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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., Detroit, Michigan; on behalf of the Petitioner.

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

PETER JON VAN HOEK, ESQ., Detroit, Michigan; on behalf of the Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 09-150, Michigan v. Bryant. Ms. Palmer.

ORAL ARGUMENT OF LORI B. PALMER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

18 JUSTICE GINSBURG: How do we --

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

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

1 said that that is an indicator that it lacks the
2 formality.

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

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

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

22 JUSTICE SOTOMAYOR: But whose primary
23 purpose is it?

24 I mean, the victim here knew that the
25 incident hadn't happened there. There was nothing he

1 had to share with the police, because they could see he
2 was bleeding from his stomach and he had been shot. He
3 apparently didn't fear any threat, or there doesn't seem
4 to be any circumstances suggesting an immediate threat
5 to him. He had driven away. Rick didn't know where he
6 had gone.

7 So what's the ongoing emergency to the
8 victim?

9 MS. PALMER: I think here, in this line in
10 Davis, you said the primary purpose is the questioning
11 is what you look at in Davis. And we are not asking you
12 to overrule that.

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

17 JUSTICE SCALIA: That is -- that is what it
18 says.

19 MS. PALMER: What --

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

23 MS. PALMER: But the formality indicators
24 that the Court delineated in Davis did not include
25 whether the answers to the questions were for the

1 purpose of establishing past events, but whether the
2 primary purpose of the questions were for those ends.

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

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

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

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

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

19 When the questioning seeks answers that go
20 beyond meeting the emergency, then courts can properly
21 find there's a point where the non-testimonial
22 statements end and the testimonial statements begin.

23 JUSTICE ALITO: In a situation like this, do
24 you think it's meaningful to ask what the primary
25 purpose of the victim was when he responded to the

1 police and said who shot him?

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

11 It seems like it's totally artificial.

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

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

20 MS. PALMER: He did ask --

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

25 But giving the name of the person who shot

1 him, where he was shot, what does that have anything --
2 how does that have anything to do with an ongoing
3 emergency?

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

6 JUSTICE SCALIA: But he does.

7 MS. PALMER: -- to that person.

8 JUSTICE SCALIA: But he does.

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

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

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

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

23 JUSTICE GINSBURG: Suppose he had survived.
24 Suppose Covington had survived instead of died. And
25 then the prosecutor says, I want to introduce this

1 evidence against Bryant. Would you say that, yes, it's
2 nontestimonial, so it comes in?

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

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

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

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

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

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

25 JUSTICE GINSBURG: But then -- then your

1 answer is that if we typed it as nontestimonial in my
2 trial scenario, it would be nontestimonial, it comes in.

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Yes, I mean --

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

24 CHIEF JUSTICE ROBERTS: But what the
25 footnote -- I'm sorry to interrupt you, but what the

1 footnote says is in the final analysis, it's the
2 declarant's statements, not the interrogator's question,
3 that the Confrontation Clause requires us to evaluate.

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

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

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

20 MS. PALMER: Correct. But as --

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

24 Now, is that testimonial or not? Because
25 the declarant knows he is 6 miles away. It's not going

1 to help them solve an emergency, but the police don't
2 know that.

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

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

10 MS. PALMER: I don't --

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

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

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

1 MS. PALMER: Right. But --

2 JUSTICE SCALIA: If you were worried about
3 that, do you run immediately over to the person lying on
4 the ground or do you examine the gas station first,
5 rather than expose yourself to the -- to the shooter
6 that you think is still in the gas station?

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

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

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

24 The question is whether or not the answers
25 are, later, admissible. Those are two different

1 inquiries.

2 MS. PALMER: Correct. And I was simply
3 saying the record would have been better --

4 JUSTICE KENNEDY: And, of course, Crawford
5 rejects reliability as a criteria.

6 MS. PALMER: Yes. So our position here
7 is that you cannot evaluate an ongoing emergency from
8 hindsight.

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

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

22 It goes to the very essence of reliability.
23 Was the statement made under circumstances that would
24 suggest an intent to testify? That's really what you're
25 getting at, isn't it?

1 MS. PALMER: No. No.

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

9 MS. PALMER: Which is what this Court said
10 in Davis, and said that that was not related to
11 reliability but to formality there, and that that was
12 not a formal thing, such as a magisterial examination.

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

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

23 MS. PALMER: We are not saying that any time
24 there is a perpetrator at large, there is automatically
25 an ongoing emergency until that person is caught.

1 What we are saying is that preliminary
2 inquiries on the scene to try to determine who the
3 perpetrator is and where it might be would be --

4 JUSTICE SOTOMAYOR: For all crimes, or only
5 for shooting crimes or knifing crimes? For explosions?
6 What kinds of crimes would qualify?

7 MS. PALMER: I think, obviously, violent
8 crimes raise ongoing emergencies, emergencies to
9 which -- more than others. There could also be contexts
10 in which it would apply to other crimes.

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

17 MS. PALMER: It is preliminary questions
18 designed to assess the risk to themselves, the public,
19 and --

20 JUSTICE SCALIA: No, no, no. It's not
21 designed to assess the risk. You don't know what they
22 are designed to do. These policemen didn't say: We are
23 assessing the risk. They just asked the questions. And
24 that's what is going to happen in future cases.

25 And you are saying, whenever policemen come

1 upon a victim of violent crime and said: Who did it?
2 What's his name? All of that will always be admissible,
3 because they -- they could be assessing the risk, right?

4 MS. PALMER: I think if the context shows
5 that's the primary purpose, then yes, that will often be
6 the case.

7 JUSTICE BREYER: What do you mean? How
8 could it possibly be admissible.

9 First, there has to be a degree of
10 formality, as the Court held in Hammon, sitting in the
11 kitchen; and second, it has to satisfy State hearsay
12 tests. So unless it's an exception to the hearsay rule,
13 it is not admissible.

14 MS. PALMER: Well, here, for instance, it
15 was admitted as an excited utterance.

16 JUSTICE BREYER: Well, of course there are
17 exceptions. There could, in fact, there could be a
18 coconspirator exception. There could be a dying
19 declaration exception, but what we are talking about is
20 whether the Constitution keeps it out, even though State
21 law -- because, say it's a coconspirator exception --
22 would permit it in.

23 So the answer is no, it's not the case that
24 whenever you come across a victim of a crime and ask him
25 questions, it's going to be admissible. It depends.

1 The State hears the law, the exception, and whether
2 there is a degree of formality, as there would in
3 Hammon.

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

7 Or if State law doesn't apply and we are
8 dealing with a Federal crime and Federal officers,
9 right, and trial in Federal court? And in that case,
10 what Justice Breyer just said would not apply.

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

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

15 MS. PALMER: Your -- I --

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

18 MS. PALMER: Yes. And I did misspeak. What
19 I meant to say was that it would be non-testimonial, not
20 that it would always be admissible.

21 JUSTICE GINSBURG: In the -- if you had the
22 benefit of hindsight and this trial occurred before
23 Davis, and so the prosecutor went on excited utterance,
24 would you have instead tried to make a case that this
25 was a dying declaration?

1 MS. PALMER: Absolutely.

2 I will reserve whatever time I have left.

3 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

4 Ms. Kruger.

5 ORAL ARGUMENT OF LEONDRA R. KRUGER,

6 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE,

7 SUPPORTING THE PETITIONER

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

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

18 When the objective primary purpose of that
19 interrogation is to enable police to meet an ongoing
20 emergency rather than to collect evidence for future
21 possible prosecution, the statements that are given in
22 response to that interrogation are non-testimonial.

23 JUSTICE SCALIA: Do you distinguish between
24 collecting evidence for a future prosecution and
25 collecting evidence in order to pursue and arrest the

1 felon? Do you distinguish those two?

2 And you can say these police -- these
3 policemen weren't collecting evidence for a future
4 prosecution; they just wanted to know who the shooter
5 was and where he was so they could go get him. Would
6 that -- would that not be collecting evidence for a
7 future prosecution?

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

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

15 MS. KRUGER: I think that what would qualify
16 under the Davis test is if police need to apprehend the
17 person, not for purposes of bringing the person into the
18 criminal justice system, but rather to neutralize an
19 ongoing threat that they present to the community at
20 large, as is often the case when somebody has just
21 proven themselves both capable and --

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

24 MS. KRUGER: I think it makes a significant
25 difference --

1 JUSTICE SCALIA: There is a violent criminal
2 out there.

3 MS. KRUGER: Justice Scalia, I think it
4 makes a significant difference whether we are talking
5 about a -- an act of violence like a shooting, somebody
6 who has used a weapon that is capable of inflicting
7 deadly harm on multiple victims in a short period of
8 time, or someone who has used their fists, like the
9 alleged perpetrators --

10 JUSTICE SCALIA: Okay. So if you use a gun,
11 a knife, or a machinegun, whatever the victim says gets
12 admitted into evidence, because the police could --
13 could be not -- not trying to get evidence, but just
14 trying to safeguard society against the -- the felon on
15 the loose?

16 MS. KRUGER: I don't think that we would
17 draw the rules that broadly, Justice Scalia.

18 JUSTICE SCALIA: I thought that's how you
19 just described it.

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

24 JUSTICE SCALIA: Yes.

25 MS. KRUGER: They need to find out in that

1 situation --

2 JUSTICE SCALIA: Who did it.

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

6 JUSTICE SCALIA: That's always the case.
7 That's such a phony evasion of what the purpose of a
8 testimonial rule is. That's always going to be the
9 case, at least when there is a violent crime.

10 MS. KRUGER: Well, I think --

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

14 MS. KRUGER: I don't think that that's the
15 case at all, Justice Scalia. I think it's actually very
16 much consistent with what this Court said in Davis.

17 It may very well have been that the
18 subjective purpose of the 9-1-1 operator was also to
19 bring the perpetrator in that case to justice. But this
20 Court, I think quite properly, recognized that in an
21 emergency situation, the attention of both law
22 enforcement and the declarant is quite properly going to
23 be focused on dealing with the emergency at hand and is
24 not going to be made of the kind of focused
25 understanding of --

1 JUSTICE SCALIA: The crime was ongoing in --
2 in Davis when -- when the woman was on the phone with
3 the operator. It was ongoing. She was seeking help
4 from the emergency that was occurring to her at that
5 moment. There is nothing like that here.

6 MS. KRUGER: It is true that that is a
7 factual distinction between this case and Davis, but we
8 don't think that it's one that makes a dispositive --

9 JUSTICE KENNEDY: Did the police know that
10 that was the case when they began the questioning? Did
11 the police know that this man was not on a rampage, that
12 he was not going to act in self-defense when they came
13 after him?

14 MS. KRUGER: No, they certainly did not know
15 that, Justice Kennedy.

16 JUSTICE KENNEDY: That he was not taking
17 hostages?

18 MS. KRUGER: That's correct. They had no
19 way of knowing that. And neither, for that matter -- I
20 think it is important to emphasize -- did the declarant.
21 The fact that he was able to escape the scene and
22 managed to drive himself 6 blocks away in no way
23 indicates that he had any --

24 JUSTICE SCALIA: Will they ever know that?

25 MS. KRUGER: I --

1 JUSTICE SCALIA: I mean, is that -- is that
2 likely not always to be the case when -- when you come
3 upon a person who has been the -- they victim of a
4 violent crime?

5 You can say it all the time. No, they
6 didn't know where the -- where the offender was, so
7 whatever this person says comes in as evidence in a
8 trial.

9 MS. KRUGER: Well, I think it's important to
10 emphasize that what we are arguing for is not a rule
11 that would say as long as there is a violent perpetrator
12 at large, as long as he is at large, any questions that
13 police ask of -- of potential people who have
14 information about the crime would necessarily be
15 non-testimonial.

16 Our argument is a far narrower one, and one
17 that we think follows very closely from the principle
18 articulated in Davis, which is when the primary purpose
19 of the police interrogation is to obtain information
20 that is necessary for them to meet an ongoing
21 emergency --

22 JUSTICE GINSBURG: Well, how do you know
23 that? Because they would ask the same very questions if
24 what they wanted was testimonial evidence. So you
25 can -- you can characterize that set of questions either

1 way. What would lead us to pick one rather than the
2 other?

3 MS. KRUGER: I think it's actually not the
4 case, Justice Ginsburg, that they would have asked the
5 very same questions. We know from reading the trial
6 testimony that the officers, as they appeared on the
7 scene in response to the police run of a man being shot,
8 asked the same question over and over again. Each
9 officer, as they approached him, said: What happened?
10 Where did it happen? And wanted to know how to
11 recognize the shooter so when they proceeded to the
12 scene they would know who they were dealing with and how
13 to safeguard themselves.

14 JUSTICE KENNEDY: Let's say --

15 MS. KRUGER: They weren't asking the type of
16 questions --

17 JUSTICE KENNEDY: Let's say that we -- let's
18 say that we agree with you that there was an emergency
19 and the police were asking questions in order to
20 mitigate the emergency.

21 What would be the rationale for admitting
22 this statement, then? Is it more reliable? Because if
23 we say that, then we are undercutting Crawford, which
24 says reliability is not the key.

25 What is the reason for this? Is it because

1 the police likely have less motive to manipulate the --
2 the statements and to ask loaded questions? That in
3 itself, it seems to me, is a reliable -- but what is
4 the -- assuming we adopt your distinction, what is the
5 rationale for the distinction?

6 MS. KRUGER: We think that the principle
7 that this Court announced in Davis and we are asking
8 this Court to apply again today reflects two principles
9 that underlie the Confrontation Clause as this Court
10 interpreted it in Crawford.

11 The first is that testimony is typically
12 characterized by the kind of focused understanding by
13 the declarant that the person is providing information
14 for potential use in future prosecution. It's -- the
15 petitioner in Davis, I would note, made an argument to
16 this Court that whenever a person calls 9-1-1, they do
17 so with an awareness that the information they provide
18 may be used for prosecutorial purposes.

19 But this Court rejected that argument,
20 because it understood, I think quite rightly, that there
21 is a difference between providing that sort of
22 information to law enforcement with a sort of vague
23 awareness that that might be its potential use, and
24 doing so with the kind of focused understanding that has
25 been characteristic of the testimonial statements this

1 Court has so far identified, like Sylvia Crawford's
2 station house interview in Crawford or Amy Hammon's
3 interview with the police officer from the safety of her
4 kitchen that resulted in the execution of a formal
5 affidavit in the Davis case.

6 JUSTICE GINSBURG: One of the officers
7 zeroed in on the victim. No one was looking around to
8 see if anybody was lurking in the bushes. Then as far
9 as protecting the public, do we take into account that
10 this was between 3:30 and 4:00 in the morning when they
11 are not likely to be many members of the public around,
12 or do we just say, you find someone, looks like he has
13 been the victim of a violent crime, doesn't matter
14 whether the public is around or not, we -- the victim of
15 a violent crime can be asked these questions.

16 MS. KRUGER: To take your first question
17 first, Justice Ginsburg. I think that the trial
18 testimony is not quite as clear on the question of what
19 fears the officers had as I think Respondent has
20 suggested in his brief. If you look at Joint Appendix
21 page 136, Officer Stuglin testified that he was, in
22 fact, afraid for his safety when he got to the gas
23 station. I would note that all of the officers when
24 they left the gas station after EMS arrived they
25 proceeded immediately to the location of the shooting.

1 The location that Anthony Covington had identified for
2 them. When they got there, they took a tactical
3 position and they waited for back-up and they did so
4 because they were afraid that a shooter was in the
5 house, and they wanted to proceed very cautiously in
6 making sure that they neutralized the threat that
7 shooter posed to the public safety, including their own.
8 I think that in examining the exigencies of a situation
9 a court would be justified in looking at the
10 circumstances in which the crime occurred, and could
11 very well take into account the fact that the crime
12 occurred at 3:00 in the morning as opposed to 5:00 in
13 the afternoon. But I think that we would expect any
14 reasonable police officer to do precisely what the
15 police officers in this case did, which is proceed
16 directly to the scene, not use their interview with
17 Anthony Covington as an occasion to execute an affidavit
18 or otherwise --

19 CHIEF JUSTICE ROBERTS: Then you are saying
20 that the focus is on the police officers. And after
21 all, we are not saying that police officers can't do
22 this, we are just saying the testimonial aspects can't
23 be admitted into evidence or that is what your friend is
24 arguing for. I still have trouble figuring out is the
25 issue the purpose of the interrogating officers, or the

1 purpose and intent of the Declarant?

2 MS. KRUGER: I think that the test that the
3 Court set out in Davis is one that focuses on the
4 purpose of the interrogation because of the limited
5 context in which that --

6 CHIEF JUSTICE ROBERTS: Okay. And what do
7 you do with the last sentence on footnote 1. It's the
8 one that says --

9 MS. KRUGER: In the end it's the Declarant's
10 statement that the Confrontation Clause requires us to
11 examine.

12 CHIEF JUSTICE ROBERTS: Right, right.

13 MS. KRUGER: We read footnote 1 to be an
14 acknowledgement that answers given in response to police
15 interrogation do not constitute the universe of possible
16 testimonial statements, that testimony can indeed be
17 volunteered as was Lord Cobham's letter, for example, in
18 Sir Walter Raleigh's treason case, but in the end Davis,
19 I think, quite properly focuses on the primary purpose
20 of the interrogation.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Van Hoek.

23 ORAL ARGUMENT OF PETER JON VAN HOEK

24 ON BEHALF OF THE RESPONDENT

25 MR. VAN HOEK: Mr. Chief Justice and may it

1 please the Court:

2 When Anthony Covington made his statement to
3 the officers at the gas station, not just once but
4 several times, he reasonably understood that he was
5 providing the police information as to events which had
6 concluded a half hour earlier at a location six blocks
7 away with an understanding that that information would
8 assist the police in locating, apprehending and
9 potentially prosecuting the person he felt was
10 responsible for his injury.

11 JUSTICE KENNEDY: I didn't hear the end. In
12 locating and?

13 MR. VAN HOEK: And apprehending, arresting.

14 JUSTICE BREYER: If -- what keeps that out?
15 I mean, assuming that a State law or Federal Rules of
16 Evidence admitted as an exception to the hearsay rule,
17 why should the Confrontation Clause bar it? There is
18 not great likelihood that like Sir Walter Raleigh or
19 Cobham's affidavit is going to be introduced, per se,
20 into the trial as a form of evidence that there was --
21 why would we want to keep it out? That is the part that
22 I do not understand.

23 MR. VAN HOEK: Well, certainly.

24 JUSTICE BREYER: Under the Federal
25 Constitution?

1 MR. VAN HOEK: The Federal Constitution --

2 JUSTICE SCALIA: I think your answer,
3 counsel, is that we decided that in Crawford from which
4 Justice Breyer dissented.

5 JUSTICE BREYER: Suppose I think he did it.

6 JUSTICE KENNEDY: Perhaps there is another
7 answer that I would like to hear.

8 JUSTICE BREYER: I would like to hear your
9 answer because I don't think we decided it in Crawford.

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

12 (Laughter.)

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

25 JUSTICE BREYER: Does it mean, does it mean

1 that the individual is thinking this may be used --
2 there is a certain formality of the situation, it may be
3 used at trial or it may just happen to turn out? What
4 is the relevance of the formality of the situation?
5 When I looked into history I thought -- I'm not an
6 expert in history -- and I'm also understand that have
7 been situations where the Court's gone back to prior
8 cases and looked at footnotes and said it doesn't
9 express things precisely clearly and changed it a little
10 bit. I think that that all could be open to us. So I
11 want to know what the basic reason is that would justify
12 keeping out, let's say an investigation. There is an
13 investigation of a crime, and a policeman comes across a
14 confederate who makes some statements just generally
15 that help the investigation, therefore it would come in
16 as co-conspiracy, okay?

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

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

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

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

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

11 JUSTICE BREYER: Of course what I'm looking
12 for now is whether there is any sense to that? What is
13 the constitutional rationale? I agree on joining
14 Crawford, but I have to admit to you I have had many
15 second thoughts when I've seen how far it has extended
16 as I have written it.

17 MR. VAN HOEK: Well, I would have to say the
18 constitutional justification of that is the reason why
19 the right of constitution isn't in the Constitution.
20 Where you had a situation in English common law where
21 magistrates were allowed to go out, interview witnesses,
22 come into court and present their memory, their version
23 of what the witness said as substantive evidence in the
24 case and the defense is not allowed to question or talk.

25 JUSTICE BREYER: That's the value of just

1 what I'm looking for. What I'm looking for is I can go
2 into Blackstone a little bit and look back and see what
3 this was after, was the problem of Sir Walter Raleigh's
4 trial and the Marion judges, and now what I need is a
5 line. Because if I can't find a line, then what we've
6 done would seem just as wrong to me, is suddenly bar
7 virtually all hearsay exception evidence of which for
8 400 years, or 200 years anyway, there has been quite a
9 lot in the courts.

10 MR. VAN HOEK: I certainly don't think
11 Crawford and Davis bars all.

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

14 MR. VAN HOEK: I believe this Court in
15 Crawford and Davis correctly established that line, in a
16 situation like this where it is the response of a
17 citizen to questions from a police officer, that you
18 look primarily, as footnote 1 indicates, to the content
19 of that statement.

20 JUSTICE ALITO: But we established that this
21 was a dying declaration and was made in contemplation of
22 death, would it be barred by Crawford?

23 MR. VAN HOEK: Well, this Court certainly
24 has suggested that in Giles, that a dying declaration
25 might be an exception to Crawford as an exception that

1 existed at the time of the framing. We don't have to
2 deal with that question in this case because this is not
3 a dying declaration.

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

13 MR. VAN HOEK: Yes. And I think maybe the
14 dying declaration as being in that situation is an
15 indication. What is different about dying declaration
16 from all these other hearsay exceptions is that at the
17 point at which the statement is made it is an
18 understanding that that witness will not be testifying,
19 that there is no potential that that witness will appear
20 in court in person. There is -- the police officers in
21 any of these situations speaking to the witness, when a
22 police officer arrives at the scene they have no way of
23 knowing what is going to occur months later.

24 JUSTICE KENNEDY: I thought -- I thought the
25 rationale for dying declaration admissions was that they

1 are inherent reliable -- inherently reliable. You can
2 certainly question that. But I thought that that was
3 the rationale that the Court gave.

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

5 JUSTICE KENNEDY: On your death bed before
6 you are going to meet the maker, you were not going to
7 lie, I think that was the test. So it was a reliability
8 component, correct?

9 MR. VAN HOEK: That's true. I think
10 that's -- that's also the -- the -- the background of
11 most hearsay exceptions is that for the circumstances
12 that there is some degree of inherent reliability to
13 that statement which excuses the absence of
14 cross-examination if the witness is unavailable. But --

15 JUSTICE KENNEDY: Now, suppose that there is
16 a universe of instances that says we can identify as
17 questions in order to alleviate and stop an emergency to
18 prevent a crime from becoming aggravated and continuous.
19 Let's suppose we can have a universe of those questions.

20 MR. VAN HOEK: Yes.

21 JUSTICE KENNEDY: Is -- is there an argument
22 that responses made for that purpose are more reliable?
23 Is that what -- is that what underlies the so-called
24 emergency exception, do you think?

25 MR. VAN HOEK: I don't believe so. I don't

1 believe that -- that a -- a -- a statement by a witness
2 that is a narrative --

3 JUSTICE KENNEDY: So the -- so the --
4 well -- and, of course, Davis is certainly does not rest
5 on reliability -- Crawford rather doesn't rest on
6 reliability.

7 MR. VAN HOEK: No.

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

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

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

14 MR. VAN HOEK: I don't think that the fact
15 that someone calls 911 and makes a report, whether they
16 are talking about an ongoing situation or reporting of a
17 past event, makes that somehow inherently more reliable
18 than if they had used another medium.

19 I think the distinction in Davis is that the
20 beginning of the 911 call that Mr. Contra was making to
21 the case was not relating past events it was a
22 declaration of emergency. It was a call for immediate
23 assistance.

24 JUSTICE KENNEDY: But isn't -- isn't the
25 reason we accept that is because it's reliable. It's an

1 excited utterance, it's an account of an ongoing event.
2 It's a contemporaneous observation, therefore, it is
3 reliable.

4 MR. VAN HOEK: I don't -- no, I don't think
5 that's the basis on which this Court held it was
6 nontestimonial. I think this Court held it was
7 nontestimonial because it was not what a witness does
8 during a trial. It was --

9 JUSTICE GINSBURG: Let's go back to this
10 case.

11 MR. VAN HOEK: Yes.

12 JUSTICE GINSBURG: Excited utterance was --
13 the prosecutor thought that was his best shot, and he --
14 and he prevailed, except that the -- Davis intervened.

15 I asked Ms. Palmer, suppose we were back
16 there at the trial and the prosecutor knew that excited
17 utterance wouldn't work, could he have raised dying
18 declaration? She said absolutely yes.

19 So my question to you is, just assume that
20 we should hold the confrontation clause that is
21 applicable. Shouldn't the prosecutor then have a chance
22 to say, well, if I realized that, I could have made a
23 dying declaration plea here, so it would only be fair to
24 allow the prosecutor to try to establish that this
25 testimony was a dying declaration?

1 MR. VAN HOEK: Well, in -- in this case,
2 when -- when -- when the initial attempted admission of
3 this evidence, at the preliminary exam, when it met a
4 hearsay objection, the prosecutor at that point argued
5 that it was admissible under Michigan evidence rules as
6 either an excited utterance and/or a dying declaration.

7 JUSTICE GINSBURG: Maybe she argue dying
8 declaration.

9 MR. VAN HOEK: Well, they argued dying
10 declaration, the judge sustained the objection and said
11 he has not established the foundation for either one of
12 those. The prosecutor at that point established a
13 foundation solely for excited utterance. The judge
14 ruled the evidence admissible and specifically said
15 admissible only as excited utterance.

16 At that point the prosecution abandoned any
17 attempt, threw out the State court proceedings to say
18 this was a dying declaration.

19 JUSTICE GINSBURG: And that -- that -- that
20 was in the pre-Davis world. But do you think the
21 prosecutor had abandoned that effort had he been
22 informed about Davis?

23 MR. VAN HOEK: I don't know. I don't know
24 what --

25 JUSTICE SCALIA: Mr. Van Hoek, what is the

1 basis for your concession that a dying declaration is an
2 exception from the Confrontation Clause? It is an
3 exception from hearsay, for certain, but from the
4 Confrontation Clause?

5 MR. VAN HOEK: I'm not -- if I -- if I
6 meant -- if you took what I said as a concession, what I
7 said is that this --

8 JUSTICE SCALIA: You conceded it. It's been
9 the whole basis for Justice Ginsburg's subsequent
10 interrogation.

11 JUSTICE GINSBURG: My question was based on
12 its an open question, because we have said maybe dying
13 declaration.

14 MR. VAN HOEK: And I --

15 JUSTICE SCALIA: I -- I thought it was an
16 open question only -- only where the -- the defendant
17 has effected the death of the person who has made the
18 dying declaration. I don't know of any cases that allow
19 a dying declaration in over a Confrontation Clause
20 objection.

21 MR. VAN HOEK: If I -- if you took my answer
22 to the prior question to say that I conceded that, I'm
23 not saying that. I'm saying when I was first asked the
24 question about dying declaration, I pointed out that
25 this Court in Giles indicated that that may be an

1 exception to the Confrontation Clause. And I agree --

2 JUSTICE GINSBURG: And it wasn't -- and it
3 wasn't in Giles. It wasn't in --

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

5 JUSTICE GINSBURG -- any way to the -- that
6 the -- that the purpose of the killing was to get rid of
7 the witness's testimony. Giles made the statement maybe
8 dying declaration is an -- is an exception to our
9 Crawford's jurisprudence.

10 MR. VAN HOEK: Yes. And as you said, this
11 Court has not reached that question directly, and -- and
12 there is no need to reach that question in this case
13 because this is not a dying declaration case.

14 JUSTICE SCALIA: If it hasn't been reached
15 and if it is not an established exception to the
16 Confrontation Clause, there is no basis for saying,
17 therefore, the Confrontation Clause pertains only to
18 reliability. It pertains to the opportunity to
19 cross-examine.

20 And -- and reliability exceptions are what
21 we used to do under -- under Reynolds. If it was
22 reliable, we let it in. The mere fact that it is
23 reliable as a dying declaration instead of reliable as
24 to something else ought to have nothing to do with the
25 Confrontation Clause decision.

1 MR. VAN HOEK: I agree. I'm not -- I
2 clearly don't --

3 JUSTICE GINSBURG: Whether you agree or not,
4 we said it was an open question.

5 MR. VAN HOEK: Yes, yes.

6 JUSTICE ALITO: Can there be --

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

8 JUSTICE ALITO: Can there be a situation in
9 which the primary purpose for a statement or for the
10 question that elicits the statement is to respond to an
11 ongoing emergency rather than to gather evidence for
12 subsequent use in a legal proceeding when the statement
13 relates to something that has occurred, perhaps just a
14 few seconds before, but it relates to something that has
15 occurred as opposed to something that is occurring at
16 that very moment?

17 MR. VAN HOEK: I think there are situations
18 where -- where the police are coming in and asking
19 questions, is there a threat here? Is there someone
20 here who is -- who is threatening you? Is there someone
21 here who is coming to threaten you or other people?
22 They may be able to get some background information to
23 put it in context, but we don't have anything like that
24 in this case.

25 JUSTICE ALITO: But I understand, but we

1 need to know where to draw the line. So, you concede
2 that the line is not between a statement about he is
3 hitting me with a baseball bat as opposed to he just
4 finished hitting me with a baseball bat and is headed
5 out the door? That is not where the line is drawn.

6 MR. VAN HOEK: I think the line would be
7 drawn if those were the only statements, he's hitting me
8 with a baseball bat, versus he -- he just hit me with a
9 baseball bat and he just left. I think the line is
10 clearly drawn in Davis between the hitting me with a
11 baseball bat would be nontestimonial --

12 JUSTICE ALITO: I really would like a clear
13 answer to this. Is -- can there be an ongoing emergency
14 where the statement relates -- where the statement
15 recounts something that has occurred, not something that
16 is occurring?

17 MR. VAN HOEK: I think that in the absence
18 of any statement by the witness alleging that there is
19 any current ongoing imminent danger, if the witness only
20 gives a statement that relates to past completed events,
21 then it's not a showing of -- of an ongoing emergency.

22 CHIEF JUSTICE ROBERTS: So what do you do --
23 what do you do with the statement "The guy in the gas
24 station shot me"? Is that purely past or is that an
25 ongoing emergency?

1 MR. VAN HOEK: That statement standing alone
2 I would say that that is past, purely past.

3 CHIEF JUSTICE ROBERTS: Even though the guy
4 in the gas station is still there with a gun, the police
5 are within range?

6 MR. VAN HOEK: Are we referring to a
7 specific person?

8 CHIEF JUSTICE ROBERTS: Yes. I mean, that
9 strikes me as something that happened in the past, he
10 shot me, but at the same time demonstrates an ongoing
11 emergency because he is right there and he might shoot
12 you. I'm suggesting the line you propose to
13 Justice Alito doesn't work.

14 MR. VAN HOEK: Well, I -- I -- I would -- I
15 don't -- I don't think that -- that the -- the -- the
16 discussion of verbs tense and past tense, I don't think
17 that is the -- is the -- is the determining factor.
18 It's certainly important, certainly a relevant
19 consideration in --

20 JUSTICE SCALIA: The guy in the gas station
21 is present. It's not past. He is making an assertion
22 the guy who is now in the gas station shot me. The shot
23 me is past, but he is asserting that the person is now
24 in the gas station. That is a statement of a present
25 fact.

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

7 JUSTICE ALITO: Well, suppose they get a
8 9-1-1 call. There's -- a man has just been shot on the
9 corner of Fifth and Main. They go to Fifth and Main;
10 they find a man there; he's shot; he's bleeding
11 profusely; he's in shock; and they know nothing more
12 about what's happened. And they say, well, what
13 happened? Well, he shot me. Who shot you? It's John
14 Jones.

15 Now what about that?

16 MR. VAN HOEK: I would say that's our case
17 and I would say that was testimonial.

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

24 How can they -- how can you answer that
25 question, what's the primary purpose there? I just

1 don't understand it.

2 MR. VAN HOEK: Well, I would -- in that
3 situation, nothing about the Davis rule and nothing
4 about the Confrontation Clause precludes the police from
5 taking that information and asking those further
6 questions.

7 JUSTICE KENNEDY: But you -- you -- you were
8 you the one that drew the line between a past event and
9 ongoing event. Suppose the sniper says, I've shot you
10 now, and I'm going to shoot three other students,
11 good-bye. That's a past event.

12 MR. VAN HOEK: But if the statement is made
13 to the police that a sniper has said he's -- he is on
14 the verge of shooting other people, because he just shot
15 someone, I would say that's certainly a declaration of
16 an emergency and certainly would be non-testimonial
17 under the -- under the test of Davis.

18 JUSTICE BREYER: Is there any -- I'll try
19 to -- I think you're just -- you don't like my -- where
20 I'm coming from, and so you might not have an answer to
21 this.

22 But -- but in my mind, I see a line, and
23 that line is dividing what I think of as the
24 Confrontation Clause, Sir Walter Raleigh situation,
25 which I have in my mind as people going into a room and

1 saying, "now write out your testimony," and they write
2 it out in the form of an affidavit, or they send in a
3 letter, and they say "bye," and then they walk next door
4 to the trial and introduce it. I mean, that's Walter
5 Raleigh, in my mind.

6 And then on the other side of the line is an
7 evidentiary rules that are basically in State cases run
8 by the State. And they sometimes let hearsay in and
9 they sometimes don't, and they make reliability et
10 cetera judgments in developing their -- their decision
11 as to how hearsay exceptions will work. Okay?

12 Now why don't I like emergency to draw that?
13 The reason I don't like the word emergency is I think
14 police do lots of things other than handle emergency and
15 develop testimony.

16 There is a range of things that you would
17 describe as investigating the circumstance. There is no
18 danger. There have been a string of robberies. They go
19 around and ask the grocery store people and everything
20 what happened. Now I don't know why we should keep out
21 evidence that say, is given in that situation by a
22 confederate. It turns out he was the assistant -- why?

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

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

4 JUSTICE SCALIA: Do it.

5 (Laughter.)

6 MR. VAN HOEK: I -- there is nothing --
7 there is nothing but the emergency rule. I think that
8 when -- hen the police are investigating, a reported
9 crime and getting statements from witnesses, whether the
10 victim or another witness --

11 JUSTICE BREYER: They're not. They are just
12 asking -- all right. Yes. Go ahead.

13 MR. VAN HOEK: Well they are investigating.
14 They are seeking information in which they will do their
15 job, which is to go try to arrest someone and see what
16 the situation is. And they are getting narratives of
17 past events from witnesses. And they're asking on it.
18 And nothing about this rule prevents them from doing
19 that.

20 But the admissibility -- for them to be able
21 to come into court, and they alone to come into court
22 and say this is what this witness told me and this is
23 what this witness told me and this is what this witness
24 told me -- and by the way, defense counsel, those
25 witnesses are not going to be here today, and you are

1 not going to be able to ask them what they meant by that
2 or whether they were telling the truth.

3 No. Mr. Bryant at this trial was never able
4 to question Mr. Covington.

5 JUSTICE BREYER: Yes, just -- but in the
6 past that situation you are describing arose only where
7 there was a hearsay exception. I would imagine most
8 likely it would be the case of a confederate, someone
9 who was part of the conspiracy. So if I think if that
10 is going to be the case, it probably will be admissible
11 where this has bite.

12 MR. VAN HOEK: Well --

13 JUSTICE BREYER: And there be some others,
14 excited utterances may be another. Dying declarations
15 are probably few and far between. Baptismal
16 certificates?

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

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

25 MR. VAN HOEK: I don't believe --

1 JUSTICE BREYER: Confederates is the one I
2 come back to.

3 MR. VAN HOEK: Those examples you just gave,
4 are not statements made during police questioning. If
5 we're talking about --

6 JUSTICE BREYER: Okay, okay. I forgot.

7 MR. VAN HOEK: What -- the difference that
8 made in Davis is that the -- the definition of
9 testimonial is not across the board.

10 JUSTICE SCALIA: I guess it depends on what
11 you mean, by in the past, as Justice Breyer put it.
12 Undoubtedly under the regime of United
13 States v. Reynolds which was what, 25 years old --
14 when --

15 MR. VAN HOEK: Roberts.

16 JUSTICE SCALIA: Roberts, I'm sorry.

17 MR. VAN HOEK: Roberts.

18 JUSTICE SCALIA: Roberts. Reynolds was the
19 Mormon case -- which was about 25 years old or so when
20 Crawford was decided, yes, hearsay was your protection,
21 and that was it. But if by -- what you had mean is in
22 the past, Crawford examined the past and its conclusion
23 as to what the past said is quite different from what
24 Justice Breyer now says, although he joined Crawford.

25 MR. VAN HOEK: Yes. As you said, in

1 Crawford this Court looked at that and though the
2 protections of the hearsay rule, and the focus under the
3 Roberts standard of whether a statement fell within a
4 firmly established hearsay rule, was not sufficient
5 under the Constitution, under the Confrontation Clause,
6 to -- to alleviate the fact that there -- there is no
7 cross-examination.

8 JUSTICE BREYER: Many -- I mean, like many
9 cases there is language that can take us far afield from
10 the subject matter before us. And I will admit that I
11 did not foresee the scope of Crawford. So I'm really
12 asking about that scope, and in particular, whether
13 looking to the past or to reason, or to whatever you
14 want, there is a good reason for keeping out the
15 testimony of say a coconfederate, a coconspirator --
16 where it was elicited, not with intent to introduce it
17 into the courtroom, but it was elicited in the course of
18 an ordinary investigation of a crime.

19 MR. VAN HOEK: Well, I'd have to go back to
20 my answer that the Confrontation Clause is the primary
21 law of the country, not State hearsay objection rules.
22 Many of the examples -- the coconspirator -- the
23 coconspirator exception is not going to be applicable in
24 many cases because those statements aren't made to
25 police officers, they are made to coconspirators in the

1 course of a conspiracy. That is the foundational
2 requirement.

3 It is not going to eliminate hearsay rules.
4 Statements made to private citizens; statements made in
5 a lot of different circumstances are still going to be
6 evaluated solely under hearsay rules, because they are
7 not testimonial, because they are not the product of
8 police -- police questioning.

9 JUSTICE ALITO: Well, I'm still trying to
10 understand your conception of the scope of the ongoing
11 emergency doctrine. Would it be fair to say that your
12 idea is that the police have to have specific evidence
13 that there is an immediate threat of physical violence
14 that they need to respond to, in order for the ongoing
15 emergency doctrine to apply?

16 MR. VAN HOEK: Yes. Yes. They have to.

17 JUSTICE ALITO: And in a case of doubt they
18 can't do it. So if they don't know whether there is an
19 immediate threat or not an immediate threat then that
20 doesn't fall within that exception; that's your idea?

21 MR. VAN HOEK: My position is that where the
22 witness has not provided any information to the police
23 indicating that there is an immediate threat, either
24 volunteered to the police or in response to questions
25 from the police, saying is there a threat? Where -- in

1 this case, no question is asked --

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

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

5 JUSTICE SCALIA: They can always ask the
6 questions. The only issue here is not whether they can
7 ask the questions, but whether after they ask them the
8 answers can be introduced at trial.

9 MR. VAN HOEK: Yes, and if the answers, no
10 matter what questions they asked, if the answers all are
11 a narrative of past events, then that qualifies as
12 testimonial because it is the -- the equivalent.

13 JUSTICE ALITO: I thought you just said that
14 wasn't the test, past versus present. Didn't you say
15 that about 10 minutes ago, it's not the difference
16 between something that is taking place and something
17 that has taken place?

18 MR. VAN HOEK: No. No. I think my answer
19 was that -- that if the witness is declaring an
20 emergency and telling the police that there is --

21 JUSTICE ALITO: The witness has to say there
22 is an emergency?

23 MR. VAN HOEK: Not in those words but -- but
24 in comparison to what -- Mrs. Davis said, which is that
25 he's beating me up.

1 JUSTICE ALITO: There is a report of
2 shooting at a school, and the police go and they find
3 two students lying on the ground. One is dead and the
4 other is severely wounded and they ask the one who is
5 wounded did it. "It's John Jones." Now does that -- is
6 that an ongoing emergency?

7 MR. VAN HOEK: No.

8 JUSTICE ALITO: No. Why is it not an
9 ongoing emergency? What would be an ongoing emergency?

10 MR. VAN HOEK: Well, it would be -- it would
11 be -- a statement from the -- from the witness at that
12 point of the police officer asking him, is John Jones
13 here? Is he threatening you? Do you know where he is
14 right now? Do you know what he is intending to do?

15 And the answers are "yes, he has a gun, he's
16 right over there. He's going to shoot someone else. He
17 said he was going to shoot someone else." That's
18 different.

19 JUSTICE ALITO: That is a very specific
20 information.

21 MR. VAN HOEK: Because the -- or the
22 Petitioner's position here is that the situation itself,
23 standing alone --

24 JUSTICE ALITO: What if there are three
25 students who have been shot, four students who have been

1 shot, but nobody says, well, I think he's still in the
2 building, he may have an interest in shooting some more
3 students?

4 MR. VAN HOEK: Well, certainly if the police
5 have come on the scene and multiple students have been
6 shot. You would think that the primary purpose, if the
7 primary purpose, if you take that as a test. That their
8 primary purpose of questioning the witness is to
9 determine whether there is an emergency, they are going
10 to ask those questions.

11 JUSTICE SCALIA: Would they ask his name?
12 God, it's really important for us to know, four students
13 on the ground. What's the name of the guy that did
14 this? That's not the emergency. They would say where
15 is he.

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

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

1 that prevents the police.

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

5 MR. VAN HOEK: I think there is an ongoing
6 emergency that a statement that is non-testimonial
7 relating to an ongoing emergency, when there is some
8 indication from the statement made by the witness that
9 such -- that there is some immediacy.

10 JUSTICE ALITO: You made by the Declarant.
11 It can't be inferred from the circumstances.

12 MR. VAN HOEK: No, I don't think just from
13 the circumstances.

14 CHIEF JUSTICE ROBERTS: Oh, sure it can. If
15 he says the principal did it. It's 10:00 in the
16 morning, you assume the principal is at the school and
17 he says the principal did it. You can infer from the
18 circumstances that he is referring to an ongoing
19 emergency.

20 MR. VAN HOEK: I don't agree. I don't
21 agree. If that's the case, any report, as
22 Justice Scalia said previously, any report of a past
23 crime certainly raises the potential that a subsequent
24 crime will occur. If that's the case --

25 CHIEF JUSTICE ROBERTS: It's quite different

1 from saying this happened to some guy driving by or
2 something like that. If it says the principal did it,
3 it's at 10:00, it's in the school, that suggests to me
4 more, not that the dying student or the wounded student
5 wanted to make sure that the principal was convicted,
6 but there is an emergency, something is happening.

7 MR. VAN HOEK: Well, again, I think that if
8 all it is that the principal shot someone before, that
9 basically is --

10 JUSTICE SOTOMAYOR: You don't think there is
11 a danger implicated by coming onto the lawn of a school
12 and a student is there and says the principal shot me
13 inside. You don't think that that suggests an ongoing
14 emergency? That the principal is still inside with a
15 gun?

16 MR. VAN HOEK: Well, if they ask those
17 questions and the principal is still inside and there is
18 an indication.

19 CHIEF JUSTICE ROBERTS: Oh, no, no. You
20 don't want them to have to go through, you know, a whole
21 list of questions while the students there dying and the
22 principal is inside the building shooting people?

23 JUSTICE SOTOMAYOR: Did he shoot you because
24 he had a grudge against you or did he just shoot you
25 blindly and he says he shot me?

1 MR. VAN HOEK: I'm not taking the position
2 that they have to go through a whole list of questions
3 before they can do anything. If you go to a situation
4 and a student says the principal shot someone, certainly
5 nothing about the Davis rule stops them from immediately
6 running into the school and determining if there is a
7 situation there.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Ms. Palmer, you have two minutes remaining.

10 ORAL ARGUMENT OF LORI B. PALMER
11 ON BEHALF OF THE PETITIONER

12 MS. PALMER: I would just like to reiterate
13 that the underlying principle as this Court has said
14 repeatedly in Crawford and in Davis is formality, and
15 that's what the purpose of any inquiry should be in
16 looking at the scene whether there is an emergency or
17 not or Declarant's view or not, it all comes down to
18 formality akin to a magisterial examination. And I
19 would also.

20 JUSTICE SOTOMAYOR: Let's go to formality.
21 It can't be that you arrive at a scene of a crime and
22 everything a victim tells you is admissible. There has
23 to be some emergency. That's what we have said.

24 MS. PALMER: Right.

25 JUSTICE SOTOMAYOR: Correct? So the issue

1 here is how do you define that dividing line between
2 emergency and non when the police officers are just
3 asking questions that by their nature are always going
4 to be testimonial, because they are going to use or try
5 to use whatever is said later. So in discerning the
6 primary purpose, I think your adversary is saying, you
7 can't go by what the police officer are asking, because
8 they are going to be asking dual motive always. You
9 have to look to what the Declarant tells you. And is he
10 or she telling you something that suggests an emergency?

11 MS. PALMER: Well --

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

14 MS. PALMER: Even if, even if you take that
15 view that it's the Declarant's purpose or objective view
16 that controls, I think here it's difficult to see how
17 Covington's purpose could have been to provide evidence
18 any more than the 9-1-1 call in Davis. I think he was
19 in shock from a bleeding wound. He didn't call the
20 police. They came to him. You know, this wasn't even a
21 9-1-1 call where he sought them. They came to him.
22 It's not clear who called, but it was not him. So even
23 taking it from his point of view, it is difficult to see
24 here how the purpose would have been anything other
25 than, as he said, when is EMS coming to help me.

1 JUSTICE SCALIA: I don't understand what you
2 are saying. You mean he has to intend to provide
3 evidence that he knows will be used at trial? I don't
4 think that's the test.

5 MS. PALMER: I don't agree with that.

6 JUSTICE SCALIA: He is intending to accuse
7 somebody.

8 MS. PALMER: I think here he is intending to
9 seek help because he has been mortally wounded.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

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

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