

Witness Unavailability by Coercion

By: Wayne C. Fricke; Dec 2006

Over the last couple of years the United States Supreme Court has decided two cases that originated within our state involving the admissibility of hearsay evidence in contravention of the Confrontation Clause of the United States Constitution. Davis v. Washington, 126 S.Ct. 2266 (2006); Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Both of these cases held that the admission of testimony of a witness who did not appear at trial is barred by the Confrontation Clause of the Sixth Amendment if the witness was unavailable and the defendant has not had a prior opportunity for cross examination. The Davis opinion also defined what is considered testimonial and non-testimonial statements, stating:

Statements are non-testimonial 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. Their testimony when the circumstances objectively indicate that there is no such 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.

Davis at 2273-74.

The defense bar has viewed these cases as an affirmation of our constitutional rights, while the prosecution has considered them detrimental to the prosecution of cases involving domestic violence and child sexual assault cases.

However, while rereading the cases, there was one aspect of the Davis case that caught my attention. Specifically, in response to government concerns, the Court indicated that the defense would not necessarily be given a windfall if a witness failed to appear. As the Supreme Court stated:

...When defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the state in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-

trial system. We reiterate what we said in Crawford: That “the rule of forfeiture by wrongdoing...extinguishes confrontation claims on essentially equitable grounds.”

Davis at 2280.

I did some additional research to determine how many times this doctrine has been cited in appellate court cases in the State of Washington as well as the federal circuits. FRE 804(b)(6), which was adopted in 1997 incorporates the common law rule. In Washington, ER 804(a)(6) sets forth the rule. I found no cases in the State of Washington. I only found ten appellate cases from five circuits that cited to the federal rule. The case of U.S. v. Stribbling, 405 F.3d 227 (4th Cir. 2005), addresses the history of the rule. It noted that by 1996 all of the circuits that had addressed the issue had recognized the doctrine. See United States v. Houlihan, 92 F.3d at 1271, (1st Cir. 1996); United States v. Mastrangelo, 693 F.2d 269, (2nd Cir. 1982); Steal v. Taylor, 684 F.2d 1193 (6th Cir. 1982); United States v. Thevis, 665 F.2d 616 (5th Cir. 1982); United States v. Balano, 618 F.2d 624 (10th Cir. 1979); United States v. Carlson, 547 F.2d 1346, (8th Cir. 1976).

End

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