

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS  
(CAVANAGH, P.J. AND JANSEN AND SAAD, JJ.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

RICHARD BRYANT,

Defendant-Appellant.

Supreme Court No. 133725

Court of Appeals No. 247039

Lower Court No. 02-5508-01

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**WAYNE COUNTY PROSECUTOR**  
Attorney for Plaintiff-Appellee

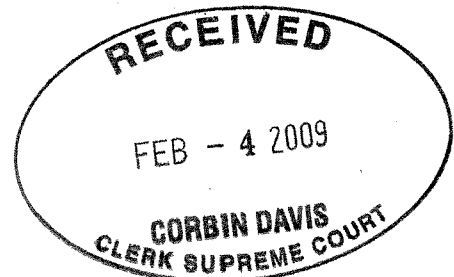
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**DEFENDANT-APPELLANT'S REPLY BRIEF**

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## STATEMENT OF QUESTIONS PRESENTED

- I. **MUST PLAINTIFF-APPELLEE’S ARGUMENT THAT THE OUT-OF-COURT STATEMENT OF MR. COVINGTON WAS PROPERLY ADMITTED AT TRIAL AS A DYING DECLARATION, UNDER MRE 804(B)(2), AND NOT IN VIOLATION OF MR. BRYANT’S SIXTH AMENDMENT RIGHT TO CONFRONTATION, FAIL AS THE RECORD SHOWS THAT THE STATEMENT WAS NEVER ADMITTED INTO EVIDENCE AS A DYING DECLARATION, THE PROSECUTION FAILED TO ESTABLISH ANY FACTUAL FOUNDATION FOR ADMISSION AS A DYING DECLARATION, AND THE PROSECUTION AFFIRMATIVELY WAIVED AND ABANDONED ANY APPELLATE REVIEW OF WHETHER THE STATEMENT WAS ADMISSIBLE AS A DYING DECLARATION BY ACKNOWLEDGING IN THE TRIAL COURT THAT MR. COVINGTON WAS NOT AWARE OF IMPENDING DEATH ARISING FROM HIS GUNSHOT WOUND AT THE TIME HE MADE HIS STATEMENT; FURTHER IS THE PROSECUTION’S ARGUMENT THAT THE STATEMENT WAS PROPERLY ADMISSIBLE AS AN EXCITED UTTERANCE DIRECTLY CONTRARY TO THE RULING AND RATIONALE OF THE UNITED STATES SUPREME COURT IN *DAVIS V WASHINGTON*, 547 US 813; 126 S CT 2266; 165 L ED 2D 224 (2006)?**

Court of Appeals answers, "No".  
Defendant-Appellant answers, "Yes".

## STATEMENT OF FACTS

Defendant-Appellant incorporates by reference the Statement of Facts included in his initial Brief on Appeal to this Court.

- I. **PLAINTIFF-APPELLEE'S ARGUMENT THAT THE OUT-OF-COURT STATEMENT OF MR. COVINGTON WAS PROPERLY ADMITTED AT TRIAL AS A DYING DECLARATION, UNDER MRE 804(B)(2), AND NOT IN VIOLATION OF MR. BRYANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION, MUST FAIL AS THE RECORD SHOWS THAT THE STATEMENT WAS NEVER ADMITTED INTO EVIDENCE AS A DYING DECLARATION, THE PROSECUTION FAILED TO ESTABLISH ANY FACTUAL FOUNDATION FOR ADMISSION AS A DYING DECLARATION, AND THE PROSECUTION AFFIRMATIVELY WAIVED AND ABANDONED ANY APPELLATE REVIEW OF WHETHER THE STATEMENT WAS ADMISSIBLE AS A DYING DECLARATION BY ACKNOWLEDGING IN THE TRIAL COURT THAT MR. COVINGTON WAS NOT AWARE OF IMPENDING DEATH ARISING FROM HIS GUNSHOT WOUND AT THE TIME HE MADE HIS STATEMENT; FURTHER THE PROSECUTION'S ARGUMENT THAT THE STATEMENT WAS PROPERLY ADMISSIBLE AS AN EXCITED UTTERANCE IS DIRECTLY CONTRARY TO THE RULING AND RATIONALE OF THE UNITED STATES SUPREME COURT IN *DAVIS V WASHINGTON*, 547 US 813; 126 S CT 2266; 165 L ED 2D 224 (2006).**

Plaintiff-Appellee spends the majority of its Brief on Appeal to this Court in a review of the history of the dying declaration exception to the hearsay rule, adopted in Michigan as MRE 804(b)(2), and argument that the decision of the United States Supreme Court in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), exempted this hearsay exception from its rule that the Sixth Amendment right to confrontation bars admission of testimonial, out-of-court statements in the absence of an opportunity to cross-examine the declarant, even if that statement falls within a recognized hearsay exception under state evidentiary rules. While this discussion is an interesting recitation of the question of whether a

dying declaration is outside the scope of the *Crawford* decision, it is irrelevant to the real issue before this Court. As the record from the trial court and the Court of Appeals below makes abundantly clear, the case at bar **is not, and has never been**, a dying declaration case. While Appellee vainly attempts to shift the issue to suit its own position, three overriding considerations demonstrate that this case does not, and cannot, present the question of whether a dying declaration is a testimonial statement precluded from admission under *Crawford*.

First, the out-of-court statements allegedly made by Mr. Covington to the police officers who responded to the gas station were never admitted into evidence, either at the preliminary examination or at trial, under the dying declaration exception. The question of the admissibility of the statements was first raised at the examination, during the testimony of Officer Pellerito. When asked by the prosecutor to relate the statements made to him by Mr. Covington, defense counsel objected on hearsay grounds. (18ja). In response, the prosecutor asserted that the statements were admissible as either excited utterances or as dying declarations. (18ja-19ja). Defense counsel replied that there had been no showing of the requisite factual foundation for admission as a dying declaration or an excited utterance. (19ja). At this point, the examining magistrate sustained the defense objection. (19ja).

The prosecutor then sought to establish a foundation for admission of the statements, directly solely at the question of whether the statements were excited utterances. At no point in the ensuing examination was Officer Pellerito asked any questions about whether Mr. Covington expressed a belief that his death was imminent, or was told by the officer that he was likely to die from his wound. (19ja-21ja). After this brief examination, the prosecutor again sought to elicit testimony relating Mr. Covington's alleged statements, prompting a further defense hearsay objection. (21ja). The judge now ruled the statements admissible. Critical to the current

discussion, defense counsel then asked the court to specify under which hearsay exception was the court finding the evidence admissible. (21ja). The judge responded that he was ruling the evidence admissible **only** as an excited utterance:

THE COURT: At this stage, I'm going to allow it under the excited utterance. There has been testimony that the victim appeared to be, first of all, that there was a police run regarding a shooting. And that when they arrived, that they found the victim, Anthony Covington, I believe, on the ground. That he was holding his stomach. That he was bleeding and he appeared to be in shock. So, at this stage, I'm going to allow these statements as an excited utterance. (21ja).

At no point during the remainder of the examination was the issue revisited, or any further ruling made by the magistrate as to admissibility.

Prior to the trial, the defense made a motion to suppress the statements. (33ja-34ja). That motion accurately stated that the evidence was admitted at the examination as an excited utterance. At the evidentiary hearing held before Judge Brookover, the **only** question raised by the prosecution was whether the statements were admissible as excited utterances. At no point of the prosecution's argument was any attempt made to have Judge Brookover also consider whether the statements would qualify as dying declarations. (35ja-38ja, 66ja-75ja). Judge Brookover's decision that the statements were admissible was solely based on the excited utterance exception of MRE 803(2). (75ja-76ja). At no point of his ruling did the trial judge even mention the words "dying declaration," and concluded his ruling by stating:

Court finds the statements were made under the stress and excitement of that startling events and I will admit the statements of the decedent to the officer under 803(2). (76ja).

The written order issued following this ruling similarly indicates that the motion "to admit statements (excited utterance)" is granted. (77ja).

No further rulings as to the admissibility of the statements were made during the trial. At no point did the prosecution seek to have Judge Brookover either consider or supplement his pre-trial ruling under the dying declaration exception.

This record shows beyond dispute that the only ruling under the dying declaration exception was the initial ruling of the magistrate at the examination, where the defense objection as to a lack of foundation was sustained. That ruling was never overturned or appealed.

Second, it is equally clear that the prosecution never established any sufficient factual foundation under that exception. Appellee recognizes that this hearsay exception is premised on a conclusion that such a declaration has inherent reliability due to “the certain expectation of almost immediate death will remove all temptation to falsehood and enforce as strict adherence to the truth as the obligation of an oath could impose.” *Mattox v United States*, 146 US 140, 152; 13 S Ct 50; 36 L Ed 917 (1892), quoted at page 5 of Appellee’s brief. Accordingly, in order to establish the requisite foundation for admission of a statement as a dying declaration, the proponent of the evidence must show not only that the statement concerns the circumstances that led to the death, but also that the declarant made the statement with the expectation and/or belief that death was imminent. *People v Stamper*, 480 Mich 1, 4 (2007).<sup>1</sup>

In this case there was no foundation established, either at the examination or at trial, meeting these requirements. Appellee has not cited a single instance in the record where either Mr. Covington expressed a belief that his death was imminent or inevitable arising from the

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<sup>1</sup> (b) *Hearsay exceptions*. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

(2) *Statement under belief of impending death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death. MRE 804(b)(2).

gunshot wound, or where any of the officers advised him that he was likely to die. No such testimony exists on this record. When the examining magistrate initially sustained the defense objection to the lack of foundation, the prosecution abandoned any effort to establish a sufficient foundation under 804(b)(2), and limited his further questions to the excited utterance question under 803(2). The record of the pre-trial suppression hearing shows the only issue considered by Judge Brookover was whether the evidence was admissible as an excited utterance. Again, no questions were asked to the sole witness at that hearing, Officer Brown, relative to whether Mr. Covington expressed a belief in his imminent or inevitable death. (39ja-65ja). During the cross-examination of Officer Brown by defense counsel, he indicated that Mr. Covington was bleeding and appeared to be in pain, and stated to the officer that he needed an EMS unit, and asked when it would arrive. (61ja). That statement from Mr. Covington was not a belief that he was about to die, but rather that he needed and wanted medical assistance for his wound.

In their brief, Appellee acknowledges that there was no direct evidence on this record showing the requisite foundation for admission as a dying declaration, but argues that a sufficient showing can be made on circumstantial evidence, citing primarily to this Court's opinion in *Stamper, supra*. Appellee's Brief at 12, fn. 45. In fact, the *Stamper* decision did not deal with the question of whether direct or circumstantial evidence was necessary to establish the foundation. That opinion dealt with whether evidence that a four year old child who twice expressed a direct belief that he was about to die from his injuries was sufficient to establish the foundation. The situation in the case at bar is obviously distinguishable from that in *Stamper*.

Appellee seeks to argue that there was sufficient circumstantial evidence in this case that Mr. Covington made his statements under a belief of impending death, but is inconsistent in the standard to be applied to determine whether there was enough such evidence. Initially, Appellee

concedes that the mere fact a declarant subsequently dies from injuries is insufficient. Appellee's Brief at 3, fn 5. However, later in the brief Appellee asserts that the circumstantial evidence in this case was sufficient based solely on the facts that Mr. Covington was shot, was bleeding when the police arrived, and was in pain. Appellee's Brief at 12, fn. 45. Those two positions cannot be reconciled. The rule of evidence cannot, and has not, been read to permit admission of **any** statement made by an injured person as to the cause of the injuries, and who later dies from those injuries, regardless of whether the declarant believed, at the moment the statement was made, that death was inevitable. Under Appellee's interpretation of 804(b)(2), the dying declaration exception will be expanded far beyond its long-understood rationale, and would lose its logical underpinning of inherent reliability. In this case, there was no sufficient factual foundation for a finding that Mr. Covington's out-of-court statements were admissible dying declarations.

Third, and possibly most importantly, the prosecution both abandoned the dying declaration argument and waived any subsequent appellate review of this issue. As pointed out above, at the examination, once the magistrate sustained the defense objection that no foundation for admission as a dying declaration had been shown, the trial prosecutor abandoned any effort to establish that foundation and confined his subsequent questions and arguments, both at the examination and later at trial, to only the excited utterance issue. No effort was made by the prosecution to revisit the magistrate's decision, nor to reraise the question of whether the statements were alternatively admissible under 804(b)(2). A review of the two decisions of the Court of Appeals in this matter similarly shows that the issue of whether the statements were dying declarations was never considered by that Court. (146ja-149ja, 152ja-154ja). Finally, this Court's orders first remanding the case to the Court of Appeals for reconsideration in light of

*Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006), and then granting leave to appeal “limited to the issue” of whether the statements were admissible under *Crawford, supra*, and *Davis, supra*, do not raise the question of whether the statements were admissible dying declarations, as neither *Crawford* nor *Davis* dealt with that hearsay exception. The prosecution abandoned their argument that the statements were admissible under MRE 804(b)(2) early in this prosecution, and cannot revive that question now before this Court.

Even more to the point, the prosecution affirmatively waived the dying declaration argument in the trial court. During his argument during the pre-trial suppression hearing before Judge Brookover, the trial prosecutor stated:

One’s been shot, and, in fact, Mr. Covington, as we know, unlike what the officers knew that night, but what we know now is that Mr. Covington ended up dying of his injuries. **He himself, Mr. Covington, may not have known that at the time.** (66ja). (Emphasis added).

This confession that there was no factual foundation for admission under the dying declaration exception bars this Court from any consideration of the question. This Court in *People v Carter*, 462 Mich 206 (2000), and *People v Riley*, 465 Mich 442 (2001), established that an express, intentional relinquishment or abandonment of a legal position extinguishes the right of the party to later argue that position on appeal. Just as where a defendant may not, for example, assert on appeal an error in jury instructions after having affirmatively consented to or agreed with the instructions in the trial court, the prosecution here cannot now claim that there was a sufficient circumstantial foundation under the dying declaration exception after having admitted in the trial court that the declarant may not have believed that he was about to die from his wound. See *People v Pollick*, 448 Mich 376 (1995); *People v Lueth*, 253 Mich App 670 (2002). Where the prosecution confined their arguments in the trial court to the excited utterance

exception, they cannot now alter their position on admissibility to a theory they abandoned and waived in the lower courts. *People v Asevedo*, 217 Mich App 393 (1996); *People v Lino (After Remand)*, 213 Mich App 89 (1995). As this Court would not allow a criminal defendant to alter the grounds for objection to the admission of evidence on appeal from those raised in the trial court, so to must the Court reject Appellee's effort to reconfigure the actual issue in this case to a question more to their liking. This Court should defer consideration of whether *Crawford* exempts the dying declaration exception to a case which actually and appropriately presents that issue. The case at bar is not that case.

In regards to the actual issue in the case – whether the statements were admissible under *Crawford* and *Davis*, Defendant will rely primarily on his initial Brief to this Court. However, Mr. Bryant finds it necessary to respond to some of the arguments made in Appellee's brief that seriously misconstrue his arguments.

Appellee fails to comprehend the meaning of the term “emergency” in context to the *Crawford* and *Davis* decisions. Obviously Mr. Covington was in a medical emergency when the police arrived at the gas station. However, the focus of the United States Supreme Court's decisions was not on whether an alleged crime victim has been injured, but instead on whether there is an ongoing criminal episode, contemporaneous with the statement, to which the declarant is seeking to have the police intervene and/or prevent. That is the “emergency” which is relevant to this issue, and to which Defendant is referring. Where there is no current emergency in the sense of an on-going criminal act, and the police, rather than preventing further illegal behavior, instead seek information as to an already completed offense, the *Crawford* ruling terms that statement “testimonial.” This definition of “emergency,” for the purposes of this authority, is the only way to explain why the 911 call in *Davis*, made during an ongoing

crime, was found non-testimonial, while the statement made by the declarant in *Hammon v Indiana*, the companion case to *Davis*, was found to be testimonial, and thus inadmissible (even though it met the state evidentiary standard for an excited utterance), as that statement was made at the alleged crime scene but minutes **after** the charged offense was committed. The controlling factor in the two cases was not the presence or absence of an injury or need for medical treatment, but instead the substance of the statements themselves – whether they were a plea for help during the commission of a crime or a description of activity that had already occurred. In the case at bar, the substance of Mr. Covington’s alleged statements was confined to the circumstances of an act which took place at an earlier time and a different location. Nothing of what he said about the offense related to the situation at the time the police arrived at the gas station – there was no allegation he told the police the crime was occurring then and there, or was likely to continue absent police intervention.

The line Appellee wishes this Court to draw between non-testimonial, emergency statements and testimonial descriptions of past events is not the line drawn by the Supreme Court in *Davis*, the controlling constitutional authority. This Court cannot square Appellee’s assertion that non-testimonial statements under *Crawford* include both spontaneous statements made during the course of an event, and those intended “to discuss or describe a recent event to one who was not there” (Appellee’s Brief at 16), with the decision in *Hammon*, where the Supreme Court found testimonial a description of a recent event to police officers who were not there to witness or intercede in the alleged domestic violence. Appellee posits a requirement of a “detailed, formal” interrogation for a statement to be deemed testimonial, an argument expressly rejected by the *Davis* Court:

But in cases like this one, where Amy’s statements were neither a cry for help nor the provision of information enabling officers

immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were “initial inquiries” is immaterial. 165 L Ed 2d at 243.

It does not matter whether the evidence of the statement was written down or only in the memory of the interrogating officer. 165 L Ed 2d at 239-240. As set forth in Defendant’s Brief, the key inquiry, based on the substance of the declarant’s statement (and not the subjective beliefs of the police), is whether the primary purpose of the police questioning was to intervene in an ongoing situation or to obtain information about the circumstances of a completed event. In the case at bar, Mr. Covington’s statements clearly fell within the definition of testimonial statements, as set forth in *Crawford, supra*, and *Davis, supra*.


Finally, nothing in Defendant’s initial brief to this Court can be construed as finding “fault” with the actions of the police upon their arrival at the gas station. There is no issue of police misconduct present in this case. The officers’ concern over Mr. Covington’s medical situation was laudable. However, as argued in Defendant’s brief, their actions in tending to and questioning Mr. Covington, rather than reacting as if there might be an ongoing criminal event, are highly relevant to the question of the primary purpose of the questioning. On this record, that primary purpose was to “establish or prove past events potentially relevant to later criminal prosecution.” 165 L Ed 2d at 237. The statements made to the officer, concerning what, when and where the alleged crime happened, and who committed the offense, were “an obvious substitution for live testimony, because they do precisely **what a witness does** on direct examination; they are inherently testimonial.” 165 L Ed 2d at 242. (Emphasis in original). As such, the declarant’s statements in response to the questions was testimonial, and inadmissible under the Sixth Amendment. US Const, Amend VI.

**SUMMARY AND RELIEF**

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse his conviction and remand for a new trial

Respectfully submitted,

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