# *Crawford* Round 2: *Davis v. Washington* and *Hammon v. Indiana*

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## Introduction

Erasing more than two decades of Confrontation Clause precedent, the Supreme Court held in Crawford v. Washington, 541 U.S. 36 (2004), that the Confrontation Clause prohibits the introduction of "testimonial" hearsay statements against a criminal defendant unless the defendant is afforded an opportunity to cross-examine the declarant, and that "[s]tatements taken by police officers in the course of interrogations are ... testimonial." Id. at 52. What was dispositive under prior doctrine – whether the statement is admissible under a "firmly rooted" hearsay exception, or is otherwise deemed to possess "particularized guarantees of trustworthiness," Ohio v. Roberts, 448 U.S. 56, 65-66 (1980) – no longer mattered. "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation," which "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Justice Scalia authored the majority opinion; only two justices (Rehnquist and O'Connor) would have refused to overrule Roberts.

But Crawford left open far more questions than it answered, and this led lower courts, not surprisingly, to reach wildly inconsistent results. Though the decision created the potential for a dramatic reduction in so-called "victimless" trials, in which the prosecution introduces the victim's early accusatory statements to police without calling her to testify, whether that potential would be realized depended entirely on how narrowly or broadly its critical terms were to be construed.

Most importantly, what, precisely, is "testimonial" hearsay? The Crawford Court "le[ft]" that question "for another day," 541 U.S. at 68, since the statement at issue there was made during the course of police "interrogation," and such statements are "testimonial under even a narrow standard." Id. at 52. It did enumerate three potential standards that had been proposed, but did not choose among them: "*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 51-52.

The third, and broadest, of these definitions had been originally proposed by Prof. Richard D. Friedman of Michigan Law School, and the Crawford opinion cited one of his law review articles discussing the issue.[1] The narrowest, requiring that the statement be "formalized," was proposed by Justice Thomas (joined by Scalia), in a concurring opinion in White v Illinois, 502 U.S. 346, 365 (1992). If the Supreme Court eventually chose the latter test, very few early accusations of crime would qualify as testimonial.

Crawford left many other critical questions unanswered as well. What sort of police "interrogation" results in testimonial statements? The Court in Crawford decided that it did not have to define that term either, because the declarant's statement in Crawford qualified as the

[1] Id. at 61; Friedman, Confrontation: The Search For Basic Principles, 86 Geo. L.J. 1011 (1998).

product of interrogation "under any conceivable definition." Id. at 53 n. 10. Could statements made to police, but not in response to questioning, qualify as testimonial? How about statements to private parties? Business records, public records, and lab reports prepared with the expectation of potential prosecutorial use? Crawford said little about any of these issues. Could the introduction of nontestimonial hearsay ever violate the Confrontation Clause? The Crawford opinion strongly suggested a negative answer, but declined to "definitively resolve" the matter. Id. at 61.

Clarification was desperately needed, and Davis v. Washington and Hammon v. Indiana promised to provide it. Both cases involved allegations of domestic violence, a context in which "victimless" prosecutions had become prevalent under the Roberts regime, since complainants in such cases often become unwilling to testify, and prosecutors were routinely allowed to offer their uncross-examined early accusations as excited utterances. Indeed, the trials in Davis and Hammon were both conducted before Crawford, and both prosecutions were based primarily on the admission of the nontestifying complainants' initial accusations to law enforcement under the excited-utterance exception to the hearsay rule. Cases like them had proven to be the primary battleground in lower courts attempting to determine the scope of Crawford.

Davis involved accusatory statements made in a 911 call, a context in which appellate courts had nearly universally rejected arguments characterizing such accusations as testimonial. In Hammon, however, the prosecution was allowed to introduce a wife's statements to police, who had responded to the scene of a reported domestic disturbance, that accused her husband of assaulting her, and lower courts were closely divided regarding the testimonial character of such crime-scene statements absent an opportunity to confront the declarant. Justice Scalia authored

the opinion in both cases. The Court determined unanimously that the statements made during the early portion of the 911 call that were at issue in Davis were not testimonial, but held by a vote of 8-1, with Justice Thomas dissenting, that the statements to responding police by defendant's wife in Hammon were testimonial and hence inadmissible, since Ms. Hammon could not be cross-examined. Davis v. Washington, 122 S.Ct. 2266 (decided June 19, 2006).[2]

The Davis Court adopted a standard for police "interrogation," ostensibly focusing on whether the "primary purpose" of the police, considered objectively, is to "meet an ongoing emergency" (resulting in nontestimonial statements) or to "establish past events ... relevant to later ... prosecution" (resulting in testimonial statements), that is so amorphous that it is likely to lead to the same kind of unpredictability for which the Crawford Court condemned Roberts. Adding to the confusion, the Court recognized elsewhere that an objective assessment of the *declarant's* motive or expectation should play some role in the analysis, but did not elaborate further.

Despite this analytical morass, the Court's discussion of Hammon signals the Court's belief that most crime-scene accusations to police should be regarded as testimonial, and its decision may lead to this outcome, in domestic-violence cases and perhaps even more so in cases involving street crimes. This is particularly likely in New York, because, before Davis, the Appellate Divisions had repeatedly refused to hold that such statements require confrontation. But the Supreme Court unmistakably regards accusatory statements to 911 operators as nontestimonial, unless it is apparent from the outset that the caller is merely reporting a past

[2] The Supreme Court announced these decisions under the title of Davis v. Washington, and I will use that nomenclature when discussing the opinion's rationale and ramifications.

event, or when it become clear that an emergency situation no longer exists.

The Court also declared unreservedly, as part of its holding, that the introduction of nontestimonial hearsay no longer implicates the Confrontation Clause.[3] Of course, defense counsel still should argue if possible that the statements at issue are inadmissible hearsay. Regarding some of the other Confrontation Clause issues left open by Crawford, Davis provides guidance, but not resolution.

**Facts and Procedural History**

**Davis v. Washington**

Adrian Davis was charged with violating an order of protection by assaulting his former girlfriend, one Michelle McCottry. She called 911 and said that Davis was beating her. During the ensuing four-minute conversation, the 911 operator elicited Davis' full name (middle initial

[3] Neither Davis nor Hammon argued that, assuming the statements at issue were nontestimonial, their Confrontation Clause rights were violated under Roberts. Nevertheless, the Court began its legal discussion in Davis by stating, "[w]e must decide ... whether the Confrontation Clause applies only to testimonial hearsay." 126 S.Ct. at 2274. Continuing, the Court says that "[t]he answer to this question was suggested in Crawford," where the opinion concluded that the text of the Clause only applied to those who "bear testimony." Id. The Court then declares, "[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out merely its 'core,' but its perimeter." Id. And finally, the Court notes that "our own Confrontation Clause jurisprudence was carefully applied only in the testimonial context." Id. at 2274-2275. This is enough to convince me that the Court held that the Confrontation Clause is inapplicable to nontestimonial hearsay. The Seventh Circuit, however, initially disagreed, announcing post-Davis that it would continue to apply Roberts to nontestimonial statements. United States v. Thomas, ___ F.3d ___, 2006 WL 1867487 (decided July 7, 2006), at *5. But less than two weeks later, in United States v. Tolliver, ___ F.3d ___, 2006 WL 2007642 (decided July 19, 2006), a different panel concluded in dictum, without mentioning Thomas, that the Supreme Court held in Davis that "nontestimonial hearsay is not subject to the Confrontation Clause." Id. at *3 n. 2. From a practical standpoint, however, this is much ado about very little, since it will be a rare circumstance in which hearsay will be nontestimonial but nevertheless insufficiently reliable to satisfy Roberts. See Richard D. Friedman, Grappling With the Meaning of "Testimonial", 71 Brooklyn L. Rev. 241, 241 and n. 2 (2005).

included), his date of birth, and the circumstances leading up to the alleged assault. After McCottry told the operator that Davis was running away, the operator elicited still more details about Davis and the incident. McCottry initially cooperated with the prosecutor's office, but the prosecution was unable to locate her at the time of trial. In this pre-Crawford trial, the prosecutor successfully argued that the contents of the 911 call were admissible under the excited-utterance exception to the hearsay rule, overcoming defense counsel's Confrontation Clause objection.

The Washington Supreme Court held, 8-1, that the accusations in the portion of the 911 call preceding Davis' flight were not testimonial under Crawford. It reasoned that "one who calls 911 for emergency help is not 'bearing witness,'" but is simply seeking assistance. State v. Davis, 111 P.3d 844, 849-850 (Wash. 2005). It distinguished 911 calls made "simply to report a crime," which "may conceivably be considered testimonial." The majority concluded that the decisive inquiry is to determine the motivation of the caller, saying that the trial court must determine "whether it is a call for help to be rescued from peril or is generated by a desire to bear witness." Id. at 849. It acknowledged that emergency 911 calls may contain some statements that are testimonial; namely, those that "were not concerned with seeking assistance and protection from peril." Id. at 851. The court did not deal with the possibility that the caller may have had mixed motivations, even during the "assistance-seeking" portion of the call; she may have wanted Davis to be arrested, at least in part. It also failed to explain why it was focusing on the speaker's subjective motivation, rather than whether she reasonably should have expected that her statements would be used prosecutorially. See, e.g., United States v. Hinton, 423 F.3d 355, 360 (3d Cir. 2005) ("where an objective witness reasonably anticipates that a given statement will be used at a later trial, that statement is likely testimony in the sense that it is

offered to establish or prove a fact"); United States v. Summers, 414 F.2d 1287, 1302 (10th Cir. 2005) ("It is the reasonable expectation that a statement be later used at trial that distinguishes the flippant remark, proffered to a casual acquaintance, see Crawford, 541 U.S. at 51, from the true testimonial statement"). Finally, the Court concluded that even if the post-emergency portions of McCottry's statement on 911 were testimonial, their introduction was harmless.

The dissenting judge criticized the majority's subjective test, and instead would have adopted the standard originally proposed by Prof. Friedman, and then set forth as a possible test by the Supreme Court in Crawford: whether a reasonable person would know that her statement "is likely to be used in investigation or prosecution of a crime." State v. Davis (Sanders, J., dissenting), 111 P.3d at 852-853, quoting from Friedman and McCormack, Dial-In Testimony, 150 U. Pa. L. Rev. 1171, 1241 (2002). He concluded that "the great majority of the content of most 911 calls" will be testimonial, since they would not only satisfy Prof. Friedman's standard, but would also be the product of police interrogation, because most 911 operators, like the one in Davis, follow "a 'script' composed and directed by agents for investigating authorities." Davis, 111 P.3d at 854. The "emergency" nature of the call, the dissenter reasoned, is relevant to the issue of whether the call qualifies as an excited utterance, but has no bearing on whether the call is testimonial in nature. Id. at 854.

At the Supreme Court, Jeffrey Fisher, who had successfully argued Crawford, represented Davis.

**Hammon v. Indiana**

Herschel Hammon, who the prosecution claimed had assaulted his wife Amy, was convicted of domestic battery. Shortly after a report of a domestic disturbance, two officers arrived at the Hammon home, and asked the alleged victim what had happened; she said "everything was okay." An officer then spoke to Mr. Hammon, who said that he and his wife had "been in an argument" that "never became physical." That officer returned to Ms. Hammon, who was in another room, and asked her again what had occurred. This time, Amy Hammon made a detailed statement regarding the incidents up to and including the alleged assault. Immediately thereafter, the officer asked her to fill out and sign an affidavit reciting these allegations, and she did so. The prosecutor subpoenaed the complainant, but she was not present at trial. The trial court (pre-Crawford) admitted the oral statement as an excited utterance and the affidavit as a present sense impression.

The Indiana Supreme Court acknowledged that the affidavit constituted testimonial hearsay, but unanimously held that the complainant's oral statement immediately before signing the affidavit was not testimonial. State v. Hammon, 829 N.E.2d 444, 450-458 (Ind. 2005).[4] It concluded that "a 'testimonial' statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings," and that, in evaluating this "purpose" issue, "the motive of the questioner, more than that of the declarant, is determinative, but if either is principally motivated by a desire to preserve the statement it is sufficient to render the statement 'testimonial.'" Id. at 856. Under this standard, the court concluded, "responses to initial inquiries at a crime scene are typically not 'testimonial,' id. at 453, because they are made

[4] The court held the introduction of the affidavit to be harmless error. The harmless-error question was not before the Supreme Court.

in the course of "preliminary investigation[s]" that are "essentially" conducted "to determine whether anything requiring police action had occurred, and if so, what." Id. at 458.

That was the situation in Hammon, the court concluded; moreover, the complainant's "motivation was to convey basic facts and there is no suggestion that [she] wanted her initial responses to be preserved or otherwise used against her husband at trial." Further, an "interrogation" within the meaning of Crawford takes place, the court concluded, only when police "attempt[] ... to pin down and preserve statements rather than [undertake] efforts ... to determin[e] whether an offense has occurred." Id. at 457.

Prof. Friedman represented Hammon before the Supreme Court.

**The Supreme Court's Decision**

The Court's self-described holding regarding whether statements elicited by police are testimonial ignores the declarant's motive or reasonable expectation, and focuses instead solely on an objective assessment of the motivation of the interrogating officer:

> **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.**

126 S.Ct. at 2273-2274.

The Court also rejected the standard proposed by Justice Thomas in White v. Illinois, which he reiterated in his opinion concurring in the result in Davis and dissenting in Hammon, that would require "solemnity" and a "formalized process" as essential elements of a testimonial

statement, based on Thomas' conception of the original purpose underlying the recognition of the confrontation right at common law. See id. at 2282 (opinion of Thomas, J.)

The majority opinion did "not dispute that formality is ... essential to testimonial utterance." 126 S.Ct. at 2278 n. 5. But the Court said that "[t]he solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood." Id. at 2276; see id. at 2278 n. 5 ("it imports sufficient formality ... that lies to such officers [by declarants] are criminal offenses"). More broadly, the opinion states, "we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policemen *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition." Id. at 2276 (emphasis as written). And, the Court declared, "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction." Id. at 2278 n. 5. The Court thus dispelled fears that the promise of Crawford would be extinguished by an exceedingly narrow construction.

Applying this standard in Davis, the Court stressed that McCottry "was speaking about events *as they were actually happening*, rather than "'describ[ing] past events.'" 126 S.Ct. at 2276 (emphasis as written; citation omitted). Thus, "any reasonable listener would recognize that McCottry ... was facing an ongoing emergency." Id. And "the nature of what was asked and answered in Davis, viewed objectively," including "the operator's effort to establish the identity of the assailant," "was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather that simply to learn ... what had happened in the past." Id. (emphasis as written). Moreover, the Court continued, the level of "formality" in the police interview was

much less than in Crawford, since the Crawford declarant was "responding calmly, at the station house, to a series of questions," whereas "McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even ... safe." Id. at 2276-2277.

For all of these reasons, the Court said, "the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*. ... No 'witness' goes into court to proclaim an emergency and seek help." Id. at 2277 (emphasis as written).

The Court did acknowledge, however, regarding the 911 operator's elicitation of additional information from McCottry after the emergency "appears to have ended," that "it could readily be maintained that, from that point on, McCottry's statements were testimonial." Id.

Deciding Hammon in defendant's favor, the Court significantly declared that "[d]etermining the testimonial or nontestimonial character of the statements [at issue there] is a much easier task" than in Davis. Id. at 2278. The Court found it "entirely clear" that the interrogation of Amy Hammon was "part of an investigation into possibly criminal past conduct;" Amy Hammon related "how potentially criminal past events began and progressed," "at some remove in time from the danger she described." Id. at 2278, 2279. Moreover, there was "no emergency in progress;" "the interrogating officer ... had heard no arguments or crashing and saw no one break or throw anything." Id. at 2278. Amy Hammon had originally told police that "things were fine," and the officers prevented Mr. Hammon from interfering with the questioning of his wife. Id. Statements such as those of Amy Hammon are "an obvious substitute for live testimony, because they do precisely *what a witness does* on direct

examination; they are inherently testimonial." Id. (emphasis as written).

More generally, the Court stated that it was not holding that "*no* questions at the [crime] scene will yield nontestimonial answers." Id. at 2279 (emphasis as written) Regarding domestic disputes, responding officers will "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Id., quoting from Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 U.S. 177, 186 (2004). Such "exigencies," the Court continued, "may *often* mean that 'initial inquiries' produce nontestimonial statements. But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial." Id. (emphasis as written).

The Court reaffirmed its pronouncement in Crawford that a defendant forfeits his right to invoke the Confrontation Clause if he procures the declarant's absence at trial through his misconduct. Id. at 2280. Unfortunately, it then went further and seemed to encourage a broad conception of the forfeiture doctrine. Although the opinion cautions that the Court "take[s] no position" regarding the standards necessary to prove forfeiture, it noted that federal and state courts have "generally held the [prosecution] to a preponderance-of-the-evidence standard," and quoted approvingly from a Massachusetts decision that apparently permitted the prosecution to rely on the declarant's out-of-court statements themselves when determining their admissibility. The Court also said nothing about enforcement of a strict unavailability requirement before the doctrine could be invoked.

Hopefully, the forfeiture discussion in Davis will not have a significant impact in New

York prosecutions. New York's forfeiture rules are well-settled, and, in general, provide stronger procedural safeguards than the Supreme Court apparently would mandate. For example, New York requires the prosecution to demonstrate defendant's responsibility for a witness's unavailability by clear and convincing evidence, People v. Geraci, 85 N.Y.2d 359, 368 (1995), and that the prosecution also establish the defendant's intent to prevent the declarant from testifying. People v. Maher, 89 N.Y.2d 456, 462 (1997). And it does not allow the trial court to decide the forfeiture issue by determining the ultimate question of the defendant's guilt of the charged crime. Id.

**Davis' Reasoning and Ramifications Regarding Accusations Made in the Immediate Aftermath of a Crime**

Particularly regarding domestic-violence cases, this is a dangerous decision for criminal defendants, because it contains something for everyone, including, unfortunately, prosecutors. When language is included in a Supreme Court decision that judges can cite as a justification for refusing to enforce a right, they usually jump on it. Such language is abundant here. It is probably the result of a desire, perhaps orchestrated by the Chief Justice, to forge the broadest possible majority coalition by papering over major doctrinal disagreement among the justices. Anyone who observed the argument is likely to have been flabbergasted upon learning that Justices Scalia, Roberts, and Ginsburg not only reached the same result in these cases, but signed on to the same opinion as well. Scalia attacked the prosecutors' positions relentlessly during the arguments in both cases, and Roberts was nearly as hostile to both defense counsel. Ginsburg attacked the defendants' position as well, expressing concern that a holding in defendants' favor would result in many fewer prosecutions in domestic violence cases, since battered women are

usually "scared to death" to testify, "even without threats" from the batterer.

The court's focus on the "primary purpose" of the police questioning is dubious analytically. Though the purpose of the Crawford inquiry is to determine whether the declarant should be considered a "witness" for purposes of the Confrontation Clause, the Court nevertheless seems to require lower courts to resolve that question from a perspective that renders the declarant's motive or reasonable expectation irrelevant. The test also creates the potential for police manipulation. Though the court is careful to couch the standard in objective terms, going so far as to declare that police "saying that an emergency exists cannot make it so," 126 S.Ct. at 2279 n. 6, it will be difficult for courts to ignore an officer's claim that he believed that an emergency was in progress when he questioned the declarant. Under analogous circumstances, when applying a similarly objective standard under the Fourth Amendment, if an officer testifies that he frisked the defendant because he believed him to be armed, courts are exceedingly reluctant to rule that based on the surrounding circumstances, the officer's belief was unreasonable. More insidiously, the Davis standard may lead some officers to question a suspected victim of domestic violence before ensuring her safety, in order to obtain evidence from a declarant who may well be reluctant to testify.

The "primary purpose" test standard is also, to say the least, not susceptible of easy application. Justice Thomas aptly points out in his opinion dissenting in part that police often have two purposes in questioning witnesses shortly after a crime, "to respond to the emergency situation *and* to gather evidence." 126 S.Ct. at 2283 (emphasis as written). A judge required to resolve which purpose is "primary" has a difficult task indeed.

Confusing matters further, Justice Scalia's opinion suggests elsewhere that the declarant's

motive or reasonable expectation may be important after all. The Court discussed the statements at issue in Davis from the declarant's viewpoint when it characterized them as "plainly a call for help" rather than a "narrative report of a crime absent any imminent danger," 126 S.Ct. at 2276, and said that McCottry was not "acting as a witness," or "testifying." Id. at 2277. More directly, the Court looked to the declarant by stating that "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate," id. at 2274 n. 1, and that "police conduct" cannot "govern the Confrontation Clause; testimonial statements are what they are." Id. at 2279 n. 6.

These pronouncements leave room for arguments that the declarant's motive or reasonable expectation should factor into the analysis.[5] Indeed, there is already one helpful post-Davis appellate decision from a state high court in a domestic-violence case that relies on the above language to conclude that the focus should be on the *declarant's* primary purpose, considered objectively, when evaluating the status of statements made in response to police questioning. State v. Mechling, ___ S.E.2d ___, 2006 WL 1805697 (W. Va., decided June 30, 2006).

The Court's language and reasoning suggest its belief that most crime-scene accusations to police are testimonial. It does this, first, by declaring that deciding Hammon was a "much easier task" than deciding Davis. Id. at 2278. Second, it repeatedly stressed the Court's view that the critical factor distinguishing Hammon (and Crawford) from Davis was that in the former two cases, the officers were trying to determine whether past conduct was criminal, rather than to

[5] They also provide the basis for advocating a declarant-centered focus when arguing the testimonial character of statements not obtained through police interrogation. See post at 17-18.

evaluate the status of a emergency seemingly still in progress. Id. at 2276-2279. Officers responding to most reports of crime will know in advance that the reported incident is likely to be over. And the Court's emphasis on the investigating officer in Hammon having "heard no arguments or crashing" and seen "no one throw or break anything" could give rise to an argument that crime-scene statements should be recognized as testimonial unless it is apparent to the officer that the domestic disturbance is still in progress. Even regarding 911 calls, the court recognized the possibility that statements made after the operator has ascertained that the emergency is over, id. at 2277, or "provid[ing] a narrative report of a crime absent any imminent danger," id. at 2276, should be considered testimonial

Outside the context of domestic violence, the court's focus on whether an emergency situation persists should lead most courts to recognize that statements to police at the scene of street crimes must generally be regarded as testimonial. In such cases, the defendant usually will have fled the scene before the police arrive, rendering fatuous any claim of a continuing emergency.

Nevertheless, the opinion contains language likely to hearten prosecutors, suggesting, for example, that potential "exigencies" in domestic-violence cases, creating a need for officers to ascertain whether they and/or the victim may be at risk, "may *often* mean that 'initial inquiries' produce nontestimonial statements." Id. at 2279. The Court also noted Amy Hammon's initial report that "things were fine," and that she was interviewed "in a separate room, away from her husband," who had been "forcibly prevented" from "participating in the interrogation." Id. at 2278. Officers often question the possible victim without receiving any representation concerning her safety, and before they have determined the location of her alleged assailant.

The Court also noted that the declarant in Davis gave "frantic" answers to the 911 operator, which may be seized upon by judges like those who have previously viewed "excited utterances" as inherently nontestimonial. One thing that should be clear from the result in Hammon, however, is that it can no longer be maintained that the factors that may qualify a statement as an "excited utterance" also necessarily make it nontestimonial. The officers who questioned Amy Hammon said that she was "timid" and "somewhat frightened" when they first saw her, and the lower court's determination to admit her ensuing statements as excited utterances on this basis was upheld throughout the state appellate process. The Supreme Court, however, never mentioned these rulings except when it discussed the decision's procedural history.

What about statements not made in response to detailed police questioning? The Davis Court addresses this topic in an important footnote, stating:

> Our holding refers to interrogations because ... the statements in the cases presently before us are the products of interrogations – which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. ...And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

126 S.Ct. at 2274 n. 1.

Though this footnote is dictum, it establishes the Court's viewpoint that volunteered statements to police, and statements in response to open-ended questioning such as "what happened," may be testimonial in nature, and that the declarant's motivation or reasonable

expectation may be decisive in resolving such questions. This should prove extremely helpful in New York, where two Appellate Division departments have suggested that statements not made in response to police questioning cannot be testimonial. See People v. Bryant, 27 A.D.3d 1124 (4th Dept. 2006); People v. Bradley (Norman), 22 A.D.3d 33 (1st Dept. 2005), leave granted, 6 N.Y.3d 752 (2005) (Graffeo, J.). The West Virginia Supreme Court of Appeals has already seized on the language in footnote 1, and the other declarant-focused language noted earlier at p. 15, ante, to declare that "the existence or lack of government interrogation does not necessarily determine whether a statement is testimonial," and that "a court assessing whether a witness's out-of-court statement is 'testimonial' should focus more upon the witness's statement, and less upon any interrogator's questions." State v. Mechling, ___ S.E.2d ___, 2006 WL 1805697 (W.Va., decided June 30, 2006).[6]

Before Davis, the New York Court of Appeals granted leave to criminal defendants in two cases involving victims' statements to police at crime scenes. The Court of Appeals granted the New York County District Attorney's request for supplemental briefing in light of Davis, and the cases, which may be argued this fall, may prove critical in setting guidelines for lower courts in construing Davis. People v. Bradley (Norman), 22 A.D.3d 33 (1st Dept. 2005), leave granted, 6 N.Y.3d 752 (2005) (Graffeo, J.), involves a statement by an alleged victim of domestic violence to a responding officer that her boyfriend "threw [her] through a glass door." And in People v. Diaz, 21 A.D.3d 58 (1st Dept. 2005), leave granted, 5 N.Y.3d 852 (2005) (Ciparick, J.),

[6] The Mechling court held that the declarant's statement to responding police was testimonial, but the court's analysis will probably prove more helpful than the result. The case is not a close one under Davis, and also is atypical regarding domestic violence, in that the incident took place on the street rather than in the home, and the defendant fled the scene well before the police arrived.

the Appellate Division upheld the introduction of an identification of the defendant by a street-crime victim about 25 minutes after the crime occurred.

**The Impact of Davis Upon Other Questions Left Unanswered By Crawford**

Once again, the Supreme Court refused in Davis to provide an overarching definition of "testimonial" hearsay. But, as the Mechling decision recognizes, the declarant-centric language in Davis' fn. 1 and elsewhere supports the argument that the declarant's expectation/motivation is relevant not only to whether statements to police are testimonial, but to an overall understanding of the term "testimonial" hearsay as well. Relying on this language, the Mechling court writes, "a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Regarding whether statements to private parties can be testimonial, Davis contains some language that is encouraging, particularly considering that nearly all courts after Crawford had flatly refused to declare any statement not made to law enforcement officials or their agents to be testimonial. Davis specifically reserved the question of "whether and when statements made to someone other than law enforcement are 'testimonial.'" 126 S.Ct. at 2274 n. 2. Moreover, it approvingly discussed an English common-law decision, King v. Brasier, 168 Eng. Rep. 202 (1779), excluding a nontestifying child rape victim's statement made to her mother "immediately upon coming home," that related "all the circumstances" of the incident. 126 S.Ct. at 2277. The Mechling opinion picked up on these hints as well. One of the statements at issue there was made to a civilian on the street before police arrived. The Mechling court "interpret[ed]" the remarks in Davis just discussed "to imply that statements made to someone other than law enforcement

personnel may also be properly characterized as testimonial," but remanded because the "full extent" of the civilian's "interaction with" the declarant was unclear.

Did Davis say anything relevant regarding the testimonial character of business records, public records, and lab reports that are prepared with the expectation that they may be used prosecutorially? The case contains one clue regarding the ultimate fate of such documents, and it seems to send a negative signal in some respects, but perhaps a positive one in others. After declaring that only testimonial hearsay was governed by the Confrontation Clause, the Court supported its point by saying, "[w]ell into the 20th century, our own Confrontation Clause jurisprudence was carefully applied only in the testimonial context." 126 S.Ct. at 2274-2275. The Court then illustrated this by citing a number of its early decisions, including Dowdell v. United States, 221 U.S. 325, 330-331 (1911). In a parenthetical, it described this case as holding that "facts regarding [the] conduct of [a] prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to defendants' guilt or innocence and hence were not statements of 'witnesses' under the Confrontation Clause." 126 S.Ct. at 2275.

The Court could be suggesting here that official documents prepared without awareness that they would be used in prosecuting a particular crime are not testimonial, at least if they do not relate directly to the defendant's "guilt or innocence." This may not bode well for defense contentions that, for example, certified copies of orders of protection cannot be admitted in contempt prosecutions absent testimony from the judge or clerk, or that calibration reports certifying the operability of a breathalyzer are inadmissible in DWI trials unless the tester is

called as a witness.[7] On the other hand, by negative implication, the Dowdell reference is helpful to the defense in cases involving, inter alia, documents certifying the result of a DWI defendant's breath test, or lab reports determining that substances sold to police are contraband.

Finally, for post-conviction counsel, I am attaching an appendix (Appendix A) that includes part of an earlier analysis of the potential retroactivity of Crawford that I wrote last year, since it remains pertinent. The following is new information.

The Supreme Court has granted cert to the state of Nevada in a case from the 9th Circuit holding Crawford to be retroactive on habeas corpus review. Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005), rehearing en banc denied (with 9 judges dissenting), 418 F.3d 1055 (9th Cir. 2005), cert. granted sub nom. Whorton v. Bockting, 126 S.Ct. 2007 (2006). Every other circuit to address this issue has held Crawford to be nonretroactive, including the 2d Circuit (see Appendix A, pp. 26-28). A favorable outcome is highly unlikely. The Supreme Court may also address the threshold question of whether any Supreme Court decision can be retroactive under AEDPA, which on its face permits a habeas petitioner to rely only on Supreme Court cases decided before his state court judgment became final. That is a closer question; it may be possible to persuade the Court that the two exceptions to Teague retroactivity survive AEDPA. Obviously, the Court can duck that issue if it wishes, by holding Crawford nonretroactive even assuming that the Teague exceptions still apply.

On the New York State level, since the 2d Circuit held Crawford to be inapplicable retroactively, five additional trial judges have refused to apply Crawford retroactively to

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[7] The latter argument was generally rejected by New York trial judges before Davis. See, e.g., Green v. DeMarco, 11 Misc.3d 451 (Sup. Ct., Monroe Co. 2005) (Fisher, J.).

defendants seeking to vacate their convictions under C.P.L. §440.10. People v. Tam, 2006 WL 1868023 (Sup. Ct., Queens Co., decided July 7, 2006; Knopf, J.); People v. Jackson, 2006 WL 1867328 (Sup. Ct., Queens Co., decided June 30, 2006; Braun, J.); People v. Ayrhart, 2005 WL 1662045 (Co. Ct., Genesee Co., decided June 30, 2005; Broderick, J.); People v. Perfetto, 2005 WL 1330536 (Sup. Ct., Queens Co., decided May 3, 2005; Kohm, J.); People v. Soto, 8 Misc.3d 350 (Sup. Ct., Bronx Co. 2005; Massaro, J.). No appellate court has yet addressed the issue.

What about Davis? Since the decision springs from Crawford, any argument that it qualifies as a new rule is dubious. If you're representing a defendant in a state-court 440 proceeding, you should first attempt to establish Crawford's retroactivity, and then argue that the Davis rationale should be followed because the decision is merely an application of Crawford.

**Conclusion**

In cases involving statements to responding police, attorneys seeking to invoke Hammon should try to convince the court that there was no continuing emergency when questioning began, or at least that there was nothing apparent that would lead the officer to believe that any danger persisted. Make it clear that an officer's subjective belief that an emergency was in progress is irrelevant under the Supreme Court's rationale; the court must independently examine the objective circumstances. If it is clear under the circumstances that the declarant/victim would reasonably expect her statements to be used prosecutorially, make this argument as well; as Mechling demonstrates, it retains viability in the aftermath of Davis/Hammon. And consider raising a Crawford/Davis claim regarding some statements made in 911 calls. As Davis itself strongly suggests, if a woman calls 911 at 1:00 p.m. to report that her boyfriend beat her up that morning, the statement should be considered testimonial; the same is true regarding statements

elicited by the operator in an emergency scenario, after it has become clear that the caller is no longer in danger.

Make certain that you explain the fatally flawed nature of rationalizations frequently offered by judges in holding statements to be nontestimonial. A statement to police need not be the product of "interrogation" to be testimonial. It may qualify as such even if "volunteered," or made in response to an "open-ended" question. It need not necessarily be made to law enforcement at all. And the considerations that qualify statements as excited utterances do not disqualify them as testimonial, if no emergency persists.

Finally, trial attorneys should understand that even though nontestimonial statements are not subject to the Confrontation Clause, they remain subject to the hearsay rule. If the facts permit it, argue vigorously that statements to police or even to 911 operators do not qualify as excited utterances. Such an argument may be viable even if the declarant is injured at the time the statement is made. See People v. Johnson, 1 N.Y.3d 302, 306 (2003) ("there is no ... 'injury' exception to the hearsay rule"). And the Court of Appeals has instructed lower courts to be "especially vigilant" to ensure that only "inherently reliable" evidence should be admitted under hearsay exceptions "[w]here the only direct evidence of a defendant's guilt is in the form of hearsay testimony." Id. at 307-308.[8]

Andrew C. Fine
July 21, 2006

[8] I am attaching, as Appendix B, a slightly modified version of a review of potential state constitutional challenges to non-testimonial hearsay that I wrote last year.

## APPENDIX A: RETROACTIVITY OF CRAWFORD
## (originally written March 16, 2005; amended July 14, 2006)

Regardless of whether you raised a Confrontation Clause claim on direct appeal, you may do so in a 440 if you're relying on a retroactively applicable change in the law. C.P.L. §§440.10(2)[a], (3)[b], (3)[c]. In People v. Eastman, 85 N.Y.2d 265 (1995), the Court of Appeals applied the retroactivity standard governing pre-AEDPA federal habeas review announced in Teague v. Lane, 489 U.S. 288, 311 (1989), in a 440 proceeding. Under Teague, a decision stating a new rule is retroactively applicable only if (1) it places "certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe," or (2) it alters a bedrock element of criminal procedure that implicates the fundamental fairness and accuracy of the trial.

Despite the Court of Appeals' application of Teague in Eastman,[9] state defendants whose state court judgments have become final are better situated at this juncture to collaterally challenge their convictions at the state than at the federal level. There are two reasons for this. The first stems from the Court's decision in Eastman to apply Cruz v. New York, 481 U.S. 186 (1987), retroactively under the second Teague exception. The second is the Second Circuit's

[9] It could be argued that the Eastman Court applied Teague because it concluded that even under that harsh standard, defendant would prevail, and that Teague provided a federal constitutional baseline for the applicability of new Supreme Court decisions. In a case where the outcome under Teague is problematic, a state retroactivity standard could be advocated. Indeed, if the Supreme Court rules in Whorton v. Bockting that the Teague exceptions no longer apply under AEDPA, see p. 21 ante, it may well lead state courts, including New York's, to rethink their retroactivity doctrine regarding such collateral challenges. Unfortunately, however, the Court of Appeals, if it chose to go that route, would probably employ the standard it has applied to state-law decisions adopting new rules, which sometimes permits retroactive application to defendants whose direct appeals are still pending, but virtually always prohibits such application to defendants whose convictions have become final. See People v. Pepper, 53 N.Y.2d 213, 220-222 (1981).

decision not to apply Crawford retroactively to state habeas petitioners in Mungo v. Duncan, 393 F.3d 327 (2d Cir. 2004).

The Teague/retroactivity issue in Eastman presented a remarkably similar situation: like Crawford, Cruz is a Confrontation Clause decision (also authored by Scalia, by the way) that, in contravention of prior precedent, held that a particular variety of unconfronted hearsay – in Cruz, statements of a codefendant that were inadmissible against the defendant because codefendant did not testify – violated defendant's Confrontation Clause rights, notwithstanding a jury instruction that the co-defendant's statement could not be used against defendant. The Eastman Court reasoned that Cruz "unquestionably departs from established precedent, and implicates a bedrock procedural element – the Sixth Amendment right of confrontation." 85 N.Y.2d at 276. The Cruz rule, according to Eastman, "is central to an accurate determination of guilt or innocence," and the failure to apply it "undermined the fundamental fairness of the trial, where, as here, there was no opportunity for cross-examination to test the reliability of the co-defendant's confession." Id. Very similar arguments can be made regarding Crawford, except that Crawford – which, without question, states a new rule, given its radical analytical shift – is a far more "fundamental," "bedrock" decision than is Cruz. Thus, you should seriously consider the 440 option if one of your closed cases presents a potentially strong Crawford claim.

Thus far, three out of five New York trial courts have held, relying on Eastman, that Crawford is retroactive under the second Teague exception. People v. Encarnacion, 2005 WL 433252 (Sup. Ct., N.Y. Co., decided February 23, 2005; McLaughlin, J.) (retroactive); People v. Dobbin, 2004 WL 3048648 (Sup. Ct., N.Y. Co., decided December 22, 2004; Tejada, J.) (retroactive); People v. Watson, 2004 WL 2567124 (Sup. Ct., N.Y. Co., decided November 8,

2004; Kahn, J.) (retroactive); but cf. People v. Vasquez, 2005 WL 429807 (Sup. Ct., N.Y. Co., decided January 18, 2005; Corriero, J.) (not retroactive); People v. Khan, 2004 WL 1463027 (Sup. Ct., Queens Co., decided June 23, 2004; Rotker, J.) (not retroactive).

The first three courts agreed that Crawford, like Cruz v. New York, altered a bedrock element of criminal procedure, and did so in a way that significantly improved the overall accuracy of the factfinding process. The Watson court noted that the Supreme Court had often explained that the "'basic purpose' of the Confrontation Clause is the 'promotion of the integrity of the fact finding process'" (quoting from White v. Illinois, 502 U.S. at 356). Disagreeing, the court in Vasquez, relying on the Second Circuit's reasoning in Mungo, argued that although Crawford will occasionally prohibit the admission of unreliable testimonial hearsay, it will also on occasion bar the introduction of reliable testimonial hearsay, and thus will not improve the accuracy of the factfinding process overall. The court in Encarnacion reasoned, however, that Crawford treats all testimonial hearsay from non-testifying declarants as presumptively unreliable, and that Mungo's analysis subverted accuracy by its focus on "reliable" evidence that is constitutionally incompetent. In Mungo, moreover, the Second Circuit did not even mention, much less attempt to distinguish, its holding in Graham v. Hoke, 964 F.2d 982 (2d Cir. 1991), which agreed with Eastman that Cruz v. New York was retroactive under Teague.

## APPENDIX B: POTENTIAL CONSTITUTIONAL CHALLENGES TO NONTESTIMONIAL HEARSAY POST-DAVIS (originally written March 16, 2005; amended July 14, 2006)

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Though the Supreme Court has now ruled that nontestimonial hearsay does not implicate the Confrontation Clause, it is arguable that the admission of such evidence could violate due process under certain circumstances, if the declarant does not testify. See Friedman, The Confrontation Blog: Non-Testimonial Statements, http://confrontationright.blogspot.com/ (January 24, 2005). Prof. Friedman suggests that relevant due-process considerations could include, inter alia, the importance of the evidence to the prosecution, the likelihood that cross-examination would be useful, whether the evidence would be prejudicial absent cross-examination, and whether the prosecution was in a better position than the defense to produce the declarant. Id. And a state constitutional Confrontation Clause (N.Y. Const., Art. I, §6) challenge could be raised regarding the admission of nontestimonial hearsay that does not satisfy Roberts.[10]

[10] Of course, hearsay that does not qualify under an exception remains inadmissible as a matter of evidentiary law. It is nevertheless imperative that trial practitioners preserve any potential constitutional claim in order to enhance clients' possibilities for relief if they are convicted. Accordingly, if you argue that nontestimonial hearsay should be excluded because it does not fit within a hearsay exception, you should also argue that its introduction would violate your client's state constitutional right of confrontation if the declarant does not testify. The Court of Appeals has made it clear that a hearsay objection *does not* preserve a confrontation claim, even when the declarant does not testify. People v. Kello, 96 N.Y.2d 740, 743-744 (2001); People v. Maher, 89 N.Y.2d 456, 462 (1997). If the admission of hearsay violates the state constitution as well as the rules of evidence, and counsel invokes the constitution as well as the hearsay rule, the harmless-error standard on appeal will be much more favorable. If counsel does not raise it, the client's chances on appeal will be compromised.

In addition, a state constitutional confrontation claim may be available if the state does not demonstrate the unavailability of the non-testifying declarant. In People v. Roman, 212 A.D.2d 390 (1st Dept. 1995), and People v. Persico, 157 A.D.2d 339 (1st Dept. 1990), the First Department held that the introduction of hearsay statements *that were otherwise admissible* under the co-conspirator exception to the hearsay rule violated defendants' state constitutional right of confrontation, because the prosecution had failed to establish the declarants' unavailability to testify.[11] The court refused to follow United States v. Inadi, 475 U.S. 387 (1986), which held that when hearsay is admitted under the co-conspirator exception, the prosecution, to satisfy the Confrontation Clause, did not have to establish a declarant's unavailability in order to introduce his/her out-of-court statement under an exception to the hearsay rule.[12]

The rationale of these decisions is equally applicable to statements offered under other hearsay exceptions. And, it is supported by some case law in other jurisdictions. In Beach v. State, 816 N.E.2d 57, 60 (Ind. App. 2004) (dictum), the court wrote, "We are troubled by [the] scenario [] in which the alleged victim of a crime is present in the courtroom and apparently available to be called by the State as a witness, but the State chooses not to call the witness and instead relies upon hearsay statements the witness made to another person to prove its case.

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[11] Statements admitted under the co-conspirator exception are indisputably non-testimonial. United States v. Robinson, 367 F.3d 278, 292 n. 20 (5th Cir. 2004); United States v. Reyes, 362 F.3d 536 (8th Cir. 2004); see Davis, 126 S.Ct. at 2275; Crawford, 541 U.S. at 56.

[12] Inadi, which further suggested that the prosecution need never demonstrate a declarant's unavailability unless the statement it is offering consists of prior testimony, may well have been undermined by Crawford. Regarding testimonial hearsay, Crawford holds that even where there was an opportunity to cross-examine on a prior occasion, the statement is still inadmissible unless the prosecution establishes the witness's unavailability at trial.

...[T]he State would be well-advised to avoid the tactic of introducing hearsay statements without calling the declarant to testify in cases where the declarant is in fact available to testify." The court approvingly cited State v. Jackson, 69 P.3d 722, 725 (Ore. App. 2003), which held that allowing the prosecution to introduce hearsay statements without calling an available declarant violated defendant's state constitutional right of confrontation.