

Crawford v. Washington (2004)

During a police investigation into a non-fatal stabbing episode, both Crawford and his wife, who witnessed the altercation, made statements that implicated Crawford as the assailant. However, when the case went to trial, Crawford claimed that he had acted in self-defense. His wife declined to testify, citing the husband–wife privileged relationship. As a result, the prosecutor was left with a weak case.

The prosecutor tried to salvage the case by introducing earlier statements the wife had made during an interrogation session at the police station, in an effort to show that the stabbing was not done in self-defense. Part of the prosecutor’s reasoning was that the marital exemption only applied to in-court testimony. Crawford countered that his wife’s unavailability as a witness denied him the right to confrontation as guaranteed under the Sixth Amendment. Eventually, the court allowed the jury to hear the taped interrogation session, and the jury went on to convict the defendant of assault.

The case made its way to the U.S. Supreme Court. There, after considerable analysis, the Justices decided in favor of Crawford. Admitting testimonial statements without affording the defendant the opportunity to cross-examine the witness amounts to a fundamental violation of the Sixth Amendment.

Davis v. Washington (2006)

This ruling actually involved two separate cases. In the first situation, McCottry dialed 911 immediately after her boyfriend Davis left her residence and reported that Davis had just beaten her. The victim gave the authorities the suspect’s name and a physical description. Two

officers responded, observed McCottry's injuries, and filed a report. Eventually, the police were able to arrest Davis. When the case came to trial, the victim, McCottry, failed to appear. Instead of just dropping the case, the prosecutor introduced the 911 tapes as evidence of the assault, and the jury found Davis guilty. Later, Davis appealed his conviction on the grounds that he was denied the opportunity to confront and cross-examine his accuser.

In the second instance, the police responded to another domestic disturbance. Upon arrival, the officers found the victim, Ms. Amy Hammon, outside on the porch. After gaining her consent to enter the premises, the officer observed signs of a struggle in the living room and located the suspect inside the kitchen. Based on their observations, what the victim told them, and the contents of the affidavit the victim had written under oath and signed at the scene, the officers arrested the suspect, Mr. Herchel Hammon for domestic battery. When the case went to trial, the victim failed to appear. The prosecutor introduced the affidavit as evidence in the victim's absence. Although the defendant's lawyer objected to the affidavit because its author was not available for cross-examination, the trial judge admitted the statement under the "excited utterance" exception. Hammon was convicted and subsequently appealed on the basis of the Sixth Amendment because he was not able to cross-examine the accuser.

Upon review of these cases, the Supreme Court drew a distinction between *testimonial* and *nontestimonial statements*. As the Court explained:

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.

(p. 7)

Using this distinction, the Court reasoned that the information generated during McCottry's 911 telephone exchange fell under exigent circumstances and did not constitute testimony for the purpose of proving guilt. In contrast, the Hammon situation had already concluded, was relatively calm, and did not involve any immediate danger. As a result, the Court concluded that the McCottry 911 tape was nontestimonial and, therefore, admissible without triggering any Sixth Amendment protections. On the other hand, the affidavit in Hammon was testimonial, and the defendant had the right to conduct a cross-examination of the victim.

Giles v. California (2008)

Giles shot and killed his ex-girlfriend Avie during the course of an argument. About three weeks earlier, Giles had battered Avie and threatened to kill her. Avie contacted the police following that incident and the officer wrote a report.

When the murder case went to trial, the prosecutor introduced the statements Avie had made to the investigating officer in the earlier incident. Giles objected on the grounds that he could not possibly cross-examine the witness. But the trial court allowed the evidence because California law permitted out-of-court statements when the victim was not available as long as they involved threats or injuries to the victim and those statements were trustworthy. Giles was found guilty and appealed his conviction to the California Court of Appeal. That court applied the *forfeiture by wrongdoing doctrine* and ruled that Giles had lost his right to cross-examine Avie because he was responsible for her murder.

The Supreme Court remanded *Giles* back to the state court with instructions to consider whether the defendant murdered Avie in order to prevent her testimony in court. In other words,

forfeiture by wrongdoing would be appropriate only if the defendant murdered the victim in a deliberate effort to prevent her from testifying against him:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

(p. 23)

When taken together, these three rulings have had some chilling implications for no-drop policies and victimless prosecutions. Some observers think it would behoove the system to concentrate more on the reasons why IPV victims do not testify against their attackers. Making victims safer from their batterers, addressing economic security, recognizing that a battering relationship constitutes an ongoing emergency, introducing more expert witness testimony about the devastating effects of IPV, providing a series of photographs that document victim injury from the time of the incident until after those wounds heal, and crafting more workable forfeiture-by-wrongdoing strategies would do much to help empower victims in the post-*Giles* era (Bailey, 2009; Ewing, 2007; Hussain, 2009; Messing, 2014).

References

Bailey, K. D. (2009). The aftermath of *Crawford* and *Davis*: Deconstructing the sound of silence. *Brigham Young University Law Review*, 2009, 101–155.

Ewing, D. (2007). Prosecuting batterers in the wake of *Davis* and *Hammon*. *American Journal of Criminal Law*, 35, 91–106.

Hussain, A. (2009). Reviving hope for domestic violence prosecutions: *Giles v. California*. *American Criminal Law Review*, 46, 1301–1321.

Messing, J. T. (2014). Evidence-based prosecution of intimate partner violence in the post-*Crawford* era: A single-city study of the factors leading to prosecution. *Crime & Delinquency*, 60, 238-260.