[ ] can be used against [you] in a court of law." Miranda v. Arizona, 384 U.S. 436, 479 (1966).

latter situation, it is likely that the endangered caller's purpose is to seek help, and it is highly improbable that the caller would even consider whether the statement would be used at trial.

Of course, there is another more obvious explanation for the language in *Crawford* referring to what the declarant would anticipate the use of his or her statement to be: that language is derived from the petitioner's brief[42] and from the amicus brief of the National Association of Criminal Defense Lawyers,[43] both of which have an interest in the Court adopting a broad definition of "testimonial" hearsay. Such a definition will exclude more incriminating evidence than a narrower definition. The paragraph in which these excerpts from the briefs appear merely illustrates various suggested formulations of tests that could be used to determine which statements are testimonial.[44] The Court expressly did not endorse any particular formulation and, indeed, that same paragraph includes another possible formulation proposing a much narrower standard: "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[45] The Court did not find it necessary to choose which of the possible formulations best describes what makes an out-of-court statement "testimonial," because it recognized that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard."[46] *Crawford* concerned precisely this type of statement.

The Tenth Circuit's decision in *United States v. Summers*[47] provides an example of the mischief that can occur when a court misreads *Crawford* as requiring only that a person in the declarant's position would "objectively" foresee that his or her statement would be used at trial. In *Summers*, the defendant's accomplice, after his arrest and as he was being walked to a patrol car, asked, "How did you guys find us so fast?"[48] The court found the statement to be testimonial despite the absence of *Miranda* warnings or formal interrogation, and despite the absence

[42] *Crawford*, 541 U.S. at 51.

[43] *Id.* at 53.

[44] *Id.* at 51-52.

[45] *Id.*

[46] *Id.* at 52.

[47] 414 F.3d 1287 (10th Cir. 2005).

[48] *Id.* at 1302.

of government involvement in eliciting the statement.[49] The court reached its result by finding "that a reasonable person in [the declarant's] position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution."[50]

While it may be true that a reasonable judge, law professor, or attorney might "objectively" foresee that a question directed by an arrestee to the police could become evidence at a trial, it verges on the absurd to believe that a reasonable layperson would so foresee in the absence of any of the trappings of an interrogation. Indeed, one wonders why a criminal suspect would ever volunteer such an incriminating question if use of this evidence at trial is so "objectively" foreseeable. Only by completely ignoring the importance that *Crawford* places on government involvement in the creation of the statement can the result in *Summers* be justified. Thus, *Crawford* limits "testimonial" statements to those made in a setting or under circumstances where the forseeability of such use would be obvious: where the government is involved in a present-day analogue to pretrial ex parte examinations.

The *Crawford* majority repeatedly required government involvement in order to render an out-of-court statement testimonial. As noted previously, the Court was careful to focus on the type of abuse at which the Confrontation Clause was aimed: the use of pretrial ex parte examinations at trial.[51] Further, the opinion expressly referred to government involvement in describing the type of evidence that is testimonial under the Confrontation Clause.[52] For example, in explaining why statements produced by police interrogations are testimonial, the Court stated that "[t]he involvement of government officers in the production of testimonial evidence presents the same risk whether the officers are police or justices of the peace."[53] In addition, the Court emphasized the peculiar risk presented by government involvement in producing a testimonial statement that does not exist for nontestimonial hearsay statements. "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne

[49] *Id.*
[50] *Id.* at 1303.
[51] *See supra* Part I.A.
[52] *See* Crawford v. Washington, 541 U.S. 36, 56 n.7 (2004).
[53] *Id.* at 53.

out time and again throughout a history with which the Framers were keenly familiar."[54] Thus, the *Crawford* opinion repeatedly affirmed that the Confrontation Clause was directed at preventing the government from creating out-of-court testimonial statements for use at trial in the absence of confrontation by the accused.

Naturally, if an essential component of a testimonial statement is government involvement in its creation, some out-of-court statements made by a declarant will be *accusatory* but not *testimonial*. The *Crawford* majority implicitly recognized this in its footnoted discussion of dying declarations.[55] A dying declaration is a statement that concerns the cause or circumstances of a declarant's perceived impending death.[56] *Crawford* noted that it is indisputable that the dying declarations exception was recognized as a general rule of criminal hearsay law.[57] Then the Court stated "many dying declarations may not be testimonial."[58] If one assumes, as one must, that virtually all dying declarations offered in a criminal trial are accusatory, then the Court is recognizing that something more than the accusatory nature of a statement is needed to make it testimonial. The language of the *Crawford* opinion, and the history of the Confrontation Clause, clearly indicate that the "something more" is government involvement in the creation of the statement.

Of course, a finding that a statement is not testimonial does not mean that it is admissible. It merely means that the statement is not subject to the procedural requirements for testing reliability mandated by the Confrontation Clause.[59] Nontestimo-

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[54] *Id.* at 56 n.7.

[55] *See id.* at 56 n.6.

[56] *See, e.g.*, FED. R. EVID. 804(b)(2):

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.
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> . . . .
>
> (2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

[57] *Crawford*, 541 U.S. at 56 n.6.

[58] *Id.*

[59] *Cf. id.* at 61 ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

nial hearsay may still be inadmissible under the rules of evidence, and many accusatory out-of-court statements will be found inadmissible under those rules. Further, as will be discussed, the substantive guarantee of reliability, which the Court has declared is *not* to be found in the Confrontation Clause,[60] is found in the rules of evidence and in the Due Process Clause.[61] Thus, accusatory out-of-court statements that are not testimonial must nevertheless satisfy the reliability concerns of the rules of evidence and due process.

C. The Plain Language of the Confrontation Clause Requires Government Involvement in Creating "Testimonial" Statements

In its guarantee of the right of confrontation, the Sixth Amendment limits this right to "witnesses" against the accused. Prior to *Crawford*, the Court had interpreted "witnesses" broadly so that the Confrontation Clause was read to apply to witnesses who were physically present and testifying at trial as well as to all hearsay declarants whose statements were being offered to prove the truth of the matter asserted.[62] Professor Akhil Reed Amar has argued persuasively that this misreading of the Confrontation Clause stems from the Court's misreading of the term "witness," which he argues should be given its "ordinary everyday meaning."[63] For example, he poses a hypothetical situation in which *A* takes the witness stand at a trial and recounts what *B* has told her.[64] If *B* were asked if she had been a witness at the trial, Professor Amar suggests that the truthful answer would be "no," as *B* may well not even be aware that her words were paraphrased in court by *A*.[65] Professor Amar also notes that this plain meaning interpretation of who is a witness is consistent with the use of the term "witness" in other parts of the Constitution, such as the Treason Clause of Article III, Section 3, which provides: "[n]o Person shall be convicted of Treason un-

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[60] *Id.*

[61] *See infra* Part II.

[62] *See* Ohio v. Roberts, 448 U.S. 56, 62-63 (1980) (contending that the Confrontation Clause, if read literally, would bar all hearsay statements made by a declarant not present at trial).

[63] AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 94, 127-31, 153 (1997).

[64] *Id.*

[65] *Id.*

less on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[66] He explains that this clause is obviously intended to require more than merely having *A* testify to an overt act followed by *A*'s repetition of *B*'s out-of-court statement indicating that the accused in fact engaged in the overt act.[67]

Professor Amar recognizes that both the spirit and the letter of the Confrontation Clause would be violated if the government were able to avoid confrontation by preparing videotapes, transcripts, depositions, and affidavits for court use and to be introduced as testimony.[68] Thus, he reasons that a "witness" is someone "who physically takes the stand to testify, or (to prevent *government* evasion of the spirit of the clause) a person whose out-of-court affidavit or deposition (*prepared by the government for in-court use*) is introduced as in-court testimony."[69]

The focus in *Crawford* on "testimonial" statements reflects a similar plain meaning approach to the definition of the term "witnesses" in the Confrontation Clause. Citing Webster's Dictionary, the Court noted that a witness is one who bears testimony,[70] and that testimony is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[71] Echoing Professor Amar's distinctions between witnesses and ordinary hearsay declarants, *Crawford* distinguishes between testimonial and nontestimonial hearsay statements: "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."[72] Therefore, it is the government officials' involvement in procuring a statement for use at trial that transforms a statement from mere hearsay by a declarant, which is not regulated by the Confrontation Clause,[73] to a testimonial statement by a witness, which must comply with the Confrontation Clause.[74]

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66 *Id.* at 128; U.S. CONST. art. III, § 3, cl. 1.

67 AMAR, *supra* note 63, at 128.

68 *Id.* at 129 (noting that this interpretation would evade both the words and spirit of the Treason Clause's two-witness requirement).

69 *Id.* at 94 (emphasis added).

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

71 *Id.*

72 *Id.*

73 *Id.* ("[N]ot all hearsay implicates the Sixth Amendment's core concerns.").

74 *Id.* at 68.

II

HEARSAY STATEMENTS THAT ARE NOT TESTIMONIAL MUST BE RELIABLE TO BE ADMISSIBLE AND ARE SUBJECT TO DUE PROCESS CONFRONTATION REQUIREMENTS

The *Crawford* opinion is explicit that the Confrontation Clause is *not* a substantive guarantee of reliability.[75] Rather, it is a procedural right guaranteeing that the testimonial evidence to which it applies will be tested for reliability "in the crucible of cross-examination."[76] It therefore seems that the admissibility of hearsay evidence, other than testimonial hearsay, is not regulated at all by the Confrontation Clause. What, then, prevents the conviction of criminal defendants based upon unreliable, nontestimonial hearsay evidence?

One answer to that question is found in the text of *Crawford*: "Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law. . . ."[77] The hearsay rule and certain exceptions thereto were in existence at the time the Sixth Amendment was ratified,[78] although hearsay law has evolved considerably since that time. Further, the reliability of an out-of-court statement being admitted under a hearsay exception is a key consideration in recognizing the exception.[79] For example, the federal hearsay exception for present sense impressions found in Rule 803(1) is recognized because the contemporaneity of the statement and the event being reported therein "negate the likelihood of deliberate or conscious misrepresentation."[80] Similarly, the federal exception for excited utterances found in Rule 803(2) is deemed reliable because the excited condition of the declarant "temporarily stills the capacity of reflection and

[75] *Id.* at 61.

[76] *Id.*

[77] *Id.* at 68.

[78] *See* Mattox v. United States, 156 U.S. 237, 243-44 (1895) (citing the well-settled rule admitting a victim's dying declarations at trial against his accused killer and noting that this rule was known at the time the Confrontation Clause was drafted); *see also* Jack v. Mut. Reserve Fund Life Ass'n, 113 F. 49, 53-54 (5th Cir. 1902) (noting that "exceptions to the hearsay rule are as well established as the rule itself").

[79] *See* FED. R. EVID. 801 advisory committee's note (Introductory Note: The Hearsay Problem) (noting that under the common law a scheme evolved in which there is a general rule excluding hearsay subject to many exceptions for statements made "under circumstances supposed to furnish guarantees of trustworthiness").

[80] *See* FED. R. EVID. 803 advisory committee's note (Notes to Paragraphs (1) and (2)).

produces utterances free of conscious fabrication."[81] Likewise, statements made for the purpose of medical diagnosis or treatment are excepted from the hearsay rule and are believed reliable because a patient has a strong motivation to be truthful.[82] Each exception to the rule against hearsay is premised upon a theory supporting the reliability of the hearsay statement. Indeed, the federal residual hearsay exception, which is available to admit certain hearsay statements not expressly covered by the enumerated exceptions, has as its most basic requirement that the hearsay statement have "equivalent circumstantial guarantees of trustworthiness" to those statements that are explicitly excepted by Rules 803 and 804.[83] Thus, the evolving evidentiary rules concerning the admissibility of hearsay are very focused upon issues of reliability as a predicate to admission into evidence.

It might be asked whether the *Crawford* Court's recognition that only testimonial evidence is regulated by the Confrontation Clause, which affords states flexibility in their development of hearsay law, invites the potential for states to permit the use of unreliable, nontestimonial hearsay evidence against criminal defendants. Indeed, the potential for just such a result can be seen when one compares *Williamson v. United States*[84] with *Lilly v. Virginia*.[85] In *Williamson*, where the Supreme Court had before it the scope of the federal hearsay exception for statements against interest, the Court ruled that only those statements that are actually against the penal interest of the declarant are sufficiently reliable to be admitted under the exception.[86] Five years later, in *Lilly*, the Court was again considering whether a statement against interest had been properly admitted against an accomplice.[87] This time, however, the Court applied the reliability standard that it has now rejected as the test for admission under

[81] *Id.*

[82] *See* FED. R. EVID. 803 advisory committee's note (Note to Paragraph (4)).

[83] *See* FED. R. EVID. 807 ("A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule . . . .").

[84] 512 U.S. 594 (1994).

[85] 527 U.S. 116 (1999).

[86] *Williamson*, 512 U.S. at 600-01 ("The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self inculpatory statement says nothing at all about the collateral statement's reliability.").

[87] *Lilly*, 527 U.S. at 122.

the Confrontation Clause.[88] The evidence would have run afoul of the *Williamson* standard under the federal rules, because the statement at issue was a statement of an accomplice inculpating the defendant.[89] However, the Virginia Supreme Court had concluded that the statement was admissible under Virginia's "against penal interest" hearsay exception, which it construed more broadly than the United States Supreme Court had construed the similar federal exception in *Williamson*.[90] Because each state's highest court is charged with interpreting the scope of that state's rules, the *Lilly* Court did not have before it the issue of whether the evidence was sufficiently reliable to be admissible under Virginia's hearsay rules.[91] This illustrates that the law governing the admissibility of hearsay can permit the admission of evidence that the courts of one jurisdiction find reliable even though the courts of another jurisdiction would not admit the same evidence, finding it too unreliable. The danger in leaving to each state's legislature the task of declaring what hearsay is sufficiently reliable to be admitted in a criminal case is obvious: criminal defendants may not be protected against the admission of unreliable hearsay evidence now that the Court has determined that the Confrontation Clause does not act as a substantive guarantor of reliability.

There is a straightforward answer to this concern: the Due Process Clause imposes a reliability requirement on evidence. The Court has been most expansive in considering reliability as a due process concern in the context of identification evidence offered against criminal defendants.[92] In *Manson v. Brathwaite,*[93] the Court considered whether the Due Process Clause compels exclusion of identification evidence resulting from an unnecessarily suggestive pretrial identification procedure.[94] While acknowledging the serious problems posed by unnecessarily suggestive identification procedures, the Court held that the linchpin in determining the admissibility of identification evi-

[88] *Id.* at 125, 134.

[89] *See id.* at 120-21.

[90] *Id.* at 125.

[91] *Id.*; *see also* Gurley v. Rhoden, 421 U.S. 200, 208 (1975) ("[A] State's highest court is the final judicial arbiter of the meaning of state statutes.").

[92] *See, e.g.,* Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Foster v. California, 394 U.S. 440 (1969); Stovall v. Denno, 388 U.S. 293 (1967).

[93] 432 U.S. 98 (1977).

[94] *Id.* at 99.

dence under the Due Process Clause is the reliability of that evidence.[95] Thus, the Court recognizes that reliability of evidence against criminal defendants is a due process concern.

The need to have some standard of reliability applied to nontestimonial statements in the wake of *Crawford* is implied in several post-*Crawford* decisions that continue to apply the *Ohio v. Roberts* reliability standard after determining that an out-of-court statement is not testimonial. For example, in *United States v. Brun*,[96] the Eighth Circuit held that statements made during a 911 call were not testimonial under *Crawford*.[97] After making that determination, the court applied the *Ohio v. Roberts* reliability standard to determine the admissibility of the 911 call.[98] These decisions that continue to apply *Ohio v. Roberts* as a Confrontation Clause standard are premised upon a misunderstanding, which *Crawford* expressly refuted, that the Confrontation Clause is a general guarantor of reliability. Nevertheless, they clearly reflect the need to have some guarantee that nontestimonial hearsay statements will meet a uniform minimum standard of reliability. If, in light of the clear language in *Crawford*,[99] that standard can no longer be tied to the Confrontation Clause, then it must be found in the Due Process Clause.

Recently, in *United States v. Hall*,[100] the Ninth Circuit held that *Crawford* does not apply to hearings on revocation of supervised release because the Confrontation Clause does not apply in that context. The court nevertheless found that the defendant enjoyed a more limited "due process right to confront witnesses" during the revocation proceeding.[101] This explicitly recognized

[95] *Id.* at 114.

[96] 416 F.3d 703 (8th Cir. 2005).

[97] *Id.* at 707. In addition, the court also held that statements made by the victim to the officers who responded to the crime scene were not testimonial. *Id.* at 707-08.

[98] *Brun*, 416 F.3d at 707; *see also* United States v. Franklin, 415 F.3d 537, 546 (6th Cir. 2005) (finding that where nontestimonial statements are at issue it is completely in line with *Crawford* to apply the *Roberts* reliability standard); Parle v. Runnels, 387 F.3d 1030, 1037-38 (9th Cir. 2004) (applying *Roberts* and progeny after finding that statements admitted under California Evidence Code section 1370 were nontestimonial).

[99] Crawford v. Washington, 541 U.S. 36, 61 (2004) (noting that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner"). For another view of the Due Process Clause as a check on reliability in the wake of *Crawford* see Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After* Crawford v. Washington, 20 CRIM. JUST. 39 (2005).

[100] 419 F.3d 980, 985 (9th Cir. 2005).

[101] *Id.* at 986.

that due process requires a determination of the reliability of evidence, including by confrontation, in situations where the Confrontation Clause does not apply. Citing *United States v. Comito*,[102] the *Hall* opinion noted that the limited due process confrontation rights require the court to weigh the releasee's interest in confrontation against the government's good cause for denying it as a predicate to determining the admissibility of hearsay evidence.[103] The weight to be accorded the releasee's interest in confrontation takes into account two considerations: (1) the importance of the evidence to the determination; and (2) "the nature of the facts to be proven by hearsay evidence."[104]

Concerning the importance of the hearsay evidence to the court's ultimate finding, one of the bases for revoking supervised release in *Hall* consisted of allegations of domestic violence.[105] The victim could not be located and the violation was proved in part by admitting the victim's hearsay statements to a physician and to police officers.[106] However, other non-hearsay evidence of the acts of domestic violence were also admitted, which the *Hall* court found sufficient to prove the domestic violence charge.[107] Based upon this, the court concluded that the releasee's interest in confrontation was weak.[108]

The hearing in *Hall* also concerned a second charge, false imprisonment, which lacked substantial non-hearsay proof.[109] In fact, evidence supporting the lower court's finding on that charge consisted almost entirely of the victim's hearsay statements, and the Ninth Circuit was required to consider the nature of the facts to be proven by the hearsay evidence.[110] With respect to these statements, the court engaged in a determination of their reliability.[111] The court found that the statements bore indicia of reliability,[112] but did not end the inquiry there. Instead, the reliability of the hearsay evidence merely lessened, rather than defeated,

102 177 F.3d 1166 (9th Cir. 1999).
103 *Hall*, 419 F.3d at 986.
104 *Id.*
105 *Id.*
106 *Id.* at 988.
107 *Id.* at 986-87.
108 *Id.* at 987.
109 *Id.*
110 *Id.*
111 *Id.* at 987-88.
112 *Id.*

the releasee's due process right to confrontation.[113] Ultimately, however, the *Hall* court admitted the hearsay statements.[114] The court found that the releasee's interest in confronting the victim, which was lessened by the indicia of reliability of the hearsay statements, was outweighed by the government's good cause for not producing her to testify (she could not be located and was therefore unavailable).[115]

In short, for situations in which the Confrontation Clause (and therefore, *Crawford*) does not apply, the Due Process Clause provides a more limited confrontation right as a means of assuring the reliability of evidence. That right considers the need for confrontation to test the reliability of the evidence, as measured by the importance of the evidence to the determination of the facts, as well as any indicia of reliability borne by the hearsay statements. Against this need for confrontation the court weighs the State's need to admit the hearsay evidence, as measured by the government's reasons for not producing the hearsay declarant.

The due process right of confrontation will serve to provide a uniform minimum standard of reliability for the admission of nontestimonial hearsay evidence being offered against criminal defendants at trial. Therefore, the Confrontation Clause and the Due Process Clause, as well as evidentiary limitations on the admission of hearsay, protect criminal defendants against unreliable hearsay in two distinct ways. First, as to testimonial hearsay—those statements that are obtained through government involvement in a way similar to the ex parte examination against which the Confrontation Clause was created to protect[116]—the defendants will be protected by the post-*Crawford* limitations. Those statements will be inadmissible unless the declarant is testifying and is subject to cross-examination, or unless the defendant had a prior opportunity to cross-examine the declarant.[117] In addition, even if the hearsay statement is not testimonial and is not subject to the requirements of *Crawford*, the limitations contained in the rules of evidence provide assurance

[113] *Id.* at 988.

[114] *Id.* at 988-89.

[115] *Id.* at 989.

[116] *See supra* Part I.A.

[117] Crawford v. Wshington, 541 U.S. 36, 68 (2004) ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

of reliability, and due process considerations limit the admission of hearsay statements where the court determines that the defendant's interest in confrontation outweighs the government's good cause for not calling the witness to testify.

III

Applying This New Framework in the Context of Domestic Violence and Abuse Cases

Thus far this Article has proposed that "testimonial statements," as that term is used in *Crawford*, be limited to statements in which government officers had been involved in the production with an eye toward trial.[118] While this is a definition that is narrower than has been suggested by others,[119] it is consistent with an important aspect of *Crawford*. *Crawford* clearly recognized that the Confrontation Clause is not a substantive guarantee of reliability of evidence, but rather is a procedural mechanism for testing the reliability of a particular type of evidence: testimonial hearsay.[120] In calling for a more narrow definition of what is testimonial, this Article further suggests that nontestimonial hearsay may nevertheless be excluded as a matter of due process where the defendant's interest in confrontation outweighs the government's good cause for not producing the hearsay declarant.[121] It is now useful to determine how this framework would function in the cases that form the eye of the hurricane of post-*Crawford* evidentiary issues: domestic violence and familial abuse cases.

As has been mentioned, domestic violence and familial abuse cases typically rely heavily upon out-of-court statements made by the victim. Often victims become uncooperative, sometimes out of fear because of threats made by the abuser,[122] sometimes out

118 *See supra* Part I.

119 *See, e.g.*, Friedman, *supra* note 10, at 457-58 (opining that a definition of "testimonial" as one requiring government involvement would be a mistake); Lininger, *supra* note 10, at 772-83, 818-19 (suggesting that 911 calls and statements to responding officers are likely testimonial and referring to the labeling of most statements by victims to police as "non-testimonial" as "intellectually dishonest"); Mosteller *supra*, note 15, at 590-94 (favoring a broader definition of what is testimonial as a way of giving the prosecution an incentive to procure like testimony).

120 *Crawford*, 541 U.S. at 61.

121 *See supra* Part II.

122 *See* State v. Jacobs, 2 P.3d 974, 976-77 (Wash. Ct. App. 2000) (noting officer's experience that victims of domestic abuse are uncooperative because of fear of retri-

of affection for the abuser once things have "cooled off,"[123] sometimes out of fear of economic consequences if the prosecution succeeds,[124] or sometimes because there are things in the victim's background that the victim would rather not discuss in court.[125] Most heartbreakingly, sometimes the victims are unavailable because their tender years render them incapable of meeting even the minimal standards of witness competency required under the evidence codes.[126] Whatever the reason, in these types of cases the victims are far more likely to become noncooperative or unavailable than in any other type of case. Yet, without the victim's statements in evidence, great difficulty frequently arises in attempting to prove these cases.

There are five general categories of out-of-court victim statements that have been relied upon in domestic violence and familial abuse cases: (1) 911 calls;[127] (2) statements made to responding officers or medical providers;[128] (3) formal statements given to police or police investigators after the initial response to the incident;[129] (4) statements given to individuals other than police officers and police investigators;[130] and (5) dy-

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bution from their attacker); *see also* State v. Grant, 920 P.2d 609, 613-14 (Wash. Ct. App. 1996) (discussing how many victims attempt to recant as an attempt to avoid repeated violence).

123 *See* United States v. Young, 316 F.3d 649, 654-55 (7th Cir. 2002) (describing how victim of domestic violence recanted her statement and specifically stated that she still loved her abuser, an event the court found not entirely uncommon).

124 *See* Benton v. Superior Court, 897 P.2d 1352, 1355 (Ariz. Ct. App. 1994) (recognizing the fact that most domestic abuse victims recant for various concerns including economic dependency); *see also* People v. Brown, 94 P.3d 574, 576 (Cal. 2004) (noting that financial dependency is a reason why some abuse victims recant).

125 *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1866 (1996) (citing prosecutor of 1983 Alaska domestic abuse case stating: "[W]hen the police get called and a complaint is filed, it is no longer a *private* matter." (emphasis added)).

126 *Cf.* Idaho v. Wright, 497 U.S. 805, 809 (1990) (assuming, without deciding, that a three-year-old child abuse victim was "unavailable" under witness competency standards).

127 *See, e.g.*, People v. Corella, 18 Cal. Rptr. 3d 770 (Ct. App. 2004); State v. Williams, 695 N.W.2d 23 (Iowa 2005); People v. Moscat, 777 N.Y.S.2d 875 (Crim. Ct. 2004).

128 *See, e.g.*, United States v. Arnold, 410 F.3d 895 (6th Cir. 2005); Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004); Fowler v. State, 829 N.E.2d 459 (Ind. 2005); People v. Coleman, 791 N.Y.S.2d 112 (App. Div. 2005); Spencer v. State, 162 S.W.3d 877 (Tex. Ct. App. 2005).

129 *See, e.g.*, People v. Vigil, 104 P.3d 258 (Colo. Ct. App. 2004); Hammon v. State, 829 N.E.2d 444 (Ind. 2005).

130 *See, e.g.*, White v. Illinois, 502 U.S. 346, 350 (1992) (statements by abused child to medical doctor offered into evidence); Idaho v. Wright, 497 U.S. 805, 809-10

ing declarations.[131] Each of these types of evidence will be considered separately under the proposed framework.

A. 911 Calls

Often the first information that the police receive about a crime in progress comes in the form of a 911 call. Tape recordings of these calls have frequently been offered into evidence in domestic violence cases,[132] but the admissibility of this evidence is unsettled after *Crawford*.[133] A number of lower courts have reached varying results on this issue. Some have found the statements to be nontestimonial by limiting testimonial statements to those produced when the government summons the citizen to be a witness, distinguishing 911 calls in that it is the citizen who is summoning the government.[134] Other courts have concluded that the statements are not testimonial because the caller's purpose was to secure help rather than in contemplation of a future legal proceeding.[135] Yet other courts have ruled that the 911 calls are testimonial—thus subjecting them to *Crawford* strictures—after finding that the caller was motivated by a desire to prosecute the defendant rather than to seek protection.[136] And some courts have examined the conduct of the 911 operator, holding the statements made to the operator to be testimonial when the court finds that the operator's pattern of questioning was for the purpose of investigation and prosecution.[137] In sum, the courts'

(1980) (statements by abused children to medical doctors offered into evidence); People v. Compan, 100 P.3d 533, 535 (Colo. Ct. App. 2004) (statement to doctor entered into evidence); State v. Aaron, 865 A.2d 1135, 1139 (Conn. 2005) (statements to mother offered into evidence); State v. Snowden, 867 A.2d 314, 317 (Md. Ct. App. 2005) (statements to social worker entered into evidence); State v. Krasky, 696 N.W.2d 816, 817-18 (Minn. Ct. App. 2005) (statements to nurse entered into evidence).

131 *See, e.g.*, Boone v. State, 668 S.W.2d 17, 20-21 (Ark. 1984) (statements to officer by dying child abuse victim entered into evidence).

132 *See* Lininger, *supra* note 10, at 773.

133 *Id.*

134 *See, e.g.*, People v. Corella, 18 Cal. Rptr. 3d 770, 776 (Ct. App. 2004); People v. Moscat, 777 N.Y.S.2d 875, 879 (Crim. Ct. 2004); State v. Forrest, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004).

135 *See, e.g.*, People v. West, 823 N.E.2d 82, 91-92 (Ill. App. Ct. 2005); State v. Wright, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004); People v. Conyers, 777 N.Y.S.2d 274, 276-77 (Sup. Ct. 2004).

136 *See, e.g.*, State v. Powers, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) (victim calling 911 to report defendant's violation of a restraining order and giving his description to aid in apprehension of defendant).

137 *See, e.g.*, People v. Cortes, 781 N.Y.S.2d 401, 404-07 (Sup. Ct. 2004).

results seem to depend on whether the courts view the 911 call as citizen initiated or government orchestrated and on what the courts divine to be the purpose motivating the caller. Continued reliance on factors such as these to determine admissibility is not likely to yield any easily predictable outcome as to whether the 911 call is testimonial within the meaning of *Crawford*. But there is a simple way to resolve these cases.

Returning to the letter and rationale of the *Crawford* opinion as discussed above,[138] the resolution of the admissibility of 911 calls after *Crawford* is clear. *Crawford* recognizes that the Confrontation Clause was aimed at the abusive practice of engaging in ex parte witness examinations for the purpose of creating evidence at trial.[139] Although the government, through the person of the 911 operator, is involved in obtaining the statements made by the 911 caller, the reality is that a 911 call bears no resemblance to the pretrial ex parte witness examinations that the Framers were trying to curb and that were discussed at length by the *Crawford* opinion in reasoning that the Confrontation Clause is limited to *testimonial* hearsay.[140] It is also significant that the government is not the initiator of 911 calls, which further undercuts the argument that a 911 call is the modern-day analogue to the ex parte pretrial examinations conducted by government officers with an eye toward trial. It is true that 911 calls may find their way into evidence, but *Crawford* itself recognizes that the mere fact that a hearsay statement is in evidence does not make it testimonial and subject to the Confrontation Clause.[141] There is simply nothing in the *Crawford* opinion or in the historical underpinnings relied upon in *Crawford* to support a conclusion that the Confrontation Clause was intended in any way to limit the use of initial contact by civilians with police to report criminal activity. The statements made during 911 calls quite simply are not testimonial hearsay within the meaning of *Crawford*.

Those statements made during 911 calls *are* hearsay evidence when offered at trial and, therefore, are subject to the reliability

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138 *See supra* Part I.A.

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

140 *See id.* at 42-50. Part II of the *Crawford* opinion, which is nine pages in length, is devoted entirely to exploring the historical underpinnings of the Confrontation Clause.

141 *Id.* at 68 (distinguishing between nontestimonial hearsay, which is not limited by the Confrontation Clause, and testimonial hearsay, which is subject to the Confrontation Clause).

requirements of the hearsay rules and, as discussed above,[142] the Due Process Clause. Under the Due Process Clause, the court must examine the strength of the defendant's interest in confrontation. If there is substantial nonhearsay evidence supporting the determination of the case, the defendant's interest in confrontation is reduced. Further, if the hearsay bears indicia of reliability, the defendant's interest in confrontation is reduced. Against the interest of the defendant in confrontation, the Court must weigh the government's reasons for not producing the declarant as a witness. Where the declarant is truly unavailable because he or she cannot be located or refuses to testify, the government's showing of good cause will be compelling. But if it is merely inconvenient for the declarant to testify, or if the prosecutor is motivated by concerns that the declarant will be a "weak" witness, then the government showing should be insufficient to outweigh the defendant's interest in confrontation.

B. Statements to Responding Officers

The officer responding to the scene of a crime is often called to testify about statements made to him or her by those present. It appears that post-*Crawford*, prosecutors are confronting even greater difficulty admitting victims' statements made to responding officers than they are in admitting 911 calls.[143]

As with 911 calls, courts have taken varying approaches as to whether, and for what reasons, these statements are testimonial. Some courts have held that the statements are not testimonial, focusing instead upon whether the witness could or should have foreseen that the statement would be used at a criminal trial.[144] Other courts have distinguished between the preliminary questioning that occurs at the crime scene and a more formal police interrogation at a later time.[145] But even in the latter category, courts are not consistent in the criteria relied upon to determine

142 *See supra* Part II.

143 *See* Lininger, *supra* note 10, at 773, 776 (noting that fifty-six percent of prosecutors surveyed reported greater difficulty in introducing 911 tapes after *Crawford*, compared with eighty-seven percent who reported encountering greater difficulty in introducing victims' statements to responding officers).

144 *See, e.g.*, Lopez v. State, 888 S.2d 693, 698-99 (Fla. Dist. Ct. App. 2004); People v. Moscat, 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004); People v. Conyers, 777 N.Y.S.2d 274, 277 (Sup. Ct. 2004).

145 *See, e.g.*, People v. Corella, 18 Cal. Rptr. 3d 770, 775-76 (Ct. App. 2004); People v. Coleman, 791 N.Y.S.2d 112, 114 (App. Div. 2005); State v. Forrest, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004).

whether the questioning is preliminary or more formal.[146]

Although there is language in *Crawford* that includes the declarant's reasonable expectations regarding whether his or her statement would be used at trial as an element in finding hearsay to be testimonial,[147] the opinion does not expressly endorse any particular formulation as to what comprises testimonial hearsay. This language, taken from criminal defense-oriented briefs,[148] is apparently offered to give examples of possible formulations for the definition of what is testimonial. It is difficult to see how the intent of the declarant by itself can transform an otherwise nontestimonial statement into the modern-day equivalent of the pretrial ex parte examinations against which the Confrontation Clause was designed to protect.

Those court decisions that focus on the formality of the questioning appear to be more true to the Framers' intent as construed in *Crawford*. Indeed, if what the Framers intended to limit was the use of statements that the government obtains through pretrial ex parte examinations conducted with an eye toward trial, it is difficult to understand how a statement made to a responding officer at a crime scene can be categorically characterized as testimonial hearsay. The focus of the responding officer will almost invariably be on determining what happened. While it is likely that the responding officer, and possibly the declarant, will realize that the declarant's statements may be used at trial, that is very different from the preordained taking of testimony in a controlled environment (i.e., evidence gathered for the purpose of offering it at trial) as taken at an ex parte examination. The *Crawford* opinion expressly recognized that an accuser who makes a "formal" statement to government officers "bears

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146 Some courts consider the informality of the communication, *see*, *e.g.*, *Forrest*, 596 S.E.2d at 27, while other courts reject this. *See*, *e.g.*, People v. Kilday, 20 Cal. Rptr. 3d 161, 173 (Ct. App. 2004). Some courts consider the setting, refusing to find noncustodial statements testimonial, while other courts have found that hearsay statements by out-of-custody declarants are testimonial. *Compare* People v. Cage, 15 Cal. Rptr. 3d 846, 856-57 (Ct. App. 2004), *with* People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 (Ct. App. 2004).

147 *See* Crawford v. Washington, 541 U.S. 36, 51-52 (2004).

148 The brief of the defendant/petitioner would include as testimonial "similar pretrial statements that declarants would reasonably expect to be used prosecutorially," and an amicus brief filed by the National Association of Criminal Defense Lawyers would include as testimonial "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." *See id.*

testimony,"[149] and that statements taken by the police officers in the course of interrogations are also testimonial.[150] But the opinion qualified that proposition, saying "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England."[151] If nothing else, this is an indication that the type of police questioning that produces testimonial hearsay is very different from the type of questioning performed by officers responding to a crime scene. Unlike later police interrogations, questioning at a crime scene is not pre-planned, and not directed or guided by a prosecutor. Rather, these are exchanges of information dictated by necessity. Statements obtained by responding officers may well be useful to the prosecution—or to the defense—at trial, but they should not necessarily be subject to the limitations imposed by the Confrontation Clause.

That the Confrontation Clause does not limit their use does not guarantee their admissibility. As is the case with 911 calls, the hearsay statements produced during investigations by responding officers must satisfy the requirements of an exception to the hearsay rule to be admissible. Further, the more limited due process right to confrontation requires the court to weigh the defendant's interest in confrontation against the government's reasons for not producing the declarant as a witness.

C. Statements Made During Police Interrogations

At first blush this appears to be the easiest category of hearsay statements for which to resolve the question of what is testimonial. After all, *Crawford* itself concerned the application of the Confrontation Clause to a statement made during a police interrogation, and the Court held that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard."[152] But the Court did not specify what conduct on the part of the police constitutes an interrogation. It did not have to, because the defendant's wife, whose statements were at issue, was clearly being interrogated by the police.[153] She was in custody and had been read her *Miranda* warnings.[154]

[149] *Id.* at 51.
[150] *Id.* at 52.
[151] *Id.*
[152] *Id.*
[153] *Id.* at 38.
[154] *Id.* The *Miranda* warnings include the advice that anything said may be used in a court of law. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (establishing

Thus, it seems safe to assume that statements produced during custodial police interrogation will *always* be testimonial and, therefore, inadmissible unless the declarant testifies.

But is all questioning by the police "interrogation" that renders any statements produced thereby "testimonial"? There is some language suggesting that police interrogations under *Crawford* might be limited to formal custodial interrogations. For example, the Court notes that police interrogations "bear a striking resemblance to examinations by justices of the peace in England."[155] This suggests a formal examination in a government-dominated setting, and gives rise to an argument that the questioning of individuals not in custody or in settings other than the police stationhouse is unlike the English ex parte examinations, and so statements produced thereby are not testimonial. But such an argument misses the mark. If, as *Crawford* states, the Confrontation Clause is intended to combat the risk of prosecutorial abuse by government-created testimony,[156] then it is clear that this potential for abuse occurs whenever the government is involved "in the production of testimony with an eye toward trial."[157] Thus, it would seem more true to *Crawford*, and to the purposes underlying the Confrontation Clause, to conclude that police "interrogation," includes any police questioning that is being recorded (electronically or otherwise) or that produces a written or signed statement by the person being questioned, with an eye toward using the statement at trial. This broad definition will encompass almost all police questioning, save that which might occur during 911 calls or by a responding officer at the crime scene as discussed above.[158]

D. Statements to Persons Other than Police Officers

Victims of domestic violence and familial abuse sometimes describe what has happened to them to persons other than police officers. For example, a child abuse victim may report the abuse to a babysitter,[159] a family member,[160] a teacher,[161] or a physi-

that both the interrogators and the declarant are aware of the potential for use of the declarant's statements at trial).

155 *Crawford*, 541 U.S. at 52.

156 *Id.* at 56 n.7.

157 *Id.*

158 *See supra* Part III.A-B.

159 *See* Burrell v. Anderson, 353 F. Supp. 2d 55, 63 (D. Me. 2005) (inconsistent

cian.[162] Are statements made in these and other non-law enforcement contexts "testimonial" within the meaning of *Crawford*?

As has been previously discussed,[163] government involvement in the creation of the out-of-court statement is a prerequisite to determining that the statement is testimonial. This would categorically eliminate statements made to individuals who are not government officials or agents involved in the prosecution or investigation of the criminal case.[164] Thus, statements made to private parties not acting on behalf of government officials involved in the prosecution or investigation of criminal cases would never be testimonial within the meaning of *Crawford*. Nonetheless, although such statements are not subject to the Confrontation Clause, they are still subject to the reliability requirements of the rules of evidence and due process.

In some situations, however, there may be room to argue that a statement made to someone other than a police officer is testimonial. Some government employees, although their job responsibilities do not include investigation and prosecution of criminal cases, may be expected to receive statements that may bear upon criminal prosecutions. Examples include statements by crime victims to social workers, emergency room physicians, and paramedics. But construing such statements as "testimonial" merely because they happen to be relevant to a criminal prosecution distorts the holding and reasoning of *Crawford*. *Crawford* explicitly recognized that nontestimonial hearsay evidence can find its way into a criminal case unimpeded by Confrontation

statement by a child victim to babysitter and police); Christina T. v. Edith T., 229 Cal. Rptr. 247, 248 (Ct. App. 1986).

160 *See* Bugh v. Mitchell, 329 F.3d 496, 499 (6th Cir. 2003) (mother).

161 *See* Valentine v. Konteh, 395 F.3d 626, 629 (6th Cir. 2005) ("[T]he child told her second-grade teacher that her stepfather had been abusing her."); Offor v. Scott, 72 F.3d 30, 31 (5th Cir. 1995).

162 *See, e.g.*, Idaho v. Wright, 497 U.S. 805, 809 (1990) (statement to medical doctor); United States v. Wipf, 397 F.3d 677, 681 (8th Cir. 2005) (statement to psychologist).

163 *See supra* Part I.B.

164 In extending the definition of what statements are testimonial beyond those obtained by judicial officers to those obtained during police interrogations, *Crawford* emphasizes that the judicial officers involved in the ex parte examinations in England "had an essentially investigative and prosecutorial function." Crawford v. Washington, 541 U.S. 36, 53 (2004). Implicit in this is the recognition that not only must the person who secures the statement be a government official, but that government official must be involved in the investigation and prosecution of criminal cases.

Clause strictures.[165] Yet the focus of the *Crawford* determination of what is testimonial is on identifying "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed"[166]—ex parte examinations by government officers with an eye toward trial.[167] A doctor's inquiry in the course of treatment about how a patient was injured bears absolutely no kinship to those ex parte pretrial examinations, even though the response may happen to be relevant to a criminal investigation or prosecution. Statements made in response to such inquiries, therefore, should not be considered testimonial absent a showing that the statement can be accurately characterized as one made in response to an inquiry by government officers or agents who had the purpose of creating testimonial evidence for trial.[168] Rather, their admission into evidence should depend upon whether the statements meet the requirements of an exception to the hearsay rule and on whether the reliability standards under the Due Process Clause are met.

E. Dying Declarations

Occasionally a domestic violence or familial abuse victim will make a statement that qualifies for admission into evidence as a dying declaration. Typically, to be admissible under an exception to the hearsay rule, the statement must be made while the declarant believes his or her death is imminent and it must concern the cause or circumstances of the perceived impending death.[169] Some rules limit the admissibility of this evidence in criminal cases to homicides,[170] but others do not contain any such limita-

165 *See id.* at 68 (noting that leaving state hearsay law the flexibility to regulate the admission of nontestimonial hearsay, "is wholly consistent with the Framer's design").

166 *Id.*

167 *Id.* at 56 n.7.

168 In footnote 8 of the *Crawford* opinion, 541 U.S. at 58 n.8, the Court questioned its prior holding in *White v. Illinois*, 502 U.S. 346 (1992). In that case, a child abuse victim had made statements to a treating physician and to a police officer, both of which had been admitted at trial. *White*, 502 U.S. at 349-50. Although the footnote suggests that the victim's statements to the police officer may have been testimonial, which would make that case inconsistent with the outcome in *Crawford*, the footnote concerns only the statements to the police officer and ignores the statements to the physician. This implies that the victim's statements—other than those made in response to the police officer's questioning—are not testimonial.

169 *See, e.g.*, FED. R. EVID. 804(b)(2); CAL. EVID. CODE § 1242 (West 2005).

170 *See, e.g.*, FED. R. EVID. 804(b)(2).

tion.[171] As *Crawford* recognizes, not all dying declarations are testimonial.[172] Indeed, one would assume that police interrogations of crime victims who believe their own death to be imminent are fairly rare. Likely, most such statements are made to medical personnel, paramedics, family members, friends, or bystanders rather than to a police officer. Those dying declarations made to police officers responding to the crime scene would not be testimonial for reasons already discussed.[173]

But even assuming that a dying declaration is made under circumstances that make it testimonial, *Crawford* notes that there is authority for admitting the statement.[174] While the Court does not expressly decide whether the Confrontation Clause incorporates an exception for testimonial dying declarations,[175] the Court makes it clear that if such an exception must be accepted it is sui generis.[176] In any event, dying declarations will be admitted in criminal cases either because they are not testimonial, or, even if testimonial, because they are within a narrow historical exception to the Confrontation Clause, or because the defendant has forfeited his or her right to object[177] on Confrontation Clause grounds.

IV

Additional Considerations: Forfeiture and Impeaching Hearsay Evidence

Under *Crawford,* so much will depend upon the resolution of the question of whether a hearsay statement is testimonial. If it is, *Crawford* teaches that the Confrontation Clause requires its exclusion unless the declarant testifies and is subject to cross-examination concerning the statement, or the declarant is unavailable and the defendant had a prior opportunity for cross-examination.[178] And, if the determination is made that a hearsay statement is not testimonial, it is admissible subject to its satisfaction of reliability requirements imposed by the rules of evidence

171 *See, e.g.*, Cal. Evid. Code § 1242 (West 2005).

172 *Crawford*, 541 U.S. at 56 n.6 (stating that many dying declarations are not testimonial).

173 *See supra* Part III.B.

174 *Crawford*, 541 U.S. at 56 n.6.

175 *Id.*

176 *Id.*

177 *See infra* Part IV.

178 *Crawford*, 541 U.S. at 68.

and due process. In that event, no cross-examination may occur. This Article will now consider briefly two related concerns: (1) forfeiture, which may permit admission of testimonial hearsay evidence when a defendant has procured the declarant's unavailability as a witness; and (2) strategies for challenging the reliability of nontestimonial hearsay in the absence of cross-examination.

A. Forfeiture by Wrongdoing

It has long been recognized that a criminal defendant who procures the unavailability of a witness through wrongdoing forfeits the right to object to the admission of that witness' out-of-court statements.[179] This principle was expressly reaffirmed by *Crawford*, which explicitly accepted that the rule of forfeiture by wrongdoing extinguishes confrontation claims.[180] Thus, if a prosecutor can demonstrate that a witness was made unavailable by means of the defendant's wrongdoing, then the defendant cannot object on Confrontation Clause grounds to the admission of that witness' testimonial hearsay statements.

At least two issues are raised by this rule. One is the apparent bootstrapping that must occur. For example, assume that the defendant is charged with the murder of a declarant whose testimonial statement—taken in a police interrogation before the declarant died—the prosecution seeks to offer. The ultimate issue in deciding whether the defendant has forfeited his right to object to the admission of the statement is whether the defendant killed the declarant. In order for the statement to be admitted because of forfeiture, the trial court must first make this determination. Although this involves bootstrapping, that is not an insurmountable problem. Courts frequently engage in this type of bootstrapping when making evidentiary rulings admitting, for example, co-conspirator statements, which may be offered to prove that the defendant was involved in a conspiracy.[181]

A more serious concern will be whether the prosecution can tie witness unavailability to the defendant's wrongdoing. The

[179] *See* Reynolds v. United States, 98 U.S. 145, 158-59 (1879).

[180] *Crawford*, 541 U.S. at 62.

[181] Co-conspirator statements are admissible against a defendant only after the court determines that the declarant and defendant were co-conspirators. Once the court has made this preliminary determination, the fact finder can consider the co-conspirator statement in order to determine whether the defendant engaged in the conspiracy. *See* Bourjaily v. United States, 483 U.S. 171, 180-81 (1987).

simplest case in which this can be done is where the defendant is charged with killing the declarant. When the declarant is unavailable because he or she is dead, the reason for unavailability is clear-cut.[182] However, it is not always clear—particularly in domestic violence or familial abuse cases—that the declarant's unavailability was procured by the defendant's wrongdoing. For example, an abused spouse may become uncooperative because she fears that the conviction of her husband will cause her economic hardship, or because she genuinely loves him. A young child may become uncooperative after being removed from her family environment for her own safety where she perceives this removal to be a negative consequence of her telling what happened. Or, the witness may just vanish, and there may be no way of knowing what prompted the disappearance. Therefore, in the absence of proof of some connection between the defendant and unavailability of the witness, forfeiture may not be a viable argument in favor of admitting testimonial hearsay.

B. Attacking Reliability Without Cross-Examination

When a statement is determined to be nontestimonial hearsay, it will be admitted against a criminal defendant so long as it satisfies the reliability requirements established by the rules of evidence and due process.[183] But the defendant cannot further test the reliability of those statements through cross-examination. So how might a defendant discredit the evidence?

One answer to this is to recognize that the credibility of the declarant is in issue just as is the credibility of a testifying witness. Thus, the credibility of the declarant can be attacked by any evidence that would be admissible for this purpose had the declarant testified as a witness.[184] This can include admission of statements or conduct inconsistent with the nontestimonial hearsay evidence, evidence of motive or bias, or evidence of poor character for veracity, just to name a few of the more common ways to discredit witnesses and witness testimony.

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[182] Indeed, one commentator has suggested that rather than treating dying declarations as an exception to the Confrontation Clause, it should be understood as a forfeiture situation: the defendant forfeits the right to exclude the out-of-court statements of someone he is accused of killing so long as sufficient evidence exists to support a preliminary finding that the defendant did, in fact, kill the declarant. *See* Friedman, *supra* note 10, at 464-67.

[183] *See supra* Part II.

[184] *See, e.g.*, FED. R. EVID. 806; CAL. EVID. CODE § 1202 (West 2005).

Finally, the jury should be reminded that it has not had an opportunity to test the credibility of the declarant by observing his or her demeanor under cross-examination, or by watching the declarant making his or her accusation in the defendant's presence. This reminder should be included in the defense's argument and in an instruction to the jury.

CONCLUSION

Crawford has radically changed our understanding of the Confrontation Clause and its limitations on the admission of hearsay evidence. As noted at the outset, these changes have had perhaps their greatest impact upon domestic violence and familial abuse cases, where it can be expected that the battle over what is "testimonial hearsay" will be waged with increasing frequency. Yet, as this Article demonstrates, the effect of *Crawford* on these prosecutions need not be draconian. Many, particularly in the criminal defense bar, will no doubt take exception to the narrow definition that this Article proposes for "testimonial hearsay." It may be some time before the Court provides a clearer indication of which types of hearsay statements will found to be testimonial and which will not.[185] But the *Crawford* decision makes it apparent that the answer is to be found by keeping our eyes fixed upon the objective of the Framers who drafted the Confrontation Clause: eliminating the abusive practice of admitting in criminal trials statements produced by government officials' ex parte pretrial examination of witnesses. The narrow focus of the Framers dictates a relatively narrow definition of what comprises testimonial hearsay for Confrontation Clause purposes, leaving the regulation of nontestimonial hearsay in criminal cases to the rules of evidence and to the Due Process Clause.

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185 The Supreme Court recently heard argument in two cases that may shed light on the issue of what is testimonial evidence. One of the cases, *Davis v. Washington*, No. 05-5224, concerns whether statements made in a 911 call are testimonial. The Washington Supreme Court had held by a vote of 8-1 that they were not. In the other case, *Hammon v. Indiana*, No. 05-5705, statements made by a victim to a police officer responding to a report of domestic violence were held by the Indiana Supreme Court not to be testimonial. The cases were both argued March 20, with a ruling in each expected by late June.