

# Recent Development: The Death of Confrontation Clause Originalism?, *Michigan* *v. Bryant*, 131 S. Ct. 1143 (2011)

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## I. INTRODUCTION

There has been a recent transformation in Confrontation Clause jurisprudence. Before 2004, the Confrontation Clause<sup>1</sup> did not bar out-of-court statements admitted against a criminal defendant, even if the defendant could not cross-examine the declarant, if (1) the declarant was unavailable to testify; and (2) the evidence bore “adequate ‘indicia of reliability,’” which existed where the statement “[fell] within a firmly rooted hearsay exception” or contained other “particularized guarantees of trustworthiness.”<sup>2</sup> However, in *Crawford v. Washington*,<sup>3</sup> an opinion authored by Justice Scalia, the Court rejected this framework on originalist grounds. Instead, the Court read the Clause to prohibit the introduction of “testimonial” statements against a criminal defendant, absent an opportunity to cross-examine the declarant.<sup>4</sup>

The *Crawford* Court opted to “leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”<sup>5</sup> It instructed only that the “core class” of testimonial statements included “a formal statement to government officers,” such as “*ex parte* testimony at a preliminary hearing.”<sup>6</sup> In succeeding years, the Court endeavored to clarify and expand upon the

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<sup>1</sup> “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” U.S. CONST. amend. VI.

<sup>2</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>3</sup> 541 U.S. 36.

<sup>4</sup> *Id.* at 59. The *Crawford* Court traced the origin of the Confrontation Clause to English common law. The English confrontation right grew out of the “notorious” conviction and execution of Sir Walter Raleigh in 1603. *Id.* at 44. Lord Cobham, Sir Raleigh’s alleged accomplice, made an out-of-court statement to investigators that implicated Raleigh in a treasonous plot. *Id.* Though Sir Raleigh claimed the right to cross-examine Lord Cobham in court, Lord Cobham’s statements were read to the jury absent any opportunity to cross-examine him. *Id.* English law later reacted against this practice, codifying a right to confront and cross-examine declarants before out-of-court statements could be admitted. *Id.* at 44–47. The Court used this historical background to arrive at its reformed interpretation of the Confrontation Clause. *Id.* at 50.

<sup>5</sup> *Id.* at 68; *see also id.* at 61 (“[Declarant’s] statement is testimonial under any definition.”).

<sup>6</sup> *Id.* at 51–52.

*Crawford* principles. *Davis v. Washington*<sup>7</sup> and *Melendez-Diaz v. Massachusetts*,<sup>8</sup> both opinions written by Justice Scalia, reaffirmed *Crawford*'s central holding. *Davis* also established a "primary purpose" test for whether a statement is testimonial, and held that statements whose primary purpose is preventing an ongoing emergency, rather than preparing for a future prosecution, are not testimonial.<sup>9</sup> But *Davis* also left open a number of questions, including: (1) what constitutes an ongoing emergency; and (2) whose primary purpose—the interrogator's or the declarant's—is controlling?<sup>10</sup>

Last Term, in *Michigan v. Bryant*,<sup>11</sup> the Court held that inculpatory statements made to police officers by a dying gunshot victim in a gas station several miles from where the victim was shot were not made with the primary purpose of preparing for a future prosecution and thus were admissible even absent the opportunity to cross-examine the declarant. *Bryant*'s outcome properly recognizes that it is wrong to permit a defendant to profit from restriction of testimony by a witness who is unavailable only because of the defendant's own conduct.<sup>12</sup> However, although *Bryant* professes adherence to the *Crawford* principle, its reasoning harkens back to the pre-*Crawford* era, rejecting the devotion to categorical rules that had characterized recent Confrontation Clause jurisprudence and instead favoring the pragmatic reasoning that those cases soundly rejected. *Bryant*'s retreat from *Crawford* may have been avoidable, but Justice Scalia inadvertently set the

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<sup>7</sup> 547 U.S. 813 (2006) (holding that statements taken in circumstances objectively indicating that the primary purpose of the interrogation is to respond to an ongoing emergency are nontestimonial and thus not subject to Confrontation Clause restrictions).

<sup>8</sup> 129 S. Ct. 2527 (2009) (holding that a drug lab analyst's report prepared in advance of a drug prosecution is testimonial and thus inadmissible absent opportunity to cross-examine the analyst).

<sup>9</sup> *Davis*, 547 U.S. at 822 ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."). *Davis* was decided jointly with *Hammon v. Indiana*. Both cases involved domestic assaults where the victim did not testify at trial. In *Davis*, prosecutors introduced the victim's statements to a 911 operator, made during the assault, identifying Davis as the assailant. *Id.* at 817–19. In *Hammon*, prosecutors introduced the victim's statements to police officers who responded to the scene, made after the assault had ended, identifying Hammon as the assailant. *Id.* at 819–21. The Court held that the statements in *Davis* were admissible because their "primary purpose was to enable police assistance to meet an ongoing emergency." *Id.* at 828. The statements in *Hammon*, by contrast, were inadmissible, because "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime . . ." *Id.* at 830.

<sup>10</sup> See Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 280 (2006) (identifying a shift from declarant's purpose in *Crawford* to interrogator's purpose in *Davis*).

<sup>11</sup> 131 S. Ct. 1143 (2011). The Court also decided another Confrontation Clause case, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), in which it held that the live testimony of an analyst at a drug testing lab cannot overcome a Confrontation Clause objection to a drug analysis report written by another analyst at the lab, at least where the testifying analyst has no first-hand knowledge of the testing done by the reporting analyst. The implications of *Bullcoming* on *Bryant* are discussed *infra* Part IV.D.

<sup>12</sup> But see *Giles v. California*, 554 U.S. 353 (2008) (holding that defendants forfeit their confrontation right only if the trial court finds that the defendant specifically intended to make the witness unavailable at trial).

stage for a backlash against *Crawford*'s rigid categorical framework in *Giles v. California*, where his majority opinion relied on originalist reasoning to narrow the class of cases in which defendants forfeit their confrontation rights.<sup>13</sup> Because application of the narrow forfeiture rule led several justices who joined the *Crawford* majority to balk at the outcome such a rule would have on *Bryant*, the *Bryant* Court instead retreated from categoricalism to pragmatism. Had the Court instead embraced a broader forfeiture rule, this Development argues, the *Bryant* Court could have reached its same outcome without destroying *Crawford*'s categorical framework. *Bryant* thus serves as a warning about the instability that ensues when a doctrine premised on originalist understandings turns on the fragile support of swing Justices who are not pure originalists.

## II. FACTS & PROCEDURAL HISTORY

In the early morning hours of April 29, 2001, Detroit police officers responded to a radio dispatch that a man had been shot.<sup>14</sup> They found the victim, Anthony Covington, lying next to his car in a gas station parking lot.<sup>15</sup> The police asked Covington about "what had happened, who had shot him, and where the shooting had occurred."<sup>16</sup> Covington responded that a man named Rick had shot him; that he had been shot at Rick's house; and that he had subsequently driven himself to the gas station.<sup>17</sup> Police questioning ended when emergency medical personnel arrived.<sup>18</sup> They transported Covington to a nearby hospital, where Covington died hours later.<sup>19</sup>

Following up on Covington's statements, police went to defendant Richard Bryant's residence.<sup>20</sup> There, they found blood and a bullet on the back porch, an apparent bullet hole in the back door, and Covington's wallet and identification outside the house.<sup>21</sup> The police did not find Bryant until a year later, when he was arrested in California, extradited to Michigan, and tried on charges arising from Covington's murder.<sup>22</sup> Bryant's first trial ended with a hung jury.<sup>23</sup> On retrial, he was convicted of second-degree murder, possessing a firearm as a felon, and possessing a firearm during commission of a felony.<sup>24</sup>

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<sup>13</sup> See *id.*; see also *infra* Part IV.B.

<sup>14</sup> *Bryant*, 131 S. Ct. at 1150.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (quoting *People v. Bryant*, 768 N.W.2d 65, 71 (Mich. 2009)).

<sup>17</sup> *Id.* Though Covington was shot by a bullet fired through a closed door, he identified the shooter by his voice. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *People v. Bryant*, 768 N.W.2d 65, 67 (Mich. 2009).

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

<sup>24</sup> *Id.* at 67–68.

During Bryant's retrial, which occurred prior to *Crawford*, several police officers testified to statements Covington made to them at the gas station.<sup>25</sup> Under pre-*Crawford* Confrontation Clause jurisprudence, as long as the prosecution showed that the statements were inherently reliable because they fell within a "firmly rooted hearsay exception," the Confrontation Clause posed no bar to the introduction of these out-of-court statements into evidence.<sup>26</sup> The trial court admitted these statements under the excited utterance hearsay exception;<sup>27</sup> notably, they were not admitted under the dying declaration hearsay exception.<sup>28</sup> In a decision handed down shortly after *Crawford* (but before *Davis*), the Michigan Court of Appeals affirmed Bryant's conviction.<sup>29</sup> When the Michigan Supreme Court remanded the case for reconsideration in light of *Davis v. Washington*, the Court of Appeals again affirmed the conviction.<sup>30</sup>

On appeal for the second time, the Michigan Supreme Court, in a 4-3 decision, reversed the Court of Appeals. It ruled that, under *Davis*'s primary purpose test, the statements were testimonial because the police interrogation had the primary purpose of "determin[ing] who shot the victim and where the shooter could be found so that they could arrest him."<sup>31</sup> Two separate dissents argued that the statements were not testimonial because, in their view, "the interrogation's primary purpose was to enable police assistance in an ongoing emergency."<sup>32</sup>

<sup>25</sup> *Bryant*, 131 S. Ct. at 1150.

<sup>26</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>27</sup> *Bryant*, 768 N.W.2d at 77; see also MICH. R. EVID. 803(2) (excited utterance exception to hearsay rule).

<sup>28</sup> *Bryant*, 768 N.W.2d at 77; see also MICH. R. EVID. 804(b)(2) (dying declaration exception to hearsay rule). Under the *Roberts* regime, it did not matter for Confrontation Clause purposes whether the statements were admitted as excited utterances or dying declarations. The Court had held that, where the declarant was unavailable, both excited utterances and dying declarations were "firmly rooted hearsay exceptions" such that the Confrontation Clause did not bar their introduction into evidence. *Roberts*, 448 U.S. at 66; see also *White v. Illinois*, 502 U.S. 346, 355 n.8 (1992) (excited utterances); *Kirby v. United States*, 174 U.S. 47, 61 (1899) (dying declarations). The distinction is much more significant post-*Crawford*. In dicta, *Crawford* itself suggested that, based on Founding-era practices, dying declarations might be a *sui generis* exception to *Crawford*'s rule against the introduction of testimonial statements absent confrontation. 541 U.S. 36, 56 n.6 (2004). The Court has never held that the dying declaration exception exists, though it did suggest the possibility again in dicta in *Giles v. California*, 554 U.S. 353, 358-59 (2008). Because the statements in *Bryant* were admitted as excited utterances rather than dying declarations, the Court could not consider whether the dying declaration exception applied to this case. *Bryant*, 131 S. Ct. at 1151 n.1; *id.* at 1177 (Ginsburg, J., dissenting). See *infra* Part IV.B for further discussion of the dying declaration exception.

<sup>29</sup> *People v. Bryant*, No. 247039, 2004 WL 1882661 (Mich. Ct. App. Aug. 24, 2004) (per curiam).

<sup>30</sup> *People v. Bryant*, No. 247039, 2007 WL 675471 (Mich. Ct. App. Mar. 6, 2007) (per curiam).

<sup>31</sup> *Bryant*, 768 N.W.2d at 73.

<sup>32</sup> *Id.* at 79 (Weaver, J., dissenting); see also *id.* (Corrigan, J., dissenting) ("[T]he victim's statements . . . were elicited by police officers addressing an ongoing emergency.").

## III. THE OPINIONS

A. *The Majority Opinion*

The Supreme Court, in an opinion by Justice Sotomayor,<sup>33</sup> reversed the Michigan Supreme Court and upheld Bryant's conviction.<sup>34</sup> Justice Sotomayor's opinion first claimed that *Crawford* and *Davis* offered only limited guidance to the Court in deciding the case before it. Although *Davis* clearly explained that statements made during an interrogation that has the primary purpose of addressing an ongoing emergency are not testimonial, "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony."<sup>35</sup> Additionally, *Davis* and its counterpart, *Hammon v. Indiana*, were both domestic violence cases.<sup>36</sup> The Court drew a factual distinction between those cases and *Bryant*, which involved an ongoing emergency that "extends beyond an initial victim to a potential threat to the responding police and the public at large."<sup>37</sup>

Faced with what Justice Sotomayor characterized as a "new context" in Confrontation Clause jurisprudence, the Court sought "to provide additional clarification" of the bounds of the ongoing emergency test.<sup>38</sup> Under *Crawford* and *Davis*, the Confrontation Clause requires an objective inquiry to determine "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred."<sup>39</sup> The existence of an ongoing emergency is one objective factor indicating that the primary purpose of an interrogation is about "something other than 'prov[ing] past events potentially relevant to later criminal prosecution.'"<sup>40</sup>

The Court's opinion tied the "ongoing emergency" test to a reliability rationale: "Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."<sup>41</sup> Thus, it drew an analogy to many hearsay rules, which "rest on the belief that certain statements are, by their nature, made for a purpose

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<sup>33</sup> Justice Sotomayor was joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Alito. Justice Kagan, who as Solicitor General had signed an amicus brief supporting Michigan, recused herself from the case.

<sup>34</sup> *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

<sup>35</sup> *Bryant*, 131 S. Ct. at 1154–55.

<sup>36</sup> See *supra* note 9.

<sup>37</sup> *Bryant*, 131 S. Ct. at 1156.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1157 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)) (alteration in original).

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

other than use in a prosecution and therefore should not be barred by hearsay prohibitions.”<sup>42</sup>

Justice Sotomayor then provided a laundry list of several factors she found relevant to the inquiry of whether Covington’s statements were made for the primary purpose of responding to an ongoing emergency. First, she again noted the distinction between domestic violence cases, like *Davis* and *Hammon*, and cases, such as *Bryant*, “involving threats to public safety.”<sup>43</sup> Where there are multiple potential victims, the ongoing emergency inquiry “cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue.”<sup>44</sup> Second, Justice Sotomayor argued that “the duration and scope of an emergency may depend in part on the type of weapon employed.”<sup>45</sup> Where the assailant uses a firearm, rather than merely his fists, more action is required to end the ongoing emergency.<sup>46</sup> Third, the medical condition of the declarant is not irrelevant; rather, it affects the primary purpose inquiry both because it “sheds light on the ability of the victim to have any purpose at all” and “provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.”<sup>47</sup>

After setting out this extensive list of factors that must be considered, the Court sought to cabin its ongoing emergency inquiry in two ways. First, it reiterated *Davis*’s caution that “‘a conversation which begins as an interrogation to determine the need for emergency assistance’ can ‘evolve into testimonial statements’” made for the purpose of developing a future prosecution.<sup>48</sup> Second, it cautioned against treating “the existence *vel non* of an ongoing emergency [as] dispositive of the testimonial inquiry”; rather, this is just one factor in the primary purpose test.<sup>49</sup>

Justice Sotomayor then addressed a key question left open in *Davis*: Whose primary purpose controls in the Confrontation Clause inquiry, the declarant’s or the interrogator’s? Rejecting the suggestion made by some academic commentators that only the declarant’s purpose is relevant,<sup>50</sup> the Court held that the inquiry properly focuses on the purposes of *both* the

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<sup>42</sup> *Id.* at 1157 n.9. The Court cited Federal Rules of Evidence 803(2) (excited utterance exception); 801(d)(2)(E) (co-conspirator statements exception); 803(4) (statements for the purpose of medical diagnosis or treatment exception); 803(6) (business records exception); 803(8) (public records exception); 803(9) (records of vital statistics exception); 803(11) (records of religious organizations exception); 803(12) (marriage and baptismal certificates exception); 803(13) (family records exception); and 804(b)(3) (statements against interest exception). *Id.*

<sup>43</sup> *Id.* at 1158.

<sup>44</sup> *Id.*

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

<sup>46</sup> *Id.* at 1159.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 828 (2006)).

<sup>49</sup> *Id.* at 1160.

<sup>50</sup> See, e.g., Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 255 (2005).

declarant *and* the interrogator.<sup>51</sup> In some situations, the Court noted, the interrogator's purpose will affect the declarant's purpose, as the questions asked by the interrogator who is focusing on a future prosecution will also focus the declarant on a future prosecution.<sup>52</sup> The Court suggested that its approach of looking at the intent of both the declarant and the interrogator may prove helpful in "mixed motive[ ]" cases, where the declarant and/or the interrogator have the purpose of addressing both the ongoing emergency and a future prosecution.<sup>53</sup>

Finally, the Court applied these general principles to the facts in *Bryant*. Here, the police who questioned Covington did not know the scope of the emergency, as "[n]othing Covington said to the police indicated that the cause of the shooting was a purely private dispute or that the threat from the shooter had ended."<sup>54</sup> And because a gun was involved, "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington."<sup>55</sup> The Court noted that the record indicated Covington was in significant physical pain when the police questioned him, and he repeatedly asked when medical services would arrive. Under these circumstances, the Court refused to find that "a person in Covington's situation would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution.'" <sup>56</sup> The Court also interpreted the interrogators' questions to show a primary purpose of evaluating the scope of and risk from the situation before them. The police, according to the Court, asked "the exact type of questions necessary to allow [them] to 'assess the situation, the threat to their own safety, and possible danger to the potential victim' and to the public. . . ." <sup>57</sup> Finally, the Court noted how "the situation was fluid and somewhat confused," suggesting that "the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements."<sup>58</sup> From these factors, the Court arrived at the conclusion that the primary purpose of the interrogation was to respond to an ongoing emergency, thus making Covington's statements nontestimonial.<sup>59</sup>

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<sup>51</sup> *Bryant*, 131 S. Ct. at 1160.

<sup>52</sup> *Id.* at 1161.

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

<sup>54</sup> *Id.* at 1163.

<sup>55</sup> *Id.* at 1164. The Court avoided the more difficult question of when the ongoing emergency ended: "We need not decide precisely when the emergency ended because Covington's encounter with the police and all of the statements he made during that interaction occurred within the first few minutes of the police officers' arrival and well before they secured the scene of the shooting—the shooter's last known location." *Id.* at 1164–65.

<sup>56</sup> *Id.* at 1165 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

<sup>57</sup> *Id.* at 1166 (quoting *Davis*, 547 U.S. at 832) (internal quotation marks omitted).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1166–67.

### B. Justice Thomas's Concurrence

Justice Thomas, who did not join the majority opinion, filed a short opinion concurring in the judgment. As he had in *Davis*, Justice Thomas rejected the Court's "primary purpose" approach because in his view it "is 'disconnected from history' and 'yields no predictable results.'"<sup>60</sup> Justice Thomas would instead apply the Confrontation Clause solely to formal interrogations that "resemble[ ] those historical practices that the Confrontation Clause addressed."<sup>61</sup> Because Covington's interrogation was particularly informal, Thomas argued that the Confrontation Clause did not bar the use of the statement at trial.<sup>62</sup>

### C. Justice Scalia's Dissent

Justice Scalia filed a vigorous dissent arguing that the majority had abandoned the approach it had embraced seven years earlier in *Crawford*.<sup>63</sup> Justice Scalia began his opinion by accusing the majority of distorting both the facts of the case and the Court's previous Confrontation Clause jurisprudence, making it "the obfuscator of last resort."<sup>64</sup> After reviewing the *Crawford* and *Davis* definitions of testimonial, Justice Scalia gave his own answer to the question of whose intent matters: In his view, the declarant's intent is controlling. Rejecting the majority's combined approach of looking at the intent of both the declarant and the interrogator, Justice Scalia would hold that a statement is testimonial if the declarant "intend[s] the statement to be a solemn declaration rather than an unconsidered or offhand remark"

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<sup>60</sup> *Id.* at 1167 (Thomas, J., concurring) (quoting *Davis*, 537 U.S. at 839 (Thomas, J., concurring in part and dissenting in part)). In *Davis*, Justice Thomas was the sole dissenter. He argued that the primary purpose test was an "exercise in fiction" because most interrogations are targeted both at responding to an emergency and gathering evidence (and courts are not equipped to disentangle those motives). *Davis*, 537 U.S. at 839 (Thomas, J., concurring in part and dissenting in part). Thus, Justice Thomas argued that the primary purpose test "yields no predictable results to police officers and prosecutors attempting to comply with the law." *Id.* Justice Thomas suggested that this was the same folly of the *Roberts* regime that *Crawford* sought to remedy. *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)).

<sup>61</sup> *Bryant*, 131 S. Ct. at 1167 (Thomas, J., concurring) (citing *Davis*, 537 U.S. at 835–36 (Thomas, J., concurring in part and dissenting in part)).

<sup>62</sup> *Id.* at 1167–68.

<sup>63</sup> *Id.* at 1168–76 (Scalia, J., dissenting). Though Justice Scalia is known for his strong language, many commentators noted that this opinion was impassioned even compared to his other dissents. See, e.g., Adam Liptak, *Jury Can Hear Dying Man's Words, Justices Say*, N.Y. TIMES, Mar. 1, 2011, at A14, available at <http://www.nytimes.com/2011/03/01/us/01scotus.html> (characterizing Justice Scalia's opinion as a "slashing dissent"); Linda Greenhouse, *Justice Scalia Objects*, N.Y. TIMES OPINIONATOR BLOG (Mar. 9, 2011, 8:40 PM), <http://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects/> (characterizing Justice Scalia's opinion as a "public thrashing" of Justice Sotomayor); Orin Kerr, *Michigan v. Bryant and the Future of the Confrontation Clause*, THE VOLOKH CONSPIRACY (Feb. 28, 2011, 1:41 PM), <http://volokh.com/2011/02/28/michigan-v-bryant-and-the-future-of-the-confrontation-clause/> ("The case seems destined to be known in part for its absolutely blistering solo dissent by Justice Scalia. Yes, it's blistering even by Justice Scalia standards. . . .").

<sup>64</sup> *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting).



and “make[s] the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused.”<sup>65</sup> Within this framework, what interrogators do or say is relevant only insofar as it impacts the intent of the declarant.<sup>66</sup>

Justice Scalia squarely rejected the Court’s argument that a dual-intent approach would prove helpful in mixed motive cases. First, he claimed that the dual-intent approach only “compounds the problem” in cases where both the declarant and the police have mixed motives.<sup>67</sup> Second, he claimed that the Court’s approach creates a new problem where the declarant has one clear motive and the police have another clear motive.<sup>68</sup> The upshot for the Court, according to Justice Scalia, is that judges are free to use whichever party’s intent leads to the court’s favored result—a “malleable approach [under which] ‘the guarantee of confrontation is no guarantee at all.’”<sup>69</sup>

Justice Scalia then turned to the declarant’s perspective. Finding this to be “an absurdly easy case,” Justice Scalia argued that “[f]rom Covington’s perspective, his statements had little value except to ensure the arrest and eventual prosecution of Richard Bryant.”<sup>70</sup> Unlike the declarant in *Davis*, who called 911 in the midst of an attack by the assailant,<sup>71</sup> Bryant’s attack on Covington “had ended six blocks away and 25 minutes earlier . . . .”<sup>72</sup> Looking to the interrogators’ questions, Justice Scalia found that they focused Covington on the investigation of a past crime, and not on addressing an ongoing emergency.<sup>73</sup> Indeed, the questions asked and the answers given “would have been a routine direct examination” at trial—precisely the type of *ex parte* examinations that are the target of post-*Crawford* Confrontation Clause jurisprudence.<sup>74</sup> Furthermore, Justice Scalia claimed, the Court’s opinion was wrong on its own dual-motive test. Rather than acting as if there was an ongoing emergency—which would involve investigating the scene and asking Covington where the shooter was—the officers instead asked Covington questions about what happened.<sup>75</sup> Such conduct reflected a purpose of “interrogat[ing] Covington primarily to investigate past criminal events.”<sup>76</sup>

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<sup>65</sup> *Id.* at 1168–69 (citing Friedman, *supra* note 50, at 259).

<sup>66</sup> *See id.* at 1169 (“The identity of an interrogator, and the content and tenor of his questions, can bear upon whether a declarant intends to make a solemn statement, and envisions its use at a criminal trial.”); *id.* (“[T]he actions and statements of a declarant’s audience [are relevant] only because they shape the declarant’s perception of why his audience is listening and therefore influence *his purpose* in making the declaration.”).

<sup>67</sup> *Id.* at 1170.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (quoting *Giles v. California*, 554 U.S. 353, 375 (2008)).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1171.

<sup>72</sup> *Id.* at 1170.

<sup>73</sup> *Id.* at 1171 & n.2.

<sup>74</sup> *Id.* at 1171.

<sup>75</sup> *Id.* at 1171–72.

<sup>76</sup> *Id.* at 1171.

Justice Scalia next criticized the long-term result of the majority's opinion, which he saw as "creat[ing] an expansive exception to the Confrontation Clause for violent crimes."<sup>77</sup> If the emergency created by a violent crime lasts for several hours, then many witness statements in violent crimes will pass *Bryant's* "ongoing emergency" test.<sup>78</sup> Justice Scalia argued that this was inconsistent with the paradigmatic case of Sir Walter Raleigh, whose infamous conviction based on an *ex parte* unconfronted statement inspired the Confrontation Clause.<sup>79</sup> Because the officials who investigated Raleigh's case were focused on the "ongoing emergency" of "alleged treasonous conspiracies," Justice Scalia argued that the Court's test would permit introduction of those statements.<sup>80</sup>

Finally, Justice Scalia attacked the Court's interpretation of existing Confrontation Clause jurisprudence. First, he criticized the majority's use of the reliability rationale to justify *Davis's* "ongoing emergency" test.<sup>81</sup> *Crawford* squarely rejected a reliability rationale in Confrontation Clause jurisprudence, overruling *Ohio v. Roberts*. On Justice Scalia's view, "[r]eliability tells us *nothing* about whether a statement is testimonial."<sup>82</sup> Nor do hearsay rules tell us anything about confrontation rights; because hearsay exceptions are directed at reliable statements and confrontation rights are directed at testimonial statements, "the scope of the exemption from confrontation and that of the hearsay exceptions also are not always coextensive."<sup>83</sup> In a series of rhetorical questions, Justice Scalia pondered whether the Court sought to overturn *Crawford* without explicitly saying so.<sup>84</sup> Additionally, Justice Scalia argued that the Court's use of a multi-factor balancing test to assess the existence of an ongoing emergency "is no better than the nine-factor balancing test [the Court] rejected in" *Crawford*.<sup>85</sup> And *Crawford* did so because the Framers rejected such balancing tests in favor of a bright-line rule requiring confrontation of testimonial statements even

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<sup>77</sup> *Id.* at 1173.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* The *Crawford* Court read the Confrontation Clause as the Framers' way of avoiding the abuses that occurred in Sir Raleigh's trial. See *Crawford v. Washington*, 541 U.S. 36, 44–47, 50 (2004); see also *supra* note 4.

<sup>80</sup> *Bryant*, 131 S. Ct. at 1173 (Scalia, J., dissenting). The Court, citing Justice Thomas's concurring opinion, retorted that "the situation presented in this case is nothing like the circumstances presented by Sir Walter Raleigh's trial." *Id.* at 1155 n.4 (majority opinion) (citing *id.* at 1167 (Thomas, J., concurring)). Justice Thomas's concurrence focused solely on the informality of Covington's interrogation, compared to the formality of historical interrogations like those of Sir Raleigh. *Id.* at 1167 (Thomas, J., concurring). By contrast, the *Bryant* majority viewed the informality of Covington's interrogation as only one factor in the primary purpose inquiry. *Id.* at 1160 (majority opinion). The Court specifically noted that "[f]ormality is not the sole touchstone of [the] primary purpose inquiry . . . ." *Id.*

<sup>81</sup> *Id.* at 1174 (Scalia, J., dissenting).

<sup>82</sup> *Id.* at 1175.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1175–76 (citing *Crawford v. Washington*, 541 U.S. 36, 63 (2004)).

where they are reliable.<sup>86</sup> In conclusion, Justice Scalia accused the Court of shirking on its obligation to protect constitutional rights even when they are contrary to judicial policy preferences.<sup>87</sup>

#### D. Justice Ginsburg's Dissent

In a brief separate dissent, Justice Ginsburg voiced her agreement with much of Justice Scalia's dissent: that the statements were testimonial; that the declarant's intent should control the analysis; that Covington's statements were testimonial even under the Court's dual-purpose test; that the Court's opinion "creates an expansive exception to the Confrontation Clause for violent crimes"; and that the majority improperly brought back a reliability rationale into Confrontation Clause jurisprudence.<sup>88</sup> She added a note that, "[w]ere the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions."<sup>89</sup> But because the issue was not properly preserved in the state courts, the Supreme Court could not address it.<sup>90</sup>

### IV. ANALYSIS

#### A. Originalism vs. Pragmatism Post-Crawford

The *Bryant* opinions reflect a familiar divide in Confrontation Clause cases. On one side is an originalism-based categoricalism, led by Justice Scalia. This position emerged from arguments by Justices Scalia and Thomas in pre-*Crawford* cases<sup>91</sup> and in academic literature<sup>92</sup> criticizing the *Roberts* regime. *Crawford* represented a significant victory for proponents of Justice Scalia's approach, and, up until *Bryant*, originalism dominated post-*Crawford* jurisprudence.<sup>93</sup> Opposing *Crawford*'s analytical framework,

<sup>86</sup> *Id.* at 1176.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1176–77 (Ginsburg, J., dissenting). Professor Orin Kerr suggested that Justice Ginsburg's decision not to join in Justice Scalia's dissent—even though she professed agreement with Justice Scalia's arguments—contributed to Scalia's decision to write such a heavy-handed opinion. See Kerr, *supra* note 63. Of course, the causality could be reversed: Justice Ginsburg may have chosen not to join Justice Scalia's dissent because of its harsh language.

<sup>89</sup> *Bryant*, 131 S. Ct. at 1177 (Ginsburg, J., dissenting).

<sup>90</sup> *Id.*; see *supra* text accompanying note 28.

<sup>91</sup> See *White v. Illinois*, 502 U.S. 346, 358–66 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment).

<sup>92</sup> See, e.g., Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998).

<sup>93</sup> See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2534–35 (2009) (discussing historical practices); *Giles v. California*, 554 U.S. 353, 357–73 (2008) (same); *Davis v. Washington*, 547 U.S. 813, 823–26 (2006) (same). Others have termed this a "formalist" approach. See, e.g., Jonathan H. Adler, *Formalists Prevail in Bullcoming v. New Mexico*, THE VOLOKH CONSPIRACY (June 23, 2011, 10:53 AM), <http://volokh.com/2011/06/23/formalists->

other justices and commentators took a pragmatic approach. They objected that the new Confrontation Clause jurisprudence harmed the criminal justice system by excluding reliable evidence that could aid prosecutors.<sup>94</sup>

Until *Bryant*, the pragmatists were relegated to the minority. The split between the two sides of the Court came to the fore most clearly in *Melendez-Diaz v. Massachusetts*.<sup>95</sup> There, the question was whether, in a narcotics prosecution, the government could introduce a certificate from a state drug analyst certifying that the drugs seized were illegal narcotics, absent live testimony and cross-examination of the analyst. In a 5-4 decision, written by Justice Scalia, the Court held that such a procedure violated the Confrontation Clause.<sup>96</sup> The certificates, according to the Court, were part of the “core class of testimonial statements” within the ambit of *Crawford*’s originalist reasoning.<sup>97</sup> The Court also rejected the Commonwealth’s argument that the Court should “relax the requirements of the Confrontation Clause to accommodate the ‘necessities of trial and the adversary process.’”<sup>98</sup> Recognizing that “[t]he Confrontation Clause may make the prosecution of criminals more burdensome,” the Court held that its categorical rule does not yield to such pragmatic concerns.<sup>99</sup>

By contrast, the four *Melendez-Diaz* dissenters, led by Justice Kennedy, embraced the state’s pragmatic position. They claimed that the decision “threaten[ed] to disrupt forensic investigations across the country,” and that the costs of the decision were not justified by its “negligible benefits.”<sup>100</sup> The dissent devoted a substantial section to discussing the burden *Melendez-Diaz* would put on state and federal drug analysts, who were now required to

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prevail-in-bullcoming-v-new-mexico/. However, the Court’s decisions are distinctly motivated not just by formalism, but also by originalism. See *Bryant*, 131 S. Ct. at 1176 (Scalia, J., dissenting) (“[W]e did not disavow multifactor balancing for reliability in *Crawford* out of a preference for rules over standards. We did so because it ‘d[id] violence to’ the Framers’ design.” (quoting *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (alteration in original))). As explained *infra* Part IV.B, it was originalism, beyond just formalism, that motivated the Court’s decision about the forfeiture doctrine in *Giles v. California* and thus set the stage for *Bryant*.

<sup>94</sup> Dissenting from the Court’s reformed Confrontation Clause jurisprudence in *Crawford*, Chief Justice Rehnquist argued that the *Crawford* rule “adds little to a trial’s truth-finding function . . . .” *Crawford*, 541 U.S. at 75 (Rehnquist, C.J., concurring in the judgment). He accused the Court of ignoring the “longstanding guidance” that “‘the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.’” *Id.* (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

<sup>95</sup> 129 S. Ct. 2527.

<sup>96</sup> *Id.* at 2532.

<sup>97</sup> *Id.*; see also *id.* at 2534–35 (rejecting argument that analysts’ reports are not statements of the type that concerned the Founders); *id.* at 2538–40 (rejecting argument that analysts’ reports were admissible under a common-law exception for official records).

<sup>98</sup> *Id.* at 2540 (citing Brief for Respondent at 59, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591)) (internal quotation marks omitted).

<sup>99</sup> *Id.*; see also *Crawford*, 541 U.S. at 61 (Confrontation right is a “procedural rather than a substantive guarantee”); *id.* at 67 (characterizing Confrontation right as a “categorical constitutional guarantee[ ]”).

<sup>100</sup> *Melendez-Diaz*, 129 S. Ct. at 2549 (Kennedy, J., dissenting).

testify in every criminal drug trial.<sup>101</sup> At their core, these pragmatic concerns amounted to a worry that “[g]uilty defendants will go free, on the most technical grounds, . . . adding nothing to the truth-finding process.”<sup>102</sup>

In *Bryant*, the sides in *Melendez-Diaz* reversed. Supporting the newly-added Justice Sotomayor, all four *Melendez-Diaz* dissenters—Chief Justice Roberts and Justices Kennedy, Breyer, and Alito—joined the *Bryant* majority opinion. And two of the three remaining members of the *Melendez-Diaz* majority—Justices Scalia and Ginsburg—became the *Bryant* dissenters.<sup>103</sup> Not surprisingly, given this lineup,<sup>104</sup> *Bryant* reintroduces pragmatic considerations into the Confrontation Clause.<sup>105</sup> The Court’s decision proposes at least eight factors a court should weigh to determine whether the “primary purpose of the interrogation” is to address an ongoing emergency.<sup>106</sup> But *Crawford* explicitly *rejected* such multi-factor tests in Confrontation Clause

<sup>101</sup> *Id.* at 2549–50. The Court responded that the dissent’s argument did not account for the fact that defendants often stipulate to the results of the drug test. *Id.* at 2540 n.10, 2542 (majority opinion).

<sup>102</sup> *Id.* at 2550 (Kennedy, J., dissenting). The dissent conceded that these pragmatic concerns “would be of no moment if the Constitution did, in fact, require the Court to rule as it [did].” *Id.* However, the dissent’s choice to discuss pragmatic concerns ahead of its Constitutional analysis seems to indicate its belief in the strength of the pragmatic arguments.

<sup>103</sup> Justice Thomas, who joined the Court’s *Melendez-Diaz* opinion, voted for the same outcome as the *Bryant* majority, but for starkly different reasons. See *supra* Part III.B. The remaining two members of the *Melendez-Diaz* majority, Justices Stevens and Souter, left the Court between *Melendez-Diaz* and *Bryant*. The Court’s other new member, Justice Kagan, recused herself from the case. See *supra* note 33.

<sup>104</sup> The split in Confrontation Clause cases does not follow the traditional “liberal”/“conservative” divide present in most other closely divided decisions. Rather, it resembles the divide in another set of Sixth Amendment cases, originating from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which concern the role of juries in sentencing decisions. There, Justices Stevens, Souter, and Ginsburg joined with originalist Justices Scalia and Thomas to form a five-member majority holding that defendants cannot be sentenced more harshly based on factors that are not elements of the crime for which they were convicted unless a jury finds those factors to exist beyond a reasonable doubt. See *id.* at 490. Chief Justice Rehnquist and Justice O’Connor, both of whom rejected *Crawford*’s reasoning, also dissented from *Apprendi*, partially on pragmatic grounds. See *id.* at 551 (O’Connor, J., dissenting) (“[T]he Court’s decision threatens to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court’s decision today.”). They were joined by Justices Kennedy and Breyer, both of whom joined *Crawford* but have positioned themselves as pragmatists in post-*Crawford* cases. See *id.* at 555 (Breyer, J., dissenting) (“At the very least, the impractical nature of the requirement that the majority now recognizes supports the proposition that the Constitution was not intended to embody it.”).

<sup>105</sup> The *Bryant* majority’s argument is recast slightly from the *Melendez-Diaz* dissent. There, the claim was that a certain class of statements—reports of scientific testing of forensic evidence—does not implicate the Confrontation Clause’s proscriptions. See *Melendez-Diaz*, 129 S. Ct. at 2552 (Kennedy, J., dissenting) (“No historical evidence supports the Court’s conclusion that the Confrontation Clause was understood to extend beyond conventional witnesses to include analysts who conduct scientific tests far removed from the crime and the defendant.”). *Bryant*, on the other hand, applies a particular test to *all* statements, regardless of the nature of the evidence, to determine whether the Confrontation Clause applies. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 & n.5 (2011).

<sup>106</sup> The eight factors are: (1) similarity to hearsay rules, *id.* at 1157 & n.9; (2) the “zone of potential victims,” *id.* at 1158; (3) the “type of weapon employed,” *id.*; (4) the “medical condition of the victim,” *id.* at 1159; (5) the facts that the declarant provides to the police, see *id.* at 1159; (6) “whether an ongoing emergency exists,” *id.* at 1160; (7) whether the interac-

jurisprudence, because they “depend[ ] heavily on which factors the judge considers and how much weight he accords each of them.”<sup>107</sup> And *Melendez-Diaz* similarly rejected the notion that Confrontation Clause analysis should yield to pragmatic concerns. Thus, despite the majority’s claimed fidelity to *Crawford* and *Davis*, the dissents correctly identify *Bryant* as a break from prior Confrontation Clause jurisprudence.<sup>108</sup> Rejecting *Crawford*’s categorical framework, under which the right to confrontation did not yield to practical considerations, *Bryant* instead embraces pragmatic considerations as relevant to the Confrontation analysis.

Though not explicit in the opinion, the same concern underlies the *Bryant* majority opinion and the *Melendez-Diaz* dissenting opinion: If the testimony at issue is inadmissible, “[g]uilty defendants will go free, on the most technical grounds . . . adding nothing to the truth-finding process.”<sup>109</sup> Indeed, that fear might be even more animated in *Bryant*, where the deceased declarant could not possibly be produced at trial.<sup>110</sup> Yet *Bryant*’s solution to the problem is overbroad, even covering cases where the declarant is plainly available to testify. *Crawford* applies only to testimonial statements where the declarant is unavailable and the defendant had a previous opportunity to cross-examine the declarant.<sup>111</sup> But, by ruling that statements like Covington’s fall within the ongoing emergency exception, *Bryant* simply removes the whole class of statements from being testimonial at all.<sup>112</sup> Thus, the Confrontation Clause poses no bar to their admission, and unless some other state evidentiary rule prohibits it, the statements can be introduced at trial even where the declarant is available and the defendant had no prior opportunity to cross-examine the witness.<sup>113</sup>

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tion was formal or informal, *see id.* at 1160; and (8) the “statements and actions of both the declarant and the interrogators,” *id.* at 1160.

<sup>107</sup> *Crawford v. Washington*, 541 U.S. 36, 63 (2004); *see also Bryant*, 131 S. Ct. at 1175–76 (Scalia, J., dissenting) (criticizing the majority’s test on these grounds). Part of *Crawford*’s criticism of multi-factor tests derived from the malleability of the factors involved. *See Crawford*, 541 U.S. at 63 (“Some courts wind up attaching the same significance to opposite facts.”). That criticism might not apply as strongly to *Bryant*, where the Supreme Court has laid down a set of at least some factors and outlined their usage. Yet the Court still did not answer the crucial question of how to judge a case where the factors pull in different directions. This is the same problem that *Crawford*’s categorical rule sought to avoid. *See id.* (“Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them.”).

<sup>108</sup> *Bryant*, 131 S. Ct. at 1173 (Scalia, J., dissenting); *id.* at 1176 (Ginsburg, J., dissenting).

<sup>109</sup> *Melendez-Diaz*, 129 S. Ct. at 2550 (Kennedy, J., dissenting).

<sup>110</sup> The *Melendez-Diaz* dissent worried that, even though the drug analyst technically was available, she might face a number of practical obstacles that would prevent her from testifying at trial. *See id.*

<sup>111</sup> *See Crawford*, 541 U.S. at 53–54.

<sup>112</sup> *Bryant*, 131 S. Ct. at 1150 (“Covington’s identification and description of the shooter and the location of the shooting were not testimonial statements . . .”).

<sup>113</sup> *Crawford*, 541 U.S. at 68; *cf. Bryant*, 131 S. Ct. at 1167 (“We leave for the Michigan courts to decide on remand whether the statements’ admission was otherwise permitted by state hearsay rules.”). Of course, if the declarant is available, any hearsay statements would have to fit into some exception to the prohibition on hearsay where the declarant is available. *See, e.g., FED. R. EVID.* 802 (rendering hearsay inadmissible unless a rule permits its admission);

*Bryant's* expansive reasoning suggests that lower courts will open the door for the admission of statements that appeared to be testimonial under the Court's prior precedents. Indeed, in a decision shortly after *Bryant*, a Georgia appeals court relied on *Bryant's* factors to permit the introduction, absent confrontation, of a statement made in a situation that looks strikingly like the one in *Hammon*, where the Court found the declarant's statement to be testimonial.<sup>114</sup> The statement was made in the safety of the declarant's home after the assailant had left the house,<sup>115</sup> just as in *Hammon*, where the statements were made in the safety of the declarant's living room while the assailant was detained in another room of the house.<sup>116</sup> The statements in *Hammon* were testimonial because "[t]here was no emergency in progress . . ." <sup>117</sup> By contrast, the Georgia court relied on several *Bryant* factors—the informality of the setting, the mental state of the declarant, the (alleged) zone of potential other victims, the proximity of the crime to the time of the interrogation, and the existence of a state hearsay exception—to find the statement nontestimonial.<sup>118</sup>

*B. Forfeiture of Confrontation Rights: The Effect of Giles v. California on the Bryant Decision*

Though *Bryant's* reasoning is expansive, its outcome has intuitive appeal. Why should a defendant who killed her victim then benefit from her illegal act by precluding the victim's testimony at trial? To the extent that this concern animated the majority opinion, the Court did not discuss another possible solution to its dilemma: that *Bryant* forfeited his Confrontation rights when he shot and killed Covington. That is because the Court's prior decision in *Giles v. California*<sup>119</sup> precludes such an argument. There, the Court held that a defendant forfeits her right to Confrontation only when she has caused the declarant to be unavailable *and* did so with the intent of preventing the declarant from testifying at trial.<sup>120</sup> As in *Crawford*, Justice Scalia wrote the majority opinion, and he relied on originalist reasoning.<sup>121</sup>

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FED. R. EVID. 803 (listing exceptions to inadmissibility of hearsay "even though the declarant is available as a witness").

<sup>114</sup> See *Philpot v. State*, 709 S.E.2d 831, 838–39 (Ga. Ct. App. 2011).

<sup>115</sup> *Id.* at 838.

<sup>116</sup> *Davis v. Washington*, 547 U.S. 813, 819–20 (2006) (discussing facts of *Hammon v. Indiana*).

<sup>117</sup> *Id.* at 829.

<sup>118</sup> *Philpot*, 709 S.E.2d at 839 & n.51. The state hearsay exception that the *Philpot* court relied on permits the admission of statements that are part of the *res gestae* of the crime—a hearsay exception that commentators have criticized harshly. See, e.g., Chris Blair, *Let's Say Good-Bye to Res Gestae*, 33 TULSA L.J. 349, 351–52 (1997) (collecting criticisms from Thayer and Wigmore).

<sup>119</sup> 554 U.S. 353 (2008).

<sup>120</sup> *Id.* at 361 ("The manner in which the rule was applied makes plain that unconfrosted testimony would *not* be admitted without a showing that the defendant *intended* to prevent a witness from testifying.") (second emphasis added).

<sup>121</sup> *Id.* at 361–65 (surveying pre-Founding cases and treatises).

Because the evidence in *Bryant* did not indicate that the defendant killed the victim with the specific intent of rendering him unavailable at trial, the Court could not find that Bryant forfeited his right to confront the victim.<sup>122</sup>

The unavailability of a forfeiture finding also explains the Court's opaque discussion of the "dying declaration" exception. The Court has regularly suggested, without explicitly deciding, that dying declarations are an exception to the Confrontation Clause.<sup>123</sup> Here, Covington's statement appears to be admissible as a dying declaration.<sup>124</sup> Such a finding, along with a substantive holding that dying declarations constitute an exception to the Confrontation Clause, would have permitted the Court to admit the statement without resorting to the broader reasoning it opted to use. However, because the state trial court admitted the statement as an excited utterance, and not a dying declaration,<sup>125</sup> those grounds were waived under state law and thus not properly before the Court.<sup>126</sup> This eliminated another ground for finding Covington's statement admissible under the Confrontation Clause.

Even though *Giles* plays a minor explicit role in the *Bryant* opinions,<sup>127</sup> it plays a significant role in understanding how the development of Confrontation Clause jurisprudence precipitated *Bryant's* outcome. Because the Court could not hold that Bryant forfeited his confrontation right, it instead cast Covington's statement as nontestimonial.<sup>128</sup>

<sup>122</sup> See Richard D. Friedman, *Preliminary Thoughts on the Bryant Decision*, CONFRONTATION BLOG (Mar. 2, 2011, 12:42 AM), <http://confrontationright.blogspot.com/2011/03/preliminary-thoughts-on-bryant-decision.html> [hereinafter Friedman, *Preliminary Thoughts on the Bryant Decision*] ("[A] court easily could have held that Bryant forfeited the confrontation right—had *Giles* not foreclosed the possibility by holding that even a defendant who murders a witness forfeits the right only if he commits the murder for the purpose of rendering the witness unavailable.").

<sup>123</sup> The Court first identified the dying declaration exception in *Crawford v. Washington* as a "deviation" from the general rule against admitting testimonial statements absent confrontation. 541 U.S. 36, 56 n.6 (2004). There, the Court identified the exception, if it existed, as *sui generis*. *Id.* But see Richard D. Friedman, *Giles v. California: A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733, 735–36 (2009) [hereinafter Friedman, *Giles Article*] (suggesting that the dying declaration exception could be understood as part of the forfeiture doctrine). The Court again recognized the possibility of a dying declaration exception in *Giles v. California*, 554 U.S. 353, 358–59 (2008).

<sup>124</sup> See *Giles*, 554 U.S. at 358 (identifying the Founding-era dying declaration exception for statements "made by a speaker who was both on the brink of death and aware that he was dying"); *cf.* FED. R. EVID. 804(b)(2) (dying declaration hearsay exception covers "a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death"); MICH. R. EVID. 804(b)(2) (same).

<sup>125</sup> See *supra* note 28 and accompanying text.

<sup>126</sup> See *Michigan v. Bryant*, 131 S. Ct. 1143, 1151 n.1 (2011); *id.* at 1177 (Ginsburg, J., dissenting).

<sup>127</sup> *Giles* is cited only five times total in the four *Bryant* opinions, and never for its substantive holding. See *Bryant*, 131 S. Ct. at 1152 n.1, 1157 n.9, 1167 (Thomas, J., concurring); *id.* at 1170 (Scalia, J., dissenting); *id.* at 1177 (Ginsburg, J., dissenting).

<sup>128</sup> See Friedman, *Giles Article*, *supra* note 123, at 745 ("[T]he decision in *Giles* will increase the temptation courts already have to construe the key term 'testimonial' too narrowly.").



C. Bryant, *Swing Justices, and Backlash*

Bryant's retrenchment from the *Crawford* framework calls into question whether supporters of broad Confrontation rights should support a fully originalist approach to confrontation.<sup>129</sup> Justice Scalia has long rejected any method of constitutional interpretation that imports common law, case-by-case decision-making by judges with discretion.<sup>130</sup> Yet, there is no reason to think that originalist rules are the best rules.<sup>131</sup> The development of Confrontation Clause jurisprudence shows that the Court should consider how the rules it develops will play out in future cases, rather than simply tracking its own reading of Founding-era practices.

*Giles* is symptomatic of this problem. Tethered to its originalist bent, the *Giles* Court created a narrow forfeiture doctrine.<sup>132</sup> It thus rejected the opposing pragmatic argument, focused particularly on domestic violence cases, calling for a more expansive forfeiture doctrine.<sup>133</sup> Yet, the Court also rejected a third path presented by Professor Richard Friedman in an amicus brief that "equitable considerations" compel a holding that a defendant forfeits her Confrontation right when she "engages in serious misconduct that has the foreseeable consequence of rendering a witness unavailable to be a

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<sup>129</sup> *But cf.* Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL'Y 53, 61 (2011) ("I believe . . . that it is a welcome and appropriate development for the Supreme Court to be taking originalism seriously in criminal procedure . . ."). Another concern about supporting a fully originalist approach to Confrontation is that "many defense lawyers . . . would not like the whole package that would result from applying a consistent originalist philosophy." Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB. POL'Y 45, 45 (2011). Thus, for example, following Justice Thomas's originalist reading of the Confrontation Clause would limit Confrontation rights solely to statements made in formal settings. See *Bryant*, 131 S. Ct. at 1167 (Thomas, J., concurring in the judgment); *Giles*, 554 U.S. at 377–78 (Thomas, J., concurring); *Davis v. Washington*, 547 U.S. 813, 835–37 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>130</sup> See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>131</sup> See David A. Strauss, *On the Origin of Rules (with Apologies to Darwin): A Comment on Antonin Scalia's The Rule of Law as a Law of Rules*, 75 U. CHI. L. REV. 997, 998 (2008) ("The best rules do not spring full-blown from the language of the Constitution or the understandings of the Framers. They are the product of an evolutionary process of trial and error, and they continue to evolve after they are announced.").

<sup>132</sup> There is substantial disagreement over whether the Court arrived at the proper result on its own originalist terms. Compare, Friedman, *Giles* Article, *supra* note 123, at 744 (arguing that forfeiture doctrine not requiring specific intent to make declarant unavailable is consistent with the Founding-era cases); with Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 877–78 (2009) (arguing that *Giles* ignored Founding-era sources that opposed its holding). For the purposes of this Recent Development, what matters is that the Court's opinion articulated a primary goal of hewing to originalism, eschewing a common law approach. *Giles*, 554 U.S. at 375; see also Lininger, *supra*, at 865 (arguing that "*Giles* erred by focusing excessively on" originalism).

<sup>133</sup> Compare *Giles*, 554 U.S. at 405 (Breyer, J., dissenting) (arguing that narrow forfeiture doctrine is insufficient to prevent the pressing problem of domestic violence), with *id.* at 376 (majority opinion) (rejecting adoption of broader forfeiture doctrine based on domestic violence concerns).

witness subject to confrontation . . . .”<sup>134</sup> This argument does not rely on originalism, although one reading of the Founding-era cases does support this result.<sup>135</sup> Nor is it dependent on the pragmatic argument that supports admitting statements where they are reliable and aid prosecutors in obtaining convictions.<sup>136</sup> Rather, it recognizes that the Confrontation Clause’s procedural protection is a two-way street. The Clause prevents prosecutors from introducing *ex parte* examinations of a witness where the prosecution could, but chooses not to, present the witness at trial.<sup>137</sup> Conversely, it should also prevent defendants from precluding the introduction of out-of-court statements where they chose to make that witness unavailable, regardless of their specific intent to make the witness available for trial.<sup>138</sup>

Presented with this exact argument, the *Giles* Court’s main ground for rejecting it was not that such a rule would be inequitable, but that it would be inconsistent with the original understanding of the Clause.<sup>139</sup> And the equitable arguments against the broader forfeiture doctrine are unavailing. Concurring in *Giles*, Justice Souter identified the primary non-originalist objection to a broader forfeiture doctrine, which he termed one of “near circularity . . . .”<sup>140</sup> In a homicide case, Justice Souter argued, permitting the victim’s statement to come into evidence absent confrontation on a finding that the defendant made the victim unavailable by murdering her requires the judge to make a decision about the merits of the underlying homicide charge to determine the admissibility of the statement: “[A]dmissibility of the victim’s statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence; evidence that the defendant killed would come in because the defendant probably killed.”<sup>141</sup> Setting aside the possibility that the Court could make the statement admissible only on a stronger showing that the defendant made the victim unavailable,<sup>142</sup> Souter’s argument fails because the jury can still find reasonable doubt about the

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<sup>134</sup> Brief for Richard D. Friedman as Amicus Curiae Supporting Respondent, *Giles v. California*, 554 U.S. 353 (2008) (No. 07-6053), 2008 WL 859395, at \*3 [hereinafter Friedman, *Giles* Brief].

<sup>135</sup> *Id.* at \*20–21; see *supra* note 132.

<sup>136</sup> See Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2550 (2009) (Kennedy, J., dissenting).

<sup>137</sup> *Crawford v. Washington*, 541 U.S. 36, 49 (2004). For this reason, Professor Friedman also proposes that the prosecution be subject to an additional burden of “mitigation”: The statement should be inadmissible, even where the defendant caused the witness to be unavailable, “if the authorities could reasonably have arranged an opportunity to afford confrontation, but failed to do so.” Richard D. Friedman, *Forfeiture of the Confrontation Right After Crawford and Davis*, 19 REGENT U. L. REV. 489, 494 (2007) [hereinafter Friedman, *Forfeiture Article*]; see also Friedman, *Giles* Brief, *supra* note 134, at \*10 & n.8.

<sup>138</sup> See Friedman, *Giles* Article, *supra* note 123, at 735.

<sup>139</sup> *Giles v. California*, 554 U.S. 353, 375 (2008) (“The Sixth Amendment seeks fairness indeed—but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen.”).

<sup>140</sup> *Id.* at 379 (Souter, J., concurring in part).

<sup>141</sup> *Id.*

<sup>142</sup> See Friedman, *Forfeiture Article*, *supra* note 137, at 494 (arguing for an “elevated” standard of proof beyond preponderance of the evidence).

accuracy of the judge's finding or the victim's statement.<sup>143</sup> The jury could find that the victim lied about the identity of her attacker, or was simply mistaken. Or it could find that the statement itself is insufficient to support a finding of guilt given the remaining evidence presented at trial.<sup>144</sup> Although Souter recognized these "distinct functions of judge and jury," he dismissed them as insufficient to overcome the problem without explaining why.<sup>145</sup>

Given that the equitable arguments against a broader forfeiture doctrine are weak, *Giles* rests solely on its originalist reading of the Clause. But where swing justices are not pure originalists, such a foundation is shaky. The replacement of Justices Souter and Stevens with Justice Sotomayor and *Bryant's* resulting turn toward a pragmatic approach to Confrontation Clause cases show the frailty of building judicial coalitions based on originalist doctrine. When swing justices come to believe that the outcomes governed by a purely originalist approach are unpalatable, the coalition will collapse.

*Bryant* represents exactly such a backlash against the outcomes governed by *Giles's* narrow forfeiture rule. Moreover, *Bryant's* approach threatens to undermine *Crawford* altogether. At oral argument, Justice Breyer candidly questioned whether *Crawford's* rule was more desirable than the *Roberts* scheme.<sup>146</sup> And a number of the early reactions to *Bryant* agree with Justice Scalia that the Court's discussion of reliability harks back to the *Roberts* framework that the Court rejected in *Crawford*.<sup>147</sup>

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<sup>143</sup> *Id.* at 492 ("The judge has a function, to determine the forfeiture question, and the jury has a function, to determine the facts bearing on the underlying charge. They are separate functions."); cf. FED. R. EVID. 806 (permitting a party against whom a hearsay statement is admitted to attack the credibility of the declarant, notwithstanding any rules requiring that the declarant must have an opportunity to explain other statements made by the declarant).

<sup>144</sup> Souter recognized that the "distinct functions of the judge and jury" separated the two inquiries in question, but found them insufficient to overcome the "near circularity" problem. *Giles*, 554 U.S. at 379 (Souter, J., concurring in part). These separate roles should have been sufficient to overcome Souter's concerns. As Professor Friedman notes, saying that the "only thing" to overcome the circularity problem is the distinction between the roles of the judge and of the jury "is like saying that the only thing saving noon from being dark is the sun." Friedman, *Giles* Article, *supra* note 123, at 742.

<sup>145</sup> *Giles*, 554 U.S. at 379 (Souter, J., concurring).

<sup>146</sup> See Tr. of Oral Argument at 34, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150) ("I have to admit to you I've had many second thoughts when I've seen how far [*Crawford*] has extended . . ."); *id.* at 32 ("[A]ssuming that a State law or the Federal Rules of Evidence admit [the statement] as an exception to the hearsay rule, why should the Confrontation Clause bar it?").

<sup>147</sup> See Friedman, *Preliminary Thoughts on the Bryant Decision*, *supra* note 122 ("[T]his decision strikes me as a giant step backwards towards a morass like that of *Ohio v. Roberts*, which gave the courts considerable leeway to let almost any statement in."); Colin Miller, *Michigan v. Bryant, Part 6*, EVIDENCE PROF BLOG (Mar. 3, 2011), <http://lawprofessors.typepad.com/evidenceprof/2011/03/yesterday-i-posted-an-entry-about-justice-scalia-accusing-the-majority-in-michigan-v-bryant-of-retreating-from-crawford-v-washi.html> (arguing that "the majority [in *Bryant*] resurrected *Ohio v. Roberts*").

*D. Bullcoming v. New Mexico and the Future of Bryant*

For those who feared that *Bryant*'s backlash would go so far as to upend *Crawford*'s roots, the Court's subsequent opinion last Term in *Bullcoming v. New Mexico*<sup>148</sup> is promising. There, the Court held that in-court testimony from a blood-alcohol analyst who did not conduct or review the specific test in question was insufficient to permit the introduction of a testimonial blood-alcohol analysis report absent confrontation of the analyst who conducted the report.<sup>149</sup> The lineup of majority and dissenting justices resembled *Melendez-Diaz* rather than *Crawford*. Justice Ginsburg wrote the majority opinion, joined in full by Justice Scalia and joined in large part by Justices Thomas, Sotomayor, and Kagan. The *Melendez-Diaz* dissenters once again held the minority view: Justice Kennedy wrote the dissent, joined by Chief Justice Roberts and Justices Breyer and Alito.

The dissent urged a broad reading of *Bryant*, citing the Court's opinion for the proposition that "reliability [is] an essential part of the constitutional inquiry."<sup>150</sup> Justice Sotomayor, in a separate concurrence, squarely rejected this reading.<sup>151</sup> She drew a sharp distinction between reliability and the Confrontation Clause analysis: "The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation."<sup>152</sup> Justice Sotomayor's opinion thus may show a willingness to rein in some of the more extreme readings of *Bryant*'s reasoning. On the other hand, Justice Sotomayor stood firm on her application of *Bryant*'s multi-factor test to the Confrontation Clause analysis.<sup>153</sup> In future cases, this could undermine the formalism that is critical to upholding *Crawford*'s framework.

Moreover, in dissent, the pragmatists amplified their objection to the entirety of the *Crawford* line of cases. *Bryant*'s majority opinion, joined by the four *Bullcoming* dissenters, preached fidelity to *Crawford*'s underlying reasoning. Yet, the concluding paragraph of the *Bullcoming* dissent offered a thinly veiled threat to overturn *Crawford* entirely: "Seven years after its initiation, it bears remembering that the *Crawford* approach was not pre-ordained. This Court's missteps have produced an interpretation . . . at odds with the sound administration of justice. It is time to return to solid ground."<sup>154</sup> Thus, the Court's future debates over the Confrontation Clause

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<sup>148</sup> 131 S. Ct. 2705 (2011).

<sup>149</sup> *Id.* at 2716.

<sup>150</sup> *Id.* at 2725 (Kennedy, J., dissenting).

<sup>151</sup> *See id.* at 2720 n.1 (Sotomayor, J., concurring in part).

<sup>152</sup> *Id.*

<sup>153</sup> *See id.* at 2720 (discussing how the business records hearsay exception, FED. R. EVID. 803(6), tended to make the statement testimonial); *id.* at 2721 (applying the formality factor of *Bryant*'s test to the statement).

<sup>154</sup> *Id.* at 2728 (Kennedy, J., dissenting).

will be fought not merely over *Crawford's* application to certain factual situations, but also over *Crawford's* viability itself.

