

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 77507-9
Respondent,)	
)	RESPONSE TO STATE'S
v.)	MOTION TO STRIKE AND
)	REQUEST FOR COURT TO
KIM MASON,)	CONSIDER ADDITIONAL
Petitioner.)	ISSUE

I. IDENTITY OF MOVING PARTY

COMES NOW the petitioner, by and through the undersigned attorney, and upon all the files, records and proceedings herein, moves this Court for the relief designated below.

II. STATEMENT OF RELIEF SOUGHT

So that the ends of justice might be served, Mr. Mason moves the court for the entry of an order denying the State's motion to strike and expanding the scope of review to consider an issue raised by the Court of Appeals decision that is contrary to the recent United States Supreme Court decision in Davis v. Washington, __ U.S. __, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), pertaining to statements to non-governmental officials based on recent developments in the law, and permitting the State to reply to

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this additional issue.

III. GROUNDS FOR RELIEF SOUGHT

As grounds for and in support of this motion petitioner avers the following:

1. The undersigned counsel represents Mr. Mason in his appeal of his conviction for first degree aggravated murder, for which he received a life sentence without the possibility of parole.
2. This Court accepted review of Mr. Mason's petition for review, which assigned error to the Court of Appeals' incorrect legal analysis regarding the admissibility of numerous statements by a non-testifying declarant to various police officers and police employees.
3. The published Court of Appeals decision also addressed the admissibility of statements to non-police employees, ruling that statements to an emergency room doctor, among others, did not violate Crawford, interpreting Crawford as requiring "government officials must somehow be involved in the creation of a statement if the statement is to be deemed testimonial." State v. Mason, 127 Wn.App. 554, 565 & n.25, 126 P.3d 34 (2005), rev. granted, 157 Wn.2d 1007 (2006).

4. Mr. Mason's petition for review was filed in July 2005 but this Court deferred its decision several times, apparently awaiting the decision from the United States Supreme Court in Davis v. Washington, __ U.S. __, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (decided June 19, 2006).

5. In Davis, the United States Supreme Court elaborated upon the history of the Sixth Amendment beyond that contained in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and explained that the Sixth Amendment's roots include the requirement of confrontation for statements containing accusations of a completed crime made to private parties. 126 S.Ct. at 2277. Davis stated that cases such as King v. Brasier, 1 Leach 199, 200, 168 Eng. Rep. 202 (1779), would be "helpful" to Mr. Davis and thus instructive in defining the scope of the confrontation clause had the facts been more akin to those that occurred in Mr. Davis's case. In Brasier, the court excluded a mother's testimony recounting her daughter's allegation that she had been recently assaulted on the grounds that the victim did not testify at trial.

5. The State correctly notes that this issue was not

previously presented to this Court.

6. This Court should expand the scope of review to consider this issue since it is closely connected to the issues raised in the case at bar and this case is not only a suitable vehicle but also an appropriate platform to address this newly unfolding area of the law.

7. Crawford substantially altered the legal analysis for Confrontation Clause violations but did not address all pertinent factual situations. Even though the decision is predicated on age-old legal doctrines, this historical focus is now the dispositive arena for measuring the scope of the right of confrontation, which simply was not the case before Crawford was decided.

8. Despite substantially revising the method of Confrontation Clause analysis, Crawford took pains to limit itself to the facts of that case and did not explain its understanding of the Sixth Amendment in other scenarios, which it left for another day. Davis, 126 S.Ct. at 2273; Crawford, 541 U.S. at 52.

9. Davis was the first opportunity taken by the United States Supreme Court to further explain its understanding of “testimonial” statements in the context of fact-patterns beyond

those at issue in Crawford. Davis, 126 S.Ct. at 2273-74.

10. Davis expressly opens the door to Sixth Amendment protection for statements describing a crime to a non-police officer. 126 S.Ct. at 2277.

11. Including the issue of whether statements made to an emergency room doctor fall within the scope of the right of confrontation in the case at bar serves the interest of justice as well as this Court's interest in judicial economy and efficient use of resources.

12. The parties have already presented this Court with substantial briefing on the history and scope of the Confrontation Clause as it applies to the facts of this case and any additional briefing will not need to be substantial. The State's supplemental brief to this Court was 43 pages long, substantially exceeding the traditional 20-page limit, and almost entirely focused on confrontation clause issues including a discussion of Brasier, thus demonstrating why this case is a good vehicle for expanding the legal review to add an additional issue that was not present in an obvious or clear way before Davis was decided.

13. The prosecutor in this case was also the Respondent in

Davis and is therefore well-aware and fully informed of the historical analysis presented in the briefing in that case and discussed in the Davis decision. Therefore, the prosecutor is particularly well-placed to address this additional issue.

14. It was far from clear at the time this case was initially briefed that the scope of the confrontation clause extended to statements to non-police officers. As the Court of Appeals decision demonstrates, that court believed Crawford was strictly limited to statements made to police officers, reading the factual discussion as a limit to the legal scope of the ruling. 127 Wn.App. at 565.

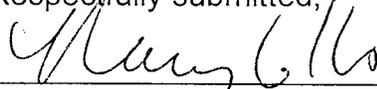
15. Mason has no objection to the prosecution filing additional briefing addressing this topic.

IV. CONCLUSION

Mr. Mason respectfully requests this Court deny the State's motion to strike and consider the additional fact pattern presented in the supplemental brief regarding the scope of the right to conform witnesses.

DATED this 12th day of September 2006.

Respectfully submitted,



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Washington Appellate Project - 91052
Attorney for Appellant

~~Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.~~

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name



Date

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Done in Seattle, Washington