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Testimonial Statements: The Death of Dying Declarations? - People v. Clay

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TESTIMONIAL STATEMENTS: THE DEATH OF DYING DECLARATIONS?

SUPREME COURT OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

People v. Clay[1]
(decided June 28, 2011)

I. INTRODUCTION

Thomas Clay and Sidor Fulcher were convicted of murder in the second degree by a jury in the Supreme Court of New York, Kings County.[2] Clay appealed, claiming that the trial court erred when they permitted a police officer to testify in court to a statement made by the victim, allegedly violating defendant's Sixth Amendment rights under the Confrontation Clause.[3] The Confrontation Clause of the Sixth Amendment of the United States Constitution bars testimonial hearsay evidence from being introduced in a criminal trial against a criminal defendant unless the prosecutor puts the out-of-court declarant on the stand as a witness subject to cross examination or, alternatively, the prosecutor may show the declarant is presently unavailable and the defendant had a prior opportunity to confront the declarant.[4] Article 1, Section 6 of the New York State

[1] 926 N.Y.S.2d 598 (App. Div. 2d Dep't 2011).

[2] *Id.* at 601.

[3] *Id.*

[4] U.S. CONST. amend. VI. The Sixth Amendment of the Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him." *Id.*; *see also* Davis v. Washington, 547 U.S. 813, 821 (2006) (noting that the declarant may only be a witness under the meaning of the Confrontation Clause if the statement is testimonial); Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

Constitution contains a parallel provision.[5] Clay stated that the admission of the officer's testimony into evidence violated his constitutional rights under both the federal and state constitutions.[6]

The Appellate Division, Second Department held that a statement made by the victim of a shooting who did not think he would survive to a late-arriving police officer was testimonial in nature, but the Confrontation Clause recognizes an exception for dying declarations.[7] The victim was shot six times, had difficulty speaking, and was informed by a police officer that he doubted his chance of survival.[8] Under these conditions, the victim made a statement to the police identifying his assailant.[9] The court held that the statement was made under the threat of imminent death; therefore, the statement was admissible in court as a dying declaration, and did not violate the Confrontation Clause.[10]

II. THE FACTS OF *PEOPLE v. CLAY*

Clay and Fulcher were convicted by a jury of murder in the second degree.[11] On August 11, 2006, at approximately nine o'clock at night, both Clay and Fulcher approached Igol Isaacs on a local street in Brooklyn.[12] The defendants shot Isaacs six times with the bullets entering his abdomen, back, "kidney, liver, and small and large intestines."[13] The bullets also "fractured two vertebrae and the spinal cord, and passed into his chest cavity, perforating the middle and lower lobes of the right lung."[14] Police Captain Brian McGee re-

[5] N.Y. CONST. art. I, § 6. Article 1, Section 6 of the New York Constitution provides, in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her." *Id.*

[6] *Clay*, 926 N.Y.S.2d at 609.

[7] *Id.*

[8] *Id.* at 610.

[9] *Id.*

[10] *Id.* at 610-11.

[11] *Clay*, 926 N.Y.S.2d at 601. Although both defendants initially contended that the statement by Isaacs violated their rights under the Confrontation clause, the appeal only concerns the statement made against Thomas Clay. *Id.*

[12] *Id.* at 600-01.

[13] *Id.* at 610.

[14] *Id.*

sponded to the request for assistance at the location of the shooting.[15] When McGee arrived at the scene of the crime, a police van and other officers were already present.[16] Without stopping to speak with any of the other officers, McGee moved directly toward Isaacs, who was on the ground "lying face-up on the sidewalk" next to a police officer.[17]

McGee asked Isaacs, "Who shot you?"[18] When Isaacs did not respond, McGee informed him that it was unlikely he would survive the gunshot wounds, and asked for the name of the perpetrator again.[19] Isaacs said, "Todd shot me."[20] In an attempt to confirm the identity of the shooter, McGee inquired, "Todd shot you?"[21] Isaacs was gasping for air and with his final words he uttered, "No. No. Tom shot me. Tom. Tom."[22] Isaacs had severe trouble breathing and was unable to speak any further.[23] McGee questioned Isaacs for Tom's last name but failed to receive a response from the mortally wounded victim.[24] Then, McGee spoke with another officer but did not discuss the conversation with Isaacs and pushed back a crowd of people in order to prevent contamination of the crime scene.[25] Isaacs was rushed to the hospital and died a few hours later.[26] That same night, Yvette Clay contacted the police and stated that she witnessed her estranged husband Thomas Clay and his cousin Sidor Fulcher shoot Isaacs.[27] The police recovered seven .9 millimeter shell casings and one discharged .45 caliber shell casing at the scene of the crime.[28]

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[15] *Clay*, 926 N.Y.S.2d at 600.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* The court recognized that there were no medical personnel on the scene at the time who could have disclosed an opinion as to Isaacs' condition. *Clay*, 926 N.Y.S.2d at 610.

[20] *Id.* at 600-01.

[21] *Id.* at 601.

[22] *Id.*

[23] *Id.*

[24] *Clay*, 926 N.Y.S.2d at 601.

[25] *Id.* The facts indicate that a crowd of people gathered at the scene of the incident and Officer McGee sought to find any possible witness to the crime. *Id.* at 606.

[26] *Id.* at 601.

[27] *Id.*

[28] *Clay*, 926 N.Y.S.2d at 601. All the shell casings at the crime scene were "found to have been fired from the same gun." *Id.*

Clay and Fulcher were indicted on multiple charges, including "one count of murder in the second degree . . . and were jointly tried before a jury."[29] Before trial, counsel for both defendants objected to admission of Officer McGee's testimony on the ground that it would violate the defendants' rights under the Sixth Amendment.[30] The New York Supreme Court held that the statements made by Isaacs to Officer McGee were not testimonial.[31] The court admitted the testimony of Officer McGee into evidence under the dying declaration exception to hearsay.[32] The court held that the statements made by Isaacs shortly before his death were not barred by the Confrontation Clause of the Sixth Amendment.[33] Ultimately, Officer McGee testified at trial to the statements made by the mortally wounded Isaacs the night of the shooting.[34] The jury convicted both defendants of murder in the second degree.[35]

Clay appealed the decision on the grounds that it was a constitutional error to allow McGee to testify to the conversation with Isaacs which identified "Tom" as the shooter.[36] The Appellate Division, Second Department agreed with the New York Supreme Court's decision to permit the testimony into evidence as a dying declaration, and affirmed the judgment.[37]

III. REASONING OF THE COURT IN THE *PEOPLE v. CLAY* DECISION

A. Confrontation Clause

The court began its opinion by determining whether the

[29] *Id.*

[30] *Id.* (citing *Crawford*, 541 U.S. 36).

[31] *Id.*

[32] *Clay*, 926 N.Y.S.2d at 601.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* The appellant did not argue that the State Constitution is more protective of the right of confrontation than the United States Constitution; however, the court based the analysis on relevant New York case law. *Clay*, 926 N.Y.S.2d at 609 (citing People v. Bradley, 862 N.E.2d 79 (N.Y. 2006)).

[37] *Id.* at 601.

statements made by Isaacs to Officer McGee were testimonial.[38] The analysis used by the court was set forth in *Davis v. Washington*,[39] where the United States Supreme Court looked to the primary purpose of the interrogation and whether statements made by the declarant were intended to be used for criminal prosecution.[40] When McGee arrived at the scene, he immediately approached Isaacs and asked one very specific question, "Who shot you?"[41] This was a pointed question, designed only to learn the identity of the perpetrator.[42] The court noted that, "[n]o such precautionary or remedial purpose can reasonably be attributed to McGee's inquiry as demonstrated most prominently by the remainder of the conversation."[43] McGee informed Isaacs, "I don't think you are going to make it" and repeatedly asked who shot him.[44] These facts indicate that McGee was not trying to assist with an ongoing emergency, but rather to give Isaacs a final opportunity to disclose the identity of the assailants.[45] After McGee learned the identity of the shooter, he sought to locate and secure evidence as well as find any witness to the crime.[46]

While the United States Supreme Court recognized in *Davis* that initial inquiries made by police officers tend to produce nontestimonial statements, it explicitly acknowledged that statements ascertained at crime scene under certain circumstances are testimonial.[47] McGee questioned Isaacs at the crime scene shortly after the shooting occurred but the court held that "the totality of the surrounding circumstances objectively indicates that McGee's primary purpose was 'to nail down the truth about past criminal events.' "[48] McGee "intended to and did elicit statements that [in effect] 'do precisely what a witness does on an examination [in court when he] "accuses" a perpetrator of a crime.' "[49] Taking all relevant information

[38] *Id.* at 605-06.

[39] Davis v. Washington, 547 U.S. 813 (2006).

[40] *Clay*, 926 N.Y.S.2d at 602 (citing *Davis*, 547 U.S. at 822).

[41] *Id.* at 600.

[42] *Id.* at 606.

[43] *Id.*

[44] *Id.*

[45] *Clay*, 926 N.Y.S.2d at 606. The police officer did give Isaacs what turned out to be his final opportunity to bear witness against his assailants. *Id.*

[46] *Id.*

[47] *Id.* at 607.

[48] *Id.* (quoting People v. Rawlins, 884 N.E.2d 1019, 1027 (N.Y. 2008)).

[49] *Clay*, 926 N.Y.S.2d at 607 (quoting *Rawlins*, 884 N.E.2d at 1027).

into account, the court concluded that the statements made by Isaacs constituted testimonial hearsay.[50]

B. Dying Declarations

Next, the court focused on whether or not the testimonial statement falls under an exception which may be invoked to admit these statements against the criminal defendant.[51] Hearsay is generally inadmissible, subject to various exceptions including the dying declaration.[52] The court focused on this exception since case law provides that " 'dying declarations are admissible on a trial for murder as to the fact of the homicide' " when the declarant is the victim.[53]

The court recognized that the Supreme Court in *Crawford* did not clearly define the common-law hearsay exception of dying declarations.[54] Instead of following federal precedent, the Appellate Division, Second Department joined the decision of other state courts and concluded that the Confrontation Clause " 'incorporates an exception for testimonial dying declarations.' "[55] Although the appellant did not argue that the State Constitution is more protective than the Federal Constitution, the court applied New York law in the *Clay* decision since citizens are generally afforded more protection under the State Constitution.[56]

The court recognized that dying declarations are rooted in case law such as the New York Court of Appeals decision in *People v. Bradley.*[57] A fair reading of case law indicates that "the 'requisite state of mind of [the] declarant may be found from all circumstances surrounding the statement sought to be admitted,' and the declarant need not have 'actually expressed a certainty of impending death.' "[58] The court recognized that several relevant factors should be consi-

[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* (quoting Mattox v. United States, 146 U.S. 140, 151 (1892)).
[54] *Clay*, 926 N.Y.S.2d at 608.
[55] *Id.* at 609 (quoting *Crawford*, 541 U.S. at 56 n.6).
[56] *Id.*
[57] 862 N.E.2d 79.
[58] *Clay*, 926 N.Y.S.2d at 610 (quoting People v. Nieves, 492 N.E.2d 109, 114 (N.Y. 1986)).

dered to determine the state of mind of the declarant, including the condition of the declarant, the nature and the severity of the wound, and whether the objective actions are associated with an expectation of imminent death.[59]

The court held the high standard that invokes dying declarations was satisfied in *Clay* since Isaacs made the statement under the hopeless expectation that death was near at hand.[60] Isaacs was shot six times and the bullets entered through several vital organs as well as the spinal cord.[61] The court concluded that Isaacs made these statements as his condition was declining.[62] After Isaacs identified his assailant, he was unable to respond to subsequent inquiries due to the severe nature of his injuries.[63] Taking all relevant circumstances into account, the court affirmed the district court's decision to admit Isaacs' statement to Officer McGee as a dying declaration.[64]

IV. OVERVIEW

A. The Sixth Amendment of the U.S. Constitution

The Sixth Amendment of the United States Constitution reads, in pertinent part, "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him."[65] The right of confrontation mainly serves to secure the criminal defendant the opportunity of cross-examination.[66] Allowing the opportunity for cross-examination

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* Isaacs was struggling to breathe and was unable to speak after naming "Tom" as the perpetrator. *Clay*, 926 N.Y.S.2d at 610.

[63] *Id.*

[64] *Id.* at 611.

[65] U.S. CONST. amend. VI.

[66] California v. Green, 399 U.S. 149, 156 (1970).

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face

is significant because it is universally recognized as a primary method for determining the truth. Most legal evidence containing oral testimony may only be admissible when the statements are subject to this stringent form of scrutiny.[67]

As long as the declarant is a witness subject to cross-examination, "the Confrontation Clause is not violated by admitting the declarant's out-of-court statements."[68] The witness is there to testify against the one accused of the crime and must "bear testimony."[69] Testimony is defined as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[70] Under certain circumstances, testimony given by an out-of-court declarant may be admissible in a criminal proceeding.[71] This balances the Confrontation Clause protection with the danger of admitting out-of-court statements into evidence.[72]

B. Article 1, Section 6 of the New York State Constitution

The New York Constitution contains a Confrontation Clause counterpart which explicitly states, in pertinent part, "[i]n any trial in any court whatever the party accused shall be allowed to appear and

> with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 157-58 (quoting *Mattox*, 156 U.S. 247, 242-43).

[67] *Id.*

[68] *Id.* at 158. The declarant must testify as a witness and be subject to full cross-examination. *Id.*

> Confrontation: (1) insures that the witness will give his statements under oath-thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth;' (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Green, 399 U.S. at 158. However, "the out-of-court statement may have been made under circumstances subject to none of these protections." *Id.*

[69] *Crawford*, 541 U.S. at 51.

[70] *Id.*

[71] *Id.* at 59.

[72] *Green*, 399 U.S. at 158.

defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her."[73] Although criminal defendants in New York may allege violations under both the federal and state constitutions, they are subject to the same interpretation.[74]

V. THE DYING DECLARATION HEARSAY EXCEPTION

Dying declarations are a long recognized exception to the hearsay rules in the United States court systems and date back to the middle of the 18th century.[75] This exception to the hearsay rule admits dying declarations in homicide cases under certain circumstances when the deceased made a declaration identifying the perpetrator after receiving the fatal blow.[76] For a statement to be introduced into evidence as a dying declaration, the declarant must be unavailable and must identify the perpetrator under the sense of impending death where there is absolutely no chance of recovery.[77] It is not sufficient if the declarant makes the statement under the assumption that death is possible or even likely.[78] A number of factors must be considered in assessing whether the statement was made under the certainty of impending death including the improvement or decline of the condition, the nature and severity of the declarant's injuries, and whether or not actions were taken which are generally associated with an expectation of imminent death.[79]

[73] N.Y. CONST. art. I, § 6.

[74] *Bradley*, 862 N.E.2d at 80.

[75] *See* Wilson v. Boerem, 15 Johns. 286 (N.Y. Sup. Ct. 1818).

[76] King v. Woodcock, 168 Eng. Rep. 352, 353-54 (1789); King v. Reason, 93 Eng. Rep. 659, 661 (1722).

[77] *Mattox*, 146 U.S. at 151. Statements made with the belief that death is near are deemed to be truthful, similar to a statement made under oath. *Id.* at 152.

[78] *Nieves*, 67 N.E.2d at 113.

[79] *Id.* at 114.

A. The Federal Courts' Application of Dying Declarations

Dying declarations are deeply rooted in our justice system and have a long history of recognition by the United States Supreme Court.[80] In 1892, the Court in *Mattox v. United States*[81] stated, "dying declarations are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed, in favor of the defendant as well as against him."[82] The Court held that the party attempting to introduce these declarations into evidence must show these statements were made under a sense of impending death due to the nature and extent of the injuries or the conduct and communication made by the victim as well as any medical personnel.[83]

Five years after the Court's decision in *Mattox*, it faced another dying declaration issue in *Carver v. United States*.[84] The Court recognized that dying declarations are an exception to the general rule that only sworn testimony can be received since the fear of impending death can be assumed to be as powerful as the obligation of an oath.[85] Also, the Court noted that the dying declarations are admissible "to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present."[86]

The Supreme Court clarified the situations where dying declarations may be admissible in *Shepard v. United States*.[87] Shepard was convicted for the murder of his wife by mercury poisoning.[88] The trial court admitted the evidence of the victim's statement, "Dr. Shepard has poisoned me" and appellant contended it error to admit this evidence as a dying declaration.[89] The Court held that the declarant spoke with the hope of recovery since her illness began on May 20th and she showed great improvement until almost a month later

[80] *See Mattox*, 146 U.S. at 151 (noting that dying declarations are admissible in murder trials under certain circumstances).

[81] 146 U.S. 140 (1892).

[82] *Id.* at 151.

[83] *Id.* Medical personnel on scene may inform the victim about the severity of his or her condition. *Id.*

[84] Carver v. United States, 164 U.S. 694 (1897).

[85] *Id.* at 695-96.

[86] *Id.* at 697.

[87] Shepard v. United States, 290 U.S. 96 (1933).

[88] *Id.* at 97.

[89] *Id.* at 98.

when she died on June 15th.[90] There was no indication that the statement would be used to charge her husband with murder; rather, she spoke as an ill woman voicing her beliefs and conjectures of the present moment.[91] The Court recognized that "[h]omicide may not be imputed to a defendant on the basis of mere suspicions, even when they are the suspicions of the dying."[92] In order to admit the declaration into evidence, there must be personal knowledge as to the acts that are declared.[93]

More recently, the Second Circuit confronted a dying declaration issue in *Rao v. Artuz*.[94] Rao was convicted of murder in the second degree due to the shooting death of Harold Gillard.[95] Rao contended on appeal that Gillard's dying declarations were improperly admitted at trial in violation of the Confrontation Clause.[96] After Gillard was shot, he stated that the perpetrator was "the fat man" who "works for a fellow named Vinnie."[97] The Second Circuit upheld the admission of this testimony as a dying declaration.[98]

The Southern District of New York applied the dying declaration exception in *Paul v. Ercole*[99] and *Figueroa v. Ercole*.[100] In *Paul*, Thompson was the victim of a shooting who stated, "Jermaine, he shot me . . . Mom, Dreds did it. I'm going to die."[101] The court held that the victim's dying declaration met the criteria for admissibility since the statement was made "with an awareness of impending death" and was presumed to be reliable.[102] Conversely, in *Figueroa v. Ercole*, the Southern District of New York held that the statement

[90] *Id.* at 99.

[91] *Id.* at 100.

[92] *Shepard*, 290 U.S. at 101.

[93] *Id.*

[94] No. 97-2703, 1999 WL 980847 (2d Cir. Oct. 22, 1999).

[95] *Id.* at *1. Edward Jordan shot Gilliard, but Rao was convicted under the theory that he hired Jordan to kill Gillard because of a debt. *Id.*

[96] *Id.*

[97] *Id.*

[98] *Rao*, 1999 WL 980847, at *2. The court admitted the dying declaration only for the purpose of identifying the assailant. *Id.* The court did not allow this evidence for other purposes including the fact that the victim believed he was shot because of a debt or to infer that someone other than the gunman was involved in the shooting. *Id.*

[99] No. 07 Civ. 9462, 2010 WL 2899645 (S.D.N.Y. June 10, 2010).

[100] No. 10 Civ. 3262, 2011 WL 3359682 (S.D.N.Y. July 27, 2011).

[101] *Paul*, 2010 WL 2899645, at *1-2.

[102] *Id.* at *3. There were also three other witnesses to the crime who corroborated the dying declaration evidence. *Id.* at *2.

made by the declarant was not admissible as a dying declaration.[103] Figueroa shot a man named Pressley twice where one bullet entered the abdomen and the other bullet grazed his leg.[104] Pressley's breathing returned to normal and he appeared lucid as he was being transported to the hospital.[105] Pressley stated, "I don't know who did this to me. I don't know nothing," and died from the wounds a few hours later.[106] Figueroa attempted to admit this statement as a dying declaration.[107] The trial court denied the motion and found that Pressley did not believe that he was going to die when the statement was made since the majority of his wounds were internal and he could not have known their severity.[108]

The Southern District of New York decided a case very similar to the facts of *Clay* in *Nesmith v. Bradt*.[109] Scott was shot three times and the injuries from the wounds caused his demise.[110] When police officials arrived on scene, Scott informed them that "T" shot him and explained to one officer that "T" was "Terrence from Soundview."[111] The trial court admitted the statements by the police officers into evidence as dying declarations and the appellate court affirmed the decision.[112]

B. The New York Courts' Application of Dying Declarations

The New York courts have interpreted Article 1, Section 6 of the State Constitution to permit dying declarations into evidence in certain situations where a fatally wounded victim utters the name of the perpetrator with his or her dying breath.[113] The New York Court

[103] *Figueroa*, 2011 WL 3359682, at *1.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Figueroa*, 2011 WL 3359682, at *1. The only visible wound was small in size and not life threatening. *Id.*

[109] Nesmith v. Bradt, No. 08 Civ. 6546, 2009 WL 3189346 (S.D.N.Y. Oct. 5, 2009).

[110] *Id.* at *1.

[111] *Id.* The victim made the same statement to three different police officers who arrived at the scene. *Id.*

[112] *Id.* at *3.

[113] People v. Falletto, 96 N.E. 355, 358 (N.Y. 1911).

of Appeals also recognized that in every specific case, the statement made by the declarant must be viewed "through a multifaceted prism that properly reflects the 'core' evil the Confrontation Clause was designed to prevent."[114] The Confrontation Clause was adopted with the intent to disallow the use of an ex parte examination into evidence against a criminal defendant.[115]

In New York, dying declarations are admissible in a criminal prosecution when the declarant's statements concerning his or her own death are uttered "with no hope of recovery."[116] The statements must be made by the victim of an assault who has the " 'hopeless expectation that death is near at hand' " and this is the final opportunity to disclose the identity of the assailant.[117] The Court of Appeals has historically been skeptical about the validity of dying declarations for two reasons.[118] First, dying declarations are hearsay.[119] Second, it is difficult to prove with certainty that the declarant had no hope of recovery.[120]

The New York Court of Appeals recognized a clear distinction between evidence such as business records permitted into evidence since they are independent and objective tests as opposed to second hand testimony given by an individual who may be powered by motives other than justice.[121] There is a question of the reliability and authenticity of the statement that is made under suspicion or conjecture, especially when the victim is not seen by the jury and subject to cross-examination.[122]

Another significant issue with this hearsay exception is that it must be proven with certainty that the dying declaration was made under a sense of impending death and the declarant made these statements under the belief that there was absolutely no chance of recovery.[123] This issue arose in *Nieves* where the victim was hospita-

[114] *Rawlins*, 884 N.E.2d at 1029.

[115] *Id.*

[116] *Nieves*, 492 N.E.2d at 113.

[117] *Id.* (quoting *Shepard*, 290 U.S. at 100).

[118] *Clay*, 926 N.Y.S.2d at 610.

[119] *Id.*

[120] *Id.*

[121] People v. Allen, 90 N.E.2d 48, 50-51 (N.Y. 1949).

[122] *Id.* at 51.

[123] *Nieves*, 492 N.E.2d at 113. This is an evidence issue and it is difficult to prove this element when the declarant is deceased and not available to testify. *Id.* at 114. The court

lized with only one stab wound.[124] The doctor believed that her condition was stabilizing or improving at the time the victim made the statement that asserted the identity of the person who perpetrated the assault.[125] Despite the fact that the wound was fatal, it was not an injury where the victim would believe that death was imminent.[126] In order for a statement to be admitted into evidence as a dying declaration, the standard of proof set out by the New York Court of Appeals must be satisfied.[127] An important element in this standard of proof requires that the declarant must believe death was close at hand.[128] In *Nieves*, the court determined that this high standard of proof was not satisfied since it is unlikely that the declarant believed she was going to suffer imminent death from her relatively minor injuries.[129]

In contrast to *Nieves*, the court in *Clay* concluded that Isaacs identified his assailant under a sense of impending death.[130] Isaacs was mortally wound and suffering severely from six gunshot wounds.[131] The bullets entered Isaacs' abdomen, back, and chest cavity, puncturing his kidney, liver, small and large intestines, and the right lung.[132] The bullets also fractured two vertebrae and the spinal cord.[133] At the time Isaacs made the statement to McGee, he was struggling to breathe and his condition was rapidly declining.[134] Isaacs was in such a devastatingly poor state that immediately after he uttered the name of the man who shot him, he was unable to speak any further.[135] Even though there were no medical professionals on scene, Isaacs was informed by an officer that he would not survive the gunshot wounds.[136] Additionally, Isaacs was shot at a very close range which indicated that the identification was made based on see-

looks to the nature and severity of the wounds as well as the actions of the declarant. *Id.*

[124] *Id.* at 110.

[125] *Id.* at 111.

[126] *Nieves*, 492 N.E.2d at 114.

[127] *Clay*, 926 N.Y.S.2d at 610.

[128] *Id.*

[129] *Nieves*, 492 N.E.2d at 114.

[130] *Clay*, 926 N.Y.S.2d at 610.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Clay*, 926 N.Y.S.2d at 610.

[136] *Id.* Although there were no medical personnel on scene to inform the victim of his condition, the officer explained the severity of his injuries. *Id.*

ing the assailants face up close, rather than conjecture or suspicion.[137] The Appellate Division, Second Department affirmed the decision that the statement made by Isaacs identifying Thomas Clay as the murderer was appropriately admitted as a dying declaration.[138]

VI. THE TESTIMONIAL STATEMENT

There is a "core class" of testimonial statements which includes ex parte in court testimony, affidavits, depositions, prior testimony, confessions, and statements taken by law enforcement through the course of formal police interrogations.[139] These statements are formal testimonial material "that were made under circumstances which would lead an objective witness reason[ ] to believe that the statement would be available for use at a later trial."[140]

Historically, testimonial statements were not permitted unless the declarant was unable to testify and the defendant had a prior opportunity to cross-examine the declarant at the time the statement was made.[141] There is an express indication that the prior opportunity for cross-examination was a dispositive requirement and was necessary in order for the testimonial statements to be admissible.[142] In situations where the defendant had an opportunity for cross-examination, the testimony was excluded when the government failed to establish unavailability of the witness.[143]

The Supreme Court addressed the Confrontation Clause directly in *Ohio v. Roberts*.[144] There, the Confrontation Clause of the

[137] *Id.* at 610-11. Even if the victim makes the statement identifying his assailant when he or she is near death, it is not sufficient if these statements are made under conjecture or suspicion. *Id.*

[138] *Clay*, 926 N.Y.S.2d at 611.

[139] *Crawford*, 541 U.S. at 51-52.

[140] *Id.* at 52.

[141] *Id.* at 53-54.

[142] *Id.* at 55-56.

[143] *Id.* at 57. The unavailability of a witness is simpler to establish when the witness is deceased as opposed to circumstances where the witness voluntarily does not appear to testify. *See* Giles v. California, 554 U.S. 353, 402 (2008) (discussing the forfeiture theory which arises when a criminal defendant murders the witness to ensure he or she would be unavailable to testify in court against the defendant).

[144] 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

Sixth Amendment[145] was interpreted by the Court to provide that if a witness is unavailable to testify against a criminal defendant, the statement may be admitted if it has an "adequate indicia of reliability."[146] A statement may be admitted as evidence if it bears "particularized guarantees of trustworthiness" or falls under the "firmly rooted hearsay exception."[147] This interpretation of the Sixth Amendment was exceedingly vague and constitutional concerns developed as to whether the rules of evidence involving hearsay dissipated under a newly formed and overly broad hearsay exception.[148]

In *Crawford v. Washington*,[149] the Supreme Court's focus shifted from the amorphous reliability standard of *Roberts* to the concept of testimonial.[150] The Court in *Crawford* explicitly stated that when testimonial evidence is at issue, the Confrontation Clause requires that the prosecutor produce the declarant for in court cross-examination or show unavailability of the declarant and a prior opportunity for cross-examination.[151] The Court in *Crawford* did not provide a comprehensive definition of "testimonial" statements.[152] However, the Court did indicate that at bare minimum, it applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations."[153]

The Court in *Davis* further defined testimonial statements when it established the primary purpose test which provides that statements are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish factual evidence that may be potentially relevant in a criminal prosecution rather than obtaining information to meet an ongoing emergency.[154] However, the Court in *Davis* did not produce an "exhaustive classification of all conceivable statements."[155]

[145] U.S. CONST. amend. VI.

[146] *Roberts*, 448 U.S. at 66.

[147] *Id.*

[148] *Rawlins*, 884 N.E.2d at 1028. "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." *Id.* at 1026 (quoting *Crawford*, 541 U.S. at 56 n.7).

[149] *Crawford*, 541 U.S.36.

[150] *Id.* at 68.

[151] *Id.*

[152] *Id*.

[153] *Id.*

[154] *Davis*, 547 U.S. at 822.

[155] *Id.* at 822.

The Supreme Court most recently defined testimonial statements in *Michigan v. Bryant*.[156] The Court noted that whether an ongoing emergency exists is a "highly context-dependant inquiry" and the word "emergency" is not limited to the victim but may extend to the safety of the public.[157] The Court also noted that whether an ongoing emergency exists is only one factor in determining the primary purpose of the interrogation.[158] Other factors include the medical condition of the victim, the informality of the encounter, and the statements and actions of both the declarant and interrogators.[159] The ultimate inquiry used to determine whether a statement is testimonial is the primary purpose of the interrogation.[160]

A. Federal Courts' Determination Whether Statements Are Testimonial

1. Crawford v. Washington

The Supreme Court in *Crawford* recognized the difficulty in distinguishing between statements which are testimonial and those which are not testimonial.[161] The Court recognized that police attempts to obtain information initially to provide emergency assistance may progress into an investigation into past events thereby producing testimonial statements.[162] A statement is testimonial when under the particular circumstances, the primary purpose of the questioning viewed objectively is to learn information that is or may potentially be relevant to a criminal prosecution.[163] In contrast, a statement is not testimonial when it is made under circumstances which objectively indicate that the primary purpose is to immediately assist with an

[156] 131 S. Ct. 1143 (2011).

[157] *Id.* at 1158.

[158] *Id.* at 1148.

[159] *Id.* at 1160. The factors taken into account must be viewed objectively. *Id.*

[160] *Bryant*, 131 S. Ct. at 1165.

[161] *Clay*, 926 N.Y.S.2d at 602.

[162] *Id.*

[163] *Id.* ("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." (quoting *Davis*, 547 U.S. at 822)).

ongoing emergency.[164] There are situations in which the primary purpose is distinctly clear.[165] However, this may be a fine line which may often be blurred by a multitude of circumstances.[166]

2. Davis v. Washington

In order to clarify the confusion regarding whether a statement is or is not testimonial in nature, the Court in *Davis* developed the primary purpose test.[167] This analysis takes into account the main purpose the statement was intended to serve.[168] Although this test is extremely broad and open to interpretation, the Court emphasized that the primary purpose test is objective.[169] The primary purpose test does not look at the actual or subjective purpose of the individuals involved.[170] Instead, this analysis focuses on the impression that reasonable individuals would have had under the exact circumstances in which the altercation occurred.[171] A statement is generally testimonial when a reasonable individual would believe that the primary purpose of the statement was to act as a witness for criminal prosecution.[172] A number of factors must be taken into consideration in order to determine whether or not a statement is testimonial, including the existence of an ongoing emergency, the victim's condition, the severity of the wounds, the objective statements from the police officer and the declarant, the safety of the police and the public, the weapon used in the crime, and the formality of the encounter.[173]

The Court in *Bryant* recognized that the existence of an ongoing emergency is a significant factor to take into account.[174] However, the existence of an ongoing emergency is merely one factor to be

[164] *Id.* ("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." (quoting *Davis*, 547 U.S. at 822)).

[165] *Id.* at 604.

[166] *Clay*, 926 N.Y.S.2d at 602.

[167] *Davis*, 547 U.S. at 822.

[168] *Id.*

[169] *Bryant*, 131 S. Ct. at 1156.

[170] *Id.*

[171] *Id.*

[172] *Davis*, 547 U.S. at 822.

[173] *Bryant*, 131 S. Ct. at 1160.

[174] *Id.*

considered in evaluating the main purpose of the questioning.[175] In *Davis*, the Supreme Court held that statements made to law enforcement at the actual crime scene during a 911 telephone call did not constitute testimonial statements because the declarant sought help in the midst of an emergency situation and was not providing information for use in a court of law.[176]

There is no bright line that delineates when a statement made by the declarant is testimonial or not testimonial in nature.[177] In *Hammon v. Indiana*,[178] a companion case to *Davis*, the police responded to a call which reported a domestic disturbance.[179] When the officers arrived at the scene, a woman was standing outside with a frightened expression on her face, but she claimed everything was fine.[180] The police entered the home and saw her husband in the kitchen.[181] Some officers questioned the wife in room separate from her husband, while other officers remained with the husband in order to prevent him from interfering with the investigation.[182] The police took the wife away for a second time and questioned her with the sole purpose and intent of investigating a possible crime.[183] The statements from the first line of questioning were not testimonial since they were made to the officers to deal with the present emergency situation.[184] In contrast, the Court held that the statements made to the police during the second line of questioning were testimonial since they were made with the intent to gather information pertaining to a criminal prosecution.[185]

3. Michigan v. Bryant

The United States Supreme Court was confronted with a Sixth

[175] *Id.*
[176] *Davis*, 547 U.S. at 828.
[177] *Clay*, 926 N.Y.S.2d at 602.
[178] Hammon v. Indiana, 547 U.S. 813 (2006).
[179] *Id.* at 819.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Hammon*, 547 U.S. at 819-20.
[184] *Id.* at 830.
[185] *Id.*

Amendment Confrontation Clause issue more recently in *Michigan v. Bryant*.[186] In *Bryant*, an emergency call was made about a shooting that took place.[187] The police arrived at the scene and found the victim lying on the ground with bullet wounds in his torso.[188] When the victim was questioned about the events, he explained that he had been shot by a man named Rick.[189] The victim provided the location of the shooting and a physical description of the man who shot him.[190] The victim died a few hours later.[191] The police officers testified at trial to the statements made by the deceased regarding the description of perpetrator.[192] The Supreme Court of Michigan reversed and concluded that the statements made by the victim constituted testimonial hearsay.[193]

However, the United States Supreme Court reversed that decision and provided further clarification of the primary purpose test.[194] The Court ruled that the primary purpose test is objective, and that the existence of an ongoing emergency, while a significant factor, is not the only factor to be considered under the circumstances.[195] Both the actions as well as the statements made by the participants at the scene of the crime assist in determining the type and scope of danger existing at the moment, not only to the victim of the crime but also the police and the public.[196] The primary purpose of the interrogation is most accurately determined by both the questions of the officers on scene as well as the victim's responses.[197]

The Supreme Court in *Bryant* concluded that the victim's statements were not testimonial because the primary purpose was to meet an ongoing emergency.[198] A major factor in this decision was

[186] *Bryant*, 131 S. Ct. 1143.
[187] *Id.* at 1150.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Bryant*, 131 S. Ct. at 1150.
[192] *Id.*
[193] *Id.* at 1151.
[194] *Id.*
[195] *Id.*
[196] *Bryant*, 131 S. Ct. at 1162.
[197] *Id.* at 1160-61. The primary purpose test does not look at the subjective intent or beliefs of the involved parties, but views the situation and the statements from an objective standpoint. *Id.* at 1162.
[198] *Id.* at 1164.

the fact that the victim questioned how soon emergency medical services would arrive for assistance.[199] These facts suggested that the victim sought urgent medical assistance with the hope that his condition would be stabilized.[200] There is no indication that the victim made these statements with the primary purpose of providing evidence for a subsequent criminal prosecution of the perpetrator.[201] Therefore, under those particular circumstances, the statements made by the victim in *Bryant* did not violate the Confrontation Clause.[202]

B. New York Approach To Testimonial Statements

The New York Court of Appeals applied the primary purpose test set out in *Davis* to analyze testimonial statements in many cases, including *People v. Bradley*,[203] which had similarities to the facts of both *Davis* and *Hammon*.[204] In *Bradley*, the police arrived on scene in response to an emergency call and immediately observed a visibly injured and shaken woman.[205] An officer on scene questioned the woman, who explained that she had been thrown through a glass door.[206] As a result of this assault, the woman suffered severe injuries.[207] The New York Court of Appeals reasoned that the statement made by the victim was not testimonial in nature because it was made to assist with an ongoing emergency and the officer's questioning was designed to prevent the woman from suffering further harm.[208]

The New York Court of Appeals decided a case with facts very similar to *Clay* in *People v. Nieves-Andino*.[209] There, two police officers arrived at the scene of a shooting where they observed the

[199] *Id.* at 1165. The facts indicate that "an armed shooter whose motive for and location after the shooting were unknown." *Bryant*, 131 S. Ct. at 1164.

[200] *Id.* at 1165.

[201] *Id.*

[202] *Id.* at 1166-67.

[203] 862 N.E.2d 79.

[204] *Davis*, 547 U.S. 813; *Hammon*, 547 U.S. 813.

[205] *Bradley*, 862 N.E.2d at 80.

[206] *Id.*

[207] *Id.* The woman walked with a noticeable limp, bled profusely from her hand and had blood on her face and clothes. *Id.*

[208] *Id.* at 81.

[209] People v. Nieves-Andino, 872 N.E.2d 1188 (N.Y. 2007).

victim laying the street in between two parked cars.[210] Initially, the officers summoned an ambulance to the scene and requested from the victim his name, phone number and address.[211] Subsequently, the officers inquired about the shooting and the victim stated that he had been shot three times by an individual named Bori.[212] The court held that the identification of Bori as the shooter was stated during an ongoing emergency when the primary purpose of the interrogation was to take action to prevent further harm.[213] The court held the statement made by the victim was not testimonial and did not violate the Confrontation Clause.[214]

In these cases, the police officers who heard the statements at issue were the first officers on scene and responsible for determining the nature and severity of the attack in order to prevent any further harm.[215] In contrast, Officer McGee was not the first police officer to arrive at the scene of the emergency.[216] Isaacs had already spoken with an officer who was one of the first responders and was aware that he would not survive.[217] Before Officer McGee arrived, a police van was present as well as other officers who assessed the situation and acted in a manner to deal with the ongoing emergency.[218]

Furthermore, the nature of the questioning by Officer McGee signified that he sought information solely in order to determine the identity of the person who shot the victim rather than resolve an ongoing emergency.[219] McGee did not request the victim's name, address, and telephone number as the officers did in *Nieves-Andino* but rather approached the victim directly and asked, "Who shot you?"[220] Although the officers in both *Davis* and *Bryant* made an effort to learn the identity of the assailant, the questions they asked the victim were intertwined with a barrage of questions designed to learn about

[210] *Id.* at 1188.

[211] *Id.* at 1188-89.

[212] *Id.* at 1189.

[213] *Id.* at 1190. The concept of preventing further harm not only applies to the victim but also the safety of the general public as well as the police officers. *Nieves-Andino*, 872 N.E.2d at 1190.

[214] *Id.*

[215] *Clay*, 926 N.Y.S.2d at 605.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.* at 605-06.

[220] *Clay*, 926 N.Y.S.2d at 605-06.

the events taking place in the present emergency or to determine the likelihood of injury to the general public.[221] In contrast to the other officers who made general inquiries about what happened, Officer McGee asked only one question with the sole intent to learn the identity of the shooter.[222] When McGee did not receive a response from the victim, he told Isaacs, "I don't think you are going to make it" and repeatedly asked who shot him.[223]

This line of questioning makes clear that the main purpose was not to deal with a current emergency situation, but to give the victim a chance to disclose who delivered the fatal blow.[224] After McGee's conversation with the victim, he did not alert other officers of this information to locate the assailant or proceed to secure an ambulance.[225] Instead, McGee went to preserve the crime scene from contamination and to locate possible witnesses to the crime.[226]

Under these particular circumstances, it is reasonable to conclude that the primary purpose of Officer McGee was to obtain information to convict the perpetrator in a court of law.[227] By applying the rules set forth by both the United States Supreme Court and the New York Courts, the statement made by Isaacs to Officer McGee is testimonial in nature.[228]

1. Controversy Related to the Confrontation Clause Exception for Dying Declarations

Some justices expressed concern about the recent decisions involving the application of dying declarations as an exception to the Confrontation Clause.[229] This concern arose from the fact that the focus on whether or not a statement is testimonial seems to eliminate

[221] *Id.* at 606.
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Clay*, 926 N.Y.S.2d at 606.
[226] *Id.*
[227] *Id.*
[228] *Id.* at 606-07.
[229] *Crawford*, 541 U.S. at 69 (Rehnquist, J., concurring); *Davis*, 547 U.S. at 834 (Thomas, J., concurring in part and dissenting in part); *Bryant*, 131 S. Ct. at 1177 (Ginsburg, J., dissenting).

the common law dying declaration hearsay exception.[230]

In *Crawford*, Justice Rehnquist noted that there have historically been exceptions to confrontation that make certain out-of-court statements as reliable as in court testimony subject to cross examination.[231] There are instances where statements cannot be replicated in court but are made under circumstances were the declarant's statements are unlikely to be false and admitting these statements furthers the Confrontation Clause's goal of advancing the truth in criminal trials.[232] Rehnquist emphasized the fact "[t]hat a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions."[233]

In *Davis*, Justice Thomas attacked the primary purpose test set out by the majority and the vague concept of testimonial statements, stating the analysis "bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause." [234] The dissent stated that the Confrontation Clause sought to prevent abuse by overzealous prosecutors using ex parte statements as evidence against a criminal defendant, however, this new test also encompasses technically informal statements that may be used to circumvent the literal right of confrontation.

The Court in *Giles* suggested that a defendant who committed a wrong forfeits his hearsay rights rather than his rights under the Confrontation Clause.[235] This is because courts have largely excluded hearsay evidence due to the fact that the statements were not confronted and noted the close relationship between hearsay and the Confrontation Clause.[236] Most recently, in *Bryant*, Ginsburg raised the vexing issue of "whether the exception for dying declarations survives our recent Confrontation Clause decisions."[237] However, the prosecutor failed to preserve this argument and the United States Su-

[230] *Bryant*, 131 S. Ct. at 1177 (Ginsburg, J., dissenting).

[231] *Crawford*, 541 U.S. at 74 (Rehnquist, J., concurring).

[232] *Id.* This was noted to apply to spontaneous declarations, dying declarations, statements made in the course of obtaining medical services and other hearsay exceptions. *Id.*

[233] *Id.* The court said that this analysis of testimony excludes at least some of the hearsay exceptions such as business records and official records. *Id.* at 76.

[234] *Davis*, 547 U.S. at 834 (Thomas, J., concurring in part and dissenting in part).

[235] *Giles*, 544 U.S. at 365.

[236] *Id.*

[237] *Bryant*, 131 S. Ct. at 1177 (Ginsburg, J., dissenting).

preme Court has yet to directly resolve this question.[238]

If the view of these justices prevails in future litigation, then it is likely that the court will alter the primary purpose test and shift the focus on whether the statement falls under a hearsay exception regardless whether or not the statement was testimonial. Although this potential change may affect the outcome of many cases, it is likely that the outcome in *Clay* would be the same under both the primary purpose test and the proposed standard set out by the dissenting justices.

VII. CONCLUSION

Evidence of final statements made by a homicide victim may be accurate and crucial to a conviction in a homicide case.[239] However, no case is exactly like another and it is necessary for each case to meet the standards set in place to properly allow testimonial hearsay into evidence as a dying declaration. It is important to recognize that this evidence rests on an assumption which cannot possibly be regarded with the same value and weight of evidence given in a court room under all the safeguards provided by cross-examination and jury observation.[240]

Under the particular circumstances in *Clay*, the court was correct in concluding that the statement was testimonial in nature and allowing Officer McGee's testimony.[241] The statements were made by the declarant to a late-arriving police officer whose objective behavior indicated that he solicited this information in order to use it as evidence to prosecute the individual responsible for Isaacs' death.[242]

There was also significant evidence corroborating the dying declaration.[243] The jury also heard testimony from Yvette Clay who contacted the police the night of the shooting and another eyewitness who spoke with Isaacs when the shooting occurred.[244] Both Yvette Clay and another witness identified Thomas Clay and Sidor Fulcher

[238] *Id.*
[239] People v. Kraft, 43 N.E. 80, 80 (N.Y. 1896).
[240] *Id.*
[241] *Clay*, 926 N.Y.S.2d at 607.
[242] *Id.*
[243] *Id.* at 601.
[244] *Id.*

as the shooters while subject to cross-examination in front of a jury.[245] The conversation between Isaacs and McGee was combined with consistent evidence of Yvette Clay and a separate witness at the scene of the crime.[246] The evidence presented at trial was sufficient for a jury to convict both defendants for the crime of murder.[247] The Appellate Division, Second Department was correct in its ruling.

Sarah R. Gitomer[*]

[245] *Id.*

[246] *Clay*, 926 N.Y.S.2d at 601.

[247] *Id.*

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