
EVIDENCE — CONFRONTATION CLAUSE — NEW YORK COURT OF APPEALS HOLDS THAT SHOOTING VICTIM’S STATEMENTS TO RESPONDING POLICE OFFICER WERE NOT TESTIMONIAL. — *People v. Nieves-Andino*, 872 N.E.2d 1188 (N.Y. 2007).

When a violent suspect is at large, law enforcement officers frequently question witnesses in hopes of reducing the danger that the suspect’s freedom poses to the public. But despite the value of such statements from witnesses, when the Supreme Court decided *Davis v. Washington*¹ in 2006, it concluded that the Confrontation Clause of the Sixth Amendment² is not concerned with the *danger* posed by a suspect at large, but rather with the existence of an ongoing *emergency*.³ After *Davis*, numerous commentators forecast that a great deal of litigation would turn on the definition of “emergency,”⁴ and the New York Court of Appeals recently encountered one such case. In *People v. Nieves-Andino*,⁵ the court held that statements made to a police officer by a shooting victim who was bleeding to death were admissible nontestimonial hearsay.⁶ In doing so, the court failed to articulate a definition of “emergency” that sufficiently distinguishes emergencies from the more manageable dangers that police officers face every day. A close reading of emergency cases from analogous constitutional doctrines and a careful examination of the language in *Davis* reveal important clues about how courts should approach Sixth Amendment emergency cases and suggest that the court in *Nieves-Andino* reached the wrong conclusion.

In the early morning hours of November 28, 2000, Juan Nieves-Andino shot Jose Millares and left him lying in a Bronx gutter.⁷ Millares’s associate, Michael O’Carroll, witnessed the shooting and called 911.⁸ Minutes later, Police Officers Doyle and Riordan responded to the scene.⁹ Officer Doyle observed Millares “bleeding and grimacing with pain” and immediately called for an ambulance.¹⁰ After determining that he himself could not assist Millares medically, Officer

¹ 126 S. Ct. 2266 (2006).

² U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

³ Although the *Davis* Court discussed “danger” on several occasions, *see, e.g.*, 126 S. Ct. at 2279, the holding implicates only “emergency,” *see id.* at 2273–74.

⁴ *See, e.g.*, Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 280 (2006); Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 172, 189–90 (2006).

⁵ 872 N.E.2d 1188 (N.Y. 2007).

⁶ *Id.* at 1190.

⁷ *Id.* at 1188.

⁸ *Id.*

⁹ *Id.* at 1188–89.

¹⁰ *Id.* at 1188.

Doyle asked him his name, address, phone number, and what had happened.¹¹ Millares provided the pedigree information, then said that he had been shot three times by a man named “Bori.”¹² Millares also provided Officer Doyle with Bori’s address.¹³ While Officer Doyle obtained this information, Officer Riordan searched the scene for shell casings; he found four.¹⁴ Millares eventually died of his wounds.¹⁵ O’Carroll later told police that he had seen Nieves-Andino, known as Bori, shoot Millares.¹⁶

At trial, the prosecution sought to introduce Millares’s hearsay statements to Officer Doyle under the excited utterance doctrine; Nieves-Andino moved in limine to suppress them.¹⁷ The court denied the motion orally,¹⁸ and the jury convicted Nieves-Andino of murder in the second degree.¹⁹ Over one year after the conviction, Judge Fisch of the Supreme Court of New York issued an opinion explaining the denial of the motion to suppress, holding that under *Crawford v. Washington*,²⁰ the statements were admissible because they were not testimonial: Doyle’s “brief questions, general in nature, lacked the formality associated with a police interrogation, and did not go beyond a simple inquiry to ascertain what had happened.”²¹

The Appellate Division affirmed the conviction.²² Like Judge Fisch, the panel emphasized the informality of Millares’s discussion with Doyle: “Here, aside from asking the victim some pedigree questions, the officer simply asked ‘What happened.’”²³

The New York Court of Appeals affirmed.²⁴ Writing for the majority, Judge Pigott²⁵ relied on *Davis* to establish “that statements made in response to police inquiries are *not* testimonial when the circumstances ‘objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emer-

¹¹ *Id.* at 1189.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *People v. Nieves*, No. 3206/01, 803 N.Y.S.2d 20, 2005 WL 1802186, at *1 (Sup. Ct. July 8, 2005) (unpublished table decision).

¹⁸ *Id.*

¹⁹ *People v. Nieves-Andino*, 815 N.Y.S.2d 577, 578 (App. Div. 2006).

²⁰ 541 U.S. 36 (2004).

²¹ *Nieves*, 2005 WL 1802186, at *3. The court cited several cases to support its conclusion, *see id.* at *2–3, including *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), which would soon be reversed by the U.S. Supreme Court in *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006).

²² *Nieves-Andino*, 815 N.Y.S.2d at 578.

²³ *Id.*

²⁴ *Nieves-Andino*, 872 N.E.2d at 1191.

²⁵ Judge Pigott was joined by Chief Judge Kaye and Judges Graffeo and Read.

gency.”²⁶ The court emphasized that the emergency inquiry contained in this primary purpose test is “fact-based” and “must necessarily be answered on a case-by-case basis.”²⁷ The court rejected the per se argument that there can be no ongoing emergency once the assailant has fled the scene, explaining that the circumstances “may objectively indicate that the officer reasonably assumed an ongoing emergency and acted with the primary purpose of preventing further harm.”²⁸ Here, the court maintained, “[g]iven the speed and sequence of events, the officer could not have been certain that the assailant posed no further danger to Millares or to the onlookers.”²⁹ The court ultimately concluded that the primary purpose of Doyle’s questions was to prevent further harm, and the statements were therefore nontestimonial.³⁰

Judge Jones concurred in the result.³¹ Unlike Judge Pigott, Judge Jones thought that the officers’ actions established that there was no ongoing emergency. He quoted Officer Riordan’s testimony that upon hearing that Millares had been shot, Riordan “immediately turned around . . . and started looking . . . for any shell casings,”³² which he took to mean that Riordan did not perceive there to be an emergency.³³ Furthermore, Judge Jones quoted Officer Doyle’s testimony that after he initially called for an ambulance, he sought “to get some information” from Millares.³⁴ Judge Jones argued that once Officer Doyle had solicited Millares’s pedigree information (which would be of use to the ambulance workers), his “focus properly shifted from managing an emergency to investigating a past crime and gathering key information such as where defendant resided.”³⁵ He also mentioned the absence of “any indication that the assailant was still on the scene,”³⁶ perhaps endorsing the per se rule rejected by the majority. Judge Jones determined that “it was objectively apparent that the emergency (i.e., the threat from the assailant) had passed” by the time Officer Doyle called an ambulance, so Millares’s statements were inadmissible testimonial hearsay under *Crawford* and *Davis*.³⁷ However, he con-

²⁶ *Nieves-Andino*, 872 N.E.2d at 1189 (alteration in original) (quoting *Davis*, 126 S. Ct. at 2273).

²⁷ *Id.* at 1190.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (noting Doyle’s “reasonable efforts to assess what had happened to cause Millares’s injuries and whether there was any continuing danger to the others in the vicinity”).

³¹ Judge Jones was joined by Judges Ciparick and Smith.

³² *Nieves-Andino*, 872 N.E.2d at 1191 (Jones, J., concurring in the result) (internal quotation mark omitted).

³³ *See id.* at 1192.

³⁴ *Id.*

³⁵ *Id.* at 1192–93.

³⁶ *Id.* at 1192.

³⁷ *Id.* at 1193.

cluded that the introduction of Millares's statements constituted harmless error.³⁸

An emergency is, of course, difficult to define. The Confrontation Clause offers no help, and the Supreme Court provided little guidance in *Davis*. But a survey of emergency doctrine from other constitutional arenas, combined with a close textual reading of *Davis* itself, can offer courts a creative approach to a difficult problem. These sources reveal that the primary purpose test is in fact a stealth balancing test under which courts should weigh the seriousness of a threat against the need for rigorous procedure when determining the admissibility of this special class of hearsay.

At the heart of the Confrontation Clause is the right to cross-examination, and with it the ability of the defendant to impeach government witnesses.³⁹ In *Crawford*, the Court concluded that the Confrontation Clause is today, as it was at the time of its adoption, "acutely] concern[ed] with a specific type of out-of-court statement."⁴⁰ The Court determined that the Confrontation Clause implicates only "witnesses," meaning "those who 'bear testimony,'"⁴¹ hence the clause applies only to testimonial statements.⁴² Two years later, the *Davis* Court held that statements obtained by law enforcement "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" are nontestimonial.⁴³

But *Davis* remains elusive. In cases similar to *Nieves-Andino*, courts have diverged on whether the statements in question are testi-

³⁸ *Id.* at 1193–94.

³⁹ See Richard D. Friedman, Essay, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1011 (1998); see also *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (noting that the Confrontation Clause was adopted as a protective measure against overbearing state tactics); Akhil Reed Amar, Essay, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1048 (1998) (arguing that the confrontation right exists to protect defendants from governmental abuse).

⁴⁰ *Crawford*, 541 U.S. at 51.

⁴¹ See *id.* (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). This articulation suggests that the inquiry hinges on the subjective intent of the declarant. See Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 252 (2005).

⁴² See *Crawford*, 541 U.S. at 68.

⁴³ *Davis v. Washington*, 126 S. Ct. 2266, 2273–74 (2006). Despite the Court's insistence that the crux of the inquiry relates to "the declarant's statements, not the interrogator's questions," *id.* at 2274 n.1, the primary purpose test seems to focus on the intent of the officer, see, e.g., Lininger, *supra* note 4, at 280. The test also represents a departure from the historical focus of *Crawford*: *Crawford* never discussed emergency, and *Davis* cited no authority, historical or otherwise, for the test. See *Davis*, 126 S. Ct. at 2278 n.5 ("Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.").

monial⁴⁴ or not.⁴⁵ One survey has divined a latent pro-defendant jurisprudence from the Court,⁴⁶ whereas another has concluded that the lower courts have been applying a pro-government gloss to the question.⁴⁷ Judge Pigott believes, apparently, that the definition of an emergency allows for one police officer to respond to the emergency while his partner combs the crime scene for clues.

The Confrontation Clause says nothing about emergencies, and *Davis* did nothing to define the term. But the Sixth Amendment “fit[s] together” with its neighboring amendments,⁴⁸ suggesting that an inquiry into emergency cases from other constitutional doctrines might be instructive. Cases from First, Fourth, Fifth, and Fourteenth Amendment doctrines suggest that courts should consider the immediacy, particularity, and magnitude of a danger when evaluating whether a *Davis* emergency exists. These cases further suggest that the danger in *Nieves-Andino* failed to rise to the level of emergency.

One overarching theme that emerges from a survey of these constitutional doctrines is that a danger must be immediate to constitute an emergency. For instance, the Court in *Brigham City, Utah v. Stuart*⁴⁹ read the Fourth Amendment to allow a warrantless entry into a home during “an emergency situation”⁵⁰ in which police sought to assist a person they had observed under attack.⁵¹ With its opening words, the

⁴⁴ See, e.g., *United States v. Fields*, 483 F.3d 313, 377–78 (5th Cir. 2007) (assailant had already left the scene, the police themselves had not observed any altercation, and some officers were already searching the scene for evidence, including shell casings); *State v. Lewis*, 235 S.W.3d 136, 147 (Tenn. 2007) (assailant had already left the scene, someone had already called 911, and the witness, who was severely injured, was responding to police inquiries); cf. *United States v. Cannon*, 220 F. App’x 104, 109–10 (3d Cir. 2007) (classifying statements as nontestimonial because police arrived to hear shouts and threats and were informed that one of the people present had a gun, evincing a “present and proximate danger”).

⁴⁵ See, e.g., *State v. Warsame*, 735 N.W.2d 684, 693 (Minn. 2007) (noting that police interrogation was “necessary to resolve [declarant’s] apparent medical emergency”).

⁴⁶ See Timothy O’Toole & Catharine Easterly, *Davis v. Washington: Confrontation Wins the Day*, CHAMPION, Mar. 31, 2007, at 20, 22 (surmising, from nine cases in which the Court granted certiorari, vacated, and remanded in light of *Davis*, that the Court requires an emergency be “actual, not past, future, or theoretical,” and that a “possible danger to the general public posed by a defendant who is at large will be insufficient to trigger the emergency exception”).

⁴⁷ See Myrna S. Raeder, *Confrontation Clause Analysis After Davis*, CRIM. JUST., Spring 2007, at 10, 13–14.

⁴⁸ AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE*, at x (1997) (noting that the Court has failed to treat the Fourth, Fifth, and Sixth Amendments as “a coherent whole”); see also Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (arguing that focusing on “various words and phrases [that] recur” in the Constitution will yield important “clues” in the search for “constitutional meaning”). The Supreme Court itself has also recognized the usefulness of comparing different constitutional doctrines. See, e.g., *New York v. Quarles*, 467 U.S. 649, 653 n.3 (1984) (comparing Fourth and Fifth Amendment law).

⁴⁹ 126 S. Ct. 1943 (2006).

⁵⁰ *Id.* at 1947.

⁵¹ See *id.* at 1949 (Roberts, C.J.) (“[A]n officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.”). Chief Justice Roberts apparently likes his sports

Court made clear that such an entry is constitutional only when an individual “is seriously injured or *imminently* threatened with such injury.”⁵² Likewise, for the First Amendment to allow the suppression of speech, the Court required imminence in *Brandenburg v. Ohio*⁵³ and immediacy in *Chaplinsky v. New Hampshire*.⁵⁴

Another recurring theme in the Court’s emergency jurisprudence is a particularity requirement: dangers are more likely to be constitutionally significant when they threaten a distinct person or group of people. For instance, the Court in *New York v. Quarles*⁵⁵ allowed the police to interrogate a suspect without Mirandizing him under the Fifth Amendment when he had hidden a gun in a supermarket.⁵⁶ There the Court was concerned about the danger the gun posed to those in the supermarket, and concluded that the relaxation of *Miranda*’s⁵⁷ prophylactic requirements was justified by the threat.⁵⁸ The *Stuart* Court also emphasized that the police acted to prevent injury to an identifiable person.⁵⁹ Furthermore, the Court in *Cohen v. California*⁶⁰ required that an antagonistic statement be directed toward someone in particular before it could be restricted under the First Amendment.⁶¹

The final persistent theme in the Court’s treatment of emergencies is the magnitude of danger: even if a threat is neither immediate nor particularized, the Court sometimes makes constitutional allowances for emergencies of great size. The Court has relaxed the due process guarantees of the Fourteenth Amendment when “our shores [were] threatened by hostile forces” during World War II,⁶² and during the war on terror in the years immediately following the attacks of Sep-

analogies. See *Confirmation Hearing of the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.) (“Judges are like umpires.”).

⁵² See *Stuart*, 126 S. Ct. at 1946 (emphasis added).

⁵³ 395 U.S. 444, 447 (1969).

⁵⁴ 315 U.S. 568, 572 (1942) (requiring injury or “an immediate breach of the peace”).

⁵⁵ 467 U.S. 649 (1984).

⁵⁶ See *id.* at 659–60.

⁵⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵⁸ See *Quarles*, 467 U.S. at 657. Compare *Rhode Island v. Innis*, 446 U.S. 291 (1980), in which police were attempting to locate a gun hidden by a suspect somewhere in a field. *Id.* at 294. The police elicited the location of the gun from the suspect after he had invoked his right to an attorney. *Id.* at 294–95. The Court allowed the evidence, holding that the police, despite pointedly mentioning children at a nearby school, never interrogated the suspect. *Id.* at 302. Notably, the Court did *not* find that the threat to public safety justified a violation of *Miranda* (a rationale it would employ four years later in *Quarles*). In fact, the *Innis* Court never even mentioned the danger posed to the public by the hidden gun.

⁵⁹ See *Brigham City, Utah v. Stuart*, 126 S. Ct. 1943, 1949 (2006).

⁶⁰ 403 U.S. 15 (1971).

⁶¹ See *id.* at 20.

⁶² *Korematsu v. United States*, 323 U.S. 214, 220 (1944).

tember 11, 2001.⁶³ Likewise, the Court in the First Amendment context found “fighting words” criminal when they were directed towards notable political figures, including the President himself.⁶⁴ These cases accord with the principle articulated by Justice Brandeis that only “reasonable ground to fear . . . serious evil” can justify abridging constitutional rights.⁶⁵

The Court’s focus on these three factors in other constitutional areas suggests their utility in determining the existence of an emergency under *Davis*. Applied to *Nieves-Andino*, these factors indicate that the officers were dealing with the simple danger posed by a suspect at large, not a true emergency. The threat was not immediate: the suspect had already fled the scene, and there was no reason to believe anyone was endangered by him. The threat was not particularized: Nieves-Andino was not in anyone’s home or an enclosed space like a supermarket, but had escaped back into the general population. The court could point to no one in particular who required protection from him. And finally, the threat was not large: there was no indication that Nieves-Andino was pursuing other victims, had taken hostages, or would visit further harm on anyone.

Judge Pigott argued simply that Officer Doyle could not have known that the emergency had passed until he had gathered a baseline amount of information from Millares. This view might be more availing if Officer Doyle’s partner, Officer Riordan, had not determined so quickly that it was safe to begin evidence collection. Officer Riordan’s response underscores the idea that no “serious evil” was present. Judge Pigott’s opinion is further problematic because it leaves no workable distinction between danger and emergency. Because information can accumulate throughout an investigation, it would be a mistake to construe any absence of useful intelligence as an emergency, even if such intelligence could reduce the danger. *Nieves-Andino* can plausibly be read to mean that whenever police arrive at a crime scene and do not know the whereabouts of the suspect, a *Davis* emergency is taking place. Such a view fails to capture the realities of the danger inherent in police work.

Critics might argue that these comparisons are inapt: the First, Fourth, Fifth, and Fourteenth Amendment cases all balance the rights of the accused against the imperatives of the state, but the Sixth

⁶³ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 531–32 (2004) (plurality opinion). *But see* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952) (denying President Truman the right to seize a steel factory, despite his claim that he did so “to avert a national catastrophe”).

⁶⁴ See *Feiner v. New York*, 340 U.S. 315, 317 (1951).

⁶⁵ See *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (emphasis added) (referring to the First Amendment); see also *id.* at 377 (“Only an emergency can justify repression.”).

Amendment asks a question that is incompatible with balancing — whether a declarant was acting as a “witness.” Such a view, however, discounts the impact of *Davis* on Confrontation Clause jurisprudence. By relying on the concept of “emergency,” the Court openly distanced itself from the historical inquiry. And the primary purpose test itself moves the focus from the declarant’s perspective to that of the officer.

Furthermore, the *Davis* Court’s choice of words suggests that balancing is built into the new inquiry. In their briefs, Indiana,⁶⁶ Washington,⁶⁷ and the United States⁶⁸ all urged the Court to adopt a rule that would admit statements obtained by police while responding to “danger,” but the Court declined to incorporate “danger” into its test, focusing instead on “emergency.” Because an emergency is essentially a danger that has ripened, the Court’s use of the word “emergency” implies that the confrontation inquiry is concerned with the *extent* of a threat. And the extent of a threat can be significant for only one reason: comparison to the constitutional interests at stake. The language of *Davis* suggests that the Sixth Amendment, like the others discussed above, is indeed concerned with balancing the procedural rights of criminal defendants against the need to protect the public.⁶⁹ As the threat grows, the accused’s interest in confrontation shrinks.⁷⁰

As the Supreme Court suggested in *Davis*, danger and emergency are different. Yet as *Nieves-Andino* has shown, recognizing the distinction is not so easy. When determining whether an officer’s belief about an ongoing emergency is reasonable, judges should think creatively about how the Court has defined emergency in other constitutional arenas. Without this constitutional guidance, emergency may fast become the new obscenity: something judges are quick to identify but loath to define.⁷¹

⁶⁶ See Brief of Respondent at 27–28, *Hammon v. Indiana*, 126 S. Ct. 2266 (2006) (No. 05-5705), 2006 WL 271825.

⁶⁷ See Brief for Respondent at 9, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (No. 05-5224), 2006 WL 284228.

⁶⁸ See, e.g., Brief for the United States as Amicus Curiae Supporting Respondent at 13, *Hammon*, 126 S. Ct. 2266 (No. 05-5705), 2006 WL 303913.

⁶⁹ Cf. *Mattox v. United States*, 156 U.S. 237, 243 (1895) (stating that “considerations of public policy and the necessities of the case” influence a confrontation inquiry that compares “the rights of the public” to benefits “preserved to the accused”); AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE*, *supra* note 48, at x (“I stress the need to construe the Constitution in ways that protect the innocent without needlessly advantaging the guilty.”).

⁷⁰ This reading accords with First Amendment jurisprudence. The text of the First Amendment, like that of the Sixth, does nothing to suggest that a balancing of constitutional interests should take place. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”). Yet the *Brandenburg* and *Chaplinsky* imminence requirements graft the notion of balancing onto the amendment.

⁷¹ Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I know it when I see it . . .”).