

1-1-2007

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Recommended Citation

12 Suffolk J. Trial & App. Advoc. 1 (2007)

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AFTER *CRAWFORD*: USING THE CONFRONTATION CLAUSE IN MASSACHUSETTS COURTS

The Honorable David A. Lowy and Katherine Bowles Dudich¹

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I. INTRODUCTION*

The sea change in interpretation of the Confrontation Clause that followed the United States Supreme Court's decision in *Crawford v. Washington*² has been disconcerting to litigator and jurist alike. The Confrontation Clause, once a fleeting thought in constitutional jurisprudence, now stands as an obstacle to admissibility separate from whether or not evidence satisfies a hearsay exception. The source of the confusion is twofold: (1) a failure to recognize precisely that the Confrontation Clause analysis is "distinct but symbiotic" to the hearsay analysis;³ and (2) the failure of appellate courts to provide a broadly applicable definition as to when hearsay violates the Confrontation Clause. This article seeks to demystify the Confrontation Clause, with a specific focus on Massachusetts, and provide suggestions for analyzing Confrontation Clause evidentiary issues.

In *Crawford*, the United States Supreme Court held that "testimonial hearsay" is inadmissible unless the out of court declarant is both unavailable as a matter of law and was previously subject to cross-examination.⁴ The Court chose, however, not to provide a functional definition of "testimonial."⁵ Other courts did only marginally better. In *Commonwealth v. Gonsalves*,⁶ the Massachusetts Supreme Judicial Court ("SJC") provided a clear definition of testimonial in its own interpretation of the Sixth Amendment.⁷ Following the *Gonsalves* decision, the United States Supreme Court revisited the definition of testimonial in *Davis v. Washington* and *Hammon v. Indiana*.⁸ While the Court's most recent hold-

* The editors wish to note that all citations to Massachusetts cases will consist of parallel cites to both the state and regional reporters, out of convenience to Massachusetts practitioners.

² 541 U.S. 36 (2004).

³ See *United States v. Brito*, 427 F.3d 53, 60 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 2983 (2006).

⁴ *Crawford*, 541 U.S. at 68.

⁵ *Id.* ("We leave for another day any effort to spell out a comprehensive definition").

⁶ 445 Mass. 1, 833 N.E.2d 549 (2005), *cert. denied*, 126 S. Ct. 2982 (2006).

⁷ *Id.* As discussed *infra*, it is important for the Massachusetts litigator to recognize that in the wake of *Crawford*, the SJC has yet to discuss the cognate provisions of the Massachusetts Declaration of Rights, which might provide an avenue for enhanced confrontation protections for criminal defendants. *But see* *Commonwealth v. Whelton*, 428 Mass. 24, 28, 696 N.E.2d 540, 545 (1998) (explaining that Article XII provides no more protection than the Sixth Amendment). Unless and until such time, however, it is the last word of the United States Supreme Court, and not the SJC, that controls. While state courts may never interpret their own state constitutions as providing less protection than the United States Constitution, they may interpret their own cognate constitutional provisions as providing more.

⁸ 126 S. Ct. 2266 (2006). Both *Davis* and *Hammon* were decided in one consolidated

ings leave many questions and provide few answers, the holdings narrow down several areas of uncertainty. These cases will be discussed throughout this article.

II. APPLICABILITY OF THE CLAUSE

The Confrontation Clause⁹ protects the right to cross-examine hearsay declarants in certain defined circumstances.¹⁰ The role of cross-examination is to both seek the truth and to promote confidence in convictions as well as justice overall. This idea has a long history in Anglo-American jurisprudence.

Sir Walter Raleigh, demanding the justice he would never see, promoted confidence in the maintenance of the social compact through ordered liberty as manifested in courts of law when he proclaimed:

If you proceed to condemn me here by bare inferences, without an oath, without a subscription, without witnesses, upon a paper accusation, you try me by the Spanish Inquisition. If my accuser were dead or abroad, it were something but he liveth . . . Why, then, I beseech you, my Lords, let Cobham be sent for; let him be charged upon his soul; upon his allegiance to the King, and if he will then maintain his accusation to my face, I will confess myself guilty.¹¹

Raleigh's plea for confrontation occurred during his famous trial for treason, in which he was subsequently convicted and sentenced to death. Raleigh had no opportunity to cross-examine his accuser.

Professor Wigmore referred to cross-examination as the "greatest legal engine ever invented for the discovery of truth."¹² Without cross-examination, under oath, under the gaze of a jury observing the witness's demeanor, truth may prove elusive. Thus, the danger of hearsay is that it cannot be adequately tested by cross-examination. The infirmities of hearsay are well-known and often discussed in the law school classroom. The

opinion. As such, the two will be referred to as *Davis* when needed.

⁹ U.S. CONST. Amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

¹⁰ See 5 WIGMORE ON EVIDENCE §1395 (1974) [hereinafter WIGMORE]; see also MUELLER & KIRKPATRICK, EVIDENCE §8.1 (2d ed. 1999).

¹¹ *Commonwealth v. Kartell*, 20 Mass. L. Rptr. 134 n.2, No. 1999-0655, 2005 WL 2739786 (Mass. Super. Oct. 25, 2005) (citing Danielle Dupre, Note, *Crawford v. Washington: Reclaiming the Original Meaning of the Confrontation Clause*, 21 TOURO L. REV. 231, 232 n.9 (2005)).

¹² WIGMORE, *supra* note 10, §1367.

trial lawyer and judge would be well served to have these infirmities on the tip of their tongue. The infirmities of an out-of-court declarant's statement, which cannot be tested at the time they are made through cross-examination are (1) misperception; (2) faulty memory; (3) misstatement or "faulty narration"; and (4) distortion or deception.¹³ The Confrontation Clause stands as the constitutional limit by which our system of justice challenges these infirmities.

To the extent these infirmities or frailties are mitigated by the nature of certain hearsay statements and to some extent, in conjunction with the loss of highly probative evidence, hearsay exceptions developed at common law.¹⁴ Certain familiar exceptions to the rule come to mind, such as dying declarations, spontaneous utterances, business records, present sense impressions, then-existing physical condition, and statements made to medical personnel. The Sixth Amendment may serve as a constitutional limit when these hearsay exceptions are advanced to admit evidence against a criminal defendant. With these thoughts in mind, the following circumstances pose no Confrontation Clause impediments to admissibility. A firm understanding of the Clause's inapplicability in these circumstances will instill confidence and hope in the Massachusetts litigator as he attempts to understand this difficult topic. Accordingly, the Confrontation Clause does not apply:

1. in any civil case, including sexually dangerous person proceedings;¹⁵
2. anytime the out of court statement is being offered for a purpose other than its truth;¹⁶
3. when offered by the defendant;
4. when the declarant is available for cross-examination at trial;¹⁷
5. if the out-of-court declarant is unavailable as a matter of law but was previously subject to cross-examination by the

¹³ See MUELLER & KIRKPATRICK, EVIDENCE UNDER THE RULES, 109-10 (5th ed. 2004) (explaining hearsay infirmities with helpful examples). Examples of the infirmities in practice include: witness A, who stated that the car was blue when it was actually silver, misperceived the color of the car; and witness B, who stated that the car was blue when it was actually silver, deliberately distorted the color of the car because he disliked the driver. *Id.*

¹⁴ *Id.* at 157.

¹⁵ Commonwealth v. Given, 441 Mass. 741, 746 n.8, 808 N.E.2d 788, 793 n.8 (2004).

¹⁶ Commonwealth v. Brum, 438 Mass. 103, 117, 777 N.E.2d 1238, 1250 (2002) (confrontation right not offended when statement offered for nonhearsay purposes).

¹⁷ California v. Green, 399 U.S. 149, 162 (1970). Note, however, that while there may not be a Confrontation Clause issue if the out-of-court declarant appears at trial for confrontation, the statement is still hearsay even when the out-of-court declarant is testifying about the statement and such statement is offered for the truth of the matter asserted. Of course, hearsay exceptions or exemptions may still apply.

defendant;¹⁸ and

6. when the hearsay is not “testimonial” (whatever that means).¹⁹

Numbers one through four are easy to understand and require little clarification. Number five requires a definition of “unavailability” and “cross-examination” - - easy enough²⁰ - - and also an understanding of the doctrinal goal of the Confrontation Clause as referenced briefly above. If the declarant is unavailable and has been subject to prior cross-examination, the Confrontation Clause is satisfied and the hearsay statement is admissible. In order to understand number six, however, a definition clarifying the testimonial/nontestimonial distinction is required. Much of the remainder of this article will be dedicated to understanding this distinction. Let us begin then by discussing the Confrontation Clause under *Ohio v. Roberts*²¹ and the *Crawford* tidal wave that struck courtrooms across the land, wreaking havoc and confusion upon lawyers and judges alike while also fostering constitutional fairness.

III. CONFRONTATION CLAUSE JURISPRUDENCE: *CRAWFORD* AND BEYOND

A. Crawford

During the period between *Roberts* and *Crawford*, in almost all circumstances, if the government satisfied a hearsay exception, it satisfied the Confrontation Clause.²² In *Roberts*, the Court held that “when a hearsay declarant is not available for cross examination at trial . . . the statement is admissible only if it bears adequate ‘indicia of reliability’ . . . [or] falls

¹⁸ *Mattox v. United States*, 156 U.S. 237, 242-43 (1895), *accord* *Crawford v. Washington*, 541 U.S. 36, 59 (2004). This exception has “been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement.” See *Barber v. Page*, 390 U.S. 719, 722 (1968) (citing both *Wigmore* and *McCormick*).

¹⁹ *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006).

²⁰ Unavailability occurs when prosecutorial authorities make a “good faith” effort to obtain the witness’ presence at trial but are unsuccessful. See *Barber*, 390 U.S. at 724-25. Prior opportunity for cross-examination occurs when counsel is able to expose the witness’ testimonial infirmities under oath at some proceeding prior to trial. See *Maryland v. Craig*, 497 U.S. 836, 847 (1990), and cases cited.

²¹ 448 U.S. 56 (1980).

²² See Thomas Lininger, *Prosecuting Batterers After Crawford*, 91 VA L. REV. 747, 756-60 (2005); *but see* *Lilly v. Virginia*, 527 U.S. 116, 139-40 (1999) (admission of non-testifying accomplice confession as statement against interest violated the Confrontation Clause).

within a firmly rooted hearsay exception."²³ For the Court, this test was sufficient to satisfy the Confrontation Clause because the purpose of the clause was the same as that of the rules of hearsay: "to augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence."²⁴ The *Roberts* test, however, proved ineffectual in protecting confrontation rights and, as a result, the Confrontation Clause became "increasingly anemic" under its guise.²⁵

A litany of academics and judges, no doubt inspired by Sir Walter Raleigh, denounced the state of the law.²⁶ Professor Margaret Berger explained that "the [Court's] insistence [in *Roberts*] that the sole function of the Confrontation Clause is to promote more accurate fact-finding ignores the historical background against which the Clause was drafted and overlooks the context in which it is placed."²⁷ Professor Berger insisted that the purpose of the Clause was to monitor and deter governmental abuse and should be refocused according to that purpose.²⁸ Justice Thomas echoed this sentiment by stating that the *Roberts* test was "inconsistent with the text and history of the Clause."²⁹

Justice Scalia illuminated this point when he said: "The purpose of enshrining the [Confrontation Clause] in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court."³⁰ Yet, the post-*Roberts* Court continued to hold that evidence law controlled the Confrontation Clause.³¹ In *Roberts* and its progeny, the Court "unnecessarily . . . complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of

²³ See *Roberts*, 448 U.S. at 66.

²⁴ *Id.* at 65-66 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934); *Dutton v. Evans*, 400 U.S. 74, 86-89 (1970); *California v. Green*, 399 U.S. 155 (1970)).

²⁵ See Lininger, *supra* note 22, at 756-60 and cases cited.

²⁶ See *White v. Illinois*, 502 U.S. 346, 358-59 (1992) (Thomas, J., concurring in part and concurring in judgment); *Maryland v. Craig*, 497 U.S. 836, 865 (1990) (Scalia, J., dissenting); see also Richard Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1043 (1998); Margaret Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 559-61 (1992); Akhil Amar, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES*, 125-31 (Yale Univ. Press 1997).

²⁷ See Berger, *supra* note 26, at 559-61 (proposing an approach to the Confrontation Clause that focuses on its purpose in restraining government power as opposed to promoting reliability).

²⁸ See Berger, *supra* note 26, at 559-61.

²⁹ See *White*, 502 U.S. at 358 (Thomas, J., concurring in part and concurring in judgment).

³⁰ See *Craig*, 497 U.S. at 861 (Scalia, J., dissenting).

³¹ See Randolph Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 622 (1988).

evidence.”³²

Against this backdrop, the Court attempted to disentangle the confrontation right from the rule against hearsay and re-infuse the Confrontation Clause with its original intent in *Crawford v. Washington*.³³ The facts of the case were as follows: The defendant Crawford stabbed to death a man who had allegedly tried to rape his wife, Sylvia.³⁴ At trial, the prosecution played a statement recorded at the police station in which Sylvia described the stabbing.³⁵ Sylvia was unavailable to testify at trial under the Washington state marital privilege and Michael Crawford had no prior occasion to cross-examine her.³⁶ Sylvia’s statements were admitted over defense objections and Crawford was subsequently convicted of assault.³⁷ The question on review was whether Sylvia’s statements were admitted in violation of Crawford’s right to confrontation.³⁸

The United States Supreme Court, in reviewing the Washington State Supreme Court’s affirmation of Crawford’s conviction, began its analysis by explaining that the purpose of the historical right to confrontation was to prevent the civil-law mode of criminal procedure abused by justices of the peace and other prosecutorial authorities in 16th and 17th century England.³⁹ The most notorious example of this abuse was Sir Walter Raleigh’s trial for treason.⁴⁰ In that case, Raleigh was tried solely on the basis of out-of-court accusations made by Lord Cobham, an alleged co-conspirator to the crime.⁴¹ Raleigh was denied the opportunity to confront Cobham and was subsequently convicted.⁴² One of Raleigh’s trial judges later lamented that “the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.”⁴³ The right to confrontation at common law, in early state constitutions, and later in the Sixth Amendment, was borne out of this history of prosecutorial abuse.⁴⁴

The *Crawford* court held that an absent declarant’s testimonial statements were inadmissible when offered against one accused of a crime. Despite the lengthy historical analysis, however, even as the Court held

³² See *White*, 502 U.S. at 358 (Thomas, J., concurring in part and concurring in judgment).

³³ 541 U.S. 36, 63 (2004).

³⁴ *Id.* at 38.

³⁵ *Id.*

³⁶ *Id.* at 38-40.

³⁷ *Id.*

³⁸ *Crawford*, 541 U.S. at 42.

³⁹ *Id.* at 43-50.

⁴⁰ *Id.* at 44.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Crawford*, 541 U.S. at 44.

⁴⁴ *Id.* at 50.

that testimonial statements are inadmissible at trial, the Court withheld a precise definition of the term testimonial.⁴⁵ Instead, the Court offered three separate formulations of the term.⁴⁶ The first formulation focused on in-court testimony or its functional equivalent, such as pretrial statements that a declarant would expect to be used for prosecutorial purposes.⁴⁷ The second focused on formal statements traditionally used at trial.⁴⁸ The third, and broadest formulation, focused on statements that an objectively reasonable declarant would expect to be used for trial.⁴⁹ The Court failed to adopt any of these formulations explicitly but suggested that “[they] all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it.”⁵⁰ The Court similarly failed to opine on what the common nucleus might be.

The only concrete insight the Court yielded was that statements from prior testimony at a preliminary hearing, before a grand jury, at a former trial, or in response to police interrogation, are testimonial under any definition.⁵¹ Police interrogations, after all, “bear a striking resemblance to examinations done by justices of the peace in England” and lie at the heart of statements the Clause was drafted to address.⁵² The Court was reluctant to furnish a definition for the term “interrogation,” however, and only hinted that police interrogations were to be understood in a “colloquial, rather than any technical legal, sense.”⁵³ Despite the ambiguity rife throughout the opinion, the Court ultimately held that Sylvia’s statements

⁴⁵ *Id.* at 68.

⁴⁶ *Id.* at 52. The exact wording of the formulations was:

‘ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,’ Brief for Petitioner 23; ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,’ *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3.

Id.

⁴⁷ *Id.*

⁴⁸ *Crawford*, 541 U.S. at 52.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Crawford*, 541 U.S. at 52.

⁵² *Id.*

⁵³ *Crawford*, 541 U.S. at 53 n.4.

were made in response to police interrogation and were therefore “testimonial.”⁵⁴

While *Crawford* placed the Confrontation Clause on a firmer constitutional footing than the *Roberts* test, it failed to shape the contours of the Clause with any real clarity.⁵⁵ Chief Justice Rehnquist, in a dissent-like concurrence, chastised the Court for its indecisive opinion when he observed, “[r]ules of criminal evidence are applied everyday in courts throughout the country, and parties should not be left in the dark in this manner.”⁵⁶ The First Circuit echoed this sentiment when it noted “the Court left open the parameters of testimonial hearsay, and so its ruling produced a miasma of uncertainty.”⁵⁷ Trial lawyers and judges undoubtedly concurred. It was into this “miasma” that the Supreme Judicial Court offered *Commonwealth v. Gonsalves*.

B. *Gonsalves*

In *Commonwealth v. Gonsalves*,⁵⁸ the SJC began the process of deciphering *Crawford* and applying it to specific facts arising in the Commonwealth.⁵⁹ In doing so, the SJC created a doctrinal dichotomy as to what constitutes testimonial statements: “testimonial per se” and “testimonial in fact.” If a statement fell into either category, it would be inadmissible under *Crawford*. First, the SJC held that prior testimony before a grand jury, at a preliminary hearing, or former trial and statements procured through “police interrogation” are all testimonial per se. The court went on to explain that all law enforcement questioning related to the investigation or prosecution of a crime constitutes police interrogation; therefore, any statement made in response to such questioning is “testimonial per se.”⁶⁰ The court, however, explained that statements made in response to ques-

⁵⁴ *Id.* at 68.

⁵⁵ See *United States v. Brito*, 427 F.3d 53, 55-56 (1st Cir. 2005) (explaining that “*Crawford* ruling left a miasma of uncertainty” regarding testimonial hearsay).

⁵⁶ *Crawford*, 541 U.S. at 75 (Rehnquist, C.J., concurring).

⁵⁷ See *Brito*, 427 F.3d at 55-56.

⁵⁸ 445 Mass. 1, 833 N.E.2d 549 (2005).

⁵⁹ *Commonwealth v. Foley*, 445 Mass. 1001, 833 N.E.2d 130 (2005), *cert. denied*, 126 S. Ct. 2980 (2006) and *Commonwealth v. Rodriguez*, 445 Mass. 1003, 833 N.E.2d 134 (2005), *cert. denied*, 126 S. Ct. 2979 (2006), applied the SJC’s holding in *Gonsalves* and were issued on the same day.

⁶⁰ *Gonsalves*, 445 Mass. at 9, 833 N.E.2d at 555-56. The *Gonsalves* court justified its broad definition of police interrogation because a colloquial understanding of the term, which was part of the *Crawford* interpretation, “both in the general public and the legal community” included “investigatory interrogation – ‘routine, nonaccusatory questioning by the police of a person who is not in custody.’” *Gonsalves*, 445 Mass. at 7-8, 833 N.E.2d at 555 (citing BLACK’S LAW DICTIONARY 838 (8th ed. 2004)).

tions related to the government's community caretaking function were nontestimonial.⁶¹ The community caretaking function is implicated when there is an objectively reasonable basis for believing that the safety of an individual or the public is jeopardized.⁶² Second, the court stated that even if an out of court statement is not testimonial per se it still may be testimonial in fact. The court explained that a statement is testimonial in fact if a reasonable person in the declarant's position would believe that declarant's statements might be used in the investigation or prosecution of a crime.⁶³ Thus, in one fell swoop, the SJC divided the testimonial analysis into a two-pronged inquiry.

The facts of *Gonsalves* were as follows: On March 16, 2003, Phyllis Duffin heard yelling and screaming coming from her daughter Kimberly's bedroom.⁶⁴ Phyllis went to Kimberly's room where Kimberly, crying and hysterical, told her mother that her boyfriend, the defendant, who was no longer on the premises, had grabbed her and choked her.⁶⁵ Although the Duffins did not call the police, two officers from the Brockton Police Department were dispatched to the Duffin residence in response to an emergency 911 call.⁶⁶ Upon arrival, Officer Legrice asked Kimberly some preliminary questions about the disturbance and learned that the defendant had "grabbed her by the neck, lifted her up off the ground, choked her, and hit her head off the floor."⁶⁷

Kimberly became unavailable to testify.⁶⁸ The Commonwealth

⁶¹ *Gonsalves*, 445 Mass. at 9, 833 N.E.2d at 556 (citing *Commonwealth v. Evans*, 436 Mass. 369, 372, 764 N.E.2d 841, 844 (2002)). The *Gonsalves* court justified this exception by stating that law enforcement questioning made to secure a volatile scene or to provide medical care was completely "divorced" from statements the Confrontation Clause was directed at. *Gonsalves*, 445 Mass. at 8, 833 N.E.2d at 555.

⁶² See *Gonsalves*, 445 Mass. at 9-10, 833 N.E.2d at 556 (citing *Commonwealth v. Brinson*, 440 Mass. 609, 800 N.E.2d 1032 (2003)); see also *Commonwealth v. Murdough*, 428 Mass. 760, 704 N.E.2d 1184 (1999); *Commonwealth v. Leonard*, 422 Mass. 504, 663 N.E.2d 828 (1996); *Commonwealth v. Smigliano*, 427 Mass. 490, 694 N.E.2d 341 (1998). Justice Sosman criticized the community caretaking function distinction as arbitrary, unsupported by the history of the Clause and language in *Crawford*, and wholly dependent on responses made to police questions. See *Gonsalves*, 445 Mass. at 23-25, 800 N.E.2d at 1033, 1037 (Sosman, J., concurring).

⁶³ See *Gonsalves*, 445 Mass. at 12-13, 833 N.E.2d at 558-59. This approach is most similar to, but considerably broader than, the objective analysis set out in the third definition of testimonial in *Crawford*. Justice Sosman characterized this approach as both "extreme" and contrary to the public policy goals of prosecuting domestic and gang violence. See *Gonsalves*, 445 Mass. at 27-37, 833 N.E.2d at 565-66 (Sosman, J., concurring).

⁶⁴ See Brief of Respondent-Appellant, *Commonwealth v. Gonsalves*, 445 Mass. 1, 833 N.E.2d 549, No. SJC-09329 (2005).

⁶⁵ *Id.*

⁶⁶ *Id.* The officers were responding to an unidentified emergency 911 call. *Id.*

⁶⁷ *Id.*

⁶⁸ The reason for Kimberly's unavailability is unclear.

sought to introduce her statements through Officer Legrice and her mother.⁶⁹ The statements were allowed at a preliminary hearing under the spontaneous utterance exception to the rule against hearsay.⁷⁰ The defendant filed a motion for reconsideration arguing that Kimberly's statements, though admissible under evidentiary principles, violated the Constitution in light of *Crawford*.⁷¹ As a result, the trial judge vacated his prior ruling and held that Kimberly's statements were clearly testimonial and thus inadmissible.⁷² A single justice of the Supreme Judicial Court reserved and reported the matter to the full bench.⁷³

The SJC stated that Kimberly's statements to Officer Legrice were made in response to police interrogation and, based on the record before them, appeared to be testimonial per se.⁷⁴ The court explained that the defendant was no longer on the scene when the questioning took place and, although an ambulance later arrived on the scene, there was no indication on the record that Kimberly required any medical attention.⁷⁵ The court then concluded that the police questioning was made for the purpose of obtaining "information about the nature of the alleged crime and the identity of the accused in order to begin to build a criminal investigation."⁷⁶ If Kimberly was unavailable for trial and the defendant had no prior opportunity to cross-examine her, the statements made to Officer Legrice would be inadmissible. On the other hand, the court determined that Kimberly's statements to her mother were neither testimonial per se nor testimonial in fact because no reasonable person in Kimberly's position would anticipate that her description of events would be used in investigating or prosecuting

⁶⁹ See Brief of Respondent-Appellant, *Commonwealth v. Gonsalves*, 445 Mass. 1, 833 N.E.2d 549 (S.J.C. No. 9329).

⁷⁰ *Id.* In Massachusetts, a hearsay statement is admissible if made under the impulse of excitement or shock and it was spontaneous to a degree that reasonably negated premeditation or possible fabrication. See HON. PAUL J. LIACOS, MARK S. BRODIN & MICHAEL AVERY, *HANDBOOK OF MASSACHUSETTS EVIDENCE*, 551 (7th ed.1999). The principle underlying the admissibility of this exception is based on the following: "It is supposed that a person under stress tends to speak what comes spontaneously to mind, without energy or disposition to invent lies; his excited utterance is likely to be truthful in that sense, and so the hearsay objection is overcome." *Commonwealth v. Santiago*, 437 Mass. 620, 623-24, 774 N.E.2d 143, 146 (2002) (citing *Commonwealth v. Carasquillo*, 54 Mass. App. Ct. 363, 368, 765 N.E.2d 777, 781 (2002) and *Commonwealth v. McLaughlin*, 364 Mass. 211, 222, 303 N.E.2d 338, 347 (1973)).

⁷¹ See Brief of Respondent-Appellant, *Commonwealth v. Gonsalves*, 445 Mass. 1, 833 N.E.2d 549, No. SJC-09329 (2005).

⁷² *Gonsalves*, 445 Mass. at 6, 833 N.E.2d at 554.

⁷³ *Id.*

⁷⁴ *Gonsalves*, 445 Mass. at 12, 833 N.E.2d at 558. The SJC remanded the case to the trial court for further development of the facts.

⁷⁵ *Id.*

⁷⁶ *Id.*

the defendant.⁷⁷

C. Davis

The SJC's definitions of both testimonial per se and testimonial in fact in *Gonsalves* represent one appellate court's interpretation in a country where many courts have offered divergent views.⁷⁸ The need for a firm resolution to these key Confrontation Clause issues cannot be overstated, especially in domestic abuse cases and gang prosecutions.⁷⁹ In *Davis v. Washington* and *Hammon v. Indiana*, the United States Supreme Court

⁷⁷ *Gonsalves*, 445 Mass. at 18, 833 N.E.2d at 561. In *Rodriguez*, a case factually similar to *Gonsalves*, the court also held that statements made to on-scene police officers by a victim of domestic abuse were testimonial. The victim had no apparent injuries, did not require immediate medical attention, and no immediate danger was posed to her family or the responding officers at the scene. The purpose of the elicited statements was to identify the defendant as the perpetrator and provide a description of the past events as they had occurred. As such, the statements were made in response to investigatory police questioning, not to enable police assistance, and were inadmissible without cross-examination. See *Rodriguez*, 445 Mass. at 1003-04, 833 N.E.2d at 134-35.

By contrast to *Gonsalves* and *Rodriguez*, in *Foley* the police arrived on the scene of a domestic dispute to find a house in complete "disarray." The victim was "crying" and her four children looked "horrified." Believing they were in the midst of an emergency, the officers asked "Where is he?" Responding to that question, one child pointed to the bedroom. The officers went to the bedroom, found the defendant, handcuffed him, and placed him in custody. The officers then returned to the victim and her children to find out if any of them needed medical attention. None was requested.

The *Foley* court held that the child's non-verbal pointing, which constituted an assertion and was therefore a hearsay statement, in response to "Where is he" and the statements made in response to police inquiries about medical attention were nontestimonial. First, the court explained that the statements were not testimonial per se because the purpose of the questioning implicated the community caretaking function rather than the investigation of alleged criminal acts. Next, under the second prong of analysis, the court explained that the statements were not testimonial in fact because "a reasonable person in each declarant's position would not have anticipated that either the child's or the adult victim's statement would be used against the accused in investigating and prosecuting the crime." These statements were therefore admissible without confrontation. See *Commonwealth v. Foley*, 445 Mass. 1001, 1001-02, 833 N.E.2d 130, 132-33 (2005), cert. denied, 126 S. Ct. 2980 (2006).

⁷⁸ See, e.g., *United States v. Brun*, 416 F.3d 703, 707-08 (8th Cir. 2005) (holding excited utterances admissible because they are inherently nontestimonial); see also *United States v. Arnold*, 410 F.3d 895, 903 (6th Cir. 2005) (holding 911 calls inadmissible because caller could anticipate the calls would be used for investigative purposes); *Hammon v. Indiana*, 829 N.E.2d 444, 453 (Ind. 2005), rev'd, 125 S. Ct. 2266 (2006) (holding responses to preliminary on the scene police questioning was not the result of police interrogation). But see *United States v. Brito*, 427 F.3d 53, 55-56 (1st Cir. 2005) (holding excited statement admissible because declarant faced "imminent personal peril").

⁷⁹ Richard Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1175 (2002).

took the opportunity to reconsider these issues, or at least the police interrogation definition (i.e., the SJC's testimonial per se prong), and provide some clarity to the confusion that had, thus far, symbolized the post-*Crawford* era.

The facts of *Davis* were as follows: On February 1, 2001, Michelle McCottry called 911 to report her boyfriend for violating a protection order, but hung up before saying anything.⁸⁰ The 911 operator called back and asked McCottry what was going on. McCottry, hysterical and crying, responded: "He's here jumpin' on me again."⁸¹ In response to more questions by the operator, McCottry explained that the perpetrator was "Adrian Martell Davis."⁸² McCottry then stated that Davis had "just run out the door."⁸³ The operator asked if McCottry needed an "aid car" but she responded "No, I'm all right." The police arrived minutes after the phone call ended and observed "fresh injuries" on McCottry's forearm and face.⁸⁴

Davis, the petitioner, was charged with violation of a protection order and assault. McCottry refused to testify at trial, but her 911 calls were admitted as spontaneous utterances, which, under the *Roberts* test, meant they were also admissible under the Confrontation Clause.⁸⁵ Davis was found guilty and his conviction was affirmed on appeal.⁸⁶ After *Crawford*, the Washington Supreme Court reaffirmed the conviction stating that the 911 call was nontestimonial and that "it was doubtful whether there could exist 'any circumstances under which a statement qualifying as an excited utterance would be testimonial.'"⁸⁷ The Supreme Court granted certiorari to decide whether McCottry's 911 call constituted a testimonial statement subject to Confrontation Clause analysis.⁸⁸

The *Hammon* facts were as follows: On the night of February 26, 2003, police responded to a "reported domestic disturbance" at the home of Amy and Hershel Hammon.⁸⁹ Amy was on the front porch "somewhat frightened" and Hershel was in the kitchen.⁹⁰ The officers entered the

⁸⁰ *Davis v. Washington*, 126 S. Ct. 2266, 2270-71 (2006).

⁸¹ *Id.*

⁸² *Id.* at 2271.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Davis*, 126 S. Ct. at 2271. Brief for the Respondent indicates that McCottry was under subpoena but failed to appear for Davis' trial and could not be located. Davis argued that the State made no attempt to prove that McCottry was legally unavailable as a witness. Brief for Petitioner, *Washington v. Davis*, No. 05-5224 at 9.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Davis*, 126 S. Ct. at 2271-72.

⁸⁹ *Id.* at 2272.

⁹⁰ *Id.*

house and observed the living room in disarray.⁹¹ Soon after, Amy came back in the house and, upon prompting by the officers in a room separate from Hershel, explained that during a verbal argument “Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice.”⁹²

Hershel, the petitioner, was charged with domestic battery and with violating his probation.⁹³ Amy did not appear at trial but the State introduced her statements through the officers who responded to the scene.⁹⁴ Over defense counsel’s objections, Amy’s statements were admitted as “excited utterances.”⁹⁵ Hershel was found guilty on both counts and his conviction was affirmed on appeal.⁹⁶ The Indiana Supreme Court reaffirmed, explaining that Amy’s statements were nontestimonial because initial inquiries by a first-responding officer are not “interrogation” and Amy’s responses were not motivated by a desire to preserve evidence for trial. The United States Supreme Court granted certiorari.⁹⁷

In a consolidated opinion authored by Justice Scalia, the Court held 9-0 that McCottry’s statements in *Davis* were admissible but 8-1 that Amy’s statements in *Hammon* were inadmissible.⁹⁸ The Court explained that statements made to police during emergency situations are nontestimonial.⁹⁹ Specifically, the Court stated that

[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution.¹⁰⁰

As such, McCottry’s 911 call was nontestimonial because it was made for the purposes of seeking help, but Amy’s statements to the first responding officers were testimonial because Amy was in no immediate

⁹¹ *Id.*

⁹² *Id.* at 2272-73.

⁹³ *Davis*, 126 S. Ct. at 2272.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 2273.

⁹⁷ *Id.*

⁹⁸ *Davis*, 126 S. Ct. at 2277-78, 2280.

⁹⁹ *Id.* at 2273-74.

¹⁰⁰ *Id.* at 2276.

danger when she made them.¹⁰¹

Unlike the reliability focus in *Roberts* or the testimonial focus in *Crawford*, the *Davis* Court shifted the focus to the emergency or non-emergency nature of the particular situation. The reason for this shift is to identify precisely the kind of statements made to police that can be considered “testimony.”¹⁰² If a court determines that the statements in question were made during an emergency and the primary purpose of the interrogation was to enable police assistance, then any responses will be considered nontestimonial.¹⁰³ If there was no emergency and the primary purpose of the interrogation was to investigate past criminal conduct, the police interrogation would induce testimonial responses.¹⁰⁴

The *Davis* test is consistent with *Crawford* because it acknowledges that interrogation, in its colloquial sense, can occur in less formal settings than a legal interpretation of the term allows (i.e., at the scene of a domestic dispute).¹⁰⁵ It is also consistent with the history and purpose of the Confrontation Clause because the *Davis* test recognizes that modern police forces, though they bear a resemblance to justices of the peace in old England, protect and serve the public in ways that the English justices of the peace did not and, as such, are not always vehicles for testimonial statements (i.e., 911 calls).¹⁰⁶ The *Davis* test appears to give the phrase “witnesses against” its plain meaning as directed by the Sixth Amendment, and brings us one step closer to a clear understanding of the Confrontation Clause.

Since the *Davis* decision, Massachusetts courts have applied the emergency/non-emergency distinction. In *Commonwealth v. Galicia*,¹⁰⁷ the SJC was asked, as in *Davis*, whether “a judge properly admitted in evidence statements made by a victim in the course of an emergency 911 telephone call and later to police officers who responded to the scene.”¹⁰⁸ The *Galicia* court held that *Davis* controlled and that, as a result, the admission of the 911 call was proper but the admission of the subsequent police questioning was not.¹⁰⁹ Despite the latter holding, however, the SJC affirmed the defendant’s conviction because the admission of the latter responses to police questioning was harmless beyond a reasonable

¹⁰¹ *Id.* at 2277, 2278.

¹⁰² *Davis*, 126 S. Ct. at 2274 (citing *Crawford* court’s use of a Webster’s Dictionary from 1828).

¹⁰³ *Id.* at 2273.

¹⁰⁴ *Id.* at 2273-74.

¹⁰⁵ See *Crawford v. Washington*, 541 U.S. 36, 53 n.4 (2004).

¹⁰⁶ See *id.* at 53.

¹⁰⁷ 447 Mass. 737, 857 N.E.2d 463 (2006).

¹⁰⁸ *Galicia*, 447 Mass. at 737, 857 N.E.2d at 465.

¹⁰⁹ *Galicia*, 447 Mass. at 745, 857 N.E.2d at 470.

doubt.¹¹⁰

IV. ANALYSIS FOR “TESTIMONIAL” STATEMENTS UNDER CURRENT UNITED STATES/MASSACHUSETTS LAW

A. Testimonial Per Se

The testimonial per se prong from *Gonsalves* focuses on whether a statement was made in response to a police interrogation. Under *Gonsalves*, this occurred any time a declarant responded to a police question unrelated to the community caretaking function.¹¹¹ In *Davis*, however, the Supreme Court enunciated something a bit different:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, *and* that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution.¹¹²

Thus, the *Davis* Court considered the primary purpose of the government in eliciting statements from a declarant as dispositive of the issue. Massachusetts courts, however, articulated a second necessary step by determining the reasonable declarant’s objective expectation of the manner in which such statements would be used. Where *Davis* and *Gonsalves* diverge, *Davis* is controlling under the Sixth Amendment and should be the focus of the testimonial per se analysis. For example, after *Davis*, the *Gonsalves* testimonial-in-fact analysis is no longer controlling on statements involving police questioning.

The SJC’s reasoning in *Gonsalves* may still prove useful in litigating some of the extraneous testimonial per se issues as they appear *infra*. Further, because the *Gonsalves* decision interpreted the Sixth Amendment, the SJC may still interpret the cognate provisions of Article 12 in accordance with the *Gonsalves* reasoning.¹¹³ As such, the Massachusetts crimi-

¹¹⁰ *Galicia*, 447 Mass. at 739-40, 857 N.E.2d at 466.

¹¹¹ *Commonwealth v. Gonsalves*, 445 Mass. 1, 8-9, 833 N.E.2d 549, 555-56 (2005).

¹¹² *Davis v. Washington*, 126 S. Ct. 2266, 2276 (2006) (emphasis added).

¹¹³ See *supra* note 7 (explaining SJC’s authority to interpret state constitutional provi-

nal defense bar should argue in accordance with the *Gonsalves* testimonial in fact reasoning under Article 12 even as it is superseded for purposes of the Sixth Amendment. Moreover, Massachusetts litigators should keep an eye on the Supreme Court's Sixth Amendment jurisprudence, always bearing in mind that, in *Gonsalves*, the SJC was interpreting the Sixth Amendment.

The *Davis* opinion removed several ambiguities in Confrontation Clause jurisprudence with respect to police interrogation, yet many questions still remain. For example: How is the analysis done? Is it the questions, answers, or both that indicate an emergency is ongoing? Where does one draw the line between testimonial and nontestimonial statements? When does a suspect's identity help resolve an emergency? Can an emergency scene move? Furthermore, what is the scope of harm that defines an emergency? These questions and others will be litigated in the post-*Davis* litigation crucible. Fortunately, the aforementioned opinions provide some insight and perhaps even answers for those who are searching.

How, then, is the analysis done? In *Davis*, the Court explained that McCottry's statements to the 911 operator described information about current circumstances necessary to resolve a "bona fide physical threat."¹¹⁴ Her "frantic answers were provided over the telephone, in an environment that was not tranquil" and the level of formality stood in stark contrast to the calm station-house interrogation in *Crawford*.¹¹⁵ Thus, McCottry's statements did not have any "courtroom analogues" and were not a "weaker substitute for live testimony."¹¹⁶ Importantly, however, the Court explained that portions of McCottry's statements, such as those made after *Davis* left the premises and the emergency had seemingly subsided, could be redacted or excluded during a motion *in limine*.¹¹⁷

In *Hammon*, on the other hand, the Court explained that the subject of police questioning was directed toward "possibly criminal past conduct" as opposed to the current resolution of an emergency situation.¹¹⁸ When the officers arrived on the scene, they heard no arguments between Amy and Hershel, saw no violence or acting out by either of them and, when asked if things were okay, Amy told the officers "that things were fine."¹¹⁹ Further, the officers' presence on the scene assured that Amy was in no immediate danger from Hershel.¹²⁰ As a result, the Court concluded that

sions as more protective of defendants rights).

¹¹⁴ *Davis*, 126 S. Ct. at 2276-77.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2277.

¹¹⁸ *Davis*, 126 S. Ct. at 2278.

¹¹⁹ *Id.*

¹²⁰ *Id.*

the primary purpose of the police questioning was to “nail down the truth about past criminal events” and Amy’s responses were therefore testimonial.¹²¹

The analyses in *Davis* and *Hammon* provide several points to consider for motions *in limine*. First, was the declarant in physical danger while making the statements? Second, can the scene be described as frantic or tranquil? Why? Remember, the analysis is an objective one; it is crucial in litigation, therefore, to bring to life the circumstances as all of the actors experienced them. Third, keep in mind that both the questions posed by the police and the answers by the declarants are important. With that in mind, determine whether the officer’s questions were asked for purposes of subduing a hostile situation, preventing injury, or providing medical care.¹²² Determine whether the declarant’s statements were made in the present tense or the past tense. Tense might indicate whether the declarant was seeking help or reporting a crime. Consider also whether the statements are analogous to formal testimonial materials such as courtroom testimony, affidavits, or depositions. While none of these factors alone are dispositive, all are helpful.¹²³

Another important question to ask is: Where does one draw the line between testimonial and nontestimonial statements? In *Gonsalves*,¹²⁴ the court identified *Maryland v. Buie*¹²⁵ to support its use of an objective analysis.¹²⁶ The analysis in *Buie*, however, may also provide a useful analogy to the confrontation analysis. *Buie* stands for the proposition that, under the Fourth Amendment, police can do a simple protective sweep of the premises when executing a dangerous search warrant to determine whether their safety is in jeopardy.¹²⁷ The Court explained that, under the Fourth

¹²¹ *Id.*

¹²² Though questions can prove helpful “it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.” *Davis*, 126 S. Ct. at 2274 n.1. Without reading too much into the decision, the Court vacated and remanded a case where the declarant spontaneously volunteered information to police, without prompting, and the state court held the statements nontestimonial. See *State v. Forrest*, 64 N.C. App. 272 (2004), *vacated*, 126 S. Ct. 2983 (2006). An issue the Court’s decision does not reach is whether, once the emergency subsides, a declarant’s statements would be testimonial or nontestimonial in the absence of questioning.

¹²³ Professor Myrna Raeder states that she “would not be surprised if pressure emerges to change the typical 911 script to better fit with *Davis* by specifically asking as the first question whether the caller is presently in danger.” Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 346-47 (2005).

¹²⁴ 445 Mass. 1, 833 N.E.2d 549 (2005).

¹²⁵ 494 U.S. 325 (1990).

¹²⁶ *Gonsalves*, 445 Mass. at 10, 833 N.E.2d at 557 (explaining that the law enforcement sweep in *Buie* was justified by the objective standard).

¹²⁷ *Buie*, 494 U.S. at 335.

Amendment, a protective sweep is “not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel” the danger and ensure the safety of the officers.¹²⁸

The same principle of necessity that limits the safety exception to Fourth Amendment protections from unreasonable search and seizure also limits the emergency function exception to the confrontation right under the Sixth Amendment.¹²⁹ Just as a protective sweep may constitute justification for seizure of evidence, police questioning only produces nontestimonial responses when necessary to enable police assistance in an emergency, but no longer.¹³⁰ For example, during a hostage crisis, motive might be essential knowledge for the police to negotiate with the perpetrator and questions designed to elicit such knowledge might produce non-testimonial statements. The same information about motive might be testimonial in different circumstances, however, like in a domestic abuse situation. If one is able to determine when the questioning ceases to be necessary for police assistance, make sure that the judge limits the evidence accordingly. If the emergency has subsided but the return of the perpetrator appears imminent or uncertain, perhaps a situation exists where police questioning elicits hybrid responses; seemingly testimonial declarations are elicited along with non-testimonial assertions responsive to emergency based questions. Therefore, the moment that the emergency dissipates is critical in providing a line of demarcation for Confrontation Clause analysis, similar to the point of seizure being critical to the constitutional justification for a seizure.

Next, when are questions of identity made for the purpose of enabling police assistance? The *Davis* Court observed that the 911 call operator asked about the assailant’s identity “so that the dispatched officers might know whether they would be encountering a violent felon.”¹³¹ The Court further explained that because “[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim . . . [s]uch exigencies may *often* mean that ‘initial inquiries’ produce non-testimonial statements.”¹³² If the statements are made during an emer-

¹²⁸ *Id.*

¹²⁹ See *Davis v. Washington*, 126 S. Ct. 2266, 2276 (2006). The Court explained that one main difference between the statements in *Davis* and the statements in *Crawford* was that, in *Davis*, “the elicited statements were necessary to *resolve* the present emergency.” *Id.*

¹³⁰ See *infra* notes 131-134 and accompanying text.

¹³¹ *Davis*, 126 S. Ct. at 2277 (citing *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004)).

¹³² *Davis*, 126 S. Ct. at 2279. In *Hiibel* itself, the Court stated:

gency, it is likely that the identity and description of the assailant will help resolve questions concerning immediate police assistance.¹³³ If, on the other hand, no emergency exists then the police purpose of “‘initial inquiries’ is immaterial, even if officers claim to be assessing the situation.”¹³⁴

Can an emergency scene move? The *Gonsalves* court seems to have anticipated this question. The court stated:

Although not the facts before us, we acknowledge that situations may occur in which the “volatile” scene is no longer restricted to the scene of the original incident, such as when law enforcement officers become aware that a fleeing party is driving while under the influence of alcohol or drugs, or if such a person is armed and known to be seeking to carry out specific threats, or certainly if a hostage is involved. These situations pose immediate danger to the safety of the community. In contrast, the volatile scene exception to the definition of interrogation does not encompass questioning meant to apprehend a perpetrator without a more concrete concern of impending harm.¹³⁵

In other words, the scene is only one factor to consider when determining whether an emergency exists. The focus is on the “concrete harm” and if that harm can be articulated to exist away from the scene, the analysis need not be restricted to the original scene.

Consider also the scope of harm that defines an emergency. In *Davis*, the Court explained that:

[j]ust as for Fifth Amendment purposes, “police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect,” *New York v. Quarles*, 467 U.S. 649, 658-59 (1984), trial courts will recognize the point at which, for Sixth Amendment pur-

Obtaining a suspect’s name . . . serves important government interests. Knowledge of the identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder . . . Identity may prove particularly important in cases such as this, where the police are investigating what appears to be a domestic assault.

Hiibel, 542 U.S. at 186.

¹³³ See *Head v. State*, 912 A.2d 1 (Md. Ct. Spec. App. 2006); see also *State v. Washington*, 725 N.W.2d 125 (Minn. Ct. App. 2006).

¹³⁴ *Davis*, 126 S. Ct. at 2279; see also *State v. Kirby*, 908 A.2d 506 (Conn. 2006).

¹³⁵ *Commonwealth v. Gonsalves*, 445 Mass. 1, 10 n.4, 833 N.E.2d 549, 556 n.4 (2005).

poses, statements in response to interrogations become testimonial.¹³⁶

The reference to *Quarles*, like the SJC's earlier reference to *Buie*, is instructive because the *Quarles* Court illustrated an exigent circumstances exception to the Fifth Amendment, similar to the Fourth Amendment exception in *Buie*. In *Quarles*, the officers believed that the whereabouts of an apprehended suspect's weapon "posed [a] danger to the public safety."¹³⁷ For example, a joint-venturer could retrieve the gun and carry out a crime, a curious passer-by could pick it up and fire it inadvertently, or a child could find it.¹³⁸ As such, the officers did not have to inform the suspect of his *Miranda* rights before interrogating him about the missing gun.¹³⁹ If the defendant *Quarles* was instead an unavailable witness and his statements regarding the location of the gun were being challenged on confrontation grounds, those statements might be admissible as non-testimonial under the emergency function exception.

Medical emergencies also fall within the emergency function exception to the Confrontation Clause. In *Gonsalves*, the court explained that providing medical care was part of the police "caretaking function" and is separate from investigation.¹⁴⁰ The court cited several cases in support of this proposition.¹⁴¹ Consider the facts in *Commonwealth v. Leonard*,¹⁴² for example: the defendant was parked in her vehicle in a breakdown lane at about one a.m. on a busy street in Boston.¹⁴³ A trooper observed the motionless defendant and pulled alongside her vehicle.¹⁴⁴ The trooper unsuccessfully tried to get her attention by activating his lights, by using the PA system, and by sounding the air horn.¹⁴⁵ The trooper knocked on the defendant's window, got no response, and opened her door.¹⁴⁶ The defendant woke up and became physically and verbally abusive.¹⁴⁷ The trooper ob-

¹³⁶ *Davis*, 126 S. Ct. at 2277.

¹³⁷ *New York v. Quarles*, 467 U.S. 649, 657-58 (1984).

¹³⁸ *See id.*

¹³⁹ *Id.*

¹⁴⁰ *Gonsalves*, 445 Mass. at 9-10, 833 N.E.2d at 556-57.

¹⁴¹ *Id.* The cases were as follows: *Commonwealth v. Evans*, 436 Mass. 369, 764 N.E.2d 841 (2002); *Commonwealth v. Brinson*, 440 Mass. 609, 800 N.E.2d 1032 (2003); *Commonwealth v. Murdough*, 428 Mass. 760, 704 N.E.2d 1184 (1999); *Commonwealth v. Leonard*, 422 Mass. 504, 663 N.E.2d 828 (1996); *Commonwealth v. Smigiano*, 427 Mass. 490, 694 N.E.2d 342 (1998).

¹⁴² 422 Mass. 504, 663 N.E.2d 828 (1996).

¹⁴³ *Leonard*, 422 Mass. at 504-05, 663 N.E.2d at 829.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Leonard*, 422 Mass. at 504-05, 663 N.E.2d at 829.

¹⁴⁷ *Id.*

served a strong odor of alcohol from the defendant and arrested her.¹⁴⁸ Relying on the Fourth Amendment, the District Court judge suppressed all the evidence obtained after the trooper opened the defendant's door.¹⁴⁹

The SJC reversed the District Court because the trooper's opening of the defendant's door was "a minimally intrusive response to one of the myriad and uncategorizable events that may alert an officer that his assistance may be required."¹⁵⁰ The defendant was parked on the side of a busy road at one a.m., suggesting that she was experiencing some sort of a problem.¹⁵¹ The fact that she remained unresponsive further suggested that she may have been ill, perhaps even dying.¹⁵² At that point, and consistent with the Fourth Amendment, the trooper properly opened her car door.

Finally, another case that illustrates the potential scope of harm, at least in analogous Fourth Amendment situations, is *Commonwealth v. Murdough*.¹⁵³ There, the defendant was parked in a highway rest area on a "bright, cold, January morning."¹⁵⁴ Two troopers pulled into the rest area after having observed the car there earlier.¹⁵⁵ As they approached the defendant's vehicle, the troopers noticed that the defendant's brake lights were on and that his eyes were closed.¹⁵⁶ The troopers approached the car and, after two or three minutes of knocking, the defendant finally woke up and rolled down his window.¹⁵⁷ The defendant was incoherent, however, and quickly fell back asleep.¹⁵⁸ The troopers woke him up again, asked him to step out of the car, at which point drugs came into plain view of the troopers.¹⁵⁹ The troopers arrested the defendant for possession of controlled substances and seized the marijuana and cocaine observed in the car.¹⁶⁰ The District Court judge suppressed evidence of the drugs because, he stated, the troopers merely had a "hunch" that the defendant was under the influence and went beyond the caretaking function by looking for evidence.¹⁶¹

¹⁴⁸ *Id.*

¹⁴⁹ *Leonard*, 422 Mass. at 506, 663 N.E.2d at 829. A single justice of the SJC granted the Commonwealth's motion for interlocutory review and referred the case to the Appeals Court. The SJC then transferred the matter to the full bench on its own motion. *Leonard*, 422 Mass. at 506, 663 N.E.2d at 829.

¹⁵⁰ *Leonard*, 422 Mass. at 509, 663 N.E.2d at 832.

¹⁵¹ *Leonard*, 422 Mass. at 507-08, 663 N.E.2d at 830-31.

¹⁵² *Id.*

¹⁵³ 428 Mass 760, 704 N.E.2d 1184 (1999).

¹⁵⁴ *Murdough*, 428 Mass. at 761, 704 N.E.2d at 1185.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Murdough*, 428 Mass. at 761, 704 N.E.2d at 1185.

¹⁵⁸ *Id.*

¹⁵⁹ *Murdough*, 428 Mass. at 761, 704 N.E.2d at 1185.

¹⁶⁰ *Id.*

¹⁶¹ *Murdough*, 428 Mass. at 762, 704 N.E.2d at 1185-86.

The Appeals Court reversed the ruling and the SJC affirmed.¹⁶² The SJC held that the trooper's actions were, in fact, based on the caretaking function and, therefore, consistent with the Fourth Amendment.¹⁶³ The SJC explained that

if the community caretaking function . . . means anything, surely it allows a police officer to determine whether a driver is in such a condition that if he resumes operation of his vehicle, in which he is seated at a highway rest stop, he will pose an extreme danger to himself and others.¹⁶⁴

For Confrontation Clause purposes, *Murdough* is a good example of a situation where, as Justice Thomas warned in his *Davis* dissent, “the purposes of an interrogation [can be] both to respond to the emergency situation and to gather evidence.”¹⁶⁵ Here, the emergency was diffused by gathering evidence sufficient for arrest, yet the caretaking function was implicated.

In sum, both *Davis* and *Gonsalves* provide the framework for arguing and applying the emergency function exception to the testimonial per se analysis. *Davis* and *Gonsalves* also highlight cases that analyze Fourth and Fifth Amendment rights in the same objective way premised on an “emergency” based exception. The cases cited in this section may provide guidance for criminal litigators to apply in practice.

B. Testimonial in Fact

Recall that the SJC in *Gonsalves* set out two categories of “testimonial” statements for Confrontation Clause analysis. The testimonial-in-fact analysis comes into play whenever the statements are not made to law enforcement officials and analyzed under the testimonial per se analysis.¹⁶⁶

¹⁶² *Murdough*, 428 Mass. at 760, 704 N.E.2d at 1185.

¹⁶³ *Murdough*, 428 Mass. at 763-64, 704 N.E.2d at 1186-87. The court also added that, for search and seizure purposes, the United States Constitution and the Massachusetts Declaration of Rights are “coextensive.” *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Davis v. Washington*, 126 S. Ct. 2266, 2283 (2006) (Thomas, J., dissenting).

¹⁶⁶ A related issue is how Massachusetts treats business and public records after *Crawford*. In a pre-*Gonsalves* decision, the court held that business records and public records are historical exceptions to the Confrontation Clause and that in particular, drug certifications were nontestimonial because they were nondiscretionary records of primary fact. *See Commonwealth v. Verde*, 444 Mass. 279, 827 N.E.2d 701 (2005). This view has been affirmed and expanded to prior records of conviction and toxicology reports. *See Commonwealth v. Crapps*, 64 Mass. App. Ct. 915, 835 N.E.2d 275 (2005), *further rev. den.*, 445 Mass. 1107, 838 N.E.2d 576 (2005); *Commonwealth v. Lampron*, 65 Mass. App. Ct. 340, 839 N.E.2d 870 (2005), *further rev. den.*, 843 N.E.2d 638 (2006). Other jurisdictions

We turn, therefore, to the objective expectation of a reasonable declarant as construed by the *Gonsalves* court.¹⁶⁷ The question is whether a reasonable person in the declarant's position would believe that the declarant's statements might be used in the investigation or prosecution of a crime.¹⁶⁸ The court explained that the analysis must be focused on the "declarant's intent by evaluating the specific circumstances in which the out-of-court statement is made," rather than specifically on the declarant's familiarity with trial procedure or its associated formalities.¹⁶⁹ The assessment of what a reasonable person in the declarant's position would anticipate takes into account the "purpose for which the statement was made or procured" and necessarily includes considering possible manipulation of circumstances by the questioner or declarant.¹⁷⁰

For example, an analysis of the objective expectation of a child declarant may be found in *Commonwealth v. DeOliveira*.¹⁷¹ *DeOliveira* was a child rape case in which the Court concluded that the unavailable child witness perceived an examining physician's questions to be medical and, "in the forthright manner of a small child, readily responded."¹⁷² The Court explained that the small child did not recognize the criminality of the defendant's acts nor did she comprehend the potential for the prosecutorial use of her answers to the questions.¹⁷³

As a final thought, it is imperative to breathe life into the courtroom by recreating the reality in which the statements were made. By providing trial and appellate courts with the narrative richness of the drama, or lack thereof, of the circumstances that existed for the persons involved, the opportunity to persuade the court increases. A mere proffer of either the prosecution or defense assessment of the statement is often insufficient.

have applied the fact-based objective reasonable declarant analysis to such records with varying results. *See, e.g.,* *State v. Caulfield*, 721 N.W.2d 886 (Minn. 2006) (holding drug report testimonial because it was "prepared for litigation"). *But see* *United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006) (explaining that autopsy reports are not testimonial because as business records, they cannot be made in anticipation of litigation and therefore cannot be testimonial under the fact-specific *Crawford* analysis); *see also* *State v. Craig*, 853 N.E.2d 621 (Ohio 2006) (holding the same).

¹⁶⁷ *See* *Commonwealth v. Gonsalves*, 445 Mass. 1, 11-15, 833 N.E.2d 549, 558-59 (2005).

¹⁶⁸ *Id.*

¹⁶⁹ *Gonsalves*, 445 Mass. at 15, 833 N.E.2d at 559.

¹⁷⁰ *See Gonsalves*, 445 Mass. at 15 n.8, 833 N.E.2d at 559 n.8. It is necessary to keep in mind that the declarant's motivations and whether a reasonable person in the declarant's position would anticipate the out-of-court statement being used for investigatory or prosecution purposes is simply not implicated when statements are made to a government official. *Id.*

¹⁷¹ 447 Mass. 56, 65, 849 N.E.2d 218, 226 (2006).

¹⁷² *Id.*

¹⁷³ *Id.*

Particularly where the issue to be resolved implicates the application of the testimonial in fact analysis, the better practice is to offer the court all of the intensity and humanity of the circumstances possible.

Factors to address include, but are not limited to, the following:¹⁷⁴

1. to whom was the statement made;
2. whether the statement was made in a public or private setting;
3. the emotional temperature of the declarant and the would-be witness;
4. the motivation behind the out-of-court statement (i.e., whether it was made to stop an ongoing emergency or to provide information related to past events);
5. fully develop the circumstances;
6. whether police were present;
7. the content of the statement at issue; and
8. whether the out-of-court statement was unsolicited or responsive to questioning.

By analyzing the facts of a particular case within these factors, Massachusetts litigators will be able to support their argument cogently and effectively, thereby helping the court decide the important issue at hand.

C. Forfeiture by Wrongdoing

It is a basic tenet of our system of justice that one may not use the courts to perpetuate and profit by one's wrongdoing. When there is evidence that a defendant has played a role in procuring the unavailability of a percipient witness, he may forfeit his right to object to the introduction in evidence, on both hearsay and constitutional grounds, of the out-of-court statements of the absent witness.¹⁷⁵ The *Crawford* court rejected reliability as a guidepost for the admissibility of testimonial statements as "an amorphous, if not entirely subjective, concept."¹⁷⁶ As the Court began its disassociation from *Roberts*, it recognized an exception to the "constitutionally prescribed method of assessing reliability."¹⁷⁷ The Court noted with approval the doctrine of forfeiture by wrongdoing as one such exception

¹⁷⁴ These factors were laid out in *Commonwealth v. Kartell*, 20 Mass. L. Rptr. 134 n.10, No. 1999-0655, 2005 WL 2739786 (Mass. Super. Oct. 25, 2005).

¹⁷⁵ *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006).

¹⁷⁶ *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

¹⁷⁷ *Id.* at 61. (Specifically, the right to confront one's accuser in a public courtroom where the witness is subject to the rigors of cross-examination).

which “does not purport to be an alternative means of assessing reliability.”¹⁷⁸ Rather, the Court stated that the doctrine “extinguishes confrontation claims” on grounds of equity.¹⁷⁹

The Court briefly revisited its approval of the forfeiture doctrine in *Davis* when it remanded the *Hammon* case to the Indiana state court. Respondents and a number of amici maintained that the very nature of domestic violence offenses, and the difficulty of so-called victimless prosecutions, require “greater flexibility in the use of testimonial evidence.”¹⁸⁰ In dicta, the Court explained,

This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.¹⁸¹

Professor Joan Meier noted that, “[b]y expressly linking [the] awareness [of the dark realities with which domestic violence victims and their advocates contend everyday] to the forfeiture doctrine . . . the Court calls attention to the importance and centrality of this doctrine in domestic violence prosecutions.”¹⁸² Meier argues that the Court “effectively invites lower courts to utilize liberal burdens of proof and evidentiary standards, specifically mentioning the preponderance of the evidence standard and the admissibility of hearsay as common . . . and appropriate standards.”¹⁸³

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Davis*, 126 S. Ct. at 2279-80.

¹⁸¹ *Id.* For the Massachusetts practitioner and jurist, article 12 should be viewed “co-extensively with the Sixth Amendment,” even as article 12 provides broader protection for a defendant to meet an adverse witness “face to face.” *Commonwealth v. Edwards*, 444 Mass. 526, 830 N.E.2d 158 (2005) (citing *Commonwealth v. Amirault*, 424 Mass. 618, 677 N.E.2d 652 (1997)); *Commonwealth v. Bergstrom*, 402 Mass. 534, 524 N.E.2d 366 (1988)).

¹⁸² Joan S. Meier, *Davis/Hammon, Domestic Violence, and the Supreme Court: The Case for Cautious Optimism*, 105 MICH. L. REV. FIRST IMPRESSIONS 22, 24 (2006), available at <http://www.michiganlawreview.org/firstimpressions/vol105/meier.pdf>.

¹⁸³ *Id.*

Indeed, the Court stated that past application of *Roberts* likely rendered application of the forfeiture doctrine less necessary because prosecutors could demonstrate reliability more readily than they could “show procurement of the witness’s unavailability.”¹⁸⁴ With respect to *Roberts*, several commentators have noted its faintly gasping demise, tucked neatly into the *Davis* decision.¹⁸⁵ Absent the reliability prong of *Roberts*, courts must turn now to the rules of evidence in the assessment of nontestimonial statements.

With regard to liberal burdens of proof and evidentiary standards, the *Davis* Court cited *Commonwealth v. Edwards*¹⁸⁶ as an example of a state decision relying upon the forfeiture doctrine codified in Federal Rule of Evidence 804(b)(6).¹⁸⁷ When the SJC adopted its current forfeiture doctrine it explained that, “the doctrine furthers the truth-seeking function of the adversary process, allowing fact finders access to valuable evidence no longer available through live testimony.”¹⁸⁸ The SJC also stated, “[w]ithout question, the doctrine should apply in cases where a defendant murders, [] threatens, [] or intimidates a witness in an effort to procure that witness’s unavailability.”¹⁸⁹ Furthermore, a defendant who wrongfully procures a witness’s absence not only forfeits his confrontation rights but loses as well the opportunity to object to the admission of nontestimonial hearsay.¹⁹⁰

Legal scholars and commentators support a broad application of the doctrine, particularly in cases involving domestic violence. For instance, Professor Friedman maintains that, “[t]he doctrine should be applied robustly – the court should be able to find forfeiture on the basis of the same wrongdoing that underlies the jury’s finding of guilt on the mer-

¹⁸⁴ *Davis*, 126 S. Ct. at 2280.

¹⁸⁵ In *Davis*, the Court stated that, “[w]e must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay.” James J. Duane, *The Cryptographic Corner’s Report on Ohio v. Roberts*, (July 2006), available at <http://www-personal.umich.edu/~rdfrdman/RobertsDavis.doc>. James Duane explained that Justice Scalia stated that “[t]he answer to [this] question was suggested in *Crawford*, even if not explicitly held” when the *Crawford* court “concluded that the history and text of the Confrontation Clause reflect a focus on *testimonial* hearsay” and provided “[a] limitation so clearly reflected in the text of the constitutional provision *must* fairly said to mark out not merely its ‘core,’ but its perimeter.” *Id.* Duane noted that prior to the Court’s consideration of whether the Confrontation Clause applies only to testimonial hearsay, Justice Scalia noted, “It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay, is not subject to the Confrontation Clause.” *Duane*, quoting *Davis*, 126 S. Ct. at 2273.

¹⁸⁶ 444 Mass. 526, 830 N.E.2d 158 (2005).

¹⁸⁷ *Davis*, 126 S. Ct. at 2280.

¹⁸⁸ *Edwards*, 444 Mass. at 535, 830 N.E.2d at 167.

¹⁸⁹ *Edwards*, 444 Mass. at 537, 830 N.E.2d at 168-69.

¹⁹⁰ *Edwards*, 444 Mass. at 540, 830 N.E.2d at 170.

its.”¹⁹¹ Furthermore, the SJC clearly stated that, in instances of collusion, even where an unavailable witness has decided on her own not to testify, the defendant may forfeit his confrontation right and hearsay objections to out-of-court testimonial statements “where the defendant has had a meaningful impact on the witness’s unavailability.”¹⁹² Defining the contours of forfeiture in the Commonwealth provides the bench and the bar with a number of challenges.

First and foremost, practitioners should seek an evidentiary hearing on the determination of forfeiture. The SJC suggests that the parties be given the opportunity to present evidence outside of the jury’s presence. The Commonwealth bears the burden of proving to the trial judge by a fair preponderance of the evidence: (1) the would-be witness’s unavailability;¹⁹³ (2) which is due to the defendant’s wrongdoing;¹⁹⁴ and (3) the defendant had the intent to procure the witness’s unavailability in order to prevent his or her testimony at trial.¹⁹⁵ Thus, the introduction of documentary evidence, such as telephone records and perhaps e-mail, enables the court to consider the circumstances fully. In the event that the witness may have given prior testimony under oath, even if the opportunity for cross-examination was not constitutionally adequate, the transcript or recording of the prior testimony must be available for the court’s consideration.¹⁹⁶

¹⁹¹ Richard D. Friedman, “*We Really (For the Most Part) Mean It!*,” 105 MICH. L. REV. FIRST IMPRESSIONS 1, 5 (2006), available at <http://www.michiganlawreview.org/firstimpressions/vol105/friedman.pdf>. In addition, Professor Friedman suggests that one of the critical tests regarding the Supreme Court’s assertion in *Crawford* as to forfeiture will involve “[w]hat, if any, procedures the Supreme Court [will require] prosecutors and trial judges to pursue as a predicate for a conclusion of forfeiture.” *Id.*

¹⁹² *Edwards*, 444 Mass. at 541, 830 N.E.2d at 171.

¹⁹³ The Commonwealth must produce or demonstrate unavailability of the declarant whose statement it seeks to introduce which includes a showing of a good faith effort to secure the out-of-court declarant’s attendance at trial. *Commonwealth v. Bohannon*, 385 Mass. 733, 434 N.E.2d 163 (1982).

¹⁹⁴ The Court explained that:

The broad scope of conduct [whether criminal or not] that may give rise to a forfeiture is consistent with the philosophy underlying the forfeiture rule . . . “[T]he disclosure of relevant information at a public trial is a paramount interest, and any significant interference with that interest, other than by exercising a legal right to object at the trial itself, is a wrongful act.” . . . Thus, it is the fact that a defendant’s conduct interferes with the interest in having a witness testify at a public trial that makes the defendant’s conduct wrongful.

Edwards, 444 Mass. at 538, 830 N.E.2d at 168 (quoting *State v. Hallum*, 606 N.W.2d 351, 356 (Iowa 2000)).

¹⁹⁵ *Edwards*, 444 Mass. at 540, 830 N.E.2d at 170.

¹⁹⁶ The Commonwealth may seek to introduce evidence demonstrating forfeiture as evidence of consciousness of guilt or the unavailable declarant’s state of mind.

The presentation of live testimony will also assist the court, bearing in mind that the rules of evidence are not applicable except when a witness exercises a privilege. The defense may, however, raise its objection to any evidence offered in order to preserve its rights at trial and for appellate review. Since the trial court will arrive at its forfeiture determination as a preliminary question of fact upon which admissibility depends,¹⁹⁷ the court may consider the unavailable witness's out-of-court testimonial statements.¹⁹⁸ How, then, will the doctrine be applied when the appropriate case arises?

Some legal commentators argue in support of the proposition that instances of domestic violence and abuse constitute an ongoing emergency. Professor Deborah Tuerkheimer argues that the exigency perceived by a battered woman is "distinct from that experienced by victims of other [isolated] types of crimes."¹⁹⁹ In the face of an ongoing threat, courts may be inclined to conclude that "in most abusive relationships, [witness tampering] conduct is inexorably bound up in the violent exercise of power that is itself criminal."²⁰⁰ Thus, law enforcement intervention merely provides the victim with a temporary reprieve from immediate violence with the promise of future violence lying beneath the surface.²⁰¹

Consider also the "challenge [] to establish new junctures for cross-examination so that courts can enforce the Confrontation Clause without excluding evidence. These new junctures would be particularly useful if they fell between the time of the victim's initial statement to police and the time of trial."²⁰² Thus, there is the opportunity for persuasive argument urging greater pre-trial opportunity for cross-examination in domestic violence and similar cases where victims become increasingly reluctant to continue as time passes.²⁰³ The equitable doctrine of forfeiture by wrongdoing is ripe for challenge based on the confrontation right, the burden of proof, and the risk of undue prejudice in criminal cases. Since *Crawford* was decided in 2004, the United States Supreme Court and our SJC have invited further exploration of the forfeiture doctrine and its fact specific inquiry.

¹⁹⁷ See *Commonwealth v. Rosenthal*, 432 Mass. 124, 127 n.4, 732 N.E.2d 278, 281 n.4 (2000) (Judge must be satisfied, by a preponderance of the evidence, that the wrongful (not necessarily criminal) act occurred and that the defendant was the actor; jury then evaluates the evidence as to weight and credit).

¹⁹⁸ *Edwards*, 444 Mass. at 545, 830 N.E.2d at 174.

¹⁹⁹ Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 9 (2006).

²⁰⁰ *Id.* at 11.

²⁰¹ *Id.* at 23.

²⁰² Thomas Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 784 (2005).

²⁰³ *Id.*

V. CONCLUSION

While a trial is a search for truth – truth, at least, in a certain way²⁰⁴ – it is also part of a quest for justice. The aim of a criminal trial is therefore twofold: “that guilt shall not escape or innocence suffer.”²⁰⁵ But these aims often conflict with each other. On the one hand, it is important to convict those guilty of committing crimes in order to promote public safety and impose a punishment that fits the crime, thus preserving the social compact. On the other hand, our Constitution, which contains certain requirements for fairness toward defendants during trial, was written to promote liberty and ensure that liberty is never taken erroneously. In a criminal trial, however, liberty and justice may, at times, appear on opposite sides of an argument.

In order to balance these apparently countervailing interests, one must first recognize, at least in the macro sense, that these interests are not necessarily inconsistent with each other. Criminal convictions must be achieved in a manner in which society can trust the result. When society trusts the result, the social compact remains intact and justice has been done. Second – and here is a major point underlying this discussion – one must look to the founding fathers of this great nation who, in the Constitution, did the balancing for us. As such, when the police or their agents obtain hearsay primarily for the purposes of convicting a criminal defendant, that evidence needs to be constitutionally tested through cross-examination. If the hearsay is not obtained for those purposes or, in cases where the police are not implicated, the “objectively reasonable declarant” could not expect the statements to be used for investigation or prosecution, the evidence should be available for the government to help convict the guilty and protect the safety of the public. This is what both liberty and justice require. After all, a trial is not only a search for the truth, but a search for justice.

²⁰⁴ Chief Justice Burger wrote of criminal trials: “The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.” *United States v. Nixon*, 418 U.S. 683, 709 (1974).

²⁰⁵ *Berger v. United States*, 295 U.S. 78, 88 (1935).