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DAVIS AND HAMMON: A STEP FORWARD, OR A STEP BACK?

By Tom Lininger^{*†}

Prosecutors, defense attorneys, and lower court judges hoped that the Supreme Court's ruling in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana* (hereafter simply *Davis*) would provide a primer on testimonial hearsay. In retrospect, these hopes were somewhat unrealistic. The *Davis* ruling could not possibly clear up all the confusion that followed *Crawford v. Washington*, the landmark 2004 case in which the Court strengthened the right of the accused to confront declarants of testimonial hearsay. In *Davis*, the Court focused on the facts under review and developed a taxonomy that will be useful in similar cases, but the Court did not attempt to explain all the implications of *Crawford*. In fact, the *Davis* ruling raised nearly as many questions as it answered.

This Essay will begin by noting some shortcomings of the *Davis* opinion. I will then highlight what I regard as salutary aspects of this ruling. The next section will list some of the questions that remain unanswered in the wake of *Davis*. I will conclude by suggesting that the *Davis* ruling is a step forward—albeit a modest one—for confrontation jurisprudence.

I. WHAT'S TROUBLING ABOUT *DAVIS*

One of the most urgent concerns after *Crawford* was to create a more predictable test for distinguishing testimonial hearsay from nontestimonial hearsay. The *Davis* opinion made only limited progress on this front, establishing a new test that deems statements nontestimonial if elicited by law enforcement officers responding to an ongoing emergency. Because the term “ongoing emergency” is susceptible to many different interpretations, this test may give lower courts the flexibility to reach varying outcomes based on notions of expediency rather than doctrinal consistency. In fact, one might argue that the line of cases extending from *Ohio v. Roberts* to *Crawford* to *Davis* has not *reduced* ambiguity, but has only *relocated* the ambiguity from the term “reliable” (in *Roberts*) to the term “testimonial” (in *Crawford*) to the term “ongoing emergency” (in *Davis*).

Another shortcoming of the *Davis* opinion is its focus on the intent of the police rather than the intent of the declarant. The Confrontation Clause of the Sixth Amendment gives the accused the right to confront witnesses against him. In *Crawford*, the Supreme Court explained that an out-of-court

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declarant could be a “witness” for purposes of the Confrontation Clause if the declarant is essentially testifying against the accused. Within *Crawford*’s framework, the testimonial character of the declarant’s statement depended more on the declarant’s mindset than on the intention of the interlocutor. *Crawford* essentially posed this question: would a reasonable person in the position of the declarant foresee the prosecutorial use of his or her statement? In *Davis*, the Supreme Court has now shifted the focus from the declarant to the police eliciting the statement. The doctrinal drift from *Crawford* to *Davis* is all the more perplexing given that the two opinions share the same author, Justice Antonin Scalia.

An additional problem posed by *Davis* is the necessity to discern the “primary motive” of the officer who questions the hearsay declarant. If the primary motive is to gather evidence of past crimes, the statement will likely be testimonial. If the primary motive is to respond to an ongoing emergency, the statement may very well be nontestimonial. In many cases, officers will have dual motives, especially where it is unclear whether a crime has ended or the emergency is ongoing. Untangling dual motivation has proven difficult in other contexts. For example, in the context of traffic stops, the courts wrestled for decades with the challenge of dual motivation, until the Supreme Court finally decided in *Whren v. United States* that “pretextual stops” are permissible if one of the dual motives is to enforce a minor traffic law. The effort to sort out the motives of officers questioning witnesses at an apparent crime scene will likely be difficult as well. The Supreme Court has falsely posited the mutual exclusivity of the motive to investigate and the motive to rescue, and because police do not neatly compartmentalize their motivations, the *Davis* test could prove difficult to apply.

Will the *Davis* test invite manipulation by police? As they have in response to the Supreme Court’s Fourth and Fifth Amendment jurisprudence, police will likely try to adapt their practices so that they can accomplish the same goals by simply incanting the right rationale for their actions. For example, police will probably be much more careful in their reports to list circumstances supporting an inference of “ongoing emergency” at the time the police question hearsay declarants. However, the use of an objective, rather than subjective, standard in *Davis* will minimize the ability of police to manipulate this test. Ultimately, the characterization of a statement as testimonial or nontestimonial will depend on a circumstance over which the officers exercise no control: the pendency of an emergency. The temporal boundary will be plain in many cases, especially when the alleged assailant is no longer at the scene. Concerns about manipulation of the *Davis* test may be overblown.

Davis is objectionable for another reason: its abdication of any constitutional regulation in the context of nontestimonial hearsay. In *Crawford*, the Court had implied that the Confrontation Clause only applies to testimonial hearsay. In *Davis*, the Court made this point emphatically. Apparently the Court is content to leave nontestimonial hearsay to statutory regulation—or to the regulation of state constitutions, in those few states that grant the accused greater confrontation rights than does the federal Constitution. After

Davis, some lower courts may continue to apply the *Roberts* framework to nontestimonial hearsay (as they did in the wake of *Crawford*), and some lower courts may simply dispense with any consideration of constitutional confrontation rights. This result seems curious indeed, given Justice Scalia's emphasis on both the teleological and deontological importance of confrontation. The great rift between the regulation of testimonial hearsay and the regulation of nontestimonial hearsay may lead some courts to err on the side of classifying hearsay as testimonial, lest they deprive defendants of any confrontation rights.

II. THE BRIGHT SIDE

The *Davis* ruling deserves praise for many reasons. To begin with, the Supreme Court rejected alternative tests that would have been much worse than the test actually adopted in *Davis*. Some lower courts had ruled that excited utterances are nontestimonial per se, on the ground that an agitated declarant cannot possibly contemplate the prosecutorial use of that declarant's statements. If adopted by the Supreme Court, such a rule would have gutted the Confrontation Clause. At the other extreme, a rule that classified all statements to police as per se testimonial would have been overbroad, and would have overlooked the fact that some declarants are not "testifying" when they interact with law enforcement officers.

The Supreme Court's ruling in *Davis* did brighten the line somewhat between testimonial and nontestimonial hearsay. Certainly the Court brought greater clarity to the review of 911 calls. If the emergency has not yet abated, these calls will be deemed nontestimonial. Most courts of appeal had already reached the same conclusion before the *Davis* ruling, but the Supreme Court's endorsement of this conclusion will improve the predictability of outcomes in lower courts. As to statements made by hearsay declarants to responding officers, the clarity of the line between testimonial and nontestimonial hearsay now depends on a distinction between past and ongoing crimes—a distinction that is doctrinally straightforward, if perhaps somewhat difficult to apply in particular cases.

The focus in *Davis* on police motives is theoretically inconsistent with *Crawford*, but there may be some practical benefit to the *Davis* approach. For example, the *Davis* ruling reduces the possibility that police will question declarants for investigative purposes at a time when declarants are so distraught that they are not contemplating prosecutorial use of their statements. The *Davis* ruling may help to standardize the treatment of adult and child witnesses. Under *Davis*, police cannot contrive circumstances in which a plain-clothes interlocutor speaks with a child for investigative purposes: while the child in this circumstance may not believe that he or she is providing information for prosecutorial use, the intent of the government agent is dispositive. (*Crawford* should have dictated the same result in such a case, but *Davis* makes the right answer even more clear).

The Supreme Court's continued enthusiasm for the doctrine of forfeiture presents intriguing possibilities. In domestic violence cases, batterers some-

times threaten retaliation if their victims testify in court. The Supreme Court emphasized in *Davis* that the defendant who wrongfully procures the absence of the accuser at trial may not be heard to protest the admission of the accuser's hearsay statements. The precise contours of the forfeiture doctrine require some further clarification, but the Supreme Court has definitely spurred the development of this doctrine by including such strong language in the *Davis* ruling.

Davis also deserves adulation for unshackling confrontation jurisprudence from the rigid originalist interpretation in the *Crawford* ruling. Two years ago, Justice Scalia's fealty to the Framers' intent raised concerns that confrontation jurisprudence might not adapt to the new circumstances of the twenty-first century. In *Davis*, Justice Scalia backed away from his strict originalist interpretation in *Crawford*, and even chided Justice Thomas's dissent for undue emphasis on the Framers' historical circumstances.

I admire *Davis* for one final reason. This case has provided an excellent "teachable moment" for evidence professors. Some of the brightest lights in academia advocated for the parties or the amici in *Davis*. The briefs filed by these advocates are a terrific resource for students who wish to understand not only the rules of evidence and the parameters of the Confrontation Clause, but also the underlying policy concerns. My students at the University of Oregon mooted the oral argument in *Davis*, and I was impressed by the cogency of both sides' arguments. This case does not present the perfect equipoise of a NITA hypothetical, but it does provide ample ammunition for both sides.

III. UNRESOLVED QUESTIONS

As noted earlier, the Supreme Court did not set out in *Davis* to clear up all the mysteries of modern confrontation jurisprudence, so it is not surprising that several questions remain. One category of unresolved questions relates to the definition of "testimonial" hearsay. Just how can police—or judges, for that matter—determine precisely when an emergency has ended? How will the courts respond when police claim that they are simultaneously investigating and responding to an emergency? What will happen when a hearsay declarant believes that an emergency is continuing, but the responding officers do not share this belief? Outside the context of interrogation, when will a hearsay statement to a police officer qualify as testimonial hearsay? How should courts determine the testimonial or nontestimonial character of a statement when police send the alleged victim to speak with a counselor or medical professional?

A second category of unresolved questions concerns the forfeiture doctrine. To what extent does Federal Rule of Evidence 804(b)(6) frame—or at least guide the interpretation of—the constitutional forfeiture doctrine? Is a subjective intent to prevent trial testimony necessary to effect forfeiture, or is it sufficient for the wrongdoer to commit intentionally an act that incidentally causes the unavailability of the declarant? Once the prosecution has

proven forfeiture, what is the scope of admissible hearsay? Can the absent declarant be impeached to the same extent as an ordinary hearsay declarant?

CONCLUSION

History may not remember *Davis* as a watershed case. Certainly, *Davis* did not alter the landscape of evidence law to the same extent as *Crawford*. But if evaluated for its incremental value in clarifying the meaning of the term “testimonial,” the *Davis* ruling is commendable. By illuminating the distinction between testimonial and nontestimonial hearsay, the Supreme Court has helped prosecutors, defense attorneys, and trial judges adapt to the post-*Crawford* world. I congratulate the law professors who did such fine work in *Davis*, including Richard Friedman at Michigan, Joan Meier at George Washington, and Jeff Fisher, who will begin teaching at Stanford this coming fall.