IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008
No. 09-150

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
RICHARD PERRY BRYANT
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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Statement of the Question

I.

Should certiorari be granted to settle the conflict of authority as to whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?

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Table of Contents

Page

Statement of The Question . . . . . -1-

Index of Authorities . . . . . -3-

Petition . . . . . -4-

Opinions Below . . . . . -5-

Statement of Jurisdiction . . . . . -6-

Constitutional Provisions Involved . . . . . -5-

Statement of Facts . . . . . -6-

Reasons for Granting the Writ . . . . . -7-

Conclusion . . . . . -14-

Appendix A: Court of Appeals opinion.....-1A

Appendix B; Order denying leave to appeal.....-8A

Blank Page

INDEX OF AUTHORITIES

Cases

Collins v State,
873 NE2d 149 (Ind. App, 2007).....12

Crawford v Washington,
541 US 36, 124 S Ct 1354,
158 L Ed 2d 177 (2004).....7

Davis v Washington,
547 US 813, 126 S Ct 2266,
165 L Ed 2d 224 (2006).....7

People v Bryant,
483 Mich 132 (2009).....8

State v Casique,
2009 WL 1508463 (Call App 1 Dist, 2009)..12

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NOW COMES the State of Michigan, by **Kym L Worthy**, *Prosecuting Attorney for the County of Wayne*, **Timothy A. Baughman**, *Chief of Research, Training, and Appeals*, **Jeffrey Caminsky**, *Principal Attorney, Appeals*, and **Lori J. Palmer**. *Assistant Prosecuting Attorney*, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Supreme Court, entered in this cause on June 10, 2009.

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OPINIONS BELOW

The original opinion of the Michigan Court of Appeals is unpublished, and appears as Appendix A. The opinion of the Michigan Supreme Court appears as Appendix B, and is published at 483 Mich 132, __NW2d__ (2009).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right to . . .be confronted with the witnesses against him. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Statement of Material Facts and Proceedings

Officers responding to a radio run that someone had been shot found Anthony Covington lying in a gas station outside his car—grabbing his sides in considerable pain, and blood oozing out of his stomach. When a police officer asked "what happened," Covington responded that he had been shot, that somebody named "Rick" had shot him through a door, and provided a description of his attacker. The officer described the victim as nervous and in obvious pain, constantly grabbing his side, and talking in a halting manner. After waiting with the victim for five or ten minutes until the ambulance arrived, the officers moved from the scene of the shooting to the place identified as the scene of the shooting to attempt to locate and apprehend the shooter. The victim died several hours later. Covington's statements were admitted at Respondent's trial, and he was convicted of second-degree murder.

On June 10, 2009, the Michigan Supreme Court held that the statements taken at the scene where the victim was found were "testimonial," and admitted in violation of the Confrontation Clause, requiring reversal under the "plain-error" standard for forfeited error.

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Reasons for Granting the Writ

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) this Court carefully distinguished between "testimonial" and "nontestimonal" statements, concluding that while the Confrontation Clause ordinarily bars use of uncross-examined testimonial statements against a defendant at trial, nothing in the Sixth Amendment precludes admission of "nontestimonial" statements. As the Court observed:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.

Crawford, 124 S.Ct 1t 1373.

Crawford sought to return the Confrontation Clause to its meaning at the time of the adoption. In *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) the Court "fleshed out" the rule of *Crawford*, determining that "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 126 S Ct at 2268-2269.

Here, police officers received a radio run that someone had been shot. On arriving at the scene, the victim was found shot and bleeding on the ground. Preliminary inquiries were made as to "what had

happened," including questions directed at establishing the identity of the shooter and the circumstances of the shooting (for all the police knew, the shooter could have been right on the scene). The victim supplied the identity of the shooter, his description, and the place of the shooting several blocks away, before being taken away by ambulance, and dying several hours later. The police immediately went to the scene described to attempt to apprehend the shooter.

The majority of the Michigan Supreme Court held that on-scene initial questions designed to identify and apprehend an at-large perpetrator of a recent shooting are not questions dealing with an ongoing emergency; the court appeared to overlook the fact that the shooter could be at the scene, something the victim might be able to point out:

> The circumstances, in our judgment, clearly indicate that the "primary purpose" of the questioning was to establish the facts of an event that had already occurred; the "primary purpose" was not to enable police assistance to meet an ongoing emergency. The crime had been completed about 30 minutes earlier and six blocks from where the police questioned the victim. The police asked the victim what had happened in the past, not what was currently happening. That is, *the "primary purpose" of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator* (emphasis supplied).
>
> *People v Bryant*, 483 Mich 132, ___ (2009)

To the majority of the Michigan Supreme Court, then, "identifying, locating, and apprehending" the

perpetrator of a serious shooting that has very recently occurred, one which turned out to be fatal, is not dealing with an "emergency situation." These questions are, in the majority's view, closer to the structured testimonial statements at issue in *Crawford*, *Hammon*, and ensuing cases, rather than to the spontaneous statements found to be non-testimonial in *Davis*.

The counter-intuitive view of the Michigan Supreme Court majority is contrary to that of some other courts. Any human being—let alone someone sworn to "serve and protect" the community—coming upon another human being lying on the pavement with blood pouring from a gunshot wound to the stomach will be painfully aware that the situation is an emergency. Finding out the basics of what happened—ie, "I'm shot; I was shot by Rick through the door at my house a few blocks away"—is part and parcel of any human response to the emergency, so as to protect against further injury to the victim, or injury to the responding officers from a shooter who remains at large; and comforting a dying man while the seconds tick by, straining to listen to what he is saying between his painful gasps, while waiting for the arrival of medical help to try to save him, is hardly the kind of formalized, testimonial interrogation that the Confrontation Clause bars from use at trial. It is, rather, precisely the sort of statement that the Constitution entrusts to the sound discretion of the trial court, to determine questions of admissibility under state law. A more classic depiction of an "excited utterance" would be difficult to find.

In *Crawford v Washington*, the "testimonial" statement at issue was a formal, structured statement the defendant's wife gave to police during a police interrogation, reduced to recorded questions

and answers and recorded on tape. In *Davis v Washington* the Court excluded written statements contained in an affidavit submitted to police in the companion case of *Hammon*, but found that statements made during a 911 call to a police operator from a victim reporting a crime were "nontestimonial," even though the operator was asking questions—questions designed to determine the nature and extent of the emergency, and basic details surrounding the incident. Clearly, the situation in this case is closer to the 911 call than the question-and-answer format of the prototypical "testimonial" statement. Indeed, had the victim made precisely the same statements that he made to the responding officers instead to a 911 operator if he had been in possession of a cell phone, *Davis* would allow the admission of the statements.

The Michigan Supreme Court majority's holding that the police efforts were focused on past events to "establish the fact of a prior offense" appears to ignore the fact that actions by law enforcement typically comes in response to "past events." We do not, in this country, punish people in the future tense; and as a consequence, most police activity revolves around the past, rather than the future. The state court's mistake is in its view that any inquiry about the past transforms an inquiry into a testimonial one: asking "what happened?" does not convert the answer into the functional equivalent of testimony. Rather, the appropriate inquiry is whether the statement at issue sought to describe an event, or to document it—to tell someone what just happened, or to record it. Testimonial statements are those given with a view toward recording the declarant's version of events that have already transpired, for purposes of memorializing it—such as the statement in *Crawford*, occurring two hours after

the event; or the testimonial statement in *Hammon*, which occurred after police had stabilized the situation and were interrogating the witness in a room separated from the defendant about events that had already run their course. This would stand in contrast to spontaneous statements either made during the course of an event, or to discuss or describe a recent event to one who was not there. Thus, a statement to a police officer who has just arrived outlining the situation would not be testimonial; on the other hand, a statement to the same officer seated at a table, with pen and paper in hand to record details of the event, would be.

Here, a correct understanding of the Confrontation Clause yields the following analysis: any 911 calls made to summon help would be admissible, whether made by the victim or someone else. As the situation was still fluid, and the victim was still seriously in need of assistance when police arrived to find him sprawled by his car near the gas pumps, his spontaneous, halting statements to the responding officers—clarifying events, outlining what had happened and who was involved, and indicating where and when the incident had taken place—were non-testimonial and admissible under Michigan evidence law as excited utterances. Within minutes, help arrived, and the officers left the victim in the care of the trained medical professionals while they started to track down the suspect. Had the victim lived, his subsequent statements to doctors may have been admissible as statements relevant to medical treatment, if the prosecution could establish an appropriate foundation. Anything the victim might have said to investigating officers arriving at the hospital to take more detailed, formal statement would have been "testimonial"—but the victim died

before the police could gather any more information from him.

Unlike the Michigan Supreme Court majority, Petitioner does not regard bleeding citizens as no cause for alarm for the police. In this case, police efforts upon finding the victim were directed toward learning what had happened to him, keeping him alive, making him as comfortable as possible until medical help arrived, and identifying the perpetrator and location of the shooting for the protection of the victim, themselves, and the community. Only when medical help arrived did they begin their efforts to find the man who had shot him. And while a "testimonial" statement from the victim might have helped their efforts, the man they found lying and bleeding on the pavement died before he could give them one.

The Michigan Supreme Court opinion is inconsistent with opinions from at least several other jurisdictions. In the unpublished decision of *People v. Casique,* 2009 WL 1508463, 16 (Cal.App. 1 Dist.) (Cal.App. 1 Dist.,2009), for example, a deputy responded to an emergency call of a shooting and discovered the victim still at the scene, near death, bleeding profusely. The court observed as to the statements made by the dying victim that "The context in which the statements were gathered was strikingly distinctive from the formality and solemnity characteristic of testimony at trial." Further, the court noted that California had held that "Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation.' Such an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police 'interrogation' as that term is used in *Crawford."* See also *Collins v. State,*

873 N.E.2d 149, 154 (Ind.App.,2007): "Applying the *Davis* factors, we conclude that, under the circumstances, the questions Grant County Sheriff's dispatcher Kathy Baker asked Downs objectively had the primary purpose of enabling police to meet an ongoing emergency, *i.e., the capture of an alleged murderer who was then at large and very possibly armed and dangerous.*" (emphasis supplied).

Certiorari should be granted to resolve this conflict regarding that which constitutes "emergency circumstances."

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Conclusion

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

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Appendix A: Court of Appeals Opinion

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Richard Perry BRYANT, Defendant-Appellant.
No. 247039.
Aug. 24, 2004.

Before: CAVANAGH, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second degree murder, MCL 750.317, felony firearm, MCL 750.227b, and felon in possession, MCL 750.224f, arising from the shooting death of Anthony Covington. We affirm.

On April 29, 2001, Covington was shot in the chest and, when he was found by police, he said "I was shot. Rick shot me." He also gave a physical description of Rick and said that he had a conversation with Rick through the back door of a yellow house on the corner of Laura and Pennsylvania, during the course of which he heard a gunshot and as he turned to leave, he was struck by a second bullet that was fired through the door. Although he did not see Rick, he knew Rick was the person who shot him because he recognized his voice. Covington died a few hours later from his injuries.

Police went directly to the house described by Covington and found two bullet holes in the rear door, a bullet, blood on the back porch, and Covington's wallet. They also found a piece of mail addressed to defendant in the trash but neither a gun nor defendant were present. Defendant's girlfriend