

*Davis v. Washington and Hammon v. Indiana*  
**Answers To Some Questions Left Open In *Crawford***

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On June 19, 2006, the United States Supreme Court issued its opinion in [Davis v. Washington](#) (June 19, 2006, no. 05-5224) and *Hammon v. Indiana* (June 19, 2006, no. 05-5705) \_\_\_ U.S. \_\_\_ [126 S.Ct. 2266, 2006 U.S.LEXIS 4886; 74 U.S.L.W. 4356, 2006 Daily Journal D.A.R. 7615]. In this nearly unanimous joint opinion (only Justice Thomas dissented), the first issued on the point since *Crawford v. Washington* (2004) 541 U.S. 36, the Court set out to “determine when statements made to law enforcement personnel during a 911 call or at a crime scene are ‘testimonial’ and thus subject to the requirements of the Sixth Amendment’s Confrontation Clause.” ([Slip Op., p. 1.](#))

**Facts**

In *Davis*, a 9-1-1 emergency operator reversed a call after the connection terminated before the caller spoke. Someone identifying herself as the defendant’s boyfriend answered, and responding to the operator’s questions, told the operator “‘He’s here jumpin’ on me again.’” In further responses to further questioning, the declarant told the operator there were no weapons in the house, and that the defendant was “‘usin’ his fists.’” ([Slip Op., p. 2.](#)) She identified the defendant by name and informed the operator that defendant had “‘just run out the door.’” When the declarant began to go on, “the operator cut her off, saying, ‘Stop talking and answer my questions,’” after which the declarant provided further identifying information “the context of the assault.” ([Slip Op., pp. 2-3.](#)) At trial, the prosecution’s only witnesses were the two police officers who responded to the 911 call. The officers described the declarant’s “shaken state, . . . and her ‘frantic efforts to gather her belongings and her children so that they could leave the residence.’” Over the defendant’s “objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of” the 9-1-1 call, providing the only evidence

identifying the assailant as the defendant, and the jury convicted him. ([Slip Op., p. 3.](#))

In *Hammon*, another domestic violence case, police responding to the home of Hershel and Amy Hammon, found Amy alone on the front porch, appearing “somewhat frightened,” but she told them that “nothing was the matter.” She gave them permission to enter the house, where an officer saw some broken items and found Hershel in the kitchen. He told the officers “that he and his wife had “been in an argument” but “everything was fine now” and the argument “never became physical.”” The officers kept the husband and wife separate while they interviewed them in an effort to “investigate what had happened.” One officer “had [Amy] fill out and sign a battery affidavit.” Amy handwrote the following: “Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn’t leave the house. Attacked my daughter.” ([Slip Op., p. 4.](#)) When Amy did not appear for defendant’s court trial, the prosecutor attempted to introduce the officer’s account of the interviews and the affidavit. Over defense counsel’s objection, “That doesn’t give us the opportunity to cross examine [the] person who allegedly drafted it. Makes me mad,” the trial court admitted the affidavit as a “present sense impression,” and Amy’s statements as “excited utterances.” The officer testified that Amy informed him, “that she and Hershel had been in an argument . . . over the fact of their daughter going to a boyfriend’s house. The argument became . . . physical after being verbal and . . . Mr. Hammon, during the verbal part of the argument was breaking things in the living room. . . . When it became physical he threw her down into the glass of the heater. . . . [,] shoved her head into the broken glass of the heater and . . . punched her in the chest twice.” ([Slip Op., p. 5.](#)) Hershel was convicted. The Indiana Supreme Court affirmed, concluding that Amy’s statement was admissible for state-law purposes as an “excited utterance,” and that it was not “testimonial,” because, focusing on “the motivations of the questioner and declarant,” it was not “given or taken in significant part for purposes of preserving it for potential future use in legal proceedings.” The state Supreme Court also concluded that, “although the affidavit was testimonial and thus wrongly admitted, it was harmless beyond a reasonable doubt, largely because the trial was to the bench.” ([Slip Op., pp. 5-6.](#))

### ***Crawford's* definition of testimonial hearsay is somewhat clarified.**

The United States Supreme Court began its analysis by reaffirming *Crawford's* holding that the Confrontation Clause entitled a defendant to an opportunity to cross examine the maker of a “testimonial statement.” The scope of the protection afforded by the Confrontation Clause with respect to statements used against the defendant begins and ends with a determination of whether the statement is “testimonial.” ([Slip Op., pp. 8-11.](#)) The Court observed that *Crawford* “set forth ‘various formulations’ of the core class of “testimonial” statements [citation], but found it unnecessary to endorse any of them, because ‘some statements qualify under any definition,’ [citation]. Among those [the court] said, were ‘statements taken by police officers in the course of interrogations.’” ([Slip Op., p. 6.](#)) Though in *Crawford*, the Court saw no need to specifically define “interrogation,” the *Davis* and *Hammond* “cases require us to determine more precisely which police interrogations produce testimony.” ([Slip Op., pp. 7-8.](#))

Rather than choosing from among the three “formulations” often cited as competing definitions of “testimonial hearsay,” the Court chose the passage from *Crawford* quoting an 1828 dictionary defining “testimony” as “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” ([Slip Op., p. 11.](#)) While this may be slightly less inclusive than the most expansive “formulation” iterated in *Crawford* (“statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”), it is far more inclusive than the most restrictive “formulation” (“in-court testimony or its functional equivalent—that is, material such as affidavits,” etc.). (See, *Crawford v. Washington, supra*, 541 U.S. at pp. 51-52.)

The Court’s conclusion on this point, “without attempting to produce an exhaustive classification of . . . all conceivable statements in response to police interrogation . . . as either testimonial or nontestimonial,” was that statements given or taken “when the circumstances objectively indicate that there is no . . . ongoing emergency” requiring police assistance, “and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to

later criminal prosecution” will be “testimonial.” By contrast, those statements given or taken for the purpose of providing assistance in an emergency are not testimonial. ([Slip Op., p. 7.](#))

## 9-1-1 Calls

The Court started with the premise that inquiries made during a 9-1-1 call “are an interrogation” of a sort. ([Slip Op., p. 8.](#)) Further, the Court dropped a footnote indicating it does not matter whether the 9-1-1 operator is a civilian or sworn officer. For the purpose of the Confrontation Clause, they are considered police agents. (*Id.*, fn. 2.)

Though the 1828 definition of testimonial does not limit itself to the proof of a “past” fact, that appears to be the implicit construction employed by the Supreme Court. Immediately after reaffirming the accuracy of the 1828 definition, the Court observed that “[a] 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to ‘establish or prove’ some past fact, but to describe current circumstances requiring police assistance.” ([Slip Op., p. 12](#), emphasis added.) In the end, the Court concluded, based as in *Crawford*, on the facts before it, that the 9-1-1 call in *Davis* was not testimonial, because the statements were not taken or made for the purpose of conveying or proving some past fact, but rather for the purpose of obtaining and lending emergency assistance during the occurrence of the emergency. The questions designed to elicit the perpetrator’s identity were asked primarily for the purpose of assessing the danger to the caller, not for investigation of the crime. ([Slip Op., pp. 12-13.](#)) The Court distinguished the situation where a victim of some offense immediately reports the events of the offense upon returning home from the situation before, where the 9-1-1 call was analogous to “screams for help.” ([Slip Op., p. 13.](#))

However, the Court also left open the factual possibility that “one *might* call 911 to provide a narrative report of a crime absent any imminent danger,” and the Court acknowledged that an interrogation during a 9-1-1 call that begins as effort to obtain and/or render aid during an emergency may “‘ evolve into testimonial statements.’” ([Slip Op., pp. 12-14](#), emphasis in original.) In the latter situation, a

trial court must, if the matter is brought to its attention, “redact or exclude the portions of any statement that have become testimonial.” ([Slip Op., p. 14.](#))

Notably, the Court’s analysis did not consider the emotional state of the caller to be relevant. Although the state court admitted the caller’s statements as “excited utterances,” and the testimony described the caller as upset and injured, these facts were not material to whether the statements were testimonial. What matters, under *Davis*, is the temporal relationship between the statements and the events they report. “[First t]he difference between the interrogation in *Davis* and the one in *Crawford* is apparent on the face of things. In *Davis*, McCottry was speaking about events *as they were actually happening*. . . . [Second], McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. . . . Third, the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency.” ([Slip Op., p. 12](#), emphasis in original.)

Thus, if an emergency is still extant at the time the statement is made, and the statement is made in order to obtain assistance in resolving the emergency, it will be considered non-testimonial. However, if the caller has reached a place of relative safety, and is not in some dire physical condition requiring immediate assistance, statements reporting a crime and describing the perpetrator should still be considered testimonial hearsay. Importantly, though the caller may initially believe an emergency exists, or not know if one exists (e.g., not know if the perpetrator is pursuing him/her), should the 9-1-1 operator, through questioning, establish that an emergency no longer exists, statements made after that point can still be challenged as testimonial hearsay.

### **Crime scene interrogations**

Though the conversation in *Davis* was made moderately difficult by the fact the 9-1-1 operator directed the declarant to answer her questions, the Court opined that categorization of the *Hammon* statements as “testimonial” was “a much easier task,” because “they were not much different from the statements” in *Crawford*. ([Slip Op., pp. 14-15.](#)) Though the interrogation in *Crawford* was custodial, the Court found the presence of formal custodial interrogatory

procedures in *Crawford* an immaterial distinction. ([Slip Op., p. 15.](#)) Here, the court reaffirmed its reasoning in *Crawford* that interrogation should be understood in a “colloquial” sense. (See, [Slip Op., p. 7](#), quoting *Crawford, supra*, 541 U.S., at p. 53, fn. 4.) In response to Justice Thomas’ dissent, Justice Scalia stated that questioning by investigative officers “imports sufficient formality,” as the modern counterpart to the 18<sup>th</sup> Century Marian magistrates. “Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.” ([Slip Op., p. 16](#), fn. 5.)

### **Categorical rules were rejected.**

What the court refused to do was state any absolute rule that does not take into account the operative facts of the police contact. As noted the Court acknowledged that what starts out as a contact in an emergency situation, may become an investigative interrogation. ([Slip Op., pp. 13-14.](#)) The Court also rejected a rule that the initial questioning at a crime scene will necessarily be nontestimonial. ([Slip Op., p. 17.](#)) The Court similarly rejected a call to make a “domestic violence exception” to the Confrontation Clause: “We may not . . . vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.” ([Slip Op., p. 18.](#))

### **Forfeiture by wrongdoing**

Finally, the opinion reaffirmed the existence of the “forfeiture by wrongdoing” doctrine. “[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, . . . ‘the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.’” ([Slip Op., p. 18.](#)) However, again, not faced with facts establishing such conduct, the Court took “no position on the standards necessary to demonstrate such forfeiture,” and referred the courts to Federal Rules of Evidence 804(b)(6). (*Ibid.*) Because Amy Hammon apparently unexpectedly failed to appear at trial, the Court advised, “the Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious. (*Ibid.*)

## Conclusion

In the end, *Davis* and *Hammon* answer questions regarding rather fine points in the Confrontation Clause analysis after *Crawford*. However, they contain indications of larger principle's behind the Court's construction of the Sixth Amendment. Most importantly, *Davis* and *Hammon* establish that statements designed to prove some fact are testimonial. If those statements are made by someone other than the defendant or a co-conspirator out of court, they will be deemed testimonial hearsay. Relatively informal procedures by which testimony is procured will suffice to bring the statements within the Confrontation Clause. Currently, the only exception to that rule is where the fact is related to an extant emergency, and the statement is made to obtain, or elicited to render assistance in that emergency. This exception currently appears to be regarded as a narrow one by the Court. Statements will not be taken out of the protection provided the defendant by the Confrontation Clause simply because the declarant is distraught from a recently occurring violation. Under *Davis* and *Hammon*, whether during a 9-1-1 call or at the crime scene, a statement describing an offense or its perpetrator, unless the statement is made during an emergency for the purpose of securing aid, rather than for the purpose of investigating the offense, the statement will be testimonial hearsay.