1-1-2006

The Right to Submit Testimony via 911 Emergency after Crawford v. Washington

Sweta Patel

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol46/iss3/6

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
THE RIGHT TO SUBMIT "TESTIMONY" VIA 911 EMERGENCY AFTER CRAWFORD V. WASHINGTON

Sweta Patel*

I. INTRODUCTION

The right to confront one's accuser goes back hundreds of years to the common law criminal justice system.¹ The Confrontation Clause contained in the Sixth Amendment of the U.S. Constitution² provides the accused with the right to cross-examine those who testify against him or her.³ Twenty-five years ago, the Supreme Court established a test for the admissibility of hearsay evidence in Ohio v. Roberts⁴ based on the reliability of the statement.⁵ Recently, Crawford v. Washington⁶ established a new test for the admissibility of hearsay evidence⁷ under the Confrontation Clause. Crawford restored the objective test of the Confrontation Clause by extending the Clause's protection to "testimonial" statements.⁸ However, the Court declined to offer a

---

* Technical Editor, Santa Clara Law Review, Volume 46; J.D. Candidate, Santa Clara University School of Law; B.A., Economics, University of California Berkeley.

2. The Sixth Amendment provides, in relevant part, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. In other words, the prosecution's witnesses must give their testimony in the presence of the accused, subject to cross-examination. See Friedman & McCormack, supra note 1, at 1171.
5. Id. at 66.
7. Hearsay is an out-of-court statement offered in evidence at trial to prove the truth of its assertion. BLACKS LAW DICTIONARY 739 (8th ed. 2004).
comprehensive definition of "testimonial" statements.\(^9\)

Recently, the lower courts have been left to sort out *Crawford's* applicability to an assortment of hearsay statements lacking a uniform test.\(^{10}\)

One of the most contentious issues is whether recordings of 911 calls are admissible under the new *Crawford* standard.\(^{11}\) Part II of this comment discusses the history of the Confrontation Clause, the *Roberts* decision, and the recent *Crawford* decision.\(^{12}\) Part II also discusses seven cases that have considered the admissibility of 911 calls following *Crawford*.\(^{13}\) These cases illustrate how courts inconsistently define "testimonial" when considering statements made during 911 calls, and the disagreement as to their admissibility when a witness is unavailable.\(^{14}\) Part III identifies the problem with applying the *Crawford* definition of "testimonial" to 911 calls.\(^{15}\) Part IV analyzes the different definitions of "testimonial" that have been used in recent cases concerning the admissibility of 911 calls.\(^{16}\) Finally, Part V proposes how courts should analyze statements made during 911 calls when determining whether they are "testimonial" under *Crawford*.\(^{17}\)

II. BACKGROUND

A. The Ambiguity of the Confrontation Clause

The right to confront one's accuser was not a novel concept to the Framers of the Constitution.\(^{18}\) In fact, the right to confront one's accuser has a long history dating back to Roman times.\(^{19}\) Two inferences about the meaning of the
Confrontation Clause can be made by examining its history.\textsuperscript{20}

First, the Confrontation Clause is applied when ex parte examinations are used as evidence against the accused.\textsuperscript{21} During the seventeenth century, Sir Walter Raleigh was executed based on the hearsay of his accuser and alleged accomplice.\textsuperscript{22} Raleigh demanded that his accuser appear in court, believing that he would recant his false statement when confronted.\textsuperscript{23} Raleigh said, "'[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . .'"\textsuperscript{24} The judge refused Raleigh's request and he was sentenced to death.\textsuperscript{25} Thereafter, English law developed a right of confrontation through statutory and judicial reforms to end such outcomes.\textsuperscript{26}

The right of confrontation, which became part of the U.S. Constitution as the Sixth Amendment in 1791,\textsuperscript{27} was intended to strengthen the adversarial process.\textsuperscript{28} The Confrontation Clause states, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."\textsuperscript{29} In \textit{State v. Webb},\textsuperscript{30} the North Carolina Supreme Court held that the right of confrontation "is a rule of common law, founded on natural justices, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."\textsuperscript{31} Moreover, the Confrontation Clause guarantees an open procedure, a chance for the defendant to examine the weakness of the witness's testimony, and discourages false testimony by providing the defendant a

\begin{itemize}
  \item[20.] \textit{Id.} at 50.
  \item[21.] \textit{Id.}
  \item[22.] Hood & Padilla, \textit{supra} note 10, at 83. The hearsay statements at issue were made by the accuser to officers when they examined him and were answers to interrogation. Margaret A. Berger, \textit{The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model}, 76 \textit{MINN. L. REV.} 557, 570-71 (1992).
  \item[23.] \textit{Crawford}, 541 U.S. at 44.
  \item[24.] \textit{Id.}
  \item[25.] \textit{Id.}
  \item[26.] \textit{Id.}
  \item[27.] \textit{Id.} at 49; \textit{ERWIN CHEMERINSKY, CONSTITUTIONAL LAW} xlvi (Sydney M. Irmas, ed., 2001).
  \item[28.] \textit{Crawford}, 541 U.S. at 49-50.
  \item[29.] \textit{U.S. CONST.} amend. VI.
  \item[30.] \textit{State v. Webb}, 2 N.C. (1 Hayw.) 103 (1794).
  \item[31.] \textit{Webb}, 2 N.C. at 104.
\end{itemize}
chance to “dispute and explore the weaknesses in the witness’s testimony.”

The U.S Supreme Court has repeatedly rejected the proposition that the Confrontation Clause applies only to in-court testimony; instead, it has held that the application of the Clause to out-of-court testimony depends on the rules of evidence. However, “[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.” Some ex parte statements are admissible under the hearsay evidentiary exceptions, yet the Framers would not have approved of such an admission without questioning whether the statement passes the muster of the Confrontation Clause. The Clause does not limit “witnesses” to those who testify in court, but rather, it takes a broad view. The Court found “witnesses” to be those who “bear testimony.” In addition, the Court deemed the definition of “testimony” to be a “‘solemn declaration or affirmation made for the purpose of establishing or proving some fact.’” Therefore, according to the Court, testimony is not limited to in-court statements, and it also includes certain out-of-court statements, such as ex parte statements.

The second inference about the meaning of the Confrontation Clause is that the Framers did not intend for the admission of “testimonial” statements in court unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him. The prior opportunity to cross-examine a witness is a necessary condition and not merely a method to establish reliability. However, if the

33. Crawford, 541 U.S. at 50-51.
34. Id. at 51.
35. See id.
36. Id.
37. Id.
38. Id. (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).
40. Id. at 53-54.
41. The cross-examination of a witness is a necessary condition because that right cannot be substituted by proving reliability through other means. See id. at 55-56. Despite there being exceptions to the general rule excluding hearsay
statement is not "testimonial" in nature, the Confrontation Clause is inapplicable and the rules of evidence determine the statement's admissibility.42

B. The End of Ohio v. Roberts

For twenty-five years, courts adhered to the test for admissibility established by the Supreme Court in Ohio v. Roberts.43 In Roberts, the Court decided that hearsay statements would not violate the Confrontation Clause and thus would be admissible when the declarant was unavailable and the statement fell within a hearsay exception or was trustworthy.44

Because the witness in Roberts was unavailable for cross-examination, the Court explored whether the defendant could test the trustworthiness of the testimony such that the goal of a "face-to-face accusation" was achieved.45 The Court, reviewing its precedent, noted that the goal of the Confrontation Clause was to establish sufficient "indicia of reliability" and allow "the trier of fact a satisfactory basis for evaluating the truth of the prior statement."46 The Court further reasoned that the Confrontation Clause and hearsay rules were "designed to protect similar values"47 and they "stem from the same roots."48

Hence, the rule that emerged from Roberts allowed constitutionally admissible hearsay statements to be admitted if the declarant was unavailable and the statements fell within a "firmly rooted hearsay exception"49 or contained evidence, the exceptions should not apply to "testimonial" statements. Id.

42. Id. at 60-61.
44. Id. at 65-66. The trial court in Roberts admitted hearsay testimony from defendant's preliminary hearing that contradicted his testimony that he had permission to use the credit cards and checks at issue. Id. at 59-60. The appellate court reversed defendant's conviction based on a violation of his constitutional right to confrontation under the Sixth Amendment, and the Ohio Supreme Court affirmed. Id. at 60. The Supreme Court reviewed the case on certiorari. Id. at 59-62.
45. Id. at 65.
46. Id. at 65-66 (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)).
47. Id. at 66 (quoting California v. Green, 399 U.S. 149 (1970)).
48. Id. (quoting Dutton v. Evans, 400 U.S. 74, 86 (1970)).
49. Roberts, 448 U.S. at 66. "Firmly rooted hearsay exceptions" are exceptions to the general rule of exclusion, such as business records and statements in furtherance of a conspiracy. FED. R. EVID. 801(d)(2)(E), 803(6). Several of the hearsay exceptions had been established by 1791. Crawford v.
"particularized guarantees of trustworthiness."\textsuperscript{50} The \textit{Roberts} test allowed juries to hear statements made by a witness who could not be cross-examined based on a judicial determination of reliability.\textsuperscript{51} Although this test drew heavy criticism, it was not until the Supreme Court decided \textit{Crawford} in March 2004 that \textit{Roberts} was abrogated.\textsuperscript{52}

C. Crawford v. Washington

In \textit{Crawford v. Washington},\textsuperscript{53} the Court reexamined the Confrontation Clause and held that "testimonial" statements made by an unavailable witness in a criminal trial are inadmissible unless the defendant had a prior opportunity to cross-examine the witness.\textsuperscript{54} However, \textit{Crawford} failed to define what constitutes a "testimonial" statement.\textsuperscript{55}

In \textit{Crawford}, the defendant was charged with the assault and attempted murder of a man who allegedly tried to rape the defendant's wife, Sylvia.\textsuperscript{56} Sylvia's statement to the police contradicted her husband's statement.\textsuperscript{57} Although Sylvia did not testify at trial due to marital privilege,\textsuperscript{58} the prosecution played a recording of her statement to the police for the jury.\textsuperscript{59} The trial court permitted the prosecution to introduce her prior statement, reasoning that it bore particularized guarantees of trustworthiness because Sylvia corroborated her husband's statement that he acted in self-defense, that she had direct knowledge of the incident, that the incident was recent, and that she was "questioned by a 'neutral' law enforcement officer."\textsuperscript{60} However, the Washington Court of Appeals reversed on the grounds that the statement did not

\begin{footnotes}
\footnote{Washington, 541 U.S. 36, 56 (2004).}
\footnote{Roberts, 448 U.S. at 66.}
\footnote{See id.}
\footnote{Crawford, 541 U.S. at 67-68.}
\footnote{Crawford v. Washington, 541 U.S. 36 (2004).}
\footnote{Id. at 68.}
\footnote{Id.}
\footnote{Id. at 38.}
\footnote{Id. at 41.}
\footnote{Id. at 40.}
\footnote{"Marital privilege" is defined as "[t]he privilege allowing a spouse not to testify in a criminal case as an adverse witness against the other spouse, regardless of the subject matter of the testimony." BLACK'S LAW DICTIONARY 1236 (8th ed. 2004).}
\footnote{Crawford, 541 U.S. at 40.}
\footnote{Id.}
\end{footnotes}
sufficiently guarantee trustworthiness. The appellate court offered several reasons for the reversal, including the fact that Sylvia admitted having her eyes closed while her husband allegedly stabbed the victim. The Washington Supreme Court reinstated the conviction, concluding that while Sylvia’s statement did not fall within an established hearsay exception, it bore guarantees of trustworthiness because Sylvia and the defendant’s statements overlapped.

The U.S. Supreme Court granted certiorari to determine whether the trial court’s admission of Sylvia’s statement violated the Confrontation Clause and unanimously reversed, remanding the case for a new trial. The Court held that hearsay evidence deemed “testimonial” cannot be allowed in court under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Sylvia was unavailable in court and the prosecution sought to admit her statement from her police interrogation. Despite the Court’s failure to provide a definition of testimonial, it held that Sylvia’s statement was “testimonial” under any definition. The Court reasoned that Sylvia’s testimony should not have been admitted because it was “knowingly given in response to structured police questioning,” it was elicited through leading questions, and only cross-examination could reveal whether her testimony was reliable.

61. Id. at 41.
62. Id. Some of the other factors considered by the appellate court were that the witness’s statement contradicted her husband’s, her statement to the police was made in response to specific questions, and her statement differed from defendant’s statement on the issue of self-defense. Id.
63. Id.
64. Id. at 42. See supra text accompanying notes 2-3 for a discussion of the Confrontation Clause.
65. Crawford, 541 U.S. at 69.
66. Id. at 68.
67. See id. at 40.
68. See id. at 61.
69. Id. at 53 n.4.
70. Id. at 65 (“In response to often leading questions from police detectives, she implicated her husband in Lee’s stabbing and at least arguably undermined his self-defense claim.”).
71. See Crawford, 541 U.S. at 68-69.
1. Roberts Abrogated

The Court in Crawford ultimately created new precedent because of its departure from Roberts on the issue of reliability.72 The holding in Roberts was based on the finding that the Sixth Amendment only required "substantial compliance with the purposes behind the confrontation requirement."73 Thus, the Court held that hearsay evidence is permissible in court if reliability of the statement is established.74

The Court emphasized that reliability has not historically been an exception to the Confrontation Clause.75 A statement's reliability depends on the factors considered by a judge and how much weight he or she gives to them, neither of which are prescribed by the Sixth Amendment.76 The Court further reasoned that vague standards are manipulable and the Framers would not have wanted such standards to be used where the objectivity of a judiciary is blurred.77 Although the Confrontation Clause's ultimate goal is to guarantee reliability, it provides a procedural guarantee, not a substantive one.78 The Court clarified that as a procedural guarantee, it does not ensure that evidence is reliable, but requires that its reliability be assessed through cross-examination.79 Crawford explained that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."80 Therefore, Crawford held that a statement is reliable under the Sixth Amendment only when the defendant is allowed to confront and cross-examine a witness.

72. Id. at 69-76 (Rehnquist, C.J., dissenting).
74. Id. at 66.
75. Crawford, 541 U.S. at 61.
76. Id. at 62-63.
77. Id. at 67-68.
78. Id. at 61. A substantive right is "[a] right that can be protected or enforced by law; a right of substance rather than form . . . [It is a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." BLACK'S LAW DICTIONARY 1349 (8th ed. 2004). A procedural right is "[a] right that derives from legal or administrative procedure; a right that helps in the protection or enforcement of a substantive right." Id. at 1348.
80. Id. at 62.
who has made a "testimonial" statement.  

2. What is "Testimonial" Under Crawford?

While the Supreme Court in Crawford did not clearly define when statements are "testimonial," it did provide some guidance. At the very least, the term includes prior testimony at a preliminary hearing, before a grand jury, at a former trial, or during police interrogations. The Court used the term "interrogation" in a colloquial, rather than technical sense. The Court found that Sylvia's statement fell within the meaning of "interrogation" because it was "in response to structured police questioning." However, the definition was not limited to the facts of Crawford. The Court also recognized definitions of "testimonial" from other sources without accepting or rejecting the formulations offered. The Court observed that formalized testimonial materials such as affidavits, depositions, or prior confessions are "testimonial" in nature. The broadest definition of "testimonial" was offered by the National Association of Criminal Defense Lawyers (NACDL), which states that when an objective witness believes that a statement will be available for use in future prosecution, the statement is "testimonial." Without further clarity from the Supreme Court as to what constitutes a "testimonial" statement, lower courts have been left to create their own definitions.

3. Are 911 Emergency Calls "Testimonial"?

Prior to Crawford, a 911 emergency call for help was...
admitted into evidence under the "excited utterance" hearsay exception without violating the Sixth Amendment's Confrontation Clause. Crawford casts serious doubt upon such a classification because the test is not whether a 911 call falls under a hearsay exception, but whether a 911 call is "testimonial" in nature. If deemed "testimonial," the Sixth Amendment bars the use of the statement at trial unless the witness is unavailable and the defendant has had an opportunity to cross-examine the witness.

D. Post-Crawford Interpretations of "Testimonial"

Courts have applied Crawford's holding to consider whether 911 calls are "testimonial." However, the lack of a precise definition of "testimonial" has resulted in a patchwork of analyses and holdings on the issue. This section will discuss how courts have applied Crawford to the factual circumstances surrounding 911 calls and have thereby reached differing definitions of "testimonial."

1. Non-Testimonial Calls

a. Calls Made by Victims

Several cases have found 911 calls not to be "testimonial" in instances where the victim made the call. As a case of first impression, People v. Moscat answered the question of whether a 911 call is testimonial in nature under Crawford. A 911 call made by a domestic assault victim, who was later unavailable at trial, was key to the prosecution's case. The defendant moved to exclude the 911 call, claiming that it

---

91. People v. Moscat, 777 N.Y.S.2d 875, 879 (Crim. Ct. 2004) ("[T]o qualify a statement as an excited utterance the party offering the statement must show that the declarant was under the stress of excitement caused by an external event sufficient to still the declarant's reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful.").
92. See supra note 49 for a discussion of hearsay exceptions.
93. Moscat, 777 N.Y.S.2d at 879 (citing White, 502 U.S. at 346).
94. Id.
95. Id.
96. See discussion infra Parts II.D.1-2.
97. Id.
99. See id. at 876.
100. Id. at 875.
violated his Sixth Amendment right to confrontation.\textsuperscript{101}

The court held that the 911 call was not "testimonial" for several reasons.\textsuperscript{102} First, the court noted that the 911 call was made by a complainant seeking protection from the police, not by a desire to produce evidence or to prosecute the alleged assailant.\textsuperscript{103} Second, the court stated that a 911 call is inherently different from a testimonial statement in a pre-trial examination conducted by a government officer hoping to prosecute.\textsuperscript{104} The 911 caller "summons the government to her aid," while the "government summons a citizen to be a witness" in a pre-trial examination.\textsuperscript{105} Third, a 911 call is part of a criminal incident, usually made while the incident is in progress or immediately thereafter.\textsuperscript{106} Fourth, a person giving a formal statement or deposition is conscious about the effect his testimony will have on legal proceedings.\textsuperscript{107} In contrast, a person fearing bodily injury or having recently suffered bodily injury does not contemplate being a witness in future legal proceedings when calling 911 for help.\textsuperscript{108} For these reasons, the 911 call in Moscat was held not to be "testimonial."\textsuperscript{109}

In Minnesota v. Wright,\textsuperscript{110} the Minnesota Court of Appeals also ruled that a 911 call made by a victim was not "testimonial."\textsuperscript{111} In Wright, a 911 call was made by a woman alleging that the defendant had threatened her.\textsuperscript{112} The prosecutor was permitted to introduce the 911 tape into evidence for the jury to hear despite the caller's unavailability in court.\textsuperscript{113}

Although Crawford was decided after the defendant's trial, the appellate court reviewed the admissibility of the 911 call under the test set forth in Crawford.\textsuperscript{114} To determine

---

\textsuperscript{101} Id.
\textsuperscript{102} Id. at 879.
\textsuperscript{103} Id.
\textsuperscript{104} Moscat, 777 N.Y.S.2d at 879.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 880.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Minnesota v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004).
\textsuperscript{111} Id. at 302.
\textsuperscript{112} Id. at 298.
\textsuperscript{113} Id. at 299.
\textsuperscript{114} Id. at 300. Decisions of the Supreme Court are "given retroactive effect
whether the 911 call was “testimonial,” Wright held that statements made “moments after the criminal offense and under the stress of that event, are not ‘testimonial’ under Crawford . . . .”115 The court reasoned that there is enough privacy surrounding 911 calls that citizens should be encouraged to call 911 without considering the repercussions.116 Furthermore, the court found that a call made by a person struggling to survive does not equate to a response to structured questioning in an investigative environment in which a person would expect their statements to be used in judicial proceedings.117

An identical result was reached in California in People v. Corella.118 In Corella, the defendant’s wife placed a 911 call alleging that the defendant hit her.119 The prosecution played the tape for the jury during trial, although the wife was unavailable in court.120 On appeal, the defendant contended that the admission of the 911 call violated his constitutional right to confrontation.121

The court focused on differentiating the circumstance of a 911 call from that found in a police interrogation.122 Corella noted that “a police interrogation requires a relatively formal investigation where a trial is contemplated.”123 The statements held to be “testimonial police interrogation” in Crawford were made in response to structured police questioning.124 In contrast, Corella held that 911 calls have no such formal quality.125 To the contrary, 911 operators ask callers questions to determine an appropriate response to the

in criminal cases when it is Constitutional in nature and affects the determination of guilt or innocence.” New York v. Conyers, 777 N.Y.S.2d 274, 276 (App. Div. 2004). If it was “testimonial,” then the lower court’s evidentiary ruling would have been a constitutional error and the defendant would be entitled to a new trial unless the error was harmless beyond a reasonable doubt. Wright, 686 N.W.2d at 300.

115. Id. at 302.
116. Id.
117. Id.
119. Id. at 464.
120. Id. at 465.
121. Id. at 464.
122. Id. at 468.
123. Id.
125. Id.
incident.\textsuperscript{126} Thus, the \textit{Corella} court held that the 911 call made by the spouse was not "testimonial."\textsuperscript{127}

Like the cases discussed above, the California Court of Appeals in \textit{People v. Aubrey}\textsuperscript{128} discussed the "testimonial" nature of 911 calls and found them to be admissible.\textsuperscript{129} In \textit{Aubrey}, the jury heard a 911 call made by a victim despite the caller's unavailability in court.\textsuperscript{130} Relying on \textit{Crawford}, the defendant asserted that his Sixth Amendment right to confront the victim was violated.\textsuperscript{131}

The court interpreted \textit{Crawford} to suggest that a statement is not "testimonial" unless it is made during a relatively formal proceeding and a future trial is expected.\textsuperscript{132} The defendant contended that the statements made during a 911 call are essentially equivalent responses that would be made to an officer questioning a person at his or her home.\textsuperscript{133} The court disagreed with the defendant's characterization of 911 calls, finding that 911 calls can be better characterized as "the electronically augmented equivalent of a loud cry for help."\textsuperscript{134} Therefore, the court held that the call was not "testimonial," and thus, admission of the 911 recording did not violate the Confrontation Clause.\textsuperscript{135}

\textbf{b. Calls Made by Witnesses}

Soon after \textit{Moscat}, the court in \textit{People v. Conyers}\textsuperscript{136} ruled that 911 calls made by witnesses are admissible.\textsuperscript{137} Unlike \textit{Moscat}, the caller in \textit{Conyers} was not the victim, but rather a witness to the incident.\textsuperscript{138} The defendant's mother made two 911 calls while she witnessed a street-fight between the defendant and her son-in-law.\textsuperscript{139} The first call sought

\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.} at 467.
\textsuperscript{129} \textit{Id.} at *6-7.
\textsuperscript{130} \textit{Id.} at *2.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at *6.
\textsuperscript{133} \textit{Id.} at *7.
\textsuperscript{134} \textit{Aubrey}, 2004 WL 2378400, at *7.
\textsuperscript{135} \textit{Id.}
\textsuperscript{137} \textit{Id.} at 277.
\textsuperscript{138} \textit{See id.} at 275; \textit{supra} text accompanying note 100.
\textsuperscript{139} \textit{Conyers}, 777 N.Y.S.2d at 275.
assistance in stopping the ongoing fight and the second call requested an ambulance.\textsuperscript{140} The prosecution attempted to introduce the two calls under a hearsay exception, but the defendant claimed that the admissibility of such evidence would violate his Sixth Amendment right to confront the caller, who was unavailable in court.\textsuperscript{141}

The court justified its ruling by reasoning that the witness's statements were mere reactions to a violent incident.\textsuperscript{142} Furthermore, the calls were made in order to stop the violence, and the declarant probably did not consider that she would be summoned as a witness in future proceedings.\textsuperscript{143} For these reasons, the court held that the 911 calls were not "testimonial" in nature under \textit{Crawford}, and the defendant's constitutional rights were not violated by their admission.\textsuperscript{144}

2. \textit{Testimonial Calls}

\textbf{a. Calls Made by Witnesses}

Some courts have held 911 calls to be testimonial. \textit{People v. Cortes}\textsuperscript{145} is such an example. In \textit{Cortes}, a witness called 911 during the commission of a crime to report the incident.\textsuperscript{146} The prosecution sought to introduce recordings of the call even though the witness was unavailable to testify.\textsuperscript{147}

The court began its inquiry by focusing on whether the 911 call was a product of interrogation by referring to the definition of "interrogation."\textsuperscript{148} The dictionary defined "interrogation" as "the act of questioning" and "examination by questions."\textsuperscript{149} Furthermore, the court noted that, recently, dictionaries have added the words "systematic" or "formal" to the definition.\textsuperscript{150} The court reasoned that a call reporting a

\begin{itemize}
  \item \textsuperscript{140} \textit{Id.} at 275.
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{142} \textit{Id.} at 276-77.
  \item \textsuperscript{143} \textit{Id.} at 277.
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{146} \textit{Id.} at 403-04.
  \item \textsuperscript{147} \textit{Id.} at 402-03.
  \item \textsuperscript{148} \textit{Id.} at 405.
  \item \textsuperscript{149} \textit{Id.} at 404-05 (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).
  \item \textsuperscript{150} \textit{Id.} (citing OXFORD AMERICAN DESK DICTIONARY AND THESAURUS (2002)).
\end{itemize}
The court found that repeated announcements, television, movies, and the Internet have made the public aware of what information must be supplied when reporting a crime. The court cited numerous websites to illustrate that various organizations, including the New York City Police Department, prepare the public to report crimes via 911. Therefore, callers are likely to know that the police department collects information about crimes from 911 calls.

Moreover, 911 calls are also formal by definition because operators follow established procedures and rules to collect information systematically. Cortes stated that formality cannot be limited to courtroom procedure for questioning a witness. The court held that the facts of the case fell within Crawford’s definition of interrogation, thus making the statement “testimonial” in nature and inadmissible without cross-examination of the witness who made the 911 call.

b. Calls Made by Victims

Like 911 calls made by witnesses, 911 calls made by victims have also been held to be “testimonial.” In Washington v. Powers, a case deciding that 911 calls are “testimonial,” the 911 caller reported that the defendant had entered her home in violation of a restraining order. Following the test from Ohio v. Roberts, the court admitted into evidence the 911 tape without subjecting the caller to cross-examination.

Shortly after the trial court proceedings in Powers, the

151. Cortes, 781 N.Y.S.2d at 405.
152. See id. at 406.
153. Id.
154. Id. at 405-06.
155. Id.
156. Id. at 406.
158. Id.
160. Id. at 1263.
161. Id.
Supreme Court decided *Crawford*. In light of the Court's holding, the defendant in *Powers* appealed on the grounds that the trial court's admission of the 911 call violated his right to confront his accuser. Realizing that the facts in *Powers* fell somewhere in between the facts of *Moscat* and *Cortes*, the *Powers* court used the holdings in those two cases as a guide. As in *Cortes*, the caller in *Powers* called to report a crime. However, unlike *Moscat*, it was not a call for help.

The *Powers* court also turned to a law review article written prior to *Crawford* discussing the nature of 911 calls. The article concludes that a reasonable person knows that the information from his or her call will be forwarded to the police and possibly used in future prosecution. Therefore, the caller's statement may be characterized either as a request for immediate assistance or to provide information. The article states that where 911 calls contain detailed and lengthy statements aimed at providing information, they are "testimonial" in nature. Seeing that a bright line standard would not serve the purpose of the rule in *Crawford*, the court held that trial courts could best assess the admissibility of each 911 call on a case-by-case basis.

The facts in *Powers* indicated that the 911 call was neither part of the criminal incident nor a request for help, but was instead intended to report the violation of an existing protective order. Therefore, the court found that the witness knew that her statements would result in the defendant's arrest. The court held that her statements were "testimonial" and inadmissible against the defendant.

---

162. Id.
163. Id. at 1262-63.
164. Id. at 1264-65.
166. Id. at 1264-65.
167. See Friedman & McCormack, *supra* note 1, at 1242.
168. Id.
169. Id.
170. Id.
172. Id.
173. Id.
174. Id.
III. IDENTIFICATION OF THE LEGAL PROBLEM

The Court in *Crawford* recognized that its refusal to define "testimonial" comprehensively would cause interim uncertainty, yet it reasoned that the new test was superior to the one in *Roberts*, which was inherently unpredictable. Uncertainty among lower courts followed the *Crawford* ruling, just as the Court anticipated. The Court may have been correct to believe that the *Crawford* test had greater long-term potential to provide a predictable framework, but until that predictability is realized, lower courts are left with difficult choices. In his concurrence, Chief Justice Rehnquist recognized that prosecutors need to know which statements fall under the new rule now, not years from now. Despite its unpredictability, the *Roberts* framework lasted almost twenty-five years. The courts cannot wait another twenty-five years for the Supreme Court to clarify the definition of "testimonial."

The disagreement among courts over the testimonial nature of 911 calls is evident. This comment discusses seven cases, five of which held that 911 calls are not testimonial and two of which held that they were testimonial. The following section critically analyzes the reasoning used by courts to determine which definition best serves the purpose of *Crawford* with regard to 911 calls.

IV. ANALYSIS

This section analyzes the distinct elements of a 911 call, as discussed in the cases that followed *Crawford*. These elements serve an important purpose in determining whether or not a 911 call is "testimonial." Factors that courts have considered are the status of the caller as a victim or a witness, the objective state of mind of the declarant, and the

---

176. *Id.*
178. *Crawford*, 541 U.S. at 68 n.10.
179. *Id.* at 75 (Rehnquist, C.J., concurring).
181. See *Crawford*, 541 U.S. at 75 (Rehnquist, C.J., concurring).
182. See discussion *supra* Part II.D.
183. See *id*.
184. See discussion *infra* Part IV.
intent of the 911 operator. Additionally, although Crawford did not provide a complete definition of "testimonial," it did recognize that "police interrogations" fall within the definition. This recognition has been a significant factor in determining the admissibility of 911 calls when a witness is unavailable.

A. Status of 911 Caller as Victim or Witness

For the purpose of this analysis, callers fall into two categories: those who are victims and those who are witnesses. Courts have widely used the caller's classification in determining if a call is "testimonial" in nature.

Most of the cases in which 911 calls were found to be "non-testimonial" were those in which the 911 calls were made by victims of a crime. A 911 call can be considered part of the criminal incident itself because the events occur quickly and the victim is merely reacting to the incident by calling for help. Therefore, when a victim calls 911, courts have reasoned that since the caller is calling for immediate assistance, future prosecution is not contemplated.

However, at least one court has held a 911 call to be non-testimonial when the caller is not a victim, but a witness to the crime. The court in Conyers applied logic that was similar to cases in which the caller was a victim. A person witnessing a criminal incident may be reacting to the event

---

185. See discussion supra Part II.D.
186. Crawford, 541 U.S. at 68.
187. See discussion supra Part II.D.2.a.
188. See discussion supra Part II.D.
189. See discussion supra Part II.D.1.a.
190. See People v. Moscat, 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004) (noting that "[m]any 911 calls are made while an assault or homicide is still in progress" or during the immediate aftermath of a crime).
191. See People v. Corella, 122 Cal. App. 4th 461, 468 (Ct. App. 2004) (noting that a victim making a 911 call is seeking assistance and there is no police interrogation in contemplation of future prosecution); State v. Wright, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004) (stating that 911 calls are usually made because the caller wants protection and not because the caller expects the report to be used at a later trial); Moscat, 777 N.Y.S.2d at 879 (stating that the genesis of a 911 call is an urgent desire to be rescued from immediate peril, rather than the desire to prosecute or seek evidence).
193. Id. at 276-77 (noting that the caller was "react[ing] to the life threatening crisis unfolding before her eyes" although she was not the victim of the assault).
before her, just as a victim would. In Conyers, the witness's call was also a cry for help, only not for herself.\textsuperscript{194}

Courts should not rely on the status of a caller to determine the admissibility of a 911 call. There is no generally applied rule on how a caller's status should affect a ruling, nor is there any rule about how the caller's status might affect the nature of the statement. Therefore, although courts have used the status of a caller as part of their analysis,\textsuperscript{195} it should not be conclusive. Relying solely on the status of a caller would allow a "label" to determine the nature of the call and ignore all other circumstances surrounding the call. Although allowing a "label" to be the sole determining factor would achieve uniformity in the courts, it would not guarantee reliability or satisfy the Confrontation Clause.\textsuperscript{196}

B. The Caller's State of Mind

Some courts have gone beyond classifying a caller as a victim or witness and considered the 911 caller's state of mind.\textsuperscript{197} For example, the courts in Wright, Conyers, and Cortes addressed whether the caller's objective or subjective state of mind was relevant to determining if the 911 call was "testimonial."\textsuperscript{198}

Courts and authorities have suggested that the reasonable person standard is the proper test for determining if a statement is "testimonial."\textsuperscript{199} The NACDL finds that "testimonial" statements are those "made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."\textsuperscript{200} Although this definition was cited

\textsuperscript{194} Id.
\textsuperscript{195} See supra note 191 and accompanying text.
\textsuperscript{196} See supra notes 78-79 and accompanying text.
\textsuperscript{197} See State v. Wright, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004) (considering the reasonable victim's state of mind regarding the use of the 911 call); People v. Cortes, 781 N.Y.S.2d 401, 407 (App. Div. 2004) (holding that "it makes no difference what the caller believes" for determining the purpose of the 911 call, although all callers are likely to know how the information might be used); Conyers, 777 N.Y.S.2d at 277 (considering the caller's subjecting "intention in placing the 911 calls").
\textsuperscript{198} See supra note 197.
\textsuperscript{199} See supra notes 167-72 and accompanying text.
\textsuperscript{200} Crawford v. Washington, 541 U.S. 36, 52 (2004) (quoting Brief for the National Association of Criminal Defense Lawyers et al. as Amici Curiae at 3,
in *Crawford*, the Court did not explicitly accept or reject it.\textsuperscript{201} However, applying this definition, *Wright* held that a statement made by a victim cannot be "testimonial."\textsuperscript{202} *Wright* reasoned that a reasonable victim who calls 911 just moments after the incident and while she is fighting to survive would not know that the statements might be used in a future proceeding.\textsuperscript{203} The court then contrasted this situation with that of a structured police interrogation, where a reasonable person might expect his or her responses to be used in judicial proceedings.\textsuperscript{204} Therefore, it can be inferred that an objective victim would not reasonably believe that the statements he or she made during a 911 call would be used in future judicial proceedings.\textsuperscript{205}

On the other hand, when the caller is a witness to the criminal incident, the analysis is more complicated. The *Conyers* opinion did not apply an objective witness standard.\textsuperscript{206} Instead, it focused on the subjective thoughts of the witness.\textsuperscript{207} After hearing the witness's panicked 911 call, the court concluded that "her intention in placing the 911 calls was to stop the assault in progress and not to consider the legal ramifications of herself as a witness in a future proceeding."\textsuperscript{208}

In contrast to *Conyers*, *Cortes* also involved a witness caller, but the court unequivocally stated that a caller's belief is irrelevant.\textsuperscript{209} *Cortes* ruled that "[w]hen a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding."\textsuperscript{210} However, earlier in the opinion, the court reasoned that 911 callers are likely to know that the information might be used for prosecutorial reasons given that media, private organizations, and police

\begin{footnotes}
\footnote{See id.}
\footnote{Wright, 686 N.W.2d at 302.}
\footnote{Id.}
\footnote{Id.}
\footnote{See id.}
\footnote{See People v. Conyers, 777 N.Y.S.2d 274, 276-77 (App. Div. 2004).}
\footnote{Id.}
\footnote{Id. (citing People v. Moscat, 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004)).}
\footnote{People v. Cortes, 781 N.Y.S.2d 401, 415 (App. Div. 2004).}
\footnote{Id.}
\end{footnotes}
departments dispense this information.211 While Conyers subjectively judged the witness's intent, Cortes judged the witness by the substance of the call rather than the caller's intent.212

Neither Conyers nor Cortes applied the test correctly. Conyers took the court in a direction that Justice Scalia and Justice Thomas warned against in White v. Illinois.213 The Justices concluded that focusing on the witness's intent would bind the courts in a multitude of difficulties because few statements can be "categorically characterized" as being made in contemplation of legal proceedings.214 Nevertheless, the court in Conyers took into account the witness's identity as the defendant's mother and victim's mother in-law, as well as the sound of her voice in determining her intentions in placing the call.215

According to the Supreme Court, analyzing the witness's subjective state of mind is not commensurate with the right of confrontation.216 Judges make the ultimate decision as to the intent of the witness and the admissibility of the statement.217 Yet, in overruling Roberts, the Court emphasized that the Roberts test was unpredictable and highly subjective because judges had the choice of countless factors when examining the reliability of a statement.218 A similar problem lies where a non-witness caller's subjective intent is considered because there is neither concrete evidence nor criteria for determining a caller's intent.

Another question for courts is whether they should take into consideration the subjective or objective intent of a caller. An inquiry into a person's subjective state of mind is risky, especially when the person has not appeared in court for

211. See id. at 407.
214. Id. at 364 (Thomas, J., concurring); see also Gerald F. Uelmen, Preserving Crawford Objections, CHAMPION, July 28, 2004, at 46.
215. See Conyers, 777 N.Y.S.2d at 276-77.
216. Cf. Crawford v. Washington, 541 U.S. 36, 65 (2004) ("It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.").
217. See id. at 67 (recognizing the judicial discretion in the courts below and viewing the Constitution as prescribing a procedural safeguard).
218. See id. at 63.
examination and the state of mind cannot be verified. The Court noted the objective intent formulation offered by NACDL without accepting or rejecting it. The objective person standard is certainly easier to apply, but is criticized for allowing courts to determine what a reasonable person of a certain age and under circumstances would believe. The Supreme Court has not made its position clear regarding whether the subjective or objective intent of a witness should be considered, and therefore lower courts remain free to make their own judgments.

C. Intent of the 911 Operator

Some scholars have argued that the intent of a 911 operator should be used to determine if a 911 call is "testimonial." Crawford is aimed at preventing abuse by government officials when information is elicited with the goal of convicting a suspect. Thus, Crawford has been interpreted to imply strongly that the "status and motivations of the person eliciting the information, not the perceptions of the declarant should determine" if a statement is "testimonial" in all situations. Scholars have argued that an objective assessment of the status and purpose of the questioner would better serve the purpose of Crawford because it eliminates the potential for abuse when information is elicited by government officials.

This type of inquiry into the questioner's intent is inappropriate because, although the Framers wanted to minimize the potential for abuse by government officials, the Sixth Amendment guarantees the right to confront a witness only when the witness has produced testimony against the accused, not when a separate party deems the witness's

219. See id. at 52 (noting the formulation offered by the NACDL: "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."); see also Friedman & McCormack, supra note 1, at 1240; Uelmen, supra note 214, at 46.

220. See Hood & Padilla, supra note 10, at 84-85.

221. See Crawford, 541 U.S. at 52.

222. See Hood & Padilla, supra note 10, at 85.

223. Crawford, 541 U.S. at 56 n.7. For instance, a prosecutor may elicit a statement from an accomplice that incriminates the defendant. Id. at 56.

224. Hood & Padilla, supra note 10, at 85.

225. See id.
statements to be "testimonial." More importantly, the Confrontation Clause does not protect the defendant from coercion by government officials. Rather, it guarantees the right to challenge the credibility of the accuser.

In addition, the problem this test attempts to resolve still remains. The Framers were concerned about the impartiality of the judiciary and knew that it may not always be trusted to safeguard the rights of the people. The potential for governmental abuse remains present as judges make the ultimate decision regarding the intent of the objective person and the ultimate admissibility of the statement on an evidentiary ruling. Therefore, the intent of a 911 operator should not be used to determine if a 911 call is "testimonial."

D. Are 911 Calls Interrogations?

Although "police interrogation" is not the only accepted definition of "testimonial," it is a safe starting point because the Supreme Court explicitly identified it as such. Crawford resolved some of the uncertainty surrounding the definition of "testimonial" by asserting that a police interrogation is "testimonial" under any definition, yet left it up to lower courts to determine what constitutes an interrogation. Corella, Moscat, and Cortes reached different conclusions as to whether 911 calls fall within the definition of interrogation. Moscat found that a 911 call was not analogous to an interrogation. Similarly, Corella found that a 911 call did not resemble an interrogation. Relying on Crawford's application Corella applied a narrow definition, even though the Crawford Court noted that "one can imagine various definitions of 'interrogation,' and we

---

226. See U.S. CONST. amend. VI; Crawford, 541 U.S. at 56 n.7 (noting that hearsay evidence of testimonial statements are rarely admissible against the accused in a criminal case).
227. See supra note 79 and accompanying text.
228. See supra notes 79, 81 and accompanying text.
230. See id.
231. Id. at 68.
232. Id.
233. See discussion supra Parts III.D.1.a, III.D.2.a.
need not select among them . . . ." 236 In contrast, Cortes concluded that the circumstances of a 911 call, where the caller reports a crime, are within the definition of "interrogation." 237 Although there are conceivable technical differences between 911 calls and interrogations, an expanded analysis reveals that, pragmatically, they are conducted under similar circumstances. 238

Both Moscat and Corella discussed the nature of a 911 call made by a witness and emphasized that a 911 call summons the police to the aid of citizens. 239 Moscat set the tone for Corella by stating that “[a] testimonial statement is produced when the government summons a citizen to be a witness,” however the court explained that a 911 call does the reverse. 240 Crawford does not limit “testimonial” statements to those elicited by the government. 241 Therefore, the simple fact that the caller summons the government does not make the call non-testimonial. 242

The questions a 911 operator asks a caller also affect whether a 911 call can be classified as an “interrogation” and therefore “testimonial.” A 911 call is composed of a series of questions asked by an operator and responses produced by a witness. 243 The court in Corella found that an operator asks questions to determine an appropriate response to the incident, rather than to conduct an interrogation. 244 However, in Cortes, the 911 operator asked questions about the shooter’s description and direction of movement, neither of which was relevant to helping the victim or stopping the crime. 245 In fact, those questions were more relevant for purposes of a police investigation. 246 Although the primary concern of a 911 operator may be to help the victim, it cannot be denied that a secondary purpose may also be to gather

236. Crawford, 541 U.S. at 53 n.4 (holding that statements given in response to structured police questioning fall within the definition of “interrogation”); Corella, 122 Cal. App. 4th at 468.
238. See id.
239. Moscat, 777 N.Y.S.2d at 879; Corella, 122 Cal. App. 4th at 468.
240. Moscat, 777 N.Y.S.2d at 879.
242. See id.
243. See Friedman & McCormack, supra note 1, at 1242-43.
244. Corella, 122 Cal. App. 4th at 468.
246. Id.
relevant information for a future police investigation.  Unlike Moscat and Corella, in which the courts declined to equate a 911 call with a police interrogation, Cortes involved a witness to the crime as opposed to a victim. However, this fact alone may not help courts decide whether a 911 call is an "interrogation" because the reasoning outlined in Cortes is not limited to witnesses. Cortes focused on the public's knowledge of the information necessary to place a 911 call, including the crime reporting function and formal procedures of 911 calls. Since all three cases present a different analysis, courts have much to consider and a variety of factors to weigh.

V. PROPOSAL

In the face of the uncertainty created by Crawford, courts need a uniform test to determine the admissibility of 911 calls. Such a test should be based on the timing of the call relative to the crime because this is a factor common to all 911 calls and provides a narrow test. Courts should uniformly use this distinction in analyzing whether a 911 call is "testimonial."

The facts of a case are key in determining if a particular 911 call is "testimonial." Courts must be given flexibility in determining on a case-by-case basis whether to admit 911 calls into court, but this must be accomplished with a uniform test.

A. 911 Calls Made Close in Time to the Incident Are Not "Testimonial"

A 911 call made reasonably close in time to the incident should not be considered "testimonial." The issue of "reasonableness" is a fact-based question, resolved using the court's discretion. A 911 call is a considerably accurate reflection of the events that occurred, especially when the call is made while the incident is in progress or shortly thereafter.

The primary purpose of a 911 call when made close in

247. See Friedman & McCormack, supra note 1, at 1242.
248. See discussion supra Part II.D.1.a.
249. See supra Part II.D.2.a.
251. Id. at 405-07.
time to the incident is to seek assistance, not to provide testimony for future prosecution. *Crawford* held police interrogations and testimony, either at a preliminary hearing, before a grand jury, or at a former trial, to be "testimonial" because all primarily occur with prosecution as a goal. However, the goal of a 911 call is to seek assistance. Therefore, when a 911 call is made close in time to the incident, it is not "testimonial" in nature.

**B. Balancing Test Where More Than Reasonable Time Has Lapsed**

When a court finds that more than a reasonable amount of time has passed between the incident and a 911 call, it should consider different factors. Most importantly, it should consider the nature of the call and whether there was actually an emergency.

Under this approach, the "nature" of a 911 call is determined by asking whether the caller called 911 primarily to seek assistance, or to provide information which could be used for prosecution. As one commentator has noted, "The more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial." Thus, as more time passes between the 911 call and the incident, the more likely it is that the call is "testimonial." With time, the effects of the incident stabilize and emergencies are unlikely. Courts should look at the 911 call transcript to determine if the caller sought police or medical attention. Furthermore, courts could easily determine if there was an actual emergency by looking at police or medical reports and hearing testimony by personnel who responded to the 911 call. Considering the 911 caller's request and the response actually provided give clarity as to whether a call was "testimonial."

**C. Factors the Court Should Not Consider**

Having discussed the factors that should be considered by the court, it is important to exclude certain factors from

---

255. *Id.*
consideration because they are misleading and add no value to the analysis. For instance, courts have been incorrect to use the 911 caller’s state of mind to determine whether a 911 call is “testimonial.”\textsuperscript{256} Furthermore, the length and detail of a 911 call should not be considered by the courts because it has no determinative value.\textsuperscript{257} Lastly, the caller’s status as either a victim or witness should not be considered.

First, courts should not get entangled in the caller’s state of mind. Looking into the caller’s state of mind, subjectively or objectively, creates speculation and is highly unpredictable due to the various factors a court could take into account. The courts would be speculating what they think a reasonable person in the caller’s situation would have intended.\textsuperscript{258} Similarly, courts would also be speculating as to what the caller was actually thinking. \textit{Crawford} sought to eliminate the uncertainty created by a judge’s discretion over how factors should be weighed.\textsuperscript{259} Therefore, the caller’s state of mind should not be considered by the courts.

Second, the length and detail of the caller’s statement is not indicative of whether the call was being made to provide information for prosecution. Typically, 911 operators ask a series of questions, and the caller answers those questions.\textsuperscript{260} Thus, the length or detail of a caller’s statements should be attributed to the 911 operator’s questions, which are not within the caller’s control. Both the 911 operator and the caller have the same objective: to communicate sufficient information to allow emergency services to provide appropriate and effective assistance.\textsuperscript{261} For instance, when a 911 operator asks a victim his or her history with the perpetrator, the operator is attempting to evaluate the

\textsuperscript{256} See discussion \textit{supra} Part IV.B.
\textsuperscript{257} Some courts have found a statement to be more reliable because it is detailed, while other courts have held a statement to be more reliable because caller had limited information from a passing quickly through the incident. Crawford v. Washington, 541 U.S. 36, 63 (2004) (citing People v. Farrell, 34 P.3d 401, 407 (Colo. 2001); United States v. Photogrammetric Data Serv., Inc., 259 F.3d 229, 245 (4th Cir. 2001)). Since a typical 911 call consists of a series of questions by the operator, see Friedman & McCormack, \textit{supra} note 1, at 1180, the length of the call is in large part controlled by the number and type of questions asked by the operator.
\textsuperscript{258} Hood & Padilla, \textit{supra} note 10, at 85.
\textsuperscript{259} See Crawford, 541 U.S. at 63.
\textsuperscript{260} Friedman & McCormack, \textit{supra} note 1, at 1180.
\textsuperscript{261} See People v. Corella, 122 Cal. App. 4th 461, 468 (Ct. App. 2004).
situation and the perpetrator's actions to provide appropriate aid. Thus, there is no constructive value in considering the length and details of a 911 call when determining whether the call is "testimonial."

Third, the caller's status is irrelevant because it is not indicative of a call's "testimonial" nature. As discussed above, a witness could call for assistance just as easily as a victim could. Similarly, a victim could call 911 to report a crime rather than seek aid, as can a witness. Thus, a caller's status would serve no purpose in determining if a call is "testimonial."

VI. CONCLUSION

After Crawford, "testimonial" statements made by an unavailable witness are no longer admissible because of the Confrontation Clause. Statements may be admitted in court only if the defendant had a prior opportunity to cross-examine the unavailable declarant. Crawford caused much uncertainty in the lower courts with respect to 911 calls, and this uncertainty must be resolved. It is important that courts have a uniform test they can consistently follow so that certainty can be created for prosecutors, defense attorneys, and the court.

As a policy matter, this concern is particularly relevant where prosecutors in domestic violence cases rely on 911 calls to fill in the gaps when a victim is unavailable. Domestic violence victims must have courage to speak the truth during the stress of the violent situation. Once a victim has the opportunity to consider the possibility of future harm if he or she testifies during prosecution, the victim may be less candid. In this instance it is clear that a 911 call is often significant evidence at trial. Therefore, courts must take a

262. See Friedman & McCormack, supra note 1, at 1243.
263. See supra Part IV.A.
264. See id.
266. Id. at 53-54.
267. See Hood & Padilla, supra note 10, at 85; see discussion supra Part II.D.
270. Id.
uniform approach when determining the admissibility of a 911 call.

Since a 911 call can be crucial to a case, the risk of a crucial 911 call not being admitted is far too great when courts have no guidelines. This comment proposes a two-prong test that creates flexibility and sets an uniform standard for all courts in deciding whether a 911 call should be considered a "testimonial" statement.