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### DON'T BLAME *CRAWFORD* OR *BRYANT*: THE CONFRONTATION CLAUSE MESS IS ALL *DAVIS*'S FAULT

Deborah Ahrens and John Mitchell\*

In *Michigan v. Bryant*, a gunshot victim provided responding officers with the identity of the man who shot him as he lay dying in a parking lot. In determining whether the subsequent use of the deceased declarant's statement at trial violated the Confrontation Clause, the *Bryant* Court applied the "testimonial versus nontestimonial" analysis established in the Court's previous decision, *Crawford v. Washington*. Holding that testimonial hearsay included statements detailing past events, while nontestimonial statements involved the resolution of an "ongoing emergency," the *Bryant* Court applied a multi-factor, "totality of the circumstances" analysis in finding that the deceased declarant's identification had been directed at an ongoing emergency. As such, the hearsay statement was nontestimonial and, accordingly, outside the protection of the Confrontation Clause.

*Bryant* was roundly (and deservedly) criticized by all commentators, who unanimously accused the Court of making a sham of Confrontation Clause jurisprudence. To an extent, the *Crawford* decision also faced the brunt of the criticism. But for the authors of this article, it is the Court's Confrontation Clause analysis in *Davis v. Washington*, a case involving a 911 call, which is truly to blame for the debacle that is the *Bryant* decision; for it was *Davis* that carelessly equated "nontestimonial" with a decontextualized, commonplace notion of an "ongoing emergency." It was this mistake that led to the unfortunate decision in *Bryant*.

As this article will demonstrate, the issue for purposes of Confrontation Clause analysis in cases like *Davis* and *Bryant* is not whether there exists an ongoing emergency in some general sense, but rather, whose emergency it is. If the emergency is the government's, then any statements made

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by citizens to help the government address that emergency are testimonial. If the emergency is one in which a citizen is seeking the government's help (regardless of whether or not it's also the government's emergency), statements made by the citizen are nontestimonial.

Confrontation Clause<sup>1</sup> jurisprudence is currently in such a mess<sup>2</sup> that one commentator has gone so far as to liken it to a "train wreck."<sup>3</sup> Some blame *Crawford*.<sup>4</sup> Some blame *Bryant*.<sup>5</sup> Others have simply jumped off both sides of the train. Those leaping from one side attempt to limit the reach of Confrontation to formal accusatory documents like depositions, prior trial testimony, affidavits, and police interviews intended to provide a record to prosecute the defendant.<sup>6</sup> Those abandoning the train from the other side advocate for the application of the Confrontation Clause wherever the state attempts to carry its burden by offering a hearsay statement against the defendant.<sup>7</sup> And while we believe the real fault lies with *Davis*,<sup>8</sup> in truth, there is much upon which one can justify critical finger-pointing at both *Crawford* and *Bryant*.

*Crawford* ostensibly dealt with a prior Confrontation Clause "train wreck," *Ohio v. Roberts*.<sup>9</sup> *Roberts* assumed that hearsay and confrontation "stem[med] from the same roots,"<sup>10</sup> and, as such, possess the same underpinning of "reliability."<sup>11</sup> Utilizing an approach commentators have tagged as

<sup>1</sup> U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witness against him").

<sup>2</sup> See *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting) (According to Justice Scalia, the majority has "distort[ed] our Confrontation clause jurisprudence and left it in a shambles.")

<sup>3</sup> See Daniel D. Blinka, *More "Bullcoming?" The Court's Confusion in Confrontation*, MARQUETTE UNIVERSITY LAW SCHOOL FACULTY BLOG, March 3, 2011, <http://law.marquette.edu/facultyblog/2011/03/03/more-%E2%80%9Cbullcoming%E2%80%9D-the-court-courts-confusion-in-confrontation/>; Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301, 1304 (2011).

<sup>4</sup> See *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>5</sup> *Bryant*, 131 S. Ct. 1143 (2011).

<sup>6</sup> Thus, Professor Joëlle Moreno suggests a two-prong analysis based upon the nature of "witnessing:" (1) the statement was the functional equivalent of testimony, like depositions, prior testimony, affidavits, videotapes, and the like, and (2) the police and/or crime victim/witness, understood that they were making a record that could be used to prosecute the defendant. See Joëlle Ane Moreno, *Finding Nino: Justice Scalia's Confrontation Cause Legacy From Its (Glorious) Beginning to (Bitter) End*, 44 AKRON L. REV. 1211, 1250-51 (2011).

<sup>7</sup> See Cicchini, *supra* note 3, at 20-21 ("the proper inquiry to determine whether a statement is testimonial involves looking at *the statements use at trial*." (emphasis in original)); If a hearsay statement is used in any way to establish identity or another element of a charge, then it is a substitute for live testimony and triggers confrontational rights; see also Craig M. Bradley, *Further Confusion Over Confrontations*, 47 TRIAL 52 (2011) ("[I]f a defense attorney can offer some reasonable explanation of why they would have needed to cross-examine the declarant of a given hearsay statement . . . [then the right to confrontation arises]"); John R. Grimm, *A Wavering Bright Line: How Crawford v. Washington Denies Defendants A Consistent Confrontation Right*, 48 AM. CRIM. L. REV. 185, 191, 198, 200-204 (2011) (The phrase "witness" in the Sixth Amendment encompasses more than live witnesses at trial, including "those who observe or know something," and thus covers all out-of-court statements brought in against the accused.); Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, SMU Dedman School of Law Legal Studies Research Paper No. 84, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1956748](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1956748) (Historical and textual analysis leads the author to conclude that both testimonial and non-testimonial statements raise confrontation rights, with the latter requiring a showing of unavailability of the declarant before the non-testimonial statement can be received in light of the colonist's "preference for live testimony.").

<sup>8</sup> 547 U.S. 813 (2006).

<sup>9</sup> *Ohio v. Roberts*, 448 U.S. 56 (1980).

<sup>10</sup> *Id.* at 66 (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970)); see also, Katie Polonsky, *A Defense Attorney's Guide To Confrontation After Michigan v. Bryant*, 36 VT. L. REV. 1, 13 (2011).

<sup>11</sup> *Roberts*, 448 U.S. at 66; see also, Cicchini, *supra* note 3, at 1305.

“fusionism”<sup>12</sup> due to the court’s decision to define the scope of constitutional rights as synonymous with common-law hearsay doctrine, *Roberts* found Confrontation Clause rights automatically satisfied by “firmly rooted” hearsay exceptions.<sup>13</sup> Exceptions not fitting the firmly rooted label were subject to a multi-factor test varying from state to state,<sup>14</sup> again to determine reliability. The results of *Roberts* were foreseeable: no constraint on the exercise of judicial discretion;<sup>15</sup> inconsistent trial and appellate results;<sup>16</sup> and the functional demise of constitutionality mandated confrontation as a check on the government in criminal cases, leaving in its place a set of common-law hearsay rules which apply equally to civil and criminal cases.<sup>17</sup>

Then *Crawford* appeared and seemed to change everything, “effecting a sea of change in our understanding of the confrontational clause . . . .”<sup>18</sup> Playing amateur historian,<sup>19</sup> Justice Scalia

<sup>12</sup> See Kenneth W. Graham, Jr., *Michigan v. Bryant: The Counter-Revolution Begins*, UCLA RESEARCH PAPER NO. 11 - 07 (forthcoming in 30A WRIGHT AND GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5173.5 (Supp. 2012) 29 (2011)); Cf. Cicchini, *supra* note 3, at 1306 (“The first problem with *Roberts* was that it intermingled confrontation clause with rules of evidence: more specifically, the rules against hearsay and its thirty-or-so exceptions.”).

<sup>13</sup> *Roberts*, 448 U.S. at 66.

<sup>14</sup> See Cicchini, *supra* note 3, at 1306. For example, one state’s reliability determination rested on:

- (1) whether the declarant had an apparent motive to lie; (2) whether the general character of the declarant suggests trustworthiness; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) whether the timing of the statements and the relationship between the declarant and the witness suggest trustworthiness; (6) whether the statements contained express assertions of past fact; (7) whether cross-examination could not help to show the declarant's lack of knowledge; (8) whether the possibility of the declarant's recollection being faulty is remote; and (9) whether the circumstances surrounding the statements give no reason to suppose that the declarant misrepresented the defendant's involvement;

*see also* Marc Chase McAllister, *Evading Confrontation: From one Amorphous Standard to Another*, 35 SEATTLE UNIV. L. REV. 473 n. 17 (author notes particular state using thirteen (13) factors for *Roberts* analysis).

<sup>15</sup> See McAllister, *supra* note 14, at 517 (*Roberts* “proved easily manipulable [by courts]”); *see also* Cicchini, *supra* note 3, at 1303:

In *Roberts*, the court held that a prosecutor could use hearsay evidence at trial to convict a defendant as long as the judge, using a multi-factor balancing test, first found the hearsay to be reliable. For reasons that will be explained later in this Essay, this highly subjective, fact-intensive, malleable standard “failed to provide meaningful protection from even core confrontation violations.” Prosecutors, with the blessing of trial judges, routinely ran roughshod over defendants’ rights and often won convictions based primarily, if not entirely, on untested hearsay allegations. The confrontation clause was dead;

*see also* Cicchini, *supra* note 3, at 1307-1308.

<sup>16</sup> See McAllister, *supra* note 14, at 517.

<sup>17</sup> See Cicchini, *supra* note 3, at 1302 (“the Confrontation Clause, for all practical purposes, died in 1980 with the Court's decision in *Ohio v. Roberts*.”)

<sup>18</sup> *State v. Grace*, 111 P.3d 28, 36 (Haw. Ct. App. 2005); *see also* Cicchini, *supra* note 3, at 1303 n.2.; Bellin, *supra* note 7 at 2 (“Commentators cheered when the Supreme Court decided *Crawford v. Washington*.”).

<sup>19</sup> Several commentators have criticized Justice Scalia’s interpretation of history in *Crawford*. See Thomas Y. Davies, *What Did The Framers Know And When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005); Randolph N. Jonakait, *The Too Easy Historical Assumption of Crawford v. Washington*, 71 BROOK. L. REV. 219 (2005); Further criticism of Justice Scalia’s use of history has characterized the Justice’s approach as one that equates originalism with literal historical application without considering the underlying reasons and principles animating the particular application. In this vein, Professor Beery notes:

renounced the “reliability” frame of *Roberts* and its linking of constitutional confrontation to hearsay doctrine.<sup>20</sup> Confrontation was a procedural trial right focused upon a “specific type” of out-of-court statement: one made by a witness who bore testimony.<sup>21</sup> Accordingly, the issue is whether the out-of-court statement can be characterized as “testimonial” or “non-testimonial.”<sup>22</sup> The former implicates confrontation and requires the presence of the declarant on the stand or a prior opportunity for confrontation (e.g., at a deposition).<sup>23</sup>

*Crawford*, however, did not attempt to precisely define its key terms<sup>24</sup> – testimonial and nontestimonial – leaving that for another day.<sup>25</sup> Without such definition, and given the nature of an adversarial system, it was predictable that the terms “testimonial” and “non-testimonial” would tend to be almost as subject to judicial manipulation as “reliability” in *Roberts*.

*Bryant* then took the proverbial ball and ran, albeit effectively right back to *Roberts*.<sup>26</sup> The issue before the court on Certiorari in *Bryant* was as follows:

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... With regard to underlying principles, Justice Scalia anchors the Constitution semantically to the surface, insisting that although we may probe what the Constitution’s words meant when they were drafted, we may not probe the purposes that animated constitutional rules.

... Justice Scalia [thus] personifies the philosophical anxieties that lead judges to adopt species of textualist and originalist methods that anchor meaning to centuries past and to surface meaning. The resulting constitutional rules are so narrow that they are impossible to apply without producing absurd results. Thus, Justice Scalia’s brand of originalism and textualism, which are effectuated by embedding original expected application in the Court’s precedents and willfully ignoring semantic depth, invite future courts to manifest the kind of intellectual dishonesty and contortionism exemplified by Bryant.

Brendan T. Beery, *When Originalism Attacks: How Justice Scalia’s Resort to Original Expected Application in Crawford v. Washington Came Back to Bite Him in Michigan v. Bryant*, 59 DRAKE L. REV. 1047, 1048, 1085 (2011).

<sup>20</sup> See *Crawford*, 541 U.S. at 51; see also Polonsky, *supra* note 10 at 36 (*Crawford* ultimately rejected *Roberts* assumption that the Confrontation Clause and the hearsay rules seek to protect the same values).

<sup>21</sup> See *Crawford*, 541 U.S. at 51.

<sup>22</sup> See *Crawford*, 541 U.S. at 59; see also McAllister, *supra* note 14, at 7:

According to the [*Crawford*] Court, because the term “witnesses” encompasses those who “bear testimony,” the Confrontation Clause governs only “testimonial” statements. If a hearsay statement is “non-testimonial,” the Confrontation Clause does not apply, and the statement will be admitted if governing hearsay law permits its introduction. On the other hand, if a statement is “testimonial,” the Sixth Amendment require either (i) opportunity for cross-examination of the hearsay declarant in court, or (ii) in the case of a declarant who is unavailable to testify, some prior opportunity for cross-examination of that declarant. Once actual confrontation is assured, governing hearsay law determines whether the testimonial statement will be admitted.

<sup>23</sup> *Id.*

<sup>24</sup> See Cicchini, *supra* note 3, at 1322; see also, McAllister, *supra* note 14, at 519 (The *Crawford* court’s testimonial/non-testimonial “framework has proven just as malleable as the *Robert’s* rule”).

<sup>25</sup> See *Crawford*, 541 U.S. at 68.

<sup>26</sup> “In *Bryant* . . . the majority of the court, over a bitter dissent from Justice Scalia, effectively overruled *Crawford* and pushed confrontation doctrine back in the direction of *Roberts*.” Graham, Jr., *supra* note 12, at 28; see also, Cicchini, *supra* note 3, at 1304 (*Bryant* “slowly and painfully developed yet another highly subjective, fact-intensive, malleable standard—the very thing it condemned in *Crawford*”).

The Court granted certiorari on the question of whether the “preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting” are nontestimonial when they are “made under circumstances objectively indicating that the primary purpose [of the interrogation] is to enable police assistance to meet an ongoing emergency . . . .” The Court’s Question Presented firmly frames the issue as the scope of *Davis*’s emergency doctrine.<sup>27</sup>

By the time the dust settled, just as in *Roberts*, confrontation analysis would turn on an individual judge’s assessment of a highly malleable phrase: “on-going emergency.”<sup>28</sup> This new expression was now standing in the place of “reliability” and determined by a multi-factor (10–12 factors depending on how you count)<sup>29</sup> “totality of the circumstances” test reflecting all circumstances surrounding the out-of-court statement,<sup>30</sup> including the perspective of *both* declarant and the police.<sup>31</sup> To complete the return to *Roberts*, the *Bryant* Court even reinvigorated the “reliability” analysis.<sup>32</sup> Thus, analogizing to “excited utterances,”<sup>33</sup> the *Bryant* Court found statements whose primary objective purpose was to deal with an “on-going emergency” would escape confrontation demands because declarants have little reason to lie when addressing an emergency.<sup>34</sup> Given the *Bryant* formulation, confrontation decisions are once again made within a regime of functionally unconstrained judicial discretion<sup>35</sup> and are certain to produce widely inconsistent decisions.<sup>36</sup>

The revolution in *Cranford*, like most revolutions, involved a shift in power. *Cranford* took the power that *Roberts* gave to judges to determine the “reliability” of accusatory statements and returned it to the jury. Procedure rather than precedent was to govern; “reliability” was to be tested by cross-examination, not by the caselaw. But deposed powerholders do not surrender easily. The *Bryant* counterrevolution puts judges back on the throne.<sup>37</sup>

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<sup>27</sup> Polonsky, *supra* note 10, at 10.

<sup>28</sup> See Cicchini, *supra* note 3, at 1304 (“instead of determining whether hearsay was reliable, courts are now looking to a different set of factors to determine, for example, whether there was an ongoing emergency at the time of the statement”).

<sup>29</sup> See Graham, Jr., *supra* note 12, at 28 (noting that there are twelve (12) elements in the *Bryant* test); McAllister, *supra* note 14, at 15-16 (noting that there are ten (10) elements to the test); Moreno, *supra* note 6, at 1245 (noting that there are eight (8) factors).

<sup>30</sup> See *Bryant*, 131 S. Ct. at 1162 (“[C]ourts making a ‘primary purpose’ assessment should not be unjustifiably restrained from considering all relevant evidence”).

<sup>31</sup> See Polonsky, *supra* note 10, at 11; see also, Hsien-Ying Shine Chen, *Michigan v. Bryant: Defining The “Testimonial” Statement*, 6 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 21, 35-36 (2010) (Author analyzes *Bryant* from a post oral argument, pre-opinion perspective).

<sup>32</sup> See Cicchini, *supra* note 3, at 1311-1312; see also Moreno, *supra* note 6, at 1247.

<sup>33</sup> See Fed. R. of Evid. 803(2) (“A statement relating to a startling event or condition, made while the declarant was under the stress or excitement that it caused”).

<sup>34</sup> See *Bryant*, 131 S. Ct. at 1157.

<sup>35</sup> See McAllister, *supra* note 14, at 21-31 (author extensively analyzes cases illustrating malleability of the *Bryant* factors, and how they may be manipulated by judges and police).

<sup>36</sup> *Id.*

<sup>37</sup> See Graham, Jr., *supra* note 12, at 40.

However, the real culprit has all but escaped notice: *Davis v. Washington*,<sup>38</sup> and its companion case, *Hammon v. Indiana*.<sup>39</sup> Together, they merit a large share of the blame. And the funny thing is that the majority in *Davis* got it completely right, and then completely wrong, within the same opinion.

### A. Davis v. Washington: The Court Takes a Wrong Turn

Notably, the *Crawford* court ambiguously defined “testimonial” as the facts of the case did not require it to endorse a particular definition or formulation for testimonial.<sup>40</sup> On the other hand, *Davis* (and its companion case, *Hammon*) required the Court to begin providing more precision to its definition of “testimonial,” as the hearsay in each case looked less like the formal statement of a *Mirandized* suspect. In *Davis*, Michelle McCottry called 911, and, after the operator asked her “What’s going on?” she replied, “He’s here jumpin’ on me again . . . He’s usin’ his fists.”<sup>41</sup> The *Davis* court held that “[s]tatements are nontestimonial 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.”<sup>42</sup>

The court thought it important to distinguish between cases where statements were designed to establish past facts and those used to “describe current circumstances requiring police assistance.”<sup>43</sup> Indeed, it specifically focused on whether or not out of court statements related to an emergency situation in order to determine whether or not to consider them testimonial. The majority found that McCottry’s statements were nontestimonial, noting that “McCottry was speaking about events *as they were actually happening*, rather than describing past events,” that “any reasonable listener would recognize that McCottry was facing an ongoing emergency,” and that “McCottry’s call was plainly a call for help against bona fide physical threat.”<sup>44</sup>

So far, the *Davis* holding appears reasonable. When a declarant makes a statement for the purpose of providing law enforcement officials with information to aid her in the resolution of a crisis, the Confrontation Clause would not require that a criminal defendant be offered the opportunity to cross-examine the declarant in court. If we think of a sworn witness on the stand who suddenly shouts, “my water is poisoned—I need help,” we would not consider that statement to be “testimony”: it is a declaration intended to call forth assistance for its declarant, and quickly. Statements elicited or designed to help resolve that emergency would not be barred by the confrontation clause. In fact, *Davis* specifically noted, “No ‘witness’ goes into court to proclaim an emergency and seek help.”<sup>45</sup>

However, where the *Davis* court went awry was in failing to differentiate between the declarant’s emergency and an emergency that might belong to the police, so as to leave future courts

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<sup>38</sup> *Crawford*, 541 U.S. at 36.

<sup>39</sup> 829 N.E.2d 444 (2005).

<sup>40</sup> *Davis*, 547 U.S., at 822. The statement at issue in *Crawford*, the Court noted, had been made once the declarant, a criminal suspect, was in police custody and had been offered *Miranda* warnings.

<sup>41</sup> *Id.* at 817.

<sup>42</sup> *Id.* at 822.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 827 (internal quotation marks and citations omitted).

<sup>45</sup> *Id.* at 828.

with only the decontextualized phrase “ongoing emergency” for guidance.<sup>46</sup> Under this free floating, nebulous notion of ongoing emergency, it would make no difference whose emergency is the focus of police interrogation; i.e., whether it is that of declarant or the police.<sup>47</sup>

However, this makes little sense under confrontation clause jurisprudence that centers on the nature and role of a “witness.” Witnesses provide information to help the state; they do not provide information to *receive* help from the state.<sup>48</sup> Thus, the appropriate analysis for applying the “emergency” test in *Davis* is not to debate whether or not the police are dealing with some ongoing emergency in the colloquial sense; but rather, whether at the time the declarant is making her statements, those statements are designed to help police resolve the declarant’s emergency, or the police’s emergency. Often, the emergency will indeed belong to the declarant. Statements might be designed to secure medical assistance, for example, or to provide police with the information that they need to thwart an imminent attack. However, statements are also frequently made with intent to resolve what we would be described as a “police” emergency: to locate a suspect who is on the loose so that they might be arrested and prosecuted, or to protect the public in a general and diffuse sense from the ongoing presence of a person who has committed an offense and is not secured.

Part of the explanation for how the Court faltered in *Davis* was that it applied case law addressing a wholly different constitutional amendment. Indeed, the Court used *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt City*<sup>49</sup> to reason that facts elicited for the purposes of establishing whether police responding to a scene might encounter a violent felon would be nontestimonial,<sup>50</sup> transposing a doctrine meant for the Fourth Amendment onto the Sixth Amendment. *Hiibel* established that, under the Fourth Amendment, “where an officer was in the presence of a suspect whom he had reasonable suspicion to detain, it was in turn reasonable for the officer to ask the suspect for identification.”<sup>51</sup>

Now, it is entirely understandable that an officer who seizes a potentially dangerous person will want to know with whom she is dealing. However, this does not mean statements elicited from a third party for the purpose of providing similar protection for the officer in carrying out her dangerous work on the street somehow become exempt from the Confrontation Clause if offered against a defendant at trial. The type of information police may use to stop, frisk, search, arrest, or generally interrogate has absolutely nothing to do with whether that same information would offend the Confrontation Clause if offered in the setting of a trial.<sup>52</sup> Mixing the police investigative stage with the trial stage would in fact result in an “ongoing emergency” analysis which could even be applied to statements made to an officer about long-past events, provided the statements would illuminate any potential threat posed by the person whom the officer plans to encounter.<sup>53</sup>

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<sup>46</sup> *Id.* at 822. Our review of the entire published literature on *Davis* (including approximately 55 articles) did not find any scholars or other commentators who had noted that the issue of “whose emergency is it” might matter.

<sup>47</sup> One way to critique this formulation of the ongoing emergency standard might be to say that when police are engaging in investigation in order to apprehend a suspect, there simply is not a crisis afoot—unless the police are pulling an attacker off of a declarant, there is nothing that fits the definition of “emergency.” That is probably unfair to police, however – police would certainly, and reasonably, perceive it to be a matter of some urgency that they track down a person who has committed a serious crime.

<sup>48</sup> *See Davis*, 547 U.S. at 828.

<sup>49</sup> 542 U.S. 177, 186 (2004).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Graham, *supra*, note 12, at 28-29.

<sup>53</sup> *Id.* at 28.



Under our analysis, if the declarant's statements are designed to help officers with a police emergency they will comprise testimonial hearsay and would require confrontation or exclusion. By limiting nontestimonial statements in the emergency context to those designed to help resolve the declarant's emergency, we minimize the incentives for police to design investigative methods that might permit them to circumvent confrontation concerns.<sup>54</sup>

### **B. Applying the "Whose Emergency?" Test**

Asking "Whose emergency are police addressing?" as our test would require, may not always produce a different answer to the question "Is the declarant's statement testimonial?" than would the Court's current test. The facts of *Davis*, for example, lend themselves to the conclusion that many of the statements the declarant made were nontestimonial. Michelle McCottry, the declarant, called 911; in response to the operator's question, "What's going on?" she replied "He's here jumpin' on me again . . . He's usin' his fists."<sup>55</sup> This exchange seems clearly designed to get police to respond to McCottry's own emergency: she was providing the operator with information about an attack she was enduring at the time she made the phone call. In fact, it was not until the end of the statement that the Court excerpted that McCottry had said, "He's runnin' now,"<sup>56</sup> indicating that all of the prior statements had been made in the presence of McCottry's assailant and were attempts on her part to get police to help her with her own emergency.<sup>57</sup> They were not designed or elicited so that police could deal with a police emergency such as apprehending a criminal suspect or engaging in more diffuse community protection.<sup>58</sup>

The portion of the call that the Court described but did not excerpt, on the other hand, might be less clear. The Court describes a conversation in which the 911 operator elicited information from McCottry such as her assailant's date of birth. If this exchange were designed to help police officers thwart her boyfriend's immediately threatened return, McCottry's statements would be admissible. Alternatively, if the conversation were intended to assist police in making an arrest of a person who had fled the scene, the emergency, to any extent that it existed, would belong to the police rather than to McCottry, and McCottry's statements would require confrontation.<sup>59</sup>

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<sup>54</sup> See Josephine Ross, *Crawford's Short-Lived Revolution: How Davis v. Washington Reigns In Crawford's Reach*, 83 N.D. L. REV. 387, 406 (2007) (arguing that *Davis* invites police "to characterize their questioning as part of an ongoing emergency investigation" to avoid having statements classified as testimonial).

<sup>55</sup> *Davis*, 547 U.S. at 817.

<sup>56</sup> *Id.* at 818.

<sup>57</sup> *Id.*

<sup>58</sup> The court also addressed the facts from *Hammon v. Indiana* in its *Davis* opinion. In *Hammon*, police responded to a "reported domestic disturbance" at Hershel and Amy Hammon's home. The officers who arrived on scene separated Amy from her husband and asked her to fill out a battery affidavit in which she narrated the assault that led to the domestic disturbance report. The Court concluded that Amy's statements were testimonial, as police were asking Amy to recount past, concluded events. Here, neither the police nor the declarant was attempting to resolve an emergent situation. See *Davis*, 547 U.S. at 819-20, 830; see also *Hammon*, 829 N.E.2d at 447.

<sup>59</sup> During this segment of the exchange, McCottry told the 911 operator that her former boyfriend told her that he had come to the house to retrieve his belongings, as she was moving from the location, and otherwise described the context for the assault. The operator told McCottry that the police, who were en route to her home, would "check the area for [McCottry's former boyfriend] first" and that they would then "come talk to you." This language suggests that by the unexcerpted portion of the conversation, McCottry was not fearing that her former boyfriend was about to return. The *Davis* court itself suggested that the statements that followed the former boyfriend's departure from the premises might be testimonial; the Court noted that it had been asked only whether the initial exchange between the 911 operator and McCottry had been testimonial. See *Davis*, 547 U.S. at 818-19, 829.

On the other hand, under our “whose emergency” test *Bryant* would be resolved differently.<sup>60</sup> The statements at issue were designed to resolve a police emergency, rather than the declarant’s personal emergency.<sup>61</sup> When Anthony Covington spoke with police at a gas station in Detroit, he was experiencing an ongoing emergency that was his personal emergency: he had been shot in the abdomen, which had made it difficult for him to speak and caused him to suffer great pain.<sup>62</sup> Police responding to a radio dispatch report that a man had been shot asked him “what had happened, who had shot him, and where the shooting had occurred.”<sup>63</sup> Covington responded by providing a name of the possible suspect, indication that he recognized the suspect by his voice, and a brief narrative of the shooting.<sup>64</sup> Those statements did not serve the purpose of helping police officers to address Covington’s emergency: they did not apprise them of his medical condition, or otherwise provide police with information that would be useful in assisting Covington.<sup>65</sup> Under the Court’s analysis in *Bryant*, the interrogation and statements were for the primary purpose of enabling police to meet an ongoing emergency.<sup>66</sup> That emergency belonged to the police; however, the information they sought, and the statements Covington made, were for the purpose of identifying and apprehending the person whom the police believed shot Covington. Here, the identity of the person to whom the emergency belonged would have changed the outcome of the case: under our analysis, Covington’s statements are inadmissible, because the emergency that they pertained to belonged to the police rather than the declarant.

Furthermore, it is important to note that under this analysis it is absolutely irrelevant that Covington was shot as opposed to punched or stabbed.<sup>67</sup> The presence of a gun in the case may have increased the sense of emergency for police but had no bearing on whether or not the statement was directed at resolving the declarant’s emergency in *Bryant*.<sup>68</sup>

While our test reaches different results depending on whose emergency statements are designed to resolve, it does not require that the emergency belong personally to the declarant. Indeed, the emergency might belong to a third-party victim on whose behalf the declarant was seeking emergency assistance. In the same way that we would not consider a witness screaming

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<sup>60</sup> See *Bryant*, 131 S. Ct. 1143.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1150.

<sup>63</sup> *Id.* (internal quotation marks and citations omitted).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1165.

<sup>67</sup> *Id.* at 1150.

<sup>68</sup> Because of the Court’s mistaken focus on the generic sense of “ongoing emergency”, the use of a gun became central to the *Bryant* Court’s analysis:

The Michigan Supreme Court also did not appreciate that the duration and scope of an emergency may depend in part on the type of weapon employed. The Court relied on *Davis* and *Hammon*, in which the assailants used their fists, as controlling the scope of the emergency here, which involved the use of a gun . . .

This is also the first of our *post-Crawford* Confrontation Clause cases to involve a gun. The physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat here . . . See *id.* at 1159, 1164.

“Help, I’m on fire!” while on the witness stand to be “offering testimony,” we would similarly refuse to label a witness screaming “Help, the bailiff is on fire!” as “offering testimony.”

If Covington’s brother had witnessed a guest in his home shooting Covington and had pulled out his cell phone to call the police, we would not consider a statement to the effect of “there is a man at my house who is attacking my brother” to be testimonial. Covington’s brother would be attempting to notify police so that they might provide assistance with his brother’s ongoing emergency. Similarly, if police arrived at the scene and asked Covington’s brother to let them know Covington’s condition, and the brother told them “My brother has been bleeding profusely and is no longer responding to his name,” he would be attempting to elicit assistance for his brother in order to resolve his ongoing emergency. Our test would therefore admit his statements as nontestimonial (assuming that they were otherwise admissible under his jurisdiction’s hearsay rule).<sup>69</sup>

### C. The Case of a Madman on a Shooting Spree

In oral argument, Justice Kennedy posed a hypothetical based on the tragedy at Virginia Tech.<sup>70</sup> One could not have completed a legal education—replete with Socratic questioning in a large first-year classroom—without maintaining the instinct to test the boundaries of every principle by resort to a hypothetical at the extreme. Yet, in interpreting a document like the Constitution, which must provide a workable framework for application in day-to-day life, we should be cautious of tying our legal understanding to the most aberrational possibilities lest we lose any capacity for clarity. The madman indiscriminately shooting fellow students at a college or high school, the disgruntled employee indiscriminately trying to kill fellow workers, and the sniper firing at cars on the freeway are all stories which fill the newspapers and the electronic media. They shock us, fascinate us, make us puzzle over the nature of evil, and philosophize about our culture. However, in contrast to the half a dozen or so of these undoubtedly horrible, albeit aberrational, incidents, in 2010 there were 138,395 reported firearms assaults<sup>71</sup> and 8,775<sup>72</sup> murders by firearm, totaling 147,170 shootings. It is among this mass of firearm crimes that any Confrontational Clause doctrine will come into play; particularly since, to the authors’ knowledge, in the madman scenario the perpetrator never sees the legal system and dies at the scene at their own hand or in a final gunfight with law enforcement. With that caution in mind, we will apply our “Whose emergency is it?” approach to the madman on a shooting spree hypothetical.

For both declarant/victims and declarant/third-party witnesses, our approach is the same. If they are in the general physical area where the rampage is taking place, and are generally aware as to what is happening, statements to police will be either asking for help in their “own” emergency or asking for help for readily visualized, identifiable others. This latter type of statement is similar to a 911 call that a neighbor is being burglarized. Although in the madman scenario the declarant may not actually see the individual(s) at risk, they can readily visualize identifiable individuals (fellow

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<sup>69</sup> Cf. Fed. R. Evid. 803(4).

<sup>70</sup> See Transcript of Oral Argument at 13-14, *Michigan v. Bryant*, 562 U.S. \_\_\_, 131 S. Ct. 1143 (Oct. 5, 2010), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-150.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-150.pdf).

<sup>71</sup> We arrived at this statistic by taking data indicating that there were 44.78 firearms assaults in 2010 per 100,000 people in a given population and then did the math based on a population of 308,745,538. The data statistics came from, *Gun Crime Statistics by U.S. State: Latest Data*, THE GUARDIAN, DATABLOG, JAN. 10, 2011, <http://www.guardian.co.uk/news/datablog/2011/jan/10/gun-crime-us-state>; The population statistics from *USA Quickfacts from the US Census Bureau*, Jan. 17, 2012, <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>72</sup> See THE GUARDIAN, DATABLOG, *supra* note 71.

students, workers, or drivers) who are similarly situated towards the madman bent on randomly shooting anyone who crosses his path.<sup>73</sup>

Note that this situation is completely different from, for example, a drive-by shooting where bystanders have already been shot. Certainly the people in the car are dangerous, and they may act similarly in the future, but unless some witness talking to the police who arrive on the scene has a reason to believe that the occupants of the car are still driving around, shooting away, the emergency is the government's, not the witnesses. The witness is simply not seeking help for themselves or for some readily visualized, identifiable persons currently known to be at risk. It is now the government that is seeking help, it is the government's emergency, and the Confrontation Clause applies to any of those witness statements the government attempts to bring into trial.

#### **D. The Case of Joint Emergencies**

Finally, one might ask how we would handle the situation where the emergency could be characterized as that of *both* the declarant and the government (e.g., when the declarant calls the police on his cellphone that he is driving on a road currently under attack by a sniper). This apparent quandary, however, dissolves upon analysis. Every time a citizen declarant asks for help from the government, out of necessity they must provide its agents with information to obtain that help. That the emergency for which the citizen-declarant seeks help by chance also entails aspects which constitute a broader problem for the government should make no difference. If the citizen is asking for help, even though he realizes that, in the process of providing aid the government will likely also need to deal with an emergency of public nature, it makes no difference for purposes of Confrontation Clause analysis. The statement by the declarant is nontestimonial.

On the other hand, if the declarant provides a mix of information, some applicable to his emergency and some to the government's, the information should be parsed such that the former information would be nontestimonial and the latter testimonial.<sup>74</sup> Imagine a declarant calls 911 gasping, "Help me. I've been shot in the chest; I need an ambulance, quick. Bill Smith shot me, and I'm bleeding bad . . ." Most of this statement deals with the caller's emergency; here, a medical one, and is nontestimonial. But identifying Bill Smith as the shooter has nothing to do with getting medical help from the government, it only serves to help the police catch a potential criminal and, as such, is testimonial.

#### **E. Final Thoughts**

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<sup>73</sup> Interestingly, the Court in *Bryant* noted:

If an out-of sight sniper pauses between shots, no one would say that the emergency ceases during the pause. That is an extreme example and not the situation here, but it serves to highlight the implausibility, at least as to certain weapons, of construing the emergency to last precisely as long as the violent act itself . . . *Bryant*, 131 S. Ct., at 1164.

We agree. But that is because any citizen-declarant offering information to the police contemporaneously with the fusillade would be seeking help in order to protect his or her self, or some specific readily visualized fellow citizens, from this madman; it would not be because the emergency here was "ongoing" in some general sense.

<sup>74</sup> *Davis* was clear that in assessing the 911 call in the case before it under a Confrontation Clause analysis, part of the 911 call could be non-testimonial while other parts of the same call could be testimonial. *See Davis*, 547 U.S. at 828-29.

While we believe that our proposed inquiry into the locus of the emergency will offer general clarity to the issue of Confrontation when assessing 911 calls and on-the-scene and near-the-scene statements, no lens for analysis can insure that, given the endless variety of facts, difficult decisions will not inevitably arise. To protect the explicit Constitutional right incorporated in the Confrontation Clause, we propose a sequence of shifting burdens in the manner in which the United States Supreme Court dealt with the discriminatory use of peremptory challenges in *Batson v. Kentucky*.<sup>75</sup>

First, the defendant will have to establish that the prosecution plans to offer hearsay evidence at trial, that the declarant will not testify, and that there has been no prior confrontation (such as at a deposition). The prosecution will then have the burden by a preponderance of the evidence to establish that the statement is not testimonial. The judge would then weigh all the arguments and, if unsure, keep out the statement, thereby signaling the importance of the right embodied in the Confrontation Clause.

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<sup>75</sup> 476 U.S. 79 (1986) (The Court sets up a three-part process: (1) challenging party must establish a “pattern of discrimination” (2) challenged party must provide a neutral, non-discriminatory reason for the strike (3) the judge considers the arguments and rules).