

**“AN EXERCISE IN FICTION”:  
THE SIXTH AMENDMENT CONFRONTATION  
CLAUSE, FORFEITURE BY WRONGDOING,  
AND DOMESTIC VIOLENCE IN  
*DAVIS V. WASHINGTON***

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I. INTRODUCTION

Women who are victims of domestic violence are often reluctant to cooperate with prosecutors by testifying in court against their abusers. Thus, prosecutors who attempt to introduce out-of-court statements by victims must face hearsay and Confrontation Clause objections by defense attorneys. In the spring of 2006, the Supreme Court decided *Davis v. Washington*,<sup>1</sup> holding that prosecutors could not use out-of-court “testimonial” evidence at trial. This holding has dramatic implications for domestic violence prosecutions. The Court’s test for determining which evidence is “testimonial” requires an objective determination of the primary purpose of the police investigation that elicited the evidence. This test achieves unpredictable results, is unnecessary to prevent abuse, and is not grounded in history or case law. In the same case, the Court articulated the doctrine of forfeiture by wrongdoing, an important tool that allows prosecutors to circumvent the test altogether.

Prosecutions of domestic violence offenders present special problems relating to the Confrontation Clause of the Sixth Amendment. This clause gives a criminal defendant the right “to be confronted with witnesses against him,”<sup>2</sup> and a system that does not provide this constitutional protection “calls into question the ‘ultimate integrity of the fact finding process.’”<sup>3</sup> Although a literal reading of the Confrontation Clause suggests that only testimony made in the courtroom in front of the accused should be admissible, courts have been reluctant to adopt such a narrow interpretation.<sup>4</sup> Because domestic violence prosecutors “are more likely than others to rely on out-of-court statements by accusers who may recant or refuse to cooperate with the prosecution at the time of the trial,”<sup>5</sup> they must find ways to admit this evidence without violating the Sixth Amendment’s requirements. Some

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<sup>1</sup> *Davis v. Washington*, 126 S. Ct. 2266 (2006).

<sup>2</sup> U.S. CONST. amend. VI.

<sup>3</sup> *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

<sup>4</sup> See *Roberts*, 448 U.S. at 63; FED. R. EVID. 803.

<sup>5</sup> Tom Linninger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768 (2005).

experts estimate that eighty to ninety percent of domestic violence victims will recant, often due to the batterer's express threats of retaliation or actual retaliatory violence.<sup>6</sup>

In *Crawford v. Washington*, the Supreme Court held that the Confrontation Clause barred "testimonial statements of a witness who did not appear at trial, unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination."<sup>7</sup> In *Davis v. Washington*, the Supreme Court took a critical step by defining which statements are "testimonial," thus requiring exclusion at trial.<sup>8</sup> In his dissent, Justice Thomas persuasively argued that the Court's test for determining which statements are testimonial is unpredictable, unnecessary to prevent abuse, and not rooted in history or case law.<sup>9</sup> Yet the Court's comment on forfeiture of the right to confrontation as a result of wrongdoing by the defendant provides prosecutors with an important tool for avoiding this cumbersome test altogether.<sup>10</sup> Because "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation,"<sup>11</sup> prosecutors of domestic violence cases must work to expose such wrongdoing.

## II. THE CONFRONTATION CLAUSE AND *CRAWFORD V. WASHINGTON*

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."<sup>12</sup> Rule 802 of the Federal Rules of Evidence provides that "hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."<sup>13</sup> While Rule 803 provides an extensive list of exceptions to the hearsay rule, the Supreme Court has made clear that testimonial hearsay, unlike other hearsay evidence, is subject to the Confrontation Clause.<sup>14</sup>

The Sixth Amendment Confrontation Clause protects a criminal defendant's right to "be confronted with witnesses against him."<sup>15</sup> The *Davis*

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<sup>6</sup> See *id.* at 768–69; *People v. Brown*, 94 P.3d 574, 576 (Cal. 2004); see also Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002) (noting estimates that 90% of domestic violence victims recant); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 (1996) (noting that victims do not cooperate with the prosecution in 80 to 90% of domestic violence cases).

<sup>7</sup> *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

<sup>8</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2273–74 (2006).

<sup>9</sup> *Id.* at 2283 (Thomas, J., concurring in part and dissenting in part).

<sup>10</sup> *Id.* at 2280 (majority opinion).

<sup>11</sup> *Id.*

<sup>12</sup> FED. R. EVID. 801.

<sup>13</sup> FED. R. EVID. 802.

<sup>14</sup> *Davis*, 126 S. Ct. at 2273.

<sup>15</sup> U.S. CONST. amend. VI.

Court noted that the phrase “witnesses against him” could be interpreted in different ways, either “narrowly, to reach only those witnesses who actually testify at trial, or more broadly, to reach many or all of those whose out-of-court statements are offered at trial.”<sup>16</sup> Prior case law suggests that neither of these interpretations is sufficient.<sup>17</sup> In *Ohio v. Roberts*, the Supreme Court held that an out-of-court statement (hearsay evidence) would be admissible if it fell under a firmly rooted hearsay exception or if it bore “particularized guarantees of trustworthiness.”<sup>18</sup> In 2004, the Supreme Court overturned *Roberts* with its decision in *Crawford v. Washington*.<sup>19</sup>

In *Crawford*, the Court held that “witnesses” were those who “bear testimony” and that “testimony is a solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>20</sup> Further, it held that the Confrontation Clause barred “testimonial statements of a witness who did not appear at trial, unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”<sup>21</sup> Unlike casual statements or offhand remarks, which may be barred by hearsay rules, only “testimonial statements” could be subject to the Confrontation Clause because they transformed the declarant into a witness.<sup>22</sup> Additionally, the Court held that “statements taken by police officers in the course of interrogations” were ordinarily testimonial, but it declined to define “interrogation” beyond saying that “[w]e use [it] in its colloquial, rather than its technical legal sense.”<sup>23</sup>

In spite of the seemingly rigid requirements of the Confrontation Clause, the *Crawford* Court did not fail to mention its approval of the rule of forfeiture by wrongdoing, which “extinguishes confrontation claims on essentially equitable grounds.”<sup>24</sup> Federal Rule of Evidence 804(b)(6) makes otherwise inadmissible hearsay evidence admissible if the defendant “engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as witness.”<sup>25</sup>

With respect to proving forfeiture by wrongdoing, Federal Rule of Evidence 804(b)(6) has been interpreted by Courts to hold prosecutors only to a “preponderance of the evidence standard” and “state courts tend to follow the same practice.”<sup>26</sup> Other courts have also held that in a forfeiture hearing,

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<sup>16</sup> *Davis*, 126 S. Ct. at 2281 (Thomas, J., concurring in part and dissenting in part) (citing *Crawford v. Washington*, 541 U.S. 36, 42 (2004)).

<sup>17</sup> *See id.*

<sup>18</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>19</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>20</sup> *Id.* at 51 (quoting 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

<sup>21</sup> *Id.* at 53–54.

<sup>22</sup> *Id.* at 51.

<sup>23</sup> *Id.* at 52–53.

<sup>24</sup> *Id.* at 62.

<sup>25</sup> FED. R. EVID. 804(b)(6).

<sup>26</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006).

hearsay and other inadmissible evidence may be reviewed.<sup>27</sup> Under *Roberts*, few prosecutors resorted to this approach,<sup>28</sup> but after *Crawford*, forfeiture hearings could play a more important role in prosecution of domestic violence crimes.

### III. "HE'S USIN' HIS FISTS": DEFINING "TESTIMONIAL" STATEMENTS

In 2006, the Court heard *Davis v. Washington* and *Hammon v. Indiana*,<sup>29</sup> as a consolidated action, against a backdrop of uncertainty surrounding the meaning of "testimonial statements" in *Crawford*.<sup>30</sup> These were two separate cases, both involving domestic violence criminal prosecutions, consolidated into one opinion; the Court distinguished them based on the different circumstances under which law enforcement procured the witnesses' statements.<sup>31</sup>

In *Davis*, victim Michelle McCottry phoned 911 and made a number of statements to an emergency operator while in the midst of a domestic disturbance.<sup>32</sup> McCottry stated that her boyfriend, Adrian Davis was "here jumpin' on me again" and when the operator asked if he had any weapons, McCottry replied, "No. He's usin' his fists." The operator also learned that "Davis had just r[un] out the door after hitting" McCottry.<sup>33</sup> The police responded to the call shortly thereafter and witnessed injuries to McCottry's arm and face.<sup>34</sup> Law enforcement agents arrested Davis and charged him with felony violation of a no-contact order. The responding police officers were the only witnesses to appear at trial.<sup>35</sup> Although McCottry did not appear at trial, the trial court did admit the 911 tape of her call as evidence.<sup>36</sup>

The jury convicted Davis, and the Washington Court of Appeals affirmed the trial court's decision, holding "that the portion of the 911 conversation in which McCottry identified Davis was not testimonial."<sup>37</sup> The Supreme Court agreed with the lower courts' decisions, finding that the 911 tape was not subject to the Confrontation Clause because it was not testimonial evidence.<sup>38</sup>

The facts in *Hammon* vary slightly. Police responded to a late night domestic disturbance at the home of Amy and Herschel Hammon.<sup>39</sup> When

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<sup>27</sup> *Id.* (quoting *Commonwealth v. Edwards*, 830 N.E.2d. 158, 174 (Mass. 2005)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2266.

<sup>30</sup> *Id.* at 2273.

<sup>31</sup> *Id.* at 2273–74.

<sup>32</sup> *Id.* at 2270–71.

<sup>33</sup> *Id.* at 2271.

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

<sup>35</sup> *Id.*

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

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

<sup>38</sup> *Id.* at 2277.

<sup>39</sup> *Id.* at 2272.

they arrived, Amy was alone on the front porch and Herschel remained inside the home.<sup>40</sup> The police observed evidence of an argument, including a broken heating unit and broken glass in the living room.<sup>41</sup> Once Amy came inside, the police separated the spouses into different parts of the house to “investigate what happened.”<sup>42</sup> Amy told her side of the story, and the officer had her “fill out and sign a battery affidavit.”<sup>43</sup> Herschel faced charges of domestic battery and probation violation, and Amy did not appear at his bench trial even though she was subpoenaed to do so.<sup>44</sup>

The trial court nonetheless admitted Amy’s affidavit and found Herschel guilty of both charges.<sup>45</sup> The Indiana Court of Appeals and the Indiana Supreme Court affirmed this decision, holding that Amy’s statement was an “excited utterance”<sup>46</sup> that was non-testimonial and was thus admissible.<sup>47</sup> Unlike its holding in *Davis*, the Supreme Court disagreed and reversed this decision on the grounds that Amy’s statement was testimonial.<sup>48</sup>

In reviewing both of these cases, the Supreme Court sought to “determine more precisely which police interrogations produce testimony” for purposes of the Confrontation Clause.<sup>49</sup> It found that statements are non-testimonial and are thus admissible when “made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the investigation is to enable police assistance to meet an ongoing emergency.”<sup>50</sup> Conversely, statements are testimonial and inadmissible 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 criminal prosecution.”<sup>51</sup>

In defining testimonial statements, the Court employed the same definition it utilized in *Crawford*: “typically a solemn declaration or affirmation made for the purposes of establishing or proving some fact.”<sup>52</sup> The Court also distinguished testimony as a “formal statement to government officers” rather than a “casual remark to an acquaintance.”<sup>53</sup>

The precise question in *Davis* involved whether 911 tapes are testimonial statements for purposes of the Confrontation Clause.<sup>54</sup> The Court held

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

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2273.

<sup>46</sup> FED. R. EVID. 803(2) provides that “a statement relating to a startling event made while the declarant was under the stress of excitement caused by the event or condition” is “not excluded by the hearsay rule, even though the declarant is available as a witness.”

<sup>47</sup> *Davis*, 126 S. Ct. at 2273.

<sup>48</sup> *Id.* at 2280.

<sup>49</sup> *Id.* at 2273.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2274.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2276.

that these calls are not interrogations by police “solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.”<sup>55</sup> Instead, these calls “describe current circumstances requiring police assistance.”<sup>56</sup> In *Davis*, McCottry was describing events as they were happening, and her statements were informal and frantic.<sup>57</sup> Thus, the Court found that the primary purpose of the call was to “enable police assistance to meet an ongoing emergency” and McCottry was not a witness declaring testimonial evidence.<sup>58</sup> Therefore, relevant portions of the 911 tape were admissible under the Confrontation Clause.

Conversely, the Court found that Amy Hammon’s statements to the police officer were testimonial.<sup>59</sup> The police in that interrogation had intended to investigate past events.<sup>60</sup> Further, there was no present emergency and Amy was in no immediate danger.<sup>61</sup> The primary purpose was to investigate a potential crime rather than to meet an ongoing emergency.<sup>62</sup> Finally, the Court emphasized the fact that the interrogation in which Amy made her statements took place in a separate room from Amy’s husband and was more formal than McCottry’s 911 call. Thus, the Court found that Amy Hammon’s statements were testimonial and therefore inadmissible.<sup>63</sup>

After defining “testimonial” in the context of these two situations, the Court went on to comment on the special nature of domestic violence cases and the need for “greater flexibility in the use of testimonial evidence.”<sup>64</sup> The Court noted that this type of crime is “notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.”<sup>65</sup> Therefore, it emphasized that the rule of forfeiture by wrongdoing, as codified by Federal Rule of Evidence 804(b)(6), means that a defendant forfeits his or her right of confrontation if he or she obtains the absence of a witness by wrongdoing.<sup>66</sup>

The Court explained that “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.”<sup>67</sup> While the Court cannot “vitiating constitutional guarantees when they have the effect of allowing the guilty to go free, . . . one who obtains the absence of a witness

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 2277.

<sup>57</sup> *See id.* at 2276–77. However, the dissent points out that the events McCottry described in the 911 call were over at the time she recounted them to the operator. *Id.* at 2285 n.6 (Thomas, J., concurring in part and dissenting in part).

<sup>58</sup> *Id.* at 2277 (majority opinion).

<sup>59</sup> *Id.* at 2278.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2280.

<sup>64</sup> *Id.* at 2279.

<sup>65</sup> *Id.* at 2280.

<sup>66</sup> *See id.*

<sup>67</sup> *Id.*

by wrongdoing forfeits the constitutional right to confrontation.”<sup>68</sup> The Court highlighted that federal courts have only held the government to a “preponderance-of-the-evidence standard” in proving forfeiture by wrongdoing.<sup>69</sup> Most importantly, in a forfeiture hearing, the state can use testimonial evidence from an available witness to prove wrongdoing.<sup>70</sup> This is valuable because prosecutors will likely be more able to persuade victims to provide written, out-of-court statements describing coercion or other wrongdoing by defendants than to convince them to personally appear in court. Thus, a victim’s out-of-court testimonial statement in a forfeiture hearing could ultimately lead to her abuser’s conviction for abuse, regardless of her willingness to appear in court, if that hearing results in defendant’s forfeiture of the right to confrontation.

Justice Thomas concurred in the Court’s *Davis* holding and dissented from its *Hammon* holding; he would have held the evidence to be admissible in both cases.<sup>71</sup> Justice Thomas displayed his dissatisfaction with the outcome, asserting that the majority’s standard for testimonial evidence is “unnecessary to prevent abuse . . . [and] yields no predictable results to police officers and prosecutors attempting to comply with the law.”<sup>72</sup> Further, he noted that most police responses to crime reports carry the dual purpose “both to respond to the emergency situation and to gather evidence.”<sup>73</sup> Thus, the primary purpose of an investigation is often difficult to determine because it may be two-fold.<sup>74</sup>

#### IV. AN UNPREDICTABLE TEST

The uncooperative victims in *Davis v. Washington* and *Hammon v. Indiana* made it particularly difficult for the prosecutors to successfully convict their defendants. Because the assaults occurred in the privacy of their homes, Michelle McCottry and Amy Hammon were the best witnesses to testify about what occurred.

Without the testimony of these witnesses, the prosecutors were left with little evidence of the defendants’ guilt. This is a common problem in domestic violence prosecutions, where victims “are more prone than other crime victims to recant or refuse to cooperate after initially providing information to police.”<sup>75</sup> Yet these same difficulties also create a dire need for successful criminal prosecutions in these cases. Uncooperative victims and high same-victim recidivism require creative solutions on the part of prosecutors and

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

<sup>69</sup> *Id.* at 2280.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2281 (Thomas, J., concurring in part and dissenting in part).

<sup>72</sup> *Id.* at 2283.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 2284.

<sup>75</sup> Linninger, *supra* note 5, at 768.

police in order to ensure victims are protected and batterers are convicted.<sup>76</sup> Statistics demonstrate that victims of domestic violence are often “deeply conflicted about their plight and refuse to seek police intervention, let alone testify at trial.”<sup>77</sup> When victims of domestic violence do try to separate from their abusers by involving the authorities, studies show that this is the time when they are most at risk of retaliatory violence and even homicide.<sup>78</sup> Unfortunately, if batterers are not arrested and fully prosecuted, they are likely to repeat their crime with the same victim.<sup>79</sup>

Often, victims do not cooperate with authorities because they fear that their batterer will retaliate if they do so.<sup>80</sup> Frequently, this fear is not unfounded, considering that “threats and retaliation may occur in the majority of domestic violence prosecutions.”<sup>81</sup> Further, as mentioned above, research shows that victims are most at risk of death when they attempt to leave their abusers.<sup>82</sup> When victims begin to work with authorities, their abusers often perceive this as a formal separation and thus are more likely to commit homicidal acts at this time.<sup>83</sup> This explains why many women are unlikely and reluctant to participate at trial.

Some experts have characterized this pattern of behavior as “battered women’s syndrome.” Defining this condition as “the behavioral and psychological consequences that many victims, but by no means all victims, experience as a consequence of living in domestic violence situations,” one expert witness used battered women’s syndrome to explain why a victim recanted her testimony once she took the stand.<sup>84</sup> The “cycle of violence” characteristic of these relationships involves a period of tension building followed by an abusive episode that is resolved in a “honeymoon phase” in which the batterer is apologetic and loving.<sup>85</sup> Often, women will report their stories to the police following the abuse, but will refuse to cooperate with prosecution during the “honeymoon” phase because “she doesn’t want the

<sup>76</sup> *State v. Mechling*, 633 S.E.2d 311, 324 (W. Va. 2006).

<sup>77</sup> *Id.*

<sup>78</sup> See Linninger, *supra* note 5, at 769.

<sup>79</sup> *Mechling*, 633 S.E.2d at 324 (citing the 1992 American Medical Association statistic that 47% of husbands who batter their wives do so three or more times per year).

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., Linninger, *supra* note 5, at 769 (quoting *Mechling*, 633 S.E.2d at 324); Laura Dugan et al., *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate Partner Homicide*, 37 *LAW & SOC’Y REV.* 169, 179 (2003); Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victim’s Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 *AM. U. J. GENDER SOC. POL’Y & L.* 465, 576 & n.38 (2003) (describing a study in which women identified fear of their batterer as the number one reason why they were unwilling to cooperate with government).

<sup>82</sup> See Dugan et al., *supra* note 81, at 174 (“Substantial evidence shows that the highest homicide risk is during the period when a battered victim leaves the relationship, suggesting a potential ‘retaliation effect’ from exposure reduction associated with domestic violence interventions.”).

<sup>83</sup> *Mechling*, 633 S.E.2d at 325.

<sup>84</sup> *State v. Borrelli*, 629 A.2d 1105, 1113 (Conn. 1993).

<sup>85</sup> *Id.*

relationship to end, she wants the violence to end . . . [and] she believes maybe this time it will be different.”<sup>86</sup> Further, the power and control that batterers develop over their victims can result in a “learned helplessness” that victims develop when the repeatedly fail “to take control of the relationship.”<sup>87</sup> Battered women’s syndrome helps to explain “a lot of behaviors which don’t make any sense when you understand them as an outsider,” but do when “you understand them from a standpoint of survival and safety.”<sup>88</sup>

The Court in *Davis* recognized these problems with the prosecution of domestic violence crimes and attempted to give prosecutors a guideline as to which cases they could prosecute without victim cooperation and which cases they could not.<sup>89</sup> Unfortunately, their test for determining whether evidence is “testimonial,” and therefore inadmissible at trial, stopped short of addressing the special problems presented by domestic violence cases. Justice Thomas recognized this in his concurrence/dissent when he asserted that the test, “under which the district courts are charged with divining the ‘primary purpose’ of police interrogations” is both “difficult for courts to apply” and “bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause.”<sup>90</sup> This assertion is persuasive.

First, Justice Thomas argued that the Court’s definition of “testimonial statements” is not grounded in judicial history. While he agreed that solemn, “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions” and confessions “extracted by police in a formal manner” should be subject to the Confrontation Clause, he did not agree that other “less formal” interactions with police should be construed as testimonial.<sup>91</sup> As a result, for Justice Thomas, “mere conversation[s] between a witness or suspect and a police officer” do not rise to the level of formality required to achieve testimonial status.<sup>92</sup> He also pointed out that the Court could cite no case “for its conclusion that the Confrontation Clause also applies to informal police questioning under certain circumstances.”<sup>93</sup> Finally, Justice Thomas urged that the Court’s conception of “testimonial” statements was unnecessary to prevent abuse. He argued that “even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See *State v. Mechling*, 633 S.E.2d 311, 325 (discussing *Davis v. Washington*, 126 S. Ct. 2266 (2006)).

<sup>90</sup> *Davis*, 126 S. Ct. at 2280–81 (Thomas, J., concurring in part and dissenting in part).

<sup>91</sup> *Id.* at 2282.

<sup>92</sup> *Id.* at 2282–83.

<sup>93</sup> *Id.* at 2283.

confrontation.”<sup>94</sup> This means that under *Davis*, a prosecutor could introduce non-testimonial statements solely as a way to deprive a defendant of his right of confrontation.

Justice Thomas recognized the most troublesome aspect of the Court’s standard when he noted that “it also yields no predictable results to police officers and prosecutors attempting to comply with the law.”<sup>95</sup> Nearly all police responses to crimes can be construed as responses to an ongoing emergency *and* investigations of past crimes.<sup>96</sup> Police act on a variety of motives and isolating their “primary” motive is virtually impossible. Ultimately, this determination becomes “an exercise in fiction.”<sup>97</sup>

For example, in the *Davis* case, Michelle McCottry’s 911 telephone call took place *after* the abusive incident occurred.<sup>98</sup> Further, McCottry’s boyfriend fled the scene during the course of the conversation.<sup>99</sup> Therefore, although her call was clearly a help-seeking response to what she likely perceived to be an emergency, the 911 operator’s questioning could easily be viewed merely as an investigation into a past crime. At the same time, in the *Hammon* case, Amy Hammon’s husband remained in the home throughout the police investigation. Although the incident had concluded by the time the police arrived, their questioning could have been designed to ascertain whether or not Hammon was safe and free from emergency rather than to investigate what had happened. The fact that the police separated the two into different rooms while they spoke with Amy further suggests that they were working towards diffusing a hostile and potentially emergency situation. The primary purpose of the police work in each of these cases is impossible to determine, demonstrating the unpredictable nature the Court’s test.

Additionally, Justice Thomas noted that the Court’s emphasis on the “objective” purpose of the police investigation requires judges, as opposed to the investigating police officers, to make the ultimate determination. This further contributes to the unpredictable nature of the test because their finding would not be “necessarily tethered to the actual purpose for which the police performed the interrogation.”<sup>100</sup> Thus, the Court’s holding that determining whether a statement is “testimonial” and therefore inadmissible at trial requires an objective determination of the primary purpose of police investigation is unpredictable, not rooted in history, and is ill-designed to prevent abuse.

Although Justice Thomas’s critiques are persuasive, the majority opinion’s understanding of the difficulties of prosecuting domestic violence

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2271 (majority opinion).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 2284 (Thomas, J., concurring in part and dissenting in part).

crimes is at the foundation of the opinion. The Court successfully outlined an important consideration with respect to domestic violence cases, namely that these cases “require[ ] greater flexibility in the use of testimonial evidence” because “this particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.”<sup>101</sup> The Court did not ignore the harsh reality of these cases. The majority opinion went on to assert that, in order to avoid giving domestic violence perpetrators a “windfall,” courts must comply with the rule that “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”<sup>102</sup>

A variety of behaviors on the part of a domestic violence defendant could prompt forfeiture hearings. Direct confrontation and intentional coercion, further abuse and intimidation, or even a subtle gesture that “may create a reasonable fear in a battered woman” could be viewed as wrongdoing.<sup>103</sup> Threats made prior to arrest,<sup>104</sup> though difficult to prove, could also legitimately discourage victims from testifying. In prior decisions, the Court has held that “if a witness’ silence is procured by chicanery, by threats, or by actual violence or murder, the defendant cannot then assert his confrontation clause rights . . . .”<sup>105</sup>

The process of proving forfeiture by wrongdoing likely requires “prosecutors, law enforcement officers and courts [to] secure evidence—possibly from third parties—prior to trial” indicating that the victims are scared to testify at trial or at a forfeiture proceeding.<sup>106</sup> The lower standard required for these hearings, as well as the admissibility of hearsay and “testimonial” statements, creates a powerful tool for prosecutors to address the special problems presented by domestic violence prosecutions and adherence to the requirements of the Confrontation Clause.

Unfortunately, the primary obstacle to adequate investigation of wrongdoing is a lack of resources. Yet, creative solutions, such as reviewing a defendant’s phone conversations with the victim while in custody, could present clear evidence of wrongdoing. Further, communication with neighbors, friends, and relatives of the victim could likely produce additional evidence. If prosecutors hope to adequately punish perpetrators of domestic violence and break the cycle of violence, they must be willing to prosecute in the face of uncooperative victims. While evidentiary issues present special problems in these types of cases, prosecutors should utilize every resource available to

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<sup>101</sup> *Id.* at 2279–80 (majority opinion).

<sup>102</sup> *Id.* at 2280.

<sup>103</sup> *State v. Mechling*, 633 S.E.2d 311, 326 (W.Va. 2006).

<sup>104</sup> *Id.* (“Hence, the most difficult forfeiture situation for courts to assess will be those circumstances where the victim responds to a batterer’s actions that precede the domestic violence charge—that is, where the accused’s earlier conduct and threats (statements like ‘don’t you ever call the police or else!’) cause the victim to decline to testify, claim a lack of memory, or be absent from the trial.”).

<sup>105</sup> *U.S. v. Mastrangelo*, 693 F.2d 269, 272–73 (1982) (internal citations omitted).

<sup>106</sup> *Mechling*, 633 S.E.2d at 326.

ensure these crimes do not go unpunished. If the Confrontation Clause and the Court's holding in *Davis* prevent prosecutors from admitting critical evidence, the doctrine of forfeiture by wrongdoing presents yet another valuable resource at prosecutors' disposal.

#### V. CONCLUSION

Ultimately, the Court in *Davis v. Washington* attempted to define the indefinable. While the requirement that criminal defendants have the right to confront all testimonial statements made against them is critical to protecting the rights of those defendants, the Court's definition of testimonial statements does not adequately address the special problems presented by domestic violence prosecutions. Victims of domestic violence often choose not to cooperate and, as a result, guilty abusers go unprosecuted and unpunished. Justice Thomas's dissent reinforces the need for a new conception of the term "testimonial" that will be flexible enough to work in domestic violence cases. In the meantime, prosecutors should work to acquire other forms of evidence, such as 911 tapes and third parties who are willing to appear in court and testify. The Court's test is unpredictable, not grounded in case law, and not necessary to prevent abuse. Until this problem is addressed, prosecutors should utilize the doctrine of forfeiture by wrongdoing to circumvent the Confrontation Clause altogether. By procuring evidence of threats or other wrongful witness silencing, prosecutors will be better able to successfully prosecute abusers without the assistance of victims in the courtroom.