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## Confrontation Rules After *Davis v. Washington*

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## CONFRONTATION RULES AFTER *DAVIS V. WASHINGTON*

*Roger W. Kirst\**

### INTRODUCTION

In 2006, the United States Supreme Court began refining the Sixth Amendment Confrontation Clause doctrine it announced two years earlier in *Crawford v. Washington*.<sup>1</sup> In *Crawford*, the Court held that the prosecution could not use a custodial statement of an accomplice who was not cross-examined at the time the statement was made, and could not be cross-examined at trial.<sup>2</sup> In his opinion for the Court in *Crawford*, Justice Scalia described the core concern of the Confrontation Clause as the use of “testimonial” statements by the prosecution.<sup>3</sup> In a single 2006 opinion that decided both *Davis v. Washington* and *Hammon v. Indiana*, the Court considered whether a statement to the police in a 911 call or at a crime scene is testimonial.<sup>4</sup> The Court affirmed the holding of the state court in *Davis*<sup>5</sup> that the prosecution could use certain statements of a domestic violence victim to a 911 operator. The Court rejected the

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<sup>1</sup> 541 U.S. 36 (2004).

<sup>2</sup> *Id.* at 68-69.

<sup>3</sup> *Id.* at 51-52.

<sup>4</sup> *Davis v. Washington*, 126 S. Ct. 2266 (2006).

<sup>5</sup> *State v. Davis*, 111 P.3d 844 (Wash. 2005).

holding of the state court in *Hammon*<sup>6</sup> that the prosecution could use statements of a domestic violence victim to a responding police officer at the crime scene.

The Court's focus in *Davis* was how to distinguish between statements to the police that can be used by the prosecution even if the declarant cannot be cross-examined and statements to the police that violate the Confrontation Clause if the declarant does not appear at trial. Part I of this Article will discuss how accurate and practical rules for 911 calls and statements at a crime scene can be distilled from the language of *Davis* and the Supreme Court's disposition of several other petitions for certiorari in light of *Davis*.

Judges, lawyers, and scholars will inevitably ask how much guidance *Davis* might provide on confrontation questions the Supreme Court did not address. Part II of this Article will describe the cautions in *Davis* against extrapolating from its specific holding to broader rules for other kinds of statements, and will assess what *Davis* might add in the search for broader confrontation doctrine.

Some questions about interpreting the Confrontation Clause were answered in *Davis*, but the scope of the opinion must be kept in proper perspective. Part III of this Article will describe how a more recent case on the Court's docket, *New Mexico v. Forbes*,<sup>7</sup> illustrates the convoluted history of the Supreme Court's ongoing search for stable confrontation doctrine.

#### I. STATEMENTS BY VICTIMS OF VIOLENCE

The resources for interpreting *Davis* include the Supreme Court's disposition of several other petitions for certiorari in light of *Davis*, but the starting point must be the facts of the case and the language of the opinion.

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<sup>6</sup> *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005).

<sup>7</sup> 2007 WL 632910 (U.S. 2007).

## CONFRONTATION RULES AFTER DAVIS

637

A. *Reading the Court's Opinion*1. *The Facts in Davis and Hammon*

The first report of domestic violence in *Davis* was made in a conversation between a 911 operator and a woman who answered the telephone when the operator called back after a call to 911 was terminated before anyone spoke.<sup>8</sup> The woman told the operator that “He’s here jumpin’ on me again.”<sup>9</sup> She gave the assailant’s name as Adrian Martell Davis.

Upon arriving at the scene, two responding police officers observed that the caller was very upset, that she had fresh injuries, and that she was frantically gathering her belongings and children to leave the residence.<sup>10</sup> The officers did not see Davis at the scene. At the time, Davis was subject to a domestic no-contact order. A charge of violating the order was elevated to a felony by an allegation of an assault.<sup>11</sup>

At trial in *Davis* the two responding police officers testified about what they observed at the crime scene, but they did not see Davis at the scene, so they could not identify him as the assailant.<sup>12</sup> The woman who had called 911 did not appear as a witness. In her place, the prosecution offered the tape recording of the 911 telephone call, which the trial court held was an excited utterance and admitted over the defendant’s confrontation objection. The defendant’s conviction on the basis of the 911 recording was affirmed by the Washington Supreme Court after it rejected the confrontation objection raised by Davis.<sup>13</sup> That court concluded that a victim’s emergency 911 call is not testimonial if the apparent purpose is “a call for help to be rescued from peril” and if it does not appear to be “generated by a desire to bear witness.”<sup>14</sup>

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<sup>8</sup> See *Davis*, 126 S. Ct. at 2270-71.

<sup>9</sup> *Id.* at 2271.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *State v. Davis*, 111 P.3d 844, 851 (Wash. 2005).

<sup>14</sup> *Id.* at 849.

*Hammon* also involved a report of domestic violence. However, the statement in *Hammon* came later in that incident than the statement in the *Davis* incident because the prosecution did not introduce the initial report that caused the dispatcher to send officers to the location. Instead, the prosecution in *Hammon* introduced accusations of assault that were made to the officers at the scene by Amy Hammon, the woman who was later named as the victim.

The scene the officers found in *Hammon* was similar in some ways to the scene in *Davis*—they also found a frightened woman and signs of recent violence.<sup>15</sup> The scene was also different in two important ways—Amy Hammon initially said nothing was wrong instead of immediately making an accusation against the assailant, and the alleged assailant was still present at the scene.<sup>16</sup> The statement by Amy that accused Hammon of being the assailant was made while one officer talked to Amy as the other officer remained with Hammon. Hammon was eventually charged with domestic battery and a probation violation by committing a battery.<sup>17</sup>

At trial in *Hammon*, the responding officer who had interviewed Amy at the scene testified about Amy's accusations, but Amy did not appear. The trial court admitted Amy's statement as an excited utterance and convicted Hammon in a bench trial. On appeal, the Indiana Supreme Court rejected Hammon's confrontation objection.<sup>18</sup> That court concluded that Amy's oral statement at the scene was not testimonial because it was not "given or taken in significant part for purposes of preserving it for potential future use in legal proceedings."<sup>19</sup> The Indiana court described Amy's statement as instead part of a "preliminary investigation in which the officer was essentially attempting to determine whether anything requiring police action had occurred, and, if so, what . . . in the process of

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<sup>15</sup> See *Davis*, 126 S. Ct. at 2272.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005).

<sup>19</sup> *Id.* at 456.

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*CONFRONTATION RULES AFTER DAVIS* 639

accomplishing the preliminary tasks of securing and assessing the scene.”<sup>20</sup>

2. *Applying Davis to the Facts Before the Court*

In his majority opinion for the Court, Justice Scalia described the issue as whether the interrogation produced a testimonial statement governed by the rule in *Crawford*.<sup>21</sup> He first examined the facts of *Davis*. Justice Scalia described a major distinction between *Crawford* and *Davis* as the fact that *Crawford* had involved interrogation “solely directed at establishing the facts of a past crime” while the initial interrogation in a 911 call is “ordinarily . . . designed primarily . . . to describe current circumstances requiring police assistance.”<sup>22</sup>

In his discussion, Justice Scalia identified four more differences between the facts of *Davis* and the interrogation in *Crawford*.<sup>23</sup> First, the caller in *Davis* was describing “events *as they were actually happening*” rather than events that had occurred.<sup>24</sup> Second, the 911 caller in *Davis* faced an ongoing emergency, while there was no emergency when the statement was made in *Crawford*. Third, the questions and answers in *Davis* were necessary to resolve the emergency, while in *Crawford* they involved past events. Fourth, the statements in *Davis* were frantic and made in a setting that apparently was not safe instead of in an interview room in a police station as in *Crawford*.<sup>25</sup>

Together the circumstances of *Davis* established that the primary purpose at the beginning of the 911 call was “to enable police assistance to meet an ongoing emergency.”<sup>26</sup> That meant that the statements of the 911 caller were not testimonial, at

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<sup>20</sup> *Id.* at 458.

<sup>21</sup> *See Davis*, 126 S. Ct. at 2276.

<sup>22</sup> *Id.*

<sup>23</sup> *See id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See id.* at 2276-77.

<sup>26</sup> *Id.* at 2277.

least until the emergency ended, “when Davis drove away from the premises.”<sup>27</sup> The statements that were made after Davis left “could readily be maintained” to have been testimonial, but the petition for certiorari had not raised any question about the later portion of the 911 call so the Court did not address it.<sup>28</sup> The Supreme Court’s agreement with the Washington Supreme Court that the initial statements were not testimonial meant that the Court affirmed the Washington judgment.

The Supreme Court reached the opposite conclusion in *Hammon* because that interrogation was similar to the interrogation in *Crawford* and distinguishable from the 911 call in *Davis*. The formalities of the statement in *Crawford* such as the Miranda warning, tape-recording, and location in a police station were not present in *Hammon*, but Justice Scalia explained that none was an essential difference.<sup>29</sup> The similarities the Court stressed were that in neither *Crawford* nor *Hammon* was the defendant present during the interview and in both cases the statements were answers to police questions about past events. The Court explained that the statement in *Hammon* was made when there was no emergency in progress, it was made by a person who was then protected by the presence of the police officers, and it described past events.<sup>30</sup>

The Supreme Court directly addressed the conclusion of the Indiana court that “responses to initial inquiries by officers arriving at a scene are typically not testimonial.”<sup>31</sup> It rejected that conclusion if it meant that “virtually any” response would be nontestimonial. Instead, the Court stated only that “often” a response would be nontestimonial. The Court stressed that a nontestimonial statement would involve a declarant making a statement to officers as “a cry for help” or “the provision of information enabling officers immediately to end a threatening situation.”<sup>32</sup> Both the fact that the statement was made at an

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<sup>27</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006).

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at 2278.

<sup>30</sup> *See id.*

<sup>31</sup> *Id.* at 2279.

<sup>32</sup> *Id.*

*CONFRONTATION RULES AFTER DAVIS* 641

alleged crime scene and that it was made during initial inquiries were described as immaterial.<sup>33</sup>

In his separate opinion, Justice Thomas argued that Justice Scalia had provided a test for identifying a testimonial statement that would be unpredictable and not workable.<sup>34</sup> Justice Scalia's direct response was a reminder that he had not tried to provide an exhaustive test, and an assertion that the *Davis* test was workable for "the cases before us and those like them."<sup>35</sup> He also repeated his earlier statements that the *Davis* test was "objective."<sup>36</sup>

*3. The Tests Defined and Rejected in Davis*

Justice Scalia confidently predicted in *Davis* that distinguishing testimonial and nontestimonial statements will be "no great problem" because "trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial."<sup>37</sup> Trial judges faced with this novel task, lawyers trying to anticipate how a judge will rule on an objection, and appellate courts reviewing the results might prefer a little more guidance about what to do with variations on the facts described in *Davis*.

It is possible to find practical guidance in *Davis* that will be both substantially accurate in typical cases and not overly complicated. A key element in the Court's definition of testimonial and nontestimonial statements is an "emergency." The most significant factor that explains why the outcome in *Davis* was different from the outcome in *Hammon* is whether the speaker was facing an ongoing emergency at the time. As a result, one important question is, when does an emergency end?

The Court described a nontestimonial statement as one made

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<sup>33</sup> See *Davis v. Washington*, 126 S. Ct. 2266, 2279 (2006).

<sup>34</sup> *Id.* at 2280 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>35</sup> *Id.* at 2278 n.5.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 2277.



when the speaker was “facing an ongoing emergency.”<sup>38</sup> In discussing why the facts of *Davis* involved an ongoing emergency, Justice Scalia described how the 911 caller was “speaking about events as they were actually happening” and making “a call for help against a bona fide physical threat.”<sup>39</sup> He also explained that the statements were necessary to “resolve the present emergency” and that the speaker was in an environment that was not then safe. He repeated that it was an emergency and that she was seeking emergency assistance. After the operator had the information to address “the exigency of the moment” he explained that “the emergency appears to have ended (when Davis drove away from the premises).”<sup>40</sup> The assailant’s departure from the scene was significant for Sixth Amendment purposes, because “[i]t could readily be maintained that, from that point on, [her] statements were testimonial.”<sup>41</sup>

Justice Scalia described an entirely different scene in *Hammon*—Amy made her statement while “[t]here was no emergency in progress.”<sup>42</sup> She made her accusations to one officer in the living room while another officer remained with Hammon in the kitchen, keeping Amy and Hammon separated. Amy’s statement was testimonial because she was protected by the police who were present. Her statement did not provide information to end a threatening situation immediately; the immediate threat and danger had ended when the officers arrived and separated Amy and Hammon.<sup>43</sup>

The focus on the immediate danger to the speaker at the time of the statement was highlighted by Justice Scalia’s comparison of the facts of *Davis* with the facts of *Hammon*. In *Davis* the declarant was not protected because she was alone waiting for the police to arrive; she was possibly in immediate danger until he left the scene. In *Hammon* the declarant was protected because one officer was with her and another was with the

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<sup>38</sup> *Id.* at 2276.

<sup>39</sup> *Davis v. Washington*, 126 S.Ct. 2266, 2277 (2006).

<sup>40</sup> *Id.* at 2277.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 2278.

<sup>43</sup> *See id.*

## CONFRONTATION RULES AFTER DAVIS

643

alleged assailant in another room.

The definition of emergency in *Davis* did not include the time the officer was gathering information after the end of the immediate attack, even if the officer was trying to protect the victim from similar harm in the future. That exclusion was deliberate. The State had argued in its brief in *Hammon* for an “immediate safety” rule that would include statements made after the attack when the police were determining if the victim needed shelter or other assistance.<sup>44</sup> The Solicitor General had argued in an amicus brief that an officer could still be “securing the scene” while trying to protect the victim from a repeated flare-up of violence.<sup>45</sup>

Justice Thomas endorsed this broader view of what constitutes an emergency when he argued in his separate opinion that Justice Scalia had ignored the possibility that the violence could resume if the police departed without taking any steps to prevent a recurrence.<sup>46</sup> Justice Thomas argued that meeting an emergency could include determining whether the assailant was still a continuing danger. Under his argument, the definition of a nontestimonial statement could include a statement made after the police had the suspect under control, but while Justice Thomas clearly raised the issue, he wrote only for himself. The language of *Davis* limited the category of nontestimonial statements to those made while the speaker was facing an ongoing emergency, and described the emergency as ending when either the suspect had left the scene or the suspect was under police control.<sup>47</sup>

The inquiry about when an emergency ends raises related questions, such as whether the declarant’s specific role in the emergency matters. The explanation that the *Davis* facts involved a nontestimonial statement because it was made while the speaker was facing an ongoing emergency does not

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<sup>44</sup> See Brief of Respondent State of Indiana at 9-10, *Davis v. Washington*, 126 S. Ct. 2266 (2006).

<sup>45</sup> Brief of the United States as Amicus Curiae Supporting Respondent State of Indiana at 10-11, *Davis v. Washington*, 126 S. Ct. 2266 (2006).

<sup>46</sup> See *id.* at 2284 (Thomas, J., concurring and dissenting).

<sup>47</sup> *Id.* at 2277-78.

necessarily mean that every statement made during an emergency will be nontestimonial. The rule in *Davis* may not apply if the statement was made during an emergency or about an emergency by a bystander who was not personally at risk or under a threat of harm. At the same time, the explanation in *Davis* does not necessarily mean that every statement by a bystander is testimonial.

Another related question is whether the kind of emergency makes a difference. The explanation that the *Davis* facts involved an ongoing physical threat, that the environment was not safe at the time of the 911 call, and that the emergency ended when the assailant drove away was a description of a specific kind of emergency. Subsequent statements seeking medical care might colloquially be considered statements about an emergency, but they would not be about the kind of emergency that was described in *Davis*.

### *B. The Supreme Court's Application of Davis*

At the end of June 2006, the Supreme Court disposed of eighteen petitions for certiorari that raised confrontation issues, each of which the Court had held while *Davis* and *Hammon* were argued and decided. In eight of the cases the Court granted the petition, vacated the judgment, and remanded the case for reconsideration in light of *Davis*.<sup>48</sup> This disposition is known by

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<sup>48</sup> See *Billingslea v. United States*, 126 S. Ct. 2980 (2006) (No. 05-7998) (reversing and remanding *United States v. Billingslea*, 144 F. App'x 98 (11th Cir. 2005)); *Anderson v. Alaska*, 126 S. Ct. 2983 (2006) (No. 05-8785) (reversing and remanding *Anderson v. State*, 111 P.3d 350 (Alaska Ct. App. 2005)); *Thomas v. California*, 126 S. Ct. 2983 (2006) (No. 05-9233) (reversing and remanding *People v. Thomas*, No. A104336, 2005 WL 2093065 (Cal. Ct. App. 2005)); *Warsame v. Minnesota*, 126 S. Ct. 2983 (2006) (No. 05-8778) (reversing and remanding *State v. Warsame*, 701 N.W.2d 305 (Minn. Ct. App. 2005)); *Wright v. Minnesota*, 126 S. Ct. 2979 (2006) (No. 05-7551) (reversing and remanding *State v. Wright*, 701 N.W.2d 802 (Minn. 2005)); *Forrest v. North Carolina*, 126 S. Ct. 2977 (2006) (No. 05-6102) (reversing and remanding *State v. Forrest*, 611 S.E.2d 833 (N.C. 2005)); *Lewis v. North Carolina*, 126 S. Ct. 2983 (2006) (No. 05-8875) (reversing and remanding *State v. Lewis*, 619 S.E.2d 830 (N.C. 2006));

*CONFRONTATION RULES AFTER DAVIS* 645

the acronym of a “GVR.” In all eight GVR cases, the petition had been filed by a defendant. The other ten cases in which the petition was denied included five petitions filed by the prosecution<sup>49</sup> and five petitions filed by a defendant.<sup>50</sup> There were only seventeen defendants in the eighteen petitions because both the prosecution and the defendant filed petitions in a Massachusetts case to obtain Supreme Court review of pre-trial rulings; each petition raised a separate question about a different statement so each is counted.<sup>51</sup> The Court’s denial of certiorari in one other case in which there was a confrontation issue in the state appellate opinion is not applicable here because confrontation was not the question presented in the petition for certiorari.<sup>52</sup>

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Castellanos v. California, 126 S. Ct. 2965 (2006) (No. 05-9171) (reversing and remanding *People v. Castellanos*, Nos. B175888, B181286, 2005 WL 1763623 (Cal. Ct. App. 2005)).

<sup>49</sup> See *Massachusetts v. Foley*, 126 S. Ct. 2980 (2006) (No.05-769) (denying review of *Commonwealth v. Foley*, 833 N.E.2d 130 (Mass. 2005)); *Massachusetts v. Gonsalves*, 126 S. Ct. 2980 (2006) (No. 05-674) (denying review of *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005)); *Massachusetts v. Rodriguez*, 126 S. Ct. 2979 (2006) (No. 05-672) (denying review of *Commonwealth v. Rodriguez*, 833 N.E.2d 134 (Mass. 2005)); *Texas v. Lee*, 126 S. Ct. 2978 (2006) (No. 05-357) (denying review of *Lee v. State*, 143 S.W.3d 565 (Tex. App. 2005)); *Rousseau v. Texas*, 126 S. Ct. 2982 (2006) (No. 05-856) (denying review of *Rousseau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005)).

<sup>50</sup> See *Hembertt v. Nebraska*, 126 S. Ct. 2977 (2006) (No. 05-5981) (denying review of *State v. Hembertt*, 696 N.W.2d 473 (Neb. 2005)); *Massey v. Evans*, 126 S. Ct. 2979 (2006) (No. 05-7157) (denying review of *Massey v. Lamarque*, No. 04-55712, 2005 WL 1140025 (9th Cir. 2005)); *Greene v. Connecticut*, 126 S. Ct. 2981 (2006) (No. 05-8187) (denying review of *State v. Greene*, 874 A.2d 750 (Conn. 2005)); *Gonsalves v. Massachusetts*, 126 S. Ct. 2982 (2006) (No. 05-8485) (denying review of *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005)); *Brito v. United States*, 126 S. Ct. 2983 (2006) (No. 85-8766) (denying review of *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005)).

<sup>51</sup> *Massachusetts v. Gonsalves*, 126 S. Ct. 2980 (2006) (No. 05-674); *Gonsalves v. Massachusetts*, 126 S. Ct. 2982 (2006) (No. 05-8485).

<sup>52</sup> See *Petition for Certiorari, Quintero v. Tennessee*, 126 S. Ct. 2979 (2006) (No. 05-7502) (denying review of *State v. Quintero*, No. M2003-02311-CCA-R3-CD, 2005 WL 941004 (Tenn. Crim. App. 2005)).

In October 2006 the Supreme Court disposed of two more similar cases, entering a GVR order “in light of *Davis*” on both a petition filed by a defendant<sup>53</sup> and a petition filed by a state.<sup>54</sup> In each case the petition had been filed before *Davis* but the case was not ready for the Court’s discussion at the time *Davis* was announced.

It is both difficult and unwise to draw any conclusions about the Court’s reasons for a single disposition of a petition by either a GVR or a denial. By their nature, such dispositions are not based on full briefing and oral argument, and there is no explanation from the Court.<sup>55</sup> The GVR order identified *Davis* as the reason for remanding the ten aforementioned cases for reconsideration, but that does not necessarily mean that each previous opinion reached an incorrect result on its facts. At the same time, the denial of certiorari does not necessarily mean that the result in a case or the court’s reasoning in the previous opinion was correct. A petition may be denied either because the facts do not present the issue or because there is some question about whether the Court would have jurisdiction. However, in each of these twenty cases the Supreme Court docket shows that the petition had been distributed to the Justices for discussion once or twice before being distributed again after *Davis* was announced.<sup>56</sup> The docket shows that in each case the Court requested a response to the petition if a response had not been filed. These twenty cases were also a selected subset of the confrontation cases filed after the Court granted certiorari in *Davis* and *Hammon*; other petitions that raised unrelated confrontation issues were denied during the 2005 term.

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<sup>53</sup> *Cross v. Kentucky*, 127 S. Ct. 44 (2006) (No. 05-10347) (reversing and remanding *Cross v. Commonwealth*, No. 2004-CA-001149-MR, 2005 WL 1703573 (Ky. Ct. App. 2005)).

<sup>54</sup> *Texas v. Mason*, 127 S. Ct. 68 (2006) (No. 05-1435) (reversing and remanding *Mason v. State*, 173 S.W.3d 105 (Tex. App. 2005)).

<sup>55</sup> See generally ROBERT L. STERN ET. AL., SUPREME COURT PRACTICE 279-85 (8th ed. 2002). See also *Communities for Equity v. Mich. High Sch. Athletic Ass’n*, 459 F.3d 676, 680-81 (6th Cir. 2006).

<sup>56</sup> The Supreme Court docket can be found from the Supreme Court’s web site at <http://www.supremecourtus.gov/docket/docket.html>.

*CONFRONTATION RULES AFTER DAVIS* 647

The disposition of the twenty petitions with ten GVR's and ten denials shows that the Court sorted the petitions after *Davis* was announced. Even though the Court did not explain why it sorted the petitions as it did, this is a large enough group that it is worthwhile to consider the facts and dispositions of the cases to determine if there is any pattern that might provide further guidance about the Court's understanding of the rules in *Davis*.

*1. Statements at the Crime Scene to Responding Officers**a. Comparing Hembertt and Lewis*

The strongest pattern can be found in the dispositions of the cases that resembled *Hammon*. Those were cases that included a statement at the scene of a crime to a responding police officer. The Court entered a GVR order in June 2006 in eight of these cases in which the trial court had admitted a statement that appeared to be testimonial under the test in *Davis*—either the defendant had left the scene before the statement was made or the defendant was under police control at the time of the statement.<sup>57</sup> The Court denied the petition by a defendant in the one case in which the trial court admitted a statement at the scene that appeared to be nontestimonial under the test in *Davis*—it was made while the defendant was still at the scene but was not under police control.<sup>58</sup> This pattern can be illustrated by comparing the Court's different dispositions of a case from Nebraska and a case from North Carolina.

The defendant's petition was denied in *Hembertt v. Nebraska*,<sup>59</sup> a domestic assault case that began with a 911 dispatcher directing two patrol officers to a residence to check on the well-being of a resident. At the scene, the officers were contacted at first by a man who said he had made the 911 call and then by a woman who was bruised and "crying, hysterical,

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<sup>57</sup> See *infra* notes 65-69, 87-94 and accompanying notes and text.

<sup>58</sup> See *infra*, notes 59-64 and accompanying notes and text.

<sup>59</sup> 126 S. Ct. 2977 (2006) (No. 05-5981).

trembling . . .”<sup>60</sup> The woman declared that she had been beaten and threatened with a knife, that this had happened moments before the officers arrived, and that the assailant was still inside the house. The officers stopped the woman’s report in order to locate the alleged assailant in the house. Inside the house they found Hembertt and arrested him. The officers then interviewed the complainant. The complainant did not appear as a witness at trial. The State’s evidence was the testimony of one responding officer who reported the initial accusation of the complainant.<sup>61</sup> The trial court found the initial accusation was an excited utterance, and overruled the defendant’s hearsay and confrontation objections.<sup>62</sup> The trial court did not allow the officer to testify about the accusations the alleged victim had made in the interview after the defendant was in custody.<sup>63</sup>

The Nebraska Supreme Court affirmed Hembertt’s conviction after rejecting his confrontation argument. The state court concluded that the initial accusations were nontestimonial because they were not the product of structured police questioning, they were made by a frightened declarant when the area and suspect were still unsecured, they were not made in anticipation of eventual prosecution, and they were made to assist in securing the scene and apprehending the suspect.<sup>64</sup>

In contrast to the disposition in *Hembertt*, a GVR order was entered for the defendant’s petition in *Lewis v. North Carolina*,<sup>65</sup> a case of assault and breaking and entering that also began with a dispatcher sending an officer to a reported crime scene.<sup>66</sup> At the scene, the officer met a woman who was bruised and “in shock.”<sup>67</sup> The woman reported that she had been assaulted, described the assault, and provided some identifying information about the woman who committed the assault. A police detective

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<sup>60</sup> State v. Hembertt, 696 N.W.2d 473, 477 (Neb. 2005).

<sup>61</sup> *Id.* at 476-77.

<sup>62</sup> *Id.* at 476.

<sup>63</sup> *Id.* at 477.

<sup>64</sup> *Id.* at 483.

<sup>65</sup> 126 S. Ct. 2983 (2006) (No. 05-8875).

<sup>66</sup> See State v. Lewis, 619 S.E.2d 830 (N.C. 2005).

<sup>67</sup> *Id.* at 833.

## CONFRONTATION RULES AFTER DAVIS

649

later conducted another interview of the victim at the hospital. The victim's death before trial made her unavailable as a witness.<sup>68</sup> Instead, the prosecution called the responding police officer and the detective to testify about the accusations of the victim. Both hearsay statements were admitted under the State's residual hearsay exception.<sup>69</sup>

The North Carolina Supreme Court affirmed the conviction without endorsing all of the trial court's rulings. The appellate court concluded that the statement to the detective in the hospital was a product of structured police questioning, but that admitting this statement was only harmless error.<sup>70</sup> The court also concluded that the initial statement at the crime scene to the responding officer was not testimonial because there was no formal interrogation or structured police questioning. Instead, the responding officer was fulfilling his role "to collect preliminary information to understand what purportedly took place, determine if medical attention [was] required, secure the crime scene, and possibly identify a perpetrator."<sup>71</sup> The North Carolina court quoted the Nebraska opinion in *Hembertt* that described statements made to secure the scene and apprehend the suspect as not testimonial.<sup>72</sup>

The different outcomes in *Hembertt* and *Lewis* invite a search for an explanation. Some differences can be set aside. For example, the state court opinion in *Lewis* included a lengthy discourse on forfeiture, but that would not explain the GVR—the North Carolina court declared that forfeiture was not an issue because the State had stipulated that the defendant did not cause the declarant's death.<sup>73</sup> In *Lewis*, the post-arrest accusation was admitted at trial and eliminated on appeal as harmless error, while in *Hembertt* the post-arrest accusation was excluded at trial; but *Davis* did not provide any new rules about assessing

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<sup>68</sup> *Id.* at 832.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 844.

<sup>71</sup> *Id.* at 841.

<sup>72</sup> *State v. Lewis*, 619 S.E.2d 830, 842 (N.C. 2005) (citing *State v. Hembertt*, 696 N.W.2d 473, 483 (Neb. 2005)).

<sup>73</sup> *Id.* at 832 n.1.



whether an error was harmless. The trial court admitted the initial accusation in *Hembertt* as an excited utterance, while the trial court in *Lewis* invoked the residual hearsay exception, but *Davis* and *Crawford* have emphasized that confrontation analysis is not tied to hearsay categories.

The different outcomes can be explained using the language of *Davis*. In *Lewis*, the assailant was gone by the time the officer arrived at the scene. The immediate threat of danger to the speaker was over. The state court's explanation in *Lewis*—that the victim's statement was nontestimonial because the officer was conducting preliminary questioning to understand and secure the scene, to determine the need for medical attention, and to identify a perpetrator—described reasons that did not fit the definition of an emergency adopted in *Davis*. Those facts of *Lewis* were a close match to the facts of *Hammon*, and none of the facts resembled the continued danger the declarant in *Davis* was facing before the police arrived.

In contrast to *Lewis*, the assailant in *Hembertt* had not left the scene when the responding officers arrived. The complainant in *Hembertt* had somewhat more protection from the presence of the officers than the 911 caller had in *Davis*, but neither the complainant nor the officers in *Hembertt* were in an environment as secure as the scene in *Hammon*. The complainant faced an emergency that had not yet ended. The officers in *Hembertt* were informed that the assailant was still nearby, and there was no way the officers could know whether the assailant was armed or otherwise dangerous until they found him. In fact, at *Hembertt*'s trial the officer testified that he stopped the complainant's story until he had located and obtained control over the suspect.<sup>74</sup> The facts of *Hembertt* appear to present a good illustration of what *Davis* described as a nontestimonial "provision of information enabling officers immediately to end a threatening situation."<sup>75</sup>

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<sup>74</sup> *Hembertt*, 696 N.W.2d at 477.

<sup>75</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2279 (2006).

*CONFRONTATION RULES AFTER DAVIS* 651

*b. Other Dispositions of Cases Involving Statements at the Scene*

The Massachusetts Attorney General made a concerted effort to convince the United States Supreme Court to adopt a broader definition of nontestimonial statements than it eventually did in *Davis*. In petitions for certiorari in three different cases, Massachusetts argued that *Crawford* should be limited to formal statements, and that excited utterances in response to an officer's preliminary inquiries at a crime scene should be considered nontestimonial. In each petition, Massachusetts cited *Hembertt* for the proposition that only structured police questioning produces a testimonial statement,<sup>76</sup> but the Supreme Court's denial of the defendant's petition in *Hembertt* was not matched with a GVR in any of the Massachusetts cases. Instead, the Supreme Court denied certiorari in all three Massachusetts cases. The difference between *Hembertt* and the Massachusetts cases were the facts of each case.

*Commonwealth v. Gonsalves*<sup>77</sup> involved a prosecution for a domestic assault in which the prosecutor had filed a motion in limine to allow introduction of a statement the complainant made to an officer who responded to a report of a disturbance. The complainant subsequently invoked the Fifth Amendment and became unavailable as a witness.<sup>78</sup> The trial court's ruling that the statement to the officer was testimonial and inadmissible under *Crawford* was affirmed by the Massachusetts Supreme Judicial Court in a ruling on the Commonwealth's pretrial petition for relief.<sup>79</sup> The appellate opinion concluded that the complainant's statement to the responding officer was

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<sup>76</sup> See Petition for Certiorari, *Massachusetts v. Foley*, 126 S. Ct. 2980 (2006) (No. 05-769), 2005 WL 3438570, at \*9; Petition for Certiorari, *Massachusetts v. Gonsalves*, 126 S. Ct. 2980 (2006) (No. 05-674), 2005 WL 3197641, at \*10; Petition for Certiorari, *Massachusetts v. Rodriguez*, 126 S. Ct. 2979 (2006) (No. 05-672), 2005 WL 3197639, at \*8.

<sup>77</sup> 833 N.E.2d 549 (Mass. 2005).

<sup>78</sup> *Id.* at 551.

<sup>79</sup> *Id.* at 551-52, 562.

testimonial because, “as the defendant already had left, there was no active conflict at the time the officers arrived.”<sup>80</sup> For that reason, the officer’s questioning was interrogation under *Crawford* and the statement was testimonial.

On the same day, the Massachusetts court applied its conclusion in *Gonsalves* in two similar cases. In *Commonwealth v. Rodriguez*,<sup>81</sup> four officers responded to a family dispute; two officers interviewed the defendant outside his home and two officers spoke to the complainant and other family members inside. The accusations by the complainant and his sister were made while the defendant was under police control.<sup>82</sup> The Massachusetts Supreme Judicial Court concluded that the statements were testimonial; the declarants did not testify at trial so admitting the statements was a violation of the right of confrontation.<sup>83</sup>

In *Commonwealth v. Foley*<sup>84</sup> there were two responding officers to a domestic dispute. The first officer to enter the house asked only, “Where is he?” The first officer arrested the suspect after a child pointed to a bedroom, and turned the suspect over to the custody of a second officer outside the home.<sup>85</sup> Only after the arrest had taken place did the first officer talk to the complainant to assess the situation and determine if medical attention was needed; that was when the complainant made the accusation used at trial. The Massachusetts Supreme Judicial Court concluded that the statement to the first officer was testimonial because it was made after the scene was secure.<sup>86</sup>

The denials of certiorari in the three Massachusetts cases and in *Hembertt* were consistent. The denials in the Massachusetts cases did not disturb the conclusion that a statement to the police is testimonial if made after the suspect had left the scene or was

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<sup>80</sup> *Gonsalves*, 833 N.E.2d at 552.

<sup>81</sup> 833 N.E.2d 134 (Mass. 2005).

<sup>82</sup> *Id.* at 134.

<sup>83</sup> *Rodriguez*, 833 N.E.2d at 135.

<sup>84</sup> 833 N.E.2d 130 (Mass. 2005).

<sup>85</sup> *Id.* at 132.

<sup>86</sup> *Foley*, 833 N.E.2d at 133.

## CONFRONTATION RULES AFTER DAVIS

653

under police control. The denial in *Hembertt* did not disturb the conclusion that a statement to the police is not testimonial if the victim still faces a threat from the assailant. The denials also identify what the Supreme Court was defining as the end of the emergency.

GVR orders were entered for several other defense petitions in addition to the petition in *Lewis*. Those GVRs were consistent with the apparent pattern in *Lewis*, *Hembertt*, and the Massachusetts cases on when the emergency was at an end. For example, in *Thomas v. California*,<sup>87</sup> the suspect fled the scene of a domestic assault before the police arrived; the police had the scene secured when the alleged victim made the accusations. In *Forrest v. North Carolina*,<sup>88</sup> the police responded to a hostage situation in which Forrest appeared to be holding his aunt; the aunt made the challenged statements after the police ended the hostage situation and arrested the defendant. The facts in two other GVR cases involved statements of witnesses after the defendant fled the scene. In *Castellanos v. California*,<sup>89</sup> the defendant had jumped out of the stolen car he was driving and was trying to escape from a pursuing deputy when a passenger in his car made the particular statement to another deputy. In *Billingslea v. United States*,<sup>90</sup> the witness described someone who had come into his store shortly after a robbery at a nearby bank; by that time the suspect had apparently fled the area and could not be located by several responding police officers.

The facts in two other cases in which a GVR order was entered based on a defendant's petition are not as clear, but it appears that neither involved a statement by a declarant who was still facing an emergency. In each case, nothing in the state

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<sup>87</sup> 126 S. Ct. 2983 (2006) (No. 05-9233) (reversing and remanding *People v. Thomas*, No. A104336, 2005 WL 2093065 (Cal. Ct. App. 2005)).

<sup>88</sup> 126 S. Ct. 2977 (2006) (No. 05-6102) (reversing and remanding *State v. Forrest*, 611 S.E.2d 833 (N.C. 2005)).

<sup>89</sup> 126 S. Ct. 2965 (2006) (No. 05-9171) (reversing and remanding *People v. Castellanos*, Nos. B175888, B181286, 2005 WL 1763623 (Cal.Ct. App. 2005)).

<sup>90</sup> 126 S. Ct. 2980 (2006) (No. 05-7998) (reversing and remanding *United States v. Billingslea*, 144 F. App'x 98 (11th Cir. 2005)).

court opinion or the filings in the Supreme Court suggests that the responding officers were concerned about the safety of the scene or locating the defendant at the time the challenged statement was made. For example, in *Warsame v. Minnesota*<sup>91</sup> the state court concluded that the entire statement of an alleged victim of domestic abuse was nontestimonial even though the responding officer met the victim on the street two or three houses from the scene of an alleged domestic assault. The opinion did not specify when in the conversation the officer learned that the defendant had left in a car, but it also did not describe any reason the victim might have been facing an immediate threat at the time of the statement. And in *Anderson v. Alaska*,<sup>92</sup> the victim of the assault fled the scene, met the responding officers at a nearby motel, and returned with them so that the officers could check on a second victim. The state court opinion did not state whether the suspect was still at the scene, but it did not suggest that the officers were concerned about the presence of the suspect at the scene.

The eighth case in which a GVR order was issued was *Wright v. Minnesota*.<sup>93</sup> *Wright* also involved a domestic assault and statements made by a complainant and her sister to the responding officers after the defendant was in custody. Fitting this disposition in the pattern is a bit more complicated than the other seven GVRs, because the prosecution had introduced a tape and transcript of a 911 call that was made after the defendant had left the scene, but before he had been apprehended. As in *Davis*, the 911 callers in *Wright* expressed fears that the defendant might return and cause further harm.<sup>94</sup> However, while the 911 call appears to be admissible under *Davis*, the Minnesota Supreme Court had not decided if the 911 call alone was sufficient and had not decided if admitting the

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<sup>91</sup> 126 S. Ct. 2983 (2006) (No. 05-8778) (reversing and remanding *State v. Warsame*, 701 N.W.2d 305 (Minn. Ct. App. 2005)).

<sup>92</sup> 126 S. Ct. 2983 (2006) (No. 05-8785) (reversing and remanding *Anderson v. State*, 111 P.3d 350 (Alaska Ct. App. 2005)).

<sup>93</sup> 126 S. Ct. 2979 (2006) (No. 05-7551) (reversing and remanding *State v. Wright*, 701 N.W.2d 802, 804-05 (Minn. 2005)).

<sup>94</sup> *Wright*, 701 N.W.2d at 804.

*CONFRONTATION RULES AFTER DAVIS* 655

later statements to the responding officers was harmless error. The issue that most probably led to the GVR in *Wright* was the State's use of the testimonial statements to the responding officers, and not the admission of the 911 call.

The dispositions after *Davis* of the cases in which a statement was made at the scene of the crime did not expand on the *Davis* answers to the related questions about the required role of the declarant in the emergency. Where the facts showed there was an ongoing emergency that created an immediate threat to the declarant, the Supreme Court did not vacate the appellate opinion that found a nontestimonial statement. The GVR dispositions in the cases in which a statement was made at the scene of the crime involved statements that were made when the immediate threat of violence or injury was over for the declarant, as well as for others at the scene. Both the GVRs and the denials of certiorari in the cases involving statements at the scene of the crime are consistent with the facts in *Davis* of an emergency that involved a threat of harm to the declarant. In some GVR cases and denials of certiorari, the injured victim needed medical treatment, but the pattern of the dispositions does not suggest that the Court considered the need for post-assault medical treatment to create an emergency when it sorted the petitions for disposition after *Davis*.

*c. October 2006 Dispositions*

The Supreme Court disposed of two additional petitions with GVRs in light of *Davis* at the beginning of the 2006 term, three days after the conference on confrontation at the Brooklyn Law School at which this Article was first presented. One petition was filed by the defendant and one by the State; both cases involved statements at the scene of the crime. These dispositions were consistent with the pattern in the cases the Court had sorted in June 2006 immediately after *Davis*.

In *Cross v. Kentucky*,<sup>95</sup> the appellate court had allowed the

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<sup>95</sup> 127 S. Ct. 44 (2006) (No. 05-10347) (reversing and remanding, *Cross v. Commonwealth*, No. 2004-CA-001149-MR, 2005 WL 1703573 (Ky.

prosecution to use a statement by the victim of an assault to a responding police officer; the victim had earlier told the 911 dispatcher that the perpetrator had left the scene in a cab.<sup>96</sup> The GVR is consistent with the explanation in *Davis* that a statement is testimonial if it is made after the departure of the suspect brings the emergency to an end, and removes the immediate threat of injury to the caller.

In *Texas v. Mason*,<sup>97</sup> the appellate court had reversed a conviction on confrontation grounds because the prosecution in a domestic violence case had introduced the statement of the complainant to the responding police officer, even though the complainant did not testify at trial.<sup>98</sup> Many of the facts in *Mason* were similar to the facts in *Hammon*, with one important difference: the reported opinion describes the responding officer as speaking to the complainant before speaking to Mason, but it does not describe where Mason was located. The brief filed by Mason in the Supreme Court described the officer as first talking to the complainant when she answered the door, and then talking to Mason in the bedroom where he was sitting on the bed and appearing to have been asleep.<sup>99</sup> This description of the facts makes *Mason* analogous to *Hembertt* and unlike *Hammon* on the issue of whether the police had control of the scene at the time of the statement. The accusation was made when the complainant was still at risk of attack, so it was not testimonial under the *Davis* definition. It appears that the Texas opinion was granted a GVR order because the state court had applied the Confrontation Clause to exclude a victim's accusation at the scene that was admissible under *Davis*.

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App., 2006)).

<sup>96</sup> See *Cross v. Commonwealth*, 2005 WL 1703573, at \*\*1, 5.

<sup>97</sup> 127 S. Ct. 68 (2006) (No. 05-1435) (reversing and remanding, *Mason v. State*, 173 S.W.3d 105 (Tex. App. 2005)).

<sup>98</sup> *Mason v. State*, 173 S.W.3d at 111-12.

<sup>99</sup> Brief of Respondent in Opposition to the Petition for Writ of Certiorari at 2, *Texas v. Mason*, 127 S. Ct. 68 (2006) (No. 05-1435).

## CONFRONTATION RULES AFTER DAVIS

657

## 2. 911 Calls

There were two cases the Supreme Court sorted for disposition after *Davis* involving only a 911 call. In both cases, the Court denied the defendant's petition for certiorari. The pattern in these cases is consistent with the pattern in the cases involving a statement at the scene. In addition, these cases highlight the importance of the related question about the required role of the declarant.

The case that most clearly matched the facts of *Davis* was *United States v. Brito*.<sup>100</sup> In *Brito*, there were two calls made to 911, one from a man in an office who heard gunshots in a saloon parking lot and one about the same incident from a woman in a passing car.<sup>101</sup> The man who made the first 911 call was not apparently at any risk from the shooter, but that man testified at trial; there was no confrontation issue about that call. The second 911 call came from an anonymous woman who did not testify at trial. The tape of that 911 call included statements that supported the government's case as well as this comment:

But I was just saying to my son when I was getting in the car that I didn't come to Brockton to die. And when I was pulling out and backing out driving down the street, he pointed a gun at me and acted like he was shooting at my car.<sup>102</sup>

The caller then continued by describing where the shooter was standing and what his gun looked like.<sup>103</sup>

*Brito* was convicted of possession of a firearm by a convicted felon and by an illegal alien, so there was no victim as in *Davis* or in the other domestic violence cases. Nevertheless, the 911 call supports an objective finding that the 911 caller appeared to be facing an immediate threat from an armed man at the time she made the statements about what was then

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<sup>100</sup> *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005), *cert. denied*, *Brito v. United States*, 126 S. Ct. 2983 (2006).

<sup>101</sup> *Id.* at 56.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*



happening. The First Circuit held that the second 911 call did not create a confrontation violation.<sup>104</sup> The Supreme Court's denial of certiorari in *Brito* is consistent with the *Davis* description of a nontestimonial statement as one made while the declarant was facing an immediately threatening emergency.

In the second case involving only a 911 call, *Massey v. Lamarque*,<sup>105</sup> the declarant in the 911 call was not facing the kind of immediate emergency as in *Davis*. *Massey* involved a murder prosecution for a shooting outside of an apartment building. The prosecution's evidence included statements by an 11-year-old girl who went to an apartment after the shooting and talked to the 911 operator who had called back because an earlier call had been hung-up.<sup>106</sup> Other evidence showed that the shooter had immediately fled the scene.<sup>107</sup> The appellate record before the Supreme Court noted that a police officer had testified that he and his partner heard the shooting, looked over a wall and saw the victim on the ground, and immediately drove to the scene.<sup>108</sup> Nothing in the 911 conversation indicated that the 11-year-old had been threatened or feared for her own safety, but no one foresaw the need to present evidence on the issue raised by *Davis*.

Other facts in *Massey* make it more difficult to know how to classify the denial of certiorari. *Massey* was not a direct appeal from the state court conviction. The conviction in *Massey* had been affirmed by a California District Court of Appeal in an opinion that rejected a hearsay objection to the 911 call, but did not mention confrontation or any federal constitutional issue.<sup>109</sup>

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<sup>104</sup> *Id.* at 62-63.

<sup>105</sup> *Massey v. Lamarque*, No. 04-55712, 2005 WL 1140025 (9th Cir. May 9, 2005), *cert. denied*, 126 S. Ct. 2979 (2006).

<sup>106</sup> *See* *People v. Massey*, No. B148256, 2002 WL 16086, at \*1 (Cal. Ct. App. Jan. 8, 2002).

<sup>107</sup> *Id.*

<sup>108</sup> Report and Recommendation of United States Magistrate Judge, *Massey v. Lamarque*, No. CV 03-1703-AHM (PLA) at 3 (C.D. Cal., Dec. 24, 2003) (Appendix B to Petition for Certiorari, *Massey v. Lamarque*, 126 S. Ct. 2979 (2006)).

<sup>109</sup> *See id.*

## CONFRONTATION RULES AFTER DAVIS

659

This petition was filed after Massey lost his statutory habeas action in federal court. In a memorandum written before *Crawford*, the United States Magistrate Judge recommended rejecting the confrontation claim because the 911 tape was a spontaneous statement that was admissible under a firmly rooted hearsay exception, and that therefore it had adequate indicia of reliability.<sup>110</sup> The Ninth Circuit, in an unsigned and unpublished memorandum opinion, found that the 911 tape was not testimonial, with a citation to an earlier Ninth Circuit opinion which stated that 911 calls were not the evil at which the Confrontation Clause was directed.<sup>111</sup>

The facts of *Massey* appear closer to the facts of *Hammon* than *Davis*, and the Ninth Circuit's explanation is not supported by *Davis*. This might suggest that the Ninth Circuit's conclusion in *Massey* should be reconsidered after *Davis*, but Massey's handwritten pro se petition was denied instead of being granted a GVR order. There are two possible explanations for this result. One is that in sorting the cases after *Davis*, the Court saw no difference between a 911 call from someone facing an immediate threat and a 911 call from a frightened child who was not facing a threat herself. The other explanation is that the confrontation issue was not sufficiently preserved and presented. The confrontation issue had not been raised in state court and the federal courts had avoided deciding whether it was properly preserved. In addition, other witnesses to the shooting did testify. The state appellate opinion did not have any reason to discuss whether any constitutional error was harmless, but it had suggested that any error in the hearsay ruling was harmless.<sup>112</sup> The second explanation appears to be the more likely reason for the Court's denial, which means that the disposition of *Massey* should not be considered as suggesting that a 911 call can be nontestimonial under *Davis* if the 911 caller is not facing any danger.

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<sup>110</sup> *Id.* at 10 (Appendix B to Petition for Certiorari, *Massey v. Lamarque.*, 126 S. Ct. 2979 (2006)).

<sup>111</sup> *See Massey v. Lamarque*, 2005 WL 1140025, at \*1 (citing *Leavitt v. Arave*, 383 F.3d 809, 830 n. 22 (9th Cir. 2004)).

<sup>112</sup> *See People v. Massey*, 2002 WL 16086, at \*3.

The few cases involving 911 calls may not answer every question, but they are a reminder that *Davis* did not endorse the routine admission of all 911 calls. In fact, the Court did deny a defendant's Petition in one other post-*Davis* case that involved a 911 call.<sup>113</sup> This case has not been included in this analysis because the state court's finding that the confrontation issue had not been preserved makes it doubtful that the denial of certiorari was based on the facts. If the Court did consider the facts, the denial would be fully consistent with *Davis*. The declarant was facing an immediate emergency because the 911 call apparently was made during a domestic dispute as the defendant was trying to force his way into the caller's home.<sup>114</sup>

### 3. Other Kinds of Statements

After *Davis* the Court denied the petitions for certiorari in three cases that involved facts unlike those in *Davis*. In *Texas v. Russeau*,<sup>115</sup> the State argued that it should be able to use Prison Discipline Records as business records without providing the defendant with an opportunity to confront the declarants. In *Texas v. Lee*,<sup>116</sup> the State asked the Court to allow the prosecution to use the statement of an accomplice during a custodial interrogation because it was the product of informal questioning. In *Gonsalves v. Massachusetts*,<sup>117</sup> the defendant challenged a state court conclusion that a victim's hearsay statement to her mother was not testimonial. Each case is a reminder that there are still many unresolved issues after

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<sup>113</sup> *Marino v. New York*, 126 S. Ct. 2930 (2006) (No. 05-8925) (denying review of *People v. Marino*, 800 N.Y.S.2d 439 (N.Y. App. Div. 2005)).

<sup>114</sup> Brief of Respondent New York to Petition for Writ of Certiorari at 2-3, *Marino v. New York*, 126 S. Ct. 2930 (2006) (No. 05-8925).

<sup>115</sup> 126 S. Ct. 2982 (2006) (No. 05-856) (denying review of *Russeau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005)).

<sup>116</sup> 126 S. Ct. 2978 (2006) (No. 05-357) (denying review of *Lee v. State*, 143 S.W.3d 565 (Tex. App. 2005)).

<sup>117</sup> 126 S. Ct. 2982 (2006) (No. 05-8485) (denying review of *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005)).

## CONFRONTATION RULES AFTER DAVIS

661

*Crawford* and *Davis*, but there is no pattern that might provide further information about interpreting *Davis*.

The last disposition to be discussed is an example of the importance of considering the facts of a case before accepting the language of an opinion as an authoritative holding. The facts of *Greene v. Connecticut*<sup>118</sup> involved a gang shooting in which Greene sprayed a crowd with 70 bullets from an assault weapon before he fled the scene.<sup>119</sup> He was eventually convicted of manslaughter, two conspiracies, five counts of first degree assault, and possession of an assault weapon; he also plead guilty to three counts of theft of a firearm.<sup>120</sup> One of the persons assaulted was Harris, a bystander who later spoke to an officer at the scene. After a lengthy discussion of confrontation doctrine, the state court concluded that Harris' statement was nontestimonial hearsay.<sup>121</sup> The only issue in Greene's petition was the state court's interpretation of confrontation doctrine, with a request to hold the case until *Davis* and *Hammon* were decided.

However, the closest the state court opinion in *Greene* came to describing a hearsay statement by Harris was this answer from the officer after the prosecutor asked who had approached him at the scene of the shooting: "A black man, I believe his name was Mr. [Harris] who stated - he came up to me and said he was shot in the foot, in the right foot, and there was a hole in his boot and he was grazed."<sup>122</sup> After testifying about that statement, the officer testified that he had the fire department examine Harris, and that Harris declined an ambulance because he could go to the hospital on his own.<sup>123</sup> Another officer testified there was a report on the police radio of a sixth victim, and hospital records confirmed that Harris did have a bullet in

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<sup>118</sup> 126 S. Ct. 2981 (2006) (No. 05-8187) (denying review of *State v. Greene*, 874 A.2d 750 (Conn. 2005)).

<sup>119</sup> *See Greene*, 874 A.2d at 757.

<sup>120</sup> *See id.* at 755-56.

<sup>121</sup> *Id.* at 771-76.

<sup>122</sup> *See id.* at 772.

<sup>123</sup> *Id.*

his foot.<sup>124</sup> The defendant did not object to this evidence, and did not cross-examine either officer about Harris.<sup>125</sup>

The first question in *Greene* should have been whether there was an out-of-court statement offered for its truth. The officer's observation provided direct evidence that Harris had been shot. Harris did not say Greene shot him, or even when or where he had been shot. The statement by Harris explained why the officer looked at Harris' foot and had the fire department look at his foot, but that nonhearsay use of the statement does not raise a confrontation issue. As a result, the petition by Greene involved a state court opinion that apparently reached the right result even if for the wrong reason, an issue that affected only a minor part of the charges in the case, and facts that did not present a confrontation issue. The defendant asserted another confrontation violation in the admission of Harris' statements at the hospital, but the state court opinion did not discuss that issue and neither the state court opinion nor the petition for certiorari mentions any objection to that evidence. For all these reasons, the denial of certiorari in *Greene* provides no guidance for interpreting *Davis*.

### C. Restating *Davis* as Rules

Justice Blackmun provided valuable advice in *Ohio v. Roberts* when he suggested that any confrontation rule should consider "the need for certainty in the workaday world of conducting criminal trials."<sup>126</sup> Every condition, exception, and modification that might make a rule a bit more accurate may at the same time make it too complex to be applied consistently. Trying to state every condition in a single rule may produce a rule that is awkward or inaccurate in practice. Since the end of an ongoing emergency is the most dominant factor in the Court's confrontation analysis of a victim's statement at the scene of domestic violence, the effect of *Davis* and the post-

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<sup>124</sup> *Id.*

<sup>125</sup> *See* State v. Greene, 874 A.2d 750, 772 (Conn. 2005).

<sup>126</sup> 448 U.S. 56, 66 (1980).

*CONFRONTATION RULES AFTER DAVIS*

663

*Davis* dispositions on the admissibility of the complainant's accusation at the scene of a crime of violence can be restated in this way:

A complainant's accusation about domestic or other violence that has just occurred is TESTIMONIAL if made to responding police officers after the suspect has left the scene or after the suspect is under police control. Such an accusation to the responding police officers is NONTESTIMONIAL if made while the complainant is still facing an immediate threat of further violence or injury.

The emphasis in *Davis* on the vulnerability of that specific 911 caller and the apparent pattern in the post-*Davis* dispositions suggest that the admissibility of a 911 call reporting a crime of violence can be restated in this way:

A complainant's accusation about domestic or other violence in a 911 call is NONTESTIMONIAL if it reports a crime that is ongoing at the time of the call, or if it reports a crime that has just occurred and the caller still appears to be at immediate risk of further assault. Such an accusation in a 911 call is TESTIMONIAL if the violence has ended and the caller is not at immediate risk of further assault before the police respond.

These rules provide guidance that is both accurate and workable in a trial court for typical cases of domestic violence and similar crimes of violence. They may not provide guidance for statements in other kinds of cases or even for domestic violence cases with atypical facts, but the Supreme Court has not determined how the Confrontation Clause applies in every case. The language of *Davis* will undoubtedly be quoted as other courts try to decide whether other kinds of statements are testimonial or nontestimonial. The post-*Davis* dispositions provide no further assistance in determining whether such extrapolation beyond the facts of *Davis* will produce accurate rules.

*D. Initial History of the Post-Davis GVRs*

The Eleventh Circuit wrote the first opinion on remand in the GVR cases in a per curiam decision that reversed the conviction in *United States v. Billingslea* and remanded the case to the district court for a new trial.<sup>127</sup> The opinion explained that the particular statement was testimonial under the test in *Davis* because there was no ongoing emergency at the time, and the only purpose of the interrogation was to obtain evidence of an earlier crime.<sup>128</sup> The court held that admitting the statement was a confrontation violation because the defendant could not confront the unavailable declarant at trial and the defendant did not have a prior opportunity to cross-examine the declarant at the time of interrogation.<sup>129</sup>

In contrast to the action of the Eleventh Circuit in *Billingslea*, the California appellate court that reexamined its analysis in *People v. Castellanos* after the GVR continued to adhere to its earlier conclusion that there was no confrontation violation. The court found that the facts before it were closer to the facts of *Davis* than to the facts of *Hammon*.<sup>130</sup> The statement in dispute was an accusation by a passenger in the car in which Castellanos had been trying to escape from pursuing officers. After Castellanos jumped out of the still-moving car and tried to run away, an officer went to the car to check on the other occupants.<sup>131</sup> After the passenger was handcuffed, the passenger volunteered her perspective on the incident with several statements.<sup>132</sup> One statement was an accusation that Castellanos had tried to hit an officer with the car when he drove away from an earlier traffic stop.<sup>133</sup>

The California appellate court did not discuss whether the

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<sup>127</sup> No. 03-12483, 2006 WL 3201100 (11th Cir. Nov. 7, 2006).

<sup>128</sup> *See id.* at \*2.

<sup>129</sup> *See id.*

<sup>130</sup> Nos. B175888, B181286, 2006 WL 3072370, at \*3 (Cal. Ct. App. Oct. 31, 2006).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *See id.*

## CONFRONTATION RULES AFTER DAVIS

665

emergency that created a threat of harm to the passenger ended when Castellanos abandoned the car and tried to flee on foot. Instead, the court declared that the important fact was the lack of interrogation by the police before the passenger made the accusation.<sup>134</sup> That particular interpretation appears to have been rejected by footnote 1 of *Davis*, in which Justice Scalia stated that the lack of interrogation was not sufficient to define a statement as nontestimonial.<sup>135</sup> The *Davis* footnote equated volunteered answers and responses to open-ended questions as equally objectionable as actual interrogation if the declarant is never subject to cross-examination. The California appellate court made no effort to explain how its view about interrogation was supported by or consistent with *Davis*. As a result, the California appellate opinion on remand from the GVR has the appearance of a rather weak effort to avoid recognizing that the end of the emergency meant the accusation was a testimonial statement under the definition in *Davis*.

The Minnesota Court of Appeals in *State v. Warsame* also adhered to its earlier holding that the prosecution could use an accusation by a victim that the defendant had threatened to kill her to prove a felony charge of Terroristic Threats.<sup>136</sup> The statement was made to an officer at the scene by the victim after the defendant had left with the victim's sister.<sup>137</sup> After the prosecution could not locate the victim, the trial court ruled that *Crawford* made the victim's statement inadmissible.<sup>138</sup> That pretrial ruling was reversed on an appeal by the prosecution.<sup>139</sup> The appellate court held that an initial police-victim interaction at the scene does not involve interrogation, and that a resulting statement is not testimonial. On remand from the GVR, the appellate court accepted the State's concession that the victim was no longer facing an ongoing emergency at the time she made some of her accusation, but it still concluded that her

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<sup>134</sup> *See id.*

<sup>135</sup> *See Davis v. Washington*, 126 S. Ct. 2266, 2274 n.1 (2006).

<sup>136</sup> *State v. Warsame*, 723 N.W.2d 637, 642-43 (Minn. Ct. App. 2006).

<sup>137</sup> *Id.* at 639

<sup>138</sup> *Id.*

<sup>139</sup> *State v. Warsame*, 701 N.W.2d 305 (Minn. Ct. App. 2005).



entire accusation was not a testimonial statement.<sup>140</sup>

The Minnesota court reinterpreted the facts in *Warsame* as involving not one but three separate emergencies—the threat to the victim who made the accusation, the threat to the sister who had left the scene in the defendant’s car, and the threat to a second sister who was in the residence with a small cut to her hand.<sup>141</sup> The threats to the sisters had barely been mentioned in the same court’s prior opinion.<sup>142</sup> The court declared that the declarant did not have to be facing her own emergency at the time of the statement.<sup>143</sup> All that was required was that there be an emergency—at another location and involving some other person—as long as that other emergency was related to the declarant’s situation so that questioning the declarant might clarify the other emergency.<sup>144</sup> The court also did not require that the defendant be creating a threat at the time—the possible need for medical attention to the sister’s cut finger was enough for the emergency to continue.<sup>145</sup> The Minnesota court made no effort to support this interpretation of *Davis* with any language from that opinion, leaving *Warsame* as another example of an appellate court’s effort to avoid applying the holding of *Davis*.

Later opinions on remand in other GVR cases recognized that a statement to the police after the emergency ends is testimonial under the test in *Davis*. In *People v. Thomas*, a California court concluded that a statement was testimonial because it was made to the police after the defendant had left the scene.<sup>146</sup> In *State v. Wright*, the Minnesota Supreme Court concluded that a statement was testimonial because it was made to the police after the defendant was in custody.<sup>147</sup> However, the Minnesota court also concluded that the dividing line between a testimonial and nontestimonial statement did not have to be the

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<sup>140</sup> *Warsame*, 723 N.W.2d at 641.

<sup>141</sup> *Id.* at 641-42.

<sup>142</sup> *Warsame*, 701 N.W.2d at 307.

<sup>143</sup> *Warsame*, 723 N.W.2d at 641.

<sup>144</sup> *Id.* at 641-42.

<sup>145</sup> *Id.* at 642.

<sup>146</sup> 2006 WL 3775882, at \*4 (Cal. Ct. App. 2006).

<sup>147</sup> 726 N.W.2d 464, 476 (Minn. 2007).

## CONFRONTATION RULES AFTER DAVIS

667

exact moment the suspect was taken into police custody.<sup>148</sup> In *Wright* the court allowed the prosecution to use statements made by a 911 caller as the 911 operator was trying to reassure the caller that the emergency had ended, that the suspect really was in police custody, and that the caller could hang up.<sup>149</sup> The 911 operator was not interrogating the victim after the emergency was over, a fact that distinguished this case from the 911 operator's continued questioning that *Davis* suggested might have produced a testimonial statement.<sup>150</sup>

Each appellate opinion on remand in *Thomas* and *Wright* also directed the trial court to conduct a hearing to determine if the defendant had forfeited his confrontation right by coercing the declarant from testifying. The Minnesota court in *Wright* concluded that the prosecution could introduce new evidence at the hearing, and rejected the defendant's objection that expanding the record after conviction violated due process.<sup>151</sup> The California court in *Thomas* also stated that the prosecution could present evidence of coercion at an evidentiary hearing, without discussing whether the defendant could object to new evidence offered by the prosecution at such a hearing.<sup>152</sup> On this issue there was no guidance in *Davis*, which left the forfeiture issue in *Hammon* for decision on remand without stating whether forfeiture had to be shown by evidence already in the record.<sup>153</sup> The Indiana Supreme Court did not discuss the possibility of a separate hearing on forfeiture, because it remanded the case to the trial court for a new trial.<sup>154</sup>

A marked contrast to the opinions that interpret, apply, or extend *Davis* to the specific facts of the case can be found in the opinion on remand in *Cross v. Commonwealth*.<sup>155</sup> This opinion from a Kentucky appellate court first presented nineteen

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<sup>148</sup> *Id.* at 474.

<sup>149</sup> *Id.* at 475.

<sup>150</sup> See *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006).

<sup>151</sup> *State v. Wright*, 726 N.W.2d 464, 480-82. (Minn. 2007).

<sup>152</sup> *People v. Thomas*, 2006 WL 3775882, at \*5 (Cal. Ct. App. 2006).

<sup>153</sup> *Davis*, 126 S. Ct. at 2280.

<sup>154</sup> *Hammon v. State*, 853 N.E.2d 277 (Ind. 2006).

<sup>155</sup> 2007 WL 121823 (Ky. Ct. App. 2007).

paragraphs reciting the facts and an extended quotation of ten paragraphs from *Davis*. The opinion then concluded in a single short paragraph that a 911 call is nontestimonial if the caller is seeking emergency assistance; that meant there was no confrontation violation in admitting the statement of a 911 caller who reported that the assailant had left the scene in a taxicab.<sup>156</sup> The Kentucky court neither quoted the paragraph in *Davis* that described the emergency as ending when the assailant left the premises,<sup>157</sup> nor discussed its apparent failure to apply the definition of an emergency set out in *Davis*.

#### *E. Applications of Davis by Other Courts*

The initial group of post-*Davis* cases has provided a variety of explanations for deciding whether there was an ongoing emergency at the time a victim or witness made a statement to the police. On their facts, many of these cases reach results that are consistent with the rule that a statement by a victim after the suspect has left the scene or after the police have control of the suspect is testimonial and therefore not admissible without confrontation at trial. Other opinions show resistance to the Court's definition of the end of an emergency.

##### *1. Statements to Officers at the Crime Scene*

After *Davis*, several opinions discussed whether a statement at the scene to a responding officer was testimonial. For example, the Supreme Court of West Virginia concluded that the victim of a domestic dispute made a testimonial statement to responding officers because “[t]here was no emergency in progress when the deputies arrived, and the defendant had clearly departed the scene when the interrogation occurred.”<sup>158</sup> In a habeas case, a federal district court concluded that a child who had witnessed a domestic assault made a testimonial

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<sup>156</sup> *Id.* at \*6.

<sup>157</sup> *Davis*, 126 S. Ct. at 2277.

<sup>158</sup> *State v. Mechling*, 633 S.E.2d 311, 323 (W. Va. 2006).

## CONFRONTATION RULES AFTER DAVIS

669

statement because she spoke to a responding officer “when there was no emergency in progress. [The victim] was being treated for her injuries by paramedics and Petitioner had been arrested and taken out of the house.”<sup>159</sup> A Kansas appellate court reached a consistent conclusion without discussion in ruling that a child’s statements about sexual abuse that were made to an officer well after the incidents had occurred were testimonial.<sup>160</sup> The Oregon Court of Appeals reversed a conviction in a domestic abuse case because the prosecution rested on an accusation at the scene by the victim who did not testify; the statement had been made after the “defendant was gone. The emergency had dissipated, and the girlfriend was under no threat of immediate harm.”<sup>161</sup> Several other courts have concluded that a statement is testimonial if it is made after the emergency has ended.<sup>162</sup>

Other appellate courts have recognized the importance of identifying the end of the emergency, finding that a statement was not testimonial in cases in which the responding officers did not have control of the suspect. For instance, in *Vinson v. State*,<sup>163</sup> a case whose facts resembled those of *Hembertt*,<sup>164</sup> the Nebraska case in which the Petition for Certiorari was denied, the complainant met the responding officer and made the first accusations before the defendant entered the room. The court concluded that this accusation and subsequent accusations the complainant made after the officer saw the defendant were nontestimonial because they were all made at a time when the officer did not feel the scene was safe, and was still assessing

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<sup>159</sup> *Cook v. McGrath*, No. C 03-2719 JSW (PR), 2006 WL 2479111, at \*6 (N.D. Cal. Aug. 28, 2006).

<sup>160</sup> *State v. Noah*, No. 91,353, 2006 WL 1976505, at \*\*5-6 (Kan. Ct. App. July 14, 2006).

<sup>161</sup> *State v. Miles*, 145 P.3d 242, 244 (Or. Ct. App. 2006).

<sup>162</sup> *See, e.g.*, *State v. Parks*, 142 P.3d 720, 721 (Ariz. Ct. App. 2006); *State v. Kirby*, 908 A.2d 506, 522-23 (Conn. 2006); *Raile v. People*, 148 P.3d 126, 132-33 (Colo. 2006); *State v. Bird*, No. 32943-3-II, 2006 WL 3201050, at \*6 (Wash. Ct. App. Nov. 7, 2006).

<sup>163</sup> Nos. 01-05-00784-CR, 01-05-00785-CR, 2006 WL 2291000 (Tex. App. Aug. 10, 2006).

<sup>164</sup> *See supra* text accompanying notes 59-60.

whether he needed back-up assistance and whether he needed to place the defendant in the patrol car.<sup>165</sup>

Some appellate courts have defined an emergency more broadly than the *Davis* facts. In *People v. Carpenter*,<sup>166</sup> the responding officer was not able to interview the victim until he found a Spanish interpreter. The statements were made at the hospital when there was no longer any apparent threat that the declarant might be injured. The court rested its conclusion that there was the proper kind of emergency on the officer's testimony that there might still be an ongoing emergency at the crime scene because: "there was an inordinate amount of blood at the location for there being only one victim . . . I was worried there may be other family members or small children that were unaccounted for . . ." <sup>167</sup> In *Garcia v. State*, the appellate court concluded there was an ongoing emergency even though the domestic assault had ended and the defendant had left the scene, because the defendant had taken the parties' child when he left and the complainant feared the child might have been injured when the defendant grabbed him from her.<sup>168</sup> In *State v. Alvarez*, an Arizona appellate court followed the same reasoning in finding that a statement to officers by an injured victim identifying his assailants was not testimonial, even though the assault had ended and the assailants had fled; the court found it was sufficient that the victim still faced a medical emergency.<sup>169</sup>

The opinion of the Eighth Circuit in *United States v. Clemmons* illustrates a similar effort to define an emergency more broadly than a threat of further injury to the declarant.<sup>170</sup>

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<sup>165</sup> *Vinson v. State*, Nos. 01-05-00784-CR, 01-05-00785-CR, 2006 WL 2291000 at \*\*7-9.

<sup>166</sup> No. E038769, 2006 WL 2278763, at \*2 (Cal. Ct. App. Aug. 8, 2006).

<sup>167</sup> *Id.*, at \*6.

<sup>168</sup> No. 03-04-00718-CR, 2006 WL 3841539, at \*4 (Tex. App. Dec. 29, 2006).

<sup>169</sup> *See State v. Alvarez*, No. 2 CA-CR 2002-0084, 2006 WL 2790029, at \*6 (Ariz. Ct. App. Sept. 29, 2006).

<sup>170</sup> *United States v. Clemmons*, 461 F.3d 1057, (8th Cir. 2006).

## CONFRONTATION RULES AFTER DAVIS

671

This case involved a felon in possession of a firearm conviction in which the government's evidence included the statement of an absent witness to a responding officer that the defendant had shot the witness. The responding officers had found the victim lying on the ground with a gunshot wound, talking on his cell phone in a calm voice.<sup>171</sup> Nothing in the opinion suggested that the shooter was still present at the scene, or that the officers were concerned that the suspect was present and a threat to their safety. However, the court concluded that the statement was nontestimonial under *Davis* because the officer described his purpose in interrogating the victim as “[t]o investigate, one, his health to order him medical attention, and, two, try [] to figure out who did this to him.” The court then declared, “Any reasonable observer would understand that [the victim] was facing an ongoing emergency and that the purpose of the interrogation was to enable police assistance to meet that emergency.”<sup>172</sup> This sentence describes the “emergency” from a different perspective than the Supreme Court considered in *Davis*.

There were also cases in which the courts found that a statement at the scene was nontestimonial even though it was made after the defendant had left the scene or was under police control. For instance, a Wisconsin appellate court in a domestic assault case concluded that statements of the victim were nontestimonial without discussing whether the emergency had ended before the victim spoke to the responding officer.<sup>173</sup> Nothing in the opinion suggested that the officers were concerned that the suspect was still on the premises; instead the court focused on whether the declarant would have expected her excited utterances to be used at trial.<sup>174</sup> A few other opinions presented a similar focus on the excitement of the victim.<sup>175</sup> The

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<sup>171</sup> *Id.* at 1058-59.

<sup>172</sup> *Id.* at 1060-61.

<sup>173</sup> *State v. Rodriguez*, 722 N.W.2d 136, 147-48 (Wis. Ct. App. 2006).

<sup>174</sup> *Id.*

<sup>175</sup> *See, e.g., State v. Ly*, No. A05-1106, 2006 WL 2255692 (Minn. Ct. App. Aug. 8, 2006); *In re Matter of German F.*, 821 N.Y.S.2d 410 (N.Y. Fam. Ct. 2006); *State v. Reardon*, 860 N.E.2d 141 (Ohio Ct. App. 2006).

common thread in these opinions is the absence of any discussion of whether the emergency had ended at the time the statement was made. That silence is a confirmation that there is no guarantee that the details of a definition adopted by the Supreme Court and applied by the Supreme Court in sorting the next twenty cases will be even recognized by other courts.

## 2. 911 Calls

Some appellate cases in which the challenged statement was made in a 911 call have followed the distinction between an ongoing emergency and a report after the emergency has ended. In two cases the, 911 caller was apparently facing an ongoing emergency. One court concluded that a statement was nontestimonial in a case in which the 911 call from a cell phone reported an intoxicated driver who had just thrown a beer bottle at the caller.<sup>176</sup> Another court reached a similar conclusion about a 911 caller whose complaint that he had been rammed more than once by an intoxicated driver “described events as they were actually happening.”<sup>177</sup> In addition, the importance of the end of the emergency under *Davis* was recognized by a Texas court that concluded that a 911 caller made a testimonial statement where the caller’s report of a domestic assault at her own house was made ten to fifteen minutes after the assault, when she and her children were at her mother’s house and there was little or no threat of imminent danger.<sup>178</sup>

As for the cases involving statements at the scene, not every case involving a 911 call used the *Davis* definition of an emergency to determine if a statement was testimonial. In *State v. Camarena*, the Oregon Court of Appeals concluded that an accusation of domestic assault in a 911 call that was made a minute after the assault was not testimonial because the facts were more similar to *Davis* than to *Hammon*.<sup>179</sup> The opinion did

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<sup>176</sup> See *Cook v. State*, 199 S.W.3d 495, 496-98 (Tex. App. 2006).

<sup>177</sup> *Jackson v. State*, 931 So. 2d 1062, 1063 (Fla. Dist. Ct. App. 2006).

<sup>178</sup> *Santacruz v. State*, No. 14-05-00227-CR, 2006 WL 2506382, at \*2 (Tex. App. Aug. 31, 2006).

<sup>179</sup> See *State v. Camarena*, 145 P.3d 267, 275 (Or. Ct. App. 2006).

## CONFRONTATION RULES AFTER DAVIS

673

not directly discuss the significance of the 911 caller's immediate statement that the assailant "took the car and he left."<sup>180</sup> Instead, the opinion simply asserted that it was more likely the caller was seeking protection against renewal of the assault than just reporting a past crime, a statement without any apparent support in the transcript of the 911 call quoted in the opinion. The opinion then declared that the intent of the declarant did not matter since "the dispositive distinction . . . is the primary purpose of the interrogation."<sup>181</sup> Moreover, the opinion did not explain why this proposition negated the fact the emergency had ended.

In several other opinions the courts did not discuss whether a nontestimonial statement had to be made by a declarant who was facing an immediate emergency. For instance, an Ohio court declared the purpose of a 911 call was to meet an ongoing emergency without mentioning the location of the defendant at the time; he clearly was gone when the police arrived.<sup>182</sup> The Seventh Circuit concluded that a 911 call was a nontestimonial statement where the caller was describing an ongoing gun battle outside her apartment.<sup>183</sup> The court mentioned that the caller did not identify herself because she was concerned for her own safety,<sup>184</sup> but the facts do not suggest there was an immediate threat to the 911 caller. An Oregon court similarly did not discuss any threat to the 911 caller in reviewing a conviction for being a felon in possession of a firearm where the 911 call by the defendant's mother was a report that he had threatened to shoot himself.<sup>185</sup> An appellate court in California concluded that a statement in a 911 call by the sister of an assault victim during the assault was not testimonial without discussing whether the sister also was being threatened.<sup>186</sup> Finally, an appellate court in

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<sup>180</sup> *Id.* at 269.

<sup>181</sup> *Id.* at 275 (emphasis in original).

<sup>182</sup> *State v. Chambers*, No. 87323, 2006 WL 2916194, at \*3 (Ohio Ct. App. Oct. 12, 2006).

<sup>183</sup> *See United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006).

<sup>184</sup> *Id.* at 841-42.

<sup>185</sup> *See State v. Skiles*, 139 P.3d 1006 (Or. Ct. App. 2006).

<sup>186</sup> *See People v. Campos*, No. B186815, 2006 WL 3198793, at \*\*6-7



Mississippi concluded that a 911 call by the defendant's wife in which she reported that she had just seen the defendant abducting the wife's friend and driving away was not testimonial because the wife was trying to initiate an investigation of the current situation and not recounting a past crime.<sup>187</sup>

*F. An Initial Appraisal*

Identifying the pattern in the post-*Davis* certiorari dispositions does not necessarily add any explanation beyond the language of *Davis* for the Court's decision to make the existence of an ongoing emergency such an important factor in the confrontation analysis of statements by domestic violence victims. However, it is possible to consider some effects of that decision.

First, the rules provided by *Davis* for 911 calls and statements to responding officers have refined prior confrontation doctrine. In *White v. Illinois*,<sup>188</sup> the Supreme Court held that there was no confrontation violation when the prosecution used an excited utterance of an available declarant. The Court in *White* limited the grant of certiorari to the confrontation question,<sup>189</sup> so it did not define an excited utterance and did not have to decide whether the statements in the case were actually the proper kind of excited utterances. In *Crawford*, the majority opinion by Justice Scalia cast doubt on *White* and suggested that an excited utterance had to be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage."<sup>190</sup> *Davis* modified both of these prior discussions without mentioning either *White* or the *Crawford* gloss on *White*. After *Davis*, a statement by a declarant who is still under the stress of a startling event may fit within the excited utterance

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(Cal. Ct. App. Nov. 7, 2006).

<sup>187</sup> See *Williams v. State*, No. 2005-KA-01383-COA, 2006 WL 3008133, at \*3 (Miss. Ct. App. Oct. 24, 2006).

<sup>188</sup> 502 U.S. 346 (1992).

<sup>189</sup> *Id.* at 351 & n. 4.

<sup>190</sup> *Crawford v. Washington*, 541 U.S. 36, 58 n. 8 (2004).

*CONFRONTATION RULES AFTER DAVIS* 675

hearsay exception, but those facts will not resolve the confrontation question. The statement will be testimonial, even if the declarant is still under stress, if the emergency ended when the suspect fled or the officers had the suspect under control.

Second, the phrasing of *Davis* appears to minimize the need to choose in most cases between the intent of the questioner or the intent of the declarant in identifying a testimonial statement. Neither should matter in a typical case because the rules depend on an objective interpretation of the circumstances in which the statement was made. Justice Scalia illustrated that process by making assumptions about what a typical person would have been thinking and intending in the circumstances described in the record. Perhaps that leaves the door open for a contrary conclusion, only on substantially different facts. A defendant might show that the circumstances were atypical because either the questioner or declarant was explicitly trying to create a substitute for future testimony instead of trying to resolve the immediate emergency. The prosecution might show that the emergency was more extensive than in most similar circumstances.

In addition, the rule in *Davis* has provided a substitute for judicial evaluation of reliability, the perceived defect in *Roberts* that *Crawford* sought to eliminate. However, *Davis* has raised several questions of its own. Did *Davis* make confrontation doctrine more predictable and consistent? Does *Davis* support Justice Scalia's emphasis that whether a statement is testimonial depends on facts beyond the control of the prosecution or police? Some actual cases suggest the complexity of answering these questions. For example, in the Nebraska prosecution in *Hembert*<sup>191</sup> there was still an ongoing emergency because the two responding officers met the victim first, while in the Massachusetts prosecution in *Rodriguez*<sup>192</sup> the emergency came to an end more quickly because two of the four responding officers contacted the victim and two located the suspect. These cases demonstrate that the application of *Davis* may depend on

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<sup>191</sup> See *supra* text accompanying notes 59-60.

<sup>192</sup> See *supra* text accompanying note 81.

how many officers are dispatched to a complaint or on the officers' strategy in responding at the scene.

The rule in *Davis* can also make the application of confrontation doctrine depend on the declarant's choice of words. A declarant who wants the prosecution of a domestic batterer to succeed without the testimony of the declarant should tell the responding officer immediately about the details of the crime and the identity of the assailant before the officers locate the assailant. Such a declarant should not immediately tell the responding officers that the assailant has ended the immediate emergency by leaving the scene. Conversely, a declarant who wants to preserve the option to preclude the prosecution of the batterer by ignoring a summons should ask the responding officer for protection but not explain the details of the crime or identify the assailant as the specific cause of any injury until the officer has the assailant under control. A 911 caller who says the assailant has left the scene similarly would preserve the option to block the prosecution by ignoring a subpoena, while a 911 caller who expresses fear that the assault will continue or resume would permit the prosecution to proceed on the basis of the nontestimonial statement.

The defendant's conduct at the scene can sometimes also affect the confrontation analysis. For instance, the defendant in the Nebraska prosecution in *Hembert*<sup>193</sup> could have converted the victim's nontestimonial statement into a testimonial statement that would have been excluded on a confrontation objection by coming out of the residence immediately, so the responding officers would know they had control before the victim made an accusation.

The purpose of considering these factual variations is neither to suggest that declarants will often try to game the system with strategic decisions about what to say and how to say it, nor to suggest that the Court's holding in *Davis* can be easily manipulated by law enforcement training. The purpose is rather to ask whether the test is likely to regularly lead to outcomes that are consistent with the policies the rule is intended to

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<sup>193</sup> See *supra* text accompanying notes 59-60.

*CONFRONTATION RULES AFTER DAVIS* 677

implement. On that basis, the different outcomes from these factual variations appear quite removed from any original purpose of the Confrontation Clause. *Crawford* described the principal evil as the civil-law mode of criminal procedure that used *ex parte* examinations as evidence against the accused.<sup>194</sup> *Davis* reemphasized that “it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends [the Confrontation Clause].”<sup>195</sup> What *Davis* did not explain is why its test appears to depend on how statements are collected.

The factual variations also highlight how much the discussion of the objective circumstances in which a statement was made directs attention away from confrontation as a right of the defendant. Perhaps the Justice who lamented that an earlier Court used “reasoning [that] abstracts from the right to its purposes, and then eliminates the right”<sup>196</sup> should ask if the rule in *Davis* illustrates the danger of abstracting from the right to a surrogate that eliminates any mention of the person who holds the right created by the constitutional text.

## II. *DAVIS* AND OVERALL CONFRONTATION DOCTRINE

The *Davis* opinion discussed overall confrontation doctrine in the course of applying the Confrontation Clause to the specific facts of *Davis* and *Hammon*. Other courts and attorneys now must determine whether they can apply the language of *Davis* beyond its facts.

The *Davis* opinion often warns the reader not to expect to find a global statement of confrontation doctrine. The analysis begins with an explicit self-limitation that it is addressing the topic “[w]ithout attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as

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<sup>194</sup> See *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

<sup>195</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2279 n. 6 (2006) (emphasis in original).

<sup>196</sup> *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).

either testimonial or nontestimonial.”<sup>197</sup> This is followed with a further warning about the scope of the opinion because “it suffices to decide the present cases to hold”<sup>198</sup> with a rule only for certain kinds of police interrogation. This limitation is explained with a footnote that the holding refers to interrogations because those are the facts “in the cases presently before us.”<sup>199</sup> Lest someone consider *Davis* as establishing whether a 911 operator is always a law enforcement officer for confrontation purposes, another footnote made clear that *Davis* assumed that the 911 operator was part of law enforcement: “For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.”<sup>200</sup> *Davis* said that in both *Crawford* and *Davis*, the holding “makes it unnecessary to consider whether and when statements to someone other than law enforcement personnel are ‘testimonial.’”<sup>201</sup> On the facts of *Davis*, the Court decided only whether the early portion of the 911 call was testimonial because the Petition for Certiorari “asked [the Court] to classify only [the caller’s] early statements identifying Davis as her assailant.”<sup>202</sup>

In a direct response to the argument by Justice Thomas in his dissenting opinion that the *Davis* test was unworkable, Justice Scalia repeated his statement that “our holding is not an ‘exhaustive classification of all conceivable statements . . .’”<sup>203</sup> but that it was “rather a resolution of the cases before us and those like them.”<sup>204</sup> He defended his rule as “the rule we adopt for the narrow situations we address.”<sup>205</sup> His concluding remarks about the possibility that Hammon had forfeited his right to assert a confrontation objection began with the caution that “[w]e take no position on the standard necessary to

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<sup>197</sup> *Davis*, 126 S. Ct. at 2273.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 2274 n. 1.

<sup>200</sup> *Id.* at 2274 n. 2.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 2277

<sup>203</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2278 n.5 (2006).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 2278-79 n. 5.

## CONFRONTATION RULES AFTER DAVIS

679

demonstrate such forfeiture.”<sup>206</sup>

Justice Scalia’s ten-fold caution about the limited issue addressed in *Davis* may not stop other courts and lawyers from invoking the language in *Davis* on other confrontation issues. Small differences between the phrasing in *Crawford* and *Davis* may draw particular attention. For example, in *Davis*, Justice Scalia restated the *Crawford* holding that a custodial statement of an accomplice who did not appear at trial was inadmissible without confrontation because it was testimonial.<sup>207</sup> In *Davis*, he wrote a broader statement when he stated that “[o]nly” a testimonial statement can “cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that . . . is not subject to the Confrontation Clause.”<sup>208</sup> Justice Scalia did not mention in *Davis* that *Crawford* had not used the word “only” to limit the scope of the Confrontation Clause to testimonial statements; *Crawford*’s phrasing was that testimonial statements were the “primary object” of the Confrontation Clause.<sup>209</sup> In *Davis*, Justice Scalia followed a quotation from *Crawford* about the “focus” of the Confrontation Clause on testimonial hearsay with the stronger assertion that testimonial hearsay was “[a] limitation so clearly reflected in the text of the constitutional provision [that it] must fairly be said to mark out not merely its ‘core’ but its perimeter.”<sup>210</sup>

Justice Scalia bolstered his statement in *Davis* that testimonial hearsay was the perimeter of the right of confrontation with historical evidence not presented in *Crawford*. He asserted: “We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined.”<sup>211</sup> That might be a useful hypothesis for examining the

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<sup>206</sup> *Id.* at 2280.

<sup>207</sup> *See id.* at 2273 (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)).

<sup>208</sup> *Id.*

<sup>209</sup> *Crawford*, 541 U.S. at 53.

<sup>210</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006).

<sup>211</sup> *Id.* at 2274-75.

historical record, but there are at least two reasons to ask how much it supports the proposition for which it was offered. First, the value of evidence that a particular doctrine was not used depends on whether there were instances where it could have been used and was deliberately not used. The same result would follow if there was no occasion to use the doctrine, or if those who might have used the doctrine were not the ones who knew about it. Second, it is not a true statement about history. For example, Chief Justice Marshall sitting as a Circuit Justice excluded evidence of private conversations that were offered as co-conspirator statements in the well-known prosecution of Aaron Burr.<sup>212</sup> These questions about the historical argument suggest caution in expecting *Davis* to serve as a reliable source for new issues.

The final discussion in *Davis* about the standard for determining a possible forfeiture of the right of confrontation provides a strong contrast with the many cautions about the limited issues addressed in *Davis*.<sup>213</sup> The discussion provides greater detail than might have been expected for what is labeled as advisory dictum on an issue that might or might not arise on remand. The Indiana courts had not relied on forfeiture and the parties had not briefed the issue. Justice Scalia did not discuss why the forfeiture doctrine was supported by the historical evidence he presented in *Crawford*; he also did not explain how this nontextual interpretation was consistent with the text of the Confrontation Clause.

Omissions from *Davis* also may have an effect on the development of confrontation doctrine for other facts. *Davis* did not mention *Idaho v. Wright*,<sup>214</sup> a prosecution for child sexual abuse in which Justice Scalia joined Justice O'Connor's majority opinion that found a confrontation violation in the prosecution use of a child victim's hearsay statements. *Davis* was consistent with *Crawford*, which also omitted *Wright*, even though Justice

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<sup>212</sup> United States v. Burr, 25 F. Cas. 187 (C.C.C Va. 1807) (No. 14,694). See also Randolph Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 228-29 (2005).

<sup>213</sup> *Davis*, 126 S. Ct. at 2279-80.

<sup>214</sup> 497 U.S. 805 (1990).

*CONFRONTATION RULES AFTER DAVIS* 681

Scalia's majority opinion in *Crawford* cataloged the Court's other confrontation opinions.

III. LOOKING AHEAD

A Petition for Certiorari that became a new hold on the Court's docket also provides an apt illustration of the Supreme Court's search for stable confrontation doctrine. The facts of this case began with a 1982 death that led to the murder conviction of Ralph Earnest on the basis of a custodial confession of his alleged confederate.<sup>215</sup> On appellate review, the New Mexico Supreme Court reversed that conviction on the basis of *Douglas v. Alabama*,<sup>216</sup> because the defendant never had an opportunity to cross-examine the declarant.<sup>217</sup> The State's 1985 Petition for Certiorari resulted in an order for GVR by the Court for reconsideration in light of *Lee v. Illinois*, the case in which Justice Brennan's majority opinion discussed the interlocking confession theory.<sup>218</sup> This was an atypical GVR, because Justice Rehnquist added a concurring opinion joined by three other Justices.<sup>219</sup> In his concurrence, he suggested that *Douglas* had been supplanted in part by *Ohio v. Roberts*<sup>220</sup> and that after *Lee*, the proper test was not cross-examination, but rather, reliability.<sup>221</sup> The *Earnest* opinion was the high-water mark for the reliability theory in the Supreme Court, attracting four votes but not a majority.<sup>222</sup> It was also the last confrontation opinion before Justice Scalia joined the Court.

On remand, the New Mexico Supreme Court affirmed the

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<sup>215</sup> See *State v. Earnest*, 703 P.2d 872 (1985).

<sup>216</sup> 380 U.S. 415 (1965).

<sup>217</sup> See *Earnest*, 703 P.2d at 872.

<sup>218</sup> See *New Mexico v. Earnest*, 477 U.S. 648 (1986).

<sup>219</sup> See *id.* at 649 (Rehnquist, J., joined by Burger, C.J., and Powell & O'Connor, JJ., concurring).

<sup>220</sup> 448 U.S. 56 (1980).

<sup>221</sup> See *New Mexico v. Earnest*, 477 U.S. at 649-50.

<sup>222</sup> See generally Roger Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485, 521-23 (1987).



conviction.<sup>223</sup> This time the defendant filed what was the second Petition for Certiorari in the case; it was denied.<sup>224</sup> The denial of Earnest's habeas corpus petition in federal court was eventually affirmed by the Tenth Circuit in 1996.<sup>225</sup> The defendant then filed the third Petition for Certiorari in his case; it also was denied.<sup>226</sup>

After *Crawford*, Earnest filed a new petition for a writ of habeas corpus in state court.<sup>227</sup> The New Mexico District Court concluded that *Crawford* was retroactive and granted the petition.<sup>228</sup> The New Mexico Supreme Court affirmed the order that the State release Earnest or elect to retry him.<sup>229</sup> The court described the situation and its conclusion:

It is beyond dispute that since *Crawford*, the rest of the nation knows now what the New Mexico Supreme Court announced in 1985: under the Sixth Amendment, statements from an alleged accomplice to an officer are inadmissible unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant.

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Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him to the same new trial he should have received back then.<sup>230</sup>

The State of New Mexico then filed the fourth Petition for Certiorari in this case.<sup>231</sup> That petition was distributed for the

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<sup>223</sup> State v. Earnest, 744 P.2d 539 (N.M. 1987).

<sup>224</sup> Earnest v. New Mexico, 484 U.S. 924 (1987).

<sup>225</sup> Earnest v. Dorsey, 87 F.3d 1123 (10th Cir. 1996).

<sup>226</sup> Earnest v. Dorsey, 519 U.S. 1016 (1996).

<sup>227</sup> See State v. Forbes, 119 P.3d 144 (N.M. 2005).

<sup>228</sup> See *id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 146, 148-49.

<sup>231</sup> Petition for Writ of Certiorari, New Mexico v. Forbes (U.S., No. 05-644, Nov. 17, 2005).

CONFRONTATION RULES AFTER DAVIS 683

Court's Conference of May 11, 2006, as was the petition in *Whorton v. Bockting* raising the same retroactivity issue; only the Petition in *Whorton* was granted.<sup>232</sup> The Court took no action on the petition of New Mexico for several months while *Whorton* was being decided. During the time the New Mexico petition was on hold in the United States Supreme Court, the State of New Mexico tried to obtain an untainted conviction of Earnest by calling the hearsay declarant as a witness at the new trial.<sup>233</sup> When the declarant refused to testify, the State released Earnest from prison.<sup>234</sup> After the Court held in *Whorton*<sup>235</sup> that *Crawford* is not retroactive, it denied the New Mexico petition.<sup>236</sup> That ended the prosecution of Earnest.<sup>237</sup> This resolution may be further evidence that the 1987 opinion in *Earnest* in particular was a step in the wrong direction, but there is still more work to be done as the courts undertake the complex task of reevaluating all the confrontation doctrine developed in recent decades.

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<sup>232</sup> 126 S. Ct. 2017 (May 15, 2006) (No. 05-595).

<sup>233</sup> See David Roybal, *A Year of Being Free is Priceless*, THE ALBUQUERQUE JOURNAL, Sept. 19, 2006, at A7.

<sup>234</sup> See *id.*

<sup>235</sup> *Whorton v. Bockting*, 2007 WL 597530 (U.S. 2007).

<sup>236</sup> *New Mexico v. Forbes*, 2007 WL 632910 (U.S. 2007).

<sup>237</sup> *High Court Denies State Appeal in 1982 Murder Case*, ALBUQUERQUE JOURNAL, Mar. 5, 2007, available at <http://www.albqjournal.com/news/state/apturned03-05-07.htm>