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Utter Excitement about Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive Crawford v. Washington.

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COMMENTS

"UTTER EXCITEMENT" ABOUT NOTHING: WHY DOMESTIC VIOLENCE EVIDENCE-BASED PROSECUTION WILL SURVIVE *CRAWFORD* v. *WASHINGTON*

DONNA D. BLOOM

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I met Daniel and the kids on the street accidentally. The kids wanted to come with me but he said no. Later, I was sitting on a favourite park bench and he came up to me, without the kids. He told me not to tell the truth in court—that if I did, he would take the kids and hide them. He started yelling, then pushed me against the bench. I started to lose my balance, then he pushed me on the chest

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> and I twisted my leg as I fell. He then said if I told the truth I would never be able to talk again, and then he left. My leg was badly damaged and I had to wear a leg brace and use crutches. I was afraid to report to the police.[1]

I. INTRODUCTION

Although the woman in this narrative found the courage to testify in court despite her abuser's threats, thousands of others just like her across the country and in the State of Texas will not, and who among us can blame them?[2] In response to domestic violence cases involving victims who do not wish to cooperate in the prosecution of their abuser, prosecutors "have endeavored to frame their cases around other evidence that can help to establish a defendant's guilt" with or without the testimony of the victim.[3] Alarmingly, domestic violence cases like these set for trial are being thrown out of Texas courts because of a recent U.S. Supreme Court ruling that reasserts a defendant's right to confront his accuser in court.[4]

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1. Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 89 (1997) (quoting Janet Freeman, *From Pillar to Post: One Woman's Experience of Battering and the Systems That "Help," in* LISTENING TO THE THUNDER: ADVOCATES TALK ABOUT THE BATTERED WOMEN'S MOVEMENT 23, 31 (Leslie Timmins ed., 1995)).

2. Although domestic violence is not exclusive to either gender, the U.S. Department of Justice reports that females are ten times more likely to be victims of assault by intimate partners than are males. U.S. DEP'T OF JUSTICE (BUREAU OF JUSTICE STATISTICS SPECIAL REPORT), INTIMATE PARTNER VIOLENCE (May 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv/pdf (last visited Feb 27, 2005) (providing information on violence by intimates including an analysis of both lethal and nonlethal violence). With this in mind, this Comment will use female pronouns to refer to victims and male pronouns to describe abusers.

3. Brooks Holland, *Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack?*, 8 CARDOZO WOMEN'S L.J. 171, 171-72 (2002); *see also* Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 102-03 (1997) (explaining that "when responding to a domestic violence incident, law enforcement officers can gather statements from the victims . . . and these out-of-court statements may be admissible at trial through the excited utterance exception to the hearsay rule").

4. *See* Robert Tharp, *Domestic Violence Cases Face New Test; Ruling That Suspects Can Confront Accusers Scares Some Victims from Court*, DALLAS MORNING NEWS, July 6, 2004, at A1 (discussing that courts dedicated to domestic violence offenses are facing the impact of the recent Supreme Court ruling in *Crawford v. Washington* and prosecutors are finding it harder to use statements made by victims to police officers when those victims are unwilling to testify at trial); *see also* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY 14 (1980) (noting that judges seldom deny a prosecutor's motion to withdraw prosecution); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.3(c) (2d ed. 1992)

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Although defense attorneys who represent those accused of domestic violence offenses are energetically pronouncing the death of the state's use of a strategy known as "evidence-based prosecution" (prosecuting without the cooperation and testimony of the victim at trial), proponents of this prosecutorial strategy continue to defend its use.[5] Indeed, proponents believe the survival of evidence-based prosecution in domestic violence cases is critical in a community's efforts to hold abusers accountable for their use of violence.[6] Further, prosecutors believe that strong legal arguments exist to continue successfully prosecuting abusers without the cooperation of the victim at trial, through the continued admission of certain hearsay statements,[7] despite the recent blockbuster decision, *Crawford v. Washington.*[8]

(noting the perfunctory nature of judicial approval in state motions to terminate prosecutions).

5. *See* Adam M. Krischer, *"Though Justice May Be Blind, It Is Not Stupid" – Applying Common Sense to* Crawford *in Domestic Violence Cases,* 38 THE PROSECUTOR 14, 14 (2004) (arguing for the survival of evidence-based prosecution in domestic violence cases). "Evidence-based prosecution . . . allow[s] prosecutors to go forward in cases where the victim is unable or unwilling to cooperate." *Id.*

6. Interview with Cindy Dyer, Co-Chief, Family Violence Division, Dallas County Criminal District Attorney's Office, in Dallas, Tex. (Dec. 20, 2004) (explaining how important batterer accountability is in a community's efforts to curb domestic violence and arguing that without the use of evidence-based prosecution efforts, abusers are left to manipulate their victims and the criminal justice system). Cindy Dyer has been highly solicited as a national speaker on the topic of family violence and has spoken at over 100 conferences and seminars across the country including the National College of District Attorneys, the Mid-Atlantic Regional Police Training Conference, the State Bar of Texas Annual Judicial Conference, the Texas District and County Attorney Association, the National Crimes Against Children Conference, and numerous television and radio programs. Cindy serves on the family violence faculty of the National College of District Attorneys and the Texas District and County Attorney Association. Additionally, Cindy Dyer was the first prosecutor in Texas to prosecute a domestic violence case without the cooperation of the victim. *See also* Vera Institute of Justice, *Enhancing Judicial Oversight in Domestic Violence Cases, available at* http://www.vera.org/project/project1_7.asp?section_id=28&sub_section_id=23#dyer (last visited Feb. 27, 2005) (providing a brief biography of associates of Vera engaged in the Judicial Oversight Demonstration Initiative, of which Ms. Dyer is a participating member).

7. *See generally* Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford in Domestic Violence Cases*, 38 THE PROSECUTOR 14 (2004) (detailing the value of an evidence-based prosecution and arguing for its survival despite the decision in *Crawford* through analysis of recent case law from around the country). Adam Krischer is the staff attorney for the Violence Against Women Program at the American Prosecutors Research Institute in Alexandria, Virginia. *Id.* at 48.

8. 124 S. Ct. 1354 (2004).

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The facts in *Crawford* followed what one commentator refers to as "the familiar pattern . . . [of] station house testimony."[9] Concerned with the use of testimonial evidence obtained in a coercive environment, the Court in *Crawford* barred the use of an eyewitness statement obtained by the police from the defendant's wife, Sylvia.[10] Sylvia had been taken into custody, was read *Miranda* warnings, and was being tape recorded. She was told that her ability to leave depended on how the investigation progressed, and she was twice subjected to interrogation in the form of structured police questioning by police detectives.[11] At trial, Sylvia was deemed unavailable to testify, but prosecutors offered the statement she made to investigating officers at the police station that night to undermine the defendant's theory of self-defense. Although the defense objected, the statement was admitted into evidence because it was determined to be reliable.[12]

Under *Crawford v. Washington*, the Sixth Amendment Confrontation Clause[13] analysis centers on whether a certain statement is "testimonial" in nature.[14] If it is testimonial, the Confrontation Clause prohibits the prosecution from using the statement against a criminal defendant unless the declarant is not available to testify and the defendant has had a previous opportunity to cross-examine the declarant.[15] According to the *Crawford* Court, testimonial statements include, at the very least, those made in prior testimony, whether at a hearing, trial or grand jury proceeding, or police interrogations.[16]

9. Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, *6 (2004).

10. *See* Crawford v. Washington, 124 S. Ct. 1354, 1357 (2004) (detailing the facts leading to the decisions in *Crawford*).

11. *See id.* at 1372 (detailing the facts leading to the decision in *Crawford*).

12. *See* Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, *6 (2004) (providing the relevant facts of *Crawford*).

13. *See* U.S. CONST. amend. VI (enumerating an accused party's right "to be confronted with the witnesses against him"). Other Sixth Amendment rights granted to criminal defendants include: (1) "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"; (2) the right "to be informed of the nature and cause of the accusation"; (3) the right "to have compulsory process for obtaining witnesses in his favor"; and (4) the right "to have the Assistance of Counsel for his defence." *Id.*

14. *Crawford*, 124 U.S. at 1369.

15. *See id.* (commenting that the Framers would not have admitted testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and "the defendant . . . had a prior opportunity to cross-examine").

16. *Id.*

Before *Crawford*, the basic framework for addressing these types of Confrontation Clause issues was found in *Ohio v. Roberts*,[17] and modified by later cases.[18] For decades, courts across the country viewed *Roberts* as the guiding light when tackling conflicts between confrontation rights and hearsay evidence in criminal proceedings.[19] Under *Roberts*,

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17. 448 U.S. 56 (1980).

18. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (holding that when a hearsay statement is made by an out-of-court declarant, and offered against a criminal defendant, posing a confrontation issue, the statement can nevertheless be admitted if it satisfies certain conditions), *overruled in part by* Crawford v. Washington, 124 S. Ct. 1354 (2004). The primary condition to be satisfied was that the statement be reliable. *Id.* A statement would be deemed reliable if it either fit "within a firmly rooted hearsay exception" or was supported by "particularized guarantees of trustworthiness." *Id.*; *see also* White v. Illinois, 502 U.S. 346, 348-49 (1992) (agreeing with the Illinois Appellate Court's rejection of the theory that "the Confrontation Clause of the Sixth Amendment requires that, before a trial court admits testimony under the 'spontaneous declaration' and 'medical examination' exceptions to the hearsay rule, the prosecution must either produce the declarant at trial or the trial court must find that the declarant is unavailable"); Idaho v. Wright, 497 U.S. 805, 817 (1990) (holding that a residual hearsay exception, by definition, does not fall within a firmly rooted hearsay exception). Justice O'Connor states that this exception "accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial." *Id.* Recognizing the residual hearsay exception as firmly rooted would render all hearsay exceptions firmly rooted, and all hearsay statements would pass the constitutional requirement of the Confrontation Clause. *Id.* The Court, Justice O'Connor emphasized, refused to take that step. *Id.* at 817-18; *see also* Lee v. Illinois, 476 U.S. 530, 545 (1986) (holding that a codefendant's confession is presumed to be unreliable as to the statements detailing the defendant's conduct or culpability because those statements may be the result of the codefendant's attempt to shift or spread blame, gain favor, avenge himself, or direct attention away from himself and onto another). If those elements of the codefendant's "interlocking" statement which relate in any significant manner to the defendant's participation in the crime are not completely confirmed by the defendant's own confession, the "admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." *Id.*

19. *See* Penry v. State, 903 S.W.2d 715, 751 (Tex. Crim. App. 1995), *stay granted by* 531 U.S. 1003 (2000) (finding the Confrontation Clause requires a showing that a hearsay declarant is unavailable and that the statement bears adequate "indicia of reliability" as held in *Roberts*); Long v. State, 742 S.W.2d 302, 312 (Tex. Crim. App. 1987) (finding support in the proposition of *Ohio v. Roberts* "that for prior testimony to be admissible there must be proof that the witness was unavailable and there had been a previous opportunity for cross-examination"); *see also* Smith v. State, 88 S.W.3d 652, 660 (Tex. App.—Tyler 2002, pet. ref'd) (finding that "[u]nder the *Roberts* approach, the necessary reliability can be inferred, without more, where the evidence falls within a 'firmly rooted' hearsay exception. If the hearsay exception cannot be considered 'firmly rooted,' the evidence is presumed inadmissible and must be excluded, absent a showing of 'particularized guarantees of trustworthiness.'"); Loven v. State, 831 S.W.2d 387, 393 (Tex. App.—Amarillo 1992, no pet.) (embracing the *Roberts* contention that "[w]hile a defendant's right to confrontation and cross-examination is constitutionally safeguarded, such right is not absolute").

any hearsay statement made by an out-of-court declarant and offered against a criminal defendant posed a confrontation issue, but could be entered into evidence if the statement satisfied an established set of criteria.[20] The primary concern of *Roberts* was with the reliability of the statement itself.[21] Under *Roberts*, a statement would be deemed reliable if it fit within a "firmly rooted hearsay exception" or was supported by "particularized guarantees of trustworthiness."[22] In rejecting the *Roberts* criteria, the *Crawford* Court found "[t]he *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability."[23]

Although *Crawford* drastically transformed the doctrine of the Confrontation Clause in its treatment of "testimonial" statements made by an out-of-court declarant, it failed to clearly define what statements would be considered "testimonial" in nature.[24] The Court noted three formulations of a "core class of 'testimonial' statements": (1) *ex parte* in-court testimony or its "functional equivalent," materials like affidavits, custodial examinations, prior trial testimony not subject to cross-examination, or comparable pretrial statements that declarants would within reason expect to be used in a future prosecution; (2) extrajudicial statements of the same nature found in formalized testimonial materials; and (3) "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."[25]

The looming question for prosecutors attempting to prosecute domestic violence offenses without the testimony of the victim is whether the

20. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (holding that in order to demonstrate sufficient reliability to satisfy the Confrontation Clause, admissible hearsay has to meet one of two prongs: manifest particularized content-based or circumstance-based "guarantees of trustworthiness," or fall "within a firmly rooted hearsay exception"); *see also Crawford*, 124 S. Ct. at 1364 (proclaiming that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices").

21. *See Roberts*, 448 U.S. at 66 (providing the Confrontation Clause analysis).

22. *Id.*

23. Crawford v. Washington, 124 S. Ct. 1354, 1370 (2004).

24. *Id.* at 1363 (providing that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused"). The decision further explains that *ex parte* examinations might sometimes be admissible under hearsay rules, but the Framers would have most likely condemned this practice. *Id.* at 1364. Further, the *Crawford* Court believes the Confrontation Clause embraces this notion fully. *Id.* The Court asserts that "[i]t applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* (citations omitted).

25. *Id.* at 1364.

often used excited utterance hearsay exception will continue to be a valuable weapon in their evidence-based prosecution arsenal, or will *Crawford* operate to exclude this critical evidence from admission, often resulting in the dismissal of the case.[26] The *Crawford* Court has not made this determination an easy one given that the vast majority of excited utterances in domestic violence cases are made during 911 calls and follow-up interaction with the responding police officer(s).[27] Many lower courts are examining these exchanges to determine whether they fit within *Crawford*'s definition of police interrogation. If a statement made to a 911 operator or responding police officer is deemed to be testimonial, then the statement is inadmissible and the witness must testify and be subject to confrontation and cross-examination.

Lower courts will invariably continue to wrestle with this classification because *Crawford* provides very little instruction on what is to be considered a police interrogation.[28] In fact, the Court opened the gates of confusion when it asserted that "just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case."[29] Even though the Court refused to "select among them" in *Crawford*, lower courts across the country have been forced to do so (with little guidance) on a regular basis since *Crawford*. It is no surprise that courts left to their own interpretation and analysis of the vague holdings in *Crawford* have come to conflicting decisions

26. JJ. Amy Karan & David Gersten, *Domestic Violence Hearsay Exceptions in the Wake of* Crawford v. Washington*: A View from the Bench*, Summer 2004, *available at* http://www.ncdsv.org/images/DVHearsayExceptionWakeCrawford.pdf (last visited Jan. 5, 2005); *see also cf.* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY 14 (1980) (noting that judges seldom deny a prosecutor's motion to withdraw prosecution); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.3(c) (2d ed. 1992) (noting the perfunctory nature of judicial approval in state motions to terminate prosecutions).

27. *See* Interview with Cindy Dyer, Co-Chief, Family Violence Division, Dallas County Criminal District Attorney's Office, at Dallas, Tex. (Dec. 20, 2004) (stating that the overwhelming number of cases where the district attorney seeks to continue to prosecute a domestic violence offense despite the lack of cooperation from the victim rely heavily on the introduction of excited utterance statements made to investigating police officers).

28. *Crawford*, 124 S. Ct. at 1365 n.4. The Court found no need to dig any further into defining police interrogation other than to assert that "Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." *Id.*

29. *Id.*; *see also* John F. Yetter, *Wrestling with* Crawford v. Washington *and the New Constitutional Law of Confrontation*, 78 FLA. B.J. 26, 28 (2004) (describing the scope of police interrogation intended by the *Crawford* Court). "The Court concluded further that custodial police interrogations were within this category of practice although they are not formal testimonial events." *Id.*

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on matters involving police interrogation, excited utterances, and the ultimate determination of whether a statement is, in fact, testimonial.[30]

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30. *See* Leavitt v. Arave, 371 F.3d 663, 683-84 n.22 (9th Cir. 2004) (reasoning that a victim's excited utterance in an emergency call to the police was not "testimonial" because the victim, not the police, initiated their interaction and "[s]he was in no way being interrogated . . . but instead sought their help in ending a frightening intrusion into her home"); State v. Watson, No. 51364U, slip op. at 48 (N.Y. Misc. 3d Nov. 8, 2004) (concluding that "[w]hen a police officer . . . questions a potential witness for the purpose of gathering information to aid in a suspect's prosecution, and the witness is aware of the purpose of the officer's questions, structured questioning amounting to an interrogation has occurred."). The *Watson* court asserts that this is true even if the officer has only asked one question. *Id.* In this matter, the court was responding to the State's argument that because the police officer only asked two questions at the scene of the crime, "the questioning did not constitute an interrogation and therefore did not produce any testimonial statements." *Id.* This court refused to accept their position and found the final question asked by the officer to be a form of structured police questioning, and therefore "testimonial" in nature. *Id.*; *see also* People v. Kilday, 20 Cal. Rptr. 3d 161, 173 (Cal. App. 2004) (reversing convictions for domestic abuse because of the admission of videotaped statements regarding four instances of abuse). The court concluded that statements by a frightened, visibly injured victim during police questioning were nontestimonial because the officers "were not producing evidence in anticipation of a potential criminal prosecution in eliciting basic facts from [the victim] about the nature and cause of her injuries." *Id.* However, it is important to note that the *Kilday* court considered three separate statements made by the victim to police officers and found two of the three to be testimonial. *Id.* at 171-73. To find the first statement nontestimonial, the court relied on facts establishing that the police officers encountered a frightened victim, the location was unsecured and the situation was still uncertain. *Id.* at 172. The second statement, taken an hour later by a specially requested female officer, was found to be testimonial despite the fact that the victim was still visibly frightened and highly upset, there was no recorded statement taken and the interaction took place in a hotel lobby. *Id.* at 171. In this instance, the court determined that "by the time [the officer] questioned [the victim] the overarching purpose of the interaction was obtaining a detailed statement; the responding officers had dealt with the exigent safety, security, and medical concerns initially predominant when officers arrive on a scene in response to a call for assistance." *Id.* at 171-72. It was the other statements that led to the reversal. *Id.* at 173; *see also* Fowler v. State, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004) (finding that "[w]hatever else police 'interrogation' might be . . . that word [does not apply] to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred"). Such interaction between police and witnesses at the scene does not fit within the "lay conception" of police interrogation, which includes an image of an "interview" in a room at police headquarters. *Id.* Additionally, the interaction does not "bear the hallmarks of an improper 'inquisitorial practice.'" *Id.*; *see also* Lopez v. State, 888 So. 2d 693, 699-700 (Fla. Dist. Ct. App. 2004) (asserting that a "startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation . . . [and] the statement does not lose its character as a testimonial statement merely because the declarant was excited"); Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004) (holding that the statement given by the victim to the police officer was not a "testimonial" statement because it was not given in a formal setting, it was not given during any type of pre-trial hearing or deposition, and it was not contained within a "formalized" document of any kind); State v. Wright, 686 N.W.2d 295, 305 (Minn. Ct. App. 2004) (determining that the dialogue that took place between the

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Currently, there is a split among Texas appellate courts concerning the fundamental issue of whether statements of a non-testifying victim made to a police officer during the investigation of a crime (and incriminating the defendant) are admissible against the defendant under *Crawford*.[31] The ultimate question to be answered by the Texas Court of Criminal Appeals and the U.S. Supreme Court is how far to extend the rationale of this decision, particularly in more clearly defining what the Court meant by "testimonial" statements and "police interrogation."[32]

This Comment outlines and summarizes the use of evidence-based prosecution of domestic violence offenses, examining the history of, and reliance upon, the excited utterance hearsay exception. It also outlines and summarizes the law as it stood before *Crawford* and how it was used to support the strategy of evidence-based prosecution of domestic violence offenses. It then explores the theoretical framework of the *Crawford* decision and its implications for future use of an evidence-based strategy, specifically reporting what lower courts have determined to this point concerning the excited utterance hearsay evidence exception. Finally, this Comment attempts to resolve the conflict among Texas appellate courts by examining the significant decisions in excited utterance exception case law in Texas and suggesting that this doctrine can and should inform any *Crawford* analysis involving police-victim interaction and the admissibility of any hearsay statements that result from that exchange. This Comment concludes by showing that the reasoning used and conclusion reached by one Texas court in conflict is a misapplication of the testimonial doctrine of *Crawford* that threatens to destroy the foundation of evidence-based prosecution in Texas.

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victim and responding police officer, "although certainly part of an investigative process, is not an 'interrogation' and does not result in a formal statement").

31. *Compare* Cassidy v. State, 149 S.W.3d 712, 716 (Tex. App.—Austin 2004, pet. ref'd) (holding that a police officer's questioning of an aggravated assault victim shortly after an incident at a local hospital did not constitute interrogation and finding the statements to be non-testimonial; therefore, admission of the officer's testimony as to the victim's statements did not violate the defendant's Sixth Amendment rights because the victim's statements were excited utterances, which had sufficient indicia of reliability to satisfy the Confrontation Clause), *with* Wall v. State, 143 S.W.3d 846, 851 (Tex. App.—Corpus Christi 2004, no pet.) (holding that a police officer conducting an interview of a victim at a hospital is "structured police questioning" and is considered an "interrogation" for purposes of determining the "testimonial" nature of the statement). The *Wall* court noted that the *Cassidy* court considered the "issue of what constitutes a 'testimonial' statement made during 'police interrogation.' [. . .] With facts almost identical to this case, the *Cassidy* court held than an interview of a witness by a police officer at a hospital, shortly after an assault, did not constitute interrogation . . . [w]e respectfully disagree." *Id.*

32. Chuck Mallin, *What Does* Crawford v. Washington *Mean for Future Prosecution?*, 34 TEX. PROSECUTOR 1, May/June 2004, *available at* http://www.tdcaa.com/newsletter/files/May_June%2004%20Prosecutor.pdf (last visited Jan. 5, 2005).

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II. BACKGROUND

A. *The Prevalence of Domestic Violence and a Response*

Nearly one-third of women murdered each year in the United States are killed by their current or former intimate partners.[33] In the year 2000 alone, 1,247 women were killed by an intimate partner.[34] Only about half of the domestic violence committed in the United States is reported to the police.[35] It has been recognized that domestic disturbance incidents constitute the largest category of calls received by police each year.[36] Texas is no exception.

The Texas Council on Family Violence (TCFV) and the Texas Department of Public Safety report that there were 185,299 family violence incidents reported to law enforcement and 153 women killed by an intimate partner in 2003 alone.[37] In 2002, TCFV conducted statewide polling on the prevalence and attitudes regarding domestic violence and reported that seventy-four percent of all Texans have either experienced some form of domestic violence or have had a family member or a friend experience it.[38] Forty-seven percent of all Texans acknowledged having personally experienced at least one form of domestic violence, whether severe, verbal or forced isolation from friends and family at some point in

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33. *See* U.S. DEP'T OF JUSTICE (BUREAU OF JUSTICE STATISTICS SPECIAL REPORT), INTIMATE PARTNER VIOLENCE (May 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv/pdf (last visited Feb. 27, 2005) (providing information on violence by intimates including an analysis of both lethal and nonlethal violence).

34. *Id.*

35. *See id.* (providing information on violence by intimates including an analysis of both lethal and nonlethal violence).

36. *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 46 (1992) (tracing the historical development of the criminal response to domestic violence). "In [many] communities police officers may be the only meaningful contact citizens have with 'the law.'" *Id.* at 47. Before mandatory arrest policies, police were seen as quite indifferent to the plight of a victim of domestic violence. *Id.* at 48.

37. *See* TEX. DEP'T OF PUB. SAFETY, ANNUAL REPORT OF 2003 UNIFORM CRIME REPORT DATA COLLECTION: CRIME IN TEXAS 2003 OVERVIEW (2003), *available at* http://www.txdps.state.tx.us/director_staff/public_information/2003CIT.pdf (last visited Jan. 5, 2005) (reporting crime data for the entire State of Texas based on information provided by all local law enforcement agencies throughout the state).

38. *See* Texas Council on Family Violence, Texas: Facts About Abuse, *available at* http://www.tcfv.org/abuse_in_texas.htm (last visited Jan. 5, 2005) (reporting the results of statewide prevalence study on domestic violence). The Texas Council on Family Violence (TCFV) works to end violence against women through partnerships, advocacy, and direct services for women, children and men. *Id.* TCFV is one of the largest domestic violence coalitions in the nation, with more than 100 staff and over 469 members. *Id.* Membership is composed of domestic violence programs, supportive organizations, and individuals. *Id.*

their lifetime.[39] Finally, TCFV found that thirty-one percent of all Texans report they have been severely abused at some point in their lifetime.[40] Women also report severe abuse at a higher rate than men.[41] One well-respected, nationally recognized advocate for battered women has asserted:

> While it is true that the victim bears the greatest price for the abuse . . . much of the cost is borne by society at large. Our institutions have hardly begun the task of reducing and eliminating what is ultimately a shared public and preventable burden or, even, of holding each abuser accountable for what he has done. Instead of trying to examine what society needs to do to eliminate the abuse of women, we have largely left each victim to solve her own problem.[42]

In response, the federal government has taken action through the enactment of the Violence Against Women Act (VAWA),[43] which provides sizeable federal funding to states for the formation of systems that strengthen criminalization and enforcement of domestic violence laws and provide for policies of government supported safety for battered women.[44] Since then, "legislatures, courts, law enforcement authorities, and the public have shown an increased awareness of the extent and seriousness of domestic violence. Efforts to curb this . . . problem have intensified at the national, state, and local levels."[45] As a result, domestic violence perpetrators are being arrested and prosecuted at record rates. Indeed, "[s]ome jurisdictions have taken the war against domestic violence a step further, by employing aggressive 'mandatory arrest' and 'no-drop prosecution' policies."[46]

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39. *Id.*

40. *Id.*

41. *Id.*; *see also* Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1224 n.4 (2001) (supporting the fact that 85% of domestic violence victims are, in fact, women, with 95% of the perpetrators being men). This Comment will primarily use language reflecting these statistics.

42. Joan Zorza, *Women Battering: High Costs and the State of the Law* 14, DOMESTIC VIOLENCE LAW (Nancy K.D. Lemon ed., 2003).

43. Violence Against Women Act, 42 U.S.C.A. § 13981 (1994).

44. *See* Deborah Epstein, *Redefining the State's Response to Domestic Violence: Past Victories and Future Challenges* 31, DOMESTIC VIOLENCE LAW (Nancy K.D. Lemon ed., 2003) (examining what role the state should play in responding and curbing domestic violence).

45. Richard D. Friedman & Bridget McCormack, *Dial-In-Testimony*, 150 U. PA. L. REV. 1171, 1181 (2002).

46. Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases,* 23 B.C. THIRD WORLD L.J. 159, 159 (2003). Han's article also analyzes to what degree aggressive arrest and prosecution policies are consistent with a model of victim empowerment. *Id.*

B. *The Building Blocks of an Evidence-Based Prosecutorial Approach*

"Mandatory arrest" and "no-drop" policies work in concert to shift the burden of ending domestic violence from the victim to society.[47] Additionally, these policies help to ensure that the abuser is accountable not only to his family, but to the community as a whole.[48] Although a mandatory arrest policy is an effective societal response to domestic violence, it "may create a class of unwilling or absent victim/witnesses."[49] One commentator argues:

> While some battered women will also want prosecution to the fullest extent of the law, many do not. Because of the existing or past relationship, the victim knows the batterer will see the prosecution as a hostile act *by the victim*; he will retaliate against her in some fashion. And despite the best intentions of police and prosecutors, in the battered woman's eyes, the system will not be able to protect her from this retaliation . . . . Therefore, many battered women are unwilling to participate in the prosecution, and may even take steps to obstruct it.[50]

However, retaliation is not the sole reason for the lack of cooperation experienced by many domestic violence prosecutors. Abusers are skilled in the art of manipulation and will use a variety of strategies to gain and maintain control over their victim and the criminal justice system.[51] One proponent of aggressive prosecution of domestic violence offenders details the creative maneuvering of abusers in the following way:

> They cajole their victim with promises of reform. They remind her that they may lose their jobs and, hence, the family income. They send love letters, pledging future bliss and happiness. They have their family members turn off the victim's electricity and threaten to kick the victim and her children out into the street. They pay for the

47. *See* Linda A. McGuire, *Criminal Prosecution of Domestic Violence* 2, at http://www.bwjp.org/documents/prosecuteV.htm (advocating for the aggressive prosecution of woman battering).

48. *Id.*

49. *Id.*

50. *Id.* "Arrest of a batterer is not necessarily what the victim wants; she may simply want the police to remove her batterer from the home for the night." *Id.*; *see also* Sarah M. Buel, *Dynamics of Family Violence*, Nat'l College of District Attorneys Domestic Violence Conference Notebook (Oct. 1993) (indicating that recent studies have found that victims refuse to cooperate at trial in as many as eighty percent of all domestic violence prosecutions).

51. *See* Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, DOMESTIC VIOLENCE LAW 582 (Nancy K.D. Lemon ed., 2003) (advocating for aggressive prosecution of domestic violence offenses as a public safety issue).

> victim to leave town so that she will not be subpoenaed . . . . They prey on the victim's personal weaknesses, especially drug and alcohol abuse, physical and mental disabilities, and her love for their children. They negotiate financial and property incentives that cause acute memories of terror and pain to fade dramatically.[52]

It is no surprise that a victim who once sought police assistance will likely cave under the pressure of such effective manipulation and intimidation.

Given a victim's likely unwillingness to cooperate or participate in the prosecution of her offender, prosecutors in many jurisdictions rely on the use of the "no-drop" policies to continue to pursue the matter. The primary goal of a no-drop policy is to force the abuser to stop his abuse permanently by sending a clear message that his conduct is criminal and society will not tolerate it.[53] Indeed, Allison Frankel, author of a thorough article on no-drop policies, argues that "when abusers are treated like criminals by prosecutors, they're regarded as criminals by the community. Conversely, when the system places the responsibility for prosecution on victims . . . it sends the message that domestic violence is somehow different and less serious than other crimes."[54]

In practice, a no-drop policy communicates an intention on behalf of the state to continue prosecution in spite of the victim's wishes. In effect, "once the charges are filed, the state, and not the victim, becomes the party."[55] One commentator explains the process in the following way:

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52. *Id.* at 582-83. Wills provides examples from her practice as a prosecutor of the many ways in which a abuser manipulates and intimidates his victim. *Id.*

53. *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 304 (1985) (implicating the ignorance of judges, prosecutors and police about domestic violence and recommending leadership from state legislatures to remedy governmental inaction on behalf of victims).

54. Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 99 (1997).

55. Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 858 (1994); *see also* Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J. L. & FEMINISM 359, 367 (1996) (discussing the "extremely difficult" task of prosecuting domestic violence, due in part to "uncooperative or recanting victims" motivated by fear of their attackers or hope for reconciliation); Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 392-98 (2001) (discussing reasons why domestic violence complainants do not cooperate with the prosecution, which include financial concerns, the defendant's control over the complainant, fear of retaliation, low self-esteem, the "Honeymoon phase," and a desire to maintain a relationship with the defendant). *See generally* Nimish R. Ganatra, *The Cultural Dynamic in Domestic Violence: Understanding the Additional Burdens Battered Immigrant Women of Color Face in the United States*, 2 J.L. SOC'Y 109 (2001) (detailing the many

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The policy often comes into play after formal charges have been filed and the victim has indicated that she will not support the prosecution. Under a no-drop policy, prosecutors often are directed to: (1) pursue most cases notwithstanding the reluctance of the victim; (2) stress prosecutorial control of the case to the victim; and (3) facilitate victim cooperation with state efforts.[56]

Although the prosecutor may compel the victim to testify through the issuance of a subpoena, many decline that strategy and embrace an evidence-based strategy instead.[57] In an evidence-based prosecution, prosecutors are able to prove their case with evidence other than the testimony of the victim.[58] In fact, "around the country, a growing number of prosecutors now use the excited utterance exception to the hearsay rule when attempting to prove their cases without the testimony of the victim."[59]

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barriers that immigrant women of color face in pursuing prosecution of their abusers). These factors include "language and cultural differences, racial discrimination, and immigration laws." *Id.* at 110.

56. Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 859 (1994) (footnotes omitted).

57. *See* People v. Moscat, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004) (describing efforts by prosecutors to fashion "victimless" prosecutions in domestic violence cases by using statements received under the hearsay exceptions as excited utterances and statements for the purpose of medical diagnosis and treatment). *See generally* Neal A. Hudders, Note, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer*, 49 DUKE L.J. 1041 (2000) (examining "the particular importance to prosecutors of a victim's hearsay statements in domestic violence cases, analyz[ing] the methods by which these statements may be admitted into evidence"). This article was published several years before the decision in *Crawford* and addresses the creation of a statutory exception for domestic violence situations that would likely face serious challenges under a *Crawford* analysis.

58. *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1906 (1996) (noting that "[p]rosecutors who focus on gathering evidence against the batterer . . . often obtain convictions without the victim's testimony."); Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to* Crawford *in Domestic Violence Cases,* 38 THE PROSECUTOR 14 (2004) (arguing for the survival of evidence-based prosecution in domestic violence cases).

59. *See* Brooks Holland, *Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack?,* 8 CARDOZO WOMEN'S L.J. 171, 175 (2002) (examining the emerging practice of New York prosecutors' use of the excited utterance hearsay exception in the domestic violence cases and the corresponding case law in that state); *see also* People v. Moscat, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004) (explaining the important role of hearsay exception in a "victimless prosecution").

> Often prosecutors attempt to prove such [domestic violence] cases in important part by offering certain out-of-court statements made by the complainant; they ask that such statements be admitted in evidence pursuant to various exceptions to the hearsay rule. Thus, to give two examples: prosecutors often offer statements made by a do-

The rationale behind evidence-based prosecution is to train law enforcement to gather as much evidence as possible at the scene of the crime, including recorded statements of the victim and the offender, so that even if the victim recants, the prosecution is still in a position to bring the case to trial.[60]

Around the country, a growing number of prosecutors have relied on the excited utterance exception to the hearsay rule when attempting to prove their family violence case without the testimony of the victim.[61] "Although occasionally other doctrines come into play, the . . . excited utterance . . . exception to the hearsay rule provides the principal basis on which courts allow this type of evidence."[62] Texas is no exception.[63] One survey found that prosecutors used excited utterance statements in sixty-four percent of the domestic violence cases in which the victim did not appear as a trial witness.[64] In fact, without the presence of an excited utterance, or in some cases, a statement for the purpose of medical diagnosis in matters where the victim does not cooperate, it is unlikely the prosecutor will be in a position to move forward with the case.[65]

> mestic violence victim to doctors at a hospital as statements made for the purpose of seeking medical treatment; prosecutors also often offer statements made by a domestic violence victim to the first police officers arriving at the scene as "excited utterances."

Id.

60. *See* Richard Devine, *Targeting High Risk Domestic Violence Cases: The Cook County, Chicago, Experience*, 34 THE PROSECUTOR 30 (2000) (highlighting a program in Chicago that attempts to keep victims involved in the criminal justice system in a responsible, yet safe manner).

61. *See* Interview with Cindy Dyer, Co-Chief, Family Violence Division, Dallas County Criminal District Attorney's Office, in Dallas, Tex. (Dec. 20, 2004) (stating that the overwhelming number of cases where the district attorney seeks to continue to prosecute a domestic violence offense despite the lack of cooperation from the victim rely heavily on the introduction of excited utterance statements made to investigating police officers).

62. *See* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1181 (2002) (describing what is involved in trying a case without the live testimony of the victim and "acknowledg[ing] that is how murder cases are necessarily tried").

63. *See* Interview with Cindy Dyer, Co-Chief, Family Violence Division, Dallas County Criminal District Attorney's Office, in Dallas, Tex. (Dec. 20, 2004) (stating that the overwhelming number of cases where the district attorney seeks to continue to prosecute a domestic violence offense despite the lack of cooperation from the victim rely heavily on the introduction of excited utterance statements made to investigating police officers).

64. Donald J. Rebovich, *Prosecution Response to Domestic Violence*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 186 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

65. *See* Interview with Cindy Dyer, Co-Chief, Family Violence Division, Dallas County Criminal District Attorney's Office, in Dallas, Tex. (Dec. 20, 2004) (explaining the process used by prosecutors in her division including assessing whether or not a genuine

C. *Critical Role of the Excited Utterance Exception in Evidence-Based Prosecution*

Given the significant role the excited utterance exception plays in the prosecution of a domestic violence offense without the participation of the victim at trial, it is important to understand the origins of the exception in the law. Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial . . . , offered in evidence to prove the truth of the matter asserted."[66] The excited utterance exception has evolved from the common law doctrine of *res gestae*, an element which includes spontaneous exclamations which are "defined as statements made after some exciting event by a participant or witness which describe the circumstances of that event."[67]

Under the common law excited utterance exception, a proponent had to satisfy each of the following three elements in order to admit into evidence a statement that would otherwise be excluded as hearsay: "(1) a startling event had occurred that overwhelmed reason and reflection; (2) the witness' perception of this startling event had caused the witness to utter a spontaneous statement; and (3) the statement that resulted described or explained the event that had given rise to the statement."[68] With the adoption of the Federal Rules of Evidence came a change in the third element of the common law excited utterance exception. Section 803(2)[69] modified the common law requirement that the statement "describe or explain" the startling event, resulting in the present requirement that the statement merely relate to the event.[70] The rule now defines

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hearsay exception exists, particularly an excited utterance, when making a decision to move forward).

66. FED. R. EVID. 801(c); *see also* 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1361, at 1-2 (Chadbourn rev. 1974) (examining the analytic nature of the doctrine of hearsay as an extrajudicial testimonial assertion requiring testing through cross-examination and confrontation). For example, if A testifies on the witness stand that "B told me that event X occurred," and the testimony of A is offered to prove the occurrence of event X, A's testimony is being offered for the same purpose as if it was made on the stand by B himself. *Id.*

67. Nicholas E. Davis, Jr., *Evidence: The Cry of an Abused Child: Ohio's Expansion of the Excited Utterance Exception to the Hearsay Rule*—State v. Wallace, *37 Ohio St. 3d 87, 524 N.E.2d 466 (1988)*, 14 U. DAYTON L. REV. 399, 403 (1989).

68. *See* PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 5.05(A)(1), at 551 (4th ed. 2000) (explaining the common law principles of the excited utterance hearsay exception).

69. FED. R. EVID. 803(2).

70. *See* PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 5.05(A)(2)(a), at 552 (4th ed. 2000) (explaining the common law principles of the Federal Rule of Evidence 803(2) and the subsequent departure and broadening of the rule).

excited utterance as "[a] statement relating to the startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[71]

The Texas Rules of Criminal Evidence (later codified as the Texas Rules of Evidence) were adopted in 1985, and the codification of the excited utterance exception in the Texas Rules of Evidence 803(2) mirrored the federal excited utterance exception exactly.[72] The rationale supporting the adoption of the excited utterance exception is that the individual is so overcome with emotion, shock, fear, excitement, or another dominating feeling from the startling event that whatever the individual may immediately say is inherently reliable.[73] This rationale has been embraced by Texas courts.[74]

1. Treatment Under *Ohio v. Roberts* (The Old Rule)

It is not uncommon that a defendant will challenge the admission of certain incriminating statements as exceptions to the hearsay rules and additionally assert that the statements, if admitted, deny him the constitutional right to confrontation, given the absence of the declarant at trial. Before the decision in *Crawford*, courts facing these constitutional questions of confrontation would turn to the holding in *Ohio v. Roberts* in making a final decision regarding admissibility of excited utterance exceptions to the hearsay rule.[75] In the *Roberts* decision, the Court estab-

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71. FED. R. EVID. 803(2).

72. TEX. R. EVID. 803(2).

73. *See* FED. R. EVID. 803(2) advisory committee's note (asserting that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication").

74. *See* Zuliani v. State, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003) (holding that in determining whether a hearsay statement is admissible as an excited utterance hearsay exception, the critical determination is whether declarant was still dominated by emotions, excitement, fear, or the pain of the event or condition at the time of the statement); *see also* Evans v. State, 480 S.W.2d 387, 389 (Tex. Crim. App. 1972) (finding that the rationale for the excited utterance exception is psychological and claims "when a man is in the instant grip of violent emotion, excitement or pain, he ordinarily loses the capacity for reflection necessary to the fabrication of a falsehood and the 'truth will come out'"); Ricondo v. State, 475 S.W.2d 793, 796 (Tex. Crim. App. 1971) (finding the statement is trustworthy because it represents an event "speaking through the person rather than the person speaking about the event").

75. *See* Penry v. State, 903 S.W.2d 715, 751 (Tex. Crim. App. 1995) (finding the confrontation clause requires a showing that a hearsay declarant is unavailable and that the statement bears adequate "indicia of reliability" as held in *Ohio v. Roberts*); Long v. State, 742 S.W.2d 302, 311 (Tex. Crim. App. 1987) (finding support in the proposition of *Ohio v. Roberts* "that for prior testimony to be admissible there must be proof that the witness was unavailable and there had been a previous opportunity for cross-examination"); *see also* Smith v. State, 88 S.W.3d 652, 659-60 (Tex. App.—Tyler 2002, pet. ref'd) (finding that

lished guidelines by which a lower court determines whether the prosecution's use of hearsay evidence violates a criminal defendant's right to confront his accuser.[76] The *Roberts* Court "viewed eye-to-eye confrontation as a provisional right of the defendant, often diluted by or sacrificed to other legitimate state interests such as the need for probative evidence or the protection of vulnerable witnesses."[77] One commentator summarized the significance of *Roberts* in the following manner:

> The *Roberts* majority articulated an analytical framework for determining the admissibility of all hearsay evidence under the Confrontation Clause. Recognizing that a literal application of the Confrontation Clause would exclude virtually all hearsay evidence, a result it called "unintended and too extreme," the Court nevertheless found little doubt that the Confrontation Clause was intended to exclude some hearsay.[78]

The *Roberts* Court created a two-pronged approach that would provide guidance to lower courts when making determinations regarding the conflict between the admission of hearsay evidence and the confrontation rights of the criminal defendant.[79] The *Roberts* Court's primary concerns were with the necessity of the witness and the reliability of the statement itself.[80] According to *Roberts*, the necessity prong would be satisfied with showing the unavailability of the witness. Reliability could be satisfied if the statement either fit within a "firmly rooted hearsay exception" or was supported by "particularized guarantees of trustworthiness."[81] Later Su-

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"[u]nder the *Roberts* approach, the necessary reliability can be inferred, without more, where the evidence falls within a 'firmly rooted' hearsay exception. If the hearsay exception cannot be considered 'firmly rooted,' the evidence is presumed inadmissible and must be excluded, absent a showing of 'particularized guarantees of trustworthiness'"); Loven v. State, 831 S.W.2d 387, 393 (Tex. App.—Amarillo 1992, no pet.) (asserting that "[w]hile a defendant's right to confrontation and cross-examination is constitutionally safeguarded, such right is not absolute").

76. *See* Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1043 (2003) (examining the various rights bestowed upon a criminal defendant through the Confrontation Clause of the Sixth Amendment).

77. John F. Yetter, *Wrestling With* Crawford v. Washington *and the New Constitutional Law of Confrontation*, 78 FLA. B.J. 26, 26 (2004).

78. Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1044 (2003) (citations omitted).

79. *See Roberts*, 448 U.S. at 64-65 (noting that the Court had not developed a rule to determine the validity of all hearsay exceptions applied to criminal defendants, but that an approach was clear from the case law).

80. *See id.* at 66 (holding that in order to demonstrate sufficient reliability to satisfy the Confrontation Clause, admissible hearsay has to meet one of two prongs: manifest particularized content-based or circumstance-based "guarantees of trustworthiness," or fall within a "firmly rooted hearsay exception").

81. *Id.*

preme Court decisions seriously diminished the importance of the necessity prong,[82] leaving prosecutors with the singular task of establishing the "sufficient indicia of reliability" of the offered hearsay evidence. Therefore, satisfaction of the reliability prong of the *Roberts* test allowed for the admission of hearsay evidence in the absence of the declarant at trial. Since the excited utterance exception to the hearsay rule had been determined by the Supreme Court in a later decision to be "firmly rooted,"[83] prosecutors wishing to prosecute a domestic violence offense without the trial participation of the victim were provided great latitude under the *Roberts* analysis.[84]

2. Possiblė Outcomes Under *Crawford v. Washington* (The New Rule)

With the decision in *Crawford v. Washington*, prosecutors may no longer enjoy "carte blanche" treatment in the admissibility of a genuine excited utterance. The *Crawford* majority clearly disapproved of the analytical framework of *Roberts*, stating: "where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[85] The Crawford Court further stated that the Sixth Amendment's command that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"[86] was designed to eliminate "the civil-law mode of criminal procedure."[87] The Court noted "[t]he common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers."[88] Under that method, justices of the peace or other officials examined suspects and witnesses before trial. Later, the statements resulting from this *ex parte*

82. *See* Idaho v. Wright, 497 U.S. 805, 820-21 (1990) (declaring that precedent has recognized that "statements admitted under a 'firmly-rooted' hearsay exception are so trustworthy that adversarial testing would add little to their reliability"); United States v. Inadi, 475 U.S. 387, 400 (1986) (holding that the unavailability rule is not applicable to co-conspirators' out-of-court statements).

83. *See* White v. Illinois, 502 U.S. 346, 355-56 n.8 (1992) (recognizing spontaneous declarations as a firmly-rooted exception to the hearsay rule).

84. John F. Yetter, *Wrestling With* Crawford v. Washington *and the New Constitutional Law of Confrontation*, 78 FLA. B.J. 26, 29 (2004).

85. Crawford v. Washington, 124 S. Ct. 1354, 1370 (2004).

86. U.S. CONST. amend. VI.

87. *Crawford*, 124 S. Ct. at 1363.

88. *Id.*

examination were read into evidence in the absence of a live declarant testifying to their truth at trial.[89]

The Court determined that this was the type of testimonial statements that the Confrontation Clause sought to exclude.[90] Borrowing the words from an amicus brief, the Court noted that testimonial statements are "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."[91] *Crawford* passionately concludes that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[92] *Crawford* recognizes that "[w]here [the] testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[93] The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" but argued that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[94]

Concerned with the use of testimonial evidence obtained in a coercive environment, the Court in *Crawford* barred the use of an eyewitness statement obtained by the police from the defendant's wife, Sylvia.[95] The Court concluded that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial" because they "bear a striking resemblance to examinations by justices of the peace in England."[96] The Court concluded in *Crawford* that the police questioning of Sylvia qualified as "interrogation" "under any conceivable definition" where the witness knowingly gave a recorded statement "in response to structured police

89. *See id.* at 1363 (identifying "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused").

90. *Id.*

91. *Id.* at 1364 (quoting Brief of Amici Curiae National Association of Criminal Defense Lawyers et al. at 3, Crawford v. Washington, 124 S. Ct. 1354 (2004) (No. 02-9410)).

92. *Crawford*, 124 S. Ct. at 1371.

93. *Id.* at 1374.

94. *Id.* This language delivers what is considered to be the most challenging element of the *Crawford* decision. Defining only the minimum requirements of "testimonial" evidence leaves open to broad or narrow interpretation the various formulation of what else could be included here. *See also* Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, *8-9 (2004) (grappling with the meaning of "testimonial" as indicated in *Crawford*).

95. *Crawford*, 124 S. Ct. at 1357.

96. *Id.* at 1364.

questioning . . . ."[97] Shaping the contours of what will eventually be considered "police interrogation" will be necessary in order to "avoid returning confrontation law to that same unpredictable quality that the Court sought to escape in *Crawford*."[98]

III. ANALYSIS

A. *"Interim Uncertainty" in Action*

In *Crawford*, the Court predicted that the lack of a more detailed definition of "testimonial" would result in "interim uncertainty" in the lower courts,[99] and Texas appellate courts are beginning to experience the impact of *Crawford's* prophetic words.[100] Indeed, Chief Justice Rehnquist's concurring opinion in *Crawford* criticizes the majority for "grandly" de-

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97. *See id.* at 1365 n.4 (providing some details shaping what the Court means by "police interrogation" in the determination of whether a statement is "testimonial" in nature and therefore inadmissible without unavailability of the witness and defendant's prior opportunity to cross-examine).

98. John F. Yetter, *Wrestling With* Crawford v. Washington *and the New Constitutional Law of Confrontation*, 78 FLA. B.J. 26, 28 (2004) (discussing the possible interpretive approaches lower courts will adopt in response to more clearly defining what is intended by the term "testimonial," perhaps resulting in "a relatively clear set of state-citizen interactions that produce 'testimonial statements'").

99. *See Crawford*, 124 S. Ct. at 1374 n.10 (acknowledging the Chief Justice's objection that the majority refuses to define the concept of "testimonial" in a more detailed manner which will invariably lead to confusion in the lower courts; however, the Court asserts that any confusion that results will not be any worse than the state of the law under *Roberts*).

100. *See* Wilson v. State, 151 S.W.3d 694, 698 (Tex. App.—Fort Worth 2004, no pet. h.) (determining that statements made to police officers were not made during a police interrogation "triggering the cross-examination requirement of the Confrontation Clause as interpreted by the court in *Crawford*," making the statements nontestimonial and admissible as evidence); Samarron v. State, 150 S.W.3d 701, 706-07 (Tex. App.—San Antonio 2004, no pet. h.) (determining that defendant's rights under the Confrontation Clause were violated because written statements given by witness at the police station in response to structured police questioning are inadmissible under *Crawford*); Jahanian v. State, 145 S.W.3d 346, 350 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.) (finding that the trial court erred in allowing into evidence a written statement provided to police during a criminal investigation by a suspect, given the "testimonial" nature of the statement); Lee v. State, 143 S.W.3d 565, 570 (Tex. App.—Dallas 2004, no pet. h.) (rejecting the state's argument that incriminating statements given by a witness at a roadside stop were not in response to police interrogation and finding the statements to instead be a result of a "colloquial" form of police interrogation, thus "testimonial" and inadmissible); Hale v. State, 139 S.W.3d 418, 421-22 (Tex. App.—Fort Worth 2004, no pet. h.) (setting aside the conviction on a plea agreement in a sexual assault case because the trial court erred in ruling that an affidavit given by alleged accomplice to police was admissible; such material is "testimonial" under *Crawford* and can only be admitted if the declarant is unavailable and the defendant has a chance to cross-examine); *cf.* Gonzalez v. State, No. 04-03-00819, 2004 WL 2873811, at *4 (Tex. App.—San Antonio Dec. 15, 2004, no pet. h.) (refusing to "resolve whether [victim's] statements to the police were testimonial because [defendant] forfeited his right of con-

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claring that the definition of a testimonial statement must wait for another day. He asserts that "tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' . . . is covered by the new rule. . . . Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner."[101]

The prophetic nature of Chief Justice Rehnquist's warning is exemplified by the dispute brewing among the Texas appellate courts attempting to shape the direction the state will take in defining the limits of testimonial hearsay.[102] Most Texas courts agree that the critical inquiry in determining whether a statement of an out-of-court declarant is admissible under *Crawford* is to determine whether the statement is "testimonial." In making this determination, Texas courts have noted that "[a]lthough the Court purposefully avoids drawing a comprehensive definition of the term, it identifies certain categories of out-of-court statements that definitely fall under the heading of testimonial statements."[103] Although several of the categories outlined by the Court are relatively clear, the category involving "police interrogation" raises serious questions unanswered by the *Crawford* Court.[104]

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frontation under the doctrine of forfeiture by wrongdoing. In *Crawford*, the court stated that it would continue to recognize the doctrine. . . .").

101. Crawford v. Washington, 124 S. Ct. 1354, 1378 (2004) (Rehnquist, J., concurring).

102. *Compare* Cassidy v. State, 149 S.W.3d 712, 716 (Tex. App.—Austin 2004, pet. ref'd) (holding that police officer's questioning of an aggravated assault victim shortly after an incident at a local hospital did not constitute interrogation and further finding the statements to be nontestimonial, making admission of the officer's testimony as to the victim's statements did not violate defendant's Sixth Amendment rights; victim's statements were excited utterances, which had sufficient indicia of reliability to satisfy the Confrontation Clause), *with* Wall v. State, 143 S.W.3d 846, 851 (Tex. App.—Corpus Christi 2004, no pet.) (holding that a police officer conducting an interview of a victim at a hospital is "structured police questioning" and is considered an "interrogation" for purposes of determining the "testimonial" nature of the statement). The *Wall* court noted that the *Cassidy* court considered the "issue of what constitutes a 'testimonial' statement made during 'police interrogation'. . . . With facts almost identical to this case, the *Cassidy* court held that an interview of a witness by a police officer at a hospital, shortly after an assault, did not constitute an interrogation. . . . We respectfully disagree." *Id.*

103. *See* Brooks v. State, 132 S.W.3d 702, 707 (Tex. App.—Dallas 2004, pet. ref'd) (reversing an aggravated robbery conviction for error in admitting, under against-interest exception, a custodial statement by a nontestifying co-offender, which was "testimonial" under *Crawford*).

104. *See* Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 550 (2005) (examining in detail what could and should occur as a result of the *Crawford* decision). The author contends that "all statements made knowingly to a police officer should be considered formally given, in that they should be expected to be admitted in evidence if of value to the government." *Id.* at 554; *see also* People v. Moscat, 777 N.Y.S.2d 875, 877 (N.Y. Crim. Ct. 2004) (explaining

B. *Dissension in the Ranks*

Texas appellate courts in Austin and Corpus Christi recently came to conflicting conclusions on the question of whether police interaction with a victim rises to the level of a "police interrogation" requiring the statements made by the victim to be labeled as "testimonial" for purposes of a confrontation analysis.[105]

In *Cassidy v. State*,[106] the Third Court of Appeals considered whether an interview of a victim witness by a police officer at a hospital, shortly after an assault, constitutes interrogation as the term is used in *Crawford*.[107] In *Wall v. State*,[108] the Thirteenth Court of Appeals addressed the issue of what constitutes a "testimonial" statement made during a "police interrogation" and, despite almost identical facts to *Cassidy*, came to a completely opposite decision.[109]

In *Cassidy*, the victim was taken to a hospital where, one hour after the assault, he was interviewed by the responding police officer.[110] Over objection, the police officer was allowed to testify under the excited utterance exception to the hearsay rule. The officer testified that the victim gave him a description of his assailant that matched the description provided by other witnesses.[111] He told the officer that the defendant had come into the store and asked to cash a check and when the victim refused to cash the check, the defendant stabbed him.[112] The court concluded that the officer's interview of the victim at the hospital on the afternoon of the assault did not constitute "interrogation" as that term is

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that "in a manner somewhat similar to its approach to the definition of 'testimonial' statements—the *Crawford* Court expressly declines to define what constitutes a 'police interrogation'").

105. *Compare* Cassidy v. State, 149 S.W.3d 712, 716 (Tex. App.—Austin 2004, pet. ref'd) (holding that police officer's questioning of aggravated assault victim shortly after incident at local hospital did not constitute interrogation and the victim's statements were nontestimonial), *with* Wall v. State, 143 S.W.3d 846, 851 (Tex. App.—Corpus Christi 2004, no pet.) (holding that a police officer conducting an interview of a victim is considered an "interrogation" for purposes of determining the "testimonial" nature of the statement).

106. 149 S.W.3d 712 (Tex. App.—Austin 2004, pet. ref'd).

107. *See* Cassidy v. State, 149 S.W.3d 712, 716 (Tex. App.—Austin 2004, pet. ref'd) (asserting that "[w]e do not believe that [officer's] interview of [victim] at the hospital on the afternoon of the assault constituted 'interrogation' as that term is used in *Crawford*").

108. 143 S.W.3d 846 (Tex. App.—Corpus Christi 2004, no pet.).

109. *See* Wall v. State, 143 S.W.3d 846, 851 (Tex. App.—Corpus Christi 2004, no pet.) (holding that a police officer conducting an interview of a victim at a hospital is "structured police questioning" and is considered an "interrogation" for purposes of determining the "testimonial" nature of the statement).

110. *Cassidy*, 149 S.W.3d at 714.

111. *Id.*

112. *Id.*

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used in *Crawford*.[113] Therefore, the court held that the statements were not testimonial.[114] The court further concluded:

> *Crawford* strongly suggests, but does not hold, that the admissibility of nontestimonial hearsay is outside the scope of the Sixth Amendment. Under either this theory or the "indicia of reliability" theory currently applied to nontestimonial hearsay, the admission of [victim's] excited utterances to [police officer] did not violate the Sixth Amendment.[115]

While the Third Court of Appeals found no violation of the Sixth Amendment in admitting statements made to police in response to initial investigative questioning at the hospital, the Thirteenth Court of Appeals came to a different conclusion with strikingly similar facts.[116] In *Wall*, the victim was attacked with a wooden board and was hospitalized due to his injuries. While at the hospital, the responding police officer questioned the victim about the incident. The victim answered the officer's questions and identified the defendant as the perpetrator of the assault.[117]

The victim was unavailable to testify at trial. Instead, the state called the responding police officer to testify as to what the victim disclosed to him in response to the officer's questioning at the hospital.[118] The defendant objected to the admission of this evidence claiming that it was inadmissible hearsay. However, the trial court determined the victim's statements were admissible as evidence through the excited utterance exception to the hearsay rule.[119]

The Thirteenth Court of Appeals "respectfully disagree(d)" with the *Cassidy* holding that the statements of a victim witness made in response to police questioning at the hospital following an assault were not "testi-

113. *Id.* at 716.

114. *See id.* (holding that police officer's questioning of aggravated assault victim shortly after incident at local hospital did not constitute interrogation, and further finding the statements to be nontestimonial).

115. *Cassidy*, 149 S.W.3d at 716. It is interesting to note that appellant in *Cassidy* did not challenge the court's determination that the victim's statements to the police officer were in fact excited utterances, but only challenged the "testimonial" nature of the excited utterance.

116. *See* Wall v. State, 143 S.W.3d 846, 851 (Tex. App.—Corpus Christi 2004, no pet.) (holding that a police officer conducting an interview of a victim at a hospital is "structured police questioning" and is considered an "interrogation" for purposes of determining the "testimonial" nature of the statement). Again, in this matter, the appellant did not challenge the trial court's determination that the statements were admissible as an exception to the hearsay rule as excited utterances.

117. *Id.* at 848.

118. *Id.*

119. *Id.*

monial" in nature.[120] Instead, the *Wall* court determined that the victim's statement was given in response to investigative questioning by the police officer and that this type of questioning is a form of "'police interrogation' under the definition set forth in *Crawford*."[121]

C. *Where's the Beef?*

It is disappointing that both decisions lack an adequate analysis and discussion of the road each court traveled in order to arrive at their conflicting definitions of testimonial as it relates to police interrogation and the use of the excited utterance exception to the hearsay rule.[122] The issues addressed in the *Wall* and *Cassidy* decisions are that of first impression in Texas and these courts are among the first in the nation to grapple with the implications of *Crawford* on police-citizen interaction and the testimonial nature of that exchange.[123] Courts that are among the first to speak on a legal issue of significant importance can play a significant role

120. *See id.* at 851 (noting that "our sister court addressed the issue of what constitutes a 'testimonial' statement made during 'police interrogation' . . . the [*Cassidy*] court held that the statements were outside the scope of the Sixth Amendment. . . . [w]e respectfully disagree").

121. *See Wall*, 143 S.W.3d at 851 (reporting that the *Crawford* Court noted "[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").

122. *See id.* (proclaiming that "a police officer conducting an interview of a witness at a hospital is such 'structured police questioning,' and thus an 'interrogation' under the holding in *Crawford*."). Unfortunately, this proclamation comes without any analysis regarding how the introduction of an admissible excited utterance intersects with the determination that police questioning in this matter is police interrogation and therefore "testimonial." *Id.*; *see also* Cassidy v. State, 149 S.W.3d 712, 716 (Tex. App.—Austin 2004, pet. ref'd) (asserting that "we do not believe that [officer's] interview of [victim] at the hospital on the afternoon of the assault constituted 'interrogation' as that term is used in *Crawford.*"). The court here did not provide one sentence of analysis on how they reached their decision except to identify the holding in *Crawford* and to assert that the questioning in this case did not equal interrogation. Although the conclusion seems more accurate and palatable than that of the *Wall* court, the way in which the *Cassidy* court reached its decision is a mystery, and this lack of guidance is a dilemma for lower courts struggling to walk the fine line between questioning and interrogation.

123. *Cf.* Crawford v. Washington, 124 S. Ct. 1354, 1376 (2004) (Rehnquist, J., concurring) (bemoaning the majority's refusal to clearly define "testimonial," Chief Justice Rehnquist asserts "we have never drawn a distinction between testimonial and nontestimonial statements. And for that matter, neither has any other court of which I am aware."). *Crawford* was handed down on March 8, 2004, and both *Wall* and *Cassidy* were considered a short number of months later. The opinion in *Wall* was delivered August 19, 2004, and that of *Cassidy* was delivered on October 13, 2004, making them some of the first cases to consider confrontation rights under *Crawford* in Texas.

in shaping the contours of a specific area of the law with a thorough analysis and detailed conclusion.[124]

Noticeably absent from each of these decisions is any discussion of the excited utterance exception to the hearsay rule and the role it plays in classifying statements as testimonial or nontestimonial.[125] Perhaps these courts did not address the validity of the admission of hearsay statements introduced under the excited utterance exception because neither of the defendants challenged those decisions of admissibility at the trial level.[126] However, it seems shortsighted to consider the testimonial nature of statements made in an exchange between a victim and a police officer without considering the characteristics that made the same statement admissible as an excited utterance. The primary inquiry into the legally required characteristics of an admissible excited utterance[127] is certain to

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124. *Cf.* People v. Moscat, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004) (explaining the special importance of defining the implications of *Crawford* more clearly for those courts designated to exclusively try cases of alleged domestic violence). "This case represents an early opportunity for trial courts like this one to begin to work out in practice the meaning and concrete application of the new principles of Sixth Amendment analysis recently set forth by the United States Supreme Court in *Crawford v. Washington.*" *Id.* at 876.

125. *See Wall*, 143 S.W.3d at 851 (discussing testimonial statements under Crawford, but omitting any analysis regarding the admissibility of the excited utterance). Unfortunately, this proclamation comes without any analysis regarding how the introduction of an admissible excited utterance intersects with the determination that police questioning in this matter is police interrogation and therefore "testimonial." *Id.*; *see also* Cassidy v. State, 149 S.W.3d 712, 716 (Tex. App.—Austin 2004, pet. ref'd) (asserting that "[w]e do not believe that [officer's] interview of [victim] at the hospital on the afternoon of the assault constituted 'interrogation' as that term is used in *Crawford.*"). The court here did not provide one sentence of analysis on how they reached their decision except to identify the holding in *Crawford* and to assert that the questioning in this case did not equal interrogation. Although the conclusion seems more accurate and palatable than the *Wall* court, the way in which the *Cassidy* court reached its decision is a mystery and this lack of guidance is a dilemma for lower courts struggling to walk the fine line between questioning and interrogation.

126. *Compare Wall*, 143 S.W.3d at 848-49 (appealing on two issues: improper closing argument and the admissibility of a witness's statement under the Confrontation Clause), *and Cassidy*, 149 S.W.3d at 713 (appealing the trial court's decision to admit double hearsay and in so doing violating defendant's Sixth Amendment right to confrontation), *with* Wilson v. State, 151 S.W.3d 694, 696 (Tex. App.—Fort Worth 2004, no pet.) (appealing the trial court's admission of statements as excited utterances and contending that the admission of hearsay evidence against a criminal defendant implicates the Confrontation Clause of the Sixth Amendment).

127. *See* Couchman v. State, 3 S.W.3d 155, 159 (Tex. App.—Fort Worth 1999, pet. ref'd) (embracing that "[i]n order for the utterance to be admissible . . . the statement must be the product of a startling occurrence, the declarant must have been dominated by the emotion, excitement, fear, or pain of the occurrence, and the statement must be related to the circumstances of the startling occurrence."); King v. State, 953 S.W.2d 266, 269 (Tex. Crim. App. 1997) (accepting the concept that "[i]n determining whether a statement is an

inform the overall determination regarding the testimonial nature of the statements in question. In fact, several courts have declared that "[a]n unrehearsed statement made without time for reflection or deliberation, as required to be an 'excited utterance,' is not 'testimonial' in that such a statement, by definition, has not been made in contemplation of its use in a future trial."[128]

IV. Recommendations

A. *Looking to the Past for Direction*

Perhaps the *Wall* court would have come to a conclusion more closely resembling *Cassidy* if it had considered the Texas case law regarding the excited utterance exception to the hearsay rule; particularly—the state of mind of the declarant and the type and number of questions asked by the police officer at the hospital.[129] The background and context of the statements are relevant to a determination of their testimonial nature given the *Crawford* Court's only real substantive directive on defining police interrogation being that "the case qualifie[s] as 'interrogation' 'under any conceivable definition' where the witness knowingly [gives] a recorded statement 'in response to structured police questioning . . . .'"[130]

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excited utterance under Rule 803(2), the pivotal inquiry is 'whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event'") (citation omitted); Hunt v. State, 904 S.W.2d 813, 816 (Tex. App.—Fort Worth 1995, pet. ref'd) (explaining that "[t]he critical factor is whether the declarant made the statement while dominated by the emotions arising from a startling event or condition").

128. *See* Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004) (contending that "the very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial.").

129. *See* Zuliani v. State, 97 S.W.3d 589, 595-96 (Tex. Crim. App. 2003) (holding that "[i]n determining whether a hearsay statement is admissible as an excited utterance" hearsay exception, "[t]he critical determination is 'whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event' or condition at time of the statement") (quoting MacFarland v. State, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992)); Ward v. State, 657 S.W.2d 133, 136 (Tex. Crim. App. 1983) (asserting that the offeror must show the declarant was "in the grip of a shocking event so as to render the statement a spontaneous utterance"); *see also* Salazar v. State 38 S.W.3d 141, 154 (Tex. Crim. App. 2001) (contending "[i]t is not dispositive that the statement is an answer to a question or that it was separated by a period of time from the startling event; these are simply factors to consider in determining whether the statement is admissible under the excited utterance hearsay exception").

130. *Hammon*, 809 N.E.2d at 951 (quoting Crawford v. Washington, 124 S. Ct. 1354, 1365 n.4 (2004)); *see also* Crawford v. Washington, 124 S. Ct 1354, 1365 (2004) (acknowledging that the inadmissible statements were made by Sylvia Crawford after she had been taken into custody and had been read her *Miranda* rights, informed she would be allowed to leave only when the investigation had progressed, and twice subjected to interrogation in the form of structured police questioning by police detectives). This set of circumstances

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Texas courts have not established a "single, rigid principle [to govern] the admissibility of evidence under the excited utterance exception or spontaneous declaration rule."[131] On the contrary, the Texas Court of Criminal Appeals has favored the approach that each case must be considered on a case-by-case basis, taking into consideration particular facts when making a determination regarding the admissibility of a statement as a genuine excited utterance.[132] However, the Texas Court of Criminal Appeals has indicated that when determining the admissibility of a statement made under the excited utterance exception to the hearsay rule, "the critical factor is whether the declarant was still dominated by the emotions, excitement, fear or pain of the event."[133] Stated differently, a qualifying statement must be "made under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection."[134] Given the significant importance placed on the mental state of the declarant, the proponent of the statement is required to lay a factual predicate to illustrate that the statement was in fact made while the declarant was still dominated by the emotions, excitement, fear, or pain of the event.[135] The necessity of satisfying this requirement is enforced in cases involving the admissibility of an excited utterance, including those statements made in response to police questioning.[136]

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is clearly distinguished from those in which a victim of domestic violence seeks assistance from the police to prevent future violence and during the initial police response to a "startling event" statements are made incriminating the abuser, even if those statements are made in response to non-leading, non-coercive questions like "what happened?" or "Who did this?"

131. Jones v. State, 772 S.W.2d 551, 554-55 (Tex. App.—Dallas 1989, pet. ref'd).

132. *See* Fisk v. State, 432 S.W.2d 912, 914 (Tex. Crim. App. 1968) (outlining the analysis necessary in making a determination of admissibility of a possible excited utterance hearsay statement).

133. McFarland v. State, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992).

134. Fowler v. State, 379 S.W.2d 345, 347 (Tex. Crim. App. 1964).

135. *See* Zuliani v. State, 97 S.W.3d 589, 595-96 (Tex. Crim. App. 2003) (holding that in determining whether a hearsay statement is admissible as an excited utterance hearsay exception, the critical determination is whether declarant was still dominated by emotions, excitement, fear, or pain of the event or condition at the time of the statement); Ward v. State, 657 S.W.2d 133, 136 (Tex. Crim. App. 1983) (asserting that the offeror must show the declarant was "in the grip of a shocking event so as to render the statement a spontaneous utterance").

136. *Compare* Lawton v. State, 913 S.W.2d 542, 553 (Tex. Crim. App. 1995) (finding statements as admissible when a detective testified that, an hour after a murder, witness to the murder was "still 'excited and upset' by the events leading to the victim's death"), *and* McFarland v. State, 845 S.W.2d 824, 845-46 (Tex. Crim. App. 1992) (finding statements admissible as excited utterances when it was apparent to the court that the victim was still under emotional or physical stress of a recent sexual assault and stabbing), *and* King v. State, 631 S.W.2d 486, 491 (Tex. Crim. App. 1982) (finding statements admissible as excited utterances when victim was physically shaking, crying intermittently, unable to sustain her

Texas courts have emphasized several factors that play a role in determining whether a statement falls within Rule 803(2). One factor to consider is spontaneity: The time lapse between the statement and the shocking event.[137] Another factor is whether circumstances occurred interrupting the connection between the shocking event and the statement.[138] However, no one particular factor is completely dispositive, and each case must be considered individually based on its particular facts.[139] In general, Texas courts addressing the exception look to the following factors in determining whether the statement made by the declarant is an excited utterance: (1) whether the declaration resulted from the shocking incident; (2) whether the declarant's state of mind was dominated by the shock or emotional impact of the incident; and (3) whether the statement made by the declarant was sufficiently connected to the circumstances of the incident.[140]

An additional factor considered by many Texas courts for decades, and one that is on point when discerning the testimonial nature of a state-

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train of thought, incoherent and in mild shock), *and* Ricondo v. State, 475 S.W.2d 793, 796 (Tex. Crim. App. 1971) (determining statements admissible as *res gestae* when victim had been beaten by fellow jail inmates and died shortly afterward from the resulting severe physical trauma), *with* Ward v. State, 657 S.W.2d 133, 136 (Tex. Crim. App. 1983) (holding statements not admissible as *res gestae* when the witness did not exhibit nervousness or excitement at the time the statements were made), *and* Sellers v. State, 588 S.W.2d 915, 919 (Tex. Crim. App. 1979) (reversing the holding of the lower court by finding that the "evidence does not support a finding that the startling event still dominated [the witness's] reflective powers, nor that no time to contrive or misrepresent had passed").

137. *See Lawton*, 913 S.W.2d at 553 (claiming that "[t]he time elapsed between the occurrence of the event and the utterance is only one factor considered in determining the admissibility of the hearsay statement"); *see also* Salazar v. State, 38 S.W.3d 141, 154 (Tex. Crim. App. 2001) (contending "[i]t is not dispositive that the statement is an answer to a question or that it was separated by a period of time from the startling event; these are simply factors to consider in determining whether the statement is admissible under the excited utterance hearsay exception").

138. *See* Mosley v. State, 960 S.W.2d 200, 204 (Tex. App.—Corpus Christi 1997, no pet.) (recognizing that "[w]hile time between the exciting event and the proffered statement is not dispositive, it is the lack of opportunity to fabricate details that lends this exception to hearsay its credibility. The 'excitement' experienced by the declarant must be continuous between the event itself and the statement describing it.").

139. *Id.* The court also mentions a couple of additional factors the trial court must reconcile when deciding on the admissibility of evidence under the excited utterance exception: namely, the amount of time passed between the excited utterance and the shocking event, and any intervening facts that occurred between the declaration and the incident. *Id.*

140. *See* Jackson v. State, 110 S.W.3d 626, 633 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (reiterating that for a statement to qualify as an excited utterance the proponent of the statement must establish a predicate for each of the required elements, including a mental state that indicates the declarant was "dominated by the emotion, excitement, fear, or pain of the event").

ment, is that of police questioning of a witness. In *Ward v. State*,[141] statements made at the crime scene by the defendant's wife were found to be inadmissible as an excited utterance because the witness "was not shown to be nervous or excited."[142] Additionally, she had spoken over the phone to a lawyer, talked with the defendant, had indicated she did not want to provide any information on the advice of her attorney, and answered only the responding officer's questions.[143] The court considered all of these factors, noting:

> Also, the fact that the exclamation was made in response to a question would not automatically make it less reliable and inadmissible. That an exclamation is made in response to a question is a factor to be considered along with all the surrounding circumstances in determining whether the exclamation was spontaneous. Thus, a leading question would be suspect.[144]

The Texas Court of Criminal Appeals has more recently affirmed the use of the excited utterance as a result of police questioning when the questions do not involve any element of coercion, implicitly recognizing the suspicious nature of leading questions in this context.[145] The relevant case law regarding the appropriate admission of the excited utterance exception emerging from the Texas Court of Criminal Appeals in the last two decades demonstrates the court's desire to maintain the scope of this doctrine within narrow limits. Since the court is suspicious about police questioning resulting in a genuine excited utterance, the court requires that the State must demonstrate that the declarant was still dominated by the emotions, excitement, fear, or pain of the exciting event and that the questions asked of her were not coercive in nature.[146]

The narrow limits set forth to govern the use of the excited utterance exception to the hearsay rule should influence any Texas court consider-

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141. 657 S.W.2d 133 (Tex. Crim. App. 1983).

142. Ward v. State, 657 S.W.2d 133, 133 (Tex. Crim. App. 1983).

143. *Id.*

144. *Id.* at 136 (quoting Tezeno v. State, 484 S.W.2d 374, 379 (Tex. Crim. App. 1972)).

145. *See* McFarland v. State, 845 S.W.2d 824, 845-46 (Tex. Crim. App. 1992) (approving statements admissible as excited utterances when the victim, who had been raped and stabbed and died a few hours later, responded to the police officer's questions). The questions asked by the officer included "what happened," "who did this," and "what color [were the attackers]." *Id.* at 845.

146. *Id.* at 845-46; *see also* Lawton v. State, 913 S.W.2d 542, 553 (Tex. Crim. App. 1995) (claiming that "[t]he time elapsed between the occurrence of the event and the utterance is only one factor to be considered in determining the admissibility of the hearsay statement" and questions asked by police officer are not dispositive factors for inadmissibility); *Ward*, 657 S.W.2d at 136 (asserting that the offeror must show the declarant was "in the grip of a shocking event so as to render the statement a spontaneous utterance").

ing the testimonial nature of a genuine excited utterance. A statement that survives an excited utterance analysis will certainly fall outside even the broad definition of "testimonial" advanced by the Court in *Crawford v. Washington.*[147]

147. *Cf.* Leavitt v. Arave, 371 F.3d 663, 683-84 n.22 (9th Cir. 2004) (reasoning that victim's excited utterance in emergency call to police was not testimonial because the victim, not the police, initiated their interaction and she was "in no way being interrogated . . ." but instead "sought their help in ending a frightening intrusion into her home"); *cf.* People v. Kilday, 20 Cal. Rptr. 3d 161, 173 (Cal. Ct. App. 2004) (concluding that statements by a frightened, visibly injured victim during police questioning were non-testimonial because the officers "were not producing evidence in anticipation of a potential criminal prosecution in eliciting basic facts from [the victim] about the nature and cause of her injuries"). However, it is important to note that the *Kilday* court considered three separate statements made by the victim to police officers and found two of the three to be testimonial. *Id.* at 171-73. To find the first statement non-testimonial, the court relied on facts establishing that the police officers encountered a frightened victim, the location was unsecured, and the situation was still uncertain. *Id.* at 172-73. The second statement, taken an hour later by a specially requested female officer, was found to be testimonial despite the fact that the victim was still visibly frightened, highly upset, there was no recorded statement taken and the interaction took place in a hotel lobby. *Id.* at 171-72. In this instance, the court determined that "by the time [the officer] questioned [the victim] the overarching purpose of the interaction was obtaining a detailed statement; the responding officers had dealt with the exigent safety, security, and medical concerns initially predominant when officers arrive on a scene in response to a call for assistance." *Id.*; *see also* Lopez v. State, 888 So. 2d 693, 699-700 (Fla. Dist. Ct. App. 2004) (asserting that "a startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation. . . . The statement does not lose its character as a testimonial statement merely because the declarant was excited. . . ."); Fowler v. State, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004) (finding that "[w]hatever else police 'interrogation' might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred."). "Such interaction with witnesses on the scene does not fit within a lay conception of police 'interrogation,' bolstered by television, as encompassing an 'interview' in a room at the stationhouse." *Id.* Additionally, the interaction "does not bear the hallmarks of an improper 'inquisitorial practice.'" *Id.*; *see also* Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004) (holding that the victim's statement to the police officer was not testimonial because it was not made within a formal setting, nor within any type of pre-trial inquiry, and "it was not contained within a 'formalized' document of any kind"); State v. Wright, 686 N.W.2d 295, 305 (Minn. Ct. App. 2004) (determining the dialogue that took place between the victim and responding police officer, "although certainly part of an investigative process, is not an 'interrogation' and does not result in a formal statement"); Wilson v. State, 151 S.W.3d 694, 698 (Tex. App.—Fort Worth 2004, no pet. h.) (concluding that statements made to police officers were not made during a police interrogation "triggering the cross-examination requirement of the Confrontation Clause as interpreted by the court in *Crawford*," thus making the statements non-testimonial and admissible as evidence). In *Wilson*, the court first considered the testimonial nature of the statements and then turned to the defendant's issue regarding whether the statements fell into the excited utterance hearsay exception. *Id.* at 698-99. It is interesting to note, however, that the factors considered for both inquiries were similar. The court considered that the declarant

B. *The Narrow Path Will Lead Us Home*

The majority in *Crawford* expressly refused to provide a specific definition of the critical term "testimonial" but it does impart some guidance on the topic.[148] First, there is no expectation that "testimonial" statements are only those given under oath; indeed, *Crawford* indicates that unsworn statements may also be "testimonial."[149] Second, the Court provided some examples of what it would consider "testimonial" statements, including *ex parte* in-court testimony or its corresponding resources like affidavits, custodial examinations, testimony given in a previous judicial proceeding of which cross-examination was not available to the defendant, or similar pretrial assertions that "declarants would reasonably expect to be used prosecutorially."[150] Also, "'extrajudicial statements . . . contained in formalized testimonial materials,'"—, affidavits, depositions, prior testimony or confessions—are also considered clearly testimonial by the Court.[151] Finally, "'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,'" are also perceived as testimonial.[152]

Those who favor a broad application of *Crawford* to all hearsay statements believe the last "of these is the most useful and accurate . . . [and] captures the idea that the Confrontation Clause is meant to prevent the creation of a system in which witnesses can offer their testimony without being subjected to cross-examination."[153] Proponents of a broad applica-

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seemed "nervous and visibly upset" and not responding to questions of the police officers, as much as she was seeking information and help from them. *Id.* at 699. Additionally, the court noted that "any questions posed to her by the police were in the context of answering her questions and determining why she was upset." *Id.*

148. *See* Crawford v. Washington, 124 S. Ct. 1354, 1374 (2004) (concluding "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.").

149. *See id.* at 1364 (defining "[t]estimony . . . [as a] solemn declaration or affirmation for the purpose of establishing and proving some fact"). The Court further clarifies its position by providing that "[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." *Id.*

150. *See id.* (outlining the various examples of testimonial statements that "all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it").

151. *See id.* (quoting White v. Illinois, 502 U.S. 346, 365 (1992)).

152. *Id.* (quoting Brief of Amici Curiae National Association of Criminal Defense Lawyers et al. at 3, Crawford v. Washington, 124 S. Ct. 1354 (2004) (No. 02-9410)).

153. *See* Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, *5 (2004) (celebrating the *Crawford* decision as "a very positive development, restoring to [the Sixth Amendment's] central

tion contend that statements made to a police officer responding to a domestic violence incident "are usually testimonial in nature, in that the caller knows she is not simply asking for help but providing information for the use of the criminal justice system."[154] The rationale that supports this position is based on the assertion that as a community we have greater awareness of the seriousness of domestic violence. Because of this increased awareness and encouragement to victims to report the violence, there is an expectation that domestic violence victims understand that any statements made to a government official (such as a police officer or a 911 operator, for that matter) "are likely to lead to arrest and prosecution and to be used against the alleged abuser at trial."[155]

However, courts across the country facing this very question are taking a more narrow approach in their application of *Crawford* and their interpretation of what the Court intended by "police interrogation" and what circumstances "lead an objective witness reasonably to believe that the

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position one of the basic protections of the common law system of criminal justice"). Richard D. Friedman is a professor at the University of Michigan Law School and is a long-time advocate of Justice Scalia's testimonial approach. *Id.* n.a1. In *Crawford,* Professor Friedman assisted petitioner's counsel, Jeffrey Fischer, in oral arguments before the Supreme Court, and submitted an amicus brief which he and eight other professors endorsed. *Id.*

154. *See* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1181 (2002) (basing this contention on the fact that efforts to curb domestic violence on a national level have intensified and have led to a dramatic increase in the number of victims reaching out to law enforcement for assistance and because of these increased awareness efforts a victim "probably knows that there is a good chance statements he or she makes during the 911 call, or to the responding officer, will be used in prosecution").

155. *See* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1193-95 (2002) (basing this contention on the fact that efforts to curb domestic violence on a national level have intensified and have led to a dramatic increase in the number of victims reaching out to law enforcement for assistance and because of these increased awareness efforts victims are more likely to assume that the statements they make during a 911 call, or to the responding officer, will be introduced during prosecution). These efforts leading to increased awareness include local and national media coverage, advertising in a wide variety of outlets educating the public that domestic violence is a crime and victims should report it, the O.J. Simpson trial ("probably the most observed trial of the twentieth century"), and the designation of October as National Domestic Violence Awareness Month by President Clinton. *Id.* at 1194-95. Furthermore, the authors point out the following:

> Because the principal aim of these efforts is to encourage victims of domestic violence to report it, one of their major themes is that reporting will not be futile. Victims are reminded that their complaints will be taken seriously and that protective and punitive action to assist them will follow issuance of the complaint.

Id. at 1195. "Indeed, 'under mandatory arrest laws, a battered woman's call to the police is tantamount to a request for arrest.'" *Id.* at 1196.

statement would be available for use at a later trial."[156] On the topic of police interrogation, at least one court has "observ̓e[d] that the Supreme Court chose not to say that any police *questioning* . . . would make any statement given in response thereto 'testimonial'; rather, it expressly limited its holding to police 'interrogation.'"[157] Central to the analysis of those courts embracing a more narrow approach is the belief that the key characteristic of all "testimonial" statements is the "formality by which

156. Crawford v. Washington, 124 S. Ct. 1354, 1363 (2004); *see also* State v. Watson, No. 7715/90, slip op. at 15 (N.Y. Sup. Nov. 8, 2004) (concluding that "when a police officer . . . questions a potential witness for the purpose of gathering information to aid in a suspect's prosecution, and the witness is aware of the purpose of the officer's questions, structured questioning amounting to an interrogation has occurred"). This court asserts that this is true even if the officer has only asked one question. *Id.* In this matter, the court was responding to the State's argument that because the police officer only asked two questions at the scene of the crime, "the questioning did not constitute an interrogation and therefore did not produce any testimonial statements." *Id.* This court refused to accept their position and found the final question asked by the officer to be a form of structured police questioning, and therefore testimonial in nature. *Id.*; *see also* People v. Kilday, 20 Cal. Rptr. 3d 161, 173 (Cal. Ct. App. 2004) (concluding that statements by a frightened, visibly injured victim during police questioning were nontestimonial because the officers "were not producing evidence in anticipation of a potential criminal prosecution in eliciting basic facts from [the victim] about the nature and cause of her injuries"); Fowler v. State, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004) (finding that "[w]hatever else police 'interrogation' might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred"); Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004) (holding that the statement given by the victim to the police officer did not qualify as a testimonial statement because it was not made in a formal context, "it was not given during any type of pre-trial hearing or deposition; [and] it was not contained within a 'formalized' document of any kind"); State v. Wright, 686 N.W.2d 295, 305 (Minn. Ct. App. 2004) (determining the dialogue that took place between the victim and responding police officer, "although certainly part of an investigative process, is not an 'interrogation' and does not result in a formal statement"); Cassidy v. State, 149 S.W.3d 712, 716 (Tex. App.—Austin 2004, pet. ref'd) (holding that a police officer's questioning of an aggravated assault victim shortly after an incident at a local hospital did not constitute interrogation and further finding the statements to be nontestimonial; therefore, the admission of the officer's testimony as to the victim's statements did not violate the defendant's Sixth Amendment rights, as the victim's statements were excited utterances, which had sufficient indicia of reliability to satisfy the Confrontation Clause). *Contra* Wall v. State, 143 S.W.3d 846, 851 (Tex. App.—Corpus Christi 2004, no pet.) (holding that a "police officer conducting an interview of a [victim] at a hospital is . . . structured police questioning, and is thus an 'interrogation'" for purposes of determining the testimonial nature of the statement). The *Wall* court noted that the *Cassidy* court considered the "issue of what constitutes a 'testimonial' statement made during 'police interrogation'. . . . With facts almost identical to this case, the *Cassidy* court held than an interview of a witness by a police officer at a hospital, shortly after an assault, did not constitute an interrogation. . . . [w]e respectfully disagree." *Id.*

157. *Hammon*, 809 N.E.2d at 952.

they are produced."[158] Surely, it is not a leap in logic to assume that rarely will one find formality at the scene of a domestic violence crime shortly after the incident has occurred and police intervention is required.[159]

While an expansive reading suggests that almost any interaction between police and a citizen could fit within the confines of the reasonable belief category of "testimonial" statements,[160] courts are refusing to take such a broad interpretive step in that direction.[161] In fact, many courts are first determining whether there is a genuine excited utterance exception to the hearsay rule before continuing on to an analysis of the testimonial nature of the statements. In Texas, it is likely that this order of analysis will be most effective given the narrow scope of Texas Rule of Evidence 803(2) and its corresponding case law. In other words, if a court determines that the prosecutor has provided an effective predicate for the admissibility of the excited utterance under the current standards, then a determination that those statements are nontestimonial under *Crawford* should necessarily follow.

V. Conclusion

In Texas, if a court determines that the prosecutor has met the burden of satisfying each of the narrowly crafted requirements for the admissibility of the excited utterance, then a determination that those statements are nontestimonial should necessarily follow. *Crawford* has or should have no effect in Texas when the properly admitted excited utterance forms the basis for the domestic violence evidence-based prosecution.

Despite the current uncertainty in the *Crawford* legal landscape, prosecutors must not give up on the value of an evidence-based prosecution.

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158. *Id.*; *see also Fowler*, 809 N.E.2d at 964 (finding that "[w]hatever else police 'interrogation' might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred"); *Wright*, 686 N.W.2d at 305 (determining the dialogue that took place between the victim and responding police officer, "although certainly part of an investigative process, is not an 'interrogation' and does not result in a formal statement").

159. *See Hammon*, 809 N.E.2d at 952 (refusing to find formality in the police procedure necessary to effectively respond to a domestic violence crime).

160. *See generally* Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, 19 Crim. Just. 4 (2004) (summarizing what was wrong before *Crawford* and predicting what will change under *Crawford*). Professor Friedman argues that a government official is not always a necessary ingredient and provides examples where a witness could still make statements to someone other than a government official but still reasonably believe that the statements will be used prosecutorially. *Id.*

161. *Hammon*, 809 N.E.2d at 952 (noting that the "very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial'").

Without it, abusers will be left with the understanding that they continue to have control. Control over their victims and control maneuvering through the criminal justice system, and even control, to some degree, over the prosecutor. If excited utterance exceptions to the hearsay rule are deemed inadmissible under *Crawford*, we are, in effect, instructing abusers that if they go home and coerce or threaten their victim and it results in her non-cooperation with the prosecution, then they will win. For most abusers, this is an easy choice.

Moreover, there is no reason to give up on the value of this prosecutorial strategy. The genuine excited utterance so central to a successful prosecution is, by its nature and defining characteristics, nontestimonial. When a victim who has been found by the court to have made the statements in question under the stress of a domestic violence assault, she is not in a place mentally to consider all the future ramifications.[162] This includes a possible prosecution of her abuser sometime in the distant future. The evidence of this assertion can be found in the thousands of women every day who seek to "drop the charges" for a variety of reasons, including a lack of appreciation for how the justice system really works.

Prosecuting domestic violence crimes is challenging, with or without an evidence-based approach. The decision in *Crawford* complicates an already intricate area of the law, and although this decision calls into question the admissibility of excited utterances for now, it is only temporary. Texas courts should proceed with caution and engage in careful analysis, including the consideration of trends among other jurisdictions and other state courts. If they do, excited utterance statements made by victims of domestic violence to responding police officers will survive and evidence-based prosecution will continue to save lives.

162. *See* Zuliani v. State, 97 S.W.3d 589, 595-96 (Tex. Crim. App. 2003) (holding that in determining whether a hearsay statement is admissible as an excited utterance hearsay exception, the critical determination is whether the declarant was still dominated by emotions, excitement, fear, or pain of the event or condition at the time of the statement); *see also* Evans v. State, 480 S.W.2d 387, 389 (Tex. Crim. App. 1972) (finding that the rationale for the excited utterance exception is psychological and claims "when a man is in the instant grip of violent emotion, excitement or pain, he ordinarily loses the capacity for reflection necessary to the fabrication of a falsehood and the 'truth will [come] out'"); Ricondo v. State, 475 S.W.2d 793, 796 (Tex. Crim. App. 1971) (finding a statement to be trustworthy because it represented an "event . . . speaking through the person rather than the person speaking about the event").