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**What About the Victims?
Domestic Violence, Hearsay, and the
Confrontation Clause in the Aftermath
of *Davis v. Washington***

STACEY GAUTHIER*

I. INTRODUCTION

Estimates state “approximately 1.5 million women and 834,732 men are raped and/or physically assaulted by an intimate partner annually in the United States.”¹

In June 2006, in *Davis v. Washington*, the United States Supreme Court [hereinafter “U.S. Supreme Court” or “the Court”] held that statements made to law enforcement officials in the following circumstances are testimonial in nature and thus inadmissible if the victim is unavailable to testify at trial and was not previously subject to cross-examination:² “[W]hen 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.”³

This holding resolved the ambiguity in the Court’s 2004 *Crawford v. Washington*⁴ decision as to what constitutes a testimonial statement. Unfortunately for victims of domestic

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¹ Patricia Tjaden & Nancy Thoennes, U.S. Dep’t of Just., NCJ 181867, *Extent, Nature, and Consequences of Intimate Partner Violence*, at iii (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm> (last visited Sept. 10, 2007).

² *Davis v. Washington*, 126 S.Ct. 2266, 2273-74, 165 L. Ed. 2d 224, 237 (2006).

³ *Id.*

⁴ *Crawford v. Washington*, 541 U.S. 36 (2004).

violence, in resolving that ambiguity, the Court created a hurdle to prosecuting this special type of case. The extension of the Confrontation Clause in *Davis* is unwarranted, outweighed by the need for effective law enforcement, and cost prohibitive.

This article analyzes the Sixth Amendment right to confrontation, admission of hearsay statements, and the effect of the *Davis* decision on the prosecution of domestic violence cases. Part II discusses the history of the Confrontation Clause. Part III discusses hearsay prior to *Crawford*. Parts IV, V, and VI discuss the landmark cases *Crawford v. Washington*, *Commonwealth v. Gonsalves*,⁵ and *Davis v. Washington*, respectively, with regard to whether statements made to police are admissible when the declarant is not available to testify at trial. The reasons why the Supreme Court's extension of the Confrontation Clause is unwarranted are contained in Part VII. The comparison of effective law enforcement and individual liberty is discussed in Part VIII with emphasis on constitutional rights and the functions of the police. Part IX discusses the use of expert testimony in domestic violence cases. Part X addresses the Forfeiture by Wrongdoing Doctrine in response to the Court's suggested use of this hearsay exception. The article concludes in Part XI with a hypothetical case that could cause the *Davis* decision to change.

II. HISTORY OF THE CONFRONTATION CLAUSE

The Confrontation Clause is found in the Sixth Amendment to the United States Constitution, which states that “[i]n all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him”⁶ It is applied to the States through the Fourteenth Amendment.⁷ The right to confront one's accusers can be

⁵ *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005).

⁶ U.S. CONST. amend. VI.

⁷ U.S. CONST. amend. XIV § 1.

traced back to Roman law.⁸ However, the source of the Sixth Amendment right to confrontation is English law.

England used a system of common law as well as elements of the civil law system.⁹ Common law uses the adversarial system, where lawyers for opposing parties present the evidence and the legal arguments to a neutral decision-maker.¹⁰ Under this system, counter-argument and cross-examination are used to test the truthfulness of the opposing party's case.¹¹ Civil law uses the inquisitorial system, where an examining magistrate questions the accused and the witnesses and gathers other evidence.¹² In this system, the examining magistrate investigates as well as adjudicates the case, and attorneys play a limited role.¹³ In the sixteenth century, two statutes were passed which required, in felony cases, justices of the peace to examine the parties and certify the results for the court.¹⁴ Since these statutes were passed during the reign of Queen Mary they were called the Marian Bail and Committal Statutes.¹⁵ In some instances the results of the examinations were used as evidence at trial.¹⁶

One of the most infamous occurrences was the trial of Sir Walter Raleigh for treason in 1603.¹⁷ At the time of Raleigh's trial, a person accused of treason had no right to counsel and was not normally informed of the specific

⁸ Frank R. Herrmann, S.J. and Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 483 (1994).

⁹ *Crawford*, 541 U.S. at 43.

¹⁰ Daniel L. Dreisbach, B.A., Ph.D., J.D., *Criminal Procedure*, MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA, §§II, II B (2007), http://encarta.msn.com/encyclopedia_761570809_1/Criminal_Procedure.html.

¹¹ *Id.* at § II B.

¹² *Id.* at §§ II, II A.

¹³ *Id.* at § II A.

¹⁴ *Crawford* 541 U.S. at 43-44.

¹⁵ *Id.*

¹⁶ *Id.* at 44.

¹⁷ Herrmann, *supra* note 8, at 481-82.

charges until the beginning of the trial.¹⁸ Raleigh's accuser, Lord Cobham, made accusations against Raleigh in a pretrial examination, which was then read in court during Raleigh's trial, even though Cobham had subsequently recanted.¹⁹ Raleigh denied the allegations and requested three times that Cobham be brought into court to voice his accusations to Raleigh's face.²⁰ The court refused and Raleigh was convicted and sentenced to death.²¹ In response, England developed a right of confrontation, as well as strict rules requiring that the witness actually be unavailable to testify before allowing examinations to be read.²²

The issue of the right to cross-examination arose in the 1696 English case *King v. Paine*.²³ In this case, the court ruled that although the witness was dead, his examination was inadmissible because the defendant did not have a prior chance to cross-examine him.²⁴ In 1848, Parliament made the requirement of a prior opportunity for cross-examination explicit.²⁵

Examination practices used in the Colonies were also used controversially.²⁶ Although some colonies, including Massachusetts, guaranteed a right of confrontation in their declaration of rights;²⁷ the proposed Federal Constitution did

¹⁸ RALEIGH TREVELYAN, SIR WALTER RALEIGH 371 (Henry Holt 2002). There was also no presumption of innocence until proven guilty at this time either. *Id.* at 370-71.

¹⁹ *Id.* at 364, 374, 380.

²⁰ *Id.* at 380-82, 384. Raleigh also argued that under common law there should be a trial with witnesses. The court responded that it was to be done by examination. *Id.* at 381.

²¹ *Id.* at 386, 387.

²² Crawford v. Washington, 541 U.S. 36, 44-45 (2004).

²³ *Id.* at 45 (citing *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696)).

²⁴ *Id.*

²⁵ *Id.* at 47.

²⁶ *Id.*

²⁷ *Id.* at 48 (citing BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (McGraw-Hill 1971)). See Virginia Declaration of Rights § 8; Pennsylvania Declaration of Rights §IX; Delaware Declaration of Rights § 14; Maryland Declaration of Rights § XIX; North Carolina Declaration of Rights § VII; Vermont Declaration of Rights Ch.

not.²⁸ The lack of a right of confrontation clause was objected to at the Massachusetts Ratifying Convention as well as in a letter written by the Federal Farmer.²⁹ As a result, the First Congress included a right to confrontation in what became the Sixth Amendment to the Federal Constitution.³⁰

III. HEARSAY PRIOR TO *CRAWFORD V. WASHINGTON*

The Federal Rules of Evidence define hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”³¹ The statement can be an oral or written assertion or nonverbal conduct as long as it is intended to be an assertion.³² Hearsay statements are disfavored because they are not challenged through cross-examination.³³ On the other hand, hearsay exceptions exist due to the “strong necessity” for evidence that would normally be inadmissible.³⁴ Hearsay statements have historically been allowed in evidence when the statements

1 § X; Massachusetts Declaration of Rights § XII; New Hampshire Bill of Rights § XV, reprinted in SCHWARTZ, *supra* at 235, 265, 278, 282, 287, 323, 342, 377.

²⁸ *Crawford*, 541 U.S. at 48.

²⁹ *Id.* at 48-49. Mr. Holmes stated to the President at the Massachusetts Ratifying Convention, “the mode of trial is altogether indetermined; ... whether the criminal... is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told.” Reprinted in SCHWARTZ, *supra* note 27, at 690. In a letter written by The Federal Farmer on October 12, 1787, the writer states that “[n]othing can be more essential than the cross examining witnesses, and generally before the triers of the facts in question. The common people can establish facts with much more ease with oral than written evidence.” Reprinted in SCHWARTZ, *supra* note 27, at 473.

³⁰ *Crawford*, 541 U.S. at 48-49.

³¹ FED. R. EVID. 801(c).

³² FED. R. EVID. 801(a).

³³ HON. PAUL J. LIACOS ET AL., HANDBOOK OF MASS. EVIDENCE 464 (Aspen 7th ed. 1999).

³⁴ *Id.* at 477.

were made under circumstances in which reliability was ensured, and when no better evidence was available.³⁵

Before the Court's decision in *Crawford*, hearsay statements were divided into four categories: "(1) prior statements by witnesses who testify in the present proceeding under oath and are subject to cross-examination concerning their prior statement; (2) former testimony of presently unavailable witnesses; (3) other hearsay falling within a 'firmly rooted' exception; and (4) hearsay not falling within a 'firmly rooted' exception."³⁶ The *Crawford* decision does not affect the first two categories of hearsay statements, but it greatly changes the treatment of statements in the last two.³⁷

Prior to *Crawford*, a statement made by an unavailable declarant was admissible when the statement contained "adequate 'indicia of reliability'" [hereinafter the "*Roberts* Test"].³⁸ To meet the *Roberts* Test, the Court determined that the evidence must fall within a "firmly rooted hearsay exception" or contain "particularized guarantees of trustworthiness" (non-firmly rooted exception).³⁹

According to the Court, when hearsay falls within a "firmly rooted exception," the Confrontation Clause is likely satisfied.⁴⁰ Many exceptions in the Federal Rules of Evidence

³⁵ *Id.* at 464.

³⁶ OLIN GUY WELLBORN III, *CASES AND MATERIALS ON THE RULES OF EVIDENCE* 257 (Thompson/West 2005).

³⁷ *Id.* at 257-58.

³⁸ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (In *Roberts*, the issue was whether the defendant's constitutional rights were violated when the trial court admitted the transcript of a witness's testimony at a preliminary hearing, when the witness did not testify at the defendant's trial. *Id.* at 58. The Court held that normally when a declarant does not testify at trial there must be a showing that the declarant is actually unavailable. *Id.* at 66. In this case, the statement must contain "indicia of reliability." *Id.* The Court explained that when a hearsay statement falls within a firmly rooted hearsay exception reliability can be inferred. *Id.* If the hearsay statement does not fall within a firmly rooted hearsay exception the statement must contain "particularized guarantees of trustworthiness," or it must be excluded. *Id.* The *Roberts* "indicia of reliability" test was used prior to the Court's decision in *Crawford*.)

³⁹ *Crawford*, 541 U.S. at 40.

⁴⁰ *White v. Illinois*, 502 U.S. 346,347 (1992).

qualify as firmly rooted exceptions.⁴¹ The Court specifically identified excited utterances, statements made for medical treatment, and statements made by co-conspirators as qualifying exceptions.⁴² The Court reasoned that certain ‘firmly rooted’ hearsay exceptions have such solid foundations that almost any statements that fall within them would comply with the Constitutional requirements.⁴³ For example, the spontaneous utterance exception, which has existed for the last two centuries, is currently recognized by four-fifths of the states, and the Federal Rules of Evidence.⁴⁴ As late as 1992, the Court stated in *White v. Illinois*, “a statement that qualifies for admission under a ‘firmly rooted’ hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability.”⁴⁵

For statements that do not fall within a “firmly rooted” hearsay exception, the Supreme Court held that it would only satisfy the Confrontation Clause if the statement showed “particularized guarantees of trustworthiness.”⁴⁶ “Particularized guarantees of trustworthiness” must be based on the “totality of the circumstances” surrounding the making of the statement, not on the other evidence that corroborates it.⁴⁷ For example, in *Idaho v. Wright*, the U.S. Supreme Court affirmed the Supreme Court of Idaho’s refusal to admit statements regarding sexual abuse made by a three-year-old girl to a doctor because the totality of the circumstances surrounding the doctor’s questioning was unreliable (he did not videotape the interview and he used leading questions). However, the victim’s statements were corroborated by physical evidence and the testimony of the victim’s older sister.⁴⁸ In the non-firmly rooted exception it is up to the

⁴¹ *E.g.*, FED. R. EVID 801(d)(2); FED R. EVID. 803; FED. R. EVID. 804.

⁴² *White*, 502 U.S. at 347.

⁴³ *Roberts*, 448 U.S. at 66.

⁴⁴ *White*, 502 U.S. at 355 n.8.

⁴⁵ *Id.* at 357.

⁴⁶ *Roberts*, 448 U.S. at 66.

⁴⁷ *Idaho v. Wright*, 497 U.S. 805, 819 (1990).

⁴⁸ *Id.* at 809, 812-813.

judge to decide whether a statement is reliable, which factors to consider, and how much weight to give them.⁴⁹

When the Court decided *Crawford*, in March of 2004, merely 12 years after *White*, and with seven of the same Justices, it had a very different idea about what types of hearsay statements would satisfy the Confrontation Clause.

IV. *CRAWFORD V. WASHINGTON*

In the 2004 landmark case, *Crawford v. Washington*, the U.S. Supreme Court overruled the decades-old “indicia of reliability” test from *Ohio v. Roberts*, greatly limiting the types of out-of-court statements admissible in evidence.

In *Crawford*, the Court held the Confrontation Clause of the Sixth Amendment prohibits out-of-court statements, which are testimonial in nature, to be allowed into evidence unless the declarant is unavailable and the opponent had a prior opportunity for cross-examination.⁵⁰ However, the Court declined to give a complete definition of the word testimonial except to say that it included “at a minimum ... prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”⁵¹ The Court also failed to articulate what it meant by “police interrogation.”⁵²

The vague definitions of testimonial and “police interrogation” caused confusion among state and federal courts all over the country in trying to interpret what the Court meant.⁵³ Lower courts were split on what types of hearsay evidence were admissible if the declarant was unavailable to testify. For example, the United States Court of Appeals for the Sixth Circuit held that statements made during a 911 call are testimonial because they are made to the

⁴⁹ *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

⁵⁰ *Id.* at 68-69.

⁵¹ *Id.* at 68.

⁵² *Id.* at 68.

⁵³ *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 562, 574-75 (Mass. 2005).

police.⁵⁴ On the other hand, other courts found 911 calls not testimonial when the caller was “focused on obtaining urgently needed assistance, not contemplating the statement’s potential use at trial.”⁵⁵

A. Facts

Crawford, the defendant, was arrested for stabbing the victim, Kenneth Lee, in Lee’s apartment on August 5, 1999.⁵⁶ The police gave both Crawford and his wife Sylvia their *Miranda*⁵⁷ warnings and proceeded to interrogate them.⁵⁸ Eventually, Crawford confessed that he and his wife had gone to the victim’s apartment because the victim allegedly tried to rape Sylvia and Crawford was mad.⁵⁹ When they found the victim, a fight broke out. The victim was stabbed and Crawford’s hand cut.⁶⁰

Crawford and Sylvia gave differing stories as to what happened during the fight. Crawford claimed he saw the victim reaching for something and got cut when he grabbed for it.⁶¹ Sylvia claimed the victim went to hit Crawford and that is when Crawford stabbed him; she did not see anything in the victim’s hands.⁶²

Crawford was charged with assault and attempted murder; he claimed self-defense at trial.⁶³ Due to the marital

⁵⁴ *Id.* at 571 (citing *United States v. Arnold*, 410 F.3d, 895, 933, 904 (6th Cir. 2005)).

⁵⁵ *Id.* (citing *Leavitt v. Arave*, 383 F.3d 809, 830 n. 22 (9th Cir. 2004); *People v. Corella*, 18 Cal.Rptr.3d 770, 776 (2004); *State v. Barnes*, 854 A.2d 208, 211 (Me. 2004); *People v. Moscat*, 777 N.Y.S.2d 875, 879 (N.Y. Crim.Ct. 2004); *State v. Newell*, Ohio Ct.App. No. 2004 CA 00264, 2005 WL 1364937 (May 31, 2005)).

⁵⁶ *Crawford*, 541 U.S. at 38.

⁵⁷ *See generally* *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵⁸ *Crawford*, 541 U.S. at 38.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 38-39.

⁶² *Id.* at 39-40.

⁶³ *Id.* at 40.

privilege, Sylvia did not testify.⁶⁴ Accordingly, under the Statement Against Penal Interest hearsay exception, the prosecution tried to introduce Sylvia's tape-recorded statements to police to show that Crawford did not act in self-defense.⁶⁵

Crawford argued that admitting the statements would violate his Sixth Amendment right to confrontation.⁶⁶ The trial court, using the *Roberts* test, admitted the statements finding that they contained "particularized guarantees of trustworthiness."⁶⁷ The trial court reasoned that the statements were trustworthy because Sylvia was an eyewitness, she described the events to a "neutral" police officer, and she was not shifting the blame but rather corroborating Crawford's story.⁶⁸ The prosecution played the tape at trial and Crawford was convicted.⁶⁹

The Washington Court of Appeals reversed the decision, and the Washington Supreme Court reinstated the conviction.⁷⁰ The United States Supreme Court granted certiorari to address the issue of whether the use of Sylvia's out-of-court statement violated Crawford's right to confrontation.⁷¹

B. Holding / Rationale

The Court determined that there are two "inferences" about the meaning of the Sixth Amendment.⁷² The first inference is that the main evil which the Confrontation Clause was designed to protect against was the civil-law criminal procedure method and especially the use of *ex parte* communications.⁷³ From this, the Court found that the

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 40-41.

⁷⁰ *Id.* at 41-42.

⁷¹ *Id.*

⁷² *Id.* at 50.

⁷³ *Id.* at 50.

Confrontation Clause applies to witnesses who bear testimony.⁷⁴ The court referred to a dictionary from the year 1828 finding the word “testimony” defined as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁷⁵ The Court did not specifically define the word testimonial, but gave the following examples:

[E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially ..., extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions...[,] [statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial].⁷⁶

According to the Court, these examples all have a “common nucleus,” meaning, that the above are all formal statements where the declarant is bearing testimony⁷⁷

The Court also found police interrogations testimonial because they resemble the examinations by justices of the peace in England.⁷⁸ In support of this finding, the Court stated that England did not have a police force until the nineteenth century and before that government officers performed investigations, thus creating the same risk with police officers as was created with other government figures

⁷⁴ *Id.* at 51.

⁷⁵ *Id.*

⁷⁶ *Id.* at 51-52.

⁷⁷ *Id.*

⁷⁸ *Id.*

in pre-nineteenth century England.⁷⁹ However, the Court refused to define “interrogation,” saying only that it should be used in its “colloquial” sense.⁸⁰

The second inference of the Confrontation Clause is that the Framers allowed a testimonial statement of a witness unavailable to testify only if the defendant had a previous chance to cross-examine the witness.⁸¹ The Court determined that the Sixth Amendment incorporated the common-law right of confrontation.⁸² In *Mattox v. United States*, an 1895 case, the Court held prior testimony, from a trial or a preliminary hearing, is inadmissible if the defendant does not have an adequate opportunity to cross-examine.⁸³ Historically, the Court excluded testimony where the prosecution failed to show the witness was actually unavailable.⁸⁴ The hearsay exceptions as they existed at the time of the framing of the Constitution were for non-testimonial statements, such as business records.⁸⁵ However, there was an exception for dying declarations, whether testimonial or not.⁸⁶

The Court rejected the *Roberts* Test because it claimed that the *Roberts* Test differed from the above principles. First, the Court found the *Roberts* Test to be too broad because it applies the same analysis, regardless of whether the statements are *ex parte* testimonial. Second, the Court found it was too narrow because it allows statements in evidence that are *ex parte* testimonial on only a finding of reliability.⁸⁷ The Court found the *Roberts* Test to be

⁷⁹ *Id.* at 53.

⁸⁰ *Id.* at 68, 53 n.4 (comparing *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980)).

⁸¹ *Id.* at 54-55.

⁸² *Id.* at 54.

⁸³ *Id.* at 57 (discussing *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

⁸⁴ *Id.* (citing *Barber v. Page*, 390 U.S. 719, 722-25 (1968), and *Motes v. United States*, 178 U.S. 458, 470-71 (1900)).

⁸⁵ *Id.* at 56.

⁸⁶ *Id.*

⁸⁷ *Id.* at 60.

unpredictable and that it admitted statements the Confrontation Clause was designed to keep out.⁸⁸

The Court held that when non-testimonial hearsay is at issue, state evidence law should apply; but where testimonial evidence is at issue, the Confrontation Clause and common law require that the witness be unavailable and that the defendant have a prior opportunity for cross-examination.⁸⁹

C. Concurring Opinion

In *Crawford*, there was no dissenting opinion; however, Chief Justice Rehnquist (joined by Justice O'Connor) concurred in the judgment, disagreeing only with the Court's interpretation of the Confrontation Clause.⁹⁰

Chief Justice Rehnquist believed that, at common law, un-sworn testimonial statements were not treated any differently from non-testimonial statements.⁹¹ There was no information that un-sworn testimonial statements were excluded if they fell within a firmly rooted hearsay exception.⁹² The right to cross-examination was to promote the reliability of evidence against the accused in criminal trials.⁹³ Rehnquist noted that under some circumstances, out-of-court statements are reliable by virtue of the conditions under which they were made;⁹⁴ such as statements made by co-conspirators, excited utterances, statements made for medical treatments, and dying declarations.⁹⁵ Over one hundred years ago, in *Mattox*, the Court declared "[t]he law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."⁹⁶

⁸⁸ *Id.* at 63.

⁸⁹ *Id.* at 68.

⁹⁰ *Id.* at 69.

⁹¹ *Id.* at 71.

⁹² *Id.* at 73.

⁹³ *Id.* at 74.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 75 (citing *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

Chief Justice Rehnquist opined that the Court should define testimonial at the time of the *Crawford* decision.⁹⁷ His position was that the many state and federal prosecutors should not be “left in the dark” as to what types of statements are testimonial.⁹⁸

V. *COMMONWEALTH V. GONSALVES*

Guided by the decision in *Crawford*, the Supreme Judicial Court of Massachusetts [hereinafter “SJC”] created its own landmark ruling in the 2005 case *Commonwealth v. Gonsalves*.⁹⁹ The SJC’s holding in this case is more conservative than the U.S. Supreme Court’s holding in *Crawford* and contrary in direction to that of most other states.

A. Facts

On March 16, 2003, the victim and Gonsalves, the victim’s boyfriend, were in the victim’s bedroom.¹⁰⁰ The victim’s mother was in her own bedroom located two doors down.¹⁰¹ The mother overheard an argument between the victim and Gonsalves, which included “yelling, screaming, and crying.”¹⁰² When the mother went to see what was going on she found the victim crying on her bed and Gonsalves gone.¹⁰³ The victim told her mother that she and Gonsalves had an argument during which Gonsalves grabbed her shirt so tight she could not breathe and he then hit her.¹⁰⁴

Shortly thereafter, the police arrived and stated that they received a call about a “domestic disturbance.”¹⁰⁵ The victim and her mother did not make the call to the police.¹⁰⁶

⁹⁷ *Id.* at 75-76.

⁹⁸ *Id.*

⁹⁹ *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 552 (Mass. 2005).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

When the police arrived, the victim was “crying and hysterical, ranting, loud, hyperventilating and pacing around the room.”¹⁰⁷ She had no obvious injuries.¹⁰⁸ One of the officers asked the victim what happened and she responded that her boyfriend grabbed her, choked her, and hit her head on the floor.¹⁰⁹ She named Gonsalves as her boyfriend and gave the police a description of him.¹¹⁰ An ambulance arrived and took the victim to the hospital.¹¹¹ Gonsalves was eventually charged with both ‘assault and battery’ and ‘assault and battery with a dangerous weapon.’¹¹²

The Commonwealth filed a motion *in limine* on December 16, 2003, to allow into evidence the victim’s out-of-court statements to her mother and the police under the excited utterance exception to the hearsay rule.¹¹³ At this point, the victim was available to testify.¹¹⁴ However, she was not called to testify and therefore not cross-examined.¹¹⁵ After hearing testimony from the mother and one of the police officers, the trial court allowed the motion to admit the hearsay statements.¹¹⁶

In response to the U.S. Supreme Court’s recent decision in *Crawford*, Gonsalves filed a motion for reconsideration on March 31, 2004.¹¹⁷ This time, the victim invoked her Fifth Amendment privilege against self-incrimination, thus becoming unavailable to testify.¹¹⁸ The trial court reversed its previous ruling, based on the decision in *Crawford*, finding that the statements were made in response to police

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 552-53.

¹¹¹ *Id.* at 553.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 561.

¹¹⁶ *Id.* at 553.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

interrogation and were testimonial in nature.¹¹⁹ The trial court refused to allow the statements in evidence.¹²⁰ The Commonwealth petitioned the SJC on appeal.¹²¹

B. Holding / Rationale

In its decision, the SJC held that statements made in response to questioning by law enforcement agents are *per se* testimonial, except when the questioning is meant to secure a volatile scene or to establish the need for and to provide medical care.¹²² It also held that out-of-court statements which are not *per se* testimonial should be tested to make sure they are not testimonial in fact by “evaluating whether a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting a crime.”¹²³ In *Crawford*, the U.S. Supreme Court did not clearly define what types of statements are testimonial.¹²⁴ The Supreme Court did state that testimonial statements are made during a police interrogation. The SJC had to define “police interrogation” to determine whether the statements made by the victim to the officers were testimonial.¹²⁵ The SJC defined the levels of “police interrogation” as follows:

- (1) custodial interrogation - “[p]olice questioning of a detained person about the crime that he or she is suspected of having committed”;
- (2) noncustodial interrogation- “[p]olice questioning of a suspect who has not been detained and can leave at will”; and
- (3) *investigatory interrogation*- “[r]outine, non-

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 555-56.

¹²³ *Id.* at 558 (quoting *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)).

¹²⁴ *Id.* at 557.

¹²⁵ *Id.*

accusatory questioning by the police of a person who is not in custody."¹²⁶

Since the U.S. Supreme Court stated that it used the term interrogation in its "colloquial" sense,¹²⁷ the SJC ruled that *all* questioning by any type of law enforcement agent in the investigation or prosecution of a crime is interrogation.¹²⁸

The SJC specifically excluded questioning to secure a volatile situation or to establish the need for medical care; the Court states that in those instances the police are providing a community care-taking function, not investigation of a crime.¹²⁹ The SJC further stated that the community care-taking function takes effect when "there is an objectively reasonable basis for believing that the safety of an individual or the public is jeopardized."¹³⁰ Since statements made in these circumstances are not considered police interrogation, they are not testimonial *per se* and may be admitted upon determination that they are not testimonial in fact.¹³¹

The SJC determined that the police officer's questioning of the victim was not necessary to control a volatile situation or to determine whether medical help was needed. Therefore, the statements the victim made to the police officers were *per se* testimonial. Her statements were not admissible because she continued to be unavailable to testify and she was not previously subject to cross-examination at a prior hearing.¹³²

The statements the victim made to her mother were not *per se* testimonial because the mother is a private citizen, not an agent of the police.¹³³ Using the test to determine whether the statements were testimonial in fact, the SJC determined that a reasonable person, in the victim's position, would not

¹²⁶ *Id.* at 555 (quoting Black's Law Dictionary 838 (8th ed.2004)) (emphasis added).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 556.

¹³⁰ *Id.*

¹³¹ *Id.* at 557.

¹³² *Id.* at 561.

¹³³ *Id.*

anticipate the use of her statements in prosecuting the defendant.¹³⁴

The SJC also analyzed other states' interpretation of "testimonial." An Illinois court defined "testimonial" as "whether the statement is made or procured to prove or establish facts in judicial proceedings."¹³⁵ The Sixth Circuit interpreted "testimonial" as, "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting a crime."¹³⁶ These courts construed "testimonial" in much the same way as the SJC did.

C. Concurring Opinion

Justice Sosman's concurring opinion states that "police interrogation" should not include initial questioning by police to determine why the police were called.¹³⁷ According to Justice Sosman, when police initially arrive at the scene, "they do not know whether they will be told about a crime, an accident, a misunderstanding, or a false alarm; nor do they know whether anyone will report that there is some injury or imminent danger that needs their attention."¹³⁸ Justice Sosman claims, when police arrive at the scene, they are performing both the community-caretaking function and the investigative function at the same time, and with the same questions.¹³⁹ Accordingly, Justice Sosman noted that the dictionary defined "interrogation" as "question[ing] typically with formality, command, and thoroughness for full

¹³⁴ *Id.* at 562.

¹³⁵ *Id.* at 557 (citing *People v. West*, 823 N.E.2d 82 (Ill.App.Ct. 2005)).

¹³⁶ *Id.* at 558 (citing *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)).

¹³⁷ *Id.* at 562 (Sosman, J., concurring in the result) (Justice Sosman concurred in the majority's decision to remand the case in light of *Crawford*, but disagreed with the majority's analysis of *Crawford*. *Id.* at 575).

¹³⁸ *Id.* at 564.

¹³⁹ *Id.* at 565.

information and circumstantial detail.”¹⁴⁰ She also noted that the dictionary defined “interrogate” as “to question formally and systematically.”¹⁴¹ In Justice Sosman’s view, an interrogation does not begin until the police are actually investigating a crime and preparing for trial, at which point the questioning takes on an “aura of formality.”¹⁴² She also opines that police questioning in these circumstances is not the kind of evil the Confrontation Clause was designed to protect against.¹⁴³

Justice Sosman looked to decisions made in other states. The Alaska Court of Appeals held that “excited responses to brief on-the-scene questioning by police officers,” are not testimonial as delineated in *Crawford*.¹⁴⁴ The Alaska court also claimed that this position is “the emerging majority view” of initial police questioning upon arrival at the scene.¹⁴⁵ The Federal District Court in Massachusetts stated in dicta that it was “doubtful” *Crawford* included spontaneous utterances.¹⁴⁶ A Texas court found that, “most of the post-*Crawford* cases reviewing this issue have held that initial police-victim interaction at the scene of an

¹⁴⁰ *Id.* at 564 (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 1182 (1993)).

¹⁴¹ *Id.* (quoting MERRIAM-WEBSTER’S DICTIONARY OF LAW (1996)).

¹⁴² *Id.*

¹⁴³ *Id.* at 566.

¹⁴⁴ *Id.* at 567 (quoting *Anderson v. State*, 111 P.3d 350, 356 (Alaska Ct. App. 2005)) (The issue in *Anderson* was “whether [the victim’s] response to the [police] officer’s question, ‘What happened?’, qualifies as ‘testimonial’ hearsay under *Crawford*.” *Anderson*, at 351. The Alaska Appeals Court held that it did not, because under the facts of the case, the victim’s response was an excited utterance and therefore was not made “under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial.” *Id.* at 354 (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004))).

¹⁴⁵ *Gonsalves*, at 567 (citing *Anderson*, at 356).

¹⁴⁶ *Id.* at 572 (citing *United States v. Brown*, 322 F.Supp.2d 101, 105 n. 4 (D. Mass, 2004)) (In *Brown*, the police relied on the statement, “I am not going to jail for [the defendant] again” as a basis for probable cause to arrest the defendant. The judge determined that the statement could be credited as reliable either as an excited utterance or as a declaration against penal interest. *Brown*, at 105).

incident is not an interrogation....”¹⁴⁷ These courts agree with Justice Sosman’s view that initial police questioning at the scene of the crime is not police interrogation.

Justice Sosman predicts there will be a negative effect on an “overly expansive” definition of police interrogation in prosecuting certain crimes, particularly gang-related and domestic violence crimes.¹⁴⁸ Also she suggests that a “narrow” definition will violate a defendant’s right to confrontation.¹⁴⁹ Per the opinion, it is evident that Justice Sosman believes the SJC should choose a definition that falls between “overly expansive” and “narrow.”¹⁵⁰

VI. *DAVIS V. WASHINGTON/HAMMON V. INDIANA*

In June 2006, the U.S. Supreme Court ruled on a pair of cases collectively referred to as “*Davis*.” The Court answered the questions left open by *Crawford*. Notably, the Court ruled on the issues of confrontation and hearsay.

A. Facts

In *Davis v. Washington*, the victim called 911 but the phone disconnected when the operator answered.¹⁵¹ The operator called back and when the victim answered, the operator asked her what was going on. The victim replied

¹⁴⁷ *Gonsalves*, at 567 (citing *Key v. State*, 173 S.W.3d 72, 75 (Tex.Ct.App. 2005)) (In *Key*, the Texas Appeals Court opined that the police officer “was responding to a call and was involved in the preliminary task of securing and assessing the scene.” He was “not producing evidence in anticipation of a potential criminal prosecution when he encountered [the victim]. The “unstructured interaction” between the police officer and the victim was not an “interrogation” in the sense used in *Crawford*. In addition, the victim had just suffered physical abuse and had no time to think about it. Therefore, the statement was most likely truthful, and not made in contemplation of use in a future trial. *Key*, at 76).

¹⁴⁸ *Gonsalves*, at 574.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Davis v. Washington*, 126 S.Ct. 2266, 2270, 165 L. Ed. 2d 224, 234 (2006).

that “[h]e’s here jumping on me again.”¹⁵² While Davis was still in the house the operator ascertained his full name.¹⁵³ Davis then ran out of the house and at that point the operator questioned the victim about the events leading up to the attack.¹⁵⁴ The police arrived shortly after the call to 911 and found the victim shaken, with “fresh injuries on her forearm and her face.”¹⁵⁵

Davis was charged with felony violation of a no-contact order. The only witnesses that testified were the police officers who responded to the emergency 911 call.¹⁵⁶ The victim was available to testify but did not.¹⁵⁷ The court admitted the tape-recorded emergency call over Davis’s objection and he was convicted.¹⁵⁸ The Washington Court of Appeals and the Washington Supreme Court affirmed the conviction.¹⁵⁹

In *Hammon v. Indiana*, the police responded to a “domestic disturbance” call at the home of Hammon and his wife, the victim.¹⁶⁰ The victim was found to be “somewhat frightened” on the front porch.¹⁶¹ She told them nothing was wrong but allowed them to enter the house where they noticed that a heating unit in the living room was broken, with flames coming out and glass on the floor.¹⁶² Hammon told the police that he and his wife had an argument, that everything was all right now, and that it had not become physical.¹⁶³

One of the officers took the victim into another room to hear her side of the story and Hammon got mad when the

¹⁵² *Id.* at 2271, 165 L. Ed. 2d at 234.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 2271, 165 L. Ed. 2d at 235.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2272, 165 L. Ed. 2d at 235

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

officer would not let him into the room.¹⁶⁴ After hearing the victim's side, the officer had her fill out a battery affidavit. In the affidavit the victim wrote that Hammon broke the heater, pushed her down into the broken glass, hit her, and attacked her daughter.¹⁶⁵

Hammon was charged with domestic battery and probation violation.¹⁶⁶ The victim was subpoenaed but failed to appear at trial.¹⁶⁷ The prosecution called the officer who spoke to the victim and asked him to testify as to what the victim told him and to authenticate the affidavit.¹⁶⁸ Hammon objected, but the trial court admitted the victim's statement under the spontaneous utterance exception and the affidavit under the present sense impression exception to the hearsay rule.¹⁶⁹ Hammon was found guilty and convicted. The Indiana Court of Appeals and the Indiana Supreme Court affirmed the conviction.¹⁷⁰

B. Holding / Rationale

The U.S. Supreme Court raised the concern that these cases are not as clear as *Crawford* and that they would have to more clearly define what types of police interrogations generate testimonial statements.¹⁷¹ The Court determined that a statement is testimonial when there is no ongoing emergency and the main purpose of the interrogation is to prove past criminal events. On the other hand, the Court determined that a statement is not testimonial when the main purpose of the interrogation is to take care of an ongoing emergency. Whether a statement is testimonial or not is an objective test.¹⁷²

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 2272, 165 L. Ed. 2d at 235-36.

¹⁶⁶ *Id.* at 2272, 165 L. Ed. 2d at 236.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 2272-2273, 165 L. Ed. 2d at 236,

¹⁶⁹ *Id.* at 2272, 165 L. Ed. 2d at 236.

¹⁷⁰ *Id.* at 2273, 165 L. Ed. 2d at 236.

¹⁷¹ *Id.* at 2273, 165 L. Ed. 2d at 236-37.

¹⁷² *Id.* at 2273-2274, 165 L. Ed. 2d at 237.

When the victim in the *Davis* case called 911 she was describing “events *as they were actually happening*, rather than ‘des[cribing] past events.’”¹⁷³ The Court reasoned that the 911 emergency call was not testimonial until Davis left the house (when the emergency ended). Since the only issue before the Court was whether the early statements made to the 911 operator were testimonial, the Court ruled that they were not and upheld Davis’s conviction.¹⁷⁴

In *Hammon*, unlike in *Davis*, the court found that the police arrived after the emergency.¹⁷⁵ Therefore, the officer who took the victim’s statement was trying to find out what had already occurred.¹⁷⁶ The Court determined that the victim’s statement was formal, like that given in *Crawford*, because the officer took her into a separate room, would not let Hammon in, and questioned her on how the events evolved.¹⁷⁷ They found the statements “inherently testimonial.”¹⁷⁸ The Court did recognize that many times in emergencies an initial police questioning will not produce testimonial results. However, that was not the case in *Hammon*.¹⁷⁹

The Court acknowledged the difficulty in prosecuting domestic violence crimes suggesting that the forfeiture by wrongdoing doctrine would suffice.¹⁸⁰ In this doctrine someone who ensures the unavailability of a witness forfeits his or her right to confrontation.¹⁸¹ The government has to prove the wrongdoing by a preponderance of the evidence.¹⁸²

¹⁷³ *Id.* at 2276, 165 L. Ed. 2d at 240 (quoting *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion)).

¹⁷⁴ *Id.* at 2277-78, 2280, 165 L. Ed. 2d at 241, 244.

¹⁷⁵ *Id.* at 2278, 165 L. Ed. 2d at 242

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 2279, 165 L. Ed. 2d at 243.

¹⁸⁰ *Id.* at 2279-80, 165 L. Ed. 2d at 243-44.

¹⁸¹ *Id.* at 2280, 165 L. Ed. 2d at 244

¹⁸² *Id.* See FED. R. EVID. 804(b)(6).

VII. THE EXTENSION OF THE CONFRONTATION CLAUSE IS UNWARRANTED

In 1895, in *Mattox v. United States*, the Supreme Court opined that it was “bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizens.”¹⁸³ The Court’s decision in *Davis*, however, guarantees new rights to criminal defendants.

“The exception for [excited utterances] is at least two centuries old ... and may date back to the late seventeenth century.”¹⁸⁴ The Sixth Amendment was adopted in 1791.¹⁸⁵ Thus, the excited utterance exception existed at the time of the adoption of the Sixth Amendment. If the Framers of the Constitution had intended for the Confrontation Clause to supplant the excited utterance exception to the hearsay rule, they would have made that clear when they drafted the Sixth Amendment. The Court in *Mattox* recognized the “dying declaration” exception based on reliability, not on whether it was testimonial. “[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath.”¹⁸⁶ The Court stated that reliability has been the measure of whether a hearsay statement is admissible for over 200 years and there is no reason for that to change now.¹⁸⁷

According to the *Handbook of Massachusetts Evidence*, one of the reasons for the creation of hearsay exceptions is the “*necessity* for the evidence the rule would otherwise exclude.”¹⁸⁸ To exclude victims’ statements to police in domestic violence cases could potentially give defendants a

¹⁸³ *Mattox v. United States*, 156 U.S. 237, 243 (1895).

¹⁸⁴ *White v. Illinois*, 502 U.S. 346, 355 (1992).

¹⁸⁵ U.S. CONST. amend. VI.

¹⁸⁶ *Mattox*, 156 U.S. at 244.

¹⁸⁷ *Id.*

¹⁸⁸ LIACOS, *supra* note 33, at 477 (emphasis added).

“get-out-of-jail-free card.”¹⁸⁹ There is no reason to give defendants a get-out-of-jail-free card because the types of statements now inadmissible under *Davis* are not the same types of *ex parte* statements the Confrontation Clause was designed to protect. No longer does a law enforcement agent read a statement into the record, and the defendant get convicted based on that statement alone. Law enforcement agents also testify about “the complainant’s physical appearance, her screams, her medical records, and photographs ... and the fact that no one else was in a position to have inflicted [the victim’s] injuries.”¹⁹⁰ In addition, when a hearsay statement is admitted into evidence the declarant’s credibility may be attacked as if the declarant was on the stand testifying.¹⁹¹ Fact finders have more evidence to consider in the twenty-first century than they did in the sixteenth or seventeenth century. Trials today are not limited to just a deposition or affidavit that is read into the record. The United States uses the adversarial system, where counter-argument and cross-examination are used to ferret out the truth. Hearsay exceptions were created out of necessity. It is erroneous for the Court to arbitrarily exclude evidence which hearsay exceptions were designed to allow in evidence.

In addition, it appears from the *Davis* decision that emergency medical technicians [hereinafter “EMTs”] who arrive at the scene would not be barred from testifying to statements made by the victim since EMTs are not law enforcement agents. In other words, the same hearsay statements that would not be admissible post-*Davis* under the excited utterance or present sense impression exception for police officer testimony would be admissible under the statements made for purposes of medical diagnosis or treatment exception¹⁹² when an EMT testifies. Hearsay is hearsay regardless of what exception allows it into evidence. The job of EMTs is to save lives. It is detrimental to public

¹⁸⁹ *Hudson v. Michigan*, 126 S. Ct. 2159, 2166 (2006) (discussing the exclusionary rule).

¹⁹⁰ *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 559 (Mass. 2005).

¹⁹¹ FED. R. EVID. 806.

¹⁹² FED. R. EVID. 803(4).

health to take an EMT away from his or her job to testify at court to a statement that the responding police officer could just as easily testify to and is within the police officer's duties.

It is unlikely that the Court, in 2006, has a better idea of what the Framers intended than it did in 1895. Absent new findings regarding the intent of the Framers of the Sixth Amendment, the extension of the Confrontation Clause in *Davis* and *Crawford* is unwarranted because exceptions to the hearsay rule have existed for centuries and the civil law method of criminal procedure is not used in the United States.

VIII. EFFECTIVE LAW ENFORCEMENT VERSUS INDIVIDUAL LIBERTY

Criminal defendants have a constitutional right to face their accusers.¹⁹³ However, this right must be balanced against the need for effective law enforcement. States have a compelling interest in protecting victims of domestic violence. The most effective way to prosecute this type of crime, in cases where the victim recants or refuses to testify, is to use the excited utterance hearsay exception which allows the responding police officers to testify as to the victim's statements. In reaching its decision in *Davis*, the Supreme Court unnecessarily tipped the scale in favor of the criminal defendant.

A. Constitutional Rights

There are numerous circumstances where the U.S. Supreme Court has refused to unnecessarily extend constitutional rights. For example, the Fourth Amendment protects against unreasonable searches and seizures; yet, there are exceptions to the warrant requirement, which the Court has consistently upheld. These exceptions include: plain view, exigent circumstances, searches incident to arrest, and consent searches. Additionally, in *Michigan Dep't of State*

¹⁹³ U.S. CONST. amend. VI.

Police v. Sitz, the Court rejected the argument that sobriety checkpoints are unreasonable seizures, stating the interest in eliminating drunk drivers outweighs minimal invasion of drivers' privacy interests.¹⁹⁴ In *Terry v. Ohio*, a police officer stopped the defendants and patted them down before he had probable cause to arrest them.¹⁹⁵ The Court rejected the unreasonable search and seizure argument pointing to the interest of "crime prevention and detection,"¹⁹⁶ and stating "it is this interest which underlies the recognition that a police officer may in appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."¹⁹⁷ The Court held in *New York v. Quarles* that there is a "public safety" exception to the Sixth Amendment *Miranda* warnings.¹⁹⁸

In *Quarles*, the defendant was arrested in a grocery store and had hidden a gun somewhere inside the store.¹⁹⁹ The Court went on to state that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."²⁰⁰ Over one hundred years ago, the Court acknowledged that constitutional rights, "however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."²⁰¹

The Court's decision in *Davis* fails to recognize the safety of victims of domestic violence, the states' interest in protecting those victims, and the interest of crime prevention. This allows the abuser to go free from incarceration, where the abuser may continue to hurt the victim and any children

¹⁹⁴ Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 455 (1990).

¹⁹⁵ Terry v. Ohio, 392 U.S. 1, 7-8 (1968).

¹⁹⁶ *Id.* at 22.

¹⁹⁷ *Id.*

¹⁹⁸ New York v. Quarles, 467 U.S. 649, 655-56 (1984).

¹⁹⁹ *Id.* at 651-52.

²⁰⁰ *Id.* at 657.

²⁰¹ Mattox v. United States, 156 U.S. 237, 243 (1895).

who are forced to witness the abuse. If an abuser goes free, this will put other unsuspecting people in danger as well. Further, if the abuser is freed, there is no incentive for him or her to get help in order to break the cycle of abuse. If the state is unable to successfully prosecute the abuser, why should the abuser attempt to seek help? Permitting the abuser to go free may also limit the victims from seeking help since, generally speaking, the only time the victim is truly free from the abuser is when the abuser is incarcerated. States have a compelling interest to keep domestic abusers off the streets.

In *Hudson v. Michigan*, decided merely days before *Davis*, the Court refused to suppress evidence found during a search where the police violated the knock and announce rule.²⁰² It opined that:

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates ‘substantial social costs,’ ... which sometimes include setting the guilty free and the dangerous at large. We have therefore been ‘cautious against expanding’ it, ... and have repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.²⁰³

The Court’s decision in *Davis* is contrary to its decision in *Hudson*. Failing to allow the police to testify as to the statements made by the victim in domestic violence cases effectively “suppresses” the evidence against the defendant and quite possibly allows a criminal to go free. In *Davis*, the Court failed to weigh the “substantial social costs”²⁰⁴ of not allowing hearsay evidence under the excited utterance

²⁰² *Hudson v. Michigan*, 126 S. Ct 2159, 2163 (2006).

²⁰³ *Id.* (citing *United States v. Leon*, 468 U.S. 897 (1984), *Colorado v. Connelly*, 479 U.S. 157, 166 (1986), *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 364-365 (1998)).

²⁰⁴ *Id.* (discussing the Exclusionary Rule).

exception, thus potentially allowing an abuser to go free against the “truth-seeking and law enforcement objectives.”²⁰⁵

One solution to these injustices is to create an “exigency” or “public safety” exception to the Confrontation Clause in domestic violence cases. The Court recognized in *Hudson* that the Fourth Amendment knock and announce requirement “is not necessary ... if there is ‘reason to believe that evidence would likely be destroyed if advance notice were given....’”²⁰⁶ Similarly, in domestic violence cases it is possible that the witness will recant or disappear before the case goes to trial, “destroying” vital evidence. For example, when a victim of domestic violence knows in advance that her or his testimony is needed at trial, the victim has time to recant or refuse to testify. Prosecutors are aware of this, and have reason to believe that there is a likelihood that they will lose their witness. If they lose their witness, and the responding police officer is not allowed to testify to the statements the victim made at the scene, it is likely the defendant will not be able to be prosecuted. That would be an exigent circumstance and would require an immediate solution. The solution would be an exception to the Sixth Amendment in the one limited circumstance of domestic violence since the evidence (the victim’s testimony) would likely be destroyed if advance notice were given (by refusal to testify or recanting). The exception could also be called a public safety exception since protecting victims, children, or the unsuspecting public from an abuser could be considered public safety. This solution is compatible with the Court’s decision in *Hudson*.

B. Functions of the Police

With regard to the role of police officers, there is no difference between the “investigatory function” and the “community caretaking” function of the police. Both

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 2162-63 (quoting *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995)).

functions fall within the general category of law enforcement. As Justice Sosman pointed out in her concurring opinion in *Gonsalves*, when the police respond to an emergency 911 call they do not know what to expect.²⁰⁷ They do not know whether anyone needs medical assistance or whether there is a dangerous situation they will need to control. The majority points out in *Gonsalves* that the defendant had left the scene when the police arrived and concluded that there was no ongoing emergency.²⁰⁸ However, the SJC failed to address the fact that Gonsalves could have returned after the police left. In addition, nothing in the facts, as given in the SJC's decision, indicates that the police knew Gonsalves was gone when they arrived. For all the police knew, Gonsalves could have been hiding in another room. The fact that the victim had no visible marks on her did not mean that she was not injured or in need of medical care. In *Commonwealth v. Foley*, decided on the same day as *Gonsalves*, the SJC allowed statements by a child that the defendant was hiding in another room and statements made by the victim about her need for medical care because she had marks on her.²⁰⁹ If Gonsalves was hiding in the bathroom and the victim had a scratch on her, the case would likely have been decided differently because it would essentially be the same case as *Foley*.

Justice Thomas notes, in his concurring opinion in *Davis*, that the attack in *Hammon* on the victim was not actually happening when she was describing it to the 911 operator.²¹⁰ He also points out that the defendant could have been an ongoing danger to his wife since he was still in the house.²¹¹ Additionally, the police did not know what he was going to do after they left.

The facts of *Davis*, *Hammon*, and *Gonsalves* are very similar and should have been decided the same way. In all

²⁰⁷ *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 564 (Mass. 2005).

²⁰⁸ *Id.*

²⁰⁹ *Commonwealth v. Foley*, 833 N.E.2d 130, 133 (Mass. 2005).

²¹⁰ *Davis v. Washington*, 126 S.Ct. 2266, 2284-85, 165 L. Ed.2d 224, 249 (2006) (Thomas, J. concurring).

²¹¹ *Id.*

three cases the police were performing their basic job “function” – law enforcement. Distinguishing between the two “functions” of securing a volatile scene or investigating a crime impedes the law enforcement procedure, and hinders the prosecution of domestic violence crimes.

IX. USE OF EXPERT TESTIMONY IN DOMESTIC VIOLENCE CASES

“Battered-woman syndrome” [hereinafter “BWS”] may cause a victim to refuse to testify against the abuser or recant prior statements made implicating the abuser. This could hinder the prosecution of an abuser post-*Davis*, if statements made by the victim to the responding police officer are not allowed into evidence unless the victim testifies at trial. However, in order to help the jury to understand the unusual behavior of BWS victims, such as refusing to testify at trial, many courts allow expert testimony on the subject.²¹²

BWS is one of many types of a subcategory of post-traumatic stress disorder.²¹³ It is “a series of common characteristics found in women who are abused both physically and emotionally by the dominant male figures in their lives over a prolonged length of time.”²¹⁴ Some effects of the syndrome are low self-esteem and emotional dependence on the abuser.²¹⁵ The abusive relationship is cyclical and consists of three stages: the tension-building stage, the violent stage, and the honeymoon stage.²¹⁶ BWS causes the victim to feel responsible for the beatings, thus accepting the beatings, but hoping each one is the last.²¹⁷

With regard to expert testimony, since the rules of evidence vary from state to state, the admission of expert

²¹² Cynthia Lynn Barnes, J.D., Annotation, *Admissibility of Expert Testimony Concerning Domestic-Violence Syndromes to Assist Jury in Evaluating Victim’s Testimony or Behavior*, 57 A.L.R. 5th 315, 315, 328, 331-32 (1998).

²¹³ *Id.* at 328.

²¹⁴ *Id.* at 329.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 329-30.

testimony regarding BWS varies depending on what jurisdiction the case is in. Some courts allow the expert to testify as to the traits of the “typical” BWS victim generally, but others require proof that the victim suffers from BWS.²¹⁸ Although expert testimony regarding the symptoms of BWS appears helpful to the prosecution, it is not without problems. First, it costs money to hire an expert. In the absence of police testimony, the state will have to rely more often on the testimony of experts, which becomes cost-prohibitive. Second, as previously stated, the rules regarding admission of expert testimony are not consistent since the rules of evidence vary among jurisdictions. For example, Ohio only allows the introduction of evidence of BWS when the victim is a defendant claiming self-defense.²¹⁹ Other issues that have caused concern are relevance of the evidence, prejudicial impact of the evidence, and that the evidence shows “the defendant’s propensity to be a batterer.”²²⁰ Since domestic violence is a nation-wide public safety concern, it requires a consistent solution. BWS is a medically recognized condition, so there is no reason why a victim should be able to introduce evidence of BWS in one state, but not in another state.

For example, a New York court determined that the probative value of an expert’s testimony on BWS outweighed the possibility of unfair prejudice to the defendant.²²¹ The trial court admitted the expert testimony because it was offered only in order to help the jury understand why the victim recanted her previous accusation against the defendant during her grand jury testimony.²²² On the other hand, the Ohio Appeals Court reversed a conviction for domestic violence on the grounds that the danger of unfair prejudice to the defendant outweighed the probative value of the expert

²¹⁸ *Id.* at 332.

²¹⁹ *Id.* at 332, 341-42.

²²⁰ *Id.* at 333.

²²¹ *Id.* at 357-58 (citing *People v. Ellis*, 650 N.Y.S.2d 503 (Sup. Ct. 1996)).

²²² *Id.* at 358.

testimony.²²³ In the Ohio case, the testimony was only being offered to explain why the victim would return home if the defendant had really beaten her.²²⁴ Comparing these two cases, it seems that if the Ohio defendant had beaten his victim in New York, his conviction would not have been overturned.

Although costly, prosecutors will have to rely more on experts in the wake of the *Davis* decision. One solution to cure the inconsistencies of admitting expert testimony is to create a special rule for experts testifying in domestic violence cases in the Federal Rules of Evidence. This would not guarantee consistency but it will help since most states' rules are similar to the Federal Rules. The rule should state that when there is a question of domestic violence, expert testimony as to the general character traits of BWS victims should be allowed into evidence so long as the expert does not diagnose the victim, and the testimony does not show the propensity of the defendant to be a batterer. A special rule for experts testifying in domestic violence cases would be particularly helpful post-*Davis*.

X. FORFEITURE BY WRONGDOING

In *Davis*, the Court suggested using the forfeiture by wrongdoing hearsay exception²²⁵ instead of the excited utterance or present sense impression hearsay exceptions. However, the forfeiture by wrongdoing exception is not helpful because it adds a step to the prosecution of the defendant. Under this hearsay exception, a defendant who causes the absence of a witness by means of wrongdoing gives up his right to confront that witness.²²⁶ In that instance,

²²³ *Id.* at 359 (citing *State v. Pargeon*, 582 N.E.2d 665 (Ohio Ct.App. 1991)).

²²⁴ *Id.*

²²⁵ FED. R. EVID. 804(b)(6).

²²⁶ *Davis v. Washington*, 126 S.Ct. 2266, 2280, 165 L. Ed. 2d 224, 244 (2006); *See* FED. R. EVID. 804(b)(6) ("Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." *Id.*)

the out-of-court statements would likely be allowed into evidence.²²⁷ The Court did not give an opinion as to the standard required to prove forfeiture except to say, under the Federal Rules of Evidence, the government has to prove wrongdoing by a preponderance of the evidence.²²⁸ However, if a victim is under duress from the defendant not to testify at trial, it is unlikely that she would admit to prosecutors that the duress is the reason she refuses to testify. This would make it hard for prosecutors to prove forfeiture by wrongdoing because they would not have any evidence of wrongdoing on the part of the defendant. Using the forfeiture by wrongdoing exception, the government would have to first prove by a preponderance of the evidence that defendant caused the victim's unavailability in order to get the statement admitted into evidence, and then at trial, prove beyond a reasonable doubt that the defendant committed the crime. Adding an extra step to the legal process is not a good solution. In addition, BWS often causes the victim to refuse to testify on her own initiative, without any wrongdoing on the part of the defendant.²²⁹

Under these circumstances, the forfeiture by wrongdoing exception would be of no help. The statements are hearsay whether they are allowed in evidence under the excited utterance exception, the present sense impression exception, or the forfeiture by wrongdoing exception. Switching to the forfeiture by wrongdoing exception will still allow the same statements into evidence, but make it harder to prosecute the abuser because of the added step of proving wrongdoing. This could leave the abuser free to abuse the victim again.

XI. CONCLUSION

The extension of the Confrontation Clause is unwarranted, outweighed by the need for effective law enforcement, and cost-prohibitive if the use of expert testimony increases. However, lower courts are bound by the

²²⁷ *Davis*, at 2280, 165 L. Ed. 2d at 244.

²²⁸ *Id.*

²²⁹ *State v. Barnes*, 854 A.2d 208, 330 n. 222 (Me. 2004).

Davis decision until a more sympathetic case changes the U.S. Supreme Court's mind.

A fact pattern that may cause the U.S. Supreme Court to reconsider its holding in *Davis* might be this: A state is unable to prosecute an abuser because the victim refuses to testify at the defendant's trial. The victim identified the abuser to the police upon their arrival at the scene, but the statements were not allowed into evidence because they were testimonial under *Davis*. Therefore, the defendant is not prosecuted or is acquitted because the state cannot meet its burden of proof. The victim returns to the abuser either because she believes his false promises that he is sorry and will not abuse her anymore, or because she has nowhere else to go. As projected, another cycle of abuse begins; one of two things may occur: The abuser beats the victim to death *or* the victim kills the abuser in self-defense. Although unfortunate and extreme, murder may be necessary before the current law changes. Under the prior *Roberts* "indicia of reliability" test, the hearsay statements made by the victim would have been allowed into evidence and a death may have been prevented.

"There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean."²³⁰ Nevertheless, it most likely was not intended as an escape hatch for criminals to use in order to avoid prosecution. That is what could happen if the *Davis* decision is upheld.

²³⁰ *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J. concurring in part and concurring in the judgment).