

No. 22023-1-III

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

DUANE JONATHON KOSLOWSKI,

Appellant.

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APPELLANT'S CORRECTED SUPPLEMENTAL BRIEF  
REGARDING THE APPLICATION OF *DAVIS v. WASHINGTON*

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## I. QUESTIONS PRESENTED

1. Under the ruling of *Davis v. Washington*, were the victim's statements to the investigating officer testimonial?
2. Were Koslowski's rights under the Confrontation Clause violated when the State introduced out-of-court statements made by the non-testifying victim to the responding police officers?

## II. SUPPLEMENTAL STATEMENT OF THE CASE

On November 13, 2002, Yakima Police Officers Nolan Wentz and Michael Kryger responded to a report of a robbery at 1103 South 34th Street in Yakima, Washington. (RP III 320-21, 330-32)<sup>1</sup> When Wentz arrived he questioned the victim, Violette Alvarez, about what happened, and she responded in detail. (RP1 112, 114) Alvarez described the incident, and showed the officer the locations involved. (RP1 112-14)

Alvarez died prior to trial of causes unrelated to the crime and was therefore unavailable to testify at trial. (RP111 309) As a result, the State sought to admit her statements to police under the "excited utterance" exception to the hearsay rule, ER 803(a)(2).

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<sup>1</sup> "RP1" refers to the pretrial hearing on January 13, 2003, contained in the transcript labeled Volume 1. "RP III" refers to the trial proceeding on January 29, 2003, contained in the transcript labeled Volume III.

(RP1 119) The trial court agreed, and allowed the officers to testify about Alvarez's statements. (RP1 121)

The officers testified that Alvarez told them she was outside her home unloading grocery bags from her car, when she saw a dark-colored foreign car drive by. (RP III 323-24, 327, 333) Three men got out of the car and approached her. Alvarez told the officers that she thought the three men were Hispanic. (RP III 327, 333, 344, 347) One man put what Alvarez believed was a gun against her back and told her in English to go into the house. (RP III 323, 333-34, 348) However, Officer Kryger was not certain whether Alvarez told him she actually saw the gun or whether she just told him she believed it was a gun. (RP III 348)

Once inside the house, the men ordered Alvarez to the floor, then tied her hands and covered her face with a T-shirt. (RP III 324, 334) Alvarez heard the men rummaging around the house, heard the contents of her purse being dumped onto the floor, and heard the men speak to each other in Spanish. (RP III 324, 335-36) After she heard the men leave, Alvarez called the police. (RP III 324, 336)

Alvarez told the officers that one of the men took a ring off of her finger. (RP III 335) She also told the officers that the men took

her wallet, credit cards, jewelry, and a DVD player. (RP III 337)

A jury convicted Koslowski of first degree robbery, first degree unlawful possession of a firearm, and first degree burglary, related to this incident. (CP 32-43) On appeal, he challenged the admission of the statements, arguing that their admission violated his constitutional right to confront witnesses. (See Appellant's Second Supplemental Brief, on file with the Court.) This Court disagreed and affirmed his convictions. (See Opinion dated October 20, 2005, No. 22023-1-III.) Koslowski sought review of this issue to the State Supreme Court.

While Koslowski's petition was pending, the United States Supreme Court issued an opinion directly relevant to this case, *Davis v. Washington*, 126 S. Ct. 2266, \_\_ U.S. \_\_, \_\_ L. Ed. 2d \_\_ (2006). Subsequently, the State Supreme Court granted Koslowski's petition, and remanded the case to this Court for reconsideration in light of *Davis*. This Court has now asked for supplemental briefing on the application of the *Davis* opinion.

### **III. SUPPLEMENTAL ARGUMENT & AUTHORITIES**

The Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." This guarantee applies to state

prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). Confrontation is a fundamental “bedrock” protection in a criminal case, and requires evidence be tested by the adversarial process. *Crawford v. Washington*, 124 S. Ct. 1354, 1359, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). The Confrontation Clause thus requires in-person testimony, or a full opportunity for cross-examination where the witness was unavailable, in order to admit out-of-court statements as “testimonial evidence.” *Crawford*, 124 S. Ct. at 1364.

The *Crawford* Court recognized that “testimonial” statements include “*ex-parte* in-court testimony or its functional equivalent.” 124 S. Ct. at 1364. Such evidence falls within the “core class of ‘testimonial’ statements.” 124 S. Ct. at 1364. This “core class” includes not only formal affidavits and confessions to police officers, but also “pretrial statements that declarants would reasonably expect to be used prosecutorially.” 124 S. Ct. at 1364. This includes “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *Crawford*, 124 S. Ct. at 1364.

*Crawford* further explained that “police interrogation” for

purposes of the Confrontation Clause must not be viewed in a technical or legal sense. 124 S. Ct. at 1354 n.4. Unlike *Miranda* issues, "interrogation" in the context of the Confrontation Clause embraces a wide scope of governmental conduct and should be viewed in a colloquial manner. *Crawford*, 124 S. Ct. at 1364-65 n.4.

Recently, in *Davis v. Washington*, 126 S.Ct. 2266, \_\_\_ U.S. \_\_\_, \_\_\_ L. Ed. 2d \_\_\_ (2006) (consolidated with a second case, *Hammon v. Indiana*), the Supreme Court applied its *Crawford* holding to statements made to a 911 operator and to responding officers. The facts presented by the *Hammon* case are relevant here. In that case, police officers responded late to a "reported domestic disturbance" at the home of Hershel and Amy Hammon. They found Amy alone on the front porch, appearing "somewhat frightened," but she told them that "nothing was the matter." She gave them permission to enter the house, where officers separated Amy and Hershel. One officer went to the living room to talk with Amy, and asked her what had occurred. After hearing Amy's account, the officer had her fill out and sign an affidavit. *Davis*, 126 S. Ct. at 2272.

The State charged Hershel with domestic battery and with

violating his probation. Amy was subpoenaed, but she did not appear at his subsequent bench trial. The State called the officer who had questioned Amy, and asked him to recount what Amy told him and to authenticate the affidavit. Hershel's counsel objected, but the trial court allowed the statements as "excited utterances." *Davis*, 126 S. Ct. at 2272.

The *Davis* Court first iterated the following general rule for determining whether statements made during both formal and informal police questioning are testimonial:

Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: 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.

126 S. Ct. at 2273-74 (emphasis added).<sup>2</sup>

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<sup>2</sup> The Court noted that, although it referred to police "interrogation," it did not intend to limit the holding to cases involving formal police interrogation. The Court states that this is "not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial." 126 S. Ct. at 2274 fn. 1.

The Court then applied this rule to the facts of the *Hammon* case, and found that Amy's statements to the officer were "testimonial." The Court states:

It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal conduct[.] There was no emergency in progress; the interrogating officer testified that he heard no arguments or crashing and saw no one throw or break anything. . . . Amy told them that things were fine . . . and there was no immediate threat to her person. . . . [The officer] was not seeking to determine . . . "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime[.]

126 S. Ct. at 2278.

The facts of this case are similar and require the same conclusion. There was no emergency or current crime in progress when Officer Wentz arrived at Alvarez's home. There was no immediate threat to Alvarez's safety. Wentz was not seeking to determine what was happening, but instead was trying to determine what *had* happened. The purpose of the investigation and questioning were to gather information and investigate a possible past crime, and to gather facts that were potentially relevant to later criminal prosecution. *Davis*, 126 S. Ct. at 2278.

In addition, the declarations made by Alvarez fall squarely

within "pretrial statements that declarants would reasonably expect to be used prosecutorially," that comprise the "core class" of testimonial evidence protected by the confrontation clause. *Crawford*, 124 S. Ct. at 1364. The nature of the conversation between Alvarez and the officers clearly demonstrates that the purpose was to gather evidence to use in a criminal investigation and prosecution. Any reasonable person in Alvarez's position would understand that her statements were supplying evidence to the police for a criminal investigation, and that criminal proceedings would likely follow.

Alvarez's statements are clearly "testimonial" under the standards set forth in both *Crawford* and *Davis*. The statements made up the bulk of the evidence against Koslowski on the Alvarez incident counts. The statements provided the only evidence describing the alleged crime, the alleged participants, or the possible presence of a gun. The protection offered by the Confrontation Clause is acutely applicable in this case, and the use of the statements clearly violated the holdings of *Crawford* and *Davis*.

#### IV. CONCLUSION

Alvarez's statements to the responding officers fall squarely

within the broad definition of "testimonial" because any reasonable person would understand that they could be used prosecutorially, and because they were made to officers investigating a possible past crime. Because Alvarez could not appear for trial or otherwise submit to cross-examination, Koslowski's right to confront the witnesses against him was violated, and a new trial is required.

DATED: November 27, 2006



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OF THE STATE OF WASHINGTON

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CERTIFICATE OF MAILING

I, Stephanie C. Cunningham, certify that on this day I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of the corrected COVER PAGE, the corrected PAGE ONE and the corrected PAGE NINE of Appellant's Corrected Supplemental Brief Regarding the Application of *Davis v. Washington*, and this CERTIFICATE OF MAILING, addressed to:

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