CRIMINAL LAW – HEARSAY: TESTIMONIAL OR NON-TESTIMONIAL OUT-OF-COURT STATEMENTS FOR ONGOING EMERGENCIES

State v. Burton, 2025 ND 83, 20 N.W.3d 136.

ABSTRACT

In *State v. Burton*, the North Dakota Supreme Court affirmed the admissibility of a 911 call as non-testimonial hearsay, holding that its use did not violate the Confrontation Clause of the Sixth Amendment. This decision raises critical questions about the Confrontation Clause's scope and the level of protection it affords the accused.

On May 22, 2024, two Bismarck police officers arrested Brent Burton at his Bismarck residence following a 911 call made by his wife reporting domestic abuse. Prosecutors charged Burton with domestic violence, a class B misdemeanor in the state of North Dakota. The 911 call was offered by the State and published to the jury, despite the State's inability to secure Burton's wife for testimony. Burton was ultimately found guilty. Burton appealed, contending that the district court violated his Sixth Amendment right to confront his accuser because the 911 call was testimonial, thus requiring his wife's testimony. The court applied the United States Supreme Court's primary purpose test to determine whether the out-of-court statements were testimonial. Under *Michigan v. Bryant*, if the primary purpose for an out-of-court statement is for assistance with an ongoing emergency, such as a break-in or another situation where the caller is in active danger, it is not testimonial and therefore does not violate the Confrontation Clause. Burton argued that because the alleged incident occurred before his wife's 911 call, and she had used past-tense verbs to describe the incident, the emergency was not "ongoing." Ultimately, the court disagreed, holding that the call was used to assist police officers during an ongoing emergency and affirming the conviction.

The court's holding in *State v. Burton* raises questions about the definition and flexibility of the standard of "ongoing emergency" under the Sixth Amendment. As interpretations of the Confrontation Clause continue to evolve, it will be imperative for North Dakota lawyers to explore these questions to further solidify the definition of ongoing emergency. This Comment will inform North Dakota practitioners about the nuance of what qualifies as an ongoing emergency and evaluate the flexibility of the definition given by the court, as well as propose possible paths forward for North Dakota to ensure a clear standard.

I. FACTS

Late in the evening of May 22, 2024, two police officers arrived at the residence of Brent Burton in response to a 911 call made by his wife.[1] The call reported an incident of domestic violence allegedly committed by Burton, during which his wife stated he "had grabbed and slapped her."[2] Burton was arrested and charged with domestic violence.[3]

Burton's jury trial took place in September 2024.[4] At the pretrial conference, "the State informed the court it was unable to locate or subpoena" Burton's wife to testify as the complaining witness.[5] At the trial, the State submitted the recording of the 911 call as evidence, to which Burton objected.[6] Over his objection, the 911 call was received as evidence and played for the jury at the trial.[7] Following a guilty verdict by the jury, Burton was sentenced

1. State v. Burton, 2025 ND 83, ¶ 2, 20 N.W.3d 136, 140.
2. *Id.* ¶ 10.
3. *Id.* ¶ 2 (citing N.D. CENT. CODE § 12.1-17-01.2(2)(a)).
4. *Id.* ¶ 3.
5. *Id.*
6. *Id.*
7. *Id.* ¶ 4.

by the district court.[8] Burton appealed his conviction to the North Dakota Supreme Court, "argu[ing] the district court violated his Sixth Amendment right to [be] confront[ed]" with the witnesses against him.[9]

The right for an accused person to be confronted with their witnesses in a criminal trial is afforded by the Confrontation Clause of the Sixth Amendment to the United States Constitution.[10] This Clause precludes out-of-court testimonial statements from being used in criminal trials, unless the witness is unavailable to testify and the accused previously had an opportunity to cross-examine the witness.[11] However, if such statements are deemed to be non-testimonial, then the statements are not in violation of the Sixth Amendment.[12] To determine if statements made during 911 calls are testimonial, the court inquires into the primary purpose of the call.[13] If the primary purpose of the call is to assist police in addressing an ongoing emergency, it is deemed non-testimonial and admissible.[14]

Using this rule, the court analyzed the content of the 911 call to determine whether the statements were made to help police to face an ongoing emergency.[15] The court stated that the 911 operator's questions were asked primarily to assist police to address an ongoing emergency through questions pertaining to the caller's condition and injuries, whether the perpetrator was still in the house, whether the perpetrator had access to weapons, and others related to the current safety of the caller.[16] The court *held* that the statements were non-testimonial and thus, not in violation of the Sixth Amendment right to confrontation.[17]

II. LEGAL BACKGROUND

Beginning in the English Common Law tradition and evolving through centuries of American interpretation, the right of confrontation has undergone significant transformation.[18] This section examines that evolution, highlighting the historical foundations, early judicial understandings, and modern rules that define the right today.

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8. *Id.* ¶¶ 4-5.
9. *Id.* ¶ 6.
10. U.S. CONST. amend. VI.
11. Crawford v. Washington, 541 U.S. 36, 59 (2004).
12. *See id.* at 68.
13. *See* Davis v. Washington, 547 U.S. 813, 822 (2006).
14. *See id.*
15. *See* State v. Burton, 2025 ND 83, ¶ 14, 20 N.W.3d 136, 143.
16. *See id.*
17. *Id.* ¶ 16.
18. *See generally* Crawford v. Washington, 541 U.S. 36, 43-46 (2004).

A. EARLY INTERPRETATIONS OF THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE

The Sixth Amendment provides rights to the accused in a criminal trial.[19] Among these rights is that of an accused person "to be confronted with the witnesses against him."[20] This usually occurs via in-court testimony, but can include certain out-of-court statements if the accused has the opportunity to cross-examine the witness on those statements prior to trial.[21] Many out-of-court statements are considered hearsay, and are thus generally not admissible as evidence, with a number of exceptions.[22] The hearsay rule reinforces the Confrontation Clause by preventing the admission of statements whose credibility cannot be tested through cross-examination.[23] Without the right of confrontation, accusers could cast anonymous or unchecked accusations, and the accused would not have any mechanism to deny the allegations in court.[24] As such, this right is deemed fundamental to the preservation and integrity of the adversarial system of justice in the United States.[25]

Though the idea of a right to confrontation dates to Ancient Roman law, the United States derived the right from English Common Law.[26] The right was gradually adopted into English law, in part due to the infamous trial of Sir Walter Raleigh.[27] Raleigh was on trial for treason involving an assassination plot against the King after being named by Lord Cobham, his alleged accomplice.[28] Raleigh contended Cobham had only implicated him to save himself, and Cobham's lie would be exposed if called to testify at trial.[29] The

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19. U.S. CONST. amend. VI.

20. *See id.*

21. *See Crawford*, 541 U.S. at 51-52.

22. FED. R. EVID. 801(c); *see also, e.g.*, FED. R. EVID. 801(d) (providing the exclusions from hearsay, including "(1) a declarant-witness's prior statement" and "(2) an opposing party's statement"), 803 (stating the twenty-three exceptions for hearsay), 807 (providing the residual exception).

23. *See Hearsay*, LEGAL. INFO. INST., https://www.law.cornell.edu/wex/hearsay [https://perma.cc/4B82-HLBX] (last visited Nov. 25, 2025) ("Hearsay is an out-of-court statement offered to prove the truth of whatever it asserts . . . . The problem with hearsay is that when the person being quoted is not present, it becomes impossible to establish credibility.").

24. *See Crawford*, 541 U.S. at 50 ("[T]he principal evil at which the Confrontation Clause was directed was . . . its use of *ex parte* examinations as evidence against the accused.").

25. *See* Pointer v. Texas, 380 U.S. 400, 410 (1965) (Goldberg, J., concurring) ("I agree with the holding of the Court that 'the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.'" (omission in original)).

26. *Crawford*, 541 U.S. at 43 (first citing Coy v. Iowa, 487 U.S. 1012, 1015 (1988); and then citing Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 (1994)).

27. *See id.* at 44.

28. *See id.*

29. *See id.*

judges did not grant Raleigh's request, and he was convicted and sentenced to death.[30] After this ruling, one of Raleigh's trial judges was distraught by the miscarriage of justice.[31] Because of this and other significant trials of the sixteenth and seventeenth century, judicial reforms were sought and laws were developed to give citizens the right of confrontation.[32]

Originally, the Common Law only required in-court, adversarial testimony in court for treason cases.[33] Eventually, the law evolved to allow out-of-court statements under certain circumstances of unavailability and opportunity of cross-examination of such statement.[34] American colonial governors were pressured by their townships to guarantee colonists the right to be confronted for accused crimes.[35] Declarations of rights of American colonies during the Revolution often included a guaranteed right of confrontation, and ultimately, when the United States was formed, the right was guaranteed to all accused persons under the Sixth Amendment to the Constitution.[36]

One of the first notable federal cases regarding the right to confrontation was *Mattox v. United States*, in which a witness made a statement to the court before trial, but died before he could testify against the defendant.[37] Under a literal reading of the Constitution's text, this would render the statement inadmissible—a result far more restrictive and extreme than intended.[38] As a result, the statement was admitted, and the admissibility of hearsay exceptions began to gradually be increase in court.[39] Today, there are numerous exceptions to the hearsay rule in federal courts.[40]

Over fifty years after *Mattox*, the Confrontation Clause of the Sixth Amendment was incorporated into the states through the Fourteenth Amendment by *Pointer v. Texas*.[41] In *Pointer*, the defendant was accused of robbing a man named Phillips.[42] Phillips gave a statement at a preliminary hearing as the State's chief witness but the defendant did not have the chance to cross-examine him at this hearing.[43] Between the preliminary hearing and the trial,

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30. *Id.*
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.* at 45.
35. *See id.* at 47-48.
36. *See id.* at 48-49.
37. *See* Mattox v. United States, 156 U.S. 237, 243 (1895).
38. Ohio v. Roberts, 448 U.S. 56, 63 (1980), *abrogated by*, Crawford v. Washington, 541 U.S. 36 (2004).
39. *See Mattox*, 156 U.S. at 243-44.
40. *See* sources cited *supra* note 22.
41. *See* Pointer v. Texas, 380 U.S. 400, 407-08 (1965).
42. *See id.* at 401.
43. *See id.*

Phillips moved to California, and prosecutors submitted his statement as evidence, citing his apparent lack of intent to return to the state.[44] The defendant was convicted of the crime, but he appealed to the Texas Court of Criminal Appeals and eventually to the United States Supreme Court.[45] Having incorporated the right to an attorney from the Sixth Amendment in *Gideon v. Wainwright* two years prior, the Court further incorporated the Sixth Amendment to the states by reversing the Texas court's ruling.[46] The Court held that the right of confrontation was guaranteed to all criminal trials at the state and federal level.[47]

Historically, a prominent factor used in determining the admissibility of hearsay evidence was whether the statement bore sufficient "indicia of reliability."[48] In *Dutton v. Evans*, the Supreme Court outlined some of these indicia.[49] In *Dutton*, Evans, Williams, and Truett were arrested for the murder of three police officers in Georgia.[50] At trial, the State called another witness who was familiar with Williams from their imprisonment and testified Williams had implicated Evans as the lead conspirator for the murders.[51] While Williams and Evans maintained that they were not involved in the murders, the out-of-court statement reported by the fellow prisoner was admitted and upheld on appeal by the Georgia Supreme Court.[52] On appeal, the United States Supreme Court held that because the statement was not coerced, rather uttered freely, it had reliability.[53] Additionally, the Court referenced the possibility for cross examination as to why the statement was able to be entered as a hearsay statement as evidence and not in violation of the Confrontation Clause.[54]

B. MODERN-ERA INTERPRETATIONS AND THE ONGOING EMERGENCY FACTOR

When the Confrontation Clause originated, the only way people could be confronted was with live, in-court testimony.[55] Today, new Confrontation

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44. *Id.*
45. *Id.* at 402.
46. *See id.* at 403, 406 (citing Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment)).
47. *Id.* at 407-08.
48. *See* Dutton v. Evans, 400 U.S. 74, 89 (1970).
49. *See id.* at 88-89.
50. *Id.* at 76.
51. *See id.* at 77.
52. *Id.* at 78-79.
53. *See id.* at 88-89.
54. *See id.* at 89.
55. *See* Crawford v. Washington, 541 U.S. 36, 43 (2004).

Clause issues result from the use of telephones and specifically, recorded 911 calls.[56] The seminal cases that tackle these issues in recent history are *Crawford v. Washington*, *Davis v. Washington*, and *Michigan v. Bryant*.[57]

The United States Supreme Court's decision in *Crawford v. Washington* is credited with adapting the Confrontation Clause to modern-day issues.[58] The defendant, Michael Crawford, was convicted of stabbing another man "who allegedly tried to rape his wife, Sylvia."[59] At trial, the State played a tape of Sylvia's interview with police which described the incident.[60] However, Crawford never had the opportunity to cross-examine Sylvia regarding statements made in the interview, and the Court held that statements in police interviews are testimonial.[61] The Court established that hearsay is not admissible in court if the statement is testimonial, disregarding the previous indicia of reliability test from *Ohio v. Roberts*.[62]

In *Davis v. Washington*, another modern landmark Confrontation Clause case, the defendant was accused of violating a no-contact order while attacking his former girlfriend.[63] The State only had the two responding officers as witnesses, and "neither officer could testify as to the cause of the injuries" she sustained as Davis, the alleged perpetrator, had left the scene.[64] The State used the 911 call in lieu of testimony from the girlfriend, to which Davis objected on the basis that admitting the call was a violation of his right of confrontation.[65] Regardless, Davis was convicted, and he appealed his case to the United States Supreme Court.[66] From these facts, the Court established

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56. *See generally id.* at 50 (referencing the prevention "of *ex parte* examinations as evidence against the accused").

57. *See generally* Jeffrey Bellin, *The Incredible Shrinking of the Confrontation Clause*, 92 B.U. L. REV. 1865, 1867 (2012) (acknowledging the evolution of the Confrontation Clause in the Court's jurisprudence); *Crawford*, 541 U.S. 36 (holding hearsay is not admissible in court if the statement is testimonial); Davis v. Washington, 547 U.S. 813 (2006) (establishing the primary purpose test for police interrogations to determine if statements are testimonial); Michigan v. Bryant, 562 U.S. 344 (2011) (further clarifying the standard of intent to assist police in an ongoing emergency).

58. *See generally* Bellin, *supra* note 57, at 1866-67 ("The decision finally put some teeth in the Confrontation Clause, repudiating the wishy-washy and widely-reviled Ohio v. Roberts framework that governed the Court's jurisprudence over the preceding two decades." (citation modified)).

59. *Crawford*, 541 U.S. at 38.

60. *Id.*

61. *Id.* at 68-69.

62. *See generally id.* ("*Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (citing Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by*, Crawford v. Washington 541 U.S. 36 (2004)).

63. *See generally* 547 U.S. 813, 817 (2006).

64. *Id.* at 818-19.

65. *See id.* at 819.

66. *Id.*

the primary purpose test for police interrogations.[67] If the purpose of the interrogation is to assist law enforcement to meet an ongoing emergency, then the interrogation is nontestimonial and is not in violation of the Confrontation Clause.[68] This set a different standard than *Crawford*, where police interrogations were deemed to be inherently testimonial.[69]

Six years later, the Supreme Court further clarified rules regarding nontestimonial hearsay by putting boundaries on the meaning of "ongoing emergency."[70] In *Michigan v. Bryant*, the defendant was convicted of second-degree murder and firearm charges, with testimony used from a victim's statements to police officers.[71] While *Davis* did not define ongoing emergency, the Court in *Bryant* called for an objective evaluation of the conduct of the parties rather than an exact definition.[72] As such, courts should look to the conduct and intent of the parties to determine admissibility.[73] If the conduct of the parties suggests that the interrogator is gathering information to aid law enforcement in responding to what both parties perceive as an ongoing emergency, the resulting statements are nontestimonial and therefore admissible.[74] Formality is not itself dispositive of the intent of the interrogation, though it may suggest the absence of emergency.[75] By evaluating the conduct of both the interrogator and declarant, including the specific questions posed and answers given, a court can likely determine the primary purpose of the investigation.[76]

III. ANALYSIS

The evolution of the Confrontation Clause and the development of modern case law provide essential context for analyzing the North Dakota Supreme Court's reasoning in *State v. Burton*.[77] The defendant in *Burton* argued that the 911 call in question took place after the incident occurred, and the recording should therefore be inadmissible as testimonial hearsay.[78] The

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67. *See id.* at 822.

68. *Id.*

69. *Contrast id.*, *with* Crawford v. Washington, 541 U.S. 36, 36 (2004) (concluding that interrogations by law enforcement officers are testimonial statements subject to Confrontation Clause protection).

70. *See* Adam A. Field, Note, *Beyond* Michigan v. Bryant*: A Practicable Approach to Testimonial Hearsay and Ongoing Emergencies*, 2012 U. ILL. L. REV. 1265, 1268.

71. 562 U.S. 344, 350 (2011).

72. *See id.* at 363, 370.

73. *See id.* at 367-68.

74. *See id.* at 370.

75. *Id.* at 366.

76. *See id.* at 367-68.

77. *See generally* 2025 ND 83, 20 N.W.3d 136.

78. *Id.* ¶ 10.

State, alternatively, argued that the call was made to assist police in addressing an ongoing emergency and should be admitted because the relevant statements were nontestimonial.[79] The court ultimately decided that the call was in assistance of an ongoing emergency, discussing the background of the primary purpose test and applying it to the facts at hand.[80]

A. THE DEFENDANT'S INTERPRETATION

On appeal, Burton argued that the district court's admission of the 911 call as evidence was a violation of his Sixth Amendment rights to be confronted with his witnesses against him.[81] To support his argument, he emphasized his wife's use of past tense verbs when describing the incident.[82] Additionally, he noted that when the police arrived, Burton was already outside smoking, not inside with his wife.[83] Because of this, Burton argued that the call was not assisting the police at the time of an ongoing emergency, but rather the statements served to "establish or prove past events potentially relevant to later criminal prosecution."[84]

B. THE STATE'S INTERPRETATION

The State maintained that the evidence was properly admitted as nontestimonial hearsay.[85] According to Mrs. Burton, the defendant was in the room staring at her while she made the 911 call, and he left at a later point.[86] The State also pointed to the "freshness of her injuries when observed by law enforcement," the fact that she reported being unable to get to another locked room in the house, and the presence of guns in the house as factors that indicate the danger she was in at the time of the 911 call.[87] The State argued the information conveyed in this call demonstrates there was an ongoing emergency at the time the call was made, and the call would then be nontestimonial and not violate the defendant's right of confrontation.[88]

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79. *See id.* ¶ 25.

80. *See id.*

81. Appellant Brief ¶ 13, State v. Burton, 2025 ND 83, 20 N.W.3d 136 (No. 20240286).

82. *See id.* ¶ 14.

83. *See id.* ¶ 13 ("The timing and circumstances objectively indicate there was no ongoing emergency requiring immediate police assistance.").

84. *Id.* ¶ 14 (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)).

85. Brief of Plaintiff and Appellee State of North Dakota ¶ 14, State v. Burton, 2025 ND 83, 20 N.W.3d 136 (No. 20240286).

86. *Id.* ¶ 19.

87. *See id.* ¶ 23.

88. *See id.* ¶¶ 24-25.

C. THE COURT'S DECISION

With guidance from United States Supreme Court precedent, the North Dakota Supreme Court looked to the facts to determine the primary purpose of the investigation.[89] The court determined that Burton's wife, the declarant, was describing "current circumstances requiring police assistance" at the time of the 911 call.[90] Mrs. Burton answered the 911 operator's questions, but her answers indicated police assistance was necessary.[91] For example, Mrs. Burton stated that her husband had assaulted her and that he was in the room staring at her.[92] She also described her injuries, but said that an ambulance was not needed.[93] Additionally, she reported firearms in the residence.[94] According to the court, these answers indicated she was in need of law enforcement and the primary purpose of the interrogation for her was to assist police in meeting an ongoing emergency.[95]

When evaluating the conduct of the interrogator, the 911 operator, the court emphasized the nature of the questions asked.[96] The court further concluded the primary purpose of the operator's questions was to gather information to allow the police to respond to the domestic violence call.[97]

> The 911 operator asked the caller the address of the emergency; what the emergency [was]; whether the caller [was] injured; what the caller's injuries [were]; where he (Burton) [was] "at right now"; whether the caller [was] "able to get into another room and lock the door"; whether he (Burton) [had] any weapons; what kind of weapons; wheth-er the caller need[ed] an ambulance; the caller and Burton's names; whether there [was] anybody else in the house; where the other person in the house [was] "at right now"; and in what room of the house the caller and Burton [were] in.[98]

From the context of the call, the 911 operator understood the assault had just taken place, and Burton was still in the room staring at the victim—his

89. *See* State v. Burton, 2025 ND 83, ¶ 10, 20 N.W.3d 136, 142.
90. *Id.* ¶ 13.
91. *See id.* ¶¶ 13-14.
92. *See id.* ¶ 13.
93. *Id.*
94. *Id.*
95. *See id.*
96. *See id.* ¶ 14.
97. *Id.*
98. *Id.*

wife.[99] Burton did not leave the room until after the operator informed his wife that police were on the way.[100]

From Mrs. Burton's answers, the operator had an indication that she was still in danger and deployed police to meet an ongoing emergency.[101] The court concluded that the nature of the operator's questions, the caller's responses, and the subsequent police dispatch to respond to the emergency indicated that the primary purpose of the interrogation was to assist police to meet an ongoing emergency.[102] Accordingly, the call was properly admitted as nontestimonial hearsay.[103] As such, Burton's right of confrontation under the Sixth Amendment was not violated.[104]

IV. IMPACT

With the history of the right of confrontation dissected and applied to the facts of *Burton*, the practical impact and importance of this ruling for North Dakota warrant closer examination.

A. ONGOING EMERGENCY AND WINDOW AFTER INCIDENT: CRITIQUE OF THE LAW AS IT STANDS

The United States Supreme Court in *Michigan v. Bryant* announced that "the existence *vel non* of an ongoing emergency is [not] dispositive to the testimonial inquiry."[105] Instead, it emphasized analyzing the conduct of both the interviewer and interviewee to determine whether they believed that the purpose of the exchange was to assist police in responding to an ongoing emergency.[106] However, given that attorneys may dispute whether an ongoing emergency existed at the time of the 911 call, the standard remains unsettled and often unclear in practice.[107]

Burton's argument that the statements against him in the 911 call should be inadmissible without cross-examination is not new, and it continues to resonate with some in the legal field.[108] His reasoning has surface appeal, as the incident was described in the past tense during the phone call, he cooperated with law enforcement upon their arrival, and his wife did not have a

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99. *See id.* ¶¶ 13, 16.
100. *Id.* ¶ 13.
101. *See id.* ¶¶ 13-15.
102. *See id.*
103. *See id.* ¶ 16.
104. *Id.*
105. 562 U.S. 344, 366 (2011).
106. *See id.* at 367.
107. *See generally supra* text accompanying notes 105-06.
108. *See generally* Bellin, *supra* note 57, at 1867-70 (explaining the standard set forth in Michigan v. Bryant); discussion *supra* Section II.B.

panicked or frantic tone when making the call.[109] Without excusing Burton's underlying conduct, this argument underscores how the flexible nature of the "ongoing emergency" standard can create uncertainty for defendants, practitioners, and scholars alike.[110] The North Dakota Supreme Court itself has admitted that there is a lack of uniformity in the "interpretation of the confrontation clause."[111]

For example, Burton's circumstances may be meaningfully compared to those of the defendant in *State v. Froelich*.[112] In *Froelich*, the defendant allegedly exhibited aggressive behavior toward his girlfriend's son-in-law.[113] When Froelich began allegedly assaulting the alleged victim, the alleged victim told Froelich's girlfriend to lock herself in the bathroom and call 911.[114] There is a clear delineation between having to shelter in a locked room to make a 911 call for an incident as it is occurring, and a victim making the call in plain view of an assailant after it has occurred because there is a manifestation of danger to the caller or another as the call is occurring.[115] Under the primary purpose test, however, both calls were essentially equivalent and admitted as evidence.[116] The primary purpose test often gives deference to the victims, which frustrates the Confrontation Clause and the adversarial system of justice itself.[117] The flexible standard of "ongoing emergency" is in conflict with the testimonial nature of information given during 911 calls, essentially creating a large carveout to the Confrontation Clause for 911 calls.[118] From this carveout, prosecutors can gather most of the information they need from the 911 call and not attempt to secure the caller to provide testimony, and the accused has no way to defend themselves against the statements in the call.[119]

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109. *See generally* Appellant Brief, *supra* note 81, ¶ 13 ("It's a very monotone, calm dialog with . . . the dispatcher.").

110. *Compare* State v. Burton, 2025 ND 83, 20 N.W.3d 136, *with* Davis v. Washington, 547 U.S. 813 (2006).

111. *See generally* State v. Duncan, 2011 ND 85, ¶ 14, 796 N.W.2d 672, 676.

112. *See generally* 2017 ND 154, 897 N.W.2d 905.

113. *Id.* ¶ 2.

114. *Id.* ¶ 2.

115. *Compare* State v. Burton, 2025 ND 83, 20 N.W.3d 136, *with* State v. Froelich, 2017 ND 154, 897 N.W.2d 905.

116. *See Burton*, 2025 ND 83, ¶ 16, 20 N.W.3d 136, 143-44; *Froelich*, 2017 ND 154, ¶ 10, 897 N.W.2d 905, 908-09.

117. *See generally* Bellin, *supra* note 57, at 1867 (discussing how the "reinvigoration of the Sixth Amendment confrontation right . . . [struck] a resounding blow to prosecutorial power" and laments the subsequent cases that undid that blow (footnote omitted)).

118. *See* Michigan v. Bryant, 562 U.S. 344, 384 (2011) (Scalia, J., dissenting) (citing Davis v. Washington, 547 U.S. 813, 832 (2006)).

119. *See id.*

The North Dakota Supreme Court followed the United States Supreme Court's guidance in making their ruling in *State v. Burton*, but the *Bryant* ruling has received its share of criticism since being announced.[120] Justice Antonin Scalia criticized the majority's decision in *Bryant*, saying "[f]rom [the declarant's] perspective, his statements had little value except to ensure the arrest and eventual prosecution of [the defendant]. He knew the 'threatening situation' had ended six blocks away and 25 minutes earlier when he fled from [defendant's] back porch."[121] From Justice Scalia's perspective, by assigning no true time or distance limit and instead focusing on mere perception of a threat by two parties, the Court risked eroding a right guaranteed by the Sixth Amendment at the very heart of the United States adversarial system.[122]

Justice Ruth Bader Ginsburg agreed with Justice Scalia in a separate dissent, stating the officers most likely "viewed their encounter with [the declarant] [as] an investigation into a past crime with no ongoing or immediate consequences," and further agreed with the concern that this ruling creates a broad exception to the Confrontation Clause for cases involving violent crimes.[123] These varied perspectives among the Court underscore the doctrinal tension surrounding this issue and suggests that it may warrant further consideration.[124] Some have proposed adding an unavailability requirement for the witness before the nontestimonial hearsay can be admitted.[125] This requirement would make prosecutors prove the witness is unavailable to testify at trial, ensuring the accuser must have a good reason for avoiding confrontation.[126] This would result in more accusers appearing at trial because it would raise the standard required for missing the trial.[127] Ensuring the prosecutors must show why they need to admit the nontestimonial hearsay would reduce the amount of Confrontation Clause violations that arise.[128]

B. RELEVANCE TO PRACTITIONERS

State v. Burton offers important guidance for practitioners, illustrating potential circumstances in which statements made to assist police in addressing an ongoing emergency can successfully be used as nontestimonial

120. *See generally* Bellin, *supra* note 57, at 1867-69 (offering critique on *Bryant*).
121. *See Bryant*, 562 U.S. at 384 (2011) (Scalia, J., dissenting) (citing *Davis*, 547 U.S. at 832).
122. *See id.* at 388-89.
123. *Id.* at 395 (Ginsburg, J., dissenting) (second alteration in original).
124. *See generally id.* (expressing agreement with Justice Scalia's dissent).
125. *See generally* Bellin, *supra* note 57, at 1912-13.
126. *See generally id.*
127. *See generally id.*
128. *See generally id.*

hearsay.[129] Practitioners in the state should recognize that even if an incident has technically concluded, a court may still classify the situation as an ongoing emergency based on the totality of the circumstances.[130] The factors that were present in this case included presence of weapons in the house, intimidation tactics like staring and yelling, and lack of ability to flee.[131]

Practitioners should remain attentive to the standards governing nontestimonial hearsay so they can best advise clients and shape trial strategy. Because the rules derive from United States Supreme Court precedent, they cannot be changed unless overturned by the Court.[132] However, North Dakota could take initiative by affording additional protections to North Dakotans' right of confrontation.[133] The legislature could adopt an unavailability requirement for accusers at trial to make certain there is a legitimate and demonstrable reason for their absence.[134] Alternatively, North Dakota legislators could work towards defining the outer boundaries of the term "ongoing emergency" during a 911 call.[135] As of now, practitioners must work within the existing framework, identifying and emphasizing case-specific facts that distinguish a client's situation—particularly in cases where the "ongoing emergency" classification may be ambiguous or difficult to apply.

V. CONCLUSION

The North Dakota Supreme Court in *State v. Burton* applied the primary purpose test to determine whether statements made during a 911 call were testimonial.[136] Under this test, if, through an objective lens, the court determines that the statements were intended to assist police with addressing an ongoing emergency, then such statements are nontestimonial hearsay under the Sixth Amendment's Confrontation Clause.[137] For practitioners in North

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129. *See generally* State v. Burton, 2025 ND 83, 20 N.W.3d 136 (concluding the circumstances of this case were held to be indicative of an ongoing emergency).

130. *See generally id.* ¶ 13 (concluding the "circumstances of the 911 call objectively indicate[d] the primary purpose of the interaction was to enable law enforcement to meet an ongoing emergency" although the alleged assault had concluded).

131. *See generally id.*

132. *See generally* U.S. CONST. art. III, § 2, cl. 2. The Supremacy Clause of the United States Constitution establishes that the laws of the United States cannot be overturned by the states. *See generally id.*

133. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) (explaining the ability and then recent trend of states including rights in their state constitution beyond what is required by the incorporation of the United States Constitution).

134. *See generally* Bellin *supra* note 57, at 1910-12 (providing benefits and drawbacks of unavailability requirements).

135. *See generally supra* text accompanying notes 72-76.

136. *See* 2025 ND 83, ¶ 16, 20 N.W.3d 136, 143.

137. *See id.* ¶ 8 (citing State v. Good Bear, 2024 ND 18, ¶ 23, 2 N.W.3d 721, 727).

Dakota, understanding the nuances of this standard for 911 calls is essential. The framework set by the United States Supreme Court in *Michigan v. Bryant* can be ambiguous, leaving room for interpretation and uncertainty in application.[138] Careful examination of the facts in each case is therefore critical.[139]

The right of confrontation is included through incorporation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and North Dakota specifically places an importance on the right to defend yourself in court.[140] North Dakota should seek to enforce this right by establishing more constitutional protections concerning the right to confrontation. Practitioners and judges must remain vigilant to ensure that evolving interpretations of the "ongoing emergency" doctrine do not erode a fundamental right central to North Dakota's—and the nation's—adversarial system of justice.

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138. *See generally* 562 U.S. 344 (2011).

139. *See generally id.* at 367 ("In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.").

140. *See generally* State v. Moen, 2025 ND 163, ¶ 5, 26 N.W.3d 560, 562 (citing N.D. CONST. art. I, § 12).

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