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Someone Call 911, Crawford is Dying - People v. Duhs

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Someone Call 911, Crawford is Dying - People v. Duhs

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SOMEONE CALL 911, *CRAWFORD* IS DYING

NEW YORK COURT OF APPEALS

People v. Duhs¹
(decided March 29, 2011)

I. FACTS OF THE CASE

Michael Duhs allegedly placed his girlfriend's three-year-old son into a tub of "scalding hot water" while he babysat the child, which resulted in second and third degree burns on the child's lower extremities.² "When the child's mother returned home approximately five hours later, defendant and the mother took the child to the hospital."³ At Duhs' trial for first-degree assault and "endangering the welfare of a child,"⁴ the court allowed the emergency room pediatrician to testify about a statement that the child made while no one else was present under the medical treatment exception to the hearsay rule.⁵

The pediatrician testified that she "asked the child why he did not get out of tub" and that the child responded, in reference to the defendant, "he wouldn't let me out."⁶ This statement was not included in the medical records and the child did not testify at trial.⁷ The pediatrician explained that she observed the child and wanted to

¹ 947 N.E.2d 617 (N.Y. 2011).

² *Id.* at 618.

³ *Id.*

⁴ *Id.*

⁵ *Id.* See FED. R. EVID. 803(4) ("Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded as hearsay.).

⁶ *Duhs*, 947 N.E.2d at 618.

⁷ *Id.*

know how he had been injured in order to assess how he should be treated.⁸ She stated that by phrasing the question the way that she did, she would be able to tell if the child had a “predisposing condition such as a neurological disorder that may have prevented him from getting out of the bathtub.”⁹

The issue before the Court of Appeals was whether the trial court erred in allowing the testimony of the pediatrician.¹⁰ The defendant contended that the admission of the pediatrician’s testimony regarding the child’s statement violated his Sixth Amendment constitutional right to confrontation.¹¹ The claimant based his argument on *Crawford v. Washington*¹² and *Davis v. Washington*,¹³ where the United States Supreme Court held that the Confrontation Clause prohibits the “admission of testimonial statements of a witness who [does] not appear at trial unless [the witness] was unavailable to testify, and the defendant had a prior opportunity for cross-examination.”¹⁴

The Court of Appeals unanimously rejected the plaintiff’s argument, concluding that the defendant’s rights under the Confrontation Clause were not violated because the child’s statement “was not of a testimonial character.”¹⁵ The court stated that the child’s response did not constitute testimony because the “primary purpose” of the doctor’s question was to enable her to provide proper medical treatment for the child’s injuries.¹⁶ Although New York does not have its own code of evidence, there is a “recognized exception to the rule against hearsay” that allows for this kind of statement to be admitted into evidence.¹⁷ In both federal and New York law, an out-of-

⁸ *Id.*

⁹ *Id.* at 618-19.

¹⁰ *Id.* at 618. The Appellate Division affirmed the decision of the trial court. *Duhs*, 947 N.E.2d at 618.

¹¹ *Id.* 619.

¹² 541 U.S. 36 (2004).

¹³ 547 U.S. 813 (2006).

¹⁴ *Duhs*, 947 N.E.2d at 619 (quoting *Crawford*, 541 U.S. at 53-54).

¹⁵ *Id.*

¹⁶ *Id.* at 619-20.

¹⁷ HON. LEE H. ELKINS, JANE FOSBINDER & MELISSA BREGER, N.Y. LAW OF DOMESTIC VIOLENCE §1:112 (2010) (“A person’s out-of-court statement about his or her then existing physical condition, made to a treating physician or other medical professional, for the purpose of obtaining medical care, is admissible under a recognized exception to the rule against hearsay.”).

court statement to a physician or other medical professional, made for the purpose of attaining medical treatment, is admissible in court.¹⁸

II. SUPREME COURT PRECEDENCE

In *Duhs*, the New York Court of Appeals started its Confrontation Clause analysis with *Crawford*,¹⁹ decided in 2004. The Court in *Crawford* looked to the Sixth Amendment's Confrontation Clause, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him."²⁰ According to *Crawford*, a "witness" against the accused is one who "bear[s] testimony."²¹ "Testimony," according to the Court, is a "solemn declaration or affirmation" that is made to establish or prove a fact.²² The Court explained that a formal statement to a government official would constitute testimony, whereas a casual remark to a friend would not.²³ Therefore, the Court held that tape-recorded statements between the petitioner's wife and the police were testimonial, and thus the petitioner was entitled to an opportunity to cross-examination.²⁴ At a minimum, the court stated that "testimony" refers to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations," but left a more "comprehensive definition" for another time.²⁵

That time came in 2006 in *Davis*,²⁶ where the Court established an "ongoing emergency" guideline to clear up the difference between testimonial and non-testimonial statements.²⁷ For instance, the Court explained that during police interrogations, statements are non-testimonial when circumstances objectively indicate that the "primary purpose" of the exchange is "to meet an ongoing emergen-

¹⁸ FED. R. EVID. 803(4).

¹⁹ *Duhs*, 947 N.E.2d at 408.

²⁰ U.S. CONST. amend. VI.

²¹ *Crawford*, 541 U.S. at 51.

²² *Id.* (quoting WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

²³ *Id.* In *Crawford*, the State allowed testimonial statements to be admitted against the petitioner, without allowing the petitioner an opportunity to cross-examine the witness. *Id.* at 68. The Supreme Court held that this was in violation of the Sixth Amendment. *Id.*

²⁴ *Crawford*, 541 U.S. at 68. The statements were regarding the stabbing of a man named Kenneth Lee. *Id.* at 38-39.

²⁵ *Id.* at 68.

²⁶ See generally *Davis*, 547 U.S. 813 (decided on June 19, 2006).

²⁷ *Davis*, 547 U.S. at 822.

cy.”²⁸ Statements made under circumstances that objectively indicate no ongoing emergency, where the primary purpose of an interrogation is “to establish or prove past events potentially relevant to later criminal prosecution” are testimonial in nature.²⁹ In *Davis*, the Court came to the conclusion that there was an ongoing emergency by viewing the situation objectively³⁰ and interpreted statements made during a 911 call as non-testimonial, because they were describing “current circumstances” that required “police assistance.”³¹ The Court stated that the declarant “was not acting as a witness” and was not testifying, but was telling a 911 operator the details of a domestic disturbance in real time as the events unfolded.³² According to the Court, the declarant’s statements were not “a weaker substitute for live testimony.”³³

The *Davis* decision came with a companion case, *Hammon v. Indiana*,³⁴ where circumstances showed, from an objective viewpoint, that the interrogation in question was part of a criminal investigation.³⁵ The Court stated that the interrogation in *Hammon* was similar to that of *Crawford*, as in both instances the declarant was “actively separated from the defendant,” spoke of past criminal activity, and spoke to police well after the events in question took place.³⁶ According to the Court, this situation was one of “official interrogation,” which constitutes a “substitute for live testimony” and is thus “inherently testimonial.”³⁷ The declarant in this situation acted in the same manner as a witness on direct examination at a trial.³⁸ For instance, there was no imminent threat to the declarant, and police questioned her to investigate a possible crime, not to assess an emergency in progress.³⁹ The statements made recounted how past events began

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 828. The Court stated that Michelle McCottry’s phone call to 911 was “plainly a call for help against bona fide physical threat.” *Id.* at 827.

³¹ *Davis*, 547 U.S. at 814. See *id.* at 817-818 (stating “[h]e’s here jumpin’ on me again” and “he’s usin’ his fists” in addition to telling the operator her former boyfriend’s name).

³² *Id.* at 814.

³³ *Id.* at 828 (quoting *United States v. Inadi*, 475 U.S. 387, 394 (1986)).

³⁴ 547 U.S. 813 (2006).

³⁵ *Id.* at 830.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Hammon*, 547 U.S. at 830.

and progressed, which is exactly “what a witness does on direct examination.”⁴⁰ The Supreme Court in *Hammon* focused on how formal this interrogation was, as well as the time lapse between the event in question and the time of statements.⁴¹

III. LOWER FEDERAL COURT DECISIONS

Lower courts were left to fill in the blanks from the *Crawford* and *Davis* decisions. The Seventh Circuit in *United States v. Tolliver*⁴² held that a “crucial aspect of *Crawford* is that it only covers hearsay, [or] out-of-court statements[,]” which, according to the Federal Rules of Evidence, are statements “offered in evidence to prove the truth of the matter asserted.”⁴³ The court acknowledged that “while *Crawford* did not firmly define” testimony, *Davis* indicated that it “pertains to statements that a declarant makes in anticipation of . . . criminal prosecution.”⁴⁴ In *Tolliver*, the court found not only that the statements in question were not hearsay, but also that they were not testimonial because the declarant was making “candid, real-time comments” to a government informant about a drug deal that was in progress.⁴⁵ The comments were “not [a] recounting of past events.”⁴⁶

In *United States v. Saget*,⁴⁷ the Second Circuit had to decide whether an individual constituted a “‘witness’ who bears testimony” under the Confrontation Clause, when that individual did not know his statements were being used by police and eventually at trial.⁴⁸ According to *Saget*, *Crawford* advises that the determining factor in whether a declarant is a witness who bears testimony “is the declarant’s awareness or expectation that his or her statements may later be used at a trial.”⁴⁹ This is determined by examining what a decla-

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 454 F.3d 660 (7th Cir. 2006).

⁴³ *Id.* at 666 (quoting FED. R. EVID. 801) (stating that hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”).

⁴⁴ *Tolliver*, 454 F.3d at 665.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 377 F.3d 223 (2d Cir. 2004).

⁴⁸ *Id.* at 228.

⁴⁹ *Id.*

rant would “reasonably” have believed at that time.⁵⁰

In 2007, the Sixth Circuit analyzed the assessment of the 911 calls in *Davis* in *United States v. Arnold*.⁵¹ The court in *Arnold* stated that there might be a gray area as to what is testimonial and what is not when it comes to 911 calls and “on-the-scene statements.”⁵² The court stressed the importance of assessing a victim’s statement “in its own context” in order to decide whether the statements are testimonial or not.⁵³ According to *Arnold*, such “boundary disputes will continue to emerge.”⁵⁴ In *Arnold*, the court ultimately found that the victim’s statements were non-testimonial,⁵⁵ because they were prompted by an ongoing emergency, and not interrogation by police officers.⁵⁶ The Sixth Circuit stressed the importance analyzing the individual’s statements within the circumstances of the case.⁵⁷

IV. MICHIGAN V. BRYANT EXPANSION

The decisions in *Crawford* and *Davis* have served as the starting point for Confrontation Clause analysis, but they may be dying off. The Supreme Court further expanded its view on Confrontation Clause analysis in *Michigan v. Bryant*.⁵⁸ Here, it stated that the Confrontation Clause is most concerned with restricting the use of “out-of-court statements” by a witness when involved in an “out-of-court” interrogation by a state actor.⁵⁹ The Court stated that the Confrontation Clause seeks to ensure that an accused receives the opportunity to cross-examine the witness about the statements that were used for trial.⁶⁰ According to *Bryant*, the “ongoing emergency” guideline in *Davis* forces a court to see if the primary purpose of an interrogation

⁵⁰ *Id.* at 229.

⁵¹ 486 F.3d 177 (6th Cir. 2007).

⁵² *Id.* at 189.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 192.

⁵⁶ *Arnold*, 486 F.3d at 191. In *Arnold*, Tamica Gordon approached police officers crying and explained that defendant Joseph Arnold pulled out a gun and was trying to kill her. *Id.* at 180.

⁵⁷ *Id.* at 189.

⁵⁸ 131 S. Ct. 1143 (2011).

⁵⁹ *Id.* at 1155.

⁶⁰ *Id.*

is to “create a record for trial” or to respond to an emergency.⁶¹ If the situation genuinely involved an ongoing emergency, it falls outside the “scope of the Clause.”⁶²

In *Bryant*, the Court held that the interaction between a mortally wounded man and the police served the purpose of resolving an active emergency situation, and therefore the statements made were non-testimonial.⁶³ The Court in *Bryant* also stated that “there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.”⁶⁴ Therefore, when a court finds that a statement is non-testimonial, the statement would possibly be excluded from a trial through the rules of hearsay, and not through the Confrontation Clause.⁶⁵

The *Bryant* case further explained the “ongoing emergency” situation as described in *Davis*.⁶⁶ The Court stressed that “an objective analysis of the circumstances” is necessary in assessing the primary purpose of an encounter, including the “statements and actions of the parties” involved.⁶⁷ According to *Bryant*, the purpose of the encounter must be viewed from the perspective of a “reasonable participant.”⁶⁸ The Court stated that “implicit in *Davis* is the idea” that statements are less likely to be fabricated when participants are actively resolving an emergency.⁶⁹ The Court in *Bryant* compared this logic to the justification for the “excited utterance exception in hear-

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Bryant*, 131 S. Ct. at 1150. The statements here involved the identification and description of the defendant Richard Bryant. Compare *id.* at 1150 (holding that a wounded man’s statements to police were not testimonial because the primary purpose of the statements were to receive police assistance), with *Hammon*, 547 U.S. at 830 (holding that a woman’s statements to police in investigating a possible crime were testimonial because the statements were “deliberately recounted” and “in response to police question” a significant amount of time after the event described was over), and *Davis*, 547 U.S. at 827-28 (holding that statements made by a declarant during a 911 call were not testimonial because the statements were necessary to resolve a physical threat that was ongoing).

⁶⁴ *Bryant*, 131 S. Ct. at 1155.

⁶⁵ *Id.* See FED. R. EVID. 803(4). See also *Giles v. California*, 554 U.S. 353, 376 (2008) (stating that “statements to physicians in the course of receiving treatment would be excluded [from trial], if at all, only by hearsay rules” and not by the Confrontation Clause).

⁶⁶ *Bryant*, 131 S. Ct. at 1156.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1157.

say law,”⁷⁰ where there is no time for the declarant to fabricate because he or she is under the stress of an active situation.⁷¹ Additionally, the Court noted that the *Davis* decision did not consider the implications of medical emergencies.⁷² In *Bryant*, the Court explained that the medical condition of the victim is pertinent in analyzing his or her purpose in speaking with first responders.⁷³ For example, a victim could be so debilitated that he or she may not “understand whether [his or] her statements are for the purpose of addressing an ongoing emergency or for the purpose of” use at a later trial.⁷⁴ According to the Court, this is still to be viewed objectively from the viewpoint of a “reasonable victim” because it focuses on the understanding of the victim while in the victim’s actual state.⁷⁵

Analyzing the facts in *Duhs*, using the *Bryant* decision, one can come to the objective conclusion that the main purpose of the child’s conversation with the pediatrician was to treat the injuries. One could even argue that the child and the physician were actively resolving an emergency during the time that the child was being questioned by the doctor, and thus, that the statements made by the child were comparable to an excited utterance.⁷⁶ In *Duhs*, the court held that the statements made by the child to his physician in the course of medical treatment were non-testimonial, and thus fell outside the scope of the Confrontation Clause.⁷⁷ The court stated that since the statements were for the purpose of medical diagnosis and treatment, they were “admitted under that exception to the hearsay rule.”⁷⁸

⁷⁰ *Id.* Pursuant to FED. R. EVID. 803(2), an excited utterance 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.” FED. R. EVID. 803(2).

⁷¹ *Bryant*, 131 S. Ct. at 1157.

⁷² *Id.* at 1159. Compare *Bryant*, 131 S. Ct. at 1150 (explaining that victim Anthony Covington was found by police with a gunshot wound to his abdomen), with *Davis*, 547 U.S. at 817 (“Michelle McCottry was involved in a domestic disturbance with her former boyfriend.”).

⁷³ *Bryant*, 131 S. Ct. at 1159.

⁷⁴ *Id.* at 1161.

⁷⁵ *Id.* at 1161-62. “The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim – circumstances that prominently include the victim’s physical state.” *Id.*

⁷⁶ See FED. R. EVID. 803(2) (defining excited utterance).

⁷⁷ *Duhs*, 947 N.E.2d at 619.

⁷⁸ *Id.* at 618 (quoting *Davidson v. Cornell*, 30 N.E. 573, 576 (N.Y. 1892)) (“[T]here is a strong inducement for the patient to speak truly of his pains and sufferings,” therefore,

V. NEW YORK DECISIONS

In addition to discussing federal cases, the court in *Duhs* looked to its own cases in reaching its decision. In *People v. Rawlins*,⁷⁹ the Court of Appeals stated that the question of whether statements are considered testimonial or non-testimonial “requires consideration of multiple factors not all of equal import in every case.”⁸⁰ According to the court in *Rawlins*, the two most important factors include whether the statement was made in a manner that resembles an out-of-court examination, and whether the statement accused the defendant of criminal activity.⁸¹ To find out whether these factors were fulfilled, the court formulated a test where a court must look to “the purpose of making . . . the statement, and the declarant’s motive” for making the statement.⁸²

There is long-standing precedent in New York that statements made to a physician in the course of medical treatment are admissible in court.⁸³ In *Duhs*, the court cited to its decision in *Davidson v. Cornell*,⁸⁴ where it stated that statements to a physician “have quite uniformly been held admissible.”⁸⁵ However, the statements must relate to a present condition, injury, or disease.⁸⁶ According to *Davidson*, statements made to a physician only serve as admissible evidence when the statements were made in the course of examination for the treatment of a present ailment.⁸⁷ The decision in *Davidson* was at the heart of the court’s holding in *Duhs*.

Similar to the physician’s questioning of the child in *Duhs*, a police officer in *People v. Bradley*⁸⁸ questioned an injured woman in

“statements expressive of [a patient’s] present condition are permitted to be given as evidence only when made to a physician for the purposes of treatment.”).

⁷⁹ 884 N.E.2d 1019 (N.Y. 2008).

⁸⁰ *Id.* at 1033.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See ELKINS, FOSBINDER & BREGER, *supra* note 17 (“The basis for admissibility is the notion that the person’s self-interest in receiving appropriate medical care ensures that the declarant will give accurate information to the medical professional.”).

⁸⁴ 30 N.E. 573 (N.Y. 1892).

⁸⁵ *Id.* at 576.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 862 N.E.2d 79 (N.Y. 2006).

order to decide what action to take immediately.⁸⁹ The New York Court of Appeals in *Bradley* “accept[ed] the holdings of *Crawford* and *Davis* as the basis for [its] decision under both [the federal and state] constitutions.”⁹⁰ The court found that the interaction precipitated by the officer “was a normal and appropriate way to begin” dealing with the emergency and stated that any reasonable police officer would have acted in a similar manner.⁹¹ In this instance, the court found that the woman’s statements were not testimonial under *Crawford* and *Davis*, as she was giving information to an officer who was questioning her during a present emergency.⁹² Therefore, the defendant’s rights were not violated under the Confrontation Clause.⁹³

In 2007, the New York Court of Appeals beat the Supreme Court to the chase by deciding, prior to *Bryant*, that the *Davis* decision should be interpreted broadly. In *People v. Nieves-Andino*,⁹⁴ the Court of Appeals recognized that *Davis* did not impose “a restricted interpretation of what constitutes a continuing emergency.”⁹⁵ The court looked at the “ongoing emergency” guideline in a broader sense, stating that a first responder may reasonably assume that there is an ongoing emergency to be dealt with, even if the danger has passed.⁹⁶ The responder’s questioning may “objectively indicate” that his or her primary purpose was to prevent further harm from taking place.⁹⁷ For example, in *Nieves-Andino*, police found the victim bleeding from a gunshot wound and asked the victim to explain what happened in order to assess the danger of the situation.⁹⁸

The *Nieves-Andino* decision can be applied to *Duhs*.⁹⁹ For

⁸⁹ *Id.* at 81.

⁹⁰ *Id.* at 80.

⁹¹ *Id.* at 81.

⁹² *Id.*

⁹³ *Bradley*, 862 N.E.2d at 79.

⁹⁴ 872 N.E.2d 1188 (N.Y. 2007).

⁹⁵ *Id.* at 1190.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 1188-89.

⁹⁹ However, it is important to point out that in the majority of cases discussed, law enforcement, such as police officers, were the first responders that were questioning the victims in the emergency situations. In *Duhs*, the situation was quite different, as the statements made by the declarant were in response to a physician during the course of immediate medical treatment. *Duhs*, 947 N.E.2d at 620-21. According to *Giles*, statements made to physicians do not even fall under the reach of the Confrontation Clause. *Giles*, 554 U.S. at 376.

example, it could be argued that the active emergency in *Duhs* had passed in the time between the child's injury and the child's arrival at the hospital.¹⁰⁰ However, just as police question to resolve an emergency, doctors must question patients about their injuries in order to figure out how to treat them. Thus, one can see that the interaction between the child and the doctor in *Duhs* was for the purpose of "render[ing] a diagnosis and administer[ing] medical treatment"¹⁰¹ within the broad sense of an ongoing emergency described in *Nieves-Andino*.¹⁰²

Bradley and *Nieves-Andino* emphasized the purpose of the first responder's questioning, rather than the declarant's answers, to determine whether a declarant's statement was testimonial or non-testimonial.¹⁰³ However, *Rawlins*, the court's most current decision in this area, indicated that a court must focus on the statements of all parties involved.¹⁰⁴ This is a broader approach, which was adopted by the Supreme Court in *Bryant*.¹⁰⁵ In *Rawlins*, the court placed more emphasis on the motive behind the victim's responses, rather than the motives behind the first responder's questioning.¹⁰⁶ In *Duhs*, the court focused more on the purpose of the doctor's inquiry than the purpose of the child's statement,¹⁰⁷ but, nonetheless, cited to the broad interpretation of an "ongoing emergency" from *Bryant*.¹⁰⁸ The court sought guidance from *Bryant*, rather than *Crawford* and *Davis*, which were relied on unsuccessfully by the defendant.¹⁰⁹ The court in *Duhs* also stressed the importance of the standard rules of hearsay

Likewise, in *Davidson*, the New York Court of Appeals held that statements made by an individual to a doctor regarding his or her suffering are admissible statements. *Davidson*, 30 N.E. at 576.

¹⁰⁰ *Duhs*, 947 N.E.2d at 618 (discussing the time line of events, specifically, that the child's mother came home five hours after the child was injured and, at that point, took him to the hospital).

¹⁰¹ *Id.* at 620.

¹⁰² *Nieves-Andino*, 872 N.E.2d at 1190.

¹⁰³ *Id.*; *Bradley*, 862 N.E.2d at 81.

¹⁰⁴ *Rawlins*, 884 N.E.2d at 1033.

¹⁰⁵ *Bryant*, 131 S. Ct. at 1156; see *People v. Coleman*, 791 N.Y.S.2d 112 (N.Y. App. Div. 1st Dep't 2005) (taking a position that was subsequently adopted by the Supreme Court in *Davis* in 2006). In *Coleman*, the court held that the conveyance of information to a 911 dispatcher was not "structured questioning" and thus, did not render a testimonial response. *Id.*

¹⁰⁶ *Rawlins*, 884 N.E.2d at 1033.

¹⁰⁷ *Duhs*, 947 N.E.2d at 619-20.

¹⁰⁸ *Id.* at 619.

¹⁰⁹ *Id.*

in making its determination because there may be circumstances other than ongoing emergencies where statements are not a substitute for live testimony.¹¹⁰ The rules of hearsay weighed heavily in the court's decision because of the long-standing tradition that statements made in the course of medical treatment are admissible in court.¹¹¹

VI. POST-DUHS

Ten months after *Duhs*, the Appellate Division, First Department decided *People v. Shaw*,¹¹² which dealt with statements made to both a police officer and a physician.¹¹³ Here the court found that the defendant's right of confrontation was not violated because neither statement constituted testimony.¹¹⁴ The court held that the primary purpose of the victim's statement to a responding police officer was to enable police to respond to an ongoing emergency because there was an armed suspect in the vicinity.¹¹⁵ Additionally, the police needed to learn what happened "to determine whether the victim required prompt medical assistance."¹¹⁶ The second statement at issue in this case "was made to a gynecologist" who was treating the victim at the hospital.¹¹⁷ The court found that the statement made to the doctor was non-testimonial, by looking to the *Duhs* decision, because "the doctor acted primarily as a treating physician."¹¹⁸

Like *Giles* and *Davidson*, this decision takes the view that "the right of confrontation is not absolute,"¹¹⁹ because of the admissibility of statements for purposes of medical treatment¹²⁰ and other

¹¹⁰ *Id.*

¹¹¹ *Davidson*, 30 N.E. at 576.

¹¹² 914 N.Y.S.2d 155 (N.Y. App. Div. 1st Dep't 2011). The defendant in this case was convicted of rape and burglary, both in the first degree. *Id.* at 156. The judgment of the trial court, "sentencing him . . . to consecutive terms of twelve and a half to twenty-five years and three and a half to seven years [was] unanimously affirmed." *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Shaw*, 914 N.Y.S.2d at 156.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ 33 N.Y. JUR. 2D *Criminal Law: Procedure* § 2094 (2011) (citing *In re German F.*, 821 N.Y.S.2d 410, 413 (Fam. Ct. 2006)).

¹²⁰ FED. R. EVID. 803(4).

well-established hearsay exceptions, such as excited utterances.¹²¹ While not at issue in *Shaw*, a court could potentially find that a statement made by a declarant to the police at a crime scene constitutes an excited utterance.¹²² Likewise, a court could also find that a telephone conversation with a 911 dispatcher falls under this exception.¹²³

VII. CONCLUSION

Prior to *Bryant*, courts were left to expand upon *Davis* as they saw fit. For instance, the New York Court of Appeals has put more emphasis on the questions of first responders rather than the answers of declarants in deciding if statements are testimonial.¹²⁴ In *Duhs*, the court may have chosen to analyze the circumstances this way because the declarant was a three-year-old child, so he may not have had any reason for his statements other than his own physical well being in mind. The court analyzed the primary purpose of the physician's question, holding that it was a medical inquiry during the course of treatment.¹²⁵ Therefore, the court found that the child's statement was properly admitted under the hearsay exception for statements made in the course of medical treatment.¹²⁶

The *Duhs* decision has already been cited,¹²⁷ and is likely to serve precedential value for other cases that involve statements made to medical professionals. The *Duhs* decision should be enough to dispose of claims by a defendant that his or her constitutional right to confrontation has been violated by the admission of patient testimony. However, courts may continuously be faced with the issue of what is testimonial and what is not in cases where a declarant has spoken to police. By broadening the "ongoing emergency" guideline from *Davis*, the Court in *Bryant* has rendered the *Crawford* decision useless. Future courts will utilize this broader view to guide their

¹²¹ FED. R. EVID. 803(2).

¹²² See *id.* (stating that excited utterances are statements made while under the stress of an event).

¹²³ *Id.*

¹²⁴ *Nieves-Andino*, 872 N.E.2d at 1190; *Bradley*, 862 N.E.2d at 81.

¹²⁵ *Duhs*, 947 N.E.2d at 619-20.

¹²⁶ *Id.* at 618. See FED. R. EVID. 803(4).

¹²⁷ See *Shaw*, 914 N.Y.S.2d at 156 (citing *Duhs* to support its holding that the victim's statement to the gynecologist was not testimonial).

analysis, but the question of what exactly constitutes testimony will not always be clear. Courts will be forced to resolve this question on a case-by-case basis.

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