

**STATE OF MICHIGAN**

**SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

Supreme Court  
No. 134206

-vs-

Court of Appeals  
No. 265778

GERACER RAPHAEL TAYLOR,  
Defendant-Appellant,  
\_\_\_\_\_ /

Macomb Circuit  
No. 04-3893-FC

**PLAINTIFF-APPELLEE'S BRIEF ON APPEAL**

ERIC J. SMITH P46186  
PROSECUTING ATTORNEY  
MACOMB COUNTY, MICHIGAN

ROBERT BERLIN P27824  
CHIEF APPELLATE LAWYER  
BY:

JOSHUA D. ABBOTT P53528  
ASSISTANT PROSECUTING ATTORNEY  
MACOMB COUNTY ADMINISTRATION BLDG.  
1 SOUTH MAIN, 3RD FLOOR  
MT. CLEMENS, MICHIGAN 48043  
(586) 469-5350

\*\*\*\*\*

ATTORNEY FOR DEFENDANT-APPELLANT:

LAWRENCE S. KATZ P15747



## **ISSUES PRESENTED**

### **ISSUE I**

**WERE LASATER'S STATEMENTS TO WPD OFFICERS KRISS AND BONACORSI IDENTIFYING THE DEFENDANT AS HIS ASSAILANT NON-TESTIMONIAL UNDER *DAVIS V. WASHINGTON*?**

**Plaintiff-Appellee's Answer: "Yes".  
Defendant-Appellant's Answer: "No".**

### **ISSUE II**

**DID LASATER'S STATEMENTS TO WPD OFFICERS KRISS AND BONACORSI, EVEN IF DEEMED TESTIMONIAL, CONSTITUTE DYING DECLARATIONS UNDER MRE 804(B)(2)?**

**Plaintiff-Appellee's Answer: "Yes".  
Defendant-Appellant's Answer: "No".**

### **ISSUE III**

**DID THE SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES INCORPORATE AN EXCEPTION FOR DYING DECLARATIONS?**

**Plaintiff-Appellee's Answer: "Yes".  
Defendant-Appellant's Answer: "No".**

## TABLE OF CONTENTS

	Page
<u><i>ISSUES PRESENTED</i></u> .....	<i>i</i>
<u><i>ISSUE I</i></u> .....	<i>i</i>
<u>WERE LASATER’S STATEMENTS TO WPD OFFICERS KRISS AND BONACORSI IDENTIFYING THE DEFENDANT AS HIS ASSAILANT NON-TESTIMONIAL UNDER DAVIS V. WASHINGTON?</u> .....	<i>i</i>
<u><i>ISSUE II</i></u> .....	<i>i</i>
<u>DID LASATER’S STATEMENTS TO WPD OFFICERS KRISS AND BONACORSI, EVEN IF DEEMED TESTIMONIAL, CONSTITUTE DYING DECLARATIONS UNDER MRE 804(B)(2)?</u> .....	<i>i</i>
<u><i>ISSUE III</i></u> .....	<i>i</i>
<u>DID THE SIXTH AMENDMENT RIGHT TO CONTRONT WITNESSES INCORPORATE AN EXCEPTION FOR DYING DECLARATIONS?</u> .....	<i>i</i>
<u><i>TABLE OF CONTENTS</i></u> .....	<i>ii</i>
<u><i>INDEX OF AUTHORITIES</i></u> .....	<i>iii</i>
<u><i>COUNTERSTATEMENT OF FACTS</i></u> .....	<i>1</i>
<u><i>ISSUE I</i></u> .....	<i>10</i>
<u>LASATER’S STATEMENTS TO WPD OFFICERS KRISS AND BONACORSI IDENTIFYING THE DEFENDANT AS HIS ASSAILANT WERE NON-TESTIMONIAL UNDER DAVIS V. WASHINGTON</u> .....	<i>10</i>
<u><i>ISSUE II</i></u> .....	<i>19</i>
<u>LASATER’S STATEMENTS TO WPD OFFICERS KRISS AND BONACORSI, EVEN IF DEEMED TESTIMONIAL, CONSTITUTED DYING DECLARATIONS UNDER MRE 804(B)(2)</u> .....	<i>19</i>
<u><i>ISSUE III</i></u> .....	<i>25</i>
<u>THE SIXTH AMENDMENT RIGHT TO CONTRONT WITNESSES INCORPORATES AN EXCEPTION FOR DYING DECLARATIONS</u> .....	<i>25</i>
<u><i>RELIEF REQUESTED</i></u> .....	<i>30</i>

## INDEX OF AUTHORITIES

### Cases

<i>Crawford v. Washington</i> , 541 US 36; 124 SCt 1354; 158 LEd2d 177 (2004).....	passim
<i>Davis v. Washington</i> , 547 US 813 (2006).....	passim
<i>Hankins v. State</i> , 918 So2d 378 (2005).....	25
<i>Harkins v. State</i> , 143 P3d 706 (2006).....	26
<i>Head v. State</i> , 171 Md.App. 642; 912 A2d 1 (2006).....	17
<i>Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Co.</i> , 542 US 177; 124 SCt 2451; 159 LEd2d 292 (2004).....	13, 18
<i>Mattox v. United States</i> , 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895).....	24, 26
<i>New York v. Quarles</i> , 467 US 649; 104 SCt 2626; 81 LEd2d 550 (1984) .....	12
<i>People v. Christmas</i> , 181 Mich 634; 148 NW 369 (1914).....	20, 27
<i>People v. Fritch</i> , 210 Mich 343; 178 NW 59 (1920).....	20
<i>People v. Gilmore</i> , 356 Ill App 3d 1023, 1032 (2005).....	25, 28
<i>People v. Katt</i> , 468 Mich 272; 662 NW2d 12 (2003).....	10, 19
<i>People v. Knapp</i> , 26 Mich App 112 (1872).....	22, 27
<i>People v. LeBlanc</i> , 465 Mich 575; 640 NW2d 246 (2002).....	24
<i>People v. Lukity</i> , 460 Mich 484; 596 NW2d 607 (1999).....	10, 19
<i>People v. Monterroso</i> , 34 Cal 4 <sup>th</sup> 743; 101 P3d 956 (2004).....	25, 26, 28
<i>People v. Stamper</i> , 480 Mich 1; 742 NW2d 607 (2007).....	20
<i>People v. Walker</i> , 273 Mich App 56; 728 NW2d 902 (2006).....	13

*State v. Lewis*, 235 SW3d 136 (2007).....27, 28

*State v. Martin*, 695 NW2d 578 (2005).....25

*United States v. Jordan*, 2005 WL 513501.....27, 28

*Wallace v. State*, 836 NE2d 985, 996 (2006).....25

**Statutes**

MCL § 750.227b.....8

MCL § 750.316.....8

**Rules**

MCR 7.302(G)(4)(a).....22

MRE 602.....21, 22, 23

MRE 801(c).....19

MRE 802.....19

MRE 804(a)(4).....20

MRE 804(b)(2).....iv, 19, 20, 21, 27

## **COUNTERSTATEMENT OF FACTS**

In September of 2004, 26-year-old Buel Lasater (“Lasater”) lived off and on with his long-time friend, Jason Jackson (“Jackson”), at Jackson’s house at 13983 Knox in Warren. (56a-58a). Jackson worked at a moving company called Always Moving. (56a). Lasater also worked at Always Moving, although in a part-time capacity. (56a).

On September 30, 2004, Lasater and Jackson worked from 10:00 a.m. to 5:00 p.m. (58a-59a). Jim Love (“Love”), another co-worker, worked with Lasater and Jackson that day. (58a-59a, 192a-193a). After 5:00 p.m., Lasater, Jackson, and Love bought beer and went back to Jackson’s house. (59a-60a, 194-195a). Soon, other individuals, including Ray Peters (“Peters”) and Terrah Salamone (“Salamone”), stopped by the house and it “became a little party.” (60a, 63a-64a, 136a-140a, 165a-166a, 196a-197a). Salamone was Lasater’s girlfriend. (163a). One of the individuals who came by the impromptu party was Geracer Taylor (“Taylor”), known as “Booger.” (60a-61a, 135a-136a, 163a-164a, 167a-168a, 197a-198a).

Lasater and Taylor “didn’t really care for each other.” (65a-66a). At one point during the evening, Lasater and Taylor exchanged words and got into a fight. (66a, 168a-169a, 199a-200a). Lasater struck Taylor three or four times in the jaw and knocked him to the ground. (66a-67a, 199a). Jackson “got in between them and broke it up,” telling Lasater that he did not want any fighting in his house. (66a-67a, 169a-

170a, 200a). Peters assisted Jackson in breaking up the fight. (67a, 169a-170a). After the altercation, Lasater and Taylor went back into Jackson's sunroom "to talk it out." (67a-68a). Later than evening, Lasater and Taylor shook hands. (68a, 142a-143a, 170a, 200a-201a). It did not appear to the partygoers, however, that the reconciliation was sincere. (93a-94a, 182a).

Later that evening, Lasater and Salamone went into Jackson's bedroom together and had sex. (69a-71a, 170a). At one point while they were inside the dark bedroom, Taylor "opened the door, and . . . stood there in the doorway" under the hall light. (170a-172a). Lasater said: "[W]ho is that?" (171a). Salamone stated: "[I]t's Boog." (171a). Eventually, he closed the door. (171a). Soon thereafter, Salamone went home. (172a-174a). When she left, Taylor already had left the house. (173a, 201a). The partygoers left Jackson's house by the early morning. (69a, 202a). Ultimately, only Lasater, Peters, and Jackson remained. (69a). Jackson went to sleep on a couch. (70a). Peters slept on a loveseat. (70a, 143a, 172-173a). Lasater slept in Jackson's bed. (Tr. 70a-71a).

Just as he lay down on the couch, Jackson heard a car door shut outside the house. (71a). Looking through the blinds on the window, Jackson observed Taylor "walking up to [his] porch." (71a). At the front door, Jackson said: "[W]e're going to sleep, we've got to work in the morning." (71a). Taylor insisted that he had to wake up Peters. (Tr.

71a). Jackson “tried pretty hard to wake [Peters] up.” (71a). Jackson “lifted him up and smacked him in the face.” (71a). Peters had been drinking all night, however, and these efforts were unsuccessful. (Tr. 7-28-05, 71a-72a). Taylor got a glass of water and “poured it on [Peters’] face.” (72a). Peters woke up and told Taylor: “Do that again I’ll beat your fucking ass.” (72a). Peters went back to sleep. (72a).

Taylor stood over Peters for a few moments and then sat down in a chair in the kitchen. (72a). Taylor “just sat there with his hands folded . . . for a good couple of minutes.” (72a). As he sat there, Lasater walked out of the bathroom and back into Jackson’s bedroom. (73a). From the couch where he was lying, Jackson told Lasater: “[W]e got [to] get up for work in the morning, you better wake up.” (74a). Lasater laughed and said that he would wake up. (74a). Jackson told Taylor that they had “to wake up in the morning, we got to go to sleep.” (74a). Taylor left the house. (74a). Jackson locked the door after Taylor and went back to sleep. (74a).

Officer David Kriss (“Officer Kriss”) of the Warren Police Department (“WPD”), on routine patrol with Officer Swatowski, was dispatched to a “shots heard” call on Knox. (98a-99a). Officer Kriss, overheard lights and siren activated, drove to Jackson’s house on Knox. (100a-101a). When he arrived, Officer Kriss observed “several people . . . standing on the front lawn[s] on either side of [13983 Knox].” (101a). These neighbors “were excited.” (101a). They told Officers

Kriss and Swatowski “that they had heard shots fired.” (101a). Further, the neighbors informed the WPD officers that “[t]he heard someone calling . . . for help from the house.” (101a). Officer Kriss also heard a voice from inside Jackson’s house calling for help. (101a).

Officers Kriss and Swatowski “knocked and announced [them]selves and when [they] weren’t given entry, [they] kicked the door in.” (101a). As they did, a third WPD officer, Officer Petrozini, joined them. (102a). Coming through the front door into the living room, the WPD officers observed Jackson sleeping on the couch and Peters sleeping on the loveseat. (102a). The WPD officers, after much difficulty, woke up Jackson and Peters. (74a, 102a, 144a-145a). Jackson observed WPD officers all over his house when he awoke. (74a). Looking into his bedroom, Jackson saw “a lot of blood” and Lasater “hunched over holding himself . . . moaning real loud.” (74a-75a). Officers Swatowski and Petrozini secured the living room. (102a).

Officer Kriss entered Jackson’s bedroom, located in the front of the house in the southeast corner. (102a). Officer Kriss observed Lasater standing inside the room “in front of a window, the bottom half of which was full of an air conditioner.” (103a, 107a). The vinyl blinds in the window above the air conditioner “looked sort of tattered” and the window was open. (107a-108a). He “appeared to have been shot.” (103a). Lasater had sustained wounds to “his hand, his abdomen, and his thigh.” (103a). Lasater was “hunched over” and “clutching his

abdomen.” (103a). Officer Kriss saw “copious amounts of blood” in the bedroom. (103a). To Officer Kriss, “it looked like [Lasater] had been in bed when he was shot” because “[t]here were bits of fluff from the blankets and pillow still floating in the air.” (104a). The bedroom smelled of gunpowder. (104a). On a dresser next to the bed and under the window, Officer Kriss saw “small bits of flesh and blood.” (104a).

Officer Kriss “didn’t think [Lasater] would make it” and “tried to conduct an interview.” (104a). He had Lasater lie down on the floor of the bedroom and advised him that emergency medical help was on the way. (104a-105a). When Officer Kriss asked Lasater for a description of his assailant, however, Lasater “seemed sort of reluctant.” (105a). Subsequently, Lasater told Officer Kriss that he “had beefs” and stated: “[T]hat nigger, Booger, shot me.” (105a). Officer Kriss pressed Lasater to tell him Booger’s legal name. (105a). Again, Lasater “seemed reluctant to give [Officer Kriss] any information.” (105a). Officer Kriss told Lasater that he was “in bad shape” and that he wasn’t “going to make it.” (105a). Officer Kriss said: “You need to tell me who shot you. You need to tell me who Booger is.” (105a). Lasater repeated: “[T]hat nigger, Booger, shot me.” (105a). Officer Kriss was unsuccessful in gathering additional information about the shooting from Lasater. (105a-106a). Soon, emergency medical personnel arrived to treat Lasater. (Tr. 7-28-05, 105a-107a).

Like Officers Kriss and Swatowski, WPD Officer David Bonacorsi (“Officer Bonacorsi”) was on routine patrol when he heard the radio run for “a shooting” at 13983 Knox. (121a-122a). Officer Bonacorsi entered the house to assist the WPD officers already on the scene. (122a). He viewed Lasater “on the floor” in the bedroom and saw “blood all over.” (123a). When emergency medical personnel arrived, Officer Bonacorsi cleared a path into the house. (123a-124a). With help from Officer Bonacorsi, the emergency medical personnel removed Lasater from the house on a gurney. (124a-125a).

Officer Bonacorsi observed that Lasater had sustained “several gunshot wounds to his body.” (126a). He told Lasater that “his gunshot wounds didn’t look good” and that “the fire department didn’t think he was going to make it.” (126a). Officer Bonacorsi asked Lasater “if he knew who shot him.” (126a). Lasater stated: “Booger shot me.” (126a). Lasater stated that he and Taylor “had argued earlier that evening.” (126a-127a). Officer Bonacorsi accompanied Lasater to Bi-County Hospital where Lasater later died. (127a).

Officer Kriss left the bedroom and, along with some other WPD officers, walked around the side of the house to the window to Jackson’s bedroom. (107a). From what he saw inside the bedroom, “it appeared [to Officer Kriss] that [Lasater] had been shot through the window.” (107a). Immediately, the WPD officers “found a . . . white,

plastic lawn chair under the window and some shotgun shells . . . on the ground under the window.” (108a).

WPD Officer David Helhowski (“Officer Helhowski”) later processed the house for evidence. (108a-109a; 7b). Officer Helhowski seized “five spent shotgun casings” and the white plastic chair. (11b-17b). The chair had “two partial shoe prints” on it. (16b). Inside the house, Officer Helhowski observed blood and flesh in “[s]everal different areas” of Jackson’s bedroom. (28b-29b). In addition, he observed “a hole in the [south] wall with blood splattered around it.” (29b). Officer Helhowski collected 26 pellets from the bed. (29b-31b).

Jackson owned a white plastic chair that he kept in his backyard. (75a-76a). When he locked himself out of the house, Jackson used the chair to climb into his house. (75a-76a). On the night of September 30, 2004, the chair had been in Jackson’s backyard. (76a). The window to Jackson’s bedroom on the east side of the house had an air conditioning unit in it. (91a). The window itself, however, could be lifted up “a good foot.” (91a). In processing the scene, Officer Helhowski measured this opening as “13 inches high by 24 inch width on the window.” (43b, 59b).

Dr. Daniel Spitz (“Dr. Spitz”) performed an autopsy on Lasater the following day. (70b). Dr. Spitz determined that Lasater had sustained “four separate shotgun wounds, one of them involved the chest, one of them involved the abdomen, one of them involved the left thigh, and

one of them involved the left hand.” (71b). He concluded that Lasater had been shot from a range of three to four feet. (84b, 88b). Dr. Spitz found that the cause of Lasater’s death was “multiple shotgun wounds.” (92b-93b). Further, he determined that the manner of Lasater’s death was a homicide. (93b).

The prosecution charged Taylor with First-Degree Premeditated Murder (MCL § 750.316) and Felony Firearm (MCL § 750.227b). After an eight-day trial before Macomb County Circuit Court Judge Diane M. Druzinski (“Judge Druzinski”), a jury convicted Taylor as charged on August 5, 2005. (216a). On September 20, 2005, Judge Druzinski sentenced Taylor to a term of life imprisonment without the possibility of parole on the First-Degree Premeditated Murder conviction and a term of 24 months imprisonment on the Felony Firearm conviction. (216a). Judge Druzinski ordered that the sentence regarding the Felony Firearm conviction run consecutive to and preceding the sentence regarding the First-Degree Premeditated Murder conviction. (216a). She awarded Taylor sentence credit of 351 days for jail time, to be applied to the sentence on the Felony Firearm conviction. (216a).

Taylor appealed as of right. The Michigan Court of Appeals (“Court of Appeals”) affirmed his convictions and sentences (217a-222a). The Court of Appeals subsequently denied Taylor’s motion for reconsideration (223a). Taylor sought leave to appeal with this Court. This Court granted the application for leave to appeal on the following

issues: (1) whether Lasater's identifications were testimonial or non-testimonial under *Davis v. Washington*, 547 US 813 (2006); whether, if the statements were testimonial, they constituted dying declarations; and (3) whether the Sixth Amendment incorporates an exception for testimonial dying declarations.

## **ISSUE I**

### **LASATER'S STATEMENTS TO WPD OFFICERS KRISS AND BONACORSI IDENTIFYING THE DEFENDANT AS HIS ASSAILANT WERE NON-TESTIMONIAL UNDER *DAVIS V. WASHINGTON*.**

#### **STANDARD OF REVIEW**

A trial court's decision whether to admit or exclude evidence is reviewed for an abuse of discretion. *People v. Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Preliminary questions of law, such as whether a rule of evidence, constitutional provision, or statute precludes the admission of the evidence, are reviewed de novo. *People v. Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

#### **ARGUMENT**

Several months prior to the jury trial, in April of 2005, Judge Druzinski held an evidentiary hearing regarding the admissibility of Lasater's statements to WPD Officers Kriss and Bonacorsi identifying the defendant as his assailant. (19a-54a). Judge Druzinski heard testimony from both police officers at the evidentiary hearing. (19a-46a). At the conclusion of the evidentiary hearing, Judge Druzinski concluded that Lasater's statements were "not testimonial" and, as a result, did not implicate *Crawford v. Washington*, 541 US 36; 124 SCt 1354; 158 LEd2d 177 (2004).

After the jury trial, the United States Supreme Court decided *Davis v. Washington*, 547 US 813; 126 SCt 2266; 165 LEd2d 224

(2006), which endeavored to articulate the difference between testimonial and nontestimonial statements under *Crawford*. The Court of Appeals, applying the holding in *Davis*, concluded that Lasater's statements were "nontestimonial under *Crawford*" and affirmed Judge Druzinski's ruling. (218a-220a). Now, this Court has granted leave to appeal on the issue of whether Lasater's identifications were testimonial or non-testimonial under *Davis*.

In *Crawford, supra* at 68, the United States Supreme Court held that that the Sixth Amendment's 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 to cross-examine the witness. The *Crawford* Court, however, declined to "spell out a comprehensive definition" of testimonial statements. *Id.* In *Davis, supra* at 2273-2274, the United States Supreme Court endeavored to provide some guidance regarding whether a statement is testimonial or non-testimonial, stating:

Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: 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.

If a statement is nontestimonial, the Confrontation Clause does not apply. *Davis, supra* at 2273.

In *Davis*, the United States Supreme Court determined that the beginning of a 911 call between a victim of domestic violence and the operator in which the victim stated why she needed assistance was nontestimonial because the operator's questions were aimed to elicit information to end an emergency. *Id.* at 2270-2271, 2276-2277.

However, in the companion case, *Hammon v. Indiana*, the Court concluded that statements made to police officers after the individuals involved in a domestic dispute were separated and the emergency had resolved, were testimonial. *Id.* at 2272-2273, 2278. Unlike in *Davis*, the questions in *Hammon* were designed to develop evidence against the suspect and the questioning occurred some time after the incident had ended. *Id.* at 2278-2279.

As *Davis* and *Hammon* illustrate, not all police inquiries will result in testimonial responses. Rather, a distinction should be drawn between questions "'necessary to secure [police] safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.'" *Davis, supra* at 2277, quoting *New York v. Quarles*, 467 US 649, 658-659; 104 SCt 2626; 81 LEd2d 550 (1984). The *Davis* Court observed that "'[o]fficers called to investigate . . .

need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.” *Id.* at 2279 (quoting *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Co.*, 542 US 177, 186; 124 SCt 2451; 159 LEd2d 292 (2004)). The exigent circumstances “may often mean that ‘initial inquiries’ produce nontestimonial statements.” *Davis, supra* at 2279. Where the statements are, in effect, “a cry for help” or designed to provide information that helps a police officer to “immediately end a threatening situation,” they are nontestimonial. *Davis, supra* at 2279. As soon as the “information needed to address the exigency of the moment” is secured, however, statements made in response to questioning from police officers become testimonial and, thus, implicate the Confrontation Clause.

The Court of Appeals, in *People v. Walker (On Remand)*, 273 Mich App 56, 58-59; 728 NW2d 902 (2006), recently reconsidered a case at this Court’s direction in light of *Davis*. The Court of Appeals held that statements made by a victim’s neighbor after the victim escaped from her apartment and her live-in boyfriend were nontestimonial because “the circumstances of the 911 operator’s questioning ‘objectively indicat[ed] its primary purpose was to enable police assistance to meet an ongoing emergency.” *Id.* at 59-60 (quoting *Davis, supra* at 2277). Although the 911 operator endeavored to obtain detailed information about the location of the apartment, the circumstances of the assault,

the identity of the assailant and his location, and the location of the victims, the *Walker* Court found that the main aim of this questioning was to allow police officers to respond to an ongoing emergency, help the victim, and make sure that others possibly in danger were protected. *Id.* at 64. As a result, the Court of Appeals deemed the responses to this questioning to be nontestimonial and outside the purview of *Crawford*.

The WPD officers in the instant case dealt with similarly exigent circumstances as they responded to 13983 Knox. WPD Officers Kriss and Bonacorsi, responding to a “shots heard” 911 call, arrived at Jackson’s home to find the residential Warren neighborhood in chaos. (100a-101a). Officer Kriss viewed “excited” neighbors on the lawn across the street from Jackson’s house. (101a). Jackson’s neighbors informed the WPD officers that they had heard shot fired from 13983 Knox and that they heard an individual calling for help inside the house. (101a). As he approached the house, Officer Kriss also heard a voice from within the house calling for help. (101a).

The WPD officers knocked on Jackson’s front door and announced their presence without any response from inside. (101a). Given the circumstances, the WPD officers kicked in the front door and found Jackson and Peters asleep in the living room. (101a-102a). In the bedroom, Lasater was hunched over in front of an open window holding his abdomen and moaning loudly. (74a-75a, 102a-103a, 107a).

Lasater had been shot and sustained wounds to his hand, his abdomen, and his thigh. (103a). There was blood all over the bedroom. (74a-75a, 103a). On a dresser next to the bed and under the open window, Officer Kriss observed small bits of flesh and blood. (104a). The bedroom reeked of gunpowder. (104a).

Evaluating Lasater's dire condition, Officer Kriss had Lasater lie on the floor and advised him that emergency medical help was coming. (104a-105a). Officer Kriss asked Lasater to describe his assailant. (105a). Lasater eventually told Officer Kriss that "Booger" had shot him, but balked any providing any further information. Officer Kriss advised Lasater that he was "in bad shape" and not going to live. (105a). Lasater repeated that "Booger" had shot him, but Officer Kriss was not able to elicit any details about the shooting from him. (105a-106a). Moments later, emergency medical personnel arrived to treat Lasater. (105a-107a). Officer Kriss left Jackson's bedroom, went outside, and walked around the house to open window to the bedroom. (107a). Given what he saw, Officer Kriss determined that the assailant had shot Lasater through the window. (107a). A lawn chair sat beneath the open window, along with several shotgun shells. (108a).

Like Officer Kriss, Officer Bonacorsi responded to Jackson's house after hearing the radio run for a "shooting" at 13983 Knox. (121a-122a). Entering Jackson's bedroom behind the other WPD officers, Officer Bonacorsi observed Lasater on the floor and blood all over the

bedroom. (Tr. 123a). Officer Bonacorsi assisted the emergency medical personnel in transporting Lasater to the ambulance. (124a-125a).

Inside the ambulance, Officer Bonacorsi saw that Lasater had suffered numerous shotgun wounds. (126a). Informing Lasater that his wounds looked life-threatening and that the paramedics didn't think he would survive, Officer Bonacorsi asked Lasater if Lasater knew who shot him. (126a). Again, Lasater identified "Booger" as his assailant, now adding that they had argued earlier that night. (126a-127a).

WPD Officer David Helhowski ("Officer Helhowski") subsequently processed Jackson's house for evidence. (7b). Officer Helhowski found five spent shotgun shells outside the open bedroom window, as well as the lawn chair. (11b-17b). The lawn chair had two partial shoe prints on it. (16b). In the bedroom, Officer Helhowski viewed several areas of blood and flesh. (28b-29b). Further, he saw a hole in the south wall of the bedroom splattered with blood. (29b). Officer Helhowski collected 26 shotgun pellets from the bed. (29b-31b).

Given the foregoing, the WPD officers arrived on Knox in residential Warren early in the morning of October 1, 2004, to find that an individual had climbed halfway into a bedroom window armed with a shotgun and fired multiple rounds at the sleeping Lasater. Moreover, Jackson and Peters were still inside the house and Jackson's neighbors were gathered outside the house across the street. The circumstances constituted a genuine emergency in progress. As the Court of Appeals

wrote: “When, as here, police officers arrive at the crime scene immediately after a shooting, with a number of people in the house, and where the victim—who is clearly dying of multiple gunshot wounds—identifies his assailant, the identifying statements given to the police are nontestimonial under *Crawford*.” (219a).

The case at bar is nearly identical to *Head v. State*, 171 Md.App. 642, 659-660; 912 A2d 1 (2006), in which the Maryland Court of Appeals held that the statements made by a shooting victim to an investigating police officer were nontestimonial. In *Head, supra* at 644, Kevin Darby (“Darby”) was shot eight times. Local police officers responded to the scene of the shooting. *Id.* Officer Jeremy George (“Officer George”) arrived first and, with the smell of gunpowder in the air, asked Darby: “Who shot you?” *Id.* Darby responded: “Bobby.” *Id.* Darby died 40 minutes later. *Id.* The *Head* Court wrote:

. . . ‘[a]ny reasonable observer would understand that [Darby] was facing an ongoing emergency and that the purpose of the interrogation was to enable police assistance to meet that emergency.’ Three main facts support this conclusion. First, as Officer George testified, the situation was “chaotic.” Second, the smell of gunpowder in the air would mean to an objective observer that the crime was very recent and the situation was dangerous—at least potentially—because Officer George did not know whether the criminal who shot Darby was still in the house. Third, immediately before he identified his attacker, Darby was crying for help. *Id.* at 659-660.

The bottom line for the Maryland Court was that Officer George “needed to know, for safety reasons, who shot Darby.” *Id.*

As in *Head*, Officers Kriss and Bonacorsi arrived at Jackson's house only minutes after the 911 call and were the first to speak with Lasater. Both officers were aware the multiple gunshots had been fired and that Lasater's assailant was unknown but could be anywhere in the house or in the immediate neighborhood. Both officers needed "to know who they [we]re dealing with in order to assess the situation, the threat to their own safety, and possible danger to potential victims." *Hiibel, supra* at 186. Their questions asking for a description or identification of the assailant and other details about the shooting were relevant, not primarily to build a case against the defendant in the future, but to obtain sufficient information to permit them to "address the exigency of the moment." *Davis, supra* at 2277. Under the circumstances, Lasater's statements to Officers Kriss and Bonacorsi were nontestimonial and, thus, not subject to the Confrontation Clause.

## **ISSUE II**

### **LASATER'S STATEMENTS TO WPD OFFICERS KRISS AND BONACORSI, EVEN IF DEEMED TESTIMONIAL, CONSTITUTED DYING DECLARATIONS UNDER MRE 804(B)(2).**

#### **STANDARD OF REVIEW**

A trial court's decision whether to admit or exclude evidence is reviewed for an abuse of discretion. *Lukity, supra* at 488. Preliminary questions of law, such as whether a rule of evidence, constitutional provision, or statute precludes the admission of the evidence, are reviewed de novo. *Katt, supra* at 278.

#### **ARGUMENT**

As part of her ruling regarding the admissibility of Lasater's statements, Judge Druzinski determined that the statements, even if determined to be testimonial, "qualif[ied] as dying declarations." (48a-50a). Subsequently, the Court of Appeals held that "Lasater's identifying statements to the police immediately after being shot, with knowledge of his impending death, constitute[d] dying declarations." (219a). Now, this Court has granted leave to appeal on the issue of whether Lasater's statements were admissible as dying declarations.

Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted. MRE 801(c). Hearsay is generally not admissible unless it falls under one of the exceptions set forth in the Michigan Rules of Evidence. MRE 802. The "dying

declaration” exception, MRE 804(b)(2), provides that a statement by a declarant is admissible if the declarant is unavailable as a witness and the statement was made “while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.”

Prior to admitting a statement as a dying declaration, a trial court must make a preliminary inquiry into the facts and circumstances surrounding the statement. *People v. Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007). The trial court, before proof of the declaration itself, may “allow evidence as to the circumstances under which the dying declaration was taken to show whether it was really taken when the declarant was under the conviction of approaching and inevitable death.” *People v. Fritch*, 210 Mich 343, 347; 178 NW 59 (1920) (quoting *People v. Christmas*, 181 Mich 634, 646; 148 NW 369 (1914)). If these circumstances “clearly establish that the declarant was *in extremis* and believed that his death was impending, the court may admit statements concerning the cause or circumstances of the declarant’s impending death as substantive evidence under MRE 804(b)(2). *Stamper*, *supra* at 4.

Here, Judge Druzinski did not abuse her discretion in concluding that these requirements for admissibility were met. Lasater was indisputably unavailable as a witness. MRE 804(a)(4). The admonitions of Officers Kriss and Bonacorsi, along with his substantial wounds,

evidence Lasater's belief that his death was imminent. Along with the descriptions of Lasater's injuries in the testimony of Officers Kriss and Bonacorsi outlined in ISSUE I, Dr. Daniel Spitz ("Dr. Spitz"), the forensic pathologist who conducted the autopsy, concluded that the cause of Lasater's death was multiple shotgun wounds fired from a distance of only three to four feet. (84b, 88b, 92b-93b). Moreover, Lasater's statements identifying his assailant as "Booger" concerned the circumstances of what he believed to be his impending death. MRE 804(b)(2). Given the foregoing, Lasater's statements, even if held to be testimonial, amounted to dying declarations under MRE 804(b)(2).

In his Brief on Appeal, the defendant does not appear to contest this analysis. Instead, the defendant contends that Judge Druzinski erred in admitting Lasater's statements because the assistant prosecuting attorney failed to show that Lasater spoke with personal knowledge as required by MRE 602 because Lasater could not possibly have seen who shot him. The defendant did not lodge this objection to the testimony of Officers Kriss and Bonacorsi at trial, nor did he raise it as a claim of error in the Court of Appeals or in his application to this Court. Further, this argument is beyond the scope of this Court's order granting leave to appeal on the issue of whether Lasater's statement constitute dying declarations under MRE 804(b)(2). For these reasons, the prosecution submits that this Court should not consider the defendant's argument that the assistant prosecuting attorney did not

make a showing of personal knowledge prior to admitting Lasater's statements. See MCR 7.302(G)(4)(a).

Further, the defendant, in his Brief on Appeal, cites no authority for the proposition that the "personal knowledge" requirement embodied in MRE 602 applies to the declarant of an extra-judicial statement such as a dying declaration. Moreover, 125 years ago, in *People v. Knapp*, 26 Mich App 112 (1872), this Court, citing English common law, observed: "Where [dying declarations] are taken under suspicious circumstances, or drawn out by doubtful means, they are not excluded, but go to the jury for what they are worth. The whole admission is from necessity—the witness having passed away—and the objections are therefore confined to the weight and value of the declarations."

Regardless, however, the assistant prosecuting attorney went to great lengths during trial to show that Lasater would have been able to see and identify his assailant from inside Jackson's bedroom. Thus, even if the defense had objected to this testimony pursuant to MRE 602 at trial, such an objection would have had no merit. At trial, Dr. Spitz testified that, in conducting the autopsy, he was able to determine that Lasater had been shot four times from a range of three to four feet. (84b, 88b). He told the jury that the shotgun wound to Lasater's hand had the earmarks of a defensive wound. (91b). Dr. Spitz testified that "the injuries, at least some of them or at least one

of them, occurred with [Lasater] positioned closer to the head of the bed.” (96b-97b).

Most notably, however, Dr. Spitz, in examining Lasater’s wounds in conjunction with the physical layout of Jackson’s bedroom and house, also testified:

Yes. It would be my opinion based on review of all the evidence including the autopsy, that the assailant in this case would have – his upper body to some extent would have entered the window to allow for, one, visualization of the target to assure accuracy; two, to allow the muzzle-to-target distance to be in the range that is depicted by these wounds which is three to four feet; and three, the trajectory of the wound is from primarily right to left of the chest wound and the abdominal wound.

In order to get right to left trajectory the gun would have to be perpendicular to the victim who was on the bed and situated actually more toward the head of the bed, and making it more difficult unless you are in the window to actually hit your target. (99b-100b).

At the end of direct examination, Dr. Spitz reiterated that “in order to account for a three- to four-foot range, the gun has to be inside the window” and “in order for the gun to be inside the window, the individual holding the gun also has to be inside the window.” (101b). Given the foregoing, the assistant prosecuting attorney presented overwhelming evidence from which to infer that Lasater had an opportunity to observe and actually did observe the defendant shoot him. Judge Druzinski did not err in admitting Lasater’s statements

even if this Court determines that MRE 602 applies to extra-judicial statements such as dying declarations.

### ISSUE III

#### THE SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES INCORPORATES AN EXCEPTION FOR DYING DECLARATIONS.

#### STANDARD OF REVIEW

Issues of constitutional law, including those related to interpreting the Confrontation Clause, are reviewed de novo. *People v. LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

#### ARGUMENT

In ruling that Lasater’s statements were admissible at trial, Judge Druzinski decided that dying declarations “do not all within the purview of *Crawford*.” (50a). The Court of Appeals agreed, “hold[ing] that under *Crawford*, dying declarations are admissible as an historical exception to the Confrontation Clause.” (220a). Now, this Court has granted leave to appeal on the issue of whether the Sixth Amendment incorporates an exception for testimonial dying declarations.

In *Crawford, supra* at 56, the United States Supreme Court, in reviewing various historical sources, observed that there was “scant evidence that [hearsay] exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case. In a footnote to this sentence, however, the *Crawford* Court wrote:

The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, e.g., *Mattox v. United States*, 156 U.S.

237, 243-244, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *King v. Reason*, 16 How. St. Tr. 1, 24-38 (K.B.1722); 1 D. Jardine, *Criminal Trials* 435 (1832); Cooley, *Constitutional Limitations*, at 318; 1 G. Gilbert, *Evidence* 211 (C. Lofft ed 1791); see also F. Heller, *The Sixth Amendment* 105 (1951) (asserting that this was the *only* recognized criminal hearsay exception at common law). Although many dying declarations may not be testimonial, there is authority for admitting those even those that clearly are. See *Woodcock, supra*, at 501-504, 168 Eng. Rep., at 353-354; *Reason, supra*, at 24-38; Peake, *Evidence*, at 64; cf. *Radbourne, supra*, at 460-462, 168 Eng. Rep., at 332-333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.  
*Id.*

Both Judge Druzinski and the Court of Appeals relied on this footnote in ruling that the Confrontation Clause as interpreted by *Crawford* contains an exception for dying declarations.

Numerous state courts, citing this footnote, have held that the trial court's admission of a dying declaration does not implicate the Sixth Amendment's Confrontation Clause as interpreted by *Crawford*. See *Wallace v. State*, 836 NE2d 985, 996 (2006) (Indiana); *State v. Martin*, 695 NW2d 578, 585-586 (2005) (Minnesota); *People v. Gilmore*, 356 Ill App 3d 1023, 1032-1033 (2005) (Illinois); *Hankins v. State*, 918 So2d 378 (2005) (Florida). Perhaps most notably, the California Supreme Court, in *People v. Monterroso*, 34 Cal 4<sup>th</sup> 743, 764-765; 101 P3d 956 (2004), wrote:

Dying declarations were admissible at common law in felony cases, even where the defendant was not present at the time the statement was taken. (T.

Peake, Evidence (3d ed. 1808) p. 64.) In particular, the common law allowed “the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it was committed,” provided that “the deceased at the time of making such declarations was conscious of his danger.” (*King v. Reason* (K.B.1722) 16 How. St. Tr. 1, 24-25.) To exclude such evidence as violative of the right to confrontation “would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at naught. But dying declarations, made under certain circumstances, were admissible at common law, and that common law was not repudiated by our constitution in the clause referred to, but adopted and cherished.” (*State v. Houser* (Mo.1858) 26 Mo. 431, 438; accord, *Mattox v. United States* (1895) 156 U.S. 237, 243-244, 15 S.Ct. 337, 39 L.Ed. 409 [“from the immemorial they have been treated as competent testimony, and none would have the hardihood at this day to question their admissibility”].) Thus, if, as *Crawford* teaches, the confrontation clause “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding” (*Crawford, supra*, 124 S.Ct. at p. 1365, citing *Houser, supra*, 26 Mo. at pp. 433-435), it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment.

Thus, the California Supreme Court held that the trial court did not err in admitting the dying declaration. *Id.*

The Michigan Court of Appeals adopted the California’s Supreme Court’s reasoning in *Monterroso*, as have other subsequent state supreme courts. (219a-220a). In *Harkins v. State*, 143 P3d 706, 711 (2006), the Nevada Supreme Court, pointing to the historical analysis

contained in *Crawford's* footnote and *Monterroso*, held that the Confrontation Clause was “subject to exceptions” and that the “dying declaration [wa]s one such exception to the Confrontation Clause.”

Last year, in *State v. Lewis*, 235 SW3d 136, 148 (2007), the Tennessee Supreme Court held “that this single hearsay exception survives the mandate of *Crawford* regardless of its testimonial nature.” Significantly, the Tennessee Supreme Court concluded that its dying declaration exception, Rule 804(b)(2) of the Tennessee Rules of Evidence, was “the common law embodiment of the dying declaration.” *Id.* MRE 804(b)(2) is substantively identical to TRE 804(b)(2) and also an incarnation of both the English and Michigan common law hearsay exception for dying declarations. *See Knapp, supra; Christmas, supra.* Like these other state courts, this Court should hold that the Confrontation Clause incorporates an historical exception for dying declarations otherwise admissible under MRE 804(b)(2).

In contrast, the defendant relies solely on an unpublished opinion from a federal district court judge in Colorado. *United States v. Jordan*, 2005 WL 513501. In *Jordan, supra* at 3, the federal district court judge opined that there was “no rationale in *Crawford* or otherwise under which dying declarations should be treated differently than any other testimonial statement.” The opinion states that the historical basis set forth in *Crawford's* footnote for a dying declaration exception fails

because the exception was “not in existence at the time the Framers designed the Bill of Rights.” *Id.* at 4.

All the cases discussed above, however, **including *Crawford***, trace the origin of the dying declaration back several centuries. See *Lewis, supra* at 148 (“[a]s early as the twelfth century, dying declarations merited special treatment”). In *Gilmore, supra* at 1033, the Illinois Court of Appeals stated:

We believe that the reasoning of *Monterroso* represents the sensible approach and choose to follow it instead of *Jordan*. *Crawford* provided an in-depth discussion of the right of confrontation as it existed at the time the sixth amendment was ratified and offered a strong statement regarding the admissibility of dying declarations. Considering the Supreme Court’s guidance on the issue, we are reluctant to expand that right beyond the historical parameters indicated in *Crawford*.

Like the other states that have addressed this issue of constitutional law, this Court should reject *Jordan*’s flawed historical analysis and hold that testimonial dying declarations are an exception to the Confrontation Clause as interpreted by *Crawford*.

**RELIEF REQUESTED**

The Plaintiff-Appellee requests that this Honorable Court **DENY** the Defendant-Appellant's Brief On Appeal because of the lack of merit in the issues presented and further the People respectfully pray that this Honorable Court will **AFFIRM** the judgment of conviction.

Respectfully submitted,

Eric J. Smith P46186  
Prosecuting Attorney  
Macomb County, Michigan

Robert Berlin P27824  
Chief Appellate Attorney  
By:

Joshua D. Abbott P53528  
Assistant Prosecuting Attorney

DATED: February 14, 2008.