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REFINING *CRAWFORD*: THE CONFRONTATION CLAUSE AFTER *DAVIS V. WASHINGTON* AND *HAMMON V. INDIANA*

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INTRODUCTION

Clarification of the Supreme Court's newly minted interpretation of the Confrontation Clause was desperately needed, and *Davis v. Washington* and *Hammon v. Indiana* promised to provide it. Two terms earlier, in *Crawford v. Washington*, the Supreme Court had worked a revolutionary transformation of Confrontation Clause analysis by overruling *Ohio v. Roberts* and severing the link between hearsay jurisprudence and the Clause. *Crawford* was hailed by the criminal defense bar, since it seemed to presage a sharp reduction in the frequency of so-called "victimless" trials by holding that "testimonial" hearsay, no matter how reliable, was constitutionally inadmissible in the absence of an opportunity to cross-examine, and further ruling that statements elicited through police "interrogation" were testimonial. But the Court refused to define the terms "testimonial" and "interrogation," leaving lower courts with little guidance when evaluating the circumstances in which unopposed early accusations of crime could provide the basis for prosecution. And it listed, as a potential definition of "testimonial," the narrow formulation urged by Justice Thomas in his concurring opinion in *White v. Illinois* that would only cover statements contained in "formalized" materials, which if accepted would exclude very few early accusations.

Davis, involving a 911 call by a woman who claimed her former boyfriend had beaten her, and *Hammon*, involving a wife's statements to police (who had responded to the scene of a reported domestic disturbance) that accused her husband of assaulting her, promised at least to lessen lower courts' confusion. And since both cases involved accusations of domestic violence, where complainants often become reluctant to testify, they carried the potential for clarifying the extent to which many prosecutions could proceed without confrontation.

In an opinion which, like *Crawford*, was authored by Justice Scalia, the Court unanimously held that the *Davis* declarant's accusatorial statements in the initial portion of her 911 call were nontestimonial, but ruled by a vote of 8-1, with Justice Thomas dissenting, that the wife's statements in *Hammon* were testimonial. Unfortunately, however, perhaps due to the desire to achieve a broad majority coalition, the Court adopted a standard for assess-

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ing what sort of police “interrogations” produce testimonial statements that is so amorphous that it is likely to lead to the same kind of unpredictability for which the *Crawford* Court condemned *Roberts*. And at least on the surface, the opinion oddly focused on the primary purpose of the interrogator, considered objectively, rather than the motive or reasonable expectation of the declarant, whose status as a “witness” under the Confrontation Clause is at issue.

Despite its lack of analytical clarity, *Davis* is likely to lead lower courts to hold more early accusatory statements to police to be testimonial. The opinion seems to recognize the testimonial character of most crime-scene statements made to police in domestic violence cases and even more so in prosecutions for street crime. And the Court flatly rejected Justice Thomas’s “formality” test, thereby overruling the rationale used by most lower courts that had held statements like those at issue in *Hammon* to be nontestimonial in *Crawford*’s aftermath. Nevertheless, the number of “victimless” trials may not decline significantly, for two reasons. First, the holding in *Davis* makes it clear that accusatory statements made during the preliminary portion of 911 calls, before the operator can ascertain whether there is a continuing emergency, are nontestimonial. Second, the opinion encourages expansive application of the doctrine of forfeiture by misconduct, which may well result in many testimonial accusations not subject to cross-examination being admitted through the back door.

I. THE *DAVIS* ANALYSIS

The Court’s self-described holding ignores the declarant’s motive or expectation, and focuses instead on an objective assessment of the “primary purpose” of the police questioning: if it is to “enable police assistance to meet an ongoing emergency,” an ensuing statement is nontestimonial, but if the circumstances “objectively indicate” that there is no ongoing emergency and that the “primary purpose” of the questioning is to “establish . . . past events potentially relevant to later . . . prosecution,” the response is testimonial. This standard is analytically problematic: though the purpose of the *Crawford* inquiry is to determine whether the declarant should be treated as a “witness” under the Confrontation Clause, the Court nevertheless ostensibly requires lower courts to resolve that decisive question from a perspective that renders the declarant’s motive or reasonable expectation irrelevant.

Moreover, even though the Court asks judges to evaluate the surrounding circumstances, rather than the officer’s actual motivation, and declares that police “saying that an emergency exists cannot make it be so,” its test nevertheless creates the potential for police manipulation. When determining the “primary purpose” of questioning, it will be difficult for courts to ignore an officer’s claim that he believed the emergency to be ongoing when he questioned the declarant, just as it has always been difficult for courts in the context of Fourth Amendment issues, where the standard is similarly objective, to ignore an officer’s assertion that he frisked the defendant because he believed him to be armed. More insidiously, the decision could

lead some police to question victims of domestic violence before ensuring their safety, in a desire to collect evidence from a declarant who may subsequently become reluctant to cooperate.

Practically, the difficulty of ascertaining the “primary purpose” of police questioning, even under an objective test, is virtually self-evident. Justice Thomas, dissenting in part, aptly points out that in most cases where police conduct questioning shortly after a crime, their purposes are both to respond to the potential emergency and to collect evidence in anticipation of a prosecution, and the task of discerning which purpose is “primary” will be a formidable one.

Other language in the Court’s opinion, however, suggests strongly that the declarant’s reasonable expectation or motive may also be important in evaluating a statement’s testimonial status. Thus, Justice Scalia writes that the 911 call in *Davis* was “plainly a call for help,” and that the declarant “simply was not acting as a witness,” or “testifying.” Even more directly, the opinion declares in two footnotes that “it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate,” and that “police conduct” cannot “govern the Confrontation Clause; testimonial statements are what they are.” It is therefore not surprising that in the immediate aftermath of *Davis*, the West Virginia Supreme Court of Appeals, in holding an alleged domestic violence victim’s complaint to police shortly after the event to be testimonial in *State v. Mechling*, interpreted *Crawford* and *Davis* as requiring courts to “focus more upon the witness’s statement, and less upon any interrogator’s questions.”

The Court’s rejection of Justice Thomas’s test in *White*, to which he adhered in his opinion in *Davis*, that would have required a statement to be “formalized” to qualify as testimonial, eliminates concerns that *Crawford*’s promise would be extinguished by an exceedingly narrow construction. As Justice Scalia recognized, “[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”

The Court addressed the status of statements not made in response to police interrogation only in a footnote. It recognized there that such statements are testimonial under certain circumstances, stating that neither “volunteered testimony” nor “answers to open-ended questions” are exempt from cross-examination. And its pronouncement that in any case, it is ultimately “the declarant’s statements” that must be evaluated, lends force to the argument that the testimonial character of statements not obtained through police questioning should be determined by examining whether the declarant reasonably expected them to be used prosecutorially.

Regarding other issues that have arisen under *Crawford*, the Court specifically reserved the questions of whether statements made to non-law enforcement government personnel or private citizens may be testimonial. However, it suggested that it may answer the latter question affirmatively in some instances by referring favorably to the 1779 English common law ruling in *King v. Brasier*, which excluded the accusatory statements of a young

rape victim to her mother “immediately [upon] coming home” after the incident. Regarding the character of business records and public records generated for law enforcement purposes, the Court’s approving reference to its 1911 decision in *Dowdell v. United States* suggests that documents prepared without awareness of their potential use in a specific prosecution are not testimonial, at least if they do not pertain to a defendant’s “guilt or innocence.”

Davis also sounded the death knell for the last vestige of *Roberts*. The *Davis* opinion characterized the threshold question as whether the Clause “applies only to testimonial hearsay,” noted that the text of the Clause only addresses “testimonial” statements, and then concluded that “[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.”

II. DAVIS’S LIKELY IMPACT

The Court’s factual discussion of *Hammon* should make it difficult for lower courts in domestic violence cases to conclude that an emergency is ongoing for the purpose of determining a statement’s testimonial status when the officer questions the declarant at the scene of the event. The opinion does state that in domestic disputes, exigent circumstances may well persist after the triggering occurrence, and that this “may often mean that ‘initial inquiries’ produce nontestimonial statements.” In determining that Amy Hammon’s statements to police were testimonial, however, the Court focused on the absence of observable indications of a continuing emergency at the Hammon household. It emphasized that the officer in *Hammon* had not heard “arguments or crashing,” or seen anyone “throw or break anything,” and thereby concluded that the officer questioning Mrs. Hammon was seeking to determine “what happened” rather than “what is happening.” Though the opinion noted that Mrs. Hammon first told the police that “things were fine,” the Court’s primary emphasis was on the officer’s elicitation of information regarding past events.

This discussion should result in the classification of most statements elicited by police at the scene of a domestic disturbance as testimonial, unless it is readily apparent to the responding officer that the event is still in progress when questioning begins. And the Court evinced its general belief that most such statements are testimonial by declaring that its task in deciding *Hammon* was a “much easier” one than in *Davis*. Even regarding 911 calls, the Court concluded that “it could readily be maintained” that after the 911 operator determined that Davis had left the premises, the answers to her ensuing questions were testimonial.

Outside the context of domestic violence, the Court’s focus on whether an emergency situation persists should prove even more helpful to defendants in cases involving statements made at the scene of street crimes, though in this situation Confrontation Clause claims should be less frequent because the declarant is more likely to testify at trial. In such cases, the de-

fendant usually will have fled the scene before the police arrive, rendering fatuous any claim of a continuing emergency.

Despite these indicators that the Court meant to signal that the right to confrontation should be zealously protected, its seeming approval of a broad conception of the forfeiture doctrine may serve to undermine that intention. Though the Court purported to “take no position on the standards necessary to demonstrate . . . forfeiture,” it proceeded to (1) note that most state and federal courts have required the prosecution, in order to invoke forfeiture, to demonstrate by a mere preponderance of the evidence that the defendant procured a witness’s absence, and (2) quote approvingly a Massachusetts decision seeming to permit the prosecution to rely on the declarant’s out-of-court statements themselves when determining their admissibility. Some jurisdictions do not allow this sort of circularity in resolving forfeiture issues, and require the prosecution to demonstrate the defendant’s responsibility for the declarant’s absence by clear and convincing evidence. The Court also said nothing about enforcing a stringent requirement of witness unavailability, as mandated by Federal Rule of Evidence 804, before invoking forfeiture. Without such a requirement, and under the flimsy procedural safeguards that the Court seems to be encouraging, many courts are likely to admit early accusations of crime, testimonial or not, without regard to the declarant’s presence.