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The Prosecution's Choice: Admitting a Non-testifying Domestic Violence Victim's Statements Under Crawford v. Washington

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THE PROSECUTION'S CHOICE: ADMITTING A NON-TESTIFYING DOMESTIC VIOLENCE VICTIM'S STATEMENTS UNDER *CRAWFORD V. WASHINGTON*[1]†

I. INTRODUCTION

Consider the following scenario:

Fred and Sally Smith were high school sweethearts. They have been married for two years and living in Tarrant County, Texas. Fred started emotionally abusing Sally during their courtship in high school—separating her from her friends and family, insulting her, threatening to leave her, and eventually controlling her daily activities. Following their marriage, Fred began physically abusing Sally; at first, he would only push and slap, but he quickly escalated to punching.

One night, Fred comes home from work and begins to question Sally about rumors he has heard. Fred accuses her of cheating on him with one of her coworkers. Sally denies having an affair and tries to convince Fred that she would never cheat. Despite her protests, Fred continues to accuse Sally of lying and cheating and begins pushing and slapping her. Sally begins crying and begs Fred to believe her, but Fred punches Sally in the face, knocking off her glasses, and pushes her onto their bed. Sally begs for Fred's forgiveness, but he continues

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

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to punch her in the face until she starts bleeding. Eventually, Fred stops punching Sally and leaves her alone in the bedroom. Minutes later, the police arrive, responding to a neighbor's 911 call. The police officers observe Sally: she is crying, visibly shaking, and has blood on her face and clothing, a black eye, and additional bruising on her face. One of the officers asks Sally if she needs an ambulance and Sally immediately tells the officer about the events that occurred and identifies Fred as her attacker. As Sally is taken to the hospital for treatment, Fred is arrested and charged with assault against a member of his family or household.[2]

Sally enters a battered women's shelter. There she is assisted by a social worker who helps her obtain a protective order, begin divorce proceedings, and aid in the police investigation against Fred. After a month, however, Sally, like many abuse victims, decides to reconcile with Fred and returns to their home. She informs the prosecuting attorney that she no longer wants to press charges and refuses to testify against Fred.[3] The prosecutor decides to proceed to trial without Sally, a decision commonly made when a victim chooses not to cooperate in the prosecution of her abuser.

At Fred's trial, in the 324th Tarrant County District Court, the prosecutor uses a tactic often employed in domestic violence prosecutions without a testifying victim witness: questioning the responding officer about Sally's statements made to him at the scene. Before the officer can respond, Fred's attorney objects to the line of questioning, stating that the testimony would constitute hearsay. Fred's attorney explains that Sally's statements to the officer that she was hit and that Fred was her attacker are being offered for the truth of the matter asserted and that their admission would be in violation of Fred's right to confrontation under the Confrontation Clause of the Sixth Amendment,[4] as established by the Supreme Court in *Crawford v. Washington*.[5] Facing possible exclusion of key evidence, the prosecution must respond . . .[6]

The Supreme Court's decision in *Crawford* potentially hinders the prosecution in domestic violence cases by possibly eliminating the current practice of admitting the non-testifying victim's statements

2. See TEX. PEN. CODE ANN. § 22.01(a)(1) (Vernon 1994) for the relevant statutory provision.

3. While the prosecutor has the option to subpoena Sally and compel her testimony, this choice is based on trial strategy and policy of the prosecutor's office. *See* TEX. CODE CRIM. PROC. ANN. art. 38.10 (Vernon 2005); TEX. R. EVID. 504(a)(4)(C), (b)(4)(A). This Comment does not address the situation where the prosecution chooses to compel the spouse victim. See Malinda L. Seymore, *Against the Peace and Dignity of the State: Spousal Violence and Spousal Privilege*, 2 TEX. WESLEYAN L. REV. 239 (1995) for a detailed discussion of the spousal crime exception in Texas.

4. *See* U.S. CONST. amend. VI.

5. *Crawford*, 541 U.S. at 68 (holding that "testimonial" statements are inadmissible without prior cross examination and unavailability of the declarant).

6. While the facts presented in this scenario are similar to many domestic violence situations, they are wholly created by the Author.

through a testifying police officer.[7] Texas prosecutors now face objections from defense attorneys and struggle to argue that these types of statements do not violate *Crawford* and remain admissible. This Comment will address two of the possible arguments available under Texas statute and case law supporting the admission of non-testifying victim statements through the testimony of the responding officers.

A careful reading of *Crawford* shows that its holding does not eliminate the use of non-testifying victim statements because the admission of such evidence does not violate the Confrontation Clause.[8] This Comment argues that, not withstanding *Crawford*, Texas prosecutors have at least two options available that support the admission of such evidence.[9] One of these options is to argue that a non-testifying victim's statements to a responding police officer are admissible under the excited utterance hearsay exception[10]in the Texas Rules of Evidence and constitute "nontestimonial"[11] evidence which is not subject to the requirements of *Crawford*. The second option is to argue that the evidence, even if deemed "testimonial"[12] and subject to the holding of *Crawford*,[13] is admissible because the defendant has waived the right to confrontation under the forfeiture-by-wrongdoing doctrine, an equitable rule designed to prevent a benefit from a defendant's wrongdoing that causes a witness's unavailability.[14]

This Comment explores these available options in light of *Crawford's* holding and reasoning. In Part II this Comment provides an overview of the background of the Confrontation Clause from its development as a constitutional amendment through its application in

7. Prior to *Crawford*, courts commonly allowed non-testifying victim's statements into evidence as excited utterances. *See, e.g.*, Zuliani v. State, 97 S.W.3d 589 (Tex. Crim. App. 2003); Salazar v. State, 38 S.W.3d 141, 153–54 (Tex. Crim. App. 2001); Mumphrey v. State, 155 S.W.3d 651, 658–59 (Tex. App.—Texarkana 2005, pet. ref'd); Carter v. State, 150 S.W.3d 230, 241 (Tex. App.—Texarkana 2004, no pet.); Harris v. State, 133 S.W.3d 760, 772 (Tex. App.—Texarkana 2004, pet. ref'd).

8. *See* Adam M. Krischer, *"Though justice may "be" blind, it is not stupid:" Applying Common Sense to* Crawford v. Washington *in Domestic Violence Cases*, 38 THE PROSECUTOR (Nov.–Dec. 2004) (publication available only to members of the National District Attorneys Association) *available at* http://www.tdcaa.com/dynam_news.asp?iid=8.

9. *See id.*

10. *See* Krischer, *supra* note 8.

11. The Supreme Court did not provide definition but gave examples of statements that are non-testimonial. *See* Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 515–16 (2005).

12. The Supreme Court did not provide a definition "leav[ing it] for another day," but did state that "testimonial" evidence includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." Crawford v. Washington, 541 U.S. 36, 68 (2004).

13. *Id.* at 68–69.

14. *See id.* at 62.

Ohio v. Roberts[15] and the admissibility of hearsay.[16] Part III examines *Crawford* and its holding.[17] Part IV discusses the policy concerns leading to the use of police reports and officer testimony in the prosecution of domestic violence cases and the problems that arise in the prosecution of domestic violence cases.[18] Part V examines excited utterance in Texas, the Texas Court of Criminal Appeals's recent opinion defining "testimonial," and how Texas courts may apply this definition in domestic violence cases.[19] Finally, Part VI discusses the applicability of the forfeiture-by-wrongdoing doctrine.[20]

II. HEARSAY UNDER THE CONFRONTATION CLAUSE

This section provides an abbreviated history of the Confrontation Clause from its development in English common-law, to its inclusion as an amendment to the United States Constitution, to its application in *Ohio v. Roberts*.[21] This section will further address the admission of hearsay evidence under the Confrontation Clause.

A. *The Constitutional Amendment*

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[22] The Confrontation Clause's origins can be found in the English common-law tradition of "live testimony in court subject to adversarial testing."[23] In the widely reported misdemeanor libel case of *King v. Paine*, the Court of King's Bench answered the question of whether prior opportunity to cross-examine was required to admit an unavailable witness's pretrial examination in the affirmative.[24]

At the time of the Sixth Amendment's ratification, English courts were applying the cross-examination rule in felony cases.[25] Many of the colonial state's declarations of rights adopted around the time of

15. Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part V.

20. *See infra* Part VI.

21. Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

22. *Id.* at 62–63; U.S. CONST. amend. VI.

23. Crawford v. Washington, 541 U.S. 36, 43 (2004) (citing WILLIAM BLACKSTONE, 3 COMMENTARIES *373–74 (1768)).

24. *Id.* at 45 (citing King v. Paine, 87 Eng. Rep. 584 (K.B. 1696)).

25. *Id.* at 46–47 (citing King v. Dingler, 168 Eng. Rep. 383, 383–84 (1791); King v. Woodcock, 168 Eng. Rep. 352, 353 (1789); cf. King v. Radbourne, 168 Eng. Rep. 330, 331–32 (1787); 3 Wigmore § 1364, at 23).

the Revolution contained the right of confrontation.[26] Yet, the Constitution did not have this guarantee, an omission that resulted in criticism.[27] A prominent Anti-federalist writing stated, "[n]othing can be more essential than the cross[-]examining [of] witnesses, and generally before the triers of the facts in question . . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth."[28] In response to the criticism of its omission, Congress included the Confrontation Clause in the Sixth Amendment.[29]

B. *Judicial Interpretation of the Clause*

A look at state decisions around the time of the Sixth Amendment's ratification illustrates the original understanding of the Confrontation Clause.[30] In 1794, the North Carolina Supreme Court held in *State v. Webb*:[31] "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross[-]examine."[32] Similarly, the South Carolina Supreme Court stated "that one of the 'indispensable conditions' implicitly guaranteed by the State Constitution was that 'prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination.'"[33]

In the 1895 case of *Mattox v. United States*,[34] the Supreme Court allowed a deceased witness's statement to be admitted when there was prior opportunity to confront during a previous trial.[35] "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and

26. *See id.* at 48 (citing Va. Declaration of Rights § 8 (1776); Pa. Declaration of Rights § IX (1776); Del. Declaration of Rights § 14 (1776); Md. Declaration of Rights § XIX (1776); N.C. Declaration of Rights § VII (1776); Vt. Declaration of Rights Ch. I, § X (1777); Mass. Declaration of Rights § XII (1780); N.H. Bill of Rights § XV (1783), *all reprinted in* BERNARD SCHWARTZ, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 235, 265, 278, 282, 287, 323, 342, 377 (1971)).

27. *Id.* at 48–49.

28. *Id.* at 49 (citing R. LEE, LETTER IV BY THE FEDERAL FARMER (Oct. 15, 1787), *reprinted in* SCHWARTZ, *supra* note 27, at 469, 473).

29. *Id.*; U.S. CONST. amend. VI.

30. *See Crawford*, 541 U.S. at 49–50 (citing Commonwealth v. Richards, 35 Mass. 434, 437 (1837); State v. Houser, 26 Mo. 431, 435–36 (1858); State v. Webb, 2 N.C. 103 (1794) (*per curiam*); State v. Campbell, 1 Rich. 124, 1844 WL 2558 (S.C.1844); State v. Hill, 2 Hill (SC) 607, 608–10 (S.C. 1835); Kendrick v. State, 29 Tenn. 479, 485–88 (1850); Bostick v. State, 22 Tenn. 344, 345–46 (1842); Johnston v. State, 10 Tenn. 58, 59 (1821).

31. State v. Webb, 2 N.C. 103 (1794).

32. *Id.* at 104.

33. *See Crawford*, 541 U.S. at 49–50 (quoting *Campbell*, 30 S.C.L. 124).

34. Mattox v. United States, 156 U.S. 237 (1895), *cited in Crawford*, 541 U.S. at 54.

35. *Id.* at 237.

of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . ."[36]

Later Supreme Court decisions continued to allow admission of witness statements only if there was a prior opportunity to cross-examine[37] and additionally required a showing of witness unavailability.[38] When a hearsay statement was "nontestimonial," the Court considered reliability over the chance to cross-examine.[39] "Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[40] In 1980, the Supreme Court provided a test in *Ohio v. Roberts*[41] that "conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'"[42]

III. *Crawford v. Washington*: The Case and Its Holding

Michael Crawford was charged with assault and attempted murder of a man that he contended had attempted to rape his wife Sylvia.[43] Although she was present during the incident and gave a statement, Sylvia did not testify at the trial because Crawford invoked the right of marital privilege available to him under Washington law.[44] However, the privilege did not bar admission of a spouse's out-of-court statement found admissible under a hearsay exception.[45] Therefore, the prosecution introduced Sylvia's tape-recorded statement made during a police interrogation using the exception of statement against penal interest.[46]

Michael objected to the admission of Sylvia's statement, arguing that its admission violated the Confrontation Clause by denying him

36. *Id.* at 244 (quoted in *Crawford*, 541 U.S. at 54).

37. The *Crawford* Court cited cases as support for prior to trial or preliminary hearing testimony admissibility being dependant on the defendant having an adequate opportunity to cross-examine. *See Crawford*, 541 U.S. at 57 (citing Mancusi v. Stubbs, 408 U.S. 204, 213–16 (1972); California v. Green, 399 U.S. 149, 165–68 (1970); Pointer v. Texas, 380 U.S. 400, 406–08 (1965); *cf.* Kirby v. United States, 174 U.S. 47, 55–61 (1899)).

38. The *Crawford* Court also cited cases as support that prior to trial or preliminary hearing testimony admissibility is also dependent on unavailability of the witness. *See id.* (citing Barber v. Page, 390 U.S. 719, 722–25 (1968); *cf.* Motes v. United States, 178 U.S. 458, 470–71 (1900)).

39. *Id.* (citing Dutton v. Evans, 400 U.S. 74, 87–89 (1970) (plurality opinion)).

40. *Id.* at 59.

41. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

42. *Crawford*, 541 U.S. at 60 (citing *Roberts*, 448 U.S. at 66).

43. *Id.* at 38.

44. *Id.* at 40.

45. *Id.*

46. *Id.*

the right to confront the witness against him.[47] Applying the *Roberts*[48] test, the trial court admitted the statement on the ground that it bore "particularized guarantees of trustworthiness."[49] Washington's intermediate appellate court rejected Sylvia's statement as unreliable and reversed Michael's conviction.[50] The Washington Supreme Court reinstated the conviction, finding that, under *Roberts*,[51] Sylvia's statement was admissible because it was trustworthy.[52]

The Supreme Court, "concerned with the use of testimonial evidence obtained under coercive conditions," reversed the Washington Supreme Court.[53] The Court noted circumstances that indicated coercive conditions surrounding Sylvia's statement—she was in custody, the police read her the *Miranda* warnings, she was tape-recorded, she was told that her release was conditioned on the progress of the investigation, and the police interrogated her twice through structured questions.[54]

The Supreme Court overruled *Roberts*[55] because of its "unpardonable vice . . . [of] demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[56] The Court further held that "testimonial" statements cannot be admitted unless there is a showing of witness unavailability and prior opportunity to cross.[57] For emphasis, the Court cited numerous cases in which the courts admitted accomplice confessions and "testimonial" hearsay statements in violation of the Sixth Amendment under the *Roberts* test.[58] The Supreme Court criticized the test as:

> [D]epart[ing] from the historical principles . . . in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of ex parte testimony . . . . At the same time, however, the test is too narrow: It admits statements that do consist of ex parte testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.[59]

47. *Id.*
48. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).
49. *Id.* at 66.
50. *Crawford*, 541 U.S. at 41.
51. *Roberts*, 448 U.S. at 66.
52. *Crawford*, 541 U.S. at 41.
53. Sally Carter, State's Trial Brief on the Excited-Utterance Exception to the Hearsay Rule in the Light of *Crawford v. Washington*, http://www.tdcaa.com/dynam_news.asp?iid=8 (last visited Feb. 28, 2004) [hereinafter Trial Brief] (template brief outlining the excited-utterance exception to the hearsay rule).
54. *See Crawford*, 541 U.S. at 53 n.4, 65.
55. 448 U.S. at 56.
56. *Crawford*, 541 U.S. at 63.
57. *Id.* at 68.
58. *Id.* at 63–65.
59. *Id.* at 60.

In response to *Roberts's* "unpredictability,"[60] the Supreme Court held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[61] The Court made a distinction between "testimonial" and "nontestimonial," but left "for another day" a comprehensive definition of "testimonial."[62] Although the Court did not provide its own definition, it did cite three definitions furthered by others:

> [1] *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . ; [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, [and, 3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[63]

IV. The Prosecution of Domestic Violence Cases

This section discusses the policy concerns leading to the use of police reports and officer testimony in the prosecution of domestic violence cases and the problems that arise during the prosecution of domestic violence cases. Society once regarded domestic violence as a private matter that occurred only occasionally.[64] However, the truth is that while an isolated act of domestic violence may appear insignificant, there is a likelihood that the future acts will increase in intensity and severity.[65] There has been a growing awareness and recognition of the seriousness of domestic violence as a crime with "devastating and even fatal consequences" among state and federal legislatures, courts, law enforcement authorities, and even the general public.[66] National, state, and local efforts to prevent this problem have led to more active police and prosecutorial response to complaints of domestic violence.[67] "A complaint of domestic violence . . . is now almost certain to result in a police officer making a prompt investigative visit, and usually an arrest," with prosecution occurring with or without the cooperation of the victim.[68]

60. *Id.* at 63.
61. *Id.* at 68.
62. *Id.*
63. *Id.* at 51–52 (citations omitted).
64. *See* Richard D. Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171, 1182 (2002).
65. *See id.*
66. *See id.* at 1182–83.
67. *See id.* at 1182.
68. *Id.* at 1181.

This change in view has also resulted in greater governmental efforts to prevent and prosecute domestic violence.[69] These efforts include making personal protection more available, increasing penalties for abusers, and intensifying the investigation and prosecution of domestic violence cases.[70] For example, many prosecutors have adopted "aggressive new tactics for getting convictions," like a "mandatory prosecution" or "no drop" policy, under which a prosecutor will prosecute the defendant with or without the victim, sometimes even when the victim objects.[71] Furthermore, Congress has provided funds to further the efforts taken by state and local governments, who carry the majority of the burden in curbing crime.[72]

Domestic violence victims commonly refuse to participate in the prosecution of their abuser.[73] This may be because the victims have reunited with their abuser, fear retaliation, or both.[74] Additionally, when the case involves spouses, the defendant spouse may claim marital privilege, if it is provided for in the defendant's jurisdiction.[75] Under Texas Rules of Evidence, only the spouse of the defendant in a criminal trial may invoke a privilege not to be called by the state as a witness.[76] This rule further states that the privilege does not apply "[i]n any proceeding in which the person is charged with a crime against the person's spouse."[77] Although Sally may be compelled to testify against Fred, "[m]andated participation is neither an ideal nor a guaranteed solution to the problem of domestic violence."[78] This presents the sometimes insurmountable challenge of securing the unwilling victim's availability to testify at trial, especially when the victim "disappears" to avoid giving testimony.[79] When faced with these situations, a prosecutor often chooses to offer evidence of the victim's statements through the police officers who responded to a 911 call or were involved in the investigation of the case.[80]

Despite these new approaches and changes in the law, domestic violence remains a difficult crime to prosecute because of uncooperative victims, a public that remains largely uncaring, and overwhelming

69. *See id.* at 1182.
70. *See id.*
71. *Id.* at 1188.
72. *See id.* at 1182–83.
73. *See* Sherrie Bourg Carter & Bruce M. Lyons, *Child Abuse, Elderly Abuse and Domestic Violence Litigation*, CHAMPION, Sept./Oct. 2004 at 23.
74. *Id.*
75. *Id.* This is not provided for in Texas in cases where one spouse is charged with a crime against another. *See* TEX. CODE CRIM. PROC. ANN. art. 38.10 (Vernon 2005); TEX. R. EVID. 504(a)(4)(C), (b)(4)(A).
76. TEX. R. EVID. 504(b)(1).
77. TEX. R. EVID. 504(b)(4)(A).
78. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1885 (1996).
79. *See* Carter & Lyons, *supra* at note 74, at 23.
80. *See id.*

caseloads.[81] When the victim is unwilling to testify, evidence-based prosecution allows the trial to continue without the victim's testimony by presenting other evidence, such as police officer reports and testimony.[82] Some believe the Supreme Court's decision in *Crawford* threatens this valuable tool by its requirement of unavailability and prior opportunity to cross-examine for the admission of hearsay testimony.[83]

Evidence-based prosecution serves as a vital tool in domestic violence prosecution.[84] *Crawford's* apparent requirement of the declarant's unavailability and prior opportunity to cross-examine appears to preclude the admission of evidence such as victim statements to the police.[85] These statements are hearsay and generally take the form of either the victim's spontaneous statements made to responding officers when they arrived or statements taken by officers during their investigation, where there may have been time for the victim to reflect.[86] Hearsay statements made by a victim who has had time for reflection should be excluded and are not admissible under *Crawford*.[87] In contrast, a victim's spontaneous statements generally fall under an exception to the hearsay rule—spontaneous utterances,[88] otherwise known as excited utterances.[89] When an argument in favor of a statement's admissibility is based on this exception, there is a greater chance for admission.[90]

Yet, admitting statements as excited utterance becomes doubtful after *Crawford*, because the Court implied a strict application, stating that "to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive anything for her own advantage.'"[91] Therefore, statements made by victims to the arriving officers may not qualify as excited utterances because the time span between the incident being reported to police and their arrival can range from minutes to days.[92]

On a regular basis, prosecutors present absent victim statements as evidence and, in order to follow *Crawford*, "must continue . . . [to

81. *See* Krischer, *supra* note 8.
82. *See id.*
83. Crawford v. Washington, 541 U.S. 36, 59 (2004).
84. *See* Krischer, *supra* note 8.
85. *See id.*
86. *See* Carter & Lyons, *supra* at note 74, at 23.
87. *Id.*
88. *Id.*
89. *See* Carolyn B. Tapie, *The Crying Game: How* Hunt v. State *Unnecessarily Expands the Definition of an Excited Utterance in Texas*, 56 BAYLOR L. REV. 723, 749 (2004).
90. *See* Carter & Lyons, *supra* at note 74, at 23.
91. *Id.* (quoting *Crawford*, 541 U.S. 36, 58 n. 8 (2004)).
92. *Id.*

argue] . . . that *Crawford* does not bar traditional evidence in evidence based prosecutions."[93]

> Although the actual impact of Crawford on litigation in abuse cases remains to be seen, the reality is that Crawford has opened the door to what promises to be an onslaught of challenges to hearsay exceptions, which likely will result in the exclusion of hearsay that historically has been widely relied upon by the government to help prove its cases. In some cases, the impact may be crippling to the prosecution. Therefore, the stage is set for attempts by the government to have hearsay admitted under other exceptions that are firmly rooted and not dependent upon judicial determinations.[94]

Prosecutors must argue that the admission of evidence, such as a victim's statement through police officer reports and testimony, does not violate the Confrontation Clause because: (1) the evidence is "nontestimonial" and admissible under the excited utterance exception and (2) even if the evidence is "testimonial," the defendant has forfeited the right to confrontation.[95]

V. Excited Utterances

In dicta, the Supreme Court suggested that "testimonial" statements are those which an "objective witness" would reasonably believe would be available for later use at trial.[96] An excited utterance is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[97]

A. *Excited Utterance in Texas*

The Texas Criminal Court of Appeals[98] stated that there is a psychological rationale for the exception: the event is speaking and not the person.[99] "When a man is in the instant grip of violent emotion, excitement or pain, he ordinarily loses the capacity for *reflection* necessary to the fabrication of a falsehood and the 'truth will come out.'"[100] According to the Texas Court of Criminal Appeals, the critical factor in determining whether a statement qualifies under the ex-

93. Krischer, *supra* note 8 (italics added).
94. Carter & Lyons, *supra* note 74, at 24.
95. *See* Krischer, *supra* note 8.
96. Crawford v. Washington, 541 U.S. 36, 52 (2004) (quoting Brief for Nat'l Ass'n of Criminal Def. Lawyers et al. as Amici Curiae Supporting Petitioner at 3, 2003 WL 21754961).
97. Fed. R. Evid. 803(2); Tex. R. Evid. 803(2).
98. For readers not familiar with the bifurcated Texas judicial system, the Court of Criminal Appeals has "final appellate and review jurisdiction in criminal cases" with discretionary review in all but death penalty cases. Tex. Code Crim. Proc. Ann. art. 4.04 § 2 (Vernon 2005).
99. *See* Zuliani v. State, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003).
100. *Id.* (quoting Evans v. State, 480 S.W.2d 387, 389 (Tex. Crim. App. 1972)).

ception "is whether, at the time of the statement, 'the declarant was still dominated by the emotions, excitement, fear, or pain of the event.'"[101] Plainly stated, a statement qualifies as an excited utterance if made "under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection."[102] To meet this showing, a party must "lay a factual predicate to show that the declarant was still dominated by the emotions, excitement, fear, or pain of the event."[103]

The Texas Court of Criminal Appeals strengthens this requirement when statements made in response to police officer questions[104] are offered under the excited utterance exception,[105] with an additional requirement on the offering party to show that the questions were non-coercive.[106] This requirement was illustrated in *Ward v. State*[107] when the Court of Criminal Appeals found that a defendant's wife's statements made at the crime scene were not admissible as excited utterances because the statements were made *after* her husband's arrest, *after* she spoke to a lawyer, *after* she told the police she did not want to make a statement, and, finally, only *after* further police questioning.[108] The case law from the Court of Criminal Appeals implies recognition that a statement made in response to non-coercive questions posed by an officer when the witness is "still dominated by the emotions, excitement, fear, or pain of an exciting event" is admissible as an excited utterance.[109]

It is also worthy to note that while the Supreme Court heard arguments to implement a broad ban on statements made to police, it chose a limited ban that did not include excited utterances.[110] The Court chose to use the restrictive term of "interrogation" instead of including every statement police officers collect during a criminal investigation or by questioning witnesses in its definition of "testimo-

101. *Id.* at 596 (quoting McFarland v. State, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992)).

102. *Id.* (quoting Fowler v. State, 379 S.W.2d 345, 347 (Tex. Crim. App. 1964)).

103. Trial Brief, *supra* note 53, at 1 (citing *Zuliani*, 97 S.W.3d at 595–96).

104. Other state courts have held a question-and-answer format does not destroy an excited utterance foundation and have admitted such testimony. *See* State v. Hernandez, 987 P.2d 1156, 1159 (N.M. Ct. App. 1999) (affirming the trial court's finding that complainant's answers to police questions fell within the excited utterance exception to the hearsay rule); State v. Wallace, 524 N.E.2d 466, 472 (Ohio 1988) (holding "that the admission of a declaration as an excited utterance is not precluded by questioning").

105. Trial Brief, *supra* note 53, at 1.

106. *See* Trial Brief, *supra* note 53, at 2.

107. Ward v. State, 657 S.W.2d 133 (Tex. Crim. App. 1993).

108. *See id.* at 136.

109. Trial Brief, *supra* note 53, at 2 (citing *Lawton,* 913 S.W.2d at 553–54; *McFarland,* 845 S.W.2d at 845–46; *Ward,* 657 S.W.2d at 135–36).

110. *See id.* at 5; Transcript of Oral Argument at 5, *Crawford*, 541 U.S. at 36 (No. 02-9410), 2003 WL 22705281 ("[C]ertainly when somebody is talking to a police officer, that's the kind of a statement they understand is going to be used in court.").

nial" evidence.[111] "This careful choice indicates that genuine excited utterances in response to police questions are [typically] 'nontestimonial' and not affected by *Crawford*."[112]

B. *Texas Courts Defining "Testimonial" Under* Crawford

Crawford held that while "testimonial" statements invoke the right to confrontation under the Sixth Amendment, "nontestimonial" statements are exempt from Confrontation Clause scrutiny.[113] While the Supreme Court refused to define "testimonial," in dicta it suggested that they are statements "made in contemplation of future litigation."[114] The refusal of the Supreme Court in *Crawford* to give a definition of "testimonial" leaves the determination to the trial court and "suggests that the majority contemplates that in classifying hearsay as 'testimonial' or 'non-testimonial,' the trial judge should consider the specific circumstances surrounding the making of the statement."[115] This requires that the judge characterize a statement as "testimonial" if it is made to a police officer in circumstances where the officer is clearly gathering information that may be used in a trial.[116] "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[117]

The Texas Court of Criminal Appeals first addressed the meaning of "testimonial" in *Woods v. State*.[118] In this case, the appellant argued that his co-defendant's statements to two acquaintances were "testimonial" and thus inadmissible.[119] After determining that the statements met the requirements for declaration against interest, the Court of Criminal Appeals found that the co-defendant's remarks were "nontestimonial" because they were "casual remarks . . . spontaneously made to acquaintances"[120] and did not fall within the categories of testimonial evidence described in *Crawford*.[121]

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111. *See Crawford*, 541 U.S. at 52, 68.

112. *Trial Brief, supra* note 53, at 5.

113. *See Crawford*, 541 U.S. at 68.

114. Krischer, *supra* note 8. In October 2005, the Supreme Court granted certiorari in *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *cert. granted*, 126 S.Ct. 552 (U.S. Oct. 31, 2005) (No. 05–5705), *and State v. Davis*, 111 P.3d 844 (Wash. 2005), *cert. granted*, 126 S.Ct. 547 (U.S. Oct. 31, 2005) (No. 05–5224). With oral arguments scheduled for March 20, 2006, the Court may soon provide its own definition of "testimonial."

115. Edward J. Imwinkelried, *The Treatment of Prosecution Hearsay Under* Crawford v. Washington*: Some Good News, But . . .*, 28-OCT CHAMPION 16, 18 (2004).

116. *Id.*

117. *Crawford*, 541 U.S. at 51.

118. Woods v. State, 152 S.W.3d 105 (Tex. Crim. App. 2004).

119. *Id.* at 114.

120. *See id.*

121. *Id.* at 114 (citing Crawford v. Washington, 541 U.S. 36, 51 (2004)).

The next time the Court of Criminal Appeals faced defining "testimonial" was in *Wall v. State*.[122] In 2004, prior to the *Crawford* decision, Roger M. Wall was convicted of aggravated assault.[123] While receiving medical treatment at a hospital, Donald Norman, the assault victim, provided a statement in response to an officer's question.[124] For reasons not stated in the opinion, Norman was unavailable to testify at trial and his statements were admitted through the questioning officer's testimony.[125] Wall objected to the admission of this testimony, which was admitted under the excited utterance exception of the Texas Rules of Evidence.[126]

On appeal, Wall argued that the admission of Norman's statement violated his Sixth Amendment right to confrontation.[127] The Corpus Christi Court of Appeals identified "[t]he fundamental issue presented in this appeal is whether a non-testifying witness's statement made to a police officer during investigation of a crime and incriminating the defendant, is admissible against the defendant."[128] *Crawford* was decided while this case was pending before the appellate court, so the appellate court applied the *Crawford* holding to this case.[129]

The court stated that "[t]he threshold question imposed by *Crawford* is whether the proffered out-of-court statement is 'testimonial' in nature."[130] The court further noted that a determination that a statement is "testimonial" would implicate the Sixth Amendment and require unavailability and prior opportunity to cross.[131] In its analysis of what constitutes "testimonial," the court took notice of the Supreme Court's colloquial usage of interrogation rather than a technical legal usage.[132] The court also noted that the Supreme Court "stated specifically, however, that a recorded statement 'knowingly given in response to structured police questioning, qualifies [as interrogation] under any conceivable definition.'"[133] The court concluded that because a police interview of a witness is "structured police questioning"

122. Wall v. State, No. PD-1631-04, 2006 WL 119575 (Tex. Crim. App. Jan. 18, 2006).

123. Wall v. State, 143 S.W.3d 846, 846 (Tex. App.—Corpus Christi 2004), *aff'd as modified and remanded by* Wall v. State, 2006 WL 119575 (Tex. Crim. App. Jan. 18, 2006, no pet. h.).

124. *Id.* at 848.

125. *Id.*

126. *Id.*

127. *Id.* at 849.

128. *Id.*

129. *Id.* at 850.

130. *Id.* (citing Brooks v. State, 132 S.W.3d 702, 707 (Tex. App.—Dallas 2004, no pet. h.)).

131. *Id.* at 850–51 (citing Crawford v. Washington, 541 U.S. 36, 68–69 (2004)).

132. *Id.* at 851 (citing *Crawford*, 541 U.S. at 53, n. 4).

133. *Id.*

it is an "interrogation" and, therefore, it is "testimonial" under *Crawford*.[134]

The Court of Criminal Appeals agreed with the Corpus Christi court's finding that Norman's statements to the interviewing officer were "testimonial" and their admission violated the standard set out by *Crawford*.[135] However, the Court of Criminal Appeals did not adopt the reasoning of the Corpus Christi court that structured questioning by police is an interrogation and thus "testimonial." Additionally, the court declined to adopt the position that excited utterances are *per se* "nontestimonial."[136] The court instead adopted a case-by-case approach, stating that an inquiring court "must look to the attendant circumstances and assess the likelihood that a reasonable person would have either retained or regained the capacity to make a testimonial statement at the time of the utterance."[137]

The court presented a two step approach in determining the admissibility of statements as excited utterance.[138] The court stated that while each step is separate, they are related because both consider the circumstances surrounding the declarant at the time of the statement.[139] The first step is to determine whether the statement meets the requirements of excited utterance, "focus[ing] on whether the declarant was under the stress of a startling event."[140] If, and only if, the statement is an excited utterance, the court next "look[s] to the attendant circumstances and assess[es] the likelihood that a reasonable person would have either retained or regained the capacity to make a testimonial statement at the time of the utterance," with the focus "on whether a reasonable declarant, similarly situated (that is, excited by the stress of a startling event), would have had the capacity to appreciate the legal ramifications of her statement."[141]

C. *Applying* Wall *in Domestic Violence Cases*

While the facts in *Wall* do not implicate domestic violence, its reasoning and holding have implications on the practice of admitting the non-testifying witnesses statements through the responding police officer. This case provides for Texas courts a definition of "testimonial" as a statement where an objective witness reasonably foresees that their statement will be used at a later trial.[142] In addition to this definition, the court laid out a process of determining the admissibility of

134. *Id.*
135. Wall v. State, No. PD-1631-04, 2006 WL 119575, *1 (Tex. Crim. App. Jan. 18, 2006).
136. *Id.* at *5, n.36.
137. *Id.* at *5 (quoting United States v. Brito, 427 F.3d 53, 61–62 (1st Cir. 2005)).
138. *See id.*
139. *Id.*
140. *Id.* (quoting *Brito*, 427 F.3d at 61–62).
141. *Id.* (quoting *Brito*, 427 F.3d at 61–62).
142. *See id.*

statements as excited utterances which will generally allow excited statements made by victims of domestic violence to police officers responding to the scene.

Prior to the *Wall* decision, two Texas Courts of Appeals held that statements made by a domestic violence victim to officers during the initial assessment and securing of a crime scene are not "testimonial" and therefore *Crawford* does not apply.[143] Below, the holdings and reasoning of these cases will be discussed in light of the holding and reasoning of *Wall*.

In *Key v. State*, the Tyler Court of Appeals was faced with a domestic violence case where the trial court admitted the victim's statements to the responding police officers and the victim did not testify.[144] In its discussion of the federal right to confrontation of witnesses, the court noted a common thread among the "testimonial" statements cited by the Supreme Court in *Crawford*: "[A]ll involve a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings." The court determined that the question before them was what constituted a police interrogation.[145] The court concluded that as a matter of law excited utterances were not "testimonial":

> [W]e are persuaded that the underlying rationale of an excited utterance supports a determination that it is not testimonial in nature. Such a declaration from one who has recently endured physical abuse, and with no time for reflection or deliberation, is likely to be truthful. It is consistent with the definition of an excited utterance to conclude that it is not a statement that has been made in contemplation of its use in a future trial.

While the Court of Criminal Appeals did not agree that an excited utterance statement is *per se* "nontestimonial," the outcome of the *Key* case remains the same when applying the two step test set forth in *Wall*.[146] Here, the court would first address whether the statements admitted met the requirements of excited utterance.[147] The facts available in the opinion described a situation where a police officer, responding to a disturbance call, observed the declarant arguing with the defendant.[148] Without any explanation in the opinion as to what

143. *See* Key v. State, 173 S.W.3d 72, 76 (Tex. App.—Tyler 2005), *abrogated by* Wall v. State, 2006 WL 119575 (Tex. Crim. App. Jan. 18, 2006); Spencer v. State, 162 S.W.3d 877, 881 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

144. *Key*, 173 S.W.3d at 73.

145. *Id.* at 74.

146. *See Wall*, 2006 WL 119575, at *5, n.36 (acknowledging that in the event of an excited utterance the declarant is unlikely to be "focusing on preservation rather than communication of information" and will not reasonably foresee the future use of their statements).

147. *See id.* at *5.

148. *See Key*, 173 S.W.3d at 73.

prompted the statements, the declarant told the officer that the defendant had restrained her and "[s]he had just run from the house and [the defendant] had grabbed her and pulled her to the ground."[149] She also "indicated that she feared" the defendant.[150] Additionally, in his brief, the defendant conceded that the statements met the requirements of excited utterance.[151]

Meeting the first requirement, the court would then consider whether a reasonable declarant, excited by the "stress of a startling event," would have foreseen the use of her statements at a later trial.[152] The Court of Criminal Appeals offered guidance in this determination when it stated that:

> [G]enerally statements made to police while the declarant (or another person) is still in personal danger are not made with consideration of their legal ramifications because the declarant usually speaks out of urgency and a desire to obtain a prompt response; thus, those statements will not normally be deemed testimonial.[153]

The court went on to quote *Brito*, noting: "If the record fairly supports a finding of comprehension [of the legal ramifications of the statement], the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature."[154] The facts presented in the Corpus Christi court's opinion appear to support a determination that the declarant was still in personal danger and the statements where made with a desire to obtain help from the officer, rather than to provide information in a criminal investigation. Therefore, the court would likely find that the statements were "nontestimonial."

While agreeing with the *Key* court that a police officer's questions while assessing and securing a scene are not an interrogation, the 14th District Court of Houston declined to hold that excited utterances are "nontestimonial" as a matter of law.[155] In *Spencer v. State*, the court considered an appeal for domestic assault where the trial court allowed the victim's statements that the appellant hit her, through the testimony of the responding officers.[156] The court stated that whether a statement was an excited utterance is a factor in determining if it is "testimonial," but that it could "imagine a situation in which officers secure a scene and then begin formal, structured questioning of witnesses (or the victim) who are still under the stress of the situation," and did not believe the responses to this type of questioning would be

149. *Id.*
150. *Id.*
151. *Id.* at 76.
152. *See Wall*, 2006 WL 119575, at *5.
153. *Id.* at *6.
154. *Id.* (quoting United States v. Brito, 427 F.3d 53, 62 (1st Cir. 2005)).
155. Spencer v. State, 162 S.W.3d 877, 880–81 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).
156. *Id.* at 878.

"nontestimonial."[157] The court found that "simple, preliminary question[ing] designed to ensure the safety of those on the scene does not amount to interrogation . . . [b]ecause they bear no indicia of the formal, structured questions necessary for statements to be testimonial."[158]

Spencer is in alignment with the Court of Criminal Appeals decision in *Wall*. While *Wall* does not require that police questioning "bear no indicia of . . . formal, structured question[ing],"[159] this would be a circumstance to consider when determining if a reasonable person would have reasonably known they were being questioned as part of a criminal investigation.[160]

VI. The Forfeiture-by-Wrongdoing Doctrine

A second argument for the admission of a victim's statements to police when the victim refuses to testify is found in the forfeiture-by-wrongdoing doctrine, which provides an equitable relief designed to prevent defendants from benefiting when their wrongdoing causes the witness's unavailability.[161] *Crawford* approvingly cites *Reynolds v. United States*,[162] the first application of forfeiture-by-wrongdoing.[163]

In *Reynolds*, the Supreme Court held that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts."[164] While the Confrontation Clause protects the right of all criminal defendants to confront a witness, "if [the defendant] voluntarily keeps the witnesses away, he cannot insist on his privilege."[165] This exception finds its basis in the belief that wrongdoers should not reap benefit from their wrongdoing.[166] In the 1900 case of *Motes v. United States*,[167] the Supreme Court appeared to expand the forfeiture-by-wrongdoing doctrine "to allow admission of uncross-examined depositions not made under oath, if the witness was 'absent from the trial by the suggestion, procurement or act of the ac-

157. *Id.* at 881.
158. *Id.* at 883.
159. *See id.*
160. *See* Wall v. State, No. PD-1631-04, 2006 WL 119575, at *7 (Tex. Crim. App. Jan. 18, 2006). Additionally, footnote 37 included a North Carolina case where the police officer's role was considered in determining whether statements were "testimonial" because statements made in response to a patrol officer's fact gathering questions are likely non-testimonial, while statements made in response to an investigator's question are likely testimonial. *Id.* at *5 n.37 (quoting State v. Lewis, 619 S.E.2d 830, 842 (N.C. 2005)).
161. *See* Krischer, *supra* note 8.
162. Reynolds v. U.S., 98 U.S. 145 (1878).
163. *See* Crawford v. Washington, 541 U.S. 36, 62 (2004).
164. *Reynolds*, 98 U.S. at 158.
165. *Id.*
166. *Id.* at 159.
167. *See* Motes v. United States, 178 U.S. 458, 471 (1900).

cused.'"[168] This common law doctrine case was eventually codified as Federal Rule of Evidence 804(b)(6).[169]

Courts have defined procurement as including "persuasion, the wrongful disclosure of information, control by the suspect, acquiescence in others performing acts of procurement, and asking others to persuade the witness not to testify."[170] The forfeiture-by-wrongdoing doctrine works to prevent a defendant from securing a witness's unavailability at trial.[171] The forfeiture-by-wrongdoing doctrine is not based on the timing of the defendant's act but whether their act has caused a witness's unavailability.[172] "Thus, the question should be, was the accused's act responsible for the witness being unavailable to testify?"[173]

To satisfy *Reynolds* in a domestic violence case, the State will have to prove the victim's unavailability was "a factual result of the defendant's misconduct."[174] To prove this, the State will have to demonstrate "that: (1) the witness suffers from significant trauma that precludes the witness from communicating effectively to the court; (2) the trauma is the factual result of the defendant's actions; and (3) the defendant's actions causing the trauma were wrongful."[175]

Showing that domestic violence causes unavailability is not far-reaching considering that a victim's refusal to cooperate often stems from concerns and fears "of retaliation and additional violence by the abuser if they participate in the criminal process or testify against the offender."[176] Domestic violence abusers often tell their victims "that

168. Tom Harbinson, Using the *Crawford v. Washington* "Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases, http://www.tdcaa.com/dynam_news.asp?iid=8 (last visited Feb. 28, 2006) (quoting *Motes*, 178 U.S. at 471 (un-cross examined depositions not taken under oath would violate confrontation unless procurement occurred)).

169. FED. R. EVID. 804(b)(6); Enrico B. Valdez & Shelley A. Nieto Dahlberg, *Tales From the Crypt: An Examination of Forfeiture by Misconduct and Applicability to the Texas Legal System*, 31 ST. MARY'S L.J. 99, 102 (1999).

170. Harbinson, *supra* note 168 (citing *Motes*, 178 U.S. at 471 (persuasion); *United States v. Aguiar*, 975 F.2d 45, 47–48 (2nd Cir. 1992) (defendant threatened to expose witness's criminal activity if witness testified); *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir. 1982) (witness under control of defendants who procured her refusal to testify), *cert. denied*, 460 U.S. 1053 (1983); *United States v. Mastrangelo*, 693 F.2d 269, 273–74 (2d Cir. 1982) (defendant knew witness would be murdered and did nothing to stop it); *United States v. Belano*, 618 F.2d 624, 629–30 (10th Cir. 1970) (threats by defendant communicated by bartenders to victim)).

171. *Id.*

172. *Id.*

173. *Id.*

174. Kevin Landtroop, Fear Not, Family Violence Prosecutors: Using the Forfeiture by Wrongdoing Exception to Admit Victim Statements After *Crawford*, http://www.tdcaa.com/dynam_news.asp?iid=8 (last visited Feb. 28, 2006).

175. *Id.*

176. National District Attorneys Association Policy Positions on Domestic Violence 4 (adopted on Oct. 23, 2004), *available at* http://www.ndaa-apri.org/pdf/domestic_violence_policy_oct_23_2004.pdf.

there is nothing that the victim[s] can do about the abuse and that no one will believe [or help them]."[177] Additionally, because of past unpleasant experiences with the criminal system, victims can lack "faith in the criminal justice system's ability to either hold the offender accountable or to provide for [their] protection."[178] These experiences only confirm what their abusers have told them, causing victims to accept the abuse and believe that there is nothing that can be done about the abuse and that there is no help.[179]

While there is no Texas statutory counterpart to Federal Rule of Evidence 804(b)(6), in *Gonzalez v. State*,[180] the San Antonio Court of Appeals applied the forfeiture-by-wrongdoing doctrine and held that a defendant forfeited his Confrontation Clause rights and there was no error when the trial court admitted the victim's statements to police under the excited utterance exception.[181] When several San Antonio Police Department officers arrived at the home of Maria and Baldomero Herrera after receiving two 911 calls, they observed Maria lying in a pool of blood near the front door.[182] The officers questioned Maria about what had happened, and she responded that she and her husband were shot by an eighteen-year-old Latin male with dyed, blonde hair that was living with or known by the people living in the rock house across the street.[183] She also informed them that the gunman stole her white Nissan truck.[184] Based on this information, officers apprehended Ray Gonzales, an individual fitting Maria's description and driving her stolen Nissan truck.[185] Maria and Baldomero died from their gunshot wounds and Gonzalez was charged and convicted of capital murder.[186]

Gonzales argued on appeal that the trial court erred in admitting Maria's statements through the testimony of the responding police officers.[187] Gonzalez contended that because Maria's statements were made in response to questioning they did not qualify as excited utterances and their admission violated his right to confrontation because they were "testimonial" and he had no prior opportunity to cross-examine Maria.[188]

177. *Id.*
178. *Id.*
179. *Id.*
180. Gonzalez v. State, 155 S.W.3d 603 (Tex. App.—San Antonio 2004, pet. granted). Author notes for the reader that this case was granted discretionary review by the Texas Court of Criminal Appeals on Sept. 28, 2005 with oral arguments scheduled for March 29, 2006.
181. *See id.* at 609–11.
182. *Id.* at 605.
183. *Id.*
184. *Id.*
185. *Id.* at 606.
186. *Id.*
187. *Id.*
188. *Id.*

The San Antonio Court of Appeals began its analysis by determining that Maria's statements to responding officers were admissible as excited utterances.[189] The court then tried to determine whether or not these statements were "testimonial" and therefore inadmissible in light of *Crawford*.[190] The court determined that they did not need to resolve this question because Gonzalez forfeited his right of confrontation under the forfeiture-by-wrongdoing doctrine, and stated in a footnote that Maria's statements would likely be considered "nontestimonial" because of the unstructured interaction between her and the officers.[191] The court noted that the Supreme Court continued to recognize the forfeiture-by-wrongdoing doctrine, which "extinguishes confrontation claims on essentially equitable grounds."[192] Based on this, the court held that "[a] defendant whose wrongful act renders a witness unavailable for trial benefits from his conduct if he can use the witness's unavailability to exclude otherwise admissible hearsay statements"[193] and thus should be precluded from objecting to their admission on Confrontation Clause grounds.[194]

Prosecutors must educate judges by demonstrating that domestic violence is an ongoing, systematic abuse that procures the victim's unavailability.[195] This education could be presented through the testimony of "police witnesses, family members, friends, victim advocates and medical providers" chronicling the history of domestic violence involved in a particular case.[196] Additionally, prosecutors could prove that a defendant sought to procure the victim's refusal to cooperate "through telephone records, recorded voice-mail and other messages [such as letters or emails], and testimony of other witnesses."[197] Intervention by police and prosecutors does not necessarily mean an end to abuse for the victim.[198] Studies have shown that many abusers become more violent to reassert control over the victim and use this control to stop their victims from participating in the abuser's prosecution.[199] In many cases, the defendant commits no additional acts, but the victim is so traumatized or threatened by the

189. *Id.* at 606–07.
190. *Id.* at 608–09.
191. *Id.* at 609–10.
192. *Id.* at 610 (quoting Crawford v. Washington, 541 U.S. 36, 62 (2004)).
193. *Id.* at 611.
194. *Id.* at 610.
195. *See* Krischer, *supra* note 8.
196. Laurence Busching, *Rethinking Strategies for Prosecution of Domestic Violence in the Wake of* Crawford, 71 BROOK. L. REV. 391, 398 (2005). This essay was part of the Symposium issue of the Brooklyn Law Review resulting from the papers presented at the "*Crawford* and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past" Symposium held at the Brooklyn Law School on February 18th, 2005. Robert M. Pitler, *Introduction*, 71 BROOK. L. REV. 1, 1, 14 (2005).
197. Busching, *supra* note 196, at 398.
198. *See id.* at 392–93.
199. *See id.*

defendant that she refuses to cooperate from the start of the investigation, thereby securing the victim's unavailability.[200] No matter what the reason for the victim's unavailability—fear of retaliation, physical terror, or a desire to please and remain with the abuser—the abuse itself is the manner of procurement.[201] "For the rule of forfeiture to have any meaning, domestic abusers must not be allowed to beat their partners out of court."[202]

VII. The Response

Knowing the options, the prosecutor argues to the court that Sally's statements to the responding officer fall under the excited utterance hearsay exception, still allowed under *Crawford*. Further, the statements do not implicate the Confrontation Clause because they are "nontestimonial": Sally's statements were statements made to the responding officer for the purpose of securing assistance and not the product of structured questioning or interrogation. The prosecutor also argues that in the alternative, should the court find that the statements are "testimonial," they are still admissible under the forfeiture-by-wrongdoing doctrine because Fred's emotional and physical abuse has caused Sally's unavailability to testify.

The court, applying the *Wall* test, finds the first argument compelling and allows the prosecutor to admit the statements Sally made to the responding officer at the scene.

Although the Court's decision in *Crawford* limits the prosecution of domestic violence cases where the victim is unwilling to testify, the imposed limits are not absolute bars to the practice of admitting the non-testifying victim's statements through a testifying police officer. Prosecutors must educate themselves, judges, and police officers about the two options available to them under Texas law: (1) that a non-testifying victim's statements to a responding police officer are "nontestimonial"[203] and admissible under the excited utterance hearsay exception and/or (2) that the defendant has waived their right to confrontation under the forfeiture-by-wrongdoing doctrine.[204]

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200. *See id.*
201. *See id.*
202. *Id.*
203. *See supra* Part V.
204. *See supra* Part VI.