MICHIGAN v. BRYANT: DEFINING THE "TESTIMONIAL STATEMENT"

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I. INTRODUCTION

Michigan v. Bryant[1] presents an opportunity for the Supreme Court to provide a more comprehensive definition of "testimonial statements." Specifically, the Court will determine whether a dying victim's statements to police officers regarding the circumstances of his shooting fall within the realm of testimonial statements and thus, are barred by the Confrontation Clause of the Sixth Amendment.[2] The Confrontation Clause guarantees an accused defendant the right "to be confronted with the witnesses against him."[3] If a witness is unavailable for cross-examination at trial and cross-examination previously was not possible, out-of-court statements will be admitted only in very limited circumstances. The Supreme Court has held that statements "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" are "non-testimonial" and thus, do not violate the Confrontation Clause.[4] In contrast, statements made after an emergency has ended with the primary purpose of assisting police prosecution are "testimonial" and inadmissible unless the Confrontation Clause guarantees have been met.[5]

In *Bryant*, the victim's statements were made in response to police questioning six blocks away from the scene of the shooting and thirty

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1. Michigan v. Bryant, No. 09-150 (U.S. argued Oct. 5, 2010).
2. Petition for Writ of Certiorari at 1, *Bryant*, No. 09-150 (U.S. July 29, 2009).
3. U.S. CONST. amend. VI.
4. Davis v. Washington, 547 U.S. 813, 813–14 (2006).
5. *Id.* at 822.

minutes after the fact. The Court now has the opportunity to address open questions regarding the scope of ongoing emergencies and the proper perspective for determining whether a statement is testimonial. This situation falls in the broad, uncharted gray area between the Court's two recent decisions—*Davis* v. *Washington*[6] and *Crawford v. Washington*[7]—regarding the scope of protection that the Confrontation Clause affords defendants. In *Bryant*, the Court will likely elucidate the meaning and breadth of "ongoing emergency" and "primary purpose," by more clearly distinguishing between what is and what is not a testimonial statement.

II. FACTS

On April 28, 2001, around 3:25 AM, five Detroit police officers responded to a radio call regarding a man shot at a gas station.[8] At the gas station the officers found Anthony Covington lying beside his car with a gunshot wound to his stomach.[9] The officers testified that Covington was clearly in pain as evidenced by his "moaning, facial expressions, difficulty breathing and difficulty speaking."[10] When asked by the officers what happened, Covington replied that "Rick" shot him thirty minutes earlier at a house approximately six blocks away from the gas station.[11] The house was later confirmed to be Richard Bryant's place of residence.[12] Covington further stated that he had been conversing with a man, whose voice he recognized as Rick's, through the closed back door of Bryant's house when shots were fired through the door.[13] He described "Rick" as a black male, age forty, 5'7" and approximately 140 pounds.[14] Covington was then transported to the hospital, where he died a few hours later.[15] Upon the medical personnel's arrival at the gas station, the police officers and other back-up police officers headed immediately toward the

6. *Id.* at 813.
7. Crawford v. Washington, 541 U.S. 36 (2004).
8. Brief for Respondent at 1, Michigan v. Bryant, No. 09-150 (U.S. June 16, 2010).
9. Petition for Writ of Certiorari, *supra* note 2, at 6.
10. People v. Bryant (*Bryant I*), No. 02-005508, 2007 WL 675471, at *2 (Mich. Ct. App. Mar. 6, 2007).
11. Brief for Respondent, *supra* note 8, at 1.
12. *Id.* at 2.
13. *Id.* at 1.
14. *Id.* at 2 (Subsequent investigation revealed that Richard Bryant was 30 years old, 5'10", and 180 pounds.).
15. *Id.*

address provided by Covington.[16] Although the officers did not find the defendant at his house, they discovered blood, a bullet on the back porch, a bullet hole through the back door, and Covington's wallet and identification.[17]

Bryant was arrested a year later in California, and his first trial resulted in a hung jury.[18] At his second trial, however, Bryant was convicted of second-degree murder, for being a felon in possession of a firearm, and for the possession of a firearm during the commission of a felony.[19] Bryant appealed his conviction, claiming the trial court erred by admitting Covington's statements identifying Bryant as the shooter in violation of his Confrontation Clause rights.[20]

The Michigan Court of Appeals upheld Bryant's conviction on the grounds that the statements were non-testimonial because they "were made in the course of a police interrogation under circumstances objectively indicating that its primary purpose was to enable police assistance to meet an ongoing emergency."[21] Recognizing that the police officers were faced with a bleeding victim and little additional information, the court found that the officers' interrogation of the victim was conducted in furtherance of responding to the ongoing emergency.[22] Thus, the court concluded that Covington's statements in response to the officers' questioning were admissible, non-testimonial hearsay.[23] Bryant once again appealed the ruling.[24]

III. LEGAL BACKGROUND

The Confrontation Clause guarantees an accused defendant the right "to be confronted with the witnesses against him . . . ."[25] The original purpose of the Confrontation Clause, grounded in the belief

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16. *Id.* at 3.
17. *Id.* at 4–5.
18. *Id.* at 4, 6.
19. *Id.* at 6.
20. *Id.* The trial court's ruling was handed down before the Supreme Court's *Crawford* and *Davis* decisions. Defendant's motion to suppress the victim's statements to the police were denied by the trial court, which held that the statements were admissible under the excited utterance exception to the state hearsay rule. *See* MICH. R. EVID. 803(2).
21. People v. Bryant (*Bryant I*), No. 02-005508, 2007 WL 675471, at *2 (Mich. Ct. App. Mar. 6, 2007).
22. *Id.* at 3.
23. *Id.*
24. People v. Bryant (*Bryant II*), 768 N.W.2d 65, 65 (Mich. 2009), *cert. granted sub nom.* Michigan v. Bryant, 130 S. Ct. 1685 (U.S. Mar. 1, 2010) (No. 09-150).
25. U.S. CONST. amend. VI.

that it would be difficult to lie while facing the accused, was to ensure the veracity of trial testimony.[26] It was also intended to prevent government manipulation of evidence, like that which occurred during the infamous Sir Walter Raleigh treason trial in which an adverse ex parte affidavit was admitted without providing Sir Raleigh with an opportunity to cross-examine the witness.[27] The Framers sought to prevent a similar situation in which the defendant was unable to confront the witness to test the authenticity of the information recorded in an affidavit and to ensure that the information as recorded was not manipulated by authorities.

A recent line of Supreme Court cases have helped guide lower courts in determining whether out-of-court statements are admissible or barred by the Confrontation Clause. In *Crawford v. Washington*,[28] the Supreme Court held that "[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[29] The Court chose to leave "for another day any effort to spell out a comprehensive definition of 'testimonial'," but did explain that the term "applies at a minimum to prior testimony at a preliminary hearing . . . and to police interrogations."[30] The Court also noted that testimonial statements could include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[31] In light of these principles, *Crawford* held that statements provided by the defendant's wife during a police interrogation at the police station hours after the incident were inadmissible testimonial hearsay statements.[32] This decision overruled the Court's prior Confrontation Clause case, *Ohio v. Roberts*,[33] in which the Court held that the Confrontation Clause did not bar admission of out-of-court statements of witnesses unavailable for cross-examination as long as the statements bore "adequate indicia of reliability."[34]

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26. Crawford v. Washington, 541 U.S. 36, 61 (2004).
27. *Id.* at 44.
28. *Id.* at 36.
29. *Id.* at 59.
30. *Id.* at 68.
31. *Id.* at 51–52 (citations omitted).
32. *Id.* at 36.
33. Ohio v. Roberts, 448 U.S. 56 (1980).
34. *Id*. at 66 (The *Roberts* test only required the contested evidence to fall within a "firmly rooted hearsay exception" or to bear "particularized guarantees of trustworthiness," thereby

Two years later, in *Davis v. Washington*,[35] the Court inched forward on the path toward providing clearer definitions of testimonial and non-testimonial statements.[36] The Court held that statements 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."[37] In contrast, "[s]tatements 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."[38]

In *Davis*, the disputed statements were made during a 911-call in which the victim told the operator, "[The defendant is] here jumpin' on me again . . . . He's usin' his fists."[39] The *Davis* Court found these statements to be non-testimonial because the "primary purpose" of the interrogation was to seek help during an ongoing emergency.[40] In reaching this conclusion, the Court noted that: (1) the victim was "speaking about events *as they were actually happening*, rather than describing past events . . . hours after the events"; (2) the victim was facing an "ongoing emergency"; (3) "the nature of what was asked and answered . . . was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past"; and (4) the victim's "frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe."[41] The Court clarified that although all of these factors should be considered in determining the testimonial nature of the statements, none of them are dispositive.[42] The *Davis* Court further explained that it is also possible for a declarant's statement to change from non-testimonial to

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allowing many admissions of out-of-court statements.).

35. Davis v. Washington, 547 U.S. 813 (2006).

36. Richard D. Friedman, "*We Really (For the Most Part) Mean It!*," 105 MICH. L. REV. FIRST IMPRESSIONS 1, 2 (2006), http://students.law.umich.edu/mlr/firstimpressions/vol105/friedman.pdf.

37. *Davis*, 547 U.S. at 822.

38. *Id.*

39. *Id.* at 817 (internal quotation marks omitted).

40. *Id.* at 828.

41. *Id.* at 827 (alteration omitted) (emphasis in original) (citations omitted) (internal quotation marks omitted).

42. *Id.*

testimonial.[43] For example, although the declarant's identification of the perpetrator during a 911-call was non-testimonial because the perpetrator was in the same room and still posed a danger, when the perpetrator fled the premises and no longer presented a danger, all subsequent statements became testimonial.[44]

In *Hammon v. Indiana*,[45] the companion case decided alongside *Davis*, the police responded to a reported domestic disturbance to find the victim sitting on the porch alone while the defendant was inside.[46] While outside and separated from the defendant, the victim told the police about the defendant hitting her.[47] The Court held that the victim's statements were testimonial as "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime."[48] The Court distinguished *Hammon* from *Davis* by noting that here, "the interrogation was part of an investigation in possibly criminal past conduct" and, as the questions were meant to determine what happened rather than "what is happening," no ongoing emergency was in progress.[49] The *Davis* declarant sought aid while in immediate danger, whereas the *Hammon* declarant recounted past events while in the protection of the police.[50]

The *Davis* decision attempted to draw a bright line between "what happened" and "what is happening."[51] That line is not so easily drawn, however, because answering the question of "what is happening" often requires recounting the details of "what happened"—especially in factual situations similar to the one at hand.[52] Another concern raised by the *Davis* decision is the possibility of the police manipulating how they phrase questions when responding to emergency calls in order to meet the Court's ongoing emergency requirement for non-testimonial statements.[53] Although the *Davis* Court's "primary purpose" analysis focused on assessing the

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43. *Id.* at 828–29.
44. *Id.*
45. Davis v. Washington, 547 U.S. 813 (2006).
46. *Id.* at 819.
47. *Id.* at 820.
48. *Id.*
49. *Id.* at 829–30.
50. *Id.* at 831.
51. Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach But Not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16, 17–18 (2006), http://students.law.umich.edu/mlr/firstimpressions/vol105/griffin.pdf.
52. *Id.*
53. *Id.* at 19.

interrogator's purpose throughout the opinion, it then complicated matters within a single footnote. The Court stated that "in the final analysis [it is] the declarant's statements, not the interrogation's questions, that the Confrontation Clause requires us to evaluate."[54]

Confrontation Clause cases currently sit on a spectrum with *Crawford* and *Hammon* representing the testimonial-end and *Davis* representing the non-testimonial end. At the *Crawford*/*Hammon* end, statements are likely to be found testimonial when physical and temporal separation between the interrogation and the crime is present.[55] For example, a strong indication of testimonial statements exists if the interrogation took place in the secluded and safe environment of the police station and the declarant provided answers in a clear and calm manner, similar to a witness testifying at trial.[56] At the *Davis* end of the spectrum, factors signifying that statements are non-testimonial include the presence of both the victim and the perpetrator at the crime scene as a frantic narrative is given, suggesting the criminal event is ongoing, and the lack of physical and temporal separation between the crime and the statements being uttered.[57] Although the Supreme Court has provided clear guidance regarding the admissibility of statements falling at either end of this spectrum, most statements fall somewhere in the middle, resulting in unpredictable outcomes regarding evidence admissibility in the lower courts.

Michigan v. Bryant poses an important opportunity for the Court to clarify the boundaries of the Confrontation Clause and the scope of protection it affords defendants on the spectrum between the *Davis* and *Crawford*/*Hammon* decisions. Until now, the Court has avoided providing a dispositive list of criteria for determining the nature of out-of-court statements,[58] but *Bryant* may be the case where the Court finally replaces the Confrontation Clause "spectrum" with a clearer delineation between testimonial and non-testimonial statements.

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54. *Davis*, 547 U.S. at 822 n.1 (2006).
55. Crawford v. Washington, 541 U.S. 36, 64 (2004); *Davis*, 547 U.S. at 831.
56. *Id.*
57. *Davis*, 547 U.S. at 827.
58. *Crawford*, 541 U.S. at 68; *Davis*, 547 U.S. at 831.

IV. HOLDING

In a 4–3 decision, the Michigan Supreme Court reversed and remanded the Court of Appeals's judgment by finding Covington's statements testimonial pursuant to *Crawford* and *Davis* and therefore inadmissible under the Confrontation Clause.[59] The court observed that the statements related "solely to events that had occurred in the past and at a different location . . . . [N]one alleged any ongoing threat, and none asserted the possible presence of the alleged perpetrator."[60] According to the court, the primary purpose of the questioning was not to enable police assistance to meet an "ongoing emergency," but rather to obtain the facts of a past event, as evidenced by the police asking about "what happened" rather than "what is happening."[61] In considering the *Davis* requirement that the final evaluation focus on the declarant, the Michigan Supreme Court determined that it was Convington's primary purpose, surrounded by police officers and safe from imminent danger, to identify the defendant in order to ensure police apprehension and subsequent prosecution.[62] The court found Covington's situation similar to *Davis* where "once the defendant stopped attacking the victim and drove away from the premises, the emergency appear[ed] to have ended."[63] Here, when Covington drove to the gas station, away from the shooter, the ongoing emergency effectively ended.[64]

The majority rejected the dissent's argument that an ongoing emergency still existed because the criminal was still at large and the victim was severely wounded. That proposition, the court reasoned, would deem almost all statements made during ongoing police investigations before the accused is apprehended non-testimonial.[65] The Michigan Supreme Court closely analogized the present case with *Hammon* in that both declarants were separated from the defendants, in the presence of police, and a period of time had passed

59. People v. Bryant (*Bryant II*), 768 N.W.2d 65, 79 (Mich. 2009), *cert. granted sub nom.* Michigan v. Bryant, 130 S. Ct. 1685 (U.S. Mar. 1, 2009) (No. 09-150).

60. *Id.* at 71.

61. *Id.* at 75. The court noted that the behavior of the police officers at the gas station was consistent with that of police officers investigating a past crime rather than that of officers meeting a ongoing threat. None of the officers drew their weapons or searched for the shooter at the station.

62. *Id.* at 73, 71.

63. *Id.* at 74.

64. *Id.* at 73.

65. *Id.*

since the crime had been committed. Although *Crawford* suggests that a dying declaration by its nature is admissible and an exception to the testimonial hearsay rule,[66] the court declined to consider this issue.[67] In finding the statements testimonial and therefore inadmissible, the court ruled the admission of Covington's statements to be a plain error entitling Bryant to a new trial.[68]

The dissent argued that an ongoing emergency existed and that the circumstances indicated that the primary purpose of the interrogation was to enable police assistance in response to the emergency.[69] The majority, in the dissent's view, assessed the facts in hindsight "rather than with an objective view of the circumstances at the time the statements were made[,]" as *Davis* required.[70] The dissent stated that *Davis* never set "an artificial threshold" for the amount of time allowed between the initial criminal event and the utterance of the statement before the emergency is automatically considered over.[71] The dissent distinguished *Hammon* from *Bryant* in two ways: (1) the whereabouts of Covington's shooter were unknown while the *Hammon* assailant was known to be inside the house; and (2) *Hammon*'s imminent danger threat was "negligible" relative to Covington's uncertain circumstances at the gas station.[72] The dissent found *Bryant* closer to *Davis* than *Hammon* and thus concluded that Covington's statements were non-testimonial.[73]

V. ARGUMENTS

A. Michigan's (Petitioner's) Argument

Petitioner Michigan does not challenge the *Davis* standard itself, but argues that the Michigan Supreme Court applied the standard incorrectly in finding that the preliminary inquiries and the answers

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66. Crawford v. Washington, 541 U.S. 36, 57 (2004).

67. *Id.* at 76–78. The prosecutor failed to seek admission of the statements as dying declarations with the Appeals Court and the Michigan Supreme Court, while the defense consistently asserted that the statements were not dying declarations and should not be admitted as such. "Accordingly, the prosecutor has either effectively conceded that the victim's statements did not constitute a dying declaration or, at the very least, has abandoned this issue." *Id.* at 78.

68. *Id.* at 79.

69. *Id.* (Corrigan, J., dissenting).

70. *Id.* at 79–80.

71. *Id.* at 80–81.

72. *Id.* at 81.

73. *Id.* at 82.

given to "enable the police to identify, locate, and apprehend the perpetrator"[74] at the gas station were outside the scope of ongoing emergency.[75] Michigan urges the Supreme Court to adopt the Michigan Court of Appeals's conception of "ongoing emergency," "encompass[ing] (1) a crime still in progress, and (2) situations in which the declarant or officer is in danger, either because of a medical emergency or because the perpetrator poses a threat."[76]

Michigan asserts that an ongoing emergency existed because a shooter was still at large, posing an unknown threat to public safety, the victim, and police officers. Additionally, Covington's bleeding wound constituted a medical emergency and the answers he provided between gasping breaths was not the type of formal testimony that the Confrontation Clause intended to bar from trial.[77] Michigan argues that in order to evaluate the level of danger surrounding the circumstances, the police officers needed to ask Covington if the shooter was in the area, if he had shot anyone else, and if he was likely to continue shooting.[78] The questions were meant to assist police in apprehending the dangerous shooter and phrasing the questions and responses in the past tense does not negate the immediacy of the potentially dangerous situation encountered by police at the gas station.[79] Further, Michigan claims that because "[t]he Court chose the term 'ongoing emergency,' not 'ongoing criminal event,' and nothing in the language limits the word 'emergency' to criminal conduct," the Court should not construe the scope of ongoing emergency as narrowly as Bryant proposes.[80]

To determine the "primary purpose" of the statements, Michigan argues that the evaluation must focus on the circumstances under which the interrogation happened, rather than the actual substance of the statements.[81] Michigan's "primary purpose" position was supported by the United States in its *amicus* brief in which former

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74. *Id.* at 71.

75. Petition for Writ of Certiorari, *supra* note 2, at 9. Michigan further noted the inconsistent decisions among the lower courts about whether such preliminary questioning regarding "what happened" constitutes an "interrogation" separate from the issue of an ongoing emergency.

76. Petitioner's Brief on the Merits at 12, Michigan v. Bryant, No. 09-150 (U.S. Apr. 29, 2010).

77. Petition for Writ of Certiorari, *supra* note 2, at 9.

78. *Id.* at 15.

79. *Id.*

80. Petitioner's Reply Brief at 1, *Bryant,* No. 09-150 (U.S. July 15, 2010).

81. Petitioner's Brief on the Merits, *supra* note 76, at 17.

Solicitor General Kagan urged that "statements given in response to questioning that, objectively considered, is aimed primarily at enabling police to meet an ongoing emergency are not properly considered testimonial. Such questioning bears little resemblance to the historical abuses that animated the Confrontation Clause."[82]

Michigan contends that if Covington had called 911 to report the shooting the statements clearly would have been non-testimonial like in *Davis*.[83] The mere fact that Covington's statements were made in person should not now make the statements testimonial and therefore inadmissible.[84]

Recently, the Supreme Court's decisions have tended to strengthen defendants' Confrontation Clause protections in specific situations when applying it to statements made by lab analysts[85] and when defining the boundaries of the forfeiture doctrine narrowly.[86] In *Davis*, however, the Court has also appeared to narrow the scope of the Confrontation Clause by introducing the "primary purpose" test.[87] If the Court upholds the Michigan Supreme Court's ruling, it will necessarily expand the Confrontation Clause. The bar for the admission of out-of-court statements will be even higher because it would suggest that most statements to the law enforcement and emergency responders at the crime scene, even those statements made during a standard 911-call about a recent and nearby shooting in the midst of a medical emergency, would be considered testimonial. Expanding the Confrontation Clause in this way will make the job of prosecutors much more difficult.[88]

B. Bryant's (Respondent's) Argument

Respondent Bryant contends that the phrase "ongoing emergency" should be limited to the actual crime itself.[89] Covington's

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82. Brief for the United States as Amicus Curiae Supporting Petitioner at 8, *Bryant*, No. 09-150 (U.S. May 6, 2010).

83. Petitioner's Brief on the Merits, *supra* note 76, at 16.

84. *Id.*

85. *See, e.g.*, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).

86. *See, e.g.*, Giles v. California, 128 S. Ct. 2678 (2008).

87. Davis v. Washington, 547 U.S. 813, 822 n.1 (2006). The *Davis* Court overturned *Crawford*'s implication that almost all statements made during police questioning would be regarded as testimonial.

88. Andrew C. Fine, *Refining* Crawford: *The Confrontation Clause after* Davis v. Washington *and* Hammon v. Indiana, 105 MICH. L. REV. FIRST IMPRESSIONS 11, 11 (2006), http://students.law.umich.edu/mlr/firstimpressions/vol105/fine.pdf.

89. Brief for Respondent, *supra* note 8, at 25.

statements were provided thirty minutes after the shooting and six blocks away from the crime scene—the emergency had ended when Covington drove away from the crime scene and was over by the time that the police arrived at the gas station.[90] Bryant asserts that the police officers' actions upon arriving at the gas station support the premise that no fear of imminent danger existed.[91]

Bryant challenges Michigan's interpretation of "ongoing emergency" as too broad because it would require all witness statements taken while the perpetrator remained at large to be considered non-testimonial and admissible in court, thereby eviscerating the Confrontation Clause's protections for the accused.[92] He further argues that *Davis* intended the "primary purpose" examination to turn on the substance of and the purpose behind the witness's statement, rather than the motivations of the interrogator's questions and the circumstances in which the declarant was questioned.[93] Bryant contends that Covington's statement was just a narration of past events because there was no imminent threat that Covington sought to escape.[94] Therefore, in keeping with *Davis*, Bryant argues that the Michigan Supreme Court's decision regarding the admissibility of Covington's statements must be upheld.[95]

As *amicus* for Bryant, the National Association of Criminal Defense Lawyers urged the adoption of a declarant's perspective such that "a statement's testimonial status depends on its evidentiary purpose—i.e., on whether the statement, objectively viewed, was made to provide evidence in a criminal investigation or prosecution."[96] Professor Richard Friedman advanced a similar stance in favor of the "reasonable declarant" standard in his *amicus* brief: "[a] statement should be deemed testimonial if a reasonable person in the speaker's position would understand that it would likely be used for prosecutorial purposes."[97]

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90. *Id.* at 26, 24.

91. *Id.* at 10 (The police testified that they did not attempt to secure the station, question the attendant, or draw their weapons, though they did call for back-up when they arrived at Bryant's residence.).

92. *Id.* at 22.

93. *Id.* at 35.

94. *Id.* at 31.

95. *Id.* at 38.

96. Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 3, *Bryant*, No. 09-150 (U.S. June 23, 2010).

97. Brief of Richard D. Friedman as Amicus Curiae in Support of Respondent at 5, Michigan v. Bryant, No. 09-150 (U.S. June 23, 2010).

It appears that these *amici* are concerned that a ruling for Michigan would affirm that lower courts are to examine the interrogator's primary purpose.[98] With the focus away from the declarant, the *amici* believe that this narrower interpretation of the Confrontation Clause will not provide the necessary protection to defendants and their right to cross-examination.[99] Further, the *amici* contend that adopting the rule proposed by Michigan would lead to an increased admission of statements in almost all situations involving violent perpetrators still at large because their "at-large" status would automatically make the situations "ongoing emergencies."[100] Accordingly, all the statements made to crime scene responders, like police, would be admitted as non-testimonial and outside scope of the Confrontation Clause.[101] Additionally, there is concern that with a narrowed conception of Confrontation Clause, an increase in the admission of unreliable statements at trial will increase the likelihood of false convictions.[102] For example, a declarant in Covington's situation could implicate someone out of sheer maliciousness, and these malicious statements would be admitted at trial without an opportunity for cross-examination.[103]

C. Oral Arguments

At oral arguments, the Court appeared dissatisfied with the results that *Davis*'s standard had produced.[104] Counsel Lori Palmer, on behalf of Petitioner Michigan, attempted to argue that Covington's statements in response to police questioning lacked the formality suggested in prior cases, but Justice Scalia quickly rejected this contention, saying, "[f]orget about formality . . . . Formality or no formality has nothing to do with it."[105] Justice Scalia, author of both *Crawford* and *Davis*, noted that a rule premised on context would result in the admission of almost all statements, given that all questions at a crime scene could be construed as assessing the risk of

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98. *Id*. at 6–8.

99. *See id*. at 9. ('Therefore, the officer could nearly always testify, 'My primary purpose was not to gather evidence for use in interrogation, because I did not even know a crime had been committed . . .'.").

100. *Id.* at 10.

101. *Id*. at 9–10.

102. *Id.* at 12–13.

103. *Id.*

104. Transcript of Oral Argument at 11–12, *Bryant*, No. 09-150 (U.S. Oct. 5, 2010).

105. *Id.* at 4.

danger inherent in police work.[106] With regard to the specific facts in *Bryant*, Justice Scalia seemed skeptical that the police officers onsite were actively assessing the risk when he said, "The behavior of the police here gave no indication that they thought they were in danger immediately and were interrogating this person in order to assess the danger to them."[107] Further, Justices Ginsburg and Sotomayor questioned how one would go about deciphering an officer's primary purpose when interrogators often have dual motives of assessing risk and collecting evidence.[108] As Justice Ginsburg noted, "[T]hey would ask the [very same] questions if what they wanted was testimonial evidence. So you can . . . characterize that set of questions either way. What would lead us to pick one rather than the other?"[109]

The justices seemed equally dissatisfied with Michigan's proposal that testimonial statements are those solicited with the intent to collect evidence for future prosecution.[110] Justice Scalia expressed doubt regarding how meaningful distinctions could be made between questions intended to collect evidence for future prosecution from those intended to apprehend the perpetrator.[111] He was unimpressed with the suggestion that the distinction could be based upon whether apprehending the perpetrator would "neutralize an ongoing threat" to public safety, given that for all violent crimes, when the violent perpetrators are still loose in the community, they will perpetually pose a possible threat to public safety.[112]

The justices expressed strong disapproval when Counsel Peter Jon Van Hoek, on behalf of Respondent Bryant, argued that the focus should be on the content of the declarant's statement, and that "ongoing emergency" should be based upon a formal boundary of whether the event was an ongoing or a past event and whether there is any indication of "immediacy."[113] Chief Justice Roberts skeptically asked, "[W]hat would you do with the statement 'The guy in the gas station shot me'? Is that purely past or is that an ongoing

106. *Id.* at 18. For example, Justice Scalia asked, "[a]nd you're saying, whenever policemen come upon a victim of violent crime and said who did it, what's his name, all of that will always be admissible because they—they could be assessing the risk, right?"

107. *Id.* at 14.

108. *Id.* at 5–7.

109. *Id.* at 25–26.

110. *Id.* at 21.

111. *Id.*

112. *Id.* at 22.

113. *Id.* at 36, 59.

emergency?"[114] Justice Alito also questioned, "[C]an there be an ongoing emergency where the statement . . . recounts something that has occurred, not something that is occurring?"[115] Bryant's counsel responded that it was possible and eventually conceded that context needed to be considered to determine whether a declaration about past events was properly testimonial.[116]

Justices Kennedy and Alito seemingly favored a broader scope for "ongoing emergency."[117] Justice Kennedy stated that even though dual motives for collecting evidence might always be present, the fact that "you do not know if the man is running amok and threatening to shoot other people" is enough to possibly justify "ongoing emergency" in this case.[118] Justice Ginsburg suggested that the case could be solved by the dying declaration exception when she asked Michigan's counsel, "[I]f you had the benefit of hindsight, and this trial occurred before Davis . . . would you have instead tried to make a case that this was a dying declaration?"[119] Justice Scalia disagreed with Justice Ginsburg by noting that, with the exception of forfeiture, "I don't know of any cases that allow a dying declaration in over a Confrontation Clause objection."[120] Justice Kennedy questioned whether *Davis* was essentially testing reliability as under the overturned *Roberts* framework, all over again.[121]

VI. ANALYSIS

As evidenced by these arguments and the justices' responses, there are competing viewpoints regarding the "primary purpose" of the interrogation because the Court has left open the issue of whose purpose is being examined. Those who believe that the Confrontation Clause's central purpose is to ensure reliable statements at trial are more likely to argue that the Court is referring to the declarant's purpose.[122] Those who believe the Confrontation Clause's primary

114. *Id.* at 46.
115. *Id.* at 45.
116. *Id.* at 44.
117. *Id.* at 13.
118. *Id.*
119. *Id.* at 20.
120. *Id.* at 43.
121. *Id.* at 27, 28. ("What would be the rationale for admitting this statement, then? Is it more reliable? Because if we say that, then we're undercutting Crawford, which says reliability is not the key . . . because the police likely have less motive to manipulate the statements and to ask loaded questions? That in itself, it seems to me, is a reliable . . . .").
122. Griffin, *supra* note 51, at 20.

purpose is to protect defendants from government manipulation of evidence are more likely to argue that it is the interrogator's purpose that should be the focus.[123] It seems too simplistic to consider primary purpose purely from either the declarant's perspective or the interrogator's perspective.[124] While law enforcement often have dual motives—to collect evidence and to respond to an ongoing emergency—it is equally likely for a declarant to have dual motives of making an accusatory statement for prosecution and to provide facts in order to receive the appropriate and necessary help during an ongoing emergency.[125] In fact, while the dual motives of law enforcement could be characterized as fairly straightforward and predictable, it is likely more problematic for a court to assess the declarant's personal motivations and intentions. With the presence of law enforcement, the declarant's purpose will be influenced in terms of how he thinks his answers will be used and perhaps his answers will change in tone, whether accusatory or frantic, in response to how the police officer is phrasing his questions.[126] The police officer and the declarant will always have an influence on each other and each other's perception of what is occurring. It is possible that the Court's vague pronouncements in recent Confrontation Clause decisions have been attempts to consider the perspectives of both the declarant and law enforcement, and perhaps this is why the Court has avoided confirming exactly whose perspective is being examined.[127] As police interrogations and the nature of criminal events are rarely straightforward and often have multiple motives at play, the ambiguity regarding whose perspective is being considered affords the Court flexibility in reaching its decisions. While this flexibility has been convenient for the Supreme Court in developing its

Confrontation Clause jurisprudence, it has led to split decisions in

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123. *Id.* at 19.

124. Tom Lininger, Davis *and* Hammon*: A Step Forward, or a Step Back?*, 105 MICH. L. REV. FIRST IMPRESSIONS 28, 29 (2006), http://students.law.umich.edu/mlr/firstimpressions/vol105/lininger.pdf.

125. *Id.*

126. *See* Friedman, *supra* note 36, at 3 ("Could it be that the interrogator's purpose is significant because of the light it sheds on the declarant's understanding of the situation?").

127. *See* Robert P. Mosteller, Davis v. Washington *and* Hammon v. Indiana: *Beating Expectations*, 105 MICH. L. REV. FIRST IMPRESSIONS 6, 10 (2006), http://students.law.umich.edu/mlr/firstimpressions/vol105/mosteller.pdf. ("*Davis*, however, did not resolve the issue of whose intent counts . . . . Although being interested in both the intent of the questioner and the speaker is unusual, it is quite appropriate for the Confrontation Clause.").

lower courts.[128]

Speculation persists regarding why the Court chose to emphasize the "ongoing emergency" standard as one of the markers of non-testimonial statements and why the Court chose to reserve a special place for statements made during an emergency situation.[129] It is unclear whether the justices made this distinction because they believe that the declarant's reliability will be at its utmost while he is seeking help, or if they believe that law enforcement agents are less likely to manipulate evidence for future prosecution when they are responding to an emergency. There is certain irony that in a relatively short time period, the Court has blazed from *Roberts* to *Crawford* to *Davis* a Confrontation Clause path that seemingly has come full circle and re-focused on the reliability of the statements[130]—the core of the overturned *Roberts* standard. Depending on the course that the Court chooses to follow on *Davis–Crawford* spectrums, its decision will have a major impact on the application and effect of the Confrontation Clause to crime scene statements.

VII. LIKELY DISPOSITION

The Supreme Court will likely reverse the Michigan Supreme Court's decision. Recently, the Supreme Court has engaged in a reinvigorated inspection of the Confrontation Clause premised on cases with specific factual scenarios that allow them to be placed as defining marks on the Confrontation Clause spectrum. As *Bryant* indicates, the difficulty in drawing a line between testimonial and non-testimonial statements is indicative of the tension between protecting the defendant's constitutional right to confront his accuser and the search for truth that might require admission of potentially damaging statements at trial.[131] This is not to suggest that the Confrontation

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128. *See* Lininger, *supra* note 124, at 28 ("[L]ower court judges hoped that the Supreme Court's ruling in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana* . . . would provide a primer on testimonial hearsay . . . . In fact, the *Davis* ruling raised nearly as many questions as it answered.").

129. *See id*. at 31. ("One category of unresolved questions relates to the definition of 'testimonial' hearsay. Just how can police—or judges, for that matter—determine precisely when an emergency has ended?").

130. Griffin, *supra* note 51, at 18.

131. Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."). Though the *Roberts* decision may have been overturned, that Court's primary concern is still relevant today.

Clause's constitutional guarantee of cross-examination is always at odds with the search for the truth, which would be a clear oversimplification, but merely to highlight the delicate balance that must be achieved in distinguishing between testimonial and non-testimonial statements.

As the *Bryant* oral arguments confirmed, Confrontation Clause cases have produced interesting alignments among the Justices. The Supreme Court will likely hold that Covington's statements were non-testimonial because they were meant to enable the police's primary purpose of responding appropriately to an "ongoing emergency." In keeping with their positions in past decisions, the unlikely Confrontation Clause duo of Justices Ginsburg and Scalia will likely depart from the majority and vote to affirm the Michigan Supreme Court's holding that the statements were testimonial. Justices Ginsburg and Scalia will likely find that the emergency had ended, and, because they tend to emphasize an analysis that centers on the motives of the declarant, they will likely note that Covington provided statements at that time to implicate the defendant, not to seek help.[132]

Justice Thomas, the sole dissenter in *Hammon*, likely will find Covington's final remarks to not possess the "necessary[y] degree of solemnity" to meet his conception of a testimonial statement.[133] Justices Kennedy and Alito, and Chief Justice Roberts dissented in favor of admitting lab evidence in *Melendez-Diaz v. Massachusetts*,[134] another Confrontation Clause case involving the admissibility of lab reports when the prosecution did not provide the opportunity for the defendant to cross-examine the lab analysts.[135] There, these three justices stated that they would limit the Confrontation Clause to "witnesses like those in Sir Walter Raleigh's trial . . . conventional witness[es] responding to questions under interrogation" and even though they acknowledged that the *Crawford* and *Davis* victims were relatively traditional as witnesses, Covington, a dying victim on the

132. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2529 (2009); Davis v. Washington, 547 U.S. 813, 814–16 (2006); Crawford v. Washington, 541 U.S. 36, 36–37 (2004).

133. Davis v. Washington, 547 U.S. 813, 836 (2006) (Thomas, J., concurring in part and dissenting in part).

134. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).

135. *See generally id.* (holding that drug test reports are testimonial within the meaning of the Confrontation Clause).

ground, would likely not be considered by these same justices to be a "conventional witness."[136]

Although he previously aligned himself with Justices Ginsburg and Scalia in *Crawford* and *Davis*, Justice Breyer's show of remorse during oral arguments for supporting *Crawford*'s broadening of the Confrontation Clause suggests that he may join Justices Kennedy, Thomas, Alito, and Chief Justice Roberts, in concluding that Covington's statements were non-testimonial and properly admitted at trial.[137] This speculation is supported in part by his dissent in *Melendez-Diaz*, which was Justice Breyer's first step toward limiting just how the Confrontation Clause had expanded following *Crawford*.[138] The *Melendez-Diaz* dissent, in contrast to the majority's emphasis on cross-examination, seemed to place much importance on the accepted reliability of scientific evidence in reports and as it was the best evidence, it should be admissible without the requirement that the analyst, an unconventional witness, testify.[139] In *Bryant*, Justices Kennedy, Thomas, Alito, and Chief Justice Roberts will probably regard Covington's last words as reliable and contrary to the conventional-accusatory-witness mold that the Confrontation Clause was originally concerned about, and that his death should not preclude their admission. They seem to be most concerned about the potential of law enforcement to manipulate the statement. Thus ultimately it may be that these four justices do not want the Confrontation Clause to serve as a bar to the best evidence where a witness's unavailability was not due to police manipulation and the statements were provided during an emergency.

Despite Justice Sotomayor's five years as a former prosecutor,[140] her vote remains somewhat of a mystery, as she has not favored the prosecution in her other criminal procedure cases since joining the Supreme Court.[141] And the Court's most recent appointee, Justice

Kagan, recused herself from this case because she authored the

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136. *Id.* at 2551 (Kennedy, J., dissenting).

137. Transcript of Oral Argument at 135–36, *Bryant*, No. 09-150 (U.S. Oct. 5, 2010). ("What is the constitutional rationale? I agreed on joining *Crawford*, but I have to admit to you I've had many second thoughts when I've seen how far it has extended as I have written it.").

138. *Melendez-Diaz,* 129 S. Ct. at 2551.

139. *Id*. at 2543.

140. Office of the Press Secretary, *Judge Sonia Sotomayor*, THE WHITE HOUSE (May 26, 2009), http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor/.

141. Briscoe v. Virginia, 130 S. Ct. 1316, 1316 (2010).

United States' *amicus* brief in support of Michigan.

Bryant will likely be a 5–3 or a 6–2 decision reversing the Michigan Supreme Court. The Court will use this opportunity to clarify the meaning behind "ongoing emergency" and "primary purpose" within the Confrontation Clause jurisprudence. The meaning of what is a testimonial statement has caused great confusion among the lower courts in fact patterns similar to *Bryant*. This confusion brings into question *Davis*'s workability in defining the boundaries of what is an "ongoing emergency" and from whose perspective the Court should look to when evaluating whether a statement is testimonial. But, rather than attempting to distinguish between what is and is not an emergency, the Court may opt to use *Bryant* to develop an entirely new definition of what is testimonial with respect to the Confrontation Clause.