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Justices Weigh In on Use of Tapes and Transcripts

By Linda Greenhouse

WASHINGTON, March 20 — A crime victim's emergency call to 911, when introduced in court, can provide powerful evidence of the attacker's identity and the circumstances of the crime.

Perhaps too powerful — or so most Supreme Court justices seemed to conclude during an argument Monday on whether the prosecution could use such evidence without violating defendants' constitutional rights to face their accusers in the courtroom.

The constitutional problem arises when the victim fails to appear in court and is therefore not available for cross-examination.

In domestic violence cases, the scenario is common; in one study cited to the Supreme Court, as many as 90 percent of victims of domestic violence fail to cooperate with the prosecution because of fear of or misplaced loyalty to their abusive partners.

Rather than abandon such cases, a growing number of states have begun to relax their evidentiary rules and permit juries to hear 911 tapes or read transcripts of police interviews with victims.

Two years ago, however, the Supreme Court issued an unmistakable warning that these efforts were likely to collide with the Sixth Amendment's Confrontation Clause, which guarantees to a criminal defendant the right "to be confronted with the witnesses against him."

In *Crawford v. Washington*, the court laid down a new rule: a "testimonial" statement made out of court cannot be used at trial unless the person who made the statement is available for cross-examination.

Now the question is whether the justices meant what they said, even in situations with strong policy arguments for bending the rules. Based on their responses in the courtroom on Monday, they did.

The *Crawford* case barred the admission of a woman’s tape-recorded eyewitness account of a fight in which her husband stabbed another man. But the court stopped short of defining the various types of “testimonial” statements to which the newly empowered Confrontation Clause would now apply. Defense lawyers around the country soon began to argue that the decision should bar the admission of 911 calls and of statements given to police officers who respond to a crime scene.

Two cases were argued to the court on Monday, one of each type. Both have drawn wide attention from organizations concerned with domestic violence. In *Davis v. Washington*, No. 05-5224, the Washington Supreme Court rejected a defense argument that a 911 call from a woman who said her former boyfriend had violated a no-contact order and was beating her constituted a testimonial.

The incident took place, and the man, Adrian M. Davis, was convicted, before the *Crawford* decision. The victim, Michelle McCottry, was subpoenaed but failed to appear in court.

After the *Crawford* decision, Mr. Davis’s lawyers argued on appeal that the admission of the 911 tape violated his right to confrontation, but the Washington Supreme Court said the call was not testimonial. It was, the court said, a request for “help to be rescued from peril.”

In the second case, *Hammon v. Indiana*, No. 05-5705, the Indiana Supreme Court likewise upheld a conviction for domestic battery, ruling that a wife’s statement to the police officer who arrived to investigate a report of a disturbance could be used as evidence against her husband, Herschel Hammon. The wife, Amy Hammon, failed to appear in court. Her statement to the investigating officer was not testimonial, the Indiana court ruled, because her “motivation was to convey basic facts” rather than provide evidence for later use at trial.

In the Supreme Court on Monday, Jeffrey L. Fisher, representing the defendant in the 911 case, said that during the call, Ms. McCottry “knowingly told a government agent associated with law enforcement that someone had committed a crime.” That made the call clearly testimonial, as was “any accusatory statement to a law enforcement agent,” he said.

Mr. Fisher, a Seattle lawyer who successfully argued the *Crawford* case, said the purpose of the Confrontation Clause was “to bring the accuser and accused face to face and require the accuser to deliver the accusation in court.”

But the 911 call was “not just a call,” Justice Ruth Bader Ginsburg objected. It was also “a cry for help.” Was it not a “practical reality,” she asked Mr. Fisher, “that many women in this situation are scared to death?” She added, “Your neat legal categories don’t conform to real lives.”

Mr. Fisher responded carefully. “I don’t mean to be insensitive,” he said. He offered a solution: under a rule known as the “forfeiture doctrine,” he observed, a defendant who intimidated a witness lost the right to object to the use of that witness’s out-of-court statements.

Justice Antonin Scalia interjected: “Maybe we should just suspend the Confrontation Clause in spousal abuse cases.”

The other justices undoubtedly took his point, a reminder that he was the author of the *Crawford* decision, and that he had persuaded six of his colleagues in that case, including Justice Ginsburg, that the Confrontation Clause should be interpreted literally.

As Justice Scalia made clear on Monday when the prosecution’s turn came to argue, he was not about to advocate its suspension under these or any other circumstances.

When James M. Whisman, Seattle’s senior deputy prosecuting attorney, described 911 calls as “powerful evidence” that should be regarded as constitutionally permissible, Justice Scalia responded, “You know, ‘powerful’ is part of the problem.” He said that “the voice on the phone makes it an even more damaging violation if it is impermissible.”

Mr. Whisman was joined on the state’s side of the argument by Michael R. Dreeben, a deputy solicitor general, who said that a “panic-stricken call for help” had “unique probative value” and did not present the risk of government abuse that the framers had in mind when they added the Confrontation Clause to the Constitution. The risk was that the government could manipulate a witness behind closed doors, Mr. Whisman said.

Justice Anthony M. Kennedy asked whether a 911 call reporting that “he beat me two minutes ago and now he’s running down the block” would qualify as a nontestimonial emergency report under Mr. Dreeben’s analysis.

Yes, Mr. Dreeben replied, because the attacker might return and the caller still faced an “imminent threat.”

Suppose, Justice Kennedy asked, that the call was “he’s taken my diamond necklace and is running down the block.”

“That would not be an emergency threat under our rule,” Mr. Dreeben said.

The second argument, in the Indiana case, replicated the first in many respects, including an exchange between Justice Ginsburg and Richard D. Friedman, representing the defendant.

Mr. Friedman, a professor at the University of Michigan Law School who is an acknowledged expert on the Confrontation Clause, declared that “there is no domestic-violence exception for confrontation rights.”

If the court made it clear that prosecutors could not use out-of-court statements, he said, states would have an incentive to protect victims of domestic violence and make them feel safe enough to testify.

“I don’t know why that necessarily follows,” Justice Ginsburg said. “It wasn’t so long ago that police didn’t bother with these cases.”

Mr. Friedman responded, “I think we now recognize how serious a crime domestic violence is.”

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