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Calling Crawford: Minnesota Declares a 911 Call Non-Testimonial in State v. Wright

Alistair Y. Raymond
University of Maine School of Law

CALLING *CRAWFORD*: MINNESOTA DECLARES A 911 CALL NON-TESTIMONIAL IN *STATE V. WRIGHT*

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I. INTRODUCTION

In *State v. Wright*,[1] the State of Minnesota charged David Wright with possession of a firearm by a felon and two counts of second-degree assault against his girlfriend and her sister.[2] A jury found Wright guilty on all charges and sentenced him to sixty months in jail for each crime, with sentences served concurrently.[3] Wright's girlfriend, R.R., and her sister, S.R., did not testify against him at trial.[4] The prosecution, however, used the transcript of a 911 call placed by R.R. against Wright in the trial.[5] Although the 911 call was hearsay, the court admitted it under Minnesota's excited utterance hearsay exception.[6] The prosecution used R.R.'s 911 call in its closing arguments and the jury was allowed to listen to the 911 call during deliberations.[7] After the jury found Wright guilty, he appealed his conviction to the Minnesota Court of Appeals.[8] The court, finding that there was no reversible error by the district court, affirmed Wright's conviction.[9]

This case presented a Minnesota appellate court with its first opportunity to address the admissibility of 911 calls into evidence in criminal trials after the United States Supreme Court's recent decision in *Crawford v. Washington*.[10] After the *Crawford* decision, the admission of certain 'testimonial' out-of-court statements by an unavailable witness will violate a criminal defendant's Sixth Amendment right of confrontation if the defendant lacks the opportunity to cross-examine the witness.[11] The Minnesota Court of Appeals decided that the 911 call did not fit into the Supreme Court's definition of 'testimonial' statements, and therefore held the call was admissible under a hearsay exception without violating the Sixth Amendment.[12] Moreover, Judge Hudson, in a separate opinion, argued that 911 calls should not be considered, by definition, 'non-testimonial.'[13] The issue now becomes: was the Minnesota Court

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1. 686 N.W.2d 295 (Minn. Ct. App. 2004).
2. *Id*. at 299.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*. *See* MINN. R. EVID. 803(2).
7. *Id*.
8. On appeal, Wright made four arguments in support of his appeal: 1) that the district court had erred in admitting statements made in the 911 call and to police because the statements violated his constitutional right to confrontation; 2) the district court erred in allowing into evidence a statement made by Wright concerning a gun; 3) the court had abused its discretion in allowing Wright's previous felony convictions into evidence; and 4) the prosecutor had committed misconduct in his closing arguments. *Id*. at 299-300.
9. *Id*. at 308.
10. 541 U.S. 36 (2004).
11. *Id*. at 68 ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").
12. State v. Wright, 686 N.W.2d at 302.
13. *Id*. at 309 (Hudson, J., concurring specially in part and dissenting in part) (arguing that the 'testimonial' nature of 911 calls should be evaluated on a case-by-case basis).

of Appeals correct in deciding that R.R.'s 911 call was not 'testimonial' in nature, and therefore properly admitted into evidence despite Wright's lack of opportunity to cross-examine R.R. on her assertions in the 911 call?[14]

This Note considers whether the Minnesota Court of Appeals correctly held that a 911 call does not violate a criminal defendant's Sixth Amendment right of confrontation. First, this Note will review evidentiary rules relating to hearsay and its excited utterance exception. Next, this Note discusses the government's use of such 911 calls against defendants in so-called 'victimless prosecutions' wherein the victim is unwilling to testify. This Note then considers the relationship between hearsay and the Sixth Amendment Confrontation Clause. After a brief overview of Confrontation Clause jurisprudence, this Note discusses the recent Supreme Court case of *Crawford v. Washington*, and its significant impact on how the Confrontation Clause affects victimless prosecutions. In particular, the admission of 911 calls will be analyzed in the wake of *Crawford*. After an analysis of *State v. Wright*, this Note concludes that the court correctly admitted the 911 call into evidence. In light of other court opinions on this issue, however, this Note concludes that the *Wright* court's analysis was flawed because it suggests that all 911 calls would be admissible after *Crawford*. In addition, the *Wright* court improperly focused on the victim's motivation for making the 911 call, rather than the government's use of the statement. Finally, this Note concludes that the *Wright* court could have affirmed the conviction without narrowing *Crawford* because Wright had forfeited his right of confrontation by threatening the witnesses.

II. HEARSAY AND ITS ROLE IN CRIMINAL PROSECUTIONS

Hearsay is defined as "a statement, other than one made by the declarant[15] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[16] The general hearsay rule is that, because hearsay statements are not made under oath or subject to cross-examination in a trial, they are inadmissible as evidence for the purpose of proving what the statement asserts.[17] Hearsay policy is based upon the view that these statements are inherently less reliable than statements made by a person under oath during a trial.[18] A declarant's hearsay statement is unreliable due to the fact that it is made without taking an oath, outside the presence of the jury, and not subject to cross-examination.[19] In addition, the inability to cross-examine a

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14. The Minnesota Supreme Court granted review of this case, with oral arguments on March 9, 2005. The appellate court's decision was affirmed on August 11, 2005. State v. Wright, 701 N.W.2d 802, (Minn. 2005). The Minnesota Supreme Court declined to adopt a categorical rule that all 911 calls are 'non-testimonial,' opting instead for a case-by-case analysis. *Id*. at 811. The court did note, however, that "it would be an exceptional occasion when a statement made by a caller during the course of a 911 call would be classified as testimonial." *Id*. This decision appears to be in agreement with Judge Hudson's concurrence to the appellate court decision.

15. The term "declarant" refers to a person making a statement. FED. R. EVID. 801(b).

16. FED. R. EVID. 801(c). State evidentiary rules surrounding hearsay are generally similar to those in the Federal Rules of Evidence. See, for example, in Maine, ME. R. EVID. 801, and for Minnesota, MINN. R. EVID. 801.

17. BLACK'S LAW DICTIONARY 739 (8th ed. 2004). *See also* FED. R. EVID. 802.

18. RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 465 (3d ed. 2002).

19. *See id.*

declarant prevents the opposing party from exposing weaknesses in the testimony that would allow the jury to better evaluate the statement.[20]

Although the rules of evidence generally do not allow the admissibility of hearsay as evidence in a trial,[21] numerous exceptions exist to this rule. In fact, the Federal Rules of Evidence[22] (the "Rules") subject the hearsay rule to twenty-nine specific exceptions and eight exemptions.[23] Specifically, the Rules exempt three types of statements made by a witness if that witness is testifying at trial and available for cross-examination.[24] In addition, five specific categories of hearsay are exempt from the hearsay rules if they are made by the opposing party, i.e., the party-opponent.[25]

The Federal Rules of Evidence also provide for twenty-six specific hearsay exceptions.[26] The Rules categorize these exceptions according to whether or not the declarant is available to testify as a witness. The Rules provide twenty-three exceptions to the hearsay rule when the declarant is available to testify, but decides not to do so.[27] These statements include commonly used exceptions such as excited utterances,[28] statements for purposes of medical diagnosis or treatment,[29] recorded recollection,[30] and records of regularly conducted activity.[31] The other five hearsay exceptions

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20. *See id*. Evaluation is based on what the authors describe as "testimonial dangers." *Id*. These dangers are "sincerity," "narration-ambiguity," "perception," and "memory" issues that, when exposed, allow juries to decide whether they should rely on the testimony for determining the truth of the relevant matter. *See id*.

21. *See* FED. R. EVID. 802.

22. In this Note, the Federal Rules of Evidence are used for discussion of hearsay, permissible uses of hearsay, and the interaction of evidence rules and the Confrontation Clause. Generally, most state rules of evidence are analogous to a federal equivalent. *See supra* note 16.

23. ALLEN, *supra* note 18, at 457.

24. *See* FED. R. EVID. 801(d)(1). These statements include those inconsistent with the witness' testimony at trial, consistent statements used to rebut a charge of fabricated testimony, and statements used for identification. *Id*.

25. FED. R. EVID. 801(d)(2). Admissions by the party-opponent are the most commonly used hearsay exemption. In addition, if the statement is part of a conversation, the entire conversation is admissible to put the party-opponent's statement into context. THOMAS A. MAUET, TRIAL TECHNIQUES 139 (6th ed. 2002).

26. *See* FED. R. EVID. 803-04. The Federal Rules of Evidence also allow for a catch-all exception to the hearsay rule for statements that do not fit into other specific exceptions and exemptions. FED. R. EVID. 807. The so-called "residual exception" allows hearsay if there are "circumstantial guarantees of trustworthiness," *id.*, and the court determines that the statement is material, more probative than other available evidence, and would service the general purpose of the rules and interests of justice. *Id*. This catch-all exception is viewed as a "safety-valve," allowing judges to permit the use of hearsay without distorting the purpose of other hearsay exceptions and exemptions. *See* ALLEN, *supra* note 18, at 663 (citing G. Michael Fenner, *The Residual Exception to the Hearsay Rule: The Complete Treatment*, 33 CREIGHTON L. REV. 265, 303 (2000)).

27. FED. R. EVID. 803. These exceptions cover a wide gambit of statements, documents, records, treatises, judgments, and statements of reputation. *See id.* at 803(1)-(23). Because these exceptions do not require that a declarant be unavailable for trial, a witness could repeat the declarant's own statements in court as the declarant observes. The premise behind allowing these exceptions to the hearsay rule is that these statements have certain qualities that make them particularly trustworthy and reliable, and therefore, do not require cross-examination. ALLEN, *supra* note 18, at 554.

28. FED. R. EVID. 803(2).

29. FED. R. EVID. 803(4).

30. FED. R. EVID. 803(5).

31. FED. R. EVID. 803(6).

include former testimony[32] by a declarant and dying declarations,[33] and are admissible if the declarant is deemed unavailable.[34] The rationale for allowing these exceptions is based on necessity and perhaps historical precedent.[35]

III. THE CONFRONTATION CLAUSE AND HEARSAY

The Confrontation Clause of the Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[36] The Confrontation Clause is based upon a fundamental principle in many judicial systems, particularly in England, that a witness' testimony should be given in front of the adverse party.[37] During the medieval periods, the opportunity to confront one's accuser face-to-face was a distinctive characteristic of the common law trial in England, and in stark contrast to the sheltered witness testimony allowed in continental European systems.[38] Cross-examination, then, became praised by English legal scholars and judges beginning in the fifteenth century.[39] Some English royal courts, however, clung to continental European legal systems until the seventeenth century, allowing the use of testimony without the opportunity for confrontation and cross-examination.[40] The use of such testimony was a means by which the English crown attempted to control its adversaries through the criminal law.[41]

The Framers of the United States Constitution were aware of the abusive tactics of the English government in trials lacking a right of confrontation.[42] They also recognized the development of a strong confrontation right in America before and after the American Revolution.[43] The actual history of the Framers' intent when writing the Sixth Amendment's Confrontation Clause, however, is virtually nonexistent, leaving the purpose of the clause ambiguous.[44]

The Supreme Court's first opportunity to explore the meaning of the Confrontation Clause arose in *Mattox v. United States*.[45] In *Mattox*, the State of Kansas charged the defendant with committing murder.[46] Mattox had been found guilty in a previous trial, but the Supreme Court overturned this verdict and remanded the case for a new trial.[47] After the first trial, but before the second trial, two of the government's key witnesses

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32. FED. R. EVID. 804(b)(1).

33. FED. R. EVID. 804(b)(2).

34. "Unavailability" is determined using specific situational categories. FED. R. EVID. 804(a)(1)-(5). A mere lack of presence in the courtroom is insufficient to create the required unavailability. *See id.*

35. *See* ALLEN, *supra* note 18, at 623.

36. U.S. CONST. amend. VI.

37. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1202 (2002).

38. *Id*. at 1203.

39. *Id*.

40. *Id*. at 1204.

41. *Id*. at 1205.

42. *Id*. at 1207-08.

43. *See id*. at 1206-07.

44. ALLEN, *supra* note 18, at 666.

45. 156 U.S. 237 (1895).

46. *Id*. at 239.

47. Mattox v. United States, 146 U.S. 140, 153 (1892).

died.[48] In the second trial, transcribed copies of the witnesses' testimony from the first trial were admitted into evidence.[49] Although these witnesses had been fully cross-examined during the first trial, Mattox argued that admission of their testimony violated the Confrontation Clause.[50] In the Court's opinion, Justice Brown characterized the purpose of the Confrontation Clause:

> The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief . . . . But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.[51]

Thus, Justice Brown, in affirming Mattox's conviction, constructed a test by which out-of-court statements could be admitted into evidence at trial despite the Confrontation Clause.[52]

Mattox formed the foundation for Confrontation Clause analysis, providing a general rule that a defendant's accuser must give testimony in court and face cross-examination.[53] Yet in its analysis, the Court did not discuss the hearsay rule, and in the years following *Mattox*, prosecutors used unsworn hearsay statements by unavailable witnesses against the accused.[54] In cases following *Mattox*, however, the Court attempted to maintain that Confrontation Clause analysis was, though similar, distinct from hearsay law.[55]

The Confrontation Clause and hearsay law became entangled in the Court's opinions in the 1980s,[56] beginning with its decision in *Ohio v. Roberts*.[57] After *Roberts*, the Court entwined the procedural right of confrontation with hearsay law[58]

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48. Mattox v. United States, 156 U.S. 237, 240 (1895).

49. *Id*.

50. *Id*.

51. *Id*. at 242-43.

52. Thomas J. Reed, Crawford v. Washington *and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 190 (2004).

53. *Id.* at 192.

54. *Id.* at 192-93.

55. Friedman & McCormack, *supra* note 37, at 1224 (citing Dutton v. Evans, 400 U.S. 74, 86 (1970); California v. Green, 399 U.S. 149, 155 (1970)).

56. *Id*. at 1225.

57. 448 U.S. 56 (1980).

58. Natalie Kijurna, Lilly v. Virginia: *The Confrontation Clause and Hearsay — "Oh What a Tangled Web We Weave . . . .*", 50 DEPAUL L. REV. 1133, 1134-35 (2001).

by offering a general application of the Confrontation Clause to hearsay statements and out-of-court declarants.[59]

In *Roberts*, the state charged the defendant, Herschel Roberts, with check forgery and the possession of credit cards owned by a friend's parents.[60] Roberts claimed that his friend had given him the checks and credit cards with permission to use them.[61] When the friend failed to testify at the trial, the prosecution offered the friend's preliminary hearing testimony under a hearsay exception allowed under state law.[62] Although Roberts was found guilty, the Ohio Supreme Court reversed his conviction, holding that the testimony violated Roberts' confrontation right because he had not cross-examined his friend during the preliminary hearing.[63]

Noting that competing interests may warrant dispensing with the confrontation requirement in some cases,[64] the *Roberts* Court established that the Confrontation Clause demanded that hearsay must be restricted in two ways: (1) a requirement of necessity; and (2) a required "indicia of reliability."[65] Using these two considerations, the Court created a new two-part test in which hearsay evidence could be admitted without violating the Confrontation Clause:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[66]

Applying its new test to the facts of *Roberts*, the Court reinstated Robert's conviction,[67] finding that the testimony in the preliminary hearing was sufficiently reliable,[68] and the witness was unavailable.[69]

Roberts therefore merged the Confrontation Clause into the rules governing hearsay exceptions.[70] Any hearsay statement falling within John Henry Wigmore's[71] general theory of admissible hearsay exceptions[72] would also satisfy the Confrontation

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59. Friedman & McCormack, *supra* note 37, at 1225.

60. Ohio v. Roberts, 448 U.S. at 58.

61. *Id*. at 59.

62. *Id*. The hearsay exception permitted the use of preliminary hearing testimony in cases where the witness could not be produced for trial. *Id.* In this case, the witness' whereabouts were unknown. *Id*.

63. *Id*. at 61-62.

64. *Id*. at 64.

65. *Id*. at 65-66.

66. *Id*. at 66.

67. *Id*. at 77.

68. *Id*. at 73.

69. *Id*. at 75.

70. Reed, *supra* note 52, at 201.

71. John H. Wigmore was both a professor of law and dean of the law faculty at Northwestern University between 1893 and 1929. He was best known for his influential works and treatises on the law of evidence. *See, e.g.*, JOHN H. WIGMORE, EVIDENCE (2d ed. 1923).

72. The general theory can be found in Dean Wigmore's treatise of 1912. Reed, *supra* note 52, at 201 (citing JOHN H. WIGMORE, EVIDENCE §§ 1420-22 (2d ed. 1923)). Wigmore's theories had a significant impact on the Supreme Court's Confrontation Clause jurisprudence. Kijurna, *supra* note 58, at 1146. Wigmore believed the purpose of the Confrontation Clause was to ensure cross-examination, which hearsay

Clause because the inherent reliability of a "firmly rooted" hearsay exception offset the need for cross-examination.[73] Thus, the *Roberts* Court reformulated Confrontation Clause jurisprudence without any analysis of the Clause's historical meaning or intent.[74] Confrontation Clause questions after *Roberts* centered around the Court's new test, such as whether a hearsay exception is "firmly rooted,"[75] and what is required to show "particularized guarantees of trustworthiness."[76] Later, the Court effectively abandoned the witness unavailability requirement set forth in *Roberts*, limiting it to hearsay statements made in a prior judicial proceeding.[77]

Roberts and its progeny collapsed the Confrontation Clause into hearsay law, with limited consideration of the Clause's true historical meaning. Critics argued that the right of confrontation was too easily compromised by the expanding number of hearsay exceptions.[78] The historical methodology used by some members of the Court, for example, Justices Scalia and Thomas, also suggested that reworking the *Roberts* framework would be appropriate.[79] Thus, the stage was set for the landmark case of *Crawford v. Washington*,[80] which separated the confrontation right from hearsay law and overruled *Roberts*.

IV. *CRAWFORD V. WASHINGTON* AND A NEW FRAMEWORK FOR THE CONFRONTATION CLAUSE

In *Crawford*, the Supreme Court performed a complete paradigm shift in its view of the Confrontation Clause.[81] This shift resulted in a "radically new way of looking at hearsay statements in a criminal case."[82] The *Crawford* Court eliminated the *Roberts* test requiring that hearsay statements have sufficient "indicia of reliability" in favor of a new test distinguishing "testimonial" and "non-testimonial" hearsay.[83] Unquestionably, this new test has raised significant questions about what is permissible under the Confrontation Clause.

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exceptions rendered unnecessary. *Id*.

73. Reed, *supra* note 52, at 202.

74. *Id*.

75. *See, e.g.,* Bourjaily v. United States, 483 U.S. 171, 183 (1987) (holding that the co-conspirator statement hearsay exception is "firmly-rooted"); White v. Illinois, 502 U.S. 346, 356-57 (1992) (finding that excited utterances and statements made for medical treatment were "firmly rooted" hearsay exceptions).

76. *See, e.g.,* Lilly v. Virginia, 527 U.S. 116, 137-38 (1999) (determining that evidence corroborating a hearsay statement's truth may not be used to find a particularized guarantee of trustworthiness).

77. White v. Illinois, 502 U.S. at 354 ("*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.").

78. ALLEN, *supra* note 18, at 683. *See, e.g.,* Miguel A. Mendez, Crawford v. Washington: *A Critique*, 57 STAN. L. REV. 569, 586 (2004) (noting that thirteen hearsay exceptions existed in 1960, and over thirty exist today).

79. ALLEN, *supra* note 18, at 684.

80. 541 U.S. 36 (2004).

81. Franny A. Forsman & Rene L. Valladares, Crawford v. Washington: *The Confrontation Clause Gets Teeth*, NEV. LAW., Sept., 2004, at 12.

82. *Id*. at 16.

83. *Id*. at 12.

In *Crawford*, police arrested Michael Crawford for stabbing Kenneth Lee, who had allegedly attempted to rape Crawford's wife.[84] After his arrest, police interrogated Crawford and he confessed that he and his wife, Sylvia, had gone to Lee's apartment where a fight ensued.[85] Crawford claimed that he stabbed Lee in self-defense.[86] Sylvia, during her interrogation, gave a different account of the stabbing that contradicted Crawford's self-defense claim.[87] The State charged Crawford with assault and attempted murder, to which Crawford claimed self-defense.[88] His wife did not testify against him due to spousal privilege; however, the prosecutor introduced a tape recording of her earlier interrogation to refute Crawford's self-defense argument.[89] Although this interrogation was hearsay, the state argued that this testimony should be admitted under the 'statements against penal interest' hearsay exception.[90] Crawford objected to this testimony, arguing that it violated his Sixth Amendment right to confrontation.[91] Despite his objection, the trial court admitted the testimony, finding that it had "particularized guarantees of trustworthiness" under the *Roberts* test.[92] As a result, the jury convicted Crawford.[93] The Washington Supreme Court affirmed the conviction, based on the same reasoning.[94] Thereafter, the United States Supreme Court granted certiorari to determine if admission of the evidence had violated the Confrontation Clause.[95]

Justice Scalia, writing for the majority,[96] presented a historical account of the Confrontation Clause. Differentiating between the common law tradition of live confrontation and the civil law practice of private testimony given to judicial officers, Scalia examined the evolution of examination practices and the common law right of confrontation from pre-Revolutionary England to the early United States.[97] Scalia's

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84. Crawford v. Washington, 541 U.S. at 38.

85. *Id*.

86. *Id*. at 40.

87. *Id*. at 39-40.

88. *Id*. at 40.

89. *Id*.

90. *Id*. The exception was found under Washington Rule of Evidence 804(b)(3). This exception applied to Sylvia because her statements admitted that she had facilitated the assault.

91. *Id*.

92. Ohio v. Roberts, 448 U.S. at 66.

93. Crawford v. Washington, 541 U.S. at 41.

94. *Id*. The Washington Supreme Court reversed a Court of Appeals decision to overturn the verdict. *Id*.

95. *Id*. at 42.

96. Only Chief Justice Rehnquist and Justice O'Conner dissented from the Court's decision to overrule Ohio v. Roberts, though they concurred in the judgment. *Id*. at 69.

97. *Id*. at 43-56. Scalia's history lesson began with the use of civil law practice in England and the use of pre-trial examinations without the right of cross-examination in lieu of actual testimony. *Id*. at 42-43. The famous trial of Sir Walter Raleigh in 1603 was an example used to illustrate the evils of the civil law examination, particularly in politically charged trials. *Id*. at 44. Raleigh was tried for treason and implicated by his alleged accomplice, Lord Cobham. *Id*. After being implicated by Cobham, and with the hope that he would recant at trial, Raleigh demanded the right to confront Cobham. *Id*. His demands were refused and Raleigh was sentenced to death. *Id*. Legal reforms in England after this period established a right of confrontation and cross-examination. *Id*.

Turning to the use of civil trial examination in the American Colonies, Scalia discussed the development of a right of confrontation in common law, noting examples of a confrontation on numerous declarations of rights in eight of the states between 1776 and 1783. *Id*. at 47-48. In response to significant

review of the history of the confrontation right in common law led him to draw two conclusions concerning the Sixth Amendment's Confrontation Clause.

First, Scalia concluded the Framers intended that the Confrontation Clause prevent the use of civil law practices, particularly ex parte examinations.[98] Scalia found that the Framers were primarily concerned with 'testimonial' statements given out-of-court.[99] Rather than providing a definition of what constitutes a 'testimonial' statement, Scalia noted that "[v]arious formulations of this core class of 'testimonial' statements exist."[100] Despite failing to give a precise definition, Scalia determined that unsworn statements made to police officers during interrogation fit squarely into the meaning of 'testimonial.'[101]

Next, Scalia concluded that 'testimonial' statements should be admitted only when the witness is unavailable to testify and the accused has an opportunity to cross-examine the witness.[102] The *Crawford* Court held that these requirements are dispositive, and not open to exceptions in a criminal case.[103] Although hearsay exceptions existed when the Confrontation Clause was written, they were for evidence generally considered not 'testimonial.'[104]

With these two principles in mind, Scalia turned to the Court's previous Confrontation Clause paradigm laid out in *Roberts*. Finding that the *Roberts* test departed from the Confrontation Clause's historic principles,[105] Scalia criticized *Roberts* for allowing the admission of 'testimonial' statements upon a mere finding of reliability.[106] Critical of the unpredictable nature of reliability as a test for admissibility,[107] Scalia pointed out examples of where the *Roberts* test had resulted in violations of the Confrontation Clause.[108]

The Court therefore decided that for 'testimonial' evidence to be admitted into a criminal trial, the Confrontation Clause required that the witness be unavailable and the adverse party have had a prior opportunity for cross-examination.[109] In cases where courts admitted 'non-testimonial' hearsay evidence, states were free to develop and apply their own hearsay law.[110] Despite introducing this key 'testimonial' statement

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concerns about the evils of civil law practices, the Confrontation Clause was adopted into the Sixth Amendment. *Id*. at 47-49. Early state cases carefully guarded this right to cross-examination. *See id.* at 47-48.

98. *Id*. at 49-50.

99. *Id*. at 50-51.

100. *Id*. Included within these numerous definitions were affidavits, custodial examinations, depositions, prior testimony, and confessions. *Id*. Scalia found a common nucleus in these definitions such that some testimony would fall under all definitions of 'testimonial.' *Id.*

101. *Id*. at 52-53.

102. *Id*.

103. *Id*. at 56-57.

104. *Id*. ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.").

105. *Id*. at 59-60.

106. *Id*. at 61-62.

107. *Id* at 62-63.

108. *Id*. ("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.").

109. *Id*. at 68-69.

110. *Id*. ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to

factor in Confrontation Clause analysis, the Court explicitly refrained from defining the term's meaning.[111] The Court, however, did state that the Confrontation Clause applied to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[112]

The *Crawford* decision left many questions unanswered. For example, the Court left the definition of 'testimonial' undefined, and did not determine whether the Confrontation Clause applied to 'non-testimonial' statements.[113] The Court did suggest that certain 'non-testimonial' evidence did not implicate Confrontation Clause concerns, citing business records and co-conspirator statements as two types of evidence not requiring confrontation.[114]

Crawford has altered Confrontation Clause analysis significantly, immediately impacting appellate and trial courts.[115] Indeed, commentators characterize this decision as a "bombshell" and a "paradigm shift."[116] The Court's decision in *Crawford* is dramatic and far-reaching, particularly in the areas of child abuse, elder abuse, and domestic violence prosecution.[117] The true significance of the *Crawford* case, therefore, will center on how the definition of 'testimonial' develops.[118] The *Crawford* decision, however, will not bar the use of 'testimonial' statements used for non-hearsay purposes, where they are not used to prove the matter asserted.[119]

The Court gave a list of three types of statements that were plainly 'testimonial': (1) "testimony at a preliminary hearing"; (2) "testimony before a grand jury"; and (3) "testimony at a former trial."[120] In addition, the Court provided two equivalent types of statements that would be 'testimonial': (1) statements during a police interrogation; and (2) plea allocutions, or "plainly testimonial statements."[121]

In determining how legal professionals should use the term 'testimonial,' one commentator has suggested two possible interpretations of the *Crawford* decision.[122] The first interpretation would be a narrow one, based on government activities analogous to the ex parte proceedings the Court thought to be addressed by the Confrontation Clause.[123] These activities could be expanded to other activities used by government officials to produce 'testimonial' statements.[124] Theoretically, this

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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.").

111. *Id*. ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

112. *Id*.

113. Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 318 (2005).

114. Steven M. Biskupic, *Hearsay and the Confrontation Clause*, WIS. L., May 2004, at 19.

115. Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 512 (2005).

116. Forsman & Valladares, *supra* note 81, at 12.

117. Sherrie Bourg Carter & Bruce M. Lyons, *The Potential Impact of* Crawford v. Washington *on Child Abuse, Elderly Abuse and Domestic Violence Litigation*, THE CHAMPION, Sept.-Oct. 2004, at 22.

118. Biskupic, *supra* note 114, at 19.

119. Crawford v. Washington, 541 U.S. at 59 n.9.

120. John F. Yetter, *Wrestling with* Crawford v. Washington *and the New Constitutional Law of Confrontation*, FLA. B. J., Oct., 2004, at 26, 28.

121. *Id*. at 28, n.18.

122. *Id*. at 28.

123. *Id*.

124. *Id*.

approach could provide clear guidelines on what types of interactions and statements are affected by the Confrontation Clause.[125] The second interpretation of 'testimonial' would be more expansive and look at the context in which a declarant made a statement.[126] If the declarant could have reasonably believed that her statements might be used as evidence in a trial, the statement would be 'testimonial.'[127] This "declarant-centric" perspective would be subjective and unreliable.[128] As one commentator stated: "if the testimonial statement category is limited, the Crawford regime might be no less favorable . . . than the displaced 'reliability' structure of Roberts. Conversely, if the 'testimonial' statement concept is expansively interpreted, Crawford could be a hammer blow for the prosecution of cases with unwilling, incapable, or unobtainable declarants."[129]

The First Circuit had an early opportunity to address the *Crawford* decision in *Horton v. Allen*.[130] In affirming the defendant's conviction for murder, the First Circuit held that statements by the defendant's accomplice to another man did not implicate *Crawford* because the statements were not 'testimonial' in nature.[131] Taking a narrow view of the Court's three formulations of 'testimonial' statements,[132] the First Circuit determined that the statements "were not ex parte in-court testimony . . . [or] extra-judicial statements contained in formalized documents such as affidavits, depositions, or prior testimony transcripts . . . [or] part of a confession resulting from custodial examination."[133] Because these statements, therefore, were not made with the expectation that they would be used as testimony, the First Circuit upheld the trial court's admission of them under a hearsay exception.[134] Without *Crawford* applying, the First Circuit then decided that the *Roberts* test for Confrontation Clause analysis should apply to the 'non-testimonial' statements.[135]

Since the *Crawford* decision, hundreds of federal and state court decisions have addressed the issue of whether particular statements are 'testimonial.'[136] Some courts have consistently used a two-part test to determine if a statement is 'testimonial.' These courts inquire: (1) was the statement made to a government official; and if so, (2) would the declarant reasonably believe the statement to be used later at trial.[137] In addition to the types of 'testimonial' statements defined in *Crawford*, some courts have added others. For example, courts have held that police questions in a Terry stop,[138]

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125. *Id*.
126. *Id*. at 29.
127. *Id*.
128. *Id*.
129. *Id*. at 32.
130. 370 F.3d 75 (1st Cir. 2004). The case was heard one month after the *Crawford* decision.
131. *Id*. at 84.
132. *Id*.
133. *Id*.
134. *Id*. at 84-85.
135. *Id*. at 85 ("[B]ecause [the defendant's] hearsay statements were nontestimonial, we apply *Roberts* to decide the Confrontation Clause issue.").
136. *See* Allie Phillips, *A Flurry of Court Interpretations: Weathering the Storm After* Crawford v. Washington, PROSECUTOR, Nov.-Dec. 2004, at 37 (providing an analysis of over 250 decisions interpreting *Crawford*).
137. *Id*.
138. *Id*. at 38 (citing Hiibel v. Sixth Judicial Dist Court, 542 U.S. 177, 302 (2004); *see also* Terry v.

responses to prosecutor questioning outside a courtroom,[139] and plea allocutions by a co-defendant[140] are 'testimonial' statements. Court decisions have also found numerous other types of statements to be 'non-testimonial'. For example, statements made to a friend,[141] statements by a co-conspirator to a confidential informant,[142] excited utterances,[143] statements made to police at the scene of a crime,[144] and statements made for medical treatment or diagnosis[145] have been determined 'non-testimonial' by some courts.

V. *CRAWFORD* AND THE EXCITED UTTERANCE EXCEPTION TO HEARSAY

A crucial post-*Crawford* issue is whether an unavailable declarant's excited utterance is permissible as a hearsay exception without violating the Confrontation Clause.[146] The excited utterance exception is a significant exception to the hearsay rule, allowing statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[147] Federal Rule of Evidence 803 allows these statements into evidence regardless of the declarant's availability to testify at trial. Two requirements must be met before courts will allow such statements into evidence. First, the proponent must show that the declarant was "under the stress of the event when making the statement," and second, the declarant did not, prior to making the statement, have the opportunity to reflect and consider what statement to make.[148]

The roots of the excited utterance exception can be traced to the early part of the nineteenth century and the concept of *res gestae*, meaning "things done."[149] The concept was that "if an utterance was part of the event at issue rather than a report about it, it should not be excluded under the hearsay rule."[150] Early courts limited this exception to statements made during or immediately after an event, [151] but not later narratives.[152] Over time, however, courts have applied the exception with increasing leniency, allowing greater periods of time between an event and the hearsay

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Ohio 392 U.S. 1 (1968)).

139. *Id*. (citing United States v. Saner, 313 F. Supp. 2d 896, 902 (D. Ind. 2004)).

140. *Id*. (citing United States v. Massino, 356 F. Supp. 2d 227, 237 (D. N.Y. 2004)).

141. State v. Manuel, 685 N.W.2d 525 (Wis. Ct. App. 2004) (statement to girlfriend did not violate Confrontation Clause).

142. United States v. Saget, 377 F.3d 223 (2d. Cir. 2004) (co-conspirator statement to informant was not 'testimonial').

143. State v. Orndorff, 95 P.3d 406 (Wash. Ct. App. 2004) (spontaneous declaration not 'testimonial').

144. State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004); Hammon v. State 809 N.E.2d 945, 952 (Ind. Ct. App. 2004) (differentiating between police interrogation and questioning).

145. State v. Vaught, 682 N.W.2d 284, 291 (Neb. 2004).

146. *See* Mosteller, supra note 115 at 576 (noting that the Court has questioned, but not explicitly rejected, whether the excited utterance hearsay exception is a "historically recognized exception to the [C]onfrontation right").

147. FED. R. EVID. 803(2).

148. King-Ries, *supra* note 113 at 309.

149. Friedman & McCormack, *supra* note 37, at 1212.

150. *Id*. at 1213.

151. *Id*.

152. *Id*. at 1215.

statement.[153] As the *Crawford* Court suggested, but did not hold, excited utterances, unlike dying declarations, were not a historical exception to the Confrontation Clause.[154] If any exception did exist, it was severely limited compared to the expansive hearsay exception used today.[155]

Before *Crawford*, courts would admit an excited utterance without any Confrontation Clause concerns because it was considered a "firmly rooted" hearsay exception under the *Roberts* test.[156] *Crawford*, however, requires that hearsay by an unavailable declarant be 'non-testimonial' in nature. The 'testimonial' nature of an excited utterance, therefore, becomes the key test for admissibility. Indeed, since *Crawford*, excited utterances have become the most controversial of all hearsay exceptions.[157] When determining if a statement is 'testimonial,' courts have generally focused on the intent of the declarant and the presence of government officials during the excited utterance.[158] Some courts have suggested that an excited utterance such as a cry for help or medical treatment is not 'testimonial' in nature, while a statement "that could reasonably be used at a later trial" or is made in response to questioning is 'testimonial.'[159]

Under many circumstances, the requirements for meeting the excited utterance exception might place the statement outside the definition of 'testimonial' because the victim's lack of opportunity to reflect will also suggest that the victim cannot comprehend the statement's use at later trial.[160] This reasoning has been used by many courts that allow the admission of unavailable declarant hearsay as an excited utterance. For this reason, some courts have suggested that an excited utterance can never be 'testimonial.'[161]

VI. THE ROLE OF HEARSAY IN THE VICTIMLESS PROSECUTION AND THE EFFECT OF *CRAWFORD*

Police consider the excited utterance exception during their investigations of crimes, particularly domestic violence.[162] Police carefully note a victim's demeanor, assuring that the victim's statements will be admissible as an excited utterance.[163]

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153. *Id*. at 1222.

154. *See* Mosteller, *supra* note 115, at 576.

155. *Id*. at 576-77.

156. Friedman & McCormack, *supra* note 37, at 1227 (citing White v. Illinois, 502 U.S. 346, 356-57 (1992)).

157. Phillips, *supra* note 136, at 40.

158. *Id*. at 40-42.

159. *Id*.

160. *See* King-Ries, *supra* note 113, at 318.

161. *See, e.g.,* Hammon v. State, 809 N.E.2d 945, 952-53 (Ind. Ct. App. 2004) ("[The] concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial.' . . . An unrehearsed statement made without time for reflection . . . has not been made in contemplation of its use in a future trial."); United States v. Brown, 322 F. Supp. 2d 101, 105 n.4 (D. Mass. 2004) ("[I]t is doubtful that even in a trial setting *Crawford* would apply to spontaneous utterances or declarations against penal interest[s]"); People v. Corella, 18 Cal.Rptr.3d 770, 776 (Ca. Ct. App. 2004) ("[I]t is difficult to identify any circumstances under which a section 1240 spontaneous statement would be 'testimonial.'").

162. King-Ries, *supra* note 113, at 310.

163. *Id*.

Similarly, recordings of phone calls made to 911 for police protection or medical aid are also maintained for courtroom use.[164]

Domestic violence is of particular concern for law enforcement. Domestic violence is the leading cause of injury to women and affects millions of women in the United States every year.[165] These crimes, however, are often difficult to prosecute because the victim is unavailable to testify.[166] A victim who initially pursues charges may later refuse to assist in prosecution because of fear or pressure from the defendant, concern for the family, or concerns about impeachment.[167] Due to a victim's unwillingness to testify, prosecutors often conduct 'victimless prosecutions' using other evidence.[168] This evidence often involves the use of hearsay testimony from the victim gathered during a 911 call, police interviews, and statements to medical personnel.[169]

A typical victimless prosecution may depend on multiple uses of hearsay and hearsay exceptions during a trial. A perpetrator's identity, a description of the perpetrator's actions, and injuries to the victim can all be attained from the victim-declarant's hearsay.[170] The victim may make these statements during a 911 call or a later interview with police officers, and a court will admit the hearsay under exceptions such as excited utterance or present sense impression.[171] These statements, used with available physical evidence, may be enough to convict the alleged perpetrator without any testimony from the victim.[172]

Public awareness of domestic violence has increased in recent years; likewise, there has been an increased effort by law enforcement and the courts to prosecute and punish these crimes.[173] Statutes targeted at domestic violence have resulted in significant increases in the rate of arrests for these crimes.[174] In addition, judges are under considerable pressure to punish domestic violence offenders, increasing their willingness to allow certain hearsay statements.[175] Due to uncooperative victims, however, domestic violence crimes are among the most difficult to prosecute.[176]

Crawford threatens the ability of prosecutors to go forward with these types of cases by barring the use of much of the evidence needed in a victimless prosecution.[177] Participants in domestic violence—both the victim and perpetrator—are increasingly aware of law enforcement and its use of hearsay as evidence.[178] In fact, there are cases of the savvy domestic violence *perpetrator* racing to call 911 before the victim, and

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164. *Id*.
165. *Id*. at 303.
166. *Id*. at 301.
167. Carter & Lyons, *supra* note 117, at 21.
168. King-Ries, *supra* note 113, at 301.
169. *Id*.
170. *Id.* at 311-12.
171. *Id*.
172. *Id*. at 312.
173. Friedman & McCormack, *supra* note 37, at 1182.
174. *Id*. at 1185.
175. *Id*. at 1192.
176. Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid*, PROSECUTOR, Nov.-Dec. 2004, at 14.
177. *Id*.
178. Friedman & McCormack, *supra* note 37, at 1193.

thereby securing the arrest of the *victim*.[179] With the increased awareness of these parties, a victim may well realize that a statement to police and other government officials could be used at trial, rendering the statements 'testimonial.'[180]

Prosecution of child abuse crimes may also involve an unavailable victim.[181] A child may be incompetent due to age or intellect, or too emotionally traumatized to testify.[182] Thirty-two states allow special hearsay exceptions for child testimony if there is a judicial determination of reliability—a consideration of the *Roberts* criteria.[183] The effect of *Crawford* on these prosecutions has, and will be, significant. For example, forensic interviews of children used to prosecute a case in lieu of a child's testimony at trial have been labeled as 'testimonial' by some courts.[184] Child abuse professionals are now being trained to avoid pitfalls that implicate the Confrontation Clause during these interviews.[185]

Commentators have suggested numerous ways in which the prosecution of domestic violence and other crimes that require hearsay evidence could continue with minimal impact from *Crawford*. For example, one commentator has suggested that the Court's definition of 'testimonial' be kept narrow and not include certain hearsay exceptions, such as the excited utterance, present sense impression, and statement for medical treatment,[186] which comprise the three most common exceptions used in victimless prosecutions. Another commentator argues that a defendant forfeits his confrontation right in a domestic violence situation where the defendant has attempted to prevent the victim's cooperation.[187] Yet another suggested solution is to provide earlier opportunities, such as at a preliminary hearing, for the defendant to cross-examine the victim when the victim is a more willing witness.[188]

VII. 911 CALLS AFTER *CRAWFORD*

As previously mentioned, prosecutors frequently use the excited utterance exception to admit 911 calls into evidence.[189] These calls, however, may have 'testimonial' qualities that implicate the Confrontation Clause. A 911 call may begin as a mere cry for police protection or medical assistance, without any 'testimonial' quality. As the call progresses, statements may be made that are not necessary for assistance and are geared more towards an eventual prosecution.[190] For example, questions and answers between a dispatcher and caller may detail an abusive relationship's history.[191] There-

179. *See id*. at 1196-98.
180. King-Ries, *supra* note 113, at 319.
181. Carter & Lyons, *supra* note 117, at 21.
182. *Id*. at 22.
183. *Id*.
184. Phillips, *supra* note 136, at 38.
185. *See id.* at 40. For example, professional interviewers are instructed to avoid asking a child if an alleged abuser should be punished and to focus on child treatment and safety rather than gaining evidence for trial. *Id*.
186. King-Ries, *supra* note 113, at 321.
187. Krischer, *supra* note 176, at 15.
188. Mosteller, *supra* note 115, at 610-11.
189. *Id*. at 612.
190. Friedman & McCormack, *supra* note 37, at 1242.
191. *Id*. at 1242-43.

fore, such statements may be 'testimonial' and barred by the Confrontation Clause.[192] In addition, elapsed time after the event may suggest an increase in the 'testimonial' quality of the caller's statements.[193] As a result, the *Crawford* decision has caused an eruption of state court decisions[194] addressing the 'testimonial' nature of 911 calls.

A. Cases Finding a 911 Call 'Non-testimonial'

One commonly cited case, representative of other cases allowing a 911 call into evidence, is *State v. Moscat*,[195] decided in New York by the Criminal Court of New York City in Bronx County.[196] In *Moscat*, the defendant made a motion in limine to exclude the use of a 911 call made by the victim in a domestic violence case.[197] Because the witness would not testify, without the 911 call, the prosecution would be forced to dismiss the charges.[198] The *Moscat* court reviewed *Crawford* and criticized the Court's decision[199] not to define the meaning of "police interrogation."[200] Turning to the 911 call in the case, the *Moscat* court held that 911 calls looking for help differ from the 'testimonial' statements addressed by the Confrontation Clause.[201] The *Moscat* court distinguished the calls from 'testimonial' statements on two grounds. First, the court reasoned, the 911 call was initiated by the victim, rather than the police.[202] Second, the court observed that the victim calls 911 to be "rescued from immediate peril," rather than to satisfy the government's desire to seek evidence.[203] These two reasons, the *Moscat* court held, make the 911 call fundamentally different from a 'testimonial' statement.[204] Looking at the English pre-trial examinations in *Crawford*, the *Moscat* court found a 911 call not analogous.[205] Finally, the court reasoned that because a 911 call is usually seen as part of a criminal incident, rather

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192. *Id*. at 1242.

193. *Id*.

194. Despite the rush of state court decisions after *Crawford*, as of the writing of this Note, only two circuit courts have brought up the issue. The Ninth Circuit in *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004), found that a victim's statements during a 911 call did not fit within the *Crawford* definition of 'testimonial' because the victim, not the police, had initiated the call for help. *Id*. at 830 n.22. The Second Circuit in *Gutierrez v. McGinnis*, 389 F.3d 300 (2d Cir. 2004), affirmed a conviction on harmless error grounds, expressly declining to address the issue of if a 911 call by the victim was 'testimonial.' *Id*. at 302 n.1.

195. 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

196. *But see* People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004); People v. Dobbin, 791 N.Y.S.2d 897 (N.Y. Sup. Ct. 2004) discussed *infra* Part VIII (decisions in the state of New York by different courts, finding a 911 call to be 'testimonial').

197. State v. Moscat, 777 N.Y.S.2d at 875.

198. *Id*. at 875-76.

199. *Id.* at 877-78 ("The *Crawford* decision is rich in detail about the law of England in the 16th, 17th, and 18th centuries, but . . . it fails to give urgently needed guidance as to how to apply the Sixth Amendment right now, in the 21st century.").

200. *See* Crawford v. Washington, 541 U.S. 36, 53 n.4 (2004). "Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case." *Id.*

201. State v. Moscat, 777 N.Y.S.2d at 879.

202. *Id*.

203. *Id*.

204. *Id*.

205. *Id*. at 880.

than a later prosecution, the caller does not contemplate being a "'witness' in future legal proceedings."[206] After this discussion, the *Moscat* court admitted the statement as an excited utterance.[207] Two other New York courts, in *People v. Conyers*[208] and *People v. Isaac*,[209] have followed the *Moscat* court's reasoning.

Appellate courts in California have endorsed the *Moscat* case. In *People v. Corella*,[210] a domestic violence victim told a 911 operator that she had just been hit by Corella, her spouse.[211] She later changed her story and did not testify at trial.[212] Corella appealed his conviction, claiming that his wife's excited utterances were 'testimonial.'[213] In affirming the conviction, the California Court of Appeals for the Second District found the 911 call was not 'testimonial.'[214] The *Corella* court, citing *Moscat*, noted that a 'testimonial' statement is made when the government summons a citizen, which is the opposite of what occurs in a 911 call.[215] In addition, the court stated that a 911 call has no "structured police questioning" or "indicia common to the official and formal quality of the various statements deemed 'testimonial.'"[216] Interestingly, the court added that 911 operators attempt to determine how to respond to a call, rather than conduct "interrogation in contemplation of a future prosecution."[217]

After noting the analysis in *Corella*, another California court used a slightly different approach in *People v. Caudillo*.[218] Although citing the reasoning of *Corella*, the *Caudillo* court applied the case's facts to the specific "core class" of 'testimonial' statements in *Crawford*.[219] The *Caudillo* court held that a 911 call was not "ex parte in-court testimony or its functional equivalent,"[220] an "extrajudicial statement . . . contained in formalized testimonial materials,"[221] or "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at later trial.'"[222] Therefore, admission of the 911 call did not violate the Confrontation Clause.[223]

Several state court decisions have used a less stringent interpretation of *Crawford* than the *Moscat* line of cases. In the recent case of *Talley III v. Kentucky*, [224] the

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206. *Id*.
207. *Id*.
208. 777 N.Y.S.2d 274, 277 (2004) (Supreme Court of Queens County adopting the *Moscat* reasoning and finding that the victim's "intention in placing the 911 calls was to stop the assault . . . and not to consider the legal ramifications").
209. 791 N.Y.S.2d 872 (N.Y. Dist. Ct. 2004) (adopting the narrow view of *Crawford* in *Moscat*, over the competing view in *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004)).
210. 18 Cal. Rptr. 3d 770 (Cal. App. 2004).
211. *Id*. at 772.
212. *Id*. at 772-73.
213. *Id*. at 773.
214. *Id*. at 776.
215. *Id*.
216. *Id*.
217. *Id*.
218. 19 Cal. Rptr. 3d 574 (Cal. Ct. App. 2004).
219. *Id*. at 590 (quoting Crawford v. Washington, 541 U.S at 51).
220. *Id*. (emphasis omitted) (quoting Crawford v. Washington, 541 U.S at 51).
221. *Id*. (quoting Crawford v. Washington, 541 U.S. at 51-52).
222. *Id*. (quoting Crawford v. Washington, 541 U.S. at 52).
223. *Id*.
224. No. 2003-SC-0869-MR, 2005 WL 387443 (Ky. Feb. 17, 2005).

Supreme Court of Kentucky allowed the admission of a 911 call as a present sense impression. In *Talley III*, an anonymous caller to 911 stated that a shooting had occurred and gave a description of the shooter and his direction of flight.[225] In upholding the admission of the statement, the *Talley III* court found that a 911 call simply "does not implicate the principle evil at which the Confrontation Clause was directed."[226] The *Talley III* court then held that the statement did not violate the Confrontation Clause because it fell in a "firmly rooted hearsay exception" and was sufficiently reliable,[227] a line of reasoning that is clearly dismissive of *Crawford*. In considering another situation involving 911 calls, the Supreme Court of Kentucky gave more deference to *Crawford*,[228] although it noted that *Crawford*'s definition of 'testimonial' was very limited.[229]

Using a cursory analysis of *Crawford* in *Pitts v. State*,[230] the Georgia Court of Appeals also found 911 calls to be 'non-testimonial.' In *Pitts*, a woman made a series of calls to 911 after her estranged husband had broken into her house.[231] In upholding the trial court's admission of the 911 calls, the *Pitts* court noted that statements made while an incident occurred were not 'testimonial' under *Crawford*.[232] Because the statements were "made without premeditation or afterthought," they could not be 'testimonial.'[233] As such, the trial court properly admitted the statements as excited utterances.[234]

As demonstrated, state courts' reasoning differs when determining the 'testimonial' nature of a 911 call. The concurring opinion in *State v. Nelson*,[235] an Ohio Court of Appeals opinion, is another example. In *Nelson*, a woman called 911 after she had been struck by the defendant, Nelson, though he was no longer present at the home.[236] Although the majority did not rule on the 911 call's 'testimonial' nature, the concurring opinion found the 911 call not to be 'testimonial.'[237] The concurrence reasoned that because (1) the woman was not a suspect, and (2) her excited utterances "were not made during police interrogation or . . . structured official questioning," the

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225. *Id*. at *1-*2.

226. *Id*. at *3.

227. *Id*. ("[A] finding that a statement falls within a firmly rooted hearsay exception means that it contains sufficient reliability to satisfy the requirements of the Confrontation Clause.").

228. *McCreary v. Commonwealth*, No. 2003-SC-0210-MR, 2005 WL 387285 (Ky. Feb. 17, 2005). In *McCreary*, the defendant was convicted of murder for shooting two people. *Id*. at *1. One victim, a female, was able to give a dying declaration to a 911 operator, identifying McCreary as the shooter. *Id*. at *3.

229. *Id*. at *4. The court noted that *Crawford* is limited only to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id*. (quoting Crawford v. Washington, 541 U.S. 36, 68 (2004)). In addition, the court noted that the Supreme Court had suggested that dying declarations (the type of hearsay involved in this case) might be an exception to the Confrontation Clause. *Id.*

230. 612 S.E.2d 1 (Ga. Ct. App. 2005).

231. *Id*. at *1.

232. *Id*. at *4.

233. *Id*.

234. *Id*.

235. 2004 Ohio 6153.

236. *Id*. ¶¶ 4-5.

237. *Id*. ¶ 8 (Gorman, J., concurring).

call could not be 'testimonial.'[238] Therefore, *Crawford*'s concern with ex parte examinations was not implicated.[239]

B. Cases Finding a 911 Call 'Testimonial'

New York state courts have been split as to the 'testimonial' nature of 911 calls after *Crawford*. *Moscat* makes a blanket statement about all 911 calls, and is followed by some New York courts. Other New York courts, however, have produced decisions to the contrary.

For example, in *People v. Cortes*,[240] the Supreme Court for Bronx County, New York, held that 911 calls reporting a crime are 'testimonial.'[241] In *Cortes*, the State charged the defendant with attempted murder, second degree assault, and weapon possession in connection with a shooting.[242] In its case in chief, the prosecution attempted to admit recordings of two 911 calls made by witnesses who refused to testify in court.[243] The court declined to admit the calls and held them inadmissible under *Crawford*. In reaching this conclusion, the court found that, due to the methods used by police in taking a 911 call, calls reporting a crime fell under the definition of "interrogation."[244] In addition, the state intended to use 911 to gather information about crimes.[245] Moreover, the procedures used by 911 operators made these calls 'formal' statements as described in *Crawford*.[246]

The court took a different approach to the meaning of 'testimonial.' The court decided that a proper definition should be objective, based on the primary purpose of the statement.[247] Under this test, business records, medical information, and *res gestae* would not require cross-examination.[248] 911 calls reporting a crime, however, would be 'testimonial'.[249] The court also noted that the 'testimonial' nature of the call is not dependent on the subjective intent of the caller.[250] Rather, the 911 call's role as an

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238. *Id*.

239. *Id*. ("[T]he historical concern for the state's use of ex parte examination, which is the basis of *Crawford*, simply did not apply here.").

240. 781 N.Y.S.2d 401, 415 (N.Y. Sup. Ct. 2004).

241. *Id*. at 412.

242. *Id*. at 402.

243. *Id*.

244. *Id*. at 405.

245. *Id*. at 406.

246. *Id*.

247. *Id*. at 414 ("A test more in accord with the highly prized protection of the right of confrontation is the objective one of whether the pretrial statement . . . was made primarily for another purpose. If so, it need not be confronted.").

248. *Id*.

249. *Id*. at 415.

250. *Id*. ("When a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding; it makes no difference what the caller believes.").

integral document used by the State in the judicial process made it 'testimonial'[251] because its purpose was to "invoke police action and the prosecutorial process."[252]

In another New York case, *People v. Dobbin*,[253] the Supreme Court of New York County found a 911 call to be 'testimonial' under reasoning similar to *Cortes*. In *Dobbin*, a bystander to a robbery called 911 and described the perpetrator, who was later convicted.[254] Because the caller made the 911 call with the purpose of incriminating the defendant,[255] the court held it was the type of statement implicated by *Crawford*.[256] In addition, the court noted, the caller objectively believed that his call would be available for use at a later trial, making it 'testimonial.'[257] Similar to the reasoning of the *Cortes* court, the *Dobbin* court held that the formal nature of the call to the police operator made the 911 call equivalent to a police interrogation.[258] Interestingly, however, the court refused to reverse the conviction because admission of the 911 call constituted harmless error.[259]

The *Dobbin* court, therefore, took a broad view of how *Crawford* defined the meaning of "interrogation."[260] The court also rejected an argument that the present sense impression hearsay exception could render the statement 'non-testimonial,'[261] a view contrary to other courts that suggest such statements (e.g., excited utterances) are never 'testimonial.'[262]

An appellate court in Illinois was willing to differentiate between statements within the same 911 call in *People v. West*.[263] In *West*, the defendant, Marcus West, kidnapped and sexually assaulted a cab driver, later abandoning her.[264] The victim was

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251. *Id*. The court described a 911 call's nature in the following:

> The 911 statement is made orally, but it is recorded as would a statement made to a police officer, a prosecutor or a prosecutor's stenographer who then writes it down. The statements on the 911 tapes are preserved as official documents. In New York a summary copy (a sprint report) is made and preserved separately from the tape. The preserved conversations on tape are available by subpoena. The tapes must be delivered as *Rosario* material if the witness is available and testifies. If a tape is lost or improperly or prematurely destroyed, an adverse inference may be available. The tapes must be given to the defense if they contain exculpatory information.
>
> The 911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the depositions taken by magistrates or JPs under the Marian committal statute.

Id.

252. *Id*. at 416.

253. 2004 WL 3048648 (N.Y. Supp.).

254. *Id*. at *1-*2.

255. *Id*. at *3 ("The 911 call . . . contains a solemn declaration for the purpose of establishing the fact that the defendant is committing a robbery. The caller is making a formal out of court statement to a government officer for the purpose of establishing this fact.").

256. *Id*. ("[T]he 911 call falls within the category of . . . 'witnesses' against the accused in other words, those who 'bear testimony.'").

257. *Id*.

258. *Id*. at *4 ("[t]he functional equivalent of a formal statement to a police officer").

259. Id. at *8.

260. *Id*. at *4 ([T]he Supreme Court is referring to interrogation in a very broad and inclusive manner.").

261. *Id*.

262. *See supra*, note 160 and accompanying text.

263. 823 N.E.2d 82 (Ill. App. Ct. 2005).

264. *Id*. at 84.

able to get to a house and request help from the homeowner.[265] Among the evidence admitted was the recording of a 911 call where the dispatcher asked the victim a series of questions, using the homeowner as an intermediary.[266] These questions included a description of the crime, the victim's location, age, and medical condition.[267] The dispatcher also asked about the victim's vehicle, the direction the assailants left in, and property they had stolen.[268] West was found and later convicted for aggravated vehicular hijacking, kidnapping, armed robbery, and five counts of aggravated sexual assault.[269] The victim did not testify at trial.[270] On appeal, the defendant argued that the admission of several out-of-court statements into evidence violated his right to confrontation because they were 'testimonial.'[271] In reviewing the 911 call, the court rejected any bright line rule.[272] Rather, the court held that a 911 statement is 'testimonial' if it is (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."[273] The court justified this reasoning finding that both situations implicated the Confrontation Clause.[274] Applying this test, the court found that the victim's statements about her medical condition, age, and location were not 'testimonial.'[275] Other portions, however, of her 911 call were 'testimonial,' including the description of her vehicle, stolen personal property, and the direction the assailants fled in.[276] Finding that the admission of this evidence was not harmless beyond a reasonable doubt, the court reversed and remanded for a new trial.[277]

The Washington Court of Appeals found a 911 call to be 'testimonial' in nature, despite the admission of the statement in trial as an excited utterance in *State v. Powers*.[278] In *Powers*, the defendant violated a no-contact order prohibiting him from contact with T.P.[279] After Powers had left T.P.'s home, she called 911 to report his violation.[280] Powers was later arrested and sentenced to a 14-month sentence.[281] The

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265. *Id*. at 85.
266. *Id*.
267. *Id*.
268. *Id*.
269. *Id*. at 86.
270. *See id*.
271. *Id*. at 87.
272. *Id*. at 91.
273. *Id*.
274. *Id*. The Court further noted that "statements volunteered for the purpose of 'invoking police action and the prosecutorial process,' or responses to questions posed for the purpose of collecting information 'useful to the criminal justice system,' are testimonial in nature." *Id*. (citing People v. Cortes, 781 N.Y.S.2d 401, 416 (N.Y. Sup. Ct. 2004)).
275. *Id*. at *9.
276. *Id*. The court noted that these statements were made in response to questions asked with the purpose of assisting a police investigation. *Id.*
277. *Id*. at 92. The court found many other evidentiary statements 'testimonial' besides portions of the 911 call, including statements made to police at the hospital, *id*. at 87-88, and statements of identification made to a doctor and nurse, *id*. at 89-90.
278. 99 P.3d 1262 (Wash. Ct. App. 2004).
279. *Id*. at 1263.
280. *Id*.
281. *Id*.

911 call was later admitted into evidence as an excited utterance.[282] In appealing his conviction, Powers argued that admission of the 911 call violated his right of confrontation because T.P. did not testify at trial.[283] The appellate court examined the call and rejected admission based solely on its nature as an excited utterance.[284] The court also held that trial courts should assess 911 calls under *Crawford* on a case-by-case basis to decide if they are 'testimonial' or based on interrogation.[285] Finding that the 911 call was not part of the event, or a request for help, the court held the 911 call to be 'testimonial.'[286] Rather, the call was intended to report Powers' criminal violation and assist in his prosecution.[287]

VIII. THE MINNESOTA COURT OF APPEALS AND *STATE V. WRIGHT*

The Minnesota Court of Appeals was given the opportunity to consider the impact of the *Crawford* decision on 911 calls in *State v. Wright*.[288] In *Wright*, the defendant David Wright and his girlfriend, R.R., lived together in an apartment in Minneapolis.[289] In the early morning of November 24th, 2004, the two had an argument in their apartment in the presence of S.R., R.R.'s fifteen-year-old sister.[290] The argument concerned Wright's desire to leave the apartment and R.R.'s refusal to give him keys.[291] During the argument, R.R. attempted to call 911, but Wright smashed the phone.[292] R.R. then claimed that Wright grabbed a handgun from the front closet and pointed it at her and S.R.[293] R.R. then gave Wright the apartment keys and he left.[294] After Wright was gone, R.R. called 911 from a different telephone.[295] During this call, a shaken and traumatized R.R. described Wright to the 911 operator and said that Wright had waived a gun at her and her sister.[296] R.R. gave Wright's name and an accurate description to the 911 operator, mentioned that he had keys to her apartment, and detailed her extreme fear of his possible return.[297] During this call, a police officer who was responding to the initial 911 call attempt saw Wright on the street and recognized him from a description broadcast by the 911 operator.[298] The officer

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282. *Id*.
283. *Id*.
284. *Id*. at 1266 (noting that *Crawford* rejects the admission of 'testimonial' statements solely because of reliability and trustworthiness).
285. *Id*.
286. *Id*.
287. *Id*.
288. 686 N.W.2d 295 (Minn. Ct. App. 2004).
289. *Id*. at 298.
290. *Id*. *See also* Appellant's Brief at 8, 10, State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004) (No. A03-1197).
291. *Id*. at 299. *See also* Appellant's Brief at 8, 10, State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004) (No. A03-1197).
292. *Id*.
293. *Id*.
294. Appellant's Brief at 10, State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004) (No. A03-1197).
295. State v. Wright, 686 N.W.2d at 299.
296. *Id*. at 298.
297. Respondent's Brief at 9, State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004) (No. A03-1197).
298. State v. Wright, 686 N.W.2d at 298.

attempted to stop Wright, but he fled.[299] According to the officer, he could see Wright holding a handgun.[300] After a pursuit, the officer released a police dog from his car and the dog caught Wright by the leg.[301] At this point, Wright was knocked to the ground and said, "I don't have the gun anymore."[302] After a search of the chase scene, officers found a handgun under a car, though without any usable fingerprints.[303] The 911 call lasted through this period of time, and R.R. was informed that Wright had been arrested.[304] R.R. was then informed that an officer would visit her for questioning, which occurred forty-five minutes later.[305] Later at R.R.'s apartment, an officer spoke with the two victims and got a detailed story of the occurrence.[306] The officer also uncovered a bag in the front closet containing a gun clip and bullets.[307]

Wright was charged with felony possession of a firearm and two counts of second-degree assault.[308] During trial, R.R. and S.R. refused to testify, despite repeated attempts by the State.[309] According to R.R., both R.R. and S.R. were concerned for their safety because Wright still had keys to their apartment and had called them from jail threatening to have someone harm them if they testified.[310] The court then allowed a recording of R.R.'s 911 call and testimony of her conversation with the officer at her apartment to be used at trial.[311] These hearsay statements were admitted under the excited utterance exception in Minnesota's rules of evidence.[312] Wright was found guilty of all three counts and sentenced to three concurrent sentences of sixty months.[313]

A. Arguments on Appeal

On appeal, Wright advanced four arguments concerning the evidence used at trial.[314] Wright filed his initial appellant brief on January 22, 2004;[315] *Crawford v. Washington* was decided March 8, 2004.[316] In Wright's Reply Brief, filed March 16, he contested admission of the 911 call and police interviews on Confrontation Clause

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299. *Id*.
300. *Id*.
301. *Id*.
302. *Id*.
303. *Id*.
304. Appellant's Brief at 17, State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004) (No. A03-1197).
305. *Id*.
306. State v. Wright, 686 N.W.2d at 298, 299.
307. *Id*. at 299.
308. Appellant's Brief at 1, State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004) (No. A03-1197).
309. State v. Wright, 686 N.W.2d at 299.
310. *Id*.
311. *Id*.
312. *Id*. (citing MINN. R. EVID. 803(2)).
313. *Id*.
314. Appellant's Brief at i-ii, State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004) (No. A03-1197). The four arguments were: 1) that Wright's statement to the officer that he didn't have a gun anymore was inadmissible as an involuntary, coerced statement, *id*. at 12; 2) the police interview at R.R.'s apartment was not an excited utterance, *id*. at 15; 3) the trial court improperly allowed Wright's impeachment with four prior convictions, *id*. at 23; and 4) the prosecutor committed misconduct during closing arguments by analogizing the victimless prosecution to a murder case, *id*. at 25.
315. *Id*. at title page.
316. 541 U.S. 36, 36 (2004).

grounds.[317] Wright argued that statements made to police officers were 'testimonial' and could not be admitted under a hearsay exception.[318] In addition, he contended that the 911 call was 'testimonial' because of its intended use in a later trial.[319]

As a result of *Crawford*, both Wright and the State filed supplemental reply briefs to advance Sixth Amendment arguments. Wright argued that, under *Crawford*, an excited utterance hearsay exception could not allow admission of 'testimonial' statements if the declarant failed to testify at trial.[320] Although the excited utterance exception may have existed at the enactment of the Sixth Amendment, there was no legal basis for admission of these 'testimonial' statements.[321] Historically, the excited utterance was termed a "spontaneous declaration" considered *res gestae* – an impulsive response to a startling event without time to reflect, rather than a recollection of the event.[322] The later broadening of the exception to recollections "failed to be properly tested against the constraints of the Sixth Amendment until *Crawford*."[323] Applying this argument to R.R.'s 911 call, Wright argued that R.R.'s statements were not part of the *res gestae* and were calculated to result in Wright's arrest.[324] In addition, her statements were part of an orderly procedure used by the 911 operator for criminal investigations and prosecutions.[325] Therefore, the State's failure to subpoena R.R. and compel her to testify constituted a violation of the Sixth Amendment.[326]

The State argued that the excited utterances to the 911 operator were not barred under *Crawford* [327] because they were not 'testimonial.'[328] First, the State argued that *Crawford* did not intend to bar admission of excited utterances because they were a historical exception to the confrontation right.[329] Noting that *Crawford* did not define the meaning of 'testimonial,' the State looked to the concurring opinion of Justices Scalia and Thomas in *Illinois v. White*.[330] Justice Thomas noted the difficulties in determining if statements are made "in contemplation of legal proceedings" and questioned whether the perspective of the declarant or officer should control.[331] The State argued that *Crawford* strongly suggested that the intent of the declarant should control whether a statement was 'testimonial.'[332] In support of this position, the State

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317. Appellant's Reply Brief at 1, State v. Wright, 686 N.W.2d 295 (No. A03-1197). Wright also advanced an argument that counsel was ineffective for failure to make certain objections during trial. *Id*. at 6.

318. *Id*. at 2.

319. *Id*. at 4.

320. Appellant's Supplemental Reply Brief at 1, State v. Wright, 686 N.W.2d 295 (No. A03-1197).

321. *Id*. at 2.

322. *Id*. at 3.

323. *Id*. at 4.

324. *Id*.

325. *Id*.

326. *Id*. at 6. Wright also argued that the interview with the police officer was undoubtedly "done 'with an eye toward trial'" and 'testimonial,' despite being an excited utterance. *Id*. Admission of this interview and the 911 call was not harmless error. *Id*.

327. Respondent's Supplemental Reply Brief and Appendix at 3, State v. Wright, 686 N.W.2d 295 (No. A03-1197).

328. *Id.* at 3.

329. *Id*. at 6.

330. *Id*. at 6-7 (citing Illinois v. White, 502 U.S. 346 (1992)).

331. *Id*. at 7-8 (quoting Illinois v. White 502 U.S. at 364).

332. *Id*. at 8.

noted that the *Crawford* Court had approved of several cases that would be consistent with *Crawford* only if the declarant's intentions were determinative.[333] Applying this principle to R.R.'s 911 call, the State argued that her excited utterance could not possibly have been made for use at a future criminal trial.[334] The statement was therefore 'non-testimonial' and subject only to hearsay law.[335]

B. The Decision of the Minnesota Court of Appeals

The Minnesota Court of Appeals then had the opportunity to determine if it would hold the 911 call 'testimonial', thereby reversing Wright's conviction.[336] The court began with an analysis of *Crawford v. Washington* and its analysis of the admissibility of 'testimonial' hearsay statements.[337] The court distinguished the custodial, Miranda-warned interrogation in *Crawford*, and addressed the 'testimonial' nature of a 911 call.[338] The court focused on the three formulations of 'testimonial' evidence given in *Crawford*: 1) "ex parte in-court testimony or its functional equivalent"; 2) "extra-judicial statements" similar to "formalized 'testimonial' materials"; and 3) statements which would "lead an objective witness reasonably to believe that the statement would be available for use at later trial."[339] The court also noted the specific examples of 'testimonial' statements provided by the Court.[340] The court determined that the 911 call did not fit under any of "the definitions or the examples of 'testimonial' statements."[341]

The court noted that 911 calls are made because the caller wants protection, not because the caller "expects the report to be used later at trial with the caller bearing witness."[342] The "cloak of anonymity" surrounding 911 calls was viewed as making these calls 'non-testimonial.'[343] The court, appearing to adopt the State's view that the declarant's intent controls, made a blanket statement that excited utterances in a 911 call could not be 'testimonial':

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333. *Id*. (citing Bourjaily v. United States, 483 U.S. 171 (1987)).

334. *Id*. at 9.

335. *Id*. In addition, the State made similar arguments concerning the interview with officers at R.R.'s apartment. *Id*. If the statements were 'testimonial,' the State argued that the error of admission was harmless. *Id*. at 10.

336. State v. Wright, 686 N.W.2d at 301. In addition, the court had four other issues to address. First, the court had to decide if statements made to the police at R.R.'s apartment were 'testimonial.' *Id*. at 299. Second, the court had to decide if the trial court had erred by allowing Wright's statement that he did not "have the gun anymore" into evidence. *Id*. Third, the court had to determine if Wright's impeachment with prior convictions was improper. *Id*. at 300. Finally, the court had to decide if the prosecutor had committed misconduct during closing arguments. *Id*.

337. *Id*. at 300.

338. *Id*. at 301.

339. *Id*. (quoting Crawford v. Washington, 541 U.S. at 51-52).

340. *Id*. These examples included prior testimony, formal 'testimonial' materials such as affidavits, depositions, or confessions, and formal statements taken by police officers during an interrogation. *Id*.

341. *Id*. at 302.

342. *Id*.

343. *Id*. This is interesting, because it suggests that an anonymous person could intentionally incriminate a defendant with hearsay admissible at trial without fear of cross-examination. This is surely a danger that the Confrontation Clause was intended to address.

> Even under the broadest definition of "testimonial" cited in *Crawford*, which focuses on whether an objective witness would reasonably believe the statement would later be available for use at trial, the 911 call does not qualify as "testimonial" evidence. Statements in a 911 call by a victim struggling for self-control and survival only 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.[344]

The court distinguished the case of *People v. Cortes*,[345] which had found that 911 calls are "the functional equivalent of a police interrogation."[346] The court noted that the evidence did not show a formalized protocol for the 911 call, or that there was an intention to use the 911 dialogue in an eventual prosecution.[347] Interestingly, Wright had argued that the 911 system, *by design*, was intended to supplement prosecutorial evidence at trial.[348]

The court later declined to examine the Confrontation Clause implications of the police interview at R.R.'s apartment, finding that any error at trial was harmless beyond a reasonable doubt because the 911 call was sufficient evidence for conviction.[349] Also finding that Wright's other arguments for appeal did not hold merit, the court affirmed his conviction.[350]

In a concurring opinion, Judge Hudson agreed with the court that the 911 call was not 'testimonial' within the meaning of *Crawford*.[351] Judge Hudson wrote separately to point out that not all 911 calls are 'non-testimonial' despite being classified as excited utterances.[352] Whether a call is an excited utterance is irrelevant if the statement is also 'testimonial.'[353] Judge Hudson then suggested cases where a 911 caller might have dual motives—such as when a genuinely frightened female caller is also aware her statements may be used for investigation and prosecution.[354] In such a case, the call would be an excited utterance but also 'testimonial.'[355] Citing *People v.*

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344. *Id*.

345. 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004). *See also supra* note 239-45 and accompanying text.

346. State v. Wright, 686 N.W.2d at 302-03.

347. *Id*. at 303.

348. Appellant's Reply Brief at 4, State v.Wright, 686 N.W.2d 295 (No. A03-1197) ("[911] calls are recorded for various reasons including later use at trial . . . . The questions the 911 operator asked . . . were dually designed to assist the officers in apprehending appellant and to provide a record establishing probable case [sic] for appellant to stand trial.").

349. State v. Wright, 686 N.W.2d at 305 ("The jury's verdict was surely unattributable to these consistent but cumulative statements, and any error in admitting that evidence would be harmless beyond a reasonable doubt.").

350. *Id*. at 308. In summary, the court decided not to rule on the admission of the interview, as it was harmless error. *Id*. The admission of Wright's statement about a gun was admissible because it was incidental to his apprehension. *Id*. at 306. His impeachment with prior felony convictions was proper under the trial court's discretion. *Id*. at 307. Finally, the prosecutor's possible misconduct during closing arguments did not warrant review because the defendant had failed to object at the time. *Id*. at 308.

351. *Id*. at 308 (Hudson, J., concurring).

352. *Id*.

353. *Id*. at 309 ("If [the call] is testimonial, it is irrelevant that the statement is also an excited utterance.").

354. *Id*.

355. *Id*.

Cortes, Judge Hudson noted that some 911 calls "are made specifically to invoke the investigation and prosecutorial function of the police."[356] Arguing that "trial courts must evaluate 911 calls on a case-by-case basis,"[357] Judge Hudson found that R.R. had wanted protection during her call, without suggesting that "she reasonably believed her statements would be available for use at a later trial."[358]

IX. CRITIQUE OF THE *WRIGHT* DECISION

The Minnesota Court of Appeals decision in *Wright* appears to place the court in the *Moscat* line of cases, which find that an excited utterance in a 911 call is not 'testimonial.' As in *Moscat*, the court focuses on the perspective of the 911 caller and the caller's intentions. In addition, the court suggests that all excited utterances in a 911 call are, by definition, not 'testimonial.'[359] The court also dismisses any argument that the 911 call was a formalized interrogation.[360] This places the *Wright* decision in similar company with other court decisions that have suggested that an excited utterance can never be 'testimonial.'[361] Although the *Wright* decision's outcome was arguably the correct one, the court's reasoning was incomplete. First, the court's statements regarding the 'testimonial' nature of excited utterances leave open the possibility of abuse by declarants with both 'testimonial' and 'non-testimonial' intentions. Second, the court focuses on the perspective and intentions of the victim, when the listener's (here, the State's) perspectives and intentions are also clearly relevant to Confrontation Clause analysis. Third, the court could have redacted 'testimonial' portions of the 911 call and still provided adequate evidence for the prosecution. Fourth, the court could have allowed the 911 call into evidence in its entirety without a Confrontation Clause analysis by ruling that Wright had forfeited his right of confrontation by threatening R.R.

A. The Dual Intentions of an Excited Utterance

The *Wright* court suggested in its decision that excited utterances in the 911 call could not be 'testimonial' "[e]ven under the broadest definition . . . cited in *Crawford*."[362] It is quite possible, however, for a 911 caller, even in a domestic violence situation, to have dual motivations for the call. Judge Hudson's concurring opinion in *Wright* argued this distinction, where the caller may be "genuinely frightened" but also "believe and/or understand that her statements will be used at later trial."[363] Other commentators have similarly argued that an excited utterance can have 'testimonial' intention, despite the circumstances surrounding the statement. In particular, in cases of domestic violence, the victim may have a history of interaction

356. State v. Wright, 686 N.W.2d at 309.
357. *Id*.
358. *Id*. at 308.
359. *See id*.
360. *Id*. at 303 (majority opinion).
361. *See supra* note 160 and accompanying text.
362. State v. Wright, 686 N.W.2d at 302.
363. *Id*. at 309 (Hudson, J., concurring).

with law enforcement.[364] Efforts by government and social service agencies to boost public awareness of domestic violence have helped notify victims that their reports to law enforcement will result in criminal prosecution.[365] In fact, one commentator has suggested that a 911 call in a domestic violence scenario is "tantamount to a request for arrest,"[366] and that "911 callers realize they are creating evidence for the prosecution"[367] without having to "appear at trial, take an oath, or subject themselves to cross-examination."[368]

In cases such as *Wright*, it may be best to examine the intentions and beliefs of the victim on a case-by-case basis, as in *State v. Powers*,[369] rather than using a bright line rule. Surely, excited utterances in situations where the statement is part of the *res gestae*, as in *Pitts v. State*,[370] may be made without any 'testimonial' intent. However, in other cases where the statement comes after the event, it may be 'testimonial.' In *Wright*, certain facts suggested that the call could have had a 'testimonial' quality—the call was made after Wright had left the apartment, and R.R. surely knew that her boyfriend was a former felon. R.R.'s fear of his pending return, however, and the characterization of her 911 call by the trial court were probably enough to allow their admission.

B. Consideration of the State's Perspective

The *Wright* court did not consider the intentions of the 911 operator in eliciting the information gained from the call, except for a short statement that the call's dialogue was "aimed at resolving an emergent situation by apprehending a threatening aggressor and providing R.R. and S.R. with information to ensure their safety."[371] Similarly, although the court passed on deciding if statements made during the later police interview at R.R.'s apartment were 'testimonial,' the court strongly suggested that they were not because of the victim's emotional distress.[372] The court believed

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364. King-Ries, *supra* note 113, at 319 (noting that most victims are assaulted seven times before involving police, have repeated contact with law enforcement, and may have first-hand knowledge that statements made to police may used in court).

365. Friedman & McCormack, *supra* note 37, at 1195 (noting the multi-media initiatives to educate women about and encourage reporting of domestic violence).

366. *Id*. at 1196 (quoting *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1538 (1993)).

367. *Id*. at 1199.

368. *Id*. at 1200.

369. 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) ("[A] bright line rule admitting all 911 recordings . . . would likely result in the vice *Crawford* seeks to redress . . . . [T]he trial court, on a case-by-case basis, can best assess the proposed admission of a 911 recording as testimonial or nontestimonial . . . .").

370. *See* 612 S.E.2d 1, 5 (Ga. Ct. App. 2005) ("Here, the caller's statements were made while the incident was actually in progress. The statements were not made for the purpose of establishing or proving a fact regarding some past event, but for the purpose of preventing or stopping a crime as it was actually occurring."). *See supra* notes 229-33 and accompanying text.

371. State v. Wright, 686 N.W.2d at 303.

372. *Id*. at 305 ("[The victims' statements] to the officers were made minutes after their 911 call . . . . Their demonstrated emotional distress . . . is inconsistent with a determination that they were made with a belief that such statements 'would be available for use at a later trial.'").

that it was unlikely the victim's statements were calculated to be used in legal proceedings.[373]

The intentions and motivations of the government should be considered when determining the 'testimonial' nature of a victim's statements. After all, it is the *State* that prosecutes an alleged criminal. It is the *State* that requires and must gather evidence for its case. When interviewing a declarant, a government agent may be skilled in deliberately framing a question to get a desired response suitable for prosecutorial use.[374] The government, therefore, has a role in eliciting statements damaging to the defendant.[375] A defendant is harmed by a declarant's statement no matter if the statement's root cause is a malevolent declarant or a manipulative government official.[376] Under the circumstances of a 911 call, the initial purpose of both the caller and operator may be to provide assistance and safety. At some point during the conversation, however, the purpose of the call may evolve into one of eliciting 'testimonial' statements.[377] The Confrontation Clause should extend to the role of the government in eliciting and manipulating statements for prosecution, regardless of the declarant's innocent intentions.[378]

Other courts have supported an approach to *Crawford* that includes the government's intentions along with those of the declarant's. The court in *People v. West* [379] focused on the purposes and intentions of the police officers conducting the questioning in determining that the declarant's statements were 'testimonial.'[380] The court pointed out that the officers' questions were specific and purposeful, and bore statements that "would implicate the central concerns of the Confrontation Clause."[381] Similarly, the court in *Snowden v. State*[382] held that statements by a child in an interview were 'testimonial' because they were being elicited by a social worker for the express purpose of developing testimony for use in a trial.[383] The court in *People v. Cortes*[384] analyzed the nature of a 911 call and analogized it to an interrogation.[385] The procedure and rules used by the police in these calls showed that information was being elicited in a particular pattern by the government agent.[386] The caller's subjective belief was not dispositive.[387] These cases show that the caller is not the only

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373. *Id*.

374. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 596 (1992) (noting that a government agent's agenda may encourage certain replies from a declarant).

375. *Id*. at 613.

376. Mosteller, *supra* note 115, at 572.

377. *Id*. at 613.

378. *Id*. at 624-25. *See, e.g*., Berger, *supra* note 374, at 565 (noting that observers claim that some prosecutors have improperly threatened or cajoled children during interviews to elicit evidence for child abuse prosecutions).

379. *See supra* notes 263-77 and accompanying text.

380. People v. West, 823 N.E.2d 82, 88 (Ill. App. Ct. 2005).

381. *Id*.

382. 846 A.2d 36 (Md. App. 2004).

383. *Id*. at 47.

384. *See supra* text accompanying notes 240-52.

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

386. *Id*. at 406.

387. *Id*. at 414.

person whose intentions are important in Confrontation Clause analysis. Although the evidence in *Wright* did not suggest the motives of the 911 operator, the consideration is important.

C. Redaction as a Compromise

A possible solution for courts, such as the one in *Wright*, is to redact 911 calls to separate those portions that are deemed 'testimonial' in nature. Redaction is the careful editing of documents or evidence to remove inadmissible or inappropriate portions.[388] This solution was used in *Illinois v. West* to allow portions of a 911 call that identified the victim's medical condition, age, and location.[389] Other statements, however, not related to the victim's immediate condition (direction of the assailant's escape and vehicle type, stolen personal property) were not allowed.[390] There is no overwhelming reason that a 911 call cannot be broken into smaller portions according to their 'testimonial' intent.[391] Most often, however, the entire 911 call is admitted into evidence.[392]

D. A Solution Without Sacrificing the Confrontation Clause: Forfeiture

In *Crawford*, Justice Scalia reminded us that the Supreme Court accepts the rule of forfeiture, where the confrontation right can be extinguished by actions of the defendant.[393] Since *Crawford*, some courts have used the forfeiture-by-wrongdoing rule to allow statements by a declarant that is unavailable due to the defendant's conduct.[394] Examples of such forfeiture may include obstruction of the trial, or murdering or intimidating the declarant.[395] In the realm of domestic violence prosecution, one study found that almost half of victims reported that their abusers "had threatened physical violence if they continued to cooperate with prosecution efforts."[396] Threats other than physical violence can include both economic damage and harm to, or loss of custody of, the victim's children.[397] Prosecutors are now savvy to such threats and may collect evidence to prove forfeiture by the defendant.[398] Prosecutors realize that domestic violence abusers, however, do not necessarily require additional threats after the beginning of prosecution to procure a victim's unavailability.[399] The

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388. BLACK'S LAW DICTIONARY 1281 (7th ed. 1999).

389. People v. West, 823 N.E.2d at 91.

390. *Id*.

391. *See* Mosteller, *supra* note 115, at 613.

392. Friedman & McCormack, *supra* note 37, at 1180.

393. Crawford v. Washington, 541 U.S. at 62 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds . . . . ").

394. *See* Phillips, *supra* note 136, at 43 (citing State v. Meeks, 88 P.3d 789 (Kan. 2004) and People v. Moore, 2004 Colo. App. LEXIS 1354 (Colo. Ct. App. July 29, 2004)).

395. Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L. J. 1011, 1031 (1998).

396. Kirscher, *supra* note 176, at 15 (citing the Quincy Probation Project).

397. *Id*.

398. *Id*. (noting that prosecutors, to prove forfeiture, may subpoena prison phone records, voicemail, email, and other records to show unlawful procurement of a victim's unavailability).

399. *Id*.

systematic, ongoing nature of domestic violence may make additional threats unnecessary.[400] Such systematic activity may arguably create forfeiture over the period of abuse prior to prosecution, rather than requiring any specific act by the abuser.[401]

In *Wright*, there was clear evidence of intimidation by the defendant that would have allowed the court to admit the evidence despite any 'testimonial' intentions of either R.R. or the 911 operator. Wright had called R.R. and threatened both her and S.R. if they testified at trial. Specifically, he told R.R. that if they testified, "someone [would] come over to her house and do something to her."[402] This was a clear case of forfeiture and would have allowed admission of any of her statements.[403] The *Wright* court, however, did not consider this possibility, and the prosecutor did not argue it.

X. CONCLUSION

State v. Wright is an example of the reasoning used by many courts, in the wake of *Crawford*, to admit 911 calls when the declarant is unavailable. The Minnesota Court of Appeals has demonstrated an intention to allow such statements, a decision that is commendable considering the importance of such statements to prosecute crimes of violence. The reasoning of this decision, however, should have considered that such statements may be a source of abuse by prosecutors and declarants. Such a danger is one that the Confrontation Clause was intended to address. Other doctrines, such as redaction and forfeiture, may provide for protection of the public without compromising the right of confrontation. The court should have recognized such dangers in its decision and refrained from overarching language that it may need to step back from in the future.[404]

Alistair Y. Raymond

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400. *Id*.

401. *See id.* at 16.

402. State v. Wright, 686 N.W.2d at 299.

403. *See, e.g.*, State v. Fields, 679 N.W.2d 341 (Minn. 2004) (applying *Crawford* and holding that the defendant forfeited his right of confrontation by wrongfully procuring the witness' unavailability for trial).

404. Since the writing of this article, the United States Supreme Court has granted certiorari to hear a case addressing the issue of whether a victim's identification of an assailant during a 911 call is a testimonial statement. See Davis v. Washington, 111 P.3d 844 (Wash. 2005), *cert. granted*, 74 U.S.L.W. 3272 (U.S. Oct. 31, 2005) (No. 05-5224). Hopefully *Davis* will provide more guidance for courts in an area of law enforcement that has been drastically effected by *Crawford*.