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## We Really (for the most part) Mean It!

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## **“WE REALLY (FOR THE MOST PART) MEAN IT!”**

*Richard D. Friedman*<sup>\*†</sup>

I closed my petition for *certiorari* in *Hammon v. Indiana* by declaring, “‘We really mean it!’ is the message that lower courts need to hear, and that decision of this case can send.” The prior year, *Crawford v. Washington* had transformed the law of the Confrontation Clause, holding that an out-of-court statement that is testimonial in nature may be admitted against an accused only if the maker of the statement is unavailable and the accused has had an opportunity to cross-examine her. But *Crawford* deliberately left undetermined what the term “testimonial” meant. Many lower courts gave it a grudging interpretation, devising a range of doctrines that allowed them to continue much as they had before, admitting out-of-court statements that they deemed sufficiently reliable even though the accused never had an opportunity to cross-examine the maker of the statement.

*Hammon* was a good example of this phenomenon. Hershel Hammon was convicted of battery on the basis of an accusation made by his wife, Amy. But she never testified at trial (not because she was scared to, but apparently because she did not want him convicted). Instead, the critical evidence at trial consisted of the testimony of a police officer, recounting the oral accusation that Amy made to him in the family living room the night of the incident, and an affidavit, similarly narrating the incident, which Amy completed at the officer’s request immediately after she made her oral accusation. The case was tried ten months before *Crawford*, and though defense counsel objected because of his inability to cross-examine Amy—“Makes me mad,” he said—the trial judge thought both statements were easily admissible. “You might want to refresh your memory regarding the hearsay rules,” he told counsel, admitting the oral statement as an excited utterance and the affidavit as a present sense impression. That, in pre-*Crawford* days, sufficed to dispose of concerns under the Confrontation Clause as well as under the hearsay rule. Hammon was convicted, but by the time the appellate courts decided his case *Crawford* had come down, and the Indiana Supreme Court had to acknowledge that the affidavit was testimonial. After all, it was under oath, quite formal, with an invocation of the domestic battery statute, and clearly prepared in contemplation of criminal proceedings. The court held, though, that the oral statement was not testimonial, because when the officer took that statement he was not preparing a case; rather, he

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was “securing and assessing the scene.” The conviction stood, the court drawing the highly dubious conclusion that admission of the affidavit in a bench trial was harmless error.

The state supreme court’s decision in *Hammon* struck me immediately as a perfect vehicle for the United States Supreme Court to refine the meaning of “testimonial.” If the Court was serious in *Crawford* about reinvigorating the Confrontation Clause, then Amy’s oral accusation, as well as the affidavit, must be regarded as testimonial. Otherwise, the Court would be tolerating a system in which an accuser could create evidence for prosecution—in other words, testify—simply by speaking to an officer in her living room, without any need to come to court, take an oath, face the accused, or submit to cross-examination.

Hammon and Kimberly Jackson, his appellate counsel, consented to my filing a petition for *certiorari*. Meanwhile, *Davis v. Washington* was slightly further along the pipeline. *Davis* also involved an accusation of domestic violence by a complainant who did not appear at trial. But in contrast to the relatively calm setting in which Amy Hammon made her accusation—an undetermined time after the alleged incident—the accusation in *Davis* was made immediately afterwards, during a 911 call, while the accuser, Michelle McCottry, was still in obvious distress. Ms. Hammon was in the company of one officer while another kept her husband away when she made her accusation. But no one was protecting Ms. McCottry when she made her accusation: the accused was still at large, and the call began just as he was leaving the scene. From the defense point of view, *Davis* was a much tougher case.

That is not to say that I thought *Davis* should lose. Ms. McCottry made an accusation of crime to a government agent who was a direct conduit to the police, and she did so in circumstances that would lead any reasonable person to understand that she was invoking the power of the state against the accused, since much of the conversation concerned a restraining order that already bound *Davis*. Apart from enforcement of that order, Ms. McCottry was not asking for protection, and none was offered. If she or the 911 operator had been afraid that *Davis* would return imminently to the house, then the obvious response would have been to send police there. But instead the operator told her that the police would *first* find *Davis* and then come to *talk* to her. In short, a reasonable person would understand that Ms. McCottry was providing information that would be used immediately to enforce the restraining order and might well be used later for criminal prosecution. I believe that she should have been deemed to be acting as a witness.

Even so, *Davis* was so much harder a case that I had grave qualms when the Court granted *certiorari* in both cases, because the inclination of the Court might be to split the baby—to hold for Hammon and against *Davis*. As Hammon’s lawyer, I had to regard that as good news. But as a scholar long active in this field, I was afraid that the Court would render the category of testimonial statements far more restrictive than it ought to be. I was especially afraid that this would happen because a result in favor of *Davis* would represent a dramatic departure from the state of the law that had pre-

ailed before *Crawford*. The analogy that came to mind was of the bends, the malady that afflicts deep sea divers if they try to ascend too quickly rather than get accustomed to intermediate stages a little at a time. In *Crawford*, the statement in question had been taped and made under considerable formality in the police station several hours after the incident, when the accused was already in police custody. *Hammon*, involving a less formal statement made at the scene—an undetermined but presumably short time after the incident, while the accused was guarded by police but before he was taken into custody—represented a small but intuitively appealing development from *Crawford*. A reversal in *Davis*, however, would make a large change in a hurry. It would mean that, within a little more than two years, the Court had moved from the pre-*Crawford* level to the conclusion that an urgent and distressed statement made immediately after the event was testimonial.

After the oral argument I managed to persuade myself that *Davis* as well as *Hammon* had a good chance of winning; whether this was the natural and perhaps salutary tendency of litigators to be somewhat optimistic, or merely self-delusion, I will not speculate. In the end, the Court did split the baby, drawing a sharp distinction between the two cases. Unanimously, it held that the statement in *Davis* was not testimonial. But with only Justice Thomas dissenting, it held the opposite in *Hammon*.

The facts of the two cases are sufficiently different that it is easy to draw a line between them. Whether the line that the Court did draw is a sound or sturdy one is another question. The Court said:

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.

Many questions now arise:

- How does one determine what the *primary* purpose of interrogation is, given that, as Justice Thomas points out, very often the police have two clear objectives, to resolve the immediate situation before them *and* to gather evidence for prosecution? Will police now have an incentive to leave the emergency unresolved until they can gather evidence?

- Why does the purpose of the interrogation matter, given that, as the Court acknowledges, “it is in the final analysis the declarant’s statements, not the interrogator’s questions,” that are decisive under the Confrontation Clause? Could it be that the interrogator’s purpose is significant because of the light it sheds on the declarant’s understanding of the situation?

• What qualifies as an “emergency,” when is it no longer “ongoing,” and why did the setting of *Davis* qualify as an “ongoing emergency,” given that by the time of the 911 call the alleged assailant was leaving the scene and that the complainant did not ask for immediate protection and the 911 operator did not offer it? (Within the space of two sentences, the Court suggests that the emergency ended “after the operator gained the information needed to address the exigency of the moment,” “when Davis drove away,” and when “[t]he operator . . . told McCottry to be quiet, and proceeded to pose a battery of questions”— these events, however, did not necessarily occur at the same time.)

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The Court also leaves rather uncertain the question of what degree of formality, if any, is necessary for a statement to be characterized as testimonial. In response to Justice Thomas’s opinion, the majority goes so far as to say, “We do not dispute that formality is indeed essential to testimonial utterance.” Failure to dispute a proposition is, of course, not necessarily an adoption of it. In distinguishing *Davis* from *Crawford*, the Court mentions among other considerations the “striking” difference in the level of formality between the two interrogations—but the Court does not suggest that an informal interrogation cannot be conducted, by both parties to it, primarily for the purpose of transmitting evidence for use in prosecution. Indeed, elsewhere in the opinion Justice Scalia makes clear that the Confrontation Clause is not limited to “prior court testimony and formal depositions”; it is not conceivable, he writes, that the protections of the Clause could “readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant.” This passage confirms what was plain at argument, that Justice Scalia got the point: The Clause requires that testimony be given under prescribed conditions, and it would be rendered virtually worthless if it could be avoided simply by making an informal accusation to the authorities. It appears that the Court’s rather muddled language with respect to formality resulted from its partially successful efforts to achieve consensus.

In any event, the Court makes clear that if it continues to speak in terms of formality, the standard will be a very loose one. Responding to Justice Thomas, the Court states flatly, “Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.” The Court is also explicit that none of the most salient features of the *Crawford* interrogation—that it “followed a *Miranda* warning, was tape-recorded, and took place at the station house”—were essential to characterizing Sylvia Crawford’s statement as testimonial. It was formal enough, the Court says, that Amy Hammon’s accusation was made in a room separate from her husband, with the officer recording her answers for his investigation. It seems likely, moreover, that note-taking by the officer is merely of evidentiary significance, and likewise was not crucial to characterizing the statement as testimonial. Elsewhere, the Court adds that sufficient formality is imported by the fact that lies to police officers are criminal offenses; this,

too, is presumably not a *necessary* condition. In the end, it may be that a formality test will add nothing to the general standard of whether the statement was made “to establish or prove past events potentially relevant to later criminal prosecution.” That would be good news.

There is more good news as well. The Court is explicit that it found *Hammon* a “much easier” case than *Davis*. It makes clear that if the statement concerns a closed event—“what happened” rather than “what is happening”—then it should usually be considered testimonial. The pattern of the Court’s decisions after *Davis* on pending *certiorari* petitions suggests that the Court indeed recognizes that most accusatory statements made to police officers in the field should be considered testimonial. And further confirmation is provided by the Court’s apparent endorsement of the pre-Framing English case *R. v. Brasier*, which characterized as testimonial an accusation of attempted rape made by a young child to her mother immediately after coming home; neither the immediacy of the statement, the youth of the declarant, nor the private status of the audience removes the statement from the protections of the confrontation right, and that is as it should be.

The Court also manages to close one can of worms, going well out of its way to make clear (though some lower courts have not recognized this so far) that if a statement is not testimonial it is not covered by the Confrontation Clause. Good! This is the right result as a matter of principle; it may lend some clarity and focus to the law, and the prior regime of testing statements for reliability never provided any real protection with respect to non-testimonial hearsay anyway.

What’s next? The Court has only hinted at, and not adopted a general standard of, what is testimonial. There is so much open space between *Davis* and *Hammon* that the Court may have to wade once again into the area of fresh accusations. The strong hint given by the citation of *Brasier* will probably not remove all doubt with respect to the applicability of *Crawford* to statements by children and to private recipients. In a variety of settings—reports of autopsies, of laboratory tests, of deportations, etc.—statements by government agents pose significant questions.

Finally, the doctrine of forfeiture must be clarified. The Court rightly indicates that if the accused’s inability to cross-examine the witness is caused by the accused’s own wrongdoing, he forfeits the confrontation right. The doctrine should be applied robustly—the court should be able to find forfeiture on the basis of the same wrongdoing that underlies the jury’s finding of guilt on the merits. But when the prosecution contends that the accused committed forfeiture by intimidation, it ought to be required to do more than present a police officer’s testimony that the witness is scared to testify. What, if any, procedures the Supreme Court requires prosecutors and trial judges to pursue as a predicate for a conclusion of forfeiture may be one of the most critical tests of just how much the Court really meant what it said in *Crawford*.