*Memorandum*

To: Professor Friedman and the Confrontation Blog
From: PDS Special Litigation Division, and Division Law Clerk Dawn Davison
Re: Implications of Summary Confrontation Decisions By The Supreme Court at the End of Its Term
Date: August 8, 2005

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As we have noted elsewhere, the Supreme Court's recent decision in *Davis* is a strongly pro-confrontation decision. It categorizes as testimonial a huge category of statements – all post-crime statements to law enforcement officers – that were regularly admitted without the benefit of confrontation both in the *Roberts* era and after *Crawford*. It also strengthens the confrontation guarantee by holding that reports of criminal activity made to law enforcement officers and their agents may only be deemed nontestimonial where there is (1) an actual on-going emergency, and (2) the statements are solely directed at resolving that emergency situation.

The Court's subsequent dispositions of 14 cases in the wake *Davis* appears to confirm this interpretation. For the purposes of this memo, we have divided our discussion of these decisions into two categories: The cases in which grant, vacate and remand orders were issued ("GVR" cases) and the cases in which the Court denied Certiorari. We will have a longer explanation of where these summary decisions fit within our overall view of *Davis* in a forthcoming article on the subject.

***The GVR Cases***

At the end of the term, the Court granted certiorari, vacated the judgment, and remanded for further proceedings in 8 cases in which the lower courts had denied the defendant's challenge to the admission of unconfronted statements made to law enforcement officers: *Anderson v. State*, 111 P.3d 350 (Alaska App. 2005), *cert. granted, vacated, and remanded,* 126 S. Ct. 2983 (2006); *People v. Castellanos*, 2005 WL 1763623 (Cal. App. 2005), *cert. granted, vacated, and remanded,* 126 S. Ct. 2965 (2006); *People v. Thomas*, 2005 WL 2093065 (Cal. App. 2005), *cert. granted, vacated, and remanded,* 126 S. Ct. 2983 (2006); *State v. Warsame*, 701 N.W.2d 305 (Minn. App. 2005), *cert. granted, vacated, and remanded,* 126 S. Ct. 2983 (2006); *State v. Wright*, 701 N.W.2d 802 (Minn. 2005), *cert. granted, vacated, and remanded,* 126 S. Ct. 2979 (2006); *State v. Forrest*, 596 S.E.2d 22 (N.C. App. 2004), *cert. granted, vacated, and remanded,* 126 S. Ct. 2977 (2006); *State v. Lewis*, 619 S.E.2d 830 (N.C. 2005), *cert. granted, vacated, and remanded,* 126 S. Ct. 2983 (2006); *United States v. Billingslea*, 144 Fed. Appx. 98 (11th Cir. 2005), *cert. granted, vacated, and remanded,* 126 S. Ct. 2980 (2006).

The Supreme Court has explained that GVR orders are appropriate only where "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and

where it appears that such a redetermination may determine the ultimate outcome of the litigation."[1] By presenting additional factual scenarios in which confrontation is likely required, the post-*Davis* GVRs both reinforce the explicit holdings of *Davis* and suggest additional pro-confrontation nuances in the Court's categorization of testimonial and nontestimonial statements to law enforcement officers.

The Supreme Court's decision to remand these cases for further consideration in light of *Davis* indicates that the Court intends to place strict limitations on what constitutes an emergency-resolving, nontestimonial statement to law enforcement officers.

First, it appears that any statement falling within this category must relate, as the nontestimonial statements did in *Davis*, to an emergency that is ongoing and actual, not past, future, or theoretical. *Anderson*, *Thomas* and *Lewis* all involved police interviews of the complainant more than a few minutes after the criminal incident.[2] But the Court also remanded *Forrest*, where the complainant made a statement *seconds after* she was rescued by police – a statement the lower court had been willing to construe as "part of the criminal incident itself"[3] – thereby resolving the emergency. Similarly, the Court remanded *Wright* – where the lower court tried to exempt from confrontation a call to 911 by the complainant and her sister made after defendant allegedly pulled a gun on her, while defendant, who had keys to the apartment, was still lurking in the neighborhood[4] – and *Warsame* – where the lower court tried to exempt from confrontation a statement by a complainant made to police while the defendant was still at large and she was en route to the police station purportedly to seek police protection[5] – two cases in which the witnesses possibly faced a potential threat of *future* danger, but were not in actual danger at the time they made their statements.

Second, it appears that this category of nontestimonial emergency-resolving statements will be strictly limited to statements made by witnesses who *themselves* face an emergency situation, and that the possible danger to the general public posed by a defendant who is at large will be insufficient to support a determination that a statement is nontestimonial. *Wright* and *Warsame* seem to support this proposition, as do *Castellanos* – where the lower court tried to exempt from confrontation a statement made by a passenger in a high speed car chase made to police immediately after the car crashed and while Castellanos was fleeing on foot[6] – and *Billingslea* – where the lower court tried to exempt from confrontation a statement made by a witness who had interacted with Billingslea in the course of his flight from police, but spoke to police at some point later in time when Billingslea posed no threat to him.[7]

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[1] *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

[2] *Anderson,* 11 P.3d at 351; *Thomas*, 2005 WL 2093065, at *2; *Lewis*, 619 S.E.2d at 832.

[3] *Forrest*, 596 S.E.2d at 280.

[4] *Wright*, 701 N.W.2d at 804-05.

[5] *Warsame*, 701 N.W.2d at 307.

[6] *Castellanos*, 2005 WL 1763623 at *2.

[7] Government's Supplemental Brief *United States v. Billingslea*, 2004 WL 2565964, at *6-7, 11-12.

Third, it appears that this category of nontestimonial, emergency-resolving statements will be limited to statements, as in *Davis*, that provide information critical to resolving the particular emergency presented. Thus, the Court remanded in *Anderson* where the complainant, who was severely injured and required medical attention, told the responding police officers that "Joe [Anderson] had hit him with a pipe."[8] Likewise, the Court remanded in *Lewis* where the complainant, who had been badly bruised and was purportedly in shock, recounted for the police how she had been beaten and gave the police a description of her attacker.[9] As noted above, *Anderson* and *Lewis* can both be read as cases where the unconfronted statements were clearly testimonial because the defendant had left the scene, the crime was over, and there was no ongoing emergency situation. Or, if the emergency is redefined as the complainants' need for medical attention, these cases can be read as decisions in which the complainants' statements to police discussing the crime and identifying their assailants – unlike in *Davis* where the ongoing emergency was the assailant's continued presence at the scene – had no bearing on the resolution of that particular emergency.[10] Under the latter reading, these cases indicate that the Court will not permit the definition of the ongoing emergency to be manipulated so as to allow broader admission of unconfronted accusatory statements and statements of identity.

Apart from these limits on nontestimonial, emergency-resolving statements, the Court's GVRs appear to reinforce the unimportance of the open-ended and informal nature of preliminary police questioning or the absence of any questioning at all when determining if a statement is testimonial. A number of the lower court decisions erroneously distinguish such "informal" statements as nontestimonial. For example, the lower courts in *Anderson* and *Warsame* particularly noted that the police had only asked the complainants "what happened,"[11] an inquiry that the lower court in *Anderson* concluded "does not seem to fall within the category of formal, official, and systematic questioning."[12] Likewise, the lower court in *Thomas*, highlighted the fact that the statement was the product of "an unstructured interaction between officer and witness [which] bears no resemblance to a formal or informal police inquiry that is required for a police interrogation."[13] And the lower court in *Forrest* relied upon the fact that the challenged statement had not been elicited by police because the complainant had "immediately abruptly started talking" to the police after the defendant was arrested.[14]

Finally, if there were any doubt after *Davis*, the GVRs demonstrate that whether or not a statement is testimonial is an objective inquiry and does not turn on the subjective emotional state of the witness or the application of a state hearsay exception for excited utterances. Indeed, in all but one of the cases in which the Court remanded, the lower courts had improperly relied

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[8] *Anderson*, 111 P.3d at 351.

[9] *Lewis*, 619 S.E.2d at 832-33.

[10] In *Davis*, the Court specifically noted that establishing the identity of Ms. McCottry's assailant was necessary to resolve the ongoing emergency – the ongoing attack – so that the police officers who were being dispatched to rescue her "might know whether they would be encountering a violent felon." 126 S. Ct. at 2276.

[11] *Anderson*, 111 P.3d at 351; *Warsame*, 701 N.W.2d at 307.

[12] *Anderson*, 111 P.3d at 353.

[13] *Thomas*, 2005 WL 2093065, at *5 (internal quotation and citation omitted).

[14] *Forrest*, 596 S.E.2d at 280.

upon, to some extent, the "excited" emotional state of the witness when making the statement in order to find that the right to confrontation was not triggered.[15]

***<u>The Denial Cases</u>***

In addition to the GVRs, the Court has denied review in 6 confrontation cases since *Davis*: *United States v Brito*, 427 F.3d 53 (1st Cir. 2005), *cert. denied,* 126 S. Ct. 2983 (2006); *State v Greene*, 874 A.2d 750 (Conn. 2005), *cert. denied*, 126 S. Ct. 2981 (2006); *Commonwealth v. Foley*, 833 N.E.2d 130 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006); *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005), *cert. denied*, 126 S. Ct. 2982 (2006); *State v. Hembertt*, 696 N.W.2d 473 (Neb. 2005), *cert. denied*, 126 S. Ct. 2977 (2006); *State v. Quintero*, 2005 WL 941004 (Tenn. Crim. App. 2005), *cert. denied*, 126 S. Ct. 2979 (2006).

The Supreme Court may deny certiorari for any number of reasons, and it is important not to read too much into the tea leaves of these denials.[16] Even so, the denials suggest that the Court did not believe reversible error had occurred in these cases, and, if that is the case, they appear to be consistent with the pattern of rulings emerging from *Davis* and the GVRs.

In two cases, the Court denied state petitions for review where lower courts appear to have properly anticipated the rule of *Davis* and categorized statements to police as nontestimonial and testimonial based on the existence of an ongoing emergency. Thus in *Foley*, a case where the police responded to a report of ongoing domestic violence, the lower court properly held that initial statements in response to the police question "where is he?" (which prompted a child to point to another room) and an inquiry whether anyone needed medical assistance (no one did) were nontestimonial, but statements made after the defendant was apprehended and medical care was declined were testimonial and admitted in violation of the Confrontation Clause.[17] Likewise, in *Gonsalves*, the lower court properly held that statements to police may only be nontestimonial if there is a "concrete concern of impending harm" and that the statements complainant made to police accusing her boyfriend of attacking her were the product of investigatory interrogation and testimonial because the defendant was no longer present and the "situation had diffused."[18]

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[15] *Anderson*, 111 P.3d at 354; *Castellanos*, 2005 WL 1763623, at *2; *Thomas*, 2005 WL 2093065, at *5; *Warsame*, 701 N.W.2d at 309; *Wright*, 701 N.W.2d at 812-13; *Forrest*, 596 S.E.2d at 280-81; *Lewis*, 619 S.E.2d at 844.

[16] *Teague v. Lane*, 489 U.S. 288, 296 (1989).

[17] *Foley*, 833 N.E.2d at 132-33.

[18] *Gonsalves*, 833 N.E. 2d at 551, 555-56, 561. The lower court's decision in *Gonsalves* might also provide some indication of how the Supreme Court will address another category of statements not at issue in *Davis/Hammon* – those made in response to questions by people who are not law enforcement officers. The lower court held that these statements may be testimonial if "a reasonable person in the declarant's position would anticipate the statement being used against the accused in investigating and prosecuting a crime." *Id.* at 558. Under this analysis, complainant's statements to her mother, before police arrived, were deemed nontestimonial. The lower court noted that

In four additional cases, the Court denied review where the results – if not the rationales – were in accord with the rule of *Davis*. In *Brito, Hembertt, Quintero* and *Greene*, the lower courts deemed nontestimonial statements made during an ongoing emergency where the statements directly related to the resolution of that emergency. In *Brito* and *Hembertt*, the lower courts properly deemed nontestimonial statements made to police officers during ongoing emergencies: a 911 call made seconds after a shooting while the caller was still pinned down by the shooter,[19] and a statement to police officers responding to a call of ongoing domestic abuse where the defendant was still on the scene and armed.[20] In *Quintero*, the statements – "Jose, stop, you're going to kill me" and "Jose, stop, you're killing me" – were made by the complainant while she was on the phone with a friend seeking help and the crime was ongoing.[21] Thus they fall outside of the category of statements to law enforcement discussed in *Davis*, but they certainly conform to the distinction the Court drew in *Davis* between nontestimonial emergency-resolving statements and testimonial investigatory statements. Finally, in *Greene*, the court properly deemed nontestimonial statements in which the complainant told a police officer he had been shot but declined an offer of an ambulance.[22] To the extent *Greene* can be read as a merits denial (and there are a number of reasons why it might not be[23]), it appears to be the flip side of the situation presented in *Anderson* and *Lewis*, where the complainant's accusatory statements to police were not objectively relevant to resolving an ongoing emergency if that emergency was defined as the complainant's need for medical attention. In *Greene*, the statements to police *were* limited to information related to the complainant's injury. Indeed, when the police tried to elicit information relevant to their investigation, the complainant was unable to assist them.[24] Had the complainant been able to identify the shooter for the police, however, such a statement would have been testimonial under *Davis,* because such statements, like the statements in *Anderson* and *Lewis*, would only have been relevant to the criminal investigation.

Thus, the GVRs and Certiorari denials in the wake of *Davis* appear to follow a pattern that further clarifies and reinforces the rule of *Davis* where statements made to police are (1) testimonial if they concern a completed crime, however recently completed; (2) testimonial if they are made while there is an ongoing emergency but, objectively analyzed, the statements volunteered or elicited are relevant to a criminal investigation and not limited to the resolution of

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the purpose of the mother's questions was to understand what was going on and that neither mother nor complainant had contacted the police, nor were they even aware that the police had been contacted. *Id.* at 561-62.

[19] *Brito*, 427 F.3d at 56, 62.

[20] *Hembertt*, 696 N.W.2d at 842-43, 851.

[21] *Quintero*, 2005 WL 941004, at *1, 10-12.

[22] *Greene*, 874 A.2d at 772, 775.

[23] Specifically, the confrontation issue in the case suffered from substantial preservation problems. *Id.* at 772. Moreover, it is hard to see how any confrontation error in the case would have affected the verdict because (1) defendant had already pleaded guilty to possessing the weapon used in the shooting, *id.* at 757; (2) similar statements made in medical records were not challenged, *id.* at 772; and (3) the challenged statements were not accusatory as to Mr. Greene and appear to have had minimal evidentiary value. *Id.*

[24] *Id*.

that particular ongoing emergency; and (3) nontestimonial if there is an ongoing emergency and the statements volunteered or elicited are limited to the resolution of that particular emergency.