

## In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2023-1204
Plaintiff-Appellant,	}	
	}	ON APPEAL FROM THE HAMILTON
v.	}	COUNTY COURT OF APPEALS
	}	FIRST APPELLATE DISTRICT
QUANTEZ WILCOX,	}	
	}	COURT OF APPEALS CASE NO. C-220472
Defendant-Appellee.	}	

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### MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE

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## **STATEMENT OF INTEREST OF AMICUS**

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

## **STATEMENT OF THE CASE AND THE FACTS**

*Amicus* concurs in the Statement of the Case and the Statement of Facts presented in the Merit Brief of Appellee.

## **LAW AND ARGUMENT**

**Overview and Summary of Argument.** The United States Supreme Court has determined that testimonial statements cannot be introduced at a trial without the opportunity to cross-examine the declarant. In determining whether the statement is testimonial, the Court looks to the “primary purpose” of why the statement was elicited. Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. 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.

In this case, the lower court correctly concluded that the statements made to the police officers who responded to the scene, and which were captured on their body cameras, were testimonial. By that time, the offender had been apprehended, any emergency arising from the initial call and terminated, and the interrogation became one to provide past events relevant to criminal prosecution.

The State seeks a bright-line rule that *any* video recording in the aftermath of a shooting is not testimonial. Such a rule would be completely inconsistent with the carefully crafted analysis required by the primary purpose test. In essence, the State seeks nothing more than error correction. The Court should dismiss this appeal as having been improvidently granted.

**STATE’S PROPOSITION OF LAW: Video footage of a witness in the immediate aftermath of a shooting is not "testimonial" and does not interfere with a defendant’s right of confrontation.**

**PROPOSITION OF LAW OF AMICUS CURIAE OHIO ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS: The “primary purpose test” does not extend to statements taken by the police after a suspect has been apprehended and police questioning has transitioned from responding to an emergency to gathering facts for the investigation and prosecution of a suspect.**

**1. From *Crawford* to *Davis* to *Bryant*.** The transformation of the Sixth Amendment’s right of confrontation began with *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Up to that point, the test for admission of an out-of-court statement was whether the statement bore adequate indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). The Court in *Crawford* determined that the Confrontation

Clause prohibited the admission of “testimonial” out-of-court statements without the opportunity to cross-examine the declarant.

The Court found that various formulations of what constitutes a testimonial statement exist:

ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially... extrajudicial statements... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions... statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

*Crawford*, U.S. at 51-52. (Internal quotations and citations omitted.)

But the true takeaway in *Crawford* was that the Confrontation Clause did not deal with reliability of the evidence, but the manner in which reliability was determined:

To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

*Crawford*, U.S. at 61.

The Court did not deal at substantial length with what constituted a “testimonial” statement, probably because *Crawford* presented low-hanging fruit in that regard: whatever the definition of a testimonial statement, a formal statement made to the police days after the incident clearly qualified. *Crawford*, U.S. at 52, 53.

*Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) presented a more complex situation. Both cases involved domestic violence

situations. In *Davis*, the trial court had admitted a 911 call in which the complainant had identified the defendant, a former boyfriend, as the assailant. The complainant did not appear at trial. In *Hammon*, the police had responded to a domestic violence call. The wife told the police that nothing was wrong, but the police took the husband into a separate room, interrogated the wife, and had her fill out an affidavit. The wife did not appear at trial, but the affidavit and the officer's testimony about what she told him, were admitted as evidence. The Court affirmed the conviction in *Davis* but reversed in *Hammon*, providing the following analysis:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. 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.

The Court distinguished the two situations by noting that in *Davis* the victim was “speaking about events *as they were actually happening*,” while in *Hammon* “there was no emergency in progress” and “it is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct.” 547 U.S. at 827, 829. (Emphasis in original.)

The Court confronted a more fluid situation in *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). Police had responded to a gas station parking lot, where they found the victim mortally wounded. At trial, they were permitted to testify as to what the victim told them.

In determining whether the primary purpose of the interrogation was “to enable police assistance to meet an ongoing emergency,” *Bryant*, 562 U.S. at 360, the Court looked to a variety of factors:



A. The circumstances must be viewed objectively. “[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.” *Id.*

B. Whether an emergency exists and is ongoing “is a highly context-dependent inquiry.” U.S. at 363. *Davis* and *Hammon* involved domestic violence cases, and thus focused on “the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat *to them.*” In *Bryant*, though, an unknown shooter remained at large, thus “the threat to first responders and the public” remained. U.S. at 363.

C. The scope and duration of an emergency may depend in part upon the type of weapon involved, particularly if it is a firearm. U.S. at 364.

D. An emergency can cease to exist, that the interrogation can evolve into testimonial statements, if the declarant provides information indicating that the emergency no longer exists, or when “a perpetrator is disarmed, surrenders, is apprehended, or, as in *Davis*, flees with little prospect of posing a threat to the public.” U.S. at 365.

**2. The lower court here correctly applied the primary purpose test.** In the case below, *State v. Wilcox*, 1st Dist. Hamilton No. C-220472, 2023-Ohio-2940, the court was confronted with the admissibility of two statements. The first was the recording made by Haneen Maghathe on her cell phone. Maghathe heard a gunshot and saw the victim, Keshawn Turner, and Doniesha Moore run down an alley. Maghathe followed them down the alley and began recording them. Monroe identified Wilcox as the shooter, and, according to Maghathe, appeared “frantic” and “scared.”

Cincinnati Police Department Officer Price arrived at the scene and spoke to Monroe,

with that conversation recorded by his body camera. Approximately six minutes into the recording, he is notified that Wilcox has been apprehended. He continued the interrogation, not only making further inquiries into how the incident transpired, but eliciting extensive statements by Monroe as to various past transgressions Wilcox had committed during her prior relationship with him.

Monroe did not appear at trial. The trial court admitted both Maghathe's cell phone recordings and the body cam video from Officer Price.

The court of appeals engaged in the appropriate analysis. It found that Maghathe's cell phone recordings were not testimonial, but were statements by Monroe regarding a current emergency. It found otherwise with regard to the body camera. The court noted that "[u]nlike the video filmed by Ms. Maghathe, the discussion captured on Officer Price's body-worn camera lasts for over ten minutes and involves extensive police questioning." ¶20. Furthermore, "Officer Price and Ms. Monroe were notified about halfway through the video that Mr. Wilcox had been apprehended, ending any ongoing emergency." *Id.*

**3. The State's proposition of law is not appropriate.** Eschewing the "highly context-dependent inquiry" demanded by *Bryant*, the State proposes a bright-line rule: a videotape in the "immediate aftermath" of a shooting is not testimonial. A review of the case law demonstrates that no such bright-line rule is needed: Ohio courts have been able to navigate the Supreme Court's case law and decide when videotaped statements or statements caught on bodycams are testimonial or a response to an emergency.

For example, in *Toledo v. Sailes*, 180 Ohio App.3d 56, 2008-Ohio-6409, 904 N.E.2d 543 (6th Dist.), the court concluded that the statements of the witnesses were testimonial because the police had secured the scene. The court came to the same conclusion in *Toledo v. Green*, 6th

Dist. Lucas No. L-14-1093, 2015-Ohio-1864, 33 N.E.3d 581, because the police were able to secure the scene by separating the victim and the perpetrator.

The courts are cognizant of the fact that a different result may obtain when an unapprehended suspect is armed with a weapon. *State v. Stevenson*, 6th Dist. No. WD-22-067, 2023-Ohio-4853. The nature of a victim's injuries may also compel the conclusion that her statements weren't intended to be made for purposes of investigation and prosecution. *State v. Jones*, 8th Dist. No. 110742, 2023-Ohio-380 (victim had life-threatening burn injuries and exhibited clear signs of distress).

The courts have been able to separate testimonial from non-testimonial statements on the same recording, as the lower court did here. In *State v. Haag*, 12th Dist. No CA2022-05-08, 2023-Ohio-877, for example, the court approved the trial judge's determination that ten minutes of a 27-minute video were non-testimonial, but the remainder were testimonial and could not be admitted.

The State attempts to bring this case within the ambit of *Bryant* "in that Officer Price was dispatched to an active crime scene, a gun was involved, and having arrived within three minutes of the shooting, his contact did indeed occur in the midst of an ongoing emergency." State's Brief at 11. Conspicuous by its absence is the mention of the main distinguishing feature between this case and *Bryant*: while the latter presented a situation where the shooter was still at large, posing a continuing threat to the public, here Wilcox had been apprehended, ending any ongoing emergency.<sup>1</sup>

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<sup>1</sup> While the fact that the perpetrator had been apprehended clearly signifies the end of the emergency, the converse is not necessarily true. No one would contend that a statement given to the police days after the incident would qualify as non-testimonial simply because the perpetrator

Indeed, it seems that the State and the dissent below conflated the hearsay exception for excited utterances with the issue of whether the statements were testimonial. The State highlights the dissent’s mention that “Monroe was shaking and crying,” “the scene was chaotic,” and police officers “told several loud bystanders to get back.” State’s Brief at 11. This may well be, but the analysis under hearsay rules does not come into play unless it is first determined that the statements were not testimonial. That did not happen here. The State essentially argues that the statements were not testimonial *because* they were excited utterances, which flips the necessary analysis on its head.

The State’s proposition of law is both too narrow and too broad: it would cover only inquiries made after shootings, but would ignore the analysis required by *Davis* and *Bryant*. The entire rationale behind the primary purpose test is that statements made during an *ongoing* emergency are not testimonial, but once that emergency has ended, as it did here with Wilcox’s apprehension, any further interrogation is intended for further investigation and prosecution, and is therefore testimonial.

The Ohio courts have operated quite well under the analysis provided by the Court in *Davis* and *Bryant*, carefully distinguishing between testimonial and non-testimonial statements. The State’s proposition of law adds nothing to the analysis, and what it seeks is little more than error correction. This Court should dismiss the State’s appeal as having been improvidently granted.

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was still at large.

## CONCLUSION

For the foregoing reasons, *Amicus* respectfully prays the Court to dismiss the State's appeal as having been improvidently granted, or, in the alternative, to affirm the decision of the First District Court of Appeals.

Respectfully submitted,

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## SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers was served upon all parties by email.

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