

NOTES

BATTLING THE THREAT: THE SUCCESSFUL PROSECUTION OF DOMESTIC VIOLENCE AFTER *DAVIS V. WASHINGTON*

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I. INTRODUCTION

The unique nature of violence between intimates presents unique challenges to prosecutors of domestic violence. In many instances, victims of domestic violence are unable or unwilling to testify.¹ As a result, much of the important evidence available against the accused is hearsay, often statements made by the victim at the time of the incident, raising issues of confrontation under the Sixth Amendment of the United States Constitution.² While the recent United States Supreme Court decision, *Davis v. Washington*, handed down in June of 2006, raised some cause for concern about the continued success of domestic violence prosecution, it also provided guidance for prosecutors facing critical issues of confrontation.³ For purposes of battling domestic violence through prosecution, the *Davis* decision will force prosecutors to re-focus efforts and re-shape strategies. This Note examines the progression of Confrontation Clause jurisprudence from *Ohio v. Roberts*⁴ to *Crawford v. Washington*,⁵ to the recent Supreme Court decision in *Davis*. In particular, this Note will focus on the effect of *Davis* and its predecessors on the prosecution of domestic violence. Part I

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¹ See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 771–72 (2005) [hereinafter Lininger, *Prosecuting Batterers*].

² *Id.*

³ 547 U.S. 813 (2006).

⁴ 448 U.S. 56 (1980).

⁵ 541 U.S. 36 (2004).

discusses the problems involved in the prosecution of domestic violence prior to the *Crawford* decision, namely the impact of the Confrontation Clause and the emergence of evidence-based prosecution. Part II details the *Crawford* decision and its influence on the prosecution of domestic violence. Part III carefully examines *Davis*, its newly articulated standard, and the factual contexts of the dual-decision. Part IV compares the application of the *Davis* standard in domestic violence cases around the country. Finally, Part V discusses the effect of *Davis* on the future of domestic violence prosecution and outlines potential solutions for the continued success of such prosecution.

II. PROBLEMS IN PROSECUTION

Victims of domestic violence are more likely than victims of other violent crime “to recant or refuse to cooperate” in prosecutorial efforts.⁶ Some attribute these recants and refusals to the unique aspects of domestic violence. “Domestic violence is a pattern of coercive behavior that includes the physical, sexual, economic, emotional, and psychological abuse of one person by another.”⁷ Violence between intimates has been identified as a cyclical display of this abusive behavior.⁸ Generally, abusive relationships cycle through three stages.⁹ First, the “tension-building” stage, where the batterer is controlling of, and verbally abusive toward the victim, exerting power over all aspects of the victim’s daily life and demeaning her independent existence and her self esteem.¹⁰

⁶ See Lininger, *Prosecuting Batterers*, *supra* note 1, at 768.

⁷ Karla M. Digirolamo, *Myths and Misconceptions about Domestic Violence*, 16 PACE L. REV. 41, 44 (1995); see also Geetanjali Malhotra, Note, *Resolving the Ambiguity Behind the Bright-Line Rule: The Effect of Crawford v. Washington on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U. ILL. L. REV. 205, 213 (2006) (providing an introductory understanding of the domestic violence framework).

⁸ See Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 FORDHAM URB. L.J. 953, 953–54 (2000).

⁹ See *id.* at 954. Not all commentators agree on a rigid, three-stage, cyclical approach to domestic violence. See, e.g., Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1208 (1993) (arguing that not all cases of domestic violence follow a three stage pattern). As Karla M. Digirolamo notes, diversity of experience plays an important role: “Battered women’s experiences and circumstances vary dramatically because the women come from all walks of life and varying places in diverse communities throughout the country.” Digirolamo, *supra* note 7, at 45. Digirolamo points out that while experiences of domestic violence are “eerily similar in many ways,” they are still diverse and dynamic. *Id.* at 45.

¹⁰ Vilhauer, *supra* note 8, at 954. In this Note, I use female pronouns when referring to

Second, the “violent” stage, where the batterer engages in physically abusive behavior with varying levels of severity.¹¹ Finally, the “honeymoon” stage, where the batterer “engages in loving contrition” apologizing to the victim for his violent behavior and assuring his continued love and affection.¹² It is the cyclical nature of the abuse that creates the power dynamic between the batterer and the victim, resulting in an endless cycle of domination and control of batterer over victim.¹³ Because a victim becomes the expert in reading the signs of her batterer’s violence, subtle cues which would not signal a threat to the everyday observer are critical warning signs to a victim that violence is fast approaching.¹⁴ For a victim of domestic violence, there is often no end and no escape, and the emergency is ongoing and unavoidable.¹⁵ Commentators have identified various reasons for the recants and refusals of victims in the prosecution of domestic violence, including fear of reprisal or retaliation by the batterer, intimidation and threat by the batterer, financial dependence of the victim on the batterer, continued emotional attachment to and reuniting with the batterer, issues of custody and child support, fear that the victim or batterer will be deported, distrust of the legal system, and even “genuine belief” by the victim that no wrong was committed.¹⁶

In many instances, where a victim is unable or unwilling to testify, much of the important evidence available against the accused is hearsay evidence—often statements made by the victim at the time of the incident—raising issues of confrontation under

victims and male pronouns when referring to batterers. While prevalence rates indicate that women are more often the victims of domestic violence, domestic violence is perpetrated against both women and men. I adopt this gendered language as default language reflecting prevalence rates and the factual underpinnings of much of the case law discussed in this Note.

¹¹ *Id.*

¹² *See id.* at 955.

¹³ *See* Malhotra, *supra* note 7, at 213.

¹⁴ Dutton, *supra* note 9, at 1207 (noting that “behavior which may not be considered threatening by the recipient in one relationship may be considered a clear sign of danger in another relationship, due to the context of prior violence and abuse in which the behavior occurs”).

¹⁵ *See* Vilhauer, *supra* note 8, at 955–56.

¹⁶ *See* Lininger, *Prosecuting Batterers*, *supra* note 1, at 769–70; *see also* Malhotra, *supra* note 7, at 214 (discussing probable reasons for victim refusal and recant); Kristine Soulé, Comment, *The Prosecution’s Choice: Admitting a Non-Testifying Domestic Violence Victim’s Statements Under Crawford v. Washington*, 12 TEX. WESLEYAN L. REV. 689, 697 (2006) (discussing probable reasons for victim refusal and recant).

the Sixth Amendment.¹⁷ For a prosecutor who must prove guilt beyond a reasonable doubt, these significant pieces of persuasive evidence are crucial to successful prosecution.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹⁸ Prior to 2004, the United States Supreme Court decision in *Ohio v. Roberts* governed the admissibility of hearsay statements under the Confrontation Clause.¹⁹ Under the *Roberts* standard, the Confrontation Clause permitted the admission of hearsay evidence where the declarant was unavailable to testify at trial and the statement had sufficient “indicia of reliability.”²⁰ Such reliability was demonstrated by evidence either “fall[ing] within a firmly rooted hearsay exception” or bearing “particularized guarantees of trustworthiness.”²¹

As awareness spread as to the cyclical nature of domestic violence, the control that the batterer often holds over the victim, and the tendency for victims to recant or refuse to testify, prosecutors re-focused efforts on evidence other than the testimony of the victim, sparking the emergence of the evidence-based prosecution of domestic violence.²² “No-drop” policies often accompanied prosecutors’ efforts to prosecute without live testimony from the victim, where the decision to prosecute was taken away from the victim and prosecutors moved forward in each case where there existed sufficient evidence to do so.²³ Because domestic violence has increasingly been viewed as a “societal harm” and because the initial reactions and statements of the victim are most likely to be accurate, the evidence-based prosecution of domestic violence and prosecutor “no-drop” policies have been justified in many jurisdictions.²⁴ In order for a domestic violence prosecutor to admit prior statements made by a victim, however, the statements had to pass under a hearsay exception as well as the *Roberts*

¹⁷ See Lininger, *Prosecuting Batterers*, *supra* note 1, at 771–72.

¹⁸ U.S. CONST. amend. VI.

¹⁹ See 448 U.S. 56 (1980).

²⁰ *Id.* at 66.

²¹ *Id.*

²² See Malhotra, *supra* note 7, at 213–14.

²³ See *id.* at 214.

²⁴ See Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 306 (2005) (discussing the emergence of evidence-based prosecutions because of “greater recognition of the battering dynamic” between victims and batterers).

standard.²⁵

To get around the hearsay hurdle, domestic violence prosecutors often relied, and continue to rely, on both the excited utterance and the present sense impression hearsay exceptions.²⁶ Under the Federal Rules of Evidence, a present sense impression is “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”²⁷ Furthermore, an excited utterance is “[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.”²⁸ Courts interpreting an incident of domestic violence as a “startling event” often find that a victim’s statements made after such an incident qualify as excited utterances under this hearsay exception.²⁹ Present sense impressions and excited utterances are most commonly admitted in the form of tape-recorded 911 emergency calls made by the victim, oral statements to officers responding or investigating an alleged incident of domestic violence, or written statements given by the victim in the form of affidavits or police report complaints.³⁰ Furthermore, in *White v. Illinois*, the excited utterance hearsay exception was held to be “firmly rooted,” thus passing muster under the *Roberts* standard.³¹

The determination of prosecutors to prosecute incidents of domestic violence by means of these forms of hearsay evidence was accompanied by a decline, by more than fifty percent, of reported incidents of domestic violence between 1994 and 2003.³² Not only did the evidence-based strategy provide for successful prosecution without the live testimony of a victim, but it was accompanied by other cumulative benefits.³³ Namely, prosecutors’ use of hearsay evidence rather than live victim testimony “diminishes the incentive for abusers to intimidate and otherwise manipulate victims while

²⁵ See *Roberts*, 448 U.S. at 66.

²⁶ See Celeste E. Byrom, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After Crawford v. Washington*, 24 REV. LITIG. 409, 412 n.15, 413–14 (2005).

²⁷ FED. R. EVID. 803(1).

²⁸ FED. R. EVID. 803(2).

²⁹ See Byrom, *supra* note 26, at 413.

³⁰ See Lininger, *Prosecuting Batterers*, *supra* note 1, at 773–82.

³¹ 502 U.S. 346, 355 n.8, 357 (1992).

³² See Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213, 234 (2005).

³³ Lininger, *Prosecuting Batterers*, *supra* note 1, at 771–72.

awaiting trial.”³⁴ Furthermore, the use of hearsay evidence helps to “spare victims [of] the ordeal of ‘revictimization’ on the witness stand” where victims of domestic violence “must relive the trauma . . . by describing it in court.”³⁵ With what seemed to be both a predictable and successful method of prosecuting domestic violence, accompanied by the promise of diminishing incident rates, prosecutors across the country utilized this method to tackle the society-wide problem vigorously.³⁶

III. CRAWFORD V. WASHINGTON

A. *The Crawford Decision*

The *Roberts* standard underwent massive transformation in 2004 when the Supreme Court handed down the *Crawford* decision.³⁷ The facts underpinning the *Crawford* decision involved statements given to police officers in the context of an interrogation.³⁸ On August 5, 1999, Sylvia Crawford’s husband was arrested after the police discovered the murdered body of Kenneth Lee.³⁹ Both a potential suspect and witness, Sylvia was taken into custody, received *Miranda* warnings, and became the subject of a police interrogation.⁴⁰ Sylvia did not testify at her husband’s trial, evoking the spousal privilege, but a tape-recording of Sylvia’s statements during the interrogation, potentially refuting her husband’s claim of self defense, were appropriately admitted under the state’s hearsay exception.⁴¹ On appeal, Sylvia’s husband argued that the admission of Sylvia’s tape-recorded statements violated his right to confrontation under the Sixth Amendment.⁴²

Writing for the majority, Justice Scalia examined the historical development of Sixth Amendment Confrontation Clause jurisprudence.⁴³ Based on this historical analysis, Justice Scalia

³⁴ *Id.* at 771.

³⁵ *Id.* at 772.

³⁶ See Malhotra, *supra* note 7, at 213–14.

³⁷ See Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 277 (2006) [hereinafter Lininger, *Reconceptualizing Confrontation*].

³⁸ *Crawford v. Washington*, 541 U.S. 36, 38–39 (2004).

³⁹ *Id.* at 38.

⁴⁰ *Id.* at 38–39.

⁴¹ *Id.* at 40.

⁴² See *id.* at 42.

⁴³ *Id.* at 42–50.

explained that the reference to “witnesses” in the Confrontation Clause referred to those witnesses “who ‘bear testimony.’”⁴⁴ The Court defined testimony as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁴⁵ Based on a historical interpretation of the “Framers’ understanding” of the Confrontation Clause, the *Crawford* decision articulated the controlling standard: “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.”⁴⁶

The exact contours of the *Crawford* standard, namely of the term “testimonial statement,” became a great hurdle for lower courts interpreting the decision.⁴⁷ In his conclusion, Justice Scalia explicitly noted that the Court would “leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”⁴⁸ Even so, the *Crawford* decision did provide some guidance to lower Courts as to what constituted a “testimonial statement.” Namely, Justice Scalia identified certain categories of testimonial statements, including “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,”⁴⁹ and “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.”⁵⁰ Finally, Justice Scalia noted that “[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.”⁵¹ Thus, Sylvia Crawford’s statements to the police, at the police station and after the receipt of *Miranda* warnings, constituted testimonial statements, and because Sylvia’s husband had not had a prior

⁴⁴ *Id.* at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), available at <http://1828.mshaffer.com/d/search/word,witness>).

⁴⁵ *Id.* (alteration in original) (quoting 2 WEBSTER, *supra* note 44, available at <http://1828.mshaffer.com/d/search/word,testimony>).

⁴⁶ *Id.* at 59 (footnote omitted).

⁴⁷ See Percival, *supra* note 32, at 234–35.

⁴⁸ *Crawford*, 541 U.S. at 68.

⁴⁹ *Id.* at 51–52 (alteration in original) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

⁵⁰ *Id.* at 52 (quoting Brief for National Ass’n of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21754961, at *3).

⁵¹ *Id.*

opportunity to cross-examine her, Sylvia's statements could not be admitted against her husband without violating his constitutional right to confrontation.⁵²

B. Crawford's Impact on Domestic Violence Prosecution

In his concurrence, Chief Justice Rehnquist specifically noted that the Court's decision "casts a mantle of uncertainty over future criminal trials."⁵³ Foreshadowing the uncertainty of the future, Justice Rehnquist cautioned the Court:

[T]he thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.⁵⁴

This threat of uncertainty proved to be a reality in the prosecution of domestic violence.⁵⁵ In the wake of *Crawford*, domestic violence prosecutors, defense attorneys, and domestic violence advocates found they were unable to predict outcomes and were often unsure as to how to proceed.⁵⁶ After what seemed like great progress in the prosecution of domestic violence, *Crawford* threatened the end of the successful, evidence-based prosecution of domestic violence.⁵⁷

As Chief Justice Rehnquist predicted, courts across the country were at odds in their molding of the "testimonial statement." In the context of domestic violence, courts split over the testimonial nature of statements made during 911 calls and statements made to police officers at the scene of an alleged incident of domestic violence.⁵⁸

In assessing the testimonial nature of emergency 911 calls, courts came to general agreement that these calls, or at least the initial

⁵² *Id.* at 65–68.

⁵³ *Id.* at 69 (Rehnquist, C.J., concurring).

⁵⁴ *Id.* at 75–76 (citation omitted); see also Percival, *supra* note 32, at 237 (discussing the "[c]onfusion" of the "[l]egal [c]ommunity" in the wake of *Crawford*).

⁵⁵ See Percival, *supra* note 32, at 234–35.

⁵⁶ See *id.*

⁵⁷ See *id.* at 216–17.

⁵⁸ Compare *People v. Victors*, 819 N.E.2d 311, 319–20 (Ill. App. Ct. 2004), and *State v. Maclin*, 183 S.W.3d 335, 348–49 (Tenn. 2006), with *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005), and *State v. Warsame*, 701 N.W.2d 305, 308–10 (Minn. Ct. App. 2005).

exchanges between the caller and operator, were to be considered nontestimonial in light of *Crawford*. In assessing the statements made during a 911 emergency call, many courts compared the relative informality of the call with the formal nature of the police interrogation in *Crawford*.⁵⁹ Characterizing statements made in a 911 emergency call as “fundamentally different,” a New York supreme court noted that a 911 call is “undertaken by a caller who wants protection from immediate danger” and is “usually, a hurried and panicked conversation between an injured victim and a police telephone operator,” and not the “equivalent to a formal pretrial examination.”⁶⁰ Furthermore, in *Pitts v. State*, the Georgia Supreme Court noted that the statements of the alleged victim during the 911 emergency call were not testimonial in nature as they “were made while the incident was actually in progress” and were made for the purpose of “preventing or stopping a crime as it was actually occurring,” rather than reflecting on a past crime.⁶¹

Statements made by an alleged victim to a responding officer at the scene of an incident of alleged domestic violence, however, caused more controversy in the area of domestic violence prosecution following the *Crawford* decision. Some courts hold that statements made to police officers at the scene of an alleged crime are per se testimonial.⁶² These courts opined that when a person speaks with police, she knows that the police are at the scene “in an official capacity to investigate a reported crime,” and even though that person’s statements may be excited, she knows that she is “making a formal report of the incident” and that the report may be later used against her.⁶³ Other courts considered statements made to police at the scene of the incident using a case-by-case balancing

⁵⁹ See *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (finding that statements given in a 911 call “were not given in a police interrogation because they were not ‘knowingly given in response to structured police questioning,’ and bear no indicia common to the official and formal quality of the various statements deemed testimonial by *Crawford*”).

⁶⁰ *People v. Moscat*, 777 N.Y.S.2d 875, 879–80 (N.Y. Crim. Ct. 2004).

⁶¹ *Pitts v. State*, 612 S.E.2d 1, 5 (Ga. Ct. App. 2005); see also *Wright*, 701 N.W.2d at 811 (“It is doubtful that in the face of immediate danger a caller is contemplating how her statements might later be used at a trial. In asking the caller questions, the 911 operator seeks to ascertain the nature of the caller’s peril and provide an appropriate response. The operator’s primary goal is not to conduct an investigation in anticipation of future prosecution of a wrongdoer.”).

⁶² See *Lopez v. State*, 888 So. 2d 693, 700 (Fla. Dist. Ct. App. 2004); *Jenkins v. State*, 604 S.E.2d 789, 795 (Ga. 2004).

⁶³ *Lopez*, 888 So. 2d at 700.

analysis.⁶⁴ These courts identified certain important factors, including whether the statements were made by the “victim or an observer,” the purpose of the person in making the statements as well as the purpose of the investigating officers, whether the investigation by police was initiated by the police or by the person making the statements, whether the statement was a response to police questioning or whether it was spontaneous, “the location where the statements were made,” whether the statements were recorded, the degree of “formality and structure” of the interaction between the person making the statements and the police, and, finally, whether, under the circumstances, an objective person making such statements would believe the statements could be preserved for later use at trial.⁶⁵ This factor-based, case-by-case analysis yielded somewhat disparate treatment of statements made to police at the scene of an alleged incident. In *Maclin*, for example, the Tennessee Supreme Court concluded that the victim’s statements to police officers were testimonial in nature because the victim gave a “detailed narrative of the defendant’s assault on her,” and because both the victim and a reasonable witness would have “reasonably . . . expect[ed]” her statements to be used in later prosecution.⁶⁶ By contrast, in *Wright*, the Minnesota Supreme Court concluded that the victim’s statements to the officers at the scene of the incident of alleged domestic violence were nontestimonial, as the actions of the police officers represented “a response to a call for assistance” and the officers’ questioning of the victim represented a “preliminary determination of ‘what happened’ and whether there was immediate danger, rather than an effort to gather evidence for a future trial.”⁶⁷ Similarly, in *State v. Warsame*, the court held that the victim’s statements to the officers were nontestimonial because there was no evidence that the purpose of the officers in questioning the victim “was to obtain evidence that could be used at trial,” and because the victim “was seeking police protection and assistance” and she did not objectively believe that

⁶⁴ See *Wright*, 701 N.W.2d at 812; *State v. Maclin*, 183 S.W.3d 335, 349 (Tenn. 2006); *Spencer v. State*, 162 S.W.3d 877, 881 (Tex. App. 2005).

⁶⁵ *Wright*, 701 N.W.2d at 812–14; *Maclin*, 183 S.W.3d at 349.

⁶⁶ *Maclin*, 183 S.W.3d at 352 (alteration in original); see also *People v. Victors*, 819 N.E.2d 311, 320–21 (Ill. App. Ct. 2004) (holding that the alleged victim’s statements to police officers were testimonial, as they were “made in response to police questioning while the police were conducting an investigation into the possible commission of a crime”).

⁶⁷ *Wright*, 701 N.W.2d at 813–14.

she was making the statements “to be preserved for use at a later trial.”⁶⁸

This disparate treatment of the term “testimonial” in courts across the country highlighted the ambiguity stemming from the *Crawford* standard. Furthermore, courts’ disparate treatment and the resulting uncertainty of outcome caused hesitation among domestic violence prosecutors:

When prosecutors do not know what evidence will be admissible, and thus, how strong their cases are, they are less likely to vigorously prosecute those cases. Prosecutors’ uncertainty as to whether they will be able to admit evidence of a victim’s out-of-court statements pressures prosecutors to plea-bargain, down-charge, and sometimes, not file cases at all.⁶⁹

Unfortunately, in the face of such ambiguity, some prosecutors resorted to desperate measures, even forcing victim participation in the trial process by threatening and even enforcing imprisonment for lack of participation.⁷⁰ These extreme measures result in a decreased trust by victims of the legal process, making it less likely for victims to come forward to report incidents of domestic violence and causing domestic violence advocates and shelters to advise victims not to report.⁷¹ Thus, as articulated in a recent law review article, “[a]s a result of legal confusion and decreased prosecution, the real-world impact of *Crawford* may be to reverse the last decade’s progress in the area of domestic violence prosecution and prevention, and reverse the overall national decline in domestic violence incidences.”⁷²

⁶⁸ 701 N.W.2d 305, 311–12 (Minn. Ct. App. 2005); *see also* *People v. Corella*, 18 Cal. Rptr. 3d, 770, 776 (Cal. Ct. App. 2004) (holding that “[p]reliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an ‘interrogation’” between an officer and witness because “[s]uch an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police interrogation as that term is used in *Crawford*”); *State v. Nouaim*, No. COA05-591, 2006 WL 278957, at *3–4 (N.C. Ct. App. Feb. 7, 2006) (finding statements to police officers at the scene of the crime nontestimonial because, as the police were responding to a call for help, their preliminary questions were “to ascertain whether the victim, other civilians, or the police themselves” were in danger, and the officers questions were “not made in anticipation of eventual prosecution, but [were] made to assist in securing the scene and apprehending the suspect”).

⁶⁹ Percival, *supra* note 32, at 238.

⁷⁰ *See id.* at 241.

⁷¹ *See id.*

⁷² *Id.* at 217.

IV. TESTIMONIAL STATEMENTS UNDER DAVIS V. WASHINGTON

In June of 2006, the United States Supreme Court directly confronted the confusion it created in the *Crawford* decision, which had left open for judicial interpretation the full scope of the meaning of a “testimonial” statement under the Confrontation Clause. In its decision in *Davis v. Washington*, the United States Supreme Court provided some guidance as to the contours of “testimonial statements” in what has become known as the “primary purpose” test.⁷³ Fortunately, for the purposes of this Note and the future of domestic violence prosecution, the primary purpose test in *Davis* was articulated in the context of two cases involving incidents of domestic violence.⁷⁴ Focusing on the nature of police interrogations, the Court outlined a standard by which courts may judge whether statements qualify as testimonial under the Confrontation Clause:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁷⁵

The Court noted that its holding does not imply that statements made without interrogation or questioning necessarily constituted nontestimonial statements, but rather that it is “the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”⁷⁶ Furthermore, the Court made clear that its newly articulated standard was not an attempt “to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial,” but rather a standard sufficient to decide the present case and its present set of circumstances.⁷⁷ Thus, while the scope of *Davis* may be conceived

⁷³ 547 U.S. 813, 821–22 (2006).

⁷⁴ See *id.* at 817–21.

⁷⁵ *Id.* at 822.

⁷⁶ *Id.* at 822 n.1.

⁷⁷ *Id.* at 822.

narrowly for larger confrontation purposes, for the purposes and circumstances of domestic violence prosecution, it governs the admission of valuable hearsay evidence. While this “primary purpose” test may not have resolved all questions concerning the scope of the “testimonial statement” and while the test may have raised an entirely new set of questions concerning that scope, it did provide courts, prosecutors, defense attorneys, and public enforcement officials with additional guidance in the context of domestic violence prosecution. The following discussion explores the dual-decision in greater factual and analytical depth.

A. *Davis*

On February 1, 2001, a 911 emergency operator answered a telephone call.⁷⁸ When the caller hung up the phone before speaking, the operator reverse-dialed and Michelle McCottry picked up the phone.⁷⁹ Throughout the conversation with the operator, McCottry appeared to be “upset and crying.”⁸⁰ The operator asked McCottry, “What’s going on?” to which McCottry responded, “[h]e’s here jumpin’ on me again.”⁸¹ As the conversation continued, the operator learned that McCottry and her ex-boyfriend were involved in a “domestic disturbance.”⁸² McCottry indicated to the operator that she was in a house, that her assailant was “usin’ his fists,” that her assailant had not been drinking, and that her assailant’s name was Adrian Martell Davis.⁸³ After informing the operator that Davis had hit her and then ran, leaving the house and getting in a car with someone else, the operator cut off McCottry, telling her to “[s]top talking and answer my questions.”⁸⁴ The operator proceeded to ask McCottry questions about Davis, gathering information about Davis’s purpose for going to McCottry’s house and the nature of Davis’s assault on McCottry.⁸⁵ In the course of questioning, the operator learned that McCottry had an order of protection against Davis, which prohibited Davis from contacting her, and that Davis

⁷⁸ *Id.* at 817.

⁷⁹ *Id.*

⁸⁰ *State v. Davis*, 64 P.3d 661, 663 (Wash. Ct. App. 2003).

⁸¹ *Davis*, 547 U.S. at 817.

⁸² *Id.*

⁸³ *Id.* at 817–18.

⁸⁴ *Id.* at 818.

⁸⁵ *Id.*

had come to the house, in violation of the order of protection, to gather his things before McCottry moved from the house.⁸⁶ The operator then dispatched two police officers to the scene, informing McCottry that the police were coming to her aid, that they would “check the area for him first,” and then “come talk to you.”⁸⁷ When two police officers arrived at the scene, only four minutes after the 911 call, they observed that McCottry was “very upset,” bearing what appeared to the officers to be “fresh injuries on her forearm and her face. The officers observed McCottry’s frantic efforts to gather her belongings and her children so that they could leave the residence.”⁸⁸

Davis was charged for being in violation of the domestic no-contact order.⁸⁹ While McCottry initially cooperated with the prosecutor, the State could not locate McCottry at the time of the trial and McCottry did not appear at trial to testify.⁹⁰ Thus, the only evidence connecting Davis with the domestic dispute and McCottry’s injuries was a tape recording of the 911 call and the statements made by McCottry to the emergency operator.⁹¹ The trial court admitted the tape recording of the 911 call and Davis was found guilty by a jury.⁹² The Washington Court of Appeals affirmed the conviction.⁹³ The Washington Supreme Court also affirmed, finding parts of the 911 call to be nontestimonial statements because of the immediacy of McCottry’s danger and because there was “no evidence McCottry sought to ‘bear witness’ in contemplation of legal proceedings.”⁹⁴ While the Washington Supreme Court acknowledged that other parts of the call could be found testimonial, “to the extent they were not concerned with seeking assistance and protection from peril,” these portions of the conversation were not essential to the prosecution’s case, and their inclusion below constituted harmless error beyond a reasonable doubt.⁹⁵

The United States Supreme Court utilized its “primary purpose”

⁸⁶ *State v. Davis*, 64 P.3d 661, 663 (Wash. Ct. App. 2003).

⁸⁷ *Davis*, 547 U.S. at 818.

⁸⁸ *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Davis*, 547 U.S. at 819.

⁹³ *State v. Davis*, 64 P.3d 661, 669 (Wash. Ct. App. 2003).

⁹⁴ *State v. Davis*, 111 P.3d at 851.

⁹⁵ *Id.* at 851–52.

test to discern whether McCottry's statements made during a 911 emergency call constituted testimonial statements for purposes of the Confrontation Clause.⁹⁶ First, the Court acknowledged that the history and development of the Confrontation Clause did not limit testimonial hearsay to those formal statements embodied in sworn testimony such as depositions, but includes informal interrogations paralleling those interrogations conducted in 911 emergency call: "[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."⁹⁷ Second, the Court endeavored to classify the testimonial nature of the 911 emergency call. Citing *Crawford*, the Court indicated that in that decision the Court contemplated "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator."⁹⁸ The Court noted that "[a] 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance."⁹⁹

Highlighting four primary bases, the Court distinguished the interrogation in *Davis* from that of *Crawford*, thereby contrasting the nature of the statements made in each. First, the Court noted that in *Davis*, McCottry was not describing past events, but was telling the 911 operator about events "*as they were actually happening*" to her.¹⁰⁰ Secondly, as the 911 operator determined, and as the Court found that "any reasonable listener would recognize," McCottry was in the middle of an "ongoing emergency" when she made the statements during the 911 call.¹⁰¹ Third, the interrogation conducted by the 911 emergency operator, namely the questions posed to McCottry during the beginning of the 911 call, were such that the "elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn . . . what had happened in the past."¹⁰² The Court noted that that the information

⁹⁶ *Davis*, 547 U.S. at 823–29.

⁹⁷ *Id.* at 826.

⁹⁸ *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 53 (2004)).

⁹⁹ *Id.* at 827 (some alteration in original).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

necessary to resolve the emergency included the identity of the perpetrator, as it would assist the police officers directed to the scene if they were to come upon him.¹⁰³ Finally, the Court discussed the relative informality of the 911 call, highlighting McCottry's "frantic answers" that were not provided in a "tranquil" or "safe" environment.¹⁰⁴ Thus, the Court concluded that McCottry's "primary purpose was to enable police assistance to meet an ongoing emergency," and her statements during the initial portion of the 911 call were, therefore, deemed to be nontestimonial: "No 'witness' goes into court to proclaim an emergency and seek help."¹⁰⁵

The Court went on, however, to note that the character of a 911 emergency call interrogation, under certain circumstances, might "evolve into testimonial statements."¹⁰⁶ In the context of McCottry's 911 emergency call, for example, the Court found that once the operator had collected the information necessary to remedy the emergency situation and had told McCottry to stop talking and to answer her questions, "[i]t could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the 'structured police questioning' that occurred in *Crawford*."¹⁰⁷ Thus, the Court explicitly contemplated that portions of a 911 emergency call may qualify as nontestimonial statements, whereas other portions—presumably those made after the initial information necessary to respond to the emergency are gathered—may still qualify as testimonial:

[T]rial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.¹⁰⁸

B. Hammon

In *Davis*'s companion case, *Hammon v. Indiana*, the Supreme

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 828.

¹⁰⁶ *Id.* (quoting *Hammon v. State*, 829 N.E.2d 444, 457 (Ind. 2005)).

¹⁰⁷ *Id.* at 828–29 (quoting *Crawford v. Washington*, 541 U.S. 36, 53 n.4 (2004)).

¹⁰⁸ *Id.* at 829.

Court also examined the testimonial nature of a domestic violence victim's statements.¹⁰⁹ On the night of February 26, 2003, responding to a report of a "domestic disturbance," two police officers were dispatched to the residence of Hershel and Amy Hammon.¹¹⁰ When the officers arrived at the home, they found Amy on the front porch, appearing "somewhat frightened" and alone.¹¹¹ Upon inquiry, Amy informed the officers that "nothing was the matter" and that "everything was okay."¹¹² The officers requested and received Amy's permission to enter the house, and upon entry discovered that a gas heating unit had been broken, leaving pieces of glass on the floor and flames escaping from the heater.¹¹³ Hershel, Amy's husband, was in the kitchen when the officers entered the home, and he informed the officers that "he and his wife had 'been in an argument' but 'everything was fine now' and the argument 'never became physical.'"¹¹⁴ The officers then split up, one remaining with Hershel in the kitchen and the other, Officer Mooney, rejoining Amy on the porch.¹¹⁵ Officer Mooney later testified at the bench trial that Amy told him the following:

"She informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became . . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater . . . She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe."¹¹⁶

The officer then asked Amy to complete and sign a battery affidavit narrating the same and Amy agreed.¹¹⁷

¹⁰⁹ *Id.* at 819–20.

¹¹⁰ *Hammon v. State*, 829 N.E.2d 444, 446 (Ind. 2005).

¹¹¹ *Id.*

¹¹² *Id.* at 446–47.

¹¹³ *Id.* at 447.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* (alteration in original).

¹¹⁷ *Id.*

Subsequently, the State charged Hershel with domestic battery and for violating his probation order.¹¹⁸ While the State endeavored to obtain Amy's presence at trial through subpoena, Amy did not appear, and the Court admitted, under hearsay exceptions, Amy's affidavit as a present sense impression and Amy's statements to Officer Mooney, through his testimony, as excited utterances.¹¹⁹ As a result of Officer Mooney's testimony, the court convicted Hershel on both charges.¹²⁰ The Indiana Court of Appeals affirmed the conviction.¹²¹ The Indiana Supreme Court also affirmed the conviction, finding Amy's statements to Officer Mooney to be nontestimonial as "Officer Mooney, responding to a reported emergency, was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene," and because "there is no suggestion that Amy wanted her initial responses to be preserved or otherwise used against her husband at trial."¹²² While the Indiana Supreme Court concluded that the admission of Amy's affidavit was a violation of Hershel's constitutional rights, as the affidavit constituted a testimonial statement under the Confrontation Clause, the Court concluded that the error in admitting the affidavit was harmless beyond a reasonable doubt, as cumulative of the testimony given by Officer Mooney.¹²³

Under the "primary purpose" test, the United States Supreme Court opined that Amy's statements to Officer Mooney constituted testimonial statements.¹²⁴ The Court paralleled Amy's statements to those of Sylvia Crawford:

It is entirely clear from the circumstances that the interrogation was part of an investigation into possibl[e] criminal past conduct There was no emergency in progress Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officer *should* have done.¹²⁵

The Court also dismissed the argument that the formalities of the

¹¹⁸ *Davis v. Washington*, 547 U.S. 813, 820 (2006).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 821.

¹²¹ *Hammon v. State*, 809 N.E.2d 945, 953 (Ind. Ct. App. 2004).

¹²² *Hammon*, 829 N.E.2d at 458–59.

¹²³ *Id.*

¹²⁴ *Davis*, 547 U.S. at 829.

¹²⁵ *Id.* at 829–30.

Crawford police interrogation—namely the giving of *Miranda* warnings, the recording of Sylvia’s statements, and the location of the interrogation at the police station—were the source of its testimonial nature. The Court explained that “[w]hile these features certainly strengthened the statements’ testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events—none was essential to the point.”¹²⁶ Therefore, unlike the character of ongoing emergency captured in the initial moments of a 911 emergency call interrogation, the statements given by Amy Hammon during the police interrogation at her home, without “immediate threat to her person,” and in reflection on past events, sufficiently qualified as testimonial statements by a witness “bear[ing] testimony” against the perpetrator of a past wrongdoing.¹²⁷

V. THE AFTERMATH IN COURTS AROUND THE COUNTRY

In the wake of *Crawford*, many commentators predicted the demise of successful, evidence-based domestic violence prosecution.¹²⁸ Correspondingly, the *Davis* decision sparked immediate concern by commentators.¹²⁹ In the initial aftermath of this decision, several domestic violence convictions were overturned under the newly articulated standard.¹³⁰ Although the standard set out in *Davis* appears objectively and doctrinally clear, commentators argue that the seemingly straightforward primary purpose test shifts the focus of analysis, resulting in the potential of disparate application in courts across the country.¹³¹ In the context

¹²⁶ *Id.* at 830.

¹²⁷ *Id.* at 830–32.

¹²⁸ See Percival, *supra* note 32, at 234–35.

¹²⁹ See Lininger, *Reconceptualizing Confrontation*, *supra* note 37, at 281–85 (discussing the impact of *Davis* on the prosecution of domestic violence). See generally Michael H. Graham, *The Davis Narrowing of Crawford: Is the Primary Purpose Test of Davis Jurisprudentially Sound, “Workable,” and “Predictable”?*, 42 CRIM. L. BULL. 604 (2006) (discussing the extent to which the *Davis* decisions yields a “workable” and “predictable” standard).

¹³⁰ See, e.g., *Thomas v. California*, 126 S. Ct. 2983, 2983 (2006); *Warsame v. Minnesota*, 126 S. Ct. 2983, 2983 (2006); *Wright v. Minnesota*, 126 S. Ct. 2979, 2979 (2006); *State v. Mechling*, 633 S.E.2d 311, 314 (W. Va. 2006).

¹³¹ See Graham, *supra* note 129, at 616 (asserting that “[i]f parsed too finely, different courts upon different facts, and even the same facts, can and will reach divergent conclusions”); see also Lininger, *Reconceptualizing Confrontation*, *supra* note 37, at 280 (arguing that the *Crawford* decision “focused on the mindset of the declarant” whereas the *Davis* decision “shifted the focus from the declarant’s state of mind to the officers’ purpose in

of domestic violence prosecution, the same concerns articulated in the aftermath of *Crawford* resonate today. Uncertainty in application of the standard set forth in *Davis* and the real threat of exclusion of the critical evidence, the victim's hearsay statements in the course of a 911 emergency call or to responding officers at the scene of the incident, may continue to make prosecutors hesitant to prosecute without the victim's presence at trial and remain a threat to the successful battle against domestic violence.¹³²

Following the *Davis* decision, recordings of 911 emergency calls have generally followed the Supreme Court reasoning outlined in the *Davis v. Washington* portion of the decision.¹³³ Applying the standard articulated in *Davis*, these courts examine the temporal sequence of events, the nature of the questions and responses given by the operator and the caller, and the level of formality of the conversation to assess the primary purpose of the interrogation.¹³⁴ Where the conversation between the 911 operator and the caller is focused on a present emergency, where the operator's questions are designed to understand and respond to the emergency situation, and where the caller's answers are the product of an emergency, courts are likely to equate those statements with the statements given during the course of the 911 emergency call in *Davis* and hold that such statements are nontestimonial.¹³⁵ In *Galicia*, for example, the Supreme Judicial Court of Massachusetts held that the 911 recording was nontestimonial and, therefore, admissible under the

questioning the declarant" and that this shift is both "theoretically inconsistent, and it is also problematic as a practical matter").

¹³² See Lininger, *Reconceptualizing Confrontation*, *supra* note 37, at 284.

¹³³ See, e.g., *Commonwealth v. Galicia*, 857 N.E.2d 463, 470 (Mass. 2006); *State v. Camarena*, 145 P.3d 267, 274 (Or. Ct. App. 2006).

¹³⁴ See *Camarena*, 145 P.3d at 274 (discussing *Davis's* focus on whether an emergency is ongoing).

[S]everal considerations bear on that inquiry. *First*, what is the temporal relationship between the statements and the events described? That is, were the events "actually happening" as the statements were made, or did the statements recount "past events" after "some time" had passed? *Second*, did the exchange between the police and the declarant relate, logically and practically, to the immediate identification of, and response to, an emergency—as opposed to investigating past criminal conduct and developing information for purposes of possible future prosecution? *Third*, how "formal" was the questioning? Did the questioning take place in a police station, in an isolated room, or on the phone? Were the declarant's statements "frantic" or "deliberate"?

Id.

¹³⁵ See *Galicia*, 857 N.E.2d at 470 (holding that victim statements made during a 911 emergency call were nontestimonial); *Camarena*, 145 P.3d at 274 (holding that victim statements made during a 911 emergency call were nontestimonial).

Confrontation Clause:

The call concerned an assault that was actually happening, and that any reasonable listener would conclude constituted an ongoing emergency The caller's responses to questions were properly elicited to determine what was necessary to resolve the present emergency, including the identity and location of the caller and her alleged perpetrator . . . and the questions occurred in the highly informal setting of a telephone call to a 911 dispatcher. In the language of *Crawford* and *Davis*, the statements bore no witness to any event, but identified an exigent circumstance and provided law enforcement with the information necessary to assess the current level of dangerousness of the situation.¹³⁶

In the context of victim statements to responding officers at the scene of a crime, courts across the country have wavered more as to the testimonial nature of such statements. Where the surrounding circumstances indicate that an emergency existed and continued to exist, the questions of responding officers and the often emotional responses of victims have been deemed nontestimonial under the *Davis* standard.¹³⁷ For example, in *Bradley*, the New York Court of Appeals determined that the circumstances faced by the responding officers indicated that an emergency situation was ongoing:

When [Officer] Mayfield, responding to a 911 call, arrived at Dixon's [alleged victim's] door and was met by an emotionally upset woman smeared with blood, his first concern could only be for her safety. His immediate task was to find out what had caused the injuries so that he could decide what, if any, action was necessary to prevent further harm. Asking Dixon "what happened" was a normal and appropriate way to begin that task¹³⁸

Because of the ongoing emergency, and the primary purpose of

¹³⁶ *Galicia*, 857 N.E.2d at 470.

¹³⁷ *See, e.g.*, *State v. Washington*, 725 N.W.2d 125, 133 (Minn. Ct. App. 2006); *State v. Ly*, No. A05-1106, 2006 WL 2255692, at *3 (Minn. Ct. App. Aug. 8, 2006); *People v. Bradley*, 862 N.E.2d 79, 81 (N.Y. 2006); *State v. Brown*, No. 87651, 2006 WL 3446238, at *4 (Ohio Ct. App. Nov. 30, 2006); *State v. McKenzie*, No. 87610, 2006 WL 3095671, at *3 (Ohio Ct. App. Nov. 2, 2006); *Garcia v. State*, 212 S.W.3d 877, 884 (Tex. App. 2006); *Vinson v. State*, 221 S.W.3d 256, 267 (Tex. App. 2006); *State v. Smith*, Nos. 2003AP2030-CR, 2004AP3314-CR, 2006 WL 2670391, at *5 (Wis. Ct. App. 2006); *State v. Rodriguez*, 722 N.W.2d 136, 148 (Wis. Ct. App. 2006).

¹³⁸ *Bradley*, 862 N.E.2d at 81.

the officers to secure the safety of the alleged victim, the statements elicited from that victim were not found to be testimonial in nature.¹³⁹ Similarly, in *State v. Washington*, the Minnesota Court of Appeals noted that “*Davis* recognizes that, in domestic assaults, officers who are called to investigate need to obtain information to assess the situation, ensure their own safety, and evaluate the possible danger to the complainant.”¹⁴⁰ Where the alleged victim, who had shortly before placed a 911 call, “appeared upset” and answered the officers questioning as to what happened, the nature of her injuries, and information as to the assailants whereabouts, the Minnesota Court of Appeals held that the victim’s statements to the responding officers at the scene “conveyed information that allowed the officers to reasonably respond to the emergent situation” and that the circumstances surrounding the statements indicates that the “primary purpose of the interrogation was not to establish or prove past events potentially relevant to later criminal prosecution, but to enable police assistance to meet an ongoing emergency,” and thus, constituted nontestimonial statements in light of *Davis*.¹⁴¹

By contrast, however, where the nature of circumstances, questions, and responses at the scene of an alleged incident of domestic violence do not indicate an ongoing emergency, but rather an attempt by officers or alleged victims to preserve information for later prosecution, courts parallel such circumstances to those of *Hammon* and find statements given by the alleged victim to be testimonial under the Supreme Court’s standard.¹⁴² In *Martin*, for example, the responding officer asked the alleged victim, who appeared very upset, to describe what had happened and she detailed her assault for him.¹⁴³ Despite the temporal proximity to the assault, the informality of the interview, and even the clear emotional instability of the declarant, the Michigan Court of Appeals held that the victim’s statements were not given in response to questions aimed at resolving an ongoing emergency and

¹³⁹ *Id.*

¹⁴⁰ *Washington*, 725 N.W.2d at 133.

¹⁴¹ *Id.* at 130, 133.

¹⁴² See *Commonwealth v. Galicia*, 857 N.E.2d 463, 470 (Mass. 2006); *People v. Martin*, No. 263531, 2006 WL 3682751, at *3 (Mich. Ct. App. Dec. 14, 2006); *State v. Mechling*, 633 S.E.2d 311, 323 (W. Va. 2006).

¹⁴³ *Martin*, 2006 WL 3682751, at *1.

were, therefore, testimonial under *Crawford* and *Davis*.¹⁴⁴ The court noted that “[d]espite the lack of formal questioning, complainant’s remarks were made to essentially build a case against defendant for assault,” paralleling those made by Amy Hammon and articulated in the *Davis* decision.¹⁴⁵ Similarly, in *Mechling*, the court held that statements made by the alleged victim to the responding officers in the context of a police interrogation constituted testimonial statements under *Davis*.¹⁴⁶ Although the alleged victim was crying when the police arrived, her statements to the responding officers in the course of the interrogation were not made for the purposes of resolving an ongoing emergency.¹⁴⁷ The Supreme Court of West Virginia opined:

It is clear from the circumstances that the deputies’ interrogation of Ms. Thorn was part of an investigation into possibly criminal past conduct. There was no emergency in progress when the deputies arrived, and the defendant had clearly departed the scene when the interrogation occurred. When the deputies questioned Ms. Thorn, they were seeking to determine “what happened” rather than “what is happening.” Objectively viewed, the purpose of the deputies’ interrogation was to investigate a possible crime—which is, of course, precisely what the deputies *should* have done. But the statements taken by the deputies could not become a substitute for Ms. Thorn’s live testimony, because those statements “do precisely *what a witness does* on direct examination; they are inherently testimonial.”¹⁴⁸

The aforementioned decisions seem to indicate that some of the uncertainty of *Crawford* was partially cured by the *Davis* decision in the context of domestic violence. Unfortunately, uncertainties remain. As Justice Thomas noted in his concurring opinion in *Davis*, the standard articulated by the majority “yields no predictable results to police officers and prosecutors attempting to comply with the law,” especially in the context of cases where the police respond to the reporting of an incident of domestic violence, and the “purposes of [the] interrogation, viewed from the

¹⁴⁴ *Id.* at *3.

¹⁴⁵ *Id.*

¹⁴⁶ *Mechling*, 633 S.E.2d at 323.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence.”¹⁴⁹ Despite this concern, courts around the country must re-focus their analysis to determine the purpose of the interrogation and to find the existence of ongoing emergency, aligning and distinguishing each new set of circumstances with those set out in the *Davis* and *Hammon* components of the Supreme Court decision. While arguably not a perfect or ideal standard for the prosecution of domestic violence, the primary purpose test, at the very least, provides some additional guidance for courts and prosecutors as they endeavor to ascertain what statements made by victims are admissible as evidence under the Confrontation Clause. Furthermore, the *Davis* decision, even in its undesirable aspects, may provide desirable direction for prosecutors, domestic violence advocates, law enforcement officials, and state legislatures in tackling and remedying the society-wide plague of domestic violence.

VI. THE UNEVEN PATH AHEAD: PROBLEMS AND POTENTIAL SOLUTIONS FOR THE FUTURE

The outlook for domestic violence prosecution is complicated and the future is uncertain: can prosecutors still rely on the evidence-based strategies adopted in the past and will those strategies yield successful prosecutions? The *Davis* standard, further qualifying the standard articulated in *Crawford*, especially in the context of domestic violence, has left open questions that must be answered.¹⁵⁰ To begin, courts must determine the “primary purpose” of the responding operators’ and officers’ questions as well as the responses given by victims.¹⁵¹ This analysis may be guided by the scenarios discussed in the *Davis* and *Hammon* components of the Supreme Court decision, but disparate facts may warrant disparate treatment, and courts must analogize and distinguish the factual underpinning of *Davis* to the facts presented in individual cases. Furthermore, courts must determine what circumstances constitute an “ongoing emergency” and what actions by 911 operators and responding police officers qualify as actions to “resolve” such

¹⁴⁹ *Davis*, 547 U.S. at 838–39 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹⁵⁰ See Ann Hetherwick Pumphrey, *Admissibility of Hearsay Statements to Police: Davis v. Washington and Hammon v. Indiana*, BOSTON B.J., Nov.-Dec. 2006, at 17, 18–19.

¹⁵¹ *Id.* at 18.

emergencies.¹⁵² As the aforementioned courts utilized certain factors in this determination, such as temporal proximity, nature of questioning and responses, and formality of interrogation, courts must develop workable and predictable standards for determining the existence or lack of an emergency in order to apply the standard uniformly.

As courts do their tough job of interpreting and applying the legal standard set out in *Davis*, prosecutors and advocates must continue to do their tough job of promoting and protecting the successful prosecution of domestic violence. The fundamental problem in the prosecution of domestic violence, prosecution without the testimony of the victim, directly collides with the underlying theme of the *Crawford* and *Davis* decisions, the inadmissibility of testimonial evidence under the Confrontation Clause. The legal system must work as a cohesive unit to promote the uniform application of the *Davis* standard and to encourage the reporting, prosecution, and decline of violence between intimates.

A. *The Role of Law Enforcement Officials*

An important piece in the prosecution of domestic violence is the cooperation of law enforcement officials.¹⁵³ As illustrated in the case law above, 911 operators and responding police officers are often the authorities who elicit initial statements from victims, and thereby the only source of potentially admissible evidence from the victim in the prosecution of the incident.¹⁵⁴ As a result, these officials must be properly trained in an up-to-date understanding of domestic violence and the law so that their initial investigations both provide for the safety of the victim and the community and yield evidence most conducive for the successful prosecution of domestic violence.¹⁵⁵

To begin, law enforcement officials should continue to be trained about the intricacies of domestic violence so that in the fulfillment of their enforcement responsibilities, they understand the underlying nature of violence between intimates, and the

¹⁵² *Id.* at 18–19; see also Lininger, *Reconceptualizing Confrontation*, *supra* note 37, at 280 (discussing the ambiguity of the *Davis* standard and asserting that “[t]he *Davis* test has not escaped the ambiguity that plagued the tests in *Roberts* and *Crawford*”).

¹⁵³ Percival, *supra* note 32, at 254.

¹⁵⁴ See *supra* Part IV.

¹⁵⁵ See Percival, *supra* note 32, at 254.

psychological motivation of batterers and impact on victims.¹⁵⁶ Furthermore, 911 operators and responding officers must be trained as to the requirements of the *Crawford* and *Davis* decisions, as well as the application of these standards by courts in their jurisdiction, so that in their fulfillment of procedural duties, they can respond to emergency situations in a manner promoting safety *and* successful prosecution.¹⁵⁷ Because *Davis* focuses on the “primary purpose” of the investigating or interrogating officer and the existence of an “ongoing emergency,” the actions and inquiries of law enforcement officials become the center of the analysis.¹⁵⁸ Some commentators have argued that a potential danger of the *Crawford* and *Davis* decisions is to provide a “perverse incentive for 911 operators and responding officers to prolong the ‘emergency’ phase of an investigation” in order to ensure the admissibility of the alleged victim’s hearsay statements.¹⁵⁹ Because this is a legitimate concern, operator and officer training should demonstrate “a very clear divide” between promoting victim safety and gathering evidence for prosecution.¹⁶⁰ Working within the framework of *Davis*, law enforcement officials must endeavor to make the safety of the victim the centerpiece of their investigations and inquiries. Thus, officer training should highlight that the primary purpose of a preliminary investigation into a reported domestic dispute is to assess and resolve an ongoing emergency.¹⁶¹ This focus places the safety of the victim and the community at the forefront of the investigation, but also helps to ensure that officer investigation parallels the legal

¹⁵⁶ *Id.* (discussing the importance of law enforcement training about domestic violence, so that officials “can better understand the nature and severity of the problem, the psychology and motivations of both the batterer and the victim, and the evidence prosecutors need to successfully try domestic violence cases”). In this regard, education about domestic violence is a current component of local law enforcement officer training through the Violence Against Women Act, a federally mandated program providing financial support for domestic violence training. Violence Against Women Act of 1994, chs. 2–3, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902, 1910–18 (codified as amended in scattered sections of 16 and 42 U.S.C.). The argument is not that officers are not receiving training concerning domestic violence, but rather that officers must be continuously trained about new sociological and psychological understandings of domestic violence, about the impact of technological growth on the perpetration of domestic violence, and about new developments in the law in a fluctuating legal system. See Percival, *supra* note 32, at 254–56.

¹⁵⁷ See Percival, *supra* note 32, at 255.

¹⁵⁸ *Davis v. Washington*, 547 U.S. 813, 822 (2006).

¹⁵⁹ Lininger, *Reconceptualizing Confrontation*, *supra* note 37, at 285.

¹⁶⁰ Percival, *supra* note 32, at 255.

¹⁶¹ See *id.* at 255.

requirements under the Confrontation Clause.¹⁶² Furthermore, once the emergency ends, and the reach of *Davis* is arguably complete, operators and officers should be trained to continue to gather evidence over the telephone and at the scene, irrespective of the testimonial nature of victim statements and regardless of whether the victim will testify in the future.¹⁶³ Together, effective training and implementation of an ongoing-emergency phase of investigation and a post-emergency, evidence-gathering phase will arm prosecutors with the best evidentiary tools for a successful prosecution, even in the face of Confrontation Clause concerns. Here, up-to-date training is key, as officials familiar with the applicable hearsay exceptions, the standards set forth in *Crawford* and *Davis*, and the inquires that most effectively assess an emergency and assure safety, will be much better equipped to investigate and report a variety of domestic disputes.¹⁶⁴

B. *The Role of Prosecutors*

Like law enforcement officials, prosecutors must become familiar with the requirements of *Crawford* and *Davis*, and the treatment of these decisions in their particular jurisdiction. As illustrated above, in some instances, the bright-line rule articulated in *Davis* may assist prosecutors in admitting the statements of victims to 911 emergency call operators and responding police officers, especially where it is clear that the statements were made by the victim in the course of an ongoing emergency. The downside of the bright-line rule may, however, result in the classification of many victim

¹⁶² *See id.*

¹⁶³ *See id.* at 256. In this article, Percival asserts that the investigation should involve two distinct parts: the safety portion and the evidence-gathering portion. *Id.* at 255–56. According to Percival, this separation may include “separate lines of questioning” or officers with “separate responsibilities.” *Id.* Furthermore, Percival argues that officers should still be trained in “victimless prosecution techniques” for gathering evidence of future prosecution, including taking pictures and video of crimes scenes and the victim’s injuries. *Id.* at 256. This method of covering all the bases will help prosecutors prepare for all conceivable methods of prosecution.

¹⁶⁴ *Id.* at 255. A further challenge, however, may be the downside of extensive training of law enforcement officials. While the successful prosecution of domestic violence seems to require 911 operators and responding officers who are familiar with the requirements of *Crawford* and *Davis*, questioning designed to guarantee admissibility of victim statements for later prosecution may actually transform what would be a nontestimonial statement, given in the midst of an ongoing emergency, into a testimonial statement, the primary purpose of which is to establish facts critical to later prosecution, rendering the statement inadmissible under the Confrontation Clause.

statements as testimonial, in which case prosecutors must be proactive advocates of creative, alternative forms of successful prosecution.

To begin, prosecutors must familiarize themselves with the intricacies of domestic violence, to make themselves better legal advocates before the court, as well as better representatives of victims.¹⁶⁵ Education about the complex nature of an abusive relationship will help prosecutors relate to victims and will enable prosecutors to educate the court, judges and juries, as to the peculiarities of an abusive relationship and its impact on a legal understanding of the circumstances of each case.¹⁶⁶ Furthermore, an in-depth understanding of the complexities of violence between intimates enables a prosecutor to develop legal strategies conducive to the successful prosecution of domestic violence.¹⁶⁷

A prosecutor trained in recognizing and understanding the systematic and continuous nature of an abusive relationship can interweave the unique characteristics of domestic violence with effective legal strategy and argument. First, a prosecutor should find effective ways of encouraging prior opportunities for cross examination, thus satisfying the confrontation standard articulated in *Crawford*, despite the potential testimonial nature of victim statements under *Davis*.¹⁶⁸ Some commentators argue the dangers of this strategy, namely that placing a victim on the stand at the “first available opportunity” effectively undermines the prosecution’s case because prosecutors examine victims “before having enough information to adequately do so.”¹⁶⁹ While this is a legitimate concern, prosecutors should endeavor to avoid this danger and unearth opportunities for prior cross examination that is the product of adequate preparation, potentially relieving the victim of some of the assorted pressures of trial.¹⁷⁰

A prosecutor who understands the cyclical nature of domestic violence may proactively battle repeated incidents of domestic

¹⁶⁵ See *id.* at 258.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See Lininger, *Prosecuting Batterers*, *supra* note 1, at 784–87 (advancing four arguments as to why pre-trial cross examination is an effective method for introducing victim testimony and avoiding the confrontation issues under *Crawford*).

¹⁶⁹ See Percival, *supra* note 32, at 246.

¹⁷⁰ See Lininger, *Prosecuting Batterers*, *supra* note 1, at 787–97 (recommending three methods to facilitate pre-trial cross examination: (1) nonwaivable preliminary hearings, (2) special hearings for cross-examination, and (3) depositions).

violence by focusing on the recurring nature of violence between intimates.¹⁷¹ To begin, zealous prosecution of violations of orders of protection and restraining orders, however minor, effectively “send[s] a message to batterers that their actions will not be tolerated” and “show[s] victims that law enforcement is supportive of their efforts to leave.”¹⁷² Additionally, legal argumentation enveloping the cyclical nature of domestic violence may enhance the prospect of favorable application of the *Crawford* and *Davis* standards. Prosecutors may argue that the cycle of violence between intimates often means that, for the victim, the emergency situation is continuously “ongoing”; the presence of police, while a temporary safeguard, does not ensure victim safety into the future. Thus, statements made during a 911 call and at the scene of the crime by a frantic and emotionally distraught victim are actually statements given as part of an ongoing emergency.

Furthermore, a prosecutor who understands the cycle of abuse and the commonplace retaliation of batterers on victims participating in the legal system may more effectively argue forfeiture by wrongdoing on the part of the batterer-defendant.¹⁷³ This doctrine, based on fairness and policy reasoning, allows for the admission of evidence that would otherwise be banned under the Confrontation Clause where the wrongdoing of the defendant was the cause of the witness unavailability at trial.¹⁷⁴ Working with law enforcement officials, prosecutors should continue gathering evidence following the initial incident of violence to help demonstrate that victim refusal to cooperate is the product of threats of retaliation and harm by the batterer.¹⁷⁵ The forfeiture by wrongdoing doctrine not only assists prosecutors in admitting critical evidence in individual cases, but may also help prosecutors

¹⁷¹ See Percival, *supra* note 32, at 258–59.

¹⁷² See *id.*

¹⁷³ See *id.* at 257.

¹⁷⁴ See Soulé, *supra* note 16, at 706 (discussing the Supreme Court’s ruling in *Reynolds v. United States*, where the Court held that where a defendant “voluntarily keeps the witnesses away, he cannot insist on his privilege” of confrontation (quoting *Reynolds v. United States*, 98 U.S. 145, 158 (1878))).

¹⁷⁵ Percival, *supra* note 32, at 257; see also Soulé, *supra* note 16, at 709–10 (arguing that prosecutors may use the testimony of a variety of sources, including police officers, friends and family members of the victim, and domestic violence advocates, as well as telephone records, email messages, and general correspondence between the victim and the batterer to demonstrate the particular instances of intimidation and threats of retaliation that motivated victim refusal to cooperate in prosecution).

educate courts about the cyclical nature of domestic violence, demonstrating the unique aspects of control and intimidation that motivate victims to refuse to testify or to recant.

Furthermore, prosecutors should make use of expert testimony concerning the motivations and consequences of domestic violence on victims and batterers.¹⁷⁶ While commentators express concern that the demands of *Crawford* and *Davis* will impede an expert's ability to rely on victim out-of-court statements, prosecutors should endeavor to find means by which an expert can testify as to the general psychological and sociological nature of domestic violence, highlighting for judges and juries the reasons for victim refusal to testify or to recant.¹⁷⁷ As the admissibility of expert testimony is in the discretion of the court, prosecutors must endeavor to educate the court system as to the perpetual relevance of expert testimony: the testimony of an expert on domestic violence can assist judges and juries in understanding "how the trauma of battering may affect the psychology of victims, and may lead to seemingly irrational behavior such as recanting prior accusations."¹⁷⁸

Finally, prosecutors must acknowledge that the successful prosecution of domestic violence is only one component of the struggle to eradicate our society of violence between intimates. Prosecutors must understand that a conviction, while important, is not the only objective. In prosecution, irrespective of conviction, the education of the court system and awareness-raising in the public through the media are both critical components of the successful battle against domestic violence. Furthermore, the role of the prosecution extends beyond understanding the legal requirements of *Crawford* and *Davis* and the legal argumentation and strategy that is most successful in meeting those requirements. Just as evidence-based domestic violence prosecutions were a solution to the problem of prosecution without the live testimony of the victim, so might re-entry of the victim into prosecutorial efforts be a potential solution to the problems raised by the *Davis* decision. Prosecutors must find a way to build a trust relationship with the victim, helping the victim to develop confidence in the inner-workings of the

¹⁷⁶ See Lininger, *Prosecuting Batterers*, *supra* note 1, at 812.

¹⁷⁷ See *id.* at 812 (asserting that "[e]xpert testimony can . . . help the trier of fact to understand why a victim of domestic violence may testify reluctantly or inconsistently with her prior statements" and "can explain the unique pressures brought to bear on battered women").

¹⁷⁸ See *id.* at 813.

legal system.¹⁷⁹ Immediate contact and support of victims of intimate abuse may increase the likelihood that the victim will cooperate in later prosecution, and may even help suppress the cycle of violence.¹⁸⁰ Prosecutors should take all necessary steps to provide this support for the victim in all stages of the prosecution, including involving a domestic violence advocate throughout the legal process, communicating with the advocate and the victim as to the details of each step of the prosecution, and placing the victim's safety at the forefront of planning strategy and argument.¹⁸¹ Some commentators have suggested that domestic violence advocates be part of every stage of the prosecution, and either go to the scene of a reported incident of domestic violence with law enforcement officials or contact the victim shortly after the reported incident as a means of facilitating a support system for a victim immediately after the violent incident.¹⁸² Bearing in mind the strict requirements under *Davis*, prosecutors should not abandon evidence-based prosecution strategies, and where possible, endeavor to prosecute in a manner that places the safety and psychological well-being of the victim as a priority.¹⁸³ Unfortunately, however, re-focusing prosecution on the victim carries with it the real-life threat of batterer control, intimidation, and retaliation.¹⁸⁴ Of course, such retaliation only adds to the endless cycle of victimization, and prosecutors thereby become part of the perpetuation of violence.¹⁸⁵ Just as before, prosecutors must strike the difficult balance between successfully prosecuting and harmfully perpetuating domestic violence.

VII. CONCLUSION

The *Crawford* and *Davis* decisions threaten the success of the evidence-based prosecution of domestic violence. While the threats are real and the outlook for successful prosecution is still uncertain,

¹⁷⁹ See Percival, *supra* note 32, at 260; see also Vilhauer, *supra* note 8, at 961–62 (arguing that the relationship between the prosecutor and the victim is a critical piece in the successful prosecution of domestic violence, and that the prosecutor should be sure not to assume control over the victim in a manner mirroring that of the batterer).

¹⁸⁰ See Percival, *supra* note 32, at 260.

¹⁸¹ See *id.*

¹⁸² See *id.* at 256.

¹⁸³ See *id.* at 261 (arguing that prosecutors should also use victimless prosecution as an effective method, which may continue to “help remove the responsibility, and the blame, for prosecuting the batterer from the victim”).

¹⁸⁴ See *id.* at 241–42.

¹⁸⁵ See *id.*

a constructive consequence of the *Davis* decision may be to compel prosecutors and advocates to re-evaluate, re-focus, and re-strategize efforts in the prosecution of domestic violence. While the perpetration of domestic violence may be a deep-seated characteristic of our society, the battle to end it is still relatively new. As a result, courts, prosecutors, and advocates must dedicate time and resources to develop a more complete, up-to-date body of knowledge concerning violence between intimates and must ground decision-making in an informed understanding of how the intricacies of domestic violence are directly affected by developing legal standards. Recognizing that the development of confrontation jurisprudence may be both an obstacle and a tool in the prosecution of domestic violence, those who endeavor to battle this societal malady must not allow the inherent frustrations of domestic violence prosecution to overcome the potential for success. In the face of *Davis* and its predecessors, creative minds must come together to develop innovative and effective strategies for the successful prosecution of domestic violence.