# *July 2012 MPT*

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MPT-1: *State of Franklin v. Soper*

## Franklin Rules of Evidence*

**Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

. . .

**(c) Hearsay.** "Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

**Rule 802. The Rule Against Hearsay**

Hearsay is not admissible unless any of the following provides otherwise:

- a Franklin statute;
- these rules; or
- other rules prescribed by the Supreme Court.

**Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness**

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . .

**(2) Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

. . .

**Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness**

**(a) Criteria for Being Unavailable**. A declarant is considered to be unavailable as a witness if the declarant: . . .

**(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness;

. . .

**(b) The Exceptions**. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: . . .

**(2) Statement Under the Belief of Imminent Death**. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

. . .

* The Franklin Rules of Evidence conform to the newly restyled Federal Rules of Evidence.

**State v. Friedman**
Franklin Supreme Court (2008)

Following a jury trial, the defendant, John Friedman, was convicted of the murder of a convenience store clerk. Friedman appealed his conviction on the grounds that the decedent's statement describing his attacker was improperly admitted under the excited utterance and dying declaration exceptions to the hearsay rule, and that admission of the statement violated the Sixth Amendment of the United States Constitution. The appellate court affirmed his conviction. For reasons stated below, we affirm.

## FACTS

Early on June 24, 2005, Paul Lund arrived at the convenience store where he worked and began filling the outside vending machine with newspapers. Carrie Hilton, who lived nearby, heard "hollering" and heard Lund shout, "I don't have no more, I don't have no more." She then heard two gunshots. She looked out her window and saw Lund on one knee, continuing to say, "I don't have no more."

Hilton also saw a tall man searching through a nearby car. The man went to the streetlight where Hilton could see him examining his hand. He was wearing some sort of head covering. Hilton then saw Lund limp away.

Some time later, Lund was found about a block away by an early-morning jogger, who called 911. Officer Anita Sanchez arrived on the scene about two or three minutes before the paramedics arrived. When Sanchez found him, Lund said that he had been shot. Sanchez testified that Lund was in great pain and lying in a fetal position, and that he kept repeating, "I don't want to die, I don't want to die."

As the paramedics prepped Lund for transport, Officer Sanchez asked Lund, "What happened?" Lund stated that a tall man with a black ski mask over his face and a snake tattoo on his right hand came up to him and shot him after demanding money.

Lund never spoke again. He soon lost consciousness and died. An autopsy showed that the gunshots had pierced his respiratory system and his liver. These wounds were each sufficient to have caused his death.

Friedman was convicted in part based on Lund's identification and other evidence found at the convenience store.

## ANALYSIS

### A. Excited Utterance Exception

For a statement to qualify as an excited utterance under Rule 803(2) of the Franklin Rules of Evidence (FRE), the statement must relate to a startling event or condition and the person making the statement (the "declarant") must be under the stress of excitement caused by the event or condition.

In this case, Lund was shot during a robbery—an event startling enough to satisfy Rule 803(2). His statement described the shooter, satisfying the requirement that the statement "relate to" the event or condition.

The record does not tell us how much time elapsed between the shooting and Lund's statement to Officer Sanchez. We have previously noted that "an excited utterance need not occur at the same time as the event to which it relates. But it must be made while the declarant still feels the stress of the startling event and has had no time for reflection." *State v. Cabras* (Fr. Sup. Ct. 1982). The lack of time to reflect, and thus to con-

trive or misrepresent facts, assures the reliability of such statements.

However, the lapse of time alone does not control our decision as to whether a declarant speaks under the stress of the startling event. Other factors include the declarant's physical and mental condition, his observable distress, the character of the event, and the subject of his statements.

In this case, when he spoke, Lund was bleeding profusely. Officer Sanchez testified that Lund had difficulty breathing, was lying in a fetal position, and appeared to be in great pain. Lund fell silent within minutes of Sanchez's arrival. This evidence suffices to establish that Lund spoke while under the stress of a startling condition.

The courts below did not err in concluding that the statement was admissible under FRE 803(2). But that does not end the inquiry.

**B. Dying Declaration Exception**

Franklin Rule 804(b)(2) embodies the common law exception for dying declarations. In order for a statement to qualify under this exception, it must meet the following criteria: (1) the declarant must have died by the time of the trial, (2) the statement must be offered in a prosecution for homicide or in a civil case, (3) the statement must concern the cause or the circumstances of the declarant's death, and (4) the declarant must have made the statement while believing that death was imminent.

We have justified this rule on the assumption that "a person who knows that death is imminent will be truthful. The cost of death with a lie on one's lips is too great to risk." *State v. Donn* (Fr. Sup. Ct. 1883). We have also stated that "the imminence of death encourages the truth as strongly as any oath." *State v. Leon* (Fr. Sup. Ct. 1942).

In this case, Friedman concedes all but the fourth criterion of FRE 804(b)(2). He argues that nothing in the record indicates that Lund believed that he would soon die. Friedman contends that the presence of police and of paramedics assured Lund of survival at the time he spoke, thus taking his statement out of the rule.

We disagree. The prosecution may prove a belief in imminent death in several ways: by the declarant's express language, by the severity of his wounds, by his conduct, or by any other circumstance which might shed light on the state of the declarant's mind.

In this case, the gunshots had pierced Lund's respiratory system and his liver; he died of his wounds. Officer Sanchez testified that Lund lay in a fetal position, apparently in great pain. Lund also repeatedly stated, "I don't want to die, I don't want to die." In fact, Lund died shortly after making the statement, leading to the reasonable inference that he knew the severity of his situation when he spoke.

The courts below did not err in concluding that the statement was admissible as a dying declaration under FRE 804(b)(2). But again, this does not end the inquiry.

**C. Confrontation Clause**

Friedman claims that admission of Lund's statement violated his rights under the Confrontation Clause of the Sixth Amendment. In *Crawford v. Washington* (2004), the United States Supreme Court focused on whether a statement admitted under a hearsay exception was "testimonial." If so, and if the declarant was otherwise unavailable for cross-examination, the Confrontation Clause would require the exclusion of that statement from evidence.

In the case at hand, were Lund's statement admissible solely as an excited utterance, we

would need to assess whether the statement was "testimonial" under *Crawford* and subsequent cases.

However, the prosecution in this case properly offered Lund's statement as a dying declaration. In *Crawford*, the Supreme Court noted that certain exceptions permitting testimonial hearsay against an accused in a criminal case existed before 1791, the year the Sixth Amendment was adopted, and that these exceptions might survive the adoption of the Sixth Amendment. The Supreme Court in *dicta* specifically discussed the dying declarations exception as such an exception. Courts in our neighboring states of Columbia and Olympia have addressed the issue and have held that the Confrontation Clause does not bar admission of evidence of dying declarations. *See State v. Karoff* (Olympia Sup. Ct. 2007) and *State v. Wirth* (Columbia Sup. Ct. 2006).

Accordingly we conclude that the victim's statement was not barred from admission by the Confrontation Clause.

Affirmed.

**Michigan v. Bryant**
562 U.S. ____, 131 S. Ct. 1143 (2011)

At Richard Bryant's trial, the court admitted statements that the victim, Anthony Covington, made to police officers who discovered him mortally wounded in a parking lot. A jury convicted Bryant of second-degree murder. The Supreme Court of Michigan held that the Sixth Amendment's Confrontation Clause, as explained in *Crawford v. Washington* (2004) and *Davis v. Washington* (2006), rendered Covington's statements inadmissible testimonial hearsay, and the court reversed Bryant's conviction. We granted the State's petition to consider whether the Confrontation Clause barred admission of Covington's statements to the police.

I

Around 3:25 a.m. on April 29, 2001, Detroit police officers responded to a radio dispatch indicating that a man had been shot. At the scene, they found Covington lying on the ground next to his car in a gas station parking lot. Covington had a gunshot wound to his abdomen, appeared to be in great pain, and spoke with difficulty. The police asked him what had happened, who had shot him, and where the shooting had occurred. Covington stated that "Rick" [Bryant] shot him at around 3 a.m. He also indicated that he had a conversation with Bryant, whom he recognized based on his voice, through the back door of Bryant's house. Covington explained that when he turned to leave, he was shot through the door and then drove to the gas station, where police found him.

Covington's conversation with police ended within 5 to 10 minutes when emergency medical services arrived. Covington was transported to a hospital and died within hours. The police left the gas station after speaking with Covington, called for backup, and traveled to Bryant's house. They did not find Bryant there but did find blood and a bullet on the back porch and an apparent bullet hole in the back door. Police also found Covington's wallet and identification outside the house.

II

The Confrontation Clause states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford* [involving a station-house interrogation by a detective after a stabbing], we noted that in England, pretrial examinations of suspects and witnesses by government officials "were sometimes read in court in lieu of live testimony." In light of this history, we emphasized the word "witnesses" in the Sixth Amendment, defining it as "those who bear testimony," and defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." We therefore limited the Confrontation Clause's reach to testimonial statements and held that in order for testimonial evidence to be admissible, the Sixth Amendment "demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford* noted that "at a minimum" it includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations."[4]

[4] The Supreme Court of Michigan held that the question whether the victim's statements would have been admissible as "dying declarations" was not properly before it because the prosecution established the factual foundation only for admission of the statements as excited utterances. The trial court ruled that the statements were admissible as excited utterances and did not address their admissibility as dying declarations. This occurred prior to our 2004 decision in *Crawford v. Washington*, where we first suggested that dying declarations, even if testimonial, might be admissible as a historical exception to the Confrontation Clause. Because of the State's failure to preserve its argument with regard to dying declarations, we similarly need not decide that question here.

In 2006, the Court in *Davis* and *Hammon v. Indiana* (*Davis*'s companion case) made clear that not all those questioned by police are witnesses and not all "interrogations by law enforcement officers" are subject to the Confrontation Clause. In *Davis*, the victim made the statements at issue to a 911 operator during a domestic disturbance. In *Hammon*, police responded to a domestic disturbance call at the Hammon home. One officer remained in the kitchen with the defendant, while another officer talked to the victim in the living room about what had happened.

To address the facts of both cases, we discussed the concept of an ongoing emergency.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis*.

We held that the statements at issue in *Davis* were nontestimonial and the statements in *Hammon* were testimonial. *Davis* did not attempt to produce an exhaustive classification of all conceivable statements as either testimonial or nontestimonial.[5]

[5] *Davis* explained that 911 operators "may at least be agents of law enforcement when they conduct interrogations of 911 callers," and therefore "considered their acts to be acts of the police" for purposes of the opinion.

Here, we confront for the first time circumstances in which the "ongoing emergency" discussed in *Davis* extends beyond an initial victim to a potential threat to the responding police and the public at large.

III

To determine whether the "primary purpose" of an interrogation is "to enable police assistance to meet an ongoing emergency," we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.

The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than "prov[ing] past events potentially relevant to later criminal prosecution." Rather, it focuses them on "end[ing] a threatening situation." *Davis*. Because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.

Whether an emergency exists and is ongoing is a highly context-dependent inquiry. *Davis* and *Hammon* involved domestic violence, a known and identified perpetrator, and, in *Hammon*, a neutralized threat. Because *Davis* and *Hammon* were domestic violence cases, we focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat *to them*.

An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the

threat solely to the first victim has been neutralized, because the threat to the first responders and public may continue.

The duration and scope of an emergency may depend in part on the type of weapon employed. In *Davis* and *Hammon*, the assailants used their fists, as compared to the scope of the emergency here, which involved a gun.

The medical condition of the victim is also important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

Another factor is the importance of informality in an encounter between a victim and police. Formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to "establish or prove past events potentially relevant to later criminal prosecution."

The statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers. To give an extreme example, if the police say to a victim, "Tell us who did this to you so that we can arrest and prosecute them," the victim's response that "Rick did it" appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers.

IV

Nothing Covington said to the police indicated that the cause of the shooting was a purely private dispute or that the threat from the shooter had ended. The record reveals little about the motive for the shooting. What Covington did tell the officers was that he fled Bryant's back porch, indicating that he perceived an ongoing threat. The police did not know, and Covington did not tell them, whether the threat was limited to him. The potential scope of the dispute and therefore the emergency in this case encompasses a threat potentially to the police and the public.

This is also the first of our post-*Crawford* Confrontation Clause cases to involve a gun. Covington was shot through the back door of Bryant's house. At no point during the questioning did either Covington or the police know the location of the shooter. At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington.

The circumstances of the encounter provide important context for understanding Covington's statements to the police. When the police arrived at Covington's side, their first question to him was "What happened?" Covington's response was either "Rick shot me" or "I was shot," followed very quickly by an identification of "Rick" as the shooter. In response to further questions, Covington explained that the shooting occurred through the back door of Bryant's house and provided a physical description of the shooter. When he made the statements, Covington was lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen. His answers to the police officers' questions were punctuated with questions

about when emergency medical services would arrive. From this description of his condition and report of his statements, we cannot say that a person in Covington's situation would have had a "primary purpose" "to establish or prove past events potentially relevant to later criminal prosecution."

For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred. The questions they asked—what had happened, who had shot him, and where the shooting occurred—were the exact type of questions necessary to allow the police to "assess the situation, the threat to their own safety, and possible danger to the potential victim" and to the public, including "whether they would be encountering a violent felon." *Davis*. In other words, they solicited the information necessary to enable them "to meet an ongoing emergency."

Finally, we consider the informality of the situation and the interrogation. This situation is more similar, though not identical, to the informal, harried 911 call in *Davis* than to the structured, station-house interview in *Crawford*. Here the situation was fluid and somewhat confused; the officers did not conduct a structured interrogation. The informality suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements.

Because the circumstances of the encounter as well as the statements and actions of Covington and the police objectively indicate that the "primary purpose of the interrogation" was "to enable police assistance to meet an ongoing emergency," Covington's identification and description of the shooter and the location of the shooting were not testimonial hearsay. The Confrontation Clause did not bar their admission at Bryant's trial.

The judgment of the Supreme Court of Michigan is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered*.