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The Cryptographic Coroner's Report on *Ohio v. Roberts*

Years from now, legal historians may have some difficulty pinning down the precise time of death for *Ohio v. Roberts*, 448 U.S. 56 (1980), a landmark ruling that was recently laid to rest in the legal equivalent of a covert operation.

In *Roberts*, a little more than a quarter of a century ago, the Supreme Court ruled that the Confrontation Clause of the Sixth Amendment does not forbid the admission of hearsay statements against the accused in a criminal case as long as they are shown to have sufficient indicia of reliability, meaning either that they fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." (*Id*. at 66.)

Two years ago, in *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court overturned *Roberts*—but only in part. The Court held that the Confrontation Clause ordinarily forbids the admission of what the Court called "testimonial" hearsay statements by persons who are not called to be questioned about those statements at trial, unless the witness was unavailable and the defendant had a prior opportunity to cross-examine that witness. (*Id*. at 68-69.) Testimonial statements, the Court explained, are those that operate as the functional equivalent of testimony, such as statements made at plea colloquies, trials, hearings, or during formal interrogation by police or judicial officials. (*Id*. at 51-52.)

But at the same time, the Court repeatedly reserved decision as to whether all other—that is, *nontestimonial*—hearsay statements would continue to be governed by *Ohio v. Roberts* or in any other way by the Confrontation Clause. The Court hinted that they might not, *id*. at 61, but expressly declined to decide whether nontestimonial hearsay should be regulated by *Roberts* or instead by "an approach that exempted such statements from Confrontation Clause scrutiny altogether." (*Id*. at 68.) The Court thus left undecided whether the Sixth Amendment is "solely concerned with testimonial hearsay," or whether that is only "its primary object." (*Id*. at 53.)

In the two years after *Crawford* was decided, therefore, lower federal courts correctly reasoned that they were still bound to apply *Roberts* to nontestimonial hearsay, since the Supreme Court had never ruled otherwise. (*United States v. Baker*, 432 F.3d 1189, 1204 (11th Cir. 2005); *United States v. Hinton*, 423 F.3d 355, 358 n.1 (3d Cir. 2005); *United States v. Franklin*, 415 F.3d 537, 546 (6th Cir. 2005); *United States v. Hendricks*, 395 F.3d 173, 179 & n.7 (3d Cir. 2005); *United States v. Saget*, 377 F.3d 223, 227 (2d Cir. 2004).)

That uncertainty was supposedly laid to rest by the Supreme Court a few months ago in *Davis v. Washington*, 126 S. Ct. 2266 (2006). Although the Court had not been required in *Crawford* to decide whether the Confrontation Clause applies to nontestimonial hearsay, the Court concluded in *Davis* that it no longer enjoyed "this luxury of indecision," and promised that "[w]e must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay." (*Id*. at 2274.)

And *Davis* did indeed decide that question, although Justice Scalia's statement of the Court's ruling, like the DaVinci Code, was one that you have to look quite closely to find. Indeed, his cryptographic answer to that question for the Court is camouflaged in a single sentence that does not contain the words testimonial, nontestimonial, reliability, *Roberts*, *Ohio*, or overruled.

After stating that "[t]he answer to [this] question was suggested in *Crawford*, even if not explicitly held" when *Crawford* concluded that the history and text of the Confrontation Clause reflect a focus on *testimonial* hearsay, Justice Scalia added:

> A limitation so clearly reflected in the text of the constitutional provision *must* fairly be said to mark out not merely its 'core,' but its perimeter.

(*Davis*, 126 S. Ct. at 2275 (emphasis added).)

In other words, the admission of hearsay statements implicates the Confrontation Clause only if those statements are testimonial; otherwise, those statements lie outside the "perimeter" of that clause. This solitary sentence was Justice Scalia's

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elegant but remarkably oblique way of announcing that *Ohio v. Roberts* was now at last completely abrogated, and that it no longer applies to either testimonial or nontestimonial hearsay. But it is hard to imagine how that conclusion could have possibly been announced any more subtly or indirectly without using some foreign language.

Oddly, the most explicit statement of this holding appeared much earlier in *Davis*, at a point in the opinion where nobody would be likely to look for it, and most folks would not even be reading very closely. On the page *before* he promised that "we must decide . . . whether the Confrontation Clause applies only to testimonial hearsay," 126 S. Ct. at 2274, in the portion of the opinion where he was supposedly summarizing what the Court had written in earlier cases, Justice Scalia had already (and perhaps unintentionally) announced the answer to that question when he wrote that:

> It is the testimonial character of the statement that separates it from *other hearsay* that, while subject to traditional limitations upon hearsay evidence, *is not subject to the Confrontation Clause*. (*Davis*, 126 S. Ct. at 2273 (emphasis added).)

Was the Court too subtle for its own good?

This slip may well have been unintentional, because it came from the middle of the portion of the opinion that supposedly was only summarizing *Crawford*, which had expressly refused to go that far. Moreover, it is extremely unusual for a Supreme Court opinion to state some rule of law as if it were settled, one page before the Court announces its determination to decide that same question.

So it seems fair to say that *Roberts* was interred about as surreptitiously as any Supreme Court precedent that has ever been intentionally overruled. The first time I read these two crucial lines from *Davis*, I wondered whether the Court was perhaps too subtle for its own good, and whether lower courts could be counted on to get this important message. The early indications are not promising. Indeed, if you missed these points yourself in your first hasty review of the opinion, do not feel bad. As it turns out, you are in very good company.

The official syllabus to the *Davis* case prepared by the Reporter of Decisions and the West headnotes to the opinion make no mention of *Roberts* at all, much less any mention that *Roberts* was finally overruled in that case. And the lower courts have thus far been almost completely unable to accurately decipher what *Davis* said on that point. In the short time since *Davis* was decided, there have already been five lower appellate courts that were also unable to decipher these clues to the fact that the Court had overturned all of the intervening case law since *Crawford* holding that *Roberts* still governed the admission of nontestimonial hearsay.

The Supreme Court of North Dakota, even after a careful and extended examination of *Davis*, saw no reason to think that *Davis* had altered earlier case law holding that "[t]he reliability and trustworthiness factors are still to be used for nontestimonial statements." (*State v. Blue*, __N.W.2d __, __, 2006 WL 1770577 *6, 2006 ND 134 (N.D. June 29, 2006) (citing *United States v. Brun,* 416 F.3d 703, 707 (8th Cir. 2005).)

More recently, the Court of Appeals of Wisconsin also mistakenly concluded that even after *Davis* "a determination that an out-of-court declaration is not testimonial does not end our inquiry," for the court must still ensure that nontestimonial statements satisfy *Roberts* "to make their receipt into evidence permissible under the confrontation clause." (*State v. Rodriguez*, __ N.W.2d __, 2006 WL 2088161 ¶ 28 (Wis. App. July 28, 2006) (citing *State v. Manuel*, 697 N.W.2d 811, 826-27 (Wis. 2005).) Of course, a state remains free to interpret its own constitution more broadly than the federal Constitution in protecting the rights of the accused, as Wisconsin may intend to do, but a state is not free to respectfully disregard what the Supreme Court of the United States has held about what *the* Confrontation Clause requires, or whether *Roberts* is alive and well.

The California Court of Appeals, in another opinion that cites and discusses *Davis*, has nevertheless also concluded that "[f]or nontestimonial statements, *Crawford* left undisturbed the standard set forth in Roberts," which supposedly *still* requires the courts to consider whether a nontestimonial statement "falls within a firmly rooted hearsay exception." (*People v. Menchaca*, 2006 WL 2130739 *3 (Cal. App. 1 Dist. Aug. 1, 2006) (unreported.))

Federal appellate courts have suffered from the same confusion. The Eighth Circuit Court of

Appeals, in another opinion containing a detailed discussion of *Davis*, concluded that the challenged statement in the case before it was nontestimonial, which should have been the end of any Sixth Amendment analysis. But the court added that it still regarded it as an open question after *Davis* whether the reliability analysis required by *Roberts* and its progeny "remains good law when applying the Confrontation Clause to nontestimonial hearsay." (*Middleton v. Roper*, __ F.3d __, __, 2006 WL 1840881 *14 n.6 (8th Cir. July 6, 2006) (quoting *Ferguson v. Roper*, 400 F.3d 635, 639-40 (8th Cir. 2005).) The court assumed for the sake of argument that nontestimonial statements must still be shown to be "supported by a showing of particularized guarantees of trustworthiness," *id*., but nevertheless concluded that "even assuming *arguendo* the [admission of this nontestimonial] statement violated the Confrontation Clause, any error in admitting the statement was harmless." (*Id*.)

The next day, almost one month after *Davis* was decided, the Seventh Circuit Court of Appeals squarely held that "[w]here a hearsay statement is found to be nontestimonial, we continue to evaluate the declaration under *Ohio v. Roberts*, 448 U.S. 56 (1980) . . . [to determine whether it] falls within a firmly rooted hearsay exception." (*United States v. Thomas*, __ F.3d __, 2006 WL 1867487 *5 (7th Cir. July 7, 2006) (citing *United States v. Danford*, 435 F.3d 682, 687 (7th Cir. 2005).) In a footnote the Seventh Circuit added this remarkable explanation as to why it mistakenly believed that *Roberts* had not been overruled:

> We recognize that *Crawford v. Washington*, 541 U.S. at 60, overruled, in part, *Ohio v. Roberts*, and that *Davis v. Washington* reaffirmed this fact. *Davis*, *10, n.4, *19. While at first glance, *Davis* appears to speak of *Roberts* being overruled in general, a closer reading reveals that the discussion of *Roberts* occurs strictly within the context of statements implicating the Confrontation Clause. *Id*. Where the Court addresses nontestimonial statements such language is conspicuously absent.

(*Thomas*, 2006 WL 1867487 at *5 n.2.)

In effect, although it wisely declined to say something so irreverent quite this directly, the Seventh Circuit reasoned as follows: "Because we see no citation to *Roberts* in the part of Justice Scalia's opinion where he promised to decide whether the Confrontation Clause still applies in any way to govern the admission of nontestimonial hearsay, we assume that he broke his promise and forgot to decide that question after all."

By the way, that wasn't even the strangest part of the holding in *Thomas*. Just before announcing and explaining its holding that *Davis* had not entirely overruled *Ohio v. Roberts* and that *Roberts* continues to state the constitutional test for the admissibility of nontestimonial hearsay, the Seventh Circuit correctly stated—in obviously unwitting contradiction—that "[b]ecause the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation." (*Thomas*, 2006 WL 1867487 at *5.) That makes no sense, of course. If a nontestimonial statement, by definition, does not implicate a criminal defendant's right to confrontation, the admissibility of that statement has nothing to do with *Roberts*, which was nothing more than an interpretation of the Sixth Amendment.

Only 12 days after deciding *Thomas*, however, a different (well, mostly different) panel of the Seventh Circuit Court of Appeals quietly reached the opposite conclusion, declaring that although *Crawford* had not resolved the appropriate "treatment of nontestimonial hearsay under the Confrontation Clause, . . . the Supreme Court's recent decision on the matter, *Davis v. Washington*, appears to have resolved the issue, holding that nontestimonial hearsay is *not* subject to the Confrontation Clause." (*United States v. Tolliver*, __ F.3d __, __ n.2, 2006 WL 2007642 n.2 (7th Cir. July 19, 2006) (emphasis added).) Curiously, in trying to pin down the precise point at which the *Davis* opinion laid *Roberts* to rest, the Seventh Circuit offered nothing but this remarkable citation: "126 S. Ct. at 2273, 2274-76, 2277-78." (It's in there somewhere.) The Seventh Circuit did not cite its directly contrary holding two weeks earlier in *Thomas*, even though one member of the court, Judge Richard Posner, sat on both panels and joined both opinions. Chances are that they hoped nobody would notice.

It is safe to assume that we have not yet seen the last time some court makes this same mistake in attempting to unravel what *Davis* says about the continued viability of *Roberts* and the applicability of the Sixth Amendment Confrontation Clause to nontestimonial hearsay. Indeed, at the moment the haunting question appears to be how long we will have to wait until a majority of the lower courts manage to get the answer to that question *right*. ■