

ANSWER TO QUESTION NO. 9

Defense Argument for Exclusion: Defense counsel would base his request on the Sixth Amendment to the United States Constitution. The Confrontation Clause of the Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him." The Fourteenth Amendment renders the Clause binding on the states. *Pointer v Texas*, 380 US 400, 403 (1965). Because Bobby is charged with a criminal offense, murder, the Sixth Amendment right to confrontation applies to him.

The United States Supreme Court held in *Crawford v Washington*, 541 US 36 (2004) that, if a witness is unavailable for trial and the accused had no opportunity to confront the witness through cross examination, the witness's statements cannot be relayed to the trier of fact through another witness. *Crawford* explained that, in these circumstances, the only thing that satisfies the Confrontation Clause is confrontation, not the flexibility for admission of out-of-court statements provided by the rules of evidence.

However, *Crawford's* application of the Sixth Amendment, and indeed the Confrontation Clause itself, is limited to "testimonial statements." Included in the definition of testimonial statements are statements to police officers "under circumstances that objectively indicate the primary purpose of police interrogation is to establish or prove past events potentially relevant to later criminal prosecution." See *Davis v Washington*, 547 US 813 (2006).

Defense counsel should argue that the circumstances of the interrogation, i.e. police officers quizzing a dying man prone in a gas station parking lot, the nature of the questions asked, i.e., a desire to identify the man's assailant, his location, and other details, and the interrogating officers' mild interest in the man's well-being, clearly indicate the primary purpose of the police officers' interrogation of the man was to establish or prove past events potentially relevant to later criminal prosecution.

In sum, defense counsel would conclude his argument for exclusion by indicating (1) the statements sought to be admitted are testimonial; (2) the man is unavailable for trial, and (3) no prior opportunity for cross examination was presented.

Prosecution Argument for Admission: The prosecutor would

respond that, while the defense argument for exclusion is generally accurate as far as it goes, the argument misses a central point in determining whether the statements in question are testimonial. The prosecutor should argue that the statements are not testimonial if "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."

The prosecutor would then argue that the circumstances indicate the police interrogation had as its primary purpose addressing the man's gunshot wounds; that an emergency was ongoing because the shooting was recent and nearby; that Bobby was not yet in custody and, generally, when police arrived, they had little information at hand and that their acquisition of information was in a fluid, informal setting where next occurrences were not anticipatable.

In sum, the prosecutor should argue the statements were not testimonial and therefore not within the ambit of the Confrontation Clause.

Judge's Analysis: The issue for the court to decide is whether the man's statements are categorized as testimonial. No real dispute exists as to the application of the Confrontation Clause once this determination is made: if they are testimonial, they are barred by the Clause; if they are not, no such bar exists.

Determining whether the statements are testimonial in turn is calculated by whether the primary purpose of the interrogation is to address an ongoing emergency or to gather evidence for later criminal prosecution. This is a multi-factor; context-dependent analysis not given to unduly weighing a single factor. See *Michigan v Bryant*, 131 S Ct 1143 (2011).

In reaching the determination of the purpose for the interrogation, a court may consider (1) whether an ongoing emergency actually exists, (2) the formality or informality of the victim/police encounter, (3) the statements and actions of both the declarant and interrogators, and (4) other factors germane to a particular scenario.

Pursuant to *Michigan v Bryant*, the court should rule that the statements are non-testimonial because they were made under circumstances objectively indicating that the primary purpose of the interrogation by officers at the scene was to meet an ongoing emergency. That police were present with the victim and Bobby was not, does not undermine the conclusion that an emergency situation

was present, nor compel the conclusion that the officer's interrogation was for gathering evidence for later criminal prosecution. A proper, more expansive view of whether an ongoing emergency exists is called for under *Bryant*. Defendant's motion should therefore be denied.

Additional points may be awarded for:

(1) Greater in-depth discussion of the meaning of the word "witnesses" as used in the Confrontation Clause as that meaning has significance to the determination whether a witness's statement is testimonial.

(2) Any salient discussion about the differing contests between *Crawford*, *Davis* and *Bryant*, as those contexts enlighten the decision as to the primary purpose of the interrogation.

(3) That the statements were "dying declarations" and as such were admissible at the time of the Sixth Amendment's creation and were therefore not precluded by it. This point should not simply be addressed under MRE 804(a)(4) and (b)(2) to obtain credit.

(4) Greater discussion of the case specific factors suggesting a broader measuring rod for the term "ongoing emergency" as discussed in *Michigan v Bryant*.