No. 09-150

In The
Supreme Court of the United States

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

RICHARD PERRY BRYANT,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

PETITIONER'S REPLY BRIEF

KYM L. WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals

LORI BAUGHMAN PALMER*
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
(313) 224-2698
lpalmer@co.wayne.mi.us

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

ARGUMENT

Petitioner asks this Court to apply the test set forth in *Davis v. Washington*.[1] There is no need to expand its terms, but there is a need to clarify that those terms should not be ignored, substituted, or artificially limited. The objective standard specified in *Davis* provides a workable standard for determining whether the primary purpose of the interrogation was to enable police to meet an ongoing emergency. There is no need to replace this standard with a subjective standard, which would create additional uncertainty and require greater speculation by the courts. Similarly, the language used in the *Davis* test should be respected. The Court chose the term "ongoing emergency," not "ongoing criminal event," and nothing in the language of the opinion limits the word "emergency" to "criminal conduct." To so hold unnecessarily rewrites the test in *Davis*. Finally, the common-law development of the res-gestae doctrine does not support defendant's proposed bright-line temporal rule, as the historical application of the doctrine varied and the rule itself developed as an aspect of the hearsay rule, not the right of confrontation.

---

[1] *Davis v. Washington*, 547 U.S. 813, 822 (2006).

I. The objective "primary purpose" test set forth in *Davis* should not be abandoned in favor of a subjective test focused solely on the declarant.

Respondent begins by quoting the test set forth in *Davis v. Washington*:

> 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.[2]

Respondent next asserts, however, that the determination whether an "ongoing emergency" existed "must be conducted from the perspective of the witness," and that the "proper perspective in analyzing the character of the statement is from the point of view of the declarant."[3] Such a shift to a subjective, witness-focused inquiry would be a radical departure from the *Davis* test, which focuses on the primary purpose of the interrogation as indicated by the objective circumstances.

---

[2] Respondent's Brief on the Merits, p. 11; *Davis, supra,* 547 U.S. at 822 (emphasis added).

[3] Respondent's Brief on the Merits, pp. 12, 13.

Further, Respondent's proposed standard would inject additional uncertainty into the determination whether an ongoing emergency existed, as courts would be tasked with determining the subjective perspective of a witness who is no longer available, and possibly no longer alive. Requiring courts to step into the shoes (and minds) of declarants is unnecessary and unwieldy. *Davis*'s focus on the primary purpose of the interrogation as objectively indicated by the circumstances better equips courts to determine whether statements are testimonial or nontestimonial – this Court should not jettison the *Davis* test in favor of a subjective standard focused solely on the declarant.

II. Nothing in the *Davis* opinion limits the term "emergency" to criminal events.

The Court in *Davis* stated clearly that statements made under circumstances objectively indicating that the primary purpose of the interrogation was to enable police to meet an ongoing *emergency* were nontestimonial.[4] Respondent argues that the term "emergency" should be limited to "actual criminal behavior or threats," replacing the term "ongoing emergency" with "ongoing criminal event."[5] To so hold effectively rewrites the test set forth in *Davis*. Had the Court in *Davis* wished to refer only to ongoing

---

[4] *Davis*, *supra*, 547 U.S. at 822.

[5] Respondent's Brief on the Merits, pp. 25, 27.

criminal events, it would have said exactly that. Instead, the Court chose the word "emergency," with no accompanying language limiting that term to criminal behavior or threats occurring at the exact time of the statement. Similarly, nothing in the *Davis* opinion limits the term "emergency" to a criminal event – it is hardly an expansion of the term "emergency" to include medical emergencies within its definition.

III. The res-gestae doctrine does not support Respondent's proposed temporal rule.

Finally, Respondent argues that the bright-line temporal rule he urges is consistent with the common-law doctrine of res-gestae.[6] He relies in particular on *People v. Wong Ark*, which held that a shooting victim's identification of her assailant shortly after the shooting occurred was not admissible as res-gestae – that is, as part of the description of the event itself.[7] But as the *Wong Ark* court itself acknowledged, there was no settled historical understanding that the res-gestae rule properly excluded such evidence.[8] In other cases, courts viewed the res-gestae rule as extending to statements made immediately or

---

[6] Respondent's Brief on the Merits, pp. 33-36.

[7] *People v. Wong Ark,* 30 P. 1115 (Cal. 1892).

[8] *Wong Ark,* 30 P. at 127, 133.

very shortly after the event described.[9] And in any event, as its application in civil cases such as *Mosley* confirms, the res-gestae rule developed as an aspect of the hearsay rule, not as an aspect of the right of confrontation. This Court has made clear that the hearsay rule and the confrontation right are not co-extensive.[10] The equivocal common-law development of the res-gestae rule, therefore, provides no support for the rule Respondent proposes.

---

[9] See, *e.g.*, *Rex v. Foster*, 6 Car. & P. 325, 172 Eng. Rep. 1261 (1834); *Commonwealth v. M'Pike*, 57 Mass. (3 Cush.) 181, 184 (1849); *Insurance Co. v. Mosley*, 75 U.S. (8 Wall.) 397 (1869).

[10] See *Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("[N]ot all hearsay implicates the Sixth Amendment's core concerns. An off-hand remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.").

CONCLUSION

Wherefore, Petitioner respectfully requests that this Court reverse the Michigan Supreme Court.

Respectfully submitted,

KYM L. WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals

LORI BAUGHMAN PALMER*
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
(313) 224-2698
lpalmer@co.wayne.mi.us

**Counsel of Record*