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Michigan v. Bryant: The Counter-Revolution Begins¹

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For years after the Warren Court made the Confrontation Clause of the Sixth Amendment binding on the states in *Pointer v. Texas*, the Supreme Court struggled to give content to this long-overlooked right.² Then in 1980, in *Roberts v. Ohio* the Court adopted an approach that came to be known as “fusion”; that is, the right of confrontation fused with the traditional hearsay rule so that satisfying the hearsay rule also satisfied the right of confrontation.³

Fusion brought contempt from the commentators and a new set of problems for the Court.⁴ So a quarter of a century later, in *Crawford v. Washington*, the majority of the Court, relying in part on a misunderstanding of the history of the Confrontation Clause, revolutionized our understanding of its meaning.⁵ Over the next half-dozen years, to the dismay of prosecutors and their allies, the majority moved from stationhouse interrogations out into the field and into the crime lab.⁶ Finally in 2010, *Michigan v. Bryant*, came to the Court presenting a narrow question: did the “emergency doctrine” derived from the *Davis-Hammon* cases apply when the police questioned the dying victim of a shooting as he lay beside his car in a gas station?⁷

Instead of deciding that question, the majority of the court, over a bitter dissent from Justice Scalia, effectively over-ruled *Crawford* and pushed confrontation doctrine back in the direction of *Roberts*. In the process, the majority changed confrontation from a “trial right” to a regulation of police conduct; that is, under *Bryant* the defendant can claim his right of confrontation was violated by a police interrogation only if the police violate what the majority believes is the proper conduct of a of field interrogation.⁸

¹ This article, in somewhat different form, will appear as 30A Wright & Graham, Federal Practice & Procedure: Evidence § 5173.5 (Supp. 2012)

² See 30A Wright & Graham, Federal Practice & Procedure: Evidence §§ 6361-6365 (2000).

³ See 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6367 (2000).

⁴ See 30A Wright & Graham, Federal Practice & Procedure: Evidence §§ 6367-6371 (2000).

⁵ See 30A Wright & Graham, Federal Practice & Procedure: Evidence §§ 63671.2 (2011 Supp.)

⁶ See 30A Wright & Graham, Federal Practice & Procedure: Evidence §§ 6371.3 (*Davis-Hammon*), 6371.4 (*Massachusetts v. Melendez-Diaz*) (2011 Supp). The Court also rejected a sweeping expansion of the forfeiture doctrine in *Giles v. California*, 554 U.S. 353 (2008).

⁷ Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430 (April 29, 2010) p. i.

⁸ Under prior caselaw, the Court had clearly distinguished between the propriety of the police questioning and the propriety of the use of the products of that interrogation at trial---what we shall call “the I-T split.”

The Facts⁹

Anthony Covington, the victim [hereafter “the declarant”] (a cocaine addict), lived with his brother just a few doors away from 4203 Pennsylvania Street in Detroit where the defendant, Richard Bryant, lived with his girl friend.¹⁰ The declarant had been buying cocaine from defendant at the back door of defendant’s home for more than three years.¹¹ Toxicology tests later revealed that the declarant had taken cocaine within four hours of his death.¹²

On the evening of April 28, 2001, the declarant told his brother that he planned to visit defendant to redeem an expensive coat that he had pawned with the defendant to buy cocaine.¹³ Sometime between 3:00 and 3:30 AM the next morning, declarant’s brother heard gunfire.¹⁴ Shortly thereafter, someone called 911 to report that a man had been shot.¹⁵ At around 3:25, police officers received a radio dispatch to the scene and five officers responded.¹⁶

When police arrived at a gas station some six blocks from defendant’s house, they found the declarant lying on the ground next to his car in obvious pain from a gunshot wound in his belly.¹⁷ According to the state attorneys-generals’ amicus brief, the engine

⁹ We take these from the opinion of the Michigan Supreme Court and the briefs of the parties. The statement of facts in the majority opinion departs somewhat from ours---largely by omission. These differences will appear below.

¹⁰ *People v. Bryant*, 483 Mich. 132, 135, 768 N.W.2d 65, 67 (2009). See also, Respondent’s Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 4 (June 16, 2010).

¹¹ ¹¹ *People v. Bryant*, 483 Mich. 132, 135, 768 N.W.2d 65, 67 (2009). See also, U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 2 (May 6, 2010).

¹² *People v. Bryant*, 483 Mich. 132, 137, 768 N.W.2d 65, 67 (2009).

¹³ *People v. Bryant*, 483 Mich. 132, 135, 768 N.W.2d 65, 67 (2009). See also, U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 2 (May 6, 2010).

¹⁴ *People v. Bryant*, 483 Mich. 132, 135, 768 N.W.2d 65, 67 (2009).

¹⁵ The record does not reveal the identity of the caller, but given the neighborhood it seems reasonable to assume that the caller preferred to remain anonymous.

¹⁶ U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 2 (May 6, 2010). The responding officers included 2 two-man patrol teams and a supervisor. Respondent’s Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 1 (June 16, 2010).

¹⁷ *People v. Bryant*, 483 Mich. 132, 136, 768 N.W.2d 65, 67 (2009). A search on Google Maps and Mapquest shows that in 2011 there were two gas stations nearby on Cadillac Boulevard and on Mack Avenue that might have been the *locus in quo*. The DOJ brief says that declarant was lying on the driver’s side of the vehicle between the gas pumps and the front door of the station. U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 2 (May 6, 2010).

in the car was still idling.¹⁸ The officers asked “what happened?” The declarant replied “I’ve been shot”, adding that he needed paramedic assistance. ¹⁹ The officers responded that that the paramedics were on their way and continued their questioning of declarant.²⁰

The officers asked declarant who shot him and he answered “Rick.”²¹ Declarant further stated that he had been shot around 3:00 AM while standing outside the back door of defendant’s home after they had had a short conversation through the closed door.²² The declarant claimed he did not know Rick’s last name but recognized his voice through the closed door. ²³ He described “Rick” as about 40 years of age, 5’ 7” tall, and weighing around 140 pounds.²⁴

The declarant added that after the shooting, he drove away from the scene but made it only as far as the gas station.²⁵ The paramedics arrived 5-10 minutes after the police, who then ceased their interrogation and drove off to the defendant’s residence.²⁶ Though the state made no such claim, the state-attorneys-generals’ brief claims that the officers first called for back-up.²⁷ In fact, the state’s brief says that when the officers arrived at the house, they took up a “tactical position” while they called for back-up.²⁸ Since the Justice Department brief states that only three officers took off, perhaps the remaining two officers placed the call for back-up.²⁹ [These apparent quibbles arise from concern over when and where the officers first feared further violence from defendant.]

¹⁸ State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 5 (May 6, 2010).

¹⁹ Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430, p.3 (April 29, 2010).

²⁰ Respondent’s Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 2 (June 16, 2010).

²¹ *People v. Bryant*, 483 Mich. 136 n.1, 768 N.W.2d 67 (2009)

²² *People v. Bryant*, 483 Mich. 136, 768 N.W.2d 65 (2009). The state’s brief says this took place at the front door. Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430, p. 1 (April 29, 2010).

²³ *People v. Bryant*, 483 Mich. 136, 768 N.W.2d 65 (2009); U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 2 (May 6, 2010).

²⁴ *People v. Bryant*, 483 Mich. 136, 768 N.W.2d 67 (2009).

²⁵ *People v. Bryant*, 483 Mich. 136, 768 N.W.2d 67 (2009); State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 5 (May 6, 2010).

²⁶ Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430, p. 3 (April 29, 2010).

²⁷ State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 5 (May 6, 2010).

²⁸ Respondent’s Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 4 (June 16, 2010).

²⁹ U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 3 (May 6, 2010)

In the meantime, the declarant arrived at the hospital at 4:00 AM and died at 9:40 AM following unsuccessful surgery.³⁰

Meanwhile, the officers arrived at defendant's home, a scant 6 blocks from the gas station,³¹ at 5:30 AM.³² They knocked at both the front and back doors but got no answer. So some officers secured the outside while others went for a search warrant.³³ During this operation, the police discovered what appeared to be blood and a spent bullet outside the back door. The door had a hole in it that the officers opined was a bullet hole.³⁴ They also found the declarant's wallet, his identification, and his eyeglasses.³⁵

Even without the testimony at trial, the declarant's account of the evening raises several puzzles:

- did the declarant drive a car to the defendant's house, just a few doors away?
- If so, why?
- If not, why did he get in the car and drive away instead of just going inside the house and having his brother call 911?
- If the brother heard the gunshot, did he also hear the declarant drive away?

At the very least, these gaps in the story raise questions about the declarant's ability to reason rationally.

At trial, the autopsy surgeon testified that the bullet that killed the declarant, after passing through an intermediate object such as a door, entered the declarant's chest on a downward path 47.25 inches from the ground and left his back 44.75 inches from the ground.³⁶ The parties stipulated that the bullet hole in the door was only 42 inches above the ground, a fact hard to square with the surgeon's trajectory.

The declarant's brother contradicted the declarant's statement to the police that he did not know "Rick's" last name.³⁷ Moreover, the defendant's driver's license showed

³⁰ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 4 (June 16, 2010); *People v. Bryant*, 483 Mich. 132, 136, 768 N.W.2d 65, 67 (2009).

³¹ *People v. Bryant*, 483 Mich. 132, 136 768 N.W.2d 65, 67 (2009); U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 2 (May 6, 2010).

³² *People v. Bryant*, 483 Mich. 132, 136, 768 N.W.2d 65, 67 (2009).

³³ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 4 (June 16, 2010).

³⁴ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 4 (June 16, 2010).

³⁵ *People v. Bryant*, 483 Mich. 132, 136, 768 N.W.2d 65, 67 (2009); Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 4 (June 16, 2010).

³⁶ *People v. Bryant*, 483 Mich. 132, 137, 768 N.W.2d 65, 67 (2009);

³⁷ *People v. Bryant*, 483 Mich. 132, 136, 768 N.W.2d 65, 67 (2009).

him to be ten years younger, three inches taller, and 40 pounds lighter than the description declarant gave the police.³⁸

The defendant's girl friend testified that she and the defendant had been living in the house down the street from declarant's residence for several months.³⁹ She testified that she left the house at 4:00 in the afternoon, returned at 10:00 that night to find the defendant gone, fell asleep around 11:00, and did not awake until the officers crashed into the house executing the search warrant.⁴⁰ Since the jury apparently disbelieved her testimony, we need not consider the discrepancies between her account and that of the police officers.⁴¹

Other police testimony at trial seems inconsistent with the declarant's account of the evening. The officers testified that in executing the search warrant, they did not find the defendant, the coat that declarant claimed he had pawned for drugs, nor the drugs he had come to seek, nor any guns or bullets.⁴² If the defendant absconded with all the incriminating items, he must have done so between the time of the shooting and the arrival of the police a half hour later because the police testified that they had secured both the front and back door upon their arrival.⁴³

Procedural history

The defendant apparently fled to California; he was found in that state and rendered up to Michigan in 2002.⁴⁴ In defendant's preliminary hearing and first trial, both of which took place prior to the *Crawford* decision, the trial court admitted declarant's statements to the police as an excited utterance⁴⁵ When the trial court entertained a motion for reconsideration, the prosecutor conceded that without declarant's statements he had no

³⁸ *People v. Bryant*, 483 Mich. 132, 136, 768 N.W.2d 65, 67 (2009); Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 2 (June 16, 2010).

³⁹ This seems to conflict with the testimony of the declarant's brother that declarant had been purchasing drugs at the backdoor of the house for more than three years. Perhaps this discrepancy can be explained by assuming that the defendant had lived there for years but the girlfriend had only moved in with him recently.

⁴⁰ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 2 (June 16, 2010).

⁴¹ For example, that they pounded on both the back and front doors upon their arrival at the house.

⁴² *People v. Bryant*, 483 Mich. 132, 136, 768 N.W.2d 65, 67 (2009); Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 5 (June 16, 2010).

⁴³ Another puzzle raised by the record is whether and when the police went to declarant's home after they discovered his identification outside defendant's house, and if they did, what they learned from declarant's brother.

⁴⁴ *People v. Bryant*, 483 Mich. 132, 137, 768 N.W.2d 65, 67 (2009).

⁴⁵ Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430, p.3 (April 29, 2010); U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p.3 (May 6, 2010)

case and would have to appeal if the judge excluded them.⁴⁶ The state attorneys-general's amici brief later argued that the trial judge had cut off the prosecutor's effort to get the statements in as dying declarations.⁴⁷ The Department of Justice, however, stated that the state failed to preserve this ground for admission---a more likely conclusion in that the defendant said nothing to indicate he had any sense of his impending demise.⁴⁸ The significance of this dispute will appear when he take up Justice Ginsburg's opinion.

In defendant's first trial, the jury was unable to agree on a verdict---hardly surprising given the contradictions and gaps in the evidence.⁴⁹ A second jury acquitted the defendant of first degree murder, but found him guilty of second degree murder.⁵⁰ The Michigan Court of Appeals affirmed in an unpublished opinion shortly after the decision in *Crawford*.⁵¹ The case was pending on review in the Michigan Supreme Court when *Davis-Hammon* came down, so that court remanded the case to the Court of Appeals for reconsideration.⁵² The Court of Appeals again affirmed; the Michigan Supreme Court granted review and reversed, finding that the facts did not show that the emergency was ongoing when the declarant made his accusations.⁵³

The Arguments on Appeal

Most of the arguments for the prosecution took aim at the Michigan Supreme Court's decision and its application of *Davis-Hammon*.⁵⁴ None of them suggested the overruling

⁴⁶ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 3 (June 16, 2010).

⁴⁷ State Attorney Generals' Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p.5 (May 6, 2010).

⁴⁸ U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 12 n. 1 (May 6, 2010).

⁴⁹ *People v. Bryant*, 483 Mich. 132, 137, 768 N.W.2d 65, 67 (2009).

⁵⁰ *People v. Bryant*, 483 Mich. 132, 137, 768 N.W.2d 65, 67 (2009).

⁵¹ *People v. Bryant*, 483 Mich. 132, 137, 768 N.W.2d 65, 67 (2009).

⁵² *People v. Bryant*, 483 Mich. 132, 137, 768 N.W.2d 65, 67 (2009); Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 6 (June 16, 2010).

⁵³ *People v. Bryant*, 483 Mich. 132, 137, 150 768 N.W.2d 65, 68, 75 (2009)

⁵⁴ See, e.g., State Attorney Generals' Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, pp. 5, 11 (May 6, 2010). The Justice Department argued that the Michigan court erred: in engaging in bogus speculation about the victim's intent; in relying on the "declarant intent test" rejected in *Davis-Hammon*; and failing to note that even if the victim thought he was safe, the police had to look out for their own safety. ⁵⁴ U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 19 (May 6, 2010).

of *Crawford*.⁵⁵ Ironically, the only suggestion that the Court retrench came from Professor Friedman, whose amicus brief for the defendant suggested that the Court should overrule *Giles v. California*---an issue not then before the Court.⁵⁶

The state argued that declarant's statements were admissible under the "ongoing emergency" doctrine of *Davis-Hammon*.⁵⁷ According to the state, the "primary purpose" doctrine enunciated in those cases, includes not only the threat of further violence from the perpetrator, but also a medical emergency regarding the victim.⁵⁸ And in this case, not only did the police face a threat of a violent recurrence by the perpetrator, they also had an ongoing emergency medical with the badly wounded victim.⁵⁹ To deal with the medical emergency, the state argued, the police must know the circumstances under which the victim was injured.⁶⁰

At this point, we must pause to note a fallacy suggested by the state's brief. The brief implies that if the Court holds that the police cannot interrogate for purposes of helping the victim, this constitutes a regulation of police interrogation akin to the Fifth Amendment limits imposed by *Miranda*. But that case extends a restriction on interrogation that lies at the core of the constitutional right. Confrontation, on the other hand, regulates the admission of evidence at trial. It does not forbid police interrogation, it simply bars the declarant's answers as evidence at trial. What we shall call "the **i-t** fallacy" recurs in other prosecutorial briefs⁶¹---and even makes its way into the majority opinion of the Supreme Court.

⁵⁵ This seems surprising because in *Briscoe v. Virginia*, which raised the question of what sorts of burdens the state could place on defendant's to obtain the confrontation of those who prepared testimonial laboratory reports after *Massachusetts v. Melendez-Diaz* the state attorneys-general did ask the Court to overrule *Crawford*. However, the Supreme Court dismissed that appeal without reaching the merits.

⁵⁶ Richard D. Friedman, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2565284, pp. 2, 19 (June 23, 2010). *Giles*, the reader will recall, limited the doctrine of confrontation forfeiture to cases in which the acts of the defendant were intended to make the declarant unavailable to testify at trial; under the interpretation favored by Professor Friedman, defendant would have forfeited his right to confrontation by killing the declarant, irrespective of his intent in doing so.

⁵⁷ Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430, p. 4 (April 29, 2010).

⁵⁸ Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430, p. 4 (April 29, 2010).

⁵⁹ Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430, p. 7 (April 29, 2010). Professor Friedman, nominally on the side of the defendant, agreed; to him, nothing in *Davis-Hammon* suggests there must be an "ongoing criminal episode." Richard D. Friedman, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2565284, p. 7 (June 23, 2010).

⁶⁰ Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430, p. 7 (April 29, 2010). The defense argued that the facts show that the police were not there to render emergency medical assistance to the declarant; they relied on the paramedics for that. Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, pp. 31-32 (June 16, 2010).

⁶¹ See, e.g., U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 8 (May 6, 2010).

Returning to the state's brief; it went on to argue that the Michigan Supreme Court erred in treating the four "*Davis-Hammon* factors as dispositive.⁶² The state had to concede that other courts had done the same, but it argued that the better reasoned opinions treat the "factors" only as "illustrative aids."⁶³ The state concluded that to focus on the tense of the verbs used by the declarant simply obscures the true issues.⁶⁴

The attorneys-general of the other states, in an amici brief on behalf of their Michigan brethren, sought to revive the "resemblance test" that the Court appeared to reject in *Davis-Hammon*.⁶⁵ Under that test, the modern confrontation clause only applied to questioning that resembled the abuses in English courts that supposedly gave rise to the Sixth Amendment provision.⁶⁶ The Justice Department also endorsed the "resemblance test."⁶⁷ But this is just another example of the bogus history that has plagued confrontation jurisprudence since Justice Scalia dragged it into his *Crawford* opinion.⁶⁸ While the Founders may have known of Raleigh's trial, they also knew that English law had no right to confrontation because they had seen that law applied to deny confrontation in the prosecutions of John Hancock and Henry Laurens for violations of the Navigation Acts.⁶⁹

The attorneys-general, perhaps in an appeal for Justice Thomas' vote, emphasized the requirement of "formality" originally mentioned in *Crawford*.⁷⁰ The Justice

⁶² Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430, p. 5 (April 29, 2010).

⁶³ Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430, p. 6 (April 29, 2010).

⁶⁴ Brief for Petitioner, *Michigan v. Bryant*, 2010 WL 1776430, p. 7 (April 29, 2010). The Justice Department agreed. U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 17 (May 6, 2010)(tense of verbs "not dispositive").

⁶⁵ State Attorney Generals' Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 6 (May 6, 2010).

⁶⁶ See 30A Wright & Graham, *Federal Practice & Procedure: Evidence*, § 6371.3, text at notecall 225 (Supp. 2011).

⁶⁷ U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 15 (May 6, 2010).

⁶⁸ 30A Wright & Graham, *Federal Practice & Procedure: Evidence*, § 6371.2, text at notecall 16 (Supp. 2011).

⁶⁹ 30A Wright & Graham, *Federal Practice & Procedure: Evidence*, § 6374, p. 514 (1997). Perhaps the reason the Justice Department prefers to emphasize Sir Walter Raleigh is the fear that the Hancock-Laurens example might lead courts to apply the right of confrontation to tax and securities prosecutions.

⁷⁰ State Attorney Generals' Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, pp. 6-7 (May 6, 2010).

Department seconded this approach.⁷¹ But this ignores the way in which Justice Scalia, to the disgust of Justice Thomas, chose to downplay “formality” in the majority opinion in *Davis-Hammon*.⁷² To the majority in that case, it sufficed that lying to the police was a criminal offense.⁷³

The attorneys-general argued that *Davis-Hammon* did not do away with the “formality” requirement,⁷⁴ relying on Justice Thomas concurring opinion in *Giles v. California*.⁷⁵ They claimed that the existence of an “ongoing emergency” made the interrogation “informal” and thus non-testimonial under *Crawford*.⁷⁶ The Justice Department advanced its own version of the “formality” test.⁷⁷ The attorneys-general claimed that the test that emerged from *Crawford* and its progeny was narrow: the statement must have the formality of courtroom testimony and be given to a government official acting in an investigatory capacity.⁷⁸

The defense lawyers ridiculed this argument.⁷⁹ The National Association of Criminal Defense Lawyers, in their amicus brief on behalf of Bryant, pointed out that under the view of confrontation advanced by Justice Thomas and the prosecutors, the accuser could simply phone in his testimony from a coffee shop---what could be more “informal”?⁸⁰ On a more serious note, they suggested that the elements relied upon by

⁷¹ U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 16 (May 6, 2010).

⁷² See 30A Wright & Graham, *Federal Practice & Procedure: Evidence*, § 6371.3, text at notecall 181 (Supp. 2011).

⁷³ See *Davis v. Washington*, 126 S.Ct. at 2278 n. 5, 547 U.S. at ___ n. 5 (2006).

⁷⁴ State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 8 (May 6, 2010).

⁷⁵ State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 10 (May 6, 2010).

⁷⁶ State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 9 (May 6, 2010).

⁷⁷ U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 16 (May 6, 2010).

⁷⁸ State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 10 (May 6, 2010).

⁷⁹ Professor Friedman agreed that no separate “formality” requirement exists but it is unclear whether he agrees that it might be used in applying the other requirements of *Davis-Hammon* as the prosecutors tried to do. Richard D. Friedman, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2565284, p. 15 (June 23, 2010).

⁸⁰ National Association of Criminal Defense Lawyers, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2569158, p. 13 (June 23, 2010). They also pointed out that while the existence of formality made a statement “testimonial”, its absence did not automatically make the statement “non-testimonial.” *Id.* at p. 4.

the prosecutors to show “formality” might be better used as indicia of the evidentiary purpose of the statements.⁸¹

Let us return to bogus history to see how it bedeviled the briefs in *Bryant*.⁸² The attorneys-general amici brief claimed that the modern hearsay rules were in place at the time of the adoption of the Sixth Amendment in 1791.⁸³ To call this “sheep-dip” would be too kind; the precise state of the law of evidence at the end of the 18th Century is far too uncertain to admit of such claims.⁸⁴ Indeed, the scholar relied upon for this claim concedes that in 1791, when courts excluded hearsay, they did so for the lack of an oath, not because of absence of cross-examination (the modern rationale).⁸⁵

Undeterred by such embarrassing facts, the state prosecutors pushed on to claim that courts admitted excited utterances in 1791 under the guise of “res gestae.”⁸⁶ They support this dubious proposition by some partisan scholarship, a 1694 English civil case, and a passel of 19th Century cases that could not have influenced the Framers understanding of the right of confrontation.⁸⁷ By contrast, the standard account of excited utterances posits that they did not emerge as an exception to the hearsay rule until well after the 1922 publication of a pathbreaking article by Professor Edmund Morgan.⁸⁸

Bravely pushing on where none have gone before, the attorneys-general provide a complete catalog of the historical status of the hearsay exceptions at the time of the framing. On the res gestae-excited utterances front, they claim these came in at the

⁸¹ National Association of Criminal Defense Lawyers, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2569158, p. 15 (June 23, 2010).

⁸² See, above, text at notecall 68, for an earlier reliance on bogus history.

⁸³ State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 13 (May 6, 2010).

⁸⁴ See 30A Wright & Graham, *Federal Practice & Procedure: Evidence*, p. 393, text at notecall 436 (1997)

⁸⁵ State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 12 (May 6, 2010).

⁸⁶ State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 7 (May 6, 2010).

⁸⁷ State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 13 (May 6, 2010). The Department of Justice took a similar position. U.S. Justice Dept., Amicus Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848212, p. 18 (May 6, 2010)

⁸⁸ Morgan, A Suggested Classifications of Utterances Admissible as Res Gestae, 31 *Yale L.J.* 299 (1922).

time of the framing as “verbal acts”, like the declarations of a co-conspirator.⁸⁹ Passing by the question of whether the exception for co-conspirator statements had been recognized in 1791, the “verbal act” doctrine covers what others have called “legally operative conduct”; that is, words that alter the legal relations of the parties---such as the words that form a contract.⁹⁰

Not to be outdone, the defense side took a slap at the historical tar baby.⁹¹ The National Association of Criminal Defense Lawyers’ brief correctly pointed out that the 1694 civil case cited by the prosecutors was “too obscure” to have affected the Framers.⁹² They then argued that there was no *res gestae* exception in 1791⁹³---and even if there were, the statements in the present case would not qualify as such.⁹⁴ But the defense lawyers erroneously supposed that a right of confrontation existed at common law and that James Madison wanted to “entrench it” in the Sixth Amendment.⁹⁵ But having embraced this version of history left the defense lawyers unable to explain Raleigh’s objections to Cobham’s hearsay accusations.⁹⁶

The defense lawyers also argued that the dying declarations exception has a more respectable pedigree as a confrontation exception than do excited utterances.⁹⁷ They

⁸⁹ Their claim that Wigmore endorsed this view will not hold up to scrutiny. State Attorney Generals’ Amici Curiae Brief in Support of Petitioner, *Michigan v. Bryant*, 2010 WL 1848211, p. 13 (May 6, 2010). The passage they cite does indeed discuss *res gestae* and “verbal acts” but Wigmore never claims that this was the state of the law in 1791. 6 Wigmore, *Evidence*, § 1766 (Chadbourne rev. 1976). Indeed, when Wigmore does discuss the history of the hearsay rule, he confirms our impression of the uncertain nature of the modern rule at the time of the Framing. 5 Wigmore, *Evidence*, § 1364 (Chadbourne rev. 1974).

⁹⁰ Indeed the analogy to a civil contract may have led courts to characterize the declarations of co-conspirators as “verbal acts” and limit them to statements that further the conspiracy.

⁹¹ Perhaps the most embarrassing of these was the resort to the Dead Sea scrolls, which could hardly affect the Framers since they were not discovered until the latter part of the 20th Century. Richard D. Friedman, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2565284, p. 6 n. 4 (June 23, 2010)

⁹² National Association of Criminal Defense Lawyers, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2569158, p. 25 (June 23, 2010).

⁹³ National Association of Criminal Defense Lawyers, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2569158, p. 24 (June 23, 2010).

⁹⁴ National Association of Criminal Defense Lawyers, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2569158, p. 27-28 (June 23, 2010).

⁹⁵ National Association of Criminal Defense Lawyers, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2569158, p. 9 (June 23, 2010).

⁹⁶ National Association of Criminal Defense Lawyers, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2569158, p. 6 n. 9 (June 23, 2010).

⁹⁷ National Association of Criminal Defense Lawyers, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2569158, p. 27 (June 23, 2010).

went on to argue that the emergency doctrine clashes with the use of arrest warrants as evidence.⁹⁸ And, they asked, what could present a greater emergency than a treasonous attempt to overthrow the King? (the charge against Raleigh).⁹⁹ This suggests a point seldom emphasized enough: had the British won, the Framers faced trials and possible death as traitors. Unlike modern elites, they had no reason to suppose that members of their class were immune from death sentences at the hands of anonymous accusers.

But enough of spurious history; let's return to the substantive arguments defense counsel advanced for affirmance. To begin, the defense brief pointed out the way the prosecutors had endorsed the "i-t fallacy." The defense insisted that courts must distinguish between investigative use and use at trial; otherwise they could confuse the emergency doctrine under the Sixth Amendment with the exigent circumstances exceptions to the Fourth and Fifth Amendments.¹⁰⁰ The brief quotes the *Davis-Hammon* opinion insisting on this distinction.¹⁰¹

Turning first to policy, the defense brief pointed out the conflicts between the declarant's statements to the police and the other evidence in the case that cry out for cross-examination of the declarant.¹⁰² Yet the prosecutors wanted to deny the defendant his trial right to confrontation by extending the "ongoing emergency" doctrine.¹⁰³ They would make all statements made before the perpetrator is taken into custody *per se* "nontestimonial."¹⁰⁴ As Professor Friedman pointed out, were that the case, the police could evade defendant's right of confrontation merely by waiting to arrest the perpetrator until they had finished their questioning of all the potential witnesses.¹⁰⁵

The defense argued that the possibility of a recurrence of the crime in the future does not change a narrative of past events into a "nontestimonial" statement.¹⁰⁶

⁹⁸ National Association of Criminal Defense Lawyers, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2569158, p. 20 (June 23, 2010).

⁹⁹ National Association of Criminal Defense Lawyers, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2569158, p. 21 (June 23, 2010).

¹⁰⁰ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 6 (June 16, 2010).

¹⁰¹ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 15 (June 16, 2010). See also, National Association of Criminal Defense Lawyers, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2569158, p. 18 n. 10 (June 23, 2010) (taking same position)

¹⁰² Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 37 (June 16, 2010).

¹⁰³ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 6 (June 16, 2010).

¹⁰⁴ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, pp. 17, 30 (June 16, 2010).

¹⁰⁵ Richard D. Friedman, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2565284, p. 14 (June 23, 2010).

¹⁰⁶ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 6 (June 16, 2010).

Accepting the state's expansive definition of the "emergency" would alter the result in *Hammon* by making the entire 911 call in that case non-testimonial.¹⁰⁷ Restriction of the emergency doctrine to descriptions of contemporaneous events is not only consistent with the common law "res gestae" doctrine¹⁰⁸ but also with the decisions of other state courts.¹⁰⁹ And, the brief pointed out, the "res gestae doctrine" applied to hearsay; it had never been made an exception to the right of confrontation.¹¹⁰

Returning to *Davis-Hammon*, the defense brief argued that the declarant's statements, not the police questions, determine whether or not the statements are "testimonial" under *Crawford*.¹¹¹ Professor Friedman agreed¹¹², pointing out that the police can manipulate their questioning to make answers appear non-testimonial.¹¹³ He added that under an objective standard, police questioning would bear on what a reasonable declarant might believe her statements would be used for.¹¹⁴

The parties disagreed on whether *Davis-Hammon* embraced the the "declarant's objective intent" test or the "police inducement test."¹¹⁵ The defense and Professor Friedman argued that the Court had endorsed the former test¹¹⁶, while the state argued in favor of the latter.¹¹⁷ The defense accused the state of seeking to shift the inquiry to the subjective intent of the questioning police officers.¹¹⁸ The defense claimed that *Davis-Hammon* required courts to decide whether viewed objectively, the declarant's statements were cries for help during an ongoing offense or a narrative intended to

¹⁰⁷ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 25 (June 16, 2010).

¹⁰⁸ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 10 (June 16, 2010).

¹⁰⁹ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 26 (June 16, 2010).

¹¹⁰ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 6 (June 16, 2010).

¹¹¹ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 10 (June 16, 2010).

¹¹² Richard D. Friedman, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2565284, pp. 2, 5 (June 23, 2010).

¹¹³ Richard D. Friedman, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2565284, p. (June 23, 2010).

¹¹⁴ Richard D. Friedman, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2565284, p. 11 (June 23, 2010).

¹¹⁵ For the derivation and meaning of these titles, see 30A Wright & Graham, *Federal Practice & Procedure: Evidence*, § 6371.2, text at notecall 133 (Supp. 2011).

¹¹⁶ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 19 (June 16, 2010); Richard D. Friedman, Amicus Curiae Brief in Support of Respondent, *Michigan v. Bryant*, 2010 WL 2565284, pp. 2, 5 (June 23, 2010).

¹¹⁷ Petitioner's Reply Brief, *Michigan v. Bryant*, 2010 WL 2826984, p. 2 (July 15 2010).

¹¹⁸ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 12 (June 16, 2010).

provide evidence of a past crime?¹¹⁹ For what it's worth, an "objective" analysis of *Davis-Hammon* would probably find the majority opinion by Justice Scalia opaque on this question, though subjectively we think the evidence favors the state.¹²⁰

Finally, we reiterate that the defense made clear the distinction between investigative use of the declarant's statements and their use at trial---a distinction the state and its allies had blurred in their briefs.¹²¹ This distinction invalidates the effort to analogize the "emergency doctrine" of *Davis-Hammon* to the "exigent circumstances" exceptions to the Fourth and Fifth Amendments.¹²² The brief quotes from Justice Scalia's majority opinion to support this point.¹²³ The brief for the National Association of Criminal Defense Lawyers also highlighted the prosecutorial effort to elide the investigation-trial distinction.¹²⁴

Oral Argument

At oral argument, the attorney for the state led off with the "formality" argument;¹²⁵ the existence of an emergency necessarily negates the appropriate formality.¹²⁶ Chief Justice Roberts and Justice Scalia jumped all over her on that point, the Chief Justice questioned whether formality was determinative and Justice Scalia insisted that "formality has nothing to do with it."¹²⁷

When the lawyer repeated her claim that an emergency equates to a lack of formality, Justice Ginsburg wanted to know how the Court could tell from the questions; wouldn't the police ask the same questions whether they were securing the scene or

¹¹⁹ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 13 (June 16, 2010).

¹²⁰ 30A Wright & Graham, *Federal Practice & Procedure: Evidence*, § 6371.3, text at notecall 152 and following (Supp. 2011).

¹²¹ Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 6 (June 16, 2010).

¹²² Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 6 (June 16, 2010).

¹²³ "Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory 'nontestimonial' evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it so. . . . neither can police conduct govern the Confrontation Clause; testimonial statements are what they are." Respondent's Brief, *Michigan v. Bryant*, 2010 WL 2481866, p. 15 (June 16, 2010)(quoting 547 U.S. at 832 n. 6).

¹²⁴ National Association of Criminal Defense Lawyers, *Amicus Curiae Brief in Support of Respondent*, *Michigan v. Bryant*, 2010 WL 2569158, p. 18 n. 10 (June 23, 2010).

¹²⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 3 (Oct. 5, 2010).

¹²⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 3 (Oct. 5, 2010).

¹²⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 4 (Oct. 5, 2010).

seeking evidence for trial?¹²⁸ The lawyer conceded that questioning could have multiple purposes but argued that the primary purpose controlled.¹²⁹ This prompted Justice Sotomayor to ask “whose primary purpose?”¹³⁰ She pointed out that the declarant apparently did not see any immediate threat from the perpetrator.¹³¹

When the state’s lawyer insisted that *Davis* said that the judge should look to the purpose of the questioner, this brought a flurry of responses from the bench.¹³² Justice Sotomayor recalled the footnote in *Davis* that said the declarant’s primary purpose controlled.¹³³ Justice Scalia chimed in that the declarant’s purpose, not that of the questioner controlled.¹³⁴ Justice Sotomayor suggested that the issue in *Davis* was whether the declarant wanted help or the arrest of the perpetrator---and the state conceded the point.¹³⁵

Justice Alito found the distinction “totally artificial”; when a badly wounded victim makes statements relevant both to a potential emergency and to the prosecution of the perpetrator, how can a judge measure his intent to determine which is “primary”?¹³⁶ The lawyer for the state agreed that the subjective inquiry was “complicated” but before she could finish her thought, Justice Scalia jumped in.¹³⁷

“What possible response to an ongoing emergency could [the declarant] have had in mind?” he asked.¹³⁸ Interrupting the answer, Justice Scalia added that if the declarant had told the police he was bleeding to death, that seemed relevant to the emergency---but not who shot him and where.¹³⁹ When the state responded that the responding officers did not know the scope of the emergency, Justice Scalia shot back “but he does.”¹⁴⁰ The declarant knows that the person who shot him was six blocks away so the

¹²⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 5 (Oct. 5, 2010).

¹²⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 5 (Oct. 5, 2010).

¹³⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 5 (Oct. 5, 2010).

¹³¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 6 (Oct. 5, 2010).

¹³² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 6 (Oct. 5, 2010).

¹³³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 6 (Oct. 5, 2010).

¹³⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 6 (Oct. 5, 2010).

¹³⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 7 (Oct. 5, 2010).

¹³⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 8 (Oct. 5, 2010).

¹³⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 8 (Oct. 5, 2010).

¹³⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 8 (Oct. 5, 2010).

¹³⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 9 (Oct. 5, 2010).

¹⁴⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 9 (Oct. 5, 2010).

only reason for giving the police his name was to insure that the perpetrator was punished.¹⁴¹

At this point, Justice Ginsburg intervened, saving the lawyer from further onslaughts from Justice Scalia. Justice Ginsburg wanted to know whether if the declarant had survived, his statements to the police would be admissible at trial.¹⁴² When the state responded that the declarant would have to be “unavailable” to make the statement admissible under *Crawford*, Justice Ginsburg pointed out that *Crawford* only required unavailability for testimonial statements; the state was arguing that the statements at issue were “non-testimonial.”¹⁴³ The lawyer for the state responded weakly that state hearsay rules might still require “unavailability.” By this time she probably would have preferred to go back to Justice Scalia; at least he did not expect answers to his questions.

Instead, Chief Justice Roberts returned to the fray. He wanted to go back around the barn again on the question of whose purpose determined the nature of the statements; the declarant’s or the police?¹⁴⁴ When the state again claimed the police purpose controlled, the Chief Justice went back to the footnote in *Davis* that said that in the final analysis, it was the declarant’s statements, not the interrogator’s questions, that were dispositive.¹⁴⁵

While the state’s lawyer floundered around, Justice Scalia suggested that the questions showing what the declarant was responding to might shed light on the intent of the declarant’s statements.¹⁴⁶ Before the state’s lawyer could complete her response, the Chief Justice wanted to know how the rule applied in this case, where the officer asked “what happened?” and the declarant responded that “Rick shot me.”¹⁴⁷ He added that the declarant knew his answer would not resolve an emergency because there was none---but the police didn’t know that.¹⁴⁸

When the state responded that in such a case, courts should look to the purpose of the police, Justice Scalia interrupted to say that if the police thought there was an ongoing emergency, they would have asked “what is happening?”, not “what

¹⁴¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 9 (Oct. 5, 2010).

¹⁴² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 10 (Oct. 5, 2010).

¹⁴³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 10 (Oct. 5, 2010).

¹⁴⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 11 (Oct. 5, 2010).

¹⁴⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 12 (Oct. 5, 2010).

¹⁴⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 12 (Oct. 5, 2010).

¹⁴⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 12 (Oct. 5, 2010).

¹⁴⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 12 (Oct. 5, 2010).

happened?”¹⁴⁹ The state responded that such a “bright-line rule” was inadvisable.¹⁵⁰ Now Justice Kennedy rode to the prosecutor’s rescue with a hypothetical based on the Virginia Tech tragedy---a man running amok on a college campus threatening to shoot people or a sniper (perhaps invoking the older U.T. Austin shootings).¹⁵¹ Before the state could reply, Justice Scalia did: if the police were worried about that, would they run directly to the victim rather than first checking out the scene for the presence of the shooter?¹⁵²

The lawyer for the state then introduced the i-t fallacy, arguing that the police did not have *Crawford* to guide them in this case.¹⁵³ Justice Kennedy immediately shot that down; *Crawford* functions to control the evidence admissible in court, not to regulate police questioning in the field.¹⁵⁴ The state’s lawyer beat a hasty retreat, explaining that all she meant was that you can’t evaluate the existence of an ongoing emergency from hindsight.¹⁵⁵

When Justice Kennedy remarked that *Crawford* rejects reliability as a criterion, Justice Sotomayor gave the first hint that the Court might overrule *Crawford* and return to *Roberts*.¹⁵⁶ She agreed with Justice Kennedy on the i-t fallacy, but added that this required a return to reliability.¹⁵⁷ But when Justice Sotomayor suggested that what the state really wanted the Court to ask was whether the statement was made under circumstances suggesting an intent to testify, the state’s lawyer immediately disclaimed the argument.¹⁵⁸ When Justice Sotomayor refused to accept the disclaimer, the state insisted that the issue was “formality”, not “reliability.”¹⁵⁹

Justice Ginsburg asked if the state was seeking a rule that whenever a violent perpetrator remained at large, the police were necessarily seeking to resolve an

¹⁴⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 13 (Oct. 5, 2010).

¹⁵⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 13 (Oct. 5, 2010).

¹⁵¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 13 (Oct. 5, 2010).

¹⁵² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 14 (Oct. 5, 2010).

¹⁵³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 14 (Oct. 5, 2010).

¹⁵⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 14 (Oct. 5, 2010).

¹⁵⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 15 (Oct. 5, 2010).

¹⁵⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 15 (Oct. 5, 2010).

¹⁵⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 15 (Oct. 5, 2010).

¹⁵⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 16 (Oct. 5, 2010).

¹⁵⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 16 (Oct. 5, 2010).

emergency.¹⁶⁰ The state replied that it did not seek a *per se* rule but only one that applied where the police sought to discover whether or not an emergency existed.¹⁶¹

Justice Sotomayor then asked what sorts of crimes qualified for emergency treatment; only shootings, knifings, or bombings?¹⁶² The state answered that the rule should apply to all “violent crimes.”¹⁶³ So---Justice Scalia interjected---anytime the police come across a victim of a violent crime, any questions plausibly seeking to determine if the perpetrator was still in the area would be non-testimonial?¹⁶⁴ The state first attempted to limit the questions to those that sought to assess the situation, but when Justice Scalia pointed out the impracticality of this limitation, the state grudgingly conceded the point.¹⁶⁵

Justice Breyer objected to the state’s concession; for the statements to come in at trial, they first had to satisfy the *Davis* formality requirement and then the hearsay rule.¹⁶⁶ The state replied that in the present case the statements came in as excited utterances, which Justice Breyer took as conceding his point.¹⁶⁷ That aroused Justice Scalia into a nitpicking fury that ended only when the lawyer for the state conceded that she had misspoke; she meant to say that an emergency made the statements not “testimonial”, not that it made them admissible.¹⁶⁸

With the smoke from that exchange lingering in the air, the Justice Department marched onto the field.¹⁶⁹ Its representative began with the Department’s reading of *Davis*.¹⁷⁰ Justice Scalia invited the DOJ to repudiate the i-t fallacy, but instead the lawyer threw up a smokescreen of multiple purposes.¹⁷¹ Undeterred, Justice Scalia pressed on; so the DOJ position is that so long as the questioning looks to an arrest of

¹⁶⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 16 (Oct. 5, 2010).

¹⁶¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 16 (Oct. 5, 2010).

¹⁶² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 17 (Oct. 5, 2010).

¹⁶³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 17 (Oct. 5, 2010).

¹⁶⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 17 (Oct. 5, 2010).

¹⁶⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 18 (Oct. 5, 2010).

¹⁶⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 18 (Oct. 5, 2010).

¹⁶⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 18 (Oct. 5, 2010).

¹⁶⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 19 (Oct. 5, 2010).

¹⁶⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 20 (Oct. 5, 2010).

¹⁷⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 20 (Oct. 5, 2010).

¹⁷¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 20 (Oct. 5, 2010).

the perpetrator rather than his prosecution at trial, it is not “testimonial?”¹⁷² When the DOJ lawyer tried to limit the rule to perpetrators who present a threat to the community, Justice Scalia replied that all violent criminals present such a threat.¹⁷³ When the lawyer suggested that there was a difference between criminals who use their fists and those who use automatic weapons, Justice Scalia amended his version of the rule to cover criminals who use guns, knives and machineguns.¹⁷⁴ This drove the DOJ lawyer to a more generic rule; the emergency exception applies whenever the police need to find out who did it in order to make sure that person doesn’t pose a continuing threat to people on the scene.¹⁷⁵ Justice Scalia replied “that’s always the case” and accused the DOJ of a “phoney evasion” of *Crawford*.¹⁷⁶

The DOJ lawyer demurred when Justice Scalia claimed that adoption of the Department’s position would reduce *Crawford* to a cypher in most cases.¹⁷⁷ She argued that the DOJ position was consistent with Justice Scalia’s opinion in *Davis*.¹⁷⁸ Justice Scalia denied that; in *Davis* the woman faced an ongoing emergency that threatened her at the moment she spoke---unlike the declarant in the present case.¹⁷⁹ The DOJ lawyer dismissed that as a mere “factual distinction” not dispositive of the present case.¹⁸⁰

Before Justice Scalia could respond to that, Justice Kennedy trotted out his favorite pony---the Virginia Tech hypothetical.¹⁸¹ The DOJ lawyer readily agreed that the police in the present case did not know if the perpetrator was running amok, shooting and taking hostages---and added that the declarant did not know this either.¹⁸² But Justice Scalia chipped in, stopping the lovefest when it had hardly started; if the test is what the

¹⁷² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 21 (Oct. 5, 2010).

¹⁷³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 21 (Oct. 5, 2010).

¹⁷⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 22 (Oct. 5, 2010).

¹⁷⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 23 (Oct. 5, 2010).

¹⁷⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 23 (Oct. 5, 2010).

¹⁷⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 23 (Oct. 5, 2010).

¹⁷⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 23 (Oct. 5, 2010).

¹⁷⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 24 (Oct. 5, 2010).

¹⁸⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 24 (Oct. 5, 2010).

¹⁸¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 24 (Oct. 5, 2010).

¹⁸² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 24 (Oct. 5, 2010).

police don't know, the DOJ rule will apply in any case of violent crime.¹⁸³ No, the DOJ lawyer replied, our test only applies when there is an ongoing emergency.¹⁸⁴

But, asked Justice Ginsburg, returning to a point she had pressed with the state's lawyer, how do we determine that there is an ongoing emergency when the questions the police ask to meet that emergency are the same questions they would ask if they were only seeking evidence for trial?¹⁸⁵ The DOJ lawyer denied the premise; the question the officers asked in this case were clearly designed to secure their safety when they went to seek the perpetrator.¹⁸⁶

Before Justice Ginsburg could pursue that point, Justice Kennedy invited the DOJ lawyer to turn to confrontation policy.¹⁸⁷ Suppose, he mused, we accept the DOJ's position; what rationale would serve to justify it---reliability, manipulability, etc?¹⁸⁸ But the DOJ declined the invitation; instead, the lawyer simply restated her claim that the Department's position was consistent with *Davis*.¹⁸⁹

Justice Ginsburg returned to her point: the police never looked around to see if anyone was lurking in the bushes. But can the Court take into account that it was during the wee, small hours of the morning when the whole wide world was fast asleep?¹⁹⁰ Instead of answering, the DOJ lawyer resorted to obfuscation: the record does not reveal exactly what the officers thought or did.¹⁹¹

The Chief Justice reiterated his previous rejection of the i-t fallacy, but wanted to know where the Department stood on the question of whose purpose controlled: the declarant's or the police?¹⁹² The DOJ replied that the police purpose controlled.¹⁹³ When the Chief Justice raised the *Davis* footnote that suggested a contrary answer, the

¹⁸³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 25 (Oct. 5, 2010).

¹⁸⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 25 (Oct. 5, 2010).

¹⁸⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 25 (Oct. 5, 2010).

¹⁸⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 26 (Oct. 5, 2010).

¹⁸⁷ For a bestiary of confrontation policies, see 30A Wright & Graham, *Federal Practice & Procedure: Evidence*, § 6371.3, text at notecall 360 (Supp. 2011).

¹⁸⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 26 (Oct. 5, 2010).

¹⁸⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 27 (Oct. 5, 2010).

¹⁹⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 28 (Oct. 5, 2010).

¹⁹¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, pp. 28-29 (Oct. 5, 2010). Reading the response gives rise to a strong suspicion that the lawyer was more interested in delivering a rehearsed response to a different question than in answering the one that Justice Ginsburg asked.

¹⁹² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 29 (Oct. 5, 2010).

¹⁹³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 30 (Oct. 5, 2010).

DOJ lawyer replied that it was intended to deal with volunteered statements, not those elicited by the police.¹⁹⁴

When defense counsel took the podium, he was met with a surprising question from Justice Breyer: if the law of hearsay admits uncontroverted accusations, why should the Confrontation Clause bar them?¹⁹⁵ One imagines that the question startled counsel who was grateful to have Justice Scalia answer it for him: “that’s what we decided in *Crawford*---from which Justice Breyer dissented.”¹⁹⁶ Justice Breyer asked “suppose I think he did it?”, Justice Kennedy said he would like to hear a different answer than the one provided by Justice Scalia, and Justice Breyer agreed, adding that “I don’t think we decided it in *Crawford*.”¹⁹⁷ Chief Justice Roberts interrupted this badinage among his brethren by suggesting to counsel that “now is a good time to try to jump in.”

After the laughter died down, defense counsel offered a serious response: the Confrontation Clause is part of the fundamental law of the land that entrusts the reliability of hearsay accusations to the discernment of the jury, with whatever aid counsel can provide through cross-examination.¹⁹⁸ As befits a Harvard graduate, this anti-elitist rhetoric did not satisfy Justice Breyer; he wanted to know why the right of confrontation should allow the defense to exclude the declaration of a co-conspirator when the rulemakers in all their wisdom had decreed it should come in.¹⁹⁹ Defense counsel stuck to his guns, aided and abetted by Justice Scalia; *Crawford* said that confrontation trumped the hearsay rule---at least in the case of testimonial statements.²⁰⁰

Contradicting Justice Scalia, Justice Breyer confessed that when he signed on to *Crawford* he had no idea how far the Court would carry it; why should Raleigh and the Marian magistrates wipe out 400 years of hearsay law?²⁰¹ Defense counsel protested that *Crawford* did not eliminate all hearsay, then tried to return to the issue before the Court.²⁰² Justice Alito wanted to know if the declarant’s statement in the instant case

¹⁹⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 30 (Oct. 5, 2010). Fortunately for the DOJ lawyer, her time was up so she did not have to face Justice Scalia’s response to this somewhat strained reading of his prose.

¹⁹⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 31 (Oct. 5, 2010).

¹⁹⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 32 (Oct. 5, 2010).

¹⁹⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 32 (Oct. 5, 2010).

¹⁹⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 32 (Oct. 5, 2010).

¹⁹⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 33 (Oct. 5, 2010).

²⁰⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 34 (Oct. 5, 2010).

²⁰¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 35 (Oct. 5, 2010).

²⁰² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 35 (Oct. 5, 2010).

would be admissible if it qualified as a dying declaration.²⁰³ Counsel replied that the opinion in *Giles* suggested that dying declarations might constitute an exception to the right of confrontation.

Justice Alito wanted to know what such an exception says about how the Framers understood the scope of the right of confrontation.²⁰⁴ Counsel replied that the dying declaration exception was unique among common law hearsay utterances in that at the time it was made, everyone knew that the declarant would be unavailable to testify at trial.²⁰⁵ Justice Kennedy thought that the basis of the dying declarations exception was reliability; no one would go to meet his Maker with a lie upon his lips---and all that.²⁰⁶ Counsel agreed, but pointed out the reliability provided the basis for other hearsay exceptions as well.²⁰⁷

Justice Kennedy then suggested that perhaps the Court could use reliability to justify the ongoing emergency exception to confrontation.²⁰⁸ While defense counsel fumbled around for an answer, Justice Kennedy provided his own; *Davis*, like *Crawford* before it had repudiated reliability as a justification for confrontation exceptions.²⁰⁹ But over defense counsel's protestations, Justice Kennedy went on to suggest that despite its overt claims, *Davis* had to rest on reliability.²¹⁰

Justice Ginsburg, apparently in reliance on the amici brief of the state attorneys-general, wondered whether fairness required the Court to allow the state to lay the foundation for the dying declarations exception that the trial judge had cut off by admitting the statements as excited utterances.²¹¹ Defense counsel replied that contrary to the amici brief of the attorneys-general, the state had tried to establish the dying declaration exception at the preliminary hearing but was unable to do so.²¹²

²⁰³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 36 (Oct. 5, 2010).

²⁰⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 36 (Oct. 5, 2010).

²⁰⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 36 (Oct. 5, 2010).

²⁰⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 37 (Oct. 5, 2010).

²⁰⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 37 (Oct. 5, 2010).

²⁰⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 37 (Oct. 5, 2010).

²⁰⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 38 (Oct. 5, 2010).

²¹⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 38 (Oct. 5, 2010).

²¹¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 39 (Oct. 5, 2010).

²¹² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 40 (Oct. 5, 2010). The record suggests that the prosecutor could not show that the declarant was under a sense of immediately impending death.

This provoked Justice Scalia to demand the basis for defense counsel's concession that dying declarations were an exception to the right of confrontation.²¹³ Justice Scalia refused to accept defense counsel's claim that he had not conceded the point, arguing that the concession provided the basis for Justice Ginsburg's other questions.²¹⁴ Justice Ginsburg intervened to state that her questions were based on her belief that the question was still open, not on any concession by counsel.²¹⁵

Justice Scalia went on to state that he knew of no case in which a dying declaration came in over a confrontation objection.²¹⁶ Defense counsel pointed out that the Court had implied in prior cases that dying declarations might constitute an historical exception to the right of confrontation.²¹⁷ Well, then, Justice Scalia huffed, until the Court does create such an exception, one cannot argue that the right of confrontation rests on reliability; it rests on a right to cross-examine.²¹⁸

Justice Alito wanted to know if counsel could conceive of a situation in which confrontation might allow the admission of statements a few seconds after an assault rather than right as it was happening.²¹⁹ Counsel conceded the possibility, but quickly added that the present case was not one of them.²²⁰ But Justice Alito wanted to know the precise location of the line; surely it cannot lie between "he is hitting me with a baseball bat" and "he just finished hitting me and is on his way out the door."²²¹ Counsel retorted that in the absence of any other circumstances, that is precisely where *Davis* drew the line.²²²

Chief Justice Roberts asked how defense counsel would respond to a statement that "the guy in the gas station shot me."²²³ Standing alone, defense counsel replied, the

²¹³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 41 (Oct. 5, 2010).

²¹⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 41 (Oct. 5, 2010).

²¹⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 41 (Oct. 5, 2010).

²¹⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 41 (Oct. 5, 2010). Justice Scalia probably meant Supreme Court cases; for other cases that have admitted dying declarations as an exception to the right of confrontation, see 30A Wright & Graham, *Federal Practice & Procedure: Evidence*, § 6371.2, text at notecall 543 (2011 Supp.)

²¹⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 42 (Oct. 5, 2010).

²¹⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 42 (Oct. 5, 2010).

²¹⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 43 (Oct. 5, 2010).

²²⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 43 (Oct. 5, 2010).

²²¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 44 (Oct. 5, 2010).

²²² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 44 (Oct. 5, 2010).

²²³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 44 (Oct. 5, 2010).

statement is “purely past.”²²⁴ “Even though the guy in the gas station is still there with a gun?” the Chief Justice asked. When defense counsel waffled, Justice Alito went on to say that this was a statement about a past event that was relevant to a present emergency.²²⁵ Defense counsel resisted the tense of the verbs as the basis for distinguishing cases.²²⁶ Justice Scalia disagreed with counsel; the statement is one of present fact---that the man who shot me (in the past) is now in the gas station.²²⁷

Justice Alito came up with another hypothetical: suppose the police respond to a 911 call, find a man on the ground in shock and bleeding profusely, they know nothing so they ask “what happened?” and the man answers “John Jones shot me.”²²⁸ Defense counsel replied: “that’s our case and it’s testimonial.”²²⁹ Falling victim to the i-t fallacy, Justice Alito expressed dismay because the police don’t know how to respond.²³⁰ Defense counsel responded quite reasonably that the right of confrontation does not prevent the police from asking what they need to know to respond to the emergency; it simply says that the declarant’s accusations cannot be used against the defendant at trial.²³¹

Justice Kennedy took another stab at a hypothetical: suppose the sniper says “I shot you and now I am going to shoot three other students---good-bye.”²³² Defense counsel replied that under *Davis*, that would qualify as an ongoing emergency.²³³

Justice Breyer returned to bogus history to shape what he felt the Sixth Amendment requires. It only applies to the Sir Walter Raleigh situation where the prosecutors take the declarant into their office, reduce his testimony to an affidavit, then run down to the court and introduce it; every other situation should be governed by state hearsay rules.²³⁴ Asked to respond to this Neo-Fusionist approach, and encouraged by Justice Scalia, defense counsel replied that *Crawford* does not allow this.²³⁵

²²⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 45 (Oct. 5, 2010).

²²⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 45 (Oct. 5, 2010).

²²⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 45 (Oct. 5, 2010).

²²⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 45 (Oct. 5, 2010).

²²⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 46 (Oct. 5, 2010).

²²⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 46 (Oct. 5, 2010).

²³⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 46 (Oct. 5, 2010).

²³¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 47 (Oct. 5, 2010).

²³² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 47 (Oct. 5, 2010).

²³³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 47 (Oct. 5, 2010).

²³⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 48 (Oct. 5, 2010).

²³⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 49 (Oct. 5, 2010).

Undeterred, Justice Breyer continued to bemoan the demise of venerable hearsay exceptions such as declarations of co-conspirators, dying declarations, baptismal certificates, and excited utterances.²³⁶ Defense counsel gently reminded him that none of these exceptions cover statements made during police interrogations so they are hardly germane to the issue before the Court.²³⁷ Seizing on Justice Breyer's "lessons of history" argument, Justice Scalia pointed out that experience under *Roberts* proved that fusion did not work; nothing in Justice Breyer's Neo-Fusionist approach promises to remedy the flaws in *Roberts*.²³⁸

Justice Breyer again questioned whether anything in the Sixth Amendment abolishes the hearsay exceptions, particularly declarations of co-conspirators.²³⁹ Defense counsel again reminded him that the hearsay exceptions continue to function where the police do not induce the statements---and that whether or not he likes it, the Sixth Amendment prevails over state evidence law.²⁴⁰

Alito asked about the scope of the emergency doctrine and defense counsel confirmed his suspicion that it only applies where police have specific evidence that there is an immediate threat of physical violence.²⁴¹ When Justice Alito suggested that this means that the police can do nothing about a threat of violence without violating the Sixth Amendment, Justice Scalia once again contradicted him; nothing in the right of confrontation bars the police from asking any questions they need to ask to deal with an emergency; it only bars the use of testimonial answers as evidence against the accused at trial.²⁴² The inability of some members of the Court to appreciate the i-t fallacy did not augur well for the defendant.

Justice Alito persisted, launching a variation of Justice Kennedy's Virginia Tech hypothetical case: police respond to a report of a shooting, find one student lying dead on the lawn and another gravely wounded beside him; when asked who did it, the surviving student answers "John Jones."²⁴³ Exasperated when defense counsel replied that the response was testimonial, Justice Alito asked what would constitute an

²³⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 50 (Oct. 5, 2010).

²³⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 51 (Oct. 5, 2010).

²³⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 51 (Oct. 5, 2010).

²³⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 52 (Oct. 5, 2010).

²⁴⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 52 (Oct. 5, 2010).

²⁴¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 53 (Oct. 5, 2010).

²⁴² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 54 (Oct. 5, 2010).

²⁴³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 55 (Oct. 5, 2010).

emergency.²⁴⁴ Defense counsel replied, where the police ask “where is the shooter now?” or “did he threaten anyone else?”²⁴⁵

Justice Alito responded by piling more bodies on the ground.²⁴⁶ When defense counsel suggested that circumstantial evidence might suffice to prove an emergency, Justice Scalia burst in once again: why would the police need to know the name of the assailant to respond to the emergency?²⁴⁷ Justice Alito responded that the police need to know the man’s name in order to arrest him before he kills again.²⁴⁸ Defense counsel wearily explained again the i-t fallacy, which Justice Alito appeared not to understand or not to accept.²⁴⁹

The discussion then turned to the use of circumstantial evidence to prove the existence of an emergency. Defense counsel opined that such evidence did not suffice without more.²⁵⁰ The Chief Justice protested; suppose the student says “the principal shot me” and it is 10:00 AM---surely the police can infer he is still on the grounds and a threat to others.²⁵¹ When defense counsel answered “no” the i-t fallacy overwhelmed the Court; the Chief Justice disputed defense counsel’s answer, joined by Justice Sotomayor.²⁵² When the Chief Justice accused defense counsel of wanting the police to rehearse a litany of questions before dealing with a life-threatening emergency, defense counsel made one last effort to explain the i-t distinction before the Chief Justice shut him off.²⁵³

After seeing what the Justices did to defense counsel, the lawyer for the state must have felt confident when she returned to the podium for rebuttal. But Justice Sotomayor wanted to go back to formality; it cannot be the case that everything the police ask when they arrive at the scene of a crime is “non-testimonial.”²⁵⁴ When the state agreed, Justice Sotomayor opined that the difference between the two sides is that the state thinks the purpose of the police controls while the defense argues for the declarant’s

²⁴⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 55 (Oct. 5, 2010).

²⁴⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 55 (Oct. 5, 2010).

²⁴⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 55 (Oct. 5, 2010).

²⁴⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 56 (Oct. 5, 2010).

²⁴⁸ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 56 (Oct. 5, 2010).

²⁴⁹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 56 (Oct. 5, 2010).

²⁵⁰ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 57 (Oct. 5, 2010).

²⁵¹ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 57 (Oct. 5, 2010).

²⁵² Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 58 (Oct. 5, 2010).

²⁵³ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 59 (Oct. 5, 2010).

²⁵⁴ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 59 (Oct. 5, 2010).

intent.²⁵⁵ The state replied that even if you accept the declarant's objective intent test, it is clear that the declarant here did not intend to provide evidence for trial.²⁵⁶ Justice Scalia objected to the state's version of the test and the claim that the declarant sought medical help; according to him, it suffices that the declarant "is intending to accuse somebody."²⁵⁷

The Court's Opinion

Justice Sotomayor---a former prosecutor---wrote for a five-person majority, reversing the decision of the Michigan Supreme Court.²⁵⁸ The majority held "that the circumstances of the interaction between [declarant] and the police objectively indicate that 'the primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency.'"²⁵⁹ This quotation from *Davis* conceals the sweeping revisionism of the majority opinion that will appear shortly.²⁶⁰

After reciting the procedural history of the case, the majority opinion presents a three-paragraph statement of the facts.²⁶¹ This truncated statement---Justice Scalia called it "transparently false"---omits any facts that might cast doubt on the majority's decision; for example, that declarant was a drug addict under the influence of cocaine at the time of his statement.²⁶²

After a recapitulation of the procedural history, this time summarizing the Michigan Supreme Court opinions, the majority opinion launches into an extended history of the Court's confrontation cases---beginning with *Pointer*.²⁶³

²⁵⁵ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 60 (Oct. 5, 2010).

²⁵⁶ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 60 (Oct. 5, 2010).

²⁵⁷ Oral Argument, *Michigan v. Bryant*, 2010 WL 3907894, p. 60 (Oct. 5, 2010).

²⁵⁸ Chief Justice Roberts, and Justices Kennedy, Breyer, and Alito joined the Sotomayor opinion. Justice Thomas concurred in the judgment only. Justices Scalia and Ginsburg dissented. Justice Kagan, presumably because of her prior role on the government side, did not participate.

On the prior prosecutorial work of Justices Sotomayor and Alito, see Greenhouse, *Justice Scalia Objects*, *New York Times*, March 9, 2011 (online).

²⁵⁹ *Michigan v. Bryant*, 131 S.Ct. 1143, 1150, 562 U.S. ____ (2011).

²⁶⁰ For an indicia of how even a knowledgeable reader of the opinion could be misled, see Greenhouse, *Justice Scalia Objects*, *New York Times*, March 9, 2011 (online).

²⁶¹ 131 S.Ct. at 1150, 562 U.S. at ____ (2011).

²⁶² For Justice Scalia's characterization, see 131 S.Ct. at 1168, 562 U.S. at ____ (2011). On declarant's cocaine use, see the text at notecalls 12 and 13, above.

²⁶³ 131 S.Ct. at 1152-1156, 562 U.S. at ____ (2011). The reader can judge for herself the adequacy of this recitation. For a detailed examination of the cases, see 30A *Wright & Graham, Federal Practice & Procedure: Evidence* §§ 6361-6371 (2000).

The opinion then launches an extended critique of the Michigan Supreme Court's misapplication of *Davis-Hammon*.²⁶⁴ Apparently the only thing the state court got right was the objective nature of the inquiry.²⁶⁵ But lower courts will find little that is useful in the majority's application of *Davis-Hammon* to the facts of this case; instead, they want to know "what is the *Bryant* test for application of the Confrontation Clause?"²⁶⁶ For their convenience, we will first set out the elements of the *Bryant* majorities multi-factored test, then discuss them in more detail.

The test has the following 12 elements:

- does the statement resemble those found to be exceptions to the Fourth and Fifth Amendments?
- does the statement qualify for admission under one of the exceptions to the hearsay rule?
- does the case involve domestic violence or some other violent crime?
- did the perpetrator use a gun or some other weapon more lethal than mere fists?
- did the victim require medical treatment at the time she made the statement?
- has the perpetrator been arrested or disarmed or otherwise disabled from further harm?
- was the statement "formal" or "informal"?
- were the police seeking evidence to resolve an emergency or for future prosecution?
- did the declarant make the statement to resolve an emergency or for future prosecution?
- what was the type and scope of the danger posed by the perpetrator to the victim, the police, and the public?
- what was the nature of the dispute that produced the violence?
- did the police know the whereabouts of the perpetrator at the time of the questioning?

These dozen elements may not exhaust all of those that a more careful scrutiny might disclose, but they should suffice to assist lower courts puzzled over how to apply *Bryant* to the case before them.²⁶⁷

Dissolving the investigative-trial gap

Crawford and *Davis-Hammon* drew a clear distinction between the use of unconfrosted hearsay for investigative purposes and its use as evidence at trial.²⁶⁸ But despite the clear statement of this distinction in the briefs and at oral argument, several

²⁶⁴ 131 S.Ct. at 1156, 562 U.S. at ____ (2011).

²⁶⁵ 131 S.Ct. at 1156, 562 U.S. at ____ (2011).

²⁶⁶ Compare the lower court response to *Davis-Hammon* described in 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6371.3 (Supp. 2011).

²⁶⁷ What these elements have to do with confrontation policy presents a more difficult question that requires separate treatment.

²⁶⁸ See above, text at notecall 121.

members of the court appeared unable to grasp it or accept it.²⁶⁹ Thus the majority opinion likewise rejects the i-t distinction, inviting lower courts to look to the Court's Fourth and Fifth Amendment cases to learn how to "objectively" apply the *Bryant* test.²⁷⁰

But the analogy fails. The Fourth and Fifth Amendments, at least under modern precedents, regulate out-of-court behavior. The Confrontation Clause, on the other hand, governs the use of evidence at trial. Does the majority's use of the analogy deputize lower courts to ride herd on police interrogations, excluding evidence at trial if the police asked questions calculated to produce unreliable hearsay?²⁷¹

Neo-Fusionism; Roberts Revived

In *Ohio v. Roberts*, the Court held that the right of confrontation was not violated if the accusation could be fitted into a "firmly-rooted" hearsay exception---a strategem later dubbed "fusionism."²⁷² But fusionism failed to fulfill its promises---one of the reasons the Court rejected it in *Crawford*.²⁷³ Not surprisingly, the majority opinion's description of the overruling of *Roberts* makes no mention of the deficiencies of fusionism.²⁷⁴

The majority opinion uses an analogy between the effect of an emergency on its confrontation analysis and its effect on the hearsay rule to shoehorn fusionism into the *Bryant* test.²⁷⁵ In each case, according to the majority, the existence of the emergency makes the statement more "reliable" because of the declarant's supposed inability to fabricate while excited.²⁷⁶ And to cinch down the point, the majority opinion provides the

²⁶⁹ See above, text at note 153 and following.

²⁷⁰ 131 S.Ct. at 1156 n. 7, 562 U.S. at ____ (2011).

²⁷¹ Consider, for example, the use of leading questions by social workers investigating charges of child abuse.

²⁷² 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6367 (2000).

²⁷³ On the problems arising from fusionism, see 30A Wright & Graham, Federal Practice & Procedure: Evidence §§ 6368-6370 (2000). Among the other reasons for rejecting fusionism was the absence of any convincing confrontation policy to justify it.

²⁷⁴ 131 S.Ct. at 1152-1153, 562 U.S. at ____ (2011).

²⁷⁵ 131 S.Ct. at 1157, 562 U.S. at ____ (2011).

²⁷⁶ 131 S.Ct. at 1157, 562 U.S. at ____ (2011).

lower courts with a list of those hearsay exceptions sufficiently “reliable” to come in over a confrontation objection.²⁷⁷

The majority’s analysis of the exception for excited utterances demonstrates the lengths to which they will go to aid prosecutors.²⁷⁸ The opinion cites a prior opinion, a treatise, and the Advisory Committee on Evidence Rules for the proposition that excited utterances “are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation. . .”²⁷⁹ Whatever the validity of that claim for the original exception, it no longer holds true after courts hold that an excited utterance can be made hours later in response to leading questions.²⁸⁰

But even the traditional justification errs in emphasizing sincerity and ignoring the other hearsay dangers---perception, recollection, and narration.²⁸¹ Consider, for example, the declarant’s statement in this case that he did not know his assailant’s last name.²⁸² Either the declarant had forgotten Bryant’s last name or he remembered it but fabricated a false answer.²⁸³ In either event, this seems to show that the “reliability” of excited utterances is less than the majority supposes.²⁸⁴

The result is equally reprehensible viewed in the light of confrontation policy.²⁸⁵ A drug addict under the influence of cocaine, in pain from a lethal gunshot wound in the stomach, and following behavior suggestive of an inability to think rationally accuses the

²⁷⁷ 131 S.Ct. at 1157 n. 9, 562 U.S. at ____ (2011)(co-conspirators statements, statements for purposes of medical diagnosis, business and official records, records of vital statistics, church records, marriage and baptismal records, family records, declarations against interest, and accusations of abuse and intimidation by victims of domestic violence). This footnote bears Justice Breyer’s fingerprints. See above, text at notecall 236.

²⁷⁸ The right of confrontation generally serves the interests of the defense, not the prosecution.

²⁷⁹ 131 S.Ct. at 1157, 562 U.S. at ____ (2011)(quoting *Idaho v. Wright*, 110 S.Ct. 3139, 497 U.S. 805, 820 (1990)).

²⁸⁰ See 30B, M. Graham, *Federal Practice & Procedure: Evidence* § 7043, p.420 n. 14 (Interim ed. 2006).

²⁸¹ A cognitive psychologist would laugh at the notion that a state of excitement enhances a person’s ability to accurately perceive, to recollect, or speak.

²⁸² See, above, text at notecall 43. The majority opinion makes no mention of this fact and by using the defendant’s last name in its statement of facts actually conceals it. 131 S.Ct. at 1150, 562 U.S. at ____ (2011)(defendant told the police “he had a conversation with Bryant”).

²⁸³ The possibility that he misspoke seems unlikely, though the possibility that the police misunderstood his answer seems more plausible.

²⁸⁴ In his dissent, Justice Scalia comments that “[t]wenty-five minutes is plenty of time for a shooting victim to reflect and fabricate a false story.” 131 S.Ct. at 1174, 562 U.S. at ____ (2011). The majority opinion concedes in a footnote that excitement can affect the reliability of perception but passes over this on grounds of *stare decisis*. 131 S.Ct. at 1161 n. 12, 562 U.S. at ____ (2011)

²⁸⁵ The majority opinion makes little effort to justify its result on policy grounds.

defendant of shooting him in a fashion inconsistent with the physical facts.²⁸⁶ This accusation calls out for cross-examination to uncover the roots of the inconsistencies in defendant's account of the shooting---or it would had the majority opinion not omitted these inconsistencies from its statement of "facts."²⁸⁷

Violence, domestic and abroad

The majority says the Michigan Supreme Court erred in relying on *Davis-Hammon* because those were cases of "domestic violence."²⁸⁸ Such cases, according to the majority, "have a narrower zone of potential victims" than do crimes of violence outside the home.²⁸⁹ Thus, echoing the Justice Department brief, the majority opines that in other cases, the threat to others does not abate simply because the police can provide security to the first victim.²⁹⁰

In applying this element of the *Bryant* test, lower courts will have to determine what constitutes a crime of "violence."²⁹¹ Presumably marketing an automobile with fatal flaws does not qualify; but what about sending workers into a mine or onto an offshore drilling platform with knowledge that the safety equipment is inadequate or has been disabled?²⁹² Or suppose the defendant calls his estranged wife, threatens to kill her, then enters the bank where she works, empties a revolver but misses her, then drops the gun and flees. Is this "domestic violence" with a narrow zone of potential victims or does the defendant's bad aim transmute the crime?²⁹³

²⁸⁶ See, above, text at notecalls 11-43.

²⁸⁷ This may have been what Justice Scalia had in mind when he accused the majority of making the Court "the obfuscator of last resort." 131 S.Ct. at 1169, 562 U.S. at ____ (2011)

²⁸⁸ 131 S.Ct. at 1158, 562 U.S. at ____ (2011).

²⁸⁹ 131 S.Ct. at 1158, 562 U.S. at ____ (2011). The majority apparently limits "victims" to the person battered and not to children who may be scarred by witnessing repetitive instances of "domestic violence."

²⁹⁰ 131 S.Ct. at 1158, 562 U.S. at ____ (2011).

²⁹¹ An inspection of the cases in which courts have determined what constitutes a "crime of violence" for sentencing does not offer much encouragement; e.g., cases holding that child molesting qualifies.

²⁹² Readers who think such cases are unlikely to be prosecuted will have grasped my point.

²⁹³ Presumably a court wishing to exclude accusations of bystanders to the police could hold that since the motive for the shooting was a domestic dispute, once the defendant left the bank, the danger to the public and the police had "abated."

The weapon used

The Michigan Supreme Court also erred, the majority tell us, by failing to distinguish *Davis-Hammon* on the basis of the weapons used.²⁹⁴ In those cases the defendants used their fists; in the instant case, the defendant used a gun.²⁹⁵ The court found it obvious that the choice of weapon enhanced the “zone of potential victims.”²⁹⁶ Hence, if defendant planted a bomb in his home, this would presumably no longer be a case of “domestic violence.”²⁹⁷

Lower courts will have to grapple with the definition of “weapon.” Apparently if the defendant tries to run down the victim in the parking lot with a car, the car constitutes a “weapon.”²⁹⁸ But suppose the defendant hires someone to kill the victim, leaving the means to the hired assassin; does the emergency continue if the defendant is apprehended but the assassin remains at large?²⁹⁹ And what about an item with lethal potentialities but that is used for another purpose, such as the gasoline can used by the arsonist to set fire to his business.³⁰⁰

The *Bryant* test also sets up some interesting problems of grading the degree of danger posed by various “weapons.”³⁰¹ For example, if the defendant tries to strangle or smother the victim, do his hands and the pillow rank with fists or guns in assessing the danger he poses?³⁰² One is tempted to answer that they are more like fists because they require the perpetrator to have close access to the victim. But if that is so, does this make poison more dangerous?

The victim’s medical needs

The majority rejected the Michigan Supreme Court’s claim that extending the emergency doctrine to a medical emergency facing the victim would make non-

²⁹⁴ 131 S.Ct. at 1158, 562 U.S. at ____ (2011).

²⁹⁵ 131 S.Ct. at 1158, 562 U.S. at ____ (2011).

²⁹⁶ We assume that if the gun was inoperative and used as a club, the zone would shrink.

²⁹⁷ But what if the bomb was home-made, turned out to be a dud, and there was no evidence the defendant had the wherewithall to make a second, more effective bomb?

²⁹⁸ We offer no opinions on bicycles, ox-carts, or Zamboni machines (the latter used by the villains in one of the James Bond movies).

²⁹⁹ That is, should the court treat the assassin as the “weapon” or as separate perpetrator?

³⁰⁰ We assume that if defendant’s wife is also a beneficiary on his fire insurance, she is not a “victim.”

³⁰¹ Justice Scalia anticipated this problem in his dissent. 131 S.Ct. at 1176, 562 U.S. at ____ (2011)(“I do not look forward to resolving conflicts in the future over whether knives and poisons are more like guns or fists for Confrontation Clause purposes”).

³⁰² Or what about a length of clothesline rope or an extension cord used to garrot the victim?

testimonial all police interrogations while a seriously wounded victim remained untreated.³⁰³ The court opined that the nature of the wounds shed light on the danger that the perpetrator posed to the police and the public as well as satisfying the *Davis-Hammon* test.³⁰⁴ We need say no more than that reasonable people could differ on that issue.³⁰⁵

Presumably the medical emergency must have been the intended result of the victim's conduct; a person who misdials when making an obscene phone call cannot have anticipated that the person who answered the phone would suffer a stroke as a result of racing to the phone before the answering machine kicked in.³⁰⁶ A more difficult question arises when a burglar enters what he believes to be an unoccupied home and the frightened victim suffers a heart attack due to a previously existing condition.³⁰⁷ Finally, we assume that the "medical emergency" doctrine does not apply where speed is not essential to the cure; e.g., the statutory rapist who infects the victim with AIDS or a venereal disease.³⁰⁸

The perpetrator's capacity for further harm

The *Bryant* majority, to rebut Justice Scalia's claim that it had created an open-ended confrontation exception for violent crimes³⁰⁹, announced that the "emergency" created by such crimes might end when the "perpetrator is disarmed, surrenders, is apprehended, or . . . flees with little prospect of posing a threat to the public."³¹⁰ Given the majority's invocation of *Davis* to cover the last clause, it seems obvious that the majority has in mind psychological as well as physical capacity; hence, if the perpetrator kills a bully who has been threatening him with bodily harm, the emergency is over even though the perpetrator remains at large.³¹¹

³⁰³ 131 S.Ct. at 1159, 562 U.S. at ____ (2011).

³⁰⁴ 131 S.Ct. at 1159, 562 U.S. at ____ (2011).

³⁰⁵ The majority of the Michigan Supreme Court and the majority in the Supreme Court, for example.

³⁰⁶ We assume the result would be otherwise if the perpetrator intended the phone call to upset the victim.

³⁰⁷ Distinguish the case where the perpetrator knows of the preexisting condition and sets out to "scare the victim to death."

³⁰⁸ Of course, it would be an unusual case for the victim or the police to be aware of the emergency at the time.

³⁰⁹ 131 S.Ct. at 1173, 562 U.S. at ____ (2011).

³¹⁰ 131 S.Ct. at 1159, 562 U.S. at ____ (2011).

³¹¹ The result may be otherwise if the perpetrator is likely to kill to evade capture.

On the other hand, a drunk driver who flees from the police provides a continuing emergency until he is caught or abandons his car.³¹² But suppose the defendant commits a non-violent crime, say shoplifting, then tries to escape the police by driving away at a high speed; does speeding create an “emergency” so that questioning store personnel about the crime should be considered “non-testimonial” until the defendant is apprehended?³¹³ We assume the majority limits “harm” to the victim, the police, or the public, not to the perpetrator; so a defendant charged with possession of child pornography does not create an “emergency” when he threatens to commit suicide when the police find the forbidden images on his computer.

The “formality” or “informality” of the encounter

Though Justice Thomas thinks it should be the sole criterion,³¹⁴ the rest of the Court has generally downplayed the importance of “formality” following its mention in *Crawford*.³¹⁵ Indeed, in *Davis-Hammon*, Justice Scalia pooh-poohed it, writing that “[i]t imports sufficiently formality. . . that lies to [police] officers are criminal offenses.”³¹⁶ But the majority, accusing the Michigan Supreme Court of giving it insufficient import, imported it into the *Bryant* test.³¹⁷

Under *Bryant*, formality is not “the sole touchstone”; while formality suggests the absence of an emergency, informality does not necessarily indicate the existence of an emergency or the absence of testimonial intent.³¹⁸ So what *does* it do? Apparently it sets the stage upon which the parties play out the inquisitorial drama.³¹⁹

But in the absence of an Emily Post for interrogatorial etiquette, lower courts must derive the definition of “formality” and “informality” from the sparse clues in the Court’s opinions. The *Bryant* majority found three elements of “informality” in the instant case: (1) location---an exposed, public area; (2) timing: prior to the arrival of emergency

³¹² The same should be true of a bank robber who flees the scene at a high rate of speed.

³¹³ Alternatively, speeding could constitute a separate crime creating an emergency irrelevant to questioning about the first.

³¹⁴ See, e.g., his concurrence in *Bryan*. 131 S.Ct. at 1167, 562 U.S. at ____ (2011).

³¹⁵ See 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6371.2, text at notecall 99 (Supp. 2012).

³¹⁶ 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6371.3, text at notecall 184 (Supp. 2012).

³¹⁷ 131 S.Ct. at 1160, 562 U.S. at ____ (2011).

³¹⁸ 131 S.Ct. at 1160, 562 U.S. at ____ (2011).

³¹⁹ This seems borne out by its use in *Crawford* where “formalized testimonial materials” were characterized as “affidavits, depositions, prior testimony, or confessions.” See 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6371.2, text at notecall 99 (Supp. 2012).

medical services; and, (3) mode of interrogation---a disorganized fashion.³²⁰ While these are scant indicia, we take them up in the order the majority sets them out.

As to location, it seems clear from *Crawford* that stationhouse interrogations are formal; the interrogation there was found testimonial and it took place in a closed, non-public area.³²¹ We assume an interrogation in the perpetrators home would also be “formal” as that was the location of the interrogations in *Davis-Hammon*. The difficult case is the backseat of a squad car.³²²

The majority’s discussion of the time of the interrogation seems particularized to the *Bryant* facts; hence, it is difficult to know what to make of it in other contexts.³²³ We can suppose that the longer the interrogation follows the crime, the more likely it is to be “formal” inasmuch the police are much more likely to be gathering evidence for trial when the questioning takes place at some remove from the crime.³²⁴

Finally, with respect to the mode of interrogation, the description of the *Bryant* interrogation as “disorganized” suggests that a “formal” interrogation would resemble the “structured questioning” that many courts found to be an indicia of “testimonial” statements under *Crawford*.³²⁵ “Structured questioning” seems “formal” because it resembles the kinds of questioning that takes place at trial or during a deposition---two of the instances of the sort of “testimonial” statement identified in *Crawford*.³²⁶ The use of the “resemblance” of the questioning to interrogation at trial as an indicia of non-testimonial intent may prove troubling because police officers can manipulate the form of their questions to make them look less like questioning at trial.³²⁷

The purpose of the police questioners

The majority opinion in *Bryant* credits the Michigan Supreme Court with correctly seeing that in determining the testimonial nature of the a statement, the court must

³²⁰ 131 S.Ct. at 1160, 562 U.S. at ____ (2011).

³²¹ But when the interrogation takes place in an area open to the public, say the booking desk, courts will have to look to the other elements to determine the formality of the encounter.

³²² While the backseat is “exposed” it is not a “public area.”

³²³ This suggests how little formality rests on any explicit confrontation policy.

³²⁴ This may not be the case when the police suspect someone else of the crime and question the declarant seeking to locate that person.

³²⁵ See 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6371.2, text at notecall 157 (Supp. 2011).

³²⁶ For this reason, Justice Scalia would have found the questioning in *Bryant* to be “formal” and “testimonial.” 131 S.Ct. at 1171, 562 U.S. at ____ (2011).

³²⁷ Manipulability has concerned the Court in its application of the Confrontation Clause.

consider both the purpose of the police *and* the purpose of the declarant.³²⁸ This seems to recognize the approach in *Crawford* that combined two kinds of analysis suggested by the advocates in that case; the “official inducement” test and the “declarant’s objective intent” test.³²⁹ The *Davis-Hammon* opinions expressed no clear preference for either of the two tests, perhaps foreshadowing the opinion in *Bryant*.³³⁰ Since the “official inducement” test and its application have been analyzed elsewhere, we need not repeat that analysis here.³³¹

The declarant’s purpose in making the statement

Since Justice Scalia thought the declarant’s objective intent test should be determinative, we cannot doubt the appropriateness of that test under *Bryant*.³³² The application of that test by the lower courts has been set forth elsewhere so we need not describe that analysis here.³³³ But it may be useful to recapitulate here some of the problems with that test that made the Court reluctant to embrace it in *Davis-Hammon*.³³⁴

First, since the designers gave the doctrine specifications to make it conform to the Supreme Court’s prior decisions, particularly *U.S. v. Bourjaily*, it cannot easily be squared with confrontation policy. *Bourjaily*, for example, found no confrontation violation when a police undercover agent induced co-conspirators to make damaging statements.³³⁵ So under that formulation of the test, the police can evade *Crawford* simply by acting as ventriloquists and letting some dummy do the interrogation.

Second, the test makes irresponsible accusations admissible while excluding more responsible ones. If I accuse Dick Vitale of aggravated moperly as I am drinking in a bar, the statement comes in; the same accusation made to the police does not.³³⁶

³²⁸ 131 S.Ct. at 1160, 562 U.S. at ____ (2011).

³²⁹ See 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6371.2, text at notecall 133 (Supp. 2011).

³³⁰ See 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6371.3, text at notecall 152 (Supp. 2011).

³³¹ See 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6371.2, text at notecall 152 (Supp. 2011).

³³² 131 S.Ct. at 1168, 562 U.S. at ____ (2011).

³³³ See 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6371.2, text at notecall 178 (Supp. 2011).

³³⁴ See 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6371., text at notecall 201 (Supp. 2011).

³³⁵ 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6369, p. 847 (2000).

³³⁶ No objective declarant would expect that barroom banter would be used to prosecute someone.

Third, courts can apply the test to children and the mentally impaired only with great difficulty.³³⁷

Finally, class differences can distort the test. Judges, who tend to fall into the upper socio-economic strata, are poorly positioned to “objectively” determine what a wounded, drug-addled loser like the one in *Bryant* would have been thinking when he accused the defendant of shooting him.³³⁸

The type and scope of the danger posed by the perpetrator

The majority opinion states that “this case brings into sharp relief” the importance of “the type and scope of the danger posed to the victim, the police, and the public” to the limits of a criminal defendant’s right to confront his accusers.³³⁹ Assuming this does not simply recapitulate the majority’s previous distinction between domestic violence and other “types” with a broader “scope”, it raises some intriguing possibilities.

Consider a Ponzi scheme swindler; once his scheme has been exposed, he no longer presents a danger to any well-informed investor.³⁴⁰ And while the scope of the danger may appear broad, “it’s only money”, not the life or health of the public. Hence, accusations made to SEC investigators cannot come in; the victims must come to court and testify.

Contrast this with the child molester.³⁴¹ Since according to Evidence Rule 414, child molesters are relentless recidivists, a person accused of this crime presents a continuing danger until locked up.³⁴² Hence, even though the accused molester has been denied access to this victim, he still remains a threat to other youngsters; hence, the “emergency” continues until he is permanently behind bars. Thus, the victim’s hearsay accusations are not barred by the right of confrontation.

³³⁷ So under the *Bryant* test, the purpose of the police or social workers would determine whether the child’s statements are “testimonial”; both groups will readily testify that they only wanted to “help” the child cope with the “emergency” of molestation.

³³⁸ See, e.g., 131 S.Ct. at 1165, 562 U.S. at ____ (2011)(Harvard grad can determine intent of addict).

³³⁹ 131 S.Ct. at 1162, 562 U.S. at ____ (2011).

³⁴⁰ He presents no danger to the police since they don’t invest in and don’t investigate such schemes.

³⁴¹ Another question that cannot be answered from the majority opinion is whether the *Bryant* test applies when a trial court considers whether the defendant has a right to face-to-face confrontation with the victim per *Coy* or whether the child can testify by closed-circuit TV. See 30A Wright & Graham, Federal Practice & Procedure: Evidence § 6370 (2000).

³⁴² It bears mentioning, since the majority does not, that when the trial court must decide the confrontation question, the defendant has only been accused, not convicted of the charged crime.

The nature of the dispute that produced the violence

We learn from the majority opinion that “the scope of an emergency in terms of its threat to individuals other than the initial assailant and victim will often depend on the type of dispute involved.”³⁴³ In applying this to *Bryant*, the majority speaks of both “a purely private dispute” and “the motive for the shooting.”³⁴⁴ This sounds as if the majority wants to distinguish between domestic violence (a private dispute) and Justice Kennedy’s Virginia Tech hypothetical (a public dispute).³⁴⁵ If so, then the trial court must attempt to determine the scope of the defendant’s rage.³⁴⁶

We assume that the majority means an “overt dispute”; otherwise, a trial court could characterize shoplifting as a dispute over property rights.³⁴⁷ But if the majority did have in mind the Virginia Tech hypothetical, then a “dispute” does not require “disputation.”³⁴⁸ So, for example, a Chicago Bears fan who attacks a cheering Cheesehead while viewing a professional football game in a bar in Hurley, need not say anything to the Packer fan to have a “dispute” with him.

This element raises a number of perplexing questions but many, if not most, of them are pretermitted by the way the majority deals with this element in the *Bryant* case.³⁴⁹ The majority constantly emphasizes what the officers “did not know” as the declarant lay dying at the gas station.³⁵⁰ We infer from this that the police can infer the worst; or as Justice Scalia suggested, that every crime of violence is a potential Virginia Tech-type massacre.³⁵¹

³⁴³ 131 S.Ct. at 1163, 562 U.S. at ____ (2011).

³⁴⁴ 131 S.Ct. at 1163-1164, 562 U.S. at ____ (2011).

³⁴⁵ For Justice Kennedy’s hypothetical, see above, text at notecall 15

³⁴⁶ This part of the test apparently does not apply to crimes that do not involve a dispute, such as child molestation or tax evasion.

³⁴⁷ Or tax evasion as a dispute over the scope of the power of Congress to tax.

³⁴⁸ If we understand the hypothetical, then it is enough that the shooter disputes the amount of attention or respect being paid to him.

³⁴⁹ For just one perplexing example, if a husband slaps his wife during a dispute over child-rearing, is this a “private” dispute between the two of them or a “public” one implicating his mother-in-law, the child’s pediatrician, and the editors of *Parents* magazine?

³⁵⁰ 131 S.Ct. at 1164, 562 U.S. at ____ (2011).

³⁵¹ 131 S.Ct. at 1172-1173, 562 U.S. at ____ (2011).

Police knowledge of the perpetrator's whereabouts

The majority opinion says that “[a]t no point during the questioning did either [the declarant] or the police know the location of the shooter.”³⁵² The majority feels that knowledge of the shooter’s location will enable the police to neutralize the threat he presents.³⁵³ This element does not apply to political crimes like treason.³⁵⁴ But once the police discover the perpetrator’s whereabouts, this element no longer applies.

Unhappily, in *Bryant* the police did not discover his location “until he was arrested in California a year after the shooting.”³⁵⁵ But, the majority insists, that does not mean that the emergency persisted so that everything said to the police during the ensuing year was “non-testimonial”; the declarant made all the accusatory statements during the first five minutes of his encounter with the police.³⁵⁶ So what is the statute of limitations on an “emergency” when the perpetrator remains at large?³⁵⁷ “We need not decide” the majority says, blithely dismissing this important question.

The surreptitious 13th element

The careful reader may wonder how trial courts can apply the *Bryant* test with its incommensurable, and perhaps indigestible, ingredients. If so, the reader will understand why Justice Scalia accuses the majority of coming up with an “open-ended balancing” test made up of elements that are “amorphous, if not entirely subjective.”³⁵⁸ He finds the *Bryant* test reminiscent of the nine-factor balancing test the Court rejected in *Crawford*.³⁵⁹

³⁵² 131 S.Ct. at 1164, 562 U.S. at ____ (2011).

³⁵³ Note that this confirms the majority’s embrace of the “i-t fallacy”; nothing the the Sixth Amendment bars police questioning to fulfill their community safety function.

³⁵⁴ 131 S.Ct. at 1164, n. 17, 562 U.S. at ____ (2011)(rejecting Justice Scalia’s analogy to the Raleigh case on grounds that *Bryant* does not resemble “treasonous conspiracies of unknown scope, aimed at killing or overthrowing the king”).

³⁵⁵ 131 S.Ct. at 1164, 562 U.S. at ____ (2011).

³⁵⁶ 131 S.Ct. at 1164-1165, 562 U.S. at ____ (2011).

³⁵⁷ Or while the perpetrator’s identity remains unknown.

³⁵⁸ 131 S.Ct. at 1175, 562 U.S. at ____ (2011).

³⁵⁹ 131 S.Ct. at 1176, 562 U.S. at ____ (2011).

But Justice Scalia finds one “virtue” in the test. In his words:³⁶⁰

. . . it leaves the judge free to reach the “fairest” result under the totality of the circumstances. If the dastardly police trick a declarant into giving an incriminating statement against a sympathetic defendant, a court can focus on the police’s intent and declare the statement testimonial. If the defendant “deserves” to go to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial.

Under this “mix-and-match” approach, the constitutional guarantee of confrontation is no guarantee at all.³⁶¹

Thus the 13th element of the *Bryant* test: class. The Ivy League millionaires on the Court need never fear that they or others like them will ever face death at the hands of an unopposed accuser. “Political correctness” demands diversity in gender and ethnicity while ignoring the class homogeneity of the federal bench.³⁶² One need not wonder who such judges will find a “sympathetic defendant” entitled to a right of confrontation that they would deny to dope dealers and immigrant smugglers.

Epilogue: Power and confrontation

The revolution in *Crawford*, like most revolutions, involved a shift in power. *Crawford* took the power that *Roberts* gave to judges to determine the “reliability” of accusatory statements and returned it to the jury. Procedure rather than precedent was to govern; “reliability” was to be tested by cross-examination, not by the caselaw. But deposed powerholders do not surrender easily. The *Bryant* counterevolution puts judges back on the throne.³⁶³

³⁶⁰ 131 S.Ct. at 1170, 562 U.S. at ____ (2011).

³⁶¹ 131 S.Ct. at 1170, 562 U.S. at ____ (2011).

³⁶² Indeed, one acolyte of the PC approach accuses Justice Scalia of engaging in a sexist bullying of Justice Sotomayor and wonders how he could think that his *Bryant* dissent can accomplish anything. Greenhouse, Justice Scalia Objects, New York Times, March 9, 2011 (online). One could hardly expect such people to understand the aphorism “we are not put on this earth to be effective but to be faithful.”

³⁶³ For a description of the elitism and anti-jury prejudices of Harvardians, see 21 Wright & Graham, Federal Practice & Procedure: Evidence § 5001, p. 36 (2005).