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NOTE

Minimizing Confrontation: The Eighth Circuit Uses *Crawford* to Avoid *Bruton* for Non-Testimonial Statements


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I. INTRODUCTION

Holding a joint trial for multiple co-defendants presents numerous advantages. Joint trials are efficient in that they save time and resources by requiring witnesses to testify once instead of multiple times.1 They also avoid the “scandal and inequity of inconsistent verdicts.”2 It is no wonder, then, that courts have a preference for joint trials over separate trials.3

Despite this preference, the Supreme Court has recognized that joint trials can sometimes interfere with the constitutional rights of at least one of the co-defendants.4 In *Bruton v. United States*, the Supreme Court determined that a non-testifying defendant’s incriminating statement which implicates a co-defendant but is not in furtherance of a conspiracy is inadmissible at a joint trial for two reasons: first, it violates that co-defendant’s Sixth Amendment right to confront the witnesses against him; and second, asking juries to use the statement as evidence against one defendant and disregard it for the other is asking them to perform an impossible task.5

The Supreme Court reexamined the right to confrontation in the landmark decision *Crawford v. Washington*.6 In that case, the Court determined that the right to confrontation applied to statements made in court as well as

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5. *Id.* at 129 n.4, 135-36.

“testimonial” statements made outside of it. Several Circuit Courts have ironically used this expansion of the Confrontation Clause against defendants desiring to invoke Bruton to avoid joint trials. The Eighth Circuit recently did just that with its decision in United States v. Dale. In Dale, one defendant made a statement that incriminated both himself and a co-defendant to a police informant wearing a wire. The Eighth Circuit determined that because the defendant’s incriminating statement was not “testimonial,” Bruton’s protections did not apply to his co-defendant, and thus a joint trial was still appropriate.

Outside of the Bruton context, this Note also examines the implications of defining “testimonial” statements entirely from the point of view of the speaker as the Eighth Circuit did in Dale. This Note will argue that to ignore the motives of the examiner encourages the police to use unethical and deceptive interrogation techniques. This Note additionally argues that applying Bruton only to testimonial statements ignores Bruton’s Due Process concerns in that it allows juries to do what the Supreme Court considers to be an “impossible” task. Finally, this Note questions whether, after Crawford, any remaining constitutional limits remain on the admission of unreliable yet non-testimonial hearsay statements.

II. FACTS AND HOLDING

Anthony Rios and Olivia Raya were found murdered in their Kansas City home on December 21, 2002. After a search of the home, police found several bricks of marijuana and cocaine. This was explained, in part, by

7. Id. at 51. This holding overruled Ohio v. Roberts. Id. at 62. Roberts held that hearsay could be admitted as long as the witness was unavailable and it bore “indicia of reliability.” Ohio v. Roberts, 448 U.S. 56, 66 (1980), abrogated by Crawford, 541 U.S. 36.


10. Id. at 949.

11. Id. at 956.

12. See Bruton v. United States, 391 U.S. 123, 129 n.4 (1968) (characterizing a jury’s attempt to consider a statement when weighing one defendant’s guilt or innocence, and then disregarding that statement when considering a co-defendant, as an “impossible” task).

13. Dale, 614 F.3d at 948. They were found by Rios’s grandfather, who lived next door and had become worried that he had not seen either of the victims that day. Id.

14. Id.
Paul Lupercio, one of the last people to see or speak to the victims while they were alive.\(^{15}\) Lupercio testified that on December 20, the night before Rios and Raya were found murdered, he had given Rios twenty-thousand dollars for cocaine.\(^{16}\) Lupercio further testified that he had planned to pick up the cocaine later that evening but was unable to because Rios never answered his phone or called him back.\(^{17}\)

A search of Rios's phone records revealed that the last person he had talked to on the phone was a man named Dyshawn Johnson.\(^{18}\) A search of Johnson's home resulted in the discovery of "scales, kilo wrappers and tape with cocaine residue, and ammunition."\(^{19}\) Several witnesses testified that Johnson was Michael Dale's "source" for cocaine and the two sold drugs together.\(^{20}\) Furthermore, several witnesses with connections to Dale through the cocaine business testified that Dale had admitted to murdering "the Mexicans."\(^{21}\) Based on this information, a federal grand jury in the Western District of Missouri indicted Dale and Johnson, and a jury later convicted them in a joint trial on two counts of first-degree murder and conspiracy to distribute cocaine.\(^{22}\)

Dale and Johnson had both asked the court to sever the proceedings, but the district court denied their motions.\(^{23}\) Johnson's main argument to sever the trials was the fact that the government introduced recorded statements that Dale had made to a fellow prisoner named Anthony Smith.\(^{24}\) Law enforcement officials had persuaded Smith to wear a wire "and probe Dale for information relating to the Rios/Raya murders."\(^{25}\) While talking with Smith, Dale admitted involvement in the murders, incriminating both himself and Johnson.\(^{26}\)

Johnson argued that because Dale did not testify at their joint trial, admitting this statement would violate his Sixth Amendment right to cross-
examine Dale.\textsuperscript{27} Instead of removing the statements entirely or severing the trial, the district court ordered the prosecution to redact all references to Johnson in the transcript.\textsuperscript{28} Additionally, “the district court instructed the jury that the tape-recorded conversation was not admissible against Johnson.”\textsuperscript{29} To accomplish the necessary redactions, the prosecution played the tape to the jury while simultaneously showing them a written transcript.\textsuperscript{30} The tape replaced Johnson’s name with 30 blank spaces, while the transcript replaced his name with the phrase “another person.”\textsuperscript{31} On the tape, Dale admitted to shooting Rios but claimed to have shot Raya only after “the other person” said “kill the bitch.”\textsuperscript{32} Johnson’s attorney argued that it was clear that Johnson was this other person because the thirty blank spaces on the tape made it obvious that the tape had been edited and the transcript’s references to “another person” emphasized these redactions.\textsuperscript{33}

On appeal, Johnson renewed his argument that the introduction of Dale’s statement ran afoul of Bruton, and thus the district court should have severed the trial.\textsuperscript{34} The government countered as follows: first, Bruton did not apply because the statements were non-testimonial; second, even if the statements were testimonial, the district court complied with Bruton by omitting Johnson’s name from the transcript; and third, even if Bruton was violated, Johnson was not prejudiced by the error.\textsuperscript{35} The Eighth Circuit agreed with the government’s first contention and held that because Dale did not believe his statements would later be used at trial, they were non-testimonial, and therefore Bruton did not apply.\textsuperscript{36}

III. LEGAL BACKGROUND

A. Testimonial Statements and the Right to Confrontation

The Sixth Amendment to the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”\textsuperscript{37} The Supreme Court in Ohio v. Roberts attempted to formulate a workable test for the admissibility of hear-

\textsuperscript{27} Id. at 954-55.
\textsuperscript{28} Id. at 955.
\textsuperscript{29} Id.
\textsuperscript{30} Appellant Johnson’s Opening Brief at 5, United States v. Dale, 614 F.3d 942 (8th Cir. 2010) (Nos. 08-3246, 08-3172), 2009 WL 908629.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 22.
\textsuperscript{33} Id. at 26.
\textsuperscript{34} Dale, 614 F.3d at 954-55.
\textsuperscript{35} Id. at 955.
\textsuperscript{36} Id. at 956.
\textsuperscript{37} U.S. CONST. amend. VI.
say testimony.\textsuperscript{38} Under \textit{Roberts}, hearsay was only admissible in a criminal trial if the declarant was unavailable and the statement bore sufficient "indicia of reliability."\textsuperscript{39}

In 2004, the Supreme Court overruled this test in \textit{Crawford v. Washington}.\textsuperscript{40} In that case, Michael Crawford was arrested for stabbing a man named Kenneth Lee.\textsuperscript{41} Both Crawford and his wife Sylvia were interrogated by the police about the stabbing, and both confessed to seeking out Lee because Lee had allegedly tried to rape Sylvia earlier that day.\textsuperscript{42} However, their stories differed in that Crawford claimed to have seen a weapon in Lee's hands before assaulting him, while Sylvia claimed not to have seen one.\textsuperscript{43} Crawford claimed self-defense at his trial and also used the state's marital privilege to prevent Sylvia from testifying.\textsuperscript{44} Still wanting to use Sylvia's statement, the state invoked Washington's "hearsay exception for statements against penal interest."\textsuperscript{45} The state then used a portion of the wife's tape-recorded statements as evidence that the stabbing was not in self-defense.\textsuperscript{46} Crawford argued to the Supreme Court that playing this statement violated his right to be "confronted with the witnesses against him."\textsuperscript{47} The Supreme Court agreed, and it determined that this right to confrontation not only applied to statements made in court, but also to "testimonial" statements outside of it.\textsuperscript{48}

The Supreme Court admitted that it did not comprehensively define "testimonial" in \textit{Crawford}.\textsuperscript{49} The court did determine, though, that at a minimum, "testimonial" statements included "prior testimony at a preliminary hearing, before a grand jury, or at a former trial," as well as to "police interrogations."\textsuperscript{50} For a statement deemed "testimonial" to be admitted, the de-
clarant must be unavailable and the defendant must have had a right to cross examine that declarant on another occasion.\textsuperscript{51}

The Supreme Court shed further light on what it meant by testimonial statements in two 2006 cases.\textsuperscript{52} In \textit{Davis v. Washington}, decided jointly with \textit{Hammon v. Indiana}, the court considered "when statements made to law enforcement personnel during a 911 call or at a crime scene are ‘testimonial.’"\textsuperscript{53} In \textit{Hammon}, police responded to a "reported domestic disturbance at the home of” Mr. and Mrs. Hammon.\textsuperscript{54} When the police arrived, Mrs. Hammon was standing on her porch, and Mr. Hammon was inside the house.\textsuperscript{55} Mrs. Hammon seemed "somewhat frightened,” but she told the officers that "nothing was the matter.”\textsuperscript{56} After further questioning, Mrs. Hammon told the police that Mr. Hammon broke their furnace, shoved Mrs. Hammon down on the floor into broken glass, hit Mrs. Hammon in the chest, and tore up her van so she could not leave the house.\textsuperscript{57} After considering the nature of these statements, the court held that because there was no ongoing emergency when the statements were made, because there was no immediate threat to Mrs. Hammon’s person, and because the officers were seeking to determine “what happened” instead of “what [wa]s happening,” the primary purpose of the questioner was to investigate a possible crime, and therefore Mrs. Hammon’s statements were testimonial.\textsuperscript{58}

In \textit{Davis}, on the other hand, the statement in question was a transcript of a call between a 911 operator and a victim of a domestic dispute.\textsuperscript{59} The operator learned during this call that the assailant had “just r[un] out the door after hitting” the caller.\textsuperscript{60} The police arrived within four minutes of the call and found the victim to be in a “shaken state” and observed “fresh injuries on her forearm and her face.”\textsuperscript{61} The Court held that because the primary purpose of the 911 operator’s questions was to enable police to assist in an “ongoing emergency,” the statements were non-testimonial and therefore admissible in court absent confrontation.\textsuperscript{62}

Most recently, the Supreme Court expanded the primary purpose test in \textit{Michigan v. Bryant}.\textsuperscript{63} In that case, the Supreme Court considered whether a statement made by Anthony Covington to a group of Detroit police officers

\textsuperscript{51} Id. at 59.


\textsuperscript{53} Id. at 817.

\textsuperscript{54} Id. at 819.

\textsuperscript{55} Id.

\textsuperscript{56} Id. (citations omitted).

\textsuperscript{57} Id. at 820.

\textsuperscript{58} Id. at 829-30.

\textsuperscript{59} Id. at 817.

\textsuperscript{60} Id. at 818.

\textsuperscript{61} Id.

\textsuperscript{62} Id. at 826-28.

\textsuperscript{63} 131 S. Ct. 1143, 1150 (2011).
was testimonial. The police had searched out Covington at a gas station in response to a radio dispatch that indicated a man had been shot. The police asked Covington “what had happened, who had shot him, and where the shooting had occurred.” In response, Covington indicated that he had a conversation with Richard Bryant through a door, and that when he turned to leave, he was shot. Covington further stated that he had driven to the gas station after he was shot.

Bryant argued that the Sixth Amendment should bar Michigan from introducing these statements at trial because they were testimonial. The Supreme Court disagreed, though, finding that the situation was different than the situation in Hammond in two relevant ways. First, the potential harm to the public was greater in this case because it involved a gun, and second, the potential for more victims was greater in this case because it involved a potential murder instead of domestic violence.

The Supreme Court explained that to determine whether a statement is testimonial, courts should evaluate “the primary purpose of the interrogation” by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. In his dissent, Justice Scalia pointed out that the majority did not provide a solution to the “glaringly obvious problem” of the statement having several different motives.

Two other cases have also contributed to the current understanding of the Confrontation Clause. In Melendez-Diaz v. Massachusetts, the Supreme Court held that certificates created by state laboratory analysts were testimonial evidence, and the author of the certificates had to testify in order for the certificate to be admissible in a criminal trial. In Wharton v. Bockting, the Supreme Court determined that the rule announced in Crawford was not a “watershed rule,” and therefore it should not be applied retroactively. Additionally, the Court definitively stated that the Confrontation Clause does not protect non-testimonial statements.

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64. Id.
65. Id.
66. Id. (quoting People v. Bryant, 768 N.W.2d 65, 71 (Mich. 2009)).
67. Id.
68. Id.
69. Id. at 1151.
70. Id. at 1158-59.
71. Id. at 1156.
72. Id. at 1162 (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)).
73. Id. at 1170 (Scalia, J., dissenting).
74. 129 S. Ct. 2527, 2532 (2009).
76. Id. at 420.
B. The Use of Confessions in a Joint Trial

In Bruton v. United States, the Supreme Court considered whether an incriminating statement which implicated a co-defendant was admissible in a joint trial when that statement would not have been admissible against that defendant were he tried alone. In that case, Bruton and Evans were charged with committing armed postal robbery. During a police interrogation, Evans confessed to committing the robbery and also stated that Bruton acted as his accomplice. Though the district court gave a limiting instruction to the jury stating that Evans's statement was not admissible as applied to Bruton, Bruton was denied his right to confront his non-testifying co-defendant.

The Supreme Court held that an incriminating statement which implicates a co-defendant is inadmissible at a joint trial, even if a curative instruction is given to the jury. The court determined that such statements would violate the confrontation rights of the defendant who did not make the statement. Furthermore, the court stated that these statements are inevitably suspect, in that there is a strong motivation for a defendant to shift blame onto others.

In addition to confrontation rights, the Supreme Court also examined how using these statements would violate a defendant’s Due Process rights. To expand on this argument, the Court cited to Jackson v. Denno, an earlier Supreme Court case. In Jackson, the defendant claimed that his confession was involuntary. He was interrogated by the district attorney in a hospital after he had been given doses of Demerol and Scopolamine and after he had lost 500 cc.'s of blood. The defendant further claimed that he was denied water and was told that "he would not be let alone until the police had the answers they wanted." Under New York criminal procedure, the judge asked the jury to decide for themselves whether the confession had been voluntary. If the jury found the statement to be voluntary, it could use the statement against the defendant. If they found it to be involuntary, though,

78. Id. at 124.
79. Id.
80. Id. at 127-28.
81. Id. at 135-37.
82. Id. at 133-34.
83. Id. at 136. The court cited several previous cases to support the point. Id. at 136 n.11 (Stoneking v. United States, 232 F.2d 385 (8th Cir. 1956); Caminetti v. United States, 242 U.S. 470, 495 (1917); Crawford v. United States, 212 U.S. 183, 204 (1909)).
84. Id. at 128.
86. Id. at 371.
87. Id. at 372.
88. Id. at 374.
89. Id. at 374-75.
the judge instructed them to disregard the confession entirely.\textsuperscript{90} The Supreme Court questioned whether it was possible for a jury to determine that a confession was involuntary yet still disregard that confession as required under the Due Process Clause.\textsuperscript{91} Because of these concerns, and because of the risk that a jury will use an involuntary confession against a defendant despite the judge’s instructions to the contrary, the Supreme Court held that New York’s procedures violated the Due Process Clause of the United States Constitution.\textsuperscript{92}

The Supreme Court in \textit{Bruton} extended the scenarios in which juries could not be trusted to follow instruction. In \textit{Bruton}, the Supreme Court declared that:

\begin{quote}
[i]f it is a denial of due process to rely on a jury’s presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury’s presumed ability to disregard a codefendant’s confession implicating another defendant when it is determining that defendant’s guilt or innocence.\textsuperscript{93}
\end{quote}

Prior to \textit{Crawford}, each circuit court that examined the issue of whether to apply \textit{Bruton} to all relevant statements or just to relevant statements made to the police determined that \textit{Bruton} applied to all relevant statements.\textsuperscript{94} In \textit{United States v. Veltmann}, for instance, the Eleventh Circuit barred a defendant’s statement to his cellmate that directly inculpated his co-defendant.\textsuperscript{95} In \textit{Vincent v. Park}, the Sixth Circuit barred a statement one defendant made to his sister which implicated two co-defendants.\textsuperscript{96} In \textit{United States v. Schmick}, the Fifth Circuit barred the admission of a defendant’s statement to a fellow member of a motorcycle club which implicated a co-defendant.\textsuperscript{97} Finally, in \textit{United States v. Truslow}, the Fourth Circuit barred the admission of a defendant’s statement made to an acquaintance which implicated a co-defendant.\textsuperscript{98}

\textsuperscript{90. Id.}
\textsuperscript{91. See id. at 388.}
\textsuperscript{92. Id. at 391.}
\textsuperscript{93. Bruton v. United States, 391 U.S. 123, 130 (1968).}
\textsuperscript{94. See United States v. Veltmann, 6 F.3d 1483, 1500-01 (11th Cir. 1993); Vincent v. Park, 942 F.2d 989, 991-92 (6th Cir. 1991); United States v. Schmick, 904 F.2d 936, 943 (5th Cir. 1990); United States v. Truslow, 530 F.2d 257, 263 (4th Cir. 1975). These statements would be considered “non-testimonial” today. See Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011).}
\textsuperscript{95. Veltmann, 6 F.3d at 1500-01.}
\textsuperscript{96. Vincent, 942 F.2d at 991-92.}
\textsuperscript{97. Schmick, 904 F.2d at 941-943.}
\textsuperscript{98. Truslow, 530 F.2d at 263.}
C. Bruton's Application After Crawford

After Crawford, at least three different courts have been confronted with whether Bruton applies to non-testimonial statements.\textsuperscript{99} In the first case, United States v. Williams, the United States District Court for the Eastern District of Virginia joined the pre-Crawford decisions and granted a co-defendant's motion to suppress a statement made by a different defendant to several witnesses even though these statements were non-testimonial.\textsuperscript{100} In that case, three co-defendants were accused of selling drugs as well as murdering an individual whom they allegedly believed stole money and drugs from them.\textsuperscript{101} At least one of the co-defendants made statements to witnesses implicating both himself and his co-defendants in the crimes.\textsuperscript{102} Freddie Wigenton, one of the co-defendants implicated by these statements, moved to suppress the statements under Bruton.\textsuperscript{103} Despite the fact that these were non-testimonial statements, the court agreed that Bruton applied here.\textsuperscript{104} The court reasoned that it would be unlikely that the Supreme Court meant in Crawford, a case that expanded Confrontation Clause rights, to actually limit Bruton in the circuits which apply it to out-of-court statements in addition to confessions made to the police.\textsuperscript{105} The court went on to hold that because the Supreme Court in Crawford had not explicitly overruled Bruton as applied to non-testimonial statements, the Bruton rule still applied to both non-testimonial and testimonial statements in a joint trial.\textsuperscript{106}

In a second case, United States v. Smalls, the Tenth Circuit reached a different conclusion.\textsuperscript{107} In that case, two defendants, along with one other person who took a plea deal, were accused of killing a "snitch" while they were in prison for other charges.\textsuperscript{108} The prison guards made a secret recording of one of the defendants, Glen Cook, confessing the murder to a fellow inmate.\textsuperscript{109} This confession also implicated a prisoner named Paul Smalls.\textsuperscript{110} Relying on Bruton, the district court severed the two defendants' trials based

\begin{itemize}
  \item 100. \textit{Williams}, 2010 U.S. Dist. LEXIS 100867 at *13-14.
  \item 101. \textit{Id.} at *2.
  \item 102. \textit{Id.}
  \item 103. See \textit{id.} at *2-4.
  \item 104. \textit{Id.} at *13.
  \item 105. \textit{Id.} at *6-9
  \item 106. \textit{Id.} at *12-13.
  \item 107. 605 F.3d 765 (10th Cir. 2010).
  \item 108. \textit{Id.} at 767-68.
  \item 109. \textit{Id.} at 768-69.
  \item 110. \textit{Id.} at 767-68.
\end{itemize}
on Cook’s statement. The government nonetheless moved to admit this statement against Smalls as a statement against Cook’s penal interests. Even after determining that Cook’s statement was non-testimonial, the district court applied the Roberts test and determined that the statement lacked a particularized guarantee of trustworthiness, and therefore excluded the statement.

The government appealed this ruling, and the Tenth Circuit Court of Appeals reversed the decision of the district court. The Tenth Circuit determined that if Cook’s statement had been testimonial, its exclusion would have been proper. Because the statement was non-testimonial, though, the court determined that the Confrontation Clause’s protections did not apply. Therefore, as long as the statement met the definition for “statements against interest” under the Federal Rules of Evidence, nothing prevented it from being admissible against Smalls – even if it lacked indicia of reliability. Though the Tenth Circuit determined that some parts of the statement did not meet the definition of a “statement against interest,” many parts of it did. The Tenth Circuit held that the district court erred in excluding the entire statement, and it remanded the case to determine exactly which parts of the statement were self-inculpatory and therefore admissible under Federal Rule of Evidence 804(b)(3). The Tenth Circuit also implied through dicta that the District Court should not have severed the trials in the first place because “the Bruton rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements.”

In a third case, the Sixth Circuit followed the approach of the Tenth Circuit. In United States v. Johnson, defendant Earl Johnson was accused of committing a bank robbery with several other people. One member of this conspiracy, Timothy O’Reilly, later bragged about this robbery to another

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111. Id. at 768 n.2.
112. Id. at 772. This hearsay exception is found in Federal Rule of Evidence 804(b)(3).
113. Smalls, 605 F.3d at 772-73. The District Court reached this determination in part by looking to Lee v. Illinois, where the Supreme Court stated “that the custodial statement of a non-testifying accomplice is presumptively unreliable and therefore inadmissible.” Id. at 773 n.7 (quoting Earnest v. Dorsey, 87 F.3d 1123, 1127 (10th Cir. 1996) (citing Lee v. Illinois, 476 U.S. 530, 543 (1986))).
114. See id. at 787.
115. See id. at 776.
116. Id. at 780.
117. Id.
118. Id. at 786-87.
119. Id.
120. Id. at 768 n.2.
122. Id. at 323.
inmate when he was in prison for an unrelated crime. This inmate approached the FBI about what he had heard, and the FBI gave him a recording device in order to get O'Reilly to confess again on tape. This recording implicated several other people who allegedly took part in the robbery, including Johnson. The District Court severed Johnson’s trial, and Johnson later argued that the recording should be excluded because admitting it would violate the Confrontation Clause and because O'Reilly’s statement was not sufficiently against O'Reilly’s interests to be admissible under Federal Rule of Evidence 804(b)(3).

The Sixth Circuit determined that O'Reilly’s statements were non-testimonial because O'Reilly did not know that he was being recorded and also did not know that his statement would be used against Johnson. The Court also determined that O'Reilly’s statements were sufficiently against his penal interests under Federal Rule of Evidence 803(b)(3) because O'Reilly was admitting his involvement in an unsolved robbery, exposing him to prosecution. As to Bruton, the Sixth Circuit determined that Crawford eliminated the need to analyze the recording under the rules established in Bruton. The court reached this conclusion by determining that, like the Confrontation Clause, Bruton “does not apply to non[-]testimonial statements.”

IV. INSTANT DECISION

In Dale the Eighth Circuit had to determine whether the district court violated Bruton by allowing recorded statements made by Dale to a fellow prisoner to be introduced at a joint trial instead of either severing the trial or suppressing the statements. The court stated that it reviews de novo any Confrontation Clause objections to the admission of evidence, and “[a] violation of the Confrontation Clause is also subject to harmless error analysis.”

123. Id. Until this point, the robbery had remained unsolved for nearly three years. Id.
124. Id.
125. See id. at 323-24.
126. Id. at 324.
127. Id. at 325.
128. Id. at 327.
129. Id. at 325-26.
130. Id. at 326. The Sixth Circuit further stated that even if Bruton did apply to non-testimonial statements, it was unclear whether it would be implicated in this case because the rule applies to joint trials and not severed trials. Id. Though the court did not mention it, it seems apparent that under the Sixth Circuit’s logic, there was no reason to sever these defendants’ trials in the first place.
132. Id. at 955 (citing Barrett v. Acevedo, 169 F.3d 1155, 1164 (8th Cir. 1999)).
The court started its analysis by describing the facts and holding of Bruton.\textsuperscript{133} It then laid out the government’s contentions that Bruton did not apply because Dale’s statements were non-testimonial; even if the statements were testimonial, the district court complied with Bruton by omitting Johnson’s name from the transcripts; and even if Bruton was violated, Johnson was not prejudiced by the error.\textsuperscript{134} The court then agreed that Dale’s statements were non-testimonial, and thus it only needed to address the first of the government’s arguments.\textsuperscript{135}

The court reached the conclusion that Dale’s statements were non-testimonial by citing to Crawford.\textsuperscript{136} The court stated that “the Confrontation Clause prohibits the admission of evidence of out-of-court ‘testimonial’ statements against a criminal defendant.”\textsuperscript{137} The court further stated “that the Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant.”\textsuperscript{138} The court then looked to Crawford to define “testimonial,” stating that testimonial statements were materials “such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statement[s] that declarants would reasonably expect to be used prosecutorially.”\textsuperscript{139} The court further defined testimonial as “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”\textsuperscript{140}

The court then used these rules from Crawford to determine whether Dale’s statements were testimonial.\textsuperscript{141} The court pointed out that Dale did not know that Smith was wearing a wire or that his incriminating statements would be used against him at trial.\textsuperscript{142} Furthermore, the court stated that Dale likely would not have made these incriminating statements if he had known

\textsuperscript{133} Id. (citing Bruton v. United States, 391 U.S. 123, 124-26 (1968)). The holding that the Court gave was that “the admission at a joint trial of a nontestifying defendant’s statement inculpating a co-defendant violates the co-defendant’s Confrontation Clause rights, notwithstanding a curative instruction.” \textit{Id.} (citing Bruton, 391 U.S. at 135-36).

\textsuperscript{134} Id.

\textsuperscript{135} Id.

\textsuperscript{136} Id. at 955-56.

\textsuperscript{137} Id. at 955 (citing Crawford v. Washington, 541 U.S. 36, 53-54 (2004)). An exception to this applies if the declarant is unavailable to testify and if the defendant had a prior opportunity to cross-examine the declarant. \textit{Id.}

\textsuperscript{138} Id. (citing Davis v. Washington, 547 U.S. 813, 821-22 (2006)).

\textsuperscript{139} Id. at 955-56 (quoting Crawford, 541 U.S. at 51).

\textsuperscript{140} Id. at 956 (quoting Crawford, 541 U.S. at 52).

\textsuperscript{141} Id. In fact, the court started its analysis by stating that “[u]nder any formulation of the rule, Dale’s incriminating statements made to Smith were not testimonial.” \textit{Id.}

\textsuperscript{142} Id.
that the authorities were listening in.\textsuperscript{143} The court distinguished this case from \textit{Bruton} by noting that in \textit{Bruton} the statements were made as the product of an interrogation, whereas in this case Dale’s statements were made “unwittingly, and not in anticipation by Dale of future use of the statements at trial.”\textsuperscript{144} The court ended its analysis by citing to five sister circuits which had previously determined that statements similar to Dale’s were nontestimonial.\textsuperscript{145}

Judge Richard Arnold concurred with the court’s reasoning yet still dissented in the result.\textsuperscript{146} This judge felt that the “evidence was insufficient for a reasonable person to conclude that Mr. Johnson was guilty of [committing murder].”\textsuperscript{147} He felt that the evidence was not strong enough to allow a finding of guilt beyond a reasonable doubt, “even drawing every inference in favor of the government’s view of the case.”\textsuperscript{148}

\textbf{V. COMMENT}

\textit{United States v. Dale} presents two main questions that the Supreme Court should address. The first is whether one should look to the viewpoint of the questioner or to the speaker to determine whether a statement is testimonial when the two sides’ motives are in conflict. The Eighth Circuit seems to consider only the viewpoint of the speaker in \textit{United States v. Dale}. The second question is whether \textit{Bruton} truly does not apply unless the incriminating statement is testimonial. The Eighth Circuit in \textit{Dale} explicitly answers this question,\textsuperscript{149} but I believe that this answer runs afoul of both \textit{Bruton} and \textit{Crawford}.

The Supreme Court determined in \textit{Michigan v. Bryant} that courts should look at the statements of all the parties to the encounter to determine whether a statement is testimonial,\textsuperscript{150} but the Court failed to specify what would happen if the various parties had different motives.\textsuperscript{151} Before \textit{Bryant}, many commenters expressed opinions about whose perspective should be considered. While the Supreme Court seems to have foreclosed the possibility of adopting some of the commenters’ ideas in contexts where the speaker and

\begin{itemize}
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{145} \textit{Id.} The court cited to United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008); United States v. Udeozor, 515 F.3d 260, 269-70 (4th Cir. 2008); United States v. Underwood, 446 F.3d 1340, 1347-48 (11th Cir. 2006); United States v. Hendricks, 395 F.3d 173, 182-84 (3d Cir. 2005); United States v. Saget, 377 F.3d 223, 229-30 (2d Cir. 2004).
  \item \textsuperscript{146} \textit{Dale}, 614 F.3d at 964 (Arnold, J., concurring in part and dissenting in part).
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} \textit{Id.}
  \item \textsuperscript{149} \textit{Id.} at 956 (majority opinion).
  \item \textsuperscript{150} 131 S. Ct. 1143, 1162 (2011).
  \item \textsuperscript{151} \textit{Id.} at 1170 (Scalia, J., dissenting).
\end{itemize}
questioner have the same motives, their approaches can still be helpful in determining how to resolve situations in which their motives are different.

Professor Richard Friedman argues that courts should determine whether a statement is testimonial by examining the declarant's perspective and not the questioner's.\textsuperscript{152} Friedman believes that a statement should be considered testimonial if "the declarant understood that there was a significant probability that the statement would be used in prosecution."\textsuperscript{153} Friedman justifies this view by stating that if a person anticipates that a statement will be used at trial, it should not matter to whom he gives the statement.\textsuperscript{154} Friedman also argues that this anticipation test best captures the testimonial function.\textsuperscript{155}

Professor Michael Seigel and Daniel Weisman, however, conclude that this view would violate \textit{Davis v. Washington}.\textsuperscript{156} \textit{Davis}, they reason, shows that statements regarding past events are inherently testimonial in nature.\textsuperscript{157} While \textit{Bryant} opens up more situations in which discussing past events can still be non-testimonial, surely whether the declarant is discussing past events should be a factor in determining when a statement is testimonial in situations where the declarant and questioner have conflicting motives. Seigel and Weisman further believe that police officers and prosecutors could take advantage of the approach that looks only to the declarant's point of view.\textsuperscript{158} This view would give law enforcement officers "the perverse motive to obtain as much information as possible through undercover means to avoid the constraints of the Sixth Amendment."\textsuperscript{159} Furthermore, prosecutors could end up actually "instructing law enforcement agents to conduct ‘undercover interrogations,’ because no matter how intrusive the government conduct, the pre-arrest statements of one conspirator would be admissible against all others."\textsuperscript{160} This is a concern because the Sixth Amendment "aspires to result in

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\item[152.] Richard D. Friedman, \textit{Grappling With the Meaning of ‘Testimonial’}, 71 \textit{BROOK. L. REV.} 241, 251-53 (2005) (arguing that courts should ask what the anticipation would be of a reasonable person in the position of the declarant).
\item[153.] Id. at 252.
\item[154.] Id. at 259-60.
\item[155.] Id. at 252.
\item[157.] See id. (interpreting \textit{Davis v. Washington}, 547 U.S. 813 (2006)).
\item[158.] Id. at 902-03.
\item[159.] Id. at 902.
\item[160.] Id. This would be true as long as the statement fit into a recognized hearsay exception. Id. at 911. \textit{See also} Josephine Ross, \textit{After Crawford Double-Speak: ‘Testimony’ Does Not Mean Testimony and ‘Witness’ Does Not Mean Witness}, 97 J. \textit{Crim. L. & Criminology} 147, 184 (2006). Ross concludes that after \textit{Davis}, police officers will ask questions such as "what is happening" instead of "what happened." \textit{Id.} Ross further states that

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\item[i] Instead of letting things calm down before gathering important details, the officers will talk to the parties early on, before the situation is clear.
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fewer absent witnesses and more in-court testimony" rather than less in-court testimony.161

The Eighth Circuit seems to have condoned this exact type of behavior in *Dale*. Using a wired police informant to ask Dale about past events was a way for the police to get around Dale's refusal to talk with them.162 However, after *Davis* determined that a 911 operator could be an agent of the police,163 the Eighth Circuit had little reason to separate a police informant from an actual police officer. In *Dale*, the police informant only wore the wire because police asked him to,164 and the informant surely knew that the statements would later be used at trial.

Taking this one step further, a police officer himself could theoretically pose as a prisoner in order to elicit confessions which implicate co-defendants. Though other constitutional concerns would limit this evidence against the declarant,165 according to *Dale*, nothing would stop this evidence from being used against others. Even if a police officer does not go this far, using the speaker-perspective view of testimonial statements could lead police officers to trick witnesses "into thinking that whatever they say is privileged and cannot be admitted against the defendant."166 Because a witness would not believe his or her statement would later be used in court against the defendant, this statement would therefore be considered non-testimonial.

Judge Paul Kelly of the Tenth Circuit Court of Appeals wrote a dissent in *United States v. Smalls* addressing this very point.167 In that case, as in *Dale*, prison guards gave an informant a recording device, and the informant solicited detailed information from a defendant named Glenn Cook "for use in investigation and prosecution."168 The majority held that Cook's statement was non-testimonial because Cook would not have shared the incriminating information had he known that the government was recording the

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When the officers come to court, they will speak of ongoing emergencies, not past investigations, and about their need to know the identity and violent tendencies of the person they are arresting.

*Id.*


166. See Michael S. Pardo, *Testimony*, 82 Tul. L. Rev. 119, 173 (2007). Professor Pardo argues that either the speaker's perspective or the hearer's perspective should be used to determine whether a statement is testimonial. *Id.* at 173-74.

167. 605 F.3d 765, 787 (10th Cir. 2010) (Kelly, J., dissenting).

168. *Id.* at 767-68.

169. *Id.* at 788 (Kelly, J., dissenting).
conversation or that his cellmate was a confidential informant. Judge Kelly believes that this view of “testimonial” statements is not broad enough. He states that “[b]y limiting the objective inquiry solely to information known to the declarant when he spoke, the court enables the government to use lies and ruses to skirt the Constitution.” Instead, Judge Kelly proposes that “[t]o accurately and objectively judge this situation . . . a court must consider all the circumstances — including that the government tricked the declarant and tampered with his reasonable expectations.” Judge Kelly further states in that case that “[a]ny declarant with full knowledge of the facts would reasonably assume the government could and would use his words in investigation and prosecution,” and that the statement should therefore be considered testimonial.

Professor Josephine Ross proposes a view of testimonial statements that avoids examining the motivations of the questioner and declarant altogether and instead considers how the statement is being used in court. This view is particularly compelling because it solves the problem of what happens in cases where the parties have conflicting motives. Ross argues that “‘testimonial’ should mean statements that function as testimony during the trial.” If the words in the statement “constitute an accusation of criminal wrongdoing,” the declarant should automatically be considered a witness. This view of the Confrontation Clause would reduce incentives for police officers to use subversive tactics in obtaining witness statements. In Dale, the statements that Dale made to the police informant were to be used as testimony during the trial and therefore would have been excluded using this standard.

A further problem with the Eighth Circuit’s decision in Dale is that the court assumes that Dale did not believe his statements would later be used in court. The Eighth Circuit seemingly did not consider that one of the key parts of the Supreme Court’s analysis in Bruton was that co-defendant statements which implicate others are invariably suspect because of the motivation to shift blame to others. In Lee v. Illinois, the Supreme Court further stated that “the Court has spoken with one voice in declaring presumptively unreliable accomplices’ confessions that incriminate defendants.” It would not be unreasonable for Dale to have made a conscious choice to implicate Johnson

170. Id. at 783, 786 (majority opinion).
171. Id. at 788 (Kelly, J., dissenting).
172. Id.
173. Id.
174. See Ross, supra note 160, at 147.
175. Id. at 196.
176. Id. Ross argues that this is true even if the declarant “does not identify the defendant as the person [who] committed the crime.” Id.
when he discussed the murders in order to diminish his own role in the murder. Dale stated that it was Johnson who suggested killing the woman in the home.\textsuperscript{180} Of the two murders, this victim was the most sympathetic to the jury due to the fact that the woman apparently had little connection to the drug deal that was supposed to take place that night.\textsuperscript{181} By shifting this blame to Johnson, Dale could have been trying to avoid a harsher sentence than he would have received if it had been his idea to shoot both of the victims.

Professor Ross has discussed the limitations of considering what a declarant does and does not know. She has stated that the Supreme Court in\textit{Davis} ignored the fact "that most people know that when they talk to 911 operators their answers will be used against those that they are accusing of criminal behavior."\textsuperscript{182} This is a compelling reason to examine statements from the point of view of the questioner. \textit{Davis} examined the primary purpose of the 911 operator and concluded that the declarant's statements were non-testimonial because the purpose of the questions was to gather information about an ongoing emergency.\textsuperscript{183} In this way, it does not matter that most people know their 911 calls will be used in court. In\textit{Dale}, like the police officer and 911 operator in\textit{Davis}, the primary purpose of the informant was to gather information about past events.

In\textit{Dale}, the Eighth Circuit concluded that Dale's statement was non-testimonial for the reason that Dale would not have made his statement if he had known it was being recorded.\textsuperscript{184} Any of the three alternative views of "testimonial" would produce a different result. If the court only considered how the statement would be used in court, it would surely be testimonial because the statement was an accusation of criminal wrongdoing. If the court considered the statement from the point of view of a declarant who knew all of the available facts, the statement would be testimonial because a reasonable declarant would not have made such a statement. Finally, if the statement is viewed using the standard outlined in\textit{Davis} the primary purpose of the questioner -- it would be testimonial because the purpose of the informant was to gather information about past events.

Using any of these three tests would reduce the incentive for police officers to attempt to trick witnesses into giving statements that could later be used in court against others without confrontation. It is clear that a statement is testimonial if both parties know the statement will later be used in court, just as it is clear that a statement is non-testimonial if the statements are made for the purpose of resolving an emergency situation. In non-emergency situa-

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\item \textsuperscript{180} See Appellant Johnson's Opening Brief at 22, United States v. Dale, 614 F.3d 942 (8th Cir. 2010) (Nos. 08-3246, 08-3172), 2009 WL 908629 (referring to Johnson as "the other person").
\item \textsuperscript{181} See \textit{Dale}, 614 F.3d at 948-49 (noting that Rios's young co-victim was shot dead while writing graduation thank you notes).
\item \textsuperscript{182} Ross, \textit{supra} note 160, at 183.
\item \textsuperscript{183} Davis v. Washington, 547 U.S. 813, 827-28 (2006).
\item \textsuperscript{184} Dale, 614 F.3d at 956.
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tions where the questioner is trying to trick the declarant into discussing past events, courts should err on the side of more confrontation rights, meaning courts should consider more than just whether the speaker knew his statements would be used in court.

The next major question presented in Dale is whether Bruton truly does not apply unless the incriminating statement is testimonial.\(^\text{185}\) This is a relatively new question, and research in this area has been sparse. Initially, though, it seems that this view would go against the pre-Crawford decisions, in which numerous circuit courts of appeals indicate otherwise.\(^\text{186}\) In fact, the United States District Court of the Eastern District of Virginia in Williams listed this as a reason to not follow decisions like Dale.\(^\text{187}\) I agree with this notion that it would be unlikely that the Supreme Court meant in Crawford, a case that expanded Confrontation Clause rights, to actually limit Bruton in the circuits which apply it to out-of-court statements as well as confessions to the police.\(^\text{188}\)

Additionally, the court in that case made the point that if the Eighth Circuit’s interpretation of Bruton in Dale is correct – that Bruton only applies to “testimonial” statements\(^\text{189}\) – the Eighth Circuit would have essentially read Bruton out of existence.\(^\text{190}\) Crawford clearly states that defendants have an unequivocal right to confront witnesses who have made testimonial statements against them, so a reading such as Dale would make Bruton’s protections redundant in a post-Crawford world.\(^\text{191}\)

Determining that Bruton does not apply to non-testimonial statements would also ignore the fact that Bruton also protects a defendant’s Due Process rights.\(^\text{192}\) At its core, Bruton protects defendants from being convicted based on unreliable statements.\(^\text{193}\) The Supreme Court determined in Bruton that it would be unfair to the defendant to trust juries “to disregard a codefendant’s confession implicating another defendant when [they are] determining that defendant’s guilt or innocence.”\(^\text{194}\) The Supreme Court’s interpretation of the Confrontation Clause in Crawford did absolutely nothing to change or minimize this unfairness. Thus, again, Dale improperly reads this aspect of Bruton out of existence.

\(^{185}\) Id. at 954.

\(^{186}\) See supra note 94 and accompanying text.


\(^{188}\) See id. at *11-12.

\(^{189}\) Dale, 614 F.3d at 958-59.


\(^{191}\) Id. at *8-9.


\(^{193}\) See id. at 136-37.

\(^{194}\) Id. at 130 (quoting People v. Aranda, 407 P.2d 265, 271 (Cal. 1965)).
It should also be noted that unlike Smalls and Johnson, Dale’s statement was not admitted against Johnson using a hearsay exception. Therefore, even if Dale’s statement truly was non-testimonial and therefore outside the realm of the Confrontation Clause, the statement still should not have been admissible against Johnson under the Federal Rules of Evidence. Even absent any discussion of the Confrontation Clause, Bruton stands for the proposition that juries are simply unable to follow a judge’s instructions that a statement can be used against one defendant but not another. The Supreme Court in Bruton also determined that statements made by one co-defendant which implicate another are inherently unreliable in that there is a strong motivation for a defendant to shift blame onto others.

Both of these concerns are still present regardless of whether a statement made by a co-defendant was “testimonial.” Under Dale’s logic, though, any non-testimonial statement can be used in a joint trial, even when a jury will be unable to stop itself from using the statement against both defendants, or when the statement itself is inherently unreliable. The question left to be answered is whether there is some point at which using unreliable hearsay statements to convict a defendant violates the Due Process Clause of the United States Constitution.

Though Dale’s statement did not seemingly fit into a relevant federal hearsay exception as used against Johnson in this case, surely it is not out of the realm of possibilities that either the federal government or a state could create a hearsay exception which would encompass any statement made by a co-conspirator regarding any subject, even though this type of statement does not bear any “indicia of reliability.” If the Eighth Circuit is correct, and even Bruton — where the Supreme Court determined that the statements at issue

195. The fact that Dale possibly shifts the blame to Johnson by declaring that it was Johnson’s idea to “kill the bitch” might have prevented this part of the statement from being admissible as a statement against interests anyway. See Appellant John-

196. See FED. R. EVID. 802 (stating that “[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress”).

197. Bruton, 391 U.S. at 130 (quoting People v. Aranda, 407 P.2d 265, 271 (Cal. 1965)).

198. Id. at 136.

199. In Dale, Johnson’s attorney never raises a question of whether using Dale’s statement would violate Rule 403 of the Federal Rules of Evidence, which states that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .” FED. R. EVID. 403; see United States v. Dale, 614 F.3d 942 (8th Cir, 2010), cert. denied, 131 S. Ct. 1814 (2011) (there is no mention of Rule 403 of the Federal Rules of Evidence in the opinion). Using the Supreme Court’s logic in Bruton, I can think of no reason as to why using Dale’s statement would not be unfair prejudice to Johnson.
were inherently unreliable\textsuperscript{200} – is no longer implicated when it comes to non-testimonial statements, other unreliable hearsay statements have little chance of being barred as well.

The Eighth Circuit’s determination that \textit{Bruton} is not implicated in this case is made all the more important by the dissent. While Judge Arnold agrees with the majority’s view of \textit{Bruton} and \textit{Crawford}, he believes that there was not enough evidence to sustain a murder verdict against Johnson.\textsuperscript{201} Other than Dale’s incriminating statements which implicate Johnson, there is little else which would suggest that Johnson knew that Dale had brought a gun to the drug deal, let alone that he assisted in any way in the murder.\textsuperscript{202} It is obvious that the jury used this statement against both defendants, which is exactly what \textit{Bruton} attempted to prevent.

\section*{VI. Conclusion}

In its decision in \textit{United States v. Dale}, the Eighth Circuit Court of Appeals limited the Supreme Court’s decisions in both \textit{Crawford v. Washington} and \textit{Bruton v. United States}. It narrowed \textit{Crawford’s} test for determining whether a statement is testimonial by looking at only the viewpoint of the speaker instead of also taking into account the motives of the questioner, as the court examined in \textit{Davis} and \textit{Bryant}. It narrowed \textit{Bruton} to apply only to testimonial confessions instead of applying to any statement made by one defendant which implicated another. Taken together, these views severely limit the ability of a defendant to be granted a severed trial. This also increases the risk that juries will use a statement which would not have been admissible in a severed trial against that defendant.

This view of \textit{Crawford} also gives law enforcement officers and prosecutors the perverse motive of using undercover agents or police informants to question suspects when the statements would be inadmissible if the police officers were asking the questions themselves. After \textit{Dale}, prosecutors in the Eighth Circuit do not have to worry about the admissibility of these statements in a joint trial, no matter how unfair to one defendant, because these statements are not “testimonial.”

It is surely possible that Johnson knew of Dale’s intentions to murder Rios and Raya before entering their home, and even that Johnson encouraged Dale to do it as the jury found in \textit{Dale}. Unfortunately, this is more in doubt than it would have been had Dale’s statement been suppressed and had Johnson been convicted based only on reliable evidence. Because of the Eighth Circuit’s views of \textit{Bruton} and \textit{Crawford}, the jury in \textit{Dale} was allowed to do a job that \textit{Bruton} considered “impossible.”

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\textsuperscript{201} \textit{Dale}, 614 F.3d at 964 (Arnold, J., concurring in part and dissenting in part).
\textsuperscript{202} \textit{Id.} at 963-64 (majority opinion).
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