HEARSAY AFTER CRAWFORD: 
A PRACTITIONER’S GUIDE

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I. INTRODUCTION

The Sixth Amendment to the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

Although it may appear simple, concise and direct, the language of the Sixth Amendment has been the subject of much discussion. The Confrontation Clause has been inevitably comingled with the hearsay rules, and determining when an out-of-court statement violates the rights of criminal defendants has been no easy task. For many years, it was uncontested, as established in Ohio v. Roberts, that to avoid violating a criminal defendant’s Sixth Amendment rights, the Confrontation Clause required a prosecutor who sought to introduce hearsay evidence to establish that the hearsay declarant was unavailable and that the out-of-court statement bore “adequate indicia of reliability.” Showing the statement fell under one of numerous hearsay exceptions or bore particularized

1. A special thank you to Rocio Blanco Garcia, a third-year law student at Florida International University College of Law. Ms. Garcia’s assistance was invaluable in researching and drafting this article.
2. U.S. CONST. amend. VI.
4. See id. at 1013 (noting the Confrontation Clause has traditionally conformed to an analysis of the ordinary law of hearsay).
guarantees of trustworthiness established the necessary level of reliability. However, in 2004, the Supreme Court departed from the rule in Roberts. In Crawford v. Washington, the Supreme Court held that compliance with the Sixth Amendment’s Confrontation Clause requires more than an “adequate indicia of reliability.”

Pursuant to Crawford, out-of-court statements that are testimonial are barred by the Confrontation Clause, unless the declarants are unavailable and the defendant had the prior opportunity to cross-examine the witnesses. Contrary to Roberts, whether a court deems such statements reliable is irrelevant. Despite this direct ruling, the Crawford holding failed to provide a clear answer to the correlation between out-of-court statements and the rights of criminal defendants. Uncertainty has reigned in courts’ interpretation of the meaning of “testimonial.” A study of the post-Crawford jurisprudence is therefore a must for the practitioner to be able to understand the current connection between hearsay and the Confrontation Clause. This article will focus on the meaning the courts have given to the word “testimonial,” which has proven to be a complex and determinative factor when operating under the Confrontation Clause. It will also attempt to create a guide for practitioners with the ambitious goal of facilitating the sometimes-arduous task of determining whether a particular piece of evidence is likely to be deemed testimonial and, consequentially, subject to the Confrontation Clause.

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7. See id.
8. See Crawford, 541 U.S. at 75.
9. See id. at 68–69 (holding that confrontation is the “only indicium of reliability sufficient to satisfy constitutional demands”).
10. See id. at 54 (describing how the Sixth Amendment incorporates the limits of common law which “conditioned [the] admissibility” of an absent witness’ testimony on unavailability and a prior opportunity to cross-examine).
11. See id. at 68–69. Though Roberts required a showing of indicia of reliability, the Court declined to “mine the record for such a showing.” Id. at 68. Instead, the Court held: “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” Id. at 68–69.
12. See id. at 68 (acknowledging that the Court’s “refusal to articulate a comprehensive definition in this case will cause interim uncertainty,” but that the Roberts test is inherently and permanently unpredictable).
13. See Commonwealth v. Gonsalves, 833 N.E.2d 549, 562 (Mass. 2005) (Sosman, J., concurring) (acknowledging that the exercise of determining when a statement is testimonial is fraught with uncertainty).
II. CRAWFORD AND ITS LEGACY

A. THE SUPREME COURT'S VIEW OF THE CONFRONTATION CLAUSE

In 2004, and after more than twenty years of established Confrontation Clause jurisprudence, the Supreme Court revisited the Sixth Amendment in Crawford v. Washington. In that case, the State charged the defendant with assault and attempted murder. Because the marital privilege prohibited the wife's in-court testimony, the prosecution, as part of its case in chief, introduced into evidence a recorded statement the defendant's wife gave to police after the incident and which cast doubt on her husband's claim of self defense. The defendant was convicted, and he appealed.

The Court found the introduction of the wife's out-of-court statement violated the Confrontation Clause and held:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

In reaching this decision, the Court departed from Roberts and noted that the "adequate indicia of reliability" principle that for many years guided the courts' decisions is no longer good law. Departing from Roberts also meant that a dividing line between hearsay and the Sixth Amendment's Confrontation Clause was now in place. Roberts employed a reliability analysis specifically focused on whether the

14. 541 U.S. at 42 (granting certiorari to determine whether the State's use of an out-of-court statement violated the Sixth Amendment's Confrontation Clause).
15. Id. at 40.
16. Id.
17. Id. at 41.
18. Id. at 68 (emphasis added).
evidence fell under one of the exceptions to the hearsay rule. To the contrary, *Crawford* separated the constitutional standard from the hearsay rule, requiring that any out-of-court testimonial statement offered by the prosecution be subjected to cross-examination.

Therefore, in criminal cases, to determine whether the admissibility of a statement will proceed under the hearsay rules or the Confrontation Clause, a prosecutor must solve the threshold issue of whether a particular out-of-court statement is testimonial. If so, cross-examination becomes a must, and unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant, the statement is inadmissible. Unlike in *Roberts*, whether the statement is reliable or not—that is, whether the statement falls under one of the hearsay exceptions—is irrelevant. Although the *Crawford* Court did not expressly adopt a definition of "testimonial," it shed light on the issue, describing testimonial statements as "solemn declarations or affirmations made for the purpose of establishing or proving some fact." The Court gave several examples, including (1) ex-parte in court testimony or materials such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions; (3) statements that were made under circumstances which would lead an objective witness reasonably to

21. See Ohio v. Roberts, 448 U.S. 56, 73 (1980) (holding the out-of-court statement, which consisted of a witness's prior testimony at a preliminary hearing, bore sufficient "indicia of reliability" because "there was an adequate opportunity to cross-examine [the witness], and counsel . . . availed himself of that opportunity . . . ." (quoting Mancusi v. Stubbs, 408 U.S. 204, 216 (1972))). The *Roberts* Court justified its "indicia of reliability" analysis on the basis that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Id.* at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).

22. See *Crawford*, 541 U.S. at 61 (holding that, where testimonial statements are involved, the Confrontation Clause requires that evidence be subjected to the "crucible of cross-examination"). Justice Scalia, writing for the majority, noted it was not the intention of the Framers "[t]o leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.; see also* Amanda L. Stinson, *Comment, Giving Victims a Voice: The Doctrine of Forfeiture by Wrongdoing as a Remedy to the Silencing Effect of Crawford*, 32 HAMLIN L. REV. 265, 274 (2009) ("[C]rawford . . . almost completely separated the constitutional standard from the hearsay rule . . . .").

23. See *Crawford*, 541 U.S. at 51–52 (explaining the various forms of evidence that constitute "testimony").

24. See *id.* at 68.

25. *Id.* at 68–69.

26. *Id.* at 51.
believe that the statement would be available for use at a later trial; and (4) statements taken by police officers in the course of interrogations.  

In the consolidated cases of Davis v. Washington and Hammon v. Indiana, the Court further explained what a testimonial statement entails. More specifically, the Court had to determine the circumstances under which statements made to law enforcement personnel are testimonial. In so doing, the Court established a primary-purpose test.  

In Davis, the state charged the defendant with a felony violation of a domestic no-contact order. During trial, the prosecution sought to introduce a series of statements the defendant’s wife made during the course of a 911 call that took place as the defendant was allegedly attacking her. These statements not only identified the defendant as the victim’s assailant but also described the way in which he was attacking her. To the contrary, in Hammon, the statements the prosecutor sought to introduce were not made during the course of a 911 call but rather during a police interrogation that took place after the incident was over, but while the victim was still “somewhat frightened.”  

In determining whether the statements in Hammon and Davis were testimonial and, thus, in violation of the defendants’ Sixth Amendment rights, the court focused on the precise moment the call took place. The Court, carefully noting its holding applies only to interrogations, found that “[s]tatements are nontestimonial when made in the course of police interrogations under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an  

27. Id. at 51–52. Although these examples can help practitioners and courts determine when a particular statement is testimonial, the Court’s decision to refrain from providing a comprehensive definition of the kind of statements that are testimonial in nature has been the cause of much confusion. See Morgan M. Long, Commonwealth v. Gonsalves: Erroneously Expanding the Concept of Police Interrogation Set Forth in Crawford v. Washington to Include Investigatory Police Interrogations, 33 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 171, 173 (2007) (“The decision by the Supreme Court in Crawford to abstain from defining the key concept of . . . ‘testimonial’ led to confusion on the part of the courts as to how to apply this holding.”).  
29. Id.  
30. Id. at 822.  
31. Id. at 818.  
32. Id. at 817–18.  
33. See id.  
34. Davis, 547 U.S. at 819–20.  
35. Id. at 819.  
36. See id. at 822.  
37. Id. at 822 n.1.
ongoing emergency."38 Therefore, because in *Davis* the victim made the statements as the battery was ongoing, the Court found those statements were nontestimonial and thus admissible against the defendant.39 The Court, however, found the statements in *Hammon* were testimonial.40 It reasoned:

It is entirely clear from the circumstances that the interrogation [in *Hammon*] was part of an investigation into possibly criminal past conduct . . . . There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. [T]here was no immediate threat to her person. When the officer questioned [the victim] for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) “what is happening,” but rather “what happened.” 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.41

In reaching a decision, the Court additionally noted how a conversation that begins as an interrogation to determine the need for emergency assistance may evolve into a testimonial statement, once the emergency-solving purpose has been achieved.42

Recently, in *Melendez-Diaz v. Massachusetts*, the Supreme Court visited, once again, the Confrontation Clause.43 The defendant in *Melendez-Diaz* was charged with distribution and trafficking of cocaine.44 The prosecution introduced into evidence certificates reporting the results of forensic analysis showing the material police seized, and connected to the defendant, was cocaine.45 The Court found the analysts were witnesses for the purposes of the Sixth Amendment and the certificates were the equivalent of affidavits within the category of extrajudicial statements the Court identified as testimonial in *Crawford*.46 The Court reasoned the certificates were affidavits because they were “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.”47 They were, in the words of the Court, “functionally

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38. *Id.* at 822 (emphasis added).
39. *Id.* at 828–29.
40. *See Davis*, 547 U.S. at 830.
41. *Id.* at 829–30 (first emphasis added).
42. *Id.* at 828.
43. 129 S. Ct. 2527, 2531 (2009).
44. *Id.* at 2530.
45. *Id.*
46. *Id.* at 2532.
47. *Id.*
identical to live, in-court testimony. . .” The Court further noted that under Crawford the affidavits were “made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial.” Therefore, “[a]bsent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled ‘to be confronted with’ the analysts,” who were, in effect, testifying against him.

B. THE SUPREME COURT HOLDINGS AS INTERPRETED BY LOWER COURTS

The Supreme Court is not the only tribunal that has faced the challenging task of determining when a particular out-of-court statement is testimonial. Indeed, courts all around the country have confronted this issue, and their decisions, no doubt, provide further insight into the relationship between hearsay and the Confrontation Clause.

The Ohio Supreme Court’s decision in Ohio v. Stahl is an example of how state courts have interpreted Crawford’s holding. In Stahl, the court had to determine whether a rape victim’s statements made to a hospital nurse were testimonial. Before receiving medical treatment, the victim, whose boyfriend’s boss had allegedly raped her, signed a consent form authorizing the examination and agreeing to the release of any evidence that may help prosecute the case. A nurse also asked her numerous questions and documented the victim’s answers in a report, which the prosecution later sought to introduce as evidence at trial. Because the victim died before the beginning of trial, she was unavailable to testify. In determining whether the victim’s statements to the nurse were testimonial and, thus, inadmissible against the defendant, the Ohio

48. Id.
50. See id. (quoting Crawford, 541 U.S. at 54).
51. See, e.g., Ohio v. Stahl, 855 N.E.2d 834, 841–44 (Ohio 2006) (determining whether a rape victim’s statements to a nurse were testimonial).
52. See, e.g., id.
53. See id. at 844; Andrew Etter, Embracing Crawford: The Rights of Defendants and Children Under the Confrontation Clause, 77 U. CIN. L. REV. 1167, 1181 (2009) (“Stahl signifies the Ohio Supreme Court’s first attempt to define a defendant’s Confrontation Clause rights after Crawford and provides necessary background to the Court’s subsequent efforts.”).
54. Stahl, 855 N.E.2d at 838.
55. Id. at 836.
56. Id. at 837.
57. Id. at 838.
58. Id.
Supreme Court applied *Crawford*’s objective-witness test.⁵⁹ The Court noted that in making this determination, “[c]ourts should focus on the expectation of the declarant at the time of making the statement; [and] the intent of a questioner is relevant only if it could affect a reasonable declarant’s expectations.”⁶⁰ The court reasoned the victim’s statements were not testimonial because a reasonable person being questioned by a nurse or other medical professional during the course of an emergency-room examination would expect her statements to be used for a health-care-related function and not as prosecutorial evidence at a later trial.⁶¹

The court also differentiated the victim’s statements from those the prosecution sought to introduce in *Crawford*:

In sharp contrast with the prosecution in *Crawford*, the state in the instant case seeks to introduce a statement made by a victim to a medical professional during an emergency-room examination identifying a person who allegedly raped her. Though made in the presence of a police officer, the identification elicited during the medical examination came to a medical professional in the ordinary course of conducting a medical examination, and no *Miranda* warnings preceded its delivery. Unlike *Crawford*, this case does not involve police interrogation. The court in *Crawford* concluded that the term “testimonial statement” applies “at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” [The victim’s] statements to [the nurse] do not fall within any of these specific examples, and we decline to expand that list to include statements made to a medical professional for purposes of receiving medical treatment or diagnosis.⁶²

Indeed, finding that a particular statement lacked formality was the core of the court’s decision in *United States v. Lee*.⁶³ In that case, the State charged the defendant with a violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, and with the commission of three murders in furtherance of racketeering.⁶⁴ As part of its case, the prosecution introduced into evidence a statement a co-defendant made to his mother, which implicated the defendant in multiple murders.⁶⁵ In determining whether the co-defendant’s statements were testimonial

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⁵⁹. *Id.* at 844.
⁶¹. *Id.* at 846.
⁶². *Id.* at 839–40 (citation omitted).
⁶³. 374 F.3d 637, 645 (8th Cir. 2004) (noting the statements in question were more like casual remarks to an acquaintance than formal testimonial statements made to law enforcement and finding the statements were not testimonial and, therefore, not barred under *Crawford*).
⁶⁴. *Id.* at 642.
⁶⁵. *Id.*
evidence within the meaning of Crawford, the Eighth Circuit Court of Appeals focused on the level of formality surrounding the co-defendant’s confession. The court found: “[t]he circumstances surrounding them do not raise the same confrontation concerns as the introduction of witness statements previously made in court proceedings or during police interrogations.” The court further noted that the co-defendant’s confession to his mother took place over a year before his mother had any contact with the police. In the words of the Eighth Circuit, the co-defendant’s statements “were more like casual remarks to an acquaintance than formal testimonial statements made to law enforcement.”

The Indiana Court of Appeals’ decision in Ramirez v. Indiana further illustrates the importance of formality. In Ramirez, an officer, while on patrol, stopped the driver of a vehicle after he noticed that the vehicle was weaving in and out of its lane and almost hit a curb. After concluding that the driver seemed intoxicated, the officer conducted a routine chemical breath test. The test confirmed the officer’s suspicions, and the State charged the driver with a series of misdemeanors. At trial, the prosecution introduced, over the defendant’s objection, a certificate indicating that the machine used to test the defendant’s alcohol-blood levels had been examined two months prior and was in good working condition, thereby enhancing the machine’s reliability. The defendant was convicted, and he appealed. Even though this case, like Melendez-Diaz, required the court to determine whether a particular set of certificates

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66. See id. at 645.
67. Id.
68. Id.
69. Lee, 374 F.3d at 645; see also State v. Rivera, 844 A.2d 191, 202 (Conn. 2004) (holding that a statement made in confidence to a close family member was not testimonial).
70. 928 N.E.2d 214, 220 (Ind. Ct. App. 2010) (noting the document was not a sworn statement or other formalized testimonial document and holding the trial court did not err in admitting the certificate in question).
71. Id. at 215.
72. Id.
73. Id.
74. See id. at 216. The court noted that the official who examined the machine and completed the inspection certificate was not present. Id. Ramirez’s arguments against the introduction into evidence of both the inspection certificate and the test results were as follows: He argued that he was unable to cross-examine the person who prepared the certificate, so introduction of the document violated his Sixth Amendment confrontation rights. He further argued that since the certificate was a foundational requirement for the breath test results, his inability to cross-examine the certifier precluded admission of the DataMaster printout.
75. See id. (“Ramirez argues that the DataMaster inspection certificate and breath test results were admitted in violation of his Sixth Amendment right to confrontation.”).
were testimonial, the two cases may seem, at first glance, irreconcilable.\footnote{76} The difference in the level of formality involved in the certificates in Ramirez, however, serves to justify the court’s finding that the certificates were nontestimonial.\footnote{77} Unlike the certificates in Melendez-Diaz, which were sworn, the certificates in Ramirez, the court noted, were not “formalized testimonial materials like sworn affidavits.”\footnote{78} Moreover, while the certificates in Ramirez “contemplate[d] use in criminal trials, they [were] completed in advance of any specific alleged drunk-driving incident and breath test administration and [were] not created for the prosecution of any particular defendant.”\footnote{79}

While the aforementioned decisions illustrate the workings of Crawford’s objective-witness test, Ohio v. Siler is an example of how lower courts have interpreted the Supreme Court’s decision in Davis.\footnote{80} In

\footnote{76. Compare Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009) (holding the certificates in question were affidavits, therefore, constituting formalized testimonial material entitling petitioner to be confronted with the analysts at trial), with Ramirez, 928 N.E.2d at 220 (holding the inspection certificates were not testimonial, thus properly admissible into evidence without the need for live testimony).}

\footnote{77. See Ramirez, 928 N.E.2d at 218–19 (analyzing Melendez-Diaz and prior decisions, reaffirming why “certificates verifying routine inspection of breath test instruments are nontestimonial”). In holding that the level of formality rendered the certificates nontestimonial, the court noted:}

The certificate was prepared following routine inspection and was completed over two months before Ramirez’s arrest and breath test administration. To be sure, the document was created for use in criminal investigations and judicial proceedings - even reflecting that it could be “duplicated as needed for use in Court” - but it was not prepared for a particular prosecution of any one defendant. Nor was it a sworn affidavit or other formalized testimonial document. In line with the foregoing, we find the certificate was nontestimonial under Crawford and Melendez-Diaz, and the admission of the certificate without live testimony from the certifier did not run afoul of Ramirez’s Sixth Amendment rights.

\footnote{78. Id. at 220. The court held: “Nor was it a sworn affidavit or other formalized testimonial document.” Id. at 220. In Melendez-Diaz, on the other hand, the certificates of analysis were sworn to by state laboratory analysts before a notary public. See id. at 218.}

\footnote{79. Id. at 219. The court held “the document was created for use in criminal investigations and judicial proceedings ... but it was not prepared for a particular prosecution of any one defendant.” Id. at 220.}

\footnote{80. See Ohio v. Siler, 876 N.E.2d 534, 541 (Ohio 2007) (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)). The Ohio Supreme Court noted:}

[T]o determine whether a child declarant’s statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test: “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.”

\footnote{Id. Applying the Davis primary-purpose test, the court found that statements made by the}
Siler, the State charged the defendant with the commission of multiple felonies, including the murder of his own wife. At trial, the prosecution sought to introduce the statements the victim’s child gave to police the morning after the murder, when the three-year-old mentioned that “mommy” and “daddy” were fighting and described how “daddy” hurt “mommy.” Faced with the task of determining whether the child’s statements to police were testimonial, the Ohio Supreme Court noted: “since Davis, courts have consistently applied the primary-purpose test to statements that a child declarant made to police or those determined to be police agents, and we are aware of no courts that continue to apply the objective-witness test in such cases.” Applying that precise test, the court found the police interrogation that took place in Siler was factually similar to that in Hammon and noted the child’s statements were testimonial because there was no emergency in progress. Therefore, the court concluded, the primary purpose of the interrogation was to investigate a possible crime rather than to respond to an ongoing emergency.

Although Davis established a seemingly-clear rule for determining whether a declarant’s statements during the course of a police interrogation are testimonial, cases such as State v. Alvarez demonstrate that applying Davis’ primary-purpose test is more complicated than it may have been originally expected. In State v. Alvarez, a police officer, while on patrol, came upon the victim of an assault whose face and hair were covered with blood. The officer immediately requested medical assistance, as the injured man collapsed on the back of the officer’s car. After requesting assistance, the policeman asked the injured man, who was going in and out

defendant’s child to police were testimonial because “the circumstances objectively indicate that no ongoing emergency existed and that the primary purpose of the police interrogation was to establish past events potentially relevant to a later criminal prosecution.” Id. at 536.

81. Id. at 536–37.
82. See id. at 537 (noting the conversation between the child and police). Over Siler’s objections, the trial court admitted the testimony as excited utterances pursuant to Federal Rule of Evidence 803. See id.
83. Id. at 540.
84. Id. at 544–45 (citing Davis, 547 U.S. at 830).
85. Id. at 545.
86. See Davis, 547 U.S. at 821 (“[Statements] 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.”); see also State v. Alvarez, 143 P.3d 668, 673 (Ariz. Ct. App. 2006) (citation omitted) (“Without question, an investigating officer’s asking a victim at the scene ‘what happened’ might often lead to testimonial answers . . . .”).
87. Alvarez, 143 P.3d at 669.
88. Id.
of consciousness, what his name was and what had happened to him.99 The victim died two days later.90 As such, the victim was unavailable at trial, so the prosecution called the police officer as a witness.91 The officer testified that the victim had told him "three men had 'jumped him' and had taken his 1995 white Suzuki."92 The officer further noted the victim was in pain, going in and out of consciousness, and was "talking real low."93

In determining whether these statements were testimonial evidence, the Arizona Court of Appeals, using the Davis primary-purpose test, focused on whether the victim made his statements during the course of an ongoing emergency.94 The defendant repeatedly argued that the officer, who had already secured medical assistance, did not ask the victim what had happened for the purpose of resolving a medical emergency.95 The court disagreed and noted that "[a]lthough the criminal activity that resulted in [the victim's] injuries and the ensuing charges against Alvarez had ended, the emergency that those events set in motion was very much ongoing."96

With these words, the Alvarez court seems to expand the original notion of the primary purpose test, as enunciated in Davis.97 Alvarez's approach, if broadly applied, could result in the admittance, as nontestimonial hearsay, of all statements uttered while the declarant remained under the ill effects of the defendant's actions, when, without such test, the same statements would not be admitted.98

89. Id.
90. Id.
91. See id. (recounting the police officer's testimony).
92. Id.
93. Alvarez, 143 P.3d at 669.
94. See id. at 674 (concluding that, under the circumstances at bar, the victim was facing an ongoing emergency and that the purpose of the interrogation was to enable police assistance to meet that emergency).
95. See id
96. See id. (emphasis added).
97. See Andrew Dylan, Note, Working Through the Confrontation Clause after Davis v. Washington, 76 FORDHAM L. REV. 1905, 1937 (2007). Although an approach that focuses on the intent of the declarant remains technically open, Davis suggests that the Court would prefer an approach that largely concerns itself with the primary purpose of the investigating officers responding to an emergency. Id. (emphasis added); see also id. at 1931 ("Alvarez’s expansive view of the ongoing emergency doctrine . . . offers no clear point at which an ongoing emergency is determined to have ended.").
98. Id. at 1931. Under the Roberts standard, the statements in this case would also have been admissible, regardless of whether the statements were testimonial, because they bare sufficient "indicia of reliability" as they fell within the off-cited excited utterance exception to the hearsay rule. See FED. R. EVID. 803(2) (excluding as hearsay any "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").
III. EXCEPTIONS TO THE CONfrontATION CLAUSE

Although these holdings, when taken together, seem to completely foreclose the possibility of admitting testimonial statements absent a showing that the declarant is unavailable and the defendant had a prior opportunity for cross-examination, such is not the case.109 Indeed, in Crawford, the Court acknowledged that a testimonial statement is admissible if the defendant himself procured the declarant’s unavailability.100 This well-recognized exception to the inadmissibility of testimonial statements is best known as the “forfeiture by wrongdoing” exception, and has been around for more than a hundred years.101 Furthermore, the Confrontation Clause does not bar the admission of testimonial statements offered for purposes other than the truth of the matter asserted.102 In an effort to avoid a departure from this article’s main concern — the traits of testimonial statements — this article will not further elaborate on these exceptions. It suffices to say that if a testimonial statement is relevant for purposes other than the truth of the matter asserted, the Confrontation Clause does not apply.103 Likewise, the Confrontation Clause will not protect a defendant who procures a declarant’s unavailability at trial by threats or otherwise.104

IV. FROM 2004 TO PRESENT: A TWO-TRACK ANALYSIS

As noted above, after Crawford there has been a sea of confusion surrounding the nature of testimonial statements.105 However, Crawford


100. Crawford, 541 U.S. at 62 (“[F]orfeiture by wrongdoing . . . extinguishes confrontation claims on . . . equitable grounds.”).

101. See Reynolds v United States, 98 U.S. 145, 158 (1878). The Reynolds Court held that the Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him. Id. The Court held, however, that this right is not absolute, and explained that “if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.” Id.

102. Crawford, 541 U.S. at 59 n.9 (citing Street, 471 U.S. at 414) (“The Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”).

103. See United States v. Tenerelli, 614 F.3d 764, 773 (8th Cir. 2010) (“This court has noted that regardless of whether an out of court statement is testimonial, a right to confrontation is not implicated if the testimony is not offered or admitted to prove the truth of the matter asserted.”).

104. See supra note 100 and accompanying text.

105. See David Alan Sklansky, Anti-Inquisitorialism, 122 Harv. L. Rev. 1634, 1649 (2009) (explaining that the rules stated by the Court in Crawford “brought both new rigidity and a large
and its progeny have made it clear that, today, prosecutors face a greater burden to prove the particular statement they seek to introduce is not testimonial.\textsuperscript{106} Deciding whether a particular statement is testimonial is a factually-driven inquiry that must be determined on a case-by-case basis.\textsuperscript{107} Reaching a conclusion is not always an easy task,\textsuperscript{108} and factually similar cases can lead to what may appear to be inconsistent results.\textsuperscript{109}

Between this sea of confusion, two tracks of analysis emerged: \textit{Crawford}’s objective-witness test and \textit{Davis}’s primary-purpose test.\textsuperscript{110} The application of one test or another depends on the circumstances surrounding the statement.\textsuperscript{111} If the statement was elicited during the course of a police interrogation, then, and only then, \textit{Davis} governs.\textsuperscript{112} In all other situations where the prosecution seeks to introduce an out-court-statement, the analysis of whether such statement is indeed testimonial proceeds under \textit{Crawford}’s objective-witness test.\textsuperscript{113}

Determining what test to apply, however, is not the difficult part, because a police interrogation and its equivalent under \textit{Davis} – statements elicited during the course of a 911 call – are easily identifiable.\textsuperscript{114} Instead, the difficulties and the intricacies of \textit{Davis}’ primary-purpose analysis come to life when trying to determine whether there is an emergency, and, if so, whether it is an ongoing one.\textsuperscript{115} \textit{Crawford}’s objective-witness analysis can

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\textsuperscript{106} See, e.g., State v. Parks, 116 P.3d 631, 640 (Ariz. Ct. App. 2005) (finding that the determination of whether an out-of-court statement is testimonial is a factually driven inquiry that must be determined on a case-by-case basis).

\textsuperscript{107} Id.

\textsuperscript{108} See Baugh, supra note 19, at 1868 (acknowledging that determining what constitutes a testimonial statement under \textit{Crawford} is difficult).

\textsuperscript{109} Compare Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009) (finding that certificates indicating substance found in car was cocaine were testimonial), with Ramirez v. State, 928 N.E.2d 214, 220 (Ind. Ct. App. 2010) (finding that certificates indicating blood-alcohol test results were accurate were not testimonial).


\textsuperscript{111} See Davis v. Washington, 547 U.S. 813, 822 (2006) (explaining the necessary circumstances in which to apply each test).

\textsuperscript{112} See id. (finding that \textit{Davis}’ primary purpose test should be applied when the circumstances clearly indicate that the primary purpose of the interrogation is to provide police assistance to meet an on-going emergency); see also Allshouse, 985 A.2d at 868 (Baer, J., concurring) (noting that \textit{Davis}’ test is limited on its face to police interrogations).

\textsuperscript{113} See Davis, 547 U.S. at 822 (finding that \textit{Crawford}’s objective-witness test applies when the circumstances objectively show the absence of an ongoing emergency situation).

\textsuperscript{114} See Tom Lininger, \textit{Reconceptualizing Confrontation after Davis}, 85 TEX. L. REV. 271, 280 (2006) (stating that the \textit{Davis} ruling is doctrinally straight-forward).

\textsuperscript{115} See id. (explaining that while \textit{Crawford} had focused on the mindset of the declarant, \textit{Davis} shifted the focus from the declarant’s state of mind to the officers’ purpose in questioning
also be challenging.\textsuperscript{116}

When proceeding under \textit{Crawford}, the court must determine whether an objective witness under the circumstances would have expected her statement to be used prosecutorially at a later trial.\textsuperscript{117} In reaching a determination, as the cases above illustrate, the court will consider several factors: (1) the level of formality surrounding the statement,\textsuperscript{118} (2) whether the statement was made to a police officer or other governmental agent or, instead, to a private party,\textsuperscript{119} and (3) the declarant’s expectations when making the statement.\textsuperscript{120}

When applying \textit{Davis}, however, the focus shifts from the declarant’s expectations to the officer’s purpose in questioning the declarant.\textsuperscript{121} The question thus becomes: was the statement elicited during the course of a police interrogation, and, if so, was the primary purpose of the interrogation to respond to an ongoing emergency or, instead, to determine what happened?\textsuperscript{122} If the primary purpose of the interrogation is to respond to an ongoing emergency, any statement made in response to such interrogation, is \textit{not} testimonial.\textsuperscript{123} Some of the factors to consider are: (1) whether the declarant is speaking about events as they are actually happening or describing past events, (2) whether a reasonable listener would recognize the declarant is facing an ongoing emergency, (3) whether, objectively viewed, the declarant’s statements were necessary to resolve the present emergency or, rather, to learn about something that had happened in the past, and (4) the level of formality surrounding the statement.\textsuperscript{124}

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\textsuperscript{116} See Baugh, \textit{supra} note 19, at 1852–53.

\textsuperscript{117} See \textit{Crawford}, 541 U.S. at 51.

\textsuperscript{118} State \textit{v. Vasquez}, 194 P.3d 563, 577 (Kan. 2008). Whether the statement was made in response to questions, whether it was recorded, whether the declarant was removed from third parties, and whether the interview was conducted in a formal setting such as a governmental building are all relevant in determining the level of formality surrounding the making of a statement. \textit{Id.}

\textsuperscript{119} See United States \textit{v. Lee}, 374 F.3d 637, 645 (8th Cir. 2004) (analyzing a statement made by the defendant to a private party).

\textsuperscript{120} State \textit{v. Stahl}, 855 N.E.2d 834, 844 (Ohio 2006) (finding that federal courts general hold that a witness’s reasonable beliefs or expectations determine the testimonial nature of a statement under \textit{Crawford}).

\textsuperscript{121} Lininger, \textit{supra} note 114, at 280.

\textsuperscript{122} See \textit{id.} “For example, if an officer questions a clear-headed declarant while an emergency is pending and the declarant contemplates the prosecutorial use of her statement, the statement may nonetheless fall outside the definition of ‘testimonial’ under \textit{Davis}.” \textit{Id.}


\textsuperscript{124} \textit{Id.}
As the factors under both tests illustrate, formality and solemnity are a common trait between Crawford's objective-witness test and Davis' primary-purpose test. No matter which test applies, the court will always engage in an objective totality-of-the-circumstances analysis, even if some of the factors to consider vary depending on whether one is dealing with a Crawford or a Davis-kind-of situation.

Working through a hypothetical case from the North Carolina Conference of District Attorney's website would be a practical way of further illustrating the intricacies of Crawford and its legacy:

You are prosecuting a domestic violence case. The alleged victim's name is Joan Jones. The alleged perpetrator is her husband, Tim Jones. Tim is charged with attempted murder and rape, among other crimes. The basic facts are as follows: On January 2, 2006, a neighbor, Mrs. Crane, made a 911 call to the police. Hysterically screaming, Mrs. Crane tells the 911 operator, "Please get here right away. Joan's husband is going at her. Please. Please. Hurry. Oh, my god, oh my god, he is going to kill her." Officers Black and Blue responded to the scene. When they entered the home, [however, there was no sign of Tim.] [Joan] was unconscious, in a pool of blood. A gun was lying on the floor nearby. [After securing medical assistance, the officers start looking for the alleged perpetrator, who they find a few blocks away; his hands are covered with blood. He is arrested. In the meantime, Joan is taken to the hospital where, after regaining consciousness, but while she is still unable to move or speak clearly, and is still at risk of dying, she tells a nurse she has been raped and almost killed. The nurse wrote the victim's statements on a piece of paper, which she later turned over to police.] The day after the incident, Detective Green went to see Joan at the hospital. Green asked Joan what happened and she recounted the incident, including identifying Tim as her attacker . . . Green asked Joan to provide him with a written statement, under oath . . . and Joan agreed. You are now at trial[,] and as part of its case in chief, and to prove Tim is guilty, the prosecution seeks to introduce the following pieces of evidence.

125. See supra notes 118–20, 124 and accompanying text.
126. See Lininger, supra note 114, at 280 (finding that the Davis test suffers from the same ambiguity as the Crawford test, but that the focus has simply shifted from whether the totality of the circumstances indicate that a particular statement was "testimonial" or whether the statement was made during an "emergency" situation).
127. See Jessica Smith, State v. Jones: Case Scenario and Discussion Questions, NORTH CAROLINA CONF. OF DISTRICT ATT'YS, 1 (May 23, 2006), http://www.ncdistrictattorney.org/traininghandout/dv/1/1_2%20DV%20Training%20Case%20Scenario.pdf. This problem is based, in part, on a fact pattern published on the North Carolina Conference of District Attorneys' website. See id. The fact pattern has been modified to achieve this article's goals.
1. Mrs. Crane’s statement to 911 operator: “Please get here right away. Joan’s husband is going at her. Please. Please. Hurry. Oh, my god, oh my god, he is going to kill her.”

2. Although Joan told a police officer her husband was her assailant, she now refuses to testify, claiming that if she does her husband will kill her. Since her live testimony is unavailable, the prosecution offers into evidence Joan’s statement to officer Green, given shortly after she regained consciousness.

3. The prosecution additionally offers into evidence Joan’s statement to the nurse to whom she explained she had been raped and badly hurt.

4. At trial, the prosecution also offers James Groom as an expert in forensic chemistry. He testifies to his opinion that Tim fired the gun the police found in Joan’s house. He testifies that his opinion is based on a gunshot residue report done by SBI agent Terry West. The reports are introduced into evidence, but Terry West does not testify at trial.

5. For this last question, assume that at Tim’s first trial, Joan testified fully. Tim was convicted, but his conviction was overturned on appeal, and the prosecution is now retrying the case. Because Joan is now deceased, you seek to have her statements to the police introduced at retrial.

Assume defense counsel raises a Crawford objection to each of the aforementioned pieces of evidence. You will have to argue why the evidence should come in or not and why.

In determining the admissibility of each of these statements, and as explained above, both the prosecutor and the defense attorney will have to engage in a factually-driven inquiry. As the fact pattern clearly states,

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129. See id. no. 6, at 2 (explaining the forfeiture by wrongdoing exception to the Confrontation clause).

130. See id. no. 9, at 3 (questioning whether statements between private parties are testimonial).

131. Id. no. 4, at 2.

132. Id. no. 11, at 3.

133. See id. at 1–3. Each of the above paragraphs numbered 1–5 are based on the above fact pattern, which is intended to invoke discussion about issues in the admissibility of various statements under Crawford. See id.

134. See Smith, supra note 128, at 1–3 (analyzing the admissibility of twelve statements based
these out-of-court statements are being used for the purpose of proving the
defendant’s guilt, matters clearly stated in the statements.\textsuperscript{135} Therefore, the
exception for statements used for purposes others than to prove the truth of
the matter asserted does not apply.\textsuperscript{136}

Having said that, one must now determine whether the first piece of
evidence, Mrs. Crane’s statements, are admissible. A defense attorney
facing this situation should argue \textit{Crawford} forbids the admissibility of this
kind of statement, as Mrs. Crane was speaking to a 911 operator – the
equivalent of a police officer, and she should have thus expected her
statements would be used prosecutorially at a later trial. This argument,
however, will carry little weight, as the prosecutor, in an attempt to
convince the judge that Mrs. Crane’s statements must come in, will argue
that, pursuant to \textit{Davis}, statements made during the course of a police
interrogation or its equivalent, and statements made to 911 operators, must
be admitted into evidence where the primary purpose of the interrogation
was to respond to an ongoing emergency rather than to prosecute a possible
crime.\textsuperscript{137} Based on the factors mentioned at the beginning of the analysis
section of this article, the prosecution will further argue that because the
declarant was speaking about events as they were happening, and she was
screaming and crying for help, a reasonable listener would have recognized
she was facing an ongoing emergency.\textsuperscript{138} Furthermore, given the victim’s
inability to call for help, Mrs. Crane’s statements were undoubtedly
necessary for the authorities to put an end to the assailant’s allegedly
aggressive and almost deadly attacks.

Based on an analysis of all relevant factors, this author is of the
opinion that a court will likely find that Mrs. Crane’s statements are
nontestimonial and thus admissible against the defendant, regardless of the
declarant’s availability and the defendant’s lack of opportunity for cross-
examination.

Determining whether Joan’s statements to officer Green are
admissible presents additional complexities, as in this case the reason why
Joan does not want to testify is because she fears that if she does, her
husband will kill her. Assuming, however, her fear is a natural one and not
a consequence of defendant’s active procurement of Joan’s unavailability at

\footnotesize{\textsuperscript{135} See \textit{supra} text accompanying note 127 (stating that the prosecutor seeks to introduce
statements into evidence “to prove Tim is guilty”).
\textsuperscript{136} See, \textit{e.g.}, Smith, \textit{supra} note 128, nos. 2–4, at 1–2 (providing examples of circumstances
where evidence is introduced for a purpose other than for the truth of the matter asserted).
\textsuperscript{138} See \textit{supra} text accompanying notes 122–24.}
trial, one must still determine whether her statements are testimonial. The fact that she made these particular statements after the attack was over, and she had regained consciousness makes it difficult to determine whether there was an ongoing emergency. The prosecutor, of course, wants Joan’s statements admitted into evidence; to achieve that goal he should argue that some cases, such as State v. Alvarez, have found that statements such as Joan’s are nontestimonial because an emergency can be ongoing even if medical assistance has been secured and the criminal activity that resulted in the victim’s injuries has ended.\textsuperscript{139}

In the above scenario, Joan made her statement at a time when she was visibly weak, unable to move, and was still facing the risk of death. Accordingly, the statement should be admitted because the emergency, which defendant’s alleged acts set into motion, was still ongoing. The defense attorney, however, should, then rise from his chair in disbelief and argue that finding Joan’s statements to officer Green are nontestimonial would run afoul of established Supreme Court precedent.\textsuperscript{140} Indeed, the defense attorney should mention that, in spite of the fact that the victim in Hammon was still visibly shaken by her assailant’s attack, the Court found that her statements to police were nontestimonial because the officer was not seeking to determine “what was happening,” but rather “what happened.”\textsuperscript{141}

Likewise, under the facts of this case, Officer Green specifically asked Joan “what happened,” and his goal in asking this question, the defense should argue, was not to resolve an ongoing emergency but rather to acquire facts that would facilitate the prosecution of the case. Moreover, the declarant’s statements were in the past tense, and she was not screaming or facing the risk of further attacks. In short, there was no reason for an objective listener to believe the declarant was facing an ongoing emergency. Most importantly, the circumstances under which Joan made her statements were highly formal. Her statements were made under oath, under the risk of perjury, and since the alleged perpetrator had already been arrested, Joan’s statements were not necessary to stop the emergency. Based on the foregoing, a court will likely find Joan’s statements are testimonial and, consequentially, inadmissible against defendant.

Next, as in the case of Mrs. Crane’s statements, a court will likely find Joan’s statements to the nurse are not testimonial. The reasons, the

\textsuperscript{139} 143 P.3d 668, 674 (Ariz. Ct. App. 2006).
\textsuperscript{140} See Davis, 547 U.S. at 834 (finding similar comments were nontestimonial).
\textsuperscript{141} Id. at 830.
prosecution would argue, is that Joan’s statements were not made in response to questions by the nurse, the declarant was not secluded from third parties, and the statement was not given in a formal setting, such as a governmental building. 142 Most importantly, her statement was not given under oath or in the presence of a police officer – factors that the court in Stahl considered important. 143 Even though the nurse recorded Joan’s statements, given the circumstances, Joan would have probably expected her statements would be used for the purpose of medical treatment rather than prosecutorially at a later trial. The obvious difference in formality between Joan’s statements to the nurse and her statements to officer Green supports a finding that her statements are nontestimonial.

When looking at testimony such as the one James Groom is attempting to give at trial, a defense lawyer should immediately think of Melendez-Diaz. 144 Indeed, the defense attorney in this case should argue that without a showing that Terry West, the agent who created the gun powder analysis report, was absent, and that defendant had a prior opportunity to cross-examine him, the report should not come in, as it is the equivalent of an affidavit. 145 The prosecution, on the other hand, should argue that, unlike the certificates in Melendez-Diaz, there is no evidence whatsoever that the report constitutes declarations of facts written down and sworn to by the declarant before an officer authorized to administer oath. 146 However, because the report was obviously made in anticipation of litigation, and more specifically, for the prosecution of a particular defendant – it was part of an ongoing investigation for attempted murder—the person who made the report should have anticipated his statements would be used prosecutorially at a later trial.

The last piece of evidence is unlike any other. In fact, it is the perfect example of when Crawford will allow a testimonial out-of-court statement to come in. 147 As the facts explain, the prosecution is now retrying the case, and Joan has died. The prosecutor wants to use Joan’s statement at the earlier trial as a substitute for her live in-court testimony, and he should be able to do so without facing any problems. Joan’s death has obviously

142. See supra text accompanying notes 117–20 (listing several factors considered under the objective witness test).
145. Id. at 2532 (finding the certificate at issue to be an affidavit and further finding the affidavit to be testimonial).
146. Id. (providing the definition of affidavit as a sworn statement under oath).
made her unavailable, and since she testified against Tim at an earlier trial, the defendant has had a prior opportunity to cross-examine the declarant. Therefore, whether or not the statement is testimonial is irrelevant because *Crawford* allows the admission of testimonial statements when the declarant is unavailable and the defendant had a prior opportunity to cross examine, which is precisely what occurred here.148

As this rather lengthy problem illustrates, focusing on the formalities surrounding a statement is the key to determining a declarant’s expectations. Likewise, being able to determine when an emergency has ended or is ongoing will aid a practitioner in his quest to convincing a court that a particular statement must or must not come in.

*Crawford* and its legacy demonstrate that a statement’s reliability no longer determines admissibility.149 The Court’s decision in *Hammon* illustrates this precise point.150 The victim’s statements in *Hammon* would have been admissible under Roberts’ “indicia of reliability” standard.151 As explained in the introduction, under Roberts, a finding that a particular statement falls under one of the multiple hearsay exceptions is sufficient to establish reliability.152 In *Hammon*, the victim’s statements were arguably admissible under the excited utterance exception, as she was “somewhat frightened” and made her statements while under the stress of her alleged assailant’s attack.153 Her statements were likewise admissible under the

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148. *Id.* at 68 (holding that the Sixth Amendment demands that both requirements, unavailability and a prior opportunity for cross-examination, be met).

149. See Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331, 1353 (2006) (acknowledging that in *Crawford* the Supreme Court provided more protections under the Confrontation Clause by limiting hearsay testimony that could be used against criminal defendants); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 112 (2005) (“*Crawford* appears to imbue the confrontation right with considerably more protection for criminal defendants than had been the case under . . . *Roberts*.”).

150. See generally *Davis v. Washington*, 547 U.S. 813 (2006). The Court reiterated that under *Crawford* the Confrontation Clause bars “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.” *Id.* at 821. The Court found the statements made in the affidavit were testimonial. *Id.* at 829–31. The Court excluded the affidavit to be used against the defendant. *Id.* at 834.

151. See Ohio v. Roberts, 448 U.S. 56, 66 (1980) (explaining the indicia of reliability standard); see also *supra* note 6 and accompanying text.

152. See *supra* text accompanying note 7; see also Roberts, 448 U.S. at 66 (“Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”).

153. See *Davis*, 547 U.S. at 819–20 (describing the trial court’s admission of Hammon’s statements as “‘excited utterances’ that are expressly permitted in these kinds of cases even if the declarant is not available to testify’”); see also FED. R. EVID. 803(2) (holding that a statement is not hearsay if it “relat[es] to a startling event or condition [and was] made while the declarant was
present sense impressions exception embedded in Fed. R. Evid. 803(1), because her statements described an event shortly after it occurred.\footnote{154} Under the current state of the law, however, the fact that statements like those in Hammon are reliable is irrelevant.\footnote{155} The reality is that Crawford, while affirming a constitutional right, diminished well-recognized hearsay exceptions in the criminal arena.\footnote{156} Criminal defendants can now, more often and more successfully, argue that admitting a particular statement would result in a violation of their right to confrontation.\footnote{157}

\section*{V. CONCLUSION}

In an unorthodox, but hopefully practical, manner, this article has attempted to illustrate the intricacies surrounding the Confrontation Clause. Although, after Crawford, determining whether an out-of-court statement would violate a defendant’s Sixth Amendment rights is anything but easy, a practitioner should pay attention to the circumstances surrounding the statement.\footnote{158} The more formal a statement is, the more likely it will be

\footnote{154} See FED. R. EVID. 803(1) (directing that a statement is admissible hearsay if it "describe[s] or explain[s] an event or condition [and was] made while the declarant was perceiving the event or condition, or immediately thereafter"); see also Davis, 547 U.S. at 819–20 (describing the trial court’s admission of Hammon’s affidavit as a "present sense impression").

\footnote{155} See Crawford v. Washington, 541 U.S. 36, 68–69 (2004). The Court declined to follow the Roberts “indicia of reliability test.” Id. at 68. Instead, the Court held that where testimonial statements are at issue, “the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” Id. at 68–69.

\footnote{156} See Josephine Ross, After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness, 97 J. CRIM. L. & CRIMINOLOGY 147, 151 (2006) (“Currently, post-Crawford jurisprudence threatens to drift away from an understanding of how evidence operates within the courtroom and may create new legal fictions so that ‘witness’ does not mean witness and the term ‘testimonial’ has little to do with testimony in court.”); see also Sklansky, supra note 105, at 1649. Sklansky stated that:

[the Crawford requirements for the admissibility of testimonial hearsay against a criminal defendant are, by design, less flexible and less pragmatic than the Court’s old approach to the Confrontation Clause. But the Court declined in Crawford, and has declined in subsequent cases, to offer any comprehensive set of criteria for distinguishing hearsay that is "testimonial" from hearsay that is not. So the rules announced in Crawford are both relatively inflexible and substantially ambiguous.]

\footnote{157} See Prudence Beidler Carr, Comment, Playing by All the Rules: How to Define and Provide a “Prior Opportunity for Cross-Examination” in Child Sexual Abuse Cases After Crawford v. Washington, 97 J. CRIM. L. & CRIMINOLOGY 631, 646, 653 (2007) (noting that “children’s once admissible ex parte statements are now much more frequently excluded for their ‘testimonial nature,’” because, under Crawford, “anything an unavailable witness says to a police officer or any other investigatory official under non-emergency conditions is testimonial and therefore excludable as evidence at trial”).

\footnote{158} See Sklansky, supra note 105, at 1649 (noting “[t]he rules announced in Crawford brought both new rigidity and a large element of confusion to the law of confrontation”).
found to be testimonial.159 A detailed analysis of factors, as well as an ability to determine when an emergency has ended, is the key to determining the admissibility of testimonial statements.

159. See Davis, 547 U.S. at 825–30 (comparing the formality of the questioning in Crawford, Davis, and Hammon and finding the statements in Davis less formal and not testimonial); see also Ross, supra note 156, at 177–78, 185–89 (scrutinizing the role of formality in Crawford, Davis, and Hammon).