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## Court Rules on the Admissibility of 911 Calls, Statements to Police

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A recent U.S. Supreme Court decision holding that an emergency 911 call was admissible under the Confrontation Clause but a victim's oral statements to a police officer were testimonial and inadmissible is expected to lead to a series of case-by-case assessments of what's admissible. In its decision, the Court created a test that requires a fact-based analysis of the "primary purpose" of the interrogation and whether there was an "ongoing emergency" at the time the statements were made in order to determine what is "testimonial."

The ruling clarifies the Court's 2004 decision in *Crawford vs. Washington*, which said that any evidence determined to be "testimonial" cannot be introduced unless the defendant is given the opportunity to cross-examine the witness. (541 U.S. 36)

Many lawyers complain the new test is unclear and will be difficult to apply.

"Anything that talks about 'primary purpose' is kind of a wishy-washy test and is vulnerable to manipulation," said Richard D. Friedman, a professor at University of Michigan Law School who argued for the defendant in the statement case.

Brooks Holland, a former public defender and current professor at Gonzaga University School of Law in Spokane, Wash., agreed.

"This primary purpose standard is very confusing and it's going to be unpredictable in how it's applied," he said.

While the popular media have focused on the admissibility of the 911 call, the biggest change for lower courts is going to be in cases involving statements made to police at the scene.

Before this decision, "there were many, many courts letting in statements [to police], but there weren't any courts excluding statements like the 911 call," said Seattle, Wash., attorney Jeffrey Fisher, who represented the defendant in the 911 case.

Deborah Tuerkheimer, a former domestic violence prosecutor who teaches at the University of Maine School of Law in Portland, Maine, noted this could present a problem for domestic violence prosecutions.

“To the extent the Court announced a definition of testimonial that makes it difficult or impossible for prosecutors to get these statements in, it’s a huge setback,” she said.

In the 911 call case, the operator determined that caller Michelle McCottry had been assaulted by her former boyfriend, defendant Adrian Davis. The altercation was still ongoing during the first part of the call. The defendant then ran away.

The state charged Davis with felony violation of a domestic no-contact order.

The trial court admitted the 911 recording and a jury convicted Davis.

In the second case, police responded to a report of a domestic disturbance at the home of Amy and Herschel Hammon. When the police arrived, Amy was alone on the porch. The officer entered and found a broken gas heater with shattered glass on the floor.

One officer remained inside with Herschel while the other talked to Amy in the living room. Herschel angrily attempted to enter the room several times. After hearing Amy’s account, the officer had her fill out and sign a battery affidavit.

The state charged Herschel with domestic battery. The affidavit was admitted and he was convicted.

The defendants argued that both the call and the statements to police were “testimonial” under *Crawford* and therefore admitting them without the victim present to testify was a violation of the Sixth Amendment’s Confrontation Clause.

The Court, in an opinion by Justice Antonin Scalia, set up the following test for evaluating what is testimonial.

“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,” Scalia wrote for the majority.

The Court then applied the test to the cases at hand.

In *Davis*, “McCottry was speaking about events as they were actually happening, rather than ‘describ[ing] past events.’ [A]ny reasonable listener would recognize that McCottry was facing an ongoing emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry’s call was plainly a call for help against bona fide

physical threat. [Further,] the nature of what was asked and answered was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn what had happened in the past,” the Court said.

“We conclude that the circumstances of McCottry’s interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not testifying.”

However, the court said that once the defendant fled the scene, the statements became testimonial.

In the *Hammon* case, “[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct. There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything [T]he primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime – which is, of course, precisely what the officer should have done.”

“Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial. Amy’s narrative of past events was delivered at some remove in time from the danger she described,” the Court said.

The ruling in the 911 call case was unanimous, but Justice Clarence Thomas filed a dissent in the case involving statements to police at the scene.

Determining whether statements are admissible when the victim isn’t available to testify now depends on the “primary purpose” of the official asking the questions – whether it’s a 911 operator or an officer at the scene.

“The Court is saying that descriptions of an ongoing threat or emergency are admissible, but as soon as it shifts, or after the whole thing is over, then we have testimonial statements,” said Fisher.

The debate is going to focus on where to draw the line between an ongoing emergency and an investigation of a past event.

This is a complicated analysis because, in domestic violence cases especially, “the line between crisis resolution emergency by police and investigation isn’t nearly so clear,” said Holland.

In practice, it’s going to be a statement-by-statement analysis.

“You can’t look at an entire colloquy and say this is testimonial,” said Holland. For example, “the Court went out of its way to say there are plenty of circumstances where 911 calls will involve testimonial statements,” including the 911 call at issue here once the perpetrator fled the scene.

Fisher, who practices with Davis Wright Tremaine, agreed. “Any 911 call that begins after the person has left the scene strikes me now as testimonial.”

A difficult case for lower courts will be where an “officer responds to a scene when an altercation is still occurring and in the process of stopping the altercation, people start saying things,” predicted Fisher. “It’s going to be a challenging question for courts to decide where the emergency ends and the investigation begins.”

In Tuerkheimer’s view, the test leaves lower courts with a lot of room for interpretation.

“The decision leaves room for advocacy on both sides so there is little predictability,” she said.

As a result of the ruling, prosecutors may encourage police officers to testify in a way that improves the chances that statements will be considered testimonial.

“If you’re a police officer, you’re going to testify you were facing an emergency,” said Friedman. “Officers are going to be trained to gather evidence and look like they weren’t gathering evidence.”

He fears that the decision is going to create a disincentive to separate the parties in a domestic violence case before questioning the victim about what happened.

“Now if you separate them and have resolved the situation before talking, all of that likely isn’t going to come in if the victim doesn’t testify,” said Friedman. “There’s more of an incentive to get information under less than optimum conditions before resolving an emergency.”

Another possibility is that prosecutors will argue forfeiture more often in the domestic violence context, claiming that statements should be admitted because the victim is missing as a witness due to the misconduct of the defendant.

“Forfeiture is where prosecutors have to go and should go,” said Tuerkheimer.

In domestic violence cases, the development of events over time often causes a victim to fear testifying, she said.

“To understand why misconduct causes unavailability, the court has to look at domestic violence as a course of conduct, including before the crime, everything afterwards and the way he’s threatened her in the process,” Tuerkheimer said.

In order for the argument to win, “maybe he doesn’t have to say, ‘If you testify, I will kill you,’” she suggested. “Maybe he just has to say, ‘If you ever cooperate with the cops, you’re going to pay.’”

She said she also expects prosecutors will look for new ways to encourage victims to testify.

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