

## **Crawford and 911 Tapes!**

**By: Brett A. Purtzer, July 2005**

In State v. Davis, 2005 WL 1115865 (May 12, 2005), the Supreme Court decided the issue of whether evidence of 911 calls violated a defendant's Sixth Amendment right to confrontation under the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004). Significantly, Davis held that 911 calls should be reviewed on a case-by-case basis and that all statements made should be individually evaluated for admissibility in light of the confrontation clause.

In Davis, like many domestic violence cases, the complaining witness was unavailable for trial, although she initially cooperated with the prosecutor's office when the case arose. The only evidence linking the defendant to the victim's injuries was the 911 call. Although the defense argued that playing the 911 tape violated the defendant's confrontation rights, the trial court admitted the tape under the excited utterance exception to the hearsay rule. The Court of Appeals upheld the trial court's decision holding that the 911 call was an excited utterance, thus satisfying all reliability requirements.

The Davis court, reviewing Crawford, held that the circumstances of a 911 call must be reviewed to determine whether the declarant knowingly provided the functional equivalent of testimony to a government agent. Importantly, the court noted that a 911 call may contain both testimonial and non-testimonial statements. The court also reviewed, in light of a confrontation clause violation, whether the error in admitting the call was harmless beyond a reasonable doubt. Here, the court held that because the untainted evidence was overwhelming, any error in admitting testimonial statements from the 911 call was harmless beyond a reasonable doubt.

The teachings of Davis are important because it allows parts of 911 calls to be eliminated if considered testimonial. Using Davis to completely exclude a 911 call is unlikely to be successful as there is no "whole statement" approach when concerning the contents of a 911 call. Accordingly, all motions to exclude 911 calls should be done pre-trial to properly exclude testimonial portions of the call. Such motion will preserve your record and will make certain that a reviewing court does not gloss over the fact that, even if considered harmless error when compared to other evidence, 911 call evidence is generally harmful to your client's cause.

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