

Constitutional Law—Allowing Excited Utterances to Affect Characterizing Accusatory Statements as Testimonial Statements Contradicts Confrontation Clause Jurisprudence—*United States v. Brito*, 427 F.3d 53 (1st Cir. 2005)

The Confrontation Clause of the Sixth Amendment provides every criminal defendant with a procedural right to confront witnesses against him through cross-examination.¹ Identifying which individuals are witnesses requires a court to determine whether an individual has made a testimonial statement.² In *United States v. Brito*,³ the First Circuit Court of Appeals examined the effect that an excited utterance could have on identifying a testimonial statement.⁴ The court held that the excited utterance within an anonymous 911 call was nontestimonial because the caller's excited state prevented her from reasonably foreseeing the government using her statement in a future prosecution.⁵

Outside a local tavern in Brockton, Massachusetts, two witnesses saw a man with a gun.⁶ One witness called 911, identified himself, and told the operator that he saw the man load the gun.⁷ Moments later, another witness who would not identify herself called 911 to report that she had heard a shooting in the area.⁸ The anonymous caller reported that a man wearing a black hat and black coat pointed a gun at her while she drove her car from the scene.⁹ After the 911 operator questioned her, the caller provided a more specific description of the perpetrator and told the operator that she could still see the man in the area.¹⁰ The operator assured the anonymous caller that the police were already responding and that she would relay the caller's description of the perpetrator to dispatched officers.¹¹

1. See U.S. CONST. amend VI (listing procedural rights for criminal defendants); *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (characterizing right guaranteed by Confrontation Clause as procedural rather than substantive). The relevant portion of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend VI.

2. See *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (defining witnesses as individuals making testimonial statements); see also *United States v. Saget*, 377 F.3d 223, 227 (2d Cir. 2004) (beginning Confrontation Clause analysis by identifying testimonial statements).

3. 427 F.3d 53 (1st Cir. 2005).

4. *Id.* at 58-63 (considering whether to characterize excited utterances to police as testimonial statements). In framing the issue, the court noted that determining when excited utterances are testimonial statements was an issue of first impression in the First Circuit. *Id.* at 55-56.

5. *Id.* at 62-63 (reasoning excited utterance factors suppressed declarant's ability to reasonably foresee future legal use of statement).

6. *Id.* at 56 (discussing two witness reports).

7. 427 F.3d at 56 (noting first 911 caller to report shooting identified himself).

8. *Id.* (stating second 911 call came from anonymous caller).

9. *Id.* (describing anonymous caller's observations of perpetrator).

10. *Id.* (identifying shooter as black man between 5'8" and 5'10" wearing unzipped coat).

11. 427 F.3d at 56 (detailing operator's closing remarks).

Upon reaching the location of the reported shooting, the police identified a man matching the anonymous caller's description.¹² The man fled after noticing the police watching him and an officer followed in pursuit.¹³ At the end of the chase, the police apprehended Jean Brito and retrieved a gun and a black hat from the chase route.¹⁴

The grand jury indicted Brito on federal charges related to possessing a gun.¹⁵ At trial, Brito denied that he ever had a gun.¹⁶ With the 911 caller unavailable to testify, the government attempted to admit the anonymous caller's statements in its rebuttal case.¹⁷ The trial court admitted the portion of the 911 call that contained the caller's description of the perpetrator as an excited utterance.¹⁸ The trial court reasoned that admitting the statement did not violate Brito's confrontation right because the excited utterance exception "was a firmly rooted hearsay exception."¹⁹ The First Circuit Court of Appeals held that admitting the anonymous caller's description as an excited utterance did not violate the Confrontation Clause because the caller could not foresee the government using her statement in a future prosecution.²⁰

The right to confront witnesses originated as an individual's right to have accusatory witnesses brought physically before him during criminal proceedings.²¹ Courts developing the confrontation right shifted the focus from the physical presence of the witness to the defendant's opportunity to cross-examine the witness.²² Cross-examination thus became an irreplaceable

12. *Id.* at 56-57 (outlining police officers' response to 911 calls).

13. *Id.* at 56 (describing chase down alley).

14. *Id.* (detailing police tackling Brito and taking him into custody).

15. 427 F.3d at 57 (listing charges returned from grand jury relating to gun possession).

16. *Id.* (summarizing Brito's trial testimony).

17. *Id.* at 57-58 (detailing prosecution's trial strategy).

18. *Id.* (noting trial court's decision).

19. *See* 427 F.3d at 58 (discussing trial court's analysis under old Confrontation Clause jurisprudence).

20. *See id.* at 62-63 (analyzing admissibility of call under new Confrontation Clause jurisprudence).

21. *See* Frank R. Hermann, S.J. & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 486-89 (1994) (discussing right to have witnesses physically present before accused in ancient times); *see also* CICERO, *Against Verres I*, in *SELECTED WORKS* 35, 57 (Michael Grant trans., Penguin Books 3d ed. 1971) (referencing procedure of calling witnesses physically before tribunal and cross-examining them); Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1201-02 (2002) (alluding to importance of witness testifying *at trial*).

22. *See* *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (describing common law procedure requiring cross-examination by criminal defendant); Friedman & McCormack, *supra* note 21, at 1205-06 (discussing common-law focus of criminal defendant examining accusatory witnesses); *see also* 5 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 1365, 1397 (James H. Chadbourne ed., Little, Brown and Company 1974) (observing cross-examination essential at common law while witness' physical presence subordinate interest). The origination of the modern Confrontation Clause doctrine springs from the trial of Sir Walter Raleigh for treason. *See* *Crawford v. Washington*, 541 U.S. 36, 44 (2004) (discussing Raleigh's conviction without confronting his accuser began analysis of Confrontation Clause history). The court trying Raleigh denied him the right to confront his accomplice, whose prior testimony implicated Raleigh for treason. *Id.* The common law and statutory law detailing the right for the defendant to confront his accusers developed in response to Raleigh's conviction. *See id.* at 44-45 (detailing response to Raleigh's conviction without witness testimony).

procedure providing criminal defendants with the means to test the accuracy, reliability, and veracity of witnesses making accusatory statements.²³ By incorporating the confrontation right into the Sixth Amendment, the Framers of the Constitution provided criminal defendants with the essential procedural right of cross-examining accusatory witnesses.²⁴ Providing criminal defendants with the procedural right of cross-examination prevents the government from prosecuting individuals with *ex parte* testimony.²⁵ In *Crawford v. Washington*,²⁶ the Supreme Court aligned its Confrontation Clause jurisprudence with the Framers' intentions and the history behind the confrontation right by replacing its emphasis on the reliability of statements with an absolute opportunity to cross-examine individuals making testimonial statements.²⁷

23. See *Crawford v. Washington*, 541 U.S. 36, 55-56 (2004) (suggesting importance of cross-examination greater than merely testing testimony's reliability); *People v. Cortes*, 781 N.Y.S.2d 401, 407-09 (N.Y. Sup. Ct. 2004) (observing cross-examination serves more functions than determining reliability); see also WIGMORE, *supra* note 22, at § 1367 (noting irreplaceable role of cross-examination in search for truth during trial); cf. WIGMORE, *supra* note 22, at § 1368 (discussing purposes of cross-examination beyond testing trustworthiness of witness).

24. See U.S. CONST. amend VI (listing confrontation right as procedure in criminal trial); *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (concluding history behind Confrontation Clause indicates Founders' intent to admit testimony without cross-examination); see also *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) (suggesting admitting anonymous accusations would subvert Confrontation Clause). The founders enacted the Confrontation Clause to prevent the abuses of the defendant's confrontation right that those entrusted with criminal investigations and prosecutions had inflicted in England. See *Crawford v. Washington*, 541 U.S. 36, 53 (2004); cf. *People v. Kilday*, 20 Cal. Rptr. 3d 161, 170 (Cal. Ct. App. 2004) (comparing modern police investigatory function to English justice of the peace investigatory function); Friedman & McCormack, *supra* note 21, at 1202-09 (analyzing Founders' purpose in enacting Confrontation Clause).

25. See *Crawford v. Washington*, 541 U.S. 36, 49-50 (2004) (noting Founders intended Confrontation Clause to prevent *ex parte* testimony); see also *White v. Ill.*, 502 U.S. 346, 363 (1992) (Thomas, J., concurring) (remarking founders enacted Confrontation Clause to prevent trials by *ex parte* affidavits and anonymous accusers); cf. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (observing dispensing with Confrontation Clause's protection based on hearsay exceptions would allow "flagrant" prosecutorial abuses).

26. 541 U.S. 36 (2004).

27. See *Crawford v. Washington*, 541 U.S. 36, 63-69 (2004) (abandoning reliability analysis and adopting testimonial analysis for Confrontation Clause jurisprudence); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (establishing prior Confrontation Clause jurisprudence by analyzing hearsay statements for reliability), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004); see also *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (suggesting Framers did not intend courts to set aside Confrontation Clause protections because statement reliable). The Court's prior Confrontation Clause jurisprudence riddled the defendant's right to cross-examine witnesses with exceptions equating the application of a constitutional right with hearsay law. See *Ohio v. Roberts*, 448 U.S. 56, 63-66 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004); cf. *White v. Illinois*, 502 U.S. 346, 358-59 (1992) (Thomas, J., concurring) (suggesting Confrontation Clause jurisprudence incorrectly combined with hearsay law); Friedman & McCormack, *supra* note 21, at 1208-09 (arguing Confrontation Clause analysis should be separate and distinct from hearsay law). In abandoning the prior Confrontation Clause jurisprudence that focused on reliability, the *Crawford* Court noted: "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford v. Washington*, 541 U.S. 36, 62 (2004). The language from *Crawford* expressly recognizing a procedural right of cross-examination provides: "the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that

Lower courts have struggled when applying the *Crawford* decision because the Court did not clearly define the term “testimonial statement.”²⁸ These courts have applied either a formal test, characterizing only formalized statements to government authorities as testimonial, or a reasonableness test, characterizing all statements a reasonable speaker would foresee that the government would use in a future investigation or prosecution as testimonial.²⁹

reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.* at 61.

28. See *Crawford v. Washington* 541 U.S. 36, 68 (2004) (refusing to precisely define testimonial statements); see also *id.* at 69 (Rehnquist, C.J., concurring) (characterizing majority opinion as leaving behind “mantle of uncertainty”); *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004) (noting difficulty in identifying testimonial statements under *Crawford* decision); *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 554 (Mass. 2005) (suggesting *Crawford*’s guidance regarding testimonial statement analysis unclear); *State v. Wright*, 701 N.W.2d 802, 809-10 (Minn. 2005) (observing *Crawford*’s failure to define testimonial caused subsequent confusion); cf. *State v. Maclin*, 183 S.W.3d 335, 348 (Tenn. 2006) (suggesting all accusatory statements to police officers testimonial, but favoring objective case-by-case analysis). In trying to ascertain the scope of testimonial statements, courts have focused on three formulations for the “core class of testimonial statements.” See *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004). The core class consists of “ex-parte in court testimony,” “extrajudicial statements . . . contained in formalized testimonial materials,” and “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 51-52 (internal quotations omitted). The *Crawford* Court noted that these three types of statements shared a “common nucleus,” but the Court failed to define that nucleus. *Id.* at 52. The Court, however, suggested that accusatorial statements to government officials are always testimonial. See *id.* at 51 (recognizing difference between accusatory witness statements made to police from those made to acquaintances).

29. See, e.g., *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004) (applying reasonableness test to characterize statements as nontestimonial); *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 555 (Mass. 2005) (applying reasonableness test and criticizing formal test); *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (applying formal test to characterize statements as nontestimonial); cf. *United States v. Cromer*, 389 F.3d 662, 673-75 (6th Cir. 2005) (noting reasonableness test conforms with purpose of Confrontation Clause by encompassing informal accusatory statements).

Drawing heavily from three law review articles and a previous dissent, the *Crawford* Court identified useful sources for lower courts to utilize when determining whether a statement is testimonial. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (requiring cross-examination to admit testimonial statements); see also *White v. Illinois*, 502 U.S. 346, 363-65 (1992) (Thomas, J., concurring) (calling for Court to adopt cross-examination requirement for testimonial statements); Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045 (1998) (agreeing Confrontation Clause absolutely requires cross-examination of individuals making testimonial statements); Richard J. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1011 (1998) (advocating cross-examination requirement for accusatory witnesses); Friedman & McCormack, *supra* note 21, at 1208-09 (advocating clear separation of hearsay analysis and Confrontation Clause analysis). These sources, however, recommend different methods for defining testimonial, thus providing little guidance into the actual contours of testimonial statements. Compare *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring) (advocating formal test), and Amar, *supra*, at 1045 (criticizing definition of Friedman’s definition of “witnesses” within reasonableness test as too broad), with Friedman, *supra* note 27, at 1043 (noting testimonial statements encompass more than formal statements), and Friedman & McCormack, *supra* note 21, at 1240-41 (arguing “testimonial” encompasses statements speaker reasonably foresees government using in criminal investigation and prosecution).

The Supreme Court has recently favored following an objective test. See *Davis v. Wash.*, 126 S. Ct. 2266, 2273-74 (2006) (characterizing statements while official obtaining facts as testimonial and statements during emergency as nontestimonial). The Court, however, has not resolved all ambiguities in defining testimonial statements because future decisions will turn on the facts of each case. See *id.* at 2280-81 (Thomas, J., dissenting) (suggesting courts’ attempts to glean state official’s “primary purpose” would produce

Courts have also struggled with the potential effect that excited utterances should have on identifying testimonial statements.³⁰ Some courts allow the nature of the excited utterance to affect its testimonial analysis by reasoning that the speaker's excited state affects her ability to foresee the government's future use of the statement.³¹ Other courts refuse to allow the nature of the excited utterance to encroach upon its testimonial analysis.³² These courts reason that the nature of an excited utterance demonstrates its reliability and that *Crawford* broke the Confrontation Clause jurisprudence free from examining reliability.³³

The different variations used to examine excited utterances have produced inconsistent results in determining whether statements made during 911 calls are testimonial.³⁴ Courts have reached different conclusions when deciding

unpredictable results).

30. See *Drayton v. United States*, 877 A.2d 145, 149-50 (D.C. 2005) (discussing potential effects of excited utterances on testimonial analysis); *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (considering whether excited utterance statement could ever be testimonial). The Federal Rules of Evidence provide an excited utterance exception to the hearsay rule for "statement[s] [that] relat[e] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FED. R. EVID. 803(2). The rationale behind the rule is that the excited nature of the statement makes the statement reliable because the speaker could not have time to lie. See Jay M. Zitter, Annotation, *When is Hearsay Statement Made to 911 Operator Admissible as "Excited Utterance" Under Uniform Rules of Evidence 803(2) or Similar State Rule*, 7 A.L.R. 6TH 233, § 2 (discussing history and rationale of excited utterance exception). But see Aviva Orenstein, "My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 161-62 (1997) (criticizing excited utterance rationale as adversely affecting observation and memory).

31. See *United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005) (reasoning excited nature disqualified witness' ability to make testimonial statement); see also *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 572-73 (Mass. 2005) (Sosman, J., concurring) (discussing effect of excited utterances on determining reasonableness in testimonial analysis); Franny A. Forsman & Rene Valladres, *Grappling with What Statements Are Testimonial Under Crawford v. Washington: "The Reasonable Expectation of the Declarant" Test*, 13 NEV. LAW. 26, 28 (2005) (advocating rule focusing on nature of excited utterances when identifying testimonial statements).

32. See *Lopez v. State*, 888 So. 2d 693, 699 (Fl. Dist. Ct. App. 2004) (observing nature of excited utterances does not affect testimonial analysis); *State v. Powers*, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) (ignoring excited utterance in testimonial analysis and focusing on other factors); cf. *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004) (suggesting excited utterances by victims of crime should be characterized as testimonial).

33. See *Lopez v. State*, 888 So. 2d 693, 699 (Fla. Dist. Ct. App. 2004) (focusing on purpose for making statement and rejecting effect of excited state of mind); *State v. Powers*, 99 P.3d 1262, 1265-66 (Wash. Ct. App. 2004) (characterizing excited utterance analysis as focusing on reliability and noting *Crawford* abandoned reliability); see also Friedman & McCormack, *supra* note 21, at 1234-36 (arguing excited utterance does not affect application of Confrontation Clause); Zitter, *supra* note 30, at § 2 (noting rationale of excited utterance stems from reliability of statements made under stress); cf. *White v. Illinois*, 502 U.S. 346, 364-66 (1992) (Thomas, J., concurring) (arguing reliability has no place in Confrontation Clause analysis); Bradley Morin, Note, *Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 B.U.L. REV. 1243, 1250-55 (2005) (suggesting courts should look to *Crawford* and history of Confrontation Clause when identifying testimonial statements).

34. See *State v. Wright*, 701 N.W.2d 802, 810-11 (Minn. 2005) (discussing inconsistencies among various courts' analyses of 911 calls). Compare *People v. Cortes*, 781 N.Y.S.2d 401, 415 (N.Y. Sup. Ct. 2004) (characterizing 911 call as testimonial under formal test), with *People v. Moscat*, 777 N.Y.S.2d 875, 880 (N.Y. Crim. Ct. 2004) (focusing on lack of formalities in 911 call held statement nontestimonial). But cf. Linda

whether a reasonable person would foresee the government using 911 calls in future prosecutions.³⁵ Courts also differ in deciding whether to characterize questions by 911 operators as interrogations.³⁶ Attempting to craft some consistency in this morass, some courts have focused on the nature of the 911 call to determine whether a statement is testimonial.³⁷ These courts classify cries for help as nontestimonial and characterize statements reporting the details of a crime as testimonial.³⁸ The courts crafting consistency have reasoned that admitting statements reporting the factual details of a crime would enable the government to prosecute a defendant with *ex parte* testimony.³⁹

Greenhouse, *Justices Weigh in on Use of Tapes and Transcripts*, N.Y. TIMES, Mar. 21, 2006, at A15 (quoting Justice Scalia suggesting admitting 911 calls raises constitutional concerns).

35. See, e.g., *United States v. Arnold*, 410 F.3d 895, 903 (6th Cir. 2005) (noting caller reasonably expects government to use statements in 911 call to prosecute defendant), *vacated*, 434 F.3d 396 (6th Cir. 2005) (replacing decision on constructive possession issue and not revisiting admissibility of evidence issue); *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005) (holding caller could not reasonably expect use of 911 call in future prosecution); *People v. Cortes*, 781 N.Y.S.2d 401, 406-07 (N.Y. Sup. Ct. 2004) (suggesting 911 callers know how government will use statements); cf. Friedman & McCormack, *supra* note 21, at 1172 (recognizing public knows law enforcement uses 911 calls in criminal investigations); JOHN J. HORGAN, *CRIMINAL INVESTIGATION* 8 (Susan H. Munger ed., McGraw-Hill Book Company 2d ed. 1979) (observing criminal investigation begins with call from citizen reporting crime); PAUL B. WESTON & KENNETH M. WELLS, *CRIMINAL INVESTIGATION BASIC PERSPECTIVES* 4-6 (James D. Stinchcomb ed., Prentice Hall, Inc. 3d ed. 1980) (discussing criminal "apprehension process" beginning with reported crime).

36. See, e.g., *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005) (refusing to characterize questions by 911 operator as interrogation); *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (concluding questions during 911 call for help not interrogation); *People v. Cortes*, 781 N.Y.S.2d 401, 406-07 (N.Y. Sup. Ct. 2004) (observing 911 questions and procedures similar to interrogations banned by *Crawford*).

37. See *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (observing statements made while under stress of event nontestimonial); *People v. Moscat*, 777 N.Y.S.2d 875, 880 (N.Y. Crim. Ct. 2004) (analyzing nature of 911 calls for help and confirming its nontestimonial nature); see also *People v. Cortes*, 781 N.Y.S.2d 401, 405-07 (N.Y. Sup. Ct. 2004) (examining nature of 911 calls reporting details of crime and characterizing as testimonial).

38. See, e.g., *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (defining 911 calls as merely calls for help and characterizing as nontestimonial); *Lopez v. State*, 888 So.2d 693, 699 (Fla. Dist. Ct. App. 2004) (recognizing purpose of 911 call as determining factor for testimonial analysis); *People v. Cortes*, 781 N.Y.S.2d 401, 405-07 (N.Y. Sup. Ct. 2004) (characterizing 911 calls reporting factual details of crime as testimonial); *People v. Moscat*, 777 N.Y.S.2d 875, 879-80 (N.Y. Crim. Ct. 2004) (limiting nontestimonial statements within 911 calls to those made for help); see also *Drayton v. United States*, 877 A.2d 145, 151 (D.C. 2005) (reasoning statements to officer after scene secured investigatory in nature and thus testimonial); *State v. Wright*, 701 N.W.2d 802, 810 (Minn. 2005) (limiting testimonial analysis in case at bar to 911 calls for help). The Supreme Court recently favored this analysis by characterizing statements made while a government official assesses an "ongoing emergency" as nontestimonial and statements made while a government official gathers information to "prove past events" as testimonial. See *Davis v. Wash.*, 126 S. Ct. 2266, 2273-74 (2006).

39. See *Crawford v. Washington*, 541 U.S. 36, 44-45 (2004) (observing confrontation right developed in response to conviction of Raleigh with *ex parte* testimony); *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2005) (noting detrimental effect of anonymous prosecutions on Confrontation Clause); Morin, *supra* note 33, at 1260 (stating Confrontation Clause abhors convicting defendant with *ex parte* testimony); cf. *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004) (suggesting potential for abuse when government involved in producing *ex parte* testimony); Friedman & McCormack, *supra* note 21, at 1252 (criticizing admission of 911 calls as violating fundamental principle of confrontation right). The reasoning of these courts aligns with the

In *United States v. Brito*, the First Circuit Court of Appeals considered how it would examine excited utterances within its Confrontation Clause analysis.⁴⁰ The court noted that determining whether a statement is an excited utterance and determining whether a statement is testimonial are “symbiotic” analyses.⁴¹ The court observed that the excited utterance analysis focuses on whether the stress of the underlying event affected the speaker, while the testimonial analysis focuses on whether a reasonable person could foresee the future legal use of any statements.⁴² The court also noted that the stress inherent in an excited utterance and the temporal proximity of the statement to the stress-causing event may or may not affect the speaker’s ability to foresee the government’s future use of the statement.⁴³ Offering one bright line within this murky fact-intensive analysis, the court suggested that statements made to extricate the speaker or others from a dangerous situation could not be testimonial.⁴⁴

The court began analyzing whether the anonymous 911 caller’s description of the perpetrator was testimonial by examining *Crawford* to find a definition for testimonial statements.⁴⁵ Drawing guidance from the *Crawford* Court’s classifications of testimonial statements, the First Circuit characterized statements relaying the facts of a crime to the police during a 911 call as testimonial.⁴⁶ The court, however, observed that the excited utterance within the anonymous 911 call would not fit within this characterization.⁴⁷ The court

historical concerns underlying the Confrontation Clause that *Crawford* raised. See *Crawford v. Washington*, 541 U.S. 36, 53 (2004) (observing history supports Confrontation Clause prohibiting governmental abuse of investigatory and prosecutorial functions); see also *White v. Illinois*, 502 U.S. 346, 363 (1992) (Thomas, J., concurring) (suggesting historical basis of Confrontation Clause would not allow anonymous prosecutions). The *Crawford* Court explicitly noted that the Confrontation Clause should exclude ex parte evidence from trial. See *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (observing courts must interpret Sixth Amendment to prohibit ex parte evidence); cf. *Greenhouse*, *supra* note 34, at A15 (reporting Justice Scalia’s observation that weight of evidence from 911 calls is troubling).

40. 427 F.3d at 59-60 (examining how excited utterances may affect testimonial characterization).

41. *Id.* at 60-61 (observing statement could qualify as excited utterance but not as testimonial statement). The court suggested that examining whether a statement is an excited utterance should be the initial analysis and examining whether a statement is testimonial should follow. *Id.* at 61-62.

42. *Id.* at 61 (contrasting excited utterance analysis with testimonial analysis).

43. See *id.* (examining logic of excited utterance hearsay exception in relation to Confrontation Clause doctrine). The court observed that a statement could qualify both as an excited utterance and a testimonial statement, or could qualify only as an excited utterance. *Id.* at 61-62.

44. See 427 F.3d at 62 (reasoning speaker under such stress could not comprehend prosecutorial outcome of statement). The court also noted that a statement qualifying as an excited utterance would be testimonial when the speaker could foresee the government’s future use of the statement. *Id.*

45. *Id.* at 58-59 (discussing *Crawford*’s characterization of testimonial statements).

46. *Id.* at 59 (analyzing three classes of testimonial statements depending on circumstances behind the statement). To reach its conclusion, the court focused on the gravity of 911 calls in the public eye and the fact that the police retain records detailing 911 calls. *Id.* at 60. The court suggested that an objectively reasonable 911 caller would foresee the government using her statement in a future prosecution. See *id.* at 59-60.

47. See *id.* at 60 (suggesting classifying anonymous call as excited utterance may withdraw statement from testimonial characterization).

explained that the stress from hearing gunshots, seeing a man with a gun, and watching that man while she made the 911 call sufficiently altered the caller's ability to foresee the government using her statement.⁴⁸ The court ultimately concluded that the anonymous 911 caller's description of the perpetrator was nontestimonial.⁴⁹

The First Circuit contradicted two important points from the *Crawford* opinion when it held that an excited utterance identifying the perpetrator of a crime to the police was nontestimonial.⁵⁰ First, the court effectively brought a statement's reliability back into Confrontation Clause analysis by allowing excited utterances to morph testimonial statements into nontestimonial statements.⁵¹ Second, the court set a precedent that will permit future courts to admit the types of statements that the Framers and the *Crawford* Court intended to exclude by characterizing an accusatory statement to the police as nontestimonial.⁵² Allowing courts to admit accusatory statements provides the government with the means to prosecute criminal defendants with ex parte testimony without providing the defendant his right to cross-examine the witnesses against him.⁵³

In its examination of the testimonial nature of the anonymous 911 call, the First Circuit correctly observed that a statement reporting the factual details of a crime to the police is testimonial.⁵⁴ The court, however, went astray in its reasoning when it negated this proposition by asserting that the nature of an excited utterance could change this conclusion.⁵⁵ The stress and the temporal

48. See 427 F.3d at 62 (listing factors supporting conclusion that caller's state of mind prevented foreseeing future use of statement).

49. See *id.* at 62-63 (noting stress of excited utterance sufficient to alter caller's future perceptions).

50. Compare 427 F.3d at 62-63 (allowing excited utterance characteristics to affect defining caller's description of perpetrator as testimonial), with *supra* notes 27, 33 and accompanying text (noting reliability examination has no place in Confrontation Clause analysis), and *supra* note 39 and accompanying text (discussing how Confrontation Clause prevents ex parte prosecutions).

51. Compare 427 F.3d at 62-63 (focusing on factors characterizing statement as excited utterance to conclude nontestimonial), with *supra* note 33 and accompanying text (discussing reliability rationale of excited utterances and *Crawford's* abandonment of reliability examination).

52. Compare 427 F.3d at 62-63 (affirming trial court admitting caller's description of perpetrator into evidence as excited utterance), with *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004) (noting Confrontation Clause seeks to exclude ex parte accusatory statements), *State v. Maclin*, 183 S.W.3d 335, 348 (Tenn. 2006) (holding accusatory statements to police testimonial), and *supra* note 39 and accompanying text (discussing history of confrontation right and purpose of Confrontation Clause to prohibit ex parte testimony).

53. See *supra* note 39 and accompanying text (discussing adverse affect of ex parte testimony); see also *Crawford v. Washington*, 541 U.S. 36, 44 (2004) (discussing effect of admitting ex parte testimony against Raleigh in development of confrontation right); *supra* note 24 (referencing Framers' intent behind Confrontation Clause).

54. Compare 427 F.3d at 62-63 (concluding reports of factual details in 911 call testimonial), with *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (contrasting statements to government from statements to acquaintances), and *supra* notes 37-38 and accompanying text (noting characterizing statements reporting facts as testimonial aligns with *Crawford* and Confrontation Clause history).

55. Compare 427 F.3d at 62-63 (allowing nature of excited utterance to change characterization as testimonial statement), with *supra* note 27 and accompanying text (establishing clear separation from hearsay).

proximity of the stress-causing event to the excited utterance indicate that the statement is reliable.⁵⁶ Evaluating the qualities of an excited utterance that demonstrate its reliability to identify a testimonial statement contradicts the *Crawford* opinion because the *Crawford* Court expressly excluded the reliability of a statement from its Confrontation Clause jurisprudence.⁵⁷

Additionally, the First Circuit effectively ignored the historical underpinnings of the Confrontation Clause by characterizing the anonymous caller's description of the perpetrator as nontestimonial.⁵⁸ Changing its initial determination that a statement describing a perpetrator to the police is testimonial, the court classified the quintessential testimonial statement as nontestimonial.⁵⁹ A statement made to the police accusing an individual of committing a crime is precisely the type of statement that the *Crawford* Court sought to exclude absent an opportunity to test the accuracy, reliability, and veracity of the statement through cross-examination.⁶⁰ By providing the description that matched Brito, the anonymous 911 caller accused him, or at the very least, a man that looked like him, of committing the crime.⁶¹ Classifying this statement as nontestimonial would allow the government to prosecute Brito with ex parte testimony, thus denying him his right to test the accuracy and reliability of his accuser through the "crucible of cross-examination."⁶²

analysis), and *supra* note 32-33 and accompanying text (suggesting allowing excited utterance to encroach Confrontation Clause analysis is incorrect).

56. See Zitter, *supra* note 30, at § 2 (noting stress and temporal proximity factors indicate reliability as justification for excited utterance exception).

57. See *supra* note 33 and accompanying text (reasoning reliability of excited utterances not factor in Confrontation Clause analysis).

58. See *supra* notes 24-25, 39 and accompanying text (discussing history of confrontation right prohibiting accusatory statements without cross-examination); see also *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (noting Confrontation Clause seeks to exclude accusatory statements without cross-examination); *supra* note 22 (discussing history of confrontation right from Raleigh's trial).

59. Compare 427 F.3d at 60, 62-63 (changing accusatory statement from testimonial to nontestimonial), with *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (noting formal statements to government officials for prosecution testimonial), *supra* note 22 (discussing effect of admitting accomplice's statement to authorities against Raleigh to develop confrontation right), and *supra* notes 24-25, 39 and accompanying text (suggesting purpose of Confrontation Clause to prevent government from prosecuting with ex parte testimony).

60. See *Crawford v. Washington*, 541 U.S. 36, 52 (comparing prosecutions through ex parte statements to prosecutions under Marian law); see also *id.* at 56 n.7 (noting involvement of government in preparing statement provides strong possibility of abuse); Morin, *supra* note 33, at 1260 (observing *Crawford* suggests Founders sought to prevent admission of ex parte testimony).

61. Compare 427 F.3d at 56 (providing detailed description of perpetrator to police), with HORGAN, *supra* note 35, at 8 (noting police begin to investigate individual based on call from citizen reporting crime), and WESTON & WELLS, *supra* note 35, at 4-6 (describing police process to apprehend criminals begins with report of crime).

62. See *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (emphasizing Confrontation Clause guarantees opportunity to cross-examine witnesses); see also *supra* notes 24-25, 39 and accompanying text (discussing ex parte prosecutions violating Confrontation Clause). Prosecuting Brito by admitting the anonymous 911 caller's description of the perpetrator without providing him the opportunity to cross-examine the caller is akin to denying Sir Walter Raleigh his opportunity to confront his accuser. Compare 427 F.3d at 62-63 (allowing admission of anonymous call to stand), with *Crawford v. Washington*, 541 U.S. 36, 44 (2004) (discussing

In *Brito*, the First Circuit established a rule allowing lower courts to consider the nature of an excited utterance to determine whether it is testimonial. Establishing such a rule brought the reliability of a statement back into the Confrontation Clause analysis. The *Crawford* decision, however, clearly abandoned examining a statement's reliability when determining whether the Confrontation Clause applied. In expanding the examination of testimonial statements to include the reliability indicia of excited utterances, the First Circuit has allowed the government to prosecute the defendant with ex parte testimony. Thus, the First Circuit has established a test directly contradicting Confrontation Clause jurisprudence and denying criminal defendants their important and irreplaceable procedural right to cross-examine accusatory witnesses.

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