



# The Confrontation Clause After *Michigan v. Bryant* and *Bullcoming v. New Mexico*

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September 13, 2011

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

R41996

**CRS Report for Congress**

*Prepared for Members and Committees of Congress*

## Summary

The Sixth Amendment to the United States Constitution includes the guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”

Historically, the U.S. Supreme Court interpreted the Confrontation Clause as being more or less compatible with evidentiary rules governing out-of-court statements. In 1979, in *Ohio v. Roberts*, 448 U.S. 56, the Court expressed the view that evidence that fit within a hearsay exception or had analogous “particularized guarantees of trustworthiness” would also “comport with the substance” of the Confrontation Clause; hearsay rules and the Confrontation Clause were generally designed to protect similar values and stemmed from the same roots.

However, in a landmark 2004 decision, *Crawford v. Washington*, 541 U.S. 36, the Court overruled *Roberts*. The *Crawford* decision introduced a new standard for Confrontation Clause analysis: testimonial versus nontestimonial statements. The Court concluded that the Framers of the Constitution intended that, where introduction of out-of-court testimonial evidence is at issue, the Sixth Amendment demands, at a minimum, that a witness be *both* unavailable and that the defendant had a prior opportunity for cross-examination. Testimonial evidence, though not fully defined by the Court, includes solemn declarations made for the purpose of establishing or proving some fact in a context that the declarant would reasonably expect to be used prosecutorially. When a court determines that an out-of-court statement is “testimonial,” it may not be admitted into evidence under *any* traditional hearsay exceptions if the declarant is unavailable to testify, unless the defendant had a prior opportunity to cross-examine.

In the U.S. Supreme Court’s 2010-2011 term, two cases were handed down which are significant post-*Crawford* interpretations of the Clause. One case, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), held that admitting into evidence a dying man’s statements to police officers about his assailant did not violate the Confrontation Clause—not through the “dying declaration” exception to hearsay, but because they were made to assist law enforcement officers in an “ongoing emergency” and were therefore “nontestimonial.” The other, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), addressed the prosecution’s use of forensic laboratory reports. It concluded that the Confrontation Clause requires the laboratory analyst who performed the test to appear at trial and confront the defendant in person.

This report examines these decisions in the context of the Court’s relatively new Confrontation Clause jurisprudence. It considers their implications for admissibility of evidence in criminal prosecutions.

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## Background

The Sixth Amendment to the United States Constitution includes fundamental procedural protections for criminal defendants, among them the guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”<sup>1</sup> Along with the Due Process Clause of the Fifth Amendment, the Fourteenth Amendment, and other protections, it comprises the constitutional foundation for fair trials. Complex and oft times technical requirements for conducting a trial—civil or criminal—are further embodied in numerous laws governing trial procedure. The federal courts operate in conformance with the federal rules of civil or criminal procedure,<sup>2</sup> and the federal rules of evidence.<sup>3</sup> State courts have comparable procedural strictures.

Simply put, the Confrontation Clause ensures that a defendant has the right to challenge, generally through cross-examination, the testimony of his accusers. The judge and jury’s ability to assess the demeanor and credibility of a witness is an essential element of a criminal defense. In practice, however, evidence—both incriminating and exculpatory—is not delivered solely through the testimony of live witnesses at trial. In addition to witness testimony, rules of evidence govern the admissibility at trial of innumerable out-of-court statements, documents, records, and objects.

Not all evidence is deemed admissible. Among the more well-known categories of common but *inadmissible* evidence is “hearsay.” Hearsay evidence is defined as:

[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.<sup>4</sup>

Hence, a prior out-of-court statement made by someone other than the witness actually testifying, that is, the declarant, which is offered in evidence to prove the matter asserted therein is generally inadmissible.<sup>5</sup>

There are, however, many exceptions to the hearsay rule embodied in the Federal Rules of Evidence and those of the states as well. The exceptions, like the rule itself, derive from the common law and have historically been judged as being sufficiently trustworthy to permit their admission into evidence.<sup>6</sup> One well-known exception to the hearsay rule is a “dying declaration.”<sup>7</sup>

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<sup>1</sup> U.S. Const. amend. VI provides that “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” Sixth Amendment protections apply to state criminal prosecutions. *Pointer v. Texas*, 380 U.S. 400 (1965).

<sup>2</sup> FED. R. CRIM. P.

<sup>3</sup> FED. R. EVID.

<sup>4</sup> FED. R. EVID. 801(c).

<sup>5</sup> For example, if a witness at trial testifies “Charley said that the blue Buick ran the red light,” Charley’s statement would be hearsay, and thus inadmissible, if offered to prove that the blue Buick ran the red light.

<sup>6</sup> See, e.g., FED. R. EVID. 803, “Hearsay Exceptions; Availability of Declarant Immaterial” and 804 “Hearsay Exceptions; Declarant Unavailable.”

<sup>7</sup> A dying declaration exception is codified in FED. R. EVID. 804(b)(2) as a “Statement under belief of impending death” (continued...)

For example, shortly before dying, a homicide victim might tell someone who shot him. The now-deceased victim clearly cannot stand for direct or cross-examination. Accordingly, if the person who heard the statement testifies at trial about the victim's identification of the killer, it would be deemed hearsay. But it can be judged admissible if it comports with the "dying declaration" exception to the hearsay rule.

Historically, the U.S. Supreme Court interpreted the Confrontation Clause as being more or less compatible with evidentiary rules governing out-of-court statements. In 1979, in *Ohio v. Roberts*,<sup>8</sup> the Court expressed the view that evidence that fit within a hearsay exception or had analogous "particularized guarantees of trustworthiness" would also "comport with the substance" of the Confrontation Clause; hearsay rules and the Confrontation Clause were generally designed to protect similar values and stemmed from the same roots.<sup>9</sup>

However, in a landmark 2004 decision, *Crawford v. Washington*,<sup>10</sup> the Court overruled *Roberts*. The *Crawford* decision introduced a new standard for Confrontation Clause analysis: testimonial versus nontestimonial statements. In the U.S. Supreme Court's 2010-2011 term, two cases were handed down which are significant post-*Crawford* interpretations of the Clause.

One case, *Michigan v. Bryant*,<sup>11</sup> held that admitting into evidence a dying man's statements to police officers about his assailant did not violate the Confrontation Clause—not through the "dying declaration" exception, but because they were made to assist law enforcement officers in an "ongoing emergency" and were therefore "nontestimonial." The other, *Bullcoming v. New Mexico*,<sup>12</sup> addressed the prosecution's use of forensic laboratory reports. It concluded that the Confrontation Clause requires the laboratory analyst who performed the test to appear at trial and confront the defendant in person.

This report examines these decisions in the context of the Court's relatively new Confrontation Clause jurisprudence. It considers their implications for admissibility of evidence in criminal prosecutions.

## ***Crawford v. Washington*:<sup>13</sup> Testimonial versus Nontestimonial Evidence**

Defendant Crawford was tried and convicted in a Washington State court for stabbing a man who allegedly tried to rape his wife. During police questioning, the wife stated that the victim was

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(...continued)

which, in a prosecution for homicide or in a civil action or proceeding, is "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."

<sup>8</sup> 448 U.S. 56 (1979)(holding that admission at defendant's prosecution of testimony of unavailable witness given at defendant's preliminary hearing under questioning of defense counsel did not violate Sixth Amendment's Confrontation Clause).

<sup>9</sup> *Id.* at 66.

<sup>10</sup> 541 U.S. 36 (2004).

<sup>11</sup> 131 S. Ct. 1143 (2011).

<sup>12</sup> 131 S. Ct. 2705 (2011).

<sup>13</sup> 541 U.S. 36 (2004).

unarmed at the time of the attack. That statement was recorded by the interrogating police officer. The defendant, charged with assault and attempted murder, alleged that he had acted in self-defense. Because the defendant's wife invoked her marital privilege not to testify against her husband, the prosecution introduced the recording of the wife's statement. The defendant's Sixth Amendment objection was overruled.

The Washington State Supreme Court upheld the conviction,<sup>14</sup> which the United States Supreme Court reversed and remanded. In an opinion by Justice Scalia, the Court held that playing the wife's tape-recorded statement at the defendant's trial violated his Sixth Amendment right to be confronted by the witnesses against him.<sup>15</sup> Because the defendant's wife did not take the witness stand, her recorded statement was inadmissible.

After an exhaustive survey of the right of confrontation from Roman times through the 17<sup>th</sup>-century English common law and continental civil law, the Court concluded that the Framers of the Constitution intended that, where out-of-court testimonial evidence is at issue, the Sixth Amendment demands, at a minimum, that a witness be *both* unavailable at trial and that the defendant had a prior opportunity for cross-examination. Therefore, the state's admission of the wife's prior testimonial statement against the accused, where the defendant had no opportunity to cross-examine her, constituted a violation of the Sixth Amendment.

The Court devoted considerable discussion to the 1603 trial of Sir Walter Raleigh for treason, where accusations made by Lord Cobham before the Privy Council and in a letter were read to the jury hearing Raleigh's case. Raleigh was denied the right to question Cobham. Raleigh was subsequently convicted and sentenced to death. The widely perceived injustice of Sir Walter Raleigh's case led to a series of statutory and judicial reforms regarding a right to confrontation under English law. Many of these were adopted into late 18<sup>th</sup>-century and early 19<sup>th</sup>-century American jurisprudence.

The Court concluded that the Framers viewed "testimonial" evidence as including solemn declarations made for the purpose of establishing or proving some fact in a context that the declarant would reasonably expect to be used prosecutorially. The Court gave examples of "testimonial" statements, including "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."<sup>16</sup> Testimonial statements include those taken by police officers in the course of interrogations, because, in the Court's view "[p]olice interrogations bear a striking resemblance to examination by justices of the peace in England."<sup>17</sup>

Therefore, the Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."<sup>18</sup> Since the common law in 1791 conditioned admissibility of an absent witness's examination on

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<sup>14</sup> State v. Crawford, 54 P.3d 656 (Wash. 2002).

<sup>15</sup> Justice Scalia's majority opinion was joined by Justices Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Chief Justice Rehnquist authored a concurring opinion joined by Justice O'Connor. Hence, a unanimous Court agreed on the ultimate outcome.

<sup>16</sup> 541 U.S. at 51-52 (citation omitted.)

<sup>17</sup> *Id.* at 52.

<sup>18</sup> *Id.* at 54.

unavailability and a prior opportunity to cross-examine, the Sixth Amendment incorporates those limitations. Any contrary common law exceptions to rules of exclusion for hearsay evidence did not apply to *testimonial* statements against the accused in a *criminal* case.<sup>19</sup>

Despite the historical antecedents for the Court's understanding of testimonial evidence and the Confrontation Clause, it nevertheless had to address the rationale of *Ohio v. Roberts*,<sup>20</sup> which held that the confrontation right did *not* bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability,'" a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."<sup>21</sup>

The Court found that the balancing test employed by the courts to determine whether hearsay evidence satisfied "indicia of reliability" did not conform with the intent of the Framers with respect to the Confrontation Clause. It overruled the *Roberts* standard, replacing it with the standard that "testimonial" evidence may *not* be admitted absent a right of cross examination:

Where testimonial statements are involved, we do not think the Framers meant to leave the *Sixth Amendment's* protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. *To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.*<sup>22</sup>

The Court declined to spell out a comprehensive definition of "testimonial" evidence, leaving it for another day.<sup>23</sup> It applies, at a minimum, to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations.

Chief Justice Rehnquist wrote a concurring opinion, which Justice O'Connor joined, agreeing with the decision to overturn the Washington Supreme Court's holding, but taking issue with the majority's decision to overrule *Roberts*. The majority's distinction between testimonial and nontestimonial statements "contrary to its claim, is no better rooted in history than our current doctrine [under *Ohio v. Roberts*]."<sup>24</sup> Chief Justice Rehnquist's interpretation of historical precedent and English common law indicated a more flexible and evolving jurisprudence related to the admissibility of evidence, in general, and the treatment of "testimonial" evidence in particular:

It is one thing to trace the right of confrontation back to the Roman Empire; it is quite another to conclude that such a right absolutely excludes a large category of evidence. It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to

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<sup>19</sup> *Id.* at 56. The Court observes, in footnote 6, that the one exception involves dying declarations, citing *Mattox v. United States*, 156 U.S. 237 (1895).

<sup>20</sup> 448 U.S. 56 (1979).

<sup>21</sup> *Id.* at 66.

<sup>22</sup> *Crawford, supra*, 541 U.S. 61 (emphasis added).

<sup>23</sup> *Id.* at 68.

<sup>24</sup> *Id.* at 69.

the admissibility of testimonial statements when the law during their own time was not fully settled.<sup>25</sup>

The concurring opinion expressed concern about the quandary for law enforcement to determine what exactly is “testimonial” evidence—that is, what evidence will be deemed inadmissible under a hearsay exception. It challenged the assertion that the testimonial versus nontestimonial standard will be more easily applied than the pre-existing standards which considered indicia of reliability when applying rules of evidence.<sup>26</sup>

## The Post-Crawford Cases

In 2006 in *Davis v. Washington*,<sup>27</sup> the Court attempted to clarify the distinction between testimonial and nontestimonial statements for right of confrontation purposes. *Davis* consolidated two separate state court cases that involved the introduction into evidence of out-of-court statements. The first, *Davis*, involved a recording of a 911 call in which a victim of a domestic assault named her attacker while the assault was ongoing. The victim did not testify at the trial. In the second case, *Hammon*, the prosecution introduced an affidavit completed by a victim of domestic assault, written in response to police questioning in the victim’s home after the police had separated her from her attacker. Again, the victim did not testify. The Court held that the affidavit in the second case was “testimonial” because it recounted the events of a past criminal act, just as a witness would do when testifying at trial.<sup>28</sup> However, the 911 recording in the first case was not “testimonial” because its purpose was to seek help during an emergency, and no witness “goes into a courtroom to proclaim an emergency and seek help.”<sup>29</sup>

The *Davis* opinion builds upon the rule in *Crawford*, that is, that the Confrontation Clause bars the admission at a criminal trial of testimonial statements of a witness who does not appear at trial, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. It analyzed the 911 call and the affidavit and concluded that:

- For purposes of the Confrontation Clause, 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*; and *testimonial* when the circumstances objectively indicate that (i) there is no such ongoing emergency, and (ii) the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution;<sup>30</sup> and
- The Confrontation Clause applies only to testimonial hearsay, where “testimony” typically means a solemn declaration or affirmation made for the purpose of

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<sup>25</sup> *Id.* at 73.

<sup>26</sup> *Id.* at 75-76, stating that “[t]he Court grandly declares that ‘[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial[.]’” ... But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of ‘testimony’ the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.” (citations omitted.)

<sup>27</sup> *Davis v. Washington and Hammon v. Indiana*, 547 U.S. 813 (2006).

<sup>28</sup> *Id.* at 829-30.

<sup>29</sup> *Id.* at 828.

<sup>30</sup> *Id.* at 822.

establishing or proving some fact; but its scope is not limited to testimonial statements of the most formal sort, such as sworn testimony in prior judicial proceedings or formal depositions under oath.<sup>31</sup>

## **Recent Cases: *Michigan v. Bryant* and *Bullcoming v. New Mexico***

In the 2010-2011 term, the Court continued to address the requirements of the Confrontation Clause, fulfilling Chief Justice Rehnquist's prediction in *Crawford* that the testimonial versus nontestimonial standard would not easily be applied.

In parsing out the components of the *Crawford* standard, the Justices identified and gave different weight to many factors:

- What is the primary purpose of the police interrogation—that is, to gather incriminating evidence or address an ongoing emergency?
- What is a police “interrogation”—is it a call to 911, or any incriminating statement made to someone in authority?
- What is the nature of testimonial evidence—is it a solemn and formal statement by a witness that is the functional equivalent of “bearing testimony” against a defendant, or can it be a less formal utterance?

*Crawford* clearly established that out-of-court testimonial hearsay is inadmissible in a criminal prosecution under the mandates of the Confrontation Clause, regardless of whether it would otherwise be admissible under federal or state rules of evidence. But establishing a working standard to determine whether evidence is testimonial for Confrontation Clause purposes may prove to be a lengthy and litigation intensive process.

The cases from the 2010-2011 term do not answer these questions in order to provide a clear standard. They deal with two discrete issues: the admissibility of a statement made to the police during an “ongoing emergency” and the use of forensic analysis reports in criminal prosecutions. They are discussed below.

### ***Michigan v. Bryant*:<sup>32</sup> Out-of-Court Statements Made to the Police**

The Court's decision in *Bryant* is a stepping-stone in the developing rule of testimonial versus nontestimonial hearsay and the admissibility of out-of-court statements in a criminal prosecution. *Bryant* considered a statement made by a dying man to the police identifying his killer. The Court concluded that the decedent's statement was *not* testimonial and therefore not inadmissible under the Confrontation Clause, but its reasoning is not easily explained.

On April 29, 2001, police responded to a call indicating that a man had been shot. They arrived at a gas station and found the victim, Anthony Covington, lying next to his car in the parking lot. Covington was in great pain from a gunshot wound. Police officers asked Covington who had shot him, what had happened, where the shooting had taken place, and to describe the shooter. Covington answered that the defendant, Richard Bryant, had shot him through the back door of

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<sup>31</sup> *Id.* at 826.

<sup>32</sup> 131 S. Ct. 1143 (2011).

Bryant's house.<sup>33</sup> The police interrogation ended when emergency medical technicians arrived and took Covington to a hospital, where he later died.

At Bryant's trial, the police officers testified about Covington's out-of-court statements. Those statements were admitted via a state hearsay exception for "excited utterances."<sup>34</sup> Bryant was convicted of second-degree murder, and appealed on the basis that his Sixth Amendment right of confrontation had been violated. Although the state court of appeals initially affirmed Bryant's conviction,<sup>35</sup> the Michigan Supreme Court reversed for rehearing in consideration of *Davis v. Washington*.<sup>36</sup> The U.S. Supreme Court granted *certiorari* to determine whether Covington's statements should have been excluded under the Confrontation Clause.<sup>37</sup>

In a six to two opinion, the Court held that the use of Covington's statements did not violate the Confrontation Clause. Justice Sotomayor, writing for the Court, reasoned that the statements were not "testimonial" because they were made to assist the police in an "ongoing emergency."<sup>38</sup> The Court drew upon its previous holding in *Davis* that whether a statement is "testimonial" or not depends on the "primary purpose" of the interrogation that produced the statement.<sup>39</sup>

### **Excited Utterances versus Dying Declarations**

The Court's analysis, and those of the Michigan state courts, considered Covington's statement as an exception to hearsay by categorizing it as an "excited utterance" under Michigan rules of evidence, rather than a "dying declaration." The facts of the case suggest that Covington's statements could typically be considered a dying declaration as well. In a footnote, the Court explained that the Supreme Court of Michigan did not consider whether the victim's statement would have been admissible as a "dying declaration" because the question was not properly before it.<sup>40</sup> The distinction between these hearsay exceptions may become significant for Confrontation Clause purposes.

The exception to hearsay for a dying declaration derives from common law. Obviously, a decedent is not available to testify at trial, and where a defendant may face a charge of homicide, the stakes are high. Because the *Bryant* decision is framed as addressing the admissibility of an excited utterance in the course of an ongoing emergency, it leaves open the question of the constitutionality of admission of dying declarations, including whether they may be considered testimonial or nontestimonial.

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<sup>33</sup> *Id.* at 1150.

<sup>34</sup> An excited utterance is a statement made about a startling event while the declarant is still startled and is thus more likely to speak truthfully. *See generally* FED. R. EVID. 803(2).

<sup>35</sup> *People v. Bryant*, No. 247039, 2004 WL 1882661 (Mich. Ct. App. 2004).

<sup>36</sup> *People v. Bryant*, 768 N.W.2d 65 (Mich. 2009).

<sup>37</sup> *Michigan v. Bryant*, No. 09-150, 130 S. Ct. 1685 (Mar. 1, 2010).

<sup>38</sup> 113 S. Ct. at 1167. The Court remanded the case to the Michigan Supreme Court to determine whether the statement is otherwise permitted under state hearsay rules. *Id.*

<sup>39</sup> *Id.* at 1154.

<sup>40</sup> 131 S. Ct. at 1151, footnote 1. The prosecution established the factual foundation for admission of the statement as an excited utterance, and the trial court admitted it on that basis. Because the state did not preserve its argument with regard to dying declarations, the Court determined that "we similarly need not decide the question here." *Id.*

In *dicta*, the Justices expressed different views. The majority opinion, in a footnote, observed that *Crawford* “suggested that dying declarations, even if testimonial, might be admissible as a historical exception to the *Confrontation Clause*.”<sup>41</sup> Justice Ginsburg’s dissenting opinion in *Bryant* explicitly reserved the right to decide the question whether dying declarations can survive the constraints of the Confrontation Clause in a future case.<sup>42</sup> As discussed below, the factors employed by the Court to determine the primary purpose for Covington’s statements do not appear to be dispositive of future questions that may concern dying declarations.

## Primary Purpose and Ongoing Emergencies

The majority opinion concluded that the statements and actions of decedent Covington and the police objectively demonstrate that the police questioning was intended to assist them to meet an ongoing emergency.

The analysis opens with a recap of *Davis*, noting that it did not attempt to classify all conceivable statements in response to police interrogations as either testimonial or nontestimonial.<sup>43</sup> It reminds readers that the purpose of the Confrontation Clause was to prevent the abuses exemplified at the notorious treason trial of Sir Walter Raleigh. It acknowledges that 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, and that, in those cases, standard rules of hearsay, which emphasize the likely reliability of evidence, may be relevant.<sup>44</sup> But it does not elaborate on these possibilities because the Court determined that Covington’s questioning occurred in the course of an ongoing emergency.

Although the Court cites numerous factors to support its conclusion that there was an ongoing emergency, no individual factor appears controlling. It explains, however, that the “existence of an ‘ongoing emergency’ at the time of an encounter between an individual and the police is among the most important circumstances informing the ‘primary purpose’ of an interrogation.”<sup>45</sup>

In *Bryant*, the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown. Unlike the domestic violence involved in *Hammon, supra*, the scope of potential threat to the police and the public arising from a gunman at large made the “primary purpose” of the police questioning a matter of public safety, rather than an attempt to collect incriminating evidence. Domestic violence cases, in the Court’s view, often have a narrower zone of potential victims than cases involving threats to public safety.<sup>46</sup>

The 911 call in *Davis* was deemed nontestimonial largely because the victim “was speaking about events as they were actually happening during an ongoing emergency.” Likewise, the fact that the gunman remained at large in *Bryant* led the Court to conclude that the police questioning was not intended to prove past events relevant to future prosecution (that is, the shooting itself), but to

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<sup>41</sup> *Id.* at footnote 1 (emphasis in original).

<sup>42</sup> *Id.* at 1177.

<sup>43</sup> *Id.* at 1155.

<sup>44</sup> “In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the *Confrontation Clause*.” *Id.* at 1155 (emphasis in original; footnote omitted).

<sup>45</sup> *Id.* at 1157.

<sup>46</sup> *Id.* at 1158.

assure the gunman posed no further danger. In both cases, the Court concluded that the parties were focused on ending the emergency.<sup>47</sup>

The Court listed additional faulty assumptions made by the Michigan Supreme Court in its determination that Covington's statements to the police were testimonial. Namely, that statements made to the police *after* an assault stops and the defendant leaves the scene signal the end of an emergency;<sup>48</sup> that the medical condition of the declarant is irrelevant to determining existence of "ongoing emergency";<sup>49</sup> and, that the existence (or not) of an emergency will be dispositive of the testimonial or nontestimonial nature of evidence, or when the transition from one to the other occurs.<sup>50</sup> The Court emphasized that in addition to circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.<sup>51</sup> In short, a court's determination in future cases will be highly context-specific.

In a concurring opinion, Justice Thomas expressed his view that Covington's statements were nontestimonial because they lacked sufficient "formality and solemnity." Rather than reconstructing the primary purpose of the participants, Justice Thomas would use the historical practices employed under the English bail and committal statutes passed during the reign of Queen Mary (Marial law) to inform Confrontation Clause analysis.<sup>52</sup>

A spirited dissent authored by Justice Scalia, joined by Justice Ginsburg, viewed the majority decision as distorting Confrontation Clause jurisprudence and leaving it in a "shambles."<sup>53</sup> He advocated a far narrower inquiry to determine the primary purpose of the interrogation—the intent of the declarant. Employing this standard leads to an "absurdly easy" finding that Covington's statement was testimonial.<sup>54</sup> Covington's description of the gunman resembled common testimony by a witness at trial; it "bore accusation" notwithstanding that Covington was dead and could not testify at trial. Justice Scalia did not categorize Covington's statement as a "dying declaration," discussed above, but he described it as a testimonial accusation, assuming that, from Covington's perspective, his statements had little value except to ensure the arrest and eventual prosecution of Richard Bryant.<sup>55</sup>

In a detailed discussion of the events at the gas station, Justice Scalia concluded that Covington and the police knew they had nothing further to fear from the gunman. The dissent was concerned

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<sup>47</sup> *Id.* at 1157.

<sup>48</sup> *Id.* at 1158.

<sup>49</sup> *Id.* at 1159.

<sup>50</sup> *Id.* at 1164.

<sup>51</sup> "The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause. The emergency is relevant to the 'primary purpose of the interrogation' because of the effect it has on the parties' purpose, not because of its actual existence." *Id.* at 1160, footnote 8.

<sup>52</sup> *Id.* at 1167-68. Whether the American judiciary and bar, particularly federal and state prosecutors and other law enforcement entities, are schooled in English law and procedure from the reign of Queen Mary is not considered in this report.

<sup>53</sup> *Id.* at 1168. "Instead of clarifying the law, the Court makes itself the obfuscator of last resort."

<sup>54</sup> *Id.* at 1170.

<sup>55</sup> *Id.*

that the Court's view of what constitutes an emergency is distorted and will create an expansive exception to the Confrontation Clause for violent crimes. Because almost 90% of murders involve a single victim, Justice Scalia appeared convinced that the officers viewed their encounter with Covington as an investigation, not an emergency:

A final word about the Court's active imagination. The Court invents a world where an ongoing emergency exists whenever “an armed shooter, whose motive for and location after the shooting [are] unknown, . . . mortally wound[s]” one individual “within a few blocks and [25] minutes of the location where the police” ultimately find that victim. Breathlessly, it worries that a shooter could leave the scene armed and ready to pull the trigger again. Nothing suggests the five officers in this case shared the Court's dystopian view of Detroit, where drug dealers hunt their shooting victim down and fire into a crowd of police officers to finish him off, or where spree killers shoot through a door and then roam the streets leaving a trail of bodies behind. Because almost 90 percent of murders involve a single victim, it is much more likely—indeed, I think it certain—that the officers viewed their encounter with Covington for what it was: an investigation into a past crime with no ongoing or immediate consequences.<sup>56</sup>

Discounting the majority's vision of the “faux” emergency, he believed the Court reinstated the previously rejected evidentiary standard of “reliability” from *Ohio v. Roberts*, rather than staying true to the Framers' intent as reflected in 16<sup>th</sup>- and 17<sup>th</sup>-century English treason trials.<sup>57</sup> The dissent asserted that the two standards, reliability as reflected in the rules of hearsay and evidence, and testimonial versus nontestimonial statements, cannot coexist:

Is it possible that the Court does not recognize the contradiction between its focus on reliable statements and *Crawford's* focus on testimonial ones? Does it not realize that the two cannot coexist? Or does it intend, by following today's illogical roadmap, to resurrect *Roberts* by a thousand unprincipled distinctions without ever explicitly overruling *Crawford*? After all, honestly over-ruling *Crawford* would destroy the illusion of judicial minimalism and restraint. And it would force the Court to explain how the Justices' preference comports with the meaning of the Confrontation Clause that the People adopted—or to confess that only the Justices' preference really matters.<sup>58</sup>

In summary, the *Bryant* majority held that the primary purpose of Covington's interrogation by police was to address an ongoing emergency. Consequently, the statements of the dying man were not testimonial for Confrontation Clause purposes. The Court employed a highly context-specific analysis and considered factors such as the nature of the crime, its duration, the weapon employed, the medical condition of the declarant, and the intent of the interrogators and the declarant, as significant factors.

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<sup>56</sup> *Id.* at 1172-73 (citations and footnotes omitted).

<sup>57</sup> The majority's rejoinder to the dissent's assertions about the non-existent emergency argues that the *Bryant* case is readily distinguishable from the “treasonous conspiracies to overthrow the king about which Justice Scalia's dissent is quite concerned.” *Id.* at 1164, footnote 17.

<sup>58</sup> *Id.* at 1175. Justice Scalia's dissent accuses the majority of abandoning judicial minimalism and restraint, as did Chief Justice Rehnquist's concurring opinion in *Crawford* when Justice Scalia's opinion for the Court overruled *Roberts*.

## ***Bullcoming v. New Mexico*:<sup>59</sup> Forensic Analysis Reports and the Testimony of Laboratory Analysts**

Arguably, the Court’s Confrontation Clause standard for the use of forensic laboratory reports is less complicated.

When the investigation of a crime requires laboratory testing—for example, matching a suspect’s DNA with DNA found at the crime scene, or analyzing a substance that might be an illegal drug—the results of that testing are presented at trial in a report prepared by laboratory technicians.<sup>60</sup> Since *Crawford*, the Supreme Court has twice addressed the question of whether such reports are “testimonial.” In both cases, the Court has held that because reports are testimonial, the Confrontation Clause requires the actual laboratory analyst who performed the tests to appear at trial and confront the defendant in person.

In 2009, the Supreme Court applied the Confrontation Clause to forensic analysis reports in *Melendez-Diaz v. Massachusetts*.<sup>61</sup> The defendant was charged with distribution of cocaine, and was in possession of a white powder at the time of his arrest. At trial, the results of a laboratory analysis of the white powder were presented via “certificates of analysis.” The certificates had been sworn by the analysts before a notary public, and “reported the weight of the seized bags and stated that the bags ‘have been examined with the following results: the substance was found to contain: Cocaine.’”<sup>62</sup> The Supreme Court held that the certificates were “quite plainly affidavits,” and *Crawford* had specifically said that affidavits are testimonial.<sup>63</sup> The Court rejected arguments from four dissenting Justices that this holding would needlessly overburden state crime labs by requiring technicians to testify in person at trial.

In *Bullcoming v. New Mexico*, the Court affirmed its *Melendez-Diaz* rationale and clarified its position with respect to the defendant’s right to confront those who prepare a forensic laboratory report. In 2005, defendant Donald Bullcoming rear-ended a pickup truck. The police administered field sobriety tests, which Bullcoming failed. Because he refused to submit to a breathalyzer test, he was taken by the police to a nearby hospital, where a sample of his blood was drawn. The sample was sent to the New Mexico state crime laboratory, known as the Department of Health, Scientific Laboratory Division (“SLD”).

At trial, the prosecution presented the results of the blood test, which showed an alcohol content of almost three times the legal limit. The test results were presented in court via a “Report of Blood Alcohol Analysis” prepared by an SLD technician named Caylor. The report contained certifications by Caylor that he had received the blood sample with its seal intact, and that the seal was broken at SLD; that he had followed the procedures set out on the back of the report; and that there had been no “circumstance or condition which might affect the integrity of the sample ... or the validity of the analysis.” Caylor himself did not appear in court, as he had been placed on unpaid leave for undisclosed reasons. The prosecution announced on the day of the trial that it

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<sup>59</sup> 131 S. Ct. 2705 (2011).

<sup>60</sup> For more background, see CRS Report R41847, *DNA Databanking: Selected Fourth Amendment Issues and Analysis* by Emily C. Barbour and CRS Report R41800, *DNA Testing in Criminal Justice: Background, Current Law, Grants, and Issues*, by Nathan James.

<sup>61</sup> 129 S. Ct. 2527 (2009).

<sup>62</sup> 129 S. Ct. at 2531.

<sup>63</sup> *Id.* at 2532.

intended to introduce the report as a “business record”<sup>64</sup> that would be explained during the testimony of an expert witness. That witness, named Razatos, worked at SLD and was an expert with respect to SLD procedures and the gas chromatograph machine that Caylor used.

Bullcoming objected that his Sixth Amendment right of confrontation had been violated. Nevertheless, the trial court admitted the report as a “business record,” and Bullcoming was convicted of an aggravated charge of driving while intoxicated. Both the intermediate appellate court and the New Mexico Supreme Court upheld the conviction. The state supreme court held that, while the report was “testimonial,” Bullcoming’s right of confrontation was not violated because Caylor was not a “witness” but a “mere scrivener” who simply transcribed the results displayed by the gas chromatograph machine.<sup>65</sup> Because Razatos “provided live, in-court testimony, and, thus, was available for cross-examination,” Bullcoming was effectively confronted at trial.<sup>66</sup> The Supreme Court granted certiorari to determine whether this method of introducing a forensic analysis report through the testimony of an unrelated expert witness satisfies the Confrontation Clause.

In an opinion by Justice Ginsburg, the Court held that Bullcoming’s Sixth Amendment right of confrontation was violated and reversed his conviction.<sup>67</sup> The Court emphasized that Razatos was not competent to testify on key issues about which Bullcoming may have wanted to cross-examine Caylor. For example, the SLD Report contained certifications by Caylor that he had received the blood sample with its seal unbroken, that he performed a particular test on the blood sample while adhering to a particular protocol, and that nothing had affected the integrity of the sample or the validity of the analysis. How could Razatos, who was not involved in the analysis of the blood sample, testify about these “human actions not revealed in raw, machine-produced data”? The Court wrote that to allow Razatos to testify about Caylor’s report because of Razatos’s expertise with SLD equipment and procedures would be like allowing a police officer to testify about the readout of a radar gun, when that officer was not the one who saw the readout, because the officer was also expert with respect to radar guns and police procedures.<sup>68</sup>

The Court again rejected arguments that this interpretation of the Confrontation Clause will burden crime labs in exchange for little payoff. The Court wrote that the Confrontation Clause specifies a particular method of protecting defendants—confrontation by their accusers—and the Court does not have the power to reject the Framers’ choice and pick another method that might work better:

More fundamentally, as this Court stressed in *Crawford*, “[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.” 541 U.S., at 54.<sup>69</sup>

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<sup>64</sup> Business records are generally admissible under Fed. R. Evid 803, 901, 902 or state law equivalents.

<sup>65</sup> 131 S. Ct. at 2713.

<sup>66</sup> *Id.*

<sup>67</sup> Justice Ginsburg’s opinion was joined in full only by Justice Scalia. Justices Sotomayor and Kagan joined the majority opinion as to all but Part IV, a relatively short section that reviews information about the operation of forensic laboratories and trial procedures in states that have already adopted laws requiring laboratory analysts to testify in court, and concludes that the negative impact of *Bullcoming* on forensic laboratories will be limited. Justice Thomas joined the majority opinion as to all but Part IV and footnote 6, which reemphasizes the “primary purpose” test for whether a statement is testimonial.

<sup>68</sup> 131 S. Ct. at 2708.

<sup>69</sup> *Id.* at 2716.

Justice Sotomayor wrote a concurring opinion concluding that Caylor’s lab report was testimonial and thus inadmissible. Unlike the majority, she reached that conclusion by applying the “primary purpose” analysis that she laid out for the Court in *Bryant*. She considered that Caylor’s lab report would be recognized by the rules of hearsay as having been prepared for use as evidence and had a high degree of formality. These factors lead to the conclusion that the “primary purpose” of the report was to create a record for trial. Therefore, the SLD report was “testimonial.”

Justice Sotomayor identified four factual circumstances that, if present, may have changed her view. She postulated that it might have come out differently (1) if the laboratory report had been prepared for some purpose other than litigation, such as providing medical treatment to Bullcoming; (2) if the person testifying had been a supervisor, reviewer, or anyone with some connection to the actual test performed by Caylor; (3) if the expert witness testified as to his own opinion about a testimonial report that was not itself entered into evidence; or (4) if the lab report entered into evidence had included only machine-generated data and no certifications about the actions of the analyst.<sup>70</sup> Because Justice Sotomayor was part of the 5 to 4 majority that comprises *Bullcoming’s* holding, these reservations could be interpreted as limiting the scope of the holding to situations where none of these four factors are present.

The majority opinion in *Bullcoming* was opposed by the same four Justices who opposed the holding in *Melendez-Diaz*.<sup>71</sup> Justice Kennedy, author of the dissent, reiterated the main objections from the dissent in *Melendez-Diaz*. The record in the case before the Court did not indicate that the certifying analyst’s role was any greater than that of anyone else in the chain of custody. He wrote that requiring forensic analysts to testify in person at trial is a “hollow formality” that burdens crime laboratories and the justice system while producing no real benefits.<sup>72</sup> The dissenters believe that persistent ambiguities create a requirement that is “not amenable to sensible applications” because it does not make clear which lab technician is the “analyst” who must appear at trial.<sup>73</sup>

The dissent also expressed fundamental concerns with possible evidentiary constraints on the courts and burdens for law enforcement that may arise from the holding and rationale of *Crawford* and its progeny. They are discussed below.

## **Implications of *Bryant* and *Bullcoming***

The holding in *Crawford v. Washington* was unanimous. Its emphasis on “testimonial” evidence in relation to the Confrontation Clause and overruling *Ohio v. Roberts* were endorsed by seven Justices. Since then, however, the Court appears to be struggling to adapt *Crawford’s* rationale to the cases before it. The two cases from the 2010-2011 term illustrate the Justices’ divergent jurisprudential philosophies and their concerns about the testimonial rule’s implications for trial procedure and the administration of justice.

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<sup>70</sup> *Id.* at 2723.

<sup>71</sup> Justices Kennedy, Breyer, and Alito, and Chief Justice Roberts.

<sup>72</sup> 131 S. Ct. at 2724.

<sup>73</sup> *Id.* at 2726.

### ***Effects on Forensic Analysts, Forensic Laboratories, and DNA Databases***

*Bullcoming*'s holding is arguably more straightforward than *Bryant*. The Confrontation Clause permits a defendant to confront the analyst involved in the preparation of forensic laboratory reports. It is a consistent extension of the holding in *Melendez-Diaz*. In both cases, the Court, in its holdings and dissenting opinions, engaged in various colloquies: will state laboratories become overwhelmed when analysts are required to appear in court? How many "analysts" in the chain of custody will be required to appear? The majority and dissenting opinions consider and disagree about the impact of *Melendez-Diaz* and whether it imposes an undue burden on the prosecution. Nevertheless, the issue is discrete. And, when the state conducts *forensic* testing, many will readily agree that it intuitively comes within the ambit of "testimonial" evidence, because it is most often collected by the state, prepared as a formal document, and introduced into evidence to support an allegation of criminal conduct.

One unresolved question about the scope of *Bullcoming* may be answered next term, when the Court hears *Williams v. Illinois*.<sup>74</sup> In *Williams*, police matched a DNA sample from a sexual assault kit, which was analyzed out-of-state, with an in-state sample taken from the defendant on an unrelated charge. At trial, Williams was convicted of aggravated criminal sexual assault, aggravated kidnapping, and robbery. At the trial, a laboratory technician testified about the tests she had performed on the defendant's DNA obtained from the unrelated charge, and presented conclusions based on the data from the out-of-state laboratory regarding the DNA semen sample from the sexual assault kit. No technician from the out-of-state laboratory testified. The Court will likely rule on whether state rules of evidence allowing an expert witness to testify about the results of DNA testing performed by nontestifying analysts, which the defendant had no opportunity to cross examine, violates the Confrontation Clause. All 50 states and the federal government have established repositories of DNA evidence samples that are collected during crime scene investigations. This evidence is analyzed and retained in the hope that unsolved "cold" cases linked to DNA evidence may one day be reopened if a match is later found with a newly identified criminal defendant. However, the longer a "cold" case remains unsolved, the greater the chance that the laboratory technician who analyzed the original DNA sample will retire, move, or become unavailable. If *Bullcoming* means that records of forensic analyses are not admissible unless the specific analyst who performed the test is available to testify, then it may limit the effectiveness of DNA databases in achieving the purpose for which they were designed, and the role they serve creating persuasive forensic evidence.

### ***Effects on Law Enforcement and Federal and State Rules of Evidence***

A more open-ended question is what the impact of *Bryant* and *Bullcoming* might imply for law enforcement practices and federal and state rules of evidence.

With respect to rules of evidence, whether "dying declarations," discussed above, will continue to be admissible is an open question. Applying the Justices' broad and imprecise criteria to determine whether a statement is testimonial seems especially difficult with respect to this hearsay exception. Will the Court, in a future decision, "grandfather" the hearsay exception into its Confrontation Clause testimonial standard because it existed under 17<sup>th</sup>- and 18<sup>th</sup>-century

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<sup>74</sup> *People v. Williams*, 939 N.E.2d 268 (Ill. 2010), cert. granted sub nom *Williams v. Illinois*, No. 10-8505, 2011 WL 2535081 (June 28, 2011).

common law?<sup>75</sup> If not, will the Court apply the “primary purpose” test to determine whether the declarant intended to “bear testimony” or make an accusation while making the statement? Will the Court rule out declarations made to the police on the scene or at a medical facility when there is no ongoing emergency? Will admissibility depend upon who the witness is—a 911 operator, a medical technician, or a physician?<sup>76</sup>

In *Bryant*, Justice Scalia asserted that a focus on reliable statements cannot coexist with a focus on testimonial ones. The four dissenters in *Bullcoming* expressed similar concerns:

Instead of freeing the Clause from reliance on hearsay doctrines, the Court has now linked the Clause with hearsay rules in their earliest, most rigid, and least refined formulations.... In cases like *Melendez-Diaz* and this one, the Court has tied the Confrontation Clause to 18th century hearsay rules unleavened by principles tending to make those rules more sensible.<sup>77</sup>

The dissent continued, predicting that the testimonial standard will foreclose enhanced modern evidentiary procedures and techniques, determined to be reliable and designed to address long-standing, difficult, sometimes intractable problems that prosecutors confront when attempting to prosecute defendants for crimes against especially vulnerable types of witnesses:

Second, the States are not just at risk of having some of their hearsay rules reviewed by this Court. They often are foreclosed now from contributing to the formulation and enactment of rules that make trials fairer and more reliable. For instance, recent state laws allowing admission of well-documented and supported reports of abuse by women whose abusers later murdered them must give way, unless that abuser murdered with the specific purpose of foreclosing the testimony.... Whether those statutes could provide sufficient indicia of reliability and other safeguards to comply with the Confrontation Clause as it should be understood is, to be sure, an open question. The point is that the States cannot now participate in the development of this difficult part of the law.<sup>78</sup>

Throughout the *Crawford* line of cases, reference is repeatedly made to domestic abuse prosecutions. Victims of domestic abuse frequently refuse to testify against their abusers; even more difficult are the traumatized child and adult victims of sexual assault. They, too, are often unable to “confront” their abusers in court. The right of confrontation often precludes a successful prosecution. But the issue, post-*Crawford*, *Davis*, *Bryant*, and *Bullcoming*, is what types of collateral evidence will continue to be viewed as nontestimonial, that is, admissible when the victim cannot or refuses to testify.

In the case of domestic abuse, *Davis* and *Hammon* provide some guidance. Pleas for help (the 911 call) constitute an ongoing emergency. But post-abuse statements are problematic. If a victim of abuse refuses to take the stand, information provided to physicians, social workers, or others is far less likely to remain admissible under the testimonial rule of the Confrontation Clause, even if it otherwise conforms to an existing exception to hearsay.<sup>79</sup>

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<sup>75</sup> See *Giles v. California*, 554 U.S. 353 (2008).

<sup>76</sup> In his dissent in *Bryant*, Justice Scalia, expounding upon his view that the testimonial status of an out-of-court statement depends upon the intent of the declarant, stated that he “remains agnostic about whether and when statements to nonstate actors are testimonial.” 131 S. Ct. at 1169, footnote 1 (citation omitted).

<sup>77</sup> *Bullcoming*, 131 S. Ct. at 2727 (citations omitted).

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

<sup>79</sup> See, e.g., Fed. R. Evid. 803(4), “Statements for purpose of medical diagnosis or treatment.”

With respect to prosecutions for sex crimes, particularly sexual abuse of children, and other types of child abuse, there is significant case law and legislation which attempts to address the widely perceived problem when children must “confront” an alleged assailant (who may be a family member or authority figure) in a courtroom setting in order for prosecutors to obtain a conviction.<sup>80</sup> Whether these procedures and practices will be available to courts in the future remains to be seen.

Justice Scalia, for example, has repeatedly signaled his concern with the existing precedent, *White v. Illinois*,<sup>81</sup> which permitted the admission of statements under exceptions to hearsay that a child victim of sexual assault made to multiple adults, including an investigating police officer. In *Crawford*, he identified the Court’s *White* holding as being “arguably in tension” with the testimonial rule. He observed:

It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made “immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.” *Thompson v Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K. B. 1693).<sup>82</sup>

Likewise, in his opinion for the Court in *Davis*, Justice Scalia cited the 1779 English case, *King v. Brasier*,<sup>83</sup> to illustrate the distinction between nontestimonial evidence in an ongoing emergency (the 911 call) and common-law testimonial evidence (a child’s statement to her mother).<sup>84</sup> He invoked it again in his dissent in *Bryant* to discredit the majority’s “ongoing emergency” analysis:

No framing-era confrontation case that I know of, neither here nor in England, took such an enfeebled view of the right to confrontation. For example, *King v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202, 202-203 (K. B. 1779), held inadmissible a mother’s account of her young daughter’s statements “immediately on her coming home” after being sexually assaulted. The daughter needed to testify herself. But today’s majority presumably would hold the daughter’s account to her mother a nontestimonial statement made during an ongoing emergency. She could not have known whether her attacker might reappear to attack again or attempt to silence the lone witness against him. Her mother likely listened to the account to assess the threat to her own safety and to decide whether the rapist posed a threat to the community that required the immediate intervention of the local authorities. *Utter nonsense*.<sup>85</sup>

Legal scholars began speculating on the significance of *Brasier*’s role informing the Court’s view of statements of child abuse victims after it was cited by Justice Rehnquist in *Crawford* and

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<sup>80</sup> See 18 U.S.C. § 3509 entitled “Child victims’ and child witnesses’ rights.”

<sup>81</sup> 502 U.S. 346 (1992)(The Court upheld admission of hearsay as not violating the Sixth Amendment. After two unsuccessful attempts to have the child testify in court, an Illinois trial court permitted admission, over the defense’s objections, of testimony by the child’s babysitter, the child’s mother, an investigating officer, an emergency room nurse, and a doctor, regarding prior, out-of-court statements made by the child to these individuals about the alleged assault pursuant to the state’s hearsay exceptions for spontaneous declarations and for statements made in the course of securing medical treatment.).

<sup>82</sup> *Crawford*, 542 U.S. at 58, footnote 8. *See also*, *Davis*, 547 U.S. at 825.

<sup>83</sup> 168 Eng. Rep. 202 (K.B. 1779).

<sup>84</sup> *Davis*, 547 U.S. at 828.

<sup>85</sup> *Bryant*, 131 S. Ct. at 1173 (emphasis added).

Justice Scalia in *Davis*.<sup>86</sup> Neither *Bryant* nor *Bullcoming* purport to address legal challenges likely to arise in this area, but given the severity of sexual assault and abuse crimes involving adults and children, and the necessity that they be prosecuted vigorously, it is impossible to ignore the potential impact of the testimonial rule on this class of criminal prosecutions.

*Williams v. Illinois*, discussed *supra*, will address the use of DNA databases for sex crime prosecutions in the upcoming term. In another case of interest, the Court vacated and remanded the Supreme Court of Pennsylvania's decision in *Commonwealth v. Allshouse*,<sup>87</sup> a post-*Davis* case on application of the testimonial standard. Defendant Allshouse was convicted of assault and child endangerment for breaking the arm of his seven-month-old son. The trial court admitted statements made by the defendant's four-year-old daughter to a County Youth Service caseworker and a psychologist, finding them "nontestimonial" under the state's Tender Years Hearsay Act and therefore not in violation of the Confrontation Clause.<sup>88</sup> The four-year-old, who did not testify, made statements to others indicating that she had witnessed her father twist the arm of the infant, which caused a spiral fracture indicative of abuse.

The *Bullcoming* dissent reflected a generalized concern about clarifying a future framework for discernible standards governing the use of evidence:

Today's majority is not committed in equal shares to a common set of principles in applying the holding of *Crawford*.... That the Court in the wake of *Crawford* has had such trouble fashioning a clear vision of that case's meaning is unsettling; for *Crawford* binds every judge in every criminal trial in every local, state, and federal court in the Nation. This Court's prior decisions leave trial judges to "guess what future rules this Court will distill from the sparse constitutional text," or to struggle to apply an "amorphous, if not entirely subjective," "highly context-dependent inquiry" involving "open-ended balancing."<sup>89</sup>

The Court's reasoning will presumably become clearer as it continues to hand down decisions interpreting the right of confrontation. But their more immediate impact on the administration of justice at the prosecutorial level is not clear under current standards.

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<sup>86</sup> See, e.g., Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from King v. Brasier*, 15 BROOK. J. L. & POLICY 495 (2007); Robert Mostellar, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917 (2007).

<sup>87</sup> 985 A.2d 847 (Pa. 2009), case remanded for further consideration in light of *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) at 131 S. Ct. 1597 (2011).

<sup>88</sup> Under the Tender Years Hearsay Act, 42 Pa. C.S.A. § 5985.1, certain out-of-court statements made by a child victim or witness may be admissible at trial if the child either testifies at the proceeding or is unavailable as a witness, and the court finds "that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability." 985 A.2d 847, 851 (Pa. 2009).

<sup>89</sup> *Bullcoming*, 131 S. Ct. at 2725-2726 (Citations omitted.)

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