

No. 09-150

In The
Supreme Court of the United States

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THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

RICHARD PERRY BRYANT,

Respondent.

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**On Writ Of Certiorari To The
Michigan Supreme Court**

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PETITIONER'S BRIEF ON THE MERITS

—————◆—————
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QUESTION PRESENTED

Are preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting nontestimonial because “made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,” that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?

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OPINIONS BELOW

The original opinion of the Michigan Court of Appeals is unpublished, and appears in the Appendix to the Petition for Certiorari at 1A. The opinion of the Michigan Court of Appeals on remand is unpublished, and appears in the Joint Appendix at 147. The opinion of the Michigan Supreme Court appears in the Appendix to the Petition for Certiorari at 8A and is published at 483 Mich. 132, 768 N.W.2d 65 (2009).

**STATEMENT OF JURISDICTION**

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

The Sixth Amendment to the United States Constitution provides, in relevant part, that “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



STATEMENT OF THE CASE

In the pre-dawn hours of April 29, 2001, Detroit Police officers were dispatched to a gas station in Detroit on a report of a person shot. J.A. 33-34. When they arrived, they found Anthony Covington lying on the ground next to the driver's side door of his car in the gas station driveway. J.A. 34-35, 44, 80, 100-101. Covington had blood across the front of his torso. J.A. 11, 35, 49. Various officers asked Covington "What happened," and Covington responded, "I've been shot" and said he needed EMS.¹ J.A. 21, 36, 49, 56, 127, 131-132. At least one officer asked Covington who shot him, and Covington answered that Rick shot him. J.A. 22. Covington seemed to be in pain, talked haltingly, had trouble breathing, and would stop and grab his side like he was in pain. J.A. 8, 38-39, 41, 75,

¹ The record in this case lacks specificity, but not through any fault on behalf of the parties at trial. At the time the case was tried, *Crawford v Washington*, 541 U.S. 36 (2004), and *Davis v Washington*, 547 U.S. 813 (2006), had not yet been decided; the questioning and argument at trial reflected that *Ohio v Roberts*, 448 U.S. 56 (1980), controlled at the time. Therefore, the level of detail about circumstances relevant under *Davis* (i.e., exact questions asked, exact answers given, when in the course of events questions were asked and answered, how much time had lapsed when statements were made) is lacking.

83, 101, 111. Covington said that he went to a friend's house, knocked on the door, had a conversation through the door with Rick (whose voice he recognized), and then Rick shot him through the door. J.A. 12-13, 37-38, 76, 102, 114, 120, 127-128. Covington said that he had been shot around 3:00am (the police were dispatched around 3:25am). J.A. 39, 79, 105, 129. Covington said that he was shot at 4203 Pennsylvania, about six blocks away from the gas station, and then drove himself to the gas station. J.A. 14, 39-40, 60. He also gave a description of "Rick," saying he was a light-complected black male, 40, 5'7" and around 140 pounds. J.A. 85, 103, 134. Once EMS arrived and began tending to Covington, the officers ceased questioning him. J.A. 103, 117, 138. Approximately five to ten minutes elapsed between the time the officers arrived on the scene and the time paramedics arrived. J.A. 41, 56. The officers then went to 4203 Pennsylvania to try to locate and apprehend the shooter. J.A. 139-141. Covington died several hours later. Pet. App. 1A.

Covington's statements were admitted at Respondent's trial as excited utterances, and he was convicted of second-degree murder, among other charges. J.A. 70-72; Pet. App. 10A. On June 10, 2009, the Michigan Supreme Court held that the statements taken from Covington at the gas station were testimonial and admitted in violation of the Confrontation Clause, requiring reversal under the "plain-error" standard of review for forfeited error. Pet. App. 8A.



SUMMARY OF ARGUMENT

When 911 calls or interrogation by first responders is at issue, a declarant's statements are non-testimonial under the Confrontation Clause of the Sixth Amendment when, objectively viewed, the primary purpose of the interrogation is to meet an ongoing emergency. This test controls the inquiry: although the Court provided illustrative reasoning in *Davis v Washington*, that reasoning cannot be used to bar statements meeting the "ongoing emergency" test. The factors mentioned in *Davis* were sufficient to establish that the statements were nontestimonial – they are not, however, necessary to reach that conclusion.

Consistent with *Davis*' focus on whether the declarant is proclaiming an emergency and seeking help, the term "ongoing emergency" encompasses both crimes in progress and situations in which the declarant or officer is danger, either due to a medical emergency or because the perpetrator poses a threat. An "ongoing emergency," then, is not limited to discrete criminal acts and includes other emergencies resulting from those criminal acts.

Interrogations whose objective primary purpose is to assess and address a party's emergency medical condition, including questions regarding the circumstances surrounding the injury, will therefore often be nontestimonial. Similarly, questions aimed at ascertaining the identity and location of an armed perpetrator are also nontestimonial, as the existence of an

unknown perpetrator with a weapon presents a potentially immediate danger to the declarant, the officers, and others. The officers need to ascertain the perpetrator's identity and location in order to assess the situation and determine the extent of the risk and danger, and interrogations with that primary purpose are designed to meet an ongoing emergency.

The above applications of *Davis*' "primary purpose" test allow the Confrontation Clause to bar the formal, testimonial statements it was designed to guard against without impermissibly expanding the Clause to bar informal statements not designed to solemnly establish or prove some fact.



ARGUMENT

- I. Preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because “made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,” that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual.**

A. Introduction

In *Crawford v Washington*,² this Court redefined its understanding of the Confrontation Clause, “jettisoning a quarter-century of ‘reliability’ jurisprudence in favor of a new” analysis rooted in the historical development and understanding of the Confrontation Clause.³ The Court noted that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of *ex parte* examinations as evidence of the accused,” and concluded that “[t]he Sixth Amendment must be interpreted with this focus in mind.”⁴ Consistent with the method of obtaining those *ex parte* examinations, the Court noted that the term

² *Crawford v Washington*, 541 U.S. 36 (2004).

³ Shanes, Hon. Daniel B., *Confronting Testimonial Hearsay: Understanding the New Confrontation Clause*, 40 Loy. U. Chi. L.J. 879 (2009).

⁴ *Crawford, supra*, 541 U.S. at 50.

“witness” refers to those who “bear testimony.”⁵ This necessarily includes some sense of formality or solemnity, as the Court in *Crawford* noted in defining “testimony” to typically include “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁶ The Court concluded that testimonial statements of witnesses absent from trial may only be admitted if the declarant is unavailable and the defendant had a prior opportunity to cross-examine.⁷

The question remaining, of course, was what made a statement “testimonial.” The Court in *Crawford* declined to enunciate a comprehensive definition, concluding: “Whatever 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. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed.”⁸ Two years later, the Court again confronted the meaning of “testimonial” in the companion cases of *Davis v Washington* and *Hammon v Indiana*,⁹ this time in the context of statements made to law enforcement during a 911 call or at a crime scene. In further defining

⁵ *Crawford, supra*, 541 U.S. at 51 (citation omitted).

⁶ *Crawford, supra*, 541 U.S. at 51 (citation omitted).

⁷ *Crawford, supra*, 541 U.S. at 59.

⁸ *Crawford, supra*, 541 U.S. at 68.

⁹ *Davis v Washington* and *Hammon v Indiana*, 547 U.S. 813 (2006).

the term, the Court in *Davis* and *Hammon* focused on the presence or absence of an ongoing emergency:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.^[10]

In other words, when objective indications show that an interrogation's primary purpose is to help police handle an ongoing emergency, then the declarant is simply "not acting as a *witness*" or testifying, as "[n]o 'witness' goes into court to proclaim an emergency and seek help."¹¹ On the heels of *Davis*, as may be expected, new uncertainty has arisen: what exactly constitutes an "ongoing emergency"?

¹⁰ *Davis, supra*, 547 U.S. at 822.

¹¹ *Davis, supra*, 547 U.S. at 828.

B. Elevating Form Over Substance: The Danger of Focusing on the Illustrative Reasoning in *Davis* Rather Than on the Test Itself

The Court in *Davis* did not define “ongoing emergency.” The Court did, however, give four reasons why the declarant’s statements in *Davis* were different than the declarant’s statements in *Crawford*:

- In *Davis*, the declarant was speaking about events “*as they were actually happening*, rather than ‘describ[ing] past events.’”
- In *Davis*, the declarant’s call was “plainly a call for help against a bona fide physical threat.”
- Viewed objectively, the questions and answers in *Davis* “were necessary to be able to *resolve* the present emergency, rather than to simply learn . . . what had happened in the past.”
- The declarant in *Davis* made informal statements “in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.”¹²

Nowhere in its opinion did the Court hold that the above factors were *required* for a situation to constitute an ongoing emergency and a statement to be

¹² *Davis, supra*, 547 U.S. at 827 (emphasis in original).

nontestimonial; rather, the Court used the above reasons to illustrate the difference between the statements in *Davis* and *Crawford*. In other words, while the above circumstances were *sufficient* to show that the declarant's statements were made under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency, it does not follow that they are *necessary* to do so.

Unfortunately, rather than focusing on the actual holding of *Davis* – that statements made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency are nontestimonial, and that statements made when the circumstances objectively indicate that there is no ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution are testimonial – some courts have instead turned *Davis*' four illustrative reasons into a rigid four-part test. Just as the Michigan Supreme Court so held in this case, some courts find that the failure to meet any of the four reasons provided in *Davis* automatically negates the existence of any ongoing emergency and renders the statements testimonial.¹³ This method of analysis elevates form over

¹³ See *People v Bryant*, Pet. App. 13A-21A; *Rankins v Commonwealth*, 237 S.W.3d 128, 131 (Ky. 2007) (citing *Davis* in holding that “statements that tell ‘what is happening’ are
(Continued on following page)

substance and leads to conclusions such as the one here from the Michigan Supreme Court, where the presence of a man lying on pavement bleeding from a gunshot wound from an unknown assailant is not considered an ongoing emergency.

Most courts, however, have recognized that the factors given in *Davis* are not necessary conditions, but are instead illustrative aids – they are meant to *inform* the inquiry, not control it.¹⁴ Instead, the focus should be on the definition set forth in *Davis*: objectively viewed, is the primary purpose of the interrogation to meet an ongoing emergency or to establish or prove past events potentially relevant to later criminal prosecution? The other factors mentioned in *Davis* instruct the inquiry, but the presence or

non-testimonial, while statements that tell ‘what happened’ are testimonial”).

¹⁴ See, e.g., *United States v Arnold*, 486 F.3d 177 (6th Cir. 2007) (en banc) (fact that declarant drove around the corner from the scene and used past tense during the 911 call did not mean there was no ongoing emergency); *Wright v State*, 916 N.E.2d 269 (Ind. App. 2010) (finding use of past tense not dispositive); *Commonwealth v Allshouse*, 985 A.2d 847 (Penn. 2009) (finding that primary purpose test was not reliant on the temporal relationship between the statement and the wrong it describes); *State v Camarena*, 176 P.3d 380 (Or. 2008) (finding ongoing emergency even when declarant’s 911 call described an attack that had passed); *People v Nieves-Andino*, 872 N.E.2d 1188 (N.Y. App. 2007) (holding circumstances can objectively indicate an emergency even if police ask declarant “what happened”); *State v Ayer*, 917 A.2d 214 (N.H. 2006) (finding ongoing emergency even when police responded and interrogated after shooting had occurred).

absence of any one factor is not outcome determinative.¹⁵

C. Towards a More Complete Understanding of “Ongoing Emergency”

Courts that have addressed the definition of “ongoing emergency” have generally held that the term encompasses (1) a crime still in progress, and (2) situations in which the declarant or officer is in danger, either because of a medical emergency or because the perpetrator poses a threat.¹⁶ This definition comports with the focus of *Davis* – whether the declarant is proclaiming an emergency and seeking help or formally establishing the facts of a past crime. Further, the two parts of the definition are not necessarily linked: in other words, the existence of an ongoing emergency is not dependent on the crime still being in progress. After all, the term “emergency” is not limited to criminal acts: criminal activity often sets in motion other emergencies.¹⁷ Indeed, that happened here – although the shooting of Covington had

¹⁵ See *Collins v State*, 873 N.E.2d 149, 154 n. 2 (Ind. App. 2007) (finding that the four factors in *Davis* are not an exhaustive list, will not be relevant in all cases, and were not “elements” to be satisfied before testimony can be considered nontestimonial).

¹⁶ See, e.g., *State v Koslowski*, 209 P.3d 479, 484 n. 7 (Wa. 2009); *State v Shea*, 965 A.2d 504, 508-509 (Vt. 2008); *Anderson v State*, 163 P.3d 1000 (Alaska App. 2007).

¹⁷ See *State v Alvarez*, 143 P.3d 668, 674 (Ariz. 2006); *State v Ayer*, 917 A.2d 214, 225 (N.H. 2006).

ended by the time police arrived at the gas station, the medical emergency and potential danger caused by the shooting were ongoing. For this reason, focusing myopically on whether the interrogation or statements use the past or present tense obscures the focus on whether the primary purpose of the statements was to enable police assistance to meet an ongoing emergency, as often information about past events is needed to properly assess and address a current emergency. This Court recognized as much in *Hammon*, stressing that, although the Court rejected the implication of the Indiana Supreme Court that virtually all “initial inquiries” at a crime scene (which normally occur after the crime has been completed) would be nontestimonial, it was not holding “that *no* questions at the scene would yield nontestimonial answers.”¹⁸

This is particularly true when, as here, police are confronted with not only the report of a possible crime, but a person in need of emergency medical attention. It strains credulity to assert, as the Michigan Supreme Court did here, that police responding to a shooting who find a man lying on the ground, in pain, bleeding, and having difficulty breathing are not presented with an ongoing emergency.¹⁹ Nothing in *Davis* limits “ongoing emergency” to “an ongoing criminal episode,” as asserted by the Michigan Supreme

¹⁸ *Hammon*, *supra*, 547 U.S. at 832 (emphasis in original).

¹⁹ Pet. App. 19A.

Court.²⁰ This ignores the reality that a completed criminal act can result in an ongoing emergency. Injuries requiring emergency medical attention present the “bona fide physical threat” discussed in *Davis*, and the interrogations concerning those injuries by first responders are usually conducted on the scene, lacking any formality.²¹ Questions by first responders that assess and address a declarant’s medical condition will often qualify as interrogations designed to meet an ongoing emergency. In order to assess a party’s injuries to determine whether immediate medical attention is necessary and whether additional assistance will be needed from paramedics, “officers must inevitably learn the circumstances by which the party was injured.”²² If the circumstances of the interrogation objectively indicate that that is the primary purpose for obtaining the information, then the statements are nontestimonial, regardless of whether the crime itself is no longer in progress.

In the same way, as this Court noted in *Hammon*, initial inquiries regarding the identity of the perpetrator, particularly when the crime involves a weapon, often produce nontestimonial statements under this definition when the primary purpose is to learn “‘whom [the officers] are dealing with in order to assess the situation, the threat to their own safety,

²⁰ Pet. App. 19A.

²¹ *Davis*, *supra*, 547 U.S. at 827.

²² *People v Warsame*, 735 N.W.2d 684, 693 (Minn. 2007). *See also Nieves-Andino*, *supra*, 872 N.E.2d at 1190.

and possible danger to the potential victim.’”²³ Until the identity and location of the perpetrator is ascertained, the police have no way of knowing whether an armed and possibly dangerous suspect may be at the scene or return to the scene, potentially placing the declarant and the officers in immediate danger and presenting an ongoing emergency.²⁴ Interrogation with the primary purpose of determining this degree of continuing risk and the appropriate response to that risk is nontestimonial under *Davis*.²⁵ Similarly, when an officer arrives on the scene and does not know where the perpetrator is, whether he is armed, whether he might have other targets, and whether the violence might continue at the scene or elsewhere, interrogation that has the primary purpose of establishing those facts to assess the situation is designed to meet the ongoing emergency and is nontestimonial.²⁶

²³ *Hammon, supra*, 547 U.S. at 832, quoting *Hiibel v Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004). *See also Commonwealth v Simon*, 923 N.E.2d 58, 74 (Mass. 2010) (citation omitted).

²⁴ *See Collins, supra*, 873 N.E.2d at 154 (finding that “the capture of an alleged murderer who was then at large and very possibly armed and dangerous” constituted an ongoing emergency).

²⁵ *Shea, supra*, 965 A.2d at 510.

²⁶ *Ayer, supra*, 917 A.2d at 224-225 (N.H. 2006). *See also Warsame, supra*, 735 N.W.2d at 694-695; *Nieves-Andino, supra*, 872 N.E.2d at 1190; *Arnold, supra*, 486 F.3d at 190-191.

Here, police responded to a report of a man shot. They had no other information when they arrived at the scene and found Covington lying on the ground next to his car, bloody, in pain, having trouble breathing, and asking for emergency medical services. Viewed objectively, the primary purpose of the officers' interrogation of Covington, and of Covington's responses, was to enable the officers to meet an ongoing emergency, which consisted of both Covington's life-threatening injury and the fact that the police had no idea if a gunman was in the immediate vicinity or planning more violence, or if there were other victims. In other words, the officers' questions concerning what had happened, who had shot Covington, and where the shooting occurred primarily served to assess Covington's medical emergency and the danger to Covington, the officers, or others, both of which constituted ongoing emergencies at the time of the interrogation.²⁷ The fact that the officers and Covington used the past tense or that Covington had already been shot when the police

²⁷ Indeed, had Covington had access to a phone and made precisely the same statements that he made to the responding officers to a 911 operator instead, it seems clear that *Davis* would allow the admission of the statements. *Davis, supra*, 547 U.S. at 827. Similarly, had the declarant in *Hammon* been sitting on the porch, bleeding, in obvious pain, and having trouble breathing, doubtless initial inquiries designed to determine the cause of her injuries and the identity and location of the perpetrator would have been nontestimonial because an ongoing emergency existed, regardless of the fact that the act that caused the injuries was no longer ongoing.

arrived did not negate the ongoing emergency occurring when the police responded to the scene. To hold otherwise applies the Confrontation Clause to bar statements far removed from the formal civil law *ex parte* examinations the Clause was principally designed to address and elevates the four illustrative factors given in *Davis* above the Court's holding that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

◆

CONCLUSION

Wherefore, Petitioner respectfully requests that this Court reverse the Michigan Supreme Court.

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