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## **Supreme Court Confronts ‘Testimonial Statements’**

*Consolidated Rulings Help Explain Landmark 2004 Sixth Amendment Case*

**By David L. Hudson, Jr.**

The U.S. Supreme Court got the chance this week to explain what it meant two years ago when it prohibited certain “testimonial statements” made outside of court from being admitted in a trial when the witness doesn’t testify.

In two domestic violence cases decided Monday, the court said statements made to police officers when “the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency” are not testimonial and can be admitted, even when the witness doesn’t appear. (*Davis v. Washington*, No. 05-5224 and *Hammon v. Indiana*, No. 05-5705 <http://www.supremecourtus.gov/opinions/05pdf/05-5224.pdf>)

Justice Antonin Scalia, who wrote the majority opinions this week and in the landmark 2004 case, *Crawford v. Washington*, 541 U.S. 36, has maintained that testimonial statements must satisfy the Sixth Amendment’s confrontation clause giving the defendant the right to cross-examine witnesses.

Although the case has been praised by defense lawyers, some prosecutors worry that it will hinder prosecution of domestic violence cases when victims—predominantly women—decline to testify out of fear.

“In many situations, the victim of the domestic violence crime will tell authorities what happened only in the immediate aftermath of the crime,” says Mark Dwyer, chief of the appeals bureau for the Manhattan District Attorney’s Office, which filed an amicus brief in support of Washington and Indiana.

“The victim is often in shock and willing to inculcate the criminal. But in many situations, the victim will not later cooperate,” Dwyer says. “The inability to use the excited utterances to responding police officers will effectively end many prosecutions.”

In *Davis*, a woman made statements in a 911 call that indicated her former boyfriend, Adrian Davis, had hit her with his fists. The Supreme Court determined that the woman’s excited

utterances made to the police officer about “an ongoing emergency” were nontestimonial and could be admitted in the felony prosecution of Davis for violation of a domestic no-contact order.

However, in *Hammon*, the wife of Hershel Hammon told police officers at their house that her husband had hit and shoved her, and had thrown her down. The officer had Mrs. Hammon fill out and sign a “battery affidavit.” The Supreme Court ruled that the statements and the affidavit were testimonial and could not be introduced in the felony prosecution of Hershel Hammon for domestic battery and probation violation.

The prosecutors in each case needed the hearsay testimony introduced because neither woman appeared at the respective defendants’ trials.

The consolidated decisions allowed the court to expand some of the parameters of *Crawford*, which determined the confrontation clause prohibits “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”

However, Scalia’s opinion in *Crawford* did not define testimonial statements. Nor was it clear whether statements could be considered testimonial if they occurred in less than formal settings, such as when individuals spoke to police officers.

This week, Scalia established the following rule: “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.”

Applying this standard in *Davis*, Scalia reasoned that the 911 call case came as part of an “ongoing emergency.” He wrote that the woman “was not acting as *witness*; she was not *testifying*.” He then applied the standard in *Hammon*, noting that “there was no emergency in progress.”

“Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime,” Scalia added.

Scalia did address the criticism raised by Dwyer – that the decision could hinder the prosecution of domestic violence cases in which victims later refuse to testify.

“When this occurs, the confrontation clause gives the criminal a windfall,” Scalia acknowledged. “We may not, however, vitiate constitutional guarantees when they have an effect of allowing the guilty to go free.” He added that a defendant “who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”

Justice Clarence Thomas was the lone dissenter, writing that he would have allowed the admission of statements in both cases. He criticized Scalia's "primary purpose" test as "unpredictable" and one that "calls for nothing more than a guess by the courts."

Defense attorneys praised the ruling. "In empirical terms, defendants are much better off after *Davis / Hammon* than before," says Seattle-based attorney Jeffrey Fisher, who argued on behalf of Davis before the high court and who also argued *Crawford*.

"During the two years between *Crawford* and *Davis / Hammon*, virtually no appellate courts excluded 911 calls, and only a minority of appellate courts excluded statements to responding officers describing completed crimes," Fisher says. "Now the Supreme Court has made clear that 911 calls that describe completed events are testimonial, as are statements to responding officers. I, of course, would have liked the court to go a little bit farther and say that even reports of ongoing events are testimonial. But the decisions plainly expanded the scope of the confrontation clause beyond the facts of *Crawford*."

University of Michigan law professor Richard G. Friedman, who argued on behalf of Hammon before the high court, expresses concern that some lower courts could too broadly define "ongoing emergency."

"The case did establish an important principle, and that principle is that even statements made in a rather informal setting to police officers that involve accusatory statements can invoke a defendant's confrontation rights," he adds.

Both Fisher and Friedman say the court's emphasis should have been placed on the declarant – the speaker – rather than the police officer in determining whether statements are testimonial.

But Dwyer says he would have preferred the court had further honed the rule. "We had thought that there should be a requirement that the victim intend the statement to be introduced as evidence at trial and that the police officer understand that he was gathering the statements for evidentiary purposes before the statement could be considered 'testimonial,'" Dwyer says.