Confrontation and Domestic Violence Post-Davis: Is There and Should There Be a Doctrinal Exception

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INTRODUCTION

Close to five million intimate partner rapes and physical assaults are perpetrated against women in the United States annually. Domestic violence accounts for twenty percent of all non-fatal crime experienced by women in this country. Despite these statistics, many have argued that in the past six years the Supreme Court has “put a target on [the] back” of the domestic violence victim, has “significantly eroded

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3. Id. at 871.
offender accountability in domestic violence prosecutions," and has directly instigated a substantial decline in domestic violence prosecutions. The asserted cause is the Court's complete and groundbreaking re-conceptualization of the Sixth Amendment right of a criminal defendant to confront his accusers, beginning with the historic decision Crawford v. Washington in 2004, through Davis v. Washington two years later, and then Giles v. California two years after that. This Article will evaluate the Sixth Amendment right of confrontation in the context of domestic violence cases, both to assess certain consequences of this major constitutional shift and to suggest a change to confrontation doctrine in order to address some of the negative consequences that have apparently resulted. This Article engages in this consideration by way of an assessment of all state domestic violence cases that have examined the Confrontation Clause after Davis v. Washington.

After this brief introduction, Part I traces the recent development of the confrontation right, from its grounding in a reliability concern in Ohio v. Roberts, to the Crawford v. Washington "testimonial" revolution, to the Davis v. Washington clarification (or lack thereof), and through the Giles v. California forfeiture decision. Part II then explores the right of confrontation specifically in the domestic violence context, outlining how the change in domestic violence prosecutions and the characteristics of the classic domestic violence crime have left such prosecutions particularly vulnerable to the confrontation revolution. Part III presents the data collected and analyzed in this study, highlighting certain results and patterns and offering potential explanations for the findings. The findings demonstrate that state court judges take a relatively expansive but unpredictable approach to the Davis framework, allowing many testimonial statements while excluding others, with little consistency. Part IV then considers the normative question of whether there should be a doctrinal exception to the confrontation right, as it is currently understood. It is argued in this final part that a domestic violence exception should be created in the confrontation doctrine, for it would help prosecute batterers and resolve existing classification inconsistency, while still sufficiently protecting defendant rights. The domestic violence exception would function as a part of—rather than separately from—the currently existing Crawford/Davis confrontation framework.

by reclassifying all victim statements within an abusive relationship as non-testimonial, and as such admissible, if satisfying other evidentiary requirements.

It should be acknowledged at the outset that there are limitations to the data presented in this Article. As will be detailed below, this author examined a small sample of cases and only reviewed the record as presented in the decision, excluding trial transcripts. The coding categories used were somewhat broad and at times it was difficult to determine the factors upon which a judicial decision rested. Accordingly, the conclusions reached in this Article are limited. Limitations recognized, however, the data presented and the topics explored in this Article remain valuable. The cases and opinions that are analyzed present a significant and helpful snapshot of judicial decision-making post-Davis, and the themes and arguments offered encourage forward-thinking discussion and debate on how the confrontation right and domestic violence interact.

I. Recent Developments in the Right of Confrontation

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."6 From the language of the amendment, it is clear that this right applies only in criminal prosecutions, concerns only witnesses against the defendant, and is satisfied by confrontation.7 The exact scope of this right, however, has drastically expanded within the last several years based on how the Supreme Court has defined "witnesses" and their statements. The Court has always understood witness statements to include in-court testimony as well as some, but not all, out-of-court hearsay statements.8 However, its 2004 decision in Crawford v. Washington reinvigorated the confrontation right by completely redefining the meaning of the out-of-court hearsay statements with which the right is concerned.9

6. U.S. Const. amend. VI.
7. The consensus within the United States judiciary is that the right "to be confronted" is "the right to be in the courtroom with a witness, to look at him face-to-face, and to cross-examine him." Clifford S. Fishman, Confrontation, Forfeiture, and Giles v. California: An Interim User's Guide, 58 Cath. U. L. Rev. 703, 707 (2009).
8. Hearsay statements are those out-of-court statements introduced to prove the truth of the matter asserted. Fed. R. Evid. 801(c).
Prior to Crawford, the 1980 Ohio v. Roberts decision defined the meaning of the right of confrontation.\(^\text{10}\) In Roberts, the Court was ultimately concerned with reliability, as it saw the underlying purpose of the Confrontation Clause as a safeguard against the use of untrustworthy evidence against a criminal defendant. Accordingly, in the test created under Roberts, a prosecutor could introduce hearsay statements without also calling the declarant as a witness as long as the prosecutor could demonstrate (i) the unavailability of the declarant and (ii) that the statement had sufficient “indicia of reliability.”\(^\text{11}\) The Court found that a statement could be deemed sufficiently reliable in one of two ways. First, the statement would be admissible if the prosecution could demonstrate that it fell within a “firmly rooted” hearsay exception, such as the dying declaration exception, the business records exception, or the public records exception.\(^\text{12}\) Second, even if the prosecution could not show that the statement fell within such an exception, the statement would still be admissible if the prosecution could demonstrate statement reliability by meeting the standard of “particularized guarantee of trustworthiness.”\(^\text{13}\) Under this criterion, the prosecution was able to admit much unconfronted hearsay (i.e. out-of-court statements made by a declarant who did not face cross-examination, introduced to prove the truth of the matter asserted) as sufficiently reliable.

In the years following the Roberts decision, the Court made it yet easier for the prosecution to introduce unconfronted hearsay against a defendant by weakening and virtually destroying any significant requirements to either the unavailability or the reliability portions of the admissibility test.\(^\text{14}\) Consequently, post-Roberts, the Confrontation Clause did little work: much unconfronted hearsay was routinely admitted against the accused, and the consensus was that the “Roberts test” was not much of a test at all.\(^\text{15}\)

\(^{10}\) See Ohio v. Roberts, 448 U.S. 56, 76–77 (1980).

\(^{11}\) Roberts, 448 U.S. at 65–66.

\(^{12}\) Roberts, 448 U.S. at 66.

\(^{13}\) Roberts, 448 U.S. at 66.

\(^{14}\) See White v. Illinois, 502 U.S. 346, 354–56 (1992) (finding the unavailability test of little benefit and thus unnecessary in situations involving hearsay admitted under the spontaneous declarations exception or under the medical treatment exception); Bourjaily v. United States, 483 U.S. 171, 183 (1987) (finding that it was unnecessary to make an independent assessment of reliability of a co-conspirator statement, as the exception was sufficiently “firmly rooted”); United States v. Inadi, 475 U.S. 387, 398–99 (1986) (limiting the Roberts unavailability test to situations involving the use of the prior testimony exception); Lininger (2005), supra note 5, at 756–60.

\(^{15}\) Lininger (2005), supra note 5, at 760.
In 2004, however, the Supreme Court revitalized the confrontation right by wholly re-conceptualizing the right's purpose, and thereby altered the type of statements with which it was concerned. In Crawford, the prosecution sought to admit tape-recorded statements of a non-testifying declarant's interview with the police. The defendant argued the admission of the tapes violated his Sixth Amendment right of confrontation. Rejecting the Roberts test, the Supreme Court agreed. The opinion, authored by Justice Scalia, surveyed the history of the Confrontation Clause, beginning with Roman law, through English common law, the American colonies, and the states. From this historical inquiry, the majority drew two inferences. The first inference was that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." Using this inference, the Court rejected the notion that the confrontation right is only concerned with in-court statements and also rejected the complete overlap between hearsay statements and those statements implicating confrontation. In doing so, the Court made the crucial distinction of the confrontation right as one between "testimonial" and "non-testimonial" statements. The second inference drawn by the majority from the history was that "the Framers would not have allowed admission of 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." Thus, replacing the overruled Roberts test, the Court established the new Crawford rule: testimonial statements may only be admitted against a criminal defendant when the declarant is unavailable and the defendant had a previous opportunity for cross-examination.

In drawing these inferences and creating the new rule, the Court rejected Roberts' conception of the right as solely concerned with reliability. Instead, under Crawford, while the right of confrontation does have an "ultimate goal" of ensuring reliability, it is fundamentally a procedural and not substantive right, such that "it commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Crawford therefore severed the connection between hearsay analysis and confrontation analysis, such that each is now a distinct consideration, and

17. Crawford, 541 U.S. at 50–51.
hinged the confrontation analysis on whether a statement can be characterized as testimonial.

While "testimonial" versus "non-testimonial" became the new critical consideration of Confrontation Clause analysis, the Majority in Crawford did little to define the terms, leaving "for another day any effort to spell out a comprehensive definition of 'testimonial.'"\(^{20}\) The Court did recognize a "core class" of testimonial statements, however, including ex parte testimony at a preliminary hearing, before a grand jury or at a prior trial, and statements taken by police officers in the course of interrogations.\(^{21}\) The declarant's tape-recorded out-of-court statements to the police in Crawford were deemed clearly testimonial as part of a police interrogation and thus inadmissible.\(^{22}\)

Two years later, the Supreme Court returned to the confrontation issue in Davis v. Washington.\(^{23}\) Davis consolidated two cases: Davis v. Washington and Indiana v. Hammon, both of which involved domestic violence and both of which considered whether certain statements made to law enforcement personnel are "testimonial" and therefore potentially inadmissible under Crawford.\(^{24}\) In Davis, the relevant statements were those made to a 911 emergency operator by the victim who stated that her ex-boyfriend was "here jumpin' on me again," was "usin' his fists," and then slightly later in the conversation, was "run[ning] out the door."\(^{25}\) The 911 operator went on to ask the victim a series of questions, and the police showed up within four minutes to find the victim looking "shaken" and "frantic."\(^{26}\) In Hammon, the relevant statements were those made by the victim to police officers who had responded to a domestic disturbance complaint. When the police arrived, the victim opened the door looking "somewhat frightened" but stated that "nothing was the matter."\(^{27}\) She allowed the police to enter, however, and upon talking with the police, separately from her husband, admitted that her husband had assaulted her and signed an affidavit to that effect.\(^{28}\)

\(^{20}\) Crawford, 541 U.S. at 68.
\(^{21}\) Crawford, 541 U.S. at 68.
\(^{22}\) Crawford, 541 U.S. at 68.
\(^{24}\) In addition to addressing whether statements made to law enforcement are testimonial, the Court also found the Confrontation Clause inapplicable to non-testimonial statements. This had been "suggested in Crawford, even if not explicitly held" but was absolutely confirmed in Davis. Davis, 547 U.S. at 823–24.
\(^{25}\) Davis, 547 U.S. at 817–18.
\(^{26}\) Davis, 547 U.S. at 818.
\(^{27}\) Davis, 547 U.S. at 819.
\(^{28}\) Davis, 547 U.S. at 819–20.
While the Court, again in an opinion authored by Justice Scalia, declined to "produce an exhaustive classification" of testimonial and non-testimonial statements, it did provide more guidance on the issue, asserting that "[s]tatements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." The Court thus created the "primary purpose" and "ongoing emergency" test to classify statements to law enforcement. Under this rubric, the Majority found the statements made in Davis to the 911 operator to be non-testimonial while the statements made in Hammon to the police officers to be testimonial. The Court considered the following factors in making this distinction between Davis and Hammon (and also between Davis and Crawford, for the majority refers back to the facts in their previous confrontation decision): (i) whether the victim-declarant was speaking about events "as they were actually happening"; (ii) whether the victim-declarant was "facing an ongoing emergency"; (iii) whether the statements of the victim-declarant "were necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past"; and (iv) the level of formality of the interviews. On each one of these factors, the Court distinguished Davis from Hammon and Crawford. The Court observed that in Davis, the victim was speaking about the abuse as it actually happened, faced an ongoing emergency, needed help to resolve an ongoing emergency, and was communicating in a frantic rather than tranquil or formal manner. In Hammon, and previously in Crawford, the Court found that the victims were speaking about the abuse after it had happened, were not experiencing an ongoing emergency when speaking to police, were making statements to explain what had happened, and were doing so in a calm, formal, and organized manner. Accordingly, despite the fact that both victim-declarants were unavailable at trial and had not been previously crossed by the defendant, only the non-testimonial statements in

29. Davis, 547 U.S. at 822.
30. Davis, 547 U.S. at 827.
31. Davis, 547 U.S. at 827.
32. Davis, 547 U.S. at 827.
33. Davis, 547 U.S. at 827.
Davis were admissible, while the testimonial statements in Hammon were not admissible.  

In Giles v. California in 2008, the Court again decided a major confrontation case also involving a domestic violence victim's statements to law enforcement. The issue was whether a defendant, in murdering his victim, forfeited his right of confrontation by making the victim-declarant unavailable. The majority again based its opinion on historical considerations and found that the forfeiture doctrine only applies when the prosecution is able to establish that “the defendant engaged in conduct designed to prevent the witness from testifying.” Accordingly, under Giles, it is not sufficient to find that the defendant took actions against the victim-declarant resulting in unavailability. Instead, the prosecution must be able to demonstrate a specific intent by the defendant to block the victim-declarant's testimony at trial. The specific intent requirement is a more stringent requirement than many lower courts had been using pre-Giles.

34. The Supreme Court remanded the Hammon decision to consider the issue of forfeiture, such that if the lower court did find that the defendant had forfeited his right of confrontation, then the testimonial statements would still be admissible, even if the victim-declarant was unavailable and had not been subject to cross-examination. Davis, 547 U.S. at 834.


36. In both Crawford and Davis, the Supreme Court briefly mentioned the issue of forfeiture of the confrontation right. In both opinions, the Court reaffirmed the existence of a forfeiture exception without providing much detail. In Crawford, the Court said, "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds." Crawford, 541 U.S. at 62. In Davis, the Court said, "we reiterate what we said in Crawford...we take no position on the standards necessary to demonstrate such forfeiture..." Davis, 547 U.S. at 833.

37. Giles, 128 S. Ct. at 2680.

38. There has been much commentary on the Giles decision specifically in relation to domestic violence cases. Most commentary is critical of Giles, finding the burden of specific intent too high for the government to prove. However, there are commentators who view Giles as less devastating to domestic violence prosecutions than others, emphasizing the tools remaining for prosecutors, the ambiguity in the opinion, and potential changes that can be made within the framework to improve the chances for the prosecution. See, e.g., Fishman, supra note 7; Ajaysh Hussain, Reviving Hope for Domestic Violence Prosecutions: Giles v. California, 46 AM. CRIM. L. REV. 1301 (2009); Lininger (2009), supra note 2; Deborah Tuerkheimer, Forfeiture After Giles: The Relevance of "Domestic Violence Context," 13 LEWIS & CLARK L. REV. 711 (2009).

39. See, e.g., People v. Johnson, No. C042274, 2006 WL 3648929 (Cal. Ct. App. Dec. 14, 2006) (explaining that defendant forfeited his ability to raise a Crawford challenge because he murdered the victim, thereby rendering her unavailable to testify); State v. Moua Her, 750 N.W. 2d 258 (Minn. 2008) (holding, prior to the Supreme Court's decision in Giles, that the applicability of the forfeiture by wrongdoing doctrine does not require specific intent); State v. Sanchez, 177 P.3d 444 (Mont. 2008) (holding, prior to the Supreme Court's decision in Giles, that the applicability of the forfeiture
II. The Domestic Violence Context

Although the Confrontation Clause revolution has influenced all types of criminal prosecutions, it is clear that prosecutions of domestic violence have been particularly affected. Domestic violence prosecutions often rely very heavily on hearsay statements of victims, many of which become inadmissible testimonial evidence under Crawford. It is both the history and development of domestic violence prosecutions as well as the specific nature of crimes of domestic violence that make the Crawford/Davis line of confrontation cases especially detrimental to such prosecutions.

Today the concept of domestic violence as a public health crisis figures prominently in societal consciousness and, accordingly, represents a crime that prosecutors take seriously. However, this has not always been so. Until the last several decades, domestic violence was viewed largely as a private family matter and not a concern for the criminal justice system or society as a whole. Although many American states adopted antidomestic violence laws in the nineteenth century, they were only enforced in the most violent of circumstances involving serious injury to the victim. It was not until the 1970s and 1980s that domestic violence advocates were able to successfully raise awareness of domestic violence as a larger societal problem. Advocates for the first time received attention from policymakers, and the government began supporting shelters for victims, batterer intervention programs, and empirical studies on domestic violence. With this public transformation in acknowledging the occurrence of domestic violence came a transformation in charging and prosecuting domestic violence. The prosecutorial transformation, however, lagged behind the innovations in the public sphere, with prosecutorial changes not implemented until the

by wrongdoing doctrine does not require specific intent); People v. Costello, 53 Cal. Rptr. 3d 288 (Cal. Ct. App. 2007) (explaining rationale for not requiring specific intent).

40. Prosecutions for child abuse and elder abuse have also been specifically affected by the Crawford revolution due to many of the same reasons as in the domestic violence context, however, this Article will not address these child and elder abuse prosecutions. For a sampling of commentators’ discussions on the specific negative impact of Crawford/Davis on domestic violence cases, see infra note 57.


42. Id. at 1000–01.

43. Id. at 1001.
late 1980s and 1990s. The lack of attention and response to the problem of domestic violence in state prosecutors' offices drew much criticism from domestic violence advocates. In response to this criticism, specialized courts were developed for handling domestic violence cases, judges received sensitivity training in issues surrounding domestic violence, and states passed new criminal procedures for domestic violence cases. Prosecutor offices also implemented "no drop" policies and "evidence-based prosecutions" for domestic violence cases, demonstrating their commitment to these types of cases.

Evidence-based prosecutions, also called "victimless prosecutions," are prosecutions that do not require the victim's live testimony, enabling the government instead to present certain types of hearsay evidence to prove its case. In domestic violence cases, the out-of-court statements often are those made by the victim to a 911 operator or the responding police officers. The specifics of "no drop" policies vary from jurisdiction to jurisdiction but generally necessitate a prosecutor to pursue the domestic violence case even over the victim's objections. These two strategies enable prosecutors to bring domestic violence cases despite the absence of a victim and, accordingly, because of the specific nature of the crime of domestic violence (discussed below), have served to dramatically increase the number of domestic violence prosecutions.

Two key aspects of the crime of domestic violence create evidentiary obstacles in the prosecution of batterers. Tom Lininger, in "Prosecuting Batterers After Crawford," provides an insightful commentary on this relationship between battered women and prosecutors. First, victims of domestic violence are more likely than any other crime victim to recant or refuse to cooperate with police after initially providing information to them. Approximately eighty percent of victims do not

44. Id.
45. For example, states increasingly allowed warrantless arrests in domestic violence cases, provided discretionary arrest authority to police, imposed laws effectively requiring overnight lock-up of the suspected abuser, and imposed new record-keeping requirements in domestic abuse cases. Richard D. Friedman & Bridget McCormack, Dial-In Testimony, 150 U. PA. L. Rev. 1171, 1184–88 (2002).
46. Jaros, supra note 41, at 1001–02.
47. Lininger (2005), supra note 5, at 751–52.
48. Friedman & McCormack, supra note 45, at 1188. No drop policies are very controversial; debates concern both the effectiveness of such policies and the potential of such polices to deprive the victim of choice and agency in an arguably paternalistic manner. Id. at 1189. See also Angela Corsilles, Note, No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution? 63 Fordham L. Rev. 853 (1994).
49. Lininger (2005), supra note 5, at 768.
assist in the prosecution of their domestic violence cases. Additional explanations include economic dependence of the victims; emotional attachment to batterers; desire to keep families together; religious and cultural views of relationships; fear of state intervention and taking away of children; concern of deportation (of batterer and/or victim); “learned helplessness” created by recurring abuse; and a belief by the victim that no crime has in fact occurred. Second, domestic violence is a crime that commonly occurs at home and in private. As a result, often the only witnesses to the crime will be the victim and the defendant.

The high likelihood both that victims will refuse to cooperate and that there will be no other witnesses often requires prosecutors to rely primarily on hearsay evidence. This type of hearsay evidence generally consists of 911 emergency calls, verbal statements given by the victim to the police upon their arrival at the scene, and written statements given by the victim, such as affidavits or civil restraining orders. Under the formally obsolete Roberts framework, these types of out-of-court statements were routinely admitted without the presence of the declarant in court, thus enabling domestic violence prosecutions to proceed. Under the new Crawford framework, however, if these statements are deemed testimonial (and the victim has in fact chosen not to testify), then their admission would be barred as a violation of the defendant’s Sixth Amendment right. Without these types of statements, a considerable barrier is erected for the prosecutor in “utilizing the criminal justice system to combat domestic violence.”

III. The Data: Is There a Domestic Violence “Exception”?

As described above, the generally accepted interpretation of the post-Crawford/Davis legal state of affairs is that prosecutors in domestic

50. Id. at 751 (citing People v. Brown, 94 P.3d 574, 576 (Cal. 2004)).
51. Id. at 768–79.
52. Id. at 769–70.
54. Id.
55. See generally Friedman & McCormack, supra note 45 (discussing the heavy prosecutorial use and judicial acceptance of out-of-court statements, especially 911 calls in domestic violence cases, under the Roberts framework, and advocating for a change in the interpretation of the Confrontation Clause).
56. Jaros, supra note 41, at 1002.
violence cases will often be left with little admissible evidence and therefore have difficulty prosecuting batterers. This has resulted in heavy criticism of the Supreme Court decisions. Some commentators have argued that in order to address this problem, judges will effectively ignore the new constitutional framework and admit evidence under the old Roberts reliability framework as they see fit based on the current prosecution. Commentators have also directed criticism at the Supreme Court’s lack of clarity in both the Crawford and Davis opinions regarding what constitutes testimonial as opposed to non-testimonial evidence. These commentators argue that the Supreme Court created much confusion for lower courts in these decisions, leading to inconsistency in judicial opinions on admissibility. It is these claims and criticisms that this Article attempts to explore through a survey of

57. See, e.g., Baxter, supra note 53, at 224 (“The decision in Hammon, of course, was seen certainly as a blow to prosecutors.”); Michael H. Graham, The Davis Narrowing of Crawford: Is the Primary Purpose Test of Davis Jurisprudentially Sound, “Workable,” and “Predictable”, 42 CRIM. L. BULL., NO. 5, at 604 (2006) (finding the Crawford and Davis decisions to “pave a road that is rocky, difficult to navigate, lacks a clear jurisprudential foundation, and creates very bizarre and potentially hazardous results”); Lininger (2005), supra note 5, at 752 (noting the “district attorneys, defense attorneys, judges, victims’ advocates and scholars [that] have predicted a significant reduction of evidence-based prosecutions because of Crawford”); Moody, supra note 4, at 404 (stating that as a result of the “Court’s intentionally obtuse holding, many domestic violence cases will never be prosecuted.”); Myrna S. Raeder, Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford, 20 CRIM. JUST., 24 (Summer 2005) (“Crawford’s fallout is being felt throughout the criminal justice system, but it has had a unique impact on domestic violence . . . cases.”) [hereinafter Raeder (2005)].

58. See, e.g., Baxter, supra note 53, at 225 (finding that many judges “will try to admit what they believe is reliable evidence despite the fact that Crawford’s holding obviated the Roberts reliability standard”); Jatos, supra note 41, at 1008–09 (noting that “[i]n order to fully understand many Crawford decisions, one must appreciate the unique dynamics of domestic violence prosecutions and the unusual role that many judges adopt in such cases” as “those who stop the violence” and thus take a more expansive view of non-testimonial statements.).

59. See Lininger (2005), supra note 5, at 781 (“The lower courts’ treatment of victim’s statements to responding officers is unpredictable—just as unpredictable, perhaps, as the courts’ analyses of reliability during the Roberts era.”); Moody, supra note 4, at 394 (“Nowhere has the application of the testimonial statements test been more painfully inconsistent than in the area of domestic violence.”); Myrna S. Raeder, Confrontation Clause Analysis After Davis, 22 CRIM. JUST., 10, 13–14 (Summer 2007) (asserting that “as with Justice Stewart’s view of pornography, we are left with little guidance other than we will know testimonial statements when we hear them,” and that the “answer to whether a statement is testimony may vary greatly depending on the viewpoint from which the judge analyzes the call”); Raeder (2005), supra note 57, at 26 (stating that in Crawford, the “Court provided no clear definition as to what is ‘testimonial’ . . . [u]ndoubtedly, the vagueness was required in order to obtain a majority”).
domestic violence cases post-Davis. The analysis aims to determine whether de facto judicial evidentiary exceptions are present, such that hearsay evidence is still being admitted despite Davis mandates, and to determine whether classification inconsistencies exist in the cases, such that the determination of a statement to be testimonial or not is unpredictable or irregular.

This author reviewed state appellate and Supreme Court domestic violence cases involving the Confrontation Clause after Davis v. Washington (decided in 2006). "Domestic violence cases" limited the sample to cases that involved a prosecution based on violence between adults who were currently in an intimate relationship at the time of the violence, or two adults who had formerly been in such a relationship. The sample was limited to those cases decided that examined or discussed the Confrontation Clause issue, not just mentioning or citing Crawford or Davis. The sample was limited to those state cases decided after Davis because, as mentioned above, the Court in Crawford provided very little guidance on the classification of evidence as testimonial. Accordingly, even if claims of inconsistency were valid post-Crawford, could be explained they at least partially by the lack of judicial commentary in the decision. If those inconsistencies persist post-Davis, it is likely to be the result of the new confrontation framework rather than a lack of clarity.

With the above-mentioned parameters, the sample contained eighty-two state cases: sixty-nine appellate level cases and thirteen Supreme Court cases. For each of those eighty-two cases, the Confrontation Clause issues were recorded, including the type of hearsay evidence that was offered, the classification of the evidence as testimonial or non-testimonial, the key factors for the classification of each statement, any forfeiture claims at issue and the ultimate ruling on admissibility of the evidence. Each type of hearsay evidence was assigned to one of the following categories: (1) 911 call; (2) verbal statements made to police immediately upon arrival at the incident; (3) later verbal statements made to police regarding the incident; (4) statements of the victim made to medical personnel (including doctors, nurses and paramedics); (5) statements of the victim made to non-police regarding the incident (including friends, family and neighbors); and (6) miscellane-
ous written statements of the victim (including transcripts, affidavits and notes). Categories one, two, and three contained some statements made by non-victims (mostly children), but the majority were victim statements. The remaining three categories were all victim statements.

The questions of an expansion (or not) of *Davis* and the existence (or not) of predictability are explored below by first analyzing the judicial classification of statements as testimonial or not and then briefly examining the overall rate of admissibility of the hearsay statements at issue. The focus in the testimonial section will be on categories one, two, and three as those were the bulk of statements at issue in the opinions. The results demonstrate an apparent expansion of the *Davis* framework, with much unconfronted hearsay admitted in two ways: first, statements that are objectively testimonial under *Davis* often were found to be non-testimonial, and second, those statements found to be non-testimonial by a lower court but testimonial by a higher court on appeal frequently were deemed harmless error and ultimately admissible. The results also demonstrate a lack of predictability in the testimonial versus non-testimonial classifications, as similarly contexted statements were often classified differently, with no consistent explanatory factor. Two potential explanations, individually or conjunctively, may explain these results. First, perhaps the Court in *Davis* actually construed “non-testimonial” broadly but also vaguely, enabling the admission of much unconfronted hearsay but without much guidance. Second, perhaps some, but not all, judges are consciously undertaking a broad reading of *Davis*, admitting evidence they deem to be reliable and/or necessary to a prosecution, judgments that may differ among judges.

**A. Testimonial Versus Non-Testimonial**

The eighty-two cases contained a total of 137 hearsay statements at issue. Of those one hundred and thirty-seven, seventy-seven were found to be non-testimonial, forty-six were found to be testimonial and fourteen were not ruled upon (either because the case was decided or remanded through harmless error, forfeiture or another unrelated issue on appeal). Of the 137, thirty-four were coded as (1) 911 calls, sixty-one as (2) immediate statements to police, twenty-one as (3) later statements to police, five as (4) statements to medical personnel, eleven as (5) statements to non-police and five as (6) written statements.

62. In the following section, “*Davis v. Washington*” refers to the Supreme Court decision as a whole, while the use of only “*Davis*” or only “*Hammon*” refers to that specific set of facts within the larger *Davis v. Washington* decision.
Based on the 123 statements that were classified, it can be conclud-
ed that there is a credible domestic violence “exception”, as many
statements that objectively would be classified as “testimonial” under
Davis v. Washington have in fact been judged “non-testimonial” by the
state courts. This apparent expansion of Davis v. Washington in these
domestic violence cases is limited, however, because the classification of
the statements is inconsistent.

One hundred percent of the Category One, 911 calls, were deemed
non-testimonial. The Supreme Court in Davis v. Washington implied that
most 911 calls would qualify as non-testimonial statements, for they ordi-
narily “describe current circumstances requiring police assistance,” which
constitute ongoing emergencies. The Court, however, also left open the
possibility that at least portions of 911 calls could be found to be testimo-
nial, and thus the fact that all of the calls were judged non-testimonial is
somewhat significant. While some of the calls analyzed in the state deci-
sions exactly mirrored the situation in Davis—the victim was speaking
about events as they were happening and was providing information clearly
to resolve the present emergency—others were made in situations that
failed to reach the objective level of “emergency.” For instance, in cases
such as State v. Pugh and State v. Camarena, the courts found the victim’s
statements to the 911 operator to be non-testimonial, even though in
both instances she described the events in the past tense (“my husband
was beating me up really bad” and “my boyfriend hit me”) and in both
instances the defendant had already left the scene. The courts in People
v. Nguyen and People v. Kaough found 911 calls to be non-testimonial
despite their having been made over thirty minutes and several hours,
respectively, after the domestic violence incident had occurred. Addition-
ally, 911 calls were classified as non-testimonial notwithstanding the

63. Davis v. Washington, 547 U.S. 813, 827 (“Although one might call 911 to provide a
narrative report of a crime absent any imminent danger, [the victim’s] call was plainly
a call for help against bona fide physical threat.”).
64. Davis, 547 U.S. at 828 (explaining that the Court is not “saying that a conversation
which begins as an interrogation to determine the need for emergency assistance can-
not . . . ‘evolve into testimonial statements.’”)
called 911 operator while hiding outside of her home, barefoot and in pajamas, after
the defendant attacked her; defendant was still looking for her and accordingly victim
was whispering and terrified, pleading for help on the phone); State v. Hewson, 642
S.E.2d 459, 466-67 (N.C. Ct. App. 2007) (victim called 911 operator stating, “I am
bleeding. My husband keeps shooting me. My husband keeps shooting me”).
66. State v. Pugh, 225 P.3d 892 (Wash. 2009); State v. Camarena, 176 P.3d 380 (Or.
2008).
fact that the victim made the call after having found safety in a neighbor or friend's house. In discussing these cases, this author is not arguing that the victims in these situations were not in need of police or medical help. Instead, as these 911 call statements were uniformly classified as non-testimonial, despite the variances from the *Davis* situation and despite the arguable end of the immediate emergency, these cases represent a pattern that is at least a small expansion upon *Davis v. Washington*, and one that is also consistent and predictable.

Of the fifty-two Category Two, immediate statements to police, classified, fifty-six percent were found to be non-testimonial and forty-four percent to be testimonial. Of the twenty Category Three, later statements to police, classified, ten percent were found to be non-testimonial and ninety percent to be testimonial. All of the state court decisions in categories two and three fit the general *Hammon* scene: a domestic dispute has recently occurred and the victim is speaking to police about the incident. An argument, therefore, could be made that under a strict reading of *Davis v. Washington*, all of these statements should be testimonial: the simple presence of police means that the victim is not alone and is not vulnerable to more attacks. Accordingly, in all these scenarios the present emergency had dissipated, arguably making the statements testimonial as in *Hammon*. Under this strict reading, state courts are engaging in a significant expansion of *Davis v. Washington* in these types of victim statements.

Many of these Category Two cases, however, despite their structural similarity to the scene in *Hammon*, may be distinguished from *Hammon* (and compared to *Davis*) because of: the level of threat the defendant still posed, for example, defendant and victim both still within the house, unsecured by the police; the injury experienced, for example, serious, life-threatening injuries; and the level of informality, for example, statements made spontaneously, yelling, hysterical, while running away, thus making the situation an "ongoing emergency." Cases such as these, then, may be said to have been properly classified as more similar to the *Davis* 911 call scenario and therefore non-testimonial within the *Davis v. Washington* framework.

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69. See, e.g., State v. Smith, 746 N.W.2d 604 (Wis. Ct. App. 2008) (wherein the police arrived at the scene and heard from inside the house, "'[h]e's beating me. He's beating me . . . [h]elp.'"); State v. Martin, 885 N.E.2d 18 (Ind. Ct. App. 2008) (police arrived to find the victim sitting on the side of the street, "crying, spitting out blood, hysterical" with the defendant having fled with their children); People v. Lewis, No. A118107, 2007 WL 4206637 (Cal. Ct. App. 2007) (police found the victim walking down the middle of the street, in the rain, "holding her face
However, even putting this set of "obvious" non-testimonial cases aside, there are still numerous Category Two cases that arguably expand *Davis v. Washington* because of their similarity to *Hammon* despite their classification of statements as non-testimonial. In *Hammon*, the Supreme Court found the victim's statements to be testimonial because she calmly made them to police officers after the violence had ended, in order to explain what had happened. In the following cases, the courts attempted to distinguish the facts at issue in various ways from those in *Hammon*, but in fact the differences were often minimal or superficial. First, for example, while not bleeding or crying, the victim in *Hammon* had been frightened, anxious and injured, and while the assault may have not “just concluded,” the incident was at least recent, having occurred that same night.\(^{70}\) In *Cleveland v. Colon*, however, the court emphasized the fact that “[u]nlike the circumstances in *Hammon*, the incident had just concluded when the officer arrived . . . and the victim was hurt, bleeding and crying.”\(^{71}\) Similarly, in *Rodriguez v. State*, the court highlighted that in contrast to *Hammon*, the victim “appeared ‘shaken up’ and ‘very scared’ . . . [and] had been ‘assaulted’ by her boyfriend” recently.\(^{72}\)

Second, in evaluating the situation in *Hammon*, the Supreme Court stated that “there was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything.”\(^{73}\) The majority of state cases also involved situations with a comparable lack of ongoing violence against the victim, either because the defendant had already halted the immediate attack or had left the premises. But again, in an attempt to distinguish *Hammon* either the courts often found the statements given to be non-testimonial by focusing on the previous violence (e.g., the recentness or severity of the previous violence) or by focusing on the absence of the defendant (e.g., the missing defendant created an emergency despite the current lack of violence).\(^{74}\)

Third, the Supreme Court deemed the statements made in *Hammon* “formal enough” because the victim was separated from her husband and the questions were for the police investigation. Various cases, including *People v. Otis* and *State v. Bonvillain*, satisfied this level...
of minimal formality, but the courts still judged the statements non-testimonial, either by underscoring other aspects of the situation (i.e. the injury or fear of the victim) or by simply stating that the situation was “informal” without providing further elaboration. Finally, some courts almost explicitly rejected the *Davis v. Washington* framework: one court found statements to be non-testimonial even while acknowledging that the situation had “not ris[en] to the level of ‘crisis’ or ‘emergency,’” and another even while acknowledging that the victim was sufficiently “protected because an officer was present.” The courts in cases such as these therefore widely construed “ongoing emergency” in order to distinguish their cases from *Hammon* and find the statements admissible.

Even more striking than the suggested expansion of *Davis v. Washington* for these statements, however, is the inconsistency in the classification of the Category Two statements. The Category Two statements, which comprised essentially half of all statements analyzed, had close to a fifty-fifty chance of being in either Category. Statements emerging from virtually identical situations were classified differently and characteristics of the statements and scenarios were weighed and used in disparate manners by the courts. Per *Davis v. Washington*, courts uniformly framed the inquiry as one of whether there was an “ongoing emergency” to which police had the “primary purpose” of responding. Courts engaged in this inquiry by looking primarily to the following factors: whether the victim was “upset” (i.e. crying, hysterical, yelling); whether the victim was injured and in need of medical attention; the amount of time that had elapsed since the incident; the nature of the “interrogation”; and the presence or absence of the defendant at the scene. None of these factors, however, was uniformly determinative of whether the court found a situation to constitute an “ongoing emergency.”

Many courts that found statements to be non-testimonial emphasized the hysteria, fear, anxiety and injury of the victim as an important factor in finding an “ongoing emergency.” But in all the decisions

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75. People v. Otis, No. D046547, 2007 WL 18814 at * 13(Cal. Ct. App. 2007) (the “informal setting” was at the victim’s house while victim was complaining of pain in her thumb and head); State v. Bonvillain, 2008 WL 2064978 at * 4 (La. Ct. App. 2008) (discussing degree of victim and purpose of resolving emergency to find statements non-testimonial).


78. See, e.g., Thomas v. State, 668 S. E. 2d 711 (Ga. 2008) (focusing on the fact that the victim was bleeding profusely in finding her statements to be non-testimonial); Cleveland v. Colon, No. 87824, 2007 WL 179082 at * 4 (Ohio Ct. App. Jan. 25, 2007) (finding statements non-testimonial when “the victim was bleeding from the
where the statement at issue was judged testimonial, the victims too were injured, upset and fearful—and some significantly so. While the time that had elapsed between the incident and statement was an important consideration—such that the less time elapsed, the more likely the court was to deem the statement non-testimonial—there were several non-testimonial statements where significant time had passed (including cases of thirty minutes and several hours) and several testimonial statements where very little time had passed. While the spontaneity of a victim statement was a factor for some courts in finding it non-testimonial, courts also stressed that spontaneity was not necessary, noting that a more formal question/answer exchange may also produce non-testimonial statements. Courts finding statements testi-

79. See, e.g., State v. Ramirez, No. COA09-168, 2009 WL 4575977 at *5 (N.C. Ct. App. Dec. 8, 2009) (finding that the victim was injured, "but a victim still requiring medical attention when police arrive is not determinative of an ongoing emergency"); People v. Thomas, No. A104336, 2006 WL 3775882 at *1 (Cal. Dist. Ct. App. 2006) (noticing that the victim was "'crying and very scared' . . . [with] a small . . . and . . . a 'bunch of lumps around her eye'" but the statements were testimonial); Mason v. State, 225 S.W.3d 902, 911 (Tex.Ct. App. 2007) (finding the statements testimonial even though the victim was "upset, crying and angry"); Suniga, 2008 WL (finding statements testimonial "although the situation may still have been very upsetting" to the victim).

80. See, e.g., People v. Johnson, No. C042274, 2006 WL 3648929 (Cal.App. Dist. Dec. 14, 2006) (finding that the statement given to police the next day was non-testimonial); Lewis v. United States, 938 A.2d 771 (D.C. 2007) (considering statement given to police "several minutes" after their arrival as testimonial); Rodriguez v. State, 274 S.W.3d 760, 765 (Tex. Ct. App. 2008) (judging statements given to police non-testimonial when victim waited an hour to call the police); People v. Saracoglu, 62 Cal.Rptr. 3d 418 (Cal.App. 2007) (deeming statements non-testimonial when victim drove thirty minutes to police station to give statements).

81. See, e.g., State v. Warsame, 735 N.W.2d 684, 692 (Minn. 2007) (finding that the victim's "initial, volunteered statement" to the police was non-testimonial); Lewis, 938 A.2d at 781 ("We are satisfied that her initial, spontaneous statements were clearly non-testimonial.").

82. See, e.g., Lewis, 938 A.2d at 781 ("That some of her statements were made in response to questions by the police does not transform the encounter into a testimonial interrogation, even in the broadest, most 'colloquial' sense of the term."); People v. Lewis, No. A115107, 2007 WL 4206637 at *4 (Cal. Ct. App. Nov 29, 2007) (finding that the police officer asking "what happened" and the victim responding with statements that "were effectively an accusation of criminal conduct" were non-testimonial); Shea, 965 A.2d at 510 (finding the victim's non-testimonial statements were a result of the officer asking "simple questions").
monial, however, consistently noted the question/answer format as contributing to the statement's formality and thus testimonial nature. Finally, many courts believed the location of the defendant to be a key consideration, but courts found the factor to cut both ways for the purposes of classification. Several courts used the defendant's absence as a factor for finding the end of the previous emergency and thus that statements were testimonial; other courts found the defendant's absence to be an indicator that there was an ongoing emergency, because his location was uncertain, and therefore that the statements were non-testimonial; and in some cases, courts found that the defendant's absence did not matter, such that an unknown location could lead to either testimonial or non-testimonial statements. Hence, clear inconsistencies existed when courts

83. See, e.g., Lewis, 938 A.2d at 782 (finding the officer's "detailed questions about how the assault occurred and what had happened" prompted testimonial statements in response from the victim); Mason, 225 S.W.3d at 911 (finding that the officer "questioned the complainant when she answered the door" producing testimonial statements); State v. Mechling, 633 S.E.2d 311, 323 (W.Va. 2006) (explaining how through their questions, the officers were "seeking to determine 'what happened'" in the course of their interrogation; the statements were judged testimonial).

84. See, e.g., Mechling, 633 S.E.2d at 323 (commenting "there was no emergency in progress . . . the defendant had clearly departed the scene when the interrogation occurred" and accordingly finding the statements testimonial); Davis v. State, 268 S.W.3d 683, 705 (Tex. Ct. App 2008) (finding statements testimonial because the defendant "had left the apartment" and thus there was no ongoing emergency); Rankins v. Commonwealth, 237 S.W.3d 128, 129 (Ky. 2007) (finding that defendant had "fled the scene" and thus there was no ongoing emergency); Thomas, 2006 WL at *4 (finding statements were testimonial because there was "no emergency in progress . . . all of [the victim's] statements . . . were made after defendant had departed the scene").

85. See, e.g., Rodriguez, 274 S.W.3d at 765–66 (finding that once the police confirmed the location of the defendant, subsequent statements were judged testimonial, as the emergency had ended); Cleveland v. Colon, No. 87824, 2007 WL 179082 (Ohio Ct. App. Jan. 25, 2007)(finding statements made by the victim "with the primary purpose of enabling the police to 'meet an ongoing emergency,' i.e. to apprehend the personnel involved"); Lewis, 2007 WL at *3 (finding that the fact the officer "did not know the identity or location of the assailant" contributed to the statements being non-testimonial); People v. Oris, No. D046547, 2007 WL 18814 at *13 (Cal. Ct. App. Jan. 4, 2007) (explaining that police were attempting to gather information to "find a potentially dangerous armed suspect"); State v. Shea, 965 A.2d 504, 505 (Vt 2008) (finding non-testimonial statements resulting from the fact that the police officer "did not know where the perpetrator was, whether he might return"); People v. Suniga, No. F052710, 2008 WL 3090622 (Cal. Ct. App. July 3, 2008) (finding statements to be non-testimonial in two separate instances when the police arrived and the defendant and the victim were in separate locations).

86. See, e.g., Warsame, 735 N.W.2d at 694 (declaring that "extending an emergency beyond the declarant's geographic proximity comports with the fundamental concern the Supreme Court considered in Davis/Hammon" and concluding that the decla-
classified Category Two statements in domestic violence cases—stemming from disparate uses of factors such as victim mood and injury, time elapsed, interrogation formality and defendant location—creating little predictability in these state court results.

Ninety percent of the Category Three statements—later statements to police—were judged testimonial, making it as a Category less consistent than 911 calls but significantly more consistent than initial statements to police. As noted above, these statements fit the general Hammon scenario of statements to police after a domestic dispute incident, but are distinguished from Category Two in that more time has elapsed since the arrival of the police on the scene. This increase in time means that police have had more time to complete an initial assessment of the situation, to secure the scene, and to calm the victim and therefore engage in questioning with a “primary purpose” of future prosecution.\(^8\) The statements that do not exactly fit the Hammon scenario are even more clearly testimonial because they occur in formalized settings such as the police station and are tape-recorded.\(^8\) Accordingly, the classification of the majority of these statements as testimonial because of lack of an ongoing emergency comports with the Davis v. Washington framework.

The remaining categories consist of a much smaller sample of statements, with the three categories represented by twenty statements total. Statements made to medical personnel and statements made to non-government/police officials, such as friends, family and neighbors, were consistently non-testimonial: the courts found four of the five medical statements non-testimonial and nine of the ten statements made to non-police non-testimonial. In classifying these statements, the courts are, if not expanding Davis v. Washington, then widely construing the opinion, for the Supreme Court did not clarify the non-testimonial nature of these types of statements until their 2008 Giles decision and

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\(^8\) ant's unknown location at the time of the statements could produce testimonial or non-testimonial statements).  

87. See, e.g., People v. Walker, 728 N.W. 2d 902, 907 (“As in Hammon ... the police questioning in this case first occurred in the neighbor’s home, and there is no indication of a continuing danger ... the victim’s oral statements to the police recounted how potentially criminal past events began and progressed.”); State v. McKenzie, No. 87610, 2006 WL 3095671, at *4 (Ohio Ct. App. Nov. 2, 2006) (“With [the defendant] safely ensconced in the police car, the ongoing emergency ended. Any further remarks by the victim were obviously intended for prosecution, not just apprehension or cessation of the emergency.”); People v. Garces, No. D045022, 2007 WL 4384935, at *19 (Cal. Ct. App. Dec 17, 2007)(finding that the officer had solicited statements from the victim’s brother and mother before then talking with the victim, while “ac[ting] in an investigative and/or prosecutorial capacity”).  

88. See, e.g., State v. Romero, 156 P.3d 694 (N.M. 2007).
only five of the cases were decided after *Giles*. In *Davis v. Washington*, the Court was presented with two cases involving police interrogations and therefore discussed testimonial versus non-testimonial characteristics only in the context of victim-police interactions. In a footnote in that decision, Justice Scalia specifically stated that the Court's holding concerns police interrogations but that "[t]his is not to imply . . . that statements made in the absence of any interrogation are necessarily non-testimonial." In consistently classifying these non-interrogation statements as non-testimonial, then, the state courts expanded *Davis v. Washington*.

Category Six—miscellaneous written statements of the victim—is less consistent, but the sample is also one of the smallest. Only five written statements were part of the sample: two were non-testimonial, three testimonial. While the small size of the sample makes it difficult to draw any conclusions, statements that are written down are arguably both more formal and created with more of an eye toward prosecution than other verbal statements. Therefore, two statements classified as non-testimonial is an arguable expansion of *Davis v. Washington*.

### B. Admissible Versus Not Admissible

Of the eighty-two cases, fifty-nine found all of the statements at issue admissible, ten found all of the statements inadmissible, eleven found some of the statements admissible, and two cases were resolved otherwise (evidence admissible only for impeachment, not for truth; reversed on other grounds). Of the fifty-nine opinions that admitted all of the statements, fifty-seven were affirmations of the lower court, and two were reversals of the lower court.

All statements judged non-testimonial were admitted. Testimonial statements, however, were often also admissible because courts found that the defendant had forfeited his right of confrontation or because

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the court found that the lower court’s admission of the testimonial evidence constituted harmless error. As a result, overall eighty-five percent of the opinions found at least some of the statements in question ultimately admissible. And of the opinions that found some or all of the statements admissible, courts relied in whole or in the alternative on harmless error or forfeiture thirty-nine times.

It is therefore clear that courts admit much unconfronted hearsay evidence that has been classified as testimonial. This fact alone, but especially in conjunction with the testimonial versus non-testimonial assessment above, arguably demonstrates the existence of a domestic violence “exception” or expansion of Davis, as well as the lack of consistency and predictability in these types of cases. If evidence is being judged testimonial but is ultimately admitted as harmless error, then the consistency of what the confrontation right entails decreases as the amount of unconfronted hearsay admitted at trial increases. The scenario is exacerbated if one considers that much of the evidence being judged non-testimonial is objectively testimonial in the first place.

C. Potential Explanations

Two explanations, which may account both for the large amount of unconfronted hearsay admitted and for the inconsistency of testimonial versus non-testimonial classifications post-Davis, are presented below. The two explanations are likely both true in that they each individually or conjunctively may explain an outcome in any particular case.

First, one explanation is that the Supreme Court in Davis in fact construed the Confrontation Clause to allow the admission of much unconfronted hearsay, and thus state courts are simply adhering to Supreme Court precedent. In Davis, the Court found that all statements made during an ongoing emergency in the course of an interrogation for the primary purpose of resolution of that emergency are admissible—a Category which in many ways is broad, having the potential to include many of the hearsay statements discussed above. For example, all of the following statements are admissible under Davis: statements made by a non-testifying victim to law enforcement while the batterer was in the same house with her; statements made by a non-testifying victim to law enforcement while the batterer’s location was unknown and remained a threat to the victim; and statements made by a non-testifying victim to law enforcement in the course of trying to escape or hide from the batterer. Accordingly, state courts are able to admit much unconfronted hearsay as non-testimonial under the Davis framework, and thus state
courts are in fact not expanding Davis but rather complying with the expanse of Davis.

Under this first explanation, the inconsistency that exists may be accounted for by the fact that while perhaps broad, Davis was also vague. The Supreme Court provided more guidance than it had in Crawford, but Davis still left much unclear. The Court explicitly did “not attempt[ ] to produce an exhaustive classification” of testimonial and non-testimonial statements. Among others, the Davis framework leaves the following questions unanswered: whose purpose is controlling (the Court implies that it is the police officer’s or government agent’s, not the victim’s, but is not clear)? How should the actors involved determine the primary purpose of a statement (as pointed out in the dissent, police are often “both respond[ing] to the emergency situation and . . . gather[ing] evidence”)? Lastly, how precisely should courts define both “ongoing” and “emergency”?94 The answers to these questions and others are crucial to the testimonial classification. Lower court judges are doing their best to comply with the Davis framework, but the impreciseness of the Supreme Court opinion means inevitable disagreements among reasonable judges on what constitutes testimonial evidence.

An alternative explanation for the above results is that judges consciously engage in a broad reading of Davis and in doing so create a de facto confrontation clause exception in domestic violence cases. This second explanation is a legal realist-based explanation wherein the results are understood as law made and interpreted by human beings and social actors who are subject to imperfections and influences in their interpretation of the law. Accordingly, the “act of judging [is] not impersonal or mechanistic, but rather [is] necessarily infected by the judges’ personal values.” As detailed above, the Crawford/Davis framework has been widely viewed as having a negative impact on domestic violence cases because it often leaves prosecutors with little admissible evidence and few options. Judges are not blind to this situation. As noted by a staff attorney in the Bronx Defenders office, “it is important to recog-
nize that courts interpreting Crawford in a domestic violence context are likely to be influenced by judges’ institutional interests in preserving evidence based prosecutions. And further, state courts “will push the limits to restore their own discretion to admit evidence when they see fit.” Judges lament the lack of government evidence and thus broadly construe “non-testimonial” to allow unconfronted hearsay evidence necessary to the prosecution. It is possible that in doing so, judges rely on the old and familiar Roberts consideration of “reliability” to determine admissibility.

Under this second explanation, the inconsistency in the results stems not just from reasonable judges disagreeing but also from judges differently viewing, assessing, and interpreting the evidence based on their values, imperfections, and social considerations. A judge may choose to engage in a reliability evaluation of the statement(s) because reliability was the ultimate consideration under the overruled (but well-known) Roberts framework. A reliability evaluation may also enable a judge to admit statements he deems necessary and relevant to the case at hand. A judge may also consider reliability an ultimate consideration in the admission of any hearsay statement and thus find it rational to apply in a Confrontation Clause situation. The choice to engage in a reliability evaluation, however, is neither universal nor uniform. Furthermore, if judges are using reliability as their baseline concern, that consideration would not necessarily map onto the testimonial versus non-testimonial divide or onto the categories used to classify statements in this study, creating additional unpredictability in the results. But again, the lack of clarity and the uncertainty in Davis more easily enable judges to make such conclusions.

IV. Should There Be a Domestic Violence “Exception”?

The last section explored the results of the state domestic violence cases engaging Crawford/Davis to evaluate the predictability of testimonial classifications and to determine whether courts routinely widely construed or expanded Davis. This section will engage the normative consideration of whether there should be a “domestic violence exception”

96. Jaros, supra note 41, at 1008.
98. Id. at 225 (predicting that “many states will try to admit what they believe is reliable evidence despite the fact that Crawford’s holding obviated the Roberts reliability standard”).
in confrontation doctrine.\textsuperscript{99} It will be argued that there should be such a doctrinal exception in the confrontation framework so as to allow our criminal justice system to more fully prosecute batterers and to help alleviate the classification unpredictability in such cases. This exception would not entail revision of any Federal Rule of Evidence, as the right of confrontation is a constitutional right. Instead, the exception would be a common law, Supreme Court-created exception to the doctrine.\textsuperscript{100}

The Supreme Court affirmatively believes there should not be a doctrinal domestic violence exception to confrontation. The Court in \textit{Crawford} emphasized that its history demonstrates that the Sixth Amendment confrontation right is a procedural rather than substantive right, such that it must be equally and consistently applied in all cases. Thus, as Justice Scalia asserted, “dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”\textsuperscript{101} It is not done. In \textit{Davis}, the Court affirmed the conception of the right as procedural. While the Court did acknowledge that there are particular difficulties in domestic violence prosecutions, by noting the susceptibility of victims to coercion and the possibility of giving the defendant a “windfall,” it refused to treat such cases differently.\textsuperscript{102} Justice Scalia stated, “[w]e may not . . . vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.”\textsuperscript{103} He pointed out that the rule of forfeiture does provide some protection to domestic violence victims because “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”\textsuperscript{104} However, as discussed in Part I above, two years later, in \textit{Giles}, the Court made proving such forfeiture difficult, requiring proof of the specific intent of the defendant to prevent the testimony.\textsuperscript{105} In \textit{Giles}, the Court also expressly acknowledged the

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\item 99. In engaging in this normative consideration, this Article approaches the question more from the perspective of those who support evidence-based prosecutions and no-drop policies in domestic violence cases, rather than from the perspective of those who support a confrontation right in its purest form. This is not to say that these two perspectives are necessarily in direct opposition, but rather that “differing opinions arise as to the reach of the Confrontation Clause to these specific situations.” \textit{Id. at} 223.
\item 100. As a contrast to the type of common law, doctrinal exception suggested in this Article for domestic violence cases, see Tom Lininger’s proposal to amend Federal Rule of Evidence 804(b)(6), which codifies the doctrine of forfeiture by wrongdoing, in response to the \textit{Giles} decision. Lininger (2009), \textit{supra} note 2.
\item 103. \textit{Davis}, 547 U.S. at 833.
\item 104. \textit{Davis}, 547 U.S. at 833.
\end{itemize}
prosecutorial difficulties presented by domestic violence but again specifically rejected the notion of an exception or different rule: "[d]omestic violence is an intolerable offense . . . [b]ut for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal [of means to combat domestic violence]."106 In its recent confrontation cases, then, the Supreme Court has recognized the inherent differences in domestic violence prosecutions but has refused to make any exceptions to the defendant's (procedural) right of confrontation.

Apart from the Supreme Court doctrine and its historical-procedural rationale, there are additional reasons why there should not be a domestic violence exception. First, perhaps there is no need for such a doctrinal exception. As demonstrated by the results of state court decisions, much hearsay evidence necessary to domestic violence prosecutions is being admitted. Much evidence is being judged non-testimonial (sixty-three percent of all statements analyzed), and even if some is judged testimonial, it is ultimately judged admissible through harmless error or forfeiture (eighty-five percent of cases found at least some of the statements ultimately admissible). Thus, if the purpose of such a domestic violence exception is to ensure that prosecutors are able to introduce hearsay statements crucial to their domestic violence prosecutions, the Davis framework as implemented by state court judges may be said to be functioning sufficiently.

Second, the current framework enables judicial discretion in determining the admissibility of statements, which is an aspect that is important to our system's evidentiary structure and appropriate here. The Federal Rules of Evidence confer enormous discretion to the trial court judge as the ultimate decider on admissibility issues. The Federal Rules include this type of discretion because admissibility decisions are often incredibly contextual and dependent on a number of variables in the trial and in the evidence; accordingly, the trial judge is often in the best position to make the decision.107 This rationale applies equally to

106. Giles, 128 S. Ct. at 2693. The Majority did, however, recognize that the domestic violence context is "relevant for a separate reason," as a history of an abusive relationship (the statements resulting from prior incidents of abuse) may be admissible to prove the requisite intent needed in a forfeiture case post-Giles. Id. This discussion of the use of a history of abuse, however, is simply an application of the general Giles forfeiture rule.

107. See, e.g., Fed. R. Evid. 103 (mandating that reviewing courts disregard errors that do not affect the substantial rights of the parties, thus conferring much discretion on the trial judge); Fed. R. Evid. 105 (giving trial judges broad discretion to exclude even unquestionably relevant evidence for reasons such as confusion of the jury or taking up too much time). See also, e.g., United States v. Walton, 217 F.3d 443, 449 (7th
Confrontation Clause decisions. In many instances, the right to confront is arguably more important than in others, and in these instances, the judge can find the statements to be testimonial, while in others, non-testimonial. For instance, in cases where the declarant has filed false claims before or the context of the statement seems particularly unreliable, the judge can insist on confrontation (or no evidence) by deeming the statement testimonial. Through this judicial discretion, then, both the defendant’s right to confront and the victim’s justice in prosecution are protected. In creating a doctrinal exception for all domestic violence cases, some judicial discretion is necessarily removed.

Third, perhaps there is no need for such an exception because actors within the system can change and adapt to the Davis framework so as to ensure admissible evidence in the future. As discussed above, it is possible that judges have already adapted to the new framework by admitting evidence they have judged to be reliable by framing their reliability considerations as Crawford/Davis evaluations of primary purpose, ongoing emergency, and testimonial or not. Prosecutors and police, as other system actors, may also alter their behavior, if they have not already begun doing so, to utilize the current framework to its fullest. Prosecutors have the ability to structure their prosecutions around the type of non-testimonial statements that the Court has made clearly admissible. For example, Davis protected excited utterances made during 911 calls and thus “maintained a large tool in the prosecutor’s repertoire.” Further, in Giles, the Court clarified that “[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment” are non-testimonial. Thus, under the current framework, several types of victim statements may be admitted and prosecutors should attempt to introduce those as much as possible. Prosecutors should also decline to concede that a certain statement is testimonial, for as noted above, there is much room for debate within the Davis structure; prosecutors may take advantage of that lack of clarity by arguing that seemingly testimonial statements may actually be non-testimonial. Additionally, prosecutors could increase their use of experts in domestic violence trials to ensure that the jury is knowledgeable about the particularities of such a crime, to explain the

\[\text{Cir. 2000, (stating that “[w]e afford great deference to the trial court’s determination of the admissibility of evidence because of the trial judge’s first-hand exposure to the witnesses and the evidence as a whole, and because of the judge’s familiarity with the case and ability to gauge the impact of the evidence in the context of the entire proceeding.” (quoting United States v. Van Dreel, 155 F.3d 902, 905 (7th Cir. 1998)).}}\]

lack of victim presence and testimony, to clarify contradictions and misconceptions that may exist about domestic violence, and to opine the effects abuse can have on a person and a relationship. Finally, prosecutors may also engage in strategies to increase victim cooperation and therefore provide in-court testimony, avoiding Crawford/Davis problems completely. Certain states have specialized prosecution programs, increased victim advocacy, and specialized domestic violence courts, structures which they have found effective in reducing victim fear and therefore increasing victim testimony. Increased prosecutorial communication and contact with the victim as well as minimization of the burden on the victim are crucial in increasing the likelihood of victim testimony. While victims refuse to testify for a number of reasons, as discussed above, these types of programs may help to overcome at least some of the obstacles.

Of all the actors involved in establishing evidence in domestic violence cases, police have the most limited capacity to increase the amount of admissible evidence. As stated in Davis, “[w]hile prosecutors may hope that inculpatory ‘non-testimonial’ evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so.” That acknowledged, as prosecutors rely more on other sources of evidence, the burden shifts to law enforcement to find many of those sources. Police accordingly should ensure that they “gather as much evidence as possible and accurately identify all potential witnesses and ways to contact them, or identify third parties who will remain in touch with them.” Police may also function as an additional communication tool with the victim, so as to increase the chances of victim cooperation.

Even acknowledging the validity of the above outlined reasons to keep the current conception of the confrontation right, it is clear that the results under the current conception have been inconsistent and

110. Hussain, supra note 38, at 1317–19 (citing Jane H. Aiken & Jane C. Murphy, Evidence Issues in Domestic Violence Civil Cases, 34 Fam. L.Q. 43, 46 (2000)) (outlining how three types of expert opinion may be used to demonstrate an abuser’s “silencing influence: (1) the clinically based opinion, (2) the social framework opinion, and (3) a hybrid of clinically based and social framework opinions”).


112. Id. at 41.


114. Klein, supra note 111, at 42–43.
unpredictable and therefore unsatisfactory. The results indicate that lower court judges have been forced to engage in somewhat of a dishonest exercise, admitting what they find to be reliable evidence by labeling it "non-testimonial" and/or admitting such evidence through harmless error. Thus while the current structure does provide for judicial discretion, it is somewhat of a fictional and limited discretion. The arguable "discretion" may actually be an impediment, for judges are forced to couch their actual (reliability) assessments in testimonial versus non-testimonial considerations: "[n]o doubt many state courts view [Crawford] as interference of their evidentiary sovereignty." Additionally, even if system actors have altered (or can alter) their behaviors, there are significant costs in doing so. The types of evidence upon which prosecutors are forced to rely, and that police are forced to collect, still often leave insufficient evidence for prosecution and conviction. News reports indicated that nearly fifty percent of domestic violence cases were being dropped in some jurisdictions post-Crawford because of the lack of evidence. Domestic violence continues to be perpetrated in the privacy of the home, with few witnesses and little cooperation from the victim. Thus even if prosecutors rely more heavily on experts and statements to non-police, they still have very little upon which they may rest their case. Finally, even if prosecutors are able to increase victim cooperation, many argue that forcing a victim to testify constitutes a type of re-victimization of the victim and accordingly something that should not be forced.

For the above listed reasons, it is evident that the Davis framework has proved, if not unworkable, then at least heavily flawed within the context of domestic violence cases. The creation of a doctrinal domestic violence exception in the confrontation right of defendants would do much to rectify the current major problems. While it does appear that in many ways lower courts have engaged in a type of expansion of Davis in domestic violence cases already, the creation of a clear, bright-line exception has several benefits. In general, bright-line rules enable courts to function with more consistency: they send clear messages to the public about the law and behavior in the particular area, enhancing the expressive function of the law. Additionally they enable practitioners and parties to more fully and reliably assess the strengths and weaknesses of

117. See Lininger (2005), supra note 5, at 772 ("Testifying victims must relive the trauma of domestic violence by describing it in court. They must endure the badgering of both defense attorneys and prosecutors.").
their cases.\textsuperscript{118} Applied in this context, a domestic violence exception would rectify the inconsistency and unpredictability detailed above. In creating such an exception, the law would be sending a clear and powerful message about the unacceptability both of domestic violence and of intimidating victims in advance of trial—a message that the general public embraces and yet one that is not reflected in confrontation doctrine. Moreover, the exception would help practitioners better evaluate the strength of the case before them, for often the piece of evidence of least certain admissibility is also the piece of evidence most important to the case: the victim’s statements.\textsuperscript{119}

As an initial conceptualization, such a doctrinal exception would use the \textit{Davis} framework of testimonial versus non-testimonial statements but would broaden the concepts of “ongoing emergency” and “primary purpose” in domestic violence cases such that any statements made by a victim in an abusive relationship, whether to law enforcement or non-law enforcement, would be deemed non-testimonial. The prosecutor would be required to show to the judge’s satisfaction that the defendant imposed upon the victim a “classic abusive relationship, which is meant to isolate the victim from outside help . . . .”\textsuperscript{120} Upon such a showing, the statements would be judged non-testimonial and admissible if satisfying the other applicable evidentiary rules.

The theoretical rationale for such a reclassification of battering victims’ statements is the cyclical and patterned nature of domestic violence.\textsuperscript{121} Domestic violence is a “pattern of harm in both a quantitative and qualitative sense.”\textsuperscript{122} Both the frequency and duration of domestic violence turn it into a pattern of harm quantitatively, consisting of “repeated acts by the same offender against the same victim.” Studies have shown that over sixty percent of men who batter their wives do so repeatedly; nearly twenty percent of women were victims of abuse by the same partner ten or more times; and nearly seventy percent

\begin{footnotesize}
\begin{enumerate}
\item Linerary (2009), \textit{supra} note 2, at 893 (discussing the benefits of a new and bright-line rule for forfeiture post-\textit{Giles}).
\item See \textit{supra} notes 53–57 (discussing the importance of victim statements to the prosecution in domestic violence cases).
\item Burke, \textit{supra} note 121, at 567.
\end{enumerate}
\end{footnotesize}
of women who had been assaulted by an intimate partner reported that their victimization lasted more than one year. The importance of both power and control in domestic violence turns it into a pattern of harm qualitatively, such that the ensuing harm comes not only from the violence: physical battering is “just one method of inflicting . . . trauma” within a relationship characterized by numerous other forms. Thus a domestic violence victim exists in a relationship defined by long-term, ongoing, powerful, and continuous abuse. It is accordingly clear that it is illogical and impractical to attempt to find the beginning and end of an “emergency” in such a context. Determining the contours of an “emergency” can be arbitrary even in non-domestic violence contexts, but it is even more arbitrary in the context of an abusive relationship, where a victim is under constant threat of assault or maltreatment. Creating a doctrinal exception in domestic violence cases means that judges would no longer have to engage in such a capricious and ultimately unhelpful exercise.

A domestic violence exception would deprive the defendant charged with domestic violence of some of his right of confrontation, for he would not always have the opportunity to confront all of his accusers, even if the statement was (under the current framework) testimonial. Being deprived of any portion of a right in the criminal justice system is not a trivial concern. But this type of trade-off (less confrontation for the defendant, more hearsay evidence for the prosecution) mirrors the trade-offs that exist throughout criminal justice system and the Federal Rules of Evidence. The Federal Rules and the Constitution involve delicate balancing acts of disparate and often opposing concerns. Here, while the defendant’s right to confrontation is narrowed in specific contexts (i.e. the abuse victim’s uncontroverted hearsay may be deemed admissible), the defendant still maintains significant protections provided to him by various parts of the criminal justice system and the U.S. Constitution. The defendant still has the opportunity to cross-examine the police officers or government officials who are witnesses in court and thus subject their testimony to the “crucible of cross-examination.” The defendant still has the opportunity to present any testimony, including his own, to rebut any hearsay statements of the victim introduced under the exception. The defendant is still protected by the hearsay rule, which is a separate limitation on out-of-court statements, unaffected by any exception in the confrontation right. Further,

123. Id. at 567–68 (citing Donald G. Dutton, The Domestic Assault of Women: Psychological and Criminal Justice Perspectives 112 (rev. & expanded ed. 1995) and Tjaden & Thoennes, supra note 1, at 39).
124. Id. at 568.
the trial judge retains significant discretion under the Federal Rules to exclude evidence deemed not relevant, unreliable, not probative or too prejudicial, always providing a protection to the defense. Finally, the U.S. Constitution further protects the defendant’s rights through the Fifth Amendment guarantees against self-incrimination and against double jeopardy, and the Sixth Amendment guarantees to a speedy and fair trial and to counsel.

While creating such a domestic violence exception is undoubtedly a significant change in confrontation doctrine, it is not entirely unimaginable. The judicial conception of the confrontation right has been completely reconfigured in the last six years and remains a live issue for the court. Moving from Crawford to Davis to Giles, the Court has engaged in a continual refining and sharpening of the confrontation right—a process which has grown out of the previous decisions and subsequent effects of those decisions. Creating a doctrinal domestic violence exception such as the one suggested above would simply constitute a further refinement of the confrontation right, not any substantial break in judicial precedent.

Additionally, the Court has proved that it is not blind to domestic violence as a serious issue within the confrontation right. As mentioned above, both the Davis and Giles majorities recognized the inherent difficulties and obstacles particular to domestic violence prosecutions. For example, in Davis, the majority stated that domestic violence is a crime “notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.” And in Giles, the Court noted that “[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecution.” Further, while the majority in Giles does not create a separate rule for domestic violence cases, it appears that a majority of the Court, based on the various concurrences and dissents produced, may in fact support a “softer” intent rule for proof of forfeiture in domestic violence cases.

125. See Fed. R. Evid. 401–403.
126. U.S. Const. amend. V; U.S. Const. amend. VI.
127. In 2009 the Supreme Court decided Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), a confrontation case involving the use of certifications of state laboratory analyses instead of the analysts’ live testimony. In January, 2010, the Court heard arguments in Briscoe v. Virginia, 130 S. Ct. 1316 (2010), another confrontation case involving a similar issue to that raised in Melendez-Diaz.
130. Fishman, supra note 7, at 731–32 (“[I]t is Justice Souter’s approach, rather than Justice Scalia’s, that captured a majority of the Court on this issue [of proving intent].”).
This softer, “inferred intent” was discussed by Justice Souter in his con-
currence and consists of a standard wherein intent may be inferred from
defendant’s knowledge that his conduct would prevent the victim’s tes-
timony. While no such rule in forfeiture cases was imposed (and while
the composition of the Court has since changed), it is still an indication
of a willingness of at least some justices to potentially treat domestic vi-
olence cases differently in the context of confrontation issues. This
willingness suggests that a doctrinal exception to confrontation doctrine
for these cases is not out of reach.

CONCLUSION

“We concur . . . that much of this law is archaic, paradoxical and
full of compromises and compensations . . . . But somehow it has
proven a workable even if clumsy system . . . . To pull one mis-
shapen stone out of the grotesque structure is more likely simply to
upset its present balance between adverse interests than to establish
a rational edifice.”

The above quote is from the 1948 Supreme Court decision Michel-
son v. United States, a decision concerning the use of character evidence
by the prosecution, but is a quote that in fact is appropriate here. The
quote reflects the idea that our system of criminal justice and the rules
that govern that system constantly engage in delicate balancing and in-
tricate trade-offs that only appear logical or justifiable when viewed as
an overall cohesive framework. To examine one portion of the arrange-
ment in isolation may create the appearance of unfairness or inequity.
Only when that one piece of the structure is examined in conjunction
with another piece does the system become workable and justifiable.
Thus in isolation, it may appear unfair to carve out a domestic violence
exception to the Confrontation Clause, for such an exception unques-
tionably infringes upon a defendant’s constitutional right to confront his
accuser. But as detailed in this Article, once one considers the nature of
the crime of domestic violence, the particular challenges faced by prose-
cutors, and the protections that still exist unaffected for the defendant, it
appears that such an exception in fact fits into the “grotesque structure”
of our system.

131. Giles, 128 S. Ct. at 2695.
### Table One

**Testimonial vs. Non-Testimonial**

<table>
<thead>
<tr>
<th></th>
<th>(1) 911 Calls</th>
<th>(2) Immediate Statements to Police</th>
<th>(3) Later Statements to Police</th>
<th>(4) Medical Statements</th>
<th>(5) Statements to Non-Police</th>
<th>(6) Written Statements</th>
<th>Totals</th>
</tr>
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<tbody>
<tr>
<td>Non-Testimonial</td>
<td>31</td>
<td>29</td>
<td>2</td>
<td>4</td>
<td>9</td>
<td>2</td>
<td>77</td>
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<tr>
<td>Testimonial</td>
<td>0</td>
<td>23</td>
<td>18</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>46</td>
</tr>
<tr>
<td>No Ruling</td>
<td>3</td>
<td>9</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>14</td>
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<tr>
<td>Total</td>
<td>34</td>
<td>61</td>
<td>21</td>
<td>5</td>
<td>11</td>
<td>5</td>
<td>137</td>
</tr>
<tr>
<td>Total Ruled Upon</td>
<td>31</td>
<td>52</td>
<td>20</td>
<td>5</td>
<td>10</td>
<td>5</td>
<td>123</td>
</tr>
<tr>
<td>Percentage (only if ruled upon)</td>
<td>100% vs. 0%</td>
<td>56% vs. 44%</td>
<td>10% vs. 90%</td>
<td>80% vs. 20%</td>
<td>100% vs. 0%</td>
<td>40% vs. 60%</td>
<td>63% vs. 37%</td>
</tr>
</tbody>
</table>

### Table Two

**Admissible vs. Non-Admissible**

<table>
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<tr>
<th>Total Cases</th>
<th>Statements Admissible</th>
<th>Statements Inadmissible</th>
<th>Some Statements Admissible, Some Inadmissible</th>
<th>Other Dispositions</th>
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<td></td>
<td></td>
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<td>2</td>
</tr>
</tbody>
</table>

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133. The cases listed in the Appendix are all domestic violence cases, defined and limited as noted above in Section Four.