

HIJACKING JUSTICE: ASSESSING THE EMERGENCY DRIVEN ANALYSIS OF CONFRONTATION CLAUSE JURISPRUDENCE

Steven C. Berlowitz[†]

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[†] Notes Editor, *Cardozo Law Review*. J.D. Candidate (June 2015), Benjamin N. Cardozo School of Law; B.A., *magna cum laude*, Union College, 2009. I would like to thank Professor Jessica Roth for her guidance throughout the research and writing process; Emily Chen, Matthew Weston, Marisa Seiss, Greg Wong, and the editors of the *Cardozo Law Review* for their diligence; my parents, Lois and Michael, for their unconditional love and support; and my sisters, Kim and Alison, for their patience, humor, and encouragement.

INTRODUCTION

A victim, shot in the chest, lies bleeding on the ground. Thirty minutes have passed, and the unidentified gunman is on the loose. With labored breath, and despite great pain, the victim gives police the name of a suspect, then dies several hours later. The suspect, now a criminal defendant at trial, objects to admission of the victim's statement to police that the suspect shot the victim. Should the court admit the statement into evidence?

Admission of the statement turns on application of the Sixth Amendment's Confrontation Clause, which guarantees the right of a criminal defendant "to be confronted with the witnesses against him."¹ It has long been understood that this constitutional guarantee included the right to a "face-to-face" meeting with these witnesses at trial.² Perhaps more importantly, the Confrontation Clause also ensures a criminal defendant's right to cross-examine witnesses against him while under oath.³

For over a quarter-century, Confrontation Clause jurisprudence was guided by *Ohio v. Roberts*.⁴ Under *Roberts*, out-of-court statements were deemed to satisfy the Confrontation Clause, and were thus admissible, so long as (1) the declarant was unavailable at trial;⁵ and (2) the statement was considered "reliable."⁶ Then, in 2004, the Supreme Court abandoned the *Roberts* reliability framework in *Crawford v. Washington*.⁷ There, the Court held that Confrontation Clause protection turned not on a statement's reliability, but rather on whether the statement was testimonial.⁸ Heralded as "a vindication of the rights

¹ U.S. CONST. amend. VI. This guarantee entails the right of a criminal defendant "to directly encounter adverse witnesses, the right to cross-examine adverse witnesses, and the right to be present at any stage of the trial that would enable the defendant to effectively cross-examine adverse witnesses." *Sixth Amendment at Trial*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 621, 628–29 (2007).

² See *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) ("We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.").

³ See Richard D. Friedman, Essay, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1011 (1998).

⁴ *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004).

⁵ The declarant refers to the "person who made the statement." FED. R. EVID. 801(b).

⁶ *Roberts*, 448 U.S. at 66. "Reliable" statements were those which fell within a recognized hearsay exception, or which had other "indicia of reliability." *Id.* at 65–66. The rationale was that reliability of such statements obviated the need for cross-examination by the defendant. See *id.* at 65 (noting statements marked by indicia of reliability "have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant" (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972))).

⁷ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁸ *Id.* at 68. As under *Roberts*, the Confrontation Clause under *Crawford* still requires the unavailability of the declarant at trial. *Id.*

of the accused,⁹ *Crawford* helped solve a litany of problems associated with the *Roberts* reliability standard.¹⁰

However, the Court in *Crawford* failed to articulate a comprehensive definition of the new framework's key term: testimonial.¹¹ The Court later provided further guidance in *Davis v. Washington*,¹² holding that statements made with the "primary purpose" of aiding police in responding to an ongoing emergency were nontestimonial.¹³ Nonetheless, this new emergency assessment—often involving statements made during the course of critical situations such as 911 calls and crime scene interviews—resulted in the development of a fact-intensive inquiry. Courts now review numerous factors,¹⁴ but still have little guidance regarding the proper weight each factor should be accorded.¹⁵

This Note argues that the absence of a formal and comprehensive Confrontation Clause test represents a striking blow to the constitutional protections guaranteed to criminal defendants. Without a clearly defined test, the fact-intensive inquiry has caused courts to rule inconsistently on similar fact patterns.¹⁶ Moreover, the tendency of the emergency assessment to drive the analysis, in the context of 911 calls and crime scene interviews, is precisely what makes the assessment so difficult. With few guiding principles,¹⁷ criminal defendants risk going to trial with a dubious confrontation guarantee.

Part I of this Note discusses the relevant background, including the hearsay rule, the Confrontation Clause under *Roberts*, and the Confrontation Clause under *Crawford* and *Crawford*'s progeny: *Davis v. Washington*¹⁸ and *Michigan v. Bryant*.¹⁹ Part II analyzes lower court decisions made after *Crawford*, elucidating the danger and confusion

⁹ Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 439 (2004).

¹⁰ See *infra* Part I.C.

¹¹ *Crawford*, 541 U.S. at 68. The Court wrote: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.*

¹² *Davis v. Washington*, 547 U.S. 813 (2006).

¹³ *Id.* at 822.

¹⁴ See *infra* Part II.A and note 132.

¹⁵ See *Michigan v. Bryant*, 131 S. Ct. 1143, 1162 (2011) (noting that controlling weight is not given to either declarant's or interrogator's statements, and that all relevant circumstances should be evaluated in assessing whether statements are testimonial or nontestimonial).

¹⁶ See *infra* Part II.B.

¹⁷ The only principles currently guiding lower courts come from *Crawford*, *Davis*, and *Bryant*, which reveal relatively little about most Confrontation Clause cases because they represent extreme markers which delineate boundaries across a Confrontation Clause spectrum. See Hsien-Ying Shine Chen, Comment, *Michigan v. Bryant: Defining the "Testimonial Statement,"* 6 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 21, 27 (2010).

¹⁸ *Davis*, 547 U.S. 813.

¹⁹ *Bryant*, 131 S. Ct. 1143.

that are generated by the current emergency assessment, and how this confusion has resulted in inconsistent decisions.

Part III then proposes an analytical framework that should help increase consistency by reducing the prominent role the emergency assessment plays in the analysis. Rather than focusing on the existence of an emergency, courts should focus on the declarant's intent. Courts should first expressly identify the declarant's intent or expectation, determining whether the declarant knew (or would have known) that the declarant's statements would be used to prove past events potentially relevant to future prosecution. The declarant's awareness of the existence of an emergency will affect the determination of the declarant's intent, and should thus be assessed at this stage. Second, only after the declarant's intent or expectation has been determined should courts assess whether the interrogator or public were experiencing an emergency. Third, if the interrogator or the public were experiencing an emergency, this finding should be balanced against the declarant's intent. This framework blunts the danger that courts will justify the admission of statements by finding continuing threats to the public or the interrogator.

I. BACKGROUND

Because the Confrontation Clause applies to the admission of out-of-court statements that would constitute hearsay, this Section begins first by outlining the hearsay rule and its role in Confrontation Clause analysis. It then provides a brief overview of Confrontation Clause jurisprudence as it has evolved, starting with *Roberts*.

A. *The Hearsay Rule*

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.²⁰ Unless a federal statute, the Federal Rules of Evidence, or other rules promulgated by the U.S. Supreme Court state otherwise, hearsay is not admissible into evidence in federal court.²¹ Though out-of-court statements are hearsay when offered for the truth, such statements are not hearsay when offered to prove some other purpose; for example, that the statement was made or the state of mind of the declarant or listener.²²

²⁰ See FED. R. EVID. 801(c); BLACK'S LAW DICTIONARY 790 (9th ed. 2009).

²¹ FED. R. EVID. 802.

²² FED. R. EVID. 801(c) advisory committee's note.

The hearsay rule sits as the gatekeeper to Confrontation Clause analysis. If a statement is not hearsay, then there is no Confrontation Clause violation.²³ Under *Roberts*, the Confrontation Clause “did little to expand the common law protection against hearsay.”²⁴ However, today, the hearsay rule and the Confrontation Clause are viewed as serving two distinctly different functions. The bar against hearsay is a state or federally promulgated rule used primarily to exclude unreliable evidence.²⁵ In contrast, while the Confrontation Clause also serves to exclude unreliable evidence, its primary purpose is to function as a constitutional procedural guarantee to the accused.²⁶

B. *The Confrontation Clause Under Ohio v. Roberts*

In 1975, Herschel Roberts was charged with check forgery and possession of stolen credit cards belonging to Bernard Isaacs.²⁷ At a preliminary hearing, Roberts’ defense counsel called Anita Isaacs, Bernard Isaacs’ daughter, as a witness.²⁸ She testified that she knew Roberts and had permitted him to use her apartment for a few days while she was away.²⁹ Defense counsel also attempted to prompt an admission that Anita had given Roberts the checks and credit cards, while failing to inform Roberts that she did not have permission to use them.³⁰ Anita denied this claim.³¹

At trial, although Anita was unavailable, the state offered the transcript of Anita’s testimony based upon an Ohio statute that permitted introduction of preliminary examination testimony where a

²³ See *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004).

²⁴ Michael Richardson, *Suddenly, Everything Has Changed: The Testimonial Approach to Admission of Hearsay Statements Under Michigan v. Bryant and Beyond*, 80 U. CIN. L. REV. 945, 945 (2012). Since the Confrontation Clause only involves hearsay statements, and since statements which fell within a recognized hearsay exception were deemed reliable (and thus admissible), the Confrontation Clause under *Roberts* did little work that the rule against hearsay did not. See *id.* Moreover, statements by witnesses who did not appear at trial “appear[ed] to create a direct conflict with the Confrontation Clause’s heightened protection of the right of the accused in a criminal case to cross-examine witnesses.” *Id.* at 948. Utilizing evidence rules in this way “render[ed] the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.” *Crawford*, 541 U.S. at 51.

²⁵ See FED. R. EVID. 803 advisory committee’s note; *State v. Flood*, 219 S.W.3d 307, 319 (Tenn. 2007).

²⁶ See *Crawford*, 541 U.S. at 61. The Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.*

²⁷ *Ohio v. Roberts*, 448 U.S. 56, 58 (1980), *abrogated by Crawford*, 541 U.S. 36.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

witness could not be produced.³² Roberts objected to the use of the transcript, but the trial court admitted it, and Roberts was found guilty.³³

The Court of Appeals of Ohio reversed Roberts' conviction on the grounds that the prosecution did not demonstrate a "good-faith effort" to ensure Anita's attendance at trial.³⁴ The Supreme Court of Ohio affirmed on different grounds, finding that the opportunity for cross-examination during the preliminary hearing did not afford Roberts his constitutional guarantee of confrontation at trial.³⁵

The U.S. Supreme Court granted certiorari, and upheld the admission of the transcript.³⁶ The Court found that the purpose of the Confrontation Clause, like the hearsay rule, was to exclude unreliable evidence at trial.³⁷ The Court wrote that the Clause operated to exclude unreliable statements in two ways: (1) by requiring the prosecution to produce the declarant of the statement, or otherwise prove that the declarant was unavailable at trial; and (2) once the unavailability of the declarant had been demonstrated, the Clause admitted only statements marked by adequate "indicia of reliability."³⁸ Statements which fell within a recognized hearsay exception met this reliability standard.³⁹ Moreover, even if the statement did not fall within a hearsay exception, it could still be admitted so long as it exhibited "particularized guarantees of trustworthiness."⁴⁰

³² *Id.* at 59 (citing OHIO REV. CODE ANN. § 2945.49 (1975) ("Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving the testimony dies or cannot for any reason be produced at the trial or whenever the witness has, since giving that testimony, become incapacitated to testify. If the former testimony is contained within an authenticated transcript of the testimony, it shall be proven by the transcript, otherwise by other testimony.")).

³³ *Id.* at 59–60.

³⁴ *Id.* at 60.

³⁵ *Id.* at 60–61. The Ohio Supreme Court reasoned "that normally there is little incentive to cross-examine a witness at a preliminary hearing, where the 'ultimate issue' is only probable cause . . ." *Id.* at 61.

³⁶ *Id.* at 56–57.

³⁷ *Id.* at 65–66. "Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Id.* at 65 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)).

³⁸ *Id.*

³⁹ *Id.* at 66. The Court explained that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Id.* (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

⁴⁰ *Id.* The phrase "particularized guarantees of trustworthiness" was generally interpreted as meaning "whether the content and circumstances of the statement were sufficiently reliable and 'marked with such trustworthiness' as to reassure judges that a criminal defendant's rights to confront and cross-examine his accuser to try to impugn those statements was no longer necessary." Sean Douglass, Note, *From the Blue Lights of "Police" to the Red Lights of "First Responders": The Changing Rhetoric of Law Enforcement in Michigan v. Bryant*, 100 GEO. L.J.

The *Roberts* reliability framework presented several significant problems, many of which were firmly recognized by legal scholars and jurists before *Roberts* was abrogated.⁴¹ First, it effectively destroyed any distinction between the Confrontation Clause and the hearsay rule.⁴² Second, *Roberts* allowed judges to use “untested hearsay” if the judge first conducted a preliminary hearing and found the hearsay reliable.⁴³ Thus, cross-examination was replaced with a preliminary “judicial determination of reliability.”⁴⁴ According to the *Crawford* Court, this was problematic because the purpose of the Confrontation Clause was not to ensure that the statements were reliable, but rather to ensure the reliability of the statements in a particular manner: by allowing the defendant to confront his accuser in court.⁴⁵ Third, the *Roberts* reliability framework failed to limit judicial discretion.⁴⁶ The Sixth Amendment was designed specifically as a guarantee to protect criminal defendants against judicial discretion.⁴⁷ This “categorical constitutional guarantee” was effectively replaced with an “open-ended balancing test[]” after *Roberts*.⁴⁸

Lastly, and perhaps most crucially, the *Roberts* reliability framework produced inconsistent results in lower courts.⁴⁹ Whether a

1311, 1315–16 (2012) (footnote omitted). One such example of a statement bearing “particularized guarantees of trustworthiness” is a statement by a coconspirator. See Shari H. Silver, Note, *Michigan v. Bryant: Returning to an Open-Ended Confrontation Clause Analysis*, 71 MD. L. REV. 545, 552 (2012).

⁴¹ See *Lilly v. Virginia*, 527 U.S. 116, 141 (1999) (Breyer, J., concurring) (criticizing “hearsay-based Confrontation Clause test” under *Roberts* as “both too narrow and too broad”); *White v. Illinois*, 502 U.S. 346, 358 (1992) (Thomas, J., concurring in part and concurring in judgment) (criticizing confusion generated in case law due to *Roberts* and acknowledging the unhealthy bonding of confrontation and hearsay rules of evidence); Friedman, *supra* note 3, at 1014 (criticizing *Roberts* Confrontation Clause jurisprudence for “tend[ing] to meld the Clause and ordinary hearsay doctrine”).

⁴² See Jason Widdison, Comment, *Michigan v. Bryant: The Ghost of Roberts and the Return of Reliability*, 47 GONZ. L. REV. 219, 225 (2011). The *Roberts* decision “empowered judges to decide admissibility under the Confrontation Clause using the same reliability assessment employed under the rules of hearsay. In so doing, the *Roberts* Court virtually wrote the Confrontation Clause out of the Constitution.” *Id.*

⁴³ See Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301, 1306 (2011).

⁴⁴ See *id.* at 1306–07.

⁴⁵ See *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”).

⁴⁶ Cicchini, *supra* note 43, at 1307–08. The *Crawford* Court wrote that “[t]he Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and [the U.S. Supreme Court], no less than the state courts, lack[s] authority to replace it with one of our own devising.” *Crawford*, 541 U.S. at 67.

⁴⁷ See *Crawford*, 541 U.S. at 67. This design was implemented because the Framers “knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people.” *Id.*

⁴⁸ See *id.* at 67–68.

⁴⁹ See Cicchini, *supra* note 43, at 1307.

statement was reliable turned on a number of factors.⁵⁰ Strangely, some courts assigned the same meaning to contradictory facts.⁵¹ For example, in one case the Colorado Supreme Court found a statement reliable because the statement was detailed.⁵² However, in a different decision, the Fourth Circuit found a statement reliable for precisely the opposite reason: because the statement was “fleeting.”⁵³

Other times, courts interpreted similar facts differently. Ironically, this was the case with *Crawford* itself. There, the trial court deemed the declarant’s statements trustworthy, while the appellate court deemed them untrustworthy on completely separate grounds.⁵⁴ These

⁵⁰ *Crawford*, 541 U.S. at 63. For example, in *People v. Farrell*, 34 P.3d 401, 406 (Colo. 2001), *overruled by People v. Fry*, 92 P.3d 970 (Colo. 2004), the court identified a number of factors it considered when assessing the trustworthiness of a hearsay statement, including: (1) how the declarant made the statement; (2) to whom the statement was made; (3) what prompted the statement; (4) the contents of the statement; (5) the overall nature and character of the statement; (6) the relationship of the parties; (7) the declarant’s motivation for making the statement; and (8) the circumstances in which the statement was made. The *Farrell* court also identified several more specific factors, such as: (1) the level of detail of the statement; (2) the physical or mental stability of the declarant; (3) whether the statement was made shortly after the events described; and (4) whether the declarant had reason to retaliate against the defendant. *Id.* at 406–07. Complicating this assessment further, the reliability of a statement depends not only on the factors considered by the judge, but also on the weight assigned to each factor. *See Crawford*, 541 U.S. at 63.

⁵¹ *See Crawford*, 541 U.S. at 63. For example, in *Nowlin v. Commonwealth*, 579 S.E.2d 367, 371–72 (Va. Ct. App. 2003), the Virginia Court of Appeals found a statement to be reliable because the declarant was in custody and had already been charged with a crime, whereas in *State v. Bintz*, 650 N.W.2d 913, 918 ¶ 13 (Wis. Ct. App. 2002), the Wisconsin Court of Appeals found a statement more reliable because the declarant was neither in custody nor a suspect.

⁵² *See Crawford*, 541 U.S. at 63 (citing *Farrell*, 34 P.3d at 401, 407). In *Farrell*, the defendant was convicted, among other things, of first-degree murder. *Farrell*, 34 P.3d at 402. The defendant’s accomplice, Blankenship, gave statements to the police, which were admitted at defendant’s trial. *Id.* at 404. He told police that he and the defendant had stolen three cars on their trip to visit the defendant’s girlfriend (a trip from Illinois to Colorado). *Id.* at 403. Blankenship initially stated that he and defendant stole the victim’s car while the victim was looking underneath the car’s hood. *Id.* Defendant and Blankenship then proceeded to ransack the victim’s home over the course of three days. *Id.* Blankenship then informed police about where they had left the victim (tied to a cement structure with logs, rocks, and a spare tire on top of the victim). *Id.* at 403–04. The Supreme Court of Colorado found that these statements were trustworthy, and thus admissible, in part because of their level of detail, writing that “[t]rustworthiness is buttressed by the likelihood that the declarant would have been unable to fabricate the details without having observed or participated in the events.” *Id.* at 407.

⁵³ *See Crawford*, 541 U.S. at 63 (citing *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (4th Cir. 2001), *abrogated by Crawford*, 541 U.S. at 36). In *Photogrammetric Data Services*, appellant Webb, an employee of Photogrammetric Data Services, made statements to the Virginia Department of Transportation that his employer had padded hours and increased billing amounts. *Photogrammetric Data Servs.*, 259 F.3d at 236. The court found that the statement was trustworthy due to the self-inculpatory nature of the statement. *Id.* at 245. Webb had referenced his predecessor as engaging in similar conduct, and Photogrammetric Data Services argued that this reference undermined the reliability of Webb’s inculpatory statements. *Id.* The court dismissed this argument, finding that Webb’s statements about the actions of his predecessor were “fleeting at best” and were not made by Webb in order to shift blame. *Id.*

⁵⁴ The state trial court held that the statements were reliable because they corroborated another witness’s story, the declarant had direct knowledge of the events she described, and the events were recent. *Crawford*, 541 U.S. at 40. However, the state appellate court found the

inconsistent outcomes were necessarily at odds with the procedural constitutional guarantee of confrontation.⁵⁵

C. Crawford v. Washington Revives the Confrontation Clause

Recognizing the many flaws of Confrontation Clause jurisprudence under *Roberts*, the U.S. Supreme Court ultimately rejected the reliability framework in favor of a doctrine that was distinct from hearsay law.⁵⁶ Instead of framing the Confrontation Clause as a substantive guarantee of reliability, the Court in *Crawford* reinterpreted the Clause as a procedural guarantee of confrontation.⁵⁷

In *Crawford*, Petitioner Michael Crawford was charged with assault and attempted murder after stabbing a man who allegedly tried to rape his wife, Sylvia.⁵⁸ At Crawford's trial, the state introduced into evidence a tape recording of Sylvia's statement to the police that described the stabbing.⁵⁹ Sylvia did not testify at trial because of the state's marital privilege law.⁶⁰ Since Washington's marital privilege did not extend to out-of-court statements admissible under a hearsay exception,⁶¹ the prosecution argued that the recorded statement was admissible under the exception reserved for statements against penal interest.⁶² Crawford argued that admitting the recorded statement violated his Sixth Amendment Confrontation Clause guarantee, as the statement was not subject to cross-examination at the time it was made, nor was the declarant subject to cross-examination at trial.⁶³

declarant's statements unreliable on the grounds that they were contradictory, were the product of direct questions, and that the declarant had admittedly shut her eyes during the events in question. *Id.* at 41. The U.S. Supreme Court even acknowledged that the vast difference in reasoning between the trial and appellate courts was itself "a self-contained demonstration of *Roberts'* unpredictable and inconsistent application." *Id.* at 66.

⁵⁵ See Cicchini, *supra* note 43, at 1307.

⁵⁶ *Crawford*, 541 U.S. at 67–69.

⁵⁷ *Id.* at 61.

⁵⁸ *Id.* at 36–38.

⁵⁹ *Id.* at 38. The victim was stabbed on August 5, 1999 in his apartment; Sylvia and her husband were arrested later that evening. *Id.* Sylvia's statements to police were made after Sylvia had been given her *Miranda* warnings. *Id.* Her statements were also recorded. *Id.*

⁶⁰ See WASH. REV. CODE § 5.60.060(1) (1994). The law protects spouses and domestic partners from being examined either for or against their partner without the consent of the spouse or domestic partner. *Id.*

⁶¹ *Id.*; *Crawford*, 541 U.S. at 40.

⁶² A statement against interest is one "which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true." WASH. R. EVID. 804(b)(3) (2014). In *Crawford*, Sylvia admitted that she had led her husband to the victim's apartment, thus aiding in the assault, and subjecting her to potential criminal liability. See *Crawford*, 541 U.S. at 40.

⁶³ See *Crawford*, 541 U.S. at 40.

Relying on *Roberts*, the trial court admitted the statement on the grounds that it was sufficiently trustworthy.⁶⁴ The jury then convicted Crawford of assault.⁶⁵ The Washington appellate court reversed, finding that the statements were not sufficiently trustworthy.⁶⁶ On appeal before the Washington Supreme Court, the conviction was reinstated after the court found that the statements “bore guarantees of trustworthiness,”⁶⁷ though they did not fall within a recognized hearsay exception.⁶⁸ Ultimately, the U.S. Supreme Court granted certiorari to determine whether use of Sylvia’s out-of-court statements violated Crawford’s confrontation guarantee.⁶⁹

In the landmark decision, the Supreme Court held that admitting Sylvia’s statements violated Crawford’s Sixth Amendment right to confrontation.⁷⁰ The Court abandoned the *Roberts* reliability standard, establishing a new “testimonial” framework for Confrontation Clause jurisprudence.⁷¹

The decision to abrogate *Roberts* was based primarily upon a historical analysis of the Confrontation Clause.⁷² Justice Scalia, writing for the majority, rejected the view that the Confrontation Clause represented a substantive guarantee of reliability, and distinguished it from the hearsay rule.⁷³ Scalia explained that the Confrontation Clause was not implicated by all out-of-court statements because the Sixth Amendment’s use of the word “witness” was interpreted by the Court to mean “those who ‘bear testimony.’”⁷⁴ Thus, the Court found that the Confrontation Clause “reflects an especially acute concern” with testimonial hearsay.⁷⁵ To this end, the Court in *Crawford* differentiated

⁶⁴ *Id.* The trial court offered several reasons for the trustworthiness of Sylvia’s statement. First, the statement corroborated her husband’s story and did not shift blame. *Id.* Second, Sylvia was an eyewitness to the stabbing, and therefore had direct knowledge of the event. *Id.* Third, the events she was describing had occurred recently (earlier that day). *Id.*

⁶⁵ *Id.* at 41.

⁶⁶ *Id.* The Washington Court of Appeals found that Sylvia’s statements were not trustworthy because they contradicted a previous statement, and because Sylvia admitted that at one point “she had shut her eyes during the stabbing.” *Id.*

⁶⁷ *Id.* The Court was persuaded of the reliability of Sylvia’s statements because they corroborated the defendant’s statements. *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 68–69.

⁷¹ *Id.* at 53–54.

⁷² *Id.* at 43–50; see also Deborah Ahrens & John Mitchell, *Don’t Blame Crawford or Bryant, the Mess is All Davis’s Fault*, 39 RUTGERS L. REV. 104, 105–06 (2011–2012); Richardson, *supra* note 24, at 950.

⁷³ *Crawford*, 541 U.S. at 68–69.

⁷⁴ *Id.* at 51. The Court explained that “[a]n off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.” *Id.*

⁷⁵ *Id.*

between “testimonial” and “nontestimonial” statements, finding that the Confrontation Clause bars only the former.⁷⁶

The new Confrontation Clause standard thus turned on whether the statement was testimonial.⁷⁷ In creating this rule, the Court reasoned that the new framework protected the procedural rights of criminal defendants by eliminating the judicial discretion that had accompanied Confrontation Clause analysis under *Roberts*.⁷⁸ Accordingly, hearsay deemed testimonial was now excluded from evidence where the declarant was unavailable and the defendant had no prior opportunity for cross-examination, regardless of the statement’s reliability.⁷⁹ In contrast, nontestimonial evidence posed no Confrontation Clause problem.⁸⁰

While *Crawford* was hailed by many as a “constitutional triumph,”⁸¹ the U.S. Supreme Court expressly avoided defining the meaning of the case’s key terms—“testimonial” and “nontestimonial”—choosing instead to leave this “for another day.”⁸² Nonetheless, *Crawford* did outline a “core class” of “testimonial” statements: (1) “prior testimony at a preliminary hearing, before a grand jury, or at a former trial”;⁸³ and (2) extrajudicial statements made in response to police interrogation.⁸⁴

D. *Davis v. Washington Clarifies the Definition of Testimonial*

The Supreme Court attempted to clarify the meaning of “testimonial” two years later in *Davis v. Washington*.⁸⁵ *Davis* was

⁷⁶ Richardson, *supra* note 24, at 950.

⁷⁷ *Crawford*, 541 U.S. at 61; *see also* Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 241 (2005).

⁷⁸ *See Crawford*, 541 U.S. at 67–69.

⁷⁹ *Id.* at 53–54.

⁸⁰ *See id.* at 68.

⁸¹ *See, e.g.,* Widdison, *supra* note 42, at 227.

⁸² *Crawford*, 541 U.S. at 68.

⁸³ *Id.* The most notorious case of this class of testimonial statement is that of Sir Walter Raleigh, who was on trial in 1603 for treason. *Id.* at 44. Raleigh’s alleged accomplice, Lord Cobham, implicated Raleigh in a letter. *Id.* At trial, the letter was read to the jury. *Id.* Raleigh argued that Cobham had lied to shift blame and save himself, and demanded that the court produce Cobham so that Raleigh could confront him. *Id.* The Court refused Raleigh’s demand, the jury convicted, and Raleigh was sentenced to death. *Id.*; *see also* Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington*, 50 S.D. L. REV. 41, 52 (2005).

⁸⁴ An extrajudicial statement is “[a]ny utterance made outside of court.” BLACK’S LAW DICTIONARY 665 (9th ed. 2009). The Court in *Crawford* flushed out this concept further, writing that the extrajudicial statements of concern were those “‘contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’” *Crawford*, 541 U.S. at 51–52 (quoting *White v. Illinois* 502 U.S. 346, 365 (1992) (Thomas J., concurring in part and concurring in judgment)).

⁸⁵ *Davis v. Washington*, 547 U.S. 813 (2006).

decided alongside a companion case: *Hammon v. Indiana*.⁸⁶ Both cases involved out-of-court statements made during a domestic dispute.⁸⁷

In *Davis*, Michelle McCottry made statements to a 911 operator that her boyfriend, Adrian Davis, had assaulted her.⁸⁸ McCottry told the operator that Davis was “here jumpin’ on me again.”⁸⁹ After the operator obtained Davis’ full name, McCottry stated that Davis had left.⁹⁰ The police arrived on the scene after the incident had occurred.⁹¹ Davis was charged with a felony violation of a no-contact order.⁹² At trial, the prosecution was permitted to introduce the statements that McCottry made to the 911 operator.⁹³ Davis was found guilty, and his conviction was upheld on appeal by both the Washington Court of Appeals and the Supreme Court of Washington.⁹⁴

In *Hammon*, police responded to a domestic dispute at the home of Herschel and Amy Hammon.⁹⁵ Amy, who the police found on her front porch, gave the officers permission to enter her home.⁹⁶ Upon entering the police observed flames coming out of a gas heating unit, and broken glass on the floor.⁹⁷ Herschel told police that he and his wife had an argument, but that it did not become physical, and that it was over.⁹⁸ After Amy told her side of the story, the police had Amy fill out a battery affidavit describing the incident.⁹⁹ The affidavit stated, among other things, that Herschel had broken the furnace, shoved Amy down into the broken glass, and hit her in the chest.¹⁰⁰

Herschel was subsequently charged with domestic battery.¹⁰¹ Amy did not appear at Herschel’s bench trial, so the prosecution called the police officer who had questioned Amy and asked him to recall her statements and to authenticate the affidavit for the court.¹⁰² Herschel objected on the grounds that this violated his Sixth Amendment right to confrontation.¹⁰³ The trial court admitted Amy’s statements under the

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 813.

⁸⁹ *Id.* at 817.

⁹⁰ *Id.* at 817–18.

⁹¹ *Id.* at 818.

⁹² *Id.*

⁹³ *Id.* at 819.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 820.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

excited utterance exception to hearsay,¹⁰⁴ and the affidavit as a present sense impression.¹⁰⁵

Herschel was found guilty at trial.¹⁰⁶ The Indiana Court of Appeals and the Indiana Supreme Court both affirmed his conviction.¹⁰⁷ The U.S. Supreme Court granted certiorari to determine whether the statements made during a 911 call or during a crime scene investigation were testimonial and thus subject to the Confrontation Clause.¹⁰⁸

In these companion cases, the Court refined its new Confrontation Clause framework by articulating a new “primary purpose” test.¹⁰⁹ Under this test, statements are nontestimonial when they are made with the primary purpose of aiding police in an ongoing emergency.¹¹⁰ In contrast, statements are testimonial when there is no emergency and the statements are made with the primary purpose of establishing past events “potentially relevant” to future criminal prosecution.¹¹¹

The Court identified four factors in its application of the primary purpose test to *Davis* and *Hammon*: (1) whether the declarant was making the statement as events were occurring; (2) whether there was an ongoing emergency; (3) the level of formality of the interrogation; and (4) the nature of what was asked and answered during the interrogation.¹¹² However, *Davis* disappointingly failed to deliver a comprehensive description of “testimonial” statements.¹¹³

Thus, in *Davis*, the Court held that the statements made to the 911 operator were nontestimonial because they were made as events were

¹⁰⁴ *Id.* An excited utterance under the Washington Rules of Evidence is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” WASH. R. EVID. 803(a)(2) (2014). Presumably, Amy was still “under the stress of excitement” from her alleged altercation with her husband, which justified admission of her statements as an excited utterance. *See Davis*, 547 U.S. at 819–20.

¹⁰⁵ *Davis*, 547 U.S. at 820. A present sense impression is “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” WASH. R. EVID. 803(a)(1) (2014). Since Amy signed the affidavit shortly after the alleged incident, the trial court admitted the affidavit as a present sense impression. *See Davis*, 547 U.S. at 820. The trial court reasoned that the statements were admissible because they were “expressly permitted in these kinds of cases even if the declarant is not available to testify.” *Id.* (citation and internal quotation marks omitted).

¹⁰⁶ *Davis*, 547 U.S. at 821.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 817.

¹⁰⁹ *See, e.g.*, Widdison, *supra* note 42, at 229.

¹¹⁰ *Davis*, 547 U.S. at 822.

¹¹¹ *Id.*

¹¹² *Id.* at 827. Significantly, Scalia also wrote in dicta that while the “primary purpose” test is an objective inquiry, the Confrontation Clause requires courts to evaluate “the declarant’s statements, not the interrogator’s questions . . .” *Id.* at 822 n.1.

¹¹³ *Id.* at 822. For example, the Court in *Bryant* later explained that it did not define “ongoing emergency” in *Davis*, nor the extent of the emergency. *Michigan v. Bryant*, 131 S. Ct. 1143, 1158 (2011). By leaving open the definition of “ongoing emergency,” the *Davis* Court did little to mark the boundary between testimonial and nontestimonial statements within the context of 911 emergency calls and crime-scene interviews. *See id.*

occurring and the elicited statements, viewed objectively, were necessary to aid police in resolving an ongoing emergency—the contemporaneous assault.¹¹⁴ In contrast, the statements in *Hammon* were held testimonial, and thus inadmissible, because the circumstances suggested the primary purpose was investigative and there was no ongoing emergency.¹¹⁵

E. *The U.S. Supreme Court Retreats in Michigan v. Bryant*

The Court's decision in *Davis* set the stage¹¹⁶ for *Michigan v. Bryant*.¹¹⁷ There, police responded to a shooting.¹¹⁸ The victim, Anthony Covington, had sustained a gunshot wound to his abdomen, appeared to be in great pain, and had difficulty speaking.¹¹⁹ The police asked Covington a barrage of questions, including what had happened, who had shot him, and where the shooting had occurred.¹²⁰ Covington stated that "Rick" had shot him at around 3:00 AM, outside of Rick's house.¹²¹ Covington was transported to the hospital, but died hours later.¹²²

At trial, the police officers who had interviewed Covington testified about what Covington had told them.¹²³ The jury convicted "Rick" Bryant of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during commission of a felony.¹²⁴ Bryant appealed to the Michigan Supreme Court,¹²⁵ arguing that Covington's statements were testimonial and thus inadmissible under

¹¹⁴ *Id.* at 826–29.

¹¹⁵ *Id.* at 829–30. The Court found that the statements were made under circumstances similar to those in *Crawford*. *Id.* The interrogating officer observed no argument between the parties. *Id.* Moreover, when the officer first arrived, Amy told him that there was not a problem. *Id.* at 830. The Court also noted that "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime . . ." *Id.* Lastly, the second time the officer began questioning Amy, he was seeking to determine past events. *Id.*

¹¹⁶ After *Davis*, but before *Bryant* was decided, Confrontation Clause cases were viewed as sitting on a spectrum. See Chen, *supra* note 17, at 27. *Crawford* and *Hammon* fell on the testimonial side of the spectrum, while *Davis* sat on the nontestimonial side. *Id.* However, *Crawford*, *Hammon*, and *Davis* represented the poles of the spectrum, and most Confrontation Clause cases fell somewhere between the extreme boundaries marked by these cases. *Id.* It was hoped that *Bryant* would clarify the meaning of testimonial and nontestimonial and replace the unworkable "spectrum" framework. *Id.*

¹¹⁷ *Bryant*, 131 S. Ct. 1143.

¹¹⁸ *Id.* at 1150.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* Before this appeal, the Michigan Court of Appeals had affirmed Bryant's conviction. *Id.* On appeal before the Michigan Supreme Court for the first time, his case was remanded in light of the U.S. Supreme Court's recent decision in *Davis*. *Id.* at 1150–51. The Michigan Court of Appeals held Bryant's statements to be nontestimonial on remand. *Id.* at 1151. Bryant then appealed to the Michigan Supreme Court for a second time. *Id.*

Crawford and *Davis*.¹²⁶ The court agreed, holding that the primary purpose of Covington's statements was not to meet an ongoing emergency, but rather to establish past events.¹²⁷ Thus, the Michigan Supreme Court ordered a new trial.¹²⁸

The U.S. Supreme Court's decision in *Bryant* utilized the ongoing emergency framework established in *Davis*.¹²⁹ However, the Court broadened the scope of the inquiry, introducing the concept of an emergency that threatens "the public at large."¹³⁰ The Court distinguished *Davis* and *Hammon* from *Bryant* on the grounds that domestic violence disputes entail fewer potential victims than cases involving public safety threats.¹³¹ Additionally, the Court in *Bryant* appeared to confirm a plethora of new criteria to consider in the overall primary purpose inquiry.¹³² Lastly, the Court suggested that the inquiry should include an assessment of the declarant's and interrogator's statements and actions, viewed objectively, in order to help determine the primary purpose.¹³³

The Court concluded that there was an ongoing emergency because there was a live shooter at large, the police sought information

¹²⁶ *Id.* at 1151.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Richardson, *supra* note 24, at 960.

¹³⁰ *Id.*

¹³¹ See *Bryant*, 131 S. Ct. at 1158. The Court explained that "[d]omestic violence cases . . . often have a narrower zone of potential victims than cases involving threats to public safety. An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." *Id.*

¹³² See Richardson, *supra* note 24, at 960–61.

Coupled with the aforementioned modifications to the *Davis* analysis, *Bryant* appeared to require a series of unweighted inquiries each with multiple sub-factors of indeterminate import. Specifically, courts may now evaluate (1) whether a statement is reliable under standard rules of hearsay; (2) the proximity of the interrogation to the scene of the crime; (3) the proximity of the interrogator to the victim; (4) whether a statement describes past or ongoing actions; (5) the formality of the interrogation; (6) the content of the questions asked; and (7) whether the accused has been disarmed, has surrendered, has been captured, or has fled. A court can also consider, based on the knowledge or belief of either the declarant or the listener; (8) the type of weapon used; (9) the distance between the victim and the accused at the time of the statement; (10) the severity of the victim's injuries; (11) whether the dispute is public or private; and (12) whether the suspected crime occurred on public or private property.

Id. (footnotes omitted); see also *Bryant*, 131 S. Ct. at 1175–76 (Scalia, J., dissenting).

¹³³ See *Bryant*, 131 S. Ct. at 1160 (majority) ("In addition to the 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."). However, in his dissent, Justice Scalia argued that it was the declarant's intent which should count. *Id.* at 1168–69 (Scalia, J., dissenting) ("For an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark; and he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused.").

necessary to address the ongoing emergency, and the informal nature of the interrogation indicated that the primary purpose of the questioning was to meet the ongoing emergency.¹³⁴ Ultimately, Covington's statements were deemed nontestimonial, and thus admissible.¹³⁵

II. ANALYSIS

A. Courts Stretch the Meaning of "Emergency"

Lower courts have struggled with *Crawford's* Confrontation Clause framework¹³⁶ because the Supreme Court has provided them with little guidance on the proper execution of the ongoing emergency inquiry.¹³⁷ With no limiting principle or framework in place, and an extensive list

¹³⁴ *Id.* at 1165–67 (majority); Silver, *supra* note 40, at 561–62.

¹³⁵ *Bryant*, 131 S. Ct. at 1166–67.

¹³⁶ Though it is possible that some of this confusion is attributable to the Supreme Court's befuddling reference to reliability in *Bryant*, whether *Bryant* resurrects the *Roberts* reliability framework is beyond the scope of this Note. Yet, it is difficult to reconcile *Bryant's* reference to reliability with *Crawford's* express rejection of the *Roberts* reliability framework. As a result, many scholars have in fact argued that *Bryant* resurrects the *Roberts* reliability test. See, e.g., Cicchini, *supra* note 43; Widdison, *supra* note 42. In *Bryant*, the Court made two significant statements, which arguably turned Confrontation Clause jurisprudence back towards reliability. First, the Court wrote that the rules of hearsay—"designed to identify some statements as reliable"—are relevant in the primary purpose inquiry. *Bryant*, 131 S. Ct. at 1155. Second, the Court also wrote that the existence of an ongoing emergency was an important factor in the primary purpose inquiry because "an emergency focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecution.'" *Id.* at 1157 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). More importantly, however, the Court went on to write that statements made with the purpose of resolving an ongoing emergency need not "be subject to the crucible of cross-examination" because the statements posed an insignificant threat of fabrication. *Id.* The Court argued that this rationale mirrored that of the hearsay exception for excited utterances. See *id.* In his dissent, Scalia lambasted the *Bryant* majority, arguing that their decision was a "gross distortion of the law." *Id.* at 1174 (Scalia J., dissenting). Scalia argued that, unlike the *Bryant* majorities' characterization, reliability is not a good indicator of whether a statement is testimonial because "[t]estimonial and nontestimonial statements alike come in varying degrees of reliability." *Id.* at 1175. It is noteworthy that at least one court since *Bryant* has utilized a reliability test on the grounds that *Bryant* reintroduced a reliability framework. *Henderson v. Commonwealth*, 710 S.E.2d 482, 496 n.12 (Va. Ct. App. 2011), *vacated on reh'g en banc*, 722 S.E.2d 275 (Va. Ct. App. 2012).

¹³⁷ The fact-intensive nature of the inquiry is usually cited as a significant part of the problem. See Brooks Holland, *Crawford & Beyond: How Far Have We Traveled from Roberts After All?*, 20 J.L. & POL'Y 517, 524 n.43 (2012). The primary purpose depends on (1) whether the statement describes past events, or events which are currently happening; (2) the amount of time between the event and the statement (if the statement happened in the past); (3) the nature of the inquiry by the interrogator; (4) the formality of the interrogation; (5) the location of the interrogation and "whether the declarant was protected by police"; (6) the type of crime at issue; (7) the type of weapon involved; (8) and the medical condition of the victim. Cicchini, *supra* note 43, at 1309–10. Moreover, the judge must determine whether a statement transitions between testimonial and nontestimonial, or vice-versa, and must also navigate the potential mixed motives of the declarant. *Id.* at 1310.

of applicable factors,¹³⁸ the emergency inquiry has hijacked Confrontation Clause analysis. As a result, criminal defendants are guaranteed a feeble right of confrontation.

First, courts have struggled with defining the scope of emergencies. In fact, some have found the existence of emergencies under arguably dubious circumstances.¹³⁹ For example, in *People v. Saracoglu*,¹⁴⁰ the court found a victim's statement nontestimonial, and thus admissible, even though the statement was made within the safe confines of a police station. The victim, Rachel, arrived at the police station with her child after being assaulted by Peter Saracoglu, the child's father.¹⁴¹ Visibly distraught,¹⁴² Rachel told police officer David Hawkins that she and Saracoglu had gotten into an argument at home around thirty minutes earlier.¹⁴³ Saracoglu had allegedly choked Rachel, pushed and hit her, and then threatened her, stating that he would "put a bullet in [her] fucking head" if she went to the police.¹⁴⁴

Cuts on Rachel's nose and on the inside of her lip, red marks on her forearm, and bruising around Rachel's ribs were all visible to Officer Hawkins.¹⁴⁵ Rachel said that these injuries were caused by Saracoglu.¹⁴⁶ Subsequently, Hawkins went to Rachel's and Saracoglu's residence and arrested Saracoglu.¹⁴⁷ Rachel did not testify at trial and the only evidence offered was the testimony of Officer Hawkins about his interrogation of Rachel and his arrest of Saracoglu.¹⁴⁸ The trial court admitted the statements, and the California Court of Appeals affirmed,¹⁴⁹ finding that Rachel was experiencing an ongoing emergency and deeming Rachel's visit the "functional equivalent" of placing a 911 emergency call.¹⁵⁰

Saracoglu turned on three critical issues. First, although Rachel made her statements in person at a police station, the court equated

¹³⁸ See Cicchini, *supra* note 43, at 1309–10; see also *supra* note 137.

¹³⁹ See, e.g., *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012) (justifying admission of DNA analysis on grounds that an at-large rapist posed public threat); *United States v. Solorio*, 669 F.3d 943, 953 (9th Cir. 2012) (justifying admission of out-of-court statements by non-testifying agents on grounds that buy-bust operation was a high risk enterprise which could have quickly devolved into an emergency).

¹⁴⁰ *People v. Saracoglu*, 62 Cal. Rptr. 3d 418 (Ct. App. 2007).

¹⁴¹ *Id.* at 419.

¹⁴² Rachel was described as "nervous, crying and shaking." *Id.* At trial, Officer Hawkins testified that Rachel "was very upset, very scared." *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* Rachel said that she went to the police station because she was afraid of Saracoglu's threat. *Id.* The record fails to indicate how Rachel arrived at the police station. *Id.* at 421.

¹⁴⁵ *Id.* at 420.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 422.

¹⁵⁰ *Id.* at 427. The Court reasoned that Rachel's decision to go directly to the police station did not alter its analysis. See *id.* ("Under the unusual facts of this case, it just happened that Rachel's plea for assistance was made to a police officer rather than a 911 operator.").

Rachel's station visit with a 911 call.¹⁵¹ This was problematic because the harried and chaotic exchanges which often accompany 911 calls are, objectively viewed, simply not the same as station visits. Additionally, had Rachel called 911, the time between her decision to do so and her first statement to the 911 operator would have been miniscule. Thus, Rachel would have had little time to process what she had seen or heard, or to gather her thoughts. However, in this case, Rachel made the decision to enter the police station in person.¹⁵² The actual time between her decision and her first statement to law enforcement was certainly *much* greater than it would have been had she called 911.¹⁵³ This permitted her to consider what she would say and to whom she would say it.

Second, deeming Rachel's visit to the police station the "functional equivalent" of a 911 call disregarded the atmosphere of formality and solemnity which a police station is traditionally thought to engender.¹⁵⁴ While Rachel's concern may have been for her and her child's safety, Rachel's primary motive for speaking with law enforcement at the police station may have been to preserve a record for a future prosecution. It certainly must have at least crossed Rachel's mind that what she told police could be used later at trial.¹⁵⁵ Moreover, Rachel waited in the police station before giving her statement to Hawkins.¹⁵⁶ This permitted Rachel additional time to both fully appreciate the formal atmosphere of the police station, and to consider any statements she might make.

In fact, the court in *Saracoglu* even suggested that Rachel made a number of statements to an officer at the front desk before she spoke with Hawkins.¹⁵⁷ The alleged exchange considerably alters the objective assessment of Rachel's interrogation. Rather than having a frantic conversation held over the phone, Rachel spoke in person with one

¹⁵¹ *See id.*

¹⁵² Rachel arrived at the police station approximately thirty minutes after the assault. *Id.* at 426. Had she called 911, presumably her first statements to police would have been made much closer in time to the event. *See id.*

¹⁵³ The amount of time separating the event and the interrogation is one of the factors assessed in determining whether a statement is testimonial. *See Davis v. Washington*, 547 U.S. 813, 815 (2006).

¹⁵⁴ The formality of the interrogation is one of the factors the U.S. Supreme Court has instructed lower courts to consider in assessing potential Confrontation Clause violations. *See id.* at 814. In *Davis*, formality was assessed when the Court noted that McCottry's statements "were provided over the phone, in an environment that was not tranquil, or even safe." *Id.* Moreover, the Court made a similar observation about the formality of Sylvia's interrogation in *Crawford* when it noted that Sylvia made her statements while in police custody. *See Crawford v. Washington*, 541 U.S. 36, 65 (2004).

¹⁵⁵ *See Commonwealth v. Gonsalves*, 833 N.E.2d 549, 558 (Mass. 2005) (arguing that proper inquiry for Confrontation Clause violations is "whether a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting a crime").

¹⁵⁶ *Saracoglu*, 62 Cal. Rptr. 3d at 426.

¹⁵⁷ *Id.*

officer who then summoned Hawkins to the station,¹⁵⁸ a description consistent with a person checking in with an office for an appointment.

Third, Rachel was in *no immediate danger* when she made her statements to Hawkins precisely because her interrogation took place in a police station.¹⁵⁹ Rachel was separated from her assailant by an unknown, but considerable, distance.¹⁶⁰ Furthermore, Rachel's child accompanied Rachel to the police station, so there was no threat of harm to him.¹⁶¹ It was simply unlikely that Rachel or her child would have been attacked while she remained at the station, surrounded by uniformed police officers.¹⁶²

Thus, *Saracoglu* demonstrates the relative discretion and latitude courts enjoy in framing a situation as an ongoing emergency. In *Saracoglu*, the court made the questionable decision to explain away Rachel's apparent safety,¹⁶³ and equated her method of emergency contact to a 911 call.¹⁶⁴

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* at 419; Sloan A. Heffron, Note, *Resuscitating Roberts? How Courts Should Construe the "Emergency" Exception to the Sixth Amendment's Confrontation Clause*, 39 HASTINGS CONST. L.Q. 861 (2012) (discussing need for workable definition of "emergency" in Confrontation Clause analysis).

¹⁶⁰ Courts have deemed statements testimonial under circumstances evincing far less physical separation, and far greater potential for harm. For example, in *Hammon*, Amy Hammon made her statement to police in her living room while her assailant was nearby in the kitchen. *Davis v. Washington*, 547 U.S. 813, 819 (2006). Richardson has argued that rather than assessing the physical proximity of the parties to each other as an independent factor, it is more appropriately used in the assessment as a bridge between the potential for further physical harm to the declarant and the formality of the interrogation. Richardson, *supra* note 24, at 954 n.80 ("[The] [p]roximity of the parties too [sic] each other is indicative of the ongoing danger to the declarant, while the proximity of the two relative to the police (i.e., whether police officers are physically between the parties) is a sign of the formality of the interrogation.").

¹⁶¹ *Saracoglu*, 62 Cal. Rptr. 3d at 419. *Contra* *Young v. State*, 980 N.E.2d 412, 420 (Ind. Ct. App. 2012) (holding statement made by victim at firehouse nontestimonial because primary purpose of interrogation was to determine extent of harm suffered by victim as well as to determine whether child taken by assailant was in danger).

¹⁶² Under these circumstances, Rachel's statements appear testimonial. The absence of an ongoing emergency and the formal setting in which the interrogation took place are particularly suggestive of this conclusion. See *People v. Cage*, 155 P.3d 205, 217 (Cal. 2007) (noting that "sufficient formality and solemnity are present" in situations where statements are made in response to police questioning under no threat of an ongoing emergency and where "deliberate falsehoods might be criminal offenses"). Ultimately, it appears that the court was convinced of Rachel's "harried" state at the time she made her statements. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1166 (2011). However, the court's decision to treat Rachel's station visit like a 911 call is troublesome. See *Saracoglu*, 62 Cal. Rptr. 3d at 427. The court could have achieved the same end simply by recognizing that Rachel was in danger regardless of her method of police contact. See *id.* at 428 ("The emergency was ongoing because Saracoglu had threatened to kill Rachel if she went to the police.").

¹⁶³ *Saracoglu*, 62 Cal. Rptr. 3d at 428.

¹⁶⁴ *Id.* at 427.

Whereas *Saracoglu* arguably falls within an acceptable gray area, other courts have pushed the emergency analysis further.¹⁶⁵ For example, in *United States v. Solorio*,¹⁶⁶ the defendant was arrested during a sting operation in which he attempted to sell a large quantity of methamphetamine.¹⁶⁷ At trial, the agents who actually witnessed the interactions of the drug transaction did not testify.¹⁶⁸ Rather, the prosecution offered testimony of the agents who were monitoring the observations of the nontestifying agents, which were broadcast over the radio.¹⁶⁹ On appeal, the Fifth Circuit found no Confrontation Clause violation, reasoning that the statements were admissible because they were made primarily to ensure the success and safety of the operation.¹⁷⁰

The problem with *Solorio*'s rationale is its potential for abuse. The reasoning underlying *Solorio* is potentially too broad, and ultimately places a large swath of statements made to law enforcement within either the "emergency" or "operational success" paradigm.¹⁷¹ The fact is that almost all law enforcement work is dangerous. Furthermore, deeming statements made during the investigation nontestimonial simply because the situation had the *potential to escalate* into an emergency ignores the very basic fact that the agents in this case surely anticipated that their statements might be used at trial.¹⁷² A buy-bust

¹⁶⁵ See, e.g., *United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012); *United States v. Solorio*, 669 F.3d 943 (9th Cir. 2012).

¹⁶⁶ *Solorio*, 669 F.3d 943.

¹⁶⁷ *Id.* at 945.

¹⁶⁸ *Id.* at 949.

¹⁶⁹ *Id.* The trial court admitted these statements as present sense impressions. *Id.* at 949–50.

¹⁷⁰ *Id.* at 953 (characterizing the situation as "a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs"). The court also reasoned that the fact that the exchange took place near the seller's place of work offered the seller a strategic advantage in the event that the deal went sour. *Id.* Moreover, the court was concerned that though the agents knew the actors involved in the exchange, the agents did not know whether they were armed. *Id.* As a result, the court reasoned that "the agents did not know exactly what might happen if Solorio discovered that the exchange was a set-up and that [the purchaser] was actually a government informant." *Id.*

¹⁷¹ The court's language, eerily reminiscent of *Roberts*, is somewhat broad:

The circumstances thus suggest that, like an "ongoing emergency," which "has a[n] . . . effect of focusing an individual's attention on responding to the emergency," *Bryant*, 131 S. Ct. at 1157, the undercover operation focused the surveilling agents' attention on reporting the unfolding events to others working with them. Accordingly, objectively assessed, the "primary purpose" of the agents' statements was assuring that the arrest effort both succeeded and did not escalate into a dangerous situation, not "to create a record for trial . . ."

Id. (first alteration in original). The court's rationale here extends the boundary line of nontestimonial statements to include not only situations in which emergencies do in fact exist, but also to situations where there is merely potential for emergencies to develop. See *id.* ("[S]tatements made out-of-court with a primary purpose other than possible prosecutorial use are nontestimonial.").

¹⁷² In fact, *Solorio* argued precisely that on appeal, claiming observations of the field agents were formally recorded to create a record for trial. See *id.*

operation requires time, coordination, and planning. It is thus difficult to imagine that the organizers did not anticipate the use of statements for prosecution.

Other courts have likewise struggled with the emergency question. In *Williams v. Illinois*,¹⁷³ a bench trial for rape, the prosecution introduced expert testimony about a DNA profile¹⁷⁴ produced by an outside laboratory, Cellmark.¹⁷⁵ The testimony included statements that Cellmark was an accredited laboratory, and that Cellmark had received and sent back vaginal swabs taken from the victim in order to conduct its tests.¹⁷⁶ The expert testified that the DNA profile produced by Cellmark matched the DNA profile produced by a police lab using a sample of the defendant's blood.¹⁷⁷

The Court's plurality opinion, authored by Justice Alito, took the view that the DNA profile was nontestimonial.¹⁷⁸ First, the plurality found that the expert's testimony was not offered for its truth, and thus did not implicate the Confrontation Clause.¹⁷⁹ Second, the plurality found in the alternative that even if the DNA profile produced by Cellmark had been offered into evidence, there would have been no Confrontation Clause problem because the report would have been offered to help catch a dangerous rapist on the loose.¹⁸⁰

The idea that the situation in *Williams* constituted an ongoing emergency is dubious at best. This characterization fails to account for a number of significant factors in assessing an emergency, including how much time has passed since the alleged crime, whether the suspect was armed and with what type of weapon, as well as the medical condition

¹⁷³ 132 S. Ct. 2221 (2012).

¹⁷⁴ DNA profiling refers to the identification of rare features in an individual's genetic code. Frank B. Ulmer, Notes, *Using DNA Profiles to Obtain "John Doe" Arrest Warrants and Indictments*, 58 WASH. & LEE L. REV. 1585, 1590–91 (2001). Because every human has a unique genetic code, DNA profiling can help law enforcement identify whether a suspect committed a particular crime. See Jennifer Callahan, Survey, *The Admissibility of DNA Evidence in the United States and England*, 19 SUFFOLK TRANSNAT'L L. REV. 537, 538 (1996). However, from an evidentiary perspective, DNA profiles are reports that are created outside of court, and thus present hearsay issues. See FED. R. EVID. 801(c). In *Williams*, the fact that the report itself may have been admitted into evidence without giving the defendant the opportunity to cross-examine the maker of the DNA profile (a Cellmark lab technician) also presented a Confrontation Clause issue. See *Williams*, 132 S. Ct. at 2228.

¹⁷⁵ *Williams*, 132 S. Ct. at 2227.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 2228.

¹⁷⁹ *Id.* ("Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.")

¹⁸⁰ The plurality reasoned that the primary purpose of the Cellmark DNA profile was not to create evidence for use at trial, but rather "to catch a dangerous rapist who was still at large" *Id.* at 2243.

and safety of the victim.¹⁸¹ By the time Cellmark began generating its profile, the victim was already well out of reach of the defendant.¹⁸² The reasoning of the *Williams* plurality, by extension, would permit the admission of out-of-court statements so long as they were made while the alleged suspect was still unapprehended, on the grounds that the suspect posed a continuing threat.¹⁸³

Even cases involving offenses less egregious than rape raise cause for concern. For example, in *Philpot v. State*,¹⁸⁴ the Georgia Court of Appeals admitted out-of-court statements by the victim that described the defendant on the grounds that the defendant, who had just fled a failed robbery attempt, posed a public threat to the neighborhood.¹⁸⁵ Similarly, in *United States v. Polidore*,¹⁸⁶ although the Fifth Circuit determined that there was no emergency to the victim, interrogator, or the public,¹⁸⁷ the court admitted a non-testifying witness's out-of-court statement concerning the defendant's possession of illicit drugs on the

¹⁸¹ See *supra* note 132 and accompanying text.

¹⁸² See *Williams*, 132 S. Ct. at 2229. The victim was abducted by defendant while walking home from work. *Id.* The defendant forced the victim into his car, where he raped and robbed her. *Id.* After the defendant pushed the victim out of his car, the victim ran home and told her mother. *Id.* The victim was then taken to the hospital where a sexual assault kit was administered. *Id.* The kit was sent to the Illinois State Police lab, which confirmed semen on the vaginal swab. *Id.* The Illinois State Police lab then later sent samples to Cellmark for DNA testing. *Id.* The samples, which generated the report, were sent to Cellmark nine months after the victim's rape. *Id.* at 2274 (Kagan, J., dissenting).

¹⁸³ Justice Kagan, in her dissent, made a similar argument. See *id.* Justice Kagan argued that the *Williams* plurality stretched the "ongoing emergency" test, noting that the Court had applied the test in the past where the statements were "informal [and] harried" in nature, made by "frantic" victims during or shortly after the event described, and made to police officers who were trying to ascertain potential threats. *Id.* (citing *Michigan v. Bryant*, 131 S. Ct. 1143, 1166 (2011)). In *Williams*, however, the report was made over a year after the rape, and there was testimony that it was created for the purpose of a criminal investigation and litigation. *Id.* In light of the timeline and purpose of the report, Justice Kagan argued that it was difficult to see how it was used to address an emergency. *Id.* Similarly, the court in *State ex rel. J.A.* rejected the type of reasoning employed by the *Williams* plurality writing that it "would allow the use of testimonial hearsay narrating a past crime so long as the suspects are at large, even where neither the declarant nor the victim is in danger." *State ex rel. J.A.*, 949 A.2d 790, 803-04 (N.J. 2008). Although decided before the U.S. Supreme Court introduced the concept of a threat to the public at large in *Bryant*, *State ex rel. J.A.* interpreted *Davis* to mean that a statement made to law enforcement about a crime is testimonial if it is made after the "imminent danger" to the declarant or other identifiable persons is over. *Id.* at 804; see also *State v. Kirby*, 908 A.2d 506, 523 n.19 (Conn. 2006) (rejecting argument that at-large suspect constituted ongoing emergency on grounds that any 911 emergency call reporting past crime in which suspect had not been apprehended would render situation an emergency, and the statement nontestimonial); *State v. Lewis*, 648 S.E.2d 824, 829 (N.C. 2007) (unknown location of defendant at time of declarant's statement does not itself render situation an emergency).

¹⁸⁴ *Philpot v. State*, 709 S.E.2d 831 (Ga. Ct. App. 2011); see *infra* Part II.B.

¹⁸⁵ *Philpot*, 709 S.E.2d at 839.

¹⁸⁶ *United States v. Polidore*, 690 F.3d 705 (5th Cir. 2012).

¹⁸⁷ *Id.* at 712-15.

grounds that the defendant's actions constituted an "ongoing criminal activity."¹⁸⁸

Together, these cases suggest that the declarant's intent or expectation in making the statements can be easily overridden by extraneous circumstances. First, the highly fact-intensive nature of the emergency inquiry makes it relatively easy for courts to justify the existence of an emergency, and thus deem statements nontestimonial and admissible.¹⁸⁹ Second, it is similarly easy for courts to justify admission of statements as nontestimonial under a public emergency rationale since some courts have found that unapprehended suspects pose public emergencies.¹⁹⁰ Third, courts have even justified admission of statements on the grounds that interrogators were in *potential* danger—a particularly questionable justification given the nature of law enforcement.¹⁹¹ The plain outcome is weaker protection for criminal defendants against testimonial statements from non-testifying witnesses.

B. Courts Produce Inconsistent Outcomes

As a result of not knowing how far to push the "ongoing emergency" analysis, courts have also come to different conclusions regarding the existence of ongoing emergencies. Thus, unlike in *Saracoglu*, a number of courts have found that separating the victim from the attacker ends the emergency.¹⁹² These decisions stand in stark

¹⁸⁸ *Id.* at 716–19. The court's decision must ultimately be evaluated in light of its statement in footnote ten, in which the court noted that its conclusion that possession of illegal drugs did not pose an ongoing emergency was based upon current precedent set by the U.S. Supreme Court, "which may be subject to change." *Id.* at 716 n.10. Here, the court appears to suggest that ongoing criminal activity may constitute an emergency. *Id.*

¹⁸⁹ See *People v. Saracoglu*, 62 Cal. Rptr. 3d 418, 428 (Ct. App. 2007) (admitting testimonial hearsay on grounds that declarant's safety within police station was temporary); see also *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

¹⁹⁰ See *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012) (justifying potential admission of DNA profile on grounds that rape suspect had not yet been apprehended and thus posed a public emergency); *Philpot*, 709 S.E.2d at 839 (admitting testimonial hearsay on grounds that an at-large robber posed public threat to neighborhood).

¹⁹¹ See *United States v. Solorio*, 669 F.3d 943 (9th Cir. 2012) (justifying admission of statements on grounds that the success and safety of police operation were paramount).

¹⁹² See, e.g., *People v. Cage*, 155 P.3d 205, 217 (Cal. 2007) (holding statements by a victim to police testimonial where victim was physically separated from assailant in a remote location to receive medical treatment); *Commonwealth v. Galicia*, 857 N.E.2d 463, 470 (Mass. 2006) (holding victim's statement to police testimonial where statement was made "separate and apart from the danger [the victim] sought to avert, both temporally and physically"); *State ex rel. J.A.*, 949 A.2d 790 (N.J. 2008) (holding statement testimonial where statement was made to police ten minutes after a robbery had occurred on grounds that the crime had ended and the danger to the victim was over). Even the Supreme Court in *Davis* noted that the physical separation of Amy from Herschel constituted requisite formality in order to deem Amy's statements testimonial, though

contrast to ones in which courts have found that emergencies persist even after the victim and the assailant were physically separated.¹⁹³

Courts have also disagreed on whether an unapprehended suspect renders a situation an ongoing emergency. For example, in *Philpot v. State*,¹⁹⁴ Joshua E. Philpot was convicted of burglary, simple assault, criminal trespass, and being a “Peeping Tom.”¹⁹⁵ He argued on appeal that testimony from an officer about what a victim had told the officer about a past burglary violated the Confrontation Clause.¹⁹⁶ At trial, the officer testified that the victim had told the officer that she heard a noise in her kitchen and went to investigate.¹⁹⁷ She allegedly discovered Philpot, holding a knife, attempting to enter her home through her kitchen window.¹⁹⁸ The victim screamed, and Philpot fled.¹⁹⁹ While speaking with the officer, the victim spotted Philpot standing in a neighbor’s yard.²⁰⁰ The officer then chased Philpot and arrested him.²⁰¹

The trial court admitted the victim’s statements²⁰² and the Georgia Court of Appeals affirmed, finding the statements nontestimonial because they were offered to help police meet an ongoing emergency.²⁰³ The court reasoned that the situation constituted an ongoing emergency because the attempted burglary had occurred mere minutes before the statements were made to the officer,²⁰⁴ and even though the burglar had fled, he was likely still in the vicinity and thus posed a potential threat to the victim and the neighborhood.²⁰⁵

In contrast, the Supreme Court of New Jersey found that statements made to police shortly after a robbery were testimonial in *State ex rel. J.A.*,²⁰⁶ rejecting the type of reasoning underlying the *Philpot*

the interrogation took place in the Herschel residence, and the victim and assailant were merely in separate rooms. *Davis v. Washington*, 547 U.S. 813, 830 (2006).

¹⁹³ A similar observation, and criticism, was leveled by the U.S. Supreme Court in *Crawford*. There, the Court noted that under *Roberts*, lower courts were assigning the same significance to opposite facts. *Crawford v. Washington*, 541 U.S. 36, 63 (2004); *see also supra* Part I.C.

¹⁹⁴ *Philpot*, 709 S.E.2d 831.

¹⁹⁵ *Id.* at 834.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 838.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 834.

²⁰³ *Id.* at 838.

²⁰⁴ *Id.* at 839. The court noted that the victim was still “shaken up” while she was speaking with the officer. *Id.*

²⁰⁵ *Id.* The court recognized that the prior victim was not “immediately threatened,” but compared the situation to the one in *Bryant*, writing that “the armed perpetrator was still on the loose, and thus continued to pose a serious potential threat to the prior victim and her neighbors.” *Id.*

²⁰⁶ *State ex rel. J.A.*, 949 A.2d 790 (N.J. 2008).

decision.²⁰⁷ On February 10, 2005, at around 9:30 PM, Juana Chavez was walking to her home in Paterson, New Jersey.²⁰⁸ During her walk, she was attacked and robbed of her purse.²⁰⁹ As her attacker ran off, she noticed a second individual running with him.²¹⁰ Though she saw her attacker's face and was able to identify his clothing, Chavez did not see the second individual's face and was unable to later identify him.²¹¹

Shortly thereafter, a third-party witness told police that he saw two Hispanic teenagers rob Chavez and that he had followed the suspects.²¹² Two teenagers, matching the description of the eyewitness, were later stopped by police.²¹³ At their trial, the third party's statements to police identifying the defendants were deemed nontestimonial, and the two defendants were convicted.²¹⁴

The New Jersey Supreme Court reversed, finding the non-appearing eyewitness's statements to Officer Semmel testimonial.²¹⁵ The court determined that there was no ongoing emergency to either Chavez or the witness, since both were protected by police.²¹⁶ Moreover, unlike in *Philpot*, the court expressly rejected the idea that Chavez's attackers posed a threat to the public.²¹⁷ Additionally, the court found that the requisite formality was met by the interrogation in order to deem the statements testimonial.²¹⁸ Lastly, the court determined that the eyewitness's statements served as a substitute for in-court testimony,

²⁰⁷ See *id.* at 803–04. In *Philpot*, the court did not accept the Attorney General's argument that the suspects at-large posed an ongoing emergency for Confrontation Clause purposes. *Id.*

²⁰⁸ *Id.* at 792.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 793.

²¹¹ *Id.* at 793–94.

²¹² *Id.* at 793.

²¹³ *Id.*

²¹⁴ *Id.* at 793–94.

²¹⁵ *Id.* at 806. The New Jersey Appellate Division had affirmed, finding that the statements were nontestimonial because an objective witness would not have reasonably believed his statements would be subsequently used at trial. *Id.* at 795.

²¹⁶ *Id.* at 803.

²¹⁷ *Id.* The *J.A.* court wrote that an interpretation of “ongoing emergency” which permitted “use of testimonial hearsay narrating a past crime so long as the suspects are at large, even when neither the declarant nor victim is in danger,” was too “expansive” and was “implicitly rejected by the *Davis* Court.” *Id.* at 803–04. Rather, the court adopted the view that “a declarant's narrative to a law enforcement officer about a crime, which once completed has ended any ‘imminent danger’ to the declarant or some other identifiable person, is testimonial.” *Id.* at 804 (citing *Davis v. Washington*, 547 U.S. 813, 827 (2006)).

²¹⁸ The court noted that it was a crime to knowingly give false information with the intent of accusing another, or to report an offense to law enforcement knowing that the offense did not occur. N.J. STAT. ANN. § 2C:28-4(a)–(b) (2005). The court reasoned that the witness's statements in light of these laws satisfied the formality requirement. *J.A.*, 939 A.2d at 804–05 (citing *Davis*, 547 U.S. at 826–27 (noting that requisite solemnity is established by criminal penalties attending false statements to law enforcement)).

and were thus testimonial, on the grounds that it was a critical piece of identifying evidence at trial.²¹⁹

The key distinction was that, unlike the *J.A.* court, the court in *Philpot* erroneously analogized *Philpot* with the public emergency in *Bryant*. The suspect in *Bryant* was considered a public threat because he was armed with a gun, and his whereabouts and motive were unknown.²²⁰ In contrast, and contrary to the court's conclusion, the defendant in *Philpot* hardly seemed like he posed a public threat. *Philpot* was allegedly armed with a knife—a weapon significantly less dangerous than a gun—²²¹ and was thought to be in the immediate area before his location was identified and relayed to police.²²² Moreover, *Philpot*'s entry into a specific home suggested that his motive was aimed against an individual, not the public.²²³ Since the victim identified *Philpot* to police under circumstances indicating that both the immediate danger and the crime had ended the court should not have found the existence of a public emergency.²²⁴

Other inconsistencies abound under the current jurisprudence. For example, the North Carolina Court of Appeals' conclusion in *State v. Glenn*²²⁵ that an alleged rapist who fled the scene did not pose an ongoing threat to the public stands at odds with the dicta in the U.S. Supreme Court's decision in *Williams v. Illinois*,²²⁶ in which an at-large rapist was deemed to pose a public threat. In *Glenn*, the defendant was convicted of kidnapping and indecent exposure.²²⁷ At trial, the prosecution introduced statements made by Misty Hooper.²²⁸ Hooper had previously accused the defendant of rape.²²⁹ Since Hooper was

²¹⁹ *J.A.*, 939 A.2d at 805. While Chavez was able to identify one of her attackers, she was unable to identify the other. *Id.* In contrast, the eyewitness declarant's statements provided identifying information about the second suspect, describing the jacket he was wearing and the fact that he had glasses. *Id.*

²²⁰ See *Michigan v. Bryant*, 131 S. Ct. 1143, 1164 (2011).

²²¹ In order to harm the victim or police, *Philpot* would have had to come back into close contact with them. See *State v. Glenn*, 725 S.E.2d 58, 64 (N.C. Ct. App. 2012) (contrasting the risk of injury by knife as against by gun).

²²² See *Philpot v. State*, 709 S.E.2d 831, 838 (Ga. Ct. App. 2011).

²²³ See *id.* at 838; see also *Bryant*, 131 S. Ct. at 1163 (“[T]he scope of an emergency in terms of its threat to individuals other than the initial assailant and victim will often depend on the type of dispute involved.”).

²²⁴ *Philpot* had fled the scene, and the victim was protected by police in her home. *Philpot*, 709 S.E.2d at 838. Note that this was the approach applied in *J.A.*, 949 A.2d 790. See also *supra* note 217 and accompanying text.

²²⁵ *Glenn*, 725 S.E.2d 58.

²²⁶ *Williams v. Illinois*, 132 S. Ct. 2221, 2229 (2012) (describing the facts of the case as well as showing the significant time lapse between the date of the crime and the identification of the suspect).

²²⁷ *Glenn*, 725 S.E.2d at 60.

²²⁸ *Id.* at 62.

²²⁹ *Id.* Though Hooper accused defendant of rape at knifepoint, defendant was only convicted of menacing. *Id.*

deceased at the time of the current trial,²³⁰ her statements were admitted through Officer Baker.²³¹

Hooper had told Baker that she was waiting at a bus stop when a vehicle pulled over and asked her for directions.²³² When Hooper approached the car, the driver grabbed her shirt collar and told her to get in.²³³ She complied because the driver had a knife.²³⁴ The defendant allegedly drove to a parking lot, raped Hooper, and then let her go.²³⁵ Hooper then walked to the Waffle House restaurant and called police.²³⁶ The trial court found that Hooper's statements to Baker were nontestimonial, and thus admissible, because they were made to aid police in resolving an ongoing emergency.²³⁷ The Court of Appeals reversed, holding Hooper's statements testimonial.²³⁸ The court was convinced of the testimonial nature of the statements because it concluded that Baker was aware that the assault which had generated the 911 call had ended.²³⁹ Moreover, the court found that the questioning more closely resembled a formal interview on the grounds that only one officer questioned Hooper and the inquiry was about a past event.²⁴⁰

The court's approach in *Glenn* is laudable for its narrow interpretation of *Bryant*'s public emergency analysis.²⁴¹ While *Williams* made no attempt to explain how an at-large rapist posed a public threat,²⁴² the *Glenn* court engaged the reasoning underlying *Bryant* and

²³⁰ *Id.* Because Hooper was not alive at the time of defendant's trial, it was clear Hooper was unavailable to testify and that defendant had no opportunity to cross-examine her. *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 65.

²³⁹ *Id.* at 63–64. The court focused on the interrogator's perspective in arriving at this conclusion. The court noted that when Baker interviewed Hooper there was no ongoing assault, no suspect was present, and that Hooper was not demonstrating any signs of trauma. *Id.* at 63. Curiously, there was no record at trial that Baker secured the scene or attempted to locate the suspect. *Id.*

²⁴⁰ *Id.* at 65. Unlike in *Bryant*, where multiple officers were posing questions to the victim, here, Baker was the only officer questioning Hooper. *Id.* The court characterized Hooper's response to Baker's questions as a narrative of the evening's events. *Id.* The court also noted that Hooper was able to provide a detailed account of the incident, "implying that her primary purpose was to provide information necessary for defendant's prosecution." *Id.* Lastly, the court reasoned that the questioning was conducted with sufficient formality since it was done as part of an investigation and in the absence of the defendant. *Id.*

²⁴¹ *See id.* at 64.

²⁴² *See Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012) (stating that primary purpose of the Cellmark report was to capture a dangerous rapist who was still at large, not to produce evidence for a potential future prosecution).

evaluated the nature of the crime at issue.²⁴³ The court in *Glenn* correctly concluded that the circumstances of Hooper's interrogation were sufficiently dissimilar to *Bryant* to justify the non-existence of a public emergency.²⁴⁴ Specifically, the *Glenn* court appropriately recognized that the motive of Hooper's attacker was sexual, and thus failed to rise to the level of a public threat.²⁴⁵ Moreover, Hooper's voluntary release by her attacker,²⁴⁶ the presence of police when she made her statements, and the fact that the suspect was armed with a knife, but had only used it to threaten—not harm—his victim, all indicated that neither Hooper nor Baker were experiencing an emergency.²⁴⁷

Strikingly, the Supreme Court failed to appreciate similar facts in *Williams*. There, the victim had been raped and then released by her attacker,²⁴⁸ suggesting that the crime was both narrow in scope and had ended.²⁴⁹ Rather than engaging the emergency analysis, the Court presented a conclusory gloss, which failed to justify exactly why the defendant in *Williams* posed a public emergency. A more appropriate public emergency assessment would have analyzed the nature of the crime and motive of the defendant.²⁵⁰ In failing to even attempt to justify the existence of a public emergency, the decision injected the very judicial discretion that *Crawford* sought to prevent.²⁵¹

III. PROPOSAL

Since *Crawford*, lower courts have struggled with Confrontation Clause analysis in cases involving ostensible emergencies because they

²⁴³ See *Michigan v. Bryant*, 131 S. Ct. 1143, 1163 (2011) (explaining that the existence of a public emergency will often turn on the nature of the dispute).

²⁴⁴ See *Glenn*, 725 S.E.2d at 64.

²⁴⁵ *Id.* The court, again looking to *Bryant*, examined the suspect's motive in order to determine the potential threat to the public. *Id.* In *Bryant*, the motive of the shooter was unknown, and thus was deemed to extend beyond the victim and law enforcement to the public at large. *Bryant*, 131 S. Ct. at 1163–64. However, in *Glenn*, Hooper specifically told Baker that the suspect had “just want[ed] sex.” *Glenn*, 725 S.E.2d at 64. Thus, the court reasoned that unlike the shooter in *Bryant*, the threat posed by the suspect did not endanger the public. *Id.*

²⁴⁶ The court argued that the voluntary release of Hooper and the lack of indication that the suspect would return to harm Hooper again ruled out a continuing threat against the victim. *Id.* at 65. Moreover, the court contrasted this case with *Bryant*, noting that the suspect had only “displayed a knife to threaten Hooper.” *Id.* Absent evidence that the suspect was in the Waffle House parking lot or close enough to injure Hooper or Baker with his knife, the court concluded that there was no ongoing threat. *Id.*

²⁴⁷ See *id.* at 64.

²⁴⁸ See *Williams v. Illinois*, 132 S. Ct. 2221, 2229 (2012).

²⁴⁹ See *Bryant*, 131 S. Ct. 1143, 1163–64 (2011) (assessing the scope of the emergency); see also *supra* note 223.

²⁵⁰ See *Bryant*, 131 S. Ct. at 1163–64 (assessing the crime and the motive for the shooting).

²⁵¹ See *supra* Part I.C.

have been given relatively little guidance on the application of the complex emergency inquiry.²⁵² With few guiding principles, courts have vast discretion to characterize a situation as an emergency or a non-emergency.²⁵³ Confusion over the proper application of *Crawford's* framework has also lead lower courts to produce inconsistent outcomes.²⁵⁴

This Note proposes that courts utilize a modified step-by-step primary purpose analysis that emphasizes the primacy of the declarant's intent. First, a court should determine the subjective intent or expectation of the declarant in making the statement.²⁵⁵ This assessment includes evaluating whether the declarant was experiencing an emergency, and thus made the statement in order to seek help. Second, after the court has determined the declarant's intent, the court should determine whether the interrogator or the public, when objectively viewed, was experiencing an emergency. Third, if the interrogator or public was experiencing an emergency, this finding should be balanced against the declarant's intent. However, courts should engage in this balancing by granting a presumption favoring declarant's intent. This will provide greater protection to criminal defendants by forcing courts to justify the admission of statements made during an emergency in the face of a declarant's testimonial purpose.

A. *Prong One: Determining the Declarant's Intent or Expectation*

The first prong focuses on the declarant's subjective intent or expectation. Although the Supreme Court has repeatedly stated that the primary purpose test is an objective inquiry,²⁵⁶ the Court's examination

²⁵² See *supra* note 134.

²⁵³ See *supra* Part II.A; see also *Crawford v. Washington*, 541 U.S. 36, 68 ("Vague standards are manipulable, and, while that might be of small concern in run-of-the-mill assault prosecutions . . . the Framers had an eye toward politically charged cases like Raleigh's . . .").

²⁵⁴ Compare *State v. Kirby*, 908 A.2d 506, 523 n.19 (Conn. 2006) (rejecting argument that at-large suspect constituted an ongoing emergency on grounds that any 911 emergency call reporting a past crime in which a suspect had not been apprehended would render the situation an emergency, and statement nontestimonial), with *Commonwealth v. Nesbitt*, 892 N.E.2d 299, 309 (Mass. 2008) (suggesting that an ongoing emergency persists until the safety of police officers and first responders can be guaranteed).

²⁵⁵ Since the Confrontation Clause refers to those who bear testimony, it makes sense to first determine whether the declarant's statement is meant to do precisely that. See *United States v. Cromer*, 389 F.3d 662, 674–75 (6th Cir. 2004) (indicating that the proper inquiry for determining whether the declarant intended to bear testimony is to assess whether a person in the declarant's position would anticipate his statement being used at trial); *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004) (suggesting that whether the declarant bears testimony turns on whether the declarant was aware, or should have expected, that the declarant's statements would be used later at trial).

²⁵⁶ See *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011); *Davis v. Washington*, 547 U.S. 813, 822 (2006).

of the meaning of “testimony” suggests a role for a subjective inquiry as well.²⁵⁷ By its nature, providing testimony is an active choice by the witness because it is an “affirmation” made with a specific “purpose.”²⁵⁸ It is simply not possible for a witness to testify by accident. This decision, whether to make a solemn affirmation with the purpose of proving some fact, is thus reserved to the individual to subjectively determine.²⁵⁹ Therefore, the first prong focuses on the declarant’s intent or expectation because a person who makes statements to law enforcement with the knowledge that they will be used later at trial effectively bears testimony against the accused.²⁶⁰

The key question in determining the declarant’s intent is whether a person in the declarant’s position would have reasonably expected that his statement would be used against the accused at a future trial. This assessment involves looking to the statements and actions of both the declarant and interrogator. Additionally, whether the declarant was experiencing an emergency should be assessed. The existence of an emergency plays a major role in determining the declarant’s intent because a declarant who makes statements with the intent of seeking aid in the face of an ongoing emergency is unlikely to consider or expect that the statements will be used in a later trial. However, the proposed framework prohibits courts from determining whether the interrogator or the public was experiencing an emergency at this stage of the inquiry. Restricting the inquiry to the declarant’s intent, and giving this finding deference, limits judicial discretion by forcing judges to justify the admission of the declarant’s statements upon more than merely potentially dubious public or police emergencies.²⁶¹

Courts should consider many of the same factors outlined in *Crawford*, *Davis*, and *Bryant* in determining the declarant’s intent or expectation, such as: (1) whether the statement describes past events, or events which are currently happening; (2) the amount of time between the event and the statement; (3) the interrogation’s formality; (4) the location of the interrogation and whether the declarant was protected by police; (5) the type of crime at issue; (6) the type of weapon involved;

²⁵⁷ See *Crawford*, 541 U.S. at 51.

²⁵⁸ In *Crawford*, the Court noted that “testimony” is a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* (citation and internal quotation marks omitted).

²⁵⁹ See *Bryant*, 131 S. Ct. at 1168–69 (Scalia, J., dissenting) (“The hidden purpose of an interrogator cannot substitute for the declarant’s intentional solemnity or his understanding of how his words may be used.”).

²⁶⁰ Statements “made to the authorities who will use them in investigating and prosecuting a crime, . . . made with the full understanding that they will be so used[,] . . . are testimonial in every meaningful sense of the word; indeed they lie at the core of the concern underlying the Confrontation Clause.” See Friedman, *supra* note 3, at 1025–26.

²⁶¹ See *supra* note 185.

and (7) the declarant's medical condition.²⁶² These factors inform whether the declarant intended or would have reasonably anticipated that his statements would be used later at a criminal trial, as well as whether the declarant was experiencing an emergency.

If the declarant did not intend or would not have reasonably expected the statements to be used in future prosecution—possibly because the statement were made in order to seek aid—then the declarant's statements are likely nontestimonial. However, if the court finds that the declarant intended or would have reasonably expected the statements would be used in future prosecution, then the statement is likely testimonial.

Where the court finds that the declarant's intent or expectation was mixed,²⁶³ a finding of an emergency to the interrogator or the public may play a stronger role in the balancing analysis. Where the intent or expectation is mixed, and neither the interrogator nor the public is experiencing an emergency, courts should then assess whether the statement was made primarily for the purpose of seeking aid or for preserving a record for trial.²⁶⁴

B. *Prong Two: Determining the Existence of an Emergency to the Interrogator or the Public*

Courts should next examine whether the interrogator or the public was experiencing an emergency. Determining whether the interrogator was experiencing an emergency is effectively the same as determining whether the declarant was experiencing an emergency.²⁶⁵ However, courts should not justify the existence of an emergency to police where there is merely a potential for such.²⁶⁶

The existence of a public emergency should be assessed by looking to: (1) the type of dispute involved;²⁶⁷ (2) the location of the suspect;²⁶⁸

²⁶² See Cicchini, *supra* note 43, at 1309–10.

²⁶³ In certain circumstances, a declarant may have made his statement to law enforcement in order to both seek aid and to establish facts for future prosecution. Where the declarant has no single intent or expectation in making his statement, the intent or expectation of the declarant is deemed “mixed.”

²⁶⁴ Effectively, if neither the interrogator nor the public is experiencing an emergency, and the declarant's intent is mixed, the test is reduced to a primary purpose assessment of the declarant's subjective intent.

²⁶⁵ See *supra* Part III.A.

²⁶⁶ See *supra* Part II.B.

²⁶⁷ See *Michigan v. Bryant*, 131 S. Ct. 1143, 1163 (2011) (noting existence of public emergency depends on the nature of the dispute at issue). Thus, actions by a suspect which indicate that the crime's motive was focused against an individual should cut against the finding of a public emergency. See *id.*

²⁶⁸ See *id.* at 1164 (indicating that the unknown location of a suspect affects the existence of a public emergency).

and (3) the type of weapon employed.²⁶⁹ *Bryant* teaches that the unknown location of an armed shooter with unidentified motives gives rise to a public emergency.²⁷⁰ However, *Bryant* represents an outer-boundary. Thus, to the extent that a case falls short of meeting the motive-location-weapon trifecta illustrated in *Bryant*, courts should hesitate to find a public emergency.²⁷¹

C. *Prong Three: Balancing the Declarant's Intent Against Emergency to Interrogator or the Public*

The third and final step in the analysis requires the balancing of the declarant's intent against any existing emergency to the interrogator or the public. In some cases neither the interrogator nor the public will experience an emergency, and therefore admission of the declarant's statement would turn on the declarant's intent alone. However, where the interrogator or the public is found to be experiencing an emergency, this must be balanced against a presumption favoring the intent of the declarant. This is meant to protect criminal defendants from judicial discretion by requiring judges to justify the emergency exception in the face of the declarant's intent.²⁷²

D. *Application: People v. Saracoglu*

To illustrate, the following is an application of the proposed framework to the facts in *Saracoglu*.²⁷³ First, Rachel's intent or expectation in making her statements to Officer Hawkins must be determined. Here, the relatively recent timing of the statement in relation to the alleged crime,²⁷⁴ the nature of the defendant's threat,²⁷⁵ and the unknown location of the defendant²⁷⁶ indicate that Rachel made her statement to police in order to seek aid. Moreover, because the

²⁶⁹ See *id.* (indicating that whether a suspect is armed affects the existence of a public emergency).

²⁷⁰ *Id.* at 1165–67.

²⁷¹ See also *Langley v. State*, 28 A.3d 646, 655 (Md. 2011) (suggesting that whether unapprehended suspect is armed with a gun is significant in assessing existence of an ongoing public emergency).

²⁷² For example, in *Glenn*, it would be difficult for the court to characterize Hooper's statements as nontestimonial, given that she gave a detailed account of her rape and stated that she wanted to prosecute. See *State v. Glenn*, 725 S.E.2d 58, 65 (N.C. Ct. App. 2012).

²⁷³ See *People v. Saracoglu*, 62 Cal. Rptr. 3d 418 (Ct. App. 2007); see also *supra* Part II.A.

²⁷⁴ Rachel's statement to police was made approximately thirty minutes after the alleged assault. *Saracoglu*, 62 Cal. Rptr. 3d at 426.

²⁷⁵ *Saracoglu* threatened to kill Rachel if she went to the police. *Id.* at 419.

²⁷⁶ At the time Rachel made her statement to police, the location of the defendant was unknown. See *id.* at 419–20.

danger to Rachel was premised upon her going to the police, Rachel's police interview itself generated the very ongoing emergency Rachel was facing.²⁷⁷ However, the fact that Rachel's statements were made in a police station, which afforded her a degree of safety, and the formal nature of the interrogation by Hawkins²⁷⁸ suggests that Rachel would have reasonably expected that her statements would be used later at trial, despite the fact that she was seeking aid. At best, Rachel's intent or expectation in making her statement to police was mixed.

Second, the existence of an emergency to the interrogator or the public is assessed and balanced against the declarant's intent or expectation. In this case, Saracoglu's threat was made specifically against Rachel, which cuts against a finding that there was a danger to the public.²⁷⁹ Moreover, at the moment, no police were currently threatened by Saracoglu since they were safe in the station. On balance, the interrogators and the public were not experiencing an emergency.

The question then becomes whether Rachel's objective in seeking aid outweighs her expectation that her statements may be used in a future prosecution. Rachel's predicament left her in a position where she had to make a personal appearance at the police station in order to seek aid, thus minimizing the value of the interview's formality and the police station's safety in support of an expectation that the statements would be used later at trial. Moreover, the visible cuts and bruises on her body, and the recent timing of the assault, indicated that Rachel contacted police primarily to seek aid. In light of Rachel's particular circumstances, the facts which support an expectation that her statements would be used later at trial are outweighed by Rachel's intent in seeking aid to resolve the situation. Thus, her statements were nontestimonial.

E. *Application: Philpot v. State*

The proposed framework also helps correct the questionable outcome in *Philpot*.²⁸⁰ First, the declarant's intent is determined. Here, the declarant was unharmed and protected by police when she identified Philpot. Moreover, the declarant's conversation with the officer was about a past event and was conducted outside the presence of the

²⁷⁷ Similarly, Rachel's safety within the police station was only temporary since Rachel could not go home to Saracoglu until the situation had been resolved. *See id.* at 428.

²⁷⁸ Hawkins was specifically called back to the police station to conduct Rachel's interview. *See id.* at 419.

²⁷⁹ *See Michigan v. Bryant*, 131 S. Ct. 1143, 1158 (2011).

²⁸⁰ *See Philpot v. State*, 709 S.E.2d 831 (Ga. Ct. App. 2011); *see also supra* Part II.B. The Georgia Court of Appeals ultimately found that the declarant's statements were nontestimonial. *Philpot*, 709 S.E.2d at 838.

defendant. All of this suggests that the declarant was not experiencing an emergency.²⁸¹ Even though the suspect was armed with a knife, he would need to get very close to cause any harm. On balance, the threat to the declarant ended once the attacker fled and police had arrived.²⁸² Additionally, the declarant's one-on-one interview with the officer indicated a high degree of formality.²⁸³ Thus, because the declarant was interviewed by a single officer after the danger of the crime was over, and provided the officer with the type of information one would expect at trial—identification of the burglar—the declarant would have anticipated that her statements would be used later.

Second, the existence of an emergency to the interrogator or public is assessed. While police work can be dangerous, the knife-wielding burglar would have to be in close proximity to harm anyone. And although the suspect had fled, the officer was quickly made aware of the suspect's location. Thus, the officer was not experiencing an emergency.

Nor was the public under threat.²⁸⁴ The nature of the dispute—burglary—was narrow, and the location of the suspect was known. While the suspect was unapprehended and armed with a knife, on balance, this is not enough to find a public emergency.

The last step is to balance the declarant's intent against any finding of an emergency to the interrogator or the public. In this case there was no such emergency. Therefore, because the declarant would have reasonably understood that her statements might be used in future prosecution, the declarant's statements were testimonial and should have been excluded.

CONCLUSION

The current state of Confrontation Clause jurisprudence allows judicial discretion, along with the new doctrine's malformed and ill-defined limits, to substantially weaken an alleged guarantee promised criminal defendants. The amorphous boundaries of *Crawford's* framework and the complexity of the inquiry have produced a Confrontation Clause test driven primarily by the existence or nonexistence of an emergency, with little regard for other significant factors, such as the declarant's intent. The results have spawned court

²⁸¹ See *Philpot*, 709 S.E.2d at 838; see also *State ex rel. J.A.*, 949 A.2d 790, 804 (N.J. 2008) (“[A] declarant’s narrative to a law enforcement officer about a crime, which once completed has ended any ‘imminent danger’ to the declarant or some other identifiable person, is testimonial.”).

²⁸² The court even admitted in its opinion that the declarant was in no immediate danger. *Philpot*, 709 S.E.2d at 839.

²⁸³ In contrast, the declarant in *Bryant* was barraged with questions by five police officers while bleeding to death. See *Bryant*, 131 S. Ct. at 1163.

²⁸⁴ See *supra* Part II.A.

decisions that have expanded the meaning of “emergency” beyond recognition and left criminal defendants with insufficient protection.

In sum, the emergency assessment must be reined in. Confrontation Clause analysis, rather than focusing on the existence of an ongoing emergency, should turn primarily on an assessment of the declarant’s intent. This will help blunt the driving force that the emergency assessment plays. This shift in focus, in addition to a formal analytical framework, should help produce more consistent rulings and protect criminal defendants from the vagaries of judicial discretion.