

**STATE V. BUDA: THE NEW JERSEY SUPREME COURT,
THE CONFRONTATION CLAUSE, AND
“TESTIMONIAL” COMPETENCE**

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The last temptation is the greatest of treason: To do the right
deed for the wrong reason.¹

I. INTRODUCTION

“Dad says nobody beat me. I fell when I was sleeping in my room.”² A three-year-old child, N.M.,³ made this statement to a New Jersey Division of Youth Services (DYFS) employee, Miriam Nurudeen, while hospitalized for injuries apparently sustained from physical abuse.⁴ Nurudeen recounted his statements to a jury in a criminal trial against Ryan Buda—the boyfriend of N.M.’s mother, Christine, whom N.M. regularly called “Dad” or “Daddy.”⁵ The jury convicted Buda on three counts of endangering the welfare of a child and one count of aggravated assault.⁶ N.M. did not testify at Buda’s trial, and the defendant argued on appeal that the trial court should not have permitted Nurudeen to relay N.M.’s statements to the jury.⁷ Buda claimed that the trial court’s decision to admit those statements into evidence violated the right afforded to him by the Confrontation Clause of the Sixth Amendment, which states that “[i]n all criminal

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¹ T.S. ELIOT, *MURDER IN THE CATHEDRAL* 44 (1988).

² *State v. Buda*, 949 A.2d 761, 766 (N.J. 2008).

³ To protect the privacy of the child, his mother’s surname is omitted from the opinion, and the court refers to the child by his initials. *Id.* at 765.

⁴ *Id.* at 766. While the defendant formally protested his innocence at trial, the actus reus was not a practically triable issue—that is, it was virtually certain that N.M.’s injuries had been sustained by physical abuse. *See infra* note 113 and accompanying text.

⁵ *Buda*, 949 A.2d at 765.

⁶ *Id.* at 768.

⁷ *Id.*; *see infra* note 124 and accompanying text.

prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁸ On appeal, the Appellate Division of the New Jersey Superior Court dismissed some of Buda’s claims but agreed that Nurudeen’s testimony violated the Confrontation Clause and, therefore, reversed and remanded the case.⁹ Subsequently, both Buda and the State petitioned the New Jersey Supreme Court for certification.¹⁰ The supreme court accepted the case and affirmed his conviction, holding in a four-to-three decision that the defendant’s confrontation right had not been violated.¹¹

The issue before the *Buda* court—the admission of N.M.’s out-of-court statements—implicated both evidentiary hearsay rules and the rights afforded to a criminal defendant by the Sixth Amendment to the U.S. Constitution.¹² Both are closely related in some aspects; most notably, they both prohibit some out-of-court statements from being admitted into evidence.¹³ In a 2004 case, *Crawford v. Washington*,¹⁴ the Supreme Court of the United States directed lower courts to radically alter the way in which they had been analyzing the relationship between hearsay and the Confrontation Clause for the previous quarter century.¹⁵ In *Crawford*, the Court gave the somewhat elusive directive that the Confrontation Clause should not apply to all hearsay but only to those statements made by “witnesses.”¹⁶ The identifying act of a

⁸ U.S. CONST. amend. VI.

⁹ See *State v. Buda*, 912 A.2d 735 (N.J. Super. Ct. App. Div. 2006), *rev’d*, 949 A.2d 761 (N.J. 2008).

¹⁰ *Buda*, 949 A.2d at 769. A petition for certification is a request that the New Jersey Supreme Court review the final judgment of the appellate division. See Supreme Court of N.J., Guide to Filing an Appeal in Supreme Court, <http://www.judiciary.state.nj.us/supreme/guide.htm#petitioncert> (last visited May 19, 2010). The defendant cross-petitioned the New Jersey Supreme Court because the appellate division decided that other incriminating statements that N.M. made to his mother would be admissible into evidence on remand. See *Buda*, 912 A.2d at 740. These issues are not the focus of this Comment.

¹¹ *Buda*, 949 A.2d at 780.

¹² *Id.* at 770.

¹³ See *California v. Green*, 399 U.S. 149, 155 (1970) (“[H]earsay rules and the Confrontation Clause are generally designed to protect similar values”); see also *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (“It seems apparent that the Sixth Amendment’s Confrontation Clause and the evidentiary hearsay rule stem from the same roots.”).

¹⁴ 541 U.S. 36 (2004).

¹⁵ See *infra* Part II for a discussion of the Supreme Court’s Confrontation Clause jurisprudence and, specifically, how the *Crawford* decision changed the Court’s longstanding approach.

¹⁶ *Crawford*, 541 U.S. at 51.

witness is the making of a so-called “testimonial” statement, and thus, only witnesses make “testimonial” statements while other out-of-court declarants do not.¹⁷ The Court stated that “testimonial” hearsay is inadmissible at a criminal trial unless the following two circumstances are met: the witness is unavailable to testify at trial and the defense had a prior opportunity to cross-examine the witness.¹⁸

In a later case, *Davis v. Washington*,¹⁹ the Court elaborated on the definition of “testimonial” as it applies to statements made in response to police “interrogations.”²⁰ The Court held that statements made in response to a police interrogation that is aimed at eliciting

¹⁷ *Id.* The author has placed quotation marks around the word testimonial throughout this Comment because, as will be discussed *infra* Part V.B, the meaning of testimonial in the *Crawford* sense is still not perfectly clear. Despite *Crawford*'s dependence on historical sources, the word testimonial was not used in the framing era as a description of a type of hearsay. See Thomas Y. Davies, *Not “The Framers’ Design”: How the Framing-era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y 349, 369 (2007). Furthermore, in the twentieth century, the Supreme Court explained that testimonial evidence refers to communicative evidence or assertions made by a human being. *Schmerber v. California*, 384 U.S. 757, 765 (1966); see also *Pennsylvania v. Muniz*, 496 U.S. 582, 591 (1990) (distinguishing “real or physical” evidence from “testimonial” evidence); *Doe v. United States*, 487 U.S. 201, 201 (1988) (“[I]n order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.”). *Crawford* and its progeny have given “testimonial” a very different, much narrower meaning, and thus, the quotation marks are meant to signify the phrase “testimonial in the *Crawford* sense”—a phrase that, if regularly used, would make this Comment inordinately awkward.

¹⁸ *Crawford*, 541 U.S. at 68.

¹⁹ 547 U.S. 813 (2006).

²⁰ *Id.* The Court stated in *Crawford* that it was using the word “interrogation” in its colloquial sense. *Crawford*, 541 U.S. at 53 n.4. Interrogation was an odd word choice to describe the dialogue in *Davis*. A police interrogation has a very specific meaning—namely a systematic, planned series of questions initiated by the police seeking inculpatory information from a criminal suspect to secure a conviction against him at a later trial. See RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 11, 22 (2008); see also BLACK’S LAW DICTIONARY 838 (8th ed. 2004) (“The formal or systematic questioning of a person; esp., intensive questioning by the police, usu. of a person arrested for or suspected of committing a crime.”). When police conduct interrogations they usually use psychological tactics and strategies designed to secure a confession from the suspect. See LEO, *supra*, at 119. A police interview, on the other hand, is a distinct manner of questioning reserved for the innocent, such as victims and witnesses. *Id.* at 22. Labeling the dialogue in *Davis* as an interrogation becomes even more perplexing because the Court had previously stated that an interrogation is usually initiated by the police. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (defining an interrogation as “questioning initiated by law enforcement officers”); see also *Edwards v. Arizona*, 451 U.S. 477, 485–86 (1981) (noting that if a suspect had initiated communication with the police, no “interrogation” would occur).

past facts relevant to a criminal prosecution are “testimonial,” whereas statements are “non-testimonial” when the purpose of the interrogation is to resolve an ongoing emergency.²¹

The *Crawford* and *Davis* opinions can be problematic for prosecutors of child abuse. For example, in New Jersey, DYFS workers are required to investigate allegations of child abuse by interviewing the victim,²² and the investigator may elicit statements from the child that have probative evidentiary value for the criminal prosecution of the abuser. The prosecution’s case against the defendant may hinge on the admission of those statements into evidence, especially because for several reasons, a child may not testify at trial to repeat his statements to the jury firsthand.²³ Furthermore, there is often little other evidence against the accused besides the child’s pretrial statement.²⁴ Therefore, if a court determines that the child’s pretrial statement is “testimonial,” then admitting that statement into evidence would be constitutionally impermissible,²⁵ which could seriously hamper the prosecution’s case.

It is unclear whether the State would have been able to prove that Buda was the perpetrator of the apparent abuse beyond a reasonable doubt without N.M.’s statements, and thus, the New Jersey Supreme Court was faced with a situation similar to the one described above. This Comment argues that the *Buda* majority came to the right conclusion—that N.M.’s statements were not “testimonial”—but for the wrong reasons. Specifically, the *Buda* majority mechanically applied the holding of *Davis* in a manner unintended by

²¹ *Davis v. Washington*, 547 U.S. 813, 822 (2006). As will be discussed in more detail *infra* Part V.B, the Court gave other indications about how a “testimonial” statement can be identified—criteria that some have criticized as being vague and inconsistent. See, e.g., Josephine Ross, *After Crawford Double-Speak: ‘Testimony’ Does Not Mean Testimony and ‘Witness’ Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 169–70 (2006).

²² N.J. ADMIN. CODE § 10:129-2.5(b) (2009) (“The child protective investigator shall interview the alleged child victim in person and individually . . .”).

²³ See Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them,”* 82 IND. L.J. 917, 985–92 (2007) (discussing the various ways in which courts find children to be incompetent or unavailable).

²⁴ See *State v. Sheppard*, 484 A.2d 1330, 1334 (N.J. Super. Ct. Law Div. 1984) (“For obvious reasons, only one witness with personal knowledge is available to prove the State’s case in almost every child abuse prosecution: the child victim.”).

²⁵ See, e.g., *State v. Snowden*, 867 A.2d 314, 325 (Md. 2005) (finding statements made by a child to a health and human services employee to be “testimonial” and inadmissible); *State v. Buda*, 912 A.2d 735, 743 (N.J. Super. Ct. App. Div. 2006), *rev’d*, 949 A.2d 761 (N.J. 2008).

the U.S. Supreme Court. This Comment contends that the *Buda* court could have justified its result by explaining that confrontation was not required because N.M. lacked the competency to make a “testimonial” statement—that is, N.M. lacked the mental ability to be an extrajudicial witness as described in *Crawford*. The making of a “testimonial” statement requires the declarant to objectively understand that his statement could be used in a criminal prosecution. Given N.M.’s age, mental development, and unfamiliarity with the judicial system, he likely would not have been able to understand that his answers to Nurudeen’s questions could or might be used to convict Buda.²⁶

In Part II, this Comment gives a brief explanation of the hearsay rules as they relate to the Sixth Amendment’s Confrontation Clause. Part III reviews of the factual background, procedural history, and majority opinion of the *Buda* case. Part IV analyzes the majority’s approach and reasoning. Part V summarizes the criteria necessary to

²⁶ The idea of extrajudicial “testimonial” competency has been raised both explicitly and implicitly by judges and commentators, and the author agrees that it is the most persuasive argument supporting the theory that some very young children, such as N.M., are unable to make “testimonial” statements. See Rebecca K. Connally, “*Out of the Mouth[s] of Babes*”: Can Young Children Even Bear Testimony?, *ARMY LAW.*, Mar. 2008, at 1, 18–19 (noting that “[s]ome young children are incapable of making testimonial statements because they either lack the competency or capacity to ‘bear witness’”); Matthew M. Staab, *Child’s Play: Avoiding the Pitfalls of Crawford v. Washington in Child Abuse Prosecution*, 108 W. VA. L. REV. 501, 522 (2005) (“[I]t is doubtful whether a trial court could find, on one hand, that a child is incompetent to testify at trial but, on the other hand, that the same child at an earlier time could make a testimonial statement which he reasonably believed could be used at a future trial.”). Some courts, without referring specifically to the phrase “testimonial” competency, have touched on the issue. See, e.g., *State v. Bobadilla*, 709 N.W.2d 243, 255–56 (Minn. 2006) (“[G]iven [the child’s] very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial. . . . [C]hildren of [a very young age] are simply unable to understand the legal system and the consequences of statements made during the legal process. . . . An interview with an older child who understands the law-enforcement consequences of his statement, or an interview with more significant law-enforcement involvement might both exhibit a greater purpose on the part of a declarant or government questioner to produce statements for use at a future trial.”). Professor Richard D. Friedman, who helped spark the *Crawford* Court’s decision to overturn *Roberts*, proposed the idea that very young children were incapable of acting as witnesses because they would not be aware at the time they made the statements that their words would lead to the punishment of the abuser. See Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 250 (2002) [hereinafter Friedman, *Conundrum*]; see also Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 272 (2005) (noting that “some very young children should be considered incapable of being witnesses for Confrontation Clause purposes”).

make a “testimonial” statement and then explains what those criteria indicate about “testimonial” competency. Specifically, “testimonial” competency requires that the declarant have the mental ability to infer from the circumstances that his statement could be used in a criminal prosecution. In the *Buda* case, N.M. was unable to do so. Part VI suggests a procedure that should be followed for child-abuse prosecutions that would protect children and ensure a fair trial for the defendant. This Comment concludes by placing the *Buda* decision into perspective with the state of the law on child hearsay and the Confrontation Clause. It also calls for more definitive guidance from the Supreme Court about how this issue should be handled in the future.

II. THE SUPREME COURT’S CONFRONTATION CLAUSE JURISPRUDENCE

A. *The Relationship Between Hearsay and the Right to Confrontation*

In criminal trials, two issues become relevant when the prosecution attempts to introduce an out-of-court statement made by a declarant who is not present to testify. First, an extrajudicial statement may be considered hearsay, which is defined as a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”²⁷ The general rule is that hearsay is inadmissible at trial.²⁸ While the origins of the hearsay rule are somewhat unclear—in fact, there was no established rule against it in criminal practice until the 1700s²⁹—two generally accepted reasons are given as to why the hearsay rule was established: (1) a preference for live testimony under oath and (2) subjecting the witness to cross-examination.³⁰

²⁷ FED. R. EVID. 801. For purposes of this Comment, the author will refer and cite mainly to the Federal Rules of Evidence and at times to the New Jersey Rules of Evidence. Hearsay can be distinguished from statements that are not used to prove the truth of the matter asserted but are offered for some other reason, such as proving the statement’s effect on a person. See *id.* advisory committee’s note (“If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.”).

²⁸ *Id.* 802; N.J.R.E. 802. The hearsay rule is concededly riddled with exceptions. See FED. R. EVID. 803, 804, 806; see also *infra* notes 31–34.

²⁹ JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 242 (2003).

³⁰ See *id.* at 245–47 (citing several treatises that indicate that the rationale for having a hearsay rule shifted from a desire for testimony under oath to the need for cross-examination).

In the federal system and in the states, however, several exceptions to the hearsay rule permit the prosecution to admit a statement made by a person not present to testify at trial.³¹ The New Jersey Rules of Evidence and the Federal Rules of Evidence divide hearsay exceptions into two categories: (1) those applicable regardless of the declarant's availability to testify at trial and (2) those applicable only when the declarant is unavailable to testify at trial.³² The former set of exceptions is premised on the grounds that they "possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial."³³ The unavailable witness exceptions follow the theory that, although live testimony is preferred, the circumstances under which the out-of-court statement was made meets a certain guarantee of reliability.³⁴

In addition to the hearsay rules of evidence, a prosecutor may also face a constitutional challenge to the admission of an extrajudicial statement. The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."³⁵ The Confrontation Clause is a right granted to criminal defendants with the purpose of determining the truth at trial by discouraging perjury by prosecution witnesses who, for one reason or another, would not be able to lie (effectively) in front of the defendant. Accordingly, the Confrontation Clause entitles the defendant to hear the all of the prosecution's evidence against him and provides him an opportunity for cross-examination.³⁶ While these may be the goals of confrontation, the Supreme Court has acknowledged that there is scant firsthand proof of how the Framers intended the amendment to operate in practice,³⁷ and as a result, several interpretations exist.

For example, one extreme reading of the clause is that the confrontation right has no relation to hearsay statements at all and that

³¹ See FED. R. EVID. 803, 804; N.J.R.E. 803, 804.

³² See FED. R. EVID. 803, 804; N.J.R.E. 803, 804.

³³ FED. R. EVID. 803 advisory committee's note.

³⁴ *Id.* 804 advisory committee's note.

³⁵ U.S. CONST. amend. VI.

³⁶ See Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 688–89 (1996).

³⁷ See *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) ("History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause.").

the phrase “witnesses against” refers only to witnesses who actually testify at trial.³⁸ Under this reading, the clause simply requires that a criminal defendant be present during an adverse witness’s testimony;³⁹ it would not affect the admission of an out-of-court statement. While the Court has rejected this interpretation, it has also rejected the opposite extreme—that the Confrontation Clause was simply a constitutional prohibition of *all* hearsay from criminal trials.⁴⁰ Because the Court has determined that hearsay rules and the Confrontation Clause are neither completely distinct nor identical, it has attempted to explain that there will be some situations in which the prosecution will need to pass two obstacles before it can admit a hearsay statement into evidence: the evidentiary hearsay rule and a constitutional Confrontation Clause challenge. While the prosecution will *always* need to find an evidentiary exception to admit hearsay into evidence, there will also be some situations in which a defendant raises a constitutional challenge that can be overcome only if the prosecution can demonstrate that the admission of the statement will not violate the Confrontation Clause.⁴¹ As discussed below, the Supreme Court has struggled to establish a clear and long-lasting rule to explain which hearsay statements are subject to the constitutional obstacle.

³⁸ See *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (citations omitted).

³⁹ See *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring). Justice Harlan stated,

If one were to translate the Confrontation Clause into language in more common use today, it would read: “In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him.” Nothing in this language or in its 18th-century equivalent would connote a purpose to control the scope of the rules of evidence. The language is particularly ill-chosen if what was intended was a prohibition on the use of any hearsay . . .

Id.

⁴⁰ See *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (holding that the Confrontation Clause was not meant to prohibit all hearsay, as such an interpretation “would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme”); see also *Crawford*, 541 U.S. at 51 (“[N]ot all hearsay implicates the Sixth Amendment’s core concerns.”).

⁴¹ See, e.g., *Lee v. Illinois*, 476 U.S. 530, 546 (1986) (recognizing that a co-conspirator’s statement was properly admitted under a hearsay exception but could not be admitted into evidence because it would violate the defendant’s Sixth Amendment right to confrontation).

B Roberts and its Effect on Child-Abuse Prosecutions

In a 1980 case, *Ohio v. Roberts*,⁴² fifteen years after the Confrontation Clause was made applicable to the states via the Fourteenth Amendment,⁴³ the Supreme Court established a test for lower courts to apply when determining whether a hearsay statement could be admitted into evidence without violating the Confrontation Clause.⁴⁴ The Court stated,

[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate “indicia of reliability.” Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.⁴⁵

Roberts and its progeny established two important points about the Court’s understanding of the Confrontation Clause. First, the Court seems to have construed the Confrontation Clause’s words “witnesses against” to include all hearsay declarants.⁴⁶ Second, the opinion strengthened the relationship between evidentiary hearsay rules and the Sixth Amendment; as long as a statement fell into a “firmly rooted”⁴⁷ hearsay exception or proved to be trustworthy, it could be admitted without any constitutional violation.

⁴² 448 U.S. 56 (1980).

⁴³ *Pointer v. Texas*, 380 U.S. 400 (1965).

⁴⁴ *Roberts*, 448 U.S. at 65.

⁴⁵ *Id.* at 46. The Court later clarified in *United States v. Inadi*, 475 U.S. 387 (1986), and *White v. Illinois*, 502 U.S. 346 (1992), that under *Roberts*, the Confrontation Clause did not require a showing of unavailability as a condition of admitting some hearsay statements into evidence.

⁴⁶ *Roberts*, 448 U.S. at 66; *see also* *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (stating in a *Roberts*-era case that “a declarant [is] undoubtedly as much a ‘witness against’ a defendant as one who actually testifies at trial”).

⁴⁷ The *Roberts* court did not define the term “firmly rooted,” but it did give the following examples of such exceptions: dying declarations, previously cross-examined former testimony, and appropriately administered business and public records. *Roberts*, 448 U.S. at 66 n.8. But without a concrete definition or set of criteria for determining “firmly rooted” exceptions, lower courts subsequently struggled to identify them. *See* Stanley A. Goldman, *Not So “Firmly Rooted”: Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 3, 11–16 (1987) (criticizing the label of “firmly rooted” and discussing lower courts’ various interpretations of the term). Adding to the confusion is the fact that one of the Court’s given examples, properly administered business records, was not recognized at common law and has its origins in the Common-

Subsequent to the *Roberts* decision, prosecutors were able to bypass both the evidentiary and constitutional impediments to admitting children's hearsay by using residual hearsay exceptions,⁴⁸ newly formed "tender-years" hearsay exceptions,⁴⁹ and other hearsay exceptions that had sufficient indicia of reliability.⁵⁰ The ability to admit children's pretrial statements proved beneficial to child-abuse prosecutors because those statements were often very important for a successful prosecution. The statements' importance is due to the fact that, frequently, the child victim is the only individual other than the abuser who has firsthand knowledge about the abuse, making the child's information an essential piece of evidence.⁵¹ Moreover, a child may potentially be prevented from testifying at trial for two rea-

wealth Fund Act of 1927, a year not too long ago. See FED. R. EVID. 803(6) advisory committee's note.

⁴⁸ See, e.g., FED. R. EVID. 807 ("A statement not specifically covered by [another hearsay exception] but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.").

⁴⁹ Tender-years exceptions are defined as "hearsay exception[s] for an out-of-court statement [of a young child], usually describing an act of physical or sexual abuse, when the child is unavailable to testify and the court determines that the time, content, and circumstances of the statement make it reliable." BLACK'S LAW DICTIONARY 790 (9th ed. 2009). New Jersey was one of many states that passed a tender-years hearsay exception. See N.J.R.E. 803(c)(27) (stating that "[a] statement by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil proceeding if" certain elements of reliability are met). The age of "tender years" must be distinguished from both the age of legal infancy, or minority, and the age at which it is unlikely a child would be competent to testify. A minor is a person who has not yet reached the full legal age of majority, which is usually eighteen. See 42 AM. JUR. 2D *Infants* § 10 (2000). The age of "tender years" is younger than the legal age of infancy, usually ten or twelve. See, e.g., CAL. EVID. CODE § 1228 (West 1995); MASS. GEN. LAWS ANN. ch. 233, § 81 (West, Westlaw through ch. 30 of 2010 2nd Ann. Sess.); N.J.R.E. 803(c)(27). Some states have a rebuttable age of presumed incompetency and others have no presumptive age but set forth guidelines for courts to use in determining competency. See generally 81 AM. JUR. 2D *Witnesses* §§ 203, 204, 208-211 (2004).

⁵⁰ See, e.g., *White v. Illinois*, 502 U.S. 346 (1992) (holding that no confrontation violation occurred by admitting a child's hearsay statements under a spontaneous-declaration hearsay exception and a medical-treatment exception because they were sufficiently reliable).

⁵¹ See *State v. D.R.*, 537 A.2d 667, 672 (N.J. 1988) ("Courts, legislatures, and commentators that have focused on the problems of proof in child sex abuse prosecutions appear to agree that testimony by the victim is often the indispensable element of the prosecution's case.").

sons: First, the court can excuse a child from testifying if it finds the child is unavailable due to the potential trauma he may face as a result of giving testimony in front of the alleged abuser.⁵² In addition, the child must be formally competent to testify,⁵³ and if he is not, the court will preclude the child from giving testimony.⁵⁴ Under *Roberts*, however, even if the child did not testify, prosecutors still were able to admit the child's extrajudicial statement if the court found that it met

⁵² See, e.g., *T.P. v. State*, 911 So. 2d 1117, 1120 (Ala. Crim. App. 2004); *Rangel v. State*, 199 S.W.3d 523, 529–32 (Tex. App. 2006) (holding six-year-old child to be unavailable because giving courtroom testimony would be too traumatic). Some commentators make the argument that requiring a child to repeat accounts of the abuse, especially in front of the abuser, can be detrimental to the child's psychological well-being and can result in unreliable testimony. See Paula E. Hill & Samuel M. Hill, Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 820–21 (1987) (noting that the fear of confronting an abuser and the hostility of the courtroom can have long-lasting effects on the child and may lead to inaccurate courtroom testimony). But equally dangerous consequences can result from admitting unreliable children's hearsay. Studies have shown that children can be very susceptible to the suggestiveness of the interviewer. See Amye R. Warren & Dorothy F. Marsil, *Why Children's Suggestibility Remains a Serious Concern*, 65 LAW & CONTEMP. PROBS. 127, 127–31 (2002). In addition, young children have been found to make false accusations of abuse when an interviewer gives the children positive reinforcement for some answers but not others, and children also may make false accusations when alleged victims speak with one another and share information about the alleged abuse. *Id.* at 131–32. During the *Roberts* era, several infamous examples of cases were decided where the manner of pretrial questioning of children was found to be unduly suggestive or coercive, including the New Jersey case, *State v. Michaels*, 642 A.2d 1372 (N.J. 1994). In *Michaels*, the New Jersey Supreme Court reversed a defendant's conviction for sexual abuse because the investigators had asked the potential child-victims leading questions. *Id.* at 1383. The investigators also furnished information to the children that the children had not voluntarily offered. *Id.* at 1380. Another infamous example of a problematic / suggestive interview is the California "McMartin Preschool case." *Satz v. Superior Court*, 225 Cal. App. 3d 1525 (Cal. Ct. App. 1990). These are two notorious examples, and undoubtedly, numerous other cases exist in which the investigation was coercive and suggestive, leading to false or inaccurate accusations that were used in a criminal trial.

⁵³ See N.J.R.E. 601; 81 AM. JUR. 2D *Witnesses* § 201 (2004). The word "testimonial" could have been used in place of the word "formally" because competency is a measure of a person's ability to testify or give testimony. To avoid confusion with the term "testimonial" in the *Crawford* sense, the author has chosen to use the word "formal" to refer to a witness's competence to give testimony at trial. See *supra* note 17.

⁵⁴ See, e.g., *State v. D.R.*, 537 A.2d 667 (N.J. 1987) (ruling that a three-year-old did not understand the duty to tell the truth, thus making her incompetent to testify). Courts apply a number of factors when determining the formal competence of a witness, including the witness's ability to understand the oath or affirmation to speak the truth and the witness's ability to communicate with the jury. See N.J.R.E. 601. This element of competency is discussed in more detail *infra* Part V.A.

certain guarantees of trustworthiness,⁵⁵ which essentially mitigated the effect of a nontestifying child.

C. *The Crawford Decision*

In 2004 the Supreme Court dramatically changed its Confrontation Clause jurisprudence in *Crawford v. Washington*.⁵⁶ In *Crawford*, the Court eschewed the *Roberts* reliability framework and articulated a new approach to the Confrontation Clause's relationship to hearsay. Justice Scalia, writing for the majority, first attacked the *Roberts* rule as being unpredictable, overly subjective, and unfaithful to the Framers' intent.⁵⁷ He then explained that the term "witnesses," as it is used in the Sixth Amendment, refers only to those individuals who make "testimonial"⁵⁸ statements and that other hearsay declarants—those who do not make "testimonial" statements—are not witnesses for Confrontation Clause purposes.⁵⁹ Consequently, if a hearsay statement is "nontestimonial," it can be admitted via a hearsay exception without violating the defendant's confrontation rights; however, if the hearsay statement is "testimonial," it can only be admitted if the witness is present on the witness stand, or (1) the declarant is unavailable to testify at trial and (2) the defendant has had a prior opportunity to cross-examine the witness.⁶⁰

Crawford was significant for several reasons. First, it considerably narrowed the scope of the Confrontation Clause by limiting its reach to declarants making "testimonial" statements—a much smaller sample of hearsay declarants than the Court's previous jurisprudence,

⁵⁵ See *supra* notes 48–50 and accompanying text.

⁵⁶ 541 U.S. 36 (2004).

⁵⁷ *Id.* at 61–65. Justice Thomas, who was joined by Justice Scalia, voiced his displeasure with the *Roberts* framework in his concurring opinion in *White v. Illinois*, where he "respectfully suggest[ed] that, in an appropriate case, we reconsider how the phrase 'witness against' in the Confrontation Clause pertains to the admission of hearsay." *White v. Illinois*, 502 U.S. 346, 366 (1992). (Thomas, J., concurring). The *Crawford* Court seems to have been partially influenced by the writings of Professor Richard Friedman. See *Crawford*, 541 U.S. at 61 (citing Richard Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998)). Professor Friedman suggested in this article that the Court adopt a new Confrontation Clause jurisprudence using an "alternative approach, detached from hearsay law and based instead on the idea that the Confrontation Clause gives the defendant a right to confront adverse witnesses—those who make testimonial statements." Richard Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1013 (1998).

⁵⁸ *Crawford*, 541 U.S. at 51; see *supra* note 17.

⁵⁹ *Crawford*, 541 U.S. at 51, 68.

⁶⁰ *Id.* at 68.

which considered all hearsay declarants to be witnesses for Confrontation Clause purposes.⁶¹ Second, *Crawford* extricated the Confrontation Clause from evidentiary hearsay rules.⁶² The *Roberts* rule, which married the reasons that would permit a statement to be admissible for evidentiary purposes with the reasons why it would be admissible for constitutional purposes,⁶³ would no longer control whether a hearsay statement violates the Confrontation Clause; as the Court proclaimed, “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”⁶⁴ After *Crawford*, therefore, lower courts were directed to no longer consider the reliability of a hearsay statement when deciding whether the Constitution prohibited its admission but rather to consider only its “testimonial” nature.⁶⁵

A third salient point about *Crawford* is that it emphasized that the Confrontation Clause was not aimed at admitting substantively reliable evidence but was rather concerned with the procedure by which the jury could determine reliability—face-to-face cross-examination.⁶⁶ By emphasizing this point, however, Justice Scalia implied that the Confrontation Clause imposes a social and moral obligation on some hearsay declarants that serves an atavistic purpose of requiring accusers to gather the courage to stand by their previous accusatory assertions as they face the accused.

This implication can be gleaned from Justice Scalia’s words and the tone of his arguments. For example, to support his argument in *Crawford*, Justice Scalia uses the famous case of Sir Walter Raleigh, whose alleged accomplice in treason, Lord Cobham, made incriminating statements about Raleigh—but not during Raleigh’s trial.⁶⁷ Justice Scalia quotes Raleigh as saying, “[L]et Cobham be here, let him speak it. *Call my accuser before my face.*”⁶⁸ In addition, consider the following remarks that Justice Scalia made in a pre-*Crawford* case: “[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair

⁶¹ See *supra* note 46 and accompanying text.

⁶² *Crawford*, 541 U.S. at 61.

⁶³ See *supra* notes 45–47 and accompanying text.

⁶⁴ *Crawford*, 541 U.S. at 61.

⁶⁵ See *id.* at 51–53.

⁶⁶ *Id.* at 61.

⁶⁷ *Id.* at 44.

⁶⁸ *Id.* (emphasis added).

trial in a criminal prosecution.’”⁶⁹ Quoting President Dwight D. Eisenhower, he added,

“[M]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . . In this country, if someone dislikes you, or accuses you, he must come up in front. *He cannot hide behind the shadow.*”⁷⁰

Furthermore, he stated that “Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: ‘Then call them to our presence—*face to face, and frowning brow to brow*, ourselves will hear the accuser and the accused freely speak.’”⁷¹ These quotes demonstrate an approach to the Confrontation Clause that suggests it is not simply a defendant’s right, but that it also places a moral and ethical obligation on those who make accusatory statements.⁷²

D. *Davis and the Meaning of “Testimonial”*

The *Crawford* court left “for another day any effort to spell out a comprehensive definition of the term ‘testimonial.’”⁷³ That day came, partially, in 2006 when the Court decided the combined cases of *Davis v. Washington* and *Hammon v. Indiana*.⁷⁴ In *Davis*, the issue before the Court was whether certain statements made to a 911 telephone operator in the midst of a domestic-violence dispute were “testimonial.”⁷⁵ By contrast, in *Hammon*, the issue also involved state-

⁶⁹ *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (quoting *Pointer v. Texas*, 380 U.S. 404 (1965)).

⁷⁰ *Id.* at 1017–18 (quoting President Dwight Eisenhower, Remarks Given to the B’nai B’rith Anti-Defamation League (Nov. 23, 1953)) (emphasis added).

⁷¹ *Id.* at 1016 (emphasis added) (citation omitted).

⁷² See generally Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003). Clark argues that the Confrontation Clause should be interpreted as a moral and social obligation that is imposed on those who act as accusers and not simply as a right belonging to the accused. *Id.* at 1258. He explains that “the confrontation right might be best understood in conjunction with the oath requirement [and] [t]he oath taken by a witness in a criminal trial may . . . serve a way of requiring witnesses to put themselves on the line.” *Id.* at 1267.

⁷³ *Crawford*, 541 U.S. at 68. In a footnote following that statement, the Court noted that “this case will cause interim uncertainty.” *Id.* at 68 n.10.

⁷⁴ 547 U.S. 813 (2006).

⁷⁵ An abbreviated version of the dialogue between the 911 operator and the victim, Michelle McCottry:

911 Operator: What’s going on?

Complainant: He’s here jumpin’ on me again.

....

ments made by a domestic-violence victim; however, she made the statements after the altercation ended when the police were physically present at the scene to question the couple, and, moreover, the police had the victim fill out and sign an affidavit about the altercation.⁷⁶

The Court used the following rule to make its decisions:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁷⁷

Accordingly, the Court held that the statements made in *Davis* to the 911 operator were “nontestimonial” because they described events that were presently happening and the purpose of the question and answer dialogue was to resolve an ongoing emergency.⁷⁸ But in *Hammon*, the Court found that the statements were “testimonial”

911 Operator: Are there any weapons?

Complainant: No. He’s usin’ his fists.

....

911 Operator: Okay, sweetie. I’ve got help started. Stay on the line with me, okay?

....

911 Operator: Listen to me carefully. Do you know his last name?

Complainant: It’s Davis.

Id. at 817–18 (internal quotation marks omitted).

⁷⁶ *Id.* at 819–20. In *Hammon*, the police responded to a house where a reported domestic disturbance had occurred, and when they arrived on the scene they separated the apparent victim, Amy Hammon, from her husband Hershell. *Id.* at 819. The officers questioned Amy and had her write and sign the following statement: “Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn’t leave the house. Attacked my daughter.” *Id.* at 819–20 (citation omitted). The lower court held that Amy Hammon’s signed affidavit was “testimonial,” but her statements to the officers were not and, therefore, were admissible. *Id.* at 821.

⁷⁷ *Id.* at 822. Justice Thomas made a very thoughtful point in his dissent that is relevant to the *Buda* case: “Assigning one of these two ‘largely unverifiable motives [protection and obtaining evidence],’ primacy requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible. It will inevitably be, quite simply, *an exercise in fiction.*” *Id.* at 839 (Thomas, J., dissenting) (emphasis added) (citation omitted).

⁷⁸ *Id.* at 827. While the Supreme Court focuses on the circumstances surrounding the “interrogation,” the Court indicates that a “testimonial” statement can be made in other contexts as well. *Id.* at 822 n.1.

because no ongoing emergency existed and the questions were designed to elicit facts about past criminal conduct.⁷⁹

E. *Crawford's Effect on the Admissibility of Child Hearsay*

The *Crawford* decision poses obstacles to child-abuse prosecutions that did not exist when courts followed the *Roberts* rule.⁸⁰ Because a statement may be “testimonial” even if it is very reliable, the same trustworthy or firmly rooted hearsay exceptions that prosecutors utilized to overcome constitutional challenges under *Roberts* are no longer useful under *Crawford*. For example, in *State v. Snowden*,⁸¹ the Maryland Court of Appeals held that the admission of two children’s extrajudicial statements to a Department of Health and Human Services investigator violated the Confrontation Clause because they were “testimonial,” notwithstanding the fact that they had been admitted under the state’s tender-years hearsay exception.⁸² The court found that in light of *Crawford*’s new rule, the fact that the children’s statements satisfied the reliability criteria of the state’s tender-years exception was irrelevant; because the statements were “testimonial,” the Confrontation Clause prohibited their admission into evidence without the children testifying.⁸³

After *Crawford*, a substantial number of courts have held that children’s extrajudicial statements to social workers were “testimonial” and, therefore, inadmissible.⁸⁴ Of concern to prosecutors and so-

⁷⁹ *Id.* at 829–30. As will be discussed in more detail *infra* Part V.B, the term “testimonial” has been a source of great controversy and criticism even after the *Davis* decision. While a plethora of articles have been written about the meaning of “testimonial,” a well-written collection can be found in *Regent University Law Review’s* 2006–2007 Symposium. Symposium, *Confrontation Clause*, 19 REGENT U. L. REV. 303 (2006–2007).

⁸⁰ See Mosteller, *supra* note 23, at 957 (noting that hearsay statements that would have been admissible under *Roberts* may “run contrary to [*Crawford*’s] restrictions on testimonial hearsay”). Consider also the case of *Whorton v. Bockting*, 549 U.S. 406 (2007), where the defendant was convicted in 1993 for child abuse based partially on the fact that the victim’s hearsay was admitted into evidence. After *Crawford* was handed down, the defendant argued that the admission of these statements violated the Confrontation Clause because they were “testimonial.” *Id.* at 414. This case makes clear that, at least theoretically, children’s hearsay was more easily admitted under *Roberts* than under *Crawford*. The Court ruled, however, that *Crawford* was not to be applied retroactively and sustained the defendant’s conviction. *Id.* at 409.

⁸¹ 867 A.2d 314 (Md. 2005).

⁸² *Id.* at 325. The children were ten and eight years old, respectively. *Id.* at 316.

⁸³ See *id.* at 325.

⁸⁴ See, e.g., *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *T.P. v. State*, 911 So. 2d 1117 (Ala. Crim. App. 2004); *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal.

cial workers is the fact that courts have been employing inconsistent rationales to determine whether a child's statement is "testimonial."⁸⁵ For example, courts have used one or more of the following as the determinative factor: whether a reasonable child would anticipate the prosecutorial use of the statement,⁸⁶ whether an objective adult would anticipate the prosecutorial use of the statement,⁸⁷ and whether the questioner's purpose was to gather past facts that are potentially relevant to a future prosecution.⁸⁸ Others make the determination based on the formality of any questioning and the involvement of government personnel.⁸⁹ This inconsistency has led to at least one formal request for the Supreme Court to provide further guidance on the issue of child-victim hearsay and the criteria for determining when a

Ct. App. 2004); *People v. Sharp*, 155 P.3d 577 (Colo. Ct. App. 2006); *State v. Contreras*, 979 So. 2d 896 (Fla. 2008); *State v. Justus*, 205 S.W.3d 872 (Mo. 2006); *State v. Blue*, 717 N.W.2d 558; (N.D. 2006); *State v. Mack*, 101 P.3d 349 (Or. 2004); *State v. Pitt*, 147 P.3d 940 (Or. Ct. App. 2006).

⁸⁵ See Brief for the States of Missouri et al. as Amici Curiae in Support of Petitioner, *Iowa v. Bentley*, 128 S. Ct. 1655 (2008) (No. 07-886), 2008 WL 534802 [hereinafter Missouri Brief] (petitioning the Supreme Court to establish concrete guidelines on the issue of the admissibility of child hearsay made to social workers); see also Connally, *supra* note 26, at 4–12; Mosteller, *supra* note 23, at 944, 976–84 (noting that “lower courts are engaged in [an] analysis based upon . . . limited information . . . [and] [w]hen the results are relatively consistent, they might be seen as reasonable judicial interpretation in a situation of ambiguity”).

⁸⁶ See, e.g., *People v. Vigil*, 127 P.3d 916, 924–25 (Colo. 2006).

[A]ssessment of whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial involves an analysis of the expectations of a reasonable person in the position of the declarant. Expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic for analysis.

Id. at 925.

⁸⁷ See, e.g., *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 n.3 (Cal. Ct. App. 2004) (“Conceivably, the Supreme Court's reference to an ‘objective witness’ should be taken to mean an objective witness in the same category of persons as the actual witness—here, an objective four year old. But we do not think so. It is more likely that the Supreme Court meant simply that if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial.”).

⁸⁸ See, e.g., *State v. Blue*, 717 N.W.2d 558, 564 (N.D. 2006) (holding that the forensic interviewer's law-enforcement purpose was dispositive, notwithstanding the fact the child was four years old); *State v. Mack*, 101 P.3d 349 (Or. 2004) (holding a three-year-old child's statements were “testimonial” because the Department of Human Services employee conducting the interview was attempting to elicit statements that were to be used in a criminal prosecution).

⁸⁹ See, e.g., *People v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (finding a child's statement “nontestimonial” because it was made to a private individual as opposed to a government employee).

statement to a social worker is “testimonial.”⁹⁰ As of the time of publication, the Supreme Court has not accepted a case involving *Crawford*'s affect on child hearsay.

III. *STATE V. BUDA*⁹¹

N.M.'s mother, Christine, was still a teenager when she gave birth to N.M. in 1998.⁹² In 2002 Christine began dating the defendant, Ryan Buda.⁹³ Soon afterwards, she and N.M. moved out of her parents' home and in with Buda.⁹⁴

Christine's sister regularly babysat N.M. at Christine's parents' house while Christine was at work.⁹⁵ In July 2002, while Christine was driving N.M. to drop him off with her sister, the three-year-old told her, “Daddy beat me.”⁹⁶ Christine responded by asking when Buda had beat him, and N.M. told her “the nighttime.”⁹⁷ That same day, Christine's mother called her to inform her that N.M. had bruises on his buttocks that resembled handprints.⁹⁸ Later that day, Christine asked Buda about the bruises, and he claimed that N.M. incurred them when he fell down in the bathtub.⁹⁹ Christine accepted this explanation and believed it again two months later when she learned that N.M. had bruises on his head.¹⁰⁰

On October 16, 2002, Christine's sister was babysitting N.M. while Christine was working.¹⁰¹ Usually Christine picked N.M. up, but Buda picked N.M. up that day.¹⁰² When he arrived, N.M. started crying and refused to leave the house with Buda.¹⁰³ At that point, Christine's sister accused Buda of abusing N.M., and an argument en-

⁹⁰ See Missouri Brief, *supra* note 85, at *2 (“It is critical for those courts to have concrete, uniform guidance . . . as to how to determine the admissibility of a child's out-of-court statement made to child welfare advocates.”)

⁹¹ State v. Buda, 949 A.2d 761 (N.J. 2008).

⁹² *Id.* at 765.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*; see *infra* text accompanying note 5. This statement may be referred to later in the Comment as “the July statement.”

⁹⁷ Buda, 949 A.2d at 765.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 765–66.

¹⁰¹ *Id.* at 766.

¹⁰² *Id.*

¹⁰³ Buda, 949 A.2d at 766.

sued.¹⁰⁴ The police came to the house,¹⁰⁵ and “after a phone call to Christine,”¹⁰⁶ the police had to physically carry N.M. into Buda’s car.¹⁰⁷

Two days later, on October 18, Christine left N.M. with Buda instead of with her family while she was at work.¹⁰⁸ When she returned from work, N.M. was calmly watching television and Buda was in the house nearby.¹⁰⁹ About an hour after her arrival, Christine noticed a large red mark on the back of N.M.’s neck, at which point she became frantic, and she and Buda rushed N.M. to the emergency room.¹¹⁰ At the hospital, Christine asked Buda what happened to N.M., and Buda responded that he did not know and that N.M. “‘must have fallen.’”¹¹¹

N.M. was immediately examined by a doctor in the presence of Christine’s parents.¹¹² The treating physician at the hospital found that N.M. had serious injuries to his scalp, ears, eyes, and neck, as well as several other smaller injuries to his scrotum and flank—injuries that led the doctor to believe that N.M. had been subjected to physical abuse.¹¹³ The doctor reported his findings to DYFS’s Office of Child Abuse Control and the Dover Township Police Department.¹¹⁴ The police department then contacted the Ocean County Prosecutor’s Office, and Investigator Kenneth Hess, who is a member of the Child Abuse/Sexual Assault Unit, arrived at the hospital around 8:45 p.m.¹¹⁵ Later that evening, Miriam Nurudeen, a member of DYFS’s Special Response Unit, arrived at the hospital.¹¹⁶ Hess and Nurudeen

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* The opinion is unclear about who actually called the police.

¹⁰⁶ *Id.* The opinion is also unclear about who spoke with Christine and what exactly she said. A reasonable inference is that the police officers spoke with Christine, who then told them that Buda had permission to take N.M. from her sister’s house.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Buda*, 949 A.2d at 766.

¹¹⁰ *Id.* Christine’s parents were apparently notified about N.M.’s injuries and came to the hospital to be with N.M., but the opinion is unclear about who notified them.

¹¹¹ *Id.* at 766.

¹¹² *Id.*

¹¹³ *Id.* at 767. N.M. was ultimately hospitalized for two weeks for internal bleeding. *Id.* at 766.

¹¹⁴ *Id.* at 781.

¹¹⁵ *Buda*, 949 A.2d at 781.

¹¹⁶ *Id.* at 767.

met to discuss how they should proceed with interviewing N.M.¹¹⁷ Hess decided that Nurudeen should interview N.M. because Hess was interviewing Buda.¹¹⁸

Nurudeen entered N.M.'s hospital room and asked his grandparents to leave the room while she questioned N.M.¹¹⁹ The pertinent part the interview is as follows:

Nurudeen: "Okay. I understand you fell. How did you fall?"

N.M.: "From my bed."

Nurudeen: "What were you doing?"

N.M.: [No answer]

Nurudeen: "Did anybody hit you? Did anybody beat you?"

N.M.: "Dad says nobody beat me. I fell when I was sleeping in my room."¹²⁰

A. *Procedural History*

Buda was eventually charged with three counts of endangering the welfare of a child and one count of assault.¹²¹ Although apparently available, N.M. did not testify at trial,¹²² but Christine, the treating physician, and Nurudeen testified for the prosecution.¹²³ After a pre-trial hearing regarding the admissibility of N.M.'s hearsay statements,¹²⁴ the trial court concluded that both the July statement, in which N.M. told his mother that "Daddy beat me" and the October statements made to Nurudeen fell under New Jersey's "excited utterance" hearsay exception and were therefore admissible into evidence.¹²⁵ The trial court also concluded that *Crawford* would not pre-

¹¹⁷ *Id.* at 781.

¹¹⁸ *Id.* Nurudeen indicated that prosecutors normally interview the child first and sometimes the DYFS investigator and the prosecutor interview the child together. *Id.*

¹¹⁹ *Id.* at 781-82.

¹²⁰ *Id.* at 782. These statements may be collectively referred to as "the October statements" in the remainder of this Comment.

¹²¹ *Buda*, 949 A.2d at 767. Christine was also charged with one count of second-degree endangering the welfare of a child, which the state later reduced to one count of fourth-degree cruelty and neglect of a child, in exchange for her cooperation and testimony against Buda. *Id.* at 767 n.3.

¹²² *Id.* at 767, 783.

¹²³ *Id.* at 767.

¹²⁴ N.J.R.E. 104.

¹²⁵ *Buda*, 949 A.2d at 768; *see also* N.J.R.E. 803(c)(2) (stating that an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate"). The admission of excited utterances is not conditioned on the availability of the declarant, which explains why the prosecutor

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vent N.M.'s statements from being admitted into evidence.¹²⁶ Buda was eventually convicted of all charges.¹²⁷

Buda challenged his conviction on several grounds, most notably that the admission of both the July and the October statements violated the Confrontation Clause.¹²⁸ On appeal, the appellate division held that while both sets of statements were excited utterances and thus passed the evidentiary bar against hearsay statements, N.M.'s statements to Nurudeen were "testimonial" and constitutionally inadmissible.¹²⁹ The appellate division rejected Buda's claim that the July statement to Christine was "testimonial" and, accordingly, held that the statement that "Daddy beat me" was properly admitted into evidence.¹³⁰ After the appellate division reversed and remanded the case, both Buda and the State petitioned the New Jersey Supreme Court for certification, which was granted.¹³¹

B. *The New Jersey Supreme Court*

The State argued that the appellate division erred in concluding that the October statements were "testimonial" because (1) neither N.M. nor anyone similarly situated would have expected the statements to have been used in a criminal prosecution, and (2) Nurudeen's primary purpose in questioning N.M. was to protect him, not to elicit evidence of past facts.¹³² Buda argued that the appellate divi-

did not have to demonstrate that N.M. was unavailable to testify as a prerequisite to admitting N.M.'s hearsay. *See id.* See also *infra* note 130 for a discussion regarding the decision to label N.M.'s statements as an excited utterances. Notably, N.M.'s statement would not qualify for New Jersey's tender-years hearsay exception because that exception requires the child to be a victim of sexual abuse, and no such allegation was made in this case. *See* N.J.R.E. 803(c)(27).

¹²⁶ *Buda*, 949 A.2d at 776–77. The *Davis* case had not even been argued before the U.S. Supreme Court at the time of Buda's trial. *Id.* at 777 n.6.

¹²⁷ *Id.* at 768.

¹²⁸ *Id.* at 768. Buda also argued that the evidence was insufficient to support the guilty verdict, that certain jury instructions were in error, and that his sentence was improper. *Id.*

¹²⁹ *State v. Buda*, 912 A.2d 735, 745 (N.J. Super. Ct. App. Div. 2006) ("The October statement . . . was taken when N.M. was no longer in danger and there was no 'ongoing emergency.' As a result the statement must be deemed testimonial" (citation omitted)), *rev'd*, 949 A.2d 761 (N.J. 2008).

¹³⁰ *Id.* at 746 n.11.

¹³¹ *Buda*, 949 A.2d at 769.

¹³² *Id.*

sion erred when it decided that N.M.'s July statements to Christine were admissible as excited utterances and were not "testimonial."¹³³

The New Jersey Supreme Court, in a four-to-three decision, began its legal analysis by stating that "we address first whether N.M.'s hearsay statements to his mother or the DYFS worker qualify as excited utterances We then turn to whether those statements are 'testimonial' within the meaning of *Crawford* and *Davis*."¹³⁴ After the *Buda* majority held that the trial court had not abused its discretion in concluding that both statements met the evidentiary requirements of New Jersey's excited-utterance hearsay exception,¹³⁵ the court addressed each statement to determine if its admission had violated the Confrontation Clause.¹³⁶ The court, relying on the *Crawford* decision, reasoned that N.M.'s statement to Christine that "Daddy beat me" was not "testimonial" because it was more analogous to a "casual remark to an acquaintance," than to a statement in response to a "formal statement [given] to government officers."¹³⁷

¹³³ *Id.*

¹³⁴ *Id.* at 770.

¹³⁵ *Id.* at 773. While this Comment deals specifically with the analysis of N.M.'s statement to Nurudeen and whether its admission at trial violated the Confrontation Clause, the majority surprisingly held that N.M.'s statements to Christine and Nurudeen were excited utterances. *Id.* The elements of an excited utterance in New Jersey are (1) a statement relating to a startling event or condition; (2) made while the declarant was under the stress of excitement caused by the event or condition; (3) without opportunity to deliberate or fabricate. See *State v. Branch*, 865 A.2d 673, 689 (N.J. 2003) (citing N.J.R.E. 803(c)(2)). The three *Buda* dissenters vigorously argued that neither N.M.'s statements to Christine nor his statements to Nurudeen met the elements of an excited utterance. *Buda*, 949 A.2d at 781, 787 (Albin, J., dissenting). The dissent pointed out that to be considered an excited utterance, the elicited statement must be related to the startling event at issue—in this case, alleged physical abuse. *Id.* at 782 n.2. Thus, the dissent explains that

for [N.M.'s] responses to [Nurudeen] to be "excited utterances," [N.M.] must have been under the continuing stress and excitement caused by the beating, not caused by the mother's discovery of the child's injury, which the majority describes as the "intervening action-filled chaos." The "intervening action filled chaos" is not a substitute for the startling event.

Id. (citation omitted). The dissent also argued that the July statement did not meet the elements of an excited utterance because there was no concrete evidence of when N.M. had last been abused, and thus, it seems as if he had time to deliberate and that he was not under the stress of a "startling event." *Id.* at 787–88.

¹³⁶ *Id.* at 773 (majority opinion). This section addresses only the majority's opinion. See *infra* Part IV for certain arguments the dissent makes about the majority opinion.

¹³⁷ *Id.* at 777–78 (citing *Crawford v. Washington*, 541 U.S. 36, 51, 53–54 (2004)). The *Crawford* Court made clear that "[a]n accuser who makes a formal statement to

The court then addressed the most controversial issue of the case—the statements N.M. made to Nurudeen in the hospital, which the majority held were not “testimonial.”¹³⁸ The *Buda* majority used the *Davis* decision¹³⁹ to guide its resolution of the issue and attempted to assign Nurudeen one of two possible purposes while she was questioning N.M.: (1) resolving a life-threatening emergency or (2) gathering past facts relevant to a potential criminal prosecution.¹⁴⁰ The majority believed that Nurudeen’s purpose fell neatly into the former.¹⁴¹ In the court’s words, Nurudeen’s primary purpose was “to end defendant’s then-present reign of terror over N.M., [who made] a statement no different than the domestic abuse victim’s 911 call *Davis* instructs is nontestimonial.”¹⁴²

Not only did the *Buda* majority believe that Nurudeen’s primary purpose was to protect N.M., but it also argued that Nurudeen had absolutely no prosecutorial purpose and that a clear separation of duties existed between her and the county prosecutor, Investigator Hess. The court stated,

Here the DYFS worker was doing precisely her job: she was not collecting information about past events for prosecutorial purposes, but gathering data in order to assure a child’s future well-being. Indeed, by the time she arrived at the hospital, an investigator from the Prosecutor’s Office already was there. The division of duties [at the hospital] was clear: while the Prosecutor’s Office investigator was charged with collecting evidence of the crimes visited on N.M., the DYFS worker was responsible for ensuring N.M.’s continued safety and well-being.¹⁴³

Thus, the majority determined that Nurudeen’s role at the hospital was to resolve a “life-threatening emergency” and was not to aid in the investigation of Buda’s prosecution.¹⁴⁴ Based on this rationale,

government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Crawford*, 541 U.S. at 51. Thus, it would be difficult to argue that N.M.’s statement to Christine could be “testimonial.” In fact, almost no post-*Crawford* cases have found that statements made to family or friends are “testimonial.” See Mosteller, *supra* note 23, at 947–48.

¹³⁸ *Buda*, 949 A.2d at 778.

¹³⁹ See *supra* Part II.D.

¹⁴⁰ *Buda*, 949 A.2d at 778–79.

¹⁴¹ *Id.* at 778.

¹⁴² *Id.* at 780.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 778; see *infra* note 171 (discussing the majority’s decision to use the term “life-threatening emergency”).

the court concluded that N.M.'s statements were "nontestimonial" and reinstated Buda's conviction.¹⁴⁵

IV. THE *BUDA* MAJORITY'S FLAWED APPROACH AND REASONING

While the majority was ultimately correct in concluding that N.M.'s statements were not "testimonial,"¹⁴⁶ the three dissenting justices properly criticized the majority's reasoning. The majority stated that Nurudeen was gathering facts for a purely civil purpose—protecting N.M. from a "life-threatening emergency"—and not for any prosecutorial purpose.¹⁴⁷ This conclusion is problematic because it attempts to make a parallel comparison between *Buda* and *Davis* but is only able to do so by distorting the meaning of an "ongoing emergency" and by denying the crucial role that DYFS workers play in investigating and prosecuting child abusers.

A. *The Buda Majority's Reliance on Davis Was Misplaced*

The first major problem with the *Buda* majority opinion is that it relies too heavily on the factually distinct *Davis* case. While *Davis* did provide some criteria for explaining the meaning of "testimonial," the decision also left much unresolved. It seems as though the rule laid down in *Davis* was tailored specifically to fit facts before the Court, as opposed to a general "one size fits all" rule that was predetermined and subsequently applied to the facts of the cases before the Court. As the dissenting justices in *Buda* point out, "the test set forth in *Davis* 'suffice[d] to decide' [*Hammon* and *Davis*.] The [United States Supreme] Court was prescient to foresee that a multitude of variations on the theme would arise and did not expect a court, such as [the New Jersey Supreme Court], to apply its words mechanically"¹⁴⁸

¹⁴⁵ *Buda*, 949 A.2d at 780.

¹⁴⁶ See *infra* Part V.C for a more detailed explanation of why N.M.'s statement was not "testimonial."

¹⁴⁷ *Buda*, 949 A.2d at 778.

¹⁴⁸ *Id.* at 786. Significantly, Judge Sabatino of the appellate division seemed to be begging for another way to decide the case when he wrote, "[I]f one is *compelled* to identify a single dominant purpose of Nurudeen's hospital interview of N.M. here, I am inclined to agree with my colleagues that the interview was mainly to assist law enforcement *Forced to choose*, I concur with the majority's assessment that the child's statement to Nurudeen was 'testimonial'" *State v. Buda*, 912 A.2d 735, 749 (N.J. Super. Ct. App. Div. 2006) (Sabatino, J., concurring) (emphasis added), *rev'd*, 949 A.2d 761 (N.J. 2008). One of this Comment's main points is that a court

With that critique in mind, it is helpful to think of *Davis* and *Hammon* as setting forth two polar ends on a continuum of possible Confrontation Clause scenarios, with one end representing clearly “testimonial” statements (*Hammon*) and the other end representing statements that are “nontestimonial” (*Davis*). The holdings in those cases were relatively uncontroversial and unsurprising¹⁴⁹ because in both cases the declarants were competent adults, the statements were responses to questions from law-enforcement personnel, the primary purpose of the questions could be (arguably) fairly easily identified,¹⁵⁰ and the line at which each respective emergency ended was fairly straightforward. But *Davis* does not give any detailed directive on how to decide cases that fall in the middle of the continuum, such as the *Buda* case, where the declarant is a young child, the questioner is not a law-enforcement employee, and the interview has an unverifiable or dual purpose.¹⁵¹

As opposed to interpreting *Davis* as establishing the polar ends of a continuum, the *Buda* majority seems to have interpreted *Davis* as setting forth two discrete possibilities, forcing them to pigeonhole Nurudeen into either the role of a 911 operator responding to a crime in progress or into that of a police officer asking questions about a crime committed in the past to gather evidence. The *Buda* case, however, did not fall into either one of those scenarios. Therefore, any attempt at a literal application of *Davis* could not sufficiently

should not be “forced” or “compelled” to apply a doctrine to a set of facts to which it does not apply and that will not sufficiently resolve the legal issue at hand.

¹⁴⁹ In fact, one commentator argued that the rule laid down in *Davis* can be explained by the common law *res gestae* doctrine, the predecessor of the modern excited-utterance exception. See Jeffrey L. Fisher, *What Happened—and What is Happening—to the Confrontation Clause?*, 15 J.L. & POL’Y 587, 608–16 (2007). Professor Fisher compares the modern day 911 call to the “hue and cry” of crime victims during the framing era—calls that had the purpose of both alerting the village constable to the commission of a crime and aiding in the perpetrator’s criminal prosecution. *Id.* at 592. Noting the lack of reliable records from criminal trials in the framing era, Fisher examined criminal cases in the post-framing era and found that courts would admit victims’ statements that were made contemporaneously with the criminal act but not those that described past events. *Id.* at 598–99. According to Fisher’s study, *res gestae* statements were exempt from the common-law right of confrontation and this, he argues, fully explains the Court’s rationale in *Davis*. *Id.* at 603, 608.

¹⁵⁰ But see *supra* note 77.

¹⁵¹ See *State v. Buda*, 912 A.2d 735, 748 (N.J. Super. Ct. App. Div. 2006) (Sabatino, J., concurring) (noting that *Davis* does not “contemplate the sticky circumstance in which the ‘primary purpose’ of a declarant’s interview is unclear, or where the interview is being conducted for dual or multiple purposes”), *rev’d*, 949 A.2d 761 (N.J. 2008).

resolve the legal issue before the court. The *Buda* court appears to have overemphasized the utility of the *Davis* opinion and applied it in a mechanistic manner that was unintended by the Supreme Court.¹⁵²

B. Denying the Investigatory Purpose of DYFS Investigators

Despite the assertions of the *Buda* majority, DYFS investigators regularly play a substantial role in the criminal prosecution of accused child abusers,¹⁵³ and the facts of the case demonstrate that Nurudeen had a substantial prosecutorial purpose when she questioned N.M. DYFS has the legal responsibility of investigating allegations of child abuse¹⁵⁴ and then, based on a set of prescribed factors, making

¹⁵² Although the author disagrees that the *Davis* opinion was a directive to lower courts to look only at the alleged purpose of a questioner, some courts believe that that was exactly what the Court was implying. See, e.g., *State v. Krasky*, 721 N.W.2d 916, 924 (Minn. Ct. App. 2006). (“It has become evident under *Crawford* and *Davis* that the Supreme Court has deliberately abandoned a prior, vague Confrontation Clause test in favor of a new approach that focuses on an uncomplicated study of the purpose of an interviewer who takes a statement that is later introduced as trial evidence.”). This position is questionable because the Supreme Court has indicated that “testimonial” statements can be made even when no questioner is involved. See *Davis*, 547 U.S. at 822 n.1. It is perplexing to consider how courts using an “uncomplicated study of the purpose of the interviewer” would address situations such as taped crime tips, accusatory written documents, and any other situation in which information is given without an interviewer.

¹⁵³ The majority recognized this fact when it stated,

This is not to say that a DYFS worker in all instances will be acting in a purely civil capacity. One can envision circumstances where the DYFS worker serves predominantly as an agent/proxy or an operative for law enforcement in the collection of evidence of past crimes . . . that may well render the hearsay statements thereby procured testimonial under *Crawford*. However, other than acknowledging that possibility, we need not discuss it further in this case in light of the facts presented.

State v. Buda, 949 A.2d 761, 779–80 (N.J. 2008) (citation omitted). In light of the court’s holding, however, it is hard to conceive of a set of facts that would lend to a finding of a “testimonial” statement made to a DYFS worker.

¹⁵⁴ See *Public Hearing Before Senate Committee on Children’s Services Committee: To Examine Policy Issues Relating to Investigations by the Division of Youth and Family Services of Reports of Child Abuse*, 1988 Leg., 203rd Sess. 26, 45–46 (N.J. 1988) [hereinafter *Senate Hearing*] (statement of William Waldman, Director, DYFS). During that initial investigation, DYFS workers are required to

interview the alleged child victim . . . [,]

. . . .

[i]nterview . . . the caregiver and each adult in the home . . . [,]

. . . .

[i]nterview . . . each other person identified . . . as having knowledge of the incident or as having made an assessment of physical harm . . . [, and]

the decision about whether to report the case to the county prosecutor.¹⁵⁵ If a case is referred to the prosecutor, the DYFS investigator must include a written report, the contents of which have information that can be used as evidence against the abuser in a criminal trial.¹⁵⁶

After referring a case to a prosecutor, DYFS conducts “fact-finding” investigations, which involve in-depth interviews with victims, alleged perpetrators, and others to determine “*what happened*,”¹⁵⁷ not simply what *is happening*. This investigation may be going on simultaneously with the prosecutor’s investigation, and the two investigations “may merge” into one.¹⁵⁸ Thus, as the *Buda* dissent points out, the

[i]nterview . . . the alleged perpetrator

N.J. ADMIN. CODE § 10:129-2.5 (2009). Further, “the child protective investigator shall determine if a joint investigation is possible and consult with the investigating police officer or prosecutor before interviewing the alleged child victim, unless emergency action is needed.” *Id.*

¹⁵⁵ N.J. ADMIN. CODE § 10:129-3.1.

¹⁵⁶ *Id.* § 10:129-5.5(e) (“The written information regarding the report shall include: 1. The name and age of each child victim and his or her address; 2. The name and age of each of the child victim’s siblings, if any, obtained by the child protective investigator during his or her investigation; 3. The name of each perpetrator, his or her address, and his or her relationship to each child victim . . .”).

¹⁵⁷ *Senate Hearing, supra* note 154, at 26 (statement of William Waldman, Director, DYFS) (emphasis added).

¹⁵⁸ *See Senate Hearing, supra* note 154, at 56 (Statement of Joyce Munkacsi, Assistant Prosecutor, Middlesex County and Co-chair, Governor’s Task Force on Child Abuse and Neglect). Not only might these investigations “merge,” but DYFS’s regulatory scheme apparently encourages their investigators to work directly with the police and prosecutors. *See* N.J. ADMIN. CODE § 10:129-1.1(b) (2009). The purpose of this regulation is to

Define each circumstance requiring [DYFS’s] referral of a report to a medical or other professional, law enforcement officer or prosecutor for specialized assessment;
 . . . [s]et forth guidelines by which Division caseworkers may easily identify cases that must be referred to prosecutors;
 . . . [e]stablish procedures for such referrals to prosecutors;
 . . . [e]stablish a system through which a Department caseworker may assist prosecutors in determining which cases should be investigated for criminal prosecution and in identifying cases in which criminal investigation or prosecution would be detrimental to the child’s best interests;
 . . . [e]stablish a framework for liaison and improved communication and cooperation between the Department’s local offices and the prosecutors’ offices in order to further the mutual goals of protecting the child and proper law enforcement; [and]
 . . . identify the requirements for accessing law enforcement assistance[.]

Id.

“protection of the child and prosecution of the offender [are] inextricably intertwined.”¹⁵⁹

The merging of the investigations occurs because the same facts are relevant to both family-law proceedings involving child abuse and the criminal prosecution of a defendant for that abuse, with the only major evidentiary distinction being the standard of proof required for judicial action.¹⁶⁰ Thus, facts found by police officers may frequently be used in civil proceedings because parental abuse is grounds for termination of custody¹⁶¹ and because the fact-finding investigations led by DYFS are the basis for deciding whether to prosecute an alleged abuser.¹⁶²

The foregoing should be well known by the New Jersey judiciary. For example, in *State v. Helewa*¹⁶³ the appellate division held that the *Miranda*¹⁶⁴ doctrine applied to a DYFS worker who had conducted a custodial interview of a criminal defendant accused of child abuse. There, the court held that the DYFS worker was acting as an agent of law enforcement.¹⁶⁵ The court reasoned that

there is significant cooperation with DYFS during the investigatory stages of child abuse cases, specifically with respect to the exchange of reports and other sources of information. . . . Although the DYFS caseworker's ultimate purpose in obtaining information from the alleged perpetrator is to ensure the protection and welfare of the child, the likelihood of such information being used against the perpetrator in a criminal prosecution changes the status of the “social worker” to one of a “law enforcement officer”¹⁶⁶

¹⁵⁹ *State v. Buda*, 949 A.2d at 761, 786 (N.J. 2008) (Albin, J., dissenting).

¹⁶⁰ See *Senate Hearing, supra* note 154, at 40 (statement of William Waldman, Director, DYFS) (“There are individuals that may have been found not guilty in criminal court proceeding, but where abuses and/or neglect may have been substantiated by both [DYFS] and the family court of New Jersey.”).

¹⁶¹ See, e.g., N.J. STAT. ANN § 30:4C-15(a) (West 2008) (establishing that a conviction for child abuse permits the filing of a petition for termination of parental rights).

¹⁶² See *Senate Hearing, supra* note 154, at 40–41 (statement of William Waldman, Director, DYFS).

¹⁶³ 537 A.2d 1328 (N.J. Super. Ct. App. Div. 1988).

¹⁶⁴ See generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁶⁵ *Helewa*, 537 A.2d at 1333.

¹⁶⁶ *Id.* at 1332.

It bears repeating that on the night that Nurudeen interviewed N.M., Hess and the police were already at the hospital when she arrived.¹⁶⁷ Nurudeen and Hess met before she interviewed N.M. and discussed how the two of them should proceed in interviewing N.M.¹⁶⁸ Because Hess was interviewing Buda, he asked Nurudeen to speak with N.M.¹⁶⁹ To borrow terminology from criminal law, it seems evident that Nurudeen's state of mind when she questioned N.M. was that she knowingly, if not intentionally, questioned N.M. to give information to Hess that would aid in a criminal prosecution. With this in mind, the *Buda* majority apparently indulged in a legal fiction when it asserted that Nurudeen was investigating in a purely civil capacity.

C. *The Court Distorted the Meaning of an Ongoing Emergency*

In addition to denying that Nurudeen had a prosecutorial purpose, the court used flawed reasoning when it asserted that N.M. was facing a "life-threatening emergency" analogous to the situation in *Davis*.¹⁷⁰ The *Buda* court's choice of words makes clear that it was analogizing N.M.'s situation to what the Supreme Court called an "ongoing emergency" in *Davis*, which the Court explained is an indicator of a "nontestimonial" statement.¹⁷¹ This analogy, however, is misplaced because *Davis* makes perfectly clear that "ongoing emergenc[ies]" are short lived and are contingent on the threat of imminent danger.¹⁷²

Using the *Buda* majority's reasoning, N.M.'s life had been one continuous "ongoing emergency" from the time that he and Chris-

¹⁶⁷ State v. Buda, 949 A.2d 761, 766 (N.J. 2008).

¹⁶⁸ *Id.* at 781 (Albin, J., dissenting).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 778 (majority opinion).

¹⁷¹ See *Davis v. Washington*, 547 U.S. 813, 822 (2006). While the *Buda* majority used the term "life-threatening emergency" as opposed to "ongoing emergency," it is readily apparent that the two terms were meant to be synonymous for all practical purposes. The *Buda* dissent only refers to "ongoing emergencies," *Buda*, 949 A.2d at 784–85 (Albin, J., dissenting), and part of the reason why the appellate division held that N.M.'s statements were "testimonial" was that N.M. was no longer facing an ongoing emergency in need of immediate resolution. State v. Buda, 912 A.2d 735, 745 (N.J. Super. Ct. App. Div. 2006), *rev'd*, 949 A.2d 761 (N.J. 2008). In fact, nowhere in *Crawford* or *Davis* does the Court even mention a "life-threatening" emergency—a fact that casts some doubt on the *Buda* majority's choice of words and the import given to them. For purposes of argument in this Comment, however, "life-threatening" and "ongoing" will be treated synonymously.

¹⁷² *Davis*, 547 U.S. at 828 (emphasis added). The Court noted that *Davis*'s 911 call could easily turn into a "testimonial" statement once the emergency clearly ended. *Id.*

tine moved in with Buda—an idea that is antithetical to the explanation given in *Davis*. The majority’s reasoning cannot withstand scrutiny because any imminent threat of physical harm had ended hours before Nurudeen began questioning N.M. During the questioning, N.M. was in a hospital, protected by his grandparents, a prosecutor, and police officers; he was physically separated from his mother and Buda; and the last incident of abuse had occurred at least several hours before Nurudeen arrived.¹⁷³ Despite the majority’s reliance on *Davis*, N.M.’s situation was not comparable to the ongoing emergency present in that case—a woman who was being or had just been physically assaulted.¹⁷⁴

Davis also explains that “ongoing emergencies” can be identified by the time reference of the dialogue.¹⁷⁵ Specifically, questions aimed at resolving ongoing emergencies will elicit answers about events “as they [are] happening,”¹⁷⁶ not “describing past events.”¹⁷⁷ Nurudeen’s questions, “Did anybody hit you?” and “Did anybody beat you?”¹⁷⁸ were clearly aimed at discovering facts about past events. While it is indisputable that returning N.M. to Buda and Christine could have been detrimental to his mental and physical health, believing that N.M. was facing an ongoing emergency in the hospital that night is more than a stretch. A deplorable situation—even one that can be described as life threatening—is not the equivalent of an *ongoing* emergency if the immediacy of the physical harm is absent.

V. THE MISSING LINK: N.M.’S COMPETENCY TO MAKE A TESTIMONIAL STATEMENT

While the reasoning behind the majority’s decision is problematic, its conclusion that N.M.’s statements to Nurudeen were not “testimonial” is ultimately correct—but for reasons other than those given. Under *Crawford*, extrajudicial declarants who make “testimonial” statements are analogues to in-court witnesses, at least for Confrontation Clause purposes.¹⁷⁹ Just as some children are not competent to

¹⁷³ *Buda*, 949 A.2d at 785 (Albin, J., dissenting). The *Buda* dissenters actually considered N.M.’s situation to be much more analogous to the facts of the *Hammon* case as opposed to those of *Davis*. *Id.*

¹⁷⁴ See *Davis*, 547 U.S. at 817.

¹⁷⁵ *Id.* at 827.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (citation omitted).

¹⁷⁸ *Buda*, 949 A.2d at 782 (Albin, J., dissenting).

¹⁷⁹ See *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

be witnesses at trial, some children likewise may not be competent to act as witnesses in an extrajudicial setting, rendering them incapable of making “testimonial” statements.¹⁸⁰ In the *Buda* case, N.M. likely did not possess this “testimonial” competence, and therefore, confrontation was not constitutionally required—not because Nurudeen was acting in a purely civil capacity in an attempt to end an ongoing emergency but, rather, because N.M. was not competent to act as a “witness” against Buda. Although the Supreme Court of the United States has yet to explicitly recognize or define what “testimonial” competence is and how it can be determined, clues about “testimonial” competence can be taken from the requirements of formal trial competency, from the Court’s description of “testimonial” statements in *Crawford* and *Davis*, and also from the Court’s Fifth Amendment self-incrimination jurisprudence.

A. Trial Witnesses

The *Davis* Court explained that “testimonial” statements are “substitute[s] for live testimony because they do precisely *what a witness does* on direct examination.”¹⁸¹ Given the parallel between in-court and extrajudicial witnesses, it is relevant for this Comment’s purposes to consider the competency requirements of potential trial witnesses.

In the American legal system, a witness must be competent to testify.¹⁸² A competent witness is one who has personal knowledge about the issue for which he will testify and can and will take an oath or affirmation that his testimony will be truthful.¹⁸³ While an oath or affirmation is explicitly a witness’s promise to tell the truth, implicit in the taking of the oath is the witness’s assurance to the court that he understands his moral duty to be honest and that lying has adverse consequences.¹⁸⁴ The oath was originally intended to impress on the

¹⁸⁰ See *supra* note 26.

¹⁸¹ *Davis*, 547 U.S. at 830.

¹⁸² See 81 AM. JUR. 2D *Witnesses* § 160 (2004).

¹⁸³ See 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6002 (2d ed. 2007); see also FED. R. EVID. 603; N.J.R.E. 603. Although the Federal Rules of Evidence do not define oath or affirmation, the general difference between the two is that an oath is a solemn promise to God to speak the truth, while an affirmation is a promise to tell the truth without any religious invocation. See 27 WRIGHT & GOLD, *supra* § 6044.

¹⁸⁴ See FED. R. EVID. 603 (stating that the oath is “calculated to awaken the witness’ conscience and impress the witness’ mind with the duty” to tell the truth); see also

witness fear of divine punishment for lying.¹⁸⁵ Although belief in divine retribution is no longer a prerequisite for testifying,¹⁸⁶ witnesses who intentionally lie—perjurers—may still be subject to criminal punishment.¹⁸⁷ These burdens are placed on the witness, at least in part due to the serious consequences that the accused in a criminal trial could face as a result of the witness's testimony.¹⁸⁸

Courts have long struggled with the issue of child-witness competency.¹⁸⁹ At early common law, very young children, usually those younger than seven, were presumed incompetent because they were believed to be unable to fully understand and appreciate the oath.¹⁹⁰ The writings of the seventeenth century English jurist, Sir Matthew Hale, however, indicate that many courts took the position that incompetent children's hearsay should be admitted in cases of sexual abuse because it was the best evidence available and also that incompetent children ought to be able to speak to the jury unsworn.¹⁹¹ In the late 1700s, the presumption of incompetence was effectively eliminated after *King v. Brasier*,¹⁹² a case in which the Twelve Judges held

State v. Zamorsky, 387 A.2d 1227, 1230 (N.J. Super. Ct. App. Div. 1978). The *Zamorsky* court stated,

Since the goal is to ascertain the child's comprehension of the duty of a witness to tell the truth, it is first necessary to explore the child's conceptual awareness of truth and falsehood. The younger the child, the more searching the inquiry must be. When it has been established that the child understands the meaning of those terms, the next area of inquiry is not, as is so often the case, whether the child will tell the truth, but rather *whether the child understands that it is his or her duty to tell the truth. This is the essence of moral responsibility.*

Id. at 1230 (emphasis added).

¹⁸⁵ See 27 WRIGHT & GOLD, *supra* note 183, § 6044.

¹⁸⁶ See *In re R.R.*, 398 A.2d 76, 82 (N.J. 1979).

¹⁸⁷ See, e.g., 18 U.S.C. § 1621 (2006); N.J. STAT. ANN § 2C:28-1 (West 2005).

¹⁸⁸ See, e.g., *Wheeler v. United States*, 159 U.S. 523, 525–26 (1895) (“[C]are must be taken by the trial judge [in assessing competency], especially where, as in this case, the question is one of life or death.”). A noteworthy law in New York allows incompetent children to make unsworn statements to the jury but does not permit the defendant to be convicted based solely on these unsworn statements. N.Y. CRIM. PROC. LAW § 60.20 (Consol. 1996).

¹⁸⁹ See *The Competency of Child Witnesses*, 39 VA. L. REV. 358, 358 (1953).

¹⁹⁰ See John E. B. Meyers, *The Testimonial Competence of Children*, 25 J. FAM. L. 287, 293 n.29 (1986–1987) (citing 9 W. HOLDSWORTH, *THE HISTORY OF ENGLISH LAW* 188 (3d ed. 1944)).

¹⁹¹ See Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 IND. L.J. 1029, 1034–35 (2007).

¹⁹² *R v. Brasier*, (1779) 168 Eng. Rep. 202 (K.B.), reprinted in Lyon & Lamagna, *supra* note 191, at 1032–33.

that courts should no longer presume incompetence based solely upon a child's age.¹⁹³ Thus, after *Brasier*, unless a court found a specific child to be incompetent after examination, the child would be required to testify under oath.¹⁹⁴

The Federal Rules of Evidence and New Jersey Rules of Evidence take the view that all witnesses, regardless of age, are presumed to be formally competent.¹⁹⁵ If a party raises a substantial question about the child's competence, however, the court may conduct an examination and make a discretionary ruling.¹⁹⁶ When a court determines

¹⁹³ *Id.*

¹⁹⁴ See Lyon & Lamagna, *supra* note 191, at 1052. The Twelve Judges were a group of judges from the three common law courts who would hear significant legal issues and whose decisions set binding precedent. *Id.* at 1032 n.10 (citing JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 212–13 (2003)). *Brasier* appears to have been cited by the *Davis* court to support the notion that “ongoing emergencies” are short lived. *Id.* at 1030. In *Brasier*, a young girl complained to her mother that she had just been raped. *Id.* at 1032–33 (citing *R v. Brasier*, (1779) 168 Eng. Rep. 202 (K.B.)). The trial court presumed the child to be incompetent and allowed her mother to testify about the child's complaint. *Id.* The Twelve Judges ruled that the trial court had erred in presuming the child to be incompetent and that henceforth courts should use discretion when faced with a question of an individual child's competency to take the oath. *Id.* at 1032–33. Thus, *Brasier* eliminated the presumption of incompetence, but it also stands for the proposition that children's hearsay should still be admitted if it is the best evidence available—that is, when the child is incapable of testifying under oath. *Id.* at 1053. Notably, one suggestion is that *Brasier* should be interpreted as a prohibition on children's hearsay, which comes from WILLIAM BLACKSTONE, *COMMENTARIES* (Richard Burn ed., 9th ed. 1783). Lyon & Lamagna, *supra* note 191, at 1053. But Burn only briefly mentions *Brasier*, and his sources are unknown. *Id.* Furthermore, many case reports and treatises after *Brasier* indicate that incompetent children's hearsay was still regularly admitted, which shows that *Brasier* did not affect this practice. *Id.* at 1052–53.

¹⁹⁵ FED. R. EVID. 601; N.J.R.E. 601. Jurisdictions, like New Jersey, that follow the approach of the Federal Rules of Evidence do not need to take any special precautions for child witnesses. See LUCY S. MCGOUGH, *CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM* 106 (1994). Children as young as three have been deemed competent to give testimony at trial. See *State v. R.W.*, 514 A.2d 1287 (N.J. 1986). In addition, a national trend has been to lower formal competency standards and, in some cases, eliminate competency inquiries altogether. See MCGOUGH, *supra*, at 14, 106–07. While the author agrees that age is not a determinative factor of competence, courts should be wary of allowing very young children to testify because formal competence serves the purpose of promoting honest and reliable testimony. The diminution of competency standards runs the risk of reducing the competence requirement to a meaningless formalism that not only is prejudicial to the defendant but also is not the best route to ensuring that children's accounts of abuse are admitted into evidence.

¹⁹⁶ See, e.g., *Galindo v. United States*, 630 A.2d 202, 207 (D.C. Cir. 1992) (noting the need to conduct competency tests on very young children); see also *Walters v. McCormick*, 108 F.3d 1165, 1169 (9th Cir. 1997) (“After a defendant raises a colorable objection to the competency of a witness, the trial judge must perform a ‘reason-

that a child is competent to testify, the court is not guaranteeing that the child will be truthful but, rather, is deciding that the child at least has the *ability* to appreciate the oath and the responsibilities it entails.¹⁹⁷ Without this understanding, the child may be deemed incompetent to testify and disqualified as a witness.¹⁹⁸

Thus, one aspect of “testimonial” competence can be extracted from formal competency standards: the competency requirements of trial witnesses lead to the logical assumption that a child who would be incompetent to testify at trial could not possibly make a “testimonial” statement before trial.¹⁹⁹ A finding that a child-victim is incompetent to testify at trial would be difficult to reconcile with a ruling that the child was competent to be a witness against the accused at the time that he made the statement before trial. Therefore, under *Crawford*, the formally incompetent child could not have made a “testimonial” statement, and confrontation is not required by the Constitution. To assert otherwise would be the equivalent of a court saying, “It is not possible for this child to be a witness at trial because he is not competent to testify. He is too young to comprehend the difference between truth and falsehood nor does he understand the moral duties and obligations required of a witness. But because the child was acting as a witness and giving the equivalent of testimony

able exploration of all the facts and circumstances’ concerning competency.” (quoting *Sinclair v. Wainwright*, 814 F.2d 1516, 1523 (11th Cir. 1987))). Because FED. R. EVID. 601 does not explicitly state that federal courts have authority to disqualify a witness based on competency, the federal courts of appeals have taken two primary approaches to the issue. See RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 169 (2006). Some courts, like the U.S. Court of Appeals for the Sixth Circuit, have held that the authority to disqualify a witness does not come from FED. R. EVID. 601 but rather from rules covering the prejudicial effect of the proffered testimony (FED. R. EVID. 403), the ability of the potential witness to comprehend the oath (FED. R. EVID. 603), and whether the witness can satisfy the personal-knowledge requirement (FED. R. EVID. 602). See ALLEN ET AL., *supra*, at 169 (citing *United States v. Ramirez*, 871 F.2d 582, 584 (6th Cir. 1989)). Others, like the U.S. Court of Appeals for the First Circuit, have taken the approach that courts retain the discretionary power they had at common law, which is presently derived from Rule 601. See *id.* at 170 (citing *United States v. Devin*, 918 F.2d 280, 291–92 (1st Cir. 1990)).

¹⁹⁷ N.J.R.E. 601 advisory committee’s note.

¹⁹⁸ See, e.g., *State v. D.R.*, 537 A.2d 667 (N.J. 1987) (where the trial court ruled that the three-year-old did not understand the duty to tell the truth, thus making her incompetent to testify).

¹⁹⁹ At least one court has considered this argument. See *State v. Krasky*, 736 N.W.2d 636, 642 n.6 (Minn. 2007) (stating that “it would be an odd outcome if we were to hold that, while [the child] is not competent to be called to the stand to give testimony in court, her out-of-court statements . . . are nonetheless inadmissible because they are testimonial in nature”).

before trial, his statements cannot be admitted unless he confronts the defendant and gives live testimony in court.” Based on the logical absurdity of that scenario, it seems fair to infer that, at a minimum, a child who is incompetent to testify at trial was not “testimonial” competent before trial.

*B. What a “Testimonial” Statement Requires of the Declarant*²⁰⁰

The U.S. Supreme Court has never explicitly defined the term “testimonial” nor has it set firm guidelines for identifying a “testimonial” statement in all situations.²⁰¹ The *Crawford* and *Davis* opinions, however, suggest several questions and criteria that courts should consider when determining the “testimonial” nature of a statement, including (1) Was the information given/taken in a formal manner?;²⁰² (2) Were the declarant’s statements solemn affirmations?;²⁰³ (3) Was the declarant doing what a trial witness does?;²⁰⁴ (4) Did the statement contain the “common nucleus” of “testimonial” statements?;²⁰⁵ and (5) Was the primary purpose of any questioning to gather past facts that would be potentially relevant to a criminal prosecution?²⁰⁶ Affirmative answers to any of these questions militate toward finding that the statement was “testimonial.”

1. The Common Nucleus of “Testimonial” Statements

In *Crawford*, the Supreme Court considered adopting the following definitions of “testimonial”:

[(1)] *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar

²⁰⁰ This Part of the Comment is meant only to be a brief summary of the author’s interpretation of the meaning of “testimonial” to support a later argument regarding the competency required to make such a statement. As might be clear by now, however, the meaning of “testimonial” is somewhat vague and is subject to several interpretations. For a more in depth treatment of the meaning of “testimonial” see Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & POL’Y 553 (2007).

²⁰¹ See *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004) (refusing to accept any of three proffered definitions of “testimonial”); see also *Davis v. Washington*, 547 U.S. 813, 822 (2006) (giving guidance about “testimonial” statements only in response to police interrogations).

²⁰² *Davis*, 547 U.S. at 830 n.5 (“We do not dispute that formality is indeed essential to testimonial utterance.”).

²⁰³ *Crawford*, 541 U.S. at 51.

²⁰⁴ *Davis*, 547 U.S. at 830.

²⁰⁵ *Crawford*, 541 U.S. at 52.

²⁰⁶ *Davis*, 547 U.S. at 822, 830.

pretrial statements that declarants would *reasonably expect to be used prosecutorially*; . . . [or (2)] 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*.²⁰⁷

While it declined to adopt either definition, the Court stated that “[t]hese formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it.”²⁰⁸ Considering these two formulations and what they share in common, the common nucleus must relate to the speaker’s expectation that his statement could be used in a prosecutorial fashion.²⁰⁹

2. The Solemnity Requirement

In *Crawford*, the Court also stated that testimony and, thus, a “testimonial” statement, is a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”²¹⁰ The Court has given examples of what it considers to be solemn declarations, such as when “[a]n accuser . . . makes a formal statement to government officers”²¹¹ or the police.²¹² The Court has also indicated that a solemn declaration is not given when “a person . . . makes a casual remark to an acquaintance.”²¹³ Nor does a person give a solemn declaration when he “unwittingly” makes a statement to a government informant, notwithstanding the fact that the informant was gathering incriminating information to assist the police in a criminal prosecution.²¹⁴

²⁰⁷ *Crawford*, 541 U.S. at 51–52 (emphasis added) (citation and internal quotation marks omitted). The *Crawford* Court also considered Justice Thomas’s definition of “testimonial” that he put forth in his concurring opinion in *White v. Illinois*: “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *Id.* (citing *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)). This definition was later rejected by the *Davis* Court as being too narrow in scope and unfaithful to the Framers’ intent. *Davis*, 547 U.S. at 830.

²⁰⁸ *Crawford*, 541 U.S. at 52.

²⁰⁹ See *People v. Vigil*, 127 P.3d 916, 925 (Colo. 2006) (noting that “the ‘common nucleus’ . . . centers upon the declarant’s reasonable expectations”).

²¹⁰ *Crawford*, 541 U.S. at 51 (citation omitted).

²¹¹ *Id.*

²¹² See *Davis*, 547 U.S. at 826. See also *State ex rel J.A.*, 949 A.2d 790, 804 (N.J. 2008), where the New Jersey Supreme Court found that a statement to a police officer was a solemn declaration because there criminal penalties attached to making a knowingly false statement and, therefore, were considered “testimonial.”

²¹³ *Crawford*, 541 U.S. at 51.

²¹⁴ *Davis*, 547 U.S. at 825 (citing *Bourjaily v. United States*, 483 U.S. 171, 181–84 (1987)).

A review of those examples demonstrates that even if a statement is incriminating, which is possible whether a person makes a remark to a government officer, an acquaintance, or an informant, it is only considered a “solemn declaration” in the cases where the declarant should reasonably know that the recipient of the information holds a law-enforcement or other governmental position. Also present in the examples of solemn declarations is the declarant’s reasonable expectation that legal consequences could attach to his statements, both for himself and for others about whom he may be speaking.²¹⁵ Absent from the situations that are not considered solemn declarations is the declarant’s reasonable anticipation that any official consequences would result from his statements.

3. The Formality Requirement

The formality of the circumstances under which a statement is made is also relevant to whether a statement is “testimonial” in nature²¹⁶ because it serves as an indicator to the declarant that a substantial likelihood exists that his statement will be used prosecutorially. As the Court explained in *Davis*, the formality of an interrogation makes it “more objectively apparent” that the interrogation was designed to elicit facts about past criminal events.²¹⁷ Part of the reason why the statements were considered “testimonial” in *Hammon* but not in *Davis* is due to the presence of formality in the former “interrogation” and its absence in the latter.²¹⁸ The formality requirement suggests that the “testimonial” nature of a statement depends largely on whether circumstances would reasonably lead the speaker to expect that his statements might be used as evidence in a criminal prosecution.

4. What a Witness Does

According to the *Davis* court, those who make “testimonial” statements do exactly what a trial witness does.²¹⁹ Trial witnesses an-

²¹⁵ For example, an affidavit can be used as evidence in some situations, *see* 3 AM. JUR. 2D *Affidavits* § 19 (2002), and making a false statement in one can subject the declarant to penalties. *See* 60A AM. JUR. 2D *Perjury* § 40 (2003).

²¹⁶ *Davis*, 547 U.S. at 830 (“We do not dispute that formality is indeed essential to testimonial utterance.”).

²¹⁷ *Id.*

²¹⁸ *Id.* at 827, 830. *But see generally* Ross, *supra* note 21.

²¹⁹ *Davis*, 547 U.S. at 830.

swer questions that are designed to elicit evidence.²²⁰ The Supreme Court explained that “[n]o ‘witness’ goes into court to proclaim an emergency and seek help.”²²¹ Framed in this way, it seems that the declarant’s purpose in making the statement is relevant and that extrajudicial declarants only make “testimonial” statements when the impetus behind the statement was to provide evidence of another’s guilt.

5. The Purpose of the “Interrogation”

The *Davis* court explained that “when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution,”²²² the answers to those questions are “testimonial.” The Court, however, followed that explanation with a footnote stating that “it is in the final analysis the declarant’s statements, not the interrogator’s questions that the Confrontation Clause requires us to evaluate.”²²³ Although some courts have interpreted these lines to mean that the only variable in the “testimonial” equation is the questioner’s purpose,²²⁴ a more plausible reading is that the questioner’s purpose is relevant only to the extent that it would lead the declarant to expect his statements to be used prosecutorially.²²⁵ Thus, this criterion also hints that the declarant’s expectations, based on the circumstances surrounding the statement, are the determinative factor in the “testimonial” equation.

C. The Court’s Fifth Amendment Jurisprudence

Notably, *Crawford* and its progeny share much in common with the Court’s Fifth Amendment jurisprudence, which supports the notion that the “testimonial” nature of a statement hinges on the decla-

²²⁰ See 98 C.J.S. *Witnesses* § 1 (2002).

²²¹ *Davis*, 547 U.S. at 828.

²²² *Id.* at 822.

²²³ *Id.* at 822 n.1.

²²⁴ See *supra* note 152; see also *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005); *State v. Bobadilla*, 709 N.W.2d 243, 250 (Minn. 2006); *State v. Mack*, 101 P.3d 349, 352 (Or. 2004).

²²⁵ See, e.g., *State v. Stahl*, 855 N.E.2d 834, 844 (Ohio 2006) (“In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant’s expectations.”).

rant's reasonable anticipation that it could be used in a subsequent criminal trial. For example, the Court has held that a violation of the Fifth Amendment right against self-incrimination²²⁶ can be successfully invoked by a criminal suspect only when his pretrial statements are compelled, incriminating, and testimonial (not in the *Crawford* sense).²²⁷ If a compelled statement is testimonial (communicative), but the suspect does not "reasonably believe[]" that his statements can be used against him as evidence in a criminal trial, no Fifth Amendment violation occurs.²²⁸ Thus, to determine whether a Fifth Amendment violation has occurred, the Court has focused on whether the suspect (or the "witness against himself") had a reasonable belief that his statements would be used as evidence in a subsequent criminal trial against him.

In addition, the Court's use of the word "interrogation" in *Davis* may be borrowed from a line of Fifth Amendment *Miranda*²²⁹ cases in which the Court has held that a criminal suspect's incriminating statements are only subject to a *Miranda* analysis if he has been subject to an "interrogation."²³⁰ Significantly, for Fifth Amendment purposes an interrogation

refers not only to express questioning, but also to any words or actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. *The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.*²³¹

Clearly, the perceptions of the suspect are not decisive factors in a *Miranda* analysis. The Court has held that even when a suspect makes incriminating statements to an agent of law enforcement, no violation occurs if the suspect is *unaware* that he is being surreptitiously "interrogated" and providing incriminating information.²³²

²²⁶ U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

²²⁷ See *Hiibel v. Sixth Judicial District Court of Nev., Humboldt County*, 542 U.S. 177, 189–90 (2004). Testimonial in these cases refers to communicative assertions. See *supra* note 17.

²²⁸ *Hiibel*, 542 U.S. at 190 (citing *Kastigar v. United States*, 406 U.S. 441, 445 (1972)).

²²⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²³⁰ See *Edwards v. Arizona*, 451 U.S. 477, 485–86 (1981).

²³¹ *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (emphasis added) (footnotes omitted).

²³² See *Illinois v. Perkins*, 496 U.S. 292, 297 (1990) ("Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*.").

The Court has also held that an exception to a *Miranda* violation exists that is similar to the *Davis* ongoing emergency rule. Even if a suspect, while being interrogated, has a reasonable belief that his statements will be used as evidence against him, no *Miranda* violation occurs when “police officers ask questions reasonably prompted by a concern for the public safety.”²³³ The Court, however, was careful to note that “most police officers [in an emergency situation] would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect”—but their individual motivations are irrelevant to the Fifth Amendment analysis.²³⁴ Thus, if the Court is using its Fifth Amendment jurisprudence as a guide for its Sixth Amendment Confrontation Clause analysis, then a statement clearly is only “testimonial” when it is reasonable to conclude that the declarant should know, based on the context of the situation, that his statements could be used in a criminal prosecution,²³⁵ unless the statements are given in response to an emergency situation that requires immediate resolution for safety reasons.

D. N.M. Was Not Constitutionally Required to Confront Buda

1. N.M. Was Not “Testimonially” Competent

The foregoing criteria suggest that three prerequisites exist for making a “testimonial” statement in the context of a question and answer dialogue.²³⁶ First, a questioner who has actual law-enforcement capacity or who can be considered an arm of law enforcement must be involved.²³⁷ Second, the questioner must ask his questions in a

²³³ *New York v. Quarles*, 467 U.S. 649, 656 (1984).

²³⁴ *Id.*

²³⁵ The major difference between the Fifth and Sixth Amendment analyses is that under the Fifth Amendment, it is the suspect who must be aware that he is incriminating himself, while under the Sixth Amendment, the declarant must be aware that his statements could be incriminating as to a third party.

²³⁶ This Comment deals only with situations in which a questioner is involved because that was the context of the *Buda*, *Davis/Hammon*, and *Crawford* statements; however, a “testimonial” statement can be made in other circumstances. See *Davis v. Washington*, 547 U.S. 813, 822 n.1 (2006).

²³⁷ Many courts have found that statements made to private individuals, such as parents, friends, and doctors are not considered testimonial. See, e.g., *People v. Cage*, 155 P.3d 205, 219 (Cal. 2007) (child’s statement to emergency-room doctor); *People v. Vigil*, 127 P.3d 916, 920–21, 928 (Colo. 2006) (child’s statement to his father); *In re Rolandis G.*, 817 N.E.2d 183, 189 (Ill. App. Ct. 2004) (child’s statement to his moth-

(somewhat) formal manner.²³⁸ And finally, the speaker should be able to use the context of the situation to recognize that his answers could be used in a prosecutorial manner.²³⁹

The speaker's ability to digest the context of the situation is the heart of "testimonial" competence. The value of the contextual criteria mentioned by the Court—such as the formality and solemnity of the exchange, the questioner's law-enforcement role, and the absence of an ongoing emergency—hinges on the declarant's recognition and use of them. Those criteria lose their value if a declarant could not process them. Thus, N.M., who in all likelihood would not be able to appreciate the "testimonial" circumstances of his dialogue with Nurudeen, did not make a "testimonial" statement because there is very little chance that he was doing "what a witness does"—knowingly providing potential evidence.

If a "testimonial" competent person was in N.M.'s place, the statements undoubtedly would be considered "testimonial." Nurudeen was acting as an agent of the prosecutor, her questioning was just as, if not more, formal than the questioning in *Hammon*, and N.M. was in no immediate danger.²⁴⁰ Nevertheless, the crucial point is that N.M. was unable to identify Nurudeen's law-enforcement purpose, and thus, his words could not be considered "solemn declarations" or testimony. Although Nurudeen's questioning might be considered "formal," the formality requirement presupposes that the declarant has the capacity to understand that formal questioning indicates that the questioner may be attempting to elicit and preserve evidence. That is, the formality requirement hinges on the speaker's ability to recognize a prosecutorial purpose when he sees one.

er); *State v. Fisher*, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (adult's statement to doctor); see also Mosteller, *supra* note 23, at 944–48, 950–57.

²³⁸ For a critique of the way the Court applied this factor in the *Davis* and *Hammon* cases, see Ross, *supra* note 21, at 186–89 (arguing that the questioning in *Hammon* was less formal than that of *Davis*).

²³⁹ The idea that whether a statement is "testimonial" hinges on the declarant's anticipation of the statement's prosecutorial use was advocated by Richard D. Friedman in a pre-*Crawford* article, *The Conundrum of Children, Confrontation, and Hearsay*. See Friedman, *Conundrum*, *supra* note 26, at 247 (explaining that a "testimonial" statement is one in which "an out-of-court declarant knows that she is probably providing evidence toward investigation or prosecution of a crime"). Courts that follow this analysis have also been split over whether to use the perspective of an "objective adult" or an "objective child of the same knowledge and understanding." See Mosteller, *supra* note 23, at 976–84.

²⁴⁰ See *supra* Part IV.B–C.

While it would be futile to engage in a hypothetical guessing game about N.M.'s subjective state of mind when he answered Nurudeen's questions, the circumstantial evidence militates toward finding an extremely low probability that he had any idea that his statements could or might be used against Buda in a criminal trial: N.M. was three years old when he made the statement;²⁴¹ no evidence indicates that he had any previous contact with the criminal-justice system or DYFS;²⁴² he had just been examined by medical professionals who were concerned with his injuries;²⁴³ and given the events of the day, it is likely that he was mentally and emotionally exhausted. Given those factors, it would be illogical to conclude that N.M. had the capacity to recognize the possibility that his words could or might be used against his mother's boyfriend in a future criminal prosecution. Therefore, he was not acting as a witness under *Crawford* and was not constitutionally required to confront Buda.²⁴⁴

2. There Would Be No Value in Requiring Confrontation Between N.M. and Buda

Besides N.M.'s competence, in light of the courage-gathering nature that the *Crawford* court has assigned to confrontation,²⁴⁵ requiring N.M. to face Buda in court would have apparently been fruitless. N.M.'s situation does not resemble any of the models of required

²⁴¹ State v. Buda, 949 A.2d 761, 765 (N.J. 2008).

²⁴² Nothing in the opinion suggests that Christine or N.M. had ever previously dealt with DYFS.

²⁴³ *Buda*, 949 A.2d at 766.

²⁴⁴ Many courts argue that taking an approach similar to the one advocated in this Comment could lead to prosecutorial abuse and that interviewers of children could flout the Confrontation Clause by asking suggestive and leading questions to incompetent children. See, e.g., State v. Snowden, 867 A.2d 314, 328–29 (Md. 2005) (“To allow the prosecution to utilize statements by a young child made in an environment and under circumstances in which the investigators clearly contemplated use of the statements at a later trial would create an exception that we are not prepared to recognize.”). But it is important to keep in mind that the prosecution must pass two obstacles before the admission of a hearsay statement—the evidentiary one and the constitutional one. And as *Crawford* makes clear, the Confrontation Clause is not meant to guarantee the substantive reliability of hearsay statements; that is the purpose of the rules of evidence. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (stating that the Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner”). An unreliable statement or one that was elicited by means of suggestive questioning should be considered inadmissible under the rules of evidence, not because its admission would contravene the Confrontation Clause.

²⁴⁵ See *supra* notes 60–65 and accompanying text.

confrontation mentioned by the Supreme Court, such as Cobham's remarks about Sir Walter Raleigh's apparent treason²⁴⁶ or Amy Hammon's explanation to the police as to how her husband had beaten her.²⁴⁷ Present in those model situations is a person who knowingly and voluntarily provided government officials with incriminating information about a party who was not currently present, and thus, the declarant assumed the obligations of a witness.²⁴⁸ Based on the Court's current jurisprudence, it seems that accusers are required to stand by their previous assertions while confronted by the defendant in a court of law so that any falsehoods are weaned out. Also, society is likely to look down on individuals who make accusations and then "hide behind the shadow."²⁴⁹

No analogous value would be served by requiring the three-year-old to face off with Buda and repeat the nonaccusatory statement, "Dad says no one beat me. I fell when I was sleeping."²⁵⁰ N.M. did not make a voluntary accusatory statement and then attempt to "hide behind the shadow"²⁵¹ but was cast into the role of an evidence giver without any knowing and independent choice of his own. The value of confrontation stressed by the Court seems to only make sense when an individual voluntarily assumes the role of a witness by knowingly making statements that could be used in an adverse way against an accused.²⁵² Furthermore, requiring a three-year-old child to repeat a nonaccusatory statement in front of his alleged abuser would not only be fruitless for confrontation purposes, but it also has the potential to reduce the clause to a vehicle to intimidate some child victims.

VI. A PROCEDURAL RECOMMENDATION

Some courts have found children's statements to be "nontestimonial" on grounds related to the notion of "testimonial" compe-

²⁴⁶ *Crawford*, 541 U.S. at 443.

²⁴⁷ *Davis v. Washington*, 547 U.S. 813, 819–20 (2006).

²⁴⁸ See *Clark*, *supra* note 72, at 1267.

²⁴⁹ See *supra* note 70 and accompanying text.

²⁵⁰ *State v. Buda*, 949 A.2d 761, 766 (N.J. 2008).

²⁵¹ See *supra* note 70 and accompanying text.

²⁵² See *Clark*, *supra* note 72, at 1258 ("[T]he Confrontation Clause of the Sixth Amendment ought to be re-understood as primarily an accuser's obligation rather than primarily as a defendant's right. We demand that those who would perform this potentially dangerous, morally weighty, and symbolically loaded act—the act of accusation—be willing to do so face to face.").

tence explored in this Comment. Without using the phrase “‘testimonial’ competence,” these courts have argued that a child’s statement is not “testimonial” because an objective child of the same age and understanding would not have anticipated the prosecutorial use of the statements.²⁵³ While that approach is a step in the right direction, courts preferably should follow the Federal Rules of Evidence model so that no age of presumptive “testimonial” incompetence applies. While it is extremely unlikely for a very young child to be “‘testimonial’” competent, it is essential to the defendant’s rights that the court examine the child so that the court can make a determination about whether *that particular child* reasonably could have anticipated how his statements could be used under the circumstances.²⁵⁴ Even if the child were young, if he appears to have recognized that his statements could be used to get someone in trouble with the law, then he should be required to confront the defendant in court.

The state’s interest in protecting children from physical and mental harm and the rights of the criminally accused are of equal importance, and it is essential that the judicial system ensure that both are given proper protection. To do so, states should require child social-service workers, such as DYFS investigators, to videotape their interviews with child-abuse victims.²⁵⁵ If a criminal prosecution

²⁵³ See, e.g., *People v. Vigil*, 127 P.3d 916, 926 (Colo. 2006) (“[A]n objective seven-year-old child would reasonably be interested in feeling better and would intend his statements [to a doctor] to describe the source of pain and his symptoms. . . . He would not foresee the statement being used in a later trial.”); *State v. Bobadilla*, 709 N.W.2d 243, 255–56 (Minn. 2006) (noting that because the child was only three, “it is doubtful that he was even capable of understanding that his statements would be used at trial”). But it should be noted that the Supreme Court mentioned in *Crawford* that the one case decided under *Roberts* that might be in conflict with new rule set down in *Crawford* was *White v. Illinois*, where the Court held that a four-year-old’s statements to a police officer were properly received into evidence under an excited-utterance hearsay exception and did not violate the Confrontation Clause, without any showing that the child was unavailable. *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004) (citing *White v. Illinois*, 502 U.S. 346, 349–45 (1992)). While this dictum may seem to imply that the four-year-old’s statements were “testimonial,” which would cast doubt upon using an objective-child perspective, the Court made it clear that the issue in *White* dealt only with witness unavailability and its relation to the Confrontation Clause. *Id.*

²⁵⁴ For example, a court could possibly conclude that even a young child could have anticipated the prosecutorial use of his statements. See, e.g., *State v. Justus*, 205 S.W.3d 872, 880 (Mo. 2006) (“Even at four years old, [the child]—who told [the social worker] that she would tell a judge what her father had done—was aware that her statements could be used to prosecute [her father].”).

²⁵⁵ The New Jersey Supreme Court has recognized that videotaping preliminary interviews with child sex-abuse victims is beneficial because it enables judges to de-

ensues, the court and the prosecutor should make efforts to have the child testify at trial.²⁵⁶ If the child is deemed incompetent to testify, then the pretrial statement should also be deemed “nontestimonial” because a child who is unable to undertake the duty and obligations of a trial witness could not logically have recognized and assumed those duties prior to trial.²⁵⁷ In this situation, the videotape should then be admitted in lieu of the DYFS worker’s testimony because it would be the best evidence available.²⁵⁸ Admission of the videotape would pose no threat to the defendant’s confrontation right because the statement is not “testimonial” and also would serve the twin goals of the rules of evidence—allowing the fact finder to determine the truth and to have the proceeding conducted in a just manner.²⁵⁹ In addition, this process reduces any threat of psychological harm that may result as a consequence of a child giving testimony in front of his alleged abuser.²⁶⁰

If, however, the child is competent to testify but is ruled emotionally unavailable or does not testify for some other reason, it is in-

termine the reliability of any elicited statements. *See* State v. Michaels, 642 A.2d 1372, 1379 n.1 (N.J. 1994).

²⁵⁶ Some commentators have noted that prosecutors have some influence over whether a child is physically available to testify, and therefore, they must make good-faith efforts to ensure children’s availability. *See* Mosteller, *supra* note 23, at 985–86. Steps can also be taken to ensure that a potential child-witness is emotionally available. For example, it is constitutional to allow child-victims to testify via a closed circuit video system. *See* Maryland v. Craig, 497 U.S. 836, 857 (1990). In addition, there are ways to lessen the emotional strain of testifying in court, including (1) having the judge appear less intimidating by removing his robe and reassuring the child that he is not going to be sent to jail, (2) bringing the child to the courtroom before the trial, (3) explaining the trial and the roles of the various parties, and (4) allowing the child to testify by using testimonial aids. *See* SHERRIE BOURG CARTER, CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES 93–98 (2005).

²⁵⁷ *See supra* note 199 and accompanying text. Curiously, under *Roberts*, establishing that a child was incompetent to testify at trial would militate toward finding that the Confrontation Clause would prohibit the pretrial statement from being admitted into evidence because it would appear to lack the requisite indicia of reliability. *See, e.g.,* People v. Rocha, 547 N.E.2d 1335, 1341 (Ill. App. Ct. 1989) (“If a child sexual abuse victim is deemed ‘incompetent’ as a witness, a seeming paradox results from the attempt to introduce into evidence that child’s out-of-court statements. It may appear incongruous to allow into evidence the statements of someone declared incompetent to testify to the same events at trial just a few months later.”).

²⁵⁸ To justify the admission of this videotape, legislatures and courts would have to create an additional hearsay exception on the grounds that the videotape is the best and most reliable evidence available.

²⁵⁹ FED. R. EVID. 103. Significantly, this process parallels the historical treatment of incompetent child witnesses. *See supra* note 191–194 and accompanying text.

²⁶⁰ *See supra* note 52.

cumbent upon the court to determine whether the child was “testimonial” competent at the time the statement was made. In this regard, judges might use tort law as a guide for making their rulings. In the law of torts, children are generally held to different standards than adults and will be held liable for their negligent or reckless actions only when they have the capacity to appreciate the inherent risk and danger associated with those actions.²⁶¹ Capacity is a factual question that can be determined by the age, intelligence, and experience of the particular child.²⁶² Those same factors should be used by judges to determine the likelihood that the child-witness had the capacity to appreciate that his statement could or might be used in a prosecutorial manner.

There is no denying that this will be a difficult task that will not work perfectly, but the use of psychologists and common sense could lead to reliable results. In addition, the videotaped interview could prove very useful in aiding the judge’s determination of the child’s “testimonial” competence because it allows the judge to factor in the setting of the interview, the manner of questioning, and the child’s responses to make a determination of whether the child could reasonably anticipate the prosecutorial use of the statements.²⁶³ If the judge concludes based on the foregoing factors that the child was not “testimonial” competent at the time the statement was made and that the questioning was conducted in a nonleading or suggestive manner, then the videotape should be admitted into evidence.²⁶⁴ If, however, the judge determines that the child was “testimonial” competent when he made the statement, then admitting the tape without the child’s testimony in court would clearly violate the Confrontation Clause and should not be permitted.

VII. CONCLUSION

The *Buda* opinion demonstrates many of the problems that lower courts face when attempting to apply the vague and confusing directives of *Crawford* and *Davis*—problems that become much more

²⁶¹ 42 AM. JUR. 2d *Infants* § 133 (2000).

²⁶² *Id.* § 134.

²⁶³ In addition, a preliminary review of the videotape would allow the judge to determine if the interviewer’s questions were leading, coercive, or suggestive.

²⁶⁴ The videotape would be admitted under the newly formed hearsay exception. *See supra* note 258. Of course, if the questioning is leading or suggestive, it should be declared too unreliable to meet the hearsay exception and should not be allowed into evidence.

complicated and sensitive when dealing with very young child-abuse victims. Instead of attempting to address the theoretical and practical difficulties of the situation, the *Buda* majority relied on questionable reasoning to achieve the result that it desired—avoiding confrontation between a three-year-old and his alleged abuser. To justify its conclusion, the *Buda* court distorted Nurudeen's role with law enforcement and also stretched the meaning of an "ongoing emergency" well beyond its common meaning and the definition provided by the U.S. Supreme Court.

The *Buda* majority could have made its decision by focusing on N.M.'s competence to make a "testimonial" statement.²⁶⁵ Just as potential trial witnesses must possess a certain level of competency before testifying, extrajudicial declarants must also possess a minimum level of competency before they can be assigned the role of "witness." While *Crawford* and *Davis* provide opaque instructions on how to identify a "testimonial" statement, one essential criterion seems to be that the declarant should realize that his statements could be used in a subsequent criminal prosecution against a third party. This requirement presupposes that the declarant has the mental competence to make such a recognition. The declarant who is unable to recognize the potential prosecutorial use is not making a "testimonial" statement; his statement is much more akin to a casual remark to an acquaintance.²⁶⁶ N.M., who was three years old and in a hospital when he made the statements at issue, was unable to recognize that Nurudeen had a prosecutorial purpose when she asked if anyone had beaten him, notwithstanding the fact that the circumstances surrounding the dialogue made it clear that she did. Because his statements were not "testimonial," the Confrontation Clause posed no bar to their admission into evidence.

While addressing the "testimonial" competence of children is an admittedly thorny issue, it is essential that courts make every effort to find the delicate balance between the protection of child-victims and the rights of the criminally accused. In this case, however, it seems odd and absurd to force N.M. to come face-to-face with the defendant to repeat his nonaccusatorial statement. As the Supreme Court stated years ago, "no one would think of calling as a witness an infant

²⁶⁵ While few, if any, courts have used this terminology in the past, such a holding would have drawn much-needed attention to the difficulties in this area of the law.

²⁶⁶ See *supra* note 253 and accompanying text.

only two or three years old.”²⁶⁷ Perhaps, more than anything, *Buda* demonstrates the necessity for more specific guidance on how to apply the “testimonial” framework to child-abuse victims. A criminal defendant’s constitutional rights and the state’s interest in protecting children from abuse and trauma are far too important to be left up to a vague legal doctrine that can be interpreted and applied in a subjective and unpredictable manner.

²⁶⁷ *Wheeler v. United States*, 159 U.S. 523, 524 (1895).