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CONFRONTATION CLAUSE AND TESTIMONIAL EVIDENCE: AFTER TWO SUPREME COURT DECISIONS, STANDARD REMAINS UNCLEAR

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Two decisions of the United States Supreme Court in the last three years[1] regarding the Sixth Amendment right of confrontation of adverse witnesses have substantially changed constitutional law as to the admissibility of hearsay

statements as evidence in criminal trials.[2] One consequence is that it may be more difficult to bring successful prosecutions in domestic battery and child abuse cases in which the alleged victim has identified the attacker but is unwilling to testify at trial.[3] This article will explain the scope of the decisions and indicate the issues that remain to be clarified or resolved regarding the operation of the Confrontation Clause.

Sixth Amendment Background

The Sixth Amendment provides that defendants in criminal cases have the right to confront witnesses.[4] For many years, the United States Supreme Court held that an unavailable witness's out-of-court statement would be admitted against a defendant if it is shown to be reliable, either because it falls within a "firmly rooted hearsay exception" or because it bears "particularized guarantees of trustworthiness."[5] In 2004, the Supreme Court abandoned the *Roberts* rule and substituted a new rule under *Crawford v. Washington*.[6]

Crawford v. Washington

Crawford involved an appeal from the conviction of Michael Crawford for the nonfatal stabbing of Kenneth Lee.[7] Michael and his wife Sylvia had gone to Lee's apartment, angered by an earlier incident in which Lee had allegedly tried to rape Sylvia.[8] Michael and Lee got into an argument, in the course of which Michael stabbed Lee with a knife.[9] Both the Crawfords gave statements to the police about the fight.[10] Michael indicated that he might have seen Lee reach for a weapon.[11] Sylvia indicated that Lee had nothing in his hands and was using them to ward off Michael's attack; however, she also stated that, during the fight, Lee put a hand in his pocket.[12] Sylvia did not testify at trial because of the State of Washington's marital privilege, which generally bars one spouse from testifying without the other spouse's consent.[13] The testimony of the police officer who obtained Sylvia's statement was admitted as satisfying the *Roberts* test—it was held to be reliable and trustworthy because Sylvia was an eyewitness to the attack, was questioned by a police officer, and corroborated much of Michael's story.[14]

In *Crawford*, the Court reviewed the historical record preceding the adoption of the Confrontation Clause.[15] Although it traced the right to confront one's

accusers to Roman times, most of the Court's analysis focused on English and colonial precedents in the 200 years prior to the adoption of the Bill of Rights.[16] One famous trial that influenced the Court's legal analysis was the treason trial of Sir Walter Raleigh in 1603.[17] The main evidence against Raleigh consisted of the answers made by Lord Cobham, Raleigh's alleged accomplice, when questioned before the Privy Council, a proceeding closed to the public and outside of Raleigh's presence.[18] Over his objections, Cobham's testimony was read to the jury trying Raleigh.[19]

Raleigh's defense was that Cobham had given his testimony in order to obtain mercy and would not have repeated his allegedly inaccurate testimony if required to speak at Raleigh's trial.[20] Refusing to order Cobham to testify, as demanded by Raleigh, the judges convicted Raleigh and ordered his execution.[21] Because of the subsequent view that Raleigh's trial had been unfair, English law was changed to require face-to-face testimony at trials for treason.[22] A subsequent decision of the Court of King's Bench in 1696 barred admission of a statement, not subject to cross-examination when made, of a person who had died before trial.[23]

The *Crawford* Court indicated that its review of history underlying the Sixth Amendment led to two conclusions.[24] First, the main evil at which the Confrontation Clause was directed was the use of *ex parte* examinations of witnesses as evidence against the accused—that is the use of testimony not given live at trial in the presence of the defendant and subject to cross-examination.[25] Testimony is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[26] Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[27] In the Court's view, these requirements were not subject to court-created exceptions beyond possibly those already existing at common law.[28] These involved admission of business records, statements in furtherance of a conspiracy, and dying declarations.[29]

Justice Scalia's opinion for the Court in *Crawford* held that the meaning of the Sixth Amendment protection of the right of confrontation should not be left to changing determinations of reliability.[30] The Court criticized *Roberts* because it

> [A]llows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. . . . The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's statements were self-inculpatory, . . . that they were not made in the heat of passion, . . . and that they were not "extracted from [him] upon any hopes or promise of Pardon."[31]

As a result of *Crawford*, evidence is subject to different treatment depending on whether it is deemed to be testimonial.[32] Admissibility of proof under state evidentiary rules, as a result of a finding of reliability, does not necessarily satisfy the constitutional requirements.[33] The Confrontation Clause applies only to testimonial evidence; any other evidence is admissible if it meets evidentiary tests such as the hearsay rules.[34] As to testimonial evidence, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[35] In *Crawford*, the Court found the evidence in that case to have been inadmissible because it was testimonial and had not been subject to cross-examination.[36]

Although the decision did not spell out the definition of the term "testimonial," the Court indicated that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."[37] Because Sylvia's statement was used against her husband in his trial, was obtained during police questioning, and was not subject to cross-examination by Michael, either when it was made or at trial, its admission violated the Confrontation Clause, necessitating reversal of Michael's conviction.[38]

In addition to not defining "testimonial," the Court did not define "police interrogation," which it indicated was one category of testimonial statements.[39] Consequently, it was unclear whether all or only some statements obtained by police are excluded from evidence because they were not subjected to cross-examination.[40] The *Crawford* Court indicated that it was using the term "interrogation" in a colloquial rather than technical sense, but found that Sylvia's statement was "knowingly given in response to structured police questioning, [and this] qualifies under any conceivable definition."[41]

As to the other categories that the *Crawford* Court clearly identifies as testimonial, there usually should be no bar to introduction at a trial of the testimony of an unavailable witness whose statement had been made at a prior trial or preliminary hearing because defendants are present and are allowed to cross-examine.[42] Grand jury testimony, another category of statements held to be testimonial, is given outside the presence of the defendant or of counsel; therefore, it would be inadmissible under this test.[43] Similarly, any statement obtained by the police that is held to be testimonial would be inadmissible because it too will not have been subjected to cross-examination.[44]

DAVIS V. WASHINGTON

In 2006, the Supreme Court, in *Davis v. Washington* again addressed the meaning of the Confrontation Clause in determining whether statements by persons not subject to cross-examination and introduced into evidence were testimonial.[45] The decision announced tests to distinguish testimonial from non-testimonial evidence, in order to decide the cases before the Court and to provide guidance to trial and appellate courts addressing these issues[46].

In *Davis*, the evidence admitted was the transcript of a 911 call in which Michele McCottry complained that Adrian Davis was punching her.[47] At Davis' trial, the officers testified regarding their observations about McCottry's injuries.[48] Because McCottry did not take the stand, the only evidence about the cause of the injuries was the 911 tape, which was admitted over Davis' assertion that doing so violated his Sixth Amendment rights.[49]

In the other case addressed by the *Davis* decision, the facts concerned a police visit to the home of Hershel and Amy Hammon, where a domestic disturbance had been reported.[50] Officers found Amy alone on the front porch.[51] She had no visible injuries, appeared to the police to be "somewhat frightened," and told them "nothing [was] the matter."[52] With her permission, the officers entered the house, where they observed some property damage in the living room.[53] The officers kept the couple apart, refusing to allow Hershel to be present when Amy was questioned.[54] Police interrogated both of the Hammons and obtained Amy's statement that Hershel had broken the glass front of a heater in the living room and pushed her face into the broken glass.[55] Amy was subpoenaed to testify at Hershel's trial for battery, but she did not appear.[56] Her written statement about the incident, obtained after she answered

the police questions, was admitted into evidence over Hershel's objection that he had no opportunity to cross-examine Amy.[57]

Both Davis and Hammon were convicted.[58] State appellate and Supreme courts affirmed the convictions, rejecting the Sixth Amendment claims and holding that the evidence was not testimonial under *Crawford*.[59] The United States Supreme Court affirmed Davis' conviction, but reversed the judgment as to Hammon.[60]

In the opinion for a nearly unanimous Court,[61] Justice Scalia announced the test to distinguish testimonial and non-testimonial statements:

> 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.[62]

Referring to language in *Crawford* defining testimony as "a solemn declaration made for the purpose of establishing or proving some fact," the *Davis* opinion distinguished between "[a]n accuser who makes a formal statement to government officers" [testimonial] and "a person who makes a casual remark to an acquaintance" [non-testimonial].[63]

Applying these tests to the facts of the *Davis* case, the Court concluded that McCottry's statements to the 911 operator were not testimonial because they were made by a person facing an ongoing emergency rather than one reporting the facts of a completed crime.[64] McCottry was seeking help against an ongoing physical threat and the 911 operator's questions about the identity of the attacker were necessary to provide information to the police to assist them in responding to the call.[65] The *Davis* Court contrasted these facts with those in *Crawford*, in which the police questioning was in a structured environment and occurred several hours after the completion of the crimes.[66]

Davis assumed, *arguendo*, that interrogation for *Crawford* purposes may be performed not only by police, but also by 911 operators, who often are not part of a police force.[67] Although the answers to the initial questions from the operator were non-testimonial, the Court noted that subsequent questions may have

elicited testimonial responses because they occurred after the emergency ended, once McCottry told the 911 operator that Davis had left the house and driven off.[68] Because the issue in *Davis* concerned only McCottry's initial statements complaining that she was being beaten and identifying Davis as her assailant, the Court had no reason to rule on the admissibility of the subsequent statements.[69]

According to the *Davis* Court, the statement made by Amy Hammon was similar to those found to be testimonial in *Crawford*.[70] In both cases, the crime was no longer in progress at the time the police obtained the information.[71] The police were not dealing with a crime in progress or responding to a cry for help, unlike the situation in *Davis*.[72] When the officer spoke to Amy Hammon, the sole motivation was to investigate a possible completed crime.[73] The Court noted that the police kept husband and wife separated and would not allow Hershel to be with Amy during her questioning, although it is unclear how important those facts are to its conclusion that the questioning led to testimonial evidence.[74]

Issues Unresolved by the Supreme Court

Crawford reversed a long-standing rule to bar the introduction into evidence of a substantial amount of evidence which was previously admissible.[75] The decision completely separates the application of the constitutional standard of the Confrontation Clause from the application of evidentiary rules as to hearsay; constitutional requirements of unavailability and opportunity for cross-examination apply to all testimonial evidence, while non-constitutional evidentiary rules govern the admissibility of all non-testimonial evidence.[76] Although *Davis* has provided some clarification for determining what are testimonial statements, numerous questions remain, which will need to be addressed in subsequent cases applying the standards of *Crawford* and *Davis*.[77] If decisions implementing the Confrontation Clause are contradictory or diverge from the Supreme Court's intention, the Court may again need to address questions about the meaning of the Confrontation Clause.

Among the unresolved questions are the following:

1) When, if ever, will statements of fact relevant to criminal charges made to government officials other than police be held to be testimonial?
2) When, if ever, will statements of facts relevant to criminal charges made to non-government persons be held to be testimonial?

3) When there are multiple reasons for engaging in questioning, how will courts determine the primary purpose of the interrogation?
4) In determining the primary purpose for the interrogation, should a court focus on the motivation for the speaker to give the statement, or upon the purpose for the questioner obtaining the information, or both?
5) Does the *Crawford* rule make an exception for dying declarations? Are there other exceptions that will be recognized to the rule?
6) Are statements made by injured persons, implicating others in criminal activity and made to medical personnel, to be viewed as admissible hearsay or as inadmissible testimonial statements?

It is possible that *Crawford* will have a disproportionate effect of barring admission of statements of alleged victims of domestic abuse and child abuse, crimes regarding which there is substantial reluctance of victims to testify.[78] It will be important to find out if prosecutors are significantly impeded in bringing such prosecutions as a result of not being able to admit into evidence statements made by the victims to police or medical personnel or others.[79] Such a result does not challenge the appropriateness of the Court's ruling in *Crawford* but it may suggest the need for devoting additional resources or developing alternative strategies which can assist in the prosecution of these crimes, consistent with the requirements of the Confrontation Clause.[80]

Crawford distinguished between solemn declarations made under police interrogations and casual statements made to acquaintances.[81] Because many statements of fact fall between those two categories, the language of *Crawford* is not particularly helpful in determining whether some of those statements should be classed as testimonial and thus subject to Confrontation Clause requirements.[82]

A great deal of investigation of matters which may lead to criminal prosecution is done by persons other than police. For example, school teachers and social workers frequently attempt to discover whether crimes have been committed, injuries have occurred, and whether danger of further harm continues to exist.[83] Doctors, nurses, and other hospital and medical office personnel routinely encounter injured persons and ask questions to ascertain facts that may be relevant to possible criminal charges.[84] Corporate security personnel, whose numbers exceed the numbers of sworn police officers in the United States, daily conduct numerous investigations of behavior which may well be criminal.[85] Supervisory officials and attorneys frequently investigate and often un-

cover evidence of wrongdoing which may violate criminal statutes. It is important to know when or whether statements they hear, record or put into writing are subject to the requirements of the Confrontation Clause when sought to be introduced in criminal proceedings.

In *Davis,* the Supreme Court declined to rule whether questioning by a 911 operator could be testimonial under the Sixth Amendment.[86] The Court stated that it need not answer the question once it determined that the statements at issue were not testimonial because they concerned an ongoing crime and constituted a cry for help.[87] Subsequent cases will likely consider the issues regarding hearsay declarations made to many non-police investigators. Courts may formulate absolute rules that certain types of interrogations do not yield statements subject to the Confrontation Clause, or the courts may follow the lead of the Supreme Court in *Davis* by declining to rule on the question while determining under all the circumstances whether the statements were testimonial.[88]

If the crucial distinction made in *Davis* is whether interrogation is about a continuing or completed crime, then a great deal of investigation and interrogation will likely lead to statements being declared testimonial.[89] However, the Court in *Davis* also referred to the formalities surrounding the taking of the statement in *Crawford* as being important in determining if the statement was testimonial.[90] On the other hand, the *Davis* opinion also found the situation regarding Amy Hammon to be "not much different" from that in *Crawford,* although the officers questioning Hammon did not employ most of the mechanisms which had created the formality found in *Crawford.*[91]

Furthermore, the *Davis* Court has required an objective determination whether the primary purpose of the questioning was to obtain a statement which could be used in a criminal prosecution.[92] When there clearly is more than one reason for conducting an interrogation, courts may have difficulty determining the primary purpose. Examples that illustrate this problem can be easily imagined in regard to questioning of a possible rape victim at a hospital or of a child showing signs of abuse in a school. Among the motives for the inquiries are learning of physical injuries and providing medical or other care, discovery of whether the alleged victim continues to be at risk of further harm, whether there are other persons immediately at risk of similar injury, and ascertainment of specific facts for use in criminal prosecutions and/or in employment decisions.[93]

Sexual assaults, whether of adults or children, and domestic violence cases are among the least prosecuted of serious crimes, in part because of the frequent unwillingness of alleged victims to testify against those who may have battered, assaulted or abused them.[94] In recent years, there has been a trend to prosecute such cases more frequently without the testimony of the victim, particularly in instances in which the victim has named the perpetrator to police or other persons questioning the victim at the time of the alleged offense or shortly thereafter.[95] The bringing of charges in both cases involved in *Davis* is indicative of this trend. Although police testimony established that Michelle McCottry had been injured recently, the only proof that Davis was the perpetrator of the harm came from the testimony of the 911 operator relating what McCottry said.[96] Similarly, only Amy Hammon's statement to police provided evidence that Hershel had pushed her face into broken glass on the floor of their living room.[97] Neither McCottry nor Hammon testified at the trials.[98] Although the Supreme Court found the evidence admissible in McCottry's case, the suppression of the evidence in Hammon's case is likely to be a more common result because most statements will be obtained, as in *Hammon*, after the crime has been completed, rather than in the course of the ongoing crime, as in *Davis*.[99]

Various briefs urged the Court to find that the statements were properly admitted in both cases, on a variety of rationales, and warned the Court that any contrary ruling would have a deleterious effect on the prosecution of domestic violence and child abuse cases, which so often have victims who are unwilling or unable to testify at trial.[100] Rejecting the pleas of *amici curiae*, to declare admissible all statements made to 911 operators or to police making initial investigations of crime, the Court instead set out the tests and insisted on a totality of the circumstances analysis.[101] It will be important for researchers to try to discover whether the new rules of Confrontation Clause jurisprudence adversely affect the ability of prosecutors to prove such cases.[102] If such a result is shown to occur, which is not a certainty, it may be appropriate to devote additional resources to developing evidence and to encouraging alleged victims of such trials to cooperate more often in their prosecution.

It is likely that criminal cases involving evidence of dying declarations against a defendant will bring defense challenges to the admissibility of such statements, so that issue left open by *Crawford* can be addressed.[103] Although the Court *suggested* that such statements might be admitted for historical and precedential reasons and that no other exception should be allowed, that language is *dicta*

and thus not binding on courts.[104] If dying declarations are admitted because of their presumed reliability despite not being subjected to cross-examination, perhaps other exceptions to *Crawford*'s rule will be allowed based on similar showings of reliability and precedent.

Throughout his tenure on the Supreme Court, Justice Scalia has been a champion of enforcing the literal meaning of the Confrontation Clause, rejecting arguments that other reliable procedures are adequate in the absence of cross-examination and face-to-face confrontation.[105] In *Crawford* and *Davis,* Scalia has appeared able to lead the Court to support his position, although it represents an abandonment of settled precedent and could have a significant effect of the prosecution of some cases. Certainly, the Court in *Davis* has provided a fuller definition of "testimonial" than *Crawford* did, but the new standard is still unclear, and there are many important questions about the scope of the *Crawford* rule which remain to be decided by subsequent cases.

NOTES

1 Davis v. Washington, ___U.S. ___, 126 S. Ct. 2266 (2006); Crawford v. Washington, 541 U.S. 36 (2004).

2 The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Sixth Amendment requirements have been held to apply both in federal and in state prosecutions. *Pointer v. Texas,* 380 U.S. 400, 406 (1965).

3 *See* Brief for National District Attorneys Association as Amicus Curiae Supporting Respondents at 2, Davis v. Washington, 126 S. Ct. 2266 (2006) (No. 05-5224, 05-5705) (arguing great harm to domestic violence prosecutions).

4 U.S. CONST. amend. VI.

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

6 541 U.S. 36 (2004).

7 *Id.* at 38.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at 38–39.

13 *Id.* at 40; *see also* Wash. Rev. Code § 5.60.060(1)(1994).

14 *Id.* at 40–41; The *Roberts* test allows a jury to hear evidence based solely on a judicial determination of reliability, bypassing the adversary process. *Id.*

15 *Id.* at 43–50.

16 *Id.* at 43.

17 *Id.* at 44.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 44–45; 13 Car. 2, c. 1, sec. 5 (1661).

23 *Crawford*, 541 U.S. at 45; King v. Paine, 5 Mod 163, 87 Eng. Rep. 584 (1696).

24 *Crawford*, 541 U.S. at 50.

25 *Id.* at 50.

26 *Id.*; 1 N. Webster, An American Dictionary of the English Language (1828).

27 *Id.* at 53–54.

28 *Id.* at 56.

29 According to the *Crawford* decision, the first two of these exceptions involve evidence which is clearly non-testimonial. *Id.*. The decision recognizes clear precedent for allowing into evidence dying declarations even though some of them are clearly testimonial. *Id.* at 56 n.6. Citing various cases involving dying declarations, the Court left the appropriateness of these rulings, in light of *Crawford*, to further cases: "We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*. *Id.*

Another question also not decided by *Crawford* was whether a statement made by a child victim of crime to an investigating police officer could be admitted into evidence as a spontaneous utterance when the child did not testify at trial, as occurred in *White v. Illinois*, 502 U.S. 346 (1992). *Id.* at 58 n.8. Justice Scalia's opinion recognized that *White* was in tension with the rule announced in *Crawford*, but viewed the former decision as dealing only with the unavailability requirement for admitting testimony, rather than with the question of whether the statement was testimonial and had to be barred because it had not been subjected to cross-examination. *Id.* The *Crawford* Court indicated that its holding "cast doubt" on the continued validity of *White*, but declined to rule on whether that decision was still a correct statement of the law because it was not necessary to do so in order to rule on the facts presented in the *Crawford* case. *Id.* at 60.

30 *Id.* at 61.

31 *Id.* at 61–62.

32 *Id.* at 68.

33 *Id.* at 67–68.

34 *Id.* at 68. The *Davis* Court indicated that *Crawford* had not clearly decided this point and proceeded to make it explicit by indicating that admission of "[non-testimonial hearsay evidence] while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause. Davis v. Washington, 126 S. Ct. 2266, 2274 (2006).

35 *Crawford*, 541 U.S. at 68.
36 *Id.* at 68–69.
37 *Id.* at 68.
38 *Id.* at 68–69.
39 *Id.* at 68.
40 *Id.* at 68–69.
41 *Id.* at 53 n4.
42 *Id.* at 68.
43 Grand jury proceedings are secret. The target of an investigation often does not know he is being investigated. He receives no notice of grand jury activities, does not know the identity of witnesses, and is not present during the proceedings. WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, 3 CRIMINAL PROCEDURE § 8.3(f) (2d ed. 1999).
44 *See id.* at 68–69.
45 Davis v. Washington, 126 S. Ct. 2266 (2006).
46 The *Davis* decision addressed not only the facts of that case but also those of another case, Hammon v. Indiana, 05-5705. Both the cases had been argued before the Court on the same day, March 20, 2006.
47 *Davis*, 126 S. Ct. at 2271.
48 *Id.*
49 *Id.*
50 *Id.* at 2272.
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.* at 2272–73.
56 *Id.* at 2272.
57 *Id.*
58 *Id.* at 2271, 2273.
59 *Id.* at 2271; *see also* Davis v. Washington, 111 P.3d 844 (2005), cert. granted, 546 U.S.___, 126 S.Ct. 547 (2005); Hammon v. Indiana, 829 N.E.2d 444 (2005), *cert. granted*, 546 U.S.___, 126 S.Ct. 552 (2005).
60 *Davis*, 126 S. Ct. at 2280.
61 The Court was unanimous in deciding the *Davis* case. Justice Thomas was the sole dissenter from the result in *Hammon*. *Id.* at 2280.
62 *Id.* at 2273–74.
63 *Id.* at 2274 (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)).
64 *Davis*, 126 S. Ct. at 2277–78.
65 *Id.* at 2276–77.
66 *Id.* Although the elements of formality in the *Crawford* questioning contributed to the determination that the statements were testimonial, the formality is not necessary for a finding that a statement is testimonial, as is evident in the *Davis* Court's determination that the statement made by Amy Hammon was testimonial evidence even though it was obtained in a more casual setting. *Id.* at 2278. The *Crawford* statement occurred when the police knew that a man had been stabbed and was preceded by police giving the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), was tape-recorded, and was made at a police station. *Davis*, 126 S. Ct. at 2278 (quoting Crawford v. Washington, 541 U.S. 36, 53 n.4). None of these factors was present in *Hammon*, in which the police did not know if any crime had occurred, were not aware of any injury suffered, and obtained a statement from the occupant of the front

porch of the Hammon home without giving any warnings or transporting the people to the police station. *Davis*, 126 S. Ct. at 2278.

67 *Davis*, 126 S.Ct. at 2274 n.2:

> If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial."

Id.

68 *Id.* at 2277.

69 *Id.* at 2277–78

70 *Id.* at 2278.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 2278. Further, the Court rejected Indiana's argument that all responses to initial inquiries by police at a possible crime scene should be treated as nontestimonial. *Id.* at 2274. This is consistent with its *dicta* in *Davis* that rejected Washington's claim that all responses to 911 questioning should be ruled to be non-testimonial. *Id.* at 2278. In either instance, statements may be testimonial or non-testimonial depending on an objective view of the surrounding circumstances, an assessment of the primary purpose for making the statement, and whether a crime is still in progress or danger still is present. *Id.* at 2277–78. Even when a statement is initially non-testimonial, it may later become testimonial. *Id.*

The Court makes clear it is not criticizing the actions of the police. *Id.* at 2279 n.6. The issue for the Court is not whether the police committed any improper actions, which the Court does not suggest occurred in either of these two cases, but rather whether a statement obtained by the police should be barred from introduction into evidence because it was testimonial and was not subjected to cross-examination by the defendant. *Id.* at 2279 n.6.

75 Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

76 *Davis*, 126 S. Ct. at 2273.

77 *Id.* at 2273–74 (2006).

78 Brief for National Association of Counsel for Children as Amicus Curiae Supporting Respondents at 2, Davis v. Washington, 126 S. Ct. 2266 (2006) (No. 05-5224, 05-5705).

79 *See* Brief for National Network to End Domestic Violence, Indiana and Washington Coalitions Against Domestic Violence, Legal Momentum, et al. as Amici Curiae Supporting Respondents at 2, Davis v. Washington, 126 S. Ct. 2266 (2006) (No 05-5224, 05-5705) (stating that the uncertainty created by *Crawford* has "led many prosecutors to drop domestic violence charges or seek to compel victims of abuse to testify under extreme duress.").

80 *See* Brief for National District Attorneys Association as Amicus Curiae Supporting Respondents at 28, Davis v. Washington, 126 S. Ct. 2266 (2006) (No. 05-5224, 05-5705) (arguing that a 911 call or an excited remark at the scene of a crime is not testimony whether made by a police officer or anyone else); *see also* Brief for National Network to End Domestic Violence, Indiana and Washington Coalitions Against Domestic Violence, Legal Momentum, et al. as Amici Curiae Supporting Respondents at 9–15, Davis v. Washington, 126 S. Ct. 2266 (2006) (No 05-5224, 05-5705) (arguing that domestic violence crimes create a unique dynamic that "compromises the truth-gathering function of the prosecutor and requires the use of alternative reliable evidence.").

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

82 *See* Davis v. Washington, 126 S. Ct. 2266, 2273 (2006) (explaining that *Crawford* set out "various formulations" of testimonial statements but did not endorse any of them.).

83 Every state has a mandatory child abuse reporting statute, requiring certain professionals learning of suspected child abuse to report it to police and/or designated public agencies. Mitch Maio, *When Two Rights Make a Wrong: How Utah's Mandatory Reporting and Rape Crisis Counselor Confidentiality Statutes Combine to Hurt Mature Minors*, 8 J. L. & FAM. STUD. 265,267 (2006).

84 One description of a medical protocol for nurses in rape cases indicates five essential purposes of the nurse's action:

> "1) treatment and documentation of injuries;
> 2) treatment and evaluation of sexually transmitted diseases;
> 3) pregnancy risk evaluation and prevention;
> 4) crisis intervention and arrangements for follow-up counseling and;
> 5) collection of medicolegal evidence while maintaining the proper chain of evidence."

Patricia A. Furcia, *The Sexual Assault Nurse Examiner: Should the Scope of the Physician-Patient Privilege Extend that Far?*, 5 QUINNIPIAC HEALTH L. J. 229, 236 (2006).

85 Heidi Boghasian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 177–78 (2005).

> The security industry . . . outnumbers public police by three to one in the United States . . . . They can stop, detain, and search individuals . . . and can sometimes turn over evidence obtained to local law enforcement. In some private sector jobs, security officers may even arrest suspects and file criminal charges in court. Such cooperation between private security personnel and public police is becoming routine in the United States.

Id.

86 Davis v. Washington, 126 S. Ct. 2266, 2274 (2006)

87 *Id.* at 2276–77.

88 *See id.*

89 The *Davis* Court contrasts the facts in *Davis* where McCottry was speaking about events as they were actually happening, with the facts in Crawford, where the interrogation "took place hours after the events she described had occurred." *Id.* at 2276. Davis was confronting an emergency and seeking help rather than giving testimony. *Id.* Most police and other investigators learn facts as to completed rather than ongoing crimes. If this is a critical factor in determining whether a statement is testimonial, it usually will provide support for declaring statements about crimes to be testimonial.

90 *Id.* at 2275–76.

91 *Id.* at 2278.

92 *Id.* at 2273–74.

93 *See e.g.* Mitch Maio, *When Two Rights Make a Wrong: How Utah's Mandatory Reporting and Rape Crisis Counselor Confidentiality Statutes Combine to Hurt Mature Minors*, 8 J. L. & FAM. STUD. 265,267 (2006) (explaining that every state has a mandatory child abuse reporting statute requiring certain professionals learning of suspected child abuse to report it to police and/or designated public agencies).

94 *See e.g.*, Brief for National Network to End Domestic Violence, Indiana and Washington Coalitions Against Domestic Violence, Legal Momentum, et al. as Amici Curiae Supporting Respondents at 2, Davis v. Washington, 126 S. Ct. 2266 (2006) (No 05-5224, 05-5705) (explaining judicial reluctance to prosecute domestic violence crimes).

95 *See id.* at 14–15 (contending that evidence based prosecution is often the only effective means hold batterers criminally liable).
96 Davis v. Washington, 126 S. Ct. 2266, 2271 (2006).
97 *Id.* at 2272.
98 *Id.* at 2271–72.
99 *See Id.* at 2277 (finding McCottry's early statements identifying Davis not testimonial).
100 Brief for National District Attorneys Association as Amicus Curiae Supporting Respondents at 2, Davis v. Washington, 126 S. Ct. 2266 (2006) (No. 05-5224, 05-5705) ("great harm would be done in domestic violence prosecutions, in which victims frequently will not appear in court. . . Elderly victims, children, and the socially powerless frequently are unable or unwilling to appear in court.").; *see also* Brief for National Association of Counsel for Children as Amicus Curiae Supporting Respondents, Davis v. Washington, 126 S. Ct. 2266 (2006) (No. 05-5224, 05-5705) and Brief for National Network to End Domestic Violence, Indiana and Washington Coalitions Against Domestic Violence, Legal Momentum, et al. as Amici Curiae Supporting Respondents, Davis v. Washington, 126 S. Ct. 2266 (2006) (No 05-5224, 05-5705).
101 *See generally,* Davis v. Washington, 126 S. Ct. 2266 (2006).
102 *See* Brief for National District Attorneys Association as Amicus Curiae Supporting Respondents at 2, Davis v. Washington, 126 S. Ct. 2266 (2006) (No. 05-5224, 05-5705) (arguing that "a decision for petitioners would have an enormous and negative impact on the ability of prosecutors to do their jobs.").
103 *See* Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004) ("We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations.").
104 *See id.* ("If this exception must be accepted on historical grounds, it is *sui generis.*").
105 *See e.g. .,* Maryland v. Craig, 497 U.S. 836 (1990) (Scalia, J., dissenting). In *Craig,* the Court, in a 5-4 decision, upheld a Maryland law allowing the testimony of a child alleged to be a victim of sexual abuse to testify outside the presence of the defendant, who watched the testimony on closed circuit television and was able to communicate with his attorney, who was in the room with the child, the judge, and the prosecutor. *Id.* at 860. According to Scalia's dissent, "For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. . . . We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, . . ." *Id.* at 870.