Davis and Hammon: Missed Cues Result in Unrealistic Dichotomy

Sarah M. Buel*

On its face, the Supreme Court’s combined Davis v. Washington and Hammon v. Indiana ruling appears to be a just affirmation of criminal defendants’ right to cross-examine those bearing witness against them. However, Davis has made Confrontation Clause analysis more difficult by failing to mandate the contextual analysis necessary to ensure a proper balancing of constitutional and social norms—here as they pertain to domestic violence cases. First, Davis employs a faulty analytical framework that mistakenly applies remedies for state interference with confrontation to defendant prevention of a witness’s testimony. It makes little sense to eliminate the injustice alleged in Crawford and Davis, only to reward known criminals for brazen witness tampering and deny terrified victims a legal remedy. Second, the Court misguidedly imposes a temporal delineation that gives rise to an unrealistic dichotomy between evidence relating to ongoing emergencies and evidence of past conduct. Finally, in Hammon, the Supreme Court missed many obvious cues and ignored salient facts supporting the trial court’s determination that the abuse victim’s statements were not testimonial.

I. The Problem of the Absent Victim

Because battered women are often too fearful to testify against their perpetrators, successfully convicting offenders often requires that their victims’ out-of-court statements be admitted under a hearsay exception, usually as an excited utterance. Recently however, courts have been receptive to defendants’ arguments that this violates their Sixth Amendment right to confront witnesses testifying against them. The Supreme Court attempted to resolve this tension with an uneasy compromise in its 2004 Crawford v. Washington decision, which held that the Sixth Amendment requires an opportunity to confront an unavailable witness when “testimonial” statements are proffered. Problematic, however, was the Court’s refusal to fully define “testimonial,” which gave rise to widely divergent rulings across the country. A unanimous Court in Davis v. Washington decided that a battered woman’s call to 911 was not testimonial because her statements related to police assistance in an ongoing emergency.3

* Clinical Professor of Law, University of Texas School of Law.
3. 126 S. Ct. at 2276–77.
The Court then distinguished the *Hammon v. Indiana* case by finding that an abuse victim’s statements to law enforcement were testimonial because the victim spoke after the crisis had dissipated and she was responding to police questioning that sought information regarding past events for later use in a criminal prosecution.\(^4\) Consolidated as *Davis*, this ruling is anchored on a faulty paradigm inconsistent with the Framers’ intent merely to prevent “trial by affidavit.”\(^5\)

The new *Davis* test hinges the admissibility of victim statements on whether the “circumstances objectively indicate that the purpose of the conversation was to investigate prosecution.”\(^6\) As an abuse survivor forced to seek police assistance on several occasions in an attempt to procure safety, I can verify that the prospect of future prosecution was not ever a consideration of mine when speaking to law enforcement. Moreover, in thirty years of working with thousands of abuse victims, seven as a domestic violence prosecutor, I have never heard a victim describe the abusive incidents with an eye toward developing a subsequent criminal case—only as part of a quest for safety. It is flawed psychology to suggest that a victim would legitimately call for help but switch to a manipulative mode in the middle of the crisis, taint her statements, and render them testimonial. Professor Tom Lininger notes the extraordinary number of victims who recant and disappear, in part to avoid testifying against their abusers.\(^7\) Surely this phenomenon indicates that the last objective of most victims is the successful criminal prosecution of their assailants.

Central to this analytic framework is the role of witness tampering as the offense most often committed by batterers and yet the least charged. The inherent problem in prosecuting obstruction of justice cases is that an abuse victim intimidated into refusing to testify against her perpetrator about the initial incident is most likely also too terrified to testify about his ongoing efforts to keep her from appearing at trial. Although in *Davis* Justice Scalia recognizes that domestic violence is “notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial,”\(^8\) this concept is noticeably absent from his final formulation of a workable confrontation paradigm.

The Sixth Amendment was designed to prevent the state from denying defendants an opportunity to confront their accusers, as in Sir Walter Raleigh’s treason trial, which is described in *Crawford*. But as Professor Joan Meier notes, in domestic violence cases, the defendant, not the state,

---

4. *Id.* at 2278.
5. *Id*.
6. *Id.* at 2268.
often makes certain the victim will be unavailable to testify. Ignoring the prevalence of witness tampering in domestic violence ensures the omission of critical contextual analysis; an omission that is so great that the majority decision is widely viewed as unworkable in its application. Professor Kristian Miccio has written eloquently about the state’s continuing failure to protect battered women and to hold itself responsible for doing so, despite statutory mandates in every jurisdiction. In light of batterers’ extraordinary success in, as Tony Soprano says, making it worth the victim’s while not to testify, the Court’s conciliatory affirmation of the doctrine of forfeiture by wrongdoing is of little significance. Sadly, the majority decision bespeaks profound ignorance of batterers’ common behaviors in spite of the availability of much empirical data documenting typical dynamics of domestic violence relationships at issue in Davis and Hammon. The catastrophic impact of Davis is already being felt, as prosecutors across the country are forced to dismiss cases against perpetrators of extreme violence because their victims are too terrified to testify at trial. In spite of the Court’s omission, however, prosecutors should still proactively charge these batterers with witness tampering and argue for an expansive interpretation of the doctrine of forfeiture by wrongdoing. Some courts have correctly inferred forfeiture from the cumulative circumstances and history of abuse.

That batterers’ witness tampering is such a successful enterprise poses great danger for abuse victims. The latest report from the U.S. Department of Justice on homicide trends documents that while fewer men are now murdered by intimate partners, women have been killed by intimate partners at a steady rate for at least two decades and in increased numbers in areas lacking sophisticated medical trauma centers. But victim safety must not be measured solely in terms of homicide rates, for abusers commit a wide range of heinous but nonfatal crimes against current and former intimate partners that certainly interfere with their partners’ constitutional rights to life, liberty, and pursuit of happiness. This reality makes Justice Scalia’s caustic comment at oral argument that “[m]aybe we should just suspend the Confrontation Clause in spousal abuse cases” all the more troubling.


11. Transcript of Oral Argument at 25, Davis, 126 S. Ct. 2266 (No. 05-5224).
II. Faulty Analytical Framework

The Court’s disengagement from the job of safeguarding the rights of abuse victims—ostensibly based on the Framers’ intent—is puzzling at best. In *Crawford*, Justice Scalia seemed to argue for strictly limiting hearsay exceptions to those recognized in 1791, when the Sixth Amendment was ratified. Yet Justice Scalia had to acknowledge (in footnote 8) that excited utterances were then admissible, as documented by *Thompson v. Trevanian*, a 1694 domestic violence case. *Thompson* upheld the admissibility of spontaneous declarations made “immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.” This is precisely the rule embodied in all state evidence codes and in Federal Rule of Evidence 803(2), which allows statements of unavailable witnesses to be admitted as excited utterances when they “relat[e] to a startling event or condition” and were “made while the declarant was under the stress of excitement caused by the event or condition.” The Advisory Committee Notes reflect the *Thompson* logic: “The theory of [the excited utterance exception] is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.”

Although otherwise a rigid originalist, Justice Scalia thus employs reasoning unsupported by the history of the Confrontation Clause or the history of related statutory and common law. The specific reasonableness test advanced in *Hammon* would render most spontaneous utterances testimonial, an outcome inconsistent with the 1694 *Thompson* case and basic tenets of equity.

A reasoned constitutional analysis must balance the rights of the accused with those of victims. Constitutional jurisprudence provides many examples of such balancing in the realms of due process, discovery, and Fifth Amendment rights. In cases implicating the compelling state interest in protecting all victims of domestic violence, some rights once thought resolute have been modified. It is on this basis that excited utterances, and indeed the panoply of codified, accepted hearsay exceptions must be admissible. As Justice Cardozo noted in *Snyder v. Massachusetts*, “[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”

---

III. Disingenuous Dichotomy

Although the Supreme Court understandably finds comfort in bright line tests, the misguided dichotomy it created in *Davis* has provided neither clear guidance for lower courts nor an accurate interpretation of the Sixth Amendment. *Davis* is a labored attempt to protect defendants’ rights that results in a hodgepodge of standards that trial judges cannot be expected to untangle. The *Davis* Court uses a false, misguided, temporal definition of emergency to distinguish between statements made in the midst of an ongoing emergency and statements made following an emergency. It is now the police officer’s and judge’s responsibility to discern the precise moment at which a particular domestic violence victim is no longer in crisis.

Under the Court’s current rubric, statements made by a victim who can access a phone in the midst of an assault are nontestimonial and admissible with or without her testimony. However, if the batterer prevents the victim from calling for help, the victim’s subsequent 911 call, even moments after the attack, is inadmissible without her presence in court. Thus, the tenacious batterer is rewarded for committing an especially brutal assault, interfering with the victim calling 911, or both. This distinction also ignores how typical it is for batterers to prevent their victims from accessing law enforcement assistance—one reason that so many states have now codified interference with a call for help as a crime independent of the preceding assault.

In adopting a standard that relies on a trial court’s assessment of the “primary purpose” of police questioning, the Court assigns judges the extraordinarily difficult, if not impossible, task of sorting out temporal delineations long after an incident and without critical information. *Davis* ruled that if statements are elicited by police in order to handle an “ongoing emergency,” they are nontestimonial. If the officer seeks information about past events only for future use in a criminal prosecution, a victim’s responses are testimonial and inadmissible at trial without her presence. This troublesome analysis rests on the false assumption that law enforcement officers have the luxury of single-minded approaches to highly volatile, rapidly changing domestic violence incidents. Having conducted hundreds of law enforcement trainings on domestic violence across the country and gone on scores of “ride alongs” (in which I accompanied officers on domestic violence calls), I have seen firsthand that most of the time officers must *simultaneously* gather as much information as possible about the incident and address immediate threats to victims, children, and themselves. In his *Davis* dissent, Justice Thomas notes this disconnect, saying that, “the purposes of an interrogation, viewed from the perspective of the police, are both to respond to the emergency situation and to gather evidence.”

17. 126 S. Ct. at 2283 (Thomas, J., concurring in part and dissenting in part).
The primary purpose test is overly simplistic in that it fails to take into account the multifarious, fluid nature of domestic violence incidents. It is common knowledge among law enforcement that offenders frequently return to the scene of their crimes, especially in domestic violence cases. Thus, the fact that a batterer is not present at the instant an officer arrives does not indicate that the victim no longer faces danger. In order to defuse these volatile scenarios, it is necessary for the officer to learn what the abuser’s typical patterns of conduct are, for instance whether he usually flees to his mother’s home or often goes to a bar and returns intoxicated. Similarly, in order to assess the potential lethality of the immediate circumstances, an officer must determine whether the batterer has a criminal record, is the subject of a protective order, has access to a vehicle, has children with the victim, carries a weapon, is employed, lives with the victim, abuses drugs or alcohol, or is mentally ill.

In order to realize every state’s goal of abuse prevention, trial court judges must adopt an expansive definition of “primary purpose.” The doctrine of equity requires that judges admit excited utterances based on a rebuttable presumption that they were relayed to officers whose primary purpose was resolving an ongoing emergency. Certainly if an officer states that his goal was only to gather information for later prosecution, the witness’s responses would be testimonial, as would any written affidavits she made at the time. This is because the Confrontation Clause was intended to prevent the use of affidavits as the primary evidence against the accused. But the Confrontation Clause does not preclude the admission of excited utterances, as recognized in Thompson even prior to the ratification of the Sixth Amendment in 1791.

IV. Missed Cues

The Davis decision reflects a number of false assumptions about the dynamics of domestic violence and how law enforcement should respond to it. Justice Scalia assumes that once an assault has ended, the victim and police officers no longer face danger. The Indiana trial and appellate courts, as well as dissenting Justice Thomas, noted many indications of ongoing danger in Hammon.\(^\text{18}\) The undisputed facts are that in the dead of winter and in the middle of the night, an obviously traumatized Amy Hammon met law enforcement officers responding to her call for help. Specifically, she was sitting outside on her front porch in Peru, Indiana, a small community in the northern part of the state, on February 26, 2003, at 10:55 p.m. when the police arrived. She eagerly told the officers “nothing [is] the matter,” presumably because her husband, who was already on probation, had

\(^{18}\) Id. at 2284–85.
dispatched her to get rid of the police before they could enter the home and see the destruction he had wrought.\textsuperscript{19}

Concerned for Amy’s safety due to her frightened appearance, the officers obtained permission to enter the home and saw gas flames leaping from a stove and shards of shattered glass strewn about the floor. Amy then admitted that her husband had smashed the heater, a phone, and at least one lamp prior to pushing her to the floor, shoving her head into the broken glass, and punching her twice in the chest. The officer testified that after Hershel Hammon repeatedly attempted to interrupt Amy’s conversation with the police, Hershel “became angry when I insisted that [he] stay separated from Mrs. Hammon so that we [could] investigate what happened.”\textsuperscript{20} Certainly, when faced with an increasingly belligerent offender at a domestic violence crime scene, officers are likely to focus on potential danger to themselves and the victim. Given that a substantial number of officers are injured while responding to domestic violence calls, officers who refrain from comprehensive questioning do so at their own peril.

I find it interesting that Justice Scalia cites Amy Hammon’s initial statement that nothing was wrong as if it were more reliable than all physical evidence to the contrary. In fact, Amy Hammon’s subsequent statement as to her husband’s destruction of their property and assault of her were consistent with the physical evidence that something was, in fact, wrong—a house in complete disarray. Yet the majority ignored this critical information. Justice Scalia’s apparent suggestion that officers and judges disregard compelling physical evidence in favor of victim statements that were very likely made under duress calls to mind the Richard Pryor routine in which he advised adulterous husbands caught in the act to deny wrongdoing and ask their wives, “Are you going to believe me or your lying eyes?”

Perhaps it would have been helpful for Justice Scalia to consult the International Association of Chiefs of Police 1998 Training Manual, \textit{Protecting Victims of Domestic Violence: A Law Enforcement Officer’s Guide to Enforcing Orders of Protection Nationwide}. Under the heading of “What Enforcement Action Should be Taken,” it instructs police to:

\begin{itemize}
  \item Ensure the safety of all involved[;]
  \item Seek medical attention, if necessary[;]
  \item Safeguard the victim from further abuse[;]
  \item Secure and protect the crime scene[;]
  \item Seek voluntary surrender of firearms for safekeeping purposes[;]
  \item Seize firearms subject to State, territorial, local, or tribal prohibitions[;]
  \item Identify whether an order of protection has been violated[;]
  \item Evaluate the validity and enforceability of the order[;]
  \item Arrest for violation of the order where required by the enforcing jurisdiction[;]
  \item Arrest for any other criminal offenses[;]
  \item Seek an arrest warrant, when required, related to the criminal conduct if the
\end{itemize}

\textsuperscript{19} Id. at 2272 (majority opinion) (citation omitted).
\textsuperscript{20} Id.
abuser is not at the scene; and] Attempt to locate and arrest the 
abuser.21

Justice Scalia could also have consulted the web site of the Columbus, 
Indiana, Police Department, which states:

The primary objective in responding to domestic violence calls is to 
de-escalate violent situations, to protect victims, to reduce officer 
injury, to reduce repeat calls, to enforce the law against violators, to 
effect community safety, and to facilitate prosecution, where 
applicable. The purpose of responding to these calls is also to protect 
the victim and summon emergency medical care if needed, and to 
further protect the victim by informing her/him of community 
resources available such as shelter facilities and support programs.22

These police training materials reflect a primary focus on safety, in part 
because violence most commonly manifests in a community as domestic 
abuse. According to the National Institute of Justice, 55% of American 
women will be raped or beaten in their lifetimes and 76% of the perpetrators 
of these crimes will be intimate partners.23 And those are just the crimes 
reported to police—the Bureau of Justice Statistics found that the police were 
not notified in half of all intimate partner victimizations.24 Judges have noted 
that courts can provide life-saving remedies to victims of domestic violence 
but are sometimes unaware of the impact of domestic violence on the cases 
before them. The U.S. Supreme Court should set an example for lower 
courts, either by correcting the application of the law or by crafting new, 
more equitable jurisprudence. This role is especially important in the Davis 
context because abuse victims are increasingly turning to the courts for help, 
too often with poor results. Given that the recidivism rate among domestic 
violence offenders is two-and-one-half times that of those who assault 
strangers, there is much room for improvement.

Professor Richard Fallon argues that absent fair implementation of 
constitutional mandates, legal doctrine loses its purpose. The Sixth 
Amendment right to confrontation must thus be balanced with the need to 
hold known perpetrators responsible for their crimes. Given that witness 
imintimation occurs in the majority of domestic violence cases, it must be 
addressed in Sixth Amendment Confrontation Clause jurisprudence. Violent 
crime victims are forced to work within a criminal justice system that does 
not guarantee them a lawyer, due process, privacy, information regarding

21. INT’L ASS’N OF CHIEFS OF POLICE, PROTECTING VICTIMS OF DOMESTIC VIOLENCE: A LAW 
ENFORCEMENT OFFICER’S GUIDE TO ENFORCING ORDERS OF PROTECTION NATIONWIDE 8 (2006), 
23. PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE, PREVALENCE, 
INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 3 tbl.1, 8 (1998), available at 
24. Bureau of Justice Statistics, U.S. Dep’t of Justice, Intimate Partner Violence in the U.S.: 
their cases, consultation with prosecutors, access to court records, or an opportunity to be heard. Although all of the foregoing rights are granted to the accused, none is uniformly granted to crime victims. This disparity reflects the victim’s role as a witness in the state’s case against the accused and presumes that the prosecutor will protect victims while making optimal use of them to obtain a conviction. However, because domestic violence perpetrators often make it too dangerous for their victims to testify in person, courts should admit victim statements that qualify as hearsay exceptions under a broad definition of testimonial. The most effective jurisprudence is reality-based and can be implemented fairly. Although Davis fails on both counts as presently construed, judges can do much to ameliorate its deficiencies by more accurately contextualizing victim statements.