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IN THE SUPREME COURT OF THE UNITED STATES

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MICHIGAN, :

Petitioner :

v. : No. 09-150

RICHARD PERRY BRYANT :

- - - - - x

Washington, D.C.

Tuesday, October 5, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

LORI B. PALMER, ESQ., Assistant Prosecuting Attorney, Detroit, Michigan; on behalf of Petitioner.

LEONDRA R. KRUGER, ESQ., Acting Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as Amicus Curiae, Supporting Petitioner.

PETER JON VAN HOEK, ESQ., Assistant Defender, Detroit, Michigan; on behalf of Respondent; appointed by this Court.

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1 PROCEEDINGS

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 09-150, Michigan v. Bryant.

5 Ms. Palmer.

6 ORAL ARGUMENT OF LORI B. PALMER

7 ON BEHALF OF THE PETITIONER

8 MS. PALMER: Mr. Chief Justice, and may it
9 please the Court:

10 Formality is indeed essential to testimonial
11 utterance. So said this Court in Davis, which dealt
12 with two related situations: On-the-scene questioning
13 by police officers and questions by 9-1-1 operators.
14 This Court noted that such questioning may often lack
15 the formality essential to testimonial utterance, as
16 officers called to investigate need to know whom they
17 are dealing with in order to assess a situation, the
18 threat to themselves, and the potential danger to
19 possible victims.

20 The question here is whether those same
21 assessing questions -- what happened, who did it, where
22 did it happen -- asked by police officers who, upon
23 receiving a radio report of a man shot, found a wounded
24 man lying on the ground next to a car at a gas station,
25 bleeding, visibly in pain, and having trouble talking --

1 were made in a formal context sufficiently similar to a
2 magisterial examination so that the answers by the dying
3 -- by the dying victim are testimonial.

4 CHIEF JUSTICE ROBERTS: Well, it can't all
5 be the formality of the context. I mean, if the police
6 came in and said, well, has this person -- Rick, I
7 guess -- sold you drugs before, what was the -- what was
8 the quantity, and all those sorts of questions, the
9 answers to that would be testimonial, despite the same
10 lack of formality.

11 MS. PALMER: Which is where the ongoing
12 emergency test from Davis comes into play. The
13 questions need to be -- the primary purpose needs to be
14 to meet an ongoing emergency. So assessing the risk,
15 assessing the danger to others. And any questions
16 beyond that could arguably be testimonial, while --

17 JUSTICE GINSBURG: How do we --

18 JUSTICE SCALIA: Forget about formality, in
19 other words. Formality or no formality has nothing to
20 do with it.

21 MS. PALMER: Well, under Davis, you said
22 that was how you tested the formality. If -- the Davis
23 test is a gauge of formality. If there are questions
24 that respond to ongoing emergency, then this Court has
25 said that that is an indicator that it lacks the

1 formality.

2 JUSTICE GINSBURG: How do we tell that?
3 Because it seems to me, here, if you want to know what
4 happened, you'd ask the very same questions. You're
5 saying the questions are relevant also to securing the
6 situation. But what -- what different questions would
7 you ask if you wanted to find out what happened? What
8 was the past -- what were the past events?

9 I mean, I'm trying to understand how you
10 take these questions and say we can put a label on them
11 here that says, well, this is to control an emergency
12 situation versus we want to know what happened
13 historically.

14 MS. PALMER: Well, I think that what you
15 have to do is look at the -- I mean, obviously, things
16 can have dual purposes and often will. You need to look
17 at the primary purpose here. And you said in Davis it's
18 an objective -- what would an objective person
19 viewing this test --

20 JUSTICE SOTOMAYOR: But whose primary
21 purpose is it?

22 I mean, the victim here knew that the
23 incident hadn't happened there. There was nothing he
24 had to share with the police, because they could see he
25 was bleeding from his stomach and he had been shot. He

1 apparently didn't fear any threat, or there doesn't seem
2 to be any circumstances suggesting an immediate threat
3 to him. He had driven away. Rick didn't know where he
4 had gone.

5 So what's the ongoing emergency to the
6 victim?

7 MS. PALMER: Well, I think here -- which is
8 why in Davis you said is the primary purpose of the
9 questioning, is what you look at in Davis. And we're
10 not asking you to overrule that.

11 JUSTICE SOTOMAYOR: Well, wait a minute.
12 What is the primary -- isn't -- doesn't -- isn't there a
13 footnote that says the primary purpose of the declarant
14 is what is at issue?

15 JUSTICE SCALIA: That is -- that is what it
16 says.

17 MS. PALMER: What --

18 JUSTICE SCALIA: It's the -- it's the --
19 it's the purpose of the declarant, not of the
20 questioner.

21 MS. PALMER: But the formality indicators
22 that the Court delineated in Davis did not include
23 whether the answers to the questions were for the
24 purpose of establishing past events, but whether the
25 primary purpose of the questions were for those ends.

1 The -- the question is one of context, not
2 content, as you noticed in -- as you said in Crawford.

3 JUSTICE SOTOMAYOR: Well, in Davis, the
4 issue is why was the declarant talking? What you were
5 trying to do was to figure out whether the declarant was
6 seeking help or attempting to get someone arrested.
7 That's how I read the situation.

8 The questions provided context for that.
9 Are you seeking immediate ongoing help or are you
10 talking about an event, attempting to get the police to
11 intercede and arrest the person?

12 Isn't that a fair reading of that case?

13 MS. PALMER: Yes. And in Davis, you said
14 also that there comes a point where courts can tell when
15 the questioning takes on a different tone and the
16 answers might become testimonial.

17 When the questioning seeks answers that go
18 beyond meeting the emergency, then courts can properly
19 find there's a point where the nontestimonial statements
20 end and the testimonial statements --

21 JUSTICE ALITO: In a situation like this, do
22 you think it's meaningful to ask what the primary
23 purpose of the victim was when he responded to the
24 police and said who shot him?

25 You have a man who has just been shot. He

1 has a wound that's going to turn out to be fatal, and
2 he's lying there on the ground bleeding profusely, and
3 he says: My primary purpose in saying this is so that
4 they can respond to an ongoing emergency. No, but I
5 also have the purpose of giving them information that
6 could be used at trial, but it's a little less -- that's
7 a little bit less my purpose than responding to the
8 ongoing emergency.

9 It seems like it's totally artificial.

10 MS. PALMER: Yes. And I think it -- any
11 time you ask the courts to delve into the subjective
12 intent of someone who is not present and cannot testify
13 and cannot tell you, it necessarily complicates things.
14 And I think it would --

15 JUSTICE SCALIA: What possible response to
16 an ongoing emergency could he have had in mind? What
17 possible response to an ongoing emergency?

18 MS. PALMER: He did ask for EMS --

19 JUSTICE SCALIA: He was bleeding to death,
20 and he could have said, you know, I'm bleeding to death.
21 Now, that statement would -- would be, you know,
22 suggesting an ongoing emergency.

23 But giving the name of the person who shot
24 him, where he was shot, what does that have anything --
25 how does that have anything to do with an ongoing

1 emergency?

2 MS. PALMER: Well, the police, upon
3 responding to the scene, don't know that this emergency
4 is limited --

5 JUSTICE SCALIA: But he does.

6 MS. PALMER: -- to that person.

7 JUSTICE SCALIA: But he does.

8 MS. PALMER: Which is why you have to look
9 at the entire context.

10 JUSTICE SCALIA: He knows -- he knows that
11 his -- that the person that shot him is nowhere near
12 there. He knows that -- that he drove, what -- how far
13 away was it? Six blocks or -- a good distance from
14 where the shooter was. He knows all of that.

15 The only reason he could be giving the name
16 of the person who shot him is so that person could be
17 apprehended and punished.

18 MS. PALMER: And yet that subjective mindset
19 doesn't affect the formality. It doesn't change the
20 fact that this is an informal situation. You don't have
21 the --

22 JUSTICE GINSBURG: Suppose he had -- suppose
23 he had survived. Suppose Covington had survived --

24 MS. PALMER: Yes.

25 JUSTICE GINSBURG: -- instead of died. And

1 then the prosecutor says, I want to introduce this
2 evidence against Bryant. Would you say that, yes, it's
3 nontestimonial, so it comes in?

4 MS. PALMER: He would have to be unavailable
5 for it to come in.

6 JUSTICE GINSBURG: But why, if it's
7 nontestimonial?

8 MS. PALMER: Well, under -- the way the
9 current jurisprudence is, he would have to be
10 unavailable. If it's not testimonial, I do not think it
11 would offend the Confrontation Clause for it to come in.

12 JUSTICE GINSBURG: If you said -- you said
13 it's -- you're typing it nontestimonial. It goes to
14 emergency situations. So I'm saying: Would that carry
15 over to the man survives and the prosecutor says, I
16 don't need to put him on the stand so he can be
17 cross-examined; I've got nontestimonial evidence that I
18 can put in?

19 Would it become testimonial, then, if he
20 survived?

21 MS. PALMER: No, I don't think it would
22 change the nature of what happened at the time. I do
23 think, though, that is why we have said the
24 Confrontation Clause is not some sort of super-hearsay
25 rule and that we will allow the Government --

1 JUSTICE GINSBURG: But then -- then your
2 answer is that if we typed it as nontestimonial in my
3 trial scenario, it would be nontestimonial; it comes in.

4 MS. PALMER: As long as it was not somehow
5 barred by the rules of hearsay, which I believe it would
6 be.

7 CHIEF JUSTICE ROBERTS: I'm confused of
8 what -- what Davis focuses our inquiry on. Is it the
9 purpose of the interrogators or is it the purpose of the
10 declarants?

11 We say the statements are testimonial when
12 the circumstances objectively indicate that there is no
13 such ongoing emergency and that the primary purpose of
14 the interrogation is to establish or prove past events.
15 The -- the focus seems to be on the purpose of the
16 interrogation, which seems to be the question of what
17 the police thought, not what the -- the person dying
18 thought.

19 MS. PALMER: That's correct. And I
20 understand there is the footnote stating that,
21 obviously, the declarant's statements are at issue. If
22 there were no declarant, then --

23 CHIEF JUSTICE ROBERTS: Yes, I mean --

24 MS. PALMER: -- there wouldn't be an issue.

25 CHIEF JUSTICE ROBERTS: But what the

1 footnote -- I'm sorry to interrupt you, but what the
2 footnote says is, in the final analysis, it's the
3 declarant's statements, not the interrogator's question,
4 that the Confrontation Clause requires us to evaluate.

5 So which -- I guess, which is it?

6 MS. PALMER: Well, I think what happens is
7 the -- the interrogator's statements are not what are
8 going to be determined to be testimonial or
9 nontestimonial. They provide a glimpse into the context
10 so we can determine whether those statements that are at
11 issue are testimonial or nontestimonial. They are one
12 way to determine the formality of the situation.

13 JUSTICE SCALIA: One way to evaluate those
14 statements is what they are made in response to. If
15 they are made in response to a certain type of police
16 inquiry, they are more likely to be testimonial. And
17 another kind -- you know, are you dying? They are more
18 likely not to be testimonial. But it is ultimately the
19 statements that -- that we have to evaluate, whether
20 they are testimonial or not.

21 MS. PALMER: Correct. But as --

22 CHIEF JUSTICE ROBERTS: Well, then, how does
23 that apply? The officer says, what happened? And
24 the -- the declarant says, Rick shot me.

25 Now, is that testimonial or not? Because

1 the declarant knows he's 6 miles away. It's not going
2 to help them solve an emergency, but the police don't
3 know that.

4 MS. PALMER: Right, which is why I think you
5 look at the purpose of the questioning -- here, to
6 respond to an ongoing emergency. The police don't
7 know --

8 JUSTICE SCALIA: Well, if it was an
9 emergency, he wouldn't have asked, what happened? He
10 would ask, what is happening?

11 MS. PALMER: I don't --

12 JUSTICE SCALIA: To ask what happened is to
13 ask the declarant to describe past events, which is
14 testimonial.

15 MS. PALMER: I don't think that you can make
16 that kind of bright-line rule. I think here when you
17 have a man bleeding out on a sidewalk and you don't
18 know -- is there an assailant behind him; is there --
19 are there victims somewhere else; is, you know, this a
20 wanted felon -- I think there is an ongoing emergency
21 until you can determine --

22 JUSTICE KENNEDY: And you -- you do not know
23 if the man is running amok and threatening to shoot
24 other people or if -- if he's drunk, if he's on a
25 rampage, if it's a college campus, then it's -- it's --

1 it's a sniper. You just don't know.

2 MS. PALMER: Right. But --

3 JUSTICE KENNEDY: But you can --

4 JUSTICE SCALIA: And if you're worried about
5 that, do you run immediately over to the person lying on
6 the ground or do you examine the gas station first,
7 rather than expose yourself to the -- to the shooter
8 that you think is still in the gas station?

9 The -- the behavior of the police here gave
10 no indication that they thought they were in danger
11 immediately and were interrogating this person in order
12 to assess the danger to them. That wasn't what they
13 were after.

14 MS. PALMER: Well, to be fair, this was
15 before Crawford was answered. The questions were asked
16 were to determine whether this was an excited utterance,
17 and the questions that we would like to know now were:
18 What did you do for your safety? How were you worried?
19 What were -- that was not at issue, and that was not
20 asked.

21 JUSTICE KENNEDY: Well, I'm not -- I'm not
22 sure that policemen should read Crawford before they
23 perform their -- their peacekeeping duties. The --
24 no -- no one questions the right of the police to -- to
25 ask these questions and to use the word either "happens"

1 or "happening" or "happened."

2 The question is whether the -- the answers
3 are later admissible. Those are two different
4 inquiries.

5 MS. PALMER: Correct. And I was simply
6 saying the record would have been available to check --

7 JUSTICE KENNEDY: And, of course, Crawford
8 rejects reliability as a criteria.

9 MS. PALMER: Yes. So our position here
10 simply is that you cannot evaluate an ongoing emergency
11 from hindsight.

12 When police -- you know, arrive on a scene
13 and find a wounded man bleeding, they don't know the
14 circumstances until they can find out what happened, who
15 did it, and where did it happen, and try to assess the
16 risk of harm, as you said in Davis, to themselves, to
17 the victim, and to others.

18 JUSTICE SOTOMAYOR: But what does that have
19 to do -- we're back to the reliability test, really,
20 because they didn't do anything wrong. They were trying
21 to assess the situation. But that's what they do when
22 any report of criminal activity occurs. That's a
23 different inquiry than the inquiry of why should that
24 statement be permitted to be introduced at trial?

25 It goes to the very essence of reliability.

1 Was the statement made under circumstances that would
2 suggest an intent to testify? That's really what you're
3 getting at, isn't it?

4 MS. PALMER: No. No.

5 JUSTICE SOTOMAYOR: Well, you are, because
6 you're trying to pigeonhole yourself into an ongoing
7 emergency that suggests that in those situations,
8 whatever the person is saying is okay because it was
9 done to assess an emergency situation and not done for
10 purposes of catching somebody, primary purpose of
11 catching somebody.

12 MS. PALMER: Which is what this Court said
13 in Davis, and said that that was not related to
14 reliability but to formality there, and that that was
15 not a formal thing akin to magisterial examinations.

16 We're not trying to question or in any way
17 change the test already set forth by this Court in
18 Davis. We agree with that test. We simply disagree
19 with the application by the lower court of that test
20 here and the limitation it put on it.

21 JUSTICE GINSBURG: So are you saying that
22 the rule would be that whenever the perpetrator may be
23 in the vicinity, then the police are pursuing an urgent
24 emergency situation, rather than trying to find out what
25 had -- the nature of the crime?

1 MS. PALMER: We're not saying that any time
2 there is a perpetrator at large, there is automatically
3 an ongoing emergency until that person is caught.

4 What we are saying is that preliminary
5 inquiries on the scene to try to determine who the
6 perpetrator is and where it might be would be -- would
7 be nontestimonial --

8 JUSTICE SOTOMAYOR: For all crimes, or only
9 for shooting crimes or knifing crimes? For explosions?
10 What kinds of crimes would qualify?

11 MS. PALMER: I think, obviously, violent
12 crimes raise ongoing emergencies, emergencies to
13 which -- more than others. There could also be contexts
14 in which it would apply to other crimes.

15 JUSTICE SCALIA: So at least whenever the
16 police come upon somebody who has been the victim of a
17 violent crime, whatever interrogation they conduct could
18 plausibly be to -- to make sure that the person is not
19 still nearby, and that testimony will always be
20 admissible?

21 MS. PALMER: It is preliminary questions
22 designed to assess the risk to themselves, the public,
23 and --

24 JUSTICE SCALIA: No, no, no.

25 MS. PALMER: So, yes.

1 JUSTICE SCALIA: Strike "designed to assess
2 the risk." You don't know what they're designed to do.
3 These policemen didn't say we're assessing the risk.
4 They just asked the questions. And that's what is going
5 to happen in future cases.

6 And you're saying, whenever policemen come
7 upon a victim of violent crime and said who did it,
8 what's his name, all of that will always be admissible
9 because they -- they could be assessing the risk, right?

10 MS. PALMER: I think if the context shows
11 that's the primary purpose, then, yes, that will often
12 be the case.

13 JUSTICE BREYER: What do you mean? How
14 could it possibly be admissible?

15 First, there has to be a degree of
16 formality, as the Court held in Hammon, sitting in the
17 kitchen; and, second, it has to satisfy State hearsay
18 tests. So unless it's an exception to the hearsay rule,
19 it is not admissible.

20 MS. PALMER: Well, here, for instance, it
21 was admitted as excited utterance.

22 JUSTICE BREYER: Well, of course, there are
23 exceptions. There could, in fact, there could be a
24 co-conspirator exception. There could be a dying
25 declaration exception. But what we're talking about is

1 whether the Constitution keeps it out, even though State
2 law -- because, say, it's a co-conspirator exception --
3 would permit it in.

4 So the answer is no, it's not the case that
5 whenever you come across a victim of a crime and ask him
6 questions, it's going to be admissible. It depends.
7 The State hearsay law, the exception, and whether
8 there's a degree of formality, as there was in Hammon.

9 JUSTICE SCALIA: Only when he's excited,
10 right? Only when the victim who has been the object of
11 a violent crime is excited.

12 Or if State law doesn't apply and we're
13 dealing with a Federal crime and Federal officers,
14 right, and trial in Federal court? And in that case,
15 what Justice Breyer just said would not apply.

16 MS. PALMER: That's correct. And I --

17 JUSTICE BREYER: It would not apply? There
18 are -- there isn't a Federal hearsay rule? And there
19 are not exceptions that you have to satisfy?

20 MS. PALMER: Your -- I --

21 JUSTICE BREYER: I thought there were, in my
22 copy of the Federal Rules of Evidence.

23 MS. PALMER: Yes. And I did misspeak. What
24 I meant to say was that it would be nontestimonial, not
25 that it would always be admissible.

1 JUSTICE GINSBURG: In the -- if you had the
2 benefit of hindsight, and this trial occurred before
3 Davis, and so the prosecutor went on excited utterance,
4 would you have instead tried to make a case that this
5 was a dying declaration?

6 MS. PALMER: Absolutely.

7 I'd like to reserve whatever time I have
8 left.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Ms. Kruger.

11 ORAL ARGUMENT OF LEONDRA R. KRUGER,
12 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE,
13 SUPPORTING THE PETITIONER

14 MS. KRUGER: Mr. Chief Justice, and may it
15 please the Court:

16 As we understand the rule of
17 Davis v. Washington, it is a rule that focuses on the
18 primary purpose behind police interrogation, because
19 it's designed for a particular purpose: Not to provide
20 a comprehensive definition of the term "testimonial,"
21 but rather to identify those statements that are
22 testimonial because they are made in response to police
23 interrogation.

24 When the objective primary purpose of that
25 interrogation is to enable police to meet an ongoing

1 emergency, rather than to collect evidence for future
2 possible prosecution, the statements that are given in
3 response to that interrogation are nontestimonial. That
4 was --

5 JUSTICE SCALIA: Do you distinguish between
6 collecting evidence for a future prosecution and
7 collecting evidence in order to pursue and arrest the
8 felon? Do you distinguish those two?

9 And you can say these police -- these
10 policemen weren't collecting evidence for a future
11 prosecution; they just wanted to know who the shooter
12 was and where he was so they could go get him. Would
13 that --

14 MS. KRUGER: Well, I think that --

15 JUSTICE SCALIA: Would that not be
16 collecting evidence for a future prosecution?

17 MS. KRUGER: I think that there are often
18 multiple reasons, particularly in the wake of a violent
19 event like a shooting, why --

20 JUSTICE SCALIA: But you say it has to be
21 for the purpose of a future prosecution. Just -- just
22 in order to an arrest and bring into jail the person who
23 committed this crime, that doesn't qualify?

24 MS. KRUGER: I think that what would qualify
25 under the Davis test is if police need to apprehend the

1 person, not for purposes of bringing the person into the
2 criminal justice system, but rather to neutralize an
3 ongoing threat that they present to the community at
4 large, as is often the case when somebody has just
5 proven themselves both capable and --

6 JUSTICE SCALIA: When does that not exist in
7 the case of a violent crime? When does that not exist?

8 MS. KRUGER: I think it makes a significant
9 difference --

10 JUSTICE SCALIA: There's a violent criminal
11 out there.

12 MS. KRUGER: Justice Scalia, I think it
13 makes a significant difference whether we're talking
14 about a -- an act of violence like a shooting, somebody
15 who has used a weapon that's capable of inflicting
16 deadly harm on multiple victims in a short period of
17 time, or someone who has used their fists, like the
18 alleged perpetrators --

19 JUSTICE SCALIA: Okay. So if you use a gun,
20 a knife, or a machine gun, whatever the victim says gets
21 admitted into evidence, because the police could --
22 could be not --

23 MS. KRUGER: I don't think --

24 JUSTICE SCALIA: -- not trying to get
25 evidence, but just trying to safeguard society against

1 the -- the felon on the loose?

2 MS. KRUGER: I don't think that we would
3 draw the rule that broadly, Justice Scalia.

4 JUSTICE SCALIA: I thought that's how you
5 just described it.

6 MS. KRUGER: Well, I think that in this
7 situation, we have police arriving on the scene to
8 discover a man who has been recently shot; as it turns,
9 fatally.

10 JUSTICE SCALIA: Yes.

11 MS. KRUGER: They need to find out in that
12 situation --

13 JUSTICE SCALIA: Who did it.

14 MS. KRUGER: They need to find out who did
15 it so that they make sure that person isn't continuing
16 to threaten other people on the scene.

17 JUSTICE SCALIA: That's always the case.
18 That's such a phony evasion of what the purpose of the
19 testimonial rule is. That's always going to be the
20 case, at least when there's a violent crime.

21 MS. KRUGER: Well, I think --

22 JUSTICE SCALIA: And you may as well take
23 Crawford and throw it out, in -- in the majority of
24 serious cases, if that's going to be your rule.

25 MS. KRUGER: I don't think that that's the

1 case at all, Justice Scalia. I think it's actually very
2 much consistent with what this Court said in Davis.

3 It may very well have been that the
4 subjective purpose of the 9-1-1 operator was also to
5 bring the perpetrator in that case to justice. But this
6 Court, I think quite properly, recognized that in an
7 emergency situation, the attention of both law
8 enforcement and the declarant is quite properly going to
9 be focused on dealing with the emergency at hand and is
10 not going to be made of the kind of focused
11 understanding of --

12 JUSTICE SCALIA: The crime was ongoing in --
13 in Davis when -- when the woman was on the phone with
14 the operator. It was ongoing. She was seeking help
15 from the emergency that was occurring to her at that
16 moment. There's nothing like that here.

17 MS. KRUGER: It's true that that is a
18 factual distinction between this case and Davis, but we
19 don't think that it's one that makes a dispositive legal
20 difference.

21 JUSTICE KENNEDY: Did the police know that
22 that was the case when they began the questioning? Did
23 the police know that this man was not on a rampage, that
24 he was not going to act in self-defense when they came
25 after him?

1 MS. KRUGER: No, they certainly did not know
2 that, Justice Kennedy.

3 JUSTICE KENNEDY: That he was not taking
4 hostages?

5 MS. KRUGER: That's correct. They had no
6 way of knowing that. And neither, for that matter -- I
7 think it's important to emphasize -- did the declarant.
8 The fact that he was able to escape the scene and
9 managed to drive himself six blocks away in no way
10 indicates that he had any --

11 JUSTICE SCALIA: Will they ever know that?

12 MS. KRUGER: I --

13 JUSTICE SCALIA: I mean, is that -- is that
14 likely not always to be the case when -- when you come
15 upon a person who has been the -- the victim of a
16 violent crime?

17 You could say it all the time. No, they
18 didn't know where the -- where the offender was, so
19 whatever this person says comes in as evidence in a
20 trial.

21 MS. KRUGER: Well, I think it's important to
22 emphasize that what we're arguing for is not a rule that
23 would say, as long as there's a violent perpetrator at
24 large, as long as he is at large, any questions that
25 police ask of -- of potential people who have

1 information about the crime will necessarily be
2 nontestimonial.

3 Our argument is a far narrower one, and one
4 that we think follows very closely from the principle
5 articulated in Davis, which is when the primary purpose
6 of a police interrogation is to obtain information
7 that's necessary to enable them to meet an ongoing
8 emergency --

9 JUSTICE GINSBURG: Well, how do you know
10 that? Because they would ask the same very questions if
11 what they wanted was testimonial evidence. So you
12 can -- you can characterize that set of questions either
13 way. What would lead us to pick one rather than the
14 other?

15 MS. KRUGER: I think it's actually not the
16 case, Justice Ginsburg, that they would have asked the
17 very same questions. We know from reading the trial
18 testimony that the officers, as they appeared on the
19 scene in response to the police run of a man being shot,
20 asked the same question over and over again. Each
21 officer, as they approached him, said: What happened?
22 Where did it happen? And wanted to know how to
23 recognize the shooter so when they proceeded to the
24 scene, they would know who they were dealing with and
25 how to safeguard themselves.

1 JUSTICE KENNEDY: Let's say --

2 MS. KRUGER: They weren't asking the kinds
3 of questions --

4 JUSTICE KENNEDY: Let's say that we -- let's
5 say that we agree with you that there was an emergency
6 and the police were asking questions in order to
7 mitigate the emergency.

8 What would be the rationale for admitting
9 this statement, then? Is it more reliable? Because if
10 we say that, then we're undercutting Crawford, which
11 says reliability is not the key.

12 What is the reason for that? Is it because
13 the police likely have less motive to manipulate the --
14 the statements and to ask loaded questions? That in
15 itself, it seems to me, is a reliable -- but what's
16 the -- assuming we adopt your distinction, what's the
17 rationale for the distinction?

18 MS. KRUGER: We think that the principle
19 that this Court announced in Davis and we're asking the
20 Court to apply again today reflects two principles that
21 underlie the Confrontation Clause as this Court
22 interpreted in Crawford.

23 The first is that testimony is typically
24 characterized by the kind of focused understanding by
25 the declarant that the person is providing information

1 for potential use in a future prosecution. It's -- the
2 petitioner in Davis, I would note, made an argument to
3 this Court that whenever a person calls 9-1-1, they do
4 so with an awareness that the information they provide
5 may be used for prosecutorial purposes.

6 But this Court rejected that argument,
7 because it understood, I think quite rightly, that
8 there's a difference between providing that sort of
9 information to law enforcement with a sort of vague
10 awareness that that might be its potential use, and
11 doing so with a kind of focused understanding that has
12 been characteristic of the testimonial statements this
13 Court has so far identified, like Sylvia Crawford's
14 stationhouse interview in Crawford or Amy Hammon's
15 interview with the police officer from the safety of her
16 kitchen that resulted in the execution of a formal
17 affidavit in the Davis case.

18 JUSTICE GINSBURG: Do we look to the
19 specific situation? I mean, one of the officers zeroed
20 in on the victim. No one was looking around to see if
21 anybody was lurking in the bushes. Then, as far as
22 protecting the public, do we take into account that this
23 was between 3:30 and 4:00 in the morning when there are
24 not likely to be many members of the public around? Or
25 do we just say you find someone who looks like he has

1 been the victim of a violent crime, doesn't matter
2 whether the public is around or not, we -- that's
3 enough, the victim of a violent crime can be asked these
4 questions?

5 MS. KRUGER: To take your first question
6 first, Justice Ginsburg, I think that the trial
7 testimony is not quite as clear on the question of what
8 fears the officers had as I think Respondent has
9 suggested in his brief. If you look at Joint Appendix
10 page 136, Officer Stuglin testified that he was, in
11 fact, afraid for his safety when he got to the gas
12 station. I would note that all of the officers, when
13 they left the gas station after EMS arrived, they
14 proceeded immediately to the location of the shooting,
15 the location that Anthony Covington had identified for
16 them. When they got there, they took a tactical
17 position, they waited for back-up, and they did so
18 because they were afraid that a shooter was in the
19 house, and they wanted to proceed very cautiously in
20 making sure that they neutralized the threat that
21 shooter posed to the public safety, including their own.

22 I think that in examining the exigencies of
23 a situation a court would be justified in looking at the
24 circumstances in which the crime occurred, and could
25 very well take into account the fact that the crime

1 occurred at 3 o'clock in the morning as opposed to 5
2 o'clock in the afternoon. But I think that we would
3 expect any reasonable police officer to do precisely
4 what the police officers in this case did, which was
5 proceed directly to the scene, not use their interview
6 with Anthony Covington as an occasion to execute an
7 affidavit or otherwise engage --

8 CHIEF JUSTICE ROBERTS: No, but then you're
9 saying that the focus is on the police officers. I
10 mean, after all, we're not saying that police officers
11 can't do this; we're just saying the testimonial aspects
12 can't be admitted into evidence or that's what your
13 friend is arguing for. I still have trouble figuring
14 out is the issue the purpose of the interrogating
15 officers or the purpose and intent of the declarant?

16 MS. KRUGER: I think that the test that the
17 Court set out in Davis is one that focuses on the
18 purpose of the interrogation because of the limited
19 context in which that --

20 CHIEF JUSTICE ROBERTS: Okay. And what do
21 you do with the last sentence of footnote 1. It's the
22 one that says --

23 MS. KRUGER: In the end it's the declarant's
24 statement that the Confrontation Clause requires us to
25 examine.

1 CHIEF JUSTICE ROBERTS: Right, right.

2 MS. KRUGER: We read footnote 1 to be an
3 acknowledgement that answers given in response to police
4 interrogation do not constitute the universe of possible
5 testimonial statements, that testimony can indeed be
6 volunteered as was Lord Cobham's letter, for example, in
7 Sir Walter Raleigh's treason case. But in the end
8 Davis, I think, quite properly focuses on the primary
9 purpose of the interrogation.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Mr. Van Hoek.

12 ORAL ARGUMENT OF PETER JON VAN HOEK

13 ON BEHALF OF THE RESPONDENT

14 MR. VAN HOEK: Mr. Chief Justice, and may it
15 please the Court:

16 When Anthony Covington made his statement to
17 the officers at the gas station, not just once but
18 several times, he reasonably understood that he was
19 providing the police information as to events which had
20 concluded a half hour earlier at a location six blocks
21 away, with an understanding that that information would
22 assist the police in locating, apprehending, and
23 potentially prosecuting the person he felt was
24 responsible for his injury.

25 JUSTICE KENNEDY: I didn't hear the end. In

1 locating and?

2 MR. VAN HOEK: Apprehending.

3 JUSTICE KENNEDY: Apprehending.

4 MR. VAN HOEK: Arresting --

5 JUSTICE BREYER: -- involves something like
6 that, if -- what keeps that out? I mean, assuming that
7 a State law or the Federal Rules of Evidence admit it as
8 an exception to the hearsay rule, why should the
9 Confrontation Clause bar it? There is not great
10 likelihood that, like Sir Walter Raleigh or Cobham's
11 affidavit, it is going to be introduced per se into the
12 trial as a form of evidence that there was -- why would
13 we want to keep it out? That's the part that I do not
14 understand.

15 MR. VAN HOEK: Well, certainly --

16 JUSTICE BREYER: Federal -- I mean, under
17 the Federal Constitution.

18 MR. VAN HOEK: Under the Federal
19 Constitution --

20 JUSTICE SCALIA: I think your answer,
21 counsel, is that we decided that in Crawford, from which
22 Justice Breyer dissented.

23 (Laughter.)

24 JUSTICE KENNEDY: But I think you might have
25 another --

1 JUSTICE BREYER: Suppose I think we didn't.
2 Suppose I happen to think --

3 JUSTICE KENNEDY: Perhaps there is another
4 answer that I would like to hear.

5 JUSTICE BREYER: I'd like to hear your
6 answer because I don't think we decided it in Crawford.

7 CHIEF JUSTICE ROBERTS: Now is a good time
8 to try to jump in, I think.

9 (Laughter.)

10 MR. VAN HOEK: Okay. The reason, Your
11 Honor, that the Confrontation Clause is the
12 fundamental -- part of the fundamental law of the
13 country, and what this Court, I believe, decided in
14 Crawford and then applied to those situations -- similar
15 situations in Davis and Hammon, is that where you have a
16 statement from a witness to a police officer as part of
17 a questioning and that statement is the functional
18 equivalent of testimony that witness would have given
19 had he or she appeared at trial and been subject to
20 cross-examination, then the admission of that statement
21 at trial even under a hearsay exception without
22 cross-examination effectively allows the police to
23 present --

24 JUSTICE BREYER: But does it mean -- does it
25 mean that the individual is thinking this may be used --

1 there's a certain formality to the situation; it may be
2 used at trial? Or it may just happen to turn out? I
3 mean, what is the relevance of the formality of the
4 situation? When I looked into history I thought -- I'm
5 not an expert in history, and I'm also -- I understand
6 there have been situations where the Court's gone back
7 to prior cases and looked at footnotes and said it
8 doesn't express things precisely clearly and changed it
9 a little bit. I think that that goal could be open to
10 us.

11 So I want to know what the basic reason is
12 that there -- that would justify keeping out, let's say,
13 an investigation. There's an investigation of a crime,
14 and a policeman comes across a confederate who makes
15 some statements just generally that help the
16 investigation; therefore, it would come in under -- as
17 co-conspiracy, okay?

18 What in the Constitution, what functional
19 principle, is there that says we should keep that out of
20 Court?

21 MR. VAN HOEK: Because I think what this
22 Court said in Crawford and Davis is that is the primary
23 test. That is what our Constitution requires to allow
24 the reliability, the believability, the trustworthiness
25 of that evidence to be evaluated by a jury. We don't

1 have a situation --

2 JUSTICE BREYER: Is it all hearsay? Now,
3 all -- all hearsay evidence, despite State or Federal
4 rule makers saying there are exceptions where the
5 trustworthiness is sufficient, such as co-confederates,
6 confederates, all of that's wiped out by Crawford and
7 the --

8 MR. VAN HOEK: It would be wiped out if the
9 statement at issue qualifies as testimonial under the
10 test this Court announced in Crawford and Davis.

11 JUSTICE SCALIA: That's what we said in
12 Crawford, isn't it?

13 MR. VAN HOEK: Yes, it is.

14 JUSTICE BREYER: Of course, what I'm looking
15 for now because I'm -- is whether there's any sense to
16 that. What is the constitutional rationale? I joined
17 Crawford, but I have to admit to you I've had many
18 second thoughts when I've seen how far it has extended
19 as I have written it.

20 MR. VAN HOEK: Well, I would have to say the
21 constitutional justification for that is the reason why
22 the right of confrontation is, isn't it, in the
23 Constitution, where you had a situation in English
24 common law, as we said, where magistrates were allowed
25 to go out, interview witnesses, come into court, and

1 present their memory, their version, of what the witness
2 said as substantive evidence in a case and the defense
3 is not allowed to question or talk to the witness --

4 JUSTICE BREYER: So now you've just got what
5 I'm looking for. What I'm looking for is I can go into
6 Blackstone a little bit and look back and see what this
7 was after, was the problem of Sir Walter Raleigh's trial
8 and the Marian judges. And now what I need is a line.
9 Because if I can't find a line, then what we've done,
10 which seems just as wrong to me, is suddenly bar
11 virtually all hearsay exception evidence, of which for
12 400 years, or 200 years anyway, there has been quite a
13 lot in the courts.

14 MR. VAN HOEK: I certainly don't think
15 Crawford and Davis bars all hearsay exception --

16 JUSTICE BREYER: What, in your view, is the
17 correct line and why, most importantly why?

18 MR. VAN HOEK: I believe this Court in
19 Crawford and Davis correctly established that line, in a
20 situation like this where it is the response of a
21 citizen to questions from a police officer, that you
22 look primarily, as footnote 1 indicates, to the content
23 of that statement. If that's --

24 JUSTICE ALITO: If it were established that
25 this was a dying declaration and was done in -- made in

1 contemplation of death, would it be barred by Crawford?

2 MR. VAN HOEK: Well, this Court certainly
3 has suggested that in Giles, that a dying declaration
4 might be an exception to Crawford as an exception that
5 existed at the time of the framing. We don't have to
6 deal with that question in this case because this is not
7 a dying declaration.

8 JUSTICE GINSBURG: Well, why not?

9 JUSTICE ALITO: I understand -- I understand
10 that, but assume -- assume for the sake of argument that
11 it would be consistent with Crawford if it were a dying
12 declaration, which the Court has suggested. What does
13 that tell you about the understanding of the scope of
14 the confrontation right at the time when the Sixth
15 Amendment was adopted? Because a dying declaration may
16 very well be testimonial under -- is likely to be
17 testimonial under the Crawford test.

18 MR. VAN HOEK: Yes. And I think that the
19 dying -- maybe the dying declaration as being in that
20 situation is an indication. What's different about
21 dying declaration from all these other hearsay
22 exceptions is that, at the point the statement was made,
23 it's an understanding that that witness is never going
24 -- will not be testifying, that there -- that there is
25 no potential that that witness will appear in court in

1 person. There's -- the police officers in any of these
2 situations speaking to a witness -- when a police
3 officer arrives at the scene they have no way of knowing
4 what's going to occur months later at trial.

5 JUSTICE KENNEDY: I thought -- I thought the
6 rationale for dying declaration admissions was that they
7 are inherent reliable -- inherently reliable. You can
8 certainly question that. But I thought that that was
9 the rationale that the courts gave.

10 MR. VAN HOEK: I think that's correct.

11 JUSTICE KENNEDY: On your death bed before
12 you're going to meet the maker, you're not going to
13 lie -- I think that was the test. So it was a
14 reliability component, correct?

15 MR. VAN HOEK: That's true. And I think
16 that's -- that's also the -- the background of most
17 hearsay exceptions is that for the circumstances that
18 there's some degree of inherent reliability to that
19 statement which excuses the absence of cross-examination
20 if the witness is unavailable. But --

21 JUSTICE KENNEDY: Now, suppose that there is
22 a universe of instances that we can identify as
23 questions in order to alleviate and stop an emergency to
24 prevent a crime from becoming aggravated and continuous.
25 Let's suppose we can have a universe of those questions.

1 MR. VAN HOEK: Yes.

2 JUSTICE KENNEDY: Is -- is there an argument
3 that responses made for that purpose are more reliable?
4 Is that what -- is that what underlies the so-called
5 emergency exception, do you think?

6 MR. VAN HOEK: I don't believe so. I don't
7 believe that -- that a -- a statement by a witness that
8 is a narrative of past events --

9 JUSTICE KENNEDY: So it -- so -- well --
10 and, of course, Davis certainly does not rest on
11 reliability -- or Crawford, rather, doesn't rest on
12 reliability.

13 MR. VAN HOEK: No.

14 JUSTICE KENNEDY: But isn't that really the
15 only way to explain the 911 exception?

16 MR. VAN HOEK: No, no. The 911 -- well, the
17 fact there's a 911 --

18 JUSTICE KENNEDY: Isn't there a reliability
19 component that underlies this whether we like it or not?

20 MR. VAN HOEK: I don't believe so. I don't
21 think that the fact that someone calls 911 and makes a
22 report, whether they're talking about an ongoing
23 situation or reporting a past event, makes that somehow
24 inherently more reliable than if they used another
25 medium.

1 I think the distinction made in Davis is
2 that the beginning of the 911 call that Ms. McCottry was
3 making to the case was not relating past events. It was
4 a declaration of emergency. It was a call for immediate
5 assistance.

6 JUSTICE KENNEDY: But isn't -- isn't the
7 reason we accept that is because it's reliable? It's an
8 excited utterance. It's an account of an ongoing event.
9 It's a contemporaneous observation. Therefore, it is
10 reliable.

11 MR. VAN HOEK: I don't -- no, I don't think
12 that was the basis on which this Court held it was
13 nontestimonial. I think this Court held it was
14 nontestimonial because it was not what a witness does
15 during a trial. It was --

16 JUSTICE GINSBURG: Let's go back to this
17 case.

18 MR. VAN HOEK: Yes.

19 JUSTICE GINSBURG: Excited utterance was --
20 the prosecutor thought that was his best shot, and he --
21 and he prevailed, except that the -- Davis intervened.

22 I asked Ms. Palmer, suppose we were back
23 there at the trial and the prosecutor knew that excited
24 utterance wouldn't work. Could he have raised dying
25 declaration? She said absolutely yes.

1 So my question to you is: Just assume that
2 we should hold the Confrontation Clause is applicable.
3 Shouldn't the prosecutor then have a chance to say,
4 well, if I realized that, I could have made a dying
5 declaration plea here. So it would only be fair to
6 allow the prosecutor to try to establish that this
7 testimony was a dying declaration?

8 MR. VAN HOEK: Well, in -- in this case,
9 when -- when the initial attempted admission of this
10 evidence, at the preliminary exam, when it met a hearsay
11 objection, the prosecutor at that point argued that it
12 was admissible under Michigan evidence rules as either
13 an excited utterance and/or a dying declaration.

14 JUSTICE GINSBURG: Then she did argue dying
15 declaration.

16 MR. VAN HOEK: Well, they argued dying
17 declaration. The judge sustained the objection and said
18 he had not established the foundation for either one of
19 those. The prosecutor at that point established a
20 foundation solely for excited utterance. The judge
21 ruled the evidence admissible and specifically said
22 admissible only as excited utterance.

23 At that point, the prosecution abandoned any
24 attempt, throughout the State court proceedings, to say
25 this was a dying declaration.

1 JUSTICE SCALIA: Mr. --

2 JUSTICE GINSBURG: And that -- that was in
3 the pre-Davis world. But do you think the prosecutor
4 had abandoned that effort had he been informed about
5 Davis?

6 MR. VAN HOEK: I don't know. I don't know
7 what the --

8 JUSTICE SCALIA: Mr. Van Hoek, what is the
9 basis for your concession that a dying declaration is an
10 exception from the Confrontation Clause?

11 MR. VAN HOEK: I --

12 JUSTICE SCALIA: It is an exception from
13 hearsay, for certain, but from the Confrontation Clause?

14 MR. VAN HOEK: I'm not -- if I -- if I
15 meant -- if you took what I said as a concession, what I
16 said is that this --

17 JUSTICE SCALIA: You conceded it. It's been
18 the whole basis for Justice Ginsburg's subsequent
19 interrogation.

20 JUSTICE GINSBURG: My question was based on
21 it's an open question because we have said maybe a dying
22 declaration.

23 MR. VAN HOEK: And I -- I --

24 JUSTICE SCALIA: I thought it was an open
25 question only -- only where the -- the defendant has

1 effected the death of the person who has made the dying
2 declaration. I don't know of any cases that allow a
3 dying declaration in over a Confrontation Clause
4 objection.

5 MR. VAN HOEK: If I -- if you took my answer
6 to the prior question to say that I conceded that, I'm
7 not saying that. I'm saying when I was first asked the
8 question about dying declaration, I pointed out that
9 this Court in Giles indicated that that may be an
10 exception to the Confrontation Clause. And I agree --

11 JUSTICE GINSBURG: And it wasn't -- and it
12 wasn't in Giles. It wasn't in --

13 MR. VAN HOEK: No, Giles is not --

14 JUSTICE GINSBURG -- any way to the -- that
15 the -- that the purpose of the killing was to get rid of
16 the witness's testimony. Giles made the statement maybe
17 dying declaration is an -- is an exception to our
18 Crawford's jurisprudence.

19 MR. VAN HOEK: Yes. And as you said, this
20 Court has not reached that question directly, and -- and
21 there's no need to reach that question in this case
22 because this is not a dying declaration case.

23 JUSTICE SCALIA: If it hasn't been reached,
24 if it is not an established exception to the
25 Confrontation Clause, there is no basis for saying,

1 therefore, the Confrontation Clause pertains only to
2 reliability. It pertains to the opportunity to
3 cross-examine.

4 And -- and reliability exceptions are what
5 we used to do under -- under Reynolds. If it was
6 reliable, we let it in.

7 MR. VAN HOEK: Yes.

8 JUSTICE SCALIA: And the mere fact that it's
9 reliable as a dying declaration instead of reliable as
10 something else ought to have nothing to do with the
11 Confrontation Clause decision.

12 MR. VAN HOEK: I agree. I'm not -- I
13 clearly don't --

14 JUSTICE GINSBURG: Whether we -- whether you
15 agree or not, we said it was an open question.

16 MR. VAN HOEK: Yes, yes.

17 JUSTICE ALITO: Can there be --

18 MR. VAN HOEK: And it has not been decided.

19 JUSTICE ALITO: Can there be a situation in
20 which the primary purpose for a statement or for the
21 question that elicits the statement is to respond to an
22 ongoing emergency rather than to gather evidence for
23 subsequent use in a legal proceeding when the statement
24 relates to something that has occurred, perhaps just a
25 few seconds before, but it relates to something that has

1 occurred as opposed to something that is occurring at
2 that very moment?

3 MR. VAN HOEK: I think there are situations
4 where -- where the police are coming in and asking
5 questions: Is there a threat here? Is there someone
6 here who is -- who is threatening you? Is there someone
7 here who is coming to threaten you or threaten other
8 people? They may be able to get some background
9 information to put that in context, but we don't have
10 anything like that in this case.

11 JUSTICE ALITO: Well, I understand, but we
12 need to know where to draw the line. So, you concede
13 that the line is not between a statement about he's
14 hitting me with a baseball bat as opposed to he just
15 finished hitting me with a baseball bat and is headed
16 out the door? That's not where the line is drawn.

17 MR. VAN HOEK: I think the line would be
18 drawn if those were the only statements, he's hitting me
19 with a baseball bat versus he -- he just hit me with a
20 baseball bat and he just left. I think the line is
21 clearly drawn in Davis between -- the hitting me with a
22 baseball bat would be nontestimonial --

23 JUSTICE ALITO: No, no. I really would like
24 a clear answer to this. Is -- can there be an ongoing
25 emergency where the statement relates -- where the

1 statement recounts something that has occurred, not
2 something that is occurring?

3 MR. VAN HOEK: I think that in the absence
4 of any statement by the witness alleging that there's
5 any current, ongoing, imminent danger, if the witness
6 only gives a statement that relates to past, completed
7 events, then it's not a showing of -- of an ongoing
8 emergency.

9 CHIEF JUSTICE ROBERTS: So what do you do --
10 what do you do with the statement the guy in the gas
11 station shot me? Is that purely past, or is that an
12 ongoing emergency?

13 MR. VAN HOEK: That statement standing
14 alone -- I would say that that's past, purely past.

15 CHIEF JUSTICE ROBERTS: Even though the guy
16 in the gas station is still there with a gun, the police
17 are within range?

18 MR. VAN HOEK: Are we referring to a
19 specific person?

20 CHIEF JUSTICE ROBERTS: Yes. I mean, that
21 strikes me as something that happened in the past, he
22 shot me, but at the same time demonstrates an ongoing
23 emergency because he's right there and he might shoot
24 you. I'm suggesting the line you propose to
25 Justice Alito doesn't work.

1 MR. VAN HOEK: Well, I -- I would -- I
2 don't -- I don't think that -- that the -- the -- there
3 has been discussion of verbs tense and past tense, and I
4 don't think that is the -- is the determining factor.
5 It's certainly important. It's certainly a relevant
6 consideration in --

7 JUSTICE SCALIA: The guy in the gas station
8 is present. It's not past. He's making an assertion
9 the guy who is now in the gas station shot me. The
10 "shot me" is past, but he's asserting that the person is
11 now in the gas station. That is a statement of a
12 present fact.

13 MR. VAN HOEK: Yes. And I think if you look
14 at all of the circumstances together, it's a -- it's --
15 and going to the primary purpose is, is the witness
16 declaring some type of emergency, some sort of imminent
17 harm and requesting the police to render assistance to
18 alleviate that, to protect him -- him or her.

19 JUSTICE ALITO: Well, suppose they get a
20 9-1-1 call. There's -- a man has just been shot on the
21 corner of Fifth and Main. They go to Fifth and Main;
22 they find a man there; he's shot; he's bleeding
23 profusely; he's in shock; and they know nothing more
24 about what's happened. And they say, well, what
25 happened? Well, he shot me. Who shot you? It's John

1 Jones.

2 Now what about that?

3 MR. VAN HOEK: I would say that's our case,
4 and I would say that was testimonial.

5 JUSTICE ALITO: Well, the police under those
6 circumstances don't know whether John Jones is going on
7 a shooting spree; this is just the first of numerous
8 victims. Maybe it's a gang fight. He's shot one member
9 of an opposing gang; now he's going to go shoot another
10 member of an opposing gang.

11 How can they -- how can you answer that
12 question, what's the primary purpose there? I just
13 don't understand it.

14 MR. VAN HOEK: Well, I would think -- in
15 that situation, nothing about the Davis rule, nothing
16 about the Confrontation Clause precludes the police from
17 taking that information and asking those further
18 questions --

19 JUSTICE KENNEDY: But you -- you were the
20 one that drew the line between a past event and an
21 ongoing event. Suppose the sniper says, I've shot you
22 now, and I'm going to shoot three other students,
23 good-bye. That's a past event.

24 MR. VAN HOEK: But if the statement is made
25 to the police that a sniper has said he's -- he is on

1 the verge of shooting other people because he just shot
2 someone, I would say that's certainly a declaration of
3 an emergency and certainly would be nontestimonial under
4 the -- under the test of Davis.

5 JUSTICE BREYER: Is there any -- I'll try
6 this -- I think you're just -- you don't like my --
7 where I'm coming from, but -- and so you might not have
8 an answer to this.

9 But -- but in my mind, I see a line, and
10 that line is dividing what I think of as the
11 Confrontation Clause, Sir Walter Raleigh situation,
12 which I have in my mind as people going into a room and
13 saying, now write out your testimony, and they write it
14 out in the form of an affidavit, or they send in a
15 letter, and they say "bye," and then they walk next door
16 to the trial and introduce it. I mean, that's Walter
17 Raleigh, in my mind.

18 And then, on the other side of the line, is
19 an -- evidentiary rules that are basically in State
20 cases run by the State. And they sometimes let hearsay
21 in, and they sometimes don't, and they make reliability,
22 et cetera, judgments in developing their -- their
23 decision as to how hearsay exceptions will work. Okay?

24 Now, why don't I like emergency to draw
25 that? The reason I don't like the word "emergency" is I

1 think police do lots of things other than handle
2 emergency and develop testimony.

3 There's a range of things that you would
4 describe as investigating the circumstance. There's no
5 danger. There have been a string of robberies. They go
6 around and ask the grocery store people and everything
7 what happened. Now, I don't know why we should keep out
8 evidence that, say, is given in that situation by a
9 confederate. It turns out he was the assistant -- why?

10 And if I don't like that, I don't like the
11 emergency rule as doing the -- as doing the work there,
12 and I'm looking for something else.

13 Now, you have my whole train of thought. If
14 you want to say, Judge, there is nothing but the
15 emergency rule, you are perfectly free to say it.

16 JUSTICE SCALIA: Do it.

17 (Laughter.)

18 MR. VAN HOEK: I -- there is nothing --
19 there is nothing but the emergency rule. I think that
20 when -- when the police are investigating a reported
21 crime and getting statements from witnesses, whether the
22 victim or another witness --

23 JUSTICE BREYER: They're not. They're just
24 asking -- all right. Yes. Go ahead.

25 MR. VAN HOEK: Well, they're investigating.

1 JUSTICE BREYER: Yes. They're
2 investigating.

3 MR. VAN HOEK: They're seeking information
4 in which they will do their job, which is to go try to
5 arrest someone and see what the situation is. And
6 they're getting narratives of past events from
7 witnesses, and they're acting on that. And nothing
8 about this rule prevents them from doing that.

9 But the admissibility -- for them to be able
10 to come into court, and they alone to come into court,
11 and say this is what this witness told me and this is
12 what this witness told me and this is what this witness
13 told me -- and by the way, defense counsel, those
14 witnesses aren't going to be here today, and you're not
15 going to be able to ask them what they meant by that or
16 whether they were telling the truth.

17 No. Mr. Bryant at this trial was never able
18 to question Mr. Covington.

19 JUSTICE BREYER: Yes, yes, but in the past
20 that situation you are describing arose only where there
21 was a hearsay exception. I would imagine most likely it
22 would be the case of a confederate, someone who was part
23 of the conspiracy. So if I think if that's going to be
24 the case, that probably will be admissible where this
25 has bite.

1 MR. VAN HOEK: Well --

2 JUSTICE BREYER: And there be some others,
3 excited utterances, maybe another. Dying declarations
4 are probably few and far between. Baptismal
5 certificates --

6 MR. VAN HOEK: But the line this Court drew
7 in Crawford and Davis --

8 JUSTICE BREYER: I know they did. And what
9 I'm saying is I'm finding that -- it seems to me that
10 that line, if taken literally, would keep out exceptions
11 to hearsay testimony, which have been well established
12 in the United States for 200 years. Baptismal
13 certificates, statements of birth.

14 MR. VAN HOEK: I don't believe that --

15 JUSTICE BREYER: Confederates is the one I
16 come back to.

17 MR. VAN HOEK: Those examples you just gave
18 -- baptism -- are not statements made during police
19 questioning. If we're talking about a --

20 JUSTICE BREYER: Okay, okay. I forgot --

21 MR. VAN HOEK: The difference that made in
22 Davis is that the -- the definition of testimonial is
23 not across the board --

24 JUSTICE SCALIA: I guess it depends on what
25 you mean by "in the past," as Justice Breyer put it.

1 Undoubtedly, under the regime of United
2 States v. Reynolds, which was what, 25 years old --
3 when --

4 MR. VAN HOEK: Roberts.

5 JUSTICE SCALIA: Roberts. I'm sorry.

6 MR. VAN HOEK: Roberts, which --

7 CHIEF JUSTICE ROBERTS: No relation.

8 JUSTICE SCALIA: Roberts. I'm sorry.

9 Roberts, which -- Reynolds was the Mormon case -- which
10 was about 25 years old or so when Crawford was decided,
11 yes, hearsay was your protection, and that was it. But
12 if by what you mean is in the past, Crawford examined
13 the past, and its conclusion as to what the past said is
14 quite different from what Justice Breyer now says,
15 although he joined Crawford.

16 MR. VAN HOEK: Yes. I -- and as you said,
17 in Crawford this Court looked at that and thought that
18 the protections of the hearsay rule, and the focus under
19 the Roberts standard of whether a statement fell within
20 a firmly established hearsay rule, was not sufficient
21 under the Constitution, under the Confrontation Clause,
22 to -- to alleviate the fact that there -- there's no
23 cross-examination.

24 JUSTICE BREYER: Many -- I mean, like many
25 cases there is language that takes -- that can take us

1 far afield from the subject matter before us. And I
2 will admit that I did not foresee the scope of Crawford.
3 So I'm really asking about that scope and, in
4 particular, whether, looking to the past or to reason or
5 to whatever you want, there is a good reason for keeping
6 out the testimony of, say, a co-confederate, a
7 co-conspirator, where it was elicited, not with intent
8 to introduce it into the courtroom, but it was elicited
9 in the course of an ordinary investigation of a crime.

10 MR. VAN HOEK: Well, I'd have to go back to
11 my answer that the Confrontation Clause is the primary
12 law of the country, not State hearsay evidentiary rules.
13 Many of the examples -- the co-conspirator -- the
14 co-conspirator exception is not going to be applicable
15 in many cases because those statements aren't made to
16 police officers; they're made between co-conspirators in
17 the course of a conspiracy. That's the foundational
18 requirement.

19 It's not going to eliminate hearsay rules.
20 Statements made to private citizens, statements made in
21 a lot of different circumstances are still going to be
22 evaluated solely under hearsay rules because they're not
23 going to be defined as testimonial, because they're not
24 the product of police -- police questioning.

25 JUSTICE ALITO: Well, I'm still trying to

1 understand your conception of the scope of the ongoing
2 emergency doctrine. Would it be fair to say that your
3 idea is that the police have to have specific evidence
4 that there is an immediate threat of physical violence
5 that they want -- they need to respond to, in order for
6 the ongoing emergency doctrine to apply?

7 MR. VAN HOEK: Yes. Yes. They have to --

8 JUSTICE ALITO: And in a case of doubt, they
9 can't do it. So if they don't know whether there is an
10 immediate threat or not an immediate threat, then that
11 doesn't fall within that exception. That's your idea?

12 MR. VAN HOEK: My position is that where the
13 witness has not provided any information to the police
14 indicating that there's an immediate threat, either
15 volunteered to the police or in response to questions
16 from the police saying is there a threat? Where -- in
17 this case, no questions were asked, where is Rick?

18 JUSTICE SCALIA: Well, they can always do
19 it. You -- you don't say they can't do it.

20 MR. VAN HOEK: No, not at all.

21 JUSTICE SCALIA: They can always ask the
22 questions. The only issue here is not whether they can
23 ask the questions, but whether, after they ask them, the
24 answers can be introduced at trial.

25 MR. VAN HOEK: Yes, and if the answers -- no

1 matter what questions they asked, if the answers all are
2 a narrative of past events, then that qualifies as
3 testimonial because it is the -- the equivalent --

4 JUSTICE ALITO: I thought you just said that
5 wasn't the test, past versus present. Didn't you say
6 that about 10 minutes ago -- it's not the difference
7 between something that's taking place and something that
8 has taken place?

9 MR. VAN HOEK: No. No. I think my answer
10 was that -- that if the witness is declaring an
11 emergency and telling the police that there is a --

12 JUSTICE ALITO: The witness has to say there
13 is an emergency?

14 MR. VAN HOEK: Not in those words but -- but
15 in comparison to what the witness in Davis said, is that
16 he's beating me up.

17 JUSTICE ALITO: There's a shooting --
18 there's a report of shooting at a school, and the police
19 go and they find two students lying on the ground. One
20 is dead, and the other is severely wounded. And they
21 ask the one who is wounded: Who did it? It's John
22 Jones.

23 Now, does that -- is that an ongoing
24 emergency.

25 MR. VAN HOEK: No.

1 JUSTICE ALITO: No?

2 MR. VAN HOEK: No.

3 JUSTICE SOTOMAYOR: Can he ask the witness

4 --

5 JUSTICE ALITO: Well, why is that not an
6 ongoing emergency? What would be an ongoing emergency?

7 MR. VAN HOEK: Well, it would be -- it would
8 be -- a statement from the -- from the witness at that
9 point of the police officer asking him: Is John Jones
10 here? Is he threatening you? Do you know where he is
11 right now? Do you know what he is intending to do? And
12 the answers are: Yes, he has a gun. He's right over
13 there. He's going to shoot someone else. He said he
14 was going to shoot someone else.

15 That's different.

16 JUSTICE ALITO: You have to have very
17 specific information?

18 MR. VAN HOEK: Because the -- the
19 Petitioner's position here is that the situation itself,
20 standing alone --

21 JUSTICE ALITO: What if there are three
22 students who have been shot, four students who have been
23 shot, but nobody says, well, I think he's still in the
24 building, he may have an interest in shooting some more
25 students?

1 MR. VAN HOEK: Well, certainly if the police
2 come on the scene and there's multiple students who have
3 been shot, you would think that if their primary
4 purpose -- if the primary purpose, if you take that as a
5 test, that their primary purpose of questioning the
6 witness is to determine whether there's an emergency,
7 they're going to ask those questions.

8 JUSTICE SCALIA: Would they ask his name?
9 God, it's really important for us to know, four students
10 on the ground. What's the name of the guy that did
11 this?

12 That's not the emergency.

13 MR. VAN HOEK: No.

14 JUSTICE SCALIA: They'd say: Where is he?

15 JUSTICE ALITO: Of course that -- of course
16 that's the emergency because how are they going to find
17 the person that they -- that they're looking for if they
18 don't know who it is? What if he's thrown away his gun?
19 Of course, if they come upon him and he has his gun in
20 his hand, then it's not a question. Bu what if he has
21 disposed of it? They have to know who to -- who to go
22 for.

23 MR. VAN HOEK: And they can ask all of those
24 questions. As Justice Scalia said, there's nothing in
25 the -- in this Court's opinion in Davis or nothing in my

1 position that prevents the police --

2 JUSTICE ALITO: But I still -- I'm totally
3 puzzled now as to what you -- when you think there's an
4 ongoing emergency and when there isn't.

5 MR. VAN HOEK: I think there's an ongoing
6 emergency -- that a statement relates -- would become
7 nontestimonial relating to an ongoing emergency when
8 there's some indication from the statement made by the
9 witness that such -- that there's some immediacy.
10 There's some request for assistance --

11 JUSTICE ALITO: It has to be made by the --
12 by the declarant? It can't be inferred from the
13 circumstances?

14 MR. VAN HOEK: No, I don't think just from
15 the circumstances, because if you --

16 CHIEF JUSTICE ROBERTS: Oh, sure it can. If
17 he says the principal did it. It's -- it's 10 o'clock
18 in the morning; you assume the principal is at the
19 school; and he says the principal did it. You can infer
20 from the circumstances that he's referring to an ongoing
21 emergency.

22 MR. VAN HOEK: I don't -- I don't agree. I
23 don't agree because if that's the case, any report -- as
24 Justice Scalia I think said previously, any report of a
25 past crime certainly raises the potential that a

1 subsequent crime will occur. If that's the case, then
2 --

3 CHIEF JUSTICE ROBERTS: Well, it's quite
4 different than saying, you know, this happened to some
5 guy driving by, or something like that. If he says the
6 principal did it, it's at 10 o'clock, it's in the
7 school -- that suggests to me more, not that the dying
8 student or the wounded student wanted to make sure that
9 the principal was convicted, but that there's an
10 emergency, something is happening.

11 MR. VAN HOEK: Well, again, I think that if
12 all it is that the principal shot someone before, that
13 basically is I think the --

14 JUSTICE SOTOMAYOR: You don't think there's
15 a danger implicated by coming onto the lawn of a school
16 and a student is there and says the principal shot me
17 inside? You don't think that that suggests an ongoing
18 emergency, that the principal is still inside with a
19 gun?

20 MR. VAN HOEK: Well, if they ask those
21 questions and the principal is still inside and there is
22 an indication that the --

23 CHIEF JUSTICE ROBERTS: Oh, no, no. You
24 don't want them to have to go through, you know, a whole
25 list of questions while the student's there dying and

1 the principal is inside the building shooting people?

2 JUSTICE SOTOMAYOR: Did he shoot you because
3 he had a grudge against you, or is he just shooting --

4 MR. VAN HOEK: No --

5 JUSTICE SOTOMAYOR: -- blindly, and he says
6 he shot me?

7 MR. VAN HOEK: No. I'm not taking the
8 position that they have to go through a whole list of
9 questions before they can do anything. If you go in
10 that a situation and a student says the principal shot
11 someone, certainly nothing about the Davis rule stops
12 them from immediately running into the school and
13 determining if there's a situation there. But --

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Ms. Palmer, you have 2 minutes remaining.

16 REBUTTAL ARGUMENT OF LORI B. PALMER

17 ON BEHALF OF THE PETITIONER

18 MS. PALMER: I'd just like to reiterate that
19 the underlying principle, as this Court has said
20 repeatedly in Crawford and in Davis, is formality, and
21 that's what the purpose of any inquiry should be in
22 looking at -- at the scene, whether there's an emergency
23 or not, or declarant's view or not. It all comes down
24 to formality akin to a magisterial examination. And I
25 would also --

1 JUSTICE SOTOMAYOR: Let's go to formality.
2 It can't be that you arrive at a scene of a crime and
3 everything a victim tells you is admissible. There has
4 to be some emergency. That's what we've said.

5 MS. PALMER: Right.

6 JUSTICE SOTOMAYOR: Correct? So the issue
7 here is how do you define that dividing line between
8 emergency and non, when the police officers are just
9 asking questions that by their nature are always going
10 to be testimonial, because they are going to use or try
11 to use whatever is said later? So, in discerning the
12 primary purpose, I think your adversary is saying you
13 can't go by what the police officers are asking because
14 they are going to be asking dual motive always. You
15 have to look to what the declarant tells you. And is he
16 or she telling you something that suggests an emergency?

17 MS. PALMER: Well --

18 JUSTICE SOTOMAYOR: That's really the
19 difference between the two of you, I think.

20 MS. PALMER: Well, even if -- even if you
21 take that view, that it's the declarant's purpose,
22 objectively viewed, that controls, I think here it's
23 difficult to see how Covington's purpose could have been
24 to provide evidence any more than the 9-1-1 call in
25 Davis. I think he was in shock from a bleeding wound.

1 He didn't call the police. They came to him. You know,
2 this wasn't even a 9-1-1 call where he sought them.
3 They came to him. It's not clear who called, but it was
4 not him.

5 So even taking it from his point of view,
6 it's -- it's difficult to see here how the purpose would
7 have been anything other than, as he said, when is EMS
8 coming to help me.

9 JUSTICE SCALIA: I don't understand what
10 you're saying. You mean he has to intend to provide
11 evidence that he knows will be used at trial? I don't
12 think that's the test.

13 MS. PALMER: I don't agree with that, and --
14 JUSTICE SCALIA: He's intending to accuse
15 somebody.

16 MS. PALMER: Well, I think here he's
17 intending to seek help because he has been mortally
18 wounded.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 12:06 p.m., the case in the
23 above-entitled matter was submitted.)

24

25

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