

A DEFENSE ATTORNEY'S GUIDE TO CONFRONTATION AFTER *MICHIGAN V. BRYANT*

*For all I know, Bryant has received his just deserts. But he surely has not received them pursuant to the procedures that our Constitution requires. And what has been taken away from him has been taken away from us all.*¹

INTRODUCTION

In 1603, the Crown charged Sir Walter Raleigh with high treason in part for plotting to murder King James I.² In preparing for trial, Lord Cobham, Raleigh's alleged co-conspirator, was interrogated and signed a sworn confession.³ During trial, the King used the Crown-procured *ex parte* testimony of Cobham against Raleigh.⁴ Raleigh demanded Cobham be brought before the court so Raleigh might interrogate him "face to face."⁵ Raleigh was sure Cobham would prove his innocence.⁶ After all, Cobham had written a letter stating his charges against Raleigh contained no truth.⁷

The Judges refused to allow Raleigh the use of Cobham's exonerating letter, stating that common law did not require face-to-face confrontation⁸ and that the letter had been "extorted by unfair pressure."⁹ Cobham's out-of-court deposition accusing Raleigh, however, was allowed in simply because it was probative.¹⁰ Raleigh was convicted of treason based on Cobham's *ex parte* testimony.¹¹ The Judges imprisoned Raleigh in the Tower of London and sentenced him to be "hanged, drawn and quartered."¹² A judge sitting on the case lamented, "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh."¹³

1. *Michigan v. Bryant*, 131 S. Ct. 1143, 1176 (2011) (Scalia, J., dissenting).

2. PATRICK HASTINGS, *FAMOUS AND INFAMOUS CASES* 54 (William Heinemann ed., 1950).

3. Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 545 (1994).

4. *Id.*

5. Trial of Sir Walter Raleigh, 2 T.B. Howell, *State Trials*, cols. 87–88 (1603).

6. HASTINGS, *supra* note 2, at 55.

7. *Id.*

8. Herrmann & Speer, *supra* note 3, at 545.

9. HASTINGS, *supra* note 2, at 56.

10. Herrmann & Speer, *supra* note 3, at 545.

11. HASTINGS, *supra* note 2, at 56.

12. *Id.*

13. DAVID JARDINE, *CRIMINAL TRIALS* 520 (1832) (quoting Gawdy, J.).

The right to confrontation has a significant history in this country.¹⁴ In 1791, the newly created United States ratified the Sixth Amendment, ensuring that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹⁵ The Founders were primarily concerned with the use of *ex parte* testimony against criminal defendants, and cases like Sir Walter Raleigh’s were the paradigmatic reason for this concern.¹⁶ In particular, the Founders sought to constitutionalize criminal procedures to protect criminal prosecutions from the English law tradition that favored the civil-law method of criminal procedure.¹⁷ Ultimately, the Founders wanted to protect criminal defendants against the government’s use of out-of-court testimony when the defendant had no chance to confront that testimony.¹⁸

Two hundred and thirteen years after the ratification of the Sixth Amendment and 401 years after Sir Walter Raleigh’s infamous trial, the United States Supreme Court waded again into the murky waters of confrontation.¹⁹ Though some could view Sir Walter Raleigh’s case as ancient history, his story and the lessons learned therein are central to understanding the Court’s modern Confrontation Clause jurisprudence. Predictably, the Court’s most recent foray into the Confrontation Clause has had major effects on criminal defendants, particularly in light of the Court’s most recent decision, *Michigan v. Bryant*. This Note will first attempt to clarify the Court’s current confrontation jurisprudence so that defense attorneys may successfully challenge and control the admission of out-of-court statements in criminal cases. Secondly, this Note will argue that state courts should refuse to follow *Bryant*.

Part I will examine the recent Supreme Court Confrontation Clause precedents of *Crawford*, *Davis*, and *Giles* before introducing *Michigan v. Bryant*, the major confrontation case that the Court decided in February of

14. 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 235, 265, 278, 282, 287, 323, 342, 377 (Leon Friedman et al. eds., 1971) (noting that at least eight of the original thirteen colonies’ declarations of rights guaranteed a confrontation right).

15. U.S. CONST. amend. VI.

16. See *Crawford v. Washington*, 541 U.S. 36, 48–49 (2004).

The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told. . . . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the *Inquisition*.

Id. (alteration in original) (quoting 2 DEBATES ON THE FEDERAL CONSTITUTION 110–11 (J. Elliot ed., 2d ed. 1863)).

17. Richard Freeman, *The Confrontation Clause Re-Rooted and Transformed*, CATO SUP. CT. REV. 439, 445 (2004).

18. *Id.* at 445–46.

19. *Crawford*, 541 U.S. at 36.

2011. Part II attempts to clarify the Court's recent precedent by examining the historical context of these cases, cataloging the key terms used in the Court's recent confrontation cases, and providing examples of some creative arguments defendants can make to keep statements out of evidence. Part III discusses the unique problem *Bryant* poses to defendants and urges states to reject *Bryant* under their own constitutions.

I. THE COURT'S RECENT CONFRONTATION CLAUSE JURISPRUDENCE

The Court has taken on four major Confrontation Clause cases since 2004.²⁰ First, it held that certain types of very formal statements are always testimonial and thus subject to the Confrontation Clause in *Crawford v. Washington*. Next, it attempted to clarify what constituted a testimonial statement, versus a nontestimonial statement, in *Davis v. Washington*. The third case, *Giles v. California*, incorporated a forfeiture exception to confrontation rights, will be discussed in Part III, *infra*. Finally, in March of 2011, the Court decided *Michigan v. Bryant*, a case that attempted to further define *Davis*'s emergency doctrine. A brief background on the facts and decisions in *Crawford*, *Davis*, and *Bryant* are necessary to parse out what the Court's recent confrontation jurisprudence means for defendants.

A. Crawford v. Washington

In August of 1999, Michael Crawford stabbed Kenneth Lee, a man who allegedly tried to rape Crawford's wife.²¹ After receiving *Miranda* warnings, Crawford admitted to the stabbing.²² He told police he thought Lee had something in his hand during the attack, thus claiming he stabbed Lee in self-defense.²³ Crawford's wife, Sylvia, also received *Miranda* warnings and gave the police a statement.²⁴ Sylvia told the interrogating officer that she essentially facilitated the stabbing by taking Crawford to Lee's apartment.²⁵ She admitted also that Lee had nothing in his hand when

20. The Court decided a fifth confrontation case in 2009, *Melendez-Diaz v. Massachusetts*, which is discussed briefly in Part II-B-1. Generally, this case affirmed that sworn affidavits "fall within the 'core class of testimonial statements'" described in *Crawford*. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531–32 (2009) (quoting *Crawford*, 541 U.S. at 51).

21. *Crawford*, 541 U.S. at 38.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 40.

Crawford stabbed him.²⁶ The State of Washington charged Crawford with assault and attempted murder for stabbing Lee.²⁷

At trial, Sylvia did not testify against Crawford pursuant to Washington's spousal privilege law, "which generally bars a spouse from testifying without the other spouse's consent."²⁸ Washington's marital privilege does not extend to out-of-court statements, however, and the State sought to introduce Sylvia's statements at trial via the declarations-against-penal-interest exception to the hearsay rule.²⁹ The trial court allowed in Sylvia's statements, finding that they did not violate the marital privilege and "were sufficiently reliable to alleviate confrontation clause concerns."³⁰

The trial court considered Sylvia's statements reliable because "Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or 'justified reprisal'; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a 'neutral' law enforcement officer."³¹ Though the Washington Court of Appeals reversed this finding of reliability, the Washington Supreme Court reinstated Crawford's conviction. It concluded that Sylvia's statements "bore guarantees of trustworthiness"³² because they were "virtually identical" to the defendant's and thus reliable.³³

As Petitioner's brief discusses, the Court granted certiorari to determine, in part, whether the Court should reevaluate the reliability test established in *Ohio v. Roberts*³⁴ and "hold that the [Confrontation] Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in 'testimonial' materials."³⁵ The Court did reevaluate *Roberts* and found its particularized guarantees of trustworthiness test to be inappropriate for "testimonial" statements.³⁶ Thus, a new confrontation framework emerged under *Crawford*: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."³⁷

The *Crawford* Court further rejected using *Roberts* to assess the admissibility of out-of-court testimonial statements, noting, "*Roberts*'

26. *Id.* at 39–40.

27. *Id.* at 40.

28. *Id.* (citing WASH. REV. CODE § 5.60.060(1) (1994)).

29. *Id.*; WASH. R. EVID. 804(b)(3) (2003).

30. *State v. Crawford*, 54 P.3d 656, 658 (Wash. 2002).

31. *Crawford*, 541 U.S. at 40.

32. *Id.* at 41.

33. *Id.* (quoting *Crawford*, 54 P.3d at 664).

34. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

35. Brief for Petitioner at i, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 219339940, at *i; see also *Crawford v. Washington*, 539 U.S. 914 (2003) (granting certiorari).

36. *Crawford*, 541 U.S. at 61–62.

37. *Id.* at 68.

failings were on full display in the proceedings below.”³⁸ Since Sylvia Crawford’s statements were so clearly testimonial (she signed a sworn affidavit while in police custody as a suspect herself), the Court did not feel the need to further define testimonial and nontestimonial in that case.³⁹ The Court noted that “[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”⁴⁰ Somewhat frustratingly, the majority “[left] for another day any effort” to further define “testimonial.”⁴¹

B. *Davis v. Washington*

Two years after *Crawford*, the Court attempted to define “testimonial” and “nontestimonial” in *Davis v. Washington*.⁴² The Court consolidated two cases: *Davis v. Washington* and *Hammon v. Indiana*,⁴³ both of which involved incidents of domestic violence and both of which prompted the Court to further define and distinguish between testimonial and nontestimonial statements.⁴⁴

1. The *Davis* Case

The *Davis* case involved a 911 call. Michelle McCottry spoke with a 911 operator and relayed that she was “involved in a domestic disturbance” with her ex-boyfriend, Adrian Davis.⁴⁵ Specifically, McCottry told the operator that Davis “[is] here jumpin’ on me again. . . . He’s usin’ his fists.”⁴⁶ After asking McCottry more questions, the operator learned that Davis had “just r[un] out the door.”⁴⁷ The police arrived to find McCottry frantically attempting to pack her things and her children so she could move out.⁴⁸ The officers also noted her “shaken state”⁴⁹ and the “fresh injuries on her forearm and her face.”⁵⁰

38. *Id.* at 65.

39. *Id.* at 65, 68.

40. *Id.* at 68.

41. *Id.*

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

43. *Id.* at 813.

44. *Id.* at 817.

45. *Id.*

46. *Id.*

47. *Id.* at 818 (alteration in original).

48. *Id.*

49. *Id.*

50. *Id.* (quoting *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005) (en banc)).

The State of Washington charged Davis with a felony violation of his domestic no-contact order.⁵¹ The State sought to admit a recording of McCottry's 911 call because McCottry would not appear at trial.⁵² Davis objected to the use of the 911 tapes, arguing that using the statements violated his confrontation rights.⁵³ The trial court disagreed and admitted the recording.⁵⁴ The Washington Court of Appeals and the Supreme Court of Washington both affirmed, holding that the admitted pieces of the 911 call were nontestimonial.⁵⁵

2. The *Hammon* Case

Hammon also involved a domestic disturbance.⁵⁶ Police found Amy Hammon sitting alone on her front porch.⁵⁷ She seemed "somewhat frightened," but she told the officers "nothing was the matter."⁵⁸ Amy gave the officers permission to enter the home, where they discovered a broken gas heater with broken glass in front of it.⁵⁹

Hershel Hammon, Amy's husband, was in the kitchen when the officers entered the home.⁶⁰ He told the officers that he and Amy argued but that it "never became physical."⁶¹ While the officers attempted to discuss the episode with Amy, Hammon continually tried to include himself in this discussion.⁶² In response, the officers continually separated Hammon from Amy, corralling him in the kitchen while another officer spoke to Amy in a separate room.⁶³ Amy eventually signed a battery affidavit.⁶⁴ She handwrote that Hammon "[b]roke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter."⁶⁵

51. *Id.*

52. *Id.* at 819.

53. *Id.*

54. *Id.*

55. *State v. Davis*, 64 P.3d 661, 663 (Wash. Ct. App. 2003); *Davis*, 111 P.3d at 851.

56. *Davis*, 547 U.S. at 819.

57. *Id.*

58. *Hammon v. State*, 829 N.E.2d 444, 446-47 (Ind. 2005).

59. *Davis*, 547 U.S. at 819.

60. *Id.*

61. *Hammon*, 829 N.E.2d at 447.

62. *Davis*, 547 U.S. at 819-20.

63. *Id.* at 820.

64. *Id.*

65. *Id.*

The State charged Hammon with a probation violation and with domestic battery.⁶⁶ Though prosecutors subpoenaed Amy, she failed to appear at Hammon's trial.⁶⁷ Over numerous objections by Hammon, the trial court allowed the officer who questioned Amy to testify to the statements made in the battery affidavit.⁶⁸ The trial court justified the admissibility of the affidavit using the present sense impression and excited utterance exceptions to hearsay.⁶⁹

After a bench trial, the trial judge convicted Hammon of both charges.⁷⁰ The Indiana Court of Appeals and the Indiana Supreme Court affirmed.⁷¹ The Indiana Supreme Court declared "testimonial statements" to be those "given or taken in significant part for purposes of preserving [them] for potential future use in legal proceedings."⁷² It considered the "motivations of the questioner and declarant" to be the "central concerns" of the testimonial inquiry.⁷³ Though the court ultimately found Amy's affidavit to be testimonial, it affirmed the appellate court because admitting the affidavit was "harmless beyond a reasonable doubt."⁷⁴

3. The Supreme Court's Analysis

Without much preamble and without attempting to create an "exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation," the Court defined testimonial and nontestimonial.⁷⁵ Testimonial statements are those made under "circumstances objectively indicat[ing] that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."⁷⁶ Conversely, the Court stated that statements to police officers or their proxies made to allow officers to respond to an ongoing emergency are nontestimonial.⁷⁷ The Court does not fully define "nontestimonial" outside the emergency context. The *Davis* Court then

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 821.

71. *Hammon v. State*, 809 N.E.2d 945, 953 (Ind. Ct. App. 2004); *Hammon v. State*, 829 N.E.2d 444, 459 (Ind. 2005).

72. *Hammon*, 829 N.E.2d at 456.

73. *Id.* at 457.

74. *Id.* at 458–59.

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

76. *Id.*

77. *Id.*

expressly held what *Crawford* only implied: The Confrontation Clause applies only to testimonial hearsay, not nontestimonial hearsay.⁷⁸

After deciding upon its testimonial and emergency definitions and determining that the Confrontation Clause only applies to testimonial statements, the Court applied these definitions to the facts of *Davis* and *Hammon*.⁷⁹ In *Davis*, the Court classified McCottry's 911 statements as nontestimonial for four reasons.⁸⁰ First, the statements were made when "McCottry was speaking about events *as they were actually happening*."⁸¹ Second, "any reasonable listener" would understand McCottry's 911 phone call as a cry for help "against a bona fide physical threat."⁸² Third, the objective purpose of the 911 operator's interrogation was to allow the police to "*resolve* the present emergency."⁸³ Finally, the 911 call in *Davis* was strikingly less formal than the police interrogation of Sylvia Crawford in *Crawford*.⁸⁴

Conversely, in *Hammon*, the Court took on a "much easier task, since [Amy's statements] were not much different from the statements . . . found to be testimonial in *Crawford*."⁸⁵ After discussing the same four factors discussed in reference to Adrian Davis's case, the Court found Amy Hammon's statements to be testimonial.⁸⁶ First, Amy's statements described "what happened," not "what is happening."⁸⁷ Second, no emergency existed when she spoke.⁸⁸ Third, Amy clearly made her statements in response to an interrogation aimed at investigating potentially past criminal behavior.⁸⁹ Finally, in making the formality assessment, the Court admitted that the statements at issue in *Crawford* were more formal.⁹⁰ The Court noted, however, that while formality "certainly strengthen[s] the statements' testimonial aspect," formality alone is not dispositive.⁹¹ Amy Hammon's statements were "formal enough."⁹² She made her statements to the officer while in a room separated from her husband, she "deliberately recounted, in response to police questioning," how the possible criminal

78. *Id.* at 823–24 (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

79. *Id.* at 826.

80. *Id.* at 827.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 829.

86. *Id.* at 830.

87. *Id.*

88. *Id.* at 829.

89. *Id.*

90. *Id.* at 830.

91. *Id.*

92. *Id.*

past actions started and progressed, and the statements were made “some time after” the potentially criminal episode ended.⁹³

The Court ended its analysis of *Davis* and *Hammon* by firmly stating that future confrontation cases will require fact-specific analyses.⁹⁴ In so doing, the Court “necessarily reject[ed] the Indiana Supreme Court’s implication that virtually any ‘initial inquiries’ at the crime scene will not be testimonial.”⁹⁵ The Court was quick to assure prosecutors that it did not reach the opposite result—“that *no* questions at the scene will yield nontestimonial answers.”⁹⁶ *Michigan v. Bryant* further explored when such initial inquiries are nontestimonial.

C. Michigan v. Bryant

Michigan v. Bryant is the Court’s latest confrontation case. On April 28, 2011, Anthony Covington, the victim, told his brother that he planned to visit Richard Bryant’s house.⁹⁷ Covington sought to retrieve an expensive coat he previously pawned with Bryant for cocaine.⁹⁸ At trial, Covington’s brother testified to hearing gunshots between 3:00 and 3:30 a.m.⁹⁹ Around 3:25 a.m., police responded to a radio dispatch alerting them to the location of a victim who had been shot.¹⁰⁰ Police found Covington lying on the ground at a gas station next to his car, about six blocks from Bryant’s house.¹⁰¹ Covington had suffered a gunshot wound to the stomach.¹⁰²

Upon approaching Covington, one of the officers asked Covington “[w]hat happened.”¹⁰³ Covington told the officers, “Rick shot me.”¹⁰⁴ Pursuant to continued police questioning, Covington discussed the circumstances of the shooting.¹⁰⁵ According to him, he had been shot around 3:00 a.m. as he stood at the back door of Bryant’s house.¹⁰⁶ Covington told the officers that “Rick” shot him through the door while the two conversed.¹⁰⁷ Covington stated that he did not see who shot him,

93. *Id.*

94. *Id.* at 832.

95. *Id.* (quoting *Hammon v. State*, 829 N.E.2d 444, 453, 457 (Ind. 2005)).

96. *Id.*

97. *People v. Bryant*, 768 N.W.2d 65, 67 (Mich. 2009).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 79 (Corrigan, J., dissenting).

104. *Id.* at 76.

105. *Id.*

106. *Id.*

107. *Id.*

though he recognized Bryant's voice through the door.¹⁰⁸ Covington described Rick as being forty years old, 5'7" tall, and approximately 140 pounds.¹⁰⁹ Bryant was actually thirty years old, 5'10" tall, and 180 pounds.¹¹⁰ Covington told the police that he incurred his injury at 4203 Pennsylvania Avenue, Bryant's house.¹¹¹ Finally, Covington told the officers that he drove himself to the gas station.¹¹² Covington died a few hours after being taken to the hospital.¹¹³

Before trial, Bryant argued that Covington's statements were inadmissible hearsay.¹¹⁴ Although the prosecution initially claimed the statement fell within both the excited utterance and dying declaration exceptions to the hearsay rule, the State ultimately argued that the statements were admissible as excited utterances.¹¹⁵ The trial court found admissibility on this ground and permitted the jury to hear Covington's statements.¹¹⁶ Since the trial was held before *Crawford* and *Davis* were decided, the defense made no Confrontation Clause argument during the trial.

In 2004, the Michigan Court of Appeals affirmed the trial court's decision.¹¹⁷ While Bryant's case was on appeal to the Michigan Supreme Court, the United States Supreme Court decided *Davis*. In light of this decision, the Michigan Supreme Court remanded Bryant's case to the appellate court for review pursuant to *Davis*.¹¹⁸

The Michigan Court of Appeals again affirmed the trial court's decision, characterizing Covington's statements as admissible nontestimonial hearsay under the Court's *Davis* definition.¹¹⁹ Bryant appealed once more to the Michigan Supreme Court.¹²⁰ The majority classified the statements as inadmissible testimonial hearsay under both *Crawford* and *Davis*.¹²¹ The Michigan Supreme Court's analysis stressed that Covington's statements referred to past events, occurred at a different

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 71.

112. *Id.*

113. *Id.* at 67.

114. Joint Appendix, *People v. Bryant*, 768 N.W.2d 65 (Mich. 2009), *cert. granted*, 130 S. Ct. 1685 (2010) (No. 09-150), 2009 WL 6411478, at *7-11.

115. *Id.* at *9.

116. *Id.* at *12.

117. *People v. Bryant*, 768 N.W.2d 65, 68 (Mich. 2009).

118. *Id.*

119. *People v. Bryant*, No. 247039, 2007 WL 675471, at *3 (Mich. Ct. App. Mar. 6, 2007).

120. *Bryant*, 768 N.W.2d at 65.

121. *Id.* at 70-71.

location from the shooting, and did not allege any ongoing threat.¹²² The court concluded that the statements' primary purpose was to "identify, locate, and apprehend" the shooter.¹²³ The Michigan Supreme Court classified these statements as being primarily relevant to a later prosecution of a past criminal action rather than focused on dealing with an ongoing emergency.¹²⁴

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."¹²⁵ The Court's Question Presented firmly frames the issue as the scope of *Davis*'s emergency doctrine.¹²⁶ The Court's opinion broadly interpreted *Davis*'s ongoing emergency test to make the doctrine expansive and far-reaching, holding that Covington's statements were made pursuant to an ongoing emergency.¹²⁷ Thus, the statements were nontestimonial and the Court remanded to the Michigan Supreme Court to determine whether they were admissible under state hearsay laws.¹²⁸ In reaching its decision, the Court used a combined approach in assessing both the primary purpose of the declarant's statements and the police interrogation.

The Court's combined approach laid to rest one of the most confused aspects of *Davis*. The Court stated that "*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator."¹²⁹ The Court took this combined approach because it "ameliorates problems" that arise when courts look to the primary purpose of either the interrogator or the declarant.¹³⁰ Chief among these problems, noted the Court, is the potential for both interrogators and declarants to speak with "mixed motives."¹³¹ The Court saw its combined inquiry as accounting for a police officer acting as both a criminal investigator and a first responder when he interrogates a victim.¹³² Additionally, the Court found that victims too may speak with mixed motives, which this combined approach also considers.¹³³ In

122. *Id.* at 71.

123. *Id.*

124. *Id.*

125. Petition for Writ of Certiorari at 1, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150), 2009 WL 5942670.

126. *Id.*

127. *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011).

128. *Id.* at 1167.

129. *Id.* at 1160.

130. *Id.* at 1161.

131. *Id.*

132. *Id.*

133. *Id.*

analyzing a victim's statements, courts must focus "on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim's physical state."¹³⁴ Thus, at least in theory, the inquiry remains an objective one.

This combined-approach analysis rolls into the overall circumstantial evaluation of the situation to assess primary purpose. The Court implicitly uses the four-part approach in *Davis* to analyze the circumstances under which Covington spoke.¹³⁵ First, a reasonable person would not understand Covington's statements as an attempt to relay past events. Rather, they were a cry for help: He bled from the stomach while responding to the officers; he "punctuated" his responses with questions about emergency medical services; and "[h]e was obviously in considerable pain and had difficulty breathing and talking."¹³⁶ Second, an emergency existed when Covington made his statements. Third, police questions objectively focused on gathering information to meet a potential emergency, as they were made to "assess the situation, the threat to their own safety, and possible danger to the potential victim."¹³⁷ Finally, the informal and disjointed nature of the questioning, conducted several times by different officers, indicates that the "somewhat confused" interrogation of Covington occurred to help police meet an ongoing emergency.¹³⁸

Finally, the *Bryant* Court modifies *Davis*'s formality discussion and firmly states that formality is not dispositive to the testimonial inquiry. The Court noted that out-of-court statements can offend the Confrontation Clause "[w]hether formal or informal."¹³⁹ Additionally, the Court declares formality to be relevant to determining whether an ongoing emergency exists at the time the out-of-court statements are made.¹⁴⁰ The Court quickly cautions, however, that informality is not the sole indicator of an emergency situation.¹⁴¹ Since "informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent," the formality inquiry is but one piece in a much larger puzzle.¹⁴²

Justice Scalia decries the majority's approach and its analysis for being overly complex and confusing.¹⁴³ Indeed, the Court's confusion over

134. *Id.* at 1161–62.

135. *See infra* Part II.B.1.

136. *Bryant*, 131 S. Ct. at 1165.

137. *Davis v. Washington*, 547 U.S. 813, 832 (2006) (quoting *Hübel v. Sixth Judicial Dist. Court of Nev., Humboldt Cnty.*, 542 U.S. 177, 186 (2004)).

138. *Bryant*, 131 S. Ct. at 1166.

139. *Id.* at 1155.

140. *Id.* at 1160.

141. *Id.*

142. *Id.* (citing *Davis*, 547 U.S. at 813).

143. *Id.* at 1170 (Scalia, J., dissenting).

whether the Confrontation Clause focuses on the declarant's statements or the interrogator's questions in assessing primary purpose was on full display at oral arguments.¹⁴⁴ The majority's resolution—the combined approach—does confuse *Davis* further. While this confusion can be frustrating, it also leaves room for creativity in arguing inadmissibility of out-of-court statements at trial. Key to making such arguments is a clear understanding of what these cases mean.

II. A USER'S MANUAL TO THE CONFRONTATION CLAUSE AFTER *BRYANT*

The Court's recent confrontation cases cannot be read in isolation from each other. Rather, they must be read together, and with proper historical context, to fully understand the Court's confrontation jurisprudence. This section will first examine how *Crawford* and *Davis* are read in the proper historical context. Then, it will provide a catalog of pertinent terms stemming from *Crawford*, *Davis*, and *Bryant* that must be understood to effectively protect a defendant's confrontation rights. Finally, it will examine *Bryant*'s effect on the ongoing emergency doctrine originating in *Davis*.

A. *Crawford and Davis: A Historical Context*

Crawford marks the beginning of the Court's modern approach to understanding the Confrontation Clause. In reaching its holding, the *Crawford* Court overruled the *Roberts* paradigm for admitting hearsay statements under the Confrontation Clause.¹⁴⁵ *Roberts* involved a conviction for forgery, and the facts in *Roberts* required the Court "to consider once again the relationship between the Confrontation Clause and the hearsay rule with its many exceptions."¹⁴⁶

The *Roberts* Court recognized the central tenant of the Confrontation Clause to be cross-examination but also considered that, if the Clause were read literally, it would "abrogate virtually every hearsay exception."¹⁴⁷ The Court therefore recognized that it must balance the "competing interests" of the preferred face-to-face confrontation¹⁴⁸ on one hand with the "strong interest in effective law enforcement, and in the development and precise

144. Oral Argument at 8:39, *Michigan v. Bryant*, 131 S. Ct. 1143 (2010) (No. 09-150), available at http://www.oyez.org/cases/2010-2019/2010/2009_09_150#argument (last visited Dec. 1, 2011).

145. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

146. *Ohio v. Roberts*, 448 U.S. 56, 62 (1980).

147. *Id.* at 63.

148. *Id.* at 64 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

formulation of the rules of evidence applicable in criminal proceedings”¹⁴⁹ on the other. In so balancing, the *Roberts* Court held that statements were admissible under the Confrontation Clause when a declarant was unavailable and the statement fell into a firmly rooted hearsay exception or contained particularized guarantees of trustworthiness.¹⁵⁰ This holding reflected the *Roberts* Court’s belief that “hearsay rules and the Confrontation Clause are generally designed to protect similar values¹⁵¹ and stem from the same roots.”¹⁵² Under *Roberts*, all out-of-court statements were essentially admissible under both hearsay rules and the Confrontation Clause so long as they were *reliable*.¹⁵³ The hearsay and confrontation analyses were thus largely married.

Crawford divorced the hearsay analysis from the confrontation analysis. In reevaluating *Robert*’s reliability approach,¹⁵⁴ the *Crawford* Court stated that the “the regulation of out-of-court statements” under the Confrontation Clause could not be left to the rules of evidence.¹⁵⁵ *Crawford* ultimately rejected *Roberts*’s assumption that the Confrontation Clause and the hearsay rules seek to protect the same values.¹⁵⁶ While an out-of-court statement may implicate both the Confrontation Clause and the laws of evidence, there are certain times when a statement is admissible under the laws of evidence but not under the Confrontation Clause, thus preventing the prosecution from using the statements at all.¹⁵⁷ This occurs because the Confrontation Clause is not primarily concerned with the reliability of evidence but rather with the “principal evil . . . [of] the civil-law mode of criminal procedure,” which allowed prosecutors to use unopposed *ex parte* statements against a defendant at trial.¹⁵⁸ The Confrontation Clause thus focused on a “specific type” of out-of-court statements: those made by witnesses who bear testimony.¹⁵⁹

It is within this historical context that the Court’s distinction between “testimonial” statements and “nontestimonial” statements must be understood. The majority in *Crawford* refers to a “core class of ‘testimonial’ statements,” which include: “*ex parte* in-court testimony or its

149. *Id.* at 64 (citing *California v. Green*, 399 U.S. 149, 171–72 (1970) (Burger, J., concurring); *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)).

150. *Id.* at 66.

151. *Id.* (quoting *Green*, 399 U.S. at 155) (internal quotation marks omitted).

152. *Id.* (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970)).

153. *Id.*

154. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

155. *Id.* at 51.

156. *Id.*

157. *Id.*

158. *Id.* at 50.

159. *Id.* at 51.

functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.”¹⁶⁰ The Founding Fathers were concerned with the civil-law method of “examination in private by judicial officers” to obtain this “testimony.”¹⁶¹ This practice began falling out of favor before the Sixth Amendment was ratified.¹⁶² Therefore, following the common-law trend of the day, they expressly wrote into the Sixth Amendment a Confrontation Clause, which constitutionalized criminal procedure to reflect their rejection of the earlier English civil mode of criminal procedure.¹⁶³

Since the Founding Fathers “conditioned admissibility of an absent witness’s [testimonial statement] on unavailability and a prior opportunity to cross-examine,” the *Crawford* Court did the same.¹⁶⁴ Unlike the *Roberts* Court’s understanding of confrontation, *Crawford* understood cross-examination not as one way to establish the reliability of testimonial hearsay statements but rather as a dispositive condition for admissibility.¹⁶⁵ The Court noted that, apart from *Roberts*, which still “hew[ed] closely to the traditional line,”¹⁶⁶ and arguably *White v. Illinois*,¹⁶⁷ its case law reflects this central focus on the opportunity to cross-examine testimonial statements.¹⁶⁸

Against this background, *Davis* helped determine what types of statements can be testimonial beyond the obviously testimonial statements discussed in *Crawford*. The *Davis* Court provides two major clues in defining “testimonial” that provide insight into how to effectively argue a particular statement as “testimonial” and therefore subject to the Confrontation Clause.

First, the Court refers back to *Crawford*’s witness requirement.¹⁶⁹ If out-of-court statements are made primarily to assist police in meeting an ongoing emergency, the statements are not the functional equivalent of

160. *Id.*

161. *Id.* at 43.

162. *Id.* at 45–49.

163. *Id.*

164. *Id.* at 54.

165. *Id.*

166. *Id.* at 58 (citing *Lilly v. Virginia*, 527 U.S. 116 (1999); *Bourjaily v. United States*, 483 U.S. 171, 181–84 (1987); *Ohio v. Roberts*, 448 U.S. 56, 67–70 (1980)).

167. *White v. Illinois*, 502 U.S. 346 (1992). The Court admitted a child victim’s statements to a police officer as spontaneous declarations and noted that “[t]he holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable.” *Crawford*, 541 U.S. at 58 n.8.

168. *Crawford*, 541 U.S. at 57–59.

169. *Davis v. Washington*, 547 U.S. 813, 821 (2006) (citing *Crawford*, 541 U.S. at 51).

testimony because “[n]o ‘witness’ goes into court to proclaim an emergency and seek help.”¹⁷⁰ Conversely, when the statements are made primarily to assist the police in gathering evidence to solve a crime or for a potential future prosecution, they are the functional equivalent of live witness testimony at trial and therefore must be subject to cross-examination.¹⁷¹

Second, the *Davis* Court examines to whom the declarant speaks when he makes his statements to determine whether they are testimonial. Again, this examination rests on the *Crawford* Court’s understanding that statements made to government officers were testimonial in a way that those made to “casual . . . acquaintance[s]” are not.¹⁷² Statements made to government officials are more likely to be testimonial because the declarant likely knows he “bears testimony”—that his statements could be used in court—when he speaks to a police officer.¹⁷³ As noted below, speaking to a police officer should not be dispositive in determining whether statements are testimonial. *Davis* and *Crawford*, read together, hold that when statements are not made pursuant to a formal investigative or court proceeding, they are still testimonial under the Confrontation Clause if the declarant acts as a testifying witness would by making statements that bear testimony.¹⁷⁴ Out of this historical background emerged the Court’s key confrontation terms: testimonial, nontestimonial, and ongoing emergency.

B. Defining the Terms

Crawford and *Davis* identified the game, established the outer boundaries on the pitch, and successfully installed the goal posts. However, the interior of the field and the rules of the game remain somewhat murky. For practitioners to have the chance to win on the still undefined field, they must have a clear command of what testimonial and nontestimonial statements are and the arguments that will be made for or against admissibility. Additionally, practitioners must know when and how a statement may be classified under the ongoing emergency exception.

First, in assessing the distinction between testimonial and nontestimonial statements, it is best to start with the broad question that asks what types of statements, if admitted, do *not* violate the Confrontation Clause. There are five main categories of statements that do not offend the Confrontation Clause: (1) testimonial statements made by an available declarant-witness; (2) prior testimonial statements made by an unavailable

170. *Id.* at 828.

171. *Id.* at 829.

172. *Id.* at 824 (quoting *Crawford*, 541 U.S. at 51).

173. *Id.* (quoting *Crawford*, 541 U.S. at 51).

174. *Id.* at 823; *Crawford*, 541 U.S. at 51.

declarant-witness when the defendant had an opportunity to bring out the testimony of the declarant on direct or redirect examination; (3) prior testimonial statements made by an unavailable declarant-witness when the defendant had a prior opportunity for cross-examination; (4) testimonial statements offered for nonhearsay purposes; and (5) nontestimonial statements such as statements made for the primary purpose of assisting police to resolve an ongoing emergency, co-conspirator statements, statements contained within business records, possibly dying declarations, and, generally, statements made to friends. Statements falling under (1), (2), (3), and (4) will be discussed in the “testimonial statements” section, while those falling under (5) will be discussed in the “nontestimonial statements” section.

1. Testimonial Statements

This Note starts with “testimonial” statements because the Confrontation Clause is concerned with exactly this type of statement. Testimonial statements, as the *Davis* Court held, are statements made for the primary purpose of helping police gather evidence relevant to a criminal investigation or a potential criminal prosecution.¹⁷⁵ These statements are testimonial since they serve as an “obvious substitute for live testimony”¹⁷⁶ and the declarant acts as a witness would when making the statements.¹⁷⁷

This is a very specific category of statements. As discussed above, it includes the obviously testimonial statements mentioned in *Crawford*, including “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.”¹⁷⁸ “Specific category of statements” does not indicate, according to *Crawford* and *Davis*, that these are the only types of statements that are “testimonial.” Other types of statements can be testimonial, so long as the content of and circumstances producing the statements indicate that the statement was made for the primary purpose of helping police gather evidence for a criminal investigation or potential future prosecution. Thus, when the statements are made for such a primary purpose, they are the functional equivalent of witness testimony under the Confrontation Clause.

Determining when a declarant acts as a testifying witness is a heavily fact-specific analysis. The *Davis* Court provided insight into how to frame

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

176. *Id.* at 830.

177. *Id.* at 821.

178. *Crawford*, 541 U.S. at 51.

the questions that must be asked in making a confrontation claim. As noted in Part I, the Court examines whether the statements were made concurrent with or subsequent to the potentially criminal incident,¹⁷⁹ whether a reasonable person would understand the declarant's statement as a cry for help or a recounting of past events,¹⁸⁰ whether the objective purpose of the statements and interrogation was to allow the police to resolve a present emergency,¹⁸¹ and, though not dispositive, whether the statement is made with any degree of formality, which strengthens its testimonial aspects.¹⁸²

Though the Court did not state that the above-four factors compiled a particular test under which primary purpose analyses will be conducted, analyzing these factors provides a starting point for attorneys who need to classify statements. These factors present ample room to make creative arguments, especially in analogizing to the *Hammon* facts. The Court essentially found Amy Hammon's statements to be *testimonial enough* to be subject to the Confrontation Clause. In this sense, the Court seems to refer to the balancing test discussed in *Roberts*, though the *Davis* Court's more rigid analysis seems inclined to err on the side of excluding more out-of-court statements. Using the historical analysis *Crawford* engaged in and *Davis* expounded upon provides solid policy arguments as to why a hearsay statement is testimonial and thus excludable under the Confrontation Clause.

Although testimonial statements will typically be made to law-enforcement officers, this may not always be the case. People can and do use agents to relay testimony to police.¹⁸³ Statements can thus be made *for* the primary purpose of assisting police officers to gather evidence for a potential future prosecution without actually being made *to* police officers. For example, if Victim candidly speaks to Friend/Neighbor, a non-law-enforcement officer, about the physical abuse that she suffers from her husband with the intention that Friend/Neighbor will go to the police for Victim, Victim's statements are testimonial. Victim acted as a witness would: she "testified" to past abuse in the same way she would if she told her story while on the witness stand. Her statements were made for the primary purpose of commencing an investigation or the prosecution of a crime.

Finally, there are two types of testimonial statements that, if introduced at trial, do not violate the Confrontation Clause. First, if the hearsay

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Richard D. Friedman, *Grappling With the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 260 (2005).

statements are testimonial, and a declarant-witness who made them is available at trial for at least minimal cross-examination, the introduction of those statements through that declarant-witness clearly does not offend the Confrontation Clause. *Crawford* contemplates this exact scenario in promulgating its two-part test. Introducing the out-of-court testimony of a declarant-witness who is available at trial and thus available to be cross-examined does not violate the Confrontation Clause or *Crawford* because the witness can be cross-examined on her current testimony and her previous testimonial statement. Unfortunately, the Court broadly defines cross-examination in such cases,¹⁸⁴ indicating, for example, that even an unremembering witness is adequately cross-examined so long as the witness testifies to his current belief.¹⁸⁵ These statements must therefore only meet state or federal hearsay requirements to be available. Therefore, the defense attorney's best strategy seeking to exclude the statements is to challenge them as inadmissible hearsay.

Admitting the second type of testimonial statement likewise presents few if any Confrontation Clause concerns under *Crawford*. The statements in this second group are the prior testimonial statements made by an unavailable declarant-witness when the defendant had an opportunity to bring out the testimony of the declarant on direct or redirect when the testimony is given. When a defendant engages in a full direct and redirect at a previous hearing, such as a pre-trial probable cause or motion in limine hearing and fails to address these hearsay statements at the subsequent trial, it is unlikely a court would find any confrontation violation. The defendant in this scenario controlled the testimony of his own witness and chose, at the subsequent trial, not to offer any explanation to the jury. When defense counsel's "questioning clearly partook of cross-examination as a matter of form," the Confrontation Clause is satisfied.¹⁸⁶ Thus, when such questioning technically occurs on direct examination but is "replete with leading questions" and "comported with the principal *purpose* of cross-examination," the defendant has confronted the witnesses against him under the Confrontation Clause.¹⁸⁷

184. See *Nelson v. O'Neil*, 402 U.S. 622, 629–30 (1970) (holding that cross-examination is adequate even when the witness says that he cannot remember making a prior statement); *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985) (stating that cross-examination is adequate even when an expert witness cannot remember on cross-examination what his conclusions rested upon).

185. *United States v. Owens*, 484 U.S. 554, 563–64 (1988) (holding that the defendant can impeach on the witness's inability to remember, but this is a weight and credibility issue, not an admissibility issue).

186. *Ohio v. Roberts*, 448 U.S. 56, 70 (1980) (*Crawford*, 541 U.S. 36, did not overrule this concept).

187. *Id.* at 70–71.

The third category of statements is far more problematic for prosecutors attempting to admit evidence, thus providing defendants ample opportunity to oppose admission. These statements are those testimonial statements made before trial when the defendant had a prior opportunity to cross-examine the declarant-witness. When a defendant chooses not to cross-examine a witness in a pre-trial hearing or deposition, the strategic choice he makes is entirely different from a decision not to engage the declarant-witness on testimonial hearsay statements during direct examination at trial. The strategy is different here because choosing not to cross-examine at a pre-trial hearing or deposition indicates the defendant is waiting to cross the declarant-witness until trial. Perhaps the attorney wishes to reserve cross until the jury can observe the declarant-witness's demeanor. Perhaps the attorney does not wish to tip his hand prior to trial. Whatever the reason for reserving cross until trial, this strategy goes to the heart of a defendant's right to "a meaningful opportunity to present a complete defense."¹⁸⁸

The *Crawford* Court's majority opinion leaves open the question whether making this strategic choice necessarily means the "prior opportunity to cross-examine" prong of its test is met. Admittedly, *Crawford* contains sweeping language about the Confrontation Clause requiring only a prior *opportunity* to cross-examine for testimonial statements to come in when the declarant-witness is unavailable.¹⁸⁹ The Court's previous language on what constitutes an adequate opportunity to cross seems likewise unhelpful.¹⁹⁰ Despite this language, defense attorneys generally strategically decide "to *forego* cross-examination at the preliminary hearing, on the theory that tipping their hand to the witness (whom they expect to see at trial) is worse than forgoing ahead on the slim chance that they can get the case thrown out."¹⁹¹ Despite *Crawford*'s sweeping language, the "better view" is that such a strategic decision does not waive a defendant's confrontation rights when the declarant-witness fails to show up at the later trial.¹⁹²

188. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)) ("[C]riminal defendants [must be afforded] 'a meaningful opportunity to present a complete defense.'").

189. *Crawford v. Washington*, 541 U.S. 36, 55 (2004).

190. *See, e.g., Mancusi, Corr. Superintendent v. Stubbs*, 408 U.S. 204, 216 (1972) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)) ("Since there was an adequate opportunity to cross-examine Holm at the first trial, and counsel for Stubbs availed himself of that opportunity, the transcript of Holm's testimony in the first trial bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'").

191. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES* 399 (6th ed. 2008).

192. *Id.*

This better view is affirmed in the Court's 1968 decision, *Barber v. Page*. In that case, the declarant made testimonial statements against the defendant at a pre-trial hearing.¹⁹³ The defendant chose not to cross-examine the declarant at this hearing and was given no warning by the prosecution that the declarant would not be present at trial.¹⁹⁴ The Court refused to find that the defendant waived his constitutional right to confrontation by failing to cross-examine his accuser at the pre-trial hearing.¹⁹⁵ The Court expressly recognized that preliminary hearings typically involve "a much less searching exploration into the merits of a case than a trial."¹⁹⁶ Indeed, the "right to [cross-examine] is basically a trial right" because it both gives the defendant the chance to cross-examine a witness and provides the jury an opportunity to observe the demeanor of the witness.¹⁹⁷ Thus, the Court held that while some preliminary hearing opportunities to cross-examine may satisfy the Confrontation Clause when the witness is unavailable at trial, *Barber* was not "such a case."¹⁹⁸

Although *Barber* is pre-*Crawford*, the Court mentions *Barber* in *Crawford* to support its shift away from *Roberts*, thus affirming *Barber* as good law.¹⁹⁹ Thus, a defendant can argue that this strategic decision goes directly to a defendant's ability to present a complete defense. If the right to confrontation is "basically a trial right,"²⁰⁰ he should not be penalized for making the strategic choice to cross-examine at trial.

This better view alluded to in *Barber* indicates that defendants must have a "meaningful opportunity to present a complete defense."²⁰¹ Whether this meaningful opportunity stems from the Due Process Clause,²⁰² the Compulsory Process Clause,²⁰³ or the Confrontation Clause,²⁰⁴ the Court

193. *Barber v. Page*, 390 U.S. 719, 720 (1968).

194. *Id.*

195. *Id.* at 725.

196. *Id.*

197. *Id.*

198. *Id.* at 725–26.

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

200. *Barber*, 390 U.S. at 725.

201. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

202. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.")

203. *Washington v. Texas*, 388 U.S. 14, 23 (1967) ("We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.")

204. *Crane*, 476 U.S. at 690; *see also* *Davis v. Alaska*, 415 U.S. 308 (1974).

recognizes its importance. This right to confront a witness at trial means more than mere physical confrontation, which is why the Court has long recognized a defendant's right to cross-examine.²⁰⁵ Cross-examination is the primary means by which the jury may observe the demeanor of the witnesses against the accused.²⁰⁶ Thus, the cross-examiner is entitled "to delve into the witness' story to test the witness' perceptions and memory [and] . . . to impeach, *i.e.*, discredit, the witness."²⁰⁷ Since the key to cross-examination is the jury's ability to observe the demeanor of the witness, an opportunity that occurs *at trial*, a defendant's decision at a pre-trial hearing to forego or to reserve extensive cross-examination for trial cannot be considered a "meaningful opportunity" to confront an accusatory witness under the Confrontation Clause.

This constitutional right is similarly reflected in Federal Rule of Evidence (FRE) 804(b)(1), the Rule dealing with the admissibility of former testimony. Rule 804(b)(1) declares in pertinent part that testimony taken at former proceedings is admissible only "if the party against whom the testimony is now offered . . . had *an opportunity and similar motive* to develop the testimony by direct, cross, or redirect examination."²⁰⁸ Thus, defense attorneys can argue that if no similar motive existed at the prior proceeding—even if only because the attorney strategically chose to wait until trial to confront the accusatory witnesses against his client—then the State cannot introduce the prior testimonial statements under this hearsay exception.

Similarly, in *Melendez-Diaz*, the Court rejected the State's argument that a defendant's ability to subpoena a witness and ask him questions as a hostile or adverse witness does not satisfy the Confrontation Clause. *Melendez-Diaz* involved the question of whether a sworn affidavit was testimonial hearsay, thus requiring the affiant to be available at trial and subject to cross-examination.²⁰⁹ The Court determined that sworn affidavits are testimonial and the affiants are witnesses under the Confrontation Clause.²¹⁰

Once reaching this threshold decision, the Court addressed the State of Massachusetts' argument that no Confrontation Clause violation occurred since the defendant was perfectly free to subpoena the affiants and ask them questions at trial. If the Court adopted the State's rule, defendants, not prosecutors, would bear the consequences of "adverse witness no-

205. *Davis*, 415 U.S. at 315 (citing *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)).

206. *Id.* at 316.

207. *Id.*

208. FED. R. EVID. 804(b)(1) (2010) (emphasis added).

209. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530 (2009).

210. *Id.* at 2532.

shows.”²¹¹ Since “the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court,” prosecutors cannot be allowed to introduce testimonial statements through *ex parte* affidavits and wait for defendants to bring the affiants into court.²¹² *Melendez-Diaz*'s most important lesson is clear: a defendant's confrontation rights are not satisfied simply because the defendant has the opportunity to subpoena the witness who has testified against him on another occasion.²¹³

Finally, the unavailability requirement is significant to these category three statements, both constitutionally and under the Federal Rules of Evidence. A declarant must be truly unavailable to satisfy *Crawford*'s two-part test regarding statements made under categories (2) and (3). Certain types of witness unavailability require only the obvious showing that a witness is dead, sick, seriously injured, or, in cases involving child sex abuse victims, mentally unable to testify. Other circumstances exist, however, when a witness is merely absent from trial. In order for a prosecutor to meet the unavailability requirement in these scenarios, the prosecutor must make a good faith effort to bring a witness to court.²¹⁴ When the prosecution fails to make such efforts, defendants should argue that *Crawford*'s unavailability requirement is not met. In all cases, defense attorneys should recall that unavailability alone does not render statements admissible. *Crawford* requires both unavailability and a prior opportunity to cross-examine.

Similarly, the hearsay exceptions found in 804(b) also require a showing of unavailability that contemplates whether prosecutors acted reasonably in attempting to procure a witness for trial.²¹⁵ Rule 804(a)(5) states that a declarant is unavailable when “the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other

211. *Id.* at 2540.

212. *Id.*

213. In *Bullcoming v. New Mexico*, the Court was presented with the question of “whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.” 131 S. Ct. 2705, 2710 (2011). The Court held that, such “surrogate testimony” is insufficient. *Id.* “The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.” *Id.*

214. *Barber v. Page*, 390 U.S. 719, 725 (1968) (concluding that the prosecution made no good-faith effort to ensure that declarant, who made clearly testimonial statements at a pre-trial hearing, would be available at trial).

215. See FED. R. EVID. 804(b) (“The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . .”).

reasonable means.”²¹⁶ Though the committee notes that the Rules of Criminal Procedure make depositions difficult,²¹⁷ parties should at least attempt to depose a declarant before he or she is deemed unavailable at trial.²¹⁸ Congress included this language for a reason. Defendants should therefore argue that if a State simply rushes through a trial witness’s testimony at a pre-trial hearing without taking a deposition, and the witness is not present at the subsequent trial, then the prosecutor has failed to procure this witness’s testimony by all reasonable means. Thus, defense attorneys must ask whether prosecutors have exhausted all “reasonable means,” including obtaining victim’s testimony by deposition, before a witness is declared unavailable at trial.²¹⁹

Fourth, the *Crawford* Court recognized that the Confrontation Clause does not prohibit the admission of testimonial statements offered not for the truth of the matter asserted. The *Crawford* Court affirms that such statements do not offend the Confrontation Clause in a footnote citing to its decision in *Tennessee v. Street*.²²⁰ In that case, the defendant argued that his confession was coerced.²²¹ To rebut this argument, the State introduced the defendant’s confession “not to prove what happened at the murder scene but to prove what happened when respondent confessed.”²²² Additionally, the defendant’s right to cross-examine remained intact because the confession was offered through the officer who took the defendant’s confession and the defendant was free to cross-examine the officer about the nature of the interrogation that led to this confession.²²³ The Court found that admitting this statement did not violate the Confrontation Clause.²²⁴ *Crawford* therefore confirms that *Street* is still good law, and statements

216. *Id.* 804(a)(5).

217. FED. R. CRIM. P. 15(a)(1) (2002) (“A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice.”).

218. FED. R. EVID. 804(a)(5) (committee notes) (“The amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable.”).

219. Defense attorneys should keep in mind that prosecutors are required to give defendants notice that such depositions will take place and that defendants have a right to be present. FED. R. CRIM. P. 15(b)(1) (“A party seeking to take a deposition must give every other party reasonable written notice of the deposition’s date and location.”). *See also Id.* 15(c) (“Defendant’s Presence,” noting that defendants have the right to be present during depositions).

220. *Tennessee v. Street*, 471 U.S. 409, 412 (1985). This case is not primarily a confrontation case. However, *Crawford* points to this case as an example of the kinds of statements not offered for their truth do not offend the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

221. *Street*, 471 U.S. at 411.

222. *Id.* at 414.

223. *Id.*

224. *Id.*

offered not for the truths they assert are admissible under the Confrontation Clause, provided the statements meet hearsay requirements.

With out-of-court statements, defendants should be prepared to make three arguments. First, defendants should argue that the statements are testimonial because the declarant gave the statement while acting like a testifying witness. This forces prosecutors to meet both the hearsay standards and the constitutional requirements before a statement can be admissible. Second, if the statement is testimonial and is admitted, the question is whether the defendant was afforded an adequate opportunity to cross-examine—or its functional equivalent—either when the statement was made or at the current trial. If not, *Crawford* is not met and the statement cannot be used. Third, as a last resort, if the statement meets *Crawford*'s requirements, defendants should argue that the statement does not meet the hearsay rules. This last argument is key to controlling the prosecution's use of nontestimonial statements at trial and may bar the use of some prior hearing statements pursuant to Rule 804(b)(1).²²⁵

2. Nontestimonial Statements

The biggest practical difference between testimonial statements and nontestimonial statements is that nontestimonial statements do not offend the Confrontation Clause when admitted in place of an unavailable declarant-witness's live testimony. Put simply, nontestimonial statements are statements that are *not* testimonial. While some nontestimonial statements are made pursuant to an ongoing emergency, many significant categories of nontestimonial statements are made outside of the ongoing emergency context.²²⁶ These statements include statements contained within business records, co-conspirator statements, possibly statements made as dying declarations, and, generally, statements made to non-law enforcement personnel. Since nontestimonial statements need only be admissible under existing hearsay rules to be used against the defendant at trial, a defendant's best weapon against admissibility is arguing that a statement fails to meet the hearsay requirements.

The Court in *Crawford* notes that “by their nature . . . business records or statements in the furtherance of a conspiracy” are generally nontestimonial.²²⁷ The “nature” of such statements becomes clear when analyzed through the lens of *Davis*'s primary purpose test. Business records

225. FED. R. EVID. 804(b)(1) (“Former testimony”).

226. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) (“But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.”).

227. *Crawford v. Washington*, 541 U.S. 36, 56 (2004).

are not made to help police develop evidence for future prosecutions but are made in the regular course of business.²²⁸ Similarly, co-conspirator statements are exactly opposite to testimonial statements because they are made for the primary purpose of committing a crime,²²⁹ not helping police investigate a crime and gather evidence for future prosecutions.

Additionally, the dying declaration is arguably an exception to *Crawford*'s Confrontation Clause requirements.²³⁰ The *Crawford* Court first addresses this potential exception to the general bar against an unavailable declarant-witness's testimonial statements absent a prior opportunity to cross-examine in a footnote.²³¹ In a footnote, the Court declares that there is ample evidence to support the concept that even testimonial dying declarations were admitted in 1791 when the Founders ratified the Sixth Amendment.²³² However, the Court refused to determine whether the Confrontation Clause incorporates such an exception, noting only that if the Clause warrants such an exception, it will be incorporated *sui generis*, or as a one of a kind exception to the Clause.²³³ In referring to this footnote, the *Giles* Court seems to expressly acknowledge that unopposed testimonial dying declarations do not offend the Confrontation Clause when admitted into evidence.²³⁴

In *Crawford*, the Court notes that examining a statement's reliability remains a proper way to assess the admissibility of nontestimonial statements.²³⁵ The Court will not second guess a state court's decision to allow in a nontestimonial statement under state hearsay laws absent a constitutional issue. Therefore, defendants may examine a statement's reliability as a hearsay exception. The *Bryant* Court both affirms and expands this notion.

228. See FED. R. EVID. 803(7).

229. See *id.* 801(d)(2)(E).

230. Despite likely being an exception to the Confrontation Clause, dying declaration requirements are very strict. Defense attorneys can thus attack such statements on hearsay grounds. See *Shepard v. United States*, 290 U.S. 96, 99 (1933) (finding that a wife's statement made three weeks before her death that her husband poisoned her was not admissible as a dying declaration).

231. *Crawford*, 541 U.S. at 56, n.6.

232. *Id.* at 55, n.5.

233. *Id.* at 56, n.6.

234. *Giles v. California*, 554 U.S. 353, 358 (2008) ("We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unopposed.").

235. *Crawford*, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.").

C. Michigan v. Bryant's Approach to an Ongoing Emergency

After *Bryant*, it is clear that a statement made pursuant to an ongoing emergency is only one type of nontestimonial statement. Justice Sotomayor's opinion discusses emergency statements as inherently different from testimonial statements.²³⁶ Indeed, the majority argues that there is little incentive to lie when making statements for the primary purpose of assisting police response to an emergency, thus excluding them from the Confrontation Clause's reach.²³⁷

Additionally, *Bryant* seems to clearly indicate that the ongoing emergency analysis is part of the larger circumstantial inquiry.²³⁸ The existence of an ongoing emergency is central to the circumstantial inquiry under the primary purpose test when an "encounter between an individual and the police" yields out-of-court statements.²³⁹ Statements made during an ongoing emergency do not constitute an entirely separate category of statements from nontestimonial statements under the Confrontation Clause. Rather, they inform the circumstantial analysis conducted by courts pursuant to *Davis*'s primary purpose test. The Court makes several key points in determining whether an ongoing emergency existed under the circumstances in *Bryant*.

First, Bryant's choice of weapon informed the Court's emergency analysis, specifically given the facts available to the Court. The Court distinguished *Davis* because Bryant used an easily portable, concealable handgun against Covington, rather than his fists, as in *Davis* and *Hammon*. The Court rejected Bryant's argument that, since "[n]o shots were being fired," the emergency was over when police spoke to Covington.²⁴⁰ For the Court, Bryant's argument would make an "emergency" last "only for the time between when the assailant pulls the trigger and the bullet hits the victim."²⁴¹ In rejecting this definition of ongoing emergency, the Court expounded upon the difference between committing an act of violence with one's fists versus using a gun, particularly given the relatively short time period—twenty five minutes—between the shooting and the officers' conversation with Covington. In the former scenario, "physical separation" can be enough to end the emergency.²⁴² In the latter, the *Bryant* Court

236. Michigan v. Bryant, 131 S. Ct. 1143, 1157 (2011) (citing Davis v. Washington, 547 U.S. 813, 822 (2006)).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 1164 (quoting Brief for Respondent at 27, Michigan v. Bryant, 131 S. Ct. 1143 (2011)).

241. *Id.*

242. *Id.*

insists that since neither Covington nor the police knew who the shooter was or where he was located, “there was an ongoing emergency here.”²⁴³ Bryant remained “a threat potentially to the police and the public” when Covington spoke to police.²⁴⁴

Second, this approach required the *Bryant* Court to determine more clearly when an emergency exists and how long it lasts. The Court noted, “the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.”²⁴⁵ In assessing the scope of the emergency, the Court looked to whether Covington’s shooting resulted from a “purely private dispute or [whether] the threat from the shooter had ended.”²⁴⁶ Covington told the police he fled from Bryant’s house, indicating to the Court that Covington “perceived an ongoing threat.”²⁴⁷ Additionally, Covington never told police “whether the threat was limited to him.”²⁴⁸ Therefore, the scope of the shooting and emergency “stretches more broadly than those at issue in *Davis* and *Hammon*.”²⁴⁹

Third, implicit in this “scope of the emergency” analysis is a “scope of the threat” inquiry. The Court distinguishes the emergencies in both *Hammon* and *Davis* because those cases involved domestic violence.²⁵⁰ For the *Bryant* Court, domestic violence crimes typically include “a narrower zone of potential victims than cases involving threats to public safety.”²⁵¹ Whether an emergency is ongoing when a crime involves such public threats cannot, according to the Court, be based on “whether the threat solely to the first victim has been neutralized.”²⁵² Fortunately, the Court quickly notes that emergencies are not ongoing “for the entire time that the perpetrator of a violent crime is on the loose” since nontestimonial statements can evolve into testimonial statements.²⁵³ The Court leaves for trial courts to determine initially when such an evolution occurs.²⁵⁴

Fourth, the Court rejected Bryant’s position that a declarant’s medical condition is irrelevant. A victim’s medical condition is relevant to determining whether there is an ongoing emergency “to the extent that it sheds light on the ability of the victim to have any purpose at all in

243. *Id.*

244. *Id.*

245. *Id.* at 1162.

246. *Id.* at 1163.

247. *Id.* at 1164.

248. *Id.*

249. *Id.*

250. *Id.* at 1158.

251. *Id.*

252. *Id.*

253. *Id.* at 1159.

254. *Id.*

responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one.²⁵⁵ The medical condition analysis directly relates to the “scope of the threat” inquiry. A victim’s medical condition supplies context for police officers to determine “the existence and magnitude of a continuing threat to the victim, themselves, and the public.”²⁵⁶

Finally, the Court nonchalantly states that the existence of an ongoing emergency is not dispositive to determining whether out-of-court statements are testimonial. Indeed, the Court notes that the existence of an emergency is “simply one factor—albeit an important factor—” present in the circumstantial inquiry.²⁵⁷

Defendants must be prepared to distinguish *Bryant* should a prosecutor argue that out-of-court statements were made during an emergency. As noted above, *Bryant* sets out four major factors that can be used to assess whether an emergency existed when statements were made: the weapon used by the defendant; the scope of the emergency; the scope of the threat; and the declarant’s medical condition. The Court’s analysis provides plenty of room for defendants to creatively argue an emergency did not exist at the time the statements were made.

Defendants should argue both that the weapon used does not present a broad threat and that *Bryant*’s language on the dangers presented by crimes involving guns is narrow. Asking a series of questions can help this argument. Can the weapon realistically be used against more than one victim in a short period of time? Even if the answer is yes, is more than one person realistically exposed to the weapon when the defendant uses it? Even if the weapon is a gun, as it was in *Bryant*, is the threat narrowly confined to one victim or a finite, identifiable group? Did police speak with the victim after a significantly longer period of time than 25 minutes? If so, the potential threat is not as broad as that in *Bryant*. In fact, where a defendant’s location is known to be elsewhere, the current danger is minimized. When the defendant’s identity is known, there is less reason than there was in *Bryant* to ask the victim to name his assailant.

Additionally, the emergency should be construed narrowly. Are the police and the public in danger? Is there any indication that the defendant’s location or identity is unknown? If not, the scope is certainly not as broad as the one present in *Bryant*. Moreover, argue that no medical emergency existed. The *Bryant* Court noted that there were no medical emergencies in *Davis* and *Hammon*.²⁵⁸ In *Bryant*, the Court contrasted and found that police

255. *Id.*

256. *Id.*

257. *Id.* at 1160.

258. *Id.* at 1159.

responded to a call to find a man lying on the ground outside a gas station parking lot, bloody from a gunshot wound to the stomach. For the Court, this indicated that the police were acting primarily as first responders in *Bryant*. Contrast these facts. Is the declarant suffering from a medical emergency under the Court's seemingly narrow understanding of medical emergency presented in *Hammon* and *Davis*? Is the medical emergency—if one exists—different and less serious than the one present in *Bryant*? Perhaps needing a few stitches or a trip to the doctor to be checked out does not, in fact, present a medical emergency under the Court's precedent. Defendants should answer these questions in distinguishing *Bryant*.

Furthermore, the answers to such questions *must* be obtained and preserved on the record so that defendants can avoid instances such as the one present in *Bryant* where a court can, in a very sympathetic situation, speculate from an inadequate record to find that an ongoing emergency existed. If defense attorneys fail to meticulously frame these cases, it will be simple in many cases for officers or victims to use the buzzwords “ongoing emergency” and to testify that an emergency existed and that they felt threatened by it. Defense attorneys can take several steps to prevent or at least curtail this result. In states such as Vermont, the rules of criminal procedure provide for pre-trial discovery.²⁵⁹ Take advantage of such a procedural opportunity. If possible, depose the declarant or the officers before the prosecutor has had the opportunity to frame their testimony.

Finally, on cross-examination, a defense attorney has the opportunity to treat the officer or declarant as an adverse witness. Here, the attorney can use leading questions. Carefully craft these questions to represent to the judge why no ongoing emergency existed when the declarant made his or her out-of-court statements. Ask police officers whether they have medical or emergency training. If not, though the officers may be first responders, they might not be assessing a medical emergency, especially if medical treatment is on the way. Ask the officers what they observed when they arrived at the scene to attempt to establish that the scope of the medical injury present in *Bryant* is not present.

Moreover, ask the victim whether he or she felt safe when speaking to the officers. If so, the scope of the threat is arguably limited. While technically the existence of a medical emergency is a form of threat to the victim, it is not necessarily enough to establish an ongoing emergency alone under *Bryant*.²⁶⁰ It is critical to establish facts such as these before and

259. See, e.g., VT. R. CRIM. P. 16 (2008).

260. As noted in Part III, *infra*, *Bryant* is an unusual case. Given the way the record was developed, the Court essentially had to guess both Covington's and the officers' primary purposes for the statements. Defense attorneys can use this to argue that *Bryant* should be read narrowly: the Court

during pre-trial hearings. Defendants, pursuant to *Bryant's* broad understanding of emergency, must gather as many favorable facts as possible to foreclose the idea that there was a medical emergency or that a threat existed to the victim, the officers, or the public.

Creativity and flexibility are essential to arguing the inadmissibility of statements under the Court's general Confrontation Clause jurisprudence. Specifically, when defendants are being tried in jurisdictions that follow *Bryant*, defense attorneys must ably distinguish *Bryant* and preserve the lower court's record to this end.

III. *BRYANT'S* DANGEROUS PRECEDENT—A RETURN TO *OHIO V. ROBERTS*

The Court's broad understanding of ongoing emergency in *Bryant* is highly problematic for defendants. The Court's language has the potential to sweep a large number of statements into the nontestimonial category, particularly in fatal situations. At the federal level, defendants are stuck with *Bryant's* broad brush. This Note therefore urges defense attorneys to bring confrontation violation claims under state constitutions. Importantly, defense attorneys should argue that state courts should refuse to follow *Bryant* under their own constitutions.²⁶¹ In making these arguments, defense attorneys can make two main points: first, *Bryant* is in large part a direct reaction to *Giles v. California*; and second, Justice Scalia's dissent in *Bryant* more accurately reflects the Confrontation Clause's purpose.

A. *The Giles Effect*

In the 2008 decision *Giles v. California*, the Supreme Court held that the forfeiture by wrongdoing doctrine requires the defendant to have “in mind the particular purpose of making the witness unavailable.”²⁶² Only then are hearsay and confrontation protections waived against the admission

erred on the side of admissibility based on unclear facts. This illustrates the care that the defense must take in developing the record.

261. The concept of departing from the United States Supreme Court on constitutional issues in criminal law is not unfamiliar to state supreme courts. For example, the Vermont Supreme Court offers more protections under Article 11's search and seizure clause than the Supreme Court guarantees under the Fourth Amendment. *See State v. Burgess*, 2010 VT 64, ¶ 8, 188 Vt. 235, 5 A.3d 911 (holding that exit orders in vehicle stops are not allowed as a matter of course under the Vermont Constitution but rather require “particular justification”); *State v. Bauder*, 2007 VT 16, ¶ 1, 181 Vt. 392, 924 A.2d 38 (holding that absent exigent circumstances, officers must obtain warrants before searching a vehicle); *State v. Rheaume*, 2005 VT 106, ¶ 8 n.*, 179 Vt. 39, 889 A.2d 711 (“[W]e have recognized that Article 11 affords individuals greater privacy rights than its federal counterpart in certain circumstances.”).

262. *Giles v. California*, 554 U.S. 353, 367 (2008) (quoting 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 8:134 (3d ed. 2007)).

of the unavailable witness's previously unfronted testimony.²⁶³ In its analysis, the Court noted that the doctrine was historically understood as applying a purpose-based definition.²⁶⁴ The prosecution therefore must show more evidence than that the defendant merely *caused* the witness's absence.²⁶⁵ In short, the state must show a defendant specifically intends to cause the absence of a witness's testimony.²⁶⁶ Six justices agreed with this strong intent requirement.²⁶⁷

The Court's decision in *Giles* is only relevant where testimonial statements are at issue. If the statements the government seeks to admit are nontestimonial, the Confrontation Clause does not bar their admission, and the prosecution does not have to rely upon *Giles* to get them in. Rather than attempt to further define the types of *statements* the Confrontation Clause means to address, *Giles* examines the types of *circumstances* under which a defendant loses his confrontation rights. Specifically, *Giles* required the Court to pick up one of *Crawford's* loose ends: "whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right."²⁶⁸

The Court quickly points to *Lord Morly's Case* as the source of the forfeiture doctrine,²⁶⁹ a doctrine that American courts followed from the beginning.²⁷⁰ This doctrine allowed the government to introduce testimonial statements made by a witness who was "detained" or "kept away" by the "means or procurement" of the defendant.²⁷¹ The major question before the Court was whether "detained" referred simply to the defendant *causing* a witness's absence, or whether it referred to something more: that the defendant purposefully made the declarant unavailable so that she could not testify against him at trial.²⁷² The Court concluded the latter, noting that history and the Court's own case law, most notably *Reynolds v. United*

263. *Id.* at 373.

264. *Id.* at 361–65.

265. *Id.*

266. *Id.*

267. Chief Justice Roberts and Justices Alito, Thomas, Ginsburg and Souter agreed with Part 11-A of Justice Scalia's opinion. *Id.* at 353.

268. *Giles*, 554 U.S. at 358.

269. *Id.* at 359 (citing *Lord Morly's Case*, 6 How. St. Tr. 769, 770–71 (H.L.1666)) ("The doctrine has roots in the 1666 decision in *Lord Morly's Case*, at which judges concluded that a witness's having been 'detained by the means or procurement of the prisoner' provided a basis to read testimony previously given at a coroner's inquest.")

270. *Rex v. Barber*, 1 Root 76 (Conn. Super. Ct. 1775).

271. *Giles*, 554 U.S. at 359; *see also Lord Morly's Case*, 6 How. St. Tr. at 771.

272. *Giles*, 554 U.S. at 359–60.

States,²⁷³ supported a “purpose-based” definition of detained, means, or procurement.²⁷⁴

Bryant's expansive ongoing emergency doctrine is directly related to *Giles*'s very narrow forfeiture doctrine. Confrontation scholar Richard D. Friedman argues:

[A] court easily could have held that Bryant forfeited the confrontation right—had *Giles* not foreclosed the possibility by holding that even a defendant who murders a witness forfeits the right only if he commits the murder for the purpose of rendering the witness unavailable. The bottom-line result of the Michigan Supreme Court's decision—that Covington's statements were inadmissible—is singularly unappealing at a gut level, and I think it was inevitable that courts would compensate for the unavailability of forfeiture in cases like this by narrowing the confrontation right.²⁷⁵

Friedman's argument is persuasive. In order to prevent defendants like Bryant from receiving what the Court considers to be a “windfall” because the prosecution cannot meet *Giles*'s stringent requirements, the Court expands the nontestimonial category to emergency situations because statements made during an emergency are not subject to the Confrontation Clause.

Additionally, since the Court recognizes FRE 804(b)(6) as a hearsay exception “which codifies the forfeiture doctrine,”²⁷⁶ the *Giles* Court merged the requirements for hearsay and confrontation in the context of statements made by the alleged murder victim of the defendant. Therefore, the confrontation and hearsay analyses are the same in a *Giles*-like circumstance, thus burdening prosecutors with meeting the *Giles*' purpose-based intent requirement even when statements are nontestimonial and subject only to exclusion under FRE 804(b)(6).

Since *Bryant* was very likely a reaction to the restrictive language in *Giles*,²⁷⁷ defense attorneys should urge state courts to refuse to follow *Bryant* under state constitutions. *Giles* firmly closed the door on an expansive interpretation of the forfeiture doctrine. What *Bryant* does in relation to *Giles* is offer prosecutors an end-run around the Confrontation

273. *Reynolds v. United States*, 98 U.S. 145, 158–59 (1878) (admitting testimony in cases where the defendant had engaged in wrongful conduct designed to prevent a witness's testimony).

274. *Giles*, 554 U.S. at 360.

275. Richard D. Friedman, *Preliminary Thoughts on the Bryant Decision*, THE CONFRONTATION BLOG (last visited Nov. 9, 2011, 4:34 PM), <http://confrontationright.blogspot.com/2011/03/preliminary-thoughts-on-bryant-decision.html>.

276. *Giles*, 554 U.S. at 367 (quoting *Davis v. Washington*, 547 U.S. 813, 833 (2006)).

277. *Id.*

Clause. *Bryant* gave statements that were not permitted to enter court through the front door after *Giles*, a key to the back door. A federal prosecutor's lesson after *Bryant* is a simple one: classify the statement as an emergency statement, and the forfeiture doctrine is unnecessary.

This result is troubling from a policy standpoint, particularly in light of the facts upon which *Bryant* rests. The record in *Bryant* was developed before the Court decided *Crawford*, *Davis*, and *Giles*. Even the majority admits this reality.²⁷⁸ Indeed, the record was developed under the *Roberts* standard, which allowed prosecutors to satisfy confrontation concerns in the same breath as hearsay concerns. Statements only needed to be reliable. To this end, the prosecution argued that Covington's statements were admissible as excited utterances, which was all the state needed to do under *Roberts*.

At trial, no attempt was made to discern what Covington's and the officers' primary purpose was when Covington responded to the officers' questions. Many uncertainties remain as to whether the officers or Covington perceived a threat during their encounter. Additional uncertainties remain about the circumstances surrounding the officers' conversation with Covington. For example, were other patrons of the gas station nervous or fleeing? Did Covington fear that Bryant followed him? Did the officers think Bryant followed Covington? In response to these evidentiary holes, the State of Michigan and Bryant presented the Court with dueling speculations about what actually happened in the gas station parking lot that night.

Admittedly, the Court had some solid facts, but the holes left by the record development allowed some of the most influential facts to be argued by inference alone. Most alarmingly, Bryant's trial occurred in 2001. Since this was a time in which the hearsay and confrontation questions were essentially the same under *Roberts*, Bryant made no confrontation argument at trial. Therefore, even if the subsequent appellate courts remanded for Bryant to make such arguments, the trial record was never developed to include the confrontation issue. This left the state appellate courts and supreme court to speculate on what actually happened that night in the gas station parking lot.

Based on these speculations and the inadequately developed record, the Court rendered its sweeping opinion. Quite simply, *Bryant*, given its factual vagueness, was the wrong case for the Court to use to determine the expansiveness of *Davis*'s ongoing emergency doctrine. The Court imprudently decided extremely important issues concerning the fundamental right criminal defendants have to confront the witnesses

278. *Michigan v. Bryant*, 131 S. Ct. 1143, 1154 (2011).

against them based largely on speculation. State courts should not allow an inadequately developed case to govern the scope of a defendant's confrontation rights.

B. Following the Dissent: Why Justice Scalia Got It Right

Even if the Court had sufficient facts upon which to base its opinion, its analysis is incorrect. Justice Scalia's dissent ends with a hauntingly accurate portrayal of the majority's opinion. "For all I know," says Justice Scalia, "Bryant has received his just deserts. But he surely has not received them pursuant to the procedures that our Constitution requires. And what has been taken away from him has been taken away from us all."²⁷⁹ This result, quite accurately, leaves the Court's confrontation jurisprudence "in shambles."²⁸⁰ Unwilling to be party to such destruction, Justice Scalia offers his dissent.

Justice Scalia first parts ways with the majority in determining whose perspective the primary purpose inquiry should consider. For Justice Scalia, the decision is simple: "The declarant's intent is what counts."²⁸¹ A testimonial statement contemplates a declarant who vows to give "a solemn declaration."²⁸² Therefore, a court cannot substitute the interrogator's "hidden purpose" for "the declarant's intentional solemnity or his understanding of how his words may be used."²⁸³

The combined approach advocated by the majority adds to, rather than detracts from, the inherent confusion in assessing a declarant's primary purpose for making statements. Courts under *Bryant* are now required to "sort through two sets of mixed motives to determine the primary purpose of an interrogation."²⁸⁴ Additionally, as Justice Scalia points out, the majority fails to consider the very likely scenario in which the declarant and the police "each have one motive, but those motives conflict."²⁸⁵ The uncertainty created by the majority's approach ensures that "the guarantee of confrontation is no guarantee at all."²⁸⁶ This guarantee must be better protected under state constitutions.

The dissent notes that under this declarant-focused inquiry, Bryant's case is "absurdly easy."²⁸⁷ Covington understood that his statements were

279. *Id.* at 1176 (2011) (Scalia, J., dissenting).

280. *Id.* at 1168.

281. *Id.*

282. *Id.*

283. *Id.* at 1169.

284. *Id.* at 1170.

285. *Id.*

286. *Giles v. California*, 554 U.S. 353, 375 (2008) (plurality).

287. *Bryant*, 131 S. Ct. at 1171 (Scalia, J., dissenting).

meant “to ensure the arrest and eventual prosecution of Richard Bryant.”²⁸⁸ He knew the threat to him and the officers was limited: the shooting resulted from a drug deal gone wrong, “not a spree killer who might randomly threaten others.”²⁸⁹ Additionally, the shooting took place approximately twenty-five minutes before and six blocks away from his conversation with the police.²⁹⁰

Moreover, Covington’s medical condition fails to “suggest that he was responding to an emergency” since Covington knew the police were conducting a criminal investigation.²⁹¹ No evidence suggests that the officers attempted to render first aid or really even questioned Covington about his medical condition. They knew Covington was shot prior to arriving on the scene and that medical attention was immediately forthcoming.²⁹² The questions they asked had “little, if any relevance to Covington’s dire situation. Police, paramedics, and doctors do not need to know the address where a shooting took place, the name of the shooter, or the shooter’s height and weight to provide proper medical care.”²⁹³ Covington knew the responses he gave to such inquiries were not focused on his pressing medical needs, needs that the facts provide no indication that the officers could meet.

Finally, Justice Scalia notes the striking similarities between Covington’s conversation with police and a prosecutor’s direct examination of a victim at trial. Just like a trial witness, Covington proceeded to detail “how potentially criminal past events began and progressed.”²⁹⁴ He identified and described his alleged shooter, gave the officers a precise description of Bryant’s home, said he had been shot through a door, and said he recognized the shooter’s voice as the defendant’s. These statements “deliberately recounted” facts to the police so they could locate, identify and apprehend the shooter for the primary purpose of developing evidence for a potential prosecution.²⁹⁵ These are the same kinds of statements Covington would make on direct examination at trial. The Confrontation Clause analysis centers on whether out-of-court statements were made by a declarant acting as a testifying witness would at trial. Under this rubric, Covington’s statements were surely testimonial.

Justice Scalia’s dissent provides the more legally and factually sound analysis of the *Bryant* case. The majority’s contrasting analysis squarely

288. *Id.* at 1170.

289. *Id.*

290. *Id.*

291. *Id.* at 1171.

292. *Id.*

293. *Id.*

294. *Davis v. Washington*, 547 U.S. 813, 830 (2006).

295. *Id.*

returns the Court's confrontation jurisprudence to the *Roberts* era reliability standard. The majority declares that it will examine "the standard rules of hearsay, designed to identify some statements as reliable," in determining whether statements are testimonial.²⁹⁶ Additionally, the Court concludes that emergency statements are not subject to the Confrontation Clause for the same reason excited utterances are an exception to the general ban on hearsay: both statements are reliable.²⁹⁷ This is precisely the *Roberts* standard. As Justice Scalia notes, the Court "*rejected* [that standard] as unworkable [and] . . . unmoored from the text and the historical roots of the Confrontation Clause."²⁹⁸ In attempting to "fit its resurrected interest in reliability into the *Crawford* framework," the Court creates an "incoherent," imprecise, and dangerous result. State courts should be in no hurry to similarly distort their confrontation guarantees under their own state constitutions.

CONCLUSION

The Supreme Court's decision in *Michigan v. Bryant* does little to cure the evils the Founders sought to abolish with the Confrontation Clause—evils so infamously represented in the case of Sir Walter Raleigh. Because of the Court's decision in *Bryant*, Bryant faces a fate far worse than Sir Walter Raleigh. Though Sir Walter Raleigh's case had very little light by which one could see a silver lining, his trial occurred before the procedural protections offered by the Sixth Amendment. It is therefore understandable, though deplorable, that he would be denied the right to confront the witnesses against him when the system of government under which was prosecuted offered him no such procedural safeguard. Bryant's case is dark to silver linings. The Court eroded his Sixth Amendment rights, and in so doing eroded the rights of all citizens. No state should shine an approving light on this unpardonable decision.

—Katie Polonsky*†

296. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

297. *Id.* at 1151.

298. *Id.* at 1174.

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