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## **Excited Utterances, “Testimonial” Statements, and the Confrontation Clause**

**December 14, 2005**

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# Excited Utterances, “Testimonial” Statements, and the Confrontation Clause

## Summary

The United States Supreme Court will hear oral argument this term in appeals from two state supreme court cases, *Hammon v. Indiana* and *Davis v. Washington*, concerning the admissibility of “excited utterance” statements made by non-testifying witnesses at criminal trials. In the landmark *Crawford v. Washington* case in 2004, the Court held that the Sixth Amendment’s Confrontation Clause forbids hearsay “testimonial” evidence from being introduced against the accused unless the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness. However, the *Crawford* Court declined to provide a comprehensive definition of “testimonial,” leaving such task “for another day.”

This omission has caused state and federal courts to struggle over which out-of-court statements are “testimonial” for purposes of triggering the *Crawford* requirements. The confusion has arisen most often in cases involving out-of-court statements made by non-testifying witnesses to investigating police officers at a crime scene or during 911 emergency calls. These “excited utterance” statements have traditionally been admitted into evidence under an exception to the hearsay exclusionary rules followed by courts. However, since *Crawford*, the lower courts have disagreed over whether spontaneous utterances are considered “testimonial” statements subject to the Sixth Amendment’s cross-examination mandate. These two cases offer the Court an opportunity to resolve this uncertainty by more clearly explaining what constitutes “testimonial” statements. The outcome has the potential to impact significantly the strategy and method of prosecuting criminal cases, particularly the use of out-of-court accusations against defendants in domestic violence and gang-related crimes.

This report will be updated after the Supreme Court issues its decision.

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# Excited Utterances, “Testimonial” Statements, and the Confrontation Clause

## Background

**The Rules of Evidence and Hearsay.** The rules of evidence govern the use of evidence<sup>1</sup> in civil and criminal judicial proceedings. Courts apply these rules when determining what types of evidence, such as testimony and tangible objects, may be admitted at trial. In the federal court system, the Federal Rules of Evidence (FRE)<sup>2</sup> are followed, while many state and local courts have adopted their own rules that often closely parallel the federal ones.

Hearsay is a particular type of evidence. Hearsay is a prior out-of-court statement of a declarant,<sup>3</sup> affirmatively offered at trial either orally by another person or in written form, in order to prove the truth of the matter asserted.<sup>4</sup> Under the FRE, hearsay evidence is inadmissible unless it falls within one of the numerous exceptions to the hearsay rules.<sup>5</sup> One reason for the general prohibition on hearsay is to minimize the danger of unreliable evidence from being introduced at trial. Since hearsay is the statement of a person who is not testifying at trial under oath and not subject to cross-examination, the reliability of the evidence is questionable.

**Excited Utterances.** If an out-of-court statement was made under certain circumstances that help to ensure its reliability, it may be admissible evidence even though it is hearsay. One such exception to the hearsay exclusionary rule is a statement that qualifies as an “excited utterance.” The FRE defines an excited utterance as a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”<sup>6</sup> The underlying rationale of this exception is that such a spontaneous statement is likely

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<sup>1</sup> Evidence is a form of proof that helps to establish the existence or nonexistence of a fact.

<sup>2</sup> See Federal Rules of Evidence, available at [<http://judiciary.house.gov/media/pdfs/printers/108th/evid2004.pdf>].

<sup>3</sup> A “declarant” is a person who makes a statement. FED. R. EVID. 801(c).

<sup>4</sup> FED. R. EVID. 801(b). An example of hearsay: in order to prove that the traffic light was red when a car drove through it, a bystander testifies at trial that he had heard a woman on the street shout out, “The light is red!”

<sup>5</sup> FED. R. EVID. 802.

<sup>6</sup> FED. R. EVID. 803(2).

to be truthful since the shocked declarant had no time to reflect and deliberate before making it.<sup>7</sup>

**The Confrontation Clause and *Crawford v. Washington*.** The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”<sup>8</sup> The purpose of the Confrontation Clause is:

to prevent depositions or ex parte affidavits ... [from] being used against [the defendant] in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.<sup>9</sup>

Although the Confrontation Clause aims to protect similar values as the hearsay rules, they do not overlap completely. Some evidence that might be admissible under a hearsay exception may be found to violate the defendant’s constitutional right of confrontation, while an out-of-court statement that is erroneously admitted in violation of the exclusionary rule may not necessarily be a denial of the defendant’s Sixth Amendment rights.<sup>10</sup>

In March 2004, the U.S. Supreme Court in *Crawford v. Washington*<sup>11</sup> had the opportunity to interpret the meaning of the phrase “witnesses against,” as it appears in the Confrontation Clause.<sup>12</sup> The Court determined that the phrase encompasses more than just those individuals who actually testify at trial, but also includes anyone who “bear[s] testimony.”<sup>13</sup> In turn, testimony “is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”<sup>14</sup> Thus, “not all hearsay implicates the Sixth Amendment’s core concerns,” but an out-of-court

<sup>7</sup> See *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004) (explaining that at common law historically, a spontaneous declaration was potentially admissible only if the statement was made “immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage”) (citation omitted).

<sup>8</sup> U.S. CONST. amend. VI.

<sup>9</sup> *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

<sup>10</sup> *California v. Green*, 399 U.S. 149, 155-56 (1970).

<sup>11</sup> 541 U.S. 36 (2004).

<sup>12</sup> For a detailed summary of this case, see CRS Report RS21888, *Confrontation Clause Reshaped: Crawford v. Washington*, by Estela I. Velez Pollack.

<sup>13</sup> *Crawford*, 541 U.S. at 51.

<sup>14</sup> *Id.* (citation omitted). This example by the *Crawford* Court suggests that the constitutional right to confrontation may not apply to a declarant’s hearsay statement to a bystander and other individuals who are *not* agents of the government.

statement that is “testimonial” would trigger the defendant’s right “to be confronted with the witnesses against him.”<sup>15</sup> According to the Court, examples of “testimonial” statements include, “at a minimum,” prior testimony offered at a preliminary hearing or before a grand jury, formal statements made in response to police interrogations, and sworn affidavits and depositions.<sup>16</sup>

In a landmark decision, the *Crawford* Court announced the new guiding principle applicable to the rules of evidence in a criminal trial: the Confrontation Clause bars the introduction into evidence of hearsay “testimonial” statements in a criminal prosecution, unless the declarant is unavailable<sup>17</sup> and the defendant has had a prior opportunity to cross-examine the declarant. Only if testimonial statements made by out-of-court declarants are tested “in the crucible of cross-examination” may such evidence be admitted in a criminal trial without violating the defendant’s confrontation rights.<sup>18</sup>

Unfortunately, the *Crawford* Court expressly stated that it would “leave for another day any effort to spell out a comprehensive definition of ‘testimonial’.”<sup>19</sup> This refusal to articulate a precise definition of a key term left the late Chief Justice William Rehnquist, joined by Justice Sandra Day O’Connor, to observe in a concurring opinion:

[T]he thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists ... is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.<sup>20</sup>

This assessment of the consequences of the Court’s deferral appears to have been prescient. In the time since *Crawford*, federal and state courts have struggled and disagreed over the meaning of “testimonial.” This “miasma of uncertainty”<sup>21</sup> has arisen most often in cases involving out-of-court statements made by non-testifying witnesses to investigating police officers at an alleged crime scene or during tape

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<sup>15</sup> *Id.* However, “[w]here *nontestimonial* hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law.” *Id.* at 68 (emphasis added).

<sup>16</sup> *Id.*

<sup>17</sup> A declarant is “unavailable” if the declarant: 1) holds a particular privilege against testifying; 2) persists in refusing to testify despite an order of the court to do so; 3) testifies to a lack of memory concerning the statement; 4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity; or 5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant’s attendance by process or other reasonable means. FED. R. EVID. 804.

<sup>18</sup> *Crawford*, 541 U.S. at 61.

<sup>19</sup> *Id.* at 68.

<sup>20</sup> *Id.* at 75-76 (Rehnquist, C.J., concurring).

<sup>21</sup> *United States v. Brito*, 427 F.3d 53, 55 (1st Cir. 2005).

recordings of 911 emergency calls.<sup>22</sup> Until *Crawford* was handed down, such statements would probably have been admissible under the excited utterance exception to the hearsay rule.

Applying *Crawford* to excited utterances, however, has divided courts across the country into three categories: some finding excited utterances “nontestimonial” and thus admissible under the hearsay exception, some ruling that spontaneous statements are subject to the Confrontation Clause, and others electing to examine the circumstances of each case to determine whether the declarant has provided “the functional equivalent” of testimony to a government officer. In an effort to resolve this conflict, the U.S. Supreme Court has agreed to hear oral argument this term in two cases, *Hammon v. Indiana*<sup>23</sup> and *Davis v. Washington*,<sup>24</sup> concerning the admissibility at criminal trials of “excited utterance” statements made by non-testifying witnesses.

### ***Hammon and Davis***

Both of these cases involve domestic violence prosecutions in which the government attempted to introduce out-of-court statements made by individuals who declined to testify at trial. This scenario is not uncommon in domestic violence cases. According to a recent law review article, “Batterers put hydraulic pressures on domestic violence victims to recant, drop the case, or fail to appear at trial.”<sup>25</sup> As a consequence, the government frequently must go forward without the cooperation or testimony of the alleged victim, by introducing into evidence their out-of-court statements, or those of other eyewitnesses, made to responding police officers or to 911 operators.<sup>26</sup> These hearsay statements are often the only other evidence of the abuse besides the victim’s complaint.<sup>27</sup> The statements may be admissible under the “excited utterance” exception to the hearsay rule; however, a few states have

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<sup>22</sup> Although these statements are offered most frequently in domestic violence cases, they may also be introduced in murder, robbery, burglary, and assault prosecutions. Leonard Post, *Eyes on Clarifying “Crawford;” Thousands of Cases Hang in Balance*, NAT’L L. J., Oct. 24, 2005, at P1.

<sup>23</sup> 829 N.E. 2d 444 (Ind. 2005), *cert. granted*, 126 S. Ct. 552 (2005) (No. 05-5705).

<sup>24</sup> 111 P.3d 844 (Wash. 2005), *cert. granted*, 126 S. Ct. 547 (2005) (No. 05-5224).

<sup>25</sup> Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 709 n.76 (2003) (citation omitted). It has been estimated that between eighty and ninety percent of domestic violence victims recant their accusations or refuse to cooperate with a prosecution. *Id.*

<sup>26</sup> *Stancil v. United States*, 866 A.2d 799, 807 (D.C. 2005).

<sup>27</sup> Lininger, *supra* note 25, at 709, 713 (noting that hearsay statements are used in domestic violence prosecutions because the offender’s identity is often not readily apparent from the physical evidence, or because the perpetrator may try to ascribe the victim’s injuries to a fall or some other “innocent” accident).

specifically created hearsay exceptions for statements made by adult victims of domestic violence.<sup>28</sup>

**Statements Made to Investigating Police At Crime Scenes.** In *Hammon v. Indiana*, Hershel Hammon was convicted of domestic battery of his wife, Amy Hammon, during an argument.<sup>29</sup> Amy had been subpoenaed to testify, but she failed to appear at the trial. Under Indiana’s excited utterance exception to the hearsay rule, the trial court admitted a police officer’s testimony regarding Amy’s responses to his questioning at the scene of the domestic disturbance, specifically that Hershel had punched her and thrown her down into the glass of the gas heater.<sup>30</sup> Hershel did not have a prior opportunity to cross-examine Amy about these statements made to the police officer.

The Indiana Supreme Court upheld the admissibility of this evidence under state law but then considered its constitutionality in light of *Crawford*. The court rejected adopting a categorical approach to classifying excited utterances as either testimonial or non-testimonial statements. Instead, the court announced its interpretation of “testimonial,” which is to be applied by all Indiana state courts in future cases:

[A] “testimonial” statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. In evaluating whether a statement is for purposes of future legal utility, the motive of the questioner, more than that of the declarant, is determinative, but if either is principally motivated by a desire to preserve the statement it is sufficient to render the statement “testimonial.”<sup>31</sup>

Applying this test to the facts of the case, the Indiana court concluded that Amy’s out-of-court statements did not qualify as “testimonial” and thus were not subject to the *Crawford* requirements:

[T]he initial exchange between Mooney and Amy fell into the category of preliminary investigation in which the officer was essentially attempting to determine whether anything requiring police action had occurred and, if so, what. Officer Mooney, responding to a reported emergency, was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene. Amy’s motivation was to convey basic facts and there is no suggestion that Amy wanted her initial responses to be preserved or otherwise used against her husband at trial.<sup>32</sup>

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<sup>28</sup> *Id.* at 708, citing CAL. EVID. CODE § 1370 (allowing the admission of hearsay statements by victims of domestic violence who are unavailable to testify at the time of the trial) and OR. REV. STAT. § 40.460(26) (admitting hearsay statements made by victim of domestic violence within twenty-four hours of the incident, whether or not victim is presently available as a witness).

<sup>29</sup> *Hammon*, 829 N.E. 2d at 447.

<sup>30</sup> *Id.* at 448.

<sup>31</sup> *Id.* at 456.

<sup>32</sup> *Id.* at 458.



The *Hammon* court opined that “responses to initial inquiries by officers arriving at a [crime] scene are typically not testimonial.”<sup>33</sup> Furthermore, police at a crime scene are attempting to determine whether an offense has occurred, protect victims, or apprehend a suspect, rather than trying to obtain and preserve statements in anticipation of a potential criminal prosecution.<sup>34</sup>

**911 Calls.** In *Davis v. Washington*, Adrian Davis was convicted of violating a protective no-contact order, when he assaulted Michelle McCottry.<sup>35</sup> Shortly after the attack, McCottry called 911, identified her assailant as Adrian Davis and explained that he had used his fists to beat her. The government’s only witnesses at trial were the two police officers who responded to the 911 emergency call, but they could not testify as to the cause of McCottry’s physical injuries. The government was unable to locate McCottry at the time of the trial and thus she did not testify. The tape recording of the 911 call was the only evidence that connected Davis to the assault.<sup>36</sup> The trial court admitted the 911 tape recording under the State of Washington’s excited utterance exception.

The Washington Supreme Court explained that this case turned primarily on whether McCottry’s 911 call constitutes a “testimonial” statement under *Crawford*. The court distinguished 911 calls made by individuals seeking emergency help “to be rescued from peril,” which would not be considered testimonial, from calls made to the police to report a crime out of a desire “to bear witness,” which would more likely be testimonial.<sup>37</sup> The court adopted a case-by-case approach to statements made to 911 operators, stating that the circumstances of the 911 call must be scrutinized “to determine whether the declarant knowingly provided the functional equivalent of testimony to a government agent.”<sup>38</sup> Finally, the court explained that 911 emergency calls might contain both testimonial and nontestimonial statements, and that the portion of the call that is nontestimonial could be admitted without subjecting the entire statement to the *Crawford* requirements.<sup>39</sup>

Under the facts of the case, the Washington high court ruled that there was no evidence to suggest that McCottry sought to “bear witness” when she called 911. Instead, she was in immediate, grave danger and called 911 to seek protection from peril. An amicus curiae brief filed on behalf of the defendant argued that it is “common knowledge” that 911 calls may later be used to prosecute the perpetrator of the abuse.<sup>40</sup> However, the court found no evidence to suggest McCottry had such knowledge or that it influenced her decision to call 911. Consequently, the court

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<sup>33</sup> *Id.* at 457.

<sup>34</sup> *Id.*

<sup>35</sup> *Davis*, 111 P.3d at 847.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 849.

<sup>38</sup> *Id.* at 850.

<sup>39</sup> *Id.* at 851.

<sup>40</sup> *Id.*

held that the portion of McCottry's 911 call that identified Davis as her assailant was nontestimonial and, as such, did not violate Davis's confrontation rights.<sup>41</sup>

### **Comparison of the *Hammon* and *Davis* Definitions of Testimonial.**

Although both the *Hammon* and *Davis* courts determined that the excited utterances at issue in their respective cases were non-testimonial in nature, they formulated different tests to evaluate them. The *Hammon* court reasoned that an excited utterance should be considered testimonial "where a principal motive of either the person making the statement or the person or organization receiving it is to preserve it for future use in legal proceedings."<sup>42</sup> Thus, the *Hammon* approach is to focus on the motivations of the questioner and the declarant. In contrast, the *Davis* court advocates examining the circumstances which generated the excited utterance, specifically whether the statement was made in an effort to obtain emergency help from a dire situation, or whether it was made out of a desire to provide evidence for use in a future trial.<sup>43</sup> The *Davis* approach concerns itself with the context in which the out-of-court statement was made, in addition to the motivations of the questioner and responder.

## **Three General Approaches of Lower Courts**

The subtle difference between the Indiana and Washington supreme courts in *Hammon* and *Davis* reflects the variety of approaches that lower courts have taken in trying to apply *Crawford* to excited utterances. State and federal court efforts to decide whether excited utterances may or may not be classified as "testimonial" hearsay can be categorized into three main groups: per se non-testimonial, per se testimonial, and case-by-case evaluation.

**Per Se Non-testimonial.** Several courts have decided that excited utterances are necessarily non-testimonial in nature because they are made under the influence of a stressful event and, as such, are "emotional and spontaneous rather than deliberate and calculated" statements.<sup>44</sup> The rationale for this view is that excited utterances, "made without reflection or deliberation[,] are not made in contemplation of their 'testimonial' use in a future trial."<sup>45</sup> Courts espousing this approach will thus admit an excited utterance under the traditional hearsay exception, without requiring the out-of-court statement to satisfy the *Crawford* cross-examination requirements.

**Per Se Testimonial.** Some courts believe that all statements made to a government agent after an alleged crime has occurred are per se testimonial and thus subject to *Crawford*. The highest state court in Massachusetts is a leading proponent of this proposition:

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<sup>41</sup> *Id.*

<sup>42</sup> *Hammon*, 829 N.E. 2d at 446.

<sup>43</sup> *Davis*, 111 P.3d at 849.

<sup>44</sup> *United States v. Braun*, 416 F.3d 703, 707 (8th Cir. 2005).

<sup>45</sup> *People v. Corella*, 122 Cal. App. 4th 461, 469 (2004).

We conclude that questioning by law enforcement agents, whether police, prosecutors, or others acting directly on their behalf ... is interrogation ... This includes “investigatory interrogation,” such as preliminary fact gathering and assessment whether a crime has taken place. Under our reading of *Crawford* statements elicited by such interrogation are per se testimonial and therefore implicate the confrontation clause. No further analysis is needed. The statements are inadmissible unless the declarant testifies at trial or formally is unavailable and was previously subject to cross-examination.<sup>46</sup>

However, the Massachusetts court allowed a narrow exception to its general rule: “Statements made in response to emergency questioning by law enforcement to secure a volatile scene or determine the need for or provide medical care are not per se testimonial.”<sup>47</sup> This qualification reflects the court’s acknowledgment of law enforcement’s different functions: on the one hand, peacekeeping and community caretaking, and on the other, detecting, investigating, and gathering evidence related to a criminal offense.<sup>48</sup> The focus of the “community caretaking” exception is on the emergency nature of the situation, and statements made to law enforcement during this stage would not be considered testimonial. Once the peril has passed and the police enter the “investigatory” stage, any statements made to law enforcement would be testimonial and subject to *Crawford*.

**Case-by-Case Evaluation.** The “overwhelming majority of courts”<sup>49</sup> that have considered excited utterances in the *Crawford* aftermath have rejected categorical approaches, and instead favored a case-by-case, multiple-factor balancing test to evaluate whether a statement qualifies as “testimonial” hearsay. However, as the *Hammon* and *Davis* courts demonstrate, this approach can create disparity as to the circumstances a court should examine. Among the relevant considerations are:<sup>50</sup>

- Whether the declarant was a victim or an observer
- The declarant’s purpose in speaking with the officer (e.g., to obtain emergency assistance or to bear testimony)
- Whether it was the police or the declarant who initiated the conversation
- The location where the statements were made (e.g., the declarant’s home, a squad car, or the police station)
- The declarant’s emotional state when the statement was made

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<sup>46</sup> Commonwealth v. Gonsalves, 833 N.E. 2d 549, 556 (Mass. 2005).

<sup>47</sup> *Id.* at 557.

<sup>48</sup> *Id.* at 556. The court in *Davis* also advocates this distinction, although it may be important to note that the Washington court ruled on statements made to 911 operators whereas the Massachusetts court was considering responses given to police at a crime scene. However, 911 operators may be civilian employees of the police department or even police officers. See, e.g., *People v. Cortes*, 781 N.Y.S.2d 401, 405 (N.Y. Sup. Ct. 2004). In addition, “[i]t is doubtful that in the face of immediate danger a caller [to 911] is contemplating how her statements might later be used at trial.” *Minnesota v. Wright*, 701 N.W. 2d 802, 811 (Minn. 2005).

<sup>49</sup> *Wright*, 701 N.W. 2d at 812.

<sup>50</sup> *Id.* at 812-13.

- The level of formality and structure of the conversation between the officer and declarant
- The officer's purpose in speaking with the declarant (e.g., to secure the scene, determine what happened, or collect evidence)
- If and how the statements were recorded

In addition to these factors, courts have disagreed whether a subjective or objective test should be used in assessing the purpose or motivation of the declarant. Most courts suggest that the proper inquiry is “whether a reasonable person in the declarant’s position would anticipate the statement’s being used against the accused in investigating and prosecuting the crime.”<sup>51</sup> However, some observers have argued that the objective or subjective intent of the declarant is irrelevant if the “defining characteristic” of a testimonial statement is whether the statement is made to a government agent.<sup>52</sup> This view of the Confrontation Clause would thus scrutinize the purpose of the *questioner* in eliciting the declarant’s excited utterance.

## Conclusion

By granting certiorari to review the state court opinions in *Hammon v. Indiana* and *Davis v. Washington*, the U.S. Supreme Court this term will have an opportunity to clarify what kind of statements qualify for “testimonial” hearsay and thus are subject to the constitutional cross-examination principles previously announced in *Crawford v. Washington*. By articulating a definitive standard, the Court may resolve the uncertainty among the lower courts that have tried to apply *Crawford* to excited utterances. The Court’s decision in these two cases has the potential to significantly alter the strategy and method of prosecuting criminal cases, particularly in domestic violence and gang-related cases that often rely on out-of-court accusations in the absence of the initial complaining witness.<sup>53</sup> The outcome also may further limit the hearsay rules of evidence, as the Court could determine that the Confrontation Clause trumps the excited utterance exception, at least when such statements are made to government agents.

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<sup>51</sup> *Gonsalves*, 833 N.E. 2d at 559.

<sup>52</sup> Major Robert Wm. Best, *To Be or Not To Be Testimonial? That Is the Question*, 2005 ARMY LAW. 65, 74.

<sup>53</sup> *Gonsalves*, 833 N.E. 2d at 559 (noting that “the prosecution can still present powerful evidence that a crime has occurred and that the defendant was the perpetrator ... [such as] the responding officer’s testimony as to the complainant’s physical appearance, her screams, her medical records, and photographs ... and the fact that no one else was in a position to have inflicted her injuries”).