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## Justices Weigh If Accusers Must Testify In Court

By Charles Lane

*Washington, DC* – Michelle McCottry and Amy Hammon were both alleged victims of domestic violence. Michelle called 911 to report a beating that her boyfriend had just administered; Amy gave an account of a fresh attack by her husband to police who came to her home. McCottry and Hammon did not testify at the men's trials; the state won convictions anyway, based in part on the women's previous statements.

But did those convictions violate the Constitution, which guarantees a defendant the right to confront his accuser in court? That was the question before the Supreme Court March 20, as the justices heard oral arguments in two of the most significant criminal cases of this term.

At stake are the rules of evidence that will govern not only many domestic violence prosecutions but also any criminal case in which prosecutors seek to introduce past accusations by people who, whether out of fear or any other reason, cannot or will not repeat their charges in open court.

On one side are Michelle McCottry's boyfriend, Adrian Davis of Washington State, and Amy Hammon's husband, Hershel Hammon of Indiana, who say that the Sixth Amendment requires the state to bring its witnesses to court, put them under oath and allow them to be cross-examined. They are supported by briefs from the American Civil Liberties Union, the National Association of Criminal Defense Lawyers and the D.C. Public Defender Service.

On the other side are the states of Indiana and Washington, supported by the Bush administration, 27 other states including Maryland, the National Network to End Domestic Violence and the National District Attorneys Association. Though their arguments vary in emphasis, these parties agree that statements made in the moments surrounding a criminal attack are not testimony and therefore are not covered by the Sixth Amendment.

The cases arise largely because the Supreme Court changed its rules in a 2004 decision. In an opinion written by Justice Antonin Scalia, it barred a statement to police by a wife who would not testify against her husband regarding an alleged assault on a third person. The Sixth Amendment was intended to keep out any previous testimony from a witness unavailable to testify, the court ruled, unless that witness had previously been subject to cross-examination.

Before that, the court had said that an unavailable witness's out-of-court statement could be admissible if a judge found that it fell into one of the exceptions to the rule against hearsay or

was otherwise clearly trustworthy. Yet federal and state courts have struggled to apply Scalia's ruling in practice, and the court agreed to hear the Washington and Indiana cases to clarify its scope. The 2004 ruling enjoyed the support of the entire court except Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor, who are no longer sitting.

Still, during the course of an intense two-hour discussion of the two cases, *Davis v. Washington*, No. 05-5224, and *Hammon v. Indiana*, No. 05-5705, at least some of the justices seemed concerned about how far to extend the new rule. Justice Ruth Bader Ginsburg, in particular, seemed worried about the implications for other cases in which women tell police about abuse but then are reluctant to risk a court appearance. "The practical reality is that many women are scared to death of what will happen to them," she told Davis's attorney, Jeffrey L. Fisher. "So neat legal categories don't really fit the realities of this situation."

Ginsburg repeatedly suggested that the court consider a rule proposed by the Bush administration: that statements made to authorities during "emergencies" be admissible. But Fisher replied that although he did not want to appear "insensitive," the "Sixth Amendment applies across the board." The court's newest member, Justice Samuel A. Alito Jr., a former prosecutor, also seemed to lean in favor of the states. He asked lawyers for the defendants questions that implied they were asking for too broad a rule.

"If someone calls and says 'I just saw a blue Toyota with Ohio plates do a hit-and-run,' is that testimony?" he asked at one point. "Yes," replied Hammon's lawyer, Richard D. Friedman.

But Scalia noted that "it seems to me that there are better ways to solve the problem than to design our whole confrontation-clause jurisprudence based on what happens in spousal abuse cases." The confrontation clause is the part of the Sixth Amendment that guarantees the defendant's right "to be confronted with the witnesses against him."

Decisions in the two cases are expected by July.

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