In The
Supreme Court of The United States
October Term, 2008
No. 09-150

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner,

Vs.

RICHARD PERRY BRYANT
Respondent.

On Petition for Writ of Certiorari
To the Michigan Supreme Court

Brief in Opposition to Petition for Writ of Certiorari

PETER JON VAN HOEK*
Assistant Defender
State Appellate Defender Office
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833

***Counsel of Record**

Table of Contents

Index of Authorities

Statement of Material Proceedings and Facts

Respondent concurs with the Statement of Material Proceedings and Facts included within the Petition for Writ of Certiorari, except to add that Mr. Covington told the investigating officers that the shooting occurred at a location six blocks from the gas station and approximately 30 minutes prior to the arrival of the police. The evidence of these out-of-court statements was admitted at Respondent's trial, over defense objection, as excited utterances under Michigan Rule of Evidence 803(2).

Response to Petitioner's Reasons for Granting the Writ

In the Petition to this Court, Petitioner argues that the Court should grant the writ and subsequently overturn the decision of the Michigan Supreme Court, which applied this Court's authority of *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006), to hold that the alleged statements made by the declarant in this matter in response to police questions were testimonial and thus inadmissible under the Confrontation Clause of the Sixth Amendment in the absence of any opportunity for Mr. Bryant to cross-examine the declarant. This Court should deny that request, as Petitioner has failed to establish sufficient grounds for granting of the writ, and has seriously misconstrued the holdings in *Crawford* and *Davis.* In essence, Petitioner is asking this Court to apply the rulings in those cases to the factual situation in the case at bar and reach a different result than the Michigan Supreme Court majority, or grant the writ in order to revisit constitutional principles already decided, primarily in *Davis* and its companion case of *Hammon v. Indiana*. Neither of these arguments present reasons for this Court to grant the writ.

Under Supreme Court Rule 10, a writ of certiorari should only be granted for "compelling reasons," such as a direct conflict between United States courts of appeals on a common question, a conflict between a United States court of appeals and a state court of last resort, conflicts on an important federal question between state courts of last resort, or a decision of a United States court of appeals or state court of last resort on an important question of federal that has not as yet been settled by this Court. The rule notes that a grant of a writ is rare where the only question raised is whether the lower court properly applied an established rule of law to the facts of a particular case.

Application of these standards reveals why the present petition should be denied. Petitioner has failed to document any conflict in or between the Federal courts of appeals or state courts of last resort on the factual or legal matters raised in this case. The only cases cited in the petition, other than *Crawford, Davis, and Hammon*, are two decisions from state intermediate appellate courts (one of which is even unpublished) which Petitioner asserts show a sufficient conflict with the Michigan Supreme Court's decision in the instant case to justify review by this Court.[1] The lack of any showing of a conflict on these questions among the Federal Circuit Courts of Appeals and state courts of last resort exposes the current petition for what it really is – an effort by Petitioner to have this Court merely overturn the application of the *Crawford* and *Davis* decisions to the facts of the present case. That effort should be rejected.

Even if this Court were to review the decision of the Michigan Supreme Court in its application of *Crawford* and *Davis* to the facts of the present case, that decision should be upheld, as it accurately and fairly applied those precedents to find that Mr. Bryant's constitutional right to confrontation was violated by the admission at trial of the declarant's out-of-court statements. Petitioner's arguments seriously misconstrue the decisions of this Court, and seek to assert positions which the majority of this Court have already explicitly rejected.

[1] In each of these two cases, the respective courts basically applied the rulings in *Crawford* and *Davis* to the particular facts of their case. *Collins v. State*, 873 N.E.2d 149 (2007); *People v. Casique*, unpublished opinion of California Court of Appeals, No. A113636. In neither case did the respective appellate court question the legal principles expressed in *Crawford* or *Davis*, or call for a reconsideration of those opinions. While in both cases the courts found the out-of-court statements of the declarants to be non-testimonial and admissible, there were facts in each case that are clearly distinguishable from the instant case. In *Collins*, the Indiana Court of Appeals noted that the statement made to a 911 dispatcher discussed the possible present location of the suspect, and what type of car he then might be driving, facts the Court held were relevant to a possible ongoing emergency. 873 N.E.2d at 154-155. In *Casique*, the California Court of Appeals recognized that in questioning the declarant, the police officer "did not solicit a description of the events or seek to discover any details of the shooting." 2009 WL 1508463, p. 14. The record of the case at bar shows that no portion of the declarant's statement discussed the possible present location of his assailant, and that the police repeatedly asked the declarant to relate the circumstances and details of the shooting, which had allegedly occurred 30 minutes earlier.

The majority of the Michigan Supreme Court correctly recognized that Petitioner's arguments conflicted with this Court's rulings in the controlling authority. Petitioner has presented no compelling reasons for this Court to now question or revisit this recent precedent.

The basic flaw in Petitioner's arguments is their failure to acknowledge that this Court's use of the term "ongoing emergency" in the *Davis* opinion was in reference to whether the alleged criminal conduct in the case was actually occurring at the time of the declarant's statement, rather than conduct that had concluded prior to the statement being made, and not to whether the declarant suffered wounds and thus was in a medical emergency at the time of the statement. There is no discussion in *Crawford, Davis, or Hammon* concerning an exception to the Confrontation Clause where the declarant is injured or in need of medical attention. To the contrary, the Court's use of the term "emergency," in the context of these decisions, relates to the content of the declarant's statement – whether it is a call for immediate help so that the police can intervene and halt an ongoing crime, as in *Davis, supra*, or a description of past events to assist the police in identifying and apprehending the offender, as in *Crawford* and *Hammon*. This Court in *Davis* ruled that the question of whether a statement is testimonial for the purposes of the Confrontation Clause is resolved by examining the objective circumstances, with the primary consideration being the substance of the declarant's statement, to determine whether the primary purpose of the police questioning was "establish or prove past events potentially relevant to later criminal prosecution." 547 U.S. at 822. In the instant case, all of the objective circumstances of the declarant's alleged statements demonstrate that the primary purpose of the police questioning was to investigate a past event. The Michigan Supreme Court correctly held that under this Court's rulings, the statements obtained were testimonial, and thus inadmissible at

trial, as Mr. Bryant had no opportunity (the declarant died hours after receiving the wound) to cross-examine the declarant.[2]

There was no dispute in the case that the charged offense did not occur at the time or place of the police questioning, nor that the alleged shooter was not at the gas station when the police arrived in response to a call that a man had been shot. To the contrary, according to the statements attributed to the declarant, the shooting occurred some 30 minutes prior to the questioning, at a location six blocks away. There was never any indication from the declarant to the police that the alleged crime was ongoing at the time of the statement, that the offender was present or posed any current or continuing threat either to the declarant, the police, or bystanders, or a statement to the police seeking for them to intervene and halt an ongoing crime. The entirety of the statement concerned alleged events that had already concluded.

Even viewing the actions of the police alone, based on the officers' own testimony, demonstrates that they did not have any objective or subjective belief or fear that there was an ongoing crime, or danger to their safety, at the time of the questioning. Petitioner posits that "for all the police knew, the shooter could have been right at the scene." Petition at 8. As the Michigan Supreme Court recognized, however, the actions of the five officers who responded to the call belie any conclusion that they feared for their safety or that of the declarant, or suspected that a shooter was then present at the gas station. **None** of the officers drew their weapons upon arrival at the scene, began a search of the area, nor questioned other people at the scene as to whether there was any ongoing crime or dangerous persons present. Instead, all five engaged in questioning the declarant during the short time prior to the arrival of medical personnel, who had

[2] The opinion of the Michigan Supreme Court, which is attached as an appendix to the Petition, shows that that Court rejected Petitioner's effort to reconfigure the issue presented in the case to a question of whether an exception exists or should exist under *Crawford* for statements

been summoned to the scene along with the police. Contrary to Petitioner's insinuations that Respondent has been critical of the police conduct in the case, there has never been an assertion of police misconduct in this case, nor is that question relevant to the issue of the admissibility of the statement. This Court in *Davis* noted that the characterization of statements as either testimonial or non-testimonial does not impugn the police investigation which elicited the statements:

> While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial **use** of, not the investigatory **collection** of, *ex parte* testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

547 U.S. at 832, fn. 6. (Emphasis in original).[3]

These officers acted appropriately in regards to the situation – upon arriving after the occurrence of alleged criminal conduct the officers sought to question a witness to that conduct in order to identify, apprehend, and aid in the possible prosecution of an offender. The real, and only, issue in this case is whether the statements they elicited from the declarant through this investigative questioning were later admissible in the absence of an opportunity to cross-examine the declarant. Under this Court's authority, that issue was correctly decided by the Michigan Supreme Court.

Petitioner criticizes the decision of the Michigan Supreme Court's majority in focusing on the undisputed fact that the entirety of the declarant's statement referred to events that

---

admissible under state evidentiary law as dying declarations, and Petitioner has not raised nor argued that question in the present petition.

[3] In their opinion, the Michigan Supreme Court majority expressly cited to footnote 6 of the *Davis* decision (38A, fn. 10), and at no point criticized the police actions in this case or found any police misconduct.

occurred prior to the time of the statement, and then makes the unsurprising statement that the state cannot prosecute persons for crimes that have not yet occurred. Petition at 10. Petitioner errs, however, in construing the *Davis* decision as based on a distinction between past and future events. In fact, the critical distinction made in *Davis* and *Hammon* was between past and **current** events – a plea for assistance during an ongoing crime as compared to a description of prior, completed events.

Petitioner's arguments as to what this Court decided in *Davis*, or why this Court should now revisit and redefine that decision, are both internally inconsistent and contrary to this Court's rulings. While Petitioner recognizes that this Court held that "testimonial statements are those given with a view toward recording the declarant's version of events that have already transpired, for the purposes of memorializing it," Petitioner then asserts that non-testimonial statements should include both "spontaneous statements either made during the course of an event, or to discuss or describe a recent event to one who was not there." Petition at 10, 11. Petitioner does not explain how or where the constitutional line can or should be drawn between statements recording the declarant's version of events which have already transpired and statements describing a recent event to one who was not there, other than to assert there is an outcome-determinative difference between a declarant making an oral statement outlining the prior events to a police officer who has arrived at the scene and a more formalized, written statement given to an officer at a police station. That assertion is directly contrary to this Court's decision in *Davis*, where the Court majority rejected the argument that testimonial statements are confined to those taken during formal or written questionings, or at some location away from the alleged crime scene:

> The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps

> notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, "`[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" * * * But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial. 547 U.S. at 826, 832.

If Petitioner's interpretation of the Confronation Clause is correct, the statement taken in *Hammon* – given orally to an officer responding to a report of a domestic violence situation at the scene of the alleged crime only minutes after its occurrence – would have been found non-testimonial and admissible, under Indiana evidentiary law, as an excited utterance. This Court ruled that those circumstances – the location, timing, and formality of the questioning – did not render a statement whose substance related solely to prior events, and given in response to police questioning, non-testimonial. Likewise, the Michigan Supreme Court held in the case at bar that the objective circumstances of the statement, given after the occurrence of the events, at a different location, in response to police questions, and recorded in the memory of the investigating officers, established that the statement was testimonial. That decision fully comports with this Court's ruling in *Davis*. Petitioner has presented no compelling grounds for this Court to reconsider that ruling.

Petitioner further asserts that any statement made during a 911 call to the police qualifies as non-testimonial under *Crawford* and *Davis*, and as the statement at issue in this case could have been made via a 911 call had the declarant then possessed a cell phone, this statement should equally be deemed non-testimonial. Petition at 10. Again, Petitioner misconstrues this Court's holding in *Davis*. It is not the manner in which the statement is communicated to the police, but the substance of the statement that is the crucial element in the determination of the status of that evidence. In *Davis* this Court recognized that the fact the declarant's statement was made during

a 911 call to a police operator neither automatically rendered that statement non-testimonial nor qualified the entire statement as non-testimonial. While Justice Scalia's majority opinion noted that ordinarily 911 calls "describe current circumstances requiring police assistance" rather than establish or prove past events, 547 U.S. at 827, the substance of the particular statements made during the call will determine whether they are testimonial or not under the Sixth Amendment, not merely the fact that a telephone was used to contact the police. Justice Scalia expressly wrote that where the objective circumstances change during a 911 call, that portion of the call which comes after the changed circumstances could be rendered testimonial, despite having been made during that same call:

> This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," 829 N.E. 2d, at 457, once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*…[4]

547 U.S. at 828-829.

Petitioner's argument that the declarant's statements in this case would have been admissible under *Davis* had he made "precisely the same statements" to a 911 operator via a phone call rather than in person to responding police officers cannot be reconciled with the above language.

The Michigan Supreme Court correctly interpreted and applied the *Crawford* and *Davis* rulings to the particular facts of this case. The record establishes that there was no ongoing criminal activity or continuing threat at the time the statements were made, and thus no emergency, as that term is defined for the purposes of these precedents. The substance of the statements attributed to the declarant did not include any spontaneous call for assistance in an ongoing crime, but instead were confined to descriptions of the circumstances of past, completed events. The objective actions of the police showed they were investigating an alleged prior crime rather than focusing on determining if a present threat or emergency existed. The statements made to the officers, concerning what, when and where the alleged crime happened, and who committed the offense, were "an obvious substitution for live testimony, because they do precisely **what a witness does** on direct examination; they are inherently testimonial." 547 U.S. at 830. (Emphasis in original).

Petitioner has failed to provide compelling reasons for this Court to grant the writ. The Michigan Supreme Court accurately recognized this Court's holdings in *Crawford* and *Davis*, and correctly applied those rulings to the individual facts of this case. The petition does not meet the standard for certiorari under Rule 10, and should be denied.

[4] Under this analysis, any statements made during the latter portions of the 911 call, after Mr. Davis drove away from the scene and thus no longer posed a current threat to the declarant, would have been testimonial, despite the fact that the alleged violent offender was then at large in the community. Under Petitioner's reading of *Davis*, the "emergency" would be ongoing until such time, be it minutes, hours, or days, that the suspect was apprehended. Again, this Court has already expressly rejected such a broad exception to the Sixth Amendment right to confrontation.

Summary

WHEREFORE, for the reasons stated, Respondent asks this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

_____

PETER JON VAN HOEK
Assistant Defender
State Appellate Defender Office
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833

Dated: September 3, 2009.