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Testimonial? What the Heck Does That Mean?: *Davis v. Washington*

Lindsay Brewer

Casenote

Testimonial? What the Heck Does That Mean?: *Davis v. Washington*

I. INTRODUCTION

The 2004 United States Supreme Court decision in *Crawford v. Washington*[1] reformulated the standard for determining when the admission of hearsay[2] statements in criminal cases is permitted under the Confrontation Clause of the Sixth Amendment[3] to the United States Constitution. The majority held that the Confrontation Clause operates to exclude out-of-court statements that are "testimonial" in nature, unless the person making the statement is unavailable to testify and the

1. 541 U.S. 36 (2004).

2. This Casenote discusses only the implications of the Confrontation Clause and the admissibility of a certain category of hearsay: testimonial hearsay. This Casenote does not analyze the other rules against hearsay and the exceptions to those rules that also operate to exclude or allow out-of-court statements made by a person other than the person testifying. Where out-of-court statements are not testimonial, the Confrontation Clause is not implicated, but the rule against hearsay can operate to exclude those statements that do not fall into a firmly-rooted hearsay exception. *See* H. Patrick Furman, Crawford *at Two: Testimonial Hearsay and The Confrontation Clause*, 35 MAY COLO. LAW. 47 (2006).

3. U.S. CONST. amend VI.

defendant has had an opportunity for cross-examination.[4] Chief Justice Rehnquist, who concurred in the judgment, expressed concerns that the decision would lead to uncertainty in future criminal trials because the Court did not provide a definition of "testimonial."[5] *Davis v. Washington*[6] and its companion case *Hammon v. Indiana*[7] comprise the Supreme Court's attempt to begin shaping a workable framework for determining whether an out-of-court statement is "testimonial" or "nontestimonial." In *Davis* and *Hammon* the Court addressed the issue of whether certain types of statements made to law enforcement officers or personnel are "testimonial" and thus subject to the Confrontation Clause.[8]

II. FACTUAL BACKGROUND

In *Davis v. Washington*,[9] the defendant, Adrian Davis, was charged with a felony for violating a domestic no-contact order that prohibited him from contacting his ex-girlfriend and petitioner in the case, Michelle McCottry. In support of its case against Davis, the State presented the testimony of two police officers who responded to a 911 call that McCottry made. These police officers could only testify that they observed that McCottry had injuries that looked recent and could not testify that Davis caused these injuries. McCottry did not appear at the trial, and the State's only evidence supporting Davis's guilt in causing the injuries was the transcript of the 911 call in which McCottry stated that it was Davis who hit her.[10] Davis objected to the entry of the transcript on the grounds that it violated the Sixth Amendment's Confrontation Clause, but the trial court admitted it anyway, and a jury convicted Davis.[11] The Washington Court of Appeals and the Washington Supreme Court affirmed the outcome, reasoning that the portion of the 911 transcript that contained McCottry's identification of Davis as the person who attacked her was not testimonial and therefore not subject to the Confrontation Clause.[12] The United States Supreme Court affirmed.[13]

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4. *Crawford*, 541 U.S. at 53-54.
5. 541 U.S. at 75 (Rehnquist, J., concurring).
6. 126 S. Ct. 2266 (2006).
7. 126 S. Ct. 2266 (2006).
8. *Id.* at 2270.
9. 126 S. Ct. 2266 (2006).
10. *Id.* at 2271.
11. *Id.*
12. *Id.*
13. *Id.* at 2280.

In the companion case, *Hammon v. Indiana*,[14] Hershel Hammon was charged with domestic battery and a probation violation resulting from a domestic disturbance with his wife, Amy Hammon. The main witness in the case, Amy Hammon, did not appear at trial, and the State relied on the testimony of a police officer who responded to the disturbance and had taken a written affidavit of Amy's recollection of the events. The State asked the police officer to testify about Amy's statements on the night of the incident, and Hershel's attorney objected to the State's line of questioning on the grounds that there was no opportunity to cross-examine Amy. The police officer testified that Amy told him that during the course of an argument between herself and Hershel, Hershel had thrown her into some broken glass. The trial court allowed the testimony, noting that Amy's oral statements were permissible under a firmly rooted exception to the rule against hearsay, but the trial court did not address whether the statements were testimonial.[15] The judge in the trial court found Hershel guilty of both the domestic battery and the probation violation.[16]

Both the Indiana Court of Appeals and the Indiana Supreme Court affirmed the relevant parts of this decision, upholding Hershel's conviction and holding that Amy's oral statements were not testimonial. The oral statements were admissible because they fell under a firmly rooted exception to the rule against hearsay. The Indiana Supreme Court further held that the written statements in the affidavit were testimonial and should not have been admitted, but that admission was harmless.[17] The United States Supreme Court reversed and remanded, holding that Amy's written statements in the affidavit were testimonial, and therefore the Confrontation Clause required that the affidavit be excluded unless the defense had an opportunity for cross-examination.[18]

III. LEGAL BACKGROUND

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[19] In *Dowdell v. United States*,[20] the Supreme Court noted that the Clause prohibits any testimony by witnesses that does not

14. 126 S. Ct. 2266 (2006).
15. *Id.* at 2272-73.
16. *Id.* at 2273.
17. *Id.*
18. *Id.* at 2280.
19. U.S. CONST. amend. VI.
20. 221 U.S. 325 (1911).

allow the accused to be face-to-face with the witness and able to cross-examine the witness.[21] However, the Court noted that there are several exceptions to the literal language of the Clause, stemming from public policy and necessity.[22]

A. The Confrontation Clause is Set Aside: 1980 – 2004

In *Ohio v. Roberts,*[23] the Supreme Court discussed the Confrontation Clause and whether it was constitutionally permissible for witness testimony from a preliminary trial to be admitted at the later trial where the witness was not present.[24] The Court reevaluated the relationship between the Confrontation Clause and the basic rule against hearsay evidence and its many exceptions.[25] The Court noted that hearsay evidence is defined as "'testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-[court] asserter.'"[26] The Court concluded that the Confrontation Clause operates to exclude some hearsay evidence[27] and works with the rule against hearsay to safeguard the criminal justice system in that there is greater accuracy in the fact-finding process where witnesses are subject to cross-examination at trial.[28] This greater accuracy comes from (1) the reluctance of witnesses to lie against someone present at trial, (2) the punishment of perjury for lying under oath, and (3) the cross-examination's ability to sift through the truth of the recollection.[29] The Court indicated that the right to confrontation was a traditional part of trial that contributed to the meaningfulness of the proceedings.[30]

The Court also noted that there are other interests that may override the necessity of confronting witnesses at trial.[31] Under *Roberts,* the Court's general approach to determine how the Confrontation Clause works to limit the admissibility of hearsay evidence consisted of two

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21. *Id.* at 330.
22. *Id.* (citing Mattox v. United States, 156 U.S. 237, 242 (1895)).
23. 448 U.S. 56 (1980).
24. *Id.* at 58.
25. *Id.* at 62.
26. *Id.* at 62 n.4 (quoting E. CLEARLY, MCCORMICK ON EVIDENCE § 246, at 584 (2d ed. 1972)).
27. *Id.* at 63.
28. *Id.* at 63-64 n.6 (citing California v. Green, 399 U.S. 149, 158 (1970)).
29. *Id.*
30. *See id.* at 63-64.
31. *Id.* at 64.

separate tests.[32] First, the prosecution must meet the rule of necessity and show that the declarant whose testimony it wishes to introduce is unavailable for trial.[33] To show that a witness is unavailable for trial, the prosecution must show that it made a good faith effort to get the witness to court.[34] In *Roberts* the Court held that the prosecution satisfied its burden in showing that the witness was unavailable because it subpoenaed her five different times at her parents' address, and learned from her parents that they had unsuccessfully tried to locate her for over a year.[35]

Second, once the prosecution shows that a witness is unavailable, it must demonstrate that the testimony it wishes to introduce is reliable by meeting an indicia of reliability.[36] This reliability test is intended to guarantee that the written evidence presented is trustworthy.[37] The Court evaluated the reliability of the witness in *Roberts* by comparing the facts to *California v. Green,*[38] a case in which a witness claimed to have forgotten an earlier statement that he offered in a preliminary hearing, identifying the defendant as a drug supplier, and the prosecution attempted to introduce into evidence the transcript from that preliminary hearing.[39] Generally, the evidence meets this requirement when it falls within one of the "firmly rooted hearsay exceptions" or when it bears "particularized guarantees of trustworthiness."[40]

In *Green* the Court held that the statements made at the preliminary hearing were admissible and satisfied the Confrontation Clause because they were given in a setting where the witness was represented by counsel, and there was an opportunity to cross-examine.[41] The Ohio Supreme Court determined that the statements were reliable even if the witness was not actually cross-examined, so long as there was an opportunity to do so.[42] The United States Supreme Court did not decide this issue because there was evidence that the declarant was cross-examined at the preliminary hearing, and therefore, the statements were reliable.[43]

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32. *Id.* at 65.
33. *Id.*
34. *Id.* at 74 (quoting Barber v. Page, 390 U.S. 719, 724-25 (1968)).
35. *Id.* at 75.
36. *Id.* at 65-66.
37. *Id.*
38. 399 U.S. 149 (1970).
39. *Id.* at 151-52.
40. *Roberts*, 448 U.S. at 66.
41. *Id.* at 68-69.
42. *Id.* at 70.
43. *Id.* at 71.

Also, the Court in *Roberts*, following the logic in *Green*, based a large portion of its analysis on the purposes behind the Confrontation Clause and noted that even if the literal language is not satisfied, the Clause's requirements are met where the purposes are satisfied.[44] Further, the Court declined to evaluate the actual reliability of the declarant's statements, holding that because counsel was afforded an adequate opportunity for cross-examination, there was sufficient reliability.[45]

The Court's purpose-oriented application of the Confrontation Clause in *Roberts* noticeably weakened the literal right to Confrontation. Moreover, the rules against hearsay and the exceptions to those rules essentially swallowed the Confrontation Clause. The prosecution had little barrier to the introduction of testimony where the witness was not at trial and not subject to cross-examination. Under *Roberts*, the prosecution only had to show that it had made a good faith effort to find the witness for trial to satisfy its burden of showing that the witness was unavailable.[46] Further, it was not necessary for the accused to have the actual opportunity to cross-examine the witness, so long as the testimony was found to be reliable, a seeming departure from the literal language requirements of the Confrontation Clause.[47] The Confrontation Clause continued to receive this dismissive treatment until the Supreme Court revisited the issue in 2004.

B. The Confrontation Clause Re-emerges in 2004

On March 8, 2004, the United States Supreme Court revisited the Confrontation Clause issue in *Crawford v. Washington*,[48] and expressly overruled the decision in *Roberts*.[49] The Court reformulated the standard for determining when the admission of testimonial hearsay statements in criminal trials is permitted under the Confrontation Clause and held that the reliability standard from *Roberts* was unreliable and unpredictable.[50]

In *Crawford* the defendant, who was charged with assault and attempted murder for allegedly stabbing a man, claimed self-defense at trial. The defendant's wife invoked marital privilege and did not testify, so the prosecution played a tape-recorded statement that the wife had given on the night of the incident. The recording was contradictory to

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44. *Id.*
45. *Id.* at 73.
46. *Id.* at 74.
47. *Id.* at 66, 74.
48. 541 U.S. 36 (2004).
49. *Id.* at 68.
50. *Id.* at 63.

the defendant's contention that the stabbing was in self-defense. In the lower court, the State was successful in introducing the recording into evidence because it bore an "adequate 'indicia of reliability'" and was trustworthy.[51]

The defendant objected to the admission and attempted to invoke the protection of the Confrontation Clause as it was understood in *Roberts*.[52] The defendant was convicted, but the conviction was overturned by the Washington Court of Appeals, which applyied a nine-factor test to determine the reliability of the statement. The reasons given by the Washington Court of Appeals for the reversal included: (1) many of the statements on the recording contradicted one another, (2) the witness said she may have closed her eyes, and (3) it was a recording of a very specific, question-driven interrogation.[53] Also, the prosecution argued that the statements were reliable because both the defendant's story and the wife's story were "'interlocked'" and recounted the same events leading up to the stabbing.[54] The court of appeals rejected this argument because the central issue—whether the stabbing was in self-defense—was the point where the statements diverged. The Washington Supreme Court reversed the court of appeals and reinstated the defendant's conviction.[55]

The United States Supreme Court granted certiorari to revisit the issue of whether certain out-of-court statements can be admitted into evidence without a cross-examination of the person who made the statements.[56] The defendant argued that the *Roberts* reliability test did not reflect the Framers' intention for the Confrontation Clause and asked the Court to reconsider the issue.[57] The Court first looked to the text of the Constitution, but as noted in *Roberts*, the literal language of the Confrontation Clause does not fully explain the way it should operate in practice.[58] Instead, the Court analyzed the history and purpose for the Confrontation Clause and observed that early in the civil law system, there was a tendency for abuse when witnesses were not required to come face-to-face with those that they accused.[59] Also, the literal right to confront those that accuse a person of a crime is a right

51. *Id.* at 38, 40.
52. *Id.* at 40.
53. *Id.* at 41.
54. *Id.*
55. *Id.*
56. *Id.* at 42.
57. *Id.*
58. *Id.* at 42-43.
59. *Id.* at 43.

that has been in existence since Roman times.[60] Because of the historical importance of the right, and in response to the abuses, early courts tightened application of the doctrine.[61] The Court noted that historically, the main purpose of the Sixth Amendment was to prohibit ex parte witness examinations—those that did not notify the defendant or allow him to rebut—from being admitted as evidence against the defendant.[62]

Importantly, the Court pointed out that the Confrontation Clause only applies to witnesses who "bear testimony" against the accused because only testimonial hearsay statements are subject to its requirements.[63] The Court then discussed what identifies a statement as testimonial and thus subject to the Confrontation Clause.[64] The Court declined to provide a complete definition of testimonial and instead provided minimal guidance for the application of the reformulated doctrine.[65] First, the Court stated that formal written statements that are given with the reasonable expectation that they will be used in the prosecution of a criminal are clearly testimonial.[66] Also, the Court noted that formal police interrogations are considered to be testimonial because they are "essentially investigative and prosecutorial."[67]

Next, the Court noted that the Framers intended the Confrontation Clause to prohibit testimonial statements to be admitted as evidence where the person who made the statements is not present at trial, unless that person is shown to be unavailable, and the defendant had an opportunity for cross-examination.[68] So, where a statement is shown to be testimonial, and the defendant does not have the opportunity to cross-examine the witness who made the statement, the Confrontation Clause operates to exclude that statement from the trial. Unlike the Court's decision in *Roberts*, the Court in *Crawford* decided that the ability to cross-examine was a dispositive factor and could not be satisfied by a showing of reliability.[69]

In overruling *Roberts*, the Court said that the test for reliability did not reflect the history and purpose behind the Clause discussed above in two respects: (1) it was too broad in that it did not distinguish

60. *Id.*
61. *Id.* at 44-45.
62. *Id.* at 49.
63. *Id.* at 51.
64. *Id.*
65. *See id.* at 51, 68.
66. *Id.* at 51-52.
67. *Id.* at 53.
68. *Id.* at 53-54.
69. *Id.* at 55-56.

between testimonial and nontestimonial statements, and thus treated all hearsay the same, and (2) it was too narrow in that some ex parte testimony was admitted when shown to be reliable.[70] Therefore, according to the Court, the test was too flexible and did not always adequately protect the right to confrontation.[71] The Court rejected the *Roberts* indicia of reliability standard and held that testimonial statements can only be admitted into evidence where the defendant is given the ability to cross-examine the declarant.[72] In his concurrence, Chief Justice Rehnquist criticized the majority's decision to leave out a comprehensive definition of testimonial and noted that prosecutors would be burdened by this deficiency.[73] The Court began to provide some guidance in its 2006 decision in *Davis v. Washington.*[74]

IV. COURT'S RATIONALE

Davis v. Washington[75] is a follow-up case to *Crawford v. Washington*[76] and analyzes two specific factual scenarios under the *Crawford* rule to further clarify what types of statements are testimonial and therefore subject to the Confrontation Clause.[77] In *Davis*, the first case, the Court analyzed whether the transcript of a 911 call is testimonial for purposes of the Confrontation Clause.[78] The defendant challenged the entry of the transcript into evidence based on the argument that it was testimonial, and it identified the defendant as the caller's attacker but did not afford the defendant an opportunity to cross-examine the caller because she did not appear at trial.[79] The Court noted that there are times when a statement will be subject to hearsay rules but not to the Confrontation Clause because the statement is not testimonial in nature.[80]

The Court further noted that when statements are made to police or law enforcement officials and the purpose of the statements is to enable the officials to "meet an ongoing emergency," the statements are not testimonial.[81] But when the statements are made to establish facts

70. *Id.* at 60.
71. *Id.*
72. *Id.* at 61.
73. *Id.* at 69 (Rehnquist, CJ., concurring).
74. 126 S. Ct. 2266 (2006).
75. 126 S. Ct. 2266 (2006).
76. 541 U.S. 36 (2004).
77. *Davis*, 126 S. Ct. at 2270.
78. *Id.*
79. *Id.* at 2271.
80. *Id.* at 2273.
81. *Id.*

that will later be used by the prosecution in a trial against a person about whom they were made, the statements are testimonial.[82] The Court then distinguished the facts in *Davis* from those in *Crawford.*[83] First, the victim in *Davis,* McCottry, was expressing facts as they were happening in an attempt to secure her safety by helping the police capture her attacker, not recounting facts for use in a later prosecution.[84] Second, it was clear that McCottry was faced with an ongoing emergency, unlike the victim in *Crawford.*[85] Also, the 911 operator asked questions that were necessary to resolve the present emergency, not to establish facts about the defendant.[86] Further, the Court noted, there is a notable difference in the level of formality in *Davis* and that of *Crawford.*[87] In *Crawford* the statements were responses to structured questions and were tape-recorded in a police station after the declarant was Mirandized.[88] In *Davis,* on the other hand, the declarant was on the phone in her home while hiding from her attacker, frantically answering questions, not as a witness, but as someone in an emergency situation.[89]

Not only is *Davis* distinguishable from *Crawford,* but it is also much different from any of the early cases in Confrontation Clause jurisprudence because none of those cases involved statements made in an ongoing emergency.[90] The Court also noted that portions of the 911 call could have included testimonial statements if the questioning changed from the type necessary to resolve the emergency to traditional police questioning that would be used in the trial against the attacker.[91] However, the parts of the transcript that identified Davis as McCottry's attacker did not appear to be after any such transition and thus were not testimonial.[92]

In the companion case, *Hammon v. Indiana,*[93] the Court held that the statements made during the course of Amy Hammon's interrogation were testimonial and thus subject to the Confrontation Clause.[94] The

82. *Id.* at 2273-74.
83. *Id.* at 2276.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 2276-77.
88. *Id.* at 2277.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. 126 S. Ct. 2266 (2006).
94. *Id.* at 2278.

Court noted that the task of determining whether these statements were testimonial was much easier than it was in *Davis* because the facts of *Hammon* are very similar to those in *Crawford*.[95] The interrogation in *Hammon* was a line of questioning in which the police officer was trying to establish whether there was criminal conduct at the Hammon home earlier in the evening.[96] The officer was not obtaining information in order to address an ongoing emergency.[97] The police officer did not Mirandize Amy Hammon like the officer did in *Crawford*, but the Court held that this difference is not legally significant to change the character of the statements from testimonial to nontestimonial.[98] Also, the investigation in *Crawford* was more formal than in *Hammon*, but the Court noted that it was significant that the officer in *Hammon* took Amy Hammon into a separate room to conduct the questioning.[99]

In both *Crawford* and *Hammon*, the declarants were forcibly separated from the person against whom they were testifying, the "statements [were] deliberately recounted," and the declarants were both responding to specific questions about potential criminal conduct.[100] The Court also noted that there are very significant differences between *Hammon* and *Davis*, most notably that *Davis* involved a cry for help and *Hammon* did not, and that these differences led to different results in the two cases.[101]

The Court also noted that there is not a sufficiently compelling reason to make the Confrontation Clause more flexible in domestic violence cases.[102] However, according to the Court, if there is a finding that there was some wrongdoing on the part of the defendant that caused the witness not to appear at trial—referred to as "forfeiture by wrongdoing"—then the defendant loses his or her right to confrontation.[103]

Justice Thomas declined to join the majority opinion and instead concurred in the Court's decision in *Davis* and dissented from the Court's decision in *Hammon*.[104] Justice Thomas opined that neither *Davis* nor *Hammon* implicated the Confrontation Clause and that in order to implicate the Clause there must be more formality in the state-

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 2279.
102. *Id.* at 2279-80.
103. *Id.* at 2280.
104. *Id.* at 2281 (Thomas, J., concurring in part and dissenting in part).

ments.[105] Justice Thomas focused on the historical formality surrounding the Confrontation Clause, which stemmed directly from the Framers' desire to exclude hearsay testimony that Queen Mary's English bail and committal statutes permitted.[106] Also, Justice Thomas pointed to the customary use of Miranda warnings to inform a person that any statement a person gives can be used against that person in court.[107] He stated that this necessary level of formality is not present in "a mere conversation between a witness or suspect and a police officer."[108] He further noted that the *Crawford* test was workable and closely matched the language of the Confrontation Clause, but that the Court in *Davis* changed that test and made it unworkable and overinclusive.[109] Thomas claimed that the Court's desire to avoid potential abuse by the prosecution—purposely avoiding the Confrontation Clause by using technically informal questioning methods—did not warrant such an overinclusive test.[110] He concluded that neither the 911 call in *Davis* nor the police questioning in *Hammon* was sufficiently testimonial to warrant the implication of the Confrontation Clause under *Crawford*.[111]

V. IMPLICATIONS

The main implication of *Davis v. Washington*[112] is that it provides guidance in how the Confrontation Clause operates by attempting to further define what constitutes testimonial evidence. In two specific factual scenarios, the Court has begun to outline a balancing test for determining whether a statement made to law enforcement personnel constitutes testimony. Also, it provides an example of nontestimonial statements given to law enforcement personnel. Therefore, prosecutors, judges, and law enforcement have a larger framework for analyzing whether testimonial evidence can be constitutionally permitted without the witness being present at trial and subject to cross-examination. With *Davis* and *Hammon v. Indiana*,[113] courts now have a broader

105. *Id.* at 2281-82.

106. *Id.* at 2281. These statutes required a formal oral examination of all suspects and witnesses within two days and a physical transmission of the statements to the judge hearing the case without the participation or appearance of the suspects or witnesses (*ex parte* examinations). *Id.*

107. *Id.* at 2282.

108. *Id.* at 2282-83.

109. *Id.* at 2280.

110. *Id.* at 2283.

111. *Id.* at 2284.

112. 126 S. Ct. 2266 (2006).

113. 126 S. Ct. 2266 (2006).

case-comparison basis for determining whether statements are testimonial or nontestimonial.

Even with the more precise definition of testimonial, prosecutors face a larger hurdle with the reformulation of the Confrontation Clause test. As noted in *Davis*, the Court is not willing to make the Confrontation Clause more flexible in domestic violence cases.[114] As a consequence of *Crawford v. Washington*[115] and *Davis*, domestic violence cases are more susceptible to dismissal than under *Ohio v. Roberts*[116] because the victims are "notoriously susceptible to intimidation or coercion" and therefore are less likely to appear to testify in court.[117] Without the presence of a victim in a domestic violence case, police reports and written affidavits are not admissible to the extent that they are testimonial. Without the witness, the reports, or the affidavits, the prosecution essentially has no case against the defendant. Therefore, in practice, prosecutors have a much greater burden to ensure that the victim comes to trial. Further, defense counsel has a much easier road than before *Crawford* and *Davis* because the defendant is very likely to prevail if the victim does not appear. Also, *Davis* places a greater burden on law enforcement personnel because the timing and level of formality of the questioning are key factors in determining whether the statements are testimonial or nontestimonial.

Justice Thomas, in his dissent, noted that this increased burden on the prosecution and law enforcement will result in a lack of consistent results under *Davis*.[118] Also, Justice Thomas indicated that the decision in *Davis* was too broad and makes many more statements qualify as testimonial than was intended by *Crawford*.[119] Thomas further noted that many of the statements that will be barred by the post-*Davis* Confrontation Clause interpretation would have previously been admissible hearsay (statements that are not testimonial do not implicate the Confrontation Clause and are instead governed by the rules against hearsay and the numerous exceptions to those rules).[120]

Davis only defines testimonial hearsay in the narrow category of statements made to law enforcement, and there are many more situations that will implicate the Confrontation Clause. Until the Court defines other types of testimonial hearsay, judges, prosecutors, and

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114. *Id.* at 2279-80.
115. 541 U.S. 36 (2004).
116. 448 U.S. 56 (1980).
117. *Davis*, 126 S. Ct. at 2279-80.
118. *Id.* at 2283 (Thomas, J., concurring in part and dissenting part).
119. *Id.* at 2281.
120. *Id.*

defense attorneys will have to use the framework provided in *Davis*. The decision is a single step of the many steps necessary for a full understanding of testimonial for purposes of the Sixth Amendment's Confrontation Clause.

LINDSAY BREWER