Crawford v. Washington: Bright Line Rules to Identify Testimonial Statements

by JENNY M. KIM*

I. Sixth Amendment Confrontation Clause

The Confrontation Clause of the Sixth Amendment gives a defendant in a criminal prosecution the right to "be confronted with the witnesses against him."[1] The Constitution's text alone does not resolve the meaning of the Confrontation Clause and its application to the admissibility of an unavailable witness' statements.[2] Thus, in determining whether admission of an unavailable witness' tape-recorded statement to a police officer was a Confrontation Clause violation, the *Crawford* Court looked to the history of the Confrontation Clause from its inception at English common law.[3] The Court determined that the Framers of the Constitution were particularly concerned about the unique potential for prosecutorial abuse.[4]

In *Crawford*, the Court expressed concern that there was little "meaningful protection" from Confrontation Clause violations under the "indicia of reliability" test articulated in *Ohio v. Roberts,* 448 U.S. 56 (1980).[5] The Court's two main concerns were that the open-ended *Roberts* test was unpredictable and that it admitted "core testimonial statements" that the Constitution intended to exclude.[6]

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1. U.S. CONST. amend. VI.
2. Crawford v. Washington, 541 U.S. 36, 42 (2004).
3. *Id.* at 43-47.
4. *Id.* at 56 n.7.
5. *Id.* at 62-63.
6. *Id.* at 63.

Consequently, the Court abrogated *Roberts* and ruled that, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[7] While the Court laid down a clear rule barring the admission of testimonial statements where a witness is unavailable for cross-examination, the Court did not fully define what makes a statement "testimonial."[8]

In the aftermath of the *Crawford* decision, lower courts were left with the task of developing a standard to determine whether a statement is testimonial and whether its admission would violate the Confrontation Clause. In June of 2006, two years after *Crawford* was decided, the Court revisited the Confrontation Clause and *Crawford* to address the more specific issue of what type of interrogations produce testimony.[9]

This article surveys the recent United States Supreme Court and lower court decisions analyzing the distinction between testimonial and nontestimonial statements and advocates adopting bright line rules consistent with the Framers' intent. Adopting bright line rules that comport with the guarantees of the Sixth Amendment would avoid the vices of the prior standard articulated in *Roberts.*

These bright line rules consider the formal quality of a statement and the level of government involvement in procuring that statement. If there is neither a formal quality to a statement nor a government agent involved in procuring a statement, courts should rule that it is nontestimonial. However, where a non-government agent's sole purpose is to collect evidence as dictated by a statute or at the request of a prosecutor or police officer, a formal statement collected under those circumstances should be held testimonial. In that situation, the non-government agent has, in effect, prosecutorial functions, and presents a potential for prosecutorial abuse. Finally, courts should find that spontaneous statements are nontestimonial because they are not made with an eye toward trial or an opportunity for reflection.

A. Overcoming Confrontation Clause Objections Prior to *Crawford*

Under *Ohio v. Roberts*, the Confrontation Clause did not bar admission of an unavailable witness' statement against a criminal defendant if the statement bore "adequate 'indicia of reliability.'"[10]

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7. *Id.* at 68-69.

8. *Id.* at 61.

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

10. 448 U.S. 56, 66 (1980).

The *Roberts* reliability test was met when the evidence either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."[11]

The Court pointed out two vices of the *Roberts* reliability test.[12] The first vice is that determining a statement's reliability is almost entirely subjective and leads to unpredictable results.[13] The procedural history of *Crawford* illustrates the "unpredictable and inconsistent application" of the reliability test.[14] There, the trial court, appellate court and state supreme court each listed their own reasons for their findings that the statement was or was not reliable.[15] That procedural history demonstrated that the *Roberts* test itself was unreliable in determining whether an unavailable witness' statement should be admitted.

The second and "unpardonable vice" of the *Roberts* test is its history of admitting "core testimonial statements that the Confrontation Clause plainly meant to exclude."[16] In *Crawford*, the State sought admission of an unavailable witness' tape-recorded statement to police against a criminal defendant.[17] Justice Scalia characterized this as ex parte testimony and opined that the trial court's admission of that statement was a violation of the Confrontation Clause.[18] Cross-examination was necessary to undermine the court's assumptions regarding the statement's reliability.[19] The Court stated that cross-examination would have teased out the motives of the government officer conducting the interview, the declarant's perception of whether the officer was neutral to her,[20] and the truth of ambiguous statements.[21]

B. *Crawford* and Its Impact

To preserve the protections of the Confrontation Clause, *Crawford* abrogated *Roberts* and placed an absolute bar on the

11. *Id.*
12. *Crawford*, 541 U.S. at 63-65.
13. *Id.* at 63.
14. *Id.* at 66.
15. *Id.* at 65-66.
16. *Id.* at 63.
17. *Id.* at 38.
18. *Id.* at 68-69.
19. *Id.* at 66.
20. *Id.*
21. *Id.* at 67.

admission of testimonial hearsay where an unavailable witness' out-of-court statement is concerned.[22] Because the Constitution's text alone does not resolve the Confrontation Clause's meaning,[23] *Crawford* provided an extensive historical analysis of the Clause.[24] The Court found that "the principal evil at which the Confrontation Clause was directed was . . . use of ex parte examinations as evidence against the accused."[25]

The Court examined the origins of the Confrontation Clause and determined that the Framers were concerned with the potential for prosecutorial abuse of ex parte testimony.[26] In 16th century England, it was routine for Justices of the Peace or other officials to subject witnesses and suspects to a pretrial examination and use the statements as evidence in some cases.[27] English common law required a prior opportunity for cross-examination to admit an unavailable witness' statement.[28] This right of confrontation was included in the Sixth Amendment.[29] The Court determined that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[30]

After *Crawford*, the threshold question in the Confrontation Clause analysis is whether a statement is "testimonial." *Crawford* explicitly declined to give a comprehensive definition of "testimonial."[31] However, the Court did make reference to the dictionary definition of "testimony" and determined it was typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[32] The Supreme Court contrasted the way in which "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[33] The *Crawford*

22. *Id.*

23. *Id.* at 42.

24. *Id.* at 42-47.

25. *Id.* at 50.

26. *Id.* at 43-50.

27. *Id.* at 43.

28. *Id.* at 46-47.

29. *Id.* at 49.

30. *Id.* at 53-54.

31. *Id.* at 68.

32. *Id.* at 51 (quoting NOAH WEBSTER, AM. DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828)) (alteration in original).

33. *Id.*

HeinOnline -- 33 Hastings Const. L.Q. 428 2005-2006

Court provided various formulations of this core class of testimonial statements:

> [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 declarant 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.[34]

The *Crawford* Court did not adopt these formulations and declared they were not inclusive but "share a common nucleus and define the Clause's coverage at various levels of abstraction around it."[35]

II. Defining "Testimonial"

Typically courts make factual inquiries to determine whether a statement was made under circumstances that fall under one of three formulations proposed in *Crawford*. It is clear that the Court did not want an open-ended balancing test due to its vulnerability to the type of manipulation that occurred under the *Roberts* test.[36] However, the first and third formulations provided in *Crawford* are open-ended tests that will require factual inquiries and balancing. Reliance on these two formulations is vulnerable to similar forms of manipulation that resulted in application of *Roberts*.

In light of this consideration, bright line rules that comport with the history of the Confrontation Clause should be adopted. *Crawford* and subsequent case law appear to focus on the formal quality or solemnity of a statement and the level of government involvement in procuring the statement to determine whether a statement is testimonial. This article demonstrates that bright line rules covering a variety of situations can be developed. These rules remain faithful to the purposes of the Confrontation Clause. Also, bright line rules will prevent subjective manipulation of the facts by judges and will lead to predictable results. Lastly, a variety of situations are presented where a defendant will be afforded the protections of the Confrontation

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34. *Id.* at 51-52.

35. *Id.* at 52.

36. *Id.* at 67-68.

Clause even if prosecutors and police officers modify or outsource their investigatory functions in response to *Crawford.*

A. An Examination of Each Formulation

Rather than adopting one formulation, the Court expressed that "these formulations all share a common nucleus and define the Clause's coverage at various levels of abstraction around it."[37] The Court also added that "some statements qualify under any definition" which implicitly means that some statements might qualify under only one definition.[38] Thus, courts should not adopt a single formulation as the standard to determine whether a statement is testimonial. Doing so would result in a failure to bar testimonial statements that might be covered under the other two formulations. Additionally, falling within one of the three formulations should be a necessary, but not sufficient, requirement to characterizing a statement as testimonial due to the vulnerability to similar problems that resulted from applying the *Roberts*' "indicia of reliability" test.

The third formulation, "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" is the broadest definition of "testimonial."[39] Application of this formulation to find a testimonial statement is susceptible to the type of manipulation that occurred with *Roberts*' "indicia of reliability" test. *Roberts* required judges to make factual inquiries and list the factors that made a statement sufficiently or insufficiently trustworthy.[40] Under the third formulation for a testimonial statement, a judge will have to produce a similar factual inquiry and list of factors to determine whether circumstances "would lead an objective witness" to reasonably believe a statement would further prosecution.[41] According to *Crawford*, a judge should not make assumptions that cross-examination might undermine.[42] Whether an objective witness reasonably believed a statement would be used later in trial is a question that can only be answered through cross-examination.[43]

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37. *Id.* at 52.
38. *Id.*
39. *Id.*
40. *Id.* at 65.
41. *Id.* at 52.
42. *Id.* at 66.
43. *Id.*

Another difficulty with the third formulation is determining who the "objective witness" is. The court in *People v. Sisavath* considered this question.[44] In determining who the objective witness was, where a four year old child's statement was concerned, the court considered two options. One option was that the objective witness was "in the same category of persons as the actual witness."[45] Under that interpretation, the objective witness would be a four year old child.[46] The court rejected this notion and determined it was "more likely that the Supreme Court meant . . . if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial."[47] The court is probably right since a judge may have a difficult time ascertaining whether a child would know that a statement will be used for a later trial.[48]

The first formulation of a testimonial statement as "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 declarant would reasonably expect to be used prosecutorially"[49] is subject to similar unpredictability as the third formulation. In addition, the *Crawford* decision indicates that one of the purposes of cross-examination is to determine the subjective intent of a declarant.[50] It would go against *Crawford*'s reasoning to displace cross-examination with a judicial determination of what a declarant reasonably believed.

The second formulation that *Crawford* offered, "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,"[51] is the narrowest definition. This definition appears to focus entirely on the formal quality of a statement without considering the intent or perception of the declarant or interviewer. *Crawford* will be read in a "dynamic system that can and will respond to the opinion with short-

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44. 118 Cal. App. 4th 1396, 1402 n.3 (Ct. App. 2004).

45. *Id.*

46. *Id.*

47. *Id.*

48. Miguel A. Méndez, Crawford v. Washington*: A Critique,* 57 STAN. L. REV. 569, 608 (2004).

49. *Crawford*, 541 U.S. at 51.

50. *Id.* at 66.

51. *Id.* at 51-52.

term tactical countermeasures and with potentially long-term legal and institutional changes."[52] Relying on the second formulation could easily be circumscribed with "alternative investigative methods . . . to avoid *Crawford*'s impact."[53] For example, the second formulation requires that the statement be contained in formalized testimonial materials.[54] To avoid any violations, prosecutors and police officers might change their practices and simply eliminate memorializing statements. The second formulation by itself is not a substantial obstacle to overcoming Confrontation Clause violations.

B. Bright Line Rules

Crawford stated that a "formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[55] This illustration sheds little light on the issue of what makes a statement testimonial because it compares two polar opposites. Lower courts are left to struggle with statements that fall within the polar examples: casual remarks to a government officer and formal statements to an acquaintance. However, the Court recently revisited *Crawford* and made it clear that a formal quality is essential to finding a testimonial statement.[56]

This article attempts to create bright line rules for whether a statement is testimonial based on situations with varying levels of formality and government involvement. Also, this article argues that regardless of the level of formality or government involvement in procuring a statement, courts should hold that spontaneous statements, by definition, are nontestimonial.

1. *A Formal Quality Is a Necessary Requirement in Finding a Testimonial Statement.*

Where it is clear that a statement was knowingly made to a police officer or government official, courts will focus on the formality of the statement. According to *Crawford*, "[a]n accuser who makes a formal statement to government officers bears testimony."[57] However, where there is no formal quality in either the statement or the

52. Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses,* 39 U. RICH. L. REV. 511, 513 (2005).

53. *Id.*

54. *Crawford*, 541 U.S. at 51-52.

55. *Id.* at 51.

56. *Davis*, 126 S. Ct. at 2278.

57. *Crawford*, 541 U.S. at 51.

proceeding, courts should find that a statement is not testimonial. An informal statement to a government officer does not resemble a 16th century English pretrial examination.

The need for a formal quality in the statement or proceeding is essential in determining whether statements made to agents of law enforcement are made in the course of an "interrogation" and are, therefore, testimonial. *Crawford* extrapolated from its various formulations that testimonial "applies at a minimum to . . . police interrogations."[58] While *Crawford* specifically stated that police interrogations are testimonial, it did not fully define "interrogation" as distinguished from other types of questioning. Instead, *Crawford* used the term in its "colloquial, rather than any technical, legal sense"[59] and implicated that testimony involves a solemn declaration or a formal statement to a government officer.[60] A police interrogation requires a formal quality with a view toward prosecution.[61] Some types of formality that courts note are the presence of structured questioning,[62] whether an arrest has already occurred,[63] whether the government initiates contact,[64] or memorialization of the proceeding through a video tape[65] or tape recording.[66]

Though formality is "essential to testimonial utterance,"[67] the level of formality required is minimal so long as the statement is "[a] solemn declaration . . . made for the purpose of establishing or proving some fact."[68] This clarification on the definition of "testimonial" statements came in June of 2006 when the Court revisited the Confrontation Clause and *Crawford* issues in the context of "statements made to law enforcement personnel during a 911 call or at a crime scene."[69] *Davis* was decided together with *Hammon v.*

58. *Id.* at 68.

59. *Id.* at 53 n.4.

60. *Id.* at 51.

61. People v. Corella, 122 Cal. App. 4th 461, 468 (Ct. App. 2004).

62. *See id.* at 469.

63. *See id.* at 468.

64. *See id.*

65. *See* People v. Sisavath, 118 Cal. App. 4th 1396, 1400 (Ct. App. 2004).

66. *See Corella*, 122 Cal. App. 4th at 468.

67. Davis v. Washington, 126 S. Ct. 2266, 2278 n.5 (2006).

68. Crawford v. Washington, 541 U.S. 36, 51 (2004) (quoting NOAH WEBSTER, AM. DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828)) (alteration in original).

69. *Davis*, 126 S. Ct. at 2270.

Indiana.[70] The Court proceeded by separately comparing the facts in *Davis* and *Hammon* to those in *Crawford.*[71]

Davis involved statements made by Michelle McCottry to a 911 emergency operator regarding a domestic disturbance with the defendant Adrian Davis, her former boyfriend.[72] The Court determined that the initial statements made during this call were not testimonial.[73] There were four factors distinguishing *Davis* from *Crawford.*[74] The Court looked at the timing of the statements in relation to the criminal event, the presence of a threat of imminent danger, the purpose of the statements, and the level of formality in procuring the statement.[75]

First, unlike the declarant in *Crawford*, McCottry was "speaking about events *as they were actually happening*, rather than 'describ[ing] past events.'"[76] Second, an objective observer would recognize that McCottry was facing an ongoing emergency rather than calling 911 to give a "narrative report of a crime absent any imminent danger."[77] Third, an objective observer would find that the purpose of the questions and statements was "to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past."[78] On this point, the Court noted that an interrogation to determine the need for emergency assistance may "'evolve into testimonial statements' once that purpose has been achieved."[79] Lastly, the level of formality in McCottry's frantic answers over the phone in an environment that was not tranquil or safe is in stark contrast with Sylvia Crawford's calm responses "at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers."[80]

In *Hammon*, statements were elicited when police officers

70. 809 N.E.2d 945, 952 (Ind. Ct. App. 2004).

71. *Davis*, 126 S. Ct. at 2276-79.

72. *Id.* at 2270-72.

73. *Id.* at 2277.

74. *Id.* at 2276-77.

75. *Id.*

76. *Id.* at 2276 (quoting Lilly v. Virginia, 527 U.S. 116, 137 (1999) (plurality opinion)) (alteration in original).

77. *Id.*

78. *Id.*

79. *Id.* at 2277 (quoting Hammon v. State, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006)) (citation omitted).

80. *Id.*

responded to the scene of a reported domestic disturbance.[81] Officers found Amy Hammon on the front porch outside of her house and defendant, Hershel Hammon, in the kitchen.[82] Amy gave statements about what had happened and signed an affidavit.[83] Unlike the statements made in *Davis*, those in *Hammon* were similar to testimonial statements found in *Crawford*.[84] First, the statements were elicited to describe what happened in the past rather than what was actually happening.[85] Second, there was no emergency in progress as the interrogating officer "testified that he had heard no arguments or crashing and saw no one throw or break anything."[86] Third, an objective observer would find that the primary purpose of the interrogation was to investigate a possible crime rather than to resolve a present emergency.[87]

Even though the Court found a higher level of formality in *Crawford* than *Hammon*, the circumstances in *Hammon* were "formal enough."[88] The *Crawford* interrogation "followed a *Miranda* warning, was tape-recorded, and took place at the station house."[89] However, these features were not essential to the testimonial aspect of the statements made.[90] It was sufficient that the interrogation in *Hammon* was conducted in a separate room from the defendant, for the purpose of describing past criminal events, and took place after the criminal events were over.[91] Thus, the Court held that statements given under official interrogation are "inherently testimonial" because they are an obvious substitute for live testimony.[92]

Davis appears to hold that when a statement describes an event in the past — rather than events as they are actually happening — an objective observer would find that when the declarant made the statement, she was not facing an ongoing emergency. Moreover, an objective viewer would find that the primary purpose of the statement

81. *Id.* at 2272.
82. *Id.*
83. *Id.*
84. *Id.* at 2278.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 2278.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*

is to gather evidence in investigating a crime rather than to end a current emergency. In these circumstances, the statement is sufficiently formal to be deemed testimonial.

2. *Government Involvement Should Be a Necessary Requirement in Finding a Testimonial Statement.*

Crawford noted that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse."[93] Statements have been found to be nontestimonial when "made to family, friends, and acquaintances without an intention for use at trial."[94] While cases appear to necessitate some type of government involvement, the scope of involvement appears broad. The more difficult cases are those in which a statement is not made directly to a government official, but where there is some level of government involvement in procuring the statement and some formality to the proceedings. Some examples of government involvement include: the level of involvement with law enforcement procedures and officials,[95] special training that the interviewer must complete,[96] whether statutes govern procedure,[97] and purpose of the interview.[98] It appears that all of these factors go toward determining whether the interviewer intended to use the statement in prosecution.

a. Casual Statements to a Family, Friend, or Acquaintance Should Be Held Nontestimonial.

A casual statement to a person unaffiliated with a government agency has been held nontestimonial because a declarant would not reasonably believe the statement would be available for use at a later trial.[99] According to *Crawford*, a casual remark to an acquaintance is not testimonial.[100] A statement that is not contained in formalized materials, made under formal procedures, nor procured through government involvement is not at risk for prosecutorial abuse. A

93. Crawford v. Washington, 541 U.S. 36, 56 n.7 (2004).

94. Mosteller, *supra* note 52, at 540.

95. *See* People v. Sisavath, 118 Cal. App. 4th 1396, 1403 (Ct. App. 2004).

96. *See id.* at 1400.

97. *See* City of Las Vegas v. Walsh, 91 P.3d 591, 595 (Nev. 2004).

98. *See Sisavath*, 118 Cal. App. 4th at 1402-03.

99. *See* People v. Cervantes, 118 Cal. App. 4th 162, 174 (Ct. App. 2004).

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

declarant making such a statement would more likely expect that the statement will be kept in confidence rather than be turned over to police.[101]

In *Cervantes*, Ubaldo Cervantes, Jose Martinez, and Cesar R. Morales were convicted of first degree murder.[102] The trial court admitted Morales's out-of-court statement made to his neighbor detailing the criminal acts committed earlier that morning.[103] On appeal, the nondeclarant defendants contended that Morales's statement to his neighbor should have been excluded from evidence as against each nondeclarant defendant.[104]

The trial court found the neighbor's trial testimony regarding Morales's out-of-court statements was "admissible as against Morales's penal interest and found 'sufficient indicia of trustworthiness and reliability to overcome the [Confrontation Clause] objections.'"[105] In support of its ruling, the court noted that Morales sought his neighbor out for medical assistance "outside the normal avenues [for treatment], in all likelihood due to the manner in which the injuries were suffered."[106] Morales's neighbor was not connected with or operating as an agent for any law enforcement agency and her curiosity was understandable since she was acquainted with all three defendants.[107] Although Morales's statement appeared to minimize his participation or shift blame on to the other codefendants, the trial court held that his statement: "[w]e shot at the guy," was an acknowledgement of his equal level of culpability.[108] Based on the totality of the circumstances, the trial court admitted the neighbor's testimony as against Morales's penal interest.[109]

The appellate court applied the new *Crawford* test and ruled that the statement was nontestimonial.[110] The statement was "not similar to the primary examples of testimonial statements given in *Crawford*" and was possibly testimonial only under *Crawford*'s third formulation

101. *See Cervantes*, 118 Cal. App. 4th at 174.

102. *Id.* at 164.

103. *Id.* at 169-70.

104. *Id.* at 169.

105. *Id.* at 170 (alteration in original).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 173-74.

of testimonial: statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[111] In applying this formulation of testimonial statements to the facts of the case, the court found that a statement made to a friend who provided medical assistance was nontestimonial because it was more reasonable to believe that declarant expected his statement would not be used for future prosecution.[112]

Determining whether an objective witness would reasonably believe that the statements would be used in prosecution required the court to examine the circumstances under which the statements were made. Codefendants Cervantes and Martinez argued they "made the statement to [the neighbor] knowing she would repeat it to the police, as she eventually did."[113] The court rejected this contention as an unreasonable view of the evidence.[114] Instead, the court ruled that it was more reasonable that the defendant expected his neighbor not to repeat his statements to the police considering that he "sought medical assistance from a friend of long standing who had come to visit his home."[115] Additionally, the neighbor admitted that she knew of the defendant's status as a gang member and was afraid to testify in the case.[116] The facts of *Cervantes* provide an easier situation since there was no level of government involvement or formality in procuring the statement to evidence any intent to use the statement at trial on either the declarant or neighbor's part.

Other jurisdictions have also ruled that informal statements where non-government agents are not involved are not testimonial.[117] In *Rivera*, a defendant's confession to his cousin was made under circumstances which would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[118] Specifically, the declarant "made the statement in confidence and on his own initiative to a close family member."[119] The court held

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111. *Id.* at 173 (quoting Crawford v. Washington, 541 U.S. 36, 52 (2004)) (internal quotation marks omitted).

112. *Id.* at 174.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *See, e.g.*, State v. Rivera, 844 A.2d 191, 202 (Conn. 2004).

118. *Id.*

119. *Id.*

that this statement was nontestimonial.[120]

Informal statements to non-government agents who are not working with the government to collect evidence should be held nontestimonial. Such a statement does not fall within any of the formulations that *Crawford* proposed. *Crawford* specifically stated that a casual remark to an acquaintance is not testimonial.[121] These statements are generally made with the expectation that they will be held in confidence and do not present a potential for prosecutorial abuse.

b. Informal Statement Made Unknowingly to a Government Official

The *Crawford* Court decided that a police interrogation occurred because the statement was knowingly given in response to police questioning.[122] Lower courts are presented with cases where there is neither structured questioning, nor is a statement made "knowingly" to a police officer or government agent. It has been held that where a statement is made unknowingly to a government official, that statement is nontestimonial because a declarant would not reasonably believe the statement would be used for prosecution.[123]

Crawford cited *Bourjaily* as a case in which the outcome was "'consistent with' the principle that the [Confrontation] Clause permits the admission of nontestimonial statements in the absence of a prior opportunity for cross-examination,"[124] even though the reasoning may have been incorrect.[125] In *Bourjaily*, a tape-recorded statement was made unknowingly to a Federal Bureau of Investigation agent.[126] The statement was admitted over Confrontation Clause objections because it fell under the firmly rooted hearsay exception for "co-conspirators' statements . . . made in the course and in furtherance of the conspiracy."[127]

In a case containing facts similar to *Bourjaily*, the court was guided by *Crawford's* approval of admitting a formal statement made without a declarant's knowledge that a government agent was

120. *Id.*

121. *See* Crawford v. Washington, 541 U.S. 36, 51 (2004).

122. *Id.* at 53 n.4.

123. United States v. Saget, 377 F.3d 223, 229 (2d Cir. 2004).

124. *Id.* at 229 (citing *Crawford*, 541 U.S. at 57-58).

125. *Crawford*, 541 U.S. at 58.

126. Bourjaily v. United States, 483 U.S. 171, 173 (1987).

127. *Id.* at 183.

receiving that statement.[128] In *Saget*, statements were made to a confidential informant who the declarant considered a friend.[129] The court deciphered from the various formulations stated in *Crawford* that "the statement must be such that the declarant reasonably expects that the statement might be used in future judicial proceedings."[130] *Saget* held that a "declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*."[131] This scenario suggests that the declarant's perception of the situation carries weight in determining whether a statement is testimonial. This is likely due to the effect that the declarant's perception of the situation will have on the truthfulness of the statement. The recipient's intent to use the statement as evidence for prosecution is not, in itself, sufficient to label a statement testimonial.

Where there is no formality to procuring a statement and the declarant does not have knowledge that the recipient is a government agent, courts should find such a statement is nontestimonial. Such a statement does not fall even under the broadest formulation of testimonial. An objective witness would not reasonably believe a statement made under those circumstances would be used at a later trial.

c. Informal Statement Knowingly Made to a Government Official

Where it is clear that a statement was knowingly made to a police officer or government official, courts will focus on the formality of the statement. According to *Crawford*, "[a]n accuser who makes a formal statement to government officers bears testimony . . . ."[132] However, where there is no formal quality in either the statement or the proceeding, courts should find that a statement is not testimonial. An informal statement to a government officer does not resemble a 16th century English pretrial examination. Nor does it resemble a police interrogation, even in its colloquial sense.

A statement given to a police officer responding to a 911 call was found to be nontestimonial because it "b[ore] no indicia common to the official and formal quality of the various statements deemed

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128. *Saget*, 377 F.3d at 229.

129. *Id.* at 224.

130. *Id.* at 229.

131. *Id.*

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

testimonial by *Crawford*."[133] In *Corella*, a police officer dispatched to the crime scene found the victim "crying and distraught;" she also"appeared to be in physical pain."[134] The victim said appellant punched her in several places on her body and she recounted the reasons for the assault.[135] In deciding whether this statement was testimonial, the court focused on the formality of the proceedings.[136] The court held that informal and unstructured preliminary questions asked by a police officer responding to a 911 call did not amount to "a police interrogation merely because Officer Diaz was an officer and obtained information from" the victim.[137] The court also found it probative that contact was initiated not by the police, but by the victim.[138] These factors contributed to the court's finding that there was no formality to the proceedings and the statement was therefore nontestimonial.[139]

Decisions by lower courts classifying informal statements to a government officer as nontestimonial comport with the purpose of the Confrontation Clause to prevent prosecutorial abuse. Where there is no formality to the statement or proceeding, the potential that a declarant or witness was forced to make inculpating statements is less likely. Police questioning alone, without a formalized statement or formal proceeding, does not resemble a police interrogation.

d. Formal Statement to a Non-government Official Working with a Government Agency or Procedures Governed by Statute

The Framers and the *Crawford* Court were especially concerned with the potential for prosecutorial abuse.[140] Under *Crawford*, a police interrogation is testimonial and this classification has been broadened to include interrogation by other government agents such as prosecutors. For example, in *United States v. Saner*, the court found the only distinguishing factor between the statement to a prosecutor and *Crawford*'s statement to a police officer was that the declarant was not in custody when he made statements to the

133. People v. Corella, 122 Cal. App. 4th 461, 468 (Ct. App. 2004).

134. *Id.* at 465.

135. *Id.*

136. *Id.* at 468.

137. *Id.* at 469.

138. *Id.* at 468.

139. *Id.*

140. 541 U.S. 36, 56 n.7 (2004).

prosecutor.[141] The *Saner* court found that the role of a modern day prosecutor probably provides a closer analogy to the role of 18th Century English Justices of the Peace than modern day investigating officers because the risk of prosecutorial abuse is presented.[142] Thus, statements made in response to interrogation by prosecutors can be testimonial if there is a formal quality to the statement.[143]

However, it should not be necessary that a government agent actually procure a statement in order to deem it testimonial. If that were the case, then government agencies would avoid Confrontation Clause issues by outsourcing their evidence gathering needs to independent agencies. Instead, courts should look at whether: a government agent prompted a statement to be taken; a statute governs the procedure for use at a later trial; criminal charges have been filed; the interviewer was trained by a government agent; or government agents are present at, but not conducting the interview.

In California, a child's statement to an interviewer employed by a non-government agency has been held testimonial because there was a high level of government involvement in setting up the interview.[144] In addition to the presence of a deputy district attorney and investigator from the district attorney's office, the interview took place after a preliminary hearing had already been held and the information already filed.[145] Taking these facts into consideration the court found "no serious question but that Victim 2's statement was 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[146] In *People v. Warner*, the high degree of law enforcement involved in training interviewers, observing the interview, and using the interview once a criminal investigation was determined to be warranted would lead an objective witness to reasonably expect the interview would be used prosecutorially and at trial.[147]

Even where a law enforcement agent or proceeding is not involved in procuring the statement, an interview conducted for the sole purpose of developing testimony under a relevant statute may

141. 313 F. Supp. 2d 896, 901 (S.D. Ind. 2004).

142. *Id.*

143. *Id.* at 902.

144. People v. Sisavath, 118 Cal. App. 4th 1396, 1402 (Ct. App. 2004).

145. *Id.*

146. *Id.* (quoting Crawford v. Washington, 541 U.S. 36, 52 (2004)).

147. 119 Cal. App. 4th 331, 344 (Ct. App. 2004).

qualify as testimonial. In *Snowden v. State*, a social worker's interviews with children "for the expressed purpose of developing their testimony . . . under the relevant Maryland statute" were ruled testimonial under *Crawford*.[148] Also, in *City of Las Vegas v. Walsh*, the affidavit of a registered health professional made pursuant to Nevada Code was testimonial because it was prepared solely for the prosecution's use at trial.[149]

The reasoning and outcomes of lower court cases suggest that a non-government agent, who is working with a prosecutor or under a statute to collect evidence, is acting in a prosecutorial function. In this scenario, the declarant is in effect making a statement to a government agent. The formal quality of the statement and level of government involvement would lead an objective witness to reasonably believe that the statement would be used as evidence in a later trial.

e. Formal Statement to a Non-government Agent with No Government Involvement

While an accuser who makes a casual remark to an acquaintance does not bear testimony, courts struggle with how a formalized statement to a non-government agent should be categorized. This situation might be covered under the second formulation offered by *Crawford* – as an extrajudicial statement contained in a formalized material – but should nevertheless be held nontestimonial to avoid injustice and comport with the meaning of the Confrontation Clause.[150] A declarant who makes a statement that is memorialized might consider that the statement could be used later at trial. However, just because a statement could, and should, be used at trial does not mean that a declarant would reasonably believe the statement would be used for prosecution. A formal statement to a non-government agent, whose purpose is not to collect evidence, does not present a potential for prosecutorial abuse.

3. *Spontaneous Statements*

Spontaneous statements are nontestimonial in nature.[151] Under the Federal Rules of Evidence, an unavailable declarant's statement

148. 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004).

149. 91 P.3d 591, 595 (Nev. 2004).

150. Crawford v. Washington, 541 U.S. 36, 51-52 (2004).

151. Hammon v. State, 809 N.E.2d 945, 953 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006).

may be admitted as an excited utterance if the statement is made while declarant is under the stress of an exciting event and the statement relates to the startling event. After *Crawford* this hearsay exception is inapplicable if the statement is testimonial. However, there is case law deciding that a spontaneous statement, by definition, is nontestimonial because there is no opportunity for reflection when the statement is made and the statement is not made with an eye toward trial.

In *People v. Moscat*, the court decided the admissibility of a statement made in a 911 call.[152] It considered the argument that the 911 call was testimonial because a police interrogation occurs when the "caller answers questions posed by the police operator."[153] Prior to *Crawford*, the statement was admissible as a spontaneous statement, which is a firmly rooted hearsay exception.[154] The court held that a "911 call for help is essentially different in nature than the 'testimonial' materials that *Crawford* tells us the Confrontation Clause was designed to exclude."[155]

The court looked at the reasoning behind classifying police interrogations as testimonial statements.[156] The historical analysis in *Crawford* reveals that the "[sixteenth] and [seventeenth] century English practice of pretrial examinations conducted by Justices of the Peace [was] a practice against which the Confrontation Clause was intentionally directed."[157] Formal police interrogations are testimonial because they are analogous to the English practice of pretrial examinations.[158] A pretrial examination is testimonial because it is "undertaken by the government in contemplation of pursuing criminal charges against a particular person."[159]

A 911 call is fundamentally different from a pretrial examination.[160] One feature distinguishing a 911 call from a pretrial examination is that a victim typically initiates a 911 call.[161] When a victim initiates a 911 call, he or she is usually seeking to be rescued,

152. 777 N.Y.S.2d 875, 875 (Crim. Ct. 2004).

153. *Id.* at 877.

154. *Id.* at 879.

155. *Id.*

156. *Id.* at 880.

157. *Id.*

158. *Id.*

159. *Id.* at 879.

160. *Id.*

161. *Id.*

not to generate evidence against a suspect.[162] Another distinction between 911 calls and pretrial examinations is that most 911 calls are "made in the *immediate* aftermath of the crime" and can qualify as a spontaneous statement.[163] When a 911 call qualifies as an excited utterance, the reasoning that the statement is produced without an eye toward trial is bolstered further. In such a situation, "there has been no opportunity for the caller to reflect and falsify her (or his) account of events."[164] A 911 call made under the excitement of a startling event is more similar to an "electronically augmented equivalent of a loud cry for help" than a "formal pretrial examination by a Justice of the Peace in reformation England."[165] Thus, the victim is not "conscious that he [or she] is bearing witness . . . ." In other words, the declarant is not contemplating the impact of the statement on furthering prosecution in contrast to one who "gives a formal statement, or deposition, or affidavit . . . ."[166] The court concluded that a 911 call is nontestimonial in nature.[167]

A California court has followed *Moscat*'s reasoning in determining that a 911 call is not testimonial.[168] The court added that it would be "difficult to identify any circumstances under which a . . . spontaneous statement would be 'testimonial.'"[169] A spontaneous statement hearsay exception applies to a statement when the utterance is "made without reflection or deliberation due to the stress of excitement."[170] Although a 911 call may ultimately be used in a future trial, "statements made without reflection or deliberation are not made in contemplation of their 'testimonial' use in a future trial."[171]

III. Conclusion

In the aftermath of *Crawford,* judges, prosecutors, and defense lawyers struggle to define what makes a statement testimonial in order to avoid Sixth Amendment Confrontation Clause violations.

162. *Id.*
163. *Id.* at 880.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. People v. Corella, 122 Cal. App. 4th 461, 469 (Ct. App. 2004).
169. *Id.*
170. *Id.*
171. *Id.*

Previously, under the *Roberts* test, the Confrontation Clause was not a difficult obstacle to overcome. However, *Crawford* determined that *Roberts* produced unpredictable results and admitted statements that the Confrontation Clause meant to keep out. As a result, the Court overruled *Roberts* with regard to testimonial statements and placed an absolute bar to the admission of an unavailable witness' testimonial statement where there was not a prior opportunity for cross-examination. *Crawford* failed to fully define what makes a statement testimonial.

By conducting a survey of lower court cases, this article rejects any open-ended tests and points out several bright line rules for determining whether a statement is testimonial based on the formal quality of the statement and level of government involvement in procuring the statement. This article suggests that where there is neither a formal quality to the statement nor government involvement in procuring the statement, a court should hold that a statement is not testimonial because such a statement bears little resemblance to a pretrial examination. Also, a non-government agent whose purpose, either by statute or at the request of a government agent, is to secure evidence, should be treated as a government agent and the statement should be held testimonial only if the statement has a formal quality. Finally, any statements that fall within the spontaneous statement hearsay exception are by nature nontestimonial because there is opportunity for reflection when the statement is made. Spontaneous statements are not made or procured with an eye toward trial and are therefore nontestimonial.

These bright line rules comport with the history and purpose of the Confrontation Clause to avoid prosecutorial abuse. While bright line rules could lead to a change in the way prosecutors and police officers conduct investigations to avoid Confrontation Clause issues, this article covers a variety of situations such that any changes that might be made should fall under one of the scenarios discussed. Any questions about whether a statement is testimonial should be resolved by one of the scenarios discussed above. These rules provide clear guidance to judges and practitioners who attempt to seek justice, afford defendants a fair trial, and remain faithful to the purposes of the Confrontation Clause.