***Davis v. Washington* (2006)**

547 U.S. 813.

In this decision, the U.S. Supreme Court heard two companion cases dealing with the question of statements made to law enforcement personnel during a 911 call or at a crime scene are "testimonial" and thus subject to the Sixth Amendment's Confrontation Clause as elaborated in Crawford v. Washington (2004). In Davis v. Washington, a 911 operator ascertained from Michelle McCottry that she had been assaulted by her former boyfriend, Adrian Davis, who had just fled the scene. McCottry did not testify at Davis's trial for felony violation of a domestic no-contact order, but the court admitted the 911 recording despite Davis's objection, which he based on the Sixth Amendment's Confrontation Clause. He was convicted. The Washington Court of Appeals affirmed; so too did the State Supreme Court, which concluded that the portion of the 911 conversation in which McCottry identified Davis as her assailant was not testimonial. In Hammon v. Indiana, after police officers responded to a reported domestic disturbance at the home of Amy and Hershel Hammon, Amy told them that nothing was wrong, but gave them permission to enter. Once inside, one officer kept petitioner Hershel in the kitchen while the other interviewed Amy elsewhere and had her complete and sign a battery affidavit. Amy did not appear at Hershel's bench trial for domestic battery, but her affidavit and testimony from the officer who questioned her were admitted over Hershel's objection that he had no opportunity to cross-examine her. Hershel was convicted, and the Indiana Court of Appeals affirmed. The State Supreme Court also affirmed, concluding that, although Amy's affidavit was testimonial and wrongly admitted, it was harmless beyond a reasonable doubt. The Supreme Court granted certiorari.

Opinion of the Court: Scalia, Roberts, Stevens, Kennedy, Souter, Ginsburg, Breyer, Alito.

Concurring in the judgment in part and dissenting in part: Thomas.

JUSTICE SCALIA delivered the opinion of the Court.

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington* (2004), we held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort 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, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause. . . .

Without attempting to produce an exhaustive classification of all conceivable statements — or even all conceivable statements in response to police interrogation — as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there

is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. . . .

The question before us in *Davis*, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford* that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation . . . is testimonial. . . . A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establish or prove" some past fact, but to describe current circumstances requiring police assistance.

The difference between the interrogation in *Davis* and the one in *Crawford* is apparent on the face of things. In *Davis*, McCottry was speaking about events *as they were actually happening*, rather than "describing past events." Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in Davis, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in Crawford) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not *testifying*. . . . No "witness" goes into court to proclaim an emergency and seek help.

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot "evolve into testimonial statements" once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*. This presents no great problem. . . Through in *limine*, procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. Davis's jury did not hear the complete 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even

if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.

Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task, since they were not much different from the statements we found to be testimonial in *Crawford*. It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct — as, indeed, the testifying officer expressly acknowledged. There was no emergency in progress; the interrogating officer *testified* that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in Davis) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime — which is, of course, precisely what the officer *should* have done.

It is true that the *Crawford* interrogation was more formal. It followed a *Miranda* warning, was tape–recorded, and took place at the station house. While these features certainly strengthened the statements' testimonial aspect — made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events, none was essential to the point. It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigation." What we called the "striking resemblance" of the *Crawford* statement to civil-law *ex parte* examinations is shared by Amy's statement here. Both declarants were actively separated from the defendant — officers forcibly prevented Hershel from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial. . . .

Respondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases – domestic violence – requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. (Cf. *Kyllo v. United States* (2001), suppressing evidence from an illegal search). But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal–trial system. We reiterate what we said in *Crawford*: that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds. That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit. The Indiana courts may (if they are

asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

We affirm the judgment of the Supreme Court of Washington. We reverse the judgment of the Supreme Court of Indiana and remand the case to that Court for proceedings not inconsistent with this opinion.

JUSTICE THOMAS concurring in the judgment in part and dissenting in part.

In *Crawford v. Washington* (2004), we abandoned the general reliability inquiry we had long employed to judge the admissibility of hearsay evidence under the Confrontation Clause, describing that inquiry as "*inherently*, and therefore *permanently*, unpredictable." Today, a mere two years after the Court decided *Crawford*, it adopts an equally unpredictable test, under which district courts are charged with divining the "primary purpose" of police interrogations. Besides being difficult for courts to apply, this test characterizes as "testimonial," and therefore inadmissible, evidence that bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause. Because neither of the cases before the Court today would implicate the Confrontation Clause under an appropriately targeted standard, I concur only in the judgment in *Davis v. Washington* and dissent from the Court's resolution of *Hammon v. Indiana*. . . .

The Court's standard is not only disconnected from history and unnecessary to prevent abuse; it also yields no predictable results to police officers and prosecutors attempting to comply with the law. In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are both to respond to the emergency situation and to gather evidence. Assigning one of these two "largely unverifiable motives" primacy requires constructing a hierarchy of purpose that will rarely be present — and is not reliably discernible. It will inevitably be, quite simply, an exercise in fiction.

. . . The Court draws a line between the two cases based on its explanation that *Hammon* involves "no emergency in progress," but instead, mere questioning as "part of an investigation into possibly criminal past conduct" and its explanation that Davis involves questioning for the "primary purpose" of "enabling police assistance to meet an ongoing emergency." But the fact that the officer in *Hammon* was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers, and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as "past conduct" back into an "ongoing emergency." Nor does the mere fact that McCottry needed emergency aid shed light on whether the "primary purpose" of gathering, for example, the name of her assailant was to protect the police, to protect the victim, or to gather information for prosecution. In both of the cases before the Court, like many similar cases, pronouncement of the "primary" motive behind the interrogation calls for nothing more than a guess by courts.

Because the standard adopted by the Court today is neither workable nor a targeted attempt to reach the abuses forbidden by the Clause, I concur only in the judgment in *Davis v. Washington* and respectfully dissent from the Court's resolution of *Hammon v. Indiana*.