

# JUDICIAL (IN)DISCRETION: HOW COURTS CIRCUMVENT THE CONFRONTATION CLAUSE UNDER *CRAWFORD* AND *DAVIS*

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## I. INTRODUCTION

When the State attempts to prove a criminal allegation by using hearsay evidence, rather than calling the accuser to the witness stand for live testimony, the defendant's Sixth Amendment right of confrontation is implicated.<sup>1</sup> The right of confrontation guarantees that the accused "be confronted with the witnesses against him."<sup>2</sup> Historically, courts simply dispensed with the defendant's right to confront his or her accuser, provided the court first made at least a perfunctory finding that the hearsay was reliable.<sup>3</sup> Once the court made that finding, the theory was that actual confrontation of the witness by the defense would add little if any value to the truth-seeking process.<sup>4</sup> Therefore, the prosecutor was permitted to present untested, uncross-examined hearsay evidence to the jury.<sup>5</sup>

In the 2004 *Crawford v. Washington* decision, however, the United States Supreme Court finally addressed the dangers and unconstitutionality of allowing judges, rather than juries, to determine the reliability of hearsay evidence.<sup>6</sup> The Court noted that "[r]eliability is an amorphous, if not entirely subjective, concept."<sup>7</sup> More significantly, "judges, like other government officers, [can]not always be trusted to safeguard the rights of the people."<sup>8</sup> Therefore, "[a]dmitting

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1. U.S. CONST. amend. VI.
2. *Id.*
3. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).
4. *See id.* at 64 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).
5. *See id.* at 66.
6. *Crawford v. Washington*, 541 U.S. 36, 61-65 (2004).
7. *Id.* at 63.
8. *Id.* at 67.

statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.”<sup>9</sup>

Applying this new framework derived from *Crawford*, the Supreme Court determined in *Davis v. Washington* that a prosecution’s use of testimonial hearsay, as opposed to nontestimonial hearsay, is what triggers the protections of the Clause.<sup>10</sup> Testimonial hearsay is defined, in part, as statements made during the course of police interrogations where the “primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution.”<sup>11</sup>

Conversely, the Court’s new framework offers no protection at all against nontestimonial hearsay. Nontestimonial hearsay includes statements made during the course of police interrogations where the “primary purpose” of the interrogation was not to investigate a past crime, but rather to gather information that would enable police to offer assistance, or respond to an “ongoing emergency.”<sup>12</sup> Consequently, in the span of two cases – *Crawford* and *Davis* – the Court appeared to set a new course in Confrontation Clause jurisprudence: one that required the reliability of “testimonial hearsay” to be determined by juries, not by judges, and only after “testing in the crucible of cross-examination.”<sup>13</sup>

Lower court decisions in the wake of *Crawford* and *Davis*, however, have sought to circumvent rather than apply the Court’s new framework. For example, courts have grossly distorted key terminology such as “ongoing emergency” and “primary purpose,” and in so doing have been able to classify hearsay as nontestimonial, thereby placing it outside the protections of the Clause altogether.<sup>14</sup> In other cases, courts have dramatically expanded the forfeiture doctrine, a critical exception to the right of confrontation, and in so doing have been able to dispense with cross-examination even where testimonial hearsay is at issue.<sup>15</sup> As a result, a defendant’s right of confrontation remains as weak, malleable, and subject to judicial manipulation as it was before *Crawford* and *Davis*.

Lower courts have been successful in circumventing the Court’s new framework because *Crawford* and *Davis* never actually constrained judicial discretion as the Court intended. Rather, the lower courts’ discretion has merely shifted from one issue – whether the hearsay was reliable<sup>16</sup> – to other issues, such as whether the hearsay is testimonial<sup>17</sup> and, if so, whether the defendant forfeited

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9. *Id.* at 61.

10. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

11. *Id.*

12. *Id.*

13. *Crawford*, 541 U.S. at 61.

14. See discussion *infra* Part IV.A.-B.

15. See discussion *infra* Part IV.C.

16. See discussion *infra* Part V.

17. See discussion *infra* Part VI.A.

his or her right of confrontation.<sup>18</sup> In the end, therefore, little has changed, and the problem of judicial manipulation remains.

Unfortunately, the most commonly proposed solutions to this problem continue to merely shift, rather than constrain, judicial discretion. This Article asserts that such approaches are constitutionally inadequate. It is true that many judges – perhaps even most judges – honestly attempt to uphold the Constitution. However, the cases discussed herein will show that many do not. The purpose of this Article, then, is to address this serious problem directly and openly.

The only viable solution to the problem of judicial manipulation is to *constrain* judicial discretion. In the context of defining testimonial hearsay, such constraint can only be achieved by focusing on how a statement is used at trial, not the manner in which the statement was gathered or obtained or the circumstances under which the statement was made.<sup>19</sup> Only a bright-line, trial-based rule will restore the right of confrontation, as the Court intended in *Crawford* and *Davis*.

## II. CONFRONTATION: A BRIEF AND RECENT HISTORY

The Sixth Amendment's Confrontation Clause states rather simply and clearly that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>20</sup> Surprisingly, this simple and clear mandate has met with much resistance from the courts and has historically been the subject of much debate.<sup>21</sup> For purposes of this Article, we need only to recount the recent history of the Clause.

### A. *Ohio v. Roberts: Interpreting the Clause*

From 1980 to 2004, the leading Supreme Court case interpreting the Confrontation Clause was *Ohio v. Roberts*.<sup>22</sup> In *Roberts*, the defendant was

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18. See discussion *infra* Part V.

19. See discussion *infra* Part VI.B.

20. U.S. CONST. amend. VI.

21. See, e.g., Randolph N. Jonakait, "Witnesses" in the Confrontation Clause: *Crawford v. Washington*, *Noah Webster & Compulsory Process*, 79 TEMP. L. REV. 155, 197 (2006); Ellen Liang Yee, *Confronting the "Ongoing Emergency": A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 735-38 (2008); Fred O. Smith, Jr., Note, *Crawford's Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1501-07 (2008).

22. *Ohio v. Roberts*, 448 U.S. 56 (1980).

charged with possession of stolen property, among other crimes.<sup>23</sup> At his preliminary hearing, a witness had testified and denied giving the defendant permission to possess the property.<sup>24</sup> At trial, the witness was unavailable for live testimony, and the State had attempted to introduce the transcript of her preliminary hearing testimony; the defendant objected on confrontation grounds.<sup>25</sup>

The Court acknowledged the importance of a defendant's right to confront a witness at trial, stating that cross-examination is crucial in "testing the recollection and sifting the conscience of the witness" and aiding the jury to decide "by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."<sup>26</sup> However, the Court also stated that a literal reading of the Clause "would require, on objection, the exclusion of any statement made by a declarant not present at trial."<sup>27</sup> The Court rejected this literal approach because it believed that a variety of other competing interests "may warrant dispensing with confrontation at trial."<sup>28</sup>

The *Roberts* Court therefore held that once a witness is shown to be unavailable for live testimony at a criminal trial, the witness's prior hearsay statement may be used by the State, and the defendant's right of confrontation may be dispensed with, if the proffered statement bears "indicia of reliability."<sup>29</sup> If the trial judge determined that the hearsay is reliable, then cross-examination of the declarant on the stand would serve little purpose, and confrontation must give way to competing interests.

Under the *Roberts* analysis, trial courts could make this finding of reliability in two ways: (1) if the court found that the hearsay fell within a "firmly rooted hearsay exception," it would be deemed reliable *per se*, and therefore admissible;<sup>30</sup> or (2) if the hearsay did not fall within such an exception, the trial court could still find that the prior statement carried "particularized guarantees of

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23. *Id.* at 58. According to the Court, "[The defendant] was charged with forgery of a check . . . and with possession of stolen credit cards." *Id.*

24. *Id.*

25. *Id.* at 59. There was much argument about whether the witness was actually "unavailable" for trial. *Id.* at 60-61. Although outside the scope of this Article, the concept of unavailability is crucial. If the witness is actually "available," the State must call the witness to testify at trial, regardless of whether the defendant had a prior opportunity for cross-examination. *California v. Green*, 399 U.S. 149, 182-83 (1970).

26. *Id.* at 64 (citing *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

27. *Id.* at 63.

28. *Id.* at 64. Interestingly, the Court once believed that each jurisdiction considered "the development and precise formulation of the rules of evidence applicable in criminal proceedings" as one such competing interest that warranted dispensing with the right of confrontation. *Id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)). This position was reversed years later when the Court stated that "[w]here testimonial statements were involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . ." *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

29. *Roberts*, 448 U.S. at 66.

30. *Id.*

trustworthiness” and was therefore reliable and admissible.<sup>31</sup> When using this second, disjunctive prong of the reliability analysis, courts had wide latitude to consider virtually any imaginable fact or circumstance that surrounded both the declarant and the hearsay itself.<sup>32</sup>

At the preliminary hearing in *Roberts*, defense counsel had the opportunity for cross-examination, which “was not ‘significantly limited in any way in [its] scope or nature . . . .’”<sup>33</sup> Defense counsel asked leading questions and even had some success in exposing the declarant’s “ulterior personal reasons for unfairly casting blame.”<sup>34</sup> For these reasons, the hearsay was deemed reliable by the Court and was therefore admitted into evidence.<sup>35</sup>

At first glance, the *Roberts* Court’s reliability test seemed promising and, at least under the specific facts of that case, seemed to result in a holding that was immune from any serious criticism. The application of this test in the 26 years to come, however, would showcase the perils of allowing judges, rather than juries, to determine the reliability of evidence.

### B. Judicial Discretion in Action

The *Roberts* reliability test would prove, in hindsight, to be quite ill-conceived. Applying the test to the particular hearsay in *Roberts* – the prior, sworn, and fully cross-examined preliminary hearing testimony – was easy and straightforward. The facts presented in *Roberts* left little room for any real judicial discretion or meaningful debate.

Applying the reliability test to the facts of other cases, however, produced highly inconsistent, irreconcilable, and even bizarre results. Judges were able to manipulate facts to reach their desired outcomes, largely because of the tremendous amount of judicial discretion inherent in the *Roberts* reliability test. Thus, two phenomena—highly inconsistent and irreconcilable results without manipulative intent, and outright judicial manipulation—are evident to varying

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31. *Id.* This Article does not address the historical underpinnings of the various hearsay exceptions. Consequently, the search for particularized guarantees of trustworthiness will simply be referred to, more generally, as the “reliability test” or “reliability analysis.”

32. See discussion *infra* Part II.B. The past tense verb “had” is used because the *Roberts* analysis was overturned in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813, 822 (2006).

33. *Roberts*, 448 U.S. at 71 (citing *California v. Green*, 399 U.S. 149, 166 (1970)).

34. *Id.*

35. *Id.* at 73. Furthermore, “[i]n *Green* the Court found guarantees of trustworthiness in the counterments [sic] of the preliminary hearing itself.” *Id.* As in *Green*, the *Roberts* court found that the defendant had “an adequate opportunity to cross-examine [the witness],” leaving no reason to hold that the hearsay testimony in *Roberts* was unreliable. *Id.* (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972)).

degrees when comparing relevant court decisions across states, within a single state, and even within a single court.<sup>36</sup>

### 1. Inter-State Analysis

A citizen's constitutional rights should not vary depending on the state in which that person was accused of a crime.<sup>37</sup> Nonetheless, mere random variation is the most innocent of the possible explanations for discrepancies across jurisdictions. A less innocent (and perhaps more likely) explanation is that judges may have attached any meaning they wished to any given factor to reach their desired outcome: the admission of untested, uncross-examined hearsay evidence against defendants.

For example, in a Virginia case *Nowlin v. Commonwealth*, the defendant was charged with illegally possessing a firearm.<sup>38</sup> At trial, the State introduced the hearsay statement of the defendant's wife who was unavailable for live testimony.<sup>39</sup> She had previously stated to police, "[h]is bedroom door was locked. He keeps his bedroom door locked because we've got guns in there."<sup>40</sup> This statement was offered to prove that the defendant *knowingly* possessed a firearm, which was an essential element of the charge.<sup>41</sup>

After doing a facts-and-circumstances reliability analysis, the court found that the wife's hearsay statement to the police was reliable, largely because the wife made the statement after she had been arrested, taken into custody, and interrogated regarding her *own* criminal activity.<sup>42</sup> Ironically, the wife was being investigated for shooting at her husband with the very firearm that he was accused of unlawfully possessing.<sup>43</sup> As justification for its finding, the court reiterated, "[a]gain, we note that [the defendant's] wife made the statement while she was *in police custody, charged with shooting at [the defendant]*."<sup>44</sup>

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36. The state court cases discussed in the following sections were cited by the Court in *Crawford*, when criticizing the *Roberts* reliability test. *Crawford*, 541 U.S. at 63. However, the cases are discussed in greater detail in this Article than in *Crawford*; therefore, citations herein are made directly to the state court cases themselves. See notes and discussion *infra* Parts II.B-VI.B.

37. This statement incorporates the presumption of innocence. For those less inclined to respect the presumption, a modified version of the statement still holds true: a citizen's constitutional rights should not vary depending on the state in which he or she has *committed* a crime.

38. *Nowlin v. Commonwealth*, 579 S.E.2d 367, 369 (Va. Ct. App. 2003).

39. *Id.* at 370.

40. *Id.*

41. *See id.*

42. *Id.* at 372. The statement by the defendant's wife was deemed to be reliable because the investigating officer "advised [the defendant's] wife of her rights to remain silent and that what she said might be used against her." *Id.*

43. *Id.* at 371.

44. *Id.* at 372 (emphasis added).

In contrast, in the Wisconsin case *State v. Bintz*, the defendant was charged with homicide for allegedly killing a bartender at a tavern.<sup>45</sup> At trial, the State introduced the hearsay statement of the defendant's brother, who was unavailable for live testimony.<sup>46</sup> The brother previously said to the police, among other things, that he and the defendant were at the tavern the night of the murder.<sup>47</sup> Of course, this statement was offered to place the defendant at the scene of the crime.<sup>48</sup>

After its facts-and-circumstances reliability analysis, the court found that the brother's hearsay statement to police was reliable because the brother had *not* been arrested, was *not* in custody, and was *not* a suspect in the murder or in any other crime when he made the statement.<sup>49</sup> In making its reliability finding, the court stated that "there is no evidence [the brother] was told he was a suspect. [He] was *not in custody* and there is *no indication he was threatened with prosecution* or asked leading questions."<sup>50</sup>

These decisions illustrate an irreconcilable contradiction. In Virginia, when a declarant is *in custody* and *accused* of a crime, any statement he or she made is likely to be found reliable and therefore admissible against a defendant, even if the declarant became unavailable for trial and could not be cross-examined.<sup>51</sup> Conversely the opposite was true in Wisconsin. When a declarant was *not* in custody and *not* accused of a crime, any statement he or she made was likely to be found reliable and therefore admissible against a defendant, even if the declarant became unavailable for trial and could not be cross-examined.<sup>52</sup>

Further, this discrepancy across jurisdictions was not an aberration. For example, a Colorado court determined that a hearsay statement was reliable and therefore properly admitted because it was detailed.<sup>53</sup> The declarant "provided detailed descriptions of the events and conversations that occurred, the surroundings at each stage of the criminal episode, and the actions attributable to each party."<sup>54</sup> Conversely, the Fourth Circuit Court of Appeals determined that a hearsay statement was reliable and therefore properly admitted in a Virginia case because the declarant's statement contained little detail.<sup>55</sup> The court was

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45. *State v. Bintz*, 650 N.W.2d 913, 915 (Wis. Ct. App. 2002).

46. *Id.* at 916. The declarant had invoked his Fifth Amendment privilege, thus the court found him unavailable for trial. *Id.*

47. *Id.* at 915.

48. *See id.* at 917.

49. *Id.*

50. *Id.* at 918 (emphasis added).

51. *Nowlin v. Commonwealth*, 579 S.E.2d 367, 372 (Va. Ct. App. 2003).

52. *Bintz*, 650 N.W.2d at 918.

53. *People v. Farrell*, 34 P.3d 401, 407 (Colo. 2001).

54. *Id.*

55. *See United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (4th Cir. 2001).

particularly impressed that the statement, in its relevant part, “was fleeting at best.”<sup>56</sup>

Variations between states may have been attributable to causes other than judicial manipulation. These causes may include, for example, differences in the wording of two states’ facts-and-circumstances reliability tests. Of course, given that the right of confrontation is guaranteed by the United States Constitution, even this innocent explanation is simply unacceptable. A citizen accused of a crime should not have his or her freedom hinge merely on the state in which the citizen has the misfortune of being charged.

However, an alternative explanation is that courts were willing and able to manipulate any set of facts and circumstances, no matter how diametrically opposed, to reach the same, predetermined outcome. If this explanation were the case, then the right of confrontation had effectively been eliminated. An analysis of cases within a single state, rather than across states, will test this hypothesis.

## 2. Intra-State Analysis

Further analysis of the *Roberts*’ reliability test also shows tremendous variations not only between states, but also *within* any given state. These variations are most easily exposed when analyzing a single case as it proceeds vertically in the hierarchy of a state court system.

In a Washington case *State v. Crawford*, the defendant was charged criminally for stabbing a man, but maintained that he did so in self-defense.<sup>57</sup> At trial, the State introduced the hearsay statement of the defendant’s wife, a witness who was unavailable for live testimony.<sup>58</sup> The wife, who was a suspected accomplice to the crime, had been arrested and interrogated by police.<sup>59</sup> During the interrogation, she described in great detail how the defendant stabbed the alleged victim.<sup>60</sup>

After concluding a facts-and-circumstances reliability analysis, the trial court found that the wife’s hearsay statement to police was reliable and therefore admissible.<sup>61</sup> The court found that the statement “was against her penal

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56. *Id.*

57. *State v. Crawford*, No. 25307-1-II, 2001 Wash. App. LEXIS 1723, at \*1 (Wash. Ct. App. Jul. 30, 2001). This Washington Court of Appeals decision led to the Washington Supreme Court decision *State v. Crawford*, 54 P.3d 656 (Wash. 2002). Eventually, that decision led to the United States Supreme Court decision *Crawford v. Washington*, 541 U.S. 36 (2004), discussed at length in Parts III.A and V of this Article. All citations in this section, however, are to the state court decisions.

58. *Crawford*, 2001 Wash. App. LEXIS 1723, at \*2. The defendant invoked the marital privilege to prevent his wife from testifying. *Id.*

59. *Id.*

60. *Id.*

61. *See id.* at \*9.

interest”<sup>62</sup> because her “admissions could give rise to accomplice liability.”<sup>63</sup> Moreover, the absence of police coercion or offers of leniency coupled with the wife’s “apparent motive” to help the defendant also led the court to conclude that the statement was reliable.<sup>64</sup>

The appellate court reversed the trial court, finding that much of the wife’s statement was “*not* against her penal interest.”<sup>65</sup> Further, the court found that the wife gave conflicting versions of her statement, that her statements were not spontaneous but were the product of structured police interrogation, and that she even admitted to closing her eyes during the stabbing.<sup>66</sup> All of these factors indicated that the statement was not reliable and therefore should not have been admitted against the defendant.<sup>67</sup>

Nevertheless, the Washington courts were not through with this case. The Washington Supreme Court analyzed the reliability of the wife’s statements and reversed the appellate court because of two factors.<sup>68</sup> The court held that the wife’s statements were reliable because they were self-inculpatory.<sup>69</sup> Moreover, the court held that, because the hearsay statement by the wife “was virtually identical” to the statement given by the defendant, the statements interlocked and thus the hearsay was reliable and had been properly admitted by the trial court.<sup>70</sup>

The issue of interlocking statements, however, had already been analyzed by the appellate court. In its analysis, the appellate court acknowledged many similarities between the statements, including what the husband and wife did and where they went *before* the alleged crime.<sup>71</sup> Yet the appellate court decided that the two statements were different with regard to the only critical issue in the case: whether the alleged victim was armed at the time he was stabbed.<sup>72</sup> As the Washington Supreme Court even conceded, “[s]elf-defense is at issue in this case, so admittedly the timing of [the] possession of a weapon is significant.”<sup>73</sup> Nonetheless, the state supreme court overruled the thorough, well-reasoned decision of the appellate court and reinstated the conviction in an effort to uphold the admission of the hearsay.<sup>74</sup>

Just as with inter-state variations, these intra-state variations are far from aberrational.<sup>75</sup> Judicial flip-flopping from court to court, combined with

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62. *Id.* at \*9.

63. *Id.*

64. *Id.* at \*9-10.

65. *Id.* at \*10 (emphasis in original).

66. *Id.* at \*13-15.

67. *Id.* at \*16.

68. *See* State v. Crawford, 54 P.3d 656, 664 (Wash. 2002).

69. *Id.* at 662.

70. *Id.* at 664.

71. *Crawford*, 2001 Wash. App. LEXIS 1723, at \*17-18.

72. *Id.*

73. *Crawford*, 54 P.3d at 664.

74. *Id.*

75. *See, e.g.*, People v. Farrell, 34 P.3d 401, 402 (Colo. 2001) (reinstating the trial court’s finding of reliability, and therefore admissibility, of hearsay evidence).

disagreement within a given court, diminishes citizens' confidence in any judicial system. Constitutional protections should not be so easily malleable and subject to the whim of the judges who preside over a case on a given day.

This intra-state example shows that allowing judges to determine the reliability of hearsay produced random and highly inconsistent outcomes. Additionally, because all of the courts were in the *same* state and were applying the *same* reliability test, this intra-state example may also rule out any innocent explanation for the variation. A further examination of a single court within a state will provide strong evidence that judicial manipulation is the most likely explanation.

### 3. Intra-Court Analysis

Trial courts from different states could have innocently and unintentionally used completely *opposite* facts to reach the *same* finding of reliability in two different cases. Also, different levels of courts within the same state could have innocently and unintentionally used the *identical* facts to reach *different* findings of reliability in the same case.

Even if devoid of manipulative intent such inter- and intra-state variations are not acceptable under the United States Constitution. Nonetheless, a further analysis of a single state, and a single court within that state, may rule out innocent explanations altogether. More specifically, when a single court reaches the same finding of reliability with completely opposite facts in two different cases, the most likely explanation is judicial manipulation.

This point is well illustrated by the Colorado Supreme Court in *People v. Farrell*,<sup>76</sup> where the defendant was charged with murder, among other crimes.<sup>77</sup> At trial, the State introduced the hearsay statement of the co-defendant who was unavailable for live testimony.<sup>78</sup> The co-defendant had previously given a statement to police that inculpated himself and the defendant in the crimes.<sup>79</sup>

The court determined that the co-defendant's statement was reliable and therefore admissible against the defendant for several now familiar reasons. The court found that the co-defendant gave a great level of detail and did not make the statement in exchange for "any offers of leniency or special deals."<sup>80</sup> Also, the court found that the co-defendant, who was in police custody, "made his

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76. *Id.*

77. *Id.* A jury convicted the defendant of intentional first-degree murder, felony first-degree murder, robbery of an at-risk adult, aggravated robbery, second degree kidnapping, two counts of second-degree burglary, theft, first-degree criminal trespass, and two counts of conspiracy. *Id.*

78. *See id.* at 404.

79. *See id.* at 403.

80. *Id.* at 407.

statement *immediately after* the criminal episode,” which further enhanced its reliability.<sup>81</sup>

Conversely, the very same court less than four months earlier decided *Stevens v. People*,<sup>82</sup> where the defendant was also charged with murder, among other crimes.<sup>83</sup> At trial, the State also introduced the hearsay statement of a co-defendant who was unavailable for live testimony.<sup>84</sup> This co-defendant had also previously given a statement to police that inculpated himself and the defendant in the crimes.<sup>85</sup>

In *Stevens*, the court also determined that the co-defendant’s statement was reliable and therefore admissible against the defendant for several reasons. Just as in *Farrell*, the court found that the co-defendant provided many details about the murder and did “not receive any deals in exchange for his statement.”<sup>86</sup> Unlike *Farrell*, however, the court found enhanced reliability in the co-defendant’s statement because he was not in police custody at the time. Moreover, he made his statement after “*two years had passed*” from the time of the murder.<sup>87</sup>

This contradiction offends not only the Constitution, but also the fundamental concepts of consistency and logic. In one case, the court found a statement reliable and therefore admissible in large part because it was made *immediately after* the alleged crime.<sup>88</sup> In another case, the same court found a statement reliable and therefore admissible in large part because it was made *two years after* the alleged crime.<sup>89</sup> Given that these two decisions were the product of the same court and were issued within four months of each other, one may reasonably conclude that judicial manipulation lies at the heart of the inconsistency.

### III. THE “SEA CHANGE”: *CRAWFORD* AND *DAVIS*

Although it took twenty-four years, the Court finally revisited the *Roberts* reliability test that had seemingly allowed judges to dispense with confrontation rights on mere whim. This change in course came in the form of two cases—*Crawford* and *Davis*—thought to be so significant that many courts and commentators have hailed them as a “sea change” in Confrontation Clause

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81. *Id.* (emphasis added).

82. *Stevens v. People*, 29 P.3d 305 (Colo. 2001).

83. *Id.* at 308. The defendant was convicted of first-degree murder, conspiracy to commit first-degree murder, and solicitation to commit first-degree murder. *Id.*

84. *See id.* at 310.

85. *See id.*

86. *Id.* at 316.

87. *Id.* (emphasis added).

88. *People v. Farrell*, 34 P.3d 401, 407 (Colo. 2001).

89. *Stevens*, 29 P.3d at 316.

jurisprudence.<sup>90</sup> Other commentators have been equally dramatic, claiming a “Copernican shift in federal constitutional law” and a “revolutionary decision in the law of evidence.”<sup>91</sup> Although the ultimate accuracy of these claims is the subject of Part V of this Article, the Court’s bold language in *Crawford* and *Davis* supported these grand predictions of the day.

#### A. *Crawford v. Washington*—The Paradigm Shift

Regardless of whether irreconcilable lower court rulings were due to judicial manipulation or a more benign explanation, the Court in *Crawford v. Washington* finally acknowledged that the *Roberts* reliability test was a failure.<sup>92</sup> In *Crawford*, the Court was loud and clear in its criticism, stating that “we do not think the Framers meant to leave the Sixth Amendment’s protection to . . . amorphous notions of ‘reliability.’”<sup>93</sup> Further, “[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.”<sup>94</sup> Instead, the Clause demands “that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>95</sup>

On a practical level, the Court’s chief criticism was that the *Roberts* reliability test was “so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations.”<sup>96</sup> These core violations consisted of admitting into evidence hearsay statements made to police while the declarant was in police custody and being interrogated.<sup>97</sup> The involvement of police in the production of hearsay evidence against a defendant is “the principal evil at which the Confrontation Clause was directed,”<sup>98</sup> and the *Roberts* reliability test simply offered no consistent or substantial protection.

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90. See *State v. Grace*, 111 P.3d 28, 36 (Haw. Ct. App. 2005) (“[e]ffecting a sea change in our understanding of the [C]onfrontation [C]lause . . .”); Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-vamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington*, 50 S.D. L. REV. 41, 61 (2005) (“[t]his is a sea change for prosecution of cases involving child witnesses.”); Andrew King-Ries, *State v. Mizenko: The Montana Supreme Court Wades into the Post-Crawford Waters*, 67 MONT. L. REV. 275, 313 (2006) (“*Mizenko*, therefore, recognizes *Crawford*’s sea-change in confrontation rights, . . .”)

91. Jerome C. Latimer, *Confrontation After Crawford: The Decision’s Impact on How Hearsay is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327, 329 (2006) (citations omitted) (citing a lengthy collection of comments and catch-phrases used to describe the *Crawford* decision).

92. See *Crawford v. Washington*, 541 U.S. 36, 60 (2004).

93. *Id.* at 61.

94. *Id.*

95. *Id.*

96. *Id.* at 63.

97. *Id.* at 63.

98. *Id.* at 50.

In addition, the Court acknowledged a more fundamental problem. Put simply, “[v]ague standards are manipulable,”<sup>99</sup> and “judges, like other government officers, could not always be trusted to safeguard the rights of the people.”<sup>100</sup> Despite this problem, “[t]he *Roberts* test allow[ed] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability.”<sup>101</sup> Succinctly stated, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”<sup>102</sup>

The Court then replaced the *Roberts* reliability test with a new test.<sup>103</sup> Under *Crawford*, the State may use the prior testimony of a witness who is unavailable for trial only if the defendant has had an opportunity to cross-examine that statement.<sup>104</sup> Absent that opportunity, the Confrontation Clause requires that the statement be excluded from evidence.<sup>105</sup>

This summary, however, is an oversimplification in at least one regard: the new rule actually only applies to “testimonial” hearsay.<sup>106</sup> If the hearsay being offered at trial is nontestimonial, the defendant is not afforded such constitutional protection.<sup>107</sup> Deserved criticism was directed at the Court for its failure to define the term “testimonial” but the Court did hold that “[s]tatements taken by police officers in the course of interrogations are [] testimonial under even a narrow standard.”<sup>108</sup> This vagueness, in turn, led to much debate about the meaning of the term “interrogation.”<sup>109</sup> Two years later, the Court decided *Davis v. Washington* in which it developed a potentially workable framework to distinguish between testimonial and nontestimonial hearsay.

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99. *Id.* at 68.

100. *Id.* at 67.

101. *Id.* at 62.

102. *Id.*

103. *Id.* at 68.

104. *Id.*

105. *Id.*

106. *Id.*

107. *See id.* (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law . . .”). Actually, in the years immediately following *Crawford*, the debate raged as to whether nontestimonial hearsay was afforded any residual protection under the old *Roberts* test. Today, however, most jurisdictions have abandoned *Roberts* completely based on the Court’s dicta in *Davis*, as well as other subsequent case law.

108. *Crawford*, 541 U.S. at 52.

109. *See, e.g.*, Michael D. Cicchini & Vincent Rust, *Confrontation After Crawford v. Washington: Defining “Testimonial”*, 10 LEWIS & CLARK L. REV. 531, 554 (2006) (advocating a solution providing that all accusatory hearsay be defined as testimonial to comport with the goal of judicial constraint put forth in *Crawford*); Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 215-17 (2006) (advocating, in substance, for the same solution).

*B. Davis v. Washington—The Emerging Framework*

Although the Court in *Davis v. Washington* finally expanded *Crawford's* framework, the two cases, even in combination, offer limited guidance regarding the vast majority of potential scenarios in the universe of hearsay evidence.<sup>110</sup> Instead, the focus of *Davis* is on hearsay statements that are produced through police interrogation of the declarant.<sup>111</sup> Within this focus, the Court in *Davis* developed a potentially workable framework to determine what types of hearsay are testimonial, and therefore must be excluded by the Confrontation Clause, and what types are nontestimonial, and therefore are not affected by the Clause.<sup>112</sup>

In *Davis*, the Court heard two consolidated cases and, between the two sets of facts, developed one rule.<sup>113</sup> The *Davis* Court held that hearsay is testimonial and must be excluded under the Clause when “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>114</sup> Conversely, hearsay is nontestimonial and therefore not affected by the Clause when the statements are “made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”<sup>115</sup>

This holding seemed to conform to the Court’s statement in *Crawford* about the dangers of government-manufactured hearsay.<sup>116</sup> If the police were responding to an ongoing emergency, their goal would be to protect crime victims, and presumably would have no opportunity to fabricate, mold, or manipulate statements to suit the prosecution.<sup>117</sup> Conversely, if the police are in an investigative mode and looking to “establish or prove past events,”<sup>118</sup> the danger of manipulation would be quite real, and statements gathered under these circumstances should be excluded by the Clause.<sup>119</sup>

The Court then applied this new rule to the two factual scenarios before it. In one of the consolidated cases, *Davis v. Washington*, the alleged victim called 911 to report that the defendant was, at the time of the call, jumping on her and striking her with his fists.<sup>120</sup> After more dialogue, she then reported that the

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110. See *Crawford*, 541 U.S. at 75; see also *Davis v. Washington*, 547 U.S. 813, 822 (2006) (where court does not “attempt [ ] to produce list of conceivable statements in response to police interrogation.”)

111. See *Davis*, 547 U.S. at 822 n.1.

112. *Id.* at 821-22.

113. *Id.* at 817-19.

114. *Id.* at 822.

115. *Id.*

116. See *Crawford*, 541 U.S. at 56 n.7.

117. *Id.*

118. *Davis*, 547 U.S. at 822.

119. See *id.* at 832 n.6.

120. *Id.* at 817.

defendant had left the residence with a third party.<sup>121</sup> The conversation continued, and the 911 operator obtained additional information.<sup>122</sup> At trial, the alleged victim was unavailable, and the State introduced her hearsay statements to the 911 operator over the defendant's confrontation objection.<sup>123</sup>

The Court held that under these facts, the initial statements to the 911 operator were nontestimonial and therefore properly admitted because the alleged victim "was speaking about events as *they were actually happening*, rather than 'describ[ing] past events.'"<sup>124</sup> Her 911 call was "a call for help against a bona fide physical threat," and her statements "were necessary to be able to resolve the present emergency."<sup>125</sup> However, the Court also stated that "the emergency appears to have ended (when [the defendant] drove away from the premises)."<sup>126</sup> After that point in time, the alleged victim's statements "were testimonial, not unlike the 'structured police questioning' that occurred in *Crawford*."<sup>127</sup>

In *Hammon v. Indiana*, the other of the consolidated cases decided in *Davis*, the police responded in person to the home of an alleged victim.<sup>128</sup> Upon arrival, they found her "somewhat frightened" on the porch.<sup>129</sup> She and the police went into the living room, while the defendant remained in the kitchen, and she told police that the defendant had battered her.<sup>130</sup> During this time, the defendant attempted to intervene in the interview and "became angry when [the officer] insisted that [he] stay separated" from the alleged victim.<sup>131</sup> At trial, the alleged victim was unavailable, and the State introduced her hearsay statements to the police over the defendant's confrontation objection.<sup>132</sup>

The Court held that under these facts, all statements to the police were testimonial and therefore were admitted in error because "the interrogation was part of an investigation into possibly criminal past conduct," and "[t]here was no emergency in progress."<sup>133</sup> Even though the defendant became angry and the "officers forcibly prevented [him] from participating in the interrogation," there simply was "no immediate threat" to the alleged victim.<sup>134</sup> The Court explained

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121. *Id.* at 818.

122. *Id.* ("[The 911 operator] then gathered more information about Davis (including his birthday), and learned that Davis had told [her] that his purpose in coming to the house was 'to get his stuff,' since [she] was moving. [She then] described the context of the assault.")

123. *Id.* at 819.

124. *See Davis*, 547 U.S. at 827-28 (quoting *Lilly v. Virginia*, 527 U.S. 116, 137 (1999)).

125. *Davis*, 547 U.S. at 827 (emphasis omitted).

126. *Id.* at 828.

127. *Id.* at 829 (quoting *Crawford v. Washington*, 541 U.S. 36, 53 n.4 (2004)).

128. *Davis*, 547 U.S. at 819.

129. *Id.* (quoting *Hammon v. Indiana*, 829 N.E.2d 444, 446 (Ind. 2005)).

130. *Davis*, 547 U.S. at 819.

131. *Id.* at 819-20.

132. *Id.*

133. *Id.* at 829.

134. *Id.* at 829-30.

that “[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime . . . .”<sup>135</sup>

A fair reading of *Crawford* and *Davis* would lead an objective, dispassionate person to conclude that when someone is calling out for help and reporting an ongoing crime, that statement is nontestimonial and may be admitted.<sup>136</sup> However, if statements are made after the emergency dissipates—e.g., after the perpetrator leaves the scene or after the police arrive and begin questioning the alleged victim about what happened—the statement is testimonial and must be excluded.<sup>137</sup>

The problem, however, is that judges cannot be assumed to be objective and dispassionate. In fact, the Court in *Crawford* had already rearticulated what the Framers knew long ago: “judges, like other government officers, [can] not always be trusted to safeguard the rights of the people.”<sup>138</sup> This wisdom has become painfully obvious in lower court decisions post-*Davis*.

#### IV. THE LOWER COURTS: CIRCUMVENTING *CRAWFORD* AND *DAVIS*

The post-*Davis* years have produced perhaps the most poorly reasoned and disingenuous court decisions in Confrontation Clause jurisprudence. Repeatedly, courts completely distort the Clause—as interpreted in *Crawford* and *Davis*—in order to accomplish a predetermined goal of admitting hearsay evidence against defendants.<sup>139</sup> The means by which courts accomplish this result are limited only by judicial imagination and creativity. However, the most common judicial approaches include expanding the ongoing emergency, distorting the primary purpose test, and expanding the forfeiture doctrine.

##### *A. Expanding the Ongoing Emergency*

Perhaps the most common way courts have distorted the plain language of *Crawford* and *Davis* in order to dispense with the right of confrontation is simply to expand the concept of the ongoing emergency. If courts can somehow find that a declarant’s statements to police were made within an ongoing emergency situation, then the statements can be labeled as nontestimonial and thus admitted into evidence without ever being cross-examined.

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135. *Id.* at 830.

136. *See id.* at 832.

137. *See id.* at 830.

138. *Crawford*, 541 U.S. at 67.

139. *See* Richard D. Friedman, *Crawford, Davis and Way Beyond*, 15 J.L. & POL’Y 553, 563 (2007) (stating that courts will look “for whatever toehold they can find to admit accusatory statements that were made absent an opportunity for confrontation”).

For example, in the Oregon case *State v. Camarena*, the defendant was accused of striking the alleged victim in the eye.<sup>140</sup> The alleged victim then told the defendant that she was going to call the police, and the defendant promptly left the apartment and drove away in a car.<sup>141</sup> After about one minute, the alleged victim called 911 but hung up.<sup>142</sup> The operator called back and questioned the alleged victim, who then accused the defendant.<sup>143</sup> After being told that the defendant hit the alleged victim, the operator asked “[w]here is he at now?”<sup>144</sup> The alleged victim responded, “I don’t know. He took the car and he left.”<sup>145</sup> She then answered a number of other questions about the alleged assault and in the process provided the defendant’s “name and driver’s license number.”<sup>146</sup> The alleged victim was unavailable at trial, but the court held her statements to be nontestimonial and therefore admissible.<sup>147</sup>

In analyzing the case, the court relied on *Davis* in acknowledging that if “the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution,” then the statements would be testimonial and inadmissible.<sup>148</sup> The court went on to find that the alleged victim’s statements were “referring to past events” and were not describing events that were ongoing.<sup>149</sup> In fact, the accusations were made *after* the defendant had left the residence in a car.<sup>150</sup>

However, the court still found the statements to be nontestimonial and therefore admissible because it was *possible* that the domestic assault could conceivably have been renewed before the police arrived.<sup>151</sup> The court found that, even though the defendant had just driven away from the residence, “the danger of a renewal of the domestic assault had *not necessarily* or fully abated.”<sup>152</sup> The court believed that this theoretical possibility of future criminal activity against the declarant was enough to constitute an ongoing emergency during the time at which she accused the defendant.<sup>153</sup>

Similarly, in the Minnesota case of *State v. Warsame*, the alleged victim accused the defendant of domestic violence by describing past events.<sup>154</sup> These allegations occurred both after the alleged crime and after the defendant drove

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140. *State v. Camarena*, 145 P.3d 267, 269 (Or. Ct. App. 2006).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 269-70.

147. *Id.* at 274.

148. *Id.* at 272.

149. *Id.* at 275 (internal quotations omitted).

150. *Id.* at 269.

151. *Id.* at 275.

152. *Id.* (emphasis added).

153. *Id.*

154. *State v. Warsame*, 723 N.W.2d 637, 638-39 (Minn. Ct. App. 2006).

away from the scene.<sup>155</sup> In this case, however, the alleged victim was actually in the presence of at least two police officers at the time she accused the defendant of battery.<sup>156</sup>

In finding the statements nontestimonial and therefore admissible, the Minnesota Court of Appeals expanded the meaning of ongoing emergency.<sup>157</sup> However, in this case, the court could not assert that the defendant might renew the alleged domestic attack; the alleged victim was in the actual presence of police officers when making her statements.<sup>158</sup> Instead, the court expanded the concept of ongoing emergency to include other people and other locations.<sup>159</sup>

The court found that it was conceivable that the defendant posed a danger to others, including the car passenger with whom he drove away.<sup>160</sup> Therefore, the court reasoned that the alleged victim's statements about what had happened to *her* should be classified as nontestimonial.<sup>161</sup> The court explained, "[w]e conclude that the 'ongoing emergency' referred to in *Davis* . . . need not be limited to the complainant's predicament or the location where she is questioned by police."<sup>162</sup>

These two decisions—*Camarena* and *Warsame*—should be openly criticized as judicial manipulation designed to reach a predetermined outcome. First in applying the *Davis* analysis to the facts of these two cases, the alleged victims were describing "past events," rather than "events as they were actually happening."<sup>163</sup> Consequently, because there was "no immediate threat"<sup>164</sup> to the alleged victims, the statements were testimonial and should have been excluded.

Second, the Court in *Davis* stated that even when an alleged victim does describe ongoing events that constitute a true emergency—which was *not* the case in either *Camarena* or *Warsame*—the emergency ends when the defendant drives "away from the premises."<sup>165</sup> Just as in *Davis*, the defendants in both *Camarena* and *Warsame* had already driven away from the supposed crime scenes *before* the allegations were made.<sup>166</sup> Once again, for this reason, the statements were testimonial and should have been excluded.

Under the rationale of *Davis*, an ongoing emergency cannot exist when the defendant has left the scene and the alleged victim calls the police to report past events.<sup>167</sup> Furthermore, with *Camarena*, *Warsame*, and *Davis* all dealing with domestic violence allegations, the facts of these cases do not indicate a random

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155. *Id.*

156. *Id.*

157. *Id.* at 643

158. *Id.* at 638.

159. *Id.* at 641-42.

160. *Id.* at 641.

161. *Id.*

162. *Id.*

163. *Davis v. Washington*, 547 U.S. 813, 827 (2006).

164. *Id.* at 830.

165. *Id.* at 828.

166. *Camarena*, 145 P.3d at 269; *Warsame*, 723 N.W.2d at 639.

167. *Davis*, 547 U.S. at 827.

crime spree where other members of the community might be at risk. Instead, the police had not even a hint of evidence in any of the cases that another crime was remotely likely.

Was it not just as likely that the defendant in *Davis* could have renewed his alleged assault after he drove away from the residence but before the police arrived? Of course it was, but this theoretical possibility did not create an ongoing emergency in *Davis*, nor should it have in *Camarena*. Was it not just as likely that the defendant in *Davis* could have committed a crime against the passenger in his car with whom he left? Of course it was, but again, this theoretical possibility did not create an ongoing emergency in *Davis*, nor should it have in *Warsame*.

The courts' analyses in *Camarena* and *Warsame* are disingenuous and intellectually deficient. If situations can be upgraded to ongoing emergencies simply because a defendant might commit an unspecified crime at some unspecified time in the future against an unspecified victim, then every situation will be automatically transformed into an ongoing emergency. In that case, every factual scenario would swallow the *Davis* rule whole, as no statement could ever be classified as testimonial. As the Connecticut Supreme Court stated in a similar context:

Even if we were to accept the State's contention that the complainant was hysterical and in need of medical assistance, those portions of the call explaining what had happened to her at the hands of the defendant did not point to an ongoing emergency, but rather to an explanation of past events. Put differently, accepting the State's arguments on this point would render meaningless the distinction drawn by the United States Supreme Court, *as they would render virtually any telephone report of a past violent crime in which a suspect was still at large, no matter the timing of the call, into the report of a "public safety emergency."*<sup>168</sup>

Unfortunately, the examples cited herein are not anomalous. Numerous other state courts—including those in Wisconsin, Texas and Nevada—have been highly creative in defying reason, logic, and the holding of *Davis* in order to make any statement part of a fictional, ongoing emergency.<sup>169</sup> Once that is

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168. *State v. Kirby*, 908 A.2d 506, 523-24 n.19 (Conn. 2006) (emphasis added).

169. *See, e.g., Harkins v. State*, 143 P.3d 706, 715 (Nev. 2006) (holding that allegations made during a 911 call, where there was no proof that the defendant "left the area completely at that point," were part of an ongoing emergency); *Vinson v. State*, 221 S.W.3d 256, 264-65 (Tex. App. 2006) (holding that the police asking the alleged victim "what happened?" was the functional equivalent of asking "whether an emergency existed," and therefore was part of an ongoing emergency); *State v. Rodriguez*, 722 N.W.2d 136, 147-48 (Wis. Ct. App. 2006) (holding that questioning by police the day following the incident, when police responded to return some property, was part of an ongoing emergency); *see also State v. Washington*, 725 N.W.2d 125, 132-33 (Minn. Ct. App. 2006) (holding that allegations made after the defendant left the area were part

accomplished, the hearsay statements are labeled nontestimonial and, more significantly, admitted without cross-examination.

### *B. Distorting the Primary Purpose Test*

Even when there is no possibility of finding an “ongoing emergency”—e.g., in cases where the hearsay statement was made days or weeks after the alleged crime—courts still have other means of labeling hearsay as nontestimonial, thereby placing it beyond the reach of the Clause. One such way is to find that the statement was made, or obtained, for some “primary purpose” other than the investigation of a crime.<sup>170</sup> This tactic is very common in cases involving medical professionals who act on behalf of, or in concert with, police.<sup>171</sup>

For example, in the Ohio case *State v. Stahl*, the alleged victim reported to police that the defendant had “orally raped her” the previous day.<sup>172</sup> After taking the alleged victim’s statement, an officer took her to the Developing Options for Violent Emergencies (“DOVE”) unit, a medical facility that is funded by the state Attorney General’s Office and gathers and retains physical evidence for use in prosecuting crimes.<sup>173</sup> At the DOVE unit, the alleged victim signed a waiver stating, “I authorize the release of evidence, *information* (including protected health information), clothing, colposcope photos, and photography documentation of injuries to law enforcement agency *for use only in the investigation and prosecution of this crime.*”<sup>174</sup>

The alleged victim was then interviewed by a Sexual Assault Nurse Examiner (“SANE nurse”) to whom she repeated the allegations she made to the officer.<sup>175</sup> The officer was also present when the SANE nurse interviewed the alleged victim in the examination room.<sup>176</sup> The SANE nurse then took photos of the alleged victim’s mouth, collected “nail scrapings, oral swabbings, and material retrieved with dental floss.”<sup>177</sup> She also collected a napkin from the alleged victim’s pocket thought to contain physical evidence related to the assault.<sup>178</sup> No medical doctor

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of an ongoing emergency because the alleged victim asked the police to “watch her when she left the apartment to make sure that she was not assaulted again”).

170. See, e.g., *State v. Stahl*, 855 N.E.2d 834, 836 (Ohio 2006).

171. See Elizabeth J. Stevens, Comment, *Deputy-Doctors: The Medical Treatment Exception after Davis v. Washington*, 43 CAL. W. L. REV. 451, 472 (2007) (“[U]nder *Davis*, courts should treat health care providers as agents of the police and their interactions with the declarant as police interrogation” based on principles of agency law.).

172. *Stahl*, 855 N.E.2d at 836.

173. *Id.*

174. *Id.* at 837 (emphasis added).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

ever treated, or even saw, the alleged victim.<sup>179</sup> The alleged victim was unavailable at trial, but the court inexplicably held that her statements to the SANE nurse were nontestimonial and therefore admissible.<sup>180</sup>

However, SANE nurses, or even medical doctors or any other medical professionals, can act as agents of the police, just as the 911 operator did in *Davis*.<sup>181</sup> The relevant inquiry is whether the SANE nurse was performing the function of, or acting on behalf of, the police or prosecutor.<sup>182</sup> For example, in *Davis*, the 911 operator took the call, listened to allegations, and asked follow-up questions of the alleged victim.<sup>183</sup> All of this questioning was done on behalf of police, who then took the information and responded to the scene.<sup>184</sup>

Similarly, in *Stahl*, the SANE nurse met with the officer and the alleged victim, listened to the allegations, took photographs, and collected evidence from the alleged victim.<sup>185</sup> The DOVE unit's release form even stated that the information and evidence would be used in "the investigation and prosecution of this crime."<sup>186</sup> In fact, not only was the SANE nurse an agent of police,<sup>187</sup> but her primary purpose was to collect information and evidence "to establish or prove past events potentially relevant to later criminal prosecution."<sup>188</sup>

However, the *Stahl* court ignored the overwhelming evidence of the SANE nurse's primary purpose. Instead, it relied on rank speculation as to the alleged victim's *possible* expectations, ultimately finding the statements to the SANE nurse nontestimonial and therefore admissible.<sup>189</sup> The court stated that because the alleged victim first spoke to police, and *then* was taken to the DOVE unit, she "could reasonably have assumed that repeating the same information to a nurse or other medical professional served a separate and distinct medical purpose."<sup>190</sup>

If the legal community values the Constitution in any significant way, the *Stahl* court's conclusion must be openly and widely criticized. The only reasonable conclusion is that the primary, if not sole, purpose of the interview by the SANE nurse – whether viewed from the perspective of the SANE Nurse, the alleged victim, the police officer, or a hypothetical independent observer – was to collect and preserve evidence of past events for future criminal prosecution.<sup>191</sup>

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179. *Id.*

180. *Id.* at 845-47.

181. Stevens, *supra* note 171, at 479-81.

182. *Id.* at 472.

183. *Davis v. Washington*, 547 U.S. 813, 817 (2006).

184. *Id.* at 818.

185. *Stahl*, 855 N.E.2d at 837.

186. *Id.*

187. Stevens, *supra* note 171, at 479-80 (arguing that SANE nurses "should categorically be treated as police agents" due in part because of their intimate involvement with the prosecutor, the state, and the criminal process on multiple levels).

188. *Stahl*, 855 N.E.2d at 841 (quoting *Davis*, 547 U.S. at 813-14).

189. *Id.*

190. *Id.* at 846 (emphasis added).

191. *Id.* at 847-48 (Lanzinger, J., dissenting) (stating that the "primary purpose for the police to take [the alleged victim] to the DOVE unit was for collection of evidence, not medical

The alleged victim's statements to the SANE nurse were therefore testimonial and should have been excluded.

Unfortunately, police and prosecutors can take steps to make it even easier for judges to bypass the Clause. For example, in the Minnesota case *In re A.J.A.*, parents reported to police that their child informed them that she was sexually assaulted.<sup>192</sup> The police then purposely took several steps to *avoid* doing anything that remotely resembled a police investigation so that they could distance themselves from any hearsay statements.<sup>193</sup>

First, a detective responded to the home of the parents and the alleged victim "dressed in plain clothes" and purposely avoided contact with the alleged victim.<sup>194</sup> The detective then contacted the district attorney's office for information on "the appropriate person to examine" the alleged victim.<sup>195</sup> The detective provided that information to the parents and instructed *them* to arrange for an examination.<sup>196</sup> A nurse subsequently interviewed the alleged victim who identified the defendant.<sup>197</sup>

However, as the police and prosecutor knew under Minnesota law, the nurse was a mandatory reporter.<sup>198</sup> Therefore, after hearing the accusations of abuse, the nurse simply repeated the information to the police, who initiated the criminal prosecution.<sup>199</sup> Further, when the alleged victim later became unavailable for trial, the State argued that because the interview was conducted by a nurse, rather than by police, the primary purpose of the interview was not to investigate a past crime, but rather to render medical aid.<sup>200</sup>

The trial court, however, applied a substance-over-form analysis and correctly held that the nurse "was simply a surrogate for police investigation and interview."<sup>201</sup> As a result, the hearsay was testimonial and therefore inadmissible.<sup>202</sup> Nonetheless, the appellate court reversed and found the statements nontestimonial, and therefore admissible, for a completely irrelevant reason: that the nurse "expressly rejected the suggestion that police could

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treatment," and that "[t]he forensic aspects of the DOVE unit are clear from the precise nature of the nurse's activities in collecting evidence").

192. *In re A.J.A.*, No. A06-479, 2006 Minn. App. LEXIS 988, at \*6 (Minn. Ct. App. Aug. 29, 2006).

193. *See id.* at \*7.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at \*8.

198. *Id.* at \*7 (citing Minn. Stat. § 626.556, subd. 3(a)(1) (2004)).

199. *Id.* at \*8-9. *See Stevens, supra* note 171, at 478-79 (arguing that the mandatory reporter laws, which are often enforced by threat of criminal penalty, "effectively deputize all medical practitioners").

200. *See In re A.J.A.*, 2006 Minn. App. LEXIS 988, at \*12.

201. *Id.*

202. *Id.*

influence her examination of her patients” and therefore “was not acting as an agent of or in concert with the government.”<sup>203</sup>

Can judges really dispense with the Clause this easily? The State, with the blessing of the courts, is simply bypassing the Clause by shifting investigative duties away from police to mandatory reporters who, by law,<sup>204</sup> must immediately report back to police. Consequently, the police still obtain, indirectly, the allegations they need to initiate a criminal prosecution. Additionally, should the alleged victim later become unavailable for trial, the statements can be admitted without any cross-examination because they were first made to a nurse, rather than to the police. Indeed “[i]f testimonial evidence can be admitted through this ‘middleman’ mechanism, then the Confrontation Clause’s renewed vigor post-*Crawford* is a sham.”<sup>205</sup>

Interestingly, a comparison of the two cases discussed in this section—one from Ohio and one from Minnesota—invokes memories of the inconsistent and irreconcilable rulings from earlier cases that applied the *Roberts* reliability test. That is, in Ohio, statements will be labeled nontestimonial and therefore admissible if the police *first* take a statement from the alleged victim and *then* take her to a nurse to repeat the statement.<sup>206</sup> Conversely, in Minnesota, the opposite is true.<sup>207</sup> Statements will be labeled nontestimonial and therefore admissible if the police *avoid* taking a statement from the alleged victim but rather send her *directly* to a nurse.<sup>208</sup> Once again, outright judicial manipulation designed to reach a predetermined outcome leads to an irreconcilable contradiction.

### C. Expanding the Forfeiture Doctrine

Even when courts are unable to fabricate an ongoing emergency, or when police cannot use surrogates in their place, courts have found other ways to bypass the Confrontation Clause. One such way is to expand the scope of the forfeiture doctrine. This doctrine is essentially an exception to the general ban on testimonial hearsay and allows even testimonial hearsay to be admitted if a court finds that the defendant acted in such a way as to forfeit his right of confrontation.<sup>209</sup>

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203. *Id.* at \*11.

204. *Id.* at \*9 (citing Minn. Stat. § 626.556, subd. 3(a)(1) (2004)).

205. Stevens, *supra* note 171, at 476.

206. *See State v. Stahl*, 855 N.E.2d 834 (Ohio 2006).

207. *See State v. Washington*, 725 N.W.2d 125 (Minn. Ct. App. 2006).

208. *Stahl*, 855 N.E.2d at 834.

209. James F. Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant’s Intent to Intimidate the Witness*, 15 J.L. & POL’Y 863, 864-65 (2007).

This [forfeiture] doctrine provides that a defendant who deliberately acts to prevent a witness from testifying loses any right to object to the admission of the witnesses' testimonial hearsay statement . . . . This doctrine has always required that the defendant *specifically intend to prevent the witness from testifying*, and was previously limited to cases of deliberate *witness tampering*.<sup>210</sup>

More specifically, the doctrine has “always required the defendant’s knowledge of the declarant’s status as a witness and intentional efforts to prevent that witness from testifying.”<sup>211</sup> In the wake of *Crawford* and *Davis*, however, and in an effort to gain more convictions, courts have expanded the scope of this doctrine.<sup>212</sup> Even more alarming is the bold nature in which courts have made this move. In fact, courts have openly stated that they are seeking not to apply *Crawford* and *Davis*, but rather to circumvent them.

For example, in the Wisconsin case *State v. Jensen*, the defendant was charged with murdering his wife, and the State attempted to introduce his wife’s hearsay statements into evidence.<sup>213</sup> The trial court, and eventually the state supreme court, agreed with the defendant that the statements were, in fact, testimonial.<sup>214</sup> Further, because the wife was deceased long before any criminal action had begun, there was no possibility that the killer had murdered her for the purpose of preventing her from testifying in court.<sup>215</sup> This obvious fact precluded the possibility that the defendant could have forfeited his right of confrontation.

However, this reality did not prevent the state supreme court from finding a way to admit the statements. The court expanded the forfeiture doctrine by requiring the trial court to determine, by a mere preponderance of the evidence, *not* whether the defendant acted to prevent the witness from testifying, but whether the defendant was guilty of the underlying murder.<sup>216</sup> Without the murder, the reasoning continues, the wife would hypothetically be available to testify at trial—albeit a trial that would not even take place if she were alive.<sup>217</sup> Therefore, if the judge believed that the defendant murdered his wife, the defendant forfeited his right of confrontation.<sup>218</sup>

The state supreme court acknowledged that “[r]equiring the court to decide by a preponderance of the evidence the very question for which the defendant is on trial may seem, at first glance, troublesome.”<sup>219</sup> However, it still boldly declared that “[i]n essence, we believe that in a post-*Crawford* world the broad

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210. *Id.* (emphasis altered).

211. *Id.* at 874.

212. *See id.* at 877-78.

213. *State v. Jensen*, 727 N.W.2d 518, 520-21 (Wis. 2007).

214. *Id.* at 521.

215. *Id.*

216. *Id.* at 536.

217. *See id.*

218. *Id.*

219. *Id.* at 535 (citing *United States v. Mayhew*, 380 F. Supp. 2d 961, 967 (S.D. Ohio 2005)).

view of forfeiture by wrongdoing espoused by [Professor] Friedman and utilized by various jurisdictions since *Crawford's* release is essential.”<sup>220</sup>

The court’s declaration is nothing short of a plain and open admission that it was expanding the forfeiture doctrine to circumvent *Crawford's* strengthened confrontation right. In so doing, the court found comforting that “[s]ince the release of *Crawford*, many jurisdictions have either adopted the forfeiture by wrongdoing doctrine if they had not done so before, or *they have expanded the doctrine . . .*”<sup>221</sup>

However, the court should have found its new rule quite troublesome. First, in its rush to find a way to admit evidence against the defendant, the court merely abandoned the “substantive doctrine that was adopted by the founders.”<sup>222</sup> Second, as the trial court had previously warned, the expanded forfeiture doctrine—then espoused by the prosecutor and later adopted by the supreme court—“would render superfluous the doctrine of dying declarations.”<sup>223</sup> Third, the court only selectively adopted the views of Professor Friedman, whom it cited in support of its new rule, while ignoring his views that worked against the adoption of its new rule.<sup>224</sup> Fourth, and most significantly, as Justice Butler stated in his dissent:

[A]pplying the forfeiture doctrine to admit testimonial evidence when the defendant is on trial for the crime that rendered the witness unavailable, absent any showing that the defendant’s purpose was to procure the absence of the witness to keep him or her from testifying at trial, *places the cart before the horse.*<sup>225</sup>

The far-reaching implications of expanding the forfeiture doctrine should not be underestimated. For example, the obvious consequence of the court’s new expanded doctrine is that the trial judge must make a finding, by the preponderance of the evidence, on whether the defendant is guilty of the underlying crime.<sup>226</sup> However, the often forgotten consequence is that *after*

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220. *Id.* (emphasis added).

221. *Id.* at 533 (emphasis added).

222. *Id.* at 545 (Butler, Jr., J., dissenting in part).

223. *Id.* at 546 (Butler, Jr., J., dissenting in part).

224. *Id.* at 545 n.9 (Butler, Jr., J., dissenting in part) (“The majority declines, however, to adopt Professor Friedman’s recommendation” to apply a higher burden of proof before finding that the defendant forfeited the right to confront his accuser.).

225. *Id.* at 546 (Butler, Jr., J., dissenting in part) (emphasis added). As it turns out, Justice Butler was correct. After this Article was written, but before it was published, the United States Supreme Court decided *Giles v. California*, 128 S. Ct. 2678 (2008), where it held, with regard to the expanded forfeiture doctrine, that “[w]e decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter.” *Id.* at 2693. Further, “[t]he notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury.” *Id.* at 2686 (emphasis in original).

226. See Stevens, *supra* note 171, at 495 (“A forfeiture hearing should not become a mini-trial

finding the defendant guilty, the very same trial judge must then preside over the defendant's trial.<sup>227</sup> This same predicament in other contexts is a constitutional due process violation.

For example, in *Franklin v. McCaughtry*, the trial judge—coincidentally the very same trial judge that presided in *Jensen*—“took the highly unusual step of filing a memorandum” expressing an opinion on the defendant's guilt while his case was still pending.<sup>228</sup> The United States Court of Appeals for the Seventh Circuit held that “[t]he memorandum demonstrates that [the judge] decided the issue of [the defendant's] guilt long before trial.”<sup>229</sup> The problem with this pretrial determination of guilt, of course, is that due process guarantees “a defendant's right to be tried *by an impartial judge*.”<sup>230</sup> Therefore, the judge's opinion on the defendant's guilt, as expressed in his memorandum issued *before* the trial, was “a clear violation of [the defendant's] due process rights.”<sup>231</sup> Consequently, the conviction was reversed.<sup>232</sup>

Is there any substantive difference between expressing an opinion of guilt in a pretrial memorandum, as in *Franklin*, and expressing an opinion of guilt in a pretrial ruling under the forfeiture doctrine, as in *Jensen*? In both cases, the trial judge has formed an opinion before trial that the defendant is guilty, but then must preside over the defendant's trial. In both cases, the defendant's due process rights are *necessarily* violated. However, in its haste to find a way to reach its predetermined outcome—the admission of hearsay statements against the defendant—the Wisconsin Supreme Court was too short-sighted to see the ramifications of the rule that it rushed to adopt.

Further, and unfortunately, this expanded forfeiture doctrine is not anomalous. Other state courts—including those in Colorado, Kansas, Texas and Ohio—have also expanded the forfeiture doctrine by requiring the trial judge to first make a finding of guilt on the underlying crime, and then preside over the defendant's trial on that very same criminal allegation.<sup>233</sup>

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at which the judge effectively adjudicates the defendant's guilt under a lesser standard of proof. If ‘allow[ing] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability’ was bad, allowing the jury to hear such evidence based on a judicial predetermination of guilt would be far worse.” (alteration in original) (internal footnotes omitted).

227. This pretrial finding of the defendant's guilt on the underlying offense should not be confused with other pretrial findings that are routine, and constitutionally permissible, in criminal law. For example, a judge's belief and finding that the defendant intimidated a witness has nothing to do with whether the defendant committed the underlying crime for which he is standing trial. As another example, a judge's belief and finding that police did *not* violate a defendant's privacy rights during a search of his home has nothing to do with whether the items recovered during the search were illegal or even knowingly possessed by the defendant. Therefore, in these examples, the judge is not making a finding of ultimate guilt.

228. *Franklin v. McCaughtry*, 398 F.3d 955, 957 (7th Cir. 2005).

229. *Id.* at 961.

230. *Id.* at 959 (emphasis added).

231. *Id.* at 962.

232. *Id.* at 957.

233. *See, e.g.*, *United States v. Mayhew*, 380 F. Supp. 2d 961, 969 (S.D. Ohio 2005); *State v.*

V. WHAT WENT WRONG? A CLOSER LOOK AT *CRAWFORD* AND *DAVIS*

*Crawford* and *Davis* have failed to live up to their billing as a great “sea change” in Confrontation Clause jurisprudence.<sup>234</sup> While the Court claimed to have grand intentions of constraining judicial discretion, post-*Davis* cases in lower courts have shown that little has changed. In fact, as illustrated in Part IV, judicial manipulation is as prevalent today as it was under the old *Roberts* reliability test.<sup>235</sup>

Earlier, however, Part III of this Article purposely cast the *Crawford* and *Davis* decisions in a fairly positive light.<sup>236</sup> The reason for this moderate praise was that if applied by any objective and dispassionate person, the policies and rules developed in the cases would probably produce correct results the majority of the time. In that limited regard, then, the problem lies not with the Court, but with the lower courts’ distortion of *Crawford* and *Davis*.

The fundamental problem, however, still lies with the United States Supreme Court. The Supreme Court specifically acknowledged that judges often are *not* objective and dispassionate, yet it still did nothing to constrain their discretion. This lack of resolve is evident in *Crawford* itself, where the Court in one sentence acknowledges that “judges, like other government officers, could not always be trusted to safeguard the rights of the people.”<sup>237</sup> However, in the very same paragraph, the Court concludes perplexingly that “[w]e have no doubt that the courts below were acting in utmost good faith when they found reliability.”<sup>238</sup>

Unfortunately, this lack of resolve resulted in the implementation of another vague and fact-intensive test by carrying over the broad concepts of *Crawford* into the more specific framework outlined in *Davis*.<sup>239</sup> Now, instead of finding that a statement is reliable, and therefore admissible, trial judges may simply find that the statement is nontestimonial—e.g., that it was made in the course of an ongoing emergency—and is therefore admissible.<sup>240</sup> All the Court did in *Davis* and *Crawford* was change the label for the judicial discretion, while doing nothing to remove the judicial discretion itself, the very thing that the Court (weakly) acknowledged was the underlying problem.<sup>241</sup> The new framework still

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Meeks, 88 P.3d 789, 794 (Kan. 2004); *People v. Moore*, 117 P.3d 1, 5 (Colo. Ct. App. 2004); *Gonzalez v. State*, 155 S.W.3d 603, 609-10 (Tex. App. 2004).

234. See *supra* notes 90 and 91.

235. See discussion *supra* Part IV.

236. See discussion *supra* Part III.

237. *Crawford*, 541 U.S. at 67.

238. *Id.*

239. See Ross, *supra* note 109, at 193 (The “Court may have unconsciously descended down the *Roberts* reliability path the justices so recently abandoned.”).

240. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

241. See Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach But*

“allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination.”<sup>242</sup>

The new *Davis* test, much like the *Roberts* test, is in practice nothing more than a manipulable, open-ended balancing test that *Crawford* condemned.<sup>243</sup> In essence, “[t]he multiple factors for determining whether a statement is testimonial invite a lack of uniformity in applying the new test. Trial judges may weigh the factors *in any way they wish* to support their conclusion . . . .”<sup>244</sup> Moreover, when deciding the primary purpose of an interrogation, judges *may chose the very factors* they wish to weigh, including whether the declarant’s statement was made in the past or present tense, whether the declarant was seeking assistance, the lapse of time between the alleged crime and the statement, and the level of formality in the interrogation.<sup>245</sup>

Additionally, under *Davis*, the “primary purpose” may actually “evolve” at a judicially determined point of the interrogation.<sup>246</sup> This evolution allows a judicial parsing of the statements<sup>247</sup> and serves as yet another tool to admit whatever hearsay statements the court sees fit. As Justice Thomas stated in his dissent in *Davis*, the *Davis* framework, when compared to the *Roberts* framework, is “an equally unpredictable test, under which district courts are charged with divining the ‘primary purpose’ of police interrogations.”<sup>248</sup> Further, the new *Davis* framework “is neither workable nor a targeted attempt to reach the abuses forbidden by the Clause.”<sup>249</sup>

Equally significant with regard to the forfeiture doctrine, the Court stated that “[w]e take no position on the standards necessary to demonstrate such forfeiture.”<sup>250</sup> This lack of resolve essentially granted the lower courts full discretion to expand the forfeiture doctrine in any way they wished.<sup>251</sup> As a result,

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*Not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16, 18 (2006) (“Ironically, the *Davis* formulation is a totality of the circumstances test in many ways more similar to the *Roberts* reliability inquiry . . . .”); Gregory M. O’Neil, Comment, *Davis & Hammon: Redefining the Constitutional Right to Confrontation*, 40 CONN. L. REV. 511, 536 (2007) (“The fact-specific nature of the Court’s inquiry in *Davis* seems to afford courts broad discretion over defendant’s confrontation right, similar to that allowed under the *Roberts* test.”); Stevens, *supra* note 171, at 495 (warning that continued judicial discretion under *Davis* will “resurrect *Roberts*’s critical flaw in new guise.”).

242. *Crawford*, 541 U.S. at 62.

243. Friedman, *supra* note 139, at 563 (“[a] test relying on the terms ‘primary purpose’ and ‘ongoing emergency’ is extremely ambiguous . . .”).

244. Ross, *supra* note 109, at 193 (emphasis added).

245. *Davis*, 547 U.S. at 827. See O’Neil, *supra* note 241, at 543 (“Courts are given the power to create and consider a host of factors in deciding whether an out of court statement should be admissible against the defendant.”).

246. *Davis*, 547 U.S. at 828.

247. See *id.* at 829.

248. *Id.* at 834 (Thomas, J., dissenting in part).

249. *Id.* at 842 (Thomas, J., dissenting in part).

250. *Id.* at 833.

251. See *State v. Jensen*, 727 N.W.2d 518, 536 (Wis. 2007).

courts now routinely make pre-trial findings of guilt on the underlying crime with which the defendant is charged—a level of discretion unknown pre-*Crawford*—in order to admit untested, uncross-examined hearsay.<sup>252</sup>

Obviously the *Davis* test was born not only out of the Court's lack of resolve, but also out of its naiveté as to the workings of an actual criminal trial. For example, the Court states that “[w]hile prosecutors may hope that inculpatory ‘nontestimonial’ evidence is gathered, this is essentially beyond police control. *Their saying that an emergency exists cannot make it be so.*”<sup>253</sup> This statement, however, is simply wrong. In reality, a police officer's saying that an emergency exists *is* precisely the thing that makes it so.<sup>254</sup>

In such circumstances, it is important to keep in mind that the declarant of the statement is necessarily absent from trial, or he or she would simply testify and these confrontation issues would not even arise in the first place. Further, as the cases discussed in this Article illustrate, the defendant will rarely be a witness to the declarant's statement. This leaves only the police officer or other government agent to testify about the purpose of the interrogation, the circumstances surrounding the statement, and even the very *content* of the statement. This uncontradicted police testimony, combined with the lower courts' eagerness to upgrade every situation to emergency status, *is* precisely what makes the emergency.

In sum, then, there is ample blame to go around for the state of post-*Davis* confrontation law. It is true that the lower courts are responsible for distorting the reasonably clear purposes of *Crawford* and *Davis*.<sup>255</sup> However, the Supreme Court knew, and even explicitly stated, that the lower courts “could not always be trusted to safeguard the rights of the people.”<sup>256</sup> Despite this awareness, the Court made no serious attempt to constrain judicial discretion. The Court, therefore, must bear the blame for the lower courts' manipulation of the *Davis* test.

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252. *See id.* This lower court practice, however, should now be curtailed by the Court's decision in *Giles v. California*, 128 S. Ct. 2678 (2008), where it struck down the expanded forfeiture doctrine, holding that “[w]e decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter.” *Id.* at 2693.

253. *Davis*, 547 U.S. at 832 n.6 (emphasis added).

254. *See* Cicchini & Rust, *supra* note 112, at 547-48 (analogizing to Fourth Amendment violations and illustrating how easily police could, after the fact, convince a court that a statement was freely offered, rather than extracted through a formal interrogation); *see also* Andrew C. Fine, *Refining Crawford: The Confrontation Clause After Davis v. Washington and Hammon v. Indiana*, 105 MICH. L. REV. FIRST IMPRESSIONS 11, 12 (2006), <http://www.michiganlawreview.org/firstimpressions/vol105/find.pdf> (“When determining the ‘primary purpose’ of questioning, it will be difficult for courts to ignore an officer's claim that he believed the emergency to be ongoing when he questioned the declarant,” similar to the difficulty in “Fourth Amendment issues.”).

255. *See* Friedman, *supra* note 139, at 563 (explaining how courts will look “for whatever toehold they can find to admit accusatory statements that were made absent an opportunity for confrontation.”).

256. *Crawford*, 541 U.S. at 67.

## VI. EVALUATING POTENTIAL SOLUTIONS

In forums for legal writing, there has been no shortage of opinions on the Confrontation Clause, especially with regard to defining “testimonial hearsay.” However, rather than evaluating each and every potential solution on an individual basis, it is important to understand on a fundamental level what will *not* work and *why* it will not work. Only after this fundamental recognition can a sound and workable solution be developed.

## A. Identifying Ineffective Solutions

Perhaps the most common proposal for interpreting the Clause, and more specifically for defining the term testimonial hearsay, is to suggest that courts focus on the objective intent of the declarant, rather than of the questioner or interrogator.<sup>257</sup> It is argued that this standard is less easily manipulated by police, prosecutors, and judges and is also a more accurate test of whether the declarant actually bore testimony, and thereby created testimonial hearsay.<sup>258</sup>

However, the problem with this approach, and with all of the imaginable variations of it, is that it does not even mask the problem, let alone resolve it. The real problem is not whether the courts should focus on the declarant or the questioner, assuming such a distinction offers even a theoretical benefit. The problem, rather, is the use of judicial discretion itself, combined with the potential for manipulation by police.<sup>259</sup> It is just as easy for a police officer to manipulate the objective intent of the declarant, who is necessarily absent from trial and cannot speak for himself or herself, than it is to misrepresent the officer’s own intent.<sup>260</sup> For example, it *is* very easy for an officer to testify that he was

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257. See O’Neil, *supra* note 241, at 545 (“For the sake of uniform application of a defendant’s right to confrontation, courts should confine their constitutional analyses to the witness’s perspective of the events at the time the statement was made.”); Friedman, *supra* note 139, at 560 (arguing that the perspective of the declarant, and not the questioner, is the relevant focus); Tom Lininger, *Davis and Hammon: A Step Forward, or a Step Back?*, 105 MICH. L. REV. FIRST IMPRESSIONS 28, 29 (2006), <http://www.michiganlawreview.org/firstimpressions/vol1105/lininger.pdf> (arguing that an objective test from the standpoint of the declarant is the relevant focus).

258. See O’Neil, *supra* note 241, at 547 (arguing that the focus should be on the “declarant’s reasonable expectation, something the officers cannot control through their actions or observations.”); Lininger, *supra* note 257, at 29 (arguing that an objective test, from the standpoint of the declarant, will “minimize the ability of police to manipulate this test”).

259. Ross, *supra* note 109, at 205 (“One problem with focusing on how evidence is gathered. . . is that it permits manipulation by police and police agents.”).

260. In fact, police and prosecutors are already well trained in manipulating the intent of the declarant; they do it often at preliminary hearings and even at trials to fit hearsay statements into the excited utterance exception to the hearsay rule. For example, in *State v. Searcy*, 709 N.W.2d 497,

personally concerned for the safety of the alleged victim or others, and therefore was asking questions to help him assess the situation and not to investigate a past crime.<sup>261</sup> Therefore, focusing on the interrogator's intent or expectations—whether subjectively or objectively—*is* rife with possibilities for manipulation.<sup>262</sup>

However, it is just as easy for a police officer to testify that the declarant, at the time he or she made the statement, appeared to be scared, spoke frantically, and in the present tense. The officer could also testify that, at the time of the statement, the defendant's location was unknown and the declarant acted as though he or she feared the assault may be renewed. To make matters even simpler, an officer could testify that the alleged victim, after giving the statement, asked the officer to "watch her when she left the apartment to make sure that she was not assaulted again."<sup>263</sup> Any of these simple tactics will effectively manipulate the objective intent of the absent declarant.<sup>264</sup> The statements will then be labeled as nontestimonial and admitted into evidence.<sup>265</sup>

Another excellent example of manipulating the objective intent of the declarant is *State v. Stahl*, discussed in Part IV.B., where the court found the declarant reasonably could have believed that the interview was conducted to obtain medical help, and not to assist in the prosecution of the crime.<sup>266</sup> This particular judicial finding did not even require any overt manipulation by the police, and was made despite the declarant's acknowledgment that her statements would be used "in the investigation and prosecution of this crime."<sup>267</sup>

These examples establish that the problem lies not in the particular focus of the judicial discretion, but rather in the judicial discretion itself. Any proposed solution that merely shifts the subject of the judge's discretion without constraining it will fail.<sup>268</sup> This assertion is true not only with regard to defining testimonial hearsay, but also with regard to applying the forfeiture doctrine. Solutions that continue to rely on judicial discretion, regardless of the label under which it is used, will be no more effective in fixing *Davis* than *Davis* was in fixing *Roberts*.

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502 (Wis. Ct. App. 2005), an officer testified that the declarant, at the time she made her statement, was "[u]m, rather excited." The court accepted this self-serving, conclusory testimony, and found that the statement was admissible under the excited utterance exception. *Id.*

261. See Ross, *supra* note 109, at 183.

262. See *id.* (discussing how the "intent of the officer's rationale allows manipulation by police.").

263. *State v. Washington*, 725 N.W.2d 125, 132 (Minn. Ct. App. 2006).

264. See Ross, *supra* note 109, at 183.

265. See *id.* at 133.

266. *Stahl*, 855 N.E.2d at 846.

267. *Id.* at 837.

268. See Ross, *supra* note 109, at 206-07 (discussing how the proposals of two well-known professors fail to cure the problem because they do not eliminate the opportunity for manipulation).

*B. Putting “Confrontation” Back in the Clause*

The solution to the problem is simple and can therefore be stated briefly: the Court must constrain, rather than merely shift, judicial discretion. With regard to the forfeiture doctrine, lower courts must *not* be permitted to find a defendant guilty of the underlying the crime with which he or she is charged—the ultimate exercise of discretion—and then use that pretrial finding of guilt to admit uncross-examined testimonial hearsay at trial.

Fortunately, the forfeiture doctrine need not be reinvented or even discussed at great length. Rather, the doctrine’s pre-*Crawford* application, which was limited specifically to cases of witness tampering,<sup>269</sup> should be explicitly adopted by the Court.<sup>270</sup> This interpretation is not only true to the doctrine’s constitutional origins, but it also serves to constrain judicial discretion and prevent the perverse “cart before the horse” logic of the lower courts’ post-*Davis* holdings such as *State v. Jensen*.<sup>271</sup>

With regard to defining testimonial hearsay, its meaning must *not* depend on what the interrogator claims his or her primary purpose was in asking the questions, or what the court thinks the declarant’s expectations might have been regarding how the statement might be used in the future. First, as Josephine Ross has stated, the right of confrontation is a trial right and does not depend on the means or techniques used in gathering the statement, but rather on how the statement is used at trial.<sup>272</sup>

Second, any definition of testimonial hearsay that hinges on theoretical subtleties—e.g., whether the focus should be on listener or speaker, or whether the test for intent should be objective or subjective—will be entirely ineffective, unworkable, and subject to manipulation.<sup>273</sup> As the cases discussed in this Article demonstrate, linguistic dances about distinctions without a practical difference provide busy work for commentators but are easily sidestepped by prosecutors and judges in the courtroom.

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269. See Flanagan, *supra* note 209, at 864-65.

270. As noted earlier, after this Article was written, but before it was published, the United States Supreme Court decided *Giles v. California*, 128 S. Ct. 2678 (2008), where it struck down the expanded forfeiture doctrine. The Court held that “[t]he notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury.” *Id.* at 2686 (emphasis in original).

271. *State v. Jensen*, 727 N.W.2d 518, 546 (Wis. 2007) (Butler, Jr., J., dissenting in part).

272. Ross, *supra* note 109, at 196-97 (arguing that the right of confrontation is a trial right, and the focus should *not* be on how the statements were gathered, but rather on “how the out-of-court words are being used in the particular trial”).

273. See *id.* at 171-72 (arguing that under fact-intensive tests that focus on the method of creating or collecting the hearsay, “[p]olice and prosecutors will be encouraged to alter their methods of gathering evidence and describing the investigation in such a way that statements will be deemed responses to emergency situations . . .”).

The concept of testimonial must therefore focus on the statement's use at trial. As Vincent Rust and I wrote before *Davis* was published:

The term testimonial should be defined as all accusatory hearsay, i.e., hearsay that tends to establish in any way an element of the crime or the identification of the defendant. To adopt a narrower definition . . . would necessarily require a tremendous amount of judicial discretion under a facts-and-circumstances analysis. Although such an analysis would be under the heading of testimonial, rather than reliability, the end result would be the same: judges would still be deciding which hearsay is admissible.<sup>274</sup>

Most significantly, this proposed definition would prevent the admission of core testimonial hearsay, which is “the principal evil at which the Confrontation Clause was directed.”<sup>275</sup> Because the focus would be on how the statement is used at trial rather than how it was obtained, there would no longer be any incentive for government manipulation. For example, the police would no longer have an incentive to channel statements through surrogates, rather than conduct the investigations themselves, in hopes of circumventing the defendant's confrontation rights should the declarant later become unavailable.<sup>276</sup> The pretrial manipulation and gamesmanship created by the current definition of testimonial would simply become irrelevant.

Realistically, however, it took the Court twenty four years to change course from *Roberts*, and the Court is now only four years into its new course with *Crawford*. If recent history is any indication, the Court will not make such firm and sweeping changes anytime soon. Additionally, the Court's trepidation in deciding even basic issues—e.g., whether 911 operators are agents of the police<sup>277</sup>—makes it even less likely that swift change is anywhere on the near horizon. Therefore, if reform is going to take place it may have to come from the state courts.<sup>278</sup>

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274. Cicchini & Rust, *supra* note 109, at 543-44; *see also* Ross, *supra* note 109, at 196 (arguing similarly that “the term testimonial should apply to all statements repeated at court that are accusatory in the context of the criminal trial, that are introduced for the truth of their assertion, and where the reliability of the declarant could affect the truth of the charges in that particular case”). Admittedly, while it is possible to constrain judicial discretion, it is never possible to eliminate it entirely. For example, using Ross' definition, a court could simply find that the statement was being offered for a purpose *other than* the truth of the matter asserted, and could attempt to bypass the Clause in this manner. However, there is a much greater body of case law defining what constitutes the “truth of the matter asserted” than there is defining what constitutes an “ongoing emergency,” for example. Therefore, long-standing and well-established legal precedent would severely temper judicial manipulation in such instances.

275. *Crawford*, 541 U.S. at 50.

276. *See* discussion *supra* Part IV.B.

277. *See* *Davis v. Washington*, 547 U.S. 813, 823 n.2 (stating that “[f]or purposes of this opinion (and without decided the point), we consider [911 operators'] acts to be acts of the police”).

278. *See, e.g., State v. Knapp*, 700 N.W.2d 899, 914 (Wis. 2005) (citing *State v. Doe*, 254 N.W.2d 210, 216 (Wis. 1977)) (holding that “[t]his court ‘will not be bound by the minimums

However, reform by the Court is not completely without hope. The Court has shifted to bright line, workable rules in other areas of constitutional jurisprudence, such as in search and seizure cases. In *Chimel v. California*,<sup>279</sup> for example, the Court held that police are allowed to search all areas “within [the arrestee’s] immediate control” in order to prevent an arrestee from destroying potential evidence or using a weapon.<sup>280</sup> This was a fact-intensive test, much like the test in *Roberts* and *Davis*, and depended on the facts surrounding the arrest, including the distance between the arrestee and the area being searched.<sup>281</sup>

In *New York v. Belton*,<sup>282</sup> however, the Court changed course and abandoned its facts-and-circumstances analysis to adopt a new bright-line rule.<sup>283</sup> The new rule allowed police to search an arrestee’s automobile under all circumstances incident to arrest.<sup>284</sup> The Wisconsin Supreme Court applied this rule and upheld a police search of an arrestee’s vehicle even when he was arrested outside of and away from his automobile, was handcuffed, secured in a squad car, and guarded by officers.<sup>285</sup> Clearly, if a person was not near his or her automobile when arrested and then was searched, cuffed, and locked in a guarded squad car, there is *no possibility* that the person will obtain a weapon from, or destroy potential evidence in, his automobile.

Nonetheless, the United States Supreme Court adopted this bright line rule to give police the right to search an automobile in all cases incident to arrest, even where there was no real or imaginary risk of the arrestee destroying evidence or obtaining a weapon. The Court, as well as the lower courts, found the previous, fact-intensive analysis “unworkable” because it was supposedly too difficult to determine when an arrestee could actually gain access to his automobile.<sup>286</sup> Therefore, the police are no longer required to *prove* or even *believe* that the automobile was accessible; rather, they may simply *assume* accessibility, even in cases where accessibility is literally impossible.<sup>287</sup>

This example proves that the Court is quite capable of drawing bright line rules. Admittedly, this particular bright line rule was drawn for the benefit of police rather than defendants; it would be somewhat naive to assume that the Court would employ the same underlying reasoning in cases where the rule would

which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens’ liberties ought to be afforded.”)

279. *Chimel v. California*, 395 U.S. 752 (1969).

280. *Id.* at 762-63 (1969).

281. *Id.*

282. *New York v. Belton*, 453 U.S. 454, 460 (1981).

283. *Id.*

284. *Id.*

285. *See State v. Fry*, 388 N.W.2d 565, 565-75 (Wis. 1986).

286. *Id.* at 574. (“The only other alternative to the *Belton* rule would be to permit searches on a case-by-case basis when the police believe that a suspect may escape from their control and regain access to an automobile. This alternative is unworkable, however, because such momentary escapes are not predictable.”).

287. *Id.*

benefit the citizenry, rather than the government. Nonetheless, if the Court is willing to adopt such rules as a matter of police convenience in search and seizure law, it is not too much to demand that the Court do so to protect fundamental constitutional rights. Therefore, a similar bright line rule, focusing on the statement's use at trial rather than the method in which it was obtained, should be the hallmark of Confrontation Clause jurisprudence.

## VII. CONCLUSION

In *Crawford* and *Davis* the Court finally acknowledged the dangers and unconstitutionality of allowing judges to substitute their discretion in place of actual confrontation.<sup>288</sup> Unfortunately, however, the Court's new framework—at first thought by many to be a “sea change” in Confrontation Clause jurisprudence<sup>289</sup>—has done little to constrain the very judicial discretion that the Court condemned.<sup>290</sup> Instead, the framework merely shifted the judicial discretion from one issue—whether the hearsay was reliable—to other issues, such as whether the hearsay is testimonial and, if so, whether the defendant forfeited his right of confrontation.<sup>291</sup>

The Court's lack of resolve has left the lower courts with as much or more discretion in admitting untested hearsay evidence as they had under the old *Roberts* reliability test. Consequently, lower courts have easily circumvented *Crawford* and *Davis* and have done so in numerous, creative ways.<sup>292</sup> Most commonly, courts have expanded the scope of the ongoing emergency<sup>293</sup> and distorted the primary purpose test,<sup>294</sup> both of which result in labeling hearsay as nontestimonial, thus causing it to fall outside the scope of the Clause altogether.<sup>295</sup> Even in cases of testimonial hearsay, courts have simply expanded the scope of the forfeiture doctrine in order to make a finding that the defendant forfeited his right of confrontation.<sup>296</sup>

Regardless of the tactic employed, however, the end result is just as it was under the old *Roberts* test: judges, with the help of police and other government

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288. See discussion *supra* Part III.

289. See *State v. Grace*, 111 P.3d 28, 36 (Haw. Ct. App. 2005); Hutton, *supra* note 90, at 61; King-Ries, *supra* note 90, at 313.

290. See discussion *supra* Part V.

291. See *id.*

292. See discussion *supra* Part IV.

293. See *State v. Washington*, 725 N.W.2d 125 (Minn. Ct. App. 2006); *State v. Warsame*, 723 N.W.2d 637 (Minn. Ct. App. 2006); *Harkins v. State*, 143 P.3d 706 (Nev. 2006); *State v. Camarena*, 145 P.3d 267 (Or. Ct. App. 2006); *Vinson v. State*, 221 S.W.3d 256 (Tex. App. 2006); *State v. Rodriguez*, 722 N.W.2d 136 (Wis. Ct. App. 2006).

294. See *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006).

295. See discussion *supra* Parts IV.A.-B.

296. See discussion *supra* Part IV.C.

agents, are easily finding ways to admit untested and uncross-examined hearsay against defendants. Any proposed solution that attempts to cure these judicial abuses by merely shifting judicial discretion from one issue to another will be no more effective in fixing *Davis* than *Davis* was in fixing *Roberts*.<sup>297</sup>

The only viable solution to the problem is to constrain judicial discretion. With regard to the forfeiture doctrine, its reach must be limited to cases of alleged witness tampering.<sup>298</sup> With regard to testimonial hearsay, the focus must be on the hearsay's use at trial, rather than the manner in which it was given by the declarant or obtained by the police.<sup>299</sup> This bright line, trial-based rule is not only mandated by the plain language of the Confrontation Clause, but it would also be consistent with the Court's reasoning and holdings in other areas of constitutional jurisprudence.<sup>300</sup> Only this approach will constrain judicial discretion and ensure the constitutional right of confrontation.

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297. See discussion *supra* Part VI.A.

298. See discussion *supra* Part VI.B.

299. See *id.*

300. See *id.*