

## Davis Update

By: Lance Hester; July 2006

A year ago Brett Purtzer wrote about *State v. Davis* in the pages of this publication. See, *Just News*, July 2005. Since writing that article, the US Supreme Court has accepted certiorari and has published its opinion affirming our state supreme court. This is an important opinion in the post-Crawford era dealing with the confrontation clause and witnesses who fail to show for trial.

In *Davis v. Washington*, 126 S.Ct. 2266 (2006), Justice Scalia noted a 911 caller made statements such as the following:

“He’s jumping on me again.” ... “He’s usin’ his fists.” ... “It’s Davis... Adrian.” ... “He’s runnin’ now.” The court also noted it presumed the caller could have identified Davis as the assailant but the caller did not appear at trial. The trial court admitted the 911 recording over Confrontation Clause and Sixth Amendment objections, and the Court of Appeals and the Supreme Court of Washington both affirmed the trial court’s decision. Within its opinion it is clear that the US Supreme Court agrees that the 911 call was not testimonial.

The Court made comparisons with *Crawford*. And importantly, it concluded that the critical difference between the interrogations in *Davis* and *Crawford* was obvious. In *Davis*, the court noted the caller “was speaking about events as they were actually happening, rather than “describ[ing] past events.” Unlike the caller in the *Davis* case, Ms. *Crawford*’s interrogation occurred hours after events.

The Court concluded, “the circumstances of (the caller’s) interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not testifying. And thus, the court affirmed the Washington State Supreme Court’s decision. While the opinion limits *Crawford*, the practitioner needs to pay attention to 911 calls and accordingly continue to move to exclude those arguably “testimonial” statements and/or portions of statements whenever such is offered by the state.